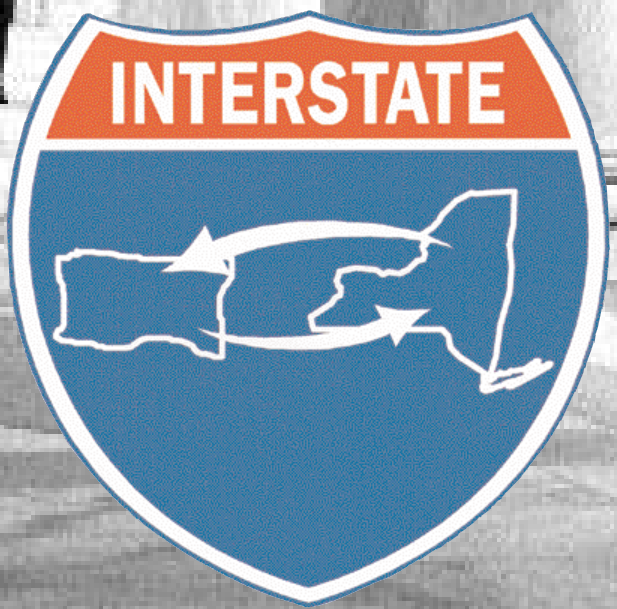
NEW YORK STATE BAR ASSOCIATION

JANUARY 2000 | VOL. 72 | NO. 1

# Journal

## CHILD SUPPORT ORDERS UNDER THE UIFSA




*Inside:*

Threats in Civil Cases
Company E-mail Policies
N.Y. Antitrust Bureau
Influence of Roman Law
Ethical Duties of Writers

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

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

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

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

# CONTENTS



## DEPARTMENTS



## ON THE COVER

*The cover logo symbolizing interstate transactions is taken from the booklet Interstate Actions Made Easy, prepared by the New York State Office of Child Support Enforcement; it is used with permission.*

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

# President's Message

THOMAS O. RICE*

## Justice for All

*Justice William J. Brennan wrote: "Nothing rankles more in the human heart than a brooding sense of injustice." The organized Bar has carried that message to lawmakers and others when pressing for necessary resources to ensure that equal justice is made real for all. Incremental progress has been achieved but the cause requires persistence and grassroots efforts.*

*The following open letter to lawmakers is a compilation of some of the issues and concerns of the New York State Bar Association that are pursued in our meetings and our correspondence with legislators. Readers are encouraged to use the letter as a reference and to communicate with and lobby legislators and decision makers.*

*Thank you for all your efforts in Albany and Washington. Please continue to take every opportunity to educate and advocate.*

Dear Lawmakers:

For just a moment, recall your days in civics and history class. Reflect upon our Constitution's very first sentence: "We the people of the United States, in order to form a more perfect union, establish justice . . ." Remember that the Sixth Amendment assures an accused the right to the "assistance of counsel." Consider the fact that it rests with members of the bar and bench to hear cases and see the faces behind these concepts, and to breathe life into those words. On paper, it seems so simple.

Lawyers know only too well that an indispensable ingredient of justice for all is assurance that every citizen, without regard to economic condition, has practical access to effective counsel. That cause has been long embraced by private practitioners who give freely of their time and experience to those in need.

Last year, a survey of the New York State Court System found that two million *pro bono* hours of service are donated annually by New York attorneys. Private practitioners alone, however, cannot and should not shoulder sole responsibility. Rather, there is a societal obligation.

One advocate for civil legal service programs has said it well: "[L]ike other great crises in our domestic history — independence or subservience as a nation, slavery or its abolition, resistance to totalitarian enemies or non-involvement, full civil rights for all or continued discrimination and injustice — the struggle to bring a poor man the same expectation of justice as the rich man is basically a moral crisis."

It is then self-evident that there need to be in place adequately and regularly funded programs to ensure that attorneys are available to provide the unmet legal needs of low-income persons. That was the vision of programs created more than three decades ago. Sadly, despite progress there remains a challenge and a source of concern.

The fortitude of legal services counsel is tested when their programs are continually subject to attack and in peril of budget reductions. It strains the stamina of assigned counsel in criminal matters and in Family Court when they are unfairly paid $40 for time in court and $25 for time outside the courtroom, rates that have remained unchanged for 14 years. It compounds the stress on public defenders when they receive insufficient resources and carry huge caseloads.

As attorneys continue to "thin the soup" to serve more people with less, we cannot help but contemplate the time when no counsel might be available. In some types of matters, that is the case today.

History is replete with examples of courageous advocacy and thoughtful rulings respecting the right to counsel. We do well to keep in mind Justice Sutherland's words in 1932: "[T]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . [The layperson] requires the guiding hand of counsel at every step in the proceeding against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." Since 1963, and the Supreme Court's decision in *Gideon v. Wainright*, 372 U.S. 335 (1963), the indigent accused has been assured that right, through court appointed counsel.

For more than a quarter of a century, the Legal Services Corporation has provided indigent civil legal services and a measure of hope, but it remains dependent upon government funding. Despite political uncer-

CONTINUED ON PAGE 6

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

## PRESIDENT'S MESSAGE

CONTINUED FROM PAGE 5

tainty, the LSC has managed to provide "legal assistance to those who face an economic barrier to adequate counsel" and to "serve best the ends of justice and assist in improving opportunities for low-income persons." Obviously, the availability of effective legal assistance reaffirms faith in government and the law. It is, therefore, essential to keep LSC free from partisan pressure and ensure that attorneys have the freedom and independence to represent clients' best interests.

In the face of efforts to reduce or eliminate LSC, we must be mindful of its purpose, the people served, and the basic needs provided by assistance. Each day LSC lawyers help victims escape domestic abuse, resolve eviction disputes, keep roofs over the heads of families, obtain child support, ensure that seniors, children and persons with disabilities receive necessary health care and other services, and assist consumers in protecting their rights.

More than two-thirds of those served by LSC programs are women and 10% are age 60 or older. Contrary to some assertions, about only 10% of LSC cases result in court proceedings. In most situations, clients receive advice, referrals are made, aid is given to understand often complex procedures, and help is extended in negotiating settlements and obtaining other assistance. Funding of LSC programs then is clearly one of our highest priorities. We know that when budgetary hurdles are presented year after year, time and effort are wasted, and attention is diverted from the direct delivery of legal services. While on the federal front, we were heartened at congressional approval of funding that will provide nearly $304 million for LSC in fiscal 2000 — up from $300 million in 1999 — that appropriation is down from the highest level of funding for LSC, $400 million five years ago.

When LSC was first proposed, our Association made a recommendation worthy of revisiting. In 1973 testimony before a congressional subcommittee, then NYSBA President Robert MacCrate observed that "uninterrupted continuation and strengthening are essential" to the purpose of LSC. He called for adequate funding for three-year periods "to allow rational planning" by the agency. Certainly, that is a wiser course than the yearly hat-in-hand approach, which absorbs so many valuable resources that could be better spent counseling those in need.

That approach is equally appropriate to state funding. This past year, just over $6 million was budgeted by the legislature for legal services — welcome support in light of the governor's veto of a similar request for assistance the previous year. A regularized source of state funding, however, is vitally needed. We have been working with the court system and other bar organizations to secure such a mechanism.

Various state funding ideas deserve serious consideration. For example, a committee of the Chief Judge has proposed — and our House of Delegates has endorsed — use of the Abandoned Property funds to develop a pool of some $40 million for civil legal services.

It is important to note that civil legal service providers frequently coordinate their efforts with those of bar associations providing *pro bono* services. Referrals are made and programs are offered in mentoring and for training volunteer attorneys.

Through NYSBA's Legal Assistance Partnership Conference and in other forums, staff and volunteer legal service providers have forged partnerships to maximize service and use of resources. Those partnerships leverage funding and in-kind services. Taking away government funding threatens their effective and meaningful efforts.

We do not need to speculate on the consequences of short-sighted inadequate funding. We have experienced them. Legal services offices will turn away all but those in the most dire of circumstances. Staffs will be reduced. In some cases, providers will simply shut their doors.

Recently, lines of people snaked out the door of one legal services provider, around the corner, and up the street. Upon inquiry, it was learned the office had announced that it would only accept certain matrimonial matters on that day. Such is the need for assistance and the demand for adequate funding.

Of course, another priority is to bring compensation rates for assigned counsel to levels adequate for the new century. Fair and reasonable compensation for assigned counsel is also on the immediate agenda of the court system. This past spring, the chief judge, NYSBA, the District Attorneys Association, other bar associations, and public officials rallied for the cause.

Juanita Bing Newton, the deputy chief administrative judge for justice initiatives, discussed funding and fairness concerns in an address to our House of Delegates in November. She stressed the urgent need for action and voiced fear that the day may come when the number of assigned counsel dwindles to rock bottom. On that day, no explanation would suffice to the individual in need of effective assistance.

We are meeting with Judge Newton and representatives of other organizations to coordinate efforts to seek increased compensation. We have supported proposed legislation. In criminal matters, our House has called for a tiered-system of compensation ranging from $50 to $100, based on the seriousness of the charge, plus an increase to $75 in Family Court, and elimination of the

CONTINUED ON PAGE 52

# Editor's Mailbox

## Rensselaer Court

It was a pleasure to see the new Rensselaer County Family Court in the November *Journal*. I write to note those who participated in the renovation process from the beginning.

OCA had long noted the deficiencies in the Rensselaer County courts. They were old, small, lacked privacy for litigants and lacked the basic necessities for all users. The Rensselaer County Bar Association was urged to take action by Judge Carpinello at a dinner honoring newly elected judges. The Rensselaer County Bar Association quickly established a liaison committee consisting of Stephen Pechenik, Jane Williams, Jill Nagy, James Brearton, William Aram and myself. The committee met frequently with Judge Hughes and later Judge Spain to urge the matter forward.

The committee met with the Rensselaer County judges and staff, met with the county executive, testified before the county legislature and held informational luncheons with the membership. Some members together with Stacy Pomery of the Rensselaer County Historical Society took inventory of the many valuable artifacts within the facilities so that they could be restored for future use. The committee work continues by providing tours and information to the interested public.

This project is a fine example of bench, bar, community and public officials working together for the public good.

*Anne Reynolds Copps*
*Albany, N.Y.*

## Use of Firearms

It is unfortunate that Robert F. Nicolais marred an otherwise capable review of firearms laws (Robert F. Nicolais, *State and Federal Statutes Affecting Domestic Violence Cases Recognize Dangers of Firearms*, N.Y. St. B.J., Vol. 71, No. 8, at 39 (November 1999)) by uncritically recycling junk science from the gun control lobby. Much of the "research" cited in the opening paragraphs has been discredited. In fact, the *Journal of the Medical Association of Georgia* devoted an entire issue to debunking such research. Further, the National Center for Injury Prevention and Control of the Federal Centers for Disease Control lost funding for sponsoring political advocacy masked as research purporting to establish that firearms are a public health problem.

Citing a 1993 paper by Arthur Kellermann in the *New England Journal of Medicine*, Nicolais states that households with firearms are 7.8 times more likely to have a firearm homicide at the hands of a family member or intimate acquaintance than homes without firearms. Kellermann started with a figure of "43 times more likely" in a 1986 issue of the same journal, and eventually worked his way down to the claim in the October 3, 1997, issue that gun owners were 2.7 times more likely to kill a family member or acquaintance than an attacking intruder.

Looking behind the statistics reveals the fraudulent nature of the claims. For example, Kellermann states that 15 "victims" were killed under "legally excusable" circumstances, and that four "victims" were shot by police "in the line of duty." Justifiable shootings are hardly the image of the alleged "domestic violence problem" the studies' conclusions seek to conjure. Moreover, "acquaintances" in the Kellermann world of "family violence" include relationships such as pimp/prostitute, drug addicts/drug dealers, and criminal associates.

Commenting in the Spring 1995 issue of the *Tennessee Law Review* (Don B. Kates et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda*, 62 Tenn. L. Rev. 513 (1995)), criminologist and attorney Don Kates stated that Kellermann's conclusions depended "entirely on an accurate estimation of the control group's gun ownership." For his study, Kellermann chose locales that had some of the most restrictive firearm laws. Members of the control group who acknowledged firearm ownership therefore risked admitting to a felony simply by mere possession of a firearm.

According to Kates, within the confines of Kellermann's published data it would take only 35 interviewed residents, out of a total of 388, lying about whether they owned a gun to completely invalidate Kellermann's conclusion. In light of this and other fudges, it should come as no surprise that Kellermann refused to share his data with other researchers, which is contrary to the common practice of respected researchers.

Nicolais also cites Kellermann for the proposition that "the easy accessibility of firearms in the home increases the risk of suicide." The easiest way to debunk this claim is to simply point to countries such as Japan, which have minimal firearm accessibility yet their suicide rates are higher than the rate in the United States. Moreover, Kellermann tossed out the 30% of suicides occurring outside the victim's home, thereby inflating the contribution from firearms. Kellermann also virtually ignored his own data, which showed stronger links to psychiatric medications, drug abuse, hospitalization for alcoholism, and even living alone, than to firearms.

The use of the medical literature by Kellermann and others to bolster the claim that firearm ownership is a "public health" issue is a ploy to justify passage of additional gun control laws. Such laws would be in addition to the more than 20,000 federal, state and local gun control laws already on the books. But those expressing concern over domestic violence — or indeed any criminal violence in society — would be better off working to pass "Right To Carry" laws, which allow sane, law-abiding people to carry firearms for protection. The most in-depth research suggests that firearms are used as often as 2.4 million times a year for self-defense against criminal attack, usually by simply brandishing the firearm. (Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a*

CONTINUED ON PAGE 10

CONTINUED FROM PAGE 8

*Gun*, 86 J. Crim. L. & Criminology 150 (1995)).

Professors John R. Lott, Jr., and David B. Mustard, of the University of Chicago, found that:

> [A]llowing citizens to carry concealed weapons deters violent crimes, without increasing accidental deaths. If those states without right-to-carry concealed gun provisions had adopted them in 1992, . . . approximately 1,500 murders would have been avoided yearly. Similarly, we predict that rapes would have declined by over 4,000 . . . and aggravated assaults by over 60,000. . . . The estimated annual gain from all remaining states adopting these laws was at least $5.74 billion in 1992.
>
> * * *
>
> [W]hen state concealed handgun laws went into effect in a county, murders fell by 7.65 percent, and rapes and aggravated assaults fell by 5 and 7 percent.

(John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-To-Carry Concealed Handguns*, 26 J. Legal Stud. 1 (1997). *See* John R. Lott, Jr., More Guns, Less Crime: Understanding Crime and Gun Control Laws (1998)).

Sadly, New York is not a "right-to-carry" state, and residents here live with the most infamous of all victim-disarmament laws, the "Sullivan Law." While the Lott-Mustard study gives us some strong indicators, we can only wonder just how many lives have been lost to New York's draconian gun control laws.

*Robert P. Firriolo*
*Commack, N.Y.*

*The writer is legal advisor to the Sportsmen's Association for Firearms Education, Inc.*

## Statistics on Use of Firearms

The November 1999 article discussing firearms and domestic violence presented important analysis of the various laws covering the suspension and revocation of firearms licenses. The role of firearms in domestic violence cases is significant. In 1997, the Governor's Commission on Domestic Violence Fatalities reported that firearms were used in 51% of the domestic violence homicides that the commission investigated. Controlling access to firearms by domestic violence offenders is an important component of the strategy to protect victims of domestic violence.

As set forth in the article, the various state and federal provisions covering possession and sale of firearms, and suspension and revocation of firearms licenses, present a statutory framework that is complex and neither consistent nor complete in its coverage. While this may be understandable given the different origins of the various laws, the result can be undesirable from the point of view of effective law enforcement. The article provided a valuable road map for courts and police departments attempting to apply these provisions. In addition, the analysis pointed out the shortcomings of the existing framework of state and federal laws. These are valuable contributions to the legal community's understanding of the tools available in domestic violence cases involving firearms.

*Mary Cheasty Kornman*
*New York City*

*The writer is counsel to the Governor's Commission on Domestic Violence Fatalities.*

## Project Labor Agreements

The article on Project Labor Agreements in the September/October *Journal* sends the clear message that PLAs are legally permissible on public work if they provide an economic benefit to the public owner after a study. Just what is the economic benefit?

All the PLA studies I have seen are generally superficial and very speculative in regard to the savings. Unfortunately, the courts have tolerated such an approach. The key question really is, have there actually been any savings or costs under PLAs that have been negotiated once the project was under way and completed? We do not know of any studies that have verified the savings at the end of a project, nor do we know of any that have analyzed what the project costs would have been without the PLA. We believe the only real way to ensure that PLAs are saving money is to bid projects both ways with and without a PLA.

The Court of Appeals recognized that PLAs by their very nature are anti-competitive. While the court found them legally permissible, it did not try to defy the laws of economics. The simple theory of supply and demand tells us that fewer bidders will mean higher prices. PLAs inhibit the normal market interaction of union and open shop contracts. They discourage open shop contractors from bidding. In one case (South Glens Falls schools) recently, 13 general contractor planholders were seeking to bid a project. An addendum was issued inserting a PLA. In the end, there were only three bidders. Comparing the owner's budget numbers with the bids shows us it cost, not saved, the owner 10% because of the PLA. The owner found a way to proceed by selecting several deduct alternates, but in the end that only meant the owner got less school than hoped for. The kids suffered in the end.

Every case cited by the authors offers no follow-up studies or results on whether the terms of the PLA were every really implemented and whether the public owner really saved any money. Until "projected" savings are verified, it is misleading to say that PLAs save anybody any money.

The labor relations environment in the construction industry in upstate New York is a highly competitive one with the union and open shop sectors competing with one another and checking each other's excesses. The lean labor agreements in that region show that. Downstate is another matter. Well-negotiated PLAs probably could provide real savings for owners in that region.

*Jeffrey J. Zogg*

*The writer is the managing director of General Building Contractors of New York State, Inc.*

# Uniform Interstate Family Support Act Has Made Extensive Changes In Interstate Child Support Cases

BY JOHN J. AMAN

In the two years since the Uniform Interstate Family Support Act (UIFSA) became effective in New York State on December 31, 1997, it has provided a new set of procedural rules and mechanisms to govern interstate child support cases. They are making far-reaching changes for litigants and their attorneys in the way these cases are handled.

The UIFSA was developed by the National Conference of Commissioners on Uniform State Laws in 1992 to create uniformity in interstate child support proceedings, and thereby foster greater consistency and efficiency in the enforcement of interstate child support cases. Differences among the states had led to a proliferation of procedures and court orders involving the same parties, and little comity was offered from one state to another.

In 1996, Congress effectively required all states to adopt the UIFSA when it passed the Personal Responsibility Work Opportunity Reconciliation Act, also known as the Welfare Reform Act of 1996. Any state that chose not to pass UIFSA would lose federal funding for its child support enforcement programs. It is now the law in all 50 states and applies to every case for child or spousal support filed on or after January 1, 1998, that involves parties who live in two different states.

Although some states already had similar statutes, the UIFSA in New York, codified as article 5-B of the Family Court Act, is quite different than its predecessor, the Uniform Support for Dependents Law (USDL). Judges, hearing examiners, court personnel, child support agency personnel and some practitioners have received extensive training on UIFSA, but it is difficult to understand the full implications of the changes until confronted with a case that falls under its provisions.

This article is designed to provide attorneys who occasionally deal with interstate child support issues with basic guidance on how to analyze UIFSA fact patterns. The concepts are covered in a question-and-answer format, and boldface is used to highlight key topics within some answers.

## Comparison of UIFSA and USDL

*Q. What are the major differences between the UIFSA and the USDL?*

A. The key differences between the two statutes include the following:

- Under the USDL, multiple child support orders could be in effect simultaneously for the same parties. There was no limit on the number of orders that could exist between two parties for the same child(ren). Generally under the UIFSA a tribunal[1] cannot issue a new order of support if an order already exists between the parties in another state. If multiple orders do exist when court action is initiated, only one order will be entitled to legal recognition. The UIFSA sets forth rules on which the order will be recognized as valid for future enforcement and for future modification purposes.
- Under the USDL, jurisdiction to modify an existing order of support varied from state to state and was not consistent in New York. Under the old laws (including USDL) many states might have claimed the authority to modify the same order. Under the UIFSA, **only one state has jurisdiction or authority** to modify the one legally recognized order of support. The UIFSA establishes a number of rules that a tribunal must follow in determining which state has the jurisdiction to modify a prior order.

**JOHN J. AMAN** is a hearing examiner in the Erie County Family Court and president of the statewide Hearing Examiners Association. He is a graduate of Canisius College and received his J.D. degree from Buffalo School of Law at the State University of New York.

He wishes to acknowledge assistance in the preparation of this article from Barbara Handschu, Esq., Erie County family law specialist, and Kristie Kantor, Esq., Supreme Court law clerk, Erie County.

- Under the USDL, all litigants had to be physically present in a tribunal to testify. The UIFSA has **procedures that allow litigants to testify by telephone or electronic means.**
- The USDL really had no provisions for long-arm jurisdiction. Instead it generally required the use of a two-state method with the custodial parent's state serving as the initiating jurisdiction and the non-custodial parent's state serving as the responding jurisdiction. Thus, under the USDL, the obligee[2] had, in effect, to start a two-state proceeding. These cases frequently fell into a black hole and were not heard from for months. The UIFSA contains a **long-arm provision** and actually encourages its use. This has far-reaching implications for litigants and counsel.
- Under the USDL, a party who attempted to modify an obligation established by another state that was registered for enforcement in the obligor's state had to travel to the state that issued the order to seek relief. This was virtually impossible for most obligors. Under the UIFSA, the **obligor can initiate a petition to modify an out-of-state order in the obligor's state** and cause the petition to be filed in the state that issued the order. The obligor can then appear by telephone in that state and litigate without the need for travel.
- Under the USDL, registration of a support order of another state was necessary before obtaining enforcement of the order. Thus, the courts had to be involved immediately in enforcing an order from another state. Under the UIFSA, **an order can be enforced by certain administrative or non-court proceedings**, including direct income withholding, without first registering the order. An income deduction order issued across state lines, under UIFSA, is treated the same as one issued in the state where obligor resides and works.
- Under UIFSA, the **admissibility of pleadings**, business records and other documentary evidence is much easier. The statute says that documents are not excludable merely based upon their means of transmission.
- Generally, the USDL allowed only the custodial parent to initiate an action to **establish paternity or to establish or modify support**. UIFSA makes these remedies available to both parties.
- Under UIFSA **communication is encouraged** between tribunals and decision makers. It was not encouraged under the USDL.
- Unlike the practice under the USDL, the UIFSA **does not apply intrastate** in New York.
- Under the UIFSA there is **more accountability for the processing of a case**. Definitive time frames are established and followed so that cases cannot be lost in the system for months and years at a time.

## Using the UIFSA

*Q. Generally, when does one use the UIFSA?*

A. The UIFSA is used when that party seeks interstate establishment, enforcement or modification of child support or spousal support. The UIFSA also applies to paternity determinations when the other party lives in another state.

*Q. Does the UIFSA have a definitional section?*

A. Yes. UIFSA's definitional section is located in § 580-101.[3] Because UIFSA uses a number of terms that are different from those used in the USDL, the definitional section should be referenced and studied.

*Q. How can a proceeding be brought under the UIFSA?*

A. A proceeding can be brought in the initiating party's state by using long-arm jurisdiction to serve the responding party in the responding party's state. If long-arm jurisdiction is not available, appropriate, or desirable, the initiating party may file a two-state proceeding brought under the UIFSA in her/his state, and it will be transmitted to the state that has jurisdiction over the responding party. The matter will be heard in the responding party's state with the local IV-D agency[4] (in New York, the Support Collection) representing the initiating party. This is frequently known as a two-state proceeding and is similar to the two-state proceeding under the USDL.

*Q. How can a support order be registered under the UIFSA?*

A. An initiating party may register an existing support order for enforcement in the responding party's state. This procedure is similar to provisions under the USDL.

*Q. What enforcement methods are available?*

A. Enforcement methods include direct income withholding. Many of these mechanisms are available only if the party seeking enforcement has made an application for the services of the local Office of Child Support Enforcement. (See below.)

