NEW YORK STATE BAR ASSOCIATION

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Journal

COMPUTER CRIME INVESTIGATION

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digital fingerprint
valid consent
forensic software
protect source media
search family computer

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On The Cover

This month's cover illustration was prepared to accompany the article on computer crime investigation. It describes the computer forensics process by showing how the "evidence" initially presented in a child custody case turned out to have been fabricated.

Cover Design by Lori Herzing.

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President's Message

LORRAINE POWER THARP

Speaking Out And Taking Action

MBWA – Management by Walking Around. That approach, coined by Tom Peters several years ago, continues to be used by professionals and executives in search of effective administration and leadership.

Last month, I did an abundance of "Presidency by Walking Around" as I made visits among the 300-plus events at our Annual Meeting. This year's gathering had a record number, by far, of registrants and meeting attendees. The opportunity to visit with so many of you and see you in action through the Association was rewarding and revealing. From my overall vantage point, I saw common threads and trends in these meetings that were not coincidental.

In numerous Association, section and committee programs and working meetings, the dialogue focused on professional responsibility, professionalism and core values. First, a few general observations of what these meetings did and did not involve. These were not esoteric and aspirational exercises but discussions of real-life situations with practical solutions offered. These were forums that brought together people of diverse backgrounds who spoke passionately about their views of what should be done. The forums included working meetings, as well as educational programs. The issues spanned the basic to the complex in a range of practice areas, affecting everyone from new admittees to the most seasoned practitioners. The participants did not shrink from controversy and did not attempt to limit approaches to minimum responsibility. It was an Annual Meeting of speaking out and action.

By no means is our Association a neophyte in examining and acting on these issues. This is the Association that: called for and adopted Canons of Ethics 94 years ago; a dozen years ago worked for and shaped mandatory continuing legal education provisions, including bridge-the-gap and ethics program requirements; successfully sought to preserve the tenet of independent counsel in its milestone recommendations concerning multidisciplinary practice; has emphasized the importance of the lawyer's role as counselor in its commentary on proposed rules; and prepared proactive reports and comprehensive reviews of the Code of Professional Responsibility to deal with contemporary conditions. Over the years, thousands of attorneys across the state have been educated on matters of professional responsibility through the programs and publications of our sections and committees.

Given all that is happening with corporate governance, issues of responsibility of the professions, including law, have taken on a heightened profile in the arena of public opinion. It is vital that we as an Association continue to be visible and vocal for the profession in this venue. That includes providing thoughtful analysis and constructive solutions, as well as using every opportunity to educate and communicate.

A sampling from the Annual Meeting forums gives a taste of the dimension of discussions and reflects the profession's willingness to speak with candor and introspection about its roles and values. Come with me, for a moment, to sit in on the following sessions: our bridge-the-gap program for new admittees, which included concerns in advertising; the Committee on Attorney Professionalism's session using movie clips to illustrate ethics issues; the program on "Ethics in Government: The Public Trust – A Two-Way Street" presented by the Committee on Attorneys in Public Service on identification of government lawyers' clients and related confidentiality elements; an examination by the Health Law Section on ethics in representing health care systems; review of the ethics of witness preparation by the General Practice, Solo and Small Firm Section; the Family Law Section's guidance on avoidance of ethical pitfalls in matrimonial practice; and consideration of professional responsibility standards for prosecutors, discussed by the Committee on Professional Discipline. The Committee on Legal Education and Admission to the Bar conducted a program on multijurisdictional practice, another topic on which the Association has prepared an analysis.

In a forum of the Real Property Law Section's Committee on Professionalism, panelists responded affirmatively to the program title, "Ethics, Lawyers and the Practice of Law: Are They Related Anymore?" but iden-

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tified different areas and approaches to better meet today's challenges and, as Judge Betty Weinberg Ellerin stated, to ensure that new generations of lawyers have the preparation and grounding that bring honor to the bar.

Among recommendations of that program was a revamping of the century-old system of legal education to provide greater attention to the elements needed in practice, increase training in lawyering skills, enhance listening and communication, and give more emphasis to the fundamental "core values" of the profession so well set out by past President Bob MacCrate. In the face of public confusion and concern on the roles of the professions and business, there were reminders that lawyers should pursue the important work of counselor with the integral element of attorney-client confidentiality. I was pleased that, hand-in-hand with promoting professionalism in school and practice, panelists cited the need to convey the profession's responsibilities and its many positive efforts to the public – as I have repeatedly stated, communications in this regard is one of my priorities.

In additional programs, the Environmental Law Section discussed the post-Enron climate. Lawyers' requirements under the newly enacted Sarbanes-Oxley Act affecting corporate governance were the focus of the Business Law, Commercial and Federal Litigation and International Law and Practice Sections. We thank the Business Law Section, in coordination with the Commercial and Federal Litigation and Corporate Counsel Sections, for preparing thoughtful comments to the SEC on the proposed implementation of attorney conduct standards stemming from Sarbanes-Oxley.

On the brink of release of the SEC rules, on which we had submitted comment, I opened the proceedings of our first-ever Presidential Summit on, as moderator Bob Haig observed, a topic as timely as tomorrow's headlines – the past, present and prospective roles of inside and outside counsel, corporate officers and directors, accountants and government in corporate responsibility. Panelists examined and opined, sometimes vociferously disagreeing, on the confluence of circumstances that, to use panelist Ken Bialkin's metaphor, created the "perfect storm." At issue in the forum were questions of whether responsibilities of the professions overlap, what constitutes knowledge, the client's responsibilities in assessing evidence, and the role of the bar in speaking out.

With the obvious choices for blame in the corporate scandal arena – CEOs, accountants, directors – I must admit that I was taken aback when panelist Attorney General Eliot Spitzer stated definitively that the attorneys were "asleep at the wheel." His point was that attorneys had been involved in "doing the deals" because their legal expertise was needed, but it apparently had been used in documenting certain of the questionable transactions. As others on the panel confirmed, if attorneys violated ethics rules or did anything illegal, they should be held accountable. Then the discussion went beyond strict matters of ethics and legalities. Panelist Professor Richard Painter said, for instance, that attorneys should not simply accept the practices or numbers certified to them by the accountants on the deal. Questions ensued regarding what the SEC rules will mean for the profession, and whether the Model Rules and the Code of Professional Responsibility should be revisited on the issue of corporate fraud. Clearly, we cannot be afraid of self-examination – as Attorney General Spitzer noted, our ability to self-examine is essential to our ability to continue to self-regulate.

I am so pleased with our extensive efforts of education and analysis of issues of professional responsibility, demonstrated at the Annual Meeting. But make no mistake: We will continue to express our views, to use the profession's superb abilities of analysis in shaping solutions, to educate ourselves and others as to how the bar serves and should serve. As Justice Frankfurter observed, "From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.'"

As I "walked around" at the Marriott Marquis, attending meetings and programs, addressing attorneys and judges, one thing was reaffirmed for me – my pride in this profession, replete with moral character, knows no bounds.

Knowledge of Computer Forensics Is Becoming Essential For Attorneys in the Information Age

By Steven M. Abrams with Philip C. Weis

The matter began as just another child custody hearing. The wife's attorney had asked for the hearing after the husband had made a threatening phone call. Claiming to be in the parking lot of the store in which the wife worked, he had let her know that he was looking through a telescopic sight, and that each person in the store was visible and within range of his firearm.

The wife's attorney fully expected that after the judge read the police report of this incident he would grant custody of the couple's 3-year-old child to his client. So he could hardy believe his eyes and ears when, rather than disputing the allegations in the police report, the husband's attorney instead placed a stack of printed e-mail messages on the judge's bench. The e-mails appeared to have been sent from the wife to various men who frequented a chat room called, "MARRIED AND CHEATING IN HICKORY."[1] Most damning of all, the e-mails had an attached digital image file that appeared to be a pornographic picture of the wife. This had been printed out and was attached to the materials given to the judge.

Based on these materials and the husband's assertions that the wife had been advertising for sexual liaisons on the Internet, the judge issued an order awarding custody to the husband. The wife was to have only limited and supervised visitation. The wife, her family and attorney were stunned by this completely unexpected outcome. The author was thereafter engaged to investigate by the wife's attorney.

The balance of the story is at the conclusion of this article, but it cannot be fully understood without some understanding of the new world of computerized evidence. As the biographical thumbnail indicates, the author is not an attorney, but rather a licensed private investigator specializing in computer forensics and computer crime investigation, focusing on civil domestic matters. The focus of this article therefore is not detailed legal analysis, but rather a technical and practical overview of this relatively recent but increasingly vital part of the legal profession.

The New Specialties: Computer Forensics And Computer Crime Investigation

"Computer forensics" is the science of obtaining, preserving, and documenting evidence from digital electronic storage devices, such as computers, pagers, PDAs, digital cameras, cell phones, and various memory storage devices. All must be done in a manner designed to preserve the probative value of the evidence and to assure its admissibility in a legal proceeding.

"Computer crime" investigation includes such endeavors as detecting and stopping hackers, as well as other criminals who use the Internet as the instrumentality of their criminal enterprises. Catching them often involves tracing and verifying e-mail messages, or setting traps on the Internet in the hope of reeling them in.

Most computer forensics specialists and computer crime investigators fall into one of two narrow categories: those who work for law enforcement agencies exclusively on the prosecution side, and those who work as information security experts for large corporations. That latter group focuses on keeping hackers, disgruntled employees, and other like-minded individuals from attacking the company's information resources.

The tools of the trade vary, but certain standards have developed. Although many over-the-counter software

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Philip C. Weis assisted in the preparation of this article. He is law secretary to Hon. Robert Roberto Jr. (Supreme Court, Nassau County), and is associate editor of the *Journal*.

programs that are available at retail business software stores can be used, more expensive but industry-established tools are preferred by professionals. These programs have already been proven to produce scientifically reliable evidence that can be used by a computer investigations expert as part of the expert's testimony.[2]

Three industry associations exist, and their names should be known to attorneys who are considering hiring a computer investigator. These organizations establish minimum training standards for computer forensic examiners, and promulgate industry-accepted and recommended procedures for the forensic examination of various types of computer media and electronic data storage devices. The largest and most respected of these include IACIS (International Association of Computer Investigative Specialists) and HTCIA (High Technology Crime Investigation Association). IACIS membership is restricted to sworn law enforcement personnel and full-time civilian employees of law enforcement agencies. Like IACIS, HTCIA membership consists mainly of sworn law enforcement officers and agents. However, unlike IACIS, civilian computer forensic specialists can also become members of HTCIA, provided they pass background screening. They also must agree not to work for defense counsel in a criminal matter, and need the sponsorship of two existing HTCIA members (preferably law enforcement personnel) who are familiar with their qualifications.

A third organization, HTCN (High Tech Computer Network), also certifies computer forensic examiners and computer crime investigators who can meet rigorous standards for training and computer forensic investigation experience. HTCN is the only organization that currently offers certification for those who are not sworn law enforcement or full-time civilian employees of law enforcement agencies.[3]

Initial Concerns of an Investigative Search

A person who performs computer forensics must have more than technical knowledge, however; an understanding of how to perform the work legally is critical. Relatedly, the work must be done in a way that preserves the value and admissibility of the evidence collected. This requires the investigator to always maintain a well-documented chain of custody, and to follow industry-established procedures for the collection, preservation, and documentation of the data. At no time should the evidence media ever be altered by the investigator. (A more detailed discussion of how the work should be performed appears below.)

Clearly, when called on to search a computer the best strategy is to obtain consent, especially written consent, from one of the adults with access to the system to be searched; in general, if the search is of a home computer, any adult with such access can do so.[4] Without a valid consent (or, of course, a court order granted as part of the discovery process in a pending action), the investigator, and possibly the person who hired him or her, runs the risk of criminal and possible civil liability under both state and federal statutes.[5]

Even if consent is obtained, however, not all files will be immediately available, because some may be password-protected. The person giving consent may not know the passwords. Further, the person consenting may have specifically exempted such files from the consent. Software such as the Password Recovery Tool Kit (PRTK), by Access Data Corp.[6] can make quick work of cracking most password-protected application data files, but doing so raises the specter of a statutory violation, at least in a context other than a domestic relations matter.[7]

Although Fourth Amendment considerations that affect government searches seldom come into play for a private investigator who is not acting as an agent of the government, one must, as indicated above, be wary of committing an offense under New York State or federal law. One of the most common concerns has to do with reading someone else's e-mail. Unopened e-mail, while it is on the Internet service provider's (ISP's) mail server, may be viewed as "in transit" because it has not yet been read by its intended recipient. After it is downloaded by being opened, a copy generally will then exist on the computer's hard drive or other memory area, and thus may be seen as "in storage."

Some federal courts have made a distinction between the two with regard to liability under the Federal Wiretap Act. Under this view, accessing e-mail before it is read would be a violation, while a review after it is opened may not be.[8] However, this is an area of the law that is not well-established; as one federal appeals court has noted, "[U]ntil Congress brings the laws in line with modern technology, protection of the Internet . . . will remain a confusing and uncertain area of the law."[9]

Some matrimonial attorneys and private investigators advise their clients to install spy software on the family computer to catch a cheating spouse's chat room and e-mail communications. If the software works by capturing keystrokes or e-mails that are on the computer's hard drive, it is probably legal, subject to the concerns expressed above.[10] However, if it operates by catching the messages from the Internet data stream, they probably violate wiretap restrictions, especially if the software itself forwards the e-mail or chat room text to another e-mail address over the Internet. Although it is unlikely that prosecutors will bring wiretap charges against a spouse in domestic litigation situations, it is certainly possible that attorneys and other legal advi-

sors could be at risk by giving this kind of advice – the use of the software has to do not only with data on the client's spouse's computer, but with the operation of the commercial electronic mail system itself.

For a valuable discussion of the federal rules for seizing and searching computers, members of the public can visit a Department of Justice Web site.[11] Although the manual found at this site pertains to criminal investigations, it can serve as a useful guide to attorneys in civil practice, especially with regard to the admissibility of evidence obtained from a search.

What a Search May Yield

Assuming that the investigator has acted legally, the next question is what his or her search might yield.

A search of the family computer often yields a bounty of financial records, personal correspondences, and other probative material that can outshine almost any other source of discovery in a civil or domestic relations case. In most instances, and as noted above, either spouse can consent to a search of the family computer, even if the other spouse, or an unemancipated minor child, objects.

Many people who know something about computers have an unjustified faith in their ability to hide digital information.

It is fair to say that a good part of the value of a competent computer search lies in the fact that many people who know something about computers have an unjustified faith in their ability to hide digital information. Although it is certainly better than the time-honored act of burying the second set of books in the backyard, it is far from foolproof, and complete reliance on encryption and passwords can prove costly.

An example drawn from the author's own experience may make the point. In a domestic relations case, a hard drive contained financial records for a husband's professional practice. The computer was marital property, and the wife could and did consent to a search. The forensic examination led to the identification of a series of Quicken files containing the financial records of the business, as well as personal investments. A few of the Quicken files were password protected, but, as noted above, the Password Recovery Tool Kit can decrypt the passwords used in most common Windows applications. This tool, apparently unknown to the husband or his attorney, is capable of breaking passwords in seconds. (It should be pointed out that the company that produces this product restricts access to this and another similar program to prevent misuse.) The husband first gave consent to search all his files during discovery.

At trial, the husband's attorney was shocked to find out that the password-protected files had been opened and reviewed. The consent that allowed a search of all his files was apparently based upon the husband's mistaken belief that the password-protected files could not be read, but they were. What they revealed was a second set of financial records for the business, combinations to two safes the husband had in his home office, pornography, and notes the husband had written to himself about his strategy for limiting the amount of money he would have to divide with his wife as a result of the divorce. As one might imagine, he was not happy with the disclosure.

The Mechanics of a Search

Without attempting to give a short course on the more technical side of an investigation, it is important for an attorney to know at least the basics of how a search is conducted.

The first step in most computer forensic examinations is to make an exact copy of the data residing on the evidence hard disk (or other electronic digital storage device). This copy is made on a forensically sterile examination media (usually another hard drive or a CD-ROM). This must be done because a search conducted on the original creates both the actual and perceived problem that the original has been corrupted or altered by the person performing the analysis, rendering it subject to a disqualifying objection. The copy is what is actually evaluated but, as noted, it must be exact. There are three paramount considerations at this step.

First and foremost, the copy procedure must maintain the integrity of the original media. For this reason, making a copy from within a Microsoft Windows environment is usually not acceptable because Windows automatically writes and updates time and date stamps on each file during the copy operation. This changes the data on the source drive and violates the integrity of the original (source) media. There are hardware write-blocking devices that can be used to protect source media from these automatic changes made by Windows. By using a write-blocking device, the Windows version of Guidance Software's EnCase or Access Data's FTK Forensic Explorer can safely be used to image an evidence drive.

Although these devices are catching on with computer forensic technicians, many still use MS-DOS or Unix / Linux command line utilities for forensic imaging because these programs do not write on the source drive during the copy operation. In the MS-DOS envi-

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ronment, the disk image utility Fastback, and the DOS boot disk version of EnCase are popular. In the Linux environment the DD utility and a GUI (graphic user interface) tool called SMART are becoming popular.

The second consideration in making a forensically sound copy is that the media onto which the copy will be placed must be "forensically sterile." This requires that any previous data be removed from the copy media with a software-wiping program that is proven to remove all data from the drive. Merely reformatting a hard drive does not actually remove all files from the drive, a fact that has caught many a cyber-criminal. Access Data Corp., Maresware, and other companies sell wiping programs that have been proven to remove all data from hard drives. Special care should be taken with any wiping software that runs from within a GUI environment such as Windows, because it is usually not possible for these programs to completely access all areas of the hard drive. Any data left behind during the wipe procedure will corrupt the forensic copy of the evidence drive, and could jeopardize the entire case.

The final consideration concerns time. Once the copy is made, the forensic examination is performed using any of a number of tools. The most popular tools in the Windows environment are Guidance Software's EnCase, and Access Data Corp.'s FTK. In a typical hard drive that contains the Windows operating system, programs, and data, there may be 30,000 or more individual files. Inspecting each file manually could take weeks, if not months. Using these forensic tools can dramatically cut the amount of time required.

By eliminating known "innocent" files such as an operating system and off-the-shelf program files, as many as half the files on the hard drive may be ignored. The way these forensic tools accomplish this recognition of known program files is by use of a "hash" algorithm. A hash algorithm uses a mathematical formula to compute a unique value from each byte of data in a file. A hash is very much like a digital fingerprint that uniquely identifies a particular file. The MD5 (Message Digest 5) hash is the most common hash algorithm in use. By computing a hash code from each file on the evidence drive, and comparing the hash against a database of hash values for all known commercial software and operating system components, the forensic software can flag each of these files as known, and they can therefore be safely ignored by the investigator.

The other initial processing typically done by forensic software is to create a key word index of all words and letter combinations on the evidence drive. This allows for lightning-fast searches for certain words, such as names, or keywords (example: "bomb") that may become of interest during the investigation of that evidence drive. Another feature common to forensic software is the ability to identify and flag certain types of files, such as encrypted files, deleted files, graphics files, documents files, spreadsheets, databases, e-mails, etc. Viewers are provided to properly display each file type.

After the analysis is complete, these forensic tools produce printed reports that summarize all the evidence collected, including copies of e-mails, and thumbnail illustrations of key graphics files.

The Internet Factor

Just as there are specific software applications that have been created to assist with the forensic examination of data storage devices, there are tools used to analyze and verify e-mail, and to detect and catch hackers. This, of course, brings us to the Internet. Tracing and tracking e-mails and criminals through the Internet is possible because the communications protocol that serves as the backbone of the Net, known as TCP/IP, assigns a unique four-byte identifier to every computer device connected to the Net.

Referred to as an IP address, this identifier is often represented as four decimal numbers separated by dots, such as 123.23.12.13. Each Internet service provider (ISP) is assigned a range of IP addresses that it, in turn, assigns ("leases") to its subscribers. Some subscribers have static IP addresses that never change; others are assigned different IP addresses each time they connect to the Internet. In this latter case, ISPs maintain log files that show who was assigned any given IP address at a given date and time. However, these logs are only maintained for a matter of days or weeks, depending on the policy of the individual ISP.

The IP address of the sender is usually found in the header information that is sent with each e-mail message. Using relatively simple network tools, it is possible to get the name and contact information for the ISP who is assigned the IP address. By presenting the ISP with a search warrant in a timely manner, law enforcement can get the name and address of the subscriber who was assigned a particular IP address at a given time. It was by tracing the IP address from an e-mail sent to the media that the FBI was able, with the help of Pakistani authorities, to track down the murderers of Daniel Pearl. They were traced through a Pakistani ISP to a cyber-café in Pakistan. From that point conventional police work netted the culprits. In a civil matter, the ISPs generally will honor a court order and produce subscriber information in a similar manner to a warrant in a criminal matter.

It is important to note that e-mail headers are easily forged, especially the "from" and "reply to" fields in the

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header. One should be particularly suspicious of e-mails coming from any of the free Web-based e-mail services such as Hotmail and Yahoo. These e-mail headers are the simplest to forge and sometimes the most difficult to detect. For example, any Hotmail user can easily forge the from and "reply to" addresses in a Hotmail e-mail, and make it appear that another Hotmail user had sent it, because the rest of the headers will appear exactly as they would had the apparent sender been the actual sender. As a rule, an investigator should assume that the user information given when signing up for these free accounts is completely false. In the case of e-mail services that are not free, such as AOL, the credit card information, at least, is usually correct, and that can be a starting place for an investigation.

The key is to quickly identify and retrieve the pertinent facts before they are erased forever, and to subject the data to a fair and rigorous review by a trained expert.

"Married and Cheating in Hickory"

The author's involvement in the case that opened this article serves as a good example of how the foregoing applies to actual court matters.

I received an urgent call from the wife's distraught attorney on a Sunday morning following the developments in court described above. After he explained the particulars of the custody hearing and described the e-mail evidence, he asked if there were any way to verify whether these e-mails were real. His client and her father claimed that on the date the e-mails were allegedly sent she had no access to a computer, and that she was not the person depicted in the photo. The husband, I was told, was a computer programmer with access to his wife's Hotmail e-mail account and to various computers.

The next morning the wife's father and her attorney came to my office with a copy of the e-mails and the photo that had been given to the judge. In addition to the e-mails was a printout showing a transcript of a chat room ("Married and Cheating in Hickory"), in which the recipients of the e-mails were listed as participants.

I made note that the wife's e-mail address was not listed as a participant on the transcript, and that there was no evidence that she had ever been to that chat room. I also noted that the printed e-mails had no header information and were created using a free (and therefore unverified) Hotmail account. I was already skeptical of its authenticity because the computer-programmer husband had not seen fit to print the e-mail headers, something he would be likely to do if he wanted to prove the validity of the e-mails. There was also a digital picture of a computer screen showing an Outlook Express inbox containing several e-mails, including a copy of the wife's alleged e-mail.

Contacting the wife by telephone, I was given her Hotmail account password, and an immediate examination of the account revealed no evidence that the e-mails in question had been sent from that account. For example, none of the e-mail addresses that were recipients of the e-mails in question were in the address book. Among all the many e-mails the wife had received, there was no e-mail from any men listed as members of that chat group. There were no pornographic pictures in any e-mail.

The most interesting clue in the pages given to the court was the photograph of the Outlook Express inbox. Along with suspect e-mail there were several e-mails from the online auction site eBay. As with all e-mails from eBay, these contained unique transaction numbers in the subject line of each e-mail. I was able to use the transaction numbers to trace the e-mails to a particular eBay user, and from the online payment site PayPal was able to get a name and address for that eBay user. It was none other than the husband's sister. That left me with this question: *Was it reasonable for the wife to send an e-mail and a pornographic photo to her sister-in-law in the middle of a divorce proceeding?* The husband contended that the e-mail was sent to the sister-in-law because it contained a hidden virus meant to infect the sister-in-law's computer.

However, once I learned that the husband maintained a large collection of virus programs on a set of CD-ROMs, the focus shifted back to him as a likely source of a virus and the e-mail.

For all the reasons above, I was convinced that the e-mails could not be verified to have come from the wife and they therefore should not have been given the weight ascribed to them by the judge. I wrote a report and an affidavit detailing my investigation and conclusions. The report was given to the guardian *ad litem*, who was charged by the court with evaluating the custody situation.

