CIVIL PRACTICE

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CONTENTS

INTRODUCTION

During this *Survey* year,[1] New York's Court Of Appeals and appellate divisions published hundreds of decisions that impact virtually all practitioners. These cases have been "surveyed" in this article, meaning that the author has made an effort to alert practitioners and academicians about interesting commentary and/or noteworthy changes in New York State law and to provide basic detail about the changes in the context of the Civil Practice Law and Rules ("CPLR"). Whether by accident or design, the author did not endeavor to discuss every Court of Appeals or appellate division decision.

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1. July 1, 2013, through June 30, 2014.

I. LEGISLATIVE ENACTMENTS

A. CPLR 3101(d)(1)(iv)

Chapter 23 of the Laws of 2013, effective February 17, 2014, amended CPLR 3101(d)(1)(iv) to repeal the provision stating "[i]n an action for podiatric medical malpractice, a physician may be called as an expert witness at trial."[2]

B. CPLR 3103(a)

Chapter 205 of the Laws of 2013, effective July 31, 2013, amended CPLR 3103 to prevent abuse during discovery.[3] Under the new rule, a protective order may now be sought by the person "about whom" discovery is sought. CPLR 3103(a), as amended, provides:

> The court may at any time on its own initiative, or on motion of any party or of any person from whom *or about whom* discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.[4]

C. CPLR 4106

Chapter 204 of the Laws of 2013, effective July 31, 2013, amended CPLR 4106 to empower a court to empanel "one or more" alternate jurors, and to retain alternate jurors during deliberations in the event that an alternate is needed to replace a juror.[5] CPLR 4106, as amended, provides:

> One or more additional jurors, to be known as "alternate jurors", may be drawn upon the request of a party and consent of the court. Such alternate juror or jurors shall be drawn at the same time, from the same source, in the same manner, and have the same qualifications as regular jurors, and be subject to the same examinations and challenges. They shall be seated with, take the oath with, and be treated in the same manner as the regular jurors. After final submission of the case, the court may, in its discretion, retain such alternate juror or jurors to ensure availability if needed. At any time, before or after the final submission

2. Act of May 2, 2013, ch. 23, 2013 McKinney's Sess. Laws of N.Y. 814 (codified at N.Y. C.P.L.R. 3101 (McKinney 2014)).

3. *See* Act of July 31, 2013, ch. 205, 2013 McKinney's Sess. Laws of N.Y. 6554 (codified at N.Y. C.P.L.R. 3103).

4. N.Y. C.P.L.R. 3103.

5. *See* Act of July 31, 2013, ch. 204, 2013 McKinney's Sess. Laws of N.Y. 6553 (codified at N.Y. C.P.L.R. 4106 (McKinney 2014)).

> of the case, if a regular juror dies, or becomes ill, or is unable to perform the duties of a juror, the court may order that juror discharged and draw the name of an alternate, or retained alternate, if any, who shall replace the discharged juror, and be treated as if that juror had been selected as one of the regular jurors. Once deliberations have begun, the court may allow an alternate juror to participate in such deliberations only if a regular juror becomes unable to perform the duties of a juror.[6]

II. CASE LAW DEVELOPMENTS

A. Article 2: Limitations of Time

1. Cause of Action Accruing Without the State

CPLR 202 is New York's "borrowing" statute and provides that

> [a]n action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply."[7]

In *Norex Petroleum Ltd. v. Blavatnik*, the Court of Appeals analyzed CPLR 202 in the context of a tort action arising out of ownership of a Russian oil company.[8] The plaintiff in *Norex* was a resident of Alberta, Canada, who filed suit in 2002 against a number of defendants in the United States District Court for the Southern District of New York.[9] Allegations in the complaint included various claims under the Racketeer Influenced and Corrupt Organizations Act (RICO).[10] The defendants' first strike was to dismiss the action for forum non conveniens.[11] The motion was granted, as the Court concluded that the case strongly favored a Russian forum.[12] The plaintiff appealed and the Second Circuit reversed.[13]

Thereafter, the plaintiff amended its complaint to include claims for tortious conduct and unjust enrichment under Russian law.[14] The

6. N.Y. C.P.L.R. 4106.
7. N.Y. C.P.L.R. 202.
8. *See* 23 N.Y.3d 665, 668, 16 N.E.3d 561, 563, 992 N.Y.S.2d 503, 505 (2014).
9. *Id.* at 669, 16 N.E.3d at 564, 992 N.Y.S.2d at 506.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Norex Petroleum Ltd.*, 23 N.Y.3d at 669, 16 N.E.3d at 564, 992 N.Y.S.2d at 506.
14. *Id.*

defendants then moved to dismiss the action for lack of subject matter jurisdiction.[15] The district court granted the motion and the plaintiff again appealed to the Second Circuit.[16] This time, the district court was affirmed.[17]

In 2011, the plaintiff then filed suit in supreme court.[18] The defendants moved to dismiss, arguing that the action was untimely under CPLR 202 because the plaintiff was a resident of Alberta, Canada and, therefore, a two year statute of limitations was applicable.[19] Furthermore, the defendants argued that Alberta law does not have a savings statute.[20] The trial court concluded that the plaintiff's claims expired in 2004 and granted the defendants' motion.[21] The Appellate Division, First Department, affirmed.[22] Leave to appeal was granted.[23]

Before the Court of Appeals, the plaintiff argued that CPLR 205(a) permits it to file a new state court action because its initial action, in federal court, was timely under CPLR 202.[24] The defendants argued that the plaintiff may not benefit from CPLR 205(a) because the state court action was untimely under Alberta law.[25] Stated differently, the plaintiff would have the Court apply CPLR 202 one time (i.e., whether the initial federal action was timely in Alberta when filed in 2002); while the defendants would have the Court apply CPLR 202 twice (i.e., whether the initial action was timely in Alberta when filed in 2002 and whether the second action was timely in Alberta when filed in 2011).[26]

After a review of relevant prior precedent including *Global Financial Corp. v. Triarc Corp.*,[27] *Smith Barney Harris Upham & Co. v. Luckie*,[28] and *Besser v. Squibb & Sons, Inc.*,[29] the Court of Appeals concluded that the state court action was timely because once the plaintiff

15. *Id*.
16. *Id*. at 669-70, 16 N.E.3d at 564, 992 N.Y.S.2d at 506.
17. *Id*. at 670, 16 N.E.3d at 564, 992 N.Y.S.2d at 506.
18. *Norex Petroleum Ltd.*, 23 N.Y.3d at 671, 16 N.E.3d at 565, 992 N.Y.S.2d at 507.
19. *Id*.
20. *Id*.
21. *Id*. at 671, 16 N.E.3d at 565-66, 992 N.Y.S.2d at 507-08.
22. *Id*. at 672, 16 N.E.3d at 566, 992 N.Y.S.2d at 508.
23. *Norex Petroleum Ltd.*, 23 N.Y.3d at 672, 16 N.E.3d at 566, 992 N.Y.S.2d at 508.
24. *Id*.
25. *Id*. at 672-73, 16 N.E.3d at 566, 992 N.Y.S.2d at 508.
26. *Id*. at 673, 16 N.E.3d at 566, 992 N.Y.S.2d at 508.
27. 93 N.Y.2d 525, 526, 715 N.E.2d 482, 483, 693 N.Y.S.2d 479, 479 (1999).
28. 85 N.Y.2d 193, 197, 647 N.E.2d 1308, 1310, 623 N.Y.S.2d 800, 802 (1995).
29. 146 A.D.2d 107, 109-10, 539 N.Y.S.2d 734, 734-35 (1st Dep't 1989).

> timely commenced its federal court action in New York, the borrowing statute's purpose to prevent forum shopping was fulfilled, and CPLR 202 had no more role to play. Because Norex's "prior" federal court action was timely under the borrowing statute, the "new" action that it brought pursuant to the savings statute "would have been timely commenced at the time of commencement of the prior action" (CPLR 205[a]). Stated another way, it is irrelevant that Alberta law does not have a savings statute similar to CPLR 205(a) because at the point in time when Norex filed its "new" action in Supreme Court, the borrowing statute's requirements had already been met. In our view, this reading of the way in which CPLR 202 and CPLR 205(a) interrelate best comports with statutory language, and honors both the borrowing statute's purpose to prevent forum shopping and the savings statute's goal to "implement[ ] the vitally important policy preference for the determination of actions on the merits."[30]

2. Termination of Action

Pursuant to CPLR 205, where a timely commenced action is terminated for any reason other than (1) voluntary discontinuance, (2) failure to obtain personal jurisdiction over the defendant, (3) a dismissal for neglect to prosecute, or (4) final judgment on the merits, the plaintiff may file a new action on the same facts within six months if the new action would have been timely if commenced at the time the original action was commenced and the defendant is served within six months.[31]

As a reminder, the six-month savings provision contained in CPLR 205 is unavailable to a party with unclean hands.[32] The plaintiff in *Marrero* filed a personal injury action in 2005 against a business and building owners for damages caused by a fall on ice dating back to 2003.[33] After the action was commenced, the trial court set a discovery schedule that included a conference to discuss the prospects of settlement.[34] The plaintiffs failed to timely provide bills of particulars or appear at the conference and the court dismissed the complaint.[35] Approximately one year later, the plaintiffs moved to vacate the dismissal and restore the action.[36] After the plaintiffs' motion was denied, they filed

30. *Norex Petroleum Ltd.*, 23 N.Y.3d at 679, 16 N.E.3d at 571, 992 N.Y.S.2d at 513.
31. *See* N.Y. C.P.L.R. 205(a) (McKinney 2014).
32. *See* Marrero v. Nails, 114 A.D.3d 101, 103, 978 N.Y.S.2d 257, 258 (2d Dep't 2013).
33. *Id.* at 104, 978 N.Y.S.2d at 259.
34. *Id*.
35. *Id*.
36. *Id*.

a new summons and complaint based upon the same incident.[37] The defendants' motion to dismiss the second action as time-barred under CPLR 214(5)[38] was granted.[39]

On appeal, the plaintiffs argued that the second action was timely because the first action was not dismissed because of neglect.[40] Rather, it was dismissed pursuant to 22 New York Code Rules & Regulations ("NYCRR") 202.27, which provides:

> At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as follows: . . . If the defendant appears but the plaintiff does not, the judge may dismiss the action and may order a severance of counterclaims or cross-claims.[41]

The plaintiff argued that dismissal for failure to appear at a conference did not amount to neglect to prosecute.[42] The Second Department cited the 2005 Court of Appeals decision in *Andrea v. Habiterra Associates*[43] and stated that "the dismissal of an action pursuant to 22 NYCRR 202.27(b) may, under appropriate circumstances, constitute a dismissal for neglect to prosecute."[44] The Second Department then rejected the plaintiffs' argument that CPLR 205(a) was available because the trial court did not state on the record, specifically, that negligent to prosecute was the factual basis for the dismissal.[45] The trial court's order dismissing the second action was affirmed.[46]

