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The Ultimate Matrimonial Motion Practice Primer

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THE ULTIMATE MATRIMONIAL MOTION PRACTICE PRIMER

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INTRODUCTION

There is little doubt that motion practice constitutes the bulk of pre-trial work and inundates our court system in civil cases. When opposing attorneys cannot agree to produce documents for disclosure, one of them makes a "motion" for an order compelling disclosure. When a father assaults his child, the mother's attorney makes a motion for an order of protection. When a litigant wants permission to serve a summons by an alternative method, she makes a "motion" for such relief. A litigant makes a motion for "interim relief" where it is needed. In each instance, a motion is made for relief in the context of an action, or in contemplation of an action. Although motion practice constitutes a major portion of civil litigation in the Supreme Court today, the rules of motion practice are not clear or concise. The rules are scattered throughout various sections of the CPLR and the Uniform Rules. Confusion often occurs, due in part to the promulgation of individual motion practice rules by judges who work under an Individual Assignment System (IAS). The purpose of this article is to provide the bar with a working tool that summarizes in one place the procedural rules of civil motion practice.

WHAT IS A MOTION?

"A *'civil judicial proceeding'* is the prosecution, other than a criminal action, of an independent application to a court for relief."[1] Ordinarily, actions are proceedings by one person against

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another, and special proceedings are extraordinary or unusual in nature.[2] The CPLR does not define "action" or "special proceeding," but does provide that "action" includes a special proceeding.[3] An action may be distinguished from a special proceeding in that it is commenced by filing a summons. A special proceeding, however, is generally commenced by filing a notice of petition or an Order to Show Cause.[4]

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[1] N.Y. C.P.L.R. 105(d) (McKinney 1990).

[2] Application of Callahan, 262 A.D. 398, 28 N.Y.S.2d 980 (3d Dep't 1941), *appeal and reh'g denied by*, 262 A.D. 978, 30 N.Y.S.2d 695 (N.Y.A.D. 1941), *appeal dismissed*, People v. Callahan 287 N.Y. 743, 39 N.E.2d 942 (1942), *reh'g denied*, 264 A.D. 812, 35 N.Y.S.2d 288 (1942).

[3] N.Y. C.P.L.R. 105(b) (McKinney 1990).

[4] N.Y. C.P.L.R. 304 (McKinney 1990 & Supp. 1998). An "action" means that form of prosecution where the claimant issues a summons to answer a complaint stating the facts constituting the cause of action, the defendant takes issue or sets up his facts in defense or counterclaim, and either party may require a trial and a judgment, enforceable by execution. *See* McLean v Jephson, 123 N.Y. 142, 25 N.E. 409, 13 N.Y.S. 834 (1890).

An *order* is a direction for incidental relief in the context of an action or proceeding.[5] An application for an order is a motion.[6] When a notice of motion or an Order to Show Cause is served, a "motion on notice is made."[7] A motion differs from a ruling on the record in open court at trial or during a hearing.[8] No appeal lies from a ruling because it is not a formal order.[9] Unlike a ruling, a motion results in a formal order and, therefore, may be appealable.[10] A party to an action or special proceeding has the right to move for an order in an action. Sometimes non-parties are also permitted by statute to do so.[11]

EX PARTE MOTIONS

A judicial proceeding is *ex parte* when "it is taken or granted at the instance and for the benefit of one party only, and without notice to or contestation by, any person adversely interested."[12] An *ex parte* motion is made by submitting an order to the court with supporting papers demonstrating why the order should be signed. The *ex parte* motion is "made" when the proposed order and papers in support of the motion are submitted to the court for signature. Some *ex parte* motions do not require notice and are explicitly authorized by statute. One such motion is a motion made pursuant to CPLR 308(5).[13] *Ex parte* applications which are not authorized by statute are disfavored by the courts.[14]

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[5] *See In re* Argus Co., 138 N.Y. 557, 34 N.E. 388 (1893); *see also In re* Dietz, 138 A.D. 283, 122 N.Y.S.2d 1063 (1st Dep't 1910).

[6] N.Y. C.P.L.R. 2211 (McKinney 1991).

[7] *Id.*

[8] *See* N.Y. C.P.L.R. 5701 (McKinney 1995).

[9] *Id.*

[10] *Id.*

[11] *See* N.Y. C.P.L.R. 1012, 1013, 1014, 1021, 2203 (McKinney 1997). *See also* N.Y. DOM. REL LAW §§ 237, 238 (McKinney 1986).

[12] BLACK'S LAW DICTIONARY 517 (5th Edition 1979).

[13] N.Y. C.P.L.R. 308(5) (McKinney 1990). This section states that the court may make an order "*without notice*". *Id.*

[14] *See* Formire v. Nicoleau, 144 A.D.2d 8, 536 N.Y.S.2d 492 (2d Dep't 1989).

An *ex parte* motion made in the Supreme Court, "that may be made without notice may be made at a motion term or to a justice out of court in any county in the state."[15] An *ex parte* motion made in such a manner must be accompanied by an affidavit stating the result of any prior motion for similar relief.[16] The motion must also specify new facts, if any, that were not introduced to the court in the prior motion.[17]

In *the Matter of Deloitte, Haskins and Sells*,[18] defendants made an application pursuant to CPLR 3102(e). The action, which was commenced in Michigan, was for an *ex parte* order directing the custodian of records for a nonparty to the litigation to appear for a deposition, and to produce documents, at the office of the defendant's New York counsel. In declining to sign the proposed *ex parte* order, the court stated that "in the absence of a judicial mandate (CPLR 3102-e), and in accordance with the spirit of CPLR 3101(a)(4) * * * this application should be made on notice to the witness and adversary and not *ex parte*."[19]

In *Fosmire v. Nicoleau*,[20] an application was made pursuant to CPLR 5704 to vacate an *ex parte* order of the Supreme Court, Suffolk County. The order authorized Brookhaven Hospital to administer necessary blood transfusions to the respondent. The court held that "[e]*x parte* applications are generally disfavored by the courts, unless expressly authorized by statute, because of the attendant due process implications caused by proceeding without notice."[21]

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[15] N.Y. C.P.L.R. 2212(b) (McKinney 1991).

[16] *Id.*

[17] *Id.*

[18] 146 Misc. 2d 884, 552 N.Y.S.2d 1003 (Sup. Ct. New York County 1990).

[19] *Id.* at 885, 552 N.Y.S.2d at 1004. *See* N.Y. C.P.L.R. 3101(a)(4) (McKinney Supp. 1998), stating in pertinent part: "There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof by: . . . (4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required." *Id.*

[20] 144 A.D.2d 8, 536 N.Y.S.2d 492 (2d Dep't 1989).

[21] *Id.* at 12, 536 N.Y.S.2d at 495 (citing Luckey v Mockridge, 112 A.D. 199, 98 N.Y.S. 335 (1st Dep't 1906); Lohne v City of New York, 25 A.D.2d 440, 266 N.Y.S.2d 909 (2d Dep't 1966); Papacostopulos v Morrelli, 122 Misc. 2d 938,

NOTICE OF MOTION: TIME FOR SERVICE OF MOTION PAPERS

CPLR 2214(b) lays out the rules for service of motion papers. Section 2214(b) discusses the time of service. It states that the notice of motion, along with supporting affidavits, are to be served at least eight days prior to the date when the motion is noticed to be heard, and that answering affidavits are to be served at least two days before the hearing date.[22] CPLR 2214(c) requires that all papers must be served in accordance with this rule, if they are to be read either in support of, or in opposition to, the motion. Failure to do so will result in non-recognition by the court, unless the court finds good cause for the failure and allows recognition of the papers.[23]

EXCEPTION FOR CIVIL CONTEMPT MOTION

Not all motions are required to be served at least eight days before the time at which the application is noticed to be heard. For example, the moving papers on an application for civil contempt, pursuant to Section 756 of the Judiciary Law, are governed by a different time limitation.[24]

The application for civil contempt may be brought by service of a notice of motion or by Order to Show Cause.[25] If the application is brought by notice of motion, the notice of motion and supporting

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472 N.Y.S.2d 284 (Sup. Ct. Kings County 1984); N.Y. C.P.L.R. 2211 commentary at 40-42. (McKinney 1991)

[22] N.Y. C.P.L.R. 2214(b) (McKinney 1991). *See also*, Burstin v. Public Service Mut. Ins. Co., 98 A.D.2d 928, 471 N.Y.S.2d 33 (1983). In *Burstin*, the court noted that failure to give requisite notice of motion denies movant the opportunity for a court to obtain jurisdiction. Koppelman v. Schackman, 39 Misc.2d 344, 240 N.Y.S.2d 678 (1963). It is imperative that the notice be filed in a timely manner to avoid adverse consequences resulting in a court having no jurisdiction to decide the motion.

[23] N.Y. C.P.L.R. 2214(c) (McKinney 1991).

[24] *See* N.Y. JUD. LAW § 756 (McKinney 1992).

[25] *Id.* "An application to punish for a contempt punishable civilly may be commenced by notice of motion returnable before the court . . . or by an order of such court or judge requiring the accused to show cause before it.". *Id.*

papers must be personally served upon the accused at least ten days, and no more than thirty days, prior to the return date of the application.[26] However, where the application is made by an Order to Show Cause, the court may reduce the period within which the papers must be served or the papers are returnable and may direct service upon the attorney for the accused.[27] A notice of motion for contempt, together with the supporting papers, may be served by mail.[28] Section 756 of the Judiciary Law requires that an application to punish for contempt contain on its face both a notice that the purpose of the hearing is to punish for contempt and that such punishment may consist of a fine or imprisonment.[29] Additionally, the application requires a warning, printed in 8 point bold type, stating that failure to appear may result in an arrest or an imprisonment.[30] The warning reads as follows:

WARNING:
YOUR FAILURE TO APPEAR
IN COURT MAY RESULT IN
YOUR IMMEDIATE ARREST
AND IMPRISONMENT FOR
CONTEMPT OF COURT.[31]

A motion initiating a civil contempt proceeding against a third party witness, who is not a party to the underlying action within

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[26] *Id.*

[27] N.Y. JUD. LAW § 761 (McKinney 1992) The section provides that "[a]n application to punish for contempt in a civil contempt proceeding shall be served upon the accused, unless service upon the attorney for the accused be ordered by the court or judge." *Id.*

[28] *See* New York Higher Educ. Assistance Corp. v. Cooper, 65 A.D.2d 906, 410 N.Y.S.2d 687 (3d Dep't 1978) (holding that a notice of motion for contempt and all supporting papers may be served by regular mail. The court found that Judiciary Law, Article 19 does not expressly require personal service of an application to punish for contempt. Section 761 merely states that the application must be "served on the accused"; Section 756 provides that the application shall be noticed, heard and determined according to the procedure of a motion on notice. The court concluded that § 761 does not require personal service).

[29] N.Y. JUD. LAW § 756 (McKinney 1992).

[30] *Id.*

[31] *Id.*

which the contempt is claimed to have been committed, may not be served by mail. The nonparty witness is not privy to the underlying action, and is entitled by CPLR 403(d) to have notice served in the same manner as a summons in an action.[32]

The notice and service requirements are jurisdictional. Absent requisite notice and warning, the court is without jurisdiction to punish for contempt.[33] However, the notice and service requirements may be waived. The New York Court of Appeals has held that by contesting a contempt application on the merits and failing to object in a timely manner to the omission of the notice and warning required by the statute, the accused waived the protections afforded therein.[34] The commencement of a contempt application by notice of motion has been held valid where the application was opposed on the merits and the Appellate Division found it had no prejudicial effect.[35]

EXCEPTION FOR MOTION FOR SUBPOENA

CPLR 2302(b) discusses the court's authority to issue motions. It states that a motion for a "subpoena to compel production of an original record or document where a certified transcript or copy is admissible . . . or to compel attendance of any person confined in . . . jail shall be issued by the court."[36] Such motion must be made

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[32] *See* Long Island Trust Co. v Rosenberg, 82 A.D.2d 591, 442 N.Y.S.2d 743 (2d Dep't 1981) (explaining the application in such case must be brought on by special proceeding rather than a motion in the action).

[33] *See, e.g.,* Barreca v. Barreca, 77 A.D.2d 793, 430 N.Y.S.2d 739 (4th Dep't 1980); Stevens Plumbing Supply Co. v Bi-County Plumbing & Heating Co., 94 Misc. 2d 456, 404 N.Y.S.2d 964 (Sup. Ct. Nassau County 1978); Murrin v Murrin, 93 A.D.2d 858, 461 N.Y.S.2d 360 (2d Dep't 1983); *In Re* Estate of Devine, 126 A.D.2d 491, 511 N.Y.S.2d 231 (1st Dep't 1987).

[34] *See In Re* Rappaport, 58 N.Y.2d 725, 444 N.E.2d 1330, 458 N.Y.S.2d 911 (1982) The Court relied on Section 756 of the Judiciary Law noting that a party may waive protections afforded by the statute. *Id.* at 726.

[35] *See* Nelson v. Nationwide Measuring Service, Inc., 59 A.D.2d 717, 398 N.Y.S.2d 443 (2d Dep't 1977).

36 N.Y. C.P.L.R. 2302(b) (McKinney 1991)..

on "at least one day's notice to the person having custody of the record, document or person."[37]

ORDER TO SHOW CAUSE FOR ENFORCEMENT IN MATRIMONIAL ACTION

An application for the enforcement of a New York order or judgment for maintenance, child support, counsel fee or property distribution is treated as a motion in the matrimonial action for enforcement purposes.[38] The Supreme Court of New York has continuing jurisdiction to enforce its orders and judgments. The court does not require the service of new process to obtain in personam jurisdiction over the spouse in default.[39]

Section 244 of the Domestic Relations Law does provide, however, that in a proceeding to obtain a judgment for arrears due under a judgment of divorce, separation, annulment, or declaration of nullity of a void marriage, the application for an order directing the entry of judgment must be upon notice to the spouse or other person as the court may direct.[40] To comply with Section 244 the application must be made by an Order to Show Cause. Section 243 of the Domestic Relations Law also requires that applications for security and sequestration must be on notice to the spouse or other person as the court shall direct.[41] Further, there is nothing in sections 243 or 244 that requires personal service upon the spouse.

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[37] *Id.*

[38] *See* N.Y. DOM. REL. LAW § 243 (McKinney 1986). Section 243 states in pertinent part: "if a party fails to give security as required by the court or fails to make any payment required by a judgment or order [in matrimonial actions] . . . the court can cause the personal property and the rents of the real property of the defaulter to be sequestered." *Id.*

[39] *See, e.g.*, Karlin v. Karlin, 280 N.Y. 32, 19 N.E.2d 669 (1939); Fox v. Fox, 263 N.Y. 68, 188 N.E. 160 (1933); Haskell v. Haskell, 6 N.Y.2d 79, 160 N.E.2d 33, 188 N.Y.S.2d 475 (1959).

