Association of the Bar of the City of New York
[1]Committee on State Courts of Superior Jurisdiction (October 29, 2004)

REPORT ON PROPOSED NEW YORK COURT RULE REGARDING INTERROGATORIES

I. Introduction

The Committee on State Courts of Superior Jurisdiction (the "Committee") is concerned with the extent to which interrogatories are abused, particularly in commercial cases.[1] The Committee undertook to study the subject, identify the problems and make recommendations with regard to existing law, court rules and practice with a view to improving the utility of this discovery tool.[2]

This is the report of that Subcommittee. Subcommittee members are Michael Graff, Paul Levinson, Andrea Masley, and Irvin H. Rosenthal. The Committee determined that an effective way of addressing this problem would be to prepare a proposed rule on Interrogatories that the Committee recommends for adoption by the Commercial Division of the Supreme Court of New York County on a pilot basis, as discussed in section IV.

The Committee examined the Federal Rules of Civil Procedure and local Federal Court rules, which mandate initial disclosures by parties before formal interrogatories

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[1]See also, Michael Hoenig, *The Other Kind of Discovery Abuse*, NYLJ, Oct. 6, 1997, p 3; Rand Institute for Civil Justice, *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. Rev. 613 (1998); Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. Rev. 683 (1998); Judith A. McKenna and Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. Rev. 785 (1998).

[2]The report was drafted by a subcommittee consisting of Michael Graff, Paul Levinson, Andrea Masley and Irvin H. Rosenthal.

and document requests are exchanged. Initial mandatory disclosures followed by interrogatories and document demands limited in number, are credited with reducing discovery abuse in Federal Courts.[2] The Committee concluded that although initial disclosures are not a part of New York discovery practice, they are essential for any limitation on interrogatories to be effective.

II. History of the Federal Rule on Initial Disclosures

The history of Federal Rule of Civil Procedure Rule 26(a)(1) Initial Disclosures has not been static and free from revision.[3] As adopted by the U.S. Judicial Conference in 1993,[4] the rule was more comprehensive than the present rule, and is also more comprehensive than the rule which is recommended by this Committee. Under the 1993 federal rule, a party was obligated to disclose witnesses and documents, whether favorable or not, that it did not intend to use. Rule 26(a)(1) stated that a party shall provide to other parties:

> (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information *relevant to disputed facts alleged with particularity in the pleadings,* identifying the subjects of the information:
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> (B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things *that are relevant to disputed facts alleged with particularity in the pleadings;*

[2]Paul V. Niemeyer (U.S. Circuit Judge, Fourth Circuit; Chair, Civil Rules Advisory Committee), *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. Rev. 517, 521 (1998).

[3]Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. Rev. 747, 747-768 (1998).

[4]28 U.S.C. §2073.

The current federal rule, which became effective on December 1, 2000, provides:

> (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information *that the disclosing party may use to support its claims or defenses, unless solely for impeachment*, identifying the subjects of the information;
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> (B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things *that are* in the possession, custody, or control of the party and *that the disclosing party may use to support its claims or defenses, unless solely for impeachment*.

The current federal rule limits disclosure obligations to information the disclosing party may use in its claims or defenses, eliminating any requirement of disclosing adverse information the disclosing party has in its possession. In so amending the rule, the Advisory Committee noted the strong reluctance of attorneys to act as an attorney for their client's adversary by locating and producing, unasked, documents and information damaging to their clients.[5] The amendment narrows the disclosure obligations to identification of witnesses and documents that the disclosing party may use to support its claims and defenses. A party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use.