3. Infancy and Insanity

Pursuant to CPLR 208, the applicable statute of limitations is tolled if the plaintiff's cause of action accrued when he or she was under a disability because of infancy or insanity.[47] Depending upon the length of the applicable limitations period, the amount of time available to file suit will be extended by three years from when the disability ceases, or by the

37. *Marrero*, 114 A.D.3d at 104-05, 978 N.Y.S.2d at 259.
38. *See* N.Y. C.P.L.R. 214(5) (McKinney 2014).
39. *Marrero*, 114 A.D.3d at 107, 978 N.Y.S.2d at 261.
40. *Id*. at 109, 978 N.Y.S.2d at 262.
41. *Id*. at 109-10, 978 N.Y.S.2d at 263 (citing N.Y. COMP. CODES R. & REGS. tit. 22, § 202.27 (2014)).
42. *Id*. at 110, 978 N.Y.S.2d at 263.
43. 5 N.Y.3d 514, 520, 840 N.E.2d 565, 568, 806 N.Y.S.2d 453, 456 (2005).
44. *Marrero*, 114 A.D.3d at 110, 978 N.Y.S.2d at 263.
45. *Id*. at 111, 978 N.Y.S.2d at 263-64.
46. *Id*. at 114, 978 N.Y.S.2d at 266.
47. *See* N.Y. C.P.L.R. 208 (McKinney 2014).

period of disability.[48]

Competency was at issue in *Thompson v. Metropolitan Transportation Authority*.[49] On February 13, 2008, the plaintiff in *Thompson* fell onto railroad tracks, was struck by a train, and sustained severe injuries.[50] He retained an attorney in March of 2008 and the attorney timely served notices of claim.[51] On March 25, 2009, the attorney then filed a summons and complaint against the Metropolitan Transit Authority ("MTA"), and two of its subsidiaries.[52] In their answer, the defendants asserted that the action was time-barred because it was filed outside of the one-year-and-thirty-day statute of limitations set forth in the Public Authorities Law.[53] The defendants moved for summary judgment and, while that motion was pending, the plaintiff died.[54] After appointment of an estate representative, the plaintiff opposed the defendants' motion by arguing that the statute of limitations was tolled per CPLR 208 for the time-period during which the plaintiff's decedent was hospitalized, i.e., from February 13, 2008, through April 2, 2008.[55] In support of this argument, the plaintiff submitted the affidavit of a physician who reviewed the decedent's medical records and opined that the decedent "faced an overall inability to function in society and protect his legal rights during his forty-nine-day hospitalization" because of numerous surgical procedures, general anesthesia, and over-medication with analgesic substances.[56] The trial court held that the toll set forth in CPLR 208 applied and denied the defendants' motion.[57]

On appeal, the defendants argued that the toll set forth in CPLR 208 should be narrowly interpreted.[58] The Second Department agreed, noting that "[t]he provision of CPLR 208 tolling the Statute of Limitations period for insanity, a concept equated with unsoundness of mind, should not be read to include the temporary effects of medications administered in the treatment of physical injuries."[59] The appellate division concluded

48. *See id*.
49. 112 A.D.3d 913, 977 N.Y.S.2d 387 (2d Dep't 2013).
50. *Id*. at 912-13, 977 N.Y.S.2d at 387.
51. *Id*. at 913, 977 N.Y.S.2d at 387.
52. *Id*.
53. *Id*.
54. *Thompson*, 112 A.D.3d at 913, 977 N.Y.S.2d at 387.
55. *Id*.
56. *Id*.
57. *Id*. at 914, 977 N.Y.S.2d at 388.
58. *Id*.
59. *Thompson*, 112 A.D.3d at 914, 977 N.Y.S.2d at 388 (quoting Eisenback v. Metro. Transp. Auth., 62 N.Y.2d 973, 975, 468 N.E.2d 293, 294-95, 479 N.Y.S.2d 338, 339-40

that the action was time-barred and reversed the trial court, noting that "the fact that the plaintiff's decedent was able to retain an attorney, and arrange for the service of notices of claim during his hospital stay, indicated that he was not mentally incapacitated during that period."[60]

4. Statutes of Limitations

Article 2 of the CPLR sets forth statutes of limitations for claims. The time periods range in duration from less than one year through twenty years.[61] Some of the most commonly used time periods are six years under CPLR 213,[62] three years under CPLR 214,[63] and two and one-half years under 214-a.[64]

The statute of limitations applicable to attorney deceit was address by the Court of Appeals in *Melcher v. Greenberg Traurig, L.L.P.*[65] The plaintiff in *Melcher* filed suit against his law firm and its partner for attorney deceit and collusion.[66] Specifically, that the defendants were part of a scheme to conceal the contents of the original amendment of an operating agreement, and that their conduct deprived him of his membership share of profits.[67] Apparently, the first page of the two-page operating agreement was destroyed while one of the signatories was "making tea."[68]

After the action was commenced, the defendants moved to dismiss arguing that the lawsuit was precluded by the three-year statute of limitations set forth in CPLR 214(2).[69] CPLR 214(2) governs "an action to recover upon a liability, penalty or forfeiture created or imposed by statute."[70] The plaintiff countered that the action was governed by CPLR 213(1), as an action "for which no limitation is specifically prescribed by law."[71] The trial court denied the defendants' motions and the appellate

(1984)).

60. *Id*.

61. *See* N.Y. C.P.L.R. 211-218 (McKinney 2014).

62. *Id.* § 213.

63. *Id.* § 214.

64. *Id.* § 214-a.

65. 23 N.Y.3d 10, 13, 11 N.E.3d 174, 175, 988 N.Y.S.2d 101, 102 (2014).

66. *Id*. at 12-13, 11 N.E.3d at 175, 988 N.Y.S.2d at 102.

67. Melcher v. Greenberg Traurig, L.L.P., 102 A.D.3d 497, 498, 958 N.Y.S.2d 362, 363 (1st Dep't 2013).

68. *Id*. at 498, 958 N.Y.S.2d at 363.

69. *Melcher*, 23 N.Y.3d at 13, 11 N.E.3d at 175, 988 N.Y.S.2d at 102.

70. N.Y. C.P.L.R. 214 (McKinney 2014).

71. *Melcher*, 23 N.Y.3d at 13, 11 N.E.3d at 175, 988 N.Y.S.2d at 102.

division reversed.[72] The Court of Appeals reversed the appellate division and clarified the limitations period applicable to a claim for attorney deceit as one that is "not necessarily an action to recover under a statute just because it may be traced back to the first Statute of Westminster rather than common-law fraud."[73] Noting that a "cause of action for attorney deceit . . . existed as part of New York's common law before the first New York statute governing attorney deceit was enacted in 1787,"[74] the Court of Appeals held that "claims for attorney deceit are subject to the six-year statute of limitations in CPLR 213(1)."[75]

Whether a defendant was a professional under CPLR 214(6) and was at issue in *Livingston v. En-Consultants, Inc*.[76] In *Livingston*, the plaintiff hired the defendant to prepare an application for a permit to replace a bulkhead on the plaintiff's beachfront property in Montauk, New York.[77] The plaintiff's permit application was approved by the New York State Department of Environmental Conservation.[78] Thereafter, the plaintiff installed the new bulkhead, it failed within one year, and an action was brought against the defendant for breach of contract.[79] As the action was commenced more than three years after the defendant assisted with the permit, the defendant moved to dismiss the action as untimely under CPLR 214(6).[80] The plaintiff argued that the defendant was not a professional and, therefore, the action was timely under CPLR 213(2).[81] The trial court denied the defendant's motion.[82] On appeal, the Second Department stated:

> whether a person is a professional is determined by reference to qualities that "include extensive formal learning and training, licensure and regulation indicating a qualification to practice, a code of conduct imposing standards beyond those accepted in the marketplace and a system of discipline for violation of those standards," as well as a relationship "of trust and confidence, carrying with it a duty to counsel and advise clients."[83]

72. *Id*.
73. *Id*. at 14, 11 N.E.3d at 176, 988 N.Y.S.2d at 103.
74. *Id.* at 15, 11 N.E.3d at 177, 988 N.Y.S.2d at 104.
75. *Id*.
76. 115 A.D.3d 650, 651, 981 N.Y.S.2d 556, 557 (2d Dep't 2014).
77. *Id*.
78. *Id*.
79. *Id.*
80. *Id*.
81. *Livingston*, 115 A.D.3d at 651, 981 N.Y.S.2d at 557.
82. *Id*. at 650-51, 981 N.Y.S.2d at 557.
83. *Id*. at 651, 981 N.Y.S.2d at 557 (citations omitted) (internal quotations marks

As the defendant's motion papers failed to articulate how it rendered professional services to the plaintiff, and relied entirely upon one conclusory allegation in the complaint referring to the defendant as a professional, the appellate division affirmed the trial court.[84]

Accrual of a claim was at issue in *McDonald v. Edelman & Edelman, P.C.*[85] The plaintiff in *McDonald* retained the defendants to represent him in connection with personal injuries.[86] Thereafter, the plaintiff filed suit against the defendants for legal malpractice and an accounting.[87] The trial court granted the defendant's motion to dismiss the legal malpractice claim.[88] On appeal, the Appellate Division, First Department, stated that the legal malpractice action "accrued at the time that plaintiff's appeal of the order that granted summary judgment dismissing his underlying Labor Law claims was dismissed for want of prosecution, in July 2006, notwithstanding his lack of knowledge of the dismissal."[89] Holding that the plaintiff's reliance upon the continuous representation doctrine was misplaced, the appellate division noted that:

> defendants sent him a letter enclosing the Second Department's affirmance of the underlying judgment and formally closing their representation of him . . . . Even accepting that defendants concealed from plaintiff the fact that his appeal was dismissed as abandoned, their letter placed him on notice that his attorney-client relationship with them had ended.[90]

Ultimately, the Court rejected the plaintiff's claim that CPLR 213(1) applied and affirmed dismissal of the legal malpractice cause of action because it was not timely commenced.[91]

The CPLR does not specifically contain a statute of limitations for copyright infringement. In turn, the catch-all six year statute of limitations contained in CPLR 213(1)[92] applies. This issue was discussed in *Capitol Records, L.L.C. v. Harrison Greenwich, LLC*.[93] The plaintiff in *Capitol Records*, the owner of song rights, sued the defendant, a

omitted).

