

## Memorandum in Support

### COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #15

March 12, 2008

S. 4213

By: Senator Volker

A. 8508

By: M. of A. Dinowitz

Senate Committee: Codes

Assembly Committee: Judiciary

Effective Date: Immediately

**AN ACT** to amend the civil practice law and rules, in relation to the time of service

**LAW AND SECTION REFERRED TO:** CPLR 306-b

### **THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES** **SUPPORTS THIS LEGISLATION**

This bill amends CPLR 306-b to measure the time within which to serve the summons and complaint (or third party summons and complaint, or petition with notice of petition or order to show cause) from the date of commencement of the action or proceeding, rather than the date of filing. The change will have no effect on the majority of cases where the commencement of the action or proceeding occurs at the filing of the summons and complaint or petition. However, under CPLR 304, an action may be commenced by the signing of an order requiring a subsequent filing of the summons and complaint at a specific time and date within five days of the order. This provision enables a litigant to commence an action when the county clerk's office is not open for filing, in order to seek temporary relief, or in order to avoid the running of the statute of limitations.

The provision in CPLR 304 was never meant to lengthen the time in which the summons and complaint was to be filed. However, when this exception under CPLR 304 is utilized, under CPLR 306-b, as it currently reads, the time within which to effect service would not begin to run until the filing occurred, up to five days later. There may also be an additional problem with CPLR 306-b as currently stated, where the litigant wishes to effect service after the signing of the order, but before the filing of the summons and complaint. In that situation, the service, prior to the filing, may be ineffectual for purposes of CPLR 306-b, which requires service within "one hundred and twenty days after the filing of the summons and complaint." Service effected prior to filing is generally ineffectual. *In re Connolly v. Chenot*, 275 AD2d 582 (3d Dept. 2000).

This bill would simply correct these anomalies without affecting in any way the usual situation where the action is commenced by filing.

For the foregoing reasons, the Committee on Civil Practice Law and Rules **SUPPORTS** this legislation.

Person who prepared the memorandum: Sharon Stern Gerstman, Esq.

Chair of the Committee: David L. Ferstendig, Esq.