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Spring 2018

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President's Column:
Calls to Service

HEATHER D. WILSHIRE-CLEMENT, ESQ*

Dear DANY Members, Esteemed Jurists, Colleagues and Sponsors:

It is truly a privilege and honor to serve as the 52nd President of the Defense Association of New York for the 2017-2018 term. Each President before me has paved a way for this organization to be and continue to be one of the leading defense bar associations and I pledge to follow in their footsteps.

DANY has had a longstanding history of service to our members and the legal community through programs such as our cutting edge CLE's led by Teresa Klaum and Bradley Corsair, Amicus Briefs led by Andy Zajac, our Diversity Programs led by Claire Rush, and the Defendant, our premier publication, led by John McDonough and Vincent Pozzuto. This year we expanded our programs to meet the needs of our growing Young Lawyers and Upstate membership through developing core CLE topics including CLE webinars in collaboration with New York County Lawyers Association, networking events, and the launch of the Mentorship program. We also look forward with anticipation to the completion of our re-designed website and to the completion of becoming an On-Line CLE provider.

As such, we kicked off our educational component with our Annual CLE and Yankee game on Dram Shop Liability in New York followed by programs on New York Labor Law Update, Employment Law, and Trial Skills/Techniques. The Young Lawyers committee, led by Seth Frankel and Patrick Kenny, has already had a couple of very successful networking mixers. Our Amicus Committee continues to deliver outstanding briefs and provides a vehicle for our members to hone their appellate skills, most recently in Forman v. Henkin on Facebook discovery, resulting in a favorable

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Specific Personal Jurisdiction:
Bristol-Meyers Squibb and the Narrowing of Stream-of-Commerce Personal Jurisdiction

JOHN J. MCDONOUGH*

Without question, the most significant product liability case of 2017 was the U.S. Supreme Court's ruling in *Bristol-Myers Squibb v. Superior Court of California*, 137S.C.t. 1773(2017).

For the past several years some of the high eight and nine figure verdicts rendered in Missouri involving claims against Johnson and Johnson and its talcum powder revealed to many Product Liability practitioners that junk science had again been allowed to go too far. A closer look at these decisions in Missouri revealed that none of the plaintiffs in the reported cases were domiciles in the State where their case was venued. Upon further review, it became apparent that Johnson and Johnson was not incorporated in Missouri nor did it have its principal place of business in Missouri. How then did a non-domicilliary of the forum get personal jurisdiction domiciled in Missouri?

Simply put, personal jurisdiction is the ability of an individual State to exercise power over an individual or company. The doctrine arises out of the Due Process Clause of the Fourteenth Amendment, which traditionally provided that a State's power reaches no farther than its borders. In practical terms, this means that a State cannot compel a party to appear in the courts of that State or maintain judgment against the party unless baseline constitutional requirements are met.

A party may be subjected to one of two types of jurisdiction: general or specific. If a party is subject to general jurisdiction in a particular forum it may be sued for any claim, even those claims that are unrelated to its activities in that forum (e.g. a Delaware Corporation may be sued in Delaware even though none of its day-to-day business operations occur in Delaware.) For a corporation, this "home base" forum

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Bristol-Meyers Squibb and the Narrowing of Stream-of-Commerce Personal Jurisdiction

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would either be in a state of incorporation or principal place of business. An individual's "home base" would be the state of domicile. If a party attempts to sue a defendant outside of the defendants "home base," general jurisdiction should be invoked in the limited circumstance in which a company's activities in a State are so substantial that it should reasonably anticipate being subject to suit in that State. This is an extremely limited exception that has been further constrained by *Daimler AG v. Bauman, et al., 134S.C.t. 746(2014).*

If general jurisdiction is not met, a claimant must rely on specific jurisdiction, which requires that the specific claims asserted in the lawsuit be sufficiently related to the connections that the defendant does have to a given forum. For example, if Company sells Widget A only in Texas and Widget B only in New York (and otherwise has a minimal presence in both states), a plaintiff somehow injured by Widget B in Texas would hypothetically not be able to maintain a

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product liability suit against Company in Texas.

The Supreme Court first addressed the stream-of-commerce theory of jurisdiction in 1980 in *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286. In upholding the dismissal of two defendants on jurisdictional grounds as they had no connection to the forum State of Oklahoma, the Court held that "[t]he relationship between the defendant and the forum must be such that it is "reasonable…to require the corporation to defend the particular suit which is brought there." *World Wide Volkswagen 444 U.S. at 292.* The Court disclaimed the idea that "foreseeability is wholly irrelevant" to personal jurisdiction, concluding that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." Id. At 297-98 (citation omitted)

Seven years later, in *Asahi Metal Industry v. Superior Court of California Salanno City*, 480 U.S. 102 (1987), Justice Brennan wrote for four judges in a 4-4 split, "jurisdiction premised on the placement of a product into the stream of commerce [without more] is consistent with Due Process..." Id. At 117. He further stated:

> the stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.
>
> Id.

This 4-4 split created uncertainty in the lower courts, with the plaintiffs' bar pushing Justice Brennan's opinion to champion the stream-of-commerce theory in cases across the country.

In 2017 the Supreme Court handed down its latest specific jurisdiction decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S.C.t. 1773. In overturning a decision by California's highest court, the Supreme Court found that non-California residents could not pursue claims against Bristol-Myers as state courts in California didn't have jurisdiction over suits brought by nonresidents based on personal specific jurisdiction because of the lack of business ties Bristol-Myers had to California.

In rejecting arguments that Bristol-Myers had acquiesced to personal jurisdiction in California by availing itself of the benefits of the California market by aiming its manufacturing, distribution and advertising at the State, the Court stated the plaintiffs failed to show that they were injured by that precise conduct in the forum State, as opposed to the company's largely identical conduct elsewhere.

In essence, the opinion deals a fatal blow to the refrain that the new economic realities of globalization mean that a company with a national distribution network can be sued in any state of a plaintiff's choosing.

President's Column

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decision for the defense. We also re-named our award highlighting legal writing scholars to the John Moore Distinguished Author Award, named after the founder and first editor of the Defendant. The 2017 John Moore award was presented to Eileen Buholtz. In addition, we have re-launched the law student scholarship awards program in furtherance of supporting our future lawyers and leaders.

As part of the dedication to serve, we launched DANY's Pro Bono committee led by Doris Rios Duffy and Margaret Klein, focusing on fostering pro bono legal work by our members in collaboration with pro bono legal service providers, other bar associations and the community. DANY has and continues to be committed to strengthening the Bar through collaborations with other bar associations and organizations as a whole. Prime examples of this commitment are our collaborations with the Defense Research Institute ("DRI"), led by Tom Maroney and Jim O'Connor, as well as the Brooklyn Legal Pipeline

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President's Column

Initiative, led by Claire Rush, which is co-sponsored with the Brooklyn Bar Association and the Brooklyn Women's Bar Association.

In response to the devastation caused by Hurricanes Harvey, Irma, and Maria and in furtherance of our mission to serve the community, we answered the call for service by supporting the Puerto Rican Bar Association's Call for Action for Puerto Rico in wake of Hurricane Maria to support our fellow colleagues in Puerto Rico. In addition, DANY donated a percentage of the proceeds from our Past President's dinner to the New York State Bar Association's ("NYSBA") Hurricane relief fund, which is the charitable and philanthropic arm of the NYSBA. It not only provided a vehicle for us to support the communities affected by all three hurricanes but it also continued to foster the ongoing collaboration between DANY and the NYSBA.

A special welcome to new Board Members, Rona Platt, Dan Gerber and Doris Rios Duffy, Assistant Executive Director, Dina Tirelli, and congratulations to new Officer and Assistant Treasurer, Tom Liptak. DANY extends a special thank you to Patricia Zincke and Christopher Hart for their years of service on the Board. I, personally, would also like to thank the members, committee members and chairs, the Board, Executive Director Connie McLennin, distinguished Jurists of the State of New York and our sponsors for their support. I look forward to continue working with everyone during my term in order to foster DANY's call to serve the legal community and the community at large.

The Defendant Welcomes Contributors
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Worthy Of Note

VINCENT P. POZZUTO *

1. LABOR LAW

Defendant Motion for Summary Judgment Denied– Contractual Indemnity Conditionally Granted

Flynn v. Turner Constr. Co. – 2017 N.Y. Slip Op 08472 – (1st Dept. – December 5, 2017)

In a case involving plaintiff's alleged exposure to toxins while performing construction, the lower Court denied defendant motion summary judgment seeking dismissal of the Labor Law §200 claims and common-law negligence claims. The Appellate Division, First Department affirmed, holding that defendant LVI failed to establish prima facie that plaintiff was not exposed to toxins at sufficient levels to cause his claimed respiratory illness. The Court held that the record contained ample evidence of plaintiff's exposure to toxins at the construction site, and found that LVI's expert did not opine that those toxins were not capable of causing plaintiff's injuries. The Court further held that LVI did not establish prima facie that it was not responsible for the release into the air of toxins that allegedly caused plaintiff's respiratory illness. LVI was responsible for asbestos abatement, lead abatement and concrete demolition, and the Court found ample evidence of the presence of silica dust, which occurs naturally during the course of concrete demolition. The Court further held that because the contract between LVI and defendant Turner requires LVI to defend and indemnity Turner and defendant MSG for liability and loss merely claimed to have resulted from injury arising out of or in connection with LVI's work, Turner and MSG were entitled to conditional summary judgment on their claims for contractual indemnity against LVI, unless and until the injury was determined to have been caused by the negligence of Turner or MSG.

2. NEGLIGENCE

Restaurant Granted Summary Judgment in Burn Case

Sekkat Individually and as Guardian of S.S. v. Huitres NYC, Inc. – 2016-10231 (2nd Dept., October 13, 2017)

Plaintiff brought suit against defendant restaurant alleging that defendant was negligent in serving soup that was unsafe due to its temperature and in failing to warn that the soup was hot. The lower Court denied the defendant's motion for summary judgment. The Appellate Division, Second Department reversed, holding that defendant may be held liable for personal injuries caused by the service of soup that "because of its excessive temperature, was unreasonably dangerous for its intended use, and the drinking or other use of which presented a danger that was not reasonably contemplated by the consumer." In support of its motion for summary judgment, defendant submitted evidence that the soup spilled on the child when her younger brother pushed a toy into it, that the mother had warned the child that the soup was hot and that the temperature of the soup was checked by a line cook and it was between 140 and 165 degrees Fahrenheit, which is the temperature required by the New York City Department of Health. The Court held that this evidence established prima facie that the evidence was not unreasonably dangerous for its intended use and that it was a danger that plaintiff reasonable contemplated. The Court held that plaintiff failed to raise a triable issue of fact in opposition.

3. LEGAL MALPRACTICE

Plaintiff's Complaint Dismissed

Hickey v. Steven E. Kaufman, PC – 2017 NY Slip Op 08599 (1st Dept., December 7, 2107

On appeal of the lower Court's grant of plaintiff's motion to amend the complaint, and denial of

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* *Vincent P. Pozzuto is a member in the Manhattan office of Cozen O'Connor.*

defendant's motion to dismiss the amended complaint, the Appellate Division, First Department, held that given the 2005 amendment to CPLR §3211(e), plaintiff was not required to support his motion to amend the complaint with an affidavit of merit. The Court however reversed the lower Court's denial of defendant's motion to dismiss the amended complaint, holding that plaintiff's claim that but for the defendant's negligence, he would have recovered the full $3 million that he was owed during the bankruptcy of a non-party consisted of "gross speculation of future events" and could not support the motion to amend.

4. INSURANCE COVERAGE

Excess Carrier Not Obligated to Defend and Indemnify

Arthur Vincent & Sons Construction, Inc. v Century Insurance Company et al. 2015-04061 (2nd Dept., September 28, 2017)

In a declaratory judgment action, plaintiff brought suit alleging that it was owed excess coverage from defendant Admiral Insurance company relative to an underlying personal injury suit. Plaintiff had entered into a contract with Fordham University to install a new roof on a campus building. One of plaintiff's employees fell off the roof and died. His estate brought a wrongful death suit against Fordham. Fordham brought a third-party action against plaintiff in the underlying law suit, seeking common-law and contractual indemnification. Plaintiff brought the subject declaratory judgment action seeking among other things, a declaration that Admiral under the excess policy issued to plaintiff, was obligated to defend and indemnify plaintiff. Admiral made a motion for summary judgment arguing that it was not obligated to defend or indemnify plaintiff on the ground that plaintiff's employer liability coverage is unlimited, thereby never triggering excess coverage. The lower Court granted plaintiff's motion. On appeal, the Appellate Division, Second Department reversed, holding that the Admirial excess policy states that it provides coverage in the amount of the "ultimate net loss" in excess of the "underlying insurance limit." The "underlying insurance limit" is defined as the sum of the amounts applicable to any claim of "suit" from (1) the "underlying insurance" which is the coverage(s) afforded under insurance policies for the limits shown, as designated in the schedule of "underlying insurance"; and (2) "other insurance". The Court held that the employer's liability policy issued by Commerce in included in the "underlying insurance limit" because that term, by definition, includes both the policies designated in the schedule of underlying insurance and "other insurance". As the Commerce policy contained a New York Limit of Liability Endorsement that provides plaintiff with unlimited coverage, the Court held pursuant to the clear unambiguous terms of the Admiral policy, excess coverage under the Admiral policy cannot be triggered.

5. LABOR LAW

Plaintiff Granted Summary Judgment Under Labor Law §241(6)

Fitzgerald v. Marriott Intl., Inc. 2017 NY Slip Op 08631 (1st Dept. – December 12 2017)

Plaintiff was injured when during the course of his work as a steamfitter, he slipped and fell on a piece of mud-covered insulation while walking down a wooden ramp. At the time, plaintiff was working the night shift to monitor the heating fans and pipes, and to ensure that there were no problems with the work that his company had performed earlier that day. On defendant's motion to dismiss the Labor Law §241(6) claim, the lower Court granted the motion and denied plaintiff's cross motion to amend the bill of particulars. On appeal, the Appellate Division, First Department, held that plaintiff's testimony established that he was engaged in construction work for Labor Law purposes. The Court further held that 12 NYCRR 23-1.7(d) did not apply as plaintiff did not slip on a "slippery condition" or "foreign substance" within the meaning of that provision. The Court held however, that 12 NYCRR 23-1.7(e)(1) did apply as the ramp constituted a "passageway" and "working area" and the insulation constituted "debris" under the regulation. The fact that plaintiff slipped rather than tripped did not render the regulation inapplicable.

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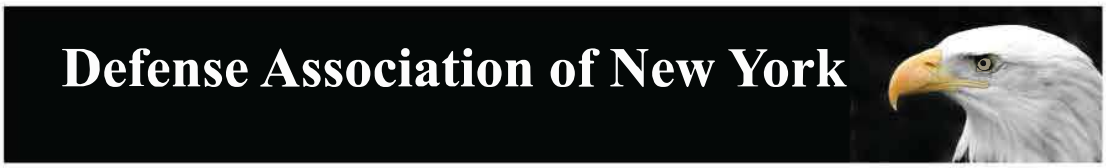

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6. MEDICAL MALPRACTICE

Plaintiff's Complaint was Time-Barred

Green v. Sol S. Stolzenberg, D.M.D., P.C. – 2017 NY Slip Op 08639 (1st Dept., December 12, 2017)

Plaintiff brought an action for dental malpractice. Defendant had performed two root canal procedures on plaintiff in 2003 and 2007. Plaintiff did not commence the action until January 2016. The Appellate Division, First Department held that the continuous treatment did not apply as the root canal therapies constituted isolated and discrete procedures. The Court further held that plaintiff's contention that the motion court should have allowed plaintiff to conduct further discovery was unavailing. The motion court permitted plaintiff to take a deposition of Dr. Tatyana Berman on the limited issue of continuous treatment, and plaintiff was also in possession of the complete dental records. The Court also noted plaintiff failed to submit an affidavit in opposition to the motion, and that plaintiff should have facts regarding any treatment plan available to her as the the recipient of the allegedly negligent dental services.

7. RECREATIONAL LIABILITY

Defendant Motion for Summary Judgment Denied

Lee v. Brooklyn Boulders, LLC, - 2016-04353 (2nd Dept., October 6, 2017)

Plaintiff was allegedly injured at the defendant's rock climbing facility when she dropped down from a climbing wall and her foot landed in a gap between two mats. According to plaintiff, the gap was covered by a piece of velcro. The defendant made a motion for summary judgment and plaintiff made a cross-motion to amend the complaint to add a claim for punitive damages. The lower Court denied the defendant's motion and plaintiff's cross-motion. The Appellate Division, Second Department affirmed. The Court held that contrary to defendant's contention, the release of liability that the injured plaintiff signed was void under General Obligations Law §5-326 because defendant's facility is recreational in nature. In addition, the Court held that defendant failed to establish prima facie that the doctrine of primary assumption of risk applies. The Court held that the plaintiff's deposition testimony revealed triable issues of fact as to whether the gaps in the mats constituted a concealed risk and whether the injured plaintiff's accident involved an inherent risk of rock climbing. The Court also held that the lower Court providently exercised its discretion in denying plaintiff's cross-motion for leave to amend the complaint to add a claim for punitive damages.

8. EMPLOYMENT LAW

Plaintiff's Claim was Time-Barred

Ortegas v. G4S Secure Solutions (USA) Inc., - 2017 NY Slip Op 09262 (1st Dept., December 28, 2017)

Plaintiff brought suit alleging employment discrimination. The lower Court granted defendant's motion to dismiss the complaint as time-barred. On appeal, the Appellate Division, First Department, affirmed, holding that the employment application unambiguously shortened the applicable statute of limitations to six months. Plaintiff did not contest that her complaint was untimely if the provision was enforceable, but argued that the provision was unconscionable. The Court held that a showing of unconscionability requires a showing that "the contract was both procedurally and substantively unconscionable when made, i.e., some showing of an absence of a meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." The Court ruled that plaintiff could not establish unconscionability, as New York Courts have held that a six-month period to bring an employment claim is inherently reasonable.

9. MEDICAL MALPRACTICE

Defendant Granted Summary Judgment

Kim v. Lenox Hill Hospital, 2015-09461, (2nd Dept., October 2, 2017)

Plaintiff's decedent underwent surgery to repair two aortic aneurysms in her abdomen. After the surgery, blood circulation issues arose in the decedent's bowl, and over the next two months, she underwent seven follow-up surgeries. Her condition continued to deteriorate and she died. The defendants made a motion for summary judgment. The lower Court granted the motion and the Appellate Division, Second Department affirmed, holding that defendants

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Modern Day Discovery Disputes – Cases and Principles – Version Four

BRADLEY J. CORSAIR *

This article embodies an ongoing initiative to furnish a current, quick reference discovery guide that is also comprehensive. Here you will find a discussion of principles based mainly on contemporary appellate determinations of discovery disputes. I have categorized these cases into a number of topics that are presented generally in alphabetical order, so readers can readily return to a topic of interest as necessary. Included is a mix of discovery items, disclosure devices, and procedural issues. If you are reading this in a pdf format, your software's search function can probably lead you to content of immediate concern.

This guide is a fourth version. It is an expansion of the third version that is published in the Winter 2016 / 2017 "Defendant" journal.[1] New content is presented in this burgundy color, whereas previously published text and legal citations are in black. In some instances, the end notes for principles set forth in prior versions now include additional case citations.

Basic Discovery Standards, Objections, Privileges and Precautions

CPLR 3101(a) provides that there "shall be full disclosure of all matter material and necessary in the prosecution or defense of an action,[2] regardless of the burden of proof."[3] "'[M]aterial and necessary' in this statute must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity."[4] The information sought should meet a test of "usefulness and reason."[5] "The statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise."[6]

CPLR 3120 is the statutory source for production of a document or thing: "After commencement of an action, any party may serve on any other party a notice ... to produce and permit the party seeking discovery ... to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served."[7] It has been held that service of copies of documents in electronic format is a satisfactory response to a demand for paper copies.[8] Similarly, a party is not categorically entitled to its preferred electronic document format.[9]

As with CPLR 3101(a), it has been held that the scope of CPLR article 31 in general must be liberally construed.[10] However, while New York's judicial system generally fosters a pro-discovery environment, "the right to disclosure, although broad, is not unlimited."[11] "[A] party is not entitled to unlimited, uncontrolled, unfettered disclosure."[12] The demanded items should be "sufficiently related to the issues in litigation to make the effort to obtain them in preparation for trial reasonable."[13]

A litigant who is dissatisfied with a response to a discovery notice, or lack of one, should communicate with the target party or non-party toward resolving the problem. Parties are "free to chart their own litigation course, and they may fashion the basis upon which a particular controversy will be resolved,"[14] whether by stipulation or a less formal understanding. This conferral is called for by 22 NYCRR 202.7(a)(2), as discussed below in the section about motions to compel discovery (concerning good faith effort to resolve a discovery dispute before getting the court involved), and in the section concerning note of issue vacatur.

If the conferral does not yield a resolution, there is the option of a motion to compel a response pursuant to CPLR 3124. "A party seeking discovery must satisfy the threshold requirement that the

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request is reasonably calculated to yield information that is 'material and necessary' –i.e., relevant – regardless of whether discovery is sought from another party (see CPLR 3101[a][1]) or a nonparty (CPLR 3101[a][4])."[15] Of course, a party who has responded to a discovery notice in good faith can oppose a 3124 motion by asserting that the response was adequate.[16]

The obligation to search for items in view of a discovery notice is not boundless. "A party may not be compelled to produce or sanctioned for failing to produce information that is not in his or her possession or control."[17] Similarly, "a party cannot be compelled to produce records, documents, or information that were not in its possession, or did not exist."[18] In this scenario, a court can providently call for an affidavit stating that a search has been conducted and the documents do not exist.[19] On the other hand, it is an abuse of discretion for a court to give a party unfettered access to an opposing party's documents, particularly where the underlying motion had not requested such broad relief.[20]

Discovery demands are improper if they are based upon "hypothetical speculations calculated to justify a fishing expedition."[21] Moreover, "discovery demands that are overly broad, are lacking in specificity, or seek irrelevant documents are improper,"[22] as are demands that seek material already produced.[23] Likewise, it has been held that "disclosure demands may be palpably improper where they seek irrelevant information, are overbroad and burdensome, or fail to specify with reasonable particularity many of the documents demanded."[24] "Palpably improper" has similarly been defined as "either overly broad, unduly burdensome, irrelevant, or vague,"[25] "immaterial" to the claims of the demanding party,[26] and "not necessary and proper to the prosecution of this action."[27] Inversely, characteristics of a proper discovery notice may include "specific references to deposition testimony, details, and time parameters, and information material and necessary to the pending causes of action" or defenses.[28]

"[W]here discovery demands are overbroad, the appropriate remedy is to vacate the entire demand rather than to prune it."[29] However, a litigant who has made an overbroad demand, such as for all construction project documents, might obtain leave to serve a more narrowly tailored notice,[30] or may be given leniency as to "additional, narrow categories of documents" in view of the "liberal discovery standard."[31]

As for a general standard to justify production of discovery to potentially support a defense, the First Department has called for two things. First, that there is a factual basis for the defense,[32] and second, that "the discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the defense"[33] Similarly, a standard as to a plaintiff challenged with a motion to dismiss for failure to state a cause of action is whether the discovery demanded "could lead to relevant evidence."[34] Once a claim or defense has been dismissed, the remaining litigation generally should not involve discovery that would only be germane to that claim or defense.[35]

In accord with the foregoing, the Second Department has expressed that a plaintiff or a defendant should "demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims,"[36] and "unsubstantiated bare allegations of relevancy are insufficient to establish the factual predicate regarding relevancy."[37] "Each request must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure."[38] Other considerations upon a motion to compel are whether the target parties "did not turn over materials that were in their possession and responsive to the discovery requests, or that their submissions in response to the discovery demands were otherwise inadequate,"[39] or whether materials sought were expressly referenced in the target party's deposition testimony.[40]

Typically exchanged discovery in personal injury cases includes insurance coverage information; authorizations to obtain records concerning the plaintiff from health care providers, employers, and collateral sources; eyewitnesses; notice witnesses; opposing party statements; photographs and video of an incident scene;[41] and incident reports prepared in the regular course of a party's business. Other

Continued on next page

popular discovery devices include depositions of parties and non-party witnesses, and defense medical examinations ("IMEs"). This is self-evident from pre-printed language in form preliminary conference orders,[42] and from the terms of CPLR 3102(a).[43] Parties can pursue discovery without judicial involvement by serving a notice or procuring a stipulation, as can be seen from CPLR 3102(b).

In a trip and fall case, it may be appropriate to have disclosure of floor plans and a site inspection of the involved part of the property.[44] This may be subject to restrictions in respect of a defendant's business interests or residents' privacy.[45]

Sometimes discovery reaches to parts of a premises, or the entirety of a premises, outside the specific area where a plaintiff's injuries were allegedly sustained.[46] A potential rationale is that "[k]nowledge of a dangerous condition in one portion of the structure may have imposed upon the owners an obligation to examine other portions of the structure for defects arising from the same cause, and to ascertain what was ascertainable with the exercise of reasonable care."[47]

There are a myriad of other types of discovery items that a party might demand, which are often based on the unique facts of a given case. A good variety of items are mentioned in the balance of this publication.

The time at which discovery will take place is designated by the preparer of the notice to obtain the discovery, or prescribed in a court order. The earliest time at which discovery can occur after service of a notice can depend on which device is involved. For example, under CPLR 3120(2), a notice to produce documents or things shall specify a time "not less than twenty days after service." In contrast, pursuant to CPLR 3042(a), a bill of particulars is to be served "[w]ithin thirty days of service of a demand."

It can become necessary to update a discovery response that was thought to be complete at the time it was served. Under CPLR 3101(h), a party "shall amend or supplement a response previously given to a request for disclosure promptly upon the party's thereafter obtaining information that the response was incorrect or incomplete when made." A duty to amend or supplement also exists where a past response, "though correct and complete when made, no longer is correct and complete, and the circumstances are such that a failure to amend or supplement the response would be materially misleading."

The Appellate Division has described this responsibility as an "ongoing obligation" to amend or supplement a response when circumstances trigger 3101(h).[48] If the commencement of the trial is near, 3101(h) cautions that preclusion of evidence is not inevitably required. Rather, the court, upon motion of a party or on its own initiative, may make whatever order may be just.

When served with a discovery notice that seems improper, the recipient's options include timely service of a notice of objection, i.e. within twenty days of service pursuant to CPLR 3122 ("Objection to disclosure, inspection or examination; compliance"), or, a motion for a protective order pursuant to CPLR 3103 to excuse any obligation to respond.[49] "Litigants are not without protection against unnecessarily onerous application of the disclosure statutes. Under our discovery statutes and case law competing interests must always be balanced."[50]

When the notice of objection relates to a withholding of one or more documents that appear to have been called for by the underlying discovery demand, CPLR 3122(b) mandates indication of the legal ground for withholding each document, and that the following information be provided: "(1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document for a subpoena duces tecum."[51] This notice is known in practice as a "privilege log."[52]

Based on other wording in CPLR 3122(b), a discovery target can be relieved of this four-part requirement if divulgence of such information would cause disclosure of the allegedly privileged information. Where no privilege log is produced, or it is not sufficient, a potential judicial solution is an order directing production of an adequate privilege log, and thereafter, an in camera review of the log and the allegedly privileged documents.53 Beware that the absence of a privilege log can undermine or even preclude a claim that items demanded are privileged.[54]

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Concerning the motion option, "[u]nlimited disclosure is not mandated, and a court may issue a protective order pursuant to CPLR 3103 denying, limiting, conditioning or regulating the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."[55] A court "may issue a protective order precluding disclosure that is palpably improper in that it seeks irrelevant and/or confidential information, or is overly broad and burdensome."[56]

A failure to timely challenge an opposing party's discovery demand, by service of a notice of objection or motion for a protective order, can have consequences. Such generally forecloses inquiry into the propriety of the information sought, except for requests that call for privileged information or which are palpably improper.[57]

"Trial courts are vested with broad discretion to issue appropriate protective orders to limit discovery.... this discretion is to be exercised with the competing interests of the parties and the truth-finding goal of the discovery process in mind."[58] Thus, "to properly exercise such discretion, a trial court must balance the need for discovery against any special burden to be borne by the opposing party."[59] "If the trial court has engaged in such balancing, its determination will not be disturbed in the absence of an abuse of discretion,"[60] or "an improvident exercise of that discretion"[61] or "an error of law."[62]

Note though that where discretionary determinations concerning discovery and CPLR article 31 are at issue, the Appellate Division is vested with the same power and discretion as Supreme Court, and may substitute its discretion even absent abuse below.[63] However, the Appellate Division may see Supreme Court as better positioned to decide a discovery dispute, where the latter court has held numerous conferences over multiple years.[64]

Contexts that may befit a protective order include overbroad and burdensome discovery demands,[65] needs to curtail or avoid an oral deposition of a party[66] or non-party,[67] or to protect trade secrets,[68] proprietary rights,[69] privacy rights,[70] or privileged information e.g. in view of CPLR 3101(b)[71] or 3101(c)[72] or 3101(d)(2).[73]

"The CPLR establishes three categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101[b]); attorney's work product, also absolutely immune (CPLR 3101[c]); and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means CPLR 3101[d][2]."[74]

This was said by the First Department in an insurance coverage litigation discovery dispute. Attorney-client communications were at issue, which can plausibly involve any or all of these three categories. The court held further that "in order for attorney-client communications to be privileged, the document must be primarily or predominantly a communication of a legal character."[75] Additionally, "the burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity."[76] Privilege stemming from the attorney-client relationship is discussed further with relation to CPLR 3101(c) below.

CPLR 3101(b) ("Privileged matter") states that "[u]pon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable." "Once the privilege is validly asserted, it must be recognized and the sought-after information may not be disclosed unless it is demonstrated that the privilege has been waived."[77]

There are numerous examples of what matter is or might be considered privileged, and what relationships may warrant a privilege, within the meaning of 3101(b). A common example is the physician-patient privilege,[78] such as of a defendant in a personal injury action[79] or the nonparty sibling of a plaintiff in such an action.[80] Note though that a personal injury plaintiff waives the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue,[81] at least with respect "to those conditions affirmatively placed in controversy,"[82] as discussed further below. This can also happen with the "statutory social worker-patient confidentiality privilege" conferred by CPLR 4508.[83]

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Other privileges are less well known, e.g., the "bank examination privilege," which is "a qualified rather than an absolute privilege that accords agency opinions and recommendations and banks' responses thereto protection from disclosure."[84] Records of a shelter for domestic violence victims that concern a plaintiff are not presumed to be privileged.[85]

There is a "public interest" privilege intended to encourage witnesses to come forward to cooperate in pending criminal investigations.[86] Given a dispute over documents that may be within the scope of this privilege, a court is to undertake an in *camera* review, so as to balance the public interest against a party's need for the documents to prosecute or defend a claim.[87]

"The determination whether a particular document is shielded from disclosure by the attorney-client privilege is necessarily a fact-specific determination."[88] CPLR 3101(c) ("Attorney's work product") states "[t]he work product of an attorney shall not be obtainable." Attorney-generated materials may be additionally or alternatively protected under the "prepared in anticipation of litigation" privilege that is potentially available pursuant to CPLR 3101(d)(2).

Given an allegation of work-product privilege, a court will examine whether the document is by an attorney acting as counsel for the objecting party, and "reflects legal research, analysis, conclusions, legal theory or strategy."[89] Put another way, an inquiry is whether the allegedly privileged materials are "uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his or her legal research, analysis, conclusions, legal theory or strategy."[90] Materials obtained by an attorney via requests pursuant to state and federal freedom of information laws do not trigger this privilege.[91]

CPLR 3101(d), titled "Trial preparation," has two components. 3101(d)(1) is subtitled "Experts" and is discussed below under the subheadings that pertain to expert witnesses. 3101(d)(2) is subtitled "Materials" and states as follows:

> "Subject to the provisions of paragraph one of this subdivision, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."

Materials that befit CPLR 3101(d)(2) are referred to as conditionally privileged[92] or conditionally immune[93] from disclosure as materials prepared for litigation. CPLR 3101(d)(2) states a non-exhausive list of party representatives whose materials could be privileged, including an attorney, insurer or agent. Case law provides other examples, such as a medical expert,[94] forensic accountant[95] and an investigator or party employee who served that role.[96]

Regarding a 3101(d)(2) objection, "the burden of proving that a statement is privileged as material prepared solely in anticipation of litigation or trial is on the party opposing discovery."[97] "This burden is imposed because of the strong policy in favor of full disclosure" and "it cannot be satisfied with wholly conclusory allegations."[98] Rather, "[s]uch burden is met by identifying the particular material with respect to which the privilege is asserted and establishing with specificity that the material was prepared exclusively in anticipation of litigation."[99]

The "solely" or "exclusively" criteria is a strict one: "To fall within the conditional privilege of CPLR 3101 (subd [d], par 2), the material sought must be prepared solely in anticipation of litigation ... Mixed purpose reports are not exempt from disclosure."[100] Similarly, preparation of the material must not have been "motivated by other relevant business concerns."[101]

Evaluation of whether materials were prepared in anticipation of litigation may require a focus on both the circumstances and timing of their

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preparation.[102] Naturally, the period between a tortious occurrence or contractual breach on the one hand, and commencement of litigation on the other, is a common battleground time frame.

Concerning the insurance coverage context, "the purpose of liability insurance is the defense and settlement of claims and, once an accident has arisen, there is little or nothing that the insurer or its employees do with respect to accident reports except in preparation for eventual litigation or for a settlement which may avoid litigation."[103] That being so, "an insurer's file is generally protected by a conditional immunity as material prepared for litigation."[104] However, "reports prepared by insurance investigators, adjusters, or attorneys before the decision is made to pay or reject a claim are not privileged and are discoverable."[105] This takes into account that "payment or rejection of claims is a part of the regular business of an insurance company.

Consequently, reports which aid an insurer in the process of deciding whether to pay or reject a claim are made in the regular course of its business."[106] In accord, it has been held that material prepared by outside counsel as part of an insurer's investigation into a claim, that is not primarily and predominantly of a legal character, is neither privileged not attorney work product, and thus is discoverable.[107] And analogously, "[a]ccident reports prepared with a mixed purpose … are not exempt from disclosure."[108]

The relative need or lack thereof of the party who demanded the discovery can also be a factor. Where the privilege applies, a party seeking to overcome it must "establish that it had a substantial need for the materials ... and could not, without undue hardship, obtain the substantial equivalent of the materials by other means."[109] A court may inquire as to whether the pursuing party can obtain the subject information from or through an alternative source, such as an expert or consultant of its own.[110]

Another issue is whether the party asserting the privilege had waived it due to prior conduct.[111] This and other considerations were in play in an April 2017 appeal[112] which provides a good illustration of 3101(d)(2) contest. In that case, a personal injury plaintiff was pursuing a recorded statement that the defendant had given to his liability insurer's claim representative five days after the occurrence. The claim rep had informed the defendant that the conversation was being recorded and taken as part of the normal claims process. When motion practice insured, the claim rep's supervisor attested that the statement was procured in accord with the insurer's normal practice in anticipation of future litigation.

These facts supported the defendant's threshold burden of proof in asserting the privilege. The plaintiff wanted the recording as an admission that the defendant owned the instrumentality that had caused the plaintiff to become injured. A competing factor was that the plaintiff had other means available to explore this ownership issue, and had not demonstrated any undue hardship if the statement were withheld. Additionally, there was no indication that the statement was taken for some purpose other than preparing for litigation.

This meant that the defendant would prevail unless he had waived the privilege. The plaintiff had already obtained a transcript of the recording from the defendant. The fact that the claims office had sent the transcript to the defendant in the first instance was not a lack of due diligence or a waiver of the confidentiality of the document.[113] However, if the defendant had voluntarily given that statement to the plaintiff, any privilege would probably have been waived. But the defendant asserted that the plaintiff took the transcript without his consent. This prompted the Third Department to order a hearing so that the issue of waiver could be determined.[114]

A demand for disclosure may also be challenged in view of a quality assurance privilege founded in Education Law § 6527[3] or Public Health Law § 2805–m: "Records generated at the behest of a quality assurance committee for quality assurance purposes ... should be privileged, whereas records simply duplicated by the committee are not necessarily privileged."[115] A redaction of non-party patient information, or an in *camera* review as to a claim of quality assurance purpose, may be necessary in this setting.[116]

As to a subpoena that seeks documents or testimony from a non-party, a party or the non-party may move to quash that subpoena if a basis for protest exists.[117] On the flip side of the coin,

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the fact that desired documents may be available from a non-party, as with public records, does not categorically preclude production of those records from a party.[118]

Be wary about a casual denial of possession of discovery, followed by a later disclosure that ought to have made earlier, as that can have serious judicial consequences.[119] Lack of formal disclosure is sometimes forgiven where the information was made available or known at a deposition, as with notice witnesses for example.[120] However, upon motion, a court may require a line by line response to a discovery notice, since a non-specific response notice with unsorted documents is not necessarily sufficient.[121] A broader review of discovery failure is provided later in this article.

There can also be consequences where time elapses without a litigant demonstrating interest in discovery. For instance, laxity can undermine an argument that determination of an adversary's summary judgment should await discovery: "the record shows that plaintiff had, and failed to take advantage of, a reasonable opportunity to pursue the disclosure it now seeks."[122] A party opposing summary judgment based upon alleged discovery needs may be compromised if it has neither established that the adversary ignored a proper discovery demand nor identified or specified the desired discovery.[123]

Conversely, a diligent party facing an early summary judgment motion should be allowed additional time to conduct discovery, so long as adequate justification exists: "CPLR 3212(f) permits a party opposing summary judgment to obtain further discovery when it appears that facts supporting the position of the opposing party exist but cannot be stated" and "(t)his is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion,"[124] and where the defendant to date "is limited to the plaintiff's own unchallenged account of the accident" and "has not had an opportunity to explore potential defenses."[125]

The fact that court-ordered discovery is outstanding is also a ground to forestall decision of a summary judgment motion.[126] Some valid reason to delay the motion will generally be required as "the mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion."[127] The motion opponent must "demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition (are) exclusively within the knowledge and control of the movants."[128]

It has been similarly said that "a party who seeks a finding that a summary judgment motion is premature is required to put forth some evidentiary basis to suggest that discovery might lead to relevant evidence."[129] Given a showing of that kind, an opportunity should be provided for the parties to conduct discovery, and summary judgment should be denied with leave to renew upon the completion of the litigation's discovery phase.[130] However, parties' professed need to conduct discovery will not warrant denial of the motion where they already have personal knowledge of the relevant facts.[131]

A plaintiff facing a motion to dismiss for failure to state a cause of action may seek discovery in opposition to the motion. The plaintiff must specify how additional discovery would enable him to state a sufficient claim.[132]

At the other end of the spectrum, discovery is not available to a defendant who did not timely appear in the litigation: "[w]here a defendant defaults in answering the complaint, he or she forfeits the right to engage in discovery."[133]

Authorizations – Various Records Exchanged by Authorizations

A wealth of disputes focuses on types of records or information that should be made available by written authorization forms, known in practice as "authorizations." Sometimes the scope of the time frame in which records or information were made is in controversy as well.

