

STATE OR FEDERAL COURT?: THE COMMENCEMENT OR REMOVAL OF CIVIL CASES IN NEW YORK

By Kenneth A. Manning & Kevin M. Hogan

Mr. Manning is a member of the law firm of Phillips, Lytle, Hitchcock, Blaine & Huber LLP, Buffalo, New York. He is a member of the Civil and Criminal Litigation Department. Mr. Hogan is an associate with the Environmental Practice Group of Phillips, Lytle, Hitchcock, Blaine & Huber LLP. The authors wish to thank the members of the Trial Department of the Firm for their many contributions to the article.

ABSTRACT

This article provides a practical guide to an important dilemma faced by defense counsel. Should a case filed in state court be removed to federal court? In an attempt to illustrate the factors relevant to a removal decision, the authors perform an in depth, comparative analysis of the differences between New York's civil and evidence codes and the Federal Rules of Civil Procedure and Evidence. The article addresses a number of important differences in practice, procedure, evidence, and decision-making between New York state and federal courts. Although the article focuses primarily on removal of cases filed in New York, it helps practitioners identify the many factors and issues which are involved in deciding whether to remove any state case to federal court.

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I. INTRODUCTION

A trial attorney should have at least a general awareness of the factors associated with the choice of forum between state or federal court. An attorney who is unfamiliar with the differences and similarities between state or federal practice may have second thoughts about removing, or not removing, a state court action to federal court. This article addresses a number of important differences in practice, procedure, evidence, and decision-making between New York state and federal court. The procedural and substantive law discussed in this article is subject to continuous change as legislative enactments and judicial decisions are never ending. Consequently the authors remind the reader to determine whether the law recited herein has changed since the article was submitted for publication in April 1999. Many other states have civil procedures that mirror the federal rules. In those states, the decision to commence a civil action or remove a state court action to federal court is less complicated than in New York, where there is a complex set of guidelines for civil procedures, the Civil Practice Law and Rules (the "CPLR").

This article does not address the extent to which substantive law is applied differently in state and federal court in New York. New York's intermediate appellate court is divided into four "Appellate Divisions." A state trial court is required to apply the law of the Appellate Division in which it is located. Differences can and do exist between the substantive law according to one Appellate Division as opposed to another. A federal court, however, is not bound by the view of the Appellate Division in which it is located. Rather, the federal court is required to apply that rule of law which it predicts the New York Court of Appeals (the state's highest court) would choose. Thus, when New York's highest appellate court has not weighed in on a relevant substantive legal issue, differences in how New York's intermediate appellate courts have decided such an issue is another important consideration in deciding in which court to commence an action or whether to remove an action to federal court.

There appears to be no existing published or widely employed comparison^{1/} of the differences in practice among state and federal courts.^{2/} Consequently, forum selection may have more to do with an attorney's general awareness of the differences and his or her personal preference or comfort level in a particular court, rather than a thorough consideration of tactical advantages or client needs. This article summarizes the differences between New York state and federal practice to guide the practitioner through a more systematic and thorough analysis in choosing state or federal court. Section II of this article compares the procedural differences

^{1/} *But cf.* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U.L. REV. 369 (1992) (discussing survey results of attorney rationales for removal).

^{2/} *See generally* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986) (the CPLR contains many provisions that are dissimilar to federal rules).

between New York State and Federal courts. Section III differentiates the important discovery considerations for each forum, and Section IV addresses evidentiary concerns that a practitioner faces when deciding whether to commence or remove an action in federal as opposed to New York state court.

II. PROCEDURAL FACTORS AFFECTING CHOICE OF FORUM

Although many factors come into play when evaluating whether to proceed in state or federal court, they generally fall into the following broad categories: (A) procedure; (B) discovery; and (C) evidence. This section addresses the procedural differences between New York state and federal practice.

1. Jurisdiction

New York state supreme court has plenary jurisdiction over all claims, limited only by those exceptions specified in the state Constitution or in various statutes.^{3/} The supreme court has original, unlimited, and unqualified jurisdiction and is competent to entertain all actions unless the court's jurisdiction has been specifically proscribed.^{4/}

Federal courts have jurisdiction primarily over cases in which: (1) there is complete diversity of citizenship between the opposing parties and the amount in controversy exceeds \$75,000; or (2) the questions involved arise under federal law.^{5/} Federal courts have supplemental jurisdiction over all other claims arising out of the same case or controversy unless the exercise of such supplemental jurisdiction would, by virtue of the joinder of new parties, destroy diversity.^{6/} Federal courts also have the discretion to decline supplemental jurisdiction if, for instance, the claim raises a novel or complex issue of state law, the new state claim "substantially predominates" over the original federal claim, the original federal claim later is dismissed, or there exist "other compelling reasons."^{7/}

^{3/} N.Y. CONST. art. 6, § 7; *Bankers Trust Co. v. Braten*, 101 Misc. 2d 227, 420 N.Y.S.2d 584 (Sup. Ct. N.Y. County 1979).

^{4/} *Fry v. Village of Tarrytown*, 89 N.Y.2d 714, 680 N.E.2d 878, 658 N.Y.S.2d 205.05 (1997).

^{5/} 28 U.S.C. §§ 1331-1332.

^{6/} 28 U.S.C. § 1367.

^{7/} 28 U.S.C. § 1367(c).

In federal practice, statutory jurisdiction must be specifically pleaded. The pleading must contain "a short and plain statement of the grounds upon which the court's jurisdiction depends".^{8/} There is no similar requirement in New York state practice.

2. Judges

In both state and federal court, there is a random assignment of one judge for the duration of the case. However, in federal court, a judge may designate a magistrate judge to conduct any non-dispositive pre-trial proceedings.^{9/} The authority of a magistrate judge, in New York federal court, varies from district to district. In addition, in certain administrative districts within the state court system, trial ready cases may be assigned to another judge for settlement efforts, or for the purpose of scheduling an earlier trial than might otherwise be possible with the initially assigned judge.

In the Eastern, Northern and Western Districts of New York, a magistrate judge is specifically authorized to act on all non-dispositive pre-trial matters pursuant to 28 U.S.C. § 636(a) and (b) as well as to perform any additional duties that are not inconsistent with the Constitution and laws of the United States.^{10/} In all four districts, parties in a civil action may consent to a trial by a magistrate judge.^{11/}

Furthermore, in order to promote the "speedy, fair, and economical resolution of controversies by informal procedure, parties may consent to arbitration" in the Western, Northern, and Eastern Districts of New York.^{12/} The federal courts in New York also have begun to promote court facilitated mediation as a means of resolving disputes; established programs are in place, for instance, in the Southern and Eastern Districts of New York.

^{8/} [FED. R. CIV. P. 8\(a\)](#).

^{9/} [28 U.S.C. § 636](#).

^{10/} [U.S. Dist. Ct. N.D.N.Y., Civ. R. 72.1\(a\)](#); [U.S. Dist. Ct. W.D.N.Y., Civ. R. 72.1\(a\)](#) and [\(b\)](#); [U.S. Dist. Ct. S. & E.D.N.Y. Civ. R. 72.2\(a\)](#).

^{11/} [U.S. Dist. Ct. N.D.N.Y. Civ. R. 72.2\(b\)](#); [U.S. Dist. Ct. W.D.N.Y. Civ. R. 72.2\(b\)](#); [U.S. Dist. Ct. S. & E.D.N.Y. Civ. R. 73.1](#).

^{12/} [U.S. Dist. Ct. W.D.N.Y. Civ. R. 16.2](#); [U.S. Dist. Ct. N.D.N.Y. Civ. R. 16.2](#). [U.S. Dist. Ct. S. & E.D.N.Y., Appendix F](#). (If the plaintiff is seeking money damages of less than \$100,000 in the Eastern District of New York, the Clerk shall designate the case for compulsory arbitration. [U.S. Dist. Ct. R. S. & E.D.N.Y., Appendix F, Section 3\(A\)](#).)

3. Commencement of Action

In New York practice, an action is commenced by filing^{13/} the summons with notice or the summons and complaint with the clerk of the court.^{14/} Since January 1, 1998, service of the summons and complaint or summons with notice must be made within 120 days after filing with the clerk of the court.^{15/} The requirement that proof of service be filed with the court within 120 days of the filing of the summons is no longer a prerequisite for survival of an action. However, it may be necessary to file proof of service for the "entirely separate, non-judicial purpose of making service `complete' in order to start the running of defendant's response time."^{16/} If service is not made within the prescribed time frame, the court, upon motion, must dismiss the action without prejudice as to the moving defendant or extend the time for service upon a showing of good cause.^{17/}

^{13/} For a discussion of the adoption of New York's "filing" system, see *The Filing System That Takes Over on January 1, 1993, Part III*, 395 N.Y. STATE L. DIGEST 1 (1992); *The Filing System That Takes Over on January 1, 1993, Part IV*, 396 N.Y. STATE L. DIGEST 1 (1992); *Most Extensive Change in Practice Since CPLR's Introduction in 1963: Filing System Adopted as of July 1st; Lower Courts Exempted; Half-Year Grace Period Allowed, Part I*, 390 N.Y. STATE L. DIGEST 1 (1992); *Most Extensive Change in Practice Since CPLR's Introduction in 1963: Filing System Adopted as of July 1st; Lower Courts Exempted; Half-Year Grace Period Allowed, Part II*, 391 N.Y. STATE L. DIGEST 1 (1992); *Legislature Prepares to Convert Courts to `Filing' System, Requiring Filing of Summons (and Opening of File) Before Summons is Served*, 388 N.Y. STATE L. DIGEST 1 (1992). See also *Special Feature: New York's Commencement by Filing Law (including amendments effective January 1, 1998)*, MCKINNEY'S NEW YORK CIVIL PRACTICE LAW AND RULES, 1998 REDBOOK (Matthew Bender Pamphlet Edition).

^{14/} [N.Y.C.P.L.R. 304](#); The mere posting of the papers to the clerk of the court does not satisfy filing requirements. *Enos v. City of Rochester*, 206 A.D.2d 159, 619 N.Y.S.2d 459 (4th Dep't 1994), *appeal denied*, 1995 WL 42487 (NY 1995). The papers must actually be received by the clerk of the court. *Id.*; see also *"Posting Summons and Complaint On Last Day Doesn't Satisfy Statute of Limitations; Receipt by Clerk Necessary*, 26 SIEGEL'S PRAC. REV. 2 (1994); *Is Posting of Summon and Complaint to Clerk on Last Day Timely If Papers are not Received That Day?* 20 SIEGEL'S PRAC. REV. 2 (1994); *Mere Posting of Papers to Clerk Doesn't Suffice*, 13 SIEGEL'S PRAC. REV. 3 (1994).

^{15/} [N.Y.C.P.L.R. 306-b](#).

^{16/} Alexander, 306-b Practice Commentaries, McKinney's Cons. Law of N.Y., Book 7B, CPLR C306-b:3 1999 Supplement at 136.

