Defense Counsel Ethical Considerations Presentation
by Rod Coyne

We all set out as attorneys-at-law in New York State by taking an oath. It is the oath that binds us to our ethical obligation so let's begin with it.

The Oath:

Section 466 of the Judiciary Law provides:

> Each person, admitted as proscribed in the chapter must, upon his [or her] admission, take the constitutional oath of office in open court, and subscribe the same in a Roll or a book, to be kept in the office of the clerk of the appellate division of the supreme court for that purpose.

Section 1 of Article XIII of the New York State Constitution sets forth the language of the oath:

> I do solemnly swear (or affirm) that I will support the constitution of the United States and the constitution of the State of New York and that I will faithfully discharge the duties of the office of [attorney and counselor-at-law], according to my ability.

The terms of the oath requires, among other things, that attorney in assuming the legal concerns of his or her clients to give sound legal advice, and loyally and conscientiously fulfill the tasks associated with the transaction of the client's legal business.

The Rules of Professional Conduct:

These Rules, adopted by each Appellate Division in 2009, provide the standard for measuring attorney misconduct.

Statement of Client's Rights:

22 NYCRR 1210.01 requires every attorney with a New York office to post a Statement of Client's Rights in a manner visible to clients.

Defense Counsel Perspective:

Rule 1.5 (b) requires an attorney to communicate to the client the scope of the representation and the basis for the rate of the fee and the expenses for which the client

will be responsible - before or within a reasonable time following the commencement of representation.

A lawyer is obligated to consult with a client about the means by which a client's objectives are to be accomplished and to keep the client reasonably informed about the status of his or her legal matter including material developments in the client case (Rule 1.4). The decision to accept or reject a settlement offer is within the province of the client, not the lawyer (Rule 1.2).

Irrespective of whether an attorney was retained or assigned, the failure to properly communicate with a client is a source of frequent complaints, and may result in disciplinary action.

Tripartite Relationship in Settlement Proceedings - (Not always three part harmony!):

When a defense is provided to a client pursuant to a liability policy it creates a tripartite relationship among the client, the carrier and defense counsel. [add citation]

This relationship in certain instances may lead to conflicts during settlement negotiations.

> [W]hen a plaintiff makes a settlement offer within the policy limits, "an inherent conflict arises between the insurer's desire to settle the claim for as little as possible, and the insured's desire to avoid liability in excess of the policy limits." *Pinto v. Allstate Ins. Co.*, 221 F. 3d 394, 399 (2nd Cir. 2000) (citing *Smith v. General Accident Ins. Co.*, 91 NY 2d 648, 697 NE 2d 168,
>
> 170-171 (1998)).

A typical G.L. policy provides:

> [The insurer] will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" and settle any "claim" or "suit" that may result.

The Rules of Professional Conduct still apply to defense counsel representing a client within the context of the tripartite relationship.

When attorneys are retained by insurance companies to defend their insureds in an action for damages covered by their policy, the insureds are nonetheless clients of the retained attorneys. *Turzio v. Ravenhall*, 34 Misc. 2d 17, 227 NYS 2d 103 (N.Y. City Ct. 1962). When the attorney, compensated by the carrier, assumes the duty of representing

the policy holder the attorney owes the client — the carrier's insured— an undeviating and single allegiance.

Instances where problems arise:

- Defense counsel does not convey to client (insured) probability that a jury would find in favor of the plaintiff and render a verdict in excess of client's coverage.

- Defense counsel fails to convey to client plaintiff's willingness to settle within policy limits/possibility of client's exposure to excess verdict.

- Defense counsel fails to communicate to client that it may retain own counsel to get involved in settlement discussions considering verdict in excess of coverage.

Consideration beyond strictly ethical considerations:

Counsel assigned by primary insurance carrier will also be well advised to keep its excess carrier(s) apprised of negotiations. The excess carrier will, of course, have a strong interest in seeing that a matter is resolved within the limits of the primary layer. The excess layer of coverage gives rise to what is sometimes referred to as the "quadpartite relationship." A failure to keep the excess carrier apprised of negotiations – coupled with a damages verdict – beyond the primary layer of coverage may well result in a lawsuit by excess against defense counsel. No one wants that.

Bad faith:

A failure by defense counsel to communicate clearly and effectively regarding settlement negotiations has been deemed an important component in a "bad faith" action by the client against the carrier. See for example Tavares v. American Transit Co. 2011 slip opinion where the court ruled that the carrier knowingly ignored the probability that a jury would find in favor of plaintiff and render an excess verdict – and failed to communicate to the insured (defense counsel's client) that plaintiff in the underlying personal injury action) was willing within the policy limits.

168 A.D.3d 428, 88 N.Y.S.3d 875 (Mem), 2019 N.Y. Slip Op. 00057

*1 Steven Grant, Appellant,
v
Arcodio A. Almonte, Respondent.

Supreme Court, Appellate Division, First Department, New York
20112/14E, 8025N
January 3, 2019

CITE TITLE AS: Grant v Almonte

HEADNOTE

Stipulations
Stipulation in Open Court
Requirements

Parker Waichman LLP, Port Washington (Jay L.T. Breakstone of counsel), for appellant.
Marjorie E. Bornes, Brooklyn, for respondent.
Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered December 12, 2017, which denied plaintiff's motion to restore the action to the trial calendar, unanimously reversed, on the law, without costs, and the motion granted.

