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President's Column

VINCENT POZZUTO*

Dear DANY Members, Colleagues, and Sponsors:

It is difficult to express in words what a tremendous privilege and honor it is to serve as the 51st President of the Defense Association of New York, for the 2016-2017 term. I began my affiliation with this great organization in 2004, when during my fourth year as an Associate at Cozen O'Connor, I was asked by the Editor of this magazine, John McDonough, to take over the authorship of "Worthy of Note", which up until that point had been so expertly written and published by John Moore of Barry, McTiernan & Moore. I was also asked to assist in the quarterly production of the Defendant Magazine. Recognizing what large shoes I had to fill, the task was daunting. However, I quickly realized the quality of the lawyers and the excellent all-around people who made up the Board and membership of DANY, and I was able to consistently rely on the many contributions of those people in not only the publication of the Defendant, but in many other events and educational presentations put on by DANY over the years. I became a member of the Board of Directors in 2007 and, as the Board has grown and new members have been sworn in, the contributions and effort of both the Board and the membership has continued to astound me.

Thus, after I became President, it did not surprise me that the job has been relatively easy, due in large part to the unrelenting efforts of the Board and DANY membership. This organization is strong. And its strength is based upon the extraordinary people on the Board and within DANY membership, who continue

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* *Vincent Pozzuto is a member of the law firm of Cozen O'Connor.*

The Vanishing Jury Trial Part III

JOHN J. MCDONOUGH, ESQ.*

This third installment in our continuing series of the decline in the use of jury trials to resolve civil disputes at both the state and federal levels will explore the impact of the proliferation of class action lawsuits and agreements to pursue Alternative Dispute Resolution and their impact on jury trials.

A. Class Actions

It can be argued that the increase in the prevalence of class actions before the courts is attributable to the decline in the number of trials, as they are effectively taking a multitude of individual cases and grouping them into one trial, or, most likely, a large settlement. This not only creates a false representation of the overall number of cases being tried before a jury, but in some instances it can provide leverage to the plaintiffs in seeking early settlement on their claims. For example, whereas, a company might be inclined to defend itself against a case brought by an individual plaintiff on a particular claim for nominal damages, that company's incentive to go to trial is greatly diminished where a class action is certified against that company based on that same claim, and the nominal damage claim of one plaintiff could be a multi-million dollar claim when brought by multiple plaintiffs. When a class is certified and can't be dismissed on appeal or motion, settlement is the likely result in the overwhelming majority of cases. In general, state courts are more likely to allow a class action than federal courts.

B. Migration of Cases to Other Forums: Increased Use of Alternative Dispute Resolution ("ADR")

In 2001 some 24,000 cases were referred to some form of ADR in federal courts. That is about one-seventh of the number of dispositions that year.

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The Vanishing Jury Trial Part III

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1. Arbitration

A pre-condition to many economic relationships today is that the parties surrender their right to a jury trial in favor of arbitration. There has been a greater prevalence of arbitration agreements both in the commercial and consumer context, which requires that both parties to the agreement submit to an arbitrator, rather than the courts, in the event that a dispute arises among them. Unlike mediation, arbitration is a binding procedure (unless otherwise agreed upon by the parties). As such, arbitration is adjudicatory, as opposed to advisory, and the arbitrator (usually a retired judge or attorney) renders a binding decision at the end of an arbitration hearing. Thus, by agreeing to arbitration, the parties, perhaps among other things, are waiving their fundamental, constitutional right to a trial by a jury of their peers, and they will not be entitled to de novo review of the arbitrator's decision. In 1992, arbitration accounted for 1.7 percent of contract dispositions and 3.5 percent of tort dispositions in the state courts in the nation's 75 largest counties. Courts in New York have followed this preemption holding. Schiffer v. Slomin's, Inc., 48 Misc. 3d 15 (App. Term 2015).

2. Mediation

Has the emergence of mediation and its embrace by judges, attorneys, corporate counsel, and individuals been so widespread that jury trials are only justified in a very small number of cases?

Mediation is another form of ADR that likely plays a major role in the decline of civil jury trials. Mediation, unlike arbitration, leaves the decision power in the hands of the parties. The mediator does not make any determination as to who is right, what is fair, or the merits of the case. Instead the mediator meets with both sides as a neutral party and helps them to understand and analyze the facts and issues of their dispute and eliminate obstacles to communication, in an attempt to avoid confrontation amongst the parties, and thereby facilitate settlement. Corporate legal departments, insurance

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companies, judges, and society in general have all embraced the use of mediation as an alternative to trial. Many retired judges become mediators, and they use their experience to educate both parties of the expense, uncertainty and complications of going to trial. In recent years it has been the trend among judges to pressure lawyers to mediate their cases as opposed to trying or settling them, in many cases using a mediator chosen by the judge.

C. Cost and Resource Constraints

It is unquestionable that financial considerations impact the way in which a dispute is resolved. With the cost of litigation rising and the apparent unpredictability of trial outcomes, many are inclined to settle before trial, or submit to ADR instead. The advent of E-disovery and adoption of rules imposing duties of full disclosure of ESI have greatly increased those costs as well, requiring the need for document management companies, the organization and back-up of electronic documents, as well as the use of security measures to ensure the preservation of data and communications.

D. Other Factors

Other factors for the decline in jury trials, although less compelling, may include the uncertainty of jury verdicts, the delay in resolving cases by jury trial, the increased filing and granting of dispositive motions, and the lack of trial experience among both lawyers and judges (and the attendant reluctance to try cases). Another significant influence may be the existence of more readily available information (vis-à-vis the Internet) to assist parties in valuing their cases, thereby facilitating settlement.

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President's Column

advancing DANY's many goals, including education, advocacy, diversity and community.

In terms of education, we kicked off in August with a CLE Event that included a presentation on assumption of risk, with emphasis on liability arising out of attending sporting events, appropriately followed by a Yankees game. Board member Kevin Faley gave an excellent presentation on the assumption of risk defense, and thereafter all attendees enjoyed a Yankee game on a hot August night, only interrupted by one rain shower. This event was due in large part to the efforts of not only Kevin, but Past President and Board Member Brian Rayhill.

As for advocacy, our Amicus Committee, led by Andy Zajac, continues its long standing tradition of allowing DANY's voice to be heard on many different topics that affect the defense bar. The Amicus Committee filed a brief in the Newman v. RCPI Landmark Properties case, recently decided by the Court of Appeals. The Amicus Committee is now hard at work on a Court of Appeals case involving the discoverability of the Facebook accounts of allegedly injured plaintiffs.

With respect to diversity and community, DANY maintains its active role in supporting diversity in the legal profession and providing

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Concealed Carry and the College Campus

BY: KRISTIN KEEHAN*

The main mall at the University of Texas at Austin is the focal point of the campus. Any given day, you can find students reading or debating one another on the vibrant green lawn, or find a troupe of drama majors acting out a Shakespearian drama within the confines of one of the many courtyards. You feel like a University of Texas at Austin student when you walk along the main mall. You're a Longhorn from that moment on.

However, despite all of this, an air of somberness hangs over the main mall. It's impossible to not contemplate, as you walk underneath the symbolic Tower, that fifty years ago student Charles Whitman climbed to the top of that tower, armed with rifles, pistols and a shotgun, and began shooting down at the crowd below. The shooting lasted for 96 terrible minutes. Charles Whitman murdered thirteen people that day.[1]

What became known as the UT Tower Shooting would be the first of, unfortunately, many mass school shootings. And while it has been fifty years since that horrible day, many find themselves wondering, in the face of new gun legislation, how far have we really come?

Concealed Carry on Texas Campuses

On June 13, 2015, Texas Governor Greg Abbott signed into law S.B. 11, also known as the "concealed carry" law.[2] The law went into effect on August 16, 2016 the law went into effect. S.B. 11 provides that a public university may enact reasonable rules and regulations regarding 1.) carrying of concealed handguns by licensed holders on campus; and 2.) storage of handguns in dormitories or other residential facilities.[3] However, the law holds that "these rules and regulations may not either 'generally prohibit' or 'have the effect of generally prohibiting' license holders from carrying concealed handguns on campus."[4] Importantly, this law means that university staff and faculty members cannot ban handguns from their classrooms.[5] If a student has a concealed carry license, they have the right to carry them in the classrooms.[6]

On July 6, 2016, University of Texas at Austin Professors Jennifer Lynn Glass, Lisa Moore and Mia Carter filed a lawsuit against the University and the Texas Attorney General's Office. They claim that the law is unconstitutional and "chills" their First Amendment rights to academic freedom.[7] Additionally, they also challenge claims that the law is protected by the Second Amendment right to bear arms and violates the Constitution's equal protection clause.[8] Texas Attorney General Ken Paxton has called the lawsuit "frivolous" and urges its dismissal.[9]

U.S. District Juddge Lee Yeakel denied the professors' request for a preliminary injunction, which sought to block implementation of the law. Judge Yeakel found that the professors had failed to establish a likelihood of success on the merits and denied the request.[10] In his eleven page opinion, Judge Yeakel held that neither the Campus Carry Law or the University's Campus Carry Policy was a content-based regulation of speech, and thus the plaintiffs' complaint did not fit within any "recognized right of academic freedom."[11]

In reaching his decision, Judge Yeakel looked to the *University of Pennsylvania v. EEOC*.[12] In that matter, an associate professor filed a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging discrimination on the basis of race, sex and national origin in violation of Title VII of the Civil Rights Act of 1964.[13] The EECO issued subpoenas seeking the professor's tenure-review file and the tenure files of five male faculty members identified in the charge as having received more favorable treatment. The University of Pennsylvania applied to the EEOC for modification of the subpoena

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to exclude what it termed "confidential peer review material." The EECO denied the application. The United States Supreme Court held that a university does not enjoy a special privilege requiring a judicial finding of particularized necessity of access, beyond a showing of mere relevance, before peer review materials pertinent to charges of discrimination in tenure decisions are disclosed to the EEOC.[14]

The University of Connecticut attempted to rely upon "academic freedom cases". However, the Court held that, since "those cases dealt with attempts to control university speech that were content-based" and the case at bar did not involve a content-based regulation, those cases were inapplicable.[15] However, the Court also noted that the infringement was "extremely attenuated," a point that Judge Yeakel did not discuss in his eleven page opinion.

The Texas Attorney General's Office and the University of Texas at Austin have both filed motions to dismiss, arguing, inter alia, that the professors do not have enough evidence to prove that the presence of concealed handguns will stifle free speech in the learning environment.[16] These motions are still pending.

A. Merits of the Claims

In the *District of Columbia v. Heller*, Justice Scalia famously wrote that the decision in *Heller* should not be taken to cast doubt on "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings."[17]

In deciding to veto legislation that would provide for concealed carry on campuses, Georgia Governor Nathan Deal cited to this quote from Scalia. The Governor stated that colleges have historically been treated as "sanctuaries of learning where firearms have not been allowed." He said that to depart from such "time honored protections should require overwhelming justification."[18] He found that no such justifications existed. Notably, all 29 public universities and college presidents in Georgia opposed the bill.[19]

The United States Supreme Court has frequently recognized the importance of freedom of speech in the school setting. In *Healey v. James*, the Court held that the "vigilant protection of constitutional freedom [was] nowhere more vital than in the community of American schools."[20] In *Tinker v. Des Moines Independent School District*, 393 U.SD. 503 (1969), the Court held that students are "possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the state."[21]

However, when analyzing whether a particular law has an impact on a professors' First Amendment Right to freedom of speech, the courts look to see whether the law was content-based.[22] The concealed carry law at issue in the lawsuit brought by University of Texas at Austin professor s is not content-based, as held by Judge Yeakel in his denial of the request for preliminary injection. Like the petitioners in *University of Pennsylvania v. EEOC*, the professors are alleging only that "the quality of instruction and scholarship [will] decline" as a result of the allowance of concealed carry handguns on campus.[23]

The best chance the instant lawsuit might have is an argument based on policy. Using the words of, arguably, the most conservative justice to ever grace the bench of the United Supreme Court to support the argument that laws allowing the possession of "firearms in sensitive places such as schools" should be prohibited. The policy argument does not end there. In *Keyishian v. Board of Regents of the State Univ. of New York*, the court opined that "[academic] freedom" is a "special concern of the First Amendment, which does not tolerate a pall of orthodoxy over the classroom."[24]

The court in Texas, in deciding the merits of this matter, will likely look to the high court decisions of other states that permit concealed carry on campuses. For example, in *Regents of the University of Colorado v. Students for Concealed Carry on Campus*, the Supreme Court of Colorado held that Colorado University had to comply with state legislation and permit students to carry concealed handguns on campus.[25] However, notably, in the Supreme Court of Colorado decision, constitutional claims were not evaluated. The court simply looked to the law to determine its breadth and found that it was intended to extend to Colorado University, as the law explicitly provided that it was to apply

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to "all areas of the state."[26] In the matter of *Oregon Firearms Educational Foundation v. Board of Higher Education, et al.*, the Oregon Court of Appeals invalidated a Board of Education rule that imposed sanctions on persons who possessed or used firearms on university property. The Court of Appeals held that the administrative rule was preempted because only the Legislative Assembly may regulate activities involving firearms. Again, due to preemption issues, the court did not consider constitutional concerns.

The University of Texas at Austin case is unique in that the court in Texas, unlike the courts in Colorado and Utah, will be forced to consider the constitutional concerns of the professors. Furthermore, this lawsuit might be coming at just the right time. Gun violence is of large concern for the country. Not only do we have politicians, such as the Governor of Georgia, refusing to back concealed carry legislation, we have the recent Ninth Circuit decision that the Second Amendment does not give people the right to carry a concealed weapon.[27] An argument rooted in the limitations of the Second Amendment in "sensitive places" and the policy of providing a learning environment unhindered by the presence of weapons, has the potential to be a successful one.

Concealed Carry on Campuses Throughout the U.S.

Only eight states currently allow the carrying of concealed weapons on college campuses. These states include Colorado, Idaho, Kansas, Mississippi, Oregon, Utah, Wisconsin, and, now, Texas.[28] In twenty-three states, the decision of whether to allow or ban concealed carry weapons rests with the college or university.[29] Eighteen other states have statutory prohibitions: Florida, Georgia, Illinois, Louisiana, Massachusetts, Michigan, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, South Carolina, Tennessee, Washington and Wyoming.[30]

Colorado has permitted concealed handguns on campus since 2003. Since that time, there has been only once case in which a handgun was fired. That firing was accidental and the employee of the school was immediately fired. A main argument in support of concealed handgun carry on campuses is the ability to protect one's self.[31] Notably, since 2003, there have been no mass shooting on Colorado college campuses.[32] Of the more than 150 colleges and universities in the eight states permitting concealed carry on campuses, not one of these campuses has seen a single resulting act of violence.[33] However, professors at the University of Colorado have stated that they have been in a heightened state of anxiety when dealing with some students, and some students still see the ability of other students to concealed carry as a "threat".[34]

Utah's concealed handgun law was put in the spotlight back in October of 2014, when feminist Anita Sarkeesian cancelled her speech due to the Utah State University.[35] Prior to the scheduled speech, someone sent an email to several school staffers threatening "the deadliest school shooting in American history" if the event was not cancelled.[36] When Ms. Sarkeesian asked the school whether they would forbid guns from the speech or do pat-downs, the school refused, saying that, if a person has a valid concealed firearm permit, then they are permitted to have said firearm at the venue.[37] As a result, Ms. Sarkeesian cancelled her speech.