"Subdivision (e)(1), which is unchanged by the 2000 amendment, requires supplementation if information later acquired would have been subject to the disclosure requirement had it been in the possession of the disclosing party at the time of the initial disclosures. As case preparation continues, a party must supplement its disclosures when it determines that it may use a witness or document that it did not previously

[5]Report Regarding 1998 Draft of Proposed Revisions to Certain of the Federal Rules of Civil Procedure Concerning Discovery, ABA Section on Litigation, Jan. 15, 1998, at 5 (www.abanet.org.litigation.taskforces/report.pdf).

intend do use."[6]

The current federal rule originated, according to Honorable Paul V. Niemeyer, the Chair of the Civil Rules Advisory Committee, because of "the persistence of complaints and questions about the merit of broad discovery and its expense."[7] "Plaintiffs' lawyers tended to complain more about the cost of depositions, while defendants' lawyers focused more on the cost of document production."[8] Many argued for the amendment of the 1993 version of Rule 26 as a means to establish a nationally uniform practice.[9] According to participants at the conference organized by the Federal Civil Rule Advisory Committee's Subcommittee on Discovery in Boston in 1997, "[i]n districts where initial mandatory disclosure has been practiced, it is generally liked, and the users believe that it lessens the cost of litigation."[10]

In 1998, the Association of the Bar of the City of New York supported the mandatory disclosure in Rule 26, but objected to the burden on attorneys to produce

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[6]Committee Note, Amendments to Federal Rules of Civil Procedure, Communication from the Chief Justice, The Supreme Court of the United States, Transmitting Amendments to the Federal Rules of Civil Procedures that have been adopted by the Court, 192 F.R.D. at 385-86 (Adopted April 17, 2000, effective December 1, 2000)(includes excerpts from Report of the Judicial Conference).

[7]Paul V. Niemeyer (U.S. Circuit Judge, Fourth Circuit; Chair, Civil Rules Advisory Committee), *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. Rev. 517, 521 (1998).

[8]Id.

[9]Id. at 523.

[10]Id.

adverse information.[11] It stated that the 1993 federal rule jeopardized the attorney-client relationship because it required the lawyer to reveal what is discovered about the client, regardless of whether it is good or bad. By narrowing Rule 26, the federal Advisory Committee addressed the Association's concern, at least in part, removing possible tensions with the attorney-client relationship and the work-product doctrine.

The recommendations of this Committee are thus consistent with the published views of this Association and represent a method of improving the effectiveness of the existing discovery scheme embodied in the CPLR as well as making the practice between the federal and state courts more uniform.

Using the Federal model, the Committee has developed a procedure for New York courts that takes the form of a new court rule. Under the new rule, the discovery process begins with the “initial disclosure” of four basic inquiries: names and addresses of persons with discoverable information that support claims or defenses; descriptions or copies of documents which support claims or defenses; computation of damages; and insurance agreements. As these initial disclosures will provide information that will form the basis for the drafting interrogatories (as well as document requests) by the non-disclosing party, the rule requires that the interrogatories themselves shall be case specific and limited in number (including discrete subparts), without further court order. The proposed rule includes uniform definitions, provides procedural requirements for the assertion of a claim of privilege; and provides standards for electronic formatting.

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[11]Comments Submitted to Federal Committee on Rules of Practice and Procedure, *Proposed Amendments to the Federal Rules of Civil Procedure* (Report of the Committee on Federal Courts of the Association of the Bar of the City of New York), Dec. 2, 1998.

The goal is to promote timely and appropriate disclosure while reducing the economic burden on all parties and the delay and waste of resources engendered by motion practice related to discovery disputes. In the view of the Committee, the Rule will hopefully achieve its goal to the extent that the New York Courts adopt and strictly enforce its provisions.

III. Comparison of Proposed Rule to Federal Analogs and Reasons for Differences

The Subcommittee looked to existing provisions in the Federal Rules of Civil Procedure and the Local Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York ("Local Civil Rules") for guidance in drafting the proposed rule. The Subcommittee also considered New Jersey Rules Governing Civil Practice, Rules 4:10 and 4:17; Massachusetts Rule of Civil Procedure Rule 33 and Florida Rules of Civil Practice, Rule 1.340. We now briefly address the salient features of the rule including a comparison with other rules as appropriate.

