NEW YORK STATE BAR ASSOCIATION

Journal

MAY 2006
VOL. 78 | NO. 4

Bringing It Home

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by Sanford F. Young

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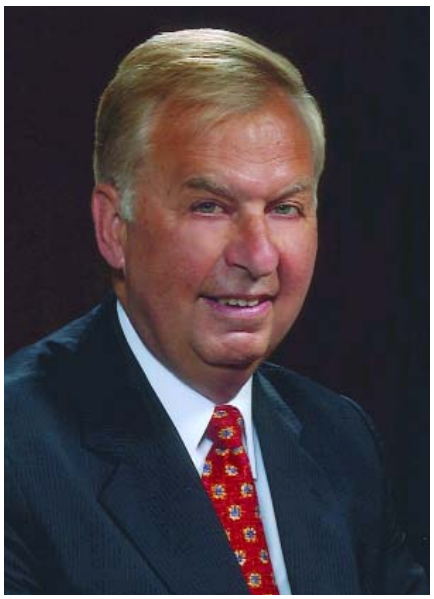
PRESIDENT'S MESSAGE

A. VINCENT BUZARD



The Past Year

What seems like a couple of months ago, but was actually almost a year ago, I wrote my first President's Message, which I entitled "The Year Ahead." In that column, I discussed some of the goals I wanted us to accomplish during my Presidency. Now my term will almost be over by the time you read this, so I thought I would look back over the year to review what we did accomplish together and to thank some of the people who gave such great help.

In my first column, I talked about the need to improve public understanding of the legal system and the lawyers' role in it, because public understanding is the foundation upon which the legal system rests, and, in turn, our free society rests upon the legal system. I reviewed our efforts in that area extensively in my February column and will not repeat what I said before.

Since that time, the People's Law School – a series of programs recorded before a live audience in which lawyers from around the state explain important legal topics in lay terms – is being distributed to the public through the Internet and is available for purchase at cost from the Bar Association. Thanks go to Terry Brooks, the Director of the Continuing Legal Education Department, and the lawyers who participated in that program. I am also pleased that additional topics are being taped this spring, and hope that the library of topics will continue to grow over the years.

The "Ask a Lawyer" column, in which we answer questions from the public, is being distributed in 15 newspapers throughout the state, and we are working to add to that list. One of the useful aspects of the columns is that there is a new one every month, so that we get regular coverage. Thanks to Media Services Director Brad Carr for working with me on the project.

We are continuing the program we put together with the help of the New York State Broadcasters Association in which, for $30,000, we receive radio broadcast time across the state with a value of approximately $800,000. Last fall, I did the voiceovers for the announcements, and I am now doing so again on topics that include lawyer advertising, the importance of an independent legal profession (in contrast to China's), and an announcement about the People's Law School.

At the beginning of my term, I also said that I was appointing a Task Force on Lawyer Advertising, chaired by Bernice Leber, a partner at Arent Fox PLLC in New York City, to issue recommendations to control lawyer advertising to the extent possible under the First Amendment. In record time, the Task Force produced a report that was then adopted by the House of Delegates and has been forwarded to the Presiding Justices of the four Appellate Division Judicial Departments for their consideration. We have received more favorable comments from our members and the public regarding our efforts on lawyer advertising than on any other single program, and I am grateful to Bernice and her committee for acting within the time constraints, for her excellent report, and to the House for its prompt adoption.

We have continued to obtain favorable newspaper coverage for our efforts in explaining the law and for our advocacy on issues confronting the legal system. I have also continued to use radio talk shows to discuss the Association's role and to explain the legal system and what lawyers do, and I will use the remainder of my term to be on the radio as much as I possibly can. Scott Eisenstein of Linden Alschuler & Kaplan, our public relations firm in New York City, is a genius at getting me on the radio and at working

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with me to get our message out. Thanks also to Frank Ciervo of the Media Services Department for working on this effort.

We, the members of the New York State Bar Association, are the voice of the profession in this state, and we must speak with a strong and clear voice to the public and to the Legislature on issues affecting the administration of justice and the practice of law. We must do this both to improve public understanding of the legal system and to protect the system and lawyers from unwarranted attack.

A good example of how to explain the law and at the same time speak out for the profession was our work on the issue of the erosion of the attorney-client privilege by prosecutors who seek to have clients waive the privilege as an indication of cooperation. I was pleased that at the American Bar Association meeting in February, Bill Ide, former President of the ABA and a partner at McKenna, Long & Aldridge LLP in Atlanta, cited our program on protecting the attorney-client privilege as a model for other states to follow. I am grateful to Steve Hoffman, a partner at Siller Wilk LLP in New York City, for agreeing to chair the Task Force on Attorney-Client Privilege and to the other Task Force members. The Task Force prepared an excellent report to the United States Sentencing Commission urging the Commission to remove any language from the guidelines suggesting that the waiver of the privilege is a factor in sentencing and instead that there be an express statement that waivers of the privilege are not to be considered. The report was unanimously adopted by the Executive Committee and we then received front-page coverage from the *New York Law Journal* on this excellent work. Much remains to be done on the attorney-client privilege issue, but we are off to a great start.

The Supreme Court decision in *Kelo v. New London* regarding eminent domain has provided an excellent vehicle for explaining the law, speaking out against court bashing, and at the same time considering proposed changes in the law. I appointed a Task Force on Eminent Domain, chaired by Professor Patricia Salkin, Director of the Government Law Center at Albany Law School, and the task force has issued an extraordinary report. It contains a detailed and thoughtful analysis that I know will be very helpful in removing some of the hysteria from the issue and in considering changes in law.

We are continuing our efforts to oppose intrusions into the areas previously reserved to the states. In that regard, we continue to actively oppose the Lawsuit Abuse Reduction Act, which would, among other things, apply a federal rule of sanctions to state courts. We are also continuing to oppose unwarranted changes in habeas corpus rights in federal courts.

Because of the importance of resisting unwarranted changes and attacks on the legal system by Congress, we now have up and running our Federal Key Contacts Program, in which Bar Association members are in contact with Members of Congress. I have met with Senator Charles Schumer and am going to Washington to meet with the rest of the New York delegation on these issues.

I have made a number of trips to Albany to meet with our legislators to discuss our priorities, which include judicial pay increases, access to justice, no-fault divorce, same-sex relationships, and health care proxies. Thanks to Hank Greenberg, the chair of our Legislative Policy Committee and a partner at Greenberg Traurig LLP in Albany, and Glenn Lefebvre and Ron Kennedy of our Governmental Relations Department.

We are collaborating with Chief Judge Judith Kaye, Chief Administrative Judge Jonathan Lippman, and the Office of Court Administration in pressing the judicial pay issue. Obviously, the quality of our judiciary determines the quality of justice, and so the issue of adequate judicial pay should be paramount to all of us. I am hopeful that this year, we will be successful. On this issue and so many other issues, I am grateful to Judge Kaye for her leadership and her support of the Association and to Judge Lippman for his collaboration. Maintaining a strong collaborative – but independent – relationship with OCA is critical.

In my first column I also talked about the need to renew our efforts in protecting the public against the unauthorized practice of law. I appointed Harvey Besunder, a partner at Pruzansky & Besunder LLP in Islandia, as chair of the Special Committee on the Unlawful Practice of Law. That committee recently issued a report that provides an excellent roadmap for future study and action.

When we talk about doing the public good, we usually think of pro bono. I also believe that the public good arises out of our own law practices, when lawyers put all of their effort and energy to representing their clients, and the opposing lawyers are similarly committed. From that effort, the truth emerges and justice is done. To achieve that goal, the lawyers must be competent and committed to our high calling. For those reasons, our CLE program is critical, and remaining current on the law is important for all attorneys. To let people instantly know about changes in the law, we are now providing Professor David Siegel's *New York State Law Digest* by e-mail. I have also been working with Terry Brooks to develop a system whereby our members can instantly be informed by e-mail of new cases or developments in their area of the law. We should be in a position to launch that program in the spring.

I am always dismayed when lawyers say that the practice of law is just a business. We must never denigrate our role as members of a learned, independent profession. But, in order to fulfill our duties as lawyers, we must also competently handle the business side of our practice. Not dealing with that aspect properly interferes with what we do professionally. Therefore, our Law Practice Management effort

CONTINUED ON PAGE 24

NYSBACLE

Schedule of Spring Programs

(Subject to Change)

The New York State Bar Association has been Certified by the New York State Continuing Legal Education Board as an Accredited Provider of Continuing Legal Education in the State of New York.

Automobile Litigation: Update and Strategies
Fulfills NY MCLE requirement for all attorneys (6.0): 1.0 in ethics and professionalism; 2.0 in skills; 3.0 practice management and/or professional practice

May 8	Tarrytown
May 11	Buffalo
May 19	New York City

Representing Physicians and Other Health Care Practitioners in the Professional Disciplinary Process
(one-half day program)
Fulfills NY MCLE requirement for all attorneys (4.0): 2.0 in skills; 2.0 in practice management and/or professional practice

May 19	Rochester

Ethical Issues in Matrimonial Cases: What's the Good Lawyer to Do?
(one-half day program)
Fulfills NY MCLE requirement for all attorneys (4.5): 4.0 in ethics and professionalism; 0.5 in practice management and/or professional practice

May 12	Melville, LI
May 19	Rochester
June 2	Albany
June 16	New York City

The New Regime in Medicaid Planning – Changes Wrought by the Deficit Reduction Act of 2005
†*Fulfills NY MCLE requirement (7.5): 7.5 in practice management and/or professional practice*

May 19	Melville, LI
May 24	Albany
May 31	New York City
June 5	Syracuse
June 8	Buffalo

Commercial Lines: Coverage for the Construction Defect Claim
Fulfills NY MCLE requirement for all attorneys (6.5): 1.0 in ethics and professionalism; 5.5 in practice management and/or professional practice

May 12	New York City; Syracuse
May 19	Albany; Uniondale, LI

Long Term Care and the Law: Issues and Skills
Fulfills NY MCLE requirement for all attorneys (6.0): 2.5 in skills; 3.5 in practice management and/or professional practice

May 12	New York City; Rochester
May 19	Albany

Practical Skills Series: Tort and Insurance Law Practice
Fulfills NY MCLE requirement for all attorneys (6.5): 0.5 in ethics and professionalism; 2.5 in skills; 3.5 in practice management and/or professional practice

May 16	Albany; Buffalo; Long Island; New York City; Syracuse; Westchester

Surrogate's Court Proceedings
Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 in ethics and professionalism; 2.0 in skills; 4.5 in practice management and/or professional practice

May 17	Albany; Buffalo
May 18	Tarrytown
May 23	Binghamton
May 24	New York City
May 31	Rochester; Uniondale, LI
June 1	Syracuse

The New World of Real Estate Financing
Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 in ethics and professionalism; 2.0 in skills; 4.0 in practice management and/or professional practice

May 17	Tarrytown
May 22	Uniondale, LI
June 2	New York City
June 7	Rochester
June 9	Albany

Attorney Professionalism
(one-half day program)

May 18	New York City

Public Sector Labor and Employment Law in New York State
†*Fulfills NY MCLE requirement (7.5): 1.5 in ethics and professionalism; 6.0 in skills and practice management and/or professional practice*

May 18	Melville, LI
June 6	New York City
June 8	Albany
June 9	Rochester

Ethics and Professionalism
(one-half day program)
Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 in ethics and professionalism

May 19	Tarrytown
May 23	New York City
May 30	Buffalo
June 7	Melville, LI
June 15	Rochester
June 16	Albany
June 22	Ithaca
June 23	Syracuse

Transactions and the Environment: Contaminated Property Issues in Real Estate and Corporate Matters
Fulfills NY MCLE requirement for all attorneys (6.5): 0.5 in ethics and professionalism; 6.0 in practice management and/or professional practice

May 19	New York City
May 25	Melville, LI
June 1	Rochester; Tarrytown
June 2	Albany

Attorney Escrow Accounts – What Every Attorney Needs to Know
(one-half day program)
Fulfills NY MCLE requirement for all attorneys (4.5): 4.5 in ethics and professionalism

May 31	Albany
June 5	New York City
June 15	Melville, LI

Bridging the Gap: Crossing Over Into Reality II
(two-day program)
Fulfills NY MCLE requirement for all attorneys (16.0): 3.0 in ethics and professionalism; 6.0 in skills; 7.0 practice management and/or professional practice

June 8–9	New York City

Practical Skills Series: Basics of Bankruptcy Practice
Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 in ethics and professionalism; 1.5 in skills; 5.0 in practice management and/or professional practice

June 13	Albany; Buffalo; Melville, LI; New York City; Rochester; Westchester
June 14	Syracuse

† Does not qualify as a basic level course and, therefore, cannot be used by newly admitted attorneys for New York MCLE credit.

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ADVANCED LITIGATION TECHNIQUES – PART III

Bringing It

Feasible Strategies for Successful Discovery and Winning Dispositive Motions

By Sanford F. Young

Home

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Jan B. Rothman, an associate of the firm, assisted in the preparation of this article. She is a graduate of Boston University and received her J.D. degree from Rutgers Law School.

This is the third in a continuing series of articles devoted to litigation techniques. Mr. Young's first article, "Canons and Myths: Strategies to Enhance Success," which appeared in the January 2004 issue of the Journal (Volume 76, No. 1), began with a discussion of the initial retention and creation of a team-like effort with the client, an overview of strategy, tactics, risk assessment and implementation, and dealing with adversaries. The second article "Conventional Wisdoms or Mistakes: The Complaint and the Response," which appeared in the June 2004 issue (Volume 76, No. 5), discussed strategic and tactical decision making and implementation for commencing actions or responding to the complaint, and gave an overview of preliminary motion practice and discovery.

This article focuses on creating and implementing feasible strategies and tactics for completing discovery and making or opposing dispositive motions.

Once the answer is served and issue joined, the party who begins with the earliest and best-prepared discovery demands seizes a strategic advantage that will have a profound effect on the outcome of the suit. Likewise, well-planned dispositive motion practice, *i.e.*, dismissal or summary judgment, is an essential part of strategic planning.

Discovery

Do or Die

After the lawsuit has been commenced, the first, and perhaps, most determinative phase of the case is discovery. Here is where the more diligent, if not aggressive, party takes control. It is where each side has the opportunity to uncover and pin down critical facts and weaknesses of the adversary's case. It is also where each side must reveal its own strengths and weaknesses.

Many attorneys make the mistake of treating discovery as either a necessary inconvenience or something to avoid altogether. All too often, however, they realize the consequence of missed discovery when it is too late, such as when faced with the hasty need to defend against a summary judgment motion, or worse, when the case is about to be tried. Rather than wait, discovery is a vital strategic step to be effectuated promptly and diligently.

Also, discovery is often where the most abuse occurs in terms of overreaching and overspending. While discovery may comprise the predominant part of the pre-trial budget (followed by the costs of engaging in dispositive motion practice), it is easy to get caught up in a frenzy of overkill – whether as the seeker or defender of discovery. The key is to optimize probable benefits versus risks and costs of obtaining or resisting discovery.

Priority Is Job Number One

Obtaining priority is one way to achieve this efficiency. Priority allows you to gain and maintain control over much of the discovery process. In New York state courts, defendants have the automatic right to priority for depositions and interrogatories so long as they serve those requests with the answer.[1] While the Federal Rules and rules of other jurisdictions generally do not recognize priority,[2] there can be advantages to being first to serve discovery demands, such as when the discovery schedule is negotiated or set by court order. The advantages of having priority are fairly obvious and many-fold. One, priority allows the party to be the first to pin down the other side and ferret out its evidence. Two, it goes a long way to learning your own case and the types of information and documents your client may have.[3] Three, it places the onus on the adversary to complete its discovery obligations before it can move the case forward. This is especially true in state court where a party cannot place the case on the trial calendar until he or she can certify that discovery has been completed.[4]

There are many discovery devices available, most of which are not substitutes for, but are complementary to, each other.[5] When used in concert and in a sensible order, the various devices allow for the opportunity to gain the most complete discovery in an organized manner. Those devices include:

- discovery and inspection of documents, things and places
- Interrogatories or Demand for a Bill of Particulars
- depositions of parties and non-parties
- notices to admit
- expert information
- accident reports
- insurance information
- photographs, video and audio recordings
- physical and mental examinations
- names and addresses

A typical initial set of discovery demands includes a Notice for Discovery and Inspection (for documents), Interrogatories *or* a Demand for Bill of Particulars,[6] and Notice to Take Deposition. In personal injury cases, it is also common practice to serve various miscellaneous combined demands, such as for party statements,[7] insurance coverage,[8] medical and other relevant authorizations,[9] and photographs and videos.[10]

Optimization or Attrition: The Choice Is Yours

One way to optimize the pre-trial budget is to spend more on obtaining discovery than providing it. This does not mean resisting discovery; it means providing it! Resisting discovery can be a costly business, leading to endless motion practice and inviting expensive knee-jerk retaliatory countermeasures by your adversary. Unless you and your client are willing to engage in a war of attrition and possibly walk an ethical line, any discovery resistance should be well focused on that which is truly harmful, and for which there is a good-faith basis for objection.[11] On the other hand, such resistance may also focus the adversary's attention on the objected-to documents or testimony, where otherwise, its existence or relevance might stand a chance of being lost in the bulk of the freely given discovery.

On the other side of the coin, one of the greatest costs and annoyances is doing battle with an adversary who stonewalls in providing discovery. This means, for both sides, expending great effort on making successive discovery demands and motion practice. One time or another – and probably way too often – we have all encountered adversaries whose attitude is that they have nothing of relevance to give, and in any event, claim that you don't know how to ask the right questions. These are the obdurate adversaries who are quick to give us their pedantic views of how we should conduct discovery, especially when they are posturing before the court. Unfortunately, these attorneys – and they come in all ages, shapes and sizes – are among the most challenging, as they readily and uselessly eat up our time, resources and patience. Fortunately, there are ways to deal with and conquer them, but it takes diligence and stamina.

Whatever the situation, do not allow the adversary's offensiveness to deter you from insisting on the discovery you need. First, as noted above, you should attempt to gain priority, as it may create a scenario where they cannot obtain discovery until their compliance with your requests. Second, where available, at the earliest opportunity, request a conference before the court. In New York, the Preliminary Conference ("PC Conference") is extremely useful, efficient and readily available by simply filing a Request for the conference with a Request for Judicial Intervention (RJI), if not already filed.[12] By the time the PC Conference is held, you should have served your discovery requests so that the PC Order can make specific reference to the demands and set a schedule for responses.[13] Third, in addition to the usual arsenal of discovery devices which depend upon the adversary's good-faith response, such as Demands for Bills of Particulars, Interrogatories and Document Demands, try utilizing methods that are less passive and place an affirmative onus and deadline on the adversary. Among those methods are Notices to Admit, which must be responded to within 20 days; otherwise, the admissions are deemed

made.[14] Also, use methods which require the attestation of the party, rather than the simple signature of the attorney. Interrogatories, for example, require the party's sworn statement, while many Bills of Particulars may not. Obviously, depositions are also extremely useful as they force the adverse party to face the heat. Finally, if your back is against the wall, rewarding the adversary's poor conduct with a motion for summary judgment may be the best way to catch him or her off guard and unprepared. It also forces your adversary to involve and put his or her client on the line.

The Zero Value of Definitions and Instructions

Attorneys faced with Interrogatories and Notices for Discovery and Inspection are all too familiar with the need to wade through pages and pages of definitions and instructions, before locating the actual questions or items demanded. Likewise, most of us are probably guilty of using similar boilerplate when drafting our own demands, as well as using complex questions with numerous subparts. Nevertheless, most of us could count on one hand those instances where we have received, or provided, interrogatory answers that complied with verbose definitions and instructions or went beyond the main question to answer the myriad subparts.[15]

Ironically, while our compulsion for using complex sets of questions is to ensure that our adversaries provide us with complete answers that spare no detail, the more likely result will be just the opposite: evasion and avoidance. To prove this point, compare the use of Interrogatories to cases where parties employ Demands for Bills of Particulars – which typically use a simple one-question-at-a-time structure. While some of the difference may be the nature of the cases where Bills are used (such as personal injury actions), the simplicity of style probably accounts most for the clarity of the responses. The lesson to be learned is not that Demands for Bills are better – they are not – it is that greater simplicity is desirable when drafting Interrogatories.

Discovery Without Using Discovery

While formal discovery is indispensable, attorneys should not overlook extra-judicial methods for obtaining information. For example, a useful pre-litigation tool is writing to the adverse party, if not yet represented,[16] in the hopes of getting a written response that may contain admissions or other useful information. While often a response may not come, it is well worth the try.

The Internet also provides a seemingly endless source of information. In most cases, it should be routine to Google the parties, attorneys, witnesses, involved agencies and other known factors. Since Web sites can change or disappear, your Internet search should be done at the earliest opportunity, and redone from time to time, with meaningful results saved and printed out for future use.

It is also possible to search for older versions of Web sites via various archival services that store this information and provide it for a nominal cost.

An electronic name search should be made for the parties' involvement in other cases. The New York court system, as well as that of the federal and many other states, run Web sites that provide access to case dockets, filed documents and court rules.[17] Once cases are identified, a good starting point for further investigation is to download or otherwise obtain the docket sheet, which usually names the parties and attorneys, describes the type and status of the case, and provides a chronology of the proceedings and list of filed legal papers. For reported (usually appellate) cases, a comprehensive search can be made using the various commercial legal data bases.[18] Once located, the decisions should also identify the parties and attorneys, as well as provide useful information about the lawsuit. It may also enable you to locate the appellate record (which may contain pleadings, affidavits, trial and deposition transcripts and exhibits) and briefs, which may be accessible from any of a number of major law library depositories that receive and maintain appellate records and briefs. Often, these libraries, when contacted by phone, will identify, copy and fax select pages to you for a nominal charge. You can also try contacting the attorneys of record who are often willing to provide copies for a nominal fee.

Freedom of Information (FOI) requests[19] can be used to obtain non-confidential information on file with various public agencies. Here, all types of relevant information may be available for the asking: complaints and investigations, registration and licensing information, rules and regulations, and various studies and activities. Among these, you may find information on the adverse party, including insurance and financial information, the identity of officers and employees, customer complaints, investigations, lawsuits and the like. In most instances, the initiation of an FOI request is amazingly simple, requiring only a short letter to the agency, preferably to the attention of its Freedom of Information records department or similar office, identifying what it is you are requesting. You will often be surprised by how cooperative most agencies are. Remember, however, that since you are dealing with bureaucracies, FOI requests should be sent out at the soonest opportunity.[20]

In addition to the relative ease and low cost of finding publicly available information, such information may provide an excellent source for surprising the adversary at trial. Unlike your client's own information and documents, which must be disclosed, information the attorney gathers from outside sources may be immune from discovery. As such, its disclosure may not have to occur until you actually use it, or when trial exhibits must be exchanged or pre-marked.

