NEW YORK STATE BAR ASSOCIATION

JULY/AUGUST 2003 | VOL. 75 | NO. 6

Journal

interact, observe and assess your adversaries and their clients

Inside

BESTSELLERS

FROM THE NYSBA BOOKSTORE

July/August 2003

Business, Corporate, Tax

Limited Liability Companies

This practical guide, written by Michele A. Santucci, enables the practitioner to navigate the Limited Liability Company Law with ease and confidence. You will benefit from numerous forms, practice tips and appendixes. (PN: 4124/**Member $55**/List $70)

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Matrimonial Law

Written by Willard DaSilva, a leading matrimonial law practitioner, *Matrimonial Law* provides a step-by-step overview for the practitioner handling a basic matrimonial case. While the substantive law governing matrimonial actions is well covered, the emphasis is on the practical—the frequently encountered aspects of representing clients. (PN: 41212/**Member $65**/List $75)

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New York Lawyer's Deskbook, 2nd Ed.

Includes 2002 Supplement

WINNER OF THE ABA'S CONSTABAR AWARD. The second edition consists of 25 chapters, each covering a different area of practice. Incorporating the 2002 Supplement, it updates the original text, adds a new chapter on Limited Liability Companies, and more! (PN: 4150/**Member $180**/List $220)

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Trusts and Estates/Elder Law

Elder Law and Will Drafting

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Provides an overview of the complex rules and considerations involved in the various aspects of estate planning in New York State. Get practical advice from experts in the field to be able to better advise your clients, and have access to sample wills, forms and checklists used by the authors in their daily practice. (Book PN: 4095/**Member $130**/List $160)

Estate Planning & Will Drafting Forms on Disk, on CD in WordPerfect and Microsoft Word: Access commonly used forms and wills used by leading practitioners in their daily practice. (CD PN: 60951/**Member $155**/List $190)

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Written by veteran trusts and estates practitioners, this comprehensive text covers all aspects of estate administration, from preliminary preparations to filing the accounting. (PN: 4005/**Member $110**/List $140)

NEW!

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The 2002 Supplement includes analysis of the effect of CPLR 306-b regarding service and filing requirements, alternative dispute resolution and a new section on mechanic's liens, as well as updated case and statutory citations. (PN: 4030/**Member $80**/List $110, 2002 Supplement PN: 50301/**Member $50**/List $60)

Insurance Law Practice

Written and edited by leading insurance law practitioners, *Insurance Law Practice* provides a thorough examination of the general principles of insurance law and covers the specifics as well. The 2003 supplement includes new chapters as well as updates to case and statutory law. (PN: 4125/**Member $115**/List $140, 2003 Supplement PN: 51252/**Member $60**/List $70)

Criminal Law

The Practice of Criminal Law Under the CPLR and Related Civil Procedure Statutes

This book pulls together in an orderly, logical way the rules and provisions of law concerning jurisdiction, evidence, motion practice, contempt proceedings and article 78 and habeas corpus applications, none of which is covered in the CPL or the Penal Law. This third edition features greatly expanded discussions of case and statutory law. (PN: 40693/**Member $40**/List $47)

Health Law

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Mental and Physical Disability

Representing People with Disabilities

This book is a comprehensive reference which covers the myriad legal concerns of people with disabilities—including an in-depth examination of the Americans with Disabilities Act. It is ideal for those who want a "one-stop" reference that provides a thorough overview of the legal framework affecting individuals with disabilities. (PN: 52151/**Member $115**/List $140)

Trial

Evidentiary Privileges

(Grand Jury, Criminal and Civil Trials)

Evidentiary Privileges is a valuable text of first reference for any attorney whose clients are called to testify. It covers the evidentiary, constitutional and purported privileges which may be asserted at the grand jury and at trial. Also examined are the duties and rights derived from constitutional, statutory and case law. (PN: 40993/**Member $43**/List $55)

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ON THE COVER

The cover illustration was prepared to symbolize themes that run through the first three articles in this issue.

Cover Design by Lori Herzing.

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. Copyright © 2003 by the New York State Bar Association.

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President's Message

A. Thomas Levin

Another Fine Mess

"This is another fine mess you've gotten us into . . . " Stan Laurel, speaking to Oliver Hardy

"Even if you're on the right track, you'll get run over if you just sit there." Will Rogers

"Focus 90% of your time on solutions and only 10% of your time on problems." Anthony J. D'Angelo, *The College Blue Book*

Fans of Laurel and Hardy's slapstick comedy can literally hear the dulcet tones of Stan Laurel, chastising his partner Oliver Hardy, for "another fine mess you've gotten us into. . . ." The legendary penchant of these two goofballs for getting into (and out of) trouble amused millions for more than a generation. If only the messes of some politicians, lawyers and judges could be considered so comedic, or be so easily cured!

It will not come as a surprise to readers of any newspaper, or any law-related publication, to learn that our judicial system is under the public scrutiny microscope at all times. Allegations of favoritism, of conflicts of interest, of inadequate performance, of inappropriate methods of selecting candidates for judicial office, or, even worse yet, of outright criminal conduct, seem to be the order of the day.

Those of us who are familiar with the many decent, honest, hardworking and well-intentioned people who serve in the New York judiciary know that these pejorative allegations are in fact directed to only a small number of jurists. Most members of the judiciary are recognized to be diligent in the performance of their duties, and to be striving for impartiality, fairness, and wisdom in disposing of their respective caseloads. Those of us familiar with the justice system also know that allegations of misconduct are not proof of misconduct, and that we should await the full airing of the facts before we reach conclusions about the guilt or innocence of any individual.

However, we must also recognize that the media, and the public, are under no such constraints, and do not respect them. Thus, in the public mind, those accused of judicial misconduct are guilty as charged. The disrespect this has generated for the judicial system, and the legal profession, is profoundly disturbing.

As members of the Bar, we have good reason to be concerned. As one member of NYSBA's Family Law Section recently commented, the public hears this constant drumbeat, sees smoke, and assumes fire. And that fire consumes not only the judges, but also the Bar.

One cannot deny that we live in an increasingly partisan, sometimes combative, world, where criticism of public officials abounds (and sometimes knows no bounds). Politicians currying public favor regularly attack judges for decisions that are not in accord with the majority view, without any understanding (or interest) on the part of the attackers in learning the reasons behind those decisions. The legal correctness of the decision is not of any concern; the focus is only on whether it is supported by public opinion. Even where there is disagreement with the merits of a decision, the attack is too often directed personally at the judge. This is regrettable enough when we see it in the newspaper, or on television, or in talk show commentary, but it is even more disappointing when we see it in increasingly vitriolic decisions and commentary from the highest court in the land.

Entertaining though these rhetorical flourishes may be at times, and although they may be self-satisfying to those who author them, it is time to lower the temperature of the debate. It is time that the lawyers stand up for the return of reason to our political discourse. It is time that the lawyers come forward to defend the justice system where it is unjustly accused, based on visceral reactions, partial information, or even disregard for the truth. When we stand by silently, observing such behavior, without speaking up, we are part of the problem, not part of the solution.

How, you ask, can we possibly believe that we can turn the tide? How can we overcome constant waves of editorial comment and reportorial excess? I believe we can do it by standing up and speaking out for fairness, and common courtesy. This doesn't mean reflexively defending every lawyer and judge who is criticized; it means coming to the defense of those who are unjustly criticized.

It means taking the time to explain the workings of the legal system and to bring out the actual facts, not the distorted versions that are offered up for public consumption. So, when a judge is unfairly criticized for a

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decision interpreting a statute in a manner that offends some commentator, or is contrary to the preferences of some person or group, lawyers must take the time to point out to the critics that a judge is called upon to opine on the law as it is, not on the law as it perhaps should be. The Legislature is the forum for enactment of laws, but if they are worded poorly, or subject to more than one construction, the court cannot correct the error. The court can do no more than identify and elucidate upon what the Legislature did, and perhaps suggest legislative reconsideration.

If a statutory interpretation is criticized because it does not meet someone's view of what the law should be, take the time to point out that the Legislature always has the option to remedy the situation by adopting a new statute or an amendment to the old one. Judges interpret the laws as written by the Legislature. If the legislative process yields an unworkable law (as it all too often does), the fault in the law usually can't be repaired by the judge who has to deal with it, but can be fixed by the Legislature.

A recent example of this is the Court of Appeals decision in *Desiderio*,[1] which interpreted the structured judgment statute to reach a result that many, including the court majority itself, characterized as absurd and probably unintended. Yet, that interpretation was the logical consequence of what the Legislature had written, and the court was bound to so conclude. Rather than place the blame on the drafters of the statutory language that caused the problem, the unfortunate reaction was a howling media and insurance industry attack on the court, and on trial lawyers, for creating such an absurd result. This despite the fact that NYSBA and others had pointed out the failings in the statute when it was first enacted, and for years had urged its correction, to no avail.

Once the consequences of the statutory language were made apparent by the Court of Appeals, one would have hoped that the Legislature would deal with the problem. And, the Legislature forthrightly leaped into action . . . by putting another band-aid on the problem, without dealing with the underlying statutory deficiency. One is left to wonder, what panel of unlucky judges will be called on to bell this amended cat? And what intemperate and unfounded criticism will be directed at them when they do?

It certainly isn't a new phenomenon to blame the messenger when we are unhappy with the message, but we seem to be getting ever more proficient at it, and doing it ever more often. All of our energies would be better served by seeking solutions, rather than pointing fingers.

Speaking of seeking solutions (how is that for a segue?), the New York State Bar Association has been increasingly active in the legislative and regulatory field this year. Our legislative efforts often lie in defeating ill-advised proposals, but we also have positive proposals to offer for enactment.

For example, there is the case of the Rockefeller Drug Laws. There is nearly unanimous agreement among various political factions that these laws have not served their purpose, are outdated and unrealistic, and have caused the state to spend millions of dollars for the incarceration of relatively minor offenders, without putting a drug kingpin in jail and without making a dent in the substance abuse problem. One would think that the Legislature and Governor could easily come to consensus to fix this problem. Regrettably, this year's legislative session once again proved that some problems remain too elusive for grasp, even while our legislative and executive leaders profess an interest in solving the problem. Instead, we are treated to a succession of "one house" bills, pandering to different points of view, without meaningful progress to a solution.

Now, with the combined efforts of the Criminal Justice Section, Committee on Legislative Policy, and Rockefeller Drug Laws Working Group, and with endorsement from the Executive Committee, NYSBA has offered a solution for this problem, which can form a basis for legislative leaders and the Governor to reach consensus. The key provisions of NYSBA's framework are: (a) giving judges discretion to deviate, under specific circumstances, from the present mandatory sentencing provisions and to divert non-violent addicted defendants to drug treatment programs instead of prison; (b) providing for judicial review and reconsideration of existing sentences, and a review process for sentences imposed in the future; (c) doubling the current drug weight requirements for each felony class, so that minor offenders are no longer subject to the most lengthy sentences; (d) increasing penalties for drug kingpins; and (e) adequate funding of proven diversion programs for treatment of substance abuse. This proposal continues NYSBA's efforts not only to identify problems, but also to propose solutions.

In future issues, I will be speaking of other NYSBA proposals, other solutions to problems. We can't clean up every mess, but neither are we going to stand idly by when there is work to be done. In the months ahead, our members and the public will be hearing more about our proposals for multi-jurisdictional practice regulation, improvements to the jury system, keeping judicial campaigns within proper bounds, and improving public information about lawyers and the legal system. As they say in the advertising trade: watch this space.

1. *Desiderio v. Ochs*, No. 29, 2003 N.Y. LEXIS 432 (Apr. 8, 2003).

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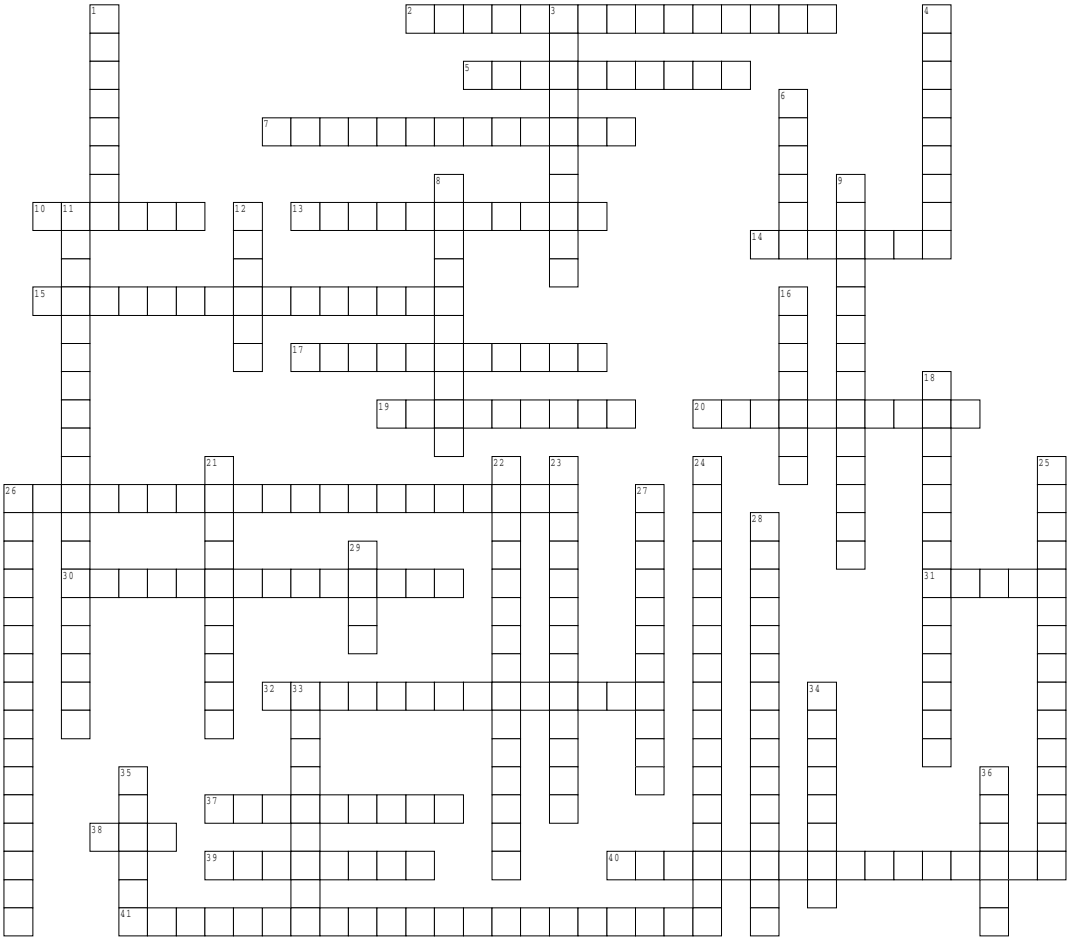
CROSSWORD PUZZLE

The puzzles are prepared by J. David Eldridge, a partner at Pachman, Pachman & Eldridge, P.C., in Commack, NY. A graduate of Hofstra University, he received his J.D. from Touro Law School. (The answers to this puzzle and the previous issue's puzzle are on pages 55–56.)



You Tell Me That It's Constitutional, by J. David Eldridge

Across

2 "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

5 Doctrine holding that federal statute takes precedence over state law

7 Certain utterances not protected under First Amendment because inherently likely to provoke a violent response

10 The official counting of people in a state, nation or other subdivision every 10 years as required by Article One

13 Political districts designed to suppress the voting power of certain groups

14 The right to be let alone

15 Seminal case establishing doctrine of judicial review

17 A law that retroactively alters the criminal law in a substantively prejudicial manner

19 The branch of government charged with enforcing the laws

20 Constitutional amendment guaranteeing women the right to vote

26 First Amendment right to peaceably assemble

30 Constitutional provision giving Congress exclusive power to regulate interstate transactions

31 _____ and unusual punishment, prohibited by the Eighth Amendment

32 A scheme to deny expression before publication

37 Legislation so sweeping that it is rendered invalid because it restricts protected rights

38 The government's method of raising revenue by assessing a charge against personal income

39 The branch of government whose function is to interpret, construe and apply the laws

40 Doctrine prohibiting court from considering issue committed to another branch of government or incapable of resolution by judicial process

41 Categorizing a person or group based upon race, sex, national origin, alienation, etc.

Down

1 Legalized by *Roe v. Wade*

3 Clause guaranteeing procedural and substantive fairness

4 You'll know it when you see it

6 The prohibition against manufacturing this once-illegal beverage was repealed by the Twenty-first Amendment

8 Privileges and _____

9 Personal and natural rights guaranteed and protected by the Constitution (e.g., freedom of speech, press, etc.)

11 Portion of Constitution requiring separation of church and state while guaranteeing free exercise of religion

12 This right, not mentioned in the Constitution, protects the ability to move from state to state

16 Abolished by the Thirteenth Amendment

18 Test requiring compelling state interest before fundamental right can be affected

21 A wrongdoer misusing power while clothed with authority of the state is said to be acting under the _____

22 A legislative act that inflicts punishment without a trial for past conduct

23 Fifth Amendment right against self _____, provides that no person shall be required to be a witness against himself

24 Program designed to remedy past discrimination against minority groups

25 Clause requiring that similarly situated persons receive similar treatment under the law

26 A right explicitly guaranteed by the Constitution

27 The branch of government whose function is to make and enact laws

28 Doctrine established in *International Shoe v. Washington* requiring nexus with state before non-resident can be subjected to court's jurisdiction

29 Can't be excessive

33 Judicial _____; the self-imposed discipline by judges in deciding cases without indulging personal views or ideas

34 We the people . . .

35 Under the Tenth Amendment, powers not delegated to the federal government are reserved to the respective _____

36 When governmental action directly interferes with or substantially disturbs an owner's use and enjoyment of property

Dissecting the Deposition: More Than Just a Set of Questions

BY ROBERT A. GLICK

A deposition goes well beyond the scope of merely questions and answers. If conducted, evaluated and assessed carefully, the deposition will do more than yield an invaluable amount of discovery information for you and your client, it will also provide a foundation to foster, develop and strengthen your practice.

This article looks beyond effective deposition techniques and questioning skills for the litigator. It is designed to analyze the practical applications of the deposition process and suggest a self-introspection that can translate into an honest critique of yourself, together with some constructive and creative ideas to be more effective. In other words, the practical, everyday realities of taking or defending a deposition constitute a process that is interrelated with all aspects of your practice.

A deposition does much more than yield answers to questions. Each deposition provides a unique forum to learn new skills and perform meaningful evaluations that go way beyond assessing liability and damages. It is an opportunity to evaluate yourself, your practice and your skills as well as that of your adversaries. Likewise, it is also a chance for your client, your adversaries and their clients to assess your legal acumen and capabilities. Generally, the deposition is the only time you have before trial to assess the parties, the witnesses and others who may be called to give trial testimony. More often than not, the non-verbal information, observations and subtle cues you give or glean from others will be just as effective as any of the spoken words, and perhaps more so. Experienced litigators will learn to look for and provide such information at the deposition, and use it to their advantage for their clients and their practice.

Stop, Look and Listen

The deposition is usually the first opportunity for counsel, the parties and other witnesses to interact, observe and assess each other. Think of a deposition as the opening rounds of a boxing match . . . you get to feel each other out, determine each other's strengths and weaknesses, and prepare for what you hope will be a knockout punch at trial. But like a seasoned fighter, you must prepare thoroughly, hone your skills and evaluate your opposition before entering the ring.

When you enter the deposition room, carefully observe everything, paying attention to detail, listening to each word as it's uttered and then silently asking questions of your adversary, the witness and yourself. Are you prepared? . . . Are you thorough? . . . Are you articulate? . . . Are you argumentative? Do you have a command of the witness, the proceedings and the law? Do you follow up after getting a response? Are you asking the right questions to elicit favorable testimony? Are you making supplemental discovery demands based on the testimony? Are your objections proper or obstreperous?

Does the witness come across as honest, credible, knowledgeable, educated, confident, sincere and empathetic? Or does the individual appear unsure, forgetful, deceptive, hostile, manipulative or sarcastic? Is the witness in control or easily intimidated, giving independent responses or being coddled by the attorney? And if the witness is being coddled, put a stop to it. A leopard never changes its spots. You can bet your bottom dollar the performance of counsel and witnesses at the deposition is a litmus test for how they will conduct themselves or be portrayed at trial.

The Unspoken Discovery

In a tort action, besides liability, the nature, extent and duration of the plaintiff's alleged injuries are usually contested. General questioning of the plaintiff regarding those injuries provides only limited data. The

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unspoken discovery and information available (and there for the taking without a transcription charge) may often be more valuable than any words the witness speaks. Pay careful attention to your adversary and the deponent. Make note of the surroundings, the interactions, eye contact, subtle gestures, the tone and intonation of the questions posed and the respective responses. Evaluate the temperament and personality of your adversary and the witnesses. Does counsel come across as professional? Does he know the facts of his case? Does she appear sincere, disingenuous, condescending, manipulative or full of herself?

Your performance at the deposition sends a message to your adversary, the plaintiff, other witnesses and your own client that this is the type of thoroughness and advocacy they should expect.

Make a thorough observation of the plaintiff who claims a bodily injury. How is the witness dressed? Did the plaintiff arrive at the deposition alone, with a friend or family member? Does the plaintiff appear to need assistance? What you observe in the deposition room will often not become part of the record unless you choose to make it part of the record. For example, in a back injury case, did the plaintiff arrive at the deposition wearing high heels, carrying a briefcase or pocketbook, using a crutch, wearing braces? Was the witness unable to sit for long periods of time? Does the plaintiff take breaks to stretch? In response to your questioning, does the plaintiff place outstretched arms over his head, behind his back, or in the air to point or make reference to another portion of his body? Did the plaintiff drop something on the floor and pick it up on her own volition?

Inquire of the plaintiff. Make a specific record: "Let the record reflect that plaintiff has testified that he is unable to sit for extended periods of time, but remained seated during the entire two hours of questioning without getting up or requesting a break." Or: "Let the record reflect that the plaintiff has raised his right arm over his head and then placed his right hand on the upper middle portion of his back, approximately 10 inches below his neck." If there are allegations of scarring, inspect the scars and describe them on the record. Likewise, note in your file (not on the record) that the plaintiff appears in earnest to have physical difficulty in walking, bending, sitting, standing, lifting or stretching during breaks.

Send a Message

Your performance at the deposition sends a message to your adversary, the plaintiff, other witnesses and your own client that this is the type of thoroughness and advocacy they should expect through the pendency of the litigation and at trial.

Did you come to the depositions with a complete file? Do your actions and questions show that you are prepared? Did you have all of your exhibits pre-marked and did you have enough copies? Are you able to think on your feet? Do you make appropriate, well-founded objections, or are you just being obstreperous? Do you convey your knowledge of the law and procedural rules? By asking the plaintiff specific, detailed questions about the accident scene, you tell everyone that you are prepared, have conducted a thorough investigation, have a full command of all the facts and circumstances in the case, and have been to the scene. For example:

> Q. Ms. Jones, you tripped and fell on the broken glass somewhere in aisle 4 of the supermarket, correct?
>
> A. Sort of in the middle, but closer to the shelves where the pickles are located, because I fell near that section.
>
> Q. And directly across from the pickle section is the canned vegetables section, correct?
>
> A. I don't recall.
>
> Q. After you fell, you spoke with the manager, Mr. Steer. Correct?
>
> A. Yes.
>
> Q. Mr. Steer is a Hispanic male, approximately six feet tall, and has an earring in his left ear. Correct?
>
> A. I believe so. In fact, I think he helped me up and sat me next to the frozen food section.
>
> Q. The frozen food section is at the front of the store directly across from the customer service desk and he helped you sit on the blue newspaper rack in front of that area. Correct?
>
> A. That's right.

Creative Questioning

Prepared witnesses who have repeatedly rehearsed their testimony will not easily give the answers you're trying to elicit. Generally, responses to systematic, canned and rote questions will not yield the powerful ammunition you are seeking for use at trial.

Ask yourself: How can I get the witness to provide meaningful testimony, information and possibly evidence without him or her (and counsel) realizing that those responses contain such intrinsic value? Invariably, certain responses may not require follow-up questioning or explanation, but will form the basis of post-deposition discovery, investigation or an expert's retention as

a way to test the veracity and credibility of the witnesses' testimony. The key is "creative questioning." Sometimes, it's not just the questions themselves that are key, but the sequence and the way in which they are asked.

The combination of testimony and non-verbal discovery can prove invaluable and may lead to an expeditious end to the litigation. The plaintiff on the day of the deposition who claims to have daily and continuous difficulty walking, running, climbing stairs, bending, lifting, dancing or carrying heavy objects, or requires the use of a cane or brace walking up and down stairs may be quite a different plaintiff after being shown a surveillance tape depicting physical activity that directly contradicts testimony.