[40] *See* N.Y. DOM. REL. LAW § 244 (McKinney 1986). The Legislature intended that notice be given eight days previously. *Id. See also* Turkish v. Turkish, 126 A.D.2d 436, 510 N.Y.S.2d 582 (1st Dep't 1987) (holding that the court's direction as to the method of service is jurisdictional and must be complied with. It is not waived by actively defending on the merits and cross moving for relief).

[41] N.Y. DOM. REL. LAW § 243 (McKinney 1986).

It simply states that the application for the order shall be upon such notice to the spouse as the court may direct. Therefore, it may be assumed that the court will direct that service shall be made in a manner in keeping with the particular circumstances.[42] The due process clause of the Federal Constitution may require that reasonable notice, that is calculated to inform the spouse of the action for a default and judgment, be given.[43]

There is no prerequisite that the application for entry of a judgment, security, sequestration or contempt, if made upon notice to a person other than the spouse, be made to his attorney. It suffices if the person directed by the court to be served is one through whom it is likely that defendant will receive adequate notice of the application.[44] It has been held that a direction for service of notice upon the husband's attorney of record in the matrimonial action was sufficient, even though he contended that he no longer represented the husband.[45]

MAKING A CROSS MOTION

A party served with a Notice of Motion or an Order to Show Cause may ask for relief in response to the motion by making a cross motion. CPLR 2215 authorizes the service of a notice of cross motion. It provides that "[a]t least three days prior to the time at which the motion is noticed to be heard, a party may serve upon

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[42] *See* Jacobi v. Drucker, 203 Misc. 1080, 118 N.Y.S.2d 495 (Sup. Ct. Onondaga County 1953); *see also* Silverman v. Silverman, 189 Misc. 227, 70 N.Y.S.2d 90 (Sup. Ct. Kings County 1947). The court stated "[a] direction of the court as to the manner of service is unnecessary where personal service may be effected." *Id.* at 229, 70 N.Y.S.2d at 91. It is important for notices to be given in writing; oral notices will not suffice. Cumming v. Cumming, 113 A.D.2d 735, 493 N.Y.S.2d 201 (2d Dep't. 1985).

[43] *See* Griffin v. Griffin, 327 U.S. 220 (1946), *reh'g denied*, 328 U.S. 876 (1946).

[44] *See* Patillo v. Patillo, 12 Misc. 2d 645, 178 N.Y.S.2d 154 (Sup. Ct. Bronx County 1958).

[45] Haskell v. Haskell, 6 N.Y.2d 79, 160 N.E.2d 33, 188 N.Y.S.2d 475 (1959); *see also* Hornok v. Hornok, 121 A.D.2d 937, 504 N.Y.S.2d 660 (1st Dep't 1986); Puorto v. Puorto, 120 A.D.2d 845, 502 N.Y.S.2d 116 (3d Dep't 1986); Gunsburg v. Gunsburg, 173 A.D.2d 232, 569 N.Y.S.2d 641 (1st Dep't 1991).

the moving party a notice demanding relief, with or without supporting papers."[46] It also provides, "[r]elief in the alternative or of several different types may be demanded; relief need not be responsive to that demanded by the moving party." Supporting papers do not have to be served with the Notice of Cross Motion.[47]

CALCULATION OF DAYS FOR SERVICE OF MOTION PAPERS

The General Construction Law provides a method for calculating the number of days for serving motion papers. It provides that "a calendar day includes a time from midnight to midnight."[48] Calculating the number of days from "within which or after or before which an act is authorized or required to be done, means such number of calendar days exclusive of the calendar day from which the reckoning is made."[49] For example, "Saturday, Sunday, or a public holiday must be excluded from the reckoning if it is an intervening day between the day from which the reckoning is made in a two day period, or if the day of reckoning is the last day of the period."[50] "In computing any specified period of time from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified period of time is reckoned shall be excluded in making the reckoning."[51]

"When any period of time within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, the act may be done on the next succeeding business day . . . ."[52] If the period ends at a specified hour, the act may be done at or before the same hour of the next succeeding business day.[53] However, where a period of time specified by contract ends on a Saturday, Sunday or a public

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[46] N.Y. C.P.L.R. 2215 (McKinney 1991).
[47] N.Y. C.P.L.R. 2103(b)(2) (McKinney 1997).
[48] N.Y. GEN. CONSTR. LAW § 19 (McKinney 1951).
[49] N.Y. GEN. CONSTR. LAW § 20 (McKinney 1951 & Supp. 1998).
[50] *Id.*
[51] *Id.*
[52] N.Y. GEN. CONSTR. LAW § 25-a(1) (McKinney 1951 & Supp. 1998).
[53] *Id.*

holiday, the extension of such period is governed by General Construction Law § 25.[54]

MANNER OF SERVICE OF NOTICE OF MOTION

Generally, a party to an action is prohibited from serving any papers in the action. CPLR 2103(a) provides that motion papers may be "served by any person" who is not a party to the action and who is eighteen years of age or over.[55] Moreover, if a party is represented by an attorney, the papers must be served upon the attorney. In order to avoid duplication expenses, only a single copy of the motion papers is required to be served upon the attorney.[56]

Service of motion papers upon an attorney may be made by delivering the papers to the attorney personally, or by mailing the papers to the attorney at the address designated by the attorney for that purpose. If no address is designated, the mail should be forwarded to the attorney's last known address.[57] If the attorney's office is open, service of the motion papers may be made by leaving the papers with a person in charge of the office. If there is no person present who is in charge of the office, the documents may then be left in a conspicuous place. If the attorney's office is closed, the papers may be enclosed in a sealed wrapper directed to the attorney and deposited in the attorney's office letter drop or box. Otherwise, the papers may be left at the attorney's residence within the state of New York, with a person of suitable age and discretion.[58] However, service of the motion papers upon an attorney may not be made at the attorney's residence unless service at the attorney's office cannot be made.

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[54] *Id. See, e.g,* Kod-Rose Holding Corp. v. Aglietti, 174 Misc. 276, 20 N.Y.S.2d 625 (1940) (holding that where a lease ended on Sunday and the following day was a legal holiday then the tenant was able to move on Tuesday without being deemed a holdover tenant).

[55] N.Y. C.P.L.R. 2103(a) (McKinney 1997) This prohibition may be modified by court order. *Id.*

[56] N.Y. C.P.L.R. § 2103(b) (McKinney 1997).

[57] *Id.*

[58] *Id.*

In 1989, the CPLR was amended to permit service by electronic means. CPLR Section 2103 allows for the transmission of motion papers to the attorney by electronic means when a telephone number is designated by the attorney for that purpose.[59] An attorney may designate a telephone number for electronic service in the address block on a paper served or filed by the attorney during an action or proceeding. The provision of such constitutes consent to electronic service. It is also appropriate to dispatch papers to the attorney by overnight delivery service, to a designated address or to the attorney's address.[60]

The definitions under CPLR 2103 which are expressly noted are 'mailing'[61] and 'electronic means'.[62] Section 2103 articulates the procedures for service of papers upon a party.[63] If a party has not appeared by an attorney, or the party's attorney cannot be served, the service of motion papers may be made upon the party by one of the methods specified above, except it may not be left in the party's office or deposited in the party's office letter drop or box.[64] If a paper cannot be served by any of these methods

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[59] *Id.*

[60] *Id.* "Overnight delivery service" means any delivery service which regularly accepts items for overnight delivery to any address in the state. N.Y. C.P.L.R. 2103(b) (McKinney 1997).

[61] N.Y. C.P.L.R. 2103(f)(1) (McKinney 1997) states:

> 'Mailing' means the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state.

Id.

[62] N.Y. C.P.L.R. 2103(f)(2) (McKinney 1997) states:

> 'Electronic means' is any method of transmission of information between two machines designed for the purpose of sending and receiving such transmissions, and which results in the fixation of the information transmitted in a tangible medium of expression.

Id.

[63] N.Y. C.P.L.R. 2103(c) (McKinney 1997).

[64] N.Y. C.P.L.R. 2103(c) (McKinney 1997).

specified above, service may be made by filing the paper as if it were a paper required to be filed.[65]

Service by mail is deemed complete upon mailing.[66] Service by fax is complete upon the sender's receipt of a signal from the recipient's fax machine indicating that the transmission was in fact received, and the mailing of a copy of the paper to that attorney.[67] Service by overnight courier is complete when the papers enclosed in a properly addressed wrapper are given to the delivery service for overnight delivery, prior to the latest time designated by the service for such delivery."[68] A time table for the service of motion papers is in the footnote.[69]

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[65] N.Y. C.P.L.R. 2103(a) (McKinney 1997). "Where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days must be added to the prescribed period." *Id.*

[66] N.Y. C.P.L.R. 2103(b)(2) (McKinney 1997)..

[67] N.Y. C.P.L.R. 2103(b)(5) (McKinney 1997).

[68] N.Y. C.P.L.R. 2103(b)(6) (McKinney 1997). "Where a period of time prescribed by law is measured from the service of a paper and service is by overnight delivery, one business day must be added to the prescribed period." *Id.*

[69] Time Table For Service of Motion Papers

Serve Notice Of Motion and Affidavits	Serve Answering Affidavits	Serve Reply Affidavits	Serve Notice Of Cross motion
8 Days Before Return Date	2 Days Before Return Date	N/A	At Least 3 Days Before Time Motion Is Noticed To Be Heard
If a Motion is Filed 12 Days Before Return Date,	Then 7 Days Before Return Date *If* Notice Of Motion Demands,	Then 1 Day Before Return Date	At Least 3 Days Before Time Motion Is Noticed To Be Heard

(1) CPLR 2214(b)
(2) CPLR 2215

TIME FOR AND MANNER OF SERVICE OF ORDER TO SHOW CAUSE

An alternative method of bringing a contested motion is by an Order to Show Cause. CPLR 2214(d) authorizes the court to grant an Order to Show Cause, "to be served in lieu of a notice of motion, at a time and in a manner specified therein."[70]

An Order to Show Cause is served "in lieu of a notice of motion," which becomes an order after it is signed by a judge.[71] One reason for seeking an Order to Show Cause is that CPLR 2214(b) requires the person making the motion to give his/her adversary's attorney at least eight days prior notice of a hearing for the motion. Therefore, if the movant cannot wait eight days to make the motion and wants permission to have a shorter return date, or needs an *ex parte* interim order, an application for this relief can be made by submitting to the Court an Order to Show Cause with supporting papers.[72] Upon the submission of an Order to Show Cause, the Court may, in its discretion, shorten the return date of the motion, direct the manner in which the motion papers are to be served or grant interim relief (such as an injunction or a stay) pending the determination of the motion.[73] This is done in the body of the Order to Show Cause that is submitted to the Court for signature.[74]

An Order to Show Cause is, by practice and custom, an *ex parte* motion which, when granted, results in an *ex parte* order. The CPLR, however, does not specifically designate it as an *ex parte* order. Furthermore, the CPLR does not specifically provide that it may be obtained without notice.

Service by mail is complete upon mailing (CPLR 2103).
Where a record of time as prescribed by law is measured from the service of a paper and service is by: 1) mail, five days shall be added to the prescribed period or 2) overnight delivery service, one business day shall be added to the prescribed period.

[70] N.Y. C.P.L.R. 2214 (McKinney 1991).

[71] N.Y. C.P.L.R. 2214 (d) (McKinney 1991)..

[72] *See* N.Y. C.P.L.R. 2214 (McKinney 1991); § 2217 (McKinney 1991).

[73] *Id.*

[74] *Id.*

The time and manner of service of an Order to Show Cause is determined by the court granting it.[75] Absent a clear abuse of discretion, this determination will be sustained.[76] In *Robinson v. Robinson*,[77] the Appellate Division held that "the mode of service of the Order to Show Cause was within the court's discretion, and the notice was sufficient, where it was appropriate to advise defendant of the relief sought and gave him a reasonable opportunity to be heard."[78]

In *Burstein v. Burstein*,[79] the plaintiff made a motion for an order directing the defendant to give security for the payment of support and maintenance, for the sequestration of defendant's personal property, and for the appointment of plaintiff as receiver.[80] The Order to Show Cause directed that service of the order and annexed papers be made upon defendant by registered mail at his office in New York City, at his address in Reno, Nevada, and upon his attorney and business manager in New York City.[81] Plaintiff submitted proof of service, with return receipts signed by defendant in accordance with the directions of the court.[82] The Supreme Court in Bronx County held that the challenge to this method of service had no support in the law, as "it was within the

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[75] N.Y. C.P.L.R. 2214(d) (McKinney 1991).

[76] *See* Block v. Nelson, 71 A.D.2d 509, 423 N.Y.S.2d 34 (1st Dep't 1979).

[77] 24 A.D.2d 138, 264 N.Y.S.2d 816 (1st Dep't 1965). The Plaintiff wife applied for sequestration after her husband defaulted on alimony payments due to her.

[78] *Id.* at 140, 264 N.Y.S.2d at 818 (citing Burstein v. Burstein, 12 Misc. 2d 521, 155 N.Y.S.2d 288 (Sup. Ct. Bronx County 1956), *aff'd*, 2 A.D.2d 879, 156 N.Y.S.2d 996 (1st Dep't 1956); Karpf v. Karpf, 260 A.D. 701, 23 N.Y.S.2d 745 (1st Dep't 1940)).

[79] 12 Misc. 2d 521, 155 N.Y.S.2d 288 (Sup. Ct. Bronx County 1956). Defendant tried to get out of alimony payments by establishing residence in a state where the original judgment was not issued. He then obtained a new decree whereby he did not have to pay alimony.

[80] *Id.* at 522, 155 N.Y.S.2d at 289.

[81] *Id.*

[82] *Id.*

court's discretion to designate the mode of service of the Order to Show Cause, since it was an order in an action."[83]

The court does not have the authority to order that a motion be returnable before the appellate division. In *Moreton v. Buffalo Urban Renewal Agency*,[84] a motion for a temporary injunction pending appeal was brought before the Appellate Division by an Order to Show Cause signed by a justice of the Supreme Court. The Appellate Division held that "CPLR 2214(d), providing for orders to show cause, does not empower a judge or justice of a court of original jurisdiction to order that a motion be returnable before an appellate court."[85]

TIMELINESS OF SERVICE OF ORDER TO SHOW CAUSE AND CONSIDERATION OF ANSWERING AND REPLY PAPERS

Absent a direction by the Court in the Order to Show Cause, answering papers may be served at any time prior to the submission or oral argument of a motion.[86]

In *W.I.L.D. W.A.T.E.R.S., Ltd. v. Martinez*,[87] W.I.L.D. W.A.T.E.R.S. brought an action for specific performance, related injunctive relief and damages, and by Order to Show Cause moved for a temporary restraining order and a preliminary injunction enjoining a third party purchaser, Mrs. Nelson, from transferring, altering or destroying certain premises.[88] The Supreme Court of Warren County granted the temporary restraining order and directed that service of the Order to Show Cause, together with the supporting papers, be made by May 9, 1988. The court set May 13, 1988 as the return date.[89] In its brief on appeal, "counsel for

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[83] *Id.* at 523, 155 N.Y.S.2d at 291 (citing Scott v. Scott, 219 A.D. 451, 220 N.Y.S. 93 (1st Dep't 1927), *appeal dismissed*, 247 N.Y. 527, 161 N.E. 169 (1928)).