The University of Texas at Austin has already seen adverse effects from the enactment of the "concealed handgun" law. The Dean of Architecture sought another position with the University of Pennsylvania School of Design. University of Virginia media studies professor withdrew his candidacy for dean of UT Austin's Moody College of Communications.[38]

Conclusion

While the legal team for the University of Texas at Austin professors are gathering evidence to prepare for trial, the case may well be over before it begins if the court rules in favor of defendants' motions to dismiss. While the majority of states do not mandate that students be permitted to concealed carry handguns on college campuses, the decision in this litigation could change whether more states propose legislation similar to that of Texas. On the other hand, if the lawsuit brought by the professors is successful, challenges to the laws in the eight states permitting students to concealed carry on campuses could begin to flood in. Whether you are a gun rights advocate or an advocate for gun control, this case is one to watch for.

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Court of Appeals to Address Parameters of Social Media Discovery

BY: ANDREW ZAJAC* AND AMANDA L. NELSON**

On October 20, 2016, the Appellate Division, First Department granted defense counsel's motion for permission to appeal in relation to its decision in Forman v. Henkin.[1] Forman was a highly-publicized decision which highlights the tension between the explosive growth in use of social media on the one hand, and traditional discovery principles on the other.

In Forman, a three-judge majority of the court denied discovery of most of a personal injury plaintiff's Facebook account, calling the request a "fishing expedition."[2]

The lengthy two-judge dissent suggested reconsideration of "[t]he case law that has emerged in this state in the last few years regarding discovery of information posted on personal social networking sites [which] holds that a defendant will be permitted to seek discovery of the nonpublic information a plaintiff posted on social media, *if, and only if*, the defendant can first unearth some item from the plaintiff's publicly available social media postings that tends to conflict with or contradict the plaintiff's claims. Even if that hurdle is passed, then the trial court must conduct an in camera review of the materials posted by the plaintiff to ensure that the defendant is provided only with relevant materials." (emphasis in original)[3]

The plaintiff in Forman alleged that she was injured while riding one of defendant's horses. The stirrup attached to the saddle broke, which caused her to fall to the ground. She asserted that the accident resulted in cognitive and physical injuries which have limited her ability to participate in recreational and social activities. At her deposition, the plaintiff testified that she maintained an active Facebook account prior to the accident which depicted recreational activities, but she deactivated her Facebook page after the accident and subsequent to the commencement of the action. She testified that because of her current difficulties with memory, she is unable to recall the precise nature or extent of her Facebook activity between the time of the accident until she disabled the account.

Defense counsel moved for an order compelling the plaintiff to provide an authorization granting them access to the plaintiff's Facebook account, including all photographs, status updates and instant messages. The trial court granted defendant's motion and directed plaintiff to produce: (a) all photographs posted prior to the accident that she intends to introduce at trial; (b) all photographs posted after the accident (excepting those depicting nudity or romantic encounters) and (c) an authorization for records of private messages posted after the accident and the number of characters or words in those messages.

The three-judge majority reversed as to items (b) and (c). The majority reviewed two of the court's prior decisions, namely Tapp v. New York State Urban Development,[4] and Pecile v. Titan Capital Group, LLC,[5] and it held that the "threshold factual predicate"[6] in cases of this nature is not met unless the defendant can point to some item from the plaintiff's publicly-available social media postings which conflicts with the claims made in the case.

The majority rejected the dissent's invitation to revisit the court's prior rulings on the issue as being barred by the doctrine of stare decisis.

The dissent stated that the court's prior rulings on the issue inappropriately created a different set of discovery rules for social media information. The dissenting opinion further indicated that "[t]here is no reason why the traditional discovery process

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cannot be used equally well" in the context of social media as long as the defendant's discovery demand is "limited to reasonably defined categories of items that are relevant to the issues to be raised."[7]

As noted above, the dissent strongly disagreed with the majority's conclusion that a defendant must demonstrate a "threshold factual predicate" before such information may be obtained. The dissent stated that as long as the request was appropriate and narrowly-tailored, the plaintiff must then perform a proper search and turn over any responsive and non-privileged social media information.

The dissent also indicated that stare decisis should not be a bar to re-examining the court's previous rulings on this issue since they were of recent vintage and the issues surrounding social media continue to evolve. The dissent also noted that the court's prior rulings created an unnecessary burden on the trial courts by requiring then to conduct an in camera review of a plaintiff's social media postings prior to them being disclosed to the defense.

DANY's Amicus Curiae Committee is currently preparing a brief to support the defendant's position in this case.

The Committee will, in large part, be advocating for the position offered by the dissent that social media discovery should not be granted any heightened protections or additional hurdles to clear before defendants are entitled to disclosure. In particular, we will be contesting the rule adopted by the majority (as well as numerous courts outside of New York), that a defendant is obligated to demonstrate, through publicly available social media postings, that it is more than likely that the plaintiff has private postings which conflict with his or her claimed injuries. To this end, the Committee will argue that, as suggested by the dissent, social media discovery should be subject to the same standards and requirements as traditional discovery.[8] In light of the long-standing history of favoring open and extensive pre-trial discovery in New York courts, and the liberal interpretation of what is considered "material and necessary" under CPLR 3101, we will argue that there is no viable basis for creating a threshold predicate for social media discovery.[9]

While the majority rested on a stare decisis rationale and refused to reconsider the threshold which it established in Tapp and Pecile, other courts have held that no such factual predicate is necessary. Indeed, shortly after leave to appeal was granted, a Georgia District Court expressly rejected the requirement of a predicate threshold before "private" social media information must be produced. In Orr v. Macy's Retail Holdings, Inc.,[10] the Court stated that it was "unconvinced that the Federal Rules of Civil Procedure require a 'threshold showing' that relevant evidence already exists before a party can request production of that same relevant evidence. ...Because Jacqueline's physical condition and the Orrs' quality of life are both at issue in this case ...plaintiffs' Facebook postings reflecting physical capabilities and activities inconsistent with their injuries are relevant and discoverable."

Although the Orr court was considering the issue in the context of the Federal Rules, the analysis is plainly applicable to the CPLR, and supports the Committee's argument that no predicate requirement should be imposed. To this end, the dissent similarly looked to federal case law, relying in part on the Eastern District case Giacchetto v. Patchogue-Medford Union Free Sch. Dist.,[11] wherein the court stated "[t]he fact that Defendant is seeking social networking information as opposed to traditional discovery materials does not change the Court's analysis." This, in short, sums up the Committee's argument that, whether obtained from an electronic social media source or traditional hard copy, discovery is discovery, and should be produced upon a demonstration that it is "material and necessary" to the matter. No heightened threshold requirements should be mandated.

As to the issue of privacy in itself, courts have found repeatedly that social media is not entitled to any heightened privacy protections, even when the page is set to "private." Indeed, in in Patterson v. Turner Constr. Co., the First Department itself recognized that postings on a plaintiff's "private" Facebook account are not shielded from discovery

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merely because plaintiff used the service's privacy settings to restrict access.[12] As the lack of any reasonable privacy expectations has been largely acknowledged, this will set the stage for the Committee's argument that there is no basis to treat social media discovery different than traditional discovery.

Lastly, in accord with the dissent, the Committee will argue against the notion that social media discovery must first be subject to in camera review before production to the defense. Not only is this unduly burdensome on the courts, and will potentially dissuade judges from permitting such discovery overall, but it again places social media discovery in a special category unto itself. With the overarching argument being that social media should be treated no differently than any other discovery, the Committee will argue that the plaintiff must search both the public and private portions of her social media outlets, and produce responsive documents from those outlets accordingly.[13]

This is an issue of great significance for the Defense Bar. Ultimately, if defense counsel and the Amicus Curiae Committee are successful in persuading the Court of Appeals that no heightened threshold requirements for social media production are warranted, this will open a greater avenue to uncover evidence and allow counsel to present the jury with the full facts surrounding the damages and limitations alleged by personal injury plaintiffs.

DANY's Amicus Curiae Committee is currently comprised of Andrew Zajac and Dawn DeSimone of McGaw, Alventosa & Zajac, who co-chair the Committee, as well as Rona L. Platt of Rona L. Platt PLLC, Brendan T. Fitzpatrick of Goldberg Segalla, Jonathan Uejio / special counsel to Conway, Farrell, Curtin & Kelly, P.C., Lisa L. Gokhulsingh of Gannon, Rosenfarb & Drossman and Amanda L. Nelson of Cozen O'Connor. The members of the Committee provide their services on a voluntary basis, free of charge. Printing costs have been borne by DANY. Inquiries with respect to the Committee should be directed to Andrew Zajac at (516) 932-2832.

Any views and opinions expressed in this article are solely those of its authors. Each case has different facts and issues, and any approach suggested here may not be appropriate in a given case.

1 134 A.D.3d 529, 22 N.Y.S.3d 178 (1st Dep't 2015).
2 134 A.D.3d at 533, 22 N.Y.S.3d at 182.
3 134 A.D.3d at 536, 22 N.Y.S.3d at 184-185.
4 102 A.D.3d 620, 958 N.Y.S.2d 392 (1st Dep't 2013).
5 113 A.D.3d 526, 979 N.Y.S.2d 303 (1st Dep't 2014).
6 134 A.D.3d at 532, 22 N.Y.S.3d at 182.
7 134 A.D.3d at 540-541, 22 N.Y.S.3d at 188.
8 134 A.D.3d at 540, 22 N.Y.S.3d at 188.
9 Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 406, 235 N.E.2d 430, 431 (1968).
10 2016 U.S. Dist. LEXIS 147573 (S.D. Ga. Oct. 24, 2016).
11 293 F.R.D. 112, 114 (E.D.N.Y. 2013).
12 88 A.D.3d 617, 931 N.Y.S.2d 311 (1st Dep't 2011).
13 134 A.D.3d at 540, 22 N.Y.S.3d at 188.

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Preparing Expert Witnesses for Trial

BY: CLAIRE F. RUSH, ESQ.,* RUSH & SABBATINO, PLLC

Speak to any trial attorney about expert witnesses and you will be sure to get an earful. In a perfect world expert witnesses, would be retained at the start of a case to assist attorneys in marshalling the evidence and objectively analyzing it. If a case is indefensible they would say so. Where a defense exists, attorneys would collaborate with their experts to establish an appropriate theory of the case and theme that would best ethically represent their client's interests. Attorneys and experts acting from a shared position of honesty and integrity would work together to protect and advance their client's interests.

Such experts surely do exist and their names are legend among those lawyers who love to learn and work with them. Unfortunately, the hallways of courthouses and law firms are rife with stories about those experts who consistently jeopardize clients' rights because of their cavalier behavior. The ways in which these experts destroy themselves and threaten their clients are numerous. Some erstwhile experts oversell their qualifications claiming expertise in areas far afield from their training, knowledge and experience. Other witnesses when presented with a possible engagement stretch to reach a conclusion only to advise the client and counsel on the courthouse steps that perhaps they may not be able to testify in accordance with their previously expressed opinion after all. Still others are just plain lazy and routinely produce shoddy error ridden work. These witnesses are often times those that routinely avoid consulting with counsel. The egos of yet other experts are so large that lawyers and clients alike are loathe to work with them. Many of these very witnesses take personal umbrage when opposing counsel dare to question their fee schedules and litigation backgrounds and fight back on cross-examination against these legitimate questions thereby undermining their credibility and usefulness.

The good news is that it is possible to teach an expert how to become a good witness. This process can be kick started if the expert witness is willing to be a patient teacher and accessible mentor to the attorney and client. Conversely it requires the expert witness to defer to the trial attorney's superior knowledge of the law and practice and accept direction as to how to field questions and conduct oneself on the witness stand.

Technical and scientific experts who voluntarily participate in the litigation process must reconcile themselves to the fact that they can and will be criticized as part of the cross- examination process. To quote Harry Truman "If you can't take the heat get out of the kitchen." Not everyone is meant to be a trial lawyer and not every scientist is meant to be an expert witness. Learning how to deal with criticism and cross-examination is an essential skill that experts must develop if they wish to venture into the courtroom.

Generally speaking, an effective expert witness must: (1) be a good communicator; (2) understand "it's just business"; (3) not make assumptions, and; (4) always do their best. Expert witnesses who guide themselves by these principles are less likely to fall prey to the usual means by which expert testimony is impeached.

Effective Expert Witnesses are Good Communicators

Outstanding expert witnesses are great communicators. These individuals use everyday language to boil down complicated scientific concepts into sound bites that a middle schooler could understand. Great expert witnesses are also terrific teachers. They clearly enjoy teaching and their excitement when sharing their knowledge

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Preparing Expert Witnesses for Trial

is palpable. They use familiar analogies to make their points accessible to all people regardless of their educational background. Lawyers and experts should always consider using demonstrative evidence to assist the triers of fact in visualizing and understanding the substance of technical testimony.

Mediocre expert witnesses by contrast will hide behind technical jargon and attempt to intellectually bully juries and attorneys into accepting their theories by virtue of their superior IQ's and educational achievements. Such witnesses make no attempt to teach, provide context for their opinions or even advance their client's theory of the case.

A talented expert witness will always take his or her time before answering questions. Rapid fire questioning by a cross- examiner does not inspire a knee jerk response to answer with a similar rapidity. Seasoned expert witnesses listen, think and then respond.

Another hallmark characteristic common to poor expert witnesses is their propensity to answer questions other than the question asked. A skilled cross-examiner will pounce upon this shortcoming and spin the non-responsive answer to the jury as a deliberate attempt to obfuscate the truth. Trial attorneys need to encourage their experts to be active listeners and responsive witnesses.

Expert witnesses must first understand what is being asked of them before giving an answer. An expert witness should never be afraid to say that they do not understand a question. The cross-examiner should be forced to ask the question again. If the expert still doesn't legitimately understand the question you can bet your bottom dollar that the jury does not understand it. Attorneys must encourage their expert witnesses to make their cross- examiners ask a cogent question that can be articulately and accurately responded to.

A related topic that can pose fear in a novice attorney's and expert's heart is the "dreaded" yes/no question. A cross-examiner's demand that a witness respond yes or no to a particular set of questions can cause many an expert to blanche or become petulant. A seasoned expert witness by contrast will neutrally respond that while he or she understands that the questioner is seeking a yes or no answer it is not possible to give an accurate and complete yes or no answer. A deft cross-examiner will advise opposing counsel that such a simplistic answer would only mislead the judge and jury. Such a response turns the question against the examiner by making the cross-examining attorney look manipulative.

Other techniques skilled expert witnesses use when responding to such questions are to qualify the response to the demand for a yes or no answer as follows: "As I understand your question my response is [yes or no]" or similarly "My answer is [yes or no] under certain circumstances". The value of these types of responses is that they alert the jury to the fact that the question cannot be fairly answered as asked and permit the expert's attorney to return to the question on redirect and clarify the topic with the expert witness.

Attorneys and experts must also beware of the "reptile" theory of trial practice. This system developed by Don Keenan and David Ball is premised on a two-prong attack on witness integrity. The first tactic is to elicit an agreement that there has been a safety violation and if the witness fails to agree that a safety standard has been violated the questioner will commence an all-out emotional assault on the witness' integrity. Reptile theory for the uninitiated basically seeks to frame every case so that it appears that the defendant intentionally chose to violate one or more safety rules. The courtroom thus becomes a safety arena wherein the jurors serve as the guardians of public safety and award damages to protect themselves and the community at large. The technique while based on dubious science is highly compelling and persuasive when not properly countered.

A reptile attorney will generally ask two types of safety questions: (1) those that focus on big picture safety principles and (2) subsequent hypothetical questions that scaffold from the previous safety concessions. In an outstanding article entitled *Debunking and Redefining the Plaintiff Reptile Theory* William Kanasky boiled the big picture reptile safety questions down to the following general principles: safety must always be the top priority; danger is never appropriate; protection from danger is always a top priority; reducing risk is always a

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top priority; sooner is always better, and; more is always better. See, For The Defense, DRI, April 2014. The aim of the reptile attorney is to secure a series of agreements to these principles. Once sufficient agreements are secured the attorney will then cherry pick the evidence to formulate questions that will require the witness to concede that the actions taken in a particular case were not the safest possible. While most people would agree that these general safety principles are all reasonable in the abstract, the problem with them is that the standard in a negligence case is not absolute safety but rather reasonable care.