In a recent case, a 30-year-old female plaintiff involved in an automobile accident said she had sustained severe disc herniations, with impingement. Her initial testimony (through rote questions), which was obviously well thought out and prepared, echoed the injuries listed in the bill of particulars. With empathetic eyes and tears running down her red cheeks, she testified in a very soft-spoken voice that, as a result of the injuries to her back, she had to quit her job as a waitress because she couldn't carry the plates or trays of food. She testified that she was no longer able to stand or sit for any length of time, had difficulty driving a car, walking up or down stairs, could no longer partake in any sports activities, do the laundry, go grocery shopping or pick up her 3-year-old daughter, cuddle her in her arms, caress her and give her a hug. When she finished, it was time for some creative questioning:

Q. Ms. Smith, after the automobile accident did you return to work?

A. No. I wasn't able to because of my injuries.

Q. Are you currently employed?

A. No.

Q. Have you attempted to seek employment in any capacity?

A. No. I'm not able to do very much.

Q. At any time after the accident were you prescribed any medications by any of your doctors?

A. Yes. I was given some painkillers by my doctor.

Q. Did you have that prescription filled at a pharmacy?

A. No. Because it was Tylenol and I also had some in the house.

Q. So you were actually never given a written prescription for any medications or had any prescriptions filled as a result of your injuries?

A. No. I don't believe so.

Q. You testified that you continue to have pain in your back, your activities and physical ability has been limited since the date of the accident and you underwent physical therapy that lasted for approximately three months. Can you tell me when was the last time you saw or consulted with a doctor or any health care provider concerning your injuries?

A. Over a year ago.

Q. Ms. Smith, in the last year, have you been to any nightclubs or bars and gone dancing?

A. No. I'm no longer able enjoy dancing because of my back.

Q. In the last year have you tried to dance at all?

A. No, I told you already, I'm no longer able to dance.

Q. Can you ride a bicycle, go swimming, work out in any way?

A. No. Not at all.

Q. Earlier when you said you had difficulty bending, could you explain in more detail what you meant?

A. I'm unable to pick things up, carry groceries, sweep. It hurts if I try and bend forward.

Q. In the last year have you attended any weddings, bar mitzvahs or any other social events?

A. My brother's wedding was last March. My husband and I were in the wedding party and my daughter was one of the flower girls.

Q. Was there a wedding reception that you attended?

A. Yes.

Q. Was there dancing at the wedding reception?

A. Of course there was dancing. It was a wedding.

Q. Did you dance at all? In any capacity?

A. No. Not at all.

Q. Are you sure?

A. Positive.

Q. O.K., Ms. Smith. Was there video taken of your brother's wedding and the reception?

A. Yes, I was given a copy.

Q. Have you seen the video of the reception?

A. Yes.

Q. Was there video taken of the dance floor?

A. Yes.

Q. If I were to view that video would you be depicted dancing at any time or in any capacity?

A. Well. . . . Uh . . . um . . . I wouldn't call it dancing.

Whereupon a record of the plaintiff's brother and sister-in-law's name, address and telephone number was

made. A demand was also placed on the record for production of a copy of the videotape. When plaintiff did not recall the videographer's information, I left a blank in the transcript for her to provide the information. The day after the deposition, the plaintiff was served with supplemental discovery demands that included a demand for the video. Not only did the video show the plaintiff on the conga line, but it showed that she remained standing along with the others in the wedding party for the entire 40-minute ceremony. It also showed her bending to the floor both before and after the ceremony to pick up her sister-in-law's train as they climbed and descended the stairs in front of the altar, and it showed her scurrying after her daughter, the flower girl, who was afraid to walk down the aisle. The case settled for less than nuisance value within a month after the deposition.

Seek favorable or useful testimony by asking questions that place the plaintiffs in an environment where they will have to tell the truth or risk being caught in a lie.

Corroborating the Veracity of the Witness's Answers

Ms. Smith's Q&A is also illustrative of creative questioning whereby you try to place the witness in various situations, surroundings, environments and circumstances so it becomes readily apparent that the veracity of the testimony may be challenged or contradicted by others (non-parties) or, best of all, by documentary evidence.

A witness will think twice about giving misleading or false testimony if he or she knows that friends, family members, colleagues, co-workers, health care providers, religious leaders, ex-girlfriends, neighbors or other innocuous acquaintances are likely to be called upon at trial, asked to place their hand on a bible, swear to tell the truth and provide testimony that will contradict what was said at the deposition. Based upon the plaintiff's responses to questions, are there any documents out there (discoverable) that when shown to a jury will establish that the plaintiff's testimony is not credible? Don't play all of your cards. Get what you want through the back door. As part of your defense, establish a line of questioning, a theory or a point that you'll save for use down the road in closing arguments. Then seek favorable or useful testimony by asking questions that place the plaintiffs in an environment where they will have to tell the truth or risk being caught in a lie.

Assume, again, that you believe the plaintiff's physical abilities are not restricted to the degree, certainty or extent that he or she hopes a jury will believe. After rote Q&A provides answers about what the plaintiff currently does for work or did for work at the time of the accident, ask detailed follow-up questions: How many people are there in the company or on the job? Do you generally work alone or among others? What are the names and telephone numbers of your supervisor(s), co-workers or others business associates? Do you have to travel as part of your job? Ask questions that may establish that the plaintiff's job description, duties and responsibilities require physical activity, contrary to prior testimony, then continue with step-by-step, detail-by-detail questions to elicit responses that will illustrate the witness's physical abilities. An actual sequence of testimony went something like this:

> Q. Mr. Smith, you previously testified that you have great difficulty bending, lifting, walking and carrying heavy objects on a daily basis, is that correct?
>
> A. Yes.
>
> Q. What do you currently do for work?
>
> A. For the past eight years I've been employed in the computer industry by a company called CRM Services, Inc., as a senior systems analyst. Pretty boring stuff. I sit at a desk working with computers all day long.
>
> Q. What does CRM stand for?
>
> A. Computer repair and maintenance.
>
> Q. Currently, what are your day-to-day job responsibilities?
>
> A. I repair computer hard drives and monitors that are under warranty.
>
> Q. How many employees in the company?
>
> A. About 50.
>
> Q. Do you currently report to a particular supervisor?
>
> A. Yes. Craig Mazzuchin.
>
> Q. How many other people in the company have similar job responsibilities?
>
> A. I would say around 15.
>
> Q. Do you work in relatively close proximity to each other?
>
> A. Yes, there are three people to each work station, we tend to share a set of tools and equipment.
>
> Q. Do you normally share the same work station with the same people every day?
>
> A. Generally. . . . Yes. But sometimes we switch for different reasons or if someone leaves the company or there's a new worker.

Q. How long have you been at your current station with the other two co-workers, and what are their names?

A. First there's Arnie Snell. He's been with the company for about four years, but we've been at our station together for only a little over a year. And then there's Steve Kang. He just joined the company in November.

Q. Can you tell me the names and addresses of all of your co-workers?

A. I don't recall all of their names right now, but let's see . . . there's Tim Silver . . . Bryan Klein . . . Susan Hyman . . . Kelly Sant-Maria and . . . Tank Connors, we call him Tank, because when you take a look at him . . . well . . . you'd understand. I really don't know his real name. I don't remember any others right now.

Q. O.K. we'll ask the court reporter to leave a blank in the transcript and I'll ask you to provide us with the correct spelling, address and telephone number of each of the co-workers you have just named as well as any other co-worker you recall after the deposition is completed.

A. I'll see what I can do.

Q. Now Mr. Smith, when you say that you repair hard drives and monitors, can you be more specific and tell me in more detail what your actually do on a day-to-day basis?

A. Well . . . when customers have problems with their computers, they are sent back to the manufacturer, who has a service contract with CRM. The hard drives or monitors are boxed by the manufacturer and sent to us for repair. When they arrive, one of the supervisors reviews the repair order and, depending on the repair needed, assigns the job order to one of us. We get a copy of the new job orders each night before we leave.

Q. When the computers arrive to CRM for repair where do they get stored until they're worked on?

A. They are kept on shelves in one of the back rooms, next to our parts department. We call it the property room.

Q. Can you describe the shelves, how many shelves, what they're made of, their height, their length?

A. They are three or four gray metal shelves about two to three feet apart . . . one on top of the other. I'd say the height of the top shelf is no more than seven feet. The computers, monitors, laptops and other components are left in their boxes and placed on any one of the shelves with a copy of the repair order taped to the outside of each box.

Q. How does the computer get from the property room to your work station?

A. Whoever is assigned to the repair order goes to the property room, removes the boxed hardware from the shelf and brings it to their station. Usually we have a dolly or hand truck to wheel some of the bigger boxes. When the job is done, I box the hardware back up, place a "repaired sticker" on the outside of the box, and bring it back to the property room and place it back on the shelf.

Q. How far is the property room from your station?

A. Oh I don't know exactly . . . I would guess around 75 to 100 feet.

Q. When you bring the hardware back to your station, do you yourself actually remove it from the box and place it on your work station and when you are done remove it from your station and box it back up?

A. Yes.

Q. Generally speaking, on average how much do each of the boxes weigh?

A. I have no idea. I couldn't tell you. It really varies.

Q. Can you approximate?

A. I would say anywhere from 15 pounds to 50 pounds.

Q. Are you also responsible for taking the hardware out of the box, placing it on your station and then repackaging it once the job is completed?

A. Yes.

Q. How high is your work station from the ground?

A. I don't know . . . let me think . . . I would say around four feet or so.

Q. On average, how many pieces of hardware do you repair in any given day?

A. It also varies. It depends on what the job requires and if we have the parts in stock. Some days I may only work on one piece and there are other days I can fix six or seven pieces.

Q. Mr. Smith, as a result of your injuries, did you miss any time from work?

A. Yes, about a week or so.

Q. When you returned to work after the accident, did you at any time, or on any occasion ever tell Mr. Mazzuchin or any supervisor that you might have difficulty carrying, lifting or removing or replacing the boxes to or from the shelves?

A. I'm not sure. I don't think so. Probably not.

Q. When you returned to work, at any time, or on any occasion did you ever ask any of the co-workers you mentioned before, like Tank or anyone you didn't yet identify for help in carrying or lifting any of the hardware?

A. Not generally. Sometimes if it's really heavy I'll ask someone to help me.

Q. And are you called upon at times to help a co-worker if a piece of hardware is particularly heavy?

A. Sure. That happens occasionally.

Q. Have you ever told any of your co-workers, when you've been asked for assistance, that you can't because you have problems with your back?

A. I don't recall. I don't remember the last time I was asked to help.

Q. Mr. Smith, when you were examined by any of your doctors after the accident, whether they be your treating physicians or any of your designated expert(s), did you ever tell them that your job entails lifting boxes of hardware on a regular basis?

A. They never asked.

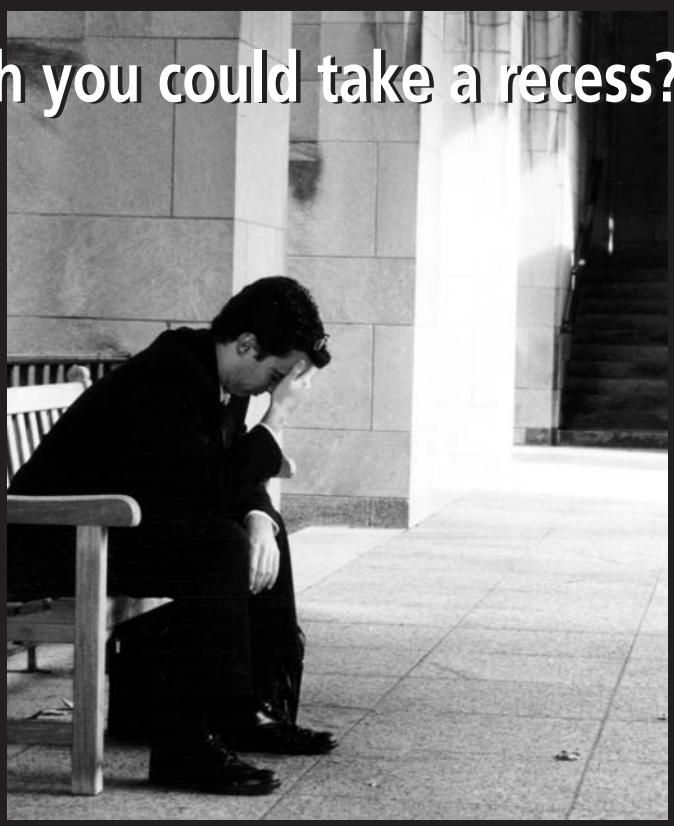
Remember: You're a Professional

I can't tell you how many times I have deposed witnesses while their counsel were not concentrating, not paying attention to the questioning, busy scurrying through unrelated paperwork, or reading a newspaper or magazine. They were oblivious to the world around them. In fact, in one deposition co-defendant's counsel had to be nudged on the arm and wakened from a catnap.

Too often I've observed counsel leave the client's side, ask to be excused and attempt to leave the room, but who have told me to go ahead and continue my questioning. When this happens, I immediately stop the Q&A and remind counsel that it improper for me to continue questioning the client in counsel's absence.

Be mindful that your clients are with you. Your actions are constantly being monitored and observed. Your conduct at a deposition reflects upon you individually and professionally. No matter how heated the deposition gets, compose yourself and refrain from engaging in unrelated colloquy and personal attacks. They are not only improper, they also become part of the permanent record for which your client will be loathe to pay. Such petty antics can only come back to haunt you and diminish your effectiveness. As a general rule, consider that anything that you say will be published the next morning on the front page of the *New York Times*.

The definition of "deposition" in *Black's Law Dictionary* says, in part, that it is a discovery device that involves taking testimony "in answer to questions or interrogations," but that only scratches the surface. The deposition is there for the taking, but your actions and inactions bespeak volumes about your ability, integrity and professionalism.



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Psychological Testimony on Trial: Questions Arise About the Validity Of Popular Testing Methods

BY STEVEN K. ERICKSON

A major part of the increased use of expert testimony over the past 50 years[1] has involved the behavioral sciences.[2] Psychologists and psychiatrists are routinely called upon to assist the court in clarifying various matters, such as a defendant's competency to stand trial, child custody disputes, and personal injury cases.

Recognizing inherent dangers in allowing unfettered expert opinions into evidence, the U.S. Supreme Court has used several key cases to establish guidelines for the admissibility of expert opinions. The most well-known of these cases, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[3] states that trial judges, as the gatekeepers of expert testimony, must ensure that the purported expert testimony meets several threshold factors before it will be admitted into evidence. Recognizing that expert testimony in federal court is governed by Federal Rule of Evidence 702, the Court in *Daubert* went on to delineate several factors that can be used to weigh the "scientific validity" of expert testimony when considering its admissibility:[4]

- Whether the underlying methodology and principles of the testimony have been or can be tested;
- Whether the principles and methodology have been subjected to peer review and publication;
- Whether the known or potential error rate is acceptable;
- Whether the underlying principles have obtained general acceptance in the scientific community.

Daubert clarified the role of the trial judge as a gatekeeper of expert evidence, placing the judge in a more active role in determining the admissibility of expert evidence. Furthermore, the decision outlined specific criteria that trial judges should employ in determining what evidence is admissible and what should be excluded. The *Daubert* case replaced the minimal standard that the court set forth in *Frye v. United States*,[5] which held that expert testimony was admissible if the procedures used by the expert were generally accepted by the relevant scientific community[6] Although some states, including New York,[7] have retained the *Frye* test in some form, the majority of jurisdictions in the United States have conformed to the *Daubert* criteria.[8]

Techniques Used to Form Opinions

Psychologists routinely testify as experts on numerous matters before the court.[9] Often psychological experts use psychological instruments, tests or tools to help formulate their opinions. These instruments generally help the psychologist to gauge a person's personality, the presence of a mental disorder, or intellectual and cognitive functioning.

In addition, there are specific instruments that can provide relevant data to help the psychologist form an opinion about whether a person is attempting to feign a mental illness, has a propensity for psychopathy, or is suffering from a neurological impairment.[10]

Psychological instruments are typically divided into two groups: objective instruments and projective instruments.

Objective Instruments The Minnesota Multiphasic Personality Inventory (MMPI) is typical of many objective instruments. After individuals have responded to a standard set of true/false questions about their thoughts and feelings, their responses are matched against the normative sample when the inventory was developed. Correlations are then established between the respondent's choices and those responses of the normative population known to have a certain mental dis-

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order. Thus, if a person responds in the affirmative to the majority of statements endorsed by the majority of the normative sample diagnosed with schizophrenia, then the respondent receives a high score on the instrument's schizophrenia scale, which represents a relative likelihood that the respondent has the disorder of schizophrenia.

Most important, such instruments are called "objective" for two primary reasons. First, a person's score on the instrument requires no judgment on the part of the clinician. Second, the probable meaning of the score is suggested not because the person's answers "look schizophrenic" to the clinician, but because they are in fact answers that are known (through past research) to be like those of persons with schizophrenia.

Projective Instruments

Alternatively, projective instruments are psychological procedures used to measure personality that rely on a person's unrestricted responses to ambiguous stimuli or situations. Developed mainly out of the domain of Freudian psychoanalytic theory, projective instruments generally rely upon interpretation by the psychologist of a participant's response to a series of pictures, images or open-ended questions. Often the subject matter or expected responses to these stimuli are unclear, requiring the participant to draw a conclusion based upon internal contemplation.

The concept behind projective testing is that the participant's reaction to these stimuli in the face of their ambiguity reveals matters of clinical importance.

The concept behind projective testing is that the participant's reaction to these stimuli in the face of their ambiguity reveals matters of clinical importance about the individual. Thus, when one person perceives an image that looks vaguely like a face with something red on it as "a clown" while another perceives it as "a bloody head," this tells the clinician something important about the participant's personality. What the responses "mean" may be based either on a normative sample used when the instrument was created (*e.g.*, the "types" of persons who have seen this picture as "a clown" in normative studies), or from a theoretical perspective (*e.g.*, that seeing "a bloody face" suggests the possibility of underlying aggressive or fearful tendencies).

Projective instruments have always been embroiled in controversy.[11] This phenomena appears to be due to the fact that projective instruments lack face validity (*i.e.*, it is not readily apparent to the untrained eye what they measure) and are associated historically with psychoanalytic theory, which over the past several decades has fallen out of favor for the majority of psychologists. However, there is a new controversy involving the chief projective instrument, the Rorschach, of which attorneys should be aware, because this projective instrument remains a common method of psychological assessment in court-related evaluations.

The Rorschach Test

One of the most predominant projective psychological instruments used by psychologists is the Rorschach.[12] It contains a standardized set of ambiguous inkblots that are presented to the participant along with a series of queries by the psychologist as a means of probing the participant's perception and reaction to the inkblot.

Using this approach, the psychologist asks the participant to explain what is perceived within the inkblot, and why those images come to mind. The psychologist precisely records participant responses and later evaluates them theoretically or on the basis of complex scoring criteria. The results of the test are compared to a set of norms, allowing for inferences about mental capacities and illnesses.

The Rorschach is widely used by psychologists in a variety of court-related cases and remains a popular assessment instrument.[13] Although not as popular as objective instruments, the Rorschach remains a main component of many psychological "batteries" that are frequently given to defendants in criminal matters. In fact, research has revealed that the Rorschach is the third most common psychological assessment instrument used in forensic evaluations in criminal cases.[14] Moreover, approximately 30% of psychologists report using the Rorschach for competency to stand trial evaluations, and 32% report using the Rorschach for criminal responsibility evaluations.[15]

In addition, the Rorschach is used frequently in child custody evaluations.[16] Research has shown that the Rorschach is used in roughly 30% of evaluations of adults in child custody matters, making the Rorschach second only to the MMPI.[17] Furthermore, the Rorschach is used in approximately one in six evaluations of children in child custody matters.[18]

These numbers are surprising, because the Rorschach has been criticized as lending little valuable information on parenting abilities.[19] Moreover, studies have indicated that the Rorschach has the propensity to present psychologically healthy children as severely disturbed.[20] Likewise, the Rorschach is used frequently among a small proportion of psychologists who evalu-

ate sexual abuse victimization, which often leads to a diagnosis of post-traumatic stress disorder (PTSD) even though there is little validation that it accurately measures these psychopathologies.[21]

While all Rorschach testing follows the same general format, how participants' responses are scored and interpreted vary widely, based upon any of several available scoring manuals. Due to the reportedly extensive research and empirical data that supports it, the most widely used scoring method for the Rorschach is *The Rorschach: A Comprehensive System* (TRACS)[22] developed by John Exner.[23] Before the development of this system in the early 1970s, the variety and questionable scientific basis of scoring methods limited the validity and reliability of participants' scores.[24] Furthermore, the inconsistencies between scoring methods made it difficult to compare results across the field. Because the TRACS system promised to bring scientific rigor to the Rorschach, it was widely praised when it debuted, and it quickly became the preferred method for scoring and interpreting Rorschach protocols.[25]

Despite the general agreement that the TRACS system is the most common and best scrutinized method of administering the Rorschach, like all projective instruments, the Rorschach itself has remained a controversial test among psychologists. Regardless, it has remained mainly unchallenged by attorneys[26] despite the fact that many psychologists routinely use it in court-related evaluations.[27] Perhaps attorneys are unaware of the controversy surrounding the Rorschach and assume that it meets the *Daubert* standards of admissibility because it has been a fixture of forensic evaluations for quite some time.[28]

Recent developments within the psychological community raise serious questions about the evidence backing the TRACS system, casting doubt on whether it is responsible for a psychologist to formulate a clinical opinion based upon it and whether such an opinion should be admitted into evidence.[29] The possible lack of a rigorous scientific basis behind the TRACS method has reopened the debate on the Rorschach test, and some prominent psychologists are now calling for the exclusion of this test as a method of formulating expert opinion.[30] Many others believe that it is necessary at least to re-evaluate whether in fact the Rorschach provides reliable, valid results.[31]

Criticism of the Rorschach Much of this call for re-examination of the TRACS system is due to the recent discovery that much of the empirical data for which it was originally praised simply may not exist. This has opened to debate a plethora of controversies, attacks on the central validity of the TRACS system, and claims that the method is so flawed that the results are unreliable and probably invalid, thus making any expert tes-

timony opinion derived from the TRACS system inadmissible under *Daubert*.[32]

A chief concern among the Rorschach's critics is that many of the studies cited in the TRACS system manual have been found to be unpublished or nonexistent.[33] One study found that 99 (63%) of the 156 studies cited in the TRACS manuals were unpublished, and hence, not subject to peer review.[34] In addition, when researchers attempted to obtain copies of these unpublished studies, it was discovered that many were never written or were unavailable for review.[35] Moreover, Exner recently revealed that of the 700 cases comprising the 1991/1993 adult normative sample, 221 were duplicates.[36]

Interrater reliability means that a psychological instrument produces consistent ratings across multiple examiners.

As a consequence, the norms that are established in the TRACS system, which are the basis for interpreting the performance of persons who take the Rorschach, appear to be fundamentally flawed and thus of dubious credibility. They have not been subjected to critical peer review outside of Exner's inner circle of colleagues. Yet, these studies are cited in the TRACS manual repeatedly, with the implication that they have been subjected to peer review when, in fact, they have not.

Furthermore, most of the studies cited in the TRACS manual that established the reliability and validity of the TRACS system were informal studies conducted at Rorschach workshops. Most of these studies were never formally written up or submitted to professional journals for review. They were not formal studies that had to pass an internal review board,[37] their methodology was never scrutinized by disinterested parties and most have never been reviewed by psychologists outside of these workshops. In addition, some studies cited in the Exner manual appear to be missing,[38] and all the data used in developing the TRACS system are unavailable to the scientific community, because the TRACS author refuses to release it for independent review.[39]

Single Responses One of the more troubling aspects of the TRACS system is that a participant's single response can result in an interpretation of severe psychopathology. For example, critics point to the fact that a single reflection response (*e.g.*, a person sees a reflection in the inkblot) under the TRACS system indicates "a nuclear element in the subject's self-image is a narcissistic-like feature that includes a marked tendency to overvalue personal worth."[40] Likewise, if a participant gives a food response, this is interpreted to mean that the participant "can be expected to manifest many more dependency behaviors than usually expected."[41] Thus, even a single response on the Rorschach can give the impression that a participant is abnormal, even though it is a well-accepted maxim in psychology that a single piece of data should not be the basis for determining psychopathology.

In contrast, the *Diagnostic and Statistical Manual for Mental Disorders*,[42] the most widely accepted diagnostic tool for mental disorders, requires multiple data points for the diagnosis of *any* mental disorder. This is particularly the case when diagnosing core personality features (*e.g.*, narcissistic personality disorder), because such a label can have serious implications in terms of prognosis and treatment. Because such diagnoses can have serious ramifications for a litigant when mental health or fitness is at issue, the rather liberal labeling of psychological flaws by the TRACS system is perilous and not in harmony with modern mental health practices.