[84] 110 A.D.2d 1089, 489 N.Y.S.2d 1019 (4th Dep't 1985).

[85] *Id.*

[86] *See* W.I.L.D. W.A.T.E.R.S., Ltd. v. Martinez, 148 A.D.2d 847, 539 N.Y.S.2d 119 (3d Dep't 1989). An action was brought against a lessor and a third-party purchaser by a lessee, who was claiming the right of first refusal.

[87] *Id.*

[88] *Id.* at 847-48, 539 N.Y.S.2d at 120.

[89] *Id.* at 848, 539 N.Y.S.2d at 120.

[appellant Mary] Nelson represented that papers in opposition to the motion were submitted to the court, as well as to plaintiff's counsel, on the return date, immediately prior to the hearing, but that they were rejected as untimely."[90] The court, treating the motion as unopposed, granted the preliminary injunction and other relief.[91] The appellant, Mrs. Nelson, appealed and the Appellate Division reversed.[92] The Appellate Division began its analysis by noting that the record did not indicate when appellant served her papers. Therefore, because the plaintiff did not submit a brief, appellant's characterization of what occurred at the hearing was uncontested. "Since the motion was brought on by Order to Show Cause and there was no court direction in the order limiting the time when answering papers were to be filed," the appellate court held that such papers could be furnished up to the time of submission of the motion or oral argument.[93] Moreover, the court stated that even if this had been a motion on notice, appellant would not have been obliged to answer prior to the return date because she received only seven days' notice, as she was served with the moving papers on May 6, 1988."[94]

In *Block v. Nelson,*[95] plaintiff sought to recover a judgment for arrears of alimony and child support by Order to Show Cause dated October 16, 1978 and returnable on November 2, 1978.[96] Thereafter, by Order to Show Cause dated December 22, 1978 and returnable on December 26, 1978, the defendant made a cross motion to modify the custody and child support provisions of the judgment of divorce.[97] The Order to Show Cause directed that a note of issue be submitted to Special Term Part V "no later than noon prior to the return date."[98] Special Term Part V found no cross motion on the calendar and there was no notice of motion

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[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] 71 A.D.2d 509, 423 N.Y.S.2d 34 (1st Dep't 1979).
[96] *Id.* at 511, 423 N.Y.S.2d at 36.
[97] *Id.*
[98] *Id.*

served for the cross motion.[99] Consequently, Special Term treated defendant's papers solely as opposing papers to the motion in chief and determined the motion against him.[100] Furthermore, the court noted that neither adjournments nor notice of issue for the cross motion were filed.[101]

The Appellate Division refused to "disturb the special term's finding," reasoning that "the defendant did not point to any proof in the record showing that a note of issue was filed or that the cross motion was otherwise on the calendar."[102] Plaintiff argued that the cross motion was properly rejected because the Order to Show Cause provided that answering affidavits were to be served five days before the return date.[103] The Appellate Division held that CPLR 2214 allows a court to permit the service of a cross motion on four days' notice.[104] "It was not apparent from the record what facts were brought to the attention of the court issuing the Order to Show Cause, dated December 22, 1978."[105] Therefore the court was unable to conclude whether the lower court "abused its discretion in making that Order to Show Cause returnable on only four days' notice."[106] Due to this "factual deficiency of the record, the Appellate Court could not intelligently pass upon the issue of whether the plaintiff had a fair opportunity to answer the cross motion."[107]

The *Block* Court further held that because the "cross motion was not on the calendar, Special Term acted within its authority in rejecting the cross motion."[108] However, the court concluded that

> Special Term acted inconsistently in considering defendant's papers in opposition to the motion in chief. To be consistent, Special Term should have accepted or

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[99] *Id.*
[100] *Id.* at 512, 423 N.Y.S.2d at 36.
[101] *Id.*
[102] *Id.* at 512, 423 N.Y.S.2d at 37.
[103] *Id.* at 512-13, 423 N.Y.S.2d at 37.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*

rejected defendant's papers in their entirety. Since Special Term chose to consider the merits of defendant's papers, it did the same on this appeal.[109]

FORMAT OF MOTION PAPERS

CPLR 2101 provides the technical aspects of legal papers filed in civil actions, and subsection (a) covers size, legibility and quality.[110] Each paper served or filed must be white and, except for exhibits, must be eleven by eight and one-half inches in size.[111] The paper must be legible and written in black ink.[112] The names signed must also be printed beneath each signature.[113] Every other printed or typed paper that is served or filed, except an exhibit, must be legible and at least ten-point in size, except for exhibits.[114]

All papers served or filed must be written in ordinary English usage.[115] If an affidavit or exhibit is in a foreign language, it must be accompanied by an English translation, and an affidavit by the translator stating his qualifications and that the translation is accurate.[116] CPLR 2101 states, "every paper that is served or filed must begin with a caption setting forth the name of the court, the venue, the title of the action, the nature of the paper and the index number of the action, if one has been assigned."[117] It is sufficient to state the name of the first named party on each side with an indication of any omissions.[118] Subsection (d) discusses the attorney's endorsement of served and filed papers, requiring that

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[109] *Id.*
[110] N.Y. C.P.L.R. 2101 (McKinney 1997).
[111] N.Y. C.P.L.R. 2101(a). N.Y. C.P.L.R. 2101 commentary at 717-20 (McKinney 1997).
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] N.Y. C.P.L.R. 2101(b) (McKinney 1997).
[116] *Id.*
[117] N.Y. C.P.L.R. 2101(c) (McKinney 1997).
[118] *Id.*

each paper must include "the name, address and telephone number of the attorney for the party serving or filing the paper."[119] If a party does not appear by attorney, each paper served or filed by that party must be endorsed with the name, address and telephone number of the party.[120]

In matrimonial actions, an attorney certification must actually appear, without qualification, on any papers submitted by a party who is represented by counsel. It must state, "I hereby certify under penalty of perjury and as an officer of the court I have no knowledge that the substance of any of the factual submissions contained in this document is false."[121]

A signature, as defined by New York's General Construction Law, consists of "any memorandum, mark or sign, written, printed, stamped, photographed, engraved or otherwise placed upon any instrument or writing with intent to execute or authenticate that instrument or writing."[122] Thus, a computer generated signature placed on an affirmation is sufficient.

Except where otherwise specifically prescribed, copies of all papers, including orders, affidavits and exhibits, may be served or filed instead of originals. Where service of filing of the original is required, and the original cannot be found or obtained, the court can allow a copy to be served or filed instead.[123] Thus, copies of orders, affidavits and affirmations may be served or filed in support of or in opposition to a motion.

As long as a party's substantial rights are not prejudiced, a defect in form will be disregarded by the court.[124] If a party seeks to amend the defect, the court will freely grant the amendment.[125] A party has the right to object to a defect in form; however, such objection must be made by returning the paper within two days after its receipt, together with a statement as to its defect.[126]

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[119] N.Y. C.P.L.R. 2101(d) (McKinney 1997).
[120] *Id.*
[121] N.Y. COMP. CODES R. & REGS. tit. 22, § 202.16(e) (1998).
[122] N.Y. GEN. CONSTR. LAW § 46 (McKinney 1951).
[123] N.Y. C.P.L.R. 2101(e) (McKinney 1997).
[124] N.Y. C.P.L.R. 2101(f) (McKinney 1997).
[125] *Id.*
[126] *Id.*

COURT RULES APPLICABLE TO MOTION PRACTICE

The Uniform Rules for New York State trial courts deal with motion practice. They provide that "there shall be compliance with the procedures prescribed in the Civil Practice Law and Rules for the bringing of motions."[127]

INDEX NUMBER ON ALL PAPERS

The party that files the first document in a civil action, after paying the required fee, must obtain an index number from the county clerk, and affix it to the paper.[128] This party must inform all other parties in writing which index number shall designate the action.[129] Thereafter, this index number must appear "on the outside cover and first page to the right of the caption of every paper tendered for filing in the action."[130] Section 202.5 of Title 22 of the New York Compilation of Codes, Rules, and Regulations further requires that each cover and first page indicate the nature of the paper being submitted and the county of venue.[131] A case specifically assigned to a judge or justice, must include "the name of the assigned judge to the right of the caption."[132] Additionally, where required, proof of service of process on all parties must be annexed to every filed paper.[133] Except for exhibits or printed forms, every paper must be written on one side only, and if typewritten, contain at least a double space between lines (except for any quotations, and for the names and office addresses of the attorneys of record), and have margins spaced at least one inch.[134] If any papers are stapled together, or bound securely, the court may

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[127] N.Y. COMP. CODES R. & REGS. tit. 22, § 202.7(a) (1998).

[128] N.Y. COMP. CODES R. & REGS. tit. 22, § 202.5(a) (1998) (explaining how to file papers in court).

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

not reject them on the sole basis of lacking a "backer."[135] Either the attorney, or a party if the party is not represented by an attorney, must sign the notice of motion.[136]

NOTICE OF MOTION - REQUIRED FORMAT

Unless a motion is brought by an Order to Show Cause, or is an application for *ex parte* relief, no motion may be filed with the court unless a notice of motion is served or filed with the motion papers and is substantially in compliance with the uniform notice of motion form that is found in the rules.[137]

PLACE MOTION RETURNABLE AND SUBMISSION OF PAPERS

"All motions must be returnable before the assigned judge and motion papers must be filed with the court on or before the return day."[138]

In an instance where a judge has not been assigned to a case, a motion should be due "before the court," along with an exact copy of the motion, a Request for Judicial Intervention (if needed), and proof of service upon all other parties, and must be filed with the court within five days of service upon the other parties.[139] The moving party, immediately after filing the papers, is required to provide written notice of the index number to all other parties.[140] In addition, copies of all documents, showing proof of service and the index number, must be filed with the court, on or before the return date.[141] A judge will then be assigned to the case as soon as possible after the Request for Judicial Intervention is timely

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[135] *Id.*

[136] N.Y. COMP. CODES R. & REGS. tit. 22, § 103-1.1-a (1998); N.Y. COMP. CODES R. & REGS. tit. 22, § 202.16 (1998).

[137] N.Y. COMP. CODES R. & REGS. tit. 22, § 202.7, 202.7(a) (1998). The form is found at N.Y. COMP. CODES R. & REGS. tit. 22, § 202.7(b) (1998).

[138] N.Y. COMP. CODES R. & REGS. tit. 22, § 202.8 (1998).

[139] *Id.* The rule does not require the "RJI" where the application is ex parte.

[140] *Id.*

[141] *Id.*

filed.[142] After the case is assigned to the judge, the court will submit notice of the assigned judge's name to all parties involved.[143] When motions are scheduled to be heard, in a county other than which plaintiff has established venue, the motions "must be assigned to a judge in accordance with procedures established by the chief administrator" in the county where the motion will be heard.[144]

SERVICE OF PAPERS ON ALL PARTIES AND NATURE OF PAPERS

The moving party also must serve copies of every affidavit and brief upon every other party concurrently with service of the notice of motion.[145] The party answering likewise must serve copies of every affidavit and brief as required under CPLR 2214.[146] Affidavits and affirmations are required to state the relevant facts, and briefs must be used for a statement of the relevant law.[147]

ORAL ARGUMENT

A party making a request for oral argument must set forth the request in the notice of motion, the Order to Show Cause, or on the first page of the answering papers.[148] The assigned judge has discretion to determine that a motion be orally argued and may fix a time for oral argument."[149] A party requesting an oral argument must set forth the request in its notice of motion, in its Order to Show Cause, or on the first page of the answering papers. Where all parties to a motion request oral argument, oral argument must be granted unless the court finds it to be unnecessary. Where a motion is brought by Order to Show Cause, the court may set forth

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[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] N.Y. COMP. CODES R. & REGS. tit. 22, § 202.8(c) (1998).
[146] *Id.*
[147] *Id.*
[148] N.Y. COMP. CODES R. & REGS. tit. 22, § 202.8(d) (1998).
[149] *Id.*

in the order that oral argument is required on the return date of the motion.[150]

ADJOURNMENT OF MOTION

Stipulations adjourning the return date of a motion must be in writing and submitted to the assigned judge and will be effective unless the judge directs otherwise. Only three stipulated adjournments, for an combined period of sixty days, may be submitted without the court's prior permission.[151]

A request for an adjournment must be submitted in writing, upon notice to the other party, to the assigned judge on or before the return date unless all parties otherwise agree. The court will notify the requesting party upon granting or denying the adjournment.[152]

DISCLOSURE MOTIONS

Where a preliminary conference has not been held, motions relating to disclosure or to a bill of particulars shall have a preliminary conference scheduled by the court, in its discretion, not more than 45 days from the return date of the motion. The court shall notify all parties of a scheduled date to appear for a preliminary conference, and shall make available for signature of the parties a form of a stipulation and order prescribed by the Chief Administrator of the courts. This stipulation "agreeing to a timetable which shall provide for completion of disclosure within 12 months and for a resolution of any other issues raised by the motion," if signed and returned to the court by all parties before the return date of the motion, will be "so ordered" by the court and the motion deemed withdrawn.[153] Thereafter, the conference will be held on the assigned date and any issues unresolved subsequent to the conference will be determined by the court.[154]

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[150] *Id.*
[151] N. Y. COMP. CODES R. & REGS. tit. 22, § 202.8 (e)(1).
[152] N. Y. COMP. CODES R. & REGS. tit. 22, § 202.8(e)(2) (1998).
[153] *Id.*
[154] *Id.*

Unless a settlement of an order is required by the circumstances, the decision on a motion shall incorporate an order effecting the relief specified.[155]

The court will not accept a motion unless the following documents have been served and filed with the motion papers: (1) a notice of motion; and, for motions relating to disclosure or to a bill of particulars, (2) an affirmation that counsel, in a good faith effort to resolve the issues raised by the motion, has conferred with opposing counsel.[156] Any such affirmation "must indicate the time, place and nature of the consultation, the issues discussed and any resolutions, or it must indicate good cause why no such conferral with counsel for opposing parties was held."[157]

An Order to Show Cause or an application for *ex parte* relief need not contain the form notice of motion, but must contain the affirmation of good faith if the affirmation is otherwise required by the rules.[158]

REFERRAL OF EX PARTE MOTIONS

An *ex parte* motion submitted to a judge who is outside the county where the underlying action is venued must be referred to the appropriate court in the county of venue. However, if the judge where the *ex parte* motion is submitted determines that the motion requires immediate attention, the judge may make an immediate determination on the motion.[159]

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[155] N.Y. COMP. CODES R. & REGS. tit. 22, § 202.8(g) (1998).

