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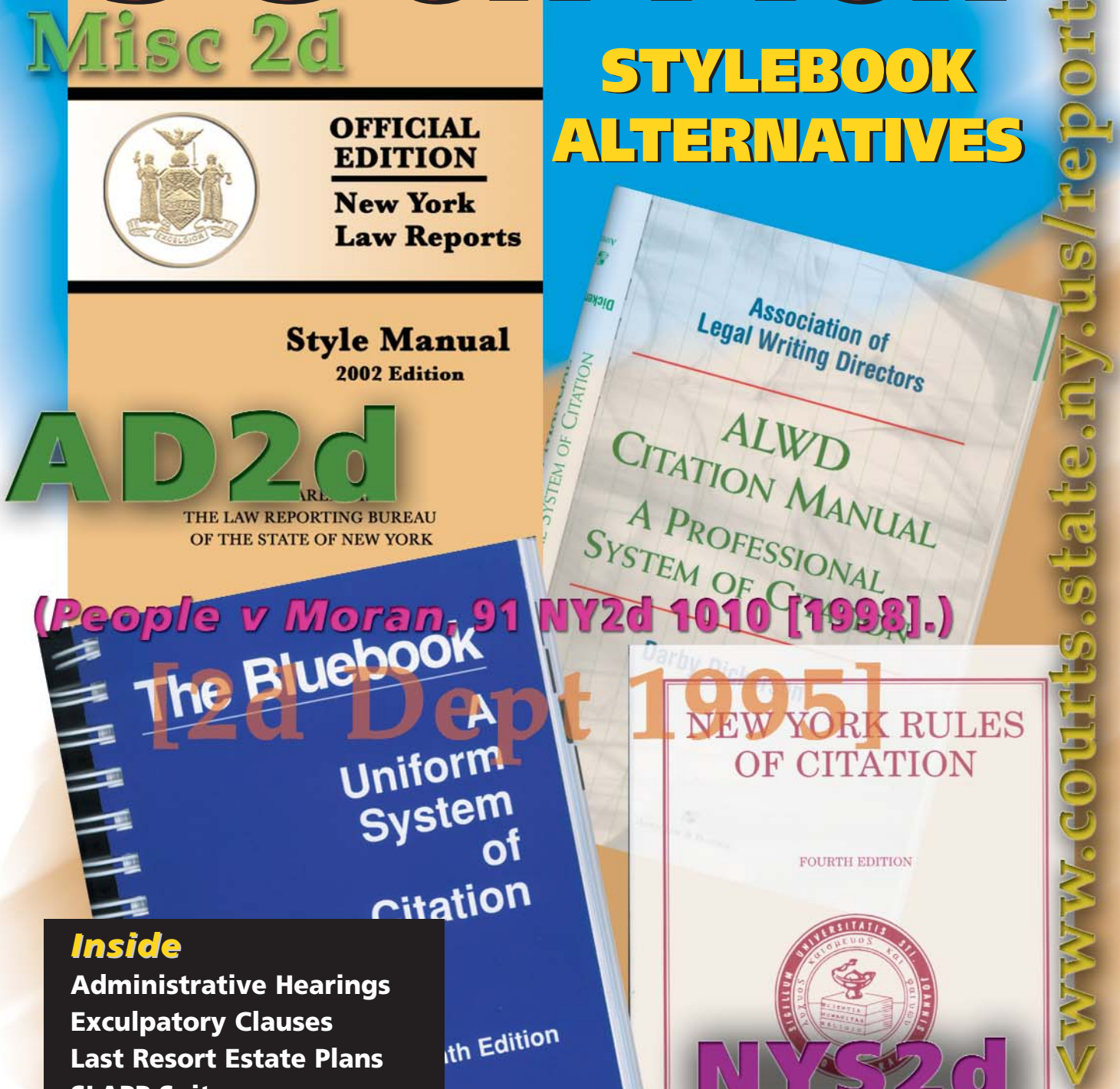

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On The Cover

This month's cover highlights the new *Tanbook* that the New York State court system has published, together with three other stylebooks that compete for the allegiance of law students, legal scholars and lawyers when they need to cite their sources.

Cover design by Lori Herzing.

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President's Message

STEVEN C. KRANE

Gunderson, Esq.

Bob negotiated the channel he had created through the towering banks of snow, a six-foot evergreen slung over his shoulder. He stamped the packed snow off his boots. "Help me get this set up, will ya, Effie?"

The Gundersons, now celebrating their 40th year together, swiftly had their tree standing perfectly upright in its usual location by the front window. Even though Effie had been in Chicago attending law school for the better part of the past 22 months, and faced a series of final exams in early January, she had come home for the holidays.

"Bob?"

Bob had settled into his easy chair, where he glared at the steely gray glow of the old Emerson. As usual, he pretended not to have heard his wife's page.

"BOB? I am addressing the living?"

"Yes, Effie." Bob diverted his attention from his daytime dramas. "What did those bar fellows do now?" He knew that his wife, soon hoping to become a full-fledged practicing lawyer, had not lost her passion for the fine art of reading bar journals.

"It's not the bar fellows, Bob, this time. This is about my *career*."

Bob's ears perked up. "What about your career?"

"I have a serious problem, Bob, and I don't know how to solve it."

"We've been through an awful lot together, Effie. I'm sure we can figure out what to do. What's the problem?"

Effie took a deep breath. "I've been offered that job I interviewed for, working in the state's attorney's office down in Williston. I can be a prosecutor."

"That's not a problem, Effie. That's great! That's what you always wanted to do. Congratulations!"

"Save it, Bob. I don't think I can take the job."

"Why not?"

"Well, you know how much three years cost me at the University of Chicago Law School."

"I do." Bob nodded. They owned the farm free and clear, and the subsidy he received from the government paid their living expenses but not much more.

"It cost over $120,000, not counting travel to and from, and now I've got all that in student loan debt to pay off."

"I thought they give you seven or ten years to pay that off."

"Yes," Effie replied, "but starting salary for an assistant state's attorney is only $29,000 a year."

Bob held his tongue. Three years earlier, he had gently suggested that Effie turn down her offer at Chicago and attend the University of North Dakota Law School over in Grand Forks for one-fourth the cost. Effie had been accepted at the University of Chicago and insisted on attending.

"We could sell the farm and get a small place down in Williston." Bob, like Effie, had lived in the small town of Winston, North Dakota, his whole life, and didn't intend to end his days in an apartment over the Rexall in bustling Williston.

Effie pounced on Bob. "I'm not going to sell this farm. There have been Lundegaards living here since pioneer days, and I'm not going to be the one to break the chain." Effie fully expected that the farm would pass to their daughter, Jeanne, and son-in-law, Carl Rolvaag. "Besides, if we sell this place we won't get the government subsidy anymore, and then we'll really be in a pickle."

"This is a tough one. But you can't be the only person in this position. What do other law students do when they want to take jobs like this and have lots of student loans to pay off?"

Effie paused for a moment. "You're right. I'm not alone. A lot of my classmates want to go into government service or public interest law, and just can't afford it. And they're not as well off as we are. We've got a place to live rent-free, except for the taxes and upkeep."

"So how can they take the jobs they want?"

"They can't. They go into private practice and try to save enough money to pay off their loans, and then hope they can do what they wanted to in the first place."

Effie was always the optimist, always with a "can do" attitude toward the problems of the world. But this time she was stumped. She explained to Bob that her salary wouldn't cover her loan and transportation costs to Williston. This time, Bob played the optimist. "I can't believe there isn't an answer to this. Let's check the Internet."

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Within moments Bob, who had spent many lonely mornings and evenings (afternoons were occupied) surfing the net while Effie was off at school, quickly found the University of Chicago Law School Web site, and was reading aloud the page entitled "Loan Deferment Forgiveness Program." Effie would probably be eligible at least in part for interest-free loans from the school to help pay off her loans, and depending on how long she stayed in public service, part or all of the loans could be forgiven. Effie seemed to breathe a sigh of relief.

It turned out that there were a fair number of law school loan deferment and forgiveness programs, about 50 nationwide. Only a handful of states—five—had statewide programs for law students interested in public service or public interest practice.

"You know, Bob, I read that the New York State Bar Association . . ."

"Here we go."

Effie barely missed a beat, ". . . is working on a statewide student loan assistance program. They have a Special Committee on Student Loan Assistance for the Public Interest, headed up by a fellow named Hank Greenberg from Albany. He was the general counsel of the New York State Department of Health, so he knows first-hand how hard student loan debt burdens make it for recruiting young lawyers into government service. He was also a judicial law clerk and an assistant U.S. attorney, so he's been a public service lawyer for most of his career. And the committee has members from law schools, legal aid offices, government law offices, bar associations, the judiciary and private practice. It's really quite a high-powered group."

Effie continued. "They're working on something called the New York Loan Repayment Assistance Pilot Program that will raise money from the big law firms and other contributors and distribute it to New York lawyers working in public interest or public service jobs. It would work much the same as the school program, except that it would also help students in schools that don't have repayment assistance programs of their own."

"I guess that's good even for students in schools that do have assistance programs," Bob observed, "since they don't guarantee that they'll have enough money to go around."

"That's right, Bob. Maybe programs like this will even help solve the problem that we have nationally with inadequate legal services for the poor. Did you know that nearly 40 million Americans live below the poverty level? And that over 80 percent of their civil legal needs are not being met?"

"I didn't, Effie. That's pretty serious."

"You bet it is. Not everyone's as lucky as we are. We haven't been rich, but we've worked hard and have always been comfortable."

Bob began to sing. "If I had a million dollars . . ."

"Don't sing, Bob," Effie said sharply.

The couple settled into their usual routine, Bob at the TV and Effie at her desk, reading intently.

Later, the Gundersons sat down for dinner. Effie was no longer the gravely concerned law student she had been earlier in the day. "So I guess I'll call the state attorney's office and accept their offer. You know Bob, I always dreamed of being a prosecutor."

"And you'll be a great one, Effie, I know that. But you always know everything. If you knew all that about loan forgiveness programs, and all that stuff about what's going on in New York, how come you didn't know about the loan forgiveness program at school?"

Effie slipped into her wry smile. "You caught me. I knew all about it. I just wanted to see if you could find it with all your Web surfing."

Bob swallowed his meat loaf and looked at Effie with mock disapproval. "Love ya, Effie."

"Love ya, Bob."

New Edition of State's "Tanbook" Implements Extensive Revisions In Quest for Greater Clarity

By Gerald Lebovits

Question: What's tan and black and should be read all over? Answer: The Official Edition New York Law Reports Style Manual 2002, effective March 1, 2002, affectionately known as the Tanbook because its cover is tan with black print. The 2002 Tanbook, with a new, gold state seal, is the most extensive and important revision the Tanbook has ever undergone. Even where rules remain the same, the 2002 Tanbook gives new and better examples.

Chief Judge Judith S. Kaye wrote a foreword for the 2002 Tanbook in which she exclaimed that the 2002 revision "makes my heart jump with joy." As the Chief Judge observed, "I detect a decisive step toward clearer, cleaner, more readable decisions, unencumbered by needless, distracting material. And I applaud it."

Curious what Tanbook citing looks like? Read on. Unless indicated otherwise, all citations in this article are from the new Tanbook. You'll see these citations in future New York Official Law Reports (Misc 2d, AD2d, and NY2d). And maybe judges will see these citations in practitioners' briefs and papers.

2002 Tanbook Overview

The Tanbook is designed for anyone who writes to or for a New York State court. Published New York judicial opinions must comply with the Tanbook. Adherents should include not only New York State judges and their law clerks and court attorneys but also any advocate who seeks to persuade them by making decision making easier, faster, and more accurate. According to one authority, "[t]he *Official Style Manual* * * * * is the citation standard used by judges and * * * is recommended for use by attorneys in briefs and papers submitted to the courts of New York." (Ellen M. Gibson, New York Legal Research Guide I-170 [2d ed, William S. Hein & Co. 1998].)

The 2002 Tanbook, which replaces the 1998 edition, was prepared by the New York State Law Reporting Bureau (LRB) board of editors headed by Senior Legal Editor Katherine D. LaBoda under State Reporter Gary D. Spivey's direction. LRB edits all published judicial opinions and selects miscellaneous opinions (those below the Appellate Division) for book publication (Judiciary Law §§ 431-432; 22 NYCRR part 7300) and online publication (<www.courts.state.ny.us/reporter/decisions.htm> [accessed Mar. 7, 2002]). (*See generally* James M. Flavin, *Decisions and Opinions for Publication*, 12 Syracuse L Rev 137 [1960]; Gary Spencer, Behind the Books, *Reporter Selects, Cuts Official Opinions*, NYLJ, Feb. 28, 1991, at 1, col 3].) LRB gives unedited slip opinions selected for official publication to a West Group arm—West Group publishes the official and the unofficial reports as well as the Tanbook—for publication in the state's unofficial reports (NYS2d and NE2d), where unofficial parallel citations are added and Tanbook citation format is changed to a West Group version of Bluebook citation.

The New York Court of Appeals adopted the Tanbook on December 12, 2001. It takes effect for opinions submitted to the State Reporter on or after March 1, 2002. Drafts of the 2002 Tanbook were reviewed by the Court of Appeals, the decision departments of the four Appellate Division departments, and all who responded to a solicitation for comments. My contribution as a Housing Court judge was to recommend a new "Hous Part" citation, now included in section 2.2 (a) (1) (g) ("Court Abbreviations") with an example of a citation in parentheses in "Optional Information": (*Pershad v Parkchester S. Condominium*, 174 Misc 2d 92 [Hous Part, Civ Ct, NY County 1997]).

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, currently assigned to Brooklyn and Staten Island. He teaches part-time at New York Law School and writes the *Journal*'s Legal Writer columns. The 2002 Style Manual (Tanbook) featured in this article cites his Advanced Judicial Opinion Writing (7th ed, NY St Unified Ct Sys 2002) as one of six authorities, together with the Chicago Manual of Style and Webster's Third New International Dictionary, to be "consulted on matters not covered by this Manual."

All legal writers should care about citing and citations. Citations explain, justify, and persuade—or not, as the case may be. Citations contain the information necessary to find and read the material. And good citing impresses readers. Citing is like bread at a restaurant. It won't make the meal. But you'll know whether the meal will be good by the bread you're served.

There are nearly as many citation formats as there are varieties of bread at restaurants. If you're a sentient lawyer under 120 years old, you've heard of the Bluebook, established in 1926, which over the years has been olive green, brown, white, and light blue. In its current 2000 edition, it's royal blue. (*See* The Bluebook: A Uniform System of Citation [Columbia L Rev Assn. *et al.* eds, 17th ed 2000]; Bluebook Home Page <www.legalbluebook.com> [accessed Mar. 7, 2002].) If you're new to law school or you teach legal writing, you've recently become a master of the gray, green, blue, and red 2000 ALWD (pronounced "All Wid"), the Association of Legal Writing Directors' answer to the Bluebook. (*See* Assn. of Legal Writing Directors and Darby Dickerson, ALWD Citation Manual: A Professional System of Citation [Aspen L & Bus 2000]; ALWD Home Page <www.alwd.org> [accessed Mar. 7, 2002].)

Attend the University of Chicago Law School? You're a Maroon Book fan, familiar with its Volume 69 2002 Style Sheet, which incorporates and updates the Maroon Book and highlights some important rules from the Chicago Manual of Style (14th ed, Univ of Chicago Press 1993). (*See* Richard A. Posner, *Goodbye to the Bluebook*, 53 U Chi L Rev 1343 [1986] [appendix]; The Maroon Book [Lawyers Co-Op. Publ. 1989]; <http://lawreview.uchicago.edu/files/styledoc.htm> [accessed Mar. 7, 2002].) A Texas lawyer? You supplement the Bluebook with the University of Texas School of Law Greenbook, the 1998 ninth edition of the Texas Rules of Form. From Louisiana? You've got a Bluebook addendum, too. (*See Louisiana Law Review Streamlined Citation Manual*, 50 La L Rev 197 [1989].) Ditto for Floridians, whose *Florida State Law Review Style Manual* is in its fourth edition. (*See* <www.law.fsu.edu/journals/lawreviews> [accessed Mar. 7, 2002].)

If you're a California lawyer, you follow the California Style Manual, first issued in 1942 and updated for its fourth edition in 2000. Visit CASTYLE on <www.westlaw.com> [accessed Mar. 7, 2002].

A law-review editor in New York? You fix the Bluebook with the St. John's Rules of Citation, which, in its 2001 fourth edition, released in February 2002, is white with red print, although it used to be gray and red with blue hairy speckles. (*See* St. John's Law Review, New York Rules of Citation [William H. Manz rev ed, 4th ed 2001].)

But if you practice in or work for the New York State court system, then you live and die by the Tanbook.

The Tanbook? It wasn't always tan. When it came out in 1956, it was dark blue. It turned dark green in 1959. It was tan in 1963 but light blue in 1969 and stayed that way in 1974, only to become yellow in 1977. It was light green with a red panel in 1981, 1983, and 1985. Like a chameleon, it changed to tan in 1987 and remained so in 1992, 1996, 1997, and 1998. It's tan again in 2002.

The Tanbook is New York's Official Style Manual. It's New York's version of the California Style Manual. The LRB wrote it to guide New York judges and their staffs in drafting judicial opinions. It dictates the style the LRB uses to edit opinions for publication in the Official Reports. It covers citing, abbreviating, capitalizing, quoting, word choice, and case-name styling. In its new-and-improved 2002 version, it's an instant classic.