Disclosure from Non-Parties; the Friendly or Not-So-Friendly Way

Non-parties are another major source of information and documents. For some reason, however, many attorneys are reluctant to tap into this resource. Why that is, is not clear, for non-parties present a fertile source of information and documents.

In addition to the relative ease and low cost of finding publicly available information, such information may provide an excellent source for surprising the adversary at trial.

There are two ways to obtain information from non-parties: the friendly or not-so-friendly way. The friendly way is seeking it via voluntary means, such as by writing a letter, making a call or paying a visit. The other way is by compulsion: *i.e.*, serving the non-party with a third-party subpoena.[21] If the latter, there is a good chance that the non-party's attorney may become involved. That may help or hinder the search, depending on the attitude of the non-party and his or her lawyer. Also, in the case of compulsion, you are obligated to serve your adversary with the demand and response.[22] If voluntary means are used, however, it may be done without notice, and the fruits of your voluntarily obtained bounty may be immune from discovery.

However, there are potential risks to obtaining the information and documents via voluntary means. For one thing, the non-party may be suspicious, uncooperative or outright hostile. Two, the information and documents will not be authenticated and may be legally unreliable (*e.g.*, hearsay), leading to objections to their admissibility at trial. Those challenges may be less significant, however, if it is the adverse party's admission, you intend to use it for cross-examination, or your own client can establish its foundation (such as being the author or recipient). It may also be desirable to obtain the non-party's affidavit, which would include a recitation of the underlying facts

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and would identify annexed documentation. Since affidavits are not admissible at trial, however, if you anticipate that the non-party's testimony will be critical and he or she will not be available for trial, you should preserve the testimony via a non-party deposition.[23] Otherwise, you may find yourself scurrying around trying to locate and subpoena the non-party for trial.

Motions for Summary Judgment

Keep Biting at the Apple

Dispositive motions – whether a pre-answer motion to dismiss under CPLR 3211 arguing that the complaint does not state a cause of action,[24] based on documentary evidence[25] or other grounds,[26] or a post-answer motion for summary judgment[27] – present opportunities for various bites at the apple. However, unlike motions to dismiss, which offer many advantages with little risk for the moving defendant,[28] any party who moves for summary judgment will be revealing key elements of his or her case, and additionally, inviting a cross-motion.[29]

Summary judgment motions are also useful devices for stirring up the pot, to induce parties to come to the table and engage in settlement negotiations.

Hence, a risk assessment must be made before making the motion.

In addition to presenting an opportunity to win judgment without the necessity of trial, the summary judgment motion is a strong tool to force the adverse party to reveal its best case: evidence and theories. Indeed, as noted above, summary judgment motions can be used as the discovery device of last resort.

Summary judgment motions are also useful devices for stirring up the pot, to induce parties to come to the table and engage in settlement negotiations. They do this by creating a heightened uncertainty, whereby either party can envision summarily losing the case. It also creates an indirect communication of your case that your adversary must relay to his or her client, who must be consulted for instructions, information, affidavits and the fee for opposing the motion. This may motivate the parties to consider the certainty of settlement, rather than expending large sums to oppose the motion and risk the uncertainty of losing the case.

When Should the Motion Be Made?

In many cases, attorneys opt to move for summary judgment early in the case, before discovery is underway or reciprocated. For those attorneys, it is an attempt to win without going through or completing discovery, either because they feel they don't need any, or perhaps, to prevent adverse parties from having their turn at discovery. In fact, under state practice, the motion automatically stays discovery.[30] A party (usually the defendant) may also benefit from the resulting delay during the time the motion is *sub judice* and the stay in effect.

In other cases, attorneys prefer a more traditional approach by moving for summary judgment after discovery has been completed. In that situation, the motion is usually fairly comprehensive and may act as a prelude to trial. Recognizing that many motions follow the completion of discovery, and so as to avoid delaying a trial pending a decision on a late-made motion, the CPLR requires that motions for summary judgment be made within 120 days after the filing of the Note of Issue, unless a shorter time has been set by the court.[31] A defendant may therefore opt to move before the Note of Issue is filed, since its pendency will delay the plaintiff's ability to file the Note of Issue, as the Certificate of Readiness requires that there be no outstanding motions.[32] On the other side of the coin, the plaintiff would be wise to first file the Note of Issue and then serve the motion, so that the case continues to advance on the trial calendar while the motion is pending.[33]

Parties may also attempt more than one motion for summary judgment at different points in the suit. However, courts look askance on successive motions, although they usually can pass muster when strong grounds exist.[34]

How Much Should Be Revealed in the Motion?

Many attorneys, especially those opposing these motions, make the common mistake of not appreciating the threat of the motion being granted. Those are the parties who most often lose and are then compelled to explain to their clients why the case is not going to trial and a decent appellate record not preserved. Whether the moving or opposing party, you are well-advised to take these motions seriously and give them your best shot. That means following the requirements that the affiant be someone with first-hand knowledge of the facts, annexing relevant exhibits and presenting, via a speaking affirmation,[35] or preferably a memorandum of law,[36] a strong legal argument. Counsel should also be mindful that they are preserving a record for a potential appeal.

Having said that, there is room for counsel, whether he or she represents the moving or opposing party, to make assessments of how much of the case – evidence and theories – should be revealed in the motion papers. On the one hand, revealing too little may result in the loss of the motion, while on the other, too much may give away the strategic edge of surprise should the motion be lost and the case continue on to trial. For the movant,

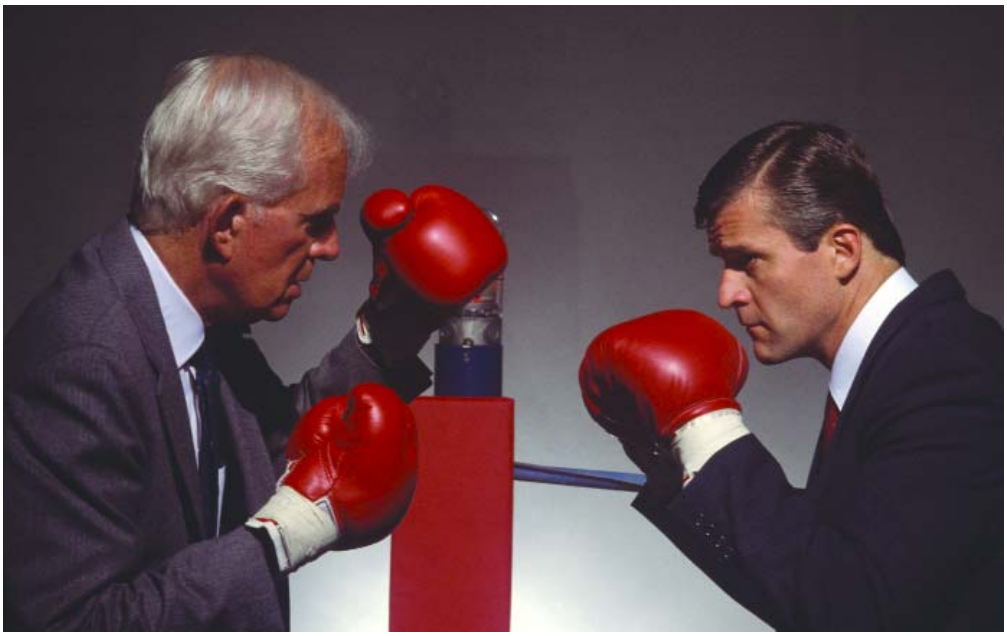
there may be a feeling that less is at stake, as a loss may mean going to trial. On the other hand, more may be at stake for the respondent. This imbalance in risks can sometimes be deceptive, however, if there is a significant possibility that summary judgment can be granted to the respondent. In fact, a respondent can gain some advantages by cross-moving. One, it can shift the momentum by obviously turning the threat around and putting the original movant on the defense. Two, the time for the original movant to respond to the cross-motion is typically short.[37] Three, the cross-movant may finagle gaining the last word if the court accepts its sur-reply.

Are Partial Summary Judgments Worth the Effort?

The rules also provide for partial summary judgments.[38] Partial could mean a judgment of liability, an order granting or dismissing less than all causes of action, or a decision on the validity of the affirmative defenses. In addition to the general strategic assessments that need to be made for any motion, there are special considerations for partial summary judgment motions. One of these may be whether winning a partial summary judgment helps or hinders the case. For example, when suing for personal injuries (including malpractice), seasoned trial attorneys will usually want the jury to hear the nature and extent of the defendant's wrongful behavior. On the other hand, where the defendant's conduct is sympathetic, or its negligence not commensurate with the seriousness of the claimed injury, it may be preferable to keep that from the jury. Many of these considerations become less relevant, however, when the applicable practice rules require bifurcated trials.[39] In appropriate cases, it may also be possible to request an immediate hearing on specific issues.[40]

The Psychological Effect of the Motion

Some argue that there is a psychological cost to making and losing a motion; that it may demoralize the movant and fortify the resolve of the opposing party. While there may be some truth to this, a litigation has so many ups and downs that it is hard to assess which has the greatest, if any, impact. For example, a party subject to a grueling and humiliating deposition may suffer an emotional setback way out of proportion to the actual harm of what may be, in reality, irrelevant or inadmissible testimony.



Likewise, while the emotional needs of varying clients differ greatly and often evade our understanding, there are many tangible assessments that can easily be made. All of these factors weigh in assessing the feasibility of all strategic or tactical decisions: *i.e.*, the cost and risks of taking (or not) some action versus the likely benefit or detriment to the outcome of the case. To be sure, the psychological and emotional needs of the client – *i.e.*, "hand holding" – must not be ignored. However, except in the rarest of cases, it does not reign supreme.

Motions to Reargue or Renew

A party can seek to reargue or renew the grant or denial of any motion, thus obtaining another bite at the apple.[41] This relief is often sought following the loss of a summary judgment motion. Surprisingly, it is not as uncommon as one would think for a judge to vacate his or her original decision when confronted with one of these motions. However, when engaging in the original motion – whether as the moving or opposing party – you should not count on being one of those cases, and hence, you should always give the original motion your closest attention.

Although most parties typically entitle their post-decision motions as both "reargument and/or renewal," the practitioner should be mindful of the difference between the two. Each of these motions has a distinctive basis, a significant difference in timeliness and, most critical of all, a big difference in appealability.[42]

Is It Reargument or Renewal?

A reargument motion is generally based on the same facts and body of law as the original motion, the premise of the motion being that the court overlooked or misapprehend-

ed the applicable facts or law.[43] Paradoxically, while the standard basis for making the motion calls for an improved reiteration of the original argument, the usual opposition also argues just that: movant is substantively saying nothing new. Thus, while the moving papers are typically fairly detailed and lengthy, the oppositions are often very short, saying only that the court was correct in its original decision.[44]

A renewal motion, as spelled out in the rules, is based on newly discovered evidence or changes in the law that would have changed the results of the underlying motion.[45] "Newly discovered" means evidence that, despite due diligence, was unknown at the time of the original motion and therefore not then brought to the court's attention.[46] Notwithstanding these standards, parties often try to use the motion as a way of making up for deficiencies in the original motion, as well as to supplement the appellate record.[47]

Timeliness

While the rules are explicit on when a motion for reargument must be made,[48] they are open-ended on motions to renew.[49]

Appealability – a Minefield of Misunderstanding

Perhaps, the most significant consideration involves issues of appealability. It is a bit complicated.

First, the general rules:

- The denial of a motion to reargue is not appealable.
- The grant of a motion to reargue is appealable.
- The denial or grant of a motion to renew is appealable.[50]

Second, the above-stated rules are a minefield. To get it right requires a deeper understanding of the nature of these motions.

Technically, these motions, whether to reargue and/or renew, have two component parts: One, the motion actually begins with a request for the court to grant leave (*i.e.*, permission) to make the motion; and two, if leave is given, that the court, upon such reconsideration, vacate or modify its original decision. Accordingly, the typical Notice of Motion would contain a request for relief that includes something like the following language:

> . . . movant respectfully requests that the court grant the undersigned leave to reargue and/or renew the court's decision dated _____, and upon such reconsideration, that the court vacate the above-described decision and in its stead enter an order [granting/denying] _____ [relief].[51]

Hence, the decisions of these motions should also contain two basic components: first, the initial recital that leave is being granted or denied; and second, if leave is granted, the substantive decision. If the court states that it is denying leave to reargue, the decision is not appealable. If, on the other hand, the court states that it is granting leave to reargue, the decision is appealable, whether or not the court adheres to the original decision.[52]

The grant or denial of leave to renew is technically appealable, however. Although, as would be expected, simply naming it a renewal motion is not enough, as it is not a question of form over substance. In such cases, where an appeal is taken, it would be up to the appellate court to decide – whether upon a pre-argument motion to dismiss the appeal or in deciding actual full appeal – whether it is really a renewal motion.[53]

In any event, where the decision on the reconsideration motion is not appealable, there are two consequences: one, the only appeal that is available is from the original underlying decision – assuming that a timely Notice of Appeal had been served and filed and the time to perfect has not run out. Two, the record on appeal from the original underlying decision cannot be properly supplemented by any new facts or documents submitted on the reconsideration motion. On the other hand, if the reconsideration decision is appealable, an appeal therefrom also brings up for review the original underlying decision.[54]

Whatever the case, because of the unpredictability of how the motion will be viewed and decided by the lower court, and subsequently, by an appellate court – which determines whether it is independently appealable – it is always advisable to file a Notice of Appeal from the original underlying decision and thereafter not allow the time to perfect to pass. Ideally, the motion to reargue and/or renew should be expeditiously made, so that, if denied, a timely appeal can then be taken from the original order.[55]

Want of Prosecution

While the CPLR seemingly provides for dismissal for failure to prosecute,[56] the rule is actually very limited in that it sets forth express predicate conditions for dismissal: that at least one year has passed since issue has been joined and the court or party seeking dismissal served a written demand that the adverse party (1) resume prosecution and (2) serve a note of issue within 90 days.[57] A separate rule applies to cases struck from the trial calendar. There, the action is automatically considered abandoned if not restored within one year.[58]

Motions *in Limine*

In few cases, an attorney may submit a motion *in limine* to obtain advance rulings (*e.g.*, limits) on specific evidentiary issues or substantive questions regarding the merits of the suit or defenses.[59] These motions, however, are not always well received and risk not being ruled on in time for trial.[60] For substantive issues, the better practice would have been to make a timely motion for summary judgment. If that time has run out, however, then the motion *in limine* presents the last opportunity before trial. For evidentiary questions, however, it may make sense to

not make any motion and just wait for trial to state your objections (side-armed with a concise bench memo or supporting authorities). That way, the adversary has little or no opportunity to prepare to refute your argument and, if the objection is sustained, to come up on the fly with alternative evidence or witnesses.

Summary

As early as possible in the case, a strategy that includes timely and well-thought out discovery requests, as well as planning for potential dispositive motion practice, is essential for a successful litigation culminating in a winning judgment or desirable settlement.

In future articles, we will discuss planning for and trying the case, appellate strategies, provisional remedies and alternative dispute resolution. ■

1. CPLR 3106(a), 3132. Although, CPLR 3120 (the provision for Deposition and Interrogatory – D&I – notices) does not provide for priority, priority can still be achieved by also requesting documents in the Notice to Take Deposition. *See* CPLR 3111.

2. *See* Fed. R. Civ. P. 26(d).

3. Much can also be learned about adversaries' cases by paying attention to what they are asking, especially when they are taking depositions.

4. 22 N.Y.C.R.R. § 202.21.

5. *See* CPLR 3101 *et seq.*, *and especially*, CPLR 3102(a). *Cf.* Fed. R. Civ. P. 26–37.

6. Bills of Particulars are unique to New York. *See* CPLR 3041–3044. Under CPLR 3130, except in matrimonial actions, a party must make a choice between demanding a Bill of Particulars or using Interrogatories. In personal injury cases, however, CPLR 3130(1) *suggests* the use of a Demand for a Bill, as otherwise it provides that Interrogatories and a deposition may not be sought from the same party. CPLR 3043 also prescribes the questions that may be asked in a Demand for a Bill in personal injury cases. In all other cases, while there may be some technical advantages to seeking a Bill of Particulars, such as it is considered a pleading and thus *binding*, there are a number of disadvantages which favor the use of Interrogatories, when available. For example, Demands for a Bill are limited to seeking *amplification* of affirmative allegations in the pleadings (*i.e.*, allegations of the complaint and affirmative defenses and counterclaims). *See, e.g.*, *Graves v. County of Albany*, 278 A.D.2d 578, 717 N.Y.S.2d 420 (3d Dep't 2000); *Orros v. Yick Ming Yip Realty, Inc.*, 258 A.D.2d 387, 685 N.Y.S.2d 676 (1st Dep't 1999). Thus, there is nothing to amplify for mere denials. Demands cannot be used for obtaining evidentiary information and material. *Napolitano v. Polichetti*, 23 A.D.3d 534, 806 N.Y.S.2d 629 (2d Dep't 2005); *Franklin, Weinrib, Rudell & Vassallo v. Stallato*, 240 A.D.2d 301, 658 N.Y.S.2d 622 (1st Dep't 1997). Also, Bills of Particulars only need to be verified when the proceeding pleadings are verified or when used in negligence actions. CPLR 3020(b), 3044. But, even then, there are numerous scenarios where the verification may be made by the attorney rather than his or her client. CPLR 3020(d). On the other hand, the scope of Interrogatories are much broader as they can be used to seek information and material relevant to the case, and must always be sworn to by the actual party. CPLR 3133(b). If given the choice, I generally opt for Interrogatories.

7. CPLR 3101(e).

8. CPLR 3101(f).

9. 22 N.Y.C.R.R. § 202.17. In addition to medical authorizations, the case may call for authorizations for employment records, school records and collateral source reimbursements. *See* CPLR 4545.

10. CPLR 3101(i). Aside from seeking photographs of the scene of the accident and/or injured party, it is essential to learn of any surveillance tapes that may be created and used against your client.

11. When a court gets involved in contentious discovery disputes, the judge's reaction as to which party is in the right is often unpredictable and can lead to the court's continued impatience.

12. 22 N.Y.C.R.R. § 202.12. For special rules for qualifying commercial cases, *See* 22 N.Y.C.R.R. § 202.70 at Rule 7 *et seq*.

13. The PC Conference typically precedes most discovery motions, such as those seeking protective orders under CPLR 3103, compelling discovery under CPLR 3124 or seeking sanctions for abuse or non-compliance under CPLR 3126. Unlike earlier versions of the CPLR, which required the objecting party to make a timely motion for a protective order, under the current rules, a party need only serve a timely statement of its objections under CPLR 3122(a) and 3133(a). *See also* 22 N.Y.C.R.R. §§ 202.7 (affirmations of good-faith attempt to resolve issues), 202.8(f).

14. CPLR 3123.

15. Fed. R. Civ. P. 33(a) limits Interrogatories to 25 questions, including discrete subparts. *Cf.* Local Federal S.D. Rule 33.1 which places even greater restrictions on the use of Interrogatories. *Cf.* 22 N.Y.C.R.R. § 202.70 at Rule 11(c) (court may set limits in commercial cases).

16. 22 N.Y.C.R.R. § 1200.35(a): "During the course of the representation of a client a lawyer shall not: (1) Communicate or cause another communication on the subject of the representation with a party the lawyer knows to be represented by a lawyer in the matter unless the lawyer has the prior consent of the lawyer representing such other party." While the parties may communicate directly, subsection b of the Rule sets parameters on the lawyer's involvement: "[U]nless prohibited by law, a lawyer may cause a client to communicate with a represented person, if that person is legally competent, and counsel the client with respect to those communications, *provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place*" (emphasis added).

The rule applies where there is actual knowledge that the adverse party is represented by counsel, *Corneroli v. Borghi*, 11 A.D.3d 409, 783 N.Y.S.2d 572 (1st Dep't 2004), and has been applied where a party knows or should have known that the adverse party was represented by counsel. *In re Harris*, 259 A.D.2d 170, 694 N.Y.S.2d 678 (2d Dep't 1999). However, even if a plaintiff is aware that the defendant will be represented by an insurance carrier, but there has not yet been an appearance by counsel, the plaintiff is not prohibited from contacting the defendant. *McHugh v. Fitzgerald*, 280 A.D.2d 771, 719 N.Y.S.2d 785 (3d Dep't 2001). With respect to corporate parties, the Court of Appeals has held that the rule extends to employees "whose acts or omissions in the matter under inquiry are binding on the corporation . . . or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel." *Niesig v. Team I*, 76 N.Y.2d 363, 373, 559 N.Y.S.2d 493 (1990).

17. *See* <www.courts.state.ny.us>; <www.uscourts.gov>. A number of law schools and other institutions run Web sites that may provide less comprehensive, but free access to some decisions and court proceedings.

18. *See* <www.westlaw.com>; <www.lexis.com>.

19. *See, e.g.*, N.Y. Public Officers Law §§ 84 *et seq.*; 5 U.S.C.A. § 552.

20. As one would expect, if a FOI request is denied, they can usually be challenged via administrative and judicial remedies. Public Officers Law § 89(5)(c); 5 U.S.C.A. § 552(a)(4)(B).

21. The subpoena can be for testimony and/or documents. *See* CPLR 2301, 3107, 3110(a)(2), (3), 3120; Fed. R. Civ. P. 30(b)(1), 34(c), 45.

22. CPLR 3120(3) requires that a copy of the subpoena *duces tecum*, as well as notice stating the availability for discovery and inspection of the items produced in response, be served on all parties.

23. CPLR 3117(a)(3) lists the situations (*e.g.*, unavailability) when the non-party deposition can be used at trial.

24. CPLR 3211(a)(7); Fed. R. Civ. P. 12(b).

25. CPLR 3211(a)(1).

26. Other grounds for a motion to dismiss include lack of jurisdiction, prior pending action, running of the statute of limitations, *res judicata*, collateral *estoppel*, infancy or other disability of the moving party, absence of a necessary party, etc. *Cf.* CPLR 3211(a); Fed. R. Civ. P. 12(c), (h).

27. CPLR 3212; Fed. R. Civ. P. 56

28. For a fuller discussion of motions to dismiss and requirements for challenging certain defenses and waivers, *See* Sanford F. Young, *Conventional Wisdoms or Mistakes: The Complaint and the Response*, N.Y. St. B.J. (June 2004) pp. 33–34.

29. In fact, CPLR 3212(b) provides that "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion." Likewise, the Appellate Division has the authority to search the record and award summary judgment to a nonmoving party. *JMD Holding Corp. v. Congress Fin. Corp.*, 4 N.Y.3d 373, 385, 795 N.Y.S.2d 502 (2005); *Halloway v. State Farm Ins. Cos.*, 23 A.D.3d 617, 805 N.Y.S.2d 107 (2d Dep't 2005), as well as to a non-appealing party. *Nobre v. NYNEX Corp.*, 2 A.D.3d 602, 769 N.Y.S.2d 556 (2d Dep't 2003). However, the Court of Appeals has held that it cannot grant summary judgment to a nonmoving party, *JMD Holding Corp.*, 4 N.Y.3d 373, or a non-appealing party, *Merritt Hill Vineyards Inc. v. Windy Heights Vineyard, Inc.*, 61 N.Y.2d 106, 109, 472 N.Y.S.2d 592 (1984).

