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CPLR 3406(a): Court of Appeals Finds Dismissal Is Improper Sanction for Failure to File a Timely Notice of Medical Malpractice

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voted to indict, a prosecutor may resubmit charges or present new evidence to the same grand jury or a different one, so long as this action does not impair the integrity of the grand jury proceedings or prejudice the defendant.

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CIVIL PRACTICE LAW AND RULES

CPLR 3406(a): Court of Appeals finds dismissal is improper sanction for failure to file a timely notice of medical malpractice

The massive number of medical malpractice claims has created a crisis for both physicians and patients, prompting much legislative attention over the past fifteen years.[1] To discourage meritless claims, the New York State Legislature has implemented significant substantive and procedural changes in the law,[2] most recently, the enactment of the Medical Malpractice Reform Act ("Reform Act") in 1985.[3] A critical feature of the Reform Act was

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the prosecutor to one resubmission of previously dismissed charges to a grand jury. *See* CPL § 190.75(3) (McKinney 1982); *supra* note 5 and accompanying text.

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[1] *See* Note, *The 1985 Medical Malpractice Reform Act: The New York State Legislature Responds to the Medical Malpractice Crisis with a Prescription for Comprehensive Reform*, 52 BROOKLYN L. REV. 135, 137-44 (1986). The crisis has been characterized by a threatened decline in the availability of health care services provided by insured physicians due to exorbitant malpractice insurance rates. *See id.* at 137. A major contributing factor to the crisis has been the rapid increase in the number of malpractice claims filed. *See* Brinkley, *AMA Study Finds Big Rise in Claims for Malpractice*, N.Y. Times, Jan. 17, 1985, at A1, col. 4. The large number of substantial settlements and inflated damage awards also has contributed to the malpractice crisis. *See* Sullivan, *Reducing Doctors' Costs*, N.Y. Times, Apr. 12, 1985, at B4, col. 5.

[2] *See* Note, *supra* note 1, at 139. The New York Legislature first responded to the medical malpractice crisis in 1974 by enacting section 148-a of the Judiciary Law. *See* N.Y. JUD. LAW § 148-a (McKinney 1982 & Supp. 1986). The Judiciary Law was amended to require the use of medical malpractice panels to encourage settlements and discourage meritless claims. *See* Judiciary Law, ch. 146, § 1, [1974] N.Y. Laws 182 (McKinney). *But see* Note, *supra* note 1, at 161-62 (criticizing medical malpractice panels as costly failures). Additional legislative reforms include reducing the statute of limitations period for medical malpractice claims, CPLR 214-a (McKinney 1984), and modifying the informed consent doctrine, N.Y. PUB. HEALTH LAW § 2805-d (McKinney 1985).

[3] Medical Malpractice Reform Act, ch. 294, [1985] N.Y. Laws 685 (McKinney). The Reform Act, which became effective July 1, 1985, was directed initially to medical and den-

the addition of CPLR 3406,[4] specifically subdivision (a), which requires a plaintiff in a medical malpractice action to file a mandatory notice of malpractice within sixty days of joinder of issue.[5] Lower courts in New York had been divided on the issue of

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tal malpractice, but was amended in 1986 by the addition of podiatric malpractice. *See* Medical Malpractice Reform Act, ch. 485, § 6, [1986] N.Y. Laws 999 (McKinney).

The legislative purpose of the Reform Act was to affirmatively deal with the medical malpractice crisis in New York by providing "comprehensive reform . . . [for the] malpractice adjudication system . . . in order to ensure the continued availability and affordability of quality health services in New York state." Medical Malpractice Reform Act, ch. 294, § 1, [1985] N.Y. Laws 685 (McKinney). The Reform Act sought to "reduce the cost of malpractice insurance and to restrain associated health care costs, while assuring the availability of compensation for persons injured as a result of malpractice." *Id.* at 685-86. This objective would be accomplished by "expediting case resolution, discouraging frivolous claims and defenses . . . to reduce the escalating cost of malpractice insurance and to improve the adjudication of malpractice claims." *Id.* at 686.

The Reform Act provided a comprehensive overhaul of much of New York's Public Health Law. *See* N.Y. PUB. HEALTH LAW §§ 2803-e(1)(a), 2805-j, 2805-k (McKinney Supp. 1986); CPLR 3101(d), 3406, 4111-d, 4213-b, 4545-a, 5031-39, 8303-a (McKinney Supp. 1986); N.Y. EDUC. LAW §§ 6509(5)(d), 6509(11), 6524(10) (McKinney Supp. 1986); N.Y. INS. LAW §§ 2343, 3437, 5502-e(1) (McKinney Supp. 1986); N.Y. JUD. LAW §§ 148-a(1), 474-a(2-4) (McKinney Supp. 1986).

