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Drafting NY Civil-Litigation Documents: Part 40—In Limine, Trial & Post-Trial Motions

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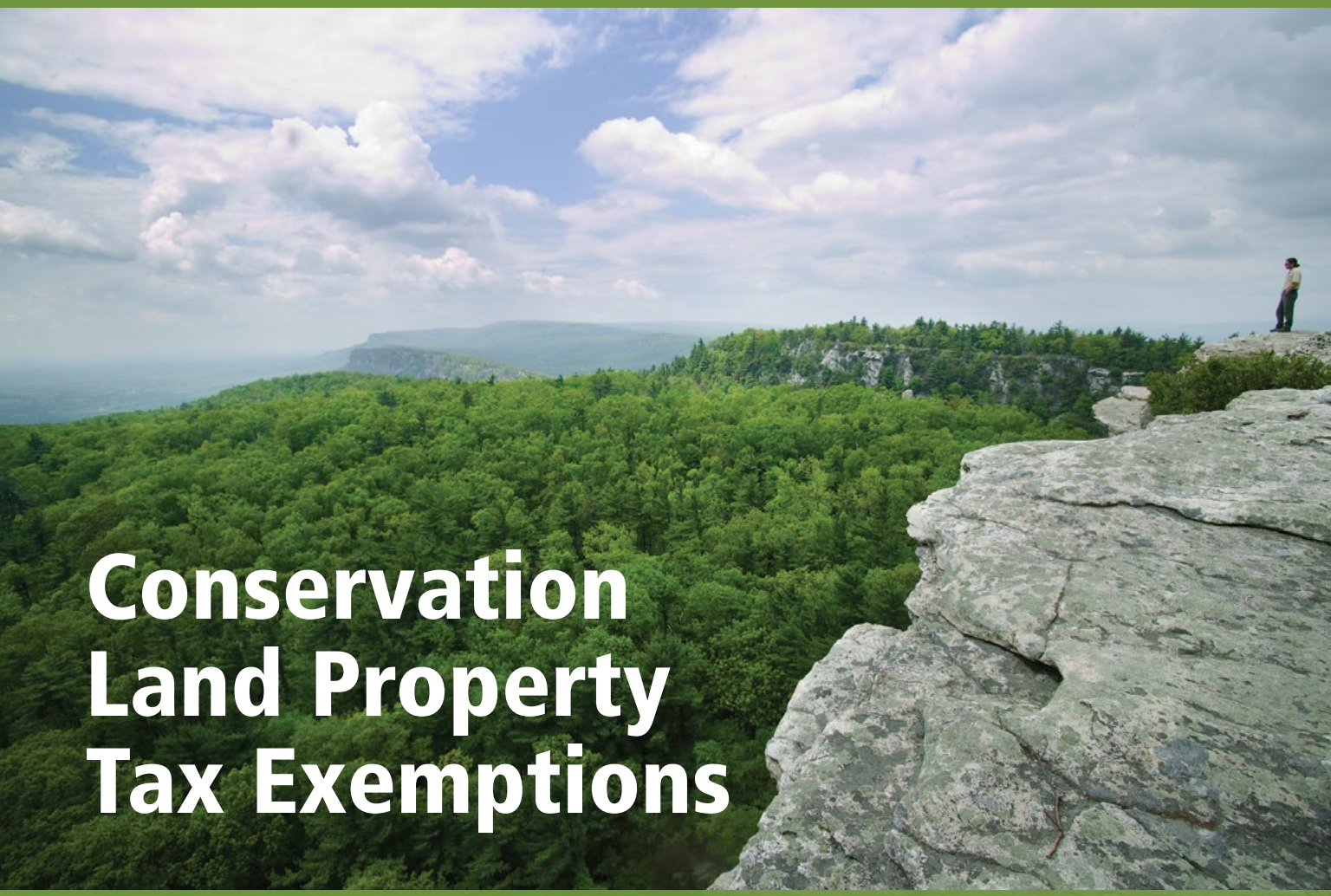

