COMMERCIAL AND FEDERAL LITIGATION SECTION

REPORT APPROVING THE RECOMMENDATION OF THE ASSOCIATION'S COMMITTEE ON CIVIL PRACTICE LAW AND RULES RECOMMENDING AN AMENDMENT TO CLARIFY THE APPLICATION OF CPLR §3101(a)(4)

The Association's Standing Committee on Civil Practice Law and Rules ("Standing Committee") has proposed an amendment to Civil Practice Law and Rules ("CPLR") Section 3101(a)(4) to eliminate a split in the Appellate Divisions' application of the statute. Since 1988, the Second Department has required a party seeking disclosure of a non-party to show "special circumstances" warranting the disclosure, despite a 1984 amendment eliminating any need for such a showing. The Commercial and Federal Litigation Section has reviewed the Standing Committee's proposal and recommends that it be approved without any changes.

Until 1984, CPLR 3101(a)(4) required disclosure by any person when a court, on motion, determined that there were special circumstances justifying the disclosure. Courts interpreted this requirement very liberally, finding that "[a] mere showing by the lawyer that he needs the [non-party] witness's pretrial deposition in order to fully prepare for the trial [w]ould suffice as a 'special circumstance'." *Kenford Co. v. County of Erie*, 41 A.D.2d 586 (4th Dept. 1973).

In 1984, the Legislature enacted Chapter 294 which amended CPLR 3101(a)(4) to its current form by eliminating the need for a motion and any requirement of showing 'special circumstances'. The amendment thus permitted discovery from any person possessing material and necessary evidence. *1984 N.Y. Legis. Annual*, pp. 122-23. Any potential abuses could be avoided by utilizing CPLR §§ 3103 and 3104. *Id.*

Shortly after the amendment was enacted, two cases came before the First Department presenting the question of whether the new or the old statute applied to appeals pending in existing actions. *See Slabakis v. Drizen*, 107 A.D.2d 45 (1st Dept. 1985); *New England Mut. Life Ins. Co., v. Kelly*, 113 A.D.2d 285 (1st Dept. 1985). The First Department found it unnecessary to decide the point because, even under the old statute, *Kenford* would permit non-party disclosure. *Slabakis*, 107 A.D.2d at 48; *New England Mut. Life*, 113 A.D.2d at 288. Moreover, there was no suggestion by the Legislature "to depart from the liberal interpretation heretofore accorded to the 'special circumstances' standard in the former legislation". *Id.* Three years later, however, the Second Department affirmed the refusal to permit a non-party deposition, holding that disclosure could only be directed against a non-party witness on a showing of special circumstances. *Dioguardi v. St. John's Riverside Hosp.*, 144 A.D.2d 333, 334 (2d Dept. 1988).

A comparison between *Dioguardi* and the amended statute clearly shows that *Dioguardi* is contrary to the Legislature's intent in enacting the 1984 amendment. *1984 N.Y. Legis. Annual*, at 122-23. *Dioguardi* also ran counter to the holdings of *Slabakis* and *New England Mut. Ins. Co.* 107 A.D.2d at 48; 113 A.D.2d at 288. Although both the First and Fourth Departments have squarely rejected *Dioguardi* (*see Schroeder v. Con. Ed. Co. of N.Y., Inc.*, 249

A.D.2d 69 (1st Dept. 1998); *Catalano v. Moreland*, 299 A.D.2d 881 (4th Dept. 2002)), the Second Department to this day continues to uphold the special circumstances requirement abandoned by the Legislature in 1984. *Moran v. McCarthy, Safrath & Carbone, P.C.*, 31 A.D.3d 725, 726 (2d Dept. 2006); *Tannenbaum v. Tannenbaum*, 8 A.D.3d 360 (2d Dept. 2004); *Lanzallo v. Lakritz*, 287 A.D.2d 601 (2d Dept. 2001); *Bostrom v. Wm. Penn Life Ins. Co.*, 285 A.D.2d 482 (2d. Dept. 2001).

The conflict among Appellate Divisions clearly warrants this bill. The issue is highly unlikely to reach the Court of Appeals because these Appellate Division decisions (a) are not dispositive of the action, (b) do not directly involve the construction of the State or Federal constitutions, nor do they (c) involve a final judgment or determination where the Appellate Division made an order on a prior appeal in the action which includes a dissent by at least two (2) justices on a question of law in favor of the party taking the appeal *and* necessary affects the judgment, determination or award. *N.Y. C.P.L.R.* § 5601(a), (b) & (d) (West 2005). To that end, it is unrealistic to believe that the Second Department would grant leave to appeal on this issue.

The Standing Committee's commentary notes that the proposed amendment is not intended to change the statutory or case law governing discovery of physicians or experts.

Conclusion

For the reasons stated, the Standing Committee's proposed amendment to CPLR 3101(a)(4) is APPROVED.