



DAVID L. FERSTENDIG  
& OSCAR G. CHASE

## SHOULD COUNSEL FOR A NON-PARTY DEPONENT BE A “POTTED PLANT”?

May 19, 2014

**Abstract:** It has long been the practice in New York that non-party deponents may be represented at depositions and that counsel may object to questions counsel believes are improper. In 2010, however, the New York State Appellate Division, Fourth Department ruled in *Thompson v. Mather* that counsel for a non-party may not make objections and, in effect, is a mere “potted plant” at the deposition. Under *Thompson*, counsel may not object even to protect a privilege or to strike a plainly improper question that would cause substantial prejudice if answered. Although only the Fourth Department has ruled in this manner, the case is binding on all lower courts throughout the state absent a contrary decision by another Appellate Division Department, an overruling by the Court of Appeals, or a legislative correction. This article analyzes practical considerations and ethical dilemmas implicated by this ruling. The article concludes that the ruling rests on an improper interpretation of New York Civil Practice Law and Rules, flies in the face of established practice, is impractical, and raises serious ethical dilemmas for counsel representing a non-party at a deposition. The authors urge the Court of Appeals, which is set to decide this issue in the October, 2014 term, to reject the Fourth Department ruling and hold that important protections provided by counsel to party deponents are available to counsel for non-parties. Alternatively, the authors recommend legislation be enacted to achieve that end.

**Authors:** David L. Ferstendig is a commercial litigator, a member of the Law Offices of David L. Ferstendig, LLC and an Adjunct Professor of Law at New York Law School. Oscar G. Chase is the Russell D. Niles Professor of Law at the NYU School of Law and is the Faculty Co-Director of the Institute of Judicial Administration at NYU.



## SHOULD COUNSEL FOR A NON-PARTY DEPONENT BE A “POTTED PLANT”?

*David L. Ferstendig & Oscar G. Chase*

### INTRODUCTION

**I**gnoring long-standing litigation practice in the New York state courts and without citing any precedent, the New York Appellate Division, Fourth Department ruled in *Thompson v. Mather*<sup>1</sup> that counsel for a non-party must act like a “potted plant” at her client’s deposition.<sup>2</sup> She “is precluded from objecting during or otherwise participating in the . . . depositions.”<sup>3</sup> This suggests that she may not object in any manner; not even on privilege grounds or if the question presented is plainly improper and would cause substantial prejudice if answered.<sup>4</sup> Although only the Fourth Department has ruled in this manner, absent further rulings from the other Departments or the New York State Court of Appeals, the Fourth Department rule applies to trial courts throughout the State.<sup>5</sup> Apart from the impractical nature of such a rule and its po-

---

<sup>1</sup> 894 N.Y.S.2d 671 (App. Div. 4th Dep’t 2010). *See generally* 6 Jack B. Weinstein, Harold L. Korn and Arthur R. Miller, *New York Civil Practice* §3113.11, 3115.01b (David L. Ferstendig, 2d Ed. 2014).

<sup>2</sup> Lawyers representing non-party deponents have “bristle[d]” at the ruling that they may not make objections to questions posed to their clients, asserting that they are turned into “potted plant[s].” *See Sciarra v. Surgical Associates of W. N.Y., P.C.*, 927 N.Y.S.2d 770, 775 (Sup. Ct. 2011).

<sup>3</sup> *Thompson*, 894 N.Y.S.2d 673.

<sup>4</sup> *See also Sciarra v. Surgical Associates of W. N.Y., P.C.*, 961 N.Y.S.2d 640, *leave to appeal granted*, 107 A.D.3d 1503, *appeal dismissed, in part*, 999 N.E.2d 544 (2013). Although reiterating and invoking *Thompson*, the court went on to note that a non-party retained the right to seek a protective order pursuant to CPLR 3103(a). *Id.*

<sup>5</sup> *See Mountain View Coach Lines, Inc. v. Storms*, 476 N.Y.S.2d 918, 920 (App. Div. 2d Dep’t 1984) (“the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this [department] pronounces a contrary rule.”) (citations omitted). Note the New York State Court of Appeals is scheduled to hear the *Sciarra* appeal in the October 2014 term.

tential abuse, it raises serious ethical dilemmas for an attorney “representing” a non-party at a deposition.