The requisite formality necessary to accord an oral agreement binding effect as an "open court" stipulation under CPLR 2104 was not present when, following a pre-trial conference at which an unidentified per diem attorney appeared for plaintiff, the matter was marked "settled" in the court's records. There was no indication of the terms of the settlement, and the agreement was never further recorded, memorialized, or filed with the County Clerk (*see Velazquez v St. Barnabas Hosp.*, 13 NY3d 894 [2009]; *Andre-Long v Verizon Corp.*, 31 AD3d 353, 354 [2006]; *compare Harrison v NYU Downtown Hosp.*, 117 AD3d 479 [1st Dept 2014]).
Concur—Sweeny, J.P., Gische, Kahn, Oing, Singh, JJ.

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McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 21. Papers

McKinney's CPLR Rule 2104

Rule 2104. Stipulations

Effective: July 14, 2003
Currentness

An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk.

Credits
(L.1962, c. 308. Amended L.2003, c. 62, § 28, eff. July 14, 2003.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Thomas F. Gleason

2016

CPLR 2104 Stipulations.

Sylla v. 90-100 Trinity Owner LLC (135 A.D.3d 501 [2016]) points out that a valid stipulation can deprive the court of jurisdiction for appellate review, because neither stipulating party is aggrieved by an order to which they stipulate. In *Sylla*, the First Department declined to entertain an appeal of an order entered upon a written stipulation signed by counsel in accordance with CPLR 2104, and "so ordered" by the court below.

The order sought to be appealed granted a motion for summary judgment dismissing the complaint. The order was not affirmed by the Appellate Division, but rather the appeal was "dismissed." The dismissal reflects the lack of jurisdiction to entertain the appeal, because there is no case or controversy on matters on which the parties agreed in a CPLR 2104 stipulation.

Papers Constituting A Written Stipulation.

In *Matter of George W. & Dacie Clements Agricultural Research Institute, Inc. v. C. Bruce Green, Assessor of the Town of Lisbon, et al.* (130 A.D.3d 1422 [2015]), the Appellate Division Third Department considered an appeal from an order of the Supreme Court denying petitioner's motion for summary judgment to enforce a settlement between the parties to a real property tax dispute. The proceedings were brought under the Real Property Tax Law on behalf of a not-for-profit corporation that sought an exemption from real property taxes based on its non-profit activities. The petitioner operated a farm, a restaurant and a bed-and-breakfast, but also provided the public with training and educational information concerning organic and biodynamic farming and gardening. The requested tax exemption was denied, and in the course of the ensuing tax challenges the representatives of the parties engaged in written correspondence concerning potential settlement.

The Supreme Court, after a careful review of the writings that formed the basis for the purported settlement, concluded that no binding agreement to settle had been reached. On appeal, the Third Department affirmed. Justice Devine's opinion explains how writings between parties discussing the possibility of settlement can form the basis for a subsequent settlement, if the proposed settlement is adequately described, and the later writings confirm consent to the proposed agreement. Such writings taken together must indicate mutual accord and all the material terms of the agreement.

Thus, a settlement agreement can result when writings explicitly incorporate the terms of other documents prepared in anticipation of settlement. By way of contrast, however, proposed settlement writings do not reflect agreement if they expressly anticipate a subsequent writing that will officially memorialize the existence of the settlement and the material terms of the accord.

In the documents before the court in *Matter of George W. & Dacie Clements Agricultural Research Institute, Inc.*, it was clear that one of the parties

"took pains to describe the proposed settlement hypothetically." Therefore, the writings taken together "evidence nothing more than an 'agreement to agree' to the amplified terms of a future writing ...." Such writings were "incomplete as to all terms necessary necessarily material to any settlement of the proceedings of the instant proceedings, "and thus no settlement ensued. The case represents the benefit of clarity that comes with a bilaterally signed document that complies with CPLR 2104.

Can Performance Reflect A Settlement Agreement?

In *Martin v. Harrington* (139 A.D.3d 1017 [2016]), correspondence was exchanged in an action involving property line dispute. The defendants in the case alleged that approximately six months after the action was commenced, the parties had entered into a settlement agreement. The plaintiff's then counsel had sent a letter to the defendants proposing that the plaintiff would discontinue the action if the defendants satisfied certain conditions. The defendants apparently satisfied the proposed conditions of the settlement, but the action was not discontinued. Approximately three years later the plaintiff (apparently with a new attorney) complained that the defendants still were encroaching upon her land.

The defendants moved to enforce the settlement and dismiss the complaint. The settlement was enforced and the complaint dismissed by the Supreme Court, and on appeal the Second Department affirmed, holding that the material terms of the settlement were contained in plaintiff's attorney letter, and the attorney had apparent authority to settle the case on plaintiff's behalf. The Appellate Division held that the exchange of correspondence between the attorneys for the parties, in conjunction with the defendants' completion of the tasks demanded in the settlement without any objection by the plaintiff, was sufficient to constitute an enforceable settlement agreement.