## Long-Arm Jurisdiction

*Q. I represent a New York parent seeking child support against a parent in another state. Why would I want to try to "long-arm" the obligor into New York State?*

A. The UIFSA encourages long-arm proceedings and there are definite advantages in proceeding this way. First, if long-arm jurisdiction is obtained, the New York Family Courts will hear the matter from start to finish, generally as a local case, without the complications and the delays that are often involved

CONTINUED ON PAGE 16

## New York State Decisions

The following three cases have provided initial insights into how provisions of the UIFSA are being interpreted in New York State when issues are brought to litigation.

***Hauger v. Hauger***.[1] The mother and children, aged 19 and 17, were New York residents. The father resided in Nevada and was subject to a Nevada support order until the children turned 18. The mother sought a New York Order for Support until both children were 21. The Family Court dismissed the petition.

The Appellate Division reversed in part and affirmed in part. Because the younger child was still the subject of the Nevada order, dismissal of this portion of the petition was correct. Nevada had CEJ (a party resided in the issuing state), so New York could not modify the duration of the Nevada order.

However, the court found that the order had expired as to the older child. Because there was no order, New York was not barred by UIFSA or Full Faith and Credit for Child Support Orders Act from entering a new order for this older child.

***Gloria P. v. Armondo P.***[2] The respondent's Florida Order of Divorce, including child support, terminated when the child turned 18. The petitioner then filed a de novo petition for support in New York under Article 4 of the FCA. The Family Court held that it could not modify the Florida order, but in the absence of an existing order could enter a new order.

The court held that it could exercise long-arm jurisdiction to bring the respondent into a New York court on three different grounds:

First, the respondent was served while physically present in New York.[3]

Second, respondent resided in New York several months of the year, his car was registered in New York, he received Medicare benefits in New York, and while he was in New York the child resided with him.[4]

Third, the respondent made support payments while he resided in New York.[5]

The de novo application was entertained in New York. The court held that the Florida order terminated when the child turned 18. The New York court held that accordingly Florida no longer had CEJ.

***Chisholm v. Chisholm-Brownlee***.[6] The parties resided and were divorced in New Hampshire. The mother and children then moved to New York. Under the terms of the divorce order, one child became emancipated and the second was going to be emancipated in June of 1998 when he turned 18. The emancipation age set in the divorce order was based on New Hampshire law.

The mother filed two petitions in New York. The first sought to modify the New Hampshire order. The second sought a de novo order after the New Hampshire order was terminated by the emancipation of the last child. The petition was a "one-state" or long-arm petition, not a two-state petition (because a two-state petition would be heard in New Hampshire and the lower age of emancipation would defeat the petition).

The second petition was dismissed for lack of jurisdiction. The mother claimed long-arm jurisdiction under FCA § 154(b). The court noted that § 154(b) was repealed, so UIFSA § 580-201 provided the exclusive basis for jurisdiction. The mother did not allege that any of the UIFSA grounds applied to the non-resident father, and the court lacked personal jurisdiction.

The first petition met a number of objections. First, the New Hampshire order was never registered for modification pursuant to FCA § 580-609. Second, New Hampshire retained CEJ, so New York could modify the New Hampshire order only on written consent of both parties (a finding that differed from those in the *Hauger* and *Armondo* cases). Finally, the court held that the mother failed to allege sufficient grounds for modification.

1. 256 A.D.2d 1076, 683 N.Y.S.2d 771 (4th Dep't 1998).
2. N.Y.L.J., Dec. 22, 1998, p. 30 col. 2 (Fam. Ct., Dutchess Co.).
3. FCA § 580-201(1).
4. FCA § 580-201(4).
5. *Id.*
6. N.Y.L.J., July 2, 1998, p. 36 col. 6 (Fam. Ct., Albany Co.).

CONTINUED FROM PAGE 13

in the two-state proceedings. Of importance, New York State substantive law will be fully applicable, including the use of the Child Support Standards Act as well as the New York age of emancipation. Further, statutory and case law regarding the educational (college support) add-on will apply. If New York is the "issuing state," New York's interpretive law will be applied from that point forward whenever the meaning of an order is an issue. Importantly, New York, as the issuing state, will become the state with continuing exclusive jurisdiction for prospective modification purposes (see below). Finally, it is normally advantageous to counsel and to the client to litigate in a convenient and home forum.

*Q. How do I know if I am able to obtain long-arm jurisdiction over the responding party?*

A. UIFSA § 580-201 sets forth the bases for long-arm jurisdiction. Basically, New York State has long-arm jurisdiction over non-residents based on any of the following: the individual is personally served with the summons and petition while in New York; the individual submits to the jurisdiction of the New York courts; the individual resided with the child in New York; the individual resided in New York and provided prenatal expenses or support for the child; the child resides in New York as a result of the acts or directives of the individual; the individual engaged in sexual intercourse in New York that may have resulted in the conception of the child; the individual asserted parentage in the putative father registry maintained in New York; or there is any other basis consistent with the New York or the U.S. Constitution.

*Q. What are the practical effects if I successfully assert long-arm jurisdiction over the responding party and I have personal jurisdiction over the responding party?*

A. Your local court will have the same powers over the responding party that it would have if that party were a resident of New York State.

*Q. What are some of the practical considerations to weigh, aside from the long-arm requirements, in deciding whether to proceed in this fashion?*

A. Practical issues include the difficulties in serving process on the responding party, whether your local court will accept substituted service, whether your local court will proceed with a default if the responding party is served and does not appear, how pre-hearing discovery will take place with an out-of-state responding party, and the difficulties that may be associated with having the responding party appear telephonically.

## Two-State Proceedings

*Q. If it is not possible to assert long-arm jurisdiction over the responding party, is there another way of establishing, modifying or enforcing support through the UIFSA?*

A. Your client may proceed by what is called the "two-state" proceeding. This involves initiating a petition for support in the local support agency or the local tribunal. The petition is then forwarded for an administrative or judicial proceeding in the responding state.

*Q. When should I use a two-state proceeding?*

A. A two-state proceeding should be used only when long-arm jurisdiction cannot be obtained or is not appropriate.

*Q. How does the two-state proceeding work?*

A. Two-state proceedings are described generally in §§ 580-303 through 580-319 of the UIFSA.

If long-arm jurisdiction is not available or appropriate, the initiating party may file a petition in her/his state, and it will then be transmitted to the state that has jurisdiction over the responding party. The initiating party may seek paternity or paternity and support using this two-state proceeding. The local IV-D agency will represent the initiating party in the proceeding heard in the responding party's state.[5]

*Q. What are the responsibilities of the initiating tribunal in a two-state proceeding?*

A. Whether cases are initiated through the local IV-D agency or through private means, to obtain the assistance of an out-of-state agency for establishment, enforcement or modification of a support order through a two-state process, the following steps[6] are necessary:

- Complete the standard interstate forms (these are generally available through the local Office of Child Support Enforcement[7]): Transmittal #1, Uniform Support Petition, General Testimony, and Affidavit in Support of Establishing Paternity (if requesting the establishment of paternity);
- Prepare the required number of copies of forms and other necessary documents (including birth certificates, proof of income and certified copies of orders for support);
- Send the materials to the Interstate Central Registry (ICR) in the responding state;
- Monitor the case for progress and take action when necessary.

*Q. What are the responsibilities of the responding tribunal in a two-state proceeding?*

A. When the responding ICR receives the documents, it must return the Acknowledgment Section of the

CONTINUED ON PAGE 18

## Decisions on CEJ Issues

Other states have addressed issues of continuing exclusive jurisdiction (CEJ) in the following decisions.

***Haulin v. Jamison***.[1] The parties divorced in 1993 in Tennessee, and the divorce judgment fixed the father's support obligation. The mother moved to Missouri, registered the Tennessee order and moved for a modification

The Appellate Court held that the order could only be modified under UIFSA if the state had CEJ. If the father resided in Tennessee, the issuing state, then Tennessee retained CEJ[2] and mother could not modify the order.

The father was working in Singapore, and the mother claimed that he was no longer a resident of Tennessee. The court found that because he was employed by a Tennessee company, received his pay in Tennessee, had bank accounts in Tennessee, was registered to vote in Tennessee, had personal property stored in Tennessee, paid Tennessee income tax and intended to return to Tennessee when his temporary overseas assignment was over, he was a resident of Tennessee.

***Cepukenas v. Cepukenas***.[3] The parties divorced in Virginia and the divorce order required the father to pay support. The mother and child moved to Wisconsin and the father moved to Delaware. The mother moved for a modification of the Virginia order in Wisconsin but the court dismissed her application.

The Appellate Court affirmed. The mother had failed to register the order, a prerequisite for modification.[4] Even if she had registered the order, Wisconsin could not proceed. Virginia no longer had CEJ, so under UIFSA § 580-611, Wisconsin could only modify the order if both parties consented in writing, or if: (1) no party or child resided in the issuing state; (2) the petitioner seeking modification did not reside in the state where a modification is sought; and (3) the respondent was is subject to personal jurisdiction of the court.

The father had not consented to have the modification heard in Wisconsin. While conditions 1 and 3 were met, condition 2 was not, and therefore the petition was dismissed.

The UIFSA provision was found to be intended to provide "rough justice" between the parties. A party seeking a modification when there is no state with CEJ must apply to the courts in the other party's state of residence.

The court rejected the mother's argument that because no state had CEJ, Wisconsin was able to enter a de novo order. UIFSA § 580-207 makes it clear that a controlling order must be recognized. The concept of CEJ only applies to the power to modify an order.

1. 971 S.W.2d 938 (Mo. Ct. App. 1998).
2. *See* FCA § 580-205(a)(1).
3. 584 N.W.2d 227 (Wis. Ct. App. 1998).
4. *See* FCA §§ 580-609, 580-611(a).

CONTINUED FROM PAGE 16

Transmittal #1 within 20 days to the initiating agency as acknowledgment of its receipt of the documents. The acknowledgment generally provides information on which local IV-D agency has received the proceeding for further action. If the responding state requires additional information, you will be advised by either the ICR or the local agency. The responding tribunal is required to advise when and where the petition is filed and when the proceeding is scheduled to take place. If the initiating party receives any new or updated information that the responding state is not aware of, that party should notify the responding state by using Transmittal #2, forwarding it directly to the local agency. Documents should be forwarded to the ICR only if this is the first request for action that is being sent to the responding state. Subsequent information and requests must be forwarded directly to the local tribunal.[8]

*Q. What are the duties of each state's support enforcement agency (e.g., the Support Collection Unit in New York State) under UIFSA?*

A. Each state's support enforcement agency must provide certain services upon request from the initiating party. These services include: taking the necessary steps for the court to obtain jurisdiction over the responding party (including locating the absent parent

CONTINUED ON PAGE 20

CONTINUED FROM PAGE 18

or their employer), requesting the tribunal to schedule hearings, making reasonable effort to obtain relevant information such as income of the parties, prosecuting the case diligently, and communicating on a regular basis.[9]

## Evidentiary Issues

*Q. Does the UIFSA have any special evidentiary rules?*

A. Applicable rules appear in § 580-316. Generally, the UIFSA provides that the verified petition and any attachments are normally admissible as evidence. Certified records of child support payments are admissible. Copies of bills for testing for parentage and for prenatal and postnatal health care for the mother and the child are admissible. Evidence transmitted from one tribunal to a tribunal in another state by telephone, facsimile or other means may not be excluded from evidence because it is not an original writing. Finally, the UIFSA requires financial disclosure.

*Q. Is the presence of the initiating party required in the responding tribunal in a two-state proceeding?*

A. No. In any two-state action, even one involving paternity, the physical presence of the initiating party in the responding tribunal is not required.[10]

*Q. Does the UIFSA provide for telephonic depositions and testimony?*

A. Yes. The UIFSA permits a party or witness residing in one state to be deposed or to testify by telephone, audio-visual linkup or other electronic means at a designated tribunal or other location in the responding state. Both the initiating and responding parties can take advantage of this rule.[11] This feature of the UIFSA is proving to be very popular.

*Q. What problems should be anticipated with electronic testimony?*

A. Some of the problems include the limits of present technology, the difficulty of identifying a party or witness who is not physically present in the tribunal, the issue of administering an oath to a party who is not physically present, discovery issues, evidentiary admissibility issues, determining the credibility of an individual not physically present before the trier of fact, and the creation and preservation of the record for appeal purposes.

## Enforcement of Support and Controlling Orders

*Q. Does the UIFSA change the rules regarding where an obligee can seek enforcement of a support order?*

A. No. An obligee can seek enforcement of the order in any state where the obligor has income or owns property or assets.

*Q. What are issues that are likely to arise in enforcement proceedings?*

A. Although enforcement is easy when a single order exists between the parties, there are cases in which there are already multiple orders involving the same parties, especially in the early years of the implementation of the UIFSA. The parties may seek to enforce different orders. Accordingly, the UIFSA establishes a method to reconcile or prioritize multiple support orders involving the same parties. The methodology is set forth in § 580-207.

*Q. What is the role of the "controlling order" in the enforcement of a support obligation when multiple orders exist?*

A. A "controlling order" is the key UIFSA provision when multiple orders exist.[12] It is the order between the parties that must be recognized by every state for the purpose of enforcement.

*Q. If there is only one support order, is that the controlling order?*

A. If there is only one support order, that order is controlling and must be recognized.[13]

*Q. What are the series of priorities relative to determining the controlling order when there are multiple support orders?*

A. These priorities are found in § 580-207(b). The first analysis that must be done and the first priority that is given is that of "continuing exclusive jurisdiction" (CEJ). If only one of the issuing tribunals has CEJ, the order of that tribunal controls and must be recognized.[14]

*Q. What if two or more states have issued enforceable orders and each claims CEJ? Which is the controlling order?*

A. If two or more states claim CEJ, the order in the child's "home state"[15] controls. If there is no order in the child's home state, the most recently issued order controls[16] as long as obligee or obligor still lives in that state. If there is no order in the child's home state and neither obligee or obligor lives in the state with the most recently issued order, then there is no controlling order and a de novo application for support must be made in the appropriate state.

*Q. Is there an easy way to determine which order is controlling in a multiple-order situation?*

A. Numerous charts have been prepared that make it easy to track the controlling order in a multiple-order situation. They are invaluable and should be obtained by practitioners.

## Enforcement Mechanisms

*Q. What enforcement mechanisms are available under the UIFSA?*

A. The enforcement mechanisms generally are direct income withholding, administrative enforcement options[17] and registration for enforcement.

*Q. Does UIFSA permit direct income withholding from one state to another?*

A. Yes. The UIFSA establishes the theory of a nationally enforceable income withholding order.[18]

*Q. Does a tribunal become involved if direct income withholding from one state to another is sought?*

A. The tribunal will not become involved unless there is a challenge to the withholding order.

## Registration for Enforcement

*Q. What is registration for enforcement?*

A. An order issued by a tribunal of one state may be registered for enforcement in any one of the other 49 states. If this is done, the order becomes enforceable in the responding state in the same manner as in the issuing state. However, the responding state may not modify the registered order. The procedure for registration is very similar to that formerly used in the USDL.[19]

*Q. Does the tribunal involve itself in registration for enforcement?*

A. Yes. The tribunal files the support order and then notifies the non-registering party of the registration.[20]

*Q. Can a non-registering party contest the registration?*

A. Yes. This procedure is very similar to the procedure in the USDL. The non-registering party must request a hearing to vacate the registration within 20 days after the date of mailing or personal service of notice of the registration.[21]

*Q. What happens if a timely request to contest the validity of the registration is not made?*

A. If a timely request is not made, the order is confirmed and will be enforced.[22]

*Q. What defenses can the non-registering party raise when contesting registration of the order?*

A. The non-registering party can allege that the issuing tribunal lacked personal jurisdiction, that the order was obtained by fraud, that the order has been vacated, suspended or modified by a later order; that the issuing tribunal has stayed the order pending appeal, that there is a defense to the remedy sought under the law in the responding state, that full or partial payment has been made, or that the applicable statute of limitations precludes enforcement of some or all of the alleged arrearage. Certain other defenses may also be raised.[23]

## Form and Document Checklist

**Standard interstate forms are listed in bold type, other documents are listed in plain type.**

### Checklist for Establishing a Support Order

| To do this | You need these forms and/or documents |
|---|---|
| establish an order in New York using long-arm jurisdiction | a local family court petition, and any other documents that are regularly used for establishment in local cases in your county |
| establish an order in the other party's state using the two-state process | **CSE Transmittal # 1**<br>**Uniform Support Petition**<br>**General Testimony**<br>if paternity establishment is needed:<br>**Affidavit in Support of Establishing Paternity** |

*Boldface indicates a standard interstate form.*

### Checklist for Enforcing a Support Order

| To do this | You need these forms and/or documents |
|---|---|
| register a New York order for enforcement only | **CSE Transmittal # 1**<br>**Registration Statement**<br>one certified copy of the New York order<br>one regular photocopy of the New York order<br>also see the note at the bottom of page 12* |
| ask another state to enforce its own order | **CSE Transmittal # 1**<br>also see the note at the bottom of page 12* |
| register an order of a third state for enforcement only | **CSE Transmittal # 1**<br>**Registration Statement**<br>one certified copy of the order<br>one regular photocopy of the order |
| establish an order in New York using long-arm jurisdiction when there are existing multiple orders but no order is controlling | a local family court petition, and any other documents that are regularly used for establishment in local cases in your county<br>one certified copy of each existing order<br>a payment record and/or affidavit of arrears for each existing order |
| establish an order in the other party's state using the two-state process when there are existing multiple orders but no order is controlling | **CSE Transmittal # 1**<br>**Uniform Support Petition**<br>**General Testimony**<br>one certified copy of each existing order<br>one regular photocopy of each existing order<br>a payment record and/or affidavit of arrears for each existing order |

*Boldface indicates a standard interstate form.*

## Modification and Continuing Exclusive Jurisdiction

*Q. What is the most important concept regarding the modification of interstate child support orders?*

A. Continuing exclusive jurisdiction. It is the right of a state — and only that state — to modify an existing child support order.

Under the UIFSA only the state that holds CEJ may modify a prior interstate order.[24] When a state has CEJ, it means it is the only state that has the author-

ity to modify an existing order; and that state keeps that authority so long as the obligor, obligee or child still lives in that state. Thus this state has "continuing exclusive jurisdiction."

*Q. How is CEJ obtained?*

A. CEJ is obtained when a state enters a child support order and remains the resident state of the obligor, the obligee or the child unless the individual parties agree in writing that another state exercise modification jurisdiction.

*Q. If only one state has issued a child support order, does that state have CEJ?*

A. Yes, if only one state has issued a child support order, the issuing state has CEJ, but only as long as the obligor, obligee or child continues to reside in that state.

*Q. What if only one state has issued a child support order and neither obligor, obligee nor the child lives in that state?*

A. If neither obligor, obligee nor child lives in the state that issued the only child support order, while that order is still "controlling" (for enforcement purposes), no state will have CEJ. The party seeking modification must register the order for modification in the other party's state and seek modification relief there. This is the only circumstance under which an order can be registered for modification. This occurs frequently.[25]

*Q. Does the UIFSA provide a resolution if there are multiple orders that pertain to the same parties? Does it say which state, under these circumstances, has CEJ?*

A. UIFSA has a series of rules that address this problem. The analysis begins with the question of whether any of the orders has been issued by the child's home state.[26] If so, that state has CEJ.

*Q. What if none of the orders were issued in the child's home state?*

A. If none of the orders were issued in the child's home state, the UIFSA looks at whether any order was issued in the obligor or the obligee's state. If so, that order controls and that state has CEJ.[27]

*Q. What if multiple orders exist and none of the orders were issued by the obligor's, obligee's or child's state?*

A. In that case, no tribunal has CEJ. Either party may bring a proceeding to establish a de novo order of support in an appropriate state having jurisdiction, perhaps creating a "rush to the courthouse" situation.[28]

*Q. Is it possible for more than one state to have CEJ?*

A. More than one state may claim CEJ, but by definition, this authority is exclusive. There may be multiple orders, but once an analysis is performed under § 580-207, only one order is recognized as controlling and only one state has CEJ. Because UIFSA is uniform, it should not matter which tribunal does the analysis; the result should be the same.

*Q. What happens when the parties resume residence in the same state?*

A. When the parties resume residing in the same state and there is no CEJ state, a party may register the controlling order in the state where both parties reside and seek enforcement or modification in that state.[29]

## Checklist for Modifying a Support Order

| To obtain: | You need these forms and/or documents: |
|---|---|
| modify a New York order | a local family court petition, and any other documents that are regularly used for modification in local cases in your county<br>also see the note at the bottom of this page* |
| ask another state to modify its own order | **CSE Transmittal # 1**<br>**Uniform Support Petition** (some states do not require this)<br>**General Testimony**<br>also see the note at the bottom of this page* |
| register an order of a third state for modification | **CSE Transmittal # 1**<br>**Uniform Support Petition**<br>**General Testimony**<br>**Registration Statement**<br>one certified copy of the order<br>one regular photocopy of the order |
| establish an order in New York using long-arm jurisdiction when there are existing multiple orders but no order is controlling and no state has CEJ | a local family court petition, and any other documents that are regularly used for establishment in local cases in your county<br>one certified copy of each existing order<br>if you are also seeking enforcement of arrears: a payment record and/or affidavit of arrears for each existing order |
| establish an order in the other party's state using the two-state process when there are existing multiple orders but no order is controlling and no state has CEJ | **CSE Transmittal # 1**<br>**Uniform Support Petition**<br>**General Testimony**<br>one certified copy of each existing order<br>one regular photocopy of each existing order<br>if you are also seeking enforcement of arrears: a payment record and/or affidavit of arrears for each existing order |

* If the case has multiple orders for current support and the controlling order has not been determined by a tribunal, you must also provide: one certified copy of each existing order and, if you are seeking enforcement of arrears, a payment record and/or affidavit of arrears for each existing order and, if the determination will be made in another state, one regular photocopy of each existing order.

*Boldface indicates a standard interstate form.*

## Out-of-State Decisions

The following decisions reflect initial interpretations of the UIFSA by other states on issues involving long-arm jurisdiction and controlling orders.

***Franklin v. Commonwealth of Virginia***.[1] The parties married in California, then moved to Virginia for three months before moving overseas. While in Africa, the parties experienced several physical altercations culminating in the father ordering mother and children out of the house. The mother and children returned to Virginia, and the father voluntarily paid child support.

Several months later the mother obtained an Administrative Support Order (ASO) in Virginia and it was served on the father by certified mail. She also obtained an emergency custody order under the Uniform Child Custody Jurisdiction Act (UCCJA). The father made several "limited appearances" in the custody proceedings to contest jurisdiction. However, on one occasion the father filed an order to show cause alleging a violation of the visitation order and requesting relief.

When the Virginia Division of Child Support Enforcement (DCSE) began a wage withholding, the respondent contended the ASO was invalid for lack of personal jurisdiction.

The Court of Appeals found two grounds for long-arm jurisdiction. First, the children became residents of Virginia as a result of the father's acts. The father argued that he took no action to help or facilitate the children's move to Virginia. The court rejected this argument, saying that in moving the children from the house in Africa, and in providing no assistance, it was logical for the mother to return to her point of departure, the last marital residence. The law did not require that the father specifically direct the mother to live in Virginia.

Secondly, in filing visitation papers requesting substantive relief, the father waived his objection to personal jurisdiction and submitted himself to the authority of Virginia's Courts.

NOTE: The first ground is a very expansive reading of the law, and may be subject to constitutional challenge. The court seems to have considered the need to establish child support somewhere, and determined not to get too technical in enforcing the father's clear duty to support his family.

***Northrup v. Northrup***.[2] The parties married and divorced in New York. Child support was part of a settlement agreement that was incorporated but did not merge into the divorce judgment. Subsequently, the father moved to Delaware. The mother, by Uniform Reciprocal Enforcement of Support Act (URESA) Petition, obtained a support order and wage withholding order in the Delaware Family Court.

In 1995, Delaware enacted the UIFSA. In 1996 the father moved for a downward modification of the Delaware order based on the eldest child turning 18. The master granted the petition, and the mother appealed. She also filed a petition to enforce the New York order.

The Family Court dismissed the father's modification and the mother's enforcement petition. Where there are two orders (New York and Delaware), the first step is to determine which order controls. Here, the New York order was controlling because it was issued first and New York was the current home state of the child. Therefore, the Delaware order was a nullity and could not be modified.