84. *Id*. at 651-52, 981 N.Y.S.2d at 557-58.
85. 118 A.D.3d 562, 562, 988 N.Y.S.2d 591, 592 (1st Dep't 2014).
86. *Id*.
87. *Id*.
88. *Id.*
89. *Id*.
90. *McDonald*, 118 A.D.3d at 562-63, 988 N.Y.S.2d at 592.
91. *Id*. at 563, 988 N.Y.S.2d at 593.
92. *See* N.Y. C.P.L.R. 213 (McKinney 2014).
93. 44 Misc. 3d 428, 429, 986 N.Y.S.2d 837, 837-38 (Sup. Ct. N.Y. Cnty. 2014).

restaurant, for playing music on its website homepage without a license.[94] The defendant answered the complaint and then moved to amend the pleading to assert a statute of limitations defense.[95] Namely, that that the three year statute of limitations set forth in CPLR 214(4) applied because this was an action "to recover damages for an injury to property" and, therefore, the action was time-barred.[96] The trial court denied the motion, stating that the defendant's attempt to analogize copyright infringement to trespass to chattel was "implicit[] recogni[tion] that no specific limitations period exists."[97] Moreover, "the benefit of CPLR 213(1) is clarity since, when no limitations period expressly exists, courts can simply apply a six-year period without resort to speculation about legislative intent."[98]

Sometimes it is difficult, or completely impossible based upon the record, to determine which statute of limitations applies. When this happens, it is proper for a court to deny a dispositive motion. The Appellate Division, Third Department, recently addressed this situation in *Newell v. Ellis Hospital*.[99] In *Newell*, the plaintiff was injured when she fell from an operating table while being extubated.[100] Just under three years later, she brought suit against the anesthesiologist and the hospital.[101] The anesthesiologist moved to dismiss the complaint as untimely because it was not filed within two and a half years of the incident per CPLR 214-a.[102] The plaintiff cross-moved to amend the complaint to clarify that it was an action for negligence, not medical malpractice.[103] The trial court denied the plaintiff's cross-motion and granted the defendants' motions.[104] On appeal, the appellate division attempted to determine if the action was one for malpractice or negligence, concluding that "[t]he record here does not contain enough factual information to make such a determination."[105] Further, because "it [was] unclear exactly how plaintiff was injured . . . we must deny

94. *See* Capitol Records, LLC v. Harrison Greenwich, LLC, 44 Misc. 3d 202, 203, 984 N.Y.S.2d 274, 275 (Sup. Ct. N.Y. Cnty. 2014).

95. *Capitol Records, LLC*, 44 Misc. 3d at 429, 986 N.Y.S.2d at 838.

96. *Id*.

97. *Id*.

98. *Id*.

99. 117 A.D.3d 1139, 1140, 984 N.Y.S.2d 652, 653-54 (3d Dep't 2014).

100. *Id*. at 1139-40, 984 N.Y.S.2d at 653.

101. *Id*. at 1140, 984 N.Y.S.2d at 653.

102. *Id*.

103. *Id*.

104. *Newell*, 117 A.D.3d at 1140, 984 N.Y.S.2d at 653.

105. *Id*. at 1140, 984 N.Y.S.2d at 653-54.

defendants' motions to dismiss based on statute of limitations grounds, without prejudice to renewal when further factual information is available."[106]

As a reminder, in the context of legal malpractice, a claim accrues against an attorney of a law firm when the attorney acts improperly, e.g., renders incorrect advice. The Second Department reviewed the well-established rule in *Landow v. Snow Becker Krauss, P.C.*[107] The plaintiff in *Landow* filed suit against his attorneys for advice rendered in connection with the tax implications of the sale of property.[108] On March 5, 2003, the defendants provided the plaintiff with an opinion letter about tax deferment.[109] In 2007, the IRS notified the plaintiff that five million dollars in taxes were due in connection with the sale.[110] The plaintiff retained a different law firm to challenge the IRS determination but was unsuccessful.[111] On December 29, 2011, the plaintiff brought suit against his former attorneys.[112] The defendants moved to dismiss, citing the three year statute of limitations in CPLR 214(6).[113] The trial court granted the defendants' motion.[114] The appellate division agreed, stating that "the cause of action alleging legal malpractice accrued on March 5, 2003, the date they allegedly issued the opinion letter . . . [even though] the plaintiff did not discover that his attorneys' alleged advice was incorrect until years later."[115] Stated differently, "what is important is when the malpractice was committed, not when the client discovered it."[116]

106. *Id.* at 1141, 984 N.Y.S.2d at 654.
107. 111 A.D.3d 795, 796, 975 N.Y.S.2d 119, 120 (2d Dep't 2013).
108. *Id.* at 795-96, 975 N.Y.S.2d at 120.
109. *Id.*
110. *Id.* at 796, 975 N.Y.S.2d at 120.
111. *Id.*
112. *Landow*, 111 A.D.3d at 796, 975 N.Y.S.2d at 120.
113. *Id.*; N.Y. C.P.L.R. 214(6) (McKinney 2014).
114. *Landow*, 111 A.D.3d at 796, 975 N.Y.S.2d at 120.
115. *Id.*
116. *Id.*

The "continuous representation doctrine"[117] is frequently relied upon by plaintiffs in an effort to extend the time available to file suit against a defendant. Determining when the attorney-client relationship ends can be a challenge. In *Champlin v. Pellegrin*, the plaintiff filed suit against his former attorney in 2011, approximately sixteen years after his last communication with the attorney in 1994.[118] The trial court granted the defendant's motion for summary judgment[119] and the First Department affirmed, stating that "tolling under the continuous representation doctrine 'ends once the client is informed or otherwise put on notice of the attorney's withdrawal from representation.'"[120] In this instance, "[t]he more than 16-year lapse in communications from defendant was sufficient to constitute reasonable notice to plaintiff that defendant was no longer representing him."[121]

The First Department tackled the definition of "medical malpractice" in *Perez v. Fitzgerald*, when determining whether claims against chiropractors must be filed within two and a half versus three years.[122] The plaintiff in *Perez* was involved in a car accident in 2005.[123] She sought treatment from the defendant for neck pain in 2005 and 2006.[124] In 2008, the plaintiff was diagnosed with a tumor involving her spine that, according to the complaint filed in June of 2009, the defendant failed to diagnose.[125] The defendant moved to dismiss the action as time-barred under CPLR 214-a.[126] The plaintiff argued that CPLR 214(6)

117. Shumsky v. Eisenstein, 96 N.Y.2d 164, 167-68, 750 N.E.2d 67, 70, 726 N.Y.S.2d 365, 368 (2001) (citations omitted) (internal quotations marks omitted) ("The continuous representation doctrine, like the continuous treatment rule, its counterpart with respect to medical malpractice claims, recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered. The doctrine also appreciates the client's dilemma if required to sue the attorney while the latter's representation on the matter at issue is ongoing. Neither is a person expected to jeopardize his pending case or his relationship with the attorney handling that case during the period that the attorney continues to represent the person. Since it is impossible to envision a situation where commencing a malpractice suit would not affect the professional relationship, the rule of continuous representation tolls the running of the Statute of Limitations on the malpractice claim until the ongoing representation is completed.").

118. 111 A.D.3d 411, 411, 974 N.Y.S.2d 379, 379-80 (1st Dep't 2013).

119. *Id.* at 411, 974 N.Y.S.2d at 379.

120. *Id.* at 411-12, 974 N.Y.S.2d at 380.

121. *Id.* at 412, 974 N.Y.S.2d at 380.

122. 115 A.D.3d 177, 178, 981 N.Y.S.2d 5, 5 (1st Dep't 2014).

123. *Id.*

124. *Id.* at 178, 981 N.Y.S.2d at 5-6.

125. *Id.* at 179, 981 N.Y.S.2d at 6.

126. *Id.*; N.Y. C.P.L.R. 214-a (McKinney 2014).

applied.[127] After a trial, the court granted the defendants' renewed motion to dismiss.[128] On appeal, the First Department cited a number of precedents, including *Bleiler v. Bodnar*,[129] and *Karasek v. LaJoie*,[130] and held that CPLR 214(6) applied because:

> plaintiff was not referred to [the defendant] by a licensed physician and [the defendant's] chiropractic treatment was not in integral part of the process of rending medical treatment to a patient or substantially related to any medical treatment provided by a physician. Indeed, plaintiff did not even inform her physicians, including her primary care physician, that she was receiving chiropractic treatment for her neck and back. Further, the record establishes that the treatment provided by [the defendant], consisting of adjusting or applying force to different parts of the spine, massages, heat compression, and manipulation of plaintiff's neck, constituted chiropractic treatment (*see* Education Law 6551). The fact that defendant provided treatment to the human body to address a physical condition or pain, which may be within the broad statutory definition of practicing medicine (Education Law § 6521), does not, by itself, render the treatment 'medical' within the meaning of CPLR 214-a, since the use of such a broad definition would result in the inclusion of many 'alternative and nontraditional approaches to "diagnosing [and] treating . . . human disease"' which are clearly nonmedical in nature.[131]

B. Article 3: Jurisdiction and Service

1. Personal Service Upon A Corporation

CPLR 311 governs the manner in which a corporation is to be served.[132] In *Cellino & Barnes, P.C. v. Martin Lister & Alvarez, P.L.L.C.*, the Fourth Department analyzed whether a party is entitled to rely upon representations of authority made by a corporation's employees when attempting to effect service.[133] In *Cellino & Barnes*, the plaintiff law firm sued a Florida law firm seeking quantum meruit damages for legal representation.[134] The defendant moved to dismiss the complaint on the grounds that the supreme court lacked personal jurisdiction over the law

127. *Perez*, 115 A.D.3d at 179, 981 N.Y.S.2d at 6; N.Y. C.P.L.R. 214(6).

128. *Perez*, 115 A.D.3d at 180, 981 N.Y.S.2d at 6.

129. 65 N.Y.2d 65, 479 N.E.2d 230, 489 N.Y.S.2d 885 (1985).

130. 92 N.Y.2d 171, 699 N.E.2d 889, 677 N.Y.S.2d 265 (1998).

131. *Perez*, 115 A.D.3d at 183, 981 N.Y.S.2d at 9 (citations omitted) (internal quotations marks omitted); N.Y. C.P.L.R. 214(6) (McKinney 2014).

132. *See* N.Y. C.P.L.R. 311.

133. 117 A.D.3d 1459, 1459, 985 N.Y.S.2d 776, 777 (4th Dep't 2014).