As odd as it may seem given the heated nature of the proceedings, the case ultimately ended because the couple reconciled. (Whether this was in the child's best interest I leave to others.) There was therefore no need for my testimony in open court. It should be noted that the

guardian had wanted forensic analysis of the husband's sister's computer, but without consent we would have needed a court order to conduct the investigation. The information was probably long gone in any event – the ISPs likely have long since purged any log files that would have settled the matter regarding who actually sent those e-mails.

For purposes of this article, the lesson to be taken from the case is that the judge and attorneys were misled by evidence that was of little probative value – and that the law has lagged behind the technology that can be used to manipulate it.

Conclusion

Electronic evidence can be powerful, but it is often perishable and transient, and can be misleading. The key is to quickly identify and retrieve the pertinent facts before they are erased forever, and to subject the data to a fair and rigorous review by a trained expert. Courts need to provide expedited hearings in these matters so that appropriate court orders can be issued to compel the forensic examination of vital electronic evidence, and to compel ISPs to hand over log files crucial to these cases before data is lost.

Where the court is uncertain of the procedures to follow, or lacks the expertise to properly evaluate electronic evidence, special masters, who themselves are experts in the field of computer forensics, should be appointed to aid the court. In the 21st century, the American legal system must adjust to new technology, as it has in the past.

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1. To protect the identity of the parties the name of the city has been changed.
2. *See generally Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
3. More information on these certification programs is available at the HTCN Web site, http://www.htcn.org.
4. *See U.S. v. Smith*, 27 F. Supp. 2d 1111 (C.D. Ill. 1999) (live-in companion could consent to search of other party's computer, even though she used it only occasionally).
5. *See* Penal Law art. 156 (Offenses Involving Computers); 18 U.S.C. § 1030 (Computer Fraud and Abuse Act); 18 U.S.C. §§ 2510–2522 (Wiretap Act); 18 U.S.C. §§ 2701–2712 (Stored Communications Act). The federal statutes are penal in nature but also expressly provide for a private cause of action (18 U.S.C. §§ 1030(g), 2520, 2707); the New York Penal Law does not. One state court has held that no such private right can be implied. *Lawrence v. State of N.Y.*, 180 Misc. 2d 337, 688 N.Y.S.2d 392 (N.Y. Ct. Claims 1999).
6. http://www.accessdata.com.
7. *See People v. Angeles*, 180 Misc. 2d 146, 687 N.Y.S.2d 884 (Crim. Ct., N.Y. Co. 1999); *see generally People v. Versaggi*, 83 N.Y.2d 123, 608 N.Y.S.2d 155 (1994). There does not appear to be any published New York authority to the effect that a spouse's password-protected files must be considered excluded from the other spouse's consent, or even the spouse's own general consent to search the computer. Given the general ability of either spouse to consent to the search of a family computer, it appears that the objecting spouse would have a difficult time convincing a court that information found in them should be inadmissible on the sole basis that they were password-protected.
8. *Eagle Investment Sys. Corp. v. Tamm*, 146 F. Supp. 2d 105 (D. Mass. 2001); *Fraser v. Nationwide Mut. Ins. Co.*, 135 F. Supp. 2d 623 (E.D. Pa. 2001); *Steve Jackson Games v. U.S. Secret Serv.*, 36 F.3d 457 (5th Cir. 1994); *but see Konop v. Hawaiian Airlines, Inc.*, 236 F.3d 1035 (9th Cir.) (refusing to distinguish stored communications from those in transit for purposes of the Wiretap Act), *opinion withdrawn*, 262 F.3d 972 (9th Cir. 2001) *and substituted opinion*, 302 F.3d 868 (9th Cir. 2002).
9. *Konop*, 302 F.3d at 874.
10. The Stored Communications Act makes it illegal for an unauthorized person to access stored electronic information (18 U.S.C. § 2701(a)), but if the home computer loaded with this software was one to which the "spying party" had routine and unrestricted access, liability under the statute seems doubtful.
11. http://www.usdoj.gov/criminal/cybercrime/searchmanual.htm.

New Law Gives Guardians Authority to End Futile Treatment For Adults With Retardation

By Ben Golden

Beginning March 16, 2003, many parental guardians of individuals with mental retardation will have the authority to refuse futile life-sustaining treatment for their adult children as a result of the new Health Care Decisions Act for Persons with Mental Retardation (HCDA).[1] The authority is limited to guardians of individuals with mental retardation appointed under Article 17-A of the Surrogate's Court Procedure Act.[2]

The HCDA amends Article 17-A almost entirely. Key changes include: (i) a new standard of evidence for appointment of a guardian with health care decision-making authority; (ii) a comprehensive standard of review for decisions regarding life-sustaining care, at the core of which is the individual ward's "best interest"; and (iii) an extensive due process procedure for making decisions regarding life-sustaining treatment.[3]

The HCDA carves out an exception to New York State's general standard for refusing life-sustaining treatment. For nearly a decade the Legislature has tried unsuccessfully to change the standard. It requires that an individual, while competent, leave "clear and convincing" evidence of his or her wishes concerning life-sustaining treatment, usually through completion of a health care proxy or a living will.[4] Many competent individuals do not leave that evidence, and many persons with mental retardation are never competent to leave it. For them and their guardians, the standard presents an insurmountable obstacle to refusing futile life-sustaining care. New York's standard is equaled only by those in Michigan and Missouri.[5] Legislators and advocates who seek to change the general standard hope that the HCDA will eventually be a first step toward providing a means for all New Yorkers to avoid futile and aggressive medical interventions, which many believe are inhumane.[6]

Most, although not all, Article 17-A guardians are parents or other family members. Because many individuals with mental retardation never attain independence, their parents rely on Article 17-A guardianships to extend their decision-making authority into their child's adulthood. These parents widely believed that the broad discretion afforded families to make decisions based on their values included all medical decisions.[7] Not true, as some families found out in a succession of deaths involving futile life-sustaining care.[8]

Hence, on March 16th, guardianship authority will become especially important to reassure these families that if the worst happens, they can make necessary end-of-life decisions. In fact, the HCDA unambiguously clarifies the existing authority of guardians to make *all* health care decisions,[9] which will be a source of relief to many families. The HCDA's authority comes with a higher level of accountability, however. As a result, families may find Article 17-A guardianship proceedings in Surrogate's Court more demanding.

Interpreting the Standard

Lack of public awareness of the clear and convincing standard is pervasive.[10] Further, the standard is inconsistently enforced and often overlooked altogether. In one illustrative case, a Syracuse judge who stated "there's the law and there's what's right" when he ordered a stop to aggressive and futile life-sustaining care, even though the patient's condition could not meet the standard.[11]

Health care practitioners and their attorneys may construe facts to avoid strictly applying the standard "but in the process the participants face anxiety about

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legal liability, and lose respect for the law."[12] Effectively, therefore, life-and-death decisions may be made without the benefit of clear legal guidance. Still, any New Yorker can be and is subject to a "strict" application of the standard, receiving aggressive life-sustaining treatment regardless of the consequences, and individuals with mental retardation are especially prone to a strict application. For certain of those individuals, the HCDA should resolve sensitive legal and medical concerns on March 16th.

Many experts believe that in light of the gravity of the matter, courts will be asked to interpret some of the HCDA's provisions, especially given rulings by both the U.S. Supreme Court[13] and New York Court of Appeals[14] emphasizing that, as a general principle, great caution should be exercised when substituting a third party's judgment for another human being's on the issue of life-sustaining treatment. Therefore, for the foreseeable future, families should know that they may be subject to the uncertainties of an evolving area of law.

Background

The right of states to apply the clear and convincing standard was upheld by the U.S. Supreme Court in *Cruzan*.[15] In that case, the Court stated:

> The differences between the choice made *by* a competent person to refuse medical treatment, and the choice made *for* an incompetent person by someone else to refuse medical treatment, are so obviously different that the State is warranted in establishing rigorous procedures for the latter class of cases which do not apply to the former class.[16]

The challenge of finding the right "rigorous procedures" has made changing New York's clear and convincing standard extremely difficult. The Family Health Care Decision Act (FHCDA),[17] first introduced in the New York Legislature in 1994, would change the standard for all of New York's citizens.[18] But ever since its introduction, it has failed to gain legislative approval.[19] As recently as July 2002, a federal court struck down a suit against New York's attorney general for forcibly ordering futile treatment of a Syracuse woman over the objections of her family, stating that without clear and convincing evidence, "New York law simply does not allow a third party in a situation such as this to decide that the quality of life of another has declined to a point where treatment should be withheld and the patient should be allowed to die."[20] The clear and convincing standard has remained steadfast for nearly 20 years, despite repeated pleas from courts[21] and many advocates[22] for a more flexible standard.

The HCDA is an unprecedented exception to New York's clear and convincing standard. Advocates of persons with mental retardation supported the exception primarily on four grounds. First, "rigorous procedures" were adopted, which amend Article 17-A almost entirely. Many of these procedures were borrowed from the FHCDA,[23] statutes dealing with do-not-resuscitate orders (DNRs) and health care proxies.[24] Second, individuals with mental retardation are especially vulnerable to a harsh interpretation of the law. Third, families generally are accorded a special authority to make value-based decisions.[25] Article 17-A extends that authority for many families of adults with mental retardation. Last, because the clear and convincing standard is often overlooked, decisions to provide *or* refuse life-sustaining care can occur without clear legal guidance protecting affected individuals.

HCDA Overview: "Rigorous Procedures"

Life-sustaining care The "rigorous procedures" incorporated into the HCDA were endorsed by the New York State Right to Life Committee ("Committee"), a group by definition circumspect about end-of-life legislation. The Committee stated that the bill's provisions represented "a vital advance in the protections against involuntary euthanasia that will be available under New York law."[26] Indeed, the HCDA states that it is "not intended to permit or promote suicide, assisted suicide or euthanasia" or "permit a guardian to consent to any act or omission to which the mentally retarded persons could not consent if such person had capacity."[27]

The HCDA makes refusal of life-sustaining treatment the option of last resort, to be employed only when treatment is futile and inhumane. First, guardians have the "affirmative obligation to advocate for the full and efficacious provision of health care, including life-sustaining treatment."[28] "[I]n the event that a guardian makes a decision to withdraw or withhold life-sustaining treatment," the statute spells out an exhaustive procedure for implementing that decision.[29]

At the procedure's core, two physicians must agree that one of the following three conditions is present: (i) a terminal condition; or (ii) permanent unconsciousness; or (iii) a medical condition other than mental retardation "which requires life-sustaining treatment, is irreversible and which will continue indefinitely."[30] To withhold or withdraw life-sustaining treatment, the treatment must "impose an extraordinary burden" on the patient in light of the patient's medical condition (other than mental retardation) and the anticipated result of the life-sustaining treatment.[31] Withdrawal of life-sustaining artificial nutrition and hydration apply similar standards, requiring that there be "no reasonable hope of maintaining life" or that the nutrition or hydration pose "an extraordinary burden" to the patient.[32]

Perhaps the patient's ultimate protection against the wrong decision is automatic suspension, pending judicial review, of a guardian's decision to withdraw or withhold life-sustaining treatment upon the objection

of: (i) Mental Hygiene Legal Services (MHLS); (ii) persons with a close relationship to the patient; (iii) the chief executive officer of the facility where the patient resides; (iv) the Office of Mental Retardation and Developmental Disabilities (OMRDD), the state agency charged with regulating services to persons with mental retardation; (v) the patient; and (vi) the attending physician or any other involved health care practitioner.[33]

Full health care authority Provided a ward has been determined to be incapable of making his or her own health care decisions, the HCDA explicitly authorizes Article 17-A guardians to make *all* health care decisions.[34] This unambiguous clarification of existing authority should dispel any uncertainty that previously existed. Health care practitioners, concerned about clear lines of authority authorizing critical procedures, should be relieved when the surrogate is an Article 17-A guardian.

At HCDA's core is the mandate to make all advocacy and health care decisions "solely and exclusively on the best interests" of the individual with mental retardation.

Likewise, anxious family members will know that their input can't be brushed aside. This is especially important in New York State, which takes a restrictive view of all health care decisions made by third parties for all incapacitated individuals, whether or not they have mental retardation.[35]

Best interest and equal rights At HCDA's core is the mandate to make all advocacy and health care decisions "solely and exclusively on the best interests" of the individual with mental retardation.[36] From this standard spring other aspects of the law; notably, a best interests standard is far more likely to result in providing health care rather then refusing health care. This is underscored by the mandate that guardians have "an affirmative obligation to advocate for the full and efficacious provision of all health care, including life-sustaining treatment" which not only prioritizes the *provision* of health care, but also prescribes the degree of commitment – an "affirmative obligation" – required from the guardian.[37] In the past, some Article 17-A guardians have been seen as too uninvolved.

The HCDA's expansive definition of the "best interests" standard is consistent with the emphasis on the value of *all* health care decisions. The assessment of best interest must include: (i) "the dignity and uniqueness of every person"; (ii) "the preservation, improvement or restoration of the mentally retarded person's health"; (iii) "the relief of the mentally retarded person's suffering by means of palliative care and pain management"; (iv) "the unique nature of artificially provided nutrition or hydration, and the effect it may have on the mentally retarded person"; and (v) "the entire medical condition of the person."[38]

The HCDA forbids basing any health care decision on a "presumption that persons with mental retardation are not entitled to the full and equal rights, equal protection, respect, medical care and dignity afforded to persons without mental retardation or developmental disabilities."[39] This is in keeping with the spirit of developments in disabilities law, such as the Americans with Disabilities Act[40] and the Supreme Court's *Olmstead*[41] decision, which affirmed the equal rights of individuals with disabilities, including maximizing individual autonomy. Thus, the HCDA requires all Article 17-A guardianship appointments made on or after March 16th to include a determination stating whether an individual can make his or her own health care decisions.[42] This is in addition to the current and sometimes vague requirement for a determination that the individual cannot "manage him or herself and/or his or her own affairs."[43]

To further safeguard autonomy, guardians must base decisions on the patient's beliefs and wishes when these are "reasonably known or ascertainable."[44] As an additional protection, the individual's inability to make his or her own health care decisions must be reconfirmed in the event a guardian decides to withhold or withdraw life-sustaining treatment.[45]

General provisions Under the HCDA, health care providers must comply with a guardian's decision unless it is contrary to the provider's formally adopted "religious beliefs or sincerely held moral convictions."[46]

Other provisions include: (i) notice requirements for a decision to withdraw life-sustaining treatment;[47] (ii) access to all necessary records;[48] (iii) immunity from civil or criminal prosecution for health care providers, their employees and the guardian provided they have acted in good faith;[49] and (iv) patient transfer under certain circumstances.[50] If an individual is determined to have capacity to make his or her own health care decisions, the law does not prohibit guardians from making other non-health-related decisions.

Balanced health care As a historically devalued class of individuals,[51] persons with mental retardation are under-treated as well as over-treated.[52] Gruesome and extreme instances of overtreatment are relatively rare, but of enormous concern. The protections of the HCDA seek to eliminate both overtreatment and undertreatment.

The HCDA's expansion of Article 17-A attempts to achieve this balance. However, its layers of protection raise several questions. Does the HCDA appropriately balance medical treatment? For example, does an automatic suspension of a decision to stop life-sustaining treatment by any one of a number of groups with potentially diverse and strong opinions unreasonably obstruct such a decision? Will a guardian's "affirmative obligation to advocate for full and efficacious health care" overemphasize "full," thereby promoting overly aggressive treatment? Or, will "efficacious" balance the statement, ensuring that treatment is effective, not futile? Time and perhaps the courts will tell.

Narrow application The necessarily political process of crafting legislation to address sensitive issues required narrowing the bill down to its strongest arguments. For example, in many key areas, the bill creates as little new language as possible, relying whenever possible on tested language in existing related laws.[53] Further, Article 17-A corporate guardians were denied the authority to make decisions regarding life-sustaining treatment,[54] on the theory that there is a potential conflict of interest inherent in providing costly services on the one hand, and being able to make the decision to refuse life-sustaining treatment on the other. Nor do guardians appointed under Article 81 of the Mental Hygiene Law – a more prescriptive, complicated and expensive form of guardianship used for some persons with mental retardation – have the new authority.

A further consequence of narrowing the legislation was to limit it to guardians appointed under the mental retardation subcategory of Article 17-A,[55] not the developmental disabilities subcategory.[56] This exception has raised concern. Although individuals in the developmental disabilities subcategory ostensibly do not have mental retardation, some, such as individuals with traumatic brain injury and autism, are nevertheless incapable of executing an advanced directive. The legislation was crafted under the assumption that mental retardation is the sole disability that incapacitates an individual's ability to leave clear and convincing evidence. At the time, that assumption appeared correct and happened to fit with the narrowing political strategy. Further, because mental retardation is a developmental disability, some individuals may seek guardianship under the developmental disabilities subcategory, instead of the mental retardation subcategory, to avoid the pejorative implications of the term "mental retardation." However, with the expanded authority of the HCDA hanging in the balance, the choice between subcategories may become much more weighty than a choice between terminologies. Even if a family opts for the term "mental retardation" to obtain the benefits of the HCDA, however, there is still a risk that the court may choose the developmental disabilities category if the individual, as is often the case, is not only a person with mental retardation but also has developmental disabilities such as cerebral palsy.

A Mechanism for Difficult Decisions

Upon signing the HCDA, Governor Pataki recognized the dilemma faced by individuals with mental retardation, stating that "the Health Care Decisions Act will provide the mechanism through which the most difficult health care and end-of-life decisions can be made on behalf of people who were never capable of expressing their personal wishes and who might otherwise suffer prolonged and painful deaths."[57]

While the "clear and convincing" standard is problematic for all New Yorkers, the general population may benefit from "[p]hysicians and hospitals – and their counsels – [who] strive to apply New York's rule flexibly to avoid clinically intolerable results."[58] For persons with mental retardation, that flexibility is diminished and, therefore, they "may be the only large group of people in New York State who are [disproportionately] denied the opportunity to forgo inappropriate, futile and painful medical care."[59]

Many individuals with mental retardation are never competent, but other factors make them subject to a less flexible interpretation of the clear and convincing rule.

CONTINUED ON PAGE 23

SCPA 1750, 1750-b

The following laws are effective March 16, 2003.

SCPA § 1750. Guardianship of mentally retarded persons When it shall appear to the satisfaction of the court that a person is a mentally retarded person, the court is authorized to appoint a guardian of the person or of the property or of both if such appointment of a guardian or guardians is in the best interest of the mentally retarded person. Such appointment shall be made pursuant to the provisions of this article, provided however that the provisions of section seventeen hundred fifty-a of this article shall not apply to the appointment of a guardian or guardians of a mentally retarded person.

1. For the purposes of this article, a mentally retarded person is a person who has been certified by one licensed physician and one licensed psychologist, or by two licensed physicians at least one of whom is familiar with or has professional knowledge in the care and treatment of persons with mental retardation, having qualifications to make such certification, as being incapable to manage him or herself and/or his or her affairs by reason of mental retardation and that such condition is permanent in nature or likely to continue indefinitely.

2. Every such certification pursuant to subdivision one of this section, made on or after the effective date of this subdivision, shall include a specific determination by such physician and psychologist, or by such physicians, as to whether the mentally retarded person has the capacity to make health care decisions, as defined by subdivision three of section twenty-nine hundred eighty of the public health law, for himself or herself. A determination that the mentally retarded person has the capacity to make health care decisions shall not preclude the appointment of a guardian pursuant to this section to make other decisions on behalf of the mentally retarded person. The absence of this determination in the case of guardians appointed prior to the effective date of this subdivision shall not preclude such guardians from making health care decisions.

SCPA § 1750-b. Health care decisions for mentally retarded persons

1. Scope of authority. Unless specifically prohibited by the court after consideration of the determination, if any, regarding a mentally retarded person's capacity to make health care decisions, which is required by section seventeen hundred fifty of this article, the guardian of such person appointed pursuant to section seventeen hundred fifty of this article shall have the authority to make any and all health care decisions, as defined by subdivision six of section twenty-nine hundred eighty of the public health law, on behalf of the mentally retarded person that such person could make if such person had capacity. Such decisions may include decisions to withhold or withdraw life-sustaining treatment, as defined in subdivision (e) of section 81.29 of the mental hygiene law, except in the case of corporate guardians appointed pursuant to section seventeen hundred sixty of this article. The provisions of this article are not intended to permit or promote suicide, assisted suicide or euthanasia; accordingly, nothing in this section shall be construed to permit a guardian to consent to any act or omission to which the mentally retarded persons could not consent if such person had capacity.

2. Decision-making standard. (a) The guardian shall base all advocacy and health care decision-making solely and exclusively on the best interests of the mentally retarded person and, when reasonably known or ascertainable with reasonable diligence, on the mentally retarded person's wishes, including moral and religious beliefs.

(b) An assessment of the mentally retarded person's best interests shall include consideration of:

(i) the dignity and uniqueness of every person;

(ii) the preservation, improvement or restoration of the mentally retarded person's health;

(iii) the relief of the mentally retarded person's suffering by means of palliative care and pain management;

(iv) the unique nature of artificially provided nutrition or hydration, and the effect it may have on the mentally retarded person; and

(v) the entire medical condition of the person.

(c) No health care decision shall be influenced in any way by:

(i) a presumption that persons with mental retardation are not entitled to the full and equal rights, equal protection, respect, medical care and dignity afforded to persons without mental retardation or developmental disabilities; or

(ii) financial considerations of the guardian, as such considerations affect the guardian, a health care provider or any other party.

3. Right to receive information. Subject to the provisions of sections 33.13 and 33.16 of the mental hygiene law, the guardian shall have the right to receive all medical information and medical and clinical records necessary to make informed decisions regarding the mentally retarded person's health care.

4. Life-sustaining treatment. The guardian shall have the affirmative obligation to advocate for the full and efficacious provision of health care, including life-sustaining treatment as defined in subdivision (e) of section 81.29 of the mental hygiene law. In the event that a guardian makes a decision to withdraw or withhold life-sustaining treatment from a mentally retarded person:

(a) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, must confirm to a reasonable degree of medical certainty that the mentally retarded person lacks capacity to make health care decisions. The determination thereof shall be included in the mentally retarded person's medical record, and shall contain such attending physician's opinion regarding the cause and nature of the mentally retarded person's incapacity as well as its extent and probable duration. The attending physician who makes the confirmation shall consult with another physician, or a licensed psychologist, to

further confirm the mentally retarded person's lack of capacity. The attending physician who makes the confirmation, or the physician or licensed psychologist with whom the attending physician consults, must (i) be employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law, or (ii) have been employed for a minimum of two years to render care and service in a facility or program operated, licensed or authorized by the office of mental retardation and developmental disabilities, or (iii) have been approved by the commissioner of mental retardation and developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or licensed psychologist possess specialized training or three years experience in treating mental retardation. A record of such consultation shall be included in the mentally retarded person's medical record.

(b) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, with the concurrence of another physician with whom such attending physician shall consult, must determine to a reasonable degree of medical certainty and note on the mentally retarded person's chart that:

(i) the mentally retarded person has a medical condition as follows:

A. a terminal condition, as defined in subdivision twenty-three of section twenty-nine hundred sixty-one of the public health law; or

B. permanent unconsciousness; or

C. a medical condition other than such person's mental retardation which requires life-sustaining treatment, is irreversible and which will continue indefinitely; and

(ii) the life-sustaining treatment would impose an extraordinary burden on such person, in light of:

A. such person's medical condition, other than such person's mental retardation; and

B. the expected outcome of the life-sustaining treatment, notwithstanding such person's mental retardation; and

(iii) in the case of a decision to withdraw or withhold artificially provided nutrition or hydration:

A. there is no reasonable hope of maintaining life; or

B. the artificially provided nutrition or hydration poses an extraordinary burden.

(c) The guardian shall express a decision to withhold or withdraw life-sustaining treatment either:

(i) in writing, dated and signed in the presence of one witness eighteen years of age or older who shall sign the decision, and presented to the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law; or

(ii) orally, to two persons eighteen years of age or older, at least one of whom is the mentally retarded person's attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law.