However, the mother failed to register the New York order in Delaware; thus the court did not have authority to enforce the order.

1. 497 S.E.2d 881 (Va. Ct. App. 1998).

2. 1996 WL 862379 (Del. Fam. Ct. Nov. 8, 1996).

*Q. Must a tribunal in a UIFSA state recognize a modification of its order by a sister state if jurisdiction was assumed pursuant to a UIFSA-like statute in the sister state?*

A. Yes. Once an order is modified, the original issuing state must recognize the subsequent order. The issuing state can then enforce its order as to amounts accruing before modification and also can prospectively enforce the modified order if it is registered in that state for enforcement purposes.[30]

*Q. The CEJ analysis is a similar analysis to the "controlling order" analysis. Is there an easy way to make this analysis?*

A. Yes. Similar to the "controlling order" situation, charts are available to assist in tracking CEJ. They, too, are invaluable. Practitioners should get one.

*Q. When do tribunals determine that an order is controlling or that a particular jurisdiction has CEJ?*

A. Tribunals are not looking for situations where there are multiple orders. When a party commences an action for relief, whether for establishment, enforcement or modification, the tribunal must make an effort to determine if there are any other existing orders. If there are, the tribunal must then utilize the appropriate analysis.

*Q. How do I know if there are other orders? How do I obtain copies of other orders?*

A. Any time parties have lived in different states, questions should be asked about prior support proceedings. The Federal Office of Child Support Enforcement has started a Federal Support Order Registry. All child support orders must be registered there. New York State has also established such a registry. The hope is that these registries will make it easier to learn about and obtain other existing orders.

## Registration for Modification

*Q. Can an order of support be registered in another state for modification purposes?*

A. As discussed above, under specific circumstances an order can be registered in another state for modification purposes. This procedure is described in §§ 580-609 through 580-614.

*Q. What specific circumstances would give a tribunal authority to modify an order of another state registered for modification purposes in its state?*

A. A tribunal has the authority to modify an order of another state registered in its state for that purpose only if the following circumstances exist:[31]

1. The child, the obligee and the obligor do not reside in the issuing state; and
2. The party requesting the modification is a nonresident of the state in which modification is sought; and
3. The responding party is subject to the personal jurisdiction of the state in which modification is sought.

*Q. Is the procedure for registering an order for modification different from registering the order for enforcement?*

A. No. The procedure is the same except that the pleading must specify the grounds for modification.

*Q. What is the practical reason for registering an order for modification?*

A. Registering an order for modification purposes allows modification of an order if no state can claim CEJ (e.g., if there is only one order and the parties and child no longer live in the state that initiated the order).

*Q. Why must registration be sought in the state of the responding party?*

A. This precludes the party seeking relief from forum shopping, i.e., from moving to a jurisdiction with advantageous child support laws and filing for relief there.

## Choice of Law

*Q. Does the UIFSA address choice of law questions?*

A. Yes. The UIFSA addresses these questions. UIFSA states that "[e]xcept as otherwise provided" the procedural and substantive law of the forum state applies. This is a significant departure from the USDL.[32]

*Q. What about enforcement and modification proceedings?*

A. In enforcement and modification proceedings, the law of the responding forum or tribunal applies. The only exception regards issues involving interpretation of the order. In those circumstances the law of the issuing tribunal applies. Under § 580-604(a), the law of the issuing state governs the nature, extent, amount and duration of the obligation. This includes emancipation issues.

*Q. What if the statute of limitations differs from the initiating state to the responding state?*

A. If the two states have different statutes of limitations for enforcement purposes, the longer period of time applies.[33]

## Paternity

*Q. Can petitions be brought under the UIFSA to determine paternity alone (without seeking child support)?*

A. Yes. This is a departure from the USDL. As has been generally indicated above the provisions of the UIFSA can be used solely to establish paternity.[34]

The law of the state of the responding tribunal applies in paternity proceedings.[35] Also, there is a res judicata effect of a prior paternity finding or an acknowledgment of paternity.

## Spousal Support

*Q. Does the UIFSA address spousal support issues?*

A. Yes. However, because states have such differing laws regarding spousal support and alimony, the UIFSA provides that only the issuing state can modify its spousal support order.[36]

## Other Resources

*Q. What articles, studies and materials are available if I need more information regarding the UIFSA?*

A. A number of extensive and in-depth articles and studies have been published regarding the UIFSA. They include: Joel R. Brandes, *Recent Decisions, Legislation, and Trends: The Uniform Interstate Family Support Act, Laws of 1997, ch. 398*, N.Y. St. B. Ass'n Fam-

ily L. Rev., Vol. 30, No. 2, at 29 (June 1998); Myrna Felder, *Uniform Interstate Support: A Quiet Revolution*, N.Y.L.J., Aug. 10, 1998, p. 3; U.S. Department of Health and Human Services, Administration for Child and Families, Office of Child Support Enforcement, *Uniform Interstate Family Support Act Handbook*; an extensive outline done by Margaret Campbell Haynes, Service Design Associates, 2000 L. St. N.W., Suite 200, Washington, DC 20036; New York State Office of Child Support Enforcement, *Interstate Actions Made Easy*, Publication No. 4627 (March 1999); and various materials prepared by the New York State Office of Temporary and Disability Assistance.

---

1. UIFSA uses the term "tribunal" instead of "Court" in recognition of the fact that many states have established administrative agencies to make child support determinations. I will use "tribunal" throughout this article. UIFSA, in § 580-102 of the Family Court Act (FCA), designates the Family Court as the New York State "tribunal" although the Supreme Court has concurrent jurisdiction in this matter.
2. UIFSA replaces the terms "petitioner" and "respondent" and other such terms with "obligee" and "obligor."
3. Note the numbering system used in UIFSA, one that is inconsistent with the Family Court Act and the Domestic Relations Law. UIFSA was adopted verbatim by New York State, including its numbering system. All further section references are to the Family Court Act.
4. These agencies were required under Title IV-D of the Social Security Act, which established the Office of Child Support Enforcement. The legislation, codified as United States Code, title 42 §§ 651-670, required every state to have an agency to assist custodial parents in obtaining support.
5. *See* FCA § 580-203.
6. *See generally* FCA § 580-304.
7. There are federally mandated forms that must be used in UIFSA two-state proceedings. These are very long and somewhat complicated.
8. *See* FCA § 508-305.
9. *See* FCA § 580-307.
10. *See* FCA § 580-316(a).
11. *See* FCA § 580-316(f).
12. *See generally* FCA §§ 580-207–580-209.
13. *See* FCA § 580-207(a).
14. *See* FCA § 580-207(b)(1).
15. FCA § 580-101(4).
16. FCA § 580-207(b)(2).
17. *See* FCA §§ 580-501–580-506.
18. *See* FCA § 580-501.
19. *See generally* FCA §§ 580-601–580-607.
20. *See* FCA § 580-605(a).
21. *See* FCA § 580-606(a).
22. *See* FCA § 580-606(b).
23. *See* FCA § 580-607.
24. The elements of CEJs are covered in FCA § 580-205 of the UIFSA. Other CEJ rules are covered in FCA § 580-207.
25. *See* FCA § 580-611.
26. The child's home state is defined in FCA § 580-101(4). *See* FCA § 580-207(b)(2).
27. *See* FCA § 580-207(b)(2).
28. *See* FCA § 580-207(b)(3).
29. *See* FCA § 580-613.
30. *See* FCA § 580-612.
31. *See* FCA § 580-611(a).
32. *See* FCA § 580-303(1).
33. *See* FCA § 580-604(b).
34. *See* FCA § 580-701.
35. *See* FCA § 580-701(b).
36. *See* FCA § 580-205(f).

# Using Threats to Settle a Civil Case Could Subject Counsel To Criminal Consequences

By Wayne D. Holly

When the facts in a civil dispute have both civil and criminal significance, an attorney who suggests or actually threatens a resort to the criminal process unless the client's settlement demands are met is almost certainly acting unethically. If the conduct produces the desired result, it may also be a crime.[1] Despite these implications, such conduct unquestionably occurs during litigation, if only occasionally.

Although the penalties alone reflect the significance of the conduct, adjusting private civil claims by threatening a resort to the criminal process should also be considered in light of statistics indicating that nearly 94% of civil cases are disposed of without trial. This suggests what most attorneys already know — settlement negotiations play a significant role in resolving litigations. As such, counsel should at least be generally familiar with the permissible boundaries of the practice.

## Ethical Issues

The ethical proscription against threatened use of the criminal process for advantage in a civil case is well known. Disciplinary Rule 7-105 of *The Lawyer's Code of Professional Responsibility* states that a "lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." Complementing the disciplinary rule, EC 7-21 states further that "[t]hreatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of th[e criminal] process." It is thought that such misuse of the criminal process diminishes public confidence in the legal system, discourages meritorious lawsuits, and prevents crimes from being reported.

Of course, while the ethical consideration is merely "aspirational," the disciplinary rule is "directory," violation of which may subject an attorney to professional discipline.[2]

The operative word in the disciplinary rule is "solely," which may save counsel from professional discipline when a criminal threat was made, but not exclusively to gain an advantage.[3] Nonetheless, counsel should tread carefully in this area, because the Appellate Divisions historically have censured attorneys for resorting to the criminal process in enforcement of civil claims.[4] In fact, in *In re Geoghan*, the Second Department disbarred an attorney based upon several charges of professional misconduct arising from a deliberate plan to utilize pending criminal charges to "serve as leverage or as a bargaining chip to resolve [a] civil action" against former New York Knick Anthony Mason.[5]

In addition to the ethical implications, threatening criminal charges to force a settlement in a civil case may also constitute a criminal offense under two separate provisions of the New York Penal Law.

## Larceny by Extortion

Penal Law § 155.05(1) (PL) defines the crime of larceny. A person commits the crime of larceny "when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof." The elements of the offense require proof of (1) an intent to (a) deprive another of property, (b) appropriate another's property to oneself, or (c) appropriate another's property to a third person, and (2) a wrongful (a) taking, (b) obtaining, or (c) withholding, of such property (3) from an owner thereof. Larceny, therefore, may be committed in several ways.

One method by which the crime may be committed is by obtaining property through extortionate means.[6] Under New York law, "[a] person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by

**Wayne D. Holly**, an associate at Tracy L. Klestadt & Associates in Manhattan, has written extensively about bankruptcy crimes. He is a member of the Criminal Justice Section of the N.Y. State Bar Association. He is a graduate of Rhode Island College and received his J.D. degree from New York Law School.

means of instilling in him a fear that, if the property is not so delivered, the actor or another will . . . [a]ccuse some person of a crime or cause criminal charges to be instituted against him."[7] The basic crime of larceny ordinarily is a class A misdemeanor.[8] When committed by means of extortion, larceny becomes grand larceny in the fourth degree, a class E felony.[9] Consistent with its federal counterpart, the Hobbs Act,[10] the essence of the state law offense is obtaining property through the wrongful use of fear.[11]

In the civil settlement context, the law of extortion does not alter the fact that use as leverage in a settlement negotiation of an adversary's desire to avoid litigation risks may be an entirely appropriate means of obtaining payment on account of a compromised cause of action. However, when counsel induces the settlement by creating (or exploiting) a fear of potential criminal liability from the same act or omission, the approach transcends mere "hard bargaining" and may cross the line into an extortionate "negotiation." This may occur in any number of contexts in which both civil and criminal liability may attach to the same set of operative facts, including, most commonly, tort and bankruptcy law.

For many intentional torts, commission of the civil offense may, and often does, give rise to both a civil suit for damages and a criminal complaint against the alleged wrongdoer — if only for a misdemeanor such as assault, battery, larceny or other petty offense.[12] Similarly, seeking the protection of the bankruptcy laws may produce both civil claims and other proceedings against the debtor, as well as criminal investigations for evidence of bankruptcy crimes, such as false oaths, concealment of assets, or other forms of fraudulent conduct.[13] These civil disputes commonly engage counsel in intense and often protracted negotiations designed to settle the action and avoid the risks (and costs) of litigation. At the same time, the "dual-jurisdictional" nature of the relevant conduct in these contexts is rife with potential for "extortionate" negotiation.

## "Instilling" Fear

A conviction for larceny by extortion requires proof, *inter alia*, that a defendant obtained property by "instilling" fear in the mind of her/his victim.[14] Case law has held that the fear required for conviction need not have been initially induced by the defendant.[15] In fact, proof that a defendant was (merely) aware of a potential victim's pre-existing fear, and used that knowledge to exploit the opportunity thus presented, can be sufficient for conviction.[16]

Thus, counsel who enlightens his unknowing adversary to the possible criminality of the acts being sued upon, and then bargains on a "threat" to commence criminal charges, has sufficiently "instilled" fear for purposes of conviction. Counsel may also be subject to prosecution when, being aware that an adversary's client is sensitive to the criminal aspects of her/his own alleged conduct, exploits that *a priori* fear, and thereby obtains a settlement and payment thereof. It is important to note that counsel need not actually possess the power to cause criminal charges to be instituted, so long as the victim "reasonably fears" that counsel possesses such power and will use it if demands are not met.[17]

## Threats and Innuendo

The requirement that a defendant must have instilled fear in her/his victim requires proof of a defendant's "threat" to do an unlawful injury.[18] In the present context, the unlawful injury may take either of two forms — a threat to accuse a person of a crime or a threat to cause criminal charges to be instituted against the threatened individual.[19] No form of words is necessary; a threat may be conveyed by innuendo or suggestion. More than a century ago, the Court of Appeals held:

> The statute cannot be evaded under the guise of friendship. No precise words are needed to convey a threat. It may be done by innuendo or suggestion. To ascertain whether a [communication] conveys a threat, all its language, together with the circumstances under which it was [conveyed], and the relations between the parties may be considered, and if it can be found that the purport and natural effect of the [communication] is to convey a threat, then the mere form of words is unimportant.[20]

More recently, the First Department has opined that threats may even be made "without verbal communication," and neither a social nor cordial relationship with the victim will necessarily insulate a defendant from conviction.[21] Where, despite apparent cordiality, a victim relinquishes property out of fear that the defendant's threat would otherwise be carried out, both federal and state courts have rejected defenses to extortion based upon a defendant's alleged social relationship with the victim.[22]

The question arises, however, whether counsel making an extortionate threat in an attempt to settle a civil case will communicate at all with the "victim," inasmuch as the victim/property-owner will, in most instances, be an adverse party who is represented by an attorney. Presumably, any offending demands for payment of a settlement would be made to opposing counsel, not directly to an adverse party.[23] The statute, however, does not require the offending threat to be made directly to the owner of the property ultimately obtained. Thus, in *People v. Slocum*, the court stated:

> Larceny [by extortion] does not require that the wrongful means employed to acquire the sought-after property be leveled directly at the owner thereof. Where

> there is a special relationship between the person to whom larcenous conduct is directed and the owner of property, of such a nature that such person can reasonably be considered in a position to effectuate the nefarious demand if he is willing, the larceny statute is applicable.[24]

Although no reported decision seems to have addressed the issue directly, the attorney-client relationship would seem to be sufficiently "special" for purposes of the larceny statute. Extortionate settlement demands made to an adverse party's attorney should therefore constitute the "threat" required for conviction.

From the foregoing, it thus appears that in negotiating the compromise of a civil claim, when the relevant facts underlying the cause of action are both civilly and criminally significant, counsel who obtains a settlement payment by stating that without a settlement he would accuse his client's adversary (or anyone else for that matter) of a crime, or cause criminal charges to be instituted against such person, may himself have committed the crime of larceny by extortion.

***Counsel inclined toward overly aggressive negotiations should keep in mind both the ethical and criminal implications.***

It is of no avail that counsel does not intend to appropriate the settlement proceeds to himself, because the intent element of the statute requires an intent either to appropriate property to oneself or to a "third person."[25] The "third person" will most often be the offending attorney's client. Similarly, it is no defense that counsel caused the settlement proceeds to be delivered directly to his client, because the "obtains" element of the offense permits conviction upon proof that the property was delivered either to the actor or to a third party.[26]

One defense that is available, however, is provided in PL § 155.15(2). It states:

> In any prosecution for larceny by extortion committed by instilling in the victim a fear that he or another person would be charged with a crime, it is an affirmative defense that the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge.

According to the practice commentary, the defense would be available, for instance, to a defendant who, under threat of charging a youth with criminal mischief, compels him to paint a wall which the youth had marked up by vandalism.[27] The defense's application in the context under discussion has not been the subject of a reported decision.

## Coercion

A second criminal offense with possible application to attempts to settle a civil case by threatening a criminal charge is the crime of coercion in the second degree.[28] Coercion and larceny by extortion are "parallel crimes." While extortion consists of compelling the turnover of property through the wrongful use of fear, coercion consists of compelling a person by intimidation to engage or refrain from engaging in certain conduct.[29]

A person commits coercion in the second degree when he or she

> compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he has a legal right to engage, by means of instilling in him a fear that, if the demand is not complied with, the actor or another will . . . [a]ccuse some person of a crime or cause criminal charges to be instituted against him.[30]

Coercion in the second degree is a class A misdemeanor.[31]

When in response to threatened criminal charges, a party is induced to settle or discontinue a civil litigation, regardless of whether a settlement payment is made, the inducing party may have committed the crime of coercion in the second degree. In fact, in contrast to the larceny by extortion charge, the coercion offense appears even easier to prove, as it contains simpler elements, and seems to cover a broader range of offending conduct.

However, the coercion offense shares the same affirmative defense with the extortion offense. A defendant's reasonable belief in the truth of the threatened charge, coupled with a singular purpose to induce the victim reasonably to make good a wrong done, will exculpate a defendant from a charge of coercion.[32] As with the extortion offense, this defense to coercion, in the context under discussion, has not been the subject of a reported decision.

## Conclusion

The disciplinary rule against threatening a criminal charge solely for advantage in a civil case is well known. On the other hand, the potential criminal implications of such conduct are probably less familiar. Yet, as a leading treatise on legal ethics correctly notes, many lawyers would probably be surprised to learn that "the law of extortion, [is] a potential quagmire for overly aggressive negotiators."[33] The same might likewise be said of the law of coercion.

While seemingly novel, the criminal consequences discussed in this article have been recognized, albeit obliquely, by at least one New York court.[34] Although the affirmative defenses discussed above may ultimately secure an acquittal,[35] counsel inclined toward overly aggressive negotiations should keep in mind both the ethical and criminal implications of threatening a criminal charge to gain advantage in a civil case.

1. Even if the desired result does not obtain, counsel may still be guilty of an "attempt" offense. *See* N.Y. Penal Law § 110.00 (PL) ("A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.").
2. *See The Lawyer's Code of Professional Responsibility*, Preliminary Statement (hereinafter "*Code*").
3. *See, e.g., Decato's Case*, 379 A.2d 825, 826-27 (N.H. 1977) (interpreting criminal threat under provision identical to DR 7-105, and vacating reprimand on ground that threat was not made "solely" to gain advantage); *see also* Florida Ethics Opinion 85-3 (1985) (sending statutorily prescribed notice of worthless check does not constitute impermissible threat of criminal prosecution because such action was not done solely to gain advantage in a civil case).
4. *See, e.g., In re Gelman*, 230 A.D. 524, 245 N.Y.S. 416 (1st Dep't 1930); *In re Penn*, 196 A.D. 764, 188 N.Y.S. 193 (1st Dep't 1921); *In re Hyman*, 226 A.D. 468, 235 N.Y.S. 622 (1st Dep't 1929); *see also In re Padilla*, 109 A.D.2d 247, 491 N.Y.S.2d 630 (1st Dep't 1985) (disbarment).
5. 253 A.D.2d 205, 206, 686 N.Y.S.2d 839, 840 (2d Dep't 1999).
6. The second element of the crime specifies the various methods by which larceny may be committed when the means chosen for obtaining another's property coincides with at least one of the requisite culpable mental states specified in the first element. We are here concerned with the "extortionately obtaining" means for committing the crime. *See* PL § 155.05(2)(e).
7. PL § 155.05(2)(e)(iv).
8. PL § 155.25.
9. PL § 155.30(6).
10. United States Code, title 18 § 1951 (U.S.C.).
11. *See People v. Dioguardi*, 8 N.Y.2d 260, 268, 203 N.Y.S.2d 870 (1960) (stating that crime of larceny by extortion is essentially "obtaining property by a wrongful use of fear, induced by threat to do an unlawful injury"); 18 U.S.C. § 1951(b)(2) (defining "extortion" for purposes of Hobbs Act as "the obtaining of property from another, with his consent, induced by wrongful use of . . . fear."); *United States v. Capo*, 791 F.2d 1054, 1061 (2d Cir. 1986) ("The essence of extortion within the meaning of the Hobbs Act, as it pertains to the present case, is the extraction of property from another through the wrongful use of fear.").
12. *See, e.g., In re Geoghan*, 253 A.D.2d 205, 206, 686 N.Y.S.2d 839, 840 (2d Dep't 1999) (discussing alleged assault upon police officer by Anthony Mason, which gave rise to civil suit and felony assault charges); *Read v. Sacco*, 49 A.D.2d 471 (discussing civil personal injury action and criminal conviction for assault in third degree arising from defendant's assault and battery upon plaintiff/complainant). *See generally* PL §§ 120.00–120.15 (defining assault and menacing offenses); PL §§ 155.00–155.45 (defining larceny offenses).
13. *See, e.g.*, Wayne D. Holly, *Criminal and Civil Consequences of False Oaths in Bankruptcy Help Ensure Reliable Information*, N.Y. St. B.J., Vol. 71, No. 3, at 38 (March 1999). The "bankruptcy-crime" provisions of the federal Criminal Code are codified at 18 U.S.C. §§ 152–157. *See generally* Tracy L. Klestadt & Wayne D. Holly, *Bankruptcy Crimes Under the Federal Criminal Code*, N.Y.L.J., Jan. 22, 1998, p. 1.
14. *See* PL § 155.05(2)(e).
15. *Dioguardi*, 8 N.Y.2d at 268, 203 N.Y.S.2d 870.
16. *Id*. ("[I]t is not essential that a defendant *create* the fear existing in the mind of his prospective victim so long as he succeeds in persuading him that he possesses the power to remove or continue its cause, and instills a new fear by threatening to misuse that power as a device to exact tribute.").
17. *Id*. at 271 (stating that "so long as [the defendants] professed to have power to eliminate or continue [an injurious activity], and used that purported power as a lever to exact tribute" they were punishable).
18. *See People v. Thompson*, 97 N.Y. 313, 318 (1884); *People v. Forde*, 153 A.D.2d 466, 471-72, 552 N.Y.S.2d 113, 116 (1st Dep't 1990); *Dioguardi*, 8 N.Y.2d at 269, 203 N.Y.S.2d 870.
19. PL § 155.05(2)(e)(iv).
20. *Thompson*, 97 N.Y. at 318; *see Dioguardi*, 8 N.Y.2d at 269, 203 N.Y.S.2d 870.
21. *See Forde,* 153 A.D.2d at 472, 552 N.Y.S.2d at 116.
22. *See id.*; *United States v. Tolub*, 309 F.2d 286, 289 (2d Cir. 1962).
23. *See Code*, DR 7-104(A) (generally prohibiting an attorney during the course of the representation of a client from communicating on the subject of the representation with a party the lawyer knows to be represented by an attorney in that matter).
24. 97 Misc. 2d 728, 730, 412 N.Y.S.2d 321, 323 (N.Y. City. Ct. 1979); *see Giuffre v. Metropolitan Life Insur. Co.*, 129 F.R.D. 71, 77 (S.D.N.Y. 1989) (citing and relying upon *Slocum*).
25. PL § 155.05(1).
26. *Id.*
27. Donnino, McKinney Practice Commentary, PL art. 155 (1997).
28. PL § 135.60 (practice commentary).
29. *Id*.
30. PL § 135.60(4).
31. PL § 135.60.
32. PL § 135.75.
33. Charles W. Wolfram, Modern Legal Ethics 714 (1986).
34. *See People v. Harper*, 75 N.Y.2d 313, 318, 552 N.Y.S.2d 900 (1990) (recognizing that "it is improper to use the threat of criminal prosecution as a means of extracting money in a civil suit" and citing to both DR 7-105 and PL § 155.05(2)(e)(iv)).
35. *See* Joel Cohen & Sarah Diane McShea, *Threatening to Contact the Criminal Authorities: A Lawyer's Dilemma*, N.Y.L.J., Oct. 26, 1999, p. 1 (taking the position that the affirmative defenses discussed herein would insulate a defendant from conviction in similar circumstances).