[156] N.Y. COMP. CODES R. & REGS. tit. 22, § 202.7(a) (1998). *See* Koelbl v. Harvey, 176 A.D.2d 1040, 575 N.Y.S.2d 189 (3d Dep't 1991).

[157] N.Y. COMP. CODES R. & REGS. tit. 22, § 202.7(c) (1998). The court in Eaton v. Chabal, 146 Misc. 2d 977, 553 N.Y.S.2d 642 (Sup. Ct. Rensselaer County 1990) found the proper standard to be: "Significant, intelligent and expansive contact and negotiations must be held between counsel to resolve any dispute and such efforts must be adequately detailed in an affirmation."

[158] N. Y. COMP. CODES R. & REGS. tit. 22, §202.7(d) (1998).

[159] N. Y. COMP. CODES R. & REGS. tit. 22, §202.7(e) (1998).

SUBMISSION OF ORDER TO SHOW CAUSE

Parties submitting papers to the court, either for signature or for consideration by the court, must present the papers to the clerk of the trial court for the appropriate court or clerks office.[160] In the event the clerk is unavailable, or should a judge so direct, the papers may be submitted to the judge. When a judge directs that the papers be submitted to a judge, a copy of the papers clearly addressed to the judge for whom they are intended and displaying "the nature of the papers, the title and index number of the action in which they are filed, the judge's name and the name of the attorney or party submitting them," must be filed with the clerk as soon as practicable.[161] The clerk must promptly deliver any papers filed in the clerk's office to the appropriate judge.[162]

WITHDRAWAL OF MOTION

A motion may be withdrawn by a party at any time prior to its submission to the court.[163] However, once the motion is submitted, it may only be withdrawn with the consent of the parties or by order of the court. A motion is submitted after oral argument or by submission of the motion papers to the court on the return day.[164]

NOTICE OF MOTION - JURISDICTION

Courts have held that the requirement of giving notice of motion is jurisdictional. Moreover, it is error as a matter of law and a denial of due process for the court to *sua sponte* grant an oral application of a substantive matter absent notice of motion and an

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[160] N. Y. COMP. CODES R. & REGS. tit. 22, §202.5(b) (1998).

[161] *Id.*

[162] *Id.*

[163] Oshrin v. Celanese Corp., 37 N.Y.S.2d 548 (Sup. Ct. New York County), *aff'd*, 265 App. Div. 923 (1st Dep't 1942), 39 N.Y.S.2d 984, *aff'd*, 291 N.Y. 170, 151 N.E.2d 694 (1943).

[164] Wallace v. Ford, 44 Misc. 2d 313, 253 N.Y.S.2d 608 (1964).

opportunity to be heard, as required by CPLR 2214(b).[165] Failure to give timely notice of motion as required by CPLR 2214 deprives the court of jurisdiction and renders the order granting the motion void.[166] CPLR 2214(b) provides:

> "A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard. Answering affidavits shall be served at least two days before such time. Answering affidavits shall be served at least seven days before such time if a notice of motion served at least twelve days before such time so demands; whereupon any reply affidavits shall be served at least one day before such time."[167]

Furthermore, failure to give timely notice of motion also deprives the court of jurisdiction to *sua sponte* entertain such a motion and renders the resulting order void.[168]

In *Beck v. Goodday*,[169] the respondent served its "motion to dismiss the petition" by mail on May 28, 1964, returnable on June 1, 1964, which was less than the time prescribed by CPLR 7804. The Appellate Division held that Special Term did not acquire jurisdiction of the motion. Therefore, the order granting respondent's motion was jurisdictionally void.[170]

In *Morabito v. Champion Swimming Pool Corp*,[171] the plaintiff served a motion for summary judgment on September 7, 1961,

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[165] *See* Phoenix Enterprises Ltd. v. Insurance Co. of North America, 130 A.D.2d 406, 515 N.Y.S.2d 443 (1st Dep't 1987); Kantor v. Pavelchak, 134 A.D.2d 352, 520 N.Y.S.2d 830 (2d Dep't 1987).

[166] Golden v. Golden, 128 A.D.2d 672, 513 N.Y.S.2d 171 (2d Dep't 1987).

[167] N.Y. C.P.L.R. 2214(b) (McKinney 1991).

[168] *See* Burstin v. Public Serv. Mut. Ins. Co., 98 A.D.2d 928, 471 N.Y.S.2d 33 (3d Dep't 1983); Morabito v. Champion Swimming Pool Corp., 18 A.D.2d 706, 236 N.Y.S.2d 130 (2d Dep't 1962); Silverman v. Silverman, 261 A.D. 1106, 27 N.Y.S.2d 11 (2d Dep't 1941); Palmer v. Rotary Realty Co., 233 A.D. 764, 250 N.Y.S. 187 (2d Dep't 1931).

[169] 24 A.D.2d 1016, 265 N.Y.S.2d 916 (2d Dep't 1965).

[170] *Id.*

[171] 18 A.D.2d 706, 236 N.Y.S.2d 130 (2d Dep't 1962).

with a return date of September 14, 1961. The Appellate Court held that "it was an improvident exercise of discretion to deny Champion's motion to open its default, and refuse to vacate a prior order and deny plaintiff's motion for summary judgment."[172] Since the notice of motion only provided seven days' notice, Special Term did not acquire jurisdiction over the motion for summary judgment. and the order granting plaintiff's motion was jurisdictionally void. [173]

Some lower courts have been more liberal when the rights of a party have not been prejudiced. In *Coonradt v Walco*[174] Justice Cooke, sitting at Supreme Court, Special Term, Rensselaer County, finding no substantial prejudice to the plaintiff, held that the failure to serve a notice of motion and affidavits by mail 11 days before the return date was an "irregularity which should be disregarded."[175] In *Coonradt*, the motion was originally returnable on September 22, 1967 but was adjourned to October 13, 1967. The court stated:

> While it has been held that the failure to serve a notice of motion and the supporting affidavits for at least the statutory time in advance of the return date is a jurisdictional defect prohibiting the court from considering the substance of the motion . . ., it should be treated as a procedural irregularity which is deemed waived unless objection is raised thereto or one which may be disregarded if a substantial right of a party is not prejudiced.[176]

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[172] *Id.*

[173] *Id.*

[174] 55 Misc. 2d 557, 285 N.Y.S.2d 421 (Sup. Ct. Rensselaer County 1967).

[175] *Id.* at 558.

[176] *Id.* (citing Beck v. Goodday, 24 A.D.2d 1016, 265 N.Y.S.2d 916 (2d Dep't 1965); Miot v. JoCarl Realty Corp., 19 A.D.2d 889, 244 N.Y.S.2d 721 (2d Dep't 1963); Morabito v. Champion Swimming Pool Corp., 18 A.D.2d 706, 236 N.Y.S.2d 130 (2d Dep't 1962); Thrasher v. United States Liabilty Ins. Co., 45 Misc. 2d 681, 257 N.Y.S.2d 360 (Sup. Ct. New York County 1965); Irish Propane Corp. v. Burnwell Gas Distributors, Inc., 25 A.D.2d 616, 269 N.Y.S.2d 390 (4th Dep't 1966); Doran Lumber Corp. v. James Talcott, Inc., 20 A.D.2d 643, 247 N.Y.S.2d 380 (2d Dep't 1964); Shanty Hollow Corp. v. Poladian, 17

The court reasoned that "this is in keeping with the philosophy underlying the Civil Practice Law and Rules, that procedural rules should be primarily a means to the end of securing the just resolution of controversies on the merits and at a minimum of expense and delay and with a de-emphasis on nonprejudicial procedural defects."[177] Applying this principle to the facts of the case, the court held that the defect or irregularity was to be disregarded.

In *Baciagalupo v. Baciagalupo*,[178] the Supreme Court, Suffolk County, held that ten days' notice of motion by mail, instead of eleven days, was a mere irregularity and, absent prejudice, the motion could be considered. The court granted the motion for leave to serve a supplemental complaint. The court noted the repeated classification of a failure to give notice of the days specified as a jurisdictional defect which results in an inability of the court to consider the substance of a motion so served.[179] Further, the court noted that because the defect may be waived by opposition on the merits or even avoided altogether by the procedural device of an Order to Show Cause, the rationale regarding jurisdictional defect is not always clear.[180] The Court of Appeals has even "ratified the efficacy of a motion first raised orally to the extent of treating its ultimate disposition."[181] The court reasoned that:

N.Y.2d 536, 215 N.E.2d 168, 267 N.Y.S.2d 912 (1966); Baciagalup v. Baciagalup, 53 Misc. 2d 13, 277 N.Y.S.2d 760 (Sup. Ct. Suffolk County 1967)).

[177] *Id.*

[178] 53 Misc. 2d 13, 277 N.Y.S.2d 760 (Sup. Ct. Suffolk County 1967).

[179] *Id.* at 761 (citing Miot v. JoCarl Realty Corp., 19 A.D.2d 889, 244 N.Y.S.2d 721 (2d Dep't 1963); Doran Lumber Corp. v. James Talcott, Inc., 20 A.D.2d 643, 247 N.Y.S.2d 380 (2d Dep't 1964); Thrasher v. United States Liab. Ins. Co., 45 Misc. 2d 681, 257 N.Y.S.2d 360 (Sup. Ct. New York County 1965); Todd v. Gull Constr. Co., 22 A.D.2d 904, 255 N.Y.S.2d 452 (2d Dep't 1964); Shanty Hollow Corp., v. Poladian, 17 N.Y.2d 536, 215 N.E.2d 168, 257 N.Y.S.2d 912 (1966); N.Y. C.P.L.R. 2214 commentary at 82 (McKinney 1991).

[180] *Id.*

[181] *Id.*

> Although numerical authority is to the contrary, the lonesome, more recent highest precedent seems to indicate a defect in the notice of motion as to timeliness as something other than jurisdictional. This reasoning leads us to consider the defendant's objection here as addressed to a procedural irregularity, which may be disregarded absent prejudice to the defendant.[182]

WAIVER OF LACK OF TIMELY NOTICE OF MOTION

Some Appellate Courts have held that lack of jurisdiction may be waived if due to a failure to give timely notice of motion. For example, in *Miot v. Jocarl Realty Corp.*,[183] the court held that plaintiff's contention, that the original order dismissing the complaint was jurisdictionally void because it was based on insufficient notice of motion (7 instead of 8 days'), lacked validity because the contention was not raised in the court below and therefore could not be raised on appeal. Moreover, the court held that the plaintiff's application for an adjournment from July 10, 1961, the original motion's return date, to August 15, 1961, constituted a general appearance. As a consequence, the motion to vacate the orders of dismissal, which resulted in the order appealed from, was in fact a hearing on the merits.[184] Since the August 15, 1961 appearance constituted a general appearance, the plaintiff was deemed to have waived the defect arising out of the insufficient notice of the motion.[185]

In *Todd v. Gull Contracting Co., Inc.*,[186] the court held that "although the application for the severance was made on insufficient notice, the defect in service was waived by the appellants' opposition to the application on the merits."[187]

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[182] *Id.*

[183] 20 A.D.2d 664, 246 N.Y.S.2d 542 (2d Dep't 1964).

[184] *Id.*

[185] *Id.*

[186] 22 A.D.2d 904, 255 N.Y.S.2d 452 (2d Dep't 1964).

[187] *Id.* (citing Miot v. JoCarl Realty Corp., 20 A.D.2d 664, 246 N.Y.S.2d 542 (2d Dep't 1964); Application of Glasser, 180 Misc. 311, 41 N.Y.S.2d 733 (Sup. Ct. Kings County 1942)).

Capocia v. Brognano[188] involved an appeal of the lower court's order granting the defendant's motion "to disqualify the individual plaintiff from acting as the corporate plaintiff's counsel."[189] Plaintiff rejected defendant's motion papers arguing that the "answering affidavits were requested seven days prior to the return date and plaintiff had not been given the 17 days' notice required for such a request."[190] Thereafter, the plaintiff intentionally defaulted by failing to submit opposing papers."[191] The lower court concluded that it had jurisdiction since plaintiff had received 13 days' notice of motion, the minimum required for motions served by mail, and plaintiff had appeared on the motion by letter rejecting the papers.[192] The Appellate Division affirmed, finding that the lower court properly had jurisdiction, despite defendant's error in giving plaintiff only 13 days' notice of motion and demanding that answering affidavits be served 7 days prior to the return date.[193] The Appellate Division held that "since plaintiffs' notice of the motion was not less than the minimum time period authorized by CPLR 2103 (b) (2) and 2214 (b), the lower court correctly ruled that the defect was not jurisdictional."[194]

In *Bush v. Hayward,*[195] defendant's motion to dismiss a personal injury suit included a demand that responding papers be served at least 7 days before the November 18, 1988 return date.[196] In response, plaintiff submitted opposition papers on November 17, 1988. On the return date of the motion, the Supreme Court, Broome County refused to accept the plaintiff's responding papers because they were submitted late and the plaintiff offered no excuse for their tardiness.[197] The Supreme Court granted defendant's motion and plaintiff appealed from the amended order of that court. The Appellate Division rejected the plaintiff's

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[188] 132 A.D.2d 833, 517 N.Y.S.2d 622 (3d Dep't 1987).
[189] *Id.* at 833, 517 N.Y.S.2d at 838.
[190] *Id*
[191] *Id.* at 834, 517 N.Y.S.2d at 838.
[192] *Id.*
[193] *Id.* at 834, 517 N.Y.S.2d at 839.
[194] *Id.*
[195] 156 A.D.2d 899, 549 N.Y.S.2d 873 (3d Dep't 1989).
[196] *Id.* at 900, 549 N.Y.S.2d at 874.
[197] *Id.*

"contention that the Supreme Court lacked jurisdiction to consider the defendant's motion because the original notice of motion served by defendant did not contain a return date as required by CPLR 2214 (a)."[198] The court noted:

> "22 NYCRR 202.8 (b) provides that, when a case has not been assigned to a judge, a party may properly serve motion papers without a return date or the name of the assigned judge. After assignment to the judge, the court shall provide for appropriate notice to the parties of the name of the assigned judge and of the return date of the motion."[199]

The court concluded that the defendant complied with 22 NYCRR 202.8 (b), reasoning that "here, plaintiff was served with the motion papers by mail on October 19, 1988, and defendant then filed a copy of the moving papers, a request for judicial intervention and an affidavit of service with the Supreme Court."[200] The plaintiff admitted that she received notice of the return date as early as November 3, 1988.[201] The court found "that when plaintiff first received the motion papers on October 20, 1988, she received 29 days' notice of the motion, which was more than sufficient to meet any of the time limitations set forth in CPLR 2103 (b) (2) and 2214 (b)."[202] The court concluded that because the requisite notice was given, the lower court had jurisdiction to hear the motion.[203]

The Appellate Division also found that, due to the defendant fulfilling the filing deadline requirements, the lower court was warranted in refusing to accept the plaintiff's opposing papers which were served the day before the motion's due date.[204] The court noted that even if the defendant were not entitled to demand opposition papers at least seven days before the return date, he at

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[198] *Id.* at 900, 549 N.Y.S.2d at 875.
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.* (citing Burstin v. Public Serv. Mut. Ins. Co., 98 A.D.2d 928, 471 N.Y.S.2d 33 (3d Dep't 1983)).
[204] *Id.*

least was entitled to service of answering papers two days prior to the return date.[205] Additionally, the papers contained no valid explanation as to why they were late, and "plaintiff's proffered explanations were belied by the record and would not suffice."[206]

TIME FOR SERVICE OF ANSWERING AND REPLY PAPERS BY MAIL

The provision in CPLR 2103(B)(2), which states that five days must be added when a period of time prescribed by law is measured from the service of a paper, does not apply to the service of answering and reply affidavits by mail. The service of a notice of cross motion does not measure any time period. In *Ryan v. Town of Cortlandt*,[207] the Second Department rejected the plaintiff's contention that the defendant's reply papers, which were mailed two days prior to the adjourned return date, were not timely served and, as a result, that she was prevented from showing evidentiary facts sufficient to defeat the defendant's motion.[208] The court stated:

> CPLR 2214 only requires reply affidavits to be served at least one day before the motion is noticed to be heard when the moving papers are served 12 days before the return date and there is a demand for answering papers to be served 7 days prior to the return date. Although the additional five-day provision of CPLR 2103 (b) (2) applies to service of the notice of motion by mail, it is inapplicable to service of answering or reply papers * * *. Consequently, the defendant's reply papers were timely served."[209]

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[205] *Id.* at 901, 549 N.Y.S.2d at 875

[206] *Id.* (citing Henderson v. Stilwell, 116 A.D.2d 861, 862, 498 N.Y.S.2d 183 (3d Dep't 1986); Dominski v. Firestone Tire & Rubber Co., 92 A.D.2d 704, 705, 460 N.Y.S.2d 392 (3d Dep't 1983)).

