McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 80. Fees (Refs & Annos)

McKinney's CPLR § 8016

§ 8016. Clerks of courts of record generally

Currentness

(a) Fees of clerks in action. Except where a greater fee is allowed by another statute for the same service, each clerk of a court of record, except the clerk of the civil court of the city of New York, except a county clerk, except clerks of the family courts, and except the clerks of the district courts, is entitled for the services specified to the following fees, payable in advance:

1. upon the trial of an action, or the hearing, upon the merits, of a special proceeding, from the party bringing it on, one dollar;

2. for entering final judgment, including the filing of the judgment-roll and a copy of the judgment to insert therein, fifty cents, and fifteen cents in addition for each folio, exceeding five, contained in the judgment;

3. for entering any order or an interlocutory judgment, fifty cents, and fifteen cents in addition for each folio, exceeding five;

4. for a certified or other copy of an order, record or other paper in an action brought or transferred to the court of which he is clerk and entered or filed in his office, ten cents for each folio;

5. for a certified transcript of the docket of a judgment, fifty cents; and

6. for filing a transcript, or docketing or redocketing a judgment thereupon, fifty cents, and fifty cents in addition for each defendant, exceeding two.

(b) Certifying judgment-roll on appeal. Where, on an appeal from a judgment or order, a party shall present to the clerk of a court of record, except the clerk of the civil court of the city of New York, except a county clerk, except clerks of the family courts, and except the clerks of the district courts, a printed copy of the judgment-roll or order appealed from, it shall be the duty of the clerk to compare and certify the same, for which service he shall be entitled to be paid at the rate of fifty cents per page or portion thereof, unless a greater fee is allowed by another statute.

Credits

(L.1962, c. 308. Amended L.1963, c. 532, § 53; L.1965, c. 437; L.1969, c. 219, § 2.)

Editors' Notes

LEGISLATIVE STUDIES AND REPORTS

This section is derived from § 1553 of the civil practice act.

Subd. (a) indicates in its opening paragraph that a provision for higher fees would supersede the ones provided in the section.

Pars. 1 and 2 of subd. (a) are identical with subds. 1 and 2 of former § 1553 except that the reference in subd. 2 to the "final order in the special proceeding" has been deleted because the final determination in a special proceeding is designated a "judgment" in rule 411.

Par. 3 of subd. (a) is virtually identical with subd. 3 of former § 1553.

Par. 4 of subd. (a) is derived from subd. 4 of § 1553.

Pars. 5 and 6 of this subdivision are identical with subds. 6 and 7 of former § 1553. Subd. 2 of former § 1554 has been omitted. As to transcripts, they were covered by subd. 7 of former § 1553; the latter's provision for numerous defendants was thus made applicable.

Subd. (b) is derived from subd. 5 of § 1553 of the civil practice act. The introductory material employed in subd. (a) is incorporated.

The provision is stated separately, for it prescribes a duty of the clerk as well as the fee to be charged therefor, comments the Fourth Report to the Legislature.

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20, p. 109.

5th Report Leg.Doc. (1961) No. 15, p. 220.

6th Report Leg.Doc. (1962) No. 8, p. 698.

Notes of Decisions (3)

McKinney's CPLR § 8016, NY CPLR § 8016
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 80. Fees (Refs & Annos)

McKinney's CPLR § 8017

§ 8017. Exemption of the state and counties, and agencies and officers thereof, from fees of clerks

Currentness

(a) Notwithstanding any other provision of this article or any other general, special or local law relating to fees of clerks, no clerk shall charge or collect a fee from the state, or an agency or officer thereof, for any service rendered in an action in which any of them is involved, nor shall any clerk charge or collect a fee for filing, recording or indexing any paper, document, map or proceeding filed, recorded or indexed for the county, or an agency or officer thereof acting in an official capacity, nor for furnishing a transcript, certification or copy of any paper, document, map or proceeding to be used for official purposes.

(b) Notwithstanding any other provision of law the exemption of subdivision (a) of this section shall not apply to the fees of clerks where the action is on behalf of the New York State Higher Education Services Corporation to recover money due as a result of default of a student loan.

Credits

(Formerly § 8017-a, added L.1963, c. 670, § 1. Amended L.1964, c. 388, § 31. Renumbered § 8017 and amended L.1965, c. 147, § 2. Amended L.1984, c. 858, § 1; L.1988, c. 192, § 1.)

Editors' Notes

LEGISLATIVE STUDIES AND REPORTS

This section [former § 8017] is new, but it does not substantially change the law. State actions were exempted from index number fees in those counties which prescribed them. See e.g. civil practice act §§ 1557-a(II)(a), 1557-c(45)(d). Moreover, certain officers are exempted from particular fees by § 161 of McKinney's Executive Law. See also McKinney's Banking Law § 619(2)(b). This section [former § 8017] is intended to remove the confusion presently caused clerks who must ascertain which agencies or officers are charged fees and which are not.

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20, p. 115.

5th Report Leg.Doc. (1961) No. 15, p. 224.

6th Report Leg.Doc. (1962) No. 8, p. 701.

Notes of Decisions (14)

McKinney's CPLR § 8017, NY CPLR § 8017
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 80. Fees (Refs & Annos)

McKinney's CPLR § 8017-a

[§ 8017-a. Renumbered 8017]

Currentness

McKinney's CPLR § 8017-a, NY CPLR § 8017-a
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 80. Fees (Refs & Annos)

McKinney's CPLR § 8018

§ 8018. Index number fees of county clerks

Effective: September 1, 2010
Currentness

(a) Amount of fee. 1. A county clerk is entitled, for the assignment of an index number to an action pending in a court of which he or she is clerk, to a fee of: (i) one hundred ninety dollars; and (ii) in an action to foreclose pursuant to article thirteen of the real property actions and proceedings law, such clerk is entitled to collect an additional fee of one hundred ninety dollars. Such fees are payable in advance.

2. The filing of a transcript of judgment in the county clerk's office is not to be deemed an action pending in the supreme or county court of the county in which it is filed, nor does it constitute the commencement of an action in such courts.

3. In addition, a county clerk is entitled, for the assignment of an index number to an action pending in a court of which he or she is clerk, to the following fee: an additional five dollars, to be paid monthly by the county clerk to the commissioner of education, after deducting twenty-five cents, for deposit into the New York state local government records management improvement fund and an additional fifteen dollars, after deducting seventy-five cents, for deposit to the cultural education account.

(b) Exemptions from index number fee. No fee shall be charged for the assignment of an index number:

1. upon the filing of an order of the appellate term of the supreme court or of an order or certificate of commitment under the mental hygiene law; or

2. upon the transfer of papers from the clerk of any other court, pursuant to an order for change of venue; or

3. to a criminal case or to any action at the request of a public agency, officer or poor person entitled by law to exemption from payment of fees to a county clerk; or

4. to any case in a county court on appeal from a judgment or order of the district court or a town, village or city court; or

5. to a civil cause of action in which a city, town, village, fire district, district corporation, school district or board of cooperative educational services is the plaintiff.

(c) Endorsement of index number on papers. No paper in an action in the supreme or a county court, other than an order submitted for signature to a judge out of court, shall be submitted for any purpose to the supreme or county court or to a clerk thereof unless there is endorsed on such paper the index number of the action assigned by the clerk of the county.

(d) Additional services without fee where index number assigned. A county clerk who has assigned an index number shall charge no further fee in the action to which the index number is assigned:

1. for the filing, entering, indexing, or docketing, and in the counties within the city of New York, for recording, as required by statute, of any and all papers in the action, or preliminary thereto or supplementary to judgment;

2. for furnishing an extract of minutes for filing with the clerk of the court, for affixing a certificate to a filed paper, for taxing costs, for sealing writs, for issuing commissions, for certifying a copy of the clerk's minutes to accompany papers transmitted upon entry of an order for change of venue, or for entering a judgment in the action;

3. for docketing of a satisfaction, a partial satisfaction, an assignment, a reversal, a modification, an amendment, a cancellation or a continuance of a previous entry or docket of a previously filed paper in the action;

4. for certifying a copy of an order of an appellate term of the supreme court for transmittal to the civil court of the city of New York or a city, municipal or district court, or for certifying a copy of an order for use in a division of the clerk's office or for transmittal to a city or county treasurer;

5. for docketing of a return of execution, satisfied, unsatisfied or partially satisfied;

6. for filing a notice or order continuing or cancelling a notice of pendency of action or a notice of attachment against real property; and

7. for discharging a judgment of record by deposit with the clerk.

(e). Repealed.

Credits

(L.1962, c. 308. Amended L.1963, c. 532, § 54; L.1964, c. 286; L.1966, c. 752; L.1970, c. 105; L.1971, c. 404, § 1; L.1972, c. 709, § 2; L.1972, c. 734, § 5; L.1977, c. 33, § 1; L.1977, c. 688, § 3; L.1980, c. 39, § 1; L.1981, c. 997, § 1; L.1983, c. 15, § 140; L.1987, c. 825, § 14; L.1988, c. 192, § 2; L.1989, c. 78, § 7; L.1990, c. 190, § 260; L.2000, c. 314, § 1, eff. July 1, 2001; L.2002, c. 83, pt. B, § 1, eff. July 1, 2002; L.2003, c. 62, pt. J, § 23, eff. July 14, 2003; L.2010, c. 56, pt. K, § 5, eff. Sept. 1, 2010.)

Editors' Notes

LEGISLATIVE STUDIES AND REPORTS

Subd. (a). The former phrase "action or proceeding" has been replaced with the word "action" in this provision and in other provisions in which it appears, because § 103(b) provides that all procedures in a proceeding shall be the same as those in an action, unless otherwise provided.

Subd. (c). The phrase "which ultimately is to be filed" has been omitted as unnecessary. The phrase "judge's order" has been shortened to "order" because under CPLR, former distinctions are abolished between a judge's order and a court order, comments the Fourth Report to the Legislature.

The phrase "to a judge out of court" was added from the former provisions to which this subdivision corresponds. Since CPLR retains the distinction between judge's orders and court orders for certain purposes, the added phrase clarifies the type of order intended as an exception, states the Fifth Report to the Legislature.

Subd. (d). The words "judgment or final order" were changed to "judgment", in this provision and in other provisions in which it appears, since a "final order" under former law is now denoted a "judgment" under rule 411.

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20, p. 115.

5th Report Leg.Doc. (1961) No. 15, p. 224.

6th Report Leg.Doc. (1962) No. 8, p. 702.

Notes of Decisions (13)

McKinney's CPLR § 8018, NY CPLR § 8018
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 80. Fees (Refs & Annos)

McKinney's CPLR § 8019

§ 8019. County clerks generally

Effective: August 6, 2008
Currentness

(a) Application. The fees of a county clerk specified in this article shall supersede the fees allowed by any other statute for the same services, except in so far as the administrative code of the city of New York sets forth different fees for the city register of the city of New York and the county clerk of Richmond, and except that such fees do not include the block fees as set out in the Nassau county administrative code, which are to be charges in addition to the fees specified in this article. This subdivision does not apply to the fees specified in subdivision (f) of section 8021.

(b) Legible copies. Whenever a paper or document, presented to a county clerk for filing or recording, is not legible or otherwise suitable for copying or recording by the photocopying process, the county clerk may require a legible or suitable copy thereof along with such paper or document, and the same fees shall be payable for the copy as are payable for the paper or document.

(c) Notice to county clerk. A county clerk need not make an entry which is required by a court order unless proper notice is given to the clerk by a party to the action or a person legally interested therein.

(d) Exemptions for state or city of New York. A clerk of a county within the city of New York shall not charge or receive any fee from the city of New York or the state of New York or from any agency or officer of either acting in official capacity.

(e) Size of page and type. For purposes of this article, the size of each page accepted by a county clerk for recording and indexing shall not exceed nine inches by fourteen inches, except that in the counties of Cattaraugus, Columbia, Delaware, Herkimer, Monroe and Otsego, the size of the page shall not exceed eight and a half inches by fourteen inches, and every printed portion thereof shall be plainly printed in not smaller than eight point type. The county clerk acting as recording officer may in special circumstances accept a page exceeding the size or with smaller print than that prescribed herein, on such terms and at such fee, subject to review by the supreme court, as he may deem appropriate, but the fee for such recording and indexing shall not be less than double the fees otherwise chargeable by law therefor.

(f) Copies of records. The following fees, up to a maximum of forty dollars per record shall be payable to a county clerk or register for copies of the records of the office except records filed under the uniform commercial code:

1. to prepare a copy of any paper or record on file in the office, except as otherwise provided, sixty-five cents per page with a minimum fee of one dollar thirty cents;

2. to certify a prepared copy of any record or paper on file, sixty-five cents per page with a minimum fee of five dollars twenty cents;

3. to prepare and certify a copy of any record or paper on file, one dollar twenty-five cents per page with a minimum fee of five dollars;

4. to prepare and certify a copy of a certificate of honorable discharge, except as provided for in the military law, two dollars fifty cents; and

5. to prepare a copy of any paper or record on file in the office in a medium other than paper, the actual cost of reproducing the record in accordance with paragraph (c) of subdivision one of section eighty-seven of the public officers law.

Credits

(Added L.1963, c. 532, § 55. Amended L.1964, c. 476, § 23; L.1965, c. 773, § 16; L.1988, c. 192, § 3; L.2003, c. 62, pt. J, § 24, eff. July 14, 2003; L.2008, c. 223, § 7, eff. Aug. 6, 2008.)

Notes of Decisions (6)

McKinney's CPLR § 8019, NY CPLR § 8019
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 80. Fees (Refs & Annos)

McKinney's CPLR § 8020

§ 8020. County clerks as clerks of court

Effective: July 14, 2003
Currentness

Whenever a county clerk renders a service in his capacity as clerk of the supreme or a county court, in an action pending in such court, he is entitled to the fees specified in this section, payable in advance.

(a) Placing cause on calendar. For placing a cause on a calendar for trial or inquest, one hundred twenty-five dollars in the supreme court and county court; except that where rules of the chief administrator of the courts require that a request for judicial intervention be made in an action pending in supreme court or county court, the county clerk shall be entitled to a fee of ninety-five dollars, payable before a judge may be assigned pursuant to such request, and thereafter, for placing such a cause on a calendar for trial or inquest, the county clerk shall be entitled to an additional fee of thirty dollars, and no other fee may be charged thereafter pursuant to this subdivision; except that the county clerk shall be entitled to a fee of forty-five dollars upon the filing of each motion or cross motion in such action. However, no fee shall be imposed for a motion which seeks leave to proceed as a poor person pursuant to subdivision (a) of section eleven hundred one of this chapter.

(b) Calendar fee for transferred cause, joint trial, retrial, or separate trial. Where a cause which has been placed upon a calendar is transferred before trial to a court for which a larger calendar fee is prescribed, the difference in calendar fee shall be paid at the time the cause is placed upon the calendar of the latter court, except that no additional fee shall be required when the action is transferred for the purpose of consolidation or trial jointly with another action. No separate calendar fee shall be imposed for a retrial of a cause or for the trial of a separate issue in a cause.

(c) Filing demand for jury trial. For filing a demand for a jury trial in the following counties, where the right to a jury trial is duly demanded:

1. in the counties within the city of New York, sixty-five dollars in the supreme court;

2. in all other counties, sixty-five dollars in the supreme court and county court.

(d) Filing a stipulation of settlement or a voluntary discontinuance. For filing a stipulation of settlement pursuant to rule twenty-one hundred four of this chapter or a notice, stipulation, or certificate pursuant to subdivision (d) of rule thirty-two hundred seventeen of this chapter, the defendant shall file and pay:

1. in the counties within the city of New York, thirty-five dollars in the supreme court.

2. in all other counties, thirty-five dollars in the supreme court and county court.

Provided, however, that only one such fee shall be charged for each notice, stipulation or certificate filed pursuant to this subdivision.

(e) Jury fee for transferred cause, joint trial, retrial or separate trial. Where a cause in which a jury has been demanded is transferred before trial to a court for which a larger jury fee is prescribed, the difference in the jury fee shall be paid at the time the cause is placed upon the calendar of the latter court, except that no additional fee shall be required when the action is transferred for the purpose of consolidation or trial jointly with another action in which a jury fee has previously been paid. No separate jury fee shall be imposed for a retrial of a cause or for the trial of a separate issue in a cause.

(f) Certification, exemplification, and copies of papers.

1. For issuing any certificate, in counties within the city of New York, eight dollars, and in all other counties, four dollars, except as otherwise expressly provided in this article.

2. For a certificate of exemplification, exclusive of certification, in counties within the city of New York, twenty-five dollars, and in all other counties, ten dollars.

(g) Searches. For certifying to a search of any court records for a consecutive two-year period or fraction thereof, for each name so searched, five dollars.

(h) Production of court records. For each day or part thereof in attendance in any action pursuant to a subpoena duces tecum, twenty dollars, and in addition thereto, mileage fees of twelve cents per mile each way and the necessary expenses of the messenger, except that if the subpoena duces tecum be served within the city of New York, and the place of attendance is within the city of New York, then actual transportation costs shall be charged instead of the mileage fees.

Credits

(Added L.1963, c. 532, § 56. Amended L.1968, c. 14, § 1; L.1969, c. 801, § 1; L.1970, c. 104, § 1; L.1970, c. 440, § 1; L.1971, c. 404, § 2; L.1971, c. 828, §§ 1-5; L.1971, c. 829, § 1; L.1972, c. 185, § 4; L.1972, c. 709, § 1; L.1972, c. 734, § 6; L.1977, c. 33, §§ 2, 3; L.1980, c. 39, §§ 2, 3; L.1983, c. 15, § 141; L.1983, c. 784, § 1; L.1987, c. 825, § 15; L.1988, c. 192, § 4; L.1990, c. 190, § 261; L.1992, c. 55, § 405; L.1996, c. 309, § 54; L.2003, c. 62, pt. J, § 25, eff. July 14, 2003.)

Editors' Notes

PRACTICE COMMENTARIES

by Vincent C. Alexander

2003

Recent amendments to CPLR 8020 impose significant new fee-paying obligations. For the first time, stipulations of settlement must be filed with the County Clerk (CPLR 2104, as amended), triggering a $35 filing fee. CPLR 8020(d). This rule is discussed in the 2003 Supplementary Practice Commentaries on CPLR 2104, at C2104:2. In addition, most voluntary discontinuances--by notice, stipulation or certificate--must now be filed with the County Clerk (CPLR 3217(d)), also triggering a $35 fee.

Most vexing, perhaps, is the $45 fee that must be paid upon the filing of every motion and cross-motion. CPLR 8020(a). *See also* CPLR 8022(b). Professor Siegel discusses the myriad issues raised by this legislation throughout his 2003 Supplementary Commentaries on CPLR Article 22 as well as in *Siegel's Practice Review*, Numbers 136 and 137 [136 Siegel's Prac. Rev. 1; 137 Siegel's Prac. Rev. 1] (June, July 2003), available on Westlaw and at *www.siegelspracticereview.com*. For example, how strictly should the "payment in advance" directive of CPLR 8020 be applied in this context? How will the payment requirement be handled administratively when the clerk with whom the motion papers are filed is not the County Clerk, or when the motion is made ex parte to a judge out of court? Is the $45 fee required for a CPLR 3213 motion that commences an action? Because of wide variations from county to county in the operation of clerks' offices, practitioners will need to stay abreast of local directives.

Professor Siegel makes a convincing argument that good faith mistakes in complying with the new fee-paying requirements should not result in the forfeiture of substantive rights if payments are made within a reasonable time as determined by the circumstances.

Notes of Decisions (4)

McKinney's CPLR § 8020, NY CPLR § 8020
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 80. Fees (Refs & Annos)

McKinney's CPLR § 8021

§ 8021. County clerks other than as clerks of court

Effective: July 7, 2008
Currentness

Whenever a county clerk renders a service other than in his capacity as clerk of the supreme or a county court, or other than in an action pending in a court of which he is clerk, he is entitled to the fees specified in this section, payable in advance.

(a) Services in connection with papers or instruments relating to real property and not filed under the uniform commercial code.

1. For filing any paper, document or other instrument of any nature or description which is required or permitted by law to be filed in his office, five dollars, except as otherwise expressly provided in this article and in article twelve of the real property law.

2. For filing and indexing any map, ten dollars.

3. For affixing and indexing a notice of foreclosure of a mortgage, as prescribed in section fourteen hundred four of the real property actions and proceedings law, ten dollars.