Among its attributes is that the Tanbook is free for New York judges, court staffs, attorneys, and libraries. To download a copy on PDF format, visit <www.courts.state.ny.us/reporter/new_styman.htm> [accessed Mar. 7, 2002]. Regular Tanbook updates will be available on that site as well. To get a free hard copy, which will be available in a few months, write to the Law Reporting Bureau at One Commerce Plaza, Suite 1750, Albany, New York 12210; e-mail reporter@courts.state.ny.us; or telephone (518) 474-8211.

Few are familiar with the Tanbook. A recent Westlaw and LEXIS check disclosed only two law-journal references to it; the references, both in footnotes, take up one sentence each. (*See* William H. Manz, *The Citation Practices of the New York Court of Appeals: A Millennium Update*, 49 Buff L Rev 1273, 1281 n 37 [2001]; James W. Paulsen, Book Review, *An Uninformed System of Citation*, 105 Harv L Rev 1780, 1791 n 77 [1992] [reviewing The Bluebook: A Uniform System of Citation, 15th ed 1991].) The Bluebook, ALWD, and even the St. John's Rules of Citation don't mention the Tanbook at all. Practitioners buy, research from, and cite West Group's New York Supplement, Second Series (NYS2d), or the New York Law Journal, which don't cite Tanbook-style. Many practitioners, even New York practitioners, don't read or cite the Official Reports. They're unfamiliar with New York's official citation scheme, a curious amalgam of the Maroon Book (relaxed system with lots of discretion and period dropping) and the California Style Manual (abounding in parentheses), with significant departures from each. Other practitioners, aware that New York has its own citation system, prefer not to learn it. No law journal or law review uses the Tanbook, unknown territory for academics and students.

New York judges think well of those who cite from the Tanbook, but no judge requires Tanbook citation.

Many trial judges in New York don't cite according to the Tanbook, although all appellate judges do. Many New York trial judges and their law clerks have never even heard of the Tanbook.

Some who are aware of the Tanbook dislike it. It's got parentheticals and brackets, it's not keen on periods or apostrophes, and it leaves a good deal to the writer's discretion. It doesn't impress law-review types, who assume that those who cite according to the Tanbook didn't make law review and thus weren't inculcated in the Bluebook. Until the 2002 Tanbook, New York's way of citing was so archaic that it didn't pay to learn the formulas.

Below are some 2002 Tanbook case-citation options for New York case law, adapted from section 1.2 (c) (2). The first 8 of the 12 examples are citations in parentheses. The last four are citations in running text. The rule on including, in brackets, optional case-citation information like the deciding forum, judge, and date (section 2.2 [a] [1] [g]) hasn't changed from the old to the new Tanbook. But, according to the 2002 Tanbook's Preface, "[t]he rule * * * * has been restated to make clear that such information may be included when desired."

- That is the law (*People v Moran*, 91 NY2d 1010). *Or*
- That is the law (*see People v Moran*, 91 NY2d 1010). *Or*
- That is the law. (*People v Moran*, 91 NY2d 1010.) *Or*
- That is the law. (*See People v Moran*, 91 NY2d 1010.) *Or*
- That is the law (*People v Moran*, 91 NY2d 1010 [1998]). *Or*
- That is the law. (*People v Moran*, 91 NY2d 1010 [1998].) *Or*
- That is the law (*People v Moran*, 246 AD2d 607, 607-608, *lv denied* 91 NY2d 1010). *Or*
- That is the law. (*People v Moran*, 246 AD2d 607, 607-608 [2d Dept 1998, mem], *lv denied* 91 NY2d 1010 [1998].) *Or*
- That is the law, according to *People v Moran* (91 NY2d 1010). *Or*
- That is the law, according to *People v Moran* (91 NY2d 1010 [1998]). *Or*
- That is the law, according to *People v Moran* (246 AD2d 607, *lv denied* 91 NY2d 1010). *Or*
- That is the law, according to *People v Moran* (246 AD2d 607 [2d Dept 1998, mem], *lv denied* 91 NY2d 1010 [1998]).

Below are six 2002 Tanbook case-citation options for federal case law, adapted from section 2.2 (b) (2). The first two are citations in parentheses. The last four are citations in running text. The Tanbook lets the writer alter this citation in at least a dozen other ways to add optional information.

- That is the law (*United States v Gridley*, 725 F Supp 398). *Or*
- That is the law. (*United States v Gridley*, 725 F Supp 398 [ND Ind 1989].) *Or*
- That is the law, according to *United States v Gridley* (725 F Supp 398, 402-403 [US Dist Ct, ND Ind]). *Or*
- That is the law, according to *United States v Gridley* (725 F Supp 398, 402-403 [ND Ind]). *Or*
- That is the law, according to *United States v Gridley* (725 F Supp 398). *Or*
- That is the law, according to *United States v Gridley* (725 F Supp 398, 398-399 [ND Ind 1989, Sharp, Ch. J.], *affd* 909 F2d 1486 [7th Cir 1990], *cert denied* 499 US 951 [1991]).

Below are four 2002 *Tanbook* statutory-citation options, from section 3.1 (b) (2). The first two are citations in parentheses. The second two are citations in running text.

- That is the law (Town Law § 199 [1], [3]). *Or*
- That is the law. (Town Law § 199 [1], [3].) *Or*
- That is the law, according to Town Law § 199 (1), (3). *Or*
- That is the law, according to subdivisions (1) and (3) of Town Law § 199.

As non-standard as the Tanbook is, however, it's a great deal better for New York authorities than the Bluebook or ALWD.

Bluebook v Tanbook

The Bluebook is confusing and unhelpful—doubtless about many things, say those with the Bluebook blues. (*See e.g.* Maureen B. Collins, Legal Communication, *Bluebook Blues: Changes in the Seventeenth Edition*, 88 Ill BJ 663 [Nov. 2000]; A. Darby Dickerson, *An Un-Uniform System of Citation: Surviving with the New Bluebook (Including Compendia of State and Federal Court Rules Concerning Citation Form)*, 26 Stetson L Rev 53 [1996].) The Bluebook is especially unhelpful when it comes to New York citations.

One can study the Bluebook for years—as many law students do—before realizing that it distinguishes between citing New York cases in general and citing them for New York courts. In the Bluebook's most recent edition, the seventeenth, we're told in the section on New York materials (T.1) (pages 217–218) to cite current Court of Appeals opinions only to West Group's unofficial NE and NYS2d reporters, not to NY2d. Then we're told to cite current Appellate Division cases to the unofficial NYS2d, not to AD2d, and to cite current opinions from courts lower than the Appellate Division to NYS2d, not to Misc 2d. This advice violates several New York rules. (*See* CPLR 5529 [e] [requiring that "New York decisions * * * be cited from the official reports, if any"]; Rules of Ct of Appeals [22 NYCRR] §§ 500.1 [a], 500.5 [d] [3], 510.1 [a]; Rules of App Div, 1st Dept [22

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NYCRR] § 600.10 [a] [11]; Rules of App Div, 4th Dept [22 NYCRR] § 1000.4 [f] [7].)

Hidden at rule 10.3.1 (a) (page 62) and Practitioners' Notes rule P.3 (page 14) is the Bluebook's directive for those who write briefs to New York State courts. The Bluebook tells New York practitioners to cite thus, with parallel pinpoint (jump) citations: People v. Taylor, 73 N.Y.2d 683, 690, 541 N.E.2d 386, 389, 543 N.Y.S.2d 357, 360 (1989). This directive is directionless. New York judges, citing according to the Tanbook (section 2.2 [2] [a]), will not use an unofficial reporter if an Official Reports citation is available. Most New York State judges aren't even given West Group's unofficial reporters. Taxpayers don't pay for them. But all judges of courts of record in New York get the Official Reports. (Judiciary Law § 434 [6].)

Giving parallel New York citations serves only to help adversaries find your citations more easily—a professional courtesy, but ethically unnecessary—and bill clients for needless research. (*See e.g. Disenhouse Assoc. v Mazzaferro*, 135 Misc 2d 1135, 1137 n * [Civ Ct, NY County 1987, Friedman, J.] [urging attorneys to cite the Official Reports in their papers and briefs to trial courts], citing CPLR 5529 [e].) Giving parallel citations for New York cases will not help a New York State court.

Besides, it's a principle of honesty in citing that writers use what they cite and cite what they use. (*See e.g.* Paul Axel-Lute, *Legal Citation Form: Theory and Practice*, 75 Law Lib J 148, 149 [1982].) Differences sometimes appear between the authoritative Official Reports and the unofficial reports because court-annexed editors like New York's LRB often edit slip opinions after slip opinions are published unofficially. Sometimes private publishers conform to the final, official source; sometimes they don't, especially for lower-court opinions. Writers who give parallel citations but take their quotations from the unofficial reports may misquote. That's another reason to cite only the Official Reports in New York, a Tanbook directive the Bluebook contradicts.

The Tanbook gives correct, straightforward, easy-to-follow advice. Telling the reader at section 7.1 (b) that "the full names of authors is optional," the Tanbook explains how to cite New York Law Journal articles in a citation in parentheses: (Spencer, *Court of Appeals Caseload Shifts*, NYLJ, May 2, 1991, at 1, col 3). At section 2.2 (a) (2) (c), the Tanbook tells you how to cite Law Journal opinions in parentheses: (*Tryon v Westermann*, NYLJ, Oct. 6, 2000, at 30, col 5 [Sup Ct, Nassau County, Austin, J.]). On the other hand, the Bluebook is internally inconsistent and wrong when it comes to citing New York authorities.

Compare the Tanbook's simplicity and accuracy with the Bluebook's version of citing the New York Law Journal. Bluebook rule 10.1 (page 56) tells us to cite the Law Journal as follows, with a space between N.Y. and L.J.: *Charlesworth v. Mack*, N.Y. L.J., Dec. 5, 1990, at 1 (D. Mass. Dec. 4, 1990). This made-up citation is obviously made up. The Law Journal does not print federal opinions from Massachusetts, and because the Law Journal does not give decision dates, New York State law clerks suffer regular telephone calls from Bluebookers asking for needless decision dates for opinions published in the Law Journal. But it gets worse. Bluebook rule 16.5 (page 120), contradicting earlier advice (and its rule about capitalizing the preposition "to" in a title), tells readers to cite the Law Journal as follows: *New York County Lawyers Association: Edwin M. Otterbourg To Represent the Association in House of Delegates of American Bar Association*, 124 N.Y. L.J. 1221 (1950). The Bluebook's obscure, consecutively paginated NYLJ citation is nearly impossible to find.

The Bluebook can make a New Yorker blue in the face. Rule 10.4 (b) (page 66) provides as follows: "Do not indicate the department or district in citing decisions of intermediate state courts unless that information is of particular relevance." This is the Bluebook's example: Schiffman v. Corsi, 50 N.Y.S.2d 897 (Sup. Ct. 1944). The only problem with this guidance on New York law is that it's all wrong. First, it's always relevant for legal writers to denote the "department or district." Indeed, the rebellion against rule 10.4 (b) is the reason St. John's compiled its *New York Rules of Citation*. According to page 9 of the *Rules of Citation*, "Contrary to rule 10.4(b) of *The Bluebook: A Uniform System of Citation* (17th ed. 2000), it is the policy of the *St. John's Law Review* to give as complete information as possible when citing New York authority." Second, the cited *Schiffman* case isn't from an intermediate state court. The Bluebook's *Schiffman* citation is from a court of first instance: Supreme Court, Special Term, New York County. And third, an intermediate court really did decide *Schiffman*.

The Appellate Division, First Department, a New York intermediate court, affirmed in *Schiffman*, the Court of Appeals reversed, and the United States Supreme Court denied certiorari. The Bluebook should therefore have given a rather different citation, consistent with its own Practitioners' Notes and accurate legal research: In re Schiffman v. Corsi, 182 Misc. 498, 50 N.Y.S.2d 897 (Sup. Ct. N.Y. County), aff'd mem. sub nom. In re Schiffman v. Murphy, 268 App. Div. 765, 50 N.Y.S.2d 132 (1st Dep't 1944), rev'd sub nom. Schiffman v. Corsi, 294 N.Y. 305, 62 N.E. 81, cert. denied, 326 U.S. 744 (1945). Of all the examples the Bluebook could have picked, it picked one that has quite the intermediate

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procedural history, all of which the Bluebook ignored. Under the Tanbook, the citation for running text, with the optional bracketed details, is *Matter of Schiffman v Corsi* (182 Misc 498 [Sup Ct, NY County 1944], *affd sub nom. Matter of Schiffman v Murphy*, 268 App Div 765 [1st Dept 1944, mem], *revd sub nom. Schiffman v Corsi*, 294 NY 305 [1945], *cert denied* 326 US 744 [1945]).

The Tanbook requires parentheses and brackets to make citations unobtrusive. Parentheses and brackets (probably) have the opposite effect. But the Tanbook gets New York law right every time, and the Bluebook gets it wrong every time. And New Yorkers cite, or should cite, according to the Tanbook, whereas the Bluebook is designed to assure uniformity for practitioners and law-review editors from Alaska to Arkansas. Given all that, which style guide—the Tanbook or the Bluebook—should New York practitioners use to cite New York law?

ALWD v Tanbook

In its first year of issuance, the 2000–2001 academic year, 86 law schools adopted ALWD for their first-year writing and research programs. (*See* Assn. of Legal Writing Directors, <www.alwd.org/cm/adoptions.htm#LawSchools> [accessed Mar. 7, 2002].) One reason for its popularity is that "the ALWD manual has a built in constituency—legal writing directors and teachers—who are adopting it, using it, and pushing it." (Wayne Schiess, Law Office Management, *Meet ALWD: The New Citation Manual*, 64 Tex BJ 911, 915 [Oct. 2001].) Another is widespread dissatisfaction with the Bluebook. (*See e.g.* Carol M. Best and Susan Harrell, Review Article, *Has the Bluebook Met its Match? The ALWD Citation Manual*, 92 Law Lib J 337 [2000]; Pamela Lysaght and Grace Tonner, Plain Language, *Bye-Bye Bluebook?*, 79 Mich BJ 1058 [Aug. 2000].)

ALWD's main goal is to "address[] the needs of practitioners, not the needs of law journals." (M.H. Sam Jacobson, *The ALWD Citation Manual: A Clear Improvement Over the Bluebook*, 3 J App Prac & Process 139, 139 [2001].) Unlike the Bluebook, ALWD doesn't distinguish between law-review and practitioner citing. But ALWD fails New York practitioners. ALWD repeatedly tells its readers to follow local citation rules in jurisdictions that have local rules. (Pages 6-7 [Caveats]; 8-9 [Local Citation Rules].) And ALWD (Appendix 1) (page 361) tells its readers that New York has a local citation rule, which it purports to give in Appendix 2 (page 395). From its citations, however, all that ALWD tells you in Appendix 2 is that briefs to the Court of Appeals require citations to the Official Reports and that "[p]ractitioners might also want to consult the *St. John's Law Review Rules of Citation*," the New York Bluebook supplement for law-review articles. ALWD's New York errata sheets, accessible at <www.alwd.org/cm/updates.htm> [last updated Mar. 7, 2002]) in PDF format, doesn't solve the problem. All it adds, from the First Department's Rules (and without the subdivision and paragraph), is that "New York decisions shall be cited from the official reports, if any * * * * N.Y. Sup. Ct. App. Div. R. 600.10."

Nowhere does ALWD mention CPLR 5529 (e), which requires that practitioners cite the Official Reports in every document to every New York appellate court. Nor does ALWD mention the Tanbook, which tells you at section 2.2 (a) (2) (a) not to cite unofficial New York reporters if a case is officially reported, regardless of the court to which or for which you write. Indeed, whenever ALWD gives an example of how to cite a case from New York, ALWD violates not merely New York's "local rules" but also its own rules. At ALWD rule 11.3 (f) (page 51), the entire New York citation, from a citational footnote, is 634 N.Y.S.2d 740 (App. Div. 1995), *aff'd*, 679 N.E.2d 1035 (N.Y. 1997). This citation breaks with tradition by italicizing the comma after "*aff'd*"; contradicts ALWD rule 12.6 (b) (2) (page 74), which requires that citations include "information about departments, districts, or divisions"; and flips from the New York Supplement Reporter, Second Series, to the North Eastern Reporter, Second Series, without rhyme, reason, or explanation. The Tanbook would cite the case as follows in running text: *Matter of Gazza v New York State Dept. of Envtl. Conservation* (217 AD2d 202 [2d Dept 1995], *affd* 89 NY2d 603 [1997]).

ALWD fares no better in the other three places it cites New York cases. A key problem ALWD presents is whether practitioners should give parallel citations. In its New York section (Appendix 1) (pages 360–361), ALWD doesn't tell its readers which reporter to cite. That's an improvement from the Bluebook's Table 1, which tells you to cite only the West Group unofficial reporters. But it's not much of an improvement. ALWD tells you at rule 12.5 (c) (page 73) that if you use a parallel citation, "provide the pinpoint reference to at least the West reporter." Pinpoint citing only to an unofficial West Group reporter will force diligent New York judges to read your entire case from the Official Reports. That defeats the entire reason for pinpoint citing.

More problematic still is that ALWD doesn't tell you what to do with parallel citations for New York. ALWD's lack of guidance concerning parallel citations forces the reader to study ALWD's examples. One example (rule 12.6 [b]) (page 74) that has no parallel citation is *Kozemko v. Griffith Oil Co.*, 682 N.Y.S.2d 503 (App. Div. 4th Dept. 1998). ALWD burdens its readers with the "App. Div." mention—perhaps first-year law students in Idaho don't know that the Fourth Department already suggests the Appellate Division—and forgets the

"Inc." after "Co." The Tanbook would cite the case as follows in running text: *Kozemko v Griffith Oil Co., Inc.* (256 AD2d 1199 [4th Dept 1998, mem]).