The paperwork in *Martin* was messy, and endangered the viability of the settlement. The defendants' failure to nail down the settlement in accordance with CPLR 2104 caused additional expense and exposure to a claim that the settlement had never become binding. The case is an object lesson that counsel should attend to the straightforward formalities of CPLR 2104, requiring the writing subscribed by a party, or their attorney.

Court Or Docket Notation Not Sufficient To Prove Settlement

In *GLM Medical, P.C. v. Geico General Insurance Company* (50 Misc.3d 104 [2015]), a provider sought to recover assigned first party no-fault benefits sued. A notation on the New York State Unified Court System E-Court's public website indicated that the matter had been "settled" on March 9, 2009. The plaintiff later moved to restore the action to the trial calendar, and though the motion was denied by the Civil Court of the City of New York, the Appellate Term reversed. The Appellate Term held that although the court could take judicial notice of the settlement notation on the OCA website, that "does not constitute a sufficient memorialization of the terms of the alleged settlement so as to satisfy the 'requirement of CPLR 2104.' " Accordingly, the Appellate Term ordered that the plaintiff's motion to restore the action to the trial court calendar be granted.

2015

C2104 Stipulations

The Practice Commentaries for Domestic Relations Law § 236(B)(3) describes case law applicable to divorce actions, and a requirement that under certain circumstances the signature on a nuptial agreement must be acknowledged in the manner sufficient for a deed to be recorded. *See*, *Scheinkman*, 2014 Practice Commentary C236B12.

Defilippi v. Defilippi, 48 Misc.3d 937, 11 N.Y.S.3d 813 (2015) involved a challenge to a Stipulation of Settlement in a divorce action that was not so acknowledged, and whether such a written agreement had to meet the acknowledgement requirement in addition to the requirements of CPLR 2104. In *Defilippi*, the Court declined to allow a collateral attack on the stipulation of settlement (*citing*, *Rio v. Rio*, 110 A.D.3d 1051 [2nd Dept. 2013]). Although meeting the requirements of CPLR 2104 was sufficient in that case, it remains prudent to carefully examine technical requirements of the Domestic Relations Law in disputes involving equitable distribution or nuptial agreements.

In another domestic relations case, *Fulginiti v. Fulginiti*, 127 A.D.3d 1382, 4 N.Y.S.3d 780 (3rd Dept. 2013), the Court construed a stipulation of settlement between the plaintiff wife and her defendant husband in open court. At the time of the stipulation the husband appeared *pro se* and agreed to resolve several issues on the record. The wife later claimed that the stipulation included an agreement by the husband to withdraw his answer, and although the wife had made an offhand comment to that effect, the husband did not voice agreement to that particular term. The Third Department noted that the parties intended to resolve many issues involving equitable distribution, maintenance and child support, but

the stipulation was not effective on those matters, because it was not clear that the husband actually agreed to withdraw his answer. As there was not enough evidence of a meeting of the minds, the Third Department held that the trial court erred in construing the Stipulation to be effective.

2014

C2104:4. Email Confirmation of Stipulations

The Appellate Division, Second Department in *Forcelli v. Gelco Corporation* (109 A.D.3d 244, 972 N.Y.S.2d 570 [2d Dept. 2013]) enforced an out-of-court oral settlement agreement that was later confirmed by an email. The email confirmation worked, but the case illustrates that oral or email stipulations remain risky. The email message satisfied the criteria of CPLR 2104 in *Forcelli* because it was "in writing" and made by an individual with authority. The problem was whether the email could be deemed "subscribed," as required by CPLR 2104.

The email message in question contained the author's printed name at the end of the message, and not an electronic signature as might be utilized under § 304 of the State Technology Law. However, the author of the email (Brenda Green), typed at the end "thanks Brenda Green," which indicated that she "purposely added her name to the particular email message." (*Forcelli,* 109 A.D.3d at 251, 972 N.Y.S.2d at 575). The name was not automatically added by the software (which is common with email messages), so the message was deemed sufficient to meet the "subscribe" requirement of CPLR 2104. Such informality certainly is not to be recommended for stipulations on important matters.

2013

C:2104:1 Stipulations in general

The Second Department has confirmed that an email message can satisfy the criteria of CPLR 2104 and become a binding and enforceable stipulation of settlement. (*Forcelli v. Gelco Corporation* (109 A.D.3d 244, 972 N.Y.S.2d 570 [2013]). The case involved an automobile accident that had progressed at the time of settlement to a pending motion and cross-motion for summary judgment.

Shortly after the motions were submitted, the parties negotiated a settlement via telephone. This was followed by an email message from defendant's counsel to plaintiff's counsel confirming the phone conversation. Releases were then

signed by the plaintiff and notarized by plaintiff's counsel, but before delivery, the Supreme Court issued an order on the summary judgment motion dismissing the complaint. The order was promptly served by the defendant with notice of entry. On the same day, plaintiff's counsel sent the signed release and a stipulation of discontinuance to defense counsel, which the defendant rejected with a letter stating that there had been no "... settlement consummated under New York CPLR 2104 between the parties."

