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Advanced Litigation Techniques -- Part III

Bringing it Home: Feasible Strategies for Successful Discovery and Winning Dispositive Motions

BY SANFORD F. YOUNG

*This is the third in a continuing series of articles devoted to litigation techniques. Mr. Young's first article, "**Canons and Myths: Strategies to Enhance Success**," which appeared in the January 2004 issue (Volume 76, No. 1), began with a discussion of the initial retention and creation of a team-like effort with the client, an overview of strategy, tactics, risk assessment and implementation, and dealing with adversaries. The second article "**Conventional Wisdoms or Mistakes: The Complaint and the Response**," which appeared in the June 2004 issue (Volume 76, No. 5), discusses strategic and tactical decision making and implementation for commencing actions or responding to the complaint, and an overview of preliminary motion practice and discovery.*

This article focuses on creating and implementing feasible strategies and tactics for completing discovery and making or opposing dispositive motions.

Once the answer is served and issue joined, the party who begins with the earliest and best

prepared discovery demands seizes a strategic advantage that will have a profound effect on the outcome of the suit. Likewise, well planned dispositive motion practice, *i.e.*, dismissal or summary judgment, is an essential part of strategic planning.

Discovery

Do or Die

After the lawsuit has been commenced, the first, and perhaps, most determinative phase of the case is discovery. Here is where the more diligent, if not aggressive, party takes control. It is where each side has the opportunity to uncover and pin down critical facts and weaknesses of the adversary's case. It is also where each side must reveal its own strengths and weakness.

Many attorneys make the mistake of treating discovery as either a necessary inconvenience or something to avoid altogether. All too often, however, they realize the consequence of missed discovery when it is too late, such as when faced with the hasty need to defend against a summary judgment motion, or worse, when the case is about to be tried. Rather then wait, discovery is a vital strategic step to be effectuated promptly and diligently.

Also, discovery is often where the most abuse occurs in terms of overreaching and overspending. While discovery may comprise the predominant part of the pre-trial budget (followed by the costs of engaging in dispositive motion practice), it is easy to get caught up in a frenzy of overkill – whether as the seeker or defender of discovery. The key is to optimize probable benefits *versus* risks and costs of obtaining or resisting discovery.

Priority is Job Number One

Obtaining priority is one way to achieve this efficiency. Priority allows you to gain and maintain control over much of the discovery process. In New York State courts, defendants have the automatic right to priority for depositions and interrogatories so long as they serve those requests with the answer.[i] While the Federal Rules and other jurisdictions generally do not recognize priority,[ii] there can be advantages by being first to serve discovery demands, such as when the discovery schedule is negotiated or set by court order. The advantages of having priority are fairly obvious and manyfold. One, priority allows the party to be the first to pin down the other side and ferret out its evidence. Two, it goes a long way to learning your own case and the types of information and documents your

client may have.[iii] Three, it places the onus on the adversary to complete its discovery obligations before it can move the case forward. This is especially true in State court where a party cannot place the case on the trial calendar until he can certify that discovery has been completed.[iv]

There are many discovery devices available, most of which are not substitutes for, but are complementary to each other.[v] When used in concert and in a sensible order, the various devices allow for the opportunity to gain the most complete discovery in an organized manner. Those devices include:

- discovery and inspection of documents, things and places
- interrogatories or demand for a bill of particulars
- depositions of parties and non-parties
- notices to admit
- expert information
- accident reports
- insurance information
- photographs, video and audio recordings
- physical and mental examinations
- names and addresses

A typical initial set of discovery demands includes a Notice for Discovery and Inspection (for documents), Interrogatories *or* a Demand for Bill of Particulars,[vi] and Notice to Take Deposition. In personal injury cases, it is also common practice to serve various miscellaneous *combined* demands, such as for party statements,[vii] insurance coverage,[viii] medical and other relevant authorizations[ix] and photographs and videos.[x]

Optimization or Attrition: The Choice is Yours

One way to optimize the pre-trial budget is to spend more on obtaining discovery than providing it. This does not mean resisting discovery; it means providing it! Resisting discovery can be a costly business, leading to endless motion practice and inviting expensive knee-jerk retaliatory countermeasures by your adversary. Unless you and your client are willing to engage in a war of attrition and possibly walk an ethical line, any discovery resistance should be well focused on that which is truly harmful, and for which there is a good faith basis for objection.[xi] On the other hand,

such resistance may also focus the adversary's attention on the objected-to documents or testimony, where otherwise, its existence or relevance might stand a chance of being lost in the bulk of the freely given discovery.

On the other side of the coin, one of the greatest costs and annoyances is doing battle with an adversary who stonewalls in providing discovery. This means, for both sides, expending great effort on making successive discovery demands and motion practice. One time or another – and probably way too often – we have all encountered adversaries whose attitude is that they have nothing of relevance to give, and in any event, claim that you don't know how to ask the right questions. These are the obdurate adversaries who are quick to give us their pedantic views of how we should conduct discovery, especially when they are posturing before the court. Unfortunately, these attorneys – and they come in all ages, shapes and sizes – are among the most challenging, as they readily and uselessly eat up our time, resources and patience. Fortunately, there are ways to deal with and conquer them, but it takes diligence and stamina.