The next example from ALWD (rule 12.6 [e]) (page 76) is a parallel citation: *People v. Hackett*, 228 A.D.2d 377, 646 N.Y.S.2d 89 (1st Dept. 1996). The Tanbook would make the running-text citation more simple: *People v Hackett* (228 AD2d 377 [1st Dept 1996]).

The last example from ALWD (rule 12.11 [b]) (page 84) reverts to the unofficial reporter only: *Harrison v. Alago*, 608 N.Y.S.2d 118 (App. Div. 2d Dept. 1993) (mem.). ALWD's citation will raise a New York judge's eyebrows because it fails to include the official citation and because it presumes that the judge doesn't know that the Second Department is part of the Appellate Division. ALWD's citation also contradicts ALWD rule 12.2 (o) (pages 65–66), which tells you to include "In re" in a case name and to replace "Matter of" with "In re." *Harrison* is an "In re." The Tanbook would cite the case as follows in running text: *Matter of Harrison v Alago* (199 AD2d 562 [2d Dept 1993, mem], *appeal dismissed & lv denied* 83 NY2d 831 [1994]).

ALWD was written by non-New Yorkers for non-New Yorkers. It tells us to cite the Official Miscellaneous Reports (although it doesn't tell us when) as follows (Appendix 1) (page 361): N.Y. Misc. 2d, as in 60 N.Y. Misc. 2d 60. Follow that advice and you'll be labeled a novice who doesn't realize that New York judges know that the Miscellaneous Reports contain cases from New York only. ALWD gives you good advice if you're from Rome, Italy, but poor advice if you're from Rome, New York.

Except in general terms in Appendix 1 (page 361), moreover, ALWD doesn't tell you how to cite a New York statute. That's a good thing, for ALWD's advice in Appendix 1 mirrors the Bluebook's turgid advice (T.1) (pages 219–221). The Tanbook's simple CPL 10.20 citation becomes, in both the Bluebook and ALWD, a complex N.Y. Crim. Proc. Law § 10.20 (McKinney 1992 & Int. Supp. 2001-2002) or equally complex citations from Consolidated Laws Service or Gould's New York Consolidated Laws Annotated.

The one time ALWD gives a specific example of a New York court rule, ALWD makes it difficult to find the citation: ALWD doesn't give the location of the court rule. From ALWD (page 150): N.Y. Code Prof. Resp. DR 4-101(c)(2) (1999). From a running-text citation in the Tanbook (section 4.1 [b] [5] [b]): Code of Professional Responsibility DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7]). The Tanbook's authors know that the Disciplinary Rules

are binding because the departments of the Appellate Division adopted them, and therefore that the Rules are in the Appellate Division's Rules. ALWD doesn't know about that stuff.

Both the Bluebook and ALWD are brilliant documents, the product of years of thought and sacrifice. They're exceptional when it comes to citing federal, international, and foreign authorities. Indeed, in the Preface to the 2002 edition, the Tanbook itself suggests consulting the Bluebook and ALWD if the Tanbook doesn't answer a question. But the Bluebook and ALWD don't cite New York sites properly. When it comes to citing New York authorities, the Bluebook and ALWD remind me of the Rabbi's prayer for the Czar in Fiddler on the Roof: "May God bless and keep the Czar—far away from us."

Old Tanbooks v 2002 Tanbook

Previous editions of the Tanbook did not become widely used. Its rules were not current, and they deviated too greatly from other citation manuals. Previous Tanbooks dictated commas after signals ("*See*,"), short-form pinpoint citations (142 AD2d, at 483), footnote numbers (20, n 2), and "id." (*Id.*, at 234). They're (not preferred) now. Previous Tanbooks required "*supra*" for short-form case citing. They, too, are "not preferred" any longer. Now, as in ALWD, all signal commas are disfavored. Now, as in the Bluebook and ALWD, "at" and "*id.*" short-form citing is required. In the past, every other word, it seemed, was a capital investment: from "Judge," to "Federal," to "Statute of Limitations." Now (section 10.1) using these ancient capitals is a capital offense.

The 2002 Tanbook still uses 19th century asterisks (* * * [omission within sentence] *or* * * * * [omission at end of sentence or to jump sentences]), not modern ellipses (. . . *or* . . . .), to denote omissions in quoted material. Other than that, the 2002 Tanbook has entered the 21st century. Old Official Reports contain numerous ways to punctuate quotation marks. Now the Tanbook (section 11.1 [b]) requires writers to follow current, conventional American format: "Commas and periods are placed within the ending quotation mark; colons and semicolons are placed outside. Other punctuation, such as question marks and exclamation marks, is placed within the ending quotation mark only if part of the quoted material."

It can even be said that the Tanbook has entered the 22nd century. Four examples. In section 12.3, the new Tanbook contains a section, with excellent examples, on avoiding Latinisms: "The use of Latin and other foreign language words and phrases generally is discouraged where an English language equivalent is available." The quantum of Latin will now be pro rata.

In section 12.1, the new Tanbook has an updated section on gender-neutral writing, based on, but better than, a court-system booklet, New York State Judicial Committee on Women in the Courts, Fair Speech: Gender-Neutral Language in the Courts (2d ed, NY St Unified Ct Sys 1997). The Tanbook is progressive and intelligent on the subject. For example, it turns "foreman" into "presiding juror," not the trite "foreperson."

Throughout the new Tanbook, moreover, are sophisticated ways to cite CD-ROM and Internet materials, including cases reported on the Law Reporting Bureau's Slip Opinion Online Service, accessible from the LRB at <www.courts.state.ny.us/reporter/decisions.htm> [accessed Mar. 7, 2002]. (*See generally* Nora A. Jones, *Greater Access to NY Trial Court Decisions*, Daily Record, Aug. 30, 2001, at 1, col 2.) Unedited opinions not selected for the Miscellaneous Reports but published in the LRB's Slip Opinion service, including all Appellate Term opinions from now on, are cited as follows (section 2.2 [a] [2] [b]) when citing in parentheses: (*TSI W. 14 v Samson Assocs.*, 2001 NY Slip Op 40001 [U], *5). Selected but not-yet-published opinions are cited as follows (section 2.2 [a] [1] [h]) as citations in parentheses, with optional details in brackets and a pinpoint citation: (*Pittari v Pirro*, __ Misc 2d __, 1999 NY Slip 99006, * 3 [Sup Ct, Westchester County, Sept. 15, 1998]).

The new Tanbook also enters the modern era by permitting conventional spelling ("marijuana") (Preface) and by eliminating excessive italicization for foreign words and phrases used in common legal English ("pro se," not "*pro se*") (section 12.3).

Some Tanbook rules will frustrate Bluebook afficionados. For example, the Bluebook tells you in rule 6.2 (a) (page 49) to "spell out the numbers zero to ninety-nine in both text and in footnotes." The Tanbook's suggestion (section 10.2 [a] [1]) is less formal but easier to read: "[N]umbers up to and including nine should be spelled out and numbers above nine should be denoted by figures." The Bluebook (rule 5.1 [a]) (pages 43–44) also instructs not to surround blocked double-indented quotations of 50 words or more with quotation marks, and to add the citation on a line separate from the quotation. The Tanbook (section 11.1 [a]) provides that quotation marks must fully surround blocked quotations. By LRB editorial convention, the citation must appear immediately at the end of and on the same line as the blocked quotation. The reason the Tanbook departs from the Bluebook on this question is that when an opinion goes online, the reader cannot see the indentations; quotation marks make double-indented quotations visible. Here, again, the Tanbook is more user-friendly than the Bluebook.

The Tanbook's Future

The Tanbook isn't perfect. In its examples, it italicizes journal articles but not book titles. And its parentheses

and brackets detract and use up space the LRB could use to publish more opinions. In its massive revision, why didn't the LRB get rid of those parentheses? All that parentheses do is throw readers a curve. The answer is *stare citatis*: not everything can change in one swoop. As State Reporter Spivey explained,

> "Although this revision is extensive, we exercised restraint in changing established rules. Judges and their staffs, and our own staff, are familiar with the existing rules, and a change in rules requires re-learning. We didn't want to burden anyone unnecessarily. So we confined our rule changes to those areas most in need of reform. The Style Manual is a work in progress, and I hope that we will be able to address additional problem areas in the future. For now, I'm satisfied that we have made a course correction and are headed in the right direction." (E-mail from Hon. Gary D. Spivey to author, Feb. 21, 2002.)

Will the next Tanbook (finally [and definitively]) get rid of parentheses and brackets? One can only hope. They're annoying, confusing space-wasters. Will the next Tanbook require authors to add currently optional information like years, courts, and leave-denied mentions in case citations? One can only hope. It's smart to include that now-optional information to explain whether a case is binding or persuasive, and if persuasive, how persuasive. Will the next Tanbook compel writers to add the first names and middle initials of writers of secondary authority? One can only hope. It's polite to do so.

The 2002 Tanbook allows too many options. It's perplexing, disordered, and non-uniform for readers to see and for writers to use citation variants, at the writer's discretion, for citations in running text or in parentheses. Why have a system that allows any of the following? That is the law (Penal Law § 10.00 [1]). *Or* That is the law. (Penal Law § 10.00 [1].) *Or* That is the law at Penal Law § 10.00 (1). And recall the federal *Gridley* citation options above? The many ways to cite *Gridley* will cause gridlock. As one legal-writing guru explained, "[i]n citation, as in procedural matters, '[i]t is almost as important that the law should be settled permanently, as that it should be settled correctly.'" (Bryan A. Garner, Book Review, *An Uninformed System of Citation: The Maroon Book Blues*, 1 Scribes J Legal Writing 191, 191 [1990] [arguing that it's "wrong to discount the importance of a uniform method of citing legal authority," *id.* at 193], quoting *Gilman v City of Philadelphia*, 70 US [3 Wall] 713, 724 [1865].) Let's hope that the next Tanbook eliminates the current Tanbook's almost-limitless discretion.

One area in which the 2002 Tanbook judiciously gives writers discretion is in citational footnotes. Some like citations in footnotes; others don't. (*Compare* Bryan A. Garner, *Clearing the Cobwebs from Judicial Opinions*, 38 Court Review 4 [Summer 2001], *and* Bryan A. Garner, *The Citational Footnote*, 7 Scribes J Legal Writing 97 [1998-2000], *with* Richard A Posner, *Against Footnotes*, 38 Court Review 24 [Summer 2001], *and* Helen A. Anderson, *Are Citations on the Way Down? The Case Against Footnotes* <www.wsba.org/barnews/2001/12/anderson.htm. [Dec. 2001, accessed Mar. 7, 2002], reprinted in 20 The Catchline [Assn. of Reporters of Judicial Decisions] 8 [Feb. 2002].) The 2002 Tanbook (section 1.2 [d]) allows citational footnotes, either in running text or parentheses. One reason to use citational footnotes is this very paragraph. It would have been less cluttered without the citations.

Will the next Tanbook be even better than the 2002 Tanbook? Chief Judge Kaye in her Foreword to the 2002 Tanbook believes it will: "I suspect that the next edition of the Style Manual will, like this one, have many exciting improvements. And so the law develops, and is perpetuated."

Until the next Tanbook is published, New York judges and attorneys should follow New York's 2002 Tanbook. It's by New Yorkers for New Yorkers. And it stands on its own as an efficient and effective system of citation and guide to legal writing.

(See the next page for a comparison of selected rules from the Tanbook, the Bluebook and the ALWD volume.)

COMPARISON OF SELECTED ALWD, BLUEBOOK, AND TANBOOK RULES FOR NEW YORK PRACTITIONERS

RULE	ALWD 2001	BLUEBOOK 17TH Ed.	TANBOOK 2002
Cases	Does not distinguish between citing in text and in parentheses. *Solomon v. New York*, 146 A.D.2d 439, 440, 541 N.Y.S.2d 384, 385 (1st Dept. 1989) (quoting *Addington v. Texas*, 441 U.S. 418, 427 (1979)).	Does not distinguish between citing in text and in parentheses. Solomon v. New York, 146 A.D.2d 439, 440, 541 N.Y.S.2d 384, 385 (1st Dep't 1989) (quoting Addington v. Texas, 441 U.S. 418, 427 (1979)).	The entire Tanbook distinguishes between citing in running text and in parentheses. Text citation, with optional matter in brackets: *Solomon v State of New York* (146 AD2d 439, 440 [1st Dept 1989], quoting *Addington v Texas*, 441 US 418, 427 [1979]). Parenthetical citation, with optional matter in brackets: (*Solomon v State of New York*, 146 AD2d 439, 440 [1st Dept 1989], quoting *Addington v Texas*, 441 US 418, 427 [1979].)
Spacing & periods	F. Supp., F.3d, U.S., S. Ct., L. Ed. 2d, N.Y. Misc. 2d, A.D.2d, N.Y.2d, N.E2d, N.Y.S.2d Period after "v." for "versus." Periods in statutes & rules: Surrog. Ct. P. Act § 201 (McKinney 1984); 18 U.S.C. § 1965 (1994); 42 C.F.R. § 422.206(a) (1999). No space between subdivisions but space before paragraph: N.Y. Civ. P.L.R. § 5015(a)(1) (McKinney 1992). Periods after all abbreviations: *E.g.* Cir. (for "Circuit"); S.D.N.Y. (for "Southern District of New York"); Sup. N.Y. County (for "Supreme Court, New York County"); N.Y.L. Sch. L. Rev. ("New York Law School Law Review").	F. Supp., F.3d, U.S., S. Ct., L. Ed. 2d Misc. 2d, A.D.2d, N.Y.2d, N.E2d, N.Y.S.2d Period after "v." for "versus." Periods in statutes & rules: Surr. Ct. Proc. Act § 201 (McKinney 1984); 18 U.S.C. § 1965 (1994); 42 C.F.R. § 422.206(a) (1999). No space between subdivisions but space before paragraph: N.Y. C.P.L.R. 5015(a)(1) (McKinney 1992). Periods after all abbreviations: *E.g.*, Cir. (for "Circuit"); S.D.N.Y. (for "Southern District of New York"); Sup. Ct. N.Y. County (for "Supreme Court, New York County"); N.Y.L. Sch. L. Rev. ("New York Law School Law Review").	F Supp, F3d, US, S Ct, L Ed 2d, Misc 2d, AD2d, NY2d, NE2d, NYS2d No period after "v" for "versus." No periods in statutes & rules: SCPA 201 **or** Surrogate's Court Procedure Act § 201; 18 USC § 1965; 42 CFR 422.206 (a). (Text.) Spaces between subdivisions and paragraphs: (CPLR 5015 [a] [1]) **or** (Civil Practice Law and Rules § 5015 [a] [1].). (Parentheses.) Except for such things as months and case names, no periods after abbreviations: *E.g.* Cir (for "Circuit"); SD NY (for "Southern District of New York"); Sup Ct, NY County (for "Supreme Court, New York County"); NYL Sch L Rev ("New York Law School Law Review").

Survey of Practice Before Administrative Law Judges Finds Counsel Are Often Poorly Prepared

BY BEVERLY M. POPPELL

The likelihood that attorneys will represent a client in an administrative law proceeding sometime in their careers is great. The chance increases with every law the state or local legislature passes.

Whether it's an appeal of a tax assessment, a claim of discrimination for any number of statutorily prohibited grounds, or an appeal of a consumer complaint against a licensed business or professional client, chances are good that an attorney will need to be familiar with at least one administrative law forum.

A survey by the Subcommittee of Administrative Law Judges of the Committee on Attorneys in Public Service, a standing committee of the New York State Bar Association, has assessed the quality of legal representation by practitioners who have appeared before a cross-section of administrative law judges (ALJs). The judges also offered their own views on the administrative law process itself and how it produces the determinations often heard on appeal.

The survey responses identified the most common mistakes attorneys make when handling matters in the administrative law forum, the ethical dilemmas that often arise, and the effect of the presence of *pro se* litigants in the administrative law forum. The quality of written submissions was also discussed. Finally, the ALJs were asked to assess the level of civility present in their hearings.

Common Mistakes

"The most common mistake is to appear unprepared," said Karen Miller, administrative law judge at the New York City Department of Consumer Affairs. That agency regulates the conduct of business in the City of New York. It also hears consumer complaints, imposes fines, and orders restitution where appropriate.

Her agency has the authority in certain cases to suspend or revoke licenses, order businesses to be "padlocked," and order vehicles used unlawfully to be forfeited to the city. "Unfortunately, not all representatives who appear before us understand the possible remedies and may not address the appropriate issues," she observed.

"Very few attorneys bother to review the Administrative Code of the City of New York and the Rules of the City of New York as they relate to administrative hearings in general and the substantive law and rules in particular," she said. Procedurally as well, Judge Miller observed that attorneys are simply not prepared to go forward; instead they assume that their cases can be adjourned without good cause.

Failure to prepare for a hearing is a common mistake that James F. Horan singled out from his experience with the New York State Department of Health. An administrative law judge hearing disciplinary charges against physicians and other health care professionals, Judge Horan estimated that more than half the attorneys who appear before his agency are new to the forum. They are often lacking in familiarity with the State Administrative Procedure Act (SAPA) and with hearing provisions that are promulgated in the controlling statute and by the agency itself.

Beyond unfamiliarity with governing regulations, Judge Horan said some attorneys are also unfamiliar with the substantive language at issue. "An attorney should remember that the same word can embody different legal definitions in different contexts," he explained.

"For example, under New York Education Law, specifically sections 6530(3) and (4), the definition of professional misconduct by a physician includes practicing with negligence on more than one occasion or practicing with gross negligence. To prove negligence

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under the Education Law requires a showing that a physician failed to exercise care that a reasonably prudent physician would exercise under the same circumstances, but it requires no showing that a physician caused harm to a particular patient, in contrast to common law negligence."