Plaintiff then moved to vacate the order of dismissal and to enforce the settlement agreement, as set forth in the email message. The Supreme Court granted the plaintiff's motion to vacate and entered judgment in favor of the plaintiffs in the amount of the settlement. On appeal, the Appellate Division affirmed and held:

[G]iven the now widespread use of email as a form of written communication in both personal and business affairs, it would be unreasonable to conclude that email messages are incapable of conforming to the criteria of CPLR 2104 simply because they cannot be physically signed in a traditional fashion.

(*Forcelli v. Gelco Corporation* (109 A.D.3d 244, 972 N.Y.S.2d 570 [2013]; citing *Newmark & Co. Real Estate, Inc. v. 2615 East 17th Realty, LLC*, 80 A.D.3d 476, 477-478).

The Appellate Division referenced the State Technology Law and the Legislature's policy to support electronic commerce by "... allowing people to use electronic signatures and electronic records in lieu of handwritten signatures and paper documents."

Remember, however, that a CPLR 2104 written stipulation has to be "subscribed" by the party or their counsel. This requirement was deemed met in *Forcelli* because defendant's counsel had typed her name at the end of the email message. The Appellate Division emphasized this point, and that the addition of counsel's name on the email was not the result of the sender's email software being "... programmed to automatically generate the name of the email message sender, along with other identifying information, every time an email is sent." In holding that defense counsel had intended to "subscribe" the email for purposes of CPLR 2104, the Court stated:

Accordingly, we hold that where, as here, an email message contains all material terms of a settlement and a manifestation of mutual accord, and the party to be charged, or his or her agent, types his or her name under circumstances manifesting an intent that the name be

treated as a signature, such an email message may be deemed a subscribed writing within the meaning of CPLR 2104 so as to constitute an enforceable agreement.

This holding suggests that a separate typed "signature" is needed for the "subscription" requirement, but one wonders whether an automatically added signature could ever suffice for "subscribing" under CPLR 2106? The State Technology Law seems to suggest that this effect is at least possible, depending on intent, because § 302(3) defines an electronic signature as "... an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record." If an attorney clicks "send" with the knowledge and intent that a signature automatically be affixed, would that not constitute a sufficient signing act?

A similar issue arises in the context of the statute of frauds, which was addressed at some length but not resolved in *Naldi v. Grunberg and Grunberg, 55 LLC* (80 A.D.3d 1 [1st Dept. 2010]). While the court clearly was of the view that a contract satisfying the statute of frauds could be created by email, the emails in that case were not intended to do so. Thus, the court did not have occasion to decide the merit of defendant's objection that the automatically generated signature block was not "an intentional subscription for purposes of the statute of frauds." (80 A.D.3d 1, 16). Therefore, the issue appears to still be open and the careful practitioner should probably memorialize stipulations the old way for now--in a hard copy signed by both sides.

Another lesson from *Forcelli* is the importance of promptly advising the court of tentative settlements, by letter and a phone call to the law secretary. A request that the court hold the release of any decision can avoid the problem the plaintiff faced in *Forcelli*. This request not only avoids the court doing unnecessary work, it prevents a change in the circumstances that may have prompted the settlement.

One final point--the plaintiff's counsel in *Forcelli* had not signed the email stipulation, but the agreement was being enforced against the party whose counsel had "subscribed the argument." Therefore, an agreement enforceable against the signing party did result. Thus, it remains essential to obtain the signature of the party against whom enforcement is sought, and one party cannot confirm the agreement of the other party without their signature.

PRACTICE COMMENTARIES

by Thomas F. Gleason

C2104:1 Stipulations, In General.

Nothing smooths the course of litigation like cooperation among opposing counsel, implemented through stipulations. The parties may freely stipulate on most (but not all) aspects of a lawsuit. Stipulations are favored by judicial policy (*see Hallock v. State of New York*, 1984, 64 N.Y.2d 224, 485 N.Y.S.2d 510, 474 N.E.2d 1178; *Nishman v. DeMarco,* 1980, 76 A.D.2d 360, 371, 430 N.Y.S.2d 339, 345 (2d Dep't), *appeal dismissed* 53 N.Y.2d 642, 438 N.Y.S.2d 787, 420 N.E.2d 979), but CPLR 2104 imposes important conditions on their enforceability.

Stipulations often are informal, but dangers lurk behind the CPLR 2104 requirements that stipulations be done by agreement in open court, in a signed writing, or in an agreement memorialized by a court order. This potential sand in the gears of practice usually is minimized by trust between lawyers, who freely but carefully rely on the word of opposing counsel on such matters as the due date for responsive papers, narrowing of disclosure requests, and scheduling of depositions.

But it is well to remember that there are three types of lawyers in this world: those for whom their word is their absolute bond; those of "flexible" memory with whom you had better get it in writing; and those with whom, even after getting it in writing, you should foresee how they will try to weasel out of a deal, when it suits their advantage. To the credit of the bar, the first category of lawyer is by far the most numerous, but to avoid subjecting the client's interests to our judgment of character, important agreements should always be confirmed in writing, or stated on the stenographic record in open court.