^{17/} [N.Y.C.P.L.R. 306-b](#); The statute now requires defendant to move for dismissal for untimely service; the case is no longer automatically dismissed. N.Y.C.P.L.R. § 306-b 1997 Practice Commentaries. The court now has explicit authority for judicial extension of time for service. *Id.*

In federal court, an action is commenced by filing the complaint with the court.^{18/} Service of the summons and complaint must be made within 120 days of filing, or the court, upon motion or at its own initiative, will dismiss the action without prejudice.^{19/} If, however, the plaintiff shows good cause^{20/} for the failure to effect service on the defendant within 120 days, the court has the authority to extend the time for service.^{21/}

4. Service of Process

In New York practice, service must be effected within the state, unless a person is subject to long-arm jurisdiction^{22/} which allows for service by either personal delivery^{23/} or by mail.^{24/} Personal service may be effected by: (1) delivering the summons to the person to be served; (2) delivering the summons to a person of suitable age and discretion at the actual place of business, dwelling place, or usual place of abode of the person to be served, and mailing the summons to the person at his or her last known residence or place of business within 20 days of service; (3) delivering the summons to an agent for service of process; (4) affixing the summons to the door of either the individual's actual place of business, dwelling place, or usual place of abode, and mailing the summons to the individual at his or her last known residence or business within 20 days of service; or (5) serving the summons in a manner directed by the court, upon a motion, if service is impracticable under 1, 2, or 4 above.^{25/} There are special rules regarding personal service upon the state, infants, incompetents, conservatees, partnerships, corporations, government subdivisions, courts, boards, and commissions.^{26/}

^{18/} FED. R. CIV. P. 3.

^{19/} FED. R. CIV. P. 4(m).

^{20/} For a discussion of a showing of "good cause", see *Extending the 120 days of Rule 4(m) for Summons Service: 'Good' Cause Versus Just 'Some' Cause?* 34 SIEGEL'S PRACT. REV. 4 (1995); *Overhaul of Summons Service and Personal Jurisdiction in the Federal Courts: The New Rule 4 of the Federal Rules of Civil Procedure, Part 7*, 18 SIEGEL'S PRAC. REV. 1 (1994); *Overhaul of Summons Service and Personal Jurisdiction in the Federal Courts: The New Rule 4 of the Federal Rules of Civil Procedure, Part 6*, 17 SIEGEL'S PRAC. REV. 1 (1994); *"Different Effects of the 120-day Period for Service in Federal and New York Practice*, 1 SIEGEL'S PRAC. REV. 4 (1993).

^{21/} FED. R. CIV. P. 4(m).

^{22/} N.Y.C.P.L.R. 301, 302.

^{23/} N.Y.C.P.L.R. 308.

^{24/} N.Y.C.P.L.R. 312-a.

^{25/} N.Y.C.P.L.R. 308(1)-(5).

^{26/} See N.Y.C.P.L.R. 307, 309, 310, 311, 312.

To effect service by mail, plaintiff simply mails, via first class mail, the summons and complaint together with two copies of the statement of service by mail and the acknowledgement of receipt with a return postage-paid envelope.^{27/} The defendant must return the acknowledgment within thirty days from date of receipt.^{28/} Service is complete on the date the acknowledgment is mailed or delivered.^{29/} The defendant then has twenty days, after the date the acknowledgment is mailed or delivered, to answer the complaint.^{30/} If the acknowledgment is not returned, the court will award the reasonable expense of serving process by an alternative method.^{31/}

The rules regarding service of process are somewhat more complex in federal practice. Federal Rule of Civil Procedure 4(e) provides that service upon an individual, "from whom waiver has not been obtained," of a summons may be effected in any judicial district of the United States.^{32/} Federal Rule of Civil Procedure 4(k) limits effective service to only those individuals: (1) who could be subjected to the jurisdiction of a court in the state in which the district court is located; (2) who are joined under Rules 14 or 19 and who are served within 100 miles from the place where the summons issued; (3) who are subject to federal interpleader jurisdiction; or (4) when authorized by statute.^{33/}

^{27/} N.Y.C.P.L.R. 312-a(a).

^{28/} N.Y.C.P.L.R. 312-a(b).

^{29/} *Id.*

^{30/} N.Y.C.P.L.R. 312-a(b)(2).

^{31/} N.Y.C.P.L.R. 312-a(f).

^{32/} FED. R. CIV. P. 4(e).

^{33/} FED. R. CIV. P. 4(k)(1)(A)-(D).

Federal practice provides for service to be effected by personal delivery.^{34/} Additionally, federal practice allows service to be made: (1) by any means allowed under the law of the state where the court sits or where service is effected^{35/}; (2) by delivering a copy of the summons and complaint to the individual personally; (3) by leaving copies thereof at the individual's dwelling house or usual place of abode with a person of suitable age and discretion; or (4) by delivering a copy of the summons and complaint to an agent authorized to receive service of process.^{36/} There are also special guidelines for service upon individuals in a foreign country, infants, incompetents, corporations, associations, and foreign, state, or local governments.^{37/}

^{34/} [FED. R. CIV. P. 4\(c\)\(2\)](#). The Federal Rules also contain a provision whereby a plaintiff may request a waiver of service from a defendant. [FED. R. CIV. P. 4\(d\)](#). Such a request is made in writing and sent by first class mail. [FED. R. CIV. P. 4\(d\)\(2\)\(A\)-\(B\)](#). The defendant, if located within the United States, has thirty days to return the waiver. [FED. R. CIV. P. 4\(d\)\(2\)\(F\)](#). If the defendant is located outside the United States, the defendant has sixty days to return the waiver. *Id.* If service is waived, the defendant is not required to serve an answer until sixty days from the day the request for waiver was sent if defendant is located within the United States, and ninety days if defendant is located outside the United States. [FED. R. CIV. P. 4\(d\)\(3\)](#). This process actually provides an incentive to the defendant to waive service because it extends the time in which defendant has to answer or otherwise move with respect to the complaint from twenty days until sixty days. [FED. R. CIV. P. \(4\)\(d\)\(3\)](#). If the defendant, located within the United States, fails to comply, without good cause, with a request for a waiver of service, courts will award costs, including the costs incurred in effecting service and any costs associated with a motion to collect the costs of service. [FED. R. CIV. P. 4\(d\)\(5\)](#). For a discussion of the waiver of service provision, see *Overhaul of Summons Service and Personal Jurisdiction in the Federal Courts: The New Rule 4 of the Federal Rules of Civil Procedure, Part 2*, 13 SIEGEL'S PRAC. REV. 1 (1994); *Overhaul of Summons Service and Personal Jurisdiction in the Federal Courts: The New Rule 4 of the Federal Rules of Civil Procedure, Part 1*, 12 SIEGEL'S PRAC. REV. (1993).

^{35/} If a party intends to effect service of process by a means allowed under the law of the state where the court sits or where service is effected, it is wise for the party to understand thoroughly the law of that state. See *In Federal Court, Okay to Use Method of State Where Service Occurs, But Out-of-State Lawyers Must Be Wary*, 36 SIEGEL'S PRAC. REV. 4 (1995); *Service is Okay According to State Law of Place of Service, But Plaintiff Had Best Know That Law Thoroughly*, 31 SIEGEL'S PRAC. REV. 4 (1995) (discussing the pitfalls that can be encountered by a plaintiff unfamiliar with a state's service procedures).

^{36/} [FED. R. CIV. P. 4\(e\)\(1\)-\(2\)](#).

^{37/} [FED. R. CIV. P. 4\(f\)-\(j\)](#).

5. Proof of Service

In New York, proof of service may be made by affidavit, certificate, or acknowledgment of receipt.^{38/} As noted in Section C above, proof of service is no longer required for survival of an action; rather, it may be necessary for the non-jurisdictional purpose of making service complete in order to start running defendant's response time. In federal practice, proof of service may be made by affidavit unless service was effected by a United States marshal or deputy United States marshal.^{39/} If service is waived, the waiver of service form, in lieu of the proof of service, shall be filed.^{40/}

6. Removal

a. Procedure for Removal

Any action brought in New York state court over which the federal court has original jurisdiction may be removed by a defendant to the district court in which the state court action is pending.^{41/} An action whose federal jurisdiction is premised on the diversity of the parties may not be removed if any one of the defendants is a citizen of the state in which the action originally was commenced.^{42/} However, any action founded upon a claim or right arising under the Constitution, treatise, or laws of the United States may be removed regardless of citizenship or residency of the parties.^{43/} Civil state court actions against railroads or common carriers, or arising under state's workers compensation laws or the Violence Against Women Act of 1994^{44/} may not be removed to federal courts.^{45/}

In order to remove an action from state to federal court, the party seeking removal must, within thirty days after receipt of the summons and complaint, file a notice of removal, containing a short and plain statement of the grounds for removal, along with a copy of all the

^{38/} N.Y.C.P.L.R. 306(d).

^{39/} FED. R. CIV. P. 4(l).

^{40/} FED. R. CIV. P. 4(d)(4).

^{41/} 28 U.S.C. § 1441(a).

^{42/} 28 U.S.C. § 1441(b).

^{43/} 28 U.S.C. 1441(b).

^{44/} The U.S. Court of Appeals, Fourth Circuit recently held the Violence Against Women Act of 1994 unconstitutional. *See Brzonkala v. Virginia Polytechnic Institute and State Univ.*, Nos. 96-2316, 96-1814, 1999 WL11391 (4th Cir. Mar. 5, 1999).

^{45/} 28 U.S.C. § 1445(a)-(d).

pleadings in the action.^{46/} Although required at one time, a bond is no longer necessary in conjunction with a removal notice.^{47/} The removal fails unless all defendants join in the petition for removal.^{48/} Removal must be made within one year after commencement of the action; if the opportunity to remove first arises more than one year after the action was commenced, removal is no longer an option.^{49/} Except for civil rights cases commenced pursuant to 28 U.S.C. § 1443, a decision by the federal court to remand a case after removal is not appealable.^{50/}

b. Procedure after Removal

After a case has been removed to federal court, a district court may issue the necessary orders and process to bring all proper parties served before it.^{51/} The district court may also require the removing party to file with the clerk of the district court copies of all records and proceedings of the state court action or the district court may obtain such records by writ of certiorari issued to the state court.^{52/}

A motion to remand a case based on any defect except for lack of subject matter jurisdiction must be made within 30 days after the notice of removal has been filed. As soon as it appears that the district court lacks subject matter jurisdiction, the case must be remanded.^{53/} Orders remanding cases to state court may require payment of the costs and expenses, including attorney's fees, incurred as a result of the removal.^{54/} If a plaintiff seeks to join additional defendants whose joinder would destroy diversity, after removal of a case to federal court, the district court may deny the request, or permit joinder and remand the action to state court.^{55/}

^{46/} 28 U.S.C. § 1446(a)-(b).

^{47/} Siegel, § 1446 Practice Commentaries, West 28 U.S.C.A. § 1446 at 320.

^{48/} *Roe v. O'Donohue*, 38 F.3d 298, 301 (7th Cir. 1994) (citing *Hanrick v. Hanrick*, 153 U.S. 192, 196, 14 S. Ct. 835, 38 L. Ed. 685 (1894)).

^{49/} 28 U.S.C. § 1446(b).

^{50/} 28 U.S.C. § 1447(d).

^{51/} 28 U.S.C. § 1447(a).

^{52/} 28 U.S.C. § 1447(b).

^{53/} 28 U.S.C. § 1447(c).

^{54/} *Id.*

^{55/} 28 U.S.C. § 1447(e).