Lack of preparation is a common problem regardless of whether an attorney who appears before the New York City Parking Violations Bureau (PVB) does so regularly or not, according to Irwin M. Strum, an administrative law judge with the city's Department of Finance. Although his agency's hearings are relatively informal, the Commercial Adjudications Unit handles a high number of summonses, and the respondents are commercial companies frequently represented by counsel, either alone or in conjunction with a ticket broker who must be represented by counsel. Attorneys also appear before appeals panels and at license reinstatement and fraudulent registration hearings.

Most arbitrability, "scope," and improper practice petitions can be determined without a trial, because there is no factual dispute on a material legal issue.

Marshaling proof in those hearings is a problem, according to Judge Strum. "Some attorneys attempt to testify as to facts to which they have no personal knowledge without producing any actual witness," he said.

Judge Strum's colleague at the PVB, Judge Stephen Jackel, added that attorneys who practice before him often "fail to appreciate that evidentiary rules are much less restrictive in administrative hearings than in court." In Judge Jackel's experience, attorneys who appear before him are generally unfamiliar with the relevant statutes and administrative rules as well as the process of adjudicating parking summonses. Another problem he has experienced involves attorneys who are "overly argumentative" and attempt to reargue an issue after the ALJ has issued a ruling.

Elizabeth Gilbert, a senior administrative law judge at the PVB, made a similar observation. She noted that under section 240(2)(c) of the New York State Vehicle and Traffic Law, her tribunal is not bound by the rules of evidence in the conduct of the hearing, except for the rules relating to privileged communications. "Attorneys who are not familiar with this provision often make unnecessary objections to evidence," she explained.

At the New York City Tax Appeals Tribunal, Steven Gombinski, the chief administrative law judge, said he sees practitioners who are unprepared to defend their case even at the pre-hearing conference. Judge Gombinski reported that poor preparation for the conference is often evident in the attorney's failure to develop facts on which the case rests, a failure that can be dispositive of the matter.

Written Submissions

Factual deficiencies of the sort described by Judge Gombinski in City Tax Appeals are also seen at the pre-hearing stage at the New York City Office of Collective Bargaining (OCB), which administers the New York City Collective Bargaining Law. The Collective Bargaining Law is similar to the New York State Public Employees Fair Employment Law ("Taylor Act"), which is administered by the New York State Public Employment Relations Board (PERB). The OCB hears matters pertaining to procedural arbitrability of contractual grievances, issues declaratory rulings with respect to the bargainability of subjects in dispute, such as changes in employee scheduling, benefits with monetary implications, and safety issues, to name a few, and empanels arbitrators who hear breach-of-contract claims and certain claims of impasse in the collective bargaining process. This is in addition to certifying bargaining units, resolving representational questions, and, perhaps the bulk of its work, adjudicating unfair labor ("improper") practice claims.

A failure to specify factual allegations in improper practice pleadings under OCB jurisdiction can result in dismissal of the petition on grounds of legal insufficiency, without so much as a hearing. Practitioners unfamiliar with OCB practice and procedure, and even some who have been practicing before the OCB for years, erroneously believe that their clients are entitled to a hearing.

Most arbitrability, "scope," and improper practice petitions can be determined without a trial, because there is no factual dispute on a material legal issue. But even when such a factual dispute exists, some practitioners, particularly those unfamiliar with the agency's practice of not holding hearings in every case, fail to plead the case with sufficient specificity even to warrant a hearing.

By contrast, Jackie Brilling, an administrative law judge at the New York State Public Service Commission (PSC), said the written submissions she sees are voluminous and of high quality. That may have something to do with the fact that, as Judge Brilling described it, "public utility regulation entails highly technical, complex issues and public policy considerations affecting local, state, and federal entities and consumers. Necessarily, practitioners before the Commission are highly paid and technically proficient."

Cathy Bennett, an administrative law judge with the New York State Division of Tax Appeals, reported that the quality of written submissions she sees is "all over the board in our cases, from taxpayer, *pro se* handwritten scribble, to very professional briefs, and everything in between." At Tax Appeals, the taxpayer, rather than the Tax Department, bears the burden of proof that an assessment is erroneous, except in cases of suspected fraud. Regardless of the quality of the written submission, Judge Bennett said, respondents often neglect to bring courtesy copies of the papers they intend to submit as evidence. In remote locations of the state where copiers may not be readily available, "that becomes a problem," she explained.

New York City's Tax Appeals Tribunal deals with highly specialized areas of income and excise taxation, which Judge Gombinski admits can be "quite difficult for the general practitioner." As Judge Bennett has found on the state level, Judge Gombinski also said he finds that the quality of written submissions varies "greatly, which is a shame," because "a quality submission that, for example, sets forth a legal argument the ALJ might otherwise not have considered, could greatly benefit a party's case."

Judge Miller at the New York City Department of Consumer Affairs said the problems she sees with the written submissions appear to be traceable to unfamiliarity with the forum. "We sometimes receive excellent submissions and at other times receive submissions which are grossly inadequate. For example, some attorneys are still not aware that hearsay is not only admissible in an administrative hearing, but if sufficiently reliable, can be the basis for a decision."

Some of the written submissions to Consumer Affairs come from non-attorney representatives who, under the Rules of the City of New York, are permitted to appear before the agency on behalf of clients. "Some of these non-attorney representatives not only argue facts but argue law and even submit legal memoranda, citing cases, statutes and principles of law," Judge Miller said. She is "quite concerned" about what she describes as the unauthorized practice of law, in part because of the extent to which non-attorneys are involved in the process at Consumer Affairs.

While Carol Abrams reported that the quality of written submissions to code-enforcement ALJs at the New York City Department of Housing Preservation and Development is "good," the ALJs in the New York City Department of Finance reported that written submissions in PVB cases, although rare, nonetheless range from "excellent" to "incomplete," "poorly written," and "lacking sufficient detail and without full research and/or proper citation."

At the New York State Department of Health, Judge Marc P. Zylberberg described the range of submissions as "very good" to "extremely bad," with the majority as "fair to lacking." His observation was reiterated by Judge Horan, who said he finds "very few written submissions helpful" in preparing decisions.

"Attorneys often miss the point in the case and too often use written submissions to attack their adversaries

The View From the Supreme Court

As part of its effort to review the status of legal representation before administrative law tribunals, the Committee on Attorneys in Public Service sought observations from members of the bench about the quality of ALJ determinations when they become the subject of appeals, and the quality of the legal representation as shown in the record.

Justice Helen E. Freedman of the Supreme Court in New York County has presided over numerous special proceedings under Article 78 of the Civil Practice Law and Rules, the article governing judicial review of administrative determinations. Top among her comments was the observation that she often finds a lack of clear findings of fact, or "what they are based on." In many cases, she said, determinations appear to have been "hastily decided" or made without the ALJ having listened carefully to the petitioner.

"What I look for are ALJs who really listen to what the petitioner says and who give petitioners, particularly *pro se* petitioners, a chance to present his or her case," she said. "We recognize that it's hard to deal with *pro se* petitioners and not appear biased" when enabling the petitioner to present his or her case.

Asked for practical advice that might be helpful to administrative law practitioners, Justice Freedman urged practitioners to "help the ALJ make a clear record" and ALJs to encourage both sides to put into evidence "whatever documentation is needed to explain what transpired as clearly as possible." "The record is important," she emphasized. "If there is a lack of clarity in the [ALJ's] decision, ask for clarification before the determination is appealed."

Finally, Justice Freedman said she advocates efforts to have parties settle their own disputes. "Often, the decisional resolution in court is not satisfactory to the parties. I would recommend mediation any time," she said, expressing the belief that "many more cases would be resolved if mediation were tried," especially in areas such as social services, where petitioners are likely to proceed *pro se*.

rather than arguing their cases," Judge Horan explained. "I see very professional looking briefs that waste lots of pages setting out the citations to case law that guarantees due process in administrative hearings or that goes into too much detail in discussing the review standards in a case. These same briefs then ignore or gloss over case law directly on point to the particular issues in the case and on which the case will turn."

Judge Horan said he also sees briefs in which advocates fail to address pertinent case law cited by their adversaries. "I have seen more than a few briefs," he recalled, "in which attorneys have cited cases without checking on the cases through Shepard's or KeyCite."

Written submissions play a unique role in physician discipline cases in that counsel are afforded an opportunity to submit written, proposed findings of fact that may be used by the ALJ in the drafting of the decision. Yet, Judge Horan noted: "Many attorneys forfeit that chance by submitting what they call 'proposed findings' but which instead constitute a written summation or memorandum of law. In my agency, each finding of fact must cite to evidence from the record that supports the finding. Some attorneys submit well-written findings but provide no citation to the record to support the finding. Such a proposed finding offers no help to an ALJ in drafting a decision."

Pro Se Litigants

Litigants who face the administrative tribunal without benefit of legal counsel require administrative law judges to take extra steps to assure due process while maintaining a reasonable degree of administrative efficiency. This is especially true in Consumer Affairs where, Judge Miller said, attorneys "need to understand that the ALJ may assist the unrepresented litigant by asking certain questions to enable her/him to present relevant facts. Such questioning is in the nature of fact-finding and does not necessarily indicate a bias toward the person who is not represented."

Judge Brilling at the PSC agreed with this approach. She explained, "If we do our jobs correctly, there is a level playing field, such that *pro se* litigants do not feel overpowered. We establish ground rules in the beginning of our proceedings to ameliorate problems."

"Lots of patience" is how Judge Bennett described the special considerations given to *pro se* litigants before the State Tax Appeals Tribunal. ALJs tend to take a more active role in questioning the unrepresented individual, giving procedural guidance, and initiating discussion if necessary, than if the individual were represented by counsel. One particular problem she noted is that taxpayers not represented by attorneys occasionally confuse legal arguments with facts. "Proper proof of facts and the introduction of evidence in a proper manner, such as laying a foundation for the introduction of a document, is often a confusing area," she noted.

"Responsibility for dealing with *pro se* and non-attorney litigants falls on the ALJ rather than the attorney for the other party," said Judge Horan. When he presides in a Department of Health case with an attorney and non-attorney litigant, he said the attorney can expect him to give the non-attorney wider latitude in presenting the case due to that person's lack of experience. "No attorney in such a case has ever expressed objection about that wider latitude," he observed. "Even otherwise contentious attorneys seem to back off when they face a non-attorney adversary."

Ethical Dilemmas

Ex-parte communications are a problem that Judge Horan said he has faced with both *pro se* litigants and parties represented by counsel. He said he believes that avoiding such communications becomes "a crucial element" in providing a fair hearing and avoiding the appearance of impropriety. Pointing out that, under § 307(2) of SAPA, no ALJ may communicate with a party on an issue of fact or of law except on notice and opportunity for all parties to participate, Judge Horan interprets the ban as permitting some one-party contacts when questions arise about scheduling, or procedure, or which statutes and regulations are controlling. He noted, however, that one colleague refuses any one-party contacts even on matters other than issues of law or fact, in the belief that such a contact can "easily" become an improper, *ex-parte* communication.

When ALJ Horan is sent written material without copies provided to the opposing party, he assumes those contacts occur due to ignorance about the ban. He said he sends a letter to both parties explaining the ban on *ex-parte* contact and attaches a copy of the material he received.

Avoiding any appearance of favoritism or impropriety is also a top priority at the New York City Department of Finance, where ALJs at the Parking Violations Bureau must recuse themselves if they know respondents who appear before them. Even with respect to attorneys who frequently appear before the same ALJs in the Commercial Adjudications Unit, ALJs said they guard against becoming too friendly with counsel with whom they often work.

The same issue concerns OCB trial examiners in New York City. Most of the practitioners who appear before that agency have done so for many years and assume a certain familiarity with the process and perhaps unwittingly with the personnel. Although some practitioners have been "on the scene" longer than some agency staff, trial examiners are occasionally called upon to remind counsel that *ex-parte* communications are not permitted on questions of law and fact.

Another problem OCB trial examiners said they occasionally face is having to disabuse practitioners of the erroneous assumption, particularly by *pro se* litigants and counsel unfamiliar with the process, that the OCB is a unit of the Mayor's Office of Labor Relations. This assumption is often made because the OCB is located in the same building as the Mayor's Office of Labor Relations. Not only is the OCB an impartial, non-mayoral agency, representing neither City Hall nor labor unions, but its determinations are issued in the name of the Board of Collective Bargaining or Board of Certification. They are not mere recommendations to any commissioner. However, where these agencies share the same facilities, *e.g.*, elevators, lobby, hallways, etc., preserving even the appearance of impartiality requires the hearing officer to be circumspect in both the hearing room as well as in informal, hallway conversations.

An ethical problem that Judge Gilbert of the PVB identified involves attorneys who simply do not know the applicable law. "It is unethical," she noted, "for an attorney to agree to represent a party without being competent to do so." When an attorney without knowledge of PVB policy and governing statutes inadvertently fails to raise a valid defense or attempts to present an argument over which her tribunal has no jurisdiction, she said she may be forced to find against the attorney's client on that point.

Docket Load

Volume "affects the quality of everything," according to Judge Miller at Consumer Affairs, including the amount of time she may devote to a case. "Dockets," she said, simply "are generally too heavy."

Volume is also a consideration at the Commercial Adjudications Unit at the New York City PVB. "While one hearing deals with numerous summonses," Judge Strum said, "each summons is a separate and unique case," placing added burden on both practitioner and ALJ. In spite of that, and in spite of a party's knowledge or lack of it with regard to governing law and policy, Irwin's colleague Judge Gilbert said, "Every respondent, whether represented by counsel or not, is afforded a full and fair hearing. This means that all relevant evidence submitted at the hearing is evaluated without regard to time constraints."

Judge Gombinski of the Tax Appeals unit concurred, stating he and his colleagues in the New York City agency "make a great effort to afford all petitioners the time they require."

At the State Department of Health, Judge Horan said he does not allow docket load to affect the quality of evidence he receives at his hearings. "I have never limited any party in presenting a case due to my workload," he explained. "I will limit attorneys if I find they are wasting time or asking repetitious questions." Rather than

A Veteran's Suggestions

A case comes to a hearing because the parties are unable to settle the case and need the administrative law judge's assistance to resolve the dispute. The ALJ's job is to render a decision no matter how difficult it may be. So says Judge Robert F. McWeeny, a Superior Court judge in Connecticut, who for many years has taught ALJs and practitioners in New York and New England how to improve the quality of administrative law proceedings.

Having heard hundreds of appeals of administrative decisions issued by state agencies, hearing officers, and decision-making boards, Judge McWeeny reflected on what the savvy practitioner needs to keep in mind about the administrative hearing process.

"The due process requirement of an opportunity to be heard encompasses—at the administrative hearing level—an opportunity to present evidence and argument as well as to cross-examine or comment on evidence admitted against a party," he said. "What is required is a *fair* hearing, not a perfect or exhaustive hearing. The opportunity to cross-examine a witness does not include the right to harass, intimidate, insult or wear down a witness.

"Administrative hearings are subject to human limitations. This is especially true with respect to evidentiary rulings. Administrative hearings are generally not subject to the rules of evidence. It is appropriate and often necessary for a hearing officer in the administrative setting to indicate that no argument is required.

"Courts are unanimous in holding administrative hearings to a more relaxed standard of evidentiary rulings. Redundant or irrelevant evidence is not proper before the administrative tribunal, and counsel to a party in such a setting can expect such evidence to be excluded. ALJs—and courts—are constantly on the alert to avoid the introduction of collateral issues, those which are not necessarily required to be resolved in the case at hearing.

"The competent administrative law judge will 'allow' counsel to try the case, to have his or her day in 'court.' However, the competent practitioner must bear in mind that the ALJ's obligation is to render a decision in a fair and efficient manner. If, at the outset, the ALJ has articulated his or her authority and a determination to render a fair decision, the parties are on notice as to the scope of their 'day in court.'"

docket load or time constraints, Judge Horan said he believes that a party's financial resources usually dictate the quality of a case. "A party with the financial resources can afford the best and most thorough counsel, expert witnesses, and a more exhaustive investigation," he said.

Similarly, Judge Brilling of the PSC said she finds that the quality and quantity of evidence presented at her hearings are affected less by her docket load and more by the expertise of the practitioners and parties who appear. "Increasingly, there are more collaborative and mediated disputes which, if left unresolved, affect competitive positions of the parties or prevent customers from receiving services or products," she said. "Such proceedings require the compression of much work—discovery, testimony, other evidentiary matters, briefs and decision-writing—into a short time frame."

However, because of the technical nature of the disputes in the public utility arena, Judge Brilling said she has also observed that the technical experts who participate in her hearings are often more inclined than counsel to resolve disputes constructively. The non-lawyers tend to concentrate on finding operational or technical solutions to problems rather than to engage in what she calls the "posturing or positioning" that attorneys are prone to exhibit.

Civility

Failure of a legal representative to exhibit civil behavior in a Consumer Affairs hearing never benefits a client, in the view of Judge Miller. "Civility, or the lack thereof," she said, "always affects the quality of practice." Judge Bennett agreed that she sees a direct relationship between more professional conduct and a more orderly record on which the State Tax Appeals Tribunal can base its eventual decision.

Judge Brilling concurred that mutual respect must be exhibited in mediation sessions at the PSC or else the session will not be productive. In a litigated proceeding, she said, she adheres strictly to a "rule of respect." In a litigated proceeding, Judge Brilling said simply, "we expect civility and collegiality."