Certain things are beyond stipulation, such as an effort to confer subject matter jurisdiction when none exists, or laws and procedures that may not be waived for reasons of public policy. (*See Nishman v. DeMarco*, *supra*, 76 A.D.2d 360, 371, 430 N.Y.S.2d 339, 345). Other types of stipulations require approval of the court, such as settlements in class actions (CPLR 908); infant settlements (CPLR 1207); or wrongful death claims (EPTL § 5-4.6).

Stipulations are contracts and subject to contractual rules of interpretation, which will be in accordance with the parties' intent (*See, Kraker v. Roll*, 1984, 100 A.D.2d 424, 436, 474 N.Y.S.2d 527, 535-36 [2d Dep't]). The meaning of unambiguous stipulations will be determined within the four corners of the stipulation, or the actual words of the statements in court. Stipulations will not be lightly set aside, and to do so, good cause must be shown such as fraud, collusion, mutual mistake,

duress, unconscionability, or that the stipulation is contrary to public policy (*See McCoy v. Feinman*, 99 N.Y.2d 295, 302).

The stipulation must be definite, and not leave open essential terms. Thus, in *Velazquez v. St. Barnabas Hospital* (13 N.Y.3d 894, 895 N.Y.S.2d 286 [2009]), the Court of Appeals held a stipulation unenforceable even though the parties did not dispute that they had agreed on the specific amount to settle the action. They did not, however, finalize or definitively agree on the details of the confidentiality agreement, nor did they make the agreement in open court or file any document with the County Clerk. Enforcement of the stipulation under such circumstances might have required the court to enforce only part of an integrated bargain, because the remaining essential terms were in dispute, or perhaps enforce an agreement never fully gelled into final form.

The reticence of the Court to enter such a quagmire is explained as part of the fundamental policy of CPLR 2104 in *Bonnette v. Long Island College Hosp.*, (3 N.Y.3d 281 [2004]): "[I]f settlements, once entered, are to be enforced with rigor and without a searching examination into their substance, it becomes all the more important that they be clear, final and the product of mutual accord." (*id.* at 209).

Bonette was a very serious medical malpractice action brought by an infant and her mother against a doctor and hospital. The parties orally agreed outside of court to a three million dollar settlement to be paid by the hospital. The paperwork for the infant settlement was not finalized over the next year and one-half, while the mother sought to complete arrangements for the structured settlement. The child later died, which changed the economics of the settlement, so the hospital responded to news of the death by asserting that the settlement had not been finalized as required by CPLR 2104, and as a result the hospital considered "no settlement to exist." (*Bonnette v. Long Island College Hosp.*, 3 N.Y.3d 281, 284).

The hospital had sent correspondence that made the existence of the settlement agreement clear, but the letters did not contain all the material terms of the settlement. In rejecting mother's request to make the settlement binding, the Court of Appeals held: "To allow the enforcement of unrecorded oral settlements would invite an endless stream of collateral litigation over the settlement terms. This would run counter not only to the statute, which on its face admits of no exceptions, but also to the policy concerns of certainty, judicial economy, flexibility to conduct settlement negotiations without fear of being bound by preliminary offers and the prevention of fraud."

This was a very harsh lesson on the need to be very careful with CPLR 2104, especially with respect to settlements.

C2104:2 Formalities of Stipulations.

In the early stages of a lawsuit, attorneys frequently agree by telephone to extensions of time to answer or move to dismiss. Often an extension is granted orally, so it is important for benefiting counsel to send written confirmation, and request acknowledgement, sometimes by adding a signature line and a notation "the above is agreed" on the confirming letter. Careful counsel also may enclose a self-addressed stamped envelope, to make the process easy on the party stipulating to the extension.

Email also is now frequently used for such agreements and confirmation (*see* Commentary C2104:4 below on Email Stipulations), but the benefiting counsel should be careful as to the form of the confirmation, with CPLR 2104 in mind. For critical matters a letter or written document, signed by the party to be charged is the better practice. The attorney who fails to receive a prompt confirmation on any extension or accommodation would do well to follow up, and if necessary seek court approval of the extension. The important point is to act promptly, and never let a critical time expire. An oral stipulation generally will not be enforceable if one of the parties disavows the agreement. (*See, e.g., Klein v. Mount Sinai Hospital*, 1984, 61 N.Y.2d 865, 474 N.Y.S.2d 462, 462 N.E.2d 1180).

Fortunately, most judges (especially those with extensive prior practice experience) will have little patience for counsel who burdens the court by a failure to abide by oral agreements, but while courts may be liberal in vacating defaults in such circumstances (*See, e.g., Saltzman v. Knockout Chemical & Equipment Co.*, 1985, 108 A.D.2d 908, 485 N.Y.S.2d 794 [2d Dep't]; *Tate v. Fusco*, 1984, 103 A.D.2d 869, 478 N.Y.S.2d 110 [3d Dep't]), it is dangerous to rely on an oral stipulation in critical situations.

CPLR 2104 requires that the party to be bound to a written stipulation have subscribed (signed) it, but in *Stefaniw v. Cerrone*, 1987, 130 A.D.2d 483, 515 N.Y.S.2d 66 [2d Dep't], the party who drafted a written stipulation but did not himself sign it was held bound nevertheless after having sent it to the other side for their signature. Apparently, the court concluded that the transmittal act was the equivalent of written confirmation, removing any doubt as to the party's agreement to the stipulation terms.