7. Change of Venue

In New York state practice, the court may, upon motion, change the place of trial if: (1) the county designated for trial is an improper county; (2) an impartial trial cannot be held in the proper county; or (3) the convenience of material witnesses and the ends of justice will be promoted by the change.^{56/}

A federal court, for the convenience of the parties or witnesses, may transfer an action, upon motion, to any district in which the action could have been commenced originally.^{57/} If venue as an initial matter is improper, the action will be transferred to a proper venue.^{58/}

8. Verification

State practice and federal practice differ significantly with respect to the verification of pleadings. In state practice, the general rule is that when a pleading has been verified, each subsequent pleading also must be verified.^{59/} Complaints must be verified in actions involving the sale and delivery of goods, the performance of labor or services, the furnishing of materials, or the gross negligence or intentional infliction of harm by officers, directors, or trustees of specified corporations, associations, organizations or trusts.^{60/} Even if the complaint is not verified, a counterclaim, cross-claim, or third-party claim in the answer may be separately verified.^{61/} Answers must be verified in fraud actions and actions against a corporation to recover damages for nonpayment of debt.^{62/} Finally, defenses which do not involve the merits of the action must be verified.^{63/}

Verification is made by affidavit of the party, except in the case of corporations and governmental entities.^{64/} In the case of domestic corporations, verification must be made by

^{56/} N.Y.C.P.L.R. 510(1)-(3); see *Change of Venue to Secure Impartial Trial Should Still Be to County of a Party's Residence, If Possible*, 430 N.Y. STATE L. DIGEST 1 (1995) (discussing change of venue in state practice).

^{57/} 28 U.S.C. § 1404(a).

^{58/} 28 U.S.C. § 1406.

^{59/} N.Y.C.P.L.R. 3020(a).

^{60/} N.Y.C.P.L.R. 3016(f),(h).

^{61/} N.Y.C.P.L.R. 3020(a).

^{62/} N.Y.C.P.L.R. 3020(b)(1)-(2).

^{63/} N.Y.C.P.L.R. 3020(c).

^{64/} N.Y.C.P.L.R. 3020(d).

an officer.^{65/} In the case of a foreign corporation or a party who is not in the county of its attorney, verification may be made by the attorney.^{66/} In the case of a state, government, subdivision, board, commission, agency, or public officer, verification must be by a person acquainted with the facts.^{67/} Where a pleading is served without the required verification, it may be treated as a nullity, provided timely notice "with due diligence" is given to the attorney of the party submitting the pleading.^{68/} "Notice with due diligence" has been defined as notice which is given "immediately, or at least within 24 hours of receipt of a defective pleading."^{69/}

The affidavit of verification must state the "pleading is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true."^{70/} If the verification is made by a person other than the party, the deponent must state "the grounds of his belief as to all matters not stated upon his knowledge and the reason why it is not made by the party."^{71/}

Since March 1, 1998, every pleading, written motion, and other paper, served on an adverse party or filed or submitted to state court must be signed by an attorney or by the party if the party is not represented by an attorney, with the name of the attorney clearly printed below the signature.^{72/} If the omission of the signature is not promptly corrected, the court shall strike any unsigned papers.^{73/} The signature of the attorney or the party certifies that to the best of his or her "knowledge, information or belief, formed after an inquiry reasonable under the circumstances," the papers presented or their contentions are not frivolous pursuant to N.Y. Rules of Chief Administrator 130-1.1(c).^{74/}

^{65/} N.Y.C.P.L.R. 3020(d)(1).

^{66/} N.Y.C.P.L.R. 3020(d)(3).

^{67/} N.Y.C.P.L.R. 3020(d)(2).

^{68/} N.Y.C.P.L.R. 3022.

^{69/} *Air New York, Inc. v. Alphonse Hotel Corp.*, 86 A.D.2d 932, 448 N.Y.S.2d 795 (3d Dep't 1982).

^{70/} N.Y.C.P.L.R. 3021.

^{71/} N.Y.C.P.L.R. 3021.

^{72/} N.Y. RULES OF CHIEF ADMINISTRATOR § 130.1.1-a(a).

^{73/} *Id.*

^{74/} N.Y. RULES OF CHIEF ADMINISTRATOR 130.1.1-a(b).

In federal practice, verification is not required; however, every pleading, motion, or other paper must be signed by the attorney of record.^{75/} If the paper is not signed, it will be stricken, unless it is signed promptly after the omission is called to the attention of the pleader.^{76/} As a practical matter, the clerk of a federal court often will reject, and refuse to file, a pleading that does not bear an original signature of the attorney of record. Sanctions are available, after notice and a reasonable opportunity to respond, if the signed document is presented for an improper purpose, if the legal contentions are unwarranted, if the allegations lack evidentiary support, or if the denials of factual allegations are unwarranted.^{77/}

9. Ad Damnum Clause

In state practice, an ad damnum clause must be included in the initial pleading, except in medical or dental malpractice actions and actions against a municipality, in which cases such clauses are prohibited.^{78/} Verdicts which exceed the amount demanded in the ad damnum clause may nevertheless be awarded unless, if in a money action, it would prejudice the defendant.^{79/} When a party is seeking a declaratory judgment, the demand for relief in the pleading must specify the "rights and other legal relations on which a declaration is requested" and state whether further or consequential relief is claimed and the "nature and extent" of such relief.^{80/}

In all actions in federal practice, the initial pleading must set forth a demand for judgment.^{81/} The court may grant any relief to which a party is entitled, even if not demanded or for more than what was demanded.^{82/}

10. Affirmative Defenses

In state practice, parties responding to a complaint or other claim must plead any matter which if not pleaded would take the adverse party by surprise, or any matter raising factual

^{75/} FED. R. CIV. P. 11(a).

^{76/} FED. R. CIV. P. 11(a).

^{77/} FED. R. CIV. P. 11(b)(1)-(4),(c).

^{78/} N.Y.C.P.L.R. 3017(a), (c).

^{79/} DAVID D. SIEGEL, *NEW YORK PRACTICE* § 217 (2d ed. 1991) (citing *Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 429 N.E.2d 90, 444 N.Y.S.2d 571, *reh'g denied*, 55 N.Y.2d 801, 432 N.E.2d 138, 447 N.Y.S.2d 436 (1981)).

^{80/} N.Y.C.P.L.R. 3017(b)

^{81/} FED. R. CIV. P. 8(a)

^{82/} FED. R. CIV. P.54(c); 5 CHARLES A. WRIGHT, ET AL. *FEDERAL PRACTICE & PROCEDURE* § 2662 (3d ed. 1998).

issues not raised on the face of the prior pleadings, such as arbitration and award, collateral estoppel, culpable conduct claimed in diminution of damages, discharge in bankruptcy, illegality, fraud, infancy or other disability, payment, release, res judicata, statute of frauds, statute of limitations or personal jurisdiction.^{83/} Some of these defenses also are waived if not pleaded in a motion to dismiss in lieu of answer.^{84/} The following affirmative defenses are waived if not pleaded in a motion to dismiss in lieu of answer or raised in the answer: (1) defense based upon documentary evidence; (2) party asserting claim lacks legal capacity to sue; (3) another action between same parties for same cause of action is pending in another court; (4) the cause of action cannot be maintained due to arbitration and award, collateral estoppel, discharge in bankruptcy, infancy, disability, payment, release, res judicata, statute of limitations or statute of frauds; or (5) with respect to a counterclaim, it may not be properly interposed.^{85/} An affirmative defense of improper service will be waived, even if raised in an answer, if the objective party does not move for judgment within 60 days after serving the answer, unless the court extends the time based on individual hardship.^{86/}

In federal practice, defenses of accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, personal jurisdiction, insufficiency of process and service of process, improper venue, and any other matter constituting an avoidance or affirmative defense must be affirmatively pleaded.^{87/} Like its state court counterpart, federal practice also treats some of these defenses as waived if not included in a motion to dismiss.^{88/}

11. Waiver of Objection to Personal Jurisdiction

In order to preserve an objection to personal jurisdiction in state court, it must be contained either in a pre-answer motion to dismiss or in the answer itself.^{89/} If contained in the

^{83/} [N.Y.C.P.L.R. 3018\(b\)](#).

^{84/} [N.Y.C.P.L.R. 3211\(e\)](#)

^{85/} [N.Y.C.P.L.R. 3211\(e\)](#)

^{86/} [N.Y.C.P.L.R. 3211\(e\)](#)

^{87/} [FED. R. CIV. P. 8\(c\)](#).

^{88/} [FED. R. CIV. P. 12\(b\)](#).

^{89/} [CPLR 3211\(e\)](#); see *Making C.P.L.R. 3211 Motion Without Including Jurisdictional Objection Irrevocably Waives It*, 15 SIEGEL'S PRAC. REV. 4 (1993).

answer, the objection generally is not waived, regardless of what the defendant may do in the action, including defending the action on the merits.^{90/}

An objection to personal jurisdiction in federal court also must be raised either by a motion to dismiss or in the answer itself; otherwise, it will be deemed waived.^{91/} In federal practice, unlike state practice, however, even if the objection to personal jurisdiction is contained in a motion to dismiss or an answer, the conduct of the defendant may waive the objection.^{92/}

12. Counterclaims and Cross-Claims

All counterclaims are permissive in New York state court actions.^{93/} The defendant, therefore, has the option of either asserting his claim against the plaintiff in the pending action or suing on it in a separate action. The risk of the application of the doctrines of res judicata or collateral estoppel, however, may effectively compel the defendant to assert the counterclaim.^{94/} One defendant may assert against another defendant a cross-claim which alleges any cause of action, regardless of subject matter.^{95/} A counterclaim requires a reply.^{96/} A cross-claim, on the other hand, requires a reply only where the cross-claim demands one. In the absence of a demand, the cross-claim is deemed denied.^{97/}

In federal practice, claims arising out of the same transaction or occurrence that is the subject matter of the opposing party's claim are compulsory counterclaims if the presence of third parties is not required, and must be asserted in the pending action or are deemed waived.^{98/} Supplemental jurisdiction exists over these counterclaims, and no independent jurisdictional basis

^{90/} Calloway v. National Servs. Indus., Inc., 60 N.Y.2d 906, 458 N.E.2d 1260, 470 N.Y.S.2d 583 (1983).

^{91/} FED. R. CIV. P. 12(h)(1).

^{92/} Datskow v. Teledyne, Inc., 899 F.2d 1298 (2d Cir.), cert. den., 498 U.S. 854, 111 S. Ct. 149, 112 L. Ed. 2d 116 (1990) (holding that attendance at a pretrial conference to schedule discovery and motion practice waived the objection to personal jurisdiction, even though the objection was contained in the answer); see *Does Defendant Who Asserts Jurisdictional Defense In Answer Waive It By Proceeding on the Merits*. 33 SIEGEL'S PRAC. REV. 1.

^{93/} N.Y.C.P.L.R. 3019(a) and (b).

^{94/} DAVID D. SIEGEL, NEW YORK PRACTICE § 224 (2d ed. 1991).

^{95/} N.Y.C.P.L.R. 3019(b).

^{96/} N.Y.C.P.L.R. 3011; SIEGEL, NEW YORK PRACTICE § 224.

^{97/} N.Y.C.P.L.R. 3011.

^{98/} FED. R. CIV. P. 13(a).

is required.^{99/} Unrelated counterclaims in federal court are permissive counterclaims and require their own independent ground for jurisdiction.^{100/} In federal practice, a cross-claim may be interposed against another defendant only if it arises out of the same transaction or occurrence that is the subject matter of the original claim (or a counterclaim), or if it relates to property which is the subject matter of the original claim.^{101/} A federal counterclaim requires a reply, which must be limited to responding to the newly asserted claim; in addition, unlike state court practice, an answer to a cross-claim is required.^{102/}

13. Amendment of Pleadings

In New York state practice, a party may amend a pleading as of right, within twenty days after its service, or at any time before the expiration of the responding time.^{103/} Amendment also is allowed by leave of the court, which is to be freely given, or by stipulation of the parties.^{104/}

In federal practice, amendment of a pleading is permitted at any time before a responsive pleading is served.^{105/} If no responsive pleading is permitted and the action has not been placed on the trial calendar, the party may amend a pleading as of right only within twenty days after it is served.^{106/} A party also may amend a pleading by leave of court, which is to be freely given, or upon the adverse party's written consent.^{107/}

14. Filing

New York state and federal practice have very different requirements as to which pleadings and papers must be filed in an action. In New York state practice, you must file the

^{99/} 28 U.S.C. § 1367.