Judge Horan agrees that uncivil conduct between counsel or by an individual attorney can "make the ALJ's job difficult at the very least." Contributing to the problem is that ALJs lack contempt powers or sanctioning authority, but Judge Horan said he addresses bad behavior head on.

"I will not only admonish the attorney for the unacceptable conduct," he said, "I will also state that the conduct poisons the atmosphere in the hearing room, causes delay and thus additional expense and does no good for that party's case. I find nothing quite so irritating or wasteful as attorneys who argue with and insult each other during a hearing. I point out to them that no one else in the room and no one who will review the record thereafter cares what they think about each other and that I can make no findings of fact that arise from such opinions."

Problems in a hearing can also arise from objectionable conduct by clients, witnesses or observers. Health Department hearings are usually closed. If open, they are usually attended by few people other than those with some relation to a party. If a non-party engages in uncivil conduct, Judge Horan said he announces that the attorney for the party who has brought in the disruptive individual is being held responsible for that person's conduct. That approach is usually successful, he said.

Judge Horan's colleague at the Department of Health, Judge Zylberberg, concurred that "civility must be addressed as soon as it is breached." He said he has found that practitioners comply readily when the ALJ is assertive on this point.

Where the disciplinary hearing concerns an individual under the influence of drugs, alcohol, or mental disease who might exhibit disruptive behavior, Judge Horan said he relies on the respondent's attorney to call the problem to his attention—on notice to opposing counsel—so that the Department of Health can arrange for increased security at the hearing. Judge Horan conducts hearings throughout the state, often at sites with little or no security.

At the New York City PVB, Judge Jackel said he simply ignores impolite and disrespectful conduct by attorneys "so as to not unfairly penalize their clients." He conceded, "It is occasionally difficult since we do not have contempt powers." Judge Strum of the PVA said he has also observed disrespectful attorneys on occasion and said it can be a genuine problem "unless the individual judge is strong enough to insist on such respect."

Conclusion

"I expect counsel to be honest, forthright, and prepared," Judge Zylberberg said in summing up his approach. "The best preparation for a hearing is to know the rules before you arrive at the hearing. Review the applicable laws, regulations, and cases of the subject matter. When in doubt, ask opposing counsel or have a conference call with the ALJ and opposing counsel.

"As an ALJ, I have no problem sharing my knowledge of the process with counsel," he continued. "From the attorneys, I expect professionalism and courtesy."

Regardless of the subject matter, the forum, or the circumstances, Judge Zylberberg said, expressing a sentiment shared by all of the ALJs surveyed, "Surprises are not welcomed."

Use of Exculpatory Clauses Is Subject to Wide Variety Of Definitions and Circumstances

By Gwen Seaquist and Marlene Barken

Everyone has seen an exculpatory clause. It may be on the back of your lift ticket or part of your application to a health club. Sometimes called a "waiver of liability," it may include language saying that if you are injured you may not bring a lawsuit or you will not be able to sue for negligence. By signing one, or even paying admission to an event, it appears that you are waiving rights to a lawsuit for injuries sustained on the property. Interestingly, few people in New York know that waivers of liability at places of amusement are void.

This article reviews the foundation cases and attempts to reconcile the often-confusing cases decided in the past 20 years. These issues affect both business operators who seek to protect themselves from liability by using effectively written exculpatory clauses and consumers who wonder whether the disclaimers they encounter and/or must sign as a condition to participating in a recreational activity are in fact enforceable.

What Is a Place of Amusement?

General Obligations Law § 5-326 (GOL) is accompanied by a significant body of contradictory case law. The title of § 5-326 reads "Agreements exempting pools, gymnasiums, places of public amusement, recreation and similar establishments from liability for negligence," yet the courts hardly limit its application to pools and gymnasiums, and even apply the statute to places of *private* amusement, including private clubs. Because the language of the statute is unclear, it is no surprise that the decisions are inconsistent, and what constitutes a place of amusement continues to be subject to debate.

The initial vision of a public place of amusement has run the gamut from riding a bull in a bar[1] to private ski clubs,[2] parachute jumping,[3] white-water rafting in the Niagara River,[4] JELL-O® pits,[5] automobile race tracks,[6] and riding stables.[7] When no commerce is involved, and therefore there is no consumer to protect, the courts consistently find that the statute does not apply. So, for example, where the plaintiff was injured while riding his bicycle on the Verrazano Narrows Bridge during the "Bike New York" five-borough bicycle tour, the exculpatory clause was effective, because neither the bridge nor the race was a "place of amusement or recreation."[8] Likewise, a challenge course at a not-for-profit residence for needy adolescents is not a place of amusement.[9]

Does the statute apply when the plaintiff is injured while participating in league or recreation sports? In *Stuhlweissenburg v. Town of Orangetown*,[10] a member of a softball team who had paid a fee to Orangetown to participate in league softball suffered an injury. She sued the town, claiming that the waiver was void under the statute. Because the plaintiff failed to produce any evidence that she had paid a fee for admission to, or use of, the town's softball field, the court found that GOL § 5-326 did not void the release executed by the plaintiff before participating in her softball game. Presumably this is because the release was *not in connection with or collateral to a fee for admission*, one of the requisites under the statute.

The case of *Bufano v. National Inline Roller Hockey Ass'n*[11] had a similar outcome. The injured plaintiff was

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a member of an inline roller hockey league. To become a member of the league, he paid $25 for annual dues and signed a registration form that contained a release of liability. Bufano was injured in a fight with another player during a game. "Contrary to the plaintiffs' contention, General Obligations Law § 5-326 does not void the release Bufano signed," the court said, because "the $25 he paid was not paid to the owner or operator of a recreational facility."[12] Instead, Bufano had paid the money as league dues. Thus, the statute was not applicable.

Note in contrast, however, *Williams v. City of Albany*,[13] which involved a flag football player who was injured by broken glass on a community playing field. He sued the for-profit corporation that ran the sports recreation league, and the league was held liable. In so ruling, the court acknowledged that its decision was in direct contrast to *Stuhlweissenburg*. The court reasoned:

> The fact that CDFF did not own, maintain or control the playing field where the recreational activity took place is not controlling . . . we note that CDFF was much more than a mere sponsor. It created and operated the league in question, arranged for the use of six fields for that purpose, provided referees for league play and acquired insurance for its protection in that regard. The relevant inquiry is whether CDFF, as the operator of the recreational activity in question, received compensation therefor.[14]

Sometimes the nature of the business so exceeds the scope of the statute that the courts find categorically that the statute has no application.

Sometimes the nature of the business so exceeds the scope of the statute that the courts find categorically that the statute has no application. When the plaintiff's ski equipment malfunctioned and she sued the business where she had rented the equipment, the court stated, "Snowbird is a retail establishment that rents and sells ski equipment and accessories; it is not a place of amusement or similar establishment contemplated by General Obligations Law § 5-326."[15]

Nor does it matter if the place of amusement is private, rather than public. Where the plaintiff was injured while playing tennis at a country club, the court did not even consider the private versus public nature of the facility. The statute applied, and the waiver was declared void in accordance with the earlier cases interpreted under the statute.[16]

Where Is a Place of Amusement?

In earlier cases, the courts distinguished between a business as a place of amusement based on whether it was an unbounded area. Thus, when a plaintiff rented a jet ski to ride in the Niagara River, because the rental was not under the control of the defendants and the plaintiff was not confined to a bounded area, the business was not a *place* and, therefore, not a place of amusement. "Although the defendants apparently gave certain instructions and took certain safety precautions, it cannot be said that they had 'control' of the environment within which these 'jet skis' were operated to the extent necessary to bring their operation within the language and intent of § 5-326 of the General Obligations Law."[17]

This particular analysis was short-lived, however. Eleven years later, in *Brancati v. Bar-U-Farm Inc.*,[18] the court rejected the controlled environment analysis. Here, the plaintiff was injured during a guided trail ride when the horse he had leased from the defendant's establishment fell and rolled on him. The court's holding that the riding stable was a place of amusement because the statute was not limited "to acts conducted within a controlled environment," but "extended to situations involving outdoor amusement,"[19] essentially discarded the idea that the statute is limited to a bounded or controlled area.

Subsequently, in *Filson v. Cold River Trail Rides Inc.*, the court reached a similar result when the plaintiff and her husband went on a "wilderness horseback riding excursion organized and operated by defendant[, that included] a one-night stay in a bed and breakfast, a lengthy trail ride through the Adirondack Park and an overnight stay in the woods."[20] The plaintiff fell when she attempted to mount the horse without a guide present, sustaining injuries to her mouth and teeth. Relying on its previous holding in *Brancati*, the court stated that "although defendant did not own the land upon which plaintiff was injured . . . we do not find that this compels a contrary result since the statute by its terms applies to owners and operators of places of amusement."[21]

These recent decisions suggest a significant shift—from determining whether the business is an established place of amusement to an analysis of the type of activity in which the plaintiff was engaged and the locus for that activity. This approach expands the consumer protection afforded by the statute. Arguments that the place is not bounded or confined or is private will fail. If, however, the place has no recreational activities, such as a rental shop, or is an instructional facility (see below), then the statute will not apply.

Places of Instruction?

During the past decade, numerous cases have distinguished between instructional versus recreational places of business. As a general rule, when a business is instructional in nature, the release is valid. Thus it is to the defendant's advantage to prove that the business is more like a school than a place of recreation. So for example, when the plaintiff was injured at a racetrack that was also used as a driving school, GOL § 5-326 was held inapplicable.[22] Likewise, injuries sustained while receiving paragliding lessons[23] or scuba diving lessons[24] or horseback riding instruction[25] were held *not* to be within the ambit of the statute.

In many cases, the place of business has characteristics of both amusement and instruction. To determine the nature of the business in those cases, the courts consider how the initial filing papers describe the business and the manner in which the business represents itself in advertisements and brochures. For example, in *Wurzer v. Seneca Sport Parachute Club*, the court held that a parachute club was a place of recreation based on the plaintiff's affidavit, the club's statement of purposes in its certificate of incorporation, and the club's name.[26] Similarly, in *Bacciocchi v. Ranch Parachute Club, Ltd.*, a parachute club promoted itself as "a year-round skydiving club and school offering state of the art aircraft and instruction" and stated in a brochure that "our emphasis is on having a good time and enjoying a relaxed atmosphere."[27] A student taking sky diving lessons landed in a tree sustaining serious injuries to her ankle. Because the club did not *restrict* its use to instruction but also had recreational aspects, the release was held void and unenforceable.

Contrast the result in *Bacciocchi* with that of *Scrivener v. Sky's the Limit, Inc*.[28] In *Scrivener*, the business had *both* recreational and instructional descriptions. The court shifted its analysis from an exclusive focus on the incorporating papers and promotional brochures to the purpose of the plaintiff's visit. Since it was "clear . . . that the plaintiff was at (defendant's skydiving facility) for instructional activity as opposed to a recreational facility as contemplated by GOL § 5-326 then the place was (held to be) one of instruction in spite of the descriptions."[29] These conflicting outcomes make it unclear just what rule the courts will follow in the future.

Who Is a User?

For the statute to apply, the plaintiff must have paid a fee "in connection with the waiver of liability."

In one of the earliest cases, *Beardslee v. Blomberg*,[30] a racetrack charged a fee and admitted spectators to the grandstands. Later in the day, the track management invited all female spectators to participate in a "powder puff derby" by first signing a waiver. The plaintiff crashed in the subsequent race and suffered severe injuries. She challenged the waiver, arguing that she had paid the fee in connection with entrance to the racetrack, though she had signed the waiver in connection with the powder puff derby. Because the agreement was not "in connection with, or collateral to . . . any contract, membership application, ticket of admission or similar

Background of GOL § 5-326

By legal standards, General Obligations Law § 5-326 is relatively new. Enacted in 1976, it traces its roots to an incident in the 1960s when Joanne Ciofalo, a member of a Vic Tanney gym, slipped and fell poolside, sustaining significant injuries.[1]

As a condition of membership, she had signed an agreement releasing the gym from liability for its own negligence. As a result, the plaintiff lost the case on a motion for summary judgment and never went to trial on the issue of negligence. The perception that the decision was an unjust one eventually led to the enactment of the statute making such waivers void.[2]

A review of the legislative history indicates that, in drafting the statute to cover all "users" of recreational facilities, the Legislature explicitly intended to overrule the holding of *Ciofalo*, wherein the Court of Appeals upheld the enforceability of a contractual provision signed by a member of a gymnasium which insulated the gymnasium from liability for personal injuries resulting from its negligence. As the Western District, quoting an appellate decision from 1991, stated:

> The legislative history of § 5-326 establishes that "it was a consumer protection measure based upon an assessment that members of the general public patronizing proprietary recreational and amusement facilities are commonly either entirely unaware of the existence of exculpatory clauses in admission tickets or membership applications or are unappreciative of the legal consequences thereof."[3]

Nevertheless, the numerous cases that have interpreted GOL § 5-326 since 1976 have left a trail of often confusing law regarding its scope and application.

1. *Ciofalo v. Vic Tanney Gyms*, 10 N.Y.2d 294, 220 N.Y.S.2d 962 (1961).
2. *Beardslee v. Blomberg*, 70 A.D.2d 732, 416 N.Y.S.2d 855 (3d Dep't 1979) (quoting the Governor's Bill Jacket, 1976 N.Y. Laws ch. 414).
3. *McDuffie v. Watkins Glen Int'l*, 833 F. Supp. 202 (W.D.N.Y. 1993) (quoting *Owen v. R.J.S. Safety Equip., Inc.*, 169 A.D.2d 150, 156, 572 N.Y.S.2d 390 (3d Dep't 1991), *aff'd*, 79 N.Y.2d 967, 582 N.Y.S.2d 998 (1992)).

writing, entered into between the owner . . . and the user of such facilities," the waiver was upheld. Taking an extremely literal approach, the court determined that she was not a user within the contemplation of the statute.

User status was also denied in *Salazar v. Riverside Riding Corp*. The court found that paying a fee to board a horse and not for riding lessons "is not analogous to a user fee for a recreational facility as contemplated by the statute."[31]

Over the past 25 years, race car drivers have remained the most frequent litigators on the issue of their status as users, and for the most part they are not covered by the statute. This result in part relates to the distinction between instructional and recreational facilities discussed above. For example, in *Lux v. Cox*,[32] the participants were bound by the release because the fees were paid to register in a race car driver school. Furthermore, the court found that the purpose of the statute was to protect not the professional but rather the unwary consumer who supposedly does not know any better. A professional race car driver assumes the risk of the profession.[33] Similarly, the statute does not apply to a mechanic working in the pits[34] or the member of a volunteer tow truck crew,[35] as their status is clearly not that of the unwary consumer.

What Satisfies the Fee Requirement?

The courts have continued to construe the fee-paid-by-a-user requirement of the statute quite narrowly, despite the broad intent of the statute to cover all agreements, contracts, and membership applications as well as tickets. As discussed above, the holdings in *Bufano* and *Stuhlweissenburg* concluded that releases executed in conjunction with payment of league membership dues were valid because the fee was not paid, in connection with a ticket of admission or agreement, to the owner or operator of a recreational facility but to the respective leagues in which the plaintiffs were participating.

Consumers now expect that, as a matter of public policy, businesses cannot disclaim their liability for negligence for truly recreational activities.

Williams v. City of Albany, also discussed above, remains the anomalous case pertaining to users. Here, the court looked beyond who actually paid the fee and to whom, and instead focused on whether the operator of the recreational activity received compensation. Because the organizer of the league received a fee for the use of the facilities where the plaintiff was injured, the release was considered within the purview of the statute and thereby void.

Drafting an Effective Exculpatory Agreement

Finally, even if the business falls outside the scope of the statute, one must be careful that the language used in any exculpatory clause will be upheld in accordance with the Court of Appeals decision in *Gross v. Sweet*.[36] There, the plaintiff signed a waiver stating:

> I, the undersigned, hereby, and by these covenants, do waive any and all claims that I, my heirs, and/or assignees may have against Nathaniel Sweet, the Stormville Parachute Center, the Jumpmaster and the Pilot who shall operate the aircraft when used for the purpose of parachute jumping for any personal injuries or property damage that I may sustain or which may arise out of my learning, practicing or actually jumping from an aircraft. I also assume full responsibility for any damage that I may do or cause while participating in this sport.[37]

The court held this waiver was incomplete and unenforceable because it failed to clearly set out the dangers inherent in parachute jumping.

> In short, instead of specifying to prospective students that they would have to abide any consequences attributable to the instructor's own carelessness, the defendant seems to have preferred the use of opaque terminology rather than suffer the possibility of lower enrollment. But, while, with exceptions not pertinent to this case, the law grudgingly accepts the proposition that men may contract away their liability for negligently caused injuries, they may do so only on the condition that their intention be expressed clearly and in unequivocal terms.[38]

The release must explicitly inform the customer what risks are inherent in the activity and also that the defendant is assuming the disclosed risks.[39] In *DiMaria v. Coordinated Ranches, Inc.*,[40] for example, the plaintiff signed guest registration cards stating, "I recognize that the sporting facilities provided at PINEGROVE have a certain amount of danger connected with them."[41] The court found the waiver inadequate because it did not clearly spell out that signing the form meant assuming all of the risks associated with the use of the defendant's business.

If the liability release expresses "in clear and unequivocal language the intent to relieve the defendants of all liability for personal injuries . . . caused by the defendants' negligence," then the release will be enforceable.[42]

Businesses should also note that the waiver is more likely to be upheld if patrons sign a detailed list of pos-

sible risks rather than a boilerplate provision on the back of a ticket. While business owners may balk at the idea of "scaring away a potential client," full disclosure is the surest route to the enforceability of the waiver.

