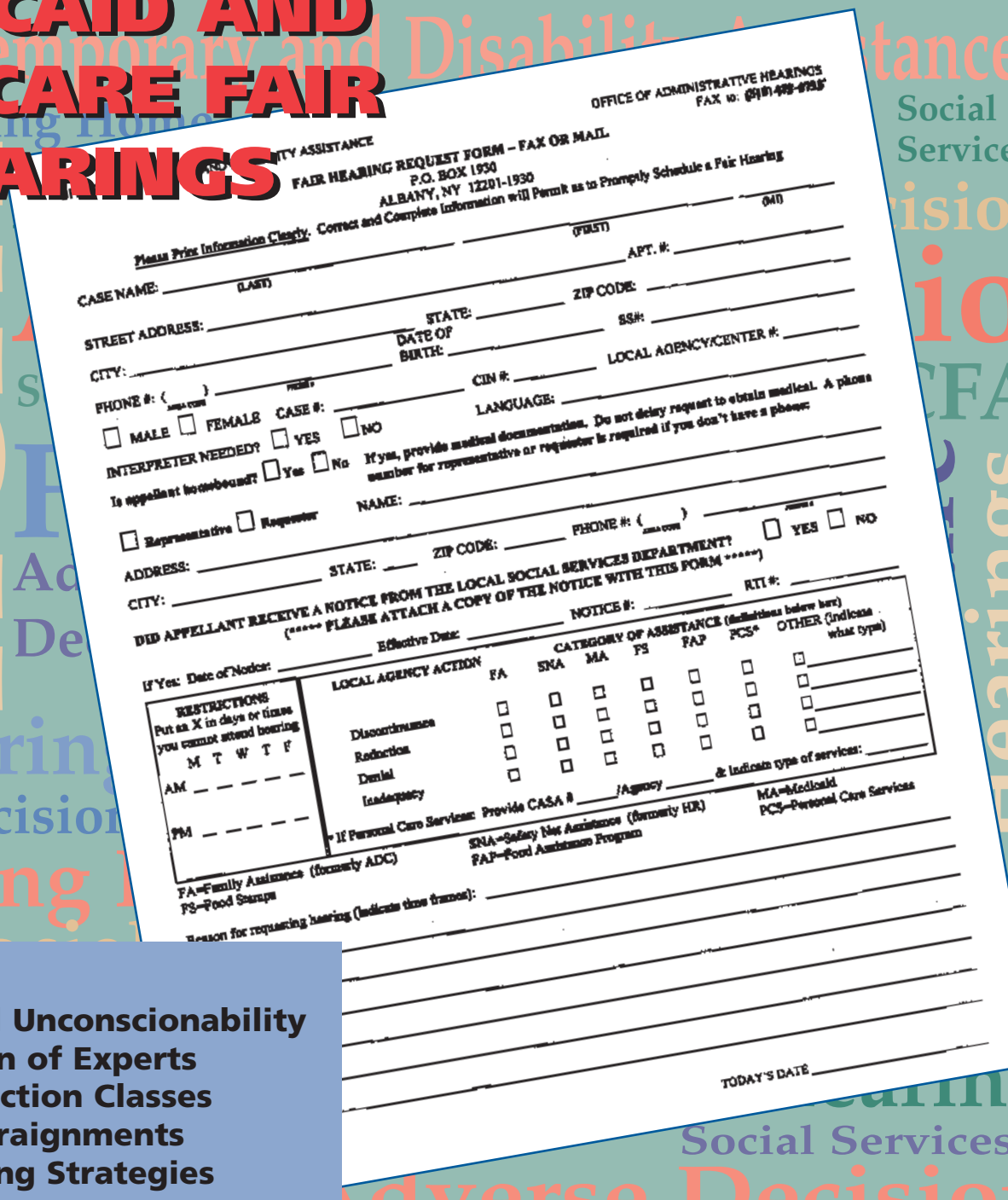
NEW YORK STATE BAR ASSOCIATION

FEBRUARY 2000 | VOL. 72 | NO. 2

Journal

MEDICAID AND MEDICARE FAIR HEARINGS



Inside:

Contractual Unconscionability
Certification of Experts
Equal Protection Classes
Hospital Arraignments
Cite-Checking Strategies

EDITORIAL OFFICES
One Elk Street
Albany, NY 12207
(518) 463-3200
FAX (518) 463-8844

ADVERTISING REPRESENTATIVE
Network Publications
Sheri Fuller
10155 York Road, Suite 205
Crestridge Corporate Center
Hunt Valley, MD 21030
(410) 628-0390
e-mail: sfuller@networkpub.com

ADDRESS CHANGE – Send To:
Records Department
NYS Bar Association
One Elk Street
Albany, NY 12207
(518) 463-3200
e-mail: mis@nysba.org

ON THE WORLD WIDE WEB:
http://www.nysba.org

CONTENTS

DEPARTMENTS

ON THE COVER

Shown on the cover is a copy of the form used to apply for a Fair Hearing when there is an issue involving Medicaid coverage. The form is provided by the New York State Office of Temporary and Disability Assistance, Office of Administrative Hearings.

Cover Design by Lori Herzing

 The *Journal* (ISSN 0028-7547), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $12. Periodical postage paid at Albany, NY with additional entry Endicott, NY. POSTMASTER: Send address changes to: One Elk Street, Albany, NY 12207.

President's Message

THOMAS O. RICE*

Administration of Justice

Glance upward in the Great Hall of the Bar Center. Cascading down, a brilliantly colored 28-foot banner of appliquéd fabrics proclaims a fundamental truth. From his letter nominating Edmund Randolph as the first attorney general of the United States, George Washington's words are as relevant now as they were then: *The due administration of justice is the firmest pillar of good government.*

Washington and the other Founders recognized as a priority the need to organize and preserve an effective and efficient system of justice. They regarded that system to be essential to the well-being of the country and the stability of the political system.

During the month in which we commemorate his birth, it is fitting to reflect on Washington's enduring counsel. It is particularly so when considering the issues raised and proposals made last month in the governor's State of the State and the chief judge's State of the Judiciary addresses. The governor and chief judge both acknowledged that the administration of justice is the responsibility of all three branches of government.

Beyond government, the legal profession is an integral partner in discharging a joint responsibility. We must ensure that the door to the justice system is open and the process functions fairly and successfully. To ensure that the pillar remains truly firm, emphasis must be placed on the need to coordinate the efforts of all participants in the venture.

An understanding on a common goal does not mean that agreement will or should flow from every plan devised. Airing diverse views, engaging in debate and working out differences help to craft an end result that is more practical and well considered.

It is fair to assume, however, had he been in the audience for the State of the State address, that George Washington would have concurred with the governor's observations:

> [E]ach of us has our principles and we will stand by them. None of us would have it any other way — that's what our system of government is built upon. But those principles need not stand in the way of progress.

Washington frequently reminded citizens of a new nation to remember what brought them together. It is likely then that he would have endorsed the governor's call to "focus first on what unites us. Let's listen more to the 'better angels of our nature,' and less to the strident voices of partisan dissent."

The difficult task is to turn words into action. Each year, the Association, the Office of Court Administration and, of course, legislators propose an array of bills involving the legal process. NYSBA's legislative agenda, for example, is wide-ranging. We have suggested ways to improve existing statutes and means of implementing advancements in technology. We have submitted initiatives calling for the provision of unmet legal needs and court restructuring to handle burgeoning caseloads.

Our practical proposals have met with considerable success, while major initiatives have become enmeshed in the logjam resulting from the legislature's inability to agree upon a budget. Both are the product of our members' experiences and debate among diverse voices within our Association. Both deserve serious consideration.

Proposals in the legislative hopper that remain unresolved include: establishment of a regular funding source for civil legal services programs; increasing 18B rates to remedy the problem of a dwindling supply of competent attorneys willing to serve as assigned counsel; creation of a fifth judicial department to better distribute the appellate caseload; and consolidation of nine trial courts to reduce procedural confusion and overlap in jurisdiction.

NYSBA has advocated court restructuring for more than a quarter of a century. Our proposals are similar to those the OCA put forth in its legislative package. We have pushed forward plans for the funding of court reorganization, which will significantly advance the administration of justice.

If, in the year ahead, the governor and legislature could engage in healthy dialogue, many of our objectives would be attained. Government officials must consider the substantial needs of their constituents. They

CONTINUED ON PAGE 6

* Tom Rice can be reached at 445 Broad Hollow Road, Suite 418, Melville, N.Y. 11747 or at: torwkcli@aol.com.

PRESIDENT'S MESSAGE

CONTINUED FROM PAGE 5

must avoid attaching constructive measures to other bills that entangle them in unrelated matters. They must focus on the common good and advance a positive agenda. They must reach agreement. When they do, the bench and bar will have the tools to meet the needs of justice.

There are signs of movement on some issues. Hurdles, however, remain to be jumped on other matters.

We will persist in educating lawmakers. We will counsel community leaders. We will assist others in understanding the importance and the impact of our actions. We will remain available to discuss the functioning of particular aspects of our proposals.

In her State of the Judiciary Address, Chief Judge Kaye described the challenges facing the courts today:

> On the one hand, cherishing traditions, preserving core values that have nourished and sustained our system of justice since this nation's birth. On the other hand, being willing to change, to innovate, to take advantage of new tools, new thinking, new ways.

Those challenges also confront the profession. Balancing effectiveness with efficiency and preservation with innovation is often the topic of discussions with court officials. Similarly, practitioners must consider that balancing of interests when determining the direction that our profession will take.

This past year, through the hard work of our sections and committees, we commented on OCA proposals concerning civil litigation, the grand jury process, petit jury procedures, commercial case management, family law matters, and alternative dispute resolution. At a developmental state, the OCA and NYSBA are coordinating efforts to resolve a broad range of issues required to improve public trust and confidence in the justice system.

We will continue to devote our attention to these questions as we examine new approaches and seek innovative solutions to taxing problems. Bench and bar will continue to work cooperatively to increase efficiencies. At the same time, we will insist on preserving flexible procedures that accommodate the needs of particular parties in a given case.

We will also review and provide input on other initiatives proposed in the chief judge's State of the Judiciary address. We will consider the impact of providing partial MCLE credit for *pro bono* service. We will review legislation to permit increased use of misdemeanor bench trials as a means of more expeditiously processing caseloads. We will comment upon proposed expansion of drug courts and the use of diversion sentencing. We will examine the fiduciary appointment process.

Dialogue is the source of solutions to problems. It is essential and must be used early and often.

As we analyze the proposals of others, we will call upon our sections and committees to recommend additional action to the Executive Committee and House of Delegates. Our Association, with the talent and efforts of our members, has a vital role to perform by developing creative approaches to devising means of bettering the justice system.

Consider what can be accomplished by a partnership comprised of bar, bench, legislature, and executive. Collectively, we have the insight, experience and ability to forge practical solutions and remove hurdles to implementation. Jointly, we can ensure the due administration of justice. Together, we will reinforce the firmest pillar of good government.

Medicaid and Medicare Fair Hearings Are Vital First Step in Reversing Adverse Decisions on Patient Care

By Rene H. Reixach Jr.

Although it once might have been the case that an administrative "Fair Hearing" to review an action by a local social services district was the exclusive purview of attorneys and paralegals from Legal Services or Legal Aid offices, that is no longer the case.

The medical assistance (Medicaid) program pays for the vast majority of days in most nursing homes, so many middle class individuals must now deal with social services offices for their spouses or parents. When they encounter a problem, they may turn to the family attorney for assistance. Understanding the rules governing Fair Hearings is critical to effectively representing clients in these proceedings.

By the same token, the reconsideration and administrative appeals process under Medicare has become more important as enrollment in Medicare health maintenance organizations (HMOs) increases, because an adverse decision may result in the patient not receiving needed care, not just a dispute about a bill.

Lest it be thought that these are highly informal proceedings of little financial significance, consider the following. I recently represented an individual concerning the denial of Medicaid coverage for an 18-month period in a nursing home. In the Rochester area, nursing homes cost approximately $6,000 per month, so such a dispute can easily involve more than $100,000. The case required a three-hour hearing, with witnesses and counsel for both sides, opposing memoranda of law, and exhibits totaling some 150 pages. While this was "only" an administrative hearing, it needed to be done right, both to try to prevail at the hearing level and to make the record for any Civil Practice Law and Rule Article 78 (CPLR) judicial review. A recent Medicare administrative law judge hearing in which I participated involved a dispute of over $22,000 in bills that an HMO had refused to cover.

Sources of Authority: Medicaid Fair Hearings

A Fair Hearing is a creature of both federal and state statutes and regulations, and in some circumstances is grounded in the due process clause of the U.S. Constitution.[1] The federal Medicaid statute, 42 U.S.C. § 1396a(a)(3), states simply that a state plan for Medicaid must "provide for granting an opportunity for a fair hearing before the state agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." The implementing state statute, N.Y. Social Services Law § 22 (SSL), elaborates on this by enumerating the various grounds for which a hearing may be held, but the most significant requirements are set forth in the federal and state regulations, codified respectively at 42 C.F.R. §§ 431.200-431.250. and N.Y. Comp Codes R. & Regs. tit. 18, Part 358 (N.Y.C.R.R.).

Because federal rules prevail over any inconsistent state rules under the supremacy clause of the Constitution,[2] the federal Fair Hearing regulations are the starting point for any analysis of the procedural rights available to a Medicaid applicant or recipient. At the outset, the applicant or recipient is entitled to written notice of the decision that has been made about her/his case.[3] The requirement is quite broad, covering "any action affecting his or her claim."[4] The notice of decision must inform the applicant or recipient in writing of the right to a Fair Hearing, how to obtain a Fair Hearing, and that he or she may be represented by counsel, a relative, friend or other spokesperson.[5]

The notice must also contain other information that may be the ground for advocacy on behalf of a client. It must contain a statement of the intended action, the reasons for it, and the "specific regulations that support, or

Rene H. Reixach Jr. is a former staff attorney at the Greater Upstate Law Project and executive director of the Finger Lakes Health Systems Agency. He is now of counsel at Woods, Oviatt, Gilman, Sturman & Clarke LLP in Rochester. A graduate of Yale College, he received his J.D. degree from Harvard University

the change in federal or state law that requires, the action."[6] The due process protections mandated by the Supreme Court in *Goldberg v. Kelly*[7] are implemented by the requirement (subject to limited exceptions such as the recipient's death or written withdrawal of his application), that notice must be mailed at least 10 days before the effective date of the proposed action,[8] and that the notice provide an explanation of how benefits may be continued if a hearing is requested.[9]

The federal Fair Hearing regulations are the starting point for any analysis of the procedural rights available to a Medicaid applicant or recipient.

The federal regulations, like SSL § 22, enumerate a variety of circumstances in which a Fair Hearing must be held and when assistance will be continued pending the hearing. It is noteworthy that these regulations apply not just to issues of Medicaid coverage, but also to decisions by nursing homes on proposed transfers or discharges.[10] The scope of these requirements can be quite broad, *e.g.*, extending to determinations made by certified home health agencies about how many hours of home health care a Medicaid recipient may receive,[11] but also quite narrow in not applying to a physician's decision about the level of care required.[12]

Requesting the Medicaid Fair Hearing

A Fair Hearing may be requested either by telephone or by mail, by following the directions on the notice of decision received by the client. You will receive an acknowledgment of the request, but if a telephone request is made, the better practice is to confirm it in writing. To avoid any disputes about timeliness, certified mail with a return receipt requested is advisable. You should identify the issue in dispute, and either specify details about the date and nature of the decision or preferably attach to the request a copy of the notice of decision.

Although state oversight of Medicaid is now vested in the state Department of Health and Fair Hearing decisions are issued in the name of that department, they are actually conducted by the Office of Temporary and Disability Assistance. Fair Hearing Requests may be made to that Office at P.O. Box 1930, Albany, New York 12201.

It is important to pay particular attention to the statute of limitations. Generally a hearing must be requested within 60 days of the date of the notice of decision from which an appeal is taken.[13] A prompt request for a Fair Hearing may be critical to protecting a client's rights where benefits are proposed to be terminated or reduced, because in such cases the recipient is entitled to "aid continued," that is to have the benefits continued unchanged until after a Fair Hearing decision has been rendered, but such continued benefits are only provided if the Fair Hearing has been requested within the advance notice period (the period between the date of the notice and the proposed effective date, which must be at least 10 days).[14]

These time limitations may be tolled if there is a defective notice, *e.g.*, it is missing one of the items specified in the Fair Hearing regulations, or if it was not sent to all the appropriate parties.[15] Close scrutiny of the notice for missing or incoherent items may thus save the case if the client has come to you past the deadline. A frequent problem area is the requirement that the notice must cite the law or regulations on which the social services district relies and contain a copy of the budget showing how the financial computations were made.[16]

Defective notices currently abound in cases where coverage is sought for either nursing home care or for waivered services like the long-term home health program and there is a community spouse. Notices are supposed to be provided to both spouses,[17] but frequently only one is sent, *e.g.*, to "Patient c/o Community Spouse" or to "Patient c/o Adult Child Representative." Likewise, the notices are required to state explicitly that the community spouse has a right to a fair hearing to increase the Community Spouse Resource Allowance (CSRA).[18] The notice forms promulgated for use in community spouse cases do not contain this explicit reference to increasing the CSRA, so any hearing concerning the calculation of the CSRA and related figures should never be untimely.

The Medicaid Fair Hearing

The first step in representing the client at the Fair Hearing is to prepare for it. The appellant or appellant's representative is entitled to review the case file and have the local social services district provide copies of any documents in the file for use at the hearing.[19] Although an attorney or employee of the attorney is entitled to review the file without a written client authorization,[20] the local district will probably request one in light of confidentiality concerns, so it is easier just to provide an authorization.

On request made five or more business days in advance of the hearing, the local district is also required to provide the appellant or representative with copies of all the documents it intends to introduce as evidence.[21] Although the local district used to be required to pro-

vide this information automatically, an explicit request is now required.

If there are any witnesses who will not appear voluntarily, they may be subpoenaed, but it appears that such a subpoena will be valid only if issued by the administrative law judge hearing the case, not by the attorney.[22] Needless to say, this has the potential for unnecessary delay.

At the Fair Hearing it is helpful to have a memorandum setting forth proposed findings of fact and conclusions of law, with authorities cited. This is particularly true if there will be a number of exhibits or evidence about multiple transactions or arithmetical computations. Without such a road map, the administrative law judge may get confused trying to take notes about a complex series of events and figures. The administrative law judges do not have routine access to court decisions or federal materials, so providing copies as part of a memorandum is advisable.

A Fair Hearing needs to be thought of as if it were a trial, where if the evidence is not presented or the issues and objections not made, they are not preserved.

Using a memorandum is also a good way of making sure that all the facts and issues are put on the record and thus preserved for subsequent judicial review. That is important whether subsequent court action is filed in state court or in federal court.

A Fair Hearing needs to be thought of as if it were a trial, where if the evidence is not presented or the issues and objections not made, they are not preserved. That is certainly the rule if state Supreme Court judicial review under CPLR Article 78 is sought; additional facts may not be submitted to the court that are not in the administrative hearing record, and theories not raised in the hearing will not be preserved for judicial review.[23]

As a more practical matter, although it is possible to have erroneous findings of fact corrected in a CPLR Article 78 proceeding, that is very difficult given the low evidentiary threshold required to sustain them under the "substantial evidence" standard, and any such review requires the time and expense of having the case transferred to and decided by the Appellate Division.[24] Under this standard, if a reasonable finder of fact could have made the finding based on the record, it should be affirmed.[25] Given that in an administrative hearing the rules of evidence do not apply, and thus hearsay is admissible,[26] this is a minimal standard indeed.

If a federal court action is brought to correct an erroneous Fair Hearing decision, the fact findings from the Fair Hearing must be applied by the federal court under collateral estoppel principles.[27] By contrast, a Fair Hearing decision should not have an issue preclusive effect as to questions of law in a subsequent federal court action, although this precise question has not been decided either by the U.S. Supreme Court or the Second Circuit, and there is some contrary authority from other circuits.[28] Because exhaustion of administrative remedies is not required in the first instance in order to bring a federal court action alleging violations of federal law,[29] it would appear to be counterproductive for the courts to hold that a Fair Hearing decision had preclusive effect on legal questions as well. This would just encourage litigants to bypass the administrative procedure altogether. Given the varying approaches being taken on this issue by different courts, further developments on this topic should be anticipated.

Despite the serious consequences of its potential findings, the Fair Hearing itself is relatively informal. The proceedings will be tape-recorded, and in addition to the administrative law judge, you and your client, there will be one person from the local social services district to present its case. In smaller counties the worker may be present to testify at the hearing, but in urban counties this is rare and the case is presented by a Fair Hearing representative from the local district. The local district will present its case first, setting forth its version of the facts and justifying the correctness of its decision under state regulations and policy. The appellant's counsel may then cross-examine the local district's witness, followed by whatever testimony and witnesses there are on behalf of the appellant.

Although the administrative law judge will make recommended findings of fact and conclusions of law, the ultimate decision will be reviewed and issued in Albany. Needless to say, that takes some time, so the time limits for issuing decisions are sometimes honored in the breach. In theory, a decision should be issued quickly enough for the local agency to implement it within 90 days from the date of the hearing request.[30] Knowledge of the time limit may provide some leverage to either push the state to issue a decision or the local district to implement it once issued.

Sources of Authority: Medicare Hearings

The Medicare review and hearing process is based on the procedures governing appeals of Social Security benefits, with a right to an independent reconsideration on written submissions, followed by an in-person hear-

CONTINUED ON PAGE 12

CONTINUED FROM PAGE 10

ing before an administrative law judge, and then before a national Appeals Council.[31]

This process can be quite time-consuming. In a case I recently handled, the Medicare beneficiary had a dispute with his HMO for coverage over a five-month period before his death. It took more than four years from his death for the Appeals Council to issue its decision; it took more than two years to do so after the administrative law judge decision. This lengthy process is in contrast to the time limits applicable to Medicaid Fair Hearings. Another difference is that, even if there is an administrative law judge decision in your client's favor, the Appeals Council may choose to review the decision on its own motion, and possibly rule against your client. Your client may only appeal to court once all these stages of the administrative process have been completed.

Beneficiaries are entitled both to a "grievance," covering virtually anything other than an "organizational determination," as well as an "appeal" from those coverage issues.

In an attempt to ameliorate harmful delays in this complex process, federal regulations now in place require expedited procedures for the stages prior to the administrative law judge hearing.[32] The regulations are in separate parts for HMOs and for the new optional coverages under the Medicare +Choice program,[33] but because Medicare has recently decided to rely on the +Choice procedures for HMO enrollees as well, the +Choice regulations are discussed here.

Beneficiaries (also called enrollees) are entitled both to a "grievance," covering virtually anything other than an "organizational determination" (a decision about emergency or urgently needed services, discontinuation of services, or a decision of non-coverage) as well as an "appeal" from those coverage issues.[34] A grievance may be something as mundane as "the telephone representative was rude and was not knowledgeable about coverage." Appeals generally involve more serious disputes.

The first step is for the plan to make an initial organization determination, which should be made within 14 days of a request for services.[35] When the decision subjects the beneficiary to jeopardy to life or health or the ability to regain maximum function, an expedited determination must be made within 72 hours.[36]

After that initial determination, the next stage is an internal plan reconsideration, which must be completed within 30 days of the request for review, but must be completed within 72 hours in those more serious categories of cases above.[37] At that stage a decision by the health plan that is negative to the beneficiary in whole or in part must be sent by the plan to an independent contractor for an automatic independent reconsideration.[38] That reconsideration decision by the contractor is the trigger for appealing to an administrative law judge.[39] Appeals over payment disputes have a 60-day time frame for decision.

The Medicare Hearing

Unlike the Fair Hearing system under Medicaid, where a representative of the local social services district always attends, it is rare that anyone representing either Medicare or the Medicare HMO (or Medicare +Choice Plan) attends a Medicare hearing. Although this makes the process less adversarial, it also makes it more difficult to obtain access to relevant documents, especially if they are in the hands of an HMO or +Choice Plan.