THOMPSON V. MATHER

In *Thompson v. Mather*,<sup>6</sup> a medical malpractice action, plaintiff alleged that defendants deviated from standard care by prescribing to the plaintiff oral contraceptives even though it was contraindicated based on the plaintiff’s medical and family history.<sup>7</sup> Plaintiff’s counsel scheduled the videotape deposition of plaintiff’s treating cardiologists for purposes of trial.<sup>8</sup> At one of those depositions, the doctor’s lawyer present at the deposition objected several times on form and relevance grounds.<sup>9</sup> Plaintiff’s counsel objected to the doctor’s counsel’s participation, and the deposition was suspended.<sup>10</sup> The plaintiff then moved for an order precluding the doctor’s counsel from objecting except as to privileged matters or abusive or harassing questioning.<sup>11</sup> The trial court first addressed the concern of an unrepresented non-party being subsequently joined in the action, by ordering that the parties consider providing general releases to the non-party.<sup>12</sup> Alternatively, the court ordered that (i) the parties’ attorneys and the doctors “shall seek to work out ground rules for a non-party deposition” of the doctors; and if such an agreement could not be reached, (ii) plaintiff would not be entitled to take the deposition, but would have to subpoena the doctors to testify at trial.<sup>13</sup>

The Appellate Division reversed, holding that “counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pre-trial deposition.”<sup>14</sup> The court relied on the language in CPLR 3113(c) which provides that the deposition witness’s examination and cross-examination “shall proceed as permitted in the trial of actions in open court.”<sup>15</sup> (The doctor’s counsel conceded that she had no right to object or participate at trial.)<sup>16</sup> The court expressly rejected the doctor’s counsel’s argument that different rules should apply at a pre-trial videotape deposition to be presented at trial:

Indeed, we discern no distinction between trial testimony and pretrial videotaped deposition testimony presented at trial.

---

<sup>6</sup> *Thompson*, 894 N.Y.S.2d 671.

<sup>7</sup> *Id.* at 672.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 672.

<sup>14</sup> *Id.* at 672.

<sup>15</sup> N.Y. C.P.L.R. 3113(c) (2014).

<sup>16</sup> *Thompson*, 894 N.Y.S.2d 673.

We note in addition that 22 NYCRR 202.15, which concerns videotaped recordings of civil depositions, refers only to objections by the parties during the course of the deposition in the subdivision entitled “Filing and objections” (*see* 22 NYCRR 202.15 [g] [1], [2]).<sup>17</sup>

The court also rejected the non-party respondents’ contention that “the fact that the statute of limitations has not expired with respect to a nonparty treating physician witness for the care that he or she provided to a plaintiff provides” a basis for conditioning the deposition upon the provision of general releases to the non-party deponent.<sup>18</sup> Obviously, a non-party in that situation would be concerned that the deposition was motivated in part to lay the groundwork for an action against that deponent.

Prior to *Thompson*, the participation of counsel for non-party witnesses was common.<sup>19</sup> As one commentator has stated, “numerous cases over the years addressing issues arising at depositions of nonparties have noted, without comment or criticism, the active participation of counsel for the nonparty at the deposition.”<sup>20</sup> For example, *Horowitz v. Upjohn Co.*<sup>21</sup> was a medical malpractice action in which the plaintiff sought to compel a non-party witness doctor to answer questions at his deposition concerning matters other than the treatment of the infant plaintiff’s mother. The case refers to objections made by “the witness’s counsel” without stating that such objections were impermissible and the court stated that the witness could refuse to answer questions seeking testimony in the nature of opinion evidence.<sup>22</sup> Nowhere was it suggested in that case or any other case that counsel’s role was limited, as *Thompson* would have it, to that of a “potted plant”.

The court’s reliance on CPLR 3113(c) in *Thompson* makes that section do more work than it can reasonably bear. Its proviso that “Examination and cross-examination of deponents shall proceed as permitted in the trial of actions in open court” does not address the role of the counsel for a deponent.<sup>23</sup> The caption of

---

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *See* David Paul Horowitz, *May I Say Something?*, N.Y. St. B.J. July/Aug. 2011, at 82 (“This represents a sharp break from day-to-day deposition practice, pre-*Thompson*, where attorneys representing nonparty witnesses traditionally exercised all of the rights available to party attorneys.”). Professor Ferstendig has also found this practice common in his own extensive litigation experience.