4. a. (1) For recording, entering, indexing and endorsing a certificate on any instrument, five dollars, and, in addition thereto, three dollars for each page or portion of a page, and fifty cents for each additional town, city, block or other indices in which such instrument is to be indexed as directed by the endorsement thereon. On the assignment of a mortgage which assigns more than one mortgage or on a release of lease which releases more than one lease, then there shall be an additional fee of three dollars for every mortgage assigned or lease released in excess of one.

(2) Notwithstanding clause one of this subparagraph, any county may opt by county law to increase the fee for recording, entering, indexing and endorsing a certificate on any instrument from five dollars to twenty dollars and, in addition thereto, increase from three dollars to five dollars for each page or portion of a page. Such increase shall take effect thirty days after the county enacts such fees. For the purpose of determining the appropriate recording fee, the fee for any cover page shall be deemed an additional page of the instrument. A cover page shall not include any social security account number or date of birth. To the extent a county clerk has placed an image of such cover page online, such county clerk shall make a good faith effort to redact such information.

b. For recording, entering, indexing and endorsing a certificate on any instrument, an additional fee of five dollars to be paid monthly by county clerks to the commissioner of education, after deducting twenty-five cents, for deposit into the New York

state local government records management improvement fund and an additional fifteen dollars, after deducting seventy-five cents, for deposit to the cultural education account.

5. For re-indexing a recorded instrument, two dollars for each town, city, block or other indices so re-indexed upon presentation of the instrument with such additional endorsement thereon or, if the original instrument is not obtainable, by request in writing sworn to by an interested party, setting forth the facts.

6. For copying and mailing any map, such fees as may be fixed by the county clerk subject to review by the supreme court.

7. For entering a cross reference of the record of any instrument on the margin of the record of any other instrument referred to therein by liber and page, fifty cents for each cross reference.

8. For examining the record of each assignment of mortgage or other instrument recited in a certificate of discharge of mortgage, fifty cents.

9. For searching for any filed or recorded instrument, upon a written request specifying the kind of instrument, the location by town, city or block if a real property instrument, and the names and period to be searched, such fee as may be fixed by the county clerk subject to review by the supreme court.

10. For filing or recording a notice of pendency of action or a notice of attachment against real property, or an amended notice of pendancy [1] of action or an amended notice of action against real property, in counties within the city of New York, thirty-five dollars, and in all other counties, fifteen dollars, but no fee shall be charged for filing or recording a notice or order continuing or cancelling same.

11. For filing federal tax liens payment shall be made in the manner provided by section two hundred forty-three of the lien law.

12, 13. Redesignated 10, 11

(b) Filing, other than in connection with papers or instruments relating to real property or filed under the uniform commercial code.

1. For filing any paper, document or other instrument of any nature or description which is required or permitted by law to be filed in his office, five dollars, except as otherwise expressly provided in this article, and except that no fee shall be charged for filing a commission of appointment to public office or an oath of office of a public officer or employee, other than a notary public or commissioner of deeds.

2. For filing any certificate, instrument or document in relation to a corporation, or any certificate pursuant to section forty-nine-a of the personal property law, or any certificate, instrument or document in relation to a joint stock association, limited partnership, continued use of firm name or registration of hotel name, in counties within the city of New York, one hundred dollars, and in all other counties, twenty-five dollars. For filing any certificate pursuant to section one hundred thirty of the

general business law, in counties within the city of New York, one hundred dollars, and in all other counties, twenty-five dollars. No fee shall be charged for filing proof of publication or a cancellation, discontinuance or dissolution certificate.

3. For filing an assignment of or order for the payment of salary or wages, in counties within the city of New York, ten dollars, and in all other counties, five dollars. No fee shall be charged for filing of a satisfaction, assignment, cancellation or vacation thereof.

4. For filing a notice of mechanics lien, or a notice of lending, in counties within the city of New York, thirty dollars, and in all other counties, fifteen dollars. No fee shall be charged for filing a notice or order continuing, amending or cancelling same, but when a mechanics lien is discharged by deposit with a clerk of the court, there shall be a fee of three dollars in all counties other than those within the city of New York.

5. For filing, examining and entering an absolute bill of sale of chattels, or any instrument affecting chattels, or a copy of the foregoing or an assignment of any such instrument, or a satisfaction of a chattel mortgage or conditional bill of sale, in all counties except those within the city of New York, one dollar and fifty cents. For filing, examining and entering an assignment of a notice of lien on merchandise, one dollar and fifty cents. Every instrument affecting chattels must be endorsed on the outside thereof with the character of the instrument, the names of all the parties thereto and the location of the property affected thereby, which must be distinguished from the address of the parties by the words "property located at," or similar words.

6. For filing a notice of hospital lien, five dollars. No fee shall be charged for filing a satisfaction, partial satisfaction, modification, assignment, cancellation, discharge of amendment thereof.

7. For filing a transcript of judgment, in counties within the city of New York, twenty-five dollars, and in all other counties, ten dollars. No fee shall be charged for filing a certificate or order of satisfaction, partial satisfaction, modification, assignment, reversal, cancellation or amendment, of judgment or lien.

8. For filing and indexing a certificate of appointment or official character of a notary public, or for filing and indexing a certificate of appointment as commissioner of deeds, ten dollars.

9. For filing an assignment of money due on a contract, or an order on owner, twenty-five dollars. No fee shall be charged for filing a notice or order continuing, amending or cancelling same.

10. For filing a building loan contract, in counties within the city of New York, fifty dollars, and in all other counties, twenty-five dollars.

11. a. For recording any instrument required by statute to be recorded, in counties within the city of New York, ten dollars, and in all other counties, five dollars, and, in addition thereto, three dollars for each page or portion of a page recorded, except that the charge for instruments of surrender and orders of commitment required to be filed and recorded pursuant to section three hundred eighty-four of the social services law shall be ten dollars per instrument or order in counties within the city of New York, and in all other counties, five dollars per instrument or order.

b. For recording any instrument required by statute to be recorded, an additional fee of five dollars to be paid monthly by county clerks to the commissioner of education, after deducting twenty-five cents, for deposit into the New York state local government records management improvement fund and an additional fifteen dollars, after deducting seventy-five cents, for deposit to the cultural education account.

(c) Certification, issuing certificates, other papers and copies of papers, records, and related services, other than in connection with papers or instruments relating to real property or filed under the uniform commercial code.

1. For issuing any certificate, except as otherwise expressly provided for in this article, in counties within the city of New York, ten dollars, and in all other counties, five dollars.

2. For an execution of a judgment, five dollars.

3. For issuing a transcript of the docket of a judgment or other lien, in counties within the city of New York, fifteen dollars, and in all other counties, five dollars.

4. For issuing a certificate of appointment of a notary public, five dollars.

5. For issuing a certificate authenticating an official act by a notary public, commissioner of deeds or other public officer, three dollars, except that no fee shall be charged for a certificate on a paper required by the United States veterans' administration.

6. For issuing an official receipt for any instrument affecting personal property, two dollars.

7. For a certificate of exemplification, exclusive of certification, ten dollars.

8. For preparing and certifying a copy of a marriage record, five dollars.

9. No fee shall be charged to any county officer, employee or institution required to file or record any instrument in connection with the official duties thereof, or to any public official in connection with the filing of his undertaking.

10 to 12. Redesignated 7 to 9

(d) Searches of records not filed under the uniform commercial code. For certifying to a search of any records, other than those in an action or relating to real property, for a consecutive two year period or fraction thereof, for each name so searched, five dollars; except that in the counties within the city of New York, when the records so searched are the census records of the state of New York, the charge shall be one dollar for a consecutive two-year period or fraction thereof.

(e) Production of records. The production in any action of any filed or recorded paper, document, map or other instrument which is part of the public records and papers of a county clerk's office, except the papers in an action which have been filed

with the county clerk in his capacity as clerk of the court, is hereby prohibited in the interest of the safety and preservation thereof, unless the county clerk consents to such production, or the judge presiding in the court in which such production is sought so orders. Instead of the original, a certified copy of such filed or recorded paper, document, map or other instrument shall be produced in evidence as provided in section 4540 without an order. In the event that the original is to be produced on order of such judge, there shall be a fee for each day or part thereof in attendance pursuant to a subpoena duces tecum of twenty dollars and, in addition thereto, mileage fees of twelve cents per mile each way and the necessary expenses of the messenger, except that if the subpoena duces tecum be served within the city of New York and the place of attendance is within the city of New York, then actual transportation cost shall be charged instead of the mileage fees. In the event that a certified photo copy of the records subpoenaed is produced, there shall be the same fee as if the original was produced on the order of a judge.

(f) Services rendered pursuant to part four of article nine of the uniform commercial code.

1. For filing, indexing and furnishing filing data for a financing statement or a continuation statement on a form conforming to standards prescribed by the secretary of state, three dollars, or if the statement otherwise conforms to the requirements of part four of such article, four dollars and fifty cents, plus, in either case,

(a) if the statement covers collateral which is crops or goods which are or are to become fixtures, fifty cents and, in addition;

(b) if the real estate is in the city of New York or the county of Nassau, any block fees allowed by the administrative code of the city of New York or the Nassau county administrative code;

(c) for each additional person, firm or organization, beyond the first, named as a debtor in the statement, seventy-five cents.

2. For filing and indexing an assignment or statement of assignment on a form conforming to standards prescribed by the secretary of state, of a security interest included in or accompanying a termination statement, three dollars, or if the assignment or statement of assignment otherwise conforms to the requirements of part four of such article, four dollars and fifty cents, plus, in either case, for each additional person, firm or organization, beyond the first, named as a debtor in the assignment or statement, seventy-five cents.

3. For filing and indexing a termination statement, including sending or delivering the financing statement and any continuation statement, statement of assignment or statement of release pertaining thereto, or an acknowledgment of the filing of the termination statement, one dollar and fifty cents and, otherwise, shall be three dollars, plus, in each case an additional fee of seventy-five cents for each name more than one against which the termination statement is required to be indexed.

4. For filing, indexing and furnishing filing data for a financing statement indicating an assignment of a security interest in the collateral on a form conforming to standards prescribed by the secretary of state, three dollars, or if the financing statement otherwise conforms to the requirements of part four of such article, four dollars and fifty cents, and seventy-five cents for each additional person, firm or organization, beyond the first, named as a debtor in the statement.

5. For filing, indexing and furnishing filing data about a statement of assignment on a form conforming to standards prescribed by the secretary of state, separate from a financing statement, three dollars, or if the statement of assignment otherwise conforms to the requirements of part four of such article, four dollars and fifty cents plus, in either case, for each additional person, firm or organization, beyond the first, named as a debtor in the statement, seventy-five cents.

6. For filing and noting a statement of release of collateral on a form conforming to standards prescribed by the secretary of state, three dollars, or if the statement of release otherwise conforms to the requirements of part four of such article, four dollars and fifty cents plus, in either case, for each additional person, firm or organization, beyond the first, named as a debtor in the statement, seventy-five cents.

7. For noting the file number and date and hour of the filing of the original upon a copy thereof furnished by the person filing any financing statement, termination statement, statement of assignment, or statement of release, and delivering or sending the copy to such person, when the filed statement contains more than one page or the statement and copy are not on forms conforming to standards prescribed by the secretary of state, an amount equal to the product of one dollar and fifty cents multiplied by the number of pages the filed statement contains.

8. For issuing a certificate showing whether there is on file a presently effective financing statement naming a particular debtor and any statement of assignment thereof or statement of release of collateral pertaining thereto, and if there is, giving the date and hour of filing of each such statement and the names and addresses of each secured party therein, four dollars and fifty cents if the request for the certificate is on a form conforming to standards prescribed by the secretary of state or, otherwise, seven dollars and fifty cents.

9. For furnishing a copy of any filed financing statement, continuation statement, termination statement, statement of assignment or statement of release, one dollar and fifty cents per page; provided, however, that the county clerk may furnish duplicate copies of microfilm records of all financing statements, continuation statements, termination statements, statements of assignment and statements of release filed during any month to any person requesting the same at a fee, to be determined by the county clerk, of less than one dollar and fifty cents per page.

(g) Services rendered in relation to federal tax liens filed pursuant to the lien law.

1. For filing and indexing a notice of lien for taxes payable to the United States of America and certificates and notices affecting such liens, four dollars and fifty cents.

2. For issuing a certificate showing whether there is on file on the date and hour stated therein, any notice of federal tax lien or certificate or notice affecting such lien, filed on or after July third, nineteen hundred sixty-six, and if there is, giving the date and hour of filing each such notice or certificate, four dollars and fifty cents.

Credits

(Added L.1963, c. 532, § 57. Amended L.1963, c. 727, §§ 1, 2; L.1964, c. 476, §§ 24-26; L.1965, c. 128; L.1965, c. 773, § 17; L.1967, c. 338, § 2; L.1967, c. 680, § 16; L.1967, c. 689, § 4; L.1968, c. 133; L.1968, c. 721; L.1969, c. 680; L.1971, c. 404, § 3; L.1972, c. 324, § 1; L.1972, c. 734, § 7; L.1972, c. 735, §§ 4, 5; L.1977, c. 688, § 4; L.1982, c. 692, §§ 8, 9; L.1983, c. 784, § 2; L.1988, c. 192, §§ 5 to 7; L.1989, c. 78, §§ 8, 9; L.1992, c. 55, §§ 406 to 408; L.2002, c. 83, pt. B, §§ 2, 3, eff. July 1, 2002; L.2008, c. 288, § 1, eff. July 7, 2008.)

Notes of Decisions (18)

Footnotes

1 So in original. Probably should read "pendency".

McKinney's CPLR § 8021, NY CPLR § 8021

Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 80. Fees (Refs & Annos)

McKinney's CPLR § 8022

§ 8022. Fee on civil appeals [1] proceedings before appellate courts

Effective: July 14, 2003
Currentness

(a) A county clerk, upon filing a notice of appeal, is entitled to a fee of sixty-five dollars, payable in advance.

(b) The clerks of the appellate divisions of the supreme court and the clerk of the court of appeals are entitled, upon the filing of a record on a civil appeal or a statement in lieu of record on a civil appeal, as required by rule 5530 of this chapter, to a fee of three hundred fifteen dollars, payable in advance. The clerks of the appellate divisions also shall be entitled to such fee upon the filing of a notice of petition or order to show cause commencing a special proceeding in their respective courts. In addition, the clerks of the appellate divisions of the supreme court and the clerk of the court of appeals are entitled, upon the filing of each motion or cross motion with respect to a civil appeal or special proceeding, to a fee of forty-five dollars, payable in advance. However, no fee shall be imposed for a motion or cross motion which seeks leave to prosecute or defend a civil appeal or special proceeding as a poor person pursuant to subdivision (a) of section eleven hundred one of this chapter.

Credits
(Added L.1987, c. 825, § 16. Amended L.1990, c. 190, § 262; L.1996, c. 309, § 50; L.2003, c. 62, pt. J, § 27, eff. July 14, 2003; L.2003, c. 686, pt. B, § 6, eff. July 14, 2003.)

Notes of Decisions (2)

Footnotes
1 So in original ("and" inadvertently omitted).
McKinney's CPLR § 8022, NY CPLR § 8022
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 80. Fees (Refs & Annos)

McKinney's CPLR § 8023

[§ 8023. Repealed by L.2005, c. 457, § 6, eff. Aug. 9, 2005]

Effective: August 9, 2005
Currentness

McKinney's CPLR § 8023, NY CPLR § 8023
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 80. Fees (Refs & Annos)

McKinney's CPLR § 8024

[§§ 8024 to 8026. Repealed. L.1963, c. 532, § 58, eff. Sept. 1, 1963]

Currentness

McKinney's CPLR § 8024, NY CPLR § 8024
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 80. Fees (Refs & Annos)

McKinney's CPLR § 8026

[§§ 8024 to 8026. Repealed. L.1963, c. 532, § 58, eff. Sept. 1, 1963]

Currentness

McKinney's CPLR § 8026, NY CPLR § 8026
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules
Chapter Eight. Of the Consolidated Laws
Article 81. Costs Generally

McKinney's CPLR Ch. EIGHT, Art. 81, Refs & Annos
Currentness

McKinney's CPLR Ch. EIGHT, Art. 81, Refs & Annos, NY CPLR Ch. EIGHT, Art. 81, Refs & Annos
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 81. Costs Generally (Refs & Annos)

McKinney's CPLR § 8101

§ 8101. Costs in an action

Currentness

The party in whose favor a judgment is entered is entitled to costs in the action, unless otherwise provided by statute or unless the court determines that to so allow costs would not be equitable, under all of the circumstances.

Credits
(L.1962, c. 308.)

Editors' Notes

PRACTICE COMMENTARIES

By Joseph M. McLaughlin

C8101:1 Costs to Winner.

C8101:2 Costs Not Equitable.

C8101:1 Costs to Winner.

Costs are an amount that the victorious party is generally entitled to recover from the losing party in partial reimbursement for the winner's expenses in recovering a judgment. The amount of costs is fixed by Article 82 (at quite nominal sums), and cannot be varied by the court. Moniz v. National Constructors, Inc., 1952, 201 Misc. 393, 113 N.Y.S.2d 729. The parties, however, may stipulate to vary costs. Cf. Real Estate Corp. v. Harper, 1903, 174 N.Y. 123, 66 N.E. 660.

Costs must be distinguished from disbursements, which are reimbursement for the actual out-of-pocket expenses incurred by a party in the prosecution of his action, and, unlike costs, cannot be recovered without proof that expenses were actually incurred. The disbursements that may be "taxed" are listed in Article 83 of the CPLR, and subject to a possible increase under CPLR 8301(d), the maximum allowances therefor are set forth in Article 80. Whoever is entitled to costs is also entitled to disbursements (CPLR 8301), although it should be noted that it is possible in some cases to get disbursements even though costs are not awarded. See CPLR 8301(c); Viking Junior Band, Inc. v. Haakon Fretheim, Inc., 1965, 46 Misc.2d 1042, 261 N.Y.S.2d 316.

By making it the general rule that costs are a matter of right, the CPLR in one felicitous stroke eliminates former distinctions made in actions at law, actions in equity, and special proceedings. Thus, New York has adopted the federal practice. Fed.R.Civ.P. 54(d).

Under the CPLR it is possible for many parties--some plaintiffs, some defendants--to be successful. In such cases it is theoretically possible for all of them to be entitled to costs. See, e.g., Montague v. Hunt, 1966, 50 Misc.2d 442, 270 N.Y.S.2d 771. The discretion conferred on the court by this section, however, as well as the provisions of CPLR 8103, 8104, and 8105 should make the problems manageable.

C8101:2 Costs Not Equitable.

In lieu of the plethora of provisions that formerly existed (see, e.g., Civil Practice Act §§ 1478, 1479, 1483, 1495, 1497), all of which denied--or allowed the court to deny--costs in situations in which an award of costs seemed unfair, CPLR 8101 simply vests the court with discretion to disallow costs when it "would not be equitable, under all of the circumstances." The discretion, of course, is not unbridled; but, in general, it calls for disallowance of costs when the victorious party has unnecessarily prolonged the litigation, as, for example, when the victorious defendant did not mention until the case had come to trial that the plaintiff's claim had been discharged by the defendant's bankruptcy. Soffer v. Frederick, 1936, 159 Misc. 291, 286 N.Y.S. 495.

LEGISLATIVE STUDIES AND REPORTS

This section replaces civil practice act §§ 1470, which set forth those actions in which a plaintiff is entitled to costs as of right upon entry of a judgment in his favor; 1475, which provided that a defendant was entitled to costs as of right in the specified actions if the plaintiff was not so entitled; 1477, which provided that in actions not specified, costs were discretionary; and 1492, which provided that costs in special proceedings were discretionary.

The actions specified in former § 1470 are usually thought of as legal actions, in contrast to equitable actions, which are the broad group to which the residuary provision of former § 1477 applied. Actually, there were equitable actions included in § 1470, and legal actions in which costs were discretionary.

Former § 1470 was derived, without substantial change, from a section of the Field Code which included (1) actions involving title to real property, (2) actions to recover a chattel, (3) actions of which a Justice of the Peace expressly had no jurisdiction, and (4) actions for money only where the recovery was more than a specified amount. Laws 1848, c. 379, § 259. These four classes of actions, upon examination, do suggest an intention to award costs as of right in legal actions, but it also seems evident that the right was to be restricted to those legal actions which could not be brought in the Justice Courts. As a by-product of the method of specification used by Field, costs as of right were also awarded in some equitable actions, apparently only because they were specifically excluded from the cognizance of Justices of the Peace. Moreover, actions for money only have been held to include equitable money actions. See, e.g. Murtha v. Curley, 92 N.Y. 359 (1883).