134. *Id*.

firm.[135] More specifically, the defendant submitted an affidavit stating that the summons and complaint were served upon the receptionist who was not authorized to accept service.[136] In opposition to the motion, the plaintiff submitted an affidavit from the process server who stated that "upon entering defendant's office, she asked the receptionist for an authorized agent to accept service of the summons and complaint. The receptionist identified herself as a legal assistant and said that she was in charge of the office. When asked whether she was authorized to accept service, the receptionist answered in the affirmative, whereupon the process server handed her the papers."[137] Notably, the attorney who submitted the affidavit in support of the motion to dismiss was not present during the exchange between the process server and the receptionist, and the receptionist did not submit an affidavit.[138] The trial court denied the defendant's motion and the appellate division affirmed, stating that "a process server is not expected to be familiar with the corporation's internal practice, and is thus entitled to rely upon the 'employees to identify the proper person to accept service.'"[139]

2. Defense by Person to Whom Summons Not Personally Delivered

CPLR 317 enables a person served with a summons in a manner other than by personal delivery to defend the action within one year after he or she obtains knowledge of entry of a judgment, upon a finding from the court that the person did not personally receive notice and has a meritorious defense.[140]

When it comes to CPLR 317, details matter. In *Moore v. Hall*, the plaintiff filed a summons and complaint for personal injuries and hired a process server to deliver process to the defendant.[141] After three attempts at personal service to the defendant's last known address, the plaintiff served under CPLR 308, i.e., "nail and mail."[142] The plaintiff later obtained a default judgment.[143] Subsequently, the defendant moved to vacate the default.[144] The trial court concluded that the defendant failed

135. *Id*.
136. *Id*.
137. *Id*. at 1460, 985 N.Y.S.2d at 778.
138. *Cellino & Barnes, P.C.*, 117 A.D.3d at 1460, 985 N.Y.S.2d at 778.
139. *Id*.
140. N.Y. C.P.L.R. 317 (McKinney 2014).
141. No. 21670/2006, 2013 N.Y. Slip Op. 51690(U), at 1 (Sup. Ct. Kings Cnty. 2013).
142. *Id*. at 1-2.
143. *Id*. at 2.
144. *Id*. at 3.

to demonstrate that he did not receive actual notice.[145] Perhaps more significant, however, was the court's identification of a different issue that "compels vacatur of the judgment."[146] Specifically, the plaintiff did not file the affidavit of service by mail with the clerk.[147] In vacating the judgment, the court stated that the defendant's "obligation to answer or otherwise respond to the complaint never began to run due to plaintiff's failure to file the affidavit, and therefore, the default judgment is a nullity and must be vacated."[148]

C. Article 5: Venue

Article 5 of the CPLR governs where a lawsuit should be commenced.[149] Whether by accident or design, parties often file suit in the wrong forum.

1. Grounds For Venue Change

Pursuant to CPLR 510, a party may ask a court to change the place of trial where the place designed for trial is not proper, where an impartial trial cannot be had in the county selected, or where the convenience of the witnesses and ends of justice will be promoted by the change.[150]

A motion to change venue was made by the defendants in *Peoples v. Vohra*.[151] In support of the motion, the defendants moved to transfer venue from Kings County to Orange County by arguing that, in effect, the only connection to Kings County was the plaintiff's residence, which was "manufactured"[152] through "clever exploitation"[153] of Section 1001(6) of the Surrogate's Court Procedure Act.[154] The trial court granted the defendants' motion despite the fact that (1) Kings County was "not improper," and (2) the defendants had not established grounds for a discretionary charge under CPLR 510(1) or (3).[155] Even though the trial court concluded that "the ends of justice will be promoted by the change" to Orange County, the Second Department reversed because the record

145. *Id.* at 7.
146. *Moore*, No. 21670/2006, 2013 N.Y. Slip Op. 51690(U) at 8-9.
147. *Id.* at 9.
148. *Id.*
149. *See* N.Y. C.P.L.R. 501-513 (McKinney 2014).
150. N.Y. C.P.L.R. 510.
151. 113 A.D.3d 664, 664, 978 N.Y.S.2d 353, 354 (2d Dep't 2014).
152. *Id.* at 665, 978 N.Y.S.2d at 355.
153. *Id.*
154. *See* N.Y. SURR. CT. PROC. ACT LAW § 1001 (McKinney 2014).
155. *Vohra*, 113 A.D.3d at 665, 978 N.Y.S.2d at 355.

did not satisfy any provision of CPLR 510.[156]

D. Article 10: Parties Generally

1. Necessary Joinder of Parties

CPLR 1001 sets forth the circumstances under which parties should or must be joined in an action to avoid an inequitable judgment.[157]

In *Smith v. Pasqua*, the issue of joinder was addressed by the Second Department.[158] The plaintiff in *Smith* brought a medical malpractice action against individual defendants, but did not name a vicariously liable hospital.[159] The individual defendants moved to dismiss the complaint for failure to join a necessary party.[160] The plaintiff opposed and cross-moved to limit her recovery to the limits of the defendants' insurance policies.[161] The trial court denied both motions, and the appellate division agreed, stating that "even if it were shown that the hospital would be vicariously liable for any negligence of the individual defendants, or that it had a contractual obligation to indemnify those individual defendants for damages recovered from them in this action, those factors would not render the hospital a necessary party to this action."[162]

2. Substitution Upon Death

When a party dies, CPLR 1015 empowers a court to order substitution of the proper parties.[163] CPLR 1021 provides that substitution must be made within a "reasonable time."[164]

Whether substitution was made within a "reasonable" amount of time was at issue in *Terpis v. Regal Heights Rehabilitation and Health Care Center, Inc*.[165] In *Terpis*, the plaintiff moved to substitute a party for the deceased plaintiff approximately twenty-one months after the death.[166] The trial court denied the motion.[167] On appeal, the Second Department noted that the "determination of reasonableness requires

156. *Id*. at 665-66, 978 N.Y.S.2d at 355.
157. *See* N.Y. C.P.L.R. 1001 (McKinney 2014).
158. 110 A.D.3d 710, 710, 972 N.Y.S.2d 98, 99 (2d Dep't 2013).
159. *Id*.
160. *Id*.
161. *Id.*
162. *Id.*
163. N.Y. C.P.L.R. 1015 (McKinney 2014).
164. N.Y. C.P.L.R. 1021.
165. 108 A.D.3d 618, 618, 968 N.Y.S.2d 380, 380 (2d Dep't 2013).
166. *Id.* at 619, 968 N.Y.S.2d at 381.
167. *Id.* at 618, 968 N.Y.S.2d at 380.

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."[168] The appellate division affirmed the trial court because the plaintiff waited twenty-one months to obtain letters testamentary, waited another twelve months to substitute after obtaining letters testamentary, did not offer a reasonable excuse for the delay, and did not submit an affidavit of merit.[169]

E. Article 20: Mistakes and Defects

1. Discretion

CPLR 2001 empowers a court to permit correction of a mistake, omission, defect, or irregularity made at any stage of an action, provided a substantial right of a party is not prejudiced.[170]

Whether a lawyer is responsible for a "glitch" in the court's electronic filing system[171] was at issue in *Grskovic v. Holmes*.[172] In *Grskovic*, the plaintiff was injured in a car accident on May 30, 2008.[173] He retained a lawyer on January 29, 2010, and the lawyer prepared a summons with notice identifying Westchester County as the anticipated venue.[174] The attorney wrote a $210 check to cover the filing fee and, on April 25, 2011, delivered the documents to a courier for filing.[175] However, the county clerk would not file the summons and complaint because the county converted to e-filing on March 1, 2011.[176] On May 4, 2011, the plaintiff's counsel established an e-filing account and, using what he believed was a valid account, electronically purchased an index number and "filed" the summons and complaint.[177] The filing was confirmed by email from the court on May 4, 2011.[178] Despite the confirmation email, plaintiff's counsel never received an index number

168. *Id.* at 619, 968 N.Y.S.2d at 381.

169. *Id.*

170. N.Y. C.P.L.R. 2001 (McKinney 2014).

171. The State of New York has moved toward the electronic filing of court documents in supreme court. *See* N.Y. COMP. CODES R. & REGS. tit. 22, §§ 202.5-b, 202.5-bb (2014).

172. 111 A.D.3d 234, 236, 972 N.Y.S.2d 650, 651 (2d Dep't 2013).

173. *Id.*

174. *Id.* at 236, 972 N.Y.S.2d at 652.

175. *Id.*

176. *Id.*

177. *Grskovic*, 111 A.D.3d at 236-37, 972 N.Y.S.2d at 652.

178. *Id.* at 237, 972 N.Y.S.2d at 652.

from the court.[179]

On June 2, 2011—three days after expiration of the statute of limitations—a case manager from the plaintiff's attorney's office sent an e-mail to the court about an inability to ascertain the action's index number.[180] A follow-up phone call to the clerk revealed no record of the e-filing on May 4, 2011.[181] Investigation revealed that the "filing" on May 4, 2011, had been within the system's "practice/training" system and not its "live" system.[182]

On June 8, 2011, the plaintiff moved pursuant to CPLR 2001 to deem the summons and complaint filed on May 4, 2011, *nunc pro tunc*.[183] The defendant opposed the relief and argued that the statute of limitations had expired.[184] The supreme court denied the plaintiff's motion.[185]

The appellate division reversed, noting that the "confirmation" email the plaintiff's attorney received from the court "was anything but clear" and could "reasonably be viewed as misleading practitioners into believing that their e-filings actually had been accomplished. In retrospect, it is clear that the confirmatory email messages should have contained warnings in bold letters stating that a practice filing did not satisfy the requirements of a real filing which must again be performed in the 'live' system."[186] In reversing the trial court, the Second Department emphasized that the relief sought by the plaintiff was a permissible "correction" of the practice filing and did not require the court to completely disregard a filing error, which would have required the plaintiff to show that the defendant would not be prejudiced.[187]

CPLR 2001 was also invoked to salvage a motion in *Lu v. World Wide Traveler of Greater New York, Ltd.*, where the validity of a defense affidavit submitted in opposition to a motion for summary judgment was challenged on the grounds of a defect in the notary stamp.[188] The trial court granted the plaintiff's motion.[189] On appeal, the court ruled that the "alleged technical defect relating to the notary public's stamp that was

179. *Id.*
180. *Id.* at 237, 972 N.Y.S.2d at 653.
181. *Id.*
182. *Grskovic*, 111 A.D.3d at 237, 972 N.Y.S.2d at 653.
183. *Id.* at 238, 972 N.Y.S.2d at 653.
184. *Id.*
185. *Id.*
186. *Id.* at 239, 972 N.Y.S.2d at 654.
187. *Grskovic*, 111 A.D.3d at 243, 972 N.Y.S.2d at 657.
188. 111 A.D.3d 690, 690, 974 N.Y.S.2d 547, 548 (2d Dep't 2013).
189. *Id*. at 690, 974 N.Y.S.2d at 547.

imprinted upon the affidavit of the defendant . . . did not invalidate the official act of the notary public."[190]

F. Article 21: Papers

1. Stipulations

CPLR 2104 governs stipulations between parties, and provides that an

> agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered.[191]

Whether an email message can satisfy the criteria of CPLR 2104 so as to constitute a binding and enforceable stipulation of settlement was analyzed at length by the Second Department in *Forcelli v. Gelco Corp*.[192] The plaintiff in *Forcelli* filed suit for injuries stemming from a car accident.[193] After discovery, the defendants filed a motion for summary judgment.[194] The parties then attempted to mediate resolution, but were unsuccessful.[195] After mediation, there were additional discussions about settlement, including the telephonic communication of a $230,000 settlement offer with oral acceptance, followed by an email from the Sedgewick claims adjuster stating "[p]er our conversation today, May 3, 2011, you accepted my offer of $230,000 to settle this case."[196] On May 10, 2011, the trial court issued an order granting the defendants' summary judgment motion.[197] On May 11, 2011, the plaintiffs faxed a release and stipulation of discontinuance to the Sedgewick adjuster.[198] On May 12, 2011, the release was rejected by letter stating that "there was no settlement consummated under New York CPLR 2104 between the parties, we considered this matter dismissed by the court's decision . . . ."[199] The plaintiffs moved to enforce the settlement and the