Typically the hearing file will not be available until a few weeks before the hearing, having been assembled by the Social Security Administration Office of Hearings and Appeals staff. You will then need to examine it at the local Social Security hearing office. Documents that are in the possession of the plan will need to be obtained directly from the plan, because they may or may not be in the hearing file.

Most of the practice at a Medicaid Fair Hearing is transferable to a Medicare administrative law judge hearing. If you are familiar with Social Security disability hearings, however, there is a very significant difference in the case law governing those hearings and Medicare hearings. In disability cases the Social Security Administration must give controlling weight to the judgment of a treating physician that the claimant is disabled. Although some district court opinions have applied that rule to issues of medical necessity for treatments in Medicare cases, the Second Circuit has declined to expressly adopt or reject the "treating physician" rule for Medicare appeals.[40]

Judicial Review

Naturally the hope is that the outcome of the Medicaid Fair Hearing or Medicare administrative law judge hearing (and any subsequent Appeals Council review, necessary for there to be a final decision of the Secretary

CONTINUED ON PAGE 14

CONTINUED FROM PAGE 12

reviewable in court) will be favorable to the client, thus making it unnecessary to so resort to court.

Although a complete analysis of the procedures applicable to court review from these administrative decisions is beyond the scope of this article, there are a few important points to remember.

Review of a Medicaid Fair Hearing decision is generally conducted under the familiar rules of C.P.L.R. article 78, although alternatively it is possible to raise legal questions based on federal grounds in federal court actions. It is important to note that the four-month statute of limitations under C.P.L.R. 217 runs from the date of the Fair Hearing decision; there is no five-day extension for mailing.[41] By contrast, at every stage of the Medicare appeals process there is a five-day extension built into the time limits to provide for mailing time.

In cases challenging Medicaid Fair Hearing decisions, the proper respondents in an article 78 proceeding or defendants in federal court would be the commissioner of the New York State Department of Health and the commissioner or director of the local social services district.

In a federal court action to review an adverse Medicare decision the proper defendant is the secretary of the Department of Health and Human Services. If the case involves an appeal from a decision concerning coverage by an HMO, the HMO must be notified of the action although it need not be made a formal party.[42]

As with any federal court case, the basis for federal court jurisdiction must be pleaded in the complaint. If the case concerns a Medicaid issue, the jurisdictional section is the general "federal question" jurisdictional statute,[43] 28 U.S.C. § 1331. For a case concerning regular Medicare coverage, the jurisdictional sections are 42 U.S.C. §§ 1395ff(b) and 405(g).[44] For cases involving Medicare HMOs, it is 42 U.S.C. § 1395mm(c)(5)(B). For Medicare +Choice it is 42 U.S.C. § 1395w-22(g)(5).

If court action is required, you may be able to recover your attorney's fees from the government if your client prevails. For federal claims involving Medicaid, the provisions of 42 U.S.C. § 1988 apply, because the case is technically a "civil rights" case under 42 U.S.C. § 1983, which provides the remedy for the substantive violations of the federal Medicaid statute or regulations.[45] Under that statute, the plaintiff may recover attorney's fees simply by being the prevailing party. A stricter standard applies to state law claims under article 78 or to claims in federal court involving Medicare determinations. Under the state and federal "Equal Access to Justice" Acts,[46] attorney's fees may only be awarded in such cases if the position of the government was not "substantially justified."

One final and important distinction in this regard is that while attorney's fees may not be awarded under 42 U.S.C. § 1988 for the time spent conducting a Medicaid Fair Hearing, under the state Equal Access to Justice Act such time may be compensable.[47]

---

1. The due process clause of the Fourteenth Amendment requires that recipients of need-based public benefit programs such as Medicaid receive prior notice and an opportunity for continuation of benefits pending a hearing and decision. *See Goldberg v. Kelly*, 397 U.S. 254 (1970).
2. *See* U.S. Const. art VI, § 2.
3. *See* 42 C.F.R. § 431.206(c).
4. 42 C.F.R. § 431.206(c)(2).
5. *See* 42 C.F.R. § 431.206(b).
6. 42 C.F.R. § 431.210(a)-(c).
7. *Goldberg*, 397 U.S. 254.
8. *See* 42 C.F.R. § 431.211.
9. *See* 42 C.F.R. § 431.210(e).
10. *See* 42 C.F.R. §§ 431.206(c)(3), 431.220(a)(3).
11. *Catanzano v. Wing*, 103 F.3d 223 (2d Cir. 1996).
12. *See* 42 C.F.R. § 431.213(f); *Blum v. Yaretsky*, 457 U.S. 991 (1982).
13. *See* SSL § 22(4)(a).
14. *See Goldberg*, 397 U.S. 254; 42 C.F.R. § 431.211; 18 N.Y.C.R.R. §§ 358-2.23, 358-3.3(g)(1).
15. *See Zellweger v. N.Y.S. Dep't of Soc. Servs.*, 74 N.Y.2d 404, 547 N.Y.S.2d 824 (1989).
16. *See* 18 N.Y.C.R.R. § 358-2.2; 42 C.F.R. § 431.210.
17. *See* 42 U.S.C § 1396r-5(c)(1)(B), (e)(1)(A); SSL § 366-c(7); 18 N.Y.C.R.R. § 360-4.10(c)(1)(iii).
18. *See* 42 U.S.C. § 1396r-5(e)(2)(A)(v), (e)(1); SSL § 366-c(7)(c).
19. *See* 18 N.Y.C.R.R. § 358-3.7.
20. *See* N.Y.C.R.R. § 358-3.9(a).
21. *See* 18 N.Y.C.R.R. § 358-4.2(c).
22. *See Chang Il Moon v. Dep't of Soc. Servs.*, 207 A.D.2d 103, 621 N.Y.S.2d 164 (3d Dep't 1995).
23. *See Klapak v. Blum*, 65 N.Y.2d 670, 491 N.Y.S.2d 615 (1985). One recent case even holds that if an issue was not addressed in the fair hearing request, it is not preserved for review even though it was raised at the hearing, *Kemp v. Erie Co. Dep't of Soc. Servs.*, ___ A.D.2d ___, 697 N.Y.S.2d 797 (4th Dep't 1999). In support of this sweeping proposition, the court in *Kemp* cites a more mainstream case holding solely that an issue not raised at a hearing is waived, *Nelson v. Coughlin*, 188 A.D.2d 1071, 591 N.Y.S.2d 670 (4th Dep't 1992).
24. *See* CPLR 7804(g).
25. *See 300 Gramatan Ave. Assocs. v. State Div. of Human Rights*, 45 N.Y.2d 176, 408 N.Y.S.2d 54 (1978).
26. *See Lumsden v. N.Y.C. Fire Dep't*, 134 A.D.2d 595, 522 N.Y.S.2d (2d Dep't 1987); N.Y.S. Admin. Proc. Act § 306(1).
27. *See University of Tennessee v. Elliott*, 478 U.S. 788 (1986).
28. *Cf. Doe v. Pfrommer*, 148 F.3d 73 (2d Cir. 1998); *Desario v. Thomas*, 139 F.3d 80 (2d Cir. 1998), *vacated on other grounds, sub nom. Slekis v. Thomas*, 525 U.S. 1098 (1999).

CONTINUED ON PAGE 16

CONTINUED FROM PAGE 14

29. *See Patsy v. Board of Regents*, 457 U.S. 496 (1982).
30. *See* C.F.R. § 431.244(f); 18 N.Y.C.R.R. § 358-6.4(a).
31. *See* 42 U.S.C. § 405 and 20 C.F.R. §§ 404.967-404.999d. Now that the Social Security Administration is an independent agency rather than part of the Department of Health and Human Services (HHS), these national reviews are handled by the Medicare Appeals Council at the HHS Departmental Appeals Board.
32. The development of these procedures is also related to the ongoing challenge to the general lack of due process for Medicare HMO beneficiaries in *Grijalva v. Shalala*, 946 F. Supp 747 (D. Ariz. 1996), *aff'd*, 152 F.3d 1115 (9th Cir. 1998), *vacated*, ___ U.S. ___, 119 S. Ct. 1573 (1999). Although the *Grijalva* order provides for greater rights for beneficiaries, it is not in effect yet.
33. 42 C.F.R. §§ 417.600-417.694 cover HMOs; 42 C.F.R. §§ 422.560-422.698 cover the Medicare +Choice program.
34. 42 C.F.R. §§ 422.561, 422.566.
35. 42 C.F.R. § 422.568(a).
36. 42 C.F.R. §§ 422.570, 422.572.
37. 42 C.F.R. § 422.590.
38. 42 C.F.R. § 422.590(a)(2). Such independent reviews from the entire country are currently conducted by the Center for Health Dispute Resolution in Pittsford, N.Y., a suburb of Rochester.
39. 42 C.F.R. §§ 422.592-422.600.
40. *Keefe v. Shalala*, 71 F.3d 1060, 1064 (2d Cir. 1995).
41. *Fiedelman v. New York State Dep't of Health*, 58 N.Y.2d 80, 459 N.Y.S.2d 420 (1983).
42. 42 U.S.C. § 1395mm(c)(5)(B).
43. 28 U.S.C. § 1331.
44. This is the general jurisdiction section for Social Security appeals, which applies to Medicare by cross-reference.
45. *See Maine v. Thiboutot*, 448 U.S. (1980).
46. 28 U.S.C. § 2412(d).
47. *Cf., Webb v. County Bd. of Educ.*, 471 U.S. 234 (1985) (no right to attorney's fee award in 19 U.S.C. § 1983 cases); to *Perez v. N.Y.S. Dep't of Labor*, ___ A.D.2d ___, 697 N.Y.S.2d 718 (3d Dep't 1999) (finding such a right under the New York Equal Access to Justice Act in contrast to the federal Equal Access to Justice Act).

Contractual Unconscionability: Identifying and Understanding Its Potential Elements

By Paul Bennett Marrow

Imagine appearing before a court on behalf of a litigant. The theory for your position is grounded in a statute that lacks any statement of criteria. You have no idea what the legal elements of your position are. You have checked the case law, and not one opinion suggests a criteria or lists any of the elements. Yet you have found decisions that say your pleadings should be dismissed if they recite mere unsubstantiated conclusions.

If this isn't enough, you have found many decisions indicating that courts know a valid claim arising under this statute when they see one! Now you are before the court and compelled by the enabling statute to limit your proof to matters that appear to have no direct relationship to the facts that brought your client into your office in the first place.

This nightmare scenario becomes all too real every time someone claims that a contract or lease, or a provision in a contract or lease, is unconscionable.

Anyone who asserts a claim of contractual unconscionability is, by definition, acknowledging that someone made a bad deal. Courts do not normally act to protect contracting parties from mistakes in judgment.[1] Exceptions are made only when the court is persuaded that the faulted action is *per se* unfair or that it resulted from unusual circumstances usually beyond the control of the complainant.

Fairness and restraint are the watchwords that are said to govern this process. When is a contractual provision so unfair as to be offensive? It's far from clear.

Much has been written about the theoretical existence of contractual unconscionability,[2] but little has been said about what components actually make up such a claim. Rules do exist, but few courts have formally identified them. This article is designed to help both draftsman and litigants identify and understand potentially unconscionable elements.

Background

At common law, traditional doctrines such as fraud, duress and mutual mistake went only so far. They did not cover every situation in which a contract might be oppressive. Developed to resolve specific types of strife, the doctrines required litigants to accommodate technical elements. The doctrine of unconscionability evolved to fill the gaps.

Contractual unconscionability was thought to involve contracts "as no man in his senses and not under delusion would make on the one hand and as no honest and fair man would accept on the other."[3] Unfortunately, this abstraction was short on details, which were thought best left to the judgment of courts on a case-by-case basis. But what standards were to be applied? Uncertainty was the order of the day.

Until recently the situation had not changed much. In 1951 the New York Court of Appeals declared that an unconscionable contract is one that is "so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforcible according to its literal terms."[4]

Commentators have struggled to provide clarity. Most notable has been the contribution by Professor Arthur Allen Leff, who suggested a two-step framework for any analysis.[5] First the parties negotiate terms, then they incorporate the final terms into a definitive agreement. He characterized the first stage as procedural, the second as substantive. Using this approach, courts sometimes identify offensive conduct during the first stage as being procedurally unconscionable. Coarse substantive terms are frequently referred to as being

Continued on page 20

Paul Bennett Marrow practices in Chappaqua, N.Y. He graduated from Case Western Reserve University and received his J.D. degree from New York Law School.

CONTINUED FROM PAGE 18

substantively unconscionable. These descriptions fall short in that they merely tell us where in the process the unconscionability is thought to have occurred. What is missing is any information about what makes the provision *per se* unconscionable.

In 1962, the legislature attempted to include the concept of unconscionability in New York's commercial jurisprudence when it passed § 2-302 of the Uniform Commercial Code[6] (UCC) governing sales contracts. In 1976, N.Y. Real Property Law § 235-c[7] (RPL), a provision similar in content to the UCC, was enacted to govern real estate leases. Although the official comments and much of the legislative history state otherwise,[8] the litigants are told only that courts have the power to do what the legislature has failed to do, *i.e.*, define and defeat unconscionability when and if they see it. This was a power the courts already possessed, raising the question of whether these statutes contributed anything of substance.

Inherent in the statutory scheme is the assumption that unconscionability actually exists.

New York courts still reserve for themselves the common law power to review covenants that fall outside the scope of these statutes. Challenges based on unconscionability are commonplace in the context of agreements involving matrimonial disputes,[9] covenants not to compete found in employment agreements,[10] and arbitration agreements found in agreements relating to mergers and acquisitions,[11] to name a few. In disposing of these "non-statutory" cases, the courts appear to use the same equitable principles that apply in cases arising under the statutes.

What the Statutes Say

Both the UCC as adopted in New York and the RPL follow a similar format. They:

- Give courts the power to define and identify *as a matter of law* if contracts or leases, or their provisions, were unconscionable *when made*.
- Give courts the power to refuse to enforce any unconscionable provision or to enforce the contract or lease so as to avoid any unconscionable result.
- When either someone claims unconscionability, or the court on its own suspects unconscionability, the parties are afforded a reasonable opportunity to present evidence:
  - in the case of a contract, about its commercial setting, purpose and effect;
  - in the case of a lease, about its purpose and effect, so as to aid the court in making a determination about unconscionability.[12]

On its face, the legislation appears almost mystical in that it assumes that the lack of definition notwithstanding, unconscionability nevertheless exists and that courts can spot and defeat it. It's a bit like religion: unconscionability exists in the minds of true believers. This seems to leave the draftsman with the charge of predicting the whims of mysterious forces.

What is clear is that courts are empowered to police and protect against whatever *they* perceive to be unconscionable covenants. The courts are given the power to (1) *define* what as a matter of law is unconscionable, (2) decide whether to enforce a covenant if doing so would lead to an unconscionable result given (a) the court's definition and (b) where appropriate, receive proof offered by the parties.

Both statutes require a plenary hearing for the introduction of evidence if a party raises the issue in pleadings *or* the court on its own suspects that unconscionability *may* be present. Presumably this means that the court on its own has the power at any time to determine that, as a matter of law, unconscionability *is* present, in which case a plenary hearing is not required.

Rules for Defining Unconscionability

Within the context of cases decided under these statutes, now examine the rules the courts have fashioned to define what they believe is meant by unconscionability. Bear in mind that these rules appear to have application to "non-statutory cases."

Inherent in the statutory scheme is the assumption that unconscionability, whatever it is, actually exists. Given the failure of the legislature to define what it meant by unconscionability, the courts appear free to apply any equitable standard developed prior to the legislation, together with whatever standards are developed thereafter. This reality is the basis for the question of whether the statutes actually add anything of substance to the debate.[13]

Although it is not stated in the statutory text, the legislative history does provide a hint regarding what unconscionability was actually thought to involve. The draftsman of the Uniform Commercial Code declares:

> The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise and not of the disturbance of allocation of risks because of superior bargaining power.[14]

CONTINUED ON PAGE 22

CONTINUED FROM PAGE 20

Thus, under the statutes at least, the question is not whether a covenant is or is not unconscionable, but rather is it so one-sided or oppressive and likely to result in unfair surprise that it becomes unconscionable. The primary judicial responsibility therefore is to create rules that define the transgression.

When looking for clauses that are one-sided, oppressive and result in unfair surprise, what should courts watch for?

For the most part, the issue of when a contract is one-sided involves a review of only the substance of the questionable provision. What makes a contract one-sided is most often tied directly to the substantive result of the language in question, such as when contractual language is profoundly discriminatory in its effect on one of the parties. In making this determination, the court normally looks no further than the substance of the covenant itself. But does this mean that no questions of fact exist? This issue is discussed below.

By contrast, determining oppression or the possibility for unfair surprise will almost always necessitate a consideration of the factual circumstances leading up to the contract and the substantive provision itself.

It appears that there are at least three threshold rules leading to a conclusion that a covenant is actually unconscionable — i.e., one-sided, oppressive and likely to result in unfair surprise.

Oppression bespeaks trying to sanction abusiveness, arbitrariness or the imposition of a needlessly burdensome condition. The evaluation exercise usually requires considering the circumstances that led to the agreement. Usually, but not always, neither the substance nor the circumstances alone leads to the conclusion that unconscionability exists. To reach such a result, there is a need to couple the two. Because the circumstances are rarely self-evident from the terms of an agreement, a hearing of some sort is needed for the presentation of facts.

A contract results in unfair surprise when the real meaning of its terms are intentionally obscured from one of the parties, thereby precluding the complainant from making a reasoned choice. Here again the evaluation often requires consideration of the substantive provision itself and the circumstances leading to the actual agreement.

From the above, it thus appears that there are at least three threshold rules leading to a conclusion that a covenant is actually unconscionable — *i.e.*, one-sided, oppressive and likely to result in unfair surprise:

- Its effect is profoundly discriminatory to one of the contracting parties.
- It contains language that attempts to sanction abusiveness, arbitrariness or the imposition of a needlessly burdensome condition.
- It contains language the real meaning of which is intentionally obscured from one of the parties.

All three elements justify judicial interference because they have the appearance of being unfair, they have an unfair consequence, and there is no reasonable basis for enforcing the contested covenant.

Covenants having a profoundly discriminatory effect on one of the contracting parties have been found to exist where:

- There is exploitation, *i.e.*, where one party receives all the benefits and the other none at all, such as where a consumer receives a product that does not work but is barred from a refund by virtue of a clause disclaiming warranties,[15] or where a party turns over title to property in exchange for an open-ended promise to pay at the option of the person receiving the property.[16]
- The offending provision entitles one party to a benefit that bears no reasonable relationship to the subject matter of the agreement. Examples are clauses that require arbitration in a foreign jurisdiction where the filing fee exceeds the amount of the substantive claim,[17] or a labor escalation provision that bears no relationship to actual labor cost.[18]
- The provision imposes a condition that cannot be met, thereby relieving one party from any obligation.
- One party to the contract has the unfettered power to act arbitrarily and unilaterally, such as where the agreement on price is left blank and the seller has the right to fill in any price he wishes, whenever he wishes.[19]
- The parties to the contract agree to deny a court the power to exercise judicial discretion when such denial interferes with the courts' otherwise lawful ability to administer judicial business.[20]
- Holding otherwise would sanction an act that is unto itself against public policy.[21]

CONTINUED ON PAGE 24

CONTINUED FROM PAGE 22

Clauses seeking to sanction abusiveness, arbitrariness or the imposition of a needlessly burdensome condition have been found to exist where:

- One party is entitled to abuse the dignity and well-being of the other, such as an agreement granting one party the right to physically injure the other.[22]
- The nature of the offending provision suggests that one party has grossly overreached and taken unfair advantage, such as where an unknowing consumer pays a price that is greater than four times the retail value paid by others.[23]
- The contract is one of adhesion.[24]

Generally, courts put aside claims of unconscionability where the nature of the business makes the contested clause commercially reasonable.

Provisions have been found to be intentionally obscure where:

- One party is profoundly handicapped and unable to understand the terms agreed to, such as where a buyer is presented with an agreement in a language that he cannot read,[25] or lacks sufficient education to understand what he has read,[26] or is mentally or physically impaired and unable to make a reasoned decision.[27]
- One party is profoundly handicapped by virtue of non-disclosure of circumstances that have a bearing on the meaning of the contractual language, thereby depriving that party of the ability to make a meaningful choice.[28]
- One party is denied all recourse from defects discovered upon delivery, such as an agreement in which a buyer contractually cannot object to defects once merchandise is delivered and signed for, even if the signature is given before the packaging is opened.[29]

Rules for Rejecting Claims of Unconscionability

Equally important and informative are cases that have rejected claims of contractual unconscionability. Generally, courts put aside claims of unconscionability where the nature of the business makes the contested clause commercially reasonable.[30]

Building on this approach, courts rebuff claims of unconscionability in situations where a commercially reasonable bargain has been struck and one party's obligations were fulfilled pursuant to that bargain before the claim of unconscionability. Such situations include:

- Cases where the party defending against a claim of unconscionability has performed as required by the bargain and to that party's detriment.[31]
- Cases where the claim of unconscionability is founded solely upon an assertion of superior bargaining power in a contract that is otherwise commercially reasonable.[32]
- Cases where a party has exchanged something of value for the waiver of a right.[33]
- Cases where the party claiming unconscionability failed to negotiate the terms before the agreement was signed.[34]
- Cases where the party claiming unconscionability failed to inquire about circumstances that preceded the challenged agreement.[35]

Courts will reject claims of unconscionability where the court is required to imply a condition not agreed to by the parties. Such situations include:

- Cases where a party regrets having accepted a risk imposed by an otherwise commercially reasonable agreement.[36]
- Cases where the complaining party fails to prove circumstances under which courts would otherwise imply the covenant sought.[37]

Courts have rejected assertions of unconscionability when a covenant has the effect of merely recognizing a condition or status otherwise permissible by law.[38]

Using this analysis, it is possible to conclude that there are at least four general rules associated with the denial of claims of unconscionability:

- As a general rule, commercially reasonable agreements are not unconscionable simply because there is a disparity in bargaining power or because a given provision is exacting in nature.
- Contracts will not be struck as unconscionable if they require the implication of a condition not agreed to by the parties.
- If a party to a commercially reasonable bargain has completed its obligations before the claim of unconscionability is made, the contract will be upheld.
- A covenant that has the effect of merely recognizing a condition or status otherwise permissible by law will be upheld.

Linking the Rules Together

Is there a relationship between the rules that permit a finding of unconscionability and those that do not? Are these rules mutually exclusive of one another? It appears that the answer is that there is a relationship and that the rules operate in a mutually exclusive manner.

The rules that apply when unconscionability is not established revolve around determinations of reasonableness and recognition of a condition or status otherwise permissible by law. The rules that support findings of unconscionability are applied in situations emphasizing factors that make a given contract unreasonable. This group of rules actually defines what is unreasonable and what is not. They also suggest conditions that must be met prior to a finding of unconscionability.

A provision cannot be reasonable and unreasonable at the same time. It's one or the other. Thus, for example, in the case of a one-sided agreement, the complainant must show that the agreement is unreasonable because it is profoundly discriminatory in its effect. But a contract by definition cannot be both reasonable and discriminatory if the latter condition is *per se* unreasonable. Likewise, a contract cannot be found to be reasonable if facts are shown to establish that there was an attempt to intentionally obscure terms from one of the parties.

Taken together, these rules suggest some important guidelines. Practitioners should advise their clients that these principles should always be considered from the outset and that the mere appearance of a disparity between the parties and/or an exacting provision is not enough to establish a claim of unconscionability.

It should be explained that the complainant must be able to establish that the contested covenant is not commercially reasonable and/or that the disparity or the result is so profoundly unfair as to require judicial review.

The circumstances and conditions that exist when a potentially suspect provision is agreed upon should be carefully and completely documented.