The target of a demand for authorizations is usually a plaintiff. As a general rule, the medical condition of a defendant, third party defendant, or non-party is not placed in controversy in personal injury litigation, and so their medical history is usually privileged.[134] There are occasional exceptions, however. For example, a defendant in a motor vehicle action may allege a non-negligent explanation for

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an accident such as loss of control due to sudden onset of a medical condition.[135] Exchange of an authorization for that defendant's medical records of relevance may be indicated in such a scenario, if requested.[136]

An authorization is a means to obtain information about a plaintiff or other person from a custodian, who presumably would not otherwise release anything. Several varieties of information are discussed in this section. Still more are covered further below, including cell phone records and social media information. The information typically authorized is a record or other tangible item, such as a diagnostic test film. An authorization can also potentially permit defense counsel to speak with a healthcare provider who has rendered care to a personal injury plaintiff; some practitioners call this an "Arons" authorization, which is a reference to *Arons v. Jutkowitz*.[137]

Concerning medical records, the general rule is that authorizations are due with relation to conditions affirmatively placed in controversy.[138] It has thus been held that "a party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue."[139]

The mandate for a plaintiff to exchange medical reports and authorizations, and to do so in advance of a defense medical examination, is founded in Section 202.17 of the Uniform Rules for the New York State Trial Courts. 202.17(b) states:

(b) At least 20 days before the date of such examination, or on such other date as the court may direct, the party to be examined shall serve upon and deliver to all other parties the following, which may be used by the examining medical provider:

(1) copies of the medical reports of those medical providers who have previously treated or examined the party seeking recovery. These shall include a recital of the injuries and conditions as to which testimony will be offered at the trial, referring to and identifying those X-ray and technicians reports which will be offered at the trial, including a description of the injuries, a diagnosis and a prognosis. Medical reports may consist of completed medical provider, workers' compensation, or insurance forms that provide the information required by this paragraph;

(2) duly executed and acknowledged written authorizations permitting all parties to obtain and make copies of all hospital records and such other records, including X-ray and technicians' reports, as may be referred to and identified in the reports of those medical providers who have treated or examined the party seeking recovery.

To justify authorizations for records not relating to treatment or testing of injuries specified in bills of particulars, a defendant may need to demonstrate that the information sought is material and necessary to a claim or defense. The predicate showing should be made with the original motion rather than awaiting reply papers.

A purported need to take prescription narcotic medications implicates a plaintiff's mental condition,[140] as that allegation affirmatively places that condition in issue.[141] On the other hand, an authorization for methadone treatment records was denied where the records were not shown to relate to the happening of the accident or "the injury sued upon," and any claim for mental injuries was withdrawn.[142] Also significant, in that same case, it was not evident that the interests of justice significantly outweighed the need for confidentiality so as to permit disclosure pursuant to Mental Hygiene Law § 33.13(c)(1).[143]

According to the Second Department, broad allegations in a complaint, bill of particulars and/or bill of particulars concerning physical and/or mental injuries can mean that a plaintiff has affirmatively placed his "entire" medical condition in controversy,[144] such as by expressing intention to prove damages for loss of enjoyment of life[145] and/or exacerbation of preexisting injuries at trial.[146] "Because the plaintiff affirmatively placed her entire medical condition in controversy through broad allegations of physical injuries and claimed loss of enjoyment of life due to those injuries, which included impairment of her nervous system and requirement of neurological care, the nature and severity of her previous psychiatric conditions and her history of treatment for

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substance abuse are matters material and necessary to the issue of damages."[147] The Second Department has directed a plaintiff in such circumstances to provide authorizations, unrestricted as to date, for the release of medical records concerning acoustic neuroma[148] and back issues, although unrelated to the underlying occurrence.[149]

The First Department seems generally less inclined than the Second Department to find that a plaintiff's entire medical history has become discoverable.[150] This was the outcome, however, in a First Department appeal decided in April 2017.[151] In that matter, the plaintiff had alleged numerous physical and psychological injuries, including depression, and that those injuries permanently impacted his ability to work. That being the case, the defendants were entitled to disclosure of the plaintiff's entire medical history, because "his overall health directly bears on how many years he realistically could have continued to work had no accident occurred."[152]

Where a personal injury plaintiff has claimed loss of enjoyment of life, authorizations for release of alcohol and drug abuse treatment records have been directed,[153] as well as for psychological treatment records,[154] mental health records,[155] pharmacy and health insurance records,[156] social security disability records,[157] records concerning serious medical conditions that are unrelated to the subject accident such as diabetes,[158] kidney disease,[159] and cardiac conditions,[160] as well medical history before the subject accident occurred: "The defense is entitled to review records showing the nature and severity of the plaintiff's prior medical conditions which may have an impact upon the amount of damages, if any, recoverable for a claim of loss of enjoyment of life."[161]

It is commonly appropriate to pursue authorizations to access information relating to a plaintiff's prior or subsequent traumatic event, and/or pre-existing condition. This is often done upon a revelation that a prior or subsequent occurrence involved injuries identical or similar to those claimed in the action being defended.[162] But this is hardly the only predicate for seeking discovery as to medical history that does not directly arise from the subject occurrence.

In a motor vehicle case, it has been said that "the nature and extent of previous injuries and medical conditions are material and necessary to claims of having sustained a serious injury within the meaning of Insurance Law § 5102(d), as well as any claims of loss of enjoyment of life."[163] In a case involving multiple bodily injury, i.e. neck, back and right knee, the Second Department has directed authorizations for the plaintiff's records reflecting her "medical history" and "preexisting physical conditions" including records of a non-medical custodian (Witness Security Office pertaining to Witness Protection Program) reflecting her physical condition.[164]

An allegation of an exacerbation of a pre-existing condition or the like opens the door in a similar way. In a 2013 First Department case, a defendant was accused of causing "aggravation of a pre-existing latent and asymptomatic degenerative condition."[165] Accordingly, the defendants were entitled to authorizations for those portions of the plaintiff's dental records that discuss her medical history. "Inasmuch as plaintiff has clearly voluntarily put her prior medical condition at issue, such disclosure is material and necessary for the defense of this action so that defendants may ascertain her condition."[166]

In a 2011 appeal, the First Department perceived cause for the plaintiff "to provide authorizations for all medical records unrestricted by date."[167] There, the justification was a bill of particulars alleging that the subject accident "aggravated or exacerbated underlying conditions that were asymptomatic before the accident" and that the plaintiff was disabled as a result.[168] In light of those averments, "defendants are entitled to discovery to determine the extent, if any, that plaintiff's claimed injuries 'are attributable to accidents other than the one at issue here.'"[169] In an analogous vein, where the plaintiff has congenital conditions of relevance, there may be cause for authorizations relative to an extended or even life-long medical history.[170]

A 2013 Second Department appeal involved underlying allegations in bills of particulars to the effect that the subject accident had "exacerbated or accelerated" previously existing injuries.[171] In this scenario, the Second Department directed release

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of all medical records for the five years preceding that accident.[172]

Where a plaintiff had explicitly alleged psychological as well as physical injuries from the subject accident, including depression, with permanent impact on ability to work, the First Department has directed that he provide "authorizations for production of his medical, psychological, and psychiatric records, for the period beginning five years before the accident."[173] As also noted above, the defendants in that setting were "entitled to disclosure of his entire medical history, including any psychological or psychiatric records," because "his overall health directly bears on how many years he realistically could have continued to work had no accident occurred."[174]

Regarding employment records, it is well understood that authorizations as to work attendance are appropriate, especially where the plaintiff claims disability or the like. And it is also standard for a plaintiff to authorize wage records where loss of earnings is claimed. However, sometimes a plaintiff should permit a broader range of records from an employer. For example, an "authorization for any medical records related to the claimed injuries in his employment file from one year prior to the motor vehicle accident at issue to the present" has been required.[175]

A plaintiff who is self-employed and claiming damages for lost earnings has been required to allow defendants to obtain tax returns filed by him and his company.[176] Additionally, a plaintiff may be compelled to provide an authorization for tax returns where the defendant has been unable to obtain salary history from the plaintiff or other sources such as purported former employers, and where such information is indispensable to the litigation.[177] In litigation generally, requests for tax returns are treated with heightened scrutiny since they are confidential by their nature, and disclosure of tax returns can be made subject to an order of confidentiality.[178]

When a party receives a copy of a subpoena directed to its accountant that seeks financial records, the party can potentially object to their disclosure "on the basis of their confidential and private nature."[179]

There may be interest in personnel records of a police officer, firefighter, firefighter/paramedic, correction officer or peace officer in an action against a governmental defendant based on alleged act or omission of such a public employee. In that scenario, Civil Rights Law § 50-a is applicable. Under that statute, the employee's personnel records used to evaluate performance toward continued employment or promotion "shall be considered confidential and not subject to inspection or review without the express written consent" of the employee "except as may be mandated by lawful court order."

§ 50-a contemplates an *in camera* inspection, stating that "prior to issuing such court order the judge must review all such requests and give interested parties the opportunity to be heard." There must be "a clear showing of facts sufficient to warrant the judge to request records for review." And if there is, the judge "shall then review the file and make a determination as to whether the records are relevant and material in the action before him."

A wrongful death action involving a discovery dispute in this realm spawned two appeals to the Second Department.[180] The decedent was involved in a motor vehicle accident. The plaintiffs alleged that county police failed to render first aid treatment at the scene, and that police and an ambulance company delayed in transporting the decedent to a hospital. After serving a discovery notice, the plaintiffs moved to compel the production and in camera inspection of certain records of the police department's Internal Affairs Bureau pursuant to § 50-a. In the first appeal, it was held that an *in camera* inspection should have been granted; "the plaintiffs established a factual predicate for obtaining access to the subject records … which might contain information that is relevant and material to the underlying incident."[181]

The Supreme Court went on to conduct the *in camera* inspection, and then denied disclosure of most of the records contained in the Internal Affairs investigation file regarding the subject accident. In the second appeal, the Second Department agreed that the records sought – including a report of an Internal Affairs investigator with factual findings and conclusions about the accident – were not "relevant and material" and therefore were not

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subject to disclosure, with two exceptions. The Second Department did direct the disclosure of recording(s) of emergency dispatch calls and a "Fire, Rescue, and Emergency Services (FRES)" recording.[182] That second appeal also determined a dispute about additional examinations before trial; this aspect of the opinion is discussed in the section below on further depositions.

There is a December 2017 First Department opinion in this realm, in an action by a former police officer for damages due to alleged harassment and discrimination.[183] The plaintiff sought disclosure of the disciplinary files of a police officer and another employee of the defendant police department. The police officer's disciplinary files are protected by Civil Rights Law § 50–a, and the plaintiff failed to provide a clear showing of facts sufficient to warrant even an *in camera* review.[184] The disciplinary file of the other police department employee was not warranted, since she was not similarly situated with plaintiff, and thus is not comparable for the purpose of showing discrimination.[185]

In a medical malpractice action involving birth with a brain injury, the plaintiff was directed to produce authorizations for medical records pertaining to the births of the infant plaintiff's siblings, and the pregnancies that resulted in those births.[186] That plaintiff was also required to permit the defendants to perform genetic testing and a physical examination of the infant plaintiff.[187] The defendant had submitted an expert affirmation indicating that this discovery was germane to the potential defense that the infant's brain injury was an outcome of genetic predisposition rather than malpractice.

In a lawsuit involving real estate property damage, there may be a claim to recover monies that were expended in making improvements to the real property prior to the subject occurrence. In that scenario, even if all parties were familiar with the end product of those improvements, the plaintiff upon request should disclose documentation - and potentially "all documentation" - relating to all improvements that were made during the plaintiff's period of ownership.[188] However, the plaintiff generally would not be compelled to provide discovery concerning a lease executed with a non-party tenant after the loss, even if that tenant demolished the damaged improvements at issue.[189] In accord with this, it would be appropriate to quash any subpoenas duces tecum directed to such a non-party.[190]

Bills of Particulars

One could write an entire journal article on the law as to propriety of a bill of particulars and a demand for the same, updating a bill of particulars, and implications of its content or deficiency. The focus here is on the legislative framework and recent decisions.

The statutory authority for a bill of particulars is CPLR 3041 through 3044. Based on 3041, "any party may require any other party to give a bill of particulars of such party's claim."

CPLR 3042 provides procedure as to a demand, response, amendment, failure to respond, and penalties. Under 3042(a), "a demand for a bill of particulars shall be made by serving a written demand stating the items concerning which particulars are desired." Within thirty days of service of a demand, "the party on whom the demand is made shall serve a bill of particulars complying with each item of the demand, except any item to which the party objects, in which event the reasons for the objection shall be stated with reasonable particularity."

For changing a bill of particulars, CPLR 3042(b) states: "in any action or proceeding in a court in which a note of issue is required to be filed, a party may amend the bill of particulars once as of course prior to the filing of a note of issue."[191]

CPLR 3042(c) addresses failure to respond or to comply with a demand. "If a party fails to respond to a demand in a timely fashion or fails to comply fully with a demand, the party seeking the bill of particulars may move to compel compliance, or, if such failure is willful, for the imposition of penalties pursuant to subdivision (d) of this rule." 3042(d) adds that "if a party served with a demand for a bill of particulars willfully fails to provide particulars which the court finds ought to have been provided pursuant to this rule, the court may make such final or conditional order with regard to the failure or refusal as is just" including relief per CPLR 3126.

If a demand for a bill of particulars is thought to be improper or unduly burdensome, the court

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pursuant to 3042(e) may vacate or modify the demand, or make such order as is just.

CPLR 3043(a) sets forth a list of subjects as to which a personal injury plaintiff must provide particulars upon demand, i.e.:

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

(2) Its approximate location;

(3) General statement of the acts or omissions constituting the negligence claimed;

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

(5) If actual notice is claimed, a statement of when and to whom it was given;

(6) Statement of the injuries and description of those claimed to be permanent;[192]

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

(8) Length of time incapacitated from employment; and

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

CPLR 3043(b) allows a "supplemental" bill of particulars with respect to claims of continuing special damages and disabilities without leave of court except where that would occur less than thirty days prior to trial. No new cause of action or injury may be alleged, however. Significantly, any party who receives a supplemental bill of particulars becomes "entitled to newly exercise any and all rights of discovery" with respect to such continuing special damages and disabilities, upon seven days of notice.

Under CPLR 3043(c), a court may deny any one or more of the foregoing particulars, or the court may grant other, further or different particulars.

CPLR 3044 is the statutory source as to whether a bill of particulars is to be verified: "If a pleading is verified, a subsequent bill of particulars shall also be verified. A bill of particulars of any pleading with respect to a cause of action for negligence shall be verified whether such pleading be verified or not."

Bills of Particulars – Amendments

Where a party seeks to amend a bill of particulars after a note of issue has been filed, the party must move for leave of court and provide a reasonable explanation for the timing.[193] "Generally, such leave should be freely granted, especially where the proposed amendment is not palpably insufficient or patently devoid of merit, and there is no evidence that it would prejudice or surprise the opposing party,"[194] e.g. where "the proposed amendment arises out of the same facts as those set forth in the complaint."[195] And, "where this standard is met, the sufficiency or underlying merit of the proposed amendment is to be examined no further."[196] But "where the proposed amendment clearly lacks merit and serves no purpose but to needlessly complicate discovery and trial, such a motion should be denied."[197]

"Mere delay is not a sufficient basis to deny the relief."[198] However, "[w]here there is an extended delay in moving to amend, an affidavit of reasonable excuse for the delay in making the motion and an affidavit of merit should be submitted in support of the motion."[199]

One scenario where merit is evaluated is where a plaintiff proposes an amendment to allege violations of statutory[200] or code[201] provisions. "Leave to amend or supplement the pleadings to identify the relevant Code provision may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant."[202] On the other hand, such an amendment is properly denied where those provisions are inapplicable to the action.[203]

Leave is not so freely given when a trial is about to begin. "The decision to permit an amendment to a pleading or bill of particulars, especially on the eve of trial, is committed to the sound discretion of the IAS court."[204] "At or on the eve of trial, judicial discretion in allowing such amendment should be discreet, circumspect, prudent and cautious,"[205] and "should be exercised sparingly."[206]

Factors to be considered may include whether the amendment would prejudice an opposing party,[207] and the amount of time that has passed since commencement of the action and service of the original bill of particulars.[208] The latter factor will typically be in play where the proposed allegations are based on information that has been available all

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along, such as a plaintiff's exact accident location,[209] photographs,[210] and the existence of an injury and its relationship to an accident.[211] Additional factors are delay in having sought expert opinion predicate for the desired allegation,[212] delay in making the motion,[213] and whether the amendment is proposed in opposition to summary judgment[214] or in view of discovery produced by an adverse party, with the timing of such discovery being a consideration as well.[215]

A plaintiff who wants to allege a new injury[216] or a new category of "serious injury" in an auto case[217] would be amending rather than supplementing the original bill of particulars. In contrast, new allegations of continuing consequences of the same injuries that were alleged in the original bill of particulars can properly be made in a supplemental bill of particulars.[218]

Bills of Particulars – Implications

The collective content of pleadings and bills of particulars remains important for later developments in litigation, including summary judgment motions, expert disclosure disputes, and other aspects of a trial. As a general rule, "when a party attempts to introduce evidence at trial which does not conform to the bill of particulars, the appropriate remedy is the preclusion of that evidence."[219] In accord with this, an expert witness will generally be precluded from supporting a theory of liability that is not contained in a complaint, affirmative defense, or bill of particulars.[220] Further, a court may decline to consider opposition to summary judgment that is based on a liability theory,[221] an injury,[222] or a category of serious injury[223] not contained in a bill of particulars. That does not always happen, however, since "modern practice permits a plaintiff to successfully oppose a motion for summary judgment by relying on an unpleaded cause of action which is supported by the plaintiff's submissions,"[224] albeit "protracted delay in presenting new theories of liability warrants the rejection of these new claims."[225]

Bills of Particulars - Improper Allegations

A plaintiff cannot use a bill of particulars to transform the nature of the case that is framed in the complaint. "The purpose of the bill of particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial,"[226] and it "may not be used to supply allegations essential to a cause of action that was not pleaded in the complaint."[227] Nor may the bill of particulars "add or substitute a new theory or cause of action."[228] Accordingly, a defendant is entitled to a dismissal of claims that are not alleged in a complaint and are asserted for the first time in a bill of particulars.[229]

Similarly, if the action is against a public entity, a consideration is how the allegations of a bill of particulars compare with the content of any notice of claim that was served. A query from a defense perspective is whether allegations in the notice of claim "were not sufficient to put defendant on notice of the allegations in the bill of particulars."[230] An issue is whether it can be "fairly inferred" from the notice of claim that the plaintiff would later assert the contention under scrutiny.[231] Allegations that amount to new theories of liability that cannot be fairly implied from a notice of claim are properly struck.[232]

Some degree of specificity of allegation will be required. A bill of particulars should not be "replete with overly broad and factually vague statements, which failed to particularize and amplify the pleadings."[233] Where co-defendants had different roles vis-à-vis the dispute at hand, there should not be identical allegations on subjects such as how each defendant was purportedly negligent.[234]

Cell Phone Records

An authorization for cell phone usage records can be required in an appropriate case.[235] For example, in an action involving a motor vehicle accident, such an authorization can be justified where the question of whether a driver was using a cellular phone is relevant to a claim of negligent operation of a motor vehicle.[236] A demand for access to a party's cellular telephone records can be "reasonably calculated to lead to the discovery of information" bearing on a claim or defense.[237] Cell phone records are not invariably required on request, however. Bare speculation that a plaintiff was using a cell phone at the time of an accident does not, of itself, warrant disclosure of records.[238] For more information, see the article by Andrea M. Alonso and Kevin G. Faley titled "Social Media and Cell Phone Requests: Not a LOL Matter"

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in the Summer 2013 "Defendant" journal.[239]

Contracts

Where a litigant seeks to establish a claim or defense based on terms of an alleged contract with another litigant, it is customary for those parties to disclose the documents that purportedly comprise their agreement. Additionally, contracts may be discoverable with regard to other issues, such as control by a party over another party, a premises, and/or an instrumentality. However, a plaintiff is not categorically entitled to all information about the interrelationship and ownership of defendants in a lawsuit, e.g. where such information is confidential.[240]

A contract between a defendant and a non-party, that may constitute evidence as to that defendant's relationship with or control over a co-defendant, has been held to be discoverable.[241] Exchange of a contract made in connection with a post-accident premises repair may be directed where maintenance or control of the premises is in dispute.[242]

Custodian of Evidence is Defunct (MRI Films)

It is routine practice to demand and receive authorizations to obtain medical records, films, and other kinds of evidence. But it occasionally happens that a third party source of such information ceases operations, and the information cannot be obtained elsewhere. What is a defendant to do?

One possibility is a motion under CPLR 3124 and 3126 to compel the plaintiff to make the information available for inspection, and to preclude the plaintiff from introducing such as evidence if it is not produced. This was done in a case where a custodian of MRI films was ultimately no longer in business.[243] There, it was proper "to compel the plaintiffs to make the MRI films available for duplication or, pursuant to CPLR 3126, be precluded from offering the films and/or the reports related to the films into evidence at the time of trial."[244] Such plaintiffs may be relieved of any burden, however, where the subject medical records or things are "not in their possession or control or the possession and control of their counsel, treating physicians, experts, or anyone under their control."[245]

Depositions – Adjournments

Adjourning a court-ordered deposition without advance judicial permission can result in a sanction. And courts frequently stress that "if the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity."[246] However, there is still authority to support forgiveness in some circumstances, at least if some legitimate excuses can be provided; "multiple adjournments of a party's deposition are generally not grounds for dismissal" or for a stricken pleading[247] particularly "in the absence of any evidence of willful or contumacious conduct."[248] A deposition adjournment upon the mutual consent of the parties' attorneys would tend to indicate an absence of willful or contumacious conduct; when there is a disagreement about whether such consent was given, an evidentiary hearing may be necessary before a motion to strike a pleading or for another sanction can be decided.[249]

Conversely, a corporate party was precluded from testifying after it failed to produce a witness for a deposition in violation of six court orders issued over the course of four years.[250] The proffered excuse of inability to locate the witness was inadequate given that counsel had failed to make efforts to contact the witness until after the fourth discovery order requiring the deposition (nearly a two year delay), and the witness was aware that litigation required his participation.[251] This amounted to willful and contumacious conduct.[252]

It can be understandable for an attorney to not attend a noticed deposition of a non-party, where the witness could not appear on the date that was selected, and the attorney contacts opposing counsel about that in advance of the examination day.[253]

Depositions – Business or Governmental Entity Party

"A corporate entity has the right to designate, in the first instance, the employee who shall be examined."[254] Likewise, "in the first instance, a municipality has the right to determine which of its officers or employees with knowledge of the facts may appear for a deposition."[255] However, CPLR 3106(d) provides an option for a deposition notice to name an officer, director, member or employee whose testimony is sought. Where a party has exercised that option, the party to be deposed no later than ten days prior to the scheduled deposition is to give notice

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that another individual would be produced instead, and provide the identity, description or title of such individual.[256]

A business party's officer, director, member, agent or employee is a potential candidate for a mandatory deposition.[257] However, the party need not necessarily produce such persons of a parent or sibling business, especially where control over the witness is lacking.[258]

Where multiple defendants are united in interest, an employee of one defendant is sometimes produced for a deposition on behalf of all of them. A May 2017 First Department case[259] illustrates difficulties that can arise in this scenario. The plaintiff allegedly was injured while working in a tunnel during construction of the Second Avenue Subway. After a consolidation of two actions, the defendants were City of New York, Metropolitan Transportation Authority, and Parsons Brinckerhoff, Inc. The Parsons witness could not answer any questions respecting the City and the MTA, or ownership of the tunnel and the ground on which it was built. City and MTA thereafter refused the plaintiff's request that they produce an additional deposition witness. Depositions of City and MTA had been scheduled under stipulations executed before the Parsons witness had testified. In the end, the answer for City and MTA was stricken.[260]

Depositions – Conduct of Depositions / Improper Questions

22 NYCRR Part 221 is titled "Uniform Rules for the Conduct of Depositions" and contains three sections. The first, § 221.1, is addressed to objections at depositions. Under 221.1(a), no objections shall be made, except those which would be waived if not interposed by virtue of CPLR 3115(b), (c) and (d), and except if in compliance with CPLR 3115(e). However, "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."[261]

§ 221.1(b) is captioned "speaking objections restricted" and governs what is to be said, and not said, in making an objection. "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."[262] Additionally, unless permitted by CPLR 3115 or by this rule, persons attending depositions "shall not make statements or comments that interfere with the questioning."[263]

§ 221.2 sets forth the limited circumstances in which an objection may be coupled with a refusal to answer the question, i.e. (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. The Bar is admonished that "[a]n attorney shall not direct a deponent not to answer except as provided in CPLR 3115 or this subdivision."[264] Any refusal to answer, or direction not to answer, "shall be accompanied by a succinct and clear statement of the basis therefor."[265]

§ 221.3 ("Communication with the deponent") is intended to prevent coaching of witnesses. An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent, or unless the communication is to determine whether the question should not be answered on a ground in 221.2. The reason for any such communication shall be stated succinctly and clearly.

While appellate opinions addressed to improper questions are infrequent, the Third Department did render one in June 2017.[266] The nature of the action was personal injury during an attempt to mount a horse at the defendants' resort. At his deposition, the plaintiff answered all fact-based questions concerning the incident and the premises' condition. However, he declined to answer questions primarily addressed to the defendants' purported negligence. On appeal, the Third Department cited the aforementioned 22 NYCRR 221.2, and common law precedent that deposition questions "should be freely permitted unless a question is clearly violative of a witness' constitutional rights, or of some privilege recognized in law, or is palpably irrelevant."[267] However, a deponent "may not be compelled to answer questions seeking legal and factual conclusions or questions asking him or her to draw inferences from the facts."[268]

Accordingly, questions seeking opinions

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addressed to ultimate legal contentions, such as what warnings were required, what dangerous conditions were created, and what risks existed, are objectionable.[269] It is permissible though to elicit underlying facts that may bear on such conditions. Thus, one can legitimately ask about what warnings were actually given, but not what warnings should have been given. The latter inquiry "is a legal assessment derived from the underlying facts that goes beyond the factual evidentiary scope of a deposition."[270] That kind of inquiry is "palpably improper" and "violative of 22 NYCRR 221.2, which precludes 'plainly improper' questions that would cause significant prejudice to a party."[271] Asking a party to discuss legal implications "is by its nature significantly prejudicial to that party's interests."[272] A rationale for why party deponents are not required to testify as such is the opportunity to procure a bill of particulars as the statement of the acts and/or omissions that constitutes the negligence alleged.[273]

Depositions – Former Employee

Perhaps you have attended a business client's deposition revealing that a former employee has key knowledge, and then heard disappointment that the person hadn't already been produced. But it is a "well-established principle that a party may not be compelled to produce a former employee for a deposition."[274] Be wary though that an attorney's course of conduct, such as volunteering to produce a former employee or appearing to represent him, can translate to an obligation to make the witness available.[275]

Depositions – Inadequate Witness / Further Deposition

"A further deposition may be allowed where the movant has demonstrated that (1) the employee already deposed had insufficient knowledge, or was otherwise inadequate, and (2) the employee proposed to be deposed can offer information that is material and necessary to the prosecution of the case."[276] The second prong of this standard has also been couched as "a substantial likelihood that the persons sought for depositions possess information which is material and necessary to the prosecution of the case."[277] Where a party's deposed witness was generally unknowledgeable, or lacked knowledge on just one critical issue, that can be grounds for preclusion where that party then breached an order requiring a further deposition.[278]

There can be cause for a "supplemental deposition" of a plaintiff as to a surgery that the plaintiff underwent following the initial deposition. "Based on the plaintiff's testimony that the surgery, if successful, would alleviate several of the major injuries and limitations for which she seeks compensation, and the medical records of the surgery reflecting its nature and purpose, the movants established that further discovery on the limited issue of the surgery and any resultant changes in the plaintiff's condition would be 'material and necessary' to the defense of the action."[279]

A defendant may be dissatisfied where a plaintiff has invoked the Fifth Amendment privilege against self-incrimination at a deposition. As to whether the defendant is entitled to any relief, a standard is whether the invocation of that privilege has prevented a proper defense of the lawsuit.[280]

A witness who was evasive may be ordered to attend a further deposition.[281] Conversely, a continued deposition has been denied where questioning counsel had "battered the witness," and the pending questions "were so grossly irrelevant and "improper that they were not required to be answered."[282]

In a case where numerous of the defendants' employees have knowledge of interest, there can be an outcome where some additional depositions are ordered but others are denied. An illustrative case is one introduced above involving a motor vehicle / wrongful death action against governmental and ambulance company defendants.[283] Again, the plaintiffs had alleged that county police failed to render first aid treatment at the scene, and that both police and the ambulance company delayed in transporting the decedent to a hospital. The following rulings emerged:[284]

- The plaintiffs were not entitled to depose the Deputy Medical Examiner who conducted an autopsy of the decedent because, among other reasons, the Medical Examiner's report has already been disclosed;

- The plaintiffs did not proffer a sufficient basis for deposing a police detective who investigated

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possible criminal charges against the driver whose vehicle collided with the decedent's vehicle; among other considerations, the detective did not have firsthand knowledge of the accident, and the plaintiffs had already deposed a police officer who was present at the scene;

- Depositions were warranted of all EMTs or EMT aides who were present at the scene; the plaintiffs had already deposed two EMTs who had responded to the scene, one of which was the police officer who allegedly failed to provide necessary first aid, but those depositions did not provide sufficient information regarding the actions taken by the various EMTs and ambulance workers who responded to the accident, and it was likely that other on-scene EMTs would possess relevant and material information.

There is a common scenario where an initial defense deposition witness testifies about the facts of an accident or other tortious occurrence, but lacks knowledge about a contractual relationship between or among defendants. If the underlying contract is considered discoverable, it may be that a deposition of someone knowledgeable about that contract is warranted as well.[285]

Where a deponent refused to answer questions that should have been answered, a motion to compel is plausibly a means to obtain a further deposition of that deponent. Of course, the motion will be denied if the witness had a proper basis for withholding his testimony.[286] A party who wishes to appeal a motion court's order in such circumstances should request leave to do so, since an order of this nature is generally not appealable as of right.[287]

Depositions – Infant, Incapacitated or Incompetent Deponent

Counsel for a party, or opposing counsel, may face the difficulty of whether an infant, or an adult who appears to be mentally incapacitated or incompetent, should not testify at a deposition. Issues may include the evaluation of capacity to testify, what relief should be granted given a lack of such capacity, and the timing for pursuit of such relief.

In a case where competency to testify has not been adjudicated before the deposition, a statute to bear in mind is CPLR 3115, titled "Objections to qualification of person taking deposition; competency; questions and answers." CPLR 3115(d) states that "objections to the competency of a witness or to the admissibility of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if objection had been made at that time."

The likely ideal for a party lacking capacity during the discovery phase would be relief from deposition attendance, but an option to testify at a trial if appropriate at that juncture. Next steps for opposing counsel can depend on what the reasons have been for taking the deposition, e.g. obtaining testimony needed to establish a claim or defense, versus merely ruling-out the possibility that the person has adverse information. In the former setting, opposing counsel may hope to depose the ostensibly incompetent party, and, at the time of trial, have options to use or exclude the deposition transcript, and to examine or exclude the witness.

In a pre-trial setting, the issue of whether a witness should not testify due to plausible insufficient competency can initially be brought to a court in several ways. One methodology is a motion for a protective order, pursuant to CPLR 3101(a), by counsel wanting to shield a client or witness from a deposition obligation.[288] On the other hand, where a witness has failed to attend a deposition, opposing counsel can move to compel the deposition[289] and/or to preclude or conditionally preclude trial testimony by the witness, or strike his answer.[290] Additionally, attorneys may find themselves at a court conference where remaining depositions must be memorialized in an order.[291] As discussed below, a hearing may ensue.

If testimony of the witness is not essential to a party's claims or defenses, counsel can consider pursuing a result by which the person would not testify at a trial, or submit an affidavit in opposition to a summary judgment motion, unless produced for a deposition by a date certain.[292] This kind of outcome can take the form of an order, a stipulation, or an affirmation from the witness's attorney.[293] In one instance, motions made during an action's discovery phase resulted in an order precluding a party from testifying or producing evidence at a

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trial, unless he submitted to a deposition no later than two weeks before the trial; there was medical evidence indicating that the party's incapacity might resolve by the time a trial would occur.[294]

A court's discretion in deciding whether to excuse a deposition obligation or compel testimony "is to be exercised with the competing interests of the parties and the truth-finding goal of the discovery process in mind."[295] Evidence in support of or in opposition to a motion may include an affidavit, affirmation or sworn report from a health care provider or medical expert, which explains why there is or isn't sufficient capacity.

Examples of such evidence include a report by a psychologist that demonstrates that a person is not competent to testify due to insufficient intellectual capacity, judgment and/or mental stability,[296] a psychiatrist's affidavit attesting to a nervous breakdown and hospitalization after a stressful event, along with depression, stress, inability to concentrate, and risk of worsening condition if here were deposed,[297] a neurologist's report opining that the witness is incompetent because he is incapable of understanding and accurately answering questions in the structured format of a deposition,[298] and an internist's affirmation chronicling the witness's complaints of memory loss in recent years, severe decline in cognitive function, and current severe dementia.[299]

Given adequate cause, a court can conduct an in-person hearing, i.e. a preliminary examination as to whether a person lacks sufficient capacity and thus is not competent to testify, and then make the determination.[300] As a general proposition, a court can determine competency to testify with or without a hearing.[301] However, see the discussion below with regard to infants.

The determination of whether a witness possesses the requisite capacity to testify is within a court's discretion,[302] based on observation of e.g. manner, demeanor and presence of mind.[303] Memory loss can render a person too infirm to testify.[304] At an evidentiary hearing or trial, a court can consider testimony of a witness's treating physician[305] and other health care providers or medical experts, as discussed above with relation to motion practice.

A good example of a determination that a party has lost adequate mental capacity to testify, made in a live testimony setting, is provided by a 2009 First Department case.[306] There, the plaintiff's treating physician testified that plaintiff's injuries "severely impaired her immediate and delayed recall and abstract thinking, and her orientation to time and space, resulting in memory loss."[307] Also significant, this physician assessment was highlighted by the plaintiff's own attempt at testimony, "during which she was unable to recollect her accurate home address, the current month, the circumstances of the accident, or any details concerning her medical treatment."[308] The Appellate Division also emphasized that prior testimony of this party was "incoherent and internally contradictory, and did little or nothing to advance her case."[309]

Other potential factors in a court's determination of whether a deposition should proceed include the age of the witness, whether the person was traumatized in the subject occurrence, evidence of being psychologically incapable of being deposed or that testifying would cause permanent damage or be life impairing, and existence of a prior declaration of incompetency to proceed[310] or a guardian appointed pursuant to Article 81 of the Mental Hygiene Law,[311] versus a prior finding of competency to handle one's own affairs.[312]

With regard to infants, competency to testify in a civil case is a matter of discretion for the trial court to decide, depending on the particular circumstances and infant.[313] There is no precise age at which an infant is competent to testify under oath.[314] Under CPL § 60.20(2), a child under nine years of age is presumed incompetent to testify in a criminal trial.[315] This presumption is overcome if the court is satisfied that the child understands the nature of the oath.[316] A child's sworn testimony has been held to be properly admitted after a sufficient inquiry by the court establishing that the child understood the nature of an oath and the difference between the truth and a lie, and promised to tell the truth to the court.[317] Similarly, a court can consider whether the infant has a sufficient conception about the consequences of giving false testimony.[318]

As noted above, under CPLR 3115(d), an objection to the competency of a witness is not waived by failure to object before or during a

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deposition, unless the underlying ground might have been obviated or removed if raised at that time. With respect to an infant deponent, it has been noted that an objection to competency "is not obviated or removed by raising it at the time of the deposition because the state of infancy does not change simply by raising the objection."[319] However, where a child of tender years is deposed without an advance judicial determination of competency, the transcript might be deemed an unsworn statement for the purposes of a trial.[320]

Accordingly, with a child of young age, e.g. six years old, it may well be incumbent upon a court to conduct a hearing, to determine whether the child may be deposed or examined pursuant to General Municipal Law § 50–h.[321] In that kind of setting, "[i]f the court finds that the child may be sworn as a witness, her examination should be conducted before the court."[322]

Given an infant plaintiff who has a fragile condition, counsel may be directed to work with experts to put guidelines in place toward lessening stress and trauma from the deposition.[323]

Parenthetically, a failure to submit to a § 50–h examination "may be excused in exceptional circumstances, such as extreme physical or psychological incapacity."[324]

Depositions – Non-Party - Misconduct

A nonparty deposition, as with discovery generally, is not properly noticed or held after a note of issue has been filed, absent judicial permission; as stated by the Second Department, "[w]e find no authority that post-note of issue discovery of a nonparty should be treated any differently from party discovery."[325] A nonparty deposition can be authorized while awaiting trial upon a showing of unusual or unanticipated circumstances or the like, as discussed below.[326]

According to the Fourth Department, "counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pretrial deposition."[327] However, "the nonparty has the right to seek a protective order (see CPLR 3103[a]), if necessary."[328]

Where one party's attorney deposes a non-party, and then the non-party terminates the deposition before other counsel can question him, one can expect a court to refuse to consider any of the deposition testimony.[329] Trial testimony of such a witness might well be precluded as well.

Depositions – Non-Resident Plaintiff

"As a general rule, a non-resident plaintiff who has invoked the jurisdiction of New York State by bringing suit in its courts must stand ready to be deposed in New York unless it is shown that undue hardship would result."[330] The burden is on the deponent to establish that traveling from his foreign residence to New York to be deposed would cause undue hardship.[331] Depending on the equities, a court has the option to direct a deposition to occur in a foreign country, or by video conference[332] or "remote electronic means."[333] See also the section below on "international discovery."

Depositions – Transcript Errata Sheet

CPLR 3116(a) provides that a witness may make changes in form or substance to deposition testimony, as long as such changes are accompanied by a statement of the reasons given by the witness for making them.[334] "A correction will be rejected where the proffered reason for the change is inadequate" and "material or critical changes to testimony through the use of an errata sheet is also prohibited."[335] A court may decline to consider an errata sheet in opposition to a motion for summary judgment where the deponent "made changes to his testimony without explaining why he was making them."[336]

It is improper for a plaintiff to make numerous and significant corrections that would substantively change portions of this deposition testimony, while also conflicting with his past GML § 50–h hearing testimony as to the basis for alleged negligence.[337] In such a scenario, it does not avail a deponent to assert that he "mis-spoke" or is "clarifying his testimony."[338]

Depositions - Treating Physicians

A party is not categorically entitled to depose the plaintiff's treating physicians. This kind of deposition is not countenanced where the desired testimony only "relates directly to diagnosis and treatment,"[339] and the plaintiff has exchanged authorizations allowing access to medical records and permitting the physicians to speak with defense counsel.[340] A rationale is that if a defendant's views differ from

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those of the physicians, the medical records can be reviewed by defense medical experts, who can offer their own testimony.[341] Accordingly, for this kind of deposition to be directed, a party must generally show that "the testimony sought is unrelated to diagnosis and treatment and is the only method of discovering the information sought."[342]

The First Department did, however, enable depositions of a plaintiff's pathologists who had diagnosed cancer and mesothelioma.[343] The court emphasized that the precise nature of the plaintiff's affliction appeared to be central to the resolution of the parties' dispute, and the testimony would be addressed to "a potentially dispositive issue."[344] Further, the Second Department allowed a deposition of a physician whose records had indicated skepticism about the plaintiff's claims as to the cause of her injuries.[345] In that matter, the defendants satisfied the notice requirement of CPLR 3101(a)(4), having served a subpoena stating the circumstances or reasons for the deposition, with an authorization that permitted an interview of the doctor. The plaintiff was therefore burdened "to establish that the deposition testimony sought was irrelevant to this action, which she failed to do."[346]

Another potential context for a deposition of a plaintiff's health care provider is to preserve testimony for trial.[347] In the Third Department, a plaintiff who does not serve a CPLR 3101(d)(1)(i) expert disclosure notice in advance of such deposition, risks being precluded from offering the health care provider as an expert at trial, or incurring the cost for a second deposition.[348] This subject of expert witnesses and notice is discussed further below.

