CIVIL PRACTICE

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TABLE OF CONTENTS

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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 the authors have made an effort to alert practitioners and academicians about interesting commentary about 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 authors did not endeavor to discuss every Court of Appeals or appellate division decision.

I. LEGISLATIVE ENACTMENTS AND AMENDMENTS

A. CPLR 1349

Chapter 206, section one of the Laws of 2018, effective August 24, 2018, amended CPLR 1349 to provide that money received through forfeiture can be used for law enforcement assisted diversion of individuals with substance use disorders (i.e., substance abuse treatment,

1. July 1, 2018 through June 30, 2019.

health or mental health services, housing assistance, with other services as may be needed).[2]

B. CPLR 2305

Chapter 218, section one of the Laws of 2018, effective August 24, 2018, amended CPLR 2305 to add subdivision (d) to provide that "[w]here a trial subpoena directs service of the subpoenaed documents to the attorney or a self-represented party at the return address" noted on the subpoena (rather than to the court clerk), a copy of the subpoena must also be served "simultaneously" upon all of the parties.[3] In addition, the receiving party is to deliver "forthwith" a complete copy of the produced documents in the same format as received, to all opposing counsel and self-represented parties.[4]

C. CPLR 4540-a

Chapter 219, section one of the Laws of 2018, effective January 1, 2019, added Rule 4540-a to provide that material provided by a party in response to a CPLR article thirty-one demand for "material authored or otherwise created by such party" is presumed to be authentic when it is offered into evidence by an adverse party.[5] However, this presumption can be rebutted by a preponderance of evidence proving that the material was not authentic and does not preclude any other admissibility objections.[6]

D. CPLR 5003-b

Chapter 57, section one of subpart D of the Laws of 2018, effective July 11, 2018, added CPLR 5003-b to provide that an employer (or its employee or officer) cannot include in a settlement agreement in connection with a sexual harassment claim, a nondisclosure agreement preventing the disclosure of the underlying facts and circumstances of the claim or action unless it is the plaintiff's (settling individual's) preference.[7] In addition, the plaintiff must have twenty-one days to

2. Act of Aug. 24, 2018, 2018 McKinney's Sess. Laws of N.Y., ch. 206, at 582 (codified at N.Y. C.P.L.R. 1349(2)(h)(i) (McKinney Supp. 2019)).

3. Act of Aug. 24, 2018, 2018 McKinney's Sess. Laws of N.Y., ch. 218, at 592 (codified at N.Y. C.P.L.R. 2305(d) (McKinney Supp. 2019)).

4. *See* N.Y. C.P.L.R. 2305(d).

5. Act of Aug. 24, 2018, 2018 McKinney's Sess. Laws of N.Y., ch. 219, at 592 (codified at N.Y. C.P.L.R. 4540-a (McKinney Supp. 2019)).

6. *See* N.Y. C.P.L.R. 4540-a.

7. *See* Act of Apr. 12, 2018, 2018 McKinney's Sess. Laws of N.Y., ch. 57, at 170 (codified at N.Y. C.P.L.R. 5003-b (McKinney Supp. 2019)).

consider whether to accept the provision; and even after signing the agreement, the plaintiff has an additional seven days to revoke the agreement.[8]

E. CPLR 7515

Chapter 57, section one of subpart B of the Laws of 2018, effective July 11, 2018, added CPLR 7515 to bar mandatory arbitration clauses in connection with sexual harassment claims, except where inconsistent with federal law.[9] The mandatory arbitration clause concerns provisions in a written contract (1) requiring the submission of a matter to arbitration (as defined in CPLR article seventy-five) prior to bringing any legal action, and (2) providing that an arbitrator's determination with respect to an alleged "unlawful discriminatory practice based on sexual harassment shall be final and not subject to independent court review."[10] If such provisions are included, they will be deemed null and void.[11] Where there is a conflict between provisions of this section and a collective bargaining agreement, the latter controls.[12]

II. CASE LAW DEVELOPMENTS

A. Article 2: Limitations of Time

1. CPLR 213: Actions to be commenced within six years: where not otherwise provided for; on contract; on sealed instrument; on bond or note, and mortgage upon real property; by state based on misappropriation of public property; based on mistake; by corporation against director; officer or stockholder; based on fraud

Pursuant to CPLR 213(2), an action upon a "contractual obligation or liability, express or implied" (with exceptions), must be commenced within six years.[13]

The above provision was addressed by the Court of Appeals in *Deutsche Bank National Trust Co. v. Flagstar Capital Markets Corp*., regarding residential mortgage backed securities ("RMBS") claims.[14] There, the defendant, Quicken Loans, Inc., was the originator of certain

8. *See* N.Y. C.P.L.R. 5003-b.

9. *See* Act of Apr. 12, 2018, 2018 McKinney's Sess. Laws of N.Y., ch. 57, at 168 (codified at N.Y. C.P.L.R. 7515(a)(2), (b)(i) (McKinney Supp. 2019)).

10. *See* N.Y. C.P.L.R 7515(a)(3).

11. *See id.* 7515(b)(iii).

12. *See id.* 7515(c).

13. N.Y. C.P.L.R. 213(2) (McKinney 2003).

14. *See* 32 N.Y.3d 139, 144, 112 N.E.2d 1219, 1221, 88 N.Y.S.3d 96, 98 (2018).

mortgage loans and sold pursuant to a June 2006 Mortgage Loan Purchase and Warranties Agreement ("MLPWA").[15] The mortgage loans were eventually sold into a trust for the purpose of issuing RMBS.[16] The plaintiff served as trustee of the trust and was entitled to enforce the rights of the mortgage loan purchaser under the MLPWA.[17]

In two sections of the MLPWA, the defendant made a number of representations and warranties concerning the characteristics and quality of the mortgage loans it was conveying.[18] The closing date for the loans, which were closed in groups, occurred between December 7, 2006 and May 31, 2007.[19]

The plaintiff commenced an action alleging that defendant breached the MLPWA when it sold mortgage loans that did not comply with the representations and warranties by filing a summons with notice on August 30, 2013 and its complaint on February 3, 2014.[20] The defendant moved to dismiss the action as time-barred by New York's six-year statute of limitations for contract actions since it was commenced more than six years after the closing date of the last mortgage loan sale.[21]

When faced with that dismissal, the plaintiff argued that the statute of limitations had yet to lapse, relying upon an "accrual clause" in the MLPWA that stated that a cause of action "shall accrue as to any Mortgage Loan upon (i) discovery . . . ."[22] The supreme court rejected the plaintiff's argument, and the First Department affirmed in a unanimous decision, but granted the plaintiff leave to appeal.[23]

On appeal, the Court affirmed, noting the general rule that contract actions accrue when the contract is breached and, given the importance of certainty in determining when an action accrues, it has "repeatedly rejected accrual dates which cannot be ascertained with any degree of certainty, in favor of a bright line approach . . . and for that reason, [does] not 'apply the discovery rule to statutes of limitations in contract actions.'"[24] As to the plaintiff's argument that the language "shall accrue"

15. *Id.* at 97, 112 N.E.2d at 1221, 88 N.Y.S.3d at 98.