[4] *See* Medical Malpractice Reform Act, ch. 294, § 5, [1985] N.Y. Laws 689-90 (McKinney); CPLR 3406 (McKinney Supp. 1986).

[5] *See* CPLR 3406(a) (McKinney Supp. 1990). Section 3406(a) provides, in pertinent part:

> Mandatory filing. Not more than sixty days after issue is joined, the plaintiff in an action to recover damages for dental, medical, or podiatric malpractice shall file with the clerk of the court in which the action is commenced a notice of dental, medical or podiatric malpractice action, on a form to be specified by the chief administrator of the courts.

Id. The plaintiff must file with the clerk a notice of the malpractice action along with proof of service, proof of authorizations to obtain medical records, if demanded, and any other papers required by the chief administrator of the courts. *Id.*; *see also* 4 WK&M § 3406.01, at 34-110 (1989).

Subdivision (a) further provides that the time for filing a notice of malpractice action "may be extended by the court only upon a motion made pursuant to [CPLR 2004]." CPLR 3406(a) (McKinney Supp. 1990). Stipulation of the parties for extending the time period is excluded; hence, court approval is required for all extensions of time. *See id.*, commentary at 80; CPLR 2004 (McKinney 1962). CPLR 2004 provides:

> Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.

Id.; *see also* 2A WK&M § 2004.02-.05, at 20-27-20-33 (1989). The purpose of section 3406(a) is to 'earmark' medical malpractice litigation for the special treatment, pre-calendar conferences, and special calendar control rules required by subdivision (b). *See* 4 WK&M § 3406.01, at 34-110. CPLR 3406(b) provides that the chief administrator of the courts "shall adopt special calendar control rules for actions to recover damages for dental, podiatric or medical malpractice." CPLR 3406(b) (McKinney Supp. 1990). These special rules are codified in the Uniform Rules of New York State Trial Courts. *See* [1986] 22 N.Y.C.R.R.

whether a failure to file a timely notice of malpractice may result in dismissal of a plaintiff's complaint.[6] Recently, in *Tewari v. Tsoutsouras*,[7] the New York Court of Appeals resolved this conflict, holding that the dismissal of a complaint is an improper sanction for failure to file a mandatory notice of malpractice timely.[8]

In *Tewari*, the plaintiff instituted a medical malpractice action alleging that the defendant physician's negligent treatment caused the death of her infant daughter.[9] Three months after the action was initiated, the defendant served his answer along with demands for a bill of particulars and disclosure.[10] The defendant sent the plaintiff's counsel four letters over the next four months demanding compliance with the discovery demands. Plaintiff's counsel

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§ 202.56. The mandatory pre-calendar conference and the rules promulgated by the Chief Administrator attempt to aid disclosure, narrow issues, explore settlement, and dispose of meritless claims at an early stage. *See id.* § 202.56(b)(1). These rules provide a non-exclusive list of measures a judge may take in preliminary conference to expedite final disposition of the case. *Id.* Discovery is to be completed within 12 months after the notice of pendency. *Id.* § 202.56(b)(1)(ii); CPLR 3406(b) (McKinney Supp. 1990).

To the extent practicable, the parties are required to be ready for trial within 18 months of filing of the notice. [1986] 22 N.Y.C.R.R. § 202.56(b)(1)(vi) (McKinney); CPLR 3406(b) (McKinney Supp. 1990). The rules adopted by the Chief Administrator also provide sanctions for failure to comply with the pre-calendar conference rules or any court directives. *See* [1986] 22 N.Y.C.R.R. § 202.56(b)(1)(vi). The sanctions prescribed include "costs, imposition of appropriate attorney's fees, dismissal of an action, claim, cross-claim, counterclaim or defense, or rendering a judgment by default." *Id.* § 202.56(b)(2).

[6] *See, e.g.*, Kirschbaum v. Brookdale Hosp. and Medical Center, 147 App. Div. 2d 530, 531-32, 537 N.Y.S.2d 832, 834 (2d Dep't 1989) (failure to file mandatory malpractice notice results in dismissal in absence of good cause for extension); Bonelli v. New York Hosp., 144 Misc. 2d 22, 26, 543 N.Y.S.2d 851, 854 (Sup. Ct. N.Y. County 1989) (court granted 15-day extension to file malpractice notice where plaintiff's excuse deemed reasonable and non-prejudicial); Marte v. Montefiore Medical Center, 142 Misc. 2d 745, 748, 538 N.Y.S.2d 396, 399 (Sup. Ct. Bronx County 1989) (dismissal not authorized sanction for failure to file 3406(a) notice); Trophia v. Valvo, 136 Misc. 2d 925, 926, 519 N.Y.S.2d 448, 449 (Sup. Ct. Oneida County 1987) (failure to file mandatory notice not deemed jurisdictional), *aff'd*, 143 App. Div. 2d 549, 533 N.Y.S.2d 168 (4th Dep't 1988).