# Can Employers Limit Employee Use of Company E-mail Systems For Union Purposes?

By Maureen W. Young

As more and more companies provide employees with e-mail capacity,[1] its ease, speed and cost-free nature may prompt union-supporting employees to use it as a preferred method for communicating with and organizing other employees. Understandably, employers are not eager to provide unions with a way to convey anti-company messages that may disrupt employee working time and slow the employer's computer network.

But can an employer legally prohibit union messages from being sent over its computer system? Neither the courts nor the National Labor Relations Board (NLRB) has explicitly ruled on this issue. The NLRB's general counsel has taken the position that an absolute prohibition of all non-business use of an employer's e-mail system, which would include union-related use, is presumptively unlawful. Whether that position will be adopted by the NLRB itself is yet to be seen.

## Union Solicitation and Distribution Rules

Section 7 of the National Labor Relations Act guarantees employees the right to self-organize, to form, join and assist unions, and to bargain collectively.[2] This right "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the job site."[3] The work place, according to the NLRB, is a "uniquely convenient location" for employees to engage in union activity.[4]

Employers, on the other hand, have valid property and managerial rights at issue when employees discuss union topics on company property and company time. Thus, whether union-related solicitations or distributions can be limited by an employer "requires a balancing of the legitimate interests of employees to exercise protected rights with the legitimate managerial and property interests of the employer."[5] Both parties' interests are to be accommodated "with as little destruction of one as is consistent with the maintenance of the other."[6]

Balancing these respective interests, the NLRB has developed legal presumptions regarding limitations that may be placed on union-related solicitations and distribution of literature. Under the NLRB's view, the weight to be accorded employer and employee interests depends on whether the union-related communication consists of an oral solicitation or a distribution of written information.

Employees have a protected interest in orally soliciting fellow employees with respect to union topics. Balancing this interest with an employer's interest in maintaining production, discipline and order, the NLRB has developed a rule that permits employers to ban union solicitation during working hours only.[7] Solicitation that occurs on non-working time does not, according to the NLRB, sufficiently impinge on an employer's interests to justify a prohibition of such, even in working areas.[8] Thus, a rule prohibiting solicitation by employees during their non-working hours, such as when they are on break, or before work or after work, is presumptively unlawful.[9]

Distribution of union literature is governed by a slightly different rule. As compared to oral solicitation, distribution of written material impinges on an employer's interests to a greater extent in that it carries the potential of littering the employer's premises and creating a production hazard, whether it occurs on working time or non-working time.[10] The employees' interests are also different in that literature is of a permanent nature and can be read at any time after the distribution. Thus, its *receipt* satisfies the employees' interests no matter where it is distributed, whereas the time and place of a solicitation is paramount to its effectiveness.[11] Because literature can be distributed as effectively in non-working areas such as parking lots, company entrances or break rooms, as it can in working areas where an em-

**Maureen W. Young** is an associate in the Albany office of Bond, Schoeneck & King, LLP, practicing in the area of labor and employment law. She is a graduate of Holy Cross College and received her J.D. degree from Albany Law School.

ployer's interests in maintaining cleanliness, order and discipline are greatest, the balance struck by the NLRB is that employees may be prevented from distributing literature in working areas during any time, but may not be precluded from making distributions of union-related materials in non-working areas on non-working time.[12]

In sum, it is presumptively unlawful to restrict employee solicitation during non-working hours, or employee distribution in non-working areas.[13] However, even a facially valid rule that limits solicitation only during working time and distribution only in working areas can result in an unfair labor practice if it is enforced against union members in a discriminatory manner, i.e., if it is enforced with respect to union activity, but, not with respect to other nonbusiness-related activities.[14]

***Company bulletin boards*** The NLRB's rules regarding posting of union messages on company bulletin boards is straightforward. In general, an employer has complete control over its bulletin boards, and employees have no statutory right to use an employer's bulletin boards to post union-related materials.[15]

Thus, an employer may legitimately prohibit the use of its bulletin boards by employees for all purposes, provided such a rule is enforced uniformly.[16] "However, if an employer permits the use of its bulletin boards for nonwork-related messages the employer cannot discriminate against the posting of union messages."[17] This means that an employer who allows employees to post messages pertaining to social events, articles for sale, cartoons, jokes, thank-you notes, etc., cannot validly prohibit employees from posting union-related messages.[18]

## Application of NLRB Rules to E-mail

Neither the NLRB nor the courts have determined how the NLRB's rules should apply to employee use of a company's e-mail system. If e-mail communications are likened to solicitations, they cannot be limited during non-working hours. If they are treated like distributions, they cannot be limited in non-working areas during non-working time. If a company's e-mail system is treated as the NLRB treats company bulletin boards, an employer should be able to exclude union-related materials, provided it similarly excludes all other non-business communications.

It would appear most logical to analogize company computer systems to company bulletin boards, and apply similar rules to each. Unlike solicitation and distribution, which take place on an employer's premises but otherwise make little use of an employer's personal property, postings on a company bulletin board and use of an employer's computer system similarly require affirmative use of the company's personal property—property over which the employer should enjoy "complete control."[19]

If employers wish to reserve use of their computer systems for business purposes only, they should be permitted to do so, as they can with respect to bulletin boards, provided they enforce the business-only rule uniformly and not just against union members. This rationale has been adopted in the government setting by the Federal Labor Relations Authority. Relying on NLRB case law involving the use of company bulletin boards, the FLRA recently held that a union does not have a statutory right to use an employer's e-mail system, and that an employer "can uniformly enforce a rule prohibiting the use of E-mail by employees for all non-official purposes."[20] What impact, if any, this decision will have on the NLRB's analysis of this issue is yet to be seen.

To date, the NLRB has decided only one case involving violation of a company e-mail policy. In *E.I. du Pont de Nemours & Co.*,[21] the evidence showed that the company permitted employees to use its electronic mail system to distribute a wide variety of material on many subjects, including poems, TV programs, religion, and riddles.[22] However, the company prohibited use of the system to distribute union material.[23] The Administrative Law Judge found that "having permitted the routine use of the electronic mail . . . to distribute a wide variety of material that has little if any relevance to the Company's business, the Company discriminatorily denies employees use of the electronic mail to distribute union literature and notices."[24] Holding that the company's practices regarding e-mail use constituted an unfair labor practice, the administrative law judge ordered the company to cease and desist from "prohibiting bargaining unit employees from using the electronic mail system for distributing union literature and notices."[25] The NLRB upon review of the decision, found the remedy to be over-broad and limited the remedy to require cessation of its "*discriminatory* prohibition of the use of the electronic mail system for distributing union literature and notices."[26]

The decision in *E.I. du Pont* provides little guidance on whether limitations on e-mail use will be analyzed under the rules applicable to bulletin boards, solicitations, or distributions — all three rules require non-discriminatory application and would have yielded the same result under the facts present in *E.I. du Pont*. The NLRB's modification of the remedial order might be read to suggest that, if not *discriminatorily* enforced, a business-only rule prohibiting e-mail use for personal or union purposes would withstand NLRB scrutiny. How-

CONTINUED ON PAGE 34

CONTINUED FROM PAGE 31

ever, this might be reading too much into the NLRB's modification.

## The Position of the NLRB General Counsel

The NLRB's general counsel has opined that a business-only e-mail policy is over-broad and presumptively unlawful to the extent that it prohibits solicitation-like e-mails during non-working time.

***Pratt & Whitney case*** This argument was offered by the general counsel in *Pratt & Whitney*,[27] a case that settled before a decision was rendered. In *Pratt & Whitney*, as part of a union organizing drive, several employees in a bargaining unit composed of approximately 2,450 professional and technical employees sent e-mails to fellow employees discussing topics such as salaries, layoffs, NLRB procedures and unionization in general.

These employees were disciplined for violating the employer's written business-only policy regarding computer use. The evidence showed that this policy had not been strictly enforced, and that employees regularly sent each other personal messages and announcements, humorous stories and other non-business mail. Accordingly, based on the *E.I. du Pont* rationale, the general counsel determined that the employer had violated the National Labor Relations Act by disparately and discriminatorily enforcing its policy on computer use.[28]

***Employers have to decide how they want employees to use their computer systems and e-mail capabilities.***

The general counsel also took the position that by prohibiting *all* non-business e-mail, the employer's e-mail policy was over-broad and therefore facially unlawful. Accordingly, the general counsel determined that a complaint should issue against the employer and a hearing should be held before an administrative law judge.[29] Because the case was settled before a decision was made, we do not know whether the judge or the NLRB would have adopted the general counsel's position that a business only e-mail policy is facially unlawful.

***General counsel's argument*** The general counsel's argument in this regard was based on a determination that at least some e-mail communications are sufficiently akin to solicitations that they should be treated similarly, meaning that such e-mail communications cannot be prohibited during nonworking hours.

The general counsel reasoned that "if two of the Employer's employees have an interactive E-mail 'conversation' in real time regarding the Union's organizing campaign, or some collective grievance, when both employees are not on work time, this cannot not be meaningfully distinguished from any other verbal solicitation."[30] That employees may have alternate means of communicating with each other was treated as irrelevant because the presumption of unlawfulness, according to the general counsel, "does not consider the availability of alternate means of communication between employees."[31] The general counsel's conclusion was that, because at least some e-mail will constitute "solicitation," a business-only policy is presumptively unlawful because it extends to non-working hours.[32]

## Analysis of General Counsel's Approach

The general counsel's analysis poses a number of problems. In general, they revolve around the attempt to apply the rules on spoken communication and solicitation to an e-mail environment.

***Analogy to spoken communication*** The general counsel states that an interactive electronic conversation between two employees cannot be meaningfully distinguished from any other verbal communication. However, spoken communication between two non-working employees has a very minimal impact on an employer's interests. The same cannot be said of electronic communication, which requires an employer to forfeit control over its personal property and places an affirmative burden on the employer's system by using electronic storage space and by potentially slowing down the entire system.

Moreover, e-mails, even if intended by the sender to be "conversational" or interactive and to elicit an immediate "real time" response, are stored on the system and can be accessed and/or responded to at any time. In this regard, e-mail communication, even the interactive "conversational" type, is more like distribution of literature. Like distributed literature, a stored e-mail communication "is of a [relatively] permanent nature" which "carries the potential of littering the employer's [computer system], rais[ing] a hazard to production whether it occurs on working time or nonworking time."[33]

Significant differences exist between oral communication and electronic mail, making the general counsel's contention that interactive e-mail "conversations" and verbal solicitation are indistinguishable at odds with reality. Notably, the NLRB is free to reject the general counsel's position on this issue.[34]

***Balancing of interests*** The general counsel also asserts that the availability of alternate means of commu-

nication is irrelevant to the presumption that e-mail "solicitations" cannot be limited during non-working time. This premise is also faulty.

The board's decisions make clear that its rules regarding solicitation and distribution depend on a balancing of the employees' organizing interests against the employer's property interests. With regard to oral solicitation, the "working time versus non-working time adjustment" properly balances the employer's interests, which are minimally affected, with employees' interest in finding "a time and place appropriate for . . . solicitation."[35]

However, the weight to be accorded each parties' respective interests changes significantly when e-mail communication is at issue. Because the employer's property interests are infringed upon to a much greater extent, more weight must be accorded to its interest in maintaining control over its equipment and electronic storage space. Less weight need be accorded to employees' interests, on the other hand, because they already have "a time and place appropriate for solicitation" through oral communication on non-working time. Although oral communication may not be the most convenient way to communicate with employees, face-to-face communication has been routinely accepted as the most effective and important method for communicating a union's message.[36]

So long as the opportunity for oral solicitation is available, employees' interests in being able to "solicit" via e-mail should not outweigh an employer's interest in controlling use of its computer systems. However, when employees all work from home or are located throughout a large geographical area, a union might be able to successfully argue that it has no means other than e-mail to communicate its message to employees. In that unique instance, the employees' interest in e-mail use might be found to outweigh the employer's interests in prohibiting non-business use of its e-mail system.[37]

***Difficulty in application*** The general counsel's analogy of e-mail "conversations" to solicitation also poses practical difficulties that make it unworkable in everyday life. To the extent that only interactive "real time" e-mail conversations would qualify for solicitation-like treatment, it would be virtually impossible to differentiate between e-mails that spark a "real time" conversation and those that are read and/or responded to hours or even days after being sent. Applying the solicitation/distribution rules to e-mails would place an unreasonable burden on employees to determine whether the e-mail they want to send, or the e-mail they want to read, is a solicitation-type e-mail appropriate for non-working time, or a distribution-type e-mail that the employer may properly prohibit in working areas.

Moreover, while actual solicitations and distributions can be physically limited to non-working time and non-working areas, respectively, e-mail communications are not so easily contained. E-mails sent on non-working time inevitably will affect working time to the extent employees read messages on working time and to the extent that the use of "cyberspace" affects the computer system's performance. In addition, to the extent that the NLRB's distribution rules are applied, it would be virtually impossible to limit e-mails to non-working areas because, as even the general counsel acknowledges, computers used by employees, computers and computer networks generally qualify as "working areas."[38]

***Bulletin board option*** Because e-mails cannot properly be likened to solicitations, and because of the difficulty in applying non-working time/non-working area distinctions to cyberspace, the better course is to apply the NLRB's bulletin board rules to employee use of a company's e-mail system. The adaptation is appropriate in view of the way that employee use of an employer's bulletin board shares certain attributes with employee use of an employer's e-mail system.

Accordingly, an employer should have the ability to prohibit employees from using its computer system to send union-related messages, so long as all non-business use of the system is similarly prohibited, and the business-only rule is uniformly applied.

## Establishing a Company E-mail Policy

Employers have to decide how they want employees to use their computer systems and e-mail capabilities. Many employers want to allow employees to use their computers for personal or nonbusiness purposes — to send e-mail to family and friends, conduct personal business, perform on-line banking, make stock investments, shop, etc. Some employers believe that providing employees with such computer access boosts morale, attracts employees, and increases productivity by allowing employees to take care of personal matters quickly and efficiently, leaving more focused time available for work.

Given the attendant benefits, many employers will choose to allow employees to make non-business use of the company's e-mail and computer system. This is a legitimate decision, but it should be recognized that by doing so, these employers forfeit the ability to preclude employees from using the employer's computer system to send union-related e-mails.

Other employers may opt for a "business only" e-mail policy, notwithstanding the fact that the NLRB has not yet ruled on the legality of such a policy. Such a policy would enable an employer to minimize the amount of company time used by employees to conduct non-company business. A 1997 survey found that more

than 30% of all e-mail messages sent by employees are not work-related,[39] while a 1998 survey showed that 24% of the time employees spend on line is for non-business purposes.[40] In addition to minimizing employee slacking, a business-only policy, if enforced consistently and non-discriminatorily, would optimize the chances of legally precluding employees from using the employer's equipment to unionize or communicate on union-related issues.

Enforcement of a "business-only" e-mail policy would require some degree of monitoring of employee e-mails to ensure compliance and consistency. A recent survey by the American Management Association found that in 1998, 27% of companies monitored their employees' use of e-mail, while 45% monitored electronic communications, including e-mail, phone use and computer files.[41] Although it generally is illegal under both federal and state law to intercept or access an individual's electronic communications,[42] exceptions to the laws exist to enable employers to monitor and access e-mails sent or received on their systems.[43] The primary exception is where the individual has provided prior consent. Consent may be actual or implied.[44] Because actual consent is much less difficult to prove, employers who want to establish a business-only computer policy and/or provide themselves with the option of monitoring employee e-mails and computer use, should obtain their employees' express consent as set forth below.

Employers looking to implement a business-only policy should put the policy in writing, communicate it to employees, and include it in an employee handbook. A written policy should provide:

- The employer's computers, e-mail system and Internet access are to be used for business purposes only. Employees found in violation of this policy will be subject to discipline, up to and including termination.
- The employer reserves the right to monitor employee use of its computer system and to access any messages or information contained on its system. Employees do not have a personal privacy right in anything created, received or sent over the employer's computer system. Use of the employer's system constitutes employee consent to monitoring. Employee deletion of messages from the system does not necessarily prevent the company from accessing such messages.
- E-mails are written communications and should be treated as such — employees should not place anything in an e-mail they would not be comfortable including in a formal letter or memorandum. E-mails should not be used to communicate in an improper manner or on an improper topic; messages that are derogatory, harassing, offensive or otherwise inappropriate are strictly prohibited.
- Sensitive or confidential information should not be sent via the Internet.[45]

Employers should also consider having a computer "pop-up screen" that reminds employees that the computer system is for business purposes only and subject to monitoring by the employer. Many employers also have employees sign an acknowledgment form that they have read the policy and are aware of the employer's right to access information contained on the system. For further protection, the "pop-up screen" and acknowledgment form can reiterate that use of the computer system constitutes consent to monitoring.

An alternative to the business-only policy is the "non-working-time only" policy whereby all non-business e-mails would have to be clearly labeled as such within the "subject" identifier that is displayed prior to an e-mail being opened. Non-business e-mails may be sent or read during non-working time only. Such a policy would address both the employer's interest in having employees focus on business matters during working time, and the general counsel's position that some e-mail constitutes solicitation that cannot be prohibited during non-working time. Although union messages could not be completely prohibited under such a policy, they, like other non-business e-mails, could be limited to non-working time.

Employers who wish to reap the benefits of a business-only e-mail policy but also want to enable employees to communicate with each other electronically on non-business matters, might also consider creating an electronic bulletin board, where messages could be posted on a daily or weekly basis with prior authorization from the company, and accessed during non-working time. However, it should be noted that an employer providing electronic bulletin boards for non-business use would not be able to exclude union-related postings.

---

1. A Gallup poll in 1996 showed that 90% of large companies, 64% of mid-size companies, and 42% of small companies used e-mail. *See* Mark S. Dichter & Michael S. Burkhardt, *Electronic Interaction in the Workplace: Monitoring, Retrieving and Storing Employee Communications in the Internet Age* (1996), available at <http://www.mlb.com/speech1.htm>. These numbers have undoubtedly increased significantly in recent years.
2. United States Code, title 29 § 157 (U.S.C.).
3. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978).
4. *Hughes Properties, Inc.*, 267 N.L.R.B. 1167, 1170 (1983).
5. *Id.* at 1169; *see Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).
6. *Babcock & Wilcox*, 351 U.S. at 112.

7. *Stoddard-Quirk Mfg. Co.*,138 N.L.R.B. 615, 619-20 (1962); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945).
8. *Stoddard-Quirk,* 138 N.L.R.B. at 619; *Republic Aviation*, 324 U.S. at 803 n.10.
9. *See, e.g.*, *Ford Motor Co.*, 315 N.L.R.B. 609, 610 (1994); *Hughes Properties,* 267 N.L.R.B. at 1170; *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 492-93 (1978).
10. *Stoddard-Quirk,* 138 N.L.R.B. at 619.
11. *Id.* at 620.
12. *Id.* at 620-21; *Beverly Enterprises-Hawaii, Inc. v. NLRB*, 326 N.L.R.B. No. 37, Slip Op. at 1 (Aug. 26, 1998) (citing *St. John's Hosp. & Sch. of Nursing, Inc.*, 222 N.L.R.B. 1150 (1976), *enforced in part*, 557 F.2d 1368 (10th Cir. 1977)).
13. *See, e.g.*, *Beth Israel Hosp.,* 437 U.S. at 492. The employer may overcome the presumption if it can prove that special circumstances make the restriction essential to maintain production or discipline. *Id.* at 492-93.
14. *See Albertson's, Inc. v. NLRB*, 161 F.3d 1231, 1236 (10th Cir. 1998); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1270 (7th Cir. 1980).
15. *See Honeywell, Inc.*, 262 N.L.R.B. 1402 (1982), *enforced*, 722 F.2d 405 (8th Cir. 1983); *Fairfax Hosp.*, 310 N.L.R.B. 299, 303 (1993).
16. *Vincent's Steak House*, 216 N.L.R.B. 647 (1975).
17. *Eaton Technologies, Inc.*, 322 N.L.R.B. 848, 853 (1997).
18. *Honeywell, Inc.,* 262 N.L.R.B. at 1402.
19. *Fairfax Hosp.,* 310 N.L.R.B. at 303 (discussing bulletin boards).
20. *Small Business Administration Newark, New Jersey*, 1998 FLRA LEXIS 229, 32 (1998).
21. 311 N.L.R.B. 893 (1993).
22. *Id.* at 919.
23. *Id.*
24. *Id.*
25. *Id.* at 920.
26. *Id.* at 893 (emphasis added).
27. Case No. 12-CA-18446, *reported in NLRB Acting General Counsel Fred Feinstein's Report on Cases Decided from March 31, 1996, to June 30, 1998*, 172 Daily Labor Report (BNA) E-4 (Sept. 4, 1998).
28. *Id.*
29. *Id.*
30. *Pratt & Whitney,* NLRB Advice Memorandum, 26 AMR & 36022, 97 (1999). The distinction between solicitation and distribution was made as follows: "Where the communication can reasonably be expected to occasion a spontaneous response or initiate reciprocal conversation, it is solicitation; where the communication is one-sided and the purpose of the communication is achieved so long as it is received, it is distribution." *Id.* at 96.
31. *Id.*
32. *Id.*
33. *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 619 (1962). Even the General Counsel admits that e-mails "take up 'cyberspace' and thus has the potential to affect the performance of an employer's computer network." *Pratt & Whitney*, 26 AMR at 97.
34. *See, e.g., Lutheran Hosp. of Milwaukee, Inc.*, 224 N.L.R.B. 176, 182 n.32 (1976) ("the General Counsel's position is of doubtful validity").
35. *Stoddard-Quirk,* 138 N.L.R.B. at 620.
36. *See National Maritime Union of Am. v. NLRB*, 867 F.2d 767, 773 (2d Cir. 1989); *cf. Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992) (exception to general rule that nonemployee organizers cannot enter an employer's premises cannot be invoked simply because "nontrespassory access to employees may be cumbersome or less-than-ideally effective").
37. *Cf. NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) (where employees are placed beyond the reach of reasonable union efforts to communicate with them, employer's property rights may be required to yield to extent needed to permit communication).
38. *Pratt & Whitney,* NLRB Advice Memorandum, 26 AMR ¶ 36022, 97 (1999).
39. Mark S. Dichter & Michael S. Burkhardt, *Electronic Interaction in the Workplace: Monitoring, Retrieving and Storing Employee Communication in the Internet Age* (1999), *available at* <http://www.mlb.com/art61499.htm> (citing Girard, K., *Hold that thought, IS tells e-mailers*, Computer World, Apr. 21, 1997).
40. *Id.*, citing *Over 24 Percent of Employees' Time is Non-Work Related,* Business Wire, Aug. 11, 1998. Employees are also "cyberslacking" on the Web. One in three employees surfs nonwork-related Internet sites during working time, according to a 1999 survey by Reuters. As a result, some employers are using blocking filters which limit employees' access to the Web.
41. The findings were based on a survey of 1000 members of the AMA, surveyed in the first quarter of 1999. A summary of the survey results in available at www.nua.ie/surveys.
42. *See* The Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2511.; N.Y. Penal Law § 250.05.
43. Several exceptions exist under the ECPA. *See* 18 U.S.C. §§ 2511(2)(c) (consent exception), (h)(ii) (provider exception), 2510(5)(a)(ii) ("ordinary course of business" exception), (12) (defining "electronic communication" to include the transfer of information that affects interstate commerce, arguable providing an exception to e-mails transmitted on an employer's internal e-mail system). Under New York law, the only exception is where the sender or receiver has provided consent. Penal Law § 250.00(6).
44. *See* Mark S. Dichter & Michael S. Burkhardt, *Electronic Interaction in the Workplace: Monitoring, Retrieving and Storing Employee Communication in the Internet Age* (1999), *available at* <http://www.mlb.com/art61499.htm> (citing *Deal v. Spears*, 980 F.2d 1153, 1157 (8th Cir. 1992) and *Griggs-Ryan v. Smith*, 904 F.2d 112, 116 (1st Cir. 1990)).
45. *Id.*; *The Power and Peril of E-mail and Other Electronic Communications,* Indiana Employment Law Letter, May 1999.

