SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
560 Wheeler Road, Hauppauge, NY 11788
(631) 234-5588

2018 BRIDGE THE GAP
DAY TWO

FACULTY
A. Craig Purcell, Esq.
James Fagan, Esq.
Stephen Kunken, Esq.
William Ferris, Esq.

Program Coordinators: Barry Smolowitz, Esq., Stephen Kunken, Esq., William Ferris, Esq.

January 31 2018
Suffolk County Bar Center, NY

BRIDGE THE GAP 2018

HANDLING A CIVIL CASE

HANDLING A CIVIL CASE
RECENT CASES/LEGISLATION IN CIVIL PRACTICE 2018

I. JURISDICTION/SERVICE

The United States Supreme Court has limit general personal jurisdiction for a corporation holding that a court may assert general jurisdiction over a non-domestic corporation to hear any and all claims against them when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State. The Court noted in a footnote, responding to Justice Sotomayer's concurrence, that "the general jurisdiction inquiry does not "focu[s] solely on the magnitude of the defendant's in-state contacts." General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them." The court noted that International Shoe focused both on general and specific[long arm] jurisdiction. For general jurisdiction place of incorporation and principal place of business are the basis, or where the affiliations with the state are so continuous and systematic as to render the corporation essentially at home in the state. The Supreme Court also rejected the "agency" test used to impute jurisdiction between a parent and a subsidiary. This test has been used by the New York Court of Appeals. Daimler AG v. Bauman,134 S.Ct. 746.

The Second Circuit held that a District Court in Vermont did not have general jurisdiction over the Diocese of Albany for causes of action stemming from child abuse. The court held that under new Supreme Court analysis, the fact that one priest held mass in Vermont would not give general jurisdiction. In re Diocese of Albany, 745 F.3d 30.

If a defendant resists service of process, service may be effected pursuant to CPLR 308(1) by leaving a copy of the summons in the defendant's general vicinity, provided that the defendant is made aware that this is being done. Therefore, where the defendant came to the front door and the process server explained that he wanted to give her legal papers, and the defendant, speaking through the closed door, refused to open the door and told him to come back another time the process server properly served by placing the summons and complaint between the storm door and the interior brown door, and told the defendant what he was doing. Hall v Wong, 119 A.D.3d 897.

In service of a business entity, the fact that the summons and complaint, which had been sent by certified mail, return receipt requested, to the address on file with the New York Secretary of State, had been returned to the Secretary of State as "unclaimed," raises a triable issue of fact as to whether the defendant received notice of the certified mail sent to it by the Secretary of State, and the matter requires a hearing. Bennett v Patel Catskills, LLC, 120 A.D.3d 458.

In order to establish minium contacts for due process analysis over a defendant, the proper question is whether the defendant's conduct connects him to the forum in a meaningful way. Therefore, a Georgia police officer working as a deputized Drug Enforcement Administration agent at a Georgia airport, who searched and seized a large amount of cash, and thereafter allegedly helped draft a false probable cause affidavit in support of the funds' forfeiture and forwarded it to a United States Attorney's Office in Georgia could not be sued in Nevada, the plaintiff's residence. The mere fact that the conduct affected the plaintiffs was insufficient. Walden v. Fiore, 134 S.Ct. 1115

Where an OTSC requires personal delivery, but attempts to personally delivery have failed, it is an abuse of discretion not to alter the method of service to another section of CPLR 308. Koyachman v Paige Mgt. & Consulting, LLC, 121 A.D.3d 951

CPLR 301 did not expand the scope of the existing jurisdictional authority of the courts of the State of New York and therefore does not permit the application of the "doing business" test to individual defendants. Pichardo v. Zayas,122 A.D.3d 699

The failure to file proof of service is a procedural irregularity, not a jurisdictional defect, that may be cured by motion or sua sponte by the court in its discretion pursuant to CPLR 2004. However, the defendant must be afforded an additional 30 days after service upon him of a copy of this decision and order to appear and answer. Khan v Hernandez, 122 A.D.3d 802

The Court of Appeals has addressed jurisdiction based upon an internet site. The plaintiff learned about the Florida-based Laser Spine Institute through its home page obtained as an advertisement on AOL. Thereafter there was a "communication stream" between the defendant the plaintiff before and after surgical procedures, the defendants consulted with the plaintiff's New York doctors, the defendant directed blood work in New York and provided prescriptions to be filled in New York. The Court of Appeals, agreeing with Appellate Divisions, held that passive websites which merely impart information without permitting a business transaction are generally fail to provide a jurisdictional predicate under CPLR 302(a)(1). Furthermore, it is not the quantity but the quality of the contacts that matter under long-arm jurisdiction. Interestingly, the Court of Appeals noted that individuals travel across state lines in order to obtain health care and allowing jurisdiction would "set a precedent for almost limitless jurisdiction over out of state medical providers in future cases." Paterno v. Laser Spine Ins., 24 N.Y.3d 370

IS a the security guard was a person of suitable age and discretion within the contemplation of CPLR 308(2), and does the outer bounds of the dwelling place extended to the security booth? It is an issue of fact says the Second Department in remanding the issue for a hearing. Matter of MBNA Am. Bank, N.A. v Novins, 123 A.D.3d 832

A demand for a complaint pursuant to CPLR 3012(b) prior to service of the summons is premature and does not invoke the time limitations of CPLR 3012(b). Ryan v. High Rock Development, 124 A.D.3d 751

General Business Law § 89-u, which applies to process servers outside of the City of New York, requires process servers to "maintain a legible record of all service made by him [or her] as prescribed in this section" (General Business Law § 89-u[1]). Unlike General Business Law § 89-cc(1), which is applicable in the City of New York, General Business Law § 89-u, which is applicable outside the City of New York, does not expressly require that the "legible record" be "kept in chronological order in a bound, paginated volume" Since the Legislature did not include a log book requirement for process servers in counties outside of the City of New York, it was error to hold that the process server in Nassau County was required to maintain such log book. Moret Partnership v Spickerman, 125 A.D.3d 729,

The First Department found that telephone communications can establish purposeful activity conferring long-arm jurisdiction. For those who love UCC, the case also involved the "battle of the form" provision under UCC 2-207. C. Mahendar LLC v. National Gold & Diamond Ctr., Inc., 125 A.D.3d 454.

Can a New York court exercise personal jurisdiction over defendants based on the establishment of a foreign investment program, where the operative contracts establishing the program were negotiated and executed in New York? The First Department says that CPLR 302(a)(1) confers personal jurisdiction over defendants. Wilson v Dantas, 128 A.D.3d 176

The Court of Appeals held that under the Election Law § 16-116, a petitioner is required to provide notice "as the court or justice shall direct" and "this requirement calls for delivery of the instrument of notice not later than on the last day on which the proceeding may be commenced." If there is more than one method of service required, including a mailing requirement, if the mailing is performed not later than on the last day on which the proceeding may be commenced, service is good even if the mailing is received after the last day. Matter of Angletti v. Morreale, 25 N.Y.3d 794.

A limited liability company does not require the additional notice for entry of a default judgment under CPLR 3215(g)(4)(I). Gershman v Ahmad, 131 A.D.3d 1104.

The Supreme Court and the Surrogate's Court have concurrent jurisdiction over the administration of a decedent's estate; but "[w]herever possible, all litigation involving the property and funds of a decedent's estate should be disposed of in the Surrogate's Court."Nichols v Kruger, 113 AD2d 878, 878-879. Where an action seeks to recover funds of an estate it"affects the administration of a decedent's estate" and should be determined by Surrogate's Court and removed to it. CPLR 325[e]. Joffe v Widelitz, 134 A.D.3d 766.

Can a party's attorney be served? Yes, under CPLR 308(5). Usually, "[a]n attorney is not automatically considered the agent of his [or her] client for the purposes of the service of process" and, absent proof that a defendant has designated his or her attorney as an agent for the acceptance of process, an attorney lacks the authority to accept service on the defendant's behalf. Broman v Stern, 172 AD2d 475. However, where the is inability to serve the defendant at the know addresses since she lived in China and there is proof that service upon the attorney would provide notice, a court can allow serve upon the attorney. Born To Build, LLC v Saleh, 43

Misc.3d 1213(A).

The defendants communicated from another state with the plaintiff in New York via mail, telephone, and email because the plaintiffs were New York domiciliaries, not because the defendants were actively participating in transactions in New York, and the communications with the plaintiffs in New York all concerned the services that the defendants were performing in Florida so that it can not be held to be transacting business in New York.
Bloomgarden v Lanza, 143 A.D.3d 850

A Chinese citizen who had a owned a cooperative apartment in Queens was not domicile at the time of the commencement of the action to find jurisdiction under CPLR 301. The Court further analyzed limited jurisdiction under CPLR 302 and the need for further discovery under the motion to dismiss under CPLR 3211(a)(8). Chen v. Guo Liang Lu, 144 A.D.3d 735

The Court of Appeals found long-arm jurisdiction against a private bank with its principal place of business and general partners claiming defendants aided and abetted the employees' breach of their fiduciary duty and were part of a civil conspiracy with the employees. The focus was the bank's correspondent accounts. The Court of Appeals found long arm jurisdiction under CPLR 302(a)(1) noting that repeated, deliberate use that is approved by the foreign bank on behalf and for the benefit of a customer demonstrates volitional activity constituting transaction of business. In other words, the quantity and quality of a foreign bank's contacts with the correspondent bank must demonstrate more than banking by happenstance. Furthermore, there is a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim. This satisfied the two prong under "jurisdiction is proper even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted. Three judges dissented finding that use of a correspondent account as a jurisdictional predicate requires some direct deliberation action. Rushaid v Pictet & Cie, 28 N.Y.3d 316

"[I]f a process server is not permitted to proceed to the actual apartment by the doorman or some other employee, the outer bounds of the actual dwelling place must be deemed to extend to the location at which the process server's progress is arrested. " Where there is an issue of fact about the actions of the employee, a hearing is required. Citibank, N.A. v Balsamo, 144 A.D.3d 964

The Supreme Court does not have jurisdiction to apportion fault to the State under CPLR 1601(1). Carol Artibee v. Home Place Corp., 28 N.Y.3d 739

Having a glass of wine may provide jurisdiction. The defendant, a winery located in Spain, entered into an oral contract in Spain with the plaintiff, a Spanish limited liability company, to obtain a distributor in the United States. The parties traveled to New York several times to promote the wine and obtained a distributor. After a year paying commissions, the defendant

stopped paying claiming the contract was for a year. The plaintiff commenced an action in New York. The issue was whether there existed personal jurisdiction over the defendant. The Court of Appeals held yes, as the action were sufficient to establish transacting of business and a nexus between the cause of action and the transaction of business under CPLR 302(a)(1). D & R Global Selectins, L.L., 29 N.Y.3d 292

General Business Law § 13 provides: "Whoever maliciously procures any process in a civil action to be served on Saturday, upon any person who keeps Saturday as holy time, and does not labor on that day, or serves upon him any process returnable on that day, or maliciously procures any civil action to which such person is a party to be adjourned to that day for trial, is guilty of a misdemeanor." The Second Department held that this includes the affixation portion of "nail and mail" service pursuant to CPLR 308(4) on the door of a defendant's residence, not only personal service. JPMorgan Chase Bank, National Association, v Molly I. Lilker, 153 A.D.3d 1243

New York City Charter § 1049-a(d)(2)(b) permits use of affix and mail service after a single reasonable attempt by a DOB inspector to personally deliver the NOV at the premises, so that the Court of Appeals did not require CPLR 308(4) due diligence. Matter of Frank Mestecky v. City of New York, 2017 WL 5557882.

A affidavits of service filed by the plaintiff must indicate that the process server mailed the summons to the defendant. "Jurisdiction is not acquired pursuant to CPLR 308(2) unless both the delivery and mailing requirements have been strictly complied with." Josephs v AACT Fast Collections Services, Inc., 155 A.D.3d 1010

Failure of a process server's affidavit to establish that"duplicate copies" of process were delivered to the Secretary of State as required by Business Corporation Law § 306(b)(1) may void service. Where the affidavit was ambiguous, a hearing was directed. JP Morgan Chase Bank, NA v Adventure Corp., 155 A.D.3d 1013

II. PLEADINGS

"Generally, in the absence of prejudice or surprise to the opposing party, leave to amend a bill of particulars should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit." Dimoulas v Roca, 120 A.D.3d 1293

Remember that a corporation must be represented by an attorney and cannot proceed pro se. Boente v. Peter C. Kurth Office of Architecture and Planning, P.C., 113 A.D.3d 803

A defendant is not required to serve an answer where the complaint did not set forth any allegations that the defendant was required to defend against. "A defendant who has no defense, and therefore serves no pleading, might nevertheless serve a notice of appearance so as to be kept apprised of the progress of the proceeding" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons.Laws of NY, Book 7B, CPLR C320:1 at 130). Serving a notice of appearance entitles the party to be kept apprised of the proceedings. Furthermore, there is no statutory or other requirement that a notice of appearance, timely served upon a plaintiff, must also be filed with the clerk of the relevant court in order for a defendant to appear in the action. Tsionis, v. Eriora Corp., 123 A.D.3d 694.

Returning an answer claiming it was not properly verified, without more specificity, can not be the basis of treating the answer as a nullity. Gaffey v Shah, 131 A.D.3d 1006

The basis rule for leave to amend or supplement a pleading is to be "freely given" under CPLR 3025[b]. "In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit." A party seeking leave to amend a pleading need not make an evidentiary showing of merit, and leave to amend will be granted unless such insufficiency or lack of merit is clear and free from doubt. Calamari v Panos, 131 A.D.3d 1088

Upon the denial of a plaintiff's motion for summary judgment in lieu of complaint, "the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise." (CPLR 3213). Where the Court, in this case the Appellate Division, Second Department finds that "the moving and answering papers do not satisfactorily define the issues" formal pleadings must be served. Mirham v. Awad, 131 A.D.3d 1211

Where there has been an inordinate delay in seeking leave to amend the bill of particulars to include a new injury, a plaintiff must establish a reasonable excuse for the delay and show that the proposed amendment has merit. Canals v. Lai, 132 A.D.3d 626

The supplemental bill of particulars may be served by the plaintiff subsequent to the filing of the note of issue where, pursuant to CPLR 3043(b), "[a] party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities," with the proviso that "no new cause of action may be alleged or new injury claimed." Moreover, the statute provides that supplemental bills of particulars may be served 30 days or more prior to trial without leave of court, and that the opposing party is entitled to an opportunity for further disclosure regarding the continuing damages and disabilities. However, if the supplemental bill of particulars alleges any new injuries so as to constitute a de facto amended bill of particulars it is improperly served without leave of court. Alicino v Rochdale Vil., Inc., 142 A.D.3d 937

In an interesting case involving an “amendment” to the bill of particulars, the Second Department divided 3-2 as to whether the amendment, labeled a supplemental, bill of particular was sufficient to provide notice of malpractice derived from a follow up visit. Mackauer v. Parikh, 148 A.D.3d 873

III. TRIAL

A witness' testimony is only cumulative, to negate a missing witness charge [PJI 1:75], when the party's own witness provides the predicate testimony, not the opposing party. DeVito v. Feliciano, 22 N.Y.3d 159.

"When a motion to reopen is made, the trial court should consider whether the movant has provided a sufficient offer of proof, whether the opposing party is prejudiced, and whether significant delay in the trial will result if the motion is granted." Sweet v Rios, 113 A.D.3d 750

"When a jury's verdict is internally inconsistent, the trial court must direct either reconsideration by the jury or a new trial. " Therefore, where a party is found to have not been a proximate cause of an incident, but being allocated a percentage of liability is internally inconsistent. D'Annunzio v. Ore, 119 A.D.3d 512

A court may set aside a jury verdict as contrary to the weight of the evidence and order a new trial if "the evidence so preponderates in favor of the [moving party]" that the jury's conclusion "could not have been reached on any fair interpretation of the evidence" (O'Boyle v. Avis Rent–A–Car Sys., 78 A.D.2d 431, 439; see Lolik v. Big v. Supermarkets, 86 N.Y.2d 744, 746; Agui v. Fernandez, 113 AD3d 645; Seong Yim Kim v. New York City Tr. Auth., 87 AD3d 531, 532). "It is within the province of the jury to determine issues of credibility" (Palermo v. Original California Taqueria, Inc., 72 AD3d 917, 918). "Its resolution of these issues is entitled to deference and a successful party is entitled to a presumption that the jury adopted a reasonable view of the evidence" (Bertelle v. New York City Tr. Auth., 19 AD3d 343, 343–344 [citations omitted]; see Acosta v. City of New York, 84 AD3d 706, 709; Louis Puccio Dev., Inc. v. Dean, 18 AD3d 826, 827)." Rivera v. Motor Vehicle Accident Indemnification Corp., 119 A.D.3d 540

CPLR 4511 allows a court to take notice of federal and foreign state law, not facts, that is relevant to a proceeding.. The congressional findings in support of legislation seeking to reduce amounts of lead in homes, though codified in a federal statute, are not "law" that is relevant to Hamilton's case. Taking judicial notice of them under CPLR 4511 would be inappropriate. Hamilton v. Miller, 23 N.Y.3d 592

The amount of damages to be awarded to a plaintiff for personal injuries is a question for the jury, and its determination will not be disturbed unless the award deviates materially from what would be reasonable compensation. Prior damage awards in cases involving similar injuries are not binding upon the courts but serve to "guide and enlighten" them in determining whether a verdict constitutes reasonable compensation. Taveras v Vega, 119 A.D.3d 853

It is proper to provided the emergency charge if there exists a factual basis and "[i]t was for the jury to find whether [defendant driver] was faced with a sudden and unforeseen emergency not of her own making and, if so, whether her response to the situation was that of a reasonably prudent person" Pelletier v. Lahm, 24 N.Y.3d 966

The trial court has broad discretion in deciding whether to submit interrogatories to the jury under CPLR 4111[c]. However, where there is sufficient evidence to support a plaintiff's cause of action pursuant to a particular theory of negligence, it is error to deny a request by the plaintiff to submit an interrogatory to the jury regarding that theory. Abato v Beller, 122 A.D.3d 554

"The decision whether to conduct a bifurcated trial rests within the discretion of the trial court, and should not be disturbed absent an improvident exercise of discretion." Unified trials should only be held "where the nature of the injuries has an important bearing on the issue of liability." However, even where a trial is bifurcated, some evidence of injuries may nevertheless be admitted, in the trial court's discretion, to establish liability at the liability phase of the trial, so long as such evidence is probative of liability and accompanied by "an appropriate limiting instruction." Therefore, when exercising its discretion in deciding whether to conduct a unified trial or a bifurcated trial, a court should determine whether the nature of the alleged injuries is probative of the issue of liability and, furthermore, should also evaluate the relative importance of such evidence to the parties' dispute. In addition, the probative value of such evidence to the issue of liability and its centrality to the parties' dispute should be weighed against the degree to which the gravity of such injuries will likely engender sympathy for the plaintiff and thereby pose a risk of prejudice to the defendant. The Second Department held that the plaintiff must demonstrate that his expert's theory could not adequately be proven at the liability phase of a bifurcated trial, plus the prejudice to the defendant that the plaintiff's full injuries would cause. Furthermore, the plaintiff failed to allege that his expert, who was not a medical doctor, would have to testify at both phases of a bifurcated trial or that a unified trial would otherwise result in increased judicial efficiency. Patino v County of Nassau, 124 A.D.3d 738[cites omitted]

In determining whether an animal has vicious propensities, the jury may consider, inter alia, the nature and result of the attack on the plaintiff, so that a unified trial would be appropriate. Matthew H. v County of Nassau, 131 A.D.3d 135

the Supreme Court can merely transferred an action to the same IAS Part as another solely for "purposes of disposition." Given that both actions are related to the same underlying incident, the transfer for this limited purpose was not improper under the circumstances presented here, but the actions were not joined. Bermejo v New York City Health & Hosps. Corp., 119 A.D.3d 500

"A motion pursuant to CPLR 4404(a) to set aside a verdict and for a new trial in the interest of justice may be granted where improper comments by the trial court deprive a party of a fair trial (see Rodriguez v City of New York, 67 AD3d 884, 885-887). "[L]itigants are entitled, as a matter of law, to a fair trial free from improper comments by counsel or the trial court" (id. at 886). A

trial court "has broad authority to control the courtroom, rule on the admission of evidence, elicit and clarify testimony, expedite the proceedings and to admonish counsel and witnesses when necessary" (Nunez v New York City Health & Hosps. Corp. [Elmhurst Hosp. Ctr.], 110 AD3d 686, 688 [internal quotation marks omitted]). Nevertheless, "[a] trial judge should at all times maintain an impartial attitude and exercise a high degree of patience and forebearance. A trial judge may not so far inject himself [or herself] into the proceedings that the jury could not review the case in the calm and untrammeled spirit necessary to effect justice" (DeCrescenzo v Gonzalez, 46 AD3d 607, 608-609 [internal quotation marks and citations omitted])." The Appellate Division found that requiring the plaintiff's examining expert to testify in the hypothetical and only assuming the injuries of the plaintiff "[t]he court conveyed an impression of incredulity" toward the physician's opinions, requiring a new trial. Ioffe v Seruya, 134 A.D.3d 993

Where there is confusion about the special verdict, should the Appellate Division write them for the trial court. Two Justice of the First Department said yes, two said no and the fifth implied no. All five granted a new trial. Srikishun v. Edye, 137 A.D.3d 1

A mistrial was declared where there was repeated references by the plaintiff and her attorney to the nature of the plaintiff's injuries and her lack of medical insurance at the time of the accident which could have influenced the jury to be more sympathetic toward her, resulting in prejudice toward the defendant. Peters v Wallis, 135 A.D.3d 922.

The trial court did not err in permitting the use of a publication from the American College of Emergency Physicians to be used during cross-examination of the plaintiff's expert physician. On cross-examination, an expert witness may be confronted with scientific works or publications for impeachment purposes where the material has been deemed authoritative by such expert. The plaintiff's expert testified that he had relied on the American College of Emergency Physicians publication in rendering his opinion in this case. He described it as "excellent, well put together, useful clinical guidelines," and he found it "[u]seful[,] clinically relevant, [and] well thought out, well researched." However, the expert witness refused to acknowledge that the publication was "authoritative" because he had "some issues with the word authoritative'" and did not "think that anything that a human being does is authoritative." Can the expert be cross examined using the American College of Emergency Physicians. Yes, a physician may "not foreclose full cross-examination by the semantic trick of announcing that he did not find the work authoritative" where he has already relied upon the text and testified in substance that he finds it reliable and trustworthy. Kearney v Papish, 136 A.D.3d 690.

The Court of Appeals reaffirmed the rule that "In toxic tort cases, an expert opinion on causation must set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered (general causation) and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries." Sean R. v BMW of N. Am., LLC, 26 N.Y.3d 801

In a legal malpractice action, there is no Frye hearing for an expert onlegal ethics, as the expert opinion is based on personal training and experience. The standard is whether the ethics expert possessed the requisite skill, training, education, knowledge, or experience from which it could be assumed that the information imparted or the opinion rendered was reliable. Doviak v Finkelstein & Partners, LLP, 137 A.D.3d 843

Remember, similar to criminal trials, a party must object to improper comments at trial or seek further curative instructions and did not immediately move for a mistrial in order to preserve the issue for appeal. Lagos v Fucale, 139 A.D.3d 908

The Court of Appeals held that it was error to allow admission of the Consent Order into evidence, in which a doctor agreed agreed not to contest charges of negligence based on allegations involving his treatment for 12 other patients holding that "it is improper to prove that a person did an act on a particular occasion by showing that he did a similar act on a different, unrelated occasion." Furthermore, as in criminal cases under Molineux, none of the exceptions to this rule — motive, intent, the absence of mistake or accident, a common scheme or plan, or identity — applied citing Matter of Brandon, 55 NY2d at 211. Mazella v Beals, 27 N.Y.3d 694

The Court of Appeals has provided the Trial Court discretion in any sanction related to insufficient expert disclose. This may be different where the disclosure was misleading or the trial testimony was inconsistent with the disclosure. Rivera v Montefiore Med. Ctr. , 28 N.Y.3d 999

The Court of Appeals reviewed appeals to the Appellate Division after a jury trial. “When the Appellate Division reviews a jury determination, it may either examine the facts to determine whether the weight of the evidence comports with the verdict, or the court may determine that the evidence presented was insufficient as a matter of law, rendering the verdict utterly irrational (see Cohen v Hallmark Cards, 45 NY2d 493, 499 [1978]). ..The Appellate Division may not disregard a jury verdict as against the weight of the evidence unless "the evidence so preponderate[d] in favor of the [moving party] that it could not have been reached on any fair interpretation of the evidence" (Lolik v Big Supermarkets, 86 NY2d 744, 746 [1995]). Where the Appellate Division determines that a verdict is against the weight of the evidence, the remedy is to remit for a new trial. By contrast, where the Appellate Division intends to hold that a jury verdict is insufficient as a matter of law, it must first determine that the verdict is "utterly irrational" (Campbell v City of Elmira, 84 NY2d 505, 510 [1998]). To conclude that a verdict is utterly irrational, requiring vacatur of the verdict, the court must determine that "there is simply no valid line of reasoning and permissible inference which could possibly lead [a] rational [person] to the conclusion reached by the jury on the basis of the evidence presented at trial" (id.). "When it can be said that 'it would not be utterly irrational for a jury to reach the result it . . . determined . . . the court may not conclude that the verdict is as a matter of law not supported by the evidence'" (id., quoting Cohen, 45 NY2d at 499).” Killon v. Parrotta, 28 N.Y.3d 101

A jury trial is guaranteed in an action for determination of a claim to real property under RPAPL article 15. CPLR 4101[2]. Even if it is not characterize or refer to as such causes of action to recover possession of real property as claims pursuant to RPAPL article 15, the plaintiff is entitled to a jury trial on those causes of action. Moreover, regardless of whether the plaintiff's causes of action to recover the subject properties are equitable in nature, he is statutorily entitled to a jury trial on those causes of action and, thus, he did not waive his right to a jury trial by joining legal and equitable claims. Burns v Burns, 148 A.D.3d 863

A stenographic transcript is an aid to the judge, who is tasked with the final responsibility to certify the record (see CPLR 5525[c], [d]). The parties may agree on a statement in lieu of a transcript and the court may adopt, according to its own recollection, a statement in lieu of transcript submitted by one of the parties (see Brandenburg v Brandenburg, 188 AD2d 368). However, when no agreement and no reconstruction is possible, a new trial is required. Indeed, in civil cases, where a stenographer dies or is no longer in possession of minutes and the minutes cannot be obtained, meaningful appellate review is impaired and a new trial should be ordered if reconstruction is not possible. Monaco v. New York City Transit Authority, 153 A.D.3d 705

In addressing the issue of an expert testifying, the Second Department clearly articulated the rule:"'The long-recognized rule of Frye v United States [293 F 1013] is that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has "gained general acceptance" in its specified field'" (Lipschitz v Stein, 65 AD3d 573, 575, quoting People v Wesley, 83 NY2d 417, 422, quoting Frye v United States, 293 F at 1014 [DCCir]; see Cornell v 360 W. 51st St. Realty, LLC, 22 NY3d 762, 780; Parker v Mobil Oil Corp., 7 NY3d 434, 447). "[G]eneral acceptance does not necessarily mean that a majority of the scientists involved subscribe to the conclusion. Rather it means that those espousing the theory or opinion have followed generally accepted scientific principles and methodology in evaluating clinical data to reach their conclusions" (Zito v Zabarsky, 28 AD3d 42, 44 [internal quotation marks omitted], and Ratner v McNeil-PPC, Inc., 91 AD3d 63, 71 [internal quotation marks omitted]). General acceptance can be demonstrated through scientific or legal writings, judicial opinions, or expertopinions other than that of the proffered expert (see Parker v Mobil Oil Corp., 16 AD3d 648, 650, affd 7 NY3d 434; see also Cornell v 360 W. 51st St. Realty, LLC, 22 NY3d at 781; Sadek v Wesley,117 AD3d 193, 200, affd 27 NY3d 982). The burden of proving general acceptance rests upon the party offering the disputed expert testimony (see Ratner v McNeil-PPC, Inc., 91 AD3d at 71; Marso v Novak, 42 AD3d 377, 378). "Broad statements of general scientific acceptance, without accompanying support, are insufficient to meet the burden of establishing such acceptance"(Saulpaugh v Krafte, 5 AD3d 934, 935-936). Furthermore, even if the proffered expert opinion is based on accepted methods, it must satisfy "the admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case" (Parker v Mobile Oil Corp., 7 NY3d at 447). . Dovberg v. Laubach, 154 A.D.3d 810

"A trial court's grant of a CPLR 4401 motion for judgment as a matter of law is appropriate where the trial court finds that, upon the evidence presented, there is no rational process by which

the fact trier could base a finding in favor of the nonmoving party" (Szczerbiak v Pilat, 90 NY2d 553, 556). In considering the motion, the evidence must be viewed in the light most favorable to the nonmoving party, and the court must afford the nonmoving party "every inference which may properly be drawn from the facts presented" (id. at 556). Canale v L & M Assoc. of N.Y., Inc., 155 A.D.3d 675

"A jury verdict is contrary to the weight of the evidence when the evidence so preponderates in favor of the movant that the verdict could not have been reached on any fair interpretation of the evidence" (Cicola v County of Suffolk, 120 AD3d 1379, 1382; see Ferreira v Wyckoff Hgts. Med. Ctr., 81 AD3d 587, 588; see generally Lolik v Big V Supermarkets, 86 NY2d 744; Nicastro v Park, 113 AD2d 129). "Whether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors" (Flynn v Elrac, Inc., 98 AD3d at 939-940 [internal quotation marks omitted]; see Vasquez v County of Nassau, 91 AD3d 855, 857). "We accord deference to the credibility determinations of the factfinders, who had the opportunity to see and hear the witnesses" (Vasquez v County of Nassau, 91 AD3d at 857 [internal quotation marks omitted]; see Exarhouleas v Green 317 Madison, LLC, 46 AD3d 854, 855). Applying these principles to the facts of this case, the jury's determination that NYCTA and Williams were negligent in the operation of the bus, and that the plaintiff was not negligent, was supported by a fair interpretation of the evidence (see Flynn v Elrac, Inc., 98 AD3d at 940). Peterson v. MTA, 155 A.D.3d 795

"The amount of damages to be awarded to a plaintiff for personal injuries is a question for the jury, and its determination will not be disturbed unless the award deviates materially from what would be reasonable compensation" (Nayberg v Nassau County, 149 AD3d 761, 762 [internal quotation marks omitted]; see CPLR 5501[c]; Graves v New York City Tr. Auth., 81 AD3d 589, 589; Chery v Souffrant, 71 AD3d 715, 716). "The reasonableness of compensation must be measured against relevant precedent of comparable cases" (Halsey v New York City Tr. Auth., 114 AD3d 726, 727 [internal quotation marks omitted]; see Kayes v Liberati, 104 AD3d 739, 741). "Although prior damage awards in cases involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation" (Vainer v DiSalvo, 107 AD3d 697, 698-699 [internal quotation marks omitted]). Considering the nature and the extent of the injuries sustained by the plaintiff, the award for past pain and suffering did not deviate materially from what would be reasonable compensation. However, the award for future pain and suffering deviated materially from what would be reasonable compensation to the extent indicated herein (see CPLR 5501[c]). Peterson v. MTA, 155 A.D.3d 795

The Second Department recently noted the standard for moving to have a verdict overturned and analyzing damage awards.