<sup>20</sup> *Sciara*, 104 A.D.3d at 1259 (Fahey & Martoche, J.J., dissenting).

<sup>21</sup> 149 A.D.2d 467, 539 N.Y.S.2d 961 (App. Div. 2d Dep’t 1989) (reversing the lower court’s holding and remitting to the Supreme Court “to rule on objections propounded at the continued examination before trial of the nonparty witness,” thus implicitly authorizing the witness’ counsel to make objections).

<sup>22</sup> *Id.* at 467–68.

<sup>23</sup> N.Y. C.P.L.R. 3113(c).

CPLR 3113(c) is “Examination and cross-examination.”<sup>24</sup> The sentence quoted seems rather to deal with the order in which the examination should proceed, i.e., the party who called the witness is expected to commence the direct examination with the opposing party to proceed with cross-examination thereafter.<sup>25</sup> The remaining two sentences of CPLR 3113(c) also deal with issues of examination and cross-examination.<sup>26</sup> The sub-section could reasonably be read to prohibit counsel for the non-party from examining or cross-examining her client but, again, it would seem irrelevant to the issue of objections by non-party counsel.

Moreover, other, more relevant provisions of the CPLR authorize non-party objections. For example, CPLR 3103(a), which provides for a motion for a protective order from improper discovery attempts, states:

Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.<sup>27</sup>

Thus, the language of the statute (“any person”) expressly allows a non-party to seek an order protecting it from improper questioning. The *Thompson* ruling would require the objecting non-party to make such a motion without having objected during the deposition. This is an absurd result because it deprives the attorney whose question is arguably objectionable from curing the problem by withdrawing the question. This result is contrary to the spirit of CPLR 3115(b), “Errors which might be obviated if known promptly.”<sup>28</sup> That sub-section actually encourages prompt objections to improper questions: “Errors and irregularities occurring at the oral examination . . . of any kind which might be obviated or removed if objection were promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.”<sup>29</sup> On this ground alone *Thompson* seems wrong. Its rule imposes unnecessary burdens on the parties, the deponent, and the court by requiring a motion when the issue could have been resolved by an objection at the deposition. In addition, one of the reasons why a deponent is not required to answer a question seeking privileged information (as opposed to a form objection, for example) is the recognition that the revelation of the privileged information, in and of itself, is problematic, even if later excluded.

---

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> N.Y. C.P.L.R. 3103(a).

<sup>28</sup> N.Y. C.P.L.R. 3115(b).

<sup>29</sup> *Id.*

Similarly, CPLR 3101(b) provides that:

Upon objection by *a person* entitled to assert the privilege, privileged matter shall not be obtainable.<sup>30</sup>

This section should also be read to permit a non-party to object to the disclosure of privileged matter, regardless of what type of disclosure device is used, including at a deposition.<sup>31</sup> Had the Legislature not intended to include non-party deposition witnesses in the protective umbrella of CPLR 3101(b) it would have presumably referred to “a party” rather than “a person” as entitled to object. The purpose of evidentiary privileges, after all, is to protect confidential information from public revelation.

*Thompson* unfortunately failed to reconcile the quoted provisions with its contrary result. Nonetheless, the Fourth Department applied *Thompson* in its subsequent decision in *Sciara v. Surgical Associates of Western New York, P.C.*<sup>32</sup> There, the lower court analyzed the implications of the *Thompson* decision and tried to reconcile it with a lawyer’s ethical obligations to his or her client.<sup>33</sup> In *Sciara*, another medical malpractice action, plaintiff sought to depose Dr. Chopra, a non-party pathologist, who had examined and reported on specimens removed during plaintiff’s laparoscopic surgery.<sup>34</sup> Dr. Chopra was represented by counsel at the deposition which “proceeded uneventfully until the plaintiff’s counsel asked Dr. Chopra about a sentence in the operative request referring to what the ‘initial frozen section evaluation revealed.’”<sup>35</sup> Plaintiff’s counsel inquired whether the report’s reference refreshed the witness’s recollection about whether she spoke with the defendant surgeon on the day of the surgery.<sup>36</sup> As the witness began to answer, her counsel interrupted the questioning and attempted to explain the question to his client; he “tried to point out that (Dr. Chopra) either misheard or misunderstood the question.”<sup>37</sup> Citing *Thompson*, plaintiff’s counsel advised Dr. Chopra’s counsel that he could not “interrupt or coach” the witness, at which point Dr. Chopra’s counsel terminated the deposition.<sup>38</sup> Plaintiff moved

---

<sup>30</sup> N.Y. C.P.L.R. 3101(b) (emphasis added).