Recitations in the contract regarding the basis for its terms and conditions, while not always unassailable, should assist in containing attempts to set an agreement aside on grounds of unconscionability.

Some Unresolved Issues

Some decisions handed down by the courts have left open technical questions that will have to be resolved in the future.

Questions of fact or law? Although statutes may not contribute much to the definition of what is or is not unconscionable, they do make it clear that the courts must afford the parties a reasonable opportunity to present evidence, in the case of a contract, about its commercial setting, purpose and effect, and in the case of a lease, about its purpose and effect when: (a) unconscionability is raised by a party in pleadings, or (b) the court on its own suspects that unconscionability *may* be present.

Regardless of the statutory language, some confusion exists about whether the issue of unconscionability is for the court to decide without a plenary hearing.[39] The better rule appears to be that if there is any question about whether unconscionability may exist, such a hearing is appropriate as a pre-condition to any final decision by the court.[40] The scope of such a hearing is ap-

parently limited because both statutes appear to bar evidence that goes beyond the setting, purpose and effect of the covenant. This constraint may have unintended consequences.

As illustrated here, some of the rules defining unconscionability require a review of only the substance of the challenged provision, with the court free to make a ruling thereupon as a matter of law. Other rules require a review of both the substantive provision and its factual circumstances. For this latter group, a plenary hearing is required before any determination can be made.[41]

But what about situations involving the rules of unconscionability that deal only with an interpretation of the substantive provision itself? Is there room under the existing statutory scheme for a plenary hearing on issues that go beyond setting, purpose and effect?

Consider, for example, *Leonedas Realty Corp. v. Brodowsky*.[42] Here there was no question that the respondent, Brodowsky, was living at the demised premises with a man to whom she was not married. The lease in question contained a "singles only" restriction that the court found to be discriminatory on its face in violation of § 296(5)(a) of the N.Y. Executive Law and § B1-7.0(5)(a) of the New York City Administrative Code and therefore unconscionable. There was no question about who was or was not living at the premises. Nor was there any issue regarding marital status. These issues were conceded by the parties.

Suppose, however, that a factual issue had been presented by a denial. The resulting threshold question would have been whether there could be any discrimination in the first place. Would this issue have fit within the statutory restriction that evidence presented must be limited to "setting," "purpose" and "effect?" A plausible argument can be made that the answer is no, in which case logically any pleading raising the issue should be dismissed. But this objection notwithstanding, can the court nevertheless proceed to hear evidence relevant to the question even though the grounds for doing so lie outside the statutory limitations? While it is far from clear, especially in cases where unconscionability is the sole issue, the better answer would appear to be "yes." The statutes give the courts full powers to develop rules against unconscionable covenants, and it follows that the statutes should be interpreted in the broadest manner possible to assure that the courts can carry out that mission. It serves no useful purpose to place technical constraints on the legislature's designee to police against unconscionability.

The businessman. The doctrine of contractual unconscionability was developed in large measure to protect the consumer from any disparity of bargaining power,[43] and from a lack of understanding about what contested terms may actually mean (unfair surprise).[44] But where the parties to a contract are both business people in a commercial setting, it is often said that there is "a presumption of conscionability."[45] The reason given is that business people are thought to be capable of applying whatever resources are needed to assure that their position is protected.

Courts recognize that their role is to police against unconscionability no matter who the prey might be, as evidenced by rulings that have found unconscionability when terms have been intentionally obscured from business people.

In substance, this "presumption" is a non-sequitur given the reality that all contracts are presumed conscionable unless challenged in court. Anyone raising the issue has the burden of establishing unconscionability. The underlying premise for the "presumption" is that all business people are equal, and clearly this is not the case. Some business people are quite sophisticated and some are not. Some are victims of the unscrupulous conduct and some are not.

In practice, courts recognize that their role is to police against unconscionability no matter whom the prey might be, as evidenced by rulings that have found unconscionability when terms have been intentionally obscured from business people.[46] What must be clarified is whether there really is need for special rules where business people are involved. It would appear that the better answer is "no."

What's next? Defining what is and what is not an unconscionable contract has been handled by the legislature as if it were a hot potato. The courts were left to fill this void. In meeting that challenge, they created a series of rules that the practitioner can use to evaluate most covenants.

The flexibility that the legislature created when it passed the responsibility on to the courts for the most part has been realized. The doctrine is evolutionary, not static, and with time, no doubt, new scenarios will appear for review, and the courts may be called upon to fashion additional rules. The practitioner should keep in mind that unconscionability is a conclusion reached after a covenant has been agreed to. Its effects are reviewed against the simple standard of what is or is not reasonable under the circumstances. The emphasis is on fairness and restraint. Courts are appropriately reluc-

tant to interfere when a reasonable basis exists for a seemingly exacting provision. The appearance of inequality itself is not likely to result in a finding of unconscionability. There must be more. The offending covenant must create a profoundly adverse and unfair result before judicial interference is justified.

---

1. *Rowe v. Great Atlantic & Pacific Tea Co.*, 46 N.Y.2d 62, 67-68, 412 N.Y.S.2d 827 (1978); *State v. Wolowitz*, 96 A.D.2d 47, 468 N.Y.S.2d 131 (2d Dep't 1983).

2. *See* John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. Pa. L. Rev. 931 (1969); James J. White & Robert S. Summers, Uniform Commercial Code (4th ed. 1995); Jonathan A. Eddy, *On the "Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719(2)*, 65 Cal. L. Rev. 28 (1977); Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 Cornell L. Rev. 1 (1981).

3. *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100 (Ch. 1750).

4. *Mandel v. Liebman*, 303 N.Y. 88, 94 (1951).

5. Arthur A. Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115 U. Pa. L. Rev. 485 (1967).

6. UCC § 2-302 provides:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

7. RPL § 235-c provides:

> (1) If the court as a matter of law finds a lease or any clause of the lease to have been unconscionable at the time it was made, the court may refuse to enforce the lease, or it may enforce the remainder of the lease without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that a lease or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose and effect to aid the court in making the determination.

8. The Official Uniform Comment that accompanied UCC § 2-302 upon its enactment, provides:

> This section is intended to make it possible for courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to it unconscionability. *The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.* Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.

(emphasis added) (citation omitted).

Concerning RPL § 235-c, in a memorandum submitted in support the following appears:

> The necessity of such legislation has become apparent as a result of the lack of an authoritative court ruling interpreting the unconscionability defense of the U.C.C. § 2-302 as being applicable to real estate leases. The basic test of unconscionability as determined under the U.C.C. can be stated, as whether in the court's determination in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one sided as to be unconscionable, under circumstances existing at the time of the making of the contract. The principle is one of prevention of oppression. *It shall be noted that it would appear that the legislature never intended to define unconscionability since to do so would limit its application*.

Memorandum of Assemblyman Edward H. Lehner, New York State Legislative Annual-1976, at 286-87 (emphasis added) (citations omitted).

9. *See McCaughey v. McCaughey*, 205 A.D.2d 330, 612 N.Y.S.2d 579 (1st Dep't 1994); *Avildsen v. Prystay*, 171 A.D.2d 13 (1st Dep't 1991); *Yuda v. Yuda*, 143 A.D.2d 657 (2d Dep't 1988).

10. *See Carvel Corp. v. Rait*, 117 A.D.2d 485, 503 N.Y.S.2d 406 (2d Dep't 1986); *Aeb & Assocs. Design Group, Inc. v. Tonka Corp.*, 853 F. Supp. 724 (S.D.N.Y. 1994).

11. *See Aviall, Inc. v. Ryder Sys., Inc*., 913 F. Supp. 826, 831 (S.D.N.Y 1996), *aff'd*, 110 F.3d 892 (2d Cir. 1997).

12. These statutes only create the defense of unconscionability. Neither was intended to recognize a cause of action for damages. "The doctrine of unconscionability is to be used as a shield, not a sword, and may not be used as a basis for affirmative recovery." *Super Glue Corp. v. Avis Rent A Car Sys., Inc*., 132 A.D.2d 604, 606, 517 N.Y.S.2d 764 (2d Dep't 1987).

13. *See* 15 U.S.C. § 3608, which governs judicial determinations respecting unconscionable leases imposed by owners of cooperative apartment associations and condominiums that are subject to federal law.

14. UCC § 2-302 (Official Uniform Comment) (citation omitted). This same concern was deemed to be incorporated into the RPL. The Governor's 1976 Message of Approval, in support of the enactment states:

> Section 235-c of the Real Property Law, which would be added by this bill, is substantially similar to section 2-302 of the Uniform Commercial Code. . . . This principle of fairness and restraint, which has been applicable to the area of sales for some time, should equally govern the conduct of the parties contemplating entering into the landlord and tenant relationship.

Governor's Memoranda on Bills Approved, New York State Legislative Annual-1976, at 406-7.

15. *See Universal Leasing Servs., Inc. v. Flushing Hae Kwan Restaurant*, 169 A.D.2d 829, 565 N.Y.S.2d 199 (2d Dep't 1991); *Industralease Automated & Scientific Equipment Corp. v. R.M.E. Enterprises, Inc.*, 58 A.D.2d 482, 396 N.Y.S.2d 427 (2d Dep't 1977).

16. *In re Estate of Friedman*, 64 A.D.2d 70, 407 N.Y.S.2d 999 (2d Dep't 1978).

17. *Brower v. Gateway 2000, Inc*., 246 A.D.2d 246, 676 N.Y.S.2d 569 (1st Dep't 1998); *Teleserve Sys., Inc. v. MCI Telecomm. Corp.*, 230 A.D.2d 585, 659 N.Y.S.2d 659 (4th Dep't 1997).

18. *Ardrey v. 12 West 27th St. Assocs*., 117 A.D.2d 538, 498 N.Y.S.2d 814 (1st Dep't 1986).

19. *Sunbeam Farms, Inc. v. Troche*, 110 Misc. 2d 501, 442 N.Y.S.2d 842 (Civ. Ct, Bronx Co. 1981); *cf. Nalezenec v. Blue Cross of W. N.Y.*, 172 A.D.2d 1004, 569 N.Y.S.2d 264 (4th Dep't 1991); *Zuckerberg v. Blue Cross & Blue Shield*, 119 Misc. 2d 834, 888, 464 N.Y.S.2d 678 (Sup. Ct., Nassau Co. 1983), *rev'd on other grounds*, 108 A.D.2d 56, 487 N.Y.S.2d 595 (2d Dep't 1985), *aff'd*, 67 N.Y.2d 688, 499 N.Y.S.2d 920 (1986).

20. *Ultrashmere House, Ltd. v. 38 Town Assocs.*, 123 Misc. 2d 102, 473 N.Y.S.2d 120 (Sup. Ct., N.Y. Co. 1984).

21. *Leonedas Corp. v. Brodowsky*, 115 Misc. 2d 88, 454 N.Y.S.2d 183 (Civ. Ct., Queens Co. 1982).

22. James J. White & Robert S. Summers, Uniform Commercial Code 117 (4th ed. 1995).

23. *Jones v. Star Credit Corp*., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct., Nassau Co. 1969); *State by Lefkowitz v. ITM, Inc*., 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct., N.Y. Co. 1966). Under RPL § 235-c a landlord can enter into a lease which calls for rent substantially below the market and those terms alone don't render the lease unconscionable. *Harold Properties Corp. v. Frankel*, 93 A.D.2d 720, 461 N.Y.S.2d 9 (1st Dep't 1983) provided that the landlord's decision isn't the result of undue influence. *See In re Estate of LoGuidice*, 186 A.D.2d 659, 588 N.Y.S.2d 623 (2d Dep't 1992).

24. *Aviall, Inc. v. Ryder Sys., Inc*., 913 F. Supp. 826 (S.D.N.Y. 1996); *Ilan v. Shearson/American Express, Inc*., 632 F. Supp. 886, 890-91 (S.D.N.Y. 1985).

25. *Davidovits v. De Jesus Realty Corp*., 100 A.D.2d 924, 474 N.Y.S.2d 808 (2d Dep't 1984); *D & W Cent. Station Alarm Co. v. Sou Yep*, 126 Misc. 2d 37, 480 N.Y.S.2d 1015 (Civ. Ct., Queens Co. 1984); *Jefferson Credit Corp. v. Marcano*, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct., N.Y. Co. 1969); *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct., Nassau Co. 1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. Term, 2d Dep't 1967).

26. *Universal Leasing Servs., Inc. v. Flushing Hae Kwan Restaurant*, 169 A.D.2d 829, 565 N.Y.S.2d 199 (2d Dep't 1991); *Fischer v. General Elec. Hotpoint*, 108 Misc. 2d 683, 438 N.Y.S.2d 690 (Dist. Ct., Suffolk Co. 1981).

27. *Currie v. Three Guys Pizzeria, Inc*., 207 A.D.2d 578, 615 N.Y.S.2d 494 (3d Dep't 1994).

28. *Halprin v. 2 Fifth Ave. Co.*, 101 Misc. 2d 943, 422 N.Y.S.2d 275 (Sup. Ct., N.Y. Co. 1979), *rev'd*, 75 A.D.2d 565, 427 N.Y.S.2d 258 (1st Dep't 1980), *appeal dismissed*, 55 N.Y.2d 937, 449 N.Y.S.2d 175 (1982); *cf. Hollywood Leasing Corp. v. Rosenblum*, 109 Misc. 2d 124, 442 N.Y.S.2d 833 (App. Term, 2d Dep't 1981).

29. *Niemiec v. Kellmark Corp*., 153 Misc. 2d 347, 581 N.Y.S.2d 569 (Tonawanda City Ct. 1992).

30. *Sablosky v. Edward S. Gordon Co.*, 73 N.Y.2d 133, 538 N.Y.S.2d 513 (1989).

31. *Albank, FSB v. Foland*, 177 Misc. 2d 569, 676 N.Y.S.2d 461 (Albany City Ct. 1998); *Master Lease Corp. v. Manhattan Limousine, Ltd.*, 177 A.D.2d 85, 580 N.Y.S.2d 952 (2d Dep't 1992); *see Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10, 537 N.Y.S.2d 787 (1988).

32. *Polygram, S.A. v. 32-03 Enterprises, Inc.*, 697 F. Supp. 132 (E.D.N.Y 1988). An interesting offshoot of this and similar cases involves advertising in phone books. Typically, the advertiser is given an agreement that limits the liability of the publisher to a refund of the fee paid by the advertiser. In many markets only one phone book is available. These contracts have not been found unconscionable because advertisers receive the benefit of a lower price for advertising than they would receive if the publisher had to factor in the likelihood of consequential damages. *See Reuben H. Donnelley Corp. v. Krasny Supply Co.*, 592 N.E.2d 8 (Ill. App. Ct. 1991); *Wille v. Southwestern Bell Tel. Co.*, 549 P.2d 903 (Kan. 1976).

33. *Morris v. Snappy Car Rental, Inc.*, 84 N.Y. 2d 21, 614 N.Y.S.2d 362 (1994); *see Aviall, Inc. v. Ryder Sys., Inc.*, 913 F. Supp. 826 (S.D.N.Y. 1996); *Siemens Credit Corp. v. Marvik Colour, Inc.*, 859 F. Supp. 686 (S.D.N.Y. 1994); *Rubin v. Telemet Am., Inc.*, 698 F. Supp. 447 (S.D.N.Y. 1988).

34. *Aeb & Assocs. Design Group, Inc. v. Tonka Corp.*, 853 F. Supp. 724 (S.D.N.Y. 1994).

35. *Hillcrest Realty Co. v. Gottlieb*, 234 A.D.2d 270, 271, 651 N.Y.S.2d 55 (2d Dep't 1996) ("'Equity will not relieve a party of its obligations under a contract merely because subsequently, with the benefit of hindsight, it appears to have been a bad bargain.'") (quoting *Raphael v. Booth Mem. Hosp.*, 67 A.D.2d 702, 703, 412 N.Y.S.2d 409 (2d Dep't 1979)).

36. *George Backer Mgt. Corp. v. Acme Quilting Co.*, 46 N.Y.2d 211, 413 N.Y.S.2d 135 (1978).

37. *Rowe v. Great Atlantic & Pacific Tea Co.*, 46 N.Y.2d 62, 412 N.Y.S.2d 827 (1978); *cf. Schnee v. Jonas Equities, Inc.*, 109 Misc. 2d 221, 442 N.Y.S.2d 342 (App. Term, 2d Dep't 1981).

38. *Friedman v. Jordan*, 98 Misc. 2d 686, 414 N.Y.S.2d 455 (Sup. Ct., N.Y. Co.), *aff'd*, 71 A.D.2d 554, 418 N.Y.S.2d 552 (1st Dep't 1979).

39. *Cf. Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 403-4, 297 N.Y.S.2d 108 (1968) and *Euclid Ave. Assocs. v. City of New York*, 64 A.D.2d 550, 406 N.Y.S.2d 844 (1st Dep't 1978) with *State v. Avco Fin. Servs.*, 50 N.Y.2d 383, 390, 429 N.Y.S.2d 181 (1980); *Carvel Corp. v. Rait*, 117 A.D.2d 485, 503 N.Y.S.2d 406 (2d Dep't 1986); *State v. Wolowitz*, 96 A.D.2d 47, 68-69, 468 N.Y.S.2d 131 (2d Dep't 1983).

40. *See Ardrey v. 12 West 27th St. Assocs.*, 117 A.D.2d 538, 498 N.Y.S.2d 814 (1st Dep't 1986); *Carvel Corp.*, 117 A.D.2d 485.

41. *Wilson Trading Corp.*, 23 N.Y.2d 398; *Euclid Ave. Assocs.*, 64 A.D.2d 550; *Davidovits v. De Jesus Realty Corp.*, 100 A.D.2d 924, 474 N.Y.S.2d 808 (2d Dep't 1984).

42. 115 Misc. 2d 88, 454 N.Y.S.2d 183 (Civ. Ct., Queens Co. 1982).

43. *Fischer v. General Elec. Hotpoint*, 108 Misc. 2d 683, 438 N.Y.S.2d 690 (Dist. Ct., Suffolk Co. 1981).

44. *Jefferson Credit Corp. v. Marcano*, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct., N.Y. Co. 1969).

45. *American Dredging Co. v. Plaza Petroleum, Inc.*, 799 F. Supp. 1335, 1339 (E.D.N.Y. 1992).

46. *See Aviall, Inc. v. Ryder Sys., Inc.*, 913 F. Supp. 826 (S.D.N.Y. 1996); *Ilan v. Shearson/American Express, Inc.*, 632 F. Supp. 886, 890-91 (S.D.N.Y. 1985); *Davidovits*, 100 A.D.2d 924; *D & W Cent. Station Alarm Co. v. Sou Yep*, 126 Misc. 2d 37, 480 N.Y.S.2d 1015 (Civ. Ct., Queens Co. 1984); *Jefferson Credit Corp.*, 60 Misc. 2d 138; *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct., Nassau Co. 1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. Term, 2d Dep't 1967).

Judicial Certification of Experts: Litigators Should Blow the Whistle On a Common But Flawed Practice

By Paul Frederic Kirgis

The ritual of "qualifying" experts before eliciting their testimony has become an accepted feature of most civil trials and a growing number of criminal trials. After eliciting a raft of impressive credentials, the party calling the witness requests, and usually receives, some sort of judicial declaration that the witness is qualified as an expert in the field. The practice is so ingrained that many lawyers not only expect the judge to bless their own expert witnesses with an express "qualification," they also demand similar treatment for the experts offered by the other side.[1]

Yet the express expert certifications that appear so frequently in trial transcripts are not required. In fact, they are fundamentally at odds with basic principles regarding the role of the judge in the courtroom.

The key to understanding why express expert certifications should be avoided is understanding the foundation for expert testimony. Although it serves a specialized function in the courtroom, expert testimony is subject to foundational requirements directly analogous to those applicable to more traditional forms of evidence.

Most evidence is relevant because it played some direct role in the events giving rise to the litigation. For example, in a personal injury case, testimony about whether the light was red or green tells us something about the circumstances surrounding the accident that makes it more or less likely that one of the parties was at fault. By the same token, a written contract tells us something about the actual agreement between the parties that makes it more or less likely that a breach occurred.

These items of evidence are admissible only if they are supported by a foundation that establishes their relevance. For testimony, the foundation is typically testimony by the witness that he/she has personal knowledge of the subject matter of the testimony. In the auto accident example above, the foundation would consist of testimony that the witness was present at the scene and perceived the color of the light. For an item of physical evidence, the foundation is some form of authentication, or, in legal parlance, evidence that the thing is what it purports to be; for a contract it is likely to consist of testimony by a witness that the contract offered in court is the one the parties signed.

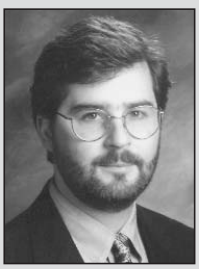
Expert testimony is relevant because it tells us something about how things function in the real world that will help the jurors better understand the other evidence before them. Rather than giving the jurors factual data about the case, it gives them knowledge to use in processing the relevant factual data. Provided the evidence meets any applicable reliability tests,[2] it is relevant and admissible only if the witness has sufficient expertise in the area to provide helpful information to the jury.

The requirement that the witness have sufficient expertise represents nothing more than the foundational evidence required to establish the relevance of the testimony. It bears a direct analogy to the foundations required to show that a witness has personal knowledge or that a document is authentic.

To say that a witness is "qualified as an expert" in a particular field is to say that the witness has the requisite knowledge, skill, training, or education to give relevant testimony on the proffered subject. In other words, the term "qualified," like the term "authentic," describes a condition existing in the world rather than a status bestowed by a judge.

No Need for Express Certification

To see why the analogy between expert testimony and other forms of evidence is significant, imagine the



Paul Frederic Kirgis is an assistant professor at St. John's University School of Law. He is a graduate of Colgate University College and received his J.D. degree from Washington & Lee University School of Law.

following scenario: a trial lawyer elicits that a witness was at the scene of the accident and saw the color of the light. Then asks the court, "Your honor, we ask at this time that the witness be designated as having personal knowledge." The request seems absurd because, as every trial lawyer knows, judges have no occasion to make rulings on the admissibility of evidence unless they are first presented with an objection. Once the foundation has been laid, absent an objection, the questioning proceeds or the document is admitted.

Testimony on specialized subject matters — that is, expert testimony — functions under the same regime. Again, experts are either "qualified" or not. They do not become qualified as the result of judicial designation. Once the required foundation is laid establishing an expert's qualifications, absent an objection, the questioning of the expert should proceed. Until an objection is raised, the court simply has nothing to rule on and hence no reason to declare the witness qualified.

Most judges who have had occasion to consider the issue have recognized that an express expert certification is not required. The rules of evidence do not require an express expert certification. In *People v. Gordon*,[3] a criminal defendant appealed the admission of testimony from a physician called by the prosecution on the ground that the physician had not been "certified" as an expert by the trial judge. In a terse opinion, the Appellate Division upheld the decision, concluding that "there is no requirement that a trial court formally 'certify' a witness as an expert."[4] At least one other New York court, as well as several federal courts, have reached similar conclusions.[5]

These holdings should not be surprising. An appellate court is likely to have little sympathy for a litigant who argues that the judgment should be overturned because the trial judge failed to certify the other party's experts. A better candidate for harmless error treatment would be hard to find. What is more surprising is the absence of case law addressing the inverse proposition — that the express certification of experts by the court is inherently improper.

Nevertheless, few courts or commentators have directly confronted what counsel on the receiving end of expert testimony should be more concerned about — that the express certification of experts by the court is inherently objectionable.

Strategy at Trial

Imagine another courtroom colloquy. Instead of asking the judge to designate a witness as having personal knowledge, counsel examines a key witness and then, before sitting down, asks the judge to certify the witness as "credible." It is not hard to imagine the hysterics that would ensue from the other counsel table.