"A jury verdict is contrary to the weight of the evidence when the evidence so preponderates in favor of the movant that the verdict could not have been reached on any fair interpretation of the evidence" (Cicola v County of Suffolk, 120 AD3d 1379, 1382; see Ferreira v Wyckoff Hgts. Med. Ctr., 81 AD3d 587, 588; see generally Lolik v Big V Supermarkets, 86 NY2d 744; Nicastro

v Park, 113 AD2d 129). "Where, as here, conflicting expert testimony is presented, the jury is entitled to accept one expert's opinion, and reject that of another expert" (Cicola v County of Suffolk, 120 AD3d at 1382; see Morales v Interfaith Med. Ctr., 71 AD3d 648; Segal v City of New York, 66 AD3d 865). "Issues of credibility are for the jury, which had the opportunity to observe the witnesses and the evidence. Its resolution is entitled to deference" (Lalla v Connolly, 17 AD3d 322, 323). "[A] successful party is entitled to a presumption that the jury adopted a reasonable view of the evidence" (Cicola v County of Suffolk, 120 AD3d at 1382 [internal quotation marks omitted]; see Lalla v Connolly, 17 AD3d at 323). ...Awards of damages for past and future medical expenses must be supported by competent evidence which establishes the need for, and the cost of, medical care" (Starkman v City of Long Beach, 148 AD3d 1070, 1072 [internal quotation marks omitted]; see Pilgrim v Wilson Flat, Inc., 110 AD3d 973, 974). "Evidence submitted at trial that is purely speculative does not support an award of damages for future medical expenses" (Starkman v City of Long Beach, 148 AD3d at 1072; see Pilgrim v Wilson Flat, Inc., 110 AD3d at 974). The jury's determination with respect to awards for past and future pain and suffering will not be set aside unless the award deviates materially from what would be reasonable compensation (see CPLR 5501[c]; Kayes v Liberati, 104 AD3d 739, 741; Guallpa v Key Fat Corp., 98 AD3d 650, 651). "The reasonableness of compensation must be measured against relevant precedent of comparable cases" (Halsey v New York City Tr. Auth., 114 AD3d 726, 727 [internal quotation marks omitted]; see Kayes v Liberati, 104 AD3d at 741). "Although prior damage awards in cases involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation" (Vainer v DiSalvo, 107 AD3d 697, 698-699 [internal quotation marks omitted]). There is no merit to the defendants' contention that the jury's award for future medical expenses should be set aside as speculative (see Nayberg v Nassau County, 149 AD3d 761, 762; Guallpa v Key Fat Corp., 98 AD3d at 651; Janda v Michael Rienzi Trust, 78 AD3d 899, 901). Moreover, considering the nature and the extent of the injuries sustained by the plaintiff, the awards for past and future pain and suffering did not deviate materially from what would be reasonable compensation (see CPLR 5501[c]; Halsey v New York City Tr. Auth., 114 AD3d 726; Guallpa v Key Fat Corp., 98 AD3d at 651; Algerio v Caribbean A.C., 98 AD3d 465; Purkiss-Riddle v New York City Tr. Auth., 89 AD3d 1001; Gonzalez v New York City Tr. Auth. 87 AD3d 675). Quijano v American Tr. Ins. Co., 155 A.D.3d 981

Justice Sgroi, speaking for the Second Department, continued the limitation on admitting “basis Hearsay” the hearsay statements which would be exclude but are used as the basis for the expert opinion. The “basis hearsay” is not admitted for its truth but to assist the factfinder in evaluation the expert’ opinions. All the cases derive from article 10 Mental Health Law proceedings, but should apply to any trial. Matter of the State of New York v. Kerry K., 2017 WL 6347223

IV. MOTIONS

Effective January 1, 2016, 2103 was amended: (b) Upon an attorney. Except where otherwise prescribed by law or order of
court, papers to be served upon a party in a pending action shall be served upon the party's attorney. Where the same attorney appears for two or more parties, only one copy need be served upon the attorney. Such service upon an attorney shall be made:
1. by delivering the paper to the attorney personally; or
2. by mailing the paper to the attorney at the address designated by that attorney for that purpose or, if none is designated, at the attorney's last known address; service by mail shall be complete upon mailing; 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 and six days if the mailing is made from outside the state but within the geographic boundaries of the United States; . . .

A proposed answer verified by an attorney who had no personal knowledge of the facts can not meet the requirements of CPLR 3012(d) since its fails to establish a reasonable excuse for the default or demonstrating that a meritorious defense to the action. Kennedy v City of New York, 114 A.D.3d 831

Hearsay statements, standing alone, are insufficient to defeat a motion for summary judgment. Guerrera v Zysk, 119 A.D.3d 647

"A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim'" "Neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)" . J. A. Lee Elec., Inc. v City of New York, 119 A.D.3d 652

A court can consider a surreply, when leave to file is granted and an opportunity to respond and filed a surreply is provided. Pennachio v Costco Wholesale Corp., 119 A.D.3d 662

Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading'" (Jennings v Orange Regional Med. Ctr., 102 AD3d 654, 655, quoting Denoyelles v Gallagher, 40 AD3d 1027, 1027; see Coleman v Putnam Hosp. Ctr., 74 AD3d 1009, 1011). " Recognizing that striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct, courts will consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness'" (Jennings v Orange Regional Med. Ctr., 102 AD3d at 655-656, quoting Iannucci v Rose, 8 AD3d 437, 438). "[A] less severe sanction or no sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her case" (Denoyelles v Gallagher, 40 AD3d at 1027; see Jamindar v Uniondale Union Free School Dist., 90 AD3d 610; Gerber v Rosenfeld, 18 AD3d 812; Deveau v CF Galleria at White Plains, LP, 18 AD3d 695, 696). Pennachio v Costco Wholesale Corp., 119 A.D.3d 662

Without notice of a court appearance, a default under 22 NYCRR 202.27 is a nullity and not showing of meritorious action is required for a plaintiff. Matter of 542 A Realty, LLC, 118 A.D.3d 993.

Where the insurer of the defendant had received actual notice of the plaintiff's claim by virtue of defective service, due to the defendant's death, leave to service the complaint should be granted in the interest of justice under CPLR 306-b. Wilson v. City of New York, 118 A.D.3d 983

A motion for summary judgment made on nearly identical grounds as a timely motion for summary judgment should be determined on the merits as good cause exists. He Ping Shao v. Cao Zhao, 118 A.D.3d 943

Bare allegations of law office failure based upon their prior counsel's unspecified negligent acts, errors, and omissions does not constitute a reasonable excuse for their default. Moreover a pattern of willful default and neglect, the negligence of the attorney is properly imputed to the client. Carillon Nursing and Rehabilitation Center, LLP v. Fox, 118 A.D.3d 933

Does a note that states the party "will pay her [mother] back in full with [her] lawsuit money from Billy-of Cool Temp Mechanical-or any debt will be paid in full" allow a motion under CPLR 3213? No, because it is not an unconditional promise to repay the borrowed sum upon demand or at definite time. Von Fricken v. Schaefer, 118 A.D.3d 869

A motion to change venue on discretionary grounds under CPLR 510(3), unlike motions made as of right, must be made in the county in which the action is pending, or in any county in that judicial district, or in any adjoining county. Schwartz v. Yellowbook, Inc., 118 A.D.3d 691

On a motion to renew and/or reargue a complete set of papers originally submitted must be provided. Plaza Equities, LLC v. Lamberti, 118 A.D.3d 687.

On a motion to disqualify an attorney, "considering the settled principle that doubts as to the existence of a conflict of interest must be resolved in favor of disqualification so as to avoid even the appearance of impropriety." Mineola Automotive, Inc. v. Millbrook Properties, Ltd., 118 A.D.3d 680.

An expert's affidavit that is speculative and conclusory, and assumes facts not supported by the evidence, it does not raise a triable issue of fact. Lopez v. Retail Property Trust, 118 A.D.3d 676.

Uauthorized surreplies containing new arguments generally should not be considered by the court. However, arguments raised for the first time in reply may be considered if the original movant is given the opportunity to respond and submits papers in surreply. Gluck v. New York City Transit Authority, 118 A.D.3d 667.

E-mail messages are not documentary evidence under CPLR 3211(a)(1). Zellner v. Odyl, LLC, 117 A.D.3d 1040.

Agreeing with the Second Department, the Third Department held that a party moving for summary judgment must reveal the name of an expert used on the motion. Rivera v. Albany Medical Center Hosp., 119 A.D.3d 1135

Remember even in criminal actions, the CPLR may be used. Where the People sought to submit portion of the grand jury minutes that had been inadvertently omitted. The Court held that it was a motion to renew and the 30 day limited was not applicable under CPLR 2221. People v. Godbold, 117 A.D.3d 565

Only in very limited areas, i.e. discovery, can a court determine a motion based upon an issue not raised. Rosenblatt v. St. George Health and Racquetball Associates, LLC, 119 A.D.3d 45

The absence of a certificate of conformity in violation of CPLR 2309 is not a fatal defect and, in the event that relief is denied on that ground, the denial should, as here, generally be without prejudice to renewal upon proper papers. Fuller v. Nesbitt, 116 A.D.3d 999

Even though there was no formal motion to dismiss based upon forum non conveniens grounds, where the parties had an opportunity to fully argue the issue, a court can grant the motion. Furthermore, the fact that money moves through a bank in New York does not require denial of

the motion. Mashreqbank PSC v. Ahmed Hamad A1 Gosaibi & Bros. Co., 23 N.Y.3d 129

"A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated" . Where depositions have not been conducted and one party has specific information, the motion is premature. Schlichting v. Elliquence Realty, LLC, 116 A.D.3d 689.

Pursuant to CPLR 2221, a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]) and "shall contain reasonable justification for the failure to present such facts on the prior motion." "A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" Singh v Avis Rent A Car Sys., Inc., 119 A.D.3d 768

"On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired." "In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff.". If the defendant meets that burden, the burden then shifts to the plaintiff to "aver evidentiary facts establishing that the action was timely or to raise a question of fact as to whether the action was timely." The plaintiff has the burden of establishing that the statute of limitations has not expired, that it is tolled, or that an exception to the statute of limitations applies. Lake v New York Hosp. Med. Ctr. of Queens, 119 A.D.3d 843[cites omitted]

"Applications for leave to amend pleadings under CPLR 3025(b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit." "No evidentiary showing of merit is required under CPLR 3025(b)." "The court need only determine whether the proposed amendment is palpably insufficient' to state a cause of action or defense, or is patently devoid of merit." "[A] court shall not examine the legal sufficiency or merits of a pleading unless such insufficiency or lack of merit is clear and free from doubt" Favia v Harley-Davidson Motor Co., Inc., 119 A.D.3d 836[cites omitted]

CPLR 3216 is "extremely forgiving" (Baczkowski v Collins Constr. Co., 89 NY2d 499, 503) in that it "never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed." While the statute prohibits the Supreme Court from dismissing an action based on neglect to proceed whenever the plaintiff has shown a justifiable excuse for the delay in the prosecution of the action and a meritorious cause of action (see CPLR 3216[e]) such a dual showing is not strictly necessary to avoid dismissal of the action.

Altman v Donnenfeld,119 A.D.3d 828[cites omitted].

Note: CPLR 3216 has been amended in 2014 to require a further notice of possible dismissal,

increase the time to wait for services of a 90-day notice and when the court itself serves the notice, it must set forth the specific conduct constituting the neglect.

A defendant can establish a prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiffs could not make out a prima facie case at trial because they were precluded from testifying as to liability and damages. Meslin v George, 119 A.D.3d 915

Where a party provides a CD-R containing the medical records relied upon by their experts, the party must make sure it contains the records and is readable. Moreover, even if a readable CD-R was previously submitted to the court in connection with an earlier motion in this case, the Supreme Court should "not be compelled, absent a rule providing otherwise, to locate previously submitted documents in the electronic record in considering subsequent motions" Garrison v Quirk, 120 A.D.3d 753

Plaintiff made a motion for summary judgment in lieu of complaint but did not make the return date at least 30 days where service was not personal. This made the default judgment improper. Also, the address of the court in the notice was wrong and Appellate Division took judicial notice of the fact that the incorrect address given in the notice of motion pertained to an actual roadway located in Mineola, New York, and was not merely a misspelling of the correct address for the relevant courthouse. As such, the "motion for summary judgment in lieu of complaint was made returnable to a location in Mineola at which the Supreme Court was not located, and at which the motion could not have been opposed. These defects in the notice of motion, under the particular circumstances of this case and in the context of an action commenced pursuant to CPLR 3213, created a greater possibility of frustrating the core principles of notice to the defendants. Accordingly, these defects constitute "jurisdictional defect[s] that courts may not overlook" pursuant to CPLR 2001. Since the Supreme Court failed to acquire personal jurisdiction, "all subsequent proceedings are thereby rendered null and void" (Emigrant Mtge. Co., Inc. v Westervelt, 105 AD3d 896, 897 [internal quotation marks omitted]), and the default judgment entered against the defendants is "a nullity."" Segway of N.Y., Inc. v Udit Group, Inc., 120 A.D.3d 789

A party seeking to vacate an order entered upon his or her failure to oppose a motion is required to demonstrate, through the submission of supporting facts in evidentiary form, both a reasonable excuse for the default and the existence of a potentially meritorious opposition to the motion. Bhuiyan v New York City Health & Hosps. Corp., 120 A.D.3d 1284

" On a motion for summary judgment dismissing a medical malpractice cause of action, a defendant has the prima facie burden of establishing that there was no departure from good and accepted medical practice, or, if there was a departure, the departure was not the proximate cause of the alleged injuries. Once the defendant has made such a showing, the burden shifts to the plaintiff to submit evidentiary facts or materials to rebut the prima facie showing made by the defendant, so as to demonstrate the existence of a triable issue of fact. General allegations of

medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of such a claim, are insufficient to defeat a summary judgment motion." Brinkley v Nassau Health Care Corp., 120 A.D.3d 1287

"In addition to the grounds set forth in section 5015(a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice." Indeed, the drafters of CPLR 5015(a) "intended that courts retain and exercise their inherent discretionary power in situations that warranted vacatur but which the drafters could not easily foresee." Hudson City Sav. Bank v Cohen, 120 A.D.3d 1304

A defendant' request for the production of documents pertaining to the plaintiffs' allegations of standing can not be construed as a motion to dismiss for lack of standing (see 3211[a][3]), or as a motion for summary judgment on that ground (see CPLR 3212). Deer Park Assoc. v Town of Babylon, 121 A.D.3d 738

In a medical malpractice the plaintiff submitted an unsigned and redacted physician's affidavit. "Such an affidavit should not be considered in opposition to a motion for summary judgment where the plaintiff does not offer an explanation for the failure to identify the expert by name and does not tender an unredacted affidavit for in camera review. On this record, there is no proof that a signed and unredacted physician's affidavit was submitted to the Supreme Court and, thus, the affidavit which was submitted was insufficient to raise a triable issue of fact." Derrick v North Star Orthopedics, PLLC, 121 A.D.3d 741

Unlike a motion for summary judgment, a motion to dismiss for failure to state a cause of action may be made at any time. Toppin v. Town of Hempstead, 121 A.D.3d 883

Although a party seeking to vacate a default must establish a reasonable excuse for the default and a potentially meritorious cause of action or defense, the courts of this State have adopted a liberal policy toward vacating defaults in matrimonial actions. Anekwe v Okoroafor,121 A.D.3d 930

Notwithstanding that CPLR 3212(b) requires that motions for summary judgment be supported by a copy of the pleadings, CPLR 2001 permits a court, at any stage of an action, to "disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced." Long Island Pine Barrens Society, Inc. v. County of Suffolk,122 A.D.3d 688

Any claim of law office failure must be supported by a detailed and credible explanation of the default at issue. A conclusory, undetailed, and uncorroborated allegation of law office failure does not amount to a reasonable excuse. Neilson v. 6D Farm Corporation,123 A.D.3d 676

"A party seeking to vacate an order entered upon his or her failure to oppose a motion is required to demonstrate, through the submission of supporting facts in evidentiary form, both a reasonable excuse for the default and the existence of a potentially meritorious opposition to the motion" J & J Alarcon Realty Corp. v Plantains Rest., Inc., 123 A.D.3d 886

A motion for leave to reargue should not be allowed for an unopposed motion. A motion to vacate is required. Bank of N.Y. v Young, 123 A.D.3d 1068

When no reasonable justification is given for failing to present new facts on the prior motion, the Supreme Court lacks discretion to grant renewal. Zelouf Intl. Corp. v Rivercity, LLC, 123 A.D.3d 1114

Did Miglino v. Bally Total Fitness of Greater N.Y. Inc, 20 N.Y.3d 342 overrule Rovello v. Orofino Realty Co., 40 N.Y.2d 633 in that on a motion to dismiss under CPLR 3211(a)(7) can the court use defendant's evidentiary submissions to establish conclusively that the plaintiff has no cause of action or is the court limited to the four corners of the pleading. The Fourth Department joining the First Department says that Miglino did not overrule Rovello. Liberty Affordable Housing, Inc. v. Maple Court Apartments, 125 A.D.3d 859

CPLR 504 provides, in relevant part, that "the place of trial of all actions against . . . school districts . . . shall be . . . in the county in which such . . . school district . . . is situated.". "The purpose of CPLR 504, which applies not just to school districts but also to counties, cities, towns, and villages, is to protect municipal entities and their employees from the inconvenience of an alternative venue.. "Nevertheless, and despite the seemingly unforgiving language of the statute, venue may be changed to a non-mandated county upon a showing of special circumstances." The decision of whether to grant a change of venue is committed to the providently exercised discretion of the trial court. Xhika v Rocky Point Union Free Sch. Dist., 125 A.D.3d 646[cites omitted]

A motion for leave to renew "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." Bank of N.Y. v Waters, 127 A.D.3d 1005

Remember that a party must submit a proposed amended pleading with their motion is required by CPLR 3025(b). Barone v Concert Serv. Specialists, Inc., 127 A.D.3d 1119

The Court of Appeals held that "the summary judgment movant bears the heavy burden of establishing 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" Deleon v. New

York City Sanitation Dept., 25 N.Y.3d 1102

CPLR 1021 requires a motion for substitution to be made within a reasonable time and factors to determine reasonableness the diligence of the party seeking substitution, the prejudice to the other parties, and whether the party to be substituted has shown that the action or the defense has potential merit. Therefore, a delay of over five years is not reasonable. Alejandro v North Tarrytown Realty Assoc., 129 A.D.3d 749

Te submission for judicial approval of a proposed qualified domestic relations order (hereinafter QDRO), instead of a motion made on notice, may be employed by a party to a matrimonial action to obtain pension arrears. Kraus v Kraus, 131 A.D.3d 94

A factor that may be relevant in denying a motion for summary judgment as premature is that one of the parties has not answered the complaint. Bonilla v. Bangert's Flowers, 132 A.D.3d 618

Where a defendant contributed to the plaintiff's inability to file a timely note of issue in the proper form, such as failure to comply with discovery, the plaintiff was not required to demonstrate a potentially meritorious cause of action in order to oppose a motion to dismiss under CPLR 3216. Lee v Rad, 132 A.D.3d 643

The defendant is not require to serve the plaintiff with a written demand to change venue pursuant to CPLR 511(a) before making its motion where there is a forum selection clause. Puleo v. Shore View Center for Rehabilitation and Health Care, 132 A.D.3d 651

Although CPLR 5511 prohibits an appeal from an order entered upon default, that provision does not apply where a party appears and contests a motion for leave to enter a default judgment, but is unsuccessful and a default judgment is granted. In such a case a motion to vacate the default order is procedurally improper and should not have been entertained, and an appeal is proper. Cole-Hatchard v Eggers, 132 A.D.3d 718

The Court of Appeals noted that on summary judgment involving a slip and fall, that the "defect alleged to have caused injury to a pedestrian may be trivial as a matter of law, but requires a holding of triviality to be based on all the specific facts and circumstances of the case, not size alone." Furthermore, based upon the "well-established summary judgment standards" a defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact." Hutchinson v. Sheridan Hill House Corp., 26 N.Y.3d 66

In order for evidence submitted in support of a CPLR 3211(a)(1) motion to qualify as "documentary evidence," it must be "unambiguous, authentic, and undeniable." "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable,' would qualify as documentary evidence' in the proper case."However, "[n]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)." Based upon this precedent, the Second Department held that affidavits and text messages failed to comply with the alleged condition precedent were not " essentially undeniable,'" and did not constitute documentary evidence. Eisner v Cusumano Constr., Inc., 132 A.D.3d 940 [cites omitted]

When determined the reasonable excuse for a default: "Whether a proffered excuse is reasonable is a sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits." Kramarenko v New York Community Hosp., 134 A.D.3d 770

Law office failure can be accepted as a reasonable excuse in the exercise of the court's sound discretion to grant leave to renew establishing the failure to include the information in the original motion. Rivera v Queens Ballpark Co., LLC, 134 A.D.3d 796

Husband and Wife were in a divorce action. The Husband owned and operated a business. The couple hired a certified public accountant to serve as trustee of the business until the divorce was final, and specifically would terminate by a signed written agreement or court order. The letter of resignation was dated February 10, 2011 although the business “closed” on August 23, 2010. The wife commences an action on February 10, 2014 sounding in accounting malpractice. The court held that there accountant failed to establish the action was time barred under the three year statute of limitation. Weight v. Day, 134 A.D.3d 806

Where a plaintiff, an innocent passenger in a rear end accident, moves for summary judgment, the a plaintiff must establish, prima facie, not only that the opposing party was negligent, but also that the plaintiff was free from comparative fault. The Second Department, in a signed opinion, noted “We take this opportunity to caution that trial courts must be careful to avoid concluding, in rear-end accident cases, that just because a plaintiff is a passenger in the lead vehicle, the liability of the rear vehicle is automatically established. It is not. A plaintiff moving for summary judgment on the issue of liability must meet the twofold burden of establishing that he or she was free from comparative fault and was, instead, an innocent passenger, and, separately, that the operator of the rear vehicle was at fault. If the plaintiff fails to demonstrate, prima facie, that the operator of the offending vehicle was at fault, or if triable issues of fact are raised by the defendants in opposition, as here, summary judgment on the issue of liability must be denied, even if the moving plaintiff was an innocent passenger.” But, a plaintiff's right as an innocent passenger to summary judgment on the issue of liability is not barred or restricted by any

potential issue of comparative fault as between the owners and operators of the two vehicles involved in the accident. In the proper case, the Court could grant, under CPLR 3212(g) a order specifying that there is no comparative liability against the passenger. Phillip v D&D Carting Co., Inc., 136 A.D.3d 18

The plaintiff seeks Workers' Compensation for a fall from a ladder while working at a house. The WCB concludes that the plaintiff lacked credibility and that no accident had occurred as alleged by plaintiff. The plaintiff commences a Labor Law action against the home owners and general contractor. The defendants move for summary judgment based upon issue preclusion/ collateral estoppel. "The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action." The Court of Appeals, in reversing the Appellate Division [3-2], held that the defendants had not established, as a matter of law, the identity of the issues. As the dissenters at the Appellate Division noted " the Board found in its decision "that no accident occurred as [plaintiff] has alleged, based on [his] lack of credibility" (emphasis added), which is not equivalent to a finding that no accident occurred at all. Ridge v. Gold 26 N.Y.3d 1069.

Leave to renew is not warranted where the factual material adduced in connection with the subsequent motion is merely cumulative with respect to the factual material submitted in connection with the original motion. Therefore, a deposition which is the same as an affidavit submitted on the original motion will not provide a basis for granting leave to renew. Varela v Clark, 134 A.D.3d 925

CPLR 3212(b) has been amended to state that "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." This was added to overrule the Second Department case of Singletree, Inc. v. Lowe, 55 A.D.3d 861.

Noted that CPLR 2214(c) was amended to eliminate the need for all papers on a motion is e-filed. It does not amend the statute requiring papers in other cases. Plus the court could require a working copy to be submitted.

It is proper to deny an unopposed motion for summary judgment on the complaint. Exit Empire Realty v Zilelian, 137 A.D.3d 742

Even when both parties do not want a trial, and "the parties jointly requested a determination as a matter of law upon their respective motions for summary judgment, contending that the material

facts are fully and accurately presented in the record and are not in significant dispute" summary judgment must be denied where there factual issues. Although parties can "chart their own course in litigation...Such freedom, however, must give way to certain practical restraints." In a case where the issue involving a waterway's navigability, which is highly factual, a trial is required. Friends of Thayer Lake LLC, v. Brown, 27 N.Y.3d 1039

"In opposing a motion for leave to enter a default judgment based on a failure to timely appear or answer a complaint, a defendant must show a reasonable excuse for his or her delay in appearing or answering and a potentially meritorious defense. The motion is addressed to the broad discretion of the court, which should also consider whether prejudice has resulted from the delay, whether there is evidence of willfulness on the defaulting defendant's part, and the strong public policy in favor of resolving cases on the merits." Brice v City of New York, 139 A.D.3d 888

On a postappeal motion for leave to renew, the movant bears a heavy burden of showing due diligence in presenting the new evidence to the Supreme Court. Priant v New York City Transit Authority, 142 A.D.3d 491

The First Department, in a signed opinion [Acosta, J] in a 3-2 decision, held that when an issue is specifically decided on a motion for summary judgment, that determination is the law of the case. As such, the trial court, as well as the parties, are bound by it "absent a showing of subsequent evidence or change of law." The dissent argued that a a denial of a motion for summary judgment is res judicata of nothing except that summary judgment was not warranted, since it decided one of two things, either that the moving party failed to conclusively establish, as a matter of law, that a issue needed no trial or that the other party raised a question of fact. In the case, the issue was whether a warrant was valid. Delgado v. City of New York, 144 A.D.3d 46

There is a divide among the Departments of the Appellate Division on a motion for summary judgment in a medical malpractice action. The First, Third and Fourth hold that if a defendant in a medical malpractice action establishes prima facie entitlement to summary judgment, by a showing either that he or she did not depart from good and accepted medical practice or that any departure did not proximately cause the plaintiff's injuries, plaintiff is required to rebut defendant's prima facie showing "with medical evidence that defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged." The Second Department disagrees and hold that if "a defendant physician, in support of a motion for summary judgment, demonstrates only that he or she did not depart from the relevant standard of care, there is no requirement that the plaintiff address the element of proximate cause in addition to the element of departure." The Court of Appeals refused to address that issue. However, Judge Fahey, in a concurring opinion for only himself, sided with the Second Department. Pullman v Silverman, 28 N.Y.3d 1060.

One could read a recent Third Department case as closer to the Second Department, although it is not a clear shift. Webb v. Albany Medical Center, 151 A.D.3d 1435.