<sup>31</sup> See *Sciara*, 104 A.D. at 1259 (Fahey & Martoche, J.J., dissenting in part) (“That section [CPLR 3101(b)] suggests that a nonparty may not be required to disclose privileged matter whether it be at a deposition or at trial. The question of what constitutes ‘privileged matter’ is a significant legal one and we fail to see how a nonparty witness at a deposition, without the benefit of counsel, would be so knowledgeable as to assert the privilege in the appropriate circumstance.”).

<sup>32</sup> See *Sciara*, 104 A.D. at 1256.

<sup>33</sup> *Sciara*, 32 Misc. 3d at 908–915.

<sup>34</sup> *Id.* at 906.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

to compel Dr. Chopra's deposition and for costs and sanctions against Dr. Chopra's counsel.<sup>39</sup> Dr. Chopra cross-moved for an order limiting, conditioning or regulating Dr. Chopra's deposition.<sup>40</sup> The court found that *Thompson* was "directly applicable" to the facts in this case, but noted the tension between applicable deposition procedures and counsel's ethical obligations to his or her client:<sup>41</sup>

Nevertheless, during the discussion between counsel at the deposition which followed the interruption, Dr. Chopra's counsel stated that he was "just trying to explain to (Dr. Chopra) that she didn't understand your question" and that Dr. Chopra had never testified before. While these reasons are not a proper basis for interrupting the deposition, they highlight the tension between the ethical obligations a nonparty witness's counsel has to represent his or her client and the trial procedures applicable to depositions. On the one hand, the lawyer for the nonparty has no right to object or otherwise participate. On the other hand, the lawyer has a duty under the Rules of Professional Conduct . . . to represent his or her client competently (rule 1.1) and diligently (rule 1.3). Undoubtedly, it is this tension which causes lawyers to bristle at the perceived requirement that they sit by as a "potted plant."

The trial court concluded, however, that under the facts of this particular case, Dr. Chopra's counsel had no right to interrupt the questioning because the objection did not involve privilege, was not plainly improper and was not prohibited by a court order.<sup>42</sup> The court further noted that the same conclusion would apply if the interrupting counsel was representing a party.<sup>43</sup> The court noted that non-parties "are routinely" represented by counsel at a deposition, just as counsel could attend a public civil trial to observe testimony from the audience.<sup>44</sup> Moreover, the court refused to read the *Thompson* decision so broadly as to prohibit counsel for a non-party from objecting to questions involving privilege, or that are plainly improper and would cause substantial prejudice, if answered. Instead, the court noted that *Thompson* dealt with a circumstance where the non-party's counsel had objected to form and relevance.<sup>45</sup> Thus, the lower court in *Sciara* held that to the extent a question fits within the three exceptions in Uniform Rules 22 NYCRR 221.2 (that is, privilege, court order, plainly improper question that will cause prejudice), the non-party could object and refuse to answer. The non-party could then move

---

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 906–07.

<sup>41</sup> *Id.* at 909–10.

<sup>42</sup> *Id.* at 910.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 912.

<sup>45</sup> *Id.* at 913.

for a protective order under CPLR 3103(a) which authorizes any “party” or “person from whom discovery is sought” to apply for a protective order.<sup>46</sup>

On appeal, however, the Fourth Department reversed, with a majority of the court finding that the lower court erred in permitting counsel for the non-party to participate in the deposition. The court noted that, to the extent that 22 NYCRR 221.2 and 221.3 might conflict with CPLR 3113(c), “it is well established” that in that circumstance the statute controls.<sup>47</sup> While recognizing (but not specifying) “the practical difficulties” that can arise in connection with a non-party deposition, the majority relied on the “express language of CPLR 3113 (c) [which] prohibits the participation of the attorney for a nonparty witness during the deposition of his or her client.”<sup>48</sup>