Conservation Land Property Tax Exemptions

The Mohonk Preserve Experience

By David C. Wilkes and Glenn D. Hoagland

Also in this Issue

BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part XL — In Limine, Trial, and Post-Trial Motions

The *Legal Writer* continues its series on civil-litigation documents. In this issue, we discuss various motions in limine and the procedure for moving in limine. In this issue and the next, we'll also discuss trial motions, including motions to dismiss, motions based on admissions, motions for a mistrial, motions for a directed verdict, motions for a continuance, motions to strike testimony from the record, motions to conform the pleadings to the proof, and motions to reopen a case. We continue in the next issue with post-trial motions, including motions for a judgment notwithstanding the verdict and motions for a new trial based on the weight of the evidence.

In Limine Motions

General Information. "In limine" means "at the threshold."[1] Most practitioners move in limine at the threshold of trial — before trial. But you may move in limine during trial, too, well before the evidence is offered.

Your motion in limine may be made orally or in writing.

Motions in limine are "preemptive motion[s]."[2] In limine motions are meant to prevent the trier of fact from "observing conduct or hearing testimony that is improper and prejudicial."[3] The function of an in limine motion is "'to permit a party to obtain a preliminary order before or during trial excluding the introduction of anticipated inadmissible, immaterial, or prejudicial evidence or limiting its use. Its purpose is to prevent the introduction of such evidence to the trier of fact, in most instances a jury.'"[4] Winning an in limine motion will ensure that your adversary doesn't mention or use that evidence in its voir dire, opening statement, trial, and closing statement.

Aside from excluding evidence, the relief you're seeking from the court in your motion in limine might also include the following:[5] (1) instructing your adversary to refrain from mentioning prohibited material in your adversary's voir dire, opening statement, cross examination, or closing statement; (2) instructing your adversary not to introduce evidence in your adversary's direct case; (3) directing your adversary's witnesses and experts not to mention prohibited material when the witnesses and experts testify; and (4) ensuring that jurors don't see or hear the prohibited material.

In your motion in limine, you may also ask the court to allow you to do something, such as "allow your expert [witness] to be present [in the courtroom] during other witnesses' testimony."[6] Moving in limine to assure that you'll be allowed to mention and use that evidence later is a proactive measure.

In limine motions are advantageous. Winning a motion in limine will prevent your adversary from talking about or introducing evidence that's damaging to you.[7] Winning a motion in limine might give you leverage in settling the case.[8] Moving in limine before trial will give the judge an opportunity to consider the issues in advance, making the judge more inclined to rule for you.[9]

Some disadvantages arise in moving in limine. Motions in limine will alert your adversary to a weakness in your case (or in your adversary's case) that your adversary hadn't yet considered.[10] Losing a motion in limine will put you in a weak settlement position.[11] And you probably won't be able to appeal immediately an adverse ruling on a motion in limine.[12]

> Winning an in limine motion will ensure that your adversary doesn't mention or use that evidence in its voir dire, opening statement, trial, and closing statement.

If there's a mistrial, "rulings on motions in limine are[n't] binding at the retrial."[13]

Here's a list of motions in limine.

Expert Testimony. Move in limine to

- exclude expert testimony of non-experts;[14]
- exclude expert testimony that's based on unreliable hearsay or on facts not in the record or personally known to the witness;[15]
- exclude expert testimony that's immaterial, irrelevant, misleading, or has no probative value;[16]
- exclude expert testimony that would be unfairly prejudicial to your client;[17]

CONTINUED ON PAGE 57

- preclude an expert's testimony, whom your adversary untimely or improperly identified;[18]
- limit the scope of an expert witness' testimony;[19]
- require your adversary to show that its expert's opinion is recognized as generally accepted in the scientific community — the *Frye* test;[20] and
- determine that your expert's testimony is admissible.[21]

Federal Law or Regulation. Move to exclude evidence preempted by federal statute or regulation.[22]

Other Complaints or Lawsuits. Move to exclude your adversary from introducing into evidence

- other complaints or lawsuits that your client — the plaintiff — initiated;[23] and
- other complaints or lawsuits "on the grounds of lack of similarity, hearsay, or waste of time on collateral issues."[24]

Include in your motion that you're seeking to prohibit your adversary from mentioning these complaints or lawsuits during the trial.