30. Under state practice, service of a motion to dismiss or for summary judgment automatically stays discovery. CPLR 3214(b). The only exceptions are motions based solely on the claim of improper service of process. *Id*. However, although the stay is automatic, the court can direct otherwise if there is a legitimate need for discovery. *See, e.g.*, *Reilly v. Oakwood Heights Cmty. Church*, 269 A.D.2d 582, 704 N.Y.S.2d 829 (2d Dep't 2000).

31. CPLR 3212(a). The 120-day time limit is strictly enforced and can only be extended for good cause for the delay in making the motion. *See Brill v. City of N.Y.*, 2 N.Y.3d 648, 652, 781 N.Y.S.2d 261 (2004); *Scherrer v. Time Equities, Inc.*, 2006 WL 488737 (1st Dep't); *Maciejewski v. 975 Park Ave. Corp.*, 10 Misc.3d 1079(A); 2005 WL 3734354 (Sup. Ct., Kings Co.).

32. 22 N.Y.C.R.R. § 202.21(a), (b).

33. Once the case reaches a ready-trial calendar, you cannot count on postponements to allow time for a decision on the motion, unless you are willing and able to strike the case and restore it later on. *See* CPLR 3404. Likewise, if an appeal is taken from the denial of summary judgment, a further postponement of trial will require a stay from the appellate court, which may not be readily granted.

34. Successive motions for summary judgment are discouraged in the absence of newly discovered evidence or sufficient cause. *See, e.g., Ralston Purina Co. v. Arthur G. McKee & Co.*, 174 A.D.2d 1060, 572 N.Y.S.2d 125 (4th Dep't 1991). However, it is subject to discretion. *See, e.g., W. Joseph McPhillips, Inc. v. Ellis*, 8 A.D.3d 782, 778 N.Y.S.2d 541 (3d Dep't 2004) (second motion followed discovery and was based on different grounds); *Baker v. R.T. Vanderbilt Co., Inc.*, 260 A.D.2d 750, 688 N.Y.S.2d 726 (3d Dep't 1999) (considerable additional discovery warranted second motion).

35. *See* CPLR 2106. *Cf.* 28 U.S.C. §1746; Local Federal S.D./E.D. Rule 1.10.

36. In New York state courts, it is not uncommon for attorneys to use *speaking* affirmations as the place for presenting legal arguments. However, such practice is best reserved for the simplest of motions – usually procedural. The better practice, which is mandatory in the local federal courts, is to use memoranda. S.D./E.D. Civ. R. 7.1 requires that "all motions and all oppositions thereto shall be supported by a memorandum of law." Also, Federal S.D./E.D. Civ. R. 56.1(a) requires that a motion for summary judgment be accompanied by "a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." Failure to annex the statements to the moving papers can be grounds for denying the motion. Subsection (b) likewise requires that the opposing papers "include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party, and if necessary, additional paragraphs containing a separate, short and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried." Subsection c provides that unless specifically controverted in the opposing party's statement, the facts will be deemed admitted for purposes of the motion. *See also* 22 N.Y.C.R.R. § 202.70 at Rule 19 (court may require these statements in qualifying commercial cases).

37. *See* CPLR 2214(b). Even when the parties stipulate, the calendar practice of the court or assigned judge will severely limit adjournments. In particular, 22 N.Y.C.R.R. § 202.8(e)(1) limits the total number of adjournments to three, aggregating no more than 60 days. For that reason, some cooperating counsel postpone filing, so that an amiable briefing schedule can be worked out, and a new return date written into the notice of motion that is eventually filed.

38. *See* CPLR 3212(c); (e); Fed. R. Civ. P. 56(d).

39. While 22 N.Y.C.R.R. § 202.42 encourages the use of bifurcated trials in personal injury cases, the supreme courts do not always follow this practice. For example, while bifurcated trials are preferred in the Second Department, they are less common in the First Department. Nevertheless, a unified trial may be appropriate where the nature and extent of the plaintiff's injuries are relevant to the determination of the cause of the injuries, *Echeverria v. City of N.Y.*, 166 A.D.2d 409, 560 N.Y.S.2d 473 (2d Dep't 1990), or where the issues of liability and damages are interrelated and pervasive. *Nat'l Broadcasting Co., Inc. v. John Gallin & Son, Inc*., 292 A.D.2d 192, 730 N.Y.S.2d 48 (1st Dep't 2002). In unique cases, courts may direct a *reverse bifurcation*, *i.e.*, the first trial is to determine damages, followed by the liability trial. This unusual procedure is sometimes employed for mass tort or strict liability cases involving a number of defendants, so as to encourage settlement among the defendants. *See, e.g.*, *In re N.Y. County DES Litig. v. Abbott Labs.*, 211 A.D.2d 500, 621 N.Y.S.2d 332 (1st Dep't 1995); *Pioli v. Morgan Guar. Trust Co. of N.Y.*, 199 A.D.2d 144, 605 N.Y.S.2d 254 (1st Dep't 1993); *In re N.Y. City Asbestos Litig.*, 173 Misc. 2d 121, 660 N.Y.S.2d 803 (Sup. Ct., N.Y. Co. 1997).

40. *See* CPLR 3212(c). A jury trial may also be available if timely demanded. CPLR 2218. *See also* Fed. R. Civ. P. 56(d).

41. CPLR 2221. *Cf.* Fed. R. Civ. P. 60; Local Federal S.D./E.D. Rule 6.3.

42. A combined motion to reargue and/or renew must separately identify and support each aspect of the motion, and the court is required to separately state its decision. CPLR 2221(f). As we will see below, this has implications for the questions of appealability.

43. CPLR 2221(d): "A motion for leave to reargue . . . (2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion."

44. While such simple oppositions are often all that is needed, you should be careful not to take the moving papers for granted.

45. CPLR 2221(e): "A motion for leave to renew . . . (2) shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and (3) shall contain reasonable justification for the failure to present such facts on the prior motion."

46. *See, e.g., Elder v. Elder*, 21 A.D.3d 1055, 802 N.Y.S.2d 457 (2d Dep't 2005) (renewal motion based on evidence that could have with due diligence been discovered earlier and on matters of public record properly denied); *Luna v. Port Auth. of N.Y. & N.J.*, 21 A.D.3d 324, 800 N.Y.S.2d 170 (1st Dep't 2005) (renewal motion was properly based on deposition which the plaintiff was unable to obtain earlier despite due diligence).

47. As one would expect, and to the disappointment of the losing party, the motion must be made to the same judge who decided the original motion, unless he or she is unable to hear it. CPLR 2221(a), (c).

48. CPLR 2221(d)(3) requires that a motion to reargue be made within 30 days after service of a copy of the order with notice of entry; this time limit is not applicable to the Appellate Division or Court of Appeals, which set forth their own time limits.

49. A motion for leave to renew is not subject to the same time constraints as a motion for leave to reargue, *Luna*, 21 A.D.3d 324, and may be made after the time period to appeal from the original order has expired. *Patterson v. Town of Hempstead*, 104 A.D.2d 975, 480 N.Y.S.2d 899 (2d Dep't 1984).

50. CPLR 5701(a)(2)(viii) includes in the list of orders that are *appealable as of right*, an order which "grants a motion for leave to reargue made pursuant to subdivision (d) of rule 2221 or determines a motion for leave to renew made pursuant to subdivision (e) of rule 2221."

51. Older practitioners will recall, and some judges may still require, that these motions be made by order to show cause. However, today, most of these motions are made by Notice of Motion, with the combined request set forth above.

52. CPLR 5701(a)(2)(viii). *See Lorenz Diversified Corp. v. Falk*, 15 A.D.3d 453, 789 N.Y.S.2d 446 (2d Dep't 2005) (appeal brings up for review supreme court order which, upon granting leave to reargue, adhered to prior order granting motion to strike defense). *See also Rubeo v. Nat'l Grange Mut. Ins. Co.*, 93 N.Y.2d 750, 755, 697 N.Y.S.2d 866 (1999) (CPLR 5517(a)(1) was enacted to ensure that an appeal remains viable where the trial court grants reargument of the order appealed from, and then on reargument adheres to its original decision).

53. *See, e.g., Malankara Archdiocese of Syrian Orthodox Church in N. Am. v. Malnkara Jacobite Ctr. of N. Am., Inc.*, 24 A.D.3d 626, 808 N.Y.S.2d 327 (2d Dep't 2005) (plaintiff's motion denominated as one for leave to *reargue and renew* is actually one to *reargue*, the denial of which is not appealable. *Accord*, *Lichtenstein v. Barenboim*, 23 A.D.3d 440, 803 N.Y.S.2d 916 (2d Dep't 2005); *Davis v. City of N.Y.*, 11 A.D.3d 254, 782 N.Y.S.2d 908 (1st Dep't 2004).

54. *See* CPLR 5517(b): "A court reviewing an order may also review any subsequent order made upon a motion specified in subdivision (a), if the subsequent order is appealable as of right." CPLR 5517(a)(3) similarly provides that an appeal is unaffected by the denial of a motion to renew. *See In re Grasso*, 24 A.D.3d 765, 2005 WL 3542655 (2d Dep't Dec. 27, 2005).

55. The practitioner is well advised to make the reargument/renewal motion quickly, and if necessary, timely move the appellate court for an enlargement of time, so as to preserve the appeal from the original underlying order. Later on, if reargument/renewal motion is lost, and if appealable, a notice of appeal should be served and filed from the reconsideration decision, so that both appeals are perfected together. *See* CPLR 5517.

56. CPLR 3216(a) states: "Where a party unreasonably neglects to proceed generally in an action or . . . unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, may dismiss the party's pleadings on terms. Unless the order specifies otherwise, the dismissal is not on the merits." *Cf.* Fed. R. Civ. P. 56(d).

57. *See* CPLR 3216(b) (requirements of the notice). *Cf.* Fed. R. Civ. P. 41(d).

58. CPLR 3404. *See also* CPLR 3216(f).

59. *See* 22 N.Y.C.R.R. § 202.26 & 202.70 at Rule 27 (qualified commercial cases).

60. Many judges are reluctant to decide these motions and will suggest that you wait until you get before the judge who will preside over the trial. By the time that happens, however, it may be way too late.

"The following criticism is directed only at those among you who, in the past 25 minutes, have not managed to bring in at least one new client."

BY DAVID PAUL HOROWITZ

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Is *Frye* Still Generally Accepted?

One of the first *Burden of Proof* columns[1] was an overview of expert witness practice in New York state courts, a topic worthy of greater attention in several respects. One of those areas is the topic of this column, and the next: challenges to the admissibility of expert testimony at trial based upon the technical or scientific basis of, and the methodology utilized by, the proffered expert. Litigating in this area requires understanding the development of, and tensions between, the *Frye*[2] (this column) and *Daubert*[3] (next column) standards, and their application by the courts of this state. The original column cautioned "[t]his is an evolving area, and practitioners are advised to pay close attention to new cases in this area, particularly any Appellate Division pronouncements." If I must say so myself, good advice – then, now, and for the foreseeable future.

Frye and *Daubert* provide a framework for trial judges in deciding whether expert testimony is to be permitted and, if the expert is permitted to testify, whether to limit the scope of the expert's testimony. *Frye*'s "general acceptance" test reigned in New York courts and in federal courts from 1923 to 1993. However, in 1993 the United States Supreme Court decided *Daubert*, holding that Federal Rule of Evidence 702 superceded *Frye*. Thereafter, in federal court, *Frye* was replaced with *Daubert*. The role of federal judges in determining whether a jury should hear a particular expert's testimony was re-cast, with the judge acting as "gatekeeper." General acceptance as a measure of reliability, while still a factor to be considered, was no longer the sole, or even key, test. More on *Daubert* next issue. For now, back to *Frye*.

In 1923 the District of Columbia Circuit decided *Frye v. United States*, reviewing a trial court's ruling on the admissibility of expert testimony of the results of a "deception test," *a.k.a.* a lie detector test. The Circuit Court, quoting directly from the defendant's brief, explained when expert testimony is appropriate:

> When the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to which the question relates are admissible in evidence.[4]

Assuming expert testimony was appropriate, what was the role, and what standards governed the role, of the trial judge in vetting the basic soundness of the proposed testimony? The *Frye* court, in what has become known thereafter in the vernacular as the "*Frye* test," explained:

> Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[5]

"General acceptance in the particular field" became the *sine qua non* for the reliability of expert testimony. New York state courts readily adopted *Frye* and, despite a lively debate in some of the lower courts, the New York Court of Appeals continues to follow *Frye*.

In determining whether expert testimony is appropriate, trial courts in New York must carefully exercise their discretion. In deciding when jurors would benefit from the testimony of an expert,

> courts should be wary not to exclude such testimony merely because, to some degree, it invades the jury's province. As we have previously noted, "expert opinion testimony is used in partial substitution for the jury's otherwise exclusive province which is to draw 'conclusions from the facts.' It is a kind of authorized encroachment in that respect."[6]

In evaluating the reliability of expert testimony, *Frye* may be satisfied in three ways. Professor Richard Farrell, in *Prince, Richardson*, explains:

> First, general acceptance may be so notorious that the court may take judicial notice of it. . . . Second, acceptance may be established by reference to "legal writings and judicial opinions." . . . Third, if acceptance cannot be established by either judicial notice or the legal

> literature, then the Trial Judge may conduct a hearing at which the proponent may establish admissibility by offering evidence of acceptance, including the expert's own testimony (citations omitted).[7]

Twice since the United States Supreme Court decided *Daubert*, the New York State Court of Appeals has reaffirmed that *Frye* remains the standard in New York,[8] quoting *verbatim* from the original opinion.[9]

A *Frye* challenge may arise at trial, in a hearing before trial as part of a motion *in limine*, or as part of a summary judgment motion.[10]

In a 2004 decision, *Marsh v. Smyth*,[11] the First Department examined the preclusion of two of plaintiff's experts in a medical malpractice action following a *Frye* hearing, on the grounds that their theories concerning the positioning of the arm of the injured party during surgery were not generally accepted in the medical field. Citing *Frye,* the First Department held this was error: "The experts' testimony, and the supporting medical literature, satisfied the *Frye* standard, and a jury should be permitted to hear the testimony."[12]

In *Zito v. Zabarsky*,[13] a Second Department decision citing Justice Saxe's concurring opinion in *Marsh*, that court, in reviewing a trial court's preclusion of plaintiff's medical experts in a medical malpractice action, reminded litigants that the "burden of proving general acceptance rests upon the party offering the disputed expert testimony."[14] Acknowledging that the alleged causal link between an excessive dose of Zocar and the onset of polymyositis was a novel one, warranting a *Frye* hearing, the Second Department held that the trial court had "erred in applying *Frye* too restrictively,"[15] precluding the expert on the basis that no medical literature reported the alleged causal connection:

> In that regard, I agree with the statement in the concurring opinion of Justice David B. Saxe of the Appellate Division, First Department, in [*Marsh*] that it is not necessary "that the underlying support for the theory of causation consist of cases or studies considering circumstances exactly parallel to those under consideration in the litigation. It is sufficient if a synthesis of various studies or cases reasonably permits the conclusion reached by the plaintiff's expert." As stated in *Beck v Warner-Lambert Co.* (NYLJ, Sept. 13, 2002, at 18, col 2), which also involved a novel scientific opinion concerning the causal relationship between the ingestion of a drug and the development of a disease, "general acceptance does not necessarily mean that a majority of the scientists involved subscribe to the conclusion. Rather it means that those espousing the theory or opinion have followed generally accepted scientific principles and methodology in evaluating clinical data to reach their conclusions."[16]

After carefully reviewing the proof that was put forward a trial, the Second Department concluded:

> Moreover, the trial court, while purporting to credit the deductive reasoning of the plaintiff's experts, apparently believed that the *Frye* test could only be satisfied with medical texts, studies, or other literature which supported the plaintiff's theory of causation under circumstances virtually identical to those of the plaintiff. However, the *Frye* test is not that exacting.
>
> The fact that there was no textual authority directly on point to support the experts' opinion is relevant only to the weight to be given the testimony, but does not preclude its admissibility.
>
> A strict application of the *Frye* test may result in disenfranchising persons entitled to sue for the negligence of tortfeasors. With the plethora of new drugs entering the

> market, the first users of a new drug who sustain injury because of the dangerous properties of the drug or inappropriate treatment protocols will be barred from obtaining redress if the test were restrictively applied.[17]

Finally, addressing the trial court's having conducted what it called a *Frye/Daubert* hearing, the Second Department stated, in a footnote, that "New York has not adopted the *Daubert* standard, but rather continues to adhere to the *Frye* test for determining the admissibility of novel scientific evidence."[18]

Frye's general acceptance test continues to be followed in the Third[19] and Fourth Departments.[20]

With *Frye* so firmly entrenched in New York state court practice *vis-à-vis* reliability and claims of novel scientific evidence, does *Daubert* have a role to play in our state courts? Next issue's column will, I hope, shed some light on this question. ■

1. David Paul Horowitz, *Burden of Proof*, "Expert Witness Primer," N.Y. St. B.J. (Feb. 2005) p. 18.
2. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
3. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).
4. *Frye*, 293 F. at 1015.
5. *Id.*
6. *People v. Lee*, 96 N.Y.2d 157, 726 N.Y.S.2d 361 (2001) (quoting *People v. Jones*, 73 N.Y.2d 427, 430–31, 541 N.Y.S.2d 340 (1989) (internal citation omitted) (quoting *People v. Cronin*, 60 N.Y.2d 430, 432, 470 N.Y.S.2d 110 (1983))).
7. Prince, Richardson on Evidence, § 7-311 (11th ed. 2005).
8. *People v. Wesley*, 83 N.Y.2d 417, 611 N.Y.S.2d 97 (1994) (DNA profiling was properly admitted at trial under the *Frye* test); *see People v. Wernick*, 89 N.Y.2d 111, 651 N.Y.S.2d 392 (1996) (expert testimony was required to be based upon scientific principles sufficiently established to have gained general acceptance).
9. *Wesley*, 83 N.Y.2d 417.
10. *See, e.g.*, *Heckstall v. Pincus*, 19 A.D.3d 203, 797 N.Y.S.2d 445 (1st Dep't 2005).
11. 12 A.D.3d 307, 785 N.Y.S.2d 440 (1st Dep't 2004).
12. *Id.*
13. No. 2004-01148, 2006 WL205067 (2d Dep't Jan. 24, 2006).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *People v. Cole*, 24 A.D.3d 1021, 807 N.Y.S.2d 166 (3d Dep't 2005).
20. *People v. Wooten*, 283 A.D.2d 931, 725 N.Y.S.2d 767 (4th Dep't 2001).

President's Message
Continued From Page 6

is very important. At the beginning of my term, I appointed Francis Musselman as chair of the Committee on Law Practice Management. He is the former managing partner of Milbank Tweed Hadley & McCloy LLP and one of the first chairs of the ABA Law Practice Management Section. Fran assembled an impressive committee of 32 members with outstanding qualifications on issues such as technology, marketing, human resources within the firm, practice management, and finance. The committee conducted an online survey of law firms in New York to determine the needs of our members in managing their law practices. The committee was one of the most prolific sponsors of programs at the January 2006 Annual Meeting, and its members are publishing a regular column on law practice management in the New York State Bar Association *Journal*. In addition, they are preparing a law practice management guide, an online database of law practice management resources, and a revamped Web page. Fran Musselman and his committee have also scheduled two upcoming seminars on attorney escrow accounts and ethical marketing. I am grateful to Fran and the committee members, to Terry Brooks who has been instrumental in launching this program, and to Pam McDevitt, the new LPM Director.

In my first column, as a part of emphasizing the legal profession's indispensable role in the administration of justice, I talked about the importance of professionalism and the attempt to teach it in CLE programs. I am therefore delighted that we are having what I believe will be an outstanding professionalism program in New York City in May. Through the efforts of Paul Saunders, partner at Cravath, Swaine & Moore, LLP in New York City, and Terry Brooks, we are assembling a group of highly esteemed practitioners to discuss professionalism and the practice of law. The four-hour session will be taped and will be sufficient to fulfill the CLE ethics requirements for a two-year period. I hope that the program will be purchased statewide and will inspire and assist practitioners for a number of years.

I also discussed in my first column the fact that members sometimes feel remote from the Association. We need to remove that remoteness, as much as we can in an organization in a state this large. I've been using e-mails to reach out to members, asking them to join committees, asking their opinions on topics and telling them what's happening; and people seem to be pleased with the approach, so long as it is not overused.

Another approach I've used to reach out is to get out on the road; whenever invited, I go to local bar associations to speak. We have also organized receptions for members in a number of judicial districts, which gives me an opportunity to get people together socially and provide brief updates about issues affecting the profession. People seem to enjoy the receptions. I find meeting with our members – not just leaders – to be quite exhilarating, and I will continue to do so during the remainder of my term. The opportunity to be together, as lawyers, is one of the main benefits a bar association can provide. I have attempted to do that among the members of the House of Delegates by having more dinners and by publishing a House directory.

Whatever success we have had obviously would not have been accomplished without the help of countless people, and I cannot possibly provide a complete list. Thanks first of all to the officers and to the members of our Executive Committee, who have been open to new ideas and indispensable in implementing them. The House of Delegates is an extraordinary group that has been enthusiastically supportive, for which I'm greatly appreciative. Thanks also to all of the section and committee chairs, who are so indispensable to the work of the Association.

I have greatly enjoyed my collaboration with our Executive Director Pat

Bucklin. She not only runs the day-to-day operations of the Association, she is the person I have talked to every day during the course of the year. Without her, I could not have accomplished whatever I have been able to do. She takes a positive approach to new ideas and has always been willing to listen and help me figure out how to make them work. She is also indispensable in anticipating what the President needs to do and makes the trains run on time. Associate Executive Director John Williamson, because of his hard work and knowledge of the organization, makes the House and Executive Committee meetings work so well.

Through my travels I've seen what terrific meetings we have with our sections and committees, and that is due to Meetings Director Kathy Heider and her staff. I go to other meetings put together by other organizations and they are never as good. Cindy Feathers has provided expert advice to me not only on Pro Bono Affairs but also in making sure that my syntax is not garbled, my infinitives are not split, and my participles do not dangle in my President's Messages.

I also want to thank my law firm, Harris Beach PLLC, without whose support I could not have been President. Because of the help of the people in my Appellate Practice group, which I am privileged to chair, I have still been able to argue a number of appeals this year, for which I am grateful.