16. *Id.*

17. *Id.*

18. *Id.* at 143–44, 112 N.E.2d at 1221, 88 N.Y.S.3d at 98.

19. *Deutsche Bank Nat'l Tr. Co.*, 32 N.Y.3d at 144, 112 N.E.3d at 1221, 88 N.Y.S.3d at 98.

20. *See id.*

21. *Id.*

22. *Id.* at 144–45, 112 N.E.3d at 1221, 88 N.Y.S.3d at 98.

23. *See id.* at 145, 112 N.E.3d at 1222, 88 N.Y.S.3d at 99.

24. *Deutsche Bank Nat'l Tr. Co.*, 32 N.Y.3d at 145–46, 112 N.E.3d at 1222, 88 N.Y.S.3d at 99 (citing ACE Sec. Corp. v. DB Structured Prods., Inc., 25 N.Y.3d 581, 593–94, 36 N.E.3d 623, 628, 15 N.Y.S.3d 716, 721 (2015)).

demonstrates the parties' intent to define a breach of the MLPWA as not just the falsity of the representations and warranties made at the date of closing, but as the defendant's subsequent failure to cure, the Court of Appeals held that despite the language, the obligation to cure was not a condition precedent to defendant's obligations under the MLPWA.[25] Rather, as in *ACE Securities Corp.*, the actual breach was the alleged failure of the mortgage loans to comply with the representations and warranties made as of the closing date (i.e., May 31, 2007).[26]

The Court also addressed the possibility that, despite the fact that any representation and warranty breach would have occurred at closing, the accrual clause could evince the parties' intent to delay commencement of the statute of limitations period.[27] In declining to address the plaintiff's claim, the Court found that even if the plaintiff's interpretation of the accrual clause were correct, enforcing that clause would violate public policy by rendering unenforceable an agreement to extend the statutory limitations period before a claim has accrued.[28] Rather, an agreement to extend the statutory limitations period must comply with General Obligations Law Section 17-103, which only permits an extension for a time period no longer than the original statute of limitations period.[29] Finally, while the majority recognized that the freedom to contract is an important public policy, if the policy conflicts with public policy prohibiting pre-accrual extensions of the statute of limitations, the latter takes precedence.[30] Accordingly, the majority affirmed the First Department's order affirming the dismissal.[31]

B. Article 3: Jurisdiction and Service, Appearance and Choice of Court

1. CPLR 302: Personal Jurisdiction by acts of Non-Domiciliaries

CPLR 302 enables a court to exercise personal jurisdiction over any non-domiciliary, or his or her executor or administrator, under certain circumstances including, *inter alia*, if he, she, or an agent, transacts business or contracts to supply goods or services in the state; commits a tortious act within the state; commits a tortious act without the state,

25. *See id.* at 148, 112 N.E.3d at 1224, 88 N.Y.S.3d at 101.

26. *See id.* at 148–49, 112 N.E.3d at 1224, 88 N.Y.S.3d at 101.

27. *See id.* at 150, 112 N.E. at 1225, 88 N.Y.S.3d at 102.

28. *See id.*, 32 N.Y.3d at 150–51, 112 N.E.3d at 1226, 88 N.Y.S.3d at 103.

29. *See Deutsche Bank Nat'l Tr. Co.*, 32 N.Y.3d at 151, 112 N.E. at 1226–27, 88 N.Y.S.3d at 103–04 (quoting John J. Kassner & Co. v. New York, 46 N.Y.2d 544, 552, 389 N.E.2d 99, 103, 415 N.Y.S.2d 785, 789–90 (1979)).

30. *See id.* at 154, 112 N.E. at 1228, 88 N.Y.S.3d at 105.

31. *Id.* at 155, 112 N.E. at 1229, 88 N.Y.S.3d at 106.

causing injury to a person or property within the state; or owns, uses or possesses any real property situated within the state.[32]

In *Deutsche Bank AG v. Vik*, the First Department addressed CPLR 302(a)(3)(ii)—the long-arm statute—which statutorily provides for jurisdiction when a tortious act is committed within the state, causes injury to person or property within the state, who expects or should reasonably expect the act to have consequences in the state, and derives substantial revenue from interstate or international commerce.[33] There, on a motion to dismiss for lack of personal jurisdiction, the court noted that "the situs of commercial injury is where the original, critical events associated with the action or dispute took place, not where any financial loss or damages occurred."[34] In the case before it, however, the critical events giving rise to the plaintiff's injury were transfers that occurred outside of New York and did not involve New York assets.[35] According to the First Department, where "the only relevant jurisdictional contacts with[in] the forum are the harmful effects suffered by the plaintiff, a court must inquire whether the defendant 'expressly aimed' its conduct at the forum."[36] As there was no evidence that the defendants would expressly aim their conduct at New York, and it was not foreseeable the alleged fraudulent conveyances would injure the plaintiff in New York, the First Department held that the fact that the injury was felt in New York was insufficient to obtain personal jurisdiction over defendants and affirmed the trial court's dismissal.[37]

In *Abad v. Lorenzo*, the plaintiff, a New York domiciliary, was injured in a motor vehicle accident in New Jersey.[38] The plaintiff commenced an action against a New Jersey corporation alleging violations of the New Jersey Dram Shop Act and defendants moved to dismiss for lack of personal jurisdiction.[39] As against one of the

32. *See* N.Y. C.P.L.R. 302(a)(1)–(4) (McKinney 2010).