Section I of the proposed Rules adopts an initial disclosure requirement similar to that found under the federal rules. Each of the state rules canvassed incorporated diverse features of the federal rules, but none contained an initial disclosure requirement. The Committee determined that initial disclosure is necessary in order to make any limitation on the number of interrogatories workable. The items to be provided as “Initial Disclosure” by the parties under Section “I(A)” of the proposed Rule, attached, are identical to those required under Fed. R .Civ. P. 26(a)(1). In addressing (a) the timing of the exchange of Initial Disclosures by each respective party and (b) objections to the exchange of Initial Disclosure, the Committee sought to address the

unique procedural posture that litigants find themselves in at the commencement of an action in the courts of the State of New York. — i.e., that a judge is not initially assigned on the filing of the Complaint, but will only be assigned upon the affirmative act of the filing of a Request for Judicial Intervention (RJI) by a party. Accordingly, in contrast to federal practice under Fed.R.Civ.P. 16(b) and Fed.R.Civ.P. 26(f), where a Scheduling Conference is conducted with the judge within a definite time frame, a preliminary conference will not be scheduled in state court unless and until requested by a litigant. In these circumstances, in Paragraphs "B" and "C" of Section "I" of the Proposed Rule, the Committee created a structure for such conferences consistent with practice under the CPLR. Finally, in Paragraph "D" of Section "I", the Committee "carved out" certain types of actions from the Rule, as they are necessarily exempt from Initial Disclosure, since disclosure is not customarily accorded in such actions.

In Section "II", entitled "Interrogatories", the Committee sought to curb the perceived abuses of this disclosure device by limiting interrogatories to 25 in number, including all discrete subparts. This provision is modeled on Fed.R.Civ.P.33(a), which contains the same numerical limitation.[12] So, too, the "Responses and Objections"

[12]Massachusetts Rules of Civil Procedure 32 limit the number of interrogatories to 25. Alaska Rules of Civil Procedure Rule 33, Illinois Court Rule 213, Maine Rule of Court 33, Tennessee Knox County Local Chan. Ct. Rule 8 and Texas R. Civ. P. 168 limit interrogatories to 30. Kentucky Rules of Civil Procedure §33.01 also limits interrogatories to 30, but excepts from the count "(a) the name and address of the person answering; (b) the names and addresses of the witnesses; and (c) whether the person answering is willing to supplement his answers if information subsequently becomes available." California Civil Procedure §2030(c) limits interrogatories to 35. Alabama, Arizona and Pennsylvania Local Court Rules limit interrogatories to 40. Al R RCP 33; Az R. C. P, Rule 33.1; PA Dauphin Cty. Civ. Local Rule 4005 . The Georgia Civil Practice Code §9-11-33 and Nebraska Court Rules 33 limit interrogatories to 50. In the state of Washington, the limitation on interrogatories depends on whether the

provisions set forth in Section "III" of the Rule are derived from Fed.R.Civ.P. 33(b). Paragraphs "H","I", "J" and "K" of this Section of the Proposed Rule, dealing with identification of documents and records, computer-generated and computer–stored information, and the timing of production of documents, are derived from Local Civil Rule 33.1. The Committee also added two "new" provisions (Paragraphs "N" and "O") proscribing the random use of form interrogatories and imposing a "reasonableness" requirement on the interpretation of interrogatories.

As for Section "IV", providing for the "Assertion of a Claim of Privilege", the Committee simply adopted the appropriate provisions of Local Civil Rule 26.2(a).

Section "V", calling for "Cooperation Among Counsel", is derived from Rule 26.5 of the Local Civil Rules. This provision is consistent with the evolving judicially-sanctioned doctrine requiring ever greater degrees of professionalism and courtesy among opposing counsel with respect to discovery issues in general.

The "Definitions and Rules of Construction" set forth in Section "VI" are virtually identical to those set forth in Local Civil Rule 26.3.

The requirement to provide interrogatories in "Electronic Format" set forth in Section "VII" was adopted to facilitate compliance with Paragraph "B" of Section "III", which itself is addressed to the requirement under CPLR 3133(b) that the party serving responses to a specific interrogatory must set forth the interrogatory and then directly follow it with the response. The Committee perceived that Rule 3133(b) is often

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case is designated expedited, standard or complex. Wash. Pierce County Local Rule 1. Wisconsin limits prisoners to a total of 15 interrogatories, documents and admissions. Wis. Stat. § 804.015.

ignored, as the responding party simply neglects to “type in” the interrogatory and only provides the response. By providing for “electronic format”, the responding party can thereby simply reformat his adversary’s interrogatories without having to “type them in” and then set forth responses immediately following.