I cannot possibly describe what an exhilarating and rewarding experience being President of the New York State Bar Association is. The year has certainly been the high point of my career. The President always faces difficulties of time demands and the need to be several places and focused on several issues at the same time. Sometimes the enjoyment of being President is overshadowed by such demands, but the opportunity to make a difference in the organization and in the profession more than compensates for whatever stressful moments there may be. Seeing the seeds I planted earlier in the year bear fruit, working with friends to achieve common goals, making new friends, receiving warm welcomes at section meetings and local bar associations, having people laugh at my attempts at humor, having people come up to me on the street to thank me for what I'm doing, and such experiences as having dinner with the Lord Chancellor of England at the International Law Section meeting in London are all enjoyable beyond description.

One of the advantages of our structure is that the President continues as a member of the House of Delegates for life, which means I can stay involved without getting in anyone's way. I know I will miss being President, but I look forward to returning to the full-time practice of law. I also know that you are in good hands with our President-Elect, Mark Alcott, who has been a terrific partner of mine this year.

Finally, thanks to you, the members of the Association, for all you have done this year and for your support and encouragement for what I've tried to do. The great strength of our Association is our membership. Thank you for the opportunity to have been President this year. ■

Ian Ayres is Townsend Professor of Law at Yale Law School; **Gregory Klass** served as an Assistant Solicitor General in the Office of the New York Attorney General until 2005, and is now an Associate Professor of Law at Georgetown Law Center. Ayres and Klass are coauthors of *Insincere Promises: The Law of Misrepresented Intent* (Yale Univ. Press 2005), from which this article draws.

Promissory Fraud

By Ian Ayres and Gregory Klass

The protracted dispute between Michael Ovitz and Michael Eisner raised one issue that no one paid much attention to: Ovitz's implicit claim that Disney defrauded him when he was hired. Ovitz maintained that Eisner, as the CEO of Disney, promised to give him extensive powers at the company, but that Ovitz was shut out, virtually from day one. Eisner countered that he only made a conditional promise – Ovitz would get the powers only if he showed that he could handle them. Where's the suggestion of fraud? In Eisner's misrepresentation of intent. According to Ovitz's reading of Eisner's promise, Eisner represented that he intended to give Ovitz full CEO powers from day one. But those powers did not appear on day one, or after. And according to Eisner's testimony, he didn't intend to grant them unless Ovitz's performance was up to snuff. On Ovitz's version of events, then, Eisner may not only have breached his contract, he may also have committed promissory fraud: he made a promise he did not intend to perform.

This is the kind of issue that a litigator can easily overlook. The reason is no mystery: Promissory fraud is almost never taught in law school, and the cause of action flies under the canonical radar. Yet our research shows that in a majority of U.S. jurisdictions, there are more promissory fraud cases than cases involving more familiar doctrines like mistake and impossibility. And promissory fraud can be a powerful weapon. It permits the recovery of punitive damages for events surrounding a breach of contract; it can allow a plaintiff to avoid procedural bars like the Statute of Frauds and parole evidence rule; and promissory fraud can even give rise to criminal liability.

While there are plenty of promissory fraud cases out there, we have found that promissory fraud claims are often mislitigated, with both plaintiffs and defendants missing significant opportunities. This article provides an introduction to the cause of action, outlines a number of practice tips for litigators, and suggests a few reforms. While we don't think there should be more promissory fraud cases – and in fact recommend new ways for limiting promissory fraud liability – we do think that a good deal more attention should be paid to the details of the doctrine.

The Curious Doctrine of Promissory Fraud

Promissory fraud happens when a party enters into a contract with no intention to perform. The basic thought is that a promise implicitly represents an intent to perform, and this representation can be true or false like any other. In the words of one of the first decisions to recognize the cause of action, "the state of a man's mind is as much a fact as the state of his digestion."[1]

While at first blush the doctrine can appear odd – a broken promise is not the same thing as a lie – in fact, a successful promissory fraud claim satisfies all of the traditional elements of deceit: representation of a material existing fact, falsity, scienter, deception and injury.[2] There is a misrepresentation: A promise represents a present intent to perform; where that intent is not present, the representation is false. The misrepresentation is almost

always material: What party entering into a contract wouldn't want to know that the other side doesn't intend to perform? The misrepresentation is knowing (scienter), since the promisor must know his or her intent. The promisee has reasonably relied upon the representation by entering into and performing his or her side of the agreement. And if the promisor then breaches, we have proximate harm: the whole point of the representation of an intent to perform was to assure the promisee that he or she could rely on performance happening.

While the above summary overlooks a few complexities, it shows that promissory fraud is not really all that odd. Breach of contract is not fraud. But when the breaching party never intended to perform in the first place, the promise is fraudulent, plain and simple. Promisees have a right to think that they are bargaining for performance, not an action for breach of contract.

Promissory Fraud in New York

Until the mid-1990s, there was some confusion as to whether New York recognized the action for promissory fraud. As early as 1957, the Court of Appeals articulated and affirmed the basic idea behind the action:

> While [m]ere promissory statements as to what will be done in the future are not actionable, it is settled that, if a promise was actually made with a preconceived and undisclosed intention of not performing it, it constitutes a misrepresentation of a material existing fact upon which an action for rescission may be predicated.[3]

The next year, in *Channel Master Corp. v. Aluminum Ltd. Sales, Inc.*, the Court extended this rule to actions for damages, writing that "one who fraudulently misrepresents himself as intending to perform an agreement is subject to liability in tort whether the agreement is enforcible or not."[4]

Despite their apparently clear language, *Sabo* and *Channel Master* did not put an end to the question of whether promissory fraud was actionable in New York. Lower courts found it difficult to reconcile them with dicta in a 1910 case, *Adams v. Gillig*,[5] which considered a claim that a real property purchaser falsely represented an intent to develop property for residential purposes. While *Gillig* held the misrepresentation to be actionable, the Court emphasized that the representations at issue were collateral to the contract and suggested that "statements promissory in their nature and relating to future actions must be enforced if at all by an action upon the contract."[6] Even after the Court of Appeals's subsequent contrary statements in *Sabo* and *Channel Master*, lower New York courts, and especially the First Department, read *Gillig* to entail that "a cause of action for fraud does not arise when the only alleged fraud relates to a breach of contract,"[7] and that "[a] contract action may not be converted into one for fraud by the mere additional allegation that the contracting party did not intend to meet his contractual obligation."[8]

To our minds, these cases were misguided, since promissory fraud is a separate wrong, even if embedded in the contracting process. We believe the Court of Appeals cleared up this confusion in 1995, with its decision in *Graubard Mollen Dannett & Horowitz v. Moskovitz*.[9] *Graubard* once again affirmed that "[a] false statement of intention is sufficient to support an action for fraud, even where that statement relates to an agreement between the parties."[10] While this would seem to have decided the issue as far as New York law goes,[11] federal courts applying New York law occasionally still rely on the earlier line of cases to dismiss promissory fraud claims.[12] Attorneys litigating promissory fraud cases under New York law should take special care navigating these waters.

Evidentiary Issues

To say that we can make sense of promissory fraud using the traditional definition of deceit is not to say that the cause of action doesn't raise special issues. The most significant is proof of intent. Direct evidence of a bad initial intent – a defendant's admission of his or her insincerity – is hard to come by. Absent such evidence, how can a plaintiff prove something as private and fleeting as the defendant's intent at the time of formation?

Worries about proof of promisor intent once caused many jurisdictions to reject the action for promissory fraud. The thought seems to have been that, in order to allow proof of intent by circumstantial evidence, evidentiary standards would have to be so relaxed that every action for breach of contract would be transformed into a fraud case. And one still finds thinking along these lines in jurisdictions like Illinois, Michigan and Tennessee, where courts set an especially high evidentiary bar for promissory fraud claims.[13]

Once you start to look at actual cases, you quickly see that there are numerous situations in which there is more than enough independent evidence of a bad initial intent.

But once you start to look at actual cases, you quickly see that there are numerous situations in which there is more than enough independent evidence of a bad initial intent. Think about the Georgia crematorium owner, who had over the course of many years failed to perform hundreds of promises to cremate remains, leaving them instead to decompose in a field. Or the itinerant roofing contractor, who takes a down payment on the job and then immediately moves on to the next town to make similar broken promises.

Proper judicial policing of the sufficiency of pleadings and evidence should prevent plaintiffs from turning run-

of-the-mill breach of contract cases into actions for promissory fraud. Most states have some analog to Rule 9(b) of the Federal Rules of Civil Procedure, which requires plaintiffs to plead fraud in particularity. In New York, CPLR 3016(b) requires that where a cause of action or defense is based on fraud, "the circumstances constituting the wrong shall be stated in detail." We believe that where the claim is one of *promissory* fraud, courts or legislatures should require even more: a plaintiff should have to plead independent evidence – other than the mere fact of breach – of an initial intent not to perform. Finally, in cases that survive the pleading stage, judges should still be quick to grant motions for summary judgment when, after discovery, the plaintiff cannot present independent evidence of bad intent.

Of course it is the attorneys representing parties to promissory fraud cases who are responsible for developing evidence of the defendant's initial intent.[14] Whether you represent plaintiff or defendant, it is helpful to think of the evidentiary question in terms of changed circumstances: Are there any facts to suggest that between the time of promising and the time of breach, the defendant changed his or her mind about performing? (Remember, the central fact is not the defendant's intent at the time of breach, but at the time of promising.) The best defensive evidence is an unforeseen event – such as a change in market price, increased cost of performance, or a better offer – that explains why the defendant changed his or her mind about performing. Correspondingly, a plaintiff who can argue no changed circumstances makes a good case for no change of heart. For the same reason, the length of time between promise and breach can be relevant. A short period between formation and the first sign of an intent to breach narrows the window for changed circumstances to occur and makes it much less likely that the defendant reconsidered performance. The longer the time, the more likely the defendant had a change of heart.

A defendant's partial performance can be strong evidence of an initial intent to perform. Why invest in performance if you intend to breach? That said, we also see cases where partial performance was used to string the plaintiff along – such as where a remodeling contractor performs just enough (knocking down a wall, leaving some tools at the house) to convince the plaintiff not to bring an immediate action for breach. As with all circumstantial evidence of intent, the appropriate inference will be highly dependent on context.

In addition to changed circumstances, events and conditions at or around the time of promising can be strongly indicative of promisor intent. For instance, a buyer who is teetering on the edge of bankruptcy and purchases on credit probably knows that he or she will be unable to make the promised payments. Alternatively, independent evidence of deceit – for example, other lies surrounding the promise – can also show that the promisor was stringing the promisee along. Or the promisor may take actions inconsistent with performance. A contractor who promises to begin work immediately, but uses the down payment to buy a ticket to Tahiti on a plane leaving the next day cannot intend to perform.

Practitioners should also remember the doctrine of chances. One broken promise may be the result of changed circumstances or chance, but a repeated string of similar breaches gives rise to the inference that they were all the result of a similar intent not to perform. Finally, while never dispositive – and certainly never enough on its own to survive a motion for summary judgment – the fact that the promisor did not perform is relevant to assessing his or her initial intent.

We summarize these various forms of evidence in Table 1.

Circumstantial Evidence of Promisor Intent

1. Post-promise events
   a. whether there were any changed circumstances that account for a post-promise decision not to perform
   b. the length of time between promise and non-performance
   c. whether the promisor made any attempt to perform
2. Circumstances at or around the time of promising
   a. the promisor's initial awareness of conditions likely to prevent her performance
   b. evidence that the promisor intended to deceive the promisee
   c. other significant promisor behavior
3. Other similar unexcused instances of non-performance (the doctrine of chances)
4. Breach

Possible Pitfalls and Recommended Reforms

While promissory fraud is a form of deceit like any other, these implicit representations of intent raise some unusual problems in litigation. Three bear special mention: the importance of separate proof of scienter, some problematic uses of promisor testimony as to intent, and the possibility of promises that do not represent an intent to perform.

In the traditional action for deceit, a plaintiff must prove scienter – that the defendant was not merely mistaken, but he or she made the misrepresentation knowingly or with reckless disregard of the truth. In promissory fraud cases, however, we often find courts omitting separate proof of scienter. Courts reason that a promisor cannot be mistaken about his or her own intent. Thus if the defendant didn't intend to perform, the misrepresen-

tation must have been a knowing one, and hence there is no need for separate proof of scienter. As one Maryland court put it, "any promise that is made with the present intention not to perform . . . is, perforce, an intentional misrepresentation."[15]

While there is something to this intuition, defense attorneys should resist the assumption that every misrepresentation of intent is perforce an intentional misrepresentation. Two important exceptions are promises made by a principal's agent, and cases where the defendant didn't understand the meaning of his or her promise.

While a natural person always knows his or her own intent, an agent may not be aware of the principal's intent, or a principal aware of an agent's representations. In *Leisure American Resorts, Inc. v. Knutilla*,[16] for example, representatives of a time-share seller informed an owner that the company would repurchase the owner's time share, though the company's policy was to repurchase only in hardship cases. While the Alabama Supreme Court affirmed a finding of promissory fraud, it described no evidence that the misrepresentations were made knowingly – that the representatives weren't simply misinformed as to the company policy. Nor was there any discussion of whether a mistake of this sort was reckless, or whether it might be a mere matter of negligence or even a reasonable mistake. This was wrong. In such cases, separate proof of scienter should be required.

A promisor can also mistakenly misrepresent her intent if she doesn't understand the meaning of her own promise. In *Beneficial Personnel Services of Texas, Inc. v. Rey*,[17] an employer promised to provide employees the same benefits as described in the Texas Worker's Compensation Act, though an internal directive stated that employees were not to be allowed to choose their own doctors – a restriction that the Act would have disallowed. In this case, the Texas Court of Appeals correctly recognized that the misrepresentation would have been a matter of mistake if the employer didn't understand what benefits were guaranteed by the Act – that is, didn't understand the meaning of its promise. Thus separate proof of scienter was necessary. The court found the requirement met, however, because even if the misrepresentation was not knowing, such a mistake would have been reckless. Again, defense attorneys in such situations will do well to insist on separate proof of scienter.

The possibility of misrepresentations of intent that result from mistakes of meaning brings us to a second observable pitfall: the misuse of a defendant's in-court testimony. A defendant to a breach of contract action should be allowed to argue an alternative interpretation of the contract. But then we must guard against allowing the plaintiff to turn those arguments against the defendant as evidence of an intent not to perform. Yet we find cases where just this happens – where a defendant's legitimate alternative interpretation of the contract ("What I meant was . . .") gets turned against the defendant as evidence of promissory fraud ("But then you didn't intend . . ."). Thus in our introductory example of the Ovitz/Eisner dispute, we would be comfortable allowing Ovitz to prove Eisner's bad initial intent by pointing to the fact that Eisner immediately failed to perform (no changed circumstances), or that he took actions at the time of promising that were inconsistent with an intent to perform. We would be less sanguine, however, about any attempt to use Eisner's testimony regarding his alternative interpretation of the contract to prove a bad initial intent. Eisner should be allowed to argue a reasonable alternative interpretation without opening himself up to accusations of promissory fraud.

Similar issues arise where courts admit a defendant's in-court denial that he or she ever made the promise as evidence of promissory fraud. As we noted above, a pattern of deception can be evidence of no intent to perform. Thus a defendant's pre-litigation denial of a promise may be relevant to proving promissory fraud. But in-court statements should be treated with more suspicion. The Oregon Supreme Court correctly diagnosed the danger:

> Such denial implies not at all that, if the promise were made, there was no intention to perform. And it certainly does not bar the defendant, when the evidence is all in, from saying to the plaintiff: "Even though the trier of fact may believe I made the promise, there is no

> proof that I did so fraudulently because of an intention not to perform." Bad indeed would be the case of the honest man who has made no such promise, if when falsely charged with it, he may not deny it without having his truth considered as some evidence either that there was such undertaking or that it was deceitfully made.[18]

At the very least, where such statements are admitted, courts should insist on separate proof of scienter – for the reasons discussed above.

Finally, litigators should keep in mind the possibility that some promises might not represent an intent to perform. The *Second Restatement of Torts* gets it seriously wrong when it declares that "a promise necessarily carries with it the implied assertion of an intention to perform."[19] The drafters here would have done well to recall Holmes's famous dictum that "the duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, – and nothing else."[20] Between sophisticated, repeat-players, it may be understood that one or each of the parties retains an option of breaching and paying damages – and therefore may only intend to perform or pay damages.[21] To take a particularly stark example, in some circumstances Delaware corporate law requires acquisition targets to affirmatively solicit better offers and to auction the firm to the highest bidder once takeover becomes inevitable.[22] Acquirers entering into merger agreement should know that the target may have a duty before closing to consider, and even to solicit, subsequent better offers that may cause it to breach the merger agreement. The target company cannot intend to perform a merger agreement come what may, for the law permits it to have at most a conditional intent.

It would still be wrongful if the promisor entered into the agreement with an affirmative intent not to perform – believing from the start that performance would not happen.

We believe that, as an empirical matter, most contracts do represent an intent to perform. But certainly there are contexts – for example, against a background of mutually understood business practices – where this is not the parties' understanding. And we see no reason why, in a given case, the parties should not be able explicitly to disclaim any representation of an intent to perform, thereby avoiding most liability for promissory fraud. Thus what the *Second Restatement of Torts* takes as a necessary representation, we would recommend as an interpretive default: Courts should interpret a promise as implicitly representing an intent to perform *absent evidence to the contrary*. Such evidence can include local business practice, course of dealings between the parties, and the explicit terms of the contract.

Assuming that a court were to accept the defendant's argument that he or she made a "Holmesian" promise, which did not represent an intent to perform, the plaintiff might still push forward with a claim of promissory fraud. The point here – and it will be our last one – turns on the difference between *not intending* to perform and *intending not* to perform.

If the parties treat the contract as a promise to perform or pay damages, it is perfectly acceptable if the promisor does not intend to perform. Thus he or she might intend to perform only under certain (undisclosed) conditions, or might intend to perform or pay damages, all without misrepresentation. But it would still be wrongful if the promisor entered into the agreement with an affirmative intent not to perform – believing from the start that performance would not happen. A comparison to option contracts is helpful here. If Gertrude buys an option to purchase Pablo's house, she does not commit promissory fraud if she intends to purchase only under certain undisclosed circumstances. The point of an option is to allow the option holder to decide later on. But Gertrude arguably commits promissory fraud if, at the time of purchase, she intends not to exercise the option under any circumstances, but buys it merely to keep Pablo from selling to a third party. Similarly, a Holmesian promisor who intends to breach in any circumstances is still guilty of promissory fraud.

The idea of insincere promises is familiar in literature. In *The Producers*, the audience knows that Max Bialystock never intends to give his investors a return from *Springtime for Hitler*. In the "Frog Prince," the Brothers Grimm tell us that the king's daughter never intends to befriend the frog, though she promises to do so if he will retrieve her golden ball. And after so many bad acts, who can believe that Lucy ever intended to hold the football for Charlie Brown? ■

1. *Edgington v. Fitzmaurice*, 29 Ch. D. 459, 483 (Ch. App. 1885).
2. *Channel Master Corp. v. Aluminum Ltd. Sales, Inc.*, 4 N.Y.2d 403, 407, 176 N.Y.S.2d 259 (1958).
3. *Sabo v. Delman*, 3 N.Y.2d 155, 160, 164 N.Y.S.2d 714 (1957) (citations and quotation marks omitted).
4. 4 N.Y.2d at 408.
5. 199 N.Y. 314 (1910).
6. *Id.* at 318. That this was dicta is shown by the next sentence in the opinion: "It is unnecessary to decide or discuss the question whether under some possible circumstances the courts will not in equity lay hold of false statements that are contractual in their nature to prevent the consummation of a fraud." *Id.*
7. *Metro. Transp. Auth. v. Triumph Adver. Prods., Inc.*, 116 A.D.2d 526, 528, 497 N.Y.S.2d 673 (1st Dep't 1986).
8. *Comtomark, Inc. v. Satellite Commc'ns Network, Inc.*, 116 A.D.2d 499, 500, 497 N.Y.S.2d 371 (1st Dep't 1986). *See generally U.S. E. Telecomms., Inc. v. US W. Commc'ns Servs., Inc.*, 38 F.3d 1289, 1301–1302 (2d Cir. 1994) (discussing then existing uncertainty in New York law).
9. 86 N.Y.2d 122, 629 N.Y.S.2d 1009 (1995).

10. *Id.* at 122.

11. *See, e.g.*, *A. Resnick Textile Co. v. Daisy Group, Ltd.*, 284 A.D.2d 101, 726 N.Y.S.2d 82 (1st Dep't 2001); *Wagner Trading Co. v. Tony Walker Retail Mgmt. Co.*, 277 A.D.2d 1012, 715 N.Y.S.2d 673 (4th Dep't 2000); *CooperVision, Inc. v. Intek Integration Techs. Inc.*, 7 Misc. 3d 592, 794 N.Y.S.2d 812 (Sup. Ct., Monroe Co. 2005). *But see Coppola v. Applied Elec. Corp.*, 288 A.D.2d 41, 42, 732 N.Y.S.2d 402 (1st Dep't 2001) (suggesting that the alleged fraud in *Graubard* "was collateral or extraneous to the breach of contract claim").

12. *See, e.g.*, *TVT Records v. Island Def Jam Music Group*, 412 F.3d 82, 91 (2d Cir. 2005); *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 19 (2d Cir. 1996); *Frontier-Kemper Constructors, Inc. v. Am. Rock Salt Co.*, 224 F. Supp. 2d 520, 528 (W.D.N.Y. 2002). *But see PKFinans Intern. Corp. v. IBJ Schroeder Leasing Corp.*, No. 96 CIV 1816, 1996 WL 363138 (S.D.N.Y. 1996) (recognizing that *Graubard* precluded reliance on earlier Appellate Division cases requiring collateral misrepresentation).

13. *See Advent Elecs., Inc. v. Buckman*, 918 F. Supp. 260, 264–65 (N.D. Ill. 1996) (requiring proof of a scheme or intent to defraud); *Jim-Bob, Inc. v. Mehling*, 443 N.W.2d 451, 460 (Mich. Ct. App. 1989) (holding that "the evidence of fraudulent intent must relate to conduct by the actor at the time the representations are made or almost immediately thereafter"), *aff'd*, 936 F.2d 273 (6th Cir. 1991); *Sanders v. First Nat'l Bank*, 114 B.R. 507, 516 (M.D. Tenn. 1990) (requiring "direct proof of a misrepresentation of actual *present* intention"). New York sets an extra high evidentiary bar for the crime of false promise, requiring evidence "excluding to a moral certainty every hypothesis except defendant's intention or belief that the promise would not be performed." N.Y. Penal Law § 155.05(2)(d).

14. Ian Ayres & Gregory Klass, *Insincere Promises: The Law of Misrepresented Intent* ch. 6 (2005) (exploring evidence of misrepresented intent in much more detail with reference to the case law).