"A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." A motion for leave to renew under CPLR 2221 must be based upon new facts not offered on the prior motion that would change the prior determination and the motion must also contain a reasonable justification for the failure to present such facts on the prior motion. Prudence v White, 144 A.D.3d 655

Mere neglect cannot be accepted as a reasonable excuse so as to allow a motion for leave to renew. A motion for leave to renew must " be based upon new facts not offered on the prior motion that would change the prior determination,'" and must " contain reasonable justification for the failure to present such facts on the prior motion.'" Assevero v Rihan, 144 A.D.3d 1061

On a motion for leave to enter a default judgment pursuant to CPLR 3215, a plaintiff is required to file proof of: (1) service of a copy or copies of the summons and the complaint, (2) the facts constituting the claim, and (3) the defendant's default. To defeat a facially adequate CPLR 3215 motion, a defendant must show either that there was no default, or that it has a reasonable excuse for its delay and a potentially meritorious defense to the action. Ingvarsdottir v Gaines, Gruner, Ponzini & Novick, LLP, 144 A.D.3d 1097

The court may grant relief that is warranted pursuant to a general prayer for relief contained in a notice of motion if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party. USAA Fed. Sav. Bank v Calvin, 145 A.D.3d 704

The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds or evidence for, the motion. USAA Fed. Sav. Bank v Calvin, 145 A.D.3d 704

The granting of an adjournment for any purpose, including the return date of a motion, rests within the sound discretion of the Supreme Court. In deciding whether to grant an adjournment, the court must engage in a balanced consideration of numerous relevant factors. It is not an improvident exercise of discretion to deny an adjournment where the need for such a request is based on the movant's failure to exercise due diligence. In addition, while a court has the discretion to grant an extension of time to file opposition papers, it must be upon a showing of good cause (see CPLR 2004). The delinquent party must offer a valid excuse for the delay. Adotey v British Airways, PLC, 145 A.D.3d 748

"Pursuant to CPLR 3213, a party may obtain accelerated relief by moving for summary judgment in lieu of complaint, provided that the action is based upon an instrument for the payment of money only or upon any judgment'" CPLR 3213. "A promissory note is an instrument for the payment of money only, provided that it contains an unconditional promise by the borrower to pay the lender over a stated period of time" (Lugli v Johnston, 78 AD3d 1133, 1134). " To

establish prima facie entitlement to judgment as a matter of law on the issue of liability with respect to a promissory note, a plaintiff must show the existence of a promissory note executed by the defendant and the failure of the defendant to pay in accordance with the note's terms'" (Nunez v Channel Grocery & Deli Corp., 124 AD3d 734, 734-735, quoting Griffon V, LLC v 11 E. 36th, LLC, 90 AD3d 705, 706; see Sun Convenient, Inc. v Sarasamir Corp., 123 AD3d 906, 907; Patel v NJDV Hospitality, Inc., 114 AD3d 738, 739; Jin Sheng He v Sing Huei Chang, 83 AD3d 788). "Once the plaintiff establishes its prima facie entitlement to judgment as a matter of law, the burden shifts to the defendant . . . to establish the existence of a triable issue of fact with respect to a bona fide defense" (Sun Convenient, Inc. v Sarasamir Corp., 123 AD3d at 907; see Gullery v Imburgio, 74 AD3d 1022). However, conclusory and unsubstantiated allegations of defenses to payment on a note are insufficient to defeat the plaintiff's entitlement to summary judgment (see Nunez v Channel Grocery & Deli Corp., 124 AD3d at 735; Sun Convenient, Inc. v Sarasamir Corp., 123 AD3d at 908; Rachmany v Regev, 115 AD3d 840, 841; Gullery v Imburgio, 74 AD3d at 1022-1023). Estate of Hansraj v Sukhu, 145 A.D.3d 755

In a case unique to matrimonial law, the Second Department held that part of a default judgment, involving custody and child support would be vacated but the remaining part involving equitable distribution and attorney's fees would remain. Genzone v Genzone, 146 A.D.3d 752

Usually, on a motion for summary judgment on a medical malpractice, where both parties have expert affidavits, an issue of fact exists. Three justices of the First Department found such issue and denied summary judgment. Two justice dissented finding that the affidavit of the plaintiff's expert was speculative and of no probative value. Torres v Cergnul, 146 A.D.3d 509

Again, the First Department also split 3-2 , with the majority denying summary judgment adhering to the rule that conflicting opinions of medical experts raise an issue of fact. The dissenting justice found that "mere possibility" equals conjecture and lacks the reasonable degree of medical certainty required to raise an issue of fact. Severino v. Weller, 148 A.D.3d 272

Do not do this. In support of their motion for summary judgment, the plaintiffs submitted a transcript of the deposition testimony of the plaintiff driver and an uncertified police accident report. The plaintiff driver testified that his vehicle was stopped in traffic behind other stopped vehicles when it was struck in the rear by the defendants' vehicle. The police accident report, however, indicated that, according to the defendant driver, the plaintiffs'vehicle was traveling in reverse. The plaintiff waived object to the police report, so summary judgment denied. Since the attorney's knew of the report, should not have made the motion. Failure to include it would have ethical issues. Cruz v. Finney, 148 A.D.3d 772

In order for evidence submitted in support of a CPLR 3211(a)(1) motion to qualify as documentary evidence, it must be "unambiguous, authentic, and undeniable." "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary

evidence in the proper case." "Conversely, letters, emails, and affidavits fail to meet the requirements for documentary evidence." Prott v Lewin & Baglio, LLP, 150 A.D.3d 908 [cites omitted]

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference,and determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83, 87; see Sokol v Leader, 74 AD3d 1180, 1181). Although a court can consider evidentiary material submitted by a defendant in support of a motion to dismiss, the motion should not be granted unless it has been shown through this evidence "that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (Guggenheimer v Ginzburg, 43 NY2d 268, 274-275; see Nilazra, Inc. v Karakus, Inc., 136 AD3d 994, 995). Mace v Tunick, 153 A.D.3d 689

Does "law office confusion" after being substituted as counsel constitute a reasonable excuse? Noting that CPLR 2005 was "not the Legislature's intent to routinely excuse such defaults" the Second Department said no. OneWest Bank, FSB v Singer, 153 A.D.3d 714

If the issue of an expert being qualified is not raised on a summary judgment motion, generally, a court is limited to the issues or defenses that are the subject of the summary judgment motion. Dyckes v Stabile, 153 A.D.3d 783

Where a defendant's guaranty did not contain broad, sweeping language waiving any and all defenses and thus, did not bar the assertion of defenses certain fraudulent representations made by the plaintiff's president, a motion for summary judgment in lieu of complaint based upon the guaranty will be denied. Therefore, the guaranty should be drafted better!!! Denjonbklyn, Inc., formerly known as Superior Location Van Service, Ltd., v Rojas, 154 A.D.3d 734

While "'[t]he Supreme Court has the inherent authority to vacate [the] judgment in the interest of justice, even where the statutory one-year period under CPLR 5015(a)(1) has expired'" , the defendant must demonstrate a reasonable excuse for the delay. Dankenbrink v. Dankenbrink, 154 A.D.3d 809.

A movant may not meet his or her burden on a motion by submitting evidence in reply. Dankenbrink v. Dankenbrink, 154 A.D.3d 809

"On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." However, where the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not just whether he or she has stated one.

Burgos v New York Presbyterian Hosp., 155 A.D.3d 598

“To dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired.” If the defendant meets this initial burden, “the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period.”Amrusi v Nwaukoni, 155 A.D.3d 814

The Appellate Division noted that a Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion. Kim v Malwon, LLC, 155 A.D.3d 1017

In the area of foreclosures, the Second Department has required that the affidavit submitted to establish standing, where standing is raised as a defense, must establish that the records relied upon meet CPLR 4518(a). Bank of N.Y. Mellon v. Alli, 2017 WL 6029704

Three opinions from the Court of Appeals seems to focus on a motion pursuant to CPLR 3211(a)(7). The majority states “When reviewing a defendant's motion to dismiss a complaint for failure to state a cause of action, a court must "give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference." Judge Feinman, dissenting in part, states "On a motion to dismiss under CPLR 3211, the pleading is to be given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference." Judge Rivera dissenting states In assessing the adequacy of a "motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory". "Unlike on a motion for summary judgment, where the court 'searches the record and assesses the sufficiency of the parties' evidence,' on a motion to dismiss the court 'merely examines the adequacy of the pleadings'" Whether the plaintiff "can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss", and therefore a plaintiff opposing a motion to dismiss need not prove entitlement to recovery. Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.[cites omitted] 2017 WL 6327110

On a pre-answer motion to dismiss pursuant to CPLR 3211(a)(1) and (7), the allegations in the amended complaint must be accepted as true, and those allegations, “supplemented by a plaintiff’s additional submissions, if any, must be given their most favorable intendment” (Arrington v New York Times Co., 55 NY2d 433, 442; see Mihlovan v Grozavu, 72 NY2d 506). “Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment,

the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (Agai v Liberty Mut. Agency Corp., 118 AD3d 830,832, citing Guggenheimer v Ginzburg, 43 NY2d 268, 274-275). 533 Park Avenue Realty, LLC, appellant, v Park Avenue Building & Roofing Supplies, LLC, 2017 WL 6504790

While unauthorized surreplies containing new arguments generally should not be considered, the Supreme Court has the authority to regulate the motion practice before it, as well as the discretion to determine whether to accept late papers or even surreply papers for "good cause" (CPLR 2214[c]. U.S. Bank Trust, N.A. v Rudick, 2017 WL 6504331

V. DISCOVERY

Records of psychological treatment that the injured plaintiff may have received prior to or subsequent to the date of the alleged injury are material and necessary for an accurate assessment of damages involving loss of enjoyment of life. Montalto v. Heckler, 113 A.D.3d 741

Where the plaintiff places the ability to engage in future employment in issue for damages, an examination by a vocational rehabilitation expert will be required if sought. Smith v Cardella Trucking Co., Inc., 113 A.D.3d 750

There is a public interest privilege involving confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be disclosed. The revealing of the government's deliberative process which would chill future candid evaluations of governmental decisions may invoke this privilege. An in camera review would be required to review the documents to determine whether the privilege should be deemed applicable. Ren Zheng Zheng v Bermeo, 114 A.D.3d 743

Where the plaintiff has surgery on her cervical spine, which injury to the cervical spine was in the original bill of particulars, the new bill of particulars is a supplemental bill of particulars, since it merely sought "to allege continuing consequences of the injuries suffered and described in previous bills of particular." If it is serviced more than 30 days before trial, leave of court was not required (see CPLR 3043[b]). Restuccio v Caffrey, 114 A.D.3d 836

The Court of Appeals finally determined what was required for a subpoena by a party seeking discovery from a nonparty under CPLR 3101(a)(4). "The subpoenaing party must first sufficiently state the "circumstances or reasons" underlying the subpoena (either on the face of the subpoena itself or in a notice accompanying it), and the witness, in moving to quash, must establish either that the discovery sought is "utterly irrelevant" to the action or that the "futility of the process to uncover anything legitimate is inevitable or obvious." Should the witness meet this burden, the subpoenaing party must then establish that the discovery sought is "material and necessary" to the prosecution or defense of an action, i.e., that it is relevant." This answers a division between the four departments since the law was amended in 1984. Kapon v. Koch, 23 N.Y.3d 32

The Second Department applied Koch in Ferolito v Arizona Beverages USA, LLC, 119 A.D.3d 642:

CPLR 3101(a) is to be liberally construed "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" (Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406). 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. Pursuant to the Court of Appeals' recent decision in Matter of Kapon v Koch (23 NY3d 32), disclosure from a nonparty requires no more than a showing that the requested information is "material and necessary," i.e. relevant to the prosecution or defense of an action (id.). However, "the subpoenaing party must first sufficiently state the circumstances or reasons' underlying the subpoena (either on the face of the subpoena itself or in a notice accompanying it), and the witness, in moving to quash, must establish either that the discovery sought is utterly irrelevant' to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious'" (id.). Should the nonparty witness meet this burden, "the subpoenaing party must then establish that the discovery sought is material and necessary' to the prosecution or defense of an action, i.e., that it is relevant" (id.).

However, in the case, where information involves trade secrets, a witness who objects to disclosure on the ground that the requested information constitutes a trade secret bears only a minimal initial burden of demonstrating the existence of a trade secret

Where there are notations in the medical records indicating that the doctor's skepticism about the plaintiff's claims, a subpoena for a deposition of the doctor is proper if compliance with CPLR 3101(a)(4). Bianchi v. Galster Management Corp., 131 A.D.3d 558

Plaintiffs are not required to produce, prior to the defense medical examinations, medical reports detailing a diagnosis of each injury alleged to have been sustained by plaintiffs and causally relating those injuries to plaintiffs' exposure to lead-based paint. Hamilton v. Miller, 23 N.Y.3d 592

"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.'" Arcamone–Makinano v. Britton Property, Inc., 117 A.D.3d 889

Pursuant to CPLR 3122(b), "[w]henever a person is required ... to produce documents for inspection, and where such person withholds one or more documents that appear to be within the category of the documents required ... to be produced, such person shall give notice to the party seeking the production and inspection of the documents that one or more such documents are being withheld. This notice shall indicate the legal ground for withholding each such document, and shall provide the following information as to each such document, unless the party withholding the document states that divulgence of such information would cause disclosure of

the allegedly privileged information: (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document" (CPLR 3122). In most case the appropriate remedy for the party's failure to produce an adequate privilege log is to allow the defendant to produce an adequate privilege log. Stephen v. State, 117 A.D.3d 820.

A conditional order of preclusion requires a party to provide certain discovery by a date certain, or face the sanctions specified in the order. A failure to timely comply with the conditional order of preclusion, that conditional order became absolute. To be relieved of the adverse impact of the conditional order of preclusion, the party 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 or defense. SRN Realty, LLC v. Scarano Architect, PLLC, 116 A.D.3d 693.

A party must submit an affirmation of good faith indicating that efforts had been made to resolve the purported discovery dispute prior to engaging in motion practice, as required by 22 NYCRR 202.7(a)(2). Perla v Daytree Custom Bldrs., Inc., 119 A.D.3d 758

Multiple adjournments of a party's deposition are generally not grounds for dismissal under CPLR 3126. De Leo v State-Whitehall Co., 126 A.D.3d 750

CPLR 4547 does not bar disclosure of the subject documents, as that statute is concerned with the admissibility of evidence, and does not limit the discoverability of evidence. Therefore, mediation documents are required to be disclosed. City of Newburgh, N.Y. v Hauser, 126 A.D.3d 926

In responding to three discovery demands, the party sent a flash drive with over 9000 documents. The party did not indicate which documents corresponded to which discovery demands. The Court held that it was appropriate to require the party to provide their discovery responses in a manner that allows the defendants "to know and understand" which documents apply to their separate discovery demands. H.P.S. Mgt. Co., Inc. v St. Paul Surplus Lines Ins. Co., 127 A.D.3d 1018

Under CPLR 3123(a), a party may serve upon another party a written request that it admit, among other things, "the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry" (CPLR 3123[a]). Of course, a notice to admit which goes to the issues involved in the action is improper. Furthermore, under CPLR 3123(b), a court may at any time permit a party to amend or withdraw any admission "on such terms as may be just." (CPLR 3123[b]). Altman v Kelly, 128 A.D.3d 741

Effective September 23, 2014, the Legislature has legislatively amended CPLR 3113 now provides that “examination and cross examination of deponents shall proceed as permitted in the trial of actions, in open court, except that a non-party deponent’s counsel may participate in the deposition and make objections on behalf of his or her client in the same manner as counsel for a party.” This overruled several rulings from the Fourth Department. See, e.g. Thompson v. mather, 70 A.D.3d 1436.

Remember that an affirmation of good faith effort to resolve the parties' discovery disputes is required to compel discovery under 22 NYCRR 202.7[a][2]. Pardo v. O'Halleran Family Chiropract, 131 A.D.3d 1214

An exception to the attorney-client privilege is the fiduciary exception where a shareholder or an investor in a company brings suit against corporate management for breach of fiduciary duty. In determining whether to apply the privilege, the First Department accepted factors from a federal case to determine whether to apply the fiduciary exception. These factors include (1) "the number of shareholders and the percentage of stock they represent," (2) "the bona fides of the shareholders," (3) "the nature of the shareholders' claim and whether it is obviously colorable," (4) "the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources," (5) "whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality," (6) "whether the communication related to past or to prospective actions," (7) "whether the communication is of advice concerning the litigation itself," (8) "the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing," and (9) "the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons." Garner v Wolfinbarger, 430 F2d 1093, 1104. The First Department, in applying these factors, noted that although "adversity limitation" was important, it was not determinative. The Court remanded for an in camera review of the documents to determine whether good cause was established for the exception to the privilege was applicable. NAMA Holdings, LLC v Greenberg Traurig LLP, 133 A.D.3d 46

A court may, in its discretion, permit additional discovery after the filing of a note of issue and certificate of readiness where the moving party demonstrates that "unusual or unanticipated circumstances" developed subsequent to the filing, requiring additional pretrial proceedings to prevent substantial prejudice (22 NYCRR 202.21[d]). Gianacopoulos v Corona, 133 A.D.3d 565

Administration of the Minnesota Multiphasic Personality Inventory–2 (hereinafter MMPI–2) can be required where a party places their mental condition in issue. Therefore, where the plaintiff seeks damages for post-traumatic stress disorder resulting from an accident, such a test can be directed. Peculic v. Sawicki, 129 A.D.3d 930

Can a plaintiff's attorney surreptitiously videotaped an independent medical examination (hereinafter IME) conducted by defendant's doctor? [plaintiff wanted to show the brevity of the examination] Must the plaintiff turn the video over as part of discovery? The Second Department held that the plaintiff's attorney must obtain permission from the court to videotape the IME and the video must be turned over. A plaintiff will normally be entitled to have his or her attorney present at an IME, but that permission to employ the additional measure of videotaping the examination will be granted only where the plaintiff establishes the existence of special and unusual circumstances. Bermejo v New York City Health & Hosps. Corp, 119 A.D.3d 500

Vague and generalized assertions that information in the plaintiff's social media sites [Facebook] might contradict the plaintiff's claims of damages were not a proper basis for disclosure. There must be a threshold showing before allowing access to a party's private social media information. Two Justices dissented arguing that there should be a different standard for discovery of social media. Forman v. Henkin, 134 A.D.3d 529

County Law § 308(4) provides that:"Records, in whatever form they may be kept, 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 a private entity or person providing medical ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services." Should this law be interpreted to prohibit discovery of 911 calls? No, says the Second Department, holding "the statute is not intended to prohibit the disclosure of matter that is material and relevant in a civil litigation, accessible by a so-ordered subpoena or directed by a court to be disclosed in a discovery order." Anderson v State of New York, 134 A.D.3d 1061

Disclosure of cellular telephone records may not be premised on "bare allegations of relevancy." Where a party adequately demonstrated that the issue of whether the driver was using her cellular telephone at the time of the accident was relevant to the contention that the other driver was negligent in the operation of her motor vehicle (see generally Vehicle and Traffic Law §§ 1225-c, 1225-d), disclosure is required. D'Alessandro v Nassau Health Care Corp., 137 A.D.3d 1195

A witness stated reasons that he "mis-spoke" and that he was clarifying his testimony were inadequate to warrant the corrections under CPLR 3116 errata sheet. Torres v Board of Educ. of City of N.Y. , 137 A.D.3d 1256

The Court of Appeals affirmed the First Department's holding that the discovery of information concerning the prior incident should be granted, and the standard for admissibility at trial is different. In re Steam Pipe Explosion at 41st Street,127 A.D.3d 554, affd. 27 N.Y.3d 985 .

The Court of Appeals held that the common interest doctrine, which provides an additional area for claiming an attorney-client privilege, is limitd to communications that relate to litigation, either pending or anticipated. Ambac Assur. Corp. V. Countrywide Home Loans, Inc., 27 N.Y.3d 616

Communications of attorneys who have sought the advice of their law firm's in-house general counsel on their ethical obligations in representing a firm are not subject to disclosure to the client under the fiduciary exception to the attorney-client privilege because, for purposes of the in-firm consultation on the ethical issue, the attorneys seeking the general counsel's advice, as well as the firm itself, were the general counsel's " real clients." The First Department rejected the "current client exception," under which a number of courts of other jurisdictions have held a former client entitled to disclosure by a law firm of any in-firm communications relating to the client that took place while the firm was representing that client. Stock v Schnader Harrison Segal & Lewis LLP, 142 A.D.3d 210

Remember the general discovery rule that "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"'. "Resolution of discovery disputes and the nature and degree of the penalty to be imposed pursuant to CPLR 3126 are matters within the sound discretion of the motion court". " To invoke the drastic remedy of preclusion, the Supreme Court must determine that the offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious"'. " The willful and contumacious character of a party's conduct 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"'. Hasan v 18-24 Luquer St. Realty, LLC, 144 A.D.3d 631 [cites omitted]

As part of your demand for a physical examination, can the notice state "[n]o non-attorney will be permitted in the exam room, without prior consent of defendant's counsel." The Second Department said no, noting that a plaintiff "is entitled to be examined in the presence of [his or] her attorney or other legal representative, as well as an interpreter, if necessary, so long as they do not interfere with the conduct of the examination." Therefore, the notice was improper. Henderson v Ross, 147 A.D.3d 915

In a rare case where the Supreme Court, in the exercise of discretion, refuses to strike pleading for failure to comply with discovery, but imposes monetary sanctions under CPLR 3126, the Second Department reversed and granted the motion to strike the answers of several defendants. Lucas v. Stam, 147 A.D.3d 921

"[T]he payment or rejection of claims is a part of the regular business of an insurance company. Consequently, reports which aid it in the process of deciding [whether to pay or reject a claim] are made in the regular course of its business" Reports prepared by insurance investigators,

adjusters, or attorneys before the decision is made to pay or reject a claim are not privileged and are discoverable, even when those reports are mixed/multi-purpose reports, motivated in part by the potential for litigation with the insured. Advanced Chimney, Inc. v. Graziano, 153 A.D.3d 478

VI. SPOLIATION

"The party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and 'fatally compromised its ability to' " prove its claim or defense" Where there is no evidence of willful or contumacious behavior drastic remedy of striking pleadings is not warranted. Neve v. City of New York, 117 A.D.3d 1006

"Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, that party may be sanctioned under CPLR 3126. Since the Supreme Court has broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence, it may, under appropriate circumstances, impose a sanction even if the destruction occurred through negligence rather than wilfulness, and 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." Based upon this jurisprudence, the Second Department struck the answer of the party where they destroyed evidence after an attorney had served a written demand for the item. Biniachvili v Yeshivat Shaare Torah, Inc., 120 A.D.3d 605

The Court of Appeals finally addressed the issue of spoliation holding that "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" (Voom HD Holdings LLC v Echostar Satellite L.L.C., 93 AD3d 33, 45 [1st Dept 2012], quoting Zubulake v UBS Warburg LLC, 220 FRD 212, 220 [SD NY 2003]). Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed (see Zubulake, 220 FRD at 220). 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 (see

id.)." The case involved preservation of electronically stored information which was lost due to computer crashes. The court noted that a party's failure to institute a litigation hold is but one factor that a trial court can consider in making a determination as to the alleged spoliator's culpable state of mind. The Court of Appeals noted the trial court has broad discrtion to provide proportionate relief trial and an adverse inference sanction would not be akin to granting summary judgment since such a charge is permissive and can be appropriately tailored by the trial court citing PJI 1:77. The dissent, noting that VOOM held that destruction that is the result of gross negligence is sufficient to presume relevance, found such evidence. Pegasus Aviation I, Inc. v Varig Logistica S.A., 26 N.Y.3d 543. Summary is that the three elements required to prove spoliation are that the party had control over the evidence, that the evidence was destroyed with a "culpable state of mind," and that the destroyed evidence was relevant to, and would support, the opposing party's claim or defense.

In a legal malpractice action, the defendant law firm claims that it provided a copy of the proposed settlement to the client. During the deposition of the former client, the law firm's attorney handed the former client the original offer document. Later the former client moves to impose sanctions for spoilation claiming that the firm failed to preserve the offer document for fingerprint analysis and had made such analysis impossible. The Appellate Division, in affirming the denial of any sanction, stated that the "Supreme Court's conclusion that the plaintiffs failed to demonstrate that the defendants intentionally or negligently destroyed fingerprint evidence which was critical to their case. The plaintiffs failed to demonstrate that they requested that the offer document be tested for fingerprints, or that it be preserved for forensic testing prior to [plaintiff's] deposition, or otherwise informed the defendants of their desire to conduct fingerprint analysis. The plaintiffs' boilerplate demand during discovery that they be permitted to examine original documents on request does not satisfy this requirement, nor is it reasonable to contend that the defendants should have anticipated the plaintiffs' desire for forensic testing of the offer. Thus, the plaintiffs failed to demonstrate that, in handing the original document to [plaintiff] at her deposition, the defendants intentionally or negligently destroyed potential forensic evidence. In any event, the plaintiffs failed to demonstrate that, by failing to preserve the offer document for forensic testing, the defendants had fatally compromised the plaintiffs' ability to prove their claims. Therefore, the court providently exercised its discretion in denying the plaintiffs' motion for sanctions for spoliation." Doviak v Finkelstein & Partners, LLP , 137 A.D.3d 843 [cites omitted]

In a split decision, the Fourth Department held that overriding of surveillance video warranted the sanction of an adverse inference. The plaintiff fell on ice on March 23, 2009. On August 10, 2010 the plaintiff made a preaction disclosure and preservation motion. At the time, the surveillance video had been overridden in the normal cause of business. However, the defendant's attorney indicated it would voluntarily undertake preservation and consented to an order of preservation, which order was granted on October 29, 210. During discovery the defendant indicated that the surveillance video had not be preserved. The plaintiff moved, pursuant to CPLR 3126, to strike the answer. The Supreme Court granted the motion. A majority of the Fourth Department modified by limiting the sanction to an adverse inference, but finding that the defendant was in wilful failure to disclose. Justice Curran dissented. Initially,

Justice Curran found the defendant's action only negligent plus under the Court of Appeals analysis in Pegasus Aviation, the defendant did not have an obligation to preserve the evidence at the time of destruction. However, almost as a change of position, Justice Curran does hold that the defendant had a duty to preserve the surveillance video as it was on notice of an impending lawsuit. As a remedy, Justice Curran would restore the balance to the litigation by precluding the defendant from introducing at trial evidence of the video's content as part of its direct case. Justice Curran notes that even under Pegasus Aviation, with a finding of negligence, an adverse inference is inappropriate. Sarach v. M & T Bank Corporation, 140 A.D.3d 1721

" The nature and severity of the sanction for spoilation 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'" When the moving party is still able to establish or defend a case, a less severe sanction than striking a pleading is appropriate. 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. Cioffi v S.M. Foods, Inc., 142 A.D.3d 520

Finding intentional destruction of computer files warranted dismissal of an action. UMS Solutions, Inc. v Biosound Esaote, Inc., 145 A.D.3d 831

Failure to save video tape required sanction of preclusion of any evidence involving the content of the video. Rokach v. Taback, 148 A.D.3d 1195

The plaintiff's MRI film is lost by the Diagnostic Imaging Service. The defendant seeks to preclude any evidence derived from the MRI. The Second Department reversed the granting of preclusion. The plaintiffs, who were never in possession of the MRI films, did not willfully discard the MRI films. Furthermore, under the circumstances, the plaintiffs cannot be held responsible for a nonparty's loss of the MRI films. In any event, the defendant, who obtained copies of the MRI reports failed to show that the MRI films were central to the case or that their destruction severely prejudiced his ability to defend the action. Gaoming You v. Rahmouni, 147 A.D.3d 729

The plaintiff does projects on the defendant's residence. The defendant finds some unsatisfactory and discharges plaintiff and brings in some new contractors. The plaintiff sues for breach of contract and seeks sanctions for spoilation. The Second Department held that the plaintiff demonstrated that the defendant hired contractors to alter and redo the plaintiff's work, but failed to demonstrate that the defendant's conduct rose to the level of being intentional or willful. Therefore, sanction of adverse inference, not preclusion was appropriate. Smith v Cunningham, 154 A.D.3d 681

The Second Department reviewed the rules of spoilation”"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" (Pegasus Aviation I, Inc. v Varig Logistica S.A., 26 NY3d 543, 547 [internal quotation marks omitted]; see Golan v North Shore-Long Is. Jewish Health Sys., Inc., 147 AD3d 1031, 1032). "Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed [evidence] is presumed" (Pegasus Aviation I, Inc. v Varig Logistica S.A., 26 NY3d at 547, citing Zubulake v UBS Warburg LLC, 220 FRD 212, 220 [SD NY]). "On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed [evidence] [was] relevant to the party's claim or defense" (Pegasus Aviation I, Inc. v Varig Logistica S.A., 26 NY3d at 547-548)...Courts "possess 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" (Pegasus Aviation I, Inc. v Varig Logistica S.A., 26 NY3d at 551). "Recognizing that striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct, courts will consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness" (Iannucci v Rose, 8 AD3d 437, 438; see Peters v Hernandez, 142 AD3d 980, 981). "A less severe sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her defense or case" (Iannucci v Rose, 8 AD3d at 438). "[A]dverse inference charges have been found to be appropriate even in situations where the evidence has been found to have been negligently destroyed" (Pegasus Aviation I, Inc. v Varig Logistica S.A., 26 NY3d at 554).” The Second Department found that the negligent destruction of a video of a slip and fall was an adverse inference. Eksarko v Associated Supermarket, 155 A.D.3d 826

Plaintiff, deceased, was killed when an van and an ambulance collided in the middle an intersection, with the force causing the van to strike the plaintiff while walking on the sidewalk. The plaintiff’s attorney served notice to produce the event data recorder(EKR) from NYCFD (ambulance) and the van owner. Neither produced and the plaintiff moved for sanctions for spoliation. City defendants maintained that the ambulance was not equipped with an EDR, and the van defendants contended that the EDR was destroyed when the van was scrapped after the accident. The plaintiff attempted to refute these claims by submitting a letter from the manufacturer of the ambulance involved in the accident indicating that the ambulance was equipped with an EDR. The plaintiff also submitted photographs, which purportedly depict the van after the accident with no discernible damage. The Second Department remitted the case for a hearing on the issues as to whether the ambulance was equipped with an EDR, when and how the EDRs were destroyed, whether the defendants were on notice that the EDRs might be needed for future litigation, whether the defendants acted intentionally, and to the extent any disposal of the EDRs was not intentional, whether the evidence contained in each EDR was relevant to proving the plaintiff's case, as well as what sanction, if any, should be imposed. Saeed v City of New York, 2017 WL 6347057

FYI- Federal Rules of Civil Procedure were amended:

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

…

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

VII. MISCELLANEOUS

The statute of limitation for a hybrid article 78 and declaratory judgment action is four months where the proceeding/action involves an audit results of a particular nursing facility. Matter of New Surfside Nursing Home, LLC v Daines, 22 N.Y.3d 1080

In an environmental challenge, “a person who can prove that he or she uses and enjoys a natural resource more than most other members of the public has standing ... to challenge government actions that threaten that resource.” Matter of Long Island Pine Barrens Society, Inc. v. Central Pine Barrens Joint Planning & Policy Commission, 122 A.D.3d 688 [quoting Ct. of Appeals]

Where a legal malpractice claim is based upon the failure to timely commence an action, does the death of the attorney require dismissal of the action? The court said on a motion to dismiss, no. Cabrera v Collazo,

Does the 2½ year time limitation in which to commence medical, dental or podiatric malpractice actions; under CPLR 214-a apply to chiropractic malpractice actions? The First Department says no, unless the service was provided at the direction or request of a physician who was providing medical treatment. Perez v Fitzgerald, 115 A.D.3d 177

A court should enforce a foreign judgment if “prior to the commencement of the proceedings the [defendant] had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved”(CPLR 5305) and was afforded fair notice of the foreign court proceeding. There is no requirement that the court undertakes “microscopic analysis” of the underlying proceedings. Landauer Ltd. v. Joe Monani Fish Co., Inc., 22 N.Y.3d 1129

"In cases against architects or contractors, the accrual date for Statute of Limitations purposes is completion of performance." "[C]onstruction may be complete even though incidental matters relating to the project remain open." New York City Sch. Constr. Auth. v Admiral Constr., LLC,114 A.D.3d 914

Two justice dissenting at the Appellate Division does not provide an automatic appeal to a party unless the dissent is "in favor of the party taking such appeal." An appeal properly taken under CPLR 5601(a) brings up for review all issues that the Appellate Division decided adversely to the appellant, even those on which no Appellate Division justice dissented. Also, PJI 2:15 is reserved for malpractice cases because the standards of care applicable to malpractice cases and not to be used for product liability cases. Reis v.Volvo Cars of North America, 24 N.Y.3d 35

It is not an abuse of discretion to grant a motion to dismiss based upon forum non conveniens with conditions. Boyle v. Starwood Hotels & Resorts Worldwide, Inc., 23 N.Y.3d 1012

When a cause of action accrues outside New York and the plaintiff is a nonresident, section 202 "borrows" the statute of limitations of the jurisdiction where the claim arose, if shorter than New York's, to measure the lawsuit's timeliness. New York's "savings" statute, section 205(a), allows a plaintiff to refile claims within six months of a timely prior action's termination for reasons other than the merits or a plaintiff's unwillingness to prosecute the claims in a diligent manner. Does the saving statute apply. The Court of Appeals said yes. Norex Petroleum Ltd. v. Blavatnik, 23 N.Y.3d 665

No appeals lies from dicta. Waldorf v. Waldorf , 117 A.D.3d 1035.