Demonstrative Evidence. Move to exclude evidence of "experiments, tests or demonstrations, not similar to [the] circumstances of [your] case."[25]

Administrative Bodies. Move to exclude findings by administrative agencies, especially "when all parties were not present or did not have motivation to thoroughly litigate." Move to exclude an administrative body's report that will mislead or confuse the trier of fact.[26]

Hearsay. Move to exclude hearsay conversations, including statements in newspaper articles or other publications. Move to exclude "[r]eports by investigating authorities containing hearsay, particularly those recorded in witness statements."[27]

Irrelevant or Prejudicial Evidence. Move in limine to exclude

- entries in medical records that aren't relevant to medical treatment;[28]
- evidence that's already been decided on a summary-judgment motion;[29] and
- evidence of criminal convictions or personal history if the prejudicial value substantially outweighs the probative value.[30]

In a negligence case, move to exclude evidence of "[s]ubsequent remedial measures, repairs or improvements."[31] In a negligent-design-products-liability case, move in limine to exclude subsequent design changes to the product.[32] On a lack-of-informed-consent claim, move in limine to "preclud[e] plaintiff from introducing evidence that defendant did[n't] have the proper credentials to perform a medical procedure."[33]

Legal Doctrines, Law, and Rules. Move in limine to

- exclude evidence "of benefits excludable under the collateral source rule";[34]
- exclude evidence under the best evidence rule;[35]
- exclude evidence under the Dead Man's Statute;[36] and
- refrain your adversary from referring to the party who bears the burden of proof.[37]

Evidence Not Provided in Disclosure. In your in limine motion, ask the court to preclude your adversary from introducing evidence you requested in disclosure or which the court ordered your adversary to produce, and which your adversary failed to produce.[38] Move in limine to preclude a witness's testimony if your adversary didn't give you adequate information identifying the witness, such as the witness's address.[39]

Stricken Pleadings. If the court struck the defendant's answer, move in limine to preclude your adversary, the defendant, from introducing evidence that may not be introduced: "As a result of a defendant's answer having been stricken, defendant[] w[as] deemed to have admitted all allegations in the complaint that [defendant] could have denied, including those relating to liability and causation as well as negligence."[40]

Witnesses. Move in limine to

- exclude evidence of consistent statements meant to bolster a witness's testimony;[41]
- exclude evidence of "enhanced recollections";[42]
- prevent your adversary from referring to missing witnesses who aren't in your control to produce;[43]
- prevent your adversary from improperly using testimony from examinations before trial (EBTs);[44]
- exclude persons from the courtroom;[45] and
- address "[m]atters of the appearance of opposing counsel or witnesses."[46]

High-Low Agreements. Move in limine to determine "whether and to what extent the jury [sh]ould be informed" of high-low agreements in multi-defendant litigation.[47]

Procedure: Moving in Limine. Some judges have their own rules on motions in limine. Check the judge's rules.

It's best to move in limine before trial. Doing so means that you've foreseen possible trial issues and anticipated your adversary's trial tactics.[48] If your adversary during voir dire or opening statement brings up something you believe is improper, move in limine as soon as possible.[49] If your adversary's statement is so "blatantly improper that you should not have had to anticipate it, move to strike the statement and if appropriate, for a mistrial."[50]

If your motion in limine is oral, make a record by ensuring that a court reporter transcribes what you say. Even if the discussion is in a judge's chambers, consider making a record of your discussion by having a court reporter present.

You may prepare a written motion. Preparing a written motion in limine will give the court time to consider your motion, "rather than having [the court] . . . render a decision on the fly to avoid delaying the trial."[51]

Consult CPLR 2214 before preparing, filing, and serving your motion papers.[52] You may submit an affirmation or affidavit, or both, in support of your motion in limine. You may also prepare a memorandum of law. In your memorandum of law, explain

your legal position and provide copies of relevant statutes and caselaw. Your adversary may submit opposition papers to your motion.