[207] 134 A.D.2d 420, 521 N.Y.S.2d 43 (2d Dep't 1987).

[208] *Id.* at 421, 521 N.Y.S.2d at 44.

[209] *Id.*

TIME FOR SERVICE OF NOTICE OF CROSS MOTION BY MAIL

CPLR 2215 requires that at least a three day notice of a cross motion be given. However, it is unsettled whether eight days' notice of cross motion must be given when a notice of cross motion is served by mail.

The Second Department requires that eight days' notice be given when a notice of cross motion is served by mail. In *Perez v. Perez*,[210] an action for a divorce, the husband appealed an order of the Supreme Court which granted the plaintiff wife's cross motion for further discovery with respect to his finances and for a *pendente lite* award of expert appraiser fees. The Second Department affirmed the order, noting that the plaintiff's notice of cross motion was served by mail four days before the return date of the defendant's motion, rather than the eight days required under CPLR 2215.[211] The court further commented that "[a]lthough the notice of cross motion was not timely, the Supreme Court considered the cross motion and supporting papers pursuant to the discretionary power conferred upon it by CPLR 2214 (c)," and held that: "[u]nder the circumstances of this case, and in view of the lack of prejudice to the defendant, the Supreme Court's actions constituted a proper exercise of discretion (***)".[212] In *Vanek v. Mercy Hospital*,[213] the Second Department held that the trial court "lacked jurisdiction to entertain the plaintiff's cross motion based on his failure to comply with the notice provisions of CPLR 2215 and 2103 ***."[214] However, the court did not indicate in the decision if the service was made by mail.[215]

Therefore it appears that, in the Second Department, the failure to timely serve a notice of cross motion is jurisdictional. The other departments have not held that an additional 5 days must be added where service of the notice of cross motion is by mail. Requiring

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[210] 131 A.D.2d 451, 516 N.Y.S.2d 236 (2d Dep't 1987).
[211] *Id.* at 451, 516 N.Y.S.2d at 237.
[212] *Id.*
[213] 135 A.D.2d 707, 522 N.Y.S.2d 607 (2d Dep't 1987).
[214] *Id.* at 707-08, 522 N.Y.S.2d at 607.
[215] *Id.*

at least eight days' service of a notice of cross motion before the return date, where service is by mail, is not in accord with the accepted method of practice in most courts in this state and is illogical, as no period of time is measured from the service of a notice of cross motion.

ORAL MOTIONS

There is no *per se* rule against making an oral motion. However, motions are governed by the notice requirements of CPLR 2214 and the Uniform Rules. A movant must present affidavits or other competent evidence in support of his factual assertions and the court rules require that a specific form notice of motion be used.[216] In Matter of *Shanty Hollow Corp. v. Poladian*,[217] the court considered an oral motion to dismiss and affidavits in support of the motion, although no notice of motion was served, pursuant to the discretion conferred upon it by CPLR 2214 (c). The order of The Special Term recited "that the application to dismiss this proceeding made on behalf of the respondents [the appellants in this court] be and the same hereby is denied".[218] The petitioner believed that the motion was not brought by notice of motion, that CPLR 2214 (b) requires that papers be served at least eight days before the notice date of the motion, and that CPLR 2214 (c) provides that only papers served accordingly will be accepted unless the court finds good cause to do otherwise. The Appellate Division found "on August 14, the return day [of the motion], the appellant submitted an affidavit by the person served [stating] that she on the same day delivered the papers to the chairman of the board of assessors, an affidavit of the town clerk that she was never served with any papers and an affidavit of the chairman of the board of assessors that the person served was his personal employee and not an officer or employee of the town."[219] The case was held for an affidavit on behalf of the petitioner, which was

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[216] *See also* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.7 (1998).
[217] 23 A.D.2d 132, 259 N.Y.S.2d 541 (3d Dep't 1965).
[218] *Id.* at 133, 259 N.Y.S.2d at 543.
[219] *Id.* at 134, 259 N.Y.S.2d at 543.

received by the court.[220] The order of Special Term recited the reading and filing of all four affidavits. The Appellate Division found that "although no notice of motion was served, the [Supreme] court considered the oral motion and also the affidavits in support of the motion in pursuance of the discretion conferred upon it by CPLR 2214 (c)"[221] It held that such consideration was a proper exercise of discretion. Notably, there was no objection in the Supreme Court to the procedure followed and the affidavits were part of the record on appeal.[222]

In *Kaiser v. J & S Realty*,[223] the plaintiffs commenced the action on April 15, 1988 by the service of a summons and verified complaint upon the Secretary of State pursuant to Business Corporation Law 306. On June 17, 1988, the court granted in plaintiff's favor. Subsequently, the defendant moved orally to vacate the default judgment arguing he was never served with the summons and complaint. The Supreme Court decided the motion to vacate the default judgment and the plaintiffs appealed.[224] The Appellate Division reversed. The court held that even though there is not a per se rule disallowing oral motions, affidavits or other relevant evidence must be presented by the movant. There was no evidentiary showing made by the defendant in this case. Therefore, the Appellate Division could not uphold the court's determination.

CHARTING YOUR OWN COURSE: WAIVER OF PROCEDURAL RULES

As the cases demonstrate, procedural irregularities are overlooked where the parties chart their own course of litigation. In *Osterling v. Osterling*,[225] both parties asked the trial court to determine the meaning of part of a stipulation entered on the record, which disposed their marital property, in plaintiff's action

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[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] 173 A.D.2d 920, 569 N.Y.S.2d 787 (3d Dep't 1991)
[224] *Id.*
[225] 126 A.D.2d 965, 511 N.Y.S.2d 989 (4th Dep't 1987); *See also* Sim v. Sim, 241 A.D.2d 660, 659 N.Y.S.2d 574 (3d Dep't 1998).

for divorce. Plaintiff's motion to vacate the order determining the request, because of *inter alia* procedural irregularities, was denied.[226] The Appellate Division held that the trial court properly denied plaintiff's motion because, although neither party served motion papers, the original order stated that the review undertaken by the court was requested by the parties.[227] The court reasoned that since counsel for both parties voluntarily appeared and argued, it was within the court's discretionary power under CPLR 2214 (c) to resolve the issues presented, and plaintiff was deemed to have waived any claim of error arising from the informal nature of the proceedings.[228]

COURTS INDIVIDUAL MOTION RULES PERMISSION TO MAKE MOTION

Soon after the Individual Assignment System was adopted, many judges began establishing their own rules for practice in their parts.[229] It was common for each judge to disseminate his or her own "information sheet" containing the rules of practice and procedure in that courtroom.[230] While well-intentioned, this created chaos and confusion due to the fact that each judge had his own motion day or time, and many judges required oral argument of motions. Moreover, before making a motion, some judges went so far as to require attorneys to obtain the permission of the Court.[231] This practice has been virtually eliminated by Appellate intervention.

In *Grisi v. Shainswit*,[232] the "Information Sheet" made available to counsel by the Justice in the IAS Part X provided that motions may not be made without a pre-motion conference. At a pretrial conference the defendants moved orally, pursuant to CPLR

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[226] 126 A.D.2d 965, 966, 511 N.Y.S.2d 989, 990 (4th Dep't 1987).
[227] *Id.* at 966, 511 N.Y.S.2d at 990.
[228] *Id.*
[229] N.Y. C.P.L.R. 2211, commentary at 35-45 (McKinney 1991); *see also* N.Y. C.P.L.R. 2211, commentary at 50-65 (McKinney 1991).
[230] *Id.*
[231] N.Y. C.P.L.R. 2211, commentary at 36-37 (McKinney 1991).
[232] 119 A.D.2d 418, 507 N.Y.S.2d 155 (1st Dep't 1986). This was a personal injury action arising out of an automobile collision.

§ 3043(b), for the deposition of the plaintiff and further physical examination.[233] The defendant's motion was denied.[234] On July 1, 1986, the defendants submitted a proposed order which reflected the denial, along with notice of settlement, but no further action was taken on the proposed order.[235] Thereafter, on July 3, 1986, the defendants "served a request for a premotion conference, seeking permission to move to strike the note of issue and statement of readiness on the ground that the action was not ready for trial."[236] They grounded this request their entitlement to another physical examination and deposition of the plaintiff, and to their right to receive duly executed authorizations for the release of his employment and tax records.[237] In response to this request, a conference was scheduled for July 14, 1986, and a preliminary conference order was issued which directed the plaintiff to provide the defendants with the authorizations.[238] Defendants requests for a new deposition and a second physical examination were denied.[239] However, the IAS judge refused to enter a written order to that effect, nor would he permit the court reporter to record the ruling.[240] The administrative judge was prevailed upon to compel the court to issue a written order of the denial, or in lieu thereof, to permit a transcription of the denial, but these requests also failed.[241] Defendants, relying on New York law,[242] commenced a mandamus

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[233] *Id* at 419, 507 N.Y.S.2d at 157.
[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] *Id.* at 420, 507 N.Y.S.2d at 157.
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] *Id.* (citing N.Y. C.P.L.R. 2219 (McKinney 1991 & Supp. 1998); Le Glaire v. New York Life Ins. Co., 5 A.D.2d 171, 170 N.Y.S.2d 763 (1st Dep't 1958); *See* N.Y. C.P.L.R. 2219, as amended by Chapter 38 of the Laws of 1996, now provides that, except in limited circumstances, an order or ruling made by a judge must be reduced to writing or otherwise recorded upon request of a party. It does not matter if the order was made sua sponte, or upon oral or written application. *See* N.Y. C.P.L.R. 2219(a) (McKinney Supp. 1998).

proceeding to compel the production of the court's denial in some form.[243]

The Appellate Division noted:

> [there was a] growing tendency in the Supreme Court civil trial parts to condition the making of a written motion on prior judicial approval. In certain instances, a refusal to allow the motion is accompanied by an express, but oral, denial of the motion. In others, the request is simply refused, effectively resulting in a denial of the motion. In either event, there is no record available for appellate review. In some instances, as here, there is not even a written order.[244]

The court stated its difficulty with this practice; "it tends to frustrate a litigant's statutorily provided right of appeal from an intermediate order."[245] While emphasizing that courts have the inherent power and responsibility to control their calendars and to supervise the course of litigation before them, it recognized that "fundamental rights to which a litigant is entitled, including the opportunity for appellate review of certain orders, cannot be ignored, no matter how pressing the need for the expedition of cases."[246]

> A party cannot be deprived of his right to be heard on a substantive matter not involving a trial ruling by the simple expedient of denying him the right to make a written motion or a record, thereby foreclosing the opportunity for appellate review. At the very least, in instances where the court, in its discretion, refuses to entertain a written motion, the denial of which would be otherwise appealable had the motion been made in writing, the putative moving party should be afforded the opportunity to

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[243] 119 A.D.2d 418, 420, 507 N.Y.S.2d 155, 157 (1st Dep't 1986).
[244] *Id.* at 421, 507 N.Y.S.2d at 158.
[245] *Id.*
[246] *Id.*

> make a record reflecting the respective positions of the parties on the particular issue and the court's reasoning and decision, as well as a recitation of the facts and documentation that were considered in the court's determination. We note that the Uniform Civil Rules for the Supreme Court and the County Court make provision for the transcription of the court's directions at a preliminary conference and expressly state that the transcript "shall have the force and effect of an order of the court" (22 NYCRR 202.12 [e]). So that there will be no question as to the appealability of such disposition, however, we would also require that where a party presents a written order embodying the court's determination spread on the transcript that such order be signed.[247]

The court noted in *Everitt v. Health Maintenance Center*[248] that a precalendar conference order not made on notice of motion and without supporting papers was not appealable, and suggested that in such cases appellate review could be had, if otherwise available, if the party adversely affected by the order formally moved to vacate or modify it. The determination of that motion would then be appealable. It now rejected such a procedure as wasteful in the Individual Assignment System.[249]

The *Everitt* court cautioned that its decision should not be construed as encouraging the practice of conditioning making written motions upon prior judicial consent.[250] It believed that the determination was best left to the discretion of the particular trial court under the present system.[251] However, it required that when an oral request to make a formal motion is refused or the motion is considered on the merits, a record must be made.[252]

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[247] *Id.* at 422, 507 N.Y.S.2d at 158-59.
[248] 86 A.D.2d 224, 449 N.Y.S.2d 713 (1st Dep't 1982).
[249] *Id.* at 227, 449 N.Y.S.2d at 715.
[250] *Id.* at 226, 449 N.Y.S.2d at 714.
[251] *Id.*
[252] *Id.*

The Appellate Division, First Department subsequently held that, as a matter of law, a court cannot refuse to entertain a motion.[253] Such a direction is inconsistent with the provisions of the CPLR, which gives the parties an opportunity to make a record, together with the court's reasoning and decision.[254] Here, it was error for the IAS Justice to schedule a conference, adjourn the motion without a date, and direct that no motion for summary judgment may be made until discovery was completed.[255]