To the extent that the purpose of the predecessor of former § 1470 of the civil practice act was to penalize plaintiffs who could have sought relief in the lower courts, a more recent enactment, § 1474, was sounder. Section 1474 also prohibited costs if the recovery was less than a specified amount, but it required a showing that the action could have been brought in the inferior court.

To the extent that former § 1470 and its predecessors represented an intention to award costs in legal, as contrasted with equitable actions, it unnecessarily perpetuated the distinction between law and equity purportedly abolished by the Field revision. Moreover, the distinction made between the right to costs in a special proceeding and the right in an action had little utility. Since § 1492 of the civil practice act provided that costs in all special proceedings were discretionary, costs were as of right only in those actions listed in § 1470, and they were discretionary in all other actions and special proceedings. Limitations, such as those in former §§ 1471 through 1474, have the effect of creating a third class of actions in which costs cannot be awarded, even by discretion; indeed, in the actions covered by § 1472, costs were taxed against the prevailing party.

The section abolishes most of the distinctions by providing that costs are to be awarded except where otherwise provided by law or by court. Its major effect is upon those actions in which costs are now as of right, where it permits the court to deny costs. This has been the situation with respect to appeals costs since 1943, states the Fourth Report to the Legislature. As to those actions where costs were discretionary, it codifies the decisional law that costs are to be awarded the prevailing party unless special circumstances warranting denial are shown. See Stevens v. Central Nat'l Bank, 168 N.Y. 560, 61 N.E. 904 (1901); Couch v. Millard, 41 Hun 212 (1886). Since under rule 411 a special proceeding results in a "judgment," this section is applicable to special proceedings as well as actions.

This section is similar to rule 54(d), of the Federal Rules of Civil Procedure, 28 U.S.C.A., which was adopted as a substitute for a statutory scheme similar to the former New York one. See Harris v. Twentieth Century-Fox Film Corp., 139 F.2d 571 (2d Cir. 1943). The Federal courts have construed rule 54(d) in much the same way as New York interprets its discretionary provisions, utilizing a rule that the prevailing party is entitled to costs, absent considerations weighty enough to require deprivation. See McKnight v. Atkins, 192 F.2d 674 (6th Cir. 1951); Shima v. Brown, 140 F.2d 337 (D.D.C.1943).

Former § 1478 of the civil practice act provided that where a defendant, who was given notice that no personal claim is made against him in an action affecting specific real or personal property, unreasonably defends, costs could be awarded against him. In view of former § 1477, which provided that costs were discretionary except as prescribed in the preceding sections, the value of § 1478 was questionable. To the extent that it applied to an action where costs would otherwise be right under former § 1470, its discretionary language seemed inconsistent with § 1470. With respect to other actions it added nothing to § 1477. Indeed, its negative implication--that costs could not be awarded unless a notice of no personal claim was served and an unreasonable defense was asserted--seems inconsistent with both § 1470 and § 1477.

Former § 1478 was derived from §§ 109 and 110 of the Field Code, which provided that in lieu of serving a complaint, a notice of no personal claim could be served with the summons in partition and foreclosure actions, and that if the defendant thereafter unreasonably defended, "he shall pay costs to the plaintiff." In effect, the section conditionally added two classes of actions to the list in the Field Code of actions in which costs were as of right.

In 1851, the provision was broadened from the two named actions to include any action affecting specific real or personal property. Laws 1851, c. 479, amending Code Proc § 131. Since some of the actions included were also listed as actions in which costs were as of right, it became unclear whether a notice of no personal claim and an unreasonable defense became conditions precedent to mandatory costs in these cases.

In 1877, the situation was further confused when the provision--then § 423 of the Code of Civil Procedure--was changed by replacing the previously mandatory words with language implying discretion. Laws 1877, c. 416, § 1(55) (changing "must be awarded" to "may be awarded").

In view of the confusing nature of § 1478, and that it was patently unnecessary, the section has been omitted.

Section 1485 of the civil practice act provided that the costs of a trial abide the event of a new trial granted as a result of the failure of the trial court to file its decision within the time required. Since the motion for a new trial on that ground has been deleted from CPLR, § 1485 has also been omitted as unnecessary.

Section 1479 of the civil practice act has also been deleted. It provided that a plaintiff who brought separate actions against co-defendants liable upon a single cause of action could recover costs in only one of the actions. It was not applicable, however, where the plaintiff sued all defendants who, with reasonable diligence, could be served. Under this section, the court could deal with the problem more directly by considering whether costs were recovered in such a previous action, in determining whether costs should be denied--for example, it could determine that a plaintiff who only recovered a minimal amount of costs in the prior action because it resulted in a default judgment be denied only that amount of costs. While the same result could be achieved under the former section, which allowed the plaintiff to elect in which action he would be entitled to costs, it

was unclear when the election was to be made, or whether the plaintiff's failure to tax costs on a judgment in anticipation of a subsequent recovery could be remedied if no further judgment materialized. The consideration embodied in former § 1479 should also be evaluated in the light of §§ 1001 to 1003.

Section 1499 of the civil practice act was also deleted. Its provision was unnecessarily limited. There appeared little reason for its restriction to executors and administrators, in their representative capacity, to money actions, or to an award of costs only if a claim was unreasonably refused.

This section would permit the court to deny costs in any matter which might have been handled more appropriately and more equitably to all parties in another court or outside of the normal litigation channels.

The omission of former § 1499, of the first part of former § 1500, and of the specific listing in former § 1470, eliminates the difficult problems created by apparent inconsistencies between §§ 1499 and 1500, on the one hand, and subdivision 6 of § 1470, on the other.

This section would also allow a court to deny costs in a situation covered by § 1483 of the civil practice act. Section 1483 referred to "the final judgment" and thus did not seem to apply to a situation where more than one judgment was entered. In order for there to be a separate judgment, a severance of the action was necessary and § 1480 would govern, for it purported to cover costs upon severance. Section 1480 was ambiguous and misleading, however, as a result of an attempt to broaden it to cover all severances, for it originally applied only to a severance occasioned by the entry of judgment for the plaintiff upon an admitted part of his claim. In the case of severance and recovery of a judgment for the defendant, it was held that § 1483 controlled and that costs to the defendant depended upon the similarity between the cause of action upon which he recovered and that which was continued. See Luisoni v. Barth, 138 N.Y.S.2d 65 (Sup.Ct.1954). Such a consideration could be employed by the court under this section. The principal impact of § 1483, upon a single judgment which represents recoveries for both parties has been covered by § 8103.

Where judgment for the plaintiff was entered on the severed portion of an action, § 1480 appeared more meaningful, but it was unclear under that section whether the plaintiff could recover any costs on the judgment for the severed part of the action. If he discontinued, § 1480 provided that costs were to be awarded, an obvious and unnecessary provision. If he continued the action, however, there seemed no reason to deny him costs, providing that he did not get a second bill of costs by recovering on the remainder of the claim. This consideration may also be employed under this section. If the plaintiff fails on the continued action, the defendant will ordinarily be entitled to costs, because the second judgment is entered in his favor. To the extent that the purpose of former § 1480 was to insure this result, it was unnecessary.

Former § 1476 provided that costs had to be denied to a prevailing defendant who was united in interest or united in an answer with a co-defendant against whom the plaintiff prevailed and that they could be denied to a defendant if his co-defendant was unsuccessful although he was neither united in interest nor in answer with him. The concept of "united in interest" apparently presupposes, however, that the defendants stand or fall together. The unity of answer requirement was also unclear. There seems no good reason, moreover, why a defendant in whose favor a judgment was entered, because he prevailed at the trial or on a motion to dismiss as to himself, should not be compensated for his expense solely because a co-defendant does not succeed. If no separate judgment is entered in his favor, he may still be awarded costs under § 8103, were the cause of action upon which he prevailed is not substantially the same as the one upon which his co-defendant failed. This section permits the court to deny him costs, upon a separate judgment entered in his favor, upon the same consideration.

Because this section provides for costs in all special proceedings, certain provisions of the civil practice act which provided for costs in particular proceedings have been omitted. For example, the first sentence of § 1301 of the civil practice act provided that costs in an article 78 proceeding could be awarded in the discretion of the court in favor of or against either party. The sentence provided that these costs were not to exceed fifty dollars where no trial of an issue of fact is had; the provision is

omitted because its substance is covered by the similar provision of this section. The second sentence in former § 1301 which provided that a judgment could be entered for costs was omitted as unnecessary.

The last paragraph of § 1462 of the civil practice act provided for costs not exceeding twenty-five dollars upon a motion to vacate an arbitration award. Where such a motion was the first application to the court with respect to the arbitration, § 7502 converts the motion into a special proceeding; if a special proceeding has already been instituted by a prior application to the court, an application to vacate an award would still be a motion under § 7502. Whether the application is a special proceeding or a motion, the general provisions of this section, do not substantially differ from the provision of the last paragraph of former § 1462 which has therefore been omitted.

Similarly, the provisions of the last two sentences of § 1464 of the civil practice act for costs on a judgment upon an arbitration award are covered by this section. Part of former § 803, which dealt with costs in a supplementary proceeding, is also covered by this section.

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20 p. 298.

5th Report Leg.Doc. (1961) No. 15, p. 758.

6th Report Leg.Doc. (1962) No. 8, p. 734.

Notes of Decisions (228)

McKinney's CPLR § 8101, NY CPLR § 8101
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 81. Costs Generally (Refs & Annos)

McKinney's CPLR § 8102

§ 8102. Limitation of costs where action brought in higher court

Currentness

A plaintiff is not entitled to costs:

1. in an action brought in the supreme court in a county within the city of New York which could have been brought, except for the amount claimed, in the civil court of the city of New York, unless he shall recover six thousand dollars or more; or,

2. in an action brought in the supreme court in a county not within the city of New York which could have been brought, except for the amount claimed, in any court of limited monetary jurisdiction in the county, unless he shall recover five hundred dollars or more; or,

3. in an action brought in the county court which could have been brought, except for the amount claimed, in any court of lesser monetary jurisdiction in the county, unless he shall recover two hundred fifty dollars or more.

Credits
(L.1962, c. 308. Amended L.1963, c. 532, § 59.)

Editors' Notes

PRACTICE COMMENTARIES

By Joseph M. McLaughlin

C8102:1 No Costs When Action Unnecessarily Brought.

C8102:1 No Costs When Action Unnecessarily Brought.

The obvious purpose of this section is to encourage a plaintiff to bring his action in the lowest court that has jurisdiction to hear the case. It is doubtful that the section has any such effect given the inconsequential amount of costs. In any event, the penalty should not be inflicted upon a plaintiff who was compelled to bring the action in a higher court because of jurisdictional limitations upon the lower court arising from factors other than the amount involved, for example, residence of the defendant. Seabott v. Wanamaker, 1914, 164 A.D. 531, 150 N.Y.S. 223.

LEGISLATIVE STUDIES AND REPORTS

This section is intended to encourage the bringing of small claims in the inferior courts, and to relieve the congestion and expense occasioned by their prosecution in higher courts, states the Fourth Report to the Legislature. It is based upon § 1474 of the civil practice act. No change of substance is made except that subd. 7 was deleted and the section was made applicable to all counties of the state.

Although failure to bring an action in an appropriate lower court may have been treated as a discretionary consideration under § 8101, the advisory committee preferred to retain the mandatory provisions in order that an attorney may fairly appraise his risk of losing costs in the light of a definite minimum recovery provision.

The simplification effected by this section would make a five hundred dollar minimum recovery applicable to the Supreme Court outside of New York city and a two hundred fifty dollar minimum recovery applicable to County Courts. It removes such anomalies as subd. 6 of former § 1474, which required a showing of availability of a lower court, although in money actions, since 1951, the more stringent provision of former § 1472, when construed with § 1475, was applicable to the same recoveries and required no such showing.

Former § 1474 has been interpreted to require only that a lower court in the county where the action was instituted be available. This section clearly indicates that availability of any local court is not required; to avoid confusion, the word "triable" has been deleted. The word was not used in the former section in the sense of any county where venue was proper but was restricted to the county where venue was actually laid.

The minimum amounts specified are each well below the limit of jurisdiction of the lower courts to allow for normal "shrinkage" between the demand and the recovery.

Former §§ 1471, 1472 and 1473 also contained restrictions on costs based upon a small recovery. The minimum recoveries specified in § 1474, except for Schoharie county, were each far greater than those specified in §§ 1471 through 1473. Moreover, the consequences of a failure to recover the amount specified differed. For example, §§ 1471 and 1473 required limitation of costs, but not denial; § 1472 was construed with § 1475 to provide for both denial of costs and liability for the defendant's costs; and § 1474 provided only for denial of costs. Moreover, there was some doubt as to whether a plaintiff affected by §§ 1471 or 1473 would be entitled to his disbursements, while a plaintiff affected by § 1474 was expressly entitled to none of his disbursements, and a plaintiff affected by § 1472 (and thus § 1475) would not only be entitled to none of his disbursements but would be liable for those of the defendant. Section 1474 required a showing that jurisdiction of a lower court was available, while §§ 1471, 1472 and 1473 did not. Section 1474 applied only to certain courts in certain counties, while §§ 1741, 1472 and 1473 applied throughout the state, presumably to all courts of record. A plaintiff affected by §§ 1471, 1472 or 1473 would also be affected by § 1474, if he could have brought his action in a lower court specified there, and the application of both limitations was difficult.

To a large extent, §§ 1471, 1472 and 1473 were originally intended to achieve the same purpose as § 1474, which was added later, comments the Fourth Report. In view of the difficulties caused by the multiplicity of limitations §§ 1471, 1472 and 1473 have been deleted. Any purpose they serve is amply served by the provisions of this section.

In 1956, the Judicial Conference proposed expansion of the provisions of former § 1474. Two limitations were provided: failure to secure the larger amount resulted in denial of costs, failure to secure the smaller amount resulted also in an award of costs to the defendant. The amendment was never enacted, however.

Delection of former §§ 1472 and 1475 removes the anomaly which entitled a defendant to recover his costs and disbursements against a prevailing plaintiff, solely because the plaintiff recovered less than one hundred dollars. In no other case of denial of costs to a prevailing plaintiff does the defendant automatically become entitled to costs and the penalty is especially harsh where jurisdiction of a lower court, was impossible or highly impracticable.

Subd. 7 of the former section, which has been deleted, provided that in an action brought in the Supreme Court in New York or Bronx county for an accounting in a representative capacity by or against an executor, trustee, administrator or guardian, or for the construction of a will, no costs were to be awarded if a proceeding could have been brought in the Surrogate's Court of those counties. Since the court may take into consideration that the plaintiff should have proceeded in another court in determining whether to deny him costs under § 8101, subd. 7 is unnecessary. Moreover, its mandatory provisions do not permit a court to take into account justifiable reasons for bringing the action in the Supreme Court, and compel separate actions for two trusts, one testamentary and the other inter vivos, which have the same beneficiary, trustee and grantor.

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20, p. 303.

5th Report Leg.Doc. (1961) No. 15, p. 758.

6th Report Leg.Doc. (1962) No. 8, p. 734.

Notes of Decisions (70)

McKinney's CPLR § 8102, NY CPLR § 8102
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 81. Costs Generally (Refs & Annos)

McKinney's CPLR § 8103

§ 8103. Costs where parties prevail upon separate issues

Currentness

Upon the recovery of a judgment in favor of the plaintiff, the court may award costs in the action to a defendant without denying costs to the plaintiff, if it determines that a cause of action upon which the defendant prevailed is not substantially the same as any cause of action upon which the plaintiff recovered the judgment.

Credits
(L.1962, c. 308.)

Editors' Notes

PRACTICE COMMENTARIES

By Joseph M. McLaughlin

C8103:1 Costs to Both Plaintiff and Defendant.

C8103:1 Costs to Both Plaintiff and Defendant.

If both the plaintiff (on his complaint) and the defendant (on his counterclaim) are successful, and if two judgments are entered, the award of costs is governed by CPLR 8101. It is more common, however, for the verdicts to be set off, one against the other, and only one judgment entered for the plaintiff. In this situation CPLR 8103 confers discretion upon the court to award costs to both parties. As was the practice under Civil Practice Act § 1483, the discretion turns upon a finding that the defendant's successful counterclaim was substantially different from the plaintiff's cause of action.

LEGISLATIVE STUDIES AND REPORTS

This section is derived from § 1483 of the civil practice act. As § 1483, this provision permits each party to recover costs against the other, where the issues upon which they prevail are not substantially the same. While § 1483 apparently entitled the parties to costs as of right under such circumstances, it required the court to certify as to the similarity of the claims. See civil practice act § 1502. It therefore essentially stated a condition under which a defendant could be permitted to recover costs where the plaintiff recovered judgment. Although § 1483 only applied to cases where the plaintiff's recovery of judgment entitled him to costs as of right, the court's discretion to award costs "to any party" in other actions (see civil practice act § 1477) and in special proceedings (see id. § 1492) would also be based upon the same consideration.

It is intended, states the Fourth Report to the Legislature, that this section also cover the situation where the plaintiff recovers against one defendant but fails to recover against a co-defendant and only one judgment is entered. For this reason, the words "a defendant" are used rather than "the defendant."

Where more than one judgment is entered, § 8101 would permit denial of costs to the defendant who recovered, if his cause of action is substantially the same as the one upon which the plaintiff prevailed against his co-defendant.

The word "recovers" in the former section, used in connection with the defendant, has been replaced by "prevailed" to include both a successful defense and an affirmative recovery on a smaller counterclaim.

Section 1484 of the civil practice act [omitted] also stated a condition under which a party could recover costs although the judgment was not in his favor. It was limited to a new action based upon an answer of title in a Justice Court. See McKinney's Justice Court Act §§ 4(2), 172 to 179 [Justice Court Act replaced by Uniform Justice Court Act, Bk. 29A, Pt. 2. Costs covered in UJCA § 1900 et seq.]; Cf. Dadado v. Cartino, 180 Misc. 337, 41 N.Y.S.2d 794 (Supp.Ct.1943); Civil Practice Act §§ 110, 110-a [See CPLR 325, 326.].

The purpose of former § 1484 was to prevent a defendant from putting the plaintiff to the extra expense necessitated by the prosecution of the action at the defendant's behest in a higher court than that in which it was instituted by the plaintiff. If the plaintiff succeeds in the action, the defendant is subject to the higher costs, but if the plaintiff should fail, the provision permits the court to allow the plaintiff costs notwithstanding, and deny them to the defendant, if prosecution in the inferior court would have been proper. The section, however, did not take into account that the defendant's answer could have been in good faith, although in error. Moreover, there seems little need to specially provide for this unusual situation. Since § 8101 would permit the court to deny costs to the defendant in such a case, it amply covers the provisions of § 1484 which has therefore been deleted.

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20, p. 306.

5th Report Leg.Doc. (1961) No. 15, p. 759.

6th Report Leg.Doc. (1962) No. 8, p. 735.

Notes of Decisions (32)

McKinney's CPLR § 8103, NY CPLR § 8103
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 81. Costs Generally (Refs & Annos)

McKinney's CPLR § 8104

§ 8104. Costs in consolidated, severed or removed action

Currentness

Where two or more actions are consolidated, costs shall be awarded in the consolidated action as if it had been instituted as a single action, unless the order of consolidation otherwise provides. Where an action is severed into two or more actions, costs shall be awarded in each such action as if it had been instituted as a separate action, unless the order of severance otherwise provides. Where an action is removed, except pursuant to subdivision (d) of section three hundred twenty-five of this chapter, costs in the action shall be awarded as if it had been instituted in the court to which it is removed, unless the order of removal otherwise provides and as limited by section eighty-one hundred two of this chapter. Where an action is removed pursuant to subdivision (d) of section three hundred twenty-five of this chapter, costs in the action shall be awarded as if it had remained in the court from which it was removed, as limited by section eighty-one hundred two of this chapter.

Credits
(L.1962, c. 308. Amended L.1990, c. 64, § 1.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Joseph M. McLaughlin

1990

C8104:1 Consolidation, Severance or Removal.