Conclusion

In the past 25 years, the legislature has made no effort to re-examine the impact and interpretation of GOL § 5-326. Case law over the past decade indicates continued confusion over the scope of the law's application, though some clarification has been achieved.

Consumers can now expect that, as a matter of public policy, businesses cannot disclaim their liability for negligence for truly recreational activities, even if the activity takes place in a wilderness area over which the defendant cannot exercise complete control. If, however, the *purpose* of the plaintiff's visit is to receive *instruction* in the recreational activity, then the court likely will uphold the waiver. Clients who provide both instructional training and access to recreational opportunities should clearly identify the type of activity for which the patron is making payment. Disclaimers are appropriate to protect against liability for injuries incurred in the course of instruction.

Another major unsettled issue is whether consumers will be protected in situations where they pay to participate in league or recreational sports organized by sponsors who do not actually own the facilities where the games take place. The intent of the legislation indicates that the statute should apply, although the current weight of case law runs counter to this interpretation. Clients should be cautioned that in this gray zone disclaimers may not survive further judicial scrutiny.

As always, consumers should be wary of signing disclaimers under any circumstances. Unfortunately, the reality is that businesses typically present patrons with form disclaimers as an absolute prerequisite to participation in the desired activity. So consumers sign and litigate later. Business clients and consumers alike should be advised that where disclaimers are permissible, they nonetheless will be examined closely under the still operable *Gross* standard. Any limitation of liability must clearly and unambiguously extend to the defendant's negligence, and the patron must clearly and expressly assume specific risks. Practitioners should be prepared to identify those situations outside the scope of the statute where releases will be upheld, and to draft effective exculpatory clauses for clients engaged in such activities.

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1. *Meier v. Ma-Do Bars*, 106 A.D.2d 143, 484 N.Y.S.2d 719 (3d Dep't 1985).
2. *Blanc v. Windham Mountain Club*, 115 Misc. 2d 404, 454 N.Y.S.2d 383 (Sup. Ct., N.Y. Co. 1982).
3. *Sivaslian v. Rawlins*, 88 A.D.2d 703, 451 N.Y.S.2d 307 (3d Dep't 1982).
4. *Franzek v. Calspan Corp.*, 78 A.D.2d 134, 434 N.Y.S.2d 288 (4th Dep't 1980).
5. *Long v. State*, 158 A.D.2d 778, 551 N.Y.S.2d 369 (3d Dep't 1990).
6. *Gilkeson v. Five Mile Point Speedway Inc.*, 232 A.D.2d 960, 648 N.Y.S.2d 844 (3d Dep't 1996); *Stone v. Bridgehampton Race Circuit*, 217 A.D.2d 541, 629 N.Y.S.2d 80 (2d Dep't 1995); *Owen v. R.J.S. Safety Equipment, Inc.*, 79 N.Y.2d 967, 582 N.Y.S.2d 998 (1992); *Lago v. Krollage*, 78 N.Y.2d 95, 571 N.Y.S.2d 689 (1991); *Smith v. Lebanon Valley Auto Racing, Inc.*, 167 A.D.2d 779, 563 N.Y.S.2d 335 (3d Dep't 1990); *Howell v. Dundee Fair Ass'n*, 73 N.Y.2d 804, 537 N.Y.S.2d 27 (1988).
7. *Salazar v. Riverdale Riding Corp.*, 183 Misc. 2d 145, 701 N.Y.S.2d 878 (Sup. Ct., Nassau Co. 1999); *Strauss v. Stoneledge Farms, Inc.*, 256 A.D.2d 1186, 684 N.Y.S.2d 387 (4th Dep't 1998); *Filson v. Cold River Trail Rides Inc.*, 242 A.D.2d 775, 661 N.Y.S.2d 841 (3d Dep't 1997); *Brancati v. Bar-U-Farm, Inc.*, 183 A.D.2d 1027, 583 N.Y.S.2d 660 (3d Dep't 1992); *DiMaria v. Coordinated Ranches, Inc.*, 138 A.D.2d 445, 526 N.Y.S.2d 19 (2d Dep't 1988).
8. *Tedesco v. Triborough Bridge & Tunnel Auth.*, 250 A.D.2d 758, 673 N.Y.S.2d 181 (2d Dep't 1998).
9. *Barone v. St. Joseph's Villa*, 255 A.D.2d 973, 679 N.Y.S.2d 870 (4th Dep't 1998).
10. 223 A.D.2d 633, 636 N.Y.S.2d 853 (2d Dep't 1996).
11. 272 A.D.2d 359, 707 N.Y.S.2d 223 (2d Dep't 2000).
12. *Id.* at 359.
13. 271 A.D.2d 855, 706 N.Y.S.2d 240 (3d Dep't 2000).
14. *Id*. at 857. In reference to the decision in *Stuhlweissenburg*, the court said,

    > we do not deem the statute as limited in application to the person or entity that actually pays the fee. Rather, the statute, by its express terms, is applicable to an owner or operator of a recreational facility who receives a fee. Accordingly, inasmuch as CDFF received a fee for the use of the facilities where Williams was injured, the release executed by him is void as against public policy and is wholly unenforceable.

15. *Perelman v. Snowbird Ski Shop, Inc.*, 215 A.D.2d 809, 626 N.Y.S.2d 304, 305 (3d Dep't 1995).
16. *See Blanc v. Windham Mountain Club*, 115 Misc. 2d 404, 454 N.Y.S.2d 383 (Sup. Ct., N.Y. Co. 1982).
17. *Dumez v. Harbor Jet Ski, Inc.*, 117 Misc. 2d 249, 458 N.Y.S.2d 119, 120 (Sup. Ct., Niagara Co. 1981).
18. 183 A.D.2d 1027, 583 N.Y.S.2d 660 (3d Dep't 1992).
19. *Id*. at 1030.
20. 242 A.D.2d 775, 775, 661 N.Y.S.2d 841 (3d Dep't 1997).
21. *Id*. at 777.
22. *Lux v. Cox*, 32 F. Supp. 2d 92 (W.D.N.Y. 1998).
23. *Chieco v. Paramarketing, Inc.*, 228 A.D.2d 462, 643 N.Y.S.2d 668 (2d Dep't 1996).
24. *Baschuk v. Diver's Way Scuba, Inc.*, 209 A.D.2d 369, 370, 618 N.Y.S.2d 428 (2d Dep't 1994). Plaintiff was injured while taking a scuba diving course sponsored by the defendant at its facilities, which included a private swimming pool. Since defendant's private swimming pool was used for instructional, not recreational or amusement purposes, the court concluded that the tuition fee paid by the plaintiff for a course of instruction is not analogous to

the use fee for recreational facilities contemplated by the statute. Hence, GOL § 5-326 was held not to apply.

25. *Salazar v. Riverdale Riding Corp.*, 183 Misc. 2d 145, 701 N.Y.S.2d 878 (Sup. Ct., Nassau Co. 1999).
26. 66 A.D.2d 1002, 411 N.Y.S.2d 763 (4th Dep't 1978).

> Plaintiff's uncontroverted assertions in his affidavit, defendant SSPC's statement of purposes in its certificate of incorporation, and defendant SSPC's own name establish that defendant SSPC is a "place of recreation" within the plain meaning of the statute. Defendants submitted no evidentiary material that would undercut this characterization of the nature of defendant's facilities.

Id. at 1003.

27. 273 A.D.2d 173, 175, 710 N.Y.S.2d 54 (1st Dep't 2000) "As stated in its certificate of incorporation, the purpose of the club, organized under the Not-For-Profit Corporation Law, is 'to promote sport parachuting.' The purpose is exclusively a recreational purpose." *Id*.
28. 68 F. Supp. 2d 277 (S.D.N.Y. 1999). Scrivener's affidavit stated, "In April 1997 my wife gave me a birthday present to take skydiving lessons at 'Sky's The Limit.' . . . After we paid the fee, I signed numerous documents before I was allowed to take my first lesson." *Id.* at 280.
29. *Id*.
30. 70 A.D.2d 732, 416 N.Y.S.2d 855 (3d Dep't 1979).
31. 183 Misc. 2d 145, 701 N.Y.S.2d 878 (Sup. Ct., Nassau Co. 1999).
32. 32 F. Supp. 2d 92 (W.D.N.Y. 1998).

> In this case, the record is clear that plaintiffs were participants in the PCA Drivers' School program, rather than spectators or patrons of the Watkins Glen race course. The fees paid by plaintiffs to PCA were for the purpose of registration in the program, not for admission to the racecourse. As frequent participants in the Drivers' School program, plaintiffs cannot be said to belong to a class of consumers "unaware of the existence of exculpatory clauses" in the releases they were required to sign, or "unappreciative of the legal consequences thereof."

Id. at 99.

33. *Mc Duffie v. Watkins Glen Int'l, Inc.*, 833 F. Supp. 197 (W.D.N.Y. 1993). "Mc Duffie was not a patron user of the recreational establishment involved here. Rather, he was an experienced participant who made his living from racing, and as such, knowingly waived suit in order to engage in his profession for profit." *Id*. at 202.
34. *Lago v. Krollage*, 157 A.D.2d 49, 554 N.Y.S.2d 633 (2d Dep't 1990).
35. *Kazmierczak v. Lancaster Motor Sports, Inc.*, 214 A.D.2d 1039, 626 N.Y.S.2d 633 (4th Dep't 1995). Plaintiff was injured while repairing the racing surface of defendant's racetrack during a racing event. Plaintiff was in the area of the raceway solely as a member of the volunteer tow truck crew. Therefore, plaintiff is not entitled to the status of a "user." *See Howell v. Dundee Fair Ass'n*, 135 A.D.2d 1133, 523 N.Y.S.2d 259 (4th Dep't 1987) (holding that a volunteer fireman on a fire and ambulance crew at the Dundee Raceway was not a protected user).
36. 49 N.Y.2d 102, 424 N.Y.S.2d 365 (1979).
37. *Id.* at 109.
38. *Id*. at 110.
39. *Rogowicki v. Troser Mgmt. Inc.*, 212 A.D.2d 1035, 623 N.Y.S.2d 47 (4th Dep't 1995). Defendants failed to meet their burden of establishing, as a matter of law, that John Rogowicki expressly assumed the risk of his injury by virtue of the disclaimer language printed on the back of the lift ticket and the ski school lesson coupon book.
40. 138 A.D.2d 445, 526 N.Y.S.2d 19 (2d Dep't 1988).
41. *Id.* at 446.
42. For an example of detailed language to use in drafting an exculpatory clause, see *Lux v. Cox*, 32 F. Supp. 2d 92 (W.D.N.Y 1998).

Last Resort Estate Planning Finds Acceptance in Statutes and Cases Relying on Substituted Judgment

By Eugene E. Peckham

The call from the client usually starts out one of several ways:

(1) "Mom (or Dad) is really getting bad. She can't remember anything. The doctor says she may have Alzheimer's and will have to go to a nursing home."

(2) "My daughter (or son) had a bad auto accident and is now partly paralyzed in a wheelchair and brain damaged. But the good news is she just got a big settlement in her court case."

(3) "My son (or daughter) was born with mental retardation. He just turned 21 and I want to do what I can to see to it he's taken care of for the rest of his life."

(4) "My husband (or wife) had a stroke and is in a coma. The doctor says he may only live a month or so. He has a big estate and the taxes will eat it up and he hasn't revised his will in 20 years."

The next question always is: "What can we do?" Reviewing the situation with the client, you quickly find there is no durable power of attorney or health care proxy for the incapacitated person, and either no will or an old one that is out of date. For many years, the only answer was to consider the appointment of a Committee of the Incompetent and then ask the court to apply the doctrine of "substituted judgment." Both of those procedures were complicated. Even worse, most people quailed at the idea of declaring Mom, Dad or other relatives incompetent by having a committee appointed, not wanting the stigma of mental illness in the family, and not wanting the loss of civil rights that accompanied a declaration of incompetence.[1]

This article explores what can be done as a last resort when someone is incompetent to make or change a will and there is no durable power of attorney that could be used to make gifts or do estate or Medicaid planning. As described below, the available options have been expanded by a Court of Appeals decision of major importance that permits courts to give guardians the authority to enter into estate and Medicaid planning transactions in the form of gifts that benefit the ward and his or her family.[2]

Substituted Judgment

Beginning in the late 1980s, a major change began regarding estate planning for incapacitated persons. First came two decisions by Nassau County Surrogate C. Raymond Radigan that have become the standard for applying the substituted judgment doctrine. The concept of substituted judgment provides the basis for a court of equity to approve the transfer of part of a mentally disabled person's property to another person, provided that the disabled person does not need the property for support and probably would have made the transfer if competent to do so.[3] The doctrine first arose in an 1816 English case, *ex parte Whitbread*,[4] but the early cases were quite restrictive in its application.

In *Florence*,[5] Judge Radigan authorized gifts for estate planning purposes from a conservatee's estate of $1.1 million out of a total estate of $1.8 million. The gifts to family members would be in accordance with the ward's testamentary plan and would save about $85,000 in taxes. The decision enunciated the two standards that had arisen for substituted judgment: objective and subjective. The objective test "is extended where the ward as a reasonably prudent person would so act, there being no substantial evidence of a contrary intent." The subjective test requires that "the ward would actually have made the transfer himself, if the capacity existed."[6]

In *In re Daly*,[7] Judge Radigan again used substituted judgment and applied the objective standard to autho-

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rize the Surrogate's Court Procedure Act (SCPA) Article 17-A guardian to make $10,000 gifts to the siblings of an 11-year-old boy with irreparable brain damage. He also held "to the extent that substituted judgment is otherwise available, the court perceives no distinction between a person who has received the protection of SCPA Article 17-A as opposed to Article 77 or 78 of the Mental Hygiene Law"[8] (MHL). Logically, this is still true of Articles 17, 17-A and 81 because Article 81 has replaced Articles 77 and 78.

MHL Article 81

In 1989, SCPA Article 17-A was substantially amended to add developmentally disabled persons to its application in addition to mentally retarded persons. But the most significant change was the adoption in 1993 of Article 81 of the MHL to replace Article 77, Conservators, and Article 78, Committees of the Incompetent. Article 81 ushered in a new era in the treatment of mental illness because the legislative findings state that "it is desirable for and beneficial to persons with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs . . . which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self determination and participation in all the decisions affecting such person's life."[9]

Least restrictive form of intervention is now the catchphrase to describe this new approach to guardianship for the disabled. The stigma attached to the appointment of a Committee of an Incompetent has been removed because the statute now provides that the "appointment of a guardian shall not be conclusive evidence that the person lacks capacity for any other purpose, including the capacity to dispose of property by will."[10]

Most important for estate planners is the codification in Article 81 of the substituted judgment concept. MHL § 81.21 authorizes a court to grant to the guardian the power to (1) make gifts, (2) create revocable or irrevocable trusts of the property of the incapacitated person, (3) change beneficiaries on insurance and annuity policies, and (4) renounce or disclaim gifts or inheritances for the incapacitated person. The court may grant the application to use such powers "if satisfied by clear and convincing evidence" that:

> 1. The incapacitated person lacks the requisite mental capacity to perform the act or acts for which approval has been sought and is not likely to regain such capacity within a reasonable period of time or, if the incapacitated person has the requisite capacity, that he or she consents to the proposed disposition;
>
> 2. A competent, reasonable individual in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances; and
>
> 3. The incapacitated person has not manifested an intention inconsistent with the performance of the act or acts for which approval has been sought at some earlier time when he or she had the requisite capacity or, if such intention was manifested, the particular person would be likely to have changed such intention under the circumstances existing at the time of the filing of the petition.[11]

As can be seen, subparagraph (2) incorporates the objective test for substituted judgment and subparagraph (3) incorporates the subjective test of the "intent" of the incapacitated person.

Section 81.21 also provides that the court shall consider[12] the following factors in making its decision:

> 1. Whether the incapacitated person has sufficient capacity to make the proposed disposition himself or herself, and, if so, whether he or she has consented to the proposed disposition;
>
> 2. Whether the disability of the incapacitated person is likely to be of sufficiently short duration such that he or she should make the determination with respect to the proposed disposition when no longer disabled;
>
> 3. Whether the needs of the incapacitated person and his or her dependents or other persons depending upon the incapacitated person for support can be met from the remainder of the assets of the incapacitated person after the transfer is made;
>
> 4. Whether the donees or beneficiaries of the proposed disposition are the natural objects of the bounty of the incapacitated person and whether the proposed disposition is consistent with any known testamentary plan or pattern of gifts he or she has made;
>
> 5. Whether the proposed disposition will produce estate, gift, income or other tax savings which will significantly benefit the incapacitated person or his or her dependents or other persons for whom the incapacitated person would be concerned; and
>
> 6. Such other factors as the court deems relevant.[13]

Supplemental Needs Trusts

Perhaps most frequently, courts and guardians have used substituted judgment to establish a supplemental needs trust (SNT).[14] Typically, the settlement proceeds of a negligence lawsuit for a disabled person injured at birth or in an accident, who is thereby rendered incapable of making decisions or managing his affairs, are used to fund the trust.