^{100/} FED. R. CIV. P. 13(b).

^{101/} FED. R. CIV. P. 13(g).

^{102/} CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, §§ 1183-85 (2d ed. 1990).

^{103/} N.Y.C.P.L.R. 3025(a).

^{104/} N.Y.C.P.L.R. 3025(b).

^{105/} FED. R. CIV. P. 15(a).

^{106/} *Id.*

^{107/} FED. R. CIV. P. 15(a).

summons and complaint and a copy with the clerk of the court.^{108/} However, orders and supporting motion papers must be filed after being granted by the court.^{109/} After a motion is submitted for a decision, an order is required to be issued within twenty days if the motion is for a provisional remedy, or within sixty days for all other motions.^{110/} Similarly, within sixty days after signing and filing a decision directing that an order be settled or submitted, proposed orders or judgments, with proof of service on all parties if so directed "on notice," must be submitted for entry by the Court.^{111/} Failure to submit the order in a timely manner shall be deemed an abandonment of the motion unless good cause is shown.^{112/} The filing of other pleadings and papers is not mandatory in actions pending in state court.

In federal practice, all papers after the complaint that are required to be served on a party must be filed with the court, together with a certificate of service within a reasonable time after service.^{113/} The federal rules provide that a court may, upon motion or its own initiative, order that depositions, interrogatories, requests for documents, requests for admissions, and answers and responses thereto not be filed, unless on further order of the court or for use in the proceeding.^{114/} All district courts in New York have affirmatively provided that depositions, interrogatories, requests for admissions, and answers and responses thereto are not to be filed with the clerk's office except by order of court.^{115/}

15. Jury Demand

In an action pending in state court, any party may demand a jury trial by filing and serving upon all other parties a note of issue containing a jury demand. If a note of issue is filed by another party without a jury demand, a jury may be demanded within fifteen days after the note

^{108/} [N.Y.C.P.L.R. 304.](#)

^{109/} [N.Y.C.P.L.R. 2220\(a\).](#)

^{110/} [N.Y.C.P.L.R. 2219\(a\).](#)

^{111/} [N. Y. UNIF. RULES OF TRIAL COURTS § 202.48\(a\).](#)

^{112/} *Id.*

^{113/} [FED. R. CIV. P. 5\(d\).](#)

^{114/} [FED. R. CIV. P. 5\(d\).](#)

^{115/} *See* [U.S. Dist. Ct. S. & E.D.N.Y. Civ. R. 5.1\(a\)](#); [U.S. Dist. Ct. N.D.N.Y. Civ. R. 26.2](#); [U.S. Dist. Ct. W.D.N.Y. Civ. R. 7.1\(a\)\(1\)](#) (except in pro se cases).

of issue is filed by the other party.^{116/} A trial by jury is waived if not then demanded.^{117/} A local jury panel is selected from the county in which the state court sits.^{118/} The primary sources for prospective jurors are voter registration lists, the New York State Department of Motor Vehicle lists, income tax lists, and volunteers.^{119/} Six jurors are seated on a jury for a civil action.^{120/} One or two alternate jurors also may be selected upon the request of a party.^{121/} The jury decision need not be unanimous; only 5/6 vote is required for a verdict.^{122/} Six jurors, however, must participate fully in the deliberations, or a new trial may be ordered.^{123/}

In an action pending in federal court, a jury trial may be demanded at any time after the commencement of the action, but not later than ten days after service of the last pleading.^{124/} A party who fails to file and serve its demand within these time constraints will waive its right to a trial by jury.^{125/} In actions that have been removed from state court to federal court, a jury trial must be demanded by the party requesting the removal within ten days after the petition for removal has been filed, or by any other party within ten days of service of the removal petition, unless a party has already demanded a jury trial in state court, or was not otherwise required to make an affirmative demand in state court pursuant to applicable state law.^{126/} The procedure for jury demands may vary in each district; therefore the District Court Rules should always be consulted.^{127/}

^{116/} N.Y.C.P.L.R. 4102(a).

^{117/} N.Y.C.P.L.R. 4102(a); see *When Defendant's Demand for Jury Trial is Rejected Because Clerk Can't Find Note of Issue in File*, 6 SIEGEL'S PRACTICE REV. 2 (1993).

^{118/} See N.Y. RULES OF CHIEF ADMINISTRATOR § 128.1.

^{119/} *Id.* at § 128.3.

^{120/} N.Y.C.P.L.R. 4104.

^{121/} N.Y.C.P.L.R. 4106.

^{122/} N.Y.C.P.L.R. 4113(a).

^{123/} *Sharrow v. Dick Corp.*, 86 N.Y.2d 54, 653 N.E.2d, 629 N.Y.S.2d 980, 1150 (1995); see *Indication That One of Six Jurors Didn't Participate Fully in Deliberating Requires a New Trial*, 427 N. Y. STATE L. DIGEST 1 (1995) (discussing *Sharrow*).

^{124/} FED. R. CIV. P. 38(b).

^{125/} FED. R. CIV. P. 38(d).

^{126/} FED. R. CIV. P. 81(c).

^{127/} For example, the Northern District of New York requires the jury demand to be noted on the first page of the initial pleading. U.S. Dist. Ct. N.D.N.Y. Civ. R. 38.1(a) and (b) and 81.3. The Western District of New York provides that in actions that have been removed from

The jury pool in federal court is selected from voter registration lists and State Department of Motor Vehicle records.^{128/} The jury consists of between six and twelve members.^{129/} There is no longer a provision in the Federal Rules for alternate jurors; in addition, the District Court Rules for all four district courts in New York are silent regarding the use of alternate jurors. All verdicts are required to be unanimous, unless the parties stipulate otherwise.^{130/}

16. Voir Dire of Jury Panel

In New York state practice, the attorneys for the parties historically have conducted voir dire without the presence of a judge. However, on application of any party, a judge may be present at the examination of jurors.^{131/} Since January, 1996, state court judges are required to be present at the beginning of the jury selection process.

In federal practice, the rules permit the court, the attorneys, or the parties to conduct voir dire.^{132/} If the court conducts voir dire, it generally will permit the parties or their attorneys to supplement the examination by further inquiry the court "deems proper."^{133/} Practice regarding jury selection varies by district.^{134/}

state court to federal court, a jury trial must be demanded within thirty days after notice--that the right to a jury trial will be waived without a timely demand--has been sent to all parties from the clerk of the court. U.S. Dist. Ct. W.D.N.Y. Civ. R. 38.

^{128/} See U.S. Dist. Ct. S. & E.D.N.Y. Appendix B, [N.D.N.Y. Rule 47.1](#), and W.D.N.Y. Rule 47.2.

^{129/} [FED. R. CIV. P. 48](#).

^{130/} [FED. R. CIV. P. 48](#); Rule 48 of the Federal Rules of Civil Procedure is modified in the Western District of New York, which mandates that all verdicts are to be unanimous, thus prohibiting stipulations to the contrary. U.S. Dist. Ct. W.D.N.Y. Civ. R. 47.1(a).

^{131/} [N.Y.C.P.L.R. 4107](#).

^{132/} [FED. R. CIV. P. 47\(a\)](#).

^{133/} [FED. R. CIV. P. 47\(a\)](#).

^{134/} See, e.g., [U.S. Dist. Ct. N.D.N.Y. Civ. R. 47.2\(a\)](#) (Jury selection is conducted by the court, the attorneys, or both, as the court determines); U.S. Dist. Ct. W.D.N.Y. Civ. R. 47.1(c) (court shall conduct voir dire, unless it orders otherwise; counsel may submit written questions prior to, or during, voir dire. Further, the judge also may allow questions to be submitted orally.).

17. Waiver of Right to Jury Trial By Joinder of Different Claims

In state court, if a plaintiff joins legal and equitable claims emanating from separate transactions, the plaintiff will not forfeit the right to a trial by jury on the legal claims.^{135/} If, however, the plaintiff joins legal and equitable claims emanating from the same transaction, the plaintiff will waive the right to trial by jury on the legal claims.^{136/} The defendant, of course, may still demand a jury trial on the legal claims.^{137/}

In federal court, there is no waiver of a jury trial by joining claims triable to a jury with claims not so triable.^{138/}

18. Class Action Certification

In state practice, the plaintiff must move for class certification within sixty days after the time to serve a responsive pleading has expired.^{139/} In federal practice, the Rules of Civil Procedure provide that the plaintiff must move for class certification as soon as practicable.^{140/} The Western District of New York provides that counsel for the parties must meet with the district judge or magistrate judge to obtain a scheduling order for discovery of facts relevant to class certification within 60 days after issue is joined and must move for class certification, unless an extension is granted, within 120 days after the filing of the pleading alleging a class action; otherwise, the "class" allegation will be deemed dismissed.^{141/} The Local Rules for the other District Courts of New York are silent with respect to class certification.

^{135/} N.Y.C.P.L.R. 4102(c).

^{136/} N.Y.C.P.L.R. 4102(c).

^{137/} *See When Law and Equity Claims Mix, But Fact Issue on Equity Claims is Distinct, Court Decides It Even If Effect is to Overturn Jury Verdict on Legal Claim*, 409 N.Y. STATE L. DIGEST 1 (1994) (discussing the apportionment of the fact-finding function when both legal and equitable claims are present).

^{138/} *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959).

^{139/} N.Y.C.P.L.R. 902.

^{140/} FED. R. CIV. P. 23(c)(1).

^{141/} U.S. Dist. Ct. W.D.N.Y., Civ. R. 23(c) and (d).

19. Orders to Show Cause

Orders to show cause are explicitly authorized under state court practice.^{142/} The primary function of an order to show cause is to shorten the required notice period for a motion.^{143/} Orders to show cause direct the recipient to show cause why the request for relief should not be granted.^{144/}

The Federal Rules of Civil Procedure do not provide explicitly for orders to show cause.^{145/} However, the equivalent of an order to show cause may be obtained in federal court by filing a companion motion to shorten the time in which the opposing party has to respond to the primary motion. The companion motion and notice of a hearing shall be served not later than 5 days before the hearing date unless a different period is set by the rules or order of court.^{146/} Opposing affidavits must be served not later than one day prior to the hearing date.^{147/}

20. Temporary Restraining Order

In state court, a temporary restraining order can be obtained *ex parte*^{148/} if the plaintiff shows that immediate and irreparable injury, loss, or damage will result unless the defendant is restrained before a preliminary injunction hearing can be held.^{149/} The court may require the party seeking the temporary restraining order to provide an undertaking in an amount

^{142/} [N.Y.C.P.L.R. 2214\(d\)](#).

^{143/} Siegel, 2214 Practice Commentaries McKinney's Cons Laws of NY, Book 7B, CPLR C2214:24 at 101.

^{144/} *Id.*

^{145/} See [FED. R. CIV. P. 7\(b\)\(1\)](#) (providing that an application to the court for an order shall be made by motion).