In *Matter of Hochberg v. Davis*,[256] a CPLR article 78 proceeding, the Appellate Division directed the respondent Justice to rescind his motion upon calendar rules conditioning the making of written motions on prior judicial consent. The First Department cautioned the courts to ensure that the fundamental rights to which a litigant is entitled are not ignored, "no matter how pressing the need for the expedition of cases."[257] The court stated that the practice of conditioning the making of motions upon prior judicial approval may prevent a party from exercising the option to move for the relief to which he or she may be entitled, and may also run afoul of certain statutory provisions such as CPLR 3212(a), which authorizes any party to move for summary judgment in any action after issue has been joined.[258] It also noted that, to the extent that the "Information Sheets" of the various parts of the Supreme Court are viewed or enforced as "rules," they are not in compliance with 22 NYCRR 202.1 (c) because they were not filed with the Chief Administrator of the Courts, in accordance with 22 NYCRR 9.1.[259]

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[253] Goldheart International Ltd. v. Vulcan Const. Corp, 124 A.D.2d 507, 508 N.Y.S.2d 182 (1st Dep't 1986).
[254] *Id.* at 508, 508 N.Y.S.2d at 183.
[255] *Id.*
[256] 171 A.D.2d 192, 575 N.Y.S.2d 311 (1st Dep't 1991).
[257] *Id.* at 192, 575 N.Y.S.2d at 311-12.
[258] *Id.*
[259] *Id.*

SHARP PRACTICE

Attorneys can be sanctioned for sharp motion practice. In *Rosenman Colin Freund Lewis & Cohen v. Edelman,*[260] a $500 sanction was imposed upon counsel pursuant to 22 NYCRR 130-1.1 (c) (2) for violating the "norms" of motion practice. Counsel had served a notice of motion returnable in the Appellate Division, accompanied by plainly deficient supporting affidavits, stating that additional material would be provided in the future.[261] "The affirmation in support of the motion asserted without pretense of argument that the court's affirmance had the effect of depriving his clients of their constitutional right to counsel, and was based on various incorrect findings of fact and conclusions of law."[262] It then concluded with the statement that "a further more detailed affirmation will be furnished in support of this motion."[263] The motion was served on November 23 and was returnable on December 27, 1990, five weeks after counsel served it.[264] On December 20, at 7:45 P.M., after the attorney completed her opposition papers, (which she instructed her office were to be served the next morning), a 28-page "Supplementary Supporting Affirmation" was served upon her.[265] On the next day, December 21, several hours after he had been served by hand with the opposition, the attorney advised his adversary that he had requested and obtained an adjournment of the motion from December 27 to January 7.[266] Additionally, on December 21, the attorney served a 28-page "Corrected Supplementary Supporting Affirmation." This affirmation, however, did not indicate what was being corrected in the previous affirmation.[267]

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[260] 165 A.D.2d 533, 568 N.Y.S.2d 590 (1st Dep't 1991). This case was brought to recover unpaid legal fees from a former client and two partnerships, with which the plaintiff was affiliated.

[261] *Id.* at 534, 568 N.Y.S.2d at 591.

[262] *Id.*

[263] *Id.*

[264] *Id.*

[265] *Id.* at 535, 568 N.Y.S.2d at 591.

[266] *Id.*

[267] *Id.*

The Appellate Division stated that it could not overlook the attorney's ignorance of well-understood norms of motion practice, which require the moving party to set forth whatever it is he has to say in papers accompanying the notice of motion.[268] Here, the affirmation in support of the motion was plainly deficient.[269] Realizing as much, he set the return date five weeks ahead and promised to furnish additional supporting papers in the future.[270] This was sanctionable.[271]

THE COURT MAY NOT GRANT SUA SPONTE RELIEF

A court may not grant *sua sponte* relief which substantially prejudices a party on the court's own motion, unless expressly authorized to do so by statute or other authority.[272] Furthermore, a court may not grant *sua sponte* relief upon an *ex parte* communication. In *Coleman v. Coleman,*[273] the court originally awarded plaintiff custody of the youngest child and exclusive possession of the marital residence, but denied interim financial relief. However, based on an *ex parte* communication by the plaintiff, the court *sua sponte* substituted an interim award of child

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[268] *Id.* at 536, 568 N.Y.S.2d at 592.

[269] *Id.*

[270] *Id.*

[271] *Id.*

[272] There are several provisions of the C.P.L.R. which expressly authorize a court to grant relief upon its own initiative. N.Y. C.P.L.R. 1202(a) (McKinney 1997) provides in pertinent part: "the court in which an action is triable may appoint a guardian ad litem at any stage in the action upon its own initiative. . . ." *Id. See* N.Y. C.P.L.R. 1342 (McKinney 1997). This section provides: "upon motion of any party or upon its own initiative, the court which appointed a receiver may remove him or her at any time." *Id.* N.Y. C.P.L.R. 4212 (McKinney 1992) provides in pertinent part: "upon the motion of any party provided in rule 4015 or on its own initiative, the court may submit any issue of fact required to be decided by the court to an advisory jury or, upon a showing of some exceptional condition requiring it or in matters of account, to a referee to report." *Id. See also* N.Y. C.P.L.R. 4404(a) (McKinney 1992), which provides: " after a trial of a cause of action or issue triable of right by a jury upon the motion of any party or on its own initiative, ..." *See also* N.Y. C.P.L.R. 7805 (McKinney 1994), which provides: "[o]n the motion of any party or on its own initiative, the court may stay further proceeding . . . ." *Id.*

[273] 61 A.D.2d 757, 402 N.Y.S.2d 6 (1st Dep't 1978).

support in the amount of $75 per week. The Appellate Division held that this procedure was improper, citing Judiciary Law, Art 15; The Code of Professional Responsibility, EC 7-35; DR 7-110, subd [B].[274] In *Leibowits v. Leibowits*,[275] the husband sought an order directing his wife to account for, and turn over to him, the contents of a safe deposit box which was under her sole control. The box contained clearly separate property as well as securities, property inherited by the husband from his mother, and marital assets.[276] The trial court ordered the wife to account for the marital assets in the deposit box and to give her husband his inherited assets, but denied the motion insofar as it related to the marital property, provided that the wife did not dispose of the property during the litigation.[277] Although the wife did not move for affirmative relief, the lower court *sua sponte* issued an order restraining the husband from disposing of any marital property within his control.[278]

The Second Department held that the trial court erred in its *sua sponte* restraint of the husband's disposition of marital property.[279] The court stated that "due process requires written notice from the moving spouse that he or she seeks possession of the marital assets

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[274] *Id.* at 757, 402 N.Y.S.2d 6, 7. (citing N.Y. JUD. LAW DR 7-110(B) (McKinney 1992), which provides in pertinent part:

> In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the case with a judge or an official before whom the proceeding is pending, except: 1. In the course of official proceedings in the case. 2. In writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to an adverse party who is not represented by a lawyer. 3. Orally upon adequate notice to opposing counsel or to an adverse party who is not represented by a lawyer. 4. As otherwise authorized by law, or by section A(4) under Canon 3 of the Code of Judicial Conduct.

Id.

[275] 93 A.D.2d 535, 462 N.Y.S.2d 469 (2d Dep't 1983).

[276] *Id.* at 536, 462 N.Y.S.2d at 470.

[277] *Id.*

[278] *Id.*

[279] *Id.* at 536, 462 N.Y.S.2d at 470-71.

or a restraint on their disposition."[280] Without such notice, the court may not act.[281]

In *Brody v. Brody,*[282] a matrimonial action, plaintiff wife appealed from an order of the Supreme Court which *sua sponte* restrained her from transferring any marital property, except in the ordinary course of business. The Appellate Division deleted the provision restraining plaintiff from transferring marital property.[283] The court held that, "with regard to Special Term's restraint of plaintiff's transfer of marital assets, such *sua sponte* stay was in violation of plaintiff's due process rights, as she was never notified that such an order was under consideration."[284]

In *De Pan v. First Natl. Bank,*[285] the Appellate Court held that, "in the absence of a CPLR 3212 motion for summary relief by defendant bank or third-party defendant, neither Special Term nor this court can, *sua sponte*, grant such relief."[286] The third-party defendant moved, pursuant to CPLR 3211 to dismiss the complaint, but the motion was never converted to a summary judgment motion.[287] Special Term stated, "[a] court may grant undemanded relief only if there is no substantial prejudice to the adverse party.[288]

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[280] *Id.*

[281] *Id.* at 538, 462 N.Y.S.2d at 471.

[282] 98 A.D.2d 702, 469 N.Y.S.2d 99 (2d Dep't 1983).

[283] *Id.* at 702, 469 N.Y.S.2d at 100.

[284] *Id.* (citing Liebowits v. Liebowits, 93 A.D.2d 535, 462 N.Y.S.2d 469 (2d Dep't 1983)).

[285] 98 A.D.2d 885, 470 N.Y.S.2d 869 (3d Dep't 1983).

[286] *Id.* at 886, 470 N.Y.S.2d at 869 (citing Fulton Inc. v. Trustees of Village of Farmingdale, 72 A.D.2d 813, 814, 421 N.Y.S.2d 907 (2d Dep't 1979)).

[287] 98 A.D.2d 885, 886, 470 N.Y.S.2d 869 (3d Dep't 1983).

[288] *Id.* (citing Ressis v. Mactye, 98 A.D.2d 836, 470 N.Y.S.2d 502 (3d Dep't 1983)). In *Ressis*, a husband and wife involved in a matrimonial action agreed to have separate examinations by a mental health professional to determine custody and visitation rights over their daughter. The daughter was also evaluated. When the defendant issued the report the husband was denied visitation rights. The husband then caused a summons and complaint to be served on the defendant alleging eight separate causes of action, several of which were unknown to the law.

In *Ressis v. Mactye*,[289] Special Term granted defendants' motion to strike the plaintiff's interrogatories and, *sua sponte*, granted summary judgment which dismissed the complaint for failing to state a cause of action. The plaintiff then appealed. The Appellate Division held that there must be a reversal of the Special Term because neither party moved for summary relief.[290] "CPLR 3212[a] clearly states that, [a]ny party may move for summary judgment in any action, after issue has been joined."[291] "Accordingly, Special Term was without authority to grant *sua sponte* relief under CPLR 3212."[292] Furthermore, the court lacked the authority to grant summary judgment pursuant to CPLR 3211[c], since neither party had made such a motion.[293] The court rejected defendants' contention that it could grant *sua sponte* summary relief under CPLR 3017[a], holding that "[a] court may grant undemanded relief only if there is no substantial prejudice to the adverse party."[294]

In *W.I.L.D. W.A.T.E.R.S., Ltd. v. Martinez*,[295] the plaintiff commenced an action for specific performance, related injunctive relief, and damages. By Order to Show Cause, the plaintiff moved to enjoin defendants from tampering with the premises. A temporary restraining order was granted by the court and served on defendants by May 9. The return date was set for May 13. Appellant's brief represented that the opposition papers were submitted on the return date [to the court and to plaintiff's counsel]

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[289] 98 A.D.2d 836, 470 N.Y.S.2d 502 (3d Dep't 1983).

[290] *Id.* at 837, 470 N.Y.S.2d at 504.

[291] *Id.* at 837, 470 N.Y.S.2d at 503-04.

[292] *Id.* at 837, 470 N.Y.S.2d at 504.

[293] *Id.*

[294] *Id.*

[295] 148 A.D.2d 847, 539 N.Y.S.2d 119 (3d Dep't 1989). In W.I.L.D. W.A.T.E.R.S., the plaintiff had rented the premises from the defendant for three months. The lease gave the plaintiff the first right to lease or purchase the property within one year. The plaintiff entered into the lease on June 15, 1987. On April 2, 1988, the defendant contracted to sell the premises to Mary V. Nelson. The plaintiff asserts he was not notified until April 11 or 12, at which time the president of the company expressed an interest in purchasing the property. Mr. Azaert, the president of W.I.L.D. W.A.T.E.R.S., alleges that he was not notified that Nelson purchased the property until after the transaction was closed on April 22.

directly before the hearing, but they were not allowed due to their untimeliness. The motion was treated as unopposed and the court granted the injunction, enjoined appellant from tampering with the property, granted possession to plaintiff, allowed plaintiff's rent to be put into an escrow account, awarded plaintiff an option to buy the property and would have the monies of the sale placed in a constructive trust for the plaintiff's benefit.[296] Appellant Nelson appealed the Supreme Court's ruling and the Appellate Division reversed.[297] The court noted that "since it was not demanded in the Order to Show Cause and yet substantially prejudiced Nelson, the relief specified in the third, fourth and fifth ordering paragraphs was indefensibly gratuitous."[298]

FORM OF ORDER

The Civil Practice Law and Rules dictate the form of orders, it states an order must be in writing[299] and be the same in form whether made by a court or a judge out of court." "An order determining a motion which is made upon supporting papers, must be signed or initialed by the judge who made it, with the judge's signature or initials by the judge who made it, state the court of which he is a judge and the place and date of the signature, recite the papers used on the motion, and give the determination or direction in such detail as the judge deems proper."[300] "An order of an appellate court must be signed by a judge of that court. However, upon written authorization by the presiding judge, it may be signed by the clerk of the court or, in his absence or disability, by a deputy clerk.[301]

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[296] *Id.*

[297] *Id.* at 849, 539 N.Y.S.2d at 121.

[298] *Id.* (citing De Pan v. First Natl. Bank, 98 A.D.2d 885, 886, 470 N.Y.S.2d 869 (3d Dep't 1983)).

[299] N.Y. C.P.L.R. 2219 (McKinney 1991 & Supp. 1998). Le Glaire v. New York Life Ins. Co., 5 A.D.2d 171, 170 N.Y.S.2d 763 (1st Dep't 1958).

[300] N.Y. C.P.L.R. 2219(a) (McKinney Supp. 1998).

[301] N.Y. C.P.L.R. 2219(b) (McKinney 1991). This section provides in pertinent part: "An order of an appellate court shall be signed by a judge thereof except that, upon written authorization by the presiding judge, it may be signed by the clerk of the court or, in his absence or disability by a deputy clerk." *Id.*

SETTLEMENT AND ABANDONMENT OF ORDER

When settlement of an order is directed by the court, a copy of the proposed order, with notice of settlement, must be served on all parties.[302] "The notice is returnable at the office of the clerk of the court in which the order or judgment was granted, or before the judge if the court has so directed or if the clerk is unavailable shall be served on all parties," either by personal service or by mail.[303] Where personal service of the proposed order with notice of settlement is made, it must not be less than 5 days before the date of settlement.[304] Where service is by mail, it must be mailed not less than 10 days before the date of settlement.[305] Proposed counter-orders or judgments shall be made returnable on the same date and at the same place, and shall be served on all parties. If such service is made in person, it shall be made not less than two days, or if made by mail, not less than seven days , before the date of settlement.[306]

Proposed orders or judgments, with proof of service on all parties where the order is directed to be settled or submitted on notice, must be submitted for signature, unless otherwise directed by the court, within sixty days after the signing and filing of the

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[302] N. Y. COMP. CODES R. & REGS. tit. 202.48, § 22 (1998) provides in pertinent part:

> submission of orders, judgments and decrees for signature. (c)(1) when settlement of an order or judgment is directed by the court, a copy of the proposed order or judgment with notice of settlement, returnable at the office of the clerk of the court in which the order or judgment was granted, or before the judge if the court has so directed or if the clerk is unavailable, shall be served on all parties either: (I) by personal service not less than five days before the date of settlement: or (ii) by mail not less than 10 days before the date of settlement.