(d) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, who is provided with the decision of a guardian shall include the decision in the mentally retarded person's medical chart, and shall either:

(i) promptly issue an order to withhold or withdraw life-sustaining treatment from the mentally retarded person, and inform the staff responsible for such person's care, if any, of the order; or

(ii) promptly object to such decision, in accordance with subdivision five of this section.

(e) At least forty-eight hours prior to the implementation of a decision to withdraw life-sustaining treatment, or at the earliest possible time prior to the implementation of a decision to withhold life-sustaining treatment, the attending physician shall notify:

(i) the mentally retarded person, except if the attending physician determines, in writing and in consultation with another physician or a licensed psychologist, that, to a reasonable degree of medical certainty, the person would suffer immediate and severe injury from such notification. The attending physician who makes the confirmation, or the physician or licensed psychologist with whom the attending physician consults, shall:

A. be employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law, or

B. have been employed for a minimum of two years to render care and service in a facility operated, licensed or authorized by the office of mental retardation and developmental disabilities, or

C. have been approved by the commissioner of mental retardation and developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or licensed psychologist possess specialized training or three years experience in treating mental retardation. A record of such consultation shall be included in the mentally retarded person's medical record;

(ii) if the person is in or was transferred from a residential facility operated, licensed or authorized by the office of mental retardation and developmental disabilities, the chief executive officer of the agency or organization operating such facility and the mental hygiene legal service; and

(iii) if the person is not in and was not transferred from such a facility or program, the commissioner of mental retardation and developmental disabilities, or his or her designee.

5. Objection to health care decision. (a) Suspension. A health care decision made pursuant to subdivision four of this section shall be suspended, pending judicial review, except if the suspension would in reasonable medical judgment be likely to result in the death of the mentally retarded person, in the event of an objection to that decision at any time by:

(i) the mentally retarded person on whose behalf such decision was made; or

(ii) a parent or adult sibling who either resides with or has maintained substantial and continuous contact with the mentally retarded person; or

(iii) the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law; or

(iv) any other health care practitioner providing services to the mentally retarded person, who is licensed pursuant to article one hundred thirty-one, one hundred thirty-one-B, one hundred thirty-two, one hundred thirty-three, one hundred thirty-six, one hundred thirty-nine, one hundred forty-one, one hundred forty-three, one hundred forty-four, one hundred fifty-three, one hundred fifty-four, one hundred fifty-six, one hundred fifty-nine or one hundred sixty-four of the education law; or

(v) the chief executive officer identified in subparagraph (ii) of paragraph (e) of subdivision four of this section; or

(vi) if the person is in or was transferred from a residential facility or program operated, approved or licensed by the office of mental retardation and developmental disabilities, the mental hygiene legal service; or

(vii) if the person is not in and was not transferred from such a facility or program, the commissioner of mental retardation and developmental disabilities, or his or her designee.

(b) Form of objection. Such objection shall occur orally or in writing.

(c) Notification. In the event of the suspension of a health care decision pursuant to this subdivision, the objecting party shall promptly notify the guardian and the other parties identified in paragraph (a) of this subdivision, and the attending physician shall record such suspension in the mentally retarded person's medical chart.

6. Special proceeding authorized. The guardian, the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, the chief executive officer identified in subparagraph (ii) of paragraph (e) of subdivision four of this section, the mental hygiene legal service (if the person is in or was transferred from a residential facility or program operated, approved or licensed by the office of mental retardation and developmental disabilities) or the commissioner of mental retardation and developmental disabilities or his or her designee (if the person is not in and was not transferred from such a facility or program) may commence a special proceeding in a court of competent jurisdiction with respect to any dispute arising under this section, including objecting to the withdrawal or withholding of life-sustaining treatment because such withdrawal or withholding is not in accord with the criteria set forth in this section.

7. Provider's obligations. (a) A health care provider shall comply with the health care decisions made by a guardian in good faith pursuant to this section, to the same extent as if such decisions had been made by the mentally retarded person, if such person had capacity.

(b) Notwithstanding paragraph (a) of this subdivision, nothing in this section shall be construed to require a private hospital to honor a guardian's health care decision that the hospital would not honor if the decision had been made by the mentally retarded person, if such person had capacity, because the decision is contrary to a formally adopted written policy of the hospital expressly based on religious beliefs or sincerely held moral convictions central to the hospital's operating principles, and the hospital would be permitted by law to refuse to honor the decision if made by such person, provided:

(i) the hospital has informed the guardian of such policy prior to or upon admission, if reasonably possible; and

(ii) the mentally retarded person is transferred promptly to another hospital that is reasonably accessible under the circumstances and is willing to honor the guardian's decision. If the guardian is unable or unwilling to arrange such a transfer, the hospital's refusal to honor the decision of the guardian shall constitute an objection pursuant to subdivision five of this section.

(c) Notwithstanding paragraph (a) of this subdivision, nothing in this section shall be construed to require an individual health care provider to honor a guardian's health care decision that the individual would not honor if the decision had been made by the mentally retarded person, if such person had capacity, because the decision is contrary to the individual's religious beliefs or sincerely held moral convictions, provided the individual health care provider promptly informs the guardian and the facility, if any, of his or her refusal to honor the guardian's decision. In such event, the facility shall promptly transfer responsibility for the mentally retarded person to another individual health care provider willing to honor the guardian's decision. The individual health care provider shall cooperate in facilitating such transfer of the patient.

(d) Notwithstanding the provisions of any other paragraph of this subdivision, if a guardian directs the provision of life-sustaining treatment, the denial of which in reasonable medical judgment would be likely to result in the death of the mentally retarded person, a hospital or individual health care provider that does not wish to provide such treatment shall nonetheless comply with the guardian's decision pending either transfer of the mentally retarded person to a willing hospital or individual health care provider, or judicial review.

(e) Nothing in this section shall affect or diminish the authority of a surrogate decision-making panel to render decisions regarding major medical treatment pursuant to article eighty of the mental hygiene law.

8. Immunity. (a) Provider immunity. No health care provider or employee thereof shall be subjected to criminal or civil liability, or be deemed to have engaged in unprofessional conduct, for honoring reasonably and in good faith a health care decision by a guardian, or for other actions taken reasonably and in good faith pursuant to this section.

(b) Guardian immunity. No guardian shall be subjected to criminal or civil liability for making a health care decision reasonably and in good faith pursuant to this section.

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Many lack the ability to leave a competent paper or oral trail – letters or conversations with loved ones – that can substitute for an advanced directive. Most important, however, many are participants in programs strictly regulated by the state through OMRDD.[60] OMRDD's continuous presence greatly increases the odds that health care providers will strictly follow state law.[61]

Anecdotal evidence suggests that the subset of individuals with mental retardation without families are most at risk of a strict interpretation of the clear and convincing rule. Many of these individuals previously resided in state institutions, often placed there years ago by their families. Now they reside in state-regulated group homes. Supporting memoranda for the broad-based FHCDA supports the protective role of families, stating "for patients without family members or close friends, existing practices . . . do not adequately protect these patients . . . when decisions about life-sustaining treatment must be made."[62] Family advocates appear to serve as a buffer between the law on the one hand and those health care personnel and attorneys who apply it on the other. Understandably, in the midst of an end-of-life crisis, the pleas of family members or close friends, despite what the law may say, are less likely to fall on deaf ears. This reasoning also applies to individuals in the general population who have lost capacity.[63]

The HCDA provides a detailed best interest standard for all medical decisions and clear due process for decisions regarding life-sustaining care.

Family sovereignty Families traditionally command a level of sovereignty from the state, allowing parents to apply their values to make decisions for their children. Parents of individuals with mental retardation frequently must extend that role into their child's adulthood. Article 17-A was "initiated by parents, for parents" to provide the legal basis for that extension.[64] Thus, the HCDA keeps decisions in the orbit of the family. That is critical, because the discretion of the family to make decisions on behalf of its members is often recognized as greater than the discretion of the state to make decisions on behalf of its citizens.[65]

Health care decisions are critical for all families. But because of a relationship between mental retardation and complex health issues,[66] these decisions take on special importance for a family member with mental retardation. The HCDA was premised on the notion that family sovereignty creates "a presumption in favor of family guardianship, but also create[s] a presumption in favor of the family guardian's decision,"[67] including life-sustaining treatment decisions.

The HCDA relies on the family orientation of Article 17-A to justify dispensing with the clear and convincing standard in favor of the best interest standard for end-of-life decisions.[68] The best interest standard, relying on the judgment of decision makers, is the "best available option for individuals never competent to leave any evidence of their wishes."[69] While the HCDA defines conditions for refusing life-sustaining treatment, families will use their judgment to determine if their family member should continue to live in one of those defined states. The discretionary authority accorded families to make difficult, even agonizing decisions for their family members, resonated with decision makers.[70] Said Governor Pataki: "This legislation will help ensure that people with mental retardation *and* their families" will be the ones to make end-of-life decisions.[71]

Filling a legal void At the very least, the HCDA's imperative to decide based on "best interest" starts to fill a sensitive void. Ironically the current law, requiring life-sustaining treatment regardless of the consequences, may fail to encourage such treatment when it should be used.

Thirteen years ago, Court of Appeals Justice Stewart Hancock Jr., concurring in a key decision on the clear and convincing standard, wrote that the standard is "unrealistic, often unfair and inhumane and if applied literally, totally unworkable."[72] These words characterize the current atmosphere in which health care practitioners and their attorneys "lose respect for the law,"[73] often bending or overlooking it in the process. Arguably, a law that is overlooked is no law or, at the very least, an enormously diminished law. By default it leaves confusion and no clear legal guidance for either providing *or* refusing life-sustaining care. Thus, for incompetent patients without an advanced directive or family members, "a patient receives treatment, but health care providers proceed without a clear legal substitute for patient and family consent. . . . Decisions are routinely made on an informal basis, without prospective or retrospective review."[74] When these decisions involve life and death, such practices raise profound concerns for all incapacitated New Yorkers, with and without mental retardation.

By contrast, for certain individuals with mental retardation, the HCDA provides a detailed best interest standard for all medical decisions and clear due process for decisions regarding life-sustaining care. Proponents of the FHCDA maintain that the FHCDA would do the same for New York's entire population.[75]

Conclusion

Regardless of how practitioners strive to soften the effects of the law,

> New York is [still] one of the only states to exclude families from making critical medical decisions [for] incapacitated patients with no health care proxy [who] are subject to medical decisions made by doctors who may not know the patient, or hospital and nursing home administrators and lawyers, who care more about their own legal risks than the patient's wishes and well being.[76]

Therefore, it is imperative that legal practitioners encourage all families to take advantage of existing and new grants of surrogate decision-making authority including, for families of individuals with mental retardation, the HCDA.

Meanwhile, advocates are expected to press vigorously to extend the fundamental protections of the HCDA to all incapacitated persons with mental retardation and developmental disabilities. Advocates for incapacitated individuals in the general population indicate they will press their case. Both efforts share three broad aims: (i) creation of a standard sufficiently workable to encourage respect for and consistent compliance with the law; (ii) restoration of traditional family authority to care for family members throughout all of life's phases; and (iii) humane treatment for those individuals who have no family members or friends to advocate for them. The HCDA is an extraordinary development and, many hope, the first step toward broader reform.

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1. 2002 N.Y. Laws ch. 500, S4622-B, A8466-D, signed on Sept. 17, 2002.
2. SCPA 1750 *et seq.*
3. 2002 N.Y. Laws ch. 500, S4622-B, A8466-D.
4. *In re Storar (Eichner),* 52 N.Y.2d 363, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981).
5. *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261 (1990) (affirming the Missouri standard of clear and convincing evidence of a patient's wishes made while competent as a requirement to withholding or terminating life-sustaining treatment.); *Martin v. Martin (In re Martin),* 538 N.W.2d 399 (1995), *cert. denied,* 516 U.S. 1113 (1996) (holding that Michigan courts will not authorize the removal of life-sustaining medical treatment in the absence of clear and convincing evidence of an incapacitated individual's wishes regarding the refusal of such treatment).
6. New York State Senate, Introducer's Memorandum in Support, S4622-B, Senator Kemp Hannon (2001) (hereinafter "HCDA Introducer's Memo").
7. *See* Robert M. Veatch, *Limits of Guardian Treatment Refusal: A Reasonableness Standard*, 9 Am. J.L. & Med. 437, 436–38 (1984).
8. Letter from Thomas Harmon, Executive Secretary, Medical Review Board, New York State Commission on Quality of Care, to Sylvester Zielinski, Director, Finger Lakes Developmental Disabilities Service Office (DDSO) (Dec. 21, 2001), (on file with Commission on Quality of Care); Letter from Thomas Harmon, Executive Secretary, Medical Review Board to Helene DeSanto, Director, Capital District DDSO (Sept. 20, 2001) (on file with Commission on Quality of Care) (in these three cases, futile life-sustaining care was forcibly administered and prolonged the agony of the dying process). *See Blouin v. Spitzer*, 213 F. Supp. 2d 184, 195 (N.D.N.Y. 2002) (concerning a suit against the New York Attorney general regarding treatment of Sheila Pouliot which plaintiffs maintained was futile and needlessly prolonged the woman's suffering).
9. 2002 N.Y. Laws ch. 500, S4622-B, A8466-D (stating that the guardian of a mentally retarded person "shall have the authority to make any and all health care decisions").
10. Sarah Lawrence College, Health Advocacy Program, *Results of Literacy Study Reinforce Need for the Family Health Care Decisions Act, available at* http:www.familydecisions.org/literacy.html (last visited Jan. 24, 2003).
11. Michael D. Goldhaber, *The Law vs. What's Right,* Nat'l L.J. (Mar. 27, 2000).
12. Robert N. Swidler, *Harsh State Rule on End-of-Life Care Remains in Need of Reform*, N.Y.L.J., Jan. 26, 2000, at S-4.
13. *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261 (1990).
14. *In re Westchester County Med. Ctr. ex rel. O'Connor*, 72 N.Y.2d 517, 534 N.Y.S.2d 886 (1988); *In re Storar (Eichner),* 52 N.Y.2d 363, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981).
15. *Cruzan*, 497 U.S. 261.
16. *Id.* at 287, n.12.
17. Family Health Care Decisions Act, A5523, 2001 Leg., 224th Sess. (N.Y. 2001).
18. Family Health Care Decisions Act, A5523, 2001 Leg., 224th Sess. (N.Y. 2001), Memo.
19. *Id.*
20. *Blouin*, 213 F. Supp. 2d 184.
21. *In re Westchester County Med. Ctr. ex rel. O'Connor*, 72 N.Y.2d 517, 534 N.Y.S.2d 886 (1988); *In re Storar (Eichner),* 52 N.Y.2d 363, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981).
22. *See* Family Decisions Coalition, *Organizations Supporting Family Health Care Decisions* A5523, *available at* http://www.familydecisions.org. (last modified Apr. 30, 2000).
23. Family Health Care Decisions Act, A5523, 2001 Leg., 224th Sess. (N.Y. 2001). *See* Family Decisions Coalition, *Report of 6/22/02, available at* http://www.familydecisions.org.
24. HCDA Introducer's Memo, *supra* note 6.
25. Veatch, *supra* note 7, at 446–47.
26. *See* Memorandum from New York State Right to Life Committee, In Support of Health Care Decisions Act for Persons With Mental Retardation (Senate Bill 4622, Hannon) (2001).
27. SCPA 1750-b(1) (eff. Mar. 17, 2003).
28. SCPA 1750-b(4) (eff. Mar. 17, 2003).
29. SCPA 1750-b(4)(a)–(e) (eff. Mar. 17, 2003).
30. SCPA 1750-b(4)(b)(i)(A)–(C) (eff. Mar. 17, 2003).
31. SCPA 1750-b(4)(b)(C)(ii)(A)–(B) (eff. Mar. 17, 2003).

32. SCPA 1750-b(4)(b)(C)(iii)(A)–(B) (eff. Mar. 17, 2003).
33. SCPA 1750-b(5)(a)(i)-(vii) (eff. Mar. 17, 2003). The suspension applies only to decisions made regarding life-sustaining treatment and does not apply if the suspension would in reasonable medical judgment be likely to result in the death of the patient.
34. SCPA 1750-b(1) (eff. Mar. 17, 2003). This comprehensive authority includes all health care decisions, not just end-of-life decision making, and may also help resolve continuing complex care issues associated with the treatment of persons with mental retardation, such as the administration of psycho-tropic drugs. *See Rivers v. Katz*, 67 N.Y.2d 485, 504 N.Y.S.2d 74 (1986).
35. *See* Family Decisions Coalition, *supra* note 23.
36. SCPA 1750-b(2) (eff. Mar. 17, 2003).
37. SCPA 1750-b(4) (eff. Mar. 17, 2003).
38. SCPA 1750-b(2)(b)(i)–(v) (eff. Mar. 17, 2003).
39. SCPA 1750-b(2)(c)(i) (eff. Mar. 17, 2003).
40. 42 U.S.C. §§ 12101–12213.
41. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S 581 (1999).
42. SCPA 1750-(1) (eff. Mar. 17, 2003).
43. SCPA 1750.
44. SCPA 1750-b(2) (eff. Mar. 17, 2003).
45. SCPA 1750-b(4)(a) (eff. Mar. 17, 2003).
46. SCPA 1750-b(7)(a)–(e) (eff. Mar. 17, 2003).
47. SCPA 1750-b(4)(e)(i)–(iii) (eff. Mar. 17, 2003).
48. SCPA 1750-b(3) (eff. Mar. 17, 2003).
49. SCPA 1750-b(8) (eff. Mar. 17, 2003).
50. SCPA 1750-b(7)(b)(i)–(ii) (eff. Mar. 17, 2003).
51. Eunice Kennedy Shriver, *Foreword* to The Mentally Retarded Citizen and the Law, xix (Michael Kindred et al. eds., Free Press 1976) (stating "mentally retarded individuals are always among the first to have their human rights denied, the first to be experimented on, to be placed in institutions, to be sterilized, to be allowed to wither and even be destroyed").
52. Pat Johnson, *Promoting Autonomy – Advance Directives*, Quality of Care Newsletter (N.Y.S. Comm'n on Quality of Care for the Mentally Disabled) Fall–Winter 1999–2000.
53. *See* Pub. Health Law §§ 2960 *et seq.* (New York's DNR law); Pub. Health Law §§ 2980 *et seq.* (New York State's Health Care Proxy Law).
54. SCPA 1750-b(1) (eff. Mar. 17, 2003).
55. SCPA 1750.
56. SCPA 1750-a.
57. Press release, OMRDD, "Governor Pataki Signs Health Care Decisions Act" (Sept. 29, 2002), *available at* http://www.omr.state.ny.us.
58. "They may accept as 'clear and convincing evidence' the family's recollection of a patient's isolated, informal remarks. Or they may rule out certain treatments as 'futile' because they would not restore the patient's health." *See* Swidler, *supra* note 12.
59. Adirondack Medical Center, Report for the Ethics Committee, *Medical Care of Mentally Retarded Persons* (July 2002).
60. MHL § 16.00.
61. As stated in the Adirondack Medical Center, Report for the Ethics Committee, *Medical Care of Mentally Retarded Persons* (July 2002):

    > If the incompetent mentally retarded persons have received services from OMRDD or its related facilities, then surrogacy decision-making for these patients is remarkably altered: OMRDD assumes the ultimate responsibility for making medical decisions. If OMRDD or employees in subsidiary facilities are not satisfied with a contemplated treatment plan, then they can require full aggressive treatments regardless of family, physicians, or the moral community.

62. FHCDA Memo, *supra* note 18.
63. *Id.*
64. HCDA Introducer's Memo, *supra* note 6.
65. As Robert M. Veatch noted in the American Journal of Law and Medicine,

    > Parents are permitted to make most decisions for their wards and society gives them considerable discretion in making unpopular choices. [Noted law professor] Lawrence Tribe . . . recognized the legal importance of the family unit. He said that a legal principle of governmental noninterference in matters essential to the integrity of the family can be based on the recognition of the central role of the family as an associational unit. It is this central importance of the family, said Professor Tribe, that has been the basis of court decisions dealing with family rights . . . affirming repeatedly a "private realm of family life which the state cannot enter."

    Veatch, *supra* note 7, at 446–47.
66. American Association on Mental Retardation, Mental Retardation: Definition, Classification and Systems of Support 64 (9th ed. 1992) ("people with mental retardation may have health problems that require special attention because of their complexity").
67. Veatch, *supra* note 7, at 447.
68. "This bill assures that Article 17-A guardians can perform this function even more effectively while addressing critical gaps in the existing law." *See* HCDA Introducer's Memo, *supra* note 6.
69. Veatch, *supra* note 7, at 440–41.
70. HCDA Introducer's Memo, *supra* note 6.
71. Press release, New York State Office of Mental Retardation and Developmental Disabilities, *supra* note 58.
72. *In re Westchester County Med. Ctr. ex rel. O'Connor*, 72 N.Y.2d 517, 535–36, 534 N.Y.S.2d 886 (1988).
73. Swidler, *supra* note 12.
74. FHCDA Memo, *supra* note 18.
75. *Id.*
76. *See* Family Decisions Coalition, *supra* note 23.

Statements of Material Facts In Summary Judgment Motions Require Careful Draftsmanship

By Joseph N. Campolo and Eric W. Penzer

Among the key steps in bringing or responding to a summary judgment motion pursuant to Federal Rule of Civil Procedure 56 is compliance with the local rules of all four district courts in New York State that require the moving party to submit a separate, short, and concise statement of material facts about which there are no genuine issues to be tried (a "Rule 56.1 statement").[1] The Commercial Division of the Supreme Court in both New York and Nassau Counties have similar rules.[2]

These rules were adopted to facilitate the "careful analysis of the evidence" on summary judgment motions,[3] and to streamline the consideration of such motions, by "freeing district courts from the need to hunt through voluminous records without guidance from the parties."[4] While a proper Rule 56.1 statement may assist the court in reaching the merits of the party's position, an improper statement may result in the denial of the motion based solely on the party's noncompliance with the rule.

Movant's Obligations – More Than "Cut-and-Paste"

Each statement of fact in the Rule 56.1 statement, which "will be deemed to be admitted unless controverted by the statement required to be served by the opposing party,"[5] must be followed by a citation to admissible evidence.[6]

Rule 56.1 statements are not argument.[7] Rather, the Rule 56.1 statement (1) should contain factual assertions, with citations to the record; (2) should not contain conclusions; and (3) "should neither be the source nor the result of 'cut-and-paste' efforts with the memorandum of law."[8]

The Rule 56.1 statement "is not itself a vehicle for making factual assertions that are otherwise unsupported by the record."[9] Movants should not submit additional statements of facts, such as appendices, compendia, or the like,[10] nor should they substitute affidavits or verified complaints for the Rule 56.1 statement.[11]

Lawyers who fail to cite supporting material after each assertion in the statement do so at their peril. Courts may disregard assertions contained in a Rule 56.1 statement if there are no citations, or if the cited materials do not support the factual assertions and statements.[12] Although courts have "broad discretion" to overlook a party's failure to comply with this or any other local rule, they have found a moving party's failure to comply with Rule 56.1 to be "particularly troubling," for "the moving party bears the burden of demonstrating that there is no genuine issue of material fact."[13] Accordingly, a district court may deny the motion based solely on a movant's failure to comply with Rule 56.1.[14]

When drafting a Rule 56.1 statement, attorneys should consult the judge's individual rules of practice. For example, the individual rules of at least one judge in the Southern District require a party moving for summary judgment to "present each asserted fact in an individually numbered paragraph that details and cites the documentary support for the assertion (*e.g.*, deposition, affidavit, letter, etc.)."[15]

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Non-Movant's Obligations – More Than an Answer

A party opposing a motion for summary judgment must "come forward with specific facts showing that there is a genuine issue for trial."[16] The papers opposing a motion for summary judgment should include a "separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried."[17] Thus, "[a] proper 56.1 statement submitted by a non-movant should consist of a paragraph-by-paragraph response to the movant's 56.1 statement, much like an answer to a complaint."[18]

There are two main differences between a non-movant's Rule 56.1 statement and an answer to a complaint. First, unlike an answer, each statement of "contested" material fact by the non-movant must be supported by a citation to admissible evidence.[19] A non-movant that fails to comply with this requirement runs the risk of having the movant's statements accepted by the court as undisputed.