So, what should an attorney and expert facing a reptilian attorney to do? First and foremost, the expert must listen intently and resist the urge to give opposing counsel the blanket concessions he or she seeks. Other than death and taxes there are very few situations that one will confront in life that are so black and white. Kanasky urges witnesses to respond to these sorts of vague general safety questions with qualifiers such as "it depends on the circumstances", "not necessarily in every situation", "not always", "it can be in certain situations" and "sometimes that is true but not always". Kanasky, William, Debunking and Redefining the Plaintiff Reptile Theory, For The Defense, DRI, April 2014. These responses are effective because they are truthful. They also give the attorney and expert a platform to provide the jury with the alternate theory that is being proffered.

If the reptilian attorney cannot obtain the desired safety concessions he or she will resort to aggressive attacks, humiliation and innuendo that it is the expert who is confused and mistaken. The reptilian attorney is attempting to awaken the expert's "flight or fight" response. Expert witnesses must be counseled not to take the bait. This is a legal strategy not personally directed at the expert. The key to appropriately deflecting these attacks is for the expert to remain calm, composed, confident and non-pulsed.

Counsel and his or her expert witness must be cognizant of the expert's social media footprint. A skilled adversary will be armed with the expert's web site, professional writings and transcripts of prior testimony together with any postings made by the expert over the years. Moreover, at least half of the jurors are going to ignore the judge's admonition not to look at the internet and will Google and Facebook everyone connected with the trial including the experts. Experts and attorneys should follow the advice that parents give their children "Don't post anything on the internet that you do not want the world to have access to".

At the end of the day it is important to remember that jurors always relate best to witnesses and attorneys that are approachable. The best expert witnesses and attorneys strive to be a peer, not a superior, to the finders of fact.

Great Expert Witnesses Don't Take Anything Personally

Over 500 years ago, in "As You Like It" William Shakespeare observed that "All the world's a stage, And all men and women merely players. They have their exits and their entrances…." So too in litigation each participant has their own circumscribed role. Expert witnesses are retained to provide technical and scientific opinions that advance their client's case. Opposing counsel's job is to discredit the opinions of any adverse experts through the process of impeachment. It is business plain and simple. A masterful expert will never lose sight of this fundamental truth. If an expert conducts him or herself with integrity and honesty, he or she has nothing to fear.

Let's look at some of the so called tough questions trial attorneys are bound to ask:

1. How many times have you testified?
2. Where have you testified?
3. How many times have you testified for plaintiff/ defendant?
4. What percentage of your income comes from testifying in court?
5. What is your hourly rate?
6. How many hours have you spent on the case to date?

There is nothing inherently difficult about answering any of these questions. If an expert has agreed to act as a witness, they need to know this information and be able to answer it in a straightforward manner. Everyone knows that experts are well compensated for their time and

effort. The only experts that I have seen destroyed by these questions are those that will not give up this information.

An expert should be questioned prior to engagement as to whether he or she has any skeletons in the closet. The commission of a past petty indiscretion standing alone will not prevent an otherwise qualified individual from being an expert witness. If an otherwise competent witness was guilty of a prior transgression the attorney proffering the expert's testimony should disclose the impropriety and take the sting out of it. If the attorney fails to disclose it, you can be sure that someday an opposing counsel will discover it and skewer you with it. The same is true about IRS liens and professional disciplinary proceedings.

When an expert is disciplined after retention, counsel must make a motion in limine to preclude the adverse attorney from questioning the expert about the facts and circumstances surrounding this sanction. Should the Court deny this in limine motion counsel must then weigh the effect this information will likely have on a jury against simply not producing the expert and taking a "missing witness charge". If a damaged expert must be called he or she must be admonished to be calm, humble and contrite. The expert should be repeatedly instructed not to lose their cool. Again, the anticipated cross examination is not personal, it's just business.

Under no circumstances should an expert witness fight with opposing counsel. Experts must keep their tempers and egos in check no matter how provocative they think the opposing attorney is being. A simple "I disagree" said without a trace of smugness and with a dose of humility will further your client's case much more than a long-winded combative diatribe. The expert witness must strive to stay above the fray at all costs.

Sometimes experts, like lawyers, can end up in front of a judge before whom they can do no right. The same rules apply. This is a battle that neither a witness nor a lawyer can win. This is why there are appellate courts.

Experts faced with such a situation don't have to be a sycophant but they should never ever fight with a judge. If the judge is biased or prejudiced it is the job of the trial attorney to make the record and document all of the eye rolling, snorting or dismissive non-verbal behavior the judge may be engaging in.

A Skillful Expert Witness Does Not Assume Anything

At least 50% of the time spent preparing a lay witness to testify is spent teaching them not to assume or guess. One would think that this would come naturally to a person who is involved with the litigation process on a professional basis but it is not. Assuming and guessing is a human characteristic that lawyers and expert witnesses suffer from as well.

Regardless of our educational background and professional achievements there will come a time when a fact or piece of information will escape us. Under such circumstances an expert should simply advise the examiner that he or she doesn't recall and ask for the opportunity to review their notes to refresh their recollection. The worst thing that can happen is that the expert guesses and is wrong. This mistake is then memorialized forever in a transcript.

Another problem arises where an expert attempting to be "helpful" ventures an opinion beyond his or her area of expertise. I took courses on taxation and criminal procedure in law school. Does that qualify me to appear in tax court or criminal court? Technically it does but I can assure you I would not want me as a lawyer in either of these venues. Experts should be similarly circumspect about their areas of expertise. One of my most satisfying cross- examinations involved an engineer who claimed to be an expert in over 250 discrete areas of engineering design. There was nothing he would not testify to. The jury was in stitches by the time I got through with my cross. The lesson is clear: Better to be a master of one field than a master of none.

Another problem that arises from time to time occurs where an attorney uses terms of art which can have different or ambiguous meanings depending on the context. An expert witness must make the cross- examiner define the context in which he or she is using the word. Reasonable, reckless, careless, safe, prudent, dangerous and risk are just a few words that should peak an expert's radar in the

course of an examination. If the examiner will not give a definition the expert should give a qualified response such as "it depends on the circumstances."

Finally, no attorney nor expert witness should assume that everyone on the jury has a base knowledge of scientific principles whether it be basic anatomy, Newtonian physics or the meaning of Delta-V. Great expert witnesses presume that their audiences know nothing about the subject matter they are testifying about. These experts relish the opportunity to school a jury on their area of expertise. Every time an expert can explain a complex concept in a way that is understandable to your average juror he or she is scoring important credibility points.

Great Expert Witnesses Always Do Their Best

Success in life is 99% perspiration and 1% inspiration. Even the most brilliant expert will be ineffective if he or she does not do the necessary ground work. This process begins from the moment the expert is first identified and the assignment accepted. Attorneys should ask their experts to identify all of the relevant records that should be secured and investigation that should be undertaken.

Attorneys need to resist the temptation to pressure their experts to express opinions outside their fields of competency. Experts as well as attorneys should not oversell their assessments of the merits of a case. Clients want a realistic risk assessment. If a case is defensible they will fight the fight but where a case is weak they will want to be able to cap their risk. A properly prepared expert can play a pivotal role in helping parties make these early assessments and save substantial sums of money in unnecessary litigation costs. Professionals who put the client's long term best interests ahead of their own short term monetary gain inevitably gain the trust, respect and return business of their client companies.

Once a case is identified as viable the expert, attorney and client should collaborate to create a working theory of the case and trial theme. Every effort should be made to advance the theory and theme throughout, discovery, the preparation of the expert's report, the expert's deposition, a *Frye* or *Daubert* hearing and trial. This requires a coordination of efforts between pre-trial and trial teams and the utilization of uniform language in describing the issues in controversy.

Where an expert prepares a formal written report, it should be complete, accurate and without error. Where the report advances a theory that is novel or not generally accepted the report should be annotated with a significant bibliography of peer reviewed articles and peer accepted methodologies which directly support the propositions the expert is citing them for. In jurisdictions where a formal report need not be prepared and exchanged, the expert should assist counsel with the drafting of any required witness disclosure documents. These documents should set forth each and every opinion the witness is expected to testify to as well as the facts upon which these opinions will be based. A bibliography of peer reviewed articles is always a must.

A party's expert witness should internalize and adopt the attorney's language and theory of the case. The expert should be able to discuss the salient facts and issues from memory without resort to reports or notes. The expert must additionally be prepared to identify and defend each of the opinions he or she will propound in the case. To the extent that the witness' opinions may be based upon third party reports these documents should be certified and authenticated in preparation for the expert's testimony.

Every expert no matter how experienced should be prepped for trial prior to coming to Court to testify. A shocking number of experts and attorneys, need to be instructed about the importance of formal dress. Prior transcripts of the witness' testimony should be reviewed to identify recurrent problem questions. So too, opposing counsel's transcripts should be obtained, if possible, to see if he or she has a scripted examination that is generally adhered to. An expert must be familiar with the basic legal rules of objections and must wait for the resolution of the objection before answering the subject question. Given the ready availability of video recorders on smart phones, counsel should consider videotaping experts who have annoying physical or verbal tics to

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New York State Introduces Paid Family Leave

BY JENNAYDRA D. CLUNIS AND STACEY L. PITCHER,* GOLDBERG SEGALLA

By 2018, employers in New York will be required to provide their employees with paid family leave. The federal Family Medical Leave Act requires employers with more than 50 employees to provide up to 12 weeks of unpaid leave for certain qualifying conditions such as the birth or adoption of a child or for the treatment of a serious health condition.

Many states, such as Connecticut, have passed their own medical leave statutes which provide additional leave, on top of the 12 weeks guaranteed by federal law. In addition, those state statutes typically require fewer than 50 employees for an employer to be covered under the act.

Previously, New York did not have its own medical leave statute supplementing the federal FMLA, but on April 4, it joined California, New Jersey, and Rhode Island as the only states to offer their employees paid family leave. As part of the state's 2016-2017 budget, Governor Andrew M. Cuomo signed legislation which enacts a statewide $15 minimum wage plan and a 12-week paid family leave policy.

The bill covers all employers — regardless of size — and requires them to provide eligible employees with 12 weeks of paid family leave. Eligible employees include all full- and part-time employees who have been employed at least six months.

The paid benefit program will be phased in over three years. Beginning January 1, 2018, employers will be required to provide up to eight weeks of paid leave at a rate of 50 percent of the individual's average weekly wage, capped at 50 percent of the statewide average weekly wage, which was $1,266.44 in 2014. In 2019 and 2020, employees will be eligible for up to 10 weeks of paid leave at rates of 55 percent and 60 percent, respectively, of the employee's average weekly wage, capped at 55 percent and 60 percent of the statewide average. The phase-in will be complete in 2021, when employers will be required to provide up to 12 weeks of paid leave at a rate of 67 percent of the individual's average weekly wages, capped at 67 percent of the statewide average.

To offset the burden to employers, the program will be funded by employees through payroll deductions that will begin at $0.70 per employee per week and will end up at $1.40. Hopefully, New York can avoid the failures of other states by eliminating the financial burden on employers.

Employers with fewer than 50 employees must be aware that they will soon be required to offer medical leave for the first time and therefore need to develop and implement policies and procedures to that effect. In addition, in light of the fact that all aspects of this program are being rolled out in phases — including the number of weeks, the wages, and payroll deductions — the transition to this program could pose difficulties for employers. Therefore, employers would be wise to speak to their employment counsel and prepare for these changes in an organized and proactive manner.

* *Jennaydra D. Clunis and Stacey L. Pitcher are attorneys in Goldberg Segalla's Employment and Labor Practice Group, which counsels and defends ownership and management on employment matters across New York State and throughout the country.*

President's Column

Continued from page 4

opportunity for aspiring lawyers from all walks of life to enter the field. Claire Rush must be commended for her work in this regard. Through Claire's efforts, DANY has most recently supported a diversity initiative program for economically disadvantaged college students interested in attending law school.

In closing, I point out that there can be no doubt that the recent Presidential Election in our country has brought to light severe divisions in economic classes, political beliefs and the ways of thinking of many of our country's citizens. The policies of the next administration, especially in terms of health care, economics and potential tort reform, will undeniably have some effect on the practice of the civil defense bar. Many of the articles that I have read post-election have emphasized the need for the country to come together and unite, regardless of political leanings. I support this notion, and I believe that the work of DANY as noted above, DANY's impressive past and its great future also firmly exemplify this ideal. As a member of this organization since 2004 and now its President, I can say that the spirit of community, collegiality and the overall goal of improving the civil defense bar within DANY is second to none. I look forward to the balance of my term and continuing to work with DANY's outstanding Board and members, as well as our loyal sponsors.

Happy Holidays to everyone.

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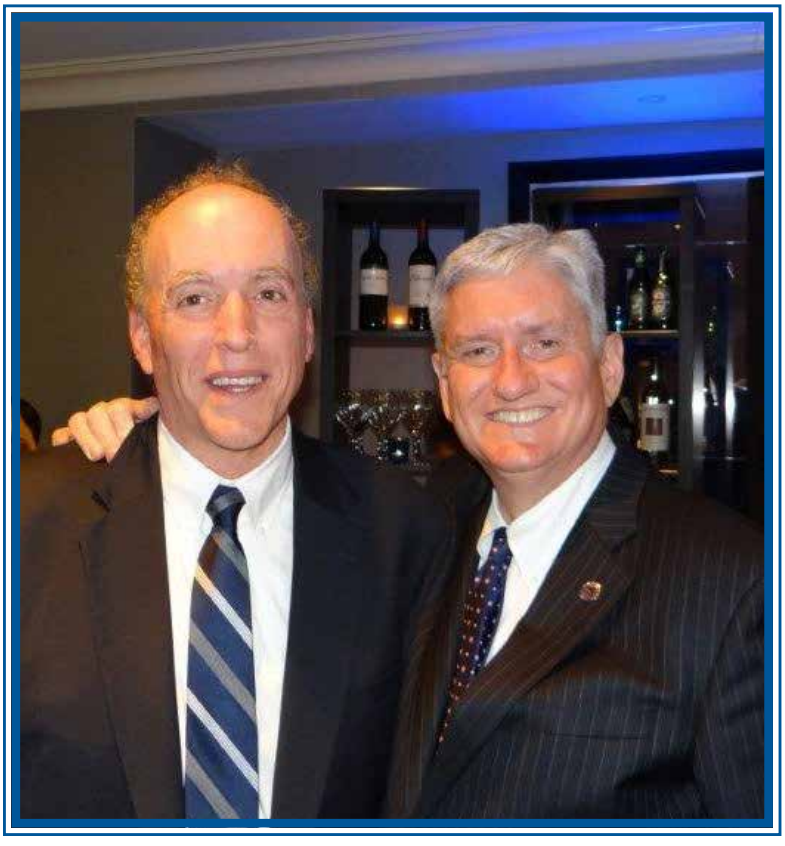

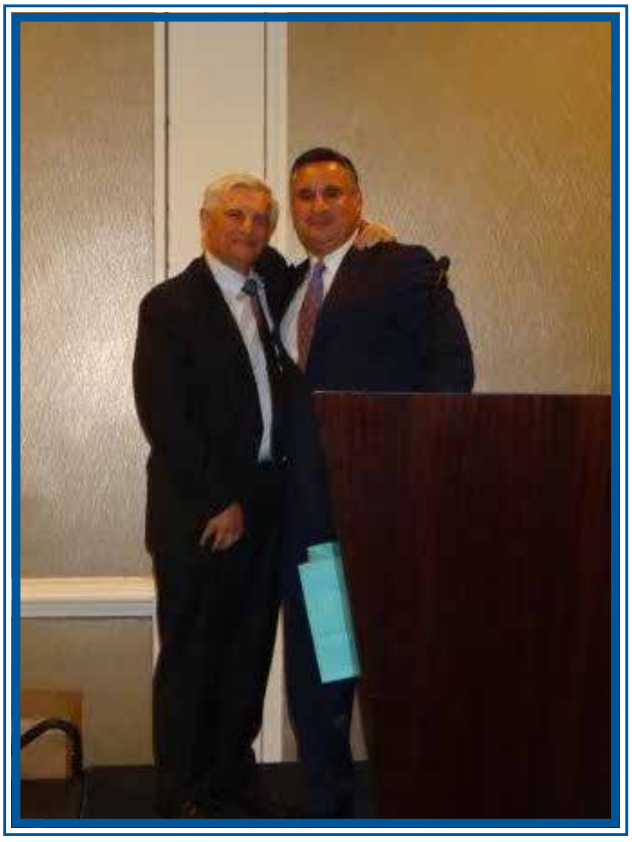


EXIT

Worthy Of Note

VINCENT P. POZZUTO *

1. PREMISES LIABILITY

Siegfried v. West 63 Empire Assoc. LLC – 2016 N.Y. Slip Op. 08163 (1st Dept., December 6, 2016)

Plaintiff was injured when she tripped and fell on an interior stairway platform owned by Defendant. The Appellate Division, First Department, affirmed the lower Court's grant of summary judgment to the Defendant, finding that even though the lease granted the Defendant a right of reentry, the complaint and bill of particulars failed to allege that the complained-of condition constituted a design defect that violated a specific statutory safety provision. The Court further held that Defendants established as a matter of law that the platform was an open and obvious condition and not inherently dangerous. Further, the Court held that plaintiff improperly raised the "optical confusion theory" for the first time in response to Defendant summary judgment motions.