This section states the general rule that when an action is removed from court A to court B, and the case proceeds to judgment in court B, costs in the action will usually be governed by the rules of court B. This makes sense in most cases. There is, however, at least one situation where such a rule would operate unfairly.

Under CPLR 325(d) a higher court may transfer an action to a lower court if the higher court believes that "the amount of damages sustained may be less than demanded." This can be done without the consent of the parties, although, curiously, when the action is transferred to the lower court a verdict thereafter obtained is subject to the monetary jurisdiction of the higher court. Thus, for example, if the Supreme Court New York County decides that an action wherein the plaintiff seeks $100,000 is not likely to result in a verdict of more than, say, $20,000, it may order the action transferred to the New York Civil Court. When the action is tried in the Civil Court, it is conceivable that the plaintiff may recover the $100,000 he demanded.

In such a situation, with 20-20 hindsight, it becomes clear that the Supreme Court misjudged the value of the case. It would, therefore, be unfair to limit the plaintiff to Civil Court costs. The 1990 amendment to this section recognizes the problem and now provides that costs shall be awarded as if the action had remained in the Supreme Court.

It should be noted that the award of costs remains limited by CPLR 8102, which means that, in the hypothetical discussed above, the plaintiff will receive no costs at all unless he recovers at least $6,000 in the Civil Court trial.

Finally, it should be emphasized that the amendment applies only to cases removed under CPLR 325(d). Where the removal occurs under CPLR 325(a) (Mistake in Choice of Court) or 325(b) (Transfer to Higher Court from Lower Court) or 325(c) (On Consent to Court of Limited Jurisdiction), costs will continue to be awarded in accordance with the general rule.

PRACTICE COMMENTARIES

By Joseph M. McLaughlin

C8104:1 Consolidation, Severance or Removal.

C8104:1 Consolidation, Severance or Removal.

The basic rule is that each action results in its own final judgment with its own bill of costs. When actions are consolidated (two or more actions merged into one) or severed (one action split in two) there will be an obvious impact upon the right to costs. Moreover, if an action is removed from one court to another and each court has different rules as to costs, a problem will arise.

This section alerts the parties to keep the costs problem in mind when consolidating, severing or removing actions. It also states the rules that will be applied to cost awards when the order of consolidation, severance or removal does not otherwise provide.

LEGISLATIVE STUDIES AND REPORTS

This section is new. With respect to consolidated actions, it changes the decisional law which precludes any costs for the period before the consolidation, unless the order of consolidation provides for them, states the Fourth Report to the Legislature. See P. V. Baranowsky Co., Ltd. v. Guaranty Trust Co., 247 A.D. 169, 286 N.Y.S. 997 (1st Dep't 1936); Gwizdak v. Netherland Cab Co., 51 N.Y.S.2d 560 (Sup.Ct.1944); Kelley v. Kelley, 123 Misc. 583, 205 N.Y.S. 737 (Sup.Ct.1924). With respect to severance, the former law was unclear. If judgment is entered for part of the claim, former § 1480 seemed to deny costs on the judgment, when the remainder was severed and continued. With respect to removal, this section probably represents the former law. Disbursements for fees and expenses incurred in the court from which the action was removed are covered by rule 326(c).

Unless special circumstances dictate a change, this section seems the most equitable, for it treats a severance as a finding that the actions should have been brought separately, a consolidation as a finding that they should have been joined, and a removal as a finding that the action should have been brought in the court to which it was removed.

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20, p. 307.

5th Report Leg.Doc. (1961) No. 15, p. 760.

6th Report Leg.Doc. (1962) No. 8, p. 736.

Notes of Decisions (22)

McKinney's CPLR § 8104, NY CPLR § 8104
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 81. Costs Generally (Refs & Annos)

McKinney's CPLR § 8105

§ 8105. Costs where more than one plaintiff or defendant

Currentness

Where a judgment is entered in favor of two or more parties, they shall be entitled, in all, to the same costs in the action as a single party, unless the court otherwise orders.

Credits
(L.1962, 308.)

Editors' Notes

PRACTICE COMMENTARIES

By Joseph M. McLaughlin

C8105:1 Multiple Winners.

C8105: Multiple Winners.

CPLR 8101 governs the award of costs when separate judgments are entered for different parties in a litigation. If only one judgment is entered on behalf of two or more successful litigants, the present section directs that they all be treated as one party and, therefore, entitled to share one bill of costs, unless the court orders otherwise. For the form of a court order making other provisions for the allocation of costs, see CPLR 8108, infra.

LEGISLATIVE STUDIES AND REPORTS

This section is new. Former decisional law allowed only one bill of costs except to prevailing defendants not united in interest who appeared, in good faith, by separate attorneys. Under this section, separate costs could be awarded to some or all parties or the court could control the apportionment of costs, states the Fourth Report to the Legislature.

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20, p. 308.

5th Report Leg.Doc. (1961) No. 15, p. 760.

6th Report Leg.Doc. (1962) No. 8, p. 736.

Notes of Decisions (15)

McKinney's CPLR § 8105, NY CPLR § 8105
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 81. Costs Generally (Refs & Annos)

McKinney's CPLR § 8106

§ 8106. Costs upon motion

Currentness

Costs upon a motion may be awarded to any party, in the discretion of the court, and absolutely or to abide the event of the action.

Credits
(L.1962, c. 308.)

Editors' Notes

PRACTICE COMMENTARIES

By Joseph M. McLaughlin

C8106:1 Motion Costs.

C8106:1 Motion Costs.

Whereas costs in an action are generally a matter of right (CPLR 8101) costs upon a motion are not. Unless the court deciding the motion expressly adverts to the subject of costs, none are recoverable. Matter of Baker, 1940, 284 N.Y. 1, 29 N.E.2d 241.

LEGISLATIVE STUDIES AND REPORTS

This section is based upon § 1486 of the civil practice act. The provisions for cost on a reference have been omitted. To the extent that a reference is ordered upon motion of a party, such costs may be awarded upon the motion, and the necessity for a separate provision is questionable. A trial before a referee does not differ from a trial before the court in any way that would warrant such special treatment. Moreover, the costs to be awarded were limited by former § 1505 to ten dollars, a sum so nominal that deletion of costs for a reference did not appreciably affect litigants or attorneys.

Indeed, the costs on a motion were seldom collected because of their nominal amount, states the Fourth Report to the Legislature. Unless extensive disbursements have been incurred, an attorney will waive costs knowing that his adversary will pay them himself rather than explain to his client that they are being taxed because he lost a motion. For the prevailing party, they represent such a small part of the expense in the action that there is always acquiescence in such a waiver. It is doubtful that the increased amount in § 8102 will alter this situation appreciably.

Section 1487 of the civil practice act, which provided for costs upon an application for judgment on a pleading as frivolous, has been deleted as unnecessary since, under CPLR, the motion to dismiss a pleading as frivolous (see rules of civil practice 103, 104) has been deleted. Cf. §§ 3024, 3212. Nevertheless, former § 1487 serves to point out a difficulty with the costs provisions.

To the extent that § 1487 implied that costs in such a case were limited to the amount granted on a motion rather than the amount which would be included in the judgment, it was misleading. Motion costs could apparently be awarded on a motion which results in a judgment, in addition to the usual action costs awarded upon entry of the judgment. The provisions of former §§ 1504 and 1504-a for the amount of costs in actions before trial court thus be enhanced with motion costs when the action was terminated by a motion just as they were enhanced with trial costs, if a trial was necessary.

It is also possible that the sole purpose of former § 1487 was to confirm that an "application," at least in this instance was the same as a "motion." In drafting CPLR the word "application" has been replaced by the word "motion" wherever appropriate in order to avoid the former ambiguity of the word. While a motion is defined as an application for an order in both § 2211 and § 113, it includes an application for judgment under both.

This section also replaces the next to last sentence in rule 66, of the rules of civil practice which provided for costs on a defaulted motion.

Section 1488 of the civil practice act provided that costs on a motion to strike scandalous matter from a pleading could be charged personally against the attorney whose name appeared on the pleading, and that his failure to pay such costs was punishable as a contempt. A court would appear to have inherent power to punish an attorney for scandalous conduct, such as the insertion of scandalous matter in a pleading. Cf. Allen v. Fink, 211 A.D. 411, 207 N.Y.S. 428 (4th Dep't 1925). The only thing that former § 1488 achieved by taxing the costs against the attorney was to save his client from paying them; in any case they would be paid to the moving party. Since costs on a motion were limited to a maximum of ten dollars under former law, however, not only did the provision impose a negligible penalty on the attorney, but it offered little saving to his client. Indeed, in practice, even without the provision, the attorney would undoubtedly pay the costs, in the rare case where his adversary so requested, simply to avoid embarrassment before his client. The section has therefore been deleted, comments the Fourth Report.

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20, p. 309.

5th Report Leg.Doc. (1961) No. 15, p. 761.

6th Report Leg.Doc. (1962) No. 8, p. 737.

Notes of Decisions (28)

McKinney's CPLR § 8106, NY CPLR § 8106
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 81. Costs Generally (Refs & Annos)

McKinney's CPLR § 8107

§ 8107. Costs upon appeal

Currentness

The party in whose favor an appeal is decided in whole or in part is entitled to costs upon the appeal, whether or not he is entitled to costs in the action, unless otherwise provided by statute, rule or order of the appellate court. Where a new trial is directed upon appeal, costs upon the appeal may be awarded absolutely or to abide the event.

Credits
(L.1962, c. 308.)

Editors' Notes

PRACTICE COMMENTARIES

By Joseph M. McLaughlin

C8107:1 Appeal Costs.

C8107:1 Appeal Costs.

This section tracks CPLR 8101 (costs in an action), although historically appellate courts exercise more discretion over costs than trial courts.

LEGISLATIVE STUDIES AND REPORTS

This section replaces §§ 1489, 1490 and 1491 of the civil practice act, and so much of § 1492 as related to appeals.

Former § 1490, relating to appeals from a final judgment, was orignally intended to grant costs on appeal as of right in those actions where costs of the action were as of right, and to allow appeals costs by discretion in those actions where action costs were by discretion. In 1943, however, the appeals as of right provision was amended upon the recommendation of the Judicial Council to permit the appellate court to deny costs. Laws 1943, c. 452. Thus, the status of costs on appeal was that unless discretion was exercised to allow them in actions where the action costs were discretionary, they would be denied; while unless discretion was exercised to deny them in actions where action costs are as of right, they would be allowed. This confusing rule has been simplified by this section to allow costs in all cases except where they are denied in the discretion of the court. Moreover, the discretion prescribed by this section may be exercised in rare cases to tax costs against the prevailing party.

Former § 1490(1) was misleading because its introductory phrase seemed to cover only an appeal from a judgment for the plaintiff. It seems clear, however, that the phrase, "action wherein the plaintiff is entitled to costs as of course," should have

been read in the light of the phrase used in the predecessor section to mean only an action of a kind specified in former § 1470. See Code Civ.Proc. § 3238(1); cf. civil practice act § 1483.

Section 1491 of the civil practice act provided with two exceptions, that costs on an appeal from an interlocutory judgment or an order were discretionary. It was therefore included in this section.

The exception in subd. 1 of § 1491 provided that where an appeal was taken from order granting or refusing a new trial and the decision on appeal refused a new trial, the respondent was entitled, of course, to the costs of the appeal. When the order appealed was a denial of a new trial, the provision was understandable since the order was affirmed and the respondent was the prevailing party. However, when the order appealed from was the granting of a new trial and the court refused a new trial, the respondent had lost and the provision then appeared to award a losing party costs of course. Although this anomaly in the Code of Civil Procedure was pointed out by the First Department in 1920, the provision was included in the civil practice act unchanged. Under the decision in Rothman v. Thompson Bros. Inc., 193 A.D. 694, 696-97, 184 N.Y.S. 505, 506-07 (1st Dep't 1920), however, its application was narrowed, states the Fourth Report to the Legislature.

In view of the confusion it caused, and the lack of necessity for a special provision for costs as of right in this area, especially since the 1943 amendment to § 1490, subd. 1 of § 1491 has also been deleted.

Subd. 2 of § 1491, which provided that upon an appeal from both a judgment and an order refusing a new trial, neither party was entitled to costs for the appeal from the order, was also deleted. Since costs are discretionary, the court may control the costs to be awarded upon this kind of continued appeal as well as upon others. Moreover, since there is presumably one appeal and one argument, there seems no reason why more than one bill of costs should be awarded, even without the provision, for the situation is analogous to an action where two or more causes of action are alleged. For similar reasons, the reference to costs in the last paragraph of § 562 was also deleted.

The phrase "whether or not he is entitled to costs in the action" is intended to cover the substance of former § 1489.

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20, p. 310.

5th Report Leg.Doc. (1961) No. 15, p. 761.

6th Report Leg.Doc. (1962) No. 8, p. 737.

Notes of Decisions (90)

McKinney's CPLR § 8107, NY CPLR § 8107
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 81. Costs Generally (Refs & Annos)

McKinney's CPLR § 8108

§ 8108. Specification of denial or award of costs

Currentness

A denial of costs in an action to a party in whose favor the judgment is entered, an award of costs in an action to a party against whom the judgment is entered, an award of separate costs in an action to one or more parties, or an apportionment of costs among several parties, shall be made in the direction of the court for judgment, or in the report or decision upon which judgment is entered, or, upon motion of the party to be benefited thereby, by an order of the judge or referee who presided at the trial. The decision on a motion shall specify the amount of costs awarded upon the motion, if any, and each party to whom they are awarded. The decision on appeal shall specify the disposition made in regard to costs.

Credits
(L.1962, c. 308.)

Editors' Notes

PRACTICE COMMENTARIES

By Joseph M. McLaughlin

C8108:1 Specification.

C8108:1 Specification.

Costs and disbursements are always taxed by the clerk when judgment is entered (CPLR 8401). The clerk will follow the general rules spelled out in CPLR 8101-8107, unless the court has made clear that, in the exercise of its discretion, it has decided to invoke one of the exceptions in Article 81. The purpose of this section, therefore, is to require the court to make clear what it wishes the clerk to do.

This section has special application to motion costs since they lie completely within the discretion of the motion court, both as to amount and as to their award. CPLR 8106, 8202.

LEGISLATIVE STUDIES AND REPORTS

This section replaces provisions now found in §§ 440, 1502 and 1533 of the civil practice act. It also provides for situations not formerly provided for.

The purpose of this section is to provide the taxing officer with a basis to tax costs. Therefore, states the Fourth Report to the Legislature, whenever costs are awarded by discretion, such fact must be specified; whenever a party is entitled to costs under the rules, only the discretionary denial thereof need be specified.

Where the amount of costs or the party to whom they are awarded are in the discretion of the court, as upon a motion, those additional facts must also be specified for the guidance of the taxing officer. See also §§ 8303(a), 8401.

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20, p. 313.

5th Report Leg.Doc. (1961) No. 15, p. 761.

6th Report Leg.Doc. (1962) No. 8, p. 737.

Notes of Decisions (12)

McKinney's CPLR § 8108, NY CPLR § 8108
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 81. Costs Generally (Refs & Annos)

McKinney's CPLR § 8109

§ 8109. Defendant's costs against the state

Currentness

(a) Action brought for benefit of municipal corporation. Costs awarded to the defendant in an action brought by the state for the benefit of a municipal corporation shall be awarded against the municipal corporation and not against the state.

(b) Payment of defendant's costs against the state. Where costs are awarded to the defendant and against the state in an action brought by a public officer, and the proceedings have not been stayed, the comptroller shall draw his warrant upon the treasurer for the payment of the costs out of any money in the treasury appropriated for that purpose, upon the production to him of an exemplified copy of the judgment or order awarding the costs, a copy of a taxed bill of costs and a certificate of the attorney-general to the effect that the action was brought pursuant to law. The fees of the clerk for the exemplified copy shall be certified thereupon by him and included in the warrant.

Credits
(L.1962, c. 308.)

Editors' Notes

PRACTICE COMMENTARIES

By Joseph M. McLaughlin

C8109:1 Costs in Actions By State.

C8109:1 Costs in Actions By State.

When the State is a defendant, it must be sued in the Court of Claims. Ct.Claims Act § 27 bars the award of costs to any party.

When the State is a plaintiff, it may sue in any court that has jurisdiction. In some of these suits the State is a nominal plaintiff only; some other person or entity is the real party in interest. This section states the rules governing costs in an action in which the State is the plaintiff, nominal or otherwise.

LEGISLATIVE STUDIES AND REPORTS

Subd. (a) is based on § 1496 of the civil practice act, without change in substance. The word "municipality" has been changed to "municipal corporation." A "municipal corporation" is defined in § 2 of McKinney's General Municipal Law as a county, town, city or village. This definition is not exclusive, however, states the Fourth Report to the Legislature, since for limited

purposes a municipal corporation also includes other governmental units. For example, under § 3-a of McKinney's General Municipal Law, "municipal corporations" include also school districts, pension or retirement systems and special or public districts. Under § 1498 of the civil practice act, moreover, it has been held that the Board of Education of the city of New York is a municipal corporation. See Rucker v. Board of Education, 172 Misc. 731, 16 N.Y.S.2d 112 (Sup.Ct.1939); Caldwell v. Board of Education, 127 Misc. 492, 216 N.Y.S. 501 (Sup.Ct.1926).

The word "action" in the provision includes both actions and special proceedings. See § 105(b).

Subd. (b) is based upon § 1494 of the civil practice act. The section apparently applied only in actions where the state was the plaintiff, and it has been reworded to so indicate. No change in substance has been made.

Section 1495 of the civil practice act has been deleted. It provided that costs awarded to the defendant in an action, brought by the state on the relation of a private person should be awarded against the relator in the first instance, and against the state if an execution against the relator is returned unsatisfied. Since § 1302 requires the relator to give an undertaking for costs in such a situation, the defendant is amply protected. Moreover, there seems no reason why the state should be liable for costs in any event.

Section 1481 of the civil practice act was apparently intended to avoid "dummy" plaintiffs, who were not responsible for costs. The problem did not seem significant and the section has accordingly been omitted.

Former § 1501 was apparently a statement of the substantive common law and it was also omitted with no intent to change the law. Similarly, former §§ 1503 and 1521 have been omitted as unnecessary, since special statutes would control over general rules.

Section 1498 of the civil practice act has also been deleted. The section provided that no costs were to be awarded to the plaintiff in an action against a municipality unless the claim upon which the action was based was presented ten days before the action was commenced. Its predecessor was held inapplicable to actions in tort. See Gage v. The Village of Hornellsville, 106 N.Y. 667, 12 N.E. 817 (1887). The section was also expressly limited to actions for a sum of money. The committee believes that § 1498 served little purpose; its function has been amply covered by the many provisions in the Consolidated Laws and in ciy charters which require a notice of claim as a condition precedent to commencing an action. See, e.g. McKinney's Town Law § 67; McKinney's Highway Law § 215; McKinney's County Law § 52; McKinney's Second Class Cities Law, § 244; see also McKinney's Gen. Munic. Law § 50-e. For an analysis of notice of claim provisions in the charters of 62 cities of the state, as of 1943, see 9 N.Y.Jud.Council Rep. 246-58 (1943).

Section 1497 of the civil practice act which precluded costs in certain actions against school officials has also been deleted. It appears with negligible wording differences as § 3810 of McKinney's Education Law. The actions to which it refers are apparently those set forth in § 310 of McKinney's Education Law, and its purpose is to encourage proceedings before the commissioner in those cases where such proceedings are not the executive remedy.

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20, p. 313.

5th Report Leg.Doc. (1961) No. 15, p. 762.

6th Report Leg.Doc. (1962) No. 8, p. 738.

Notes of Decisions (6)

McKinney's CPLR § 8109, NY CPLR § 8109
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 81. Costs Generally (Refs & Annos)

McKinney's CPLR § 8110

§ 8110. Costs against a fiduciary

Currentness

Where costs are awarded against a fiduciary, they shall be chargeable only upon the estate, fund or person he represents, unless the court directs them to be paid personally for mismanagement or bad faith in the prosecution or defense of the action.

Credits
(L.1962, c. 308.)

Editors' Notes

PRACTICE COMMENTARIES

By Joseph M. McLaughlin

C8110:1 Costs Against a Fiduciary.

C8110:1 Costs Against a Fiduciary.

This section states the normal rule that when costs are awarded against a fiduciary they should normally be paid by those whom he represents. This is true regardless of whether the fiduciary is a plaintiff or a defendant.