The dissent distinguished *Thompson* on the ground that that case dealt with 22 NYCRR 202.15, concerning videotape depositions and which specifically refers to objections “made by any of the *parties* during the course of the deposition.”<sup>49</sup> In contrast, the *Sciara* case dealt with 22 NYCRR Part 221, which permits “deponents,” which would include non-parties, to object at depositions.<sup>50</sup> In addition, the dissent found that the deponent’s right pursuant to Part 221 to refuse to answer the types of questions was not in tension with CPLR 3113(c).<sup>51</sup> The court pointed out that Part 221 became effective twenty-three years after CPLR 3113(c) was adopted and that there had been numerous cases over the years discussing “without comment or criticism” the active participation of a non-party’s counsel at the deposition. Moreover, the dissent posited that it would presume that the Chief Administrator was aware of CPLR 3113(c) when the deposition rules were adopted “and would not create a direct conflict with a statute.”<sup>52</sup>

The dissent also pointed to CPLR 3101(b), which provides that a “person” can object to the disclosure of privileged matters:<sup>53</sup>

---

<sup>46</sup> *Id.* at 913–14; *see also* *Alba v. New York City Tr. Auth.*, 37 Misc. 3d 838 (Sup. Ct. New York County 2012) (following the lower court decision in *Sciara*, and finding that “at the very least, counsel for a non-party witness at a deposition may object under the permitted exceptions set forth in the Uniform Rules for the Conduct of Depositions (22 NYCRR 221.1 *et seq.*”); *Quash Subpoena Ad Testificandum ex rel. Kapon v. Koch*, 37 Misc. 3d 1211(A) (Sup. Ct. New York County 2012), *aff’d on other grounds sub nom. Kapon v. Koch*, 105 A.D.3d 650 (1st Dep’t 2013), *aff’d*, \_\_\_N.Y.3d\_\_\_, 2014 N.Y. Slip Op. 02327, 2014 WL 1315590 (N.Y. Apr. 3, 2014) (petitioners’ motions to quash subpoenas and grant a protective order denied; but court would allow the non-party petitioners to object during the resumed depositions and to decline to answer questions if the answer would require them to reveal trade secrets or confidential information.).

<sup>47</sup> *Sciara v. Surgical Assocs. of W. N.Y., P.C.*, 104 A.D.3d 1256, 1257 (N.Y. App. Div. 2013).

<sup>48</sup> *Id.* at 1257.

<sup>49</sup> *Id.* at 1258 (Fahey and Martoche, JJ., dissenting in part).

<sup>50</sup> *Id.* (Fahey and Martoche, JJ., dissenting in part).

<sup>51</sup> *Id.* at 1259 (Fahey and Martoche, JJ., dissenting in part).

<sup>52</sup> *Id.* (Fahey and Martoche, JJ., dissenting in part).

<sup>53</sup> *Id.* at 1259–60 (Fahey and Martoche, JJ., dissenting in part).



That section suggests that a nonparty may not be required to disclose privileged matter whether it be at a deposition or at trial. The question of what constitutes “privileged matter” is a significant legal one and we fail to see how a nonparty witness at a deposition, without the benefit of counsel, would be so knowledgeable as to assert the privilege in the appropriate circumstance. Similarly, CPLR 3103 (a) authorizes a court, on its own initiative, “or on motion of any party or of any person from whom discovery is sought,” to issue a protective order denying, limiting, conditioning or regulating the use of any disclosure device. That section similarly would allow a nonparty witness, as “any person from whom discovery is sought” . . . to seek a protective order conditioning the use of a deposition by allowing the nonparty to have counsel at the deposition for the purpose of raising appropriate objections.

Finally, the dissent referred to what it called the “practical question” faced by a non-party deponent who might later be added to the existing action as a defendant.<sup>54</sup> He or she could be faced with questions which, if answered, could suggest possible liability of the deponent. This, said the dissent, underscores the importance of the presence of counsel. The dissenters did not say, however, that deponent’s counsel could properly object to such questions, and it is doubtful that they could do so successfully.<sup>55</sup> The dissenters concluded there was no direct conflict between CPLR 3113(c) and Part 221 of the Uniform Rules for the Conduct of Depositions and that the trial judge had not abused his discretion in “allowing the nonparty to have counsel present at the deposition for a limited purpose.”<sup>56</sup>

#### THE PRACTICAL PROBLEMS

The Fourth Department’s interpretation in *Thompson* reducing counsel for a non-party to a “potted plant” has several serious practical implications, including those described by the *Sciara* dissent. To summarize them: First and foremost, in essence, it leaves a non-party witness unprotected during the deposition. As the *Sciara* dissent noted, it is difficult to believe that a non-party witness would be knowledgeable as to when to assert the attorney-client privilege, without the benefit of counsel. Similarly, a non-party witness may not know when to

---

<sup>54</sup> *Id.* at 1260 (Fahey and Martoche, JJ., dissenting in part).