You may move in limine by order to show cause or by notice of motion. Move by order to show cause if the trial is imminent.

Mark for identification as a court exhibit your moving papers and your adversary's opposition papers to ensure that the papers are "made part of the record."[53]

The Court's Ruling on Your Motion in Limine. The court may grant, conditionally grant, or deny your motion in limine. The court may also reserve decision or ask you to make your motion in limine later. The court's ruling on a motion in limine "is merely 'advisory,' . . . if the effect of the ruling in question is contingent upon the state of the record when the evidence is offered."[54]

If the court grants your motion in limine, you need do nothing further. If your adversary seeks to revisit at trial something the court already decided, be prepared to remind the court of its ruling.

The court may conditionally grant your motion in limine. The court might, for example, grant your motion on the condition that you lay a foundation for the evidence that's the basis for your motion in limine.

If the court denies your motion in limine, consider moving to renew or reargue, or both, "at the appropriate time."[55] You might want to move to renew, reargue, or both right away. Or you might want to wait until the appropriate time during trial; the court might change its mind at trial. If the court hasn't changed its mind at trial, "be sure to note an objection when the evidence is offered [by your adversary] and state your reasons, based upon what has transpired at trial."[56]

The court may reserve its decision. That means that the court won't immediately issue its decision; it will think about the issues and issue its decision later.

The court might also suggest that it "revisit[] [the motion] at a particular point in the trial, e.g., when a certain witness is on the stand, or some evidence is about to be offered."[57]

Appellate Review. If you've lost a motion in limine, the court's order isn't "ordinarily immediately reviewable."[58]

You may take an interlocutory appeal to the appellate division "as of right . . . [i]f the order on a pretrial motion 'involves some part of the merits' . . . or 'affects a substantial right.'"[59] Also appealable is "[a]n order which limits the scope of issues to be tried."[60]

Because the "effect of the ruling is contingent on the state of the record when the material in question is offered into evidence at trial," some scholars recommend deferring appellate review until after the trial is over.[61] After trial, an appellate court can assess "the propriety of the challenged ruling . . . , not speculatively, but in the context of its application to a concrete factual controversy."[62]

Trial Motions

Motion to Dismiss. At trial, you may move to dismiss the action under CPLR 3211(a), namely, 3211(a)(2) for lack of subject-matter jurisdiction, CPLR 3211(a)(7) for failure to state a cause of action, and CPLR 3211(a)(10) for failure to join a party. You may move at any time under CPLR 3211 subdivisions (a)(2), (a)(7), and (a)(10). Although "technically permissible, a party's withholding a CPLR 3211(a) dismissal motion until the trial is not likely to get a warm reception."[63] One scholar has noted that "[p]ostponement until the trial of a motion that could have avoided a trial shows laches . . . . It would also be a violation of the spirit, if not the letter, of the certificate of readiness rule."[64]

Motion for Judgment Based on Admissions. You may move at any time for a judgment based on an admission.[65] Practitioners use this motion during a plaintiff's opening statement if the plaintiff "ma[kes] some fatal admission during it [the opening statement]."[66] A court will grant a motion for judgment based on admissions "only when counsel 'deliberately and intentionally states or admits some fact that in any view of the case is fatal to the action.'"[67] The admissions this motion contemplates are the "virtual equivalent of a pleading rather than some mere evidentiary statement that the party is not precluded from contradicting with other evidence."[68] A court won't dismiss a complaint if the admission in the opening statement "amounts to nothing more than an immaterial variance from the complaint or bill of particulars, or even from a deposition."[69] Also, a court won't dismiss a complaint during an opening statement "unless it plainly appears that there is really no issue of fact the plaintiff alleges and resolving in the plaintiff's favor every fact the defendant disputes, the plaintiff still has no case."[70]

Most judges avoid granting a motion for judgment based on admissions. Dismissing a case during the plaintiff's opening is "reserved for a most unique case."[71] Judges will find

You may move for a mistrial if a person engages in misconduct during trial (inside or outside the courtroom), including a misconduct of a party, a party's attorney, a judge, a juror, a witness, and court staff.