[7] 75 N.Y.2d 1, 549 N.E.2d 1143, 550 N.Y.S.2d 572 (1989).

[8] *Id.* at 7-10, 549 N.E.2d at 1145-47, 550 N.Y.S.2d at 574-76.

[9] *Id.* at 5, 549 N.E.2d at 1144, 550 N.Y.S.2d at 573. The plaintiff, Phyllis Tewari, brought the action individually and as administratrix of the estate of Jennifer, her deceased daughter, to recover damages for Jennifer's death and conscious pain and suffering caused by the defendant's alleged medical malpractice. *See* Tewari v. Tsourtouras, 140 App. Div. 2d 104, 105, 532 N.Y.S.2d 288, 289 (2d Dep't 1988), *rev'd*, 75 N.Y.2d 1, 549 N.E.2d 1143, 550 N.Y.S.2d 572 (1989). Jennifer died on March 26, 1984, and the action was brought on March 4, 1986. *See id.*

[10] *See Tewari*, 75 N.Y.2d at 5, 549 N.E.2d at 1144, 550 N.Y.S.2d at 573. Some of the discovery demands sought were authorizations to obtain the medical records of all treating physicians, hospital records and charts from four hospitals, production of x-rays, and identification of all expert and lay witnesses. *Id.*

failed to answer the letters or respond to the demanded discovery.[11]

The defendant subsequently moved to dismiss the complaint based on the plaintiff's failure to file a timely notice and failure to move for an extension of time to file.[12] The plaintiff cross-moved, pursuant to CPLR 2004, for leave to file a late notice.[13] The Supreme Court, Queens County, denied the defendant's motion and granted the plaintiff's cross-motion.[14] The Appellate Division, Second Department, analogizing the failure to file the mandatory notice of malpractice to a pleading default, reversed and dismissed the complaint.[15]

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[11] *Id.* at 6, 549 N.E.2d at 1144, 550 N.Y.S.2d at 573. The court noted that "[n]one of the letters demanded that plaintiff file a notice of medical malpractice action as required by CPLR 3406(a)." *Id.*

[12] *Id.* The defendant's motion to dismiss was received on March 16, 1987, six months after the last letter demanding discovery and eight months after the time allowed for filing a notice of malpractice action under 3406(a) had expired. *Id.*

[13] *Id.* The plaintiff stated that she had not deliberately failed to file a notice in a timely fashion, but that her attorney had been " 'awaiting production of voluminous medical records to properly answer defendants [sic] demands for a Bill of Particulars, and serve defendant with appropriate authorizations.' " *Id.*

[14] *Id.* The Supreme Court granted the plaintiff's motion based upon " 'the circumstances herein and in the interest of justice' " and scheduled a precalendar conference pursuant to CPLR 3406(b). *Id.*

[15] *See* Tewari v. Tsoutsouras, 140 App. Div. 2d 104, 112, 532 N.Y.S.2d 288, 293 (2d Dep't 1988), *rev'd*, 75 N.Y.2d 1, 549 N.E.2d 1143, 550 N.Y.S.2d 572 (1989). The court reasoned that because the 60 day filing period of CPLR 3406(a) had expired, the plaintiff was required to show good cause in order to succeed on her motion to extend the time to file under CPLR 2004. *Id.* The court relied on a line of pleading default cases, stating that "the concept of default is analogous in that in this case, the plaintiff's time to file the CPLR 3406(a) notice had expired by the time she cross-moved to serve a late notice." *Id.*; *see also* A & J Concrete Corp. v. Arker, 54 N.Y.2d 870, 872, 429 N.E.2d 412, 413, 444 N.Y.S.2d 905, 906 (1981) (showing of merit not required when application for extension of time made before expiration of prescribed period to serve complaint); Sammons v. Freer, 99 App. Div. 2d 896, 896, 472 N.Y.S.2d 491, 492 (3d Dep't 1984) (once time to serve complaint expires, affidavit of merit must be submitted with request for filing extension), *aff'd*, 62 N.Y.2d 1018, 468 N.E.2d 700, 479 N.Y.S.2d 518 (1984); LaBuda v. Brookhaven Memorial Hosp. Medical Center, 98 App. Div. 2d 711, 711, 469 N.Y.S.2d 112, 113 (2d Dep't 1983) (dismissal proper where plaintiff failed to supply bill of particulars pursuant to conditional order of preclusion and no affidavit of merit submitted), *aff'd in part*, 62 N.Y.2d 1014, 468 N.E.2d 675, 479 N.Y.S.2d 493 (1984); Smith v. Lefrak Org., Inc., 96 App. Div. 2d 859, 860, 465 N.Y.S.2d 777, 777 (2d Dep't 1983) (once preclusion order took effect plaintiff required to show reasonable excuse for untimely filing of bill of particulars and proof of meritorious claim), *aff'd*, 60 N.Y.2d 828, 830, 457 N.E.2d 799, 799, 469 N.Y.S.2d 693, 693 (1983). The Appellate Division concluded that dismissal was proper because good cause was not shown for an extension pursuant to CPLR 2004. *See Tewari*, 140 App. Div. 2d at 111, 532 N.Y.S.2d at 293. The court applied the sanction of dismissal provided for in CPLR 3406(b) and section 202.56(b)(2) of the Uniform Rules for the plaintiff's noncompliance with 3406(a). *Id.* at 109-