33. *See* 163 A.D.3d 414, 415, 81 N.Y.S.3d 18, 20 (1st Dep't 2018); N.Y. C.P.L.R. 302(a)(3)(ii).

34. *See Deutsche Bank AG*, 163 A.D.3d at 415, 81 N.Y.S.3d at 20 (quoting CRT Invs., Ltd. v. BDO Seidman, LLP, 85 A.D.3d 470, 472, 925 N.Y.S.2d 439, 441 (1st Dep't 2011)) (citing Magwitch, LLC v. Pusser's Inc., 84 A.D.3d 529, 532, 923 N.Y.S.2d 455, 458 (1st Dep't 2011), *lv. denied* 18 N.Y.3d 803, 962 N.E.2d 285, 938 N.Y.S.2d 860 (2012)).

35. *Id.* (first citing Cotia (USA) Ltd. v. Lynn Steel Corp., 134 A.D.3d 483, 484–85, 21 N.Y.S.3d 231, 233 (1st Dep't 2015); and then citing *Magwitch, LLC*, 84 A.D.3d at 532, 923 N.Y.S.2d at 458).

36. *Id.* at 416, 81 N.Y.S.3d at 20–21 (citing Charles Schwab Corp. v. Bank of Am. Corp., 883 F.3d 68, 87 (2d Cir. 2018)).

37. *See id.* at 416, 81 N.Y.S.3d at 21.

38. *See* 163 A.D.3d 903, 903, 82 N.Y.S.3d 486, 487–88 (2d Dep't 2018).

39. *See id.*

defendants, the Second Department agreed with the trial court's decision that evidence that the defendant nightclub solely promoted itself through websites and social media activity, constituting "passive internet activity which merely imparts information without permitting a business transaction," is insufficient to establish personal jurisdiction.[40]

Finally, even where the long-arm statute has been satisfied, federal due process requires minimum contacts with the forum state.[41] Indeed, in *Williams v. Beemiller, Inc.*, the Court of Appeals ruled that an Ohio firearm merchant was not subject to long-arm jurisdiction in New York based on his sale of a gun in Ohio to an Ohio resident that was subsequently resold on the black market and used in a New York shooting.[42] In so doing, the Court of Appeals rejected the plaintiff's argument that the defendant was told by the individual who sold the gun on the black market that he "wouldn't mind" someday having a shop in Buffalo—finding the statement insufficient to forge constitutionally sufficient ties with New York (i.e., no evidence of taking purposeful action to sell products within the state).[43] And, because the action cannot proceed if either the statutory *or* constitutional prerequisite for personal jurisdiction is lacking under the long-arm statute and due process, the Court of Appeals affirmed the Fourth Department's dismissal as against the Ohio defendant.[44]

Likewise, in *Repwest Insurance Co. v. Country-Wide Insurance Co.*, the First Department held that a North Carolina default judgment against the defendant, a Delaware insurance company with its principal place of business in New York, was not enforceable in New York, despite the fact that the nationwide territory coverage clause in the defendant's personal automobile policy and the occurrence of the accident involving its insured was in New York.[45] Even where the forum state's long-arm statute has been satisfied,

> [f]ederal due process requires first that a defendant have minimum contacts with the forum state such that the defendant should reasonably anticipate being haled into court there, and second, that the prospect of

40. *See id.* at 904, 905, 82 N.Y.S.3d at 488, 489 (first citing Paterno v. Laser Spine Inst., 24 N.Y.3d 370, 377, 23 N.E.3d 988, 994, 998 N.Y.S.2d 720, 726 (2014); and then citing Grimaldi v. Guinn, 72 A.D.3d 37, 50, 895 N.Y.S.2d 156, 166–67 (2d Dep't 2010)).

41. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980).

42. *See* 33 N.Y.3d 523, 526–27, 130 N.E.3d 833, 835, 106 N.Y.S.3d 237, 239 (2019).

43. *See id.* at 530–31, 130 N.E.3d at 837–38, 106 N.Y.S.3d at 241–42.

44. *See id.* at 531, 130 N.E.3d at 838, 106 N.Y.S.3d at 242.

45. *See* 166 A.D.3d 61, 63–64, 85 N.Y.S.3d 24, 25–26 (1st Dep't. 2018).

> having to defend a suit [in the forum state] comports with traditional notions of fair play and substantial justice.[46]

According to the First Department, defendant had only been licensed to issue insurance policies within New York, had never been licensed or authorized to do business in any capacity in North Carolina, never maintained an office or employees there, and never conducted or solicited business from that state.[47] And, while the defendant's territory of coverage clause insured against loss from liability imposed by law upon the insured for any accident "within the State of New York, or elsewhere in the United States in North America," the First Department held that there was a "qualitative distinction between contracting to cover an insured under a territory of coverage clause and the insurer of the policy being amenable to being haled into court anywhere in the United States . . . ."[48] Accordingly, the First Department held that the defendant could not reasonably foresee being haled into court and therefore reversed the trial court's order denying defendant's cross-motion to dismiss for lack of personal jurisdiction.[49]

2. CPLR 308: Personal Service Upon a Natural Person

CPLR 308 provides the method by which service can be made upon a natural person, including (1) delivering the summons within the state to the person to be sued; (2) substitute service at the actual place of business, dwelling place, or usual place of abode and mailing; (3) delivering to a person designated under Rule 318; (4) nail and mail; (5) and such manner as the court, upon motion, directs when service is impracticable under paragraphs one, two and four.[50]

CPLR 308(4) was at issue before the Second Department in *First Federal Savings & Loan Association of Charleston v. Tezzi*.[51] There, the plaintiff showed that process was properly served pursuant to CPLR 308(4), but the affidavit of service was not filed within twenty days of either mailing or affixing, so service was "never completed."[52] When faced with the plaintiff's motion for default judgment, the supreme court

46. *Id.* at 64, 85 N.Y.S.3d at 26 (quoting D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro, 29 N.Y.3d 292, 300, 78 N.E.3d 1172, 1177, 56 N.Y.S.3d 488, 493 (2017)) (first citing JDC Fin. Co. I v. Patton, 284 A.D.2d 164, 166–67, 727 N.Y.S.2d 71, 74 (1st Dep't 2001); and then citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

47. *See id.* at 66–67, 85 N.Y.S.3d at 28.