Whatever the situation, do not allow the adversary's offensiveness deter you from insisting on the discovery you need. First, as noted above, you should attempt to gain priority, as it may create a scenario where they cannot obtain discovery until their compliance with your requests. Second, where available, at the earliest opportunity, request a conference before the court. In New York, the Preliminary Conference [*PC Conference*] is extremely useful, efficient and readily available by simply filing a Request for the conference with a Request for Judicial Intervention [*RJI*], if not already filed.[xii] By the time the PC Conference is held, you should have served your discovery requests so that the PC Order can make specific reference to the demands and set a schedule for responses.[xiii] Third, in addition to the usual arsenal of discovery devices which depend upon the adversary's good faith response, such as Demands for Bills of Particulars, Interrogatories and Document Demands, try utilizing methods that are less passive and place an affirmative onus and deadline on the adversary. Among those methods are Notices to Admit, which must be responded to within 20 days; otherwise the admissions are deemed made.[xiv] Also, use methods which require the attestation of the party, rather than the simple signature of the attorney. Interrogatories, for example, require the party's sworn statement, while many Bills of Particulars may not. Obviously, depositions are also extremely useful as they force the adverse party to face the *heat*. Finally, if your back is against the wall, rewarding the

adversary's poor conduct with a motion for summary judgment may be the best way to catch him off guard and unprepared. It also forces him to involve and put his client on the line.

The Zero Value of Definitions and Instructions

Attorneys faced with Interrogatories and Notices for Discovery and Inspection are all too familiar with the need to wade through pages and pages of definitions and instructions, before locating the actual questions or items demanded. Likewise, most of us are probably guilty of using similar boilerplate when drafting our own demands, as well as using complex questions with numerous subparts. Nevertheless, most of us could count on one hand those instances where we have received, or provided, interrogatory answers that complied with verbose definitions and instructions or went beyond the main question to answer the myriad subparts.[xv]

Ironically, while our compulsion for using complex sets of questions is to ensure that our adversaries provide us with complete answers that spare no detail, the more likely result will be just the opposite: evasion and avoidance. To prove this point, compare the use of Interrogatories to cases where parties employ Demands for Bills of Particular -- which typically use a simple one-question-at-a-time structure. While some of the difference may be the nature of the cases where Bills are used (such as personal injury actions), the simplicity of style probably accounts most for the clarity of responses. The lesson to be learned is not that Demands for Bills are better – they are not -- it is that greater simplicity is desirable when drafting Interrogatories.

Discovery Without Using Discovery

While formal discovery is indispensable, attorneys should not overlook extra-judicial methods for obtaining information. For example, a useful pre-litigation tool is writing to the adverse party, if not yet represented,[xvi] in the hopes of getting a written response that may contain admissions or other useful information. While often a response may not come, it is well worth the try.

The Internet also provides a seemingly endless source of information. In most cases, it should be routine to *Google* the parties, attorneys, witnesses, involved agencies and other known factors. Since websites can change or disappear, your Internet search should be done at the earliest opportunity, and redone from time-to-time, with meaningful results saved and printed out for future use. It is also possible to search for older versions of websites via various archival services that store this information and provide it for a nominal cost.

An electronic name search should be made for the parties' involvement in other cases. The New York court system, as well as that of the Federal and many other states, run websites that provide access to case dockets, filed documents and court rules.[xvii] Once cases are identified, a good starting point for further investigation is to download or otherwise obtain the docket sheet, which usually names the parties and attorneys, describes the type and status of the case, and provides a chronology of the proceedings and list of filed legal papers. For reported (usually appellate) cases, a comprehensive search can be made using the various commercial legal data bases.[xviii] Once located, the decisions should also identify the parties and attorneys, as well as provide useful information about the lawsuit. It may also enable you to locate the appellate record (which may contain pleadings, affidavits, trial and deposition transcripts and exhibits) and briefs, which may be accessible from any of a number of major law library *depositories* that receive and maintain appellate records and briefs. Often, these libraries, when contacted by phone, will identify, copy and fax select pages to you for a nominal charge. You can also try contacting the attorneys of record who are often willing to provide copies for a nominal charge.

Freedom of Information ["FOI"] requests[xix] can be used to obtain non-confidential information on file with various public agencies. Here, all types of relevant information may be available for the asking: complaints and investigations, registration and licensing information, rules and regulations and various studies and activity. Among these, you may find information on the adverse party, including insurance and financial information, the identity of officers and employees, customer complaints, investigations, law suits and the like. In most instances, the initiation of a FOI request is amazingly simple: requiring only a short letter to the agency, preferably to the attention of the Freedom of Information, records or similar office, identifying what it is you are requesting. You will often be surprised how cooperative most agencies are. Remember, however, that since you are dealing with bureaucracies, FOI requests should be sent out at the soonest opportunity.[xx]

In addition to the relative ease and low cost of finding publicly available information, it may provide an excellent source for surprising the adversary at trial. Unlike your client's own information and documents, which must be disclosed, information the attorney gathers from outside sources may be immune from discovery. As such, its disclosure may not have to occur until you actually use it, or when trial exhibits must be exchanged or pre-marked.

Disclosure from Non-Parties; the Friendly or Not-So Friendly Way

Non-parties are another major source of information and documents. For some reason, however, many attorneys are reluctant to tap into this resource. Why that is, is not clear, for non-parties present a fertile source of information and documents.