2. LABOR LAW

Aslam v. Neighborhood Partnership Housing Development – 135 A.D.3d 790 (2nd Dept. January 20, 2016)

Plaintiff was injured when he fell from a scaffold on a construction site owned by Defendant Neighborhood Partnership Housing Development. Plaintiff brought a summary judgment motion pursuant to Labor Law §240(1). Defendants contended that plaintiff was expressly prohibited from performing work on the subject building until certain demolition work was completed. The lower Court granted plaintiff summary judgment. The Appellate Division, Second Dept. reversed, holding that Defendants raised a triable issue of fact as to whether plaintiff had permission to perform work at the site on the day of the accident.

3. NON-ATTORNEY PRESENCE AT IMES

IME Watchdog v. Baker, McEvoy, Morrisey & Moskovitz, P.C. – 2016 N.Y. Slip Op. 08174 (1st Dept. December 6, 2016)

Plaintiff's motion for a preliminary injunction enjoining Defendant from excluding non-attorneys from Independent Medical Examinations in personal injury lawsuits was granted in the lower Court but reversed on appeal. The Appellate Division, First Department, held that Plaintiff IME Watchdog failed to demonstrate a likelihood of success on the merits and irreparable injury. The Court further held that Plaintiff did not show that Defendant's conduct exceeded its professional duty to defend its clients "especially since several Supreme Court decisions are in Baker McEvoy's favor on the issue of a non-attorney's presence at IMEs.

4. LABOR LAW

Scofield v. Avante Contracting Corp. – 135 A.D.3d 929 (2nd Dept. January 27, 2016)

Plaintiff was injured when he fell from a six-foot tall A-Frame ladder while performing HVAC work at a condominium construction project. Prior to the accident, plaintiff had completed the same task using the same ladder in four other rooms without incident. In the final room, plaintiff encountered 2 stacks of sheetrock. These stacks were positioned in such a way that plaintiff was blocked from placing the ladder directly under the location where he needed to work. When he ascended the ladder, it was firmly on the ground and did not shake or move while he climbed to the third rung. To perform the task, plaintiff had to reach three to four feet to his right so that his upper body was on the right side of the ladder. The ladder tipped to his right and he fell to the ground. The lower Court granted summary judgment to the Defendants and dismissed the

Continued on next page

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Labor Law §240(1) cause of action. The Appellate Division, Second Department affirmed, holding that Defendants submissions demonstrated that plaintiff improperly positioned and misused the ladder, which was the sole proximate cause of his injuries.

5. ASSUMPTION OF RISK

Serin v. Soulcycle Holdings, LLC – 2016 N.Y. Slip Op. 08179 (1st Dept., December 6, 2016)

Plaintiff was allegedly injured while riding a spin cycle on Defendant's premises. The Court held that although Defendant made a prima facie showing that the spin cycle on which plaintiff was injured was not defective and that Defendant had not created or had notice of any such defect, issues of fact existed as to whether Defendants were negligent in failing to properly instruct Plaintiff, a first-time spin cycler, in the operation of the cycle and of the nature of the risks involved. The Court held that for those same reasons, issues of fact also existed at to Plaintiff's assumption of risk.

6. LABOR LAW

Korostynskyy v. 416 Kings Highway, LLC, - 136 A.D.3d 758 (2nd Dept. February 10, 2016)

Plaintiff was injured when a worker and construction materials fell from scaffolding at a neighboring construction site through a skylight in Defendant's roof onto him. The lower Court dismissed Plaintiff's Labor Law 200, 240 and 241(6) causes of action. The Appellate Division, Second Department reversed, finding that as to the Labor Law 200 claim, Defendant failed to demonstrate the absence of any triable issues of fact as to whether he had any actual or constructive notice of the co-defendant's scaffolding over his skylight. The Court further held that Defendant did not demonstrate the absence of triable issues of fact on the Labor Law 240 and 241(6) claims.

7. MEDICAL MALPRACTICE

Legakis v. New York Westchester Sq. Med. Ctr. – 2016 N.Y. Slip Op. 07843 (1st Dept. November 22, 2016)

Plaintiff in this medical malpractice action filed a motion for summary judgment. The Court affirmed the lower Court's grant of summary judgment to plaintiff holding that plaintiff established entitlement to judgment as a matter of law by relying on the medical records and the deposition testimony of the Defendant doctor in which he admitted that during arthroscopic surgery on the injured plaintiff's knee, he committed "an error" by placing a hot mallet on plaintiff's left thigh and abdomen resulting in burns to those body parts. The Court held that under those circumstances plaintiff was not required to come forward with an expert opinion to establish a prima facie case. The Court further held that "this is the rare case in which the prima facie proof of negligence is so convincing that the inference of negligence arising therefrom is inescapable and unrebutted."

8. LABOR LAW

Saavedra v. 64 Annfield Court Corp., - 137 A.D.3d 771 (2nd Dept. March 2, 2016)

Plaintiff and a coworker were installing wooden coverings to metal support columns on a construction site owned by Defendant. Despite the presence of an A-frame ladder in the vicinity and metal scaffolding on the same level, the plaintiff and his coworker constructed and utilized an unsecured makeshift structure by affixing wooden planks on top of each other over metal rebar protruding from the concrete ground floor. While the plaintiff and his coworker were standing on the makeshift structure, it collapsed, causing plaintiff to fall approximately 8 to 10 feet. The lower Court granted Defendant's motion for summary judgment dismissing the Labor Law §240(1) cause of action. The Appellate Division, Second Department affirmed, holding that the plaintiff was the sole proximate cause of the accident since he constructed and used an improperly-placed unsecured makeshift structure rather than using the A-frame ladder that was available in the immediate vicinity of the work site.

9. MEDICAL MALPRACTICE

Maxwell v. Montefiore Med Ctr. – 2016 N.Y. Slip Op. 07855 (1st Dept., November 22, 2016)

Plaintiff brought an action sounding in medical malpractice alleging that his decedent died at Defendant's hospital as a result of Defendant's negligent delay in performing an intubation when decedent was discovered unresponsive and hypoxic.

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The lower Court denied Defendant's motion for summary judgment. On appeal, the Appellate Division, First Department, affirmed, holding that plaintiff's expert pathologist was qualified to opine as to decedent's cause of death. In addition, while the Court found that the expert pathologist was not qualified to opine on the proper standard of care applicable to a critical care physician, defendant did not dispute that a delay of 45 minutes to an hour to intubate would be a departure from the relevant standard of care. While there was a factual dispute as to whether there indeed was such a delay, the fact that defendant conceded such a delay would be a departure rendered plaintiff's failure to present expert testimony on this point immaterial.

10. LABOR LAW

Kupiec v. Morgan Contracting Corp. -- 137 A.D.3d 872 (2nd Dept. March 9, 2016)

Plaintiff waterproofer was working on a scaffold when he stepped into a hole in the scaffold and fell through. Plaintiff brought a summary judgment motion pursuant to Labor Law §240(1). Defendant argued that the deposition testimony of the superintendent, the masonry foreman, and a mason tender that Plaintiff himself removed the guardrail around the hole, and this was the sole proximate cause of plaintiff's accident. The Second Department rejected this argument and found such testimony insufficient to raise a triable issue of fact to defeat plaintiff's motion for summary judgment on Labor Law §240(1), stating "These three witnesses did not have personal knowledge of the facts of the accident, or the condition of the scaffold at the time of the accident, and, as such, their testimony was based on inadmissible hearsay and was of no probative value." The Court directed the entry of summary judgment in favor of Plaintiff on his Labor Law §240(1) claim.

11. LABOR LAW

Chilinski v. LMJ Contr., Inc. -- 137 A.D.3d 1185 (2nd Dept. March 30, 2016)

Plaintiff was injured while working as a welder when he fell through an opening in a platform floor which had been temporarily covered with a piece of plywood. The platform had been erected towards the installation of an oven at a commercial bakery owned by defendant United Baking Co. ("United"). United hired defendant Dunbar to install the oven and the platform, and Dunbar in turn hired defendant C&C to fabricate and install the plywood cover for the platform. United sought summary judgment on its claims against Dunbar and C&C for common law indemnification against Dunbar and C&C, and Dunbar and C&C moved to dismiss United's claims for indemnification. The lower court denied United's motion and granted the motions of Dunbar and C&C, dismissing United's claims for common law indemnification. The Appellate Division, Second Department affirmed, finding that United failed to establish: (1) that plaintiff's accident arose solely from the manner or method of work performed, as opposed to a condition of the premises, and (2) that United did not create or have actual or constructive notice of the condition which allegedly caused plaintiffs accident. The Court thus held that United had not demonstrated that it was not negligent in connection with plaintiff's accident. The Appellate Division further affirmed the decision to the extent it granted Dunbar summary judgment, finding that Dunbar was not involved in constructing the plywood, but it reversed the issuance of summary judgment to C&C finding that C&C failed to eliminate triable issues of fact as to whether the plywood was covering the opening in the platform at the time of the accident and whether C & C was negligent in constructing the cover. The Appellate Division rejected C&C's contention that plaintiff was unable to identify the cause of his fall, inasmuch as he testified that he "saw" his foot touch the plywood cover. The Appellate Division further found the expert affidavit offered by C&C to be insufficient to establish that the plywood cover was not defective, as the expert failed to explain how the plywood was similar to the exemplar relied on by expert and failed to consider conflicting evidence.

12. INSURANCE COVERAGE

Tudor Ins. Co. v. Sundaresen – 2016 N.Y. Slip Op. 07084 (1st Dept. October 27, 2016)

The Insurance Carrier plaintiff sought summary judgment in this declaratory judgment action. The lower Court granted the motion and on appeal, the Appellate Division, First

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Department affirmed, holding that the "Contractor of Subcontractor Limitation" endorsement barred coverage. The endorsement barred coverage for bodily injury to an employee of a contractor or subcontractor of the insured. The Court held that the fact that the injured worker might be an independent contractor did not preclude him from being considered a contractor or subcontractor, and thus, the exclusion applied.

13. LABOR LAW

Sandals v. Shemtov -- 138 A.D.3d 720 (2nd Dept. April 6, 2016)

The plaintiff allegedly was injured when a ladder that he was standing on while painting a fire escape on premises owned by the defendant slipped backwards, causing the plaintiff to fall to the ground and commenced an action against the property owner asserting claims under Labor Law §§240(1), 241(6) and 200. The lower court denied plaintiff's motion for summary judgment on his Labor Law §240(1) claims, and granted defendant-owner's motion for summary judgment dismissing the complaint. The Appellate Division, Second Department affirmed, finding that, although the premises were classified as a multiple dwelling, the premises were divided into only two separate living spaces and functioned exclusively as a private home for the defendant's family members. The Court additionally rejected the plaintiff's argument that the defendant-owner was required to demonstrate that the sole purpose of the work being conducted was to convert the property into a one-family dwelling. Thus, the Court held that the homeowner's exemption applied and dismissed plaintiff' Labor Law §§240(1) and 241(6) causes of action. The Court further found that there was no evidence that the defendant owner controlled or supervised plaintiff's work, and affirmed the dismissal of the Labor Law §200 cause of action.

14 LABOR LAW

Jardin v. A Very Special Place, Inc. -- 138 A.D.3d 927 (2nd Dept. April 20, 2016)

Plaintiff was injured when he allegedly fell from an unsecured ladder that shifted as he was trying to reach the roof of the building. Plaintiff sought summary judgment on his Labor Law §240(1) claim, which motion the lower court denied. The Appellate Division, Second Department affirmed the denial of summary judgment, finding issues of fact as to whether plaintiff was authorized to be at the renovation site at the time of his accident and whether anyone had instructed plaintiff to access the roof.

15. PREMISES LIABILITY

Lovetere v. Meadowlands Sports Complex – 2016 N.Y. Slip Op. 06774 (1st Dept. October 18, 2016)

The Defendants were granted summary judgment by submitting expert evidence showing that the alleged hazardous defect in a grouted area of tiled floor measured only three-sixteenths of an inch in depth and thus physically insignificant and trivial. The Court also relied on evidence demonstrating no prior accidents or complaints relative to the area. The Court held that eyewitness testimony that plaintiff's foot became stuck in the area did not create an issue of fact.

16. LABOR LAW

Kosinski v. Brendan Moran Custom Carpentry, Inc. -- 138 A.D.3d 935 (2nd Dept. April 20, 2016)

Plaintiff, a self-employed carpenter hired to perform renovations to a property containing a house and a detached garage with apartment, was injured when he fell from a ladder. Plaintiff sued the owner, general contractor and the contractor who had retained plaintiff for, inter alia, violations under the Labor Law. Plaintiff moved for summary judgment on his Labor Law §240(1) claims, and defendants cross-moved for summary judgment dismissing the complaint. The lower court granted plaintiff's motion for summary judgment under Labor Law §240(1), which decision the Appellate Division, Second Department reversed. The Second Department found that, although plaintiff had made a prima facie showing of entitlement to judgment, defendants had raised triable issues of fact as to whether plaintiff had misused the ladder from which he fell and whether such misuse was the sole proximate cause of plaintiff's injuries. The Second Department further found that plaintiff's Labor Law §§240(1) and 241(6) causes of action should have

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"On November 29, the DANY Diversity Committee hosted a Judicial Leadership Panel. The Panel discussed the process by which they joined the judiciary and the steps interested attendees should take to achieve such goals. It was well attended and extremely informative."

Seated from left, Hon. Joanne Quinones, Hon. Jenny Rivera, Hon. Margaret Chan, standing from left Hon. Ariel Belen (ret.), Leigh Katz, attorney of record Met Life, Claire Rush, Hon. Ernest Hart, Hon. Kenneth Thompson, Marsha Hamilton, American Transit Insurance Company.

been dismissed as against the owner, inasmuch as she was the owner of a one or two-family dwelling, the work being performed was directly related to the residential use of the home and the owner did not direct or control the work being performed.