48. *See id.* at 63, 66–67, 85 N.Y.S.3d at 25, 28.

49. *See id.* at 67, 85 N.Y.S.3d at 29.

50. N.Y. C.P.L.R. 308(1)–(5) (McKinney 2010).

51. *See* 164 A.D.3d 758, 759, 84 N.Y.S.3d 239, 240 (2d Dep't 2018).

52. *See id.* at 759, 84 N.Y.S.3d at 241.

deemed the affidavit of service timely filed, *sua sponte*, pursuant to CPLR 2004, and granted the plaintiff's motion for default.[53] On appeal, while agreeing with the supreme court's determination to cure the "procedural irregularity," the Second Department held that the court must grant such relief only where a substantial right of a party is not prejudiced.[54] Accordingly, the Second Department held that the defendant must be afforded an additional thirty days to appear and answer after service upon her of a copy of the court's decision and order.[55]

CPLR 308(2) was at issue before the Second Department in *Itshaik v. Singh*.[56] There, the supreme court granted the plaintiff's unopposed motion for leave to enter a default judgment after the plaintiff served the defendant pursuant to CPLR 308(2), leaving process with a "relative."[57] The defendant moved to vacate the order and for leave to serve an answer, submitting in support of his papers affidavits from defendant and his mother stating that they had moved from the address where the plaintiff allegedly effected service ("West End address"), which remained vacant since the time of their move.[58] The defendants also stated that they did not have any male relatives by the name of the person allegedly served, nor any relative who fit the description of the affidavit of service.[59] In opposition, the plaintiff argued that the defendant was estopped from challenging service because the West End address was the address listed on his license, and Vehicle and Traffic Law section 505(5) requires every motor vehicle licensee to notify the Commissioner of the DMV of any change in residence within ten days of the change.[60] The Second Department, however, rejected the plaintiff's argument and ruled that:

> [U]nder the circumstances of this case, where the defendant did not provide the West End Avenue address at the time of the accident, where the record does not contain a DMV driver's abstract for the defendant, and where the plaintiff identified the motor vehicle allegedly involved in this accident as belonging to a neighbor, the plaintiff's contention is without merit. Accordingly, we agree with the Supreme Court's

53. *See id.* at 759, 760, 84 N.Y.S.3d at 241.

54. *See id.* at 760, 84 N.Y.S.3d at 241 (first citing N.Y. C.P.L.R. 2001 (McKinney 2012); and then citing Discover Bank v. Eschwege, 71 A.D.3d 1413, 1414, 897 N.Y.S. 333, 334 (4th Dep't 2010)).

55. *Id.* at 759, 84 N.Y.S.3d at 240.

56. *See* 165 A.D.3d 902, 904, 86 N.Y.S.3d 572, 574 (2d Dep't. 2018) (discussing whether service was properly executed on the defendant, although not explicitly referencing CPLR 308(2)).

57. *See id.* at 902, 903, 86 N.Y.S.3d at 573.

58. *See id.* at 903, 86 N.Y.S.3d at 573.

59. *Id.*

60. *Id.* at 904, 86 N.Y.S.3d at 574.

> granting of the defendant's motion to vacate the order . . . and for leave to serve a late answer, based on lack of jurisdiction.[61]

C. Article 6: Joinder of Claims, Consolidation and Severance

1. CPLR 603: Severance and Separate Trials

Pursuant to CPLR 603, "[i]n furtherance of convenience or to avoid prejudice the court may . . . order the trial of any claim or issue prior to the trial of others."[62]

In *Fu v. County of Washington*, the supreme court denied the defendant's motion to bifurcate the trial in a motor vehicle accident, and the defendant appealed.[63] In determining whether the supreme court abused its "very broad discretion" in denying the defendant's motion, the Third Department considered whether the liability and injuries were so "inextricably intertwined," i.e., whether "the injuries themselves [were] probative in determining how the incident occurred."[64]

There, the plaintiff's experts were expected to testify to, among other things, the location at which the plaintiff's vehicle left the road. The plaintiff sought to establish through the testimony that her injuries "'were the direct result of an immediate, head-on impact with the concrete culvert' that exacerbated her injuries and would have been avoided if an appropriate guardrail had been placed."[65] The plaintiff also contended that "to counter defendant's seat belt defense . . . the first responders and expert witnesses would be required to testify at both the liability and damages phases of the trial."[66] Given the above, the Third Department concluded that the trial court properly exercised its discretion, and reasonably concluded that bifurcation would not result in a more expeditious resolution of the actions, or that the nature of the injuries had an important bearing on the question of liability (i.e., inextricably intertwined).[67]

D. Article 10: Parties Generally

61. *Itshaik*, 165 A.D.3d at 904, 86 N.Y.S.3d at 574.

62. N.Y. C.P.L.R. 603 (McKinney 2006).

63. *See* 163 A.D.3d 1388, 1388, 81 N.Y.S.3d 666, 667 (3d Dep't 2018).

64. *See id.* at 1389, 81 N.Y.S.3d at 668 (quoting Barron v. Terry, 268 A.D.2d 760, 762, 702 N.Y.S.2d 171,173 (3d Dep't 2000)).

65. *Id.*

66. *Id.*

67. *Fu*, 163 A.D.3d at 1389, 81 N.Y.S.3d at 668.

1. CPLR 1021: Substitution Procedure Dismissal for Failure to Substitute; Presentation of Appeal

CPLR 1021 sets forth the ways in which substitution may be made by successors or representatives of a party.[68] According to CPLR 1021:

> If a person who should be substituted does not appear voluntarily he may be made a party defendant. If the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made, however, such dismissal shall not be on the merits unless the court shall so indicate.[69]

The above provision was at issue before the Second Department in *Feurtado v. Page*.[70] A year after the action was commenced, the plaintiff's attorney learned that three of the defendants died during pendency of the action, and the matter was removed by the trial court from the active calendar.[71] The plaintiff moved to restore the action to the calendar, and one of the defendants cross-moved to dismiss the action based upon the plaintiff's failure to make a timely motion to substitute the proper parties in place of the defendants.[72] In modifying the supreme court's denial of the defendant's motion, the Second Department observed that the moving defendant not only failed to provide notice of the cross-motion to dismiss all persons interested in decedents' estates, he also failed to offer evidence of reasonable efforts to attempt to provide such notice.[73] Accordingly, the Second Department held that service needed to be made upon persons interested in decedents' estates, rather than upon the parties designated by the supreme court.[74]

E. Article 21: Papers

1. CPLR 2103: Service of Papers

CPLR 2103(b) provides the manner by which papers may be served upon a party's attorney in a pending action.[75] Among those options, the CPLR provides for "overnight delivery."[76]

68. *See* N.Y. C.P.L.R. 1021 (McKinney 2012).
69. *Id.*
70. *See* 163 A.D.3d 926, 926, 83 N.Y.S.3d 89, 90 (2d Dep't 2018).
71. *See id.* at 926–27, 83 N.Y.S.3d at 91.
72. *Id.* at 927, 83 N.Y.S.3d at 91.
73. *Id.*
74. *Id.*
75. *See* N.Y. C.P.L.R. 2103(b) (McKinney Supp. 2019).
76. *See id.* 2103(b)(6).