15. *Miller v. Fairchild Indus., Inc.*, 629 A.2d 1293, 1304 (Md. Ct. Spec. App. 1993); *see also* Restatement (Second) of Torts § 530(1) cmt. b (1979) (pointing out that if a speaker does not have the intention he represents himself to have, "he must of course be taken to know that he does not have it"); Fowler V. Harper, et al., The Law of Torts § 7.8, 418 (3d ed. 1996) ("[I]nnocent false statements could scarcely include false statements of one's own intention, or promissory fraud").

16. 547 So. 2d 424 (Ala. 1989).

17. 927 S.W.2d 157 (Tex. App. 1996), *vacated by request of both parties and without reference to the merits*, 938 S.W.2d 717 (Tex. 1997).

18. *Holland v. Lentz*, 397 P.2d 787, 796 (Or. 1964) (quoting *McCreight v. Davey Tree Expert Co.*, 254 N.W. 623, 625 (Minn. 1934)).

19. Restatement (Second) of Torts § 530 cmt. c (1977). *The Second Restatement of Contracts* takes a more nuanced view, stipulating that "[i]f it is reasonable to do so, the promisee may properly interpret a promise as an assertion that the promisor intends to perform the promise." Restatement (Second) of Contracts § 171(2) (1981). The comments indicate that when the drafters inserted the "if reasonable to do so" proviso, they were thinking of situations where "the promisor has disclosed his intention not to perform or [where] performance is known not to be within his control." *Id.* cmt. b.

20. Oliver W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897), *reprinted in* 110 Harv. L. Rev. 991, 995 (1996–1997).

21. The Southern District has suggested that the legitimacy of an intent to perform or pay damages explains New York's (old) reluctance to recognize promissory fraud: "The rationale for this rule is that a party need not be expressing an unconditional intention to perform by contracting, and may instead be expressing an intention either to perform or suffer the ordinary contractual consequences for a breach." *VTech Holdings Ltd. v. Lucent Techs., Inc.*, 172 F. Supp. 2d 435, 439 (S.D.N.Y. 2001).

22. *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1985) (finding that when a sale is inevitable, the target's board of directors is required to act as would "auctioneers charged with getting the best price for the stockholders at a sale of the company").

BY PETER A. GIULIANI

Parting May Be Sweet Sorrow, But It's Getting More Expensive

By all reports, the cost of hiring newly minted Juris Doctors is rising again, after several consecutive years of stability. Many larger firms have crossed the $100,000 mark in associate starting salaries (higher still in New York City). Smaller firms across the state more typically rely on lateral hiring to build their legal staffs. They probably won't feel the full impact of higher starting salaries for some time, as they also hire relatively fewer lawyers than their larger counterparts, and because it usually takes a year or so for increased starting salaries to ripple up into the lateral market. Eventually, however, the cost of attracting talent is going to rise for most, if not all, of New York's law firms.

That's not all that's going to rise. As the cost of hiring rises, so does the cost of attrition. When firms hire associates, they must front the cost of associates' salaries and benefits for some considerable time until they are able to collect enough cash – on a regular and predictable basis – to cover their costs. Not only must firms cover direct salary costs, but they also have to cover "overhead" costs, such as support staff, rent and occupancy, professional liability insurance, technology and systems, and a host of other operating-expense items. To some degree, these "overhead" costs represent fixed and continuing expenses that would be incurred whether or not the firm hired an additional associate. That said, they are still very real costs and represent wasted resources if they are not put to use supporting revenue-generating activities – like serving clients. The bottom line is if an associate leaves the firm before cash inflow starts to exceed cash outflow (a condition known to my fellow economists as "break-even") the firm forfeits all of the accumulated investment it has made in bringing the associate on board in the first place. This can be, as we will see, a very big number, indeed.

Let's look at a hypothetical case. Our estimates are generally borne out by available survey data for firms of many sizes.

If our hypothetical firm is going to pay an incoming associate $100,000, the annual associated benefits and tax costs typically run to about 18% of base salary. So, that $100,000 annual paycheck is now $118,000. Furthermore, it's not likely to stay at that level for three or four years. Annual raises after the first 15 months of employment generally run about 7% per year.

Surveys of smaller firms of all sizes generally put the support-staff and "overhead" costs needed to support an associate at about $95,000 per year. These costs, like so many others, will probably rise with the general level of inflation. For simplicity, we've chosen to ignore inflation. So, that $100,000 associate now costs the firm $213,000 per year, or $17,750 per month.

The good news is that the associate will soon be billing time to clients. But, not right away. If the firm typically gets, say, 1,800 hours a year from an experienced associate, it will take nearly a full year before a brand new recruit is recording 150 solid hours per month. This lag in the "ramp-up" to full productivity, is further exacerbated by the fact that it will take about five months before the associate's time is finally billed and collected, probably at a fee realization rate that starts at about 70% and rises gradually to about 88%. Once up to full speed, however, our hypothetical associate should be generating collected fees at the rate of about $30,000 per month – yielding a monthly profit of $12,250 per month.

The operative phrase in the last sentence, however, is "Once up to full speed . . ." The problem is that the law firm will lose money each month until collections catch up with cash outflow. In this hypothetical example (space in this column does not permit showing all the calculations), "break-even" will not occur until the associate has been at work for 15 months. To compound matters, at the point of "break-even" the firm will have racked up nearly $150,000 in cumulative cash losses from 15 months of inflows lagging outflows.

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This is the point at which the firm is most vulnerable to attrition. If the associate leaves – or is asked to leave – at this point, the firm suffers the maximum loss of its investment in the associate. The good news is that there are, one hopes, many successive months ahead of positive cash contribution. Eventually, the cumulative cash-positive months will pay back the $150,000 investment, and the firm will be well on its way to earning a solid profit on its fully productive associate.

But, when does the firm finally recoup its investment? In our hypothetical, not until 32 months from the date of hire. If the associate departs before this date, the firm has lost some or all of its investment. We have already seen that the firm loses $150,000 if the associate leaves at 15 months. At two years, this loss is still about $75,000.

Associate attrition is expensive, especially if it occurs within the first two years, so it behooves firms of all sizes to take extra care in hiring new associates and getting the most out of the associates already on board. Larger firms need to assess the effectiveness of their law school recruiting and associate development programs. Losing new associates within the first two years because "the associate just didn't work out" is expensive, and getting even more expensive. ■

Month	Year	Salary and Benefits	Overhead	Total Cost	Billable Hours	Hourly Rate	Realization	Time Value	Fees Collected	Profit (Loss)	Investment	Months Employed
September	1	9,833	7,917	17,750	-	200	-	-	-	(17,750)	(17,750)	1
October	1	9,833	7,917	17,750	25	200	70%	3,500	-	(17,750)	(35,500)	2
November	1	9,833	7,917	17,750	25	200	70%	3,500	-	(17,750)	(53,250)	3
December	1	9,833	7,917	17,750	30	200	70%	4,200	-	(17,750)	(71,000)	4
January	2	9,833	7,917	17,750	35	200	70%	4,900	-	(17,750)	(88,750)	5
February	2	9,833	7,917	17,750	35	200	75%	5,250	3,500	(14,250)	(103,000)	6
March	2	9,833	7,917	17,750	45	200	75%	6,750	3,500	(14,250)	(117,250)	7
April	2	9,833	7,917	17,750	50	200	75%	7,500	4,200	(13,550)	(130,800)	8
May	2	9,833	7,917	17,750	50	200	80%	8,000	4,900	(12,850)	(143,650)	9
June	2	9,833	7,917	17,750	55	200	85%	9,350	5,250	(12,500)	(156,150)	10
July	2	9,833	7,917	17,750	75	200	90%	13,500	6,750	(11,000)	(167,150)	11
August	2	9,833	7,917	17,750	90	200	100%	18,000	7,500	(10,250)	(177,400)	12
September	2	9,833	7,917	17,750	100	200	100%	20,000	8,000	(9,750)	(187,150)	13
October	2	9,833	7,917	17,750	100	200	100%	20,000	9,350	(8,400)	(195,550)	14
November	2	9,833	7,917	17,750	150	200	100%	30,000	13,500	(4,250)	(199,800)	15
December	***2***	***9,833***	***7,917***	***17,750***	***150***	***200***	***100%***	***30,000***	***18,000***	***250***	***(199,550)***	***16***
January	3	10,522	7,917	18,438	150	210	100%	31,500	20,000	1,562	(197,988)	17
February	3	10,522	7,917	18,438	150	210	100%	31,500	20,000	1,562	(196,427)	18
March	3	10,522	7,917	18,438	150	210	100%	31,500	30,000	11,562	(184,865)	19
April	3	10,522	7,917	18,438	150	210	100%	31,500	30,000	11,562	(173,303)	20
May	3	10,522	7,917	18,438	150	210	100%	31,500	31,500	13,062	(160,242)	21
June	3	10,522	7,917	18,438	150	210	100%	31,500	31,500	13,062	(147,180)	22
July	3	10,522	7,917	18,438	150	210	100%	31,500	31,500	13,062	(134,118)	23
August	3	10,522	7,917	18,438	150	210	100%	31,500	31,500	13,062	(121,057)	24
September	3	10,522	7,917	18,438	150	210	100%	31,500	31,500	13,062	(107,995)	25
October	3	10,522	7,917	18,438	150	210	100%	31,500	31,500	13,062	(94,933)	26
November	3	10,522	7,917	18,438	150	210	100%	31,500	31,500	13,062	(81,872)	27
December	3	10,522	7,917	18,438	150	210	100%	31,500	31,500	13,062	(68,810)	28
January	4	11,258	7,917	19,175	150	225	100%	33,750	31,500	12,325	(56,485)	29
February	4	11,258	7,917	19,175	150	225	100%	33,750	31,500	12,325	(44,160)	30
March	4	11,258	7,917	19,175	150	225	100%	33,750	31,500	12,325	(31,835)	31
April	4	11,258	7,917	19,175	150	225	100%	33,750	31,500	12,325	(19,509)	32
May	4	11,258	7,917	19,175	150	225	100%	33,750	33,750	14,575	(4,934)	33
June	***4***	***11,258***	***7,917***	***19,175***	***150***	***225***	***100%***	***33,750***	***33,750***	***14,575***	***9,641***	***34***
July	4	11,258	7,917	19,175	150	225	100%	33,750	33,750	14,575	24,216	35
August	4	11,258	7,917	19,175	150	225	100%	33,750	33,750	14,575	38,791	36
September	4	11,258	7,917	19,175	150	225	100%	33,750	33,750	14,575	53,366	37
October	4	11,258	7,917	19,175	150	225	100%	33,750	33,750	14,575	67,941	38
November	4	11,258	7,917	19,175	150	225	100%	33,750	33,750	14,575	82,517	39
December	4	11,258	7,917	19,175	150	225	100%	33,750	33,750	14,575	97,092	40

BY BRUCE J. BERGMAN

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Payoff on the Eve of Sale

Practitioners who can concentrate in one or a few fields know how difficult it can be to learn most of the law even in those restricted arenas. This truism highlights the enormous burden courts bear: they must be experts in every area of the law. But merely reading cases is sometimes insufficient. There are always the parallel universes of the real world and the unwritten, where precise understanding emerges only from experience, practice, custom, guidance from the learned and other ineffable sources, which combine to impart wisdom. Mortgage foreclosure is one of those pursuits where "being there" really helps.

It is this preliminary observation that leads with dismay to mention of a continuing series of cases declaring that a defaulting mortgagor cannot necessarily save his property on the eve of foreclosure sale solely by satisfying the mortgage. Rather, so the cases say, the mortgagor must also secure a stay of the sale, failing in which the payoff may have been futile.[1]

Real estate veterans will immediately find this puzzling, and correctly so. Inherent in every mortgage is the sacred, equitable right to pay the mortgage debt and unburden the property from the lien of that mortgage. The remedy of mortgage foreclosure afforded a lender is not punitive; it is designed to obtain recompense for as much of the mortgage debt as possible.

In the cases creating the problem that catches our attention here, even though the borrower remitted the mortgage debt, some form of mistake allowed the foreclosure sale to nevertheless proceed. When the borrower then sought to overturn the sale (even with the concurrence of the foreclosing plaintiff), the courts said, "No, you also needed that stay."

> In some cases at least, borrowers who should not will nonetheless lose their property.

Mindful that the right to redeem survives until the moment the secured property is struck down at the auction sale, why would courts create some obligation to stay the sale when payoff alone is sufficient? We suggest that the answer emerges from pervasive unawareness of the exceptionally obscure methodology of "partial foreclosure," which leads courts to mix the proverbial apples and oranges and thereby commit error.

Understanding partial foreclosure is the key to solving this puzzle and, it can be hoped, to banishing the apparent confusion about mortgage redemption. When a borrower defaults, eventually, and about 99.99% of the time, the lender will accelerate the mortgage balance, that is, declare due the *entire* sum. For illustrative purposes though, examine this extreme situation. A lender holds a well above market rate mortgage (assume perhaps a 15% yield), with no provision allowing prepayment – certainly a desirable investment well worth preserving. The borrower is suddenly able to refinance at 6%, but the lender is unwilling to accept a payoff and, as noted, need not do so.

Knowing that default will elicit acceleration, the borrower purposely refrains from remitting mortgage installments, thereby triggering the right to redeem, trumping the otherwise inviolate principle that the mortgage cannot be prepaid.

But the lender has a riposte: partial foreclosure. Instead of accelerating, the lender initiates foreclosure founded upon the missed installments

alone, so that the purchaser at the foreclosure sale buys the property with the mortgage intact, reduced only by the missed installments (and those that became due during the course of the action), which becomes the purchase price at the foreclosure sale – weird, obscure, but effective for the purpose.

It is obvious that partial foreclosure will seldom be invoked. Nonetheless, its unusual nature required a special statute (Real Property Actions & Proceedings Law § 1341) to address procedure when the borrower pays off in a partial foreclosure case. The statute particularly recites the situation where in a foreclosure "any part of the principal or interest is due, and another portion of either is to become due. . . ." This is exactly the nature of partial foreclosure. It has nothing to do with virtually every other foreclosure anyone will ever see where the balance was accelerated and *all* the money has become due.

We now arrive at the heart of the confusion. In the cases declaring a stay of sale as requirement of redemption, the courts rely upon RPAPL § 1341.The section's misleading title is "Payment Into Court of Amount Due," underscoring why anyone less than a long-time foreclosure practitioner could readily misapprehend the section's true meaning. In short, though, it applies exclusively to partial foreclosure and has no relationship whatsoever to "regular" foreclosure. Thus, this section cannot be invoked in mortgage foreclosure cases to impose a stay as a condition of post-judgment redemption.

Until the Appellate Division explores the existence of partial foreclosure, it will continue to inject the stay requirement and, in some cases at least, borrowers who should not will nonetheless lose their property. ■

1. Delineation of those cases and a very detailed analysis supporting the conclusions expressed is too lengthy for this space. For that level of depth, attention is invited to 2 *Bergman on New York Mortgage Foreclosures* § 27.10 (Matthew Bender & Co., Inc. rev. 2005).

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Progress Against the Tide

Managing Tort Claims Against the City of New York

By Fay Leoussis

In 1994, the City of New York faced a litigation crisis. The number of pending tort claims had risen to 60,000 and, given a steady increase in new filings, it was forecast that the City would face an even greater accumulation of open cases by 2007 – a huge 110,000. There was no reason to expect any abatement in these new filings, and annual payouts were projected to approach a staggering $1 billion.

These dire predictions did not materialize, but not because the forecasting was inaccurate. Ten years after the first steps were taken by the City's Law Department and Office of the Comptroller to meet the coming tide, the City's tort caseload has shrunk from 60,000 to 33,000. New case filings are at a 15-year low. By fiscal year 2001, the total amounts paid out to resolve tort cases had stabilized, and remained so through 2004 – and in fiscal year 2005 a substantial drop in payouts was realized. This article offers an "inside view" of how these results were achieved as City government responded to a significant legal and fiscal crisis.

Background – Tort Claim Management Under the City Charter

Under the New York City Charter, key decision-making regarding the resolution of tort claims against the City is bifurcated. Decisions are made by two City officials: the Corporation Counsel, who is appointed by the Mayor and is in charge of the Law Department, and the Comptroller, a separately elected official who runs an independent office that is not under mayoral control. The Mayor and Comptroller need not be, and in the last several years have not been, of the same political party. This legislatively created structure requires close cooperation between these two separate offices to achieve the best overall result for the City, but such cooperation was not always forthcoming.

As most attorneys are aware, a prerequisite to the commencement of a personal injury or property damage lawsuit against the City is the filing of a notice of claim by the claimant. This must be done within 90 days of the accrual of the cause of action, which is usually the date of the injury. The City Charter empowers the Comptroller to "adjust" such claims. Any unresolved claim generally becomes a lawsuit. An action may be commenced 30 days after the service of the notice of claim if the claim has not been resolved, provided the Comptroller has not requested a statutory hearing allowed under the General Municipal Law. If a hearing has been requested, commencement of the action should await the conduct of the hearing, for which the statute allows the Comptroller 90 days from the filing of the notice of claim. Also under the Charter, lawsuits against the City are to be defended by

the Corporation Counsel. However, the Corporation Counsel cannot settle these lawsuits without the Comptroller's approval.

For many years, the numbers of tort-claim and tort-case settlements and other dispositions achieved by the Comptroller's Office and the Law Department remained static. The pace of these dispositions had become woefully inadequate in an era of rapidly growing claim and case filings. By 1994, the pending tort caseload had grown to nearly 60,000 because the rate of filings had significantly outpaced the rate of resolutions, with the excess increasing by an average of 5,000 a year. If the same rate of resolution of cases had been allowed to continue, that backlog of pending cases would have reached 110,000 by 2007.

The Hurdles Facing the Law Department

Given the number of attorneys in the Law Department's Tort Division assigned to handle the caseload noted above, the City had long confronted a critical case-management challenge. With certain exceptions, the Tort Division had to use a time-saving "horizontal" case-management system, in which each attorney performs a single task with regard to hundreds of cases, such as drafting pleadings, discovery compliance, or motion practice. Except for designated case categories, the Tort Division has not been able to use "vertical" case assignment, where one attorney handles a case from start to finish.

This horizontal assignment system, coupled with budget cuts made during the recession of the early 1990s (which further limited the Tort Division's attorney head count), left the Division in an essentially "reactive" state in its defense of tort claims. For example, the pre-litigation hearings that are statutorily authorized for municipal defendants after service of a notice of claim (General Municipal Law § 50-h), were fairly cursory, without the depth of a full examination before trial. Further, pre-litigation medical examinations authorized by the same statute were rarely scheduled. Document and witness production by the City were often delayed for years after the commencement of litigation, and long after the plaintiff's service of discovery requests. The City often undertook no affirmative discovery of its own, and hired no experts.

Not surprisingly, the result of the City's delay in responding to discovery requests and orders to produce was the filing of thousands of motions to penalize the City for its tardiness. These motions only caused a further backlog of defensive legal work because scarce attorney resources had to be devoted to fending off the dire sanction of stricken answers. Motions for sanctions, which were often filed several times in the same case, also burdened the courts' motion calendars.

There were other problems for the City. Aside from limited staff, a major contributor to the Tort Division's unwieldy caseload was long-standing case law that rendered the City, not the adjoining landowner, liable in tort for the landowner's failure to comply with the landowner's own statutory obligation to maintain the sidewalks adjoining its premises. Tort cases against the City in which the plaintiff claimed that a crack, hole, rise or slippery condition in or on a City sidewalk had caused an injury-producing slip/trip and fall comprised a very significant 26% of the Tort Division's pending caseload. Although the City's Administrative Code imposed the duty on the adjoining owner to maintain the sidewalk in a safe condition, the penalty was limited to a fine and/or liability for repairs undertaken by the City. The courts had held that the adjoining owner could not be held liable to an injured third party unless the owner had repaired the sidewalk, or had cleared it of ice/snow, in a negligent manner. If the adjoining owner had done nothing to the sidewalk, notwithstanding a deteriorated or dangerous condition, no tort liability would be imposed, and the plaintiff would look to the City for compensation.

The First Steps Toward a Solution

In 1995, the Law Department and the Comptroller's Office faced not only a woefully backlogged caseload, but tremendous anticipated liability for judgments and claims as well. Senior managers in both offices had come to realize that progress could be made in addressing their mutual and related problems only if they cooperated fully. Accordingly, the Comptroller and Corporation Counsel, each of whom controlled a different aspect of the City's claims process, began to work collaboratively.

The City often undertook no affirmative discovery of its own, and hired no experts.

That year, they jointly proposed that a study be conducted to evaluate the City's claims process. They retained the firm then known as Price Waterhouse L.L.P. (now PricewaterhouseCoopers L.L.P.) to perform a comprehensive examination of the City's methods in processing tort claims and cases, and to make recommendations for improvement. With the results of the Price Waterhouse study in hand, the Law Department and Comptroller's Office identified the key steps that had to be taken: facilitating early resolution of claims and cases, implementing a risk-management program, vigorously and efficiently defending high exposure cases, and advocating favorable legislative changes in municipal tort law.

The first task to be undertaken was to gain control of the burgeoning caseload, with its constant threat of defaults, stricken answers and inadequate trial preparation, all of which had contributed to skyrocketing num-

bers of costly judgments. At first, the Law Department's Tort Division used relatively small and easily established measures to cut back on the explosive caseload growth. Then, as some progress became visible, recognition grew that more significant caseload reduction could be achieved with existing staff levels.

Settlement of Meritorious Claims Rise Dramatically

The Law Department and Comptroller acknowledged that study after study conducted by insurers and others in the private sector had shown, as Price Waterhouse had also advised, that early resolution of meritorious tort claims resulted in lower overall payouts and transactional costs. Recognizing the validity of this principle, the Comptroller's Office, the Law Department and the State courts instituted a multi-pronged program to effect a dramatic increase in the number of cases resolved before they reached court calendars. The goal was simple: to avoid the costs of litigation by settling meritorious claims quickly. By disposing of these cases, the overall number of pending matters would be reduced, and the City could devote its limited resources to defending the highest exposure claims, and eliminating liability-producing risks where possible.

The Comptroller's Office contributed by stepping up its initial investigation of personal injury claims. In particular, the Comptroller began conducting more pre-litigation hearings and physical examinations of claimants, and also began targeting groups of cases for settlement prior to commencement of litigation. The dramatic result was a 230% increase in pre-litigation personal injury settlements, from 531 settlements in fiscal year 1997 to 1,800 in fiscal year 2005.

In a similar vein, the Law Department's Tort Division created the Early Intervention Unit (EIU) in the late 1990s, and began attaching notices to the City's answers inviting plaintiffs to contact the Tort Division staff to commence settlement discussions. This procedure encouraged negotiations in potentially meritorious cases as early as possible once litigation was commenced. Here, too, the effect was very significant. In the past five years (fiscal years 2000–2005), EIU has resolved an average of 1,350 cases a year.

In 2003, both the Law Department and the Comptroller's Office expanded their early settlement philosophy to the challenging area of medical malpractice cases, where claims typically result in the highest settlements or judgments (*e.g.*, those involving brain-damaged babies). Since the inception of this program, 396 early-case settlements of medical malpractice claims have been achieved.