Leemilt's Petroleum, Inc. v. Public Storage, Inc., 1993, 193 A.D.2d 650, 597 N.Y.S.2d 463 (2d Dep't), involved an oral extension of time to serve a pleading, which was held enforceable because the existence of a stipulation was admitted (although the precise terms were disputed), and the adversary relied upon the oral agreement. But the reliance on an oral agreement, especially at the commencement stage of an action is very dangerous. This was confirmed by the dissent in *Leemilt's*, arguing that any "reliance" exception should be sparingly applied and limited to cases where the evidence of an actual agreement is strong. Moreover, any dispute over the precise terms or extent of the oral stipulation may be fatal to even an undisputed portion of the agreement, and the Court of Appeals has been very strict in limiting the enforcement of oral stipulations, as explained in *Bonnette v. Long Island College Hosp.*, (3 N.Y.3d 281 [2004]), noted in Commentary C2104:1 above.

C2104:3 Stipulations Between Counsel in Open Court.

The policy in favor of enforcement of stipulations is tempered by the need that the terms of the agreement be clear--if a stipulation is not reduced to a writing, the requisite clarity can be accomplished "between counsel in open court." The recording of court room stipulations usually will be done by a stenographer, and so it has been held that the "open court" agreement can occur even in the judge's chambers, so long as the judge and the stenographer are present. (*See, e.g., Sontag v. Sontag*, 1985, 114 A.D.2d 892, 495 N.Y.S.2d 65 (2d Dep't), *appeal dismissed* 66 N.Y.2d 554, 498 N.Y.S.2d 133, 488 N.E.2d 1245; *Bernstein v. Salvatore*, 1978, 62 A.D.2d 945, 404 N.Y.S.2d 12 (1st Dep't). *Cf. Matter of Dolgin Eldert Corp.*, 1972, 31 N.Y.2d 1, 334 N.Y.S.2d 833, 286 N.E.2d 228). A stenographer alone apparently will not suffice, *Kushner v. Mollin*, 1988, 144 A.D.2d 649, 535 N.Y.S.2d 41 (2d Dep't.).

In *Trapani v. Trapani* (1990, 147 Misc.2d 447, 556 N.Y.S.2d 210 [Sup.Ct.Kings Co.]), the Court held that a stipulation of settlement recorded by a stenographer at a deposition did *not* meet the requirements of CPLR 2104. Therefore, if the terms of a stipulation are agreed to at a deposition the parties should have the transcript printed, and then attach it or otherwise include the terms in a written, signed stipulation.

Similarly, in *Conlon v. Concord Pools, Ltd.* (170 A.D.2d 754, 565 N.Y.S.2d 860 [1991]), the Appellate Division Third Department held that a settlement made on the record in front of judge's law clerk in chambers was insufficient. In *Conlon*, however, the court ultimately sustained the settlement on an estoppel theory, noting that the terms of the settlement were clear, and the parties had changed their circumstances in reliance upon it. As the Court held: "[W]hen there is no dispute between the parties as to the terms of a settlement agreement made during pending

litigation, the courts will refuse to permit the use of the statute (CPLR 2104) against a party who has been misled or deceived by the agreement to his detriment or who has relied upon the agreement." (170 A.D.2d at 754, 565 N.Y.S.2d at 862). It appears that it would advance the judicial policy in favor of stipulations if all agreements made clear by a stenographic transcript were enforced, but the Court of Appeals has noted that CPLR 2104 "on its face admits of no exceptions," so reliance on such an estoppel approach is dangerous.

The Third and Fourth Departments have held that the presence of a court reporter in addition to the judge is essential, because the transcript provides "irrefutable proof of the agreement" (*see Gonyea v. Avis Rent A Car System, Inc.*, 1981, 82 A.D.2d 1011, 1012, 442 N.Y.S.2d 177, 178 (3d Dep't). *See also, Kolodziej v. Kolodziej*, 1976, 54 A.D.2d 228, 388 N.Y.S.2d 447 (4th Dep't). However, other cases have enforced in-court stipulations if the agreement is memorialized in some form of official documentation such as a minute book. *See, e.g., Deal v. Meenan Oil Co.*, 1989, 153 A.D.2d 665, 544 N.Y.S.2d 672 (2d Dep't). *See also, Popovic v. New York City Health and Hospitals Corp.*, 1992, 180 A.D.2d 493, 579 N.Y.S.2d 39 (1st Dep't). The First Department also found "substantial compliance" with CPLR 2104 in a case in which the judge's personal notes detailed the settlement in chambers, at a time when the court stenographer was not available (*see Golden Arrow Films, Inc.*, 1972, 38 A.D.2d 813, 328 N.Y.S.2d 901 (1st Dep't).