The New York Court of Appeals reversed, holding that dismissal is not a proper sanction for the failure to file a timely mandatory notice of malpractice and that the Appellate Division erred in denying a filing extension.[16] Writing for the court, Judge Alexander noted that the sanction of dismissal may be granted "only when it has been authorized either by the Legislature or by court rules consistent with existing legislation."[17] Finding no authority for the dismissal sanction in either the statute or the rules,[18] Judge Alexander opined that to imply such authority would contravene the legislative intent and purpose of the Reform Act.[19] The court contrasted CPLR 3406(a) with CPLR 3406(b), which expressly authorizes dismissal as a sanction for noncompliance.[20] The court reasoned that the statute provided dismissal

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11, 532 N.Y.S.2d at 292-93.

[16] *Tewari*, 75 N.Y.2d at 5, 549 N.E.2d at 1143-44, 550 N.Y.S.2d at 572-73. The court held that the Appellate Division abused its discretion in denying the plaintiff's motion for an extension of time to file pursuant to CPLR 2004 because the plaintiff did not show the meritorious nature of her claim or a reasonable excuse for the delay. *Id.* at 5, 549 N.E.2d at 1144, 550 N.Y.S.2d at 573; *see infra* note 22 and accompanying text.

[17] *Tewari*, 75 N.Y.2d at 7, 549 N.E.2d at 1145, 550 N.Y.S.2d at 574. Under the New York State Constitution, the authority to regulate practice and procedure in the courts is delegated primarily to the legislature. *See* A.G. Ship Maintenance Corp. v. Lezak, 69 N.Y.2d 1, 5, 503 N.E.2d 681, 683, 511 N.Y.S.2d 216, 218 (1986). In the absence of authority for a procedural rule or a sanction of dismissal, courts are not free to impose their own sanctions on an ad hoc basis. *Id.* at 6, 503 N.E.2d at 684, 511 N.Y.S.2d at 219.

[18] *Tewari*, 75 N.Y.2d at 7, 549 N.E.2d at 1145, 550 N.Y.S.2d at 574. Judge Alexander found no authority for a sanction of dismissal due to a failure to file a timely notice in the rules promulgated by the Chief Administrator pursuant to 3406(a). *Id.* The Uniform Rules of New York State Trial Courts provide that "[s]uch notice shall be filed after the expiration of 60 days only by leave of the court on motion and for good cause shown." [1986] 22 N.Y.C.R.R. § 202.56(a)(3). "The court shall impose such conditions as may be just, including the assessment of costs." *Id.* Judge Alexander focused on the word "conditions" and concluded that an "[o]utright dismissal upon a denial of the motion to extend cannot be viewed as such a 'condition' because it immediately terminates the action and thus is not conditional." *Tewari*, 75 N.Y.2d at 9, 549 N.E.2d at 1146, 550 N.Y.S.2d at 575.

[19] *Tewari*, 75 N.Y.2d. at 9, 549 N.E.2d at 1146, 550 N.Y.S.2d at 575. Judge Alexander noted that to allow a sanction of dismissal for failure to file a mandatory notice would not only produce more litigation on collateral issues by encouraging defendants to litigate every issue of noncompliance, but would also frustrate the legislative purpose of the Reform Act—to expedite the adjudication of malpractice cases while assuring compensation to those injured by malpractice. *Id.*; *see also supra* note 3 (discussing purposes of Reform Act). If the 3406(a) notice was to become the subject of substantial pretrial litigation, the adjudication of malpractice cases would not be expedited. *Tewari*, 75 N.Y.2d at 9-10, 549 N.E.2d at 1146, 550 N.Y.S.2d at 575; *see also* Marte v. Montefiore Medical Center, 142 Misc. 2d 745, 746, 538 N.Y.S.2d 396, 397 (Sup. Ct. Bronx County 1989) (late mandatory notice has been single most litigated pretrial issue in medical malpractice cases).