Id.

[303] *Id.* at 202.48 (c) (1)(I).

[304] *Id.* at 202.48 (c)(1)(ii).

[305] *Id.* at 202.48 (c)(2).

[306] *Id.* at 202.48 (c)(2).

decision directing that the order be settled or submitted.[307] An order must be submitted within sixty days after the signing and filing of the decision that directs it be settled or submitted. Orders which are not submitted within the sixty day period will be deemed abandoned, unless good cause is shown for failure to do so.[308] When a party fails to adhere to the sixty day period, it will not be sufficient to show "good cause" that the adverse party was not prejudiced by such actions.[309] In *Tuller v. Tuller*,[310] the Appellate Division affirmed an order of the Supreme Court which granted the husband's motion to deem the court's February 1987 decision, which granted the wife a divorce, support, maintenance and equitable distribution, abandoned by her because she did not submit a judgment of divorce for signature until October 1988. The court held that "demonstrating lack of prejudice to the other side does not constitute good cause."[311]

In *Feuerstein v. Feuerstein*,[312] the Appellate Division reversed an Order and Judgment of the Supreme Court that was signed after being submitted more than 60 days after the motion was granted. The Appellate Division held that "a prevailing party must provide the court with a proposed order or judgment for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision directing that the order be settled or submitted."[313] The courts will consider a party's failure to comply with that rule an abandonment, unless that party shows good cause for the delay as per 22 NYCRR 202.48(b).[314] In this case, "Special Term's decision directing the submission of an order was dated May 10, 1989, and a proposed order was apparently not submitted until sometime in October 1989."[315] Since the "plaintiff failed to submit the proposed order within 60 days of the trial court's

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[307] *Id.* at 202.48 (a).
[308] N.Y. COMP. CODES R. & REGS. tit. 202.48 (b) § 22 (1998).
[309] *Id.* at 202.48.
[310] 162 A.D.2d 801, 557 N.Y.S.2d 714 (3d Dep't 1990).
[311] *Id.*
[312] 167 A.D.2d 907, 562 N.Y.S.2d 276 (4th Dep't 1990).
[313] *Id.* at 908, 562 N.Y.S.2d at 276.
[314] *Id.*
[315] *Id.* at 908, 562 N.Y.S.2d at 277.

decision, and failed to show good cause for the delay," the motion was found to be abandoned."[316]

In *Levine v. Levine*,[317] the Supreme Court awarded the wife counsel fees of $7,500 on July 25, 1989, in a memorandum decision directing the wife's attorney to "settle order." "However, no order was prepared and submitted by the plaintiff's attorney until September 28, 1989, three days after the expiration of the 60 day period in which the order should have been submitted."[318] The husband's attorney argued that the order should not be signed. Counsel for the husband contended that, pursuant to 22 NYCRR 202.48, the wife's motion for counsel fees should be dismissed as abandoned.[319] On October 10, 1989, the Supreme Court ruled that "no order having been received within 60 days from the July 25, 1989 decision of this court, the application for attorney's fees is deemed abandoned, unless a proper order is timely submitted with a satisfactory explanation for the delay."[320] The wife's attorney submitted a "supplemental affirmation," in which he explained that his repeated inquiries at the clerk's office failed to disclose, prior to September 1989, that the court had decided the motion.[321] "As soon as counsel learned of the court's decision, an order was submitted for signature."[322] "The court accepted this explanation and signed the wife's proposed order."[323] The Appellate Division held that the Supreme Court properly excused the wife's three day delay in tendering her proposed order for signature.[324]

In *Funk v. Barry*,[325] the Court of Appeals held that the sixty day requirement in 22 NYCRR 202.48(a), for the submission of order and judgments after the court has determined a motion or action, does not apply unless the decision explicitly calls for the submission or settlement of an order or judgment. The Court

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[316] *Id.*
[317] 179 A.D.2d 625, 579 N.Y.S.2d 103 (2d Dep't 1992).
[318] *Id.* at 625, 579 N.Y.S.2d at 104.
[319] *Id.*
[320] *Id.*
[321] *Id.*
[322] *Id.*
[323] *Id.*
[324] *Id.*
[325] 89 N.Y.2d 364, 675 N.E.2d 1199, 653 N.Y.S.2d247 (1996).

pointed out that where the decision states "submit order," the procedure is for the winner to prepare and submit the order or judgment to the court without notice to the loser, and then serve it on the loser after it is signed and entered.[326] Where the decision provides "settle order," the procedure in 22 NYCRR 202.48(c) must be complied with.[327] In a "settle order" the winner must prepare the proposed judgment and serve it with a notice of settlement on the loser prior to submission to the court.[328]

ENTRY AND FILING OF ORDER - METHOD OF SERVICE OF ORDER

An order determining a motion must be entered and filed in the office of the clerk of the court where the action is triable.[329] All papers used on the motion and any written opinion or memorandum must also be filed with that clerk, unless the order dispenses with the filing.[330] If a party fails to file any papers required to be filed, the order may be vacated as irregular, with costs.[331]

NECESSITY FOR SERVICE OF THE ORDER - NOTICE OF ENTRY

A party must serve a copy of the order, with notice of entry, on the other party's attorney(s) (and on the other party, if directed to do so in the order).[332] Unless an order directs otherwise, it may be

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[326] *Id.* at 365, 675 N.E.2d at 1200, 653 N.Y.S.2d at 248.
[327] *Id.* at 366, 675 N.E.2d at 1200, 653 N.Y.S.2d at 248.
[328] *Id.*
[329] N.Y. C.P.L.R. 2220(a) (McKinney 1991)
[330] *Id.*
[331] N.Y. C.P.L.R. 2220 (a) (McKinney 1991)
[332] N.Y. C.P.L.R. 5513(b) (McKinney 1995 & Supp. 1998) provides in pertinent part:

> The time within which a motion for permission to appeal must be made shall be computed from the date of service upon the party seeking permission of a copy of the judgment or order to be appealed from and within notice of entry, or, where permission has already been denied by order of the court whose determination is sought to be reviewed, of a copy of

served by mail, or by personal delivery, to the office of the other attorney(s).[333] A notice of entry indicates the date that the order was filed and recorded in the County Clerk's office.[334]

Serving a copy of the order with notice of entry begins the period in which the other party has an opportunity to appeal.[335] Unless the order is served upon the other party's attorney,[336] the time for compliance will not begin.

In *Bianca v. Frank*,[337] the issue before the Court of Appeals was whether petitioner's attorney was required to be served with a copy of the determination of the Police Commissioner to commence the statute of limitations of the Nassau County Administrative Code.[338] The appellants argued that since the section explicitly stated that the 30 days is to commence "from the service of a notice of such determination upon the member," no requirement to serve the member's attorney may be implied or imposed as a prerequisite for the running of the time limitation.[339] The Court of Appeals rejected this argument because it contravenes basic procedural dictates and the fundamental policy considerations which require that, once counsel has appeared in a matter, the statute of limitations cannot begin to run unless that counsel is served with the determination of

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> such order and written notice of its entry, except that when such party has served a copy of such judgment or order and written notice of entry, the time shall be computed from the date of such service. A motion for permission to appeal must be made within thirty days.

[333] *Id.*

[334] *Id.*

[335] *Id.*

[336] *Id.* at 167.

[337] 43 N.Y.2d 168, 371 N.E.2d 792, 401 N.Y.S.2d 29 (1977).

[338] *Id.* NASSAU COUNTY, N.Y., ADMIN. CODE ch. 436, § 8-13.0 (d) (1948) The section provides:

> A petition to review a determination by the commissioner to fine, suspend, dismiss or otherwise discipline a member of the police force shall not be granted after the expiration of thirty days from the service of a notice of such determination upon the member of the force so fined, suspended, dismissed or otherwise disciplined.

Id.

[339] *Id.* at 173, 372 N.E.2d at 793, 401 N.Y.S.2d at 31.

the order or judgment sought to be reviewed.[340] Once a party chooses to be represented by counsel in an action or proceeding, the attorney is deemed to act as his agent in all respects relevant to the proceeding. Any documents, particularly those purporting to have a legal effect upon the proceeding, should be served on the attorney. This is considered "the traditional and accepted practice which has been all but universally codified."[341] While a legislative enactment can specifically exclude the necessity of serving counsel, any intention to depart from the standard practice "must be clearly established and stated in unmistakable terms."[342] Short of that, any general requirement that notice must be served upon the party must be read in the accepted sense which requires that notice be served upon the party's attorney.

In *Raes Pharmacy, Inc. v. Perales*,[343] the Appellate Division noted that there was no statutory requirement that all court orders must be served in order to be effective. The court held that it is axiomatic that, before an order may be enforced, a notice of the order must be given to the party against whom it is sought. It is a long-established general principle that service of an order on an adverse party is necessary to give it validity.[344] The publication of the court's decision in the *New York Law Journal* is insufficient to give the necessary notice.[345] New York Executive Law provides for notice to attorneys at law by state bodies or officers.[346] C.P.L.R. § 2103(b) requires that papers to be served upon a party in a pending action shall be served upon the party's attorney. The term "papers" includes notices, pleadings, orders and judgments.[347]

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[340] *Id.*

[341] *Id.* at 173, 371 N.E.2d at 793, 794, 401 N.Y.S.2d at 31.

[342] *Id.*

[343] 181 A.D.2d 58, 586 N.Y.S.2d 579 (1st Dep't 1992).

[344] *Id.* at 62, 586 N.Y.S.2d at 582.

[345] *Id.* at 65, 586 N.Y.S.2d at 583.

[346] *Id.* at 62, 586 N.Y.S.2d at 582. N.Y. EXEC. LAW § 168 (McKinney 1993) requires that once an attorney has filed a notice of appearance in a proceeding before any administrative body or officer, a copy of all subsequent written communication or notices to the party involved must be sent to such attorney.

[347] *Id.*

McCormick v. Mars Associates, Inc.[348] involved an action to recover damages for personal injuries. Defendants appealed from an order of the Supreme Court, which conditionally granted plaintiff's motion to strike defendant's answer for failure to comply with a prior order directing an examination before trial, discovery and inspection, and an order which denied their cross motion to vacate and/or resettle the order. In reversing, the Appellate Division noted that where the rights of a party may be affected by an order, the successful moving party, in order to give validity to the order, is required to serve it on the adverse party.[349] Here, questions of fact and credibility, as to whether the order was duly served on the defendant could not be resolved on appeal.[350] The court held that it was error to grant relief to plaintiff on the ground that defendant failed to obey the order without first determining whether he had been duly served with it.[351]

MOTIONS TO REARGUE, RENEW OR RESETTLE

The CPLR provides that a motion "for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify an order, [must] be made on notice to the judge who signed the order, unless he is for any reason unable to hear it[.]"[352] If the order was made upon a default, the motion may be made on notice to any judge of the court.[353] If the order was made without notice, the motion may be made without notice to the judge who signed it, or on notice to any other judge of the court.[354] A motion

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[348] 25 A.D.2d 433, 265 N.Y.S.2d 1004 (2d Dep't 1966).

[349] *Id.* at 433, 265 N.Y.S.2d at 1005.

[350] *Id.*

[351] *Id.* at 433, 434, 265 N.Y.S.2d at 1005. In *Cultural Center Com. v. Kokoritsis*, the court held that, "[w]here a party's rights will be affected by an order, the successful party must serve a copy of the order on the adverse party in order to give it validity." 103 A.D.2d 1018, 478 N.Y.S.2d 199 (4th Dep't 1984).

[352] N.Y. C.P.L.R. 2221(a) (McKinney 1991).

[353] *Id.* at 2221 (a)(1).

[354] *Id.* at 2221 (a)(2).

made under this rule to one other than a proper judge must be transferred to the proper judge.[355]

MOTION TO REARGUE

The purpose of a motion to reargue is to convince the court of the legal incorrectness of its decision.[356] The movant must show that, in making the original determination, the court overlooked a principle of law or misapprehended relevant facts which would have had a controlling effect.[357] Reargument serves to provide the party with an opportunity to advance arguments similar to those made on the original application, and should not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion.[358] A motion for reargument is made on the papers submitted for the original motion, and counsel may not present new facts before the court.[359] A motion for reargument is not an appropriate vehicle for raising new questions.[360] The court has also determined that a final judgment made after trial is not subject to a motion to reargue;[361]

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[355] N.Y. C.P.L.R. 2221(a). *See also* N.Y. C.P.L.R. 2221(b). Subdivision (b) provides that the chief administrator may by rule exclude motions within a department, district or county from the operation of subdivision (a).

[356] *In Re* Palmer's Estate, 193 Misc. 411, 82 N.Y.S.2d 818 (Sur. Ct., Monroe Co. 1948); *see also* Foley v. Roche, 68 A.D.2d 558, 418 N.Y.S.2d 588 (1st Dep't 1979).

[357] Ellis v. Central Hanover Bank & Trust Co., 198 Misc. 912, 102 N.Y.S.2d 337 (Sup. Ct. New York County 1951). *See also* Doty v. Doty, 194 Misc. 907, 88 N.Y.S.2d 328 (Sup. Ct. Queens County 1949). (A motion for reargument is addressed to the discretion of the court, and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the facts, or the law, or for some reason mistakenly arrived at its earlier decision.)

[358] Simpson v. Loehman, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968).

[359] Phillips v. Village of Oriskany, 57 A.D.2d 110, 394 N.Y.S.2d 941 (4th Dep't 1977).

[360] *Id. See also* Foley v. Roche, 68 A.D.2d 558, 418 N.Y.S.2d 588 (1st Dep't 1979).

[361] Able v. Able, 209 A.D.2d 972, 619 N.Y.S.2d 461 (4th Dep't 1994). The Appellate Division held that the Supreme Court erred in granting the wife's cross motion, characterized as one to reargue, thereby agreeing to reconsider the issues of maintenance and support arrears as determined in the judgment of

under no circumstances may a final judgment rendered after trial be subject to a motion to reargue.[362]

Appellate courts have ruled that a motion to reargue may not be made after the expiration of the time to appeal an order, because this would permit circumvention of the prohibition against extending the time to take an appeal from the original order.[363] The New York Court of Appeals overruled the Appellate Division and commented that, "regardless of statutory time limits concerning motions to reargue, every court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action."[364]

It has been held by some lower courts that the proper procedure in seeking the reargument of a motion is to submit to the justice who decided that motion a short affidavit setting forth the decision, the asserted grounds for reargument, and a request for an Order to Show Cause.[365] The rationale for this procedure is so that one may simply conclude the matter by refusing to sign the Order to Show Cause.[366]

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divorce. The Supreme Court was not authorized to grant that relief. Final judgment made after trial is not subject to a motion to reargue under CPLR § 2221. The wife's motion also could not be characterized as one to resettle the judgment. A motion to resettle is used to correct errors or omissions in form, and may not be used to affect a substantive change in a prior decision.