There are two ways to obtain information from non-parties: the *friendly* or *not-so friendly* way. The friendly way is seeking it via voluntary means, such as by writing a letter, making a call or paying a visit. The other way is by compulsion: i.e. serving them with a third-party subpoena.[xxi] If the latter, there is a good chance that the non-party's attorney may become involved. That may help or hinder the search, depending on the attitude of the non-party and his or her lawyer. Also, in the case of compulsion, you are obligated to serve your adversary with the demand and response.[xxii] If voluntary means are used, however, it may be done without notice, and the fruits of your voluntarily obtained bounty may be immune from discovery.

However, there are potential risks to obtaining the information and documents via voluntary means. For one thing, the non-party may be suspicious, uncooperative or outright hostile. Two, the information and documents will not be authenticated and may be legally unreliable (*e.g.*, hearsay), leading to objections to its admissibility at trial. Those challenges may be less significant, however, if it is the adverse party's admission, you intend to use it for cross-examination, or your own client can establish its foundation (such as being the author or recipient). It may also be desirable to obtain the non-party's affidavit, which would include a recitation of the underlying facts and identifies annexed documentation. Since affidavits are not admissible trial, however, if you anticipate that the non-party's testimony will be critical and he or she not available for trial, you should preserve the testimony via a non-party deposition.[xxiii] Otherwise, you may find yourself scurrying around trying to locate and subpoena them for trial.

Motions for Summary Judgment

Keep Biting at the Apple

Dispositive motions -- whether a pre-answer motion to dismiss under CPLR 3211 arguing that the complaint does not state a cause of action,[xxiv] based on documentary evidence[xxv] or other grounds,[xxvi] or a post-answer motion for summary judgment[xxvii] – present opportunities for various *bites at the apple*. However, unlike motions to dismiss, which offer many advantages with little risk

for the moving defendant,[xxviii] any party who moves for summary judgment will be revealing key elements of his case, and additionally, inviting a cross-motion.[xxix] Hence, a risk assessment must be made before making the motion.

In addition to presenting an opportunity to win judgment without the necessity of trial, summary judgment motions are a strong tool to force the adverse party to reveal its best case: evidence and theories. Indeed, as noted above, summary judgment motions can be used as the *discovery device of last resort*.

Summary judgment motions are also useful devices for *stirring up the pot*, to induce parties to come to the table and engage in settlement negotiations. They do this by creating a heightened uncertainty, whereby either party can envision summarily losing the case. It also creates an indirect communication of your case that your adversary must relay to his client, whom he needs to consult for instructions, information, affidavits and the fee for opposing the motion. This may motivate the parties to consider the certainty of settlement, rather than expending large sums to oppose the motion and risk the uncertainty of losing the case.

When Should the Motion be Made

In many cases, attorneys opt to move for summary judgment early in the case, before discovery is underway or reciprocated. For those attorneys, it is an attempt to win without going through or completing discovery, either because they feel they don't need any, or perhaps, to prevent the adverse party from having their turn at discovery. In fact, under State practice, the motion automatically stays discovery.[xxx] A party (usually the defendant) may also benefit from the resulting delay during the time the motion is *sub judice* and the stay in effect..

In other cases, attorneys prefer a more traditional approach by moving for summary judgment after discovery has been completed. In that situation, the motion is usually fairly comprehensive and may act as a prelude to trial. Recognizing that many motions follow the completion of discovery, and so as to avoid delaying a trial pending a decision on a late-made motion, the CPLR requires that motions for summary judgment be made within 120 days after the filing of the Note of Issue, unless a shorter time has been set by the court.[xxxi] A defendant may therefore opt to move before the Note of Issue is filed, since its pendency will delay the plaintiff's ability to file the Note of Issue as the Certificate of Readiness requires that there be no outstanding motions.[xxxii] On the other side of the

coin, the plaintiff would be wise to first file the Note of Issue and then serve the motion, so that the case continues to advance on the trial calendar while the motion is pending.[xxxiii]

Parties may also attempt more than one motion for summary judgment at different points in the suit. However, courts look askance on successive motions, although they usually can pass muster when strong grounds exist.[xxxiv]

How Much Should be Revealed in The Motion

Many attorneys, especially those opposing these motions, make the common mistake of not appreciating the threat of the motion being granted. Those are the parties who most often lose and are then compelled to explain to their clients why the case is not going to trial and a decent appellate record not preserved. Whether the moving or opposing party, counsel are well-advised to take these motions seriously and give them their best shot. That means following the requirements that the affiant be someone with first hand knowledge of the facts, annexing relevant exhibits and presenting, via a speaking affirmation,[xxxv] or preferably a memorandum of law,[xxxvi] a strong legal argument. Counsel should also be mindful that they are preserving a record for a potential appeal.

Having said that, there is room for counsel, whether he or she represents the moving or opposing party, to make assessments of how much of their case – evidence and theories -- should be revealed in the motion papers. On the one hand, revealing too little may result in the loss of the motion, while on the other, too much may give away the strategic edge of surprise should the motion be lost and the case continue on to trial. For the movant, there may be a feeling that less is at stake, as a loss may mean going to trial. On the other hand, more may be at stake for the respondent. This imbalance in risks can sometimes be deceptive, however, if there is a significant possibility that summary judgment can be granted to the respondent. In fact, a respondent can gain some advantages by cross-moving. One, it can shift the momentum by obviously turning the threat around and putting the original movant on the defense. Two, the time for the original movant to respond to the cross-motion is typically short.[xxxvii] Three, the cross-movant may finagle gaining the last word if the court accepts its sur-reply.