Interrater Reliability

All valid psychological assessment instruments must demonstrate that they have good interrater reliability. Interrater reliability means that a psychological instrument produces consistent ratings across multiple examiners. It is imperative that any assessment instrument provide a high level of interrrater reliability in order to ensure that the results present an accurate diagnostic picture of the participant, regardless of who rates the responses.

The Rorschach was thought to have good interrater reliability due to the extensive amount of research that went into its development. However, upon re-examination, this notion has come under increased scrutiny as more psychologists have begun carefully evaluating the psychometric properties of the Rorschach. Of particular note is the use of "percentage of agreement" as the chief method in the TRACS system for establishing interrater reliability. Critics contend that this method is a fundamentally flawed means of verifying interrater reliability since it has the propensity to yield inflated estimates of true consistency.[43] Although other methods exist for measuring interrrater reliability (*i.e.*, correlation coefficients), several studies have revealed that the Rorschach fares even worse under these statistical analyses.[44] If this contention is confirmed, the credibility of the TRACS system would be seriously undermined because good interrater reliability is an essential property for any psychological assessment instrument.

Invalid Scales and Rate of Response A more troubling aspect of the TRACS system is that many of its clinical scales have been shown to have little, if any, correlation with what they purport to measure.[45] For in-

stance, most psychologists agree that the Depression Index scale on the TRACS system bears little relationship to the diagnosis of clinical depression. Likewise, the Suicide Constellation scale has been criticized for being unrelated to suicidality. In fact, the TRACS system has been recognized by both critics and some supporters as correlating poorly with psychiatric diagnoses altogether. It is doubtful that psychologists acknowledge these findings when they use the Rorschach in determining psychiatric diagnoses and formulating clinical opinions about major mental disorders.

Another apparent flaw with the TRACS system is its ratio adjustment for the rate of response.[46] When participants are given the Rorschach, they are asked to describe what they see in the inkblot. The psychologist is urged to encourage them to describe *everything* they see in the inkblot. Thus, some participants may see only one or two objects whereas another may see five, six, or forty objects. The number of responses a participant gives is known as *R*. Since *R* can be influenced by many factors, including intelligence and educational levels, the TRACS system uses a formula to adjust for *R* to minimize its effects on the clinical scores. Unfortunately, many of the clinical scores on the TRACS system are not adjusted for *R*, including scales used to measure severe psychopathology: Schizophrenia Index, Hypervigilance Index and Obsessive Style Index.[47] Research has demonstrated that these scales do not correlate well with similar scales on other psychological instruments, such as the MMPI, that have demonstrated validity for measuring these types of mental disorders.

Overreporting Psychopathology The Rorschach has been criticized for leading to overstatements of psychopathology.[48] Several studies have revealed that American adults with no history of mental illness and living in the community, score in the maladjusted range when given the Rorschach, including high scores on scales indicative of severe mental illness such as the Schizophrenia Index.[49] Moreover, many of these participants also had indications on the Rorschach that they had exhibited disturbed thinking on the TRACS measures of Perceptual Accuracy, Distorted Thinking, and Emotional Functioning.[50]

Similar results have been confirmed by other researchers,[51] while still others have discovered that the Rorschach has the propensity to show children, who had reportedly above average mental health, as mentally ill or maladjusted.[52] Disturbingly, these results showed that the Rorschach can make otherwise well-adjusted children appear to have psychotic features, cognitive impairments, clinical depression and significant impairments in establishing and maintaining interpersonal relationships.

Such findings seriously question whether the Rorschach should be used at all in custody matters because there is its susceptibility to portraying a mentally healthy child as severely disturbed. Moreover, given the fact that children generally are not present during family court proceedings, the court often relies heavily upon forensic psychological reports in determining custody, visitation, and permanency matters without an *in camera* interview, and thus, without personal observation of the child(ren) at issue. Therefore, because the Rorschach appears to present children as more pathological than they really are, there is an inherent danger that psychologists who rely upon it may present clinical findings that are not consistent with a child's true psychological profile – and may lead the court to believe a child is more disturbed than he or she truly is.

Psychological assessment can provide helpful insight into diagnostic questions as long as the measures used adhere to basic scientific principles of peer review and sound methodology.

Conclusions

There is serious debate within the scientific community about whether the Rorschach, and the TRACS system in particular, meet the *Daubert* standards and, hence, whether testimony derived therefrom should be excluded. Upon examination, it appears that the TRACS system fails to meet most, if not all, of the *Daubert* criteria.

First, the scientific foundation for the TRACS system is questionable given that much of the original data is not available for review by the greater scientific community. Moreover, the discovery that many of the studies used to validate the TRACS system do not exist or were never formally written up, despite being cited in the TRACS manual suggests that the proponents of the TRACS system expect a reliance upon *ipse dixit* in establishing the underlying principles of the TRACS system. Because it was previously thought that most of these studies were peer reviewed, and only recently has it come to light that many were not, there exists a fundamental question about whether the psychological community, and the courts, have been misled regarding its fundamental psychometric properties.

Similarly, the methodology of the TRACS system has not been subjected to thorough peer review. Most psychologists have been surprised to learn in recent years that most of the studies cited to in the TRACS manual have never been formally written up or reviewed by experts outside of the author's inner circle. Moreover, the data used in most of these studies have not been released to the greater scientific community; thus, they have not been examined to determine if they are reliable or valid.

Many leading researchers have questioned whether the underlying principles of the Rorschach are accepted by the greater psychological community. Given the decline of psychoanalytic theory as an accepted notion of behavioral interpretation, it is questionable whether the theory of projective tests, like the Rorschach, have general acceptance in the psychological community. Moreover, there is substantial evidence that the Rorschach is not a reliable or valid measure of many mental illnesses and does not measure what it purports to measure in many instances.

Although the Rorschach remains a common assessment instrument, it appears that many psychologists use it out of familiarity rather than for its psychometric properties. More specifically, some argue that the Rorschach (and TRACS system) lacks general acceptance by the psychological community as a valid and reliable measure of psychopathology, and consequently, any expert testimony that relies on the Rorschach as a method for assessing psychopathology does not meet the *Daubert* standards for admissibility.[53]

Such arguments hint that the Rorschach and TRACS system may not even meet the *Frye* standard of admissibility, which is used in several states, including New York. Although such predictions may be premature, there appears to be a growing movement in the psychological community that tests like the Rorschach are not in harmony with the principles of best practice and should be avoided. Although it is likely that in the foreseeable future there will be a core group of psychologists who will accept and use the Rorschach as a reliable and valid measure of psychopathology, there is the discernible trend of its falling into disfavor among the majority of psychologists.

The courts have struggled in interpreting what "general acceptance" means under the *Frye* standard. In *People v. Middleton*,[54] the Court of Appeals, in examining the admissibility of bite marks in a criminal proceeding, held that "the test is not whether a particular procedure is unanimously endorsed by the scientific community, but whether it is generally acceptable as reliable. The techniques employed . . . are accepted and approved by the majority of the experts in the field."[55] This notion of majority acceptance equaling *Frye* admissibility was adopted by the Second Department in *People v.*

Bethune.[56] There, in a similar criminal proceeding in which bite marks were at issue, the court held:

> So long as an expert has utilized techniques and procedures that have been approved by a majority of the experts in the field in arriving at his opinion, that opinion is admissible in evidence without the necessity of a separate judicial determination regarding the validity or acceptance of the operative scientific principles.[57]

Consequently, those psychologists who use the Rorschach in forming clinical opinions may be at risk for *Frye* challenges if a majority of psychologists disapprove of its use over concerns of reliability and validity, which is an increasing trend. Although it is unclear whether the majority of psychologists believe that the Rorschach is unreliable, given the growing controversy surrounding it, its minority use, and recent findings that many of its psychometric properties are in question, there is a strong possibility that it will fall out of acceptance in forensic evaluations.

Certainly, in forensic evaluations, where the stakes are often very high for the parties involved, it would seem prudent for psychologists to use other assessment tests and instruments that have a demonstrable history of good reliability and validity. Unfortunately, some psychologists do not; thus, attorneys may wish to reconsider holding *Frye* hearings when psychological testimony is purported to include the Rorschach.

The assessment of human behavior will always be an imprecise science, because there are always more variables that influence behavior than can be measured. Nonetheless, psychological assessment can provide helpful insight into diagnostic questions as long as the measures used adhere to basic scientific principles of peer review and sound methodology. As the science of behavioral analysis advances, the future holds promise that psychological assessment will further help the courts decide complex issues surrounding human behavior.

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1. *See* Gary B. Melton et al., Psychological Evaluations for the Courts (1987).
2. *See id.* at 519.
3. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).
4. *Id.*; *see* Alan M. Goldstein & Irving B. Weiner, Handbook of Psychology: Volume 11 Forensic Psychology 59–60 (2003).
5. 293 F. 1013 (D.C. Cir. 1923).
6. *See id.* at 1014; *see Joiner v. Gen'l Elec. Corp.*, 78 F.3d 524 (1996), *rev'd on other grounds*, 522 U.S. 136 (1997); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
7. *See People v. Wesley*, 83 N.Y.2d 417, 423, 611 N.Y.S.2d 97 (1994); *People v. Middleton*, 54 N.Y.2d 42, 49, 444 N.Y.S.2d 581 (1981); *People v. Magri*, 3 N.Y.2d 562, 565, 170 N.Y.S.2d 335 (1957). *See also* 33 N.Y. Jur. 2d Criminal Law § 2004 (2002).
8. *See generally* Alice B. Lustre, Annotation, *Post-Daubert Standards for the Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R. 5th 453 (2001).
9. *See* Melton, *supra* note 1, at 519.
10. *See* Anne Anastasi & Susana Urbina, Psychological Testing (1996).
11. *See generally* James M. Wood et al., *The Comprehensive System for the Rorschach: A Critical Examination*, 7(1) Psychol. Sci. 3 (1996).
12. *See* Randy Borum & Thomas Grisso, *Psychological Test Use in Criminal Forensic Evaluations*, 26(5) Prof'l Psychol.: Res. & Practice 465 (1995).
13. *See* James M. Wood et al., *Problems of the Comprehensive System for the Rorschach in Forensic Settings: Recent Developments*, 1(3) J. Forensic Psychol. Practice 89, 90 (2001).
14. *See* Borum, *supra* note 12.
15. *Id.*
16. *See* Margaret A. Hagen & Nicole Castagna, *The Real Numbers: Psychological Testing in Custody Evaluations*, 32(3) Prof'l Psychol.: Res. & Practice 269 (2001).

17. *Id.* at 271.
18. *Id*.
19. *See* James M. Wood et al., What's Wrong With the Rorschach? (2003).
20. *Id.* at 272.
21. *See* Wood, *supra* note 13 at 94.
22. John E. Exner, The Rorschach, Basic Foundations and Principles of Interpretation (Wiley 4th ed 2002).
23. *Id*; *see* William M. Grove & R. Christopher Barden, *Protecting the Integrity of the Legal System*, 5 Psychol., Pub. Pol'y & L. 224, 226 (1999) (stating that the TRACS system developed by John Exner is the most widely used and researched method of scoring and interpreting the Rorschach).
24. *See* Wood, *supra* note 11.
25. *Id.*
26. *See* Wood, *supra* note 13; J. Reid Meloy et al., *Authority of the Rorschach: Legal Citations During the Past 50 Years*, 69 J. Personality Assessment 53, 60 (1997) (in a review of appellate cases where the Rorschach was used, in only 10.5% was the reliability or validity of the Rorschach at issue. In almost 90% of these cases, the admissibility and weight of Rorschach data were not questioned); Irving B. Weiner et al., *Is the Rorschach Welcome in the Courtroom?*, 67 J. Personality Assessment 422, 423 (1996) (reporting that of 7,934 cases in which psychologists had presented Rorschach testimony in the courtroom, there were just 6 (0.08%) in which the integrity of the Rorschach was seriously challenged).
27. *See* Wood, *supra* note 11; *see also* Wood, *supra* note 13; John E. Pinkerman et al., *Characteristics of Psychological Practice in Juvenile Court Clinics*, 11(3) Am. J. Forensic Psychol. 3 (1993).
28. *See* Borum, *supra* note 12; Wood, *supra* note 13.
29. *See* William M. Grove et al., *Failure of Rorschach-Comprehensive-Based Testimony to Be Admissible Under Daubert-Joiner-Kumho Standard*, 8(2) Psychol., Pub. Pol'y & L. 216 (2002).
30. *Id.*
31. *See* Grove, *supra* note 29; *see also* Wood, *supra* note 11; Wood, *supra* note 13.
32. *See* Grove, *supra* note 29.
33. *See* Wood, *supra* note 13; Wood, *supra* note 11; Grove, *supra* note 23.
34. Wood, *supra* note 11.
35. *See* Grove, *supra* note 29.
36. *See id.* at 218.
37. An internal review board is an institutional ethics committee that reviews all scientific studies involving human subjects to ensure that they are treated humanly according to federal and institutional regulations.
38. Wood, *supra* note 11.
39. *Id.*
40. *Id.* at 190 (quoting Exner, 1991).
41. *See* Wood, *supra* note 11.
42. American Psychiatric Association, Diagnostic and Statistical Manual for Mental Disorders (DSM-IV-TR) (2000).
43. *See* Wood, *supra* note 11 at 4; *see also* Arthur R. Jensen, *Review of the Rorschach Inkblot Test*, *in* The Sixth Mental Measurements Yearbook 501–509 (1965).
44. *See* Marvin W. Acklin et al., *Interobserver Agreement, Intraobserver Reliability, and the Rorschach Comprehensive System*, 74 J. Personality Assessment 15 (2000); Vincent Guarnaccia et al., *Scoring Accuracy Using the Comprehensive System for the Rorschach*, 77 J. Personality Assessment 464 (2001); Gregory J. Meyer et al., *An Examination of Interrater Reliability for Scoring the Rorschach Comprehensive System in Eight Data Sets*, 78 J. Personality Assessment 219 (2002). *See generally* Wood, *supra* note 19.
45. Wood, *supra* note 13.
46. *See* Wood, *supra* note 11.
47. *See* Gregory J. Meyer, *Response Frequency Problems in the Rorschach: Clinical and Research Implications with Suggestions for the Future*, 58 J. Personality Assessment 231 (1992).
48. *See* Thomas Shaffer et al., *Current Nonpatient Data for the Rorschach, WAIS-R, and MMPI-2*, 73 J. Personality Assessment 305; *see generally* Wood, *supra* note 11, Grove, *supra* note 29.
49. *See* Grove, *supra* note 29.
50. *Id.*
51. *See* James Woods et al., *Problems with the Norms of the Comprehensive System for the Rorschach: Methodical and Conceptual Considerations*, 8 Clinical Psychol.: Sci. & Practice 350 (2001).
52. *See* Mel Hamel et al., *A Study of Nonpatient Preadolescent Rorschach Protocols*, 75 J. Personality Assessment 280 (2000).
53. *See* Grove, *supra* note 29.
54. 54 N.Y.2d 42, 49, 444 N.Y.S.2d 581 (1981).
55. *Id*. at 49 (citation omitted).
56. 105 A.D.2d 262, 267, 484 N.Y.S.2d 577 (2d Dep't 1984) (citations omitted).
57. *Id.* at 267; *see United States v. Porter*, 618 A.2d 629, 634, 61 U.S.L.W. 2434 (D.C. Cir. 1992) (explaining that under *Frye* "[t]he issue is consensus versus controversy over a particular technique, not its validity. . . . [T]he prime focus is 'on counting scientists' votes, rather than [on] verifying the soundness of a scientific conclusion.'") (quoting *Jones v. United States*, 548 A.2d 35, 29–40 (D.C. Cir. 1988)). *But cf. State v. Mohit*, 153 Misc. 2d 22, 24, 579 N.Y.S.2d 990 (N.Y. County Ct. 1992) (stating that "if a well-respected minority within a given scientific community rejects as unreliable a particular procedure, technique, or theory, the court possesses the authority to agree with that minority view and exclude the evidence offered); *see generally* 33 N.Y. Jur. 2d Criminal Law § 2004 (2002).

How to Spot a Lie: Checking Substance and Source

BY JUSTIN S. TEFF

The ability to discern deception is one of the most useful talents a lawyer can possess. An understanding of some basic principles and tactics can significantly demystify a process that essentially involves a critical look at the assertions made and the person making them. This article reviews some specific tools that may be used to assess the truthfulness of a witness.

General Analysis

When a statement is made in the course of everyday life, how do we evaluate its veracity? Generally we consider the assertion, whether consciously or subconsciously, along two axes of analysis – the substance of the assertion and its source. Put another way, we analyze what is said, who is saying it, and the way it is conveyed.

Some information is accepted almost without question, whether because of the nature of its source or substance. Even in these instances, however, the evaluation process is still conducted subconsciously. This concept is significant not only because it provides the foundation for many of the accepted avenues of impeachment in the laws of evidence, but also because all of the ideas illustrated in this article may be related back to at least one of these fundamental axes of analysis.

The behavior patterns detailed in this article are in many ways analogous to what are commonly known in card games as "tells." As is the case with tells, some patterns may be more discernable in certain circumstances with certain subjects; some witnesses will have a perfect poker face and prove immune to all angles. The various tactics are designed to help draw out, or make more conspicuous, such familiar behavioral indications. The ideas may be used alone or interchangeably, as the examiner deems fit, yet ultimately a combination of many factors is likely to form the basis for the examiner's assessment. The bottom line is that all people are different, displaying individual characteristics, and as such no single tell will always be reliable. Thus all these devices are necessarily intertwined to some degree with the examiner's common sense, logic, knowledge of outside subjects, and careful, acute observation.

Analyzing the Substance

The substance of an assertion may be tested, even without knowledge of the actual truth of the matter, by measuring the degree of internal and external consistency the assertion possesses. Internal consistency exists if the facts and inferences in the story make sense when considered together, and when the story does not contradict itself factually or logically. External consistency involves whether the story and its details comport with our knowledge of the subjects at hand and the world around us. Most of the following tactics are designed to test either internal or external consistency.

The fact that an assertion is both internally and externally consistent does not necessarily make it true; indeed, an airtight alibi should have both characteristics. In this context, it simply means that we have not found a reason to doubt the assertion based solely on the inherent nature of its contents. Know also that most of these tactics are preferably accomplished in the subtlest manner, and without the subject's knowledge, lest the witness realize the desired objective and grow more difficult and less responsive.

Keep a Liar Talking and Solicit the Details When most people lie, the story they give is either one they have fashioned on the spot, or else it is an alibi they have contrived with some effort. In the first instance, the key concept is that few people can keep all the facts and details of a story straight when they are making it up spontaneously, particularly if they are talking at length.

If you keep an on-the-spot liar talking, and constantly question details, it will typically not be long before the details begin to contradict either themselves or

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your outside knowledge. Once the number of these contradictions rises to an unreasonable level, you will naturally suspect the story is not entirely true. Even in cases of well-fashioned alibis, few people who devise such an alibi think far enough ahead, or deeply enough into details, to be able to answer many specific questions in an airtight fashion. Thus if the particulars of an alibi are questioned at length and in depth, a liar will often have to begin making up the details and explanations on the spot.

Even for an alibi that has not been contrived on the spot, the same principle applies: the longer a liar speaks and the more he or she is questioned in detail, the less internally consistent the story will become. Another avenue is to ask a subject to explain why a particular action was taken. Sometimes you can force individuals to concoct an incredible explanation simply by putting them on the spot. The more you ask about details, and the more a liar speaks, the more the liar will have to make up; and the more the liar makes up, the more likely the person will be to contradict the story or wind up painted into a corner.

Breaking up a witness's story into sections and asking about them in a jumbled order can also be useful means of testing consistency.

Do the Details Make Sense? A strong reason to ascertain as many details of the subject's story as possible, is that you can then put together a realistic picture of the circumstances, and question whether the facts related by the witness are logically and physically possible as stated.

You can also determine whether the facts as stated by the witness comport with your knowledge of outside subjects. Unlike the first idea, this angle tests the external consistency of the assertions made. For example, it is rumored that Abraham Lincoln once used an almanac to contradict a witness's assertion that he was able to see by the light of the full moon.

Aside from pure analysis and comparison, another way to use this test is to formulate a roundabout, covert manner of getting the information you seek. One of the classically cited illustrations is asking persons who claim to have witnessed an accident what first drew their attention to the scene. If they answer that they heard a crash and then looked, or heard a scream and turned around, you know it is probably not true that they actually witnessed the occurrence, because the first thing that prompted them to pay attention was actually the aftermath. Questions such as who a witness was speaking with, how engrossed they were in conversation, which way they were facing, what they were doing at the time, can all help to ascertain how truthful an assertion that "I saw the whole thing" really is.

Furthermore, if a witness provides details that simply defy common sense or your knowledge of outside topics, you can attack credibility on this level as well.

Tell Me Your Story Again Another related tactic is to simply ask the witness, after some time has elapsed since the initial telling of the tale, to repeat the story again. This idea is grounded in the principle that a person will seldom if ever tell a story the exact same way on two separate occasions; people's recollections are not that uniform. Indeed, almost all repetitions naturally have some subtle variation from the original telling.

This repetition serves two useful purposes. First, you may be fairly confident that if a subject repeats a story to you in the precise manner, and with the precise wording and details, that it was told in the first instance, the story is probably scripted and was carefully rehearsed long in advance. Second, if the details of the story vary quite considerably in the second telling, you can suspect that the witness barely recalls the first version, and now is having trouble keeping the story straight. Only if the story is retold with some slight variations is it likely to be an honest tale. Breaking up a witness's story into sections and asking about them in a jumbled order can also be a useful means of testing consistency.

Do Actions Betray Words? Not only do people frequently make assertions that are entirely belied by their actions, people also do and say things all day long that possess some hidden or subconscious personal meaning. This concept can be used in two ways.

The first involves examining the actions surrounding the event that the witness claims are true, as a means of determining whether the actions are to be expected. Ask yourself what you have or would have done if faced with the situation, and the result will be a mental list of the most common and typical human behaviors that occur in such a situation. Then ask your witness what actions he or she took surrounding the events being claimed as true. If a subject has done something completely uncharacteristic, or has failed to do something that would almost automatically be expected, you have reason to doubt the validity of the subject's assertions. As an example, it may be argued that most people who witness another person's misfortune will instinctively try to assist their injured fellow in some manner. If such an action is absent, you should question why. If a claimant asserts a significant injury, but does not visit a

physician for a month after the alleged date of accident, some legitimate doubt arises.

The second use of this tactic involves determining the hidden meaning in the witness's actions. Indeed, it may be argued that there is a subconscious reason for nearly everything we do, from the words we choose in conversation to the route we take to and from our destinations. This technique is commonly used to prove state of mind in criminal cases, because this is an element that is seldom possible to prove without using circumstantial evidence. In this way we must try to discover, as best we can, what the actions of the witnesses truly mean. If a perpetrator uses a loaded gun as opposed to an unloaded one, we can fairly infer intent to cause harm or at least a reckless disregard. Most people do not pack their bags if they are expecting to stay. Most people do not say "I love you" while looking away. This combination of questioning whether a witness's actions were typical or atypical, as well as attempting to determine the hidden meaning in the actions we do discover, can be extremely revealing in determining whether a subject's assertions are the truth.

Shouldn't You Know That? Whenever someone gives an opinion or tells a story, you can usually figure out from the nature of the assertions being made some piece of information that the teller should know if their story is indeed true. A person who claims to have read a particular book should know the main character and the ending. If someone claims to pass a particular street corner every day, that person should know most of the stores on that corner and perhaps even some of the signs or similar details. If someone claims to have had an affair with another individual, the teller should be familiar with some of the intimate characteristics of the claimed lover.

In any case, the same tactic always applies: think of some information the subject should obviously know if the assertion is true, and find out if the person knows it. As a simple illustration, if a person claims to have spoken to "someone," but cannot recall the names of anyone with whom he or she spoke, the assertion will appear less credible whether honest or not. The same underlying principle may also be helpful if by listening and questioning you realize that the speaker knows a piece of information that should not be known if the assertions being made are true. In a courtroom, this tactic can also be very effective in questioning expert witnesses about the actual extent of their knowledge of the area that is the subject of their testimony.

Shouldn't You Remember That? Distinguishing an honest failure of memory from a disingenuous assertion can be difficult and depends not only on the substance of the assertion, but also on the examiner's outside observations and considerations.

For example, if an older subject is being questioned, any claimed failure of memory is naturally more believable than the same assertion from a 21-year-old. Except for some of the elderly who have developed short-term memory problems, events that occurred 10 years ago are harder to recall than the events of yesterday. Effective use of this tactic can be reduced to the question of whether the subject should remember the information you are asking about.

