NEW YORK STATE BAR ASSOCIATION

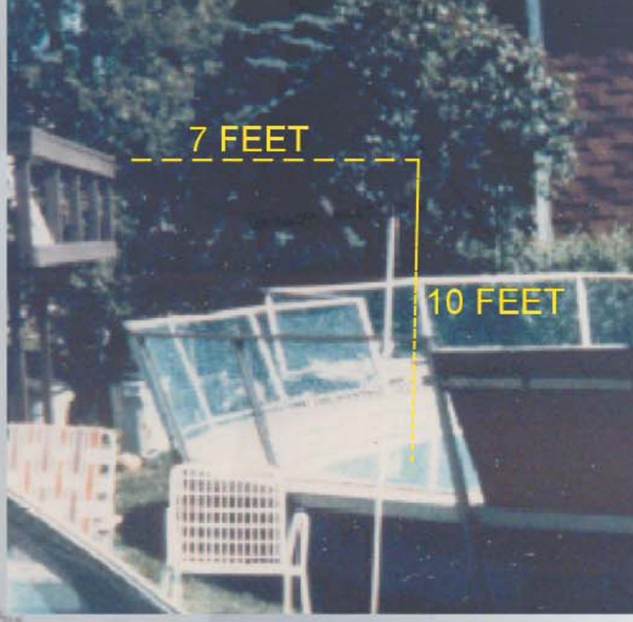
JUNE 2003 | VOL. 75 | NO. 5

Journal

BEYOND WORDS: THE ROLE OF GRAPHICS

A. Facts Showing Sole Proximate Cause of the Injury

Plaintiff admits he injured himself by diving headf railing of the deck attached to the house. The dive carried him own fence and walkway and into the four-foot-deep, aboveground swimming pool. JA 234-236. The house deck is about seven feet from the water horizontally — about five feet from the pool's own fence and another two feet for the pool's walkwa vertical drop from the house deck railing to the water is abo 92; photo above. Supp. JA 549 (Def. Exh. B), is authenticate affidavit. Supp JA 547.



Inside

Self-Evaluative Privilege

Res Ipsa Loquitur Standards

Update on Dead Man's Statute

'SUM' Decisions Review

NEW at nysba.org

NYSBA's Career Center -
Powered by LegalStaff.com. Combines the resources of over 89 Legal Career Centers nationwide. Job seekers - search jobs, post/edit resumes, search employers and access career tools. Employers - post jobs, search resumes, and access a "tool kit" of information, forms, and resources.

CourtAlert -
Access updates on the events, case information and court calendar of the New York State Supreme Court, US District Court/Southern District of New York, and NY City Civil Court/NY County.

NYSBA Section publications online -
Access archived and searchable issues of all Section publications dating back to 2000 with links to Loislaw.com for additional research opportunities of primary case law in New York State.

Personalize content just for you.

Login, visit myNYSBA and fill out the myInterests page to identify topics of interest to you. Your preferences are instantly applied across all areas of the new site so that you receive the content you want and need.

BOARD OF EDITORS

Howard F. Angione
Editor-in-Chief
Queens
e-mail: hangione@nysba.org

Rose Mary Bailly
Albany

Willard H. DaSilva
Garden City

Louis P. DiLorenzo
Syracuse

Philip H. Dixon
Albany

Lesley Friedman Rosenthal
New York City

Judith S. Kaye
New York City

John B. Nesbitt
Lyons

Eugene E. Peckham
Binghamton

Sanford J. Schlesinger
New York City

Richard N. Winfield
New York City

Eugene C. Gerhart
Editor Emeritus
Binghamton

Daniel J. McMahon
Managing Editor
Albany
e-mail: dmcmahon@nysba.org

Philip C. Weis
Associate Editor
Oceanside

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

ADVERTISING REPRESENTATIVE
Network Publications
Sheri Fuller
10155 York Road, Suite 205
Crestridge Corporate Center
Hunt Valley, MD 21030
(410) 628-5760
e-mail: sfuller@networkpub.com

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

CONTENTS

Beyond Words **– New Tools Can Enhance Legal Writing** — 10
Thomas G. Collins and Karin Marlett

New Rules on Surrogate's Court Assignments Prompt Review of Issues in "Dead Man's Statute" — 19
C. Raymond Radigan

New Court of Appeals Ruling Bolsters Use of *Res Ipsa Loquitur* in Medical Malpractice Cases — 28
Joyce Lipton Rogak

2002 Update on Issues Affecting Accidents Involving Uninsured and/or Underinsured Motorists — 32
Jonathan A. Dachs

The Self-Evaluative Privilege In the Second Circuit: Dead or Alive? — 44
Ronald G. Blum and Andrew J. Turro

DEPARTMENTS

President's Message — 5
Crossword Puzzle — 8
by J. David Eldridge
In Memoriam: Emil Zullo — 48
Meet Your New Officers — 49
Attorney Professionalism Forum — 51
Point of View — 52
by Marvin Rachlin
Index to Advertisers — 53
Classified Notices — 54
New Members Welcomed — 55
2003-2004 Officers — 63
The Legal Writer — 64
by Gerald Lebovits

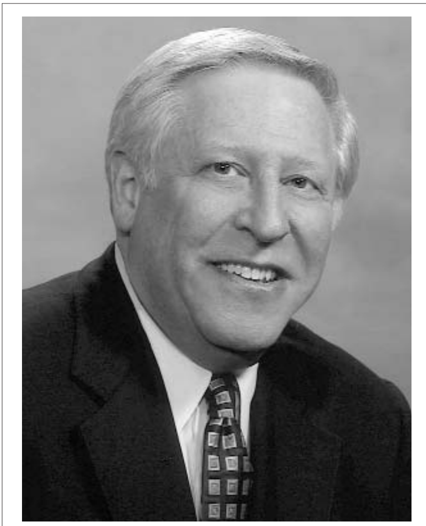
ON THE COVER

The brief page on the cover, illustrating principles advocated in this month's feature article, *Beyond Words – New Tools Can Enhance Legal Writing*, is based on actual material from the record and briefs in *Kelsey v. Muskin, Inc.*, 848 F.2d 39 (2d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). The 1988 brief by article co-author Thomas Collins took three pages and reference to the two volumes of appendix material to explain the facts shown in half a page here using current desktop publishing tools.

Cover Design by Karin Marlett.

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. The *Journal* (ISSN 1529-3769), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $18. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

PRESIDENT'S MESSAGE



A. THOMAS LEVIN

Stand Up, Speak Out

"[E]very one of us is responsible for everyone else in every way . . . everyone is really responsible for everyone and everything . . ." Dostoyevsky, *The Brothers Karamazov*

We all have power – the capacity to influence, alter, affect the lives of those around us." Marilyn French, *Beyond Power: On Women, Men and Morals*

One of the most enjoyable aspects of my recently completed year as president-elect was the opportunity to visit with so many of our sections and committees, to gain a greater familiarity with their activities, and to meet the hundreds of wonderful volunteers who make NYSBA such an effective organization. So, when it came time to decide what to discuss in my first President's Message, the answer quickly became obvious, and I knew that I must seize this opportunity to extol the virtues and accomplishments of this great organization and the volunteers who make everything happen. And once I began to write this piece, I was able to put that experience into a larger perspective, and to identify exactly what it was about those visits, and those meetings, which continues to delight and energize me every day.

Through these visits, I enhanced my knowledge of our organization, and I gained a valuable insight into the workings of NYSBA. Even more important, my own sense of purpose was reinforced. I also realized why, when I should expect to be tired and ready for respite after attending innumerable events, I am instead invigorated and inspired. The answer is: we are an organization of outstanding and dedicated volunteers, each of whom is giving knowledge, experience, and valuable time to make the legal profession and the legal system even better.

We are a voluntary bar association, a fact we tend to take for granted, but which in fact has a great deal to do with our program and our accomplishments. We are not beholden to any other authority for our organizational purpose or structure. Our agenda is not determined by others, and we have the freedom to stand up for what we believe is right, and speak out on those issues that concern us.

Thanks to sustained effort by our immediate Past President Lorraine Power Tharp, and others too many to name individually, we have just completed a highly successful year. We have put in place an invigorated legislative advocacy program, a highly visible public relations program, fuller and more interesting agendas for the House of Delegates, and have once again had the "best annual meeting yet." For the first time in 17 years, and in a year when New York State has faced perhaps its greatest fiscal crisis, assigned counsel fees have been increased. All of this comes from many individuals standing up when we needed them, and speaking out for justice and fairness.

And yet, there is so much more to do.

With more than 70,000 members, we have the opportunity to be an even more effective force in improving the legal system in New York, in providing even better continuing legal education, in being the voice of New York's legal profession, and in getting out the message that the rule of law is what makes America great. This is our mission, for the coming year and for future years.

Our focus will continue to be "access to justice." That's a wonderful phrase in principle, but what does it mean in practice? It means that everyone who has a legitimate grievance will have a forum available in which to have it heard, a lawyer to advocate for it, and an impartial arbiter to hear and decide it. It means that justice will be affordable, available, and truly dispensed without fear or favor. It means a modern legal system in which commerce can thrive, and in which commercial disputes can be resolved effectively and economically. It means recognition of our individual and collective rights, and recognition of our individual and collective responsibilities. It means a justice system open to all.

What will it take to achieve this utopian vision? Nothing more than the continued efforts of lawyers, standing up for what is right, and speaking out for those who cannot speak out for themselves. In short, continuing to do that which the legal profession does best: speaking for those without voices, protecting the helpless, seeking redress for the injured, defending the accused, prosecuting those who violate society's rules of

A. THOMAS LEVIN can be reached at Meyer Suozzi English & Klein, PC, 1505 Kellum Place, Mineola, N.Y. 11501, or by e-mail at atlevin@msek.com.

behavior, advising consumers and business people, guiding local residents through the maze of governmental regulation, protecting the environment, fostering the development of property for a stronger economy, counseling those in need of advice and guidance, developing estate plans and business strategies, helping parents adopt children, and protecting victims of domestic violence.

What is the common element in all of these activities? Lawyers performing the varied and diverse roles in which we are cast as we fill our roles in society.

Yet, polls show that the general public has little understanding or appreciation of lawyers, except for the individual lawyers with whom members of the public have dealt in their particular matters. If we truly want to do something about this, and participate in improving the reputation of lawyers, we are going to have to stand up, and speak out.

NYSBA will continue to be in the forefront of providing information to the public about the role of law and lawyers in society. We will be doing this in the schools and community organizations. We will do this by the continued good works for which our organization is known, our continued involvement in public affairs, and our continued efforts to improve the legal system for the benefit of the general public.

Every member has a role to play in this effort. We need you to carry this message forward. Explain to your clients the importance of the rule of law. Explain how the lawyers fit into this program, and the function of lawyers in their various roles. A greater public understanding of the role of lawyers is the key to greater respect for the legal profession.

Americans have been living through some difficult and stressful periods recently, some dim days and some bright ones. But, shining through the ugliness of war and strife, through the death and destruction, has been the beacon of American freedom, liberty and justice.

My father, who also was a lawyer, had a favorite saying (which I never understood fully until I also became a lawyer) that the American legal system was the worst one ever invented, except for all the others. In Afghanistan, in Iran, and in other countries around the world, the American legal system continues to be the model upon which other free nations build their legal system. There is good reason for this, and lawyers are at the center of it.

The American legal system is built upon a system of checks and balances, an elected executive who can appoint members of the judiciary and who can reject acts of the legislature, a legislature that can act even in the face of the executive's veto and can override judicial interpretations of statute or common law, and an independent judiciary that interprets what the legislature enacts and exercises oversight to insure that the executive acts only in conformance with law. At the heart of every part of this intricate structure are lawyers, standing up for what is right, and speaking out. Simply put, without lawyers, the American system that everyone admires so much would not be possible.

Perhaps lawyers are not doing enough to deliver this message. The public sometimes sees us as obstructionist and dilatory. We haven't done the best possible job explaining the role of lawyers and the law in the everyday lives of the public, or why the work of lawyers is so fundamental to maintaining the freedoms and liberties we hold so dear. The time has come for each of us to do what we can to help build the reputation of lawyers and the legal system, and promote public understanding of the importance of the role of lawyers in the rule of law.

How do we do this? Stand up and speak out!!! Help your bar association deliver this message.

Now is the time for every NYSBA member to be part of this project. You can do this in any of a myriad of ways. Pick one (or more). Volunteer for a *pro bono* case. Volunteer to speak in the community schools and before civic organizations. Volunteer to be an active member of our committees, and join with your colleagues in promoting NYSBA's vision and program. Volunteer to get a non-member colleague to join NYSBA and get with the program. Stand up, and speak out.

If you need any information or guidance on the many opportunities that are available, check out the NYSBA Web site, www.nysba.org and look up sections and committees by clicking on the right side of the home screen. Click on the left side of the section and committee screen to get the list of standing committees and special committees. There is something of interest there for everyone. And, on the chance that you might have an interest or an idea for which we don't already have a committee in action or an issue or idea that one of these groups should address, let me or any other member of the Executive Committee know about it. You will find the names of the Executive Committee members at the end of this issue of the *Journal*. We are here to serve our members, to provide a program which meets your needs, and to make sure that NYSBA membership remains valuable for you.

I am proud of NYSBA, I am proud of New York lawyers, and I want all of you to be proud of NYSBA. If we fall short of your expectations, stand up and speak out!!

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. Answers to this puzzle will be printed in the next issue. (The answer to the previous puzzle is on page 27.)

Negligence, by J. David Eldridge

Across

3 Injuries which could not have been prevented with due care
6 Failure to perform a required act
7 Providing patient with knowledge of risks involved in surgery
8 Really, really, reckless disregard
11 The sharing of damages by multiple offenders
15 Landmark case precluding duty to unforeseeable plaintiff
16 The direct origin of an injury
20 The reasonably prudent person
22 Responsibility for commission of a tort
23 What your soft tissue injury case is lacking
24 Not a bulging one
27 Rule imposing liability in certain instances upon person in trouble who had to be saved
29 What you get when you win at trial and are only awarded a dollar
34 Vertebral cushioning not fully burst
36 Reimbursement to one for another's loss
44 Failure to take care in what you said, causing damages to one who relied on your word
47 Negligence is all about finding ______ in others
49 Where a doctor's uninterrupted care stays the statute of limitations
50 Action involving breach of moral or legal duty
51 The injury Fido leaves you with when he's been bad
52 What your neighbors judge you by as jurors in a defamation case
53 Knowledge of the existence of certain facts (express or implied)
54 What the employee does on duty to relieve his boss of liability
56 A manufacturer's automatic responsibility for injuries from a defective product
57 Degree of uncertainty
58 State of property creating substantial risk of harm
59 Foolish chance

Down

1 Conduct added to another's fault jointly resulting in injury
2 Degree of concern the RPP must live up to
4 Intentionally doing something you know could be dangerous
5 When a treating doctor's negligence results in injury
9 Person who can still help in a case without broken bones
10 When an insurance company makes you visit the doctor
12 Take your victim as you find him
13 What an injured plaintiff must meet to bring an action under No Fault
14 What you have to file before you can sue a municipality
17 Violation of a duty
18 Great; culpable; general; absolute
19 Act of a third person which affects the causal connection between negligent act and wrongful injury
21 The kind of damages you don't want in an MVA
25 Complete disregard for the consequences of your actions
26 Intentional failure to perform a duty in reckless disregard of consequences
28 Legal or moral obligation
30 Two kids causing injury to another while drag racing are deemed to be __________
31 Two contemporary acts which together result in damages
32 Giving your car keys to an intoxicated minor
33 How an invitee gets on the land of another
35 Doctrine extinguishing right of action based upon delivery of goods or services
37 Formal questioning of an individual on the record (usually a party)
38 Why you should have known
39 A PI attorney's bread and butter
40 When you get in trouble for something someone else did
41 Still speaking for itself
42 The four pillars of negligence: duty, breach, ______, damages
43 The case of the hairy hand
45 Why you get paid for the accident you caused
46 Damages the insurance company will never, ever pay you for
48 Doctrine extending statute of limitations in med-mal case to date you learned of injury
55 Legal activity disturbing or annoying another

New Tools Can Enhance Legal Writing

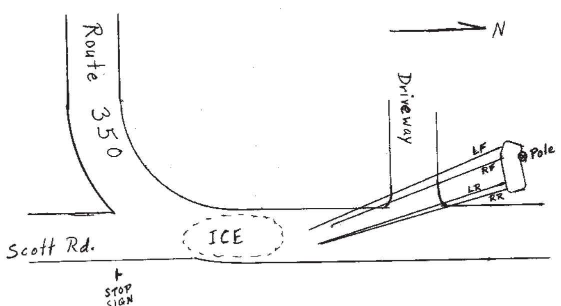
By Thomas G. Collins and Karin Marlett

In his legal writing classic *Working With Words,* more than 20 years ago Herald Price Fahringer reminded us emphatically: "A picture ***is*** worth a thousand words."[1] He urged lawyers to use charts, diagrams, key exhibits and photographs "to deliver a large amount of information to the reader quickly and effectively."[2]

Most important to the discussion here, Fahringer insisted that, whenever such a graphic is available to illustrate a crucial point, "reproduce it *in the body of your brief*. Locate it in that area where the issue is discussed. Don't make the court dig through a cumbersome record to find it."[3]

Placing graphics within the text being illustrated promotes clarity, brevity and convenience. How many words can be saved in describing how this car became wrapped around the utility pole by inserting the police report sketch, scanned from the record?[4] How much clarity and judicial convenience are gained?

28
Exhibit D—Maps of Accident Scene



At the time Fahringer gave this advice, however, reproducing graphics in the body of a brief was no simple matter.

That Was Then

In the 1980s (and well into the '90s), using graphics involved significant tradeoffs. A commercial printer could prepare and insert graphics into the text of a brief the way books were produced. But that cost far more than most clients or cases would bear.

Reasonably high quality copies could be attached as appendix material. But that only partially solved the location and convenience problems. Separated from their textual references by many pages, the graphics failed to contribute all they could to illuminate ideas. And rudimentary cut-paste-and-photocopy methods resulted in poor quality, second or third generation images in the text, often obscuring, rather than enhancing, the communication.

This Is Now

Technology has changed all that. Capturing or creating graphics and embedding them in writing is easy now. Yes, *easy*. The software tools come preloaded on most computers purchased for law office use. The hardware needed besides the computer is a good quality scanner and a good quality color printer. Both are available for a couple of hundred dollars, or less, each.[5]

This article does not present detailed how-to instructions. These tools are no harder to learn than word processing software or e-mail. Every software package uses its own on-screen interface and terminology. Even dif-

Thomas G. Collins is a lawyer retired from practice in Rochester after nearly 25 years concentrating on appellate and complex motion practice. He now studies and writes on legal technology issues and consults with lawyers and firms on research, writing, information design, and knowledge management projects. He holds a B.A. in History and a J.D. from SUNY Buffalo and currently is working on his M.A. in Informatics. His e-mail address is tcollins@advocacy2100.com.

Karin Marlett is an artist engaged in varied professional roles related to visual design. Through her consulting practice, *Information Image*, she also collaborates on law-related projects. She holds degrees in Visual Communication from the Art Institute of Pittsburgh and both Fine Arts and Health Care Management from SUNY Brockport. Her e-mail address is karinmarlett@earthlink.net.

ferent versions of the same software occasionally make changes in their look and labeling. Attempting to teach the details in a journal article would merely leave the reader confused and frustrated. Scan something, open the editing software, find the tutorial (usually under Help), and play with it!

> ***"It's not about the bike."***
>
> —Lance Armstrong

Why Bother?

The reasons why may be viewed from two angles. First, the desire to pursue excellence in legal writing fully justifies the effort to learn how to incorporate graphics. This was true long before Fahringer urged it. In 1613, Galileo published his *Letters on Sunspots*, which might be regarded as his first "brief" defending his scientific discoveries against charges of heresy.[6] In the excerpt shown here, when Galileo described his observations of Saturn, "word and drawing were as one. The stunning images, never seen before, were just another sentence element. Saturn, a drawing, a word, a noun."[7]

compagnato con due ſtelle à i fianchi, creda pur V. S. ch'è ſtata imperfezzione dello ſtrumento, ò dell'occhio del riguardante, perche ſendo la figura di Saturno così , come moſtrano alle perfette viſte i perfetti ſtrumenti, doue manca tal perfezzione appariſce così non ſi diſtinguendo perfettamente la ſeparazione, e figura delle tre ſtelle; ma io che mille volte in diuerſi tempi con eccellente ſtrumento l'hò riguar-

Other great thinkers before and after Galileo also embedded pictures in their writings. For example,

Da Vinci's notes (circa 1508–1510):

Newton, Principia Mathematica (1686):

Stephen Hawking took this tradition to a new level when he decided to publish a revised edition of his 1988 best seller, *A Brief History of Time*. The new 1996 edition was re-titled *The Illustrated A Brief History of Time*, and in the foreword Hawking noted, with considerable scholarly understatement, "I know that some people have found parts of the [first edition] difficult to follow." He then explained, "The aim in this new edition is to make it easier by including large numbers of illustrations. Even if you only look at the pictures and their captions, you should get some idea of what is going on." The book jacket noted that the illustrations were made possible, in part, by the advances made between 1988 and 1996 in computer graphics.

The ability to communicate ideas may be the most important skill a lawyer can master. Nearly every issue of this *Journal* contains one or more articles on legal writing. Yet nearly all of these articles seeking to improve legal writing focus exclusively on using words to communicate. Partly, this concentration on verbal skills may be rooted in a disregard for picture books as being for children, not for sophisticated, intelligent grownups – a kind of "pics are for kids" attitude. But if the goal of legal writing is communication, then maybe we need to take another look at those picture books.

Well-known research in the fields of education and psychology helps to explain why including graphics enhances communication of ideas. Anyone with children in school is familiar with the theories of multiple intelligences, or learning styles. At least seven have been identified and only one of them, linguistic, involves thinking in words.[8] Spatial learners think primarily in images and pictures and several other styles (logical-mathematical, bodily-kinesthetic, musical) use a variety of symbolic and visual cues that go far beyond words. Indeed, psychology research suggests that upwards of 93% of communication is nonverbal.[9]

These factors affecting the efficiency of communication do not disappear when we graduate from high school. The Web site at North Carolina State University posts an article by Drs. Felder and Solomon, with this advice for college students regarding visual and verbal learners: "Everyone learns more when information is presented both visually and verbally. In most college classes very little visual information is presented. . . . If you are a visual learner, try to find diagrams, sketches, schematics, photographs, flow charts. . . ."[10] Similarly, corporate training courses and self-help books are filled with advice on nonverbal communication skills.[11]

Perhaps the most familiar and most basic of these learning style theories is the left-brain, right-brain dichotomy. Left-brain people are linear-logical-verbal thinkers. Right-brain people think in holistic-intuitive-visual ways. Once again, this dichotomy follows us into adulthood.[12]

Now here's the sit-up-and-take-notice part for legal writers: the research concludes that "most" or "the majority" of adults are visual learners.[13] There is no reason to think judges, jurors, or clients are any different. Even more sobering, one study estimates we remember only 10% of what we read! Retention climbs to 30% of what we see (visual learning), or triple the effectiveness of the communication. Using two or more communication channels together pushes retention to 50% and higher.[14]

All of this points to but one conclusion. Combining verbal and visual information makes communication far more effective.

> ***"How you gather, manage and use information will determine whether you win or lose."***
>
> —Bill Gates

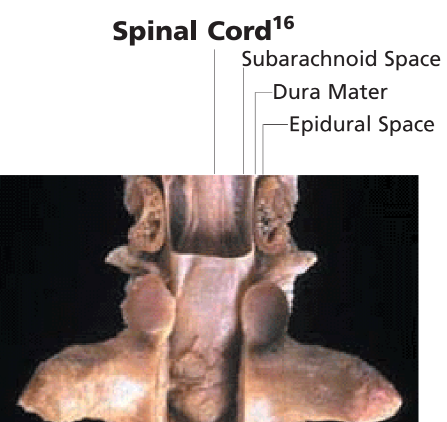
As Edward Tufte puts it, "Words and pictures belong together."[15] Excellence in legal writing, therefore, demands appropriate inclusion of graphical aids.

Coming at the "why bother" question from the other direction, the professional obligation to maintain a minimum level of competence also suggests that lawyers should learn these skills. The main benefits of using graphics to illustrate complex issues are clarity and brevity. The example above, using a police report sketch of an accident scene, showed how these two goals of writing were served. Here's another example.

Take a medical malpractice case involving an injection of a drug into the patient's lower back, near the spinal cord. The primary issue in the case was the adequacy of the drug manufacturer's warnings not to place the drug in direct contact with the spinal cord. The court needed to understand the anatomy of the spinal column in that area to fully consider that issue, but only as background.

The relevant deposition testimony consumed over 20 pages describing the vertebral bodies, layers of tissue, and spaces surrounding the spinal cord. Attempts to reduce that medical testimony to understandable prose in an all-text statement of facts never got below a page and a half. Adding a graphic made it easy to do in half a page. A glance at the labeled picture and a couple of sentences quickly lets the reader know that the drug had to be kept out of the subarachnoid space, outside the dura mater, to avoid contact with the spinal cord. This allows the reader to get right to the main issue, the adequacy of the label warnings.

Spinal Cord[16]



The title of a recent article drives home the important benefits of clarity and brevity: "An Attorney's Ethical Obligations Include Clear Writing."[17] That article cited numerous examples of cases where courts sanctioned lawyers or dismissed the claims of their clients because the lawyers failed to produce clear, concise writing.

The problem may run deeper than the quality of individual pieces of writing, however. Observers of the profession have argued that digital publication skills are becoming essential for lawyers to remain competitive with non-lawyers – indeed with their clients themselves – who have increasing access to legal information. To remain relevant, these observers say, to provide a worthwhile service, *i.e.*, to survive, lawyers must adapt to the technology that is readily available for finding, organizing, packaging and delivering information.[18]

> ***"It is not the strongest of the species that survive, nor the most intelligent, but the one most responsive to change."***
> —Charles Darwin

Thus, whether you view it as striving for excellence in legal writing or maintaining minimum competence, the result is the same. The basic graphics tools now available on nearly every lawyer's desktop seem destined to make these visual communication skills as basic to a lawyer's competence as writing well, or speaking well.

If so, the remaining question is how?

Practicing Graphical Excellence[19]

"Graphical excellence consists of complex ideas communicated with clarity, precision and efficiency. Graphical excellence is that which gives to the viewer the greatest number of ideas in the shortest time with the least ink in the smallest space. . . . And graphical excellence requires telling the truth about the data." These ideals sum up Professor Tufte's first chapter in *The Visual Display of Quantitative Information*.[20]

But before elaborating on his "do" list, Tufte spends two whole chapters on the most important "don't": don't let your table, graph, drawing, or picture distort or misrepresent the information. He calls this principle *graphical integrity*.[21]

The issue of graphical integrity points to a second reason underlying reluctance to use graphics in legal writing: the notion that because many graphics are used to display numerical or statistical information, they are often used to lie. One suspects that such a mistrust of graphics prompted the Second Department's rule that, absent permission, "briefs shall not contain maps, photographs, or other addenda."[22] Fahringer urged lawyers to seek permission, gently implying that the courts should be liberal in giving it (if not do away with the rule altogether).[23] Tufte offers a complete answer to this concern about misleading graphics in a single sentence. "But data graphics are no different from words in this regard, for any means of communication can be used to deceive."[24]

He also suggests that most people have "pretty good graphical lie detectors" and can spot attempts at graphic deception fairly easily. This seems consistent with the

research indicating that most people are visual learners and thinkers. Indeed, it may be that one of the very reasons for our cautious approach to information graphics is our ability to detect the ones that lie.

Yes, graphics done badly, or with bad intent, can be misleading. So can sloppy, or slippery, language. The answer is not to prohibit graphics, because graphics done well can be the most powerful, efficient and effective communication devices we have. The answer is for all who seek better communication to learn to use graphics well, which will also make us even better at spotting and dealing with those that aim to deceive.

One more thing, before turning to use of graphics, as such: Writing itself is a visual medium. Most serious advice on writing includes some page layout guidelines about generous use of white space, multiple blocks of text per page and the like. When you have something important to say in words, design principles can still help.

Recall one of Tufte's descriptions of graphical excellence: "Graphical excellence is that which gives to the viewer the greatest number of ideas in the shortest time with the least ink in the smallest space." That sentence is full of important ideas. Focus on the sentence in your head, or read it out loud. Does it sound something like the following?

Don't Prohibit Stained-Glass Windows

At my first NYS Bar seminar on Appellate Practice in 1983, I had the good fortune to hear Fahringer speak on legal writing. I believe he was the first person I heard tell this story:

> A man once walked by a building site and saw three masons side by side, sweating over their work in the hot sun. He asked the first, "What are you doing?"
>
> "Laying bricks," came the reply.
>
> He asked the second man, "And what are you doing?"
>
> "Building a wall," came the reply.
>
> Then he asked the third mason, "And what is it you are doing?"
>
> "I am raising a great cathedral."

Fahringer compared working with bricks to his craft of working with words and urged us all to go build cathedrals.

I've thought of this analogy often over the years and tried to apply it in my work. As I've explored the use of graphics in legal writing, I've come to believe the analogy holds true. Adding graphics can be like installing stained-glass windows. Both help communicate the story behind the building and both make the whole more beautiful.

Rules limiting the use of graphics in briefs are like zoning laws prohibiting the use of stained-glass windows in cathedrals.

— Tom Collins

Graphical excellence is that which gives to the viewer

the greatest number of ideas

in the shortest time

with the least ink

in the smallest space.

The sentence was fine as Tufte wrote it. But it contains four distinct, individually important guidelines for making powerful information graphics. The above is one possible layout that would emphasize – and perhaps make memorable – each idea.[25]

The notion of printed words having a "sound" is common. Fahringer advised legal writers to find their "voice."[26] *The Elements of Style* put it this way: "When we speak of Fitzgerald's style, we don't mean his command of the relative pronoun, we mean *the sound his words make on paper*."[27]

Books and articles on writing often suggest reading a draft out loud to see how the written words sound. Like punctuation, sentence length, and paragraph breaks, the layout of the printed words on the page can reflect, support, perhaps compel, how they sound to the reader.

Now let's examine a few graphic design do's.

1. *Know why you're using a graphic.* Jacques Barzun's first principle for writing states, "Have a point and make it by means of the best word."[28] This principle is echoed by Tufte, "Good design is clear thinking made visible."[29] And again, from Hillman Curtis, "[F]or a design to be good, it has to be about something."[30] The first step, then, is to know what your point is.

The second is to decide if the best word might actually be a graphic.

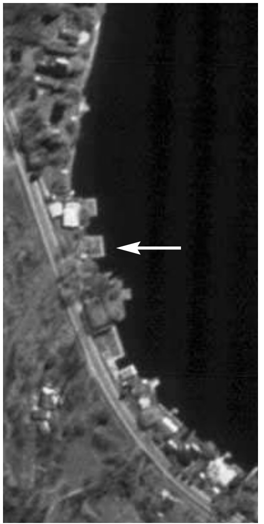
Applying the four criteria for graphical excellence emphasized above can help the decision. For example, large quantities of data may often be presented more efficiently in a table, or a scatter plot, or a data map, than they could in words alone. A photograph or drawing may convey critical information instantly, where words would take a minute or two to absorb. Unfamiliar medical or scientific terminology could be illustrated with a graphic to save paragraphs, or even pages, of explanation. And a timeline frequently can present a chronology in far less space than text alone.

Graphics included without a clear purpose amount to "chartjunk"[31] and are distracting and even irritating to the reader. By testing the need for graphics against the criteria for graphical excellence, we can decide with some assurance when using them will enhance communication.

2. *Force visual comparison.* One substantive purpose graphics can serve is to compare data. This can be as simple as a two-column table, contrasting the opposing parties' testimony on key issues. Or, it can display multiple variables on a color-coded data map, allowing quick and effective comparisons of large amounts of information.

When using graphics this way, the comparative purpose drives the critical design principles, as well. In the data map example, care should be taken in choice of adjacent colors and shades, elimination of non-data ink, and other visual factors to bring forward the desired variables and thus enable and enforce their comparison.

The black-and-white aerial photo, shown here, was used in a case that involved a requested zoning variance for lot coverage greater than the 25% allowed by the ordinance. The white arrow points out the subject vacant lot. The photo was offered to show that most of the surrounding lots along the lakeshore have very large homes that cover substantial portions of their lots, far greater than 25%. Although there were affidavits and individual ground level photos in the record, this graphic enabled and, it was hoped, forced the viewer to compare the coverage requested for the subject lot to the others already existing in the neighborhood.



3. *Show causality.* Classic examples of graphics showing causality are found in cancer cluster maps.This map showed the distribution of cases of cancer and also displays the outline of a plume of soil contamination and the plant located at the beginning edge of the plume. Another example is Dr. John Snow's famous map plotting the deaths in the London cholera epidemic of 1854. The cholera death symbols clustering around and radiating out from the location of the Broad Street pump convinced the Board of Guardians of St. James Parish to order removal of the handle from that pump.[32]

4. *Capture complexity.* The point here is to show the relevant data. Show *all* the relevant data. The goal "is the clear portrayal of complexity."[33] Attempts to simplify the data at the expense of completeness breeds suspicion that something important has been omitted. In contrast, displays that bring clarity to complex information build trust. The viewer can see that all the data is being presented and that the designer respects the viewer's ability to interpret the data.

Moreover, in some cases, adding detail can actually contribute to the clarity of the display. Tufte provides numerous examples, as well as some graphic techniques (layering and separation) to enhance such detailed displays.[34]

5. *Keep graphics adjacent to the text being illuminated.* Most of the benefit from using graphics can be lost through poor visual design. Few design flaws are more irritating and distracting to the reader – and thus destructive to communication – than placing the graphic on a different page from the text that refers to it. Tufte calls this keeping words and pictures "adjacent in space, not stacked in time."[35] His references to space and time are significant.

Violating this rule wastes the reader's precious time. By disrupting the reader's concentration, it risks loss of attention. Separating words and pictures wastes space, too, forcing the use of references like "*see* Fig. 5-7" and the addition of boxes and captions to remind the reader that this graphic relates to a point made somewhere else, not in the text on the page where it happens to be found.

"Adjacent in space" is as close to a rigid rule as you will find in information design.