[20] *Tewari*, 75 N.Y.2d at 8, 549 N.E.2d at 1145, 550 N.Y.S.2d at 574; *see* [1986] 22 N.Y.C.R.R. § 202.56(b)(2).

"only as a sanction for noncompliance with the special calendar control rules promulgated under subdivision (b)."[21] Furthermore, Judge Alexander stated that the rules promulgated by the Chief Administrator did not authorize a sanction of dismissal with respect to subdivision (a).[22] The court also pointed to the availability of other remedies to enforce the mandatory notice requirement of subdivision (a).[23] Finally, the court concluded that the Appellate Division had analogized erroneously noncompliance with 3406(a)'s notice requirement to a pleading default.[24]

In a concurring opinion, Judge Kaye noted additional reasons for not implying a sanction of dismissal under CPLR 3406(a), including: the requisite strict reading of the statute;[25] the fact that dismissal in the statutory scheme is not lightly granted;[26] and the harsh consequences such a sanction would impose upon plaintiffs.[27]

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[21] *Tewari*, 75 N.Y.2d at 8, 549 N.E.2d at 1145-46, 550 N.Y.S.2d at 574-75.

[22] *Id.* at 8, 549 N.E.2d at 1146, 550 N.Y.S.2d at 575.

[23] *Id.* at 10, 549 N.E.2d at 1147, 550 N.Y.S.2d at 576. The court noted that a defendant can obtain an order directing that the notice be filed. *Id.* If the plaintiff disregards such an order, dismissal is authorized under 3406(b) and section 202.56(b)(3) of the Uniform Rules for the New York State Trial Courts for failure to comply with the calendar control rules of subdivision (b) or failure to comply with court directed discovery. *Id.* at 10-11, 549 N.E.2d at 1147, 550 N.Y.S.2d at 576; *see* [1986] 22 N.Y.C.R.R. § 202.56(b)(2).

Furthermore, if a plaintiff delays the litigation, but later files a notice in response to a court order granting an extension, the court may impose monetary sanctions such as costs and attorney's fees. *Tewari*, 75 N.Y.2d at 11, 549 N.E.2d at 1147, 550 N.Y.S.2d at 576; *see* [1986] 22 N.Y.C.R.R. § 202.56(a)(3). Finally, even though a defendant may not seek to compel filing of a late notice of malpractice, he ultimately may have the action dismissed, pursuant to CPLR 3216, for the plaintiff's failure to prosecute. *Tewari*, 75 N.Y.2d at 11, 549 N.E.2d at 1147, 550 N.Y.S.2d at 576.

[24] *Tewari*, 75 N.Y.2d at 11, 549 N.E.2d at 1147, 550 N.Y.S.2d at 576. The court reasoned that the notice requirement, unlike a pleading, is only "a rule of calendar practice which functions to trigger the pre-calendar conference required by CPLR 3406(b)." *Id.* at 12, 549 N.E.2d at 1148, 550 N.Y.S.2d at 557. Also, the notice, unlike a pleading, does not impose an obligation on the defendant which may result in his default. *Id.*

[25] *Id.* at 13, 549 N.E.2d at 1148, 550 N.Y.S.2d at 577 (Kaye, J., concurring). Judge Kaye noted that the first step in statutory interpretation must be the statute itself. *Id.* (Kaye J., concurring). Judge Kaye stated that while CPLR 3406(b) includes a sanction of dismissal, such a sanction is conspicuously absent from the language of 3406(a). *Id.* (Kaye J., concurring).

[26] *Id.* at 13, 549 N.E.2d at 1149, 550 N.Y.S.2d at 578 (Kaye, J., concurring). Judge Kaye noted that the legislature has expressed its disfavor of dismissal as a sanction. *Id.* (Kaye, J. concurring); *see* CPLR 2005 (McKinney Supp. 1990). CPLR 2005 provides that "the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure." *Id.* Even the power to dismiss due to pleading defaults is not readily implied. *See* 2A WK&M §§ 2005.01-2005.02, at 20-38-20-47.