190. *Id.* at 690, 974 N.Y.S.2d at 548.
191. N.Y. C.P.L.R. 2104 (McKinney 2014).
192. 109 A.D.3d 244, 245, 972 N.Y.S.2d 570, 571 (2d Dep't 2013).
193. *Id*.
194. *Id*. at 245-46, 972 N.Y.S.2d at 571.
195. *Id*. at 246, 972 N.Y.S.2d at 571-72.
196. *Id.* at 246, 972 N.Y.S.2d at 572.
197. *Forcelli*, 109 A.D.3d at 246-47, 972 N.Y.S.2d at 572.
198. *Id*. at 247, 972 N.Y.S.2d at 572.
199. *Id*.

trial court agreed.[200]

The defendants appealed and argued first that the settlement was not entered into by them, or their counsel.[201] The court dismissed this argument because the Sedgewick representative was authorized to act for the defendants.[202] The defendants then argued that the email from the Sedgewick representative to the plaintiffs' attorney was not properly "subscribed."[203]

Noting that "email messages cannot be signed in the traditional sense," the appellate division held that "given the now widespread use of email as a form of written communication in both personal and business affairs, it would be unreasonable to conclude that email messages are incapable of conforming to the criteria of CPLR 2104 . . . ."[204] In affirming the trial court, the appellate division noted that the email from the Sedgewick representative ended, "Thanks, Brenda Greene," and stated that this was not an electronic signature but, instead, was text that she "purposefully added . . . to this particular email message, rather than a situation where the sender's email software has been programmed to automatically generate the name of the email sender, along with other identifying information, every time an email message is sent."[205]

2. Affirmation of Truth of Statement by Attorney, Physician, Osteopath or Dentist

CPLR 2106 enables an attorney admitted to practice in the court of the state, and a physician, osteopath, or dentist authorized by law to practice in the state, to execute an affirmation in lieu of an affidavit.[206]

Whether the rule can be extended outside of the state was at issue in *Pierre v. Young*, where the plaintiff opposed a motion for summary judgment with an affidavit from a chiropractor, and affirmations from three physicians.[207] Unfortunately, the physician submissions were not notarized and did not include language that they were "affirmed . . . to be true under the penalties of perjury."[208] Thus, they were neither valid

200. *Id*. at 247, 972 N.Y.S.2d at 572-73.
201. *Id*. at 248, 972 N.Y.S.2d at 573.
202. *Forcelli*, 109 A.D.3d at 248, 972 N.Y.S.2d at 573.
203. *Id*. at 249-50, 972 N.Y.S.2d at 573-74.
204. *Id*. at 250, 972 N.Y.S.2d at 574-75.
205. *Id*. at 251, 972 N.Y.S.2d at 575.
206. *See* N.Y. C.P.L.R. 2106 (McKinney 2014).
207. No. 18125/11, 2013 N.Y. Slip Op. 50660(U), at 2-3 (Sup. Ct. Kings Cnty. 2013).
208. *Id*. at 3.

affidavits nor affirmations.[209] Fortunately for the plaintiff, the defendant did not raise the validity of the physician submissions in its papers.[210] The court struggled with waiver of the objection, stating that "it is difficult to see the policy reasons for considering a document otherwise inadmissible on its face simply because an opposing party has not objected."[211] Concluding that it could disregard the physician submissions in the absence of an objection from the defendant, the court granted the defendant's motion, but allowed the plaintiff an opportunity to renew her opposition because "the submissions would have been sufficient to raise triable issues had they been in admissible form, and since the Court is reluctant to penalize a client for the deficiencies of counsel . . . ."[212] Costs were imposed.[213]

G. Article 23: Subpoenas, Oaths and Affirmations

1. Motion to Quash

CPLR 2304 provides that "[a] motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable."[214] In *Dominicci v. Ford*, the Fourth Department was asked to determine whether a trial court erred by denying a defendant-insurer's motion to quash a subpoena seeking a record of its payments to a physician it hired to conduct a medical examination of the plaintiff.[215] More specifically, the plaintiff served a subpoena duces tecum on State Farm, the defendant's insurer, seeking the "production of 1099 forms or other wage statements reflecting payments made by State Farm to the examining physician" for a two year time period.[216] State Farm timely moved to quash the subpoena and the trial court denied the motion.[217] The appellate division affirmed, holding that the plaintiff is entitled to cross-examine the physician regarding payments received from the insurer, and, therefore, "plaintiff is entitled to discovery materials that will assist her in preparing such questions."[218]

209. *Id*.
210. *Id*. at 4.
211. *Id*. at 7.
212. *Pierre*, No. 18125/11, 2013 N.Y. Slip Op. 50660(U) at 10.
213. *Id*. at 11.
214. N.Y. C.P.L.R. 2304 (McKinney 2014).
215. *See* 119 A.D.3d 1360, 1360-61, 989 N.Y.S.2d 733, 734 (4th Dep't 2014).
216. *Id*.
217. *Id*. at 1361, 989 N.Y.S.2d at 734-35.
218. *Id*. at 1361, 989 N.Y.S.2d at 735.

2. Oaths and Affirmations

CPLR 2309 governs oaths and affirmations, including who may administer the oath and how the oath should be administered.[219] In *Galetta v. Galetta*, the Court of Appeals reviewed CPLR 2309 in the context of a lawsuit arising out of the enforceability of a prenuptial agreement.[220] Michelle and Gary Galetta were married in July of 1997.[221] About one week before the wedding, they each separately signed a prenuptial agreement prepared by Gary Galetta's attorney.[222] Neither party was present when the other signed the agreement, and each of their signatures were witnessed by different notaries public.[223] The acknowledgement accompanying Gary Galetta's signature did not include "to me known and known to me" before "[o]n the 8 [sic] day of July, 1997, before me came Gary Galetta described in and who executed the foregoing instrument and duly acknowledged to me that he executed the same."[224]

In 2010, Gary Galetta filed for divorce.[225] Michelle Galetta filed suit against Gary Galetta, and argued that the prenuptial agreement was invalid.[226] Michelle Galetta's motion for summary judgment was denied because the trial court concluded that the acknowledgement substantially complied with the requirements of the Real Property Law.[227] The Fourth Department affirmed on other grounds.[228] Namely, that the acknowledgement was defective, but that the defect could be cured.[229]

The Court of Appeals stated that:

> [a]bsent the omitted language, the certificate does not indicate either that the notary public knew the husband or had ascertained through some form of proof that he was the person described in the prenuptial agreement. New York courts have long held than an acknowledgement that fails to include a certification to this effect is defective.[230]

219. N.Y. C.P.L.R 2309 (McKinney 2014).
220. 21 N.Y.3d 186, 189, 991 N.E.2d 684, 685, 969 N.Y.S.2d 826, 827 (2013).
221. *Id*.
222. *Id*.
223. *Id*.
224. *Id*. at 193, 991 N.E.2d at 688, 969 N.Y.S.2d at 830.
225. *Galetta*, 21 N.Y.3d at 190, 991 N.E.2d at 686, 969 N.Y.S.2d at 828.
226. *Id*.
227. *Id*.
228. *Id*.
229. *Id*. at 190-91, 991 N.E.2d at 686, 969 N.Y.S.2d at 828.
230. *Galetta*, 21 N.Y.3d at 193, 991 N.E.2d at 688, 969 N.Y.S.2d at 830.

Moving past the defective certificate of acknowledgement, the Court of Appeals reviewed whether the defect could be cured. The analysis distinguished the instant case from *Matisoff v. Dobi*, a prior Court of Appeals decision where the parties made no attempt to have their signatures acknowledged.[231] Specifically, "a rule precluding a party from attempting to cure the absence of an acknowledgement through subsequent submissions appears to be sound."[232] In the context of the *Galetta* case, the Court declined to decide whether a cure was appropriate because of problems with the affidavits the defendant submitted in support of his position.[233] Notably, the affidavit from the notary who witnessed Gary Galetta's signature did not state: (1) that he recalled acknowledging Gary Galetta's signature, (2) that he knew Gary Galetta prior to acknowledging the signature, (3) the specific procedures he followed in this instance, or (4) the precise procedures he usually follows.[234]

Ultimately, the Court of Appeals reversed the appellate division, holding that

> if the notary actually remembered having acknowledged defendant's signature, he might have been able to fill in the gap in the certificate by averring that he recalled having confirmed defendant's identity, without specifying how. But since he understandably had no recollection of an event that occurred more than a decade ago, and instead attempted to proffer custom and practice evidence, it was crucial that the affidavit describe a specific protocol that the notary repeatedly and invariably used—and proof of that type is absent here. As such, even assuming a defect in a certificate of acknowledgment could be cured under Domestic Relations Law 236(B)(3), defendant's submission was insufficient to raise a triable question of fact as to the propriety of the original acknowledgment procedure. Plaintiff was therefore entitled to summary judgment declaring that the prenuptial agreement was unenforceable.[235]

231. *Id.* at 194, 991 N.E.2d at 689, 969 N.Y.S.2d at 831 (citing Matisoff v. Dobi, 90 N.Y.2d 127, 681 N.E.2d 376, 659 N.Y.S.2d 209 (1997)).

232. *Id.* at 196, 991 N.E.2d at 690, 969 N.Y.S.2d at 832.

233. *Id.* at 197, 991 N.E.2d at 691, 969 N.Y.S.2d at 833.

234. *Id.*

235. *Galetta*, 21 N.Y.3d at 198, 991 N.E.2d at 692, 969 N.Y.S.2d at 834.

H. Article 31: Disclosure

1. Scope of Disclosure

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action."[236] The definition of material and necessary depends upon the case.

In *Rawlins v. St. Joseph's Hospital Health Center*, the Fourth Department reviewed discovery demands in a medical malpractice action virtually line-by-line, concluding that the trial court erred in denying Rawlins' motion to compel in a number of respects.[237] Most interesting was the appellate division's review of the trial court's decision to deny the plaintiff's attempt to compel the hospital to produce certain national standards published by various organizations, including the American Congress of Obstetricians.[238] Holding that the documents sought where "material and necessary" to the prosecution of the plaintiff's claims for improper care during childbirth, the appellate division also stated that "the fact that 'the documents sought may be available in public records does not, in itself, preclude production of those records from a party.'"[239]

Historically, expert disclosures were served thirty, sixty, or ninety days before trial. Over the past several years, the First and Second Departments have addressed whether a plaintiff's experts must be disclosed before filing the trial note of issue.[240]

A case of first impression with regard to the timing of an expert disclosure was at the center of the Third Department's decision in

236. N.Y. C.P.L.R. 3101(a) (McKinney 2014).

237. 108 A.D.3d 1191, 1191, 969 N.Y.S.2d 687, 688 (4th Dep't 2013).

238. *Id.* at 1193-94, 969 N.Y.S.2d at 690-91.