Are Partial Summary Judgments Worth the Effort

The rules also provide for *partial* summary judgments.[xxxviii] Partial could mean a judgment of liability, an order granting or dismissing less than all causes of action, or a decision on the validity of

the affirmative defenses. In addition to the general strategic assessments that need to be made for any motion, there are special considerations for partial summary judgment motions. One of these may be whether winning a partial summary judgment helps or hinders the case. For example, when suing for personal injuries (including malpractice), seasoned trial attorneys will usually want the jury to hear the nature and extent of the defendant's wrongful behavior. On the other hand, where the defendant's conduct is sympathetic, or its negligence not commensurate with the seriousness of the claimed injury, it may be preferable to keep that from the jury. Many of these considerations become less relevant, however, when the applicable practice rules require bifurcated trials.[xxxix] In appropriate cases, it may also be possible to request an immediate hearing on specific issues.[xl]

The Psychological Effect of the Motion

Some argue that there is a psychological cost to making and *losing* a motion; that it may demoralize the movant and fortify the resolve of the opposing party. While there may be some truth to this, a litigation has so many ups-and-downs that it is hard to assess which has the greatest, if any, impact. For example, a party subject to a grueling and humiliating deposition may suffer an emotional setback way out of proportion to the actual harm of what may be, in reality, irrelevant or inadmissible testimony. Likewise, while the emotional needs of varying clients differ greatly and often evade our understanding, there are many tangible assessments that can easily be made. All of these factors weigh in assessing the feasibility of all strategic or tactical decisions: *i.e.*, the cost and risks of taking (or not) some action *versus* the likely benefit or detriment to the outcome of the case. To be sure, the psychological and emotional needs of the client – *i.e.*, "hand holding" – must not be ignored. However, except in the rarest of cases, it does not reign supreme.

Motions to Reargue or Renew

A party can seek to reargue or renew the grant or denial of any motion, thus obtaining another *bite at the apple.*[xli] This relief is often sought following the loss of a summary judgment motion. Surprisingly, it is not as uncommon as one would think for a judge to vacate his or her original decision when confronted with one of these motions. However, when engaging in the original motion – whether as the moving or opposing party – you should not count on being one of those cases, and hence, you should always give the original motion your closest attention.

Although most parties typically entitle their post-decision motions as both "reargument *and/or*

renewal," the practitioner should be mindful of the difference between the two. Each of these motions has a distinctive basis, a significant difference in timeliness and most critical of all, a big difference in appealability.[xlii]

Is it Reargument or Renewal?

A reargument motion is generally based on the same facts and body of law as the original motion. The premise of the motion being that the Court overlooked or *misapprehended* the applicable facts or law.[xliii] Paradoxically, while the standard basis for making the motion calls for an improved reiteration of the original argument, the usual opposition also argues just that: movant is substantively saying *nothing new*. Thus, while the moving papers are typically fairly detailed and lengthy, the oppositions are often very short, saying only that the Court was correct in its original decision.[xliv]

A renewal motion, as spelled out in the rules, is based on newly discovered evidence or changes in the law that would have changed the results of the underlying motion.[xlv] Newly discovered means evidence that, despite due diligence, was unknown at the time of the original motion and therefore not then brought to the court's attention.[xlvi] Notwithstanding these standards, parties often try to use the motion as a way of making up for deficiencies in the original motion, as well as to supplement the appellate record.[xlvii]

Timeliness

While the rules are explicit on when a motion for reargument must be made,[xlviii] they are open ended on motions to renew[xlix]

Appealability – a Minefield of Misunderstanding

Perhaps, the most significant consideration that needs to be understood involves issues of appealability. Here, it is a bit complicated.

First, the general rules:

- the denial of a motion to reargue is not appealable.
- the grant of a motion to reargue is appealable.
- the denial or grant of a motion to renew is appealable.[l]

Second, the above-stated rules are a minefield. To get it right requires a deeper understanding of the nature of these motions.

Technically, these motions, whether to reargue *and/or* renew, have two component parts:

One, the motion actually begins with a request for the court to grant *leave* (*i.e.*, permission) to make the motion; and two, if leave is given, that the court, upon such reconsideration, vacate or modify its original decision. Accordingly, the typical notice of motion would contain a request for relief that includes something like the following language:

> ... movant respectfully requests that the court grant the undersigned leave to reargue and/or renew the court's decision dated _____, and upon such reconsideration, that the court vacate the above-described decision and in its stead enter an order [granting/denying] _____ [relief].[li]

Hence, the decisions of these motions should also contain two basic components: first, the initial recital that leave is being granted or denied, and second, if leave is granted, the substantive decision. If the court states that it is denying leave to reargue, the decision is not appealable. If, on the other hand, the court states that it is granting leave to reargue, the decision is appealable, whether or not the court adheres to the original decision.[lii]

On the other hand, the grant or denial of leave to renew is technically appealable. However, as would be expected, simply naming it a *renewal motion*, is not enough, as it is not a question of form over substance. In such cases, where an appeal is taken, it would be up to the appellate court to decide – whether upon a pre-argument motion to dismiss the appeal or in deciding actual full appeal -- whether it is really a renewal motion.[liii]