A classic example involves a witness who only recalls facts that will help the case and cannot recall any information that is unfavorable. In less obvious situations, you can review a few specific details that the teller provided on direct examination, then ask why the individual can recall all of those facts but not any of the information you are seeking. Even if you are unable to shake the witness, you are likely to have made an impression on the jury. If need be for purposes of the case, you can add emphasis to a claimed failure of memory by earnestly asking a witness, "Please try to remember," or suggesting that because of the importance of the matter, the witness may take a moment to think if necessary.

The converse of this principle can be used when a witness claims to remember things that probably should not be recalled. For instance, a witness testifying to an event that happened several years ago cannot be expected to recall every detail. If the witness does, you

should ask what else is remembered from the day in question: whom did the witness see, what did the witness talk about, where did the witness go? If the witness can recall little else, you should wonder why only the favorable facts are being remembered so clearly. In some instances, a witness will even get annoyed at the repeated minute questions and ask with irritation, "How do you expect me to remember everything that happened on one day many years ago?" The answer itself proves your point.

Exaggeration and Generalization Most people are not naturally precise thinkers, and therefore often speak in hyperbole, and broad, sweeping strokes. These people are not necessarily attempting to lie, but what they are saying is not really the truth. In such situations, you must pin the witness down to the actual details that led to the broad statements.

Assertions such as "I've been harassed at work for years" or "I do heavy lifting all the time" should never be accepted at face value. Such statements must be picked apart, no matter how tedious or time consuming, to reveal the actual facts behind the generalization or exaggeration. In this way you can frequently whittle away all or most of such an exaggerated assertion. If the witness claims that he or she cannot recall any specific facts, you can use your general trial skills to dramatically diminish the credibility of the assertion.

It is also important to remember that when most people relate a story in which they are involved, they almost always tell it in the light most favorable to them. Facts that would make the teller look unfavorable or silly are typically embellished or omitted. Given that every time we listen to a story we can be fairly certain that the unfavorable facts have been left out, it follows that it is incumbent upon the examiner to fill in the gaps in the story with the facts the teller has omitted. Often this can be accomplished merely by placing a different spin on the same set of facts. Sometimes the examiner must, as detailed above, imagine a similar situation that the examiner has previously faced and take note of the more embarrassing details. However, this tactic is difficult to use without some solid outside information and investigation.

Suggestion and Deception The leading question is one of the most powerful tools a lawyer may use for gathering favorable information, in part because people are much more inclined to admit something unfavorable if they think the other party already knows it. Even general questions such as, "You were on A Street, weren't you?" are more likely to lead to a particular desired response than asking, "Where were you that night?"

All lawyers should be familiar with the many scientific experiments that have been conducted to measure the reliability of eyewitness observations, most of which reveal that people will agree with whatever is suggested to them, even if it is not what they really saw. Although a lawyer has a responsibility and an obligation not to engage in deceitful or dishonest behavior, the use of careful deception, when one is well-armed with one's own theory of the case, can be an extremely revealing way of getting to the truth.

Analyzing the Source

The second major line of analysis in evaluating the truth of an assertion involves assessing the credibility of the source of the assertion. As with evaluating the substance of the assertion, there are internal and external indications. The internal aspect involves our extemporaneous psychological analysis of the subject and the conclusions we draw as a result. The external aspect involves clues provided by careful observation of tone and body language.

Psychoanalysis Anytime we seek to evaluate the credibility of a person making an assertion, we must ask two questions about the source of the information: how truthful and reliable has the subject been in the past, and why is the subject making the assertion, particularly with a view toward determining the motives and reasons the subject might have not to tell the entire truth.

The first question is usually impossible to answer in the absence of investigation, unless the witness has some relationship or history with the examiner. Thus it is often difficult to know just how truthful a person is before actually posing questions. Furthermore, during a trial the introduction of information such as prior convictions or untruthful acts must be done under the strict auspices of the relevant laws of evidence. More important, however, is to question the motivations of the person making the assertion to be evaluated. This necessarily requires some analysis of the psychological makeup of the subject, which can be aided by more general observations and inferences.

Once the strength of the reasons the teller might have to lie is evaluated, the questioner is better equipped to hear what the teller has to say. People commonly lie, for example, to get themselves out of some trouble, hardship or hassle they have encountered; people lie for monetary and other material gain; people lie to help their friends and family; people lie out of fear of retribution or punishment; some people lie simply to impress others. All of these motives may be reduced to self-interest of one form or another. This should be familiar as the area of evidentiary impeachment referred to as biases and influences.

Knowing why people say what they are saying, and what exactly is at stake for them, provides invaluable guidance in discerning the veracity of someone's assertions. This requires the questioner to consider the sub-

ject matter of the controversy, together with the conceivable consequences, both direct and indirect, for all who could be even remotely connected, including the witness. Put another way, the questioner must ascertain exactly what brought the person to the situation, and what personal interest is motivating the individual to make such an assertion.

The importance of analyzing more general observations stems from the notion that a bias or motivation may arise not only from personal interest, but also from other environmental factors including geography, culture, socialization, religion and class or monetary status. Although generalizations about people are inherently dangerous, they are all that are available in the absence of investigation. Given that these factors likewise motivate thoughts and actions, one should take care to consider as many of their indications as possible. A person's appearance should be always considered, as should the individual's dress and mannerisms. A clean-cut appearance may also signify a more conservative and careful thinker, as will well-kept and tidy clothing; the opposite is also frequently true.

Other indicators to pay heed to include, to the extent discernable, gender, age, education, vocal accent, religion, if any, general background and upbringing, family status, and other relevant past experiences, to name only a few. All these factors influence, if not control, the way we as people think. Once these factors are all combined, the examiner will have gone a long way toward knowing how likely it is he or she is being told the truth.

Tone and Body Language In this context, almost all tells that are in the nature of tone or body language are grounded in the fundamental psychological principle that lying makes most people nervous. The concept that falsehood is fundamentally wrong is so ingrained in our moral fabrics that we cannot help but feel slightly guilty or nervous, even if only on a subconscious level, when we know we are telling a blatant lie.

The principle is not universal; some people can remain perfectly calm while lying through their teeth, while others are nervous all the time. Nevertheless, the principle is generally reliable, with the caveat that most people will be nervous in stressful situations for perfectly legitimate reasons. A fair degree of interpretation of these signs is thus required if they are detected. Indeed, the interpretation is what provides the real value of this tactic. Such nervousness may cause a change in tone, mannerism or mood; it may even cause the subject to exhibit a physical mannerism or manifestation of this subconscious irreconcilable sensation.

The tone of an assertion should always be considered in assessing its truth. When many people get nervous, it causes their voice to tremble slightly. Hesitation can also be very revealing because most people will not need to pause or search too long to produce an answer that is truthful and accurate if they really do know the answer. Many people exhibit some agitation or irritability when they are feeling nervous or trapped. Such symptoms are more common in men. Women, who are generally smarter and more subtle, will simply grow evasive or deceptive if feeling trapped. The volume and speed of speech, and observable variations therein, should also be considered. Many people talk more quickly when they are nervous in order to be finished speaking sooner. An accurate interpretation of such vocal cues is extremely helpful in assessing the credibility of the source of the assertions.

A number of more overt mannerisms that can be discovered upon keen observation of body language are linked to the same fundamental principle that lying induces nervousness. Recognizing variation is extremely important, particularly because some such tells are very common and others are wholly particular to the individual.

The natural breathing pattern of most people alters slightly when they are nervous, and they may even hold their breath in short intervals or gulp at odd times. Eye contact is also a crucial thing to observe. Most people find it difficult to hold another person's gaze for extended periods when they know they are telling a lie; looking down or attempting to divert the gaze are common signs of a nervous speaker. Another classic tell occurs when people use their hands to cover all or part of their mouth while they are speaking in a subconscious attempt to prevent close scrutiny of their features. Many people perspire when nervous. As a person's voice may tremble, so may someone's hands or knees; many people place their hands in their pockets, tense their legs or cross their feet to conceal this signal. Some people may instinctively bite their lip or the inside of their cheek. A careful evaluation of the true meaning of the nervous sign can be of great aid in determining whether the person is telling the truth.

Conclusion

With a careful application of these principles and tactics, the process of ascertaining the truthfulness of a given assertion becomes a far simpler task. A thorough examination of the substance and source of the particular assertion is one major key to discerning its veracity. It is crucial to remember all individuals are different, displaying their own set of individual characteristics.

It is also a fair generalization, however, that very few false assertions will be able to survive all the angles that a skillful examiner can envision. Thus if an assertion does survive, you may rest assured that either it is indeed the truth, or the subject has won a hard-earned escape from vigilant scrutiny.

Cooperatives Authorized to Use Business Judgment Rule In Terminating Shareholder Leases

By Menachem J. Kastner and Jarred I. Kassenoff

Efforts by the board of a cooperative building to terminate the proprietary lease of a tenant-shareholder have traditionally been a costly and protracted process. A decision by the Court of Appeals in May appears to have removed some of the obstacles, but it is likely to raise new questions about the overall policies that govern the operations of any cooperative, as well as the certainty of tenant-shareholders' possessory rights under their proprietary leases.

The decision, *40 West 67th Street v. Pullman*,[1] holds that a co-op board's properly passed resolution to terminate a tenant-shareholder's proprietary lease based on "objectionable" conduct is governed by the business judgment rule, subject only to limited judicial review under N.Y. Real Property Actions and Proceedings Law § 711(1) (RPAPL). Until this decision, the conventional assumption was that it was necessary to factually establish a tenant-shareholder's "objectionable" conduct before a court of law, at trial.

While the larger implication for cooperative management is that co-op boards now appear to have the power to police tenant-shareholders' conduct without judicial scrutiny, the true effects of this decision are yet to be seen. The holding, a significant divergence from prior cases governing the eviction of tenant-shareholders, creates uncertainties regarding a co-op's power to terminate a proprietary lease and the extent to which a court may re-examine the exercise of such powers.

The significance of the shift in judicial doctrine concerning a co-op's self-governance emerges with a review of how the law of cooperative corporations has evolved.

The Legal Framework

Litigation involving the powers of a cooperative board to regulate the activities of its tenant-shareholders dates back to 1886. In *Barrington Apartment Ass'n v. Watson*,[2] the cooperative corporation brought an action to restrain a tenant-shareholder from subletting its apartment without consent. Even though there was no prohibition against subletting without consent in the parties' proprietary lease, the court upheld the board's injunction, thus equating the board's powers to those of the corporation's.[3]

Since *Barrington*, the courts have continued to struggle to define the parameters of the law with regards to co-ops.[4] The hybrid nature of the cooperative corporation has, in effect, forced the courts to blend both real property and personal property concepts.[5] In this regard, while courts have consistently equated the relationship of co-op and shareholder to that of landlord and tenant,[6] the courts have conversely held that co-ops are also not real property.[7] Similarly, while it has been held that tenant-shareholders are subject to the real property laws governing ownership of pets,[8] roommates[9] and warranty of habitability issues,[10] the sale and purchase of the cooperative apartment is governed by the Uniform Commercial Code and the business judgment rule.[11]

Interesting results have been reached by reason of the hybrid characteristics of cooperative ownership. Thus, in *Frisch v. Bellmarc Management, Inc.*,[12] while the Appellate Division acknowledged that the "warranty of habit-

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ability," embodied in Real Property Law § 235-b, applied to cooperative corporations, it did not apply to condominiums – because condominium ownership is a form of fee ownership of property, and not a leasehold interest involving a landlord-tenant relationship.[13]

Conversely, while it is well-settled that when a purchaser defaults on a contract of sale for real property, the seller is entitled to retain by way of forfeiture the down payment as liquidated damages without proof of actual damages,[14] the courts have held that this rule does not apply to co-ops.[15] To this end, in *Silverman v. Alcoa Plaza Assocs.*, the Appellate Division, First Department held that, for purposes of the sale of a cooperative apartment, the shares of stock are to be considered "goods" within Article 2 of the Uniform Commercial Code and not real property. Accordingly, the deposit made under the contract to purchase a co-op should be disposed of in accordance with § 2-718 of Article 2, which permits an inquiry into the "reasonableness" of the liquidated damages provision.[16]

Because the courts generally perceive the forfeiture of a leasehold as an extremely harsh remedy, establishing that a tenant was permitting or causing a "nuisance" was difficult.

While these aspects of cooperative ownership appear to be well-settled, the courts have had difficulty in determining which laws should predominate in other areas, including, most recently, the termination of a tenant-shareholder's leasehold.

Evicting a Tenant-Shareholder Prior to *Pullman*

The procedures for the removal of tenant-shareholders of cooperative apartments are generally governed by Article 7 of the RPAPL. Specifically, with regard to removing a tenant-shareholder based on "objectionable conduct," RPAPL § 711(1) provides, in pertinent part, as follows:

> [A tenant] shall not be removed from possession except in a special proceeding. A special proceeding may be maintained under this article upon the following grounds:
>
> The tenant continues in possession of any portion of the premises after the expiration of his term without the permission of the landlord. . . . A proceeding seeking to recover possession of real property by reason of the termination of the term fixed in the lease pursuant to a provision contained therein giving the landlord the right to terminate the time fixed for occupancy under such agreement if he deems the tenant objectionable, shall not be maintainable unless the landlord shall *by competent evidence establish to the satisfaction of the court* that the tenant is objectionable.[17]

Before the *Pullman* case, the courts interpreted this statute to require judicial scrutiny of the conduct alleged to be objectionable.[18] Accordingly, after service of any predicate notices required under the proprietary lease, the co-op board was required to commence either a "nuisance" holdover proceeding in the Civil Court or an ejectment action in the Supreme Court for removal of the tenant-shareholder deemed objectionable. After commencement of the case, it was the cooperative board's burden to establish, by "competent evidence" before the court, that the conduct of the tenant-shareholder was, in fact, objectionable.[19] The court, in its sole discretion, would evaluate the facts presented at trial and determine whether the conduct complained of was of a sufficient nature to require termination of the leasehold. Normally, when the court found sufficient evidence to uphold the board's decision to terminate the leasehold, the co-op would then have the right to conduct any re-sale of the tenant-shareholder's cooperative shares.[20]

Because the courts generally perceive the forfeiture of a leasehold as an extremely harsh remedy,[21] establishing that a tenant was permitting or causing a "nuisance" was difficult. A board seeking to terminate a tenant-shareholder's lease based upon objectionable conduct needed to be prepared for an arduous court battle testing the grounds for, and the procedures used in, terminating the lease.[22] Initially, the courts would evaluate whether the tenant's use of the property was "unreasonable or unlawful to the annoyance, inconvenience, discomfort or damage of others."[23] In addition, the conduct would need to be continuous or persistent in nature[24] and threaten the health, safety or comfort of neighboring tenants or other building occupants.[25] A single isolated incident was not enough to establish a "nuisance" or "objectionable conduct." Under such a rigid judicial analysis, most cases brought by the co-op were unsuccessful and did not result in termination.[26]

Evidencing the difficulties in establishing a "nuisance" or "objectionable" tenant is the decision this year in *Domen Holding Co. v. Aranovich*.[27] In *Domen,* the Appellate Division, First Department held, in a 3–2 decision, that three documented incidents where a tenant had been involved in conflicts at the building, necessitating police intervention and/or resulting in the filing of criminal complaints, did not constitute a nuisance.[28]

In *Domen,* a rent-stabilized tenant's housemate was involved in a series of incidents from 1995 through 2000.

Notably, in 2000, the housemate allegedly directed profanity, racial slurs and threats of violence toward the doorman of the building. In 1995 and 1997 similar incidents occurred between the housemate and a sight-impaired neighbor and the housemate and the superintendent, in which the police were summoned and criminal complaints were filed. Despite this extreme conduct, and over an ardent dissent, the majority ruled that, as a matter of law, these three separate incidents neither "quantitatively" nor "qualitatively" satisfied the exacting standard for nuisance.[29]

While *Domen* demonstrates the difficulties in establishing a "nuisance," and how, in most cases, it is subject to the trial (or appellate) judge's subjective perception of the gravity of the tenant's actions, had the court deferred to the landlord's judgment of what constituted "objectionable" conduct, a contrary result would certainly have ensued.[30]

The Emergence of the "Business Judgment Rule" and *Levandusky*

While the courts originally held that termination of the proprietary lease based on "objectionable conduct" was subject to judicial scrutiny under RPAPL § 711,[31] the authority of the board to manage other areas of the corporation and adopt rules to carry out its general purposes under the corporation's articles of incorporation, bylaws and the proprietary lease remained, for the most part, insulated from judicial review under the business judgment rule.

The standard of review of such board decisions was articulated by the Court of Appeals in the seminal case of *Levandusky v. One Fifth Avenue Apartment Corp*.[32] In that case, the tenant-shareholder sought to make renovations to his cooperative apartment. Although the board approved Levandusky's plans, it did not approve any plans to remove or relocate the steam riser in the kitchen area. Levandusky, nonetheless, hired a contractor, who "severed" and "jogged" the kitchen steam riser. When the board learned of this, it issued a "stop work" order, pursuant to the "Renovation Guidelines." Levandusky then commenced an article 78 proceeding, seeking to have the stop work order set aside.

The Supreme Court dismissed Levandusky's petition and ordered him to restore the riser to its original position, but the Appellate Division modified the judgment, determined that there was no evidence that the "jogged" pipe had caused any damage, and held that the board's decision to stop the renovations was arbitrary and capricious and should be annulled. The Court of Appeals, in turn, modified the order of the Appellate Division, upheld the board's decision and determined that the business judgment rule prohibited judicial inquiry into the actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of the corporate purposes.[33]

Under *Levandusky,* judicial inquiry into the board's decision was limited to (1) whether the board's action was properly authorized under its bylaws and properly passed rules and regulations, (2) whether the action was taken in good faith, and (3) whether the action furthered a legitimate corporate interest.[34] Further, "so long as the corporation's directors have not breached their fiduciary obligation to the corporation, 'the exercise of [their powers] for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient.'"[35]

In stark contrast to the case law governing a co-op's decision to terminate a tenant-shareholder based on "objectionable conduct" (which, until recently, placed the burden on the co-op to establish "objectionable conduct" before the court), the *Levandusky* standard of review placed the burden of proof on the tenant-shareholder. To overturn a decision of the board, it became incumbent upon the tenant-shareholder to demonstrate that the board's action (1) was beyond the authority of the board;[36] (2) was done in bad faith;[37] (3) was discriminatory[38] or deliberately singled out individuals for harmful treatment;[39] (4) had no legitimate relationship to the welfare of the cooperative;[40] or (5) was taken without notice or consideration of the relevant facts.[41] Absent the presence of any of these factors, a review of the board's decision by the judiciary was prohibited.[42]

Litigation Post-*Levandusky*: Applying the Business Judgment Rule

After the *Levandusky* decision, the courts extended the application of the business judgment rule to a wide range of board actions. Generally, these related to the co-op board's self governance, tenant-shareholders' use and transfer of their apartments, and financial impositions for operating the co-op and related *internal* matters. Specifically, the business judgment rule has shielded cooperative corporations from judicial scrutiny of their policies regarding purchasing and selling of shares,[43] subletting,[44] assignment of parking spaces,[45] imposition of sublet fees[46] and hiring of contractors.[47] Similarly, the courts have been deferential to board decisions relating to esthetics,[48] the installation of appliances[49] and the pavement of terrace floors,[50] within the cooperative premises.

Despite this pervasive application of the business judgment rule to cooperative board actions, the courts have cautioned that a board's powers are not absolute under *Levandusky*. Although the business judgment rule has substantially limited the ability of a tenant-share-

holder to contest certain cooperative decisions, it has not permitted the board to act indiscriminately.

In *Seif v. 72 Horatio Street Owners Corp.*,[51] for example, a co-op board attempted to enact a transfer fee (flip tax) after the death of a decedent shareholder, but before the sale of her apartment by the executor. Although the flip tax applied to the estate of any shareholder who subsequently died, the co-op admitted that at the time of its enactment, the shareholders specifically had the apartment of the deceased shareholder in mind. While ordinarily the imposition of such a transfer fee is permitted, the Supreme Court, New York County, held that, because insufficient notice of the shareholder meeting was given to the executor, the imposition of the flip tax was invalid. Furthermore, even if proper notice had been provided, the court held that the flip tax would still be invalid as discriminatory, because the shareholders had "admittedly aimed the enactment of the flip tax at a specific estate, and enacted it after [the deceased shareholder] died." Thus, passing a rule or regulation aimed at a *specific* shareholder would be discriminatory and thus invalid under Business Corporation Law § 501(c) (BCL).[52]

In addition to situations where a board engages in discriminatory practices, the business judgment rule will not insulate the board's decisions from judicial review when a tenant-shareholder is able to establish that the board is acting outside its corporate authority, in bad faith and/or that the action has no legitimate relationship to the welfare of the cooperative.[53]

Although the courts have applied the business judgment rule to countless cases since *Levandusky*, they have remained reluctant to apply the standard to two significant circumstances: cases involving contractual provi-

Evolution of Law on Cooperatives

The first cooperative apartments in the United States were established in 19th-century New York City. They were designed to provide people in high income brackets with the advantages and economies of individual home ownership without all the responsibilities.[1]

To this end, they offered tenant-shareholders freedom from furnacemen, watchmen and other servants and maintenance workers; and the ability to go away and return to the apartment ready for occupation, redecorate at will, move more easily, and save money on household expenses.[2]

The relationship between the tenant-shareholder and the cooperative corporation is determined by the certificate of incorporation, the corporation's bylaws and the proprietary lease under which a particular apartment is occupied.[3] The tenant-shareholder does not own real estate, per se, but merely shares of stock in the cooperative corporation. These shares of stock entitle the tenant-shareholder to occupy the space in the cooperative premises to which his or her shares are allocated under a proprietary lease.[4]

The leasehold and shareholding are inseparable and cannot really be viewed or valued in isolation from each other.[5] Cooperative corporations "are a special form of ownership of real property. . . . An interest in a cooperative corporation is represented by shares of stock and a proprietary lease entitling the shareholder to occupy a particular apartment in the building."[6]

This unique dichotomy of personalty and realty has created numerous legal complexities in determining which law should govern actions involving cooperative apartments.[7] Should the relationship be regulated by the laws governing business corporations, personalty or real property generally? Since the inception of cooperative litigation, this question has plagued the courts.

1. Richard Siegler & Herbert J. Levy, *Brief History of Cooperative Housing*, *available at* http://www.coophousing.org/HistoryofCo-ops.pdf.
2. *Id.*
3. *Fe Bland v. Two Trees Mgmt. Co.*, 66 N.Y.2d 556, 498 N.Y.S.2d 336 (1985).
4. *Beck v. Eins*, 2003 N.Y. App. Div. LEXIS 6110; *Ostrovsky v. Cartier Apts. Owners Corp.*, 247 A.D.2d 598, 669 N.Y.S.2d 352 (2d Dep't 1998); *Frisch v. Bellmarc Mgmt., Inc.*, 190 A.D.2d 383, 597 N.Y.S.2d 962 (1st Dep't 1993); *Chamberlain v. Modular Pubs., Inc.*, 99 A.D.2d 433, 470 N.Y.S.2d 399 (1st Dep't), *appeal dismissed*, 62 N.Y.2d 601, 476 N.Y.S.2d 1025 (1984).
5. 19A N.Y. Jur. 2d, *Condominiums and Cooperative Apartments* § 140 (citing *Chiang v. Chang*, 137 A.D.2d 371, 529 N.Y.S.2d 294 (1st Dep't 1988); *Sansol Indus., Inc. v. 345 East 56th St. Owners, Inc.*, 159 Misc. 2d 822, 606 N.Y.S.2d 856 (Sup. Ct., N.Y. Co. 1993)).
6. *Beck*, 2003 N.Y. App. Div. LEXIS 6110.
7. 19A N.Y. Jur. 2d, *Condominiums and Cooperative Apartments* § 140 (citing *Chiang*, 137 A.D.2d 371).

sions that required a board to act "reasonably" and cases involving the termination of a tenant-shareholder's proprietary lease based upon "objectionable" conduct.

"Reasonableness" Provisions Under the Proprietary Lease

In *Ludwig v. 25 Plaza*,[54] where the co-op board summarily denied the tenant-shareholders' request to sublet, the tenant-shareholder brought an action for a judgment declaring that the co-op board unreasonably withheld its consent. The proprietary lease, in essence, provided that any subletting of the apartment must be authorized by the board. It further provided that "[w]ith respect to a subletting . . . for less than 12 months, the Board . . . shall not unreasonably withhold their consent." The Supreme Court determined that, because the tenant-shareholder's proposed sublet was for less than 12 months, the board's action in summarily denying the sublet violated the express terms of the proprietary lease. Accordingly, the court held that the "business judgment rule" did not apply and the board's actions were unreasonable.[55]

By this decision, the court carved out a significant exception to the business judgment rule. While ordinarily, review of a board's decision was prohibited under *Levandusky* (absent bad faith, etc.), *Ludwig* now held that the "reasonableness" of a board's decision *was* reviewable where the parties' contract – the proprietary lease or bylaws – so provided. Accordingly, when a tenant-shareholder's proprietary lease required the board to act "reasonably," the burden of proof shifted back to the board to justify its conduct to the court.