Although Rule 56.1 does not explicitly permit the responsive party to object to a statement, such objections are not uncommon in practice.

The other difference between an answer and a responsive Rule 56.1 statement is that some responses commonly asserted in an answer are unavailable in Rule 56.1 statements. The non-movant must either assert in its Rule 56.1 statement that a particular statement of fact is contested *and* provide evidentiary support for that assertion, or concede that it is uncontested. The non-movant cannot, for example, state that it lacks knowledge or information sufficient to either admit or deny a statement of fact. In one case where the non-movants' Rule 56.1 statement was "replete with responses of 'lack of knowledge or information sufficient to either admit or deny,'" the court found the non-movants did not create "any issues of fact through this artifice."[20] In another case, a court found that "an answer that 'Plaintiff can neither admit nor deny this statement based upon the factual record' was insufficient to establish a disputed fact."[21]

Although Rule 56.1 does not explicitly permit the responsive party to object to a statement (if, for example, the movant includes statements of opinion, legal arguments, or unsupported statements), such objections are not uncommon in practice.[22] However, a better approach might be to cross-move to strike the improper portions of the Rule 56.1 statement. For example, in *Ofudu v. Barr Laboratories, Inc.*,[23] the court granted the defendant's motion for summary judgment and simultaneously granted, in part, its motion to strike parts of the plaintiff's Rule 56.1 statement. It noted that the plaintiff's Rule 56.1 statement "appears to be the statement of counsel, as it is argumentative without demonstrating any personal knowledge of the matters set forth therein." Among the statements stricken were those for which evidentiary material was not provided, those for which the evidence cited did not support the particular statement, and those supported only by unsworn conclusory statements.[24]

Effect of Failure to Contest

What effect, if any, do courts give to a movant's statement of fact that is not properly contested by the non-movant? Does the court have an obligation to search the record to confirm that the statement of fact is undisputed, or may it assume the existence of the fact solely because it was not properly contested? Courts have taken varying approaches in this situation, some adhering to the letter of the rule and deeming the statements of fact admitted with no further analysis, and some electing to perform their own review of the record.

In *Universal Calgary Church v. City of New York*,[25] the court detailed the deficiencies of the plaintiffs' response to the defendants' Rule 56.1 statement, concluding that "any of the Defendants' Rule 56.1 Statements that Plaintiffs do not specifically deny and support such denial with specific evidence, and any of Plaintiffs' 56.1 Statements not supported by reference to specific evidence, will be deemed admitted for purposes of this summary judgment motion."

In *Baker v. Dorfman, P.L.L.C.*, the court noted the deficiencies in the defendant's Rule 56.1 statement, which consisted almost entirely of admissions or denials without evidentiary support, and held that "[a]s a consequence, nearly all of the material facts set forth in plaintiff's Rule 56.1 statement are deemed admitted."[26] Nonetheless, the court went on to perform its independent review of the defendant's evidence, finding no basis to dispute the majority of the plaintiff's assertions.[27]

Similarly, in *Fernandez v. DeLeno*,[28] the court noted that the third-party plaintiff's counsel had blatantly disregarded the rule by failing to provide citations to evidence in its Rule 56.1 statement. It further noted that in two prior unrelated cases it had returned to counsel its Rule 56.1 statement with an opportunity to comply with the rule.[29] The court declined to overlook counsel's noncompliance on this third occasion, however, "deem[ing]

it improper to again refrain from applying a Rule counsel has systematically chosen to ignore."[30] Although the court deemed the assertions contained in the defendant's Rule 56.1 statement admitted for the purposes of the motion, it nonetheless reviewed the record, noting that the third-party plaintiff's claims were without merit.[31]

The Second Circuit has affirmed the grant of summary judgment based upon uncontested assertions in the moving party's Rule 56.1 statement.[32] However, in one recent case, *Holtz v. Rockefeller & Co.*, it held that a court cannot grant summary judgment to the movant based upon uncontested material statements of fact unless those statements are supported by evidence in the record.[33] The Second Circuit expressed concern that construing Rule 56.1 to authorize summary judgment to a movant "by default" would create tension between the local rule and Federal Rule of Civil Procedure 56.[34] It noted that, under Federal Rule of Civil Procedure 56, summary judgment is appropriate only when the movant meets its burden of demonstrating the absence of material issues of fact.[35] This burden remains with the movant even if no opposing evidentiary matter is presented.[36] Thus, permitting a movant to rely upon uncontested assertions contained in a Rule 56.1 statement in order to side-step Rule 56 would "be tantamount to the tail wagging the dog."[37] Accordingly, the Second Circuit stated that where "the record does not support the assertions in a Rule 56.1 statement, those assertions should be disregarded and the record reviewed independently."[38]

The Second Circuit's language in *Holtz* would appear to require the district court to confirm that each uncontested statement of fact is supported by evidence contained in the record. However, the court's actual *holding* in the case is permissive, not mandatory: "Thus, we have previously indicated, and now hold, that while a court 'is not required to consider what the parties fail to point out' in their Local Rule 56.1 statements, it may in its discretion opt to 'conduct an assiduous review of the record' even where one of the parties has failed to file such a statement."[39]

In a subsequently decided case, *Travelers Indemnity Co. of Illinois v. Hunter Fan Co., Inc.*,[40] a third-party defendant argued that the assertions contained in its Rule 56.1 statement should be deemed admitted because of the plaintiff's failure to submit a responsive statement. The court disagreed, however, noting that the third-party defendant itself failed to comply with the rule. It noted that the movant failed to cite admissible evidence in its Rule 56.1 statement, and "some of the statements of 'fact' are actually not facts at all, but are rather conclusions of law."[41] The court then cited *Holtz* for the proposition that the court has "broad discretion" to overlook a party's failure to comply with the rule and, under the circumstances, declined to deem the statements admitted.[42]

Conclusion

Rule 56.1 and its counterparts were designed to facilitate courts' analysis of the evidence on summary judgment motions. Improperly drafted statements may frustrate counsel's purpose in making the motion. To avoid the grant or denial of summary judgment on "technical" grounds, and to facilitate the court's resolution of a dispute on the merits, a practitioner should exercise diligence and caution in preparing and responding to a Rule 56.1 statement.

A movant's statement should contain only factual assertions, not legal arguments, which should be supported by citations to admissible evidence. The non-movant's statement should respond to each of the movant's factual assertions, stating whether they are contested or uncontested. In light of the Second Circuit's recent pronouncements concerning Rule 56.1 and other similar local rules, it remains to be seen what effect courts will give to assertions contained in a movant's Rule 56.1 statement where those assertions are not properly contested by the non-movant. To avoid the issue altogether, the non-movant should be sure to cite to admissible evidence demonstrating that a particular fact is in dispute, as required by the rule.

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1. Local Civil Rules of the United States District Court for the Southern and Eastern Districts, Rule 56.1 ("Rule 56.1"); Local Civil Rules of the United States District Court for the Western District of New York (Rule 56); Local Civil Rules of the United States District Court for the Northern District of New York, Rule 7.1(a)(3).
2. Commercial Division Rule 19-a.
3. *Rodriguez v. Schneider*, No. 95 Civ. 4083 (RPP), 1999 WL 459813, at *1 n.3 (S.D.N.Y. June 29, 1999).
4. *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 74 (2d Cir. 2001).
5. Rule 56.1(c).
6. Rule 56.1(d).
7. *Rodriguez*, 1999 WL 459813, at *1 n.3.
8. *Id.*
9. *See Holtz v. Rockefeller & Co.*, 258 F.3d 62, 74 (2d Cir. 2001).
10. *See id.*
11. *See Monahan v. N.Y. City Dep't of Corrections*, 214 F.3d 275, 292 (2d Cir. 2000).
12. *See Holtz*, 238 F.3d at 74 (quoting *Watt v. N.Y. Botanical Garden*, No. 98 Civ. 1095 (BSJ), 2000 WL 193626, at *1 n.1 (S.D.N.Y. Feb. 16, 2000)).
13. *See Travelers Indem. Co. of Ill. v. Hunter Fan Co., Inc.*, No. 99 Civ. 4863 (JFK), 2002 WL 109567, at *6 (S.D.N.Y. Jan. 28, 2002).
14. *See MTV Networks v. Lane*, 998 F. Supp. 390, 393 (S.D.N.Y. 1998); *Rossi v. N.Y.C. Police Dep't*, No. 94 Civ. 5113 (JFK), 1998 WL 65999, at *4 (S.D.N.Y. Feb. 17, 1998).

15. *See, e.g.*, Individual Rules of Sheindlin, J. (cited in *Union Carbide Corp. v. Montell*, 179 F.R.D. 425, 428 (S.D.N.Y. 1998)).
16. *McCarthy v. American Int'l Group, Inc.*, 283 F.3d 121, 124 (2d Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986)).
17. Rule 56.1(b).
18. *Rodriguez v. Schneider*, No. 95 Civ. 4083 (RPP), 1999 WL 459813, at *1 n.3 (S.D.N.Y. June 29, 1999).
19. Local Rule 56.1(d) provides as follows: "Each statement of material fact by a movant or opponent must be followed by citation to evidence which would be admissible, set forth as required by Federal Rule of Civil Procedure 56(e)."
20. *Aztar Corp. v. N.Y. Entertainment, LLC*, 15 F. Supp. 2d 252, 254 n.1 (E.D.N.Y. 1998).
21. *Universal Calvary Church v. City of N.Y.*, No. 96 Civ. 4606 (RPP), 2000 WL 1745048, at *2 n.5 (S.D.N.Y. Nov. 28, 2000).
22. *See, e.g., Building Serv. 32B-J Pension Fund v. Vanderveer Estates Holding, LLC*, 121 F. Supp. 2d 750, 754 n. 1 (S.D.N.Y. 2000) (noting that the defendant's objections to the plaintiffs' Rule 56.1 statement were either to immaterial facts or on the basis that the statement in question was an issue of law to be decided by the court); *Knoeffler v. Town of Mamakating*, 87 F. Supp. 2d 322, 326 n.2 (S.D.N.Y. 2000). *See also Brovarski v. Local 1205, Int'l Bhd. of Teamsters Union, Pension Plan*, No. 97-CV-489, 1998 WL 765141, at *1 n. 1 (E.D.N.Y. Feb. 23, 1998) (discussing the plaintiff's legal objections to various assertions made by the defendants).
23. 98 F. Supp. 2d 510 (S.D.N.Y. 2000).
24. *See id.*
25. 2000 WL 1745048, at *2 n.5. 99 Civ. 9385 (DLC), 2000 U.S. Dist. LEXIS 10142, at *2 (S.D.N.Y. July 21, 2000).
26. *Id.*
27. *See id.*
28. 71 F. Supp. 2d 224 (S.D.N.Y. 1999).
29. *See id.* at 227–28.
30. *Id.* at 228.
31. *See id.*
32. *Millus v. D'Angelo*, 224 F.3d 137, 138 (2d Cir. 2000).
33. 258 F.3d 62, 74 (2d Cir. 2001).
34. *See id.* at 74 n.1.
35. *See id.*
36. *See id.* (quoting Fed. R. Civ. P. 56(e), Advisory Committee note to 1963 Amendment); *accord Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970).
37. *Holtz*, 258 F.3d at 73 (quoting *Rivera v. Nat'l R.R. Passenger Corp.*, 152 F.R.D. 479, 484 (S.D.N.Y. 1993)).
38. *Id.* at 74.
39. *Id.* at 73 (quoting *Monahan v. N.Y. City Dep't of Corrections*, 214 F.3d 275, 292 (2d Cir. 2000)).
40. No. 99 Civ. 4863 (JFK), 2001 WL 1035146 (S.D.N.Y. Sept. 10, 2001).
41. *Id.* at *3.
42. *Id.*

Recent Court of Appeals Decisions Reflect Strict Interpretation Of Procedural Requirements

By Michael A. Rosenhouse

In appellate practice as elsewhere procedural error can preclude substantive victory – now more than ever.

Significant decisions by the Court of Appeals since early 2002 have mostly reinforced limitations on appellate review. And for the most part, those decisions have been favorable to the state and its political subdivisions, local governments.

The decisions have been well-crafted and in general narrowly drawn. The Court has eschewed lecture and overstatement. The Court has simply done its homework, instructing by example that we as advocates also need to do our homework.

In the civil area, the Court has strictly interpreted procedural requirements applicable to parties challenging governmental actions through an Article 78[1] petition. It has also dismissed such a challenge as moot in a case that could easily have gone the other way. But the Court also saw the CPLR's automatic stay provision[2] as applicable to second-level appeals, from the Appellate Division to the Court of Appeals, in a case in which a substantial sum was at stake for the City of New York as appellant.

Similarly, on the criminal side, the Court has been strict in determining whether defendants' issues had been properly preserved for review, although where a defendant sought to persuade the Court that a missing photo made "meaningful appellate review" impossible, the Court found against him and affirmed. On the other hand, the Court has been equally strict with a prosecutor seeking to overturn a dismissal of an accusatory instrument where the relevant statute afforded no right of appeal.

A Second Automatic Stay

Summerville v. City of New York,[3] a significant decision for appellate practitioners, concerned stays pending appeal. The Court of Appeals there addressed the interplay between subdivisions (a) and (e) of CPLR 5519. The Court held that the automatic stay of CPLR 5519(a) applies not only to appeals from a trial court but to second-level appeals from the Appellate Division to the Court of Appeals, despite the fact that appeals from intermediate appellate courts are specifically addressed in subdivision (e) of CPLR 5519, which contains much stricter time limitations.

Subdivision (a) of CPLR 5519 provides for an automatic stay of all proceedings to enforce a judgment or order appealed from "pending the appeal" in certain circumstances. The stay becomes effective when the adverse party is served with a notice of appeal or an affidavit of intention to move for permission to appeal. This generally gives an appellant 30 days from the date of service of the order within which to obtain a stay, because an appellant has 30 days within which to serve and file either a notice of appeal (for an appeal as of right)[4] or a motion for leave to appeal.[5]

By contrast, subdivision (e) of CPLR 5519, entitled "Continuation of stay," has a five-day limitation period. It provides that if the judgment or order originally appealed from is affirmed or modified by the intermediate appellate court, a party that has previously obtained a stay under CPLR 5519 has five days within which to obtain a continuation of that stay by either taking an appeal or making a motion for permission to appeal. The pertinent language is: "If an appeal is taken or a motion is made for permission to appeal from such an order, before the expiration of the five days, the stay shall continue."[6]

In *Summerville*, the City of New York had obtained an automatic stay for its appeal to the Appellate Division. However, in taking its appeal from the Appellate Divi-

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sion to the Court of Appeals, the city missed the five-day deadline for obtaining a "continuation of stay" under CPLR 5519(e). The initial automatic stay therefore lapsed. The question was whether the city's subsequent motion for leave to appeal effectuated a second stay under CPLR 5519(a). The Court of Appeals held that it did. The Court expressly rejected the holding of the Supreme Court[7] that CPLR 5519(a)(1)[8] and (e) should be read "collectively" as "providing for only a single automatic stay pending an appeal, which expires unless the governmental entity seeks further appellate review within the time specified in CPLR 5519(e)." Rather, the Court held that the city obtained a new automatic stay under CPLR 5519(a) when it moved the Appellate Division for leave to appeal to the Court of Appeals.

Some language in Justice Levine's opinion in *Summerville* raises a question of whether the Court intended to limit its holding to the particular automatic stay afforded to governmental (CPLR 5519(a)(1)), as opposed to private (CPLR 5519(a)(2)–(7)),[9] litigants under CPLR 5519(a). For example, the Court said,

> The dispositive question is whether a *governmental* appellant obtains a new automatic stay under CPLR 5519(a) when it appeals or files a motion for leave to appeal from an adverse order of an intermediate appellate court, even though it allowed its original automatic stay to lapse by failing to serve and file as required by CPLR 5519(e) to continue that stay.[10]

Further, the Court said, "Our holding also fosters the public policy underlying CPLR 5519(a)(1) – to stabilize the effect of adverse determinations on *governmental entities* and prevent the disbursement of *public funds* pending an appeal that might result in a ruling in the government's favor."[11]

Nothing in the language of CPLR 5519, however, suggests that the Court's interpretation should benefit only governmental appellants. And the Court elsewhere cited CPLR 5519(a) without limiting itself to subdivision (1), the provision applicable to governmental litigants. For example, the Court said that the appeal "requires us to address the interplay between two subdivisions of CPLR 5519–CPLR 5519(a) and (e)."[12] So it is likely that the effect of *Summerville* is that private litigants too may obtain a second automatic stay under CPLR 5519(a) even if they fail to obtain the stay-continuation under CPLR 5519(e).

Summerville leaves intact the underlying framework of entitlement to an automatic stay under CPLR 5519(a). Under that framework, the cost of an automatic stay in favor of a governmental litigant remains limited to the cost of filing and serving a notice of appeal or motion for permission to appeal.[13] A private litigant, on the other hand, must give an undertaking,[14] or place property[15] or a written instrument[16] in the custody of the court in order to become entitled to the stay.

Article 78 Proceeding Mooted

Governmental litigants also benefited from two Court of Appeals decisions involving Article 78 proceedings[17] in zoning matters. In both cases the litigation was ultimately decided on procedural grounds unrelated to the merits of the underlying dispute. In *Dreikausen v. Zoning Board of Appeals*,[18] the Court dismissed an appeal by disgruntled neighbors as moot where construction had taken place while the appeal was pending and was now substantially completed, even though the appellants had sought an injunction to prevent the construction. The Court clearly implied that the petitioners did not seek an injunction early enough or vigorously enough. And in *Mendon Ponds Neighborhood Ass'n v. Dehm*,[19] the Court affirmed dismissal of a petition by a neighborhood association because the petition had been filed with the wrong clerk.

Courts have retained jurisdiction notwithstanding substantial completion "where a challenged modification is 'readily undone.'"

First, the mootness decision. In general, an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment.[20] However, this general rule raises almost as many questions as it answers, particularly in the context of a zoning dispute in which new construction is proposed and then undertaken while an appeal is pending. Evaluating a colorable claim of mootness has involved a weighing of different factors. Does the new construction itself vitiate the appeal? No. As Chief Judge Kaye acknowledged in *Dreikausen,* "structures changing the use of property most often can be destroyed. . . . [A] race to completion cannot be determinative, and cannot frustrate appropriate administrative review."[21] Thus, courts have retained jurisdiction notwithstanding substantial completion "where a challenged modification is 'readily undone.'"[22]

The chief factor weighing in favor of mootness has been "a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation," the *Dreikausen* decision said.[23] However, a good argument could be

made that the petitioners in *Dreikausen* had not been lacking in diligence. They had filed their petition only nine days after the zoning board granted the disputed variance allowing construction of condominiums and boat slips.

But the Court found it significant that the petitioners had done nothing thereafter while work commenced and foundation permits were issued – a marina was torn down, a bulkhead repaired, utilities reconfigured, and pouring of foundations begun.[24] That was the state of affairs when Supreme Court dismissed the petition on its merits. It was only then, in connection with their appeal to the Appellate Division, that the petitioners sought injunctive relief (which was denied). And even then, the Court said their request for injunctive relief was "half-hearted"[25] – they "resisted posting any undertaking" and "requested that the undertaking, if imposed at all, be 'as low as possible.'"[26]

The Court of Appeals in *Dreikausen* announced no new rules. And it expressly disclaimed relying on laches or vested rights[27] – two doctrines that lend support to the conclusion reached by the Court as well as its reasoning. Yet, merely by taking the case and deciding it on mootness grounds – an issue not addressed by the Appellate Division[28] – the Court has sent a message. It has raised the bar for an appellant seeking to avoid mootness. The conduct of the *Dreikausen* petitioners – filing their Article 78 petition right after the disputed variance was granted and then seeking an injunction pending appeal as soon as the petition was denied – was decidedly more diligent than that of the petitioners in the cases on which the Court relied.[29] One wonders why the Court made a point of the petitioners' having expressed their disinclination to give a substantial undertaking when they sought an injunction. Any non-governmental appellant would naturally prefer to be treated like the government in not having to give an undertaking to obtain an injunction pending appeal.[30] It seems almost as if the appellants lost their mootness challenge when they failed to obtain the injunction pending appeal, thus allowing construction to proceed.

Clerk of the Court

Like the petitioners in *Dreikausen*, those in *Mendon Ponds Neighborhood Ass'n v. Dehm*,[31] another Article 78 case, were not lacking in diligence. They bought their index number and filed their petition on time. But they were found to have filed it in the wrong office, *i.e.*, that of the Chief Clerk of the Supreme Court, who turned out not to be "the clerk of the court" for purposes of filing an Article 78 petition. For those purposes, it is now clear, "the clerk of the court" is the county clerk. The Supreme Court's order dismissing the petition for improper filing on this basis was summarily affirmed by the Appellate Division,[32] which was then affirmed by the Court of Appeals.

An Article 78 proceeding is a "special proceeding."[33] As such, under CPLR 304, it is deemed "commenced" by the filing of appropriate papers with "the clerk of the court in the county in which the action or special proceeding is brought."[34] As the Court explained in *Mendon Ponds*, however, CPLR 304 does not define the term "clerk of the court," but the state constitution and County Law do. The constitutional provision is limited. It states only that the clerks of the several counties "shall be clerks of the supreme court,"[35] thus leaving open the possibility that the actual clerk of the Supreme Court could also be a qualified clerk of the court under CPLR 304. But the County Law is more specific. It provides that "the county clerk shall . . . be *the* clerk of the supreme court and clerk of the county court within his county."[36] The Court of Appeals was impressed by this language. It held that "the Legislature . . . has declared that there shall be a single clerk, and that the county clerk shall be the clerk of the Supreme Court."[37]

In *Mendon Ponds* as in *Summerville*, the Court's parsing of the statutory language was unassailable. Yet the Court's conclusion was essentially that the clerk of the court is not "the clerk of the court" – a holding that may have struck some as requiring further defense. So it was appropriate for the Court to respond, and the Court did respond, to the appellants' policy argument, which was that the procedure they had followed fulfilled all of the purposes underlying CPLR 304.

The Court's discussion of policy in *Mendon Ponds* was short, citing *Fry v. Village of Tarrytown*[38] for the proposition that "adherence to [the statutory] procedure ensures that the time of filing is authoritatively fixed when the County Clerk date-stamps the papers, and that the County Clerk, as custodian of public records, is properly informed of litigation that may affect local property."[39] Yet *Fry* in fact said nothing about the County Clerk's role as custodian of public records. *Fry* was a liberalizing decision that allowed an Article 78 petitioner to stay in court even though the order to show cause that had been filed to "commence" the proceeding was unsigned. *Fry* held that the statutory filing requirements were not jurisdictional,[40] and in fact, held that the state's principal interest in the filing system was "to raise money for the State coffers, which is accomplished by requiring the payment of a filing fee when an action is commenced."[41] In *Mendon Ponds*, that revenue purpose was fulfilled when the petitioners bought their index number for $170. One is left wondering who was really harmed by the appellants' act of filing their Article 78 petition with the Supreme Court Clerk rather than the County Clerk.

On balance, then, on the civil side, the Court of Appeals' appellate practice decisions since early 2002 have increased the burden on those litigating against the state or local government. Under *Summerville*, governmental parties can get a second automatic stay pending appeal after losing in the Appellate Division, even if they missed the five-day deadline to apply for a continuation of the initial stay. Under *Dreikausen*, it becomes more difficult to maintain a justiciable controversy while appealing an adverse governmental decision that permits others to change the status quo. And under *Mendon Ponds*, practitioners who, in seeking review of government actions, took the statute too literally and assumed that the Clerk of the Supreme Court was a statutory "clerk of the court" came in for a rude awakening.

After* James, *it is not enough for defense counsel to allege unlawful discrimination in jury selection, name the jurors, and make an argument.