In any event, where the decision on the reconsideration motion is not appealable, there are two consequences: one, the only appeal that is available is from the original underlying decision – assuming that a timely notice of appeal had been served and filed and the time to perfect has not run out. Two, the record on appeal from the original underlying decision cannot be *properly* supplemented by any new facts or documents submitted on the reconsideration motion. On the other hand, if the reconsideration decision is appealable, an appeal therefrom brings up for review the decision of the original underlying decision.[liv]

Whatever the case, because of the unpredictability of how the motion will be viewed and decided by the lower court, and subsequently, by an appellate court – which determines whether it is independently appealable – it is *always* advisable to file a notice of appeal from the original

underlying decision and thereafter not allow the time to *perfect* to pass. Ideally, the motion to reargue and/or renew should be expeditiously made, so that, if denied, a timely appeal can then be taken from the original order.[lv]

Want of Prosecution

While the CPLR *seemingly* provides for dismissal for failure to prosecute,[lvi] the rule is actually very limited in that it sets forth express predicate conditions for dismissal: that at least one year has passed since issue has been joined and the court or party seeking dismissal served a written demand that the adverse party (1) resume prosecution and (2) serve a note of issue within 90 days.[lvii] A separate rule applies to cases struck from the trial calendar. There, the action is automatically considered abandoned if not restored within one year.[lviii]

Motions *in Limine*

In few cases, an attorney may submit a motion *in limine* to obtain advance rulings (*e.g.*, limits) on specific evidentiary issues or substantive questions regarding the merits of the suit or defenses.[lix] These motions, however, are not always well received and risk not being ruled on in time for trial.[lx] For substantive issues, the better practice would have been to make a timely motion for summary judgment. If that time has run out, however, then the motion *in limine* presents the last opportunity before trial. For evidentiary questions, however, it may make sense to not make any motion and just wait for trial to state your objections (side armed with a concise bench memo or supporting authorities). That way, the adversary has little or no opportunity to prepare to refute your argument, and if the objection is sustained, to come up on the fly with alternative evidence or witnesses.

Summary

As early as possible in the case, a strategy that includes timely and well-thought out discovery requests, as well as planning for potential dispositive motion practice, is essential for a successful litigation culminating in a winning judgment or desirable settlement.

In future articles, we will discuss planning for and trying the case, appellate strategies, provisional remedies and alternative dispute resolution.

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i. CPLR 3106(a); 3132. Although, CPLR 3120 (the provision for D&I notices) does not provide

for priority, priority can still be achieved by also requesting documents in the Notice to Take Deposition. *See*, CPLR 3111.

ii. *See* Fed.R.Civ.P. 26(d).

iii. Much can also be learned about the adversary's case by paying attention to what they are asking, especially when they are taking depositions.

iv. 22 NYCRR§202.21.

v. *See* CPLR 3101 *et seq., and especially,* CPLR 3102(a). *Cf.,* Fed.R.Civ.P. 26-37.

vi. Bills of Particular are unique to New York. *See,* CPLR 3041-3044. Under CPLR 3130, except in matrimonial actions, a party must make a choice between demanding a Bill of Particulars or using Interrogatories. In personal injury cases, however, CPLR 3130(1) *suggests* the use of a Demand for a Bill, as otherwise it provides that Interrogatories and a deposition may not be sought from the same party. CPLR 3043 also prescribes the questions that may be asked in a Demand for a Bill in personal injury cases. In all other cases, while there may be some technical advantages to seeking a Bill of Particulars, such as it is considered a pleading and thus *binding,* there are a number of disadvantages which favor the use of interrogatories, when available. For example, Demands for a Bill are limited to seeking *amplification* of affirmative allegations in the pleadings (*i.e.*, allegations of the complaint and affirmative defenses and counterclaims). *See, e.g.,Graves v. County of Albany*, 278 App.Div.2d 578, 717 N.Y.S.2d 420 (3rd Dept. 2000); *Orros v. Yick Ming Yip Realty, Inc.*, 258 App.Div.2d 387, 685 N.Y.S.2d 676 (1st Dept. 1999). Thus, there is nothing to amplify for mere denials. Demands cannot be used for obtaining evidentiary information and material. *Napolitano v. Polichetti,* 23 App.Div.3d 534, 806 N.Y.S.2d 629 (2nd Dept. 2005); *Franklin, Weinrib, Rudell & Vassallo v. Stallato,* 240 App.Div.2d 301, 658 N.Y.S.2d 622 (1st Dept. 1997). Also, Bills of Particulars only need to be verified when the proceeding pleadings are verified or when used in negligence actions. CPLR 3020(b) & 3044. But, even then, there are numerous scenarios where the verification may be made by the attorney rather than his or her client. CPLR 3020(d). On the other hand, the scope of Interrogatories are much broader as they can be used to seek information and material relevant to the case, and must always be sworn to by actual party. CPLR 3133(b). If given the choice, I generally opt for interrogatories.

vii. CPLR 3101(e).

viii. CPLR 3101(f).

ix. 22 NYCRR§202.17. In addition to medical authorizations, the case may call for authorizations for employment records, school records and collateral source reimbursements. *See*, CPLR §4545.

x. CPLR 3101(I). Aside from seeking photographs of the scene of the accident and/or injured party, it is essential to learn of any surveillance tapes that may be created and used against your client.