Expert Witnesses – Effect of Bill of Particulars and 3101(d)(1) Notice

As noted above, an expert witness will generally be precluded from supporting a theory of liability that is not contained in a pleading or bill of particulars.[349] Absent that kind of omission, the starting point for analysis of permissibility of proposed expert testimony is typically the notice demanded and served pursuant to CPLR 3101(d)(1)(i),[350] which states in part: "Upon 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."[351]

The notice requirement of CPLR 3101(d)(1)(i) generally applies not only to liability experts, but also to damages experts, such as vocational counselors, life care planners, and economists.[352] But as to treating health care providers, such notice is only mandatory in cases within the Third Department, if the provider will be offered as an expert witness: "Unlike the First, Second and Fourth Departments, this Court interprets CPLR 3101(d)(1)(i) as requiring disclosure to any medical professional, even a treating physician or nurse, who is expected to give expert testimony."[353]

With regard to the converse point of view, the Second Department has stated "[a] treating physician may give expert opinion testimony and may do so without prior notice pursuant to CPLR 3101(d)."[354] The First Department has expressed that the absence of a CPLR 3101(d) notice with regard to a treating physician is not grounds for preclusion of the physician's expert testimony, where there has been disclosure of the physician's records and reports pursuant to CPLR 3121 and 22 NYCRR 202.17.[355] A rationale is that where the health care provider's records and reports have been fully disclosed, opposing parties thereby have sufficient notice of the proposed testimony, to negate any claim of surprise or prejudice.

Accordingly, a plaintiff's medical expert may be permitted to opine about something not contained in medical records or reporting, if there was notice from another source, such as a bill of particulars.[356] However, some courts may permit testimony about causation of claimed injuries, even where no opinion about that had been expressed in previously exchanged documents.[357] In the Third Department, a health care provider who was not identified as an expert prior to trial might still be permitted to testify as a fact witness.[358]

Service of an expert exchange notice may prompt an adverse party to demand discovery in connection with that disclosure.[359] It is plausible that such a

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demand would call for material prepared exclusively in anticipation of litigation, or attorney work product, which the CPLR exempts from disclosure,"[360] as also discussed above.

As with discovery generally, "trial courts possess broad discretion in their supervision of expert disclosure."[361] Accordingly, "a determination regarding whether to preclude a party from introducing the testimony of an expert witness at trial based on the party's failure to comply with 3101(d)(1)(i) is left to the sound discretion of the court."[362] "Although the demand is a continuing request, with no set time period for its compliance, where a party hires an expert in advance of trial and then fails to comply with or supplement an expert disclosure demand, preclusion may be appropriate if there is prejudice and a willful failure to disclose."[363]

Expert Witnesses - Timing of Disclosure and Objections

"CPLR 3101(d)(1)(i) does not require a party to respond to a demand for expert witness information at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute, unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party."[364] This is true even where an adverse party had demanded expert disclosure during the discovery phase.[365]

As this illustrates, there is generally no bright line standard for evaluating timeliness of a post-note of issue expert exchange. There is however the possibility that a local court-wide rule, a court part or judge rule, and/or a discovery phase order will speak to this.[366] Further, with relation to a plaintiff's treating physicians / medical experts, note that 22 NYCRR 202.17(g) contemplates that any supplemental medical report shall be served "not later than 30 days before trial" so long as the plaintiff is available for an additional defense medical examination.[367]

When an expert disclosure is served after an explicit court-ordered deadline, this is a factor in favor of excluding it.[368] For example, in a business dispute, preclusion of a plaintiff's supplemental expert report was warranted where it was served well after such a deadline and roughly six weeks before a scheduled trial date.[369]

Potential prejudice to an adverse party from allegedly late expert disclosure can sometimes be ameliorated by a trial adjournment of e.g. several weeks, to thereby allow time for responsive trial preparation.[370] A lack of prejudice has also been found where all parties' experts had been present concurrently at an inspection.[371]

Of course, there comes a point where a disclosure is arguably or obviously late. In that situation, factors as to whether the expert will be permitted may include whether there is "good cause" for the delay[372] versus willful or intentional failure to disclose and/or prejudice to an opposing party.[373]

A litigant dissatisfied with the adequacy of a 3101(d) notice may be less likely to obtain a preclusion of an adversary's expert, if that litigant did not previously move "for an amplification or to require the witness to provide a more complete explication of his theory."[374] Accordingly, a delayed motion *in limine* to exclude an expert can itself be rejected due to lateness, especially where the belated motion timing is deliberate. That tactic has been described as "an intentional avoidance of the strictures of the CPLR's notice provisions" and "something akin to an ambush."[375]

In a medical malpractice action, a history of service of the expert exchange several months before trial, no rejection of it or objection to it at pre-trial conferences, and earlier notice of its theories via bills of particulars, all weighed against granting a motion *in limine* to exclude it.[376] In a legal malpractice action, an expert should have been allowed where an alleged disclosure deficiency was first raised by motion *in limine* and then cured by a supplemental response, and where the substance of the proposed testimony was known from a past affidavit of the expert in opposition to summary judgment.[377]

The Court of Appeals addressed the timing of an objection to an expert disclosure notice in October 2016.[378] On that occasion, the Court of Appeals affirmed the denial of a plaintiff's trial motion to preclude a defendant's expert due to lateness. The defendant had timely served an expert disclosure statement that anticipated testimony "on the issue of causation" and "as to the possible causes of the decedent's injuries and contributing factors." Before

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the trial, the plaintiff had not objected to the general nature of these statements.

At the trial of this wrongful death case, evidently defense counsel's questioning of a treating physician and the plaintiff's expert indicated that a causation theory was in play that the plaintiff was not expecting. Mid-trial and immediately prior to the defendant's expert's testimony, the plaintiff moved to preclude that expert from giving "any testimony ... regarding any possible causes of the decedent's death" on the grounds that the disclosure statement "did not include any reasonable detail whatsoever as to what possible causes" led to decedent's death. The plaintiff did not seek an adjournment, and, as mentioned, the trial court denied the application as untimely.

The defendant's expert went on to opine as to a cause that indicated that the plaintiff died suddenly, differing from earlier trial testimony on causation. While the jury ultimately found liability, the jury accepted the defendant's expert's explanation of the death, prompting a $0 award for conscious pain and suffering. The plaintiff unsuccessfully attempted to set aside this outcome with a post-trial motion to strike this testimony on the basis that the expert disclosure notice had been silent about the causation theory in controversy.

The Court of Appeals noted that this was not a case of expert trial testimony that was inconsistent with the predicate disclosure notice, but rather an objection that alleged notice insufficiency. In the final analysis, the objection did not have to be honored in view of its tardiness: "the lower courts were entitled to determine … that the time to challenge the statement's content had passed because the basis of the objection was readily apparent from the face of the disclosure statement and could have been raised - and potentially cured - before trial. Accordingly, there was no abuse of discretion as a matter of law."[379]

Post-note expert disclosure timeliness in a summary judgment context had been something of a sub-category. However, CPLR 3212(b) now mandates that where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment made on or after December 11, 2015, "the court shall not decline to consider the affidavit because an expert exchange was not furnished prior to the submission of the affidavit."[380] For discussion about what the law was before December 11, 2015, see the original version of this article that is published in the Winter 2016 "Defendant" journal.[381]

Freedom of Information Law

The statutory foundation for obtaining information from New York governmental entities is Article 6 of the Public Officers Law, known as the "Freedom of Information Law" or "FOIL."[382] As stated in Public Officers Law § 84, "government is the public's business" and "the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article."

A litigant dissatisfied with a response to a FOIL request for information may commence a CPLR article 78 proceeding to compel a governmental respondent to comply with a FOIL request. If the petitioner has received records from an agency through a FOIL request or other discovery device, subsequent FOIL requests to a different agency for the same documents are deemed academic.383 Another issue may be whether any requested items are exempted from disclosure under Public Officers Law § 87. If however the petitioner substantially prevails in this proceeding, the court may award a reasonable attorney's fee and other litigation costs, if "(i) the agency had no reasonable basis for denying access, or (ii) the agency failed to respond to a request or appeal within the statutory time."[384]

Information that is unavailable via FOIL is not necessarily shielded from disclosure pursuant to the CPLR's discovery devices. "The discovery provisions of CPLR article 31 operate independently of the Freedom of Information Law, and a litigant's entitlement to any particular evidentiary item under article 31 is not affected by the disclosability of that item under FOIL."[385]

At the other end of the spectrum, the fact that a party may have access to publicly available records does not preclude that party from seeking those records directly from an opposing party through the discovery process.[386] Similarly, a party who has been denied information under FOIL is not barred from pursuing that information via article 31; "CPLR article 31 is not a statute specifically exempting public records from disclosure under FOIL and no

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provision of FOIL bars simultaneous use of both CPLR 3101 and FOIL to procure discovery."[387]

"IME" (Defense Medical Examination) – CPLR 3121 and 22 NYCRR 202.17

The statute regarding defense medical examinations and associated reporting is CPLR 3121, and in Supreme Court and County Court, 22 NYCRR 202.17 also applies. CPLR 3121(a) speaks to the notice to be served upon counsel for a plaintiff. It provides that where the physical condition of the plaintiff is in controversy, any party may serve notice on another party to submit to a physical, mental or blood examination by a designated physician.[388] 3121(a) adds that the notice "may require duly executed and acknowledged written authorizations permitting all parties to obtain, and make copies of, the records of specified hospitals relating to such mental or physical condition or blood relationship."[389] 3121(a) also states that the notice "shall specify the time, which shall be not less than twenty days after service of the notice, and the conditions and scope of the examination."[390]

CPLR 3121(b) addresses reporting, stating that "a detailed written report of the examining physician setting out his findings and conclusions shall be delivered by the party seeking the examination to any party requesting to exchange therefor a copy of each report in his control of an examination made with respect to the mental or physical condition in controversy." [391]

22 NYCRR 202.17 is titled "Exchange of medical reports in personal injury and wrongful death actions" and contains eleven subdivisions, i.e. 202.17(a) through 202.17(k). It provides a protocol for exchange of medical reporting by both plaintiffs and defendants, and also for service of records authorizations as discussed above. 202.17(a) reflects a vision that any party's attorney, including plaintiff's counsel, could serve a notice, any time after service of a bill of particulars, fixing the time and place for examination of the plaintiff. In practice, preliminary conference orders call for examinations to occur within a defined time frame after the plaintiff's deposition, which is most commonly 45 days, and often 60 days where a municipality or public authority is a defendant.

202.17(a) adds that a notice served by defense counsel shall name the examining medical provider or providers. Moreover, "[a]ny party may move to modify or vacate the notice fixing the time and place of examination or the notice naming the examining medical providers, within 10 days of the receipt thereof, on the grounds that the time or place fixed or the medical provider named is objectionable, or that the nature of the action is such that the interests of justice will not be served by an examination, exchange of medical reports or delivery of authorizations."[392]

202.17(b) seems intended to provide defendants with medical information in advance of examinations to be conducted by their medical experts. Specifically, 202.17(b) states that at least 20 days before the date of such examination, or on such other date as the court may direct, the plaintiff shall serve both medical reports and authorizations. Under 202.17(b)(1), there are to be medical reports "of those medical providers who have previously treated or examined the party seeking recovery" that "shall include a recital of the injuries and conditions as to which testimony will be offered at the trial, referring to and identifying those X-ray and technicians reports which will be offered at the trial, including a description of the injuries, a diagnosis and a prognosis."[393] 202.17(b)(2) calls for authorizations providing defense counsel with access to all hospital and other records, including X-ray and technicians' reports, as may be referred to and identified in the medical reports just referenced.

As per 202.17(c), reports of the defense medical examiners shall be served on all other parties within 45 days after completion of the examination. This reporting is to comply with the requirements of 202.17(b)(1).

202.17(d) applies to actions where the cause of death is in issue. In that kind of case, each party shall serve reports of all treating and examining medical providers whose testimony will be offered at the trial, complying with 202.17(b)(1). The party seeking to recover shall deliver, with the bill of particulars, authorizations for all hospital records, autopsy or post-mortem reports, and other records required by 202.17(b)(2).

202.17(e) gives parties an option to rely solely on hospital records in lieu of serving medical providers'

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reports. A party exercising this option must certify that only hospital records will be introduced at trial 202.17(f) prohibits a note of issue filing until there has been compliance with 202.17 as a whole this rule, with two exceptions. One exception is the existence of an order that indicates otherwise. The other is a scenario "where the party to be examined was served a notice as provided in subdivision (a) of this section, and the party so served has not responded thereto."[394]

202.17(g) applies to scenarios where injuries or conditions become apparent subsequent to the original service of medical reporting. If such injuries or conditions will be claimed at trial, the plaintiff shall "within 30 days after the discovery thereof, and not later than 30 days before trial, serve upon all parties a supplemental medical report."[395] Authorizations concerning the same must be delivered with the medical reports. Additionally, if IMEs have been held, a further IME may be had with regard to these newly claimed injuries or conditions. Finally, medical reporting of all parties shall be served at least 30 days before trial.

202.17(h) calls for preclusion at trial of any health care record that was not made available to opposing counsel as required by this rule, unless there is an order to the contrary, or unless the trial judge "in the interests of justice and upon a showing of good cause shall hold otherwise."[396] Similarly, 202.17(h) prohibits at trial "any evidence of injuries or conditions not set forth or put in issue in the respective medical reports previously exchanged," and "nor will the court hear the testimony of any treating or examining medical providers whose medical reports have not been served as provided by this rule."[397]

Under 202.17(i), if an action is being transferred from one court to another, and both the transferor and transferee courts are subject to Rule 202.17, then the transferor court's order "shall contain such provisions as are required to bring the transferred cases into compliance with this rule."[398]

202.17(j) authorized a party to move to compel compliance or to be relieved from compliance with this rule. Any motion directed to the sufficiency of medical reports must be made within 20 days of receipt of such reports. Relief can include a change of calendar position if appropriate.

Finally, 202.17(k) addresses a matter where an examination was conducted on consent prior to the institution of an action. In that scenario, the plaintiff shall deliver the documents specified in paragraphs 202.17(b)(1) and (2), and the report of the examining medical provider shall be delivered per 202.17(c). With that accomplished, examination after institution of the action may be waived. "The waiver, which shall recite that medical reports have been exchanged and that all parties waive further physical examination, shall be filed with the note of issue."[399] However, such a waiver does not forfeit discovery under 202.17(g) (the scenario of new or newly discovered injuries or conditions) in a proper case.

Following now is a discussion of case law addressing a variety of disputes that have arisen with relation to defense medical examinations..

"IME" (Defense Medical Examination) – Emotional Distress

A claim of emotional distress can warrant an IME in some circumstances. A plaintiff in a wrongful termination case[400] pled causes of action for, among other things, intentional infliction of emotional distress. Her allegations included "extreme mental and physical anguish" and "severe anxiety" and she sought $15 million for emotional distress damages. Though the plaintiff did not blame the defendant for any diagnosed psychiatric condition and hadn't retained a medical expert as to emotional distress, her deposition did indicate manifestations such as eczema, hair pulling, anxiety, depression, and suicidal feelings. This amounted to unusually severe emotional distress allegations such that the plaintiff had placed her mental condition "in controversy." Consequently, a mental examination by a psychiatrist was warranted to enable the defendant to rebut the emotional distress claims.

"IME" (Defense Medical Examination) - Further IME

A further IME is permissible provided the party seeking the examination demonstrates the necessity for it.[401] A potential example is where the plaintiff, after the original IME, has served a supplemental bill of particulars alleging injury to a part of the body not

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previously known to be implicated. In that scenario, a defendant is typically "entitled to newly exercise any and all rights of discovery with respect to such newly alleged continuing disabilities. Defendant's discovery rights include the right to take a further deposition, and to notice a physical examination."[402] Moreover, the defendant has the option of designating a defense medical examiner who is different than the original IME doctor.[403] Any bill of particulars on which a motion is predicated should be included as an exhibit.[404]

Where a note of issue was filed more than twenty days before service of a motion to compel, additional IMEs, as with other discovery, will be directed only based upon "unusual or unanticipated circumstances" and "substantial prejudice."[405] Additional IMEs have been denied in such a context where the ostensible need for the IMEs, i.e. the specter of future surgery, was known to the defendant during the action's discovery phase, through bills of particulars and medical reports.[406]

A further defense medical examination may be indicated where a plaintiff has been examined by his medical expert long after the original IME, especially where a child is involved. Accordingly, in such circumstances, it was held that "fairness demands that defendant be permitted to have additional IMEs performed at this later stage of the infant plaintiff's development and not be relegated to reliance on IMEs conducted years before. Logically, plaintiffs cannot propose to present expert evidence based on the later examinations and, at the same time, assert that the expert evidence based on the later examinations will not materially change the nature of the injuries for which recovery is sought."[407]

As stated in the forgoing discussion about authorizations, and in the above introduction concerning IMEs and the underlying statute and rule, 22 NYCRR 202.17 establishes a framework whereby a plaintiff is to exchange medical reports and authorizations as a prelude to defense medical examinations. A plaintiff's noncompliance with 202.17 in advance of IMEs can translate to cause for additional IMEs after a plaintiff belatedly exchanges medical reports and/or authorizations. Depending on the circumstances, a further IME by an existing defense medical expert, and/or an IME by a new physician of a different specialty, may be called for.[408]

The fact that a defendant's examining physician was placed on a suspension subsequent to the IME and the filing of the note of issue does not justify an additional examination by another physician.[409] Concern that the plaintiff may impeach the examining physician's credibility with this information is not a sufficient basis for such relief.[410] If a party's medical expert is temporarily unavailable, a potential remedy is a delay of the trial until the expert is ready to testify.[411]

"IME" (Defense Medical Examination) - Multiple Exams with Same Specialty

The notion of having multiple defense medical examinations to reflect all specialties of a plaintiff's treating physicians is well familiar to legal practitioners. Indeed, it is long settled that CPLR 3121(a) has no limitation on the number of medical examinations to which a plaintiff may be subjected.[412] Perhaps lesser known, though, is the potential for entitlement to defense medical examinations by separate physicians of the same specialty, who concentrate in different bodily areas.

In a 2015 Second Department case,[413] the defendant designated one orthopedist to examine the plaintiff's spine and another orthopedist to examine the plaintiff's knee. After the first orthopedist did his exam, which was limited to the spine, the plaintiff refused to attend the other exam. The lower court then declined to compel the plaintiff to visit the second defense orthopedist, but did direct the plaintiff to be examined again by the first orthopedist. The defendant then obtained an affidavit from the first orthopedist stating that he didn't feel qualified to examine as to the knee. In view of that affidavit, it was held on appeal that an examination by the second orthopedist as to the knee was warranted.

The Second Department reached a similar result in a 2017 case.[414] There, the plaintiff had served a supplemental bill of particulars, with allegations regarding the condition of her lumbar spine after spinal surgery. The defendants demonstrated that the information obtained from their examining neurologist and orthopedist was inadequate with respect to these allegations. Accordingly, the plaintiff was directed to appear for a physical examination by a spinal surgeon retained by the defendants.[415]

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Although not involving literally one specialty, I also note here that there is precedent indicating that with a claim of traumatic brain injury (TBI), a defendant should be entitled to both neuropsychiatric and neuropsychological IMEs.[416]

"IME" (Defense Medical Examination) – Non-Resident Plaintiff

As discussed above concerning depositions, a non-resident plaintiff who has sued on account of personal injuries must generally stand ready to be medically examined in New York. However, where that would involve undue hardship, a defendant wanting an IME may need to have it done in the foreign jurisdiction.[417] Another possibility is that an IME or other event requiring the plaintiff's attendance, such as a vocational evaluation, will have to take place when the plaintiff will be in New York for trial preparation.[418] Who must incur any extra cost can vary from case to case.[419]

"IME" (Defense Medical Examination) - Plaintiff Representative and Video of Examination

In November 2015, the Appellate Division / Second Department opined in *Bermejo v. New York City Health and Hospitals Corp*.[420] that an IME should not be videotaped -- surreptitiously or otherwise -- without advance judicial permission upon a showing of "special and unusual circumstances.[421] The Court noted that there is no explicit authority for the videotaping of medical examinations in CPLR 3121 or 22 NYCRR 202.17. The absence of express statutory authority for videotaping an IME has been emphasized in other appellate opinions on this subject.[422] In the Third Department, requests to videotape IMEs have been adjudicated case-by-case, and video has not been allowed absent special and unusual circumstances.[423] An example of such circumstances is where the plaintiff is seemingly unaware of his environment and unresponsive to the actions of individuals in his presence.[424]

A plaintiff can generally have an attorney or perhaps a non-attorney representative present during the examination.[425] The First Department in October 2017, in *Santana v. Johnson*,[426] stated that "plaintiffs are entitled to have a representative present at their physical examinations as long as the representative does not interfere with the examinations conducted by defendants' designated physician or prevent defendants' physician from conducting a meaningful examination."[427] *Santana* cites a February 2017 Second Department opinion which observed that "a plaintiff is entitled to be examined in the presence of his or her attorney or other legal representative, as well as an interpreter, if necessary, so long as they do not interfere with the conduct of the examination."[428]

Santana further states that "to the extent that this Court has implicitly suggested that a representative can be barred from an examination if the plaintiff fails to demonstrate special and unusual circumstances (citing *Kattaria v. Rosado*[429]), that is not the current state of the law in either the First, Second or Fourth Departments and is inconsistent with the general principle that plaintiffs are entitled to have a representative present at their medical examinations."[430]

Kattaria had affirmed an order that upon motion had excluded non-attorneys from a defense medical examination. The First Department there held that barring plaintiff's non-legal representative was a provident exercise of discretion "as plaintiff did not timely object to defendant's notice of physical examination" and had not demonstrated "special and unusual circumstances" either.[431]

Santana as discussed holds that a showing of special and unusual circumstances is not categorically required to enable a non-attorney representative to attend a defense medical examination. However, if the notice for the examination limits representative attendance to plaintiff's counsel, and the plaintiff does not object, an outcome as in *Kattaria* is not necessarily out of the question.

In accord with all authority cited in the preceding paragraph, a defendant can seek to exclude a plaintiff's attorney or other representative, but must establish that such person's presence would "impair the validity and effectiveness of the particular examination that is to be conducted."[432] Additionally or alternatively, a party can ask a court "to define the parameters of the physical, electronic or other presence of plaintiffs' attorney or such other representative as the court may approve" in order to minimize that person's "impairment of the validity and effectiveness of the examinations."[433]

It would be improper for a plaintiff's attorney

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or representative to be "instructing the plaintiff to refuse to respond to questions relating to her relevant past medical history."[434] As for a remedy when that happens, "to the limited extent that questions were not answered during the examinations, the court appropriately directed plaintiffs to provide affidavits as to the missing responses."[435] The role of a plaintiff's attorney is "'limited to the protection of the legal interests of his client' and in regard to the 'actual physical examination ... he has no role.'"[436] Moreover, "[w]hat the law of this state does not contemplate is plaintiffs' attorneys taking it upon themselves to surreptitiously videotape an IME, without the knowledge of the examining physician, without notice to the defendants' counsel, and without seeking permission from the court."[437]

The Second Department also held in *Bermejo* that a video recording of an IME of a party should be timely disclosed to opposing counsel pursuant to CPLR 3101(i).[438] The Court explained that while CPLR 3101(i) was enacted primarily to prevent unfair surprise where a defendant has obtained surveillance video to potentially challenge claims of injury severity, the statute is not limited to that scenario and "requires disclosure of any films, photographs, video tapes or audio tapes of a party, regardless of who created the recording or for what purpose."[439] This "full disclosure" is required "without regard to whether the party in possession of the recording intends to use it at trial."[440] *Bermejo* and this subject are discussed further in the section below titled "Photographs, Video or Audio of a Party - Surveillance, Social Media and Otherwise."

In December 2016, the First Department reversed a Supreme Court order that had granted a motion by IME Watchdog, Inc. for a temporary restraining order enjoining a defense law firm and an insurer from, *inter alia*, excluding non-attorneys from independent medical examinations.[441] The plaintiff failed to show that such exclusion (except under certain circumstances) exceeds a law firm's professional duty to defend its clients, especially given that several Supreme Court decisions supported such an outcome.[442]

Where nonparty witnesses attended defense medical examinations as plaintiff's representatives, defense counsel can depose them concerning their observations.[443] Should those witnesses fail to appear for depositions, preclusion of trial testimony by them is a potential remedy.[444]

For more information about the conduct of IMEs and related issues, see the article by Colin F. Morrissey titled "*Conduct of Physical Examinations: Turning The Exam Room Into A Hearing Room?*" in the Winter 2015 "Defendant" journal.[445]

"IME" (Defense Medical Examination) – Waiver, or Not

A right to conduct an IME may be considered waived especially where the defendant both failed to designate a physician or to hold the examination by a court-ordered deadline, and also failed to move to vacate an ensuing note of issue within twenty days after its service.[446] A motion seeking discovery that is made at a later time generally requires a demonstration that "unusual or unanticipated circumstances" developed subsequent to the note of issue filing, requiring additional pretrial proceedings to prevent substantial prejudice.[447] Without such a showing, one should not expect a belated IME to be granted.

In contrast, a late IME may be allowed where a note of issue filing was on the heels of an expired IME exam deadline, and the defendant then promptly designated the IME and moved to compel it. In this context, the defendant's motion can be granted upon considerations that only a short delay was involved, and the plaintiff is not prejudiced because the case is staying on the trial calendar.[448]

International Discovery

When discovery is sought from a party or non-party who is a foreign national, increased justification for the discovery may be necessary. A June 2006 First Department appeal,[449] cited by that court in another matter in May 2016,[450] discusses international discovery criteria at length. The First Department adopted general standards from the Restatement (Third) of the Foreign Relations Law of the United States § 442(1)(c), i.e. that a court "should take into account the importance to the ... litigation of the ... information requested; the degree of specificity of the request; whether the information originated in the United States (the location of the information to be disclosed and the people who will be deposed);

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the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located."[451]

If a conflicting foreign statute applies, there are additional considerations, including "the good faith of the party resisting discovery; the hardship of compliance on the party from whom discovery is sought; the nationality of the person who must provide the information; whether the party resisting discovery is the plaintiff; and, the amount of discovery already provided."[452]

What's more, the proponent is to demonstrate more than the usual American standard of whether the desired discovery is relevant or calculated to lead to the discovery of admissible evidence, i.e. whether the discovery is "crucial" to the resolution of a key issue in the litigation.[453] American courts are to "exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position."[454]

Jurisdictional Discovery

A plaintiff facing a motion to dismiss pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction can oppose that motion by asserting a need for discovery on that issue.[455] The plaintiff must "submit affidavits specifying facts that might exist but could not then be stated that would support the exercise of personal jurisdiction."[456] Put another way, the plaintiff must offer "some tangible evidence which would constitute a 'sufficient start' in showing that jurisdiction could exist, thereby demonstrating that its assertion that a jurisdictional predicate exists is not frivolous."[457]

Motion to Compel Discovery -- Good Faith Effort Requirement

As a prerequisite to calendaring of a motion relating to disclosure or a bill of particulars, 22 NYCRR 202.7(a)(2) requires "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." As for the content of the affirmation, it is to comply with the requirements of 22 NYCRR 202.7.[458]

Specifically, under 22 NYCRR 202.7(c), this affirmation of good faith "shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions"[459] or "shall indicate good cause why no such conferral with counsel for opposing parties was held."[460] It is to "refer to any communications between the parties that would evince a diligent effort by the (movant) to resolve the present discovery dispute," and absent that, the motion should generally be denied.[461] While the requisite showing should be set forth in the initial motion papers, a court might view the initial papers and a reply affirmation together, in determining whether there is sufficient detail to comply with 22 NYCRR 202.7(c).[462]

In accord, the Appellate Division evaluates whether the movant, before resorting to motion practice, made a good faith effort to resolve the discovery problem[463] with "recent meaningful attempts,"[464] or that there was "good cause why no communications occurred between the parties" in this regard.[465] A showing of good faith effort has been held sufficient where the movant "had long endeavored to resolve the discovery issues in and out of court."[466]

There is good cause to forego communications with opposing counsel once the adversary has announced a categorical refusal to permit the desired discovery,[467] or more generally "where any effort to resolve the dispute non-judicially would have been futile."[468] A court might refuse to address a contention of an inadequate good faith effort where the target party had failed to respond to discovery demands, or to otherwise produce documents, until after a motion to compel was made.[469]

If such an affirmation is absent from the motion papers, the motion is supposed to be denied, without regard to its merit,[470] so long as a non-moving party objects to the absence in opposition papers.[471] This is also true for motions that seek to vacate a note of issue because discovery is purportedly not complete.[472]

After a party has failed to comply with terms of a self-executing order of preclusion, an adverse party may move for summary judgment dismissing an action based on the effect of such an order, without first making an additional good faith effort

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to resolve the underlying discovery problem.[473] "The plain language of 22 NYCRR 202.7(a)(2) indicates that the affirmation requirement applies only 'with respect to a motion relating to disclosure or to a bill of particulars' (22 NYCRR 202.7[a][2]). A motion for summary judgment is not a discovery-related motion requiring an affirmation of good faith pursuant to 22 NYCRR 202.7(a)(2)."[474]

Non-Party as Source of Discovery

"Pursuant to CPLR 3101(a)(4), a party may obtain discovery from a nonparty in possession of material and necessary evidence, so long as the nonparty is apprised of the circumstances or reasons requiring disclosure."[475] As with discovery from a party, "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof."[476] "A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is 'material and necessary' –i.e., relevant."[477]

A subpoena or accompanying disclosure notice should literally state these circumstances or reasons, and the discovery will be due if it is relevant to the prosecution or defense of the action.[478] The proponent of non-party discovery is better positioned to overcome a challenge where the statement of circumstances or reasons provides non-parties with "ample information" to evaluate if the notice is otherwise objectionable.[479] However, the pursuing party need not show that it cannot obtain the requested disclosure from any other source.[480]

Again, a party or the non-party may move pursuant to CPLR 3103 to quash a subpoena that seeks documents or testimony if a basis for protest exists.[481] The objector may need to show that what the subpoena seeks would be "utterly irrelevant" or that "the futility of the process to uncover anything legitimate is inevitable or obvious"[482] whether it is deposition testimony[483] or documents[484] that are sought. Another potential requirement to sustain an objection is that the subpoenas were overbroad, rather than identifying the documents sought by category and with "reasonable particularity."[485]

If the movant has met this burden, the pursuing party "must then establish that the discovery sought is material and necessary to the prosecution or defense of the action."[486] If it is the pursuing party that has initiated motion practice, i.e. a motion to compel production of the desired discovery, the motion should state the "circumstances or reasons" that the discovery is "material and necessary" to the prosecution or defense of the claims in the action.[487]

Post-note of issue discovery of a nonparty is not treated any differently from party discovery; in that setting, there must be unusual or unanticipated circumstances or the like, as discussed elsewhere in this article.[488]

Note of Issue, Extension and Vacatur; CPLR 3216 and the 90 Day Notice; Severance of a Third Party Action, or Not; Discovery While Awaiting Trial, During Trial, and After Trial

A note of issue with certificate of readiness for trial is the document that a party files to place an action on the trial calendar of Supreme Court.[489] The note of issue "must be accompanied by a certificate of readiness, which must state that there are no outstanding requests for discovery and the case is ready for trial."[490] Thus, the Second Department views a note of issue as a nullity where the accompanying certificate of readiness acknowledges that necessary discovery has not been completed, which is a failure to materially comply with the requirements of 22 NYCRR 202.21.[491] However, the First Department will not necessarily vacate a note of issue based on such acknowledgement, where the certificate of readiness "contained no incorrect material representations."[492]

It is almost always the plaintiff who files a note of issue with a certificate of readiness. However, nothing prohibits a defendant or third party defendant from doing so, and that does happen on occasion.[493]

A plaintiff who files a note of issue waives any objection to the adequacy of a defendant's disclosures.[494] While this is a general rule, a plaintiff's motion to vacate his note of issue may be granted in peculiar circumstances. In an action underlying an appeal decided by the First Department,[495] the predecessor plaintiff's counsel had filed a note of issue with a material misstatement in the certificate of readiness. The successor plaintiff's counsel moved concurrently to vacate the note of issue and to compel discovery from the defendant. The First Department held that the motion had been properly

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granted, given that discovery in the lawsuit had not truly been complete.

Additionally, the Second Department, in a span of seven days, twice vacated notes of issue upon plaintiffs' motions, where the accompanying certificates of readiness had stated that necessary discovery had not been completed, and the defendants had not opposed the motions.[496] Both appeals were from orders of the same justice that had denied the plaintiffs' motions. In one of the appeals, it was recounted that the underlying certification order had directed the plaintiffs to serve and file a note of issue and certificate of readiness within 48 hours, or the case would be dismissed.[497] It was held in both cases that because the certificates of readiness had stated that necessary discovery had not been completed, the notes of issue were nullities. Neither appellate opinion explicitly indicates whether the existence of an order directing a note of issue filing, under threat of a dismissal, was a factor in the outcomes.

A party who needs additional discovery but who faces a note of issue filing deadline may move for an extension of that deadline pursuant to CPLR § 2004.[498] A defendant wanting to oppose this outcome would be better positioned by having made a 90-day demand under CPLR 3216.[499] Absent a failure to comply with such a demand, a court has discretion to grant a plaintiff's request for an extension upon a reasonable excuse for the delay and a lack of prejudice to the defendant.[500]

CPLR 3216 provides a means to motivate a dilatory plaintiff to complete discovery in 90 days or risk a dismissal, albeit generally without prejudice. CPLR 3216(a) states that "[w]here a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, with notice to the parties, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits."

Under CPLR 3216(b), there are three conditions precedent that must be complied with, to potentially have a dismissal pursuant to 3216(a). First, issue has been joined. Second, there must have been a lapse of one year after joinder or six months after the preliminary conference, whichever is later. Third, a written demand, known among practitioners as a "90 day notice," must have been served by registered or certified mail, requiring a resumption of prosecution and a note of issue filing within ninety days after receipt of the demand; further, the demand must state that failure to timely comply will serve as a basis for a motion for dismissal for unreasonably neglecting to proceed.[501]

CPLR 3216(c) affords protection to a party who complies with a 90 day notice after receiving it: "In the event that the party upon whom is served the demand specified in subdivision (b)(3) of this rule serves and files 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, no such court initiative shall be taken and no such motion shall be made, and if taken or made, the court initiative or motion to dismiss shall be denied." CPLR 3216(d) seems intended to prohibit a dismissal within the 90 day period that is triggered by receipt of the notice.

CPLR 3216(e) speaks to the scenario where a valid 90 day notice has been served but not complied with: "In the event that the party upon whom is served the demand specified in subdivision (b)(3) of this rule fails to serve and file a note of issue within such ninety day period, the court may take such initiative or grant such motion unless the said party shows justifiable excuse for the delay and a good and meritorious cause of action."

Finally, CPLR 3216(f) advises that 3216 shall not apply to an action that a court has acted upon pursuant to CPLR 3404. Under 3404, a case in Supreme Court or County Court that has been marked "off" or struck from the calendar or unanswered on a clerk's calendar call, that is not restored within one year thereafter, is to be deemed abandoned and dismissed without costs for neglect to prosecute.

Case law indicates that a plaintiff who cannot show an excuse and merit as stated in 3216(e) will not necessarily suffer a dismissal: "CPLR 3216 is extremely forgiving in that it never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed."[502] "While the statute prohibits

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the Supreme Court from dismissing an action based on neglect to proceed whenever the plaintiff has shown a justifiable excuse for the delay in the prosecution of the action and a meritorious cause of action, such a dual showing is not strictly necessary to avoid dismissal of the action."[503]

Consistent with these principles, trial and appellate courts both have discretion as to what relief to prescribe, where a plaintiff has not made the dual showing.[504] A court may forgive a plaintiff e.g. where there has been minimal delay, lack of prejudice to any adverse party, no pattern of persistent neglect, and no intent to abandon the action.[505] A monetary sanction may be imposed if deemed appropriate.[506]

The certificate of readiness for trial is a representation that discovery is complete. In accord with this, discovery is deemed complete once a note of issue is filed. To compel additional discovery at that point, a motion to vacate the note of issue is made pursuant to 22 NYCRR 202.21(e).[507] The motion is to be served within twenty days after the date that the note of issue was served,[508] in which case there is no need to prove unusual or unanticipated circumstances or the like.[509] "22 NYCRR 202.21(e) provides, in pertinent part, that, within 20 days after service of a note of issue and certificate of readiness, a court may grant a party's motion to vacate the note of issue 'upon affidavit showing in what respects the case is not ready for trial' and if 'the certificate of readiness fails to comply with the requirements of this section in some material respect.'"[510]

If the note of issue was filed prior to a discovery conclusion date, analysis of whether discovery is due should be similar to evaluation of a pre-note of issue motion to compel, especially if the movant had not been dilatory. Potential factors include whether the movant is "entitled to additional disclosure" and whether there is "demonstrated inability of the parties to reach an agreement."[511]

After expiration of the twenty day time frame of 22 NYCRR 202.21(e), a motion seeking discovery is made under 22 NYCRR 202.21(d). At that juncture, it is mandatory that "unusual or unanticipated circumstances"[512] or "good cause"[513] e.g. for failure to have moved within the twenty day period[514] call for discovery to be countenanced. The movant must also demonstrate that it would be substantially prejudiced if its motion were denied,[515] and show "special and extraordinary circumstances" for an amended bill of particulars to be allowed.[516]

It may suffice if there were "material misstatements of fact in the certificate of readiness" and if "a number of unforeseen circumstances stalled the completion of discovery."[517] A nonparty deposition has been permitted based on the pursuing attorney's expression of need: "Counsel's statement that he only realized the importance of the nonparty witness's testimony after filing the note of issue is sufficient."[518]

A court can also be asked to consider whether a note of issue should be vacated on its own motion, notwithstanding the lapse of the twenty day period; "a court, on its own motion may, at any time, vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect or that the certificate of readiness fails to comply with the requirements of 22 NYCRR 202.21 in some material respect (see 22 NYCRR 202.21[e])."[519] Another possibility in this post twenty days setting is that the court will direct completion of discovery that had previously been ordered, such as a defense medical examination, but without vacating the note of issue.[520]

Once the trial of an action has begun, evaluation of discovery rights comes under a somewhat different statutory scheme, e.g. CPLR 3102(d) (discovery during and after trial generally), and CPLR 5223 (disclosure toward satisfaction of a judgment), as discussed below.