"no harm in waiting until the plaintiff has called witnesses and put [on] [its] case."[72]

Admissions by a party during a party's testimony may "justify[] a directed verdict."[73]

Motion for a Mistrial. Any party may move for a new trial at any time during a trial.[74] A court may grant your motion in the interest of justice on such terms as may be just.[75]

A motion for a mistrial "is a device to cancel or discontinue a trial in order to start it afresh before a new jury or continue it at a later time before the same one."[76] Although practitioners call it a motion for a mistrial, the CPLR doesn't use that terminology.

Most practitioners move for a mistrial orally. They move for a mistrial on "the spur of the moment."[77]

Move for a mistrial promptly, or at the very least "before the jury returns its verdict."[78] If you wait to move for a mistrial until after the jury returns a verdict, a court will find that you waived your objection.[79]

CPLR 4402 provides that only a party may move for a mistrial; thus, a mistrial "may not be granted by the court sua sponte."[80] But "instances exist . . . in which the court has [declared a mistrial sua sponte]."[81] An appellate court might criticize a trial court for not sua sponte declaring a mistrial.[82] If a court is inclined to declare a mistrial, it might "advise the presumably prejudiced party of the court's willingness to entertain a mistrial motion."[83] A party who "fail[s] to respond to that invitation may be held to have waived a mistrial."[84]

In a civil case, a "trial court has wide discretion to declare a mistrial, but such discretion is not absolute."[85]

You may move for a mistrial if a person engages in misconduct during trial (inside or outside the courtroom), including a misconduct of a party, a party's attorney, a judge, a juror, a witness, and court staff: "Whatever the source of the prejudicial conduct, if it deprives an innocent party of a fair trial the court can make it the basis of a mistrial."[86] The misconduct might include your adversary's or a witness's "inflammatory or prejudicial comments" to the jury.[87] The basis for your motion for a mistrial might also be your adversary's improper questioning of a witness or your adversary discussing or introducing inadmissible evidence.[88] You may move for a mistrial if "[e]vents or circumstances have so tainted the proceedings that the trial should not go forward."[89]

Move for a mistrial if a witness, such as a witness who lies about its expert qualifications, perpetuates fraud during trial.[90]

Move for a mistrial if "critical witnesses are unavailable."[91] A court might decline to declare a mistrial when it finds no possibility of prejudice to the defendant, such as when a plaintiff dies after testifying and being cross-examined, and the court had "polled the jurors individually."[92]

Move for a mistrial if a person who is an "indispensable part of the trial," such as a party, the judge, or a party's attorney, becomes unavailable.[93]

Adverse publicity a juror sees outside the courtroom might be a ground for your mistrial motion.[94]

Unfair surprise and prejudice are also grounds for a mistrial.[95]

Move for a mistrial if a party puts into evidence a theory that wasn't alleged in its pleadings or bill of particulars.[96]

Move for a mistrial if "one or more jurors are unable to continue with the trial, and there are insufficient alternate jurors."[97]

Move for a mistrial if the jury in your case isn't able to reach a verdict.[98] The court may declare a mistrial sua sponte on this ground.[99]

Move for a mistrial if "a major change [in] evidentiary law occurs" during trial.[100]

If the event underlying your mistrial motion occurs in the court's presence, written motion papers aren't necessary.[101] If the event occurs outside the court's presence, you might need to prepare a written motion supported with evidence; you may submit a memorandum of law.[102] Your adversary may oppose your motion by submitting opposition papers and a memorandum of law.[103]

If you move for a mistrial orally, the best practice is to do so outside the jury's presence.[104]

In the next issue of the *Journal*, the *Legal Writer* will continue with motions for a mistrial and then discuss other trial and post-trial motions. ■