239. *Id.* at 1193, 969 N.Y.S.2d at 690-91 (quoting Alfaro v. Schwartz, 233 A.D.2d 281, 282, 649 N.Y.S.2d 176, 177 (2d Dep't 1996)).

240. *See, e.g.*, Ramsen A. v. N.Y.C. Hous. Auth., 112 A.D.3d 439, 440, 976 N.Y.S.2d 73, 74 (1st Dep't 2013) ("Athough plaintiffs served their expert disclosure regarding Dr. Rosen after the filing of the note of issue, the court did not improvidently exercise its discretion by denying [the defendant's] motion to exclude . . . Dr. Rosen . . . from testifying as plaintiffs' expert, because defense counsel had the disclosure regarding Dr. Rosen approximately two months prior to the trial . . . ."); Garcia v. City of N.Y., 98 A.D.3d 857, 858-59, 951 N.Y.S.2d 2, 4 (1st Dep't 2012) (citing Scott v. Westmore Fuel Co., Inc., 96 A.D.3d 520, 521, 947 N.Y.S.2d 15, 16-17 (1st Dep't 2012)) ("[E]xpert's affidavit should not have been considered in light of plaintiff's failure to identify the expert during pretrial discovery as required by defendants' demand"); Constr. by Singletree, Inc. v. Lowe, 55 A.D.3d 861, 862-63, 866 N.Y.S.2d 702, 703-04 (2d Dep't 2008) (affirming trial court's decision not to consider expert affidavits because experts were not identified until after the trial note of issue was filed).

Tienken v. Benedictine Hospital.[241] The plaintiff in *Tienken* was committed to Benedictine Hospital for an alleged mental problem.[242] After her release, the plaintiff filed suit against the hospital for assault, battery, false imprisonment, negligence, and medical malpractice.[243] Following discovery, the hospital moved for summary judgment.[244] In opposition to the motion, the plaintiff submitted expert affidavits from a psychiatrist and nurse.[245] The trial court refused to consider the affidavits because, despite the hospital's demand for expert disclosure, the plaintiff did not disclose the experts until six months after filing the trial note of issue.[246] On appeal, the Third Department affirmed.[247]

Shortly thereafter, in *Buchanan v. Mack Trucks, Inc.*, the Second Department reached the opposite holding, stating that

> "a party's failure to disclose its experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness does not divest a court of the discretion to consider an affirmation or affidavit submitted by that party's experts in the context of a timely motion for summary judgment."[248]

Dating back to the 2007 decision in *Arons v. Jutkowitz*, the Court of Appeals ruled that a plaintiff must provide defense counsel with authorizations that permit non-party healthcare providers to speak with the defense attorney.[249] Recently, in *McCarter v. Woods*, the Fourth Department held that a plaintiff is not required to provide *Arons* authorizations that enable the defense to speak with the plaintiff's educators.[250] Specifically, the appellate division held that "[w]e decline to extend *Arons* to require production of speaking authorizations to anyone other than non-party healthcare providers."[251] A two justice dissent noted that "[w]e see no reason why nonparty educators should be less available than nonparty treating physicians under the principles

241. 110 A.D.3d 1389, 1391, 974 N.Y.S.2d 166, 168 (3d Dep't 2013).

242. *Id.* at 1389, 974 N.Y.S.2d at 167.

243. *Id.*

244. *Id.* at 1390, 974 N.Y.S.2d at 167.

245. *Id.* at 1391, 974 N.Y.S.2d at 168.

246. *Tienken*, 110 A.D.3d at 1391, 974 N.Y.S.2d at 168.

247. *Id.*

248. 113 A.D.3d 716, 718, 979 N.Y.S.2d 342, 344 (2d Dep't 2014) (quoting Rivers v. Birnbaum, 102 A.D.3d 26, 31, 953 N.Y.S.2d 232, 235 (2d Dep't 2012)).

249. 9 N.Y.3d 393, 401-02, 416, 880 N.E.2d 831, 832, 843, 850 N.Y.S.2d 345, 346, 357 (2007).

250. *See* 106 A.D.3d 1540, 1541, 964 N.Y.S.2d 825, 828 (4th Dep't 2013).

251. *Id.* at 1541, 964 N.Y.S.2d at 826.

articulated by the Court of Appeals in *Arons*."[252]

Arons was also addressed by an Erie County trial court in *Charlap v. Khan.*[253] The plaintiff in *Charlap* filed a medical malpractice and wrongful death action arising out of care rendered in an emergency room.[254] During discovery, the defendants requested *Arons* authorizations to speak with the decedent's non-party treating healthcare providers.[255] The plaintiff then sent a letter to the treating providers stating that, inter alia, "[i]f you decide to meet with their lawyers, I would ask that you let me know, because I would like the opportunity to be present or to have my attorneys present."[256] The defendants moved to compel the plaintiff to send letters to the non-party treating physicians retracting the request to be present, arguing "that they have a right to privately interview decedent's treating physicians and that the letter from plaintiff interferes with this right."[257] The trial court disagreed, stating "that *Arons* did not create a 'right' to conduct private interviews of non-party witnesses" and held that "the letter which is the subject of this motion does not cross the boundaries set by the Rules [of Professional Responsibility]. The letter does not advise the witness to do anything improper under the Rules. It does not even express a preference that the witness not meet with the adversary, which in any event would be permissible . . . ."[258]

2. Protective Orders

A court may prevent abusive discovery or suppress information improperly obtained by issuing a protective order that denies, limits, conditions, or regulates discovery.[259]

The boundaries of relevance were tested in *Montalto v. Heckler*, a medical malpractice action in which the defendants sought the plaintiff's psychological treatment records, financial records, and electronic communications.[260] The trial court granted the plaintiff's motion for a protective order.[261] On appeal, the Second Department held that the trial

252. *Id.* at 1543, 964 N.Y.S.2d at 828.
253. 41 Misc. 3d 1070, 1071, 972 N.Y.S.2d 871, 872 (Sup. Ct. Erie Cnty. 2013).
254. *Id.*
255. *Id.*
256. *Id.* at 1072, 972 N.Y.S.2d at 872-73.
257. *Id.* at 1072, 972 N.Y.S.2d at 873.
258. *Charlap*, 41 Misc. 3d at 1081, 1085, 972 N.Y.S.2d at 879, 881-82.
259. N.Y. C.P.L.R. 3103 (McKinney 2014).
260. 113 A.D.3d 741, 741, 978 N.Y.S.2d 891, 891 (2d Dep't 2014).
261. *Id*.

court erred by denying the defendants access to plaintiff's psychological treatment records, but affirmed denial of access to the financial records and electronic communications, including email.[262]

The discoverability of electronically stored information was also reviewed in *Nieves v. 30 Ellwood Realty, LLC*,[263] and *Tapp v. New York State Urban Development Corporation*.[264]

In *Nieves*, a claim was made for personal injuries sustained by the infant plaintiff, "including the inability to engage in social activities, anxiety, depression, and posttraumatic stress disorder."[265] During discovery, the defendant reviewed the public portions of the infant plaintiff's Facebook profile and, thereafter, made a motion to compel the plaintiff to provide an authorization for production of her complete Facebook page.[266] The plaintiff appealed and the First Department modified the order, stating that:

> Defendant demonstrated that plaintiff's Facebook profile contained photographs that were probative of the issue of the extent of her alleged injuries, and it is reasonable to believe that other portions of her Facebook records may contain further evidence relevant to that issue. In these circumstances, and since "it is possible that not all Facebook communications are related to the events that gave rise to plaintiff's cause of action", the appropriate course is to remand the matter for an in camera inspection of plaintiff's Facebook records, to determine which of those records, if any, are relevant to plaintiff's alleged injuries. To the extent that a thorough in camera inspection may prove unduly burdensome, the trial court retains broad discretion to set reasonable terms and conditions thereon, including the right to direct plaintiff to conduct an initial review of her own Facebook account, and limit the in camera inspection to items whose discoverability is contested by plaintiff.[267]

In *Tapp*, also a personal injury action, the defendant made a motion to compel the plaintiff to provide an authorization for his Facebook records, including any records previously deleted or archived.[268] The trial court denied the motion and the First Department affirmed, stating that "plaintiff's mere possession and utilization of a Facebook account is an

262. *Id*. at 742, 978 N.Y.S.2d at 892-93.

263. 39 Misc. 3d 63, 966 N.Y.S.2d 808 (Sup. Ct. App. T. 1st Dep't 2013).

264. 102 A.D.3d 620, 958 N.Y.S.2d 392 (1st Dep't 2013).

265. *Nieves*, 39 Misc. 3d at 64, 966 N.Y.S.2d at 808.

266. *Id*.

267. *Id*. (citing Patterson v. Turner Constr. Co., 88 A.D.3d 617, 618, 931 N.Y.S.2d 311, 311 (1st Dep't 2011)).

268. *Tapp*, 102 A.D.3d at 620, 958 N.Y.S.2d at 393.

insufficient basis to compel plaintiff to provide access to the account or to have the court conduct an in camera inspection of the account's usage."[269] More importantly, "[t]o warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account—that is, information that 'contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses . . . .'"[270]

3. Written Questions

CPLR 3108 authorizes the use of written questions to take testimony outside of the state.[271] The statute also provides that "[a] commission or letters rogatory may be issued where necessary or convenient for the taking of a deposition outside of the state."[272]

The issuance of a commission is not automatic. Without a showing of a necessity, a party's request for a commission may be denied. This was the issue is *MBIA Insurance Corp. v. Credit Suisse Securities*.[273] The plaintiff in *MBIA* moved for an open-ended commission "to take the deposition and obtain document disclosure, including, among other things, personal investment and bank account statements and personal income tax returns, from nonparty residential mortgage borrowers in every state except New York, three United States territories, and the District of Columbia."[274] The trial court denied the motion and the First Department affirmed because, while the information may be material and relevant, the plaintiff did not make a "'strong showing of necessity [or] demonstrate that the information . . . is unavailable from other sources.'"[275]

4. Conduct of the Examination

CPLR 3113 governs the mechanics of a deposition, such as swearing the witness, recording testimony, objections, examination, and cross-examination.[276]

269. *Id.*

270. *Id*. (quoting *Patterson*, 88 A.D.3d at 618, 931 N.Y.S.2d at 311).

271. *See* N.Y. C.P.L.R. 3108 (McKinney 2014).

272. *Id*.

273. 103 A.D.3d 486, 486-87, 960 N.Y.S.2d 25, 26 (1st Dep't 2013).

274. *Id*. at 487, 960 N.Y.S.2d at 26.

275. *Id.* (quoting Williams v. N.Y.C. Hous. Auth., 22 A.D.3d 315, 316, 802 N.Y.S.2d 55, 56 (1st Dep't 2005)).