LEGISLATIVE STUDIES AND REPORTS

This section is derived from the last clause of § 1500 of the civil practice act. The first clause of § 1500 has been omitted as unnecessary. It stated that in an action brought by or against a fiduciary in a representative capacity, costs were to be awarded as against a person prosecuting or defending in his own right. The provision is misleading if it is read to limit such treatment to cases where the fiduciary is acting in a representative capacity, states the Fourth Report to the Legislature. Where the fiduciary does not act in a representative capacity, the rule is the same. The language of the former section "an executor or administrator in his representative capacity or a trustee of an express trust" has been replaced by the single term "fiduciary." Moreover, this section excludes "a person expressly authorized by statute to sue or be sued." The phrase was ambiguous. The identical phrase appeared in § 210 of the civil practice act, but it has been omitted in § 1004.

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20, p. 315.

5th Report Leg.Doc. (1961) No. 15, p. 763.

6th Report Leg.Doc. (1962) No. 8, p. 739.

Notes of Decisions (17)

McKinney's CPLR § 8110, NY CPLR § 8110
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules
Chapter Eight. Of the Consolidated Laws
Article 82. Amount of Costs

McKinney's CPLR Ch. EIGHT, Art. 82, Refs & Annos
Currentness

Editors' Notes

PRACTICE COMMENTARIES

By Joseph M. McLaughlin

CPLR Article 81 establishes the right to costs. Once that right has been fixed, the amount of costs that may be taxed is then prescribed by this Article. The CPLR maintains the New York tradition of awarding only nominal sums as costs. If the purpose of an award of costs is to reimburse a successful litigant for the expenses of recovering his judgment, the minimal amounts involved continue to be ludicrous. One may also question the notion that costs should be the same for all litigations regardless of the size of the verdict.

McKinney's CPLR Ch. EIGHT, Art. 82, Refs & Annos, NY CPLR Ch. EIGHT, Art. 82, Refs & Annos
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 82. Amount of Costs (Refs & Annos)

McKinney's CPLR § 8201

§ 8201. Amount of costs in an action

Currentness

Costs awarded in an action shall be in the amount of:

1. two hundred dollars for all proceedings before a note of issue is filed; plus

2. two hundred dollars for all proceedings after a note of issue is filed and before trial; plus

3. three hundred dollars for each trial, inquest or assessment of damages.

Credits
(L.1962, c. 308. Amended L.1972, c. 734, § 8; L.1972, c. 735, § 6; L.1988, c. 101, § 1.)

Editors' Notes

LEGISLATIVE STUDIES AND REPORTS

This section is derived from § 1504-a of the civil practice act, which was applicable only in the city of New York. Section 1504-a was enacted in 1951 (Laws 1951, c. 502) to replace §§ 1504 and 1507 as they applied to the city of New York. The amendment was recommended by the county clerk of New York county, who noted in connection with the bill: "This bill simplifies the taxation of costs. Its application is limited to the City of New York. It was approved at a conference of the representatives of the five County Clerks in the City of New York.

"...

"The new Section 1504-a reduces the number of items of costs listed in Section 1504, C.P.A., from thirteen to three, and yet leaves substantially unchanged the total amount of costs awarded to the successful party.

"No effort has been made to increase or decrease the amount allowed for costs, as it was felt that that is a separate problem bearing no relation to simplification of procedure, which is all that this bill proposes.

"There is no logical basis for the items of costs presently enumerated in Section 1504. Items are included or omitted from the section for reasons which may have existed a century ago, when the section was put in its present form. Our advance in practice and procedure have long since removed any such rational explanation if, in fact, any ever existed.

"Moreover, the items presently cited in Section 1504 are not clear of doubt and a large body of case law, much of it unreported or buried in Law Journal decisions, has grown up. Only a comparatively few attorneys have adequate familiarity with the law of costs, and even court clerks, charged with administering the section, disagree as to the meaning of its items. It is not surprising therefore that its interpretation is a constant source of irritation to attorneys and court clerks.

"The bill proposes to put the items of taxation on a more rational basis. The miscellaneous items specified in Section 1504 are eliminated and are replaced by the following three items of costs:

"1. Costs before note of issue is filed, $25.

"2. Additional costs after note of issue is filed, $50.

"3. Additional costs for a trial or an inquest before the court, $75.

"These items are clear. Taxation of costs will be simple and the items readily understandable. The amounts $25, $50 and $75 were arrived at after a study of several hundred bills of costs in order to leave unchanged the total amount taxed. At the conference of County Clerk's representatives hereinbefore referred to, it was estimated that the three items of costs proposed by this bill represent approximately the amounts now being taxed under the existing miscellaneous provisions of Section 1504.

"It was felt that the bill should be restricted in its application to the City of New York, as otherwise it might apply to actions in County Courts where the amount of costs taxed is usually much lower. [N.Y.Legis.Ann. 44 (1951).]"

Since former §§ 1504 and 1507 applied to County Courts as well as to the Supreme Court, the New York county clerk's reluctance to recommend the change for the entire state seems unwarranted, comments the Fourth Report to the Legislature. Moreover, the committee was impressed with the success of the section in New York city over the past eight years.

Section 1517 of the civil practice act has been deleted. This section provided for one and one-half times the normal costs to a prevailing defendant who was, or was directed by, a state officer acting in his official capacity, or was acting under color of statutory authority. These "increased costs" were minor and the actions in which they could be incurred are rare. Special provision for them therefore does not appear to be warranted. Moreover, wherever practicable an attempt has been made to treat the state and state officials in the same way as other parties. Section 1519 applied only to cases mentioned in § 1517 and it was therefore also omitted.

Former § 1511 of the civil practice act has been omitted. It provided that "no greater sum shall be demanded as costs" upon a settlement than at the rates prescribed for costs in an action. Since a settlement is made by agreement of the parties, however, the amount of costs that a plaintiff might be entitled to if he were to refuse an offer of settlement and prevail would be taken into account in considering the offer and § 1511 is unnecessary verbiage.

Former § 1516 of the civil practice act has also been omitted. It provided that a plaintiff entitled to multiple damages did not thereby become entitled to multiple costs. Since the amount of costs did not depend in any case upon the amount of damages recovered, the section was unnecessary. Where the single damages are so small that costs would be denied because the matter should have been prosecuted in an inferior court, recovery of multiple damages may entitle the plaintiff to costs.

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20, p. 318.

5th Report Leg.Doc. (1961) No. 15, p. 764.

6th Report Leg.Doc. (1962) No. 8, p. 740.

Notes of Decisions (24)

McKinney's CPLR § 8201, NY CPLR § 8201
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 82. Amount of Costs (Refs & Annos)

McKinney's CPLR § 8202

§ 8202. Amount of costs on motion

Currentness

Costs awarded on a motion shall be in an amount fixed by the court, not exceeding one hundred dollars.

Credits
(L.1962, c. 308. Amended L.1972, c. 734, § 8; L.1972, c. 735, § 6; L.1988, c. 101, § 2.)

Editors' Notes

LEGISLATIVE STUDIES AND REPORTS

This section replaces §§ 1505, 1506, 1509, and 1515 of the civil practice act. The only significant change made is an increase in the maximum fee allowable.

The amount of costs which may be awarded upon a motion were specified in § 1505 of the civil practice act as ten dollars. This maximum was in effect for over 80 years. With today's complexity of litigation and high cost of living, the new maximum of twenty dollars represents only a nominal change.

Two motions were excepted from former § 1505, the basic section regulating the amount of costs on a motion, and regulated by former § 1509, which provided that the amount of costs was the same as upon appeal. The first was the motion for a new trial upon a case. See civil practice act §§ 550 to 553. The second was the motion for judgment upon a special verdict. See civil practice act §§ 458, 495. Apparently, the original purpose of these provisions was to adequately compensate parties who secured a review upon a motion that was in effect an appeal. The motion for a new trial upon a case, however, has been eliminated in CPLR, and the special provision for it is therefore unnecessary.

Although a motion for judgment on a special verdict was apparently made originally at general term (the predecessor of the Appellate Division), it is today no more complex, and indeed often less so, than many other motions, states the Fourth Report to the Legislature. While the court in Kenny v. First National Bank of Pittsburgh, 8 N.Y.Civ.Proc.Rep. 398, 400 (Sup.Ct.1885), stated that a judgment "entered by direction of the trial judge immediately upon the rendition of the verdict, ... [was not] such 'an application for judgment upon a special verdict,' as is referred to" in the statute, most other decisions have assumed that such an application, wherever made, entitles the party to appeal costs. See e.g., Bass v. Lawrence, 98 Misc. 572, 162 N.Y.S. 959 (N.Y.C.Ct.1917); In re Owens, 31 Abb.N.C. 480, 30 N.Y.S. 348 (N.Y.C.P.1894). But cf. Prashker, New York Practice 747 (3d ed. 1954) (motion for judgment on special verdict should be made at Special Term): Mitsui & Co. Ltd. v. Schneir, 255 A.D. 620, 8 N.Y.S.2d 289 (1st Dep't 1938) (same). In Walsh v. Bowery Savings Bank, 9 N.Y.Civ.Proc.Rep. 177, 179 (N.Y.C.Ct.1886), the court noted:

"Ten dollars costs for the argument of the motion for judgment ought to be sufficient, but [the statute allows] ... $60 and leaves no discretion in the court as to the awarding or withholding them. This is the plain language of the effect of the ... [statute], and

I cannot change it by interpolating words, which might give to it the meaning which the defendant's counsel claims it ought to have. The legislative intent, the grand central light in which all statutes must be read, is to be sought for in the language used." There seems no good reason to continue the special treatment formerly accorded this motion, and it has therefore been made subject to this section.

Section 1515 of the civil practice act provided that upon an application to adjourn a trial, an award of costs could be made as a condition of granting the adjournment and that disbursements allowable would include those which were rendered ineffectual by the adjournment. This section does not substantially differ from the provisions of § 1505, respecting a motion and its special provisions have also been deleted as unnecessary.

The provision in former § 1505 for a reference has been deleted, because of the similar deletion effected by § 8106. The inclusion in § 1515 and in § 1505 of a provision for disbursements was misleading for it implied that disbursements were not allowable in other situations. Section 8301(b) expressly indicates that disbursements are allowed where costs are awarded upon a motion.

Section 1506 of the civil practice act was an obsolete provision which prescribed a fixed sum not exceeding $20 to be added to the costs of a motion for discovery or inspection "for the fees of the referee." Since § 8301(b) permits taxation of these fees as disbursements, § 1506 has been deleted as unnecessary.

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20, p. 320.

5th Report Leg.Doc. (1961) No. 15, p. 764.

6th Report Leg.Doc. (1962) No. 8, p. 740.

Notes of Decisions (13)

McKinney's CPLR § 8202, NY CPLR § 8202
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 82. Amount of Costs (Refs & Annos)

McKinney's CPLR § 8203

§ 8203. Amount of costs on appeal to appellate division and appellate term

Currentness

(a) Unless the court awards a lesser amount, costs awarded on an appeal to the appellate division shall be in the amount of two hundred fifty dollars.

(b) Costs on an appeal from a county court to an appellate term may be awarded by the appellate term in its discretion, and if awarded shall be as follows:

1. to the appellant upon reversal, not more than thirty dollars;

2. to the respondent upon affirmance, not more than twenty-five dollars;

3. to either party on modification, not more than twenty-five dollars.

On appeal from any other court to an appellate term costs shall be governed by the provisions of the applicable court act.

Credits
(L.1962, c. 308. Amended L.1972, c. 391, § 1; L.1972, c. 734, § 8; L.1972, c. 735, § 6; L.1988, c. 101, § 3.)

Editors' Notes

LEGISLATIVE STUDIES AND REPORTS

This section is based upon § 1508 of the civil practice act. The major change it makes is the elimination of subpar. 1(c) which provided a term fee of ten dollars for each term that the cause was necessarily on the calendar. In today's practice, such a provision is obsolete and bears no relation to the amount of work involved on the appeal. The similar provision for trial term fees in subpar. 3(m) of § 1504 of the civil practice act was deleted for New York city in 1951 and has been deleted in the entire state by § 8201. The former provision for a term fee in the Court of Appeals has also been deleted.

In order to compensate for the elimination of the term fee, the other amounts have been slightly increased, comments the Fourth Report to the Legislature.

Former § 1508 contained two subdivisions. The first provides a fixed amount of costs ($20 before argument, $40 for argument, $10 per term) to be awarded on appeals (1) from judgments, (2) from orders granting or refusing a new trial, and (3) from

determinations rendered on appeals from judgments or new trial orders. While the appellate court, since 1943, has had the power to deny costs entirely if they are allowed in these cases they must be in these fixed amounts.

The second subdivision of former § 1508 provided that the court could fix the amount of costs not to exceed fifty dollars, on any other appeal.

Since the amounts in the two subdivisions were not significantly different, this section combines them into a fixed rate for all appeals which may be decreased in the discretion of the court.

Costs on appeals from inferior courts to the Appellate Term of the Supreme Court or to County Courts are regulated by the inferior court acts.

See e.g. McKinney's Justice Ct.Act §§ 447, 451, 452, 456; N.Y.Munic.Ct.Code § 172.

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20, p. 321.

5th Report Leg.Doc. (1961) No. 15, p. 764.

6th Report Leg.Doc. (1962) No. 8, p. 740.

Notes of Decisions (9)

McKinney's CPLR § 8203, NY CPLR § 8203
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 82. Amount of Costs (Refs & Annos)

McKinney's CPLR § 8204

§ 8204. Amount of costs on appeal to the court of appeals

Currentness

Unless the court awards a lesser amount, costs awarded on an appeal to the court of appeals shall be in the amount of five hundred dollars.

Credits
(L.1962, c. 308. Amended L.1972, c. 734, § 8; L.1972, c. 735, § 6; L.1988, c. 101, § 4.)

Editors' Notes

LEGISLATIVE STUDIES AND REPORTS

This section is based upon § 1510 of the civil practice act. The term fee in subdiv. 3 has been eliminated, in accordance with similar proposals eliminating trial and appellate division term fees. Since the Court of Appeals has only one term a year, even stronger reasons exist for eliminating this obsolete provision in this area.

Subd. 4 of former § 1510 has also been deleted. It provided that the Court of Appeals, upon affirming a judgment, may award "damages by way of costs for the delay" not exceeding ten per cent of the amount of the judgment. The subdivision was enacted in 1858, Laws 1858, c. 306, § 11. Since then, it was mentioned in a reported decision only three times. In Tisdale v. President, 116 N.Y. 416 (1889), the court refused to apply it because the appeal was one which raised a debatable legal question. In Jackson v. City of Rochester, 124 N.Y. 624, 26 N.E. 326 (1891), and Cohen v. Mayor, 128 N.Y. 594, 27 N.E. 1074 (1891), however, the "damages" it allows were awarded, because the appeals were groundless.

These opinions indicate that subd. 4 of former § 1510 was intended to discourage frivolous appeals, states the Fourth Report to the Legislature. It has apparently not been employed since 1891, however, and there is apparently little need for it. Frivolous appeals to the Court of Appeals do not appear to be a serious problem, moreover the respondent would seem to be adequately compensated "for the delay" by his six per cent interest on the judgment and by the undertaking which insures that he will be able to collect it.

Since 1943, the Court of Appeals has had discretion to deny costs in any case. Where they were awarded, however, they had to be at the fixed rate of former § 1510. By contrast, this section's fixed rate may be denied in part, allowing the Court greater flexibility.

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20, p. 322.

5th Report Leg.Doc. (1961) No. 15, p. 765.

6th Report Leg.Doc. (1962) No. 8, p. 741.

McKinney's CPLR § 8204, NY CPLR § 8204
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-A. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title J. Prosecution of Indictments in Superior Courts--Plea to Sentence
Article 260. Jury Trial--Generally (Refs & Annos)

McKinney's CPL § 260.30

§ 260.30 Jury trial; in what order to proceed

Currentness

The order of a jury trial, in general, is as follows:

1. The jury must be selected and sworn.

2. The court must deliver preliminary instructions to the jury.

3. The people must deliver an opening address to the jury.

4. The defendant may deliver an opening address to the jury.

5. The people must offer evidence in support of the indictment.

6. The defendant may offer evidence in his defense.

7. The people may offer evidence in rebuttal of the defense evidence, and the defendant may then offer evidence in rebuttal of the people's rebuttal evidence. The court may in its discretion permit the parties to offer further rebuttal or surrebuttal evidence in this pattern. In the interest of justice, the court may permit either party to offer evidence upon rebuttal which is not technically of a rebuttal nature but more properly a part of the offering party's original case.

8. At the conclusion of the evidence, the defendant may deliver a summation to the jury.

9. The people may then deliver a summation to the jury.

10. The court must then deliver a charge to the jury.

11. The jury must then retire to deliberate and, if possible, render a verdict.

Credits
(L.1970, c. 996, § 1.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Peter Preiser

2002

In a case of first impression the Court of Appeals dealt with a situation where a trial court in a bench trial *sua sponte* in the exercise of discretion called and questioned its own witness after both parties had rested and neither had elected to call the witness who was available in the hallway. The trial court's rationale was a perceived need to clarify a disputed central issue hinging upon whether the witness's organization had a uniform procedure in performing its operations and whether that procedure was followed at the time in question. When called over defendant's objection, the witness testified that the procedure varied from time-to-time and he could not recall the procedure followed on the occasion in question. Disagreeing with the Appellate Division, which had found the trial court's action permissible "for the purpose of clarifying and satisfying itself as to the truth in its role as trier of fact", the Court of Appeals held that, under the circumstances at bar, the trial judge inadvertently prejudiced the defense; remarking that "[t]he overarching principle restraining the court's discretion is that it is the function of the judge to protect the record at trial, not to make it" *People v. Arnold*, 98 N.Y.2d 63, 745 N.Y.S.2d 782, 772 N.E.2d 1140 (2002).

While not condemning the practice out-of-hand, the Court of Appeals recommended as guidance for "those unusual circumstances" in which a court feels compelled to call its own witness that the court "should explain why, and invite comment from the parties. In that way, the court can consider what it aims to gain against any claims of possible prejudice. Moreover, an appellate court then have a basis on which to review the trial court's exercise of discretion." (98 N.Y.2d at 68).

PRACTICE COMMENTARIES

by Peter Preiser

This section simply sets forth the sequence of steps in a jury trial. The mandatory steps are identified by the word "must"; others are waivable, identified by the word "may." Thus, for example, the People cannot waive delivery of an opening address, because subdivision three uses the term must. *People v. Kurtz*, 51 N.Y.2d 380, 434 N.Y.S.2d 200, 414 N.E.2d 699 (1980).

In connection with the opening address the *Kurtz* opinion instructs that "it should set forth the nature of the charge against the accused and set forth briefly the facts [the People expect] to prove along with the evidence [the People plan] to introduce in support of the same" (51 N.Y.2d at 384).

The statutory framework for the order of trial "is not a rigid one" and trial court retains its common-law power to alter the order of proof "in its discretion and in furtherance of justice" (see *People v. Olsen*, 34 N.Y.2d 349, 353, 357 N.Y.S.2d 487, 313 N.E.2d 782 [1974]). But, absent good reason therefor, a court will not depart from the order

set forth in this statute. Thus, for example, it need not permit a defendant to reserve the right to open until after the People's evidence has been presented (*People v. Seiler*, 246 N.Y. 262, 158 N.E. 615 [1927]), or permit the defense to deliver its summation after the prosecutor's summation (*People v. Gonzalez*, 140 A.D.2d 455, 528 N.Y.S.2d 337 [2d Dept.1988]).

A distinction is in order for consideration of requests that are not attempts to gain strategic advantage, but rather are based upon an appeal to the truth finding process, such as requests to introduce additional evidence after the parties have rested and the court is about to charge the jury. While granting or denial of such requests is within the court's discretion, the asserted need will be viewed with a jaundiced eye. This applies not only to defendant (see *People v. Washington*, 71 N.Y.2d 916, 528 N.Y.S.2d 531, 523 N.E.2d 818 [1988]), but also to the People (see *People v. Whipple*, 97 N.Y.2d 1, 734 N.Y.S.2d 549, 670 N.E.2d 237 [2001]).