# New York Antitrust Bureau Pursues Mandate to Represent State Interests In Fostering Competitive Environment

BY EDWARD D. CAVANAGH

Once a sleepy back-office operation, the Antitrust Bureau of the New York State Department of Law emerged as a potent enforcement agency two decades ago. Working on its own and in cooperation with the federal government, the bureau has actively pursued its mandate to be responsible for antitrust enforcement on behalf of the state, its subdivisions and its citizens.

Together with the Multistate Antitrust Task Force of the National Association of Attorneys General (NAAG), New York helped to fill the void left by the Reagan administration's minimalist enforcement policies and budget cuts that led to significant reductions in antitrust activity at the federal level in the 1980s. The Antitrust Bureau has continued its vigorous enforcement activities through the 1990s. Yet, it remains understaffed, underfunded and, to a great extent, underappreciated.

This article examines how the office has functioned and, more importantly, how it ought to function in the future in conjunction with federal authorities and sister states.

## Role of the State in Antitrust Enforcement

In enforcing the antitrust laws, the Antitrust Bureau asserts the protections of New York's Donnelly Act,[1] as well as the federal Sherman Act and Clayton Act. The Antitrust Bureau's enforcement docket runs the gamut of antitrust offenses, but focuses principally on horizontal restraints and mergers having a particular impact on the State of New York and its consumers. In addition, during the past two decades, the Antitrust Bureau has been far more willing than federal authorities to prosecute cases involving vertical restraints such as resale price maintenance, supplier-imposed customer and territorial restraints and tying. Although the Donnelly Act has criminal sanctions,[2] criminal jurisdiction has been invoked sparingly; the Antitrust Bureau has historically functioned essentially as a civil office.

Notwithstanding the availability of state remedies, the Antitrust Bureau has proceeded almost exclusively in federal court under federal law. At first blush, it may seem anomalous for a state agency to rely principally on federal protections. Nevertheless, there are strong arguments in favor of reliance on federal, rather than state, antitrust statutes.

First, and perhaps most important, by proceeding in federal court, the state can assert both federal and state supplemental claims. The reverse is not true — because federal courts have exclusive jurisdiction to hear federal antitrust claims, the state courts cannot hear claims arising under federal law.

Second, the federal antitrust scheme is more comprehensive and better developed than New York's Donnelly Act. The Donnelly Act has no specific provision analogous to § 2 of the Sherman Act[3] prohibiting monopolization. Nor is there a state law analogous to the Clayton Act,[4] which addresses activities that may substantially lessen competition or lead to the creation of a monopoly.

Third, the substantive rules applicable in federal antitrust litigation are more favorable to plaintiffs than New York State law. For example, professions are excluded from state law antitrust coverage but not from federal coverage. Federal judges, who hear antitrust issues routinely, are arguably better equipped to determine antitrust cases than state judges, who rarely see antitrust disputes.

Fourth, the federal forum is preferred because many antitrust cases are multiparty, multidistrict and multijurisdictional. Accordingly, the federal forum is a more efficient venue to resolve these disputes and makes it easier for states to pool resources. On the other hand, states may choose the state forum where, as was the case in the *Tobacco* litigation, state law claims predominated

**EDWARD D. CAVANAGH** is a professor of law at St. John's University School of Law, where he teaches courses in federal procedure and antitrust law. He has also served as a consultant to New York's Antitrust Bureau. A graduate of Notre Dame University, he received his J.D. from Cornell Law School and an LL.M. and J.S.D. from Columbia University Law School.

and significant issues of state criminal jurisdiction and state subpoena power were raised.

In New York, the Donnelly Act is still the vehicle of choice where the conduct in question is purely intrastate and hence not reachable by federal law, but those cases are relatively rare. Moreover, recent amendments to the Donnelly Act broadening the class of victims who may sue for damages, thereby providing a state law remedy where none exists under federal law, are likely to encourage more antitrust suits under state law.[5]

***The Antitrust Bureau does more than serve as the first line of defense of the state's proprietary interest. It has, in cooperation with other states and federal agencies, had a direct role in shaping national antitrust policy.***

Regardless of whether the Antitrust Bureau proceeds under state or federal law, its principal mission is to make certain that the State of New York and the state's citizens enjoy the benefits of competition. To that end, the Antitrust Bureau may prosecute cases in conjunction with federal and state agencies, may proceed where federal authorities have declined to act, or may act where the issues are of special concern to New York and its residents.

However, the Antitrust Bureau does more than serve as the first line of defense of the state's proprietary interest. It has, in cooperation with other states and federal agencies, had a direct role in shaping national antitrust policy. While it would be an overstatement to describe state and federal enforces as co-equals in overseeing antitrust policy, it would be equally wrong to characterize state enforcers as bit players on today's antitrust scene.

Curiously, state and federal regulators started as co-equals in the antitrust realm. Indeed, some 20 states had antitrust statutes in place before enactment of the Sherman Act. The Donnelly Act itself dates back to 1897. A quick view of the case law reveals that the first decade of the Sherman Act is not memorable for its successes. However, federal enforcement picked up in the "trust-busting" Roosevelt and Taft administrations; and, as federal antitrust enforcement began to thrive at the beginning of the century, state enforcement began to recede and stayed in the background for many years.

## Rebirth of State Antitrust Enforcement

State antitrust enforcement in general and New York enforcement in particular began to emerge from the shadows in the mid-1970s. Several factors coalesced at that time to usher in a new era of activist antitrust enforcement at the state level.

First, the Hart-Scott-Rodino Antitrust Improvements Act of 1976[6] specifically authorized state attorneys general to sue *parens patriae* on behalf of natural persons in price-fixing cases. Congress believed that the *parens patriae* procedure would be a more efficient enforcement mechanism than private class actions, and it hoped that *parens patriae* cases would reduce the burdens on the federal courts without adversely affecting the rights of the consumer, the ultimate victim of antitrust violations.

Second, the Crime Control Act, passed in 1976, provided federal funding for state antitrust enforcement programs. This act, among other provisions, authorized federal grants to fund training programs for state officials.

Third, with the advent of the Reagan administration in 1981, a change in antitrust enforcement philosophy occurred at the federal level. The Reagan Justice Department, with the late Bill Baxter as its chief antitrust enforcer, moved away from industry-wide, resource-intensive price-fixing investigations such as *In re Antibiotics Antitrust Actions*,[7] *In re Folding Carton Antitrust Litigation*,[8] *In re Corrugated Containers Litigation*[9] and *In re Fine Paper Antitrust Litigation*.[10] These cases had become standard fare in the 1960s and 1970s and had generated significant follow-up private treble damages litigation. Baxter's focus was predominantly, although not exclusively, on criminal enforcement.[11] A significant percentage of Antitrust Division investigations and prosecutions involved price-fixing or bid-rigging in road building or government procurement. Such cases, although not unimportant, were incident-specific and much narrower in scope than the industry-wide enforcement actions of the 1970s.

These enforcement priorities were undoubtedly dictated in part by financial constraints. In the early years of the budget-cutting Reagan administration, the allocations for antitrust enforcement at both the Antitrust Division and the FTC were slashed to the bone. Budget cuts quickly translated into staff reductions at the agencies, making it impossible to conduct the resource-intensive, industry-wide investigations of the 1970s. Reduction in federal enforcement activity had a pronounced spill-over effect on private enforcement actions. Because bid-rigging cases rarely generated follow-up treble damage suits, private antitrust actions began to drop precipitously. The private sector and state

enforcers had relied heavily on the federal government to uncover and prosecute unlawful conduct; suddenly, federal assistance of that kind was no longer forthcoming.

Fourth, in the 1980s and especially in the early Reagan years, clear differences in philosophy regarding the role of antitrust began to emerge among federal and state enforcers. Nowhere is this more evident than in the areas of mergers and vertical restraints. In 1982, the Antitrust Division, again under the aegis of Bill Baxter, promulgated a comprehensive set of Merger Guidelines. The stated purpose of the Merger Guidelines was to provide prospective merger partners and their attorneys a road map outlining how the enforcement agencies would analyze the antitrust aspects of any merger. The Guidelines also made clear that merger activity is ordinarily healthy in a market economy and that only those mergers that threatened to create or enhance market power ought to be challenged. The principal concern was horizontal mergers; vertical mergers were seen as rarely raising competitive concerns and conglomerate mergers apparently never.

Although the Merger Guidelines had some detractors, they were widely viewed as intellectually rigorous and economically sound. They were also a marked departure from the Johnson administration's 1968 Merger Guidelines, which had codified the harsh case law of the 1960s and rendered horizontal merger activity virtually *per se* unlawful. Not surprisingly, the 1968 Guidelines soon fell by the wayside. To many, the 1982 Guidelines appeared as a breath of fresh air.

However, it soon became apparent that neither the Antitrust Division nor the FTC was particularly interested in enforcing the Merger Guidelines as written. Most mergers, even those in the clearly defined red-zone of the Guidelines, sailed through without a second look, much to the dismay of many state enforcers.

Similarly dismaying was the permissive attitude of federal enforcers toward vertical restraints. Baxter made no secret of his contempt for the rule of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[12] which made resale price maintenance unlawful *per se*. His attempt to advocate the reversal of *Dr. Miles* via an *amicus* brief in *Monsanto Co. v. Spray-Rite Service Corp.*[13] was stymied when Congress threatened to hold up funding of the Antitrust Division if it persisted in arguing for the reversal of well-established Supreme Court antitrust precedent. The Congressional power play effectively stopped Antitrust Division lobbying to overrule cases, but did nothing to stimulate enforcement in the vertical area. On the contrary, in 1985 the Antitrust Division issued Vertical Restraint Guidelines, modeled after the earlier successful Merger Guidelines. The Vertical Restraint Guidelines were permissive — far more permissive than the case law and rendered nearly all non-price vertical restraints *per se* lawful.[14] Signals emanating from Washington seemed to be that the Antitrust Division was interested in prosecuting only hard-core price-fixing. Finally, as the *Monsanto* episode indicates, the Antitrust Division was less interested in using the *amicus* procedure as a vehicle to promote antitrust enforcement and more interested in utilizing *amicus* briefs to achieve the "right" result.

***The minimalist enforcement activity at the federal level combined with the philosophical differences between state and federal enforcers galvanized the states into action.***

The minimalist enforcement activity at the federal level combined with philosophical differences between state and federal enforcers regarding the role of antitrust galvanized the states into action. In 1983, NAAG formed the Multistate Antitrust Task Force to fill the perceived gap in antitrust enforcement. The states, through NAAG and through sheer persistence, soon became formidable players in antitrust enforcement. As the states assumed a more activist posture, tensions between state and federal enforcers became evident. States were at times viewed as uninvited guests who showed up at a formal dinner party in casual clothes. During this period, the tension between state and federal antitrust authorities escalated and several skirmishes ensued. For example, in 1984, the FTC stopped disclosing premerger materials and staff workpapers to the states. Shortly thereafter, in two separate proposed mergers in the oil industry, several affected states sued in federal court to compel disclosure and lost. The states quickly responded by developing the voluntary Premerger Disclosure Compact, which allowed them to obtain federal premerger filings directly from the parties.

The states made no bones about their philosophical differences with their federal counterparts. In short order, NAAG promulgated its own set of Merger Guidelines and Vertical Restraint Guidelines. The NAAG Vertical Restraint Guidelines were more in line with the case law and mainstream antitrust analysis of vertical restraints than those of the federal government. The NAAG Merger Guidelines were a less substantive departure from the Justice Department's Guidelines. The NAAG Merger Guidelines emphasized fact over theory and thereby sought to give the states a bigger say in the

merger enforcement. States also began cooperating with each other in multistate, multidistrict enforcement actions. As federal merger enforcement activity began to pick up during the Bush and Clinton Administrations, states began conducting their own investigations in cooperation with the federal agencies. The states thrust themselves into the fray and could no longer be ignored.

***New York's role in the NAAG*** New York has been in the forefront of the state enforcement effort. Under Attorney General Robert Abrams and Bureau Chief Lloyd Constantine, New York played a key role in the promulgation of the NAAG Merger Guidelines and Vertical Restraint Guidelines.

Antitrust Bureau Chief Stephen D. Houck served as lead counsel on behalf of the state in the recently completed trial against Microsoft. Along with California, New York served as chief counsel on behalf of the states in the Thomson/West merger investigation which concluded in the entry of a joint consent decree. New York also played a prominent role in the Reebok resale price maintenance investigation, the ill-fated Rite-Aid-Revco merger investigation and the nationwide contact lens investigation. Other New York recent enforcement activities include investigations involving Primestar, Panasonic, Mitsubishi, Toys "R" Us, and Mylan.

***Criticism of state efforts*** Not surprisingly, the increased enforcement efforts by the states in general and New York in particular have not received universal acclaim. Critics have voiced particular concern about state involvement in merger control. They argue that adding yet another layer of regulation to mergers may thwart procompetitive combinations that benefit the economy. They question the need to review mergers on the state level once they have passed muster on the national level.

Critics also note that the NAAG Merger Guidelines are somewhat more restrictive than the federal Merger Guidelines and question whether businesses should be subject to differing standards at the state and federal levels. This is especially troubling in light of the fact that in an era of globalization, more and more mergers are subject to scrutiny by foreign regulators as well as the federal government.

More generally, critics assert that state actions are more often than not a case of free riding on federal actions. State claims make filings weightier, but do not necessarily shed any additional light on antitrust issues.

To the extent critics advocate that antitrust enforcement be the exclusive province of the federal government, they are running against the wind. The Supreme Court in *California v. Arc America Corp.*[15] made clear that principles of federalism permit state antitrust enforcement regimes. Moreover, antitrust enforcement is not a task that states are ready to abandon. State attorneys general have learned that however unpopular antitrust activism at the state level is with business groups, it is very appealing to consumers and hence likely to translate into votes.

## Federal-State Cooperation In Thomson/West Merger

When the Thomson Corp., the owner of Lawyers Cooperative Publishing, Clark Boardman and other well-known legal publishing names, announced in 1996 that it had reached an agreement to purchase West Publishing, the states provided personnel to assist in the review of the mass of documents produced as part of the Hart-Scott-Rodino filing and the ensuing second request.

State attorneys assisted in conducting the factual investigation, in interviewing witnesses and in taking depositions. State officials were present at, and participated in, most of the meetings between the merging parties and the Antitrust Division. The states met regularly with the Antitrust Division and with each other to plan strategy and to exchange theories. The states contributed to the content of the final Consent Decree that was signed by the Department of Justice and seven states.

The Thomson/West joint investigation showed not only that federal-state cooperation is feasible but that such cooperation could attain better results than might have otherwise been possible. It stands as a paradigm for future joint efforts.

## New York's Approach

The question then, is not *whether* there should be state antitrust enforcement, but rather *how* that enforcement power should be exercised. New York's approach to antitrust enforcement offers a model that other states may wish to emulate.

***Protecting proprietary and consumer interest*** When the principal task of state antitrust enforcers is described as assuring that the state and its citizens enjoy the full benefits of competition and are not victims of cartel behavior, critics may argue that the federal government might protect state interests equally well. Undoubtedly, the federal government can protect state interests, but where state interests are pre-eminent, prosecutions by the state are likely to be more effective.

First, state officials are closer to the action than federal officials and would normally be more advanced than their federal counterparts on the learning curve.

Second, state involvement from the outset is likely to be more efficient, since federal enforcers are apt to enlist significant state resources in any event.

***Scarcity of resources; overlooked cases*** State enforcement may complement federal enforcement in two important ways.

First, federal resources, however bountiful they may appear, are, in fact, limited. Even in boom times, federal regulators must pick and choose the cases that they prosecute. Inevitably some cases go unprosecuted because of lack of resources. State enforcers can help fill that gap. Moreover, given the personnel demands by the current record merger wave, the federal government might consider transferring to the state for prosecution cases involving bid rigging and price fixing in state procurements.

Second, there may be cases that, for whatever reason, simply do not appear on the radar screen of federal enforcers but are uncovered by state enforcers. Perhaps the conduct appeared highly localized or perhaps a victim of the antitrust violation contacted state and not federal enforcers. Thus, for example, it was the New York Antitrust Bureau, and not the Antitrust Division, that in 1996-97 investigated allegations that Wegman's, a major grocery chain in central and western New York, had conspired with certain producers of consumer products to eliminate or reduce issuance and redemption of cents-off coupons on consumer products. That investigation resulted in a settlement in which the grocery chain and product manufacturers agreed to pay consumers $4.2 million.[16]

***The unprecedented merger wave that began in the mid-1990s and continues even today has taxed federal enforcement resources to the limit.***

***Assist in federal investigations*** State authorities may augment antitrust enforcement by aiding federal antitrust investigations. Historically, antitrust investigations were separately conducted and separately staffed by state and federal officers. Cooperation between state and federal enforcers was not uncommon, but jointly conducted investigations were virtually unheard of.

This, too, changed in the 1990s. The unprecedented merger wave that began in the mid-1990s and continues even today has taxed federal enforcement resources to the limit. Antitrust Division staffing has been further stressed by enforcement priorities in the non-merger area. Most notably, the Antitrust Division has pursued the highly visible, resource-intensive case against Microsoft. It has also recently concluded well-publicized cases against ADM and foreign vitamin manufacturers. At the same time, state agencies, including New York, have traditionally been underfunded and understaffed. It thus became apparent that both state and federal enforcement would benefit from greater cooperation and, conversely, that enforcement efforts would suffer if state and federal agencies proceeded separately. Perhaps the best example of federal-state cooperation was the investigation of the Thomson/West merger in 1996-97. (See box on page 41.)

***Supporting federal actions*** State contributions to antitrust enforcement are not limited to those situations where the states are actual parties to an action. States may choose simply to play a supporting role by providing evidence for a federal enforcement action. States may also lobby the federal government to involve itself in an investigation that states believe must have federal participation in order to succeed.

Alternatively, states may choose to express their view through *amicus* briefs; and their views may differ from those of the Antitrust Division. For example, in the *State Oil Co. v. Khan*[17] case, New York's Pamela Jones Harbour argued on behalf of 37 states that the *per se* rule prohibiting resale price maintenance should apply equally to maximum resale price maintenance.[18] The Antitrust Division, on the other hand, argued against a *per se* ban in cases of maximum resale price maintenance. Ultimately, the Supreme Court held that *maximum* resale price maintenance should be subject to a rule of reason analysis but that *minimum* resale price maintenance would continue to be subject to a *per se* ban. It may very well be that the Court, in limiting its holding, was influenced by Ms. Jones Harbour's impassioned plea in defense of the *per se* ban on all resale price maintenance. The Antitrust Division also filed another brief in the *FTC v. Staples, Inc.*[19] case and *In re Brand Name Prescription Drugs Antitrust Litigation*[20] case.

***The future*** The road leading to federal-state cooperation has not been without its bumps. Clearly, progress has been made. Over time, the attitude of the federal government toward state enforcement has evolved from skepticism, if not hostility, to tolerance to partnership.

Nevertheless, several fundamental issues remained unresolved. In any joint enforcement action, the state and federal governments are not equals; the federal government still insists on being on senior partner. State enforcers may have input into filings and strategic decisions, but the federal government still has the final say. Moreover, the superior resources available to federal enforcers enable them to maintain their upper hand.

At the same time, state antitrust enforcers have demonstrated that they are players in the trade regulation game and are here to stay. As in *Microsoft*, they forced the federal courts to deal with state-specific issues.

Yet, it is not clear whether the states want or would accept the lead role in antitrust enforcement. States have showed some willingness to part company from federal enforcers. For example, in the Long Island Jewish Medical Center/North Shore Health Systems merger case, New York chose to settle, while the Justice Department sought (unsuccessfully) to enjoin the merger.[21] How firm the state's resolve to press ahead with an action when the federal government passes remains unclear. Would the states have chosen to seek an injunction against the Thomson/West merger without federal involvement? Probably not. Would the states have sued Microsoft without the participation of the Antitrust Division? Doubtful. Moreover, the current state-federal alliance is fragile. A new administration in Washington, especially if not an activist on the antitrust front, could choose to freeze-out the states. Nevertheless, if we have learned anything in the last 20 years, it is that cooperation among antitrust enforcers is in the public interest. That alone should be sufficient incentive to maintain the state-federal alliance, however fragile. Within New York, vigorous antitrust enforcement is likely to continue. Attorney General Eliot Spitzer is committed to increasing the number of attorneys at the Antitrust Bureau and to seeking additional resources for that office. Harry First, a well-respected antitrust scholar, now heads the Antitrust Bureau. In addition, the recently enacted statute[22] that supersedes the decision in *Illinois Brick Co. v. Illinois*[23] is likely to foster additional state court enforcement activity. Still, the office remains underfunded and understaffed and will have to continue to rely on cooperation from sister states and the federal government to accomplish its mission.

---

1. N.Y. General Business Law §§ 340-347 ("Gen. Bus. Law").
2. Gen. Bus. Law § 347.
3. United States Code, title 15, § 2 (U.S.C.).
4. *See* 15 U.S.C. §§ 12-37a.
5. Gen. Bus. Law § 340(6).
6. 15 U.S.C. § 15(c).
7. 333 F. Supp. 278 (S.D.N.Y. 1971); 333 F. Supp. 317 (S.D.N.Y. 1971); 410 F. Supp. 680 (D. Minn. 1975).
8. 415 F. Supp. 384 (J.P.M.L. 1976); 567 F.2d 392 (7th Cir. 1977); 75 F.R.D. 727 (N.D. Ill. 1977); 609 F.2d 867 (7th Cir. 1979); 84 F.R.D. 245 (N.D. Ill. 1979); 88 F.R.D. 211 (N.D. Ill. 1980).
9. 441 F. Supp. 921 (J.P.M.L. 1977); 80 F.R.D. 244 (S.D. Tex. 1978); 611 F.2d 86 (5th Cir. 1980); 620 F.2d 1086 (5th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981); 643 F.2d 195 (5th Cir. 1981); 644 F.2d 70 (2d Cir. 1981); 659 F.2d 1322 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982); 661 F.2d 1145 (7th Cir. 1981); 687 F.2d 52 (5th Cir. 1982).
10. 446 F. Supp. 759 (J.P.M.L. 1978); 82 F.R.D. 143 (E.D. Pa. 1979), *aff'd*, 685 F.2d 810 (3d Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983); 617 F.2d 22 (3d Cir. 1980).
11. Indeed, it was under Baxter's aegis that the landmark settlement breaking up AT&T was reached in 1982.
12. 220 U.S. 373 (1911).
13. 465 U.S. 752 (1984).
14. The Vertical Restraint Guidelines were rescinded by the Antitrust Division in August 1993.
15. 490 U.S. 93 (1989).
16. *See In re Western New York Coupon Litigation*, No. 97 CV-0707 A(M) (W.D.N.Y. Sept. 10, 1997).
17. 522 U.S. 3 (1997).
18. 74 BNA Antitrust & Trade Reg. Rep. No. 1855 at 335 (April 9, 1998).
19. 970 F. Supp. 1066 (D.D.C. 1997).
20. 1996 U.S. Dist. Lexis 4335 (N.D. Ill. Apr. 4, 1996).
21. *See* Neal Stoll & Shepard Goldfein, *Litigated Hospital Mergers: Enforcers Shut Out*, N.Y.L.J., Dec. 6, 1997, p. 3.
22. 431 U.S. 720 (1977).
23. Gen. Bus. Law § 340(6).

# Taking Title to New York: The Enduring Authority of Roman Law

*Those parts of the international system which refer to dominion, its nature, its limitations, the modes of acquiring and securing it, are pure Roman Property Law.*
— Sir Henry Maine

BY DOMINIC R. MASSARO

Beginning with the opening years of the 17th century, the Dutch Republic for more than five decades maintained supremacy over New York. Her title was always legally disputed by the English, and from time to time threatened by aggressive New Englanders, but her sway continued without serious disruption until the seizure of New Amsterdam in 1664. Recaptured in 1673, the Treaty of Westminster the following year saw The Netherlands[1] surrender to England all claims in the New World.