276. N.Y. C.P.L.R. 3113(b)-(c) (McKinney 2014).

Still at issue, years after the Fourth Department's 2010 decision in *Thompson v. Mather*, is what role an attorney may play during the examination of a non-party witness. [277]

In *Sciara v. Surgical Associates of Western New York*, the plaintiff filed a medical malpractice action against a surgeon.[278] During discovery, a non-party pathologist was deposed and, during that examination, the pathologist's attorney interrupted the deposition to clarify questions posed by plaintiff's counsel.[279] Plaintiff moved for an order precluding the pathologist's attorney from participating in a continuing deposition of the pathologist.[280] The pathologist's attorney cross-moved for an order permitting participation consistent with 22 NYCRR 221.2 and 221.3.[281] The trial court granted both motions.[282]

On appeal, the Fourth Department concluded that the trial court erred in granting the respondent's cross-motion.[283] Citing the *Thompson* decision, the appellate division noted that it is "axiomatic" that the pathologist's attorney could not make objections or otherwise participate at trial and, therefore, the attorney could not make objections or otherwise participate during a deposition.[284] While the appellate division declined to depart from *Thompson*, it did add "that the nonparty has the right to seek a protective order, if necessary."[285]

Similarly, the Second Department held in *Yoshida v. Hsueh-Chih Chin* that the trial court erred in denying the plaintiff's motion to compel a further deposition of a non-party witness because the attorney for the non-party witness directed the witness "on numerous occasions not to answer certain questions," which "were designed to elicit information which was material and necessary to the appellant's defense of this action."[286]

277. *See generally* 70 A.D.3d 1436, 894 N.Y.S.2d 671 (4th Dep't 2010) (stating that the attorney for a non-party witness may not participate during the deposition).

278. 104 A.D.3d 1256, 1256, 961 N.Y.S.2d 640, 640 (4th Dep't 2013).

279. *Id.* at 1256, 961 N.Y.S.2d at 640-41.

280. *Id.* at 1256, 961 N.Y.S.2d at 641.

281. *Id.* at 1256-57, 961 N.Y.S.2d at 641.

282. *Id.*

283. *Sciara*, 104 A.D.3d at 1257, 961 N.Y.S.2d at 641.

284. *Id.*

285. *Id.*

286. 111 A.D.3d 704, 706, 974 N.Y.S.2d 580, 582 (2d Dep't 2013).

5. Signing Deposition

It is well-known that a deponent may make changes to his or her deposition testimony upon receipt of the transcript "with a statement of the reasons given by the witness for making them."[287]

The quality of a reason for making a change to deposition testimony under CPLR 3116(a) was discussed in *Ashford v. Tannenhauser*.[288] In *Ashford*, the plaintiff proposed material change to his deposition testimony on the grounds "that he had been nervous."[289] The appellate division reversed the trial court's denial of the defendant's motion for summary judgment stating that "the injured plaintiff failed to offer an adequate reason for materially altering the substance of his deposition testimony," and, therefore, "the altered testimony could not properly be considered in determining the existence of a triable issue of fact as to whether a defect in, or the inadequacy of, the ladder caused his fall."[290]

6. Physical or Mental Examination

CPLR 3121 permits a party to compel another party to attend a physical, mental, or blood examination by a designed physician.[291] Customarily, this examination is called an independent medical examination (IME) or defense medical examination (DME).

In *Yu Hui Chen v. Chen Li Zhi*, the Second Department was asked to review the propriety of limitations placed by a trial court on a defense medical examination.[292] The plaintiff in *Yu Hui Chen* filed suit for personal injuries but, once discovery was underway, was unable to travel to New York for his deposition.[293] Therefore, the trial court issued an order permitting his deposition by Skype.[294] In addition, the trial court ordered the plaintiff's attorney to identify "five or more [physicians] 'in a city that is practical for the plaintiff to travel' for the purpose of conducting an [IME]."[295] On appeal, the Second Department held that the use of Skype was permissible.[296] However, the appellate division held that "[u]nder the unique circumstances of this case, the equities weigh in

287. N.Y. C.P.L.R. 3116(a) (McKinney 2014).
288. *See generally* 108 A.D.3d 735, 970 N.Y.S.2d 65 (2d Dep't 2013).
289. *Id.* at 736, 970 N.Y.S.2d at 67.
290. *Id.*
291. N.Y. C.P.L.R. 3121(a).
292. 109 A.D.3d 815, 971 N.Y.S.2d 139 (2d Dep't 2013).
293. *Id.* at 816, 971 N.Y.S.2d at 139-40.
294. *Id.* at 816, 971 N.Y.S.2d at 139.
295. *Id.*
296. *Id.* at 816, 971 N.Y.S.2d at 139-40.

favor of permitting the defendant to designate the doctor who will conduct the [IME] of the plaintiff, at such location and time as the defendant shall specify."[297] Further, "[t]he designation of the doctor who will conduct the [IME] of the plaintiff shall not be limited or circumscribed by the plaintiff."[298]

L. Article 32: Accelerated Judgment

1. Motions for Summary Judgment

CPLR 3212 provides a mechanism for a court to dispose of a claim, defense, or entire action if there are no genuine issues of fact for jury resolution.[299] Generally, a motion for summary judgment shall be supported by an affidavit, a copy of the pleadings, and other available proof, such as documentary evidence.[300]

The contents of a motion for summary judgment were the focus of appellate review in *Rivera v. Albany Medical Center Hospital*.[301] The plaintiff in *Rivera* brought an action against a hospital and physicians for medical malpractice in connection with a surgery for Hirschsprung's disease.[302] Following discovery, the defendants moved for summary judgment.[303] In support of their motion, the defendants submitted a name-redacted affidavit of a medical expert, together with an unredacted version of the affidavit for in camera review.[304] The trial court denied the motion because the anonymous affidavits were "incompetent evidence," and the Third Department affirmed stating:

> While the Legislature has allowed for some protection from disclosure of the identities of medical experts during "[t]rial preparation", and, consistent with this intention, courts have found it appropriate to allow nonmovants in the summary judgment context to also withhold experts' identities from their adversaries upon the reasoning that such parties did not choose to abandon the disclosure protections provided during trial preparation, the Legislature has shown no broad intention of protecting experts from accountability at the point where their opinions are employed for the purpose of judicially resolving a case or a cause of action. Further, we see no compelling reason to allow for such

297. *Yu Hui Chen*, 109 A.D.3d at 816-17, 971 N.Y.S.2d at 140.
298. *Id*.
299. *See* N.Y. C.P.L.R. 3212 (McKinney 2014).
300. *Id.*
301. 119 A.D.3d 1135, 1135-36, 990 N.Y.S.2d 310, 311-12 (3d Dep't 2014).
302. *Id.* at 1135-36, 990 N.Y.S.2d at 311.
303. *Id.* at 1136, 990 N.Y.S.2d at 311.
304. *Id.* at 1136, 990 N.Y.S.2d at 311-12.

> anonymity that would outweigh the benefit that accountability provides in promoting candor. Requiring a movant to reveal an expert's identity in such circumstances would allow a nonmovant to meaningfully pursue information such as whether that expert has ever espoused a contradictory opinion, whether the individual is actually a recognized expert and whether that individual has been discredited in the relevant field prior to any possible resolution of the case on the motion. Further, any expert who anticipates a future opportunity to espouse a contradictory opinion would be on notice that public record could be used to hold him or her to account for any unwarranted discrepancy between such opinions. For these reasons, we will not consider the incompetent affidavit of defendants' medical expert.[305]

2. Want of Prosecution

CPLR 3216 governs what happens when a party unreasonably fails to proceed with the prosecution of an action, including when and how a court may dismiss the party's pleadings.[306] Typically, a demand issues for a party to resume prosecution or file the trial note of issue within ninety days.[307]

In *Arroyo v. Board of Education of New York*, the plaintiff was injured in a fall at school in 1992.[308] The plaintiff's attorney failed to appear for a status conference in 1996 and the case "was 'marked off' the calendar and [subsequently] marked 'disposed.'"[309] In 2008, twelve years later, the plaintiff moved to restore the action.[310] The defendant cross-moved to dismiss the complaint based upon the doctrine of laches.[311] The trial court granted the plaintiff's motion and the defendant appealed.[312] Following a review of *Lopez v. Imperial Delivery Services, Inc.*,[313] *Cohn v. Borchard Affiliations*,[314] and *Airmont Homes, Inc. v. Town of Ramapo*,[315] the Second Department affirmed the trial court because "[a]t the time the instant case was 'marked off' the calendar and then later marked 'disposed' in 1996, the law governing the interplay between

305. *Id.* at 1136-37, 990 N.Y.S.2d at 312 (internal citations omitted).
306. *See* N.Y. C.P.L.R. 3216 (McKinney 2014).
307. *See id.* at 3216(b)(3).
308. 110 A.D.3d 17, 18, 970 N.Y.S.2d 229, 230 (2d Dep't 2013).
309. *Id.*
310. *Id.*
311. *Id.* at 18, 970 N.Y.S.2d at 231.
312. *Id.* at 19, 970 N.Y.S.2d at 231.
313. 282 A.D.2d 190, 725 N.Y.S.2d 57 (2d Dep't 2001).
314. 25 N.Y.2d 237, 250 N.E.2d 690, 303 N.Y.S.2d 633 (1969).
315. 69 N.Y.2d 901, 508 N.E.2d 927, 516 N.Y.S.2d 193 (1987).

CPLR 3404, CPLR 3216, and 22 NYCRR 202.27 was still unclear."[316] Further, the appellate division noted that:

> [B]ecause this case was at a pre-note-of-issue stage, there was no calendar from which to mark it off. Marking a case off a motion or conference calendar does not dispose of it. Thus, when the matter in this case was "marked off" the calendar and later marked "disposed," those acts were a nullity, and meant nothing . . . Since this action was never properly dismissed, there was no need for a motion to restore, and the Board's motion to dismiss based on laches was properly denied because it failed to comply with the [ninety]-day written demand requirement, a condition precedent to dismissal of the action for general delay.[317]

Approximately two weeks after issuing the *Arroyo* decision, the Second Department issued a second decision rejecting a motion to dismiss a claim based upon laches, stating that "'courts do not possess the power to dismiss an action for general delay where plaintiff has not been served with a [ninety]-day demand to serve and file a note of issue.'"[318]

M. Article 40: Trial Generally

1. Objections

CPLR 4017 provides that a party must request that a court take action and make objections to court rulings or risk waiver of appellate review.[319]

Waiver was at issue in *Nary v. Jonientz*.[320] *Nary* was a personal injury case that went to trial.[321] The defendant's expert physician testified in a recorded video deposition.[322] During the deposition, the expert was examined about the compensation paid in the past for performing medical examinations.[323] The defendant's attorney made several objections during the recording of the video and, after a jury verdict for the plaintiff, argued that the trial court erred in permitting the jury to hear the

316. *Arroyo*, 110 A.D.3d at 21, 970 N.Y.S.2d at 233.

317. *Id.* (internal citations omitted).

318. Baxter v. Javier, 109 A.D.3d 493, 494, 970 N.Y.S.2d 567, 569 (2d Dep't 2013) (quoting Roth v. Black Star Publ'g Co., 302 A.D.2d 442, 443, 753 N.Y.S.2d 743, 744 (2d Dep't 2003)).