At issue before the Second Department in *Moran v. BAC Field Services Corp.*, was whether the defendant properly deposited its motion to dismiss the complaint against it.[77] There, after having been served the complaint, the defendant and the plaintiff entered into an agreement giving the defendant until March 4, 2016, to respond to the complaint.[78] The defendant served its motion to dismiss on Friday, March 4, 2016, with Federal Express for weekday delivery.[79] On Monday, March 7, 2016, Federal Express returned the papers to the defendant, after no one was available for signature.[80] The defendant re-served its motion papers on March 9, 2016 and the plaintiff cross-moved for leave to enter a default judgment, arguing that the defendant was in default for failing to timely respond to the complaint.[81] The trial court granted the defendant's motion to dismiss the complaint, relying on CPLR 2103(b)(2), and the Second Department reversed.[82]

According to the Second Department, CPLR 2103(b)(2) did not apply to render the motion timely because it only relates to a motion deposited under the exclusive care and custody of the United States Postal Service.[83] The defendant instead utilized the Federal Express.[84] Further, the court noted that CPLR 2103(b)(2) provides that service shall be complete upon deposit of the paper "into the custody of the overnight delivery service *for overnight delivery*."[85] Because the defendant deposited its papers on Friday for weekday delivery on Monday, the Second Department held that the court should have denied the defendant's motion as untimely.[86]

2. CPLR 2104: Stipulations

Pursuant to CPLR 2104,

> 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 writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to the stipulation[] of settlement and notwithstanding the form of the

77. *See* 164 A.D.3d 494, 494, 83 N.Y.S.3d 111, 112 (2d Dep't 2018).
78. *Id.* at 495, 83 N.Y.S.3d at 112.
79. *Id.*
80. *Id.*
81. *Id.*
82. *See Moran*, 164 A.D.3d at 495, 83 N.Y.S.3d at 113.
83. *Id.* (quoting N.Y. C.P.L.R. 2103(f)(1)).
84. *Id.*
85. *Id.* (quoting N.Y. C.P.L.R. 2103(b)(6)).
86. *See id.*

> stipulation . . . the terms of such stipulation shall be filed by the defendant with the county clerk.[87]

At issue before the Second Department in *Demetriou v. Wolfer* was whether a stipulation of discontinuance, filed after the plaintiff changed her mind, was binding.[88] There, the plaintiff, by text message, directed her former attorney to discontinue the action; and so, on that date, the former attorney and defense counsel executed a stipulation of discontinuance.[89] The next day the plaintiff, by text message, directed her former attorney to, among other things, "not dismiss my case under any circumstances; please retract . . . instructions to discontinue."[90] Within thirty minutes of receiving the above text message, the plaintiff's former counsel advised that the case had already been discontinued, and the stipulation of discontinuance was filed two days later, on a Monday.[91] The plaintiff moved to vacate the stipulation of discontinuance and the supreme court denied the motion.[92]

On appeal, the Second Department affirmed, noting that there was no dispute that the plaintiff's former attorney had authority to act on her behalf, and quoting CPLR 2104 in support.[93] The appellate division further noted that, "[c]ontrary to the plaintiff's contention, the stipulation of discontinuance clearly evidenced [her] intent to discontinue the action" on the date the stipulation was executed, notwithstanding the fact that she changed her mind prior to the filing, and "[i]n seeking to vacate the stipulation, [she] failed to meet her burden to establish good cause sufficient to invalidate a contract" (i.e., that it was the result of duress, fraud, mistake, etc.).[94] Accordingly, the Second Department affirmed the trial court's denial of the plaintiff's motion.[95]

87. N.Y. C.P.L.R. 2104 (McKinney 2012).

88. *See* 165 A.D.3d 1230, 1230–31, 84 N.Y.S.3d 793, 793–94 (2d Dep't 2018).

89. *Id.* at 1230, 84 N.Y.S.3d at 793–94 (citing N.Y. C.P.L.R. 3217(a)(2) (McKinney 2005)).

90. *Id.* at 1230, 84 N.Y.S.3d at 794.

91. *See id.*

92. *Id.*

93. *See Demetriou*, 165 A.D.3d at 1230–31, 84 N.Y.S.3d at 794 (quoting N.Y. C.P.L.R. 2104) (first citing Hallock v. New York., 64 N.Y.2d 224, 230, 474 N.E.2d 1178, 1181, 485 N.Y.S.2d 510, 513 (1984); and then citing Weil, Gotshal & Manges LLP v. Fashion Boutique of Short Hills, 56 A.D.3d 334, 335, 868 N.Y.S.2d 24, 25 (1st Dep't 2008)).

94. *Id.* at 1231, 84 N.Y.S.3d at 794.

95. *Id.* at 1230, 84 N.Y.S.3d at 793.