Where a court finds, by clear and convincing evidence, conduct that constitutes fraud on the court, the court may impose sanctions including, as in this case, striking pleadings and entering default judgment against the offending parties to ensure the continuing integrity of our judicial system. CDR Creances S.A.S. v. Cohen, 23 N.Y.3d 307

The term "verification" has a specific meaning within the CPLR, and is defined as a statement under oath that a pleading is true to the knowledge of the deponent (see CPLR 3020 et seq. ; see also CPLR 105[u]; 2309[b] [providing for the form of oaths and affirmations]). By contrast, CPLR 3116(b), among other things, provides that the officer before whom a deposition is taken "shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness." Hence, a verification requires a deponent to swear to the truth of statements, whereas a certification requires the officer to state that the deponent was sworn by him or her and that the officer's transcription of the witness's testimony is accurate. A certification and a verification are not synonymous. Rosenblatt v. St. George Health and Racquetball Associates, LLC, 119 A.D.3d 45

"A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal.[A] party's lack of standing does not constitute a jurisdictional defect and does not warrant sua sponte dismissal of a complaint by the court." Bank of N.Y. v Mulligan, 119 A.D.3d 716

Remember the Second Department requires that to establish prima facie entitlement to judgment as a matter of law on the issue of liability, a plaintiff must demonstrate that the defendant was negligent and that the plaintiff was free of comparative fault. Valentin v Parisio, 119 A.D.3d 854

What does good faith means under CPLR 3408[mandatory settlement conference for foreclosures]. The Second Department holds that the issue of whether a party failed to negotiate in "good faith" within the meaning of CPLR 3408(f) should be determined by considering whether the totality of the circumstances demonstrates that the party's conduct did not constitute a meaningful effort at reaching a resolution. US Bank National Association, v. Sarmiento, 121 A.D.3d 187

Remember that a default judgment dismissing the complaint should be without prejudice where it is dismissed for failure to appear under 22 NYCRR 202.27 and does not constitute a determination on the merits. Farrell Forwarding Co., Inc. v Alison Transp., Inc.,119 A.D.3d 891

College savings accounts established under the laws of other states are not exempt from levy in connection with the satisfaction of a money judgment that was docketed in New York pursuant to CPLR 5402. Country Bank v Broderick, 120 A.D.3d 463

The proper vehicle for challenging the propriety of a provision contained in a separation agreement or stipulation of settlement incorporated, but not merged, into a divorce judgment is by either commencing a separate plenary action in which such relief is sought in a cause of action or by motion within the context of an enforcement proceeding. However, where such procedure is not followed but neither party objects, a court may review the merits. Macchio v Macchio, 120 A.D.3d 560

Noting that the issue of a certificate of conformity under CPLR 2309 has been raised in many cases, the Second Department noted that it "has typically held, since 1951, that the absence of a certificate of conformity is not, in and of itself, a fatal defect (see Mack-Cali Realty, L.P. v Everfoam Insulation Sys., Inc., 110 AD3d at 680; Bey v Neuman, 100 AD3d at 582; Fredette v Town of Southampton, 95 AD3d at 941; Fallah v Stop & Shop Cos., Inc., 41 AD3d at 639; Smith v Allstate Ins. Co., 38 AD3d at 523; Raynor v Raynor, 279 App Div 671). The defect is not fatal, as it may be corrected nunc pro tunc (see U.S. Bank N.A. v Dellarmo, 94 AD3d 746), or pursuant to CPLR 2001, which permits trial courts to disregard mistakes, omissions, defects, or irregularities at any time during an action where a substantial right of a party is not prejudiced (see Matos v Salem Truck Leasing, 105 AD3d at 917; Rivers v Birnbaum, 105 AD3d at 44; Betz v Daniel Conti, Inc., 69 AD3d at 545). Thus, even if the certificate of conformity was inadequate or missing, no substantial right of the defendants is prejudiced." Midfirst Bank v Agho, 121 A.D.3d 343

A cause of action for attorney deceit, under Judiciary Law §487, is subject to the six-year statute of limitations in CPLR 213(1). Melcher v. Greenberg Traurig, LLP, 23 N.Y.3d 10

Whether a Town, which owns land, has standing to challenge amendments to regulations of the state DEC may be allowed for procedural claims. Association for a Better Long Island, Inc. v. New York State Dept. of Environmental Conservation, 23 N.Y.3d 1.

As CPLR 3216 is a legislative creation and not part of a court's inherent power, a court may not dismiss an action for want of prosecution where the plaintiff was not served with the requisite 90-day demand pursuant to CPLR 3216(b). Therefore, there must be a specific notice by the court or the defendant. Diemer v Eben Ezer Med. Assoc., 120 A.D.3d 614

Although a plaintiff may choose venue based solely on a defendant's address, as set forth in a police accident report , a police accident report, standing alone, is not sufficient evidence to demonstrate that, on the date that an action is commenced, a plaintiff does not reside in the county where he or she elects to place the venue of trial, which was different than on the police report. Remember you can have several residency for venue. Chehab v Roitman 120 A.D.3d 736

The Legislature enacted CPLR 5014 to allow a judgment creditor to apply for a renewal of the lien by commencing an action for a renewal judgment. "Pursuant to CPLR 5014(1), an action upon a money judgment may be maintained between the original parties where ten years have elapsed since the judgment was originally docketed Pangburn v Klug, 244 AD2d 394, 395." Guerra v Crescent St. Corp., 120 A.D.3d 754

Under particular circumstances, the interest of justice requires that fairness be maintained amongst the siblings, the Appellate Division extended time to answer under CPLR 306-b. Abdelqader v Abdelqader, 120 A.D.3d 1275

It appears that electronic posting via E-courts of a date of a hearing is insufficient to establish notice so that failure to appear can be a default. Bank of N.Y. v Segui, 120 A.D.3d 1369

The four month statute of limitations applies to an article 78 seeking to prohibit a retrial for double jeopardy and the Court of Appeals indicated that a tolling period for continuing harm has been recognized but would not apply where the DA indicated that there would be a retrial. Matter of Eric Smith, 24 N.Y.3d 981

The Court of Appeals has held that the separate entity rule precludes a judgment creditor from ordering a garnishee bank operating branches in New York to restrain a debtor’s assets held in foreign branches of the bank. The separate entities provides that with respect to CPLR article 62 prejudgment attachments and article postjudgment restraining notices and turnover orders under article 52 a court should treat a New York branch of a bank as a separate entity to other branches outside the county. The Court specifically left open the issue if the branch was another in New York or outside[fn 2]. Furthermore, the Court distinguished Koehler, where stock certificates held at a branch in Bermuda were required to be turned over, noting the separate entity rule was not raised and did not involve bank accounts. . Motorola Credit Corp. v. Standard Chartered Bank, 24 N.Y.3d 149

Under CPLR 503(d), the county of an individual's principal office is a proper venue for claims arising out of that business. Young Sun Chung v. Kwah, 122 A.D.3d 729

When does the continuing representation toll stop, to the filing of the Consent to Change Attorney form or from earlier factual events involving the attorney and the client. The Appellate Division held runs only to the date of the actual discharge and not to the date of the later Consent to Change Attorney. Farage v Ehrenberg, 124 A.D.3d 159

A party must provide an adequate reason for the numerous, critical, substantive changes in the errata sheet that materially alter the deposition testimony under CPLR 3116[a]. Horn v 197 5th Ave. Corp., 123 A.D.3d 768

The good faith requirement is a reciprocal obligations imposed by CPLR 3408(f) for mortgage foreclosure settlement conferences. Citibank, N.A. v Barclay, 124 A.D.3d 174

CPLR 1021 requires a motion for substitution to be made within a reasonable time. The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, the prejudice to the other parties, and whether the party to be substituted has shown that the action or the defense has potential merit. Riedel v Kapoor, 123 A.D.3d 996

Plaintiff's attorney enter into a retainer agreement for a 33 1/3% contingency fee. The retainer agreement expressly states that stated, "Client further understands that the services to be provided through this agreement will not extend through the prosecution of an appeal or representation on appeal brought by any of the parties to the lawsuit," and that "[c]lient understands that [law firm] may charge reasonable additional compensation . . . if the case is appealed . . . . This further representation will require a new [f]ee [a]greement." After wining a personal injury award, the plaintiff and attorney execute a new and separate retainer agreement for appellate legal services of ten percent of the net sum recovered. After an affirmance of the judgment by the Appellate Division and leave denied by the Court of Appeals, the defendant sought to vacate the judgment due to the attorney's fee in excess of 40%. The First Department, in a 3-2 decision, upheld the fee agreement. Initially, the majority noted that the defendant had no standing to challenge the fee agreement since they were not an "interested person" under CPLR 5015(a)(3). Furthermore, although the Supreme Court held that it had inherent authority to sua sponte reach the issue of attorneys' fees, this was error said the Appellate Division. A court has no inherent authority over attorneys' fees except in two situations: (i) an attorney asking the court to approve a fee, or (ii) a client complaining about a fee. Finally on procedural issues, the Appellate Division noted that the Supreme Court was without jurisdiction to revisit the issue of fees since the judgment was final after appellate review, noting once the appellate process has been concluded, "alleged errors of law which could have been reviewed but were not, may not be addressed except insofar as the grounds for relief set forth in CPLR 5015 are present." The Appellate Division went on to address the issue that under the Court rules, which sets forth schedules of permissible contingent

fee arrangement in personal injury cases does not prohibit separate fees for appellate work performed by the trial counsel. Two justices dissented finding that the spirit and purpose of the Court's rule prohibited such separate fees. They noted that the trial firm is defending its own fee and has an interest in the appeal. The dissenting justices did find no procedural bars to the application since the defendant was an interested person, in that it could be liable for the payment to the plaintiff's firm, and a rule violation could constitute misconduct in procuring the judgment under CPLR 5015(a)(3). Stewart v New York City Tr. Auth., 125 A.D.3d 129

Whether a law firm who had previous consultation with the brother of an adversary in a divorce action should be disqualified split the Second Department. The case was a divorce action and the brother had business relations with the party, so that there was an appearance of conflict warranting disqulification. Cohen v Cohen, 125 A.D.3d 589

The relation-back doctrine is inapplicable where causes of action sought to be added are based on events that occurred after the filing of the initial pleading, rather than upon the transactions giving rise to the causes of action in the initial pleading. Cooper v Sleepy's, LLC, 126 A.D.3d 664

Under CPLR 5002, a party is entitled to prejudgment interest from the date of the arbitration award. Interest under CPLR 5002 is a matter of right and is not dependent upon the court's discretion or a specific demand. Dermigny v Harper, 127 A.D.3d 685

"Under CPLR article 53, a judgment issued by the court of a foreign country is recognized and enforceable in New York State if it is final, conclusive and enforceable when rendered. A foreign country judgment is considered conclusive between the parties to the extent that it grants or denies recovery of a sum of money. However, a foreign country judgment is not conclusive, and thus may not be recognized, if (1) it was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law' or (2) the foreign court did not have personal jurisdiction over the defendant." Gemstar Can., Inc. v George A. Fuller Co., Inc., 127 A.D.3d 689

The Court of Appeals noted that under CPLR 7804 (f), which provides where a respondent moves to dismiss a CPLR article 78 petition and the motion is denied, "the court shall permit the respondent to answer, upon such terms as may be just" does allow a court to decline an answer where "facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer."

Matter of Kickertz v New York Univ., 25 N.Y.3d 942

General Municipal Law § 50–i(1) applies to all causes of action against the City seeking to recover damages for injury to property because of negligence or a wrongful act, even claims of bailment, where the plaintiff's property was seized as part of a criminal investigation. Wikiert, v. City of New York, 128 A.D.3d 128

"Oral stipulations entered into in open court by counsel on behalf of their clients are binding." Stipulations of settlement are favored by the courts and not lightly cast aside . . . . Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation." Bethea v Thousand, 127 A.D.3d 798

The failure to comply with the notice requirements of CPLR 3215(g)(1) deprived the Supreme Court of jurisdiction to entertain the plaintiffs' motion for leave to enter a default judgment. The Second Department, per Justice Cohen, held that the failure to give notice of the motion for leave to enter a default judgment divests the court of jurisdiction distinguishing Manhattan Telecom. Corp. v H & A Locksmith, Inc. ,21 NY3d 200 [failure to file sufficient "proof of the facts constituting the claim" in support of a motion for leave to enter a default judgment, as required by CPLR 3215(f) does not nullify the judgment] Paulus v Christopher Vacirca, Inc. 128 A.D.3d 116

A defendant whose includes the statute of limitations within a laundry list of predominantly inapplicable defenses does not provide plaintiff with the requisite notice under CPLR 3013 and CPLR 3014. Furthermore, under a statute of limitation defense in the Official Form the time limit is require. However, the issue, according to the First Department, is prejudice, since pleadings must be liberally construed. Prejudice can be cured by allowing defendant to amend its pleading (CPLR 3025[b]) and then allowing plaintiff to conduct discovery on the statute of limitations issue. A concurrence indicates that the Court of Appeals in Immediate v St. John's Queens Hosp., 48 NY2d 671 allowed the pleading as sufficient for the defense without the time limit. Scholastic Inc. v Pace Plumbing Corp., 129 A.D.3d 75

A forged deed has long been treated as void ab initio, entirely without effect from inception. Therefore, the CPLR 213 (8) statute of limitations does not apply to her claims to vacate and declare the deed and mortgage-based interest based upon the forged deed is also a legal nullity. Faison v Lewis, 25 N.Y.3d 220

When a prior action terminates where an appeal is taken as of right but is dismissed by the intermediate appellate court due to the plaintiff's failure to perfect the appeal, the prior action terminates for the purposes of CPLR 205 (a) when the intermediate appellate court dismisses the appeal, not when the underlying order appealed from is entered. Malay v. City of Syracuse, 25 N.Y.3d 323

Can the patient-physician privilege be overcome. Plaintiff claims medical malpractice by a doctor in performing two surgeries. Further, the plaintiff claims that the hospital was liable for the damages that she sustained since it knew or should have known that the doctor was committing malpractice based upon the unprecedented number of surgical procedures he performed each day. The plaintiff sought discovery of the hospital's case logs pertaining to every surgery the doctor performed on the two dates involving the plaintiff's surgery. The Appellate Division directed the discovery with redaction of identifying information. The Court noted that "where the application of a privilege will not serve to further the legitimate purposes for which it was created, there is little reason to permit its invocation." Here, the plaintiff demonstrated that the privacy interests of the nonparty patients and the policy objectives of the privilege would not be undermined by the disclosure. Cole v. Panos, 128 A.D.3d 880

Although a corporation or professional limited liability company, or an individual guarantor of such an entity's debt, may not assert the defense of civil usury, a corporation or PLLC, or a guarantor of such an entity's debt, may assert the defense of criminal usury. Fred Schutzman Co. v Park Slope Advanced Med., PLLC, 128 A.D.3d 1007

An attorney's affirmation containing conclusory assertions that requested materials are conditionally immune from disclosure pursuant to CPLR 3101(d)(2) as material prepared in anticipation of litigation, without more, is insufficient to sustain a party's burden of demonstrating that the materials were prepared exclusively for litigation. Ligoure v City of New York, 128 A.D.3d 1027

A fragment from a catheter is a foreign object for purposes of the discovery rule of CPLR 214-a. Walton v. Strong Memorial Hosp., 25 N.Y.3d 554

A trial transcript is a disbursement even when used during the trial where there is an attorney affirmation, wherein counsel stated that while the transcripts were used during the trial, they were procured with the intent of preparing a record on appeal, and detailed his reasons for believing that an appeal would be necessary. O'Brien v Town of Huntington, 131 A.D.3d 685

RPAPL 1304 does not include, in its definition of "home loan," a loan secured by shares of stock and a proprietary lease from a corporation formed for the purpose of cooperative ownership in real estate. DaCosta-Harris v Aurora Bank, FSB, 131 A.D.3d 1095

An employment agreement's choice-of-law provision will be enforced except "where the chosen law violates 'some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.' " In other words this exception is reserved "for those foreign laws that are truly obnoxious." The Court of Appeals found that Florida law involving enforcement of restrictive covenants in employment agreements to be "truly obnoxious." Brown & Brown, Inc. v. Johnson, 25 N.Y.3d 364.

Do you need to establish that a party "willfully" violated a clear and unequivocal mandate of a court's order, along with knowledge of the order's terms and prejudice of the party's rights in order to establish a civil contempt. The Court of Appeals has held no, under the language of Judiciary Law §753(a) Also, the Court held that the invocation of the right against self-incrimination could be used in finding the party in civil contempt, even though the moving party sought both criminal and civil contempt. The Court of Appeals suggested that a party could seek to bifurcate the hearing so that the court would first consider the criminal contempt allegations. El-Dehdan v. El-Dehdan, 26 N.Y.3d 19

The Court of Appeals has held that a plaintiff is entitled to prejudgment interest in a whistleblower action under Civil Service Law § 75-b and Labor Law § 740 (5). Tipaldo v Lynn, 26 N.Y.3d 204

"[W]hen an originally-named defendant and an unknown Jane Doe' [or John Doe'] party are united in interest, i.e. employer and employee, the later-identified party may, in some instances, be added to the suit after the statute of limitations has expired pursuant to the relation-back' doctrine of CPLR 203(f), based upon postlimitations disclosure of the unknown party's identity."

The moving party seeking to apply the relation-back doctrine to a later-identified "Jane Doe" or "John Doe" defendant has the burden, inter alia, of establishing that diligent efforts were made to ascertain the unknown party's identity prior to the expiration of the statute of limitations. Holmes v City of New York, 132 A.D.3d 952 [cite omitted]

"An order of seizure is not a final disposition of a matter but is a pendente lite order made in the context of a pending action where the movant has established, prima facie, a superior right in the chattel." Americredit Fin. Servs., Inc. v Decoteau, 103 AD3d 761, 76. On a motion for an order of seizure, a plaintiff must demonstrate a likelihood of success on its cause of action for replevin and the absence of a valid defense to its claim under CPLR 7102. Great Am. Ins. Co. v Auto Mkt. of Jamaica, N.Y.,133 A.D.3d 631.

Although not New York practice directly, the Supreme Court interpreted the Foreign Sovereign Immunities Act which shields foreign states and their agencies from suit in the United States courts unless it falls within an exception. Ms. Sanchs was injured when she fell onto the tracks at the Innsbruck, Austria train station. She had purchased in the United States a Eurail pass. One of the exceptions is an action which is based upon a commercial activity carried on int the United States by a foreign state. The Supreme Court, in reversing the Ninth Circuit, held that an action is “based upon” the “particular conduct” that constitutes the gravament of the suit. Here the gravament of the suit involved Austria. The Ninth Circuit had used a one-element test, which held that if any element of the action involved the United States, i.e. the purchase of the ticket, then the exception applied. OBB Personenverkehr AG v. Sachs, _ U.S. _ , 136 S.Ct. 390

CPLR 2001 permits a court, at any stage of an action, to disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced. " Pursuant to CPLR 5019(a), a trial court has the discretion to correct an order or judgment which contains a mistake, defect, or irregularity not affecting a substantial right of a party"'Adams v Fellingham, 52 AD3d 443, 444. The provisions in CPLR 2001 and 5019(a) may only be employed to correct errors where the corrections do not affect a substantial right of the parties. It can be used to correct affidavit of merit and of the amount due in a foreclosure actions. Deutsche Bank Natl. Trust Co. v Lawson, 134 A.D.3d 760

The Second Department denied a FOIL request for statements of a nontestifying witness in a criminal case, broadly construing the exception under FOIL for statements of nontestifying witnesses. Matter of Friedman v. Rice, 134 A.D.3d 826

The Court of Appeals held that where parties include a New York choice-of-law clause in a contract, the parties demonstrate that they intent that the courts not conduct a conflict-of-laws analysis which applies to both common-law conflict-of-law and statutory choice-of-law directives. The dissenting judges argue that "the laws of the State of New York" include statutory directives. Ministers & Missionaries Benefit Bd. v. Snow, 26 N.Y.3d 466

The six-month period in CPLR 205(a) is not a limitations period but a tolling provision, which has no application where the statute of limitations has not expired at the time the second action is commenced. Bonilla v Tutor Perini Corp, 134 A.D.3d 869

A medical malpractice action for "wrongful birth" where the doctor fails to perform adequate genetic screening of an egg donor for an in vitro fertilization resulted in the birth of plaintiffs' impaired child accrues upon the birth of the infant and not the termination of the doctor's treatment. B.F. v. Reproductive Medicine Assoc. of N.Y., LLP, 22 N.Y.S.3d 190

Remember that an order or judgment that is directed to be settled must be done within 60 days. The Second Department noted that "It is within the sound discretion of the court to accept a belated order or judgment for settlement. Moreover, a court should not deem an action or judgment abandoned where the result 'would not bring the repose to court proceedings that 22 NYCRR 202.48 was designed to effectuate, and would waste judicial resources'" The Court noted that it was not condoning the defendants' dilatory behavior, but the interests of justice demand that the court not be burdened with the trial of demonstrably meritless causes of action. A contrary result would not bring the repose to court proceedings that 22 NYCRR 202.48 was designed to effectuate, and would waste judicial resources. Curanovic v Cordone, 134 A.D.3d 978

The sole residence of a foreign corporation or a foreign limited liability company for venue

purposes is the county where its principal office is located as designated in its application for authority to conduct business filed with the New York State Department of State, regardless of where it transacts business or maintains its actual principal office or facility. CPLR 503[c]. Carlton Group, Ltd. v Property Mkts. Group, Inc., 134 A.D.3d 1018

There is no statutory basis to compel a lender to institute a judicial action to foreclose upon shares and proprietary lease of a cooperate so as to afford her an opportunity to participate in a settlement conference pursuant to CPLR 3408. "Shares of stock issued in connection with cooperative apartments are personal property, not real property." (Lombard v Station Sq. Inn Apts. Corp., 94 AD3d 717, 718). Thus, where the pledged security for a loan consists of the shares of a cooperative apartment and its proprietary lease, it is the procedures for enforcement of a security interest set forth in UCC article 9 which apply, rather than the procedures set forth in RPAPL article 13 for the enforcement of a security interest in real property. Moreover, the mandatory settlement conference requirements of CPLR 3408 do not apply to loans secured by the shares of a cooperative apartment and its proprietary lease. Matter of Chase v Wells Fargo Bank, N.A., 135 A.D.3d 751

CPLR 2103(f)(1) was amended to allow mailing “within the United States.” This changed “within the state” which had been used by the First Department to deny an appeal, but had been revised by the Court of Appeals. M Entertainment Inc. V. Leydier, 62 A.D.3d 627, revd 13 N.Y.3d 827. This would add a day, 6 days instead of 5 days, for the extension for mail where applicable. CPLR 2103(b)(2).

Can an expert in one medical or healthcare specialty proffer an opinion in an action involving a different specialty, if the expert's opinion is related solely to the issue of proximate cause within the expert's own specialty and does not address the defendant's standard of care? The Second Department says yes in the appropriate circumstance. One such circumstance involving chiropractic malpractice allowed a board-certified orthopedic surgeon, and a board-certified radiologist to give an opinion about the proximate cause. Bongiovanni v Cavagnuolo, 138 A.D.3d 12

However, the Second Department made sure that it was limited. See Martinez v. Quintana, 138 A.D.3d 791[radiologist was not qualified to opine on orthopedic injuries]

CPLR 215(8)(a) states that "[w]henever it is shown that a criminal action against the same defendant has been commenced with respect to the event or occurrence from which a claim governed by [CPLR 215] arises, the plaintiff shall have at least one year from the termination of the criminal action as defined in [CPL 1.20] in which to commence the civil action, notwithstanding that the time in which to commence such action has already expired or has less than a year remaining." This statute does not require that the underlying "criminal action" be one that was prosecuted in New York. Walker v Estate of Lorch, 136 A.D.3d 805

CPLR 6212(e) provides, in part, that "[t]he plaintiff shall be liable to the defendant for all costs and damages, including reasonable attorney's fees, which may be sustained by reason of the attachment if the defendant recovers judgment, or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property." This provision does not limit the time period for which a party may recover damages arising from the attachment, but, rather, permits a defendant to recover "all costs and damages, including reasonable attorney's fees, which may be sustained by reason of the attachment." Matter of Jalas v Halperin, 136 A.D.3d 816

The Second Department has held that when a pharmacist has demonstrated that he or she did not undertake to exercise any independent professional judgment in filling and dispensing prescription medication, a pharmacist cannot be held liable for negligence in the absence of evidence that he or she failed to fill the prescription precisely as directed by the prescribing physician or that the prescription was so clearly contraindicated that ordinary prudence required the pharmacist to take additional measures before dispensing the medication. Abrams v Bute, 138 A.D.3d 179

The Court of Appeals held that in most cases a positive declaration under SEQRA does not give standing to challenge the declaration as it is not ripe. The prior case of Gordon stands for the proposition that "where the positive declaration appears unauthorized, it may be ripe for judicial review, as, for example, when the administrative agency is not empowered to serve as lead agency (see Gordon 100 NY2d at 242-43), when the proposed action is not subject to SEQRA (Ctr. of Deposit, Inc. v Vil. of Deposit, 90 AD3d 1450, 1452 [3d Dept 2011]), or when a prior negative declaration by an appropriate lead agency appears to obviate the need for a DEIS suggesting that further action is improper (Gordon, 100 NY2d at 243)." Matter of Ranco Sand & Stone Corp. v Vecchio, 27 N.Y.3d 92

The Court of Appeals held that filming in an emergency room without consent would state a cause of action breach of physician-patient confidentiality against the hospital and treating physician. Chanko v American Broadcasting Cos. Inc., 27 N.Y.3d 46

An interesting case involving the emergency doctrine split the First Department. The defendant was driving behind the plaintiff and had the green light. A car turned in front of him. In order to avoid the car, the defendant swerved to the right but since there was a subway column to the right he was forced to swerve back to the left, which was the cause of striking the rear end of the plaintiff's vehicle. The majority held that the emergency doctrine could be used and there was an issue of fact. Two judges dissented held that "If he had been going an appropriate rate of speed and had maintained a safe distance between his vehicle and plaintiffs' vehicle in front of him — that is, leaving enough distance to allow for stopping if plaintiffs' vehicle stopped — even the sudden need to swerve around a car that suddenly cut in front of him would not have caused him to crash into the back of plaintiffs' vehicle." Therefore, his own negligence had caused or contributed to the collision so as to negate the emergency doctrine. Maisonet v Roman, 139 A.D.3d 121

The Court of Appeals, in reversing the First Department held that there was a question of fact as to whether the worn marble edge of the step on which plaintiff allegedly slipped involved an actionable defect. Carrion v. Faulkner, 27 N.Y.3d 980

A court is not limited to making only one $10,000 award under CPLR 8303-a. The statute specifically permits an award of up to $10,000 to "the successful party" against whom a frivolous claim is asserted, so more than one award can be granted. In this case, two awards totaling $20,000.00. Baxter v Javier, 140 A.D.3d 683

A proceeding dismissed for anunexcused failure to comply with the mailing requirements of Real Property Tax Law (RPTL) § 708 (3) does not allow recommenced pursuant to CPLR 205 (a). Matter of Westchester Joint Water Works v Assessor of City of Rye, 27 N.Y.3d 566

The First Department held that where a plaintiff, is an innocent driver, who was rear-ended by several cars, is by virtue of such status not entitled to summary judgment on liability against any or all defendant drivers. The reason is that the plaintiff, an innocent driver, failed to meet his burden to eliminate triable issues of fact as to how the accident happened and which defendant driver was responsible for the rear end collision. Such an innocent plaintiff driver, however, is entitled to summary judgment on his lack of culpable conduct on the issue of liability pursuant to CPLR 3212(g). Oluwatayo v Dulinayan, 142 A.D.3d 113

The Second Department has held, in a signed opinion, that where there is no evidence that the passive conduct created or exacerbated a dangerous condition, no liability can be imposed under a snow removal contract under Espinal [98 N.Y.2d 136]. Santos v. Deanco Servs., Inc., 142 A.D.3d 137

Under CPLR 504(3), only the City may invoke this statute. Arduino v Molina-Ovando, 141 A.D.3d 622

In an important case, Justice Balkin, speaking for a unanimous panel of the Second Department held that issue does not state from the date of a stipulation on liability, since stipulations are different from "verdict, report or decision" under CPLR 5002. Mahoney v Brockbank, 142 A.D.3d 200

Reminder Mountain View Coach Lines v Storms,102 AD2d 663, “The Appellate Division is a single State-wide court divided into departments for administrative convenience . . . and, therefore, the doctrine of stare decisis requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule.” See also People v Turner, 5 NY3d 476, 482.