^{146/} *Id.*

^{147/} *Id.*

^{148/} In some of the Judicial Districts of New York State Supreme Court, however, the preferred course of conduct is for the party seeking a temporary restraining order to notify the opposing party. See Memorandum from Honorable James B. Kane, Administrative Judge of the Eighth Judicial District, to Supreme Court Justices (June 30, 1986).

^{149/} [N.Y.C.P.L.R. 6313\(a\)](#).

set by the court.^{150/} The duration of the temporary restraining order is until the preliminary injunction hearing is held.^{151/}

In federal court, a temporary restraining order can be granted ex parte if the party shows that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party's attorney can be heard, and if the applicant's attorney certifies to the court the efforts, if any, to give notice to the adverse party and the valid reasons why no such notice should be required.^{152/} Unlike state practice, security for a temporary restraining order, in an amount that the court deems proper, is required in federal practice.^{153/} The duration of the temporary restraining order may not exceed ten days.^{154/} However, it may be extended for a like period upon a showing of good cause; the duration of such an order also may be longer than ten days with consent of the restrained party.^{155/}

21. Preliminary Injunction

In order to obtain a preliminary injunction in state court, the movant must demonstrate the likelihood of success on the merits, irreparable injury if the preliminary injunction is not granted, and that the balance of the equities favors the movant's position.^{156/} A preliminary injunction may be granted only upon notice to the defendant.^{157/} Further, a preliminary injunction is not available when the plaintiff may be adequately compensated at law by an award of money damages.^{158/}

In order to obtain a preliminary injunction in federal court, the movant must demonstrate irreparable harm and either (1) a likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them fair ground for litigation and a

^{150/} N.Y.C.P.L.R. 6313(c).

^{151/} N.Y.C.P.L.R. 6301.

^{152/} FED. R. CIV. P. 65(b).

^{153/} FED. R. CIV. P. 65(c).

^{154/} FED. R. CIV. P. 65(b).

^{155/} FED. R. CIV. P. 65(b).

^{156/} W.T. Grant Co. v. Srogi, 52 N.Y.2d 496, 420 N.E.2d 953, 438 N.Y.S.2d 761 (1981).

^{157/} N.Y.C.P.L.R. 6311(1).

^{158/} E.g., Mr. Dees Stores, Inc. v. A.J. Parker, Inc., 159 A.D.2d 389, 553 N.Y.S.2d 16 (1st Dep't 1990).

balance of hardships tipping decidedly in the movant's favor.^{159/} The injury to be shown must be actual and imminent.^{160/} A preliminary injunction may be issued only upon notice to the adverse party^{161/} and is not available where a party may be adequately compensated by money damages.^{162/}

22. Attorneys' Fees

As an exception to the well-known "American Rule" prohibiting recovery of attorneys' fees by the prevailing party, a party may seek attorneys' fees in some state court actions against the state; such an application must be submitted to the court within thirty days of judgment.^{163/} Attorneys' fees also may be awarded in class actions, as well as in dental, medical and podiatric malpractice actions, arbitration proceedings, and actions involving personal injury, property damage, or wrongful death, when frivolous claims or defenses have been asserted.^{164/} Finally, a "discretionary allowance," in addition to or separate from costs, may be awarded in exceptional circumstances by the Court.^{165/}

In federal practice, attorneys' fees, when their recovery is expressly provided for by statute, are generally requested by a motion filed and served within fourteen days of the entry of judgment.^{166/}

^{159/} *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430 (2d Cir. 1993).

^{160/} *Firemen's Ins. Co. v. Keating*, 753 F. Supp. 1146 (S.D.N.Y. 1990).

^{161/} *FED. R. CIV. P.* 65(a)(1).

^{162/} *Firemen's Ins. Co.*, 753 F. Supp. at 1150.

^{163/} *N.Y.C.P.L.R.* 8601(a)-(b).

^{164/} *N.Y.C.P.L.R.* 909, 5031(c), 7564.

^{165/} *N.Y.C.P.L.R.* 8303-a.

^{166/} *FED. R. CIV. P.* 54(d)(2)(B).

23. Sanctions

The Rules of the Chief Administrator of the Courts provides for the imposition of monetary sanctions for frivolous conduct in New York state court. Both attorney and client may each be sanctioned up to \$10,000 for any single occurrence of frivolous conduct.^{167/}

In federal practice, sanctions, after notice and an opportunity to respond, are within the discretion of the court, and the emphasis is placed on nonmonetary sanctions.^{168/} In the event that a monetary sanction is assessed, there is no limit in the Federal Rules on its amount. Sanctions may be initiated by a party's motion made separately from other motions which specifically describes the conduct subject to sanction.^{169/} Alternatively, an order describing the sanctionable conduct may be entered by the court on its own initiative.^{170/} However, monetary sanctions may not be awarded pursuant to a court initiated order unless the court issues its order to show cause before a voluntary dismissal or settlement of claim is made by or against the sanctionable party.^{171/}

24. Appeals

There are few orders that can be appealed in federal court as a matter of right, and there are few orders that cannot be appealed as a matter of right in New York state court. In state court, with limited exceptions, appeals to the Appellate Division may be taken as a matter of right from final or interlocutory judgments or orders.^{172/} Appeals also may be taken by permission of the judge who made the order or by permission of a justice of the Appellate Division.^{173/} An appeal must be taken within thirty days from service of the order or judgment with notice of entry.^{174/}

^{167/} N.Y. RULES OF CHIEF ADMINISTRATOR § 130-1.2.; see *Full \$10,000 Sanction Apiece Imposed on Plaintiff and Plaintiff's Lawyer*, 33 SIEGEL'S PRAC. REV. 3 (1995); *Under N.Y.C.P.L.R. 8303-a, Sanctions of Up to \$10,000 Can Be Awarded In Favor of Each Prevailing Party*, SIEGEL'S PRAC. REV. 3 (1993).

^{168/} FED. R. CIV. P. 11(c)(2).

^{169/} FED. R. CIV. P. 11(b)

^{170/} FED. R. CIV. P. 11(c)(1)(B).

^{171/} FED. R. CIV. P. 11(c)(2)(B).

^{172/} N.Y.C.P.L.R. 5701(a).

^{173/} N.Y.C.P.L.R. 5701(c).

^{174/} N.Y.C.P.L.R. 5513(a); see *Each Winner Should Serve Its Own Notice of Entry In Order to Start Appeal Time Running Against Itself*, 27 SIEGEL'S PRAC. REV. 3 (1994).

The availability of appeals in federal courts is much more limited. Appeals may be taken from final decisions only, with a few exceptions.^{175/} An appeal must be taken within thirty days from entry of the judgment or order.^{176/} If the United States, an officer, or an agency thereof, is a party, then the notice of appeal must be filed within sixty days after entry.^{177/}

III. DISCOVERY FACTORS AFFECTING CHOICE OF FORUM

1. Scope of Disclosure

In state practice, there is to be "full disclosure of all matter material and necessary in the prosecution or defense of an action."^{178/}

In federal practice, parties "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."^{179/} The information sought need not be admissible at trial if it appears reasonably calculated to lead to the discovery of admissible evidence.^{180/} The Federal Rules now require the parties to disclose basic information, without awaiting a discovery request.^{181/} Failure to disclose such information, unless

^{175/} 28 U.S.C. § 1291. For example, interlocutory appeals may be taken under the collateral order doctrine. See *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 101 S. Ct. 669, 66 L. Ed. 2d 571 (1981). Appeals also may be taken from interlocutory orders involving injunctions, receivers, and admiralty cases, or upon certification by the trial judge and permission from the circuit court which would have jurisdiction of an appeal of the action. 28 U.S.C. § 1292(a) and (b).

^{176/} FED. R. CIV. P. 4(a)(1).

^{177/} FED. R. CIV. P. 4(a)(1).

^{178/} N.Y.C.P.L.R. 3101(a); see also *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 288 N.Y.S.2d 449, 235 N.E.2d 430 (1968).

^{179/} FED. R. CIV. P. 26(b)(1).

^{180/} FED. R. CIV. P. 26(b)(1).

^{181/} FED. R. CIV. P. 26(a)(1). See *The 1993 Disclosure and Discovery Changes: First Major Overhaul of Article 31 since CPLR's 1963 Adoption, Part 1* 7 SIEGEL'S PRAC. REV. 1 (1993); *The 1993 Disclosure and Discovery Changes: First Major Overhaul of Article 31 since CPLR's 1963 Adoption, Part 2* 8 SIEGEL'S PRAC. REV. 1 (1993); *The 1993 Disclosure and Discovery Changes: First Major Overhaul of Article 31 since CPLR's 1963 Adoption, Part 3* 9 SIEGEL'S PRAC. REV. 1 (1993); *The 1993 Disclosure and Discovery Changes: First Major Overhaul of Article 31 since CPLR's 1963 Adoption, Part 4* 10 SIEGEL'S PRAC. REV. 1 (1993); *The 1993 Disclosure and Discovery Changes: First Major Overhaul of Article 31 since CPLR's 1963 Adoption, Part 5* 11 SIEGEL'S PRAC. REV. 1 (1993) 7-11 SIEGEL'S PRAC. REV. (1993) (outlining the 1993 disclosure and discovery changes to the Federal Rules and

the failure is harmless, may preclude a party's use of the information and may result in the imposition of a sanction, including informing the jury of the party's failure to disclose.^{182/} The Southern, Western, and Northern Districts of New York have suspended some of the amendments to Rule 26(a) regarding automatic disclosure. For instance, all three district courts suspended mandatory disclosure under Rule 26(a)(1), but the disclosure of expert witness and trial witness information under Rule 26(a)(2) and (3) is operative in the Southern and Western (as well as the Eastern) Districts.^{183/}

2. Pre-Action Discovery

In New York state court, a court order is required if disclosure is desired before an action has been commenced.^{184/} Such pre-action disclosure normally may be obtained "to aid in bringing an action, to preserve information or to aid in arbitration."^{185/} Thus, although a potential plaintiff may not use such pretrial discovery to determine whether a cause of action exists, pre-action discovery may be used for such purposes as the identification of defendants.

In federal practice pre-action depositions are allowed only if the petitioner asks for an order authorizing the depositions and shows petitioner is otherwise unable to presently bring the action, the subject matter of the expected action, the petitioner's interest in the action, the names and addresses of the proposed deponents, the nature of the testimony, and the identities of expected adverse parties.^{186/}

3. Preliminary Conference

The use of the preliminary conference varies greatly from state to federal practice. In New York state practice, a party may request a preliminary conference to consider simplification of legal or factual issues, a timetable for discovery, addition of other necessary parties, settlement of the action, removal to a lower court, or any other matters that the court

comparing them to the CPLR discovery provisions).

^{182/} [FED. R. CIV. P. 37\(c\)\(1\)](#).

^{183/} *See* U.S. Dist. Ct. W.D.N.Y. Civ. R. 26(a); [U.S. Dist. Ct. N.D.N.Y., General Order #40](#); U.S. Dist. Ct. S. & E.D.N.Y. Civ. R. 49(a). The Eastern District of New York, through its Local Rules, has enacted a modified version of Rule 26(a) on a trial basis. *See* U.S. Dist. Ct. R. S. & E.D.N.Y., Appendix F, Civil Justice Expense and Delay Reduction Plan II. [FED. R. CIV. P. 37\(c\)\(1\)](#).

^{184/} [N.Y.C.P.L.R. 3102\(c\)](#).

^{185/} *Id.*; *see also* SIEGEL, *NEW YORK PRACTICE* § 352 (2d ed. 1991).