Following *Ludwig*, the Appellate Term, First Department, was confronted with a similar case. In *Cannon Point North, Inc. v. Abeles*,[56] the court had to determine the enforceability of a cooperative house rule prohibiting the installation of washing machines and dryers in individual cooperators' apartments. The proprietary lease contained language requiring that all rules made by the cooperative board be "reasonable." In citing *Levandusky,* the court determined that the tenant-shareholder failed to establish either bad faith on the part of the cooperative or that its action had "no legitimate relationship to the welfare of the cooperative." To the contrary, it determined that the house rule was promulgated because of concerns that the installation of washer/dryers would have an adverse impact on the building's plumbing and electrical systems. Cognizant that their decision diverged from *Ludwig,* the concurrence suggested that the issue of the "applicability or non applicability of the business judgment rule in the face of a specific contractual provision requiring that a co-op board act 'reasonably,'" was ripe for further appellate review.

While the Court of Appeals has yet to address whether a co-op board's "reasonableness" is subject to judicial review in the context of an express contractual provision requiring "reasonableness" in co-op board actions, the applicability or nonapplicability of the business judgment rule to a board's decision to terminate a proprietary lease was to be revisited.

The *Pullman* Decision: Reevaluating "Objectionable" Conduct

While the Appellate Division in *Ludwig* carved out an exception to the *Levandusky* standard for "reasonableness" clauses, it was yet to be determined whether such an exception would also be made for a board's decision to terminate a tenant-shareholder's proprietary lease based on "objectionable" conduct. Thus, was a tenant's "objectionable" conduct to be judged under the "business judgment rule" or by "competent evidence establish[ed] to the satisfaction of the Court"?

And then along came *40 West 67th Street v. Pullman*.

In October 1998, defendant David Pullman bought a co-op apartment at 40 West 67th Street. Pursuant to Pullman's proprietary lease, the co-op was entitled to terminate a tenancy on 30 days' notice if a lessee was found to be undesirable because of "objectionable" conduct. Such action required a vote of at least two-thirds of the shareholders of the corporation at a duly called meeting.

Soon after Pullman moved into his apartment, he allegedly began to engage in a course of conduct that the cooperative board did, in fact, deem objectionable. Pullman made numerous requests to the co-op to change the building's facilities or services, to replace the mailboxes, to install video camera security, and to hire 24-hour door attendants. Pullman also repeatedly complained and threatened to sue the co-op's managing agent and the co-op board president for failure to abate a claimed noise problem emanating from the apartment above his.[57] While the co-op board investigated his complaints and found them to be unsubstantiated, tensions increased and Pullman instituted four lawsuits against his upstairs neighbors and the co-op and its management relating to the alleged noise problem.

On June 27, 2000, the shareholders held a special meeting pursuant to the corporation's bylaws. Significantly, Pullman was notified of this meeting, but did not attend. After discussion of Pullman's conduct, a supermajority, the holders of 75% of the outstanding shares in the co-op, voted in favor of a resolution detailing how Pullman's continued tenancy was objectionable, and directing the board to terminate Pullman's proprietary lease effective August 31, 2000. While the board delivered the notice to Pullman, he allegedly ignored it and continued to reside in the apartment.

Accordingly, in October 2000, the board commenced an action in the Supreme Court, New York County, seek-

ing, *inter alia*, ejectment of Pullman, based upon his purported "objectionable" conduct. Shortly thereafter, Pullman moved to dismiss the complaint, for failure to state a claim, and the board moved for summary judgment.

Citing RPAPL § 711(1), the Supreme Court (Shafer, J.) held that it was the province of the court, not the co-op board, to determine whether a tenancy should be terminated based upon "objectionable" conduct. In short, the court held that the co-op must "by competent evidence establish to the satisfaction of the court, that the tenant is objectionable."[58] Thus, the court dismissed the board's first cause of action seeking ejectment, denied dismissal of the remainder of the complaint, found numerous disputed factual issues regarding the termination of Pullman's tenancy and, accordingly, denied the board summary judgment.

On appeal, a divided Appellate Division modified the Supreme Court's order and granted the board summary judgment on, *inter alia*, its causes of action for ejectment and the cancellation of defendant's stock. Citing *Levandusky*, the majority held that the business judgment rule prohibited judicial review of board actions "taken in good faith in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes."[59]

Furthermore, the court pointed out that Pullman, like all the other shareholders, agreed to this harsh sanction, and "agreed to submit to the decision-making authority of the cooperative board" when he purchased shares in a co-op.[60]

In a comprehensive discussion, two justices dissented. Specifically, David B. Saxe and Richard W. Wallach opined that judicial scrutiny of a board's decision to terminate a tenant-shareholder's proprietary lease was mandated based upon both policy and by express language of the statute.

Initially, speaking in terms of equity, the dissent argued that extending the *Levandusky* principle to a board's decision to evict a tenant-shareholder from his home would be an overly harsh application of the business judgment rule. While *Levandusky* permitted a board to regulate business decisions regarding *management of the building and enactment and enforcement of house rules* without judicial interference, those decisions were qualitatively different from a decision to evict a tenant-shareholder from his home. In this respect, the dissent stated:

> While it is eminently reasonable to impose *Levandusky's* severely limited form of judicial review upon co-op shareholders' challenges *to business decisions* by their elected Boards of Directors, this limited type of review is simply too narrow a prism to protect tenants against the loss of their homes. While the ordinary *management of decisions of a co-op board* may result in some sort of negative impact upon an individual tenancy, they cannot compare to the loss of a person's home.

In addition to the equitable grounds, the dissent argued that RPAPL § 711(1) mandated judicial review of the tenant-shareholder's alleged "objectionable" conduct. Accordingly, absent a "clear, unequivocal, and deliberate acknowledgment" that the tenant-shareholder was waiving the protections of RPAPL § 711(1), the business judgment rule would have to yield to this statute.[61] Thus, the majority and dissent differed on the application of RPAPL § 711(1) and whether a tenant-shareholder may waive the protections of said statute by purchasing shares in a cooperate corporation.

Despite this detailed dissent, in an opinion by Judge Albert M. Rosenblatt the Court of Appeals unanimously affirmed the Appellate Division, First Department. The Court concluded that there was no conflict between applying the business judgment rule under *Levendusky* and RPAPL § 711(1). In this regard, the Court reasoned:

> In the realm of cooperative governance and in the lease provision before us, the cooperative's determination as to the tenant's objectionable behavior stands as competent evidence necessary to sustain the cooperative's determination. If that were not so, the contract provision for termination of the lease – to which defendant agreed – would be meaningless. . . . We reject the cooperative's argument that RPAPL 711(1) is irrelevant to these proceedings, but conclude that the business judgment rule may be applied consistently with the statute.[62]

In essence, the Court reconciled RPAPL § 711(1) with Pullman's proprietary lease by holding that the vote of the supermajority of the shareholders of the co-op and the board's strict adherence to its mandate under *Levandusky* provided the functional equivalent of the "competent evidence" that would "establish to the satisfaction of the court that the tenant is objectionable."[63]

Accordingly, absent a showing by the tenant-shareholder that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith, judicial scrutiny of the board's decision to terminate the tenant based on objectionable conduct was now prohibited. In essence, the Court would merely "rubber stamp" a co-op board's determination to terminate a tenancy so long as it complied with the business judgment rule and was properly passed pursuant to its bylaws.

The Future of *Pullman*

Since the Court of Appeals has affirmed the application of the business judgment rule to the termination of a tenant-shareholder's proprietary lease, numerous questions have arisen regarding the future of eviction proceedings as well as the stability of cooperative ownership generally. Simply put, does *Pullman* improve co-

operative living or simply make shareholders' property more vulnerable to forfeiture?

Potential Pitfalls Initially, many tenant advocates may suggest that *Pullman* will provide a pretext for a cooperative board to summarily target innocent shareholders deemed "problematic" or to remove shareholders with legitimate "warranty of habitability" issues. Although the potential for abuse exists, in reality the decision will probably not create such a "chilling" effect.

Notably, while the shift in the burden of proof may make it more difficult for a tenant-shareholder to question the board's ultimate decision, the board's power to terminate the proprietary lease is not unbridled under *Pullman*. Should the tenant be able to establish legitimate "warranty of habitability" issues and that the co-op's actions are merely retaliatory or that the tenant is being unfairly targeted, the business judgment rule will not shield the co-op's decision from judicial inquiry.

In fact, apparently cognizant of the potential for co-op abuse, Judge Rosenblatt further cautioned that the "courts must exercise heightened vigilance in examining whether the board's action meets the *Levandusky* test."[64] Although the decision did not articulate the exact meaning of "heightened vigilance," it nevertheless erected a yellow flag for courts and co-op boards alike to take heed.

In addition to this "heightened vigilance," other judicial limitations to the *Pullman* holding may have already emerged from the courts.

In *Woodrow Court, Inc. v. Levine*,[65] the Civil Court, New York County (Schachner, J.), determined that *Pullman* was not applicable in a summary holdover proceeding when a decision to terminate a tenant-shareholder's proprietary lease (based on objectionable conduct) was based solely upon a vote of the co-op's seven-member board of directors. In distinguishing *Pullman*, the court stated:

> Certainly, this court is bound to follow the holding in *Pullman*. However, the facts in this case are distinguishable from *Pullman*. Therefore, *Pullman* is not applicable to this holdover proceeding in the Housing Court. In the case at bar there was no shareholder meeting or notice to the shareholders regarding respondents' tenancy. Unlike *Pullman* there was never a shareholder vote on respondents' tenancy. Respondents never had an opportunity to defend themselves at a meeting of the Board of Directors and never had notice that the Board was discussing or planning to act on the issue of their alleged objectionable conduct. . . . In *Pullman* the lease termination provision at issue required both a board resolution plus a 2/3 vote of the shareholders. The termination provision of the proprietary lease in this matter has no such requirement. The petition itself indicates that the Coop is proceeding under the "statute." Accordingly, as Pullman is distinguishable from the specific facts of this case, it is not applicable to this proceeding.

Shortly after this Civil Court decision, the Supreme Court dealt with a similar situation. In *Feld v. 710 Park Avenue Corp.* (Kapnick, J.),[66] a tenant-shareholder gave notice to the co-op board of his intention to run for the position of director. In an attempt to preclude his election to the board, the board promulgated certain amendments to the bylaws. Specifically, those amendments provided (1) that any business upon which shareholders are to take action, including nominations for election as a director, must be submitted in writing, with certain required information, to the co-op's managing agent not less than 15 days before the shareholders' meeting; (2) that no person may be an officer or director of the co-op unless he or she has been a shareholder for at least one year and holds a baccalaureate degree from a recognized college or university; and (3) that no person who has commenced an action against the co-op and who has neither prevailed in that action nor settled it, may be either a director or an officer of the co-op.

The tenant-shareholder did not have a college degree and had, in fact, previously commenced an action against the board (which was withdrawn). He moved for a preliminary injunction precluding the co-op and its board from implementing the bylaws.

While the co-op board argued that a review of its decision was precluded under *Pullman*, the Supreme Court stressed that, while the decision to evict Mr. Pullman had been made by a vote of 75% of the shareholders, the decision to amend the bylaws withdrew from the shareholders their right to vote for whom they wished to sit on the board.[67] In addition, the court found that the amendments to the bylaws were targeted at a specific tenant to prevent him from sitting on the board and therefore were void.

Accordingly, although the appellate courts have not yet examined these decisions, co-ops are further cautioned that the *Pullman* standard may be limited to instances (1) where the proprietary lease unambiguously provides for termination of a tenant's lease based on "objectionable conduct"; (2) where the decision to terminate is voted on by a supermajority (or other specified vote) of the shareholders, not just the board; and (3) where the "objectionable" tenant receives appropriate notice of any shareholder meeting to vote on the matter.[68]

Recognizing these possible limitations, co-op boards seeking to remove a tenant-shareholder deemed "objectionable" would be well-advised to (1) carefully follow the procedures contained within the cooperative corporation's bylaws, the proprietary leases and house rules; (2) properly promulgate and record any co-op resolution dealing with cooperative governance, maintenance

or a tenant-shareholder's behavior; (3) keep detailed records evidencing the tenant's alleged "objectionable" conduct; and (4) permit a shareholder vote on the issue. Similarly, tenant-shareholders, fearful of unrestrained co-op boards, are advised to maintain documents and/or evidence and create a paper trail that could establish a board's "bad faith," "discrimination," and/or "self-dealing" should an eviction scenario arise.

The records that the board or tenant-shareholder can use may include pictures, recordings of conversations, log books, police reports, letters from other shareholders or other documentation between the parties, and minutes. Minutes provide a permanent record of deliberative action at both board and shareholder meetings, can be extremely useful in litigation and can foreclose challenges to the propriety of corporate acts, or, conversely, demonstrate impropriety.[69]

Tenant-shareholders have been given more latitude in determining who their neighbors are or, more appropriately, are not.

Finally, board members and tenant-shareholders should each carefully document any verbal opinions or conduct expressed by the other that could be useful in litigation. All too often, board members or tenant-shareholders may make damaging remarks in an inappropriate place (elevators, hallways, laundry room, etc.) or at an inappropriate time (while walking their dog or taking out the garbage). Such casual comments made by either co-op board members or tenant-shareholders can provide valuable evidence of a board member's bad-faith or a tenant-shareholder's "objectionable" conduct.

Potential Benefits While tenant advocates may argue that *Pullman* eliminates valuable protections against lease forfeiture and thus diminishes the overall value of their "estate," a contrary position can also be argued.

Often, the litigation costs involved with lengthy court battles to evict objectionable tenant-shareholders are borne by the other shareholders through an increase in maintenance fees.[70] Accordingly, prohibiting judicial review of the tenant-shareholder's conduct in eviction proceedings may work to curb the litigation and, thus, curtail these expenses. Such a reduction in expenses would arguably decrease tenant-shareholder's maintenance fees and consequently increase the overall value of the cooperative apartment.

In addition to reducing cooperative expenses, the *Pullman* decision may also benefit the overall quality of living of the other tenant-shareholders. In this regard, before *Pullman*, the courts were the sole arbiters in determining whether a tenant-shareholder should be evicted. Now, tenant-shareholders have been given more latitude in determining who their neighbors are or, more appropriately, are not. Such decision-making authority affords tenant-shareholders greater control over their surroundings and may also, arguably, increase the value of their estates.

Conclusion

As much as the Court of Appeals has attempted to clarify the standard governing the review of co-op board decisions, additional questions have emerged regarding future co-op litigation. For instance, how will the courts apply *Pullman* in light of a rent-regulated tenancy of a cooperative apartment? If the rent-regulated tenant is causing the "objectionable" conduct (which would arguably remain subject to judicial review), will a board be permitted to evict the owner of the apartment, under the business-judgment rule, for failing to remove the tenant?

Another interesting situation may present itself should a co-op board deem a tenant-shareholder's nonpayment of maintenance fees "objectionable" conduct.

Normally, when a tenant defaults in the payment of rent and/or maintenance, after a demand, the landlord may begin a nonpayment case. The respondent embroiled in such a dispute may ultimately preserve its tenancy by remitting the money due, even after judgment.[71] The courts have recognized, however, that, under certain circumstances, when the "chronic" withholding of these funds has been characterized as a "breach of substantial obligation" or a "nuisance," a landlord's resort to a holdover proceeding may be justified.[72] The significance of this tactical approach is that it permits the lessor to circumvent the curative mechanisms afforded the tenant by the parties' lease and by such the pre- and post-judgment procedural requirements applicable to a nonpayment dispute.[73]

Although the resort to such litigation ordinarily has little chance of success,[74] should judicial deference be given to a co-op board's determination of what constitutes "chronic" nonpayment (and the resulting "objectionable" conduct), an anomalous result may ensue.

Similarly, while the exercise of a conditional limitation based on the nonpayment of rent has traditionally been found violative of public policy in the residential context,[75] if a co-op board decides that a conditional limitation provision would further its legitimate corporate purpose of minimizing litigation expenses, will such a provision now be upheld under the business judgment rule?

Some of these examples may seem extreme (and the extension of the business judgment rule to co-op board decisions is potentially limitless), but the full advantages and/or disadvantages of the *Pullman* decision are difficult to weigh until these issues are clarified by the courts. Clearly, as a result of *Pullman*, co-ops are now likely to amend their bylaws and proprietary leases to include provisions regarding the right to terminate the objectionable tenant. Care must be given that these amendments are properly voted upon after proper notice to all shareholders. The courts will be bound to closely scrutinize such amendments and voting procedures, under the "heightened vigilance" standard set forth by the *Pullman* majority. Suffice it to be said, for practitioners and cooperative members alike, the future of co-op litigation has dramatically changed.

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1. 296 A.D.2d 120, 742 N.Y.S.2d 264 (1st Dep't 2002), *aff'd*, 2003 WL 21057407, 2003 N.Y. LEXIS 1275 (May 13, 2003).
2. 38 Hun. 545 (1st Dep't 1886).
3. *Id.*
4. *See, e.g., Brodsky v. 136 East 64th St. Corp.,* N.Y.L.J., Nov. 21, 1990, p. 22, col. 1 (Sup. Ct., N.Y. Co.).
5. *Savasta v. Duffy*, N.Y.L.J. Mar. 20, 1998, p. 26, col. 1 (Sup. Ct., N.Y. Co.) (citing *In re Carmer,* 71 N.Y.2d 781, 530 N.Y.S.2d 88 (1988), *State Tax Comm'n v. Shor,* 43 N.Y.2d 151, 371 N.E.2d 523 (1977), *United Housing Found. v. Forman,* 421 U.S. 837, 851 (1975)).
6. *See, e.g., Raderman v. Talia Mgmt. Co.,* N.Y.L.J., Nov. 27, 1996, p. 28, col. 6 (Sup. Ct., N.Y. Co.).
7. *Saada v. Master Apts. Inc.,* N.Y.L.J., June 19, 1991, p. 21, col. 4 (Sup. Ct., N.Y. Co.).
8. *Wall St. Transcript Corp. v. Finch Apt. Corp.,* N.Y.L.J., Aug. 1, 1990, p. 18, col. 4 (Civ. Ct., N.Y. Co.).
9. *Id.*
10. 190 A.D.2d 383, 597 N.Y.S.2d 962 (1st Dep't 1993).
11. *Meason v. Greenweich and Perry St. Housing Corp.,* 227 A.D.2d 312, 643 N.Y.S.2d 56 (1st Dep't 1996) (referring to N.Y. UCC §§ 2-101 *et seq.*).
12. *Frisch*, 190 A.D.2d 383.
13. *Id.*; *see also Quasha v. Third Colony Corp.,* N.Y.L.J., Oct. 10, 1990, p. 22, col. 2 (Sup. Ct., N.Y. Co.) (holding warranty of habitability applicable to co-ops).
14. *Lawrence v. Miller,* 86 N.Y. 131 (1881); *see Maxton Builders, Inc. v. Lo Galbo,* 68 N.Y.2d 373, 509 N.Y.S.2d 507 (1986).
15. *Silverman v. Alcoa Plaza Assocs.,* 37 A.D.2d 166, 323 N.Y.S.2d 39 (1st Dep't 1971).
16. *Id. See also* N.Y. Uniform Commercial Code § 2-718:(1), which provides that the damages to which either party is entitled upon breach may be specified or liquidated in the agreement. To be binding and valid, however, the amount specified must be reasonable. Whether an amount is reasonable is determined in the light of: (1) the anticipated or actual harm caused by the breach; (2) the difficulty of proof of the damages sustained; and (3) the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. *See Bates Advertising USA, Inc. v. 498 Seventh, LLC*, 291 A.D.2d 179, 739 N.Y.S.2d 71 (1st Dep't 2002).
17. N.Y. Real Property Actions & Proceedings Law § 711 (RPAPL) was derived from former Civil Practice Act § 1410(6), enacted in 1920 (L 1920, ch. 133). Before that, a landlord could evict a tenant based on the landlord's sole and unfettered determination that the tenant was objectionable. *See, e.g., Manhattan Life Ins. Co. v. Gosford,* 3 Misc. 509 (1893); *see also Waitt Constr. Co. v. Loraine,* 109 Misc. 527 (1919).
18. *Adams Hotel Owners, Inc. v. George Wolf,* 64 Misc. 2d 614, 316 N.Y.S.2d 696 (App. Term, 1st Dep't 1969); *Brisbane House, Inc. v. Sims*, 122 Misc. 2d 46, 469 N.Y.S.2d 561 (Civ. Ct., N.Y. Co. 1983); *Sherwood Village Coop. A, Inc. v. Slovik,* 134 Misc. 2d 922, 513 N.Y.S.2d 577 (Civ. Ct., N.Y. Co. 1986); *Elliman & Co., Inc. v. Karlsen*, 59 Misc. 2d 243, 298 N.Y.S.2d 594 (Civ. Ct., N.Y. Co. 1969).
19. *See* RPAPL § 711(1).
20. Under the standard proprietary lease, once the lease has been terminated, it is the co-op that conducts the re-sale. Generally, the shareholder would be entitled to the proceeds after deduction of all co-op expenses, including legal fees, outstanding maintenance fees, etc. *See* Peter S. Herman, *No Judicial Review for Co-op's Eviction of 'Objectionable' Tenant*, N.Y.L.J., June 7, 2002, p. 4, col. 1.
21. *Park West Village v. Lewis,* 62 N.Y.2d 431, 477 N.Y.S.2d 124 (1984); *Harar Realty Corp. v. Michlin & Hill, Inc.,* 86 A.D.2d 182, 449 N.Y.S.2d 213 (1st Dep't 1982).
22. 5 N.Y. Practice Guide: Real Estate, Condominiums, Cooperatives and Homeowner Associations § 39.06B(3)(d)(ii).
23. *Elliman & Co., Inc. v. Karlsen,* 59 Misc. 2d 243, 298 N.Y.S.2d 594 (Civ. Ct., N.Y. Co. 1969) (citing *Twin Elms Mgt. Corp. v. Banks,* 181 Misc. 96, 46 N.Y.S.2d 952 (Mun. Ct., Queens Co. 1943); *Hixson v. Leonard,* 186 Misc. 379, 58 N.Y.S.2d 436 (Mun. Ct., Syracuse 1945); *Pool v. Coleman,* 8 Daly 113 (N.Y.C.P. 1878)).
24. *Frank v. Park Summit Realty Corp.,* 175 A.D.2d 33, 573 N.Y.S.2d 655 (1st Dep't 1991), *aff'd as modified*, 79 N.Y.2d 789, 579 N.Y.S.2d 649 (1991) (key to nuisance is "pattern of continuity or recurrence" of the objectionable conduct or condition); *see also Lexington Ave. Props. v. Charrier,* N.Y.L.J., Jan. 29, 1986, p. 11, col. 5 (App. Term, 1st Dep't); *RNR Realty Corp. v. Smith,* N.Y.L.J., Aug. 6, 1998, p. 23, col. 2 (Civ. Ct., Kings Co.) ("A nuisance requires a continuing course of conduct. A single occurrence does not constitute a nuisance unless it is so egregious that it causes serious injury or damage to the property, the landlord or other persons. Isolated instances of objectionable conduct will be insufficient. . . .").
25. *See Uses Realty Corp. v. Johnson,* N.Y.L.J., Dec. 3, 1997, p. 29, col. 1 (App. Term, 1st Dep't); *1021-27 Ave. St. John Housing Dev. Fund Corp. v. Hernandez,* 154 Misc. 2d 141, 584 N.Y.S.2d 990 (Civ. Ct., Bronx Co. 1992).
26. *See, e.g., Justice Court Mutual Housing Coop. v. Sandow,* 50 Misc. 2d 541, 270 N.Y.S.2d 829 (Sup. Ct., Queens Co. 1966) (playing piano for 12 hours a day held not a nuisance); *Cheren v. Jackson,* N.Y.L.J., Oct. 18, 1983, p. 6, col. 1 (App. Term, 1st Dep't) (false complaints about radiation machine and other erratic behavior held not a nuisance); *Mosholu Preservation Corp. v. Hernandez,* 13 H.C.R. 164B, n.o.r. (Civ. Ct., Bronx Co. 1985) (lying in corridor in drunken stupor held not a nuisance).
27. 302 A.D.2d 132, 753 N.Y.S.2d 57 (1st Dep't 2003).
28. Generally, while this case did not involve a cooperative corporation, it, nonetheless, is illustrative of the difficulty of establishing a cause of action based upon nuisance.
29. *Domen Holding Co.*, 302 A.D.2d 132.