Courts should be slow to use judicial estoppel in matrimonial actions. "Judicial estoppel, or the doctrine of inconsistent positions, precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed. The doctrine is invoked to estop parties from adopting such contrary positions because the judicial system cannot tolerate this playing fast and loose with the courts." The case involved a spouse seeking maintenance who had filed a bankruptcy petition during the marriage indicating not support income. The Second Department noted that it was during the marriage but further noted that it would be slow to estop from presenting evidence regarding her needs in order to obtain maintenance. Canzona v Canzona, 142 A.D.3d 1030

The Supreme Court has inherent power to analyze whether the pleading complies with CPLR 6501 where the issue involves whether to cancel the notices of pendency. However, if the cancellation of the subject notices of pendency is pursuant to the Supreme Court's inherent power, and not pursuant to CPLR 6514(a) or (b), the court had "no authority to award costs and disbursements under CPLR 6514(c)." Delidimitropoulos v Karantinidis, 142 A.D.3d 1038

"When there is a fee dispute between the current and discharged attorneys for the plaintiff in an action to which a contingent fee retainer agreement applies, [t]he discharged attorney may elect to receive compensation immediately based on quantum meruit or on a contingent percentage fee based on his or her proportionate share of the work performed on the whole case." Matter of Cohen v Grainger, Tesoriero & Bell, 81 NY2d 655, 658 . Where an election was not made by the outgoing attorney at the time of discharge, there is a presumption that the attorney has chosen a proportionate share of the contingency fee. Id." Ficaro v Alexander, 142 A.D.3d 1043

The breach of contract and joint venture claims "accrue[] at the time of the breach," even in the event that the damages do not accrue until a later date. Ely-Cruikshank Co. v Bank of Montreal, 81 NY2d 399, 402 [1993]). A breach of fiduciary duty claim accrues where the fiduciary openly repudiates his or her obligation — i.e., once damages are sustained (IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132, 140 [2009]). In a case involving Russian oil and gas company, the First Department found that a 2013 purchase of a joint venture triggered the statute of limitation, not the earlier formation of the joint venture. Lebedev v Blavatnik, 144 A.D.3d 24

Justice Gische, writing for a unanimous First Department, held that the borrowing statute applied, regardless of the contractual choice of law agreement which could be construed to include the application of both New York's procedural and substantive law. The court held tht the borrowing statute is not a statutory choice-of-law directive but a statute of limitation. Any policy issue should be determined by the legislature. Note: Draft a better contractual provision. 2138747 Ontario, Inc. v. Samsunt C & T Corp., 144 A.D.3d 122, lv. Granted 29 N.Y.3d 913

“A motion pursuant to CPLR 2201 to stay a civil action pending resolution of a related criminal action is directed to the sound discretion of the trial court (see Burgdorf v Kasper, 83 AD3d 1553, 1556; Matter of Astor, 62 AD3d 867, 868-869; Britt v International Bus Servs., 255 AD2d 143, 144). "Factors to consider include avoiding the risk of inconsistent adjudications, [duplication] of proof and potential waste of judicial resources. A compelling factor is a situation where a defendant will invoke his or her constitutional right against self incrimination" (Britt v International Bus Servs., 255 AD2d at 144 [citation omitted]; see Zonghetti v Jeromack, 150 AD2d 561, 563; DeSiervi v Liverzani, 136 AD2d 527, 528). "Although the pendency of a criminal proceeding does not give rise to an absolute right under the United States or New York State Constitutions to a stay of a related civil proceeding . . . there is no question but that the court may exercise its discretion to stay proceedings in a civil action until a related criminal dispute is resolved" (Matter of Astor, 62 AD3d at 868-869 [internal quotation marks omitted]).” Mook v Homesafe Am., Inc., 144 A.D.3d 1116

Going back to your constitutional law days, does CPLR 8501(a) and 8503 which requires nonresident plaintiffs maintaining lawsuits in New York courts to post security for the costs for which they would be liable if their lawsuits were unsuccessful violate the Privileges and Immunities Clause of the United States Constitution (US Const, art IV, § 2). The Second Department does not deprive nonresident plaintiffs of reasonable and adequate access to New York courts, and thus, do not violate the Privileges and Immunities Clause. Clement v Durban, 147 A.D.3d 39

" Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy.' Where the change in circumstances involves a construction project, we must consider how far the work has progressed towards completion" (Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn., 2 NY3d 727, 728-729, quoting Matter of Dreikhausen v Zoning Bd. of Appeals of City of Long Beach, 98 NY2d 165, 172). "Because a race to completion cannot be determinative,' however, other factors bear on mootness in this context as well. Chief among them has been a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation'" (Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn., 2 NY3d at 729, quoting Matter of Dreikhausen v Zoning Bd. of Appeals of City of Long Beach, 98 NY2d at 173). "Also significant are whether the work was undertaken without authority or in bad faith, and whether substantially completed work is readily undone, without undue hardship.' Further, [courts] may elect to retain jurisdiction despite mootness if recurring novel or substantial issues are sufficiently evanescent to evade review otherwise" (Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn., 2 NY3d at 729, quoting Matter of Dreikhausen v Zoning Bd. of Appeals of City of Long Beach, 98 NY2d at 173).” Therefore an application to the Appellate Division for a stay is required. Claiming lack of resources to so move is insufficient, so that the completion of a 150-foot monopole wireless communications tower mooted the appeal. Matter of Bruenn v Town Bd. of Town of Kent, 145 A.D.3d 878

The Court of Appeals held that the issue of proximate cause, when involving a claim of an intervenening act, was an issue of fact. Hain v. Jamison, 28 N.Y.3d 524

The Court of Appeals held that in a proceeding for leave to file a late notice of claim under 50-e, the petitioner has the burden initially to show that the late notice will not substantially prejudice the public corporation but the showing need not be extensive, the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice. To rebut the petitioner, the public corporation cannot base substantial prejudice solely on speculation and inference but must be based on evidence in the record. Matter of Newcomb. 28 N.Y.3d 455, 466

The Second Department, in a foreclosure action, held that where an action is dismissed by a routine clearing of the docket "as abandoned pursuant to CPLR 3215(c) without costs or prejudice", it can be recommenced and CPLR 205(a) applies, as the prior dismissal was not based upon a neglect to prosecute. The panel split, however, 3-2 as to whether the sucessor in interest was entitled to the saving provision of CPLR 205(a). Wells Fargo Bank, N.A. v Eitani, 148 A.D.3d 193

The First Department split, 3-2, as to whether the facts establish mere suspicion of fraud, so as to require the plaintiff to exercise due diligence to determine whether fraud existed and whether the statute of limitation should be triggered. The majority indicated that there was only mere suspicion until the SEC start their investigation, while the dissent found sufficient operative facts that should have prompted further inquiry. Norddeutsche Landesbank Girozentrale v Tilton, 149 A.D.3d 152

A school district commenced a proceeding pursuant to CPLR article 78 to review of a determination by the New York State Education Department (the State) that the District's dispute resolution practices for placing students with disabilities violated a federal statute — the Individuals with Disabilities Education Act (the IDEA [20 USC § 1400 et seq.]) — and related state law, and which directed the District to revise its practices accordingly. The Appellate Division dismissed the proceeding holding that it was not a proper article 78 action. The Court of Appeals did not answer the question but held that assuming it was correct vehicle, the district did not establish a final determination, the District has not shown that it has exhausted its administrative remedies, and the District is unable to articulate any actual, concrete injury that it has suffered at this juncture. Matter of East Ramapo Cent. Sch. Dist. v King, 29 N.Y.3d 938

"CPLR 5240 provides the court with broad discretionary power to control and regulate the enforcement of a money judgment under CPLR article 52 to prevent "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice." Nonetheless, an application to quash a subpoena should be granted only where "the futility of the process to uncover anything legitimate is inevitable or obvious" or where the information sought is "utterly irrelevant to any proper inquiry." It is the burden of the party seeking to quash a subpoena to conclusively establish that it lacks information to assist the judgment creditor in obtaining satisfaction of the

judgment."George v Victoria Albi, Inc., 148 A.D.3d 1119 [cites omitted]

"CPLR 5001(a) permits a creditor to recover prejudgment interest on unpaid interest and principal payments awarded from the date each payment became due under the terms of the promissory note to the date liability is established." . Where the parties did not include a provision in the contract addressing the interest rate that governs after principal is due or in the event of a breach, New York's statutory rate will be applied as the default rate. Castle Restoration & Constr., Inc. v Castle Restoration, LLC, 155 A.D.3d 678

" [i]n the context of civil litigation, an attorney's errors or omissions are binding on the client and, absent extraordinary circumstances, a claim of ineffective assistance of counsel will not be entertained.'" Hudson City Sav. Bank v Bomba, 149 A.D.3d 704

The EAJA, article 86 of the CPLR, permits the award of attorneys' fees and costs to a prevailing plaintiff in an action against the State under the Human Rights Law for sex discrimination in employment by a state agency. However, the decision was 3-1-3 and Judge Wilson's concurrence agrees with the dissent on the interpretation of the statute. Kimmel v. State, 29 N.Y.3d 386

The amount of a bond can be taxed as bill of costs in an appeal that modifies the judgment. The Second Department held that you have to look behind the modification to determine if there was a reversal in favor of the party that was required to obtain the bond for the appeal. . North Oyster Bay Baymen's Ass'n v. Town of Oyster Bay, 150 A.D.3d 865

The requirements for the issuance of an investigatory subpoena duces tecum are " (1) that the issuing agency has authority to engage in the investigation and issue the subpoena, (2) that there is an authentic factual basis to warrant the investigation, and (3) that the evidence sought is reasonably related to the subject of the inquiry." Matter of Evergreen Assn., Inc. v Schneiderman, 153 A.D.3d 87

The First Department held that a plaintiff could her complaint to include belated claims of discrimination on the basis of sexual orientation on the ground that those claims related back to the original pleading, which timely alleged, inter alia, discrimination on the basis of gender. The court found that the original pleading gave defendants notice of the occurrences plaintiff sought to prove pursuant to her amended complaint (see CPLR 203[f]), and defendants would not suffer undue prejudice as a result of the delay (see CPLR 3025[b]). O'Halloran v Metropolitan Transp. Auth., 154 A.D.3d 83

Pursuant to CPLR 402, the pleadings in a special proceeding are limited to a petition, an answer, and a reply to any counterclaim asserted. "The court may permit such other pleadings as are

authorized in an action upon such terms as it may specify" (CPLR 402). "[A] cross claim is not permitted in a special proceeding without leave of court." Matter of Espinal v Sosa, 153 A.D.3d 819

Where a party asserts that the Executive Board's of a political party certificate of authorization was invalid under Election Law § 6-120 [Wilson Pukla], the Executive Board is a necessary party because a judgment on this issue could inequitably affect its interests. Matter of Morgan v De Blasio, 29 N.Y.3d 559

Plaintiff asserted that defendant doctor "ignored" her repeated complaints of migraine headaches, blurred vision, and other related symptoms from on or about April 3, 1998 until September 5, 2007. Plaintiff ultimately underwent a left frontal parasagittal craniotomy and suffered a loss of vision rendering her legally blind. By complaint dated March 5, 2010, plaintiff commenced an action sounding in medical malpractice and lack of informed consent. Defendant moved for summary judgment based upon the statute of limitations. Initially, the First Department held that there was good cause for the late motion, as there was a snow storm. [an interesting second issue was that the First Department treated a denial of a motion to reargue as granting reargument and adhering to its decision so as to hear the appeal]. On the merits, three justices held that there was an issue of fact as to whether the continuous treatment doctrine tolled the statute of limitations. "...read in the light most favorable to plaintiff, the record contains issues of fact as to whether from March 1999 until at least September 5, 2007 there was continuity of treatment for symptoms — namely, recurring and sometimes severe headaches — that were traceable to plaintiff's meningioma. If so, the course of treatment would render plaintiff's action timely, as the statute of limitations would be tolled between March 1999 and September 2007." Furthermore, "the case law contains no requirement that a plaintiff have attended "regular" appointments in the sense that the appointments were scheduled for the sole purpose of treating the allegedly misdiagnosed condition. Rather, the inquiry centers on whether the treated symptoms indicated the presence of the condition that was not properly diagnosed — here, a meningioma that gave rise to plaintiff's severe headaches and partial loss of vision, both of which Dr. Rutkovsky undertook to treat by, among other things, prescribing reading glasses." Justice Tom dissented founding that the plaintiff's testimony was conclusory and failed to raise an issue of fact. Lewis v Rutkovsky. 153 A.D.3d 450

An attorney, like any other litigant, has the right, both constitutional (see NY Const art I, § 6) and statutory (CPLR 321[a]), to self-representation. Herczl v. Feinsilver, 153 A.D.3d 1336

Pursuant to 22 NYCRR 202.48(a), the plaintiff was required to submit a notice of settlement and proposed order within 60 days thereafter. However, if there is some issues after, i.e. misplaced, such time limit cannot be raised. See HSBC Bank USA, National Association, as trustee, v. Yonkus, 154 A.D.3d 643

The Court of Appeals does not have the authority to search the record and grant summary

judgment to the nonmoving party. Princes Point LLC v. Muss, 30 N.Y.3d 127

The First Department indicated that a trial court can exercised its discretion in granting leave to file a surreply. 128 Hester LLC v. New York State Div. of Housing & Community Renewal, 146 A.D.3d 706, lv denied _ N.Y.3d_[Oct. 24, 2017]

In an accounting malpractice action, the continuous representation doctrine can toll the statute of limitations. "A prerequisite for the application of the continuous representation doctrine is that the relationship be continuous with respect to the matter in which the malpractice was alleged; a general professional relationship involving only routine contact is not sufficient. More specifically, the continuous representation doctrine "applies only where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim."' However, conclusory statements that the revisions of prior years' financial statements were routinely performed and that the parties contemplated ongoing representation after review is insufficient to raise an issue of fact. Collins Bros. Moving Corp. v Pierleoni, 155 A.D.3d 601

A disagreement as to whether Supreme Court improvidently exercised its discretion is not a matter of law for review by the Court of Appeals. Grajko v. City of New York, 2017 WL 5485386

In a case involving choice of law, the Court of Appeals held that the Cayman Islands' requirement for a derivative action was procedural and therefore New York courts should apply New York law. Under the law of the Cayman Islands, a plaintiff would have to seek leave of court to commence a derivative action for a corporation. Davis v. Scottish Re Group Limited, 2017 WL 5557936

Under FOIL, the exemption from public inspection those records, or a portion thereof, "compiled for law enforcement purposes and which, if disclosed, would . . . identify a confidential source or disclose confidential information relating to a criminal investigation" (Public Officers Law § 87 [2] [e] [iii]) on applied when the agency establishes (1) that an express promise of confidentiality was made to the source, or (2) that the circumstances of the particular case are such that the confidentiality of the source or information can be reasonably inferred. Matter of Friedman v Rice, NY3d, 2017 WL 5574476

Remember that the Second Circuit in Schoenfeld v. Schneiderman, 821 F.3d 273 (2d Cir. 2016) held that Judiciary Law §470 requiring non-resident New York attorneys to maintain a physical office in New York was constitutional. What if the court finds that the attorney does not have a physical office? The Second Department and the Third Department hold that the action should not be dismissed, while the First Department does dismiss the action. Stegemann v. Rensselaer County Sheriff's Off., 153 A.D.3d 1053.

CPLR 908 provides that "[a] class action shall not be dismissed, discontinued, or compromised without the approval of the court," and that "[n]otice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs." The Court of Appeals held that CPLR 908 applies in the pre-certification context and notice to putative class members of a proposed dismissal, discontinuance, or compromise must be given. Three judges dissented noting that the statutory language does not require. Desrosiers v Perry Ellis Menswear, LLC, NY3d, 2017 WL 6327106

The Court of Appeals held that for the statute of limitations for a cause of action permitting parents to recover the extraordinary expenses incurred to care for a disabled infant who, but for a physician's negligent failure to detect or advise on the risks of impairment, would not have been born (46 NY2d 401, 410 [1978]) accrues on the date of birth. B.F. v Reproductive Medicine Assoc. of N.Y., LLP, 2017 WL 6375833

The Court of Appeals reminds those petitioners that their task in demonstrating that the rate-setting agency's determination is unreasonable is appropriately described as a "heavy burden." Matter of Prometheus Realty Corp., v. New York City Water Board, 2017 WL 6454306

The First Department has now rejoined the Second Department in holding that a plaintiff to make a prima facie showing of freedom from comparative fault in order to obtain summary judgment on the issue of liability, is the correct one. Rodriguez v. City of New York, 142 A.D.3d 778. [The Fourth Department is with the old First Department decisions that you can grant partial summary judgment to the plaintiff. Simoneit v. Mark Cerrone, Inc., 122 A.D.3d 1246] The Court of Appeals will hear the appeal as two justice dissented and the appeal will be argued on February 14, 2018.

Defendant moves for summary judgment to dismiss the complaint with prejudice. The court orders "defendant is entitled to summary judgment dismissing the complaint." Thereafter, the plaintiff moved, inter alia, in effect, to clarify the order as to whether the dismissal of the complaint was "with or without prejudice." The Supreme Court, among other things, denied that branch of the plaintiff's motion which was for clarification as to whether dismissal of the complaint was with or without prejudice and stated that "the order speaks for itself." The defendant appeals from the order denying clarification. The Appellate Division dismissed the appeal holding that the defendant was not aggrieved by the order and furthermore the statement was dicta. Dorvilier v Champion Mtge. Co., 2017 N.Y. Slip Op. 08811

The Court of Appeals reminded the Appellate Divisions that they have very limited of penalties imposed by in arbitration, being whether the penalties imposes are not ration and do not shock the conscience. Judge Rivera, in a lengthy concurrence, noted that the Appellate Division “analyses ..are so clearly at odds with uncontroversial established legal standards ...”Matter of Bolt v. NYC Dept. Ed., NY3d [Jan. 9, 2018]

James Fagan

James Fagan has worked for the last 20 years as a Law Secretary in New York State Supreme Court. He is currently serving in the chambers of Justice Mark Cohen. Previously, he was an Assistant Professor of Law at St. John's University School of Law, where he taught Legal Writing, Evidence, Civil Practice Seminar, Media Law and Legal Methods, among other subjects. He authored several law review articles involving the areas of Constitutional Law and Criminal Procedure. He has been an Adjunct Professor, presently at Touro Law School and was a Law Clerk to the Justice of the Appellate Division, Third Department. He has been a panel member for lectures by the Suffolk County Bar Association in areas of Civil Practice and Matrimonial Law. He received his B.A., summa cum laude, from the C.W. Post Campus of Long Island University; he holds Masters degrees in Public Administration from C.W. Post and in Theology from the Seminary of the Immaculate Conception; he earned his J.D., cum laude, from St. John's and an LL.M. from Columbia University School of Law.

A. CRAIG PURCELL

GLYNN MERCEP and PURCELL, LLP
Post Office Box 712
Stony Brook, New York 11790
631-751-5757
Facsimile: 631-751-5471
e-mail: acpurcell@glymerlaw.com

ADMITTED TO NEW YORK STATE BAR — **February 1974**
Admitted to Federal Courts (EDNY, SDNY) — **February 1974**
Admitted to United States Supreme Court — **1983**

EDUCATION

Law School: Brooklyn Law School (JD 1973)
Undergraduate: Hamilton College, A.B. (1970)

ACADEMIC HONORS

Undergraduate: Honors in Spanish Literature
Law: National Moot Court Team
National Moot Court Honor Society Chair

BAR ASSOCIATION ACTIVITIES

Suffolk County Bar Association

Past SCBA President (1995-1996)
Past Dean of Suffolk Academy of Law (1979-1980)
Chair, Judicial Screening Committee (Two terms)

New York State Bar Association

Vice President for the Tenth Judicial District (Nassau & Suffolk County)
Member - Executive Committee
Representative - House of Delegates
Chair - NYS Conference of Bar Leaders (1999-2000)
Elected Delegate - House of Delegates (2004 to 2007)
Life Fellow - New York Bar Foundation
Nominating Committee (Two Terms)
Co-Chair Committee on the Tort System (2011 to 2017)

American Bar Association

Member-House of Delegates

ACADEMIC ACTIVITIES

Frequent lecturer for the Suffolk Academy of Law
Guest lecturer for Hofstra Law School
Guest lecturer for Touro Law Center

PROFESSIONAL & COMMUNITY ACTIVITIES

President, Rotary Club of Ronkonkoma
President, Long Island Chapter of Hamilton College Alumni Association
Chairman of the Board, Rehabilitation Institute of Suffolk, Inc.
Member, Board of Directors of Brooklyn Law School Alumni Association

BRIDGE THE GAP 2018

HANDLING A CRIMINAL CASE

BRIDGE-THE-GAP

HANDLING A CRIMINAL CASE

Speakers: Stephen Kunken, Esq.
William T. Ferris, III, Esq.

Handling a Criminal Case

STEPHEN KUNKEN
6165 Jericho Turnpike
Commack, New York 11725
(516) 462-5950

EDUCATION

9/69 - 5/72	**Boston College Law School** - Juris Doctor Chestnut Hill, Massachusetts
9/65 - 5/69	**University of Vermont** - Bachelor of Arts Burlington, Vermont Senior Class President; Junior Class President.

EMPLOYMENT

1/73 - 10/82	**Legal Aid Society of Nassau County** - Trial Attorney Mineola, New York
1983 - 1986	**Malone, Dorfman, Tauber & Sohn** - Associate Freeport, New York
1986 - Present	**Private Practice** 6165 Jericho Turnpike, Commack, New York Concentrating in the areas of personal injury and criminal law.

PROFESSIONAL ACTIVITIES

1983 - Present	**Adjunct Professor** Touro College Jacob D. Fuchsberg Law Center
08/91 - 10/92	**Acting Village Justice** Village of Huntington Bay
10/92 - Present	**Village Justice** Village of Huntington Bay
1988 - 1993	**Officer**, Suffolk Academy of Law
1991 - 1992	**Treasurer**, Suffolk Academy of Law
1992 - 1993	**Associate Dean**, Suffolk Academy of Law
1995 - Present	**Advisory Committee Member**, Suffolk Academy of Law
Member/Lecturer	Suffolk County Bar Association
Member/Lecturer	Nassau County Bar Association
Member/Lecturer	New York State Bar Association
Member	New York State Trial Lawyers Association
Member	New York State Association of Criminal Defense Lawyers

COMMUNITY ACTIVITIES

1988 - 1990	**President**, Bay Hills Property Owners Association
Member/Coach	Tri-Village Little League/St. Hugh's Basketball League

WILLIAM T. FERRIS, III
Bracken Margolin Besunder LLP
1050 Old Nichols Road, Suite 200
Islandia, NY 11749
631-234-8585

2003 to Present

- Practice in Criminal Law and Litigation
- Civil Litigation, including Surrogate's Court and Art. 81 Guardianship Litigation

1978 to 2001 **Suffolk County District Attorney's Office**

Bar Admission:

New York State, United States Supreme Court, U.S.D.C.: Eastern District of New York and Southern District of New York, U. S. Court of Appeals for the Armed Services.

Education:

Fordham Law School, New York, N.Y. J. D. 1976
Hobart College, Geneva, N.Y. B. A. 1968

Member:

Suffolk County Bar Association:
President, June 2014-May 31, 2015
Director, June 2003-May 2006
Suffolk Academy of Law: Dean, June 2003-May 2005
Suffolk County Criminal Bar Association; Member, Board of Directors
Federal Bar Council
Felony Screening Committee; Suffolk County Assigned Counsel Defender Plan (18A and 18B)
Member, Grievance Committee for the Tenth Judicial District (reappointed to second four term)

Awards:

Suffolk County Bar Association:
President's Award as Chair, 18-b Task Force; 2012
Awards of Recognition; 1998, 2002, 2014
District Attorney Award for Excellence
District Attorney Distinguished Trial Advocacy Award
District Attorney Distinguished Service Award
District Attorney Distinguished Service Award (DA Patrick Henry)
Suffolk County Arson Task Force: 1996 Honoree

Lecturer:

SUNY Stony Brook, Adjunct Professor
Suffolk Academy of Law
Topics include: Ethics, Trial Advocacy, Evidence, Bridge the Gap
National District Attorney's Association
New York Prosecutors Training Institute

Military:

- Retired with rank of Captain

I. JURISDICTION OF THE CRIMINAL COURTS

1. **Two Major Categories of Criminal Courts**

   a. Superior Courts - composed of the Supreme Court of the State of New York and County Courts. (CPL Section 10.10 [2])

   b. Lower Courts - Lower Criminal Courts (CPL Sectiofn 10.10 [3])
      i. District Courts
      ii. The New York City Criminal Courts
      iii. City Courts
      iv. Town Courts
      v. Village Courts
      vi. A Supreme Court justice sitting as a local criminal court
      vii. A County Court judge sitting as a local criminal court

2. **Two Types of Jurisdiction**

   a. Preliminary Jurisdiction

   b. Trial Jurisdiction

3. **Jurisdiction of Superior Courts (CPL Section 10.20)**

   a. *Preliminary Jurisdiction*- A criminal court has "preliminary jurisdiction" of an offense when, regardless of whether it has trial jurisdiction thereof, a criminal action of such offense may be commenced therein, and when such court may conduct proceedings with respect thereto which lead or may lead to prosecution and final disposition of the action in a court having trial jurisdiction thereof.

   b. *Trial Jurisdiction* - A Superior Court exercises trial jurisdiction when an indictment charging an offense is properly filed with the court and a final disposition -- either plea, trial, or dismissal -- is rendered on this accusatory instrument. (CPL Section 10.20 [24]).

      i. Superior Courts have exclusive trial jurisdiction of felonies. (CPL Section 10.20 [1] [a], 10.00 [5])

      ii. Although a felony complaint filed in a local criminal court commences the action, prosecution of the action occurs in superior court when the grand jury hands down an indictment. (CPL Section

100.05, 210.05)

iii. The indictment serves as the basis for the superior court's jurisdiction.

iv. Superior courts have trial jurisdiction of misdemeanors concurrent with that of the local criminal courts. {CPL Section 10.00 [4], 10.20 [1] [2] [b])

v. Misdemeanors are usually prosecuted in the local criminal courts. (CPL Section 10.30 [1] [b])

vi. The district attorney or defendant may, under certain circumstances, request that the misdemeanor offense be prosecuted by indictment. (CPL Section 170.20, 170.25)

vii. Should an indictment charging the misdemeanor offense be returned by action of the grand jury, the superior court is vested with jurisdiction over the offense, and the local court must discontinue all proceedings in the matter. (CPL Sections 170.20 [1], 170.25 [2], [3])

viii. Superior courts may exercise trial jurisdiction over petty offenses, but only when the offense is charged in an indictment which also charges a crime. (CPL Section 10.20 [1] [c])

(1) *Example*: a defendant may not be indicted solely for disorderly conduct, but an indictment charging assault may also contain a count for disorderly conduct. (CPL Section 240.20)

4. Jurisdiction of the Local Courts (CPL Section 10.30)

a. *Preliminary Jurisdiction* - Local criminal courts have preliminary jurisdiction of all offenses. (CPL Section 10.30 [2])

b. If the local court is within a political subdivision of this state (e.g., a city, a town, a village, a county) and the court is an appropriate court for filing according to the scheme prescribed by CPL Section 100.55, it may exercise preliminary jurisdiction over the offense.

c. *Trial Jurisdiction* - The CPL provides that local criminal courts have trial jurisdiction to prosecute all offenses other than felonies. (CPL Section 10.30 [1]).

d. Local criminal courts are accorded exclusive trial jurisdiction over all petty

offenses except when the petty offense is charged in an indictment that also charges the defendant. (CPL Section 10.30 [1] [a]

e. Local criminal courts have trial jurisdiction of misdemeanors concurrent with that of the superior courts. (CPL Section 10.30 [1] [b])

   i. Such jurisdiction is subject to divestiture by a superior court if, in a given case, the misdemeanor is prosecuted by indictment returned by a grand jury. (CPL Sections 170.20, 170.25)

The author acknowledges *New York Criminal Practice* by Warner which was used as the source for this outline.

II. ARRAIGNMENT

I. **The Nature of the Arraignment**
The arraignment is the procedure whereby an accused is brought before a magistrate for the purposes of being apprized of the:

A. Charge(s) against him, and

B. Of entering a plea with respect to such charge(s)

II. **Misdemeanor Charge**
If a defendant is charged with a misdemeanor, he will usually be arraigned only once because the original accusatory instrument filed against him is sufficient for purposes of trial.

III. **Felony Charge**
If a defendant is charged with a felony, he will normally be arraigned twice.

A. When a felony arrest precedes any determination by a grand jury, the initial accusatory instrument (e.g., a felony complaint) filed in the local criminal court is, generally, insufficient for purposes of a felony trial. (The local criminal court only has preliminary jurisdiction over a felony; it does not have trial jurisdiction over the felony.)