xi. When a court gets involved in contentious discovery disputes, the judge's reaction as to which party is in the right is often unpredictable and can lead to the court's continued impatience.

xii. 22 NYCRR§202.12. For special rules for qualifying commercial cases, *see*, 22 NYCRR§202.70 at Rule 7 *et seq*.

xiii. The PC Conference typically precedes most discovery motions, such as those seeking protective orders under CPLR 3103, compelling discovery under CPLR 3124 or seeking sanctions for abuse or non-compliance under CPLR 3126. Unlike earlier versions of the CPLR, which required the objecting party to make a timely motion for a protective order, under the current rules, a party need only serve a timely statement of its objections under CPLR 3122(a) and 3133(a). *See also,* 22 NYCRR§202.7 (affirmations of good faith attempt to resolve issues) and §202.8(f).

xiv. CPLR 3123.

xv. Fed.R.Civ.P. 33(a) limits Interrogatories to 25 questions, including discrete subparts. *Cf.*, Local Federal S.D. Rule 33.1 which places even greater restrictions on the use of Interrogatories. *Cf.*, 22 NYCRR§202.70 at Rule 11(c)(court may set limits in commercial cases).

xvi. 22 NYCRR§1200.35(a): "During the course of the representation of a client a lawyer shall not: (1) Communicate or cause another communication on the subject of the representation with a party the lawyer knows to be represented by a lawyer in the matter unless the lawyer has the prior consent of the lawyer representing such other party..." While the parties may communicate directly, subsection b of the Rule sets parameters on the lawyer's involvement: "unless prohibited by law, a lawyer may cause a client to communicate with a represented person, if that person is legally competent, and counsel the client with respect to those communications, *provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place*" (emphasis added).

The rule applies where there is actual knowledge that the adverse party is represented by counsel. *Corneroli v. Borghi*, 11 App.Div.3d 409, 783 N.Y.S.2d 572 (1st Dept. 2004) and has been applied where a party knows or should have known that the adverse party was represented by counsel. *Matter of Harris*, 259 App.Div.2d 170, 694 N.Y.S.2d 678 (2nd Dept. 1999). However, even if a plaintiff is aware that the defendant will be represented by an insurance carrier, but there has not yet been an appearance by counsel, plaintiff is not prohibited from contacting the defendant. *McHugh v. Fitzgerald*, 280 App.Div.2d 771, 719 N.Y.S.2d 785 (3rd Dept. 2001). With respect to corporate parties, the Court of Appeals has held that the rule extends to employees "whose acts or omissions in the matter under inquiry are binding on the

corporation...or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel." *Niesig v. Team I*, 76 N.Y.2d 363, 373, 559 N.Y.S.2d 493, 498 (1990).

xvii. www.courts.state.ny.us/ and www.uscourts.gov/. A number of law schools and other institutions run websites that may provide less comprehensive, but free access to some decisions and court proceedings.

xviii. www.westlaw.com and www.lexis.com

xix. *See, e.g.*, New York State Public Officers Law §84 *et seq.*; 5 U.S.C.A. §552.

xx. As one would expect, if a FOI request is denied, they can usually be challenged via administrative and judicial remedies. New York State Public Officers Law §89(5)(c); 5 U.S.C.A.§552(a)(4)(B).

xxi. The subpoena can be for testimony and/or documents. *See*, CPLR 2301, 3107, 3110(a)(2)&(3), 3120; Fed.R.Civ.P. 30(b)(1), 45, 34(c).

xxii. CPLR 3120(3) requires that a copy of the subpoena *duces tecum*, as well as notice stating the availability for discovery and inspection of the items produced in response, be served on all parties.

xxiii. CPLR 3117(a)(3) lists the situations (*e.g.*, unavailability) when the non-party deposition can be used at trial.

xxiv. CPLR 3211(a)(7); Fed.R.Civ.P. 12(b).

xxv. CPLR 3211(a)(1).

xxvi. Other grounds for a motion to dismiss include lack of jurisdiction, prior pending action, running of the statute of limitations, *res judicata*, collateral *estoppel*, infancy or other disability of the moving party, absence of a necessary party, etc. *Cf*, CPLR 3211(a) & Fed.R.Civ.P. 12(c)&(h).

xxvii. CPLR 3212; Fed.R.Civ.P. 56

xxviii. For a fuller discussion of motions to dismiss and requirements for challenging certain defenses and waivers, *see, Conventional Wisdoms or Mistakes: The Complaint and the Response* in the June 2004 issue (Volume 76, No. 5) at pp.33-34.

xxix. In fact, CPLR 3212(b) provides that "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion." Likewise, the Appellate Division has the authority to search the

record and award summary judgment to a nonmoving party. *JMD Holding Corp. v. Congress Financial Corporation*, 4 N.Y.3d 373, 385, 795 N.Y.S.2d 502, 510 (2005); *Halloway v. State Farm Insurance Companies*, 23 App.Div.3d 617, 805 N.Y.S.2d 107 (2nd Dept. 2005), as well as to a non appealing party. *Nobre v. NYNEX Corporation*, 2 App.Div.3d 602, 769 N.Y.S.2d 556 (2nd Dept. 2003). However, the Court of Appeals has held that it cannot grant summary judgment to a nonmoving party, *JMD Holding Corp. v. Congress Financial Corporation, supra*), or a non- appealing party, *Merritt Hill Vineyards Incorporated v. Windy Heights Vineyard, Inc.*, 61 N.Y.2d 106, 109, 472 N.Y.S.2d 592. 595 (1984).