[27] *Tewari*, 75 N.Y.2d at 13, 549 N.E.2d at 1149, 550 N.Y.S.2d at 578 (Kaye, J., concurring). Dismissal before any evaluation on the merits should be invoked "only under con-

Judge Simons, writing in dissent, argued that dismissal is appropriate when viewed against the legislative efforts to rid court calendars of stale and meritless claims.[28] Judge Simons contended that, contrary to the majority's unduly "strict reading" of the statute, implying a power of dismissal is consistent with the language of the statute.[29]

By rejecting dismissal as a proper sanction for failure to file a timely notice of medical malpractice, it is submitted that the *Tewari* court has remained faithful to both its judicial function and the general purpose of the Reform Act, thereby expediting medical malpractice litigation. The New York State Constitution delegates authority to regulate practice and procedure in the courts primarily to the legislature.[30] Accordingly, court regulations and sanctions regarding practice and procedure must stem from either express or implied legislative authority.[31] The New York State Legislature neither specified any sanctions for failure to comply with 3406(a),[32] nor provided the Chief Administrator of the courts with authority to mandate sanctions, such as that of dismissal for such noncompliance.[33] Thus, it is submitted that the *Tewari*

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straint of justifying circumstances." *Id.* (Kaye, J., concurring) (citing Sortino v. Fisher, 20 App. Div. 2d 25, 28, 245 N.Y.S.2d 186, 191 (1st Dep't 1963)). Judge Kaye concluded that where the Legislature has not authorized dismissal and no court directive has been violated, there are no justifying circumstances for the dismissal of the plaintiff's complaint. *Id.* at 13-14, 549 N.E.2d at 1149, 550 N.Y.S.2d at 578 (Kaye, J., concurring).

[28] *Id.* at 14-15, 549 N.E.2d at 1149-50, 550 N.Y.S.2d at 578-79 (Simons, J., dissenting).

[29] *Id.* at 15-16, 549 N.E.2d at 1150, 550 N.E.2d at 579 (Simons, J., dissenting).

[30] *See* N.Y. CONST. art. VI, § 30; A.G. Ship Maintenance Corp. v. Lezak, 69 N.Y.2d 1, 5-6, 503 N.E.2d 681, 683, 511 N.Y.S.2d 216, 218 (1986) (power to dismiss complaint is legislative function); *see also* Cohn v. Borchard Affiliations, 25 N.Y.2d 237, 248, 250 N.E.2d 690, 695, 303 N.Y.S.2d 633, 640 (1969) (procedural device for dismissing complaints for undue delay is legislative creation and not product of court's inherent power).

The New York State Constitution provides in pertinent part: "The legislature shall have the . . . power to alter and regulate the jurisdiction and proceedings in law and in equity . . . The legislature may . . . delegate . . . any power possessed by the legislature to regulate practice and procedure in the courts." N.Y. CONST. art. VI, § 30.

[31] *See A.G. Ship*, 69 N.Y.2d at 5-6, 503 N.E.2d at 683, 511 N.Y.S.2d at 218. "[C]ourt rules must be adopted in accordance with procedures prescribed by the Constitution and statute" and such rules must be consistent with existing legislation. *Id.* Because the power to dismiss is a legislative function, the dismissal of a complaint must be authorized by either legislation or court rules consistent with existing legislation. *See id.*; *see also* N.Y. CONST. art. VI, § 30 ("Nothing . . . shall prevent the adoption of regulations by individual courts consistent with the general practice and procedure as provided by statute or general rules").

[32] *See* CPLR 3406(a) (McKinney Supp. 1990).

[33] *See id.* The Chief Administrator was given the authority to adopt rules "for the imposition of costs and other sanctions, including . . . dismissal . . . for failure . . . to comply with these special calendar control rules or any order of the court made thereunder." CPLR

court properly refused to enforce the dismissal for section 3406(a) noncompliance since nothing in the statute supports this result. Dismissal for noncompliance would contravene both the plain meaning and purpose of 3406(a).[34]

In *Tewari*, the Court of Appeals also stated that late notices should not be handled in the same manner as pleading defaults. Mandatory notice, unlike a pleading, neither serves to alert the defendant to an existing cause of action nor imposes an obligation on the defendant that could potentially result in a default judgment.[35] The *Tewari* court noted that the New York State Legislature views with disfavor dismissal in the case of certain pleading defaults.[36]

3406(b) (McKinney Supp. 1990). Section 202.56(b)(2) of the Uniform Rules for the New York State Trial Courts provides a sanction of dismissal only for violations of subdivision (b) or directives of the court. *See* [1986] 22 N.Y.C.R.R. § 202.56(b)(2); Marte v. Montefiore Medical Center, 142 Misc. 2d 745, 748, 538 N.Y.S.2d 396, 398 (Sup. Ct. Bronx County 1989). On the other hand, the legislature did not delegate authority to the Chief Administrator to impose the sanction of dismissal for noncompliance with subdivision (a). *See* CPLR 3406(a) (McKinney Supp. 1990). The only sanction provided by the rules for noncompliance with subdivision (a) is the imposition of conditions under section 202.56(a)(3). *See* [1986] 22 N.Y.C.R.R. § 202.56(a)(3). However, dismissal is not a condition. *See supra* note 18.