17. LABOR LAW

Vitale v. Astoria Energy II, LLC – 138 A.D.3d 891 (2nd Dept. April 20, 2016)

Plaintiff surveyor was injured while walking across the top of a rebar grid, when he lost his balance and his left leg fell through a 12 inch by 12 inch square opening in the grid. Both parties moved for summary judgment on the plaintiff's claims pursuant to Labor Law §§ 240(1) and 241(6). The Appellate Division, Second Dept. affirmed the lower court's ruling to dismiss, holding that the openings of the grid, which were not of a dimension that would have permitted the plaintiff's body to completely fall through and land on the floor below, did not present an elevation-related hazard to which the protective devises enumerated in Labor Law § 240(1) are designed to apply. For the same reason, the Court also dismissed plaintiff's alleged violation of Industrial Code § 23-1.7(b), which concerns "hazardous openings."

18. SERIOUS INJURY THRESHOLD

Bobbio v. Amboy Bus Co. Inc. – 2016 N.Y. Slip Op 07101 (1st Dept. October 27, 2016)

The Court held that Defendants made a prima facie showing of entitlement to summary judgment under the Serious Injury threshold by submitting affirmed reports of their neurologist who found no objective evidence of disability or permanency and full range of motion. Defendants also relied on plaintiff's deposition testimony that she had been found to be disabled as a result of a neck condition more than six years before the accident, thereby shifting the burden to plaintiff to demonstrate a causal connection between the accident and her claimed cervical injury. The Court held that plaintiff's orthopedist acknowledged that an MRI of the cervical spine taken four years before the accident showed a preexisting condition, but he provided no objective basis, only plaintiff's history, for his opinion that the accident exacerbated a preexisting condition. The Court further held that plaintiff's orthopedist failed to explain why her preexisting condition were ruled out as the cause of her current alleged injuries.

19. LABOR LAW

Pacheco v. 32-42 55th Street Realty, LLC – 2016 N.Y. Slip Op. 03727 (2nd Dept. May 11, 2016)

Plaintiff was injured when he fell from a scaffold. In their Answer, the Defendants asserted the affirmative defense of release, predicated upon a general release that plaintiff had signed before suffering his injury. Defendants filed a pre-answer motion to dismiss, and plaintiff filed a cross-motion to preclude the affirmative defense. The lower Court denied both motions, and the Appellate Division, Second Dept. affirmed, citing the contested issue of how the release came to be signed. In doing so, the Court held that a trial was necessary to address plaintiff's contention that the release was signed by means of fraud in the procurement, and/or that the release was not fairly and knowingly made.

20. LABOR LAW

Niewojt v. Nikko Construction Corp. – 139 A.D.3d 1024 (2nd Dept. May 25, 2016)

Plaintiff painter was injured when he fell while scaling a fence at a jobsite where Defendant was serving as the general contractor. Plaintiff alleged that he was locked into the jobsite and could not find another exit. The lower court granted Defendant's motion for summary judgment and dismissed plaintiff's Labor Law §§ 200, 240(1) and 241(6) claims, holding that climbing a fence was not a foreseeable risk inherent in plaintiff's work, and that plaintiff's act in doing so was the sole proximate cause of his injuries. The Appellate Division, Second Dept. affirmed the dismissal of the Labor Law §§ 240(1) and 241(6) claims, but reinstated plaintiff's cause of action under Labor Law § 200. The Court reasoned that a triable issue of fact existed as to whether the Defendant negligently locked plaintiff inside the work area, and, if so, whether his act in scaling the fence was a natural and foreseeable response to that condition.

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Worthy Of Note

21. ARBITRATION

Gibbs v. Holland & Knight, LLP – 2016 N.Y. Slip Op 06670 (1st Dept., October 11, 2016)

The Court held that although plaintiff had not signed the partnership agreement containing an arbitration provision, he had assumed the duty to arbitrate by annually agreeing to be bound by the partnership agreement and by repeatedly invoking the dispute resolution provision in the partnership agreement. In addition, the Court held that the Defendant did not waive the right to arbitrate by submitting an application for a preliminary injunction in aid of arbitration, finding that Defendant demonstrated a clear intent to continue the arbitration by seeking mediation of the counterclaims under the dispute resolution provision of the partnership agreement.

22. LABOR LAW

Pazmino v. 41-50 78th Street Corp. – 139 A.D.3d 1029 (2nd Dept. May 25, 2016)

Plaintiff was injured when he was struck in the head by a falling piece of wood while working at a construction site owned by Defendant. However, plaintiff testified that he did not see the piece of wood fall, or know where it fell from. The Appellate Division, Second Dept. affirmed the lower court's ruling and denied plaintiff's motion for summary judgment on his Labor Law § 240(1) claim. The Court stressed that plaintiff did not meet his prima facie burden to establish, in a "falling object" case, that, at the time the object fell, it was either being hoisted or secured, or that it required securing or another adequate safety device for the purposes of the undertaking. Plaintiff's mere belief that the wood had been part of a hoist mechanism itself was insufficient to carry this burden, as he admitted at deposition that he did not know for certain.

Preparing Expert Witness for Trial

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help them identify and rectify problem habits.

Before taking the stand, the attorney and expert must have their talking point issues identified. The expert should be ready to expound upon these bullet points and loop back to them as appropriate. By the same token the expert must be prepared to rebut the opposing party's theory of the case and be intimately familiar with the vulnerabilities of his or her own case. The expert needs to be able to identify all of the opposing expert's mischaracterizations of the evidence and incomplete factual scenarios. Challenging questions should be anticipated and replies prepared. Under no circumstances should an expert ever volunteer information or attempt to clarify an issue for opposing counsel.

Conclusion

Expert witnesses and attorneys who follow the "rules" set forth above will shine in Court. Trial attorneys should remind their expert witnesses that integrity, humility and the ability to stay calm and focused are key characteristics that must be cultivated. Expert witnesses that act like prima donnas or are chronically unavailable are useless while those that are helpful, prepared, don't fight and do their best will never want for work. Good advice for the courtroom and better advice for life. Happy litigating!

Modern Day Discovery Disputes - Cases and Principles - Version Three

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 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 third version. It is a significant expansion of the second version that is published in the Spring 2016 "Defendant" journal.1 New content is presented in this burgundy color, whereas previous text and case citations are in black. In some instances, the end notes for principles in the second version now include additional case citations.

Basic Discovery Standards, Precautions and Privileges

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] "The terms 'material 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]

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."[6] It has been held that service of copies of documents in electronic format is a satisfactory response to a demand for paper copies.[7] Similarly, a party is not categorically entitled to its preferred electronic document format.[8]

While New York's judicial system generally fosters a pro-discovery environment, "a party is not entitled to unlimited, uncontrolled, unfettered disclosure."9 The demanded items should be "sufficiently related to the issues in litigation to make the effort to obtain them in preparation for trial reasonable."10 Likewise, the obligation to search for items is not boundless: "a party cannot be compelled to produce records, documents, or information that were not in its possession, or did not exist."[11] However, in this scenario, a court can providently call for an affidavit stating that a search has been conducted and the documents do not exist.[12]

"Discovery demands are improper if they are based upon hypothetical speculations calculated to justify a fishing expedition."[13] Moreover, "discovery demands that are overly broad, are lacking in specificity, or seek irrelevant documents are improper."[14] 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."[15] "Palpably improper" has similarly been defined as "either overly broad, unduly burdensome, irrelevant, or vague,"[16] "immaterial" to the claims of the demanding party,[17] and "not necessary and proper to the prosecution of this action."[18] And "where discovery demands are overbroad, the appropriate remedy is to vacate the entire demand rather than to prune it."[19] However, a litigant who has made an overbroad demand, such as for all construction project documents,

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might obtain leave to serve a more narrowly tailored notice.[20]

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,[21] 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"[22] or "bearing on the claims."[23] 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."[24]

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,"[25] and "unsubstantiated bare allegations of relevancy are insufficient to establish the factual predicate regarding relevancy."[26] "Each request must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure."[27] Another consideration upon a motion to compel is 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."[28]

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;[29] and incident reports prepared in the regular course of a party's business. Other 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.[30]

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.[31] This may be subject to restrictions in respect of a defendant's business interests or residents' privacy.[32]

A failure to timely challenge an opposing party's discovery demand generally forecloses inquiry into the propriety of the information sought, except for requests that call for privileged information or which are palpably improper.[33]

When served with a discovery notice that seems improper, the recipient's options include timely service of a notice of objection, or, a motion for a protective order to excuse any obligation to respond.[34] "Unlimited 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."[35]

"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."36 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."[37] "If the trial court has engaged in such balancing, its determination will not be disturbed in the absence of an abuse of discretion,"[38] or "absent an improvident exercise of that discretion."[39]

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.[40]

Contexts that may befit a protective order include overbroad and burdensome discovery demands,[41] needs to curtail or avoid an oral deposition of a party[42] or non-party,[43] or to protect trade secrets,[44] proprietary rights,[45] privacy rights,[46] or privileged information e.g. in view of CPLR 3101(b)[47] or 3101(d)(2).[48] 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."[49]

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."[50] "Such 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."[51]

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."[52] 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."[53] Materials obtained by an attorney via requests pursuant to state and federal freedom of information laws do not trigger this privilege.[54]

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."[55] 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.[56]

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.[57]

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.[58] Lack of formal disclosure is sometimes forgiven where the information was made available or known at a deposition, as with notice witnesses for example.[59] 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."[60] 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.[61]

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,"[62] 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."[63]

The fact that court-ordered discovery is outstanding is also a ground to forestall decision of a summary judgment motion.[64] 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."[65] 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."[66]

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."[67] However, parties' professed need to conduct discovery will not warrant denial of the motion where they already have personal knowledge of the relevant facts.[68]

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.[69]

Authorizations and Various Types of Records

A wealth of disputes focuses on types of a plaintiff's records or information that should be authorized, and corresponding time frames. Concerning **medical records**, the general rule is that authorizations are due with relation to conditions affirmatively placed in controversy.[70] 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."[71]

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 showing should be made with the original motion rather than awaiting reply papers, when seeking authorizations as to a **primary care physician** or **cardiologist** for example.[72]

Where a plaintiff has claimed **loss of enjoyment of life**, authorizations for release of **alcohol** and **drug abuse** records have been directed,[73] as well as for **psychological treatment** records,[74] **mental health** records,[75] **pharmacy** and **health insurance** records,[76] for **social security disability** records,[77] and for records concerning serious medical conditions that are unrelated to the subject accident, such as **diabetes**,[78] **kidney** disease,[79] and **cardiac** conditions.[80] "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."[81] "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 substance abuse are matters material and necessary to the issue of damages."[82]

A purported need to take prescription narcotic medications implicates a plaintiff's **mental condition**,[83] as that allegation affirmatively places that condition in issue.[84] 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.[85] 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).86

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 injuries to those claimed.[87] But this is hardly the only predicate for seeking discovery as to medical history that does not directly arise from the subject occurrence. Accordingly, 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."[88] And 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.[89]

An allegation of an **exacerbation of a pre-existing condition** or the like opens the door in a similar way. In a First Department case, the defendant was accused of causing "aggravation of a pre-existing latent and asymptomatic degenerative condition. Accordingly, defendants sought authorizations for those portions of 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."[90] In this scenario, the Second Department has directed release of all medical records for the five years preceding the subject accident.[91] And where the plaintiff has **congenital conditions** of relevance, there may be cause for authorizations relative to an extended or even life-long medical history.[92]

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.[93]

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.[94] 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.[95] 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.[96]

A plaintiff might decline to provide an authorization for information from a **social networking** service, or the service might fail to respond to such an authorization. There is, however, judicial precedent for obtaining social networking user information directly from a plaintiff. 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.[97] To justify such relief, one must establish a factual predicate. "Defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account - that is, information that contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims."[98] 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.[99]

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."[100] 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."[101] 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."[102]

In a **wrongful death case**, **video of the decedent** is potentially relevant to damages, such as pecuniary loss and life expectancy.[103] 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.[104]

For more background in this area, see the section below titled "Photographs, Video or Audio of a Party - Surveillance, Social Media and Otherwise" and particularly *Forman v. Henkin*.[105] See also the article by Paul Zola titled "*Obtaining Social Media Evidence During Discovery*" in the Winter 2016 "Defendant" journal,[106] and the article noted in the next paragraph.

An authorization for **cell phone** usage records can be required in an appropriate case.[107] 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.[108] 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.[109] 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.[110] 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*" in the Summer 2013 "Defendant" journal.[111]

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."[112] [8]

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.[113] 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."[114]

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 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**.[115] 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.

Employee **training materials** may also be worthy of exchange, such as in an action against a hospital for medical malpractice where standards and training provided to nursing staff may be of relevance.[116] Note though that while "a defendant's internal rules may be admissible as evidence of whether reasonable care was exercised,"[117] "where an internal policy exceeds the standard of ordinary care, it cannot serve as a basis for imposing liability."[118]

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.[119] That plaintiff was also required to permit the defendants to perform **genetic testing** and a physical examination of the infant plaintiff.[120] 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.[121] 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.[122] In accord with this, it would be appropriate to quash any subpoenas duces tecum directed to such a non-party.[123]

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."

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 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;[124]

(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.[125]

"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."[126] And, "where this standard is met, the sufficiency or underlying merit of the proposed amendment is to be examined no further."[127]

One scenario where merit is evaluated is where a plaintiff proposes an amendment to allege violations of Code 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."[128] On the other hand, such an amendment is properly denied where those provisions are inapplicable to the action.[129]

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."[130] "At or on the eve of trial, judicial discretion in allowing such amendment should be discreet, circumspect, prudent and cautious,"[131] and "should be exercised sparingly."[132]

Factors to be considered may include whether the amendment would prejudice an opposing party,[133] and the amount of time that has passed since commencement of the action and service of the original bill of particulars.[134] The latter factor will typically be in play where the proposed allegations are based on information that has been available all along, such as a plaintiff's exact accident location,[135] photographs,[136] and the existence of an injury and its relationship to an accident.[137] Additional factors are delay in having sought expert opinion predicate for the desired allegation,[138] and delay in making the motion,[139] and whether the amendment is proposed in opposition to summary judgment.[140]

A plaintiff who wants to allege a new injury[141] or a new category of "serious injury" in an auto case[142] 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.[143]

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."[144] 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.[145] Further, a court may decline to consider opposition to summary judgment that is based on a liability theory,[146] an injury,[147] or a category of serious injury[148] 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,"[149] albeit "protracted delay in presenting new theories of liability warrants the rejection of these new claims."[150]

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,"[151] and it "may not be used to supply allegations essential to a cause of action that was not pleaded in the complaint."[152] Nor may the bill of particulars "add or substitute a new theory or cause of action."[153] 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.[154]

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."[155] An issue is whether it can be "fairly inferred" from the notice of claim that the plaintiff would later assert the contention under scrutiny.[156] Allegations that amount to new theories of liability that cannot be fairly implied from a notice of claim are properly struck.[157]

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."[158] 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.[159]

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.[160] 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."[161] 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."[162]

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."[163] 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[164] particularly "in the absence of any evidence of willful or contumacious conduct."[165] 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.[166]

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.[167] 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.[168] This amounted to willful and contumacious conduct.[169]

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.[170]

Depositions - Business or Governmental Entity Party

"A corporate entity has the right to designate, in the first instance, the employee who shall be examined."[171] 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."[172] 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 that another individual would be produced instead, and provide the identity, description or title of such individual.[173]

A business party's officer, director, member, agent or employee is a potential candidate for a mandatory deposition.[174] However, the party need not necessarily produce such persons of a parent or sibling business, especially where control over the witness is lacking.[175]

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."[176] 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.[177]

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."[178] 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."[179] 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.[180]

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."[181]

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.[182] A witness who was evasive may be ordered to attend a further deposition, however.[183]

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.[184] 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:[185]

- 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 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.