> A supplemental needs trust, or "SNT", is a "discretionary trust established for the benefit of a person with a severe and chronic or persistent disability" that is designed to enhance the quality of the disabled individual's life by providing for special needs without duplicating services covered by Medicaid or destroying

> Medicaid eligibility. Under Federal and State Medicaid laws, funds placed in a SNT are not considered resources that are "available" to a Medicaid recipient for purposes of assessing the recipient's eligibility for benefits, so long as the trust document conforms with the EPTL's requirements and further grants to the State a remainder interest in the trust assets remaining at the recipient's death up to the amount of all public assistance provided.[15]

There are two general types of SNTs. The first is the self-settled payback type described above, where the Medicaid recipient's own funds establish the trust, frequently from a personal injury settlement. In this type of SNT, any balance of funds remaining, after providing for the beneficiary's special needs over and above Medicaid, must be paid to the state to reimburse it for the Medicaid it has paid for the beneficiary.[16] As long as the Medicaid recipient is under age 65 and disabled, the transfer to the SNT will not cause a period of ineligibility for Medicaid.[17] Some courts have even issued decisions specifying the language to be included in payback SNTs.[18] The second type is a trust established by a third party (typically a parent or some other relative) who does not have a legal obligation to provide support to the disabled person. In these circumstances, there is no requirement for the state to be paid pack when the individual dies. Consequently, the remainder of a third party trust can be left to other family members or whomever the grantor chooses.[19]

There are two types of SNTs . . . the self-settled payback type . . . and a trust established by a third party who does not have a legal obligation to provide support.

The SNT can provide an answer to situation (2) described at the beginning of this article. The payback SNT can be used to receive the proceeds of a large personal injury settlement whether it is a lump sum or a structured settlement. A parent, guardian or the court handling the personal injury case establishes the trust to receive the proceeds and use them to supplement what Medicaid will provide for the disabled beneficiary. Only when the beneficiary dies does any remaining principal of the trust become available to pay back the state for the Medicaid assistance provided. Any excess over the Medicaid payback ordinarily would pass to the estate of the incapacitated individual.[20]

Until recently an unresolved issue in such cases was whether, before funding the SNT, the state had to be reimbursed for interim Medicaid assistance provided to the injured party from the date of injury until the date the judgment or settlement was entered. In two cases the Court of Appeals has held that reimbursement is required for interim assistance and the entire settlement amount is available and must be used to pay Medicaid liens before the balance can be placed in the SNT.[21]

The third-party SNT can be used by a parent or other relative to establish a trust for a mentally retarded or developmentally disabled child in situation (3) above, with the one proviso that the parent or relative must have no obligation to support the child; otherwise the trust will be an available resource for Medicaid.[22] Thus, turning 21 is significant because that is when the obligation of support ends. If the trust is established before the support obligation terminates, the Medicaid lien would apply because the funds used to create the SNT would be coming from the parental assets that would be an available resource for the parents' support obligations.

As can be seen from the foregoing, the courts have frequently established an SNT pursuant to the power provided in MHL § 81.21 to "create trusts," revocable or irrevocable, for an incapacitated person. Guardians appointed under SCPA Articles 17 and 17-A have also been authorized by the court to set up SNTs.[23] Obviously, creating the SNT also constitutes Medicaid planning and estate planning.

Estate and Medicaid Planning

In a very significant decision, the Court of Appeals held in mid-2000: "We now confirm that a guardian spouse is permitted to effectuate . . . Medicaid planning on behalf of an incapacitated individual pursuant to Mental Hygiene Law Article 81."[24] In the *Shah* case, Mr. Shah was in a coma from which no recovery was expected. His wife as his Article 81 guardian sought court approval to transfer all of his assets to herself to support herself and their children and then execute a spousal refusal so that Mr. Shah would be eligible for Medicaid. The Court of Appeals held that she could do so.[25]

In *In re John XX*,[26] which was cited with approval in *Shah*, an Article 81 guardian was authorized, for Medicaid planning purposes, to give $640,000 of the ward's assets to his two adult daughters. This left John with about $150,000 which, together with his pension and Social Security income, would pay his nursing home costs during the Medicaid ineligibility period of 36 months. At the time the transfer took place, the exemption from federal estate and gift tax was $600,000, and thus it would seem likely the amount of the gift to the daughters also involved an element of estate planning to use up the exemption and also use the $10,000 per-person annual exclusion from gift tax. The court said "it cannot

reasonably be contended that a competent reasonable individual in his position would not engage in the estate and Medicaid planning proposed in the petition . . . a contrary conclusion would have the effect of depriving incapacitated persons of the range of options available to competent individuals."[27]

Thus, the Court of Appeals has recognized that incapacitated persons have the same rights to engage in estate planning and Medicaid planning as competent persons. To deny an incapacitated person the same right to engage in estate planning as another person with capacity could be a denial of equal protection of the laws.[28]

The courts have allowed guardians to establish and amend revocable and irrevocable* inter vivos *trusts, which act as will substitutes.

Guardians have been authorized by the courts to exercise the powers granted by the Legislature in MHL § 81.21 to make gifts,[29] (including charitable gifts)[30] create supplemental needs trusts,[31] transfer real property,[32] renounce an inheritance[33] and do Medicaid planning[34] and estate planning.[35] The statute provides that "transfers made pursuant to this article may be in any form that the incapacitated person could have employed if he or she had the requisite capacity, except in the form of a will or codicil."[36] Thus, the only estate planning action the guardian cannot take on behalf of the ward is to make a new will. Even in situations (1) and (4) above, it is possible to do estate planning when the incapacitated person is incompetent to do so or has only a short time to live.

The courts have allowed guardians to establish and amend revocable and irrevocable *inter vivos* trusts, which act as will substitutes and can have the effect of making a new estate plan for a ward. Recently, the Third Department approved an amendment by an Article 81 guardian of a revocable trust established by the ward. The amendment added two nephews of the incapacitated person as additional co-trustees of the trust. Thus, the decision recognized that a guardian can exercise the powers reserved by the ward to alter or amend the revocable trust, if authorized by the court to do so.[37]

In an earlier case, the Kings County Surrogate authorized a conservator to establish an irrevocable trust of the conservatee's entire assets of $700,000. The trust agreement provided for the trustee to apply income and principal for the benefit of the conservatee during her lifetime and then upon her death the trust would become an SNT for the benefit of the conservatee's adult retarded son. The case was decided using the principle of substituted judgment, but it was decided just before the effective date of Article 81 and the court noted that Article 81 would give specific authority to create the trust. The court said, "From an objective perspective, the propriety of creating the proposed trust, which ensures the conservatee's well-being during her lifetime while enabling her son to enjoy an enhanced quality of life upon her death without risking his public assistance, cannot be questioned."[38]

An even more significant example of the type of estate planning a court can authorize is the unreported case of *In re Majka*[39] decided by Broome County Surrogate John M. Thomas sitting as an acting Supreme Court justice. On January 21, 1996, Theodore Majka suffered a cerebral hemorrhage that rendered him quadriplegic and unable to speak or communicate in any significant way. His wife, Beverly A. Majka, was appointed his guardian in an Article 81 proceeding. It was a second marriage for each of them and they each had three children from a prior marriage. Mr. Majka was a successful businessman who owned entirely in his name the common stock of two businesses, a machine shop and an apartment complex. Also included in his estate were two life insurance policies on his life with his children as beneficiaries and several policies owned by him on the lives of his children. At the time of his stroke, Mr. Majka had an old style "elective share trust" with his wife receiving income only from one-third of his estate and the residue of his estate divided into three trusts for each of his children with final payout of principal to them at age 45.

Because the total value of the estate was several million dollars, the estate tax under his existing will could have been almost $1 million, and since the businesses were the bulk of the estate, there would have been a severe cash shortage. Fortunately, Mr. Majka had begun some estate planning to rectify the situation, but unfortunately he had not completed it. He had set up a life insurance trust and funded it with a million-dollar second-to-die policy on himself and his wife. He had had discussions with his attorney about a new will with a QTIP trust, but had not executed a new will.

The court was petitioned pursuant to MHL § 81.21 to authorize the guardian to execute on Mr. Majka's behalf a revocable *inter vivos* trust with the then-allowable $600,000 unified credit exemption passing outright to his three children, and a QTIP trust of the residue for his wife. Upon the death of Mrs. Majka, one-third of the trust would be paid to her children and two thirds of the trust to the Majka children. The trust would be funded

with the stock of the two businesses. The result would be to eliminate tax upon Mr. Majka's death and allow the second-to-die policy to pay the tax on his wife's subsequent death. The plan also followed his existing will in that Mrs. Majka's children would receive the one-third of the estate she could have received by exercising her right of election, while Mr. Majka's children would receive the remaining two-thirds.

In addition, the court was asked to permit the guardian to establish a second life insurance trust into which the two policies on Mr. Majka's life owned by him would be transferred as gifts. The beneficiaries of this trust would be the three Majka children, consistent with the existing beneficiary designations in the policies. The purpose was to remove the value of these policies from the estate, if he lived for three years pursuant to the contemplation-of-death rule.[40] Lastly, the court was asked to approve gifts of the life insurance policies that Mr. Majka owned on the lives of his children to the respective children. Because these policies had cash values less than $10,000 apiece they would come within the then-applicable $10,000 annual exclusion from gift tax.[41]

In an order signed December 4, 1996, Judge Thomas authorized the guardian to carry out all of the requested estate planning transactions, namely establishing the revocable trust, the life insurance trust and the making of the gifts. The effect was to change totally the existing will of Mr. Majka by means of the revocable trust. The court was convinced in the words of the statute that a "competent, reasonable individual in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances."[42] The intentions that Mr. Majka had been working on for his estate planning were carried out, taxes were saved and the family benefitted.

Medical Decision Making

A health care proxy is now a document that is routinely discussed with the client as part of the estate planning process. In all of the situations above, there probably will be a need to make medical decisions for the incapacitated person. When there is no health care proxy,[43] the court can authorize a guardian of the person to "consent to or refuse generally accepted routine or major medical or dental treatment" and "choose the place of abode" of the incapacitated person.[44] The latter power may include the placement of the incapacitated person in a nursing home or other residential facility,[45] but not the power to admit the incapacitated person to a mental hospital.[46]

Major medical or dental treatment is defined in MHL § 81.03(i) and generally includes medical or surgical procedures where general anesthesia is used, any significant invasion of the body, a procedure having a significant recovery period or the administration of psychotropic medication or electroconvulsive therapy. What is not included is the "withholding or withdrawal of life sustaining treatment including artificial nutrition and hydration."[47] In this regard the Legislature followed the *O'Connor* decision of the Court of Appeals.[48] If there is no health care proxy or other advance directive, the petitioner who wishes to have authority to terminate life-sustaining measures must establish by clear and convincing evidence the incapacitated person's expressed wish to withhold or withdraw life-sustaining treatment.[49]

Although there is no specific provision in either Article 17 or 17-A regarding medical decision making, a guardian of the person appointed under those sections would ordinarily have custody of the child or retarded person and the right to make health care decisions.[50] Absent specific provisions on health care in Articles 17 and 17-A, a court would undoubtedly look to Article 81 for analogous definitions and provisions as to the guardian's powers for health care decision making. Again, with Article 17 and 17-A guardians, termination of life sustaining treatment would require proof of the ward's expressed wishes pursuant to *O'Connor*. Proof of the ward's wishes may be impossible when the ward never had capacity, as with a retarded person.

Standard of Proof

Although most requests to apply substituted judgment in an Article 81 proceeding are successful, proof is required by clear and convincing evidence of incapacity.[51] Clear and convincing evidence is also required that (1) the incapacitated person lacks capacity to perform the estate planning acts, (2) a reasonable person would perform the acts, and (3) the incapacitated person has not manifested an inconsistent intention or would be likely to change the intention under the present circumstances.[52] A hearing before the court is required in all cases.[53] The alleged incapacitated person may request a jury trial,[54] although this is rarely done.

Clear and convincing evidence is defined in the *Pattern Jury Instructions* as follows:

> Clear and convincing evidence must satisfy you that the evidence makes it highly probable that what he or she claims is what actually happened.[55]

As a result of this higher standard of evidence, not all applications for estate and Medicaid planning on behalf of an incapacitated person are approved. For example, in *In re Karp*,[56] the court refused to permit gifts by a conservator of $120,000 per year from a $4.5 million estate. The court stated there was no proof in the record of the anticipated expenses for home care of the incapacitated person, the amount of estate tax savings, the intention of

the incapacitated person to make lifetime gifts to his family or whether a lesser distribution plan would be more appropriate. In another case, a proposal for a revocable trust of the incapacitated person's assets was refused because the disposition of the remainder of the trust was different from the disposition in his will.[57] In two other cases, gifts were authorized in amounts less than had been requested because there was insufficient proof of the ward's potential future cost of care.[58]

The petition must include the information required by the statute in order to secure authorization for a transfer of the incapacitated person's property.[59] Clearly, the attorney should be prepared to present clear and convincing evidence that a reasonable person would carry out the same type of plan and that the ward has not shown a contrary intention, or would be likely to change that intention.[60] Evidence of the factors that MHL § 81.21(d) says the court should consider must also be presented, although it is not necessary to prove these factors by clear and convincing evidence.[61]

Conclusion

When a client calls with one of those difficult questions appearing at the beginning of this article, all is not lost. By incorporating the substituted judgment doctrine, Article 81 provides a method to do last resort estate and Medicaid planning. Similarly, Article 17 and 17-A guardians can use substituted judgment to do planning and decision making for their wards.

The procedure, while not simple, is not impossible because forms are available.[62] Nevertheless, the attorney must be prepared to meet the evidentiary requirements. In short, even in extreme situations it is still not too late to do estate planning for the benefit of the incapacitated person and his or her family, and to save taxes.

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1. See Report of the Law Revision Commission in McKinney's 1991 Session Laws of New York p. 1805.
2. *In re Shah*, 95 N.Y.2d 148, 711 N.Y.S.2d 824 (2000).
3. *In re Florence*, 140 Misc. 2d 393, 530 N.Y.S.2d 981 (Sur. Ct., Nassau Co. 1988).
4. 35 Eng.Rep. 878.
5. *Florence*, *supra*, note 3.
6. *Id*. at 395.
7. 142 Misc. 2d 85, 536 N.Y.S.2d 393 (Sur. Ct., Nassau Co. 1988).
8. *Id*. at 87.
9. MHL § 81.01.
10. MHL § 81.29(b).
11. MHL § 81.21(e).
12. *In re Burns*, 287 A.D.2d 862, 731 N.Y.S.2d 537 (3d Dep't 2001).
13. MHL § 81.21(d).
14. *See* EPTL 7-1.12 and Social Services Law (SSL) § 366(2)(b) for the requirements for a supplemental needs trust.
15. *Cricchio v Pennisi,* 90 N.Y.2d 296, 660 N.Y.S.2d 679 (1997).
16. 42 U.S.C. § 1396(d)(4)(A).
17. 41 U.S.C. § 1396(c)(2)(B)(iv).
18. *In re Morales*, N.Y.L.J. July 28, 1995, p. 25, col. 1 (Sup. Ct., Kings Co). For a complete discussion of SNTs and forms for both payback and third-party trusts *see* Krooks, Krooks & Robert, Creative Advocacy in Guardianship Settings, *Guardianship Practice in New York State*, 905-28, 1007-23 (NYSBA 1997) and Kassoff, *Elder Law & Guardianship in New York*, 8-75 to 8-79 (West 2001).
19. SSL § 104(3) and EPTL 7-1.12(a)(5).
20. *In re Goldblatt*, 162 Misc. 2d 888, 891, 618 N.Y.S.2d 959 (Sur. Ct., Nassau Co. 1994).
21. *Cricchio*; *supra* note 15; *Calvanese v. Calvanese*, 93 N.Y.2d 111, 688 N.Y.S.2d 479 (1999).
22. EPTL 7-1.12(c)(1).
23. Both Article 81 and Articles 17 and 17-A guardians have been authorized to establish an SNT. *See In re Sutton*, 167 Misc. 2d 956, 641 N.Y.S.2d 515 (Sur. Ct., NY Co. 1996); *In re Goldblatt*, 162 Misc. 2d 888; *In re Pace*, 182 Misc. 2d 618, 699 N.Y.S.2d 257 (Sup. Ct., Suffolk Co. 1999).
24. *In re Shah*, *supra* note 2 at 159.
25. *Id*. at 161.
26. 226 A.D.2d 79, 652 N.Y.S.2d 329 (3d Dep't 1996) *leave to appeal denied*, 89 N.Y.2d 814, 659 N.Y.S.2d 854 (1997).
27. *Id*. at 83-4; *In re Klapper,* N.Y.L.J. August 9, 1994 p.26, col.1 (Sup. Ct., Kings Co.).
28. *In re Baird*, 167 Misc. 2d 526, 531, 634 N.Y.S.2d 971 (Sup. Ct., Suffolk Co. 1995).
29. *In re Shah*, *supra* note 2*; In re John XX*, *supra* note 26; *In re Scheiber,* N.Y.L.J. October 18, 1993 p.38, col.5 (Sup.Ct., Suffolk Co.); *In re Schultze*, N.Y.L.J. September 3, 1996 p.30, col. 1 (Sur. Ct., New York Co.).
30. *In re Burns, supra* note 12.
31. *Calvanese, supra* note 21; *Cricchio, supra* note 15; *In re Goldblatt, supra* note 20; *In re Pace*, *supra* note 23.
32. *In re Daniels*, 162 Misc. 2d 840, 618 N.Y.S.2d 840 (Sup.Ct., Suffolk Co. 1994).
33. *In re Pflueger*, 181 Misc. 2d 294, 693 N.Y.S.2d 419 (Sur. Ct., N.Y. Co. 1999); *In re Baird*, *supra* note 28; *In re Scheiber, supra* note 29; *In re Lisle*, N.Y.L.J. August 9, 1994 p.27 col.1 (Sur. Ct., Nassau Co).
34. *In re Shah, supra* note 2; *In re John XX, supra* note 26; *In re DaRonco*, 167 Misc.2d 140, 638 N.Y.S.2d 275 (Sup. Ct., Westchester Co. 1995); *In re Beller* (Maltzman), N.Y.L.J. August 31, 1994 p. 23, col.4 (Sup. Ct., Kings Co.); *In re Klapper*, *supra* note 27.
35. *In re John XX, supra* note 26; *In re Scheiber, supra* note 29.
36. MHL § 81.21(a).
37. *In re Elsie B.*, 265 A.D.2d 146, 707 N.Y.S.2d 695 (3d Dep't 2000).
38. *In re Garbow*, 155 Misc. 2d 1001, 591 N.Y.S.2d 754 (Sur. Ct., Kings Co. 1992).
39. Sup. Ct., Broome Co. Index No. 96-960.
40. Internal Revenue Code (IRC) § 2035.
41. IRC § 2503.
42. MHL § 81.21(e)(2).
43. *See* MHL §§ 81.22(b)(2) and 81.29(d). A guardian may not revoke or amend an existing health care proxy, only the court can do so.