New York courts, like those of most states, may not comment on the weight of the evidence or the credibility of witnesses.[6] Judges in federal court have greater inherent authority to comment on the weight of evidence, but that authority still does not extend to comments on the credibility of witnesses.[7]

In *Hotel Utica, Inc. v. Ronald G. Armstrong Engineering Co.*,[8] the Appellate Division reversed a jury verdict for the defendant in part because the judge had said that a defense witness was "'cooperative' and 'Perhaps I'd go further and say he's a graduate of the U.S. Naval Academy, which endears him to my heart a little bit.'"[9] That offhand comment seems mild in comparison with a

CONTINUED ON PAGE 34

CONTINUED FROM PAGE 31

solemn judicial declaration that a witness hired by the other side, who may be the key to the case, is an "expert" in her/his field. Yet the instinct for self-preservation seems to desert lawyers when the critical moment of expert qualification arises.

Put simply, trial lawyers should not allow the court to certify the other party's witnesses as experts without objection. Although judges are accustomed to making those certifications when faced with the issue directly, they are likely to see the potential problems.

In *People v. Gordon*,[10] the First Department took one step down that path. In addition, at least one federal court, cited in *Gordon*, took the next step. In *United States v. Bartley*,[11] the court held that there is "no requirement that the court specifically make that finding [that a witness is qualified as an expert] in open court upon proffer of the offering party. Such an offer and finding by the Court might influence the jury in its evaluation of the expert and the better procedure is to avoid an acknowledgment of the witnesses' expertise by the Court."[12] Armed with these cases and a little persuasiveness, lawyers should be able to stem the flood of expert certifications.

Some Practical Considerations

A reason for the reluctance of many lawyers to address the qualification issue may be its entrenchment. Judges who have grown accustomed to certifying experts may look on an objection to the procedure as a direct challenge. This is a real risk. Rather than raise the issue directly in open court, probably the best approach is to address it at the pre-trial conference. Alternatively, if the request for "qualification" comes up at trial, counsel should ask for a sidebar. Without the risk of embarrassing the judge, counsel can then gently explain, in non-accusatory terms, that the express certification of an expert is neither required, nor, given the proscription on commenting on the evidence, allowed.

Another concern may be that, absent an express "certification," it will not be clear who is an expert. This can be an important consideration because experts are subject to separate disclosure rules,[13] and because an expert opinion, unlike a lay opinion, may be based at least in part on inadmissible hearsay.[14] But like the issue of the admissibility of the expert's testimony, these issues are important only to the party opposing the expert. If at some point that party sees a need to get a judicial ruling on the expert's qualifications, an objection may be interposed. The mere possibility of these issues arising does not warrant a preemptive judicial declaration that an expert is qualified.

Because the natural break point provided by the proffer of the expert will not occur if the judge does not "qualify" the witness, a party seeking to *voir dire* an expert witness will need to take some affirmative steps to secure that opportunity. Again, to avoid confusion, this issue should be discussed at the pretrial hearing. If counsel chooses to object to the expert's testimony on the ground that the expert is not qualified, either with or without *voir dire*, the judge will have to make a ruling.

If the judge finds that the expert is not qualified, the judge simply sustains the objection and the expert does not testify. If the judge finds the expert is qualified, the judge must, at a minimum, overrule the objection. Many judges may also be inclined to declare the expert qualified at that point. Although an express certification under those circumstances seems less prejudicial than such a declaration made without a prior objection, the better practice is to avoid any appearance of commenting on the weight of the evidence by simply overruling the objection and allowing the witness to testify.

Conclusion

Given the importance of expert testimony in modern litigation, litigators should not be as blasé about the judicial certification of experts as they traditionally have been.

When entire cases rise or fall on highly technical, sophisticated testimony, a simple declaration by a judge that a witness is an "expert" can have a profound impact. Yet few lawyers even recognize the danger, much less take steps to protect themselves and their clients.

Expert Certification in Courtroom Lore

The legendary trial judge and evidence scholar Irving Younger once analyzed the tactical advantages that could be gained from an unchallenged bid to have a witness certified as an expert:[1]

"[Y]ou say to the judge something like, 'Your Honor, I ask the court to declare Dr. Elko an expert in the field of physiology.' . . . And, of course, you've done it, so the judge says, 'Yes.' How does the jury hear it? The jury hears it as the judge certifying that your expert is an expert. The judge's authority begins to be associated with your expert's authority. And since the judge is the ultimate figure in the courtroom, it's a nice phenomenon to have working for you."[2]

1. *See* Irving R. Younger, *A Practical Approach to the Use of Expert Testimony*, 31 Clev. St. L. Rev. 1 (1982).
2. *Id.* at 16.

Established practices can be difficult to dislodge, but courts generally have perceived the problems with express expert qualifications when faced with them directly. With a little foresight and tact, the savvy litigator can remove at least this one arrow from his opponent's quiver.

---

1. *See, e.g., People v. Gordon*, 202 A.D.2d 166, 608 N.Y.S.2d 192 (1st Dep't 1994) (appealing failure of trial judge to expressly certify other party's expert witness).
2. *See Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *Daubert v. Merrell Dow Pharmaceutical*, 509 U.S. 579 (1993); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).
3. *See Gordon*, 202 A.D.2d at 167, 608 N.Y.S.2d 192.
4. *Id.*
5. *See People v. Highsmith*, 254 A.D.2d 768, 679 N.Y.S.2d 758 (4th Dep't 1998); *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994) ("Although the practice is different in some state courts, the Federal Rules of Evidence do *not* call for the proffer of an expert after he has stated his general qualifications."); *see also* Wright & Miller, Federal Practice and Procedure § 6265 (2d ed. 1987) ("[A] ruling from the court as to whether the witness is qualified to testify as an expert . . . is not mandated by Rule 702.").

   Indeed, there is a school of thought that the term "expert" is so prejudicial that it should never be used in a jury trial. *See* Charles R. Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" under the Federal Rules of Evidence in Civil and Criminal Jury Trials*, 154 F.R.D. 537 (1994).
6. *See People v. Ohanian*, 245 N.Y. 227, 232-233 (1927); *People v. Leavitt*, 301 N.Y. 113, 117 (1950); *People v. Ochs*, 3 N.Y.2d 54, 56-57, 163 N.Y.S.2d 671 (1957).
7. *See* Supreme Court Standard 107; *United States v. Anton*, 597 F.2d 371, 372 (3d Cir. 1979) (holding that the defendant's right to have credibility determined by jury was violated by judge's statement that defendant was "devoid of credibility").
8. 62 A.D.2d 1147, 1148, 404 N.Y.S.2d 455 (4th Dep't 1978).
9. *Id.*
10. *See People v. Gordon*, 202 A.D.2d 166, 608 N.Y.S.2d 192 (1st Dep't 1994).
11. 855 F.2d 547, 552 (8th Cir. 1988).
12. *Id.*

Decisions of the Past Decade Have Expanded Equal Protection Beyond Suspect Classes

BY J. MICHAEL MCGUINNESS

Abuse of government power is a constant risk throughout our nation.[1] Without constitutional protection, citizens from all walks of life would have little or no recourse when subjected to arbitrary and discriminatory government power, particularly at the local level.

The equal protection clause of the Constitution's Fourteenth Amendment has long been invoked to protect classes of individuals from discriminatory treatment. In recent years, more attention has been given to equal protection principles as the key legal bulwark in preventing unconstitutional treatment of those who do not fall into a suspect class but are nevertheless being subjected to inappropriate governmental interference in their lives.

The cornerstone for equal protection was articulated more than a century ago in *Yick Wo v. Hopkins*,[2] which declared:

> When we consider the nature and the theory of our institutions of government . . . they do not leave room for the play and action of *purely personal and arbitrary power*. . . . [T]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems intolerable in any country where freedom prevails.[3]

In the past decade, a series of court decisions have defined a jurisprudence that makes the equal protection tradition applicable to everyone who is the object of discriminatory treatment. Among the most eloquent was a 1995 Seventh Circuit decision, *Esmail v. Macrane*.[4] Drawing on a long line of equal protection cases, including several notable Second Circuit decisions, it declared:

> If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court. . . . [N]either in terms nor in interpretation is the [equal protection] clause limited to protecting members of identifiable groups. It has long been understood to provide a kind of last-ditch protection against government action.[5]

The range of equal protection coverage generally encompasses eight basic circumstances in which deprivations may occur:

(1) Traditional suspect class discrimination with selective enforcement.[6]
(2) Reverse discrimination.[7]
(3) Discrimination without a suspect class.[8]
(4) Abuse of government power.[9]
(5) Selective treatment with malicious or bad faith intent to injure.[10]
(6) Selective denial of protective services.[11]
(7) Retaliation for the assertion of constitutional rights.[12]
(8) Governmental harassment, grave unfairness or fundamentally unfair procedures.[13]

Basic Equal Protection for All

Although suspect class discrimination cases often capture the largest headlines, equal protection is the right of everyone, regardless of status or personal characteristics. Relief is available for ordinary citizens who were not born in some theoretical suspect class but find themselves singled out for discriminatory treatment.

Perhaps the most traditional notion of equal protection is that all similarly situated persons should be treated alike.[14] This "nondiscrimination" principle has

J. MICHAEL MCGUINNESS, a member of the New York State Bar Association, practices civil rights, law enforcement liability and employment litigation in the eastern United States from his offices in Elizabethtown, N.C., New York City and Washington, D.C. (e-mail jmichael@mcguinnesslaw.com) He was plaintiff's counsel in the *Edwards, Worrell* and *Benson* cases and submitted an *amicus* brief for the plaintiffs in the *Latino Officers Association* case.

He extends special thanks to Susan Klein for her assistance with this article.

been applied to a broad range of governmental conduct. When other, more specific constitutional guarantees do not fit, equal protection may serve as residual constitutional protection to prevent government from oppressively abusing citizens through selective enforcement and preferential treatment schemes. Recent cases in different contexts have begun to restore the "equal" component of the equal protection clause.[15]

Equal protection jurisprudence in the Second Circuit is derived from *Burt v. City of New York*,[16] *LeClair v. Saunders*[17] and their progeny.

In *Burt*, Judge Learned Hand issued an authoritative opinion concluding that an architect stated a viable nonsuspect class equal protection claim whereby city officials "deliberately misinterpreted and abused their statutory power in order to deny his applications."[18] The architect alleged that city officials selected him for oppressive measures, unconditionally approving applications of other architects similarly situated. The architect alleged that he was "singled out for unlawful oppression" and was a victim of the type of "purposeful discrimination" that had been prohibited since the Supreme Court's 1944 decision in *Snowden v. Hughes*.[19] Judge Hand concluded for the court that deliberate misinterpretation of a statute against a plaintiff for the purpose of singling him out states a viable equal protection claim.

Judge Hand's conclusion and analysis provided fertile ground for the Second Circuit's expanded recognition of equal protection in *LeClair*. In *LeClair*, the court widened the scope of equal protection by holding that an equal protection claim may be premised upon "intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person."[20]

LeClair explained that equal protection may be violated when there is "'unequal administration of a state statute . . . [and one] show[s] an intentional or purposeful discrimination.'"[21] The court observed that selective enforcement is a "murky area of equal protection law." Since that time, however, selective enforcement law has been clarified and Second Circuit cases using the *LeClair* theory have been successful.[22] Most other circuits have generally followed the Second Circuit's lead in *LeClair*.[23]

In *Thomas v. City of West Haven*,[24] the Connecticut Supreme Court reversed the dismissal of an equal protection claim in a land use dispute. *Thomas* included malicious and selective treatment of a zoning change applicant and an "atmosphere of hostility" that precluded fair treatment. The Connecticut court was "persuaded by [*Esmail*'s] reasoning" and remanded the case for trial.[25]

Protection From Selective Enforcement

Equal protection claims may be predicated upon discrimination that results from a selective enforcement rationale if vindictiveness, "unjustifiable standards" or "arbitrary classifications" underlie governmental conduct.

In 1944, the Supreme Court recognized that selective enforcement may support an equal protection claim even where there is no protected or suspect class. In *Snowden*,[26] the Court held that an equal protection violation may be premised upon deliberate selective enforcement based upon "unjustifiable standards." In *Oyler v. Boyles*,[27] the Court held that equal protection prohibits discrimination on grounds of race, religion or "other arbitrary classification." The logical import of *Snowden*, *Oyler* and the *Esmail* line of cases is that equal protection is not limited to suspect classes. In a 1999 decision, *Muller v. Costello*,[28] the Second Circuit summed up the principle in these terms: "The Equal Protection

Equal Protection Scenarios

Public employees are particularly prone to charges that call for constitutional protection.

A New York City law enforcement officer was fired for participating in a parade while off-duty.[1]

Similarly, a police association was singled out for disparate treatment in parade participation by New York City.[2]

In North Carolina, an anti-gun chief of police suspended and threatened to fire an officer who sought to teach an off-duty concealed handgun course required by state law.[3] The chief testified that the state law was "bad" and singled out the officer for suspension of employment and threatened termination because of the content of the officer's course addressing the "bad" law.

A North Carolina sheriff proclaimed that his departmental employees served "at my whim."[4]

1. *Locurto v. Giuliani*, 98 Civ. 6495 (pending S.D.N.Y.).
2. *See Latino Officers Ass'n v. City of New York*, 196 F.3d 458 (2d Cir. 1999) (affirming preliminary injunction precluding City from prohibiting Plaintiff from marching in parades with same benefits as other associations); *Sound Aircraft Servs. v. Town of East Hampton*, 192 F.3d 329, 335 (2d Cir. 1999) (remanding for application of political discrimination equal protection standard from *Brady v. Town of Colchester*, 863 F.2d 205 (2d Cir. 1988)).
3. *Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999).
4. *Benson v. McQueen*, 98-CV-164-BR1 (E.D.N.C). Sheriff McQueen claimed that God made him sheriff and that he would run his department at his "whim."

Clause prohibits 'arbitrary and irrational discrimination' even if no suspect class or fundamental right is implicated."[29]

Selective enforcement principles may also be applied to support other constitutional claims and provide inferences of causation, arbitrariness and retaliation.[30] In a 1997 Fourth Circuit case, *Worrell v. Bedsole*,[31] a law enforcement officer was fired after critically speaking about resource and personnel deficiencies in his department. The employer advanced a pretextual excuse of alleged insubordination. However, others were not fired for similar insubordination. The disparity in treatment established improper motive. A North Carolina jury returned a verdict of $781,400.

Selective enforcement principles may also be applied to support other constitutional claims and provide inferences of causation, arbitrariness and retaliation.

Protection for the Ordinary Individual

Basim Esmail, a liquor dealer in Naperville, Illinois, was subjected to a protracted course of misconduct by his local government. Esmail had owned a liquor store in Naperville since 1981. His liquor license was issued by the city and was renewable annually. Esmail's liquor license was renewed until 1992, when he applied for renewal of his license and for a second license at another location. The city prosecutor moved that both applications be denied on three grounds: that he had given beer to a minor, one of his managers had failed to register as the manager of the liquor store and Esmail had omitted on his application that his license had once been revoked.

Naperville's mayor, who was also Naperville's liquor control commissioner, found Esmail guilty on all charges except having given the minor alcohol. The mayor ordered Esmail's license revoked and his application for a second one denied. Esmail initially sought relief in the state courts, which ordered renewal of his license and that his second application be granted.

The charges against Esmail were found to have been based on a "deep-seated animosity" by the mayor and other city officials. This animosity was traced in part to Esmail's successful 1985 effort to have the revocation changed to a suspension. The "mayor's campaign of vengeance" against Esmail consisted of denial of liquor licenses, causing the Naperville police to harass Esmail and his employees with surveillance, causing the police to stop Esmail's car, and causing false criminal charges against Esmail. However, Esmail enjoyed no special protected status. He was not a member of a suspect class and no fundamental right was in issue.

Esmail's equal protection claim was premised upon the mayor's conduct in having denied Esmail's two license applications on the basis of trivial or trumped-up criminal charges while maintaining a practice of routinely granting new liquor licenses to persons who had engaged in similar conduct. Esmail pled a list of examples, of arguably more serious infractions than Esmail was charged with, yet others were punished less severely or not at all. The District Court dismissed Esmail's complaint for failure to state a claim but the Seventh Circuit reversed.

Speaking through Chief Judge Posner, the Seventh Circuit outlined the two most common kinds of equal protection cases. "One involves charges of singling out members of a vulnerable group, racial or otherwise, for unequal treatment."[32] The second involves challenges to laws or policies alleged to make irrational distinctions. Esmail complained that there was an "orchestrated campaign of official harassment directed against him out of sheer malice."[33] A question posed in *Esmail* was whether equal protection is violated when a powerful public official picks on a person because of sheer vindictiveness.

Esmail's recognition of equal protection was grounded in unequal treatment and the vindictive campaign of harassment against Esmail. Other cases have followed *Esmail*, recognizing the "'vindictive action' class of cases."[34] In *Indiana Teachers Ass'n v. Board of Commissioners*,[35] the court explained:

> The equal protection clause does not speak of classes. A class, moreover, can consist of a single member. . . . [T]he clause protects class-of-one plaintiffs victimized by the "wholly arbitrary act." . . . [T]he equal protection clause can be brought into play as a protection against allowing the government to single out a hapless individual, firm, or other entity for unfavorable treatment.[36]

Equal protection has also been held to prohibit additional types of governmental misconduct: "Equal protection rights may be violated by gross abuse of power, invidious discrimination, or fundamentally unfair procedures."[37] "Equal protection does require at the least, however, that the state act sensibly and in good faith."[38]

Retreating From Reverse Discrimination

Another line of cases has breathed new life into the equal protection clause for non-suspect class victims. Recent cases spell the decline of so-called affirmative ac-

tion, identifying the potential for reverse discrimination[39] in many circumstances, and thus ultimately providing everyone with greater equal protection under the law. "The constitutional ceiling of the Fourteenth Amendment has been lowered, resulting in the transformation of rigid race-based quotas from allowable remedies to illegal constrictions."[40] Such reverse discrimination has been held to be "detrimental to the public interest."[41]

In a 1996 decision, *Taxman v. Board of Education*,[42] the Third Circuit found that politically correct notions of "diversity" have no place ingrained in the law. In another 1996 decision, *Hopwood v. Texas*,[43] the Fifth Circuit struck down as violative of equal protection race-based university admissions policies that mandated higher standards for non-minorities and awarded race-based scholarships.

In *Taxman*, a white school teacher was selected for layoff because of her race and because the employer purportedly preferred "diversity" in the workplace. The court held that the employer's discriminatory conduct violated Title VII. After *certiorari* was granted, a coalition of civil rights groups raised 70% of the $433,500 paid to Sharon Taxman to settle her case, which avoided Supreme Court scrutiny of reverse discrimination.

In *Hopwood*, the court dealt with a law school admission program that sought to promote diversity by setting higher standards for white applicants. The court's holding was premised upon a basic but often ignored equal protection principle that "the use of race to achieve diversity undercuts the ultimate goal of the Fourteenth Amendment: the end of racially motivated state action."[44] Read together, these reverse-discrimination cases have provided a greater sense of equality to equal protection jurisprudence.

Conclusion

The equal protection clause is the foremost means for all individuals in the arsenal of weapons to combat the increasingly abusive power of government. *Esmail* reaffirmed and clarified the fundamental but often ignored principle that the equal protection clause is not limited to providing protection for suspect classes.

Basim Esmail simply wanted to be left alone by a harassing mayor and treated similarly as compared with others. Cheryl Hopwood only wanted an equal opportunity to attend law school. Sharon Taxman only wanted to be free of invidious employment discrimination camouflaged in the name of "diversity." Officer Locurto only wanted to avoid New York City's wrath and for the city to stay out of his off-duty expression. Mr. Esmail, Ms. Hopwood, Ms. Taxman, Officer Locurto and others who are not members of traditional suspect classes enjoy an equal protection prayer for relief.

1. *See, e.g.*, *Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999); *See generally* Sam J. Ervin, Jr., Preserving The Constitution! The Autobiography of Senator Sam J. Ervin, Jr. (Michie 1984); James Bovard, Lost Rights: The Destruction of American Liberty (St. Martin's Press 1994); Robert H. Bork, Slouching Towards Gomorrah: Modern Liberalism and American Decline (Regan Books 1996); J. Michael McGuinness, *Equal Protection for Non-Suspect Class Victims of Governmental Misconduct: Theory and Proof of Disparate Treatment and Arbitrariness Claims*, 18 Campbell L. Rev. 333 (1996).
2. 118 U.S. 356 (1886).
3. *Id.* at 369-70 (emphasis added).
4. 53 F.3d 176 (7th Cir. 1995).
5. *Id.* at 179-80.
6. *Abasiekong v. City of Shelby*, 744 F.2d 1055 (4th Cir. 1984).
7. *Taxman v. Board of Educ.*, 91 F.3d 1547 (3d Cir. 1996) (en banc) (case settled).
8. *Esmail*, 53 F.3d 176.
9. *See id*.
10. *LeClair v. Saunders*, 627 F.2d 606 (2d Cir. 1980).
11. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197 n.3 (1989).
12. *LeClair*, 627 F.2d 606.
13. *Dean Tarry Corp. v. Friedlander*, 650 F. Supp. 1544, 1552 (S.D.N.Y.), *aff'd*, 826 F.2d 210 (2d Cir. 1987); *Brandon v. District of Columbia*, 734 F.2d 56, 56 (D.C. Cir. 1984).
14. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).
15. *See, e.g.*, *Adarand Constructors v. Pena*, 515 U.S. 200 (1995); *Taxman v. Board of Educ.*, 91 F.3d 1547 (3d Cir. 1996) (en banc) (case settled); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied sub nom. Thurgood Marshall Legal Soc'y v. Hopwood*, 518 U.S. 1033 (1996).
16. 156 F.2d 791 (2d Cir. 1946). Judge Hand's analysis in *Burt* has been held to be "particularly persuasive" by other courts. *See Smith v. Eastern New Mexico Med. Ctr.*, 72 F.3d 138 (10th Cir. 1995) (reported in full at 1995 U.S. App. LEXIS 35920).
17. 627 F.2d 606 (2d Cir. 1980).
18. *Burt*, 156 F.2d at 791.
19. 321 U.S. 1 (1944).
20. *LeClair*, 627 F.2d at 610.
21. *Id.* at 609 (quoting *Moss v. Hornig*, 314 F.2d 89, 92 (2d Cir. 1963)).
22. *LaTrieste Restaurant & Cabaret v. Village of Port Chester*, 40 F.3d 587, 590-91 (2d Cir. 1994) (selective enforcement claim under *LeClair* sufficient for jury); *Terminate Control Corp. v. Horwitz*, 28 F.3d 1335, 1352 (2d Cir. 1994) (reversing summary judgment); *Crowley v. Courville*, 76 F.3d 47, 53 (2d Cir. 1996); *Zahra v. Town of Southold*, 48 F.3d 674 (2d Cir. 1995); *FSK Drug Corp. v. Perales*, 960 F.2d 6 (2d Cir. 1992); *Quartararo v. Catterson*, 917 F. Supp. 919, 946-47 (E.D.N.Y 1996).
23. **District of Columbia Circuit:** *Sanjuor v. EPA*, 56 F.3d 85, 92 n.9 (D.C. Cir. 1995) ("To prevail on a claim of selective enforcement in this circuit, a plaintiff must show that he was 'singled out from others similarly situated or that [the] prosecution was improperly motivated.'") (quoting *Juluke v. Hodel*, 811 F.2d 1553 (D.C. Cir. 1987)); *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988) (recognizing an

equal protection violation may be premised upon proof that government officials "are guilty of grave unfairness in the discharge of their legal responsibilities."); *Brandon v. District of Columbia*, 734 F.2d 56 (D.C. Cir. 1984) (equal protection requires that the government act in good faith).