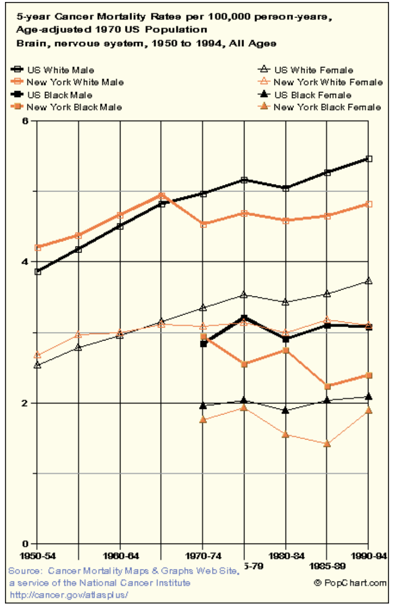
The adjacent in space rule could also be applied to resolve the running debate over footnotes and endnotes. It is not hard to see why some courts prohibit footnotes and insist that all the information be in the text. Open a law review or volume of *Federal Supplement* and you can see the rampant abuse of footnotes, some covering most of the page. But, once again, the fact that a communication tool can be abused does not justify prohibition. Footnotes can also be used well, to enhance communication.[36]

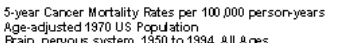
Tufte's solution is "sidenotes." By laying out pages with an extra-wide outside margin, notes can be set in that margin – immediately beside the text they supplement. Think of a three-column page. Combine two of the columns into a double-wide one, for the main text. Leave the other empty, except for an occasional, concise, well-crafted note. While this technique might not comply with some courts' current rules for briefs, the gain in clarity might well justify a motion for permission in a particular situation. And lawyers write many other types of reports, memoranda, and even formal letters.

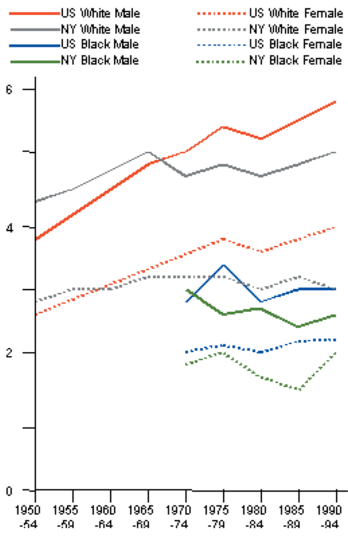
Examine Tufte's books. His sidenoted layout virtually eliminates the distractions of reference citations in the body of the text that bog down lay readers of legal writing. The wide margins and occasional sidenotes provide striking visual appeal, thorough references, and some delightfully informative asides, greatly enhancing the primary message. Yet the design minimizes the distraction of the notes themselves, because the reader's eye remains at the same level on the page after glancing at the note. Adjacent in space.

6. *Minimize non-data ink.* Here we have the graphical equivalent of Strunk and White's "Omit needless words."[37] With graphics, minimizing non-data ink takes several forms. Tufte spends several chapters on these

various techniques, so it is not possible to explain them in full detail here. By summarizing a few of them, the principle can be introduced and, perhaps, a desire for further study aroused.







Most obvious are the erasure principles: erase non-data ink and erase redundant data ink. Stating them positively, Tufte puts it, "Every bit of ink on a graphic requires a reason."[38]

Too often the data get obscured or even lost in a maze of grid lines and decoration. For example, an expert witness in a toxic tort case might compare brain and nervous system cancer rates in New York and overall in the United States. The chart, produced on the National Cancer Institute's Web site, shows prominent grid lines, a non-data color background, and an array of symbols that require frequent references back to the key to follow.

By erasing the background and most of the grid, the data can be shown with a simple color coding that eliminates the need for the symbols entirely.

More subtle, but sometimes just as effective, the data-ink ratio can be improved by decreasing the weight (thickness) of certain lines, or their color (*e.g.*, from black to gray, or a semi-transparent color).[39] Tufte provides a striking example by redrawing a detail from a map of Rome made in 1748. Simply by "muting" the heavy inking of lines in the river, he eliminates annoying optical vibration. This also causes labeling and details like bridges and docks to stand out.[40]

Another method is using "multifunctioning graphical elements." For example, a single blot of yellow ink on a map may give us many bits of data about a city: its location, its size and shape and, by varying the tint of yellow, its population range.[41]

Applying these principles requires exercising judgment – Tufte himself carefully appends the phrase "within reason." Consider the cancer mortality charts above. It is quite possible to differ over how many lines and how much ink should be erased to make the data most accessible before we begin to lose touch with the axes and labels that define the data points. The eye will usually fill in the grid without the lines being shown, but sometimes fine lines help.[42]

In writing, we must decide how many words are utterly necessary and which ones will best carry the meaning. So, too, in using graphics, we must decide how much ink is essential and which lines and forms are most effective. Both are art, after all.

7. *Use small multiples.*[43] Small multiples display information in a series of similar graphics in which one or more of the variables may change. They are especially powerful tools for visual comparisons. The familiar auto reliability charts in *Consumer Reports*, for example, display enormous amounts of information. Their small multiples layout allows easy comparisons between different years of the same make and model, or between the same component among different makes and models.

Data maps or photographs of the same location over a period of time can be arrayed as small multiples to highlight changes in a single variable such as air pollution or traffic counts. Or maps of the same area plotting different variables – such as zoning districts, locations of schools, incidents of petit larceny, drug and alcohol arrests, traffic accidents – can be shown as small multiples and provide valuable data for comparison and causation analysis. Attempting to crowd so much data on a single map would interfere with communication.

8. *Use color with a purpose.* Maps also exemplify the versatility of color as a communication tool. Blue can designate the location and boundaries of a body of water; several shades of blue can be used to show changes in its depth. Changes in color deliver information without the need for additional lines. Color can be applied to clarify tables, charts and graphs, without adding lines, too.

This is a critical point: any change in color on a graphic must indicate a change in the data. Too often, a graphic element is filled in with varying colors that show nothing more than the designer has discovered the "gradient" tool in the computer graphic software. This is more than just a waste of ink; it is confusing to the viewer.

Going back to maps – different colors for roads can carry information about their size, quality, accessibility,

ownership and toll requirements. Temperature ranges, the amount and kind of precipitation, and other weather information can be displayed at a glance using colors.

Color can also be used to call attention to a critical piece of information on a graphic, but there lies danger. If color has no other purpose than to call attention, then it becomes very much like shouting. Occasionally a message needs to be shouted. But more often shouting interferes with communication. Using color simply because you can is like typing your words in all caps. Very quickly the technique becomes obtrusive and the message may get lost.

Like graphics in general, color can be a powerful aid to communication – when used well. Learning how to use color is, therefore, very much worth the effort.[44]

Conclusion

Most of these guidelines come, or are derived, from sources such as Edward Tufte's books on visual information display[45] and Hillman Curtis's recent book on "new media design."[46] The brief summaries offered here should provide a starting point on the journey to graphical excellence, but only that. Graphical excellence, like writing excellence, should become a lifelong pursuit. As Curtis explains, new media design is part of a continuum, the history of art and expression. "Our tools may be new, but what we do is as old as cave painting."[47]

For those who may be thinking that it's too late, or these new tools are beyond them, Curtis notes that most new media designers are self-taught and still learning. "Because many of its technologies are constantly evolving, in a sense New Media will always be a level playing field. Beginners and longstanding designers alike are always on the cusp of a new era, always faced with new tools and challenges, and always prone to the same mistakes and victories."[48] Barzun says the same thing about writing, by the way: "All good writing is self-taught."[49]

There may also be the temptation for lawyers simply to hire graphic designers or outsource all the graphics work. Certainly there is a place and a need for specialized expertise in using graphics, just as there are times to bring in a specialist for research, writing or oral argument. But once again, there is a risk to professionalism. Using graphics as a communication tool makes it an integral part of formulating the argument itself. As Tufte notes, "Data graphics are paragraphs about data and should be treated as such."[50]

How many times have you found yourself in the middle of redrafting a sentence, struggling to express your idea, when you hit upon a new way of making your point, or even recognize a whole new angle on the case? Working on the design of your information graphics can have the same effect. If lawyers completely abdicate their role in designing the graphics intended to convey the crucial message of their case, they will miss some of those moments of epiphany.

Writing and graphic design are both communication skills. We should stop thinking of the two as separate. Quoting Curtis, "A common mistake of designers is thinking of themselves only as visual communicators. We're fortunate to speak the visual language fluently, but we also need to translate literal and thematic messages. In other words, we need to be bilingual."[51]

It is just as much a mistake for writers, lawyers included, to think of themselves only as verbal communicators. The audience uses both languages and many are more comfortable with the visual. With the tools available today, we all need to become "bilingual."

Two decades ago, Fahringer urged lawyers to "strive to find new and imaginative ways to persuade" by using graphics in legal writing.[52] Now you can.

---

1. Fahringer, *Working With Words*, N.Y. St. B.J., Vol. 54, No. 3, at 167 (Apr. 1982) (emphasis in original).
2. *Id.*
3. *Id.*
4. This sketch and the other graphics used in this article that are based on actual cases have been redrawn or replaced with similar images to better illustrate the information design principles discussed, as opposed to the particular issues of those cases.
5. Mr. Collins, for example, works with a Dell Pentium II-300 (with 320 MB RAM), a Hewlett-Packard ScanJet 5P scanner (24-bit, 16.7 million colors, maximum 1200 dpi

resolution) and a Lexmark Z52 printer (color ink-jet, maximum 2400 x 2400 dpi). All are a few years old and (sigh), like most technology these days, much better models are currently available for less cost.

6. Drake, Discoveries and Opinions of Galileo 85, 102, 145–46 (1957).
7. Tufte, Envisioning Information 121 (1990).
8. Gardner, Frames of Mind: The Theory of Multiple Intelligences (1983); Armstrong, Multiple Intelligences in the Classroom (1994). It is important to note that everyone possesses all seven of these intelligences. The theory merely states that one will be the dominant, or preferred, style that makes learning and processing information easiest and most effective.
9. Mehrabian, Silent Messages (1981).
10. Felder & Solomon, Learning Styles and Strategies <http://www.ncsu.edu/felder-public/ILSdir/styles.htm> (accessed Mar. 5, 2003).
11. Wallace, Climbing the Learning Ladder <http://www.llrx.com/columns/guide69.htm> (last updated Nov. 4, 2002); Lewis, The Secret Language of Success (1989).
12. Hopper, Practicing College Study Skills: Strategies for Success (3d ed. 2003), summary available online at: <http://www.mtsu.edu/~devstud/advisor/learn.html> (last updated Nov. 5, 2002).
13. Felder & Solomon, *supra* note 10; Wallace, *supra* note 11.
14. Wallace, *supra* note 11.
15. Tufte, The Visual Display of Quantitative Information 180 (2d ed. 2001).
16. This example is based on a real case, but the image used here is different from the one used in that brief (simply because we found a better one to illustrate the point). Image adapted from: Terence Williams, et al. *The Human Brain*: Chapter 1: The Spinal Cord [Web document]. The University of Iowa: Virtual Hospital, 1992–2003, <http://www.vh.org/adult/provider/anatomy/BrainAnatomy/Ch1Text/Section07.html>. Copy righted material used with permission of the authors, The University of Iowa, and Virtual Hospital, <http://www.vh.org>.
17. Davis, *An Attorney's Ethical Obligations Include Clear Writing*, N.Y. St. B.J., Vol. 72, No. 1, at 50 (Jan. 2000).
18. Granat, *Re-Training Lawyers for a Digital Age* (ABA TechShow98; available online at <http://www.digital-lawyer.com/digital-lawyer/retrain.html> (last updated Sept. 28, 1998)); Susskind, Transforming the Law (Oxford Univ. Press 2000); Robinson, *Stampede to Extinction?* (in Elder Law Advocate, Fla. Bar 1997–1998; available online at <http://64.78.52.120/article_stampede.htm> (accessed Mar. 5, 2003)). *See generally* Munneke, Seize the Future (ABA Books 2000).
19. The term "graphical excellence" comes from Edward Tufte's book, *The Visual Display of Quantitative Information* 13 (2d ed. 2001) ("Visual Display").
20. *Id.*, at p. 51. Professor Tufte has published three books on information design already: (1) *The Visual Display of Quantitative Information*, (2) *Visual Explanations* (1997) and (3) *Envisioning Information* (1990). He is currently working on another, to be entitled *Beautiful Evidence*. The title indicates that this one should be of special interest to lawyers.
21. Visual Display, *supra*, note 19, at pp. 52–87.
22. 22 N.Y.C.R.R. § 670.10(d)(1)(iii).
23. Fahringer, *supra*, note 1.
24. Visual Display, *supra*, note 19, at p. 53.
25. For more information on typography and page layout, see the chapters "Type," written by Katherine Green, and "Print," written by Fran Gaitanaros and Fernando Music, in Curtis, *MTIV: Process, Inspiration and Practice for the New Media Designer* (2002) (hereinafter "MTIV"). MTIV stands for "Making the Invisible Visible" – the motto of author Hillman Curtis's new media design company <http://www.hillmancurtis.com>.
26. Fahringer, *supra*, note 1, at pp. 168–69.
27. Strunk & White, The Elements of Style 66–67 (4th ed. 2000) (emphasis added).
28. Barzun, Simple & Direct: A Rhetoric for Writers, p. 14 (U. of Chicago ed. 1994).
29. Edward Tufte, speaking at his one-day seminar in Boston, MA, on March 12, 2002.
30. MTIV, *supra*, note 24, at p. 209.
31. Visual Display, *supra*, note 19, at pp. 107–121.
32. Visual Explanations, *supra*, note 19, at pp. 27–37 (map at pp. 30–31).
33. Visual Display, *supra*, note 19, at p. 191.
34. Envisioning Information, *supra*, note 19, at pp. 36–65.
35. Edward Tufte, speaking at his one-day seminar in Boston, MA, on March 12, 2002.
36. *See, e.g.*, McAloon, *Defending the Lowly Footnote*, N.Y. St. B.J. at 64 (Mar./Apr. 2001) (footnotes "can explicate subtleties in an argument, while leaving the core unobstructed").
37. Strunk & White, *supra*, note 27, at p. 23.
38. Visual Display, *supra*, note 19, at p. 96.
39. Envisioning Information, *supra*, note 20, at pp. 36–65.
40. *Id.*, at p. 60.
41. Visual Display, *supra*, note 19, ch. 7.
42. Visual Explanations, *supra*, note 20, at pp. 18–23. *See* Visual Display, *supra*, note 19, pp. 102–105 (Tufte experiments with how many and which lines can be erased most effectively from a graph in a Linus Pauling textbook).
43. Visual Display, *supra*, note 19, at pp. 170–74.
44. MTIV, *supra*, note 25, at pp. 146–51.
45. Tufte, *supra*, note 19.
46. MTIV, *supra*, note 25.
47. *Id.*, at p. 15.
48. *Id.*, at p. 138.
49. Barzun, *supra*, note 28, p. 3.
50. Visual Display, *supra*, note 19, at p. 181.
51. MTIV, *supra*, note 25, p. 23.
52. Fahringer, *supra*, note 1, p. 167.

New Rules on Surrogate's Court Assignments Prompt Review Of Issues in "Dead Man's Statute"

BY C. RAYMOND RADIGAN

The new Rule 36 of the Chief Judge[1] setting forth procedures for the appointment and education of attorneys who serve as guardians *ad litem* makes it appropriate for anyone who receives such an assignment to be conversant with the current status of the Dead Man's Statute, a provision of the Civil Practice Law and Rules that is frequently a significant issue in Surrogate's Court cases.

In early English law, only parties and their close relatives could testify, because the law did not want outsiders meddling in the affairs of litigants. Suddenly there was a change in thinking, however, and from the 17th century to the middle of the 19th century neither a party nor a person interested in the event was considered competent to testify. This required litigants to prove controversies by obtaining testimony from those who used to be considered meddlers.

In 1848, as English law re-thought the issue again, New York eliminated the incompetency of interested witnesses, and nine years later it eliminated the disability of a party testifying. As a result, we now have CPLR 4512, which states that, except as expressly prescribed otherwise, persons are not rendered incompetent to testify because they have an interest in a proceeding. The effect is that third parties, interested parties and parties can testify.

Between 1848 and 1869, the legislature, the courts and the evidence experts had an opportunity to observe the workings of the abolition of incompetency of interested parties and witnesses, and this slowly generated a consensus that something should be done to deal with the effect that possible perjured testimony could have on decedents and claims against their estates. In 1869, the general provisions of what became known as the "Dead Man's Statute" took shape as the expression of a specific prescription to the general rule permitting interested parties to testify in a proceeding. The reasoning was that because death had silenced one party, the law should silence the other.

The result, embodied in the old Civil Practice Act § 347, became the subject of heated debate over possible change or elimination when New York undertook a thorough review of its civil practice rules in the mid-20th century. No agreement could be reached on a good substitute, however, and discussions about modifying or eliminating the statute were tabled for further study. Thus, when the new Civil Practice Law and Rules took effect on September 1, 1963, the Dead Man's Statute was transferred, word for word, to CPLR 4519.

Even though experts in the field of evidence and some appellate judges have suggested that the statute be abolished, few changes have been made in it. Today, one could read *Greenfield on 347*, a thorough treatise on the statute published more than 75 years ago, and still obtain one of the most concise outlines of the statute without fear that the bulk of what is there might be obsolete.

The Statute

CPLR 4519 begins by providing that:

> Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person or the committee of a mentally ill person, or a person deriving his title or interest from, through or under a deceased person or mentally ill person, by assignment or otherwise, concerning a personal trans-

C. RAYMOND RADIGAN, formerly Nassau County Surrogate, is now of counsel to Ruskin, Moscou, Faltischek P.C. in Uniondale. He also serves as chairman of the Advisory Committee to the Legislature on the Estates, Powers and Trusts Law and the Surrogate's Court Procedure Act. A graduate of Brooklyn College, he received his J.D. from Brooklyn Law School.

> action or communication between the witness and the deceased person or mentally ill person, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the mentally ill person or deceased person is given in evidence, concerning the same transaction or communication.

(The term "mentally ill person" replaced "lunatic" in earlier versions of the statute, and the current version should be amended to replace "committee" with "guardian" to reflect the term used since 1993 when referring to representatives of persons found incapacitated under Article 81 of the Mental Hygiene Law.)

The statute goes on to state in clear language who cannot testify against whom and what it is that cannot be testified to. It states that a stockholder or an officer of a banking corporation is not an interested party. The fact that costs may be interposed against you does not make you an interested party, and certain provisions deal with powers of appointment.

The interest of a person, as embraced by the statute, is not something uncertain, remote or contingent. The interest must be present, certain and vested, and that is why a wife could testify but her husband could not regarding personal transactions or communications with the decedent in a suit commenced either by the estate of the decedent against her husband or by the husband against said estate. Of course, the wife's testimony would be subject to a credibility test.

When the Statute Applies

Basically, the tainted testimony occurs when one who has an interest is alive and is attempting to testify against an estate, and the party is testifying on his or her own behalf. In addition, any "person from, through or under whom [you] derive[] [your] interest" cannot testify. Accordingly, you could not call as a disinterested witness someone from whom you obtained your title by transfer, assignment or sale, and the statute concerns itself with transactions and communications that are broadly construed to include every method by which one person can derive an impression or information from the conduct, condition or language of another.[2]

Therefore, any knowledge that individuals gained from the deceased person by use of any of their senses could be barred. The statute embraces every variety of affairs that can form a subject of negotiations, interviews or actions between two persons. If the deceased could contradict, explain or qualify the testimony, if living, the subject matter should come within the statute.

Any knowledge that individuals gained from the deceased person by use of any of their senses could be barred.

Parties can testify if they are testifying against their own interest or against the interest of their successors, but they may not testify when attempting to gain from the testimony. One need not be hurt or injured by the testimony. It is just a question as to whether the individual benefitted or not. Too often during court proceedings attorneys wait to hear words from a conversation before raising objections under CPLR 4519. The statute is much broader than conversations. It includes every means by which one obtained information from a decedent. If you obtained your information independently from a transaction or conversation with the decedent, you would be permitted to testify if you are an interested person.

An example of this would involve letters you perpetually read that had been sent by your grandmother to your mother, making you able to offer an opinion regarding the genuineness of your grandmother's signature. You would be permitted to testify because you did not gain the information from a direct conversation or transaction with the decedent.

But, if the transaction did involve you with the decedent, the testimony would be barred. An example would be a physician who presented a claim against the estate for services rendered to the decedent. He cannot testify to the visits made or the treatment he provided. He could not state whether he was with the decedent or whether a conversation took place. Once the performance of services is proved by others, the claimant can then testify to the value of his services and what work he did in the absence of the deceased and without the immediate or personal participation of the decedent.[3]

You cannot prove something by negating that you did a particular thing with the decedent, because you cannot disconnect a particular fact from a transaction and attempt to testify on the basis that this fact rests independently from a transaction with the decedent when, in truth, the event had its origin in or directly resulted from a personal transaction with a decedent.

It is important to realize that to be barred one need not be a party to a proceeding. In fact, sometimes parties are not barred because the particular issue that is in controversy does not deal with a transaction or communication with the decedent, while the testimony the parties attempt to offer through a witness is barred because the witness is interested and the testimony is tainted. The issue is always whether the person testifying would gain or lose as a result of the testimony or whether there would be a gain or loss for someone from, to or under whom the interest resulted. An example of a non-party

being interested would be a second mortgagee testifying in litigation regarding the validity of the first mortgage. The second mortgagee's testimony could possibly elevate the second mortgage into a first lien and, therefore, he is an interested witness and could be barred.

In probate proceedings, neither the legatees nor distributees may testify regarding personal transactions and communications with a decedent. If a distributee waives her rights in the estate, she thereby enlarges the proportionate share that the other distributees will receive and accordingly she would still be barred because the other distributees take from the witness. A legatee, however, who releases her interest to the estate really releases it to the personal representative and the other beneficiaries under the will do not take from, through or under her and, therefore, she is permitted to testify.

An agent is not barred from testifying, and an interested person may testify regarding conversations she had with an agent. This is true even if the agent is deceased, because the interested party does not derive her title from the agent but from the principal.

Where an attorney-draftsman of a will or others in a confidential relationship with a decedent are legatees under the will, a satisfactory explanation for the bequest must be given to counteract the inference of undue influence.[4] However, CPLR 4519 is a bar to allowing the draftsman to testify regarding a satisfactory explanation.[5]

A party need not prove that he is a competent witness. The person alleging the disqualification has the burden of proof. A fiduciary has a duty to interpose an objection, but should not waive CPLR 4519 on his own unless he has a valid reason for doing so, and cannot waive the statute regarding his own claim.[6] The statute does not apply to attesting witnesses in probate proceedings. They can testify, but there is a statutory provision limiting the amount they may receive under a will when they must testify.[7]

A nominated executor in a propounded will or a prior will is competent to testify providing the nominee is not also a legatee or distributee. The nominated fiduciary can object even before her status is established by the probate of a will. The word "survivor" under the statute has been construed to mean "surviving partner" and, accordingly, the surviving partner will be entitled to raise CPLR 4519. One cannot cross-examine a protected party regarding a personal transaction with the decedent and then expect to take the stand and attempt to testify about conversations with the decedent, because the examination does not open the door.[8] One could testify, however, about documents found on the decedent's body or in the apartment after death, because transactions that happen after death are not protected by the statute.[9]

While someone may be barred from testifying, it may nonetheless be possible to use CPLR 4518 by having certain business records introduced into evidence in a competent manner, thereby obviating the restrictions of CPLR 4519. A nurse attempting to recover for services rendered, however, could not introduce her nurse's book records into evidence pursuant to 4518 based on her testimony alone, because the shop book rule under 4518 may not be used to circumvent 4519 when the interested party made the entries or dictated them to a secretary.[10] If entries were made in the ordinary course of business and this was properly established, the business entries could be used.[11] Foundation testimony by a sole proprietor was held to be competent to authenticate business records.[12]

There are very few cases in the Surrogate's Court relating to communications or transactions with a lunatic, now referred to as an incapacitated or mentally ill person. More than 56 different proceedings can be commenced in Surrogate's Court, and the statute could very well be raised in any one of these proceedings; but it usually arises in probate, accounting and discovery proceedings.

When the Statute Does Not Apply

The statute does not apply in any discovery afforded under Article 31 of the CPLR or the various disclosure proceedings afforded under the Surrogate's Court Pro-

cedure Act, such as SCPA 1404, examination of attesting witnesses; SCPA 2211, examination of a fiduciary in an accounting proceeding; SCPA 2102, examination of a fiduciary dealing with assets of an estate; and the inquisitorial examination afforded in discovery proceedings under Article 21 of the Surrogate's Court Procedure Act (SCPA 2103, 2104), even if the surrogate presides over such discovery proceedings.[13]

By taking such testimony, you may not succeed in obtaining summary judgment based on that testimony, because you would never know whether the statute would be waived or the door opened at the trial or hearing.[14] In a recent case, however, the court held that a party may offer another party's deposition in evidence when the latter party has subsequently died. Accordingly, a plaintiff could first read in the testimony of the now-deceased defendant and then take the stand and testify.[15] The theory is that the statute should be an equalizer, not a sword to unduly favor one side.

To be barred by the statute, a person must have an interest in the event at the time that the testimony is to be given. If the decedent had a transaction with two people dealing with a joint and several note, and only one of the parties is made a defendant by the estate, the other could testify, because at the time that person is testifying she is not interested in the event because any judgment would not help or hinder her as a remaining debtor. This is so, even though her testimony may discourage any further suit.

Although stockholders other than those in banking corporations are precluded from testifying, officers, employees and agents of the corporation can testify. A stockholder of a corporation may testify to lay the foundation for the admissibility of books of the corporation because his testimony is not dealing with personal transactions or communications with the decedent but is merely about how books and records are kept in the ordinary course of business. Accordingly, in many instances, corporations are immune from the statute, especially when they are aided by the shop book rule.

The maker of a note is not the one that the endorser takes from, and the maker therefore can testify. But a prior endorser cannot testify because subsequent endorsers take through the prior endorser.

A party who has already received his share of the estate is not an interested party in a subsequent judicial settlement of an account,[16] and an administrator is not interested in the event and may testify regarding his wife's claim for services rendered to a decedent.[17]

In a right of election proceeding, a spouse could be barred from testifying unless the testimony deals with testamentary substitutes, because Article 5 of the Estates, Powers and Trusts Law provides that CPLR 4519 does not apply (EPTL 5-1.1(b), 5-1.1-A).

In a proceeding to determine the right of election of a spouse, the decedent's attorney testified that the surviving spouse read an antenuptial agreement and that he, in the presence of the decedent, explained it to her. The surviving spouse was allowed to take the stand and state that she never read the agreement and that it was not explained to her, because this was a transaction with the attorney, not the decedent.[18]

There is a difference between being interested in the result and interested in the event. A wife of a claimant would certainly be interested in the result, but she is not interested in the event. Therefore, she should be permitted to testify on behalf of her husband, although he would not be permitted to testify regarding a personal transaction with the decedent.

An estate representative or an attorney-draftsman ordinarily can testify if he is not interested, because he is not a legatee or distributee (such as, in a probate proceeding). Such an individual does become an interested party, however, in an accounting proceeding that deals with objections alleging that he failed to account for all the assets, with claims that he allowed and paid, or with his own claims against the estate or when he commences an action against another estate. When a fiduciary commences an action against another estate or is a party to a proceeding commenced by or against another estate, the Dead Man's Statute applies to the estate representative, although this rule is not favored.[19]

If a stockholder disposes of stock, even during the course of the trial, the person no longer is interested in the event and may testify, although the testimony will be reviewed cautiously because the person is certainly interested in the result. The thing that must be watched is whether, when you are giving up your interest, the person who may benefit is not to take from, through or under you, because that will prevent you from being a witness.

Where a mortgagor executes a bond and mortgage and there is a subsequent foreclosure action, the mortgagor would be permitted to testify if the mortgagee released him on the bond because he is no longer interested in the event.

Ordinarily, the surrogate will not stop interested witnesses from testifying in violation of the statute. But, on occasion, where the surrogate sees an imbalance of the quality of legal representation, the surrogate may aid a litigant's attorney.[20]

A distributee whose interest under the will is less than his distributive share can testify on behalf of the will.[21]

One's testimony regarding acts he performed that did not involve the decedent is permitted.[22]

In *Jacobs v. Stark*,[23] the court held that the statute did not apply in a controversy dealing with an absentee be-

cause there was no determination of death, which is a prerequisite for the statute to apply.

In *In re Estate of Wood*,[24] the Appellate Division, Third Department held that when an executor produced evidence of the opening of bank accounts and of withdrawals, he opened the door to permit testimony by respondents concerning what they did with the cash following withdrawals. It is evident that this determination was partially influenced by the fact that the executor was also a beneficiary, but one could seriously question the ruling by the court since the fiduciary did not, as would appear from the decision, offer any transaction or communication testimony with the decedent. Instead, the fiduciary merely offered into evidence bank records, which ordinarily would not open the door. The Court of Appeals reversed, stating that "petitioner did not 'open the door' to any or all personal transactions with the decedent."[25]

If the issue has to do with status only and not pecuniary rights such as in a divorce proceeding, the statute does not apply.[26]

Loss of the Statute's Protection

The statute can be made inoperative in three ways – when the executor, administrator, survivor, committee or person deriving the title fails to object during examination in his own behalf on direct examination, or when the testimony of the mentally ill person or the deceased person is given in evidence concerning the same transaction or communication.

Waiver involving one transaction does not extend to others. Accordingly, when the fiduciary takes the stand and testifies about a transaction or communication with the decedent, the door is opened for the barred party to testify about that same transaction or communication. The executor's calling an independent witness to testify does not open the door.

The disqualification is waived when a protected party calls an interested party or witness and examines the individual regarding a particular part of a communication or transaction. The other party may then call out the whole of the communication or transaction. If the fiduciary takes the stand and does not testify about personal transactions or communications with the decedent and subsequent cross-examination by the interested party of the representative deals with personal transactions or communications with the decedent, this does not open the door to permit the interested party to testify, because the fiduciary was not examined on his own behalf.

An exception to the statute also arises when sworn testimony given upon a former trial or hearing is admitted into evidence. But mere declarations of the deceased testified to by third parties, that are received as admissions or declarations against interest, or any other exception to the hearsay rule do not open the door to the adverse party's testifying about personal transactions with the decedent.

If a protected party fails to object to testimony properly and timely, the benefit of the statute will be waived. The failure to object at the earliest opportunity does not amount to an irrevocable waiver, and the representative will receive the protection of the statute for any subsequent testimony once the objection is properly interposed. Matters that have already been the subject of testimony without a proper and timely objection will stay in the record.

An exception to the statute also arises when sworn testimony given upon a former trial or hearing is admitted into evidence.

Very often, the testimony is quite competent, relevant and material; it is the witness who is incompetent. Accordingly, the objection must be directed against the competency of the witness and not the competency of the testimony. Therefore, the objection should be that a witness is incompetent because of CPLR 4519. Critics of *In re Berlin*[27] contend that pedigree and the Dead Man's Statute are two different rules of evidence and one need not take precedence over the other. They are compatible. The pedigree rule in this case may very well permit the evidence since it is an exception to the hearsay rule and thus competent. However, the *witness* is incompetent under CPLR 4519 and should not be permitted to testify.

Once the door is opened, those on the other side can testify either by themselves or by some interested witness. When a witness on behalf of an estate testifies that an interested party or interested witness made an admission relating to a transaction with the decedent, the adverse party may take the stand and state whether the admission was made. When an interested witness admits to the genuineness of the signature on an agreement with the decedent, the door is not open to testify about the entire transaction; only the genuineness of the witness's signature is a proper subject for testimony. The same would apply if the witness were asked to identify the decedent's handwriting on a particular document. The witness can testify only to an ability to recognize or not recognize the signature and may not give any further testimony regarding the transaction or communication evidenced by the writing.[28]

If one were to ask an interested party the meaning of certain statements in a letter of the party addressed to

the decedent, this is calling for the operation of his mind and not for testimony relating to a transaction or communication with the decedent.[29] But, if the witness were asked whether the statements in the letter were true, this would be an inquiry about the entire transaction, as this is called the waiver of disqualification.

Where there are two respondents in a discovery proceeding, each claiming that the decedent made a gift of a different savings account to him or her, each would be competent to testify on behalf of the other's claim as each is an independent transaction, and the party testifying does not have an interest in the event as to that particular transaction. Once again, however, the testimony will be subject to the credibility test.[30]

When an attorney representing a claimant against the estate has no definite agreement regarding compensation, the attorney is competent to testify.

Where a decedent executes a will naming a party as beneficiary and executes another will, leaving that party nothing, and then executes a third will, again leaving that party nothing and that party is a non-distributee, and all three instruments are filed in the Surrogate's Court, that party may testify because his interest is remote. If the will offered for probate is denied probate, that party would not take immediately because there is another will to be offered for probate. Someone who attempted to testify when that intermediate will was offered for probate would now be precluded from testifying.[31]

When an attorney representing a claimant against the estate has no definite agreement regarding compensation, the attorney is competent to testify. But if the attorney is working on a contingent retainer, the attorney's testimony is barred.[32]

Where only one of two protected parties objects to the competency of a witness, the objection must nevertheless be sustained even though one of them failed to object.

In an action brought against a bank by a person claiming to be a donee of the decedent's savings account and the estate was not a party, the bank could not interpose CPLR 4519 because it was merely a stakeholder and did not take from, through or under the decedent and was not an assignee or successor.[33]

While unpaid creditors are incompetent to testify in an accounting or a determination for the validity of their claim, if they have been paid, they may testify on behalf of the estate representative seeking justification of their prior payment in an accounting proceeding, even though they may ultimately be compelled to make a refund if the claim is later rejected.[34]

While the statute is strictly construed and limited to the protection intended, so too are the waiver provisions. Any waiver operates only on the trial when it occurs, and the protection of the statute can be reclaimed in a subsequent trial dispute, even on retrial as a result of an appeal.[35] CPLR 4517, allowing the introduction of testimony from a prior trial, may be used, however. The waiver by the committee, therefore, was not binding on the representative of the estate.[36]

The introduction by the protected party of a promissory note, check, income tax return or books of account does not open the door because the statute bars testimony, not documentary evidence.