Initially, members of the Committee on State Courts of Superior Jurisdiction expressed concern over a perceived reluctance of justices to impose sanctions for discovery abuses.[13] Like Federal Rule of Civil Procedure Rule 37 (attached as endnote),[1] CPLR 3126 (attached as endnote)[2] and 22 NYCRR §130 (attached as endnote)[3] provide authority for sanctions for discovery abuses in state court.[14] Recent decisions suggest that this concern may be overstated.[15] However, Section “VIII”, entitled “Sanctions”, was drafted with the intent of vesting discretion with state judges to invoke the full panoply of remedies to forestall obstructionist tactics or frivolous conduct in complying with the new Rule.[16]

Finally, the “Scope” provision of Section “IX” is also “new” when compared to Rule 26, but part of Federal Rule 33.

The Committee rejected requiring disclosure of experts, adopting the approach taken under the Federal Rules. The Committee believes that such disclosure would be

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[13]Kasner, Sanctions Available for Discovery Abuses, NYLJ, April 11, 1996, p 5.

[14]See also, 22 NYCRR §37.

[15]Dewey and Schlyen, Courts Show Receptivity to Sanctions Motions, NYLJ, April 14, 2003, p 6, col 1.

[16]Complaints calling for more judicial involvement in discovery are not new. Pollack, Discovery-Its Abuse and Correction, NYLJ, May 11, 1978, p3, col 1.

premature at the initial stages of litigation.

Another concern raised by some Committee members was that the Rule would rob defendants of priority in discovery. However, because plaintiffs cannot serve discovery until responsive pleadings are served, defendants can maintain priority by serving discovery demands with their answer. The initial disclosure is made within 30 days after the answer is served. Accordingly, defendants may continue to serve discovery requests with their answers. This is a departure from the Federal Rules, which bars discovery requests until after the Initial Disclosure. However, it is consistent with New York practice. Likewise, the Rule does not affect the use of a bill of particulars. Since a bill of particulars precludes a party from also serving interrogatories, the initial disclosure would be made, but additional interrogatories would not be allowed.

Process

The Committee urges that the Commercial Division of the Supreme Court of New York County adopt the proposed Rule on a pilot basis. Accordingly, any case assigned to the Commercial Division or which a litigant has requested to be assigned to the Division, would be expected to follow the new interrogatory Rule. If the Rule works effectively in this pilot, the Committee recommends that it be expanded to the other Commercial Divisions in the State. In addition, if the experience in the Commercial Divisions warrants, consideration should be given to expanding the use of the Rule more generally, starting with a few counties, again as a pilot project. In New York State practice, as judges are not assigned at the beginning of a case, the Rule cannot

effectively be adopted on a judge-by-judge basis. Otherwise, practitioners will not know whether the Rule will apply to their case.

Only if these pilot programs prove successful will the Committee recommend adoption of the Rule either by the Chief Administrative Judge as a Court Rule or by the Legislature as part of the CPLR.

1. Federal Rule of Civil Procedure Rule 37 provides:

(a) Motion for Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) Appropriate Court. An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.

(2) Motion.

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) Expenses and Sanctions.

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the

reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(c) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (c) of this subdivision, unless the party failing to comply shows that party is unable to produce such person for examination.
In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.
(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C)) and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (c) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion

may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C)) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).

(e) [Abrogated]

(f) [Repealed]

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

2.CPLR 3126 provides:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

3.22 NYCRR 130-1.1 Cost; Sanctions provides:

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under article 3, 7 or 8 of the Family Court Act.

(b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.

(c) For purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party.

(d) An award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.