First a Dutch province, New York traces no inconsiderable measure of her polity to old world institutions; and, through Holland, to Roman Law. Indeed, "in many aspects our laws and customs, commonly supposed to be of British descent, may be ascribed to Latin sources, and to the Roman law."[2]

While the universality of the Roman legal system is not the burden of this inquiry, to the extent that the common law of England supplied the legal fabric for the United States, it would be gross error to deny the pervasive influence and overall impact of the law of Rome upon the body of the English law, particularly during its formative period.[3] For it has already been stated that far more important than the reception of Roman "rules" of law by the English law "was the influence of the Roman law on the English way of looking at the law, [as well as] on English jurisprudence."[4]

To know the extent to which the law of Rome made an imperishable mark on the development of the original common law of our state, it is necessary to consider the change that took place in New York's sovereignty, and to appreciate — notwithstanding whether at a particular time her seat was in London or at The Hague — that her title was always determinable under the enduring authority of Roman Law.[5]

## Title by Discovery

As Western European nations made territorial acquisition in the New World the spur of national ambitions, the property law of Rome, with its doctrine of title by discovery, came to control their destinies. The established principle, acknowledged by all as the law, was that discovery gave title to the government by whose subjects, or by whose authority, it was made. This against all claims by other European governments. Chief Justice Marshall recognized that part of the Roman law which treats with this mode of acquiring property in an early case before the U.S. Supreme Court.

> The history of America, from its discovery . . . proves . . . the universal recognition of [this] principle[]. . . . [Spanish] discussion respecting boundary, with France, with Great Britain, and with the United States, all show that she placed it on the rights given by discovery. Portugal sustained her claim to the Brazils by the same title. France, also, founded her title to the vast territories she claimed in America on discovery.
>
> No one of the powers of Europe gave its full assent to this principle more unequivocally than England.[6]

The United States has long since "unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country . . . assert[ing] in themselves, the title by which it was acquired . . . that

**DOMINIC R. MASSARO** was named a judge of the state Court of Claims in 1986. He currently sits as a justice of the Supreme Court in Bronx County. He is a member of the Committee on Federal Constitution and Legislation of the N.Y. State Bar Association. He co-authored *New York's Role in the Ratification of the Constitution* (1988). In 1991, his treatise *Cesare Beccaria - The Father of Criminal Justice: His Impact on Anglo-American Jurisprudence* received the International Dorso Prize. He is the author of *Provisional Remedies* for West's New York Practice Series (1996). He received a bachelor's degree in economics and a master's degree in government from New York University, a master's degree in criminal justice from Long Island University, and a J.D. degree from New York Law School.

[being] discovery[, which] gave an exclusive right."[7] The corollaries from this doctrine have since governed the course of all titles to real estate in New York, and generally throughout the United States. Under it,

> according to the principles of international law, as understood by the then civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered . . . as if it had been found without inhabitants.[8]

The rulers of the Old World found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the New by bestowing on them civilization and Christianity. It thus became a maxim of policy and of law that the right of the native Indians was mere occupancy, subordinate in fee to that of the first Christian discoverer, whose paramount claim excluded that of every other civilized nation. Notwithstanding legal extinguishment of title,[9] the Indians were everywhere conquered, and then destroyed, incorporated or driven farther into the interior, defeated by European diseases as much as by European guns.

## The Dutch Claim

Holland's acquisitions in America centered on the island of Manhattan. But the commercial and political entity known as New Netherland claimed lands vast in extent. She sustained her right on the common principle adopted by all of Europe, basing it on the voyage of Henry Hudson, who, in 1609, sailing in the employ of the Dutch East India Company, entered the river that has since borne his name.[10]

The territory to which the Dutch asserted title by virtue of Hudson's exploration extended along the eastern shores of the continent, from Delaware on the south to Massachusetts on the northeast, and to the great river to the north, up which he sailed to the 43rd degree of latitude, near the present day site of our state capital. Inland it ranged indefinitely, its bounds naturally being unmarked and limited only by the enterprise of future explorers. This wide terrain never came completely under the control of the Dutch, but, in addition to Manhattan, settlement was mostly confined to western Long Island and lower Connecticut, and along the Hudson Valley as far north as Fort Orange, now Albany.

The Dutch consolidated their hold under the Dutch West India Company, which, chartered in 1621, was made a governmental agency and granted governance, strictly commercial in aim, yet endowed with political power "excepting in cases not especially provided for, when the Roman Law . . . [was] to be received as the paramount rule of action."[11]

## Enter the Duke of York

The Dutch claim was never contested by the English because they questioned title given by discovery; rather, it was contested because of insistence that they themselves were rightful claimants because of such title.

***It became a maxim of policy and of law that the right of the natives was mere occupancy, subordinate in fee to that of the first Christian discoverer.***

In 1497, the English monarch, Henry VII, commissioned John Cabot and his sons "to discover . . . countries . . . which before this time were unknown to all Christians."[12] Cabot explored the coastline from Newfoundland (originally, New-found-land) south to the Carolinas. Having reached the mainland before Columbus, England claimed a title which superseded even that of Spain. But this claim long lay dormant. And while English pretensions were finally decided by the sword, England asserted no right by virtue of conquest, but rather this prior right of discovery according to the principles of Roman Law. "It was only retaken from the Dutch and claimed on the ground of this prior right."[13] By the law of nations, "dominion of new territory may be acquired by discovery and occupation as well as by cession or conquest."[14]

James I, in 1606, granted a charter to "deduce a colony . . . into that part of America commonly called Virginia and other parts and territories in America, either appertaining to us, or not now actually possessed by any Christian prince or people."[15] This grant, between the 34th and 45th degrees of latitude, known as the Virginia Charter, embraced practically all of the coast earlier claimed by Cabot. It included not only New York, which lies between the 40th and 45th degrees of latitude, but also the remainder of New Netherland within its territorial limits. Divided into two rival companies, by the time the Dutch actually colonized, the English had flourishing settlements — that of the London Company south on the James River in Virginia, and, afterwards, that of the Plymouth Company north at the Rock in Massachusetts.

## Property and Possession

The Roman law of property has almost completely survived in modern jurisprudence.

Striking to those accustomed to the complexities of English real property law, which is rooted in the artificial and rigid concept of feudal land tenure, is the absence in Roman law of any fundamental distinction between the treatment of land and the treatment of movables. Both are "things," and things are objects of rights. This is the primary meaning of *res*. Both can, in the law as we know it, be owned absolutely.

This conception of absolute ownership is characteristically Roman; central to it is the sharp differentiation between possession and ownership. Roman law did not protect possession *per se* (although protecting it as a right incidental to or separate from ownership), but rather the relative idea of ownership as the better right to possession.

As Rome grew from Republic to Empire, a *jus gentium*,[16] that is, the idea of a law common to "mankind at large"[17] as dictated by the natural order or the nature of things, was constructed; it emerged as an explicit philosophical doctrine in the sixth century with the Emperor Justinian.[18] The law of the Roman Republic had earlier recognized *jus gentium* as composed of principles so intrinsically reasonable as to be applicable to relations between Roman citizens and foreigners. *Jus gentium*, therefore, initially a system of law, or more appropriately equity, evolved to supplement Roman civil law.

In its further development, the concept of general equity embodying moral principles of natural law was regarded as *ratio scripta* (written reason), a prescriptive statement of common heritage and universal application as the law of nations. Scholars generally agree that this contribution is the central underpinning in the development of rules of conduct between and among independent states that we know today as international law.[19]

## Occupancy

As a legal doctrine, the right of title by discovery under Roman Law is compromised if not consummated by *occupatio* or occupancy. Mere transient discovery gave only an inchoate title; it amounted to little unless confirmed, in reasonable time, by actual possession.

Respecting possession, so called "natural modes of acquisition" were recognized, that is, possessing at first sight that which, at that moment, is *res nullius* — the property of nobody: wild animals ensnared, jewels disinterred, land discovered or never before cultivated.[20] "The first method, then, of acquiring property, which the Romans call part of the law of nations, is occupancy of things which belong to no one else . . . this method is indubitably a part of the natural law."[21] Bracton, the father of the English Common Law, borrowed the doctrine directly;[22] Blackstone described it "to be the true ground . . . of all property, according to that rule of the law of nations, recognized by the law of Rome."[23]

With regard to title to newly discovered lands, sovereignty could be acquired, where there was no valid agreement with the native authorities, only by taking the most real and possessive possession.

> For to discover a thing is not only to seize it with the eyes but to take real possession thereof. . . . For that reason the Grammarians give the same signification to the expressions 'to find' or 'to discover' and 'to take possession of' or 'to occupy'; and all the Latin . . . tells us that the opposite of 'to find' is 'to lose.' However, natural reason itself, the precise words of the law, and the interpretations of the [Institutes] all show clearly that the act of discovery is sufficient to give clear title of sovereignty only when it is accompanied by actual possession.[24]

In all these objects, the full right of dominion was acquired by occupancy, that is, by he who took first possession with the intention of making it his own. Sir Henry Maine writes:

> The Roman principle of Occupancy, and the rules into which the jurisconsults expanded it, are the source of all modern International Law on the subject of . . . the acquisition of sovereign rights in newly discovered countries.[25]

This principle was elevated into extreme importance by the discoveries of the great navigators of the 15th and 16th centuries.

## Roman-Dutch Law

It can easily be understood that for a country in a state of strong and rapid economic growth, as was The Netherlands in the 1600s, it was inevitable that legal science should rise beyond traditional Germanic elements. Holland had become at this period a center for international interests, in maritime trade, in commerce and finance, not to speak of the philosophical currents and scientific discoveries of her widely popular universities. All of this elaborated a body of law both more individual and more universal.

Historically, Rome had always served this idea of universality. And so a Roman-Dutch school of moral-legal jurists gained a remarkable intellectual authority in evolving the idea of a new *jus gentium* for the civilized world. Its most celebrated representative was Hugo Grotius (1583-1645), who blended customary and local law into juristic precepts built upon Roman Law, with its rationalistic conception of Natural Law. The Roman Law was thus given an encyclopaedic place that would assume the status of an international norm and serve as the basis for governing relations among sovereign states as moral persons.

The concept of territorial rights, a fundamental principle of international law, would now apply the same civil law principles the Romans had applied to private individuals over property. As a result, the international rules relating to newly discovered territory and the modes of acquiring it are still in their essentials the Roman rules of property.

Thus, the law of Rome was "received" in Holland; and while custom held its ground (largely based on Germanic tribal law already affected by an earlier infiltration of Roman law),[26] this mixed system of Roman-Dutch law evolved and was extended by Dutch colonization.

When the old law underwent profound modifications with the passing of New York to the British crown, owing as much to changed social conditions as to the incursion of rules and institutions derived from English common law, the law relating to property preserved its pure Roman character, uninfluenced by English common law. It may correctly be stated, then, derived from the common consent of nations, that Roman-Dutch law served as the original common law respecting title to this state.

***The Roman Law was given an encyclopaedic place that would assume the status of an international norm and serve as the basis for governing relations among sovereign states.***

## Historical Record

While what was afterwards known as New Netherland was within the territorial limits set down by James I in the Virginia Charter of 1606, it was not occupied by Europeans, and was therefore said by the Dutch to be within the exception specified, namely, that it was not then "actually possessed by any Christian prince or people." Undoubtedly, the Dutch were the first to actually settle, certainly in New York. But the English consistently resisted this interpretation, and never acquiesced, even tacitly, to Dutch settlement. On numerous occasions — resting their claim on Cabot's discovery of the continent in 1497 (and the explorations of his son, Sebastian, in 1498), followed, in due time, by actual occupation at different points on the seacoast under crown grants — the English asserted dominion over this part of the Atlantic coastline. Their first colony at Jamestown, in 1607, they pointed out, was prior in point of time to any occupation of contiguous territory by the Dutch. To the English, the Dutch were considered mere interlopers, trespassers, squatters.

> Thus we are told that Captain Argal of Virginia visited Manhattan Island in November, 1613, found there a Dutch settlement of four houses, and compelled Hendrick Corstiaensen, the leader of the settlement, to acknowledge the sovereignty of the King of England and of the governor of Virginia, and also exacted from him an agreement to pay tribute.[27]

The English took full cognizance of Dutch traffic on the Hudson River in 1620. Their minister at The Hague reminded the States General of the charter that James I had granted to the London and Plymouth companies in 1606, and of its broad territorial jurisdiction. He protested against Dutch vessels trading in waters where "for many years since, [England has] taken possession of the whole precinct, and inhabited some parts of the north of Virginia, by us called New England."[28] There is animated diplomatic correspondence on the subject, which engages rapt attention, each government defining its own position, justifying its own acts and setting forth its own presumptive rights, but no definite results were obtained.

In an exchange of correspondence with the Dutch governor in 1627, the English governor at Plymouth gave notice that the patent of New England extended to the limits of the Dutch settlement at New Amsterdam, and questioned the propriety of Dutch traffic with the Indians within said limits. An attempt by the Dutch to establish a boundary line failed.

In 1632, the controversy was reopened. Governor Peter Minuit, having sailed for Holland in March of that year, was driven by a storm into Plymouth, England. There he was detained on charges of illegally trading in the King's dominions. His release, demanded by the Dutch, was declined. This provoked renewed debate respecting title to New Netherland. The Dutch now advanced, in addition to title by discovery, title by purchase(s) from the Indians and, alternatively, by adverse possession in consequence of the lapse of English rights, if they ever possessed them, to settle within the more narrow confines of the 39th and 41st degrees of latitude, that is, from the banks of Delaware Bay to lower New York, and eastward to the Connecticut River, where the Dutch enjoyed continuous uninterrupted possession.

The English denied the Dutch assertions, claiming the territory "by first discovery, occupation and possession.[29] Likewise, they declared that the Indians were not *bona fide* possessors of the soil and, therefore, incapable of giving title. Respecting adverse possession ripened by prescription, they brought forth "letters patent . . .

from our Sovereigns, who were . . . the true and legitimate proprietors . . . in those parts."[30]

Based thereon, Charles I contented himself with the assumption of superiority of title and Minuit was released. But

> [t]he English continued to assert their claims, and in vindication thereof encouraged English settlements in what is now Connecticut and on the eastern end of Long Island. The Dutch regarded these settlements as encroachments on their territory, and protested against them. There were frequent negotiations by colonial authorities relating to boundaries, but there is no evidence that the English government ever relinquished or seriously modified its claim to the territory of New Netherland. On the contrary, this claim was asserted in the most positive manner by the charter granted on the 12th of March, 1664, by King Charles II to his brother, James, Duke of York.[31]

Within six months, the appearance of an English squadron in the harbor would cause Governor Peter Stuyvesant, at the behest of the citizenry, to surrender New Amsterdam without resistance. The city was henceforth to be known as New York. A few days later, Fort Orange up the Hudson capitulated; scattered settlements and outposts followed in due course. Thus, New Netherland was wrested from Dutch hands.[32] Upon final possession by the English, under the Westminster treaty of 1674, the title to all lands was transferred to the crown of Great Britain, but lands granted by the previous Dutch governors, as acknowledged in the 1664 articles of surrender agreed to by Stuyvesant, were excepted and later confirmed.[33]

> The claim of the English, it is true, has occasionally been criticised on the ground that neither of the Cabots landed in or near New York, or saw the coast of New York. The right of discovery is not recognized in the Roman law unless followed by occupation, or unless the intention of the sovereign or state to take possession be declared or made known to the world. And it must be conceded . . . that mere transient discovery amounts to nothing unless followed in a reasonable time by occupation and settlement, more or less permanent, under the sanction of the state. . . . [However,] what the English did do was sufficient to give them title by discovery . . . upon the theory that the claim of the Dutch was contested by the English from the very start, not because they questioned the title given by discovery, but because they insisted on being themselves the rightful claimants under that title.[34]

As Grotius observes, "[a]ny region that has been taken possession of as a whole . . . remains the property of the first occupier."[35]

When the War for Independence was declared, the people of New York, by force and effect of this act, and in their sovereign character as organizers of the state, succeeded to and were vested with the absolute title then held by the British crown.[36] It is altogether fitting to acknowledge, as our inquiry on New York's debt to the Roman law comes to an end, that this title descends to the present day.

---

1. The Netherlands, or, more correctly, the United Provinces of The Netherlands, at this period were a heterogeneous congress of provincial assemblies governing as the States General of the United Netherlands, Holland being its more advanced and urbanized member.
2. J. Hampden Dougherty, *Constitutional History of New York State from the Colonial Period to the Present Time*, in 2 Legal and Judicial History of New York 2 (1911).

   > Many of the basic principles of American law are Roman in many fields: adverse possession, bailments, carriers and innkeepers, contracts, corporations, the descent of property, easements, legacies and wills, guardianship, limitations of actions, marriage, ownership and possession, conveyances, sales, trusts, warranties, partnerships, mortgages. It was the Romans who developed the conveyance of real estate by written instruments and subscribing witnesses, and passage of title by a will, also to be in writing and with subscribing witnesses.

   Palmer, *An Imperishable System: What the World Owes to Roman Law*, 45 A.B.A. J. 1149, 1152, 1220 (1959).

   > Certain concepts and phrases seemingly distinctively Anglo-Saxon, for example, "an Englishman's house is his castle," is borrowed from Roman sources. The house-castle notion, the most essential bastion of privacy recognized by American law, appears in Coke's Institutes, and the "Latin phrase, the only one Coke cites as authority, is taken almost verbatim from the Digest," and the passage in the Digest is taken from Gaius' Commentaries on the Twelve Tables.

   Radin, *The Rivalry of Common Law and Civil Law Ideas in the American Colonies*, in 2 Law: A Century of Progress 404, 424 (1937).
3. The skilled presentation by Professor Re in *The Roman Contribution to the Common Law*, 29 Fordham L. Rev. 447 (1961) first introduced this author to the subject four decades ago. The impression is still vivid.
4. Munroe Smith, *Elements of Law*, in Studying Law 17, 341 (2d ed. 1955).
5. Professor Yntema summarizes the enduring authority of Roman law as follows: 1. It is the "fundamental body of legal doctrine" which is the "common element in the individual legal systems of much of Continental Europe, and its colonies;" 2. The "even wider dissemination . . . of systematic legal conceptions and principles not merely in the civil law systems but also in the Anglo-American common law;" 3. the "extension of this stock of conceptions by virtue of its acceptance in the system of international law developed by Hugo Grotius and his successors;" 4. "The language of Roman law has become a *lingua franca* of universal jurisprudence." Yntema, *Roman Law and Its Influence on Western Civilization*, 35 Cornell L.Q. 77, 88 (1949).
6. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574-76 (1823).
7. *Id.* at 587.

8. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 409 (1842); *see Jackson v. Hudson*, 3 Johns. 374 (N.Y. Sup. Ct. of Judicature 1808); Emerde Vattel, The Law of Nations 85 (Fenwick, trans. 1916).
9. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *see United States v. Fernandez*, 35 U.S. (10 Pet.) 303 (1836); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574-76 (1823); *Goodell v. Jackson*, 20 Johns. 693 (N.Y. Ct. of Errors 1823). "The eminent Chancellor Kent sets forth a lucid, if melancholy, justification for the foundation of title to land with respect to the extinguishment of claims by the Indian tribes," in James Kent, III Commentaries on American Law 309 (1828).
10. It was, of course, the Florentine navigator, Giovanni da Verrazzano, sailing for France, who first entered New York bay and the mouth of the Hudson, in 1524. Verrazzano's description of the North American coastline is one of the most interesting accounts extant of the United States before European settlement. His description of New York harbor is of particular interest, for it preceded by 85 years the coming of Hudson: "At the end of 100 leagues we found a very agreeable situation located within two small prominent hills, in the midst of which flowed to the sea a very great river . . . the land, which we found much populated . . . the people clothed with the feathers of birds of various colors." Giovanni Schiavo, Four Centuries of Italian American History 61 (1952).
11. E.B. O'Callaghan, 1 History of New Netherland 90 (1846). "Adventure brought men to Virginia; politics and religion to New England; but New York was founded by trade and for trade and for nothing else. The settlement on the island of Manhattan was due to the active spirit of Dutch commerce." Henry Cabot Lodge, A Short History of the English Colonies in America 285 (1881).
12. Giovanni Schiavo, Four Centuries of Italian American History 52 (1952). "The fundamental thing that should be remembered about Giovanni Caboto (John Cabot), a Venetian sailing for England, is that because of his 1497 voyage (and that of his son Sebastian in 1498), the English eventually took possession of North America." *Id.*
13. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 381-82 (1842).
14. *Jones v. United States*, 137 U.S. 202 (1890).
15. Charles A. Lincoln, 1 The Constitutional History of New York 17 (1906).
16. "That law which natural reason has established among all men is equally observed among all nations, and is called the law of nations, as being the law which all nations use." Inst. 1, 2, 1; Dig. 1, 1, 9. Cicero, the celebrated Roman lawyer and statesman, first stated this principle: "There shall not be one law at Rome, and another at Athens, one now and another hereinafter; but the one eternal and immutable law shall sway all nations for all time and be the common law and master of all." Marcus Tullius Cicero, 3 De re publica, De legibus 22 (Clinton Walker Keyes, trans. 1928).
17. "The justice of mankind at large . . . is rooted in the social union of the race of men." Marcus Tullius Cicero, 1 Tusculan Disputations 64.
18. Justinian reigned from 527 to 565 A.D. It was he who consolidated the whole of existing Roman Law. History will continue to proclaim his name because his code gave what is, in a sense, final form to Rome's most permanent contribution to civilization, her law. *See generally* Alburn, *Corpus Juris Civilis: A Historical Romance*, 45 A.B.A. J. 562 (1959).
19. *See* Defeis, *The Roman Contribution to International Law*, 2 NIABA L.J. 17 (1992); see also Munroe Smith, A General View of Europe's Legal History 4-5 (1927).
20. Inst. 2, 1, 12-18; Dig. 41, 1, 3.
21. Hugo Grotius, The Law of War and Peace 121 (Louise R. Loomis, trans. 1949).
22. Thomas Edward Scrutton, The Influence of Roman Law on the Law of England 145 (1885). "Many famous passages of Justinian's Digest . . . we find again, word for word, in Bracton's treatise; for we know that our . . . first great author . . . copiously used a Summary of Roman Law, by Azo of Bologna, in composing his treatise on the Laws of England." John Henry Wigmore, 3 A Panorama of the World's Legal Systems 1008 (1928).
23. Sir William M. Blackstone, 2 Commentaries on the Laws of England 258 (1765-69).
24. Hugo Grotius, The Freedom of the Seas 11-12 (Magoffin, trans.1916); see Emerde Vattel, Law of Nations 85 (Fenwick, trans. 1916); Samuel von Pufendorf, On the Duty of Man and Citizen According to Natural Law 63 (Moore, trans. 1927).
25. Henry Sumner Maine, Ancient Law 239 (Beacon, edit. 1963).
26. "German jurisprudence . . . commences with, and is due to, the inception of Roman law. As a child of Roman jurisprudence, it was but natural that, from the very outset, German jurisprudence should bear the impress of its origin." Smith, *Four German Jurists*, in A General View of European Legal History 121 (1927).
27. Charles A. Lincoln, A Constitutional History of New York 18 (1906).
28. *Id*. at 19.
29. *Id*.
30. *Id*.
31. *Id*.
32. A detailed account of Dutch primacy in New York can be found in Martha J. Lamb, 1 History of the City of New York 13 (1877). Likewise, in Alden Chester, 1 The Legal and Juridical History of New York 3 (1911).
33. In his acclaimed *Treatise Upon the Estate and Rights of the Corporation of the City of New York* (1862), Murray Hoffman, Esq. sets forth a compelling formal defense for fee in the Dutch, and states, at 95, "that Dutch [grants] were, and are, indisputable sources of title, with or without [English] confirmation." *Op. cit.* at 92 et seq.
34. *Mortimer v. New York Elevated Rail Co.*, 57 N.Y. Super. Ct. 244, 6 N.Y.S. 898, 904 (N.Y.C. Super. Ct. 1889) (Freedman, J., concurring).
35. Hugo Grotius, The Law of War and Peace 82 (Louise R. Loomis, trans. 1949).
36. *See* Constitution of 1777, Art. XXXVI; Act of October 22, 1779, (I *Laws of the State of New York*, Chap. 25, Sec. 14); see *also Jackson v. Porter*, 13 F. Cas. 235 (C.C.N.D.N.Y. 1825); *Jackson v. Ingraham*, 4 Johns. 163 (N.Y. Sup. Ct. of Judicature 1809).