In 2004, following the standard prevalent in the insurance industry, the Comptroller's Office and Law Department established an innovative, streamlined settlement process for cases not yet on the trial calendars, and valued at $25,000 or less. This program centralized the settlement authority function traditionally divided between these offices, so these cases could be settled in a more efficient and expeditious way. This initiative for the smaller, pre-trial calendar cases resulted in settlement of an additional 203 cases in fiscal year 2004; in 2005, an additional 450 such cases have been resolved.

For cases that appeared headed to trial, the Law Department has also worked with the courts to set up programs establishing firm trial dates and allowing their adjournment only in extenuating circumstances. This, of course, encouraged both sides to settle.

Working With the Courts on Pending Cases

The City, however, could not fix the problem by working with the claimants alone. Pending lawsuits created a separate set of challenges. By the late 1990s the tens of thousands of cases pending against the City were clogging dockets and posing myriad management problems for the courts. The City's Administrative judges urged the City to work to eliminate the backlog of unresolved tort cases that caused, among other things, the filing of 16,000 motions annually. Some six years ago, the Law Department addressed this request by proposing that the courts establish special early settlement programs to target the lengthy list of City cases accumulating on the court calendars. These programs worked well. In fiscal year 2005, 745 cases settled, and a total of 4,355 cases have been resolved since the programs' inception in 1999.

For cases that appeared headed to trial, the Law Department has also worked with the courts to set up programs establishing firm trial dates and allowing their adjournment only in extenuating circumstances. This, of course, encouraged both sides to settle. The result has been a substantial increase in the resolution of trial-ready City tort cases. This program has also reduced the number of such cases awaiting trial for more than 18 months – from 2,592 in 2000, to 2,069 in 2003, to 1,129 by August 2005. The value of this aspect of the City/courts case

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management effort can clearly be seen in the total number of cases on the trial calendar in August 2005 – 4,684, as compared with 7,156 cases at the close of 1999.

For all cases pending in the City of New York, at any stage, the statistics reflect the success of the case reduction effort. As of June 2005, 13,471 City tort cases were pending in the City's supreme courts, as compared with 20,811 cases pending at the end of 1999.

Risk Management

In addition to adopting techniques designed to maintain steady (or, ideally, to reduce) City caseloads, the best way to reduce the number and cost of personal injury claims is to prevent injuries from happening in the first place, whether as a result of defects in premises or as a result of government's activities. In 1999, the Tort Division initiated a pilot risk-management program to further these objectives. The program's broad and ambitious mission was to create a safer city, develop a long-range plan to reduce future litigation, preserve meritorious defenses, and find ways to make the City a less attractive target for fraudulent or baseless litigation.

The Law Department authorized the Tort Division to launch its Risk Management Unit (RMU) three years later, in 2002. The RMU was given four primary objectives: (1) reduce the number of accidents where the City would be named as a defendant; (2) reduce the number of tort claims brought against the City; (3) preserve defenses to claims against the City; and (4) prevent fraudulent tort claims through identification, investigation, and prosecution of suspect claims. At present, the Tort Division's RMU includes three lawyers, five investigators, and a computer specialist. One of the RMU's major functions is to provide advice to City agency in-house legal counsel on a wide range of risk-management concerns. Last year, it responded to more than 200 requests for risk analysis from the general counsel's offices of City agencies.

The RMU's risk assessments involve comprehensive analyses of claims history and agency operational policy. One significant result of its recommendations has been enhanced workplace-safety inspections in Department of Sanitation garages, which have significantly reduced slip-and-fall accidents caused by oil and grease. Another result has been expedited processing of fatal-accident data by the Department of Transportation's Safety Review Unit. That achievement has, in turn, enabled more expedited completion of safety analyses and implementation of preventive safety measures, where advisable. When the City sponsors major events, such as the Olympic Step Out (a televised special event in Times Square involving cabled "flight" by a gymnastic gold medalist), the RMU provides advice to increase safety and concomitantly to avoid City tort claim liability.

To address the problem of fraudulent tort claims, the RMU investigates individual cases in which fraud is suspected, and researches claim patterns suggestive of fraud. RMU staff also trains other personnel in the Tort Division in fraud identification and reporting, investigates identified frauds, and prepares case reports for referral of cases to prosecutorial agencies. Last year, the RMU identified 140 suspected fraudulent cases, of which 43 were referred to the New York City Department of Investigation (DOI) for further investigation. DOI, in turn, has referred 10 of those cases to the appropriate District Attorney for possible prosecution. Several cases initially referred by the Law Department for prosecution have resulted in indictments and convictions, including one in 2003 arising from an alleged sidewalk injury. (The RMU's investigation revealed that the plaintiff settled a claim against her landlord for an injury allegedly incurred in her apartment – an accident that had occurred on the same day she claimed she had fallen on the sidewalk, suffering the same injury.)

The RMU has also substantially assisted the City's preservation of defenses to tort claims by creating an intranet portal called TORT-LINK (Litigation Information Network, developed in cooperation with the City's Department of Information Technology & Telecommunications. In July of 2003, LINK went online with one of the City's largest client agencies, the Department of Transportation; more recently, the Department of Parks was added to the system. LINK is now the principal tool used by the Tort Division to communicate with these two agencies about pending lawsuits.

The LINK system also enables the Tort Division to transmit document and witness requests electronically to City agencies for response. Agency documents essential to litigation are then returned either electronically through LINK or by mail, with instantaneous tracking. Investigators review the responsive records and remove the posted request from the LINK site when they are satisfied that the request has been met. The implementation of this electronic litigation support system has greatly increased efficiency, streamlined the document production process, and enabled City agencies to reallocate their own limited resources to more proactive risk- or litigation-related activities.

Insurance Coverage

Another Law Department initiative is to ensure that the City receives the full benefit of private party insurance. The City is self-insured, such that any settlement or judgment it pays comes directly from the City budget and treasury. Frequently, however, another insured party is directly responsible for an injury. To assist in providing the City's extensive array of public services, City agencies often hire independent contractors. In a majority of these instances, the contractors must obtain liability insurance that protects the City as well as the contractor. Thousands

of such contracts are housed City-wide at each City agency office that contracts with private entities.

Until recently there was no central mechanism to access the insurance documents so critically necessary to obtaining coverage and representation. Just 10 years ago, the City took advantage of contractors' private insurance in only a small number of cases. To reverse this state of affairs, the Tort Division's Early Intervention Unit was, from its inception, given the important responsibility of creating a system to obtain insurance defense takeovers whenever possible. That task was made easier this past year when the Comptroller's Office centralized all certificates of insurance in favor of the City in the Comptroller's optically scanned database. As a result of these efforts, the Tort Division has obtained 1,937 insurance defense takeovers in the past five years.

When the Tort Division confronts a recalcitrant insurer, it refers the case to the Law Department's Affirmative Litigation Division, which thereafter continues to try to persuade the insurer to meet its obligations. If its efforts at persuasion are unsuccessful, the Affirmative Litigation Division commences a declaratory judgment action to compel the defense takeover. Over the past five years, it has handled over 2,500 insurance matters and has obtained over 500 takeovers in disputed cases.

A Reduced Backlog Leads to a More Vigorous Defense

The steady reduction of the City's tort case backlog has enabled the Tort Division and Comptroller to shift resources slowly but surely from a primarily reactive stance in the City's defense of tort claims to one that is more proactive. The Comptroller has engaged outside-contract attorneys to conduct more comprehensive statutory examinations, as permitted under the General Municipal Law, which can often serve the purpose of an examination before trial under the CPLR. The Tort Division can now more frequently devote energy and funds to locating and hiring experts, who provide evidence to contest both liability and damages, and conduct physical examinations of plaintiffs to confirm and assess injuries. In addition, the Tort Division has created a comprehensive expert database easily accessed by staff. The convenience provided by LINK (the Web-based document retrieval system discussed above) as a tool for responding to discovery requests, has also enabled the Tort Division to reallocate many personnel hours to affirmative litigation activities.

As the size of the Tort Division's backlogged caseload and the number of incoming cases has fallen, Division managers have been able to redirect staff from the task of responding to thousands of discovery-related motions to aggressive case investigation and City-initiated, dispositive motion practice. In the past year, these developments have enabled the Tort Division to reassign attorneys in each of the Bronx and Brooklyn borough offices from entirely defensive work to comprehensive assessment of cases as soon as they are filed, which has led to impressive rates of case reduction. Of the 1,033 cases reviewed on intake as of July 2005, 17% were earmarked for affirmative motions to dismiss to be made by the City, another 15% were referred for early settlement, and 5% were referred for insurance takeovers. This means that almost 30% of the incoming cases in the Bronx and Brooklyn will have been targeted for early resolution.

The City's attractiveness as a business and residential location is eroded by out-of-control litigation and judgment costs, which are ultimately paid by City taxpayers.

Legislation Favorable to the City

The City has also aggressively sought and continues to seek the enactment of legislation that would appropriately control and reduce the City's tort liability. The City's overall legislative goals are, first, to assure that the City is treated fairly in litigation and, second, to prevent an unwarranted drain on public resources. The City's attractiveness as a business and residential location is eroded by out-of-control litigation and judgment costs, which are ultimately paid by City taxpayers.

To attack a large component of the City's tort liability at its roots, the Law Department advocated successfully for legislative protection from suits based on sidewalk accidents. After two years of drafting and lobbying efforts undertaken primarily by the Law Department, and at the Mayor's urging, the City Council passed a law that became effective on September 14, 2003, shifting the primary tort liability for injuries sustained from falls on many City sidewalks to the adjoining owners of property.[1] The law covers accidents that occur in front of commercial and multiple dwellings (occupied by four or more families). It recognizes the owners' pre-existing legal responsibility under the City's Administrative Code, and encourages them to keep the sidewalks in front of their buildings free of defects and other dangerous

conditions. The new law also legislatively overturns case law under which the City, not the building owners and their insurance carriers, had to pay damages for claims arising from accidents on those sidewalks. The responsibility for approximately two-thirds of all sidewalk lawsuits thus has been shifted from the City to adjoining commercial or larger residential owners.

Current statistics show that the City is likely to reap the estimated $40 million in annual savings on sidewalk cases that were projected when the law was proposed. During the first 18 months after the law's effective date, 480 viable sidewalk lawsuits were filed, as compared with the filing of 945 such lawsuits during the prior 18-month period, representing a 50% decline in filings. From a public benefit perspective, another gratifying result of the new sidewalk law is that, based on anecdotal evidence, a substantial number of City landowners have undertaken repairs to adjacent sidewalks. Many of the sidewalks had long been in need of such attention, but before the legislation was enacted prior case law had created a deterrent to the undertaking of publicly beneficial repairs; as noted above, the courts had held that the repair itself could lead to owner liability. Now, it is the failure to repair that leads to owner risk.

A unique set of legislative initiatives also arose from the terrorist attacks of September 11, 2001. Within days of that disaster, Congress passed legislation establishing a Victim Compensation Fund available to individuals injured in the attacks and their aftermath, and to family members of those who had died, on condition that they forgo litigation, including claims against the City.[2] In November 2001 the City's efforts led Congress to pass additional legislation, capping the City's liability at $350 million for the lawsuits brought by those who did not, or could not, opt into the Fund. Finally, in February 2003, again in response to the City's efforts, Congress allocated $1 billion to the City to create a captive insurance company insuring the City and its private debris removal contractors for any liability arising from their activities following the disaster.

Proposed Additional Legislative Changes

At present, the City is actively seeking other legislative reforms that increase protection against municipal tort liability. The City currently proposes an enactment allowing governmental defendants to pay damages only for their proportional share of liability for all elements of damages, not solely the element of pain and suffering, as provided under the current law. In addition, City is seeking a legislative cap on pain and suffering awards.

The City also proposes the enactment of an explicit statutory ban on certain double recoveries, available under current case law to public-employee plaintiffs who sue their public employers. The statute applicable to such claims now requires only that past pension benefits be set off against past lost earnings awards. The statute does not explicitly require a similar set-off of reasonably anticipated future pension benefits against duplicative lost future earnings awards. Set-offs of future benefits are explicitly required in tort cases involving privately employed plaintiffs and private defendants.

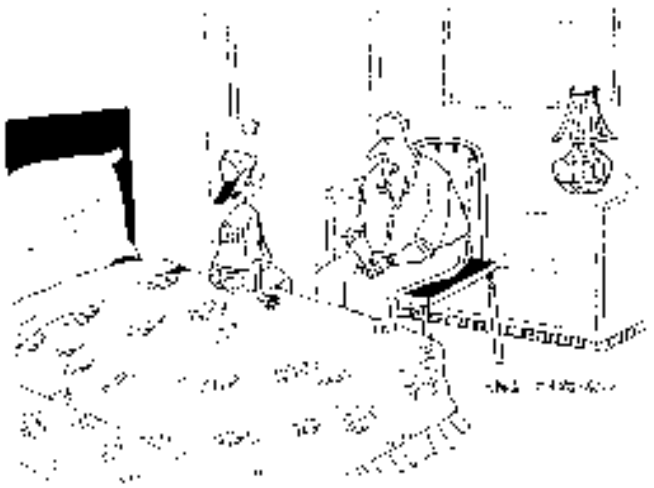
Conclusion

The City's programs of early investigation and prompt resolution of meritorious tort claims, early settlement, risk management, vigorous claim defense and advocacy for protective legislation, as well as efforts to eliminate the injury-producing conditions themselves, have led to real and measurable successes. There has been a marked decline in the number of actions commenced against the City, and elimination of a backlog of unresolved tort claims.

In the last eight years, the City has achieved a 41% reduction in the number of suits commenced – from 11,189 in fiscal year 1997 to 7,213 in fiscal year 2005. These numbers indicate that through their joint and comprehensive efforts, New York City's Corporation Counsel and the Comptroller have made impressive progress in managing the City's tort claims. The City is dedicated to continuing that progress. ■

1. N.Y.C. Admin. Code § 7-210.

2. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230.



"Son, I want to talk to you about the birds, the bees, and the attorney client privilege "

BY EDNA SUSSMAN

New York Addresses Climate Change with the First Mandatory U.S. Greenhouse Gas Program

"A great, great deal has been said about the weather, but nothing is done about it."

— Mark Twain

Today we are doing something about the weather, to undo what people have done to change it. Spurred by concerns about climate change and its impacts on the environment and the economy, the New England/Mid-Atlantic Regional Greenhouse Gas Initiative (RGGI) is breaking new ground, by creating the first mandatory greenhouse gas cap-and-trade program in the United States. Spearheaded by New York State, RGGI will reduce emissions of the principal greenhouse gas, carbon dioxide (CO_2), in the region and perhaps provide a model for the rest of the country.

With the execution of the RGGI Memorandum of Understanding (MOU) on December 20, 2005, by New York and six of its neighbors, implementation of RGGI is set to commence. This article will review the international setting for RGGI, describe the basic design of the program as set forth in the MOU, and summarize the current status of some of the other responses to climate change in the United States.

Background

The U.S. National Academy of Sciences issued a joint statement with 10 other national science academies in June of 2005 ("Joint Statement"), which observed:

> [T]here is now strong evidence that significant global warming is occurring. . . . It is likely that most of the warming in recent decades can be attributed to human activities . . . [and] has already led to changes in the Earth's climate.

As evidence of global warming, the Statement notes the rising surface and subsurface ocean temperatures, increases in average sea levels, retreating glaciers and changes to many physical and biological systems. The projected warming trends are, among other effects, likely to increase the frequency and severity of weather events and the melting of large ice sheets. The Joint Statement concludes by stating that it is "vital that all nations identify cost effective steps they can take now, to contribute to substantial and long term reduction in net global greenhouse gas emissions."[1]

The underpinnings for the Joint Statement's conclusions were the findings of the Intergovernmental Panel on Climate Change, which has been studying climate change since the 1980s. The panel's findings noted that CO_2 levels on earth have increased from 280 parts per million (ppm) in 1750 to 375 ppm today, a level significantly higher than any CO_2 level in the last 420,000 years. There is a positive correlation between CO_2 emissions and temperature. "Increasing greenhouse gases are causing temperatures to rise."

The scientific explanation for this is simple. CO_2 and other greenhouse gases trap heat in the atmosphere. While this "greenhouse effect" is essential to keeping the earth from being too cold, the accumulation of greenhouse gases emitted by the burning of fossil fuels such as oil, natural gas and coal has led to today's unprecedented CO_2 levels and to the consequent impact on climate.

World demand for energy is estimated to increase by almost 60% over the next 25 years, and fossil fuels, the principal source of CO_2 produced by humans, are projected to supply 85% of this demand. This will cause a dramatic increase in the levels of CO_2. And long-term solutions are required, because CO_2 remains in the atmosphere for many decades. Failure to take action now will make the job much harder in the future.[2] Scientists have estimated that very significant reductions of CO_2 are required – well in excess of 50% by 2050 – to stem the impact of greenhouse gases on climate change.

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Some contend that scientists have not been able to state with absolute certainty the extent to which current climate changes are due to natural weather variations. However, the Joint Statement concludes that "[a] lack of full scientific certainty about some aspects of climate change is not a reason for delaying an immediate response."[3] At a recent panel discussion by six former chiefs of the U.S. Environmental Protection Agency, all agreed that more aggressive action to limit greenhouse gas emissions was "urgent" and that the debate over how much of the problem is caused by human activity is a "waste of time."[4]

Solutions proposed for climate change address not only environmental concerns, but have sweeping ramifications for the essential goals of energy independence and energy security. In his 2006 State of the Union Address, President Bush spoke from a political perspective about the critical need to move towards powering our homes and offices with "zero emission" technology and to break our "addiction to oil" by reducing our use of oil by 75% by 2025.[5]

The debate is now not over whether action should be taken to reduce greenhouse gases, but whether mandatory action is required or wholly voluntary action will suffice. RGGI follows the wisdom of the international community on this question and adopts a mandatory approach.

International Climate Change Framework

To understand RGGI one must appreciate the international setting in which it was developed. RGGI is part of a massive international effort in which countries around the world have joined together to prevent the drastic climate changes that may result from greenhouse gas emissions.

The first major convening of nations on the issue took place in 1992 at the United Nations Conference on Environment and Development (the now-famed "Rio Earth Summit"), which resulted in the United Nations Framework Convention on Climate Change (UNFCCC). Based on years of research, the UNFCCC was ratified by 184 countries, including the United States.[6] Its stated goal was to stabilize greenhouse gas emissions at a level that would prevent interference with the world's climate system and to commence work on mechanisms for "adaptation" to already unavoidable change.

After five years of work on the means of implementing the UNFCCC, the Kyoto Protocol was signed in 1997.[7] It established a firm schedule for CO_2 reductions by industrialized countries that committed to reducing greenhouse gas emissions by an average of 5.2%, as against a 1990 base line, during the period 2008–2012. Specific targets were set for each of the signatory industrialized countries.

Developing countries did not commit to reductions under the UNFCCC but agreed to voluntary action and cooperation to improve the quality of local emission factors and to foster sustainable development. As the developed countries had already reaped the benefits of the industrialization enabled by their fossil fuel consumption, it was not deemed equitable to limit greenhouse gas emissions by developing countries, although some of those countries however, which include China and India, are likely to be major sources of increasing emissions in the coming decades.

Through the Kyoto Protocol, the industrialized countries seek to influence the developing countries to minimize greenhouse gas emissions by setting an example with their own commitment, creating a mechanism and incentives for investment in carbon reduction projects in the developing countries, keeping developing countries engaged in the international dialogue, and working to foster sustainable development in the near term and more binding commitments in the future.

The United States, drawing on its experience with its sulfur dioxide (SO_2) cap-and-trade program, urged adoption of similar market mechanisms. Cap-and-trade systems operate by capping the amount of emissions allowed, distributing emissions allowances to sources up to the cap, and requiring each covered source to have sufficient allowances to cover its emissions at the end of each compliance period. Sources can meet their emissions limit by reducing emissions, buying allowances or generating credits with qualified offset projects. Cap-and-trade programs have proved to be an effective market-driven mechanism that enables environmental goals to be met at the lowest cost. The Kyoto Protocol adopted the following market mechanisms to meet its targets:

- emission rights trading;
- recognition of Clean Development Mechanisms (CDMs) (sustainable development emission reduction projects in developing countries) as offsets; and
- recognition as offsets of Joint Implementation (JI), which are "additional" emission reduction projects in countries that have a commitment to reduce emissions under the Protocol; these are primarily Central and Eastern European transition economies.[8]

The Kyoto Protocol has been ratified by 160 countries. It went into effect in February of 2006, when Russia signed on, bringing the total number of developed countries ratifying the Protocol above the requisite 55%. The United States, which emits 25% of the world's CO_2 annually while housing only 5% of its population, is the only industrialized country, other than Australia, that has not ratified the Kyoto Protocol and committed to mandatory greenhouse gas reductions. Concern about the impact on the U.S. economy is the principal reason given for not ratifying the Protocol.

European Union Emissions Trading

To position themselves for compliance with the Kyoto Protocol, which starts in 2008, and to get a head start on reducing its own emissions, in 2003 the European Union (EU) member coun-

tries developed an EU-wide greenhouse gas allowance trading scheme, which went into effect in January of 2005. Each country was allocated an "allowance," which entitles the country to emit one ton of carbon dioxide, or an amount of any other greenhouse gas with an equivalent global warming potential, during a specified period. In addition to allowance trading, the EU also recognizes credits for certain types of CDM and JI offset projects that qualify under the Kyoto Protocol. Each country created a national plan allocating allowances to each installation in various industrial sectors including energy; iron and steel production and processing; the mineral industry; and the wood pulp, paper, and card industry.

In 2005, the 25 member states of the EU issued allowances for 2.2 billion tons of CO_2, capping the emission of 11,400 industrial facilities. The first year of the EU regime saw the development of an active market with trading of about 12% of the allowances issued, recognition of many CDM projects, and delivery of the first "Certified Emissions Credits" for CDM offset projects, which can be used like allowances to meet greenhouse gas obligations.

Launching the Regional Greenhouse Gas Initiative

In the context of the international commitment to address climate change, the limited U.S. federal government response, and the threat posed to our environment and economy, Governor Pataki announced the formation of a New York State Greenhouse Gas Task Force in 2001. The Task Force, which issued its report in April of 2003, recommended the creation of a flexible greenhouse gas market-based cap-and-trade program for the power sector, preferably on a regional basis. Governor Pataki adopted the recommendation and invited neighboring states to join in a cooperative planning effort.

An action plan was developed and guiding principles were set for the project that included:

- emphasizing uniformity across participating states to facilitate interstate trading of greenhouse gas allowances;
- building on the experiences of successful cap-and-trade programs;
- ensuring that the program is expandable so additional states can join; and
- focusing on power plants in the initial phase and developing reliable protocols for offsets over time.