xxx. Under State practice, service of a motion to dismiss or for summary judgment automatically stays discovery. CPLR 3214(b). The only exceptions are motions based solely on the claim of improper service of process. *Id*. However, although the stay is automatic, the court can direct otherwise if there is a legitimate need for discovery. *See, e.g., Reilly v. Oakwood Heights Community Church*, 269 App.Div.2d 582, 704 N.Y.S.2d 829 (2nd Dept. 2000).

xxxi. CPLR 3212(a). The 120-day time limit is strictly enforced and can only be extended for good cause for the delay in making the motion. *See, Brill v. City of New York*, 2 N.Y.3d 648, 652, 781 N.Y.S.2d 261, 264 (2004); *Scherrer v. Time Equities, Inc*., 2006 WL 488737 (1st Dept.); *Maciejewski v. 975 Park Avenue* Corporation, 10 Misc.3rd 1079(A); 2005 WL 3734354 (Sup.Ct. Kings Co.).

xxxii. 22 NYCRR§202.21(a)&(b).

xxxiii. Once the case reaches a ready-trial calendar, you cannot count on postponements to allow time for a decision on the motion, unless you are willing and able to strike the case and restore it later on. *See*, CPLR 3404. Likewise, if an appeal is taken from the denial of summary judgment, a further postponement of trial will require a stay from the appellate court, which may not be readily granted.

xxxiv. Successive motions for summary judgment are discouraged in the absence of newly-discovered evidence or sufficient cause. *See, e.g., Ralston Purina Company v. Arthur G. McKee & Company*, 174 App.Div.2d 1060, 572 N.Y.S.2d 125 (4th Dept. 1991). However, it is subject to discretion. *See, e.g., W. Joseph McPhillips, Inc. v. Ellis*, 8 App.Div.3d 782, 778 N.Y.S.2d 541 (3rd Dept. 2004) (second motion followed discovery and was based on different grounds); *Baker v. R.T. Vanderbilt Company Inc.*, 260 App.Div.2d 750, 688 N.Y.S.2d 726 (3rd Dept. 1999) (considerable additional discovery warranted second motion).

xxxv. *See*, CPLR 2106. *Cf.*, 28 U.S.C.§1746 & Local Federal S.D./E.D. Rule 1.10.

xxxvi. In New York State courts, it is not uncommon for attorneys to use *speaking* affirmations as the place for presenting legal arguments. However, such practice, is best reserved for the simplest of motions – usually procedural. The better practice, which is mandatory in the local Federal courts, is to use memoranda. S.D./E.D. Rule 7.1 requires that “all motions and all oppositions thereto shall be supported by a memorandum of law...” Also, Local Federal

S.D./E.D. Rule 56.1(a) requires that a motion for summary judgment be accompanied by "a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." Failure to annex the statements to the moving papers can be grounds for denying the motion. Subsection b likewise requires that the opposing papers "include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party, and if necessary, additional paragraphs containing a separate, short and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried." Subsection c provides that unless specifically controverted in the opposing party's statement, the facts will be deemed admitted for purposes of the motion. *See also,* 22 NYCRR §202.70 at Rule 19)(court may require these statements in qualifying commercial cases).

xxxvii. *See,* CPLR 2214(b). Even when the parties stipulate, the calendar practice of the court or assigned judge will severely limit adjournments. In particular, 22 NYCRR§202.8(e)(1) limits the total number of adjournments to three, aggregating no more than 60 days. For that reason, some cooperating counsel postpone filing, so that an amiable briefing schedule can be worked out, and a new return date written into the notice of motion that is eventually filed.

xxxviii. *See,* CPLR 3212(c) and (e); Fed.R.Civ.P. 56(d).

xxxix. While 22 NYCRR§202.42 encourages the use of bifurcated trials in personal injury cases, the Supreme Courts do not always follow this practice. For example, while bifurcated trials are preferred in the Second Department, they are less common in the First Department. Nevertheless, a unified trial may be appropriate where the nature and extent of the plaintiff's injuries are relevant to the determination of the cause of the injuries. *Echeverria v. City of New York*, 166 App.Div.2d 409, 560 N.Y.S.2d 473 (2nd Dept. 1990), or where the issues of liability and damages are interrelated and pervasive. *National Broadcasting Company, Inc. v. John Gallin & Son, Inc*., 292 App.Div.2d 192, 730 N.Y.S.2d 48 (1st Dept. 2002). In unique cases, courts may direct a *reverse bifurcation, i.e.*, the first trial is to determine damages; followed by the liability trial. This unusual procedure is sometime employed for mass tort or strict liability cases involving a number of defendants, so as to encourage settlement among the defendants. *See, e.g., In re New York County DES Litigation v. Abbott Laboratories*, 211 App.Div.2d 500, 621 N.Y.S.2d 332 (1st Dept. 1995); *Pioli v. Morgan Guaranty Trust Company of New York,* 199 App.Div.2d 144, 605 N.Y.S.2d 254 (1st Dept. 1993); *Matter of New York City Asbestos Litigation*, 173 Misc.2d 121, 660 N.Y.S.2d 803 (Sup.Ct. N.Y.Co. 1997).