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1. 1 Edward L. Birnbaum, Carl T. Grasso, & Justice Ariel E. Belen, New York Trial Notebook, § 13:01, at 13-3 (2010).
2. *Id.*
3. *Id.* at 13-3.
4. *Id.* (quoting *State v. Metz*, 241 A.D.2d 192, 198, 671 N.Y.S.2d 79, 83 (1st Dep't 1998)).
5. *Id.* § 13:05, at 13-4.
6. *Id.* § 13:01, at 13-3.
7. *Id.* § 13:02, at 13-3.
8. *Id.*
9. *Id.*
10. *Id.* § 13:03, at 13-3.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* § 13:06, at 13-4.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* § 13:07, at 13-10.
19. *Id.*
20. *Id.* (citing *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)); *Pullman v. Silverman*, 125 A.D.3d 562, 562, 2015 N.Y. Slip Op. 01707, at *1 (1st Dep't 2015) ("New York courts permit expert testimony based on scientific principles, procedures or theories only after they have gained general acceptance in the relevant scientific field. Under the *Frye* test, the burden of proving general acceptance rests upon the party offering the disputed expert testimony.") (citations omitted). New York still uses the *Frye* test, not the test in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).
21. *Id.* (citing *Ferrara v. Kearney*, 285 A.D.2d 890, 890, 727 N.Y.S.2d 358, 359 (3d Dep't 2001)).
22. *Id.* § 13:06, at 13-5 (citing *Doomes v. Warrick Indus., Inc.*, 17 N.Y.3d 594, 594, 935 N.Y.S.2d 268, 268, 958 N.E.2d 1183, 1183 (2011)).
23. *Id.* § 13:06, at 13-5.

24. *Id.*

25. *Id.*

26. *Id.* § 13:06, at 13-6 (citing *Kinsella v. Berley Realty Corp.*, 240 A.D.2d 374, 374, 657 N.Y.S.2d 771, 772 (2d Dep't 1997) ("At trial, the Supreme Court excluded from evidence a certified report of the New York State Department of Labor. We find that the court acted properly since the certified report would have misled and confused the jury.") (citations omitted)).

27. *Id.* § 13:06, at 13-6.

28. *Id.*

29. *Id.*

30. *Id.* (citing *Sansevere v. United Parcel Serv., Inc.*, 181 A.D.2d 521, 522–23, 581 N.Y.S.2d 315, 316 (1st Dep't 1992) ("A civil litigant is granted broad authority to use the criminal convictions of an adverse witness to impeach the credibility of that witness.") (internal quotations omitted)).

31. *Id.* (citing *McGarvin v. J.M. Weller Assocs., Inc.*, 273 A.D.2d 623, 625, 710 N.Y.S.2d 143, 145 (3d Dep't 2000)).

32. *Id.* § 13:06, at 13-6, 13-7 (noting that "[s]ubsequent design changes may be admissible in a strict products liability case involving manufacturing flaws . . . . [and] [s]ubsequent recalls or technical bulletins may be admissible on a failure to warn theory").

33. *Id.* § 13:06, at 13-7.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* § 13:06, at 13-11.

38. *Id.* § 13:06, at 13-8.

39. *Id.* § 13:06, at 13-8.

40. *Id.* § 13:06, at 13-9.

41. *Id.* § 13:06, at 13-10.

42. *Id.* (citing *Bennett v. Saeger Hotels, Inc.*, 209 A.D.2d 946, 947, 619 N.Y.S.2d 424, 425 (4th Dep't 1994)).

43. *Id.* § 13:07, at 13-10.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* § 13:08, at 13-11 (citing *In re Eighth Jud. Dist. Asbestos Litig. v. Amchem Prods. Inc.*, 8 N.Y.3d 717, 721, 840 N.Y.S.2d 546, 549, 872 N.E.2d 232, 235 (2007) ("A high-low agreement is a tool commonly used in litigation that guarantees the plaintiff a minimal recovery while concomitantly capping a defendant's potential exposure.")).

48. *Id.* § 13:20, at 13-11.

49. *Id.* § 13:21, at 13-12.

50. *Id.*

51. *Id.* § 13:22, at 13-12.

52. *Id.*

53. *Id.*

54. *Id.* § 13:23, at 13-13 (quoting *Hargrave v. Presher*, 221 A.D.2d 677, 678, 632 N.Y.S.2d 886, 887 (3d Dep't 1995)).

55. *Id.* § 13:22, at 13-12.