Some specific guidance in this regard was furnished by the Court of Appeals in *People v. Whipple, supra*. There the People had neglected to fully establish an element of the crime and defendant moved for a trial order of dismissal under CPL § 290.10. In upholding trial court's discretionary authority to grant People's application to present evidence to close the gap in the face of a motion for acquittal, the Court stated: "reopening is permissible where the missing element is simple to prove and not seriously contested, and reopening the case does not unduly prejudice the defense" (97 N.Y.2d at 3). The philosophical basis here is enlightening too, as it stresses the core rationale of the trial being a search for the truth. The Court observed that the motion for dismissal had given the People notice of the technical omission "and the issue now is whether the case should be concluded on "a sort of 'gotcha' principle of law" (*id.*, at 7). Note however, that the holding here was limited to reversing the Appellate Division's conclusion that reopening in this context should be barred as a matter of law and the case was remanded for consideration of whether the omission was foreseeable and the adequacy of the People's excuse.

The foregoing relates to motions made prior to when the jury retires to deliberate. Only in in extremely rare extraordinary circumstances would a trial court be justified in permitting resumption of proof after the jury has retired to deliberate. See *People v. Olsen, supra*, 34 N.Y.2d at 353-356.

Notes of Decisions (342)

McKinney's CPL § 260.30, NY CRIM PRO § 260.30
Current through L.2013, chapter 4.

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-A. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title J. Prosecution of Indictments in Superior Courts--Plea to Sentence
Article 290. Jury Trial--Trial Order of Dismissal

McKinney's CPL § 290.10

§ 290.10 Trial order of dismissal

Currentness

1. At the conclusion of the people's case or at the conclusion of all the evidence, the court may, except as provided in subdivision two, upon motion of the defendant, (a) issue a "trial order of dismissal," dismissing any count of an indictment upon the ground that the trial evidence is not legally sufficient to establish the offense charged therein or any lesser included offense, or (b) reserve decision on the motion until after the verdict has been rendered and accepted by the court. Where the court has reserved decision and the jury thereafter renders a verdict of guilty, the court shall proceed to determine the motion upon such evidence as it would have been authorized to consider upon the motion had the court not reserved decision. If the court determines that such motion should have been granted upon the ground specified in paragraph (a) herein, it shall enter an order both setting aside the verdict and dismissing any count of the indictment upon such ground. If the jury is discharged before rendition of a verdict the court shall proceed to determine the motion as set forth in this paragraph.

2. Despite the lack of legally sufficient trial evidence in support of a count of an indictment as described in subdivision one, issuance of a trial order of dismissal is not authorized and constitutes error when the trial evidence would have been legally sufficient had the court not erroneously excluded admissible evidence offered by the people.

3. When the court excludes trial evidence offered by the people under such circumstances that the substance or content thereof does not appear in the record, the people may, in anticipation of a possible subsequent trial order of dismissal emanating from the allegedly improper exclusion and erroneously issued in violation of subdivision two, and in anticipation of a possible appeal therefrom pursuant to subdivision two of section 450.20, place upon the record, out of the presence of the jury, an "offer of proof" summarizing the substance or content of such excluded evidence. Upon the subsequent issuance of a trial order of dismissal and an appeal therefrom, such offer of proof constitutes a part of the record on appeal and has the effect and significance prescribed in subdivision two of section 450.40. In the absence of such an order and an appeal therefrom, such offer of proof is not deemed a part of the record and does not constitute such for purposes of an ensuing appeal by the defendant from a judgment of conviction.

4. Upon issuing a trial order of dismissal which dismisses the entire indictment, the court must immediately discharge the defendant from custody if he is in custody of the sheriff, or, if he is at liberty on bail, it must exonerate the bail.

Credits

(L.1970, c. 996, § 1. Amended L.1983, c. 170, § 1.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by William C. Donnino

2012

Denied TOD and Double Jeopardy

As explained in the main commentary, after entry of a trial order of dismissal (TOD) premised upon a finding of insufficient evidence to support the charge, a retrial of the defendant is precluded by the Double Jeopardy Clause of the federal constitution. Given that premise, the question has arisen whether double jeopardy principles preclude a retrial after a trial in which the trial court erroneously denied an application for a TOD, the case was submitted to the jury and a mistrial was required because the jury could not reach a verdict.

Both the New York Constitution and the federal constitution contain prohibitions on double jeopardy. United States Constitution, Fifth Amendment ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"); New York Constitution, article 1 § 6 ("No person shall be subject to be twice put in jeopardy for the same offense").

Under the federal constitution's Double Jeopardy Clause, "[r]egardless of the sufficiency of the evidence" of counts for which a jury was unable to reach a verdict at a defendant's first trial, that defendant has no valid double jeopardy claim to prevent his retrial" on those counts. *Richardson v. United States,* 468 U.S. 317, 326, 104 S.Ct. 3081, 3086, 82 L.Ed.2d 242 (1984).

By contrast, New York Appellate Division law prior to *Richardson* was to the contrary, namely, that double jeopardy principles precluded a retrial after a trial in which the application for a TOD was erroneously denied and a mistrial followed. *People v. Dann*, 100 A.D.2d 909, 474 N.Y.S.2d 566 (2nd Dept. 1984); *People v. Tingue*, 91 A.D.2d 166, 458 N.Y.S.2d 429 (4th Dept. 1983). The Appellate Division decisions appear to rest upon a pre-*Richardson* erroneous interpretation of the federal constitution. Whether in light of *Richardson*, New York courts will expressly hold that the Double Jeopardy Clause of the New York Constitution applies to an erroneous denial of a TOD at a defendant's first trial ending in a hung jury remains to be determined.

There is a procedural issue on how the ruling in the first trial may be presented to an appellate court. *Dann* and *Tingue* reviewed the ruling in the first trial after the defendant had been convicted at the second trial, noting that, pursuant to *Rafferty v. Owens*, 82 A.D.2d 582, 442 N.Y.S.2d 571 (2nd Dept. 1981), review of the ruling was not available via a writ of prohibition. *But see Nolan v. Court of General Sessions of New York County,* 11 N.Y.2d 114, 227 N.Y.S.2d 1, 181 N.E.2d 751 (1962) (a writ of prohibition properly issued to preclude a retrial in violation of the principles of double jeopardy after the trial court in effect ordered a mistrial in the absence of necessity and over the defendant's objection). *Cf. Richardson* which heard Richardson's claim by an appeal before the second trial could commence and abrogated federal decisions, cited by the Appellate Division, which had held that an appeal after the first mistrial was not authorized.

by Peter Preiser

2007

Where a motion for a trial order of dismissal is made at the close of the People case, it is important to observe the difference in procedure for preservation of the issue. On Page 485 of the main volume, the Practice Commentary observes that evidence adduced by defendant or a co-defendant after a motion made at close of the People's case is denied will be considered in determining sufficiency of *all* the evidence (overall sufficiency) at the close of the case, irrespective of a motion to dismiss at that point(citing *People v. Hines*). This is so because failure to renew the original motion at that time waived preservation of any error in its denial. On the other hand, where trial court has reserved decision on the original motion, insufficiency of the People's case automatically will be reviewed on a motion to dismiss at the close of all the evidence. *People v. Payne*, 3 N.Y.3d 266, 786 N.Y.S.2d 116, 819 N.E.2d 654 (2004). Thus, where the motion to dismiss at the close of the People's case is denied, it is essential to remember to reassert that motion along with the motion made at the close of all the evidence, if counsel intends to raise that denial on an appeal to the Court of Appeals. *People v. Lane*, 7 N.Y.3d 888, 826 N.Y.S.2d 599, 860 N.E.2d 61 (2006).

PRACTICE COMMENTARIES

by Peter Preiser

The "trial order of dismissal" was renamed from the former directed verdict of acquittal with a view toward creating a People's right to appeal from a dismissal based upon an underlying judicial error as to sufficiency of the evidence (see Staff Comment for proposed § 155.20 as published in 1967). Subsequent decisions, however, made it clear that retrial after dismissal based upon *insufficiency of evidence*, irrespective of court misconstruction of the law or erroneous exclusion of evidence, violates the constitutional protection against double jeopardy (U.S. Const. amend. V). *Sanabria v. United States*, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978); *Smalis v. Pennsylvania,* 476 U.S. 140, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986); see also *Arizona v. Rumsey*, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984). Accordingly, due to this constitutional limitation, subdivisions two and three are dead letters.

In 1983 the Legislature amended subdivision one of this section, along with the section authorizing appeal by the People (CPL § 450.20[2]), to limit the People's right of appeal to the circumstance delineated in paragraph (b) of subdivision one. That brought these provisions into conformity with constitutional requirements by prohibiting the People's appeal if reversal of trial court's dismissal on the facts would require a retrial. When the timing of a dismissal is as spelled out in paragraph (b)-*i.e.*, where trial court reserves decision on a mid-trial motion to dismiss and grants it after the jury has returned a guilty verdict-there is no double jeopardy problem; because appellate correction of the error simply entails reinstatement of the verdict and does not require the defendant to submit to a second trial (see *United States v. Scott*, 437 U.S. 82, 92 n. 7, 98 S.Ct. 2187, 2194, 57 L.Ed.2d 65 [1978]).

The change made by the Legislature also gave statutory confirmation to the advice by the Court of Appeals, five years earlier, that once trial has been started it is an appropriate exercise of discretion in a proper case to reserve decision on a motion to dismiss until after the verdict. *People v. Key*, 45 N.Y.2d 111, 120, 408 N.Y.S.2d 16, 379 N.E.2d 1147 (1978); see also *People v. Marin*, 102 A.D.2d 14, 15, 478 N.Y.S.2d 650 (2d Dept.1984), affirmed 65 N.Y.2d 741, 492 N.Y.S.2d 16, 481 N.E.2d 556.

Tangentially, suppose the motion is made and denied outright at close of the People's case. If the defense proceeds and adduces evidence that happens to close the gap, defendant will have waived subsequent review of that motion; because now proof of guilt is sufficient. Defendant of course can make a new motion at the close of all the evidence; but then the court will consider *all* the evidence in determining sufficiency of proof. *People v. Hines,* 97 N.Y.2d 56, 736 N.Y.S.2d 643, 762 N.E.2d 329 (2001).

Note too, that since the motion must specifically identify the alleged omission in proof (see generally, *People v. Gray*, 86 N.Y.2d 10, 19, 629 N.Y.S.2d 173, 652N.E.2d 929 [1995]), the court has discretion to permit the People, now informed of the deficiency, to reopen the proof and fill the gap, even after both sides have rested (see Practice Commentaries for CPL § 260.30).

Notes of Decisions (80)

McKinney's CPL § 290.10, NY CRIM PRO § 290.10
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-A. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title J. Prosecution of Indictments in Superior Courts--Plea to Sentence
Article 330. Proceedings from Verdict to Sentence (Refs & Annos)

McKinney's CPL § 330.30

§ 330.30 Motion to set aside verdict; grounds for

Currentness

At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds:

1. Any ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court.

2. That during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict; or

3. That new evidence has been discovered since the trial which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant.

Credits
(L.1970, c. 996, § 1.)

Editors' Notes

PRACTICE COMMENTARIES

by Peter Preiser

This section combines two motions that were in the old Code of Criminal Procedure -- motion for a new trial (§§ 462 to 466) and motion in arrest of judgment (§§ 467 to 470) -- into a single "motion to set aside verdict." But relief hereunder, irrespective of the ground alleged, must be sought prior to imposition of sentence. After sentence is imposed, the defendant is relegated to relief by way of appeal from the judgment or, in an appropriate case, a post-judgment motion under CPL Article 440.

Under the old Code, grounds for a new trial were specified in detail in seven separate subdivisions. Subdivision one of the present CPL section substitutes a "dragnet provision" in recognition of the futility of attempting to specify

every kind of contention that could properly be raised in an attack upon the verdict (see Commission Staff Comment for proposed CPL § 170.30). It is essential to recognize, however, that subdivision one may be invoked only where the ground for the motion, if it were to be raised upon appeal, would require an appellate court to grant relief as a matter of law. Thus, the grounds for trial court action are not coextensive with the scope of grounds for reversal by an intermediate appellate court; because the trial court can only set aside a verdict on a ground that would justify corrective action upon the law, as distinguished from upon the facts or as a matter of discretion in the interest of justice (see CPL § 470.15).

In this regard CPL § 330.30 differs from its Code progenitor, because the former Code permitted the motion "when the verdict is contrary to law or clearly against evidence" (Code § 465[6]). The change is clear enough from the plain language of subdivision one; and, lest there be any doubt about it, the Court of Appeals has specifically held that a trial court cannot set aside a verdict on the ground that it is against the weight of the evidence (as distinguished from legal insufficiency). *People v. Carter*, 63 N.Y.2d 530, 483 N.Y.S.2d 654, 473 N.E.2d 6 (1984). But curiously, neither the staff comments nor Judge Denzer's original Practice Commentary furnish a clue as to any reason for the change or even whether the change was intentional or inadvertent.

A timely protest is an essential prerequisite for relief under a subdivision one claim of "an error of law" (see *e.g.*, *People v. Padro*, 75 N.Y.2d 820, 552 N.Y.S.2d 555, 551 N.E.2d 1233 [1990]; *People v. Guerrero*, 69 N.Y.2d 628, 511 N.Y.S.2d 226, 503 N.E.2d 691 [1986]; *People v. Satloff*, 56 N.Y.2d 745, 452 N.Y.S.2d 12, 437 N.E.2d 271 [1982], unless the error has deprived the defendant of a fundamental right (see *People v. Antommarchi*, 80 N.Y.2d 247, 590 N.Y.S.2d 33, 604 N.E.2d 95 [1992]). This of course means that the protest must at least precede the discharge of the jury, even where it concerns repugnant verdicts (see *People v. Satloff, supra*). Note though that some latitude as to timeliness is available in a bench trial, so long as the ground raised is an error of law (see *People v. Alfaro*, 66 N.Y.2d 985, 499 N.Y.S.2d 378, 489 N.E.2d 1280 [1985]).

Subdivision two deals with jury misconduct or tampering. Note especially the two criteria: (a) the incident was not known to the defendant before the verdict; and (b) that the incident may have affected a substantial right. The latter criterion gives warning that a new trial will not be granted mechanically upon a showing of misconduct or tampering. The litmus test for granting a motion on this ground requires a demonstration of prejudice to a substantial right. *People v. Rodriguez*, 100 N.Y.2d 30, 35, 760 N.Y.S.2d 74, 790 N.E.2d 247 (2003). This is so because as the Court of Appeals has opined, "not every misstep by a juror rises to the inherently prejudicial level at which reversal is required automatically. Each case must be examined on its unique facts to determine the nature of the misconduct and the likelihood that prejudice was engendered." *People v. Clark*, 81 N.Y.2d 913, 914, 597 N.Y.S.2d 646, 613 N.E.2d 552 (1993) (internal quote and citation omitted). Thus a hearing usually will be required "to ascertain exactly what transpired" (see *People v. Smith*, 59 N.Y.2d 988, 990, 466 N.Y.S.2d 662, 453 N.E.2d 1079 [1983]) and defendant has the burden of proving by a preponderance of the evidence every fact essential to support the claim of substantial prejudice (see CPL § 330.40[2][g]).

Subdivision three authorizes the court to set aside the verdict on the basis of newly-discovered evidence. This provision differs from the old Code in two respects. Under the old Code a motion could be made on this ground at any time up to one year after judgment (§ 466). The CPL motion must be made prior to sentence. After sentence is imposed the proper motion would be a Motion to Vacate Judgment (CPL § 440.10 [1(g)]). The second change deals with the wording of the standard. Under the old Code the standard was that the new evidence "would probably have changed the verdict" (§ 465[7]). The present wording is that the new evidence would "create a probability that ... the verdict would have been more favorable to the defendant." The revisors offered no explanation for the change in language. However, since research has not revealed any reason for it and opinions to date have not accorded any decisional difference to the change, it appears the following criteria, laid down a century ago still govern, to wit:

> Newly-discovered evidence in order to be sufficient must fulfill all the following requirements: 1. It must be such as will probably change the result if a new trial is granted; 2. It must have been discovered since the trial; 3. It must be such as could have not been discovered before the trial by the exercise of due diligence; 4. It must be material to the issue; 5. It must not be cumulative to the former issue; and, 6. It must not be merely impeaching or contradicting the former evidence.

People v. Salemi, 309 N.Y. 208, 215 to 216, 128 N.E.2d 371, cert. denied, 350 U.S. 950, 76 S.Ct. 325, 100 L.Ed. 827 (1955) (internal citations and quote marks eliminated). Here too, defendant has the burden of proving every one of these elements by a preponderance of the evidence (CPL 330.40 [2(g)]).

Notes of Decisions (876)

McKinney's CPL § 330.30, NY CRIM PRO § 330.30
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-A. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title J. Prosecution of Indictments in Superior Courts--Plea to Sentence
Article 330. Proceedings from Verdict to Sentence (Refs & Annos)

McKinney's CPL § 330.40

§ 330.40 Motion to set aside verdict; procedure

Currentness

1. A motion to set aside a verdict based upon a ground specified in subdivision one of section 330.30 need not be in writing, but the people must be given reasonable notice thereof and an opportunity to appear in opposition thereto.

2. A motion to set aside a verdict based upon a ground specified in subdivisions two and three of section 330.30 must be made and determined as follows:

(a) The motion must be in writing and upon reasonable notice to the people. The moving papers must contain sworn allegations, whether by the defendant or by another person or persons, of the occurrence or existence of all facts essential to support the motion. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief;

(b) The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, an answer denying or admitting any or all of the allegations of the moving papers;

(c) After all papers of both parties have been filed, the court must consider the same and, if the motion is determinable pursuant to paragraphs (d) or (e), must or may, as therein provided, determine the motion without holding a hearing to resolve questions of fact;

(d) The court must grant the motion if:

(i) The moving papers allege a ground constituting legal basis for the motion; and

(ii) Such papers contain sworn allegations of all facts essential to support such ground; and

(iii) All the essential facts are conceded by the people to be true.

(e) The court may deny the motion if:

(i) The moving papers do not allege any ground constituting legal basis for the motion; or

(ii) The moving papers do not contain sworn allegations of all facts essential to support the motion.

(f) If the court does not determine the motion pursuant to paragraphs (d) or (e), it must conduct a hearing and make findings of fact essential to the determination thereof;

(g) Upon such a hearing, the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion.

Credits
(L.1970, c. 996, § 1.)

Editors' Notes

PRACTICE COMMENTARIES

by Peter Preiser

This section prescribes the statutory prerequisites for a motion to set aside verdict (see CPL § 330.30 for grounds). If the ground consists of an error on the record of the trial, the motion need not be in writing, but simply on notice to the People. For any other ground, the formal motion procedure is required -- *i.e.*, a written motion with sworn allegations.

Where a written motion is required, failure to support the ground alleged with sworn allegations of all essential facts will result in summary denial; and, conversely, failure to controvert the essential facts will be deemed to be a concession that will, if the facts alleged are adequate, result in the granting of the motion without a hearing. See *People v. Ciacco*, 47 N.Y.2d 431, 418 N.Y.S.2d 371, 391 N.E.2d 1347 (1979). Thus, as the Court of Appeals has stated, "[i]t is fundamental that a motion may be decided without a hearing unless the papers submitted raise a factual dispute on a material point which must be resolved before the court can decide the legal issue" (*People v. Gruden*, 42 N.Y.2d 214, 215, 397 N.Y.S.2d 704, 366 N.E.2d 794 [1977]).

Notes of Decisions (114)

McKinney's CPL § 330.40, NY CRIM PRO § 330.40
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-A. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title J. Prosecution of Indictments in Superior Courts--Plea to Sentence
Article 330. Proceedings from Verdict to Sentence (Refs & Annos)

McKinney's CPL § 330.50

§ 330.50 Motion to set aside verdict; order granting motion

Currentness

1. Upon setting aside or modifying a verdict or a part thereof upon a ground specified in subdivision one of section 330.30, the court must take the same action as the appropriate appellate court would be required to take upon reversing or modifying a judgment upon the particular ground in issue.

2. Upon setting aside a verdict upon a ground specified in subdivision two of section 330.30, the court must order a new trial.

3. Upon setting aside a verdict upon a ground specified in subdivision three of section 330.30, the court must, except as otherwise provided in this subdivision, order a new trial. If a verdict is set aside upon the ground that had the newly discovered evidence in question been received at the trial the verdict probably would have been more favorable to the defendant in that the conviction probably would have been for a lesser offense than the one contained in the verdict, the court may either (a) set aside such verdict or (b) with the consent of the people modify such verdict by reducing it to one of conviction of such lesser offense.