While it is surprising to see a case in which a settlement before the court was sought to be disavowed, perhaps it was due to some disagreement with the recording of the agreement. For this reason, and especially in light of the Court of Appeals strict approach in *Bonette v. Long Island College Hospital* (2004, 3 N.Y.3d 281, 785 N.Y.S.2d 738, 819 N.E.2d 206), the better practice is to always ask for a stenographer, and state the agreement on the record before the judge. This also provides the court an opportunity to ask the client on the record to confirm that they agree, which is a common and salutary practice. If the stenographer is not available, it is best to wait for their arrival or find a convenient method to write out the agreement.

C2104:4 Email Confirmation of Stipulations.

An email agreement, with the attorney's name included at the end of the email, apparently will suffice to meet the "subscribed" requirement of CPLR 2104, at least in the First Department (*See, Williamson v. Delsener*, 2009, 59 A.D.3d 291, 874 N.Y.S.2d 41 (1st Dep't). In *Williamson*, the email traffic clearly indicated counsel's agreement to settle at 60% of the amount demanded, and the resulting enforceable contract was not avoided by counsel's subsequent refusal to execute releases and

a stipulation of discontinuance. However, in *The Options Group, Inc. v. Vyas* (91 A.D.3d 446, 936 N.Y.S.2d 172 [1st Dep't 2012]), the Court declined to treat an email as an acceptance of a settlement, but in that case the email did not contain all the essential terms of the settlement, and was later superseded by a formal settlement agreement drafted by plaintiff and signed by the defendant. The later agreement did contain all the essential terms and specifically cancelled all prior agreements. The Court considered this agreement binding even though it was not actually signed by the plaintiff, because "the record demonstrates that both parties intended to be bound." (*The Options Group, Inc. v. Vyas*, 91 A.D.3d 446, 447, 936 N.Y.S.2d 172, 173 [1st Dep't 2012]). For the present, email should only be used with care, and not for stipulations on anything really important.

C2104:5 Filing of Stipulations of Settlement.

CPLR 2104 was amended in 2003 to provide "[w]ith respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk." At the same time, CPLR 8020 was amended to require the defendant to pay the County Clerk $35 with the filing. The legislative history of these amendments makes clear that their purpose was to generate revenue, with the settlement filing fee enacted along with several other filing fee measures. (*See, e.g.*, CPLR 3217[d]; CPLR 8020[a], [d]). The background of the legislation was extensively analyzed by Professor Siegel in *Siegel's Practice Review*, Numbers 136, 137 and 139).

The important substantive issues raised by the filing requirement are how much detail must be included in describing the "terms of such stipulation," and what are the consequences to a party that fails to comply? For example, CPLR 2104 requires the defendant to do the filing, but does it really matter if the Plaintiff, who also has an interest in finality, files the terms of the stipulation and pays the fee? Hopefully not. Similarly, if a question arises as to the enforcement of a settlement, it makes sense to allow any defect to be corrected so long as the required fee is ultimately paid.

Confidentiality of settlements now is an issue under the CPLR 2104 requirement that the "terms of such stipulation" be filed as a public record. Two approaches may be workable here: first, if there really is good cause for confidentiality, the parties can seek to have the settlement sealed under section 216.1 of the Uniform Rules for the New York State Trial Courts. Secondly, the parties may seek to generally describe the terms of the stipulation, but of course as much specificity as is possible would be desirable. As the intent of the measure was to produce revenue and not

publicize settlements, it is to be hoped that courts will be liberal in allowing general compliance with the filing requirement so long as the fee is paid.

C2104:6 The Attorney's Authority to Settle.

An attorney acts as an agent for their client, and when authorized by the client, counsel will have the power to bind the client to a settlement. Obviously, an attorney would breach their duty to a client by settling without authorization, and it is the rare case in which the client seeks to disavow a settlement by claiming that settlement authority was not given to the attorney.

However, that is what happened in *Hallock v. State of New York*, 1984, 64 N.Y.2d 224, 485 N.Y.S.2d 510, 474 N.E.2d 1178, a case in which the attorney made an on-the-record settlement at a pre-trial conference. (It should be noted that the Uniform Rules require that the pretrial conference be attended by the party or an attorney "authorized to make binding stipulations." *See* Uniform Civil Rules 202.26[e]). *Hallock* involved a pre-trial on-the-record settlement, but the client was ill on that day and was not present. More than two months later, the client expressed dissatisfaction with the settlement and sought to disavow it on the ground that the attorney had acted beyond his authority.

As the Court of Appeals explained in *Hallock*, an attorney cannot compromise or settle a claim without a grant of authority from the client, and "settlements negotiated by attorneys without authority from their clients have not been binding" (*see Hallock*, *supra* at 230, citing *Countryman v. Breen*, 241 A.D. 392, *aff'd* 268 N.Y. 643; *Spisto v. Thompson*, 39 A.D.2d 598; *Leslie v. Van Vranken*, 24 A.D.2d 658; *Mazzella v. American Home Constr. Co.*, 12 A.D.2d 910; *see also Koss Co-Graphics, Inc. v. Cohen*, 1990, 166 A.D.2d 649, 561 N.Y.S.2d 76 [2d Dep't]).