F. Article 22: Stay, Motions, Orders and Mandates

1. CPLR 2214: Motion Papers; Service; Time

CPLR 2214(d) provides that "[t]he court in a proper case may grant an order to show cause, to be served in lieu of a notice of motion, at a time and in a manner specified therein."[96]

The above provision was at issue before the Second Department in *Gluck v. Hirsch*, where the supreme court declined to sign a proposed order to show cause seeking to vacate a default, cancel notice of pendency, and disqualify the plaintiff's attorney "with a handwritten notation that the [defendants] failed to demonstrate a meritorious defense to the action and that the [defendants] failed to submit proof of misconduct by the plaintiff's attorney."[97] According to the Second Department, "[w]hether the circumstances constitute a 'proper case' for the use of an order to show cause," versus a notice of motion, is within the sound discretion of the court.[98] Based on the facts before it, the appellate division concluded that the trial court "improvidently exercised" its discretion in failing to sign the proposed order and remitted the matter to the trial court to set a return date for the order to show cause.[99]

G. Article 31: Disclosure

1. CPLR 3101: Scope of Disclosure

CPLR 3101 provides the manner by which disclosure may be obtained and notes that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof."[100] However, CPLR 3101(b) provides that "[u]pon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable."[101]

In *Liberty Petroleum Realty, LLC v. Gulf Oil*, the plaintiffs sought a deposition of opposing counsel in a commercial action.[102] More specifically, the plaintiffs served a subpoena on the defendants' counsel

96. N.Y. C.P.L.R. 2214(d) (McKinney 2010).

97. *See* 164 A.D.3d 762, 762, 79 N.Y.S.3d 556, 556 (2d Dep't 2018).

98. *Id.* at 763, 79 N.Y.S.3d at 556 (citing DAVID D. SIEGEL, NEW YORK PRACTICE § 248 (5th ed. 2011)).

99. *Id.* at 763, 79 N.Y.S.3d at 556–57 (citing Georghakis v. Matarazzo, 123 A.D.3d 711, 711, 995 N.Y.S.2d 915, 915 (2d Dep't 2014)).

100. N.Y. C.P.L.R. 3101(a) (McKinney 2018).

101. *Id.* 3101(b).

102. *See* 164 A.D.3d 401, 402, 84 N.Y.S.3d 82, 84 (1st Dep't 2018).

seeking documents and deposition testimony about his communication with Gulf at a time when he did not represent them, prior to litigation.[103] The trial court denied the plaintiffs' motion and granted the defendants' cross-motion for a protective order pursuant to CPLR 3101(b).[104] On appeal, the First Department held that a deposition is permitted if there is: a "showing that the information sought is material and necessary;" a good faith basis for the deposition—meaning, "the deposition is [not] sought as a tactic intended solely to disqualify counsel or for some other illegitimate purpose;" and "the information is not available from another source."[105] Notably, the First Department rejected the trial court's reliance on an Eighth Circuit case, finding that the circuit court's decision was inconsistent with New York law.[106] Instead, in applying New York law and the test it promulgated above, the First Department held that "the protective order was properly granted to the extent that it sought documents from [defense] counsel" because there was no showing that they were "material and necessary."[107] However, it remanded to the trial court on the deposition question—finding that there should be further proceedings on that issue.[108]

Similarly, in *Wrubleski v. Mary Imogene Bassett Hospital*, the Third Department had to consider whether certain notes maintained by the plaintiff's decedent, as instructed by her attorney, were privileged.[109] There, the plaintiff's decedent was injured when she fell while working out at a gym and underwent surgery performed by the defendant to repair a tear of her left hamstring.[110] She obtained an attorney to represent her with respect to "a lawsuit pertaining to her injuries," who directed her to prepare a written summary of her medical treatment and "specifically told [her] to write the phrase 'to my lawyer' at the beginning of the medical journal to 'clearly designate that it is a confidential document to be protected by the attorney-client privilege.'"[111] The plaintiff's decedent unexpectedly died from a pulmonary embolism and a wrongful death lawsuit was commenced.[112] The defendant sought disclosure of the journal and a medication log and the trial court denied the former on the

103. *See id.*
104. *See id.* at 403, 84 N.Y.S.3d at 84.
105. *See id.* at 406, 84 N.Y.S.3d at 87.
106. *See id.* at 404, 84 N.Y.S.3d at 85.
107. *Liberty Petroleum Realty, LLC*, 164 A.D.3d at 405, 84 N.Y.S.3d at 86.
108. *Id.* at 408, 84 N.Y.S.3d at 88–89.
109. *See* 163 A.D.3d 1248, 1249–50, 81 N.Y.S.3d 606, 608 (2d Dep't 2018).
110. *Id.* at 1249, 81 N.Y.S.3d at 607.
111. *Id.* at 1249, 81 N.Y.S.3d at 607.
112. *Id.*

ground of the attorney-client privilege, but permitted discovery of the medication log.[113]

On appeal to the Third Department, the Appellate Division held that although the record reflected that the plaintiff's decedent's attorney instructed her to keep an injury journal in connection with an impending lawsuit, there was no evidence that he directed her to provide a medication log.[114] The circumstances indicated that the "decedent—who was a nurse—kept the medication log, at least partially, to ensure compliance with postoperative care" and "to make sure all [of] the medi[cations] were taken at certain times."[115] Accordingly, the Third Department affirmed.[116]

2. CPLR 3126: Penalties for Refusal to Comply with Order or to Disclose

CPLR 3126 provides, "[i]f any party . . . refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just. . ." including "striking out pleadings or parts thereof. . . ."[117]

In *American Recycling & Manufactuing Co. v. Kemp*, the plaintiff and two related corporations commenced an action surrounding a breach of confidentiality agreement arising from a prior business relationship.[118] The defendants moved for summary judgment and the plaintiffs cross-moved for an order imposing sanctions on the defendants for alleged spoliation of evidence and partial summary judgment on liability.[119] The plaintiffs sought copies of electronically-stored information—specifically, emails sent between April 2011 and August 2011—but the first notice the defendants had concerning its obligation to preserve electronically-stored information arose in June 2013, when they received a letter from the plaintiffs' attorney.[120] As the plaintiffs failed to establish that the emails in question were destroyed *after* the obligation to preserve arose (i.e., when the defendants were first put "on notice that the evidence

113. *See id.* at 1249, 81 N.Y.S.3d at 608.
114. *Wrubleski*, 163 A.D.3d at 1251, 81 N.Y.S.3d at 609.
115. *Id.*
116. *Id.* at 1252, 81 N.Y.S.3d at 610.
117. N.Y. C.P.L.R. 3126 (McKinney 2018).
118. *See* 165 A.D.3d 1604, 1604, 85 N.Y.S.3d 651, 652 (4th Dep't 2018).
119. *See id.*
120. *See id.* at 1605, 85 N.Y.S.3d at 652.