First Circuit: *Rubinovitz v. Rogato*, 60 F.3d 906, 911 (1st Cir. 1995) (held that "a party may establish an equal protection violation with evidence of bad faith or malicious intent to injure." However, the court observed that "'the malice/bad faith standard should be scrupulously met'" therefore requiring firm evidence of malice. Other First Circuit cases have reaffirmed the *LeClair* principle). *See e.g., Yerardi's Moody Street Restaurant & Lounge, Inc. v. Board of Selectmen*, 878 F.2d 16 (1st Cir. 1989).

4th Circuit: *Jet Stream Aero Services, Inc. v. New Hanover County*, 884 F.2d 1388 (4th Cir. 1989) (reported in full at 1989 WL 100644) (adopting and relying heavily upon the *Leclair* standard); *Houck & Sons v. Transylvania County*, 852 F. Supp. 442, 452 (W.D.N.C 1993).

5th Circuit: *Zeigler v. Jackson*, 638 F.2d 776 (5th Cir. 1981) (recognizing non-suspect class equal protection).

6th Circuit: *Futernick v. Sumpter Township*, 78 F.3d 1051 (6th Cir. 1996) (rejecting *Leclair* standard); *Birth Control Ctrs. v. Reizen*, 508 F. Supp. 1366, 1388 (E.D. Mich. 1981), *aff'd in part vacated in part on other grounds*, 743 F.2d 352 (6th Cir. 1984).

7th Circuit: *Levenstein v. Salafsky*, 164 F.3d 345, 352 (7th Cir. 1998) (equal protection claim recognized for vindictive adverse employment action); *Olech v. Village of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998) (recognizing "vindictive action class of cases"); *Indiana Teachers Ass'n v. Board of Sch. Comm'rs*, 101 F.3d 1179 (7th Cir. 1996); *Esmail v. Macrane*, 53 F.3d 176, 179-80 (7th Cir. 1995); *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982).

8th Circuit: *Heille v. City of St. Paul*, 512 F. Supp. 810, 815 (D. Minn. 1981) (citing *Leclair* as valid theory, but dismissing for insufficient allegations), *aff'd*, 671 F.2d 1134 (8th Cir. 1982).

10th Circuit: *Smith v. Eastern New Mexico Med. Ctr.*, 72 F.3d 138 (10th Cir. 1995) (reported in full at 1995 U.S. App. LEXIS 35920) (recognizing equal protection claim for non-suspect class victims); *Vanderhurst v. Colorado Mt. College Dist.*, 16 F. Supp. 2d 1297, 1301 (D. Colo. 1998).

11th Circuit: *E & T Realty v. Strickland*, 830 F.2d 1107, 1112 (11th Cir. 1987).

24. 734 A.2d 535 (Conn. 1999).
25. *Id.* at 545.
26. 321 U.S. at 8-9.
27. 368 U.S. 448 (1962).
28. 187 F.3d 298 (2d Cir. 1999).
29. *Id.* at 309 (quoting *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988)).
30. *See generally Krieger v. Gold Bond Bldg. Prods.*, 863 F.2d 1091 (2d Cir. 1988); *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460 (2d Cir. 1989).
31. 110 F.3d 62 (4th Cir. 1997).
32. *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995).
33. *Id.* at 179.
34. *See, e.g., Levenstein v. Salafsky*, 164 F.3d 345, 352 (7th Cir. 1998); *Olech v. Village of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998); *Smith v. Eastern New Mexico Med. Ctr.*, 72 F.3d 138 (10th Cir. 1995) (reported in full at 1995 U.S. App. LEXIS 35920); *Forseth v. Village of Sussex*, 20 F. Supp. 2d 1267, 1275 (E.D. Wis. 1998), *aff'd in part rev'd in part on other grounds*, 2000 U.S. App. LEXIS 4 (7th Cir. Jan. 3, 2000); *Vanderhurst v. Colorado Mt. College Dist.*, 16 F. Supp. 2d 1297, 1301 (D. Colo. 1998).
35. 101 F.3d 1179 (7th Cir. 1996).
36. *Id.* at 1181-82.
37. *Dean Tarry Corp. v. Friedlander*, 650 F. Supp. 1544, 1552 (S.D.N.Y.), *aff'd*, 826 F.2d 210 (2d Cir. 1987); *Creative Environments Inc. v. Estabrook*, 680 F.2d 822, 832 n.9 (1st Cir. 1982).
38. *Brandon v. District of Columbia*, 734 F.2d 56, 56 (D.C. Cir. 1984) (quoting *Logan v. Zimmerman Brush*, 455 U.S. 422, 439 (1981)).
39. For an excellent review of the path of reverse discrimination, see Martin L. Gross, The End of Sanity: Social and Cultural Madness in America 212-57 (Avon Books 1997), where the author reviews case after case of reverse discrimination arising from government affirmative action schemes.
40. *Freeman v. City of Fayetteville*, 971 F. Supp. 971, 977 (E.D.N.C. 1997).
41. *Id*.
42. 91 F.3d 1547, 1564 (3rd Cir. 1996) (en banc).
43. 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996); *Podbersky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).
44. *Hopwood*, 78 F.3d at 947-48.

Hospital-based Arraignments Involve Conflicts in Roles of Press, Patients, Hospitals and Law Enforcement

By Patrick L. Taylor

Hospital-based criminal proceedings, most often arraignments, place several profound public policies in direct conflict: the right of citizens and the press to attend public judicial proceedings; the obligations of hospitals and clinicians to protect patient privacy and deliver care; and the right of the accused to "a speedy and public trial."[1]

The situation is not uncommon. Police shoot-outs, hostage situations, resistance to forcible arrest, domestic violence, bar-room brawls — these are only some of the violent situations that often lead to criminal charges against someone who, because of the related injuries, is a hospital inpatient at the time arraignment would normally occur.

Frequently, the hospital receives immediate press inquiries. Video cameras may also be poised to capture the comings and goings of the police, the judge, health care staff, and, to the extent the judge will allow it, the defendant's plea from the hospital bed. Reporters may wish to question family, friends and even patients in the defendant's unit. Questions abound regarding the condition of the defendant and others affected.

Current law fails to balance the conflicting, legitimate perspectives of the press, the defendant, the prosecution and the hospital. Providers are obliged to maintain confidentiality; the press must pursue stories of public interest and have a right to open hearings; judges must arraign in public hearings; and the prosecution and defense are interested in prompt arraignments.

These conflicting rights and interests — whose importance is frequently emphasized in constitutional terms — are so fundamental that they deserve specific statutory treatment that balances them wisely. After reviewing the nature of different perspectives, this article ends with a suggested legislative solution designed to recognize the fundamental rights of the press, the defendant and the criminal justice system, while also protecting the extraordinary rights to privacy and care owed to hospital patients.

The Hospital's Obligation

An injured defendant frequently requires significant medical attention for weapons-related or other traumatic injuries, admission for surgical procedures or other acute care, and observation and follow-up care in an intensive care unit. The patient may have comorbidities that are exacerbated, or relevant to an effective treatment plan, and require special care in a manner that would ordinarily be treated as highly confidential. For example, treatment for a patient expressing symptoms of active HIV infection, or an infectious disease such as tuberculosis, may require special care that an observant reporter could note, discovering medical information ordinarily treated as extraordinarily private.

Hospitals have unambiguous legal obligations to protect a patient's privacy, control access, and assure their own ability to deliver effective care. For example, N.Y. Public Health Law § 2803-c(3)(f) (PHL) guarantees patients "privacy [while in the hospital] in treatment and in caring for personal needs [and] confidentiality in the treatment of personal and medical records," while PHL § 2803-c(3)(o) addresses a patient's right to authorize who shall be allowed to visit "consistent with the patient's or resident's ability to receive visitors."

Similarly, state regulations guarantee patients the right to "privacy while in the hospital and confidentiality of all information and records regarding [their]

Patrick L. Taylor is the senior vice president and general counsel of Albany Medical Center and is chairman of the in-house counsel committee of the Health Law Section of the New York State Bar Association. He has also participated in drafting and negotiating the passage of health care and criminal justice laws in the state legislature. He is a graduate of the University of Wisconsin at Madison and received his J.D. degree from Columbia University.

care."[2] They also require hospitals to provide "privacy consistent with the provision of appropriate care" and assure "confidentiality of all information and records pertaining to the patient's treatment, except as otherwise provided by law."[3]

This is a short list, and many other citations could be added, including those applicable to specific medical conditions such as HIV infection, Medicare conditions of participation for health care providers, and special rights to privacy in mental health or substance abuse treatment.

State Health Department regulations require that hospitals implement "control of traffic in and out of the operating room suites and accessory services to eliminate through traffic."

Confidentiality obligations also apply to physicians and other health care practitioners practicing in a hospital. Under N.Y. Education Law § 6530(23), it is professional misconduct for a physician, physician's assistant or specialist's assistant to "reveal . . . personally identifiable facts, data, or information obtained in a professional capacity without the prior consent of the patient, except as authorized or required by law." State regulations applicable to the other licensed professions, including nursing, contain the same proscription.[4]

Restrictions on patient access go beyond legal requirements, they are also good medical practice. Hospital staff are trained in disaster preparedness and patient emergency procedures, which focus on providing rapid but planned responses to patient crises and avoiding foreseeable obstacles to care. Staff must also be acutely sensitive to the extraordinary vulnerability of some patients to infection, noise or stress. Hospital staff must therefore be unsympathetic to crowds of reporters in hallways, people congregating to peer at passing hospital gurneys, and lights and camera equipment occupying patient care areas.

State Health Department regulations reflect this. They require that hospitals implement "control of traffic in and out of the operating room suites and accessory services to eliminate through traffic."[5] For all critical care and special care service units, "access shall be controlled in order to regulate traffic, including visitors, in the interest of infection control."[6] Such areas also involve special, intense staff monitoring, extraordinarily vulnerable patients, and extraordinary requirements for special intervention to counter an adverse event, even save a life.

State Health Department regulations also require specific areas for some patients with specific health conditions, such as AIDS and tuberculosis.[7] It is also customary for many hospitals to locate patient care areas to reflect medical specialties (such as urology, hematology or HIV medicine), treatment needs (such as radiation therapy), or general clinical categories (such as cancer centers or units for heart-related illnesses). Unquestionably, granting press access to an arraignment in such an area would reveal medical information about the defendant. It could also reveal the names of and medical information about other patients who share the same unit.

A hospital must also consider the rights and needs of other patients. Whatever the visitor policy of a hospital may be, no hospital will easily recognize a right for a reporter, whose job is to seek interesting stories, to gather news by walking unguided through patient care areas. Hospitals and clinicians will not be sympathetic to a reporter seeking unmonitored interviews with staff, family, visitors or other patients. Although they may respect the tenacity and ingenuity of reporters, hospital staff may respond negatively to even the most sensitive reporter's attempt to gather information. Instead, hospital administrators and patient care staff are likely to sympathize with an in-patient's typical feeling of vulnerability and lack of privacy, and the feeling that control is being lost over the most intimate aspects of life. Hospitals go to great lengths to overcome that feeling, and many staff will feel a strong ethical commitment to precluding any press observation of a patient without the patient's specific consent.

Interests of Justice

Despite the hospital's concerns, the prosecution, the defendant and the court will often seek to proceed with an arraignment in the hospital, rather than wait until the patient is well enough to be arraigned in a courthouse.

For the defendant, the arraignment brings into play specific rights such as the right to counsel and is the occasion for being formally advised of the specific charges to which a plea may be entered.[8]

Law enforcement officials are obliged to arraign a defendant without unnecessary delay. Their promptness affects whether the defendant may be detained on bail or simply released on his own recognizance, and whether a plea is considered voluntary.[9] These officials also have a practical concern in learning who will take custody of the defendant. If municipal police officers have been involved in an arrest, an early arraignment

with a remand to the county sheriff pending trial determines which agency must dedicate staff and bear the costs of assuming responsibility (including perhaps a special guard in the hospital) for an inpatient defendant.

From the perspective of the court, arraignment is the point at which it may initially exercise jurisdiction with respect to the detention or release of the defendant; make any preliminary determinations about the sufficiency of the People's case; and, unless the court finally disposes of the matter at that juncture, either remand the defendant to custody, fix bail or release the defendant upon his own recognizance.[10]

Need for Open Criminal Proceedings

Current law protects the right of the press to be present at arraignments when they are held in public places, but generally fails to provide such a right when the arraignment is held in a private setting such as a hospital. (Exceptions are described below.) Section 4 of the Judiciary Law provides:

> The sittings of every court within this State shall be public, and every citizen may freely attend the same, except that in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court.

Courts interpret this section to mean that nearly all criminal proceedings are presumptively open to the public and the press. This presumption in criminal proceedings can be overcome only to meet two sorts of compelling needs: (1) the interests of the defendant in avoiding prejudicial publicity imperiling the defendant's right to a fair trial; and (2) the interests of the judicial process or law enforcement in specific witness testimony, whether allowing testimony to proceed despite a witness's delicate emotional state, or protecting the identity of confidential informants or undercover officers. In any event, the press is entitled to a hearing on the closure before it takes place in order to assert the public and press interest in openness.[11]

Those provisions address closing pretrial criminal proceedings held in a courthouse. They do not address the public right to attend in-hospital proceedings, nor do they establish an analytical framework for reconciling the conflicting interests and obligations of health care providers or the rights of patients.

Moreover, case law also states that N.Y. Judiciary Law § 4 does not guarantee public access to private buildings such as schools or police barracks. Indeed, for precisely that reason, courts have concluded that court proceedings may not be held in such settings. In *People v. Rose*[12] the court held:

> A school building, even if a public building, is not public in the sense that any person may enter therein . . . [The school] is not owned by the village, but is private, and is for that reason as well is not open to the general public. Any public building to which access is limited, restricted or prohibited may not be used for any legal proceeding.[13]

In *People v. Schoonmaker*,[14] the same principle was applied to a police barracks. And in *Bowles v. State*,[15] the court described the very nature of a courthouse as being that "by invitation" the "public may freely enter and observe the building and the proceedings conducted therein."

In some contexts, a hospital is considered "public." For example, a hospital is a "public" place for purposes of state anti-discrimination statutes. It is a place of "public accommodation" under N.Y. Civil Rights Law § 40, so that none of its "accommodations, advantages, facilities and privileges . . . shall be refused, withheld or denied to any person on account of race, creed, color or national origin." A hospital is also "public" for purposes of the Human Rights Law.[16]

However, while those laws prohibit defined discrimination by a hospital in providing services, they do not prohibit hospitals from legitimately regulating public access based upon hospitals' legal health care obligations. An argument that the Civil Rights Law and Human Rights Laws make hospitals "public" for purposes of press and citizen access is inconsistent with the other state and federal statutes and regulations discussed above that require hospitals to protect confidentiality, limit access, and take appropriate steps to deliver care. On balance, therefore, a hospital is not generally a "public" place.

This conclusion is reinforced by cases in which courts have directly addressed whether hospitals must grant unfettered public access. One court has held that care delivery portions of hospitals are not public facilities within N.Y. Civil Rights Law § 47, which prohibits public facilities from denying access to persons on the ground that they are disabled and assisted by guide dogs. In *Perino v. St. Vincent's Medical Center of Staten Island*,[17] the court rejected the claim of a blind husband that the respondent hospital had an obligation to admit him with his guide dog to the delivery room in which his wife was expected to deliver their child. The court explained

> A delivery room of a hospital, as well as the labor room and maternity ward, are not places to which the general public is normally invited or permitted, as those places are commonly perceived. . . . They are not considered public places, not only because social custom and practice do not accept them as such, but also because reasonable health measures dictates [sic] that they not be open to the public. Ordinarily, labor, delivery, and nurs-

> ery units of hospitals are closed units, and the hospital may set appropriate restrictions governing entry into these units.[18]

In another case, an unauthorized person in a nurse's locker room, a non-public area of a hospital, was found guilty of criminal trespass in the third degree under N.Y. Penal Law § 140.10 (PL), and the Appellate Division's affirmance specifically noted the non-public nature of the location.[19] Under state criminal trespass statutes, of course, the fact that some parts of a hospital are open to the public is irrelevant: "[a] privilege to enter or remain in a building which is only partly open to the public is not a license or a privilege to enter or remain in that part of the building which is not open to the public."[20]

In *Cornell Anderson v. Strong Memorial Hospital*,[21] the complaint alleged that the plaintiff, an HIV-positive patient, was photographed by a newspaper photographer while he was an outpatient in the infectious disease unit of a hospital involved in AIDS research and treatment. The complaint alleged that upon entering the room where a physician was to examine him, a project nurse had asked the plaintiff to consent to being photographed by a photographer associated with a major regional newspaper. The plaintiff alleged that, after initially objecting, he agreed upon the nurse's assurance that he would be profiled from behind and unrecognizable. The plaintiff also asserted that he understood that the photograph would be used only for internal research purposes. The photographer and a reporter had previously been present in the disease unit waiting room with the patient.

The Appellate Division reaffirmed that patient confidentiality requires limiting press access, especially in examination rooms and other patient care areas.

Two days later, the patient's photograph appeared on the front page of the Sunday edition of the defendant newspaper, as part of an article entitled "Aura of urgency cloaks UR's research on AIDS," with a caption identifying a physician as conducting "an examination of a patient," and the "chief responsibility" of that physician as "caring for AIDS patients." The plaintiff further claimed that he was identifiable from the photograph because of certain physical characteristics, and that he had first learned of the photograph from a family friend who telephoned him to ask him if it was his picture.

The plaintiff sued, alleging invasion of privacy (for commercial use of the photograph) and breach of the physician/patient duty of confidentiality. The hospital and physician defendants moved to dismiss the confidentiality-based claims. In rejecting the motion, the trial court observed:

> The argument of the medical defendants that they did not disclose information obtained from plaintiff in confidence fails to appreciate the proper scope of the physician-patient privilege. In construing the reach of the privilege, it has been held that the fact that a person has received treatment is as much confidential information protected by the privilege as is the nature of the treatment. . . . Accepting the allegations in the amended complaint as true, plaintiff did not consent to the newspaper publication of a photograph in which he would be recognizable. Nor does it appear that he consented to the presence of the newspaper photographer and reporter in the disease unit waiting room. By their permitted presence, especially for the purpose for which they were there, plaintiff's immunity from disclosure as a patient was violated.[22]

Although it generally affirmed, the Appellate Division, Fourth Department, disagreed that the presence of the reporter and photographer in the waiting room, by itself, was a breach of confidentiality obligations *in these circumstances*:

> The mere fact that members of the news media, or any members of the public, are permitted to be in the hospital clinic's waiting room and while there, can observe other persons in the room, does not amount to a breach of that privilege. Persons present in a medical waiting room need not be patients; they may be relatives or friends of a patient, persons selling medical supplies, persons interviewing for employment, etc. Plaintiff makes no claim that, while he was in the waiting room, [the physician] or the staff of the infectious disease unit identified plaintiff as a patient. That disclosure was made when plaintiff was in the examining room and was asked if he would consent to being photographed during his examination.[23]

In short, the Appellate Division reaffirmed that patient confidentiality requires limiting press access, especially in examination rooms and other patient care areas, although also subtly pointing to the ambiguity inherent in the outpatient setting: in a waiting room, as opposed to an examination room, a person may or may not be a patient, so press presence is not an inherent violation of confidentiality.

That ambiguity will not be as present in an inpatient setting. Patients are in beds, or perhaps walking halls in gowns. The general nature of a patient's medical condition may be inferred, with some probability, from the location of the inpatient bed, the signs identifying the

unit, obvious symptoms or obvious side-effects of medication such as hair loss. Every patient enters a hospital subject to its policy regarding visitors. Especially in a teaching hospital, a patient may also have expressly consented upon admission to the involvement of students, residents, fellows, and physician and staff trainees. But the press is no ordinary visitor, and a visitor policy that required patients, as a condition of admission, to consent to the sort of media exposure alleged in the *Anderson* case would be of doubtful legality in the face of the laws and regulations described above. In short, the *Anderson* case definitively rejects a press right — which some reporters have asserted — to film patients in the surgical intensive care unit, or to take photographs in special units or semi-private rooms occupied by other patients who have not consented to the presence of the media.

Several sections of the Mental Hygiene Law authorize courts to adjudicate rights related to involuntary detention.

Hospital-based arraignments involve the hospital in yielding access, perhaps even its deliberate decision not to enforce certain access restrictions. They are therefore distinguishable from cases in which the press is alleged to have intruded on patient privacy without the concurrence of the hospital. For example, in *Howell v. N.Y. Post Co.*,[24] the plaintiff, a well-known public figure through her connection to domestic violence covered by the press, was photographed without her consent while admitted as a patient in a psychiatric facility. According to the court opinion, the photographer had "trespassed" onto hospital grounds and used a telephoto lens. The plaintiff sued for violations of N.Y. Civil Rights Law §§ 50 and 51 and for intentional infliction of emotional distress after press publication of the photograph. The Court of Appeals dismissed the complaint based upon the qualified privilege attaching to newsworthy reporting. However, the health care provider was not a defendant, nor — unlike an in-hospital arraignment — was it actively involved in yielding access to the patient's privacy. Nor, of course, did *Howell* pose the potential conflict with patient care that a camera team in an intensive care unit can pose. Significantly, nothing in the text of the *Howell* opinion suggests any lessening of the confidentiality obligations of health care providers mandated in so many New York statutes and regulations.

In short, *Howell* and similar cases do not alter the conclusion that patients' rights to privacy and effective care are paramount interests, to be protected regardless of any impact on the media's ability to cover a newsworthy event. From a hospital's perspective, the laws pertinent to generalized claims of public and press access are the directives stated in state legal and regulatory mandates on hospitals and licensed professionals, and the principles reiterated in *Anderson*.

Occasionally the legislature has explicitly authorized judicial proceedings to occur in hospital settings. Against the unequivocal language of N.Y. Judiciary Law § 4 and the case law interpreting it, discussed above, the argument is compelling that, absent such specifically articulated exceptions, arraignments ought to occur only in "public settings" generally accessible to the press — which, as argued here, do not include hospitals.

For example, several sections of the Mental Hygiene Law authorize courts to adjudicate rights related to involuntary detention "in or out of court." Patently, this language contrasts with the general mandatory language of the Judiciary Law, and is justified by the self-evident logistics of adjudicating the rights of assertedly dangerous people detained as mentally ill.[25]

Section 54 of the New York City Criminal Court Act specifically authorizes in-hospital arraignments: a "judge of the court, in his capacity as a magistrate, shall have power to arraign a defendant, or conduct a hearing upon any charge, in any county of the city of New York at the place where a defendant . . . [is] confined *or hospitalized*." (emphasis added)

However, that section applies only to misdemeanors (except libel) and lesser offenses in New York City.[26] Even in those limited cases, the statute fails to clarify its effect on the public access mandate of N.Y. Judiciary Law § 4 and whether the press has the right to attend misdemeanor arraignments in hospitals. It also fails to clarify what influence, if any, the hospital and medical staff have on whether or how such an arraignment occurs. In any event, the fact that the legislature expressly provided for in-hospital arraignments in such limited circumstances underscores that N.Y. Judiciary Law § 4 — and its mandate that arraignments occur in public places that the press can attend — governs arraignments unless the legislature has expressly provided otherwise in special and narrow circumstances.

In short, health care provider mandates, the Judiciary Law and case law are all consistent in (1) requiring hospitals to guard confidentiality and care delivery; (2) mandating that arraignments proceed promptly, which in practice may mean in a private hospital; and (3) requiring arraignments to be held in public places. Startlingly, given the gravity of these mandates, the law fails to clarify what happens when these mandates come

into conflict, as they do in the case of an in-hospital arraignment.

Law Outside New York

Outside New York, the Supreme Judicial Court of Massachusetts has specifically addressed access to hospital-based arraignments. Notably, even while reinforcing a public interest in in-hospital arraignments, the court's decision protects the prerogatives of a hospital to object to press presence in order to protect the interests of patients.[27]

In the case at issue, a defendant hospitalized with a bullet injury was arraigned in his hospital room on charges that he had killed a state trooper. The judge informed reporters that he would allow press attendance in a pool arrangement consisting of one reporter, one motion camera operator, and one still camera operator. Upon arrival at the hospital, a hospital physician objected that the media representatives and equipment would interfere with the care of other patients. The judge then arraigned the defendant without any press attendance.