Criminal Procedure – Preservation

On the criminal side, the Court's important appellate procedure decisions since early 2002 have generally made it harder to reverse a conviction. In two cases, the Court found that defendants' claims had not been preserved for appeal. These included two defendants' race-based challenges to jury selection and another defendant's claim that he was unconstitutionally deprived of his right to counsel. On the other hand, in a case where a lineup photo relied on by the trial court was missing from the record on appeal (which had only a photocopy), the Court of Appeals rejected the defendant's claim that the absence of the photo prevented meaningful appellate review of his claim that the victim's identification testimony should have been suppressed, because the lineup was improperly suggestive. On the defense side of the ledger, the Court reaffirmed statutory limits on a prosecutor's right to seek review of an order dismissing an accusatory instrument.

In general, an issue is not properly preserved for appellate review unless an objection is lodged with a certain level of specificity in the trial court.[42] The Court of Appeals has held[43] that the preservation rule has at least three rationales: (1) to ensure that the claim is brought to the trial court's attention, (2) to alert all parties to alleged deficiencies in the evidence and advance the truth-seeking purpose of the trial, and (3) to advance the goal of swift and final determination of the guilt or nonguilt of a defendant.

The practical difficulty the defendants had in *People v. James*,[44] involving allegations that the prosecutor had used peremptory challenges[45] in a racially discriminatory manner in violation of the principles of *Batson v. Kentucky*,[46] was not unusual. Their problem was that the allegedly discriminatory nature of the prosecutor's conduct did not appear until several jurors had been challenged. Once the pattern appeared, the defendants naturally objected not only to the prosecutor's challenge of the current juror but also to the prosecutor's previous peremptory challenges that, in retrospect, seemed discriminatory. In both cases on appeal in *James*, when the defendant so objected the prosecutor gave the court race-neutral reasons for having challenged all the jurors in question. This turned out to be the critical moment for the defendants' counsel for preservation purposes. Once the prosecutor had given race-neutral reasons, the burden shifted back to the defendant to show that the reasons given were pretextual.[47] This third step "permits the trial court to resolve factual disputes, and whether the prosecutor intended to discriminate is a question of fact."[48] Thus, the Court of Appeals held that when the defendants failed to renew their objections after hearing the prosecutor's specific arguments with respect to each such juror, the defendants failed to preserve their objections. Said Judge Smith:

> When . . . a party raises an issue of a pattern of discrimination in excluding jurors, and the trial court accepts the race neutral reasons given, the moving party must make a specific objection to the exclusion of any juror still claimed to have been the object of discrimination. It is incumbent upon the moving party to be clear about any person still claimed to be improperly challenged.[49]

James represents a strict enforcement of the requirement that objections be specific.[50] After *James*, it is not enough for defense counsel to allege unlawful discrimination in jury selection, name the jurors, and make an argument. Once a prosecutor answers such a *Batson* challenge, defense counsel must renew the objections to each juror in light of the prosecutor's answer in order to preserve the issue for appellate review.

Not all issues are subject to preservation rules. An exception exists in favor of reviewing unpreserved constitutional right-to-counsel claims.[51] But the Court of Appeals in *People v. Ramos*,[52] jealous of the preservation doctrine, made clear that an unpreserved claim cannot fall within the exception and gain appellate review merely by being labeled as constitutional. In *Ramos*, the Court found the purported constitutional claim to be a claim of violation of the statute[53] requiring that a person arrested without a warrant be arraigned "without un-

necessary delay." However, because the defendant had expressly disclaimed reliance on that statute – as opposed to the constitution – in his appeal, his claim was found to be unpreserved.[54] Speaking for the Court, Judge Rosenblatt said that to adopt the defendant's view by calling the claim constitutional "would skew our preservation jurisprudence."[55]

Meaningful Appellate Review

As compared with preservation principles, which tend to limit the scope appellate of review, there is a fundamental right of effective appellate review of a criminal conviction that, if violated, at least theoretically entitles a defendant to a reversal of the conviction. That right was reaffirmed by the Court of Appeals in *People v. Jackson*[56] and *People v. Yavru-Sakuk*.[57] But the Court held in both cases that the loss of an exhibit did not necessarily deprive a defendant of this fundamental right. In so holding, the Court made clear that a defendant would encounter a number of procedural obstacles and logical burdens before becoming entitled to a reversal of a conviction based on loss of the right of effective appellate review.

In general, the Court of Appeals in its appellate procedure decisions since early 2002 has taken a modest view of its own role and the role of New York appellate courts.

Thus, the Court said, there is a

> presumption of regularity which attaches to a judicial proceeding and the unavailability of an exhibit, either because it has been lost or inadvertently destroyed, standing by itself, will not rebut that presumption. Indeed, to rebut the presumption, the defendant has the burden to make an appropriate showing that alternative methods to provide an adequate record are not available. Therefore, a reversal is appropriate only when a record cannot be reconstructed because of the lapse of time, the unavailability of the participants in the proceeding or some similar circumstance.[58]

Accordingly, before finding that effective appellate review is impossible, a procedure must be followed.

> "An appellate court must first determine whether the exhibit has 'substantial importance' to the issues in the case or is essentially collateral." Then, if the exhibit is needed to resolve the issues raised on appeal, the appellate court must discern whether the record otherwise reflects that information. If the information is reflected in the record and its accuracy is not disputed, the loss of the exhibit itself would not prevent proper appellate review. However, if the exhibit contains important information that is not otherwise available in the record, a reconstruction hearing should be ordered by the appellate court unless the defendant establishes the futility of such a hearing.[59]

In *Jackson*, the defendant had moved to suppress identification testimony on the ground that the lineup at which he was identified was unduly suggestive[60] because the lineup "fillers" were significantly older. At the *Wade* hearing[61] on this issue, the trial court based its denial of the defendant's motion on its own examination of the lineup photograph. At trial, however, the photo was missing and a photocopy was used instead. (The court noted that the defendant did not object to the introduction of the photocopy and actually used it in summation.) The defendant was convicted and his conviction was affirmed by the Appellate Division. The question confronting the Court of Appeals on appeal was whether the *Wade* determination was "supported by evidence in the record."[62] Applying the analysis set forth above, the Court first acknowledged that the missing photograph was of substantial importance to appellate review of the trial court's decision not to suppress the identification testimony. But it affirmed the Appellate Division because the Court of Appeals' own "independent review of the photocopy, along with the other evidence, indicate[d] that the loss of the original photograph did not prevent proper appellate review in this case."[63] This review was not detailed, but, as noted, the Court did mention elsewhere that defense counsel had failed to object to introduction of the photocopy at trial, and had used the photocopy in summation. Implicitly, then, as in *Dreikausen*, nonverbal conduct of appellant's counsel in *Jackson* helped to dissuade the Court from adopting appellant's point of view.

In *Yavru-Sakuk*, the item missing from the record was a tape recording. A dentist had been convicted of sexual abuse for fondling a 17-year-old girl during an appointment, but his conviction was reversed by the Appellate Term. The issue was whether the loss on appeal of a trial exhibit – a tape recording of a conversation in which the defendant had responded to the victim's allegations of abuse – warranted summary reversal of the conviction on the ground that the loss deprived the Appellate Term of the ability to conduct any meaningful appellate review. The Court remanded the case to the Appellate Term to consider whether the tape had been critical to the trial court's conviction. If so, the appellate court would then need to determine whether the defendant had met his burden to establish that a reconstruction would be futile. If the defendant had not met this burden, the Court held, the appellate court should hold the

appeal in abeyance and remit the matter to Criminal Court for such a hearing. "If reconstruction of the tape is accomplished," said the Court of Appeals, "the court should then address all issues raised but not decided in the initial appeal. If reconstruction of the tape was deemed necessary but was not accomplished, the court should reverse the judgment of conviction and sentence and dismiss the accusatory instrument."[64]

Thus, an appellant seeking to protect the right of meaningful appellate review faces obstacles; new facts must be shown. While the Court of Appeals reaffirmed the fundamental right of effective appellate review of a criminal conviction, it remains difficult for a defendant to take advantage of that right.

Statutory Appeals Only

Of course, prosecutors did not win all their cases in the Court of Appeals. The Court held in *People v. Hernandez*[65] that if an accusatory instrument against a defendant arrested without a warrant is dismissed pursuant to CPL § 140.45,[66] the People have no right to appeal such a dismissal under CPL § 450.20(1).[67] The latter statute allows for appeals from certain specific orders of dismissal but does not mention the former statute.

Such a holding is not novel. It has long been established that no appeal lies from a determination made in a criminal proceeding unless specifically provided for by statute.[68]

The Court's brief discussion of the applicable statute in *Hernandez* aptly epitomizes its more general reluctance – and that of appellate courts generally[69] – to entertain appeals where there is no requirement to do so:

> [C]ourts must construe clear and unambiguous statutes as enacted and may not resort to interpretive contrivances to broaden the scope and application of statutes. This is especially so in one of the most highly structured and highly particularized articles of procedure – appeals. Where a statute delineates the particular situations in which it is to apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.[70]

In general, as in *Hernandez*, the Court of Appeals in its appellate procedure decisions since early 2002 has taken a modest view of its own role and the role of New York appellate courts. It has construed statutes literally. It has decided cases on narrow grounds, eschewing grandiose pronouncement and needless dictum. It has avoided expanding either appellate court jurisdiction or the scope of review. And in doing all these things the Court has made it just a bit more difficult to take a successful appeal.

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1. CPLR Art. 78, "Proceeding against body or officer."
2. CPLR 5519(a).
3. 97 N.Y.2d 427, 740 N.Y.S.2d 683 (2002).
4. CPLR 5513(a).
5. CPLR 5513(b).
6. CPLR 5519(e).
7. The trial court found itself confronted with a stay issue when it was required to decide whether or not the city had posted an annuity contract as security for a judgment "within thirty days after the date the judgment [was] entered" pursuant to CPLR 5043(a). If the city had been found tardy, it would have suffered acceleration of payments of its structured judgment under CPLR 5044. Given the benefit of a second automatic stay, however, the Court of Appeals specifically found that the city was not liable for the acceleration. 97 N.Y.2d at 434–35.
8. CPLR 5519(a)(1) pertains to "the state or any political subdivision of the state or any officer or agency of the state or of any political subdivision of the state."
9. CPLR 5519(a)(2)–(7) provides for automatic stays where a litigant gives an appropriate undertaking, or deposits property or a legal instrument with the court under certain circumstances.
10. 97 N.Y.2d at 431 (emphasis added).
11. *Id*. at 433–34 (emphasis added).
12. *Id.* at 430.
13. CPLR 5519(a)(1).
14. CPLR 5519(a)(2), 5519(a)(3), 5519(a)(6).
15. CPLR 5519(a)(4).
16. CPLR 5519(a)(5).
17. Article 78, which replaced the former writs of certiorari to review, mandamus, and prohibition (*see* CPLR 7801), is used to challenge actions of governmental bodies from all three branches.
18. 98 N.Y.2d 165, 746 N.Y.S.2d 429 (2002).
19. 2002 N.Y. LEXIS 3144 (Oct. 17, 2002).
20. *Wisholek v. Douglas*, 97 N.Y.2d 740, 743 N.Y.S.2d 51 (2002).
21. 98 N.Y.2d at 172.
22. *Id.* at 173.
23. *Id*.
24. *Id*. at 171.
25. *Id*. at 174.
26. *Id.* at 171.
27. *Id.* at 173–74 n.1.
28. *Dreikausen v. Zoning Bd. of Appeals*, 287 A.D.2d 453, 731 N.Y.S.2d 54 (2d Dep't 2001).
29. 98 N.Y.2d at 173 (citing *Imperial Improvements, LLC v. Town of Wappinger Zoning Bd. of Appeals*, 290 A.D.2d 507, 736 N.Y.S.2d 409 (2d Dep't 2002)) (no injunction or stay sought); *Fallati v. Town of Colonie*, 222 A.D.2d 811, 634 N.Y.S.2d 784 (3d Dep't 1995) (no injunction sought before Appellate Division); *Naselli v. Gribuski*, 206 A.D.2d 838, 616 N.Y.S.2d 302 (4th Dep't 1994) (no injunction or stay sought); *Stockdale v. Hughes*, 189 A.D.2d 1065, 592 N.Y.S.2d 897 (3d Dep't 1993) (same); *Ughetta v. Barile*, 210 A.D.2d 562, 619 N.Y.S.2d 805 (3d Dep't 1994), *leave denied*, 85 N.Y.2d 805 (1995) (proceeding commenced after construction completed).
30. As discussed above, CPLR 5519(a)(1) gives a governmental litigant an automatic stay pending appeal without the necessity of an undertaking.
31. 2002 N.Y. LEXIS 3144 (Oct. 17, 2002).

32. *Mendon Ponds Neighborhood Ass'n v. Dehm*, 292 A.D.2d 859, 738 N.Y.S.2d 911 (4th Dep't 2002).
33. CPLR 7804(a).
34. CPLR 304. The provision was amended effective July 1, 2002, to eliminate the requirement to file either a notice of petition or order to show cause in order to commence the proceeding. L. 2001, ch. 473 § 1. The amended provision requires only the petition itself for commencement. But this amendment did not affect the reasoning or result in *Mendon Ponds*.
35. N.Y. Const. Art. VI, § 6(e).
36. County Law § 525(1) (emphasis added).
37. 2002 N.Y. LEXIS 3144, *3.
38. 89 N.Y.2d 714, 658 N.Y.S.2d 205 (1997).
39. *Mendon Ponds*, 2002 N.Y. LEXIS 3144, *4.
40. 89 N.Y.2d at 718 ("none of the provisions of the filing statute purport to limit or condition Supreme Court's 'competence' to entertain particular categories of actions").
41. 89 N.Y.2d at 719. Under the old system, an action could be commenced merely by serving process, without filing or paying any clerk's fee.
42. *See People v. Fleming*, 70 N.Y.2d 947, 948, 524 N.Y.S.2d 670 (1988).
43. *People v. Gray*, 86 N.Y.2d 10, 20–21, 629 N.Y.S.2d 173 (1995).
44. 2002 N.Y. LEXIS 3804 (Dec. 17, 2002).
45. In a footnote, Judge Smith observed that U.S. Supreme Court Justice Thurgood Marshall and several judges of the New York Court of Appeals had questioned the peremptory procedure and called on the Legislature to revisit peremptory challenges, adding, "I join with those members of this Court, past and present, who urge the Legislature to take a hard look at the issue of peremptory challenges." 2002 N.Y. LEXIS 3804, *13 n.4 (Dec. 17, 2002). The Criminal Procedure Law (CPL) allows prosecution and defense each 20 peremptory challenges in trials of class A felonies, 15 in class B or C, and 10 in all other cases, plus two for each alternate juror to be selected. CPL § 270.25.
46. 476 U.S. 79 (1985).
47. 2002 N.Y. LEXIS 3804, **7–10.
48. *Id*. at **9–10 (citing *People v. Allen*, 86 N.Y.2d 101, 110, 629 N.Y.S.2d 1003 (1995)).
49. *Id.* *12–13.
50. *See People v. Fleming*, 70 N.Y.2d 947, 948, 524 N.Y.S.2d 670 (1980).
51. *People v. Samuels*, 49 N.Y.2d 218, 424 N.Y.S.2d 892 (1979).
52. 99 N.Y.2d 27, 750 N.Y.S.2d 821, 2002 N.Y. LEXIS 3372, *18 (2002).
53. CPL § 140.20(1).
54. 99 N.Y.2d 27, 750 N.Y.S.2d 821, 2002 N.Y. LEXIS 3372, **18–19.
55. *Id*. at *17 (citations omitted).
56. 98 N.Y.2d 555, 750 N.Y.S.2d 561 (2002).
57. 98 N.Y.2d 56, 60, 745 N.Y.S.2d 787 (2002) (citing *People v. Harrison*, 85 N.Y.2d 794, 796, 628 N.Y.S.2d 939 (1995); *People v. Montgomery*, 24 N.Y.2d 130, 132, 299 N.Y.S.2d 156 (1969); and CPL § 450.10).
58. *Yavru-Sakuk*, 98 N.Y.2d at 60 (citations and quotations omitted).
59. *Jackson*, 98 N.Y.2d at 560 (citing and quoting *Yavru-Sakuk*, 98 N.Y.2d at 60).
60. *See People v. Chipp*, 75 N.Y.2d 327, 335, 553 N.Y.S.2d 72 (1990).
61. *U.S. v. Wade*, 388 U.S. 218 (1967).
62. 98 N.Y.2d at 559.
63. *Id.* at 560.
64. 98 N.Y.2d at 61–62.
65. 98 N.Y.2d 8, 743 N.Y.S.2d 778 (2002).
66. CPL § 140.45 provides:

> If a local criminal court accusatory instrument filed with a local criminal court pursuant to section 140.20, 140.25 or 140.40 is not sufficient on its face, as prescribed in section 100.40, and if the court is satisfied that on the basis of the available facts or evidence it would be impossible to draw and file an accusatory instrument which is sufficient on its face, it must dismiss such accusatory instrument and discharge the defendant.

67. CPL § 450.20(1) provides: "An appeal to an intermediate appellate court may be taken as of right by the people from the following sentence and orders of a criminal court: 1. An order dismissing an accusatory instrument or a count thereof, entered pursuant to section 170.30, 170.50 or 210.20."
68. *Hernandez*, 98 N.Y.2d at 10 (citing *People v. Stevens*, 91 N.Y.2d 270, 277, 669 N.Y.S.2d 962 (1998)).
69. "An appeal, Hinnissy, is where ye ask wan coort to show its contempt f'r another coort." Finley Peter Dunne, Mr. Dooley Says: The Big Fine, *reprinted in* Mr. Dooley on the Choice of Law 42 (Edward J. Bander ed., 1963).
70. *Hernandez*, 98 N.Y.2d at 10 (citations and quotations omitted).

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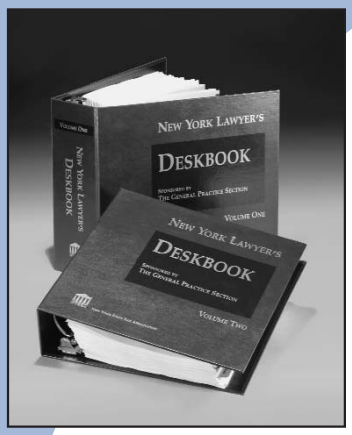

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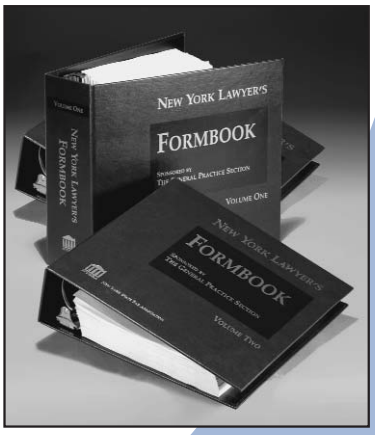

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"Final Regulations" Set Rules For Distributions From IRAs And Qualified Retirement Plans

By Susan Slater-Jansen and Avery Neumark

"Final Regulations" issued by the Internal Revenue Service last year provide guidance that has been lacking for anyone who has assets in an Individual Retirement Account (IRA),[1] a Qualified Retirement Plan,[2] an annuity contract,[3] certain types of deferred compensation plans for governmental employees,[4] or annuity contracts and custodial or retirement income accounts maintained by charitable organizations or public schools.[5]

In addition, the IRS provided "Temporary Regulations"[6] covering the rules for Required Minimum Distributions (RMDs) for defined benefit plans and annuity contracts. The IRS indicated that the "temporary" approach was taken, in lieu of "final" or additional proposed regulations, to provide more time to finalize the regulations.

This article focuses mainly on how the regulations affect participants in IRAs. In general the rules apply to employer-sponsored plans and retirement plans governed by IRC §§ 401(a), (b), (k), 403(b) and 457(d)(2), subject to rules and options contained within the plan documents themselves. Because wide variations often exist within these documents, however, it is *imperative* that anyone who advises participants with respect to these plans read all plan documents carefully before offering any advice on the options the individuals may have.

The Final Regulations do not depart significantly from the dramatic changes that the "Proposed Regulations" issued in 2001[7] made in the method for calculating Required Minimum Distributions. The final version does, however, involve several refinements, namely:

• New tables[8] are provided for calculating the life expectancies that are a key component in arriving at the yearly RMDs from a plan. The tables reflect the trend toward longer life expectancies. The result, in almost all cases, is that the Applicable Distribution Period during which plan benefits must be withdrawn extends over more years. That, in turn, means that the yearly RMDs are less, allowing larger amounts to continue earning tax-deferred interest in the plan account during a participant's lifetime.

• The deadline for identifying a deceased participant's "Designated Beneficiaries" is September 30 (rather than December 31) of the year following the year of the participant's death.[9] The deadline for providing documentation to the plan administrator (*i.e.*, the IRA custodian) where a trust is a Designated Beneficiary is October 31 (rather than December 31) of the year following the year of the participant's death.[10]

• In calculating the length of the Applicable Distribution Period (ADP) during which distributions must be made, the tables provided continue to assume that a participant has chosen an individual beneficiary who is 10 years younger,[11] with one exception. That exception applies if the participant's *sole* Designated Beneficiary is a spouse who is more than 10 years younger.[12]

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New Tables

The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) mandated the issuance of new life expectancy tables to reflect the fact that people are living longer and no adjustments have been made since 1983. In general, the new tables will require smaller annual distributions than the previous tables.

Uniform Lifetime Table This table is used for RMDs during lifetime of any account owner (with the one exception listed in the next paragraph). This table is a recalculation table based on the owner's age and a beneficiary 10 years younger, and is used regardless of the Designated Beneficiary's age or whether there is a Designated Beneficiary.[13]

Joint and Last Survivor Table This table is used only if a spouse is the Designated Beneficiary and is more than 10 years younger than the account owner.[14]

Single Life Table This table is used in most cases after the death of the account owner to determine the beneficiary's distribution period.[15]

The deadline for identifying a deceased participant's "Designated Beneficaries" is September 30 of the year following the year of the participant's death.

Designated Beneficiaries

Separate accounts for Designated Beneficiaries generally should be established by December 31 of the year following the year of a participant's death. They then take effect in the following year.

If a beneficiary designated by a participant or pursuant to terms of the IRA or Qualified Plan document, makes a qualified disclaimer under Internal Revenue Code § 2518 (IRC), or receives his or her entire benefit before September 30 of the year following the participant's death, that beneficiary will not be considered a Designated Beneficiary whose age must be considered in calculating the Applicable Distribution Period (ADP) for the Required Minimum Distributions (RMDs) of the successor or remaining Designated Beneficiaries. Unlike the proposed regulations issued in 2001, however, if a beneficiary dies before September 30 of the year following the participant's death (without disclaiming or receiving his or her share of the death benefit), he or she will still be considered a Designated Beneficiary for purposes of finding the correct ADP to calculate the RMDs of the Designated Beneficiary (regardless of whether there is a designated successor individual beneficiary).

IRS reporting requirements have also been simplified for IRA participants (but not necessarily for IRA custodians or Qualified Plan trustees). Under the Final Regulations, the IRA custodian as of December 31 of the prior year must supply the participant with a report of *either* (a) the actual amount of his or her RMD with respect to that calendar year, along with the date such amount must be distributed, using the Uniform Table, ignoring the identity of the participant's Designated Beneficiary and all amounts contributed by the participant after December 31 of the prior year; or (b) the RMD due date, with an offer to supply the participant with a calculation of the exact amount due. If the participant requests such a calculation, the custodian must provide it (taking into account the participant's actual Designated Beneficiaries).

Such reports were first due to participants on January 31, 2003. Under the Final Regulations, the IRA custodian must report to the IRS that an RMD is due but not the amount that must be distributed. The reporting requirement to the IRS is effective for RMDs due for the 2004 Plan Year. Note, however, that no such reporting is required for beneficiaries after a participant's death or for 403(b) plans.[16]

Applicable Distribution Periods

RMDs will generally be calculated using the ADP taken from the new Uniform Lifetime Table, which assumes the participant has a Designated Beneficiary 10 years younger. If the *sole* Designated Beneficiary of a participant's IRA (or "separate share") is the participant's spouse who is more than 10 years younger than the participant, the RMD will be calculated using the ADP based on their actual ages in each distribution year, using the new Joint and Last Survivor Table.