If you are overruled on a CPLR 4519 objection, you do not waive your right to the statute by subsequent cross-examination with regard to the testimony being admitted.[37] Suppose that an interested party has been permitted to testify and then there is cross-examination with timely objections to the initial testimony interposed by the representative, and then the representative introduces into the trial waiver testimony of the decedent regarding the particular transaction, this sequence cures the defect and the representative will not be permitted to complain that protection was not afforded under CPLR 4519. If the representative wanted the protection of 4519, the correct course would be to object and do a cross-examination, but not to introduce testimony of the decedent.

Where a fiduciary in a discovery proceeding took the stand and testified to a transaction with the decedent and alleged that the decedent told him that she was turning bank books over to the respondent for convenience to pay her bills, this opened the door for the respondent to testify about whether the conversation ever took place and the actual substance of the conversation.[38] The respondent could not go on to say, however, that a couple of days later the decedent came to him and said she changed her mind and wanted her to have the account as a gift, because this was a new transaction with the decedent.

It had been held that a barred party cannot read a decedent's testimony into evidence and then attempt to testify. The protected party had to first use it and then the adverse party was allowed to testify. The courts, however, have recently ruled that the statute affords everyone protection. When an estate has information to protect it from any invalid claims against the estate, it should not use the statute as a sword. When information can be introduced to give the estate's version of a

particular transaction, the adverse party should be permitted to testify. Therefore, if testimony of a decedent is available, the adverse party should be permitted to read the testimony in evidence and then testify. Perhaps even other documents from a decedent should be permitted in evidence by the adverse party so that the party can then take the stand and testify.[39]

The Appellate Division, Second Department in *Siegel v. Waldbaum*,[40] held that if "B" takes "A's" deposition and "B" then dies, "A" can circumvent the statute by offering his own deposition. Some have criticized that decision,[41] contending that the statute is supposed to protect an estate. But when the decedent had the opportunity to examine the party and that examination is available, the estate is protected and the statute should not be used as a sword against the claimant.

The Statute Should Be Retained

The purpose of the statute is to prevent estates from being flooded with claims supported solely by the testimony of a survivor and to eliminate the possibility of perjured testimony. The statute is intended as a brake, not a hammer.

Critics of the statute have asked either for its entire elimination or that it be modified. Some of the modifications call for permission for a claimant to testify in support of his own claim subject to corroboration or that the estate be permitted to offer into evidence hearsay statements of the decedent. Those advocating change feel that the courts and juries can carefully study the testimony to determine whether the claimant set forth a credible allegation. They also contend that the evidence may be weighed by the judge and jury, taking into account the inability of the deceased or an incapacitated person as they are not here to aid in cross-examination.

The statute is unpopular with many commentators and some judges on the appellate level. Those who deal with the administration of estates on a daily basis and the judges who are required to hold the initial trials and hearings have found, however, that it is an effective tool for the proper administration of estates.

In Nassau County, which handles more than $1.5 billion of estates each year, it is critical that the court's calendar be kept up to date to insure the proper administration of estates. Experience has shown that the statute has aided this endeavor without unduly visiting hardships on claimants. Allegations that the statute has created enormous difficulty in litigation are erroneous, and modifications that have been proposed would only create more litigation on collateral issues that would have to be tried by the court.

The statute is not unfair in operation or principle, and it serves a definite purpose in preventing unfair claims against estates. With proper preparation using the tools available during discovery proceedings, including the workshop rule, and the testimony that may be elicited from officers and employees of corporations and third parties, a claimant can very often properly present a claim to the court. If a claim were to rest solely on the testimony of a claimant, however, this would cause tremendous hardship to estates forcing them to expend large amounts of money to protect themselves from possible perjured claims.

Experience has shown that the statute is not as severe as alleged and that its critics should give due consideration to the benefits perceived by the trial judges and those who work on the initial level of litigation. Some critics contend that because perjured testimony from third parties can still be obtained to prove a claim – such as when a wife testifies on behalf of her husband's claim – the husband might as well be permitted to testify. Nevertheless, the trial judge is well capable of determining credibility of the wife's testimony, and opening the floodgates for the husband to testify would only cause hardship to estates. There is little evidence that claimants have been prevented from proving valid claims against estates, while the statute does prevent perjured claims. Moreover, if the only testimony in the record was that of the interested person, it would become increasingly difficult to give it no weight whatsoever.

Allegations that CPLR 4519 has caused a tremendous amount of litigation are unwarranted. True, many decisions deal with the statute, but lately they are few in number because the statute is well understood by the trial judges and its philosophy is well entrenched. The comments of John Greenfield in his treatise on the statute apply today even though it was written so many years ago.

The statute serves as an important tool in pretrial programs for settling claims in Surrogate's Court. At first blush, this may appear to be an ax being held over the heads of claimants to force them to settle. But when the reasons for using the statute are fully analyzed and claimants realize both the true implications of CPLR 4519 and the need to produce independent witnesses, one can see that that is not the intent of court officials.

Under SCPA 506, the surrogate is authorized to appoint a staff member on consent of the parties to hear and report in the capacity of referee, and the courts have done this to keep their calendars up to date. Overall, the pretrial program in Surrogate's Court not only aids in the administration of estates but also helps to bring some semblance of family harmony. Litigation only causes disruptions within the family, forcing family members to take sides, causing antagonisms and wounds that are later difficult to heal.

During pretrial hearings before referees without the surrogate present, all parties have an opportunity to

state their views openly, and thus, if a trial does become necessary, the surrogate will not be prejudiced by anything said during these conferences. Typically, all parties like to have an opportunity to tell their story, a story that, because of our rules of evidence, may not be told on the witness stand, not only because of CPLR 4519 but also because of the barriers in the laws of evidence such as rules on hearsay, self-serving declarations, etc.

When parties have had an opportunity to appear before someone with authority and tell their stories, they receive satisfaction and are then willing to deal with the other members of the family and claimants to reach what they would consider to be a fair settlement. The Dead Man's Statute fosters this approach because, when it is explained to the parties, it helps the referees show the futility of litigation, not only because the parties see how difficult it would be for a claimant to succeed in litigation, but also because they realize that, as former Surrogate John D. Bennett of Nassau County would say, there is no second prize – somebody wins, somebody loses – when you have litigation. When you have conferences and compromises, you avoid splitting the family, you restore some sense of family harmony and prevent bloodletting, and you prevent the further deterioration of relationships within families. Even with claims against the estate by other than family members, the statute is also beneficial in bringing matters to a conclusion rapidly without causing unnecessary litigation.

Experience has shown that family members do not wish to subject themselves to the emotional and physical hardships of litigating matters in open court. Litigation brings on unnecessary anxiety, causing illness that can be prevented by a proper pretrial program. The Surrogate's Court is, effectively, a family court after death, and CPLR 4519 helps prevent the bloodletting that is common in Family Court proceedings.

Conclusion

CPLR 4519 prevents fraudulent claims against an estate, aids the overall administration of estates, helps to retain some semblance of family harmony and does not cause widespread dismissal of valid claims. Its retention is favored by those who work with the administration of estates on a day-to-day basis. The Dead Man's Statute is alive in the Surrogate's Court and should be permitted to continue to offer the benefits it has provided over many years.

The Advisory Committee to the Legislature on EPTL and SCPA has reviewed this matter many times over the last 13 years and has voted not to change the statute by accepting substitutes submitted for review.

The statute is not that complicated and its meaning can be understood if it is read carefully. The age of the underlying concept is not a reason for destroying the statute, especially if it works well and benefits the overall administration of estates. Proper modifications can be made to reflect new concepts if they will, in the long term, help in the administration of estates.

---

1. N.Y. Comp. Codes, R. & Regs. tit. 22, pt. 36 (N.Y.C.R.R.).
2. *Holcomb v. Holcomb*, 95 N.Y. 316 (1884).
3. *Lerche v. Brasher*, 104 N.Y. 157, 10 N.E. 58 (1887).
4. *In re Putnam's Will*, 257 N.Y. 140, 177 N.E. 399 (1931).
5. *In re Estate of Hayes*, 49 Misc. 2d 152, 267 N.Y.S.2d 452 (Sur. Ct., Bronx Co. 1966).
6. *In re Kennedy's Estate*, 56 Misc. 2d 1092, 290 N.Y.S.2d 964 (Sur. Ct., Columbia Co. 1968).
7. Estates, Powers and Trusts Law section 3-3.2 (EPTL).
8. *Corning v. Walker*, 100 N.Y. 547, 3 N.E. 290 (1885).
9. *In re Abwender's Estate*, 241 A.D. 566, 272 N.Y.S. 569 (4th Dep't 1934).
10. *Eby v. Grieves*, 153 Misc. 428, 275 N.Y.S.2d 90 (Sup. Ct., App. Term 1st Dep't 1934); *In re De Simone's Estate*, 151 Misc. 87, 270 N.Y.S. 618 (Sur. Ct., N.Y. Co. 1934); *In re Mulderig*, 196 Misc. 527, 91 N.Y.S.2d 895 (Sur. Ct., Broome Co. 1949); *In re Mogan*, N.Y.L.J., Apr. 13, 1962, p. 13, col. 3.
11. *Mulderig*, 196 Misc. 527.
12. *Trotti v. Estate of Buchanan*, 272 A.D.2d 660, 706 N.Y.S.2d 534 (3d Dep't 2000).
13. *Phillips v. Joseph Kantor & Co.*, 31 N.Y.2d 307, 338 N.Y.S.2d 882 (1972).
14. *Id.*
15. *Ward v. Kovacs*, 55 A.D.2d 391, 390 N.Y.S.2d 931 (2d Dep't 1977).
16. *In re Lese*, 176 A.D. 744, 163 N.Y.S. 1014 (1st Dep't 1917).
17. *In re Taylor's Estate*, 206 Misc. 69, 132 N.Y.S.2d 686 (Sur. Ct., Broome Co. 1954).
18. *In re French's Will*, 8 A.D.2d 660, 185 N.Y.S.2d 132 (3d Dep't 1959).
19. *See* Fisch on Evidence § 269.
20. *In re Honigman's Will*, 8 N.Y.2d 244, 203 N.Y.S.2d 859 (1960).
21. *Harrington v. Schiller*, 231 N.Y. 278, 132 N.E. 89 (1921).
22. *In re Estate of Tremaine*, 156 A.D.2d 862, 549 N.Y.S.2d 857 (3d Dep't 1989).
23. 83 Misc. 2d 605, 373 N.Y.S.2d 758 (N.Y. City Civ. Ct. 1975).
24. 71 A.D.2d 287, 423 N.Y.S.2d 260 (3d Dep't 1979), *rev'd*, 52 N.Y.2d 139, 436 N.Y.S.2d 850 (1981).
25. *In re Woods*, 52 N.Y.2d at 145.
26. *Tworkowski v. Tworkowski*, 181 Misc. 2d 1038, 696 N.Y.S.2d 637 (Sup. Ct., Kings Co. 1999).
27. N.Y.L.J., Oct. 3, 1977, p. 32.
28. *In re Walker's Estate*, 177 Misc. 991, 32 N.Y.S.2d 595 (Sur. Ct., N.Y. Co. 1941).
29. *Weston v. Reich*, 7 N.Y.S. 784 (Sup. Ct. 1889), *aff'd*, *sub nom Bartlett v. N.Y. & S. Brooklyn Ferry & Steam Transp. Co.*, 130 N.Y. 659, 29 N.E. 1033 (1891).
30. *In re Estate of Corse*, 16 Misc. 2d 538, 182 N.Y.S.2d 514 (Sur. Ct., N.Y. Co. 1958), *aff'd*, 13 A.D.2d 651, 215 N.Y.S.2d 1014 (1st Dep't 1961).

31. *In re McCulloch*, 263 N.Y. 408, 189 N.E. 473 (1934).
32. *In re Kislyk's Estate*, 164 Misc. 287, 1 N.Y.S.2d 386 (Sur. Ct., Oneida Co. 1937).
33. *Foley v. N.Y. Sav. Bank*, 157 A.D. 868, 142 N.Y.S. 822 (1st Dep't 1913).
34. *Laka v. Krystek*, 261 N.Y. 126, 184 N.E. 732 (1933).
35. *In re Cohen's Estate*, 177 Misc. 304, 30 N.Y.S.2d 409 (Sur. Ct., N.Y. Co. 1941), *aff'd*, 263 A.D. 938, 33 N.Y.S.2d 812 (1st Dep't 1942).
36. *Dean v. Halliburton*, 241 N.Y. 354, 150 N.E. 141 (1925).
37. *Continental Diamond Mines Inc. v. Kopp*, 28 A.D.2d 518, 279 N.Y.S.2d 752 (1st Dep't 1967).
38. *Martin v. Hillen*, 142 N.Y. 140, 36 N.E. 803 (1894).
39. *Foro v. Doetsch*, 66 Misc. 2d 288, 320 N.Y.S.2d 778 (Sup. Ct., Saratoga Co. 1971), *rev'd on other grounds*, 39 A.D.2d 150, 332 N.Y.S.2d 817 (3d Dep't 1972); *Ward v. Kovacs*, 55 A.D.2d 391, 390 N.Y.S.2d 931 (2d Dep't 1977).
40. 59 A.D.2d 555, 397 N.Y.S.2d 144 (2d Dep't 1977).
41. *See* Professor McLaughlin, McKinney's Commentary to CPLR 4519.

moving?

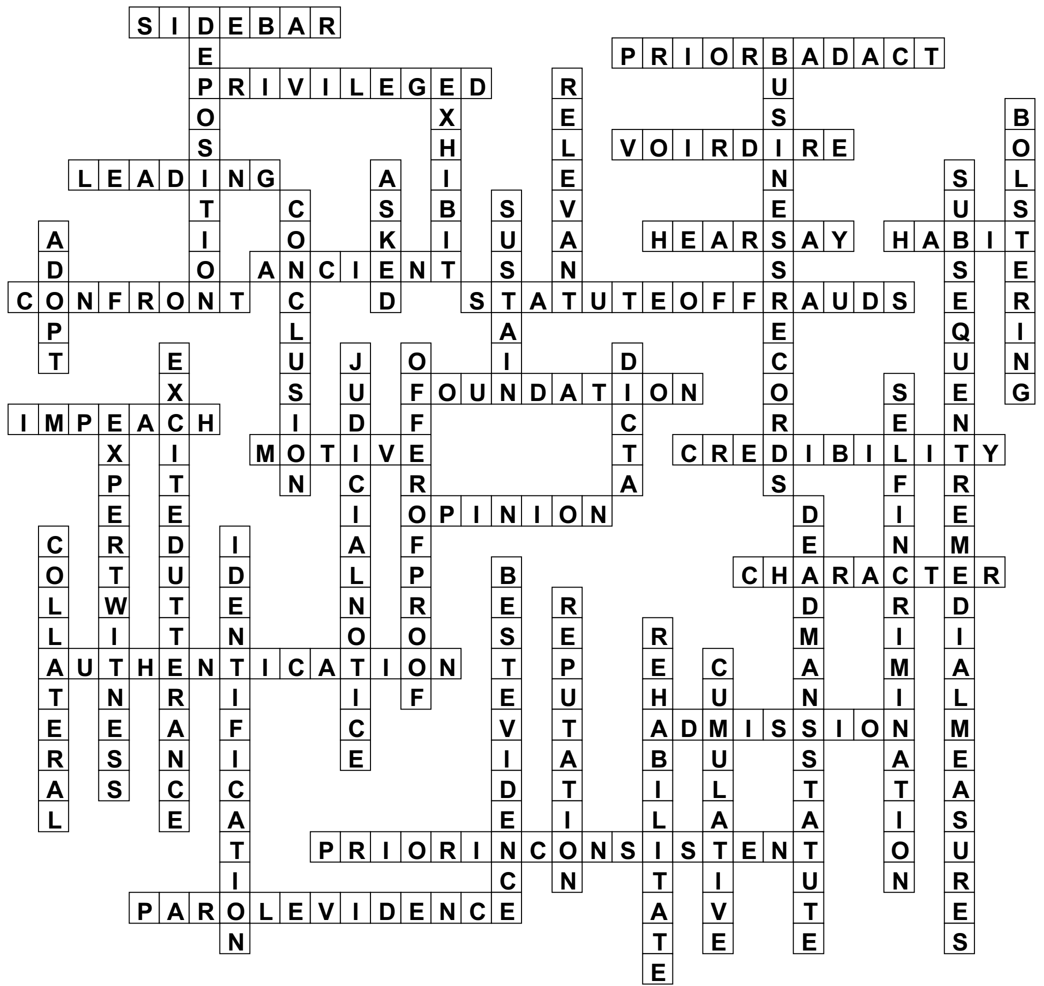
let us know.

Notify OCA and NYSBA of any changes to your address or other record information as soon as possible!

NYS Office of Court Administration
Attorney Registration Unit
PO BOX 2806
Church Street Station
New York, New York 10008
212.428.2800 - tel 212.428.2804 - fax
attyreg@courts.state.ny.us - email

New York State Bar Association
MIS Department
One Elk Street
Albany, NY 12207
518.463.3200 - tel 518.487.5579 - fax
mis@nysba.org - email

Crossword Puzzle answers from May 2003 issue:



New Court of Appeals Ruling Bolsters Use of *Res Ipsa Loquitur* In Medical Malpractice Cases

By Joyce Lipton Rogak

As we all learned in law school, *res ipsa loquitur* is Latin for "easy *prima facie* case." Perhaps that is a bit of a stretch (of course, it really means "the thing speaks for itself"), but if a doctrine could be defined by its effect, such a definition might be appropriate. That is because *res ipsa* allows the fact finder to infer negligence from the mere happening of an event,[1] and the jury can be so instructed if the plaintiff meets all the requirements of the doctrine.[2]

There appears to be a growing trend for the plaintiff's attorney to assert a claim of *res ipsa loquitur,* and to seek such a jury charge, in medical malpractice cases. Although the charge is easy enough to throw into the mix of allegations, generally speaking it is rarely given, primarily because the intricacies of a medical malpractice claim make it necessary to have an expert explain to the jury what happened. Most trial courts conclude that if an expert is needed it means that the jurors could not decide, as a matter of their own common understanding, that the subject event could not have occurred in the absence of negligence on the part of the defendant(s).

This may now change in light of *States v. Lourdes Hospital*,[3] a key decision handed down by the Court of Appeals last month. It holds that an expert can now be used to "bridge the gap" between what the lay jurors know and the specialized knowledge needed to understand what is commonly accepted by physicians.[4] The implications are substantial, especially for the medical malpractice bar.

General Law of the Doctrine

The Court of Appeals case most frequently cited for the law of *res ipsa loquitur* is *Dermatossian v. New York City Transit Authority*.[5] In dismissing the plaintiff's case, which had been submitted to the jury on the theory of *res ipsa* – with no showing of active negligence having been made – the Court of Appeals stated the rule in New York. It held that

> submission of the case on the theory of *res ipsa loquitur* is warranted only when the plaintiff can establish the following elements: "'(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.'"[6]

The Court also noted: "The rule has the effect of creating a *prima facie* case of negligence sufficient for submission to the jury, who may, but is not required to draw the permissible inference."[7]

The decision served to limit the use of the doctrine in cases where the plaintiff needed an expert to make out a *prima facie* case, primarily because of the first prong of the test. If a juror could not make that determination on his or her own, a charge was inappropriate.

Doctrine Applied to Medical Malpractice

In medical malpractice cases, the Court of Appeals gave some initial help to plaintiffs in *Kambat v. St. Francis Hospital*.[8] The Court held that the doctrine did not apply when an 18-by-18-inch laparotomy pad had been left in the abdomen of a patient after a hysterectomy. It concluded that the lay jurors did not require expert testimony to find that a laparotomy pad is not ordinarily discovered inside a patient's abdomen after a hysterectomy in the absence of negligence. In so ruling, the Court stated:

> *Res ipsa loquitur* "simply recognizes what we know from our everyday experience: that some accidents by their very nature would ordinarily not happen without negligence."
>
> * * *
>
> In the typical *res ipsa loquitur* case, the jury can reasonably draw upon past experience common to the com-

Joyce Lipton Rogak is a member of the law firm of Rogak & Gibbons, LLP, in East Meadow, N.Y. Her practice is primarily devoted to medical malpractice and insurance defense. She is a graduate of Brooklyn College, and received her J.D. from Hofstra University School of Law.

munity for the conclusion that the adverse event generally would not occur absent negligent conduct.[9]

The Court, however, sidestepped the issue of whether, had expert testimony been required, a *res ipsa* charge could have be given.[10] Specifically, the Court did not decide whether the need for expert testimony would foreclose the use of the doctrine, or whether it could be used to educate the jury about one of the key elements of *res ipsa loquitur* (and the one that had to do with the jurors' ability to rely on their own common knowledge), that is the likelihood that the occurrence ordinarily would not take place without negligence. In *Lourdes Hospital,* the Court took up the question and adopted the latter approach, indicating that this was the majority view among those states that had considered the question. As is discussed below, *res ipsa* likely will now have a larger role to play in medical malpractice cases.

An expert can now be used to "bridge the gap" between what lay jurors know and the specialized knowledge needed to understand what is commonly accepted by physicians.

After *Kambat* and even before *Lourdes Hospital*, there were certain instances where a case could proceed to the jury on *res ipsa* because the event was such that the jurors could reasonably infer that it would not occur in the absence of negligence. In the case of *Babits v. Vassar Brothers Hospital*,[11] the Appellate Division, Second Department held that *res ipsa* would be applied when, during the course of surgery, a patient was burned in an area remote from the operative site. In that case, the patient was under anesthesia, and therefore could not have contributed to the injury; any potential cause of the burn was within the exclusive control of the defendants; and this type of injury was an event that the jury could reasonably infer would not occur in the absence of negligence. That met the test established under existing law.[12] In another example, a court was willing to apply *res ipsa loquitur* when an unconscious patient fell off of an operating table. The court stated that "[h]ere, it can hardly be debated that anesthetized patients do not fall from operating tables in the absence of negligence."[13]

New York courts, however, generally denied the use of *res ipsa* in situations where it was clear that more than common sense was needed to determine whether there was negligence on the part of the physician. For example, a charge was denied where a patient developed chemical burns following a facial peel.[14] It was denied in a case where the plaintiff claimed that two cervical discs were herniated during a dental procedure where the patient had a longstanding history of disc disease,[15] and in another where the damage was to a nerve located in the area of the operative site.[16]

Expert Testimony and *Res Ipsa*

Cases on the use of *res ipsa loquitur* in the medical malpractice context frequently turned on whether the testimony of an expert was essential, as in the cases described in the preceding paragraph. This issue came into especially sharp focus in close cases – that is, where it was at least arguable that a lay juror could decide that an event would not have occurred but for the negligence of the defendants. A good example was a matter in the First Department, *Bin Xin Tan v. St. Vincent's Hospital & Medical Center.*[17]

That case involved a patient who was diagnosed with cancer, resulting in the removal of a portion of his liver. The plaintiff's attorney claimed that the patient never had cancer, that the portion of the liver should not have been removed, and that the removal of the right lobe contributed to the patient's death during subsequent transplant surgery. In addition, the defendant hospital lost the cytology slides that supposedly contained the cancerous cells, upon which the diagnosis was based. The trial court gave a missing document charge with respect to the slides. It held, however, that a *res ipsa* charge was unwarranted, despite the fact that it acknowledged that the mass, when removed, was found to have been benign. The court stated that the question of whether St. Vincent's misdiagnosis was negligent and if so, whether it was a proximate cause of the decedent's death, raised issues beyond the common knowledge of lay persons.

It appeared that this was a case where a jury could have used common knowledge to conclude that negligence occurred. A healthy lobe of a liver was removed, and one would think that a jury could reasonably have concluded on its own that this was causally related to the misdiagnosis of the cancer. Admittedly, it might have been beyond the jury's ability to determine whether the patient's death after an attempted transplant was related to the removal of the lobe. In any event, no *res ipsa* charge was given regarding any part of the case, the jury returned a verdict for the defendant, and the judgment was affirmed by the Appellate Division.

On the other hand, there have been cases in which courts would allow the charge even where experts were found to be essential. In *Ceresa v. Karakousis*,[18] the Fourth Department allowed a claim of *res ipsa loquitur* in a case where the plaintiff's expert gave opinion testimony concerning the positioning of the patient on the operating

table and why improper positioning was the reason for the plaintiff's injuries. In *Santangelo v. Crouse Medical Group, P.C.*,[19] the same court actually stated that the plaintiff *had* to utilize a medical expert in order to establish a basis for the *res ipsa* charge.

Similarly, the Second Department allowed such a charge even where experts played a significant role before the jury. *Hawkins v. Brooklyn-Caledonian Hospital*[20] concerned a case where a catheter tip broke off and remained in the patient's chest. The plaintiff had an expert testify that this occurrence constituted malpractice on behalf of the surgeon. The court held that the expert's testimony was sufficient to support *both* a case of negligence *and* a charge to the jury of the doctrine of *res ipsa loquitur*. It appears, however, that the *res ipsa* charge likely would have been given under the circumstances of the case even if an expert had not testified. As was seen in *Kambat*, retained foreign objects constitute one of the unusual circumstances where *res ipsa* has been held to apply, without the need for expert testimony.

The Court of Appeals has now reversed the Appellate Division. It rejected the idea that essential expert testimony and the doctrine of res ipsa loquitur could not coexist.

In a later case, the Second Department refused to overturn the trial court's denial of the charge of *res ipsa*, stating that "[t]he nature of the expert testimony did not give rise to an inference of negligence based upon the mere occurrence of the adverse event at issue."[21] This rather interesting comment implied that expert testimony was not only no bar to a *res ipsa* charge – it was actually required.

Before *Lourdes Hospital*, it was difficult to reconcile the holdings of the Fourth and Second Departments with the portion of the doctrine requiring the situation to be one where lay jurors could rely on their common knowledge to conclude that the injury could not have occurred without a negligent act. This has to do with an implied effect of the doctrine, that *res ipsa* should obviate the need for expert testimony.

Of course, in a medical malpractice case it would be unwise not to have an expert testify, because a plaintiff's attorney cannot know for certain beforehand whether the charge will be given, and the defendants will undoubtedly have an expert testifying on their behalf. What was a subject of controversy among the Departments prior to *Lourdes Hospital* was whether the use of a plaintiff's expert would mean that *res ipsa* was "off the table," or whether both the expert and the doctrine could exist together.

Court of Appeals Resolves the Issue

The most outspoken Department about the relationship between *res ipsa loquitur* and expert testimony had been the Third Department, which had been the intermediate appellate court to review the plaintiffs' claims in *Lourdes Hospital*. In a 3-2 decision, the Third Department found that if a plaintiff needed expert testimony to explain its claim of malpractice, *res ipsa* could not be charged. In that case, the patient underwent surgery to remove an ovarian cyst. When she awoke, she complained of pain in her right shoulder, right hand, arm and side. The defendants moved for summary judgment, noting that there was no evidence of anything unusual occurring during the surgery. In her opposition to the summary judgment motion, the plaintiff argued that the doctrine of *res ipsa loquitur* should apply. The affidavits of four medical experts were submitted on behalf of the plaintiff, who in essence alleged that the awkward positioning of her arm during the surgery caused the injury. Although the plaintiff conceded that there was no direct evidence of negligence, she argued that the injury could not have occurred without negligence, and that this could support a *res ipsa* theory before the jury. The trial court agreed and denied the defendants' motion.

On appeal, the Appellate Division reversed and dismissed the plaintiff's complaint. Citing *Kambat*, the court held that if expert opinions were needed to support the basis of a medical malpractice case, then the case was not one where a jury could reasonably draw upon experience common to the community to conclude that the event generally would not occur absent negligence.[22]

The Court of Appeals has now reversed the Appellate Division. It rejected the idea that essential expert testimony and the doctrine of *res ipsa loquitur* could not coexist, stating that

> expert testimony may be properly used to help the jury "bridge the gap" between its own common knowledge, which does not encompass the specialized knowledge and experience necessary to reach a conclusion that the occurrence would not normally take place in the absence of negligence, and the common knowledge of physicians, which does.[23]

It would be difficult to understate the importance of this change in the law concerning the use of the doctrine. In medical malpractice cases, it is often easy to

prove the third prong of the test – *i.e*, that the patient was free of any act that may have contributed to the occurrence (for example, the patient was under anesthesia). It can even be relatively simple to prove the second prong, exclusive control by the defendants (for example, a surgical instrument was left inside the patient). The most common problem for plaintiffs had been with the first prong, because most medical malpractice cases are just too complex for lay persons to draw upon their common experience to come to the necessary conclusion that the event would not ordinarily occur in the absence of the defendant physician's negligence. Now, an expert can, in the words of the Court, "bridge the gap" and supply the specialized knowledge needed. It is apparent that plaintiffs now have a method of obtaining a *res ipsa loquitur* charge that can make it vastly easier to meet their burden of proof.

While in *Kambat*, the Court of Appeals did not preclude the use of expert testimony to establish negligence, the Court did state, "In the typical *res ipsa loquitur* case, the jury can reasonably draw upon past experience common to the community for the conclusion that the adverse event generally would not occur absent negligent conduct."[24] It appears that this dicta has been substantially disregarded, as under *Lourdes Hospital* expert testimony can now be used when lay juries do *not* have the experience to come to conclusions involving the issues at hand. The Court did point out that in order for the inference to be charged, the plaintiff still must establish "exclusive control" and "absence of contributory negligence," but as indicated above, these prongs of the test had never been the real stumbling blocks for most plaintiffs.

Conclusion

Although the Court makes it appear as though the doctrine will be used in limited situations, there are numerous cases involving injuries arising after surgery, where the surgeons or anesthesiologists have exclusive control and the patient could not be held contributorily negligent. It appears that the door has been opened wide for a much broader use of the doctrine. For example: Can *res ipsa* now be used by plaintiffs for all post-operative nerve injuries if an expert testifies that it could not have occurred in the absence of negligence? What about post-operative complications such as wound infections and hernias, and procedures that simply failed?

The change made by *Lourdes Hospital* may also affect how courts examine the other prongs of the doctrine. Until now, there have not been many cases defining what constitutes exclusive control, no doubt because the doctrine was invoked so rarely. Now that *Lourdes Hospital* has expanded the use of *res ipsa*, will the courts pay more attention to this portion of the test? This ruling may well have opened a Pandora's box of issues, which will require a plethora of case-specific decisions to resolve.

1. Restatement (Second) of Torts § 328D (1965).
2. 1A New York Pattern Jury Instructions (Civil) 2:65 (3d ed. 2003).
3. 2003 N.Y. LEXIS 954 (May 6, 2003).
4. *Id*. at *5.
5. 67 N.Y.2d 219, 501 N.Y.S.2d 784 (1986).
6. *Id*. at 226.
7. *Id*.
8. 89 N.Y.2d 489, 655 N.Y.S.2d 844 (1997).
9. *Id*. at 494–95 (quoting *Dermatossian*, 67 N.Y.2d at 226).
10. *See Stokes v. Strong Health MCO Inc.*, 191 Misc. 2d 695, 744 N.Y.S.2d 650 (Sup. Ct., Monroe Co. 2002).
11. 287 A.D.2d 670, 732 N.Y.S.2d 46 (2d Dep't 2001).
12. *See Mack v. Lydia E. Hall Hosp.*,121 A.D.2d 431, 503 N.Y.S.2d 131 (2d Dep't 1986); *see also Kuhns v. Millard Fillmore Hosp.*, 296 A.D.2d 839, 744 N.Y.S.2d 787 (4th Dep't 2002); *Hill v. Highland Hosp.*, 142 A.D.2d 955, 530 N.Y.S.2d 381 (4th Dep't 1988).
13. *Thomas v. N.Y. Univ. Med. Ctr.*, 283 A.D.2d 316, 317, 725 N.Y.S.2d 35 (1st Dep't 2001).
14. *Seung Ja Cho v. In-Chul Song*, 286 A.D.2d 248, 729 N.Y.S. 2d 117 (1st Dep't 2001).
15. *Gushlaw v. Roll*, 290 A.D.2d 667, 735 N.Y.S.2d 667 (3d Dep't 2002).
16. *Schoch v. Dougherty*, 122 A.D.2d 467, 504 N.Y.S.2d 855 (3d Dep't 1986).
17. 294 A.D.2d 122, 742 N.Y.S.2d 10 (1st Dep't 2002).
18. 210 A.D.2d 884, 620 N.Y.S.2d 646 (4th Dep't 1994).
19. 209 A.D.2d 942, 619 N.Y.S.2d 981 (4th Dep't 1994).
20. 239 A.D.2d 549, 658 N.Y.S.2d 375 (2d Dep't 1997).
21. *Johnson v. Farr*, 268 A.D.2d 560, 560, 702 N.Y.S.2d 839 (2d Dep't 2000).
22. *States v. Lourdes Hosp.*, 297 A.D.2d 450, 746 N.Y.S.2d 215 (3d Dep't 2002).
23. 2003 N.Y. LEXIS 954, at *5 (May 6, 2003).
24. *Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489, 495, 655 N.Y.S.2d 844 (1997).

2002 Update on Issues Affecting Accidents Involving Uninsured And/Or Underinsured Motorists

By Jonathan A. Dachs

For the tenth year in a row,[1] a review of the most significant court decisions and legislative enactments during the previous calendar year provides an update on the ever-changing, increasingly complex areas of uninsured motorist (UM), underinsured motorist (UIM) and supplementary uninsured motorist (SUM) coverage.

GENERAL ISSUES

Self-Insurance

In *People ex rel. Spitzer v. ELRAC, Inc.*,[2] the trial court, following up on the Court of Appeals 2001 decision in *ELRAC, Inc. v. Ward*,[3] to the effect that a self-insured rental car company must provide the statutory minimum liability coverage to "inure to the benefit" of any permissive user of the vehicle, and a rental car company cannot seek indemnification from its lessee "where the damage falls below the minimum insurance that the rental company is required to provide" by N.Y. Vehicle and Traffic Law § 370(1) (VTL), held that the "self-insurance coverage amount is the legal minimum statutorily required personal injury liability coverage amount, including uninsured motorist coverage," as well as property damage liability coverage up to $10,000.[4] "If a renter wishes coverage above the statutory limits, a renter may pay an optional daily charge and receive 'supplemental liability protection,' often referred to as 'SLP.'"[5]

In addition, the court reiterated the general rule that the duty to defend cannot be terminated upon payment of a settlement or damages before the complete resolution of any litigation or claim – *i.e.*, "automobile insurers must pay all defense costs until a case ends . . . and . . . automobile insurers cannot be excused from providing a full defense by tendering the policy amount."[6] This same rule applies to self-insurers as well as insurers.