[362] *See Able*, 209 A.D.2d at 972

[363] Matter of Huie, 20 N.Y.2d 568, 572, 232 N.E.2d 642, 285 N.Y.S.2d 610 (1967). *See* Prude v. Country of Erie, 47 A.D.2d 111, 364 N.Y.S.2d 643 (4th Dep't 1975); Liberty Nat'l. Bank & Trust Co. v. Bero Constr. Corp., 29 A.D.2d 627, 286 N.Y.S.2d 287 (4th Dep't 1967); Henegar v. Freudenheim, 40 A.D.2d 825, 337 N.Y.S.2d 365 (2d Dep't 1972). *See also* Fitzpatrick v. Cook 58 A.D.2d 642, 396 N.Y.S.2d 51 (2d Dep't 1977).

[364] Liss v. Trans Auto Sys, Inc., 68 N.Y.2d 15, 496 N.E.2d 851, 505 N.Y.S.2d 831 (1986).

[365] *In re* Willmark service system, Ins., 21 A.D.2d at 479, 251 N.Y.S.2d at 268 (1st Dep't 1964).

[366] *See* Ellis v. Central Hanover Bank & Trust Co., 198 Misc. 912, 102 N.Y.S.2d 337 (Sup. Ct. New York County 1951); Dewindt v. O'Leary, 118 F. Supp. 915 (S.D.N.Y. 1954). *See also* Rubin v. Dondysh, 147 Misc. 2d 221, 555 N.Y.S.2d 1004 (N.Y.C. Civ. Ct. Queens County 1990).

MOTION TO RENEW

An application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made but were not then known to the party seeking leave to renew, and therefore were not made known to the court. The movant must offer a valid excuse for not submitting the additional facts in the original application.[367] The remedy is not available where a party has proceeded on one legal theory and thereafter sought to renew on a different legal theory. The application must be supported by new facts or information which could not have been made readily and with due diligence a part of the original motion.[368] Therefore, a motion to renew may encompass new matter that was not available prior to the court's decision on the prior motion.[369] It is important to note that the time within which to make a motion to renew is not limited to the time within which an appeal could be taken.[370] The court does not support a party's characterization of a motion as one to "renew and reargue[371] The court will make the appropriate determination as to the characterization of the motion.

The general rule is that, if the relief sought upon a second motion is the same as that sought upon a prior motion, and the second motion is only distinguished by different grounds set forth, the second motion is in the nature of renewal, and barred by the doctrine of the law of the case.[372] Where new facts are alleged in

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[367] Ecco High Frequency Corp. v. Amtorg Trading Corp., 81 N.Y.S.2d 897 (Sup. Ct. New York County), *aff'd mem,* 274 A.D. 982, 85 N.Y.S.2d 304 (1st Dep't 1948); Matter of Holad v. Motor Vehicle Accident Indem. Corp., 53 Misc. 2d 952; 280 N.Y.S.2d 87 (Sup. Ct. Kings County 1967); American Trading Company. Inc. v. Fish, 87 Misc. 2d 193, 383 N.Y.S.2d 943 (Sup. Ct. New York County 1975).

[368] Foley v. Roche, 68 A.D.2d 558, 418 N.Y.S.2d 588 (1st Dep't 1979).

[369] Haenel v. November & November 144 A.D.2d 298, 534 N.Y.S.2d 176 (1st Dep't 1988).

[370] Prude v. County of Erie, 47 A.D.2d 111, 364 N.Y.S.2d 643 (4th Dep't 1975).

[371] Smith v. Smith, 97 A.D.2d 932, 470 N.Y.S.2d 726 (3d Dep't 1983).

[372] Osserman v. Osserman, 92 A.D.2d 932, 460 N.Y.S.2d 355 (2d Dep't 1983); Albany Community Dev. Agency v. Abdelgader, 205 A.D.2d 905, 613 N.Y.S.2d 473 (3d Dep't 1994). A motion to renew is not available where a party proceeds on one legal theory and then moves for renewal on a different legal theory.

support of a motion to renew a prior motion, which facts were available at the time of the prior motion, there must be a sufficient explanation of why these facts had not been presented in the earlier motion. It is imperative that the movant provide a justified excuse for not previously disclosing the pertinent facts before the court.[373]

MOTION FOR RESETTLEMENT

"Resettlement of an order is a procedure designed solely to correct errors or omissions as to form, or for clarification [and] may not be used to effect a substantial change in or to amplify the prior decision of the court."[374] If the change sought is substantial in nature, relief cannot be had by way of a motion to resettle an order. The purpose of resettlement is to revise an order to reflect the court's decision. Resettlement is not to be used to effect a substantive change in or to amplify a prior decision of court.[375]

A court's denial of a motion to resettle a substantive portion of an order is not appealable.[376]

When there is an inconsistency between a judgment and the decision upon which it is based, the decision controls, and the inconsistency may be corrected either by a motion for resettlement or on appeal.[377]

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[373] Hooker v. Town Bd. of Guilderland, 60 A.D.2d 684, 399 N.Y.S.2d 935. (3d Dep't 1977); Lansing Research Corp. v. Sybron Corp., 142 A.D.2d 816, 530 N.Y.S.2d 698 (3d Dep't 1988).

[374] Foley v. Roche, 68 A.D.2d 558, 566, 418 N.Y.S.2d 588 (1st Dep't 1979).

[375] Barretta v. Webb Corp., 181 A.D.2d 1018, 581 N.Y.S.2d 508 (4th Dep't) *appeal dismissed without opinion* 80 N.Y.2d 892, 600 N.E.2d 636, 587 N.Y.S.2d 909 (1992). Tidball v. Tidball, 108 A.D.2d 957, 484 N.Y.S.2d 945 (3d Dep't 1985). *See* Herpe v. Herpe, 225 N.Y. 323, 327; 122 N.E. 204 (1919); Foley v. Roche, 68 A.D.2d 558, 566; 418 N.Y.S.2d 588 (1st Dep't 1979); 2 CARMODY-WAIT 2D, NEW YORK PRACTICE., 8:125, at 142. *See also* Breslow v. Solomon, 105 A.D.2d 824, 481 N.Y.S.2d 754 (2d Dep't 1984).

[376] Galaxy Intl. v. Magnum-Royal Publication, Inc., 54 A.D.2d 875, 876, 388 N.Y.S.2d 583 (1st Dep't 1976).

[377] Green v. Morris, 156 A.D.2d 331, 548 N.Y.S.2d 899 (2d Dep't 1989) *appeal denied* 75 N.Y.2d 705, 552 N.E.2d 175, 552 N.Y.S.2d 927, *reconsideration denied* 75 N.Y.2d 1005, 556 N.E.2d 1119, 557 N.Y.S.2d 312 (1990).

APPLICATIONS TO ORIGINAL JUDGE

Where the prior order is an *ex parte* order or an *ex parte* motion to vacate, renew or reargue, it may be made before the judge who made the original order.[378] If the motion to vacate, renew or reargue is made on notice, then the motion need not be returnable before the original judge who made the order.[379]

C.P.L.R. § 2221 provides that a motion to modify an order shall be made on notice to the judge who signed the order, unless he is unable to hear it. This reflects the general policy that judges shall not pass on or review a matter already seen by another judge of equal authority or coordinate jurisdiction.[380] An order of one judge cannot be set aside or materially modified by another judge of equivalent jurisdiction.[381] "Setting aside the judicial act of one judge by another of co-ordinate jurisdiction is avoided, wherever possible, as not conducive to the orderly administration of justice."[382] It is not proper practice to seek a review of the order of

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[378] N.Y. C.P.L.R. 2221(a)(2) (McKinney 1991).

[379] *Id.*

[380] *See* Rosemont Enterprises, Inc. v. Irving, 49 A.D.2d 445, 375 N.Y.S.2d 864 (1st Dep't 1975) *appeal dismissed*, 41 N.Y.2d 829, 361 N.E.2d 1040, 393 N.Y.S.2d 392 (1977). *See also* Begler v. Saltzman, 53 A.D.2d 578, 385 N.Y.S.2d 60 (1st Dep't 1976).

[381] Carlos v. Motor Vehicle Acci. Indemnification Corp. 22 A.D.2d 866, 254 N.Y.S.2d 619 (1st Dep't 1964). *See* Rosenstiel v. Rosenstiel 24 A.D.2d 952, 265 N.Y.S.2d 387 (1st Dep't 1965); Mount Sinai Hosp. v. Davis, 8 A.D.2d 361, 188 N.Y.S.2d 298 (1st Dep't 1959); Metzger v Metzger, 133 A.D.2d 524, 519 N.Y.S.2d 897 (4th Dep't 1987). *See also* Guidroz v Bochenski, 170 A.D.2d 1042, 566 N.Y.S.2d 110 (4th Dep't 1991) where the Appellate Division held that the Supreme Court has no authority to grant an *ex parte* order vacating a validly issued temporary order of custody made under the Family Court Act. The Appellate Division granted a motion for a stay to the extent that the order of the Supreme Court was vacated pursuant to N.Y. C.P.L.R. 5704 (a), and the appeal was dismissed. It held that a motion which attempts to affect an order validly issued must be directed to the Judge who issues it.

[382] United Press Ass'n. v. Valente, 281 A.D. 395, 398, 120 N.Y.S.2d 174 (1st Dep't 1953), *aff'd*, 308 N.Y. 71; 123 N.E.2d 777 (1954). *See also* Kamp v. Kamp, 59 N.Y. 212 (1874); Mount Sinai Hosp. v. Davis, 8 A.D.2d 361, 188 N.Y.S.2d 298 (1959).

one special term justice by another special term justice.[383] However, with the advent of the Individual Assignment System, it has been held by some Appellate Courts that it is not an abuse of discretion to fail to transfer a motion to reargue or renew to the Justice who made the original order. C.P.L.R. § 2221 provides that such motion be made to the judge who signed order "unless he is for any reason unable to hear it," and the motion is before a different Justice because of the Individual Assignment System, whose purpose satisfies the exception to the statute.[384]

REVIEW OF EX PARTE ORDERS BY APPELLATE DIVISION

No appeal lies from an order which is obtained without notice.[385] A party often seeks to obtain a stay or a provisional remedy, such as a temporary restraining order, pending the determination of a motion.[386] The proposed Order to Show Cause containing the requested interim relief is presented to the court which grants the order but strikes the provisional relief sought.[387] On other occasions, an adversary may obtain an Order to Show Cause with interim relief that his opponent wants to have vacated because the opponent will suffer irreparable harm during the time prior to the determination of the motion.[388] The proper remedy is to go to the full bench of the Appellate Division or to a Justice of the Appellate Division.[389]

The Second Department has construed the words *ex parte* to mean all stipulations where neither oral nor written notice of the

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[383] Empire Mut. Ins. Co. v. West, 22 A.D.2d 938, 256 N.Y.S.2d 108 (2d Dep't 1964).

[384] Billings v. Berkshire Mut. Ins. Co., 133 A.D.2d 919, 520 N.Y.S.2d 463 (3d Dep't 1987) *appeal dismissed without opinion* 70 N.Y.2d 1002, 521 N.E.2d 445, 526 N.Y.S.2d 438 (1988). *See also* Billings v. Berkshire Mut. Ins. Co., 149 A.D.2d 895, 540 N.Y.S.2d 577 (3d Dep't 1989). *See also* Dalrymple v. Martin Luther King Community Health Center, 127 A.D. 2d 69, 514 N.Y.S.2d 385 (2d Dep't 1987).

[385] Bernstein v. Zawaski, 32 A.D.2d 762, 301 N.Y.S.2d 692 (1st Dep't 1969).

[386] *In re* Willmark Service System, Inc., 21 A.D.2d 478, 251 N.Y.S.2d 267 (1st Dep't 1964).

[387] *Id.* at 479, 251 N.Y.S.2d at 268.

[388] *Id.*

[389] *Id.*

request for relief is given. A *sua sponte* order made in the presence of counsel is not considered ex parte. Where an ex parte order is obtained by Order to Show Cause, the preferred (although not required) method is to first move in the issuing court to vacate or modify the order. If a stay of the ex parte order is desired, the court may grant it, pending the determination of the motion.[390] If the original court refuses to grant the application for a stay, an application may be made to the Appellate Division for a stay.[391]

The full bench of the Appellate Division or any Justice of the Appellate Division may vacate or modify, ex parte, any order granted by any court or judge without notice to the adverse party from which an appeal would lie in the Appellate Division.[392] It may also grant any order or provisional remedy applied for without notice and denied by a court or judge from which an appeal would lie in the Appellate Division.[393]

Oral application to vacate or modify an *ex parte* order should first be made to any justice of the Appellate Division.[394] If he or she refuses to vacate the *ex parte* order, then a motion should be made, preferably by Order to Show Cause, to the full court to vacate the *ex parte* order.[395] However, only the full bench can grant an *ex parte* order which was denied by the lower court.[396]

The recent adoption of extensive calendar practice rules for matrimonial actions,[397] in an attempt to expedite such matters, has

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[390] *Id.* at 480, 251 N.Y.S.2d at 269.

[391] *Id.*

[392] N.Y. C.P.L.R. 5704(a) (1995) provides in pertinent part:

> the Appellate Division or a justice thereof may vacate or modify any order granted without notice to the adverse party by any court or a judge thereof from which an appeal would lie to such appellate division; and the appellate division may grant any order or provisional remedy applied for without notice to the adverse party and refused by any court or a judge thereof from which an appeal would lie to such appellate division.

Id.

[393] *Id.*

[394] *Id.*

[395] *Id.*

[396] *Id.*

[397] N. Y. COMP. CODES R. & REGS. tit. 22202.16 (1998).

lead to a new problem. It is not uncommon for a judge to make an order at a conference which affects a substantial right of a party, such as an order of preclusion, if disclosure is not completed by a fixed date. Such an order is not appendable. While such an order would appear to be considered to be *ex parte* or *sua sponte,*[398] the Appellate Division in the Second Department does not consider an order made upon oral application *ex parte* or *sua sponte* where counsel is present. In such a case, an application must be made on notice to vacate that order, and if it is denied, an appeal may be taken.[399]

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[398] N.Y. C.P.L.R. 2214(b) (McKinney 1991) provides in pertinent part:

> A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard. Answering affidavits shall be served at least two days before such time answering affidavits shall be served at least seven days before such time if a notice of motion served at least twelve days before such time so demands; where upon any reply affidavits shall be served at least one day before such time.

Id.

[399] N.Y. C.P.L.R. 5704(a).