^{186/} [FED. R. CIV. P. 27\(a\)](#).

deems relevant.^{187/} Once the conference has been scheduled, and all the parties have been notified, the parties can stipulate to a timetable governing the completion of discovery over the next twelve months.^{188/} If the parties reach an agreement on this discovery timetable, the preliminary conference will be canceled unless the court orders otherwise.^{189/} Absent such a preliminary scheduling conference, state courts generally have little involvement with the parties or the action until called upon to hear a motion or resolve a dispute.

The preliminary conference is used much more frequently in federal practice. The Federal Rules mandate that a scheduling order shall be entered within ninety days from the date of the defendant's appearance and within 120 days^{190/} after the complaint has been served.^{191/} The scheduling order shall be issued after receiving a report from a mandatory meeting of the parties to discuss discovery and settlement.^{192/} This scheduling order generally includes deadlines to join other parties, amend pleadings, file motions and complete discovery, and the date for at least another pretrial conference.^{193/} At these conferences, consideration may be given to: (1) simplification of the issues; (2) amendment of the pleadings; (3) the possibility of obtaining admissions of fact and documents, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence; (4) the avoidance of unnecessary proof; (5) summary judgment motions; (6) a discovery schedule; (7) the identification of witnesses and documents, the need and schedule for filing pretrial briefs, and the dates for further conferences and trial; (8) advisability of referring matters to a magistrate judge; (9) settlement; (10) a pretrial order; (11) disposition of pending motions; (12) special procedures for managing potentially difficult or protracted litigation; (13) separate trials on particular claims or issues in the case; (14) judgment as a matter of law or on partial findings during the trial; (15) time limits for presenting evidence; and (16) other matters that will facilitate the just, speedy, and inexpensive disposition of the case.^{194/}

^{187/} N.Y. UNIFORM R. TRIAL COURTS § 202.12(a), (c)(1)-(6).

^{188/} *Id.* at § 202.12(b).

^{189/} *Id.*; see *Amendments Made on Motion Practice and Preliminary Conference; Main Effect is on Disclosure and Bill of Particulars*, 3 SIEGEL'S PRAC. REV. 3 (1993) (discussing the use of the preliminary conference in state court practice).

^{190/} Except for the Western District of New York which requires the magistrate judge to hold a Rule 16 pre-trial discovery conference within 60 days of issue being joined. U.S. Dist. Ct. W.D.N.Y. CIV. R. 16.1(a).

^{191/} FED. R. CIV. P. 16(b).

^{192/} FED. R. CIV. P. 16, 26(f).

^{193/} FED. R. CIV. P. 16(b)(5). See also U.S. Dist. Ct. W.D.N.Y. CIV. R. 16.1(a).

^{194/} FED. R. CIV. P. 16(c)(1)-(16). See also U.S. Dist. Ct. W.D.N.Y. CIV. R. 16.1(b)-(k).

4. Bill of Particulars

The bill of particulars used in New York state practice finds no equivalent in federal practice.^{195/} Its purpose is to "amplify the pleading, limit the proof, and prevent surprise at trial."^{196/} But a bill of particulars generally cannot be used to obtain evidence.^{197/} The use of a bill of particulars in New York is restricted to specific actions. The use of both a demand for a bill of particulars and interrogatories is prohibited in all actions except matrimonial actions.^{198/} A demand for a bill of particulars must be answered within thirty days after receipt, and any objections must be specifically stated.^{199/} Penalties may be imposed if the demand is unduly burdensome or if the responding party fails to provide proper responses.^{200/}

5. Interrogatories

After the commencement of an action in state court, any party may serve on any other party written interrogatories.^{201/} However, interrogatories may not be served on a defendant before the defendant's time for serving a responsive pleading has expired, unless leave of the court has been granted.^{202/} There is no numerical limit on the number of interrogatories that may be served in an action pending in state court. However, the use of interrogatories, along with other discovery devices, is restricted to specified actions. For example, in an action based solely on negligence, the use of both interrogatories and depositions is prohibited, without leave of the court.^{203/} Further, a party may not serve both written interrogatories and a demand for a bill of

^{195/} [N.Y.C.P.L.R. 3041-3042.](#)

^{196/} *State v. Horseman's Benevolent & Protective Ass'n.*, 34 A.D.2d 769, 311 N.Y.S.2d 511 (1st Dep't 1970).

^{197/} DAVID D. SIEGEL, *NEW YORK PRACTICE*, § 356 (2d ed. 1991).

^{198/} [N.Y.C.P.L.R. 3130.](#)

^{199/} [N.Y.C.P.L.R. 3042\(a\).](#)

^{200/} [N.Y.C.P.L.R. 3042\(d\)-\(e\).](#) See *The New Bill of Particulars Practice: 'Preclusion' Routine Out; Motions Reduced; Penalties Increased*, Part 1, 23 SIEGEL'S PRAC. REV. 1 (1994); *The New Bill of Particulars Practice: 'Preclusion' Routine Out; Motions Reduced; Penalties Increased, Part 2*, 24 SIEGEL'S PRAC. REV. 1 (1994); *The New Bill of Particulars Practice: 'Preclusion' Routine Out; Motions Reduced; Penalties Increased, Part 3*, 25 SIEGEL'S PRAC. REV. 1 (1994) (outlining New York's practice regarding bills of particulars).

^{201/} [N.Y.C.P.L.R. 3132.](#)

^{202/} [N.Y.C.P.L.R. 3132.](#)

^{203/} [N.Y.C.P.L.R. 3130\(1\).](#)

particulars except in matrimonial actions.^{204/} Answers or objections to each interrogatory must be served within twenty days after service.^{205/} Answers to interrogatories may be amended or supplemented only by order of the court upon motion^{206/} unless new information makes the previous answers incorrect, incomplete, or materially misleading, in which case the responding party has a duty to supplement or amend.^{207/}

In federal practice interrogatories may be served on any party to an action. However, interrogatories may not be served prior to the required meeting of the parties, without leave of the court or written stipulation of the parties.^{208/} As a general rule, there is no limitation on the use of interrogatories along with other discovery devices.^{209/} The number of interrogatories served, however, may not exceed twenty-five, including all discrete sub-parts, without leave of the court.^{210/} The Northern and Southern Districts of New York have suspended the aspect of the Federal Rule which limits the number of interrogatories that may be served.^{211/} Each interrogatory must be answered, unless it is objected to; in such a case, the reason for the objection should be stated, and the interrogatory should be answered to the extent it is not objectionable.^{212/} Answers to interrogatories must be served within thirty days.^{213/}

^{204/} [N.Y.C.P.L.R. 3130\(1\)](#).

^{205/} [N.Y.C.P.L.R. 3133\(a\)](#).

^{206/} [N.Y.C.P.L.R. 3133\(c\)](#)

^{207/} [N.Y.C.P.L.R. 3101\(h\)](#).

^{208/} [FED. R. CIV. P. 33\(a\)](#).

^{209/} The Southern District of New York, however, limits the use of interrogatories at the commencement of discovery to parties seeking names of witnesses with knowledge of relevant information, computation of damages alleged, the existence, custodian, location, and general description of relevant documents and other physical evidence. U.S. Dist. Ct.S. & E.D.N.Y., Civ. R. 33.3(a).

^{210/} [FED. R. CIV. P. 33\(a\)](#).

^{211/} [U.S. Dist. Ct. N.D.N.Y., General Order #40](#); U.S. Dist. Ct. S. & E.D.N.Y. Civ. R. 33.4.

^{212/} [FED. R. CIV. P. 33\(b\)\(1\)](#).

^{213/} [FED. R. CIV. P. 33\(b\)\(3\)](#).

6. Depositions

In state court practice, after an action is commenced, any party may take the deposition of any person.^{214/} Leave of court, however, is required to notice a party's deposition prior to the expiration of that party's time for serving a responsive pleading.^{215/} There is no numerical limit on the number of depositions that may be taken in an action pending in state court. If a witness fails to sign a deposition transcript submitted for signature, the transcript may be used as though it were signed.^{216/} A videotaped deposition is permitted in New York state practice as long as it proceeds upon notice and is conducted in accordance with the Uniform Rules for the New York State Trial Courts.^{217/}

In the event that a nonparty is to be deposed in state court, a subpoena must be served twenty days before the deposition date.^{218/} The non-party witness is entitled to travel expenses and a witness fee.^{219/} Nonparty deponents who are residents of New York are to be deposed within the county in which they reside, are regularly employed, or have an office for the transaction of business.^{220/} Nonparty deponents who are not residents of New York are to be deposed within the county in which they are served, are regularly employed, or have an office for the regular transaction of business.^{221/} If a party wishes to depose another party at the same time and place of the scheduled deposition, ten days notice must be provided.^{222/} Depositions of party deponents may be held in the county in which they reside or have an office for the regular transaction of business or where the action is pending.^{223/}

In federal practice, a party desiring to take the deposition of any person must give reasonable notice in writing to every other party to the action.^{224/} Leave of the court or stipulation

^{214/} N.Y.C.P.L.R. 3106(a).

^{215/} *Id.*

^{216/} N.Y.C.P.L.R. 3116(a); see *How Long Has Deponent to Sign Deposition?* 28 SIEGEL'S PRAC. REV. 3 (1995).

^{217/} N.Y. UNIF RULES OF COURT § 202.15; C.P.L.R. 3113(b).

^{218/} N.Y.C.P.L.R. 3106(b).

^{219/} N.Y.C.P.L.R. 2303.

^{220/} N.Y.C.P.L.R. 3110(2).

^{221/} *Id.*

^{222/} N.Y.C.P.L.R. 3107.

^{223/} N.Y.C.P.L.R. 3110(1).

^{224/} FED. R. CIV. P. 30(b)(1).

of the parties is required if a party seeks to take a deposition before the parties have had their Rule 26 meeting, unless the notice contains a certification that the deponent is expected to leave the country and will be otherwise unavailable.^{225/} There is a presumptive limit of ten depositions per side, although the number may be increased by court order or stipulation of the parties.^{226/} These limits, however, are not in effect in the Northern and Southern Districts of New York.^{227/} Depositions may be taken by audio, audio and video, or stenographic means.^{228/} The deposition transcript must be reviewed and signed, within thirty days of the availability of the transcript, only if requested before the deposition's completion.^{229/} Subpoenas are required for nonparty depositions. Generally, nonparty depositions are held within 100 miles from the place where the deponent resides, is employed, or regularly transacts business.^{230/} Service of the subpoena must include payment of the attendance fee and mileage.^{231/} In New York state, a defendant may elect to depose a plaintiff first; no such priority technically is available under the federal rules, although it may be afforded in practice.

7. Expert Witness Disclosure

In state practice, a party is allowed to request information regarding the identity of the expert, the subject matter and the substance of the facts and opinions on which the expert is expected to testify, the qualifications of the expert, and a summary of the grounds for the expert's opinion.^{232/} Failure to timely comply with a request for expert information may preclude its use at trial.^{233/} Further discovery of a party's expert, including by deposition, is not permitted.^{234/}

^{225/} FED. R. CIV. P. 30(a)(2)(c).

^{226/} FED. R. CIV. P. 30(a)(2)(A).

^{227/} U.S. Dist. Ct. R. N.D.N.Y., General Order #40, U.S. Dist. Ct. S. & E.D.N.Y. Civ. R. 26.4(a).

^{228/} FED. R. CIV. P. 30(b)(2).

^{229/} FED. R. CIV. P. 30(e).

^{230/} FED. R. CIV. P. 45(b)(2) and (c)(3)(A)(ii).