Named Insured

The term "named insured" applies only to those persons or entities listed on the declarations page of the policy. Where a policy is taken out on a corporate or government-owned vehicle and the policyholder is a legal entity rather than an individual, a question may arise as to who is the "named insured."

In *Coregis Ins. Co. v. Miceli*,[7] the court held that a firefighter employed by the City of New Rochelle was not covered under the insurance policy issued by Coregis to a fire truck owned by the city, when not occupying that truck because he was not an insured as that term was defined in the policy.[8]

Resident The definition of an "insured" under the SUM endorsement includes a relative of the named insured and, while residents of the same household, the spouse and relatives of either the named insured or spouse.

In *New York Central Mutual Fire Ins. Co. v. Peckey*,[9] the defendant established that two days before the accident he had moved back to the United States after a military tour of duty in Guam; his active military duty was to end nearly two weeks after the accident, and he planned to leave the military and reside at his mother's home for an indefinite period while he sought employment; he had a key to his mother's home and his driver's license listed his mother's home as his address; he maintained his voter's registration in New York State during his entire military service; and he had returned to his mother's home for periods of up to 30 days while on military leave. The court held that he was a resident of his mother's household on the date of the accident and, thus, an "insured" under his mother's policy. The fact that he may have had other residences during his military service was not dispositive.

Jonathan A. Dachs, a member of the firm of Shayne, Dachs, Stanisci, Corker & Sauer in Mineola, is the author of "Uninsured and Underinsured Motorist Protection," 4 *New York Insurance Law*, Chapter 51 (Matthew Bender & Co., Inc.), and of a chapter on UM/UIM and SUM (Pre- and Post-Regulation 35-D), in *Weitz on Automobile Litigation: The No-Fault Handbook* (New York State Trial Lawyers Institute). He is a graduate of Columbia University and received his J.D. degree from New York University Law School.

Occupant "Occupancy" insureds comprise the second category of "insured persons."

In *Miceli*, the court held that a firefighter struck by a car while directing traffic as the fire truck was being garaged was not occupying the fire truck and, therefore, not entitled to SUM benefits under the fire truck's policy.

In *In re Martinez*,[10] the court held that a tow truck driver was no longer occupying the tow truck when he was struck by a hit-and-run vehicle while he was walking toward the disabled vehicle he had been dispatched to assist, and thus he was not entitled to coverage under the uninsured motorist policy insuring the tow truck. While he intended eventually to return to the truck, his absence from the truck was not intended to be brief and his immediate purpose was to attend to the disabled vehicle as necessary incident to his employment, which distinguished this case from those cases where "a mere temporary happenstance interrupted the operator's connection with the vehicle."[11]

"Covered Auto"

In *Jones v. St. Paul Fire & Marine Ins. Co.*,[12] the court held that a "road roller" being used by the claimant when it was struck by an underinsured automobile was not a "covered auto" under the employer's SUM policy because it was specifically defined in the policy as "mobile equipment," which was expressly excluded from the policy definition of "auto." Because the claimant could not establish that she was operating a "covered auto," she was not entitled to SUM benefits under the policy.

"Use or Operation"/Accidents

The UM/SUM endorsements provide for benefits to "insured persons" who sustain injury caused by "accidents" "arising out of the ownership, maintenance or use" of an uninsured motor vehicle.

In *Metro Medical Diagnostics, P.C. v. Eagle Ins. Co.*,[13] the court held that if a collision is actually "a deliberate event caused in the furtherance of an insurance fraud scheme, it would not be a covered accident."

In *Progressive Casualty Ins. v. Baker*,[14] the court held that loading logs onto a logging truck constituted "use or operation."

In *Elite Ambulette Corp. v. All City Ins. Co.*,[15] the insured, an ambulette service, sued the insurer of its vehicle for a judgment declaring that the insurer was obligated to defend and indemnify it for a transportee's injury caused when the temporary wheelchair in which he had been placed rolled down a flight of stairs as a result of a defect in the wheelchair and the carelessness of the attendant. In affirming the grant of summary judgment to the insurer, the court held that the insured ambulette, which was parked outside the patient's home, was not involved in the accident in any way. Because the accident occurred away from, and incidental to, the covered vehicle, it could not be said that the accident occurred in the "use and operation"/loading and unloading of the vehicle. In the words of the court, "Where coverage is provided for use and operation of a vehicle, to invoke an insurer's duty to defend and/or indemnify, the use of the motor vehicle must be more closely related to the injury."[16]

Claimant/Insured's Duty To Provide Timely Notice of Claim

UM, UIM and SUM endorsements require the claimant, as a condition precedent to the right to apply for benefits, to give timely notice to the insurer of an intention to make a claim. Although the new mandatory UM endorsement requires such notice to be given "within ninety days or as soon as practicable," Regulation 35-D's SUM endorsement requires simply that notice be given "as soon as practicable." A failure to satisfy the notice requirement vitiates the policy and the insurer need not demonstrate any prejudice before it can assert the defense of noncompliance with the notice provisions. The interpretation of the phrase "as soon as practicable" was, as always, a hot topic last year.

In *Nationwide Mutual Ins. Co. v. DiGregorio*,[17] the court reiterated that the proper standard for timely written notice of an underinsured motorist claim is "as soon as possible" from the date that the claimant knew or should have known that the tortfeasor was underinsured, and that the claimant is obligated to demonstrate that he or she acted with due diligence in ascertaining the insurance status of the vehicles involved in the accident.[18] Factors to consider include the seriousness and nature of the claimant's injuries and the extent of the tortfeasor's coverage. In that case, the court held that notice was untimely when the claimant waited more than 10 months after learning that she had sustained a herniated disc that required surgery and a pinched nerve before notifying the insurer of a claim for underinsured motorist benefits; clamant did not exercise due diligence in attempting to ascertain the insurance coverage of the tortfeasor's vehicle.[19]

In *State Farm Mutual Automobile Ins. Co. v. Proper*,[20] the court held that notice given nearly two years after the accident was untimely where the "nature and extent of [the claimant's] injury did not change from the time of the accident until the time when [the claimant] provided petitioner with notice of the SUM claim." In *Nationwide Ins. Co. v. Sawbridge*,[21] the court held that notification by the insured of an intention to make claim nine months after the accident was "as soon as reasonably practicable" where for several months after the accident

she received conservative treatment for relatively minor injuries, was released from treatment by her orthopedist seven months after the accident and she thereafter sought evaluation and care from a neurosurgical clinic, which recommended and performed a cervical discectomy and fusion 18 months after the accident.

In *Sayed v. Macari*,[22] the court held that where an insurance policy, such as the homeowner's policy involved in that case, requires an insured to provide notice of an accident or loss as soon as practicable, "such notice must be provided within a reasonable time in view of the facts and circumstances." In that case, the court held that an almost three-month delay in notifying an excess insurer of a claim was unreasonable as a matter of law.

Where notice is provided directly by the injured party, the disclaimer must address with specificity the grounds for disclaiming coverage applicable to both the injured party and the insured.

In *Interboro Mutual Indemnity Ins. Co. v. Brown*,[23] the court held that a more than four-month delay in providing notice of an uninsured motorist claim was not reasonable.

Where notice is provided directly by the injured party, the disclaimer must address with specificity the grounds for disclaiming coverage applicable to both the injured party and the insured. However, where the insured is the first to notify the insurer, even if that notice is untimely, any subsequent information provided by the injured party is superfluous for notice purposes and need not be addressed in the notice of disclaimer issued by the insurer.[24]

Notice of Legal Action

In addition to the basic notice requirement, the UM and SUM endorsements also require, as a condition precedent to coverage, that the insured or his or her legal representative "immediately" forward to the insurer a copy of the summons and complaint and/or other legal papers served in connection with the underlying lawsuit against the tortfeasor.

In *Brandon v. Nationwide Mutual Ins. Co.*,[25] the Court of Appeals held, for the first time, that the insurer must prove that it has been prejudiced by the breach of the Notice of Legal Action condition. This new rule is in contradistinction to the "no prejudice" rule applicable to other types of required notice.[26]

Discovery

The UM and SUM endorsements also contain provisions requiring, upon request, a statement under oath, examination under oath, physical examinations, authorizations and medical reports and records. The provision of each type of discovery, if requested, is a condition precedent to recovery.

In *Phoenix Ins. Co. v. Amereno*,[27] the court held that the trial court providently exercised its discretion in temporarily staying arbitration and directing the claimant to comply with all outstanding discovery demands.

In *Allstate Ins. Co. v. Yuriy Moshevev*,[28] the court held that the claimants had no right to be present at each others' examinations under oath because those examinations were requested pursuant to an insurance policy rather than as part of a legal action.

Petitions to Stay Arbitration

Arbitration vs. Litigation In *Cacciatore v. New York Central Mutual Fire Ins. Co.*,[29] the court, in a matter of "first impression," held that under the terms of the SUM endorsement, "if the limits are $25,000/$50,000, then any disagreement with respect to the value of the claim 'shall' be settled by arbitration, which may be requested by the insurer as well as the insured." Where the policy limits exceed $25,000/$50,000, however, arbitration is *not* mandatory.

Venue In *GEICO v. Fabien*,[30] the court was faced with four cases in which venue of special proceedings to stay arbitration was placed in Nassau County instead of the counties in which the claimant resided, as required by CPLR 7502, as amended effective August 16, 2000.

Describing the issue as "a problem which has plagued this court before and after the amendment to CPLR 7502," and characterizing the petitioning insurer's conduct as "the sisythian persistence with which GEICO and other uninsured carriers have attempted to utilize Nassau County as a *forum conveniens*," the court rejected GEICO's contention that the claimants/respondents had waived their right to challenge venue; held that CPLR 509 does not govern such cases, but, instead, is supplanted by CPLR 7502; and opined that GEICO's continued filing of "non-resident Petitions" in Nassau County, even after *Allstate v. Timmer*,[31] and the amendment of CPLR 7502, was "frivolous" (although it withheld an actual finding of frivolousness worthy of sanctions until GEICO had the opportunity to defend itself against that charge).

Timeliness – Exceptions to the 20-Day Rule CPLR 7503(c) provides, in pertinent part, that an application to stay arbitration "must be made by the party served within twenty days after service upon him of the notice [of intention to arbitrate] or demand [for arbitration], or

he shall be so precluded." It is, of course, well-established that the failure to make a timely application to stay arbitration will result in the denial of the application as untimely and constitutes a bar to judicial intrusion into the arbitration proceeding. One exception to the 20-day rule is that where the application to stay is based upon the ground that no agreement to arbitrate exists, it may be entertained even if made after the 20-day period had expired.[32]

In *New Hampshire Indemnity Co. v. Vranica*,[33] the court held that the insured was not assisted by the fact that the insurer did not seek to stay arbitration within 20 days because the Demand for Arbitration lacked the language advising the insurer of its right to seek a stay of arbitration within 20 days after service of the demand, as required by CPLR 7503(c), and, thus, the 20-day period for seeking a stay never began.

Filing and Service In *American Home Assurance Co. v. Dubuisson*,[34] the court held that the service of the notice of petition and petition *before* the filing of those papers and the purchase of an index number was a nullity and did not constitute proper commencement of the special proceeding.[35]

Effective November 21, 2001, the commencement statutes were amended to provide that a special proceeding, such as a proceeding to stay arbitration, "is commenced by filing a petition" only.[36]

NOTE: The legislation amending CPLR 304, 306-a and 306-b did not contain a corresponding amendment to CPLR 203(c)(1). That section still provided, in effect, that the statute of limitations is not tolled until the notice of petition or order to show cause is filed with the petition. As one respected commentator noted,

> Until this oversight is corrected (or the appellate courts provide some creative remedy), practitioners who, because of exigent circumstances, must commence a special proceeding on the eve of expiration of the statute of limitations are urged to proceed with extreme caution. Insofar as the statute of limitations is concerned, they can take no comfort whatsoever in the amended version of CPLR 304.[37]

Effective August 6, 2002, and retroactive to November 21, 2001, CPLR 203(c) was, in fact, amended to provide that the claim is interposed "when the action is commenced" (this includes a "Special Proceeding," *see* CPLR 105(b)), rather than when the pleading and process are filed.

CPLR 304 provides that in a special proceeding, "commencement" occurs when the petition is filed. Process does not have to be filed at the same time, only served, along with the petition, within the 15-day period allowed by CPLR 306-b.[38]

In *Mendon Ponds Neighborhood Ass'n v. Dehm*,[39] the Court of Appeals held that for purposes of commencing a special proceeding, the county clerk is the clerk to whom the petition has to be delivered in order to be deemed properly filed. Thus, a petition submitted to the office of the supreme and county court clerk, but not to the county clerk, was not properly filed.

Burden of Proof An insurer seeking to stay arbitration of an uninsured motorist claim has the burden of establishing that the offending vehicle was insured at the time of the accident. Once a *prima facie* case of coverage is established, the burden shifts to the opposing party to come forward with evidence to the contrary.[40]

In *In re Insurance Co. of Pennsylvania*,[41] the petitioner submitted in support of its petition a temporary insurance card issued to the offending driver and a police report listing the additional respondent insurer's insurance code. Although those documents were apparently sufficient to warrant the court to set the matter down for a framed issue hearing on the issue of coverage for the offending vehicle, none of the documents was offered into evidence at the hearing itself. Accordingly, the hearing court did not consider those documents. After the additional respondent insurer, through the testimony of its employee, denied that it ever insured the offending vehicle or its driver, the hearing court denied the petition. On appeal, the First Department affirmed, noting, first of all, that the hearing court was "not obliged to notice documents not offered into evidence."[42] In any event, the court noted that even if the documents were to be considered and were found to have satisfied the petitioner's initial burden of showing the existence of insurance, the testimony of the additional respondent insurer's employee concerning her exhaustive searches of its records for the existence of a policy sufficed to shift the burden back to the petitioner, which offered no further evidence in that regard.[43]

In *Centennial Ins. Co. v. Casilla*,[44] the court held that the SUM insurer's introduction into evidence of two DMV registration records, indicating that another insurer covered the offending vehicle on the date of the accident, was sufficient to establish its *prima facie* case. The testimony of the other insurer's underwriter, who did not search under reverse name for the offending owner or the VIN number or plate number of his vehicle, and did not introduce the records of her searches into evidence, was held to be insufficient to overcome the SUM insurer's showing.

In *Eagle Ins. Co. v. Beauvil*,[45] the court held that the petitioner established a *prima facie* case as to the existence of insurance coverage for the subject vehicle by producing the police accident report, which contained the offending vehicle's insurance code. The offending vehi-

cle's alleged insurer's letter stating in conclusory fashion that it did not insure the vehicle was held to be insufficient to overcome the petitioner's *prima facie* case.

In *Wausau Ins. Co. v. Ogochukwu*,[46] the evidence tending to show the existence of insurance coverage for the offending vehicle was the police report indicating the identity of the vehicle's owner and insurer. The purported insurer submitted the affidavit of its vice president of underwriting, who stated that the company did not write policies for personal automobile insurance and that another company was the insurer for all vehicles owned by that owner. The second company, in turn, submitted affidavits of a claims representative and a professional investigator stating that the vehicle owner did not own, operate or lease any vehicles with the plate number identified in the petition, never leased a vehicle to the person identified as the offending driver, had correspondence addressed to that person returned as undeliverable, and was unable to locate that individual. Under these circumstances, the court affirmed the denial of the petition to stay, on the ground that "[n]o issues of fact exist as to whether the offending vehicle . . . was insured at the time of the accident."[47]

Waiver of Right to Stay Arbitration In *North River Ins. Co. v. Morgan*,[48] the court held that the insurer participated in arbitration for more than two years before it commenced an Article 75 proceeding to stay arbitration, by, at a minimum: agreeing with the respondent's counsel that New York arbitration rules would be applied; agreeing that the third arbitrator would be selected by the AAA; designating an arbitrator; receiving medical reports and records; and agreeing to reschedule the hearing to a particular date. Thus, the insurer waived any objection that there was no agreement to arbitrate.

In *McCarthy v. Commercial Union Ins. Co.*,[49] the court held that there was no evidence of any demand for arbitration by either party, and

> in view of defendant's active participation in this litigation for nearly two years, including, *inter alia*, its role in procuring the examinations before trial of plaintiff, his wife and his insurance agent, the [defendant] must be deemed to have waived its right (if any) to demand that the matter [the SUM claim] be resolved through arbitration.[50]

Arbitration Awards

Issues for the Arbitrator In *New York Central Mutual Fire Ins. Co. v. Guarino*,[51] the court held, "The issue of timeliness is for the court, not the arbitrator, to decide."

Scope of Review In *Allcity Ins. Co. v. Eagle Ins. Co.*,[52] the court held that it was arbitrary and capricious for the arbitrator to disregard settled law pertaining to the statute of limitations.

In *D'Amato v. Leffler*,[53] the court reminded that a refusal to hear pertinent material evidence may constitute misconduct under CPLR 7511(b)(1).

In *Cabbad v. TIG Ins. Co.*,[54] the court held that where the evidence was clear and convincing that several instances of this conduct had taken place, including *ex parte* communications between the case administrator, the arbitrator, and counsel for the insurer without the knowledge of the claimant's counsel, and the submission of evidence by the insurer's counsel after the hearing had concluded, "this misconduct required vacatur of the arbitrator's award so as to safeguard the integrity of the arbitration process."

Res Judicata/Collateral Estoppel In *Atlantic Mutual Ins. Co. v. Lauria*,[55] the court granted the SUM insurer's Petition to Stay Arbitration "for two reasons" – (1) the AAA was not the proper forum in which to seek arbitration, and (2) "it [did] not appear" that the tortfeasor's policy limits had been exhausted. No appeal was taken from that Order. Claimants thereafter demanded arbitration in accordance with the policy provisions (three-person common law arbitration) and the insurer again sought to stay arbitration. The trial court granted the Petition to Stay on the ground of collateral estoppel, *i.e.*, the initial Order's determination that "it [did] not appear" that the underlying policy limits has been exhausted.

The Appellate Division reversed, holding the lower court's determination that "it [did] not appear" that the underlying limits were exhausted was merely an alternate ground for granting a permanent stay of the first demand for arbitration, and, thus, it was error to apply the doctrine of collateral estoppel to that finding. After the Supreme Court determined that the claimants had demanded arbitration in the wrong forum, it was unnecessary to reach the issue of whether the tortfeasor's limits were exhausted. Moreover, it was unclear from the wording of the order whether the trial court fully considered the exhaustion issue, and, thus, it could not be said that the issue was "actually litigated and specifically decided."[56]

Trial De Novo In *Calisi v. CNA Ins. Co.*,[57] the court held that the insurer waived its right to a trial *de novo* of an underinsured motorist claim by silently acquiescing in the arbitration forum's rules and by failing to advise the forum that the dispute was to be arbitrated in accordance with the terms of the policy and not the rules of the forum.

Appeals In *One Beacon Ins. Co. v. Bloch*,[58] the court reiterated the 1997 holding of the Court of Appeals in *Commerce & Industry Ins. Co. v. Nester*,[59] to the effect that a party that participates in an arbitration following the denial of a petition to stay arbitration forfeits the right to

appellate review of that denial. "[O]nce a party participates in an arbitration proceeding, without availing itself of all its reasonable judicial remedies, it should not be allowed thereafter to upset the remedy emanating from that alternative dispute resolution forum."[60]

In this case, the insurer fully participated in the arbitration by appearing at the hearing and fully cross-examining the claimant. At no time did the insurer ever seek a stay of the hearing pending its appeal from the denial of its petition to stay arbitration. Finding that the insurer and its attorneys "should have known better than to pursue this appeal in abject disregard of controlling authority squarely on point compelling the dismissal of this appeal,"[61] and that the arguments on the appeal were, in any event, frivolous, the court imposed monetary sanctions upon the insurer and its counsel, including a sanction payable to the Lawyers Security Fund and attorneys' fees, costs and disbursements payable to claimant and his counsel.

In *Progressive Northeastern Ins. Co. v. Jorge*,[62] the claimants failed to appear at the framed issue hearing to determine whether the alleged offending vehicle was insured at the time of the accident, and the court, therefore, granted the petition to stay arbitration. Because no appeal lies from an order entered upon default, the Appellate Division dismissed the claimants' appeal.

In a malpractice action against a broker for exposing the client to an uninsured loss, "the broker ultimately 'stands in the shoes of the insurer as concerns liability to the insured.'"

Action Against Insurance Agents/Brokers

In *Baseball Office of the Commissioner v. Marsh & McLennan, Inc.*,[63] an action for malpractice against an insurance broker for failure to procure insurance and failure to provide proper notice of claim, etc., the court noted, "A broker who agrees to place insurance for a customer must exercise reasonable diligence to do so and if unable to make such a placement must timely notify the customer to afford it the opportunity to procure the insurance elsewhere." Moreover, in a malpractice action against a broker for exposing the client to an uninsured loss, "the broker ultimately 'stands in the shoes of the insurer as concerns liability to the insured.'"

In *New York Health & Racquet Club, Inc. v. NIA / Kornreich, LLC*,[64] the court noted that although an insurance broker had a continuing duty to monitor a carrier's financial condition for the duration of the policy it procured, that duty does not extend beyond the policy's expiration.

NOTE: Regulation 35-D provides that automobile liability insurers must now take affirmative action to advise their insureds of the availability and desirability of SUM coverage.[65]

UNINSURED MOTORIST ISSUES

Insurer's Duty to Provide Prompt Written Notice of Denial or Disclaimer (Ins. Law § 3420(d))

Insurance Law § 3420(d) requires liability insurers to "give written notice as soon as is reasonably possible of . . . disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." The statute applies when an accident occurs in the state of New York.

In *Transportation Ins. Co. v. Cafaro*,[66] the court held that because the subject accident occurred in Aruba, Ins. Law § 3420(d) was not applicable and, thus, the insurer was not precluded from disclaiming coverage despite an untimely disclaimer.

In *Bluestein & Sander v. Chicago Ins. Co.*,[67] the federal court, applying New York law, noted that the reasonableness of any delay in providing notice of disclaimer is "'judged from the time that the insurer is aware of sufficient facts to issue a disclaimer.'" Thus, where the insurer disclaimed in September 1999 based upon interrogatory responses from December 1998, the court held that this nine-month delay was "plainly unreasonable."[68]

In *West 16th Street Tenants Corp. v. Public Service Mutual Ins. Co.*,[69] the court held that a 30-day delay in disclaiming for late notice was unreasonable as a matter of law. The delay in giving notice to the insurer – the only ground on which the disclaimer was based – was obvious from the face of the notice of claim and the accompanying complaint, and the insurer had no need to conduct any investigation before determining whether to disclaim.

In *McGinnis v. Mandracchia*,[70] the court held that an 85-day delay in disclaiming on the ground of late notice was unreasonable as a matter of law. The court noted that "the basis alleged for the disclaimer was obvious on the face of the plaintiff's notification." The court rejected the insurer's attempt to excuse its delay on the ground that it had to investigate whether the claimant was actually injured in an automobile accident, because that investigation "was unrelated to the reason for the disclaimer based on late notice and could have been asserted at any time."[71]

On the other hand, in *Mount Vernon Fire Ins. Co. v. Harris*,[72] the court held that a delay of 50 days was reasonable where the insurer promptly commenced an investigation into when the insured first became aware of the fire.[73]

The New York courts have repeatedly held that for the purpose of determining whether a liability insurer has a duty to promptly disclaim in accordance with Ins. Law § 3420(d), a distinction must be made between (1) policies that contain no provisions extending coverage to the subject loss, and (2) policies that do contain provisions extending coverage to the subject loss, and which would thus cover the loss but for the existence, elsewhere in the policy, of an exclusionary clause. It is only in the former case that compliance with Ins. Law § 3420(d) may be dispensed with.[74]

In *Abreu v. Huang*,[75] the court noted that a notice of disclaimer "must advise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated." Thus, "an insurer which has denied liability on a specific ground may not thereafter shift the basis for its disclaimer to another ground known to it at the time of its original repudiation."[76]

In *Aull v. Progressive Casualty Ins. Co.*,[77] the court held that a notice of petition to stay arbitration could constitute a written notice of disclaimer.

In *Gonzalez v. American Transit Ins. Co.*,[78] the court held that the defendant's amended answer, which was served upon the insured and which pleaded, as an affirmative defense, that the insured and the injured plaintiff failed to timely notify defendant of the underlying action, in breach of the insurance policy, constituted a sufficiently specific disclaimer of coverage under CPLR 3420(d). (This was the case even though the insured was not a party to the lawsuit in which the answer was served.)

Cancellation of Coverage

One category of an "uninsured" motor vehicle is where the policy of insurance for the vehicle had been canceled prior to the accident. Generally speaking, to effectively cancel an owner's policy of liability insurance, an insurer must strictly comply with the detailed and complex statutes rules and regulations governing notices of cancellation and termination of insurance, which differ depending upon whether, for example, the vehicle at issue is a livery or private passenger vehicle, whether the policy was written under the Assigned Risk Plan, and/or was paid for under premium financing contract.

In *Nationwide Ins. Co. v. Edwards*,[79] the court held that an Assigned Risk policy billing notice that failed to advise the insured of the option to send payment of premiums to the insurer or broker did not strictly comply with the rules of the New York Automobile Insurance Plan, § 14(E)(b)(2) and, therefore, the purported cancellation was a nullity.

In *Crump v. Unigard Ins. Co.*,[80] the court held that a cancellation in accordance with Banking Law § 576 occurred when the notice of cancellation sent by a premium finance agency was actually received by the insurer, and not on the date stated in the notice of cancellation. The court specifically concluded that Banking Law § 576, as amended in 1978,[81] did not abrogate the common-law rule requiring that an insurer actually receive the notice before the cancellation becomes effective.[82]

In *Merchants & Businessmen's Mutual Ins. Co. v. Williams*,[83] the court reiterated the rule that in order for a cancellation to be effective against third parties, it must be filed with the DMV.

In *ELRAC, Inc. v. White*,[84] the court noted, "The law is well settled that, where premiums are financed through a premium finance agency and the premium finance agency sends out cancellation notices, failure to comply with Banking Law § 576(1) is fatal."

The court added,

> Since there are separate statutory schemes relating to cancellation by a premium finance agency on behalf of the insured on one hand, and cancellation by the insurance carrier on the other, "the two statutory schemes are complementary rather than in conflict and must be construed harmoniously." Accordingly, the cancellation provisions applicable to insurance carriers do not apply to cancellation by the premium finance agency acting on behalf of the insured.[85]

In *Allstate Ins. Co. v. Perrine*,[86] the court held that a notice of cancellation that gave only 14 days' notice was void and of no effect, noting that "[p]ursuant to Veh. & Traf. L. § 313(1)(a), the 'time of the effective date and hour of termination stated in the notice [of cancellation] shall become the end of the policy' period."[87]

In *American Transit Ins. Co. v. Wilfred*,[88] Empire Mutual had issued a policy that was effective from midnight February 28, 1997, to midnight February 28, 1998. American Transit had issued a policy to be effective from February 28, 1998, midnight to February 28, 1999, midnight. An accident involving the insured under these policies took place on February 28, 1998 at 9:50 p.m. Each insurer claimed its policy did not apply to this accident. Noting that General Construction Law § 19 defines a calendar day as "the time from midnight to midnight" and that several courts have noted that the definition of a day is commonly considered to be the 24-hour period running from midnight to midnight, the court held that the use of the word "midnight" by both insurers was ambiguous, and that such ambiguity should be construed against both of them, thus resulting

in a finding that the policies overlapped and that both insurers had to defend and indemnify the insured.

In *American Casualty Ins. Co. v. Walcott*,[89] the court held, "To cancel a policy of insurance or delete a vehicle from the policy, the insurer is not required to send a notice of cancellation to an additional driver listed in the policy." However, where the insurer either knows or should know that such additional driver was actually the owner of the deleted vehicle, it is obligated to notify him of the deletion of the vehicle from the policy.

In *Eagle Ins. Co. v. Peguero*,[90] the court rejected Eagle's argument that the word "OVER" on the first page of a notice of cancellation, which referred to the back of the notice, where the 12-point type warning notice appeared, was not printed in at least 12-point type and was, therefore, invalid under VTL § 313 because it was not supported with expert opinion or other competent evidence of type size. "Absent a *prima facie* showing that the type is less than 12-point, the issue should not be framed for hearing."[91] The clear implication of this decision is that if the word "OVER" is in less than 12-point type, the notice of cancellation is invalid.

Where the insurer either knows or should know that such additional driver was actually the owner of the deleted vehicle, it is obligated to notify him of the deletion of the vehicle from the policy.

In *Integon Ins. Co. v. Goldson*,[92] the court noted, "The law is settled that a purported *ab initio* or retroactive cancellation of automobile insurance based upon fraud by the insured is not permitted in New York, unless the claimant was a participant in the fraud."

In *Pioneer Ins. Co. v. Hallen*,[93] the court noted, "'A fact is material so as to void *ab initio* an insurance contract if, had it been revealed, the insurer or reinsurer would either not have issued the policy or would have only at a higher premium.'" In this case, the court held that the alleged misrepresentation – the failure to disclose that a resident driver previously had been convicted of driving while impaired – was immaterial. The insurer's application only required disclosure of accidents and convictions within 39 months of the date thereof, and the conviction at issue took place more than four years previously. Thus, there was no evidence that the insurer's underwriting practices would have dictated rejection of the application.

Superceding Coverage

In *Goldson*, the court noted that supervening coverage releases an insurer from any obligation to provide coverage, regardless of its failure to properly cancel the policy at issue.

Stolen Vehicles

Another of the statutory categories of an "uninsured motor vehicle" is a vehicle that has been stolen and/or operated without the permission of its owner.

In *New York Central Mutual Fire Ins. Co. v. Accardo*,[94] the testimony at a framed issue hearing on the question of whether the offending driver had the permission of the vehicle's owner to drive the car at the time of the accident was to the effect that although the driver was the sister of the owner, she was staying with the owner while attempting to rehabilitate from a drug problem, she had been given strict instructions not to use the car and she took the car keys and the owner's wallet while the owner was in the shower. Moreover, the owner reported the theft of her vehicle by her sister to the police as soon as she discovered that it was missing. Under these circumstances, the trial court found that the vehicle was used without the permission of the owner and the Appellate Division affirmed, finding, "The Supreme Court's determination that the presumption of permissive use was overcome was supported by substantial evidence."[95]

In *Travelers Property Casualty Corp. v. Maxwill-Singleton*,[96] the owner of the offending vehicle testified at a framed issue hearing that he never gave anyone permission to operate the vehicle, but he conceded that he left his car keys with the assistant manager of his business since they were attached to his shop keys. On the basis of that concession, the court held that the owner effectively gave his employee control over the vehicle in his absence and, thus, that the owner's testimony failed to rebut the strong presumption of permissive use under VTL § 388(1).

In *New York Central Mutual Fire Ins. Co. v. Julien*,[97] involving a rental vehicle, the court held that in order for the vehicle's insurer to successfully rely upon a claim that the vehicle was used without permission, it must produce a copy of its insurance policy to establish that the alleged nonpermissive use of the rental vehicle either fell under an exclusion to its policy (for which it issued a timely disclaimer), or that the non-permissive use was not within the ambit of its policy.

> It is insufficient to establish the uninsured status of the offending vehicle in this CPLR article 75 proceeding simply by alleging that the unauthorized use of the rental vehicle violated the terms of the rental agreement. Only after it is determined that the policy con-

tained a provision stating that coverage is not afforded for use of the vehicle without permission of the owner . . . should the court confront the question of whether the restrictions in the rental agreement are enforceable such that [the operator's] use of the vehicle can be considered nonpermissive . . . and the question of whether the additional respondents have submitted substantial evidence that the use of the rental car was without the permission of the lessee.[98]

Hit-and-Run

One of the requirements for a valid uninsured motorist claim based upon a hit-and-run is "physical contact" between an unidentified vehicle and the person or motor vehicle of the claimant.[99]

In *State Farm Mutual Automobile Ins. Co. v. Allston*,[100] the claimants contended in a personal injury lawsuit that their vehicle was struck in the rear by a particular, identified vehicle. The court, however, granted the motion for summary judgment by the owner/operator of that vehicle based, inter alia, on evidence that that vehicle did *not* make contact with claimants' vehicle. Thereafter, claimants demanded arbitration of an uninsured motorist claim, asserting that his vehicle was struck by an unidentified, hit-and-run driver. The SUM carrier's contention that the arbitration was precluded by the doctrine of inconsistent positions was rejected by the court.

> [T]he doctrine of judicial estoppel precludes a party from framing his pleadings in a manner inconsistent with a position taken in a prior judicial proceeding. However, the doctrine will be applied only "where a party to an action has secured a judgment in his or her favor by adopting a certain position and then has sought to assume a contrary position in another action simply because his [or her] interests have changed." Here, the [claimants] never obtained a favorable judgment as a result of their inconsistent position in the personal injury action. Accordingly, the doctrine of judicial estoppel is inapplicable.[101]

Insurer Insolvency

The SUM endorsement under Regulation 35-D includes within the definition of an "uninsured" motor vehicle a vehicle whose insurer "is or becomes insolvent."

In *American Manufacturers Mutual Ins. Co. v. Morgan*,[102] the court held that, under Regulation 35-D, any situation wherein the tortfeasor's carrier has become insolvent (in liquidation) – whether covered by the Security Fund or not; whether the Fund has money or not – is an uninsured motorist situation and the Claimant is entitled to pursue UM benefits under his or her policy.