319. N.Y. C.P.L.R. 4017 (McKinney 2014).

320. 110 A.D.3d 1448, 972 N.Y.S.2d 769 (4th Dep't 2013).

321. *Id.* at 1448, 972 N.Y.S.2d at 770.

322. *Id.* at 1448, 972 N.Y.S.2d at 771.

323. *Id.* at 1448, 972 N.Y.S.2d at 770-71.

testimony.[324] The Fourth Department affirmed the trial court because "[w]hile defendant's attorney made various objections during the recording of that video testimony, there is no indication that defendant ever made a timely and specific objection to the court or otherwise sought a ruling regarding the nature or scope of that cross-examination."[325]

N. Article 50: Judgments Generally

1. Interest Upon Judgment

Pursuant to CPLR 5003-a, a defendant must pay the sum due in a settled action within twenty-one days, or ninety days if the defendant is a municipality or the state.[326] If the sum due is not timely paid, the plaintiff may file a judgment for the amount stated in the release, plus costs and interest.[327]

Whether CPLR 5003-a applies to the settlement of a federal claim was a matter of first impression for the Southern District of New York in *Elliot v. City of New York*.[328] The plaintiff in *Elliot* filed suit against the City of New York and several police officers.[329] After mediation, the defendants agreed to pay the plaintiff $9,000 to settle the case.[330] A settlement stipulation and order of dismissal was executed by the parties on September 14, 2012.[331] On December 18, 2012, the plaintiff advised the trial court by letter that the settlement had not been paid, and sought interest.[332] The court treated the letter as a motion.[333] On December 26, 2012, the plaintiff was paid $9,000.[334] Plaintiff's motion for interest was heard on January 30, 2013.[335] Citing *Brown v. City of New York*,[336] the district court concluded that CPLR 5003-a applied to plaintiff's motion for interest and, therefore, the defendants owed the plaintiff $208.60.[337]

324. *Id.* at 1448, 972 N.Y.S.2d at 771.
325. *Nary*, 110 A.D.3d at 1448, 972 N.Y.S.2d at 771.
326. N.Y. C.P.L.R. 5003-a(a)-(b) (McKinney 2014).
327. N.Y. C.P.L.R. 5003-a(e).
328. 11 Civ. 7291, 2013 U.S. Dist. LEXIS 96092, at *3 (S.D.N.Y. 2013).
329. *Id.* at *1.
330. *Id.*
331. *Id.* at *2.
332. *Id.*
333. *Elliot*, 11 Civ. 7291, 2013 U.S. Dist. LEXIS 96092, at *2.
334. *Id.*
335. *Id.*
336. CV 2009-1809, 2012 U.S. Dist. LEXIS 24365 (E.D.N.Y. 2012).
337. *Elliot*, 11 Civ. 7291, 2013 U.S. Dist. LEXIS 96092, at *7.

2. Relief from Judgment or Order

Pursuant to CPLR 5015, a court may grant a party relief from an order, upon such terms as may be just, in the event of excusable default, newly-discovered evidence, fraud, misrepresentation, misconduct, lack of jurisdiction, and reversal of a prior order.[338]

In *Nash v. Port Authority*, relief from a judgment was an issue reviewed by the First Department[339] and the Court of Appeals.[340] *Nash* involved a $4.4 million judgment entered in 2010 against the Port Authority of New York and New Jersey for damages stemming from the 1993 terrorist bombing of the World Trade Center.[341] The *Nash* judgment became final on July 13, 2011, because the defendant did not appeal a prior order from the First Department entered on June 2, 2011.[342] Thereafter, the Port Authority moved to vacate the judgment pursuant to the supreme court's "inherent powers."[343] The trial court granted the motion and a divided First Department, Appellate Division, affirmed.[344]

Before the Court of Appeals, the plaintiff argued that the trial court lacked jurisdiction to vacate the judgment pursuant to CPLR 5015(a)(5) because the defendant failed to timely appeal and, in turn, the final judgment was beyond the scope of review.[345] The Court of Appeals disagreed with the plaintiff, stating that the "discussion does not end there."[346] However, the Court of Appeals concluded the trial court was not divested "of its authority to review the equities with respect to these parties" because of the ruling in *In re World Trade Center Bombing Litigation* ("Ruiz")[347] and, because it appeared from the record that the trial court blindly followed *Ruiz*, the Court of Appeals held that the trial court "exercised *no* discretion."[348] In the absence of an exercise of discretion by the trial court, the Court of Appeals reversed the decision of the appellate division and remitted the case to the supreme court for

338. N.Y. C.P.L.R. 5015(a) (McKinney 2014).

339. *See* 102 A.D.3d 420, 421, 959 N.Y.S.2d 4, 5 (1st Dep't 2013).

340. *See* 22 N.Y.3d 220, 225, 3 N.E.3d 1128, 1132, 980 N.Y.S.2d 880, 884 (2013).

341. *Id*. at 223, 3 N.E.3d at 1130, 980 N.Y.S.2d at 882.

342. *Id*.

343. *Id*.

344. *Id*.

345. *Nash*, 22 N.Y.3d at 223, 3 N.E.3d at 1131, 980 N.Y.S.2d at 883.

346. *Id*. at 224, 3 N.E.3d at 1131, 980 N.Y.S.2d at 883.

347. *See generally* 17 N.Y.3d 428, 957 N.E.2d 733, 933 N.Y.S.2d 164 (2011) (insulating Port Authority from tort liability pursuant to N.Y. C.P.L.R. 5015(a)(5)).

348. 22 N.Y.3d at 226, 3 N.E.3d at 1132-33, 980 N.Y.S.2d at 884-85.

further proceedings.[349]

3. Validity and Correction of Judgment or Order

CPLR 5019(a) provides that "[a] judgment or order shall not be stayed, impaired or affected by any mistake, defect or irregularity in the papers or procedures in the action not affecting a substantial right of a party."[350]

The difference between a correction and a substantive change was articulated by the Second Department in *Chmelovsky v. Country Club Homes, Inc*.[351] *Chmelovsky* was an action for personal injuries.[352] Defendants SK Home Improvement, LLC, SK Home Improvement, and Stanley Kedzior made a motion pursuant to CPLR 5019 that, in effect, asked the trial court to reinstate the plaintiff's third cause of action against County Club Homes, Inc.[353] The trial court granted the motion and the appellate division reversed, stating:

> Where a movant seeks to change an order or judgment in a substantive manner, rather than correcting a mere clerical error, CPLR 5019(a) is not the proper procedural mechanism to be employed, and relief should be sought through a direct appeal or by motion to vacate pursuant to CPLR 5015(a).[354]

O. Article 83: Disbursements and Additional Allowances

1. Costs Upon Frivolous Claims

CPLR 8303-a authorizes a court to award costs and reasonable attorneys fees where an action for personal injury, injury to property, or wrongful death is deemed frivolous.[355] In order for an action to be frivolous, it must be "commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another."[356]

In *Baxter*, the Second Department held that a trial court erred in denying a defendant's cross-motion for costs and attorney's fees on the grounds that the plaintiff's claim for punitive damages was asserted

349. *Id.* at 226, 3 N.E.3d at 1133, 980 N.Y.S.2d at 885.
350. N.Y. C.P.L.R. 5019(a) (McKinney 2014).
351. 111 A.D.3d 874, 875, 976 N.Y.S.2d 508, 509 (2d Dep't 2013).
352. *Id.* at 874, 976 N.Y.S.2d at 509.
353. *Id.*
354. *Id*. at 875, 976 N.Y.S.2d at 509.
355. N.Y. C.P.L.R. 8303-a(a) (McKinney 2014).
356. *Id.* § 8303-a(c)(i).

solely to harass the defendants.[357] In this context of this breach of contract action, "an award of costs and attorney's fees [was] warranted."[358]

III. COURT RULES

The New York State Office of Court Administration ("OCA") made few material changes to the rules of court during this *Survey* year outside of electronic filing mandates.

A. OCA Rule 202.10

Effective May 24, 2013, section 202.10 was amended to read, "[a]ny party may request to appear at a conference by telephonic or other electronic means. Where feasible and appropriate, the court is encouraged to grant such requests."[359]

IV. RULES OF PROFESSIONAL CONDUCT 7.4

Effective January 1, 2014, Rule 7.4 of Part 1200 of Title 22 of the NYCRR, entitled the "Rules of Professional Conduct" were amended as follows:

> (1) A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: "This certification is not granted by any governmental authority."
>
> (2) A lawyer who is certified as a specialist in a particular area of law or law practice by the authority having jurisdiction over specialization under the laws of another state or territory may state the fact of certification if, in conjunction therewith, the certifying state or territory is identified and the following statement is prominently made: "This certification is not granted by any governmental authority within the State of New York."
>
> (3) A statement is prominently made if:
>
> (i) when written, it is clearly legible and capable of being read by the average person, and is at least two font sizes larger than the largest text used to state the fact of certification; and
>
> (ii) when spoken, it is intelligible to the average person, and is at a cadence no faster, and a level of audibility no lower, than the cadence

357. *Baxter v. Javier*, 109 A.D.3d 493, 495, 970 N.Y.S.2d 567, 570 (2d Dep't 2013).
358. *Id.*
359. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.10 (2013).

and level of audibility used to state the fact of certification.[360]

V. CONTINGENCY FEE RETAINER AGREEMENTS

It behooves any attorney compensated on a contingency fee basis to review the rules promulgated by the relevant appellate division as, in the past calendar year, all four departments made changes to rules governing agreements. More specifically, in claims for personal injury or wrongful death (other than one for medical, dental or podiatric malpractice), an attorney must offer the client the option of paying a fee on the gross versus the net settlement.[361]

All four departments adopted the following language:

> Such percentage shall be computed by one of the following two methods, to be selected by the client in the retainer agreement or letter of engagement:
>
> (i) on the net sum recovered after deducting from the amount recovered expenses and disbursements for expert testimony and investigative or other services properly chargeable to the enforcement of the claim or prosecution of the action; or
> (ii) in the event that the attorney agrees to pay costs and expenses of the action pursuant to Judiciary Law section 488(2)(d), on the gross sum recovered before deducting expenses and disbursements. The retainer agreement or letter of engagement shall describe these alternative methods, explain the financial consequences of each, and clearly indicate the client's selection. In computing the fee, the costs as taxed, including interest upon a judgment, shall be deemed part of the amount recovered. For the following or similar items there shall be no deduction in computing such percentages: liens, assignments or claims in favor of hospitals, for medical care and treatment by doctors and nurses, or self-insurers or insurance carriers.[362]

CONCLUSION

Civil practice is dynamic. Practitioners and academicians alike should use their best efforts to stay current because a failure to follow the rules may bring about an adverse result. Certainly, it is far less traumatic to read about someone else's case.

360. *Id.* § 1200.0, r. 7.4(c).
361. 22 NYCRR 603.7(e)(3), 691.20(e)(3), 806.13(c), and 1022.31(c).
362. *Id.*