30. For a detailed and colorful discussion of this case, see Dov Treiman, *Nuisance: Good Walls Make Good Neighbors*, 4 Landlord-Tenant Prac. Rep. 5 (May 2003). *See also* Warren A. Estis & William J. Robbins, *Nuisance Behavior: What Kind of Conduct Warrants Eviction*?, N.Y.L.J., Feb. 5, 2003, p. 5, col. 2.
31. *Oakley v. Longview Owners, Inc.*, 165 Misc. 2d 192, 628 N.Y.S.2d 468 (Sup. Ct., N.Y. Co. 1995); *see also Auerbach v. Bennett*, 47 N.Y.2d 619, 419 N.Y.S.2d 920 (1979); *Van Camp v. Sherman*, 132 A.D.2d 453, 517 N.Y.S.2d 152 (1st Dep't 1987).
32. 75 N.Y.2d 530, 554 N.Y.S.2d 807 (1990).
33. *Id*.
34. *Kirsch v. Holiday Summer Homes, Inc.*, 143 A.D.2d 811, 533 N.Y.S.2d 144 (2d Dep't 1988).
35. *Levandusky*, 75 N.Y.2d 530 (citing *Pollitz v. Wabash R.R. Co.*, 207 N.Y. 113, 124, 100 N.E. 721 (1912)).
36. *Id*.
37. *Smukler v. 12 Lofts Realty, Inc.*, 178 A.D.2d 125, 576 N.Y.S.2d 862 (1st Dep't 1991).
38. *Oakley v. Longview Owners, Inc.*, 165 Misc. 2d 192, 628 N.Y.S.2d 468 (Sup. Ct., N.Y. Co. 1995).
39. *Levandusky v. One Fifth Ave. Apt. Corp.*, 75 N.Y.2d 530; *Smukler*, 178 A.D.2d 125.
40. *Levandusky*, 75 N.Y.2d 530.
41. *Id*.
42. *Id*.
43. *See, e.g., Woo v. Irving Tenants Corp.*, 276 A.D.2d 380, 714 N.Y.S.2d 276 (1st Dep't 2000).
44. *See, e.g., Sporn v. 86–88 Owners Corp.*, N.Y.L.J., May 27, 1992, p. 29, col. 3 (Sup. Ct., Kings Co.).
45. *See, e.g., 2575 Owners Corp. v. Wolpert*, 22 H.C.R. 132A, n.o.r. (Civ. Ct., Bronx Co. 1993).
46. *See, e.g., Bailey v. 800 Grand Concourse Owners, Inc.*, N.Y.L.J., Jan. 25, 1993, p. 28, col. 6 (Sup. Ct., N.Y. Co.).
47. *See, e.g., Kleinman v. Point Seal Restoration Corp.*, 267 A.D.2d 430, 701 N.Y.S.2d 909 (2d Dep't 1999).
48. *2 Sutton Place Tenants Corp. v. Kaniclides*, N.Y.L.J, July 29, 1992, p. 23, col. 4 (Civ. Ct., N.Y. Co.).
49. *See, e.g., Lawrence Park Condominium v. Karabachi*, N.Y.L.J., Mar. 15, 2000, p. 30, col. 6 (Sup. Ct., Rockland Co.).
50. *See, e.g., 29-45 Tenants Corp. v. Rowe*, N.Y.L.J., Jan. 8, 1992, p. 23, col. 4 (Civ. Ct., N.Y. Co.).
51. N.Y.L.J., Feb. 6, 2002, p. 18, col. 5 (Sup. Ct., N.Y. Co.).
52. *See* Business Corporation Law § 501(c).
53. *Schwartz v. Roberts*, 230 A.D.2d 601, 646 N.Y.S.2d 7 (1st Dep't 1996) (where there is a history of bad blood between the tenant and the co-op board and the tenant is refused permission to use the apartment professionally, in spite of the presence of other professional apartments in the building, held there is sufficient indication of bad faith to allow the suit to proceed); *see Louis & Anne Abrons Found., Inc. v. 29 East 64th St. Corp.*, 297 A.D.2d 258, 746 N.Y.S.2d 482 (1st Dep't 2002) (sufficient evidence of bad faith on co-op's imposition of sublet fee); *Emily Towers Owners Corp. v. Carleton Emily Towers*, N.Y.L.J., Nov. 6, 1996, p. 30, col. 3 (Civ. Ct., Queens Co.) (as breach of contract is outside scope of co-op's authority held business judgment rule does not apply); *Milliken v. Hatfield*, N.Y.L.J., July 19, 1993, p. 23, col. 6 (Sup. Ct., N.Y. Co.); *Greenberg v. Bd. of Managers of Parkridge Condos*, 294 A.D.2d 467, 742 N.Y.S.2d 560 (2d Dep't 2002) (the board acted outside its scope of authority in prohibiting occupant from erecting a Succah on the balcony of their unit; *Schultz v. 400 Co-op. Corp.*, N.Y.L.J., Aug. 18, 1999, p. 22, col. 2 (Sup. Ct., N.Y. Co) (held business judgment rule will not insulate the board from apparent disparate treatment of two shareholders with no discernible reason); *Goodman v. 225 E. 74th Apts. Corp.*, N.Y.L.J., Aug. 19, 1997, p. 22, col. 3 (Sup. Ct., N.Y. Co.) (business judgment rule held not to shield directors of co-op from inquiry as to whether they singled out a particular cooperator for disparate treatment); *compare Park Tower Holding Corp. v. Board of Mgrs. 500 Park Tower Condo*, N.Y.L.J., Aug. 5, 1999, p. 26, col. 5 (Sup. Ct., N.Y. Co.) (refusal to permit owner to lease unit to diplomat held not discriminatory).
54. 184 A.D.2d 623, 584 N.Y.S.2d 907 (2d Dep't 1992).
55. *Id.*; *see also Rosenthal v. One Hudson Park, Inc.*, 269 A.D.2d 144, 701 N.Y.S.2d 899 (1st Dep't 2000); *Demasi v. Trousdell Village Owners, Inc.*, N.Y.L.J., Aug. 9, 2000, p. 21, col. 3 (Sup. Ct., N.Y. Co.); *Salmansohn v. Fourth Ave. Owners Corp.*, N.Y.L.J., Sept. 11, 1996, p. 21, col. 4 (Sup. Ct., N.Y. Co.).
56. N.Y.L.J., Dec. 1, 1993, p. 21, col. 3 (App. Term, 1st Dep't).
57. *40 West 67th St. v. Pullman*, 296 A.D.2d 120, 742 N.Y.S.2d 264 (1st Dep't 2002). Interestingly, the apartment above the Pullmans had been owned and occupied for over 20 years by a retired college professor and his wife without incident.
58. *See* RPAPL § 711(1).
59. *40 West 67th St.*, 296 A.D.2d 120 (citing *Auerbach v. Bennett*, 47 N.Y.2d 619, 419 N.Y.S.2d 920 (1979)).
60. *Id*.
61. *Id.*
62. *Id.*
63. *See* RPAPL § 711(1).
64. *40 West 67 St. v. Pullman*, 296 A.D.2d 120, 742 N.Y.S.2d 264 (1st Dep't 2002).
65. N.Y.L.J., Nov. 15, 2002, p. 22, col. 4 (Civ. Ct., N.Y. Co.).
66. 2002 N.Y. slip op. 50594U, 2002 N.Y. Misc. LEXIS 1826 (Sup. Ct., N.Y. Co. 2002).
67. *Id.*
68. *See also Woodrow Court, Inc.*, N.Y.L.J., Nov. 15, 2002, p. 22, col. 4 (Civ. Ct., N.Y. Co.).
69. Richard Siegler & Eva Talel, *The Use of Co-op Minutes*, N.Y.L.J., Jan. 9, 2003, p. 3, col. 1; *see also Sherry Assocs. v. The Sherry-Netherland Inc.*, 708 N.Y.S.2d 105 (1st Dep't 2000).
70. It must be noted that, where the board is successful in terminating the proprietary lease, under certain circumstances, the cooperative may be able to recoup its expenses.
71. *See* Daniel Finkelstein & Lucas A. Ferrara, Landlord and Tenant Practice in New York, § 14:6 (2002) (citing RPAPL § 271(1)).
72. *Id*. at § 13:86.
73. *Id.*
74. *Sharp v. Norwood*, 223 A.D.2d 6, 643 N.Y.S.2d 39 (1st Dep't 1996), *aff'd*, 89 N.Y.2d 1068, 659 N.Y.S.2d 834 (1997); *25th Realty Assocs. v. Griggs*, 150 A.D.2d 155, 540 N.Y.S.2d 434 (1st Dep't 1989).
75. *61 East 72nd St. Corp. v. Zimberg*, 161 A.D.2d 542, 556 N.Y.S.2d 46 (1st Dep't 1990); *205 West End Avenue Owners Corp. v. Adler*, N.Y.L.J., Nov. 2, 1990, p. 21, col. 4 (App. Term, 1st Dep't); *see Park Summit Realty Corp. v. Frank*, 107 Misc. 2d 318, 434 N.Y.S.2d 73 (App. Term, 1st Dep't 1980), *aff'd*, 84 A.D.2d 700, 448 N.Y.S.2d 414 (1st Dep't 1981), *aff'd*, 56 N.Y.2d 1025, 453 N.Y.S.2d 643 (1982).

"Shadowing" Program Provides Early Mentoring Opportunities

By Arnold J. Levine and Eve D. Birnbaum

In the fall of 1999, as plans were made for first-year associates at Proskauer Rose to receive training and mentoring, the firm introduced "shadowing time" as a way to address the economic issues that can effect the long-term viability of educational programs.

Four years later, associates have billed a total of more than 25,000 hours to "shadowing time," and the concept has provided a method to measure the effectiveness of the program and encourage its continuation.

For partners, a key economic issue was the effect that the time young associates devoted to hands-on training would have on the "realization rate" used to assess the productivity of lawyers assigned to their cases, and ultimately to compute their own compensation. Rather than charge training time to the client matter, inevitably resulting in write-offs that would adversely affect the partners' realization rates on billed time, the Proskauer executive committee created a separate billing number for shadowing time. This eliminated training time as a factor in the analysis of realization rates.

To further encourage partner participation, the executive committee determined that partners would also be evaluated on their commitment to associate training. The shadowing hours logged by associates under their direction thus provided an incentive to implement shadowing assignments. On a monthly basis, each department receives a report on shadowing time, and questions are raised when shadowing hours appear to be low.

For young associates, the issue was whether time spent on training and mentoring would reduce the number of billable hours used to determine their bonuses and their overall productivity ratings. The issue was addressed by a decision to mandate a goal of 200 hours of shadowing for each first-year associate, rather than simply "allow" them to log 200 hours on training and mentoring. In addition, they were told that shadowing time would count toward the productivity statistics used to determine their bonuses.

For clients, sensitive to the high cost of legal services, the concern would have been the expense to them of having new lawyers present primarily as observers. The response was a policy that advises clients they are not being billed for the time spent by young associates who accompany senior lawyers to depositions, negotiations, strategy sessions, corporate board meetings and the like. Over the longer term, experience has shown that the program may actually save clients money – during later stages of a case, the young associate, now familiar with the issues in the matter, is in a position to do research and perform other billable tasks that might otherwise have required work by a more senior associate, or even the partner assigned to the case, at a higher hourly rate.

What Qualifies as Shadowing?

The "shadowing" number can only be billed for time spent *in the shadow* of the senior attorney. The number cannot be billed for research or any time spent on other assignments that would typically be classified as "first-year work."

Arnold J. Levine is a corporate partner at Proskauer Rose LLP and a member of its executive committee. He wrote the firm's Associate Training Plan and developed the Proskauer Institute, a full-week training program for new associates that addresses the fundamentals of large firm practice and basic legal training. He concentrates in the fields of partnership law, private placements and syndications, and acts as outside general counsel for mid-size companies. A graduate of Cornell University, he received his LL.B. from Columbia University School of Law.

Eve D. Birnbaum is the legal director of the corporate department at Proskauer Rose LLP. Her responsibilities include professional development, legal education and other associate matters. Before joining Proskauer, she was a corporate partner in the New York office of a national firm. A graduate of Queens College, she received her law degree from New York University School of Law.

To prevent that mis-classification, the firm requires that the managing partner or the department chair be notified ahead of time regarding the nature of the activity being assigned to the junior associate as a shadowing experience and the amount of time that will be billed. Attendance at meetings, conference calls, depositions, hearings, negotiations, client meetings, all qualify. A sophisticated drafting project can also qualify so long as it involves the drafting of a document that the junior associate would otherwise not be asked to draft due to its level of sophistication, and provided that the drafting work is followed by careful review and supervision by the senior attorney.

In some departments, associates have been assigned to spend several hours shadowing specific senior attorneys on days designated by the senior attorney. The senior attorneys are likewise encouraged, and reminded on a regular basis, to be creative in looking for shadowing opportunities for the junior associates.

Proskauer's chief operating partner Robert J. Kafin recalls: "In the beginning, we thought shadowing assignments would be limited to attendance at specifically scheduled meetings or events. In fine tuning the process, we have broadened the idea to encompass observing both the preparation and aftermath of a specific event and even spending full days with senior lawyers observing interactions with clients, adversaries and colleagues using all media of communications."

Reverse Shadowing

Some partners have gone a step further and provided "reverse shadowing" – the partner advises the client that the junior associate will be billing the time at the associate's rate while the partner supervises but does not bill for his or her time. In one typical case, a labor associate who had spent shadow time on a case as a first-year associate was assigned during her second year to take a plaintiff deposition while the partner supervised.

Heather Pearson, one of the first to participate in the shadowing process, recalled how she was assigned to a discovery conference in federal court while the senior associate on the matter "reverse shadowed." "We then went before Judge Gleason in the Eastern District in the same case to argue a summary judgment motion and the partner let me argue it. We won!" Describing how the system has worked for her, Pearson said: "Reverse shadowing is a transition from being an observer to putting what you see into practice. First, you watch the senior attorney do it, the senior attorney watches you do it, and then the next time you do it, you are well-equipped and confident to do it on your own."

Practical Results

For associates, shadowing has "taken away the anxiety from spending time on a matter that would otherwise be not billable, because the shadowing time counts toward productivity," in the words of Adam Siegartel, an early participant in the program. Others report that the priority treatment given to shadowing appears to have made partners feel more comfortable spending time with them because it is perceived as providing value to everyone.

Mentoring Relationships Partner-associate working relationships have developed which would have been unlikely without shadowing. As a first-year associate, Heather Pearson attended collective bargaining negotiations with a senior labor partner, beginning with the first negotiation session between a major hospital and the union committee and continuing through the mediation process and the ultimate resolution of the matter. "Because I attended all the collective bargaining sessions from the beginning and was privy to all our client strategy meetings," she recalls, "by the end of the process the partner felt comfortable asking me to cost out certain proposals that were ultimately offered to the other side."

When the matter was completed, the partner, now comfortable about having her work with him as a productive member of the team, asked her to work on the next collective bargaining matter.

Editor's Note

For almost two decades, large law firms have struggled to find effective ways to cope with the financial demands of modern practice and the need to train young associates.

The accompanying article was prepared at the request of the *Journal* to provide readers with information about a program containing features that might be a creative addition to the mix of options that firms consider in establishing and sustaining their training programs.

The *Journal* contemplates a larger article in a future issue that would provide an overall assessment of what associate training programs have accomplished in approximately the last 15 years, and what the future is likely to bring.

Managing partners and education directors at law firms are invited to contact the *Journal* via mail or e-mail with reports on their experiences and their view of the future.

Similarly, lawyers who have participated in these programs are invited to contact the *Journal* to describe their own experiences with these programs. Send your thoughts to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Developing Associates, or by e-mail to journal@nysba.org.

Earlier Contributions by Associates Once associates have "shadowed" on a matter, they often become able to participate as team members whose work is billed to the client. Kristen Prohl, a corporate associate, attended a strategy meeting with a senior intellectual property partner and client to discuss the legal issues in a promotional project. After the discussions, Prohl drafted the contract between the client and the companies participating in the promotion. If she had not attended the meeting, she would not have been given the opportunity to draft the product and work directly with the client.

Clients have become comfortable relying on a junior associate who has become known to them. Sarah Deitch, assigned as a first-year associate to an initial public offering, recalled that by attending the meetings and strategy sessions from the beginning, she saw the evolution of the deal and later was able to work directly with the client. "At the beginning I attended the meetings and had nothing substantive to contribute, but I learned from listening. At a certain point in the progression of the deal, the client began to call me, and I became an active participant in the deal. The partner, too, became comfortable enough with my knowledge of the negotiation points to let me take a stab at drafting ancillary documents. Even the dreaded due diligence became an interesting exercise because I knew the context of my document review."

The Firm's Experience The corporate department co-chair, Steven Kirshenbaum, reports that shadowing has often led to "more productive use of junior associates at a much earlier point in a transaction than would otherwise be the case. Once an associate has sat in on the strategy session or a drafting session, that associate is well-positioned to contribute in a more meaningful way to the transaction." Net-net, the associates become better trained and more productive and more confident at an earlier stage in their careers.

Bernard Plum, co-chair of the labor and employment department, notes: "Shadowing gives us an opportunity to create experiences for very junior associates that would not otherwise happen in the modern law firm world. I had an associate shadow me to a negotiation in Boston. The associate got to see me and our clients doing things and interacting in a way that he might not otherwise have seen for several years; I got to see him in a context and role that I almost never get to see first- or second-year associates."

"The associate got to see me and our clients doing things and interacting in a way that he might not otherwise have seen for several years; I got to see him in a context and role that I almost never get to see first- or second-year associates."

Partners and associates interviewed for this article say that in addition to the specific professional benefits they have detected a subtle change in the culture of training at the firm. Where senior attorneys once viewed junior associates as peripheral to the deal, they have now become accustomed to seeking their participation in the earliest stages of a matter. The result, they report, is a culture of learning, training and mentoring that provides a more fulfilling professional experience for all involved.

The Clients Sandra Crawshaw, a litigation partner, recalls that one shadowing assignment was to have an associate join her for an all-day court-ordered mediation in a highly complex case. Several client representatives were present, including the chief legal officer. "They were thrilled with the idea that they got two lawyers for the price of one, and that our firm was willing to train associates on our dime, not theirs. They acknowledged that our young associates probably got into court quicker with more experience than lawyers at other firms, and would ultimately represent a cost savings to them."

FOUNDATION MEMORIALS

A fitting and lasting tribute to a deceased lawyer can be made through a memorial contribution to The New York Bar Foundation. This highly appropriate and meaningful gesture on the part of friends and associates will be felt and appreciated by the family of the deceased.

Contributions may be made to The New York Bar Foundation, One Elk Street, Albany, New York 12207, stating in whose memory it is made. An officer of the Foundation will notify the family that a contribution has been made and by whom, although the amount of the contribution will not be specified.

All lawyers in whose name contributions are made will be listed in a Foundation Memorial Book maintained at the New York State Bar Center in Albany. In addition, the names of deceased members in whose memory bequests or contributions in the sum of $1,000 or more are made will be permanently inscribed on a bronze plaque mounted in the Memorial Hall facing the handsome courtyard at the Bar Center.

Attorney Professionalism Forum

To the Forum:

I am a litigator in private practice, currently engaged in a heated lawsuit in federal court. I recently received a facsimile from my adversary that was addressed not to me, but to his client. My curiosity piqued, I lifted the facsimile transmission cover sheet and learned that the body of the transmission was a letter from adversary counsel to his client discussing counsel's view of the strengths and weaknesses of their case. The letter further discussed the credibility of a key non-party witness whose testimony would be favorable to their side. This non-party witness had not previously been disclosed to me.

Feeling frozen like the proverbial deer in the headlights, I don't know what to do. I have not told my adversary or my own client that I have received this information. I wish to be a zealous advocate for my client, and I believe that this information could be useful to the representation. On the other hand, it is clear that I was not the intended recipient of the fax, and I question whether the proper thing to do might be to notify my adversary. What is your advice?

Sincerely,

Perplexed in Poughkeepsie

Dear Perplexed:

During the American Civil War, Union Army soldiers discovered a copy of General Robert E. Lee's battle plans for an invasion of the North wrapped around three cigars. This enabled the Union Army to thwart a rebel advance at the Battle of Antietam. While such inadvertent discoveries can certainly be beneficial, and though litigation has often been compared to war, you are not in the same position as an actual soldier – your behavior is subject to regulation under the Lawyer's Code of Professional Responsibility (Code).

The duty of zealous advocacy to your client, as embodied in DR 7-101 and EC 7-19 of the Code, should be tempered by ethical and moral considerations. In this era of high-speed electronic communication, the errant fax or e-mail is all but inevitable. Unfortunately, no clear guidance is furnished by the Code, as there is no Disciplinary Rule or Ethical Consideration which directly addresses the inadvertent discovery of confidential material. Thus, it is unlikely that you would be subject to formal discipline for sneaking a peek at your adversary's game plan. However, that does not necessarily make it right, and indeed your question correctly identifies a tension between zealous advocacy and a lawyer's obligation of courtesy and fairness to others.

The American Bar Association Committee on Ethics and Professional Responsibility in Formal Opinion 92-368, has opined that a lawyer who receives obviously privileged or confidential information should refrain from examining the materials, notify the sending lawyer and abide by the instructions of the lawyer who sent them. The ABA opinion was based upon the ABA Model Rules of Professional Conduct. The New York County Lawyers' Association Committee on Professional Ethics recently reached a similar conclusion in an opinion based upon the Code. In NYCLA Ethics Opinion 730 (2002 WL 31962702), the NYCLA Ethics Committee found that a "lawyer has an ethical obligation to refrain from reviewing inadvertently disclosed privileged information." *Id.* at *3. Thus, the NYCLA concluded that a lawyer receiving "secrets, confidences or other privileged matter" that she believes were not intended for her eyes should notify the sender and abide by his instructions for its return or destruction.

While other authorities are not in total agreement with this approach (*see, e.g.*, Monroe Freedman, *The Errant Fax*, 1/23/1995 Legal Times 26), the Code provides a sound basis for the NYCLA/ABA opinions. For example, the Code suggests that in the absence of explicit guidance, a lawyer should act "in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession." (EC 9-2.) The Code further directs, particularly in a litigation setting, that an attorney should comply "with known local customs of courtesy or practice" in the governing tribunal unless prior notice is given to the adversary. (DR 7-106(C)(5); EC 7-38.) And the Ethical Considerations exhort us all to be courteous to opposing counsel, in addition to following local customs of courtesy or practice. (EC 7-38.) Moreover, DR 9-102 governs a lawyer's obligations upon receipt of funds or other property belonging to a client or another person. It obligates a lawyer to "promptly notify a client or third person of the receipt of funds, securities *or other properties* in which the client or a third person has an interest." (DR 9-102(C).) While the Code does not define the phrase "other properties," it is not an unreasonable stretch of the imagination to include intellectual properties or attorney work product in its definition.

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

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

No matter how careful we try to be, we all make mistakes, and any one of us could have committed the same error as your adversary. In a nutshell, the question you pose is whether you should pounce and exploit the error, or as a matter of professional courtesy help your adversary to recover from the erroneous transmission by disclosing the mistake and following his instructions with regard to the document. Of course, you should then proceed thereafter to do your best to win the case in a fair fight. There is certainly enough room for contentiousness in the ordinary practice of law without turning it into a free-for-all.

In the final analysis, your client will not be deprived of a substantial right if you decide not to exploit this obvious error, as our system does not give clients the right to peek into the minds of adversaries. Rather, by returning or destroying the errant fax, you would be merely preserving the clear right of your adversary to keep communications with his client confidential, and by so doing would be promoting the integrity of the legal system as a whole.

The Forum, by
Barry R. Temkin, Esq.
Jacobwitz Garfinkel & Lesman
New York City

LETTERS TO THE FORUM:

We received the following letter in response to the previous issue's Forum. The question is reprinted for your convenience.

To the Forum:

I have a client who is in a heated dispute with Mr. Vulnerable, a former business partner. My client has requested that to induce a settlement of the dispute, I pose the threat of a lawsuit by sending a draft complaint to counsel that has been retained by Mr. Vulnerable. My client asked me to include a cause of action that is based upon specious allegations that will be embarrassing to Mr. Vulnerable. To put even more pressure on Mr. Vulnerable, my client wants me to suggest to my adversary that my client has knowledge that Mr. Vulnerable engaged in tax fraud which we will report to the authorities (including a grievance committee since Mr. Vulnerable also happens to be an attorney) unless they accede to the proposed settlement. Finally, my client asked me to advise my adversary that it would be in his client's best interest to settle the dispute so that his client's fraudulent representations during the initial negotiations do not come to the attention of a disciplinary committee.