The reporters challenged the decision, and the lower court judge dismissed the case as moot. In affirming the dismissal on mootness grounds, the Supreme Judicial Court nonetheless set out standards to guide future incidents.

New York would benefit from a specific statute addressing in-hospital arraignments and other in-hospital judicial proceedings.

The court found that under Massachusetts law, the public's right of access applies to non-traditional settings such as hospitals. (Given New York case law, one may question that a New York court would agree.) Like New York courts, the Massachusetts court also found that the courts should not close hearings without appropriate hearings to weigh the interests involved, and every effort to reach a reasonable alternative to complete closure. But unlike reported New York decisions to date, the court specifically recognized that such hearings should take into account not simply the law enforcement interests at stake but also the rights of patients and the obligations of the health care providers. In the context of these facts, the court observed:

> [T]he judge, after hearing, might well have determined that the pool reporter alone could have accompanied him into the intensive care unit. Alternatively, the judge, after hearing, could have concluded that the danger to other patients in the intensive care unit was so substantial that closure of the limited proceedings in the intensive care unit was the only solution which would not jeopardize the interests of other patients.[28]

A Proposed Legislative Solution in New York

Existing law fails to protect the rights of the press sufficiently. At the same time, it places hospitals on shaky ground in acquiescing to press requests or prescribing the measures appropriate to protect patient privacy and care. In addition, current law does not explicitly accommodate the legitimate desires of the courts, the defendant and the prosecution for prompt arraignments.

Yet each of these interests is frequently described, in constitutional terms, as extraordinarily important. It is therefore remarkable that New York has no legislative solution to accommodating them when they conflict.

Because those interests are so fundamental, New York would benefit from a specific statute addressing in-hospital arraignments and other in-hospital judicial proceedings.

The ideal statute would first clarify the extent of courts' authority to hold them.

Second, it would acknowledge the public interest in such proceedings, and create a formal procedure in which the press and others affected could assert their interests.

Third, however, it would give heavy weight to the views of the hospital administration, physicians, nurses and other professional staff on the medical and operational effect of holding an in-hospital arraignment and particular forms of press access.

Fourth, it would proscribe holding such arraignments in areas — many already identified in state regulations — posing special concerns about access, such as intensive care areas.

Fifth, it would proscribe holding such arraignments in circumstances such as AIDS units in which the medical condition of the defendant or other patients is necessarily revealed.

Sixth, it would expressly state the obligations of the press to respect patient privacy and to act subject to the operational requirements of the health care provider, including formal hospital and departmental policies on access control.

Seventh, it would clearly authorize the courts to appropriately tailor solutions respectful of the competing interests at stake, including, if necessary, through restricting access to patient care areas and imposing pool and media arrangements as a condition of access, as the Massachusetts Supreme Judicial Court suggested.

Finally, an ideal statute would also permit a patient to block public access to the arraignment if necessary to protect the defendant's own medical privacy even where, given the law enforcement and pretrial prejudice considerations discussed above, the proceeding would otherwise remain open. To obtain an expeditious arraignment, a defendant should not have to waive the privacy privileges separately rooted in the health policy commitments of this state.

---

1. *See* N.Y. Civil Rights Law § 12; N.Y. Judiciary Law § 4.
2. N.Y. Comp. Codes R. & Regs. tit. 10, § 405.7(c)(13) (N.Y.C.R.R).
3. 10 N.Y.C.R.R. § 405.7(b)(12), (13).
4. 8 N.Y.C.R.R. § 29.1(b)(8).
5. 10 N.Y.C.R.R. § 405.12(a)(6)(iv).
6. 10 N.Y.C.R.R. § 405.22(a)(3)(i).
7. *See*, *e.g.*, 10 N.Y.C.R.R. § 405.22(g)(7) (discrete patient care units of AIDS centers); 10 N.Y.C.R.R. § 405.22(j), (k) (units for tuberculosis patients).
8. *See* N.Y. Criminal Procedure Law §§ 170.10, 170.60, 210.15, 210.50, 340.20 (CPL).
9. *See* CPL §§ 120.90, 140.20, 180.80; *Watson v. City of New York*, 92 F.3d 31 (2d Cir. 1996); *People v. Peak*, 214 A.D.2d 1012, 626 N.Y.S.2d 605 (4th Dep't 1995).
10. *See* CPL §§ 170.10, 180.10, 180.60, 210.10, 530.20.
11. *See* CPL § 180.60; *People v. Ramos*, 90 N.Y.2d 490, 662 N.Y.S.2d 739 (1997); *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 423 N.Y.S.2d 630 (1979); *People v. Jones*, 47 N.Y.2d 409, 418 N.Y.S.2d 359 (1979); *Gannett Co. v. DePasquale*, 43 N.Y.2d 370, 401 N.Y.S.2d 756 (1977); *People v. Tucker*, 228 A.D.2d 354, 644 N.Y.S.2d 714 (1st Dep't 1996); *New York Times v. Demakos*, 137 A.D.2d 247, 529 N.Y.S.2d 97 (2d Dep't 1988).
12. 82 Misc. 2d 429, 368 N.Y.S.2d 387 (Rockland Co. Ct. 1975).
13. *Id*. at 431 (citations omitted).
14. 65 Misc.2d 393, 317 N.Y.S.2d 696 (Greene Co. Ct. 1971).
15. 186 Misc. 295, 59 N.Y.S.2d 839 (Ct. Claims 1946).
16. N.Y. Executive Law § 292(9).
17. 132 Misc. 2d 20, 502 N.Y.S.2d 921 (Sup. Ct., Richmond Co. 1986); *see Albert v. Solimon*, A.D.2d 139, 684 N.Y.S.2d 375 (4th Dep't 1988) (citing *Perino v. St. Vincent's Medical Center of Staten Island* with approval).
18. 132 Misc. 2d at 21.
19. *People v. Seymour*, 160 A.D.2d 499, 500, 554 N.Y.S.2d 164 (1st Dep't 1990).
20. PL § 140.00(5).
21. 140 Misc. 2d 770, 531 N.Y.S.2d 735 (Sup. Ct., Monroe Co. 1988), *aff'd*, 151 A.D.2d 1033, 542 N.Y.S.2d 96 (4th Dep't 1989).
22. *Id*. at 775-76.
23. *Anderson v. Strong Memorial Hospital*, 151 A.D.2d 1033, 542 N.Y.S.2d 96 (4th Dep't 1989) (citation omitted).
24. 81 N.Y.2d 115, 596 N.Y.S.2d 350 (1993).
25. *See*, *e.g.*, N.Y. Mental Hygeine Law § 9.31(c) (hearings relating to involuntary admission on medical certification); § 9.39 (hearings to review emergency involuntary admissions for immediate care and treatment); § 9.33 (continued involuntary retention).
26. *See* NYC Crim. Ct. Act § 31.
27. *See Boston Herald, Inc. v. Superior Court Department of the Trial Court*, 658 N.E.2d 152 (1995).
28. *Id*. at 156.

Research Strategies

A Practical Guide to Cite-Checking: Assessing What Must Be Done

By Steven C. Bennett

Most junior lawyers, whether involved in litigation or business practice, sooner or later encounter an assignment to conduct a "cite check" of a document. Although law school legal writing courses generally provide a good introduction to cite-checking, the practical problems encountered in a law firm setting require more refined consideration. This article provides a short list of practical questions and answers to guide junior lawyers who take up their first cite-checking tasks.

What Is the Objective?

In general, legal memoranda, whether filed in court or merely "office" memoranda circulated among lawyers and their clients, are designed to inform (and often persuade) their audience. The point of including citations to legal authorities is to demonstrate that the propositions of law are well-considered and supported, and to permit the reader to review those authorities easily, so that the reader can make an informed decision.

In that vein, the accuracy of legal citations may be critical. A missed citation to negative history (reversal of a decision, for example) can be devastating. A court or a client could not help but lose confidence in a lawyer or law firm responsible for such a mistake. On a less dramatic note, however, scrupulous accuracy of legal citations subtly enhances the message of any legal memorandum, which should be, "You can rely on this document to give complete and accurate information."

For the junior lawyer, moreover, there is yet another agenda. Cite-checking is one of the "building blocks" of legal experience. In their early years, junior lawyers learn to research, to cite-check and to write parts of legal memoranda. As they gain experience in these areas and demonstrate their growing competence, senior lawyers may begin to entrust them with more complicated and more substantial tasks. A junior lawyer who "sweats the details" on mundane, relatively minor tasks such as cite-checking shows tenacity, teamwork and professionalism that is often a ticket to greater things.

How Much Work Should Be Done?

Like many things in law, there is no "one size fits all" version of cite-checking. The assigning lawyer may merely wish to check cited authorities to make sure that there is no adverse subsequent history. But there could be more: checking all the quotes to make sure that they are accurate, checking the particular pages cited, conforming citations to Bluebook form. The assigning lawyer might also want the junior lawyer to read the memorandum for content, and to fix grammar, usage, spelling and punctuation errors. The amount of work expected often depends on how much time there is to complete the memorandum, and how much the supervising lawyer has already polished the document. Without asking, the junior lawyer cannot know precisely what the senior lawyer has in mind.

More to the point, it will be too late if, after completing the task, the junior lawyer learns that he/she has seriously misunderstood how much work the senior lawyer expected would be devoted to the task. If the senior lawyer expected a top-to-bottom review, and the junior lawyer has merely checked the basics, failure to do more may give the appearance of laziness, or irresponsibility. Indeed, if the senior lawyer expects a complete review, and does not learn until the last minute that this work has not been done, the project itself may be in jeopardy. Conversely, if the senior lawyer merely expects a "once over" of the document, and the junior lawyer spends hours on the project, the time spent might have to be written off, at great annoyance.

Steven C. Bennett is a partner in the New York City office of Jones, Day, Reavis & Pogue and a co-director of its New Associate Group. He is a graduate of Macalester College and received his J.D. from New York University School of Law. The views expressed here are solely those of the author.

Most effective senior lawyers know how to give specific directions on this kind of task. If such directions are not given, however, the junior lawyer must ask before beginning the work. A junior lawyer might give the senior lawyer a checklist of the work planned. The junior lawyer might also begin the task and report in periodically on progress, so that the senior lawyer can tell whether more work should be added to the project. If the junior lawyer is at all uncertain about whether he/she is doing too much or too little, the junior lawyer must take the time to get these directions straight.

Scrupulous accuracy of legal citations subtly enhances the message of any legal memorandum, which should be, "You can rely on this document to give complete and accurate information."

Even if the senior lawyer does not ask for it, however, the junior lawyer should generally not hesitate to identify any glaring errors that may be discovered. Despite word-processing help from features such as spell-checkers, long and complicated legal documents can become infected with errors that over-worked attorneys can simply miss. "Going the extra mile" to spot such errors will almost always be well-received.

How Should the Work Be Recorded?

There are two major considerations here. The first has to do with the junior lawyer's own records of progress in the work. The junior lawyer should have a system that makes it possible to capture the information accurately as it is gathered, even if that information does not always make its way into a revised version of the document. Many attorneys make a copy of the document that is to be checked, and make notations on the copy (check marks, or other notes); others use a separate legal pad. Whatever the system, the junior attorney needs to keep track of the citations that have been checked.

The junior attorney should generally note: (1) Has the case been Shepardized? (2) Has Bluebook form been checked? (3) Have quotes on page references been verified? (4) Has subsequent history been checked? Each of these steps may be done separately, so that the document is checked several times for different potential problems. Absent some form of checklist, it is possible to miss one of these steps with a citation, and thus fail to catch an error.

The other issue that must be considered is how to communicate the proposed changes to the supervising attorney. Generally, absent specific direction from a supervising attorney, it is best not to make changes directly in the word processing version of the document. It is much better to bring proposed changes to the attention of the supervising lawyer before the changes are made. The great likelihood is that the supervising attorney will not want to make all of the suggested changes. If the supervising lawyer has to "back out" changes made in the word processing version of the document, inefficiency and annoyance may result. Thus, at a minimum, changes in the word processing version of the document should never be made without the express approval of the supervising lawyer.

A marked draft of the document, showing proposed changes to citations, may be the best way to communicate corrections. If the supervising attorney approves of the proposed changes, the marked draft can be given to a word processing operator to fix the document. If the supervising attorney has additional changes, or wishes to "stet" some portions of the proposed changes, it is also easy to mark the draft for word processing.

What Parts of Later History Are Important?

In general, there are two kinds of citations: those that are helpful to a client's position, and those that are harmful. Although, as a matter of ethics, all relevant subsequent history generally must be disclosed, the question of what is relevant may depend on whether a citation is helpful or harmful.

If a citation is helpful, it may be quite important to show that it remains good law, or that it has been extended. Thus, for example, suppose that there is a federal district court opinion granting a motion to dismiss on a legal ground that is helpful in the case at hand. It might be useful to note that reconsideration of that opinion was denied by the district court, that the decision was affirmed by the appellate court (and *en banc* review denied), and that *certiorari* was denied by the Supreme Court. It might also be worthwhile to note whether other courts have cited the opinion on the pertinent point. If, on the other hand, the citation is unhelpful, there may be no particular need to enhance the value of the citation by showing that reconsideration was denied, that (after the decision was affirmed) *en banc* review was denied, or that the opinion has been cited with approval in other jurisdictions. It might, however, be helpful to show that other courts have questioned the reasoning in the opinion or refused to extend it to facts beyond those in the original opinion.

Again, there are ethics rules on disclosure of relevant history. The point here, however, is that even matters

such as citation form can be affected by a desire to persuade. Thus, within the bounds of ethics, the extent of disclosure of subsequent history may depend on whether a citation helps or hurts a client's position.

When in doubt, of course, it is preferable to err on the side of suggesting too much subsequent history. The supervising attorney can always choose to trim back subsequent history citations that are not considered relevant. If the supervising attorney is not given a complete recitation of subsequent history, however, some relevant history may be missed. For that reason, many junior attorneys print out complete subsequent history pages from electronic services, which they offer to the supervising attorney, or at least point to in asking the supervising attorney about any subsequent history issues for which the answer (on how much history to include) was not immediately apparent.

Where subsequent history is not self-explanatory, it may be extremely helpful to the supervising lawyer to have a copy of the opinion embodying the subsequent history. For example, if a trial court decision has been modified on appeal, it will not be possible for the supervising attorney to decide whether the trial court decision is still good law without reading the decision from the appellate court. Similarly, one must read the appellate court decision before indicating in the subsequent history citation that an opinion has been "modified on other grounds." For that reason, if there is any doubt about the significance of subsequent history, it often is preferable to provide the supervising lawyer with copies of the opinions that constitute subsequent history.

Electronic research can often suggest avenues of argument that might not have been apparent when a document was first drafted.

Is Bluebook the Only Reference for Form?

Law school experience often conditions junior lawyers to rely upon the Bluebook as the only reference source for information on proper citation form. Several additional factors may affect citation form. First, local rules of court or rules for the individual judge may require special citation forms. The junior lawyer should try to become familiar with such peculiar rules. When litigation is being conducted in an unfamiliar jurisdiction, the junior lawyer should make sure to obtain copies of such rules, rather than assume that the supervising lawyer will obtain them.

Second, there may be abbreviations, proper names or other citation forms that have been consistently used in other papers affecting the client or this project. The junior lawyer should try to become familiar with such forms, either by obtaining precedent papers, or by asking the supervising lawyer whether there are any conventions that have been used in connection with this project.

Finally, at a minimum, the junior lawyer should be prepared for the possibility that a supervising lawyer may have personal preferences about citation forms that are not entirely consistent with the Bluebook. Thus, while the Bluebook is the starting point for citation form checking, the junior lawyer should not insist that a document strictly comply with the Bluebook, if the supervising lawyer prefers otherwise. The junior lawyer's role is to suggest proposed changes; the supervising lawyer's role is to exercise judgment in implementing the best of the proposed changes.

Are Electronic Databases Acceptable for Cite-Checking?

Although many senior lawyers were raised in an era when computers were not ubiquitous and citations had to be checked exclusively by paper records, today's junior lawyers are increasingly skilled in using electronic research formats. Indeed, some law firms have done away entirely with paper volumes (like Shepard's), and essentially require electronic research to perform cite-checking functions. In general, electronic research is a perfectly acceptable method of cite-checking, with a few caveats.

First, electronic databases are only as good as the information they contain. If an electronic database is not frequently updated to reflect up-to-the-minute information (such as the filing of a petition for *certiorari*, or the issuance of an unpublished opinion) it is possible that the cite-check will miss important information.

Second, the editorial assistance provided by an electronic research service is not necessarily geared to the needs of one's own specific case. For example, the West KeyCite system uses red and yellow status flags to warn of negative case histories. These flags can help alert the junior lawyer to the need to check this history. The junior lawyer should not, however, abandon judgment in response to such editorial notes. The subsequent history should be reviewed, in the complete text form, before a decision is made on whether to keep the citation in the document, and on how to refer to any negative subsequent history.

Electronic research, moreover, can often suggest avenues of argument that might not have been apparent

when a document was first drafted. For example, the West KeyCite system has the ability to check an opinion for negative treatment of the authorities cited in it (which might suggest that the opinion was not well-reasoned). With the immense power of computing, legal research can be extended to a virtually indefinite point. Thus, before using electronic research to perform cite-checking, it is very important to confirm a specific plan for that research. Is the research solely to check obvious subsequent history, or is it intended as a "no-stone-unturned" project? Before the expense and time is incurred, the junior lawyer should make certain of the directions for the electronic research project.

Finally, keep in mind that certain citations (such as statutes, regulations and agency decisions) may not be easily checked with automated citation services. For these, it is very important to make certain what information the electronic service will retrieve, and what it may omit. Often, for items such as legislative history, it will be necessary to repair to the paper records. Electronic research may help guide, but will not necessarily substitute for, that work.

What Are the Final Steps in Cite-Checking?

High-quality legal documents often go through several drafts. For the junior lawyer, the job of cite-checking may require checking the same document more than once. As changes are made (citations added or deleted, subsequent history noted, and new points made), the document must be reviewed again. Keeping a record of the citation information that has been previously gathered will aid immeasurably in this process. The junior lawyer can boost efficiency by quickly checking citations that have been previously verified, then concentrating on any new citations, or changes in citations, that have been made in subsequent drafts of the document.

Typically, each new draft of the document will be marked "draft," with the specific date and time of the draft noted, so that it is possible for all who review the document to make sure that they are examining the most recent version of the document. The junior lawyer should make sure that the draft of the document being reviewed is the most recent version, so that the cite-checking is performed most effectively, and changes can be most effectively communicated to the supervising lawyer and word processing operator.

The final portion of the work often will be creation of tables of contents and authorities. There are word processing programs that automatically create these tables, but the programs are only as good as the information in the original document. Thus, it is generally best to put the document (including citations) into final form, and then extract the headings and citations for the purpose of creating tables.

The citations in the tables should not require checking for subsequent history (which should be completed by the time the text of the document is finalized). A final check on citations in the tables for mundane matters such as citation form, spelling of case names and punctuation may, however, be a useful way to catch errors that may not be as easily apparent in the text. Any changes made in the citations in the tables, of course, must also be made in the text.

Conclusion

Cite-checking may not be the most glamorous part of being a lawyer. Yet, it is an essential skill, which leads to more sophisticated work. Lawyers who master this essential skill can differentiate themselves from other lawyers who may feel that the work is boring or "beneath" them. By mastering the details of the profession, a lawyer can help serve the client, and demonstrate qualifications for bigger things to come.

TAX TECHNIQUES

Community Foundations: Doing More for the Community

BY EUGENE E. PECKHAM*

Community foundations are the fastest growing sector of U.S. philanthropy, a 29% growth rate nationwide.[1] A community foundation is "a capital or endowment fund to support charitable activities . . . in the community or area it serves."[2]

The first community foundation was the Cleveland Foundation set up in 1914 by the Cleveland Trust Company to unite several small charitable trusts at the bank so that a distribution committee could select worthy grant recipients. Many older community foundations follow the multiple trust model, frequently with multiple bank trustees. For example, the New York Community Trust in the metropolitan area has about 17 banks acting as trustees. Newer community foundations are usually set up as not-for-profit charitable corporations managing their assets as part of a commingled pool of investments with each separate fund tracked by accounting entries according to charitable fund accounting principles.

When properly established, a community foundation benefits its community by soliciting and holding many different types of endowed gifts for many different community purposes. It generally does not conduct an annual appeal for operating funds in the manner of a United Way or United Cultural Fund campaign. It benefits the donor because it is a public charity subject to the more generous charitable deduction limits that apply to public charities (50% of adjusted gross income for cash and ordinary income property and 30% for stock and other property that would produce long-term capital gain, if sold).[3] In addition, the donor can select the method of charitable community giving that best fits her/his purpose.

The unique requirement for a community foundation is that it must be a "single entity"[4] controlling a number of different component funds.[5] To qualify as a single entity, the organization must meet six requirements set out in Treasury Regulation § 1.170A-9(e)(11): (1) the organization must commonly be known as a community foundation, trust or fund; (2) it must have a common governing instrument; (3) it must have a common governing body that directs the distribution of the funds for exclusively charitable purposes, or in the case of a designated fund, monitors the distribution;[6] (4) the governing board must commit itself by resolution or otherwise to obtain a reasonable return on investments and to take steps to insure that each participating trustee or custodian also does so in accordance with accepted standards of fiduciary conduct;[7] (5) the community foundation must prepare periodic financial reports treating all funds of the organization as component funds;[8] and (6) the governing board must have a "variance power."

The variance power has two parts. First, the board must have the power

> to modify any restriction or condition on the distribution of funds for any specified charitable purpose or to any specified organization if, in the sole judgment of the governing body, such restriction or condition becomes, in effect, unnecessary, incapable of fulfillment, or inconsistent with the charitable needs of the community or area served.[9]

In actuality, this is a *cy pres* power vested in the board of the community foundation to be exercised without having to obtain court approval. It gives the board control over all the various types of charitable funds within the community foundation.

The second part of the variance power requires that the board of the community foundation have the power to replace a trustee, custodian or agent if (1) it has breached a fiduciary duty under state law or (2) has failed to produce a reasonable rate of return over a reasonable period of time.[10] The governing body determines both what is a reasonable return and a reasonable period of time.[11] This gives the board control over the community foundation's investments and, in the multiple trust model, the trustees.

Most community foundations have several different types of funds for the receipt of tax deductible donor contributions. The donor's gift is deductible when made, subject to the 50% and 30% limits mentioned before. The general fund or unrestricted fund is available to receive donations to be used at the discretion of the board of directors of the community foundation for community projects.

A designated fund can be set up to benefit a particular designated charity. It can be established by a donor or by the charity itself. When the charity sets it up, it is an "agency endowment fund" that the community foundation holds for the agency. This can be particularly beneficial for an agency with a small endowment. Its funds can be pooled with the community foundation's other funds for investment purposes to get greater diversification and potentially a better return. When a donor sets up a designated fund, the use of the fund is restricted to the agency or agencies or purposes designated by the donor.

A field of interest fund can be established by one or more donors to bene-

fit charities with similar interests, *e.g.*, arts organizations, environmental organizations, caring for needy children, housing for the poor and homeless, etc. The board of the community foundation selects the recipients from the charitable organizations in the community with programs within the field of interest.

A donor-advised fund is one where the donor or a committee designated by the donor recommends to the board of the community foundation eligible charities to receive grants from the fund established by the donor. The recommendations are advisory and the community foundation board must be free to accept or reject them.[12] In effect, the donor has a small quasi-private foundation to use for grant making subject to the approval of the community foundation board. Although a donor-advised fund can be established with cash or any other type of property, a gift of securities is particularly appropriate. The donor makes one gift of stock instead of having to arrange to transfer the stock to many recipients. The donor gets a full charitable deduction for the gift at the time it is made. The community foundation will ordinarily sell the stock and invest the proceeds in accordance with the foundation's investment policies. After the recommendations of the donor are approved, the staff of the community foundation distributes checks to the selected charities in the name of the donor. Because the donor has already received the full charitable deduction, there is no further deduction when the recommended distributions are made.