A case decided by the Second Department in June 2016 provides a good illustration of cause for pre-trial discovery more than twenty days after a note of issue was filed.[521] There, the defendant did not learn the identities of the plaintiff's health care providers for a prior accident that seemingly involved the same injuries until after the twenty day period. According to the underlying motion affirmations, an authorization for the no-fault benefits file regarding the prior accident was provided long before discovery concluded. Defense counsel, apparently for understandable reasons, did not receive the actual no-fault file until long after the note of issue was served. The no-fault file revealed who the prior health care providers were, and then defense counsel served a demand for authorizations

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to obtain the medical records of those providers. The Second Department affirmed Supreme Court's finding of unusual and unanticipated circumstances warranting the authorizations, "especially in light of the substantial prejudice to the defendant that would result without such discovery."[522]

In practice, a typical outcome of a note of issue vacatur motion in Supreme Court is that justified discovery is directed, but the action stays on the trial calendar, i.e. it retains its awaiting trial posture. This is presuming that the discovery can be completed during the usual trial waiting period in the court involved. The Appellate Division may also reach that kind of conclusion.[523] As phrased by the First Department at least twice in 2017, "[t]rial courts are authorized, as a matter of discretion, to permit post-note of issue discovery without vacating the note of issue, so long as neither party will be prejudiced."[524]

However, in an apt situation, the Appellate Division will reverse an order that declined to vacate a note of issue.[525] For example, the Second Department did so in March 2016 in a case where depositions of the parties and nonparty witnesses had not occurred, physical examinations of the plaintiff had not taken place, properly executed medical authorizations had not been provided, and there were still other outstanding requests for discovery.[526]

The Second Department did so again in November 2016 in a case where the ostensible certificate of readiness incorrectly stated that medical reports had been exchanged and conceded that "depositions of certain party witnesses" and "expert exchanges and discovery" were outstanding.[527] "Because this was a misstatement of a material fact, the filing of the note of issue and certificate of readiness was a nullity."[528]

Similarly, the Fourth Department held in October 2016 that a note of issue filed while discovery was incomplete should have been vacated upon the defendant's motion.[529] "A material fact in the certificate of readiness was incorrect" and so it was improper to merely hold that motion in abeyance while further discovery would presumably progress.[530]

In accord with this, the First Department in November 2017 held that "[w]hen, as in this case, statements in a certificate of readiness concerning completion of discovery are incorrect or blatantly false, a motion to strike the note of issue should be granted."[531] That too was a motion by a defendant. As noted above, the First Department one month earlier had vacated a note of issue upon a plaintiff's motion, where the plaintiff's predecessor counsel's certificate of readiness had contained a material misstatement.[532]

Further, in May 2017, the Second Department held that denial of a motion to vacate a note of issue was an improvident exercise of discretion, "since the certificate of readiness contained misstatements of material fact, including that discovery had been completed."[533] In that litigation, the Second Department vacated a note of issue while reversing a sua sponte severance of a third party action. The third party action was commenced after the original note of issue deadline, and seemingly while the main action's discovery phase was in an advanced stage. However, the third party plaintiff determined during discovery and from review of the plaintiff's medical records that an impleader was necessary, and there was no evidence of intentional delay. Also weighing against severance was the fact that the parties had stipulated to extend the note of issue filing deadline after the impleader, and later, the plaintiff filed the note of issue prematurely.[534]

The First Department has declined to sever a third party action that was commenced five months after a note of issue was filed, while also declining to vacate that note of issue.[535] The basis for the impleader became evident from receipt of an expert disclosure from the plaintiff. There was some delay in commencing the third party action, but not "knowing and deliberate delay."[536] The impled party was not expected to be prejudiced "in view of its ability to review existing discovery and obtain any required additional discovery "while this case makes its way up the trial calendar."[537] It was also germane that the main and third party actions had intertwined issues of law and fact, and would likely have nearly identical witnesses at trial.[538]

As introduced above, discovery during or after trial is generally founded upon CPLR 3102(d) and/or 5223. CPLR 3102(d) states that "[e]xcept as provided in section 5223, during and after trial, disclosure may be obtained only by order of the trial court on

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notice." Discovery during trial is a possibility e.g. where a witness seeks to testify with relation to documents that had not been previously produced, and arguably should have been disclosed during the action's disclosure phase.[539]

CPLR 5223 and 5224 enables select disclosure for a judgment creditor. CPLR 5223 states that "at any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena, which shall specify all of the parties to the action, the date of the judgment, the court in which it was entered, the amount of the judgment and the amount then due thereon, and shall state that false swearing or failure to comply with the subpoena is punishable as a contempt of court." CPLR 5224 speaks to subpoenas and procedures for carrying out disclosure pursuant to 5223.

These statutes are thus the source for discovery of information related to a judgment debtor's assets.[540] As for who the information can be pursued from, "[a] judgment creditor is entitled to discovery from either the judgment debtor or a third party in order 'to determine whether the judgment debtor concealed any assets or transferred any assets so as to defraud the judgment creditor or improperly prevented the collection of the underlying judgment."[541]

A demand as to the assets and operations of non-judgment-debtors has been held to be improper, however.[542] A non-party who wishes to challenge an overly broad demand by a judgment creditor may make an application to quash the accompanying subpoena pursuant to CPLR 5240, by which a court controls judgment enforcement and prevents "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice."[543] But the application should only be granted "where the futility of the process to uncover anything legitimate is inevitable or obvious" or "where the information sought is utterly irrelevant to any proper inquiry."[544]

Notice to Admit

Under CPLR 3123(a), a party may serve upon any other party a written request for admission of the genuineness of any papers or documents, or the correctness or fairness of representation of any photographs.[545] CPLR 3123(a) also authorizes a notice to admit the truth of any matters of fact set forth in the request, as to which the party requesting admission reasonably believes there can be no substantial dispute at trial, and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry.[546]

Generally speaking, the matter is deemed admitted unless the target party serves a sworn statement either denying specifically the matters of which an admission is requested, or setting forth the reasons why he cannot truthfully either admit or deny those matters. The time to respond to avoid an admission is twenty days after service of the notice to admit, or such further time as a court allows.[547] However, items that are palpably improper should not be deemed admitted, even if the target party failed to respond.[548]

"The purpose of a notice to admit is only to eliminate from contention those matters which are not in dispute in the litigation and which may be readily disposed of."[549] It is "not to be employed to obtain information in lieu of other disclosure devices, or to compel admissions of fundamental and material issues or contested ultimate facts."[550] Thus, it is not for seeking concessions that would contravene pleading allegations, or go to the "essence of the controversy between the parties"[551] or "the heart of the matter at issue."[552] The propounding party should reasonably believe that the admissions sought are not in substantial dispute.[553] Thus, one should not seek an admission that an actionable condition existed at an accident scene.[554]

Notice to Admit

It is common practice to exchange photographs and video of an incident scene. For example, in a Third Department appeal in July 2016,[555] the defendant exchanged store video surveillance that included footage prior to, during and after the plaintiff's accident, to the point where employees cleaned-up the allegedly problematic condition after the occurrence. In that matter, the plaintiff took issue with the fact that footage for a broader time period (both before and after the accident) had not been preserved. But that was not intentional, and the plaintiff did not adequately explain why such disclosure would have been justified.

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In a First Department matter involving an accident on a staircase, a defendant who did not preserve video footage of that staircase was facing a spoliation motion.[556] In the end, that defendant was not sanctioned because the plaintiff's testimony failed to specify a particular defect that caused him to fall.[557] A separate section on the subject of spoliation is presented below.

There can be concern about proprietary and/or privacy interests in this realm. Such concern has been raised in the context of a site inspection at a residential building where both photography and videography was proposed to be used.[558] In that matter, there was potential for photographs or video to capture residents of the building, and to impact the defendant's proprietary rights and the privacy rights of the residents. As mitigation, the Fourth Department directed Supreme Court to consider implementation of reasonable restrictions.[559] It is conceivable that issues of this kind could arise where a party seeks disclosure of depictions of an incident scene, e.g. in the form of security surveillance video, or photography or video taken at a concert, wedding or other event.

The subject of scene video exchange figures to have heightened intrigue when the existence of a video is suddenly revealed during a trial. This happened in a case that came before the First Department in August 2016.[560] An issue was whether the case was properly dismissed without prejudice during the trial because the video had not been disclosed earlier on.

The plaintiff had allegedly tripped and fallen on wires laid across the floor at a party in a banquet hall. She sued the banquet hall operator and also the party's promoter. On the third day of trial, during cross-examination, plaintiff testified that she found a video of the party the previous day. Plaintiff gave the video to her attorney around noon of this third trial day. Her attorney did not notify the court and defendants about it until 3:00 or 4:00 p.m. of that day, during plaintiff's cross-examination.

The First Department took account of what had been said on this subject during discovery. At her deposition, plaintiff testified that a video was taken, which she thought was for the party promoter's own use. This led the banquet hall defendant to believe that the plaintiff did not have a copy of it. Both defendants requested production of photographs taken at the incident time, but not video, and plaintiff responded that she did not possess any. Also, the party promoter testified that she was not sure whether the party had been videotaped.

Given this and the other relevant circumstances, the trial court's dismissal of the complaint was an abuse of discretion. The First Department noted that CPLR 3101(i) requires disclosure of "any films, photographs, video tapes or audio tapes" of a party upon demand. However, here, there was insufficient evidence of willful or contumacious conduct on plaintiff's part, or prejudice to the banquet hall defendant, to warrant the dismissal. Also germane, there had not been any court order directing production of the video. Moreover, the video did not show the plaintiff's fall, and she claimed to have misplaced it and had not sought to introduce it at the trial. Also, the plaintiff at the time was willing to consent to its preclusion, striking of her testimony concerning its existence, and a curative instruction, even though she believed the video to be favorable (it showed a cord across the floor and a principal of the banquet hall defendant in the vicinity).

Given that there would now be a retrial with use of the video, the appeal's outcome included an opportunity for the banquet hall defendant to conduct discovery of the videographer and the plaintiff with respect to the video. This was to mitigate any potential prejudice to that defendant.

Photographs, Video or Audio of a Party - Surveillance, Social Media and Otherwise

In a wrongful death case, video of the decedent is potentially relevant to damages, such as pecuniary loss and life expectancy.[561] Accordingly, the non-party brother of a decedent in such an action was directed to produce a video compilation concerning the decedent, as well as an authorization for the YouTube account where that compilation had been posted; the compilation contained several video clips depicting the decedent's lifestyle before the defendant's alleged negligence had occurred.[562]

As discussed above relative to video during an IME, the Second Department on November 18, 2015 held in *Bermejo v. New York City Health*

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and Hospitals Corp.[563] that CPLR 3101(i) "requires disclosure of any films, photographs, video tapes or audio tapes of a party, regardless of who created the recording or for what purpose."[564] This "full disclosure" is required "without regard to whether the party in possession of the recording intends to use it at trial."[565] CPLR 3101(i) does state that "there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof" involving a party, or the officer, director, member, agent or employee of a party, and "there shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use."

It still remains to be seen whether other courts will share the view that 3101(i) is not limited to materials created during surveillance, and so even audio, video and photographs not intended for trial use are open to disclosure. The December 17, 2015 opinion of a divided (3 - 2) First Department in *Forman v. Henkin* (now reversed by the Court of Appeals, as discussed below)[566] addressing materials stored on Facebook, and the scope of such discovery under CPLR 3101(a), had represented a narrower outcome: "in accordance with standard pretrial procedures, plaintiff must provide defendant with all photographs of herself posted on Facebook, either before or after the accident, *that she intends to use at trial*. Plaintiff concedes that she cannot use these photographs at trial without having first disclosed them to defendant."[567]

In the third version of this article, I noted that the 3-2 divide in *Forman* could mean that we would hear from the Court of Appeals in that matter. As it has turned out, *Forman* was decided by the Court of Appeals in February 2018. Defense Association of New York had submitted a brief by its *Amicus Curiae* Committee. Through that brief, DANY respectfully contended that the First Department's majority decision should be reversed, and the Court of Appeals should clarify that social media discovery is subject to the same liberal standards as other disclosure in the State of New York. And that is what has transpired. The brief is available on the "Amicus Briefs" page of DANY's website, www.defenseassociationofnewyork.org.

The defendant in *Forman* had demanded of plaintiff "all photographs of herself privately posted on Facebook after the accident that do not show nudity or romantic encounters."[568] Whereas the First Department limited disclosure of photographs to those the plaintiff intended to use at trial, Supreme Court had more broadly directed the plaintiff to produce "all photographs of herself privately posted on Facebook after the accident that do not depict nudity or romantic encounters."[569] Supreme Court had also denied much of the disclosure that the defendant had sought, but only the plaintiff appealed to the Appellate Division. The scope of the appeal in the Court of Appeals was therefore limited correspondingly, but there is still much that can be gleaned from the decision.

A fundamental issue debated in *Forman* at both appellate levels is whether social media disclosure (including photographs and other information stored on social media) should flow from conventional discovery standards without court involvement, versus "a heightened threshold … that depends on what the account holder has chosen to share on the public portion of the account."[570] In the end, the Court of Appeals opined that the former paradigm is correct, stating that "courts addressing disputes over the scope of social media discovery should employ our well-established rules – there is no need for a specialized or heightened factual predicate to avoid improper 'fishing expeditions.'"[571]

The Court of Appeals provided a sound rationale for this outcome. It was explained that in most instances, a party can only view social media materials that an opposing party happens to have posted on the public portion of a social media account. "Thus, a threshold rule requiring that party to 'identify relevant information in [the] Facebook account' effectively permits disclosure only in limited circumstances, allowing the account holder to unilaterally obstruct disclosure merely by manipulating 'privacy' settings or curating the materials on the public portion of the account. Under such an approach, disclosure turns on the extent to which some of the information sought is already accessible – and not, as it should, on whether it is 'material and necessary to the prosecution or defense of an action' (see CPLR 3101[a])."[572]

In Version Three of this article, I stated that in digesting the *Bermejo* and *Forman* Appellate Division

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opinions concurrently, one might ponder whether posting of photos and video on social media cloaks them in privacy and thereby immunizes materials that would otherwise be disclosed. Responding to the dissent, the *Forman* First Department majority did express that "the discovery standard we have applied in the social media context is the same as in all other situations—a party must be able to demonstrate that the information sought is likely to result in the disclosure of relevant information bearing on the claims"[573] and "the discovery standard is the same regardless of whether the information requested is contained in social media accounts or elsewhere."[574]

These statements notwithstanding, the First Department's majority holding in *Forman* was viewed by the Court of Appeals as having imposed an unduly heightened threshold for warranting the social media discovery involved there. Given that traditional discovery principles are to apply to social media discovery going forward, uploading a photograph to a social media account should not make it less discoverable than it was beforehand.

Applying traditional discovery principles to the factual record in *Forman*, the Court of Appeals held that the defendant was entitled to disclosure of all photographs of the plaintiff that were privately posted on Facebook after the accident, that do not depict nudity or romantic encounters. "Defendant more than met his threshold burden of showing that plaintiff's Facebook account was reasonably likely to yield relevant evidence."[575] The plaintiff had alleged spinal and traumatic brain injuries. Her deposition revealed that before the subject accident, she had posted "a lot" of photographs showing her active lifestyle. Given the plaintiff's acknowledged tendency to post photographs representative of her activities, "there was a basis to infer that photographs she posted after the accident might be reflective of her post-accident activities and/or limitations."[576]

The request for these photographs was thus "reasonably calculated to yield evidence relevant to plaintiff's assertion that she could no longer engage in the activities she enjoyed before the accident and that she had become reclusive."[577] This kind of analysis is necessary since the commencement of a personal injury action does not categorically render a party's entire Facebook account automatically discoverable.[578]

Justification for disclosure of social media photographs or video depicting a personal injury plaintiff should exist with some frequency. In discussing how social media commonly provides insight about a person's customary being, the *Forman* Appellate Division dissent did opine that "the breadth of information posted by many people on a daily basis creates ongoing portrayals of those individuals' lives that are sometimes so detailed that they can rival the defense litigation tool referred to as a 'day in the life' surveillance video."[579] Indeed, the Second Department has directed exchange of a YouTube video compilation with that kind of scope, as noted in the opening paragraph of this section.

The statutory provision under focus in Forman was CPLR 3101(a). In Version Three of this article, I observed that "there is no mention of 3101(i) or of *Bermejo* in the majority or dissenting opinions" of the First Department's decision in *Forman*. In the Court of Appeals opinion where it is expressed that the First Department erred in limiting disclosure of photographs to those that plaintiff intended to introduce at trial, there is a footnote that states the following (note particularly the second sentence): "Because plaintiff would be unlikely to offer at trial any photographs tending to contradict her claimed injuries or her version of the facts surrounding the accident, by limiting disclosure in this fashion the Appellate Division effectively denied disclosure of any evidence potentially relevant to the defense. To the extent the order may also contravene CPLR 3101(i), we note that neither party cited that provision in Supreme Court and we therefore have no occasion to further address its applicability, if any, to this dispute."[580]

An intriguing issue is what the limitations are, if any, on disclosure of photographs or video of a party pursuant to CPLR 3101(i) and *Bermejo*. At least with respect to CPLR 3101(a), the view of the *Forman* Appellate Division dissent is that "if a plaintiff claims to be physically unable to engage in activities due to the defendant's alleged negligence, posted information, including photographs and the various forms of communications (such as status updates and messages) that establish or illustrate the plaintiff's former or current activities or abilities will

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be discoverable."[581] The Appellate Division majority opinion adds that the dissent's position "would allow for discovery of all photographs of a personal injury plaintiff after the accident, whether stored on social media, a cell phone or a camera, or located in a photo album or file cabinet."[582] It is plausible that this is what *Bermejo* calls for pursuant to CPLR 3101(i).

For additional discussion relative to social media, see the section below titled "Social Media Discovery."

Post-Accident Repair Records

"Evidence of subsequent repairs and remedial measures is not discoverable or admissible in a negligence case[583] unless there is an issue of maintenance or control."[584] With some frequency, an issue will arise as to who maintains or controls an accident location or instrumentality, such as a staircase[585] or a parking lot.[586] In that kind of scenario, there may be cause for production of the identity of an entity that repaired the location after the plaintiff's accident, and documentation of payment to that entity,[587] or other records made in connection with a post-accident premises repair.[588] Conversely, there should be no such disclosure where maintenance and control is undisputed.[589]

Pre-Action Disclosure

A potential plaintiff may have a need for disclosure in order to adequately prepare a lawsuit for commencement and service. In recognition of this, there exists CPLR 3102(c), which states: "Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order. The court may appoint a referee to take testimony."

Pre-action discovery is thus pursued by way of a special proceeding that is initiated with a petition.[590] The principal purposes are "to allow a plaintiff to frame a complaint and to obtain the identity of the prospective defendants,"[591] i.e. "to obtain information relevant to determining who should be named as a defendant."[592]

Pre-action disclosure has a narrower permissible scope than intra-action discovery, and "may not be used to determine whether the plaintiff has a cause of action."[593] Mere suspicion is not enough, carrying too high a likelihood of annoyance and intrusion upon an innocent party.[594] The petitioner thus must allege facts "fairly indicating that he or she has some cause of action," and a court may evaluate whether facts are stated that meet all elements of the proposed claim.[595] The burden on the petitioner has also been indicated as a likelihood of a meritorious claim, and that the information sought was material and necessary to the actionable wrong.[596]

The discovery device most commonly used in this context is the notice to produce documents or things pursuant to CPLR 3120. However, a deposition of the respondent is plausibly available, if requested, upon a showing of need in order to frame a complaint.[597]

A petitioner who files a summons and complaint while his special proceeding is pending risks losing any rights to pre-action discovery, since "[d]isclosure may only be obtained under CPLR 3102(c) before an action is commenced."[598]

Sanctions for Discovery Failure – Basis for Sanction

A court has broad discretion in supervising disclosure,[599] and CPLR 3126 affords discretion to impose a sanction for discovery failure.[600] "If a party refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed ... the court may make such orders with regard to the failure or refusal as are just."[601]

Moreover, "the nature and degree of the penalty to be imposed pursuant to CPLR 3126 are matters within the sound discretion of the motion court ... Absent an improvident exercise of discretion, the determination to impose sanctions for conduct that frustrates the purpose of the CPLR should not be disturbed."[602] Similarly, the Third Department has held that a sanction imposed by Supreme Court "will remain undisturbed unless there has been a clear abuse of discretion."[603] As stated by the First Department, "it would not be appropriate for this Court to substitute its discretion for that of the Justice sitting in the IAS Court."[604]

Discovery impropriety can also warrant a sanction pursuant to 22 NYCRR 130–1.1[c] where it amounted to "frivolous conduct" within the meaning of that rule.[605] It can even amount to contempt of court, but only if an order has been disobeyed.[606] "However, the drastic remedy of striking a pleading

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or even precluding evidence pursuant to CPLR 3126 should not be imposed unless the failure to comply with discovery demands or orders is clearly willful and contumacious."[607]

The classic foundation for a sanction in this realm is willful and contumacious conduct,[608] and/or bad faith,[609] prejudice[610] or being "substantially prejudiced."[611] A sanction would also be expected where a party has spoliated evidence in violation of a prior order of preservation.[612] A separate section on spoliation is presented below.

What constitutes willful and contumacious conduct is somewhat of a case by case inquiry. It "may be inferred from the party's repeated failure to comply with court-ordered discovery, and the absence of any reasonable excuse for those failures, or a failure to comply with court-ordered discovery over an extended period of time."[613]

"A pattern of noncompliance and delay can give rise to an inference of willfulness,"[614] as can "chronic or repeated obstruction of discovery."[615] Accordingly, willful and contumacious conduct has been found to exist where the plaintiff refused to appear for a deposition, canceled depositions at the last minute, missed a CPLR 3408 court-ordered mandatory conference, failed to comply with a court-ordered deposition deadline, and created confusion and delay with an inadequate and unclear effort to substitute counsel.[616]

Willfulness has also been found where the discovery failure continued despite court conferences, hearings, and issuance of multiple disclosure orders, including a conditional order of preclusion, together with contradictory excuses.[617] Similarly, it has been held that "failure to fully comply with four court orders directing (a party) to produce certain documents warrants an inference of willful noncompliance."[618]

Willful and contumacious conduct has been properly inferred from repeated delays in complying with discovery demands and the court's discovery schedule, failure to provide an adequate excuse for delays, and inadequate discovery responses which did not evince a good-faith effort to address the requests meaningfully.[619]

On the other hand, where parties have repeatedly stipulated to extend discovery deadlines at court conferences, this may weigh against the imposition of a sanction.[620] A party opposing a motion in this realm should offer an explanation for the delay if possible, as that weighs against a finding of willful and contumacious conduct.[621] Discovery delay due to substitution of counsel may be an acceptable excuse.[622] Moreover, objections or statements that items had already been produced or could not be found does not, standing alone, amount to willful and contumacious conduct.[623]

"The burden of establishing that a failure or refusal to disclose was the result of willful, deliberate, or contumacious conduct rests with the party seeking an order of preclusion" or striking a pleading.[624] The papers comprising a motion for a sanction for discovery failure should include, as applicable, any discovery notices, deposition notices, correspondence, and disclosure orders that collectively demonstrate the movant's efforts to obtain the discovery and the adverse party's failure to comply.[625]

Conversely, an adverse party's good-faith effort to locate items is a factor weighing against a sanction, even though the items were not found.[626] As a general proposition, a party will not be sanctioned for failing to produce information that is not in his or her possession or control, and/or that could not be located.[627]

A moving party's own discovery delay can be a factor as well.[628] Delay in seeking relief can be a consideration too, and a prospective movant generally cannot await the outcome of a trial; "by failing to move for sanctions pursuant to CPLR 3126 until after trial, the appellant waived his claim that (another party) had failed to meet his disclosure obligations."[629]

As for what relief should be requested or expected, that depends naturally on the extent of the discovery failure and its effect on the movant's ability to prove a claim or defense. Again, "[t]he nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the Supreme Court"[630] and "the sanction imposed should be commensurate with the particular disobedience, if any."[631] A discussion of potential outcomes now follows.

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Sanctions for Discovery Failure - Conditional and Absolute Preclusion

It has been said that public policy strongly favors the resolution of actions on the merits whenever possible.[632] This is not a license to flout discovery obligations, however, and thus the "self-executing" conditional order of preclusion is a common judicial response to a repeated failure of disclosure.[633] Such an order "requires a party to provide certain discovery by a date certain, or face the sanctions specified in the order."[634]

Preclusion is considered a "drastic" remedy, and an offending party's lack of cooperation with disclosure must be willful, deliberate, and contumacious to warrant it.[635] Conditional preclusion has been imposed upon a repeated failure for several years to comply with discovery demands and directives, e.g. five court orders, without adequate excuse.[636] It has also been imposed where a party was willful and contumacious in refusing to answer certain questions at a deposition,[637] and where no reasonable attempt was made to produce plaintiffs for depositions in compliance with judicial directives.[638] In the former matter, the deponent would be precluded unless he completed a further and adequate deposition. The latter matter involved multiple plaintiffs; those who had made a genuine attempt to schedule depositions were spared preclusion so long they now completed the same.

Preclusion may be indicated once it is apparent that a lesser sanction would not deter continued violations.[639] Beware that a court may impose the penalty of preclusion even if no last chance for compliance had been provided. This has happened, for example, where the defendant customarily would create the requested discovery (photographs) in the course of rendering services, and yet inexplicably had failed to search for the items during litigation: "As a sanction against a party who 'refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed,' a court may issue an order 'prohibiting the disobedient party ... from producing in evidence designated things or items of testimony.'"[640] In a business dispute, thousands of invoices were precluded where case history supported an inference that the dilatory party had deliberately withheld production until after the adversary had served an expert report.[641]

Conversely, a motion to exclude from evidence a document that was not timely produced in response to a discovery request might not prevail where there was a belated response, no willful noncompliance or bad faith, and no prejudice from the delay.[642] Similarly, the Second Department has affirmed a denial of preclusion as to a defendant who had produced photographs and a plaintiff's statement, i.e. a transcript of a recorded interview, after depositions.[643] A preliminary conference order had called for this kind of disclosure to be made in advance of depositions. Even so, preclusion was not warranted as there was no clear showing of willful and contumacious conduct. For additional guidance as to what conduct or history does not support preclusion, see the section below concerning the potential penalty of a stricken pleading.

The risk of a conditional preclusion does not stem from motions alone. There can be a self-executing compliance conference order by which a party who does not provide discovery by a date certain becomes precluded from presenting evidence at trial in support of all matters that were to be addressed by that discovery.[644]

A plaintiff who is obligated by a conditional order of preclusion or the like, and who cannot produce the discovery, faces a two-fold burden to be relieved of the discovery mandate and the preclusion: "the plaintiff was required to demonstrate a reasonable excuse for its failure to comply with the order and the existence of a potentially meritorious cause of action."[645] Similarly, where a defendant seeks such relief, the burden has been indicated as a reasonable excuse as aforementioned, and "the existence of a potentially meritorious defense"[646] or "a potentially meritorious defense to the motion."[647]

When a party in this situation neither produces the discovery nor an affidavit certifying to lack of possession of the discovery,[648] nor demonstrates cause for relief, the conditional order becomes absolute.[649] An "explanatory affidavit" may be necessary to establish cause for relief,[650] i.e. "a reasonable excuse for failure to comply with the order and a meritorious claim" and lack of prejudice to the opposing party.[651] Of course, an unsworn and

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unsigned affidavit that does demonstrate any of these things will not be of any effect.[652]

Law office failure can constitute an acceptable excuse.[653] Be wary however that a court may insist on proof supporting a proffered excuse. For example, in a 2018 appeal, the First Department was not moved by a bare assertion that medical issues had affected counsel's ability to handle his case load, as this "was uncorroborated by any medical documentation or affidavit from counsel's physicians."[654]

The court can take account of whether the party ultimately provided the discovery and did so only modestly after the court-ordered deadline (e.g., one and a half months), and whether that delay was not a by-product of willful and contumacious conduct.[655]

When the conditional order has become absolute and is not vacated, the order should preclude proof as to matters not furnished[656] and/or preclude a party from testifying at a trial,[657] and even a stricken answer and a default judgment can occur.[658] Prohibition of a party's testimony often follows from a party's failure to attend a deposition[659] or a defense medical examination[660] by a date specified in a conditional order of preclusion.

Problematically for a plaintiff, this sometimes proves to be a predicate for a dismissal of the entire action: "Since the plaintiff is precluded from offering evidence at trial with respect to information sought in discovery and will be unable, without that evidence, to establish a prima facie case, the Supreme Court properly directed the dismissal of the complaint."[661] As noted above, after a party has failed to comply with terms of a self-executing order of preclusion, an adverse party may move for summary judgment dismissing an action based on the effect of such an order,[662] without first making an additional good faith effort to resolve the underlying discovery problem.[663]

A dismissal does not invariably follow from a preclusion of a plaintiff's testimony, however; a defendant seeking that result must "demonstrate that the plaintiff was precluded from offering other evidence with respect to the issue of liability or her injuries" and that based on that such preclusion or another prohibition, the plaintiff is "unable to make out a prima facie case."[664] A preclusion of testimony as to a plaintiff's medical condition typically makes a personal injury case non-viable.[665] An affidavit or testimony from an officer or employee of a precluded party can plausibly be accepted for the benefit of a different party.[666]

Sanctions - Preclusion for Unavailable Discovery – Dogs Included

As seen from the foregoing discussion and cited cases, if a party is unable to produce court-ordered discovery and risks a sanction as a consequence, a motion to vacate that order may well be indicated,[667] with a showing of a reasonable excuse for failure to produce items, and existence of a meritorious claim or defense.[668] Moreover, that the evidence has moved elsewhere, even if seemingly for a good reason, will not necessarily excuse an obligation of production. In one case, the "item" was actually a dog that the plaintiffs had adopted from the defendant animal control center, and returned to the defendant after multiple attacks.[669] After suing for e.g. negligent misrepresentation, the plaintiffs obtained a conditional order of preclusion that required the defendant to produce the dog for a "behavioral examination." The defendant had already sent the dog to an animal rescue in another state. Regardless, since the defendant had not challenged the plaintiffs' showing of need for the production, a motion to vacate was required to seek forgiveness from that obligation.

Sanctions for Discovery Failure – Stricken Pleading and/or Dismissal of Claims

CPLR 3126(3) authorizes the court to strike pleadings for refusal or willful failure to disclose information which the court finds ought to have been disclosed.[670] More specifically, a stricken pleading is properly directed "upon a clear showing that failure to comply with a disclosure order was the result of willful and contumacious conduct,"[671] or "due to bad faith."[672] That is a "drastic remedy" and not appropriate in the absence of such a showing.[673] As phrased in January 2018, "[t]he drastic remedy of striking an answer is inappropriate absent a clear showing that a defendant's failure to comply with discovery demands is willful and contumacious."[674]

The determination of whether to strike a pleading for failure to comply with court-ordered disclosure lies within the aforementioned "sound discretion"

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of the trial court,[675] which has also been said to be "broad discretion."[676] The dismissal of a complaint has been affirmed based on a plaintiff's repeated failure to respond adequately to a defendant's discovery notice and interrogatories, and the absence of any adequate explanation for the failure to timely comply with those requests or the deadlines in a preliminary conference order and a conditional order of dismissal.[677]

A stricken pleading is a plausible sanction for egregious discovery failure, but, as mentioned, is viewed as a "drastic" remedy,[678] or a "harsh" remedy,[679] as there is a "strong preference in this state for deciding matters on the merits."[680] Where a party has "substantially, albeit tardily, complied by serving a response to the request for production of documents" and where the movant has "failed to demonstrate that the submissions in response to discovery demands were otherwise inadequate," a refusal to strike a pleading is a provident exercise of discretion,[681] and striking a pleading is an improvident exercise of discretion.[682]

Of course, an additional potential ground for opposition to a motion to strike a pleading is a reasonable excuse for discovery delay. An example is where an unexpected occurrence, such as a fire, caused a party to hastily move documents to a storage unit, and to have difficulties finding records due to disarray.[683] Given those circumstances, and the fact that repeated searches were made with some documents produced, no imposition of a sanction was warranted.[684]

Another factor against striking a pleading is where there have been discovery deficiencies by the adverse party as well.[685] Moreover, striking a pleading is generally not indicated where the discovery not produced was not the subject of a prior order,[686] or where the underlying discovery demands "are overly broad, are lacking in specificity, or seek irrelevant documents,"[687] or are otherwise "not necessary and proper to the prosecution of this action"[688] or to a defense.

A failure to adhere to multiple discovery orders that extended the time for the parties to be deposed and comply with discovery, without additional evidence of discovery failure, might not support an inference of willful and contumacious conduct.[689] For example, an order striking an answer was reversed where the defendant had failed to provide certain discovery in time periods imposed by preliminary and compliance conference orders, but arguably had substantially complied with a subsequent stipulation.[690]

A pleading may be stricken, however, for willful and contumacious failure to provide court-ordered disclosure, or to disclose information which ought to have been disclosed,[691] or for "repeated failure to appear for a continued deposition without a reasonable excuse."[692] A plaintiff's loss of spousal services claim was dismissed after her failure to provide a bill of particulars and to appear for depositions, in violation of two court orders.[693]

An answer has been stricken based on lack of response to a preliminary conference order, an inadequate response to a subsequent order, absence of response to a third order, and an inadequate response to an ensuing motion; the passage of over three years since the preliminary conference order, and the burden on the plaintiff of having to make two motions, were also considerations.[694] A defense attorney cannot expect to avoid a stricken answer by affirming that it is his client who has ceased cooperating in the defense of the action, such as by failing to respond to counsel's communications regarding the necessity of providing outstanding discovery.[695]

The risk of a stricken pleading is increased where a party has falsely represented that it does not possess the subject discovery.[696]

The foregoing kinds of conduct can warrant a conditional, self-executing order of dismissal,[697] which, as with a self-executing preclusion order, becomes absolute if the discovery does not occur by the prescribed date.[698] This is so long as the order is "sufficiently specific to be enforceable."[699] A conditional, self-executing order striking an answer is a possibility as well.[700]

A lower court's refusal to dismiss a complaint upon a defendant's motion may be reversed on appeal where the plaintiff had not opposed the motion below: "the plaintiff's willful and contumacious conduct can be inferred from her repeated failure, over a period of more than two years, to respond

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to any of the defendants' discovery demands, even after being directed to do so by court order, as well as her failure to respond to the defendants' separate motions to dismiss the complaint and, consequently, the absence of any reasonable excuse for her noncompliance."[701]

A party's failure to contest a motion for discovery sanctions should amount to a waiver of the right to appeal from the resulting order: "because defendant failed to respond to plaintiff's motion for discovery sanctions, the part of the order striking defendant's answer as a discovery sanction and granting judgment in plaintiff's favor, thereby disposing of the case, was entered on defendant's default, and is not appealable."[702]

As for the implications of a stricken answer, that figures to be a default judgment.[703] A defendant so penalized as a result of a default "admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff's conclusion as to damages,"[704] unless perhaps a sum certain is involved.[705]

Since damages not involving a sum certain are not admitted, a plaintiff in this scenario remains entitled to discovery; "A defendant's obligation to afford a plaintiff the opportunity to pursue discovery is not terminated when the answer is stricken, inasmuch as a plaintiff should not be handicapped in the proof of its damages by a defendant's prior defiance of orders, notices, or subpoenas calling for his production of records or the taking of a deposition."[706] Accordingly, such a plaintiff can obtain discovery in advance of an inquest, whether for evidence in proving damages, or for procurement of information that may lead to such evidence.[707]

One defendant's stricken answer can benefit another defendant, whose cross claims can thereby be admitted, warranting summary judgment on those cross claims,[708] or a contumacious defendant can suffer a dismissal of its cross claims.[709]

The penalty of a stricken pleading is typically prescribed in an order which decides a motion that requested such a result. There is, however, precedent for a self-executing compliance conference order by which a pleading is deemed stricken upon a failure to meet a discovery requirement.[710] An aggrieved party may ultimately be awarded attorneys' fees and costs from a disobedient party.[711]

Sanctions for Discovery Failure – Monetary Sanction

There are scenarios where the level of willfulness required for the striking of a pleading is not present, but a monetary sanction is appropriate,[712] e.g. to deter discovery failure or misconduct. This has occurred where missing discovery was eventually provided, after changes within a party's organization and a substitution of its counsel; a fine of $2,500 befitted that scenario.[713] A $3,000 monetary sanction has been awarded to a defendant to compensate it for costs in opposing a plaintiff's motion to vacate a conditional preclusion order.[714]

In a case where the defendant had "repeatedly failed to provide documents in a timely manner or at all," a fine of $1,500 was imposed, but the defendant's answer was not stricken; "that penalty was commensurate with the particular disobedience it was designed to punish."[715]

A court may also impose the two-fold relief of a conditional order striking a pleading, and, a sanction pursuant to 22 NYCRR 130-1.1.[716] Another possibility is an award of counsel fees to the movant, where the opposing party ought to have produced the discovery without the necessity of a motion.[717] It is error however for a court to award attorney's fees absent evidence of a willful refusal to comply with a discovery notice, or that a party or party's attorneys acted frivolously.[718]

In another First Department matter, an order dismissing the action was reversed, but a $1,500 fine was imposed.[719] There again, there was a partial albeit belated compliance with the multitude (five) of the prior discovery orders. The 77–year–old plaintiff had responded to many of defendants' extensive discovery demands that had spanned 10 years of medical records and other documents. She was given an additional chance to supplement her bill of particulars to articulate the basis for her malpractice claims and demand for special damages, and to provide completed HIPAA authorization forms.

Where larger scale discovery and/or spoliation is involved, one may expect a larger monetary sanction. The First Department in June 2016 imposed a $10,000 sanction upon a business entity plaintiff in a legal

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malpractice action that had failed to timely issue a litigation hold and thereby preserve electronic records.[720]

Social Media Discovery

Given the great popularity of social media, it is quite possible that a party or non-party witness has stored information in a social media account that may be of interest to a litigant. Typically a small percentage of such information is available for public viewing. In theory, the remainder of the information, or at least excerpts that ought to be discoverable, can be made available to an adversary in two ways: by a direct production, such as by downloading information from a website and placing it on a CD or flash drive, and through an authorization to a social media service as custodian of the information. One difficulty for counsel has been that even if given an authorization, a social media service may fail or refuse to respond to it.

The Court of Appeals' February 2018 decision in *Forman v. Henkin*[721] represents a truly significant development with regard to social media discovery. That decision and much of its import relative to social media discovery is discussed above in the section titled "Photographs, Video or Audio of a Party - Surveillance, Social Media and Otherwise." Review of this important case now continues here.

Before this Court of Appeals decision, the initial reaction of many attorneys who received a demand for social media discovery was to fail or overtly refuse to provide a response. This was ostensibly or actually because of the notion that a party's information that he placed on social media, and did not make available to the public at large, is both "private" and shielded from disclosure. Moreover, some courts were seemingly imposing a heighted predicate for social media discovery than for other discovery.

Practice and jurisprudence in this area should now change. The paramount upshot from the Court of Appeals in *Forman v. Henkin* is that the well-established rules for discovery generally are to apply to social media disclosure - "there is no need for a specialized or heightened factual predicate."[722] Moreover, "[i]n a personal injury case such as this it is appropriate to consider the nature of the underlying incident and the injuries claimed and to craft a rule for discovering information specific to each."[723] The Court of Appeals added that temporal limitations may also be appropriate, and the account holder can seek judicial protection as to sensitive or embarrassing materials of marginal relevance.[724]

Forman v. Henkin dealt with two categories of social media discovery materials. One is photographs of a plaintiff, which is reviewed above. Discussion of the other, i.e. a plaintiff's social media messaging, now follows.

Plaintiff *Forman* had allegedly sustained traumatic brain injuries resulting in cognitive deficits, memory loss, difficulties with written and oral communication, and social isolation. The subject accident purportedly caused her to have difficulty using a computer and composing coherent messages. A document she wrote contained misspelled words and faulty grammar, allegedly evidencing that she could no longer express herself the way she did before the accident. For example, a simple email could take hours to write because she had to go over written material several times.