[34] *See supra* note 3 and accompanying text (discussing purposes of medical malpractice reform). Dismissal as a sanction for noncompliance with CPLR 3406(a) would send a message to defense attorneys that they may engage in dilatory tactics and "wait-out" the lawsuit because *any* procedural flaw on the plaintiff's part, including failure to file a timely notice, may result in dismissal of the complaint. *See* Kramer, *Torts*, 40 SYRACUSE L. REV. 605, 607 (1989). Further, issues of notice compliance would become the subject of substantial pretrial litigation. *See supra* note 19 and accompanying text. It has been noted that a sanction of dismissal results in the forfeiture of the party's claim, thereby imposing a penalty on the client for what is typically the attorney's fault. *See* Collazo v. Fiasconaro, N.Y.L.J., Jan. 9, 1989, at 25, col. 6 (Sup. Ct. Kings County). Moreover, this may lead to legal malpractice claims which would further burden court calendars and provide an inadequate remedy for faultless clients. *Id.*

[35] *Tewari*, 75 N.Y.2d at 12, 549 N.E.2d at 1148, 550 N.Y.S.2d at 577. "[F]ailure to timely file the CPLR 3406(a) notice is not analogous to a pleading default." *Id.* Article 34 of the CPLR is entitled "Calendar Practice: Trial Preference," while Article 30 is entitled "Remedies and Pleading." It appears, therefore, that a 3406(a) notice was not meant to be classified as a pleading, but rather as a means by which expedited discovery and adjudication in malpractice cases could be ordered. *See* Medical Malpractice Insurance-Comprehensive Reform Act, ch. 294, [1985] N.Y. Laws 685 (McKinney). The stringent showing needed to obtain an extension of time to file a pleading by a party already in default, pursuant to CPLR 2004, does not apply to an untimely notice filing. *Tewari*, 75 N.Y.2d at 12, 549 N.E.2d at 1148, 550 N.Y.S.2d at 577. Therefore, an extension in filing the notice under CPLR 2004 upon "good cause shown," should not fail simply because the plaintiff did not submit an affidavit of merits. *See id.*

[36] *See* CPLR 2005 (McKinney Supp. 1990). The Court of Appeals has declared that law office failure, as a matter of law, is an insufficient excuse to defeat a motion to dismiss a pleading default. *See* Barasch v. Micucci, 49 N.Y.2d 594, 600, 404 N.E.2d 1275, 1277-78, 427 N.Y.S.2d 732, 735 (1980). The *Barasch* court provided that an acceptable excuse and an

Judge Kaye concluded that the legislature does not advocate dismissal as a sanction for mere procedural deficiencies.[37]

It is submitted that it would be incongruous to assume that the legislature would approve dismissal for noncompliance with 3406(a), while affording pleading defaults more leniency. Accordingly, it is further suggested the *Tewari* court properly concluded that where there has been noncompliance with section 3406(a), other remedies, such as monetary sanctions, would better promote the dual objectives of the Reform Act[38] by discouraging dilatory tactics of attorneys and securing compensation for plaintiffs with legitimate malpractice claims.[39]

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affidavit of merit were required for an extension of time to file a late pleading. *Id.* at 600, 404 N.E.2d at 1277, 427 N.Y.S.2d at 734. With respect to law office failure, *Barasch* stripped the courts of judicial discretion in considering dismissal for procedural delay, substituting a flexible test which takes into account the length of the delay, the nature of the excuse, and the merits of the case with a rigid non-discretionary test. *See id.* at 599, 404 N.E.2d at 1277, 427 N.Y.S.2d at 734. Although the *Barasch* court refused to broadly construe the dismissal sanction by limiting dismissal as a matter of law to "rare instances," the *Barasch* analysis was soon applied to a defendant's untimely answer. *See* Eaton v. Equitable Life Assurance Soc. of the United States, 56 N.Y.2d 900, 902-03, 438 N.E.2d 1119, 1120, 453 N.Y.S.2d 404, 405 (1980) (almost any procedural default due to law office failure will result in dismissal). Due to the harshness of dismissal, lower New York courts often struggle to avoid a finding of "law office failure." *See* Comment, *Law Office Failure: The Need for a Definition after* Barasch *and* Eaton, 47 ALB. L. REV. 826, 843-45 (1983).