The action plan recited the hope that RGGI "may serve as a platform and model for the implementation of future additional emissions trading programs."[9]

After more than two years of concentrated effort on developing the RGGI design, on December 20, 2005, a bi-partisan group of governors from seven states signed the MOU[10] – Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York and Vermont (the "Signatory States"). Massachusetts and Rhode Island actively participated in the design of the RGGI and negotiation of the MOU, but have not yet agreed to implement the program. Pennsylvania and Maryland participated as observers. The program launch date is January 1, 2009.

The two-year effort that led to the MOU involved extensive stakeholder participation. Myriad policy issues were addressed and resolved in developing the final program design, including the identification of those who should be governed by its provisions; the base line to be used and the extent of reduction that should be required over a time frame to be specified; how the CO_2 allowances should be allocated among the states; how concerns about leakage should be addressed; whether and when offsets should be allowed; whether and at what level price triggers should be established to give rise to additional offset rights; and which offsets should qualify. Numerous studies were conducted to inform the decisions made on these issues and to analyze the costs and benefits of the program.

Who, What and When

Power plants account for approximately 40% of the CO_2 emissions in this country. So a decision was made to limit the program's coverage to CO_2 and to regulate only electricity-generating units having a rated capacity equal to or greater than 25 megawatts and that burn more than 50% fossil fuel. Thus the program design addresses major sources of CO_2 but is, initially, more limited in scope so it is easier to administer. RGGI may be expanded in the future to cover CO_2 emissions from a wider range of sources, as in the EU. The MOU provides for multi-year compliance periods – initially a minimum of three years – to provide a mechanism for smoothing out weather-related spikes in emissions by averaging them over a longer period of time.

The Emissions Caps

The regional base CO_2 emission budget was set at 121.3 million short tons, the approximate equivalent of current levels. Each state was given an allocation out of the regional cap; New York State was allocated 64.3 million short tons. In developing the state emission budgets, consideration was given to 2000–2004 emissions, electricity consumption, population, potential emissions leakage and provision for new sources. The MOU contemplates keeping the states' base CO_2 emissions budget unchanged from 2009 through 2014. Beginning in 2015, each state's base annual emissions budget will decline by 2.5% per year so that by 2018 it will be 10% below the initial budget.

The MOU directs that each state reserve 25% of its emission allowance allocation for consumer benefit or strategic energy purposes. Thus at least 25% of the emission allowances will be available to be auctioned and the proceeds used for such activities as fostering renewable energy, offering consumer rebates, stimulating innovative carbon-reduction technologies, and funding the administration of the program. The auction of these allowances is projected to yield annual revenue of between $50 million and $185 million through 2020. It is anticipated that there will be an active market for allowances in which power plants with low emissions abatement costs will sell surplus allowances to plants with high abatement costs.

The allocation of allowances to specific sources or into the open emissions market will be determined as "appropriate" by each of the Signatory States. (The MOU is silent on salient design features that will need to be considered in allocating allowances to sources within the states.) Allocations can be made on the basis of energy output, fuel input or historic emissions. Which of these is used as the basis for the allocation and what base line is used will make a substantial difference.

Questions to be answered in the development of the allocation methodology include:

- What base line year or years will be used?
- Will allowances beyond the 25% set in the MOU be auctioned? If so, what percentage will be auctioned and what percentage will be allocated to the power plants at no cost?
- Will the allocation methodology be fuel-input neutral?
- Should allocations be awarded based on historic emissions (which would reward plants with higher emissions) or should the methodology be developed to allocate greater allowances to plants that have already switched to cleaner operations?
- Will non-emitting sources, including renewable sources, receive allowances?
- Will allowances be reserved for new sources?
- Will additional allowances be given to early adopters in recognition of their reduction of CO_2 emissions prior to the execution of the MOU?
- Will early reduction credits be awarded as part of the state's allocation or will they be allocated in addition to the state's cap?
- How will emissions and allowances be tracked?
- What will the enforcement mechanism be?

Safety Valves

The RGGI design includes several market features to help lower the cost of compliance in order to reduce the possibility of substantial increases in power prices. Because greenhouse gases are a global problem which accumulate over time, geographic and temporal limits can be flexibly applied – to some extent – without jeopardizing the principal goals of the program. Therefore, RGGI authorizes the states to allow early reduction credits for projects undertaken after the date of the MOU, and before the 2009 launch date, that reduce emissions from power plants. The MOU specifically allows power plants to bank surplus allowances, offset allowances and early reduction credits for use in subsequent compliance periods.

The RGGI program also provides for offset credits to sponsors of approved CO_2 emission offset projects, which can be used for compliance. A creditable offset is a project that removes CO_2 from the atmosphere. The MOU requires that it must be real, surplus, verifiable, permanent, and enforceable. In determining precisely which kinds of projects should be authorized as offsets, how much of a power plant's obligation could be satisfied with offsets, and what the geographic range should be for qualifying offsets, a balance was struck between affording greater market flexibility to the power plants and ensuring that RGGI would effect reductions in CO_2 levels at the power plants located within the Signatory States. This avoids the possibility that power plants could meet their CO_2 emission limits without changing their power-generating operations, but instead reducing their own emissions simply by investing in offset projects.

The use of offset allowances is capped pursuant to the MOU, and sources may use them for only up

to 3.3% of reported emissions. Offset allowances are available at one ton of allowance for each certified ton of CO_2 reduction, if the offset project is within the Signatory States; and one ton of allowance for each two tons of certified CO_2 reduction, if the offset project is in other parts of North America. Additional safety valves keyed to allowance pricing were built into the model. If emissions allowance prices exceed $7, the percentage of offsets that a source may use increases to 5% of reported emissions; projects anywhere in North America become eligible on the basis of one ton emission allowance for one ton of CO_2 reduction. If emission allowance prices hit $10 for an extended period, geographic availability is expanded to include international projects and generators, which may use offsets to cover up to 20% of emissions.

All issues related to leakage would, of course, be obviated if there were a national unified mandatory scheme for reducing greenhouse gases.

The MOU contemplates that, over time, additional offset categories will be added. However, recognition of offset credits is limited, for the time being, to natural gas, heating oil and propane energy efficiency; landfill gas and combustion; methane capture from animal operations; forestation of non-forested lands; reduction in sulfur hexafluoride (SF_6) emissions from transmission and distribution equipment; and reductions in fugitive emissions from natural gas transmission and distribution systems.

The safety valves raise another series of issues for the rule-making process:

- Which of the many offsets that have been urged by stakeholders will be added to the list?
- What level of technical information will be required to register an offset?
- How will the determination be made if an offset project is in fact "additional" (*i.e.*, it would not have happened anyway)?
- Will third-party verification of an offset's CO_2 reduction be required?
- How will compliance be monitored?
- How quickly can the mechanisms needed to administer the offset process be put in place?
- How will the determination be made whether the price triggers making additional offsets available have been met?
- Will the final design provide an absolute price cap on allowances?

Leakage Concerns

One of the principal concerns raised was the possibility of increased imports of electricity into the Signatory States from neighboring states that are not subject to RGGI's CO_2 caps, creating emissions "leakages." For example, Pennsylvania has sufficient electricity generation capacity, primarily utilizing coal as its energy source, to engage in significant exports of electricity into some of the Signatory States. It is feared that the Pennsylvania operators, unrestricted by RGGI, may be able to compete at a lower price and defeat RGGI's purpose by exporting electricity into Signatory States without CO_2 controls. By doing so, Pennsylvania operators would be "leaking" CO_2 emissions into the Signatory States while at the same time placing those states' power producers at a competitive disadvantage.

Various solutions have been suggested, including requiring companies that export electricity from their state into a Signatory State to offset their emissions on such electricity; and allocating allowances to current importers of electricity in the Signatory States in accordance with their current import level, but requiring them to purchase allowances to cover any increase in their imports based on the average emission rate of the state from which they are importing. Concerns about whether these solutions would run afoul of the Commerce Clause have been raised.

The MOU contemplates a study of the leakage issue by a panel of experts and recommendations by December of 2007 that take into account energy prices, allowance prices, electric system reliability and the economies of the Signatory States. Throughout the RGGI implementation period, electricity imports will be monitored to determine if and to what extent any increase in emissions from electricity generating units outside the Signatory States is attributable to the RGGI program. If a significant increase in such emissions is found, the Signatory States will implement measures to mitigate such emissions.

All issues related to leakage would, of course, be obviated if there were a national unified mandatory scheme for reducing greenhouse gases.

Benefits, Costs, Growth Impact

The impact of RGGI on retail electricity pricing and on the economy was of prime interest to those engaged in the program design. Studies projected that the RGGI program would have minimal cost impacts with average retail price increases ranging from 0.3% to 0.6%, about $3 to $16 per average household annually in 2015.[11] An additional model was prepared utilizing a "high" gas price scenario that projected retail price impacts of 1.7% to 3.2% in 2015. However, when increased end-use energy efficiency due to RGGI and other policies is factored in, it is projected that RGGI will actually lead to savings in excess of any price impacts of the program.

Because compliance with RGGI will fundamentally affect business behavior related to energy, it is expected to promote non-emitting sources such as renewable energy, stimulate new technologies to store or scrub carbon, foster energy independence, reduce emissions of other air pollutants, and drive increased energy efficiency. Studies of RGGI's impact on the regional economy showed a negligible impact with a very small positive

effect, in the range of 0.01% to 0.02% due to investment in new technologies.[12]

Next Steps

The MOU sets out a schedule for the rule-making needed to implement RGGI. Each Signatory State committed to establish the RGGI program, under state law, by December 31, 2008. Some states will require legislative action while others will be able to implement the program through regulation. In New York State it is anticipated that regulatory action will suffice to implement the rule-making developed pursuant to RGGI.

A regional organization, based in New York City, will provide a forum for deliberative action by the Signatory States, track emissions and allowances, work on development of additional offset standards, and offer technical assistance on offset projects. The organization will not have any regulatory or enforcement authority.

The MOU specifically provides that non-signatory states may become Signatory States and that the Signatory States will work together to encourage other states to join. It also provides that any Signatory State can withdraw from the MOU upon 30 days' written notice.

Under RGGI the reliability of the electrical system will be monitored on an ongoing basis, and a comprehensive review of all aspects of the program and its implementation is scheduled for 2012. It is hoped that RGGI will inform and inspire a national CO_2 cap regime; the MOU proposes that the Signatory States will advocate for a federal program that rewards first movers and provides for transitioning into the federal program if it is comparable.

Reactions

RGGI was hailed as a critical advance in the U.S. approach to the climate change issue. It was viewed as an inspiration to other regional and local efforts in the U.S. and a signal that the U.S. is moving closer to a national mandatory market-based system to cap CO_2 emissions. The international community has pressed the U.S. to join the family of nations in this effort as no program to reduce greenhouse gases can succeed without participation of the world's largest producer of greenhouse gases. Moreover it is much more difficult to seek further action and to plan Kyoto mandates for the post-2012 period if the U.S. is not part of the international regime.

While those in favor of mandatory caps hailed RGGI, those that oppose RGGI have threatened legal action on constitutional grounds. They have raised questions as to whether a group of states can establish an interstate emissions credit program without congressional approval; whether the operation of a program with significant effects on interstate electricity markets raises preemption issues; and whether RGGI is preempted by federal CO_2 policy. RGGI proponents are confident that RGGI will withstand constitutional challenge.

While those in favor of mandatory caps hailed RGGI, those that oppose RGGI have threatened legal action on constitutional grounds.

RGGI Spurs Other Initiatives

RGGI is a step ahead of a host of other efforts to address climate change at the regional and local levels. In recent months, one state after another, and municipalities across the country, have commenced efforts to tackle the issue.

The California Public Utility Commission announced its intention to develop a load-based cap on greenhouse gases for certain major utilities and expressly noted that it was "joining in the pioneering efforts" commenced by RGGI – Governor Schwarzenegger announced emission reduction goals for California with the ultimate goal of reducing greenhouse gas emissions by 2050 to 80% below 1990 levels. The governors of Oregon, Washington, and California have committed to act individually and regionally to reduce greenhouse gas emissions in an effort similar to RGGI.

New Mexico formed a Climate Change Action Council to develop proposals to reduce the state's total greenhouse gas emissions, ultimately seeking a reduction to 75% below 2000 levels by 2050. New Jersey revised its air pollution regulations to define CO_2 as a pollutant. Illinois established an agricultural carbon credit program. Massachusetts and Minnesota set goals for reducing greenhouse gases. Maine and Washington released climate action plans. North Carolina, Oregon, and Arizona created climate change advisory groups. Two hundred mayors across the country have signed on to the U.S. Mayors Climate Protection Agreement and committed to meet the Kyoto Protocol targets for CO_2 reductions within their municipalities.

Various other significant steps are being taken around the country to reduce CO_2 emissions. For example, California is adopting more stringent regulations for automobiles, which are to go into effect in 2009. The goal is to lower greenhouse gas emissions from cars and trucks, major sources of CO_2 emissions, by 30% by 2016. Although these regulations are being challenged by industry, several states (including New York) have followed California's lead. Many states' initiatives include increasing energy efficiency, promoting green building, and fostering the development of renewable energy. Over 20 states have adopted a Renewable Portfolio Standard, which requires that a certain percentage of the power generated in the state come from renewable sources.[13]

Impact on National Policy

RGGI presages what might well be the outcome of growing pressure at the national level. A call for mandatory

action has been heard from many quarters, in part driven by RGGI and the multiplicity of regional, state, and local efforts. The U.S. Senate has commenced an intensive review of the subject with an eye towards arriving at a national solution.

To date, voluntary action and investments in technology have been the federal government response to the climate change issue. The Asia-Pacific Partnership on Clean Development and Climate, launched during the summer of 2005 by the United States with five other countries, that together account for 50% of greenhouse gas emissions, is essentially a voluntary cooperation agreement to share technology advances. In early 2002, President Bush called for voluntary action to cut greenhouse gas intensity – the amount emitted per unit of economic activity – by 18% by 2012, and several commendable domestic programs were launched to encourage corporations to reduce CO_2 emissions. However, a growing chorus, which includes members of the Senate and representatives of energy companies, big business, the faith-based community, and environmental organizations, are urging that more be done and a mandatory regime be implemented. Recent data from the Department of Energy supports the conclusion that voluntary measures will not suffice. Notwithstanding the many voluntary efforts over the past few years, CO_2 emissions in the U.S. rose by 2% in 2004 over 2003 levels, and an increase of 28% in CO_2 emissions over 1990 U.S. levels by 2010 and over 50% by 2025 is predicted.[14]

Legislation to establish a federal carbon-cap system, the McCain-Lieberman Climate Stewardship Act, was first introduced in 2003. It would establish a comprehensive market-based system to cap emissions of six greenhouse gases in 2010 to 2000 levels, and includes the electricity, transportation, industry and commercial sectors. Senator Jeff Bingaman of New Mexico prepared a draft bill entitled "The Climate and Economy Insurance Act of 2005," based on the recommendations published by the National Commission on Energy Policy. This would require the Secretary of Energy to set emissions intensity targets for years starting in 2010, and to translate these intensity targets into an annual cap on greenhouse gas emissions. The draft bill provides for pollution credit trading and establishes a cost cap for emission "permits." At Senator Bingaman's request, the Energy Information Administration of the U.S. Department of Energy conducted a study of the economic impacts of such a greenhouse cap and found the impact to be minimal.[15]

Neither these nor other carbon cap measures survived congressional debate over the recently enacted Energy Policy Act of 2005, a comprehensive piece of energy legislation that was over four years in the making. While many of the provisions of the Energy Policy Act will indirectly reduce greenhouse gases, the legislation does not directly address greenhouse gases other than to commission several reports.

However, a significant non-binding sense of the Senate resolution was passed 53 to 44 in 2005 as an amendment to the Senate's version of the Energy Policy Act to provide a framework for legislation on climate change. The Senate's key findings were:

- Greenhouse gases accumulating in the atmosphere are causing average temperatures to rise at a rate outside the range of natural variability and are posing a substantial risk of rising sea levels, altered patterns of atmospheric and oceanic circulation, and increased frequency and severity of floods and droughts.
- There is growing scientific consensus that human activity is a substantial cause of greenhouse gas accumulation in the atmosphere.
- Mandatory steps will be required to slow or stop the growth of greenhouse gas emissions into the atmosphere.
- The Senate should enact a comprehensive and effective national program of mandatory market-based limits and incentives on emissions of greenhouse gases that slow, stop, and reverse the growth of such emissions at a rate and in a manner that will not significantly harm the U.S. economy; this program should encourage comparable action by other nations that are major trading partners and key contributors to global emissions.[16]

Following this resolution, Senate leaders held a series of hearings on climate change. In February of 2006, a white paper was issued that calls for comments and guidance on the difficult questions that must be resolved in designing a national greenhouse gas cap-and-trade program. These issues concern who should be regulated and at what level of distribution, how allowances should be allocated, whether the program should allow for trading with other greenhouse gas cap-and-trade regimes, and whether further steps should be contingent on action by major trading partners.[17]

Recent statements by Senate and community leaders suggest that federal mandatory climate change legislation may be on the horizon. Senator Richard Lugar, chair of the Senate Foreign Relations Committee, in a speech to the United Nations Security Council on February 6, 2006, called upon "the United States, the world's richest country and the largest emitter of greenhouse gases," to return to "international negotiations [on climate change] in a leadership role under the [UN] Framework Convention on Climate Change."[18] On the same day, the Evangelical Climate Initiative issued a statement that recognizes the scientific conclusion that climate change is happening and is caused mainly by human activity; millions of people could die because of climate change in this century; and the need to act is "urgent." The evangelical statement adopts the language of the Senate resolution. It urges that national legislation be passed "requiring sufficient economy-wide reductions in CO_2

emissions through cost-effective market based mechanisms such as a cap-and-trade-program."[19]

Senator Bingaman reported at the UNFCCC conference in Montreal in December of 2005 that there was increasing pressure from the business community to adopt a national carbon cap regime. He stated that business leaders are concerned that the different programs, such as RGGI, being adopted around the country to address climate change present a potential for conflicts among the states and pose difficult challenges for businesses trying to comply with a checkerboard of regulation. The Senator added that business leaders expressed a need for certainty about the regulatory scheme so that they can make informed decisions on energy capital investments that have a life of 30 to 50 years. While other Senators have since disagreed with this view, Senator Bingaman concluded that he believed that a mandatory national program to control greenhouse gases would be passed in the next year or two.[20]

Conclusion

The landmark RGGI cap-and-trade program is poised to deliver its intended environmental and economic benefits to this region. It has already accomplished its goal of informing climate change planning in other regions and fostering progress in the national debate on the subject. New York State should be proud of having been at the forefront of this signal achievement. ■

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ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I have been appointed a Law Guardian for a 14-year-old boy, who is the only child of a divorcing couple. Each parent seeks full custody of the son. Under a *pendente lite* order, the mother, who resides in the marital home, has temporary physical custody of my client. The father has liberal visitation.

It seems to me that although the mother is a bit of a disciplinarian, the father is overly permissive. During his visitation with the parties' son the father is catering to all of his wishes, including buying him expensive presents, such as a motor bike, which was purchased over the mother's objection. He allows the son to neglect his homework and to watch "R"-rated movies. The father even moved into a co-op apartment on the boardwalk of an ocean community just because his son loves the beach and swimming. In addition, the son has confided to me that his father's girlfriend sleeps over in the apartment while he is there for visitation.

I am convinced that it is in my client's best interest to reside with the mother, and to have visitation with his father, as the Court's final disposition of the custody issue. My client, however, is adamant that he wants the reverse – to live with his father and have visitation with his mother. Obviously, what I want to recommend to the Court would be contrary to his wishes. What is my proper course of action?

Sincerely,

Guardian *ad* Adolescent

Dear Guardian:

When attorneys represent children they are bound by the Code of Professional Responsibility in their jurisdiction. The New York Lawyer's Code of Professional Responsibility, EC 7-11 acknowledges that the lawyer's responsibility "may vary according to the intelligence, experience, mental condition or age of a client." EC 7-12 provides that "[a]ny mental or physical condition that renders a client incapable of making a considered judgment on his or her own behalf casts additional responsibility upon the lawyer." The American Bar Association's Model Rules of Professional Conduct provide that the lawyer's responsibility depends upon whether the client is "impaired" or "unimpaired." The American Academy of Matrimonial Lawyers (AAML) publication *Representing Children* points out that "[c]hildren can be impaired or unimpaired, depending upon their age, degree of maturity, intelligence, level of comprehension, ability to communicate, and other similar factors." Your first obligation therefore is to determine if your client is impaired or unimpaired. As indicated, age is only one factor, but under AAML guidelines there is a rebuttable presumption that children 12 or older are unimpaired, and children below 12 are impaired.

If you conclude that your 14-year-old client is "unimpaired," your responsibility to him would be the same as if he were an unimpaired adult. This means that he has the right to set the goals of your representation. You certainly have the right and obligation to counsel him, but it is he who makes the final decision regarding the substance of the case. Here, his wishes are not the same as yours. You must respect them, and not advance a contrary view before the court.

Even if you decide that the other factors noted above support the conclusion that he is "impaired" (notwithstanding his age), you should still refrain from recommending residence with the mother. AAML guidelines provide that "the child's lawyer shall not advocate a position with regard to the outcome of the proceeding or issues contested during the litigation." Counsel for the impaired child should instead bring facts to the attention of the court which may help it reach its decision. This includes, for example, calling or cross-examining witnesses who would serve that purpose. Unless the child objects, the attorney also should bring the child's wishes to the attention of the court.

In sum, if the AAML guidelines are to be followed, it would appear that as the adolescent's attorney you should not be advancing the outcome you would personally prefer.

The Forum, by
George J. Nashak Jr., Esq.
Queens, New York

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I was retained by an insurance company to represent a professional who is a defendant in a litigated matter. Given the nature of the allegations, the outcome of the case could have significant implications for my client's license to practice her profession. Recently, the insurance carrier directed me to make a settlement offer to the plaintiff. My client has objected because she is concerned that any settlement of the case

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The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

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EDITOR'S MAILBOX

Creditors' Claims

The article about Creditor's Claims in the February 2006 issue did not discuss tenancies by the entireties (available only to married persons) which have a unique place in the law of creditors' rights. By contrast with joint tenancy, a tenant by the entirety cannot break the tenancy alone – both tenants must act. Thus, while both tenants are alive, a creditor of one tenant (but not the other) cannot reach the property. If the debtor tenant dies first, the surviving tenant takes the property free of the creditor's claim. Also, one spouse cannot hypothecate the property alone – the consent of the other spouse is required. That is why married people take title as tenants by the entireties and not as joint tenants. A few years ago, there was legislation to permit tenancies by the entireties for cooperative apartments and the justification was to give married owners of coops the protection against creditors (and against the other spouse) that married owners of real property have.