IV. **If there is no disposition of the case in the lower court and a superior court accusatory instrument (i.e., an indictment) is filed, the accused will be arraigned a second time on the second accusatory instrument in the superior court as a prerequisite to trial.**

V. **Arraignment is the stage where bail is first set.**

VI. **The Purpose of Arraignment:**

A. To advise the defendant of the specific charge or charges against him

B. To address the question of the defendant's right to counsel

C. To have the defendant enter a plea to the charge or charges against him

D. To address the question of the defendant's bail

VII. **Advising the Defendant of the Charges Against Him**

A. Arraignment is the first time following arrest that defendant is brought before a magistrate.

B. The magistrate must inform the defendant of the charges that have been lodged against him. (CPL Sections 170.10 [2], 210.15 [2])

C. The charges are contained in an accusatory instrument filed with the court.

D. If the defendant is not represented by counsel, the magistrate will read the charges to the defendant.

E. If the defendant is represented by counsel, it is customary for the defense counsel to waive a formal reading of the charges.

VIII. Addressing the Defendant's Right to Counsel

A. The arraignment is a formal proceeding where the defendant is entitled to the assistance of counsel. (CPL Section 170.10 [3])

B. See CPL Section 170.10 regarding defendant's rights at arraignment.

IX. Three Pleas a Defendant May Enter to the Charge(s) Against Him:

A. Guilty

B. Not Guilty

C. Noto Contendere

X. A Plea of Guilty

A plea of guilty is equivalent to a conviction after trial and subjects the defendant to the same penalties for which he would be liable if a jury were to find him guilty.

XI. Plea Bargaining as Part of Arraignment Process

Occasionally cases are conferenced with plea bargaining as part of the arraignment process:

A. The prosecution may choose to reduce the charge provided that the defendant pleads guilty to the reduced charge.

B. On other occasions, the prosecution may even dismiss the charges if the screening process determines that the charges should not have been brought in the first place.

XII. **A Plea of Not Guilty**
A plea of not guilty constitutes a denial by the defendant of all of the charges set forth against him in the accusatory instrument. (CPL Section 220.40)

XIII. **A Plea of Noto Contendere**
A plea of noto contendere (no contest) is comparable to a plea of guilty in that the defendant does not contest the allegations that have been made against him.

A. The defendant does not formally admit his guilt.

B. Usually not available in New York – Prosecutor and court must agree.
1. Called a *Serrano* plea

XIV. **Three Options of the Court Regarding Bail**
A. To release the defendant in his own recognizance
B. To set bail in a given amount
C. To remand the defendant with no bail pending further proceedings

XV. **Preparation for Arraignment**
A. Interviewing the defendant (CPL Section 170.10)
B. Interviewing witnesses
C. Securing the attendance of family members
D. Assisting the defendant to secure bail
E. Examining the accusatory instrument
F. Planning the future trial strategy

XVI. **The Rights of the Defendant at the Arraignment**
A. The right to be present
B. The right to be arraigned without undue delay
C. The right to be informed of the charges against him
D. The right to receive a copy of the accusatory instrument
E. The right to counsel
F. The right to appear pro se

XVII. **If there is unnecessary delay between the time of the defendant's arrest and his arraignment, this would constitute a significant factor that would bear on the voluntariness of a confession obtained during this time period as well as upon any evidence discovered as a result of such confession.**

XVIII. **Procedural Steps by Defense Counsel**

A. When defense counsel appears with a defendant before a magistrate for the purpose of having the defendant arraigned, the following is the

procedure used:

1. When the defendant is charged with a misdemeanor or a violation, counsel would first request a copy of the charge(s), waive a public reading of the charge(s), request an out-of-custody trial date, and then make a bail application. If a defendant is charged with a misdemeanor, he is entitled to a jury trial because a misdemeanor is a crime. If the defendant is charged with a violation, he is entitled to a bench trial – not a jury trial – because a violation (i.e., loitering, disorderly conduct) is not a crime. (P.L. Section 10.06)

2. When a defendant is charged with a felony, the procedure followed at arraignment differs slightly. Defense counsel would request a copy of the charges (felony complaint), waive a public reading of the charge(s), request an out-of-custody felony exam date (CPL Sections 180.60, 180.70, 180.75, 180.80), and make a bail application. A defendant cannot enter a plea when he appears before a magistrate of a local criminal court for arraignment in respect to a felony charge because local criminal courts only have preliminary jurisdiction over felonies, not trial jurisdiction. (CPL Section 10.30)

The author acknowledges *Criminal Law Desk Book* by McCluskey and Schoenberg as the source for this outline.

11.A. **Orders of Protection**

Upon a defendant's arraignment, and at the request of the prosecutor, the court will consider issuing an order of protection.

I. CPL 530.11: Procedures for family offense matter.

A. Family court and criminal court have concurrent jurisdiction over certain specified conduct.

B. An arrest may precede the commencement of a family court or criminal court proceeding, but is not a requirement for commencing with proceeding.

II. CPL 530.12: Protection for victims of family offenses.

A. Temporary order of protection in conjunction with release on own recognizance, bail or remand.

1. Stay away order of protection.
2. Refrain from order of protection.
3. Usually one year duration.
4. Served on defendant in courtroom.
5. Subject to Family Court or Supreme Court orders.

III. CPL 530.13: Protection of victims of crimes other than family offenses.

A. Criminal action must be pending.

B. Court may issue for good cause show.

C. Stay away order of protection.

D. Refrain from order of protection.

IV. A violation of a temporary order of protection can result in charge of criminal contempt as a separate offense.

V. CPL 530.14: Suspension and revocation of license to carry firearms and order to surrender firearms.

VI. Upon proper showing, court has discretion to order an evidentiary hearing to challenge the order of protection as a condition of bail.

III. BAIL

I. **Introduction**

A. When a defendant is arraigned, the court must decide whether he is entitled to bail and, if so, in what amount bail should be set.

B. Bail is security or collateral that the court decides must be posted by the defendant prior to granting his release. It is forfeited if the defendant fails to return to court when required.

C. Bail thus provides a legal mechanism that allows the court to release a defendant prior to trial with a reasonable assurance that he will return for trial.

D. The right to bail has been recognized by the Supreme Court and linked to the presumption of innocence. *Stack v. Boyle*, 342 U.S. 1, 72 S.Ct.1, 96 L. Ed. 3 (1951)

E. The court has also held that the right to bail is not absolute and that the Eighth Amendment's prohibition against excessive bail does not mean that there is a right to bail in all cases. *Carlson v. Landon*, 342 U.S. 524, 72 S.Ct., 492, 96 L Ed. 547 (1952). It means that bail should not be excessive in those cases where it is proper.

II. **Excessive Bail**
The Eighth Amendment to the U.S. Constitution states that "excessive bail shall not be required. "Bail that is 'set at a figure higher than an amount reasonably calculated to assure the presence of the accused' has been held to be excessive under the eighth amendment." *Stack v. Boyle*, supra.

III. **A judicial determination in setting bail should only be overturned if there has been an abuse of discretion.** *Carlisle v. Landon*, 73 S.Ct 1179, 97 L.Ed. 1642 (1953).

IV. **Preventive Detention**
The incarceration of the defendant prior to trial in order to prevent him from engaging in criminal activity between the dates of arrest and trial.

V. **Arguments Against Preventive Detention**

A. There is no definitive way to predict future criminal conduct.

B. Preventive detention is not a legitimate purpose of bail.

C. Preventive detention is violative of the presumption of innocence for it punishes the accused prior to an adjudication of guilt.

VI. **Types and Choice of Bail (CPL Section 520.10)**

A. Cash, negotiable securities, or real property bond

B. Surety bond

C. Release on one's own recognizance (ROR)

VII. **Factors to Be Considered When Setting Bail:**

A. Defendant's roots in the community

B. Defendant's physical and mental condition

C. Defendant's economic and financial condition (i.e., his ability to make bail)

D. Defendant's prior history of appearing in court

VIII. **Defense Bail Argument**

A. The defendant is a good bail risk and is unlikely to flee the jurisdiction

B. The defendant is indigent and should not be incarcerated merely because he cannot afford cash bail.

C. Pre-trial detention is violative of the presumption of innocence.

IX. **Prosecution Bail Arguments** – See Section 3.08 C.L.D.B.

X. **When the defendant is charged by information, simplified information, prosecutor's information, or misdemeanor complaint, with an offense of less than felony grade only, the court must order bail or recognizance.** (CPL Section 530.20 [1])

XI. **When the defendant is charged with a felony, the court in its discretion may set bail or recognizance.** The court could remand the defendant without bail. (CPL Section 530.20 [2])

XII. **Continuation of Bail Pending Sentence**
The defense attorney may move for a continuation of bail after a conviction and

before sentence.

XIII. Arguments for Continuing Bail Pending Sentence:

A. That the defendant has never before failed to appear in court

B. That the defendant plans to appeal

C. That the defendant needs time to arrange his personal affairs (if a sentence of imprisonment is contemplated by the court)

D. That the defendant still maintains strong roots in the community and will not flee the jurisdiction

E. That the defendant poses no danger to any other person or to the community

XIV. Forfeiture of Bail

If the defendant fails to appear in court on the scheduled date and does not provide the court with a satisfactory explanation for his non-appearance, his bail may be forfeited. (CPL Section 540.10)

XV. Actual Procedure in Suffolk County

A. When a defendant is arrested for an offense (violation, misdemeanor, felony), he is brought to the First District Court to be arraigned. While the defendant is in custody and waiting to be arraigned, a member of the Suffolk County Probation Department interviews the defendant to determine whether he is eligible to be released in his own recognizance. The interviewer completes a form entitled Release on Recognizance and Legal Aid Eligibility. (See Appendix.)

B. Based on this interview, the defendant receives a numerical score. If he scores less than five points, he is not eligible to be released on his own recognizance. The following criteria are considered when rating the defendant:
   1. amount of time the defendant has lived at his present address or past address
   2. his family ties
   3. his employment or school status
   4. his prior criminal record

C. When the defendant appears before the court for arraignment, the court will have a copy of the Release on Recognizance and Legal Aid Eligibility Form. The court will consider the defendant's score (ROR score), when

making a determination whether to release the defendant on his own recognizance, or to set bail. The greater the score, the greater the likelihood the defendant will be released on his own recognizance. The defendant's score is not binding on the court, but only informs the court that the defendant is eligible to be released on his own recognizance.

Defendants have been released on their own recognizance where they have scored below five points and held on bail when they have scored five points or higher.

D. When a defense attorney represents a defendant at arraignment, the defendant should be presented in the most favorable light to the court. All factors which would indicate that the defendant is a good risk to return to court on his next scheduled court date should be brought to the court's attention. If the court refuses to release the defendant on his own recognizance, the defense attorney should request that the court set bail in an amount which the defendant will be able to post.

E. If the defense attorney feels that the bail set by the court is excessive, he may renew his application to have the defendant released on his own recognizance or for a reduction in bail in the defendant's next court date. The defense attorney may also petition to a higher court for a writ of habeas corpus.

F. The defense attorney should conference the case with the assistant district attorney prior to the bail application. Oftentimes, an agreement can be reached regarding the amount of bail (or ROR status) which will be approved by the court.

III. PRE-TRIAL PRACTICE

I. **Discovery:**
The defendant enjoys the presumption of innocence and is guaranteed a fair trial by the due process clause of the Fifth Amendment and Fourteenth Amendment to the United States Constitution. The right to discovery is a corollary to this principle of law because it provides the defendant with the information necessary for an effective defense.

II. **Important Functions of Pre-Trial Discovery**

A. It allows the defendant to receive a fair trial.

B. It minimizes the undesirable effect of surprise at trial.

C. It helps the defendant to investigate the case.

D. It educates the defendant so that he can make an informed decision in plea negotiations.

E. It provides notice of the prosecution's intention to offer evidence at trial, the admissibility of which can be challenged by a motion to suppress.

F. It enables the defendant to prepare effectively for trial.

G. It contributes to an accurate determination of guilt or innocence.

III. **Obtaining Discovery**
Discovery is obtained by a written notice served upon the other party demanding to inspect property pursuant to the article and giving reasonable notice of the time which it is wished to inspect the property demanded. (CPL Section 240.10 [1])

IV. **General Discovery**
The defendant is now entitled to inspect, photograph, copy, or test discoverable material. (CPL Section 240.20 [1])

A. The prosecution is entitled to reciprocal discovery upon demand (CPL Section 240.30 [1])

B. The prosecution or the defense has the right to refuse to disclose any information which they reasonably believe to be non-discoverable by a

demand to produce. (CPL Section 240.35)

V. **Notice by Prosecution**
The prosecution must give notice to the defense of its intention to offer specific evidence at trial (e.g., statement of the defendant, tangible property seized from the defendant and identification procedure) and thereby afford the defendant an opportunity to raise objections to the admissibility of such evidence in a pretrial motion to suppress.

A. Notice must be served within 15 days after arraignment and before trial (CPL 710.30 [2])

VI. **Defendant Entitlements**
The defendant is entitled to inspect, photograph, copy, or test any written, recorded, or oral statement that he has made and the statements of a co-defendant, if they are to be tried jointly, made other than in the course of the criminal transaction. (CPL Section 240.20 [1] [a])

VII. **Work Product**
Work product is not discoverable.

VIII. **Refusal of Prosecution's Demand**
If the defendant unjustifiably refuses the demand of the prosecution, the court upon motion of the prosecutor, in addition to ordering discovery of the material sought, may also order that the defendant provide non-testimonial evidence. (CPL Section 240.40 [2])

IX. **Police Reports**
Routine police reports containing information which is required to be filed in the normal course of business by the police department's regulations are not part of the attorney's work product and are discoverable. *People v. Harrison*, 81 Misc. 2d 144,. 364 N.Y.S. 2d 760 (Justice Ct. Broome Co. 1975)

X. **Defendant's Statements**
The defendant has a statutory right to discovery of any written, recorded, or oral statements made by him. (CPL Section 240.20 [1] [a])

XI. **Pre-Trial Motions**
In New York, all pretrial motions shall be served or filed within 45 days after arraignment or before commencement of trial, or within such additional time as the court may fix upon application of the defendant made prior to entry of judgment. (CPL Section 255.20 [1])

XII. **Specific Motions**

A. Motion for a Bill of Particulars – Focuses exclusively on the accusatory instrument that charges the defendant with a crime. (CPL Section 255.95 [1])

1. Timeliness of bill of particulars: CPL Sections 200.95 (3), 100.45 (4)

B. Motion for a Change of Venue – Whenever a defense attorney feels that his client would be unable to obtain a fair trial by an "impartial jury" in the jurisdiction in which he has been charged, the attorney should consider moving for a change of venue. (U.S. Const. Amend. VI. CPL Section 230.20).

C. Motion to Reduce Bail – The Eighth Amendment states that "excessive bail shall not be required." *Stack v. Boyle*, 342 U.S. 1 (1951).

D. Motion for a Continuance – If defense attorney is unprepared for any court proceeding and the prosecution is prepared. This motion should be made in good faith.

E. Motion to Subpoena Witnesses – Anytime the defense is unable, whether because of lack of funds or for any other reason, to secure witnesses or evidence relevant to its defense, it should move in the interest of justice to enlist the court's assistance.

F. Motion to Depose a Witness Prior to Trial – If it appears that a witness who is necessary for the prosecution or defense of an action will be unavailable for trial, the party whose interest is served by the witness should move to preserve that testimony of such witness by pretrial deposition. (CPL Section 660, Fed. Rule of Crim. Pro. 15A)

G. Motion for the Trial Judge to Excuse Himself – This due process clause of the Fifth Amendment and Fourteenth Amendment dictate that the defendant is entitled to a trial conducted by an impartial judge. *Ward v. Village Monroeville*, 409 U.S. 57 (1972); *Tuney v. Ohio*, 273 U.S. 510 (1927)

H. Motion to Have the Prosecutor Removed – The due process clauses of the Fifth and Fourteenth Amendments can also be used as the basis for a motion to have the prosecution removed from the trial where it appears that he has a personal interest in the outcome of the litigation or where his pretrial conduct violates accepted standards. (Disciplinary Rule 7-107 of the ABA Code of Professional Responsibility)

I. Motion to Compel the Defendant to Give Non-Testimonial Evidence – CPL Section 240.40 (2) (a)

J. Motion for Joinder – CPL Sections 100.45 (1), 200.20, 200.40

K. Motion for Severance – CPL Sections 100.45 (1), 200.20, 200.40

L. Motion for Transcripts of Pretrial Hearings – Any prior inconsistent statement of those witnesses will be available at trial.

M. Motion to Disclose the Identity of a Confidential Informant – *McCray v. Illinois*, 386 U.S. 300 (1967), *People v. Darden*, 34 N.Y. 2d 177 (1974), *Roviaro v. United States* 353 U.S. 53 (1957)

N. Motion to Dismiss the Indictment Due to Insufficiency of Evidence – CPL Section 210.30

O. Motion to Dismiss the Indictment Due to Prosecutorial Delay – CPL Sections 30.10, 30.30

P. Motion to Dismiss in the Interest of Justice – CPL Section 170.40

XIII. Notice of Defenses

The discovery law specially mandates that the defense inform the prosecution of its intent to raise an alibi or insanity defense at trial.

A. Notice of Alibi – See CPL Section 250.20 regarding time requirements of alibi notice. It is a violation of due process when a discovery statute requires the defense disclosure of the alibi witnesses without requiring the prosecution to make reciprocal disclosure of its alibi rebuttal witnesses. *Warden v. Oregon*, 412 U.S. 470 (1973).

B. Notice of Defense Based on Mental Condition – A defendant must serve the prosecution with notice if it intends to rely on the insanity defense. (CPL Section 250.10)

XIV. Sanctions for Non-Compliance with Discovery Orders –
CPL Section 240.70

XV. Exculpatory Evidence

The prosecution has an affirmative duty to disclose any and all evidence tending to exculpate the defendant. *Brady v. Maryland*, 373 U.S. 83 (1963)

XVI. Crime Scene Investigation

By viewing the scene, the defense attorney should gain a clear understanding

which will enable him to intelligently and confidently cross-examine any opposing witness regarding physical layout of the scene.

XVII. Pre-Trial Hearing

The various constitutional hearings that take place prior to trial frequently provide the cross-examiner (especially the defense attorney) with his first occasion to confront the opposing witness.

A. The pretrial hearing represents a significant opportunity for the defense attorney to discover the testimony of the opposing witness in advance of trial; it enables him to prepare effectively for cross-examination at trial.

XVIII. Common Pre-Trial Hearings (CPL Section 710)

A. Mapp Hearing – Challenges evidence obtained by searches and seizures in violation of the United States Constitution. *Mapp v. State of Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L.Ed. 1081 (1961)

B. Dunaway Hearing – Challenges detention of a defendant without probable cause. *Dunaway v. State of New York* 60 L.Ed. 2d 824 (1979)

C. Huntley Hearing – Challenges confession or admissions made by the defendant. *People v. Huntley*, 15 N.Y. 2d 71, 255 N.Y.S. 2d 838 (1965); CPL Section 710.20 (3)

D. Wade Hearing – Challenges identification evidence. *United States v. Wade*, 388 U.S. 18, 87 S.Ct. 1926, 18 L.Ed. 1149 (1967)

E. Sandoval Hearing – Challenges use of the defendant's prior criminal, vicious, or immoral acts for the purpose of impeaching the defendant's credibility. *People v. Sandoval*, 34 N.Y. 2d 371, 357 N.Y.S. 2d 849 (1974), *People v. Dickman* 42 N.Y. 2d 294, 397 N.Y.S. 2d 754 (1977), *People v. Bermudez* 98 Misc. 2d 704, 414 N.Y.S. 2d 645 (Sup. Ct. N.Y. Co. 1979 (The Sandoval Compromise)

F. Clayton Hearing – Dismissal "in the interest of justice." *People v. Clayton*, 41 A.D. 2d 204, 342 N.Y.S. 2d 106 (2nd Department 1973), CPL Sections 210.40 (1), 170.40 (1)

XIX. Omnibus Motions

A defense attorney can use what is called an omnibus motion to request pretrial hearings to suppress evidence obtained by the police. In this type of motion, the attorney will request every type of pretrial hearing to suppress the evidence to which his client is entitled.

XX. Practice in Suffolk County

The actual policy in the First District Court of Suffolk County with regard to pretrial motions for suppression of evidence, discovery, and dismissal varies from judge to judge. It is always the better practice to inquire of each judge what his/her motion practice is. The rule is that all omnibus motions must be submitted within 45 days after arraignment. Since most cases are adjourned beyond that time period before there is a serious attempt to dispose of the case without a trial, always place on the record a request that the court grant an extension of time to file motions.

XXI. Motion to Dismiss for Insufficiency of Accusatory Instrument

A. There are, however, certain motions made in the First District Court which must be made in writing. One of these is the motion to dismiss a charge for insufficiency of the accusatory instrument. In First District Court, the accusatory instrument most often used to charge a person with an offense is an information. Normally, a misdemeanor charge is made on a misdemeanor information. Criminal Procedure Law 100 and its subdivisions outline the different types of accusatory instruments. Articles 100.15 and 100.40 describe the requirements of a valid or sufficient accusatory instrument.

B. Do not take it for granted because formal charges have been filed against your client, that the information charging your client is sufficient. Remember, it is a sufficient accusatory instrument which is the basis for the court's jurisdiction and where the information is insufficient, no jurisdiction is conferred upon the court. If the court finds that the information isn't sufficient, the court lacks jurisdiction and the charge must be dismissed.

C. To be sufficient, a misdemeanor information must contain "non-hearsay" allegations in the factual part of the information and/or of any supporting depositions which establish if true, every element of the offense charged, and the defendant's commission thereof.

D. A misdemeanor information can be based on either information and belief or personal knowledge. Always request a supporting deposition if the charges are based on "information and belief" because the supporting deposition is the non-hearsay version of what transpired and you may be able to locate discrepancies in the witness version.

E. The supporting deposition must contain all the elements of the offense charged plus the fact that the defendant committed the alleged offense. An example of this is a charge that was dismissed because it should have said at the end, "I have been informed that the boys who attacked me

were so and so..." Instead, all it stated is that "there were five black boys; I identified three of the five." It was dismissed because the non-hearsay portion failed to allege who the defendants were.

F. An important thing to remember about the motion to dismiss a charge for insufficiency of the accusatory instrument is that the 45 day rule does not apply. A motion raising the question of the lack of jurisdiction of the court can be made at any time.

G. A misdemeanor offense can also be charged through a misdemeanor complaint. This distinction between a misdemeanor complaint and a misdemeanor information is that a misdemeanor complaint to be sufficient need only allege hearsay allegations while a misdemeanor information must allege non-hearsay allegations. Article 170.65 of the CPL allows you to request that the misdemeanor complaint be replaced by an information. If you are ever representing a defendant at arraignment and see that the accusatory instrument is a misdemeanor complaint, demand an information. Do not waive your right to an information. Article 170.70 requires that a defendant can only be held in custody for five days in respect to a misdemeanor complaint. If the misdemeanor complaint hasn't been replaced by an information, the defendant must be released on his own recognizance.

XXII. Speedy Trial Motion

A. A motion requesting that a criminal charge be dismissed because the defendant has been denied his right to a speedy trial must also be in writing. The defendant's right to a speedy trial is guaranteed by the Sixth Amendment of the Constitution. This right is guaranteed in Article 30.20 of the CPL, which states that "after a criminal action is commenced, the defendant is entitled to a speedy trial."

B. Article 30.30 (10) sets forth the time limitations stipulating when a defendant has been denied a speedy trial in respect to felonies, Class A misdemeanors, Class B misdemeanors, and violations. A motion to dismiss is generally called a 30.30 motion.

C. Speedy trial time is charged against the People when the defendant is ready to start the trial, but the People are not. If the defendant consents to an adjournment or requests an adjournment, speedy trial time is not charged against the People. *People v. Worley* 66 N.Y. 2d 523, 498 N.Y.S. 2d 116 (1985)

D. Article 30.30 (2) sets forth when the defendant must be released on his own recognizance when he is in custody and the People are not ready for

trial.

XXIII. Motion to Dismiss for Statute of Limitations

Article 30.10 of the CPL sets forth the statute of limitations for different classes of crimes.

XXIV. Motion to Dismiss in the Interest of Justice

A. The other motion that usually must be made in writing is the motion to dismiss a charge in the interest of justice pursuant to Article 170.40 of the CPL. This section cites 10 criteria which the judge is required to examine when deciding whether or not to dismiss the charge in the interest of justice. A situation where such a motion would be made is when you are representing an elderly client who has led a crime-free life, and is now accused of taking $5 worth of food from a grocery store.

XXV. Other Motions?

The motions which have been described are not a comprehensive list of all the pretrial motions that can be made, but they are the ones a defense attorney practicing law in the First District Court of Suffolk would most often make.

The author acknowledges *Criminal Law Desk Book* by Waxner and *New York Criminal Practice* as the sources for this outline.

V. PLEA BARGAINING AND THE GUILTY PLEA

I. **Plea Bargain**
This process begins with a conference between the defense attorney and an Assistant District Attorney. It can begin shortly after your client's arrest. In the ordinary course of events, it usually does not begin until arraignment in the local criminal court. In most misdemeanor cases, it does not begin until the case is assigned to a trial part. In some felony cases, such as serious drug cases, it is important to obtain a plea agreement before indictment because of the mandatory sentence guidelines and statutory limitation in plea bargains (e.g., A1 Drug Felony). The plea bargain itself is an agreement between the prosecution and defense whereby each party gives up and receives some consideration.

A. The prosecution gives up its right to take a case to trial and prosecute to the fullest extent of the law in return for the certainty of a conviction.

B. The defendant agrees to plead guilty and waive his right to a jury trial in exchange for some form of leniency from the state.

II. **Criteria for a Plea Bargain**
A plea bargain will only take place when the defense and prosecution both believe that they gain an advantage that outweighs any disadvantage.

III. **The Goals of Plea Negotiation**

A. The primary goal is to secure the most favorable disposition of the case for one's client, whether that be the state or the defense.

B. The secondary goal, and one that is perhaps more important if plea negotiations fail, is to discover the case of one's adversary for purposes of trial.

IV. **Types of Plea Agreements**

A. The defendant pleads guilty to a reduced charge or to a lesser charge.

B. The defendant pleads guilty to one charge in return for a dismissal of other charges or potential charges.

C. The defendant pleads guilty to the charge in return for a sentencing concession by the prosecution. (The prosecution can either recommend leniency or refrain from making a sentence recommendation.)

V. Structure of the District Attorney's Office

A. The type of crime your client is accused of committing dictates, to a large extent, when and with whom you start the plea negotiation process. As already noted, in most misdemeanor cases, the process begins with the ADA in the trial part. There are, however, specialized units, particularly with felonies, and you will deal with an ADA in those units. Understanding the structure of the District Attorney's Office is helpful.

B. The District Court Bureau is located on the fifth floor of the Cohalan Court Complex, Carleton Avenue, Central Islip, New York. This bureau handles all misdemeanor prosecutions in the western end of the county. In each courtroom there will be one or two assistants on the day your case is calendared, and on your first conference date appearance, you may conference your case with the assistant in that part. If you feel that conference is not productive, you may speak to that assistant's superiors on the fifth floor.

Caution: Do not overuse this "appellate" process since it will be counter-productive for you in the long run.

C. There are two East End Bureaus of the District Court Bureau, and they are located in Southold and Southampton.

VI. Considerations of the Prosecutor in Deciding Whether to Plea Bargain:

A. The nature of the crime.

B. The prior criminal background of the defendant.

C. The strength of the case.

D. The plea guidelines.

E. The feelings of the victim.

F. The recommendations of the police.

G. The sentiment of the community.

H. The timing of the guilty plea. (The prosecution may decide not to plea bargain after the expiration of a predetermined period.)

I. The limitations of the law. (The legislature has enacted statutes which

establish restrictions on plea bargaining – e.g., drug cases.)

J. The need for the defendant's cooperation.

K. The interests of justice (mitigating factors).

VII. Relevant Factors for the Defendant to Consider as to Whether to Plea Bargain:

A. The actual guilt or innocence of the defendant.

B. The concessions offered by the prosecution.

C. The likelihood of conviction at trial.

D. The desire to reduce the sentence exposure.

E. The nature of the guilty plea (felony, misdemeanor, YO)

F. The allocution required by the court. (The defendant's willingness to admit guilt, inculpatory statements regarding co-defendants, etc.)

G. The consequences of a guilty plea. (The impact of probation parole, his employment, license, etc.)

H. The bail status of the defendant. (If defendant is in custody and is offered a plea of time served, he will likely take the plea.)

I. The publicity surrounding the case. (The defendant may plead guilty to avoid the embarrassment of trial.)

J. The remorse of the defendant.

K. The prosecutor's threat to file new charges. (Will the prosecutor file new charges if the defendant does not plead guilty?)

1. This may be unconstitutional. *Bordenkircher v. Hayes*, 434 US. 357, 98 S. Ct. 663, 54 L.Ed 2d 604 (1978)

L. SORA REGISTRATION

M. DSS REFERRAL

VIII. Advising the Defendant

A. Inform the client that you will give him advice, but he will decide whether to enter a plea of guilty or go to trial.

B. Make it clear that you are willing to take the case to trial.

N. IMMIGRATION CONSEQUENCES

establish restrictions on plea bargaining - e.g., drug cases.)

J. The need for the defendant's cooperation.

K. The interests of justice (mitigating factors).

VII. **Relevant Factors for the Defendant to Consider as to Whether to Plea Bargain:**

A. The actual guilt or innocence of the defendant.

B. The concessions offered by the prosecution.

C. The likelihood of conviction at trial.

D. The desire to reduce the sentence exposure.

E. The nature of the guilty plea (felony, misdemeanor, YO)

F. The allocution required by the court. (The defendant's willingness to admit guilt, inculpatory statements regarding co-defendants, etc.)