^{231/} FED. R. CIV. P. 45(b)(1).

^{232/} N.Y.C.P.L.R. 3101(d)(1)(i); This rule differs slightly in actions for medical, dental, or podiatric malpractice. Therein, a party responding to a request for expert witness information may omit the names of the medical, dental, or podiatric experts involved, but must disclose all other information. N.Y.C.P.L.R. 3101(d)(1)(i). New York practice also permits the deposition of each party's experts in medical, dental, or podiatric malpractice actions upon the consent of all the parties. N.Y.C.P.L.R. 3101(d)(1)(ii).

^{233/} See *Bauernfeind v. Albany Med. Ctr. Hosp.*, 195 A.D.2d 819 (3d Dept 1993) (holding the trial court properly precluded plaintiff from calling an expert witness who was not

The Federal Rules require a party to disclose automatically an expert's identity, his or her opinions and the basis and reasons therefor, data and information considered by the expert and any supporting exhibits to be used, the expert's compensation and qualifications, and cases in which the expert has testified at trial or by deposition in the last four years.^{235/} This information must be disclosed at least ninety days before trial or within thirty days after disclosure by the other side if the evidence is intended to rebut or contradict.^{236/} This mandatory disclosure is not required in the Northern District of New York.^{237/} After the expert report has been provided, the depositions of experts expected to be called at trial may be taken.^{238/} The party seeking the expert discovery must ordinarily pay the expert a reasonable fee.^{239/}

8. Surveillance Tapes

In New York state practice, unedited videotapes, films, photographs, and audiotapes are discoverable regardless of their intended use.^{240/} The statute requires a defendant to disclose surveillance tapes upon demand of plaintiff; however, it is silent as to when the tapes should be turned over.^{241/} The Appellate Division, Fourth Department, recently held that a plaintiff is entitled to surveillance tapes regardless of whether depositions have been completed.^{242/}

disclosed until seven years after demand for expert's name and four days before trial); *see also Court Bars Use of Expert Not Retained Until Eve of Trial*, 18 SIEGEL'S PRAC. REV. 4 (1994) (discussing cases in which the use of an expert was barred because the party waited until the last minute to either retain the expert or disclose the expert's identity).

^{234/} [N.Y.C.P.L.R. 3101\(D\)\(1\)\(i\)](#); *Barrowmany v. Niagara Mohawk Power Corp.*, 675 N.Y.S.2d 734 (4th Dep't July 8, 1998), appeal denied, 92 N.Y.2d 817 (1998).

^{235/} [FED. R. CIV. P. 26\(a\)\(2\)\(B\)](#).

^{236/} [FED. R. CIV. P. 26\(a\)\(2\)\(C\)](#).

^{237/} [See U.S. Dist. Ct. R. N.D.N.Y., General Order #40](#).

^{238/} [FED. R. CIV. P. 26\(b\)\(4\)\(A\)](#).

^{239/} [FED. R. CIV. P. 26\(b\)\(4\)\(C\)](#).

^{240/} [N.Y.C.P.L.R. 3101\(i\)](#); [N.Y.C.P.L.R. § 3101\(i\)](#) was enacted in 1993 in response to *DiMichel v. South Buffalo Ry Co.*, 80 N.Y.2d 184, 604 N.E.2d 63, 590 N.Y.S.2d 1 (1992)(surveillance tapes made for a party are material prepared in anticipation of trial and may be disclosed only upon showing a substantial need and undue hardship).

^{241/} [N.Y.C.P.L.R. 3101\(i\)](#).

^{242/} *DiNardo v. Koronowski*, No. 1409, slip op., 1998 WL 956380 at *2 (4th Dep't Dec. 31, 1998).

The Appellate Division, Second Department, has held that a plaintiff has an unqualified right to surveillance tapes.^{243/}

In New York federal practice, where a party does not intend to introduce a surveillance tape into evidence, the tape does not need to be produced in response to a demand for production.^{244/} A defendant may disclose surveillance materials after the completion of the plaintiff's deposition.^{245/}

9. Discovery Disputes

In state practice, a motion may be made to compel disclosure. However, an affirmation that counsel has conferred with opposing counsel in a good faith effort to resolve the issues raised by the motion is required.^{246/}

In federal practice, a party may move, upon notice, for an order compelling disclosure.^{247/} The motion must include a certification that a good faith effort has been made to obtain the information without court intervention.^{248/}

IV. EVIDENTIARY FACTORS AFFECTING CHOICE OF FORUM

1. Rules of Evidence

New York has not yet adopted a code of evidence; however, some evidentiary rules are set forth in the CPLR.^{249/} The vast majority of evidentiary rules in state practice are found in the common law. In federal practice, the rules of evidence are codified in the Federal Rules of Evidence.^{250/}

^{243/} *Hawkins v. Lucier*, 255 A.D.2d 533, 680 N.Y.S.2d 671 (2d Dep't 1998).

^{244/} *Turnbull v. U.S. Air, Inc.*, 92-CV-4075 slip op. (W.D.N.Y. August 21, 1995).

^{245/} *Weinhold v. Witte Heavy Lift, Inc.*, No. 90 CIV 2096 (S.D.N.Y. Apr. 11, 1994) (court found it appropriate for defendant to disclose surveillance tape after plaintiff's deposition to protect value of tape as impeachment device.)

^{246/} N.Y. Unif. Rules Trial Courts § 202.7(a)(2).

^{247/} [FED. R. CIV. P. 37\(a\)](#).

^{248/} [FED. R. CIV. P. 37\(a\)\(2\)\(A\)](#). *See also, e.g.*, U.S. Dist. Ct. W.D.N.Y. Civ. R. 37.

^{249/} [CPLR Article 45](#).

^{250/} For an excellent comparison of New York state evidentiary law and the Federal Rules of Evidence, *see A Code of Evidence for the State of New York*, NEW YORK STATE LAW REVISION COMMISSION (1991 Lawyers Cooperative Publishing).

2. Hearsay

State practice, unlike federal practice, does not have a residual exception to the rule against hearsay. The federal residual exception provides for the admission of a hearsay statement if it is offered as evidence of a material fact, it is accompanied by sufficient indicia of reliability, it is more probative than any other available evidence, and the general purposes of the Federal Rules of Evidence and the interests of justice would be best served by its admission.^{251/}

3. Reputation Evidence

In state court, character is provable by general reputation.^{252/} In federal court, proof of character may be made by testimony as to reputation or testimony in the form of an opinion.^{253/} On cross-examination, an opponent may inquire into relevant specific instances of conduct.^{254/} If character is an essential element of a charge, claim, or defense, "proof also may be made of specific instances of that person's conduct."^{255/}

4. Evidence of Subsequent Remedial Measures

In New York state court, evidence of subsequent remedial measures is excluded when offered to prove negligence.^{256/} Evidence of subsequent remedial measures is admissible in a strict product liability case based upon manufacturing defect, but not in design defect or failure to warn cases^{257/} except to prove feasibility of the changes where feasibility is at issue.^{258/} Where defendant concedes feasibility of alternative design and additional warning, subsequent remedial measures are not admissible in a strict liability case.^{259/}

^{251/} [FED. R. EVID. 807.](#)

^{252/} RICHARD T. FARRELL, *RICHARDSON ON EVIDENCE* § 149 (11th ed. 1998).

^{253/} [FED. R. EVID. 405\(a\).](#)

^{254/} [FED. R. EVID. 405\(a\).](#)

^{255/} [FED. R. EVID. 405\(b\).](#)

^{256/} *DiPaolo v. Somma*, 111 A.D.2d 899, 490 N.Y.S.2d 803 (2d Dep't 1985).

^{257/} *Cover v. Cohen*, 61 N.Y.2d 261, 461 N.E.2d 864, 473 N.Y.S.2d 378 (1984).

^{258/} *Caprara v. Chrysler Corp.*, 52 N.Y.2d 114, 436 N.Y.S.2d 251, 417 N.E.2d 545 (1981).

^{259/} *Demirovski v. Skil Corp.*, 203 A.D.2d 319, 610 N.Y.S.2d 551 (2d Dep't 1994).

In federal practice, evidence of subsequent remedial measures is not admissible to prove negligence, but is admissible for other purposes, such as to prove ownership, control, feasibility of precautionary measures, if controverted, or impeachment.^{260/}

5. Evidence of Criminal Convictions

In New York state practice, a witness may be impeached by evidence of a conviction of a crime, including both felonies and misdemeanors.^{261/} Admission on cross-examination does not prohibit further questions to establish the criminal act that was the basis for the conviction.^{262/}

In federal practice, evidence that a witness has been convicted of a crime is admissible to attack credibility if the crime was a felony and the probative value from its admission substantially outweighs any prejudice its admission might cause.^{263/} Evidence that a witness has been convicted of a crime involving dishonesty or false statement is admissible regardless of whether it was a misdemeanor or a felony.^{264/} If more than ten years have passed since the date of conviction or release from confinement, whichever is later, the conviction is inadmissible unless the court determines that, in the interests of justice, the conviction's probative value substantially outweighs its prejudicial effect.^{265/} Under these circumstances, the proponent of the evidence also must provide advance written notice to his opponent of his intent to use such evidence.^{266/}

6. Impeachment by Prior Inconsistent Statements

Under New York state practice, a witness may be impeached by prior inconsistent statements subscribed to in writing or made under oath.^{267/} In federal practice, inconsistent statements made under oath subject to the penalty of perjury at a prior trial, hearing, proceeding, or deposition, are admissible for impeachment purposes.^{268/}

^{260/} [FED. R. EVID. 403](#) and [407](#); *see* *Cann v. Ford Motor Co.*, 658 F.2d 54 (2d Cir. 1981), *cert. den.*, 456 U.S. 960, 102 S. Ct. 2036, 72 L. Ed. 2d 484 (1982).

^{261/} [N.Y.C.P.L.R. 4513](#).

^{262/} *Able Cycle Engines, Inc. v. Allstate Ins. Co.*, 84 A.D.2d 140, 445 N.Y.S.2d 469, (2d Dep't 1981) *appeal denied* 57 N.Y.2d 607, 442 N.E.2d 69, 455 N.Y.S.2d 1027 (1982).

^{263/} [FED. R. EVID. 609\(a\)\(1\)](#).

^{264/} [FED. R. EVID. 609\(a\)\(2\)](#).

^{265/} [FED. R. EVID. 609\(b\)](#).

^{266/} *Id.*

^{267/} [N.Y.C.P.L.R. 4514](#).

^{268/} [FED. R. EVID. 801\(d\)\(1\)](#).

