

New York Law Journal

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By Jack Yoskowitz

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SUPREME COURT
Part 3
Commercial Div.
Justice Curtis Alogoskoufis
40 Centre Street
Phone 616-366-2200

WEDNESDAY, AUGUST 8
Status Conference
11312065 Brown v. Gil
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You're a brand new litigation associate and have handed in your first draft complaint or memorandum of law. The partner tells you what a good job you did and asks you to see to the service and filing of the papers. You go back to your desk and start sweating. What do you do now?

Many first-year litigation associates (actually many litigators of all years) are confused by the practices and procedures in New York state litigation. Not everything is covered in the Civil Practice Law and Rules (CPLR) and often it is a matter of practice rather than hard and fast rules. Often, these practices are learned under fire when deadlines are pressing (and hopefully not after they have passed).

This article will briefly cover some of the tricks of the trade, from the filing of the complaint to the note of issue.

BUT FIRST...

To begin with, you should know the different rules that may cover your actions at various times.

The CPLR is always the first set of rules to review. Second are the Uniform Rules for New York Trial Courts: Rules for the Supreme Court and County Court, 22 NYCRR §§202.1 et seq. If the county in which the lawsuit is venued has a commercial part division and the lawsuit is designated as such, then the Commercial Part rules, listed at 22 NYCRR 202.70, need to be followed. Finally, the individual judge's rules must be reviewed.

A smart first-year associate will keep all of these rules handy for reference.

Second, the most basic distinction you need to learn is the difference between filing and service. Filing means delivery to the court. Service means delivery to your adversary and the other parties or non-parties involved. These distinctions are important.

For example, complaints are filed before they are served. Motions, however, are generally served before they are filed. Some papers, like interrogatories and their responses are usually not filed, but simply served. Everything that is filed

should generally be served upon your adversary.

THE COMPLAINT

As stated above, and unlike many pleadings and motions, the summons and complaint are filed before they are served. CPLR 304 ("An action is commenced by filing a summons and complaint or summons with notice"). At that time the Index number is purchased. Id., 306-b. Thereafter, the summons and complaint (or summons with notice) must be served within 120 days from filing.

While service of process is a topic well covered by bar review and law school, make sure that the complaint is served properly and in a timely fashion according to those rules.

ANSWERS, COUNTERCLAIMS AND REPLIES

If you are given a complaint to which to respond, your first and most important task is to calculate the deadline by which the answer or motion to dismiss is to be

served (it would be the same date whether the response chosen is an answer or the motion). Similarly, if your task is to prepare a response to an answer that contains a counterclaim, the deadline to serve the reply to that counterclaim should be calculated.

Answers and replies to counterclaims are due within 20 days of the date that the complaint or answer with counterclaims was served upon the party. CPLR 3012. You never want to be in the situation where your client may be in default because the deadline for your answer or reply was missed.

Thus, you should first figure out the method and date of service of the complaint or answer upon your client. If there is some question, the earliest date should be selected. That date should be kept firmly in mind and, if necessary, reminders should be given to the partner about it.

A good litigation associate will make sure the draft answer or motion is in the hands of the reviewer in plenty of time for turn around and service. Answers and replies, unlike complaints, need not be filed with the court, but simply served.

GETTING A JUDGE ASSIGNED

Another fact of New York state practice that litigators should know is that no judge is assigned at the filing of a complaint. A judge is only assigned to an action once a request for judicial intervention (RJI) has been filed by one of the parties.

The requirements for an RJI are covered by 22 NYCRR §202.6, which states that a party may file the RJI at any time after service of process. Generally, however, it is done either to request a preliminary conference or as a requirement to filing the first motion on the case. There is a standard form for the RJI and also the requisite filing fee.

Theoretically, it is possible to go through the entire litigation, through discovery and up to note of issue with no judge being assigned. In practice, this rarely happens.

Also the RJI form is the first place where a party may designate an action as one for the Commercial Part.

THE PRELIMINARY CONFERENCE

This conference is covered by 22 NYCRR §202.12.

Once the request for the conference is filed, the court must notify the parties of the conference date, which is not supposed to be more than 45 days from the date the RJI is filed, unless the court orders otherwise. §202.12(b).

At the conference, the preliminary conference order is filled out by the parties, which is a stipulation in which the parties agree to a timetable that provides for completion of all disclosure within 12 months of the filing of the RJI (not the complaint) or within 15 months of such filing for a complex case. Therefore, if you are the associate attending such a conference, you should know the date the RJI was filed, what the outside deadline will be, and have thought through with your supervising attorneys what may be appropriate dates for depositions, other discovery devices and expert discovery (if necessary) to complete all discovery within the allotted time period.

A good faith conference with the adversary may be appropriate prior to the conference to reach agreed dates. 22 NYCRR §202.12(c) contains other matters that may be considered at the conference.