One of the defendant's contentions was that the timestamps on Facebook messages would reveal the amount of time it takes plaintiff to write a post or respond to a message. The defendant also sought the content of messages she posted on Facebook. Supreme Court directed production of an authorization for Facebook records showing each time plaintiff posted a private message after the accident, and the number of characters or words in the messages, but declined disclosure of any content of Facebook posts.

Only the plaintiff appealed to the Appellate Division, and so all appellate review was limited to whether discovery that was required of the plaintiff was not warranted. The First Department ruled in the plaintiff's favor, relieving her from providing an authorization for the Facebook message data.

Supreme Court's decision in this regard was ultimately reinstated. According to the Court of Appeals, "it was reasonably likely that the data revealing the timing and number of characters in posted messages would be relevant to plaintiffs' claim that she suffered cognitive injuries that caused her to have difficulty writing and using the computer, particularly her claim that she is painstakingly slow in crafting messages."[725]

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The Court of Appeals in *Forman* had no occasion to address whether defendant made a showing sufficient to obtain disclosure of content of the plaintiff's Facebook messages, and, if so, how to avoid discovery of nonrelevant materials. Notably, even before *Forman*, the First Department was willing to compel Facebook message content if sufficient justification was present.[726]

Following now is a review of other judicial treatment of disputes in this area. For some time now, there has been precedent for obtaining social networking user information directly from a plaintiff, rather than relying on a response from a social media service provider. The Appellate Division has directed an in camera review of a plaintiff's post-accident Facebook postings for identification of information relevant to that plaintiff's injuries.[727]

To justify such relief, one may need to establish a predicate consistent with settled rules for discovery generally. A current standard for evaluating the validity of a social media discovery demand appears to be whether it is "reasonably calculated to yield evidence" that is "relevant" to an assertion of interest that a party has made.[728] As in the past, a defendant in a personal injury case may be better positioned by basing such a demand on relevant information e.g. in a Facebook account or other factual source, that contradicts or conflicts with a plaintiff's alleged restrictions, disabilities, and losses, and other claims.[729] An example would be a showing that a photograph or a text post, that is publicly available on social media, tends to contradict a material contention that the plaintiff has made by way of deposition testimony, an affidavit, or a verified pleading.[730]

A similar foundation is where the plaintiff's Facebook user profile "contained a photograph that was probative of the issue of the extent of her alleged injuries, and it is reasonable to believe that other portions of her Facebook profile may contain further evidence relevant to that issue."[731] Thus, in that case, it was held that at least some of the discovery sought "will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on her claim."[732] Accordingly, Supreme Court was to inspect "all status reports, e-mails, photographs, and videos posted on (the plaintiff's) Facebook profile since the date of the subject accident to determine which of those materials, if any, are relevant to her alleged injuries."[733]

Before the Court of Appeals decided *Forman v. Henkin*, the First Department had conditioned entitlement to social media discovery upon a predicate showing beyond what is typically required to warrant discovery generally. The success of that threshold showing was commonly dependent on what the account holder had chosen to share on the public portion of the social media account.[734] Such a heightened showing is no longer required. Still, cases that directed disclosure upon that standard can be studied as examples of factual records which support a social media discovery demand.

It is thus worth reviewing a June 2017 case titled *Flowers v City of New York*.[735] There, the First Department compelled disclosure upon a "threshold showing that examination of the Facebook accounts will result in the disclosure of relevant evidence bearing on the claim."[736] The context for this decision was an action sounding in wrongful arrest and prosecution. Publicly visible Facebook account information of the plaintiff was justification to turn over some of his non-public Facebook content. The plaintiff was directed "to review and provide or permit access to those Facebook and associated Messenger accounts, including their messenger components, and any deleted materials which contain any information connecting plaintiff to the accounts in question … relevant to his claims that he has had no connection to the apartment searched or the contraband located thereat."[737]

The plaintiff just referenced was also compelled to provide an authorization permitting Facebook to release a photograph of a relative at this apartment since that might support a defense. The information to be released was to include "any metadata associated with the photograph."[738] However, in respect of privacy concerns, this production was "without prejudice to plaintiff seeking… a protective order for expressly identified materials on these Facebook accounts seeking protection from discovery for reasons other than relevancy."[739]

There can be an inverse scenario where a party disputes an allegation that social media account

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content belongs to him, and seeks discovery as to the origin of that content. This kind of issue came before the Appellate Division, Second Department in April 2017.[740] In that case, the plaintiff at a deposition was confronted with printouts of 13 pages that allegedly were from his Facebook account. The printouts appeared to include statements by the plaintiff about visiting a bar, having a great workout, and crossing the Williamsburg Bridge three times. The plaintiff acknowledged that he used a Facebook account in 2010, but denied that the printouts were from his Facebook account and denied that he made the statements.

Toward a potential goal of excluding these social media printouts, the plaintiff demanded information about the individual who obtained that information, and sought to depose that person. Ultimately the plaintiff moved to strike the answer of some of the defendants, and to suppress the transcript of his deposition. While a stricken answer was not warranted, the plaintiff was entitled to the deposition, given that he had no other means to prove or disprove the authenticity of the printouts.[741]

For additional background, see the article by Paul Zola titled "*Obtaining Social Media Evidence During Discovery*" in the Winter 2016 "Defendant" journal,[742] and the article by Andrea M. Alonso and Kevin G. Faley titled "*Social Media and Cell Phone Requests: Not a LOL Matter*" in the Summer 2013 "Defendant" journal.[743]

Social Security Number

The Spring 2005 "Defendant" journal has an article by Sean R. Smith titled "*Discovering Social Security – Discovery of Social Security Numbers in Personal Injury Cases in New York State.*"[744] That article was written more than a decade ago but remains informative. Mr. Smith observed that, surprisingly, the issue of whether a personal injury plaintiff is required to disclose his or her social security number had not been resolved by New York's appellate courts.

One of the Appellate Terms addressed this issue in 2011.[745] According to that court, social security numbers constitute information of a confidential and private nature and so are "generally not discoverable in the absence of a strong showing that the information is indispensable,"[746] i.e. "indispensable to (defendants) in order to obtain information necessary for their defense."[747] However, this court seemed potentially amenable to a demand for a social security number if coupled with "a demand for authorizations to obtain any documents identifiable only by reference to such numbers" or "other showing of relevance or necessity."[748]

In 2013, the topic of a personal injury plaintiff's social security number was germane to a debate about having a supplemental deposition.[749] In her original deposition, the plaintiff had refused to answer certain questions, ostensibly in view of her participation in a U.S. witness protection program. The Second Department directed the supplemental deposition, finding that the facts and circumstances surrounding the plaintiff's entry into the program were material in that litigation. One consideration was that "the information may bear on the plaintiff's credibility in light of the fact she provided differing explanations at her depositions as to why she has two social security numbers."[750]

In practice, a social security number may be listed in a plaintiff's medical records, employment records, W-2 tax records, or another source that a defendant obtains through discovery or investigation. However, if a plaintiff's social security number is unavailable, a defendant seeking its disclosure may need to amass as many justifications as possible. One potential point is that it is needed so a defendant's insurer can fulfill a duty of reporting to the Centers for Medicare & Medicaid Services (CMS), pursuant to Section 111 of the Medicare, Medicaid & SCHIP Extension Act of 2007. Another contention is that a plaintiff should disclose any social security number he has so a defendant can evaluate credibility, by independently investigating whether that plaintiff is indeed associated with that number and/or other social security numbers. The foregoing Second Department case is arguably supportive .[751]

Another consideration is that a plaintiff who alleges loss of enjoyment of life is supposed to provide an authorization for his social security disability records.[752] Those records will presumably if not always reveal the plaintiff's social security number. Some plaintiffs' depositions indicate that they applied for benefits through a governmental agency or intermediary, but cannot specify what

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types of benefits were sought. In this setting, perhaps an authorization with a social security number should be produced so a defendant can inquire of the Social Security Administration. A rationale for obtaining that authorization even from a plaintiff who has denied receipt of such benefits is to verify the accuracy of that representation, given the collateral source rule of CPLR 4545 and common law prohibition of a double recovery.

Spoliation - Standards and Sanctions

"Under the common-law doctrine of spoliation, a party may be sanctioned where it negligently loses or intentionally destroys key evidence."[753] "A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a 'culpable state of mind,' and that 'the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense.'"[754] The standard has also been phrased as "that a litigant intentionally or negligently disposed of critical evidence, and fatally compromised its ability to prove its claim or defense."[755] In one case, the defendants' culpable state of mind was evidenced by their destruction of stairs during a debate about whether the plaintiff had to disclose her expert's name before inspecting the accident scene.[756]

"In the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices."[757] Accordingly, an obligation to preserve potential evidence, such as the condition of an accident scene, may arise once litigation has begun and process has been served.[758] On the other hand, a spoliator may be subject to sanction even if the evidence was destroyed before the spoliator became a party, provided the spoliator was on notice that the evidence might be needed for future litigation.[759] A failure to institute a litigation hold is a factor that can be considered as to whether a spoliator had a culpable state of mind.[760]

When a duty to preserve electronic data had been triggered, failures which would support a finding of gross negligence, and thus likely a spoliation sanction, include "(1) the failure to issue a written litigation hold, when appropriate; (2) the failure to identify all of the key players and to ensure that their electronic and other records are preserved; and (3) the failure to cease the deletion of e-mail."[761]

Where the evidence was intentionally or willfully destroyed, its relevancy is presumed.[762] "On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense."[763]

As for whether or what sanctions should result from spoliation, a court has "broad discretion to provide proportionate relief to a party deprived of lost or destroyed evidence, including the preclusion of proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action."[764]

The Appellate Division "will substitute its judgment for that of the Supreme Court only if that court's discretion was improvidently exercised."[765]

"The nature and severity of the sanction depends upon a number of factors, including, but not limited to, the knowledge and intent of the spoliator, the existence of proof of an explanation for the loss of the evidence, and the degree of prejudice to the opposing party,"[766] and "whether a particular sanction is necessary as a matter of elementary fairness."[767] "The burden is on the party requesting sanctions to make the requisite showing."[768]

Concerning the prejudice factor, a question is whether the movant has shown that the spoliator "fatally compromised its ability to prove its claim or defense."[769] "It is well established that a less drastic sanction than dismissal of the responsible party's pleading may be imposed where the loss does not deprive the nonresponsible party of the means of establishing his or her claim or defense,"[770] i.e. the plaintiff is not "prejudicially bereft."[771]

Accordingly, in one case where a movant plaintiff was not "deprived of his ability to prove his case," a monetary sanction was indicated, rather than the more significant penalty of an adverse finding of prior notice of a defect.[772] And in a scenario

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involving a staircase accident, the First Department declined to sanction a defendant who had failed to preserve video footage of the staircase, where the plaintiff's testimony did not specify a particular defect that caused him to fall.[773] That being so, the plaintiff was not "prejudicially bereft of appropriate means to present a claim with incisive evidence, as required for the imposition of sanctions."[774]

In the aforementioned other staircase accident case, where the defendants destroyed the stairs with a culpable state of mind, the plaintiff was not "prejudicially bereft" since she possessed other evidence of what the condition had been, such as photographs. The appropriate sanction was thus an adverse inference charge at trial.[775] This type of sanction was also imposed on a defendant who failed to preserve video surveillance footage of a plaintiff's accident, in violation of a prior order of preservation.[776]

On the other hand, "when a party negligently loses or intentionally destroys key evidence, thereby depriving the nonresponsible party from being able to prove a claim or defense, the court may impose the sanction of striking the responsible party's pleading."[777] However, a court may impose a less severe sanction, or no sanction, where the missing evidence does not deprive the moving party of the ability to establish the case or defense.[778] That is a scenario where an adverse inference charge may be appropriate.[779] "Furthermore, where the plaintiffs and the defendants are equally affected by the loss of the evidence and neither has reaped an unfair advantage in the litigation, it is improper to dismiss or strike a pleading on the basis of spoliation of evidence."[780]

There are also circumstances where no penalty is indicated at all. For example, "where a party did not discard crucial evidence in an effort to frustrate discovery, and cannot be presumed to be responsible for the disappearance of such evidence, spoliation sanctions are inappropriate."[781] Another example is where the ostensibly aggrieved party is not prejudiced because alternative evidence is or can be made available, such as photographs of the lost item and a deposition of an expert who had inspected it.[782]

Training Materials and Internal Rules

Exchange of employee training materials is sometimes indicated. A potential example is an action against a hospital for medical malpractice, where standards and training provided to nursing staff may be of relevance.[783] Note though that while "a defendant's internal rules may be admissible as evidence of whether reasonable care was exercised,"[784] "where an internal policy exceeds the standard of ordinary care, it cannot serve as a basis for imposing liability."[785]

Vocational Rehabilitation Examination

There is no statutory authority to compel the examination of an adverse party by a non-physician vocational rehabilitation specialist.[786] This does not preclude a court from directing it, however.[787] A defendant can be entitled to have the examination occur, even if the plaintiff has not retained a vocational expert.[788]

The examination may well be appropriate where the plaintiff has "placed his ability to work in controversy by claiming that, as a result of his injuries, he suffered loss of future wages and reduced earning capacity and by testifying at his examination before trial that his future career opportunities were limited."[789] It has been directed where the plaintiff might not resume any form of employment, and future lost wages will comprise a considerable proportion of the total damages.[790] Additional circumstances favoring compulsion of the examination are where the plaintiff did not object when it was noticed or complain that he would be prejudiced or burdened, and no note of issue had been filed.[791]

911 Call Materials

The Second Department in December 2015 directed a County custodian to produce 911 call recordings and records, holding that County Law § 308(4) does not categorically prohibit such disclosure to a civil litigant.[792] County Law § 308(4) states that records of calls made to a municipality's E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or EMS or the like. In this wrongful death case, the claimant had argued that the material should be discoverable under CPLR 3101 since it may reveal why the decedent's vehicle left the roadway, the length of time the vehicle's occupants experienced

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conscious pain and suffering, and the amount of time it took for police to respond to the scene.

The Second Department concluded that the statute is not intended to prohibit the disclosure of matter that is material and relevant in a civil litigation, and accessible by a so-ordered subpoena or directed by a court to be disclosed.[793] It was emphasized that in analogous criminal practice, 911 tapes and records are frequently made available to individual defendants and admitted at trials to describe events as present sense impressions of witnesses, and to identify perpetrators as present sense impressions or as excited utterances.[794]

In June 2017, the Fourth Department likewise held that "County Law § 308 (4) poses no obstacle to the court-ordered discovery of 911 records in a civil lawsuit,"[795] indicating its agreement with the Second Department opinion just summarized. In this Fourth Department matter, the plaintiff's decedent was stranded inside his vehicle due to an intense winter storm, prompting a 911 call at 3:50 a.m. to report his predicament. The dispatcher instructed the decedent to remain in his vehicle, but help did not arrive until 1:37 a.m. the following day, by which time he had died. Given this history, the plaintiff was entitled to disclosure of 911 records pertaining not only to the decedent's situation, but also to other stranded persons at eight specified locations in the decedent's vicinity. The latter 911 records were directed because those records might bear upon the special duty that the defendants allegedly owed to the decedent.[796]

Conclusion

What is gleaned from discovery can substantially influence outcomes in litigation. Thus, unsurprisingly, there has been a persistent flow of appeals involving both common and uncommon discovery disputes. It will always be my hope that the foregoing review has been informative and will enhance your practices.

(Endnotes)

1 The "Defendant" is the journal of the Defense Association of New York ("DANY"). Many past "Defendant" journals are available via links on the "Publications" page of DANY's website: http://defenseassociationofnewyork.org/page-856696.

2 *Soto v. CBS Corporation*, 2018 WL 356292 at *2, 2018 N.Y. Slip Op. 00185 (2d Dept 2018); *Cascade Builders Corp v Rugar*, 154 A.D.3d 1152, 2017 WL 4679925 (3d Dept 2017); *Redmond v. Hanypsiak*, 153 A.D.3d 1374, 61 N.Y.S.3d 134, 136 (2d Dept 2017); *State Farm Mutual Auto Ins Co v. RLC Medical PC*, 150 A.D.3d 1034, 1035, 55 N.Y.S.3d 313 (2d Dept 2017); *Greco v. Wellington Leasing Ltd Partnership*, 144 A.D.3d 981, 982, 43 N.Y.S.3d 64 (2d Dept 2016); *Olympic Realty, LLC v. Open Road of Staten Island, LLC*, 142 A.D.3d 538, 539, 36 N.Y.S.3d 484 (2d Dept 2016); *D'Alessandro v. Nassau Health Care Corp.*, 137 A.D.3d 1195, 1196, 29 N.Y.S.3d 382 (2d Dept 2016). In contrast to actions, there is no disclosure in special proceedings absent leave of court pursuant to CPLR 408, except for notices to admit under CPLR 3123. Factors as to whether disclosure should be granted under CPLR 408 include whether the requested information is material and necessary, whether the request is carefully tailored to obtain the necessary information, and whether undue delay will result from the request. See *Suit-Kote Corp. v. Rivera*, 137 A.D.3d 1361, 26 N.Y.S.3d 642 (3d Dept 2016).

3 *Forman v. Henkin*, 2018 WL 828101 at *2, 2018 N.Y. Slip Op. 01015 (2018); *Advanced Chimney Inc v. Graziano*, 153 A.D.3d 478, 480, 60 N.Y.S.3d 210 (2d Dept 2017); *Berkowitz v. 29 Woodmere Blvd. Owners', Inc.*, 135 A.D.3d 798, 799, 23 N.Y.S.3d 352 (2d Dept 2016); E*remina v. Scparta*, 120 A.D.3d 616, 618, 991 N.Y.S.2d 438 (2d Dept 2014).

4 *Forman v. Henkin*, 2018 WL 828101 at *2 (2018); Redmond, 61 N.Y.S.3d at 136; State Farm Mutual, 150 A.D.3d at 1035; Hackshaw v. Mercy Medical Center, 139 A.D.3d 798, 799, 33 N.Y.S.3d 297 (2d Dept 2016); D'Alessandro, 137 A.D.3d at 1196; see also *Greco*, 144 A.D.3d at 982; *Hayes v. Bette & Cring, LLC*, 135 A.D.3d 1058, 1059, 22 N.Y.S.3d 680 (3d Dept 2016).

5 Forman v. Henkin, 2018 WL 828101 at *2 (2018); *AQ Asset Management LLC v. Levine*, 138 A.D.3d 635, 636, 31 N.Y.S.3d 32 (1st Dept 2016).

6 *Forman v. Henkin*, 2018 WL 828101 at *2 (2018).

7 *Deer Park Associates v. Town of Babylon*, 121 A.D.3d 738, 740, 993 N.Y.S.2d 761 (2d Dept 2014), quoting from CPLR 3120[1][i].

8 See *Hyman v. Pierce*, 2016 WL 7130366 at *1 (3d Dept 2016).

9 *Aalco Transportation & Storage, Inc. v. DeGuara*, 140 A.D.3d 807, 808, 35 N.Y.S.3d 113 (2d Dept 2016).

10 *Abate v. County of Erie*, 152 A.D.3d 177, 182, 54 N.Y.S.3d 821 (4th Dept 2017).

11 *Forman v. Henkin*, 2018 WL 828101 at *2 (2018).

12 *State Farm Mutual*, 150 A.D.3d at 1035; *Aalco*, 140 A.D.3d at 807; *D'Alessandro*, 137 A.D.3d at 1196; *Jordan v. City of New York*, 137 A.D.3d 1084, 27 N.Y.S.3d 656 (2d Dept 2016). See also *JPMorgan Chase Bank Nat Assn v. Levenson*, 149 A.D.3d 1053, 1054, 53 N.Y.S.3d 150 (2d Dept 2017); *Berkowitz*, 135 A.D.3d at 799.

13 *D'Alessandro*, 137 A.D.3d at 1197.

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[14] *Lantigua v. Goldstein*, 149 A.D.3d 1057, 1058, 53 N.Y.S.3d 163 (2d Dept 2017).

[15] *Forman v. Henkin*, 2018 WL 828101 at *2 (2018).

[16] *Accord JPMorgan Chase Bank Nat Assn v. Levenson*, 149 A.D.3d at 1055.

[17] *Nunez v. Laidlaw*, 150 A.D.3d 1124, 1126, 52 N.Y.S.3d 653 (2d Dept 2017).

[18] *Smith v. County of Nassau*, 138 A.D.3d 726, 728, 30 N.Y.S.3d 143 (2d Dept 2016).

[19] See *Vaca v. Village View Housing Corp.*, 2016 WL 7130520 at *1, 2016 N.Y. Slip Op. 08315 (1st Dept 2016).

[20] *Burke v. Arcadis G And M of New York Architectural and Engineering Services PC*, 149 A.D.3d 1514, 1517, 54 N.Y.S.3d 225 (4th Dept 2017).

[21] *AQ Asset Management LLC v. Levine*, 138 A.D.3d 635, 636, 31 N.Y.S.3d 32 (1st Dept 2016), quoting from *Manley v. New York City Housing Auth.*, 190 A.D.2d 600, 601, 593 N.Y.S.2d 808 (1st Dept 1993), in turn quoting from *Ministers of Ref. Prot. Dutch Church v. 198 Broadway*, 59 N.Y.2d 170, 175, 464 N.Y.S.2d 406 (1983).

[22] *Ferrara Bros. Building Materials Corp. v. FMC Construction LLC*, 138 A.D.3d 685, 30 N.Y.S.3d 157 (2d Dept 2016); *Jacobs v. Mostow*, 134 A.D.3d 765, 766, 19 N.Y.S.3d 902 (2d Dept 2015). See also *Mananghaya v Bronx-Lebanon Hosp Center*, 147 A.D.3d 487, 488, 47 N.Y.S.3d 282 (2d Dept 2017).

[23] See *Mananghaya*, 147 A.D.3d at 488.

[24] *Jordan v. City of New York*, 137 A.D.3d 1084, 27 N.Y.S.3d 656 (2d Dept 2016). *Accord Pesce v. Fernandez*, 40 N.Y.S.3d 466, 486, 2016 N.Y. Slip Op. 07172 (2d Dept 2016).

[25] *McMahon v. Cobblestone Lofts Condominium*, 134 A.D.3d 646, 22 N.Y.S.3d 50 (1st Dept 2015). Accord *JPMorgan Chase Bank Nat Assn v. Levenson*, 149 A.D.3d 1053, 1054, 53 N.Y.S.3d 150 (2d Dept 2017).

[26] *Hackshaw v. Mercy Medical Center*, 139 A.D.3d 798, 799, 33 N.Y.S.3d 297 (2d Dept 2016).

[27] *Diaz v. City of New York*, 140 A.D.3d 826, 827, 31 N.Y.S.3d 892 (2d Dept 2016).

[28] *Ural v. Encompass Insurance Co. of America*, 2018 WL 1075348 at *2, 2018 N.Y. Slip Op. 01350 (2d Dept 2018).

[29] *Berkowitz*, 135 A.D.3d at 799.

[30] *STB Investments Corp. v. Sterling & Sterling, Inc.*, 140 A.D.3d 449, 451, 35 N.Y.S.3d 1 (1st Dept 2016).

[31] *Mananghaya*, 147 A.D.3d at 488.

[32] See *SNI / SI Networks LLC v. DIRECTV, LLC*, 132 A.D.3d 616, 18 N.Y.S.3d 342 (1st Dept 2015).

[33] *Id.*

[34] *Hooker v. Magill*, 140 A.D.3d 589, 33 N.Y.S.3d 697 (1st Dept 2016).

[35] Accord *De La Cruz v. Dalmida*, 151 A.D.3d 563, 54 N.Y.S.3d 279 (1st Dept 2017); *Charles Deng Acupuncture PC v. USAA*, 58 Misc.3d 135(A), 2017 WL 6543489 (App Term, 2d Dept 2017).

[36] *State Farm Mutual Auto Ins Co v. RLC Medical PC*, 150 A.D.3d 1034, 1035, 55 N.Y.S.3d 313 (2d Dept 2017); *D'Alessandro*, 137 A.D.3d 1195, 1196-1197, 29 N.Y.S.3d 382; *Pesce*, 40 N.Y.S.3d 466, 468, 2016 N.Y. Slip Op. 07172; *Whitnum v. Plastic and Reconstructive Surgery*, P.C., 142 A.D.3d 495, 496, 36 N.Y.S.3d 470 (2d Dept 2016).

[37] *Whitnum*, 142 A.D.3d at 496.

[38] *Advanced Chimney Inc v. Graziano*, 153 A.D.3d 478, 480, 60 N.Y.S.3d 210 (2d Dept 2017); *D'Alessandro*, 137 A.D.3d 1195, 1196, 29 N.Y.S.3d 382. See also *Forman v. Henkin*, 2018 WL 828101 at *3, 2018 N.Y. Slip Op. 01015 (2018).

[39] *Giamonna v. 72 Mark Lane, LLC*, 143 A.D.3d 941, 942, 40 N.Y.S.3d 453 (2d Dept 2016).

[40] See *Mananghaya*, 147 A.D.3d at 489.

[41] This guide includes a separate section on photographs and video of an incident scene.

[42] Additionally, preliminary conference orders usually enable parties to indicate if any bills of particulars as to claims or defenses have been served, or will be. The statutory authority regarding bills of particulars is CPLR 3041, 3042, 3043 and 3044. It is technically an amplification of a pleading, and, accordingly, is not among the disclosure devices set forth within CPLR Article 31. However, like a discovery device, it can serve as a means for disclosure of information on select subjects, e.g., in personal injury actions, the subjects listed under CPLR 3043. Bills of particulars are discussed later in this article.

[43] CPLR 3102(a) ("Disclosure devices") states: "Information is obtainable by one or more of the following disclosure devices: depositions upon oral questions or without the state upon written questions, interrogatories, demands for addresses, discovery and inspection of documents or property, physical and mental examinations of persons, and requests for admission."

[44] See *Rivera v. Rochester General Health System*, 40 N.Y.S.3d 840, 841, 2016 N.Y. Slip Op. 07460 (4th Dept 2016).

[45] *Rivera*, 40 N.Y.S.3d at 841.

[46] See *Z.D. v. MP Management, LLC*, 150 A.D.3d 550, 551-552, 55 N.Y.S.3d 194 (1st Dept 2017), a case of alleged lead based paint exposure, requiring production of all documents in the defendants' possession relating to lead violations on record in all apartments in the subject buildings.

[47] *Z.D. v. MP Management, LLC*, 150 A.D.3d at 552, quoting from *Rodriguez v. Amigo*, 244 A.D.2d 323, 325, 663 N.Y.S.2d 873 (2d Dept 1997).

[48] *Camara v. Skanska, Inc.*, 150 A.D.3d 548, 549, 55 N.Y.S.3d 27 (1st Dept 2017).

[49] See *Deleonardis v. Hara*, 136 A.D.3d 558, 25 N.Y.S.3d 185 (1st Dept 2016).

[50] *Forman v. Henkin*, 2018 WL 828101 at *3, 2018 N.Y. Slip Op. 01015 (2018).

[51] See also *Stephen v. State of New York*, 117 A.D.3d 820, 820-821, 985 N.Y.S.2d 698 (2d Dept 2014).

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[52] See e.g. *Watson v. City of New York*, 2018 WL 414094 at *3, 2018 N.Y. Slip Op. 00245 (1st Dept 2018); *Abraha v. Adams*, 148 A.D.3d 1730, 1732, 51 N.Y.S.3d 75 (4th Dept 2017); *Stephen v. State of New York*, 117 A.D.3d at 821.

[53] See *Stephen v. State of New York*, 117 A.D.3d at 821.

[54] See *Ural v. Encompass Insurance Co. of America*, 2018 WL 1075348 at *2, 2018 N.Y. Slip Op. 01350 (2d Dept 2018).

[55] *Hackshaw v. Mercy Medical Center*, 139 A.D.3d 798, 799-800, 33 N.Y.S.3d 297 (2d Dept 2016); *Berkowitz v. 29 Woodmere Blvd. Owners, Inc.*, 135 A.D.3d 798, 799, 23 N.Y.S.3d 352 (2d Dept 2016); *Ligoure v. City of New York*, 128 A.D.3d 1027, 1028, 9 N.Y.S.3d 678 (2d Dept 2015); see also *Cascardo v. Cascardo*, 136 A.D.3d 729, 24 N.Y.S.3d 742 (2d Dept 2016).

[56] *Ural v. Encompass Insurance Co. of America*, 2018 WL 1075348 at *2.

[57] See *Recine v. City of New York*, 65 N.Y.S.3d 788, 2017 N.Y. Slip Op. 08870 (2d Dept 2017); *Jordan v. City of New York*, 137 A.D.3d 1084, 27 N.Y.S.3d 656 (2d Dept 2016); *McMahon v. Cobblestone Lofts Condominium*, 134 A.D.3d 646, 22 N.Y.S.3d 50 (1st Dept 2015). See also *Hackshaw v. Mercy Medical Center*, 139 A.D.3d 798, 799, 33 N.Y.S.3d 297 (2d Dept 2016); *Maiga Products Corp v United Services Auto Assn*, 57 Misc.3d 127(A), 2017 WL 4105724 at *1 (App Term, 2d Dept 2017).

[58] *Cascardo*, 136 A.D.3d at 729. See also *Zuley v. Elizabeth Wende Breast Care, LLC*, 40 N.Y.S.3d 924, 2016 N.Y. Slip Op. 07524 (4th Dept 2016).

[59] *Hayes v. Bette & Cring, LLC*, 135 A.D.3d 1058, 1059, 22 N.Y.S.3d 680 (3d Dept 2016). See also *Forman v. Henkin*, 2018 WL 828101 at *3 (2018).

[60] *Hayes*, 135 A.D.3d at1059; see also *Rivera*, 40 N.Y.S.3d 840, 841, 2016 N.Y. Slip Op. 07460; *Zuley*, 40 N.Y.S.3d 924, 2016 N.Y. Slip Op. 07524; *Berkowitz*, 135 A.D.3d at 799.

[61] *Cioffi v. S.M. Foods, Inc.*, 142 A.D.3d 520, 522, 36 N.Y.S.3d 475 (2d Dept 2016).

[62] *Forman v. Henkin*, 2018 WL 828101 at *3 (2018).

[63] *Household Finance Realty Corp of New York v Della Cioppa*, 153 A.D.3d 908, 61 N.Y.S.3d 259, 261 (2d Dept 2017); *Z.D. v. MP Management, LLC*, 150 A.D.3d at 551; *Harris v. Christian Church of Canarsie Inc.*, 147 A.D.3d 818, 47 N.Y.S.3d 114 (2d Dept 2017); *Rivera*, 40 N.Y.S.3d at 841. See also *Hawe v. Delmar*, 148 A.D.3d 1788, 1789, 50 N.Y.S.3d 777 (4th Dept 2017); *Zuley*, 40 N.Y.S.3d at 924; *Cioffi*, 142 A.D.3d at 522.

[64] See *Sears Roebuck and Co. v. Vornado Realty Trust*, 2018 WL 1093827 at *1, 2018 N.Y. Slip Op. 01421 (1st Dept 2018).

[65] *Berkowitz*, 135 A.D.3d at 799.

[66] *O'Brien v Village of Babylon*, 153 A.D.3d 547, 60 N.Y.S.3d 92 (2d Dept 2017); *Cascardo*, 136 A.D.3d 729. Accord *State Farm Mutual Auto Ins Co v. RLC Medical PC*, 150 A.D.3d 1034, 55 N.Y.S.3d 313 (2d Dept 2017) (in a declaratory judgment action seeking a judgment of no obligation to pay no-fault insurance claims, the insurer did not demonstrate entitlement to a deposition of the estate of the decedent no-fault benefits recipient).

[67] See *Tuzzolino v. Consolidated Edison Company of New York*, 135 A.D.3d 447, 22 N.Y.S.3d 430 (1st Dept 2016). See also *T.D. Bank, N.A. v. 126 Spruce Street, LLC*, 143 A.D.3d 885, 39 N.Y.S.3d 798 (2d Dept 2016) (declining to prevent non-party discovery).

[68] *JP Morgan Chase Funding Inc. v. Cohan*, 134 A.D.3d 455, 20 N.Y.S.3d 363 (1st Dept 2015) (standard of "concern that competitors may gain some competitive advantage as a result of discovery of secret business procedures and information").

[69] *Rivera*, 40 N.Y.S.3d at 841.

[70] *Id.*

[71] *Washington v. Alpha-K Family Medical Practice, P.C.*, 128 A.D.3d 687, 6 N.Y.S.3d 501 (2d Dept 2015).

[72] See *Venture v Preferred Mut Ins Co.*, 153 A.D.3d 1155, 61 N.Y.S.3d 210 (1st Dept 2017).

[73] *Ligoure*, 128 A.D.3d 1027.

[74] *Venture*, 61 N.Y.S.3d at 214.

[75] *Venture*, 61 N.Y.S.3d at 214. See *Forman v. Henkin*, 2018 WL 828101 at *2, 2018 N.Y. Slip Op. 01015 (2018).

[76] *Venture*, 61 N.Y.S.3d at 214. See *Forman v. Henkin*, 2018 WL 828101 at *2 (2018).

[77] *Washington*, 128 A.D.3d at 687.

[78] See *Paliouras v. Donohue*, 89 A.D.3d 1070, 1071, 933 N.Y.S.2d 618 (2d Dept 2011).

[79] See *Dillenbeck v. Hess*, 73 N.Y.2d 278, 280-281, 539 N.Y.S.2d 707 (1989); *D'Angelo v. Litterer*, 77 A.D.3d 1373, 1374, 907 N.Y.S.2d 917 (4th Dept 2010).

[80] See *Washington*, 128 A.D.3d at 687.

[81] See *Graziano v. Cagan*, 105 A.D.3d 701, 702, 962 N.Y.S.2d 643 (2d Dept 2013).

[82] *Spencer v. Willard J. Price Associates*, 155 A.D.3d 592, 63 N.Y.S.3d 854 (1st Dept 2017).

[83] See *Velez v. Daar*, 41 A.D.3d 164, 165, 838 N.Y.S.2d 44 (1st Dept 2007).

[84] *Manufacturers and Traders Trust Company v. Client Server Direct Inc.*, 156 A.D.3d 1364 at *3, 2017 WL 6546229 (4th Dept 2017).

[85] *Abraha v. Adams*, 148 A.D.3d 1730, 1731, 51 N.Y.S.3d 75 (4th Dept 2017).

[86] See *Smith v.Watson*, 150 A.D.3d 487, 488, 51 N.Y.S.3d 888 (1st Dept 2017).

[87] See *Smith v.Watson*, 150 A.D.3d at 488.

[88] *Burke v. Arcadis G And M of New York Architectural and Engineering Services PC*, 149 A.D.3d 1514, 1517, 54 N.Y.S.3d 225 (4th Dept 2017).

[89] *State v. Baumslag*, 134 A.D.3d at 452. See also *Venture*, 61 N.Y.S.3d at 214, which was a controversy as to whether an attorney was functioning as counsel for a party rather than as a claims investigator.

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[90] *Venture*, 61 N.Y.S.3d at 214; *Cioffi v. S.M. Foods, Inc.*, 142 A.D.3d 520, 522, 36 N.Y.S.3d 475 (2d Dept 2016).

[91] *Cioffi*, 142 A.D.3d at 523.

[92] *Micro-Link LLC v. Town of Amherst*, 2017 WL 5506603 at *3, 2017 N.Y. Slip Op. 08120 (4th Dept 2017)

[93] *Cascade Builders Corp v. Rugar*, 154 A.D.3d 1152, 2017 WL 4679925 at *2 (3d Dept 2017)

[94] See *Daniels v Armstrong*, 42 A.D.3d 558, 840 N.Y.S.2d 409 (2d Dept 2007).

[95] *Micro-Link LLC*, 2017 WL 5506603.

[96] See *Mananghaya v Bronx-Lebanon Hosp Center*, 147 A.D.3d 487, 489, 47 N.Y.S.3d 282 (2d Dept 2017). See also *Cascade Builders*, 2017 WL 4679925 at *2.

[97] *Ligoure*, 128 A.D.3d at 1028.

[98] *Micro-Link LLC*, 2017 WL 5506603 at *3; *Mananghaya*, 147 A.D.3d at 489. See also *Cascade Builders*, 2017 WL 4679925 at *2.

[99] *Micro-Link LLC*, 2017 WL 5506603 at *3; *Ligoure*, 128 A.D.3d at 1028. See also *State v. Baumslag*, 134 A.D.3d 451, 452, 21 N.Y.S.3d 51 (1st Dept 2015) (investigator work product not privileged absent evidence that the investigator's interviews were conducted in anticipation of litigation).

[100] *Micro-Link LLC*, 2017 WL 5506603 at *3. See also *Advanced Chimney Inc v. Graziano*, 153 A.D.3d 478, 480, 60 N.Y.S.3d 210 (2d Dept 2017).

[101] *Cascade Builders*, 2017 WL 4679925 at *2.

[102] *Mananghaya*, 147 A.D.3d at 489. See also *Cascade Builders*, 2017 WL 4679925 at *2.

[103] *Curci v. Foley*, 149 A.D.3d 1388, 1388-1389, 52 N.Y.S.3d 578 (3d Dept 2017).

[104] *Curci v. Foley*, 149 A.D.3d at 1389.

[105] *Cascade Builders*, 2017 WL 4679925 at *2.

[106] *Cascade Builders*, 2017 WL 4679925 at *2; *Advanced Chimney Inc v. Graziano*, 153 A.D.3d at 480. See also *Venture*, 61 N.Y.S.3d at 214.

[107] *Advanced Chimney Inc v. Graziano*, 153 A.D.3d at 480.

[108] *Curci v. Foley*, 149 A.D.3d at 1389.

[109] *Micro-Link LLC*, 2017 WL 5506603 at *4; *Daniels v Armstrong*, 42 A.D.3d at 558. See also *Curci v. Foley*, 149 A.D.3d at 1389.

[110] See *Micro-Link LLC*, 2017 WL 5506603 at *4.

[111] See *Curci v. Foley*, 149 A.D.3d at 1389-1390.

[112] *Curci v. Foley*, 149 A.D.3d 1388, 52 N.Y.S.3d 578 (3d Dept 2017).

[113] *Curci v. Foley*, 149 A.D.3d at 1389.

[114] *Curci v. Foley*, 149 A.D.3d at 1390.

[115] *Gabriels v. Vassar Brothers Hospital*, 135 A.D.3d 903, 905, 24 N.Y.S.3d 189 (2d Dept 2016).

[116] *Gabriels*, 135 A.D.3d at 905.

[117] *Cascardo*, 136 A.D.3d 729. See also *Anderson v. State of New York*, 134 A.D.3d 1061, 21 N.Y.S.3d 356 (2d Dept 2015), and *T.D. Bank, N.A. v. 126 Spruce Street, LLC*, 143 A.D.3d 885 (unsuccessful motion to quash).

[118] *Z.D. v. MP Management, LLC*, 150 A.D.3d 550, 552, 55 N.Y.S.3d 194 (1st Dept 2017).

[119] See e.g. *Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d 201, 959 N.Y.S.2d 74 (2d Dept 2012) (eyewitnesses and photographs), and *Dunson v. Riverbay Corp.*, 103 A.D.3d 578, 960 N.Y.S.2d 40 (1st Dept 2013) (notice witness).

[120] See *Brown v. Howson*, 129 A.D.3d 570, 12 N.Y.S.2d 54 (1st Dept 2015).

[121] Corex-SPA v Janel Group of New York Inc., 2017 WL 6029700 at *1, 2017 N.Y. Slip Op. 08502 (2d Dept 2017).