Lately, competition for community foundation donor-advised funds has arisen in the form of charitable gift funds operated by brokers and mutual funds such as Fidelity and Vanguard. These funds accept the charitable gifts, invest them in the sponsoring mutual fund's family of funds and distribute gifts to charities in accordance with donor recommendations. As with the community foundation, the donor gets a full deduction when the initial gift is made. What is lost is the benefit to the donor's local community and the expertise on the needs of the local area that can be provided by the staff and board of the local area community foundation.

A final type of fund is the scholarship fund. Typically, a donor may want to provide a scholarship for graduates of a high school in the area, or for a student to go into a particular area of study, such as nursing or medicine. Another possibility is a scholarship set up to honor an individual, a teacher or coach, for example. The donor and the community foundation agree on a procedure to select the scholarship winner and the community foundation staff follow through on the details.

Besides the flexibility provided by its various types of funds, another advantage of a community foundation is its unique ability to permit effective termination of an existing private foundation and yet allow the existing private foundation board to continue to oversee donations from the funds of the private foundation. The whole community benefits from such a termination because the 2% private foundation tax and other administrative and filing costs are ended, thus leaving more charitable dollars available for the local community. There are three ways to accomplish this result.

First, the private foundation can transfer all its assets to a donor-advised fund within the community foundation, but remain in legal existence for the purpose of acting as the donor advisor. The board of the private foundation would adopt resolutions recommending distributions from its donor-advised fund. Because it has no assets, the private foundation does not have to file tax returns or pay the 2% excise tax, nor must it meet the 5% payout requirement.[13]

Second, the private foundation can convert into a "supporting organization" of the community foundation. A supporting organization is one that is supervised or controlled by a public charity such as a community foundation.[14] A supporting organization is somewhat analogous to a subsidiary corporation. The simplest way for the private foundation to convert to a supporting organization is for it to amend its trust agreement or certificate of incorporation to provide that (1) its purpose is to support the community foundation and (2) that at least a majority of the private foundation board will be appointed by the community foundation.[15] This does not necessarily mean removal of all of the existing private foundation board members, because the community foundation board can reappoint the existing board members that wish to remain in office. Again, the private foundation continues in existence, but with an amended charter. As a supporting organization, the former private foundation is now treated as a public charity by virtue of being controlled by the community foundation. As such it is no longer subject to the private foundation 2% tax, 5% payout and other rules. An Internal Revenue Service advance ruling of supporting organization status should be obtained.[16]

Third, the private foundation can simply terminate its existence by transferring all its assets to the community foundation. If both organizations are corporations, they can carry out a merger under state law. Provided the community foundation has been in existence for 60 months, there is no need to notify the IRS in advance. The transfer is simply carried out and a final return is filed with the IRS.[17] If the community foundation has not been in existence for 60 months the IRS must be notified in advance and an IRS ruling obtained.[18]

A community foundation provides many benefits to its local area and its donors. The community foundation is an endowment fund available to be used for community projects now and in the future, some of which will not now be able to be foreseen. It provides donors with a variety of ways to give and impact the community and its needs. A feeling of well-being arises

from helping your neighbors in need. By providing a way for private foundations to continue in existence, but eliminate tax and other costs, more charitable dollars can be preserved for the locality. All in all, it is easy to see why community foundations are the fastest growing areas of charitable giving.

1. Peter Keating & Beverly Goodman, *The New Business of Giving*, Money, Vol. 27, No. 13, Dec. 1998, at 98.
2. Treasury Regulation § 1.170A-9(e) ("Treas. Reg.").
3. Internal Revenue Code § 170(b)(1) (I.R.C.).
4. Treas. Reg. § 1.170A-9(e)(11).
5. Treas. Reg. § 1.170A-9(e)(11)(ii).
6. Treas. Reg. § 1.170A-9(e)(11)(v).
7. Treas. Reg. § 1.170A-9(e)(11)(v)(F).
8. Treas. Reg. § 1.170A-9(e)(11)(vi).
9. Christopher R. Hoyt, Legal Compendium for Community Foundations 16 (Council on Foundations 1996). This is the best book on the legal and tax affairs of community foundations in print. Available from the Council on Foundations, Washington, D.C.
10. Treas. Reg. § 1.170A-9(e)(11)(v)(B).
11. *See id*.
12. Treas. Reg. § 1.507-2(a)(8)(iv)(A)(3)(iv).
13. Christopher R. Hoyt, Legal Compendium for Community Foundations 155 (Council on Foundations 1996); Treas. Reg. § 1.507-1(b)(9); Private Letter Ruling 88-36-033 (June 14, 1988).
14. I.R.C. § 509(a)(3); Treas. Reg. § 1.509(a)-4(a)(5).
15. *See* Treas. Reg. § 1.509(a)-4(g).
16. Treas. Reg. § 1.507-2(e)(1); I.R.C. § 507(b)(1)(B).
17. I.R.C. § 507(b)(1)(A); Treas. Reg. § 1.507-2(a).
18. I.R.C. § 507(b)(1)(B).

* Eugene E. Peckham, a partner in the Binghamton firm of Hinman, Howard & Kattell, LLP, is a member of the *Journal's* Board of Editors. He is a past chair of the Trusts and Estates Law Section of the NYSBA and a fellow of the American College of Trust and Estate Counsel.

POINT OF VIEW

To the Supreme Court: Keep the Courthouse Doors Open

BY PHILIP WEINBERG

With increasing speed, the U.S. Supreme Court has been closing the courthouse door to plaintiffs seeking review of government decisions — a trend that should disturb every lawyer. For decades the federal courts have been available to Americans claiming that government agencies acted unlawfully or in violation of the Constitution. The past few years, and particularly 1999, have seen a narrow majority of the Court repeatedly restricting litigants' access to the courts to redress governmental wrongs.

A pair of decisions this January again addressed this issue. One further limited access and the other kept the door open.

The assault began with a series of successful challenges based on plaintiffs' standing to sue. Civil liberties groups and environmental plaintiffs, under long-standing rules, must assert that a law or other governmental action has injured or is likely to injure them, but the injury need not be monetary.[1] A plausible claim of a denial of civil liberties, or of interference with the use of land for hiking, fishing or similar recreation, suffices. But the Supreme Court has more and more often held that plaintiffs making these very claims lacked standing to bring their suits. As early as 1984, the Court rebuffed a group of black parents who claimed that the failure of the Internal Revenue Service to deny tax-exempt status to all-white Southern private schools was effectively hampering desegregation and requiring their children to attend largely all-black schools.[2] Although the plaintiffs cited numerous schools in Memphis where this was occurring, the Court ruled that they lacked standing because their injury was not sufficiently "traceable to the government conduct" they challenged.

A few years later, the Court dismissed the National Wildlife Federation's suit to prevent the Interior Department from unlawfully opening up government recreational land to mining and oil and gas leases, holding that the plaintiff sought "wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress" — despite the group's claim that the Department and Congress had failed to halt the practice of allowing mining and oil exploration on recreational land.[3]

Even where Congress has explicitly provided standing for "any person" to sue to bar unlawful government action, as it has done under the Clean Air Act, the Clean Water Act and other environmental regulatory statutes, the Supreme Court ruled that a conservation group and its members could not sue under the citizen-suit provision of the Endangered Species Act to challenge the spending of United States Agency for International Development funds on a dam in Egypt likely to destroy the habitat of the Nile crocodile, an endangered species protected by that statute.[4] Refusing to decide whether the law applies outside U.S. borders, the Court once more concluded that zoologists who had visited the habitat and planned to return were without standing to even raise the question. Worse yet, the Court ruled there was no "case or controversy" for the federal courts to decide under Article III of the Constitution, so that even a congressional strengthening of the standing statute may not suffice to overcome this Constitutional objection.

In 1998, the Court held that an environmental group could not sue over a steel company's repeated failure to report its releases of toxic chemicals as mandated by the Community Right to Know Act.[5] Although the defendant had violated the law for eight years, it belatedly filed the required reports. The Court ruled that the neighboring residents' group lacked standing to compel the violator to pay civil penalties because payment to the government would not "remediate" the plaintiffs' injury. The absence of "redressability" — the Court's current mantra in this area — was fatal to this suit against an admitted persistent violator. Following that decision, the Fourth Circuit dismissed as moot a Clean Water Act suit where the defendant had ceased its pollution while suit was pending.[6] The Supreme Court has fortunately reversed by a 7-2 vote in January 2000 and performed some needed damage control.

Most recently, a narrow majority of the Supreme Court has held that state employees deprived of pay for overtime in violation of federal law may not recover from the state because "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today."[7] This ignores the fact that federal law is paramount over the states under the Constitution's Supremacy Clause, and (as Justice David H. Souter noted in his dissent) the states therefore cannot be totally "sovereign" with respect to the national objective of the federal wage-and-hour law. This decision leaves state employees unable to sue for lost wages in either the federal or the state courts, unless the state consents to be sued. The

only remedy for these employees is the unwieldy and cumbersome one of asking the United States Department of Labor to bring suit on their behalf. Thus, ironically, a Supreme Court jealous of states' rights is encouraging a federal agency to sue those very states, in place of the individuals who actually suffered the loss. The Court has now reached the same result with regard to the Age Discrimination in Employment Act, holding that state employees may not sue states for damages under that federal statute.[8]

The courthouse doors, historically open to citizens with a grievance against their government, are being closed more resoundingly with each decision. Two decades ago, Chief Justice Warren Burger, quoting the words ascribed to Sir Thomas More in Robert Bolt's *A Man for All Seasons*, noted, "'This country's planted thick with laws from coast to coast, . . . and if you cut them down . . . d'you really think you could stand upright in the winds that would blow them?'"[9] If Americans are deprived of access to their courts, we may test the truth of that warning.

1. *See Sierra Club v. Morton*, 405 U.S. 727 (1972); *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), *cert. denied sub nom. Consolidated Edison Co. v. Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966).
2. *Allen v. Wright*, 468 U.S. 737 (1984).
3. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990).
4. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).
5. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).
6. *Friends of the Earth v. Laidlaw Envtl. Servs.*, 149 F.3d 303 (4th Cir. 1998), *reversed*, __ S. Ct.__ (Jan. 12, 2000).
7. *Alden v. Maine*, 119 S. Ct. 2240 (1999).
8. *Kimel v. Florida Bd. of Regents*, __ S. Ct. __ (Jan. 11, 2000).
9. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978).

Philip Weinberg teaches constitutional law and environmental law at St. John's University School of Law.

Language Tips

By Gertrude Block*

Question: A *New York Times* column written by William Safire contained the following passage regarding Pat Buchanan's comments about World War II and Hitler: "Already his views . . . have drawn understandable outrage, not only from veterans but also historians." Doesn't parallel structure require *not only from . . . but also from*? Is this a question about grammar or style?

Answer: Given Mr. Safire's usual close attention to form, the error in the quoted sentence must be a typo that occurred after the column left his desk. Yes, standard usage would require that *not only from* be followed by *but also from*.

In a second quotation, "Upon the completion of the action, all documents shall be returned to counsel [of the disclosing party] or destroyed," the question is stylistic. Grammatically, the statement is correct if the introductory clause is intended to include the word *be*. Then the parallel clauses would be *returned to counsel . . .* and *destroyed*.

For clarity, however, I would change the statement to read: "Upon completion of the action, all documents shall be either returned . . . or destroyed." In that *either/or* construction, the introductory clause ends with the word *be*, and the parallel verbs are *returned* and *destroyed*.

Question: Jon Vogel, general counsel for the New York City Housing Partnership, asked whether the word *and* should be changed to *or* in the following sentence: "New York is the only industrial state in the Northeast ***and*** Midwest not to have a brownfields statute." (Emphasis added.) Mr. Vogel added that the author intended to say that (1) In the Midwest no industrial state lacks a brownfields statute, and (2) in the Northeast no industrial state except New York lacks a brownfields statute. Otherwise, Mr. Vogel wrote, the word *and* implies that New York is located both in the Northeast and the Midwest.

Answer: If the reader believes that the geographic location of New York State might be in the Midwest, he has problems this columnist cannot remedy. However, the stylistic difficulty with the statement as written can be eliminated. It is due partly to its negative structure. Instead of saying that New York is the only state **not** to have a brownfields statute, why not state the fact affirmatively: "Among the industrial states of the Northeast and Midwest, all except New York have a brownfields statute." Affirmative statements are usually clearer than negative statements.

From The Mailbag:

Mail continues to arrive with suggested negative words that have no affirmative counterparts. Some suggestions follow.

New York attorney Matthew Leeds added "a whole world" of *dis-* prefixed words, such as *distraught*, *disturb*, *distinguish*, *dissemble*, and *discommode*. He added *denude*, which he noted means the opposite of what intuition would lead one to expect. (His last *dis* word, *discommode*, may have a similar effect.)

Several readers, including Dunkirk attorney Robert C. Woodbury, recalled a Mark Russell program, at Chautauqua Institution, in which Mr. Russell referred to some members of the bar as "inept" and "inert." Mr. Russell concluded that the rest of us must be *ept* and *ert*.

In what may be the final words on this subject, Florida attorney Laurence Spelman wrote:

> I hate to be a senter concerning your list of negative words that have no affirmative counterparts, but I found your published list to be discomplete; I was not left with a feeling of being combobulated or gruntled.

—

Regarding the word *basically*, which was discussed in the December column in a comment about the expanded meaning of *parameter*, attorney Barney Molldrem writes that the original meaning of the word *basic* was "alkaline," that is, having a pH above seven, as opposed to "acidic." Other readers, including biochemist Seymour Block, made the same observation.

Like other words with an originally narrow, literal, scientific meaning, the adverb *basically* expanded to mean "fundamentally," and has recently become diluted in meaning so that it is now often merely an intensifier — to emphasize and call attention to what follows.

—

Under the heading "cliché city," the local newspaper carried the following item:

> It's time to give "disgruntled" a rest. The "disgruntled postal worker" has become a cliché. Of late, the list of workplace murderers has come to include a "disgruntled" day trader, accountant and maintenance worker. According to dictionaries, disgruntled has its roots in the Middle English "grunten," to grunt, which evolved into "gruntlen," to grumble. The definitive Oxford English Dictionary traces the modern usage of disgruntled back to 1682 and defines it as "sulky dissatisfaction or ill humor," a state of "moody discontent."

We'll stipulate, for the sake of brevity, that someone who kills his coworkers is indeed probably dissatisfied, discontented, moody, and in an ill humor.

Thanks to all correspondents; without you, there would be no *Language Tips*.

---

* Writing specialist and lecturer emeritus at Holland Law Center, University of Florida, Gainesville, FL 32611, and consultant on language matters. She is the author of *Effective Legal Writing*, fifth edition (Foundation Press, July 1999), and co-author of *Judicial Opinion Writing Manual* (West Group for ABA, 1991).

The author welcomes the submission of questions to be answered in this column. Readers who do not object to their names being mentioned should

Software Review

CaseMap, CaseSoft, Ponte Vedra Beach, Fla. 32082 (www.casesoft.com). $495. Reviewed by James B. Reed, Esq.

CaseMap is a new type of litigation software, a tool that makes it easy to organize and explore your thinking about the facts in a case, its cast of characters, and the issues. Like no other software I have tried, CaseMap simplifies trial preparation. It works like trial lawyers work.

CaseMap is different from other types of litigation support software such as transcript search tools and document management systems. It is a knowledge management tool intended to be a repository for your thinking about a case. You enter everything you know about your case into CaseMap, then use its wide range of tools to help you explore and evaluate your case.

I recently used CaseMap to organize critical information in a birth trauma case. I created a simple but detailed chronology with events from the nurses' notes, the doctors' notes, laboratory data, deposition transcripts, operating room logs, etc. By assembling all this data, relationships and patterns emerged that were not clear from reading the various sources standing alone. Just as important, all the information was in one central location rather than scattered among deposition summaries, medical records laden with yellow stickers, and my usual hand-scrawled notes.

You can start using CaseMap immediately after an initial meeting with clients. When you open a case, four tabs appear in the CaseMap window — the Fact tab, the Object tab (for witnesses, organizations, and documents), the Issue tab, and the Question tab. The primary feature on each tab is a spreadsheet that displays information from the case database. You can enter and view case information, then decide what information to display on the screen by adjusting the order and size of your columns and rows. Each spreadsheet is preconfigured with fields to capture case details. If your case has a unique aspect not covered by CaseMap, you can set up customized fields.

Once a file is set up, the two steps required to organize a case are capturing information about case elements (*e.g.*, the name of the witness), and establishing relationships, or links, between various aspects of your case (*e.g.*, the relationship between a fact and the issues in the case). One of the innovative exploration features is the Link Summary field. It keeps count of the relationships between case elements such as the number of facts that mention a particular witness. When you want to see the facts behind the figures, you double-click and CaseMap displays a mini-chronology that lists the facts linked to the particular element, their dates, and their sources.

The developers at CaseSoft have done a good job of fixing problems that crop up when you use a generalized database product in a litigation setting. One example is the way it handles incomplete dates in a chronology or document index. CaseMap allows you to substitute question marks for the portion of a date or time of which you're unsure. You may also enter date and time ranges.

Where CaseMap really shines is in its ability to provide custom views of knowledge about the case. For example, instead of displaying a chronology that includes all the facts in your case, you can filter down to those that are undisputed. If you were preparing a motion for summary judgment, you could export this list of undisputed facts from CaseMap into your word-processing document.

It's easy to print reports from CaseMap, enhancing communication with your clients. The printing in CaseMap is WYSIWYG, so as you make changes to a table view, you are simultaneously changing your printed report. You can also export case information as Web pages to post on the Web, or to send to your clients so that they can view or print a report using their Internet browser.

CaseMap facilitates communication among trial team members. The application is installed on your computer, but case files are stored on a network so that multiple trial team members can simultaneously work on a CaseMap file. The replication and synchronization tools allow you to take a copy of a CaseMap file on the road while changes are still being made to the master file back in the office. When you return, CaseMap synchronizes the replica with the master version, and any changes in the replica are automatically melded with changes made in the master.

Even though CaseMap provides sophisticated ways to think about your cases, it is quite easy to learn and use. In my birth trauma case, I was able to attend a settlement conference with the carriers, their counsel and the trial judge carrying nothing more than my CaseMap chronologies rather than the boxes of materials I would normally bring. The CaseMap organization permitted me to have quick command of the relevant facts as well as the sources for each of those facts. The organization paid off — my case settled for the full policy limits of $2 million. I recommend CaseMap as a very powerful tool for litigators.

James B. Reed is a personal injury and malpractice attorney with the firm of Ziff, Weiermiller, Hayden & Mustico in Elmira.

Lawyer's Bookshelf

Judicial Retirement Laws of the Fifty States and the District of Columbia, by Bernard S. Meyer, Bronx, N.Y.: Fordham University Press, 1999, 274 pages, $40 hardcover, $20 paper. Reviewed by Eugene C. Gerhart.

Bernard S. Meyer, a former judge of the Court of Appeals of the State of New York, prepared this survey as vice chair of the Judiciary Committee of the American Bar Association's Senior Lawyers Division. His view is that the retirement laws of the various states and federal government that apply to judges should be changed in certain respects.

This report, in several parts, brings together for the first time a comprehensive survey of existing retirement laws with the careful and considered judgment of a prominent member of our judiciary on how those laws should be changed to improve the administration of justice.

One of Judge Meyer's proposals would enable states to make fuller use of retired and senior judges in continued judicial service. Each report covers the state's constitution, statutes and rules and is divided into five sections:

First, mandatory retirement provisions applicable generally.

Second, retirement provisions in regard to particular courts.

Third, optional provisions for retirement.

Fourth, service after retirement.

Fifth, pay and emoluments, which deals with how a retiree can be compensated for service after retirement with all of its variations.

The judge began putting the report together in 1995 and a word should be said concerning the research supporting the 51 reports contained in this volume. The research was by students and others, and when completed the format of their reports had not yet been developed. When it was, it was decided to use the format as a basis for preparing uniform provisions. Follow-up research was then done for the other 51 jurisdictions to be sure that the relevant provisions were included. This was careful follow-up work, which is indicative of the quality of this report. The 51 reports that this volume contains form the basis for the study and the simplification proposals. The author's recommendations deserve careful study by those interested in improving the administration of justice in our state and in the nation.

Judge Meyer, who now practices with the firm of Meyer, Suozzi, English & Klein in Mineola, brings to his task not only his experience on the Court of Appeals but a long-time career at the bar. Lawyers interested in improving the administration of justice in this state, both for lawyers and the judiciary, active or retired, will find this a very helpful book in their library for future study.

Eugene G. Gerhart, the editor emeritus of the *Journal*, is of counsel at Coughlin & Gerhart, L.L.P. in Binghamton.

Transforming Practices: Finding Joy and Satisfaction in the Legal Life, by Steven Keeva, American Bar Association, published by Contemporary Books, 1999, 226 pages, $24.95, hardcover. Reviewed by Ellin M. Mulholland.

Steven Keeva, senior editor of the *ABA Journal*, has provided a deeply thoughtful and well-conceived guide for countless lawyers who find little joy and less satisfaction in their lives. To paraphrase the familiar quote, "Physician, heal thyself," he has provided direction to those who need the admonition, "Attorney, counsel thyself."

At the end of a century of unparalleled advances in science, communication and locomotion, the distinguished legal editor and author has courageously articulated the lack of advances in the legal profession in providing meaning and fulfillment to so many of its members. "Caring, compassion, a sense of something greater than the case at hand, a transcendent purpose that gives meaning to your work — these are the legal culture's glaring omissions," he writes early in the book.

Having defined the problem, the author proceeds to outline seven transforming practices to help law students and members of the academy as well as practitioners in the public and private sector find satisfaction in their professional and personal lives.

In the chapters concerning the seven transforming practices of balance, contemplation, mindfulness, service, time-out, listening and healing, the reader not only discovers the nature of the practice but also meets and reads the words of practitioners who have achieved success through their implementation. The reader finds that many are concerned with the spiritual crisis of the legal profession and learns about the integration of professional and spiritual values to overcome this crisis.

This book might well be the text of a law school course, the focus of a law firm retreat, required reading for discussion at a meeting of judges, partners or associates, or a chapter at a time as a daily guide for the busy practitioner to make her/his life aware, and then joyful and satisfying.

Attorneys, counsel thyselves with the transforming practices of this compelling book.

Ellin M. Mulholland was for many years a trial lawyer with Herzfeld & Rubin, P.C. in New York.

Classified Notices

Respond to Notices at:
New York State Bar Association
One Elk Street
Albany, NY 12207
Attn: Daniel McMahon

Deadline for Submissions:
Six weeks prior to the first day of the month of publication.

Nonmembers:
$100 for 50 words or less;
plus $1 for each additional word.
Boxholder No. assigned—$10 per insertion.

Members:
$1 for each word.

Payment *must* accompany insertion orders.

Attorney Wanted

BOND, SCHOENECK & KING, LLP seeks to hire an attorney for its Federal Tax practice area in the Syracuse office with 3+ years of experience. The practice area includes tax planning for business and business transactions and related estate planning. An LLM degree in taxation and/or an accounting background is preferred but not required. Compensation will be commensurate with experience.

Bond, Schoeneck & King is comprised of 150 attorneys in its nine offices. Its client base presents a broad array of sophisticated tax problems for both businesses and individuals. Opportunity for client responsibility and creative problem solving will be immediate. Applicants must have outstanding academic credentials and excellent communication skills. We are an ADA/EEO employer. Please send your resume to Bond, Schoeneck & King, LLP, One Lincoln Center, Syracuse, New York 13202. Attention: Human Resources

Law Books

The Lawbook Exchange, LTD. Buys, sells and appraises all major lawbook sets as well as scholarly and out-of-print titles. For the best prices, top quality and guaranteed satisfaction, call toll free 1-800-422-6686 for information. Mastercard, Visa and American Express credit cards accepted. Catalogues issued in print and online: http://www.lawbookexchange.com.