Under the prior rules, in order to qualify for the exception involving a much-younger spouse, the participant and the spouse had to be married for the entire distribution year. The Final Regulations provide exceptions to the exception, so that if the participant and the spouse are married on January 1 of a distribution year and the spouse dies during the year, the new Joint Life Expectancy Table can still be used for that year, even if a new Designated Beneficiary is named. If the participant and the spouse are divorced during the year, as long as the participant does not name a new Designated Beneficiary in that year, the divorced spouse will continue to be Designated Beneficiary for that year. In either event, during the lifetime of the participant, the much-younger spouse exception will not apply in each distribution year following the divorce or the spouse's death, and (unless the participant names a new spouse who is more than 10 years younger than the participant as the new Designated Beneficiary) the participant will have to go

Publications on the Web

The full text of the new Final Regulations is available from the Internal Revenue Service Web site. Go to http://www.irs.gov and click on Retirement Plans. Then under EP Published Guidance, click on Guidance. Click on T.D. 8987, 67 Fed. Reg. 18988 (April 17, 2002), 2002-19 I.R.B. 852, and then scroll to page 852 (http://www.irs.gov/pub/irs-irbs/irb02-19.pdf).

Also helpful are IRS Publications 590 and 590 SUPP, *Individual Retirement Arrangements.* It is available on the IRS Web site as well. Take the Publications option and follow instructions for downloading (http://www.irs.gov/pub/irs-pdf/p590.pdf).

A private site, http//www.benefitslink.com, also provides informative material, including a summary of some corrections to what was published in the Federal Register.

back to using the new Uniform Table in the following distribution year.[16]

Choosing the Designated Beneficiary

The Final Regulations confirm that naming a charity as a Designated Beneficiary will have no effect on RMDs during the participant's lifetime, because participants may use the new Uniform Table during their lifetimes regardless of whether there is a Designated Beneficiary. If a participant is charitably inclined, choosing a charity or charitable trust as a Designated Beneficiary of part or all of his or her IRA now makes even better estate planning sense. Death benefits from IRAs, Qualified Plans and all other plans subject to the Final Regulations are subject to IRC § 691, and thus these benefits are subject to both estate and income taxation. Charities receiving these benefits are generally not subject to either estate or income tax. Therefore, as long as the charity or charitable trust receives its complete distributable share as a Designated Beneficiary of a deceased participant before September 30 of the year following the participant's death, the charity (or charitable trust) will receive the entire death benefit distributed to it (undiminished by any taxes, or with respect to some charitable trusts less estate taxes but no income taxes) and not be counted as a Designated Beneficiary in determining the RMDs of the remaining Designated Beneficiary(ies).

Multiple Beneficiaries

The Final Regulations change only the timing for determining the Designated Beneficiary(ies): September 30 of the year following the year of the participant's death.

Before the participant's death, the Designated Beneficiary determined on the Required Beginning Date (RBD) will have no effect on the timing and amount of the participant's distribution during lifetime – except, as noted above, if the sole Designated Beneficiary of the participant's IRA is a spouse who is more than 10 years younger. Therefore, just as in the 2001 Proposed Regulations, and subject to the spousal requirements of IRC §§ 411(a)(11) and 417(e) (which do not apply to IRAs) participants may change their Designated Beneficiaries as often as desired.

After a participant's death, however, the amount of RMDs will be determined by the life expectancy of the oldest Designated Beneficiary as of September 30 of the year following the participant's death. *Warning:* If an entity other than an individual (*e.g.*, an estate, a charity, certain trusts) is a beneficiary as of September 30 of the year following the participant's death, the participant is treated as not having a Designated Beneficiary and RMDs will be calculated accordingly.

Another clarification made by the Final Regulations is that if the participant names his or her estate as the beneficiary on a beneficiary designation form, or if the estate becomes a beneficiary by operation of law (*e.g.*, a Designated Beneficiary predeceases the participant without the participant designating a contingent beneficiary and the IRA document does not designate a successor individual (or a class of individuals) to be Designated Beneficiary(ies) in default of the participant's selection), the executor of the participant's estate cannot create Designated Beneficiaries by distributing the right to IRA benefits to the estate's beneficiaries, even if there is only one beneficiary of the estate.

If a participant has named more than one Designated Beneficiary or more than one Designated Beneficiary becomes entitled to a deceased participant's benefits pursuant to the terms of the IRA plan document (*i.e.*, if a participant dies without having designated a beneficiary and no spouse survives the participant), the participant's remaining benefit will be distributed to his or her surviving children.

The Final Regulations further clarify how to establish separate shares or accounts in IRAs and in a participant's Qualified Plan account balance. Multiple Designated Beneficiaries of an IRA or a Qualified Plan account balance, the Designated Beneficiaries as of the participant's death who are still Designated Beneficiaries on September 30 of the year following the participant's death (*e.g.*, their distributable share has not been paid out or they have not made qualified disclaimers), can divide the IRA or a Qualified Plan balance into separate shares or accounts by December 31 of the year following the participant's death (whether the participant dies before or after his or her RBD). The separate shares must allocate all post-death investment gains and losses, contributions and forfeitures for the period prior

to the establishment of the separate shares on a pro-rata basis in a "reasonable and consistent manner" among the separate shares.

Once the separate share is established, however, the life expectancy of the individual beneficiary of such separate share is used to compute post-death RMDs. In addition, the separate shares may be invested differently from each other in accordance with the desires of the individual beneficiaries. To prevent the division of separate shares or separate accounts from being deemed taxable distributions, it is essential that the separate accounts stay in the name of the deceased participant (*e.g.*, "ABC Bank as custodian for John Doe, deceased, IRA f/b/o John Doe, Jr.").

Trusts

Technically it is the beneficiaries of a trust who will be treated as the Designated Beneficiaries. The main difference between the Final Regulations and the 2001 Proposed Regulations for trusts as Designated Beneficiaries is the documentation that must be provided to the IRA custodian (or the Qualified Plan trustee) and the due dates for providing such documentation.

A trust will qualify as a Designated Beneficiary under the Final Regulations provided that:

(a) the trust is valid under state law, or would be except that it has no assets until the death of the participant

(b) the trust is irrevocable upon the death of the participant;

(c) the beneficiaries of the trust are individuals (*e.g.*, a charitable split-interest trust will not qualify) and are identifiable pursuant to the terms of the trust;

(d) the required documentation is provided to the plan administrator.

Where the trust has multiple beneficiaries, the beneficiary with the shortest life expectancy will determine the RMDs after the participant's death. Multiple trust beneficiaries cannot set up separate shares (with individual distribution periods) unlike IRA or Qualified Plan multiple Designated Beneficiaries.

During a participant's lifetime, the documentation requirements under the Final Regulations are required only if the objective is to treat the participant's spouse as the sole beneficiary of the trust and thereby qualify the spouse as the participant's sole Designated Beneficiary. To qualify, the participant must provide the plan administrator with either:

(a) a copy of the trust, and agree to provide a copy of all trust amendments within a "reasonable time" of each such amendment; or

(b) a certified list of all trust beneficiaries (primary, contingent and remainderpersons) with the condition of their benefit entitlement, in order to establish that the spouse is the sole Designated Beneficiary (in accordance with the requirements of the IRS), and agree to supply

certified corrections to the extent amendments to the trust change any of the information previously provided and agree to give the plan administrator a copy of the trust upon the plan administrator's request.

After the death of a participant, the Final Regulations require that a copy of the final version of the beneficiary-trust or a certified list of all trust beneficiaries (primary, contingent and remainderpersons) and the condition of their entitlement as of September 30 of the calendar year following the year of the participant's death, be provided to the plan administrator by October 31 of the year following the year of the participant's death.

Trusts are favored instruments of estate planners. Unfortunately, the IRS does not appear to feel the same way. The Final Regulations confirm that the only way to assure that a trust beneficiary is the sole Designated Beneficiary is for the trust instrument to require that the Designated Beneficiary be able to withdraw from the trust all distributions that the trustees take (whether RMDs or other distributions) from the IRA or the Qualified Plan's account balance. Otherwise, all contingent beneficiaries will be included as Designated Beneficiaries, and the age of the oldest Designated Beneficiary (whether primary or contingent) will be used to determine the RMDs.

Some Basic Terms Used in IRAs and Retirement Plans

The following terms apply when working with the minimum distribution rules for Individual Retirement Accounts (IRAs) and various types of employment-related retirement plans.

Required Minimum Distribution (RMD). This is the minimum amount that must be withdrawn from an IRA each year beginning with the year the account owner reaches age 70½. The first year's withdrawal may be delayed, however, until April 1 of the following year (see Required Beginning Date).[1]

Each year's RMD is determined by dividing the owner's aggregate account balances as of December 31 of the previous calendar year by the Applicable Distribution Period (ADP), a figure based on life expectancy tables.

Except for the extension to April 1 that is allowed for the first distribution, each year's RMD must be made by December 31 of that distribution year. Postponing the first required distribution until the following April 1 does not affect the need to take a distribution for the second distribution year. The RMD for the second year must still be taken by December 31 of that year. The new rules state that the first-year December 31 account balance, which is used in calculating the second-year distribution, is not reduced by an amount subsequently withdrawn to satisfy the first-year RMD.

The penalty for not taking an RMD can be 50% of the difference between the RMD and any lesser amount actually distributed.[2]

Any distribution in excess of the amount required for the first year, when taken in the second year on or before April 1, cannot be credited toward the distribution required by December 31 of the second year.[3] Distributions greater than the required minimum cannot be used to reduce the RMD in subsequent years either.

Required Beginning Date (RBD). This is the April 1 deadline for taking the first Required Minimum Distribution, even though the distribution is actually for the previous calendar year. The rules effectively provide an automatic one-time extension to allow extra time for financial planning. The second and subsequent year's RMD must be taken no later than December 31 of the same year.[4]

Applicable Distribution Period (ADP). This is a number that reflects the anticipated distribution period, the number of years in which distributions will be made from an account.

During the participant's lifetime, the ADP is the figure taken from the Uniform Lifetime Table corresponding to the participant's age in the applicable distribution year. The only exception applies when the participant's sole Designated Beneficiary is a spouse more than 10 years younger. In this case, the ADP is taken from the Joint and Last Survivor Table which provides for a longer distribution period.[5]

For the year following the year of the participant's death, the ADP is based upon the life expectancy of the oldest Designated Beneficiary (unless separate accounts are established) calculated using the beneficiary's attained age in that year. That ADP is reduced by 1 for each subsequent year. The Final Regulations increase the life expectancies and are reflected in new Uniform Lifetime, Single Life and Joint and Last Survivor Tables.

Designated Beneficiary. This must be a living person. Otherwise, the account will be treated as having no Designated Beneficiary.[6] In effect, any designee other than a living person (*i.e.*, a charity or es-

The Final Regulations make a distinction between a "contingent" beneficiary who may be entitled to a portion of a primary Designated Beneficiary's benefit (if, for example, the trustees are permitted to accumulate income in the trust) and a "successor" beneficiary, who is only entitled to the remaining benefit on the death of the primary beneficiary (where no income is permitted to be accumulated and all distributions withdrawn by the trustees from the IRA or Qualified Plan's account balance are directly turned over to the primary Designated Beneficiary). A primary beneficiary is the sole Designated Beneficiary of a trust where there are only "successor" beneficiaries and no "contingent" beneficiaries are designated by the participant. In other words, only "conduit" trusts appear to allow the life expectancies of "successor" beneficiaries to be ignored in determining which Designated Beneficiary has the shortest life expectancy.

It is also unclear whether a "Dynasty Trust," which might go on for several generations after the participant's death, will qualify as a Designated Beneficiary (because it may not be possible to identify all the "beneficiaries" until the trust terminates) unless contingent beneficiaries of the trust, living at the death of the participant, have some sort of right to compel total withdrawals from the IRA or Qualified Plan account balance upon their death (*e.g.*, by power of appointment or directed payment to their estates). Yet the IRS has taken

tate) has a life expectancy of zero, thereby precluding any option to spread distributions over that beneficiary's life expectancy. However, if a trust is designated and certain conditions are met, the beneficiaries of the trust may be treated as Designated Beneficiaries.[7] (Note the deadline for submitting a copy of the trust document or certified trust information to the plan administrator or IRA custodian has been accelerated from December 31 to October 31 of the year following the participant's death, beginning October 31, 2003.)

Before the participant's death, all except those who designate a spouse more than 10 years younger as the sole beneficiary, use the Uniform Lifetime Table to obtain the ADP without regard for the age of a Designated Beneficiary.

After the participant's death, a beneficiary may be removed under certain circumstances until September 30 of the year following the year of death to achieve a longer ADP. This might include removal of a beneficiary by qualified disclaimer (under IRC § 2518) to allow a younger contingent beneficiary's life expectancy to be considered. For a charity, which has no life expectancy, complete distribution of its share by September 30 of the year following the participant's death can permit a living beneficiary's life expectancy to control. In addition, accounts with multiple beneficiaries can be divided into separate accounts for each beneficiary. This allows each of the beneficiaries to base their pace of distributions upon their own life expectancy (this division may be made until December 31 of the year after death but should be made earlier to allow time to determine the RMD). The terms of the beneficiary designations affect whether such adjustments are available. As was true under the old rules, beneficiary designations can take on the scope and complexity of the designations used in a will or trust. The new rules make it clear that if an account passes to an individual under a will or intestate state law, such individual is not considered a Designated Beneficiary.[8]

Five-Year Rule: Under the 1987 Proposed Regulations, when a participant died before the RBD, the default rule required complete distribution of the participant's account within five years after the year of death, unless the spouse was sole beneficiary or other alternatives were provided for. The Final Regulations now default to the Life Expectancy Rule whenever there is a Designated Beneficiary.[9] Also, the Final Regulations provide an opportunity for beneficiaries saddled with the Five-Year Rule to switch to the Life Expectancy Rule if certain conditions are timely met.[10]

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1. IRC § 401(a)(9)(A).
2. IRC § 4974.
3. Treas. Reg. § 1.401(a)(9)-5, A-1(c), A-2.
4. Treas. Reg. § 1.401(a)(9)-2; Treas. Reg. § 1.408, A-3.
5. Treas. Reg. § 1.401(a)(9)-5, A-4.
6. Treas. Reg. § 1.401(a)(9)-4, A-1.
7. Treas. Reg. § 1.401(a)(9)-4, A-5.
8. Treas. Reg. § 1.401(a)(9)-4, A-1.
9. Treas. Reg. § 1.401(a)(9)-3, A-2, A-4.
10. T.D. 8987; Treas. Reg. § 1.401(a)(9)-1, A-2(b)(2); Treas. Reg. § 1.401(a)(9)-5, A-5(b).

the position that if the terms of a trust document allow for an estate to be a trust beneficiary, the trust will not qualify as a Designated Beneficiary. Obviously, further clarification by letter rulings, TAMS, amended Regulations or case law is needed with respect to drafting trusts that will qualify as Designated Beneficiaries. Until such time, the "conduit" trust appears to be the only type of trust that will definitely qualify as a Designated Beneficiary.

If a spouse who is more than 10 years younger than the participant is treated as the sole Designated Beneficiary of a trust during the participant's lifetime, the new Joint Life Expectancy table can be used to calculate the participant's RMDs. After the participant's death, distributions to the trust can then be suspended until the year the participant would have turned age 70½. *Warning:* Allowing the trustees to suspend distributions might adversely affect the marital deduction for both the IRA and the trust-beneficiary.

Trusts whether irrevocable or revocable (as long as revocable trusts become irrevocable on the death of the participant) and testamentary trusts can qualify as Designated Beneficiaries.

The Final Regulations do give some relief to plan administrators, however: if RMDs are determined based on information provided in certified statements or pursuant to trust instruments provided to the plan administrator, and the plan administrator "reasonably relied" on such information to determine the participant's RMD, incorrect distributions thus determined will not affect a plan's qualified status. The participant who supplied the information will, however, be subject to a 50% penalty tax under IRC § 4974 based on the difference between the RMD that should have been taken in any year pursuant to the actual terms of the trust in effect for the year and the amount actually distributed in that year.

As in the 2001 Proposed Regulations, *inter vivos* trusts, whether irrevocable or revocable, (as long as revocable trusts become irrevocable on the death of the participant) and testamentary trusts can qualify as Designated Beneficiaries.

Distribution Rules After Death

As in the 2001 Proposed Regulations, the Final Regulations require that when a participant dies before what would have been his or her RBD, the rules for determining the RMD depend on which of four possible scenarios applies: the participant's spouse is the Designated Beneficiary, a non-spouse is the Designated Beneficiary, multiple beneficiaries (regardless of whether they include the participant's spouse) are Designated Beneficiaries, or there is no Designated Beneficiary. The rules in each of these circumstances appear in the charts that accompany this article.

The Final Regulations keep the 2001 Proposed Regulation rule that if a participant has a non-Designated Beneficiary and dies before his or her RBD, the life expectancy rule under IRC § 401(a)(9)(B)(iii) is the default distribution rule rather than the Five-Year Rule under IRC § 401(a)(9)(B)(ii),[17] unless of course the IRA or Qualified Plan document provides otherwise.[18] The Final Regulations provide a new transition rule, which permits Designated Beneficiaries subject to the 1987 Proposed Regulations to change to the life expectancy distribution option, provided that (a) not all of the amounts due the Designated Beneficiary had already been distributed, and (b) all amounts that would have been required to be distributed under the life expectancy rule are distributed by the earlier of December 31, 2003, or by the end of the five-year period following the year of the participant's death.

If the participant dies on or after the RBD, IRC § 401(a)(9)(B)(i) requires that distributions be made "at least as rapidly" as they would have been if the participant had survived. The Final Regulations require that in the year of the participant's death, the participant's (not the beneficiary's) RMD must be distributed to the beneficiary in the year of the participnt's death, to the extent it had not already been distributed to the participant in that year.

Beginning with the year after the participant's death, the Final Regulations provide a new rule to determine the ADP if the participant has a Designated Beneficiary: the distribution period will be the longer of (a) the remaining life expectancy of the Designated Beneficiary (or the oldest Designated Beneficiary if there are multiple beneficiaries) or (b) the remaining life expectancy of the participant. Otherwise, as under the 2001 Proposed Regulations, the ADP will depend on whether the spouse is the sole Designated Beneficiary, a non-spouse is the Designated Beneficiary, there are multiple beneficiaries or there is no Designated Beneficiary. See the charts that accompany this article.

Rollover Spousal IRAs

The Final Regulations confirm that a participant's surviving spouse may elect at any time after the participant's death to treat the balance in the participant's account as the spouse's own IRA.[19] Nevertheless, the rule still holds that only a surviving spouse can make a qualified rollover or can make the election to treat the IRA as the spouse's own.[20]

Rules for Computing Required Distributions

Example 1 Effect on married couples of the new rules for calculating life expectancies and the benefit of the new tables.

Roseann's IRA account balance on December 31 in the year before she reached age 70½ was $1 million. Her birthday is June 6th, so she will actually reach her 71st birthday in the same year she reaches age 70½. Roseann's Designated Beneficiary is her husband, Kevin, who will be 73 in that same year.

Under the 1987 rules, Roseann's Applicable Divisor for her first RMD would have been 19 and her first RMD would have been $1 million ÷ 19 = $52,632.

Using the 1987 MDIB Table under the 2001 rules, her Applicable Divisor denominator would have been 25.3, even if she did not have a Designated Beneficiary. Her first RMD would be $1 million ÷ 25.3 = $39,526. Under the Final Regulations, the ADP from the 2002 MDIB Table is 26.5, reducing her first RMD to $37,736.

Example 2 Applicable Divisor when spouse's age difference is more than 10 years and the benefit of the new Tables.

On his Required Beginning Date, Donald, a widower, named his children as Designated Beneficiaries of his IRA. After taking three Required Minimum Distributions using the Uniform Distribution Table, at age 74 he marries Daisy, age 44 and names her as his sole Designated Beneficiary.

Donald is now 75, Daisy is 45, and their joint life expectancy from the old Joint Life and Last Survivor Table is 38.1 (compared with 21.8 from the Uniform Distribution Table). The following year, their joint life expectancy would have been 37.1. Under the new Joint and Last Survivor Table, their joint life expectancy is 39.2 and 38.2 the following year.

The net result is that Donald's Required Minimum Distribution each year is the least under the new table and more assets will remain in the account over a longer period.

Example 3 Effect of ability to fix the Designated Beneficiary after death under final rules.

Alice, a widow, designates a charity to receive $100,000 of her 401(k) death benefit, and her son, Regis, to receive the balance.

Under the Final Regulations, Alice would be treated as not having a Designated Beneficiary unless distribution of the $100,000 to charity is made before September 30 of the year following the year of her death. If the charitable distribution is made, Regis will be her Designated Beneficiary.

Example 4 ADP when there is ultimately no Designated Beneficiary.

Jane died at age 76 without naming a Designated Beneficiary to receive her 401(k) death benefit, and the plan document did not provide a Default Designated Beneficiary. Her life expectancy in the year of her death under the new Single Life Table is 12.7 years.

The ADP that her estate must use in the year after her death is 11.7 years. In subsequent years, it will be 10.7, 9.7, 8.7 years, etc.

If Jane died at age 66 without naming a Designated Beneficiary, the Five-Year Rule would apply.

Example 5 ADP when a non-spouse is ultimate Designated Beneficiary.

Steven died at age 80. His wife, Jean, his primary Designated Beneficiary, died two years earlier. Steven had named as his successor Designated Beneficiary a qualifying trust for the benefit of his children.

Steven had not taken his Required Minimum Distribution in the year of his death. The Trustees will have to withdraw and distribute to his children his RMD before December 31 of that year, using 18.7 as the ADP, as provided in the new Uniform Life Table for a person age 80. As long as a copy of the trust is delivered to the IRA custodian by October 31 of the year following Steven's death, the RMD to the children through the qualifying trust that year will be based on the ADP in the new Single Life Table for the age of the oldest child who is a Designated Beneficiary. The ADP will decrease by 1 in each subsequent year until the benefit is fully distributed.

Example 6 No deduction for first RMD made April 1 of year after age 70½.

Samuel's IRA account balance on December 31, 2001, the year before he reached age 70 and 70½ is $500,000. His RBD is April 1, 2003. Assume his account balance at December 31, 2002 is $400,000. Under the Final Regulations, if he postpones his 2002 RMD until April 1, 2003, this distribution would be calculated as $500,000 divided by 27.4 or $18,248. Samuel must take a second distribution no later than December 31, 2003. The second distribution would be $400,000 divided by 26.5 or $15,094. The $400,000 would not be reduced by $18,248.

To qualify for this election, the spouse must be the sole Designated Beneficiary of the IRA or separate share of the IRA (or be a beneficiary at the participant's death and make a rollover of his or her share by September 30 of the year following the participant's death) *and* have the unlimited right to withdraw amounts from the IRA. If a trust is named as the Designated Beneficiary, the spouse may not make a rollover, even if the spouse is the sole beneficiary of the trust. If the spouse makes the election in the year of the participant's death, only the balance of the participant's RMD must be taken by the spouse in that year, even if the spouse is also over age 70½ at the participant's death.[21]

The surviving spouse is deemed to have made a rollover election if at any time either of the following occurs: (a) any amount in the IRA that would be required to be distributed to the spouse as a *beneficiary* is not paid out; or (b) any additional amount is contributed to the IRA by the spouse (which then becomes subject to the lifetime distribution rules with the spouse as the participant).

Once the spousal rollover election is made, the spouse is treated as a participant for all purposes under the Internal Revenue Code.[22]

If the spouse makes the election (regardless of whether the spouse continues to use the participant's IRA or actually transfers the participant's IRA account balance into a new spousal rollover IRA), he or she can designate new beneficiaries and use the Uniform Table, based on the spouse's age in the years following the original participant's death. However, if the spouse has not attained age 59½, the spouse will be subject to the 10% early withdrawal penalty for all distributions made (except for the participant's RMD in the year of the participant's death) prior to the year the spouse attains age 59½, except to the extent the spouse chooses a distribution plan that fits into the IRS requirements for an exception to the early withdrawal penalty rules. For example, to qualify for the exception, a strategy could be to elect a distribution period for the joint life expectancy of the spouse and his or her Designated Beneficiary, based on the new Joint and Last Survivor Table, which must last until (a) the year the spouse attains age 59½, or (b) five years from the date the distribution commences, if later.