G. The consequences of a guilty plea. (The impact of probation parole, his employment, license, etc.)

H. The bail status of the defendant. (If defendant is in custody and is offered a plea of time served, he will likely take the plea.)

I. The publicity surrounding the case. (The defendant may plead guilty to avoid the embarrassment of trial.)

J. The remorse of the defendant.

K. The prosecutor's threat to file new charges. (Will the prosecutor file new charges if the defendant does not plead guilty?)

1. This may be unconstitutional. *Bordenkircher v. Hayes,* 434 US.357, 98 S. Ct. 663, 54 L.Ed 2d 604 (1978)

L. SORA registration.

M. DSS referral.

N. Immigration consequences.

VIII. **Advising the Defendant**

A. Inform the client that you will give him advice, but he will decide whether to enter a plea of guilty or go to trial.

B. Make it clear that you are willing to take the case to trial.

C. Discuss the prosecution's case and all potential defenses at trial.

D. Explain the risks of going to trial and assess the probability of the result.

E. Convey all plea offers made by the prosecution.

F. Explain the obligation of both the prosecutor and the defendant under the proposed plea agreement.

G. Explain the significance of guilty plea: to wit, same as a conviction after trial.

H. Inform the defendant of the possible sentences under the proposed plea agreement.

I. Inform the defendant of all the consequences and potential consequences of his plea of guilty.

J. Explain that no one can force the defendant to plead guilty and that there can be no guilty plea without his informed consent.

K. Explain to the defendant the constitutional rights he waives by pleading guilty: to wit, right to confront witnesses against him, right to have jury decide innocence or guilt, right to remain silent.

L. Explain the plea-taking process.

M. Discuss the allocution required by the defendant prior to the court's acceptance of his guilty plea.

IX. Hints for the Conferencing Attorney

A. Be flexible and willing to negotiate. Before the conference, try to establish, in your mind, your opening offer and your bottom-line plea.

B. Know the "going-rate."

1. It is imperative that you know the "standard" offer for a routine case before entering the plea negotiations with the assistant district attorney. You must convey any offer by the ADA, and advise your client that he can plead guilty to the charge being offered or go to trial. Don't forget; it is the client's decision, not yours.

3. The importance of knowing the "going rate" is two-fold. Absent any special circumstances, you can promptly and efficiently dispose of your client's case without expending time and your client's money attempting to negotiate a pie-in-the-sky deal that will not materialize. In addition, knowing the "going rate" is helpful when you feel you have a case with special circumstances. You know the bench mark and can use it as a basis for obtaining a more favorable disposition.

C. Negotiations and plea-bargaining sometimes can go on during the course of several conferences. Keep good notes of who said what and when.

D. Always discuss completely, with your client, the offer that was made and your position vis-a-vis that offer.

E. Be aware that there is great disparity among the various judges in this county as to the level of their participation in plea negotiations. One extreme is a judge who refuses to participate and refuses to give a plea commitment. The opposite extreme is a judge who will put pressure on one or the other of the parties to bring about a negotiated plea.

F. Once you have reached an agreement with the ADA, attempt to conference the case with the judge as well. In a felony or misdemeanor where incarceration is a serious possibility, try to get the court's approval of the proposed plea. Many of the judges will give your client certain "promises" as to the sentence if you ask (e.g., 0-60 days incarceration, or I will follow the probation report, or fine only - no jail.)

G. Be aware of the various alternatives to incarceration that may apply to your client, i.e.:

1. T.A.S.C.
This a treatment alternative to jail in DWI cases. The defendant/patient is required to seek treatment, sometimes residential, and follow-up treatment for a year. This is usually for repeat DWI offenders.

2. Stop/Lift
Stop/Lift is an alternative to jail for shoplifters charged with Petit Larceny. It is usually applied to first time offenders and consists of a one-day seminar.

3. Community Service
Your client is assigned to do a community project, usually on weekends. The numbers of hours is predetermined and fixed at sentencing.

4. Restitution
Monetary reimbursement to the crime victim.

5. Community Mediation
Community mediation diverts cases out of the court system for resolution through mediation. Neighborhood and landlord-tenant disputes can be handled and a signed agreement is usually executed by the parties. No family violence cases are handled.

6. Anger management/domestic violence counseling.

H. Also be aware of the interplay of civil forfeitures with criminal sentencing.

These are separate but parallel procedures and, in actual fact, do affect each other

Plea-Taking Process

A. A guilty plea is generally taken in open court in the presence of the trial judge, the assistant district attorney, the defense counsel, and the defendant.

B. Prior to accepting the defendant's plea of guilty, the court must advise the defendant of his rights and the consequences of his plea. In this way, the defendant is aware of the rights he has and can make an intelligent decision to relinquish them and enter a plea of guilty.

1. It is essential that the defendant know his rights if he is to make a knowing, intelligent, and voluntary waiver that is a prerequisite for a valid plea of guilty. *Henderson v. Morgan*, 426 U.S. 637, 96 S.CT. 2253, 49 LEd. 2d 108 (1976)

C. The court must determine that the defendant is voluntarily entering his plea of guilty, prior to accepting it.

D. The court must set forth in the record the plea agreement that has been reached prior to acceptance of the guilty plea.

E. The ADA will usually initiate the proceeding. If there is to be a reduction in the existing charge or if the defendant is pleading guilty to one or more charges in satisfaction of other charges, the ADA will usually begin by apprizing the judge of the proposed disposition. If the defendant is pleading guilty "as charged," then the ADA will generally remain silent waiting for the defense attorney to speak.

F. Once the ADA has apprized the court of the proposed disposition, the defense attorney will, on the behalf of his client, withdraw the defendant's prior plea of not guilty and enter a plea of guilty to the negotiated charge. If there has been an amendment or reduction of defects in the oral amendment or reduction of the charges, the defense attorney will also waive any defects in the oral amendment of the charge and further waive any requirements for the preparation of a more formal instrument. This is the procedure in the First District Court when a misdemeanor is being reduced and has been charged by way of a misdemeanor complaint or prosecutor's information.

    1. Where the defendant is pleading guilty to a felony, Supreme Court Information ("SCI"), he will first be required to waive his right to be prosecuted by way of grand jury indictment and this is done in writing.

    2. In the case of other felonies, the defendant will be pleading guilty to a count(s) of an indictment.

G. The court will next ask to inquire of the defendant and have him sworn. Some judges will ask defense counsel if the defendant has been advised of the implication of testifying falsely. Whether the judge requires or not, defense counsel should insure that the defendant knows the consequences of lying or misleading the court. In some instances, particularly DWI cases, the defendant will already have been placed under oath and questioned by the ADA with regard to prior convictions or prior ACOD.

H. The judge will then advise the defendant that by pleading guilty he waives his constitutional rights of confrontation, self-incrimination, and trial by jury. The judge will also insure that the defendant is pleading guilty of his

own free will and is pleading guilty because he is in fact guilty.

I. The judge will also require an allocation by the defendant. This is a factual statement or admission by the defendant that he committed those acts that constitute the elements of the crime. Some judges will lead the defendant eliciting yes/no answers from him. Other judges will simply ask the defendant what happened. It is important for the defense attorney to insure that the defendant is prepared to allocate properly in this event. The words said by the defendant must be consistent with guilt. It can be both embarrassing and disastrous to the plea if the defendant attempts to hedge or says that he did not commit certain acts that are elements of the crime. An example of this is that the defendant must state that prior alcohol consumption affected his ability to operate the motor vehicle he was driving if he intends to plead guilty to Driving While Impaired. It is not uncommon to observe a defendant acknowledge the alcohol consumption and then deny it affected his ability to drive.

J. The judge, after satisfying himself of the voluntariness of the plea and placing any promises on the record, will ask the defendant, "How do you plead, guilty or not guilty?"

K. In a felony case and in some misdemeanor parts, the clerk will ask the defendant to further allocate to a series of questions and the defense attorney writes the defendant's yes/no responses on a form. The defendant and his attorney subsequently sign this document.

L. If the defendant has pled guilty to a crime (felony or misdemeanor), sentencing will be set for another date and a date will be scheduled with the Probation Department for a pre-sentence report. In the First District Court, the Probation Department is located on the third floor. If the defendant has pled guilty to a violation, he will normally be sentenced immediately.

M. **Withdrawal of Guilty Plea** – When the defense makes a timely application to withdraw a guilty plea, it has the burden to persuade the court that such is necessary to prevent a manifest injustice. (ABA Standards Section 2.1)

1. The application must set forth the grounds that will enable the court to reach this conclusion.

2. The defendant may move for withdrawal of his guilty plea without alleging his innocence.

N. *Santobello v. New York*, 404 U.S. 257 (1971). The Supreme Court ruled

> that promises made as part of a plea agreement must be kept, and, if they are not, the court has the power to permit a withdrawal of the plea or re-sentence, according to the agreed-upon conditions. *Machibroada v. Untied States*, 368 U.S. 487 (1961).

The author acknowledges *Criminal Law Desk Book* by Waxner as the source for some of the material contained in this outline.

VI. SENTENCING

I. Violations

A. Where the defendant is charged with a violation, it is common practice for sentencing to occur immediately after the plea is taken. Defendant is entitled, however, to a delay between the plea and sentencing.

II. Felonies; Most Misdemeanors

A. The judge will generally order a pre-sentence report from the probation department (CPL Section 390.30) at the time the plea is entered.

B. The defense counsel has a right (if not an obligation) to review the report before sentencing. (CPL Section 390.50 [2])

C. Sentencing usually is held four to six weeks after defendant has entered a plea of guilty.

III. Preparing for Sentencing

A. For many defendants, it is the sentence rather than the crime he pled to or was convicted of which measures the success or failure of his case. Nevertheless, the sentencing phase of a case is often given less attention by the defense attorney and is not as well prepared as the innocence/guilt phase.

B. Preparation for sentencing begins at the time plea negotiations are taking place. Try to get a commitment from the judge as to what sentence he sill impose. Also the ADA may make a commitment as to what he or she will recommend.

C. Immediately after the defendant has entered the guilty plea, the judge will direct that he report to probation.

1. Inform the defendant of the purpose of the pre-sentence report and prepare him to make a positive impression on the probation department interviewer. He should:
   a. be candid
   b. be remorseful
   c. accept responsibility for the offense
   d. identify positive things about his background and point out

any other extenuating or mitigating circumstance.

2. Insure the defendant understands that the probation report will contain a recommendation as to sentencing and that in most cases the judge will follow this recommendation.

D. Obtain letters or affidavits from schools, employers, or counselors, etc. where appropriate. Consider preparing a pre-sentence memorandum. (CPL Section 390.40)

E. Review the pre-sentence report as early as possible.

1. If there are any errors or omissions that adversely affect the defendant, bring them to the attention of the court and have the report amended.

2. If defense counsel thinks the pre-sentence report is biased, consider asking for a pre-sentence hearing. (CPL Section 400.10 [3])

F. Review the possible "permissible" sentences. Watch for a sentence in excess or different from that authorized by statute.

G. Have a pre-sentence conference with this judge. (CPL Section 400.10) It is a good opportunity to discuss the probation report with the judge. This may be defense counsel's best opportunity to convince the judge of reasons to treat the defendant leniently or impose an alternative sentence such as community service. The judge may tell you what sentence he intends to impose at this conference.

IV. Formal Sentencing

A. Prepare the defendant.

1. If the sentence is going to be adverse (e.g., jail), prepare the defendant emotionally.

2. Defendant's appearance should be neat and clean. The idea is to show respect for the court. The judge sees your client for a short period of time. The "first impression" is important.

3. Defendant should address the judge in a respectful manner. He has an absolute right to be heard on sentencing, but unless the judge finds the defendant to be contrite and genuinely remorseful, anything said by the defendant may do more harm than good. Even

when genuine, the defendant may not project himself well. Any defense attorney considering having the defendant make anything more than a cursory statement of contrition must carefully evaluate his client's ability to effectively communicate with the judge and his ability to remain composed if the judge reacts adversely to defendant's statement. At his best, the defendant can be a persuasive spokesman in his own behalf.

B. Defense counsel should argue vigorously for the defendant, but be reasonable, realistic, and resourceful. Emphasize the defendant's good points. Particularly in a case involving a guilty plea, defense counsel should demonstrate vigilance for his client by making a forceful sentencing argument.

C. Seek applicable stays.

1. Twenty-day stay of suspension of driving privilege in DWI cases.

2. Stays of execution of sentence pending appeal. (CPL Section 460.50)

D. If some charges are being dismissed in satisfaction of defendant's guilty plea, insure these charges are dismissed in open court.

E. Advise the defendant of his right to appeal.

V. Productivity of Sentencing Preparations

Every attorney has spent hours preparing for a trial that suddenly collapsed in a plea bargain. Time spent in preparation for sentencing, however, is almost always productive since the majority of cases result in some type of sentencing.

SENTENCING OPTION

Article 55: Classification and Designation of Offenses.

Offenses are defined by the sentence and the term of the sentence.

Felonies

Misdemeanors

Violations

Article 60: Disposition of offenses.

A. Unconditional discharge PL 60.01 (3)(d)

B. Conditional discharge PL 60.01 (2)(a)

C. Probation PL Article 65

Revocable sentence

May include period of incarceration in local facility

D. Indeterminate sentence of imprisonment PLSection 70

Authorized for certain felonies

Minimum period not less than 1 year

Maximum period not less than 3 years

Court must fix both minimum period and maximum period of imprisonment

Incarceration in state correctional facility

E. Determinate sentence of imprisonment PL Article 70

Sentence of a fixed number of years or any authorized portion

Shortest sentence is one year

Sentence includes an additional period of past release supervision – no parole provision

Person usually serves 6/7 of term – drug felony may receive additional merit time allowances

F. Definite sentence of imprisonment PL Section 70.00(4) and 70.15

Served in local correctional facility

Longest authorized term is one (1) year

G. Fines – PL Section 60.01(3)(b) and 60.05(7) and Penal Law Article 80

Court imposes fixed amount to be paid by a certain date

H. Restitution – PL Section 60.27 and 65.10(2)(g)

I. Mandatory Surcharge

May be waived if defendant makes restitution payment

J. Fees – DNA and Sex Offender Registration fee

K. Order of Protection – Permanent CPL Section 530.12 and 530.13

COLLATERAL CONSEQUENCES OF PLEA AND SENTENCE

A. Sex Offender Registration Act: Article 168, New York State Correction Law

Includes felonies and misdemeanors

List of offenses attached

Risk Level One: least serious

Risk Level Two:

Risk Level Three: most serious

B. Social Services Law Sections 422 and 424-a

New York State Central Register of individuals who are subject to an "indicated" report of suspected child abuse in connection with minor children

Caveat: Plea of guilty to Endangering Welfare of a Child Penal Law Section

C. Impact of plea if defendant has license from New York State Education Department or Department of State

CRIMINAL PRACTICE

SELECTED FORMS

Criminal Practice
Selected Forms

(not DWI)

Sample

STATE OF NEW YORK
DISTRICT COURT : COUNTY OF **KEYBOARD()**
----------X
THE PEOPLE OF THE STATE OF NEW YORK

DEMAND TO PRODUCE

-against-

Docket No. **KEYBOARD()**

KEYBOARD(),

Defendant.
----------X

PLEASE TAKE NOTICE that the defendant, **KEYBOARD()**, hereby demands that the District Attorney of **KEYBOARD()** County, pursuant to Criminal Procedure Law §240.20, disclose and make available for inspection, photographing, copying or testing, the following property:

1. Any written, recorded or oral statement of the defendant and of any co-defendant made to a public servant engaged in law enforcement activity or to a person acting under his direction or in cooperation with him, including any statements made by any co-defendant upon his change of plea.

2. Any transcript of testimony relating to the criminal proceeding given to the Grand Jury by the Defendant or a co-defendant.

3. Any written report or document concerning a physical or mental examination or scientific test or experiment relating to this criminal proceeding made by, or at the request of, or direction of, a public servant engaged in law enforcement, or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the People intend to introduce at trial.

4. Any photograph or drawing relating to the criminal proceedings made by a public servant engaged in law enforcement activity, or which was made by a person

whom the prosecutor intends to call as a witness at trial, or which the People intend to introduce at trial, including but not limited to:

a. Crime scene photographs and drawings.

b. Any arrest photo of the defendant.

c. Photographs of any lineup involving the pending case.

d. Any photographs exhibited to the witnesses, including that of the defendant and all other persons involved in any photo identification proceedings, whether or not an identification was made by a witness.

e. Any composite sketch or drawing attempting to depict a perpetrator of the crimes alleged herein.

f. Photographs of any property involved in the pending case including property alleged to be stolen or property seized from the defendant or the co-defendant.

g. Photographs of any witness or alleged victim showing the physical condition of that person.

5. Any property obtained from the defendant or a co-defendant

6. Any tapes or other electronic recordings which the District Attorney intends to introduce at trial, irrespective of whether such recording was made during the course of the criminal transaction.

7. Anything required to be disclosed prior to trial, to the defendant by the prosecutor, pursuant to the Constitution of this state or of the United States.

8. The exact date, time and place of the offense charged and of the defendant's arrest.

9. Any official Police Department form signed by the defendant, or prepared from information provided by the defendant, including but not limited to:

a. Physical Condition of Defendant Questionnaire;

b. The disclosure of any agreements between the District Attorney and any witness in exchange for his testimony at the trial of the in**KEYBOARD()** herein (See People v. Cwikla, 46 N.Y.2d 434).

13. Copies of the defendant's New York State and Federal criminal records, if any, indicating all past arrests of the defendant and dispositions thereof; also, all addresses and aliases, if any, used or given by the defendant in connection with such arrests.

14. To examine and be provided with all writings and memoranda memorializing or referring to any identification process including, but not limited to, lineups, photo lineups, and showups (including photographs).

15. To permit the defendant and h**KEYBOARD()** attorney, and an expert of the defendant's choosing, to physically examine and test all property which the District Attorney intends to produce at the trial of this in**KEYBOARD()** including, but not limited to, **KEYBOARD()**.

Dated: Commack, New York
DATE

Yours, etc.

STEPHEN KUNKEN, ESQ.
Attorney for Defendant, **KEYBOARD()**
6165 Jericho Turnpike
Commack, New York 11725
(516) 462-5950

To: Nassau County District Attorney
District Court Bureau
99 Main Street
Hempstead, New York 11550
Attn.: A.D.A., Part **KEYBOARD()**

COUNTY COURT: SUFFOLK COUNTY

----------X

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-against-

_____,

Defendant

DEMAND FOR DISCOVERY AND INSPECTION

Docket No. _____

Assigned Judge:
Hon. _____, Part ____

----------X

PLEASE TAKE NOTICE, that, the defendant, through his/her undersigned counsel, pursuant to Section 240.20 of the Criminal Procedure Law, demand that the prosecutor shall disclose to the defendant and make available for inspection, photographing, copying or testing, the following property for the above docket number:

a) Any written, recorded or oral statement of the defendant, and of any and all co-defendants to be tried jointly, made, other than in the course of the criminal transaction, to a public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him.

b) Any transcript of testimony relating to the criminal action or proceeding pending against the defendant, given by the defendant, or by any and all co-defendants to be tried jointly, before any grand jury.

c) Any written report or document, or portion thereof, concerning a physical or mental examination, or scientific test or experiment, relating to the criminal action or proceeding which was made by, or at the request or direction of a public servant engaged in law enforcement activity, or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the people intend to introduce at trial.

d) Any photograph or drawing relating to the criminal action or proceeding which was made or completed by a public servant engaged in law enforcement activity, or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the people intend to introduce at trial.

e) Any photograph, photocopy or other reproduction made by or at the direction of a police officer, peace officer or prosecutor of any property prior to its release pursuant to the provisions of section 450.10 of the penal law, irrespective of whether the people intend to introduce at trial the property or the photograph, photocopy or other reproduction.

6

f) Any other property obtained from the defendant, or a co-defendant to be tried jointly.

g) Any tapes or other electronic recordings which the prosecutor intends to introduce at trial, irrespective of whether such recording was made during the course of the criminal transaction.

h) Anything required to be disclosed, prior to trial, to the defendant by the prosecutor, pursuant to the constitution of this state or of the United States.

i) Anything required to be disclosed that may be considered to be favorable to the defendant pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1184 (1963) and its progeny, including, but not limited to, impeachment information of a witness, and or police officer, pursuant to *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972) and *People v. Baxley*, 84 N.Y.2d 208, 616 N.Y.S.2d 7 (1994).

j) The approximate date, time and place of the offense charged and of defendant's arrest.

k) All supporting statements, depositions and exhibits to the informations.

Thank you for your cooperation and assistance.

Dated: Islandia, New York
July 22, 2004

Yours, etc.

BRACKEN, MARGOLIN & GOUVIS, LLP

By: _____
William T. Ferris, III
Attorney for Defendant
One Suffolk Square, Suite 300
Islandia, NY 11749
(631) 234-8585

TO SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE
Attn: District Court Bureau
John P. Cohalan, Jr. Court Complex
400 Carleton Avenue
P. O. Box 9082
Central Islip, NY 11722-9082

STATE OF NEW YORK
KEYBOARD() COURT : COUNTY OF KEYBOARD()
----------X
PEOPLE OF THE STATE OF NEW YORK,

DEMAND TO PRODUCE

-against-

Docket No.: KEYBOARD()

KEYBOARD(),

Defendant.
----------X

PLEASE TAKE NOTICE that the defendant hereby demands that the District Attorney of KEYBOARD() County, pursuant to Criminal Procedure Law § 240.20, disclose and make available for inspection, photographing, copying or testing, the following property:

1. Any and all statements, declarations or recordings, whether written or oral, by the defendant and by any co-defendant made to a public servant engaged in law enforcement activity or a person acting under his direction or in cooperation with him, or to any other persons. If any such statements were oral, set forth the content, whether inculpatory or exculpatory, and the location where each statement was made. If any such statements were committed to writing by law enforcement officers, whether signed or unsigned, provide defense counsel with copies of the police reports, memo book entries, and other notes and memoranda which refer to such statements.

2. Any official Police Department form signed by the defendant, or prepared from information provided by the defendant, including but not limited to:

a. Physical Condition of Defendant Questionnaire;

b. Arrest card containing pedigree and other personal information from the Defendant;

c. Receipt for personal property possessed by the Defendant at the time of hKEYBOARD() arrest.

f. Photographs of any property involved in the pending case including property alleged to be stolen or property seized from the defendant or the co-defendant.

g. Photographs of any witness or alleged victim showing the physical condition of that person.

6. Names of police officials or citizens in the company of the defendant within one hour after his arrest who would have been in a position to observe his gait, hear his speech, see his mode of dress or generally observe his actions during that time.

7. Names of anyone who read the defendant his Miranda rights, including time(s) and place(s).

8. The time and place where the arresting officers gave the defendant an opportunity to make a telephone call after hKEYBOARD() arrest, including the person to whom such call was made and the purpose of the call. (See, People v. Gursey, 22 N.Y.2d 224).

9. Any audio or video tapes, or any other electronic recordings, which the District Attorney intends to introduce at trial, including the name of the person who recorded such tape(s).

10. Any and all reports, papers and forms of the KEYBOARD() County Police Department made in connection with the investigation of this case.

11. Anything required to be disclosed prior to trial to the defendant by the District Attorney, pursuant to the Constitution of New York State or of the United States including, but not limited to:

a. All exculpatory information of whatsoever form, source or nature which tends to exculpate the defendant either through an indication of h

16. If a machine was used to determine defendant's blood alcohol content, describe or supply the following, pursuant to CPL § 240.20(1)(k):

(a) Type of machine used.

(b) Manufacturer of machine and the date of manufacture.

(c) Serial number of the machine used.

(d) Location of the machine used.

(e) Date of purchase by department or agency making test.

(f) Number of prior tests made on the machine.

(g) Maintenance log on the machine for the last two years up to and including KEYBOARD().

(h) All repairs on the machine in the last two years up to and including KEYBOARD().

(i) All certifications of calibrations on the machine in the last two years up to and including KEYBOARD().

17. With respect to the person who administered the test to determine defendant's blood alcohol content, describe or identify the following:

(a) Name of person administering test(s).

(b) Department or agency by whom such person is employed.

(c) Date the person administering the test was originally certified by the New York State Department of Health.

(d) Date of his/her latest certification (see, CPL § 240.20(1)(k).

18. If a breath test was administered to the defendant, please describe or identify the following additional items:

(a) The sample of breath drawn from the defendant that has not been subjected to analysis, if such sample exists.

(b) Ampoule lot number.

(c) Proof of certification of the ampoule lot.

(d) Breathalyzer/Intoxilyzer ampoule test record.

20. Whether the defendant, at any time, indicated a desire to take any other chemical test to prove the alcohol content of his blood (see, VTL § 1194-4(6)(b) and, if so:

(a) To whom was the statement made.

(b) What additional test was indicated.

(c) Who did the defendant indicate KEYBOARD()he wished to administer the test.

(d) Was the defendant afforded that opportunity?

(e) With what result?

21. The names, shield numbers and commands of all law enforcement officials present at the location where the defendant performed any "field" or performance test and/or the giving of any Breathalyzer/Intoxilyzer test, and all written reports containing the results of said "field" tests.

22. State whether there were any eyewitnesses to the incident that are presently known to the Police Department or to the District Attorney's office. If so, set forth the names, addresses and dates of birth of all such persons.

23. Copies of the defendant's New York State and Federal criminal records, if any, indicating all past arrests of the defendant and dispositions thereof; also, all addresses and aliases, if any, used or given by the defendant in connection with such arrests.

The above demand is made pursuant to Brady v. Maryland (373 U.S.83); People v. Rosario (9 N.Y.2d 286), People v. Ranghelle (69 N.Y.2d 56). See also, People v. Jones (70 N.Y.2d 547) and CPL § 240.20.

PLEASE TAKE FURTHER NOTICE that the failure to comply with the within demand may result in preclusion of such evidence at trial. People v. Corley (124

Sample
(

General
(not DWI)

STATE OF NEW YORK
KEYBOARD() COURT : COUNTY OF KEYBOARD()
----------X

THE PEOPLE OF THE STATE OF NEW YORK

NOTICE OF
OMNIBUS MOTION

-against-

KEYBOARD()

KEYBOARD(),

Defendant(s).
----------X

S I R S :

PLEASE TAKE NOTICE that upon the annexed affirmation of STEPHEN KUNKEN, ESQ., affirmed the KEYBOARD() day of KEYBOARD(), 199KEYBOARD(), and upon the information herein, and upon all the proceedings had herein, the undersigned will move this Court at a KEYBOARD() Term, Part KEYBOARD(), before the presiding judge, to be held in and for the County of KEYBOARD() at the KEYBOARD() Court located at KEYBOARD() New York, on the KEYBOARD() day of KEYBOARD(), 1998, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an Order allowing the defendant the following relief:

A. Directing the District Attorney of KEYBOARD() County to file a Bill of Particulars in the above-entitled action, pursuant to § 200.95 of the CPL, as to the following items:

(COPY FROM BOP^O)

B. An order directing the District Attorney of the County of KEYBOARD(), pursuant to Article 240 of the CPL, to disclose to the defendant and make available for inspection, photographing, copying or testing the following property:

(COPY FROM DEMANDINSERT()

C. An Order, pursuant to Article 710 of the Criminal Procedure Law,

conviction or prior criminal acts if the defendant takes the stand in her own behalf during the trial of the information herein; or, in the alternative, for a pre-trial hearing to determine the extent to which the District Attorney would be allowed to cross-examine the defendant as to any prior criminal, immoral or vicious acts.

G. (a) For an Order compelling the People to disclose to the Defendant details of any electronic eavesdropping or surveillance including any and all videotapes, voice records, audio tapes, mechanical or electronic recordings and any and all logs, recordings, memoranda, letters and airtels of any videotaping, wiretapping, bugging, electronic or other similar surveillance which relates to the subject lawsuit and if such surveillance has, in fact, taken place, the defendant requests a pre-trial hearing to suppress such evidence.

(b) In the alternative, for a pre-trial hearing to determine the circumstances surrounding the obtaining of any videotape surveillance of the defendant herein and either the preservation or destruction of same.

(c) In the event of the destruction of videotaped surveillance of the defendant during the activity which forms the basis of the charges alleged herein, for an Order dismissing the information upon the grounds that the People and/or its servants, agents and/or employees have failed to preserve evidence favorable to the defendant.

H. An Order pursuant to CPL § 100.15 and § 100.40, dismissing the accusatory instrument herein upon the grounds that it is legally insufficient and defective as a matter of law.

I. For such other and further relief as to this Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE that you are hereby required to serve upon the undersigned at least five (5) days in advance of the return date of this application, all affidavits and/or other papers to be read or submitted in opposition thereto.

Dated: Commack, New York

STATE OF NEW YORK
KEYBOARD() COURT : COUNTY OF KEYBOARD()
----------X

THE PEOPLE OF THE STATE OF NEW YORK

- against -

AFFIRMATION

KEYBOARD()

KEYBOARD(),

Defendant.
----------X

STATE OF NEW YORK)
) ss.:
COUNTY OF SUFFOLK)

STEPHEN KUNKEN, being an attorney at law, duly licensed to practice in the State of New York, affirms the following to be true under penalty of perjury:

1. Your affirmant's law firm was retained to represent the defendant, KEYBOARD(), and I am submitting this affirmation in support of the instant Omnibus application.

2. The defendant is charged under Docket No. KEYBOARD() with KEYBOARD() allegedly occurring on KEYBOARD(), at KEYBOARD(). It is alleged that KEYBOARD(). These allegations are made upon information and belief, the source of information being conversations with the defendant as well as other investigation of the case.

3. The defendant was arraigned on the information on or about KEYBOARD(), and entered a plea of KEYBOARD() to the information.