MOTION PRACTICE

Usually in every litigation, motion practice is necessary. This may be a motion to dismiss or for summary judgment, or it may be a disclosure motion. Litiga-

tors should keep the rules firmly in mind here as well.

First, what papers are necessary for the filing? Every motion needs a notice of motion. 22 NYCRR §202.7. If it is a disclosure motion, it needs an affidavit of good faith. That means that if the motion involves a discovery dispute, one of the attorneys filing the motion seeking relief must set forth

in an affidavit that she has conferred with counsel for the opposing party in good faith to resolve the dispute.

The clerk of the court will quickly scan the motion papers for such an affidavit and reject the papers if it is missing. The good faith affidavit must indicate the time, place and nature of the consultation, the issues discussed and any resolutions or

must indicate good cause why no conferral was had. 22 NYCRR §202.7(c).

Motions are usually accompanied by a memorandum of law and affidavits. As the Uniform Rules state, affidavits shall be for a statement of the relevant facts and briefs shall be for a statement of the relevant law.

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FIRST-YEAR ASSOCIATES

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Is there a judge assigned yet? As stated above, if no prior motion has been made, and no preliminary conference has been sought, then no judge would have been assigned. Therefore, an RJJ will also need to be filed at the time of filing the motion papers.

Where is the motion returnable? This depends on the court and while the rules state that "All motions shall be returnable before the assigned judge," §202.8, the practice may be different.

In New York county, for example, motions are made returnable to the Motion Support Office, not before the judge who has been assigned to the action. A typical notice of motion in New York county reads, "The undersigned will move this Court at the I.A.S. Motion Submission Part (Room 130) at the Courthouse, located at 60 Centre Street, New York, New York, on [the return date], or soon thereafter as counsel may be heard."

What return date should be selected? CPLR 2214 provides that the opposing party must be served at least eight days prior to the date the motion may be heard, in which case answering papers are due two days prior to the date. If the moving party would like the opportunity for a reply, the papers must be served at least 16 days prior to the return date.¹ In that situation, the answering papers are to be served seven days prior to the return date, and any reply papers shall be served one day prior to the date.

Unlike the complaint, motion papers should be served prior to filing. Indeed service of motion papers must be done to start the clock running under CPLR 2214. The papers do not, however, have to be filed on that day but usually within five days of service. 22 NYCRR 202.8.

For example, say a motion is dated Jan. 1 and made returnable Jan. 17.² The motion papers are served on Jan. 1 on the other parties. However, the moving papers do not have to be filed on that date, but within five days. At that time the motion fee is paid and the RJJ is filed if necessary.

Under CPLR 2214, the opposition papers are due on Jan. 10, seven days prior to the return date, and any reply papers are due on Jan. 16. However, the opposition and reply papers only have to be served on those dates. Depending on the court, they may not be filed until the return date, Jan. 17.

For example, in New York county, the parties do not submit their opposition and reply papers to the Motion Submission Part until the actual return date. At that point, the clerk sends the

full set of motion papers to the judge assigned to the case. The judge had no knowledge, usually, of the papers prior to that time.

Once she receives the papers, the judge may automatically assign an oral argument date, depending on her rules. Therefore, you should be alert for the notice of oral argument, whether it be mailed by the court or listed on the court's calendar system, if one exists.

Even though all papers are served first, the originals should be saved for filing. Do not make the mistake of sending original papers to your adversary. An affidavit of service should be attached to the original papers.

What happens if the parties grant extensions? A written stipulation needs to be executed by both parties setting forth the new return date and the court needs to be alerted. To use New York county as an example again, the stipulation needs to be filed on the return date in the Motion Support office. Otherwise, the moving papers, which have already been filed, will go in without opposition.

Normally, the Motion Support Office will not take extensions of less than one week. 22 NYCRR §202.8 also provides that "no more than three stipulated adjournments for an aggregate period of 60 days shall be submitted without prior permission of the Court."

THE NOTE OF ISSUE

Finally at the end of the discovery period, the note of issue is filed. This is usually done by the plaintiff to move the case onto the trial calendar.

22 NYCRR §202.21 provides that no case can be deemed ready for trial unless the note of issue accompanied by a certificate of readiness and with proof of service on all parties has been filed. At this time, the plaintiff may select a trial by jury. The other party has 20 days to move to vacate the note of issue. 202.21(e)

Congratulations. Having kept the various rules and procedures firmly in mind, your case has proceeded smoothly from the filing of the complaint to the pre-trial ready calendar. You have begun your career as a litigator. *

1. CPLR 2214 was amended as of July 3, 2007, to, *inter alia*, change this deadline from 12 to 16 days. It also changed some of the rules concerning cross-motions. CPLR 2215 was also amended.

2. In this example, the papers are served on the adversary by hand so there is no delay. If mail is used, then five days must be added to the prescribed period, CPLR 2103(b)(2). If overnight delivery is used, one day is added. CPLR 2103(b)(6).

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