56. *Id.* § 13:23, at 13-13.

57. *Id.* § 13:23, at 13-12.

58. *Id.* § 13:30, at 13-13.

59. *Id.* § 13:31, at 13-14 (quoting CPLR 5701 (a)(2)(iv) & (a)(2)(v)).

60. *Id.* (quoting *Rondout Elec., Inc. v. Dover Union Free Sch. Dist.*, 304 A.D.2d 808, 810, 758 N.Y.S.2d 394, 397 (2d Dep't 2003) (citing *Hargrave*, 221 A.D.2d at 678, 632 N.Y.S.2d at 887); *Barksdale v. New York City Transit Auth.*, 294 A.D.2d 210, 210, 741 N.Y.S.2d 697, 698 (1st Dep't 2002)); *but see Rivera v. New York Health & Hosp. Corp.*, 38 A.D.3d 476, 476, 832 N.Y.S.2d 563, 564 (1st Dep't 2007); *Rodriguez v. Ford Motor Co.*, 17 A.D.3d 159, 160, 792 N.Y.S.2d 468, 470 (1st Dep't 2005).

61. *Id.* § 13:30, at 13-13.

62. *Id.*

63. David D. Siegel, New York Practice § 402, at 702 (5th ed. 2011).

64. *Id.*

65. *Id.* § 402, at 703.

66. *Id.*

67. *Id.* (quoting *Hoffman House v. Foote*, 172 N.Y. 348, 351, 65 N.E.169, 169 (1902)).

68. *Id.* § 402, at 703.

69. *Id.*

70. *Id.*

71. *Id.* § 402, at 704.

72. *Id.* § 402, at 703.

73. 2 Edward L. Birnbaum, Carl T. Grasso, & Justice Ariel E. Belen, New York Trial Notebook, § 35:30, at 35-11 (2010).

74. Aaron J. Broder, Trial Handbook for New York Lawyers § 2.4, at 28 (3d ed. 1996).

75. CPLR 4402.

76. Siegel, *supra* note 63, § 403, at 706.

77. 2 Birnbaum § 36:11, at 36-4.

78. Broder, *supra* note 74, § 27.2, at 511.

79. 2 Birnbaum § 36:12, at 36-4.

80. Siegel, *supra* note 63, § 403, at 707.

81. *Id.* (citing *Jaworski v. New Cassel Fuel Corp.*, 21 A.D.2d 753, 753, 251 N.Y.S.2d 929, 930 (2d Dep't 1964)).

82. 2 Birnbaum § 36:10, at 36-4 (citing *In re Brigham Park Coop. Apts., Inc. v. Fin. Adm'r of City of N.Y.*, 83 A.D.2d 551, 552, 441 N.Y.S.2d 102, 104 (2d Dep't 1981)).

83. Siegel, *supra* note 63, § 403, at 707.

84. *Id.*

85. Broder, *supra* note 74, § 2.4, at 28.

86. Siegel, *supra* note 63, § 403, at 706.

87. 2 Birnbaum § 36:20, at 36-5.

88. *Id.* § 36:22, at 36-6, § 36:23, at 36-6.

89. *Id.* § 36:01, at 36-3.

90. *Id.* § 36:25, at 36-7.

91. *Id.* § 36:01, at 36-3.

92. Broder, *supra* note 74, § 2.4, at 28.

93. *Id.* § 36:80, §36:81, at 36-13; Broder, *supra* note 74, § 2.4, at 28.

94. 2 Birnbaum § 36:61, at 36-12.

95. *Id.* § 36:70, at 36-12.

96. *Id.* § 36:71, at 36-13.

97. *Id.* § 36:82, at 36-14.

98. *Id.* § 36:01, at 36-3.

99. *Id.* § 36:90, at 36-14 (citing CPLR 4404(a); CPLR 4113).

100. Broder, *supra* note 74, § 27.3, at 512.

101. 2 Birnbaum § 36:11, at 36-4.

102. *Id.*

103. *Id.*

104. *Id.*

"Of course I'm an excellent lawyer. It says so right on my website."