In its decision, the court held that this issue was not governed by the Court of Appeals 1977 decision in *State-Wide Ins. Co. v. Curry*[103] – which had made the distinction between covered and non-covered insolvencies – and expressly rejected the holding in the only reported post Regulation 35-D case on the issue to date – *GEICO v. Silber*.[104]

Pursuant to *Morgan*, in a Regulation 35-D case involving insurer insolvency, the Claimant can proceed to SUM arbitration. If the SUM carrier wishes to pursue a subrogation claim against the tortfeasor and the insolvent insurer, *it* would then have to pursue a claim from the Security Fund, with its attendant delays and risks of non-payment. As stated by the Court, quoting the Superintendent of Insurance,

> "The individual insured for supplementary uninsured motorists coverage should not be required to wait for a recovery from the Security Fund on behalf of the insolvent insurer. Since the SUM insurer has a subrogation right against the insolvent insurer, the Security Fund would still remain liable, but the insured would be provided a more prompt recovery from his or her own insurer."[105]

NOTE: Certain language in the decision seems to distinguish the 35-D SUM rule from the rule applicable in cases involving basic, mandatory UM coverage under Ins. Law § 3420(f)(1). In non-Regulation 35-D SUM cases, the old rule still applies.[106]

UNDERINSURED MOTORIST ISSUES

Definition of Underinsured Motorist Coverage

In *Kemper Ins. Co. v. Zhanna Azayeva*,[107] the court noted that in an accident involving only one motor vehicle, there can be no claim for supplementary uninsured/underinsured motorist benefits under that vehicle's policy because, by definition, SUM coverage applies only when *another*, offending vehicle is inadequately insured to cover an injured claimant's loss.

Regulation 35-D provides within the definition of uninsured or underinsured motor vehicle, a vehicle for which there was a bodily injury liability insurance policy or bond applicable at the time of the accident but "the amount of such insurance coverage or bond has been reduced, by payments to other persons injured in the accident, to an amount less than the third-party bodily injury liability limit of the policy."[108] In *State Farm Mutual Automobile Ins. Co. v. Sparacio*,[109] the court held, "Although both policies were for the same amount, State Farm was required by the terms of its own umbrella policy to subtract the amounts paid to other injured parties by the tortfeasor before making a comparison of the policy limits to determine whether the tortfeasor's vehicle was underinsured."

Subrogation Action

In *Liberty Mutual Ins. Co. v. Clark*,[110] the court noted that since the nature of subrogation is derivative of the

underlying tort action, a cause of action for subrogation accrues from the date of the accident, not the date of payment.

Consent to Settle/Violation Of Subrogation Rights

It is well-recognized that in effecting a settlement of a personal injury action against a tortfeasor, the claimant will be held to have prejudiced the subrogation rights of the SUM carrier unless he or she can establish by express provision in the release executed to the third party, or by necessary implication arising from the circumstances of the execution of the release, that the settling parties reserved the rights of the insurer against the third-party tortfeasor or otherwise limited the extent of their settlement to achieve that result.[111] The failure to protect the subrogation rights of the SUM carrier and/or the settlement of the underlying action without the consent of the SUM carrier constitutes breaches of the SUM policy which can vitiate the coverage thereunder.

In *New York Central Mutual Fire Ins. Co. v. Danaher*,[112] the claimant settled the action against the tortfeasor and issued a general release which did not preserve by express limitation the SUM carrier's subrogation rights. When the SUM carrier was notified of the settlement, it immediately disclaimed because its prior written consent to the settlement had not been obtained as required by the policy. In upholding the disclaimer of SUM coverage, the court stated,

> By breaching condition 10 of the SUM coverage portion of the subject insurance policy, defendant is disqualified from availing herself of the benefits of the underinsured coverage provided under that policy unless she can demonstrate that [the SUM carrier], by its conduct, waived the requirement of consent or acquiesced in the settlement.[113]

The court held that the fact that the claimant's counsel's repeated telephonic requests for a copy of the insurance policy, made prior to the settlement, went unanswered, and the SUM carrier's knowledge that an SUM claim had been asserted, did not suffice to raise a question of fact as to the waiver of Condition 10. Moreover, the court noted that the SUM carrier was "'not required to demonstrate prejudice to assert a defense of non-compliance'" with Condition 10 of the policy.[114]

In *D'Angiolillo v. Singh*,[115] the court held that the failure to timely commence a personal injury action against the tortfeasor within the applicable statute of limitations will constitute a violation of the SUM insurer's subrogation rights and will vitiate the SUM coverage. The statute of limitations for commencing a personal injury action against the tortfeasor is not tolled during the time in which an uninsured motorist issue is being arbitrated.

Reduction in Coverage

In *Wick v. Encompass Ins. Co.*,[116] the Declarations Page of the policy indicated that the insured had paid a premium for and received *both* "Uninsured Motorist" coverage in the sum of $25,000/$50,000 *and* "Supplemental Un/Underinsured Motorist" coverage in the single limit sum of $50,000. In addition, the Declarations Page did not contain the "plain language" offset provision required by Regulation 35-D, 11 N.Y.C.R.R. § 60-2.3(a)(2). Finding that "[t]his case, as opposed to *Allstate* [*v. Stolarz*], does not involve a single limit uninsurance/underinsurance coverage situation with a single payment," but, rather, "the insured made two payments for, presumably, two distinct coverages,"[117] the court held that the reduction-in-coverage/offset provision was unenforceable.

Priority of Coverage

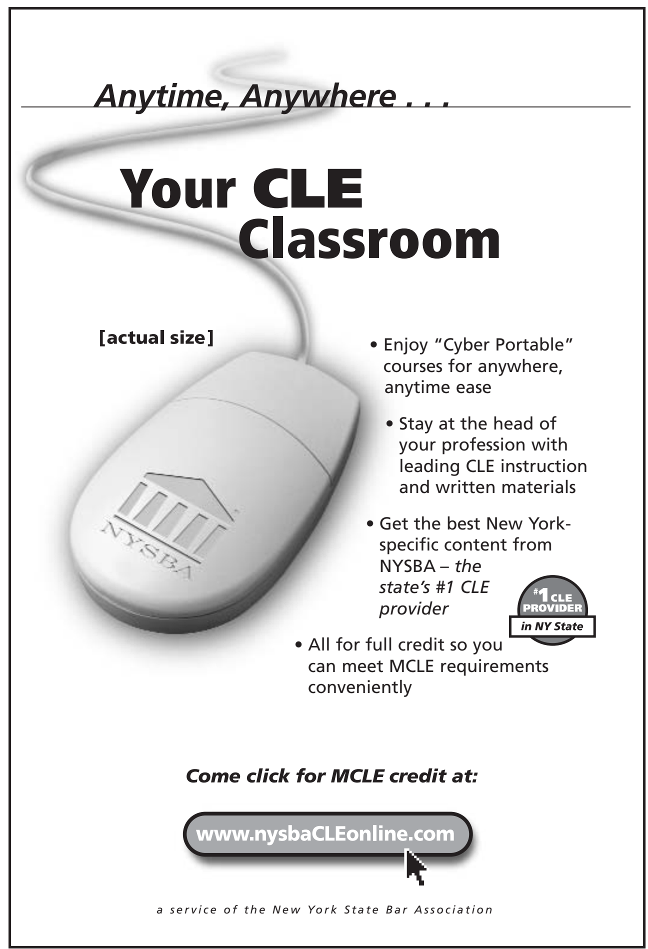
The "Priority of Coverage" provision of the SUM endorsement provides that where an insured may be covered for uninsured or supplementary uninsured motorist coverage under more than one policy, the maximum amount recoverable may not exceed the highest limit of coverage for any one vehicle under any one policy. In such cases, the following order of priority applies: (1) the policy covering the vehicle occupied by the claimant; (2) the policy identifying the claimant as a named insured; and (3) any other policy covering the claimant.[118]

---

1. *See* Jonathan A. Dachs, *A Review of Uninsured Motorist and Supplementary Uninsured Motorist Cases Decided in 2001*, N.Y. St. B.J., Vol. 74, No. 6, at 20 (July/Aug. 2002); Jonathan A. Dachs, *Actions by Courts and Legislature in 2000 Addresses Issues Affecting Uninsured and Underinsured Drivers*, N.Y. St. B.J. Vol. 73, No. 7, at 26 (Sept. 2001); Jonathan A. Dachs, *Summing Up 1999 "SUM" Decision: Courts Provide New Guidance on Coverage Issues for Motorists*, N.Y. St. B.J., Vol. 72, No. 6, at 18 (July/Aug. 2000); Jonathan A. Dachs, *Decisions in 1998 Clarified Issues Affecting Coverage for Uninsured and Underinsured Motorists*, N.Y. St. B.J., Vol. 71, No. 5, at 8 (May/June 1999); Jonathan A. Dachs, *Legislative and Case Law Developments in UM/UIM/SUM Law – 1997*, N.Y. St. B.J., Vol. 70, No. 6, at 46 (Sept./Oct. 1998); Jonathan A. Dachs, *Developments in Uninsured and Underinsured Motorist Coverage*, N.Y. St. B.J., Vol. 69, No. 6 at 18 (Sept./Oct. 1997); *The Parts of the SUM: Uninsured and Underinsured Motorist Coverage in 1995*, N.Y. St. B.J., Vol. 68, No. 5, at 42 (July/Aug. 1996); Jonathan A. Dachs, *Uninsured and Underinsured Motorist Cases in 1994*, N.Y. St. B.J., Vol. 67, No. 7 at 24 (Nov. 1995); Jonathan A. Dachs, *Uninsured and Underinsured . . . But Not Underlitigated: 1993: An Important Year for UM/UIM Coverage*, N.Y. St. B.J., Vol. 66, No. 6, at 13 (Sept./Oct. 1994).
2. 192 Misc. 2d 78, 745 N.Y.S.2d 671 (Sup. Ct., N.Y. Co. 2002).
3. 96 N.Y.2d 58, 69, 724 N.Y.S.2d 692 (2001).
4. *See* 2002 N.Y. Laws ch. 20, eff. Mar. 26, 2002, amending VTL § 370(1)(b).

5. 192 Misc. 2d at 79.
6. *Id.* at 80.
7. 295 A.D.2d 511, 744 N.Y.S.2d 677 (2d Dep't 2002).
8. *See Buckner v. MVAIC*, 66 N.Y.2d 211, 495 N.Y.S.2d 952 (1985); *Royal Ins. Co. v. Bennett*, 226 A.D.2d 1074, 642 N.Y.S.2d 125 (4th Dep't 1996); *Hogan v. Cigna Prop. & Cas. Co.*, 216 A.D.2d 442, 628 N.Y.S.2d 182 (2d Dep't 1995).
9. 298 A.D.2d 970, 747 N.Y.S.2d 878 (4th Dep't 2002).
10. 295 A.D.2d 277, 744 N.Y.S.2d 176 (1st Dep't 2002).
11. *Id.* at 278. *But see American Alliance Ins. Co. v. Verdi*, Index No. 013437/01 (Sup. Ct., Nassau Co. 2002) (tow truck operator injured in the course of directing traffic so as to allow co-worker to safely drive truck onto highway, and who intended to re-enter and drive truck thereafter, was an "occupant" of the tow truck for purposes of SUM coverage).
12. 295 A.D.2d 569, 745 N.Y.S.2d 47 (2d Dep't 2002).
13. 293 A.D.2d 751, 751-52, 741 N.Y.S.2d 284 (2d Dep't 2002).
14. 290 A.D.2d 676, 736 N.Y.S.2d 447 (3d Dep't 2002).
15. 293 A.D.2d 643, 740 N.Y.S.2d 442 (2d Dep't 2002).
16. *Id.* at 644.
17. 294 A.D.2d 579, 742 N.Y.S.2d 577 (2d Dep't 2002).
18. *See Metropolitan Prop. & Cas. Ins. Co. v. Mancuso*, 93 N.Y.2d 487, 693 N.Y.S.2d 81 (1999).
19. *See Schlesinger v. Nationwide Mut. Ins. Co.*, 294 A.D.2d 421, 742 N.Y.S.2d 352 (2d Dep't 2002) (insurer provided notice of an uninsured motorist claim as soon as practicable when he promptly notified the insurer of his claim after learning that the offending driver could not be located and that the offending vehicle might not have had insurance. The insured was entitled to rely on the insurance code and policy number provided for the offending vehicle in the police report as presumptive proof that the vehicle was insured – at least until he learned to the contrary); *see also State Farm Mut. Auto. Ins. Co. v. Sparacio*, 297 A.D.2d 284, 746 N.Y.S.2d 167 (2d Dep't 2002).
20. 300 A.D.2d 1095, 1096, 751 N.Y.S.2d 810 (4th Dep't 2002).
21. 300 A.D.2d 1063, 751 N.Y.S.2d 802 (4th Dep't 2002).
22. 296 A.D.2d 396, 397, 744 N.Y.S.2d 509 (2d Dep't 2002).
23. 300 A.D.2d 660, 753 N.Y.S.2d 102 (2d Dep't 2002).
24. *See Ringel v. Blue Ridge Ins. Co.*, 293 A.D.2d 460, 740 N.Y.S.2d 109 (2d Dep't 2002); *see also Mount Vernon Fire Ins. Co. v. Harris*, 193 F. Supp. 2d 674 (E.D.N.Y. 2002).
25. 97 N.Y.2d 491, 743 N.Y.S.2d 53 (2002).
26. *See* Dachs, N. & Dachs, J., *Notice of Legal Action and the Requirement of Prejudice*, N.Y.L.J., July 9, 2002, p. 3, col. 1; *U.S. Underwriters Ins. Co. v. 203-211 West 145th St. Realty Corp.*, 37 Fed. Appx. 575 (2d Cir. 2002); *State Farm Mut. Auto. Ins. Co. v. Sparacio*, 297 A.D.2d 284, 746 N.Y.S.2d 167 (2d Dep't 2002).
27. 297 A.D.2d 381, 746 N.Y.S.2d 605 (2d Dep't 2002).
28. 291 A.D.2d 401, 737 N.Y.S.2d 118 (2d Dep't 2002).
29. 301 A.D.2d 253, 255, 750 N.Y.S.2d 712 (4th Dep't 2002).
30. N.Y.L.J., Apr. 9, 2002, p. 22, col. 3 (Sup. Ct., Nassau Co.).
31. N.Y.L.J., Apr. 16, 2001, p. 38, col. 6 (Sup. Ct., Nassau Co.).
32. *See Matarasso v. Continental Cas. Co.*, 56 N.Y.2d 264, 451 N.Y.S.2d 703, 436 N.E.2d 1305 (1982); *Eagle Ins. Co. v. Perez*, 299 A.D.2d 544, 750 N.Y.S.2d 640 (2d Dep't 2002); *Seneca Ins. Co., Inc. v. Secure-Southwest Brokerage Ltd.*, 294 A.D.2d 211, 741 N.Y.S.2d 690 (1st Dep't 2002).
33. 294 A.D.2d 287, 743 N.Y.S.2d 270 (1st Dep't 2002).
34. 291 A.D.2d 402, 736 N.Y.S.2d 889 (2d Dep't 2002).
35. *See Ins. Co. of the State of Pa. v. Michel*, N.Y.L.J., June 7, 2002, p. 24, col. 2 (Sup. Ct., Westchester Co.).
36. *See* 2001 N.Y. Laws ch. 473, S. B. 77, eff. Nov. 21, 2001, amending CPLR 304, 306-a, and 306-b.
37. Vincent C. Alexander, *Special Proceedings: New Commencement Amendment Is Incomplete*, N.Y.L.J., Feb. 14, 2002, p. 3, col. 1.
38. *See, e.g., Boschetti v. MacKay*, 297 A.D.2d 392, 746 N.Y.S.2d 616 (2d Dep't), *appeal denied*, 98 N.Y.2d 610, 749 N.Y.S.2d 1 (2002) (decided after the statutory amendment but without noting or applying it – petition dismissed for failure to file process along with the petition).
39. 98 N.Y.2d 745, 751 N.Y.S.2d 819 (2002).
40. *See Am. Cas. Ins. Co. v. Walcott*, 300 A.D.2d 478, 751 N.Y.S.2d 560 (2d Dep't 2002).
41. 295 A.D.2d 136, 742 N.Y.S.2d 831 (1st Dep't 2002).
42. *Id.* at 137.
43. *See Wausau Ins. Co. v. Ogochukwu*, 295 A.D.2d 280, 744 N.Y.S.2d 175 (1st Dep't 2002) (evidence submitted by respondents sufficed to establish the absence of coverage).
44. 298 A.D.2d 292, 748 N.Y.S.2d 491 (1st Dep't 2002).
45. 297 A.D.2d 736, 747 N.Y.S.2d 774 (2d Dep't 2002).
46. 295 A.D.2d 280.
47. *Id.* at 280.
48. 291 A.D.2d 230, 737 N.Y.S.2d 355 (1st Dep't 2002).
49. 194 Misc. 2d 295, 752 N.Y.S.2d 209 (Sup. Ct., Richmond Co. 2002).
50. *Id.* at 297.
51. 283 A.D.2d 982, 983, 723 N.Y.S.2d 924 (4th Dep't 2001).
52. No. 2001-482 Q C, 2002 N.Y. Misc. LEXIS 244 (Sup. Ct., App. Term 2d & 11th Dists. Jan. 23, 2002).
53. 290 A.D.2d 475, 736 N.Y.S.2d 689 (2d Dep't 2002).
54. 300 A.D.2d 584, 584, 751 N.Y.S.2d 871 (2d Dep't 2002).
55. 291 A.D.2d 492, 739 N.Y.S.2d 394 (2d Dep't 2002).
56. *Id.* at 493.
57. 295 A.D.2d 219, 744 N.Y.S.2d 22 (1st Dep't 2002).
58. 298 A.D.2d 522, 748 N.Y.S.2d 783 (2d Dep't 2002).
59. 90 N.Y.2d 255, 660 N.Y.S.2d 366 (1997).
60. *Id.* at 262.
61. 298 A.D.2d at 523–24.
62. 298 A.D.2d 395, 751 N.Y.S.3d 297 (2d Dep't 2002).
63. 295 A.D.2d 73, 79–80, 742 N.Y.S.2d 40 (1st Dep't 2002).
64. 290 A.D.2d 348, 736 N.Y.S.2d 369 (1st Dep't 2002).
65. *See* 11 N.Y.C.R.R. §§ 60-2.1(e), 60-2.2(a); Ins. Law § 3420(f)(2)(B).
66. 295 A.D.2d 618, 744 N.Y.S.2d 700 (2d Dep't 2002).
67. 276 F.3d 119 (2d Cir. 2002) (quoting *Mount Vernon Fire Ins. Co. v. Unjar*, 177 A.D.2d 480, 575 N.Y.S.2d 694 (2d Dep't 1991)).
68. *See Aull v. Progressive Cas. Ins. Co.*, 300 A.D.2d 302, 751 N.Y.S.2d 292 (2d Dep't 2002); *Fed. Ins. Co. v. Provenzano*, 300 A.D.2d 485, 751 N.Y.S.2d 567 (2d Dep't 2002).
69. 290 A.D.2d 278, 736 N.Y.S.2d 34 (1st Dep't), *appeal denied*, 98 N.Y.2d 605, 746 N.Y.S.2d 279 (2002).
70. 291 A.D.2d 484, 739 N.Y.S.2d 160 (2d Dep't 2002).

71. *Id*. at 485; *see Buttenschon v. State Farm Mut. Auto. Ins. Co.*, 291 A.D.2d 864, 737 N.Y.S.2d 190 (4th Dep't 2002) (79-day delay); *Aull*, 300 A.D.2d 302 (delay of nearly four months); *Provenzano*, 300 A.D.2d 485 (almost three-month delay).
72. 193 F. Supp. 2d 674 (E.D.N.Y. 2002).
73. *See McEachron v. State Farm Ins. Co.*, 295 A.D.2d 685, 742 N.Y.S.2d 925 (3d Dep't 2002).
74. *See Cont'l Cas. Co. v. Luhrs*, 299 A.D.2d 357, 749 N.Y.S.2d 175 (2d Dep't 2002); *Metro Med. Diagnostics, P.C. v. Eagle Ins. Co.*, 293 A.D.2d 751, 741 N.Y.S.2d 284 (2d Dep't 2002); *Great Am. Ins. Co. v . Tomaino*, 293 A.D.2d 944, 741 N.Y.S.2d 315 (3d Dep't 2002); *Squires v. Robert Marini Builders, Inc.*, 293 A.D.2d 808, 739 N.Y.S.2d 777 (3d Dep't 2002).
75. 300 A.D.2d 420, 751 N.Y.S.2d 583 (2d Dep't 2002).
76. *Id*. at 420; *see Tomaino*, 293 A.D.2d 944; *Harris*, 193 F. Supp. 2d 674; *Merchs. Mut. Ins. Co. v. Falisi*, 293 A.D.2d 678, 741 N.Y.S.2d 273 (2d Dep't 2002), *rev'd on other grounds*, 99 N.Y.2d 568, 755 N.Y.S.2d 703 (2003).
77. 300 A.D.2d 302, 751 N.Y.S.2d 292 (2d Dep't 2002).
78. No. 2001-1249 Q C, 2002 N.Y. Misc. LEXIS 1095 (Sup. Ct., App. Term, 2d & 11th Dists. June 6, 2002).
79. 292 A.D.2d 389, 738 N.Y.S.2d 95 (2d Dep't 2002).
80. 291 A.D.2d 692, 738 N.Y.S.2d 425 (3d Dep't 2002), *aff'd*, 2003 N.Y. LEXIS 281 (Mar. 27, 2003).
81. 1978 N.Y. Laws ch. 565.
82. *Crump*, 291 A.D.2d 692 (citing *Savino v. Merch. Mut. Ins. Co.*, 44 N.Y.2d 625, 628-29, 407 N.Y.S.2d 468 (1978), and relying upon the rationale underlying the statute and the common law rule, which is "to protect the insured and third parties by preventing gaps in coverage.").
83. 295 A.D.2d 614, 744 N.Y.S.2d 698 (2d Dep't 2002).
84. 299 A.D.2d 546, 546–47, 750 N.Y.S.2d 641 (2d Dep't 2002).
85. *Id*. at 547 (citations omitted).
86. 300 A.D.2d 1065, 752 N.Y.S.2d 494 (4th Dep't 2002).
87. *Id*. at 1066.
88. 296 A.D.2d 360, 745 N.Y.S.2d 171 (1st Dep't 2002).
89. 300 A.D.2d 478, 479, 751 N.Y.S.2d 560 (2d Dep't 2002).
90. 299 A.D.2d 294, 750 N.Y.S.2d 601 (1st Dep't 2002).
91. *Id*. at 294; *see In re Utica Mut. Ins. Co.*, 100 A.D.2d 592, 473 N.Y.S.2d 539 (2d Dep't 1984).
92. 300 A.D.2d 396, 397, 751 N.Y.S.2d 527 (2d Dep't 2002).
93. 298 A.D.2d 725, 725, 749 N.Y.S.2d 295 (3d Dep't 2002) (quoting *Interested Underwriters at Lloyd's v. H.D.I. III Assoc.*, 213 A.D.2d 246, 247, 623 N.Y.S.2d 871 (1st Dep't 1995)).
94. 298 A.D.2d 459, 748 N.Y.S.2d 270 (2d Dep't 2002).
95. *Id*. at 459.
96. 300 A.D.2d 225, 751 N.Y.S.2d 367 (1st Dep't 2002).
97. 298 A.D.2d 587, 749 N.Y.S.2d 73 (2d Dep't 2002).
98. *Id*. at 587.
99. *See Allstate Ins. Co. v. Yuriy Moshevev*, 291 A.D.2d 401, 737 N.Y.S.2d 118 (2d Dep't 2002).
100. 300 A.D.2d 669, 751 N.Y.S.2d 795 (2d Dep't 2002).
101. *Id*. at 670 (quoting *Bono v. Cucinella*, 298 A.D.2d 483, 484, 748 N.Y.S.2d 610 (2d Dep't 2002)). (citations omitted).
102. 296 A.D.2d 491, 746 N.Y.S.2d 726 (2d Dep't 2002).
103. 43 N.Y.2d 298, 401 N.Y.S.2d 196 (1977).
104. 178 Misc. 2d 451, 679 N.Y.S.2d 552 (Sup. Ct., Nassau Co. 1998).
105. *Morgan*, 296 A.D.2d at 493–94 (quoting N.Y. St. Reg., July 8, 1992, at 10).
106. *See Eagle Ins. Co. v. St. Julian*, 297 A.D.2d 737, 747 N.Y.S.2d 773 (2d Dep't 2002).
107. 291 A.D.2d 406, 736 N.Y.S.2d 893 (2d Dep't 2002).
108. 11 N.Y.C.R.R. § 60-2.3(f).
109. 297 A.D.2d 284, 285, 746 N.Y.S.2d 167 (2d Dep't 2002).
110. 296 A.D.2d 442, 745 N.Y.S.2d 64 (2d Dep't 2002).
111. *See Weinberg v. Transamerica Ins. Co.*, 62 N.Y.2d 379, 381–82, 477 N.Y.S.2d 99 (1984).
112. 290 A.D.2d 783, 736 N.Y.S.2d 195 (3d Dep't 2002).
113. *Id*. at 784–85.
114. *See Integon Ins. Co. v. Battaglia*, 292 A.D.2d 527, 739 N.Y.S.2d 590 (2d Dep't 2002).
115. No. 2001-1585 RIC, 2002 N.Y. Misc. LEXIS 1661 (Sup. Ct., App. Term, 2d Dep't Sept. 17, 2002).
116. 191 Misc. 2d 449, 742 N.Y.S.2d 813 (Sup. Ct., N.Y. Co. 2002).
117. *Id*. at 451.
118. *See Warren v. Allstate Ins. Co.*, 300 A.D.2d 577, 752 N.Y.S.2d 689 (2d Dep't 2002).



The Self-Evaluative Privilege In the Second Circuit: Dead or Alive?

By Ronald G. Blum and Andrew J. Turro

"Know thyself," the ancients counseled. They may have been wise, but they did not have to consider who else might acquire that knowledge or whether it would be protected by privilege. They did not contend with litigation or discovery.

Times have changed. Today, a company's self-knowledge often comes from internal investigations or self-audits. Businesses seek to "know themselves" in order to improve compliance with internal policies or comply with applicable laws, whether environmental, employment or criminal.

Here in the Second Circuit, however, it is far from certain whether the reports and findings of such internal investigations can be protected from disclosure in subsequent litigation. Some district courts within this circuit have unhesitatingly embraced a privilege – the so-called self-evaluative or self-critical analysis privilege – to protect such reports, while others have rejected the concept outright. Still other district courts, while acknowledging the judicial debate surrounding the issue, nonetheless have refused to recognize the privilege. The Second Circuit has yet to address the viability of the privilege. Until it does, or until there is a consensus among the district courts, the discoverability of internal investigative reports remains unsettled in this circuit.

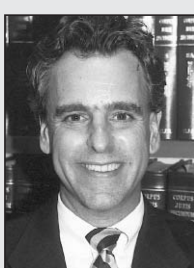
The Privilege and Its Theoretical Bases

The common law self-evaluative or self-critical analysis privilege is meant to promote candid self-evaluation. It is based on the theory that disclosure of internal investigations or self-assessments will deter socially useful activity.[1] While the protection first arose in the context of medical peer review,[2] it has since extended to other areas, including employment discrimination investigations,[3] accounting reviews,[4] libel reviews by the news media,[5] and environmental audits.[6] The privilege "serves the public interest by encouraging self-improvement through uninhibited self-analysis and evaluation."[7]

Some district courts in this circuit apply the privilege where (a) the information results from a critical self-analysis undertaken by the party seeking protection, (b) the public has a strong interest in preserving the free flow of the type of information sought, and (c) the information is of the type the flow of which would be curtailed if discovery were allowed.[8] These courts also require that the analysis be prepared with the expectation that it remain confidential and that it actually has been kept confidential.[9]

The privilege is not absolute, but qualified; it may be overcome by a showing of extraordinary circumstances or special need.[10] Thus, even where the above factors exist, courts balance the competing harms and the parties' relative need for the disclosure or non-disclosure of the self-evaluative materials.[11] If the party resisting disclosure can establish harm, the party seeking disclosure must meet a higher standard of relevancy.[12] Several courts have also limited the scope of the privilege, protecting only the evaluative portions of a report but permitting disclosure of the factual evidence upon which the evaluation is based.[13]

Ronald G. Blum is a litigation partner in the New York office of Manatt, Phelps & Phillips, LLP and an adjunct professor of law at Fordham University School of Law, where he teaches complex criminal litigation. A graduate of Brandeis University, he holds a master's degree from the University of California at Berkeley and received his J.D. from Columbia University School of Law.



Andrew J. Turro is a litigation partner in the Long Island office of Meyer, Suozzi, English & Klein, P.C. and an adjunct professor of law at New York Law School, where he teaches advanced legal writing courses. A graduate of the University of New York at Buffalo, he holds a master's degree from the University of Chicago and received his J.D. from Albany Law School of Union University.

As one set of commentators observed, the self-evaluative privilege "has led a badgered existence" in the Second Circuit.[14] Only the district courts have discussed the privilege; the appellate court has yet to do so. To date, however, the trial courts within the circuit are split regarding the viability of the privilege.[15]

The Cases Rejecting the Privilege

Several local federal district courts suggest that the 1990 U.S. Supreme Court decision in *University of Pennsylvania v. EEOC*[16] conclusively rejects the very basis of the privilege. This case involved peer reviews of a professor who was denied tenure. The EEOC sought the reviews in connection with a claim of discrimination, and the university argued that if the material were discoverable, professors would be less inclined to offer honest assessments, and the integrity of the peer review process would be undermined. The trial and circuit court upheld the EEOC's refusal to exclude peer review materials from a subpoena, and the Supreme Court affirmed. Justice Blackmun, speaking for the Court, observed that Federal Rule of Evidence 501 provides federal courts with flexibility to develop privileges, but expressed a disinclination to exercise such authority expansively, holding that courts should not "create and apply an evidentiary privilege unless it 'promotes sufficiently important interests to outweigh the need for the probative evidence.'"[17]

Relying on that rationale, several district courts have concluded that the privilege does not serve the public interest and therefore should be rejected. These courts opine that companies conduct self-evaluations to promote their business interests and that the companies would perform the self-audits without regard to whether the analyses would be discoverable in future litigation.[18]

For example, in *Roberts v. Hunt*,[19] the plaintiff sued the New York State Housing Finance Agency alleging age discrimination, upon being terminated after failing to pass a civil service examination. At depositions of employees of the defendant agency, the plaintiff sought information about a conversation concerning an investigation of the plaintiff for sexual harassment. While denying the request on the ground of relevancy, the court declared that the "so-called" self-evaluative privilege is not available under federal law. The court explained that in analyzing a proposed privilege, courts "should balance 'the public's need for the full development of relevant facts in federal litigation against the countervailing demand for confidentiality in order to achieve the objectives underlying the privilege at issue.'"[20] Rejecting the public policy argument advanced by courts recognizing the privilege, the court also noted that the rationale of the privilege was rejected by the Supreme Court in *University of Pennsylvania*, and the privilege failed the "traditional common law test for establishment of a privilege." More particularly, the court said:

> [I]t is not reasonable to believe that organizations will not comply with employment discrimination laws unless independent surveys revealing potential violations are deemed privileged. As noted, organizations have a self-interest in achieving compliance with the law and social expectations. Managers need only to scrutinize their workforce to determine if there are indications of potential discrimination. Governmental agencies have no less an incentive to promote equal opportunity in the workplace.[21]

While not flatly rejecting the viability of the privilege, Judge Martin reached a similar conclusion in *Abbott v. Harris Publications*,[22] in which the plaintiff sought documents prepared as part of the defendant's internal investigation of the processing of the plaintiff's application to serve as a dog show judge. The defendant raised the privilege to object to the production of the internal investigation. In directing disclosure of the materials, the court observed that, after *University of Pennsylvania*, the party asserting the self-critical analysis privilege "bears a heavy burden of establishing that public policy strongly favors the type of review at issue and that disclosure in the course of discovery will have a substantial chilling effect on the willingness of parties to engage in such reviews."[23] The court rejected the argument that disclosure of the document would have a "chilling effect" on organizations' willingness to engage in self-assessment, stating that "[r]eviews such as these are conducted by organizations because they are concerned with the integrity of their own operations and, while they no doubt would prefer that the information not be made public, the fact that the results might be discoverable in civil litigation will not deter them from doing what their business interest requires."[24]

The Contrasting View: Cases Embracing the Privilege

The line of cases rejecting the privilege on the basis of University of Pennsylvania is not universally embraced within the circuit. Many of the local cases recognizing the privilege have arisen in the context of employment litigation and a company's efforts to identify and rectify discriminatory employment practices. Unlike the decisions discussed above, in each of these cases the court upheld the privilege based upon the view that it furthers important public policies, encouraging businesses to take affirmative steps to ensure compliance with the law.

Urging adoption of the privilege, one pair of commentators emphasized that in *University of Pennsylvania* the EEOC had sought employee reviews that had been routinely generated in the ordinary course of the uni-

versity's business. The case did not involve an internal analysis that had been voluntarily undertaken as a good-faith effort to use self-evaluation to comply with applicable standards of conduct mandated by law.[25]

In *Flynn v. Goldman, Sachs & Co.*,[26] for example, the plaintiff sued Goldman Sachs for gender discrimination and requested the production of documents pertaining to Goldman's study of barriers to the equal and fair employment of women in the company. Goldman had retained a company, Catalyst, to study the issue, and Catalyst moved to quash a subpoena that the plaintiff had served on it. Catalyst sought protection from disclosure of its report, which included notes from interviews of Goldman employees and analysis of the results of the research. The communications between Catalyst and the defendant's employees had been made with the understanding that the statements would remain confidential and anonymous. Catalyst argued that disclosing the documents would reduce the likelihood that employers would voluntarily seek critical analysis from firms such as Catalyst.

Several courts, while recognizing the privilege, have applied it in a limited fashion to protect only the evaluative portions of a company's self-audits.