4. Upon a new trial resulting from an order setting aside a verdict, the indictment is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the course of such trial, except those upon or of which the defendant was acquitted or is deemed to have been acquitted.

Credits
(L.1970, c. 996, § 1.)

Editors' Notes

PRACTICE COMMENTARIES

by Peter Preiser

This section prescribes the corrective action to be recited in the order of a trial court to be made and entered upon the granting of a motion to set aside the verdict.

Since the ground specified in subdivision one of CPL § 330.30 is an error of law which, if raised on appeal would require a reversal or modification of the judgment (see Practice Commentaries for that section, *supra*), the trial court's

order, when made on that authority, must be similar to the one an appellate court would be required to make if it were to reverse the conviction on that ground; *i.e.*, dismissal of the accusatory instrument or a count thereof, modification of the verdict to one of a lesser included offense, direction of a new trial, or any other action that will correct the particular error or defect.

Where the verdict is to be set aside for jury misconduct or tampering (see CPL § 330.30[2]), the court is of course limited to the one appropriate order -- direction of a new trial.

In the case of newly-discovered evidence (the ground specified in CPL § 330.30[3]) the court may either: (a) set aside the verdict and order a new trial; or (b) if the new evidence would simply affect the degree of the crime, and the People consent, modify the verdict by reducing it to a conviction of a lesser included offense not affected by the newly-discovered evidence. In his original Practice Commentaries, Judge Denzer illustrated this latter option as follows. After a verdict of guilty for grand larceny of certain jewelry, the defendant produces persuasive new evidence convincing the court of the fact that the jewelry stolen was imitation and thus only valued at an amount well within the petit larceny ceiling. Under subdivision three the court, upon setting aside the verdict, retains its traditional power to order a new trial but is given an option -- if the People consent -- of reducing the grand larceny conviction to petit larceny and thus efficiently terminating the case.

Subdivision four needs revision, as defendant cannot be retried on the original indictment in a situation where that charge has been dismissed or defendant has been deemed acquitted of it (*e.g.*, where jury is unable to reach a verdict on a lesser included). See *People v. Mayo*, 48 N.Y.2d 245, 422 N.Y.S.2d 361, 397 N.E.2d 1166 (1979). There are however two alternatives: (a) the People with permission of the court can present the remaining charge (*e.g.*, the lesser included) to a second grand jury for a new indictment. *People v. Banch*, 80 N.Y.2d 610, 621 n.5, 593 N.Y.S.2d 491, 608 N.E.2d 1069 (1992); or (b) if the original indictment sets forth a separate count for the offense to be retried, the retrial can go forward without a new indictment, so long as the trier of the fact is not told of the original charge. Apart from this, where the original charge was by information, there is no need to reinstate a felony accusation by presentation to a grand jury and thus retrial can proceed on that information, which is deemed by law to incorporate the lesser included so long as the trier of the fact is not made aware of the original charge. *People v. Green*, 96 N.Y.2d 195, 726 N.Y.S.2d 357, 750 N.E.2d 59 (2001).

Notes of Decisions (16)

McKinney's CPL § 330.50, NY CRIM PRO § 330.50
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-A. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title M. Proceedings After Judgment (Refs & Annos)
Article 460. Appeals--Taking and Perfection Thereof and Stays During Pendency Thereof (Refs & Annos)

McKinney's CPL § 460.10

§ 460.10 Appeal; how taken

Currentness

1. Except as provided in subdivisions two and three, an appeal taken as of right to an intermediate appellate court or directly to the court of appeals from a judgment, sentence or order of a criminal court is taken as follows:

(a) A party seeking to appeal from a judgment or a sentence or an order and sentence included within such judgment, or from a resentence, or from an order of a criminal court not included in a judgment, must, within thirty days after imposition of the sentence or, as the case may be, within thirty days after service upon such party of a copy of an order not included in a judgment, file with the clerk of the criminal court in which such sentence was imposed or in which such order was entered a written notice of appeal, in duplicate, stating that such party appeals therefrom to a designated appellate court.

(b) If the defendant is the appellant, he must, within such thirty day period, serve a copy of such notice of appeal upon the district attorney of the county embracing the criminal court in which the judgment or order being appealed was entered. If the appeal is directly to the court of appeals, the district attorney, following such service upon him, must immediately give written notice thereof to the public servant having custody of the defendant.

(c) If the people are the appellant, they must, within such thirty day period, serve a copy of such notice of appeal upon the defendant or upon the attorney who last appeared for him in the court in which the order being appealed was entered.

(d) Upon filing and service of the notice of appeal as prescribed in paragraphs (a), (b) and (c), the appeal is deemed to have been taken.

(e) Following the filing with him of the notice of appeal in duplicate, the clerk of the court in which the judgment, sentence or order being appealed was entered or imposed, must endorse upon such instruments the filing date and must transmit the duplicate notice of appeal to the clerk of the court to which the appeal is being taken.

2. An appeal taken as of right to a county court or to an appellate term of the supreme court from a judgment, sentence or order of a local criminal court in a case in which the underlying proceedings were recorded by a court stenographer is taken in the manner provided in subdivision one; except that where no clerk is employed by such local criminal court the appellant must file the notice of appeal with the judge of such court, and must further file a copy thereof with the clerk of the appellate court to which the appeal is being taken.

3. An appeal taken as of right to a county court or to an appellate term of the supreme court from a judgment, sentence or order of a local criminal court in a case in which the underlying proceedings were not recorded by a court stenographer is taken as follows:

(a) Within thirty days after entry or imposition in such local criminal court of the judgment, sentence or order being appealed, the appellant must file with such court either (i) an affidavit of errors, setting forth alleged errors or defects in the proceedings which are the subjects of the appeal, or (ii) a notice of appeal. Where a notice of appeal is filed, the appellant must serve a copy thereof upon the respondent in the manner provided in paragraphs (b) and (c) of subdivision one, and, within thirty days after the filing thereof, must file with such court an affidavit of errors.

(b) Not more than three days after the filing of the affidavit of errors, the appellant must serve a copy thereof upon the respondent or the respondent's counsel or authorized representative. If the defendant is the appellant, such service must be upon the district attorney of the county in which the local criminal court is located. If the people are the appellant, such service must be upon the defendant or upon the attorney who appeared for him in the proceedings in the local criminal court.

(c) Upon filing and service of the affidavit of errors as prescribed in paragraphs (a) and (b), the appeal is deemed to have been taken.

(d) Within ten days after the appellant's filing of the affidavit of errors with the local criminal court, such court must file with the clerk of the appellate court to which the appeal has been taken both the affidavit of errors and the court's return, and must deliver a copy of such return to each party or a representative thereof as indicated in paragraph (b). The court's return must set forth or summarize evidence, facts or occurrences in or adduced at the proceedings resulting in the judgment, sentence or order, which constitute the factual foundation for the contentions alleged in the affidavit of errors.

(e) If the local criminal court does not file such return within the prescribed period, or if it files a defective return, the appellate court, upon application of the appellant, must order such local criminal court to file a return or an amended return, as the case may be, within a designated time which such appellate court deems reasonable.

4. An appeal by a defendant to an intermediate appellate court by permission, pursuant to section 450.15, is taken as follows:

(a) Within thirty days after service upon the defendant of a copy of the order sought to be appealed, the defendant must make application, pursuant to section 460.15, for a certificate granting leave to appeal to the intermediate appellate court.

(b) If such application is granted and such certificate is issued, the defendant, within fifteen days after issuance thereof, must file with the criminal court in which the order sought to be appealed was rendered the certificate granting leave to appeal together with a written notice of appeal, or if the appeal is from a local criminal court in a case in which the underlying proceedings were not recorded by a court stenographer, either (i) an affidavit of errors, or (ii) a notice of appeal. In all other respects the appeal shall be taken as provided in subdivisions one, two and three.

5. An appeal to the court of appeals from an order of an intermediate appellate court is taken as follows:

(a) Within thirty days after service upon the appellant of a copy of the order sought to be appealed, the appellant must make application, pursuant to section 460.20, for a certificate granting leave to appeal to the court of appeals. The appellate division of each judicial department shall adopt rules governing the procedures for service of a copy of such order.

(b) If such application is granted, the issuance of the certificate granting leave to appeal shall constitute the taking of the appeal.

[*(c) to (e). Repealed*]

6. Where a notice of appeal, an affidavit of errors, an application for leave to appeal to an intermediate appellate court, or an application for leave to appeal to the court of appeals is premature or contains an inaccurate description of the judgment, sentence or order being or sought to be appealed, the appellate court, in its discretion, may, in the interest of justice, treat such instrument as valid. Where an appellant files a notice of appeal within the prescribed period but, through mistake, inadvertence or excusable neglect, omits to serve a copy thereof upon the respondent within the prescribed period, the appellate court to which the appeal is sought to be taken may, in its discretion and for good cause shown, permit such service to be made within a designated period of time, and upon such service the appeal is deemed to be taken.

Credits
(L.1970, c. 996, § 1. Amended L.1971, c. 671, § 4; L.1977, c. 699, §§ 1, 2; L.1992, c. 85, § 1; L.1994, c. 137, § 1.)

Editors' Notes

PRACTICE COMMENTARIES

by Peter Preiser

This section prescribes the mechanics for taking an appeal. Note though that it deals only with the first step -- *i.e.*, securing the right to appeal. Once that step is completed, the prospective appellant must go on to timely comply with the requirements for "perfection" of the appeal in order to bring the right to fruition (see CPL § 460.70 and Practice Commentaries thereto).

Preliminarily, the prospective appellant should determine: 1) whether the appeal is authorized by statute; 2) if so, which court has jurisdiction to hear it; and 3) whether the appeal may be taken "as of right", or only by permission. These considerations are dealt with by the provisions of CPL Article 450 and the Practice Commentaries for the various sections therein. After establishing those facts, the next step is to follow the procedure set forth in this section.

Where an appeal may be taken as of right to the Appellate Division or to the Court of Appeals (appeals as of right to the Court of Appeals are taken directly from *nisi prius* and are permitted only where the death penalty has been pronounced), the procedure is simple. The party taking the appeal merely files a notice of appeal (in duplicate) with the clerk of the criminal court that imposed the judgment or issued the order to be appealed and serves a copy of the notice upon the opposing party as set forth in paragraphs (a) and (b) of subdivision one. That is all there is to it: the appeal is deemed to have been taken (but see discussion, infra, with regard to timing).

Minor variations on this simple procedure may be required where the appeal is from a local criminal court to a county court or to an appellate term of the supreme court (see subds. 2 and 3). If the local criminal court does not employ a clerk with whom the notice of appeal can be filed, the notice of appeal is filed with the judge and a copy with the clerk

of the court to which the appeal is taken (subd. 2). In some cases local criminal courts do not utilize stenographers to make records of the proceedings before them. Where this occurs the appeal is heard on a record pieced together by means of an affidavit of errors (made by the prospective appellant) and a return made by the judge or justice who presided over the action. The court's return must "set forth or summarize evidence, facts or occurrences * * * which constitute the factual foundation for the contentions alleged in the affidavit of errors" (subd. 3 [d]). Where an electronic recording device was employed during the proceeding, submission of a transcript of the proceedings will suffice, *provided* it covers the matters raised in the affidavit of errors. See *People v. Robinson*, 72 N.Y.2d 989, 534 N.Y.S.2d 367, 530 N.E.2d 1287 [1988]. If the court does not file a return within the prescribed period, or if it files a defective return, the appellate court, upon application of the appellant, must order the local criminal court to file a return or an amended return, as the case may be, within a designated time which the appellate court deems reasonable (subd. 3 [e]). Where the return fails to deny an allegation regarding judicial conduct made in the affidavit, the allegation is deemed admitted. See *People v. McSpirit*, 154 Misc.2d 784, 595 N.Y.S.2d 660 [App.Term 9th & 10th Jud.Dists., 1993]; *cf., People v. Feldes*, 73 N.Y.2d 661, 543 N.Y.S.2d 34, 541 N.E.2d 34 (1989).

Where an appeal may be taken only by permission, the first step is to apply for a certificate granting leave to appeal, see CPL § 460.15 (leave to appeal to an intermediate appellate court) and CPL § 460.20 (leave to appeal to the Court of Appeals). The application must be made within 30 days after service upon the prospective appellant of the order from which the appeal is taken (see CPL § 460.10[4], [5]). There is one important difference between the procedure applicable to appeals by permission to an intermediate appellate court and those to the Court of Appeals. In the case of leave to appeal to the Court of Appeals, the granting of leave completes the taking of the appeal (subd. 5[b]). No separate "notice of appeal" is required, because the judge or justice who heard the application immediately files a copy of the certificate granting or denying leave with the clerk of the Court of Appeals (see CPL § 460.20[5]). But, where leave is granted to appeal to an intermediate appellate court, the prospective appellant must within 15 days after issuance of the certificate file the certificate, together with a notice of appeal or an affidavit of errors, in the criminal court in which the order sought to be appealed was rendered and must serve copies thereof upon the opposing party as set forth in subdivisions one, two and three (see subd. 4[b]).

Throughout this section there are time limits for filing and service of documents. These should be strictly observed, as there is no avenue of relief once they are missed, except as specifically provided in subdivision six and in CPL § 460.30. In 1992 paragraph (a) of subdivision one was amended to eliminate ambiguity regarding the time for the People to take an appeal from an order entered prior to judgment. It now is established that the time for appealing the order runs from imposition of the sentence. The time for appeal of an order not entered in a judgment commences when the order is served upon the opposing party. *People v. Washington*, 86 N.Y.2d 853, 633 N.Y.S.2d 476, 657 N.E.2d 497 (1995).

Subdivision 5(a) was amended in 1994 to clarify the method for determining the procedure for service of a copy of an order required as prerequisite for application to appeal to the Court of Appeals from an order of an intermediate appellate court.

Notes of Decisions (152)

McKinney's CPL § 460.10, NY CRIM PRO § 460.10
Current through L.2013, chapter 6.

End of Document

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VI. Trials

Federal Rules of Civil Procedure Rule 50

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

Currentness

(a) Judgment as a Matter of Law.

(1) ***In General.*** If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) ***Motion.*** A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment--or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged--the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) ***In General.*** If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) ***Effect of a Conditional Ruling.*** Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

Credits

(Amended January 21, 1963, effective July 1, 1963; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; April 22, 1993, effective December 1, 1993; April 27, 1995, effective December 1, 1995; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

Editors' Notes

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). The present federal rule is changed to the extent that the formality of an express reservation of rights against waiver is no longer necessary. See *Sampliner v. Motion Picture Patents Co.,* 41 S.Ct. 79, 254 U.S. 233, 65 L.Ed. 240 (1920); *Union Indemnity Co. v. United States,* 74 F.2d 645 (C.C.A. 6th, 1935). The requirement that specific grounds for the motion for a directed verdict must be stated settles a conflict in the federal cases. See Simkins, *Federal Practice* (1934) § 189.

Note to Subdivision (b). For comparable state practice upheld under the conformity act, see *Baltimore and Carolina Line v. Redman,* 55 S.Ct. 890, 295 U.S. 654, 79 L.Ed. 1636 (1935); compare *Slocum v. New York Life Ins. Co.,* 33 S.Ct. 523, 228 U.S. 364, 57 L.Ed. 879, Ann.Cas.1914D, 1029 (1913).

See *Northern Ry. Co. v. Page,* 47 S.Ct. 491, 274 U.S. 65, 71 L.Ed. 929 (1927), following the Massachusetts practice of alternative verdicts, explained in Thorndike, *Trial by Jury in United States Courts,* 26 Harv.L.Rev. 732 (1913). See also Thayer, *Judicial Administration,* 63 U. of Pa.L.Rev. 585, 600-601, and note 32 (1915); Scott, *Trial by Jury and the Reform of Civil Procedure,* 31 Harv.L.Rev. 669, 685 (1918); Comment, 34 Mich.L.Rev. 93, 98 (1935).

1963 Amendment

Subdivision (a). The practice, after the court has granted a motion for a directed verdict, of requiring the jury to express assent to a verdict they did not reach by their own deliberations serves no useful purpose and may give offense to the members of the jury. See 2B Barron & Holtzoff, *Federal Practice & Procedure* § 1072, at 367 (Wright ed. 1961); Blume, *Origin and Development of the Directed Verdict,* 48 Mich.L.Rev. 555, 582-85, 589-90 (1950). The final sentence of the subdivision, added by amendment, provides that the court's order granting a motion for a directed verdict is effective in itself, and that no action need be taken by the foreman or other members of the jury. See Ariz.R.Civ.P. 50(c); cf. Fed.R.Crim.P. 29(a). No change is

intended in the standard to be applied in deciding the motion. To assure this interpretation, and in the interest of simplicity, the traditional term, "directed verdict," is retained.

Subdivision (b). A motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence.

The amendment of the second sentence of this subdivision sets the time limit for making the motion for judgment n.o.v. at 10 days after the entry of judgment, rather than 10 days after the reception of the verdict. Thus the time provision is made consistent with that contained in Rule 59(b) (time for motion for new trial) and Rule 52(b) (time for motion to amend findings by the court).

Subdivision (c) deals with the situation where a party joins a motion for a new trial with his motion for judgment n.o.v., or prays for a new trial in the alternative, and the motion for judgment n.o.v. is granted. The procedure to be followed in making rulings on the motion for the new trial, and the consequences of the rulings thereon, were partly set out in *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 253, 61 S.Ct. 189, 85 L.Ed. 147 (1940), and have been further elaborated in later cases. See *Cone v. West Virginia Pulp & Paper Co.,* 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849 (1947); *Globe Liquor Co., Inc. v. San Roman,* 332 U.S. 571, 68 S.Ct. 246, 92 L.Ed. 177 (1948); *Fountain v. Filson,* 336 U.S. 681, 69 S.Ct. 754, 93 L.Ed. 971 (1949); *Johnson v. New York, N.H. & H.R.R. Co.*, 344 U.S. 48, 73 S.Ct. 125, 97 L.Ed. 77 (1952). However, courts as well as counsel have often misunderstood the procedure, and it will be helpful to summarize the proper practice in the text of the rule. The amendments do not alter the effects of a jury verdict or the scope of appellate review.

In the situation mentioned, subdivision (c)(1) requires that the court make a "conditional" ruling on the new-trial motion, i.e., a ruling which goes on the assumption that the motion for judgment n.o.v. was erroneously granted and will be reversed or vacated; and the court is required to state its grounds for the conditional ruling. Subdivision (c)(1) then spells out the consequences of a reversal of the judgment in the light of the conditional ruling on the new-trial motion.

If the motion for new trial has been conditionally granted, and the judgment is reversed, "the new trial shall proceed unless the appellate court has otherwise ordered." The party against whom the judgment n.o.v. was entered below may, as appellant, besides seeking to overthrow that judgment, also attack the conditional grant of the new trial. And the appellate court, if it reverses the judgment n.o.v., may in an appropriate case also reverse the conditional grant of the new trial and direct that judgment be entered on the verdict. See *Bailey v. Slentz,* 189 F.2d 406 (10th Cir. 1951); *Moist Cold Refrigerator Co. v. Lou Johnson Co.,* 249 F.2d 246 (9th Cir. 1957), cert. denied, 356 U.S. 968, 78 S.Ct. 1008, 2 L.Ed.2d 1074 (1958); *Peters v. Smith,* 221 F.2d 721 (3d Cir. 1955); *Dailey v. Timmer,* 292 F.2d 824 (3d Cir. 1961), explaining *Lind v. Schenley Industries, Inc.,* 278 F.2d 79 (3d Cir.), cert. denied, 364 U.S. 835, 81 S.Ct. 58, 5 L.Ed.2d 60 (1960); *Cox v. Pennsylvania R.R.,* 120 A.2d 214 (D.C.Mun.Ct.App.1956); 3 Barron & Holtzoff, *Federal Practice & Procedure* § 1302.1 at 346-47 (Wright ed. 1958); 6 *Moore's Federal Practice* ¶59.16 at 3915 n. 8a (2d ed. 1954).