Referrals

WAS YOUR CLIENT INJURED OR ARRESTED IN LAS VEGAS? Call Craig P. Kenny & Associates. A law firm committed to the client, practices primarily in the areas of personal injury, workers compensation, medical malpractice and criminal defense. Experienced trial attorneys. Call Craig toll free (888) 275-3369 or CPKnASSOCS@aol.com.

Washington State Firm
Licensed in all federal and state courts in Washington. Available to serve as local counsel, for consultation, association, and referrals in commercial litigation, insurance coverage, real estate and personal injury matters. Sound Law Group PLLC, (206) 767-1155, email Rob@Soundlawgroup.com

Membership Totals

New Regular Members	January 1, 2000 through January 14, 2000	51
New Law Student Members	January 1, 2000 through January 14, 2000	73
Total Regular Members	as of January 14, 2000	61,280
Total Law Student Members	as of January 14, 2000	5,903
Total Membership	as of January 14, 2000	67,183

New Members Welcomed

FIRST DISTRICT
Marc Laurance Abrams
Daniel Lawrence Ages
Dorothy C. Alevizatos
Marilyn Bersh Ampolsk
Nora S. Anderson
Jethro M. Antoine
Robert Raoul Arreola
Gwen A. Ashton
Alexei Ormani Auld
Edgardo L. Baldinucci
Bernadette Ann Barnard
Luana Bastone
Gillian L. Berman
Amy Marie Bertolotti
Lee S. Bickley
Irma Diane Bobb
Adrian Edward Trevor Boutel
David Kay Bowles
William Larry Brian
Daniel Brothman
Binta N. Brown
Kyle D. Brown
Valerie Celeste Bruce
Kiva Niles Bryant
Donald Edward Burgess
Consuelo Irma Campuzano
John David Canton
James J. Carroll
Michael Chadirjian
Kristen Y. Chang
Everett Sanru Cheng
Su Jin Cho
Geoffrey J. Colvin
Megan Ruth Comport
David John Crowell
Shannon Bruce Dailey
Joseph F. Danowsky
John B. Dawson
Michael F. Defranco
Wilhelmina Adriana Deharder
Ellen Sanderson Delo
Alyssa Desimone
Benjamin M. Dewar
Milan Dey-Chao
Andrew Bernard Diaz-Matos
Thomas R. Esposito
Natalia Feldgun
Jason L. Fixler
Melissa A. Flannigan
Lori J. Forlano
Danek Antar Freeman
Cheryl Gayle Fried
David G. Friedman
Karin Elizabeth Garvey
Cristina Gegenschatz
Stephanie Jill Gendell
George M. Gensler
Basheva Elizabeth Genut
Anna Giabourani
Mark P. Gimbel
Noreen M. Giusti
Eric Francis Gladbach
Serena Nanett Godwin
Amanda Corina Grabowski
James Alan Gregorio
Lisa S. Halpern
James A. Harrington
Karen M. Hartman
Christopher S. Harvey
Craig T. Heard
Ryan K. Higgins
Jacob Horowitz
Richard Adam Hurowitz
Stephen James Jackson
George Januzzi
Hillary F. Jassey
Keiko Kato
Steven B. Kauff
Samrat Singh Khichi
Richard W. Kidd
Tara Lynn King
Alexey Vadimovich Kiyashko
Lawrence A. Klein
Gabi Elizabeth Kupfer
Rashida Kali Lalande
Sandra Kay Lane
Mary Catherine Latorre
Paul Kenneth Leary
David Hyung-Tek Lee
Kevin William Leonard
Laurie Shannon Leonard
Aaron Michael Levine
Jill Levine
Avi Lew
Oliverio Lew
Steven E. Lewis
Cynthia Wimer Lobo
Margaret A. Mahoney
Michelle Lynn Manzo
Carmen Martinez
James P. McCann
Elizabeth R. McColm
Timothy P. McElduff
Nicholas George Mehler
Michael A. Meisler
John Michael Mercury
Melissa A. Meyrowitz
Alexander C. Millar
Ronald Millet
Cynthia Ruth Moore
John P. Moy
Elissa Suzanne Myerowitz
John Richard Myers
Navdeep Singh Oberoi
Shinyung Oh
Raluca Viorica Oncioiu
Laura Orriols
Christopher Rush Oster
Darryl A. Parson
Trupti S. Patel
Konstantinos Petrakis
Gayle E. Pollack
Debra Michele Powell
Alan M. Rashes
Raymond Robert Richards
Tyler Brooks Robinson
Christopher S. Rooney
Andrea Robin Rosenblum
Dana M. Roth
Jason Spiros Rozes
Robert P. Sakosky
Kamil M. Salame
Carole Catherine Scallan
John S. Scherban
Brittiny Latrell Sessions
Samira Shah
Patrick J.C. Shaw
Megan Lyn Sheetz
Jennifer Sigall
Christopher Jon Silvestri
Elizabeth A. Smith
Eben H. Strobos
Bryan A. Supran
Reiko Takikawa
Nathalie Tauchner
K. Khiem Ting
Jason Seth Topman
Ralph Tortorella
Joel Mitchele Tucker
Helen Elizabeth Tuttle
Dennis John Uhlir
Timothy P. Wei
Alan M. Weigel
David B. Weisblat
Johanna Lynne Werbach
Robin M. Wertheimer
Jason Paul Wiesenfeld
Katherine A. Wilson
Julie Young Wong
Douglas Charles Wyatt
Paul R. Wysocki
Natasha Mariette Wyss
Frederick Yu
Melina Zacharopoulos

SECOND DISTRICT
David Michael Brioso
Patrick D. Canavan
Randall J. Cude
James Eugene Gandy
Gregg H. Grossman
Tiffany Jami Hott
Benjamin M. Meskin
John M. Wilson
Kit T. Wong

THIRD DISTRICT
David M. Allen
April L. Forbes
Catherine Snyder Hill
Adam Kanarek
Sandra M. Leech
Seth Robert Leech
John F. Moore
Kenneth E. Page
David M. Rossi

FOURTH DISTRICT
Dianna M. Goodwin
Laurie Anne Hoefer
Cathi L. Radner
Gary J. Smith

FIFTH DISTRICT
James S. Chatwin
Stephanie A. Miner
Margaret R. Ryniker

SIXTH DISTRICT
Karen Stanislaus-Fung
Henry C. Granison
Mary E. Grant
Christopher M. Mesh
Stephen L. Palmer

SEVENTH DISTRICT
Barbara J. Delgross
Julia A. Hall
Tara B. Lillis
Lisa Bloch Rodwin
Robert J. Sikorski

EIGHTH DISTRICT
Robert D. Cherofsky
Bradley B. Davis
Mary-Lynne R. DiPietro
Arianna Frankl
Patrice B. Harrison
Jeffrey B. Saunders
William Simon
Janice Starr
Michael J. Timko
John Vomvolakis
Richard T. Wyatt
Rita A. Wyatt
Daniel P. Zwerner

NINTH DISTRICT
Matthew James Camardella
James M. Catterson
Robert G. Federici
Harry P. Greenbaum
Mark W. Hudak
William D. Johnson
Jack A. Kaplowitz
Raymond G. Keenan
Jeanne M. Lettieri
Janice Ann Lewis
Edward H. McCarthy
Patricia Quigley
Allan Ross
Brad A. Schlossberg
Jeffrey A. Seigel
Marc J. Stern
Harry F. Tilis
Lora Jean Tryon

TENTH DISTRICT
Jimmy Chu
Lilin Ma Ciccarone
Laurence T. Ginsberg
Abraham Kleinman
Meer M. M. Rahman
Laura Tobin Ross
Emily A. Singhota
Cary L. Winslow
Zhenghong Zhou

ELEVENTH DISTRICT
Valentin Djonovic
Kenneth C. Glassman
Andrew S. Wein

TWELTH DISTRICT
Craig Anthony Ambrose
John C. M. Angelos
Carolyn M. Anner
Darren Matthew Baldo
Ruxandra Barbulescu
Ronald Carl Bavagnoli
Nurit Ben-Harav
Ayala Berler-Shapira

OUT-OF-STATE

Thomas J. Berry
Guillermo Bichara
Hayden R. Brainard
Paul David Brandes
Russell Brenner
Robert Dorrance Brown
Barbara Janet Buba
John Joseph Buttita
Sean Robert Callagy
Jeffrey E. Callahan
Lynette Joy Carhart
Gerard Cedrone
Wei-Hung Chao
Andrew C. K. Chen
Wen-Yu Chen
Jennifer Choe
Eun-Hwa Choi
Young Ik Choi
Swee Leen Chua
Mihwa Chung
Francesca Cinotti
Stuyvesant P. Comfort
Maureen Connolly
Stephen David Crosta
Paul A. Dean
Barbara Demosthene
Stephen A. Denburg
Byron A. Divins
Charles U. Enweonwu
Daniel Philip Fisher
Christopher Mark Foudy
John V. Galluccio
Elizabeth Garcia
Alana P. Gayle
Daniel M. Goldfisher
Angela M. Gurrera
John D. Habermann
Randi Haimovitz
Lesley Ellen Hanchrow
Marcia L. Hannewald
Eugene D. Hwa
Akihiro Itoh
Zinta Jansons
Lisa A. Jones
Matthew B. Kall
Jae Y. Kim
Adam M. Kohn
Walter R. Lamkin
Bleu Kuwanyantiwa Lawless
Randy Steven Laxer
David L. Lenter
Kara K. Lewis
Paul Leo Loeb
Michael Macmanus
Timothy A. Magee
Yoshimichi Makiyama
James A. McDonald
Kathryn E. McDonnell
Robert L. McKay
Paula Julia Mercado
Deborah Mermelstein
Alan I. Model
Jennifer E. Moran
Kenneth J. Moran
Tamsin Jo Newman
John C. Nimmer
Rosanne Notaro
Amy P. Nunan
David Russell Olson
Michael Gregory Palek
Dalkeith Palmer
Yaran Pan
Hyung Gun Park
Frank Paul Proscia
Anne E. Raulerson
Edward Francis Rehberg
Tod Kevin Reichert
Sandra K. Rhee
Silvia Maria Rheinbolt
Christopher Charles Roberts
Andrea Lynn Roth
Gerald R. Saffioti
Tsuyoshi Sakai
Mary Louise Serafine
Jeremiah P. Sheehan
Raoul G. Slavin
William J. Squires
George J. Sukatos
Shantanu J. Surpure
Hiroaki Takahashi
Gerald J. Van Buskirk
Ineke Vantright
Marc B. Washburn
Douglas A. Wolfson
Eiichi Yamaguchi
Michelle Anne Zamarin
Cristina Zampetti

In Memoriam

Andrew P. Dolan
Tucson, AZ

Charles F. Kaiser
Naples, FL

Lambros J. Lambros
Norfolk, CT

Luke D. Lynch
Garden City, NY

Wilson C. Price
Jamestown, NY

Ward B. Stevenson
New York, NY

Howard J. Walker
Avoca, NY

Louis S. Zappulla
Bronx, NY

Headquarters Staff E-mail Addresses

Executive Staff
William J. Carroll, *Executive Director,* wcarroll@nysba.org
John A. Williamson, Jr., *Associate Executive Director,* jwilliamson@nysba.org
L. Beth Krueger, *Director of Administrative Services,* bkrueger@nysba.org
Kathleen R. Baxter, *Counsel,* kbaxter@nysba.org
Lisa Bataille, *Administrative Liaison,* lbataille@nysba.org
Kathleen M. Heider, *Director of Meetings,* kheider@nysba.org

Accounting
Kristin M. O'Brien, *Director of Finance,* kobrien@nysba.org
Anthony M. Moscatiello, *Controller,* tmoscatiello@nysba.org

Continuing Legal Education
Terry J. Brooks, *Director,* tbrooks@nysba.org
Jean E. Nelson II, *Associate Director,* jnelson@nysba.org
Jean Marie Grout, *Staff Attorney,* jgrout@nysba.org
Leslie A. Fattorusso, *Staff Attorney,* lfattorusso@nysba.org
Cheryl L. Wallingford, *Program Manager,* cwallingford@nysba.org
Daniel J. McMahon, *Assistant Director, Publications,* dmcmahon@nysba.org
Patricia B. Stockli, *Research Attorney,* pstockli@nysba.org

Governmental Relations
C. Thomas Barletta, *Director,* tbarletta@nysba.org
Ronald F. Kennedy, *Assistant Director,* rkennedy@nysba.org

Graphic Arts
Roger Buchanan, *Manager,* rbuchanan@nysba.org
William B. Faccioli, *Production Manager,* bfaccioli@nysba.org

Human Resources
Richard V. Rossi, *Director,* rrossi@nysba.org

Law Office Economics and Management
Stephen P. Gallagher, *Director,* sgallagher@nysba.org

Law, Youth and Citizenship Program
Gregory S. Wilsey, *Director,* gwilsey@nysba.org

Lawyer Assistance Program
Ray M. Lopez, *Director,* rlopez@nysba.org

Management Information Systems
John M. Nicoletta, *Director,* jnicoletta@nysba.org
Joseph Salo, *Technical Support Manager,* jsalo@nysba.org
Paul Wos, *Data Systems and Telecommunications Manager,* pwos@nysba.org

Marketing
Richard Martin, *Director,* rmartin@nysba.org

Media Services and Public Affairs
Bradley G. Carr, *Director,* bcarr@nysba.org
Daniel M. Kittay, *Editorial Services Specialist,* dkittay@nysba.org
Frank J. Ciervo, *Manager of Media Services,* fciervo@nysba.org

Membership
Patricia K. Wood, *Director,* pwood@nysba.org

Pro Bono Affairs
Anthony Perez Cassino, *Director,* acassino@nysba.org

The New York Bar Foundation

1999-2000 OFFICERS

Maryann Saccomando Freedman
President
343 Elmwood Avenue
Buffalo, NY 14222

Richard J. Bartlett
Vice-President
1 Washington Street
P.O. Box 2168
Glens Falls, NY 12801-2963

William J. Carroll
Secretary
One Elk Street, Albany, NY 12207

Christine Beshar
Treasurer
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7416

DIRECTORS

John P. Bracken, *Islandia*
Angelo T. Cometa, *New York City*
Myrna Felder, *New York City*
Emlyn I. Griffith, *Rome*
Jules J. Haskel, *Garden City*
John R. Horan, *New York City*
Susan B. Lindenauer, *New York City*
James C. Moore, *Rochester*
Robert L. Ostertag, *Poughkeepsie*
Maxwell S. Pfeifer, *Bronx*
Joshua M. Pruzansky, *Smithtown*
M. Catherine Richardson, *Syracuse*
Hon. Shira A. Scheindlin, *New York City*
Randolph F. Treece, *Albany*
Justin L. Vigdor, *Rochester*

Journal Board Members Emeriti

As a tribute to their outstanding service to our *Journal*, we list here the names of each living editor emeritus of our *Journal*'s Board.

Richard J. Bartlett
Coleman Burke
John C. Clark, III
Angelo T. Cometa
Lawrence H. Cooke
Roger C. Cramton
Maryann Saccomando Freedman
Emlyn I. Griffith
H. Glen Hall
Charles F. Krause
Philip H. Magner, Jr.
Wallace J. McDonald
J. Edward Meyer, III
Robert J. Smith
Lawrence E. Walsh

1999-2000 OFFICERS

Thomas O. Rice, *President*
Brooklyn
Paul Michael Hassett, *President-Elect*
Buffalo
Frank M. Headley, Jr., *Treasurer*
Scarsdale
Lorraine Power Tharp, *Secretary*
Albany

Vice-Presidents

First District:
Kenneth G. Standard, Manhattan
Second District:
Edward S. Reich, Brooklyn
Third District:
James B. Ayers, Albany
Fourth District:
Peter V. Coffey, Schenectady
Fifth District:
Dennis R. Baldwin, Syracuse
Sixth District:
Eugene E. Peckham, Binghamton
Seventh District:
A. Vincent Buzard, Rochester
Eighth District:
Joseph V. McCarthy, Buffalo
Ninth District:
H. Glen Hall, Briarcliff Manor
Tenth District:
A. Thomas Levin, Mineola
Eleventh District:
Robert J. Bohner, Rego Park
Twelfth District:
Steven E. Millon, Bronx

Members-at-Large of the Executive Committee

Mark H. Alcott
James F. Dwyer
Sharon Stern Gerstman
John J. Kenney
Steven C. Krane
Ellen Lieberman

† *Delegate to American Bar Association House of Delegates*
* *Past President*

Members of the House of Delegates

FIRST DISTRICT
Alcott, Mark H.
Barasch, Sheldon
Batra, Ravi
† Bowen, Sharon Y.
Brett, Barry J.
Cashman, Richard
Chambers, Hon. Cheryl E.
* Cometa, Angelo T.
Connery, Nancy A.
Cooper, Michael A.
DeFritsch, Carol R.
* Fales, Haliburton, 2d
Farrell, Joseph H.
Fink, Rosalind S.
Flood, Marilyn J.
* Forger, Alexander D.
Freedman, Hon. Helen
* Gillespie, S. Hazard
Gregory, John D.
Haig, Robert L.
Handlin, Joseph J.
Harris, Joel B.
* Heming, Charles E.
Hirsch, Andrea G.
Hoffman, Stephen D.
Jacobs, Sue C.
Jacoby, David E.
Kahn, Irwin
Kenney, John J.
Kenny, Alfreida B.
Kilsch, Gunther H.
* King, Henry L.
† Krane, Steven C.
Krooks, Bernard A.
Landy, Craig A.
Lieberman, Ellen
Lindenauer, Susan B.
* MacCrate, Robert
Miller, Michael
Minkowitz, Martin
* Murray, Archibald R.
Nonna, John M.
Opotowsky, Barbara Berger
Patrick, Casimir C., II
* Patterson, Hon. Robert P., Jr.
Paul, Gerald G.
Pickholz, Hon. Ruth
Rayhill, James W.
Raylesberg, Alan I.
Reimer, Norman L.
Reiniger, Anne
Rifkin, Richard
Roper, Eric R.
Rosner, Seth
Rothberg, Richard S.
Rothstein, Alan
Rubin, Hon. Israel
Schaffer, Frederick P.
* Seymour, Whitney North, Jr.
Shapiro, Steven B.
Sherman, Carol R.
Silkenat, James R.
Souther, Eugene P.
Standard, Kenneth G.
Stenson, Lisa M.
Todrys, Steven C.
Vitacco, Guy R., Sr.
Wales, H. Elliot
Yates, Hon. James A.

SECOND DISTRICT
Adler, Roger B.
Barone, Anthony P.
Cohn, Steven D.
Cyrulnik, Miriam
Doyaga, David J.
Golinski, Paul A.
Hall, John G.
Hesterberg, Gregory X.
Kamins, Barry
Longo, Mark A.
Morse, Andrea S.
Reich, Edward S.
† Rice, Thomas O.
Sunshine, Hon. Jeffrey S.

THIRD DISTRICT
Agata, Seth H.
Ayers, James B.
Bergen, G. S. Peter
Cloonan, William N.
Connolly, Thomas P.
Copps, Anne Reynolds
Denvir, Sean J.
Friedman, Michael P.
Helmer, William S.
Kelly, Matthew J.
Kennedy, Madeleine Maney
Klein, Frank
Kretser, Rachel
Lagarenne, Lawrence E.
† Miranda, David P.
Reger, C. Michael
Samel, Barbara J.
Swidler, Robert N.
Tharp, Lorraine Power
Tippins, Timothy M.
Whalen, Thomas M., III
* Williams, David S.
* Yanas, John J.

FOURTH DISTRICT
Clements, Thomas G.
Coffey, Peter V.
DeCoursey, Eleanor M.
Eggleston, John D.
FitzGerald, Peter D.
Higgins, Dean J.
Hoye, Polly A.
Lorman, William E.
McAuliffe, J. Gerard, Jr.
Rider, Mark M.
Tishler, Nicholas E.

FIFTH DISTRICT
Baldwin, Dennis R.
Bowler, Walter P.
Buckley, Hon. John T.
Burrows, James A.
Coleman, Ralph E.
DiLorenzo, Louis P.
Dwyer, James F.
Gingold, Harlan B.
* Jones, Hon. Hugh R.
Klein, Michael A.
McArdle, Kevin M.
Priore, Capt. Nicholas S.
Rahn, Darryl B.
†* Richardson, M. Catherine
Sanchez, Ruthanne
Uebelhoer, Gail Nackley

SIXTH DISTRICT
Anglehart, Scott B.
Denton, Christopher
Gorgos, Mark S.
Gozigian, Edward
Hutchinson, Cynthia
Kendall, Christopher
Kilpatrick, Todd D.
Madigan, Kathryn Grant
Peckham, Eugene E.
Reizes, Leslie N.
Tyler, David A.

SEVENTH DISTRICT
Buzard, A. Vincent
Cristo, Louis B.
Heller, Cheryl A.
Inclima, Charles P.
Lawrence, C. Bruce
†* Moore, James C.
* Palermo, Anthony R.
Reynolds, J. Thomas
Schraver, David M.
Schumacher, Jon L.
Taylor, Jeffrey Lee
Trevett, Thomas N.
* Van Graafeiland, Hon. Ellsworth
* Vigdor, Justin L.
Walsh, Mary Ellen
†* Witmer, G. Robert, Jr.

EIGHTH DISTRICT
Attea, Frederick G.
Church, Sanford A.
Clark, Peter D.
Eppers, Donald B.
Evanko, Ann E.
Freedman, Bernard B.
†* Freedman, Maryann Saccomando
Gerstman, Sharon Stern
Graber, Garry M.
† Hassett, Paul Michael
McCarthy, Joseph V.
O'Donnell, Thomas M.
O'Reilly, Patrick C.
Peradotto, Erin M.
Pfalzgraf, David R.
Rybak, Daniel A.
Spitzmiller, John C.

NINTH DISTRICT
Aydelott, Judith A.
Berman, Henry S.
Coffill, Randall V.
Fine, James G.
Galloway, Frances C.
Gardella, Richard M.
Giordano, A. Robert
Hall, H. Glen
Headley, Frank M., Jr.
Kranis, Michael D.
Longo, Joseph F.
Manley, Mary Ellen
McGlinn, Joseph P.
Miklitsch, Catherine M.
* Miller, Henry G.
Mosenson, Steven H.
* Ostertag, Robert L.
Steinman, Lester D.
Stewart, H. Malcolm, III
Wolf, John A.

TENTH DISTRICT
Abrams, Robert
Asarch, Joel K.
†* Bracken, John P.
Corcoran, Robert W.
Fishberg, Gerard
Franchina, Emily F.
Futter, Jeffrey L.
Gutleber, Edward J.
Hodges, H. William, III
Levin, A. Thomas
Levy, Peter H.
Mihalick, Andrew J.
O'Brien, Eugene J.
†* Pruzansky, Joshua M.
Purcell, A. Craig
Reynolds, James T.
Roach, George L.
Rothkopf, Leslie
Spellman, Thomas J., Jr.

ELEVENTH DISTRICT
Bohner, Robert J.
Darche, Gary M.
DiGirolomo, Lucille S.
Glover, Catherine R.
James, Seymour W., Jr.
Nashak, George J., Jr.
Reede, Barbara S.
Terranova, Arthur N.

TWELFTH DISTRICT
Bailey, Lawrence R., Jr.
Friedberg, Alan B.
Kessler, Muriel S.
Kessler, Steven L.
Millon, Steven E.
†* Pfeifer, Maxwell S.
Schwartz, Roy J.
Torres, Austin

OUT-OF-STATE
Dwarica, Leonard A.
Hallenbeck, Robert M.
* Walsh, Lawrence E.