Judge Wood refused to order disclosure of the report because the confidentiality of such communications is critically important in eliciting candid responses from employees about their concerns. Finding that the privilege protected the Catalyst materials from disclosure, Judge Wood – adopting a view rejected by courts hesitant to recognize the privilege – emphasized that the "[d]issemination of Catalyst's interview notes, even in redacted form, would have a chilling effect on the future willingness of employees at defendant and other firms to speak candidly about sensitive topics."[27] The court further emphasized that "voluntary studies such as the one commissioned by defendant are to be encouraged as a matter of public policy" and "[p]laintiff's need for the interview notes and the reports does not outweigh the serious harm that disclosure would cause to the future of self-critical analysis."[28]

In *Sheppard v. Consolidated Edison Co.*,[29] Magistrate Judge Azrack adopted a similar view. In that case the plaintiff in an employment discrimination action sought disclosure of the defendant's study of internal employment and affirmative action practices. The plaintiff argued that the study would demonstrate that the company had notice of its discriminatory practices. Magistrate Judge Azrack determined that the privilege insulated the material from discovery, holding that "there is a strong public policy in favor of the flow of self-critical analysis of employment discrimination" and that

> [c]ompanies will surely be chilled from memorializing their self-critical analysis knowing that it would be disclosed to an aggrieved employee. Such a practice would not only curtail the flow of such information, but may also diminish the value of the information if companies are too skeptical of memorializing their analysis and thus fail to circulate the information to the persons responsible for employment decisions.[30]

The court also noted that the potential harm of disclosure outweighed the plaintiff's need for the information.[31]

Trial courts in this circuit have applied the privilege to other substantive areas as well. For example, in *In re Health Management, Inc.*,[32] plaintiffs sought documents from a non-party professional organization, the American Institute of Certified Public Accountants, known as AICPA, regarding its review of the financial statement audit that BDO Seidman, Health Management's auditor, had conducted. AICPA, a voluntary organization of professional accounting entities, is authorized by SEC regulation to review audits performed by its member organizations. SEC regulations require accounting firms to submit their audits for peer review to AICPA every three years, and AICPA seeks to determine whether alleged audit failures indicate breakdowns in a firm's quality control system. In *In re Health Management, Inc.*, AICPA asserted the self-evaluative privilege because the documents were prepared to evaluate BDO's audit of Health Management. Noting that the self-evaluative privilege serves the public interest by encouraging self-improvement through uninhibited self-analysis and evaluation, Judge Spatt held that the self-evaluative privilege protected the evaluation.

Several courts, while recognizing the privilege, have applied it in a limited fashion to protect only the evaluative portions of a company's self-audits. One such case is *Troupin v. Metropolitan Life Insurance Co.*,[33] in which the plaintiff alleged age and gender discrimination, and sought disclosure of an internal company report addressing the defendant's shortcomings relating to advancement opportunities for female employees. Defendants argued that the self-evaluative privilege protected the requested materials from disclosure. More particularly, Met Life claimed that disclosure of the report would dissuade businesses from conducting such studies and effectively punish attempts to advance the interests of women and minorities. Although Judge Sweet concluded that the plaintiff had met her burden of demonstrating the need for evidence of defendant's dis-

criminatory intent, the court refused to direct production of the entire report. Instead, Judge Sweet invoked the privilege to protect the narrative and the evaluative and analytical portions of the report, but not the factual information that would be otherwise discoverable "pursuant to the normal discovery process."[34] Other courts within this circuit have reached similar conclusions.[35]

Proceed With Caution

As these cases teach, until the Second Circuit or the U.S. Supreme Court addresses the issue, the only certainty is uncertainty. Whether the privilege will apply may turn on such uncontrollable factors as the other party's ability to demonstrate need or the spin of the clerk's office wheel. With this in mind, companies and counsel inclined to conduct an internal investigation must assume that the findings may be discoverable.

In-house counsel and attorneys representing companies considering self-assessment should advise clients that the "internal" reviews being conducted to ensure compliance with the law may well be transformed into discoverable materials that could prove damaging in a later litigation. To distinguish an internal investigation from the University of Pennsylvania tenure review, a company may need to establish that its self-assessment was not conducted in the ordinary course of business.[36]

The investigation and results should be kept confidential, a requirement of the privilege emphasized by many of the courts.[37] But even if an assessment is kept confidential, the protection of the privilege may be limited to only the "evaluative" portions of the analysis, not its "factual" parts. One might justifiably be dubious of whether such a distinction can be made. And while the use of "evaluative" terminology in a report, where appropriate, might increase protection, self-serving inclusion of such language may blur an already unclear line and cause additional portions of a report to lose protection.

On the other side, counsel seeking access to self-audits should aggressively challenge attempts to invoke the privilege. Clearly, in this circuit the very viability of the privilege has come under critical scrutiny and its application may hinge upon the particular judge assigned to the matter as well as the particular set of facts addressed. Counsel should be ready to demonstrate that the business carried out the investigation routinely and that it was in its self interest to do so. Moreover, full consideration must be given to all aspects of the confidentiality issues surrounding such self-auditing procedures, from the confidentiality expectations of individuals who contributed to the investigation to the manner in which the report was maintained, including the extent to which it was disseminated. And, even where confronted by a court receptive to a plaintiff's claims of privilege, counsel should vigorously seek production of the non-evaluative, factual portions of any such report.

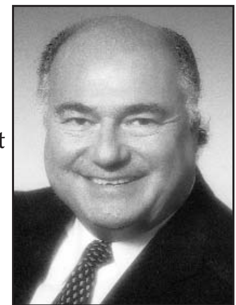
Simply stated, until the Second Circuit addresses the issue, whether the self-evaluative privilege will protect a business from disclosing internal investigation materials depends largely on the judge assigned to the matter. Because the issue remains subject to the random spin of the wheel, there is no assurance of confidentiality upon which any business may comfortably rely.

---

1. *See generally Sheppard v. Consolidated Edison Co.*, 893 F. Supp. 6, 7 (E.D.N.Y. 1995); *Hardy v. New York News, Inc.*, 114 F.R.D. 633, 640 (S.D.N.Y. 1987).
2. *Bredice v. Doctors Hosp., Inc*. 50 F.R.D. 249 (D.D.C. 1970), *aff'd mem.*, 479 F.2d 920 (D.C. Cir. 1973).
3. *See, e.g., Flynn v. Goldman, Sachs & Co.*, 1993 U.S. Dist. LEXIS 12801 (S.D.N.Y. Sept. 16, 1993).
4. *In re Health Mgmt.*, 1999 U.S. Dist. LEXIS 22729 (E.D.N.Y. Sept. 25, 1999).
5. *Lasky v American Broadcasting Co.*, 1986 U.S. Dist. LEXIS 21670 (S.D.N.Y. Aug. 11, 1986).
6. *See generally* Peter A. Gish, *The Self-Critical Analysis Privilege and Environmental Audit Reports*, 25 Envtl. L. Rev. 73 (1995).
7. *In re Crazy Eddie Sec. Litig.*, 792 F. Supp. 197, 205 (E.D.N.Y. 1992).
8. *Spencer v. Sea-land Serv., Inc.*, 1999 U.S. Dist. LEXIS 12608 (S.D.N.Y. Aug. 13, 1999); *Sheppard v. Consolidated Edison Co.*, 893 F. Supp. 6 (E.D.N.Y. 1995); *Flynn v. Goldman, Sachs & Co.*, 1993 U.S. Dist. LEXIS 12801 (S.D.N.Y. Sept. 16, 1993).
9. *Spencer v. Sea-land Service, Inc.*, 1999 U.S. Dist. LEXIS 12608 (S.D.N.Y. Aug. 13, 1999); *In re Salomon Inc. Securities Litigation*, 1992 U.S.Dist. LEXIS 17280 (S.D.N.Y. Nov. 12, 1992).
10. *In re Crazy Eddie Sec. Litig.*, 792 F. Supp. at 205; *Reichold Chems. v. Textron*, 157 F.R.D. 522, 527 (N.D. Fla. 1994).
11. *Trezza v. Hartford, Inc.*, 1999 U.S.Dist. LEXIS 10925 (S.D.N.Y. July 20, 1999).
12. *Flynn*, 1993 U.S. Dist. LEXIS 12801; *see also In re Nieri*, 2000 U.S. Dist. LEXIS 540 (S.D.N.Y. Jan. 24, 2000); *Troupin v. Metropolitan Life Ins. Co.*, 169 F.R.D. 546, 548 (S.D.N.Y. 1996).
13. *See Troupin*, 169 F.R.D. at 548; *Sheppard v. Consolidated Edison Co.*, 893 F. Supp. 6,7 (E.D.N.Y. 1995); *In re Crazy Eddie Sec. Litig.*, 792 F. Supp. at 205.
14. Hon. Arlene R. Lindsay & Lisa C. Solbakken, *Dispelling Suspicions as to the Existence of the Self-Evaluative Privilege*, 65 Brooklyn L. Rev. 459 (1999) (listing decisions of the district courts in the Southern and Eastern Districts of New York discussing the privilege).
15. This article discusses the privilege under federal common law. Where state law provides the rule of decision on the merits of the action, questions of privilege are also decided under state law. Fed. R. Evid. 501. *See Pkfinans Int'l Corp. v. IBJ Schroder Leasing Corp.*, 1996 U.S. Dist. LEXIS 17375 (S.D.N.Y. Nov. 21, 1996); *see also Bank Brussels Lambert v. The Chase Manhattan Bank, N.A.*, 1995 U.S. Dist. LEXIS 15497 (S.D.N.Y. Oct. 20, 1995) (Magistrate Judge Ellis), *aff'd*, 1995 U.S. Dist. LEXIS 18299 (S.D.N.Y. Dec. 6, 1995) (Judge McKenna) (noting that the privilege is not recognized by the New York State courts, which defer to the legislature for the creation of privileges).
16. 493 U.S. 182 (1990).
17. *Id*. at 189 (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

18. *See, e.g., Cruz v. Coach Stores, Inc.*, 196 F.R.D. 228 (S.D.N.Y. 2000), in which, while not expressly relying on *University of Pennsylvania*, Judge Rakoff warned against expansive application of the authority provided under FRE 501. Judge Rakoff also rejected the public policy argument articulated by other courts: "A company has an obvious economic interest in engaging in self-evaluation of employee misconduct: it hardly needs . . . a shield of privilege to investigate its own employee's alleged derelections. . . ." *Id.* at 232.
19. 187 F.R.D. 71 (W.D.N.Y. 1999).
20. *Id*. at 75 (quoting Weinstein's Evidence par. 501[03], at 39–41).
21. *Id*. at 76.
22. 1999 WL 549002 (S.D.N.Y. July 28, 1999).
23. *Id*. at *2.
24. *See also Cruz v. Coach Stores, Inc.*, 196 F.R.D. 228 (S.D.N.Y. 2000) (refusing to recognize privilege in connection with investigator's notes of interviews prepared for an investigative audit relating to employment discrimination, and expressing doubt that the privilege should ever be recognized.); *Hardy v. New York News, Inc.*, 114 F.R.D. 633, 640–41 (S.D.N.Y. 1987) (Refusing to recognize privilege and finding that disclosure would not deter self-evaluation); *In re Nieri*, 2000 U.S. Dist. LEXIS 540 (S.D.N.Y. Jan. 24, 2000) (discussing but not deciding whether privilege should be recognized).
25. Lindsay & Solbakken, *supra* note 14, at 474.
26. 1993 U.S. Dist. LEXIS 12801 (S.D.N.Y. Sept. 16, 1993).
27. *Id*. at *4.
28. *Id*. at *6.
29. 893 F. Supp. 6 (E.D.N.Y. 1995).
30. *Id*. at 7–8.
31. *Id*. *See also Trezza v. Hartford, Inc.*, No. 96-0889, 1999 U.S. Dist. LEXIS 22729 (E.D.N.Y. Sept. 25, 1999) (ordering disclosure of some documents but upholding application of self-critical analysis to documents concerning company's response to claims of discrimination); *Troupin v. Metropolitan Life Ins. Co.*, 169 F.R.D. 546 (S.D.N.Y. 1996) (applying privilege to documents in sex discrimination suit).
32. 1999 U.S. Dist. LEXIS 22729 (E.D.N.Y. Sept. 25, 1999).
33. 169 F.R.D. 546 (S.D.N.Y. 1996).
34. *Id*. at 550.
35. *See* Lindsay & Solbakken, *supra* note 14.
36. Of course, if documents are prepared in anticipation of litigation, the work-product doctrine may protect the materials.
37. *See, e.g.*, *Spencer v. Sea-land Serv., Inc.*, 1999 U.S. Dist. LEXIS 12608 (S.D.N.Y. Aug. 13, 1999); *In re Salomon Inc. Sec. Litig.*, 1992 U.S.Dist. LEXIS 17280 (S.D.N.Y. Nov. 12, 1992).

Emil Zullo: A Pioneer and Inspiration in Law-Related Youth Education



"The great object of Education," Emerson said, "should be commensurate with the object of life. It should be a moral one; to teach self-trust; to inspire the youthful man with an interest in himself; with a curiosity touching his own nature; to acquaint him with the resources of his mind, and to teach him that there is all his strength. . . ."

For more than three decades, as educator and most recently as Assistant Director of the NYSBA's Law, Youth & Citizenship (LYC) Program, Emil Zullo realized this objective, lighting and tending the flames of life-long learning and discovery in thousands of students, fostering an understanding of how the rule of law affects daily life and is the glue that binds democracy. Butch, as he liked to be called, died May 29 following a courageous battle with multiple myeloma.

"Butch will be dearly missed by all of his colleagues at the Bar and in the field of law-related education," said NYSBA Executive Director Patricia K. Bucklin. "His innumerable contributions to our LYC program, his professionalism and his love of law will live on and continue to serve as an inspiration to all of us."

In Butch's 33 years of teaching at Kingston High School, he was a creator of the School's Project CAPABLE, a law-related education program that served as a model to programs across the nation and was honored by the National Council on Social Studies as a program of distinction. Butch's students were actively involved in LYC's Statewide High School Mock Trial and he was a frequent contributor to LYC's teacher training projects. Through the mock trial, Butch commented, "the students learn that the way the law is organized reflects the values of the society they live in and provides means to try and reach fair conclusions about conflicting issues."

LYC, conducted in partnership with the State Education Department, provides resources, training and student learning experiences and fosters teacher-volunteer attorney collaborations to teach youths in elementary and secondary schools about the legal process and rights and responsibilities of citizenship. A Fulbright Scholar, Butch joined the NYSBA staff in 2000, sharing his experience and expertise with educators and attorneys statewide in developing law-related education projects, assisting the state Education Department in the formulation of curriculum standards, and working on youth education initiatives of the state Court System. He was a member of the Jury Project established by Chief Judge Judith S. Kaye. "This is a field that is finally being recognized nationally," Chief Judge Kaye observed in a newspaper interview, noting that Butch "was doing it long before anyone saw the importance" of law-related education.

Throughout his illness, he sought to remain active in law-related education, participating in presenting LYC's Statewide High School Mock Trial final rounds two weeks prior to his death, always with his bright smile and spark and delighted to be working with the young people.

"Work straight on in absolute duty, and you lend an arm and an encouragement to all the youth of the universe," Emerson advised. Those who do so, he said "are the fountain of an energy that goes pulsing on with waves of benefit to the borders of society, to the circumference of things."

Butch's dynamic teaching about the law and the values of citizenship is a legacy that lives on in the students, educators, members of the profession, and Association staff who were so fortunate to work with and learn from him.

Meet Your New Officers

President

A. Thomas Levin, a shareholder and director in the Mineola law firm of Meyer, Suozzi, English & Klein, P.C., is the new president of the Association.

Officially elected this past January by the House of Delegates, Levin is the fourth president from Long Island in the 127-year history of the NYSBA, and the first from Nassau County.

Levin plans to focus his efforts on several initiatives, including increased access to civil legal services for the poor, making legal services more affordable for middle income consumers, enhancing the state bar's outreach to other professional organizations, and improving the public's understanding of the law and the legal system.

A graduate of Brown University, Levin holds a J.D. and LL.M., from New York University School of Law.

He has been a member of the House of Delegates for more than 14 years and has served on the Association's Executive Committee since 1995, first as a member-at-large, then as 10th Judicial District vice president (Suffolk and Nassau counties), then as secretary and president-elect. He is past chair of the Association's By-Laws Committee and the Task Force to Study "Pay to Play" Concerns (the practice of contributing to political campaigns in return for future work from a public entity). Levin is a life Fellow of The New York Bar Foundation, the charitable and philanthropic arm of the state bar.

He is a member of the Municipal Law and General Practice, Solo & Small Firm Sections, and the committees on Finance, Civil Practice Law and Rules, Legislative Policy, Unlawful Practice of Law, and Judicial Selection (appellate panel). He is also a member of the Electronic Communications Task Force, Special Committee on the Law Governing Firm Structure and Operation (MDP), Special Committee on Legislative Advocacy, and the Young Lawyers Mentor Program. He is a past chair of the Executive Council of the New York State Conference of Bar Leaders.

Levin is a past president of the Nassau County Bar Association and the Nassau County Bar Association Fund. He is a life member of the county bar's board of directors.

Levin serves as a member of several committees of the American Bar Association (ABA), and the Suffolk County Bar Association. He is a fellow of the American Bar Foundation, and as NYSBA president will serve as a member of the ABA House of Delegates.

Previously, Levin worked as counsel to the New York State Assembly Judiciary Committee and the Joint Legislative Committee on the State's Economy. He is a former law secretary to state Supreme Court Justice Bertram Harnett and was Nassau County senior deputy attorney for appeals. He serves as village attorney and special counsel to numerous Long Island communities.

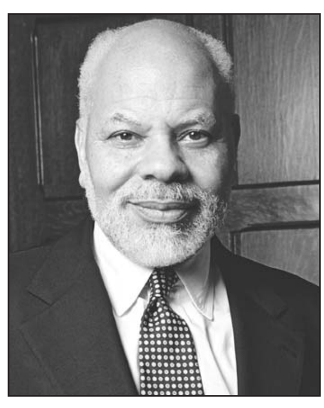
Along with his duties as chair of the House of Delegates, during his tenure as president-elect Levin co-chaired the President's Committee on Access to Justice (formed to help ensure civil legal representation is available to the poor).

Admitted to practice in Florida and the U.S. Virgin Islands, Levin is a member of the Florida Bar and Virgin Islands Bar Association, as well as the International Municipal Lawyers Association. He served on two statewide groups by direct appointment of the Chief Judge of the State of New York: the Unified Court System Task Force on the Profession and the Courts, and the Committee of Lawyers to Enhance the Jury Process.

The author and editor of numerous articles and publications on various legal subjects, he has served as a consultant on *Civil Practice in New York: Pretrial Proceedings* and, since 1971, has edited the *Bench Book for Trial Judges*. Levin frequently lectures on such legal issues as professional ethics, law office management, municipal, environmental, and civil rights law.

Since 1972, Levin has provided free legal services as general counsel to the Day Care Council of Nassau County and the Rosa Lee Young Childhood Center, Inc. He is the 2002 recipient of the Nassau/Suffolk Legal Services Commitment to Justice Award for his tireless support of pro bono work in the community.

President-Elect



Kenneth G. Standard, special counsel in the labor and employment law practice group at the Manhattan office of the international law firm of Morgan, Lewis & Bockius, is the new president-elect of the Association.

The House of Delegates, the Association's decision- and policy-making body, elected the Chappaqua resident at the organization's 126th annual meeting this past January in Manhattan.

Standard received his undergraduate degree from Harvard College and earned his law degree from Harvard Law School. In addition, he holds an LL.M. degree from New York University School of Law.

Before joining Morgan Lewis, Standard served as assistant general counsel for labor relations, environmental and benefit plans at Consolidated Edison Co. of New York City. In addition, he was director of the Office of Legal Services of the New York City School System and earlier was vice-president and counsel of the Products Division of the Bristol-Myers Co.

Standard is a former member-at-large of the Association's Executive Committee, vice-president representing the First Judicial District and Association treasurer. He has served on numerous NYSBA committees including: Judicial Selection, Law Governing Firm Structure and Operation (MDP), Association Governance, and Executive Director Search.

A sustaining member of the NYSBA, Standard is a life fellow of both the New York State and American Bar Foundations, and continues to be an active member of the Association of the Bar of the City of New York, the American Bar Association and the National Bar Association.

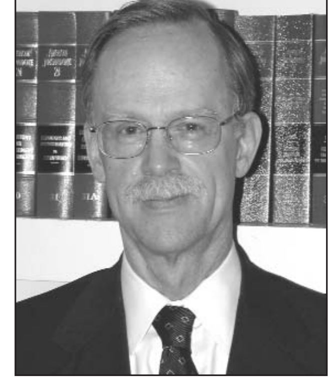
Standard served three years as vice-president, followed by three years as president of the 12,000-member Harvard Club of New York City. He has held numerous other offices at the organization, including secretary of the Admissions Committee, chair of the Athletics and Human Resources committees, trustee of the employees' pension and benefit plans, and chair of the Special Committee on Eligibility. He has also served as a member of the Nominating and Schools committees. As president, he developed membership support and financing for the first major expansion of the landmark clubhouse, on West 44th Street, in more than 50 years. The landmark status of the original clubhouse required approval for expansion from the New York City Landmarks Commission. Standard presented the addition's contemporary design to the commission, explaining why it was most appropriate. The commission approved, and the addition was completed and occupied in 2003.

Standard is a director of the Visiting Nurse Service of New York City, where he serves on its Finance and Audit, Development, and Governance committees. He is a former vice-chairman of the board of the Aspirin Foundation of America. He is also a former director of the Harvard Club of New York City Foundation.

This year, *Crain's New York Business* named him as one of "100 Most Powerful Minority Business Leaders in New York."

Along with his duties as chair of the House of Delegates, Standard will co-chair the President's Committee on Access to Justice.

Treasurer



James B. Ayers, a partner in the Albany law firm of Whiteman Osterman & Hanna, LLP, is the new treasurer of the Association.

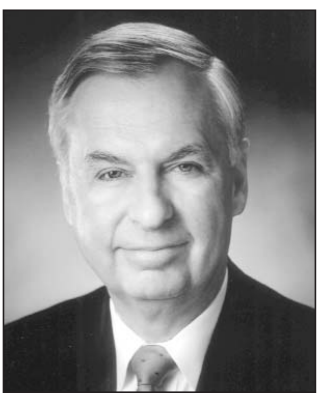
Ayers received his undergraduate degree from Colgate University (1964) and earned his law degree from Columbia Law School (1967). He has practiced in New York State since 1967 and is also admitted before various federal courts.

Before entering private practice, he served in the public sector as: confidential law assistant to the state Supreme Court, Appellate Division (1967–1968); assistant counsel to Gov. Nelson A. Rockefeller (1971–1973); counsel, Temporary State Commission on Constitutional Tax Limitations (1974–1975); and special counsel to the Deputy Majority Leader, New York State Senate (1975).

As a member of the NYSBA, Ayers served as vice-president for the Third Judicial District (Albany, Columbia, Greene, Rensselaer, Schoharie, Sullivan and Ulster Counties) from 1999–2003. In addition, he chaired the Trusts and Estates Law Section and has been a member of its Executive Committee since 1984. He is also a member of the Albany County and American Bar associations and a Fellow of the American College of Trust and Estate Counsel.

In addition to his professional affiliations, the Guilderland resident has been active in various civic groups, including serving on the boards of directors of the American Red Cross, Salvation Army, Historic Albany Foundation and Kattskill Bay Association, and the board of trustees of the Westminster Presbyterian Church.

Secretary



Rochester lawyer A. Vincent Buzard, a partner in the statewide law firm of Harris Beach LLP, begins his second term as secretary of the Association this June.

During the past 20 years, Buzard has been member-at-large of the Association's Executive Committee and vice president, representing the Seventh Judicial District, member of the House of Delegates, chair of the New York State Conference of Bar Leaders, and co-chair of both the Lawyers in the Community and Medical Malpractice Committees. Currently, he chairs the Special Committees on Legislative Advocacy, and Cameras in the Courtroom.

A resident of Pittsford, he is a past president of the Monroe County Bar Association, and he received the Adolf J. Rodenbeck Award for outstanding contribution to the community and the profession. He served as corporation counsel of the City of Rochester and on Chief Judge Judith S. Kaye's Special Committee on the Establishment of Commercial Courts in the State of New York. Currently, Buzard serves on the Governor's Fourth Department Judicial Screening Committee and as a referee for the New York State Judicial Conduct Commission.

A trial lawyer for more than 30 years, Buzard focuses on complex civil litigation including commercial matters and the representation of individuals who are seriously injured, with a particular emphasis on those who have suffered brain injuries. He is a past president and a former member of the board of directors of the New York State Head Injury Association.

He is a regular contributor to numerous publications and a legal and political commentator for radio and television stations in Rochester. He received his undergraduate degree from Wabash College and earned his law degree from the University of Michigan Law School.

Attorney Professionalism Forum

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.

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

Dear Confused in Canarsie:

DR 7-101 of the Code of Professional Responsibility requires a lawyer to zealously represent a client, which includes seeking the client's lawful objectives. However, it isn't "anything goes" – DR 7-102 limits zealous representation by requiring that it stay within the bounds of the law. This limitation prohibits a lawyer from filing a suit, asserting a position or taking any action that serves merely to harass or maliciously injure another party (DR 7-102(A)(1)).

Nevertheless, it is fair to say that in the negotiation arena, a lawyer enjoys greater latitude than he or she might once formal litigation begins. Puffery and personal opinion may enter into discussions more easily. In addition, it is acceptable to place pressure on an adversary by forwarding a proposed complaint in a civil action to demonstrate the strength of your position. Therefore, your client's request that you send a draft complaint to your adversary, standing alone, does not run afoul of ethical or professional guidelines.

However, your client's request to include specious allegations is problematic. Because the allegations are arguably included simply to harass Mr. Vulnerable, it may violate DR 7-102. More important, DR 7-102(A)(5) precludes a lawyer from knowingly making a false statement of fact during the representation of a client. Accordingly, zealous representation does not permit the inclusion of an allegation in the proposed complaint which you know to be false.

The threat of criminal prosecution is likewise inadvisable, as a lawyer may not use such a threat to gain an advantage in a civil matter (DR 7-105). Even an implicit threat could be a basis for a disciplinary investigation against the attorney, including the threat of a disciplinary prosecution against another member of the bar (Nassau Cty. Bar Op. 98-12 (1998)). This is why mentioning a disciplinary grievance would be prohibited.

Finally, and notwithstanding your client's zeal, you may not authorize him to use self-help in lieu of your own advocacy. Although a client can contact the other side if his or her lawyer is not involved, DR 7-104(B) prohibits a lawyer from directing a client to contact another represented party without notice to such other party's attorney. Even if the client contacts the other party with consent of the other attorney, the lawyer may not direct a client to engage in conduct that the attorney himself could not pursue, *e.g.*, threaten a criminal prosecution. This is because the attorney cannot circumvent the Code through the actions of another (*see* DR 1-102(A)(2)). Of course, you are not responsible for actions by your client taken without your advice, knowledge or direction.

In sum, you can and should zealously represent your client against Mr. Vulnerable, but this cannot include strategies that violate the Code of Professional Responsibility, or are otherwise unprofessional.

The Forum, by
Richard M. Maltz, Esq.
Benjamin, Brodmann & Maltz, LP
New York City

Continued on page 53

Point of View

Conflicts Between Federal and State Law Involving the Spousal Right of Election

By Marvin Rachlin

A surviving spouse in New York State is entitled to a share of a deceased spouse's estate whether it was left to the survivor or not. The share is called the elective share and it is set at $50,000 or 1/3 of the net estate, whichever is greater.[1]

The elective share entitlement has particular significance to a Medicaid recipient whose spouse predeceases. In many cases, as a result of exempt spousal transfers combined with the non-applying spouse's own assets, the non-applying spouse can leave a considerable estate.

One-third of a considerable estate readily attracts the attention of Medicaid, which does not have to initiate a judicial proceeding to require the surviving recipient of Medicaid assistance to elect against a deceased spouse's estate. A provision in state regulations defines an "available asset" as income or resources to which an individual is entitled, but does not receive because of any action or inaction of the individual.

Based on this regulation, all Medicaid must do is send the recipient a notice demanding that the right of election be exercised. Failure to do so is interpreted as failing to accept an "available asset," thereby resulting in a discontinuance or denial of Medicaid assistance.

It is much better for a surviving spouse to accept the elective share, rather than risk a discontinuance by refusing it. Once the share has been accepted, the recipient can usually reduce the impact by using the "rule of halves" to give away half of the amount and retain the rest to pay for care during the period of time that Medicaid coverage is denied.

There is, however, another untested available method for reducing or eliminating the entitlement to an elective share.

If the non-applying spouse invests all or part of his or her assets in U.S. Savings Bonds or Treasury Direct accounts, and makes the ownership joint with a third party other than the spouse, there is a right of survivorship for such investments.

Federal regulations provide that the survivor of a jointly held federal Savings Bond or Treasury Direct account "will be recognized as the sole and absolute owner." The regulations also provide that no judicial determination will be recognized that would defeat or impair the right of survivorship conferred by the regulations.

It is clear that the New York State Legislature has recognized that the federal regulations could prevent jointly owned U.S. bonds, or Treasury accounts jointly owned with a third party who is not the spouse, from being considered available to a surviving spouse as part of the elective share. The legislature therefore devised a method to attempt to bypass the federal regulations. The amended statute defines all jointly owned property with a right of survivorship as being part of the net estate subject to the spousal right of election. To remove any possible doubt, the amended statute goes on to specifically include U.S. Savings Bonds and other U.S. obligations that are jointly owned as assets subject to the right of election.

In an effort to further insure that jointly owned U.S. Savings Bonds and other U.S. obligations would be held subject to the spousal right of election, language was added to specifically counter the federal requirements. The language provides that if a surviving joint owner, who paid no consideration for the asset, obtains full title, then such surviving owner is obligated by the statute to return to the surviving spouse that property or is personally liable to the surviving spouse for that amount.

The New York statute clearly intends to insure that even if federal regulations force joint property to pass to a surviving owner, such owner is obliged to return the property to an electing spouse or to be personally liable to such spouse. In effect, what federal law gives New York law takes away!

A case arose in Texas involving a married couple in which one spouse who predeceased had a son from a previous marriage. The son was the surviving joint owner of U.S. Savings Bonds. Texas community property laws included the value of jointly held U.S. Savings Bonds as part of community property. The Texas law required the son to turn the value of the bonds over to the surviving spouse, his stepfather, to help satisfy the community property claim. Texas law attempted to override the federal law by allowing the property to pass to the survivor as federal law required, but state law then required the survivor to return the property to the community property fund.

It appears that the Texas law was similar in effect to the current New York law, which also allows property to pass to a surviving owner pursuant to federal law, but then forces the survivor to return the proceeds.

The Texas courts ruled that Texas law could override federal law because there were no U.S. interests in the case. The U.S. Supreme Court granted certiorari.

In *Free v. Bland*,[2] the U.S. Supreme Court addressed the issue of state laws that contravene federal law. The Court stated that the U.S. Treasury passed

Point of View
Continued from page 52

the survivorship regulations to establish that right regardless of state law. The U.S. Supreme Court found that the Texas law allowed full title to pass to the co-owner, but required him to account for half the value to the decedent's estate.

State law, by forcing a payback, negated the federal survivorship regulations, opined the Supreme Court, thereby violating the Supremacy Clause of the Constitution.

Returning to New York State, we must examine the statutes that frustrate the federal right of survivorship by forcing the owner to refund the proceeds to the surviving spouse. Taken in the context of Medicaid planning, the possible vulnerability of New York State's right-of-election laws should be carefully considered. *Free v. Bland* is the law of the land. Given the similarity of the Texas and New York State statutory impact on federal law, it would not be unreasonable to consider a challenge to the New York law in an appropriate spousal right-of-election case. A fact situation in which a community spouse has or converts some or all assets into U.S. Savings Bonds and or U.S. Treasury Direct accounts and designates a third party as joint owner, without consideration, would set the stage for a challenge to the state law. If the community spouse predeceases the institutional spouse, Medicaid undoubtedly would require the surviving spouse to elect against the net estate, including the U.S. Savings Bonds and/or Treasury Direct accounts. Refusing to elect against the U.S. Savings Bonds and/or Treasury Direct accounts would presumably result in a notice of discontinuance for failing to accept an available resource.

The first line of appeal would be a fair hearing, during which the federal issue would be raised, with reliance on *Free v. Bland*. A favorable ruling at the fair hearing would be unlikely, because it is doubtful that the New York State Department of Health, the administrator of the Medicaid program in the state, would agree that the state law could not be enforced.

The next stage of appeal would be an Article 78 proceeding in the New York State Supreme Court. Because the issue in the case is one of law rather than evidence, it is likely that the matter would be decided by the state Supreme Court.

The initial judicial decision, whether by the Supreme Court or the Appellate Division, would likely be appealed. The issue is important enough to be heard by the Court of Appeals.

The principle established in Free v. Bland provides a potentially advantageous planning opportunity for couples who wish to assure that assets will pass to children even if the "healthy spouse" unexpectedly dies before an ill spouse who is otherwise eligible for Medicaid assistance. If litigation ultimately determines that the state cannot negate the provisions of federal law on the subject, Medicaid would be deprived of the argument that funds invested in these government instruments were "available" to the surviving spouse.

1. EPTL 5-1.1-A(2).
2. 369 U.S. 663 (1962).

Marvin Rachlin is of counsel to Vincent J. Russo & Associates of Westbury, Islandia and Lido Beach. He is a former chief counsel to the Nassau County Department of Social Services.