If the motion for a new trial has been conditionally denied, and the judgment is reversed, "subsequent proceedings shall be in accordance with the order of the appellate court." The party in whose favor judgment n.o.v. was entered below may, as appellee, besides seeking to uphold that judgment, also urge on the appellate court that the trial court committed error in conditionally denying the new trial. The appellee may assert this error in his brief, without taking a cross-appeal. *Cf. Patterson v. Pennsylvania R.R.,* 238 F.2d 645, 650 (6th Cir. 1956); *Hughes v. St. Louis Nat. L. Baseball Club, Inc.,* 359 Mo. 993, 997, 224 S.W.2d 989, 992 (1949). If the appellate court concludes that the judgment cannot stand, but accepts the appellee's contention that there was error in the conditional denial of the new trial, it may order a new trial in lieu of directing the entry of judgment upon the verdict.

Subdivision (c)(2), which also deals with the situation where the trial court has granted the motion for judgment n.o.v., states that the verdict-winner may apply to the trial court for a new trial pursuant to Rule 59 after the judgment n.o.v. has been entered against him. In arguing to the trial court in opposition to the motion for judgment n.o.v., the verdict-winner may, and often will, contend that he is entitled, at the least, to a new trial, and the court has a range of discretion to grant a new trial or (where plaintiff won the verdict) to order a dismissal of the action without prejudice instead of granting judgment n.o.v. See *Cone*

v. West Virginia Pulp & Paper Co., supra, 330 U.S. at 217, 218, 67 S.Ct. at 755, 756, 91 L.Ed. 849. Subdivision (c)(2) is a reminder that the verdict-winner is entitled, even after entry of judgment n.o.v. against him, to move for a new trial in the usual course. If in these circumstances the motion is granted, the judgment is superseded.

In some unusual circumstances, however, the grant of the new-trial motion may be only conditional, and the judgment will not be superseded. See the situation in *Tribble v. Bruin*, 279 F.2d 424 (4th Cir. 1960) (upon a verdict for plaintiff, defendant moves for and obtains judgment n.o.v.; plaintiff moves for a new trial on the ground of inadequate damages; trial court might properly have granted plaintiff's motion, conditional upon reversal of the judgment n.o.v.).

Even if the verdict-winner makes no motion for a new trial, he is entitled upon his appeal from the judgment n.o.v. not only to urge that that judgment should be reversed and judgment entered upon the verdict, but that errors were committed during the trial which at the least entitle him to a new trial.

Subdivision (d) deals with the situation where judgment has been entered on the jury verdict, the motion for judgment n.o.v. and any motion for a new trial having been denied by the trial court. The verdict-winner, as appellee, besides seeking to uphold the judgment may urge upon the appellate court that in case the trial court is found to have erred in entering judgment on the verdict, there are grounds for granting him a new trial instead of directing the entry of judgment for his opponent. In appropriate cases the appellate court is not precluded from itself directing that a new trial be had. See *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801, 69 S.Ct. 1326, 93 L.Ed. 1704 (1949). Nor is it precluded in proper cases from remanding the case for a determination by the trial court as to whether a new trial should be granted. The latter course is advisable where the grounds urged are suitable for the exercise of trial court discretion.

Subdivision (d) does not attempt a regulation of all aspects of the procedure where the motion for judgment n.o.v. and any accompanying motion for a new trial are denied, since the problems have not been fully canvassed in the decisions and the procedure is in some respects still in a formative stage. It is, however, designed to give guidance on certain important features of the practice.

1987 Amendment

The amendments are technical. No substantive change is intended.

1991 Amendment

Subdivision (a). The revision of this subdivision aims to facilitate the exercise by the court of its responsibility to assure the fidelity of its judgment to the controlling law, a responsibility imposed by the Due Process Clause of the Fifth Amendment. *Cf. Galloway v. United States*, 319 U.S. 372 (1943).

The revision abandons the familiar terminology of *direction of verdict* for several reasons. The term is misleading as a description of the relationship between judge and jury. It is also freighted with anachronisms some of which are the subject of the text of former subdivision (a) of this rule that is deleted in this revision. Thus, it should not be necessary to state in the text of this rule that a motion made pursuant to it is not a waiver of the right to jury trial, and only the antiquities of directed verdict practice suggest that it might have been. The term "judgment as a matter of law" is an almost equally familiar term and appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules. Finally, the change enables the rule to refer to preverdict and post-verdict motions with a terminology that does not conceal the common identity of two motions made at different times in the proceeding.

If a motion is denominated a motion for directed verdict or for judgment notwithstanding the verdict, the party's error is merely formal. Such a motion should be treated as a motion for judgment as a matter of law in accordance with this rule.

Paragraph (a)(1) articulates the standard for the granting of a motion for judgment as a matter of law. It effects no change in the existing standard. That existing standard was not expressed in the former rule, but was articulated in long-standing case law. *See generally* Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts,* 55 MINN.L.REV. 903 (1971). The expressed standard makes clear that action taken under the rule is a performance of the court's duty to assure enforcement of the controlling law and is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment or any other provision of federal law. Because this standard is also used as a reference point for entry of summary judgment under 56(a), it serves to link the two related provisions.

The revision authorizes the court to perform its duty to enter judgment as a matter of law at any time during the trial, as soon as it is apparent that either party is unable to carry a burden of proof that is essential to that party's case. Thus, the second sentence of paragraph (a)(1) authorizes the court to consider a motion for judgment as a matter of law as soon as a party has completed a presentation on a fact essential to that party's case. Such early action is appropriate when economy and expedition will be served. In no event, however, should the court enter judgment against a party who has not been apprised of the materiality of the dispositive fact and been afforded an opportunity to present any available evidence bearing on that fact. In order further to facilitate the exercise of the authority provided by this rule, Rule 16 is also revised to encourage the court to schedule an order of trial that proceeds first with a presentation on an issue that is likely to be dispositive, if such an issue is identified in the course of pretrial. Such scheduling can be appropriate where the court is uncertain whether favorable action should be taken under Rule 56. Thus, the revision affords the court the alternative of denying a motion for summary judgment while scheduling a separate trial of the issue under Rule 42(b) or scheduling the trial to begin with a presentation on that essential fact which the opposing party seems unlikely to be able to maintain.

Paragraph (a)(2) retains the requirement that a motion for judgment be made prior to the close of the trial, subject to renewal after a jury verdict has been rendered. The purpose of this requirement is to assure the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment. Cf. *Farley Transp. Co. v. Santa Fe Trail Transp. Co.,* 786 F.2d 1342 (9th Cir.1986) ("If the moving party is then permitted to make a later attack on the evidence through a motion for judgment notwithstanding the verdict or an appeal, the opposing party may be prejudiced by having lost the opportunity to present additional evidence before the case was submitted to the jury"); *Benson v. Allphin,* 786 F.2d 268 (7th Cir.1986) ("the motion for directed verdict at the close of all the evidence provides the nonmovant an opportunity to do what he can to remedy the deficiencies in his case ...); *McLaughlin v. The Fellows Gear Shaper Co.,* 4 F.R.Serv.3d 607 (3d Cir.1986) (per Adams, J., dissenting: "This Rule serves important practical purposes in ensuring that neither party is precluded from presenting the most persuasive case possible and in preventing unfair surprise after a matter has been submitted to the jury"). At one time, this requirement was held to be of constitutional stature, being compelled by the Seventh Amendment. Cf. *Slocum v. New York Insurance Co.,* 228 U.S. 364 (1913). But cf. *Baltimore & Carolina Line v. Redman,* 295 U.S. 654 (1935).

The second sentence of paragraph (a)(2) does impose a requirement that the moving party articulate the basis on which a judgment as a matter of law might be rendered. The articulation is necessary to achieve the purpose of the requirement that the motion be made before the case is submitted to the jury, so that the responding party may seek to correct any overlooked deficiencies in the proof. The revision thus alters the result in cases in which courts have used various techniques to avoid the requirement that a motion for a directed verdict be made as a predicate to a motion for judgment notwithstanding the verdict. E.g., *Benson v. Allphin,* 788 F.2d 268 (7th Cir.1986) ("this circuit has allowed something less than a formal motion for directed verdict to preserve a party's right to move for judgment notwithstanding the verdict"). *See generally* 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2537 (1971 and Supp.). The information required with the motion may be supplied by explicit reference to materials and argument previously supplied to the court.

This subdivision deals only with the entry of judgment and not with the resolution of particular factual issues as a matter of law. The court may, as before, properly refuse to instruct a jury to decide an issue if a reasonable jury could on the evidence presented decide that issue in only one way.

Subdivision (b). This provision retains the concept of the former rule that the post-verdict motion is a renewal of an earlier motion made at the close of the evidence. One purpose of this concept was to avoid any question arising under the Seventh Amendment. *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243 (1940). It remains useful as a means of defining the appropriate issue posed by the post-verdict motion. A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion. *E.g., Kutner Buick, Inc. v. American Motors Corp.,* 848 F.2d 614 (3d Cir.1989).

Often it appears to the court or to the moving party that a motion for judgment as a matter of law made at the close of the evidence should be reserved for a post-verdict decision. This is so because a jury verdict for the moving party moots the issue and because a preverdict ruling gambles that a reversal may result in a new trial that might have been avoided. For these reasons, the court may often wisely decline to rule on a motion for judgment as a matter of law made at the close of the evidence, and it is not inappropriate for the moving party to suggest such a postponement of the ruling until after the verdict has been rendered.

In ruling on such a motion, the court should disregard any jury determination for which there is no legally sufficient evidentiary basis enabling a reasonable jury to make it. The court may then decide such issues as a matter of law and enter judgment if all other material issues have been decided by the jury on the basis of legally sufficient evidence, or by the court as a matter of law.

The revised rule is intended for use in this manner with Rule 49. Thus, the court may combine facts established as a matter of law either before trial under Rule 56 or at trial on the basis of the evidence presented with other facts determined by the jury under instructions provided under Rule 49 to support a proper judgment under this rule.

This provision also retains the former requirement that a post-trial motion under the rule must be made within 10 days after entry of a contrary judgment. The renewed motion must be served and filed as provided by Rule 5. A purpose of this requirement is to meet the requirements of F.R.App.P. 4(a)(4).

Subdivision (c). Revision of this subdivision conforms the language to the change in diction set forth in subdivision (a) of this revised rule.

Subdivision (d). Revision of this subdivision conforms the language to that of the previous subdivisions.

1993 Amendments

This technical amendment corrects an ambiguity in the text of the 1991 revision of the rule, which, as indicated in the Notes, was not intended to change the existing standards under which "directed verdicts" could be granted. This amendment makes clear that judgments as a matter of law in jury trials may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense.

1995 Amendments

The only change, other than stylistic, intended by this revision is to prescribe a uniform explicit time for filing of post-judgment motions under this rule--no later than 10 days after entry of the judgment. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or merely served, during that period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. These motions affect the finality of the judgment, a matter often of importance to third persons as well as the parties and the court. The Committee believes that each of these rules should be revised to require filing before end of the 10-day period. Filing is an event that can be determined with certainty from court records. The phrase "no later than" is used--rather than "within"--to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, and that under Rule 5 the motions when filed are to contain a certificate of service on other parties.

2006 Amendment

The language of Rule 50(a) has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 50(b) is amended to permit renewal of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion be made at the close of all the evidence. Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion. The earlier motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available. The earlier motion also alerts the court to the opportunity to simplify the trial by resolving some issues, or even all issues, without submission to the jury. This fulfillment of the functional needs that underlie present Rule 50(b) also satisfies the Seventh Amendment. Automatic reservation of the legal questions raised by the motion conforms to the decision in *Baltimore & Carolina Line v. Redman*, 297 U.S. 654 (1935).

This change responds to many decisions that have begun to move away from requiring a motion for judgment as a matter of law at the literal close of all the evidence. Although the requirement has been clearly established for several decades, lawyers continue to overlook it. The courts are slowly working away from the formal requirement. The amendment establishes the functional approach that courts have been unable to reach under the present rule and makes practice more consistent and predictable.

Many judges expressly invite motions at the close of all the evidence. The amendment is not intended to discourage this useful practice.

Finally, an explicit time limit is added for making a posttrial motion when the trial ends without a verdict or with a verdict that does not dispose of all issues suitable for resolution by verdict. The motion must be made no later than 10 days after the jury was discharged.

2007 Amendments

The language of Rule 50 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 50(b) stated that the court reserves ruling on a motion for judgment as a matter of law made at the close of all the evidence "[i]f, for any reason, the court does not grant" the motion. The words "for any reason" reflected the proposition that the reservation is automatic and inescapable. The ruling is reserved even if the court explicitly denies the motion. The same result follows under the amended rule. If the motion is not granted, the ruling is reserved.

Amended Rule 50(e) identifies the appellate court's authority to direct the entry of judgment. This authority was not described in former Rule 50(d), but was recognized in *Weisgram v. Marley Co.*, 528 U.S. 440 (2000), and in *Neely v. Martin K. Eby Construction Company*, 386 U.S. 317 (1967). When Rule 50(d) was drafted in 1963, the Committee Note stated that "[s]ubdivision (d) does not attempt a regulation of all aspects of the procedure where the motion for judgment n.o.v. and any accompanying motion for a new trial are denied * * *." Express recognition of the authority to direct entry of judgment does not otherwise supersede this caution.

2009 Amendments

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules.

Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28-day period.

Notes of Decisions (1575)

Fed. Rules Civ. Proc. Rule 50, 28 U.S.C.A., FRCP Rule 50
Amendments received to 2-19-13

End of Document

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VI. Trials

Federal Rules of Civil Procedure Rule 51

Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error

Currentness

(a) Requests.

(1) ***Before or at the Close of the Evidence.*** At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.

(2) ***After the Close of the Evidence.*** After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

(c) Objections.

(1) ***How to Make.*** A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

(2) ***When to Make.*** An objection is timely if:

(A) a party objects at the opportunity provided under Rule 51(b)(2); or

(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.

(1) ***Assigning Error.*** A party may assign as error:

(A) an error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction, if that party properly requested it and--unless the court rejected the request in a definitive ruling on the record--also properly objected.

(2) ***Plain Error.*** A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

Credits

(Amended March 2, 1987, effective August 1, 1987; March 27, 2003, effective December 1, 2003; April 30, 2007, effective December 1, 2007.)

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Although Rule 51 in its present form specifies that the court shall instruct the jury only after the arguments of the parties are completed, in some districts (typically those in states where the practice is otherwise) it is common for the parties to stipulate to instruction before the arguments. The purpose of the amendment is to give the court discretion to instruct the jury either before or after argument. Thus, the rule as revised will permit resort to the long-standing federal practice or to an alternative procedure, which has been praised because it gives counsel the opportunity to explain the instructions, argue their application to the facts and thereby give the jury the maximum assistance in determining the issues and arriving at a good verdict on the law and the evidence. As an ancillary benefit, this approach aids counsel by supplying a natural outline so that arguments may be directed to the essential fact issues which the jury must decide. See generally Raymond, *Merits and Demerits of the Missouri System of Instructing Juries*, 5 St. Louis U.L.J. 317 (1959). Moreover, if the court instructs before an argument, counsel then know the precise words the court has chosen and need not speculate as to the words the court will later use in its instructions. Finally, by instructing ahead of argument the court has the attention of the jurors when they are fresh and can give their full attention to the court's instructions. It is more difficult to hold the attention of jurors after lengthy arguments

Rule 51. Instructions to the Jury: Objections; Preserving a Claim of Error, FRCP Rule 51

2003 Amendments

Rule 51 is revised to capture many of the interpretations that have emerged in practice. The revisions in text will make uniform the conclusions reached by a majority of decisions on each point. Additions also are made to cover some practices that cannot now be anchored in the text of Rule 51.

Scope. Rule 51 governs instructions to the trial jury on the law that governs the verdict. A variety of other instructions cannot practicably be brought within Rule 51. Among these instructions are preliminary instructions to a venire, and cautionary or limiting instructions delivered in immediate response to events at trial.

Requests. Subdivision (a) governs requests. Apart from the plain error doctrine recognized in subdivision (d)(2), a court is not obliged to instruct the jury on issues raised by the evidence unless a party requests an instruction. The revised rule recognizes the court's authority to direct that requests be submitted before trial.

The close-of-the-evidence deadline may come before trial is completed on all potential issues. Trial may be formally bifurcated or may be sequenced in some less formal manner. The close of the evidence is measured by the occurrence of two events: completion of all intended evidence on an identified phase of the trial and impending submission to the jury with instructions.

The risk in directing a pretrial request deadline is that trial evidence may raise new issues or reshape issues the parties thought they had understood. Courts need not insist on pretrial requests in all cases. Even if the request time is set before trial or early in the trial, subdivision (a)(2)(A) permits requests after the close of the evidence to address issues that could not reasonably have been anticipated at the earlier time for requests set by the court.

Subdivision (a)(2)(B) expressly recognizes the court's discretion to act on an untimely request. The most important consideration in exercising the discretion confirmed by subdivision (a)(2)(B) is the importance of the issue to the case--the closer the issue lies to the "plain error" that would be recognized under subdivision (d)(2), the better the reason to give an instruction. The cogency of the reason for failing to make a timely request also should be considered. To be considered under subdivision (a)(2)(B) a request should be made before final instructions and before final jury arguments. What is a "final" instruction and argument depends on the sequence of submitting the case to the jury. If separate portions of the case are submitted to the jury in sequence, the final arguments and final instructions are those made on submitting to the jury the portion of the case addressed by the arguments and instructions.

Instructions. Subdivision (b)(1) requires the court to inform the parties, before instructing the jury and before final jury arguments related to the instruction, of the proposed instructions as well as the proposed action on instruction requests. The time limit is addressed to final jury arguments to reflect the practice that allows interim argument s during trial in complex cases; it may not be feasible to develop final instructions before such interim arguments. It is enough that counsel know of the intended instructions before making final arguments addressed to the issue. If the trial is sequenced or bifurcated, the final arguments addressed to an issue may occur before the close of the entire trial.

Subdivision (b)(2) complements subdivision (b)(1) by carrying forward the opportunity to object established by present Rule 51. It makes explicit the opportunity to object on the record, ensuring a clear memorial of the objection.

Subdivision (b)(3) reflects common practice by authorizing instructions at any time after trial begins and before the jury is discharged.

Objections. Subdivision (c) states the right to object to an instruction or the failure to give an instruction. It carries forward the formula of present Rule 51 requiring that the objection state distinctly the matter objected to and the grounds of the objection, and makes explicit the requirement that the objection be made on the record. The provisions on the time to object make clear

that it is timely to object promptly after learning of an instruction or action on a request when the court has not provided advance information as required by subdivision (b)(1). The need to repeat a request by way of objection is continued by new subdivision (d)(1)(B) except where the court made a definitive ruling on the record.

Preserving a claim of error and plain error. Many cases hold that a proper request for a jury instruction is not alone enough to preserve the right to appeal failure to give the instruction. The request must be renewed by objection. This doctrine is appropriate when the court may not have sufficiently focused on the request, or may believe that the request has been granted in substance although in different words. But this doctrine may also prove a trap for the unwary who fail to add an objection after the court has made it clear that the request has been considered and rejected on the merits. Subdivision (d)(1)(B) establishes authority to review the failure to grant a timely request, despite a failure to add an objection, when the court has made a definitive ruling on the record rejecting the request.

Many circuits have recognized that an error not preserved under Rule 51 may be reviewed in exceptional circumstances. The language adopted to capture these decisions in subdivision (d)(2) is borrowed from Criminal Rule 52. Although the language is the same, the context of civil litigation often differs from the context of criminal prosecution; actual application of the plain-error standard takes account of the differences. The Supreme Court has summarized application of Criminal Rule 52 as involving four elements: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. Johnson v. U.S., 520 U.S. 461, 466-467, 469-470 (1997). (The Johnson case quoted the fourth element from its decision in a civil action, U.S. v. Atkinson, 297 U.S. 157, 160 (1936): "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise substantially affect the fairness, integrity, or public reputation of judicial proceedings.")

The court's duty to give correct jury instructions in a civil action is shaped by at least four factors.

The factor most directly implied by a "plain" error rule is the obviousness of the mistake. The importance of the error is a second major factor. The costs of correcting an error reflect a third factor that is affected by a variety of circumstances. In a case that seems close to the fundamental error line, account also may be taken of the impact a verdict may have on nonparties.

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Notes of Decisions (801)

Fed. Rules Civ. Proc. Rule 51, 28 U.S.C.A., FRCP Rule 51
Amendments received to 12-1-12

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VI. Trials

Federal Rules of Civil Procedure Rule 51

Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error

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