might be needed for future ligation" in June 2013) the Fourth Department affirmed denial of the plaintiffs' motion for spoliation.[121]

H. Article 32: Accelerated Judgment

1. CPLR 3211: Motion to Dismiss

CPLR 3211 provides a mechanism for a court to dispose of a cause of action for several reasons.[122] Among them, a defendant can move to dismiss on the ground that "the cause of action may not be maintained because of arbitration and award . . . payment, release . . . or statute of frauds," and/or that the "pleading fails to state a cause of action."[123]

In *Fimbel v. Vasquez*, the defendant brought a pre-answer motion to dismiss an action arising out of a motor vehicle accident pursuant to CPLR 3211(a)(5) and (a)(7), and submitted in support of its motion a release which the plaintiff signed.[124] The trial court granted the defendant's motion despite the fact that in opposition to the motion the "plaintiff submitted an affidavit averring, among other things, that doctors at the hospital where she was treated for her injuries told her that she had rib fractures, but informed her that she did not have a leg fracture."[125] The evidence further showed that the adjuster procured the release eight days after the accident while the plaintiff was still on pain medication, and before the plaintiff was aware of the fracture to her fibula.[126] Additionally, the "plaintiff allege[d] that the adjuster gave her legal advice about recovery for her injuries by telling her that, because she only had bruising [on her leg] and a fractured rib, her injuries did not qualify as serious injuries under New York law and that $2,500 was a 'very good deal.'"[127]

On appeal to the Third Department, the Appellate Division did not rule on the validity of the release or whether the plaintiff may ultimately succeed, but held that the plaintiff plead "sufficiently alleged facts indicating that the parties were operating under a mutual mistake with respect to the fibula fracture at the time the release was executed."[128] The

121. *Id.* at 1604, 1605, 85 N.Y.S.3d at 652, 653.

122. *See* N.Y. C.P.L.R. 3211(a) (McKinney 2016).

123. *Id.* 3211(a)(5), (7).

124. *See* 163 A.D.3d 1120, 1120–21, 80 N.Y.S.3d 527, 527–28 (3d Dep't 2018).

125. *See id.* at 1120, 1121, 80 N.Y.S.3d at 527, 528.

126. *See id.* at 1122, 80 N.Y.S.3d at 528.

127. *Id.*

128. *Id.* at 1122, 80 N.Y.S.3d at 529 (first citing Ford v. Phillips, 121 A.D.3d 1232, 1234, 944 N.Y.S.2d 688, 690 (3d Dep't 2014); then citing Haynes v. Garez, 304 A.D.2d 714, 715, 758 N.Y.S.2d 391, 393 (2d Dep't 2003); and then citing Lodhi v. Stewart's Shops Corp., 52 A.D.3d 1084, 1085, 861 N.Y.S.2d 160, 162 (3d Dep't 2008)).

Third Department also found that the plaintiff alleged a cognizable claim of fraudulent inducement in the procurement of the release.[129] Accordingly, the appellate division reversed, finding that the "defendants . . . [failed to] establish as a matter of law that they were entitled to dismissal of the complaint due to the release."[130]

2. CPLR 3212(a): Motion for Summary Judgment

Pursuant to CPLR 3212(a), a

> party may move for summary judgment . . . after issue has been joined; provided however, that the court may set a date after which no such motion may be made . . . [that] date being no earlier than thirty days after the filing of the note of issue [and i]f no such date is set . . . [it] shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.[131]

In *Khan v. Macchia*, the plaintiff filed a note of issue, accompanied by an affirmation which stated, in sum and substance, that while discovery was not complete, the note of issue was being filed to comply with the part rules of the assigned justice.[132] At a conference, a Court Attorney Referee so-ordered a stipulation which outlined certain dates by which depositions had to be completed.[133] The defendant later moved for an extension of time to file a summary judgment motion until 120 days after completion of discovery, and the supreme court denied the unopposed motion.[134] On appeal, the Second Department noted that there are two separate and distinct methods to obtain further disclosure pursuant to Uniform Rules for Trial Courts (22 N.Y.C.R.R. sections 202.21(e) and (d)), and that the defendant did not apply for either.[135] However, the Second Department noted that because the "Court Attorney Referee so-ordered a stipulation which directed that further discovery take place beyond the date that summary judgment motions were to be filed … [the defendant] reasonably believed that the deadline for summary judgment motions would likewise be extended."[136]

129. *Fimbel*, 163 A.D.3d at 1122, 80 N.Y.S.3d at 529 (first citing Newin Corp. v. Hartford Accident. & Indem. Co., 37 N.Y.2d 211, 217, 333 N.E.2d 163, 166, 371 N.Y.S.2d 884, 890 (1975); then citing Pacheco v. 32-42 55th St. Realty, LLC, 139 A.D.3d 833, 834, 33 N.Y.S.3d 301, 302 (2d Dep't 2016); then citing *Ford*, 121 A.D.3d at 1235, 994 N.Y.S.2d at 691; and then citing Farber v. Breslin, 47 A.D.3d 873, 877, 850 N.Y.S.2d 604, 608 (2d Dep't 2008)).

130. *Id.*

131. N.Y. C.P.L.R. 3212(a) (McKinney 2005).

132. 165 A.D.3d 637, 637, 84 N.Y.S. 3d 233, 234 (2d Dep't 2018).

133. *Id.* at 638, 84 N.Y.S.3d at 234.

134. *Id.*

135. *See id.*

136. *Id.*

Accordingly, the appellate division held that the defendant demonstrated good cause for allowing an extension of time for summary judgment and reversed the trial court's denial.[137]

Similarly, in *Sensible Choice Contracting, LLC v. Rogers*, the Second Department considered whether a plaintiff's failure to annex the pleadings to its summary judgment papers was a fatal defect.[138] There, the trial court disregarded the plaintiff's omission and granted its motion.[139] On appeal, the Second Department noted that

> the pleadings were not only electronically filed and available to the Supreme Court and the parties, but the answer was submitted by the defendants in opposition to the motion, . . . the summons and complaint were submitted in reply by the plaintiff [and the] defendants did not assert that they were prejudiced by the omission.[140]

Given this, the appellate division affirmed the trial court's decision to disregard the plaintiff's omission and consider the motion on the merits.[141]

I. Article 45: Evidence

1. CPLR 4545: Admissibility of Collateral Source of Payment

CPLR 4545 "governs the admissibility of evidence to establish that damages have been or will be covered in whole or part by a collateral source."[142]

The above provision was at issue before the Second Department in *Cajamarca v. Osatuk*.[143] There, the plaintiff commenced an action for injuries sustained in a motor vehicle accident.[144] "A preliminary conference order directed, over the plaintiff's objection, that the plaintiff provide the defendant with 'no-fault/collateral source authorizations' within 45 days."[145] The plaintiff moved for a protective order preventing disclosure of the records relating to the plaintiff's receipt of no-fault benefits, arguing that such records are not discoverable where, as here,

137. *Khan*, 165 A.D.3d at 638–39, 84 N.Y.S.3d at 234–35.