<sup>55</sup> See *Women in City Gov’t United v. City of New York*, 112 F.R.D. 29, 32 (S.D.N.Y. 1986) (a non-party deponent is entitled to have counsel present at the deposition to help him “exercise testimonial privileges” but counsel “is not present to keep the deponent from making a statement against his interest in the absence of a testimonial privilege . . .”).

<sup>56</sup> *Sciara v. Surgical Assocs. of W. N.Y.*, P.C. 104 A.D.3d 1256, 1260 (N.Y. App. Div. 2013) (Fahey and Martoche, JJ., dissenting).

refuse to answer where a question is plainly improper and would, if answered, cause significant prejudice to any person. Answers to improper questions, for example, could open the deponent to subsequent claims of liability by inadvertent admissions to questions subject to objection. This could also lead to sharp practices by counsel for the existing parties: “[A] likely result of application of the *Thompson* ruling is that a party will be encouraged to depose a potential adverse party before joining that person as a party to the action, in order to be able to avoid the objections that a party’s lawyer would be able to make at a post-joinder deposition.”<sup>57</sup> Second, while *Thompson* itself recognizes the deponent’s “right to seek a protective order” as stated in CPLR 3103(a), it offers no way for the non-party’s attorney to avoid having to seek a protective order by simply objecting and thereby pointing out the problem to the deposing attorney. This will lead to avoidable motion practice. Third, a subsequent motion for a protective order may not, in all circumstances, cure the damage caused by revelation of the privileged information in the first instance. Allowing the non-party to protect against improper questioning would not undermine the legitimate interests of a party to discover relevant facts at the deposition as CPLR 3101 (a) provides for “full disclosure of all matter material and necessary in the prosecution or defense of an action . . . .”<sup>58</sup> Non-party deponents, who by definition are not seeking judicial resolution of a claim or defense, should have at least the same protection of privileged and other protected material as party deponents.

#### ETHICAL CONSIDERATIONS

The New York Rules of Professional Conduct impact the discussion in this area. For example:

- Rule 1.1 (a) provides that: “A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
- Rule 1.1(c) provides that: “[A] lawyer shall not intentionally: (1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or (2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.”<sup>59</sup>

---

<sup>57</sup> Report of the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York (January 2014) 69, available at <http://www.nycourts.gov/ip/judiciaryslegislative/pdfs/2014-CivilPractice-ADV-Report.pdf>. See also *Sciara v. Surgical Assocs. of W. N.Y.*, P.C., 104 A.D.3d 1256, 1260 (Fahey and Martoche, JJ., dissenting in part).

<sup>58</sup> N.Y. C.P.L.R. 3101(a) (McKinney 2013).

<sup>59</sup> N.Y. Comp. Codes R. & Regs. tit. 22 § 1200.00 (McKinney 2013).

The above-quoted Rules suggest that a lawyer who represents a non-party deponent has a duty to protect the client from improper questions that could require the revelation of privileged matter or of trade secrets, or the like. Failing to do so would violate at least the admonition of Rule 1.1(c)(2) not to “prejudice or damage the client during the course of the representation.”<sup>60</sup> This is especially so because CPLR 3115(b) warns counsel of possible waiver of the client’s rights: “Errors and irregularities occurring at the oral examination . . . of any kind which might be obviated or removed if objection were promptly presented are waived unless reasonable objection thereto is made at the taking of the deposition.”<sup>61</sup> Of course, under Rule 3.4(c) an attorney may not “disregard . . . a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling.”<sup>62</sup> In our view, a lawyer would be in compliance with her duties to the client and to the tribunal if, in representing a non-party deponent, the lawyer objected to a question that would require revealing privileged matter, or violated a court order, or was otherwise improper and likely to be prejudicial to the deponent. It could reasonably be argued that, even in the Fourth Department, this would allow a legally supportable good faith challenge to the *Thompson* limitation.<sup>63</sup>