A. Your affirmant believes that in order to properly be prepared to meet the

of the information herein is proper. As the Court said in People v. Barnes, 74 Misc.2d 743 at 744:

> Permitting pre-trial discovery of potential prosecution witnesses will enhance the possibility of satisfactory pre-trial dispositions in that counsel will be in a better position to investigate his case and advise his client with regard to the possibilities of success at trial. In addition, pre-trial disclosure of the names of witnesses will enable counsel to better prepare for trial, avoid undue surprises, adequately cross-examine witnesses, and avoid unnecessary delays caused by inadequate preparation.

In a decision precipitated by the defendant's request for the names and addresses of all prosecution witnesses, the County Court of Westchester County analyzed the history of the criminal law in this area, particularly the scope of the new discovery provisions of the CPL, the broader Bill of Particulars section contained at CPL § 200.95, and the Legislative intent with respect to the exchange of information at the pre-trial stage. As Judge Rosato stated, the new discovery provisions were intended to "amplify" disclosure and to curtail the "gamesmanship aspect" of the adversarial, truth-seeking process. Judge Rosato quoted the New York State Court of Appeals in stating that:

> These changes evince a legislative determination that the trial of a criminal charge should not be a sporting event where each side remains ignorant of facts in the hands of the adversary until events unfold at trial. Broader pretrial discovery enables the defendant to make a more informed plea decision, minimizes the tactical and often unfair advantage to one side, and increases to some degree the opportunity for an accurate determination of guilt or innocence. People v. Copicotto, 50 N.Y.2d 222, at p. 226.

Following his analysis, Judge Rosato stated that "in an effort to comply

consent, without the display or issuance of a lawful search warrant nor arrest warrant and not incident to a lawful arrest made upon probable cause. Accordingly, it is submitted that, for all of the above reasons, the instant search and seizure was unlawful and in violation of the defendant's 4th and l4th Amendment rights under the U.S. Constitution and Article 1, Section 12 of the New York State Constitution.

D. Your affirmant likewise submits that any oral statements allegedly made by the defendant to KEYBOARD() should be suppressed because the defendant was not properly advised of her/his Miranda rights after being subjected to custodial interrogation and, further, that said statements were involuntarily made in violation of the defendant's rights as set forth in § 60.45 of the Criminal Procedure Law. The defendant submits that the same arguments set forth in letter "C" above with regard to the issue of KEYBOARD() and whether these activities constituted a violation of the defendant's constitutional rights require that a pre-trial hearing be held to determine the circumstances under which said statements were allegedly made.

E. Your affirmant respectfully requests an Order precluding the District Attorney from offering at trial evidence identifying the defendant as a person who committed the offense charged to be given by a witness who has previously identified the defendant, pursuant to CPL § 710.

That upon information and belief, the defendant contends that a police-arranged identification procedure was unduly suggestive in that on KEYBOARD(), at approximately KEYBOARD().m., after the defendant was in police custody, KEYBOARD()he was individually displayed by the police to the complainant, who allegedly made an identification based upon the suggestive display. Such identification procedure was unduly suggestive and violative of the defendant's constitutional rights. See, Stovall v. Denno, U.S. 293; People v. Ballott, 20 N.Y.2d 600; Neil v. Biggers, 409 U.S. 188.

F. That the Court of Appeals, in People v. Sandoval (34 N.Y.2d 371), stated

subsequently destroyed and whether said destruction was a deliberate attempt to cover up the defendant's false arrest in this case.

In the absence of the above-stated statutory requirements, it is clear that the accusatory instruments herein are fatally defective and must be dismissed.

H. Your affirmant submits that the information filed herein is legally insufficient on its face pursuant to appropriate sections of the Criminal Procedure Law. CPL § 100.15 contains the necessary elements which must be present in order for an accusatory instrument to be valid. Subdivision 2 states that:

> The accusatory part of each such instrument must designate the offense or offenses charged.

Subdivision 3 states that:

> The factual part of such instrument must contain a statement of the complainant alleging facts of an evidentiary nature supporting or intending to support the charges. Where more than one offense is charged, the factual part should consist of a single factual account applicable to all the counts of the accusatory part. The factual allegations may be based either upon personal knowledge of the complainant or upon information and belief. Nothing contained in this section, however, limits or affects the requirement, prescribed in Subdivision 1 of Section 100.40, that in order for an information or count thereof to be sufficient on its face, every element of the offense charged and the defendant's commission thereof must be reported by non-hearsay allegations of such information and/or any supporting depositions.

CPL § 100.40, Subdivision 1, states that:

> An information, or a count thereof, is suffi-

> In this case, as in Torres, there are no evidentiary allegations in the factual part of the complaint from which it may be determined what the individual defendants actually did.

See, People v. Torres, 141 Misc. 19. A copy of Judge Dolan's decision is attached hereto as Exhibit B.

Accordingly, the information herein must be dismissed since it does not outline what each of the individual defendants actually did.

WHEREFORE, your affirmant respectfully requests that this Omnibus motion be granted, together with such other and further relief as to this court may seem just and proper.

Dated: Commack, New York
DATE

STEPHEN KUNKEN

BRADY

22. Anything required to be disclosed that may be considered to be favorable to the Defendant pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1 184 (1963) and its progeny, including, but not limited to:

a. Impeachment information of a witness, and or police officer, pursuant to Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972) and People v. Baxley, 84 N.Y.2d 208, 616 N.Y.S.2d 7 (1994);

b. Any record of previous arrests or convictions or any other evidence or information demonstrating participation in dangerous, vicious, immoral or criminal behavior on the part of the victim, and/or any persons intended to be

{00069900.1} 7

called as witnesses by the prosecutor, including but not limited to "rap sheets", police personnel records, or other memoranda;

c. Any statements known to be false or erroneous made to a public servant engaged in law enforcement activity or a grand jury or a court by persons intended to be called as witnesses;

d. Any evidence, testimony, transcript, statement or information indicating that any prospective prosecution witness on any occasion gave false, misleading or contradictory information regarding the charge at bar or any related matters, to persons involved in law enforcement or to their agents or informers;

e. Any evidence, testimony, transcript, statement or information indicating that any prospective prosecution witness have given statements which are or may be contradictory to each other;

f. Any information indicating that any prospective prosecution witness has or had a history of mental or emotional disturbance;

g. Full disclosure of any consideration, promise of consideration, or expectation or consideration offered to any prospective prosecution witness, including but not limited to, leniency, favorable treatment, assistance with respect to any pending legal proceeding or any reward or other benefit whatsoever which will or could be realized by the witness as a result of the witness' testimony;

h. Any threats, express or implied, direct or indirect, made to any prosecution witness, including criminal prosecution or investigation, any change in the probationary, parole, or custodial status of the witness, or any other pending or potential legal disputes between the witness and the prosecution or over which the prosecution has a real, apparent, or perceived influence;

i. Complete information or each occasion when each witness who was or is an informer, accomplice, or co-conspirator has testified before any court or grand jury, including date, caption and indictment number of the case;

j. Any information to the effect that all or some of the evidence which may be utilized by the People at trial was illegally or improperly obtained or was obtained even partially as the result of the improper acquisition of some other evidence or information; and

k. All evidence in the possession, custody or control of the District Attorney or any police or any police agency, the existence of which is known to the District Attorney, which may be or may tend to be favorable or exculpatory to the Defendant, and which is or may be material to the issue of guilt or punishment.

{00069900.1}

COUNTY COURT : SUFFOLK COUNTY

.....X

THE PEOPLE OF THE STATE OF NEW YORK :

- against - :

:

Defendant :

.....X

Notice of prospective or pending Grand Jury proceeding pursuant to Section 190.50(5)a of the Criminal Procedure Law

PLEASE TAKE NOTICE that the offense charged against you in the felony complaint served upon you by the court herewith, together with other offenses not set forth therein, is the subject of a prospective Grand Jury proceeding.

YOU HAVE THE RIGHT TO TESTIFY BEFORE THE GRAND JURY WHICH WILL HEAR THE CHARGES AGAINST YOU. In order to exercise this right, you or your attorney MUST SERVE UPON THE DISTRICT ATTORNEY WRITTEN NOTICE OF YOUR INTENTION TO TESTIFY, and an address to which communications may be sent. If you do not serve written notice on the District Attorney of your intention to testify, you will not be notified of the date of the Grand Jury proceeding.

You may serve notice of your intention to testify before the Grand Jury by delivery to the following address:

OFFICE OF THE DISTRICT ATTORNEY
ATT: Case Advisory Bureau
8th Floor
John P. Cohalan Court Complex
400 Carleton Avenue
P.O. Box 9082
Central Islip, N.Y. 11722-9082

PLEASE TAKE FURTHER NOTICE that persons charged with a felony are afforded an opportunity (through counsel) to have a pre-indictment conference on/or before the date set for the felony examination. HOWEVER, a felony complaint case MAY be presented to the Grand Jury AT ANY TIME, even before the date set for the felony examination. THEREFORE, any person charged with a felony who wishes to appear before the Grand Jury must give the Notice described herein, even though a pre-indictment conference or felony examination is anticipated.

DA-266 (Rev. 11/92)

THOMAS J. SPOTA
District Attorney

19-0214.. 12/01cg

STEPHEN KUNKEN
ATTORNEY AT LAW

6165 JERICHO TURNPIKE
COMMACK, NEW YORK 11725

(631) 462-5950

February 14, 2003

Suffolk County District Attorney's Office
Criminal Courts Building
Center Drive South
Riverhead, New York 11901

Attention: Grand Jury Bureau

Office of the District Attorney
P.O. Box 9082
Central Islip, NY 11722-9082

Attention: A.D.A., Courtroom D35

Re: People v. Docket No.

Dear Sir/Madam:

Please be advised that my lawfirm has been retained to represent the above-named defendant with regard to the charge of criminal contempt first degree, allegedly occurring on February 12, 2003, in East Northport, Town of Huntington, County of Suffolk, State of New York.

I am hereby requesting, pursuant to CPL § 190.50, that you serve notice of the date, time and place when this matter will be presented to a Suffolk County Grand Jury so that my client can appear and testify in his own behalf under a waiver of immunity.

My client's next court appearance is **March 18, 2003, in Courtroom D35.**

Please feel free to contact me if you have any questions concerning this request, and thank you for your prompt attention and response.

Very truly yours,

Stephen Kunken

SK/ml

30

COUNTY COURT : COUNTY OF SUFFOLK

----------X

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

Defendant

----------X

NOTICE AND DEMAND
CASE NO.: I- -2002
NOTICE PURSUANT TO
CPL SECTION 710.30
DEMAND PURSUANT TO
CPL SECTION 250.20

SIR / MADAM:

PLEASE TAKE NOTICE that the People intend to offer at a trial of the above entitled action, statement(s) by and/or identification(s) of the defendant contained in or attached to the accusatory instrument or otherwise specified below (times approximate):

☐ Evidence of oral statement(s) made by the defendant to a public servant(s); the sum and substance of statement(s) is hereby set forth as follows and/or is contained within the accusatory instrument:

DATE: Time: Place:

Sum and Substance: _____

☐ ADDITIONAL statement(s) made by the defendant is/are outlined on page two of this form.

☐ Evidence of a video recording of the defendant's statement(s) to public servant(s) subsequent to his arrest. A copy of said recording has been provided.

DATE: Time: Place:

☐ Evidence of a written statement(s) made by the defendant to public servant(s); a copy of said written statement(s) is attached hereto and/or is attached to the accusatory instrument:

DATE: Time: Place:

☐ Testimony regarding an observation of the defendant at the time or place of the commission of the offense and/or upon some other occasion relevant to the case, such testimony to be given by a witness who has previously identified the defendant at an identification procedure. [The "No. of Witnesses" refers to number of witnesses making a positive identification]: The procedure utilized was:

☐Showup:	Date:	Place:	No. of Witnesses:
☐Photo Identification:	Date:	Place:	No. of Witnesses:
☐Lineup:	Date:	Place:	No. of Witnesses:
☐Other:	Date:	Place:	No. of Witnesses:

PLEASE TAKE FURTHER NOTICE that if the defendant intends to offer, for any purpose, whatever testimony that he, at the time of the commission of the crime charged, was at some place or places other than the scene of the crime and he intends to call witnesses in support of such defense, he must, within eight days of service of such demand, serve upon the People, and file a copy thereof with the Court, a "Notice of Alibi" reciting (a) the place or places where the defendant claims to have been at the time in question, and (b) the names, the residential addresses, the places of employment, and the addresses thereof of every such alibi witness upon whom he intends to rely.

DATED:
Central Islip, New York

Yours etc.,

THOMAS J. SPOTA
District Attorney
Suffolk County

ORI: NY 051033J
Order No: _____
NYSID #: _____
CJTN #: _____

AT A TERM OF THE DISTRICT COURT, COUNTY OF SUFFOLK, HELD AT THE COURTHOUSE LOCATED AT 400 CARLETON AVENUE, CENTRAL ISLIP, NEW YORK, 11722

ORDER OF PROTECTION
FAMILY OFFENSES CPL§530.12

Present: Honorable _____

☐ Youthful Offender *(check if applicable)*

PEOPLE OF THE STATE OF NEW YORK

Part _____ DOCKET No. _____

Charges _____

VS

_____ _____
DEFENDANT NAME DATE OF BIRTH

[Check box]: ☐ EX PARTE ☐ DEFENDANT PRESENT IN COURT

NOTICE: YOUR FAILURE TO OBEY THIS ORDER MAY SUBJECT YOU TO MANDATORY ARREST AND CRIMINAL PROSECUTION, WHICH MAY RESULT IN YOUR INCARCERATION FOR UP TO SEVEN YEARS FOR CONTEMPT OF COURT. IF THIS IS A TEMPORARY ORDER OF PROTECTION AND YOU FAIL TO APPEAR IN COURT WHEN YOU ARE REQUIRED TO DO SO, THIS ORDER MAY BE EXTENDED IN YOUR ABSENCE AND THEN CONTINUES IN EFFECT UNTIL A NEW DATE SET BY THE COURT.

THIS ORDER OF PROTECTION WILL REMAIN IN EFFECT EVEN IF THE PROTECTED PARTY HAS, OR CONSENTS TO HAVE, CONTACT OR COMMUNICATION WITH THE PARTY AGAINST WHOM THE ORDER IS ISSUED. THIS ORDER OF PROTECTION CAN ONLY BE MODIFIED OR TERMINATED BY THE COURT. THE PROTECTED PARTY CANNOT BE HELD TO VIOLATE THIS ORDER NOR BE ARRESTED FOR VIOLATING THIS ORDER.

☐ **TEMPORARY ORDER OF PROTECTION.** Whereas good cause has been shown for the issuance of a temporary order of protection [as a condition of ☐ recognizance ☐ release on bail ☐ adjournment in contemplation of dismissal].

☐ **ORDER OF PROTECTION.** Whereas defendant has been convicted of *[specify crime or violation]*: _____

And the Court having made a determination in accordance with §530.12 of the Criminal Procedure Law,

IT IS HEREBY ORDERED that the above-named defendant observe the following conditions of behavior: *[check applicable paragraphs and subparagraphs]*:

[01] ☐ Stay away from [A] ☐ *[name(s) of protected persons or witness(es)]* _____ and/or from the

[B] ☐ home of _____, [C] ☐ school of _____

[D] ☐ business of _____, [E] ☐ place of employment of _____,

[F] ☐ other *[specify]* _____

- ☐ except for contact, communication or access permitted by a subsequent order issued by a family or supreme court in a custody, visitation or child abuse or neglect proceeding.

[14] ☐ Refrain from communication or any other contact by mail, telephone, e-mail, voice-mail or other electronic or any other means with *[specify protected person(s)]*: _____

- ☐ except for contact, communication or access permitted by a subsequent order issued by a family or supreme court in a custody, visitation or child abuse or neglect proceeding.

[02] ☐ Refrain from assault, stalking, harassment, aggravated harassment, menacing, reckless endangerment, strangulation, criminal obstruction of breathing or circulation, disorderly conduct, criminal mischief, sexual abuse, sexual misconduct, forcible touching, intimidation, threats, identity theft, grand larceny, coercion or any criminal offense against [specify protected person(s), members of such person's family or household, or person(s) with custody of child(ren)] :

[15] ☐ Refrain from intentionally injuring or killing without justification the following companion animal(s) (pet(s)) [specify type(s) and, if available, name(s) _____

[11] ☐ Permit [specify individual] _____ to enter the residence at [specify] _____ during [specify date/time]: _____ with Suffolk Police or Sheriffs to remove personal belongings not in issue in litigation *[specify items]*: _____

[04] ☐ Refrain from *[indicate acts]*: _____ that create an unreasonable risk to the health, safety or welfare of *[specify child(ren)*, family or household member(s)] _____

[05] ☐ Permit [Specify individual(s)]: _____ entitled by a court order or separation or other written agreement, to visit with [specify child(ren)] _____ during the following periods of time [specify] _____, under the following terms and conditions [specify] : _____

[12] ☐ Surrender any and all handguns, pistols, revolvers, rifles, shotguns and other firearms owned or possessed, including, but not limited to, the following: _____ and do not obtain any further guns or other firearms. Such surrender shall take place immediately, but in no event later than [specify date/time]: _____ at the Nearest Police Precinct or to the Police Officer or Deputy Sheriff serving this order;

[ ] ☐ Promptly return or transfer the following identification documents [specify]: _____ to the party protected by this Order NOT LATER THAN [specify date]: _____ in the following manner [specify manner or mode

BOX(ES) of return or transfer _____

IF APPLICABLE ☐ Such documents shall be made available for use as evidence in this judicial proceeding.

☐ [only owned documents or documents in both parties' names only]: the following document(s) may be used as necessary for legitimate use by the defendant (specify _____

[09] ☐ Specify other conditions defendant must observe for the purposes of protection: _____

IT IS FURTHER ORDERED that the above-named Defendant's license to carry, possess, repair, sell or otherwise dispose of a firearm or firearms, if any, pursuant to Penal Law§400.00, is hereby [13A] ☐ suspended or [13B] ☐ revoked *(final order only)*, and/or [13C] ☐ the Defendant shall remain ineligible to receive a firearm license during the period of this order [Check all applicable boxes

IT IS FURTHER ORDERED that this order of protection shall remain in force until and including (specify date): _____

BUT IF YOU FAIL TO APPEAR IN COURT ON THIS DATE, THE ORDER MAY BE EXTENDED AND CONTINUE IN EFFECT UNTIL A NEW DATE SET BY THE COURT.

Dated: _____

☐ Defendant advised in Court of issuance and contents of Order.
☐ Order personally served on Defendant in Court

_____ (Defendant's signature)

_____ District Court Judge #

☐ Order served by other means [specify]: _____
☐ Warrant issued for Defendant
☐ ADDITIONAL SERVICE INFORMATION [specify] _____

(COURT SEAL)

The Criminal Procedure Law provides that presentation of a copy of this order of protection to any police officer or peace officer acting pursuant to his or her special duties shall authorize, and in some situations may require, such officer to arrest a defendant who is alleged to have violated its terms and to bring him or her before the Court to face penalties authorized by law. Federal law requires that this order must be honored and enforced by state and tribal courts, including courts of a state, the District of Columbia, a commonwealth, territory or possession of the United States, if the person against whom the order is sought is an intimate partner of the protected party and has been or will be afforded reasonable notice and opportunity to be heard in accordance with state law sufficient to protect that person's rights (18 U.S.C. §§2265, 2266).

It is a federal crime to:

- cross state lines to violate this or to stalk, harass or commit domestic violence against an intimate partner or family member;
- buy, possess or transfer a handgun, rifle, shotgun or other firearm or ammunition while this order remains in effect (Note: there is a limited exception for military or law enforcement officers but only while they are on duty); and
- buy, possess or transfer a handgun, rifle, shotgun or other firearm or ammunition after a conviction of domestic violence-related crime involving the use or attempted use of physical force or a deadly weapon against an intimate partner or family member, even after this Order has expired (18 U.S.C. §§922(g)(8), 922(g)(9); 2261, 2261A 2262)

New York State Sex Offender Registry
Registerable Offenses
March 22, 2012

Individuals convicted of one or more registerable offenses on or after January 21, 1996 must register as a sex offender with the Division of Criminal Justice Services. Additionally, any person convicted of a registerable offense who was incarcerated or under parole or probation supervision for the offense on January 21, 1996 is required to be registered. Below are three categories of offenses which require registration.

I. New York State Penal Law Sex Offenses

The following list contains the New York State Penal Law statutes for which registration as a sex offender is required. Individuals are required to register as a sex offender upon a **conviction** of a registerable offense or a **conviction for an attempt to commit** a registerable offense or a conviction of or a conviction for an attempt to commit a registerable offense as a hate crime or a crime of terrorism.

Penal Law Statute	Offense Class	Offense
120.70	E Felony[1]	luring a child
130.20	A Misdemeanor	sexual misconduct
130.25	E Felony	rape in the third degree
130.30	D Felony	rape in the second degree
130.35	B Felony	rape in the first degree
130.40	E Felony	criminal sexual act in the third degree
130.40	E Felony	sodomy in the third degree
130.45	D Felony	criminal sexual act in the second degree
130.45	D Felony	sodomy in the second degree
130.50	B Felony	criminal sexual act in the first degree
130.50	B Felony	sodomy in the first degree
130.52[2]	A Misdemeanor	forcible touching
130.53	E Felony	persistent sexual abuse
130.55[2]	B Misdemeanor	sexual abuse in the third degree
130.60	A Misdemeanor	sexual abuse in the second degree
130.65	D Felony	sexual abuse in the first degree
130.65-a	E Felony	aggravated sexual abuse in the fourth degree
130.66	D Felony	aggravated sexual abuse in the third degree
130.67	C Felony	aggravated sexual abuse in the second degree
130.70	B Felony	aggravated sexual abuse in the first degree

Penal Law Statute	Offense Class	Offense
130.75	B Felony	course of sexual conduct against a child in the first degree
130.80	D Felony	course of sexual conduct against a child in the second degree
130.90	D Felony	facilitating a sex offense with a controlled substance
130.95	A-II Felony	predatory sexual assault
130.96	A-II Felony	predatory sexual assault against a child
135.05[3]	A Misdemeanor	unlawful imprisonment in the second degree
135.10[3]	E Felony	unlawful imprisonment in the first degree
135.20[3]	B Felony	kidnapping in the second degree
135.25[3]	A-I Felony	kidnapping in the first degree
230.04[4]	A Misdemeanor	patronizing a prostitute in the third degree
230.05	E Felony	patronizing a prostitute in the second degree
230.06	D Felony	patronizing a prostitute in the first degree
230.30(2)	C Felony	promoting prostitution in the second degree
230.32	B Felony	promoting prostitution in the first degree
230.33	B Felony	compelling prostitution
230.34	B Felony	sex trafficking
235.22	D Felony	disseminating indecent material to minors in the first degree
250.45(2), (3) and (4)[5]	E Felony	unlawful surveillance in the second degree
250.50	D Felony	unlawful surveillance in the first degree
255.25	E Felony	Incest (committed prior to 11/1/06)
255.25	E Felony	Incest in the third degree
255.26	D Felony	Incest in the second degree
255.27	B Felony	Incest in the first degree
263.05	C Felony	use of a child in a sexual performance
263.10	D Felony	promoting an obscene sexual performance by a child
263.11	E Felony	possessing an obscene sexual performance by a child
263.15	D Felony	promoting a sexual performance by a child
263.16	E Felony	possessing a sexual performance by a child
263.30	B Felony	facilitating a sexual performance by a child with a controlled substance or alcohol

- [1] If the underlying offense is a class A or a class B felony, then the offense of luring a child shall be considered respectively, a class C felony or class D felony.

Penal Law Statute | Offense Class

- [2]A registerable offense only if the victim is less than eighteen years of age or where the defendant has a prior conviction for a sex offense, a sexually violent offense, forcible touching or sexual abuse in the third degree or an attempt thereof even if registration was not required for the prior conviction; regardless of when the prior conviction occurred.
- [3]A registerable offense only if the victim is less than seventeen years old and the offender is not the parent of the victim.
- [4]A registerable offense only if the person patronized is in fact less than seventeen years old.
- [5]A registerable offense unless the trial court finds that registration would be unduly harsh and inappropriate. The Attempt version of this offense is registerable for those offenders who committed the offense on or after Sept. 23, 2011, or who previously committed the offense but were still under sentence as of that date.

II. Convictions in Other Jurisdictions

Individuals convicted in another jurisdiction (federal, military, another state or country) who reside in New York State are required to register if:

(1) the individual is convicted of an offense equivalent to a New York State registerable sex offense; or

(2) the individual is convicted of a felony requiring registration in the conviction jurisdiction; or

(3) the individual is convicted of:

- *18 U.S.C.A. 2251 (*sexual exploitation of children)*;*
- *18 U.S.C.A. 2251A (*selling or buying of children)*;*
- *18 U.S.C.A. 2252* (certain activities relating to material involving the sexual exploitation of minors)*;*
- *18 U.S.C.A. 2252A (*certain activities relating to material constituting or containing child pornography)*;*
- *18 U.S.C.A. 2260* (production of sexually explicit depictions of a minor for importation into the United States)*;*
- *18 U.S.C.A. 2422(b) (coercion and enticement)*
- *18 U.S.C.A. 2423 (*transportation of minors)*; or*
- *18 U.S.C.A. 2425 (*use of interstate facilities to transmit information about a minor).

JURY SELECTION

I. Overview

A. Goals as defense attorney

1. Avoid conviction

2. Conviction of lesser charge

3. Verdict of acquittal

B. Verdict - unanimous

1. Misdemeanor = 6 person jury

2. Felony = 12 person jury

3. Ex. - court officer with lunch menu

C. Waiver of jury trial - CPL Sec. 320

1. Factors:

a. Type of case

b. Background of defendant

c. Pre-trial publicity/ notoriety

d. Complex legal issues

e. Who is the judge?

f. Issues for appeal

II. Qualifications of Jurors

A. Judiciary Law Sec. 509

1. Citizen of U.S.

2. Resident of the County

3. No felony conviction

4. Be able to understand and communicate in English

B. All statutory exemptions for jury service abolished

III. Conduct of Voir Dire - CPL Sec. 270.15

A. Court SHALL initiate examination- "SHALL put to members of the panel questions affecting their qualifications

1) Counsel can submit written questions

a) Purpose

1) Save on time limits

2) Deal with embarassing or sensitive topics

3) Emphasize ability to talk in private with court&attorneys

B. Court SHALL permit both parties to examine qualifications

1) Each party - fair opportunity to inquire

2) Scope - within sound discretion of trial court

C. Time Limits

1) People. v. Owen Steward, 17 NY2d 104 (2011) - 5 minute limit overturned - Court abused discretion

a) Relevant considerations -

1) Here- 4 Serious Class B felonies

2) # of jurors and alternates

3) 3 of peremptories

4) #, nature, and seriousness of charges

5) Any notoriety in the community

6) Special legal issues - i.e., justification, insanity

7) Unique concerns re: ID - of defendant, victim, witnesses
Or counsel

8) Extent to which court will question

2) 10 minutes upheld - People v. Moore, (1989) 155 AD2d725
547 NYS2d 685
Lv. Denied 75 NY2d 773
551 NYS2d 95

IV. Challenges for Cause - CPL Sec. 270.15

A. Factors - CPL Sec. 270.20

1. Doesn't have qualifications per Judiciary Law

2. No impartial state of mind

3. Related w/in 6th degree of consanquinity or affinity to the defendant, or to the complaining witness , or a prospective witness, or was a party adverse to any such person in a civil action, or has been a complainan or been accused by any such person in a criminal action ...

4. Was a witness at this preliminary examination or before grand jury or is to be a witness at the trial

5. Served on the grand jury which found the indictment...

V. Peremptory Challenges - CPL Sec. 270.25

A. Depends on seriousness of the offense

1. A felonies - 20 for regular jurors
2 for each alternate

2. B/C felonies - 15 for regular jurors
2 for each alternate

3. D/E felonies - 10 for regular jurors
2 for each alternate

4. A/B/unclassified misd - 3 for regular jurors
1 for alternate

B. If 2 or more defendants tried jointly - they are treated as a single party - Majority must agree on a peremptory, or else disallowed

VI. Batson v. Kentucky, (1986) 476 U.S. 79
90 L.Ed. 69
106 S.Ct. 1712

A. Neither side can exercise peremptory challenge to exclude a juror based on race, gender, or ethnic origin

B. The defendant need not be a member of the racial/ethnic group in order to raise issue

C. Procedure

1) Party raising the issue must do so promptly and on the record

2) Court to conduct inquiry of other party re: neutral reasons for exercise of peremptory

3) If court is satisfied by reason, will deny challenge to use of peremptory

4) If court finds permemptory was used in a discriminatory manner, shall deny use of peremptory challenge

CAVEAT - All peremptory challenges must be exhausted to preserve issue of improper ruling by court re: challenge for cause/peremptory

VII. Jury Selection

A. Educate jurors re: issues in the case

1. Defenses - Justification
Lack of ownership
Credibility of witnesses/police
ID
Mental health/insanity
Innocent presence
Value of property
Agency re: drug sale
Expert witness opinion

2. Nature of Charge - Sexual abuse
DWI
Assault
Drugs

B. Get information about jurors

1. Background

2. Family

3. Education

4. Connections with law enforcement/ criminal justice system

5. Victim of Crime

6. Witness

7. Accused of a Crime

8. Party to a lawsuit

9. Interested in the outcome of a case

10. Prior convictions

11. Employment

12. Hobbies/ Volunteer Activities

13. Other exposure to criminal justice system - reading, movies, TV, etc.

CAVEAT - Most important - get jurors to talk

C. Assurances

1. Presumption of innocence

2. Burden of proof

3. Attitude if in the minority

4. Follow court's instructions

5. Keep an open mind

6. No unfavorable inference if defendant does not testify

Respectfully Submitted,

Stephen Kunken