The advantage of a rollover is, of course, that it lengthens the distribution period for the spouse by using the Uniform Table with the spouse as the participant. After the spouse's death, the ADP is based on the life expectancy of the spouse's Designated Beneficiary from the new Single Life Table. If the spouse fails to make a rollover, his or her life expectancy from the Single Life Table will be used to determine RMDs each year until the spouse's death. Thereafter, RMDs will be determined based on the spouse's life expectancy (from the Single Life Table) in the spouse's year of death, less 1 for each year thereafter.

Spousal rollovers now can be made from Qualified Plans to IRAs, from Qualified Plans to Qualified Plans (if permitted by the receiving plan document), from IRA to IRAs, from § 403(b) plans to other § 403(b) plans (again if permitted by the receiving plan document) and from § 403(b) plans to IRAs.

The Final Regulations also liberalize plan aggregation rules. That is, if an individual is a participant in more than one IRA, he or she may calculate the RMDs from each, aggregate them and take them from one or more of the IRAs. This is not a new rule. What is new is that aggregation withdrawals are permitted from like plans only. For example, a participant cannot aggregate IRAs in which he or she is the owner with those in which he or she is the beneficiary of a deceased participant. Roth IRAs must be separately aggregated, as must § 403(b) plans (also separated by an individual's status as a participant or as a beneficiary).[23] No aggregation distributions are permitted from Qualified Plans.

Additional Changes

Contributions to and distributions from a participant's account balance made after December 31 of any

Examples of Rollover Rules

Illustrations of rollover rules depending on spouse's age under new rules John has named his wife Myra as beneficiary of his IRA. Myra has her own IRA and has designated John as her beneficiary. John dies first at age 73 and Myra has already reached her own Required Beginning Date.

After taking the Required Minimum Distribution for the year of John's death from John's IRA, based on his life expectancy from the Uniform Lifetime Table (using John's age in the year of his death), she can place the balance of her husband's IRA funds in a new rollover-spousal IRA, name a new Designated Beneficiary, and distributions starting in the following year will be based on the ADP in the Uniform Lifetime Table for her age. Each year, Myra must take separate distributions from the spousal rollover IRA and from the IRA that she owned before her husband's death.

Suppose, however, that Myra was 58 at her husband's death.

She must take the minimum distribution that her husband would have been required to take from his IRA in the year he died, but she can then place the remaining funds in a rollover-spousal IRA of her own. She may not make further withdrawals from her spousal-rollover IRA until she reaches 59½. If she wants to postpone taking distributions as long as possible, she can wait until she reaches age 70½. When she reaches her Required Beginning Date (April 1 of the year following her attaining age 70½), she must take separate distributions each year from the rollover-spousal IRA and her own IRA; she will not be allowed to withdraw an amount from one equal to the total distribution required from both.

If she leaves the funds in her husband's IRA account and does not elect to treat it as her own, the normal rules for a surviving spouse Designated Beneficiary will apply (*i.e.*, she must start her Required Minimum Distributions in the year after her husband's death since he already started distributions. The distributions will be based on her life expectancy recalculated each year).

If she wants to name her children as her beneficiaries, the best strategy will likely be to start new rollover IRAs and designate one child as beneficiary of each. In this way, the ADP will be taken from the Uniform Lifetime Table during her life. After her death, each child's RMD will be based on that child's life expectancy based on his or her age in the year after her death, and reduced by 1 each year thereafter.

Differing results depending on whether spouse elects a rollover under new rules Douglas designated Cynthia, his surviving spouse, as sole Designated Beneficiary of his 401(k) plan. Douglas was 73 and Cynthia was 70 when he died.

On December 31st of the year before Douglas' death, his account balance was $470,000 after the distribution was made for that year. In the year of his death, the ADP from the new Uniform Lifetime Table was 24.7. The minimum distribution to Cynthia in the year of his death was $470,000 ÷ 24.7 = $19,028.

At the end of the year in which Douglas died, the account balance, after the deduction of the $19,028 distribution and the posting of interest and dividends for the year, was $475,000.

Cynthia elects *not* to place the funds in a rollover-spousal account. In the year after her husband's death, Cynthia is 71 and the Applicable Divisor from the Single Life Table is 16.3. The required distribution is thus $475,000 ÷ 16.3 = $29,141. After the distribution and posting of interest and dividends on the $475,000 during the year, the year-end balance in the account is $450,000.

The next year, at age 72, Cynthia dies. Douglas had designated their grandson, Ray, age 19, as his contingent beneficiary. In the year of Cynthia's death, the Applicable Divisor used to calculate the minimum distribution to Ray is 15.5, the same figure that would have applied to a person age 72 if Cynthia had lived. Thus, the minimum distribution is $450,000 ÷ 15.5 = $29,032.

In the first year after Cynthia's death, the Applicable Divisor will be 14.5. In subsequent years, it will be 13.5, 12.5, 10.5, etc.

If, instead, Cynthia had elected to place the funds in a rollover-spousal IRA, the Required Minimum Distribution in the year of Douglas' death would still have been $19,028. She would have to withdraw the amount before she could place it in a spousal-rollover IRA.

Assume that Cynthia then named her grandson, Ray, as Designated Beneficiary of her spousal-rollover IRA. The next year, at age 71, the ADP is 26.5, using the new Uniform Lifetime Table, and the Required Minimum Distribution is $475,000 ÷ 26.5 = $17,925. After the distribution and posting of interest and dividends, the account balance is $500,000.

If she dies at age 72, Ray must take a distribution in the amount that would have had to be distributed to Cynthia if she had lived, using the ADP from the new Uniform Lifetime Table – $500,000 ÷ 25.6 = $19,531. After the distribution and posting of interest and dividends, the balance in the account is $520,000.

The next year, the ADP would be 63.0, calculated using the new Single Life Table for Ray at age 20. The Required Minimum Distribution to Ray in that year would, thus, be $520,000 ÷ 63.0 = $8,524. In each subsequent year, the ADP would be 1 less than it was the previous year, until all the funds were exhausted.

Owner Dies Before Required Beginning Date

	Distribution Pattern	Applicable Distribution Period	Comments
Spouse Is Sole Designated Beneficiary	The first of the RMDs[1] must be made by the later of: (1) December 31 of the calendar year following the year when the participant died, or (2) December 31, of the year when the participant would have been 70½.[2] ——— The spouse may select one or more Designated Beneficiaries to receive any funds remaining at her/his death. If the spouse dies before the first date for RMDs, the spouse is treated as participant and the appropriate rule in the next three boxes is used. ——— The spouse may rollover distributions into an IRA, or if taken from specified plan, into qualified plan, 403(b) plan or governmental 457 plan (except for participant's RMD in year of death if not taken before death).[3]	Select from the Single Life Table, using the surviving spouse's actual age in the year after the participant's death. In subsequent years, use the surviving spouse's age in that year. ——— After the spouse dies, use the Single Life Table and choose the spouse's age at death. For the first distribution required in the year after the spouse's death reduce the spouse's life expectancy in the year of spouse's death by 1, and continue to reduce by 1 for each year thereafter.[4] ——— Distributions from spousal rollover will depend on identification of beneficiary of spousal rollover.	Spouse's life expectancy is recalculated during spouse's lifetime, but not after death.[5] ——— Marital status of the participant is determined as of January 1 of each year. Death or divorce is disregarded until the following year, except for divorce if a new beneficiary is designated in the same year.[6] ——— A change in beneficiary due to the spouse's death is not recognized until the next year.
Non-Spouse Is Sole Designated Beneficiary	The first of the RMDs[7] must be made by December 31 of the year following the year of the participant's death unless five year rule is elected.[8] ——— The Designated Beneficiary can name one or more successor designated beneficiaries to receive any remaining benefits when he/she dies.	Select from the Single Life Table, using the Designated Beneficiary's age in the first year after the participant's death. In subsequent years, deduct 1 from the figure used in the previous year. If five year rule elected distribution of entire account must be made no later than end of fifth year following year of death. No annual distributions are required.[9]	Life expectancy of non-spouse beneficiary is not recalculated. Five year rule is no longer default rule and beneficiary may switch to life expectancy rule provided that amounts that would have been required to be distributed under life expectancy rule are distributed by earlier of December 31, 2003 or the fifth year following year of participant's death.
Multiple Designated Beneficiaries	The first of the RMDs[10] must be made by December 31 of the year following the year of the participant's death, even if the spouse is one of the beneficiaries. Beneficiaries at participant's death who are still beneficiaries on (or dies prior to) September 30 following year of death, are Designated Beneficiaries. Until the December 31 following year of death the Designated Beneficiaries have the option to place the funds into separate accounts, dividing all income, gains, losses and expenses on a pro rata basis. The Applicable Distribution Period of each account is then determined.[11]	Select from the Single Life Table, using the age of the oldest Designated Beneficiary in the first year after participant's death. (If separate accounts have been created each account uses the age of the account's beneficiary, even if the oldest Designated Beneficiary dies after September 30 of the year following participant's death.) In subsequent years, deduct 1 from the figure used in the previous year.[12]	Note that the Final Regulations change the date that beneficiaries must be determined from December 31 to September 30 of the year following participant's death. ——— Separate accounts can be set up even after the year following death and will be recognized from that point but the Applicable Distribution Period does not change.
No Designated Beneficiary	The funds must be paid to the owner's estate, a charity or non-qualifying trust using the Five-Year Rule.[13]		No significant change from 2001 regulations. Life expectancy of owner is not recalculated.

Note: The title for each separate account must retain the name of the deceased IRA owner (*e.g.*, Metropolis Bank as Custodian for Clark Kent, deceased IRA, fbo Lois Lane).

1. A plan may specify, however, that the Five-Year Rule applies. The default rule is now the life expectancy rule.
2. Treas. Reg. § 1.401(a)(9)-3, A-3(b).
3. Treas. Reg. § 1.408-8, A-5(a).
4. Treas. Reg. § 1.401(a)(9)-5, A-5(c)(2).
5. *Id.*
6. Treas. Reg. § 1.401(a)(9)-5, A-4(b)(2).
7. A plan may specify, however, that the Five-Year Rule applies. The default rule is now the life expectancy rule.
8. Treas. Reg. § 1.401(a)(9)-3, A-3(a).
9. Treas. Reg. § 1.401(a)(9)-5, A-5(c)(1).
10. A plan may specify, however, that the Five-Year Rule applies. The default rule is now the life expectancy rule.
11. Treas. Reg. §§ 1.401(a)(9)-4, A-4, 1.401(a)(9)-5, A-5, A-7.
12. *Id.*
13. IRC § 1.401(a)(9)(B)(ii); Treas. Reg. § 1.401(a)(9)-3, A-4.

Owner Dies On or After Required Beginning Date

If not already made before death, a distribution must be made from the account for the amount that would have been required for the year in which the owner died.

	Distribution Pattern	Applicable Distribution Period	Comments
Spouse Is Sole Designated Beneficiary	The first of the RMDs must be made by December 31 of the year following the year of the participant's death. ——— The spouse can name one or more Designated Beneficiaries to receive the remaining benefits when he/she dies. If there is a remarriage and the new husband or wife is named, that person will *not* be treated as a spouse for this account *unless* the spouse makes a spousal rollover and names the new spouse as Designated Beneficiary of the spousal rollover. ——— The spouse may rollover distributions into an IRA, qualified plan, 403(b) plan or governmental 457 plan (except for participant's RMD in year of death if not taken before death) any time after the participant's death.[1]	Select from the Single Life Table, using the surviving spouse's age in the year after participant's death to determine the life expectancy factor. In subsequent years, use the spouse's age in that year to determine the life expectancy factor. ——— After the spouse dies, use the Single Life Table and find the spouse's age at death. For the first distribution year and each subsequent year, reduce the life expectancy factor at the spouse's age at death by 1.[2] ——— Distributions from spousal rollover will depend on identification of beneficiary of spousal rollover.	Spouse's life expectancy is recalculated during spouse's lifetime, but not after death.[3] ——— Marital status of the participant is determined as of January 1 of each year. Death or divorce is disregarded until the following year unless a new Designated Beneficiary is designated by the divorced participant.[4] ——— A change in beneficiary due to the spouse's death is not recognized until the next year. ——— Participant's RMD in year of death is paid to the spouse in the year of death to the extent not paid to participant prior to death. Spouse does not have to take a separate RMD in that year, even if spouse makes a rollover that year.[5]
Non-Spouse Is Sole Designated Beneficiary	The first of the RMDs must be made by December 31 of the year following the year of the participant's death. ——— The Designated Beneficiary can name one or more beneficiaries to receive any remaining benefits when he/she dies.	Select from the Single Life Table, using the Designated Beneficiary's age in the first year after participant's death to determine life expectancy factors. In subsequent years, deduct 1 from the life expectancy factor used the previous year. If participant's life expectancy is longer, determine as if there is no Designated Beneficiary.[6]	Life expectancy of non-spouse beneficiary is not recalculated. ——— If life expectancy of owner is longer than Designated Beneficiary (Designated Beneficiary is older than participant) the Applicable Distribution Period is the remaining life expectancy of participant.[7]
Multiple Designated Beneficiaries	The first of the RMDs must be made by December 31 of the year following the year of the participant's death. The individual beneficiaries at the death of the participant, whether named by the participant or pursuant to the plan document, who remain beneficiaries as of (or die prior to) September 30 of the year following the participant's death are the Designated Beneficiaries. Until December 31 following the year of death, the Designated Beneficiaries have the option to place the funds into separate accounts, dividing all income, gains, losses and expenses on a pro rata basis. The Applicable Distribution Period of each account is then determined.[8]	Select from the Single Life Table, using the age of the oldest Designated Beneficiary in the first year after participant's death to determine life expectancy factor. In subsequent years, deduct 1 from the figure used in the previous year. (If the beneficiaries have divided the accounts, each account uses the age of the Designated Beneficiary of such separate account.)[9]	Note that the Final Regulations change the date that beneficiaries must be determined from December 31 to September 30 of the year following the participant's death. ——— Separate accounts can be set up even after the year following death and will be recognized from that point but the Applicable Distribution Period does not change.
No Designated Beneficiary	The first of the RMDs must be made by December 31 of the year following the year of the participant's death. The likely recipient(s) will be the estate, a charity, or a non-qualified trust.	Select from the Single Life Table. In the first year, use the age the participant was or would have been on her/his birthday in the calendar year of death. Deduct 1 from the figure used the first year and each subsequent year.[10]	No significant change from 2001 regulations.

Note: The title for each separate account must retain the name of the deceased IRA owner (*e.g.,* Metropolis Bank as Custodian for Clark Kent, deceased IRA, fbo Lois Lane).

1. Treas. Reg. § 1.408-8, A-5(a).
2. Treas. Reg. § 1.401(a)(9)-5, A-5(c)(2).
3. *Id.*
4. Treas. Reg. § 1.401(a)(9)-5, A-(b)(2).
5. Treas. Reg. § 1.408-8, A-5(a).
6. Treas. Reg. § 1.401(a)9-5, A-5.
7. Treas. Reg. § 1.401(a)(9)-5, A-5.
8. Treas. Reg. §§ 1.401(a)(9)-4, A-4, 1.401(a)(9)-5, A-5, A-7.
9. *Id.*
10. Treas. Reg. § 1.401(a)(9)-5, A-5.

Joint and Last Survivor Table

Treas. Reg. § 1.401(a)(9)-9, A-3.

Ages	70	71	72	73	74	75
35	48.7	48.7	48.7	48.6	48.6	48.6
36	47.8	47.7	47.7	47.7	47.7	47.7
37	46.8	46.8	46.8	46.7	46.7	46.7
38	45.9	45.9	45.8	45.8	45.8	45.7
39	44.9	44.9	44.9	44.8	44.8	44.8
40	44.0	44.0	43.9	43.9	43.9	43.8
41	43.1	43.0	43.0	43.0	42.9	42.9
42	42.2	42.1	42.1	42.0	42.0	42.0
43	41.3	41.2	41.1	41.1	41.1	41.0
44	40.3	40.3	40.2	40.2	40.1	40.1
45	39.4	39.4	39.3	39.3	39.2	39.2
46	38.6	38.5	38.4	38.4	38.3	38.3
47	37.7	37.6	37.5	37.5	37.4	37.4
48	36.8	36.7	36.6	36.6	36.5	36.5
49	35.9	35.9	35.8	35.7	35.6	35.6
50	35.1	35.0	34.9	34.8	34.8	34.7
51	34.3	34.2	34.1	34.0	33.9	33.8
52	33.4	33.3	33.2	33.1	33.0	33.0
53	32.6	32.5	32.4	32.3	32.2	32.1
54	31.8	31.7	31.6	31.5	31.4	31.3
55	31.1	30.9	30.8	30.6	30.5	30.4
56	30.3	30.1	30.0	29.8	29.7	29.6
57	29.5	29.4	29.2	29.1	28.9	28.8
58	28.8	28.6	28.4	28.3	28.1	28.0
59	28.1	27.9	27.7	27.5	27.4	27.2
60	27.4	27.2	27.0	26.8	26.6	26.5
61	26.7	26.5	26.3	26.1	25.9	25.7
62	26.1	25.8	25.6	25.4	25.2	25.0
63	25.4	25.2	24.9	24.7	24.5	24.3
64	24.8	24.5	24.3	24.0	23.8	23.6
65	24.3	23.9	23.7	23.4	23.1	22.9
66	23.7	23.4	23.1	22.8	22.5	22.3
67	23.2	22.8	22.5	22.2	21.9	21.6
68	22.7	22.3	22.0	21.6	21.3	21.0
69	22.2	21.8	21.4	21.1	20.8	20.5
70	21.8	21.3	20.9	20.6	20.2	19.9
71	21.3	20.9	20.5	20.1	19.7	19.4
72	20.9	20.5	20.0	19.6	19.3	18.9
73	20.6	20.1	19.6	19.2	18.8	18.4
74	20.2	19.7	19.3	18.8	18.4	18.0
75	19.9	19.4	18.9	18.4	18.0	17.6
76	19.6	19.1	18.6	18.1	17.6	17.2
77	19.4	18.8	18.3	17.8	17.3	16.8
78	19.1	18.5	18.0	17.5	17.0	16.5
79	18.9	18.3	17.7	17.2	16.7	16.2
80	18.7	18.1	17.5	16.9	16.4	15.9

year will generally be disregarded for the purpose of computing a participant's RMD for the following year, even if the contributions are allocated as of a date in the year prior to that December 31. Rollover IRA amounts and re-characterized conversion contributions (between Roth and regular IRAs) not in such accounts on December 31 of a prior year, however, may be required to be added back to the respective accounts to determine correct RMDs.

Distributions made on April 1 of the year after a participant attains age 70½ (the RBD), will no longer reduce the prior year's account balance to determine the participant's second RMD.

Rules Not Changed

Most of the rules set forth in the 2001 Proposed Regulations have been at least *slightly* changed, but the TEFRA 242(b) Elections, under § 242(b) of the Tax Equity and Fiscal Responsibility Act of 1982 for Qualified Plan account balances, may still remain in effect unless a distribution is taken that does not comply with the election. In the year after the distribution, an amount equal to the total distributions that would have been required if the election had not been in place must be distributed.[24]

With respect to annuities from defined benefit plans, the joint and survivor annuity table for non-spouse Designated Beneficiaries is the same as the table set forth in the 1987 and the 2001 Proposed Regulations. That is, the annuity that may be paid to a non-spouse beneficiary is still reduced by the same percentage of the participant's annuity (*e.g.*, if the beneficiary is not more than 10 years younger than the participant, the survivor's annuity can be as much as 100% of the participant's, but if the beneficiary is 11 years younger, his or her annuity may only be 96% of the participant's).[25]

Nevertheless, annuity payments may now be made to a participant for a period certain that is as long as the ADP under the new Uniform Table for the participant's age in the year of the annuity's starting date, regardless of the identity of the participant's Designated Beneficiary. This period certain is not required to change on the participant's death, even if the remaining period certain is longer or shorter than the Designated Beneficiary's single life expectancy (from the new Single Life Table). Naturally, there is an exception for a participant's spouse who is his or her sole Designated Beneficiary and is more than 10 years younger than the participant. If the annuity provides only for a period certain with no life annuity (*e.g.*, 25 years), the annuity may be for as long as the ADP based on their actual ages from the new Joint and Last Survivor Table.[26]

Conclusion

The Final Regulations have answered many questions that remained unresolved in the prior Proposed

Single Life Table

Treas. Reg. § 1.401(a)(9)-9, A-1.

Age	Life expectancy	Age	Life expectancy	Age	Life expectancy	Age	Life expectancy	Age	Life expectancy	Age	Life expectancy
0	82.4	19	64.0	38	45.6	57	27.9	76	12.7	95	4.1
1	81.6	20	63.0	39	44.6	58	27.0	77	12.1	96	3.8
2	80.6	21	62.1	40	43.6	59	26.1	78	11.4	97	3.6
3	79.7	22	61.1	41	42.7	60	25.2	79	10.8	98	3.4
4	78.7	23	60.1	42	41.7	61	24.4	80	10.2	99	3.1
5	77.7	24	59.1	43	40.7	62	23.5	81	9.7	100	2.9
6	76.7	25	58.2	44	39.8	63	22.7	82	9.1	101	2.7
7	75.8	26	57.2	45	38.8	64	21.8	83	8.6	102	2.5
8	74.8	27	56.2	46	37.9	65	21.0	84	8.1	103	2.3
9	73.8	28	55.3	47	37.0	66	20.2	85	7.6	104	2.1
10	72.8	29	54.3	48	36.0	67	19.4	86	7.1	105	1.9
11	71.8	30	53.3	49	35.1	68	18.6	87	6.7	106	1.7
12	70.8	31	52.4	50	34.2	69	17.8	88	6.3	107	1.5
13	69.9	32	51.4	51	33.3	70	17.0	89	5.9	108	1.4
14	68.9	33	50.4	52	32.3	71	16.3	90	5.5	109	1.2
15	67.9	34	49.4	53	31.4	72	15.5	91	5.2	110	1.1
16	66.9	35	48.5	54	30.5	73	14.8	92	4.9	111+	1.0
17	66.0	36	47.5	55	29.6	74	14.1	93	4.6		
18	65.0	37	46.5	56	28.7	75	13.4	94	4.3		

Regulations. Although the Final Regulations rules are much simpler than the original 1987 Proposed Regulations and somewhat more understandable than the 2001 Proposed Regulations, there are still inconsistencies and confusing rules, especially in the area of designating trusts as beneficiaries. There is hope that the IRS will make some amendments to clarify its positions.

In the meantime, it is still essential to read the IRA or Qualified Plan documents to confirm what elections or alternatives are available, and to ask the plan administrator, with respect to Qualified Plans, whether the plan has been amended to comply with the 2001 Proposed Regulations or the 2002 Final Regulations.

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1. Treas. Reg. § 1.408-8 applicable to IRA accounts under IRC § 408 (including Roth IRAs, where applicable, under IRC § 408A). Final Regulations will be referred in these endnotes as "Treas. Reg." Treas. Reg. discussed in this article are also available in 67 Fed. Reg. 18988.
2. Treas. Reg. § 1.401(a)(9)-0 through (9)-9 applicable to plans defined in IRC § 401(a) and (b).
3. Treas. Reg. § 1.401(a)(9)-0 through (9)-9 applicable to plans described in IRC § 403(a).
4. Treas. Reg. § 1.401(a)(9)-1, A-1 applicable to IRC § 457(d)(2) plans maintained by states, political subdivisions of states and agencies, instrumentalities or political subdivisions.
5. Treas. Reg. § 1.403(b)-3 applicable to plans established under IRC § 403(b)(10).
6. Temp. Regs. § 1.401(a)(9)-6T and Prop. Reg. § 1.401(a)(9)-6 issued April 17, 2002, but IRS Notice 2003-2 postpones the effective date of these proposed and temporary regulations and provides transition rules that will apply at least through the end of the calendar year in which the relevant final regulations are published.
7. An extensive description of the changes proposed in 2001 appeared in the March/April 2001 issue of the *Journal*. *See* Susan B. Slater-Jansen & Avery E. Newmark, *New Rules Offer Great Flexibility and Simpler Distribution Patterns for IRAs and Pension Plans*, N.Y. St. B.J., vol. 73, no. 3, at 26 (2001).
8. The new Single Life Table is provided at Treas. Reg. § 1.401(a)(9)-9, A-1, the Joint and Last Survivor Table is provided at Treas. Reg. § 1.401(a)(9)-9, A-3, and the Uniform Lifetime (formerly the "MDIB") Table is provided at Treas. Reg. § 1.401(a)(9)-9, A-2.
9. Treas. Reg. § 1.401(a)(9)-4, A-4.
10. Treas. Reg. § 1.401(a)(9)-4, A-6(b).
11. Treas. Reg. § 1.401(a)(9)-5, A-4(a) (requiring the use of the Uniform Table).
12. Treas. Reg. § 1.401(a)(9)-5, A-4(b).
13. Treas. Reg. § 1.401(a)(9)-9, A-2.
14. Treas. Reg. § 1.401(a)(9)-9, A-3.
15. Treas. Reg. § 1.401(a)(9)-9, A-1.
16. IRS Notices 2002-27 and 2003-03 provide guidance on reporting requirements.
17. Treas. Reg. § 1.401(a)(9)-5, A-4(b)(2).
18. Treas. Reg. § 1.401(a)(9)-3, A-4(a)(1).
19. Treas. Reg. § 401(a)(9)-3, A-4(b).