138. *See* 164 A.D.3d 705, 706, 83 N.Y.S.3d 298, 299 (2d Dep't 2018).

139. *See id.* at 706–07, 83 N.Y.S.3d at 299–300.

140. *Id.* at 707, 83 N.Y.S.3d at 300.

141. *See id.*

142. Cajamarca v. Osatuk, 163 A.D.3d 619, 620, 81 N.Y.S.3d 439, 440 (2d Dep't 2018). *See also* N.Y. C.P.L.R. 4545 (McKinney 2007).

143. *See Cajamarca*, 163 A.D.3d at 620, 81 N.Y.S.3d at 440.

144. *Id.* at 619, 81 N.Y.S.3d at 440.

145. *Id.*

the plaintiff does not seek to recover unreimbursed special damages.[146] "The Supreme Court granted the plaintiff's motion and the defendants appeal[ed]."[147]

On appeal, the appellate division recognized that pursuant to CPLR 3101(a), there "shall be full disclosure of all matter material and necessary . . . [including] 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."[148] As noted by the court, in an action relating to a motor vehicle accident, the plaintiff's records relating to treatment following the accident are "material and necessary to the defense of a plaintiff's claim . . . [and] any claim to recover damages for loss of enjoyment of life."[149] The Second Department further rejected the plaintiff's reliance upon CPLR 4545, noting that it governs solely the "*admissibility* of evidence."[150] In the context of discovery, however, "[a]ny matter which may lead to the discovery of admissible proof is discoverable, as is any matter which bears upon a defense, even if the facts themselves are not admissible."[151]

III. COURT RULES

The New York State Office of Court Administration ("OCA") made material changes to the rules relating to the actions in the supreme court during this *Survey* year.

Effective October 1, 2018, Rule 11-e of section 202.70(g) was amended to add a new subdivision (f) as follows:

> The parties are encouraged to use the most efficient means to review documents, including electronically stored information ("ESI"), that is consistent with the parties' disclosure obligations under Article 31 of the CPLR and proportional to the needs of the case. Such means may include technology-assisted review, including predictive coding in appropriate cases. The parties are encouraged to confer, at the outset of discovery and as needed throughout the discovery period, about

146. *Id.*

147. *Id.*

148. *Cajamarca*, 163 A.D.3d at 620, 81 N.Y.S.3d at 440 (quoting Allen v. Crowell-Collier Publ'g Co., 21 N.Y.2d 403, 406, 235 N.E.2d 430, 432, 288 N.Y.S.2d 449, 545 (1969)).

149. *Id.* (citing DeLouise v. S.K.I. Wholesale Beer Corp., 79 A.D.3d 1092, 1093, 913 N.Y.S.2d 774, 775–76 (2d Dep't 2010)).

150. *Id.*

151. *Id.* (quoting Bigman v. Dime Sav. Bank, FSB, 153 A.D.2d 912, 914, 545 N.Y.S.2d 721, 723 (2d Dep't 1989)).

technology-assisted review mechanisms they intend to use in document review and production.[152]

Also effective on October 1, 2018, section 202.70(g) was amended to add a new Rule 9-a, which reads as follows:

> Rule 9-a. Immediate Trial or Pre-Trial Evidentiary Hearing. Subject to meeting the requirements of CPLR 2218, 321l(c) or 3212(c), parties are encouraged to demonstrate on a motion to the court when a pre-trial evidentiary hearing or immediate trial may be effective in resolving a factual issue sufficient to effect the disposition of a material part of the case. Motions where a hearing or trial on a material factual issue may be particularly useful in disposition of a material part of a case, include, but are not limited to:
>
> (a) Dispositive motions to dismiss or motions for summary judgment;
>
> (b) Preliminary injunction motions, including but not limited to those instances where the parties are willing to consent to the hearing being on the merits;
>
> (c) Spoliation of evidence motions where the issue of spoliation impacts the ultimate outcome of the action;
>
> (d) Jurisdictional motions where issues, including application of long arm jurisdiction, may be dispositive;
>
> (e) Statute of limitations motions; and
>
> (f) Class action certification motions.
>
> In advance of an immediate trial or evidentiary hearing, the parties may request, if necessary, that the court direct limited expedited discovery targeting the factual issue to be tried.[153]

Additionally, effective January 1, 2019, section 100.3(E)(1)(e) of the rules governing Judicial Conduct was amended to add the following material:

> (E) Disqualification.
>
> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> . . .
>
> (e) the judge knows that the judge or the judge's spouse, or a person known by the judge to be within the fourth degree of relationship to

152. 40 N.Y. Reg. 87 (Aug. 27, 2018) (codified at 22 N.Y.C.R.R. § 202.70(g), R. 11-e (2018)).

153. *Id.* (codified at 22 N.Y.C.R.R. § 202.70(g), R. 9-a (2018)).

40 N.Y. Reg. 87 (Aug. 27, 2018) (codified at 22 N.Y.C.R.R. § 202.70(g), R. 11-e (2018)).

> either of them, or the spouse of such a person, is acting as a lawyer in the proceeding or is likely to be a material witness in the proceeding. Where the judge knows the relationship to be within the second degree, (i) the judge must disqualify him/herself without the possibility of remittal if such person personally appears in the courtroom during the proceeding or is likely to do so, but (ii) may permit remittal of disqualification provided such person remains permanently absent from the courtroom.[154]

IV. 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.

154. 41 N.Y. Reg. 65 (Jan. 1, 2019) (codified at 22 N.Y.C.R.R. § 100.3(E)(1)–(e) (2019)).