Memorandum In Support Of Amendment To Make Necessary Technical Corrections To CPLR 2104, 3217(d) and 8020 Proposed by the Commercial and Federal Litigation Section

The proposed amendment seeks to eliminate a number of technical problems caused by a series of amendments made to the CPLR in 2003.

In that year, the legislature passed a series of revenue-enhancing amendments providing, among other things, for the imposition of a $35 fee in connection with the voluntary dismissal of a civil action. *See* Laws of 2003, Chapter 62, Part J ("Chapter 62"). However, the changes implemented by Chapter 62 were confusing and internally contradictory, and have been widely criticized. *See, e.g.*, D. Siegel, Practice Review # 136-137; D. Siegel, "Outside Counsel," New York Law Journal, July 14, 2003 p. 4; P. Aloe, Civil Practice, 54 Syracuse Law Rev. 101, 108-110 (2004); Vincent C. Alexander, 2003 Supplementary Practice Commentaries N.Y. C.P.L.R. C2104:2, 7B McKinney's 2005 Pocket Part p.160-61. The proposed amendment leaves intact the legislative goal of increasing revenues, but eliminates the various undesirable effects wrought by Chapter 62.

Prior to the enactment of Chapter 62, CPLR 2104 merely provided for the enforceability of out-of-court agreements between parties or their attorneys by requiring written and subscribed stipulations or court orders. As part of its revenue-raising effort, Chapter 62 added a requirement that "the *terms*" of a "*stipulation of settlement*" must be "filed *by the defendant* with the county clerk." Chapter 62 effected two other related changes: first, it amended CPLR 3217 to require that "notices, stipulations or certificates" of discontinuance "be filed with the county clerk *by the defendant"* (*see* new CPLR 3217[d]); and second, it amended CPLR 8020 to require the payment of a $35 filing fee upon the filing of a "stipulation of settlement" or "notice, stipulation or certificate of discontinuance" (*see* CPLR 8020(d)).

These amendments had two principal undesirable results.

First, the amendments to CPLR 2104 and 8020 introduced a term (the "stipulation of settlement") that is not referred to anywhere else in the CPLR, and whose relationship to the more common "stipulation of discontinuance" was not defined. This, in turn, raised the possibility that, as amended, CPLR 2104 could be interpreted as requiring parties to publicly disclose the terms of confidential settlement agreements, an interpretation that is in no way suggested by the revenue-enhancing goal of Chapter 62, and has been strongly criticized by commentators. *See* Siegel, New York Practice 3d, §204 (2003-2004 Supplement); Aloe, Civil Practice, 54 Syracuse Law Rev. 101, 108-110 (2004); Alexander, 2003 Supplementary Practice Commentaries N.Y. C.P.L.R. C2104:2, 7B McKinney's 2005 Pocket Part p.160 By deleting the requirement for filing a "stipulation of settlement," this bill does not impair the revenue-enhancing goals of Chapter 62, because CPLR 3217(a) and 8020 (discussed below) will continue to require the filing of "stipulation[s] of discontinuance" accompanied by payment of fees.

Moreover, deletion of this requirement will confirm the prevailing understanding that Chapter 62 was not intended to require parties to file the particulars of confidential settlements with the clerk of the court.

Second, the Chapter 62 amendments needlessly created internal inconsistencies within the CPLR. Prior to Chapter 62, CPLR 3217(a) required that, where any party sought a voluntary dismissal without an order of the court, a specified instrument (either a notice or stipulation of discontinuance) had to be filed with the "clerk of the court" (who, for actions in Supreme or County Courts, would be the county clerk). Thus, subsection 3217(d)'s imposition of a filing requirement was entirely unnecessary, as this was already provided for in subsection 3217(a)(1) –(3). Even more disconcerting is the fact that Chapter 62 requires the defendant to file the notice of discontinuance when, under CPLR 3217(a)(1), only the *plaintiff* would be entitled to file this notice. Indeed, on its face CPLR 3217(d) would require a defendant to make such a filing even before the defendant had been served or filed an answer. Thus, the addition of CPLR 3217(d) was both unnecessary to achieve the legislative revenue-raising goal, and harmful in that it introduced contradictory and inequitable requirements on the parties.

Accordingly, the proposed amendments seek to eliminate the uncertainties and inconsistencies introduced by Chapter 62 while respecting its revenue-enhancing purpose. Specifically, the proposal would (i) eliminate the filing requirement of CPLR 2104, since this is adequately addressed by CPLR 3217(a); (ii) eliminate CPLR 3217(d), since CPLR 3217(a) already provides that, absent a court order, an action cannot be discontinued without an appropriate filing with the clerk of the court; and (iii) revise CPLR 8020 to eliminates reference to the deleted portions of CPLR 2104 and 3217(d).

AN ACT to amend the civil practice law and rules, to make
necessary technical corrections to CPLR §§ 2104, 3217(d) and 8020

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Rule 2104 of the civil practice law and rules, as amended by section 28 of part J of chapter 62 of the laws of 2003, is amended to read as follows:

Rule 2104. Stipulations. An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by {him or his} <u>the party or the party's</u> attorney or reduced to the form of an order and entered. {With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk.}

§ 2. Subdivision (d) of Section 3217 of the civil practice law and rules, as amended by section 29 of part J of chapter 62 of the laws of 2004, is repealed.

§ 3. Subdivision (d) of Section 8020 of the civil practice law and rules, as amended by section 25 of part J of chapter 62 of the laws of 2003, is amended to read as follows:

(d) Filing a stipulation of {settlement} <u>discontinuance</u> or a voluntary discontinuance. For filing a {stipulation of settlement pursuant to rule twenty-one hundred four of this chapter or a} notice, stipulation, or certificate <u>of discontinuance</u> pursuant to {subdivision (d) of} rule thirty-two hundred seventeen of this chapter{, the defendant shall file and pay}:

1. in the counties within the city of New York, thirty-five dollars in the supreme court.
2. in all other counties, thirty-five dollars in the supreme court and county court.

Provided, however, that only one such fee shall be charged for each notice, stipulation or certificate filed pursuant to this subdivision.

§ 4. This act shall take effect immediately.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets { } is old law to be omitted.