Professionalism Forum
Continued from page 51

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 nonparty witness whose testimony would be favorable to their side. This nonparty 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 that 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

New Members Welcomed

FIRST DISTRICT

Madina Y. Abbasova
Reema Salah Abdelhamid
Olufolasade Adamolekun
Holly Agajanian
Hae-June Ahn
Ana Brenda Alba
Daniela Alba
Todd Albert
William Alpert
Dan Alster
Denis Alvarez
Ginger Dawn Anders
Lynne Marie Andreas
Beverly J. Ang
Michael Mark Angelini
Michael Henry Antonutti
Jinan Monique Arafat
David Scott Arrick
Rana H. Aryan
Christopher C. Ash
Amber A. Asher
Nicole Kathleen Avallone
Anna Avrasin
Robert F. Bacigalupi
Scott C. Baglio
Michael Bahar
Lauren Michelle Baker
Vanessa Michael Bakert
Jonathan David Ball
John T. Bandler
Mimma Barila
David Michael Baronoff
Keith D. Barrack
Kenneth Richard Barrows
Zachary M. Barth
Wesley Wade Barton
Drew J. Batkin
Michael Carl Becker
Margaret Lynn Begalle
Jamine Anne Bellarosa
Marcia Clare Bellows
Michael Warren Benjamin
Daniel Herbert Bennett
Mei Li Benni
James T. Bentley
Raphael Bera
Lynn Berat
David Andrew Bergan
Joshua David Bernstein
Nicole Ann Berryman
Farrah Robyn Berse
Chandra Shekhara Bhatnagar
Diahann Billings-Burford
Gabriel Alejandro Bisio
Federica Bisone
Anatoliy Grygorovych Bizhko
Robert Nathaniel Black
Arnold Blair
Ryan T. Bloch
Jessica Sara Boar
Emilio G. Boehringer
Thomas John Bogal
Diana Bogomolnik
Julie Bogomolny
Samuel Ethan Bonderoff
Carolynn Rachael Bonner
Toby Shawn Stuart Bordelon
Laurence Drew Borten
Michelle Ioanna Bougdanos
Jennifer Christine Bowman
Steven Derick Boyd
Saul Brander
Elizabeth Anne Brandler
Benjamin Peppercorn Bratter
Eric Scott Braverman
Justin Charles Breen
Jerrold Lyle Bregman
Neil A. Bregman
Brian M. Brown
Nia M. Brown
Sheryl Ann Bruzzese
Michael Scott Buchholtz
Yehudah Lev Buchweitz
James Peter Byrnes
Madelyn Calabrese
Angela Calcagno
Hope Ellen Calder
Molly Elizabeth Calvanese
Jaimee Lynn Campbell
Armando Capasso
Tamara Carmichael
Jessica Faye Carter
Phillip Gifford Carter
Christopher Natale Cascella
Derrick E. Champagne
Edward Chul-ho Chang
Claudia Jacinta Charles
Michael C. Chen
Ellen R. Cherick
Theodore Joseph Chiacchio
Melissa I. Chirivas
Andrew Mitchell Chonoles
Janice Ann Christensen
Elise Campbell Clark
Jessica Cohen
Marcus Anthony Colucci
Michael Earl Comerford
Willa Concannon
Jon Jerome Connolly
William Patrick Connolly
Jason Paul Conti
Jacques Cook
Jason M Cooper
Christopher Edward Copeland
Virginia Milagros Cora
Kristin Dorothy Corapi
Justin Michael Cordello
Darlene Mary Corrigan
Helene Marie Coyne
Martina Crespi Reghizzi
Yvonne M. Cristovici
Thomas F. Croke
Robyn Suzanne Crosson
James David Crutchfield
James Joseph Cummings
Albab Abraham Dabela
Karen Anne Dahlberg
Felix Aleksandrovich Dashevsky
Stephen Charles Davey
Ephraim Yitzchak Davidowitz
Ada Asante Davis
Jeffrey W. Davis
Timothy Sean Davis
Vadim Daynovsky
Mary Irene De Luca
Kerri Marie De Ruyter
Aurore C. DeCarlo
Melissa Lynn Delis
Nicholas DeMartini
Jonathan C. Derek
Christina Evangelos Diamantis
Sheryl Lynn Dickey
Ilanit Dodiuk
Kim Marie Domilici
David B. Dong
John Earl Donnelly
Daniel Joseph Doron
Jeffrey Anthony Dougherty
Joanne Amy Doughty
Dara Michele Drossman
David Charles Drucker
Felice Marie Duffy
Charles H. Dufresne
Charles Gillen Dunne
Albert Joseph Durante
Andrew Dutton
Shay Dvoretzky
Matthew John Easter
Jesse Eisenberg
Sheldon Elefant
Vladimir Elgort
Ellen Victoria Endrizzi
Adam Engel
Jarett Keith Epstein
Eric T. Ervin
Heather White Eskey
Sherrell Elizabeth Evans
Paul Ezzeddin
Timothy Charles Fanning
Nadine Farid
Timothy Johnson Fazio
Jia Fei
Marisa L. Ferraro
Tony D. Feuerstein
Thomas J. Finn
Mark Joseph Fiore
Gabrielle May Flateau
Stephen Michael Fleming
Dierk Allen Flemming
Heidi Marie Flinn
Daniele Delerme Flores
Gregory Lee Florio
Adam I. Forchheimer
Adam Douglas Ford
Christopher Jason Foster
Michael Grant Foster
Shawn Randall Fox
Judith Francois
Daniel L. Freidlin
Bradley Ryan Friedman
Jason Evan Friedman
Kevin Andrew Fritz
James David Fry
Andrew J. Fuchs
Kevin Dugald Galbraith
Karmit Shlomit Galili
Xibai Gao
Benjamin David Gardner
Seanna Beck Garrison
Hannah Ruth Garry
Christopher Jon Gawley
Michele Geiger
Lina Gelfer
Allen Aleksey Gessen
Dina Ziva Gielchinsky
Melissa Sharon Gillespie
Betsy R. Ginsberg
Oriyan Gitig
Jeremy B. Glickman
Judy Goepp
Jesse Goichman
John V. Golaszewski
Ian M. Gold
Andrew Charles Goldberg
Beth Danielle Goldman
Geoffrey Fredric Goldschein
Lori Mackson Goldstein
Antonia Golianopoulos
Alvaro Gomez De Memillera
Thomas D. Gommes
Matthew Luis Gonzalez
Alexis Gorton
Steven Charles Gove
Gina Marie Graham
Jonathan Mitchell Grant
Antoinette Lorenza Greenaway
Melissa L. Greenhawt
Stacy J. Greenhouse
Glenn Jason Greilsamer
Christopher Leigh Gretina
Mark Grinfeld
Amy C. Gross
Adam Z. Grumbach
Linda Marie Guecia
Maria J. Guerra
Aparna Gullapalli
Patricia Ellen Gunning
Vivek V. Gupta
Scott Brendan Guthrie
Elazar Guttman
Robert Guttmann
Scott Morrison Hammond
Raymond Nicholas Hannigan
Allison Marie Harlow
Melissa Hope Harris
Tishawa Dellissia Hart
Aileen Patricia Haviland
John E. Headley
Nicholas Evan Hecker
Eric Rieger Heller
Victoria Ann Heller
Tracy Martinell Henry
Leonard I. Herbst
Malia Danielle Herndon
Keely Lane Herrick
Louise Hiblin
Khue Van Hoang
Eric Honick
Catherine Horta
Linda Anne Horvath
Nicolas Brian Hoskins
Paul Michael Hotaling
Andrew Robinson Hough
Amy Hsin
Katie Rose Hughes
Daniel J. Hulseberg
Jannine Marie Huth
Laura Iannucci
James Grant Irving
Brian Thomas Isaacson
Michael H. Isenberg
Souren Avetick Israelyan
Lisa Ann Iulo
Ilysa Wendi Ivler
William Joseph Iwaschuk
Rashondra Martrice Jackson
Monika Jain
Christopher Jamal James
Xiao Jiang
Zachary Haviland Johnson
Melissa L. Johnston
Gerald Jospitre
Jason Daniel Kalish
Daniel Isaac Kaminetsky
Arielle D. Kane
Rachel Brothman Kane
Jacob Max Kaplan
Kara Renee Kaplan
Adele M. Karig
Erzsebet Karkus
Jonas Karp
David Steven Katz
Daniel Scott Kaufman
Laura Amy Kaufmann
Gordon D. Kaye
George Michael Kelakos
Wesley Herman Kelman
Wendy E. Kemp
Matthew Donald Kennedy
Mina Kennedy
Asim Aftab Khan
Daniel J. Kikel
Jonathan Kim
Maureen Peyton King
Kari A. Kish
Russell Alexander Kivler
Shana A. Kleinman
Mollie Shaw Knox
Takahiro Kobayashi
Aya Kobori

Gregory Michael Koch
Adam Jason Kolber
Thomas Kozak
Jacob Justin Kramer
Denise Mortner Kranz
Caroline Louise Kraus
Brian W. Kreutter
Brian Redmond Krex
Ely M. Kronenberg
Susan Krunic
Julia P. Kuan
Erica W. Kuo
Lynne Ann Lacoursiere
Renet Margaret Anne Ladocsi
Robert M. Lamkin
Scott Roger Landau
Alyson Leigh Lanzer
Robert A. Laplante
Ali Reza Latifi
Eliot Ramey Layne
David S. Lebolt
Kimberly A. Lebron
Jacob S. Lee
June Hie Lee
Melissa Lori Lee
Seung-eun Ann Lee
Sung-a Lee
Yuan-sea Janise Lee
Risa C. Letowsky
Julie Allyson Levi
Duncan Patrick Levin
Reuben John Levy
Robert Joseph Lewin
Joshua Carlton Lewis
Zhiying Li
Stanley Den-kuang Liang
Yue-june Liang
Micah Liberman
Jason Matthew Licht
Gideon Lin
Helenanne Listerman
Matthew R. Litt
Danny Liu
Hsin-hsin Liu
Xiangmin Liu
Jessica Lively
Matthew David Livingston
Brandon William Loew
Gavin Michael Loughlin
James Anthony Lovensheimer
Steven William Lozner
Cristi L Luckow
Roopal Premchand Luhana
Rachael M. Luken
Matthew Abraham Lux
Kerri Anne Lyman
Diane Marie Macina
Jean Lam Macinnes
Eve Tova Madison
Carlynn R. Magliano
Robert Lawrence Maier
Craig Matthew Mait
Michele Maney
Pamela Marcogliese
Jeffrey S. Margolin
Anabel Cynthia Mariani
Catalina Choe Marini Fichera
Christopher J. Marino
Katharine E. Marshall
Julie K. Mathew
Shunji Matsuda
Rachel Jaffe Mauceri
Allison E. Maue
Sharon Kay Mauer
Michelle M. Mauro
Christopher Ryan May
Courtney Ann McBride
Edward Michael McDonald
Dawn Elizabeth McFadden
Michael John McIsaac
Gregory M. McLaughlin
Meloney Lambert McMurry
Gordon M. Mead
Rachel Brooke Mears
Paulina Mejia
Michael Jared Melone
Matthew Jones Middleton
Jiro Mikami
Jessica Wendy Miller
Racquel Alexandria Millman
John Jude Mills
Shigeki Minami
Joseph Gleason Minias
Rachel Sara Mizrahi
Alina Janet Moffat
Michelle Diane Moller
Marcus Monteiro
James A. Moore
Jason Darius Moore
Vanessa Marie Morales
Max Anderson Moseley
John O.C. Moss
Tina Niehold Moss
Robert J. Mrofka
Kumi Murano
Laura D. Murphy
Michael Simon Musante
Jennifer Amie Napuli
Kessar Nashat
Rachel Lynn Nass
Lauren Charno Neches
Stacie R. Nelson
Kurt Jacob Neumann
Netanel Newberger
Eric R. Newcomer
Carey W. Ng
Jack Huu-chinh Nguyen
Jenna Zanja Nicenko
Eri Nishikawa
Stacey Nussbaum
John Stephen O'donnell
Nathaniel O'seep
Temietan Ofuya
Matthew Louis Ogurick
Jaclyn Amanda Okin
Andrew Julian Oliver
Jennifer Clair O'Loughlin
Ruth Ann O'Neil
Christopher John O'Reilly
John Nicholas Orsini
Bisola Opeyemi Osho
Christopher Aaron Owens
Richard Joseph Pacheco
Daniel James Paisley
Adina J. Pallante
Jason H. Pan
Zhengming Pan
Joanna Lee Panzera
Sandra Shin-young Park
Robert D. Patenaude
Rosa Maria Patrone
Stacey Elizabeth Pauker
Jennifer Ellen Pearl
Amie Rebecca Pelletier
Denise Lynn Penn
Rebecca C. Pergrim
Charles John Pesant
Sarah Pfuhl
Jaime A. Phillip
Rachel F. Phillips
Renee Barbara Phillips
Henry Bowman Piper
Julia A. Piszczkiewicz
Andrew E. Platek
Amy Lynn Pludwin
Bernice Polanco
Preetha Joseph Poomkudy
Priya Nandita Pooran
Ronelle Corinne Porter
Rachel Leah Posner
Michael James Pospis
Russell A. Powell
James H. Power
Maya Gopika Prabhu
Rebecca Tamara Price
Laurie Beth Puhn
Manjari Dahlia Purkayastha
Hongxu Qin
Matthew Snyder Raben
Marina Rabinovich
Cecile Ramond
Jerome Carl Ranawake
Emily Levine Rapalino
Faye C. Rasch
Peter F. Rathbun
Joshua Nissim Ratner
Corey Allan Rayburn
Kevin Barksdale Read
Evan Scott Reed
Alon Rehany
James Matthew Reiland
Paul J. Reilly
Dana Ann Remus
Han Saem Rhee
Jennifer Whitten Richards
Erin Christine Riley
Dennis Rimkunas
R. Gregory Roberts
Lesley Raye Robertson
Patrick L. Robson
Elizabeth Anne Roche
Shannon Ann Rogers
Jason B. Rooke
Anne Laure Roret
Charles Nathan Rose
Sarah C. Rosell
Alissa Rebecca Rosen
Evan Michael Rosen
Lauren Fox Rosenberg
Sherie Beth Rosenberg
Heath Douglas Rosenblat
Rachel Adina Rosenthal
Ana Elizabeth Rosu
Gloria Jean Rottell
Teresa G. Sadutto
Candace Christine Sady
Venus Eva Sahwany
Isabelle Sajous
Peggy D. Sanchez
Erick Matthew Sandler
Christina A. Santiago
Nicole N. Santucci
Takefumi Sato
Anthony Matthew Saur
Robert Scheef
Lori Elayne Scher
Frank Rocco Schirripa
Jared E. Schlosser
Michael H. Schmieder
Daniel Foster Schubert
Marc Jared Schwartz
John L. Scott
Stacie B. Seewald
Andrea Jean Sessa
Bejal Jayprakash Shah
Sonali Bipin Shah
Ian Seth Shainbrown
Matthew Steven Shaw
Adam Harris Sheinkin
Brian Michael Sher
Alexa R. Sherr
Jane Shih
Bradley Scott Shoenfeld
Mark Solomon Silver
Mason Chandler Simpson
Ji Won Sin
Aun A. Singapore
Benjamin David Singer
Thomas V. Sjoblom
Constantine Nicholas Skarvelis
Don Aarion Smith
Priscilla Joyce Smith
Austin Kyongwon So
Saema Somalya
James Richard Sommer
Sang-Hoon Song
Andrew Jay Sossen
Kimberly Ann Sparagna
Daniel Franklin Spitalnic
Balaji Srinivasan
Frank Kirk Staiano
Sara Lynn Stainback
Colin Patrick Starger
Jennifer Jaye Steen
Jeffrey Todd Steiner
Ron Edward Steinfeld
Ifat Steinman
Russell Mark Steinthal
Brian Scott Stern
Michael Jeremy Sternhell
Douglas F. Stone
Eve Stotland
Michael Gavin Strapp
Amy Leigh Strauss
Christine Strumpen-darrie
Damon William Suden
Michelle Suh
Denis James Sullivan
Rebecca Gallagher Sullivan
Matthew Summa
Mira Sun
Robert Eli Suss
Robert G. Sweeney
Randi Jennifer Szalavetz
Justin Michael Tarshis
Adam G. Tarsitano
Corey E. Tarzik
Mateo Taussig-Rubbo
Angel Taveras
Jennifer Ann Tazzi
Lisa Jill Teich
Ira Kenneth Teicher
Raz Tepper
Charles Daniel Thompson
Kerry Grace Thompson
Reginald Shawn Thompson
Beatrice Njeri Thuo
Michael John Tiffany
Carolyn Joy Tilli
Gregory Alan Todd
Serge Todorvich
Anne S. Toker
Jacqueline Bridget Tomasso
Matthew John Tomiak
Matthew Arnold Traupman
Anthony Stanley Traymore
Meri Olga Triades
Bonnie Alison Tucker
Jeremy Turk
Ari Ungar
Loren Robert Ungar
David Herrera Urias
James F. Van Doren
Edward Albert Vasquez
Stacey Ann Vegilis
Stephanie Gail Victor
Barbara Viniegra
David Michael Vogt
Harald K. Voigts
Elena Y. Volkova
Petra Von Ziegesar
Rajiv Murthy Vrudhula
Adir Gurion Waldman
Joshua Wesley Walker
Dana A. Wallach
Amanda Ruth Waller
Alecia F.M. Walters
Melinda I-ching Wang
Kanchana Wangkeo
Andrew Howard Warren
Kristy Lee Watson
LaShonne Rochelle Watts
Richard Webster
Jerrold Weinstein
William P. Weintraub
Marni Elyse Weiss
Rachel Hold Weiss
Stephanie J. Weissglas
Amy S. Weissman
Eric Corey Weissman
Stephanie Nicole Weissman
Christian Wentrup
Helaine Wexler
Michael Joseph Whidden
Rachel Wilgoren

Kevin Wayne Williams
Heather N. Winter
Scott Steven Winter
Tara Lynn Wolf
Valerie I. Wolrich
Thomas C. Wolski
Catherine F. Wong
Samuel Spruill Woodley
Richard C. Worcester
Vanya Wright
Jennifer A. Yasko
Mathias Andy Youbi
Aron Ephraim Youngerwood
Lei Yu
Li Yu
Susan Jeanine Zachman
Julia Anne Zajkowski
David Zaslavsky
Anthony David Zatkos
Andrew D. Zdrahal
S. Jonathan Zepp
Yue Zhao
Roland Ziade
Meredith Leigh Zinman
Erik March Zissu
Julie A. Zwibelman

SECOND DISTRICT
Ajamu Ali
Melissa A. Angotti
Angela L. Baglanzis
Joshua A. Barsky
Ann-Marie Beckford
Shimon A. Berger
Zina Bronfman
Joshua Alexander Brook
Ronny Carny
Claude A. Charles
Nicole Louise Chavis
Michael Jay Cohen
Brad Coven
Allison Cummings
Jeffrey Thomas Curiale
Nicholas Robert Diamand
Igor Dodin
Michael J. Doherty
Karen L. Dorman
Jasmine Edwards
Andrew J. Elmore
Clinton Alan Elmore
Fabiola Emmanuel
Errol L. Feldman
Sandra Fernandez
Neil Fink
Christine A. Fitzpatrick
Dwight T. Fylnn
Keisha Monet Gaillard
Andrea L. Gatti
Michael Vincent Gervasi
Laura Barasch Gitelson
Gail Glidewell
Natasha L. Godby
Notoya Green
Evan Charles Hammerman
Tahmina Kousar Hashmi
Dennis Conan Healy
Belinda Lavinia Heath
Julia A. Hetlof
Natalie Marie Ippolito
Marc S. Jelen
Rachel Isabel Jones
Nicholas Hull Kappas
Laura Kittross
Lynnann Klotz
Rupal Hasmukh Kothari
Paula Jo Lebowitz
Nellie Levitis
Maria Litos
Kerry Ann Longobardi
Sean Patrick Loughran
Joseph J. Lynch
Nathalie Mandel
Frank Joseph Martinez
Neal Daniel McMahon
Rachel B. Menard
Michele E. Meslin
Stephen James Meyer
Irena Milosavljevic
Colleen Darcy Miraglia
John Thomas Morale
Leslie James Morsillo
Karl Matthew Nobert
Kiat Oboler
Michael Patrick Palkhiwala
Alla Peker
Emily S. Peters
Abel Luc Pierre
Kevin Adam Reiss
Teepoo Riaz
Ryan Renaldo Rodriguez
Michael Christopher Rokicki
Jorge Rosario
Alaba Abiodun Rufai
Julia Sharifov
Jageshwar Sharma
Laura L. Shockley
Dmitriy Shulman
Robbin Slade
Sabina Sosunova
Sherry T. Stembridge
Jill M. Sultzer
Kathryn Mary Sweeney
Maria A. Trifilio
Jon Elmo Veen
Andrew D. Walcott
Michal W. Walder
Michael Lawrence Weisberg
Ahron Weissman
Sally S. Woo
Audrey Hui Woon
Meishin Yueh

THIRD DISTRICT
Laurine Ann Bermudez
Marco Rocky Caridi
Tracy E. Collins
Edward B. Downey
Todd Joseph Fanniff
Thomas F. Guernsey
Lydia M. Law
David John Oppedisano
Cheryl Ann Roberts
Edward James Seplavy
Jennifer C. Shatz
Eileen Marie Stiglmeier
Jerry Lee Turcotte

FOURTH DISTRICT
Albie S. Ferrucci
Thomas Keenan Frederick
Arik Turner

FIFTH DISTRICT
Thomas Raymond Babilon
Kathleen Walsh Bowen
Kristie Marie Carter
Julie A. Cecile
Eric Ryan Chase
Sara M. Connell
John E. Dadow
Emanuela D'Ambrogio
Mary L. Dispenza
Darlene L. Donald
Gregory Leo Germain
Ronald T. Gerwatowski
Kelly Jo Graves
Andrew Alan Greenhouse
Maureen T. Kissane
Rita Kuyumcuoglu
Mitchell P. Lenczewski
Anthony R. Martoccia
Adam William Meyers
Indranil Mukerji
Rebecca M. Neri
Honor Angwin Paul
Mark Phillip Popiel
Matthew John Porter
Aaron J. Ryder
Robbi L. Sackville
Zaven T. Saroyan
Kristin Ann Shanley
Michael Erik Shannon
Christopher G. Todd
Nicole M. True

SIXTH DISTRICT
Erin Elizabeth Bahn
Lorelei B. Smith Miller
S. Francis Williams

SEVENTH DISTRICT
Jessica Bret Birkahn
Jason Bowman
Timothy S. Brashears
Timothy Scott Broshears
Andrew M. Butler
Christine Albright Carnahan
Kathryn Mary Carney-Cole
David P. Case
James Michael Chamblee
Lorisa D'Angelo
Stephen Joseph Dilorenzo
Chad William Flansburg
Rebecca E. Graf
Jon Nelson Griffin
Kristie L. Haslinger
Maria Milagros Mendez Herrero
Kevin C. Hoyt
Chad M. Hummel
Laura A. Hutchinson
Laura Anne Jenks
Cheryl L. Kates
Kim Koski-Taylor
Jeffrey Douglas Kuhn
Sarah Ellen Marshall
Kevin A. Mattei
Heather Maure
Wesley R. Mead
Michael James Mengel
Melissa Anne Meyer
Jennifer M. Noto
Katherine Ulrich Saracene
Derek Allan Thomson
Heidi M. Wasserstrom
Kambon Raymond Williams
Daniel Nathaniel Willkens
Mary M. Willkens
Graig F. Zappia

EIGHTH DISTRICT
Danielle Marie Baldassarre
Kristy Lynn Berner
Sharon L. Black
Mary B. Bowman
Lisa Lu Britton-Fusco
Carla Christiansen Brown
Jessica J. Burgasser
Kara A. Buscaglia
Paul J. Callahan
Jaime Louise Cirulli
Shawn M. Corey
Tracie L. Covey
William Cowden
Ryan King Cummings
Rebecca Linette Dalpe
Joanna Dickinson
Louis Brian Dingeldey
Karen Beth Feger
Carmen Lleana Fors
Sandra Friedfertig
Melissa Ann Fruscione
Leslie Jean Gibbin
Marcy Elissa Golomb
Amanda A. Gresens
Steven R. Hamlin
Scott Thomas Hanson
Jennifer A. Hemming
Robin Nara Hendler
Joan Grace Henry
John Daniel Hocieniec
Kevin G. Hutcheson
Michael P. Joy
Stephen William Kelkenberg
Beth A. Keller
Edward E. Key
Jeffrey L. Kingsley
Rebecca Diina Lacivita
Joy Lamarca
Sarah Ann Loesch
Kevin Eugene Loftus
John D. Lopinski
Randy C. Mallaber
Kristen Marie Maricle
Shawn Patrick McDonald
James P. Mulhern
Michael Brendon Mulvey
Amy Nyitrai
Amy C. O'Hara
Peter M. O'Hara
Michael Donald O'Keefe
Thomas Edward Popek
Dean S. Puleo
William Quinlan
Patrick Gerard Radel
Melissa A. Reese
Joshua Paul Rubin
Deanna DeVries Russell
Destin Ciotoli Santacrose
Christopher Anthony Schenk
Barbara A. Sherk
Clayton L. Silvernail
Christopher D. Smith
Peter John Sorgi
Marc Angelo Phlip Spezzano
Paul Charles Steck
Michael A. Szkodzinski
Emily A. Vella
Marla Waiss
Mary P. Walek
Justin Todd Wallens
Cynthia Lee Warren
Paul V. Webb
Christopher Wisniewski
Melanie May Wojcik

NINTH DISTRICT
Evelyn R. Agnant
Jennifer Ann Andaloro
James Stuart Andes
German Arevalo
Jeanne Regan Aronson
Andrew Louis Baffi
Jonathan Daniel Beekman
Alison Elizabeth Breedy
Virginia Ruth Brown
Steven A. Campanaro
Stephen Alphonse Cerrato
Edward M. Char
Jerri Ann Chomicki
June C.M. Colthirst
Jennifer L. D'Afflitto
Michael D'alessio
Lisa Beth Dell Aquila
Sheilagh M. Depeter
Adam J. Detsky
Joseph C. Dibenedetto
Michael David Drews
Sarah Jennifer Eagen
Joy A. Fitzgerald
Lorraine Michele Girolamo
Esther Frances Glassberg
Justin Ari Greenspan
Colleen Elizabeth Hastie
John Thomas Holden
Carol A. Korwatch
Andrew Seth Kowlowitz
Alessandro Mazzotta
James McKnight
Joseph Medic
Kenneth Jude Miles
Eric Douglas Ossentjuk
Janel M. Pellegrino
Angela J. Pilla
Leah Rachel Pizer
Claire Cohan Pizzuti
Erica Levine Powers
Jesse J. Prisco
David S. Ritter

Jennifer Lynn Rudolph
Gregory A. Salant
Elise Schwarz
Jeremy Adam Sears
Pamela L. Segal
Jessica Mara Sokol
Anna Dymek Stoll
Olga A. Tenenbaum
Matthew Paul Tomkiel
Joy M. Vaccaro
Jeffrey Thomas Vespo
Laura Elizabeth Vincenzi
Rebecca Ann Williams
Dave Wolf

TENTH DISTRICT
Joshua Glenn Alexander
Heather Nicole Alleyne
Mersedeh Noghrei Aminzadeh
Justin Eric Angelino
Paul Andrea Bargellini
Dennis Christopher Bartling
Lisa A. Bartolomeo
Jeffrey Ross Beitler
Damien Marc Bielli
Toni Jean Biscardi
Ivan Marc Braverman
Christopher Douglas Buck
Daniel J. Caffrey
Alison Elizabeth Cahill
Michael Anthony Callinan
Lisa Marie Cannata
Bejo Charles Chacko
Ranakdevi Chudsama
Stephanie A. Clark
Jessica Lauren Claus
Joseph G. Coluccio
Joseph T. Conley
Cristin Noel Connell
Noreen E. Conroy Domingo
Steven Joel Coran
Melissa Corwin
Helen Corieth Coulton
Racquel Alicia Cousins
Jack Cutrone
Vincent Domenic D'Agostino
Kristy A, D'angelo
Jeffrey Deutsch
Henry Claude Dieudonne
Matthew Jed Ditrapani
Douglas Jordan Domsky
Thomas Smith Donlon
Alisa J. Epstein
Robert E. Fekete
Yana Feldman
Anthony John Ficara
Wendy Michelle Fiel
Michael N. Fishman
Karen Lynne Fiumano
Thomas Michael Fleming
Melissa L. Forgas
Matthew Madison Frank
Harlan Adam Freilicher
Eric David Friedhaber
Laurie Michele Gapinski
Jared Gass
Stephen C. Giametta
Annilus J. Gilot
Kevin Ryan Glynn
Robert Michael Goodstein
Pat Gravino
Kimberly Grosch
Jessica Jane Horvath
William S. Infeld
Kenneth S. Ispass
Ilana Helen Kahan
John Dwight Kern
Paul Joshua Knepper
Robert Kosowski
Hariharan Krishnaraj
Gopal T. Kukreja
Samantha Beth Lansky
Peter M. LaPiana
Todd Lee
Allison Gayle Leff
Joseph M. Lichtenstein
Daniel Seth Lissauer
Kimberly Jane Lombardo
Joaquin Jesus Lopez
Lindsay Rebecca Maleson
Debra Ann Malone
Lauren Meredith Mandel
Michele Mandell
Geoffrey Kyle McDonald
Thomas McNally
Courtney Paige Murphy
Elaine Marie Murphy
Melissa M. Murphy
Ruth Nazarian
Carol J. Notias
Joseph J. Padrucco
Frank Louis Perrone
Julia J. Pfister
Erin M. Phelan
Catherine Pignataro
Melissa Jean Price
Colin Rathje
Brian Edward Rudolph
Anthony Bernard Rutkowski
Sharon V. Ryan
Howard E. Sayetta
Calliope Schickler
Seth A. Schoenfeld
George Louis Schwab
Igor Semchenko
Howard Marc Sklar
Brandy Alexis Smith
Elizabeth Walker Spencer
Gina Marie Spiteri
Melissa A. Sposato
Sean Roman Strockyj
Claude N. Stuart
Bradford Allen Stuhler
Christina Marie Suriani
Peter Erik Sverd
Ness H. Tchaikowitz
Patricia Ann Tierney
Laurence T. Tract
Kerry R Trainor
Wayne A. Trumbull
Kyung R. Um
Ricardo Vera
Mark Joseph Volpi
Adam C. Weiss
Peter S. Will
Perry Y. Woo
Suzanne Zacharias
Xiaochun Zhu
Jennifer Ann Zinna

ELEVENTH DISTRICT
David Abraham
Marie Larrie Bagasan Alinsunurin
David Benhaim
Christy Marie Bitet
Mary Nga Lai Chan
David M. Cohen
Deborah Ann Cox
Diana Jacquelin Demirdjan
Michael A. DiOrio
Anna Maria Felipe
David A. Fultz
Francis Giallorenzo
Walter John Glibowski
Melanie Hammer
Jennifer Ann Hudson-Phillips
David L. Jadidian
Ellie Jurado-Nieves
Jun Kang
Jeeyoung Kim
Susan S. King
Lenore Lynn Lanzilotta
Titus Mathai
Roman Mavashev
Zaheer Amir Merchant
Kimberly Ann Miller
Judah Neuman
Ngozichukwuka Henrietta Okwuwa
Tajudeen Abiodun Olusesi
Anthony Chris Papadopoulos
Jason J. Park
Polixene Petrakopoulos
Ilena I. Pimentel
Hilda Elizabeth Quinto
Kamini Rampioray
Deanna Rea Reitman
Roy H. Rudd
Steven Michael Statharos
Nadira Shani Stewart
Janusz Szpara
Vania Ming Tseng
Alexandra Vines
Edon H. Warslie
Jordan Scott Wigdor
Lesley M. Wong
Les Wright
Chau-shin Yang

TWELFTH DISTRICT
Eric M. Arnone
Kenneth T. Bailey
Keith A. Barron
Angela C. Bellizzi
Thomas Anthony Boyle
Lo Y. Chan
Sara R. Cytron
Patricia Bridget Decola
Belinda Delgado
Heather Lynne Echenberg
Beth Renee From
Elliot Shawn Kay
Sharon McKenzie
Heidi M. Riviere
Naomi C. Silie
Geoffrey Simpson
Robert Varga
Frances Yufang Wang
Keith Will Wynne
Jon A. Zepnick

OUT OF STATE
Michael Seth Adler
Ozge Akin
Regan Kathleen Alberda
Howard James Anglin
Luis Alfredo Arana Tagle
Tomas Miguel Araya
Adrian David Ashkenazy
Eric Kendel Atkerson
Darryl Bryant Austin
Carolina Avendano Arce
Xiad Raymond Azar
David Peter Bailey
Emma Kate Bailey
Frances Connie Bajada
Carleton Ezra Baler
Annette Baltgian
Raymond Banoun
Ana Beatriz Nunes Barbosa
David Lynn Barnes
Kimberly Ann Bart
William C. Baton
Julie Helene Becker
Stacey Danielle Becker
Molly Jennifer Bell
Amy B. Benedict
Hande Bengisu
Arianna Rebecca Berg
Jordan Aaron Bergman
Eric S. Berman
Michael Paul Berman
Jackeline Biddle
Frank Augustus Biggio
Jennifer Leah Bills
Carol Ann Blumm
Catherine Esther Bocskor
Elena Bojidarova Bojinova
Thomas Boller
Izabela Ewa Boltryk
Gaelle Lia Bontinck
Mychal Sharron Boyd
Eric David Bozman
Jennifer M. Breaton
Susan Callaghan Brickwood
Daniel Jason Brown
David Sydney Bruggeman
Amy Cathleen Buck
Elliott Matthew Buckner
Dennis John Bujdud
Edward Matthew Burman
Julie Gail Bush
Christina Rose Busso
Pablo Esteban Bustos
Alison Lynne Butler Daniels
Benedict Chan Cabaltica
Brian Cosmo Cannon
Robert Brian Caplan
Richard John Capriola
Nancy Weisberg Carman
Dario Victor Carnevale
Brian A. Caulfield
Paula Cruz Cedillo
Charles Centinaro
Hollis T. Chen
Warren Bartholomew Kam Wai Chik
Tuneen Elease Chisolm
Byron Dean Chiungos
Gyuwan Choi
Alexandra Elizabeth Chopin
Christopher B. Chorengel
Fatema Zaman Choudhury
Amit Chugh
Neal David Colton
Mary Moynihan Connelly
William Ambrose Cotter
Cathleen Ann Coyle
Anatolio Benedicto Cruz
William John Cummins
Laurent Dabernat
Michael Sean Daigle
Patrick Laurence Davis
Arthur Philppe De Baudry D'asson
Michael John De Benedictis
Marinel Malvar De Jesus
Rajesh De
William Andrew Dean
Melissa Hope Debartolo
Benjamin Rudolph Delson
Lisa Marie R. Derogatis
Brent Allen Devere
Jacques Dewerra
Tracy Lynn DeWitt
Gagandeep Kaur Dhillon
Natalie Osunyameye Dickson
Maria Margherita Dimoscato
Lori Ann Dipierdomenico
James Neil Doherty
Elise Marie Dolan
Cynthia Ann Doyle
Rebecca Faith Ebert
Joseph Nathaniel Eckhardt
Sarah Jane Edwards
Irinia Elgart
Steven Andrew Engel
Mara Blair Epstein
Annemarie Ettinger
Joseph Michael Fairfeild
Ilaria Fava
John Kenneth Felter
Zhen Feng
Charles J. Fickey
Jennifer Leigh Filippazzo
Patrick Thoma Finnegan
Michael A. Firgeleski
Sean Michael Flanagan
Elodie Anne Fleury
Michael Jeffrey Foncannon
Michael Leonard Foran
Jessica Loraine Francisco
Robert Jesse Franco
Scott Alan Frey