Sensing my uncertainty concerning his directions and suggestions about strategy, my client asked me if he should negotiate directly with Mr. Vulnerable rather than involving counsel.

I am having trouble determining whether my client's directives constitute zealous representation or unethical conduct.

Sincerely,
Confused in Canarsie

To the Forum:

This concerns the letter about "Mr. Vulnerable" in the last issue of the *Journal* ("Confused in Carnarsie").

Counsel from Canarsie asks if his client is asking him to represent him zealously or to do something unethical by asking Counsel to write to opposing counsel for Mr. Vulnerable that Counsel will file a complaint asserting (a) tax fraud, and (b) other "specious allegations that will prove embarrassing to Mr. Vulnerable."

There is nothing unethical about sending opposing Counsel a copy of a proposed form of a complaint, *provided* the allegations contained therein are meritorious. Threatening legal action can rise to extortion, and using the mails can violate both state and federal laws, if done solely to secure a financial or other benefit. As Counsel from Canarsie knows that the allegations are specious, one must consider whether Counsel now becomes part of a RICO conspiracy.

Is this beyond mere zealous representation? Most certainly. Is the revelation of tax fraud unethical if it is true? No. However, Counsel must also consider, since the parties are "partners," and very few lead absolutely squeaky clean lives when it comes to paying taxes, whether his client exposes himself to liability for unpaid taxes as well. As my father used to say, don't throw stones if you live in a glass house.

Dealing with the dissolution of this partnership because the marriage has ended should be the prime objective, without seeking to get an upper hand. Unless Mr. Vulnerable has been stealing from the business or diverting business opportunities, a clean dissolution of the partnership should be the key objective so that the parties may get on with their lives.

Martin L. Bearg, Esq. LL.M. (Tax)
Alpert Butler Sanders Norton
& Bearg, P.C.
West Orange, N.J.

QUESTION FOR NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I am a sole practitioner with a busy, suburban law practice devoted largely to real estate, trusts and estates and civil litigation. Two months ago, I suffered a heart attack, had bypass surgery and was unable to work full time for about six weeks. Fortunately, my two paralegals and secretary carried the ball and averted any crisis with my ongoing matters. I am 61 years old and although I planned to retire at age 65, my recent bout of ill health and developing addiction to the golf channel has me thinking otherwise. However, I am concerned that if prior to my planned retirement I become ill again and unable to service my clients, that I will be in violation of an ethical rule or regulation. Does the Code of Professional Responsibility impose specific requirements upon sole practitioners to plan in advance for a sudden inability to work? What are my professional responsibilities, if any, to my clients? Although I have taken the required CLE credits in ethics, none of the courses that I've attended have covered this topic.

Sincerely,
Anxious in Amityville

Lawyer's Bookshelf

Robert H. Jackson: Country Lawyer, Supreme Court Justice, America's Advocate, by Eugene C. Gerhart, foreword by William H. Rehnquist, chief justice of the U.S. Supreme Court; William S. Hein & Co. Inc. 2003, $72. Reviewed by Lorraine S. Wagner.

This volume combines Eugene C. Gerhart's two volumes on the late Justice Robert H. Jackson: *America's Advocate* (the biography) and *Lawyer's Judge* (his decisions after being named to the U.S. Supreme Court in 1941).

Chief Justice Rehnquist was the principal speaker at the dedication of the Robert H. Jackson Center in Jamestown, N.Y. on May 16.

Justice Jackson considered his work at the trial of the Nazi war criminals in Nuremberg, Germany, as the highlight of his career. Without him, there would have been no trial. He holds the unique position of being America's advocate at the first international trial in history where individual defendants were held personally accountable for waging aggressive warfare and for crimes against humanity. In the biography, the author includes Jackson's complete opening address and his closing address, considered by prominent lawyers as "the superb triumphs of his days at Nuremberg."

Lawyers and judges in the United States and England regarded Jackson a "lawyer's lawyer," a business lawyer who handled all phases of the law, and a fine advocate.

The combined volume includes coverage of his early years as a practicing lawyer in Jamestown, and his career as solicitor general and attorney general. It then provides a detailed study of his work as a justice of the U.S. Supreme Court, which is widely regarded today as having demonstrated his writing talents together with wise and sound common sense. His opinions are frequently quoted and counted as among the best that any justice of the Court has produced.

Summer Reading

First Off the Tee, by Don Van Atta Jr.; Public Affairs, 250 West 57th St., New York, N.Y. 10107, $26, 357 pp. Reviewed by Lorraine S. Wagner.

The author's story, both amusing and informative, is a tale of "presidential hackers, duffers and cheaters from Taft to Bush." Possibly because of Tiger Woods' fame and his attitude toward golf, more and more Americans are accepting this former wealthy man's game.

The author tells us that the great golfers were John F. Kennedy, Dwight D. Eisenhower, Gerald Ford and Franklin D. Roosevelt. The worst were William Howard Taft, Woodrow Wilson, Calvin Coolidge and Ronald Reagan.

The cheats were Bill Clinton ("taking billigans"), Dick Nixon ("that didn't count"), Lyndon B. Johnson ("President Mulligan"), and Warren G. Harding ("a bet on every swing"). And then there are the Bushes, father and son, who love the game.

The book is interesting and well-documented, providing many reasons for playing golf in addition to recreation. If you want to become president, you must play golf.

Horse of a Different Color, by Jim Squires; Public Affairs, 250 West 57th St., New York, N.Y. 10107, $14 paperback, 300 pp. Reviewed by Lorraine S. Wagner.

This is the story of a horse who was unknown in the word of those famous enough to win the Triple Crown and the people who made it possible. "Monarchos" proved that he was the equal of those well-known winners when he won the Kentucky Derby. He was the second-fastest horse to win at Churchill Downs, almost beating the time of the famous Secretariat.

But the book isn't just about race horses. It is about the world of race horse breeding, ownership, training, buying and selling, and finally the race itself. Exciting though it may be, animal lovers will quiver at the many tales of super horses who must be sent out to pasture as stud horses because of various leg injuries suffered in training and racing.

The talented author, former editor of the *Chicago Tribune*, lets the reader peek into Kentucky bluegrass country, with tales of how race horses are bred, bought and sold, and of the owners' "Derby Fever." His humor throughout the story of the thoroughbred horse business makes the book especially readable.

Lorraine S. Wagner was for many years the assistant to the editor-in-chief of the *Journal*.

POINT OF VIEW

The Public Service Tradition Of the New York Bar

BY FREDERIC S. NATHAN

New York lawyers have a notable tradition of public service. Most striking is the way that many have served in the highest levels of the federal government, a trend that reached its peak in the middle of the 20th century.

No one has offered a better statement of the public service concept than Whitney North Seymour. His view of "public duty," synonymous with "public service," is found in these words:

> A part, at least, of today's broad view of the duty of the bar must have its roots in the enormous contributions made by the great lawyers who led in the Revolution, and in framing the Declaration and the Constitution. Their response to the call to public duty is legendary; they had no restrictive concept of limited availability of their professional skills.[1]

A review of the careers of Whitney North Seymour and two other prominent New York lawyers, Henry L. Stimson and J. Edward Lumbard, provides a focal point to trace the participation of eminent New York lawyers in important posts in federal government and other types of public service.

Seymour's first government post, at age 30, was as the senior assistant solicitor general in the Department of Justice. There, and in private practice at Simpson Thacher & Bartlett and in *pro bono* work, he argued more than 50 cases in the U.S. Supreme Court. He also served as a special assistant attorney general of the State of New York.

In his best-known *pro bono* case,[2] Seymour won a reversal from the U.S. Supreme Court of the conviction of a young African-American, Angelo Herndon, who had been sentenced to 18 years under the Georgia Anti-Insurrectionist Law, based largely on the presence of Communist literature in his room.

Among the bar-related posts he held were the presidencies of the American Bar Association, the Association of the Bar of the City of New York, the American College of Trial Lawyers, the Institute of Judicial Administration, the American Arbitration Association, and the Legal Aid Society. In communal activities he was active in the formation of the Landmarks Preservation Commission and had leadership roles with The Carnegie Endowment for International Peace, the Municipal Arts Society, Freedom House, and Grace Episcopal Church.

Henry L. Stimson, who held many important leadership positions in the federal government,[3] was also a leader in bar association and community organizations.

As the first in a long line of notable U.S. attorneys for the Southern District of New York, from 1906 to 1909,[4] he set the standards and began the traditions that have made the office one of the most respected in the nation. By hiring and training younger lawyers with great talent but little experience, Stimson developed a core of attorneys who quickly outperformed their middle-aged predecessors.[5] And, probably for the first time, hiring was based on merit: men like Felix Frankfurter, who had been first in his class for all three of his Harvard Law School years; Thomas D. Thacher, who later sat on the New York Court of Appeals; and Emory R. Buckner, who later became a U.S. attorney himself and hired J. Edward Lumbard as an assistant. Buckner and Lumbard were the most notable of the many distinguished U.S. attorneys who followed the path Stimson set.

The term of Warren G. Harding as president was the only one between Theodore Roosevelt and Harry S. Truman in which Stimson took no federal oath of office.[6] He was President Taft's secretary of war from 1911 to 1913. In 1927, as President Coolidge's Special Commissioner to Nicaragua, he negotiated the end of its civil war. That success led to his appointment as governor general of the Philippines from 1927 to 1929. He served as secretary of state under President Hoover from 1929 to 1933. He was secretary of war again from 1940 to 1945 under Presidents Roosevelt and Truman.[7] Like many of the other New Yorkers mentioned herein, he moved easily between public service and private practice.[8]

J. Edward Lumbard, in addition to his own exemplary career in government over more than half a century, was probably the most successful practitioner of an important element of public service: mentoring young lawyers and encouraging them to participate in public service. After several earlier terms of government services, Lumbard became successively, from 1953 to 1997, U.S. attorney for the Southern District of New York, circuit judge, chief judge of the Second Circuit Court of Appeals and a very active senior judge until his retirement at age 96.

While U.S. attorney, 1953–1955, Lumbard assembled his staff for training sessions at 4 p.m. on many Thursday afternoons. These sessions included talks by many veterans of that

office, including U.S. Supreme Court Justices Felix Frankfurter and John Marshall Harlan, and Governor Thomas E. Dewey. In addition to litigation training, a major theme of these sessions was the importance of public service. On many other occasions, including dinners at his home with groups of his assistants, Lumbard pressed this theme. He relentlessly encouraged his assistants to become active in the political parties of their choice after leaving the office, to serve their communities in other capacities and to answer calls to return to government service. Many did, often with a helping hand from their mentor.

Lumbard's 70 appointees as assistant U.S. attorneys later held at least 31 important government positions and many somewhat lesser ones. Nine became Southern District judges, three New York Supreme Court Judges, three U.S. attorneys, four special prosecutors and independent counsels; one U.S. Cabinet member; a deputy U.S. attorney general; an assistant deputy attorney general; an assistant to the general counsel and special assistant to the assistant secretary of defense for international security affairs; an assistant solicitor general; and a commissioner of Customs. One became attorney general of Vermont before he reached the age of 30. At the New York City level were a deputy mayor, two commissioners of investigation, a first assistant corporation counsel and a state senator. Eleven became Bar Association presidents. Two (Whitney North Seymour, Jr. and Robert P. Patterson, Jr.) became president of the New York State Bar Association, two became president of the American College of Trial Lawyers, and seven were elected president of the Federal Bar Council.

Among Lumbard's innovations was the first student intern program in a U.S. attorney's office. One of the first summer interns was Robert B. Fiske, Jr. who described this experience as "the catalyst for his interest in public service."[9] His notable public service career included, like Lumbard's, tours of duty in the Southern District as an assistant U.S. attorney, chief of the Criminal Division and finally as the U.S. attorney.[10]

Stimson, Seymour and Lumbard followed in a tradition begun by New York lawyers John Jay and Alexander Hamilton, whose legal minds were among the most luminous of the founding fathers. Jay and Hamilton were the most prolific of the three authors of the *Federalist Papers* and were, respectively, the first chief justice and first secretary of the Treasury.

Six New York lawyers were among the first 37 presidents – Martin Van Buren, Millard Fillmore, Chester A. Arthur, Grover Cleveland, Franklin Roosevelt and Richard Nixon. Another eight New York lawyers ran unsuccessfully for president. Four almost made it: Aaron Burr (who tied Thomas Jefferson in the electoral college but lost in the House of Representatives), Samuel J. Tilden (who had a 3% margin in the popular vote), Charles Evans Hughes (who is said to have gone to bed thinking he had defeated President Wilson in 1916) and Thomas E. Dewey (who led Harry Truman until the morning after election day in 1948). The other four unsuccessful candidates were Horatio Seymour,[11] Alton B. Parker, John W. Davis and Wendell L. Willkie.

The number of eminent New York lawyers serving at the highest levels of federal government reached its peak in the middle 61 years of the 20th century (1920–1981), which roughly corresponded to Whitney Seymour's career at the New York Bar (1923–1983). During this period, Franklin Delano Roosevelt and Nixon served as president, Charles Evans Hughes and Harlan Fiske Stone served as chief justice and a disproportionately large number of eminent New York lawyers held key Cabinet positions. Five served as secretary of state for a total of 21 of these 63 years: Stimson, Charles Evans Hughes, John Foster Dulles, William P. Rogers and Seymour's law partner, Cyrus R. Vance. Three served for seven successive critical years as secretary of war beginning in 1940: Stimson, Robert P. Patterson and Kenneth C. Royall.[12] Four served a total of 14 years as attorney general – Harlan Stone, Herbert Brownell, William P. Rogers and one who fell from grace – John Mitchell. Samuel R. Pierce, Jr.'s appointment as secretary of Housing and Urban Development in 1981 marked the end of this period.

New York lawyers played crucial federal government roles in World War II. Four led the War Department in its stunningly successful build-up and management of the army ground and air forces before and during the war: Secretary of War Henry Stimson; his undersecretary and successor, Robert P. Patterson; Patterson's deputy, General Edward S. Greenbaum; and Assistant Secretary John J. McCloy. Samuel I. Rosenman, FDR's close advisor and constant counsel before and during World War II, helped craft FDR's "fireside chats."[13] Most dramatic was the role of William J. Donovan, who served in many intelligence roles before becoming the director of the Office of Strategic Services (now the CIA).

We can only speculate about why so many New York lawyers attained top positions in federal government during this period. Three principal factors come to mind.

First was an eagerness, or at least a willingness, to serve. While personal ambition undoubtedly played a role in some cases, this group was motivated primarily by a sense of duty that embraced the public service ethic. Many were undoubtedly imbued with this sense of duty by their parents, ministers, headmasters, teachers and other mentors like Stimson, Frankfurter, Buckner and Lumbard. With few exceptions, their sense of duty went beyond conventional patriotism; they had an almost proprietary feeling about American democracy and the rule of law; they strove with energy,

passion and integrity to make both succeed; and they responded intuitively to the call of an early 19th century American political philosopher "to make the *secular* sacred" and the motto of the Groton School: "To Serve is to Reign." They were not political ideologues, nor were they motivated by the financial interests of themselves or their friends. On the contrary, both Roosevelts took actions so inimical to those interests that they were considered "traitors to their class." During his second presidential campaign in 1907, the wealthy TR went so far as to advocate a progressive inheritance tax heavy enough to block the transmission of enormous fortunes to young men on the ground that it "does not do them any real service and is of great and genuine detriment to the community at large."[14]

A second factor was opportunity. The large number of New Yorkers, many of them lawyers, in high federal positions provided networking opportunities that gave them access to the appointment process. New York had become the financial center of the world after World War I. The leading members of the New York bar had close ties with each other[15] and with corporate America, wealthy individuals and the leadership of both political parties.

A third factor was the large pool of highly qualified applicants. During the early part of this period, the New York bar dominated the profession. It handled the largest, most complicated and most interesting matters. Many of the best colleges and law schools were nearby or accessible by train, and the leading New York firms, many of whose partners had the same school ties, were able to attract a disproportionately large number of their best graduates. New York City was the "go to" place for the best and the brightest young lawyers from throughout the nation.

This environment facilitated the placement of many members of the New York bar in all levels of federal government during the Seymour years. The reputations they made attracted other New York lawyers to follow in their footsteps.

By the 1980s, the New York bar had ceased to be a force in either of the major political parties. The center of political power had moved south and west. New York State's share of electoral votes was in a steady decline.

At the same time, political activity by young lawyers has been discouraged by changes in the culture of big city law firms such as billable hours requirements and the pace of work. The explosion in the size of the leading firms had diluted political mentoring relationships. In the 1930s Herbert Brownell, with the encouragement of his senior partners at Lord Day & Lord[16] became an election district captain and a member of the New York County Republican Committee. He and a group of his fellow members of the New York Young Republican Club, mostly lawyers like Thomas E. Dewey, an associate at Rathbone Perry, Kelley & Drye, ousted the leadership of several ineffective and corrupt Republican District clubs and then helped to replace the New York County Republican organization with reformers.[17] Before becoming a partner at Lord Day & Lord, Brownell served five productive one-year terms as an assemblyman. Dewey managed the first of his campaigns.[18] Brownell acknowledged how helpful the political experience gained while a young lawyer proved to be during his service as Eisenhower's attorney general.[19] Henry Stimson also profited from his experience while a young associate as an election district captain, a member of the New York Republican County Committee and as president of his local Republican Assembly District Club.[20]

Eminent New York lawyers may also have become discouraged from considering high government office by the proliferation of statutes and regulations dealing with conflicts of interest and financial disclosure, by the widening gap between compensation in the public and private sectors, and by the escalating costs of running for elected office.

The growing tendency of major clients to rely on particular partners in various firms rather than on a single law firm has also made it more difficult for prominent partners to accept full-time public service appointments. Gone are the days when lawyers such as Davis, Donovan, Greenbaum, Lumbard, Patterson, Stimson and Vance, could move easily and repeatedly between law practice and government service.

Despite these obstacles, and the more than 20-year hiatus, eminent New York lawyers are needed and one day will serve again in the highest positions of the federal government. That day would come sooner, and their service would be more effective, if the leading New York law firms were once again to encourage political activity, for example, by giving young associates billable hours credit for a certain amount of political activity. Had they not met at the New York Young Republican Club and then worked together as a team in local politics with the encouragement of their law firms,[21] Dewey, Brownell, Lumbard and many others might never have made their substantial contributions to the public weal.

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1. Whitney North Seymour, *The Obligations of the Lawyer to His Profession*, 23 Rec. Ass'n Bar City of N.Y. 15 (1968).
2. *Herndon v. Lowry*, 301 U.S. 242 (1937).
3. Surprisingly, Stimson sought none of these positions. *See* Henry L. Stimson & McGeorge Bundy, On Active Service in Peace and War 4 (1971).
4. One of Stimson's mentors, Elihu Root, had held this position a generation earlier but it was then a small office with little to do.
5. Stimson & Bundy, *supra* note 3.
6. *Id.* at p. 107.

7. Between his two terms as secretary of war, Stimson served for a period as a field artillery colonel in France in World War I.
8. The "generous understanding of public service" of one of his partners, Bronson Winthrop, made possible repeated absences from their law office. Stimson & Bundy, *supra* note 3, p. 30.
9. Letter to the author of this article (Feb. 21, 2003).
10. The current U.S. Attorney for the Eastern District of N.Y., Roslynn R. Mauskopf, also found her summer internship in the Southern District in 1981 to be the catalyst for her public service career, which in her case has been continuous since her graduation from law school. (Conversation with author on May 1, 2003.)
11. Seymour had been elected governor of New York in 1852 and again in 1862.
12. Vance also served as secretary of the Army (1961–1962) and as assistant secretary of Defense (1964–1967), but these were not Cabinet-level positions.
13. *See* Samuel I. Rosenman, Working With Roosevelt, *passim* (1952). This book relates an incident which illustrates how these New York lawyers networked in the country's interest. Shortly before FDR's December 29, 1940 fireside chat advocating Lend Lease, a French diplomat used the phrase "arsenal of democracy" in a conversation with Mr. Justice Frankfurter. Realizing the potential of this phrase, Frankfurter mentioned it to McCloy who mentioned it to Greenbaum who passed it on to Rosenman. Roosevelt loved it. It struck just the right chord with the American people, and this fireside chat is remembered as the "Arsenal of Democracy" speech. *Id.* at pp. 258–61.
14. James MacGregor Burns & Susan Dunn, The Three Roosevelts 95 (2000).
15. In addition to law school and law firm ties, many of these lawyers worked together in bar association and community activities. Of those mentioned here, 10 were presidents of the Association of the Bar of the City of New York: Elihu Root, Charles Evans Hughes, John W. Davis; Thomas D. Thacher, Henry L. Stimson, Robert P. Patterson, Whitney North Seymour, Herbert Brownell, Samuel Rosenman, and Cyrus R. Vance. On the social side, many of those mentioned here, including both Roosevelts, were members of a relatively small but influential club, the Century Association. Such members during at least a portion of FDR's presidency, each of them for over 30 years, included Herbert Brownell, Charles Evans Hughes, J. Edward Lumbard, Robert P. Patterson, Elihu Root, Jr., Whitney Seymour, Henry Stimson, Harlan Stone and Cyrus Vance.
16. Herbert Brownell et al., Advising Ike 15 (1993).
17. *Id.*, pp. 17–18.
18. *Id.*, pp. 13–31.
19. *Id.*, p. 30. The lack of such experience may have contributed to the downfall of one of Brownell's successors, John Mitchell.
20. Stimson & Bundy, *supra* note 3, p. xix.
21. Interview by Ed Edwin with J. Edward Lumbard (1977), *in* A Conversation with J. Edward Lumbard 30 (1980) (transcript available in Butler Library, Columbia University).

FREDERIC S. NATHAN is a partner at Kelley Drye & Warren LLP. This article is condensed from an expanded study based on an address that the author gave on February 21, 2003, at the Federal Bar Council's Winter Bench and Bar Conference, in accepting the Whitney North Seymour Award for Outstanding Public Service by a Private Practitioner. He served as an assistant U.S. attorney under J. Edward Lumbard and as first assistant corporation counsel in Mayor John V. Lindsay's first administration. He was an officer of the New York Young Republican Club and a member of the New York Republican County Committee.

Correction

In the June issue of the *Journal*, the article by Joyce Lipton Rogak on the use of *res ipsa loquitur* in medical malpractice cases contains an error that occurred in the editing process. At page 28, the article states that in *Kambat v. St. Francis Hospital* the Court of Appeals held that the *res ipsa* doctrine "did not apply" in that case. It should have read that the doctrine "did apply" in *Kambat*.

In Memoriam

Robert A. Bankert
New Hartford, NY

Brian D. Berk
Nanuet, NY

Haskell Edelstein
New York, NY

Chester S. Grove
Lockport, NY

Charles E. Heming
New York, NY

Fred Lichtblau
Benson, VT

Donald J. Nugent
Forest, VA

Robert M. Peak
New York, NY

Benjamin Raphan
New York, NY

Mortimer C. Shea
Staten Island, NY

Frank Silverstein
White Plains, NY

Erik Skaalerud
Central Islip, NY

Thomas B. Treacy
New York, NY

Language Tips

By Gertrude Block

Question: A "Betty Crocker" marble-cake-mix box instructs the baker to drop the batter into the cake pan by "tablespoonfuls," not "tablespoonsful." I can't believe that General Mills would print this error on its boxes. And here's another shocker for your column. At a major cancer center in New York City, an eight-foot poster, prominently displayed, reads "We're all in this together. Cancer effects everyone."

Answer: The instructions on the Betty Crocker cake mix package are correct. The proper plural of *tablespoonful* is *tablespoonfuls*. This seems illogical because you use only one tablespoon to measure all the tablespoonfuls. But compare the plurals, *cupfuls*, *spoonfuls*, and *handfuls*. In all these plurals, the suffix *-ful* is considered part of the noun. However, the suffix of *tablespoonful* is often omitted, as in "add three tablespoons of water."

The cancer poster was a shocker. Nobody who reads my column could have been responsible for confusing the verb *effect* with *affect*. As my readers know, the proper verb should have been *affect*. The two words are not interchangeable, although many people use them interchangeably. The verb *affect* means "influence, change, or modify." You can affect decision-making by your vote. Less often, *affect* means "pretend or imitate"; you might affect interest in something that doesn't interest you.

On the other hand, the verb *effect* means "bring about or accomplish"; for example, legislation is designed to effect an end. Because "to effect a change" (that is, "to bring about a change") closely resembles the meaning of *affect*, many people confuse them. As a result, the verb *affect* is often ignored. The noun *effect* causes no problem; it means "result" or "outcome." The noun *affect*, used chiefly as a psychological description, means "a feeling of emotion, as distinct from cognition, thought, or action." It may, however, expand into popular use, as has *parameter*, and other terms once used only scientifically.