Depositions - Non-Party - Misconduct

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.[186] 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."[187] The burden is on the deponent to establish that traveling from his foreign residence to New York to be deposed would cause undue hardship.[188] Depending on the equities, a court has the option to direct a deposition to occur in a foreign country, or by video conference[189] or "remote electronic means."[190] 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.[191] "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."[192] 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."[193]

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.[194] In such a scenario, it does not avail a deponent to assert that he "mis-spoke" or is "clarifying his testimony."[195]

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,"[196] and the plaintiff has exchanged authorizations allowing access to medical records and permitting the physicians to speak with defense counsel.[197] A rationale is that if a defendant's views differ from those of the physicians, the medical records can be reviewed by defense medical experts, who can offer their own testimony.[198] 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."[199]

The First Department did, however, enable depositions of a plaintiff's pathologists who had diagnosed cancer and mesothelioma.[200] 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."[201] 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.[202] 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."[203]

Expert Witnesses - Effect of Bill of Particulars and 3101(d) 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.[204] 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),[205] 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."[206]

Service of an expert exchange notice may prompt an adverse party to demand discovery in connection with that disclosure.[207] It is plausible that such a demand would call for material prepared exclusively in anticipation of litigation, or attorney work product, which the CPLR exempts from disclosure,"[208] as also discussed above.

As with discovery generally, "trial courts possess broad discretion in their supervision of expert disclosure."[209] 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."[210]

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."[211] This is true even where an adverse party had demanded expert disclosure during the discovery phase.[212]

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.[213] 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.[214]

When an expert disclosure is served after an explicit court-ordered deadline, this is a factor in favor of excluding it.[215] 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.[216]

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.[217] A lack of prejudice has also been found where all parties' experts had been present concurrently at an inspection.[218]

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[219] versus willful or intentional failure to disclose and/or prejudice to an opposing party.[220]

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."[221] 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."[222]

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.[223] 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.[224]

The Court of Appeals addressed the timing of an objection to an expert disclosure notice in October 2016.[225] 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 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."[226]

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."[227] 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.[228]

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."[229] 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.[230] 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."[231]

"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[232] 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.[233] 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 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."[234] Moreover, the defendant has the option of designating a defense medical examiner who is different than the original IME doctor.[235] Any bill of particulars on which a motion is predicated should be included as an exhibit.[236]

A further defense medical examination may also 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."[237]

As stated in the forgoing discussion about authorizations, 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.[238]

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.[239] Concern that the plaintiff may impeach the examining physician's credibility with this information is not a sufficient basis for such relief.[240] 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.[241]

"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.[242] 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 recent Second Department case,[243] 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.

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.[244]

"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.[245] Who must incur any extra cost can vary from case to case.[246]

"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.*[247] that an IME should not be videotaped -- surreptitiously or otherwise -- without advance judicial permission upon a showing of "special and unusual circumstances.[248] 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.[249] 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.[250] 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.[251]

A plaintiff can generally have an attorney or perhaps a non-attorney representative present during the examination.[252] 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."[253] 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."[254]

It would be improper for a plaintiff's attorney or representative to be "instructing the plaintiff to refuse to respond to questions relating to her relevant past medical history."[255] 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."[256] 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.'"[257] 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."[258]

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).[259] 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."[260] This "full disclosure" is required "without regard to whether the party in possession of the recording intends to use it at trial."[261] *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.[262] 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.[263]

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.[264]

"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.[265] 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.[266] 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.[267]

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,268 cited by that court in another matter in May 2016,[269] 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); 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."[270]

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."[271]

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.[272] 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."[273]

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.[274] The plaintiff must "submit affidavits specifying facts that might exist but could not then be stated that would support the exercise of personal jurisdiction."[275] 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."[276]

Motion to Compel Discovery -- Good Faith Effort Requirement

The Appellate Division still continues to espouse the general rule that a motion to compel a bill of particulars or other discovery shall include an affirmation of good faith, i.e., an affirmation representing that the movant, before resorting to motion practice, made a good faith effort to resolve the discovery problem[277] with "recent meaningful attempts,"[278] or that there was "good cause why no communications occurred between the parties" in this regard.[279] There is good cause to forego communications with opposing counsel once the adversary has announced a categorical refusal to permit the desired discovery.[280]

If such an affirmation is absent from the motion papers, the motion is supposed to be denied, without regard to its merit.[281] This is also true for motions that seek to vacate a note of issue because discovery is purportedly not complete.[282] As for the content of the affirmation, it is to comply with the requirements of 22 NYCRR 202.7.[283]

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 to resolve the underlying discovery problem.[284] "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)."[285]

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."[286] 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.[287] That statement is considered mandatory as "more than mere relevance and materiality is necessary to warrant disclosure from a nonparty."[288] 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.[289]

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.[290] 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" whether it is deposition testimony[291] or documents[292] 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."[293]

Note of Issue, Extension, and Vacatur

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.[294] It is almost always the plaintiff who files a note of issue. However, nothing prohibits a defendant or third party defendant from doing so, and that does happen on occasion.[295]

A plaintiff who files a note of issue waives any objection to the adequacy of a defendant's disclosures.[296] 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.[297] A defendant wanting to oppose this outcome would be better positioned by having made a 90-day demand under CPLR 3216.[298] 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.[299]

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).[300] The motion is to be served within twenty days after the date that the note of issue was served.[301] 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."[302]

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"[303] or "good cause"[304] call for discovery to be countenanced. The movant must also demonstrate that it would be substantially prejudiced if its motion were denied,[305] and show "special and extraordinary circumstances" for an amended bill of particulars to be allowed.[306] 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."[307]

There is a representative case decided by the Second Department in June 2016, where 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 post-note time frame.[308] 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 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."[309]

In practice, a typical outcome of a note of issue vacatur motion in Supreme Court is that justified discovery is directed, but the action retains its awaiting trial posture. The Appellate Division will also reach that kind of conclusion.[310] However, in an apt situation, the Appellate Division will reverse an order that declined to vacate a note of issue.[311] 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.[312]

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.[313] "Because this was a misstatement of a material fact, the filing of the note of issue and certificate of readiness was a nullity."[314]

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.[315] "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.[316]

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.[317] 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.[318]

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.[319] However, items that are palpably improper should not be deemed admitted, even if the target party failed to respond.[320]

"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."[321] 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."[322] Thus, it is not for seeking concessions that would contravene pleading allegations, or go to the "essence of the controversy between the parties"[323] or "the heart of the matter at issue."[324] The propounding party should reasonably believe that the admissions sought are not in substantial dispute.[325] Thus, one should not seek an admission that an actionable condition existed at an accident scene.[326]

Photographs and Video of an Incident Scene - and Belated Disclosure during Trial

It is common practice to exchange photographs and video of an incident scene. For example, in a Third Department appeal in July 2016,[327] 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.

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.[328] In the end, that defendant was not sanctioned because the plaintiff's testimony failed to specify a particular defect that caused him to fall.[329] 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.[330] 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.[331] 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.[332] 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

As discussed above relative to video during an IME, the Second Department on November 18, 2015 held in Bermejo v. New York City Health and Hospitals Corp.[333] 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."[334] This "full disclosure" is required "without regard to whether the party in possession of the recording intends to use it at trial."[335] 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 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,[336] addressing materials stored on Facebook, represents 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."[337] The defendant had demanded of plaintiff "all photographs of herself privately posted on Facebook after the accident that do not show nudity or romantic encounters."[338]

A fundamental issue debated in Forman is whether social media disclosure should flow from conventional discovery standards without court involvement, versus the current judicial paradigm of "some threshold showing before allowing access to a party's private social media information."[339] The statutory provision under focus in Forman was CPLR 3101(a); there is no mention of 3101(i) or of Bermejo in the majority or dissenting opinions. However, in discussing how social media commonly provides insight about a person's customary being, the Forman 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."[340]

In digesting concurrently these two late 2015 appellate outcomes, 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 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"[341] and "the discovery standard is the same

regardless of whether the information requested is contained in social media accounts or elsewhere."[342]

The view of the Forman 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 be discoverable."[343] The majority sees such a standard as contrary to precedent, which it is bound to follow "particularly here where no party asks us to revisit it."[344] The 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."[345] Query: isn't that what Bermejo calls for? Given the 3-2 divide in Forman, we may hear from the Court of Appeals about this before long.

Sanctions for Discovery Failure - Basis for Sanction

A court has broad discretion in supervising disclosure,[346] and CPLR 3126 affords discretion to impose a sanction for discovery failure.[347] "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."[348] 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."[349] 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."[350]

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.[351] It can even amount to contempt of court, but only if an order has been disobeyed.[352]

The classic foundation for a sanction in this realm is willful and contumacious conduct,[353] and/or bad faith,[354] prejudice[355] or being "substantially prejudiced."[356] 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."[357]

"A pattern of noncompliance and delay can give rise to an inference of willfulness,"[358] as can "chronic or repeated obstruction of discovery."[359] 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.[360]

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.[361] 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."[362]

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.[363] Discovery delay due to substitution of counsel may be an acceptable excuse.[364] 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.[365]

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.[366] 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.[367] A moving party's own discovery delay can be a factor for consideration as well.[368] 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."[369]

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. "The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the Supreme Court"[370] and "the sanction imposed should be commensurate with the particular disobedience, if any."[371] A discussion of potential outcomes now follows.

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.[372] 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.[373] Such an order "requires a party to provide certain discovery by a date certain, or face the sanctions specified in the order."374

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.[375] 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.[376] It has also been imposed where a party was willful and contumacious in refusing to answer certain questions at a deposition.[377] In that matter, the deponent would be precluded unless he completed a further and adequate deposition.

Preclusion may be indicated once it is apparent that a lesser sanction would not deter continued violations.[378] 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.'"[379] 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.[380]

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.[381]

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.[382]

A plaintiff who is obligated by a conditional order of preclusion, 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."[383] And the burden on any variety of party wanting relief from a disclosure obligation or preclusion has been similarly stated: a reasonable excuse for the failure to produce the requested items or appear for a directed examination, as applicable, and the existence of a meritorious claim or defense.[384]

When a party in this situation neither produces

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the discovery nor demonstrates cause for relief, the conditional order becomes absolute.[385] An "explanatory affidavit" may be necessary to establish cause for relief,[386] i.e. "a reasonable excuse for failure to comply with the order and a meritorious claim" and lack of prejudice to the opposing party.[387] Law office failure can constitute an acceptable excuse.[388] 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.[389]

When the conditional order has become absolute and is not vacated, the order should preclude proof as to matters not furnished[390] and/or preclude a party from testifying at a trial,[391] and even a stricken answer and a default judgment can occur.[392] Prohibition of a party's testimony often follows from a party's failure to attend a deposition[393] or a defense medical examination[394] 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."[395] 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, without first making an additional good faith effort to resolve the underlying discovery problem.[396]

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."[397] A preclusion of testimony as to a plaintiff's medical condition typically makes a personal injury case non-viable.[398] An affidavit or testimony from an officer or employee of a precluded party can plausibly be accepted for the benefit of a different party.[399]

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,[400] with a showing of a reasonable excuse for failure to produce items, and existence of a meritorious claim or defense.[401] Moreover, that the evidence has moved elsewhere, even if seemingly for a good reason, will not necessarily excuse an obligation of production. In one recent 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.[402] 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

"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. The drastic remedy of striking a pleading is not appropriate absent a clear showing that the failure to comply with discovery demands is willful and contumacious."[403] The determination of whether to strike a pleading for failure to comply with court-ordered disclosure lies within the aforementioned "sound discretion" of the trial court.[404]

A stricken pleading is a plausible sanction for egregious discovery failure, but, as mentioned, is viewed as a "drastic" remedy,[405] or a "harsh" remedy,[406] as there is a "strong preference in this state for deciding matters on the merits."[407] 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.[408] Another factor against striking a pleading is where there have been discovery deficiencies by the adverse party as well.[409]

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, may not support an inference of willful and contumacious conduct.[410]

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,[411] or for "repeated failure to appear for a continued deposition without a reasonable excuse."[412] Similarly, 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.[413] The foregoing kinds of conduct can warrant a conditional, self-executing order of dismissal,[414] which, as with a self-executing preclusion order, becomes absolute if the discovery does not occur by the prescribed date.[415] This is so long as the order is "sufficiently specific to be enforceable."[416] A conditional, self-executing order striking an answer is a possibility as well.[417]

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 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."[418]

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."[419]

As for the implications of a stricken answer, 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,"[420] unless perhaps a sum certain is involved.[421] One defendant's stricken answer can benefit another defendant, whose cross claims can thereby be admitted, warranting summary judgment on those cross claims.[422]

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.[423] An aggrieved party may ultimately be awarded attorneys' fees and costs from a disobedient party.[424]

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,[425] 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.[426] 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.[427]

In another First Department matter, an order dismissing the action was reversed, but a $1,500 fine was imposed.[428] 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 malpractice action that had failed to timely issue a litigation hold and thereby preserve electronic records.[429]

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."[430] "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.'"[431] 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."[432]

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.[433] 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.[434]

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."[435]

Where the evidence was intentionally or wilfully destroyed, its relevancy is presumed.[436] "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."[437]

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."[438] The Appellate Division "will substitute its judgment for that of the Supreme Court only if that court's discretion was improvidently exercised."[439]

"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."[440] As to the latter factor, a question is whether the movant has shown that the spoliator "fatally compromised its ability to prove its claim or defense."[441] 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.[442]

In an analogous scenario 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.[443] 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."[444]

"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."[445] 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.[446] That is a scenario where an adverse inference charge may be appropriate.[447] "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."[448]

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."[449] 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.[450]

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."[451] 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.[452] 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,"[453] i.e. "indispensable to (defendants) in order to obtain information necessary for their defense."[454] 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."[455]

In 2013, the topic of a personal injury plaintiff's social security number was germane to a debate about having a supplemental deposition.[456] 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."[457]

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 .[458]

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.[459] 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 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.

Vocational Rehabilitation Examination

There is no statutory authority to compel the examination of an adverse party by a non-physician vocational rehabilitation specialist.[460] This does not preclude a court from directing it, however.[461] A defendant can be entitled to have the examination occur, even if the plaintiff has not retained a vocational expert.[462] 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."[463] 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.[464]

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.[465] County Law § 308(4) states that records of calls made to a municipality's E 911 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 conscious pain and suffering, and the amount of time it took for police to respond to the scene.

The Appellate Division 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.[466] 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.[467]

Conclusion

As now seen, there still continues to be a steady flow of appeals involving both common and uncommon discovery disputes. It remains 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"). The Spring 2016 edition and many other past "Defendant" journals are available via links on the "Publications" page of DANY's website: http://defenseassociationofnewyork.org/page-856696.

2 *Greco v. Wellington Leasing Ltd Partnership*, 2016 WL 6885849 at *1, 2016 N.Y. Slip Op. 07925 (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 *Berkowitz v. 29 Woodmere Blvd. Owners', Inc.*, 135 A.D.3d 798, 799, 23 N.Y.S.3d 352 (2d Dept 2016); *Eremina v. Scparta*, 120 A.D.3d 616, 618, 991 N.Y.S.2d 438 (2d Dept 2014).

4 *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*, 2016 WL 6885849 at *1; *Hayes v. Bette & Cring, LLC*, 135 A.D.3d 1058, 1059, 22 N.Y.S.3d 680 (3d Dept 2016).