*Writing Clinic*

# An Attorney's Ethical Obligations Include Clear Writing

*The power of a clear statement is the great power at the bar.*
— Daniel Webster[1]

BY WENDY B. DAVIS

Writing clearly and concisely is not only good business practice, it should also be viewed as an ethical obligation of all attorneys.

Rule 1.1 of the ABA Model Rules of Professional Conduct requires an attorney to provide competent representation, and writing skills are one aspect of competence. Although no known case identifies an attorney who was disbarred for lack of writing skills, courts have reinforced the need for effective writing by imposing sanctions for verbosity, lack of organization, and errors in grammar and citations.[2]

Although it may once have been fashionable for legal writing to be filled with Latin and legalese in the belief that this would make all parties recognize the need for legal counsel, clients and courts now demand brevity and plain English.

Courts have commended parties for clear and concise writing.[3] A Massachusetts judge, quoting an appellate procedure textbook, stated that "'[a]n attorney should not prejudice his case by being prolix. . . . Conciseness creates a favorable context and mood for the appellate judges.'"[4] Courts have indicated their displeasure with wordiness[5] and lack of clarity[6] in briefs and pleadings.

Poor writing by an attorney can result in court sanctions for the attorney, loss of the client's legal claim and unnecessary litigation.

## Attorney Sanctions

Numerous regulations impose requirements on lawyers' writing. Federal Rule of Civil Procedure 8 requires a short and plain statement of the claim in a simple, concise and direct manner.[7] Under 28 USC § 1927, courts can impose costs and attorney's fees on lawyers who unreasonably multiply proceedings.[8] Many courts impose page limits on briefs.[9] Lawyers who exceeded the required page limits, or tried to come within the limits by using smaller margins or fonts, have been subject to sanction and fines that they were prohibited from passing on to their clients.[10]

In *Laitram Corp. v. Cambridge Wire Cloth Co.*,[11] the Court of Appeals for the Federal Circuit imposed a fine of $1,000 each on the lawyers who had signed briefs for both parties, directing that the fines be paid to the U.S. Treasury. The briefs lacked references to the record, relied on attorney argument as evidence, and cited inapplicable authority. The court said counsel had "wasted this court's resources by playing in the rarified atmosphere of a debating society."[12] It vacated and remanded the District Court's decision.

In *Julien v. Zeringue*,[13] the court imposed financial sanctions, equal to the defendant's attorney's fees, against the plaintiff's counsel. In addition to the numerous extensions and missed deadlines, the court noted that the attorney did not follow the court's rules of practice governing the preparation of a joint appendix.

## Loss of Legal Claim

The inability of lawyers to write properly has a negative impact on clients. Courts have dismissed complaints with grammatical errors.[14] Courts have denied motions with misplaced punctuation marks.[15] These rejected claims have cost clients time and money, and could lead to loss of the client's legal rights.

In *Duncan v. AT&T Communications, Inc.*,[16] the court granted a motion to dismiss a complaint, stating that the plaintiff's complaint was so poorly drafted that it failed

**WENDY B. DAVIS** is an instructor of legal practice skills at Suffolk University Law School in Boston. She also teaches legal subjects in the undergraduate paralegal program at Suffolk University and in the continuing education department at Northeastern University. She is a graduate of the University of Massachusetts and received her J.D. degree from Boston College Law School.

to state a claim on which relief could be granted. The court made no attempt to hide its displeasure with the plaintiff's pleadings, noting that "the court's responsibilities do not include cryptography, especially when the plaintiff is represented by counsel."[17] The court identified grammatical and stylistic shortcomings, adding that the allegations were written in a conclusory manner that failed to explain the facts to the court. Some of the allegations, the court said, might have been legally significant if they had been well-pleaded.

In *Feliciano v. Rhode Island*,[18] the plaintiff's claim under the Americans with Disabilities Act was dismissed because the complaint was too vague. The court found that the complaint did not describe the claim in sufficient detail, nor did it allege facts to support the claim of denial of constitutional rights. The complaint also alleged that there were differences in interpretation in the two applicable federal laws, but it did not articulate those differences. For that reason, the court did not consider this allegation.

In *Lennon v. Rubin*,[19] the court upheld a grant of summary judgment against the plaintiff. The court said that its review was made more difficult because the plaintiff's brief lacked analysis of the statute and identification of the lower court's reasoning. "'[W]herever material uncertainties result from an incomplete or indecipherable record and impede or affect our decision, we resolve such uncertainties against appellants.'"[20] Finding the plaintiff's responses "weak" and his claims "cursory," the court affirmed the grant of summary judgment against the plaintiff.

## Steps to Foster Clarity

Spell check programs have made it easier to detect common typographical errors, but they cannot be relied upon to catch certain peculiarities of the English language. The fact that a document passed a spell check is not a defense to an error that was missed. A checklist for items that deserve a close look after a spell check would include:

- Is a plural word something that should instead end with 's?
- Is *there* being used instead of *their*?
- Should *sea* instead read *see*?
- Has *an* crept in where *and* is meant?
- Has *he* been used when *the* or *her* is intended?
- Should *trail* instead be *trial*?
- Is *statue* used where *statute* is intended?
- Is each use of *its* correct? (Spell checkers will allow *its'* to pass as correct, and every use of *it's* should be the equivalent of saying *it is*.)

Headings and subheadings can give your reader a road map to approach the material with a better appreciation of how the argument is being constructed. Clear topic sentences at the start of each paragraph foster comprehension, particularly for speed readers and skimmers.

### Unnecessary Litigation

Lack of clarity in transactional documents can involve a client in a lawsuit that would not have been necessary if the drafting attorney had been more cautious or skilled in writing. Many lawsuits are caused by parties asking a court to determine the meaning of ambiguous terms.[21]

In both of the following cases, parties were involved in district court suits, which were appealed to a federal Circuit Court of Appeals. Neither case would have been necessary if the contracts had been drafted clearly and accurately.

In *Bourke v. Dun & Bradstreet Corp.*,[22] employees sued their former employer for money due under a contractual incentive compensation plan. The contract provided for the employees to be paid if "targets" were achieved. Each employee had several targets and was entitled to increased compensation for each higher target. The employer interpreted the language to mean that the employee would be paid at the 100% level, and no higher. The employees contended that the phrase entitled them to payment at the 200% and higher levels for higher targets. The two different interpretations resulted in a dispute worth nearly $2 million to the employees. The court found that, although the language was ambiguous, the employer's interpretation of the language was reasonable. The employees' complaint was dismissed, as it had been by the District Court.

In *Baybank v. Vermont National Bank*,[23] the loan participation contract at issue was inaccurate regarding the loan origination date, maturity date and loan amount. The plaintiff, a participant in the loan, refused to participate in the loan renewal, citing the inaccuracies as evidence that the contract was ambiguous. The court agreed that the inaccuracies made the contract ambiguous, but it found that the plaintiff's conduct indicated its consent to participate in the loan renewal.

---

1. Quote it! Memorable Legal Quotations 18 (Eugene C. Gerhart ed., 1987).
2. For an excellent discussion of this subject, see Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 Suffolk U. L. Rev. 1 (1997).

3. *Commonwealth v. Angiulo*, 415 Mass. 502, 523 n.17, 615 N.E.2d 155, 169 n.17 (Mass. 1993).
4. *Id*. (quoting J.R. Nolan, Appellate Procedure § 24).
5. *See Gordon v. Green,* 602 F.2d 743, 744-45 (5th Cir. 1979).
6. *See Slater v. Gallman*, 38 N.Y.2d 1, 4, 377 N.Y.S.2d 448 (1975).
7. Fed. R. Civ. P. 8(a), (e)(1).
8. Section 1927 has been used by courts to impose fines on lawyers who violate page limits, thereby requiring the court and opposing counsel to read two sets of briefs. *Westinghouse Elec. Corp. v. NLRB*, 809 F.2d 419 (7th Cir. 1987).
9. *See, e.g.*, U.S. Sup. Ct. R. 33(1)(d), (g); Fed. Cir. R. 28(c).
10. *Westinghouse Elec. Corp.*, 809 F.2d 419.
11. 919 F.2d 1579 (Fed. Cir. 1990).
12. *Id.* at 1584.
13. 864 F.2d 1572 (Fed. Cir. 1989).
14. 668 F. Supp. 232, 237 (S.D.N.Y. 1987).
15. *People v. Vasquez,* 137 Misc. 2d 71, 76 n.2, 520 N.Y.S.2d 99, 103 n.2 (Crim. Ct., Bronx Co. 1987).
16. *Duncan,* 668 F. Supp. at 234.
17. *Id.*
18. 160 F.3d 780 (1st Cir. 1998).
19. 166 F.3d 6 (1st Cir. 1999).
20. *Id*. at 9 (quoting *Credit Francais International, S.A. v. Bio-Vita Ltd*., 78 F.3d 698, 700-701 (1st Cir. 1996)).
21. *Bourke v. Dun & Bradstreet Corp.*, 159 F.3d 1032 (7th Cir. 1998*); Elkhart Lake's Rd. Am. v. Chicago Historic Races, Ltd.*, 158 F.3d 970 (7th Cir. 1998); *Baybank v. Vermont Nat'l Bank*, 118 F.3d 30 (1st Cir. 1997).
22. *Bourke,* 159 F.3d at 1037.
23. 118 F.3d 30 (1st Cir. 1997).

## PRESIDENT'S MESSAGE

CONTINUED FROM PAGE 6

distinction between work in and out of the courtroom. To ease the burden on municipalities, we have proposed that the state assume responsibility for the expense of the 18-B program or, at least, cover the cost of all increases.

Our Association also has been a consistent proponent of adequate state funding for defense programs, including backup centers. When budget cuts have been made, we have been vocal in stressing the need to maintain funding on a par with those for prosecutorial services. We are pleased to note recent budgetary allocations for defense support services provided by the Defenders Association. That, of course, is at least an improvement. Much remains, however, to be done.

Enhanced funding is needed for public defenders, who work in the Family Court and the criminal courts. We, therefore, support the call for increased compensation and resources, which have been included in the recommendations of the Chief Judge's Committee to Promote Public Trust and Confidence in the Legal System.

The bar in any event will continue its tradition of voluntary *pro bono* service. Access to counsel for those who are economically underprivileged, however, requires a collaborative public/private partnership. While it is encouraging to hear agreement, outside the legal community, that existing resources are outdated and inadequate, action is needed.

As lawmakers, you hold the key to achieving sufficiently staffed and funded legal services programs. At the start of the new millennium, there is no better time to reaffirm fundamental principles.

We urge you to take immediate action and to provide necessary resources to do justice. The Founders expected no less from all of us.

## MEMBERSHIP TOTALS

| | | |
|---|---|---|
| **NEW REGULAR MEMBERS** | **JANUARY 1, 1999 THROUGH DECEMBER 10, 1999** | **6,663** |
| **NEW LAW STUDENT MEMBERS** | **JANUARY 1, 1999 THROUGH DECEMBER 10, 1999** | **1,806** |
| **TOTAL REGULAR MEMBERS** | **AS OF DECEMBER 10, 1999** | **60,665** |
| **TOTAL LAW STUDENT MEMBERS** | **AS OF DECEMBER 10, 1999** | **5,788** |
| **TOTAL MEMBERSHIP** | **AS OF DECEMBER 10, 1999** | **66,453** |

# Challenges

BY ANDREA ATSUKO DUNHAM*

HOW DARE YOU
not rise in the morning
to define the horizon
stretch your golden arms
in the sky and
yawn life into a new day
spreading love and wisdom
feeding the roots of joy to flower on earth
and summoning sleeping power
with your shine.

HOW DARE YOU
forget worlds revolve around you,
not see you light up the moon
mark days for calendars
create life with your rays
beaming smiles and love in the face
of a turning world
whose cheeks are bruised
from the abuse
of being slapped again and again
by our brothers and sisters who have forgotten
like me — like you.

HOW DARE YOU
not radiate your brilliance
for fear you will blind those who need you.
When they shade their eyes
they glimpse the beginnings
of their own infinity:
Power without destruction
energy without drain
life giver sight seer
time keeper.

HOW DARE YOU
not remember who you are
my sun
our sons and daughters
children born into my heart.

HOW DARE I
not take a stand
for the suns who forgot their shine
the rays who cannot comprehend
they generate their own light.

HOW DARE I
diminish a star
disguise the sparkle in the cosmic sea
for fear one more would be a burden
clutter your view
the universe could do with one less world
one less word
I am voiceless, speechless
silenced by despair
Forgotten God
who spoke
I once had something to say
I dreamed
about love, peace and humanity
and believed it
I really believed
my life was destined to bring it
if it did not come before me.

What is before me
is the vacuum left
with broken parts of star-dusted hearts
unmended
shattered clouds and scattered dreams
cuz my uncle robbed my grandma's dead body
and my 10-year-old sister thinks she's fat and ugly
and I sit as if my tongue has been
slashed from my throat
because it hurts
and I don't want it to be me
to make that difference
but I turned around and found
there was no one to follow.

I had a map of the cosmos
where I buried visions encased in glass
for emergencies
AND THIS IS AN EMERGENCY:

BREAK SILENCE

Inside is my extinguished fire
ready to be lit
Because the sun
will rise tomorrow
And I will open my eyes
I will open my heart
I will open my mouth
And I shall stand.

* *Andrea Atsuko Dunham is a master's student at New York University's Gallatin School of Individualized Study, focusing on the use of writing and performance as a tool for transforming society.*
*The poem was originally presented at a Landmark Education seminar designed to help the participants gain insights into their lives and set future goals.*

**POINT OF VIEW**

# Participation of Women Should Be Required in Domestic Violence Cases

BY FRANCIS T. MURPHY*

There are things you experience in life of which you cannot speak, for the words to speak them have never been written. They are things that you can only feel, and when you speak to others about those things, you can only hope that they feel what you feel.

There is no experience more demeaning than to be beaten by another person. How many of you at this dinner tonight know what it is to be punched in the face, the belly, punched in the back, the breast, kicked in the face, the back, kicked in the legs? How many of you know what it is to awaken in the morning with a broken cheek bone, broken teeth, broken arm? How many of you know what it is to have suffered loss of sight, hearing, loss of mind? How many of you have memories of mother crawling, children screaming, mother bleeding? How many of you know how low into the animal order a woman can be spun by a husband who has her by the nape of the neck, or by the hair bun she so carefully fixed that morning? How many of you have been beaten to the floor of a toilet by a drunken husband with whom marriage has cursed you and your children?

Is there any place on earth lower than a toilet floor when you are lying on it, beaten, helpless, and in despair?

Yes, there is a lower place.

It is the place where that beaten woman refuses to participate in the criminal prosecution of her husband. In that place, she inflicts upon herself the greatest wound a victim can suffer. She protects the person who has made her a victim, so that he may victimize her and her children again. She joins with him in his next beating of her, for in a silent agreement between them her body becomes his weapon and she his accomplice in his next attack. She sells her inner self, the ultimate sale for anyone to make. She turns the criminal justice system upside down, so that other beaten women may be beaten again, for what she does in frustrating the criminal system, when multiplied by other wives of like mind, becomes the trade-talk in court corridors among wife beaters and the lawyers who defend them. In her self-immolation, the beaten wife reluctant to prosecute puts to the torch all that women have gained in their struggle against a male dominated culture.

There is a widespread, unspoken belief that men who beat their wives are truck drivers, manual laborers or drunken salesmen. It is too narrow a belief. Ministers beat their wives, as do plumbers, surgeons and theologians. Judges beat their wives, as do legislators, teachers and doctors. Police officers beat their wives, as do poets, reporters and butchers.

The well-kept secret is that men of every kind and class beat their wives, and that they do so because they think themselves safe in their little castles. Outwardly, they acknowledge that, in the abandonment of ancient laws and practices that oppressed women, society has changed the relationship between husband and wife. Yet, they know that these changes lie on the perimeter of marriage. They know that in the interior of marriage, the part of marriage beyond public scrutiny, the part that cannot be seen from the street, that in that private place criminal prosecution for beating one's wife is far from certain. They know that in half of all domestic violence cases the victims refuse to cooperate with the prosecutor and, in consequence, the cases are dismissed. They know that out in that street there is a society in which many believe that, when a husband beats his wife, he does not commit a serious crime.

For all of the babble of this century, the woman of the 15th, 16th and 17th centuries still lives in the backwaters of the modern mind. Woman the weak, woman the dependent, woman the obedient, woman the follower, woman the object to be used and abused – this is the woman who, in the actual practice, many in society do not consider worthy of the forceful intervention of our criminal justice system when her husband beats her. If that woman is beaten by a local character, he will soon find himself in a sequence of rooms, the squad room, a court room for arraignment, another court room for trial and verdict or plea, and then a court room for sentence, a detention cell, a prison reception room, and then a cell in a state prison. If that woman is beaten by her husband, the odds are high that, though she calls the police, she will decline ultimately to prosecute him and he will never spend a night in jail. Two identical crimes upon the same victim yield only one conviction of a defendant, the other having "walked," as they say, because his relationship with the victim had been an intimate one.

If our criminal justice system is to have a semblance of credibility in the protection of women, it must mandate a policy of compelling the participation of women in the criminal prosecution of their husbands. Such a policy is not a guarantee of a solution to domestic violence, but it is a better policy than dismissing cases when women refuse to participate in those prosecutions.

Mandated participation advances the equality of women, deters future violence against wives and children, controls the conduct of attackers, expresses the community's moral and social revulsion, and takes the control of the judicial process out of the hands of the assailants and places it in the hands of society whose interest on behalf of the public is of a different order than that of the victim and her oppressor.

I therefore recommend that the legislature adopt a law providing that (1) no domestic violence case may be dismissed upon a victim's request, or upon proof of her refusal to participate in the prosecution, unless there is reasonable cause to conclude that the victim would benefit by the dismissal and the court states in the record facts that support that conclusion, and (2) in the case of a victim of domestic violence who refuses to participate in its prosecution, the case may not be dismissed upon the request of the people unless they state facts showing that, although all lawful means to compel the participation of the victim have been used, it is unlikely that the defendant will be convicted.

Let the word go out to every wife beater in every court corridor in this state, "If you did the crime, get ready to do the time."

---

* Francis T. Murphy, former presiding justice of the Appellate Division, First Department, is now special counsel to Kelley Drye & Warren LLP in Manhattan. This article is adapted from an address he delivered October 6, 1999, at the Annual Dinner and Public Awareness Event of My Sisters' Place.

**RES IPSA JOCATUR**

# In Praise of Appraisal: Alternate Dispute Resolution in Action

BY JAMES M. ROSE*

A recent criminal case before Justice Shirley U. Jesstt in the Town Justice Court of New Gomorrah brought to light just how much the law favors alternate dispute resolution.

The use of alternate dispute resolution in criminal courts has increasing in recent years. In 1988, more than 20,000 cases were diverted to alternative dispute resolution from New York City Criminal Court.[1] The Office of Court Administration reports that in 1998 a total of 40,113 cases were referred to alternative dispute resolution. In all, 22,834 decisions resulted from mediations, conciliations and arbitrations (other than statutory compulsory arbitration).[2] But this case put a new spin on that solution.

Mr. M.T. Nestor, a man whose sons used to mow his lawn for him before they moved away, borrowed an old lawn mower from his neighbor, Bill Hunker of the Hunker Down Parka Company. Nestor was not used to using a lawn mower. He paid little attention to what he was doing when he was going down a steep incline. As a consequence he drove the mower into a pond and ruined it.[3]

Nestor offered to pay Hunker for the old mower, but neither could agree on the value of it. For several weeks they exchanged threats of violence on the Internet.

Then they each charged the other with aggravated harassment in Town Court. When the case was called, they agreed to seek some resolution of the matter by submitting to alternate dispute resolution.

They returned to their neighborhood, this time arguing vociferously about what form the resolution should take. While they were making threatening gestures at one another with slats they removed from a picket fence that separated their homes, their neighbor, Solomon King, happened by. He offered to help settle the matter, and they agreed to let him determine the value of the old mower.

When he indicated that he was considering splitting the difference between the Hunker's and Nestor's figures, Nestor and Hunker both threatened to strike him. King then threw up his hands and said in exasperation, "Well, why don't you fight over it and the winner takes all?" Hunker and Nestor began to pummel one another with hands, feet and fence slats.

The noise caused another neighbor, Ms. Ann Tropee, to call the police anonymously, but when they arrived the fighting had stopped. Nestor and Hunker each sent Internet messages to the other claiming victory. Lacking other proof that the fight took place, the police then obtained a search warrant for the home computers of the two, and tried to get the stored files off their hard disks. When they applied for the search warrant the police told the judge, "We're going to grab them by their two big hard drives and squeeze them good."

However, when both Nestor and Hunker were arrested for assault in the second degree[4] and boxing without a license, they had an unusual defense and made an unusual motion.

The motion to suppress the results of the search dealt with an intriguing question. The defendants argued that the police needed an *eavesdropping* warrant and not a search warrant. An eavesdropping warrant is needed to access an "electronic communication" according to Criminal Procedure Law § 700.05(1) and (2). "Electronic communication" is defined in Penal Law § 250.00(5) as an electronic transfer of data. Internet boasts that were sent as e-mail were such communications, the judge ruled. Since the entire hard disk was searched and the warrant contained no minimization provisions,[5] the results were suppressed.[6]

But the police then gave Solomon King immunity and proceeded to compel him to testify about what he saw.

The district attorney had charged the defendants with assault in the second degree, and with a violation of Unconsolidated Laws § 8933, which makes it illegal to engage in a boxing or wrestling contest without the approval of and licensing by the State Athletic Commission. Since the two had agreed to fight with King as the judge of the contest, the D.A. chose to prefer a charge that included engaging in an unsanctioned fight.[7]

The judge noted that the powers of the State Athletic Commission to oversee amateur and professional athletic contests are broad indeed,[8] but they are limited to boxing and wrestling matches. The jurisdiction of the commission does not extend to fights with fence slats, which, if they can be categorized as any kind of sporting contest, most likely constitute jousting, or fencing with fencing.

Normally when two people agree to fight one another both are guilty of assault, as combat by agreement is illegal.[9] The defense of Nestor and Hunker was that they had entered into an appraisal agreement, and that the fight was part of the agreement. Article 76 of the Civil Practice Law and Rules provides in § 7601 that a special proceeding can be brought to enforce an agreement to let a third person do an appraisal. The case law indicates that

the appraisal procedure can be informal, and is, in essence, whatever the appraiser determines it to be. "[T]he prevailing practice in appraisals is more informal and 'entirely different [from the] procedure governing arbitration.'"[10] The result of the appraisal is final and binding, and can be confirmed as if it were an arbitrator's award.

The defendants argued that the appraiser, Solomon King, chose trial by combat as his method of determining the appraisal. This is an ancient and little-used procedure nowadays, but historically[11] it was a recognized method of resolving legal controversies.[12] It is, Justice Jesstt ruled, just another alternative form of dispute resolution that the courts consider so beneficial in relieving strains on the modern court system.[13] Her decision relied in part on a review of ADR that appears in *Wright v. Brockett*:[14]

> The Legislature decided to fund community-based dispute resolution centers on a State-wide experimental basis by enacting Judiciary Law article 21-A, which also contains the detailed statutory scheme permitting diversion from the criminal courts (L 1981, ch 847). "New York State Courts are currently overburdened with cases involving minor neighborhood and interpersonal disputes" (approval mem, 1981 McKinney's Session Laws of NY, at 2630). Once adequate funding was provided, ADR programs multiplied rapidly. By 1984, when ADR was made a permanent part of the criminal process (L 1984, ch 156), there were programs in 37 counties (*see*, Sise, ABA Special Committee on Dispute Resolution, Problem Solving through Mediation, at 16-17 [1984]). According to the most recent report by the Office of Court Administration (OCA) there are now ADR programs in all 62 counties. In both 1988/1989 and 1989/1990 there were approximately 40,000 referrals to ADR from courts, prosecutors and police. Almost 20,000 cases were resolved by agreement or arbitration each year (OCA, Community Dispute Resolution Centers Program, Annual Report, Mar. 31, 1990, at 36 [Annual Report]). ADR has become a most important part of the system; more than 450,000 persons have been involved in the more than 150,000 nonjudicial resolutions since the system began (OCA, State of the Judiciary, at 79 [1990]).[15]

The district attorney objected that assault violates the Penal Law even when consented to in order to resolve a dispute. However, the defendants pointed to Penal Law § 35.05, which contains the defense of justification. It is a defense to a criminal charge when persons engage in conduct where "[s]uch conduct is required or authorized by law or by a judicial decree."