My thanks to alert reader Phyllis F. Catauro of Suffern, N.Y., for sending these interesting questions.

Question: In an office meeting I told a group of associates, "Keep this between us." I was later criticized for using *between* instead of *among*. Was I wrong?

Answer: Under the traditional grammatical rule, you were. That rule required that to compare two persons or things, you use *between* and to compare more than two, you use *among*. For example, "between apples and oranges," or "among three cars." However, the traditional rule is often ignored. *The American Heritage Dictionary* (*AHD*), 4th edition, 2000 (online), notes that the distinction between the two words represents a "widely repeated but unjustified tradition." On the other hand, the 1998 *Webster's Unabridged Dictionary* quotes the traditional rule without qualification.

The basis of that rule is apparently etymological. The word *between* is derived from two Old English words, *be tweonum,* meaning "by the two." In Middle English, *tweonum* evolved to *'twain*, as in the locution, "Never the 'twain shall meet," which is archaic, though still widely quoted.

Your critic was applying the traditional rule when he urged you to say, "Keep this among us." But the traditional rule is so frequently ignored that the word *among* fails to convey the sense of secrecy that *between* carries. In your usage, you can choose between grammar and clarity, and since clarity trumps grammar, you might persuade your associate to withdraw his criticism.

The word *among* is useful to indicate that one individual differs from all others in a group, as in, "The first among equals." *Among* also indicates inclusion in a group: "She is among the best lawyers in the state." The *AHD* distinguishes the two words by the illustrations, "The bomb landed between the houses," in which the houses define the boundaries, and "The bomb landed among the houses," in which the impact occurred in the general location of the houses.

What is grammatically unacceptable – although common – is the subjective form of personal pronouns after *between* or *among*, as in "between you and I." The correct forms are "between you and me," "between (or among) us," "between (or among) them," between you and him/her," and "between (or among) you and them."

Many persons use the ungrammatical "between you and I," however, mistakenly striving for correctness. The 1987 *Random House Dictionary of the English Language* (unabridged edition) attributes that error to "overcorrection" by persons who reason that if "It is I" is correct, "Between you and I" must also be correct. However, the same persons would never say, "Give it to I," because it "sounds" wrong. They are unaware that both *to* and *between* are prepositions, like *for, after, of, from* (and others), which require the objective case of the pronoun they modify.

Another fairly prevalent error is the insertion of *each or every* after *between* and before a singular noun. The result is the redundant, "He took a 30-minute lunch break between each and every appointment." Substitute instead:

- He took a 30-minute lunch break between appointments.
- He took a 30-minute lunch break after each appointment.

You have no doubt heard a fairly new construction, which has been enthusiastically adopted by television and radio commentators, *between . . . to.* This creates an ungrammatical blend of two phrases, *between . . . and* and *from . . . to.* That condensed phrase is not yet idiomatic; continue to use the idioms: "between 5 and 10 miles" and "from 5 to 10 miles."

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

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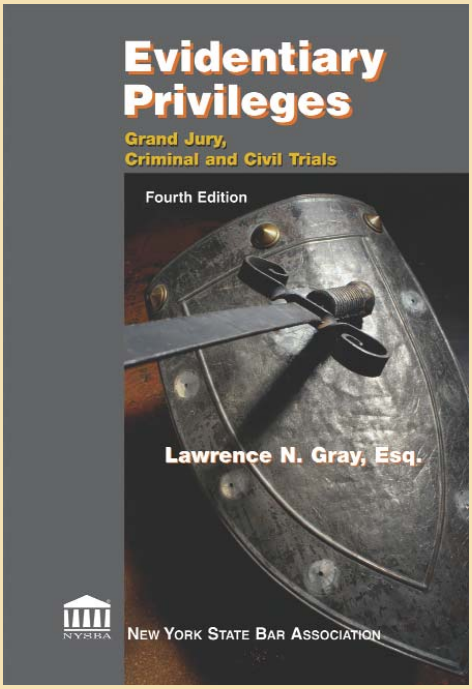

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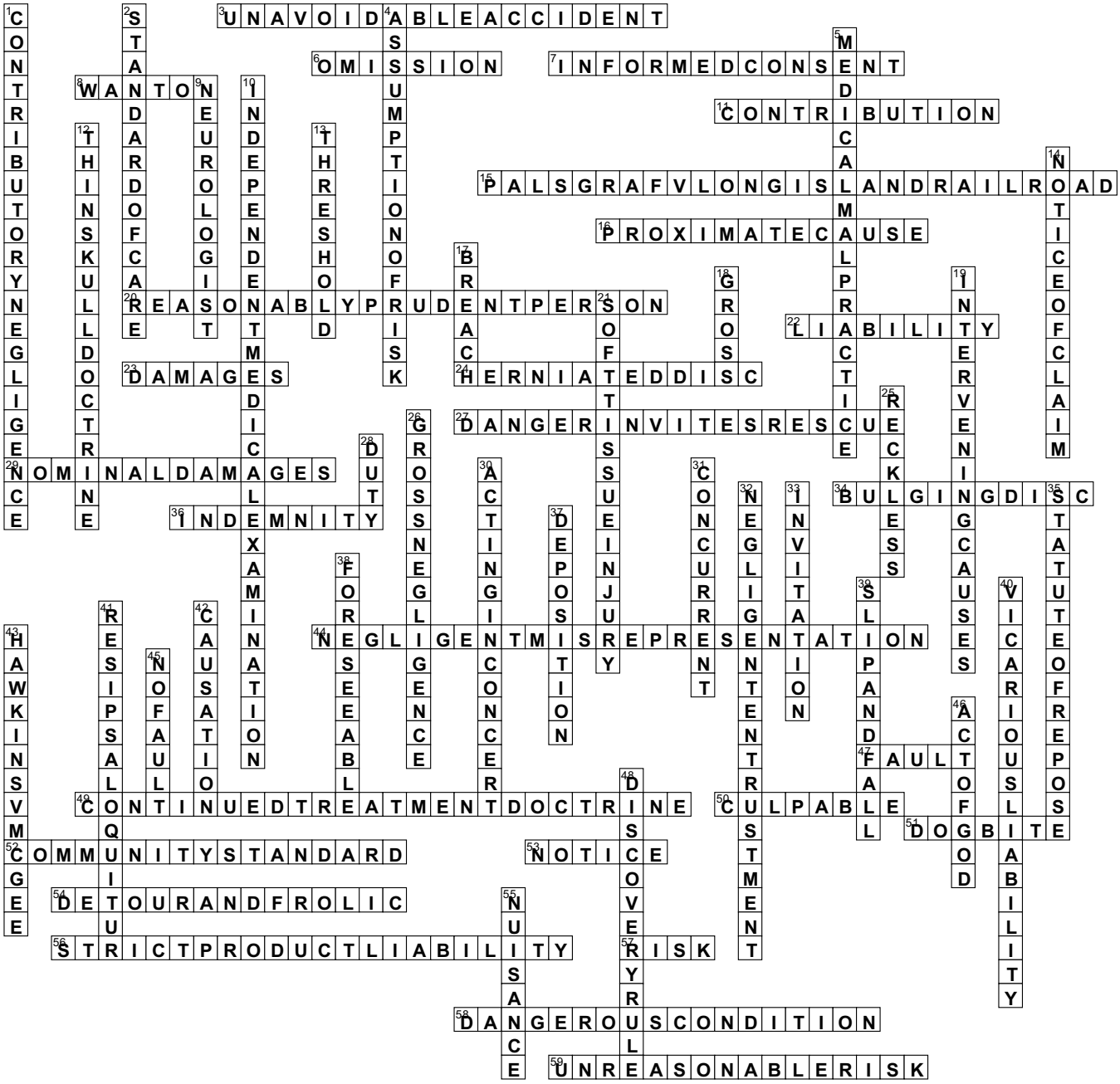

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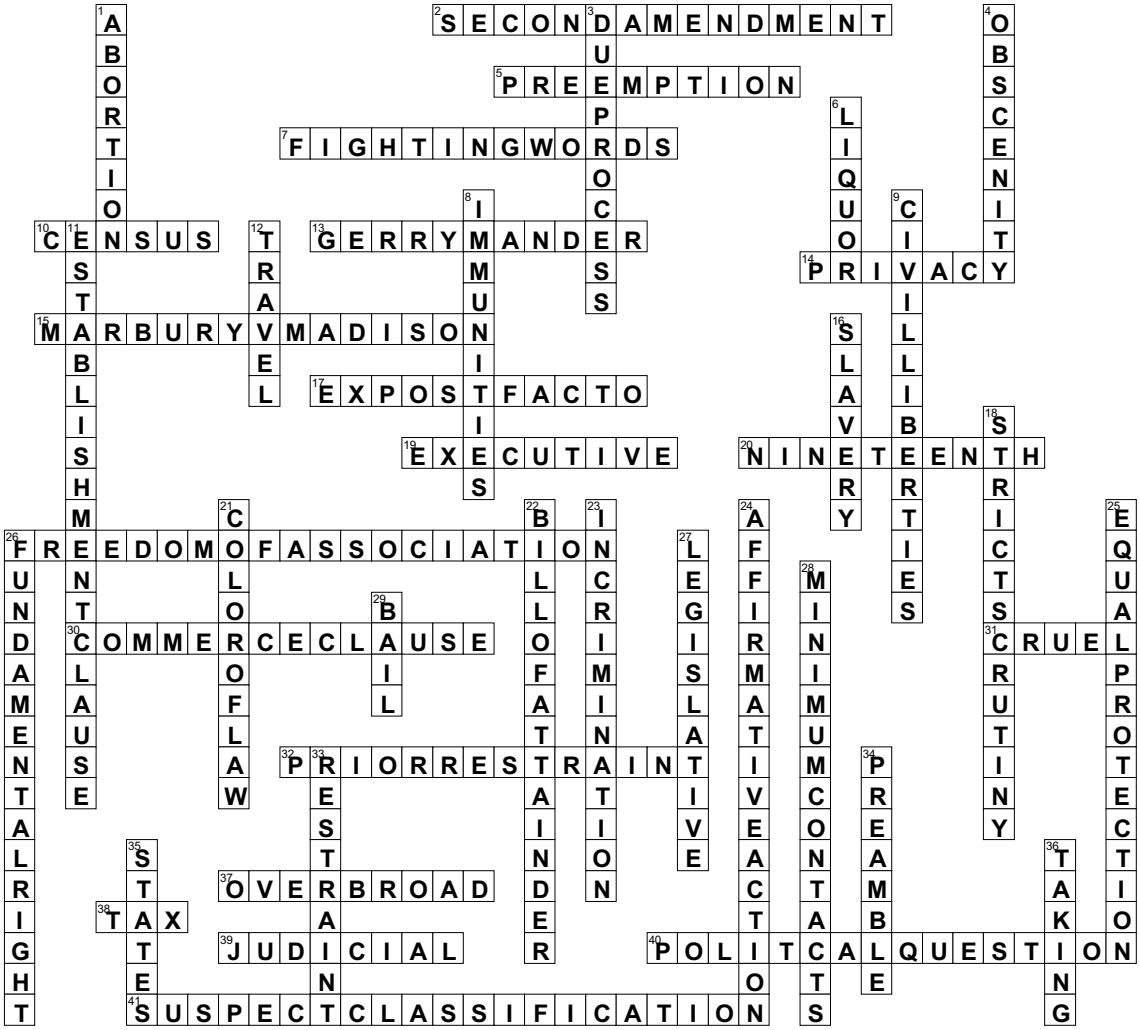

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Interest-of-Justice Discretion. New York intermediate appellate courts have the discretion in the interest of justice to consider claims of error unpreserved below. The federal standard, other than for jurisdictional matters or for fundamental constitutional questions, which may be raised for the first time on appeal, is whether the error is "plain error" – whether it should have been obvious to the district court that a litigant made a mistake in not asserting an argument or objecting. If so, the error need not be preserved. The New York Court of Appeals has no interest-of-justice prerogative to review unpreserved claims, but it, like federal appellate courts, must consider jurisdictional questions raised for the first time on appeal.

Brandeis Briefs. When Louis D. Brandeis, Esq., appeared before the Court in *Muller v. Oregon*,[9] he included in his brief scientific studies outside the trial record. The Court found the studies reliable. Brandeis's briefing technique has borne his name since then.[10]

Leave and Certiorari Granted or Denied. When a New York State appellate court may hear or decline to hear an appeal, the decision is called "leave granted" if the court agrees to do so and "leave denied" if it declines to do so. These appeals by permission are distinguished from appeals as of right. The decision is not called "appeal granted or denied," although Westlaw calls it that. In the federal system, according to U.S. Supreme Court terminology, the decision to hear an appeal or to decline to hear an appeal by permission is called "*certiorari* granted" or "*certiorari* denied." In both the New York and the federal systems, the decision no longer to hear an appeal on which leave or *certiorari* was granted is called "appeal dismissed."

Before the New York Court of Appeals, two judges must grant leave before the Court may review a civil case;[11] in criminal cases, only one judge decides whether to grant leave. The Appellate Division may also grant an applicant leave to appeal to the Court of Appeals.[12] A litigant obtains a right to appeal if two Appellate Division justices dissent on a matter of law.[13] Four justices must grant *certiorari* for the U.S. Supreme Court to hear the matter.[14] Execution of the judgment below is stayed pending appeal before the Court only if five justices grant the application for a stay. Several times prisoners have been executed because the Court, having granted *certiorari*, denied a stay.[15]

Leave denials and denials of *certiorari* have no precedential value. But legal writers should add to their citations all leave and *certiorari* denied citations, even though the *Bluebook* instructs writers to add only recent ones. Adding them proves that the writer completed the research and that the reader need not conduct additional research. Legal writers should also always add all leave and *certiorari* granted citations to show that the cited proposition might quickly be affected by a more authoritative affirmance, reversal, or modification.

Petitions are granted and writs are issued. Lawyers apply for leave and writs. They do not move for them.

Certified Questions. A "certified question" is a lower court's question to a higher court, or a question from a court of one jurisdiction to a court of another jurisdiction. For example, the Second Circuit may certify a question to the Court of Appeals if a state matter is in federal court on diversity jurisdiction and if the Second Circuit cannot determine the answer to a question posed by state law. A certified question seeks an advisory opinion to resolve a question of law. Certified questions are different from questions raised for appellate review, such as questions on *certiorari*.[16]

Advisory Opinions. They are not binding. New York courts may not give advisory opinions except in response to a certified question. Federal courts may never give advisory opinions. Courts may decide only real, justiciable controversies.[17]

Affirmed by an Equally Divided Court. When an appellate court splits evenly (3–3, 4–4), the preceding opinion is automatically affirmed. An opinion affirmed by an equally divided court has no precedential value.[18] When the U.S. Supreme Court affirms by an equally divided vote, the Court does not announce which justices fell on which side of the question. The Court states only that the opinion below is affirmed by an equally divided vote.

Mootness Doctrine. New York and federal courts may not decide a case that lacks a controversy. Thus, a court may not decide an academic question unless the issue is likely to recur, either between the litigants or among members of the public; unless the issue has evaded review; and unless the issue is substantial and novel. Moot cases include collusive and fictitious actions and proceedings, settled cases, controversies disposed of by lapse of time (such as injunctions), criminal cases abated by death, and criminal appeals in which a defendant has not appeared.

Judicial Notice. This rule of evidence allows trial and appellate courts to accept facts outside the record not subject to reasonable dispute. From Justice Frankfurter: "[T]here comes a point where this Court should not be ignorant as judges of what we know as men."[19]

Reversible Error and Harmless Error. This doctrine applies to errors of law. Jurisdictional issues are not subject to harmless-error analysis. Errors of constitutional magnitude are subject to harmless error if the error is harmless beyond a reasonable doubt. The classic justification for harmless-error analysis: "Wrong directions which do not put the traveler out of his way, furnish no reasons for repeating the journey."[20]

Standard of Review. Before a court applies law to fact, it must apply a

standard to review the facts it accepted. Facts are meaningless without a standard within which to interpret them. Standards include "overwhelming evidence," reasonable doubt," "clear and convincing," "preponderance," "legally sufficient evidence," "probable cause," "reasonable suspicion," "facts interpreted in the light most favorable to the nonmoving party," "assuming all the allegations in the complaint to be true," "evidence interpreted in the light most favorable to the side that won the jury trial," "strict scrutiny," "intermediate scrutiny," and "rational-basis test." Some of the doctrines in this column are standards of review, as are the following.

Clearly Erroneous. That is the federal appellate standard to review questions of fact. New York State's intermediate appellate courts review factual determinations under their factual review power with varying degrees of deference depending on the issue, the fact finder, and the proceeding.

Substantial Evidence. Federally, or in a New York State CPLR Article 78 proceeding, the substantial-evidence standard determines whether an administrative-law ruling will be upheld, confirmed, or disturbed. If substantial evidence supports the administrative ruling, the ruling will be confirmed or upheld, even if the reviewing court would have reached a different result had the matter appeared before the reviewing court *de novo*, so long as the ruling is not arbitrary and capricious or an abuse of discretion.

Substantial Deference. Courts give "substantial deference" or "considerable weight" to the expertise of an administrative agency to interpret its own regulations. The administrative body's interpretation – federally, it's called *Chevron*-style deference[21] – will be upheld if the interpretation is consistent with established law, rational and reasonable, within the agency's jurisdiction, and not contrary to statute. If so, the reviewing court may not substitute its interpretation in place of the agency's.

Substantial Justice. This concept lowers procedural and evidentiary hurdles in Small Claims Court. Judges follow substantive law in Small Claims Court and on appeal from a small-claims judgment.[22]

Essentials like organization and tone, combined with a readable, grammatically correct style, make for good writing. But good *legal* writing also requires good lawyering: technique and method that translate ideals into results. As Dean Wigmore noted, lawyers must know "legal science. By 'legal science' is meant all that is above, below, between, and behind the particular rules and precedents – the system of legal knowledge – that which distinguishes the architect from the carpenter."[23]

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1. *See* Supreme Court, Civil Branch, New York County, Guide to the Form of Orders and Judgments 8–9 (2d ed. 1998).
2. CPLR 5011.
3. Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. Rev. 123, 126 (1999).
4. Scott Douglas Gerber, *Introduction: The Supreme Court Before John Marshall in* Seriatim: The Supreme Court Before John Marshall 1, 20 (Scott Douglas Gerber ed. 1998); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1189 (1992). For a history of the seriatim opinion, see Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 Cornell L.Q. 186, 192–93 (1959).
5. Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on the Marshall Court Ascendancy*, 83 Mich. L. Rev. 1291, 1304 n.77 (1985).
6. *E.g.*, *Helvering v. Gowran*, 302 U.S. 238, 245 (1937) (Brandeis, J.) ("[T]he rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.").
7. CPLR 5501(c), (d).
8. CPLR 5501(b).
9. 208 U.S. 412 (1908).
10. A brief on Brandeis: Justice Brandeis had a profound influence on the Court and in opinion writing. He was the first to footnote heavily, to cite law-review articles, and to hire law clerks in a formal program. *See* William Domnarski, In the Opinion of the Court 64–65 (1996).
11. CPLR 5602(a).
12. *Id.*
13. CPLR 5601(a).
14. *See generally* Joan Maisel Leiman, *The Rule of Four*, 57 Colum. L. Rev. 975 (1957).
15. *See, e.g.*, *Hamilton v. Texas*, 497 U.S. 1016, 1017 (1990) (mem.) (Marshall, J., dissenting from denial of stay) ("[F]our Members of this Court have voted to grant certiorari in this case, but because a stay cannot be entered without five votes, the execution cannot be halted.").
16. For a review of New York law on certified questions, see Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 Fordham L. Rev. 373 (2000).
17. For some pros and cons of that rule, see Jack B. Weinstein, *Rendering Advisory Opinions – Do We, Should We?*, 54 Judicature 140 (1970); Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. Rev. 1002 (1924).
18. *See, e.g.*, *United States v. Pink*, 315 U.S. 203, 216 (1942).
19. *Watts v. Indiana*, 338 U.S. 49, 52 (1949).
20. *Cherry v. Davis*, 59 Ga. 454, 456 (1877) (Bleckley, J.).
21. *See Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)
22. *See, e.g.*, Gerald Lebovits, *Small Claims Courts Offer Prompt Adjudication Based on Substantive Law*, N.Y. St. B.J., Vol. 70, No. 8 at 6, 9 (Dec. 1998); Gerald Lebovits, *Special Procedures Apply to Enforcing Judgments in Small Claims Courts*, N.Y. St. B.J., Vol. 71, No. 1 at 28, 29 & n.14 (Jan. 1999).
23. 1 John H. Wigmore, Evidence in Trials at Common Law § 8a, at 614 (Peter Tellers rev. ed. 1983).

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The Legal Writer

Technique: A Legal Method To the Madness – Part 2

By Gerald Lebovits

The Legal Writer continues from last month, discussing concepts that make the grammatical New York lawyer a legal scientist.

Decrees. A "decree" decides a motion or matter that sounds in equity.

Orders. An "order" is an oral or written court directive on a question of law, as opposed to equity, punishable by contempt if disobeyed. Orders are directed to preliminary matters like motions. Every motion is an application for an order under N.Y. Civil Practice Laws and Rules 2211 (CPLR), and, under CPLR 2219(a), an order in long or short form must resolve every motion. Rather than write "Settle order," trial judges should render opinions that are also orders. Doing so saves litigants from settling orders.[1] The magic words for trial judges in the decretal paragraph are "It is ordered that" and, at the end of the written order and opinion, "This opinion is the court's decision and order." This phraseology is more active and concise, and less legalistic, than the current standards: "It is hereby ordered" and "The foregoing opinion constitutes the decision and order of the court."

Rulings. A "ruling" is a court order made during litigation, and necessarily before judgment. "Rules" are "reaffirmed" (if followed later by the same court), "adopted," "accepted," "no longer followed," and "stated." Rules are not "laid down," "set down," or "set forth."

Judgments. A "judgment" is the final or interlocutory resolution of an action or proceeding.[2] The word is spelled "judg*e*ment" in England but "judgment" in America. A judgment should state "It is adjudged." If a judgment contains declaratory aspects, it should state, "It is ordered and adjudged," or separate decretal paragraphs may cover the order and judgment. There can only be one judgment in a case. Note that cases, not judgments, are remanded. Judicial opinions legitimize judgments by giving reasons for them, but "[t]he operative legal act performed by a court is the entry of a judgment."[3]

Decisions. A "decision" resolves a motion, application, writ, or appeal.

Seriatim Opinions. A "seriatim opinion" is a separate writing such as a concurrence or dissent that accompanies a full or *per curiam* opinion. Before Chief Justice Marshall (1801–1835) changed the policy to conserve judicial resources, all federal appellate opinions rendered before 1801 were rendered seriatim, with each judge writing separately.[4] Chief Justice Marshall, incidentally, did more than just abolish seriatim opinions. He introduced the written opinion to the common-law world. Before the Chief Justice began his tenure, the Supreme Court followed the English tradition of delivering opinions orally and then editing them for occasional printing.[5]

Reversed, Affirmed, Reversed or Affirmed in Part, Remanded. Rulings and judgments, not rules or reasoning, are affirmed or reversed. Rules and reasoning are followed or not followed. An appellate decision that affirms the judgment below, but which uses reasoning different from the reasoning of the court below, is still an affirmance.[6] If a case has more than one result, one result can be affirmed and another reversed. A case remanded is returned to a lower court with directions to redo or reconsider some aspect of the case. The New York Court of Appeals may remand to the Appellate Division or to the court of first instance.

Overturned, Upheld, Sustained, Overruled, Disapproved. A case "overturned" or issue "overruled" on appeal is overturned or overruled by another, later case of the same court, and thus only indirectly. A lower court's opinion is "disapproved," not overturned or overruled, by a later case, not reversed or modified directly. *Res judicata* does not affect an earlier case whose holding or rationale is overturned. A case, or issue, "upheld" on appeal is upheld by another, later case. Courts "sustain" or "overrule" objections, but motions are "granted" or "denied." Dictum – statements unnecessary to the court's ultimate ruling – is "approved" or "disapproved," not "affirmed" or "overruled."

Technique and method translate ideals into results.

Modified. Modifications cover one or more aspects of a determination below but do not reverse the judgment below. For example, a conviction is affirmed, but a sentence is modified.

Questions of Fact, Questions of Law, Mixed Questions of Fact and Law. New York State and federal appellate courts review legal determinations *de novo* (plenary review). All federal appellate courts may review questions of fact and law. Both the Appellate Division and the Appellate Term may review questions of fact and law.[7] But the New York Court of Appeals may review only questions of law, unless the Appellate Division below decides a matter on facts not determined in first instance.[8] If the Appellate Division's finding on a mixed question of law and fact has record support, the Court of Appeals's review is at an end.

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