5 *AQ Asset Management LLC v. Levine*, 138 A.D.3d 635, 636, 31 N.Y.S.3d 32 (1st Dept 2016).

6 *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].

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

8 *Aalco Transportation & Storage, Inc. v. DeGuara*, 140

A.D.3d 807, 808, 35 N.Y.S.3d 113 (2d Dept 2016).

9 *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 *Berkowitz*, 135 A.D.3d at 799.

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

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

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

13 *Forman v. Henkin*, 134 A.D.3d 529, 530, 22 N.Y.S.3d 178 (1st Dept 2015); see also *AQ Asset Management LLC v. Levine*, 138 A.D.3d 635, 636, 31 N.Y.S.3d 32 (1st Dept 2016).

14 *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).

15 *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).

16 *McMahon v. Cobblestone Lofts Condominium, 134 A.D.3d 646, 22 N.Y.S.3d 50 (1st Dept 2015).*

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

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

19 *Berkowitz*, 135 A.D.3d at 799.

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

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

22 *Id.*

23 *Forman v. Henkin*, 134 A.D.3d 529, 530, 22 N.Y.S.3d 178 (1st Dept 2015).

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

25 *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).

26 *Whitnum*, 142 A.D.3d at 496.

27 *D'Alessandro*, 137 A.D.3d 1195, 1196, 29 N.Y.S.3d 382.

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

29 This guide includes a separate section on photographs and video of an incident scene.

30 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.

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

32 *Id.*

33 *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).

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

35 *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).

36 *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).

37 *Hayes v. Bette & Cring, LLC*, 135 A.D.3d 1058, 1059, 22 N.Y.S.3d 680 (3d Dept 2016).

38 *Id.*; 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.

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

40 *Rivera*, 40 N.Y.S.3d at 841; see also *Zuley*, 40 N.Y.S.3d at 924, and *Cioffi*, 142 A.D.3d at 522.

41 *Berkowitz*, 135 A.D.3d at 799.

42 *Cascardo*, 136 A.D.3d 729.

43 *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).

44 *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").

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

46 *Id.*

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

48 *Ligoure*, 128 A.D.3d 1027.

49 *Washington*, 128 A.D.3d at 687.

50 *Ligoure*, 128 A.D.3d at 1028.

51 *Id.* 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).

[52] *State v. Baumslag*, 134 A.D.3d at 452.

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

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

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

[56] *Id.*

[57] *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).

[58] 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).

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

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

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

[62] *Rodriguez v. DeStefano*, 72 A.D.3d 926, 898 N.Y.S.2d 495 (2d Dept 2010); see also *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).

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

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

[65] *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).

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

[67] *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).

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

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

[70] *Gumbs v. Flushing Town Center III, L.P.*, 114 A.D.3d 573, 981 N.Y.S.2d 394 (1st Dept 2014). See also *Kenneh v. Jey Livery Service*, 131 A.D.3d 902, 16 N.Y.S.3d 726 (1st Dept 2015).

[71] *Graziano v. Cagan*, 105 A.D.3d 701, 702, 962 N.Y.S.2d 643 (2d Dept 2013). See also *M.C. v. Sylvia Marsh Equities, Inc.*, 103 A.D.3d 676, 959 N.Y.S.2d 280 (2d Dept 2013).

[72] *Gumbs*, 114 A.D.3d 573.

[73] See *Greco v. Wellington Leasing Ltd Partnership*, 2016 WL 6885849 at *1, 2016 N.Y. Slip Op. 07925 (2d Dept 2016); *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).

[74] *Greco*, 2016 WL 6885849 at *1; *Montalto v. Heckler*, 113 A.D.3d 741, 742, 978 N.Y.S.2d 891 (2d Dept 2014).

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

[76] *Accord Azznara v. Strauss*, 81 A.D.3d at 579.

[77] See *Graziano v. Cagan*, 105 A.D.3d 701.

[78] 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).

[79] *Amoroso*, 66 A.D.3d at 618.

[80] *Id.*

[81] *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).

[82] *Greco*, 2016 WL 6885849 at *1.

[83] *Graziano v. Cagan*, 105 A.D.3d at 702.

[84] *Id.*

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

[86] *Id.*

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

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

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

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

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

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

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

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

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

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

[97] *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).

[98] *Tapp v. New York State Urban Dev. Corp.*, 102 A.D.3d 620, 958 N.Y.S.2d 392 (1st Dept 2013).

99 *See Spearin*, 129 A.D.3d at 528.
100 *Richards*, 100 A.D.3d at 730.
101 *Id.*
102 *Id.*
103 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).
104 *Id.*
105 134 A.D.3d 529, 22 N.Y.S.3d 178 (1st Dept 2015).
106 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.
107 See *D'Alessandro v. Nassau Health Care Corp.*, 137 A.D.3d 1195, 29 N.Y.S.3d 382 (2d Dept 2016).
108 *D'Alessandro*, 137 A.D.3d at 1196.
109 *D'Alessandro*, 137 A.D.3d at 1196-1197.

110 See *Gough v. Panorama Windows, Ltd.*, 133 A.D.3d 526, 19 N.Y.S.3d 169 (1st Dept 2015).
111 See the "Publications" page of DANY's website: http://defenseassociationofnewyork.org/page-856696.
112 *Deleonardis v. Hara*, 136 A.D.3d 558, 25 N.Y.S.3d 185 (1st Dept 2016).
113 *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).
114 *Cea*, 110 A.D.3d at 1027-1028.
115 *Cea*, 142 A.D.3d at 943.
116 See *Hackshaw v. Mercy Medical Center*, 139 A.D.3d 798, 33 N.Y.S.3d 297 (2d Dept 2016).
117 *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).
118 *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).
119 *Kaous v. Lutheran Medical Center*, 138 A.D.3d 1065, 1068, 30 N.Y.S.3d 663 (2d Dept 2016).
120 *Id.*
121 *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).
122 *Olympic Realty*, LLC, 142 A.D.3d at 540.
123 *Id.*
124 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).
125 *Gomez v. City of New York*, 138 A.D.3d 487, 487-488, 30 N.Y.S.3d 616 (1st Dept 2016).
126 *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 *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").
127 Lynch, 138 A.D.3d at 698.
128 *Kelly v. City of New York*, 134 A.D.3d 676, 678, 20 N.Y.S.3d 572 (2d Dept 2015).
129 *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).
130 *Reuling v. Consolidated Edison Company of New York*, Inc., 138 A.D.3d 439, 440, 30 N.Y.S.3d 605 (1st Dept 2016).
131 *Garguilo*, 137 A.D.3d at 708.
132 *Canals v. Lai*, 132 A.D.3d at 626-627 (2d Dept 2015).
133 *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.
134 *Gomez*, 138 A.D.3d at 488; see also Garguilo, 137 A.D.3d at 708.
135 *Id.*
136 *Garguilo*, 137 A.D.3d at 708.
137 *Reuling*, 138 A.D.3d at 440.
138 *Id.*
139 *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).
140 *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).
141 *Stamps*, 137 A.D.3d at 1756.
142 *Id.*
143 *Alicino v. Rochdale Village, Inc.*, 142 A.D.3d 937, 939, 37 N.Y.S.3d 557 (2d Dept 2016).
144 *Weinberger v. New York State Olympic Regional Dev. Auth.*, 133 A.D.3d 1006, 19 N.Y.S.3d 625 (3d Dept 2015).
145 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).
146 See *Atkins v. Beth Abraham Health Services*, 133 A.D.3d 491, 492, 20 N.Y.S.3d 33 (1st Dept 2015).
147 See *Boone v. Elizabeth Taxi, Inc.*, 120 A.D.3d 1143, 1144, 993 N.Y.S.2d 302 (1st Dept 2014).
148 See *Stemps v. Pudetti*, 137 A.D.3d 1755, 1756, 28 N.Y.S.3d 539 (4th Dept 2016).
149 *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).

[150] *Sacino*, 138 A.D.3d at 720; see also Begley, 111 A.D.3d at 35.

[151] *Shanoff v. Golyan*, 139 A.D.3d 932, 934, 34 N.Y.S.3d 78 (2d Dept 2016).

[152] *Paterra v. Arc Development LLC*, 136 A.D.3d 474, 475, 24 N.Y.S.3d 631 (1st Dept 2016).

[153] *Id.*

[154] *Paterra*, 136 A.D.3d at 474-475.

[155] *Thomas v. New York City Housing Auth.*, 25 N.Y.3d 1087, 12 N.Y.S.3d 617 (2015).

[156] *Lewis v. New York City Housing Auth.*, 135 A.D.3d 444, 445, 24 N.Y.S.3d 16 (1st Dept 2016).

[157] *Id.*

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

[159] *Id.*

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

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

[162] *Id.*

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

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

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

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

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

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

[169] *Id.*

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

[171] *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).

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

[173] 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).

[174] 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).

[175] *Id.*

[176] *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).

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

[178] *Schiavone*, 89 A.D.3d at 917.

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

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

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

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

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

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

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

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

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

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

[189] *Gabriel*, 98 A.D.3d at 176.

[190] *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).

[191] *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).

[192] *Id.*

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

[194] *Torres, 137 A.D.3d at 1257.*

[195] *Id.*

[196] *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).

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

[198] *Tuzzolino*, 135 A.D.3d at 448.

[199] *Tuzzolino*, 135 A.D.3d at 448.

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

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

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

[203] *Bianchi*, 131 A.D.3d at 559.

[204] 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).

[205] 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.

[206] See also *Rivera v. Montefiore Medical Center*, 28 N.Y.3d 999, 2016 WL 6104602 (2016); *Cioffi v. S.M. Foods*, Inc., 142 A.D.3d 520, 522, 36 N.Y.S.3d 475 (2d Dept 2016).

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

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

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

[210] *Id.*

[211] *Bianchi v. Galster Management Corp.*, 131 A.D.3d 558, 559, 15 N.Y.S.2d 189 (2d Dept 2015).

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

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

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

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

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

[217] 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).

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

[219] *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).

[220] *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.

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

[222] *Sadek v. Wesley*, 117 A.D.3d 193, 986 N.Y.S.2d 25 (1st Dept 2014); this case is an interesting read on several issues relative to expert witnesses.

[223] 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.

[224] See *Frankel*, 118 A.D.3d at 479-480.

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

[226] *Id.*

[227] 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."

[228] 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.

[229] See *South Shore Press, Inc. v. Havemeyer*, 136 A.D.3d 929, 25 N.Y.S.3d 303 (2d Dept 2016).

[230] See *Khatibi v. Weill*, 8 A.D.3d 485, 486, 778 N.Y.S.2d 511 (2d Dept 2004).

[231] *South Shore Press, Inc. v. Havemeyer*, 136 A.D.3d at 930-931.

[232] See *Clark v. Allen & Overy, LLP*, 125 A.D.2d 497, 4 N.Y.S.3d 20 (1st Dept 2015).

[233] *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).

[234] *Brown v. Brink Elevator Corp.*, 125 A.D.3d 421, 998 N.Y.S.2d 884 (1st Dept 2015).

[235] *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).

[236] *O'Berry v. Gelco Corp.*, 128 A.D.3d 597, 10 N.Y.S.3d 68 (1st Dept 2015).

[237] *Ramsen A. v. New York City Housing Auth.*, 112 A.D.3d 439, 440, 976 N.Y.S.2d 73 (1st Dept 2013).

[238] 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).

[239] *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).

[240] *Giorgano*, 103 A.D.3d at 774; *Carrington*, 103 A.D.3d at 607.

[241] 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).

[242] See *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).

[243] *Marashaj v. Rubin*, 132 A.D.3d 641, 18 N.Y.S.3d 79 (2d Dept 2015).

[244] *Chaudhary v. Gold*, 83 A.D.3d 477, 921 N.Y.S.2d 219 (1st Dept 2011).

[245] *Feng Wang v. A & W Travel, Inc.*, 130 A.D.3d 974, 977, 14 N.Y.S.3d 459 (2d Dept 2015).

[246] *Id.*

[247] 135 A.D.3d 116, 21 N.Y.S.3d 78 (2d Dept 2015).

[248] *Bermejo*, 135 A.D.3d at 119 and 144.

[249] 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).

[250] *Flores v. Vescera*, 105 A.D.3d at 1340, quoting *Lamendola v. Slocum*, 148 A.D.2d at 781.

[251] *Mosel v. Brookhaven Mem. Hosp.*, 134 Misc.2d 73, 509 N.Y.S.2d 754 (Sup Ct / Suffolk Cty 1986).

[252] See e.g. *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).

[253] *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.

254 *Id.*

255 *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).

256 *Guerra v. McBean*, 127 A.D.3d at 462-463.

257 *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).

258 *Bermejo*, 135 A.D.3d at 145.

259 See *Bermejo*, 135 A.D.3d at 119 and 146.

260 *Bermejo*, 135 A.D.3d at 146.

261 *Id.*, citing *Tai Tran v. New Rochelle Hosp. Medical Center*, 99 N.Y.2d 383, 388.

262 *IME Watchdog, Inc. v. Baker, McEvoy, Morrissey & Moskovits*, P.C., 2016 WL 7078981, 2016 N.Y. Slip Op. 08174 (1st Dept 2016).

263 *IME Watchdog*, 2016 WL 7078981 at *1. The First Department did not identify these Supreme Court decisions in this opinion.

264 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.

265 See *Gianacopoulos v. Corona*, 133 A.D.3d 565, 18 N.Y.S.3d 558 (2d Dept 2015).

266 *Id.*, citing 22 NYCRR 202.21[d].

267 See *Jones v. Grand Opal Constr. Corp.*, 64 A.D.3d 543, 883 N.Y.S.2d 253 (2d Dept 2009).

268 *Richbell Information Services, Inc. v. Jupiter Partners L.P.*, 32 A.D.3d 150, 816 N.Y.S.2d 470 (1st Dept 2006).

269 *Kahn v. Leo Schachter Diamonds, LLC*, 139 A.D.3d 635, 30 N.Y.S.3d 862 (1st Dept 2016).

270 *Richbell Information Services*, 32 A.D.3d at 155.

271 *Richbell Information Services*, 32 A.D.3d at 156.

272 *Richbell Information Services*, 32 A.D.3d at 156; *Kahn*, 139 A.D.3d at 635.

273 *Richbell Information Services*, 32 A.D.3d at 159.

274 See *Williams v. Beemiller*, Inc., 100 A.D.3d 143, 152, 952 N.Y.S.2d 333 (4th Dept 2012).

275 *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.

276 *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); *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.

277 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).

278 *Jackson*, 139 A.D.3d at 429.

279 *City of Troy v. Town of Brunswick*, 2016 WL 7129635 at *2, 2016 N.Y. Slip Op. 08280 (3d Dept 2016).

280 *City of Troy*, 2016 WL 7129635 at *3.

281 *Pardo*, 131 A.D.3d at 1214, citing 22 NYCRR 202.7[a][2]. *Accord Fernandez v. DaimlerChrysler, A.G.*, 143 A.D.3d 765, 40 N.Y.S.3d 128 (2d Dept 2016).

282 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).

283 See *Ovcharenko v. 65th Booth Associates*, 131 A.D.3d 1144, 16 N.Y.S.3d 763 (2d Dept 2015).

284 *Piemonte v. JSF Realty, LLC*, 140 A.D.3d 1145, 1146, 36 N.Y.S.3d 146 (2d Dept 2016).

285 *Id.*

286 *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).

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

288 *Reid v. Soults*, 114 A.D.3d 921, 980 NYS2d 579 (2d Dept 2014).

289 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).

290 *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).

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

292 *State v. Baumslag*, 134 A.D.3d 451, 452, 21 N.Y.S.3d 51 (1st Dept 2015).

293 *T.D. Bank, N.A.*, 143 A.D.3d at 885.