The enactment of CPLR 2005 had the practical effect of overruling *Barasch* and *Eaton*. *Id.*; *see* 2A WK&M § 2005.02, at 20-41. CPLR 2005 is a remedial statute which restored discretion to the courts after *Barasch* and *Eaton*. *See* 2A WK&M § 2005.02, at 20-41; *supra* note 26. With the restoration of judicial discretion regarding law office failure, lower courts have realized that dismissal is a drastic remedy which should be used only when the failure to comply with disclosure requirements is shown to be willful and deliberate. *See, e.g.*, Mink v. Park, 142 App. Div. 2d 899, 902, 531 N.Y.S.2d 400, 403 (3d Dep't 1988) (dismissal not warranted where unprofessional conduct by plaintiff's attorney did not constitute willful noncompliance); Scharlack v. Richmond Memorial Hosp., 127 App. Div. 2d 580, 581, 511 N.Y.S.2d 380, 382 (2d Dep't 1987) (nine-month unexcused failure to comply with court order was willful and warranted dismissal).

[37] *See Tewari*, 75 N.Y.2d at 13, 549 N.E.2d at 1149, 550 N.Y.S.2d at 578 (Kaye, J., concurring); *see also supra* notes 26, 27, and 33 and accompanying text (indicating legislature's disfavor of dismissal as sanction).

[38] *Tewari*, 75 N.Y.2d at 10-11, 549 N.E.2d at 1147, 550 N.Y.S.2d at 576. The *Tewari* court's decision is consistent with the statutory preference of imposing fees and costs instead of dismissal. *See* CPLR 8303-a (McKinney Supp. 1990). CPLR 8303-a authorizes the imposition of fees and costs up to $10,000 for frivolous malpractice claims, and was amended in 1986 to apply to all personal injury litigation. *Id.* Lower courts have followed the Court of Appeals' preference for monetary sanctions for noncompliance with CPLR 3406(a). *See infra* note 40 and accompanying text. Pleading defaults have sometimes received similar treatment. *See, e.g.*, Cockfield v. Apotheker, 81 App. Div. 2d 651, 651, 438 N.Y.S.2d 379, 379 (2d Dep't 1981) ($2,500 sanction).

[39] *See* Medical Malpractice Insurance-Comprehensive Reform Act, ch. 294, § 1, [1985]

The New York Court of Appeals has, in effect, directed lower courts to implement more efficient remedies, such as monetary sanctions, to compel compliance with CPLR 3406(a).[40] In light of this directive, attorneys would be wise to abide by the mandatory notice requirement time restraints pursuant to CPLR 3406(a) and avoid possible pecuniary sanctions for failure to comply in a timely manner pursuant to CPLR 3406(a).

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GENERAL BUSINESS LAW

GBL § 198-a(k): Lemon Law's alternative arbitration mechanism requiring an automobile manufacturer to submit to binding arbitration at the consumer's request is constitutional

The New York State Legislature enacted its first new car "Lemon Law" in 1983.[1] This law, General Business Law section 198-a, was promulgated in response to numerous complaints by consumers, who were dissatisfied with the myriad of confusing regulations and ineffective commercial law remedies available to them.[2] The Lemon Law, as originally adopted, provided the pur-

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N.Y. Laws 685 (McKinney); *see also supra* note 3 (discussing purposes of Reform Act).

[40] *Tewari*, 75 N.Y.2d at 10-11, 549 N.E.2d at 1147, 550 N.Y.S.2d at 576; *see* [1986] 22 N.Y.C.R.R. § 202.56(a)(3) (1986); *supra* note 23 and accompanying text (listing other remedies as alternatives to dismissal). Futhermore, "every reported case granting permission for a late filing has imposed the monetary sanctions provided by CPLR 2004 and the rule 202.56(a)(3)." Marte v. Montefiore Medical Center, 142 Misc. 2d 745, 751, 538 N.Y.S.2d 396, 400 (Sup. Ct. Bronx County 1989); *see* Kirck v. Samaan, N.Y.L.J., Feb. 10, 1989, at 26, col. 4 (Sup. Ct. Nassau County) (sanction of $1,500 imposed); Collazo v. Fiasconaro, N.Y.L.J., Jan. 9, 1989, at 25, col. 6 (Sup. Ct. Kings County) ($3,500 sanction imposed).

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[1] GBL § 198-a (McKinney 1988 & Supp. 1990). If a new car fails to conform to all express warranties during the first two years or 18,000 miles, whichever is earlier, upon timely notice to the manufacturer, the consumer is entitled to free repairs. *Id.* § 198-a(b)(1). If, after a reasonable number of attempts, the manufacturer is unable to repair a defect that substantially diminishes the value of the car, the manufacturer must either replace the car or refund its purchase price. *Id.* § 198-a(c)(1). For an overview of the development of the Lemon Law in New York, see Abrams, *New York Lemon Law Arbitration Program: Annual Report-1987*, 43 ARB. J. 36, 36-47 (Sept. 1988); Comment, *New York's Used-Car Lemon Law: An Evaluation*, 35 BUFFALO L. REV. 971, 989 (1986).

[2] Abrams, *supra* note 1, at 36-37. Before 1983, the manufacturers' approach to con-