[122] *Alcor Life Extension Foundation v. Johnson*, 136 A.D.3d 464, 24 N.Y.S.3d 629 (1st Dept 2016).

[123] See *Deutsche Bank National Trust Co. v. Brewton*, 142 A.D.3d 683, 686, 37 N.Y.S.3d 25 (2d Dept 2016).

[124] *Rodriguez v. DeStefano*, 72 A.D.3d 926, 898 N.Y.S.2d 495 (2d Dept 2010). See also *Salameh v Yarkovski*, 2017 N.Y. Slip Op. 08547, 64 N.Y.S.3d 569 (2d Dept 2017); *Churaman v. C&B Electric, Plumbing & Heating, Inc.*, 142 A.D.3d 485, 486, 35 N.Y.S.3d 716 (2d Dept 2016); *Herrera v. Gargiso*, 140 A.D.3d 1122, 1123, 34 N.Y.S.3d 498 (2d Dept 2016); *Dhanlaxmi, Inc. v. Schiller*, 119 A.D.3d 728, 989 N.Y.S.2d 329 (2d Dept 2014).

[125] *Churaman*, 142 A.D.3d at 486.

[126] *Daniels v. City of New York*, 117 A.D.3d 981, 986 N.Y.S.2d 516 (2d Dept 2014).

[127] *Figueroa v. MTLR Corp.*, 157 A.D.3d 861, 2018 WL 522955 at *2 (2d Dept 2018); *Colantonio v. Mercy Medical Center*, 135 A.D.3d 686, 693, 24 N.Y.S.3d 653 (2d Dept 2016); see also *Virkam Construction, Inc. v. Everest National Ins. Co.*, 139 A.D.3d 720, 721, 32 N.Y.S.3d 203 (2d Dept 2016); *Guerrero v. Milla*, 135 A.D.3d 635, 636, 24 N.Y.S.3d 63 (1st Dept 2016).

[128] *Colantonio*, 135 A.D.3d at 693; see *Figueroa*, 2018 WL 522955 at *2; see also *Greener v. Town of Hurley*, 140 A.D.3d 1285, 1286, 33 N.Y.S.3d 515 (3d Dept 2016).

[129] *Virkam*, 139 A.D.3d at 721; see also *Rodriguez v. Gutierrez*, 138 A.D.3d 964, 968, 31 N.Y.S.3d 97 (2d Dept 2016).

[130] See Salameh v Yarkovski, 64 N.Y.S.3d 569.

[131] *Turner v. Butler*, 139 A.D.3d 715, 32 N.Y.S.3d 174 (2d Dept 2016).

[132] See *Sitomer v. Goldweber Epstein*, LLP, 139 A.D.3d 642, 644, 34 N.Y.S.3d 8 (1st Dept 2016).

[133] *US Bank Nat Assn v. Williams*, 153 A.D.3d 650, 57 N.Y.S.3d 430 (2d Dept 2017).

[134] *Accord Dillenbeck v. Hess*, 73 N.Y.2d 278, 280-281, 539 N.Y.S.2d 707 (1989); *D'Angelo v. Litterer*, 77 A.D.3d 1373, 1374, 907 N.Y.S.2d 917 (4th Dept 2010).

[135] See *Doran v. Wells*, 101 A.D.3d 937, 957 N.Y.S.2d 249 (2d Dept 2012).

[136] See *On v. BKO Exp LLC*, 2015 WL 13135005 (Sup Ct, Bronx Cty 2015).

[137] 9 N.Y.3d 393, 850 N.Y.S.2d 345 (2007). See also *Patino v. Carlyle Three LLC*, 148 A.D.3d 1175, 50 N.Y.S.3d 478 (2d

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Dept 2017).

138 *Spencer v. Willard J. Price Associates*, 155 A.D.3d 592, 63 N.Y.S.3d 854 (1st Dept 2017); *O'Brien v Village of Babylon*, 153 A.D.3d 547, 548, 60 N.Y.S.3d 92 (2d Dept 2017). See also *Kenneh v. Jey Livery Service*, 131 A.D.3d 902, 16 N.Y.S.3d 726 (1st Dept 2015).

139 *Graziano v. Cagan*, 105 A.D.3d 701, 702, 962 N.Y.S.2d 643 (2d Dept 2013). See also *O'Brien v Village of Babylon*, 153 A.D.3d 547, 548, 60 N.Y.S.3d 92 (2d Dept 2017); *Jones v. FEGS-WeCARE/Human Resources*, NYC, 139 A.D.3d 627, 628, 30 N.Y.S.3d 860 (1st Dept 2016) (mental condition); *M.C. v. Sylvia Marsh Equities, Inc.*, 103 A.D.3d 676, 959 N.Y.S.2d 280 (2d Dept 2013).

140 *Graziano v. Cagan*, 105 A.D.3d at 702.

141 *Graziano v. Cagan*, 105 A.D.3d at 702.

142 See *Gough v. Panorama Windows, Ltd.*, 133 A.D.3d 526, 19 N.Y.S.3d 169 (1st Dept 2015).

143 *Gough v. Panorama Windows*, Ltd., 133 A.D.3d at 526.

144 *Bravo v. Vargas*, 113 A.D.3d 577, 578, 978 N.Y.S.2d 313 (2d Dept 2014); *O'Rourke v. Chew*, 84 A.D.3d 1193, 1194, 923 N.Y.S.2d 875 (2d Dept 2011). See also *O'Brien v Village of Babylon*, 153 A.D.3d at 548; *Greco v. Wellington Leasing Ltd Partnership*, 144 A.D.3d 981, 982, 43 N.Y.S.3d 64 (2d Dept 2016).

145 *O'Brien v Village of Babylon*, 153 A.D.3d at 548; *Greco*, 144 A.D.3d at 982.

146 *O'Brien v Village of Babylon*, 153 A.D.3d at 548.

147 *Greco*, 144 A.D.3d at 982.

148 Acoustic neuroma, also known as vestibular schwannoma, has been described by the Mayo Clinic as a noncancerous and usually slow-growing tumor that develops on the main (vestibular) nerve leading from the inner ear to the brain.

149 *O'Brien v. Village of Babylon*, 153 A.D.3d at 548-549.

150 Compare the *O'Brien, Greco, Bravo* and *O'Rourke* Second Department opinions with *Spencer v. Willard J. Price Associates, LLC*, 155 A.D.3d 592, 63 N.Y.S.3d 853 (1st Dept 2017), *James v. 1620 Westchester Avenue LLC*, 147 A.D.3d 575, 48 N.Y.S.3d 51 (1st Dept 2017) (with dissent), *Gumbs v. Flushing Town Center III, L.P.*, 114 A.D.3d 573, 981 N.Y.S.2d 394 (1st Dept 2014) (with dissent), and *Bennett v. Gordon*, 99 A.D.3d 539, 952 N.Y.S.2d 166 (1st Dept 2012); but see *Reyes v. Lexington 79th Corp.*, 149 A.D.3d 508, 51 N.Y.S.3d 500 (1st Dept 2017), and but cf. *McGlone v. Port Authority of New York and New Jersey*, 90 A.D.3d 479, 934 N.Y.S.2d 161 (1st Dept 2011).

151 *Reyes v. Lexington 79th Corp.*, 149 A.D.3d 508, 51 N.Y.S.3d 500 (1st Dept 2017).

152 *Reyes*, 149 A.D.3d at 509.

153 See collectively *Greco*, 144 A.D.3d at 982; *Azznara v. Strauss*, 81 A.D.3d 578, 579, 915 N.Y.S.2d 868 (2d Dept 2011); *Steward v. New York City Housing Authority*, 302 A.D.2d 449, 753 N.Y.S. 748 (2d Dept 2003).

154 *Greco*, 144 A.D.3d at 982; *Montalto v. Heckler*, 113 A.D.3d 741, 742, 978 N.Y.S.2d 891 (2d Dept 2014).

155 *Moreira v. M.K. Travel and Transport, Inc.*, 106 A.D.3d 965, 967, 966 N.Y.S.2d 150 (2d Dept 2013).

156 Accord *Azznara v. Strauss*, 81 A.D.3d at 579.

157 See *Graziano v. Cagan*, 105 A.D.3d 701, 962 N.Y.S.2d 643 (2d Dept 2013).

158 See *Vodoff v. Mehmood*, 92 A.D.3d 773, 938 N.Y.S.2d 472 (2d Dept 2012), *Abdalla v. Mazl Taxi, Inc.*, 66 A.D.3d 803, 887 N.Y.S.2d 250 (2d Dept 2009), and *Amoroso v. City of New York*, 66 A.D.3d 618, 887 N.Y.S.2d 163 (2d Dept 2009).

159 *Amoroso*, 66 A.D.3d at 618.

160 *Amoroso*, 66 A.D.3d at 618.

161 *O'Brien v Village of Babylon*, 153 A.D.3d 547, 548, 60 N.Y.S.3d 92 (2d Dept 2017); *Montalto v. Heckler*, 113 A.D.3d 741, 978 N.Y.S.2d 891 (2d Dept 2014); *M.C. v. Sylvia Marsh Equities, Inc.*, 103 A.D.3d 676, 679, 959 N.Y.S.2d 280 (2d Dept 2013).

162 See *Morales v. Sid Farber Enterprises, LLC*, 140 A.D.3d 718, 30 N.Y.S.3d 906 (2d Dept 2016).

163 *Bravo v. Vargas*, 113 A.D.3d 577, 578, 978 N.Y.S.2d 313 (2d Dept 2014).

164 *M.C. v. Sylvia Marsh Equities, Inc.*, 103 A.D.3d at 679.

165 *Colwin v. Katz*, 102 A.D.3d 449, 961 N.Y.S.2d 2 (1st Dept 2013).

166 *Colwin v. Katz*, 102 A.D.3d at 449.

167 *McGlone v. Port Authority of New York and New Jersey*, 90 A.D.3d 479, 480, 934 N.Y.S.2d 161 (1st Dept 2011).

168 *McGlone*, 90 A.D.3d at 480.

169 *McGlone*, 90 A.D.3d at 480, citing *Rega v. Avon Products, Inc.*, 49 A.D.3d 329, 330, 854 N.Y.S.2d 688 (1st Dept 2008) (involving alleged permanent partial disability).

170 See *Shamicka R. v. City of New York*, 117 A.D.3d 574, 985 N.Y.S.2d 569 (1st Dept 2014).

171 *Gutierrez v. Trillium USA, LLC*, 111 A.D.3d 669, 672, 974 N.Y.S.2d 563 (2d Dept 2013).

172 See *Gutierrez v. Trillium USA, LLC*, 111 A.D.3d at 672.

173 *Reyes v. Lexington 79th Corp.*, 149 A.D.3d 508, 509, 51 N.Y.S.3d 500 (1st Dept 2017). Accord *Jones v. FEGS-WeCARE/Human Resources*, NYC, 139 A.D.3d 627, 628, 30 N.Y.S.3d 860 (1st Dept 2016).

174 *Reyes*, 149 A.D.3d at 509.

175 *Almonte v. Mancuso*, 132 A.D.3d 529, 17 N.Y.S.3d 857 (1st Dept 2015).

176 *Singh v. Singh*, 51 A.D.3d 770, 771, 857 N.Y.S.2d 707 (2d Dept 2008).

177 See *McKanic v. Amigos del Museo del Barrio*, 74 A.D.3d 639, 903 N.Y.S.2d 394 (1st Dept 2010).

178 *JP Morgan Chase Funding Inc. v. Cohan*, 134 A.D.3d 455, 20 N.Y.S.3d 363 (1st Dept 2015).

179 *Deleonardis v. Hara*, 136 A.D.3d 558, 25 N.Y.S.3d 185 (1st Dept 2016).

180 *Cea v. Zimmerman*, 110 A.D.3d 1027, 974 N.Y.S.2d 264 (2d Dept 2013), and 142 A.D.3d 941, 38 N.Y.S.3d 205 (2d Dept 2016).

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[181] *Cea*, 110 A.D.3d at 1027-1028.
[182] *Cea*, 142 A.D.3d at 943.
[183] *Doe v. New York City Police Dept*, 2017 WL 6375439, 2017 N.Y. Slip Op. 08734 (1st Dept 2017).
[184] *Doe v. New York City Police Dept*, 2017 WL 6375439 at *1.
[185] *Doe v. New York City Police Dept*, 2017 WL 6375439 at *1.
[186] *Kaous v. Lutheran Medical Center*, 138 A.D.3d 1065, 1068, 30 N.Y.S.3d 663 (2d Dept 2016).
[187] *Kaous*, 138 A.D.3d at 1068.
[188] *Olympic Realty, LLC v. Open Road of Staten Island, LLC*, 142 A.D.3d 538, 539-540, 36 N.Y.S.3d 484 (2d Dept 2016).
[189] *Olympic Realty, LLC*, 142 A.D.3d at 540.
[190] *Olympic Realty, LLC* 142 A.D.3d at 540.
[191] See *Malek v. Village of Depew*, 156 A.D.3d 1412, 65 N.Y.S.3d 843 (4th Dept 2017).
[192] Additionally, where negligence in the use or operation of a motor vehicle in New York and Insurance Law 5104(a) are involved, a defendant may require particulars as to in what respect the plaintiff has sustained a "serious injury" as defined in Insurance Law 5102(d), or economic loss greater than basic economic loss as defined in Insurance Law 5102(a).
[193] *Gomez v. City of New York*, 138 A.D.3d 487, 487-488, 30 N.Y.S.3d 616 (1st Dept 2016).
[194] *Rocha v GRT Const of New York*, 145 A.D.3d 926, 44 N.Y.S.3d 149, 152 (2d Dept 2016); *Lynch v. Baker*, 138 A.D.3d 695, 697, 30 N.Y.S.3d 126 (2d Dept 2016); *Garguilo v. Port Authority of New York & New Jersey*, 137 A.D.3d 708, 30 N.Y.S.3d 3 (1st Dept 2016); see also *Schiff v. ABI One LLC*, 2017 WL 5707519, 2017 N.Y. Slip Op. 08312 (1st Dept 2017), *Bagan v. Tomer*, 139 A.D.3d 577, 30 N.Y.S.3d 816 (1st Dept 2016), and *Doe v. Rochester City School Dist.*, 137 A.D.3d 1761, 1763, 28 N.Y.S.3d 175 (4th Dept 2016) (leave shall be freely given "unless prejudice would result to the nonmoving party or the proposed amendment is lacking in merit").
[195] *Rocha*, 145 A.D.3d 926, 44 N.Y.S.3d at 152.
[196] *Lynch*, 138 A.D.3d at 698.
[197] *Henchy v VAS Express Corp.*, 115 A.D.3d 478, 480, 981 N.Y.S.2d 418 (1st Dept 2014); compare *Vishevnik v Bouna*, 2017 WL 705715, 2017 N.Y. Slip Op. 01467 (1st Dept 2017).
[198] *Schiff*, 2017 WL 5707519; *Flowers v. 73rd Townhouse LLC*, 149 A.D.3d 420, 52 N.Y.S.3d 81 (1st Dept 2017).
[199] *Henchy*, 115 A.D.3d at 479-480.
[200] See *Rocha*, 145 A.D.3d 926.
[201] See *Kelly v. City of New York*, 134 A.D.3d 676, 678, 20 N.Y.S.3d 572 (2d Dept 2015).
[202] *Kelly*, 134 A.D.3d at 678.
[203] *Id.*; see also *Finocchi v. Live Nation, Inc.*, 141 A.D.3d 1092, 1094, 34 N.Y.S.3d 840 (4th Dept 2016), and *Hernandez v. Callen*, 134 A.D.3d 654, 21 N.Y.S.3d 621, 622 (1st Dept 2015).
[204] *Reuling v. Consolidated Edison Company of New York*, Inc., 138 A.D.3d 439, 440, 30 N.Y.S.3d 605 (1st Dept 2016).
[205] *Garguilo*, 137 A.D.3d at 708.
[206] *Canals v. Lai*, 132 A.D.3d at 626-627 (2d Dept 2015).
[207] *Garguilo*, 137 A.D.3d at 708; see also *Jenkins v. North Shore Long Island Jewish Health Systems, Inc.*, 41 N.Y.S.3d 119, 2016 N.Y. Slip Op. 07624 (2d Dept 2016), and *Reuling*, 138 A.D.3d at 440.
[208] *Gomez*, 138 A.D.3d at 488; see also *Garguilo*, 137 A.D.3d at 708.
[209] *Id.*
[210] *Garguilo*, 137 A.D.3d at 708.
[211] *Reuling*, 138 A.D.3d at 440.
[212] *Id.*
[213] *Id.*; see also Jenkins, 41 N.Y.S.3d at 119; *Farris v. Dupret*, 138 A.D.3d 565, 29 N.Y.S.3d 366 (1st Dept 2016); *Canals v. Lai*, 132 A.D.3d 626, 17 N.Y.S.3d 311 (2d Dept 2015).
[214] *Jenkins*, 41 N.Y.S.3d at 119; *Stamps v. Pudetti*, 137 A.D.3d 1755, 1756, 28 N.Y.S.3d 539 (4th Dept 2016).
[215] *Flowers v. 73rd Townhouse LLC*, 149 A.D.3d at 421; see also *Heaney v Hospital for Special Surgery*, 54 Misc.3d 135(A), 2017 WL 390823 (App Term, 1st Dept 2017).
[216] *Stamps*, 137 A.D.3d at 1756.
[217] *Id.*
[218] *Alicino v. Rochdale Village, Inc.*, 142 A.D.3d 937, 939, 37 N.Y.S.3d 557 (2d Dept 2016).
[219] *Weinberger v. New York State Olympic Regional Dev. Auth.*, 133 A.D.3d 1006, 19 N.Y.S.3d 625 (3d Dept 2015).
[220] See *Reuling*, 138 A.D.3d at 440; *Lewis v. New York City Housing Auth.*, 135 A.D.3d 444, 445, 24 N.Y.S.3d 16 (1st Dept 2016).
[221] See *Atkins v. Beth Abraham Health Services*, 133 A.D.3d 491, 492, 20 N.Y.S.3d 33 (1st Dept 2015); accord *Siegfried v West 63 Empire Associates LLC*, 145 A.D.3d 456, 457, 43 N.Y.S.3d 33 (1st Dept 2016).
[222] See *Boone v. Elizabeth Taxi, Inc.*, 120 A.D.3d 1143, 1144, 993 N.Y.S.2d 302 (1st Dept 2014).
[223] See *Stemps v. Pudetti*, 137 A.D.3d 1755, 1756, 28 N.Y.S.3d 539 (4th Dept 2016).
[224] *Sacino v. Warwick Valley Cent. School Dist.*, 138 A.D.3d 717, 719-720, 29 N.Y.S.3d 57 (2d Dept 2016); *Begley v. City of New York*, 111 A.D.3d 5, 35, 972 N.Y.S.2d 48 (2d Dept 2013).
[225] *Sacino*, 138 A.D.3d at 720; see also *Begley*, 111 A.D.3d at 35.
[226] *Shanoff v. Golyan*, 139 A.D.3d 932, 934, 34 N.Y.S.3d 78 (2d Dept 2016).
[227] *Paterra v. Arc Development LLC*, 136 A.D.3d 474, 475, 24 N.Y.S.3d 631 (1st Dept 2016).
[228] *Id.*
[229] *Paterra*, 136 A.D.3d at 474-475.
[230] *Thomas v. New York City Housing Auth.*, 25 N.Y.3d 1087, 12 N.Y.S.3d 617 (2015).
[231] *Lewis v. New York City Housing Auth.*, 135 A.D.3d 444, 445, 24 N.Y.S.3d 16 (1st Dept 2016).

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[232] *Id.*

[233] *Sealy v. Uy*, 132 A.D.3d 839, 840, 18 N.Y.S.3d 160 (2d Dept 2015).

[234] *Sealy v. Uy*, 132 A.D.3d at 840,

[235] See *D'Alessandro v. Nassau Health Care Corp.*, 137 A.D.3d 1195, 29 N.Y.S.3d 382 (2d Dept 2016).

[236] *D'Alessandro*, 137 A.D.3d at 1196.

[237] *D'Alessandro*, 137 A.D.3d at 1196-1197.

[238] See *Gough v. Panorama Windows, Ltd.*, 133 A.D.3d 526, 19 N.Y.S.3d 169 (1st Dept 2015).

[239] See the "Publications" page of DANY's website: http://defenseassociationofnewyork.org/page-856696.

[240] See *Sears Roebuck and Co. v. Vornado Realty Trust*, 2018 WL 1093827 at *1, 2018 N.Y. Slip Op. 01421 (1st Dept 2018).

[241] See *Redmond v Hanypsiak*, 153 A.D.3d 1374, 61 N.Y.S.3d 134 (2d Dept 2017).

[242] Accord *Del Vecchio v. Danielle Associates LLC*, 94 A.D.3d 941, 942, 942 N.Y.S.2d 217 (2d Dept 2012).

[243] *Eremina v. Scparta*, 120 A.D.3d 616, 991 N.Y.S.2d 438 (2d Dept 2014).

[244] *Eremina*, 120 A.D.3d at 618.

[245] *Eremina*, 120 A.D.3d at 618.

[246] *Sealy v. Uy*, 132 A.D.3d at 840, quoting *Gibbs v. St. Barnabus Hosp.*, 16 N.Y.3d 74, 81, 917 N.Y.S.2d 68 (2010).

[247] *De Leo v. State-Whitehall Co.*, 126 A.D.3d 750, 752, 5 N.Y.S.3d 277 (2d Dept 2015), which also notes that striking a pleading is a "drastic remedy."

[248] *Caban v. Rzak Development Inc.*, 132 A.D.3d 937, 18 N.Y.S.3d 358 (2d Dept 2015).

[249] *CEMD Elevator Corp. v. Metrotech LLC I*, 141 A.D.3d 451, 454, 35 N.Y.S.3d 336 (1st Dept 2016).

[250] See *Hasan v. 18–24 Luquer Street Realty, LLC*, 2016 WL 6465483, 2016 N.Y. Slip Op. 07160 (2d Dept 2016).

[251] *Hasan*, 2016 WL 6465483 at *2.

[252] *Hasan*, 2016 WL 6465483 at *2.

[253] See *Pezhman v. Chanel, Inc.*, 135 A.D.3d 596, 25 N.Y.S.3d 75, 76 (1st Dept 2016).

[254] *Cea v. Zimmerman*, 142 A.D.3d 941, 944, 38 N.Y.S.3d 205 (2d Dept 2016); *Schiavone v. Keyspan Energy Delivery NYC*, 89 A.D.3d 916, 917, 933 N.Y.S.2d 310 (2d Dept 2011). See *O'Brien v Village of Babylon*, 153 A.D.3d 547, 60 N.Y.S.3d 92 (2d Dept 2017).

[255] *Cea*, 142 A.D.3d at 944.

[256] See *Citibank, N.A. v. Bravo*, 140 A.D.3d 1434, 1435, 34 N.Y.S.3d 678 (3d Dept 2016), citing CPLR 3106(d).

[257] See *Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.*, 41 A.D.3d 362, 363, 841 N.Y.S.2d 225 (1st Dept 2007), citing CPLR 3101(a)(1). See also *O'Brien v Village of Babylon*, 153 A.D.3d at 547 (general manager deponent on behalf of two corporate entities).

[258] *Those Certain Underwriters at Lloyds*, 41 A.D.3d at 363.

[259] *McHugh v. City of New York*, 150 A.D.3d 561, 55 N.Y.S.3d 29 (1st Dept 2017).

[260] *McHugh*, 150 A.D.3d at 562.

[261] 22 NYCRR 221.1(a).

[262] 22 NYCRR 221.1(b).

[263] 22 NYCRR 221.1(b).

[264] 22 NYCRR 221.2.

[265] 22 NYCRR 221.2.

[266] *Kaye v. Tee Bar Corp.*, 151 A.D.3d 1530, 58 N.Y.S.3d 695 (3d Dept 2017).

[267] *Kaye*, 151 A.D.3d at 1531. See also *Lieblich v. Saint Peter's Hosp. of the City of Albany*, 112 A.D.3d 1202, 1204, 977 N.Y.S.2d 780 (3d Dept 2013).

[268] *Kaye*, 151 A.D.3d at 1531.

[269] See *Kaye*, 151 A.D.3d at 1531.

[270] *Kaye*, 151 A.D.3d at 1531-1532.

[271] *Kaye*, 151 A.D.3d at 1532.

[272] *Kaye*, 151 A.D.3d at 1532.

[273] See *Kaye*, 151 A.D.3d at 1532.

[274] *Hann v. Black*, 96 A.D.3d 1503, 946 N.Y.S.2d 722 (4th Dept 2012), citing *McGowan v. Eastman*, 291 N.Y. 195, 198, 2 N.E.2d 625 (1936).

[275] See *Hann v. Black*, 96 A.D.3d 1503.

[276] *Schiavone v. Keyspan Energy Delivery NYC*, 89 A.D.3d at 917.

[277] *O'Brien v Village of Babylon*, 153 A.D.3d 547, 60 N.Y.S.3d 92 (2d Dept 2017) (declining to compel depositions of three witnesses after a general manager had been deposed); *Cea*, 142 A.D.3d at 944.

[278] See *Dominguez v. OCG, IV, LLC*, 82 A.D.3d 434, 918 N.Y.S.2d 406 (1st Dept 2011).

[279] *Bravo v. Vargas*, 113 A.D.3d 577, 579, 978 N.Y.S.2d 313 (2d Dept 2014).

[280] See *Morales v. Zherka*, 140 A.D.3d 836, 837, 35 N.Y.S.3d 121 (2d Dept 2016).

[281] See *AQ Asset Management LLC v. Levine*, 138 A.D.3d 635, 31 N.Y.S.3d 32 (1st Dept 2016).

[282] *Doe v. New York City Police Dept*, 2017 WL 6375439 at *1, 2017 N.Y. Slip Op. 08734 (1st Dept 2017).

[283] *Cea v. Zimmerman*, 142 A.D.3d 941, 38 N.Y.S.3d 205 (2d Dept 2016).

[284] *Cea*, 142 A.D.3d at 943-944.

[285] See *Redmond v Hanypsiak*, 153 A.D.3d 1374, 61 N.Y.S.3d 134, 136 (2d Dept 2017).

[286] See *Kaye v. Tee Bar Corp.*, 151 A.D.3d 1530, 58 N.Y.S.3d 695 (3d Dept 2017).

[287] *Kaye v. Tee Bar Corp.*, 151 A.D.3d at 1531, footnote 1.

[288] See *Cascardo v. Cascardo*, 136 A.D.3d 729, 24 N.Y.S.3d 742 (2d Dept 2016) (plaintiff with alleged traumatic brain injury); *Serrano v Lutheran Social Services of Metropolitan New York Inc.*, 122 A.D.3d 608, 996 N.Y.S.2d 91 (2d Dept 2014) (infancy); *Willis v. Cassia*, 255 A.D.2d 800, 801, 680 N.Y.S.2d 313 (3d Dept 1998) (young adult defendant who was age 17 when her underlying auto accident occurred); *Regina v. Day*, 186 A.D.2d 119, 587 N.Y.S.2d 422 (2d Dept 1992) (insufficient mental

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capacity); *Tuohy v. Gaudio*, 87 A.D.2d 610, 611, 448 N.Y.S.2d 42 (2d Dept 1982) (infancy).

289 See *Dufresne-Simmons v. Wingate Russotti and Shapiro LLP*, 53 Misc.3d 598, 39 N.Y.S.3d 621 (Sup Ct, Bronx Cty 2016); *In re Will of Elyachar*, 49 Misc.3d 1108, 16 N.Y.S.3d 450 (Sup Ct, Westchester Cty 2015). Accord *Bundhoo v. Wendy's*, 152 A.D.3d 734, 60 N.Y.S.3d 58 (2d Dept 2017).

290 See *Grabow v Blue Eyes Inc.*, 123 A.D.2d 155, 509 N.Y.S.2d 535 (1st Dept 1986). Accord *Weissman v 20 East 9th Street Corp.*, 48 A.D.3d 242, 852 N.Y.S.2d 67 (1st Dept 2008) (precluding trial evidence of a party's medical condition unless the party attended a defense psychiatric examination by a date certain; mental illness purportedly had been inhibiting attendance of such examination).

291 See *Bundhoo v. Wendy's*, 152 A.D.3d at 736.

292 See *Bundhoo v. Wendy's*, 152 A.D.3d at 736.

293 Accord *Bundhoo v. Wendy's*, 152 A.D.3d at 736.

294 *Grabow*, 123 A.D.2d 155.

295 *Cascardo*, 136 A.D.3d at 729.

296 See *Regina v. Day*, 186 A.D.2d at 119.

297 *Grabow*, 123 A.D.2d at 157.

298 *Dufresne-Simmons*, 53 Misc.3d at 605.

299 *In re Will of Elyachar*, 49 Misc.3d at 1111.

300 See *Regina v. Day*, 186 A.D.2d at 119; *Tuohy v. Gaudio*, 87 A.D.2d at 611; *Dufresne-Simmons*, 53 Misc.3d at 604.

301 See *Serrano*, 122 A.D.3d at 609.

302 *Dufresne-Simmons*, 53 Misc.3d at 604-605. See also *Regina v. Day*, 186 A.D.2d 119; *Tuohy v. Gaudio*, 87 A.D.2d at 611; *Carrasquillo ex rel Carrasquillo v. City of New York*, 22 Misc.3d 171, 175, 866 N.Y.S.2d 509 (Sup Ct, Kings Cty 2008).

303 *People v. Brown*, 89 A.D.3d 1473, 1474, 932 N.Y.S.2d 653 (4th Dept 2011).

304 *Sadhwani v New York City Transit Authority*, 66 A.D.3d 405, 890 N.Y.S.2d 458 (1st Dept 2009).

305 See *Baribault v. Sauvola*, 101 A.D.3d 865, 955 N.Y.S.2d 406 (2d Dept 2012); *Sadhwani*, 66 A.D.3d at 405.

306 *Sadhwani*, 66 A.D.3d 405.

307 *Sadhwani*, 66 A.D.3d at 405-406.

308 *Sadhwani*, 66 A.D.3d at 406.

309 *Sadhwani*, 66 A.D.3d at 406.

310 *Willis v. Cassia*, 255 A.D.2d 800, 801, 680 N.Y.S.2d 313 (3d Dept 1998).

311 *In re Will of Elyachar*, 49 Misc.3d at 1113.

312 *Cascardo*, 136 A.D.3d at 730.

313 *Dabbagh v. Newmark Knight Frank Global Management Services LLC*, 99 A.D.3d 448, 449, 952 N.Y.S.2d 118 (1st Dept 2012).

314 *Carrasquillo ex rel Carrasquillo*, 22 Misc.3d at 175.

315 *Carrasquillo ex rel Carrasquillo*, 22 Misc.3d at 175.

316 *People v. Brown*, 89 A.D.3d at 1474.

317 *People v. Thompson*, 119 A.D.3d 966, 967, 989 N.Y.S.2d 881 (2d Dept 2014).

318 *Carrasquillo ex rel Carrasquillo*, 22 Misc.3d at 175.

319 *Carrasquillo ex rel Carrasquillo*, 22 Misc.3d at 175.

320 *Carrasquillo ex rel Carrasquillo*, 22 Misc.3d at 176.

321 *Brian VV v. Chenango Forks Cent School Dist.*, 299 A.D.2d 803, 804, 751 N.Y.S.2d 59 (3d Dept 2002).

322 *Brian VV*, 299 A.D.2d at 804.

323 *Serrano v Lutheran Social Services of Metropolitan New York Inc.*, 122 A.D.3d 608, 609, 996 N.Y.S.2d 91 (2d Dept 2014).

324 *Brian VV*, 299 A.D.2d at 804.

325 Accord *Tirado v. Miller*, 75 A.D.3d 153, 162, 901 N.Y.S.2d 358 (2d Dept 2010).

326 See *Massa v. Lower Manhattan Dev. Corp.*, 142 A.D.3d 927, 928, 37 N.Y.S.3d 893 (1st Dept 2016).

327 *Sciara v. Surgical Associates of Western New York PC,* 104 A.D.3d 1256, 1257, 961 N.Y.S.2d 640 (4th Dept 2013).

328 *Sciara*, 104 A.D.3d at 1257.

329 See *Gonzalez v. 231 Ocean Associates*, 131 A.D.3d 871, 16 N.Y.S.3d 542 (1st Dept 2015).

330 *Gabriel v. Johnston's L.P. Gas Service*, Inc., 98 A.D.3d 168, 175, 947 N.Y.S.2d 716 (4th Dept 2012).

331 *Born to Build, LLC v. Saleh*, 115 A.D.3d 780, 781, 982 N.Y.S.2d 355 (2d Dept 2014).

332 *Gabriel*, 98 A.D.3d at 176.

333 *Feng Wang v. A & W Travel, Inc.*, 130 A.D.3d 974, 976, 14 N.Y.S.3d 459 (2d Dept 2015); *Yu Hui Chen v. Chen Li Zhi*, 81 A.D.3d 818, 819, 916 N.Y.S.2d 525 (2d Dept 2011).

334 *Torres v. Board of Education of City of New York*, 137 A.D.3d 1256, 1257, 29 N.Y.S.3d 396 (2d Dept 2016).

335 *Torres*, 137 A.D.3d at 1257.

336 *Cataudella v. 17 John Street Associates, LLC*, 140 A.D.3d 508, 35 N.Y.S.3d 304 (1st Dept 2016).

337 *Torres*, 137 A.D.3d at 1257.

338 *Id.*

339 *Tuzzolino v. Consolidated Edison Company of New York*, 135 A.D.3d 447, 448, 22 N.Y.S.3d 430 (1st Dept 2016); *In re New York City Asbestos Litigation*, 87 A.D.3d 467, 468, 928 N.Y.S.2d 513 (1st Dept 2011).

340 See *Carson v. Hutch Metro Center*, 110 A.D.3d 468, 469, 974 N.Y.S.2d 346 (1st Dept 2013).

341 *Tuzzolino*, 135 A.D.3d at 448.

342 *Tuzzolino*, 135 A.D.3d at 448.

343 *In re New York City Asbestos Litigation*, 87 A.D.3d 467.

344 *In re New York City Asbestos Litigation*, 87 A.D.3d at 468.

345 See *Bianchi v. Galster Management Corp.*, 131 A.D.3d 558, 15 N.Y.S.3d 189 (2d Dept 2015).

346 *Bianchi*, 131 A.D.3d at 559.

347 See *Schmitt v. Oneonta City School Dist*, 151 A.D.3d 1254, 155 N.Y.S.3d 834 (3d Dept 2017). See also CPLR 3117(a)(4).

348 See *Schmitt*, 151 A.D.3d 1254.

349 See *Lewis v. New York City Housing Auth.*, 135 A.D.3d 444, 445, 24 N.Y.S.3d 16 (1st Dept 2016). Accord *Reuling v. Consolidated Edison Company of New York, Inc.*, 138 A.D.3d 439, 30 N.Y.S.3d 605 (1st Dept 2016).

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[350] As to an action for medical, dental or podiatric malpractice, see also CPLR 3101(d)(1)(ii). Note also that concerning proposed testimony of a plaintiff's treating physician, the common written framework is that doctor's reporting served pursuant to 22 NYCRR 202.17.

[351] See also *Rivera v. Montefiore Medical Center*, 28 N.Y.3d 999, 41 N.Y.S.3d 454 (2016); *Schmitt v. Oneonta City School Dist*, 151 A.D.3d 1254, 1255, 55 N.Y.S.3d 834 (3d Dept 2017); *Cioffi v. S.M. Foods, Inc.*, 142 A.D.3d 520, 522, 36 N.Y.S.3d 475 (2d Dept 2016).

[352] See *Espinal v. 570 W 156th Associates*, 276 A.D.2d 255, 255-256, 716 N.Y.S.2d 280 (1st Dept 2000). Cf. *Sadek v. Wesley*, 117 A.D.3d 193, 199, 986 N.Y.S.2d 25 (1st Dept 2014).

[353] *Schmitt*, 151 A.D.3d at 1255; compare *Hamer v. City of New York*, 106 A.D.3d 504, 509, 965 N.Y.S.2d 99 (1st Dept 2013); *Jing Xue Jiang v. Dollar Rent a Car, Inc.*, 91 A.D.3d 603, 604, 938 N.Y.S.2d 90 (2d Dept 2012); *Andrew v. Hurh*, 34 A.D.3d 1331, 1331, 824 N.Y.S.2d 546 (4th Dept 2006), *lv. denied* 8 N.Y.3d 808, 834 N.Y.S.2d 89 (2007).

[354] *Jing Xue Jiang*, 91 A.D.3d at 604.

[355] *Hamer*, 106 A.D.3d at 509.

[356] *Hamer*, 106 A.D.3d at 509.

[357] See *Hamer*, 106 A.D.3d at 509, quoting from *Finger v. Brande*, 306 A.D.2d 104, 104, 762 N.Y.S.2d 50 (1st Dept 2003).

[358] See *Schmitt*, 151 A.D.3d at 1256.

[359] See e.g. *Cioffi*, 142 A.D.3d 520.

[360] *Cioffi*, 142 A.D.3d at 522.

[361] *Rivera*, 28 N.Y.3d 999.

[362] *Rivera*, 28 N.Y.3d 999.

[363] *Schmitt*, 151 A.D.3d at 1255.

[364] *Burbige v. Siben & Ferber*, 115 A.D.3d 632, 633, 981 N.Y.S.2d 537 (2d Dept 2014) (allowing expert to testify at a re-trial); *Arcamone-Makinano v. Britton Property, Inc.*, 117 A.D.3d 889, 891, 986 N.Y.S.2d 372 (2d Dept 2014) (same); see also *Inchauspe v. Take On*, LLC, 2016 WL 1590065 (1st Dept 2016); *Frankel v. Vernon & Ginsburg, LLP*, 118 A.D.3d 479, 480, 988 N.Y.S.2d 28 (1st Dept 2014).

[365] See *Ramsen A. v. New York City Housing Auth.*, 112 A.D.3d 439, 976 N.Y.S.2d 73 (1st Dept 2013).

[366] See e.g. *Kane v. Utica First Ins. Co.*, 68 A.D.3d 1667, 890 N.Y.S.2d 878 (4th Dept 2009).

[367] See also *Giles v. A. Gi Yi*, 105 A.D.3d 1313, 964 N.Y.S.2d 319 (4th Dept 2013).

[368] See *Arcamone-Makinano*, 117 A.D.3d at 891.

[369] *Calabrese Bakeries, Inc. v. Rockland Bakery, Inc.*, 139 A.D.3d 1192, 1195, 32 N.Y.S.3d 667 (3d Dept 2016).

[370] See *Burbige v. Siben & Ferber*, 115 A.D.3d at 633; see also *Elgart v. Berezovsky*, 123 A.D.3d 970, 972, 999 N.Y.S.2d 515 (2d Dept 2014); *Arcamone-Makinano.*, 117 A.D.3d at 891; accord *Inchauspe v. Take On*, LLC, 138 A.D.3d 575, 28 N.Y.S.3d 606 (1st Dept 2016) (no prejudice from late disclosure of damages expert where damages trial had not been scheduled yet).

[371] See *Arcamone-Makinano*, 117 A.D.3d at 891.

[372] *Newark v. Pimental*, 117 A.D.3d 581, 986 N.Y.S.2d 89 (1st Dept 2014); see also *Coleman v. New York City Transit Auth.*, 134 A.D.3d 427, 428, 21 N.Y.S.3d 46 (1st Dept 2015).