Nevertheless, the Court of Appeals held the settlement in *Hallock* binding, because even if the attorney did not have actual authority to settle, he did have apparent authority. Apparent authority depends on the principal, in this case the client, "clothing" the agent with what appears to be the actual authority to do certain acts, such as bind the principal to a settlement. Generally speaking the nature of the attorney-client relationship provides an attorney with a certain level of actual authority to manage the litigation on behalf of a client, and this includes the authority to make many procedural or tactical decisions (*see* Rules of Professional Conduct, Rule 1.2; *Gorham v. Gale*, 7 Cow. 739, 744; *Gaillard v. Smart*, 6 Cow. 385, 388). But this general authority will not without more allow the attorney to enter a binding settlement agreement.

In *Hallock*, as in all cases of apparent authority, the principal by words or conduct caused a third party to reasonably believe that the agent did have the necessary authority to enter the settlement transaction and bind the principal. The attorney had been involved in extensive prior settlement negotiations, with the plaintiff present, and the attorney's presence at the final pretrial conference constituted "an implied representation by [the client] to defendants that [the attorney] had authority to bind him to the settlement...." Based on such words or conduct of the principal (the client), the client later is estopped from denying that the attorney possessed settlement authority. (*See Hallock*, *supra*, 64 N.Y.2d 224, 231, *see* Restatement, Agency 2d, section 27).

As a result, the settlement was binding on Hallock, who was "relegated to relief against their former attorney for any damages which [the attorney's] conduct may have caused them." (*Hallock*, *supra*, 64 N.Y.2d 224, 230). This type of situation can and should be avoided by the attorney being very clear as to the limits of settlement authority, and by obtaining the client's express consent to any settlement proposal. The *Hallock* case also illustrates why Judges often inquire, during open court settlements, whether each client accepts the stipulation that the attorneys have placed on the record.

C2104:7. Stipulations in Arbitrations and Other Proceedings.

By its terms, CPLR 2104 applies to stipulations "relating to any matter in an action," which implies that the on the record and writing requirements apply only in actions and special proceedings (*see* CPLR 105[b]), and not in arbitrations or administrative proceedings.

In one case an oral stipulation made on the record at the hearing of an arbitration proceeding was deemed equivalent to a stipulation made in open court, but the arbitration panel had drawn that conclusion and made an award based on the stipulation. (*See Central New York Regional Market Auth. v. John B. Pike, Inc.*, 1986, 120 A.D.2d 958, 503 N.Y.S.2d 462 (4th Dep't), *appeal denied* 69 N.Y.2d 602, 512 N.Y.S.2d 1025, 504 N.E.2d 395). Therefore, this result could ensue under CPLR article 75, which governs arbitrations and strictly limits the bases for vacating or modifying an arbitration award (*see* CPLR 7511). A mistake on the law generally would not provide a basis to vacate the award, so a mistake by the arbitrator as to whether or not a stipulation is binding might be beyond remedy after the award. (*See* Siegel New York Practice [5th ed.], section 602, pp. 1095-1099). It would appear wise to make arguments on the effect of any stipulation within the arbitration itself.

The Court of Appeals in *Silverman v. McGuire* (1980, 51 N.Y.2d 228, 231, 433 N.Y.S.2d 1002, 1003, 414 N.E.2d 383, 384), stated in dicta that CPLR 2104 was "not helpful" to a party claiming that a binding oral agreement had been reached, at least for the administrative proceeding at issue in that case. The Court reached this conclusion even though the alleged agreement was done in a proceeding "similar to a courtroom setting." CPLR 2104 does not by its terms apply outside actions or special proceedings, and would seem not to be applicable to administrative proceedings unless the applicable rules or statute cross reference to CPLR rules. In any event, CPLR 2104 speaks of only a subset of all agreements--those "as to any matter in an action" which are "not binding on a party" unless the requirements of CPLR 2104 are met. This leaves open to possible enforcement a whole range of other agreements not within the subset. (*See generally* Article 5 of the General Obligations Law and the statute of frauds, GOL § 5-701).

LEGISLATIVE STUDIES AND REPORTS

This rule is derived from rule 4 of the rules of civil practice. In the Fourth Report to the Legislature, the Revisers state that this provision works well in practice and that no change is made.

The provisions of § 790 of the civil practice act, dealing with stipulations in supplementary proceedings, have not been carried forward into CPLR. It is noted that its first two sentences, stating that such stipulations may be signed by either the parties or their attorneys and that approval of the court is not required, are consistent with the provisions of this rule. Its last sentence allows an attorney who issued a subpoena or restraining notice to vacate or modify it by "written stipulation." It is not clear whether this means the attorney may do so by a unilateral writing or whether a true "stipulation" with the adverse party is required. Cf. Polo v. Edelbrau Brewery, 185 Misc. 775, 60 N.Y.S.2d 346 (Sup.Ct.App.T.1945). If it means the latter, it adds nothing to this rule; if the former, it is implicit in §§ 5222 and 5223.

Official Reports to Legislature for this rule:

4th Report Leg.Doc. (1960) No. 20, p. 201.

5th Report Leg.Doc. (1961) No. 15, p. 358.

6th Report Leg.Doc. (1962) No. 8, p. 204.

Notes of Decisions (731)

McKinney's CPLR Rule 2104, NY CPLR Rule 2104
Current through L.2019, chapter 92. Some statute sections may be more current, see credits for details.

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