22 NYCRR §130-1.2 Order awarding costs or imposing sanctions

The court may award costs or impose sanctions or both only upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate. An award of costs or the imposition of sanctions or both shall be entered as a judgment of the court. In no event shall the amount of sanctions imposed exceed $ 10,000 for any single occurrence of frivolous conduct.

Association of the Bar of the City of New York
Committee on State Courts of Superior Jurisdiction
October 22, 2004

PROPOSED NEW YORK COURT RULE REGARDING DISCOVERY: INTERROGATORIES

The purpose of this Rule is to improve the usefulness of interrogatories as a discovery tool by providing initial disclosure by the respective parties, to thereby enable interrogatories subsequently served to be more pointed and directed, to provide uniform definitions, to provide for assertions of a claim of privilege, to reduce the economic burden on both the proponent and the respondent, and to reduce the delay and waste of resources devoted to motion practice relating to discovery disputes. The goal is timely and appropriate disclosure.

I. **Initial Disclosure**:

Except where the use of interrogatories is otherwise circumscribed under the provisions of the CPLR or an Order, within 30 days after an answer is served, a party must, without waiting for a discovery request, provide other parties the following items ("Initial Disclosure"):

1. the name and, if known, the address and telephone number of each person likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

2. a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

3. a computation of any category of damages claimed by the disclosing party, making available for inspection and copying the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

4. a copy of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

A. Timing: The Initial Disclosure must be exchanged within 30 days after an responsive pleading of the first answering defendant is served, unless, before the 30 days expires, a different time, not to exceed 30 additional days, is set by stipulation, unless the

Court orders otherwise. Plaintiff and defendant shall exchange the Initial Disclosure with each additional defendant or third party defendant who has answered, within 30 days after such additional defendant or third party defendant has answered. Any party first served or otherwise joined after the exchange of the Initial Disclosure must exchange the Initial Disclosure with all other parties within 30 days after answering, unless a different time, not to exceed 30 additional days, is set by stipulation or court order. A party must make its Initial Disclosure based on the information then reasonably available to it and is not excused from making its Initial Disclosure because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's Initial Disclosure or because another party has not made its Initial Disclosure. If a party who has exchanged his Initial Disclosure thereafter obtains information that renders such Initial Disclosure incomplete or inaccurate, an amended or supplemental Initial Disclosure shall be exchanged by said party as soon as practicable in the circumstances.

B. Objections: A party may object to exchanging the Initial Disclosure at a court conference held or by motion initiated prior to expiration of the 30 days above provided. Failure to move before the timed fixed for the exchange of the Initial Disclosure constitutes waiver. Any party may request a preliminary conference to address objections to another party's Initial Disclosure or to seek relief due to another party's failure to exchange the Initial Disclosure. In ruling on the objection, the court shall determine what disclosures--if any--are to be made, and set the time for exchange of the parties' respective Initial Disclosure.

C. Exemptions: Actions which are exempt from initial disclosure include, but are not limited to, any action or proceeding where there will be no discovery such as, but not limited to, Article 78 actions; special proceedings; an action to enforce or quash a subpoena; a proceeding ancillary to proceedings in other courts; and an action to enforce an arbitration award.

II. Interrogatories:

Except where the use of interrogatories is otherwise circumscribed under the provisions of the CPLR or an Order, a party who has made an Initial Disclosure may thereafter, without leave of court or written stipulation, serve upon any other party one or more sets of written interrogatories, not exceeding 25 in number, in the aggregate, including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Without leave of court or written stipulation, additional interrogatories may not be served.

III. Responses and Objections

A. Each interrogatory shall be responded to separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the

reasons for objection and shall respond to the extent the interrogatory is not objectionable. A timely response must be made to all interrogatories to which no specific objection is made.

B. Each response is to immediately follow the specific interrogatory to which it responds in accordance with CPLR 3133(b). The responses are to be signed by the person making them, and the objections are to be signed by the attorney making them. The person responding to the interrogatories shall designate which of such information is not within the responding person's personal knowledge and as to that shall "Identify" (as that term is defined herein) every person from whom such information was received, or, if the source of the information is documentary, "Identify" that "Document" (as that term is defined herein). If any response is made by reference to a document or documents, a copy of each such document shall be annexed and identified as to the specific interrogatory to which it is responsive.