Justice Jesstt held that alternative dispute resolution is authorized by the law, and one form is an informal appraisal proceeding. The two had been ordered by the judge to seek an alternate method of resolving their dispute, and followed the court's order to do so. Their actions were thus both authorized by law and by a judicial decree. The charges were dismissed.

The trial by combat is scheduled to take place jointly on ESPN 2 and Court TV next weekend. If it is successful, ESPN and Court TV will fight over who gets the rights to broadcast future trials by combat.

---

1. *People v. Benoit*, 152 Misc. 2d 115, 116 n.1, 575 N.Y.S.2d 750 (Crim. Ct., Kings Co. 1991).
2. Information provided in a telephone call to officials of the Office of Court Administration.
3. The case referred to in this article is fictitious. No lawn mower was actually harmed in the creation of this story.
4. N.Y. Penal Law § 120.05.
5. *See* Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522; N.Y. Criminal Procedure Law § 700.30(7) (CPL); *People v. Floyd*, 41 N.Y.2d 245, 250, 392 N.Y.S.2d 257 (1976). Have your streets seemed safe since this act passed in 1968?
6. They were of no use on the charge under N.Y. Unconsolidated Laws § 8933 (boxing without a license) in any event, since that is not one of the crimes enumerated for which an eavesdropping warrant can be obtained. *See* CPL § 700.05.
7. The "prize" in the prize fight was the monetary difference in the alleged value of the lawn mower, although the Commission also has jurisdiction to sanction amateur bouts. Unconsolidated Laws §§ 8905-8906.
8. *See London Sporting Club, Inc. v. Helfand*, 3 Misc. 2d 431, 152 N.Y.S.2d 819 (Sup. Ct., N.Y. Co. 1956).
9. *People ex rel. Knight v. Eames*, 115 N.Y.S.2d 248 (Co. Ct., Broome Co. 1952); *cf. People v. Lewis*, 166 A.D.2d 238, 560 N.Y.S.2d 630 (1st Dep't 1990).
10. *Penn Cent. Corp. v. Consolidated Rail Corp.*, 56 N.Y.2d 120, 127, 451 N.Y.S.2d 62 (1982) (quoting *In re Delmar Box Co. (Aetna Ins. Co.)*, 309 N.Y. 60, 67 (1955)).
11. *See* R. Wormser, The Story of the Law and the Men Who Made It 240 (1962).
12. In *Pando v. Fernandez*, 127 Misc. 2d 224, 485 N.Y.S.2d 162 (Sup. Ct., N.Y. Co. 1984), the court said: "In Medieval law the demonstration of miracles in the courtroom and a show of divine intervention were grist for the judicial mill, and trial by combat and trial by ordeal constituted proof of God's will." *Id.* at 231.
13. *See, e.g.*, Evans & Bulman, *Alternative Dispute Resolution Method Holds Out Promise of Great Utility*, N.Y.L.J., Jan. 24, 1980, p. 25, col. 2; *Memorandum of Office of Court Administration in Support of L 1977, ch 165*, McKinney's Session Laws of New York, 1977, at 2611.
14. 150 Misc. 2d 1031, 571 N.Y.S.2d 660 (Sup. Ct., Bronx Co. 1991).
15. *Id.* at 1034-5.

---

* JAMES M. ROSE, a practitioner in White Plains, is the author of *New York Vehicle and Traffic Law*, published by West Group.

# Lawyer's Bookshelf

**New York Objections**, by Justice Helen E. Freedman, James Publishing. Inc., Costa Mesa, Calif., 1999 edition, 890 pages, $89.98. Reviewed by Lewis Rosenberg.

While it is clear from the first year of law school that the rules of evidence are not self-executing and that voicing an objection invokes a ruling, what is less obvious are the intricacies involved in employing this process when it is interwoven throughout the fabric of a trial.

Justice Helen E. Freedman's recently published *New York Objections* sorts out these intricacies, demonstrates how the rules work, and illustrates how they may be employed advantageously in actual practice. Far from being a theoretical tome, the book fleshes out the rules and their intricacies, citing instances of how, when and why they are employed. At the same time, it provides insight into what is often the best means of exploiting strategic advantage.

Justice Freedman, who is now assigned to a commercial trial part in Manhattan and has charge of managing mass tort litigation, also sits on the Appellate Term, First Department. The book reflects her wealth of experience during two decades as a trial judge. A most valuable quality of *New York Objections* is the way it reveals the thought process of a judge in analyzing the merits of an objection and the arguments advanced, pro and con.

This concise and wonderfully practical work analyzes the rules with clarity and logic, then describes their application in a host of commonly experienced situations. The 20-chapter text is highly organized and presented in an easy-to-use format that includes aids such as tabs for each chapter.

Examples describe all aspects of civil and criminal trial practice. They begin with an overview of objections and the need for motions, then continue as the trial process is covered chronologically, from jury selection through summation and jury deliberation. Chapters on judicial and attorney conduct illustrate the potential impact on the proceedings of both the court's discretionary power to regulate the trial and the behavior of the lawyers.

Basic topics such as how to lay a foundation, authenticate documents and witness qualification are arranged in a format that make the rules come alive.

Confusing evidentiary issues are addressed in a clear and straightforward manner. Not only does Justice Freedman work through when to object to evidence, she also explains how to overcome objections by the opposition and describes the need for the advocate to pursue a theme during the course of the trial.

After its introductory chapter on objections and evidence motions in general, the book continues with a chapter on the process of jury selection (both civil and criminal), describing how to handle objections to the conduct of counsel and how they may be applied to rulings during the trial. The various alternative selection methods (i.e., Whites' Rules struck and strike and replace) for civil juries are explored, eliminating much of their mystery.

The third chapter, covering opening statements, is followed by chapters on relevance and materiality, hearsay, prejudicial material, privileges, character and habit, real evidence, photographs and recordings, documents, parol evidence, demonstrative evidence, witness competence, witness examination, expert witnesses, judicial conduct, attorney conduct, summations, and jury questions such as readback requests.

The chapters on the substantive rules of evidence are presented in the context of how the rules are used in actual trial situations. For example, the foundations for the rules of relevancy and materiality are set out with their rationale, followed by suggested wording of the proper objection in bold type. Comments on tactical considerations and responsive arguments are followed by controlling case law.

Coverage of the hearsay rule includes extensive but concise descriptions of its many variations and considerations. The section on declarations against interest is illustrative of the approach taken. Model language ("Objection, Your Honor. The evidence is hearsay and does not fall within the declaration against interest exception.") is followed by five separately marked sections — *Comments*, covering the scope and purpose of the governing rules; *Tactics*, providing guidance on how to anticipate evidence problems and plan strategies; *Response*, with suggestions on how to reply if opposing counsel objects; *Foundation*, listing what the proponent of the evidence must establish to gain its admission; and *Cases*, containing citations to authoritative case law on point accompanied by brief digests of each decision.

*New York Objections* addresses the fundamentals needed to be a successful trial attorney in New York and has even been employed by several Supreme Court Justices as a bench book. It would be a valuable addition to the trial lawyer's library. Law students and newly admitted attorneys are likely to find it indispensable.

---

LEWIS ROSENBERG is a litigation partner with Shapiro, Beilly, Rosenberg, Aronowitz, Levy & Fox, LLP in Manhattan.

# Language Tips

By Gertrude Block*

**Question:** On October 6, The Associated Press quoted Hillary Rodham Clinton as urging East European leaders to "stay the course" on painful economic reforms. The quotation was indirect, so it was not clear whether that was Ms. Clinton's language or that of the AP. However, what bothers me is that the verb *stay* was used to mean "remain on," although it can also mean "stop," as in "to stay the execution."

**Answer:** The word *stay* has been ambiguous ever since 1982 when President Reagan exhorted Congress to "stay the course" by holding steady to the plans he had set forth. At that time I wrote a piece, published in the linguistics journal *Verbatim* in its winter 1983 issue, commenting that while President Reagan meant that Congress should remain on his planned course, he was actually asking Congress to delay, stop or postpone its action.

The reason is that *stay*, an intransitive verb, requires the addition of an adverb. Like the verb *remain* — a synonym of stay — the adverb *on* completes the phrase. One "remains *on* a course." Similarly, I wrote, when the meaning of *stay* is "to continue or remain on," one does not *stay* a course, but *stays on* a course.

Predictably, however, the press and others ignored logic and grammar and faithfully reiterated President Reagan's unusual usage. For example, the CBS Evening News, in its November 9, broadcast reported that the president "will stay the course on his budget." *Time* magazine, however, refused to go along, announcing on the cover of its November 15 edition, "America's message: Keep on Course — but Trim the Sails."

President Reagan's usage, which was adopted by politicians and press, and most recently Ms. Clinton, was in accordance with a growing tendency to delete prepositions and adverbs after previously intransitive verbs. Airlines, for example, have enthusiastically deleted prepositions. One now "exits an aircraft," "departs the terminal," and "flies an airport." A sign at the entrance of the Gainesville, Fla., airport exhorts passersby to "fly Gainesville Airport."

So Ms. Clinton, along with many others, is entitled to use the erstwhile intransitive verb *stay* as a transitive verb. But because *stay* is still also used in its intransitive sense with the sense of *remain* ("don't go; stay awhile"), ambiguity, both linguistic and political, may occur.

Finally, for those readers interested in etymology, the *Oxford English Dictionary* indicates that *stay* originally was a transitive verb. Its meaning was "to support or to sustain," and it appeared in 1576 in the following sentence: "The common wealth leaneth and stayeth itself upon your shoulders."(Fleming, *Panopl. Epist 150*). This meaning, however, is labeled "Now somewhat rare except in technical use." The most recent citation was in 1898: "It did not matter to you whether the building was stayed up or not?" (*Daily News*, May 10, pages 6, 7.)

## From the Mailbag

A number of readers have written to comment on the discussion in the July/August issue on how to use the possessive apostrophe in words that already end in a sibilant (*s* or *z*). In particular, some readers objected to my statement that in words of more than one syllable the rule is that only an apostrophe is added. (*Moses' leadership, Euripedes' plays*). I also said, however, that if in your own usage you pronounce that final sibilant sound, you would add an *'s* when you write the word.

Several readers objected to the "sound" of "Moses' leadership," saying it sounded as if it were "Mose's leadership." New York attorney David Green wrote that the absence of the final *'s* sounded "sloppy." The alternative spelling, "Moses's leadership" sounds much better, he wrote. Another reader argued that because "Hans's book" was the typical pronunciation, and *'s* is added to that spelling, it makes sense to add *'s* to the possessive form *Moses.'*

Those differences of opinion are the basis for the stated exception to the rule omitting the final *'s* in possessives of more than one syllable. Your own pronunciation is the guide, so there's really no argument.

David Green also asked, "How do you account for the spelling 'Myers's Rum,' one of the few commercial products that add the apostrophe before the 's' to make it possessive?" The answer is that one can spell one's own name any way one wants, and apparently the owners of Myers's Rum pronounced their name with the extra sibilant.

A more difficult question was raised by attorney John J. Master III. While writing a brief, he wanted to use the possessive form of his client, a church with a name like "St. Gertrude's. None of my grammatical sources discussed that problem, so I'm on my own in recommending the written form *St. Gertrude's'*. That looks pretty bad, but not (in my opinion) as bad as the alternative, *St. Gertrude's's*. If I were attorney Master, I would use the periphrastic possessive, 'The brief of St. Gertrude's Church' instead of 'St. Gertrude's' brief.' (Don't tell me that's a copout; I know it.)"

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

---

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

The author welcomes the submission of questions to be answered in this column. Readers who do not object to their names being mentioned should state so in their letters. E-mail: Block@law.ufl.edu

# New Members Welcomed

**FIRST DISTRICT**
Olawunmi Fasasi Adesina
Omesiri Sotonye Akpofure
Claire S. Ancona-Berk
Lisa Kim Axelrod
Shelly Lynn Baldwin
James M. Beach
George M. Bellinger
Genci Bilali
Lisa B. Bird
David Warren Blass
Yoel Borgenicht
Jessica M. Botticelli
Eric M. Burt
Andre G. Castaybert
Colleen J. Channer
Jeffrey Hui Chen
Dickson Chung Hsiu Chin
Stephen G. Crane
Joanne Marie Daley
Jennifer L. Danis
Thomas M. Devaney
Angela Beatrice Dinger
Maurice Wayne Dobson
Jennifer A. Draffen
John Manning Driscoll
Jason Dwight Fraser
Jaimie L. Fried
Gretchen Fritz
Jean E. Gallancy
Richard M. Garbarini
Melissa R. Gassler
Jonathan Carey Goltzman
Evan C. Gourvitz
Louis Timothy Gray
Brian J. Greenberg
Andrew L. Gutterlaite
Koren Harris
Todd Walter Hart
Jay Nathan Heinrich
Brian William Heller
Robert Jay Howard
Martha Hudak
Theresa Ann Jolivette
Chan Yun Joo
Michael A. Kafka
Bonnie Pamela Katz
Laurie Ellen Katzman
Matthew Jason Kautz
Maura Ann Kennedy
Sanghoon Lee
Jerrold G. Levy
Cheryl Deborah Lipsius
Jacqueline N. Lipson
Christopher E. Loh
G. Basil Manos
Georgia Maratheftis
Scott Merritt Masaitis
William Scott McClave
Catherine M. McVeigh
Gregg S. Miller
Julie E. Min
Kimberly M. Monroe
Gary Edward Murphy
Michael J. Obrien
Gustavo Adolfo Ordonez
Stephen H. Palitz
Joseph R. Palozzola
Denise Elizabeth Peart
Davida S. Perry
Tracee Joy Plowell
Tiffany Ashley Pollard
Mae Catherine Quinn
Gina Marie Raimondo
Douglas Alexander Ryder
Eileen Marie Scanlon
Carla M. Seals
Randi Beth Seltzer
David B. Shaev
Hina Shamsi
Michele Ann Shpetner
Bruce Charles Shulan
Jerry Sklar
Esta Michelle Smith
Edward I. Speer
Neal K. Stearns
Lisa Michelle Stern
Shari Beth Stern
Tara Constance Stever
Alberta Valerie Stewart
Maria Alana Tahmouresie
Jaleh Sharon Tahzib
Alan A. Tarzy
Phillandas Trevor Thompson
Beth-El Tilahun
Leo Rin Tsao
Rossie Emmitt Turman
Robert D. Vanpelt
Dawn A. Ward
Reiko Watase
Albertina Webb
Linda Suzanne Webb
Jeremy Michael Weintraub
Jack M. Weiss
Kanika Aisha Williams
David I. Witz
John H. Wolff
Deborah June Yu
David A. Zilberberg

**SECOND DISTRICT**
Alicia M. Amezcua
Jennifer A. Basselini
Sarah R. Cebik
Danielle Denise Cyr
Richard Armstrong Debrosse
Theresa M. DiMartino
Sean M. Dwyer
Sherryl A. Eluto
Stephen P. Fuerst
Elvia P. Gastelo
Yelena Gordina
Ronald A. Gregg
Cheryl J. Hager
Stephen J. Harkavy
Janeen P. Hill
Donna J. Hyer-Spencer
Mercedes Medina
Susan R. Michajlo
Jennifer M. Norris
Shamsey Oloko
Erika L. Omundson
Jason A. Oshins
Douglas H. Pollak
David M. Roberts
Natalie Shkolnik
Andrea G. Spanakos
Robert M. Steckman
Aleksandr Vakarev
Troy E. Willitt

**THIRD DISTRICT**
Susan J. Bouton
Susan Lee Ann Conklin
Douglas M. Fisher
David Friedricks
Susanne D. Harrington
Elliott A. McIntosh
Michael J. O'Connor
Olatubosun Osofisan
Daniel J. Persing
Todd M. Sardella
Tammy O'Meila Taylor

**FOURTH DISTRICT**
Christopher Rediehs

**FIFTH DISTRICT**
Philip Vasilios Broikos
Carl F. Guy
Paul Limmiatis
Regina Spause McGraw
Frank J. Patyi
Robert J. Sinnema
Thomas Joseph Valerino

**SIXTH DISTRICT**
Marian J. Cerio

**SEVENTH DISTRICT**
Gary Michael Kanellis
Salvatore J. Marcera
George F. Newton
William T. Pryor
Wendy P. Solovay

**EIGHTH DISTRICT**
Robert E. Dwyer
Mark P. Getzoni
Denise E. Grey
George W. Gunner
Mia M. Mcfarlane
Nathan S. Neill
Michael C. O'Neill
Edward G. Rice
Edward J. Schwendler
Mark J. Stuhlmiller
Ronald W. Zackem

**NINTH DISTRICT**
Warren S. Agatston
William C. Bush
Kevin M. Callaghan
Kara Lyn Campbell
Robert Paul Colin
Richard C. Ebeling
Sherry Ellenzweig
Vivian A. Fried
Lara Ganz
Andrew Ross Gottesman
Michael P. Heffernan
Ronald E. Johnson
Brian Alan King
M. Linda Martin
Richard A. Osofsky
Krista Julianne Otis
Abraham P. Ronai
Mark Francis Sanangelo
Marcela Toscanini
Christopher D. Watkins
Jane Mathews Zwerner

**TENTH DISTRICT**
Robert B. Acker
Lisa Arden
Larry I. Badash
Robert A. Benrubi
James A. Boglioli
Mary L. Brosdal
Bernadette Smith Budd
Christian Charron
Susan Elaine Christ
Charles X. Connick
Lawrence Donohue
Patrick D. Doyle
Sabrina C. Fernandez
James Vincent Ferreri
Stacey M. Fleming
Brian M. Goldberg
Carrie Grace Hannah
Debra Jean Haskell
Edward J. Holmberg
Joseph L. Hunsberger
Andrew P. Keaveney
Suzanne Lavoie
Kenya S. Lemon
Amy E. Mosery
Don Moor Obert
Anthony Howar Palumbo
Amy B. Price
Harold R. Quadrino
Dominick P. Revellino
Maurice D. Rodrigues
Hari K. Samaroo
Marie E. Small
John J. Spano
Patricia A. Stern
Russell Howard Stern
Rachel Elizabeth Tanguay
Marilyn J. Wenz
Alka Yadav
John Charles Zaher

**ELEVENTH DISTRICT**
John P. Albert
Mary Carty
Susie S. Cheng
Richard C. Gordon
William S. Hackney
Verna L. Johnson
Olga L. Lauriano
Orit Levy
Nora C. Marino
Daniel A. Mayer
Francis Mendez
Lourdes Miguez
Rocco Giuseppe Morano
Marjorie Richemard
Antonietta Russo
AnnMarie Sinisi
Evelyn V. Sylvester
Christos Varkoutas

**TWELFTH DISTRICT**
Axel Diaz
John C. Graves
Chris C. Olewuenyi
Rosemary E. Pearce
Peter J. Piergiovanni
Anna Sim
Wayne A. Wattley
Tanya Nicole White
Andrew S. Zucker

**OUT-OF-STATE**
Linda Ann Bennett
Robert Stephen Bennett
Karen Delores Bielarz
Martin T. Booher
Charlotte Koren Booncharoen
Christopher Bopst
Stephen Thomas Boughner
Albert Bright
Gretchen A. Brodnicki
Stephanie Morrow Bushell
Henry P. Butehorn
Pamela J. Castellani
Kristin Louise Chach
Matthew Chan
Byung Ho Choi
Jong Choi
Anna Laurie Cocuzzo
Tiani X. Coleman
Bryan Nolan Corbett
William James Courtney
John C. Crucs
John J. Cuff
Benjamin C. Curcio
Antonio M. Debari
John M. Debro
Nicole G. Decatur
Nicholas C. Demattheis
Susan Marie Demske
Gerald A. Denmark
Francis J. Dixon
Eric M. Dorsch
Kimberly I. Espinales
Richard John Alva Farnhill
Diane M. Flynn
Lincoln Stuart Frakes
Jodi Beth Friend
Olga Igorevna Frolova
Theresa Jean Fuentes
Michael A. Fusco
Amato Arturo Galasso
Lin Gao
Matthew D. Garamone
April Mary Gilmore

Gary John Hacker
Christina Danielle Hardman
Katherine B. Harrison
Cornelis D. Heesters
Renata Alexandra Helstoski
Mark Bogdan Hudoba
John L. Jacobus
Yao Jiang
Konstantin J. Joergens
Brad Michael Johnston
Serap Kara
Beongho Kim
Byong-Do Kim
Pomy Stephen Kim
Masai-Maliek King
Yoshinari Kishimoto
Jonathan Lewis Klein
Moon Seok Koh
Sarah B. Kotler
Jonathan G. Kuttab
Hong-Hsiang Lee
Claudia Leyendecker
Jeffrey Theodore Lowden
Verena Margreiter
Elana Sarah Marton
Lisa Marie Miralles
Seiji Miyasaka
Jason P. Nield
Benedicte Etienne Noella Nolens
Lita Louise Oberholser
Stefan Reinhard Oeter
Atsuko Okubo
Francis Christopher Orourke
Vasiliki Pagidas
Robert F. Palermo
David John Pay
Michael Edward Petrie
Stephen L. Petrillo
Christian H. Pothe
Leta Alane Principe
Rajeev Davendra Purohit
Wendle Scott Ramsey
Jesus M. Rivera-Delgado
Paul Clifford Rivett
Alan Rodetsky
John E. Runnells
Dianoosh Salehi
Leslie Beth Salter
Kalyani Santoshkumar
Suzanne Lynn Schairer
Rochelle F. Schworm
Melissa R. Shapiro
Rakesh Sharma
Prabhat Shroff
Brian Allen Silikovitz
Lynda Diane Snyder
Glenn Liang Su
Gregory A. Sullivan
Kiyoshi Tanabe
Peter Benjamin Trachtenberg
James Michael Urtis
Omar Alejandro Vargas
Karyn A. Villar
Debra R. Volland
Jeffrey Michael Vona
Jon Garrett Waggoner
Kevin G. Walsh
Mei Wang
Robert Louis Wegman
Solms Ubbo Wittig
Darin Irwin Zenov

## *In Memoriam*

Ethan Allen
New York, NY

Leonard A. Blue
Medford, OR

Daniel D. Caldwell
Hawthorne, NJ

Thomas M. Drislane
Clifton Park, NY

Walter G. Dunnington
Orange, VA

Hollie A. Elder
Ottawa ON, Canada

Ruth R. Gluck
New York, NY

Leonard Goldstein
Brooklyn, NY

Charles R. Hager
New York, NY

Patrick W. Hennessey
Garden City, NY

Allen J. Indzonka
Newburgh, NY

Michael Axton Kelly
Catskill, NY

George Kremer
Coral Gables, FL

Steven L. Lapidus
Newark, NJ

Lawrence N. Martin
White Plains, NY

Henderson W. Morrison
Sun City Center, FL

Francis H. Neverett
Chazy, NY

Paul Ramos
San Juan, PR

John M. Retting
Brooklyn, NY

Joel Rishty
New York, NY

Lance W. Rook
New York, NY

Eric J. Schmaler
Glenmont, NY

# Headquarters Staff E-mail Addresses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

# The New York Bar Foundation

## 1999-2000 OFFICERS

**Maryann Saccomando Freedman**
*President*
343 Elmwood Avenue
Buffalo, NY 14222

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

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

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

## DIRECTORS

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

# Journal Board Members Emeriti

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

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

# 1999-2000 OFFICERS

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

## Vice-Presidents

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

## Members-at-Large of the Executive Committee

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

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

# Members of the House of Delegates

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

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

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

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

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

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

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

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

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

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

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

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

**OUT-OF-STATE**
Dwarica, Leonard A.
* Fales, Haliburton, 2d
Hallenbeck, Robert M.
* Walsh, Lawrence E.


NYSBA