Sincerely,
Philip M. Maley
White Plains, NY

The recent article "Creditors' Claims – Do They Die With the Debtor?" (February 2006 New York State Bar Association *Journal*) contained some misleading statements about ERISA pension plans. Creditors' claims are less easily enforced against ERISA pension benefits than described.

The ERISA anti-alienation rule of ERISA § 206(d) preempts EPTL 7-3.1(b)(4). That section appears to allow creditors to reach fraudulent conveyances to pension plans. The anti-alienation rule applies to all ERISA pension plan benefits; it is not restricted to the benefits of participants. The United States Supreme Court has held that there are no implicit or equitable exceptions to this anti-alienation rule. *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990) and *Boggs v. Boggs*, 520 U.S. 833 (1997).

The case cited in the article for the proposition that there is no such preemption, *In the Matter of Josephine C. King*, 196 Misc. 2d 250, 764 N.Y.S.2d 519 (2003), stated that ERISA preempted EPTL 7-3.1(b)(4), but the preemption was not pertinent because the plan at issue was not covered by ERISA because it was a government plan.

The article does not mention the division among the Circuits about whether third parties may attach benefits after they have been distributed by ERISA pension plans. The Fourth and Fifth Circuits prohibit such attachments. *United States v. Smith*, 47 F.3d 681 (4th Cir. 1995) and *Herberger v. Shanbaum*, 897 F.2d 801 (5th Cir. 1990). The decisions upholding such attachments, such as the one cited in the article, *Robbins v. DeBuono*, 218 F.3d 197, 203–204 (2d Cir. 2000), are questionable. That holding rests in part on 26 C.F.R. § 1.401(a)-13(c)(1)(ii). However, contrary to the court's description, the regulation does not provide that distributed pension benefits may be attached. Moreover, the court did not mention the earlier United States Supreme Court decision that third parties that are not entitled to pension benefits from a plan may not obtain those same benefits after they are paid out by the plan. *Boggs v. Boggs*, 520 U.S. 833 (1997). In fact, the United States Supreme Court explained (*id.* at 853) that it was holding that a state law claim to distributed pension plan benefits was preempted because ERISA prevents the diversion of pension benefits and:

> If state law is not pre-empted, the diversion of retirement benefits will occur regardless of whether the interest in the pension plan is enforced against the plan or the recipient of the pension benefit.

The United States Supreme Court reached the same result after *Robbins* when it held another state law claim to distributed plan benefits was preempted. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001). It is thus difficult to understand why a creditor who is prohibited from obtaining pension plan benefits from an ERISA pension plan because of the anti-assignment prohibition is not also prohibited from obtaining those benefits from the recipient of those benefits.

Sincerely,
Albert Feuer
Forest Hills, NY

Tax Treatment of Attorneys' Contingent Fees

I'm writing to compliment the helpful article by Professor Laura Lee Mannino, "Supreme Court Rules on Tax Treatment of Attorneys' Contingent Fees," New York State Bar Association *Journal* (February 2006), p. 47. Nevertheless, I believe it is very important for New York lawyers to be aware that the Supreme Court in *Banks* did not put the tax issues to plaintiffs and their counsel entirely at rest. Although Professor Mannino correctly points out that the Supreme Court in *Banks* ruled that the plaintiff has gross income in the amount of the legal fees as a "general rule," Professor Mannino does not go on to suggest circumstances in which this general rule will *not* apply.

The Supreme Court expressly does not decide:

1. whether and to what extent a partnership between lawyer and client can obviate the *Banks* decision, thus allowing the plaintiff not to report the attorneys' fees paid to his or her counsel;

2. cases in which the taxpayer is seeking injunctive relief; and

3. cases in which the taxpayer's counsel receives fees under a statutory fee award, or the payment of contingent legal fees is made in lieu of such an award.

It is too soon to tell how each of these exceptions will be interpreted by the IRS and the courts. However, it is an overstatement to say that the Supreme Court has resolved the split among the Circuits without noting these exceptions. Many taxpayers and their lawyers are crafting legal fee

agreements akin to partnership agreements. Moreover, drafting fee agreements for payments "in lieu of" statutory fee awards is at the forefront of legal fee tax planning.

Thus, New York lawyers should be aware that some avenues for avoiding the "general rule" the Supreme Court announced in *Banks* appear to be available.

Very truly yours,
Robert W. Wood
San Francisco, CA

The writer is author of Taxation of Damage Awards and Settlement Payments, 3d Edition.

ATTORNEY PROFESSIONALISM
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could have long-term, adverse consequences for her licensing status. It should be added that the particular policy she purchased requires her consent before I can offer or agree to any settlement.

I feel that I am being pulled in opposite directions. While I believe that the case is highly defensible, we all know that there are no guarantees in litigation. Moreover, while it is better to settle the claim with insurance company money rather than asking my client to reach into her own pockets, I believe that my client has a legitimate interest in keeping her record clean. What should I do?

Sincerely,
Tugged in Two

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the end of the sentence. Tell a story in miniature.

Be concrete. Add detail — show, don't tell — to convey a sense of story. Don't characterize.

Cut irrelevant facts. Include only those details that advance your argument and help the reader understand the problem. Omit nonessential dates, times, places, persons, and particulars.

Use about 50 to 75 words. When you exceed 75 words, the writer loses focus and the reader loses interest. If you can't frame the issue in 75 words, then you don't know your issue.[17] Neither will your reader.

Highlight and incorporate the reasons for your conclusion. When you provide reasons for your conclusion, you look thoughtful and sensible.[18] When your reasons are absent, you look as if you're hiding something.[19] Giving the reasons for your conclusion will get you closer to a favorable outcome.[20]

Appear objective. A deep issue in a brief should "look[] and sound[] objective even when it's gently slanted."[21] A deep issue in an office memorandum should be objective.

End with a question mark. An issue is a question you want answered in your favor. As basic as it sounds, "the best issue ends with a question mark."[22]

Get to yes. Deep issues should answer themselves with a resounding "Yes." Frame your issue positively. Stay away from negative language or negative answers.

Divide your issues. Use a different issue for each independent ground on which relief can be granted. You're a defendant in trouble if your reader says "Yes, but so what; the defendant still loses." And you've wasted an opportunity if your issue is too broad.

Use counter-issues. As the defendant, respondent, appellee, or party opposing a motion, you shouldn't let the court rely on the other side's presentation of an issue. Level the playing field with your own deep counter-issue.

The Hybrid Approach

Some lawyers combine the old-fashioned and deep-issue approaches by framing the issue in one sentence and incorporating concrete facts.[23] Consider this: "Can a pleading defect be corrected by a 'supplemental petition,' or must the correction be designated an 'amended petition' to be effective?"[24] Another example of the hybrid approach is to frame an introductory question followed by several short one-sentence questions:

> Should an order granting a new trial be subject to appellate review in New York, as it is in the other 49 states, the District of Columbia, and the federal courts?
>
> A. Are a litigant's rights under the New York and United States Constitutions violated by New York's practice of immunizing new trial orders from review?
>
> B. Should a trial court be required to state its reasons for granting a new trial?[25]

This approach might work given these facts, but it might fail in a different case. The better way to persuade the reader is to use the deep-issue approach. It gives readers several sentences to digest, one bite at a time.

Finding Deep Issues

The three things you must deliver in any brief or memorandum are the question, the answer, and the reasons for that answer.[26] Begin writing only after you understand your facts and issues. Determining your theme will bring you to your legal issues. A clear issue will guide the reader and provide a road map for the entire argument. The clearer the issues, the quicker the reader will grasp the argument.[27] Frame your issues so that your reader will understand your theme easily.

The key is to determine your essential issues. Figure out from your client's perspective how a court can resolve the problem in your case. Ask yourself, "What relief am I seeking for my client?" After studying the relevant law, you'll be able to narrow the facts so that when they're applied, you'll prevail. The concrete facts in your case applied to the relevant law will give you your deep issue. Your deep issue will reflect your theme.

The deep-issue approach gives readers several sentences to digest, one bite at a time.

Writing the Deep Issue: Some Do's and Don'ts

The facts in your deep issue must be stated honestly. Don't distort. If you do, your adversary might point it out, or your reader will catch you even if your adversary doesn't.

Don't include facts in your issue that "assume as true what is actually hotly disputed."[28]

Don't argue your facts; save your argument for your argument or discussion section. Use neither argumentative nor biased words.[29] Lead your readers to the cliff, but let them jump off themselves.

In a brief, the facts you use should favor your side. Emphasize the facts that "lead to the answer that you want."[30] That'll force the reader to agree with you. Don't give the other side's facts. You're not denying the other side's claim. You're just not yet at the stage at which you'll want to acknowledge and contradict them.

In an office memorandum, write your facts objectively. One way to be neutral in a memorandum is to give facts that favor and oppose the conclusion you'll ultimately reach or recommendation you'll ultimately offer.

When organizing deep issues in both briefs and office memorandums, place "the most challenging pieces of information at the beginning and the end (the emphatic positions), and the most easily comprehensible part in the middle" of a sentence.[31] You can

arrange your deep issue from the law to the facts or from the facts to the law.

Writing Deep Issues in an Office Memorandum

The main focus in an intra- or inter-office memorandum, as opposed to a trial memorandum, is to analyze issues and predict outcomes. In a memorandum, the issue is framed analytically. An analytical deep issue differs markedly from a persuasive deep issue in a brief in that analytical issues are open-ended and objective. Analytical issues should be phrased to make the reader yearn for the answer[32] yet should not suggest an outcome. A few examples of the analytical deep issue:

> Immigration Act § 273 makes it a crime to bring an undocumented alien to the United States. Maritime Act § 2304 makes it a crime for the master of a vessel to fail to rescue persons aboard a vessel in distress. Does a master who rescues illegal aliens aboard a vessel in distress and then brings these aliens to the United States commit a crime under the Immigration Act?[33] [67 words]
>
> The interspousal immunity doctrine furthers public policy by preserving family harmony. Kitty Hawk sued her deceased father's estate for her mother's wrongful death in an airplane crash. Does the doctrine of interspousal immunity bar Kitty's recovery when there is no longer any marital harmony to preserve?[34] [46 words]
>
> RRR School District, a public employer, suspects that Deep Pockets, an employee, is stealing money from the register. RRR wants to confirm its suspicions so that it may terminate Pockets. Is it legal under New York and federal law for RRR covertly to videotape Pockets at his workstation? If it is legal, are there any restrictions?[35] [56 words]

These examples illustrate how to write effective deep issues in a memorandum. They contain concrete facts in separate sentences; they contain about 50–75 words; they look and sound objective; they give a reason for the conclusion; and they end with a question mark.

A memorandum containing deep issues has many advantages over one that's superficial or has one-sentence issues. Here are several:

- The assigning attorney will see erroneous assumptions;
- A reader will understand the memorandum;
- The memorandum will be understood long after it's written;
- Colleagues researching similar points in different cases will find the memorandum helpful; and
- The analytical deep issue can be transformed later into a persuasive deep issue in a brief.[36]

When writing an office memorandum,[37] follow the standards of your law firm or legal department. A memorandum will have the following items, in this order: (1) heading (To; From; Re (or Subject); Date); (2) issue or question presented; (3) conclusion or short answer; (4) statement of the facts; and (5) discussion. A memorandum is objective; it advocates a particular view, but only after it considers both sides. Adopt a "non-partisan tone."[38] Serve the client's interests by scrupulously and realistically analyzing the various views objectively.[39] Discuss not only the favorable information in the case but also the unfavorable. If you can master writing objective deep issues in a memorandum, then you'll be able to transform them into persuasive deep issues in a brief.

Next month: This column continues with writing deep issues in briefs and organizing issues. ■

1. Leonard P. Plank & Anne Whalen Gill, *Criteria for Granting or Denying Certiorari: Writing a Persuasive Petition*, 18 Colo. Prac. Appellate Law & Practice § 16.6, § 16.6(B) (2005).
2. Bryan A. Garner, *The Deep Issue: A New Approach to Framing Legal Questions*, 5 Scribes J. Legal Writing 1, 8 (1994) (hereinafter "Deep Issue").
3. Bryan A. Garner, Exercises from *Legal Writing in Plain English*, *available at* http://presspubs.uchicago.edu/garner/documents/section50.html (last visited Jan. 9, 2006).
4. Deep Issue, *supra* note 2, at 4.
5. Karen Larsen, *Tell Me a Story*, 59 Ore. St. Bar Bull. 39, 39 (Oct. 1998).
6. Adapted from Larsen, *supra* note 5, at 39.
7. Deep Issue, *supra* note 2, at 4.
8. *Id.* at 3.
9. *Id.*
10. *Id.* at 4.
11. Bryan A. Garner, *A Conversation on the Art of Legal Writing*, West's Legal News, Nov. 15, 1996, at 12191, *available at* 1996 WL 659842 (hereinafter "Conversation").
12. Deep Issue, *supra* note 2, at 3.
13. Joseph Kimble, *First Things First: The Lost Art of Summarizing*, 8 Scribes J. Legal Writing 103, 103 (2002).
14. *Id.*
15. Bryan A. Garner, *Issue Framing: The Upshot of It All*, Trial, Apr. 4, 1997, at 74 (hereinafter "Upshot").
16. *Id.* at 75.
17. Deep Issue, *supra* note 2, at 5.
18. Upshot, *supra* note 15, at 76.
19. *Id.*
20. *Id.*
21. *Id.* at 75.
22. *Id.*
23. Deborah G. Hankinson, Warren W. Harris & Tracy C. Temple, *Issue Drafting/Issue Spotting*, State Bar of Tex 17th Ann. Adv. Civ. App. Prac. Course, Ch. 12, Sept. 11–12, 2003, at 2, *available at* http:www.tex-app.org/articles/drafting.pdf (last visited Jan. 9, 2006) (hereinafter "Hankinson").
24. *Id.*
25. Adapted from Hankinson, *supra* note 23, at 2.
26. Deep Issue, *supra* note 2, at 2.
27. Larsen, *supra* note 5, at 39.
28. Henry Weihofen, Legal Writing Style 253 (2d ed. 1980).
29. *Id.* at 253.
30. *Id.*
31. Deep Issue, *supra* note 2, at 12.
32. *Id.* at 6.
33. Adapted from Deep Issue, *supra* note 2, at 6.
34. *Id.*
35. *Id.*
36. Deep Issue, *supra* note 2, at 9.
37. *See generally* Terry Jean Seligmann, *Why is a Legal Memorandum Like an Onion? — A Student's Guide to Reviewing and Editing*, 56 Mercer L. Rev. 729 (2005).
38. Nancy L. Schultz & Louis J. Sirico, Jr., Legal Writing and Other Lawyering Skills 158 (4th ed. 2004).
39. *Id.* at 152.

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at New York Law School. He thanks Brooklyn Law School student Anna Pechersky and court attorney Alexandra Standish for assisting in researching this column. Judge Lebovits's e-mail address is GLebovits@aol.com.

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Florida attorney Fred Oughterson has asked whether the abbreviation Ms needs to be followed by a period.

Answer: The answer is "no," according to the electronic *American Heritage Dictionary* (AHD, 2000). Surprisingly the 1992 *Webster's Third* does not list either *ms* or *ms.*, but it was cited as early as the mid-20th century. The 1985 *American Heritage Dictionary* lists both abbreviations, defining each as "the title of respect for a woman without regard for her marital status." Either *Ms* or *Ms.* is acceptable. Both are substitutes for the honorific *Mrs.*, an abbreviation of *Mistress*. In southern American dialect, *Mrs.* is often pronounced *Miz*. Spelled out and used as a noun, *missus* is also a colloquial substitute for *Mrs.*, as in, "I'll ask the missus."

The title *Ms*, with or without the period, came into English because of some women's concern that, unlike *Mr.*, the title *Mrs.* indicates both gender and marital status. Women pointed out that because the title *Mr.* did not reveal men's marital status, the title *Mrs.* was both unnecessary and intrusive into women's privacy.

The Usage Panel of the 1985 AHD added that *Ms* (or *Ms.*) is proper only when a woman retains her previous name after marriage. If she adopts her husband's name, a woman should be addressed as *Mrs.*, plus husband's last name, as in: *Mrs. John Smith* but *Ms. Mary Brown*. The AHD noted that although *Ms* "[was] controversial when it was first introduced, it has come to be widely used in business and professional situations, on forms, and in many social contexts."

The use of *Ms* as a courtesy title is now common and undisputed. It came into the language at a time when women had become sensitive to the grammatical masculine pronoun *he* to indicate an individual in a group, even when women as well as men were members of the group. To many women, the use of *he* in contexts like the following seemed discriminatory:

- If anyone wishes to leave, he may do so.
- As each person finished the test, he left the room.
- When one exercises, he should not overdo it.

So, as you all know, we no longer use the so-called "sexist he." Now we say and write:

- If anyone wishes to leave, he or she may do so.
- As each person finished the test, he or she left the room.
- When one exercises, he or she should not overdo it.

Some journalists prefer instead to write *s/he*. Both usages are now stylistically acceptable. And they are grammatical. But far more people, including journalists, choose the ungrammatical *they*. This results in statements like:

- When a person wants a divorce, they should first engage in marriage counseling.
- For a teacher to get a pay raise, they must have a master's degree.

Sometimes well-intentioned persons, attempting political correctness, will stumble, as one professor did in this excerpt from his lecture: "If a student is told that **his** social or regional dialect is as good as any other, without being made aware of its social functions, **he or she** will naturally refuse to learn the standard dialect." (Emphasis added.) The lecturer continued to interchange *he/his* with *he or she* and *his/her*, falling back into his customary usage whenever he began to think about the content of his language instead of the form.

That is one criticism of the arbitrary change of language: the attention of both speaker and listener is diverted from what is being said to how it is being said. Fairly early in the movement to delete "the sexist he," I wrote an article for a small journal, which I titled "Should the English Language Have a Sex Operation?" (My answer was "no.") The journal had little readership, but an enterprising reporter happened to read it and wrote a summary of it that was picked up by the national press. Fortunately, at that time e-mail was not generally available; nevertheless I received a large volume of mail criticizing my viewpoint. I had achieved Andy Warhol's "15 minutes of fame" (or infamy).

When new words appear in English, their spelling or punctuation may vary. That occurred with *Ms/Ms.* and with the electronic term *email* or *e-mail*. According to current dictionaries, the term without the hyphen is now preferred, but both spellings are acceptable.

From the Mailbag I:

In the January "Language Tips" column I discussed the two past tenses of *plead*, (*pleaded* or *pled*); and I wrote that non-lawyers prefer *pleaded*, the older term, although judges prefer *pled*. Rochester attorney Gary Muldoon wrote that he prefers *pled* because of its similarity to *bleed/bled*, and because he has seen a number of briefs in which the past tense of *plead* was pronounced *pled*, but written as *plead* (as in *read/read)*. (I prefer *pleaded* for the same reason.)

From the Mailbag II:

Los Angeles attorney Fred Neufeld provided new information about the derivation of the word hamburger (which was also discussed in the January issue). He wrote that in a new book *Yiddish Civilization*, the author, Paul Kriwaczek, said that the word derived from the Kosher beef that emigrants from Germany rolled into balls, flattened into patties, and placed between slices of bread for their steerage-class crossing to America. Mr. Kriwaczek said that the name "Hamburger steak" first appeared in *Aunt Babette's Cook Book* of 1899.

That etymology may be correct. Both my source and Mr. Neufeld's are called "folk etymology," the name for speculation about the uncertain origin of words. ■

Gertrude Block is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association). Her most recent book is *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co., 2004).

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BY GERALD LEBOVITS

You Think *You* Have Issues? The Art of Framing Issues in Legal Writing — Part I

Issues are the essence of a legal controversy. Framing issues is among the most important part of writing briefs and inter- or intra-office memorandums. Issues create the boundary of a legal controversy. Creating the issue as a question gives readers a story from your perspective to fit within that boundary. Like painters who combine color, perspective, and light to create a picture on a canvas, so do attorneys who combine fact, law, and issue to create a story on a page. Issue framing is an art, not a science[1] — an art that can be acquired with practice.

What's true for good issue framing is true for all legal writing: "good legal writing makes readers feel smart, whereas bad legal writing makes readers feel stupid."[2] There are different types of issues and different approaches to drafting them, but "good [legal] writing makes the reader's job easy; bad [legal] writing makes it hard."[3] One way to make your reader work hard is to draft a superficial issue.

The Superficial Issue

A superficial issue lacks detail. It's easy to frame but hard to understand. The reader is left trying to grasp what's written instead of focusing on the argument. To understand a superficial issue, the reader must read additional facts and law from the body of the brief or memorandum. The more abstract or conclusory the issue, the more superficial it is. An example of a superficial issue: "Can Jones maintain an action for fraud?"[4] Framing the issue this way doesn't give the reader enough information about the legal controversy. It suggests nothing about your theme. The reader will be forced to enter a black hole in a search of a deeper issue. No better than a superficial issue is the one-sentence approach.

The One-Sentence Approach

The old-fashioned legal issue consists of one sentence, it begins with "whether," it states the rule of law, and it lacks facts or details.[5] Consider the following:

> Whether a limited remedy fails of its essential purpose under Uniform Commercial Code § 2-719 when a buyer of a computer vital to the buyer's business must wait a month for the seller to repair it and thus loses substantial profit?[6]

This issue is unreadable. In the end it says nothing.

Most writers believe that this is the right way to write issues. The logic is that it must be right because other lawyers frame issues this way. But this approach frustrates readers. It makes them work unnecessarily to search the brief or memorandum for the true issues and the relevant facts. And sentences that begin with "whether" are statements; they shouldn't end with question marks. Writing the issue in the old-fashioned one-sentence approach creates generic issues and generic facts.

The Deep Issue

Bryan A. Garner, America's greatest legal-writing expert, proposes the "deep issue" approach to frame issues. At first glance, writing a deep issue seems basic and elementary, but it takes sophistication. The more tangible the issue, the deeper it is.[7] A deep issue "sums up a case in a nutshell."[8] After you frame the deep issue, your readers should understand it easily[9] and not exercise their minds.[10] Writing a deep issue will force you "to simplify difficult ideas without over simplification."[11] The two goals when writing the deep issue are brevity and clarity.[12] If you're concise and clear, your reader will reward you by continuing to read.

Frame deep issues this way:

Front-load. Provide clarity by placing the deep issue at the beginning of a brief or memorandum.[13] One of the biggest flaws in legal writing is not getting important information in front of the reader, right away.[14] The first step to writing a deep issue is to follow the 90-second rule: Make your point within 90 seconds.[15] Within 90 seconds, the reader should understand the question, the answer, and the reasons for the answer. Make sure your briefs or office memorandums make a good first impression. Catch the reader's interest; make the reader want to read on.

Use separate sentences. The sentences should follow a statement–statement–question format. Writing the issue in one sentence leads to an incomprehensible issue. Issues that begin with "whether" followed by one convoluted sentence with unchronological statements won't help the reader. Help your reader by giving information in "bite-size form."[16]

Order facts chronologically. If the facts are out of order, readers will forget the question by the time they get to

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