294 See CPLR 3402. 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.

295 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).

296 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)

297 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).

298 *Id.*

299 *Id.*

300 See e.g. *Greco v. Wellington Leasing Ltd Partnership*, 2016 WL 6885849, 2016 N.Y. Slip Op. 07925 (2d Dept 2016), and *Singh v. CBCS Construction Corp.*, 137 A.D.3d 1250, 27 N.Y.S.3d 40 (2d Dept 2016).

301 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).

302 *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.

303 See 22 NYCRR 202.21(d); *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).

304 *Sansone v. Sansone*, 114 A.D.3d 748, 749, 979 N.Y.S.2d 856 (2d Dept 2014).

305 *Saravullo v. Tillotson*, 132 A.D.3d at 1400; see also Singh v. City of New York, 68 A.D.3d 1096, 1097, 890 N.Y.S.2d 333 (2d Dept 2009).

306 *Stewart v. Dunkleman*, 128 A.D.3d 1338, 1339, 8 N.Y.S.3d 515 (4th Dept 2015).

307 *Sansone v. Sansone*, 114 A.D.3d 748, 749, 979 N.Y.S.2d 856 (2d Dept 2014).

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

309 *Morales*, 140 A.D.3d at 718.

310 See e.g. *Hoffman v. Biltmore 47 Associates, LLC*, 130 A.D.3d 478, 14 N.Y.S.3d 690 (1st Dept 2015).

311 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).

312 Singh, 137 A.D.3d 1250.

313 *Greco v. Wellington Leasing Ltd Partnership*, 2016 WL 6885849 at *1, 2016 N.Y. Slip Op. 07925 (2d Dept 2016).

314 *Id.*

315 See *Place v. Chaffee–Sardinia Volunteer Fire Company*, 143 A.D.3d 1271, 39 N.Y.S.3d 568 (4th Dept 2016).

316 *Place*, 39 N.Y.S.3d at 570.

317 See *CPLR* 3123(a).

318 *Id.*

319 *Id.* Accord *32ND Avenue LLC v. Angelo Holding Corp.*, 134 A.D.3d 696, 698, 20 N.Y.S.3d 420 (2d Dept 2015). 320 See 32ND Avenue LLC, 134 A.D.3d at 696.

321 *32ND Avenue LLC*, 134 A.D.3d at 698.

322 *Id.*

323 *Id.*

324 *Smith v. County of Nassau*, 138 A.D.3d 726, 729, 30 N.Y.S.3d 143 (2d Dept 2016).

325 *32ND Avenue LLC*, 134 A.D.3d at 698-699. See also *Smith*, 138 A.D.3d at 729.

326 See *Smith*, 138 A.D.3d at 729.

327 *Atiles v. Golub Corp.*, 141 A.D.3d 1055, 36 N.Y.S.3d 533 (3d Dept 2016).

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

329 *Cataudella*, 140 A.D.3d at 509.

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

331 *Rivera*, 40 N.Y.S.3d at 841.

332 *Fox v. Grand Slam Banquet Hall*, 142 A.D.3d 473, 36 N.Y.S.3d 653 (1st Dept 2016).

333 *Bermejo v. New York City Health and Hospitals Corp.*, 135 A.D.3d 116, 21 N.Y.S.3d 78 (2d Dept 2015).

334 *Bermejo*, 135 A.D.3d at 146.

335 *Id.*, citing Tai Tran v. New Rochelle Hosp. Medical Center, 99 N.Y.2d 383, 388, 756 N.Y.S.2d 509 (2003).

336 134 A.D.3d 529, 22 N.Y.S.3d 178 (1st Dept 2015).

337 *Forman*, 134 A.D.3d at 531 (italics supplied).

338 *Forman*, 134 A.D.3d at 530.

339 *Forman*, 134 A.D.3d at 530-531.

340 *Forman*, 134 A.D.3d at 542.

341 *Forman*, 134 A.D.3d at 532.

342 *Id.*

343 *Id.*

344 *Forman*, 134 A.D.3d at 533.

345 *Id.*

346 *Ferrara Bros. Building Materials Corp. v. FMC Construction LLC*, 138 A.D.3d 685, 30 N.Y.S.3d 157 (2d Dept 2016).

169 *See e.g. Shah v. Oral Cancer Prevention International, Inc., 138 A.D.3d 722, 30 N.Y.S.3d 154 (2d Dept 2016).*

348 *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).

349 *Morales v. Zherka*, 140 A.D.3d 836, 35 N.Y.S.3d 121 (2d Dept 2016).

350 *Calabrese Bakeries, Inc. v. Rockland Bakery, Inc.*, 139 A.D.3d 1192, 1194, 32 N.Y.S.3d 667 (3d Dept 2016).

351 See *Place v. Chaffee–Sardinia Volunteer Fire Company*, 143 A.D.3d 1271, 39 N.Y.S.3d 568, 569 (4th Dept 2016).

352 See *AQ Asset Management LLC v. Levine*, 138 A.D.3d 635,

636, 31 N.Y.S.3d 32 (1st Dept 2016).

[353] 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).

[354] *McMahon v. Cobblestone Lofts Condominium*, 134 A.D.3d 646, 22 N.Y.S.3d 50 (1st Dept 2015).

[355] *McLeod*, 122 A.D.3d at 1412.

[356] *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).

[357] *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 *Teitelbaum v. Maimonides Medical Center*, 2016 WL 6884929 at *1, 2016 N.Y. Slip Op. 07944 (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).

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

[359] *Alicino v. Rochdale Village, Inc.*, 142 A.D.3d 937, 939, 37 N.Y.S.3d 557 (2d Dept 2016).

[360] *Citibank, N.A. v. Bravo*, 140 A.D.3d at 1435.[179] 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). particulars are discussed later in this article.

[361] 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").

[362] *Herman v. Herman*, 41 N.Y.S.3d 19, 2016 N.Y. Slip Op. 07148 (1st Dept 2016).

[363] See *Teitelbaum*, 2016 WL 6884929 at *1 (2d Dept 2016); *Henry v. Datson*, 140 A.D.3d 1120, 1121, 35 N.Y.S.3d 383 (2d Dept 2016).

[364] See *Metzger v. Goldstein*, 139 A.D.3d 918, 921, 33 N.Y.S.3d 81 (2d Dept 2016).

[365] *Cioffi*, 142 A.D.3d at 524.

[366] See *Krause v. Lobacz*, 131 A.D.3d 1128, 16 N.Y.S.3d 601 (2d Dept 2015).

[367] 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).

[368] 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).

[369] *Flanagan v. Wolff*, 136 A.D.3d 739, 741, 26 N.Y.S.3d 102 (2d Dept 2016).

[370] *Cioffi v. S.M. Foods*, Inc., 142 A.D.3d 520, 524, 36 N.Y.S.3d 475 (2d Dept 2016).

[371] *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).

[372] *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).

[373] 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).

[374] *Hughes v. Brooklyn Skating, LLC*, 120 A.D.3d 758, 991 N.Y.S. 326 (2d Dept 2014).

[375] *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).

[376] See *Richards v. RP Stellar Riverton, LLC*, 136 A.D.3d 1011, 25 N.Y.S.3d 346 (2d Dept 2016).

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

[378] *Herman v. Herman*, 41 N.Y.S.3d 19, 20, 2016 N.Y. Slip Op. 07148 (1st Dept 2016).

[379] *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].

[380] *Calabrese Bakeries*, 139 A.D.3d at 1194.

[381] *East Schodack Fire Co. v. Milkewicz*, 140 A.D.3d 1255, 1258, 34 N.Y.S.3d 640 (3d Dept 2016).

[382] See Piemonte v. JSF Realty, LLC, 140 A.D.3d 1145, 1146, 36 N.Y.S.3d 146 (2d Dept 2016).

[383] See *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 *Piemonte v. JSF Realty, LLC*, 140 A.D.3d 1145, 1146, 36 N.Y.S.3d 146 (2d Dept 2016); *Hughes v. Brooklyn Skating*, 120 A.D.3d 758.

[384] *Id.*; *Arzuaga v. Tejada*, 133 A.D.3d 454, 19 N.Y.S.3d 280 (1st Dept 2015). For cases addressed specifically to a defendant seeking such relief, see Carillon Nursing and Rehabilitation Center, LLP v. Fox, 118 A.D.3d 933, 989 N.Y.S.2d 68 (2d Dept 2014), and *Julien-Thomas v. Platt*, 133 A.D.3d 824, 20 N.Y.S.3d 415 (2d Dept 2015).

[385] See *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).

386 *Nieves v. Citizens Advice Bureau Jackson Avenue Family Residence*, 140 A.D.3d 566, 567, 32 N.Y.S.3d 507 (1st Dept 2016).

387 *Nieves*, 140 A.D.3d at 567.

388 *Id.*

38 *Id.*

390 See *Wilson v. Galicia Contracting & Restoration Corp.*, 10 N.Y.3d 827, 830, quoting from *Weinstein-Korn-Miller*, N.Y. Civ Prac ¶ 3126.03.

391 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). 392 See *CPS LLC v. Brody*, 135 A.D.3d 607, 608, 22 N.Y.S.3d 871 (1st Dept 2016).

393 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.

394 See e.g. *Arzuaga v. Tejada*, 133 A.D.3d 454, 19 N.Y.S.3d 280 (1st Dept 2015).

395 *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).

396 *Piemonte v. JSF Realty, LLC*, 140 A.D.3d 1145, 1146, 36 N.Y.S.3d 146 (2d Dept 2016).

397 *Lee v. Barnett*, 134 A.D.3d at 910.

398 *Arzuaga v. Tejada*, 133 A.D.3d 454, 455, 19 N.Y.S.3d 280 (1st Dept 2015).

399 See *Jardin v. A Very Special Place, Inc.*, 138 A.D.3d 927, 930, 30 N.Y.S.3d 270 (2d Dept 2016).

400 See *Lawrence v. North Country Animal Control Center*, 133 A.D.3d 932, 20 N.Y.S.3d 197 (3d Dept 2015).

401 *Id.*

402 *Id.*

403 *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 *Shahid v City of New York*, 2016 WL 6991435, 2016 N.Y. Slip Op. 08062 (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).

404 *Teitelbaum v. Maimonides Medical Center*, 2016 WL 6884929 at *1, 2016 N.Y. Slip Op. 07944 (2d Dept 2016).

405 See *Teitelbaum*, 2016 WL 6884929 at *1; *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).

406 *Place v. Chaffee–Sardinia Volunteer Fire Company*, 143 A.D.3d 1271, 39 N.Y.S.3d 568, 569 (4th Dept 2016). 407 *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).

408 *PNC Bank, National Association v. Campbell*, 142 A.D.3d 1148, 1149, 38 N.Y.S.3d 236 (2d Dept 2016).

409 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).

410 *Henry v. Datson*, 140 A.D.3d at 1121.

411 *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 Dept 2013) (dismissal of the complaint).

412 *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 *Muboyayi v. Quintero*, 136 A.D.3d 497, 498, 24 N.Y.S.3d 642 (1st Dept 2016) (plaintiff failure to attend a continued deposition).

413 See *Bruno v. Flip Cab Corp.*, 2016 WL 6774367 at *1, 2016 N.Y. Slip Op. 07617 (2d Dept 2016).

414 See *Brannigan v Door*, 2016 WL 6885909 at *2, 2016 N.Y. Slip Op. 07918 (2d Dept 2016).

415 See *Iskalo Electric Tower LLC v. Stantec Consulting Services, Inc.*, 113 A.D.3d 1105, 979 N.Y.S.2d 212 (4th Dept 2014).

416 *Iskalo Electric Tower*, 113 A.D.3d at 1106.

417 See *Vaca*, 2016 WL 7130520 at *1.

418 *Field v. Bao*, 140 A.D.3d 921, 35 N.Y.S.3d 150 (2d Dept 2016).

419 *Liberty Community Associates, LP v. DeClemente*, 139 A.D.3d 532, 30 N.Y.S.3d 550 (1st Dept 2016).

420 *Shah v. Oral Cancer Prevention International, Inc.*, 138 A.D.3d 722, 724, 30 N.Y.S.3d 154 (2d Dept 2016).

421 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.

422 See *Aur v. Manhattan Greenpoint Ltd.*, 132 A.D.3d 595, 2015 WL 6511172 (1st Dept 2015).

423 *Id.*

424 See *CPS LLC v. Brody*, 135 A.D.3d 607, 608, 22 N.Y.S.3d 871 (1st Dept 2016).

425 See *Metzger v. Goldstein*, 139 A.D.3d 918, 921, 33 N.Y.S.3d 81 (2d Dept 2016).

426 See *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).

[427] *Nieves* 140 A.D.3d at 567.

[428] *Viruet v. Mount Sinai Medical Center Inc.*, 143 A.D.3d 558, 38 N.Y.S.3d 896 (1st Dept 2016).

[429] See *Arbor Realty Funding, LLC v. Herrick Feinstein LLP*, 140 A.D.3d 607, 610, 36 N.Y.S.3d 2 (1st Dept 2016).

[430] *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).

[431] *Atiles v. Golub Corp.*, 141 A.D.3d 1055, 1056, 36 N.Y.S.3d 533 (3d Dept 2016); *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 547, 26 N.Y.S.3d 218 (2015); see also *Doviak*, 22 N.Y.S.3d at 169.

[432] *Cioffi*, 142 A.D.3d at 525.

[433] *Id.*; *Doviak*, 22 N.Y.S.3d at 169.

[434] *Pegasus Aviation I*, 26 N.Y.3d at 553

[435] *Arbor Realty Funding*, LLC, 140 A.D.3d at 610.280 (1st Dept 2015).

[436] *Pegasus Aviation I*, 26 N.Y.3d at 547; see also *Atiles*, 141 A.D.3d at 1056.

[437] *Pegasus Aviation I*, 26 N.Y.3d at 547-548; see also *Atiles*, 141 A.D.3d at 1056.

[438] *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).

[439] *Cioffi*, 142 A.D.3d at 525.

[440] *Cioffi*, 142 A.D.3d at 525.

[441] *Doviak*, 22 N.Y.S.3d at 169, 170.

[442] 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).

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

[444] *Cataudella*, 140 A.D.3d at 509.

[445] *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).

[446] *Cioffi*, 142 A.D.3d at 525; *Hughes v. Covey*, 131 A.D.3d at 583.

[447] *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).

[448] *Cioffi*, 142 A.D.3d at 525.

[449] *Eremina v. Scparta*, 120 A.D.3d at 617.

[450] See *Neve v. City of New York*, 117 A.D.3d 1006, 986 N.Y.S.2d 606 (2d Dept 2014).

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[452] *Sullivan v. 40/40 Club*, 34 Misc.3d 138(A), 2011 WL 6934522.

[453] *Sullivan*, 2011 WL 6934522 at *4

[454] *Id.*

[455] *Id.*

[456] See *M.C. v. Sylvia Marsh Equities, Inc.*, 103 A.D.3d 676, 959 N.Y.S.2d 280 (2d Dept 2013).

[457] *M.C. v. Sylvia Marsh Equities, Inc.*, 103 A.D.3d at 678.

[458] i.e., *M.C. v. Sylvia Marsh Equities, Inc.*, 103 A.D.3d at 678.

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

[460] *Hayes v. Bette & Cring, LLC*, 135 A.D.3d 1058, 1059, 22 N.Y.S.3d 680 (3d Dept 2016).

[461] *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).

[462] *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).

[463] *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").

[464] *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").

[465] *Anderson v. State of New York*, 134 A.D.3d 1061, 21 N.Y.S.3d 356 (2d Dept 2015).

[466] *Anderson*, 134 A.D.3d at 1062.

[467] *Anderson*, 134 A.D.3d at 1063.

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