C. The party upon whom the interrogatories have been served shall serve a copy of the responses, and objections if any, within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties.

D. All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

E. The party submitting the interrogatories may move for an order under CPLR 3126 with respect to any objection to or other failure to respond to an interrogatory. Failure to so move shall not preclude a party entitled to either Initial Disclosure or a response to an interrogatory from objecting at trial to the introduction of evidence of facts upon the ground that the party required to disclose failed to provide Initial Disclosure or to respond to a proper interrogatory.

F. An interrogatory otherwise proper is not necessarily objectionable merely because a response to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be responded to until after designated discovery has been completed or until a pre-trial conference or other later time prior to the close of disclosure.

G. Option to Produce Business Records. Where the response to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient response to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the response may be ascertained.

H. Whenever a party responds to any interrogatory by reference to Documents from which the response may be derived or ascertained, the specifications of documents to be produced shall be in sufficient detail to permit the interrogating party to locate and identify the records and to ascertain the response as readily as could the party from whom discovery is sought.

I. The responding party shall make available any computerized information or summaries thereof that it either has, or can adduce by a relatively simple procedure. Such information shall also include definitions and field codes necessary for the use and understanding of the computerized information and summaries.

J. The responding party shall provide any requested relevant compilations, abstracts or summaries in its custody or readily obtainable by it, notwithstanding that the information may be derived from documents that have been made available to the interrogating party.

K. Unless otherwise ordered by the court, the Documents shall be made available for inspection and copying within 10 days after service of the responses to interrogatories unless some other date is agreed upon by the parties.

L. If a party who has furnished responses to the interrogatories served or subsequent or additional interrogatories served thereafter obtains information that renders such responses incomplete or inaccurate, amended responses shall be served as soon as practicable in the circumstances, and in any event not later than 20 days prior to the disclosure end date set by the court. Thereafter, amendments may be allowed only if the party seeking to amend certifies therein that the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date.

M. Unacceptable objections: A party may not be excused from the duty of disclosure merely because its investigation is incomplete. The party shall make its Initial Disclosure based on the pleadings and the information then reasonably available to it. As its investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (L). A party is not relieved from its obligation of disclosure merely because another party has not made its Initial Disclosure or has made inadequate disclosure or merely because its investigation is incomplete.

N. Using Form Interrogatories: Attorneys using form interrogatories shall review them to ascertain that they are relevant to the subject matter involved in the particular case. Form discovery requests which are not relevant to the subject matter involved in the particular action shall not be used.

O. Interrogatories to be Read Reasonably: Interrogatories shall be read reasonably in the recognition that the attorney serving them generally does not have the information being sought and the attorney receiving them generally does have such information or can obtain it from the client.

P. Assertion of a Claim of Privilege: Where a claim of privilege is asserted, and a response to an interrogatory or part of an Initial Disclosure is not provided on the basis of such assertion:

1. The attorney asserting the privilege shall identify the nature of the privilege (including work product) which is being claimed and, if the privilege is governed by state law, indicate the state's privilege rule being invoked; and

2. The following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information:

(a) For documents: (i) the type of Document, e.g., letter or memorandum; (ii) the general subject of the Document; (iii) the date of the Document; and (iv) such information as is sufficient to identify the Document for a subpoena duces tecum, including, where appropriate, the author of the Document, the addressees of the Document, and any other recipients showing the Document, and, where not apparent, the relationship of the author, addressees, and recipients to each other;

(b) For oral communications: (i) the name of the person making the communication and the names of the persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication, (ii) the date and place of the communication; and (iii) the general subject matter of the communication.

IV. Cooperation Among Counsel:

Counsel are expected to cooperate with each other, consistent with the interests of their clients, in all phases of the discovery process and to be civil and courteous in their dealings with each other, including in matters relating to scheduling and timing of various discovery procedures.