[373] *Banks v. City of New York*, 92 A.D.3d 591, 939 N.Y.S.2d 39 (1st Dept 2012); see also *Coleman*, 134 A.D.3d at 428.

[374] *Sadek v. Wesley*, 117 A.D.3d 193, 199, 986 N.Y.S.2d 25 (1st Dept 2014).

[375] *Sadek v. Wesley*, 117 A.D.3d 193; this case is an interesting read on several issues relative to expert witnesses.

[376] See *Dedona v. DiRaimo*, 137 A.D.3d 548, 27 N.Y.S.3d 42 (1st Dept 2016); accord *Banks v. City of New York*, 92 A.D.3d at 591.

[377] See *Frankel*, 118 A.D.3d at 479-480.

[378] *Rivera*, 28 N.Y.3d 999.

[379] *Id*.

[380] The full text of CPLR 3212(b) in this regard is as follows: "Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit."

[381] This edition and many other past "Defendant" journals are available via links on the "Publications" page of DANY's website: http://defenseassociationofnewyork.org/page-856696.

[382] See *South Shore Press, Inc. v. Havemeyer*, 136 A.D.3d 929, 25 N.Y.S.3d 303 (2d Dept 2016).

[383] See *Khatibi v. Weill*, 8 A.D.3d 485, 486, 778 N.Y.S.2d 511 (2d Dept 2004).

[384] *South Shore Press, Inc. v. Havemeyer*, 136 A.D.3d at 930-931.

[385] *Abate v. County of Erie*, 152 A.D.3d 177, 183, 154 N.Y.S.3d 821 (4th Dept 2017).

[386] See *Z.D. v. MP Management*, LLC, 150 A.D.3d 550, 552, 55 N.Y.S.3d 194 (1st Dept 2017).

[387] *Smith v.Watson*, 150 A.D.3d 487, 488, 51 N.Y.S.3d 888 (1st Dept 2017).

[388] See *Harris v. Christian Church of Canarsie Inc.*, 147 A.D.3d 818, 47 N.Y.S.3d 114 (2d Dept 2017).

[389] CPLR 3121(a).

[390] CPLR 3121(a).

[391] CPLR 3121(a).

[392] 22 NYCRR 202.17(a).

[393] 22 NYCRR 202.17(b)(1).

[394] 22 NYCRR 202.17(f).

[395] 22 NYCRR 202.17(g).

[396] 22 NYCRR 202.17(h).

[397] 22 NYCRR 202.17(h).

[398] 22 NYCRR 202.17(i).

[399] 22 NYCRR 202.17(k).

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[400] See *Clark v. Allen & Overy, LLP*, 125 A.D.2d 497, 4 N.Y.S.3d 20 (1st Dept 2015).

[401] *Harris v. Christian Church of Canarsie Inc.*, 147 A.D.3d 818, 47 N.Y.S.3d 114 (2d Dept 2017); *Bermejo v. New York City Health and Hospitals Corp.*, 135 A.D.3d 116, 142, 21 N.Y.S.3d 78 (2d Dept 2015); *Rebollo v. Nicholas Cab Corp.*, 125 A.D.3d 452, 2 N.Y.S.3d 471 (1st Dept 2015).

[402] *Brown v. Brink Elevator Corp.*, 125 A.D.3d 421, 998 N.Y.S.2d 884 (1st Dept 2015). Accord *Harris v. Christian Church of Canarsie Inc.*, 147 A.D.3d 818.

[403] *Id*. See also *Daniels v. Rumsey*, 111 A.D.3d 1408, 1409, 975 N.Y.S.2d 303 (4th Dept 2013); *Lewis v. John*, 87 A.D.3d 564, 928 N.Y.S.2d 78 (2d Dept 2011).

[404] *O'Berry v. Gelco Corp.*, 128 A.D.3d 597, 10 N.Y.S.3d 68 (1st Dept 2015).

[405] *Prevost v. One City Block LLC*, 155 A.D.3d 531, 2017 WL 5707587 at *5 (1st Dept 2017).

[406] *Prevost*, 2017 WL 5707587 at *5.

[407] *Ramsen A. v. New York City Housing Auth.*, 112 A.D.3d 439, 440, 976 N.Y.S.2d 73 (1st Dept 2013).

[408] See e.g. *Drame v. Ambulette P.R.N., Inc.*, 137 A.D.3d 631, 26 N.Y.S.3d 853 (1st Dept 2016) (directing a further orthopedic exam and a first-time neurological exam).

[409] *Rebollo v. Nicholas Cab Corp.*, 125 A.D.3d 452, 2 N.Y.S.3d 471 (1st Dept 2015); *Giorgano v. Wei Zian Zhen*, 103 A.D.3d 774, 959 N.Y.S.2d 545 (2d Dept 2013); *Carrington v. Truck-Rite Dist. Systems Corp.*, 103 A.D.3d 606, 607, 959 N.Y.S.2d 258 (2d Dept 2013).

[410] *Giorgano*, 103 A.D.3d at 774; *Carrington*, 103 A.D.3d at 607.

[411] See *Black v. St. Luke's Cornwall Hospital*, 112 A.D.3d 661, 976 N.Y.S.2d 562 (2d Dept 2013); *Hodges v. City of New York*, 22 A.D.3d 525, 802 N.Y.S.2d 231 (2d Dept 2005).

[412] See *Harris v. Christian Church of Canarsie Inc.*, 147 A.D.3d 818, 47 N.Y.S.3d 114 (2d Dept 2017); *Bermejo v. New York City Health and Hospitals Corp.*, 135 A.D.3d at 142; *Giorgano v. Wei Zian Zhen*, 103 A.D.3d 774, 959 N.Y.S.2d 545 (2d Dept 2013).

[413] *Marashaj v. Rubin*, 132 A.D.3d 641, 18 N.Y.S.3d 79 (2d Dept 2015).

[414] *Harris v. Christian Church of Canarsie Inc.*, 147 A.D.3d 818, 47 N.Y.S.3d 114 (2d Dept 2017).

[415] *Harris*, 147 A.D.3d at 819.

[416] *Chaudhary v. Gold*, 83 A.D.3d 477, 921 N.Y.S.2d 219 (1st Dept 2011).

[417] *Feng Wang v. A & W Travel, Inc.*, 130 A.D.3d 974, 977, 14 N.Y.S.3d 459 (2d Dept 2015).

[418] See *Wilkerson v. Korbl*, 75 A.D.3d 470, 471, 905 N.Y.S.2d 167 (1st Dept 2010).

[419] *Feng Wang*, 130 A.D.3d at 977.

[420] 135 A.D.3d 116, 21 N.Y.S.3d 78 (2d Dept 2015).

[421] *Bermejo*, 135 A.D.3d at 119 and 144.

[422] The Bermejo Court noted its review of precedent in other appellate departments and cited *Flores v. Vescera*, 105 A.D.3d 1340, 963 N.Y.S.2d 884 (4th Dept 2013), *Lamendola v. Slocum*, 148 A.D.2d 781, 538 N.Y.S.2d 116 (3d Dept 1989), *Cooper v. McInnes*, 112 A.D.3d 1120, 977 N.Y.S.2d 767 (3d Dept 2013), and *Savarese v. Yonkers Motors Corp.*, 205 A.D.2d 463, 614 N.Y.S.2d 4 (1st Dept 1994).

[423] *Flores v. Vescera*, 105 A.D.3d at 1340, quoting *Lamendola v. Slocum*, 148 A.D.2d at 781.

[424] *Mosel v. Brookhaven Mem. Hosp.*, 134 Misc.2d 73, 509 N.Y.S.2d 754 (Sup Ct / Suffolk Cty 1986).

[425] See *Santana v. Johnson*, 154 A.D.3d 452, 60 N.Y.S.3d 831 (1st Dept 2017); *Marriott v. Cappello*, 151 A.D.3d 1580, 1582, 56 N.Y.S.3d 691 (4th Dept 2017); *Henderson v. Ross*, 147 A.D.3d 915, 916, 47 N.Y.S.3d 136 (2d Dept 2017); *Guerra v. McBean*, 127 A.D.3d 462, 4 N.Y.S.3d 526 (1st Dept 2015); *Cooper v. McInnes*, 112 A.D.3d 1120, 977 N.Y.S.2d 767 (3d Dept 2013).

[426] 154 A.D.3d 452.

[427] *Santana*, 154 A.D.3d at 452, citing *Guerra v. McBean*, 127 A.D.3d 462.

[428] *Henderson v. Ross*, 147 A.D.3d at 916.

[429] 146 A.D.3d 457, 43 N.Y.S.3d 758 (1st Dept 2017).

[430] *Santana*, 154 A.D.3d at 452, citing *Guerra*, 127 A.D.3d 462, *Henderson*, 147 A.D.3d at 916, and *Marriott v. Cappello*, 151 A.D.3d 1582.

[431] *Kattaria*, 146 A.D.3d at 458, citing *Bermejo*, 135 A.D.3d at 145, *Cooper v. McInnes*, 112 A.D.3d at 1121, and *Mertz v. Bradford*, 152 A.D.2d 962, 543 N.Y.S.2d 786 (4th Dept 1989). Bermejo and Cooper had required special and unusual circumstances to warrant videography at a defense medical examination, as discussed here. *Mertz*, 152 A.D.2d at 962-963, held that the plaintiffs "failed to demonstrate special circumstances warranting the presence of either a medical representative or a stenographer at physical examinations to be conducted by doctors designated for that purpose by defendants. We repeat that the examining room should not 'be turned into a hearing room with lawyers and stenographers from both sides participating.' "

[432] *A.W. v. County of Oneida*, 34 A.D.3d 1236, 1238, 827 N.Y.S.2d 790 (4th Dept 2006); accord *Guerra v. McBean*, 127 A.D.3d at 462.

[433] *A.W. v. County of Oneida*, 34 A.D.3d 1236, 1238, 827 N.Y.S.2d 790 (4th Dept 2006); accord *Guerra v. McBean*, 127 A.D.3d at 462; see also *Marriott v. Cappello*, 151 A.D.3d at 1582-1583 (option to "seek guidance from the court before the examination concerning any limitations on plaintiff's right to have a representative present" citing CPLR 3103[a]).

[434] *Tucker v. Bay Shore Stor. Warehouse, Inc.*, 69 A.D.3d 609, 610, 893 N.Y.S.2d 138 (2d Dept 2010); see also *Guerra v. McBean*, 127 A.D.3d at 462-463; *Cooper v. McInnes*, 112 A.D.3d at 1120 (family history).

[435] *Guerra v. McBean*, 127 A.D.3d at 462-463.

[436] *Bermejo*, 135 A.D.3d at 143, quoting *Lamendola v. Slocum*, 148 A.D.2d at 782, and *Jakubowski v. Lengen*, 86 A.D.2d 398, 401, 450 N.Y.S.2d 612 (4th Dept 1982).

[437] *Bermejo*, 135 A.D.3d at 145.

[438] See *Bermejo*, 135 A.D.3d at 119 and 146.

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[439] *Bermejo*, 135 A.D.3d at 146.

[440] *Bermejo*, 135 A.D.3d at 146, citing *Tai Tran v. New Rochelle Hosp. Medical Center*, 99 N.Y.2d 383, 388.

[441] *IME Watchdog, Inc. v. Baker, McEvoy, Morrissey & Moskovits, P.C.*, 145 A.D.3d 464, 44 N.Y.S.3d 9 (1st Dept 2016).

[442] *IME Watchdog*, 2016 WL 7078981 at *1. The First Department did not identify these Supreme Court decisions in this opinion.

[443] *Santana v. Johnson*, 154 A.D.3d at 452.

[444] *Santana v. Johnson*, 154 A.D.3d at 452.

[445] This edition and many other past "Defendant" journals are available via links on the "Publications" page of DANY's website: http://defenseassociationofnewyork.org/page-856696.

[446] See *Gianacopoulos v. Corona*, 133 A.D.3d 565, 18 N.Y.S.3d 558 (2d Dept 2015).

[447] See *Gianacopoulos*, 133 A.D.3d at 565, citing 22 NYCRR 202.21[d]. See also *Prevost v. One City Block LLC*, 155 A.D.3d 531, 2017 WL 5707587 at *5 (1st Dept 2017).

[448] See *Jones v. Grand Opal Constr. Corp.*, 64 A.D.3d 543, 883 N.Y.S.2d 253 (2d Dept 2009). See also *Cabrera v. Abaev*, 150 A.D.3d 588, 588-589, 55 N.Y.S.3d 207 (1st Dept 2017).

[449] *Richbell Information Services, Inc. v. Jupiter Partners L.P.*, 32 A.D.3d 150, 816 N.Y.S.2d 470 (1st Dept 2006).

[450] *Kahn v. Leo Schachter Diamonds, LLC*, 139 A.D.3d 635, 30 N.Y.S.3d 862 (1st Dept 2016).

[451] *Richbell Information Services*, 32 A.D.3d at 155.

[452] *Richbell Information Services*, 32 A.D.3d at 156.

[453] *Richbell Information Services*, 32 A.D.3d at 156; Kahn, 139 A.D.3d at 635.

[454] *Richbell Information Services*, 32 A.D.3d at 159.

[455] See *Williams v. Beemiller, Inc.*, 100 A.D.3d 143, 152, 952 N.Y.S.2d 333 (4th Dept 2012). See also *PD Cargo CA v. Paten Intern SA*, 149 A.D.3d 511, 52 N.Y.S.3d 328 (1st Dept 2017).

[456] *McBride v. KPMG International*, 135 A.D.3d 576, 24 N.Y.S.3d 257 (1st Dept 2016); see also *Williams v. Beemiller*, 100 A.D.3d at 152.

[457] *SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 354, 777 N.Y.S.2d 62 (1st Dept 2004); *Mandel v. Busch Entertainment Corp.*, 215 A.D.2d 455, 626 N.Y.S.2d 270 (2d Dept 1995). See also *Peterson v. Spartan Industries, Inc.*, 33 N.Y.2d 463, 467, 354 N.Y.S.2d 905 (1974); *PD Cargo CA*, 149 A.D.3d at 512; Cotia (USA) *Ltd. v. Lynn Steel Corp.*, 134 A.D.3d 483, 485, 21 N.Y.S.3d 231 (1st Dept 2015); *Williams v. Beemiller*, 100 A.D.3d at 152.

[458] See *Ovcharenko v. 65th Booth Associates*, 131 A.D.3d 1144, 16 N.Y.S.3d 763 (2d Dept 2015).

[459] *Yargeau v. Lasertron*, 74 A.D.3d at 1806.

[460] 22 NYCRR 202.7(c).

[461] *Deutsch v. Grunwald*, 110 A.D.3d 949, 950, 973 N.Y.S.2d 335 (2d Dept 2013); *Natoli v. Milazzo*, 65 A.D.3d 1309, 1310-1311, 886 N.Y.S.2d 205 (2d Dept 2009).

[462] See *Cuprill v. Citywide Towing and Auto Repair Services*, 149 A.D.3d 442, 443, 49 N.Y.S.3d 624 (1st Dept 2017).

[463] See *Jackson v. Hunter Roberts Construction Corp.*, 139 A.D.3d 429, 29 N.Y.S.3d 170 (1st Dept 2016); *Pardo v. O'Halleran Family Chiropractic*, 131 A.D.3d 1214, 16 N.Y.S.3d 781 (2d Dept 2015).

[464] *Jackson*, 139 A.D.3d at 429.

[465] *City of Troy v. Town of Brunswick*, 2016 WL 7129635 at *2, 2016 N.Y. Slip Op. 08280 (3d Dept 2016).

[466] *Rodriguez v. Nevei Bais*, Inc., 2018 WL 1054557 at *1, 2018 N.Y. Slip Op. 01298 (1st Dept 2018).

[467] *City of Troy*, 2016 WL 7129635 at *3.

[468] *Yargeau v. Lasertron*, 74 A.D.3d 1805, 1806, 904 N.Y.S.2d 840 (4th Dept 2010). See also *Suarez v. Shapiro Family Realty Associates LLC*, 149 A.D.3d 526, 527, 53 N.Y.S.3d 23 (1st Dept 2017).

[469] See *Burke v. Arcadis G And M of New York Architectural and Engineering Services PC*, 149 A.D.3d 1514, 1518, 54 N.Y.S.3d 225 (4th Dept 2017).

[470] *Pardo*, 131 A.D.3d at 1214, citing 22 NYCRR 202.7[a][2]. Accord *JPMorgan Chase Bank Nat Assn v. Levenson*, 149 A.D.3d 1053, 1054, 53 N.Y.S.3d 150 (2d Dept 2017); *Fernandez v. DaimlerChrysler*, A.G., 143 A.D.3d 765, 40 N.Y.S.3d 128 (2d Dept 2016).

[471] See *Rosenbaum v. Festinger*, 151 A.D.3d 897, 54 N.Y.S.3d 301 (2d Dept 2017).

[472] See *Ponce v. Miao Ling Liu*, 123 A.D.3d 787, 123 A.D.3d 787 (2d Dept 2014); *Martinez v. 1261 Realty Co.*, LLC, 121 A.D.3d 955, 995 N.Y.S.2d 581 (2d Dept 2014).

[473] *Piemonte v. JSF Realty, LLC*, 140 A.D.3d 1145, 1146, 36 N.Y.S.3d 146 (2d Dept 2016).

[474] *Piemonte*, 140 A.D.3d at 1146.

[475] *Reid v. Soults*, 138 A.D.3d 1091, 30 N.Y.S.3d 669 (2d Dept 2016); *Bianchi v. Galster Management Corp.*, 131 A.D.3d 558, 559, 15 N.Y.S.2d 189 (2d Dept 2015). See also *Kapon v. Koch*, 23 N.Y.3d 32, 36, 988 N.Y.S.2d 559 (2014); *Hudson City Savings Bank v 59 Sands Point LLC*, 153 A.D.3d 611, 612, 57 N.Y.S.3d 398 (2d Dept 2017).

[476] *Snow v. Depaul Adult Care Communities, Inc.*, 149 A.D.3d 1573, 1574, 54 N.Y.S.3d 237 (4th Dept 2017).

[477] *Forman v. Henkin*, 2018 WL 828101 at *2, 2018 N.Y. Slip Op. 01015 (2018).

[478] *Kapon v. Koch*, 23 N.Y.3d at 39; *Bianchi*, 131 A.D.3d at 559.

[479] See *T.D. Bank, N.A. v. 126 Spruce Street, LLC*, 143 A.D.3d 885, 39 N.Y.S.3d 798 (2d Dept 2016).

[480] *Kapon v. Koch*, 23 N.Y.3d at 38.

[481] *Cascardo v. Cascardo*, 136 A.D.3d 729, 24 N.Y.S.3d 742 (2d Dept 2016); see also *Anderson v. State of New York*, 134 A.D.3d 1061, 21 N.Y.S.3d 356 (2d Dept 2015).

[482] *Hudson City Savings Bank*, 153 A.D.3d at 612; *Snow*, 149 A.D.3d at 1574; *Bianchi*, 131 A.D.3d at 559.

[483] *Bianchi*, 131 A.D.3d at 559.

[484] *State v. Baumslag*, 134 A.D.3d 451, 452, 21 N.Y.S.3d 51 (1st Dept 2015).

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[485] *T.D. Bank, N.A.*, 143 A.D.3d at 885.

[486] *Hudson City Savings Bank*, 153 A.D.3d at 613.

[487] *Smith v.Watson*, 150 A.D.3d 487, 488, 51 N.Y.S.3d 888 (1st Dept 2017).

[488] See *Tirado v. Miller*, 75 A.D.3d 153, 161-162, 901 N.Y.S.2d 358 (2d Dept 2010).

[489] See CPLR 3402 and 22 NYCRR 202.21. There are similar procedures for placing cases on trial calendars of other trial courts in New York State. For example, in New York City Civil Court, a party files a "notice of trial" pursuant to New York City Civil Court Act § 1301.

[490] *Slovney v. Nasso*, 153 A.D.3d 962, 2017 WL 3722772 at *1 (2d Dept 2017); *Rizzo v Drs Balish and Friedman DDS*, 153 A.D.3d 869, 61 N.Y.S.3d 257 (2d Dept 2017).

[491] *Slovney*, 2017 WL 3722772 at *1; *Rizzo*, 61 N.Y.S.3d at 258.

[492] *Suarez v. Shapiro Family Realty Associates LLC*, 149 A.D.3d 526, 527, 53 N.Y.S.3d 23 (1st Dept 2017).

[493] See e.g. *Canandaigua Emergency Squad, Inc. v. Rochester Area Health Maintenance Organization, Inc.*, 130 A.D.3d 1530, 14 N.Y.S.3d 251 (4th Dept 2015); *Sansone v. Sansone*, 114 A.D.3d 748, 979 N.Y.S.2d 856 (2d Dept 2014); *Carranza v. Brooklyn Union Gas Co.*, 233 A.D.2d 287, 649 N.Y.S.2d 464 (2d Dept 1996); *Espindola Restaurant Corp. v. 4143 CA*, LLC, 2015 WL 5917003 (Sup Ct, NY Cty 2015) (defendant filed a note of issue; the plaintiff moved to vacate it, unsuccessfully); *R.F. Schiffmann Associates, Inc. v. Baker & Daniels LLP*, 41 Misc.3d 1235(A), 981 N.Y.S.2d 638 (Sup Ct, NY Cty 2013) (defendants filed note of issue seeking a non-jury trial; plaintiffs filed a "cross-note of issue" with a jury demand).

[494] See *K–F/X Rentals & Equipment, LLC v. FC Yonkers Associates, LLC*, 131 A.D.3d 945, 15 N.Y.S.3d 891 (2d Dept 2015)

[495] *Matos v City of New York*, 2017 WL 4622302, 2017 N.Y. Slip Op. 07231 (1st Dept 2017).

[496] *Slovney*, 2017 WL 3722772; Rizzo, 153 A.D.3d 869.

[497] *Rizzo*, 153 A.D.3d 869.

[498] See *New York Timber, LLC v. Seneca Companies*, 133 A.D.3d 576, 19 N.Y.S.3d 78 (2d Dept 2015); see also *Yunga v. Yonkers Contracting Company, Inc.*, 134 A.D.3d 1031, 21 N.Y.S.3d 716 (2d Dept 2015).

[499] See *New York Timber, LLC v. Seneca Companies*, 133 A.D.3d 576; see also *Yunga v. Yonkers Contracting Company, Inc.*, 134 A.D.3d 1031.

[500] See *New York Timber, LLC v. Seneca Companies*, 133 A.D.3d 576; see also *Yunga v. Yonkers Contracting Company, Inc.*, 134 A.D.3d 1031.

[501] CPLR 3216(b) additionally states that "[w]here the written demand is served by the court, the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation."

[502] *Altman v. Donnenfeld*, 119 A.D.3d 828, 990 N.Y.S.2d 542 (2d Dept 2014). See *Gordon v. Ratner*, 97 A.D.3d 634, 635, 948 N.Y.S.2d 627 (2d Dept 2012); *Davis v. Goodsell*, 6 A.D.3d 382, 383, 774 N.Y.S.2d 568 (2d Dept 2004).

[503] *Altman v. Donnenfeld*, 119 A.D.3d at 828; *Gordon v. Ratner*, 97 A.D.3d at 635. Accord *Hawe v. Delmar*, 148 A.D.3d 1788, 50 N.Y.S.3d 777 (4th Dept 2017).

[504] See *Hawe v. Delmar*, 148 A.D.3d at 1789.

[505] See *Altman v. Donnenfeld*, 119 A.D.3d at 828-829. See also *Gordon v. Ratner*, 97 A.D.3d at 635; *Hawe v. Delmar*, 148 A.D.3d at 1789.

[506] *Hawe v. Delmar*, 148 A.D.3d at 1790.

[507] See e.g. *Greco v. Wellington Leasing Ltd Partnership*, 144 A.D.3d 981, 43 N.Y.S.3d 64 (2d Dept 2016), and *Singh v. CBCS Construction Corp.*, 137 A.D.3d 1250, 27 N.Y.S.3d 40 (2d Dept 2016).

[508] See 22 NYCRR 202.21(e); *Gianacopoulos v. Corona*, 133 A.D.3d 565, 18 N.Y.S.3d 558 (2d Dept 2015); *Saravullo v. Tillotson*, 132 A.D.3d 1399, 17 N.Y.S.3d 263 (4th Dept 2015). Note that pursuant to CPLR 2103(b)(2), "where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period if the mailing is made within the state." Thus, where a note of issue is served only by regular mail, a motion to vacate it should be heard if made within 25 days after that service; see *Levy v. Schaefer*, 160 A.D.2d 1182, 1183, 555 N.Y.S.2d 192 (3d Dept 1990).

[509] See *Kattaria v. Rosado*, 146 A.D.3d 457, 43 N.Y.S.3d 758 (1st Dept 2017).

[510] *Slovney*, 2017 WL 3722772 at *1. See also *Bundhoo v Wendy's*, 152 A.D.3d 734, 737, 60 N.Y.S.3d 58 (2d Dept 2017).

[511] *Middleton v. Russell*, 120 A.D.3d 477, 478, 989 N.Y.S.2d 906 (2d Dept 2014); accord *Breytman v. Olinville Realty, LLC*, 110 A.D.3d 753, 972 N.Y.S.2d 680 (2d Dept 2013).

[512] See 22 NYCRR 202.21(d); *Macaluso v. Glengariff Corp.*, 153 A.D.3d 915, 58 N.Y.S.3d 868, 869 (2d Dept 2017); *Bermejo v. New York City Health and Hospitals Corp.*, 135 A.D.3d 116, 141, 21 N.Y.S.3d 78 (2d Dept 2015); *Gianacopoulos v. Corona*, 133 A.D.3d 565, 18 N.Y.S.3d 558 (2d Dept 2015); *Rebollo v. Nicholas Cab Corp.*, 125 A.D.3d 452, 2 N.Y.S.3d 471 (1st Dept 2015).

[513] *Sansone v. Sansone*, 114 A.D.3d 748, 749, 979 N.Y.S.2d 856 (2d Dept 2014).

[514] *Bundhoo v Wendy's*, 152 A.D.3d at 737.

[515] *Saravullo v. Tillotson*, 132 A.D.3d at 1400; see also *Macaluso*, 58 N.Y.S.3d at 869; Singh v. City of New York, 68 A.D.3d 1096, 1097, 890 N.Y.S.2d 333 (2d Dept 2009).

[516] *Stewart v. Dunkleman*, 128 A.D.3d 1338, 1339, 8 N.Y.S.3d 515 (4th Dept 2015).

[517] *Sansone v. Sansone*, 114 A.D.3d 748, 749, 979 N.Y.S.2d 856 (2d Dept 2014).

[518] *Massa v. Lower Manhattan Dev. Corp.*, 142 A.D.3d 927, 928, 37 N.Y.S.3d 893 (1st Dept 2016).

[519] *Bundhoo v Wendy's*, 152 A.D.3d at 737.

[520] *Bundhoo v Wendy's*, 152 A.D.3d at 737.

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[521] *Morales v. Sid Farber Enterprises, LLC*, 140 A.D.3d 718, 30 N.Y.S.3d 906 (2d Dept 2016).
[522] *Morales*, 140 A.D.3d at 718.
[523] See e.g. *Hoffman v. Biltmore 47 Associates, LLC*, 130 A.D.3d 478, 14 N.Y.S.3d 690 (1st Dept 2015); *Jones v. Grand Opal Constr. Corp.*, 64 A.D.3d 543, 883 N.Y.S.2d 253 (2d Dept 2009).
[524] *Cabrera v. Abaev*, 150 A.D.3d 588, 55 N.Y.S.3d 207 (1st Dept 2017), quoting from *Cuprill v. Citywide Towing and Auto Repair Services*, 149 A.D.3d 442, 443, 49 N.Y.S.3d 624 (1st Dept 2017).
[525] See *Singh v. CBCS Construction Corp.*, 137 A.D.3d 1250, 27 N.Y.S.3d 40 (2d Dept 2016); *Amoroso v. City of New York*, 66 A.D.3d 618, 887 N.Y.S.2d 163 (2d Dept 2009).
[526] *Singh*, 137 A.D.3d 1250.
[527] *Greco v. Wellington Leasing Ltd Partnership*, 144 A.D.3d 981, 43 N.Y.S.3d 64 (2d Dept 2016).
[528] *Greco*, 144 A.D.3d at 981.
[529] See *Place v. Chaffee–Sardinia Volunteer Fire Company*, 143 A.D.3d 1271, 39 N.Y.S.3d 568 (4th Dept 2016).
[530] *Place*, 39 N.Y.S.3d at 570.
[531] *Pua v. Lam*, 2017 WL 5486195, 2017 N.Y. Slip Op. 08098 (1st Dept 2017).
[532] See *Matos v City of New York*, 2017 WL 4622302, 2017 N.Y. Slip Op. 07231 (1st Dept 2017).
[533] *Barrett v. New York City Health and Hospitals Corp*, 150 A.D.3d 949, 951-952, 55 N.Y.S.3d 318 (2d Dept 2017).
[534] See *Barrett*, 150 A.D.3d at 951.
[535] *Range v. Trustees of Columbia University*, 150 A.D.3d 515, 54 N.Y.S.3d 391 (1st Dept 2017).
[536] *Range*, 150 A.D.3d at 516.
[537] *Range*, 150 A.D.3d at 516. Accord *Suarez v. Shapiro Family Realty Associates LLC*, 149 A.D.3d 526, 527, 53 N.Y.S.3d 23 (1st Dept 2017).
[538] See *Range*, 150 A.D.3d at 516.
[539] Cf. *Abselet v. Satra Realty LLC*, 85 A.D.3d 1406, 1407-1408, 926 N.Y.S.2d 178 (3d Dept 2011).
[540] Cf. *The Carlyle LLC v. Beekman Garage LLC*, 2018 WL 358009 at *1, 2018 N.Y. Slip Op. 00242 (1st Dept 2018).
[541] See *George v. Victoria Albi Inc.*, 148 A.D.3d 1119, 50 N.Y.S.3d 466 (2d Dept 2017).
[542] *The Carlyle LLC*, 2018 WL 358009 at *1.
[543] *George*, 148 A.D.3d at 1119.
[544] *Kapon v. Koch*, 23 N.Y.3d 32, 38, 988 N.Y.S.2d 559 (2014); *George*, 148 A.D.3d at 1119-1120.
[545] See CPLR 3123(a).
[546] *Id.*
[547] *Id.* Accord *32ND Avenue LLC v. Angelo Holding Corp.*, 134 A.D.3d 696, 698, 20 N.Y.S.3d 420 (2d Dept 2015).
[548] See *32ND Avenue LLC*, 134 A.D.3d at 696.
[549] *32ND Avenue LLC*, 134 A.D.3d at 698.
[550] *Id.*
[551] *Id.*
[552] *Smith v. County of Nassau*, 138 A.D.3d 726, 729, 30 N.Y.S.3d 143 (2d Dept 2016).
[553] *32ND Avenue LLC*, 134 A.D.3d at 698-699. See also *Smith*, 138 A.D.3d at 729.
[554] See *Smith*, 138 A.D.3d at 729.
[555] *Atiles v. Golub Corp.*, 141 A.D.3d 1055, 36 N.Y.S.3d 533 (3d Dept 2016).
[556] See *Cataudella v. 17 John Street Associates, LLC*, 140 A.D.3d 508, 35 N.Y.S.3d 304 (1st Dept 2016).
[557] *Cataudella*, 140 A.D.3d at 509.
[558] See *Rivera v. Rochester General Health System*, 40 N.Y.S.3d 840, 2016 N.Y. Slip Op. 07460 (4th Dept 2016).
[559] *Rivera*, 40 N.Y.S.3d at 841.
[560] *Fox v. Grand Slam Banquet Hall*, 142 A.D.3d 473, 36 N.Y.S.3d 653 (1st Dept 2016).
[561] See *Reid v. Soults*, 114 A.D.3d 921, 980 NYS2d 579 (2d Dept 2014), and 138 A.D.3d 1091, 30 N.Y.S.3d 669 (2d Dept 2016).
[562] *Id.*
[563] *Bermejo v. New York City Health and Hospitals Corp.*, 135 A.D.3d 116, 21 N.Y.S.3d 78 (2d Dept 2015).
[564] *Bermejo*, 135 A.D.3d at 146.
[565] *Id.*, citing *Tai Tran v. New Rochelle Hosp. Medical Center*, 99 N.Y.2d 383, 388, 756 N.Y.S.2d 509 (2003).
[566] 134 A.D.3d 529, 22 N.Y.S.3d 178 (1st Dept 2015), rev'd 2018 WL 828101, 2018 N.Y. Slip Op. 01015 (2018).
[567] *Forman*, 134 A.D.3d at 531 (italics supplied).
[568] *Forman*, 134 A.D.3d at 530.
[569] *Forman*, 2018 WL 828101 at *2, 2018 N.Y. Slip Op. 01015 (2018).
[570] *Forman*, 2018 WL 828101 at *4.
[571] *Forman*, 2018 WL 828101 at *5.
[572] *Forman*, 2018 WL 828101 at *4.
[573] *Forman*, 134 A.D.3d at 532.
[574] *Forman*, 134 A.D.3d at 532.
[575] *Forman*, 2018 WL 828101 at *5.
[576] *Forman*, 2018 WL 828101 at *5.
[577] *Forman*, 2018 WL 828101 at *5.
[578] *Forman*, 2018 WL 828101 at *4.
[579] *Forman*, 134 A.D.3d at 542.
[580] *Forman*, 2018 WL 828101 at *5 and Footnote 6.
[581] *Forman*, 134 A.D.3d at 532.
[582] *Forman*, 134 A.D.3d at 533.
[583] *Graham v. Kone*, 130 A.D.3d 779, 12 N.Y.S.3d 546 (2d Dept 2015).
[584] *Soto v. CBS Corporation*, 2018 WL 356292 at *2, 2018 N.Y. Slip Op. 00185 (2d Dept 2018); *Del Vecchio v. Danielle Associates LLC*, 94 A.D.3d 941, 942, 942 N.Y.S.2d 217 (2d Dept 2012).
[585] See *Soto*, 2018 WL 356292.
[586] See *Del Vecchio*, 94 A.D.3d 941.
[587] See *Soto*, 2018 WL 356292 at *2.
[588] See *Del Vecchio*, 94 A.D.3d at 942.
[589] *Graham v. Kone*, 130 A.D.3d at 780.
[590] See e.g. *Leff v. Our Lady of Mercy Academy*, 150 A.D.3d

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1239, 55 N.Y.S.3d 392 (2d Dept 2017).

591 *Leff*, 150 A.D.3d 1240.

592 *Konig v. CSC Holdings LLC*, 112 A.D.3d 934, 935, 977 N.Y.S.2d 756 (2d Dept 2013).

593 *Leff*, 150 A.D.3d 1240. Accord *Johnson v. Union Bank of Switzerland, AG*, 150 A.D.3d 436, 51 N.Y.S.3d 417 (1st Dept 2017).

594 See *Leff*, 150 A.D.3d 1240.

595 *Leff*, 150 A.D.3d 1241; Konig, 112 A.D.3d at 935.

596 See *Camara v. Skanska, Inc.*, 150 A.D.3d 548, 549, 55 N.Y.S.3d 27 (1st Dept 2017). See also *Johnson*, 150 A.D.3d at 436.

597 Accord *Camara*, 150 A.D.3d at 549.

598 *Johnson*, 150 A.D.3d at 436.

599 *Household Finance Realty Corp of New York v. Della Cioppa*, 153 A.D.3d 908, 61 N.Y.S.3d 259, 261 (2d Dept 2017); *Ferrara Bros. Building Materials Corp. v. FMC Construction LLC*, 138 A.D.3d 685, 30 N.Y.S.3d 157 (2d Dept 2016). See also *Desiderio v. Geico General Ins Co.*, 153 A.D.3d 1322, 61 N.Y.S.3d 309, 311 (2d Dept 2017); *Mew v. Civitano*, 151 A.D.3d 840, 841, 56 N.Y.S.3d 560 (2d Dept 2017).

600 See e.g. *Shah v. Oral Cancer Prevention International, Inc.*, 138 A.D.3d 722, 30 N.Y.S.3d 154 (2d Dept 2016).

601 *Hasan v. 18–24 Luquer Street Realty, LLC*, 2016 WL 6465483 at *1, 2016 N.Y. Slip Op. 07160 (2d Dept 2016); *PNC Bank, National Association v. Campbell*, 142 A.D.3d 1148, 1149, 38 N.Y.S.3d 236 (2d Dept 2016); *Smith v. County of Nassau*, 138 A.D.3d 726, 728, 30 N.Y.S.3d 143 (2d Dept 2016). See *Watson v. City of New York*, 2018 WL 414094 at *2, 2018 N.Y. Slip Op. 00245 (1st Dept 2018).

602 *Corex-SPA v Janel Group of New York Inc.*, 2017 WL 6029700 at *1, 2017 N.Y. Slip Op. 08502 (2d Dept 2017); *Morales v. Zherka*, 140 A.D.3d 836, 35 N.Y.S.3d 121 (2d Dept 2016). See also *Candela v. Kantor*, 2017 WL 4532232, 2017 N.Y. Slip Op. 07106 (2d Dept 2017).

603 *Calabrese Bakeries, Inc. v. Rockland Bakery, Inc.*, 139 A.D.3d 1192, 1194, 32 N.Y.S.3d 667 (3d Dept 2016).

604 *Watson v. City of New York*, 2018 WL 414094 at *2.

605 See *Place v. Chaffee–Sardinia Volunteer Fire Company*, 143 A.D.3d 1271, 39 N.Y.S.3d 568, 569 (4th Dept 2016).

606 See *AQ Asset Management LLC v. Levine*, 138 A.D.3d 635, 636, 31 N.Y.S.3d 32 (1st Dept 2016).

607 *Irving v. Four Seasons Nursing and Rehabilitation Center*, 150 A.D.3d 972, 973, 55 N.Y.S.3d 140 (2d Dept 2017); *Palmieri v. Piano Exchange, Inc.*, 124 A.D.3d 611, 612, 1 N.Y.S.3d 315 (2d Dept 2015).

608 See *Mizrahi-Srour v. Srour*, 138 A.D.3d 801, 29 N.Y.S.3d 516 (2d Dept 2016); *Shah v. Oral Cancer Prevention International, Inc.*, 138 A.D.3d 722, 723, 30 N.Y.S.3d 154 (2d Dept 2016); *McLeod v. Taccone*, 122 A.D.3d 1410, 1412, 997 N.Y.S.2d 555 (4th Dept 2014); *Asim v. City of New York*, 117 A.D.3d 655, 656, 987 N.Y.S.2d 49 (1st Dept 2014).

609 *McMahon v. Cobblestone Lofts Condominium*, 134 A.D.3d 646, 22 N.Y.S.3d 50 (1st Dept 2015).

610 *McLeod*, 122 A.D.3d at 1412.

611 *Flanagan v. Wolff*, 136 A.D.3d 739, 741, 26 N.Y.S.3d 102 (2d Dept 2016); *Iscowitz v. County of Suffolk*, 54 A.D.3d 725, 864 N.Y.S.2d 78 (2d Dept 2008).