20. Treas. Reg. § 1.408-8, A-5(a).
21. IRC § 408(d)(3)(C).
22. Treas. Reg. § 1.408-8, A-5(a).
23 Treas. Reg. § 1.408-8, A-5(b).
24. Treas. Reg. §§ 1.408-8, A-9, 1.403(b)-3, A-4.
25. Treas. Reg. § 1.401(a)(9)-8, A-13, A-16.
26. Treas. Reg. § 1.401(a)(9)-6T, A-2(c).
27. Treas. Reg. § 1.401(a)(9)-6T, A-3(a).

Uniform Lifetime Table

Treas. Reg. § 1.401(a)(9)-9, A-2.

Age	Distribution period
70	27.4
71	26.5
72	25.6
73	24.7
74	23.8
75	22.9
76	22.0
77	21.2
78	20.3
79	19.5
80	18.7
81	17.9
82	17.1
83	16.3
84	15.5
85	14.8
86	14.1
87	13.4
88	12.7
89	12.0
90	11.4
91	10.8
92	10.2
93	9.6
94	9.1
95	8.6
96	8.1
97	7.6
98	7.1
99	6.7
100	6.3
101	5.9
102	5.5
103	5.2
104	4.9
105	4.5
106	4.2
107	3.9
108	3.7
109	3.4
110	3.1
111	2.9
112	2.6
113	2.4
114	2.1
115+	1.9

Attorney Professionalism Forum

With this issue, the Journal begins a column that addresses, in question-and-answer format, professional dilemmas that are a fact of life in modern practice. Although basic principles in the Code of Professional Responsibility are available to guide the practitioner, there often is no clear-cut answer to the situation encountered. Rather, the attorney must apply his or her own judgment, interpretation and conscience in coming to an answer that is consistent with a lawyer's obligations to colleagues, clients and the public. With the first column, we illustrate this point by printing two responses with different conclusions to the issue presented.

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism, and is intended to stimulate thought and discussion on that subject. The views expressed are those of the authors, and not those of the Committee on Attorney Professionalism or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

The Committee on Attorney Professionalism welcomes these articles and invites the membership to send in comments or alternatives to the responses printed below. We also invite additional questions and answers to be considered for future columns. Send your comments or your own questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to barjournal@nysba.org.

To the Forum:

I represent a client seeking to lease a large commercial facility. During the course of the negotiations the base annual rent for the first five years of the term was agreed upon by the parties to be $55,000 per month. The final draft of the Lease document was prepared by the landlord's attorney and was sent to me for approval before execution by the parties. It fixes the monthly rent during the first five years, incorrectly, at $50,000.

In reviewing the draft with my client I called the error to his attention. He said that I should not say anything to the landlord's attorney about it, so that if he or his client didn't discover it before the document was signed he would have the benefit of the lower rental for the first five years of the Lease.

May I call the error to the landlord's attorney's attention prior to signing, notwithstanding my client's request, or must I adhere to his instructions?

Perplexed in Poughkeepsie

Dear Perplexed:

No wonder you are perplexed. A review of the New York Code of Professional Conduct discloses no clear answer and several conflicting guidelines.

DR 1-102(A)(4) provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Under this provision, if you had contacted the attorney for the landlord to advise him of his error before speaking to your client, you would have been on safe ground. This is because the two clients had arrived at a meeting of the minds on the amount of rent, and the nature of your representation was to obtain a written Lease for your client that accurately reflected the agreement of the parties.

Therefore, even if keeping silent would not amount to a "dishonesty, fraud or deceit," your duty to obtain a binding and accurate agreement would justify correcting the error by making the necessary disclosure to the landlord's attorney.

Further, EC 7-10 provides that the "duty of a lawyer to represent the client with zeal does not militate against the concurrent obligations to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." Permitting the Lease to be signed with the error in rent could harm the landlord, in that if your client refused to correct the error after its discovery by the landlord after signing, it would impose on the landlord the necessity of seeking judicial relief from the error, and the chances of success in such a proceeding are not certain.

Another factor is at work, however. As you have indicated, you have advised your client of the error and he has requested that you say nothing. DR 4-101(A) defines a "secret" as "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Except when permitted under DR 4-101(C) (not applicable here), an attorney "shall not knowingly: (1) Reveal a confidence or secret of a client"; or (2) "Use a confidence or secret of a client to the disadvantage of the client" (DR 4-101(B)).

While EC 4-2 provides that the obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when necessary to perform the lawyer's professional employment, this may not be a sufficient basis for disclosure where the client has specifi-

cally requested that disclosure not be made. And the provision of DR 7-101(B) that a lawyer may, "[w]here permissible, exercise professional judgment to waive or fail to assert a right or position of the client" also provides little comfort in the face of a specific request for non-disclosure.

If you cannot persuade the client to retract his instruction, as indeed I believe you should try to do, and you are uncomfortable with continuing the representation, DR 2-110(C)(1)(e) permits you to withdraw from the representation. DR 2-110(C)(1)(e) provides that a lawyer may withdraw if a client "[i]nsists, in a matter not pending before a tribunal, that the lawyer engage in conduct which is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules."

Of course, if the client's conduct is deemed fraudulent (and that determination is beyond the scope of this column), you would be subject to DR 7-102(A)(7), which provides that a lawyer shall not "counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent." Then, of course, your withdrawal would be mandatory (DR 2-110(B)(2)).

The Forum, by
M. David Tell
Wormser, Kiely, Galef & Jacobs LLP

Dear Perplexed:

With all due respect to Mr. Tell, his distinction between "client secrets" and "confidence" (attorney-client privilege) seems unworkable, and contrary to the purpose and spirit of the Disciplinary Rules and Canons of Ethics.

Ethical Canon 4-2 provides: "A lawyer must always be sensitive to the rights and wishes of a client and act scrupulously in the making of decisions which may involve the disclosure of information *obtained in a professional relationship*." The discovery of the error was not obtained by you in your professional relationship with the client, but rather by a more careful proofreading of the proposed contract. The correct amount of rent was not a secret or a confidence that you obtained in the representation of the client; it was known to both parties and both lawyers and agreed to after what I can assume was intensive negotiation.

Inasmuch as DR 1-102(A)(4) provides that a lawyer should not '[e]ngage in conduct involving . . . misrepresentation," as the amount of the lease is clearly a misrepresentation, wouldn't a failure to correct it result in a violation of this Disciplinary Rule?

How long do you suppose that it will be before the landlord and his lawyer become aware of the error, and the fact that you knew of the error and said nothing? What do you suppose this would do to your reputation and standing in the community? Wouldn't this also contribute to the unfortunate view held by many in the public that lawyers are slick and unscrupulous, and more than willing to obtain an unfair advantage when the opportunity presents itself? Rest assured, it will be the lawyer and not the client who will be criticized. The fact that you found an obvious error and talked to your client about it does not transform it into the sanctity of a "secret" or a "confidence."

In short, you don't have an ethical dilemma. You have a typo.

The Forum, by
Grace Marie Ange
Ange & Ange
Buffalo, NY

TO BE ADDRESSED IN THE NEXT COLUMN:

To the Forum:

I am a lawyer who has represented other attorneys with disciplinary problems or ethical concerns. Now I have a problem of my own. Recently, I was consulted by a personal injury lawyer who has had an offer to participate in a group lawyer advertising program for which O.J. Simpson is a speaker.

She wanted to know whether her participation in the program was ethical and, if not, whether her participation could be tailored so that it could be made ethical. As a business matter she is very interested, because she believes (rightly or wrongly) that O.J.'s endorsement will help her obtain clients in the minority community, where she is trying to develop a client base. However, she does not want to run afoul of any Disciplinary Rule or her local Grievance Committee.

I reviewed the proposed TV advertisements at her request. They currently contain some misleading statements that would have to be changed, or removed altogether, in order to avoid disciplinary problems. But even if they are changed, I am concerned about my own representation of this attorney becoming public, since some lawyers might think I had helped a client engage in what they would consider (and I would agree) to be unseemly advertising that damages the image of lawyers as a whole. Given my concerns, can I take on the representation? Should I?

Ethicist with an Ethical Dilemma

POINT OF VIEW

Standing Down From the War on Drugs

BY JACK B. WEINSTEIN

Our nation's war on terrorism, and our need for expanded resources to wage it during a time of threatened government deficits, suggests reconsideration of the huge expenditures being wasted on our war on drugs. The over-sentencing of drug offenders has been a major drain on our social resources, running into the billions of dollars each year.

As a direct result of stiff mandatory-minimum sentencing, rigid federal guidelines, and three-strikes legislation in many states, the number of prisoners in America has swelled to monstrous proportions. According to the Department of Justice, our prison population has increased four-fold over the past two decades, with more than two million Americans currently incarcerated. Add to this some four million whose liberty is restricted and who are supervised by probation and parole authorities, and there is a total of some six million in the clutches of the criminal justice system. A large proportion of incarcerations are drug-related.

The numbers in the African-American community are staggering. A study by the Justice Policy Institute recently showed a 500% increase in the number of African-American men in prison over the same period – so that more of them are now behind bars than are enrolled in college. Nearly one in three African-American males between the ages of 20 and 29 is under some form of criminal supervision.

Can we ignore the unnecessarily destroyed lives of defendants and their families and the cost to society of removing adults from communities where they might have become better parents and community leaders? Many thousands have unnecessarily lost the right to vote, and many are even denied the right to work in many occupations.

Our policies constitute a form of cannibalism. We are eating the lives of many of our young people, particularly in minority communities.

The economic costs of this expansion of the criminal justice system have been excessive. During a time of relative prosperity we built prison after prison to house armies of the convicted. We were content to accept – or were too distracted by our new-economy stock portfolios to worry about – the 600% increase in expenditures for state and local corrections since the 1980s. We can no longer afford the multi-billion-dollar annual price tag that our ever-expanding corrections system generates.

States are feeling the pinch and beginning to react. Last year at least a dozen states either closed prisons or delayed the opening of new ones. In other states prison staff was laid off. In recent weeks Montana, Arkansas, Texas, and Kentucky all took the remarkable step of releasing convicted felons early from their sentences in order to pare down their budgets.

Michigan has just eliminated mandatory minimum sentences for nonviolent drug crimes. At least eight other states are contemplating similar measures in an attempt to reduce bloated corrections budgets. Although motivated primarily by sound fiscal policy, these measures will have the happy result of restoring some sanity to our war on drugs by returning to sentencing judges the discretion to do individual justice. They will also help heal the wound we have inflicted on our minority communities, which are seeing more money spent on new prison cells than on new classrooms and medical centers.

Shifting economic priorities and a more rational view of crime and criminals demand that we adopt a more rational orientation to the drug problem, as well as other sentencing issues.

Overly strict laws offer no real deterrent to drug activity. I have sentenced hundreds of drug defendants over the years. These men and women, almost uniformly impoverished and nearly always drawn from minority communities, rarely have any notion of the brutal penalties to which their crimes have exposed them. Locked away for many years at a total cost to society of billions of dollars a year, they are in a sense "deterred" from further illicit activity, but with little proportion, little justice, and little economic sense.

Overly strict laws offer no real deterrent to drug activity.

In New York, radical revision of the Rockefeller Drug Laws is essential. It is not a question of partisan politics in New York. Both parties seem to have approached the matter with more deference to public relations than is required by the good sense of our voters. A commission should be appointed to recommend release of those being unnecessarily detained as a result of these unjust laws.

Under Chief Judge Judith Kaye, New York state judges are exercising whatever power they can to treat rather than incarcerate. The federal courts have now sharply cut the average time served by non-recidivist, small-time drug sellers and others in the drug trade. They are using strict supervision under probation to save the lives of many young people who

should not be in prison. More can be done.

In the aftermath of 9/11, budget deficits and rising security costs spur us to re-evaluate our drug laws. As studies from organizations such as the Vera Institute of Justice demonstrate, relatively small investments in social, educational and medical programs can have profound influence on the choices young men and women make with respect to drug use and criminal activity.

Now is the time for our leaders to take bold steps in investing in the promise of our citizens rather than in expensive prisons for their warehousing.

Now is a time when we must come together as a people.

Without abandoning our anti-drug laws, we can stand down to reduce our own unnecessary casualties. It is the criminal bar that we primarily rely upon to point the way to reducing penalties without reducing protections.

JACK B. WEINSTEIN is a senior judge of the U.S. District Court for the Eastern District of New York. This column is adapted from remarks prepared for the annual meeting of the Criminal Justice Section of the NYSBA, which presented the judge with a "Special Recognition Award for Service to the Bar and Community."

Language Tips

By Gertrude Block

Question: As a reader who enjoys hearing and using oxymorons, I was delighted to hear in a commercial advertising the new Cadillacs the words "Cadillac truck," which I have added to my list. Please write a column on the subject of oxymorons for other readers who enjoy them.

Answer: Some time ago, a reader of another state bar journal asked me to write a column on the subject of oxymorons. After it was printed, I realized that there were more oxymoron-enthusiasts among my readers than I had realized. Here is that column, as well as some of the e-mail I received after it was printed.

An oxymoron, as the name implies, is a term in which the first part contradicts the second. Derived from Greek, the word *oxy* meant "sharp," and the word *moron*, "foolish." Medical book publishers Lea and Febiger sponsored an oxymoron contest. The winning pairs were *exquisite pain* and *irregular rhythm.* Among the other entries were *idiot savant*, *ill health*, *medicinal cigarettes*, *static flow*, *sanitary sewer*, *negative impact*, and *intense apathy.*

As to the question that introduces this column, I have some reservations about its inclusion as an oxymoron. But each person's point-of-view determines what constitutes an oxymoron. The following terms were sent by individuals who considered them oxymorons: *man-child*, *firewater*, *horsefly*, and *night light.* You may not agree that all those terms are oxymorons. Is there such a thing as a "delicious low-calorie dinner"? If you think that's impossible, you'd add that phrase to your list. Other selections that indicate bias are *Internal Revenue Service*, *friendly divorce*, *clean bomb*, *scheduled flight*, and *painless dentistry.* How about *federal assistance*, *social security*, and *family vacation*? Your selection of oxymorons reveals more about you than about the language.

Oxymorons have been around for a long time. Theodore Roosevelt, in referring to President John Tyler, is reported to have commented, "He has been called a mediocre man, but this is unwarranted flattery. He was a politician of monumental littleness."

Legal terms that might be considered oxymorons are terms like *negative pregnant*, shorthand for a negative statement bearing affirmative possibilities. And how about *active and affirmative negligence*? The Michigan Supreme Court used that term in the context of "a guest can recover only where his injury is a result of the active and affirmative negligence of the host."[1]

Oxymorons sometimes are created intentionally. One such is the term *deliberate speed*, used in the phrase "with all deliberate speed," in *Brown v. Board of Education*.[2] A critic later noted that this phrase by itself delayed the process of outlawing segregation.[3]

Other oxymorons are unintentional. One of my students coined one when he said of another student's writing, "That's clearly ambiguous." And columnist William F. Buckley Jr., editor of *National Review*, wrote in speaking of people who urge legalizing drugs, "What legalization advocates seek is a heavy mitigation of the concomitant consequences of the war on drugs." ("Heavy mitigation?")

Despite the objection of some of my colleagues, I consider the term *substantive due process* an oxymoron. Attorney John H. Shurtleff of Springfield, Ill., responded to my request for others with two: *steadfast vacillation* and *deliberate negligence.* Other contributions that arrived from readers after publication of the column were: *pretty ugly*, *rolling stop*, *working vacation*, *bad health*, *deliberately thoughtless*, and *justifiable paranoia.* And a legal writing teacher at this law college, who had just read his students' efforts at brief-writing, nominated *legal brief* to the list.

The words *affirmative* and *negative,* when combined with another word are fertile sources of oxymorons. In addition to *negative pregnant,* another reader suggested *affirmative pregnant*, which denotes an affirmative allegation that implies some negative in favor of the adverse party. Other readers suggested *negative impact* and *negative evidence.* Some of these terms give me pause, but no readers criticized their inclusion.

On reading this list, a reader sent this question and answer he quoted from John Kirshon, an editor at *The New York Times*, "Why did the oxymoron wear earplugs? To stop the deafening silence."

The list of oxymorons may now have been exhausted, but perhaps there are readers out there who can contribute others. If so, feel free to do so.

From the Mailbag

New York City attorney Peter W. LaVigne wrote regarding the column about missing prepositions (in the October 2002 *Language Tips*) that my comment about the missing preposition in the locution, "the declaration that was agreed this AM," was applicable only to American English. He is right. In American English, we would say "agreed upon," adding the preposition "upon." But in British English, as Mr. LaVigne noted, "agreed" is sometimes used without a preposition. *Webster's Third* cites two locutions for this usage: "The following statements were agreed," and Winston Churchill's statement, "They have agreed their quarrel."

1. *Preston v. Sleziak*, 175 N.W.2d 759 (1970) (defendants were held liable because they failed to properly maintain and operate a lift).
2. 349 U.S. 294 (1955).
3. *See* transcript, "Justice Black and the Bill of Rights," CBS News Special, Dec. 3, 1968.

Gertrude Block is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of the *Judicial Opinion Writing* (American Bar Association).

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Every rule of statutory construction has a thrust and a parry.[13] Similarly, every adage has a counter-adage:

• Is it "Birds of a feather flock together" *or* "Opposites attract"?

• Is it "Great minds think alike" *or* "It takes a fool to know a fool"?

• Is it "A stitch in time saves nine" *or* "Haste makes waste"?

• Is it "Justice delayed is justice denied" *or* "Act in haste, repent at leisure"?

• Is it "Too many cooks spoil the broth" *or* "Many hands make light work"?

But twisting adages into something original will draw smiles, if not guffaws: "A fool and his money are soon partying."

Avoiding errors will not alone make a writer a stylist. It's not enough to use good grammar and proper punctuation and to be clear and concise. What makes a writer a stylist is an effective, engaging, entertaining style that combines variety and force and elegance in simple, readable, error-free prose. That – and separating rhetoric from shmetoric.

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1. Susan McCloskey, Writing Clinic, *Rhetoric Is Part of the Lawyer's Craft*, 74 N.Y. St. B.J. 8 (2002).
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3. *See* McCloskey, *supra*, note 1, at 8 ("[S]ome rhetorical devices warrant your healthy skepticism").
4. H.W. Fowler & F.G. Fowler, *The King's English* 292 (3d ed. 1930).
5. Quoted in Henry Weihofen, *Legal Writing Style* 313 (2d ed. 1980).
6. *Kingston Dev. Co., Inc. v. Kenerly*, 132 Ga. App. 346, 346, 208 S.E.2d 118, 119 (Ga. Ct. App. 1974) (Clark, J.) (footnote omitted).
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13. *See* Karl N. Llewellyn, Symposium on Statutory Construction, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Interpreted*, 3 Vand. L. Rev. 395, 401 (1950) (classic article reprinted dozens of times).

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The Legal Writer

Ineffective Devices: Rhetoric That Fails

By Gerald Lebovits

The *Journal*'s November/December 2002 cover story by Professor McCloskey extolled the virtues of rhetoric.[1] It's a must-read: Rhetoric improves writing. As Justice Cardozo explained, legal writing "will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of proverb and maxim. Neglect of these allies, and it may never win its way."[2] But not all rhetoric succeeds.[3]

Rhetorical devices are figures of speech, or ornamental uses of language. A figure may be a scheme, which emphasizes the figure's appearance. An example of a scheme is James Joyce's chalice in *Portrait of the Artist as a Young Man*. Schemes are unknown in legal writing except when writers use artificial, unsuccessful devices like italicizing or bolding for emphasis. A figure may also be a trope, which emphasizes the figure to suggest something different from what's said. Some figures work; some fail; most work only if done well.

This column explores rhetoric that fails.

Oxymorons. It's a sure bet, say amateur experts, that an oxymoron will combine contradictory words. Some would-be oxymorons are not oxymorons at all. There is military intelligence.

Mixed Metaphors. Mixed metaphors are a pain in the neck. If you don't use clichés, you won't mix up your metaphors or wix up your murds.

Rhyming. Rhyme, however clever, wastes time. Rhyming is juvenile. With few exceptions, legal writing in rhyme contains little reason. Words that come close to rhyming are just as bad: "*President* Washington set a two-term *precedent*."

Comparisons. Comparisons are as awful as clichés. But use them to compare the facts in case-law authority to the facts of your case.

Alliteration and Assonance. Always avoid annoying alliteration – lest you become a nattering nabob of negativism. Alliteration is the repetition of consonant sounds. Assonance is the repetition of vowel sounds.

Are the following effective? No. They prove that "[a]lliteration . . . is a novice's toy."[4]

• Governor Mark Hatfield, nominating Richard Nixon for President: "A man to match the momentous need [who has] demonstrated courage in crisis from Caracas to the Kremlin, . . . a fighter for freedom, a pilgrim for peace."[5]

• Georgia Court of Appeals: "Personal prefatory pensive ponderings, such as the foregoing, recognizably play partial part in this court's eventual decision."[6]

But subtle alliteration is effective if used sparingly:

• Justice Douglas: "*F*ull and *f*ree discussion has indeed been the *f*irst article of our *f*aith."[7]

• Justice Holmes: "The *l*ife of the *l*aw has not been *l*ogic; it has been experience."[8]

• Justice Johnson: "[E]very *b*equest is *b*ut a *b*ounty, and a *b*ounty must *b*e taken as it is given."[9]

• Justice Murphy: "Moral *t*urpitude is not a *t*ouchstone of *t*axability."[10]

Rhetorical Questions. Who needs rhetorical questions? May you use this device if you know that a skeptical reader will not supply an unanticipated answer; if your goal is to make your reader think and you don't care about convincing anyone of anything; or if you enjoy befuddling? Yes, if you're Clarence Darrow.

Rhetorical questions are ineffective because legal writers should answer questions, not pose them except as issue statements. Rhetorical questions allow for miscommunication. Legal writers should state their points confidently and directly, without ambiguity.

Some believe that a good way to involve readers is to ask them questions. Do you agree?

Analogies. Analogies in writing are like feathers on a fish. But use analogies in legal writing if no authority is on point.

Some believe that a good way to involve readers is to ask them questions. Do you agree?

Hyperbole. Hyperbole lies without fooling. Your reader will be eternally grateful for this infinite wisdom: Resist hyperbole. Not one in a trillion uses it correctly. From Professor Rodell, whose writing about writing led to writing courses at every law school: "[T]he awful fact is . . . that 90 percent of American scholars and at least 99.44 percent of American legal scholars not only do not know how to write simply; they do not know how to write."[11]

Exaggeration. Exaggeration is ludicrous. It's a billion times worse than understatement. If I've told you once I've told you a million times: "Never exaggerate."

Understatement. Understatement is always the absolute best way to illustrate earth-shaking ideas.

Adages and Proverbs. Annihilate adages; pontificate against proverbs: "A rule of law should not be drawn from a figure of speech."[12]

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