xl. See, CPLR 3212(c). A jury trial may also be available if timely demanded. CPLR 2218. *See also,* Fed.R.Civ.P. 56(d).

xli. CPLR 2221. Cf., Fed.R.Civ.P. 60 & Local Federal S.D./E.D. Rule 6.3.

xlii. A combined motion to reargue and/or renew must separately identify and support each aspect of the motion, and the court is required to separately state its decision. CPLR 2221(f). As

we will see below, this has implications on the questions of appealability.

xliii. CPLR 2221(d): “A motion for leave to reargue... (2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.”

xliv. While such simple oppositions are often all that is needed, you should be careful not to take the moving papers for granted.

xlv. CPLR 2221(e): “A motion for leave to renew... (2) shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and (3) shall contain reasonable justification for the failure to present such facts on the prior motion.”

xlvi. *See, e.g., Elder v. Elder*, 21 App.Div.3d 1055, 802 N.Y.S.2d 457 (2nd Dept. 2005) (renewal motion based on evidence that could have with due diligence been discovered earlier and on matters of public record properly denied); *Luna v. Port Authority of New York and New Jersey*, 21 App.Div.3d 324, 800 N.Y.S.2d 170 (1st Dept. 2005) (renewal motion was properly based on deposition which plaintiff was unable to obtain earlier despite due diligence).

xlvii. As one would expect, and to the disappointment of the losing party, the motion must be made to the same judge who decided the original motion, unless he or she is unable to hear it. CPLR 2221(a)&(c).

xlviii. CPLR 2221(d)(3) requires that a motion to reargue be made within 30 days after service of a copy of the order with notice of entry; this time limit is not applicable to the Appellate Division or Court of Appeals which set forth their own time limits.

xlix. A motion for leave to renew is not subject to the same time constraints as a motion for leave to reargue. *Luna v. Port Authority of New York and New Jersey*, 21 App.Div.3d 324, 800 N.Y.S.2d 180 (1st Dept. 2005) and may be made after the time period to appeal from the original order has expired. *Patterson v. Town of Hempstead*, 104 App.Div.2d 975, 480 N.Y.S.2d 899 (2nd Dept. 1984).

l. CPLR 5701(a)(2)(viii) includes in the list of orders that are *appealable as of right*, an order which “grants a motion for leave to reargue made pursuant to subdivision (d) of rule 2221 or determines a motion for leave to renew made pursuant to subdivision (e) of rule 2221.”

li. Older practitioners will recall, and some judges may still require, that these motion be made by order to show cause. However, today, most of these motions are made by notice of motion, with the combined request set forth above.

lii. CPLR 5701(a)(2)(viii). *See, Lorenz Diversified Corp. v. Falk*, 15 App.Div.3d 453, 789

N.Y.S.2d 446 (2nd Dept. 2005) (appeal brings up for review Supreme Court order which, upon granting leave to reargue, adhered to prior order granting motion to strike defense). *See also, Rubeo v. National Grange Mutual Insurance Co.*, 93 N.Y.2d 750, 755, 697 N.Y.S.2d 866, 868 (1999) (CPLR 5517(a)(1) was enacted to ensure that an appeal remains viable where the trial court grants reargument of the order appealed from, and then on reargument adheres to its original decision).

liii. See, e.g., *Malankara Archdiocese of Syrian Orthodox Church in North America v. Malnkara Jacobite Center of North America, Inc.*, 24 App.Div.3d 626, 808 N.Y.S.2d 327 (2nd Dept. 2005) (plaintiff's motion denominated as one for leave to *reargue and renew* is actually one to *reargue*, the denial of which is not appealable. *Accord, Lichtenstein v. Barenboim*, 23 App.Div.3d 440, 803 N.Y.S.2d 916 (2nd Dept. 2005); *Davis v City of New York*, 11 App.Div.3d 254, 782 N.Y.S.2d 908 (1st Dept. 2004).

liv. *See*, CPLR 5517(b): "A court reviewing an order may also review any subsequent order made upon a motion specified in subdivision (a), if the subsequent order is appealable as of right." *See also*, CPLR 5517(a)(3) similarly provides that an appeal is unaffected by the denial of a motion to renew. *See, Matter of Grasso*, 24 App.Div.3d 765, 2005 WL 3542655 (2nd Dept.).

lv. The practitioner is well advised to make the reargument/renewal motion quickly, and if necessary, timely move the appellate court for an enlargement of time, so as to preserve the appeal from the original underlying order. Later on, if reargument/renewal motion is lost, and if appealable, a notice of appeal should be served and filed from the reconsideration decision, so that both appeals are perfected together. See, CPLR 5517.

lvi. CPLR 3216(a) states: "Where a party unreasonably neglects to proceed generally in an action or ... unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, may dismiss the party's pleadings on terms. Unless the order specifies otherwise, the dismissal is not on the merits." *Cf.*, Fed.R.Civ.P. 56(d).

lvii. *See*, CPLR 3216(b) for the requirements of the notice. *Cf.*, Fed.R.Civ.P. 41(d).

lviii. CPLR 3404. *See also*, CPLR 3216(f).

lix. *See*, 22 NYCRR§202.26 & 202.70 at Rule 27 (qualified commercial cases).

lx. Many judges are reluctant to decide these motions and will suggest that you wait until you get before the judge who will preside over the trial. By the time that happens, however, it may be way too late.