New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

Memorandum Urging Approval by the Governor

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #10-GOV June 26, 2014

S. 5077 By: Senator Bonacic
A. 9077 By: M. of A. Weinstein
Senate Committee: Judiciary
Assembly Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the civil practice law and rules, in relation to conduct of the examination before trial.

LAW & SECTION REFERRED TO: CPLR 3113

THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES URGES APPROVAL BY THE GOVERNOR

This bill would amend Civil Practice Law and Rules ("CPLR") Rule 3113 to provide that "a non-party deponent's counsel may participate in the deposition and make objections on behalf of his or her client in the same manner as counsel for a party."

The purpose of this bill is to overrule legislatively the decision of the Appellate Division, Fourth Department, in *Thompson v. Mather*, 70 A D 3d 1436, 894 N.Y.S.2d 671 (4th Dept. 2010).

In *Thompson v. Mather*, a medical malpractice action, plaintiff's counsel scheduled the videotape deposition of plaintiff's treating cardiologists for purposes of trial [22 NYCRR 202.15]. During the deposition of one of those doctors, the attorney for the witness objected several times on form and relevance grounds. Plaintiff's counsel objected to the doctor's counsel's participation, and the deposition was suspended. Ultimately, the Appellate Division held that "counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pre-trial deposition." The court primarily relied on the language in CPLR 3113(c) which provides that the deposition witness's examination and cross-examination "shall proceed as permitted in the trial of actions in open court." Since a non-party's attorney has no right to interpose objections to questions asked of the witness at trial, the court reasoned that no such right exists at a deposition. The court expressly rejected the doctor's counsel's argument that different rules should apply at a pre-trial videotaped deposition to be presented at trial.

A majority of the Fourth Department subsequently reaffirmed the *Thompson* ruling in *Sciara v. Surgical Associates of Western New York, P.C.,* 104 A.D.3d 1256, 961 N.Y.S.2d 640 (4th Dep't), leave to appeal granted, 107 A.D.3d 1503, appeal dismissed, in part, 22 N.Y.3d 951 (2013).

In the Committee's view, while the *Thompson* court may have correctly interpreted the literal language of the statute, it has reached the wrong result. In reducing counsel for a deposition witness to a "potted plant" [*Sciara v. Surgical Associates of Western New York, P.C.*, 32 Misc 3d 904, 927 N Y S 2d 770 (Sup.Ct. Erie Co. 2011), aff'd in part, modified in part, motion denied by, 104 A.D.3d 1256, 961 N.Y.S.2d 640 (4th Dep't), leave to appeal granted, 107 A.D.3d 1503, appeal dismissed, in part, 22 N.Y.3d 951 (2013)], the *Thompson* decision leaves a non-party witness essentially unprotected during a deposition. As the *Sciara* Appellate Division dissent noted, it is difficult to believe that a non-party lay witness would know when to assert the attorney-client privilege, without the benefit of counsel. Similarly, a non-party witness may not know when to refuse to answer where a question is plainly improper and would, if answered, cause significant prejudice to any person. Moreover, the *Thompson* decision would seemingly encourage a party to depose a potential adverse party before joining that person as a party to the action, in order to be able to avoid the objections that a party's lawyer would be able to make at a post-joinder deposition. The Committee believes that this strategy should not to be encouraged.

In the *Sciara* lower court decision cited above, the court interpreted *Thompson's* restrictions as being limited to objections to form or relevance. That interpretation could ameliorate many of the deleterious effects of *Thompson*, but was rejected by the Appellate Division majority in *Sciara*. However, this Committee believes that a witness's attorney should have the same right to object at a deposition as does an attorney for a party and should be able to protect all of the witness's interests. This is particularly so where, as in *Thompson*, the statute of limitations was still open as against the non-party treating physicians in a medical malpractice case.

In sum, the Committee supports the proposed amendment to CPLR 3113 because it affords non-party deponents protection during depositions. Non-parties are entitled to protection against disclosure of privileged information, confidential business or private information, and information unrelated to the merits of the underlying litigation. Clients expect their lawyers to protect their interests during depositions, and the proposed amendment is consistent with such an expectation. Apart from the impractical nature of the *Thompson* rule and its potential for abuse, it raises serious ethical dilemmas for an attorney representing a non-party at a deposition. Finally, the proposed amendment would make the law consistent with what is already the common practice at depositions of non-parties. See Ferstendig, David L. and Chase, Oscar G., Should Counsel for a Non-Party Deponent be a "Potted Plant"?, 2014 N.Y.U. J. LEGIS. PUB. POL'Y QUORUM 52.

For these reasons, the New York State Bar Association's Committee on Civil Practice Law and Rules **urges approval by the Governor.**

Persons who Prepared the Memo: David L. Ferstendig, Esq.
Oscar G. Chase, Esq.

Chair of the Committee: Robert P. Knapp III, Esq.