612 See *Sarach v. M And T Bank Corp.*, 140 A.D.3d 1721, 1722, 34 N.Y.S.3d 303 (4th Dept 2016).

613 *Mew v. Civitano*, 151 A.D.3d 840, 841, 56 N.Y.S.3d 560 (2d Dept 2017); *Richards v. RP Stellar Riverton, LLC*, 136 A.D.3d 1011, 25 N.Y.S.3d 346 (2d Dept 2016); *New York Timber, LLC v. Seneca Companies*, 133 A.D.3d 576, 19 N.Y.S.3d 78 (2d Dept 2015). See also *Watson v City of New York*, 2018 WL 414094 at *2, 2018 N.Y. Slip Op. 00245 (1st Dept 2018); *Sinclair v City of New York*, 153 A.D.3d 876, 876-877, 57 N.Y.S.3d 901 (2d Dept 2017); *Candela v Kantor*, 2017 WL 4532232, 2017 N.Y. Slip Op. 07106 (2d Dept 2017); *Mears v. Long*, 149 A.D.3d 823, 823-824, 52 N.Y.S.3d 124 (2d Dept 2017); *Teitelbaum v. Maimonides Medical Center*, 144 A.D.3d 1013, 1014, 43 N.Y.S.3d 66 (2d Dept 2016); *Pesce v. Fernandez*, 40 N.Y.S.3d 466, 468, 2016 N.Y. Slip Op. 07172 (2d Dept 2016); *Hasan*, 2016 WL 6465483 at *1; *Cioffi v. S.M. Foods, Inc.*, 142 A.D.3d 520, 523-524, 36 N.Y.S.3d 475 (2d Dept 2016).

614 *Citibank, N.A. v. Bravo*, 140 A.D.3d 1434, 1435, 34 N.Y.S.3d 678 (3d Dept 2016).

615 *Alicino v. Rochdale Village, Inc.*, 142 A.D.3d 937, 939, 37 N.Y.S.3d 557 (2d Dept 2016).

616 *Citibank, N.A. v. Bravo*, 140 A.D.3d at 1435.

617 See *Parker Waichman, LLP v. Laraia*, 131 A.D.3d 1215, 16 N.Y.S.3d 774 (2d Dept 2015); see also *Shah v. Oral Cancer Prevention International, Inc.*, 138 A.D.3d 722, 724, 30 N.Y.S.3d 154 (2d Dept 2016); *CPS LLC v. Brody*, 135 A.D.3d 607, 608, 22 N.Y.S.3d 871 (1st Dept 2016) (failure to comply with a conditional order requiring compliance, and "pattern of disobeying discovery orders").

618 *Herman v. Herman*, 41 N.Y.S.3d 19, 2016 N.Y. Slip Op. 07148 (1st Dept 2016).

619 *Studer v. Newpointe Estates Condominium*, 152 A.D.3d 555, 58 N.Y.S.3d 509, 512 (2d Dept 2017).

620 See *Teitelbaum*, 144 A.D.3d at 1014; *Henry v. Datson*, 140 A.D.3d 1120, 1121, 35 N.Y.S.3d 383 (2d Dept 2016). See also *Mew v. Civitano*, 151 A.D.3d at 841.

621 See *Sinclair*, 153 A.D.3d 877.

622 See *Metzger v. Goldstein*, 139 A.D.3d 918, 921, 33 N.Y.S.3d 81 (2d Dept 2016).

623 *Cioffi*, 142 A.D.3d at 524.

624 *PAL Environmental Services Inc. v. LJC Dismantling Corp.*, 2018 WL 443925 at *1, 2018 N.Y. Slip Op. 00301 (2d Dept 2018).

625 See *Krause v. Lobacz*, 131 A.D.3d 1128, 16 N.Y.S.3d 601 (2d Dept 2015).

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626 See *New York Timber*, 133 A.D.3d 576; see also *Smith v. County of Nassau*, 138 A.D.3d 726, 728, 30 N.Y.S.3d 143 (2d Dept 2016).

627 *Nunez v. Laidlaw*, 150 A.D.3d 1124, 1126, 52 N.Y.S.3d 653 (2d Dept 2017).

628 See *Tantaro v. All My Children, Inc.*, 133 A.D.3d 491, 19 N.Y.S.3d 159 (1st Dept 2015) (affirming outcome of marking deposition dates as final rather than striking the defendants' answer).

629 *Flanagan v. Wolff*, 136 A.D.3d 739, 741, 26 N.Y.S.3d 102 (2d Dept 2016).

630 *Corex-SPA v Janel Group of New York Inc.*, 2017 WL 6029700 at *1, 2017 N.Y. Slip Op. 08502 (2d Dept 2017); *Cioffi v. S.M. Foods, Inc.*, 142 A.D.3d 520, 524, 36 N.Y.S.3d 475 (2d Dept 2016); see *Irving v. Four Seasons Nursing and Rehabilitation Center*, 150 A.D.3d 972, 972-973, 55 N.Y.S.3d 140 (2d Dept 2017).

631 *Smith v. County of Nassau*, 138 A.D.3d at 728; see also *Pesce v. Fernandez*, 40 N.Y.S.3d 466, 2016 N.Y. Slip Op. 07172 (2d Dept 2016); *Hasan v. 18–24 Luquer Street Realty, LLC*, 2016 WL 6465483 at *1, 2016 N.Y. Slip Op. 07160 (2d Dept 2016; *Singer v. Riskin*, 137 A.D.3d 999, 1001, 27 N.Y.S.3d 209 (2d Dept 2016).

632 *PAL Environmental Services Inc.*, 2018 WL 443925 at *1; *Desiderio v Geico General Ins Co.*, 153 A.D.3d 1322, 61 N.Y.S.3d 309 (2d Dept 2017); *Singer*, 137 A.D.3d at 1001; *Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d 201, 210, 959 N.Y.S.2d 74 (2d Dept 2012).

633 See e.g. *Arzuaga v. Tejada*, 133 A.D.3d 454, 19 N.Y.S.3d 280 (1st Dept 2015); *Lawrence v. North Country Animal Control Center*, 133 A.D.3d 932, 20 N.Y.S.3d 197 (3d Dept 2015).

634 *Naiman v. Fair Trade Acquisition Corp.*, 152 A.D.3d 779, 780, 59 N.Y.S.3d 414 (2d Dept 2017); *Hughes v. Brooklyn Skating, LLC*, 120 A.D.3d 758, 991 N.Y.S. 326 (2d Dept 2014).

635 *Candela v Kantor*, 2017 WL 4532232, 2017 N.Y. Slip Op. 07106 (2d Dept 2017); Hasan, 2016 WL 6465483 at *1; see also *Cioffi v. S.M. Foods, Inc.*, 142 A.D.3d 520, 523, 36 N.Y.S.3d 475 (2d Dept 2016).

636 See *Richards v. RP Stellar Riverton, LLC*, 136 A.D.3d 1011, 25 N.Y.S.3d 346 (2d Dept 2016).

637 *Morales v. Zherka*, 140 A.D.3d 836, 837, 35 N.Y.S.3d 121 (2d Dept 2016).

638 *Mahgoub v. 880 Realty LLC*, 150 A.D.3d 1216, 1219, 56 N.Y.S.3d 215 (2d Dept 2017).

639 *Herman v. Herman*, 41 N.Y.S.3d 19, 20, 2016 N.Y. Slip Op. 07148 (1st Dept 2016).

640 *Calabrese Bakeries, Inc. v. Rockland Bakery, Inc.*, 139 A.D.3d 1192, 1194, 32 N.Y.S.3d 667 (3d Dept 2016) and *Romano v. Persky*, 117 A.D.3d 814, 985 N.Y.S.2d 633 (2d Dept 2014), quoting from CPLR 3126[2]. See also *Mahgoub v. 880 Realty LLC*, 150 A.D.3d at 1218-1219.

641 *Calabrese Bakeries*, 139 A.D.3d at 1194.

642 *East Schodack Fire Co. v. Milkewicz*, 140 A.D.3d 1255, 1258, 34 N.Y.S.3d 640 (3d Dept 2016).

643 *Candela v Kantor*, 2017 WL 4532232, 2017 N.Y. Slip Op. 07106 (2d Dept 2017).

644 See *Piemonte v. JSF Realty, LLC*, 140 A.D.3d 1145, 1146, 36 N.Y.S.3d 146 (2d Dept 2016).

645 *Lee v. Barnett*, 134 A.D.3d 908, 909, 22 N.Y.S.3d 122 (2d Dept 2015); *Mona and Jack's Clothing, Inc. v. Ola, Inc.*, 133 A.D.3d 642, 19 N.Y.S.3d 325 (2d Dept 2015). See also *Corex-SPA v Janel Group of New York Inc.*, 2017 WL 6029700 at *2, 2017 N.Y. Slip Op. 08502 (2d Dept 2017); *Piemonte v. JSF Realty, LLC*, 140 A.D.3d 1145, 1146, 36 N.Y.S.3d 146 (2d Dept 2016); *Arzuaga v. Tejada*, 133 A.D.3d 454, 19 N.Y.S.3d 280 (1st Dept 2015); *Hughes v. Brooklyn Skating*, 120 A.D.3d 758.

646 *Julien-Thomas v. Platt*, 133 A.D.3d 824, 20 N.Y.S.3d 415 (2d Dept 2015).

647 *Carillon Nursing and Rehabilitation Center, LLP v. Fox*, 118 A.D.3d 933, 934, 989 N.Y.S.2d 68 (2d Dept 2014).

648 See *Naiman v. Fair Trade Acquisition Corp.*, 152 A.D.3d at 780-781, involving a conditional order striking an answer.

649 See *Naiman v. Fair Trade Acquisition Corp.*, 152 A.D.3d at 780; Piemonte, 140 A.D.3d at 1146; *Julien-Thomas v. Platt*, 133 A.D.3d at 825; Lee v. Barnett, 134 A.D.3d at 909; *SRN Realty, LLC v. Scarano Architect, PLLC*, 116 A.D.3d 693, 694, 983 N.Y.S.2d 276 (2d Dept 2014); *Legaretta v. Neal*, 108 A.D.3d 1067, 1069, 969 N.Y.S.2d 305 (4th Dept 2013). See also *Mahgoub v. 880 Realty LLC*, 150 A.D.3d at 1219.

650 *Nieves v. Citizens Advice Bureau Jackson Avenue Family Residence*, 140 A.D.3d 566, 567, 32 N.Y.S.3d 507 (1st Dept 2016).

651 *Nieves*, 140 A.D.3d at 567. See also *Naiman v. Fair Trade Acquisition Corp.*, 152 A.D.3d at 780.

652 See *Corex-SPA*, 2017 WL 6029700 at *2.

653 *Nieves*, 140 A.D.3d at 567.

654 *Rodriguez v. Nevei Bais, Inc.*, 2018 WL 1054557 at *1, 2018 N.Y. Slip Op. 01298 (1st Dept 2018).

655 *Nieves*, 140 A.D.3d at 567.

656 See *Wilson v. Galicia Contracting & Restoration Corp.*, 10 N.Y.3d 827, 830, quoting from *Weinstein-Korn-Miller*, N.Y. Civ Prac ¶ 3126.03.

657 See *Lee v. Barnett*, 134 A.D.3d at 908; *Harrison v. Bailey*, 79 A.D.3d 811, 914 N.Y.S.2d 187 (2d Dept 2010).

658 See *CPS LLC v. Brody*, 135 A.D.3d 607, 608, 22 N.Y.S.3d 871 (1st Dept 2016).

659 See e.g. *Hasan v. 18–24 Luquer Street Realty, LLC*, 2016 WL 6465483, 2016 N.Y. Slip Op. 07160 (2d Dept 2016); *Lee v. Barnett*, 134 A.D.3d at 909.

660 See *Arzuaga v. Tejada*, 133 A.D.3d 454, 19 N.Y.S.3d 280 (1st Dept 2015); *Weissman v 20 East 9th Street Corp.*, 48 A.D.3d 242, 852 N.Y.S.2d 67 (1st Dept 2008).

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661 *SRN Realty, LLC v. Scarano Architect, PLLC*, 116 A.D.3d 693, 694, 983 N.Y.S.2d 276 (2d Dept 2014). See also *Sealy v. Uy*, 132 A.D.3d 839, 18 N.Y.S.3d 160 (2d Dept 2015); *Vitolo v. Suarez*, 130 A.D.3d 610, 13 N.Y.S.3d 177 (2d Dept 2015).

662 See *Mahgoub v. 880 Realty LLC*, 150 A.D.3d at 1219-1220.

663 *Piemonte v. JSF Realty, LLC*, 140 A.D.3d 1145, 1146, 36 N.Y.S.3d 146 (2d Dept 2016).

664 *Lee v. Barnett*, 134 A.D.3d at 910.

665 *Arzuaga v. Tejada*, 133 A.D.3d 454, 455, 19 N.Y.S.3d 280 (1st Dept 2015).

666 See *Jardin v. A Very Special Place, Inc.*, 138 A.D.3d 927, 930, 30 N.Y.S.3d 270 (2d Dept 2016).

667 See *Lawrence v. North Country Animal Control Center*, 133 A.D.3d 932, 20 N.Y.S.3d 197 (3d Dept 2015).

668 *Lawrence*, 133 A.D.3d at 932.

669 *Lawrence*, 133 A.D.3d at 932.

670 See *Household Finance Realty Corp of New York v Della Cioppa*, 153 A.D.3d 908, 61 N.Y.S.3d 259, 261 (2d Dept 2017).

671 *Corex-SPA v Janel Group of New York Inc.*, 2017 WL 6029700 at *1, 2017 N.Y. Slip Op. 08502 (2d Dept 2017). See also *Irving v. Four Seasons Nursing and Rehabilitation Center*, 150 A.D.3d 972, 973, 55 N.Y.S.3d 140 (2d Dept 2017); *Mears v. Long*, 149 A.D.3d 823, 52 N.Y.S.3d 124 (2d Dept 2017).

672 *Watson v. City of New York*, 2018 WL 414094 at *2, 2018 N.Y. Slip Op. 00245 (1st Dept 2018).

673 *Sears Roebuck and Co. v. Vornado Realty Trust*, 2018 WL 1093827 at *1, 2018 N.Y. Slip Op. 01421 (1st Dept 2018); *PAL Environmental Services Inc. v. LJC Dismantling Corp.*, 2018 WL 443925 at *1, 2018 N.Y. Slip Op. 00301 (2d Dept 2018); *Watson v. City of New York*, 2018 WL 414094 at *2; *Irving v. Four Seasons Nursing and Rehabilitation Center*, 150 A.D.3d at 973; *Casanas v. Carlei Group LLC*, 149 A.D.3d 515, 52 N.Y.S.3d 330 (1st Dept 2017); *Shah v. Oral Cancer Prevention International, Inc.*, 138 A.D.3d 722, 724, 30 N.Y.S.3d 154 (2d Dept 2016); *Singer v. Riskin*, 137 A.D.3d 999, 1001, 27 N.Y.S.3d 209 (2d Dept 2016). See also *Household Finance Realty*, 61 N.Y.S.3d at 261; *Desiderio v. Geico General Ins Co.*, 153 A.D.3d 1322, 61 N.Y.S.3d 309, 311 (2d Dept 2017); *Mew v. Civitano*, 151 A.D.3d 840, 841, 56 N.Y.S.3d 560 (2d Dept 2017); *Lantigua v. Goldstein*, 149 A.D.3d 1057, 1059, 53 N.Y.S.3d 163 (2d Dept 2017); *Shahid v City of New York*, 144 A.D.3d 1127, 43 N.Y.S.3d 88 (2d Dept 2016); *Pesce v. Fernandez*, 40 N.Y.S.3d 466, 468, 2016 N.Y. Slip Op. 07172 (2d Dept 2016); *Cioffi v. S.M. Foods, Inc.*, 142 A.D.3d 520, 523, 36 N.Y.S.3d 475 (2d Dept 2016); *CEMD Elevator Corp. v. Metrotech LLC I*, 141 A.D.3d 451, 453, 35 N.Y.S.3d 336 (1st Dept 2016); *McMahon v. Cobblestone Lofts Condominium*, 134 A.D.3d 646, 22 N.Y.S.3d 50 (1st Dept 2015). Accord *Ural v. Encompass Insurance Co. of America*, 2018 WL 1075348 at *2, 2018 N.Y. Slip Op. 01350 (2d Dept 2018).

674 *Gray v. Tri-State Consumer Insurance Co.*, 157 A.D.3d 938, 2018 WL 635163 at *2 (2d Dept 2018).

675 *Schiller v Sunharbor Acquisition I LLC*, 152 A.D.3d 812, 813, 60 N.Y.S.3d 79 (2d Dept 2017); *Mew v. Civitano*, 151 A.D.3d at 841; *Teitelbaum v. Maimonides Medical Center*, 144 A.D.3d 1013, 1014, 43 N.Y.S.3d 66 (2d Dept 2016). See also *Watson v. City of New York*, 2018 WL 414094 at *2.

676 *Mears, v. Long*, 149 A.D.3d at 823.

677 *Corex-SPA*, 2017 WL 6029700 at *2. See also *Masiglia v. United Services Auto Assn.*, 57 Misc.3d 157(A), 2017 WL 6047371 (App Term, 2d Dept 2017).

678 See *Mew v. Civitano*, 151 A.D.3d at 841; *Nunez v. Laidlaw*, 150 A.D.3d 1124, 1125, 52 N.Y.S.3d 653 (2d Dept 2017); *Teitelbaum*, 144 A.D.3d at 1014; *Parker Waichman, LLP v. Laraia*, 131 A.D.3d 1215, 16 N.Y.S.3d 774 (2d Dept 2015); see also *New York Timber, LLC*, 133 A.D.3d 576, 19 N.Y.S.3d 78 (2d Dept 2015); *Yunga v. Yonkers Contracting Company, Inc.*, 134 A.D.3d 1031, 1033, 21 N.Y.S.3d 716 (2d Dept 2015).

679 *Place v. Chaffee–Sardinia Volunteer Fire Company*, 143 A.D.3d 1271, 39 N.Y.S.3d 568, 569 (4th Dept 2016).

680 *CEMD Elevator Corp.*, 141 A.D.3d at 454; see also *Henry v. Datson*, 140 A.D.3d 1120, 1121, 35 N.Y.S.3d 383 (2d Dept 2016).

681 *PNC Bank, National Association v. Campbell*, 142 A.D.3d 1148, 1149, 38 N.Y.S.3d 236 (2d Dept 2016). See also *Mew v. Civitano*, 151 A.D.3d at 841. Accord *Palmieri v. Piano Exchange, Inc.*, 124 A.D.3d 611, 612, 1 N.Y.S.3d 315 (2d Dept 2015).

682 See *Nunez v. Laidlaw*, 150 A.D.3d 1124, 1126, 52 N.Y.S.3d 653 (2d Dept 2017).

683 See *Casanas v. Carlei Group LLC*, 149 A.D.3d at 515-516 (1st Dept 2017).

684 See *Casanas*, 149 A.D.3d at 516.

685 See *Vaca v. Village View Housing Corp.*, 2016 WL 7130520 at *1, 2016 N.Y. Slip Op. 08315 (1st Dept 2016), and *Jackson v. Hunter Roberts Construction Corp.*, 139 A.D.3d 429, 430, 29 N.Y.S.3d 170 (1st Dept 2016).

686 See *John Quealy Irrevocable Life Ins Trust v AXA Equitable Life Ins Co.*, 151 A.D.3d 592, 593, 58 N.Y.S.3d 26 (1st Dept 2017).

687 *Irving v. Four Seasons Nursing and Rehabilitation Center*, 150 A.D.3d at 973.

688 *Gray v. Tri-State Consumer Insurance Co.*, 157 A.D.3d 938, 2018 WL 635163 at *2 (2d Dept 2018).

689 *Henry v. Datson*, 140 A.D.3d at 1121.

690 *PAL Environmental Services Inc.*, 2018 WL 443925.

691 *Yunga*, 134 A.D.3d at 1033; see also *Lazar, Sanders, Thaler & Associates, LLP v. Lazar*, 131 A.D.3d 1133, 16 N.Y.S.3d 326 (2d Dept 2015); *Anron Heating and Air Conditioning, Inc. v. AMCC Corp.*, 133 A.D.3d 542, 19 N.Y.S.3d 414 (1st Dept 2015) (three violated discovery orders); *Silberstein v. Maimonides Medical Center*, 109 A.D.3d 812, 971 N.Y.S.2d 167 (2d

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Dept 2013) (dismissal of the complaint). See also *Studer v. Newpointe Estates Condominium*, 152 A.D.3d 555, 58 N.Y.S.3d 509, 512 (2d Dept 2017) (repeated delays in complying with discovery demands and directives without any adequate excuse, and inadequate discovery responses indicating absence of a good-faith effort to address requests meaningfully).

692 *Schiller v. Sunharbor Acquisition I LLC*, 152 A.D.3d at 813; *Ozeri v. Ozeri*, 135 A.D.3d 838, 839, 23 N.Y.S.3d 363 (2d Dept 2016) (defendant failure to attend a continued deposition). See also *McHugh v. City of New York*, 150 A.D.3d 561, 55 N.Y.S.3d 29 (1st Dept 2017) (two of the defendants did not appear for depositions through their own employees, after five so-ordered stipulations and an order determining a motion to strike their answer or compel their attendance; thereafter, a co-defendant witness produced on their behalf had inadequate knowledge, but they still failed to attend); *Muboyayi v. Quintero*, 136 A.D.3d 497, 498, 24 N.Y.S.3d 642 (1st Dept 2016) (failure of a plaintiff to attend a continued deposition).

693 See *Bruno v. Flip Cab Corp.*, 2016 WL 6774367 at *1, 2016 N.Y. Slip Op. 07617 (2d Dept 2016).

694 *Watson v. City of New York*, 2018 WL 414094 at *3, 2018 N.Y. Slip Op. 00245 (1st Dept 2018).

695 See *Racer v. Mazel USA LLC*, 150 A.D.3d 437, 51 N.Y.S.3d 418 (1st Dept 2017).

696 *Schiller v. Sunharbor Acquisition I LLC*, 152 A.D.3d at 814.

697 See *Brannigan v Door*, 2016 WL 6885909 at *2, 2016 N.Y. Slip Op. 07918 (2d Dept 2016).

698 See *Corex-SPA v Janel Group of New York Inc.*, 2017 WL 6029700 at *2, 2017 N.Y. Slip Op. 08502 (2d Dept 2017); *Iskalo Electric Tower LLC v. Stantec Consulting Services, Inc.*, 113 A.D.3d 1105, 979 N.Y.S.2d 212 (4th Dept 2014).

699 *Iskalo Electric Tower*, 113 A.D.3d at 1106.

700 See *Desederio v. Geico General Ins Co.*, 153 A.D.3d 1322, 61 N.Y.S.3d 309, 311 (2d Dept 2017); *Vaca*, 2016 WL 7130520 at *1.

701 *Field v. Bao*, 140 A.D.3d 921, 35 N.Y.S.3d 150 (2d Dept 2016).

702 *Liberty Community Associates, LP v. DeClemente*, 139 A.D.3d 532, 30 N.Y.S.3d 550 (1st Dept 2016).

703 See *Naiman v. Fair Trade Acquisition Corp.*, 152 A.D.3d 779, 781, 59 N.Y.S.3d 414 (2d Dept 2017); *ICM Controls Corp v. Morrow*, 151 A.D.3d 1935, 1936, 57 N.Y.S.3d 863 (4th Dept 2017).

704 *Shah v. Oral Cancer Prevention International, Inc.*, 138 A.D.3d 722, 724, 30 N.Y.S.3d 154 (2d Dept 2016).

705 See *CPS LLC v. Brody*, 135 A.D.3d 607, 608, 22 N.Y.S.3d 871 (1st Dept 2016), and *Liberty Community Associates*, 139 A.D.3d 532.

706 *ICM Controls Corp v. Morrow*, 151 A.D.3d at 1936.

707 *ICM Controls Corp v. Morrow*, 151 A.D.3d at 1936.

708 See *Aur v. Manhattan Greenpoint Ltd.*, 132 A.D.3d 595, 2015 WL 6511172 (1st Dept 2015).

709 See *Studer v. Newpointe Estates Condominium*, 152 A.D.3d 555, 58 N.Y.S.3d 509, 512 (2d Dept 2017).

710 See *Aur v. Manhattan Greenpoint Ltd.*, 132 A.D.3d 595.

711 See *CPS LLC v. Brody*, 135 A.D.3d 607, 608, 22 N.Y.S.3d 871 (1st Dept 2016).

712 See *Metzger v. Goldstein*, 139 A.D.3d 918, 921, 33 N.Y.S.3d 81 (2d Dept 2016).

713 See *Lobello v New York Cent Mut Fire Ins Co.*, 152 A.D.3d 1206, 58 N.Y.S.3d 842 (4th Dept 2017); *Martins v. 511 Properties, LLC*, 2016 WL 6684808, 2016 N.Y. Slip Op. 07596 (1st Dept 2016). See also *Nieves v. Citizens Advice Bureau Jackson Avenue Family Residence*, 140 A.D.3d 566, 567, 32 N.Y.S.3d 507 (1st Dept 2016).

714 *Nieves* 140 A.D.3d at 567.

715 *Lobello*, 152 A.D.3d at 1207.

716 See *Desederio v. Geico General Ins Co.*, 153 A.D.3d 1322, 61 N.Y.S.3d 309, 311 (2d Dept 2017).

717 *Rosenbaum v. Festinger*, 151 A.D.3d 897, 54 N.Y.S.3d 301 (2d Dept 2017).

718 See *Burke v. Arcadis G And M of New York Architectural and Engineering Services PC*, 149 A.D.3d 1514, 1517, 54 N.Y.S.3d 225 (4th Dept 2017).

719 *Viruet v. Mount Sinai Medical Center Inc.*, 143 A.D.3d 558, 38 N.Y.S.3d 896 (1st Dept 2016).

720 See *Arbor Realty Funding, LLC v. Herrick Feinstein LLP*, 140 A.D.3d 607, 610, 36 N.Y.S.3d 2 (1st Dept 2016).

721 *Forman v. Henkin*, 2018 WL 828101, 2018 N.Y. Slip Op. 01015 (2018).

722 *Forman v. Henkin*, 2018 WL 828101 at *5.

723 *Forman v. Henkin*, 2018 WL 828101 at *5.

724 *Forman v. Henkin*, 2018 WL 828101 at *5.

725 Forman v. Henkin, 2018 WL 828101 at *6.

726 See *Flowers v. City of New York*, 151 A.D.3d 590, 591, 55 N.Y.S.3d 51 (1st Dept 2017).

727 *Spearin v. Linmar*, L.P., 129 A.D.3d 528, 11 N.Y.S.3d 156 (1st Dept 2015); *Imanverdi v. Popovici*, 109 A.D.3d 1179, 971 N.Y.S.2d 911 (4th Dept 2013); *Richards v. Hertz Corp.*, 100 A.D.3d 728, 730, 953 N.Y.S.2d 654 (2d Dept 2012).

728 Accord *Forman v. Henkin*, 2018 WL 828101 at *5.

729 *Tapp v. New York State Urban Dev. Corp.*, 102 A.D.3d 620, 958 N.Y.S.2d 392 (1st Dept 2013), had mandated an identification of relevant information in a social media account, as a predicate for discovery of additional information in that account. In view of Forman v. Henkin, this kind of showing is no longer an absolute requirement, but is rather one form of potential support for a social media discovery demand. In this vein, see also *Flowers v. City of New York*, 151 A.D.3d 590, 591, 55 N.Y.S.3d 51 (1st Dept 2017).

730 See *Spearin*, 129 A.D.3d at 528.

731 *Richards*, 100 A.D.3d at 730.

732 *Richards*, 100 A.D.3d at 730.

733 *Richards*, 100 A.D.3d at 730.

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[734] See *Forman v. Henkin*, 2018 WL 828101 at *4.
[735] 151 A.D.3d 590, 55 N.Y.S.3d 51 (1st Dept 2017).
[736] *Flowers*, 151 A.D.3d at 591.
[737] *Flowers*, 151 A.D.3d at 591.
[738] *Flowers*, 151 A.D.3d at 591.
[739] *Flowers*, 151 A.D.3d at 591.
[740] *Lantigua v. Goldstein*, 149 A.D.3d 1057, 53 N.Y.S.3d 163 (2d Dept 2017).
[741] *Lantigua v. Goldstein*, 149 A.D.3d at 1059.
[742] This edition and many other past "Defendant" journals are available via links on the "Publications" page of DANY's website: http://defenseassociationofnewyork.org/page-856696.
[743] See the "Publications" page of DANY's website: http://defenseassociationofnewyork.org/page-856696.
[744] This edition and many other past "Defendant" journals are available via links on the "Publications" page of DANY's website: http://defenseassociationofnewyork.org/page-856696.
[745] *Sullivan v. 40/40 Club*, 34 Misc.3d 138(A), 2011 WL 6934522.
[746] *Sullivan*, 2011 WL 6934522 at *4.
[747] *Sullivan*, 2011 WL 6934522 at *4.
[748] *Sullivan*, 2011 WL 6934522 at *4.
[749] See *M.C. v. Sylvia Marsh Equities, Inc.*, 103 A.D.3d 676, 959 N.Y.S.2d 280 (2d Dept 2013).
[750] *M.C. v. Sylvia Marsh Equities, Inc.*, 103 A.D.3d at 678.
[751] i.e., *M.C. v. Sylvia Marsh Equities, Inc.*, 103 A.D.3d at 678.
[752] See *Graziano v. Cagan*, 105 A.D.3d 701, 962 N.Y.S.2d 643 (2d Dept 2013).
[753] *Gaoming You v. Rahmouni*, 147 A.D.3d 729, 730, 46 N.Y.S.3d 211 (2d Dept 2017); *Cioffi v. S.M. Foods, Inc.*, 142 A.D.3d 520, 524, 36 N.Y.S.3d 475 (2d Dept 2016); *Doviak v. Finkelstein & Partners, LLP*, 137 A.D.3d 843, 27 N.Y.S.3d 164, 169 (2d Dept 2016).
[754] *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 547, 26 N.Y.S.3d 218 (2015); *Aponte v, Clove Lakes Health Care and Rehabilitation Center Inc.*, 153 A.D.3d 593, 594, 59 N.Y.S.3d 750 (2d Dept 2017); *Burke v. Queen of Heaven Roman Catholic Elementary School*, 151 A.D.3d 1608, 1608-1609, 58 N.Y.S.3d 757 (4th Dept 2017); *Atiles v. Golub Corp.*, 141 A.D.3d 1055, 1056, 36 N.Y.S.3d 533 (3d Dept 2016). See also *Doviak*, 137 A.D.3d at 846.
[755] *Gaoming You v. Rahmouni*, 147 A.D.3d at 730; *Cioffi*, 142 A.D.3d at 525.
[756] *Burke*, 151 A.D.3d at 1609.
[757] *Aponte*, 153 A.D.3d at 594; *Bill's Feed Service, LLC v. Adams*, 132 A.D.3d 1400, 1401, 17 N.Y.S.3d 567 (4th Dept 2015); *Weiss v. Bellevue Maternity Hosp.*, 121 A.D.3d 1480, 1481, 995 N.Y.S.2d 640 (3d Dept 2014); *Gogos v. Modell's Sporting Goods, Inc.*, 87 A.D.3d 248, 257, 926 N.Y.S.2d 53 (1st Dept 2011) (in dissent).
[758] Accord *Burke*, 151 A.D.3d at 1609.
[759] *Cioffi*, 142 A.D.3d at 525; *Doviak*, 137 A.D.3d at 846. Accord *In re New York City Asbestos Litigation*, 157 A.D.3d 564, 2018 WL 454880 (1st Dept 2018); *Strong v. City of New York*, 112 A.D.3d 15, 973 N.Y.S.2d 152 (1st Dept 2013).
[760] *Pegasus Aviation I*, 26 N.Y.3d at 553
[761] *Arbor Realty Funding, LLC*, 140 A.D.3d at 610.
[762] *Pegasus Aviation I*, 26 N.Y.3d at 547; *Eksarko v. Associated Supermarket*, 155 A.D.3d 826, 828, 63 N.Y.S.3d 723 (2d Dept 2017). See also *Atiles*, 141 A.D.3d at 1056.
[763] *Pegasus Aviation I*, 26 N.Y.3d at 547-548. See also *Eksarko*, 155 A.D.3d at 828; *Atiles*, 141 A.D.3d at 1056.
[764] *Pegasus Aviation I*, 26 N.Y.3d at 551; compare *Dedushaj v. 3175–77 Villa Avenue Housing Dev. Fund Corp.*, 135 A.D.3d 421, 21 N.Y.S.3d 883 (1st Dept 2016) (precluding defendants from denying prior notice of a claimed defect was not proportionate to their misconduct; a monetary sanction was appropriate instead), *Burke*, 151 A.D.3d 1608 (adverse inference charge at trial as to defendants who destroyed stairs with a culpable state of mind, where the plaintiff had alternative evidence of the condition of the stairs), *Sarach v. M And T Bank Corp.*, 140 A.D.3d 1721, 1722, 34 N.Y.S.3d 303 (4th Dept 2016) (adverse inference charge after failure to preserve surveillance footage of the plaintiff's accident despite a prior order of preservation).
[765] *Cioffi*, 142 A.D.3d at 525.
[766] *Cioffi*, 142 A.D.3d at 525.
[767] *Burke*, 151 A.D.3d at 1609.
[768] *Burke*, 151 A.D.3d at 1609.
[769] *Doviak*, 22 N.Y.S.3d at 169, 170.
[770] *Burke*, 151 A.D.3d at 1609; *Sarach v. M And T Bank Corp.*, 140 A.D.3d 1721, 1722, 34 N.Y.S.3d 303 (4th Dept 2016).
[771] *Burke*, 151 A.D.3d at 1609; *Sarach*, 140 A.D.3d at 1722; *Cataudella v. 17 John Street Associates, LLC*, 140 A.D.3d 508, 509, 35 N.Y.S.3d 304 (1st Dept 2016).
[772] See *Dedushaj*, 135 A.D.3d at 421 (the fact that the non-produced documents were not relevant to the subject liability issue was also a consideration).
[773] *Cataudella*, 140 A.D.3d 508.
[774] *Cataudella*, 140 A.D.3d at 509.
[775] *Burke*, 151 A.D.3d at 1609-1610.
[776] *Sarach*, 140 A.D.3d at 1722.
[777] *Hughes v. Covey*, 131 A.D.3d 581, 582, 15 N.Y.S.3d 195 (2d Dept 2015); see also *Eremina v. Scparta*, 120 A.D.3d 616, 991 N.Y.S.2d 438 (2d Dept 2014).
[778] *Cioffi*, 142 A.D.3d at 525; *Hughes v. Covey*, 131 A.D.3d at 583.
[779] *Cioffi*, 142 A.D.3d at 526.; *Hughes v. Covey*, 131 A.D.3d at 583; see also *Arbor Realty Funding, LLC v. Herrick Feinstein LLP*, 140 A.D.3d 607, 610, 36 N.Y.S.3d 2 (1st Dept 2016).
[780] *Cioffi*, 142 A.D.3d at 525.
[781] *Eremina v. Scparta*, 120 A.D.3d at 617.

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[782] See *Neve v. City of New York*, 117 A.D.3d 1006, 986 N.Y.S.2d 606 (2d Dept 2014).

[783] See *Hackshaw v. Mercy Medical Center*, 139 A.D.3d 798, 33 N.Y.S.3d 297 (2d Dept 2016).

[784] *Branham v. Loews Orpheum Cinemas, Inc.*, 31 A.D.3d 319, 323, 819 N.Y.S.2d 250 (1st Dept 2006), aff'd 8 N.Y.3d 931, 834 N.Y.S.2d 503 (2007).

[785] *Pink v. Rome Youth Hockey Association, Inc.*, 28 N.Y.3d 994, 998, 41 N.Y.S.3d 204 (2016); see also *Byrd v. Walmart, Inc.*, 128 A.D.3d 629, 630-631, 8 N.Y.S.3d 428 (2d Dept 2015).

[786] *Hayes v. Bette & Cring*, LLC, 135 A.D.3d 1058, 1059, 22 N.Y.S.3d 680 (3d Dept 2016).

[787] *Hayes*, 135 A.D.3d at 1060, citing *Kavanagh v. Ogden Allied Maintenance Corp.*, 92 N.Y.2d 952, 954, 683 N.Y.S.2d 156 (1998).

[788] *Hayes*, 135 A.D.3d at 1060, citing *Smith v. Cardella Trucking Co., Inc.*, 113 A.D.3d 750, 750, 978 N.Y.S.2d 888 (2d Dept 2014); *Allen v. New York City Tr. Auth.*, 35 A.D.3d 230, 231, 828 N.Y.S.2d 301 (1st Dept 2006); *Smith v. Manning*, 277 A.D.2d 1004, 1005, 716 N.Y.S.2d 844 (4th Dept 2000).

[789] *Hayes*, 135 A.D.3d at 1060; see also *Smith v. Cardella Trucking*, 113 A.D.3d at 750 ("the plaintiffs placed the injured plaintiff's ability to engage in future employment in issue, thereby making an evaluation by a vocational rehabilitation expert appropriate").

[790] *Wilkerson v. Korbl*, 75 A.D.3d 470, 471, 905 N.Y.S.2d 167 (1st Dept 2010).

[791] *Hayes*, 135 A.D.3d at 1060; see also *Smith v. Cardella Trucking*, 113 A.D.3d at 750 ("discovery was still ongoing in the action and the note of issue had not been filed").

[792] *Anderson v. State of New York*, 134 A.D.3d 1061, 21 N.Y.S.3d 356 (2d Dept 2015).

[793] *Anderson*, 134 A.D.3d at 1062.

[794] *Anderson*, 134 A.D.3d at 1063.

[795] *Abate v. County of Erie*, 152 A.D.3d 177, 178, 154 N.Y.S.3d 821 (4th Dept 2017).

[796] *Abate v. County of Erie*, 152 A.D.3d at 182.

Any views and opinions expressed in this article are solely those of the author. Each case has different facts and issues, and any approach suggested here may not be appropriate in a given case.

Worthy of Note

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established their prima facie entitlement to judgment as a matter of law through the submission of an affirmation by an expert in colorectal surgery, the decedent's hospital chart and the transcripts of deposition testimony. The Court held that through this evidence, defendants established that they did not depart from the applicable standard of care. In opposition, plaintiff failed to raise a triable issue of fact as plaintiff's expert failed to address specific assertions made by the defense expert and the affidavit of plaintiff's expert was otherwise conclusory, speculative and unsupported by the evidence. condition arose immediately upon installation.

10. PUNITIVE DAMAGES

Plaintiff's Motion to Amend to add Claim for Punitive Damages Denied

Britz v. Grace Indus., LLC – 2017 NY Slip Op 08749 (1st Dept., December 14, 2017)

Plaintiff proposed to amend the complaint to add a claim for punitive damages by alleging that defendant negligently failed to fill in a trench on the side of the road two days prior to plaintiff's motor vehicle accident, parked construction vehicles by the roadway and that defendant personnel joked around when signing into safety meetings. The Court held that such conduct, if proven, was insufficient for the imposition of punitive damages, because it cannot be viewed as a conscious and deliberate disregard of the rights of others.

THE DEFENSE ASSOCIATION OF NEW YORK
P.O. Box 950
New York, NY 10274-0950

DEFENDANT

Application for Membership

THE DEFENSE ASSOCIATION OF NEW YORK
P.O. Box 950
New York, NY 10274-0950

I hereby wish to enroll as a member of DANY.

I enclose my check/draft $_____

Rates are $50.00 for individuals admitted to practice less than five years; $190.00 for individuals admitted to practice more than five years; and $750.00 for firm, professional corporation or company.

Name _____

Address _____

_____

Tel. No. _____

I represent that I am engaged in handling claims or defense of legal actions or that a substantial amount of my practice or business activity involves handling of claims or defense of legal actions.

***ALL APPLICATIONS MUST BE APPROVED BY THE BOARD OF GOVERNORS.**