Eric Alexander Friedman
Eran Friedman-Hauser
Daphne Geraldine Frydman
Reiko Fukushima
Roy R. Galewski
Ulisse Angelo Gallo
Michelle Patricia Gallon
Alexis Anne Gander
Steven Andrew Garner
Anna-Emily Chamblin Gaupp
Gerhard Paul Gengel
Marisa Joy Giacobello
Mary T. Gidaro
James Benjamin Gillespie
Tanya L. Giorgini
Leonard Glickman
Emily Rachel Gold
Robert Francis Gold
Frances Ann Goldfarb
Pablo Gomez-acebo
Christopher John Gonnella
Amy Beth Grabowski
James K. Grace
Maria Grechishkina
Andrew J. Gropper
Elizabeth Dara Gross
Kenneth Andrew Gross
Alejandro Jose Guadarrama
Janea Reiter Gubitosi
Eduardo R. Guzman
Kelly Fitgerald Hagg
Lucy H. Halatyn
Sylvia Hall
Heather Christine Harker
Elizabeth Brooke Harned
Ethan David Harris
Mark Andrew Harris
David Richard Helenbrook
Sharon Elaine Hernandez
Christopher Todd Hicks
Tara A. Hofstra
Allison Elyce Holzman
Helen Hong
Yutonya Vonschella Horton
Mathilde Marie Houet-weil
Joseph E. Innamorati
Alexander Ioshpa
Lars Munch Jensen
Kyung-joon Jin
Simon Johnson
Ashish Shailesh Joshi
Moushami Prabhakar Joshi
Michael Louis Kadish
Abigail Denbeaux Kahl
Laura Ann Kamps
William Kanaan
Joshua Hart Kaplan
Judith Olwen Karpatkin
Koji Kato
Melissa J. Katz
Susan Elisabeth Kearns
Philip Gupta Kent
Prince Fifi Kessie
Mykhalo V. Kharenko
John Kheit
Sunny S. Kim
Donald Allen Klein
Oren Knobel
Hiromitsu Kobayashi
Robert Charles Koch
Cartsen Alexander Kociok
Charles N. Kokoras
Misa Konomi
Nancy Shea Kopka
William Owen Krekstein
Thomas Stefan Kugler
Kristy Ann Kulina
David R. Kuney
Peter C. Lacey
Karen Denise Lacomba
Sara Elizabeth Lampro
Ori C. Landau
Ronald Joseph Lanouette
Mary Lappas
Jill Leavens
David Sang Hak Lee
Eunsook Lee
Grace Yue Lee
Victor Kwok Chuen Lee
Sean Robert Lerner
Lorraine Lester-thompson
Charles A. Levas
Brian Scott Levine
Mitchell Holt Levine
Melissa E. Liebermann
Gwen J. Liewald
Colleen Lippiello
Kevin M. Littman
Edward Louis Liva
Nicolas Lloreda
Mads Stanley Robert Loewe
Adam Vicent Loiacono
Melissa Hambrick Luce
Martin Richard Lueck
Hong Ky Luu
Tamar Luz
Paul Benjamin Macchia
Alessandro Macri
Noah John Magrisso
Sureyya Mahmutoglu
David Joseph Mairo
Richard James Maloney
Stephen Carl Maloney
Maria Corazon Maramag
Anthony Joseph Marchese
Heather Lisa Master
Jeffrey Francis Mauer
Mary Erin McAnally
Doreen Marie McCullough
Sherry T. McDuffie
Julie Elizabeth McGuire
Patricia Westbrook McKay
Carol J. Mckenna
Keith Ryan McMurdy
Arndt Michel
Glenn Dana Miller
Sarah Anne Miller
Charles K. Mone
Anthony M. Morano
Alexandra Jacky Moretti
Brian T. Moroney
Joseph Michael Morris
Jessica Leigh Murtagh
Nomita Nair
Jay Stephen Neisen
Michael R. Nelson
Zoe Michelle Neuberger
Francoise Ng Dufaux
Paul Wei-han Ng
Bob Quang Tan Nguyen
David Michael Noble
Sarah Maria Noetzli
Michael Noriega
Carole Lynn Nowicki
Mark Lindsay Nuckols
Jonathan Leroy Horning Nygren
Darina Frances O'Connor
Toru Oda
Yoshiki Ogawa
Karen Lynn O'Keeffe
Miklos Orban
Michael Andre O'Reilly
Shannon O'Reilly
Allison Beth Orris
Hernando Andres Otero
Pablo A. Palazzi
Beth Rebecca Palmer
Michael J. Pastor
David Robert Peck
Rodney Richard Peck
Angelo Charles Peruto
Karen Elizabeth Peterson
Elizabeth Pietrowski
Davide Francesco Pisanu
Irina Pisareva
Irina Mikhailovna Pisareva
Rebecca Thacher Plummer
John Andrew Poakeart
John D. Poline
Susanne Louise Pollatschek
Irene Popovic
Alireza Pourmohammadi
James Earl Prince
Jaime Elaine Quigley
Kerry L. Quinn
Zahid Nisar Quraishi
Lillian Ramirez
Itai Ran
Frank Dennis Recine
Arnold E. Reiter
Sheila Mackenly Rejouis
William Gregg Rice
Michael Lee Rich
Katharine J. Richards
Judith Olivia Riordan
Cristina Winter Ritchie
Thomas John Roberts
Lauren Bronwyn Rockerfeller
Jennifer Mae Rockwell
Scott Michael Rodman
Antoinette Frances Rodney
Jeremy M. Rogers
Vitali S. Rosenfeld
Donald Campbell Ross
Martin Carl Rothfelder
Mairav Rothstein
Amy Marie Rottura
Jason Scott Rudnick
Lisa Lee Ruesch
Lisa Ann T. Ruggiero
Kwang Hyun Ryoo
Michael San Giacomo
Daniel Mark Santarsiero
Guillermo Jose Santiago
Rosella Santilli
Lisa Marie Schultz
Alison Louise Sclater
Jeffrey Stephen Escobar Sculley
Norman Ira Segal
Rochelle Sendar
Paul Neil Lionel Parris Sexton
Purvi Patel Shah
Jeffrey David Shalom
Mark A. Shelby
J. Sarah Shin
George B. Simoncelli
Robert P. Simons
Alistair George Simpson
Gavin Scott Ewan Sinclair
Christine Marie Small
Glen Patrick Smith
Natalie Lucille Smith
Stacy Eve Smith
Louise Ann Smyth
Patricia C. Soh
Jiaolin Song
Aimee Noelle Soucie
Joseph D. Steinfield
Timothy Christie Stephens
Dov G. Sternberg
Neven Filip Stipanovic
Robert William Stradtman
Walter B. Stuart
Bong-Kyung Sung
Maryann Powell Surrick
Jacob H. Sussman
Jaimie Hope Taff
Kathryn Elizabeth Remsen Tang
Joan Jee-Young Tarbutton
Jamie Reif Taylor
Parveen Kaur Thakral
James Joseph Theisen
William L. Thomas
Jason Charles Tuchman
Malcolm K. Turner
Edna C. Udobong
Hanneke Marlise Van Der Tas
Helena Helga Johanna Verhagen
Donald Louis Vieira
Arsineh Voskanian
Phil Neal Walker
Hongtao Wang
Xinnan Wang
Tugbaty Negbalee Warner
Whitney L. Warnke
Agnieszka Was
James Paul Wehner
Eric Weil
Richard Simon Weil
Sharon V. Weiner
Joan Alster Weisblatt
Barry M. Weiss
Jonathan Irving Weisstub
Jason Charles Welch
Nina Frances Wessel
Juliette L. White
Nancy Lee White
Charles William Whitney
Le Roi Emerson Williams
David Wallace Wilson
Krista L. Witanowski
Matthew Maurice Wolf
Tamar Katrin Wolff
Sea-young Woo
Laura Jane Wood
Valerie Ann Wright
Katherine Leslie Yannitte
Sungjoo Yoon
Gian Luca Zampa
Jennifer Ann Zepralka
Hongjun Zhang
Li Zhang
Elizabeth Zimmer

In Memoriam

Donald E. Biederman
Los Angeles, CA

Robert Duval
Alexandria, VA

Jane K. Finin
Schenectady, NY

James M. Fitzsimons
New York, NY

Anthony N. Irrera
Batavia, NY

Dianne S. Landi
New York, NY

Stanley C. Lesser
New York, NY

Fred Lichtblau
Benson, VT

Morton R. Nussbaum
New York, NY

Edward T. O'Brien
Garden City, NY

Edward Rappaport
Gloversville, NY

Arnold D. Roseman
White Plains, NY

Edward J. Sperzel
Smithtown, NY

William A. Zeck
Suffern, NY

THE LEGAL WRITER
CONTINUED FROM PAGE 64

rences and dissents limits judicial advocacy by judges in the majority, fosters judicial accountability, and provides a safety valve for judges to blow off steam. Nevertheless, judges should not write concurrences and dissents unless they have something significant to express beyond personal dissatisfaction.[7]

Concurrences and dissents are written for the future, when another panel might adopt the reasoning; for a higher appellate court, which might consider the concurrence and dissent and even affirm or reverse for the reasons stated there; for the panel's other judges, who might ultimately adopt part or all of the concurrence or dissent; or for outside forces, such as the Legislature, to correct perceived mistakes.

A concurrence agrees with the result but for different reasons. Some concurrences are written to disagree with the majority's rationale. Others are written to assure the losing side that all is not lost, to highlight a ground the majority did not mention prominently enough, or, in cautioning against too broad an interpretation, to note that the majority did not go as far as its language suggests. Sometimes concurrences are written to create a majority and avoid a plurality.[8] Concurrences are calm. Dissents are often agitated.

Dissents object to the result. Most judges dissent reluctantly. Dissenting means disagreement, makes no law, requires extra work, and possibly means not being read. Busy practitioners tend to read only majority opinions, not dissents. They care about what the law is, not what some judges believe it should be.

Dissents fail when they are overly collegial: "A sense of urgency and of impending doom is almost a *sine qua non* of the dissenting voice."[9] Dissenting judges need not play hostage to judicial politics. They can exercise their First Amendment rights using whatever rhetorical flourishes they wish. Some of the most famous judicial writings come from dissents, and many famous judicial writers – Justices Black, Brandeis, Douglas, and Holmes, to name a few – were great dissenters. Often, though, spirited dissents lead to judicial jab-trading, which is something to avoid.[10]

Until it was dropped from the 1972 Code revision by an ABA committee headed by California Chief Justice Roger J. Traynor, Canon 19 of the 1924 ABA Canons of Judicial Ethics, drafted by Chief Justice William H. Taft, provided that "[e]xcept in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort."

Canon 19 was enacted because of sentiments like these:

> A dissenting judge is not limited in his dissent and often is tempted to go beyond the record. He sometimes may indulge in sarcasm and far-fetched logic, unreasonable constructions and interpretations . . . . He wants to make his view stand out in bold relief, and by undue emphasis, unreasonable criticism, unfair interpretation, and a failure to follow the record he affords by his dissent much that makes good reading in the press, all to the harm of the court as a whole.[11]

The 1972 Code revisors dropped Canon 19 because they deemed it unhelpful to make dissenting an ethical issue.[12] One of New York's solutions to avoid unfair dissents is to allow the majority to respond to dissents. Before an appellate opinion is issued, drafts are circulated, and the majority may answer the dissent. Another solution is to allow a dissenter to "give his reasons without entering into a debate with the majority or even referring to the majority opinion,"[13] except in shorthand to explain the rationale for the dissent.

Dissenting and concurring opinions should offer explanations. Unexplained dissents or concurrences have little utility and frustrate litigants and readers.[14] As Professor Cappalli has observed, "The dissenter or concurrer should state, even if briefly, her disagreement in reasoning and result from the majority."[15]

The majority's decision is the court's decision. Concurring and dissenting judges do not speak for the court. Thus, one may never write that a concurring or dissenting judge "found," "held," or "decided." A concurrence is dictum. A dissent is argument.

Special rules apply to dissents in the Appellate Division. The Court of Appeals takes leave as of right if two Appellate Division justices dissent on a question of law.[16]

Majority Opinions. A "majority opinion" is one in which more than half the court agrees with the result and the reasoning.

The desire for unanimity, or even for a majority, causes institutional pressures that greatly affect appellate opinion writing. As Judge Wald explained, "Opinion writing among judges of widely disparate views and temperaments is, like governing, the art of the possible."[17] To reach consensus, for example, a judge's "best lines are often left on the cutting room floor."[18] Moreover, "the writer may sacrifice full treatment of all non-frivolous issues properly before the court."[19] In a close case, rationales change for votes: "[A] would-be dissenter may agree to go along with a disfavored result if a disfavored rationale is avoided."[20] Influenced as well are the precedents on which the judges rely. According to Judge Wald, pariahs include *Korematsu v. United States*,[21] the Japanese-internment case, and *Rust v. Sullivan*,[22] the abortion gag-rule case.[23] To achieve consensus, authors of books and articles are included or excluded because of personalities and views.[24] Language, too, is sacrificed, from "literary allusions or humor" to "style preferences" to "generalities or expressions of high-flown precepts."[25]

CONTINUED ON PAGE 61

Many appellate opinion writers, such as Chief Justice Charles Evans Hughes, sacrificed language for consensus: "[I]f in order to secure a vote he was forced to put in some disconnected or disjointed thoughts or sentences, in they went and let the law schools concern themselves with what they meant."[26]

Plurality Opinions. A "plurality opinion" resolves an appeal in which a majority agrees with the result but not with the reasoning. Only the result of a plurality opinion is binding; the reasoning in a plurality opinion is dictum. Plurality opinions sometimes lead to unusual results. In *National Mutual Ins. Co. of District of Columbia v. Tidewater Transfer Co., Inc.*,[27] for example, a plurality opinion upheld a statute the majority considered unconstitutional. In *Oregon v. Mitchell*,[28] Justice Hugo Black's opinion became law even though eight Justices repudiated his views.

The rule for plurality opinions: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of a majority of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'"[29] A plurality is best labeled "Opinion Announcing the Court's Judgment," not "Opinion of the Court."

Next Month: Decrees, Orders, Rulings, Judgments, Decisions, Seriatim Opinions, Reversals, Advisory Opinions, Affirmances, and related variations in the statements made by courts.

1. Karl N. Llewellyn, *On What Is Wrong With So-Called Legal Education*, 35 Colum. L. Rev. 651, 662 (1935).
2. Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. Rev. 123, 126 (1999); *see also* Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 Cardozo L. Rev. 43, 62 (1993) (stating that judgments are primary: "judicial opinions are simply explanations for judgments – essays written by judges explaining why they recorded the judgment they did."
3. 531 U.S. 98 (2000) (per curiam) (presidential election case); *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (per curiam), *vacating & remanding for reconsideration*, *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000) (per curiam), *upheld on state legislative law on remand*, 772 So. 2d 1273 (Fla. 2000) (per curiam). For an excellent analysis of *per curiam* opinions, see Laura Krugman Ray, *The Road to Bush v. Gore: The History of The Supreme Court's Use of the Per Curiam Opinion*, 79 Neb. L. Rev. 517 (2000) (footnote in title omitted).
4. Joyce J. George, Judicial Opinion Writing Handbook 234 (4th ed. 2000).
5. Ruggero J. Aldisert, Opinion Writing 20 (1990).
6. George, *supra* note 4, at 236.
7. *See generally* Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 Wash. L. Rev. 133 (1990); Alex Simpson, Jr., *Dissenting Opinions*, 71 U. Pa. L. Rev. 205, 216 (1923) ("[N]o dissent should be filed unless it is reasonably certain that a public gain, as distinguished from a private one, will result."). For two pieces on separate writing from a New York perspective, *see* Hugh R. Jones, *Cogitations on Appellate Decision Making*, 34 Record of Ass'n of Bar of City of N.Y. 543, 549–58 (1979); Stanley H. Fuld, *The Voices of Dissent*, 62 Colum. L. Rev. 923 (1962).
8. *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 353–54 (1974) (Blackmun, J., concurring).
9. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1413 (1995).
10. Maurice Kelman, *Getting in the Last Word: The Forensic Style in Appellate Opinions*, 33 Wayne L. Rev. 247, 248 (1987) (arguing that forensic opinion writing "disfigures the Court's opinion and is always to be avoided").
11. Herbert Gregory, *Shorter Judicial Opinions*, 34 Va. L. Rev. 362, 366 (1948); *accord* Roscoe Pound, *Cacoethes Dissentiedi: The Heated Dissent*, 39 A.B.A. J. 794 (Sept. 1953).
12. E. Wayne Thode, (Reporter's Notes) Code of Judicial Conduct, 50 (1973).
13. John J. Parker, *Improving Appellate Methods*, 25 N.Y.U. L. Rev. 1, 13 (1950).
14. *See, e.g.*, Ira P. Robbins, *Concurring in Result Without Written Opinion: A Condemnable Practice*, 84 Judicature 118 (2000).
15. Richard B. Cappalli, Viewpoint, *Improving Appellate Opinions*, 83 Judicature 286, 319 (2000).
16. CPLR 5601(a). For a study of current "Great Dissenters" in the Appellate Division, see Joseph C. LaValley III, *The Calculus of Dissent: A Study of Appellate Division*, 64 Alb. L. Rev. 1405 (2001).
17. Wald, *supra*, note 9, at 1377.
18. *Id.*
19. *Id.* at 1378.
20. *Id.* at 1379.
21. 32 U.S. 214 (1944).
22. 500 U.S. 173 (1991).
23. Wald, *supra* note 9, at 1379 n. 13.
24. *Id.* at 1379.
25. *Id.* at 1379–80.
26. Edwin McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 Harv. L. Rev. 5, 19 (1949).
27. 337 U.S. 582 (1949) (plurality).
28. 400 U.S. 112 (1970) (plurality).
29. *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

GERALD LEBOVITS is a judge of the New York City Civil Court, Housing Part, in Manhattan. An adjunct professor at New York Law School, he has written *Advanced Judicial Opinion Writing*, a handbook for New York's trial and appellate courts, from which this column is adapted. His e-mail address is GLebovits@aol.com.

MEMBERSHIP TOTALS

NEW REGULAR MEMBERS
1/1/03 - 5/30/03 ____________4,269

NEW LAW STUDENT MEMBERS
1/1/03 - 5/30/03 ______________441

TOTAL REGULAR MEMBERS AS OF
5/30/03 ___________________60,794

TOTAL LAW STUDENT MEMBERS AS
OF 5/30/03_________________3,228

TOTAL MEMBERSHIP AS OF
5/30/03 ___________________64,022

Headquarters Staff E-mail Addresses

Executive Staff
Patricia K. Bucklin, *Executive Director,* pbucklin@nysba.org
John A. Williamson, Jr., *Associate Executive Director,* jwilliamson@nysba.org
L. Beth Krueger, *Director of Administrative Services,* bkrueger@nysba.org
Kathleen R. Baxter, *Counsel,* kbaxter@nysba.org
Lisa Bataille, *Administrative Liaison,* lbataille@nysba.org
Kathleen M. Heider, *Director of Meetings,* kheider@nysba.org
Barbara Beauchamp, *Web Site Content Editor* bbeauchamp@nysba.org

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

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

Governmental Relations
Ronald F. Kennedy, *Assistant Director,* rkennedy@nysba.org

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

Human Resources
Paula Doyle, *Director,* pdoyle@nysba.org

Law Practice Management
Stephen P. Gallagher, *Director,* sgallagher@nysba.org

Law, Youth and Citizenship Program
Deborah S. Shayo, *Director,* dshayo@nysba.org

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

Management Information Systems
John M. Nicoletta, *Director,* jnicoletta@nysba.org
Ajay Vohra, *Technical Support Manager,* avohra@nysba.org
Paul Wos, *Data Systems and Telecommunications Manager,* pwos@nysba.org
Margo J. Gunnarsson, *Database Services Administrator,* mgunnarsson@nysba.org

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

Media Services and Public Affairs
Bradley G. Carr, *Director,* bcarr@nysba.org
Frank J. Ciervo, *Associate Director,* fciervo@nysba.org
Amy Travison Jasiewicz, *Editor, State Bar News,* ajasiewicz@nysba.org

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

Pro Bono Affairs
Cynthia Feathers, *Director,* cfeathers@nysba.org

The New York Bar Foundation

2003-2004 OFFICERS

Robert L. Haig
President
101 Park Avenue
New York, NY 10178-0001

John R. Horan
Vice President
825 Third Avenue
New York, NY 10022

Patricia K. Bucklin
Secretary
One Elk Street
Albany, NY 12207

Hon. Randolph F. Treece
Treasurer
375 State Street
Albany, NY 12210

DIRECTORS

James B. Ayers, *Albany*
John P. Bracken, *Islandia*
Hon. Richard J. Bartlett, *Glens Falls*
Cristine Cioffi, *Niskayuna*
Maryann Saccomando Freedman, *Buffalo*
Emlyn I. Griffith, *Rome*
John H. Gross, *Northport*
Paul Michael Hassett, *Buffalo*
Bernice K. Leber, *New York City*
Susan B. Lindenauer, *New York City*
Kay C. Murray, *New York City*
Robert L. Ostertag, *Poughkeepsie*
Thomas O. Rice, *Garden City*
M. Catherine Richardson, *Syracuse*
Lorraine Power Tharp, *Albany*

Journal Board Members Emeriti

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

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

2003-2004 OFFICERS

A. Thomas Levin, President
Mineola
Kenneth G. Standard, President-Elect
New York
James B. Ayers, Treasurer
Albany
A. Vincent Buzard, Secretary
Rochester

Vice-Presidents

First District
Mark H. Alcott, New York
Steven D. Hoffman, New York
Second District
Edward S. Reich, Brooklyn
Third District
Rachel Kretser, Albany
Fourth District
Cristine Cioffi, Niskayuna
Fifth District
James F. Dwyer, Syracuse
Sixth District
Kathryn Grant Madigan, Binghamton
Seventh District
C. Bruce Lawrence, Rochester
Eighth District
Sharon Stern Gerstman, Buffalo
Ninth District
Joseph F. Longo, White Plains
Tenth District
A. Craig Purcell, Hauppauge
Eleventh District
Gary M. Darche, Queens
Twelfth District
Lawrence R. Bailey, Jr., New York

Members-at-Large of the Executive Committee

Donald C. Doerr
John H. Gross
Claire P. Gutekunst
Gunther H. Kilsch
David R. Pfalzgraf
Jay G. Safer

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

Members of the House of Delegates

First District
Alcott, Mark H.
† Bing, Hon. Jonathan L.
Brown, Lloyd W., II
Christian, Catherine A.
* Cometa, Angelo T.
Constantine, Lloyd
Cundiff, Victoria A.
Cuyler, Renaye B.
Eisman, Clyde J.
Eppler, Klaus
Farrell, Joseph H.
Ferrara, Lucas A.
Finerty, Hon. Margaret J.
Fink, Rosalind S.
Flood, Marilyn J.
* Forger, Alexander D.
* Gillespie, S. Hazard
Goldstein, M. Robert
Gordon, Felicia S.
Green, Bruce A.
Gregory, John D.
Gutekunst, Claire P.
Haig, Robert L.
Harris, Arlene
Harris, John B.
Harris, Martha W.
* Heming, Charles E.
Hendricks, Susan L.
Hession, Cathi A.
Hoffman, Stephen D.
Hollyer, A. Rene
Horan, John R.
Jacobs, Robert A.
Jacobs, Sue C.
Jaffe, Hon. Barbara
Kiernan, Peter J.
Kilsch, Gunther H.
* King, Henry L.
Kougasian, Peter M.
†* Krane, Steven C.
Lee, Charlotte C.
Lesk, Ann B.
Levy, M. Barry
* MacCrate, Robert
Mandell, Andrew
McShea, Sarah D.
Miller, Michael
Miller, Sonia E.
Milonas, Hon. E. Leo
Mitzner, Melvyn
* Patterson, Hon. Robert P., Jr.
Quattlebaum, Poppy B.
Ramos, Hon. Charles E.
Reed, Thomas A.
Reimer, Norman L.
Reitzfeld, Alan D.
Richardson-Thomas, Edwina
Richman, Steven H.
Robertson, Edwin D.
Rocklen, Kathy H.
Rosner, Seth
Rothstein, Alan
Russo, Salvatore J.
Safer, Jay G.
Schultz, Kenneth A.
* Seymour, Whitney North, Jr.
Sherwin, Peter J.W.
Sloan, Pamela M.
Smith, Beverly McQueary
Standard, Kenneth G.
Torrent, Damaris E.
Wales, H. Elliot
Walsh, Susan J.

Second District
Cerchione, Gregory T.
Cyrulnik, Miriam
Digiovanna, Lawrence F.
Dollard, James A.
Fisher, Andrew S.
Kamins, Barry
Reich, Edward S.
Romero, Manuel A.
Sunshine, Hon. Jeffrey S.
Sunshine, Nancy T.

Third District
Ayers, James B.
Bauman, Harold J.
† Butler, Tyrone T.
Defio, Elena M.R.
Flink, Edward B.
Freeman, Paul M.
Hanna, John, Jr.
Higgins, Patrick J.
Kinum, John B.
Klein, Frank
Kretser, Rachel
LaFave, Cynthia S.
Leistensnider, Ruth E.
Maney, Hon. Gerard E.
Marbot, Karen L.
Miranda, David P.
Privitera, John J.
* Tharp, Lorraine Power
Treece, Hon. Randolph F.
Van Derbeck, Colette A.
* Williams, David S.
* Yanas, John J.

Fourth District
Bartlett, Hon. Richard J.
Cantwell, Lori A.
Cioffi, Cristine
Coffey, Peter V.
Dorsey, Matthew J.
Heggen, Karen A.
King, Barbara J.
Rodriguez, Stephen T.
Tishler, Nicholas E.

Fifth District
Alessio, George Paul
Amoroso, Gregory J.
Doerr, Donald C.
Dwyer, James F.
Fennell, Timothy J.
Getnick, Michael E.
Hayes, David M.
Michaels, Joanne E.
Myers, Thomas E.
Peterson, Margaret Murphy
Plumley, Judy L.
Renzi, David A.
†* Richardson, M. Catherine

Sixth District
Beehm, Angelina Cutrona
Denton, Christopher
Gacioch, James C.
Lewis, Richard C.
Madigan, Kathryn Grant
Mayer, Rosanne
Shive, Edward J.
Tyler, David A.
Wayland-Smith, Tina

Seventh District
Buzard, A. Vincent
Castellano, June M.
Clifford, Eugene T.
Cristo, Louis B.
Frazee, Hon. Evelyn
Hartman, James M.
Inclima, Charles P.
Kingsley, Linda S.
Lawrence, C. Bruce
†* Moore, James C.
* Palermo, Anthony R.
Schraver, David M.
Tyo, John E.
* Van Graafeiland, Hon. Ellsworth
* Vigdor, Justin L.
†* Witmer, G. Robert, Jr.
Wolford, Michael R.

Eighth District
Aversa, John M.
Brady, Thomas C.
Doyle, Vincent E., III
Edmunds, David L., Jr.
Evans, Sue M.
Flaherty, Michael J.
* Freedman, Maryann Saccomando
Gerstman, Sharon Stern
†* Hassett, Paul Michael
Newman, Stephen M.
O'Mara, Timothy M.
Peradotto, Erin M.
Pfalzgraf, David R.
Seitz, Raymond H.

Ninth District
Bartlett, Mayo G.
Basso, John J.
Berman, Henry S.
Fedorchak, James M.
Geoghegan, John A.
Goldenberg, Ira S.
Herold, Hon. J. Radley
Hilowitz, Lynne S.
Ingrassia, John
Johnson, Martin T.
Longo, Joseph F.
Marwell, John S.
Miklitsch, Catherine M.
* Miller, Henry G.
O'Leary, Diane M.
* Ostertag, Robert L.
Plotsky, Glen A.
Riley, James K.
Seiden, Hon. Adam
† Standard, Kenneth G.
Sweeny, Hon. John W., Jr.
Zeltner, Peter P.

Tenth District
Asarch, Hon. Joel K.
* Bracken, John P.
Corcoran, Robert W.
Filiberto, Hon. Patricia M.
Fishberg, Gerard
Franchina, Emily F.
Fredrich, Dolores
Gross, John H.
Karson, Scott M.
Kossove, Scott E.
Lerose, Douglas J.
† Levin, A. Thomas
Levy, Peter H.
Liotti, Thomas F.
Matalon, Gregory Laurence
Millman, Bruce R.
Monahan, Robert A.
Perlman, Irving
* Pruzansky, Joshua M.
Purcell, A. Craig
Quinlan, Robert F.
†* Rice, Thomas O.
Robert, Joan L.
Spellman, Thomas J., Jr.
Tell, M. David
Tully, Rosemarie
Walsh, Owen B.
Weissman, Dwayne

Eleventh District
Darche, Gary M.
Dietz, John R.
Fedrizzi, Linda F.
James, Seymour W., Jr.
Nizin, Leslie S.
Rosenthal, Edward H.
Terranova, Arthur N.
Wimpfheimer, Steven

Twelfth District
Bailey, Lawrence R., Jr.
Friedberg, Alan B.
Kessler, Muriel S.
Millon, Steven E.
†* Pfeifer, Maxwell S.
Summer, Robert S.
Weinberger, Richard

Out-of-State
* Fales, Haliburton, 2d
Peskoe, Michael P.
* Walsh, Lawrence E.

THE LEGAL WRITER

Technique: A Legal Method To the Madness

BY GERALD LEBOVITS

Legal writers must know more than writing. They must know how to write in a legal context. To do that they must know how to research. Researching is less about finding authority than about analyzing authority. Analyzing authority requires understanding method and applying technique – the science and craft lawyers use to help society and their clients.

As the great Professor Llewellyn has taught, "Technique without ideals is a menace. But ideals without technique are a mess."[1] This column, which continues next month, explains some essentials of method and technique. Other essentials, like parsing precedent and interpreting statutes, are reserved for future columns.

Opinions. A "judicial opinion" is a court's reasoned explanation of its decision: "An opinion is simply an explanation of reasons for the judgment."[2] An opinion may be oral or written. An attorney gives a "legal opinion" to a client or on a client's behalf.

Per Curiam Opinions. They are unsigned and decided by "the court." In the federal appellate courts, *per curiam* opinions are reserved for cases deemed routine and squarely controlled by precedent or for cases in which the court wants to control the result without writing to explain why. In most appellate courts in New York, opinions are rendered *per curiam* because a majority of the judges agree with the result but not with the reasoning or because, for one reason or another, the judges or justices do not wish to be personally identified with the court's opinion. Thus, opinions in disciplinary appeals and judicial-misconduct appeals are decided *per curiam*.

True *per curiam* opinions are more authoritative than signed opinions when they contain no reservations or exceptions. The authority extends only to the result, not to the reasoning. *Per curiam* opinions are less authoritative than signed opinions when the court uses them to decide mundane questions. *Per curiam* opinions are the most authoritative opinions of all when the court wants to make a politically important decision come from a unanimous court, not from an individual judge appointed by a particular appointing authority. Some readers might have heard about a few recent examples of this form of *per curiam* opinion writing, such as all the federal and state opinions in *Bush v. Gore*.[3]

The Appellate Term, First Department, which for historical reasons denominates all its opinions *per curiam*, does not render true *per curiam* opinions. Appellate Term, First Department, opinions are signed only to the extent that the justices concur or dissent separately. These opinions are really memorandum opinions – and that's what the Appellate Term, Second Department correctly calls them. Judgments of the Appellate Term, First Department, are set out in the concurrences, but "[a] true *per curiam* opinion has neither a concurrence nor a dissent" that sets out a judgment.[4] A true *per curiam* opinion itself contains the judgment, not the signed concurrences and dissents attached to it.

Memorandum Opinions. True "memorandum opinions" are unsigned, except by the clerk of the court. In New York, memorandum opinions are unsigned in the First, Second, and Fourth Departments. Because the justices in the Third Department sign their memorandum opinions, the Third Department does not render true memorandum opinions. Memorandum opinions are brief and conclusory on the law, the facts, and the procedural history. Memorandum opinions, typically written when the court believes that the matter is not of first impression, are directed to the litigants and not to the public at large. They always have less weight than signed, or full, opinions.

> ***Research is less about finding authority than about analyzing authority.***

At least one commentator opined that "a memorandum opinion should not be used when disposing of a case by reversal or remand . . . ."[5] That is not the policy of the New York State appellate courts, which affirm, reverse, modify, and remand in memorandum opinions when they believe that the case does not warrant a full, signed opinion.

En Banc Opinions. A case decided *en banc* – pronounced *in bank* by many – is decided by an entire court of intermediate appellate jurisdiction, not just by one panel. This procedure is used in the federal circuits but not in New York State courts. Unless an *en banc* opinion has numerous concurrences or dissents, it's the most persuasive opinion in the federal system below a Supreme Court opinion.

Concurrences, Dissents. Unanimity enhances stability in the law, promotes collegiality, reduces the number of motions for reargument, and promotes public confidence. But "separate opinions . . . compelled by an abiding belief in an intellectual, factual, or analytical difference [signify] a healthy judiciary."[6] The availability of concur-

CONTINUED ON PAGE 60

Cut your legal research costs by 20% or more

Special Features

LawWatch™

LawWatch search agents scan Loislaw databases to find any new case law or statutes that pertain to your clients, your area of expertise, or your topics of interest. These results are automatically delivered via email or saved on your Loislaw personal start page.

GlobalCite℠ Included!

Loislaw's GlobalCite scans the entire Loislaw database for materials that have cited the document the user is viewing.

Loislaw— The best tool at the best price.

Flat Rate Pricing

Printing, copying, downloading, hyperlinking to cited state and federal cases, statutes and other primary law, as well as 24/7 technical support are all included in a fixed monthly subscription rate.

Extensive Federal and State Law Databases

NYSBA Professional Law Library: contains over 1 million pages of New York primary law.

Exclusive! NYSBA CLE Reference Library: search NYSBA publications and link directly to the full text of the cited state or federal law.

Quality you can trust

The latest case law and legislative acts are available online. All Loislaw databases contain exact duplications of the official law, and are subject to a rigorous quality control process.

Great service

Extensive online help is built into every stage of the process.

Call Loislaw toll-free at 1-877-564-7529 for unlimited customer support 24 hours a day, seven days a week.

For a FREE TRIAL to Loislaw go to: **http://signup.loislaw.com/freetrial** (access code NYF02) or call **1-877-564-7529** today!