V. Definitions and Rules of Construction:

The full text of the definitions and rules of construction set forth in subparagraphs (A) and (B) hereof is deemed incorporated by reference into all interrogatories. No

interrogatories shall use broader definitions or rules of construction than those set forth in paragraphs (A) and (B) hereof. This rule is not intended to broaden or narrow the scope of interrogatories permitted by CPLR Article 31, and shall not preclude (i) the definition of other terms specific to the particular litigation, (ii) the use of abbreviations, or (iii) a more narrow definition of a term defined in paragraph (A).

A. The following definitions apply to all discovery requests:

1. **Communication**. The term "communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).

2. **Discrete subparts**. Subparts of the subject interrogatory that seek information beyond more particularly describing or defining the response to the subject interrogatory.

3. **Document**. The term "Document" is defined to include writings, drawings, graphs, charts, photographs, phonorecords, and other media compilations from which information can be obtained, translated, of necessary, by the respondent through detection devices onto reasonably usable form, including, without limitation, electronic or computerized data compilations. A draft or non-identical copy is a separate Document within the meaning of this term.

4. **Identify (with respect to persons)**. When referring to a person, "to identify" means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

5. **Identify (with respect to Documents)**. When referring to Documents, "to identify" means to give, to the extent known, the (i) type of Document; (ii) general subject matter; (iii) date of the Document; and (iv) author(s), addressee(s) and recipient(s).

6. **Parties.** The terms "plaintiff" and "defendant" as well as a party's full or abbreviated name or a pronoun referring to a party mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries or affiliates. This definition is not intended to impose an obligation on any person who is not a party to the litigation.

7. **Person**. The term "person" is defined as any natural person or any business, legal or governmental entity or association.

8. **Concerning**. The term "concerning" means relating to, referring to, describing, evidencing or constituting.

B. The following rules of construction apply to all Initial Disclosure exchanges and all interrogatories and responses:

1. **All/Each**. The terms "all" and "each" shall be construed as all and each.

2. **And/Or**. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

3. **Number**. The use of the singular form of any word includes the plural and vice versa.

VI. Electronic Format:

A. When a party serves written interrogatories on another party, said party shall also serve same in electronic format either by email or on a 3 inch computer diskette or on a CD-ROM, in either (i) WordPerfect version 5.1 or higher format or (ii) Microsoft WORD 97 version or higher format.

B. When a party serves written Responses to Interrogatories on another party, said party shall also serve same in electronic format either by email or on a 3 inch computer diskette or on a CD-ROM, in either (i) WordPerfect version 5.1 or higher format or (ii) Microsoft WORD 97 version or higher format.

VII. Enforcement and Sanctions:

A. If a party or party s attorney shall default with respect to responding to a demand for responses to interrogatories served upon that party, the Court upon motion, or the Court s own initiative, shall make such orders with regard thereto as are just, including but not limited to the enforcement provisions of CPLR 3126, including striking pleadings and/or precluding the proffer of evidence by the defaulting party, and/or imposing costs and/or sanctions,including awarding reasonable attorneys' fees.

B. A default shall be:

1. a party s failure in good faith to provide timely and complete responsesto the interrogatories as required by these Rules;

2. the interjection of spurious objections to an interrogatory or interrogatories;

3. the failure to articulate with reasonable particularly an objection made;

4. the failure to have a written response to an interrogatory immediately following the question to which it responds;

5. the failure to produce copies of relevant Documents demanded in the possession or control of a party.

6. the failure to timely provide a privilege log containing the information required pursuant to Section(IV) hereof with respect to Documents withheld on account of a claimed privilege.

C. In lieu of, or in addition to, any other sanction, the Court shall require the party or attorney representing the party, or both, to pay the reasonable expenses, including attorneys' fees, and expenses incurred by reason of any non-compliance with the provisions of the CPLR relating to written interrogatories or this Rule.

IX. <u>Scope</u>:

Interrogatories may relate to any matters which can be inquired into under CPLR, and the responses may be used to the extent permitted by and admissible pursuant to the rules of evidence.