#### CONCLUSION

*Thompson v. Mather*<sup>64</sup> is not supported by precedent, practice or by the CPLR. It creates problems for the non-party deponent and his attorney and threatens the protection of privileged matter and other important interests. It also imposes inefficiencies on the courts by requiring unnecessary motions, as described above. The Court of Appeals would be well-advised to overrule the *Thompson* doctrine in deciding the pending appeal from the similarly flawed *Sciara* case.<sup>65</sup> Unless the Court of Appeals affirms the *Sciara* case and validates the *Thompson* rule, other Departments of the Appellate Division should not follow it. Finally, if the Court of Appeals does not strike down the doctrine, the Legislature should amend the CPLR expressly to permit counsel for a non-party deponent to

---

<sup>60</sup> *Id.*

<sup>61</sup> N.Y. C.P.L.R. 3115 (b) (McKinney 2013).

<sup>62</sup> N.Y. Comp. Codes R. & Regs. tit. 22 § 1200.00 (McKinney 2013).

<sup>63</sup> N.Y. Comp. Codes R. & Regs. tit. 22 § 221.2 (McKinney 2013) (noting circumstances in which a deponent can refuse to answer a question).

<sup>64</sup> 70 A.D.3d 1436, (App. Div. 4th Dep’t 2010).

<sup>65</sup> *Sciara v. Surgical Assocs. of W. N.Y., P.C.*, 104 A.D.3d 1256, 1260 (N.Y. App. Div. 2013), *leave to appeal granted*, 107 A.D.3d 1503, *appeal dismissed*, in part, 22 N.Y.3d 951 (2013) (the Court dismissed the appeal of the defendants on the ground that they were “not parties aggrieved.” It added: “Defendants remain respondents on the appeal by Usha Chopra, M.D. [the deponent], and may submit a brief and present argument on that appeal.”).

object at the deposition<sup>66</sup> to preserve a privilege or right of confidentiality, or to enforce a limitation ordered by a court, or if the question is palpably improper and, if answered, would cause significant prejudice to her client. (These are the grounds that, under 22 NYCRR 221.2, justify a deponent's refusal to answer a question)<sup>67</sup> We note that the Advisory Committee to the Chief Administrative Judge, which has criticized the *Thompson* holding, has recommended that it be legislatively overruled and that non-party counsel be permitted to object in the same manner as counsel for a party.<sup>68</sup>

We see no reason why the important protections provided by counsel to party deponents should not be available to counsel for non-parties. Indeed the Fourth Department's ruling is contrary to the trend under New York law to treat parties and non-parties alike with respect to discovery issues.<sup>69</sup>



---

<sup>66</sup> The OCA Advisory Committee on Civil Practice has recommended an amendment to CPLR 3113(c) to provide that the non-party's counsel "may participate in the deposition and make objections *on behalf of his or her client* in the same manner as counsel for a party". Report of the Advisory Committee in Civil Practice to the Chief Administrative Judge of the Courts of New York, *supra* note 57, at 69-71.

<sup>67</sup> N.Y. Comp. Codes R. & Regs. tit. 22 § 221.2 (McKinney 2013).

<sup>68</sup> Report of the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York, *supra* note 57, at 71 (recommending amending CPLR 3113(c) to read: "(c) Examination and cross-examination. Examination and cross-examination of deponents shall proceed as permitted in the trial of actions in open court, except that a non-party deponent's counsel may participate in the deposition and make objections on behalf of his or her client in the same manner as counsel for a party...." (underlined portion would be new).

<sup>69</sup> *See, e.g.,* Kapon v. Koch, \_\_\_N.Y.3d\_\_\_, 2014 N.Y. Slip Op. 02327, 2014 WL 1315590 (N.Y. Apr. 3, 2014) (noting that the scope of disclosure with respect to parties and non-parties is the same, that is, "all matter material and necessary to the prosecution of the action"). *See also* N.Y. C.P.L.R. § 3120(b) (McKinney 2013) (amended in 2002 to eliminate the requirement that document disclosure from non-parties be obtained only through a court order).