7. Dead Man's Statute

New York has a dead man's statute which prohibits some forms of testimony regarding transactions or communications with a decedent.^{269/} In federal practice, there is no dead man's statute. However, in federal cases, where state law provides the rule of decision, such as in diversity actions, the dead man's statute may apply.^{270/}

8. Use of Prior Testimony

In state court if a witness is unavailable because of privilege, death, physical or mental illness, absence beyond the court's jurisdiction, is unable to be located, or is incompetent to testify because of the dead man's statute, prior trial testimony is admissible if it was given in an action involving the same subject matter and parties and "the party against whom the testimony is offered had an adequate opportunity to cross-examine the witness."^{271/} However, such testimony may not be used if the witness's unavailability was procured by or through the culpable conduct of the proponent of the testimony.^{272/}

Use of prior testimony is allowed in federal court if the witness is unavailable and the party against whom the statement is offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.^{273/}

9. Habit

Habit evidence is admissible in state court only if the issue involves proof of repetitive conduct, the party was in complete and exclusive control of the circumstances, and the

^{269/} [N.Y.C.P.L.R. 4519.](#)

^{270/} [Wagner v. Tucker, 517 F. Supp. 1248 \(S.D.N.Y. 1981\).](#)

^{271/} [N.Y.C.P.L.R. 4517](#); [Healy v. Rennert, 9 N.Y.2d 202, 208, 173 N.E.2d 777, 213 N.Y.S.2d 44 \(1961\).](#)

^{272/} [N.Y.C.P.L.R. 4517.](#)

^{273/} [FED. R. EVID. 804\(b\)\(1\).](#)

act was deliberate.^{274/} Habit evidence is admissible in federal court to prove that the conduct on a particular occasion was in conformity with the habit or routine practice.^{275/}

10. Ancient Documents

In state practice, the authenticity of a document that is at least thirty years old and not otherwise in a suspicious condition is presumed^{276/} and statements contained therein are excepted from the hearsay rule if made within the personal knowledge of the declarant.^{277/} In the case of official records affecting real property which have been properly filed for more than ten years, such evidence is considered *prima facie* evidence of their contents in New York.^{278/}

In federal practice, statements in a document in existence for at least twenty years, of which the declarant had personal knowledge, are not excluded by the hearsay rule.^{279/} A twenty year old document will be deemed authentic if, at the time it is offered, it is in an unsuspecting condition and is found where an authentic document likely would be found.^{280/}

11. Opinion Testimony

In state practice, an expert may base his opinion on matters not in evidence if the information is accepted in the profession as reliable or testimony which comes from a witness subject to cross-examination.^{281/} Generally, lay witnesses may not give opinions on the ultimate

^{274/} See *Ferrer v. Harris*, 55 N.Y.2d 285, 434 N.E.2d 231, 449 N.Y.S.2d 162 (1982) (prohibiting admission of habit evidence because not offered to prove prior similar conduct); *Halloran v. Virginia Chemicals, Inc.*, 41 N.Y.2d 386, 361 N.E.2d 991, 393 N.Y.S.2d 341 (1977) (regular use of immersion coil to heat can of refrigerant admissible to prove that such procedure was followed on the day of the accident).

^{275/} [FED. R. EVID. 406.](#)

^{276/} 5 JACK B. WEINSTEIN, ET AL. *NEW YORK CIVIL PRACTICE* ¶ 4522.01 (1996)

^{277/} EDITH L. FISCH, *FISCH ON NEW YORK EVIDENCE*, § 1016 (1977); *Jakobson v. Chestnut Hill Properties*, 106 Misc. 2d 918, 436 N.Y.S.2d 806 (Sup. Ct. Nassau County 1981).

^{278/} [N.Y.C.P.L.R. 4522.](#)

^{279/} [FED. R. EVID. 803\(16\)](#); 2 JOHN WILLIAM STRONG, *MCCORMICK ON EVIDENCE* § 323 (4th ed. 1982).

^{280/} [FED. R. EVID. 901\(b\)\(8\)](#); 7 JOHN HENRY WIGMORE, *WIGMORE ON EVIDENCE*, § 213 (Chadbourne Rev. 1978 & 1998 Supp).

^{281/} *Lee v. Shields*, 188 A.D.2d 637, 591 N.Y.S.2d 522 (2d Dep't 1992).

issue in a case. However, experts may testify regarding the ultimate issue in the case when it concerns a matter requiring professional or skilled knowledge.^{282/}

In federal practice, proper factual bases for an expert opinion are those perceived by or made known to the expert at or before the proceeding^{283/}; the factual bases for the opinion need not be admitted into evidence if they are facts reasonably relied upon by experts in a particular field in forming opinions upon the subject.^{284/} In federal practice, unlike state practice, both lay and expert witnesses may give opinions on the ultimate issue in a case if it is helpful to the trier of fact.^{285/}

Expert opinion testimony, in New York state practice, must be based on generally accepted scientific principle or procedure.^{286/} In order for expert opinion testimony to be admissible, it must be "sufficiently established to have gained general acceptance in the particular field in which it belongs."^{287/}

In federal practice, expert opinion testimony is governed by the Federal Rules of Evidence.^{288/} Expert opinion testimony must be based on reliable theories or principles.^{289/} However, admissibility is not preconditioned on whether the principles applied to obtain the opinion are generally accepted.^{290/} The District Court judge must make a preliminary

^{282/} *Robillard v. Robbins*, 168 A.D.2d 803, 563 N.Y.S.2d 940, (3d Dep't 1990), *aff'd*, 78 N.Y.2d 1105 585 N.E.2d 375, 578 N.Y.S.2d 126 (1991); *Miller v. Food Fair Stores, Inc.*, 63 A.D.2d 766, 404 N.Y.S.2d 740 (3d Dep't 1978).

^{283/} [FED. R. EVID. 703](#)

^{284/} [FED. R. EVID. 703](#).

^{285/} [FED. R. EVID. 704\(a\)](#).

^{286/} *People v. Wernick*, 89 N.Y.2d 111, 674 N.E.2d 322, 651 N.Y.S.2d 392 (1996) (New York's rule for admitting expert opinion testimony is based on *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923), (the "Frye" rule)).

^{287/} *People v. Wernick*, 89 N.Y.2d at 115 (citing *People v. Wesley*, 83 N.Y.2d 417, 423, 633 N.E.3d 451, 611 N.Y.S.2d 97 (1994)).

^{288/} *See* [FED. R. EVID. 702, 703](#); *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed 2d 469 (1993)(the Supreme Court held that the Frye rule was superseded by the Federal Rules of Evidence).

^{289/} [FED. R. EVID. 703](#).

^{290/} *Fed. Deposit Ins. Corp. v. Suna Assoc., Inc.*, 80 F.3d 681 (2d Cir. 1996)(citing *Daubert v. Merrill Dow*, 509 U.S. 579.)

determination as to whether theories or principles applied by the expert are scientifically valid and whether such theories or principles can be properly applied to the facts in issue.^{291/} In determining admissibility of the expert opinion testimony the judge may use, but is not limited to, the following factors: (1) whether the theory applied by the expert can be or has been tested; (2) whether the theory has been published or subject to peer review; and (3) whether the statistical data has a "known or potential rate of error."^{292/}

12. Treatises and Publications

In state practice, treatises and publications are admissible for impeachment purposes only; they are not admissible in evidence as proof of the facts or opinions contained therein.^{293/} In federal practice, statements from learned treatises which are established to be reliable are admissible as substantive evidence to the extent relied upon by an expert on direct examination or called to the attention of an expert on cross-examination.^{294/}

13. Dying Declarations

Dying declarations are not admissible in civil actions in state court.^{295/} In federal practice, a dying declaration is admissible in any civil action if the declarant is unavailable and the statement concerns the cause or circumstances of what the declarant believed was her impending death.^{296/}

14. Admissions of Employees

In state practice, statements of employees are considered exceptions to the hearsay rule and admissible if the employee stands high enough in the hierarchy of the employer's organization to have speaking authority.^{297/} In federal practice, a statement is not considered

^{291/} *Id.*

^{292/} *Id.*

^{293/} *See, e.g., Morfesis v. Sobol*, 172 A.D.2d 897, 567 N.Y.S.2d 954 (3d Dep't), *appeal denied*, 78 N.Y.2d 856, 580 N.E.2d 409, 574 N.Y.S.2d 937 (1991).

^{294/} [FED. R. EVID. 803\(18\)](#).

^{295/} [N.Y.C.P.L.R. § 4519](#).

^{296/} [FED. R. EVID. 804\(b\)\(2\)](#).

^{297/} *Loschiavo v. Port Auth. of New York*, 58 N.Y.2d 1040, 448 N.E.2d 1351, 462 N.Y.S.2d 440 (1983).

hearsay and is admissible if it is a statement by a party's agent or servant concerning a matter within the scope of and made during the agency or employment relationship.^{298/}

15. Lost-Profits/New Business

In state court, the prospective profits of a new business may be regarded as too speculative, remote, and contingent to meet the legal standard of reasonable certainty.^{299/} Under federal practice, however, lost profits may be recoverable by a new business.^{300/}

P. Collateral Source

In New York state practice, the court, in a personal injury action, may reduce the amount awarded to a plaintiff when any element of an economic loss award has been or will be replaced by a collateral source.^{301/} The collateral source rule is both a rule of evidence and a rule of damages.^{302/} A defendant is entitled to a reduction in damages when the defendant establishes the "collateral source payment represents reimbursement for a particular category of loss that corresponds to a category of loss for which damages were awarded."^{303/}

In New York federal practice, a court sitting in diversity must apply New York's collateral source rule.^{304/}

^{298/} [FED. R. EVID. 801\(d\)\(2\)](#).

^{299/} [Kenford Co., Inc. v. County of Erie](#), 67 N.Y.2d 257, 493 N.E.2d 234, 502 N.Y.S.2d 131, (1986).

^{300/} [Perma Research and Dev. v. Singer Co.](#), 542 F.2d 111 (2d Cir. 1976), *cert. denied*, 429 U.S. 987, 97 S. Ct. 507, 50 L. Ed. 2d 598 (1976).

^{301/} [N.Y.C.P.L.R. § 4545](#).

^{302/} [Oden v. Chemung County Indus. Development Agency](#), 87 N.Y.2d 81, 661 N.E.2d 142, 637 N.Y.S.2d 670 (1995).

^{303/} *Id.* See also [Caruso v. Russell P. LeFrois Builders, Inc.](#), 217 A.D.2d 256, 635 N.Y.S.2d 367 (4th Dep't 1995) (Social Security disability benefits were deducted from economic damages award for future damages).

^{304/} [Turnbull v. USAir, Inc.](#), 133 F.3d 184 (2d Cir. 1998) (defendants damages were reduced by plaintiff's Social Security disability payments).

V. CONCLUSION

This article has attempted to summarize significant differences and similarities between New York state and federal practice. A review of these factors will assist any practitioner with his or her analysis of which forum to select or whether to remove a New York state court action to federal court.

FACTORS AFFECTING CHOICE OF FORUM

A. Procedure

1. Jurisdiction
2. Judges
3. Commencement of Action
4. Service of Process
5. Proof of Service
6. Removal
7. Change of Venue
8. Verification
9. Ad Damnum Cause
10. Affirmative Defenses
11. Waiver of Objection to Personal Jurisdiction
12. Counterclaims and Cross-claims
13. Amendment of Pleadings
14. Filing
15. Jury Demand
16. Voir Dire
17. Waiver of Right to Trial By Joinder
18. Class Actions
19. Orders to Show Cause
20. Temporary Restraining Order
21. Preliminary Injunction
22. Attorneys' Fees
23. Sanctions
24. Appeals

B. Discovery

1. Disclosure
2. Preliminary Conference
3. Bill of Particulars
4. Interrogatories
5. Depositions
6. Expert Witnesses Disclosure
7. Surveillance Tapes
8. Discovery Disputes

C. Evidence

1. Evidence
2. Hearsay
3. Reputation Evidence
4. Evidence of Subsequent Remedial Measures
5. Evidence of Criminal Convictions
6. Impeachment by Prior Inconsistent Statements
7. Dead Man's Statute
8. Use of Prior Testimony
9. Habit
10. Ancient Documents
11. Opinion Testimony
12. Treatises and Publications
13. Dying Declarations
14. Admissions of Employees
15. Lost-Pro fits/New Business
16. Collateral Source

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