44. MHL § 81.22(a)(8) and (9).
45. *In re Rimler*, N.Y.L.J. March 22, 1995 p. 30, col.4 (Sup. Ct., Queens Co.); *In re Jospe*, N.Y.L.J. January 30, 1995 p.30, col. 2 (Sup. Ct., Suffolk Co.).
46. MHL § 81.22(b)(1).
47. MHL § 81.29(e).
48. *In re O'Connor*, 72 N.Y.2d 517, 534 N.Y.S.2d 886 (1988); *Law Revision Commission Comments* to MHL § 81.29 in McKinney's Practice Commentaries to MHL § 81.29.
49. *In re O'Connor, supra* note 48; *In re Kyle*, 165 Misc. 2d 175, 627 N.Y.S.2d 903 (Sup. Ct., Suffolk Co. 1995).
50. *In re Thoemmes*, 238 A.D. 541, 264 N.Y.S. 829 (4th Dep't 1933); *Warren's Heaton on Surrogate Courts*, § 48.08(2).
51. MHL §§ 81.02(b) and 81.12(a).
52. MHL § 81.21(e).
53. MHL § 81.11.
54. MHL §§ 81.11(f) and 81.07(c).
55. *Pattern Jury Instructions* 7:65 (West 2001).
56. *In re Karp*, 145 A.D.2d 208, 537 N.Y.S.2d 510 (1st Dep't 1989).
57. *Felix v. Herman*, 257 A.D.2d 900, 684 N.Y.S.2d 62 (3d Dep't 1999).
58. *In re Daly*, *supra* note 7; *In re Schultze, supra* note 29.
59. MHL § 81.21(b).
60. MHL § 81.21(e).
61. *In re Burns, supra* note 12 at 863.
62. See *Warren's Heaton on Surrogates' Court Practice*, chap. 50, Matthew Bender 1998; Kassoff, *Elder Law & Guardianship in New York* (West 2001); N.Y. St. B. Ass'n, *Guardianship Practice in New York* (Robert Abrams ed. 1997).

Risk of SLAPP Sanction Appears Lower for Internet Identity Actions In New York Than in California

By Elizabeth Troup Timkovich

Imagine the following hypothetical situation:

A corporate client has discovered that someone (an employee, former employee, disgruntled investor, etc.) is anonymously posting defamatory, libelous, or confidential information about the company on an Internet Web site. Your client asks you to file a discovery action against the Internet Service Provider to obtain the name of the anonymous poster, needed, you would argue, to file a lawsuit against her. The company's main goal is to locate the poster and encourage her to stop posting such information; an actual lawsuit against her is not necessarily wanted.

If you bring such a bill or suit, and the court ultimately decides that there is no basis for your claim, what kind of sanctions might you or your client face? Could your action against the Internet poster qualify as a "SLAPP" (Strategic Litigation Against Public Participation) action,[1] chilling a defendant's right to free speech or petition? In California, the answer would appear to be yes; but would your Internet identity action fall victim to New York's anti-SLAPP law?

The California Case: *GTMI*

In a U.S. District Court case decided in California, *Global Telemedia International, Inc. v. Doe 1*,[2] (*GTMI*) a publicly traded company filed a trade libel and defamation suit against John Doe defendants for posting allegedly libelous material about the company on an Internet message board. The court declared the plaintiff's claims against defendants Barry King and Ronald Reader to be SLAPP actions and dismissed them, in the process granting the two defendants attorney fees under California's anti-SLAPP statute.

It is doubtful that the same decision would have been reached under New York's anti-SLAPP law. New York's anti-SLAPP statute is much narrower than California's, under which the *GTMI* case was decided; New York statutory anti-SLAPP protections are reserved for citizens petitioning against public applicants or permittees. The hypothetical Internet identity plaintiff would therefore not need to fear prosecution under New York's anti-SLAPP law. However, when pursuing an Internet identity action as described in the hypothetical posed here, it is still important to keep in mind the various other remedies for frivolous or malicious suits discussed below. One or more of them might be used by Internet poster defendants to win sanctions or attorney fees.

First Amendment Concerns

To help practitioners evaluate whether actions might be classified as SLAPP suits and how defendants might respond to those actions, it is helpful to understand the concerns underlying anti-SLAPP laws and the various remedies, in addition to anti-SLAPP statutes, that defendants can invoke in these actions.

The Petition Defense and Its Limitations The main purpose behind anti-SLAPP legislation is protection of the First Amendment right to petition. There are limits, however, to a defendant's ability to claim this petition privilege. "Sham" petitioning, for example, in which the government process is used to injure an opponent, falls outside the protection of the petition clause.[3] In addition, the right to petition does not offer an absolute privilege to one who defames. According to the Supreme Court in *McDonald v. Smith*,[4] if a defendant posts information that she knows is false, or recklessly disregards the truth, First Amendment protection does not extend to her.[5] For example, in *In re Subpoena Duces Tecum to America Online, Inc.*,[6] a suit to obtain the identities of anonymous Internet posters of defamatory and confidential information, a Virginia court held that defamatory statements and the release of confidential insider information relating to a publicly traded company were not entitled to protection under the First Amendment.

There is also support for the limitation of First Amendment protection in cases of contractual breaches.

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A Michigan district court noted that the use of trade secrets in violation of a confidentiality agreement or in breach of a fiduciary duty is not protected by the First Amendment.[7] These restrictions on a defendant's ability to claim protection for sham petitions, defamatory speech or speech made in breach of contract could strengthen the hypothetical Internet identity suit against a First Amendment challenge.

The Opinion Privilege of the First Amendment As seen in the *GTMI* case, an Internet poster accused of defamation can enjoy free speech protection for statements determined by a court to clearly be opinions (as perceived by a reasonable person) rather than statements of objective fact. This First Amendment opinion privilege was explained by the Supreme Court in *Milkovich v. Lorain Journal Co.*,[8] where the Court declared that the operative distinction lay between statements that imply an assertion of objective facts and those that do not.

> [Because] implicit assertions of fact can harm reputation just as much as explicit assertions . . . , [t]he [*Milkovich*] Court therefore rejected the proposition that defamatory statements should be protected as long as it is clear that they reflect the author's point of view, or as long as they state accurately the facts on which they are based. Such statements are nonetheless actionable if they imply factual assertions that are defamatory and untrue.[9]

Since the decision in *Milkovich*, courts that have granted the opinion privilege to defamation defendants look to the context and reasonable reader perceptions when determining whether statements imply objective fact.[10] Internet poster defendants, such as King and Reader in *GTMI*, will therefore be able to make use of this opinion privilege in many circumstances, due to the context in which their statements are posted.

Potential Remedies Available to Defendants

In addition to the remedies provided in individual state anti-SLAPP statutes, most of which contain provisions for the recovery of costs and attorney's fees, there are many common law and statutory methods for imposing sanctions and recovering monetary awards. For example,

> [s]everal avenues are available to penalize attorneys for infractions of the rules requiring that only meritorious claims be advanced. These remedial measures include Rule 11 sanctions, statutory penalties for attorneys who "unreasonably and vexatiously" multiply litigation, and the inherent power of the courts to impose sanctions on lawyers who act in bad faith to abuse the judicial process.[11]

SLAPP-Back Suits Some states, including New York,[12] provide for "SLAPP-back" suits against SLAPP plaintiffs for injuries resulting to defendants from the original SLAPP actions. These suits are usually brought in state courts on the basis of malicious prosecution or abuse of process, or in federal courts for civil rights violations, and generally allow recovery of compensatory damages and, sometimes, punitive damages. The SLAPP-back has become the latest legal growth industry in the SLAPP area.[13] Even law firms have been SLAPPed back for filing SLAPP actions.[14]

Some courts hold that the tort of abuse of process may be premised on the mere filing of a suit, even one that is successful.

Tort of Abuse of Process In addition to SLAPP-back suits, states can punish plaintiffs for wrongful litigation through common law litigation torts, such as abuse of process, in which the original defendant sues the former plaintiff for damages arising from the prior suit. The tort of abuse of process applies to litigants who use litigation for ulterior purposes,[15] and "it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting or initiating them."[16]

Some courts hold that the tort of abuse of process may be premised on the mere filing of a suit, even one that is successful and even when the plaintiff has mixed motives in filing suit.[17] However, many courts, including the Second Circuit, are reluctant to apply this doctrine; they will not find an abuse of process in suits that are otherwise meritorious but filed for an ulterior purpose.[18] This restrictive treatment of the abuse of process tort by the Second Circuit bodes well for our hypothetical Internet identity suit client if a claim of abuse of process is raised by the defense.

Rule 11 Another potentially powerful tool in the hands of the defense in an Internet identity action is Rule 11 of the Federal Rules of Civil Procedure (FRCP), which sanctions attorneys and/or their clients for frivolous litigation. Under this rule, litigants are required to certify that their pleadings are "not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."[19] A plaintiff must certify *both* that it has conducted a reasonable inquiry into the factual and legal merit of the complaint *and* that it is not filing the complaint for any improper purpose. If these requirements are violated, sanctions are generally permitted under Rule 11 (as under many states' "frivolous" suit statutes)[20] in the

The Court's Analysis in GTMI

Defendants King and Reader, both small investors in Global Telemedia International, Inc. (GTMI), argued that the plaintiff GTMI's suit was a SLAPP suit, brought against them as a transparent effort to intimidate individuals who were critical of the plaintiff's corporate performance. The court agreed with the defendants and held that the California anti-SLAPP statute permitted dismissal of the lawsuit since "the alleged bad acts arose from [the defendants'] exercise of free speech 'in connection with a public issue,'" and the plaintiff could not show a probability of success on its claims.[1]

In ruling that the defendants' speech qualified as dealing with a "public issue," the court reasoned that GTMI was a public company with thousands of investors. The court further found that King's and Reader's statements were opinion rather than fact, and therefore not actionable for trade libel or defamation. The court looked at the message board context of the postings when determining that the statements were merely individual opinions. In addition, the court found that the plaintiff could not show that damages had resulted from the defendants' postings. Therefore, because GTMI was found to be an entity of public concern, about which the defendants had a First Amendment right to freely speak their negative opinions, GTMI's suit against the defendants was dismissed under the California anti-SLAPP law, California Code of Civil Procedure § 425.16, which mandates an award of attorney's fees to "SLAPPed" defendants.

1. *Global Telemedia Int'l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1265 (C.D. Cal. 2001).

amount of a defendant's costs and attorney's fees.[21] Luckily, however, the Second Circuit does not award sanctions for a plaintiff's improper purpose if the complaint is otherwise meritorious.[22] This treatment by the Second Circuit of Rule 11 could work in favor of the hypothetical Internet identity action, but New York attorneys should nevertheless not rule out the possibility of sanctions for suits deemed frivolous under New York's frivolous suit statute, 22 N.Y.C.R.R. § 130-1.1, found in chapter I, Standards and Administrative Policies.

Additional Sanctioning Forms In addition to Rule 11, 28 U.S.C. § 1927 punishes lawyers whose groundless litigation techniques waste time and cost their opponents money by unnecessarily prolonged litigation. Under this statute, an attorney "may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."[23]

A defendant in a SLAPP-like action also might pursue a claim under 42 U.S.C. § 1988, under which, if the suit is filed in federal court, the defendant may be awarded attorney's fees if the suit is shown to be meritless.

> However, just as with a malicious prosecution suit, a motion for fees under 1988 cannot be filed until favorable termination of the suit upon which the motion is based. Receiving fees under this statute is subject to the same limitations as receiving sanctions under Rule 11. If the SLAPP defendant cannot show that the claim was completely without merit, she will not be awarded fees under the statute.[24]

Courts' Inherent Power to Sanction In addition to statutory sanctioning powers (such as Rule 11 and 28 U.S.C. § 1927), the Supreme Court has held that along with the powers derived from statutes and court rules, federal courts have the inherent power to control the proceedings before them, which includes the power to impose sanctions on parties and their lawyers for abusing the judicial process.[25]

Most courts impose such inherent power sanctions only in extraordinary cases, *e.g.*, when the party has acted in bad faith *and* filed a frivolous pleading.[26] For example, the Second Circuit, in *Oliveri v. Thompson*,[27] noted that the inherent power standard is to be interpreted restrictively:

> "[W]e have declined to uphold awards under the bad-faith exception absent both 'clear evidence' that the challenged actions are 'entirely without color, and [are taken] for reasons of harassment or delay or for other improper purposes' and 'a high degree of specificity in the factual findings of the lower courts.'"[28]

This restrictive treatment of the inherent power to sanction by the Second Circuit should favor the plaintiff in the hypothetical Internet identity suit being discussed here.

Rules of Professional Responsibility New York attorneys filing Internet identity suits that could be deemed frivolous might also be sanctioned professionally. Under the Model Rules of Professional Conduct, Disciplinary Rule 7-102(A)(1), adopted by New York, a lawyer is ethically prohibited from "fil[ing] a suit, assert[ing] a position, conduct[ing] a defense, delay[ing] a trial, or tak[ing] other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another." This rule might well apply to an attorney who files a SLAPP-like suit in New York, subjecting him or her to various sanctions under the attorney disciplinary process.

Comparison of California and New York SLAPP Laws

California's Broad Anti-SLAPP Statute Currently, at least 13 states have adopted legislation to combat SLAPPs. These are California, Delaware, Florida, Georgia, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New York, Rhode Island, Tennessee, and Washington.[29] California's statute, under which *GTMI* was decided, is one of the broadest, much broader than New York's.

The statute, California Code of Civil Procedure § 425.16, explicitly states that "this section shall be construed broadly."[30] Immunized activities may include not just speech targeted at the government, but activities in connection with private persons and entities, especially when (as with the publicly held company in *GTMI*) a large, powerful organization may have an impact on the lives of many individuals.[31] Once a defendant has invoked the protection of this anti-SLAPP statute, the burden switches to the plaintiff to show a probability of success on its claims and to satisfy an actual malice standard by showing that the defendant's defamatory statement was made with actual knowledge or reckless disregard of its falsity.[32] If a plaintiff fails to meet these burdens, the prevailing defendant under § 425.16(c) can recover reasonable attorney's fees and costs. "Awards for attorney's fees [in California] for motions to strike have ranged from a low of $3,000 to a high of $130,506.71. The average attorney fee awards range from $15,000 to $40,000."[33]

Under the broad coverage of California's anti-SLAPP statute, it is not surprising that Internet posters such as King and Reader in the *GTMI* case succeeded in branding the plaintiff's Internet identity suit a SLAPP and won attorney fees. However, New York's anti-SLAPP statute is much narrower, and there is as yet no New York case law defining Internet identity actions as SLAPPs.

New York's Narrow Anti-SLAPP Statute Unlike California's statute, which protects statements "made in a place open to the public or a public forum in connection with an issue of public interest" and "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest,"[34] the protective coverage of New York's anti-SLAPP statute is much narrower. New York's anti-SLAPP protection is limited to "action[s] involving public petition and participation" in regard to public applicants or permittees.[35] "New York's narrow definition [of 'public applicant or permittee'] is well-suited to the paradigmatic situation where, for example, a developer applies for a permit and retaliates against citizen opponents, but it fails to provide any broader protection for the right of petition."[36]

New York's anti-SLAPP statute has been given a very narrow construction since the first case that interpreted it. The court in *Harfenes v. Sea Gate Ass'n, Inc.*[37] found that the statute did not apply to a suit brought against residents trying to delay a federal clean-up loan to their homeowners association because, as statutorily defined, the loan application process did not constitute a public proceeding.[38] The *Harfenes* court recognized that the new law (the anti-SLAPP statute), being in derogation of the common law,[39] had to be narrowly construed; therefore, the only way a defendant could claim protection under the anti-SLAPP statute was if she directly challenged the permit application.[40]

New York's scheme for providing recovery of costs and fees to a SLAPP target is unusually complex: a defendant can recover fees and costs if the plaintiff's action "was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law."[41] Further compensatory damages can be awarded upon a showing that the plaintiff filed the action to harass, intimidate, punish, or otherwise maliciously inhibit the free exercise of speech, petition or association rights.[42] Punitive damages only become available if those illegitimate designs are shown to have been the plaintiff's "sole purpose."[43] In making these awards, New York courts exercise discretionary authority; imposition of attorney fees and costs in every situation in which a SLAPP claim is interposed is not mandated.[44]

Conclusion

Although there are some similarities between the anti-SLAPP statutes of California and New York, such as actual malice requirements (New York, like California, requires a plaintiff seeking damages to demonstrate actual malice on the part of the defendant), and provisions for attorney fees and costs, it is the difference in the scope of their protective coverage that is vital to the hypothetical Internet identity scenario considered in this article.

The coverage of California's anti-SLAPP statute is so broad that it easily encompasses the hypothetical Internet identity action. However, because New York's statute is so much narrower, New York attorneys representing typical (non-public applicant or permittee) corporate clients in the same situation need not yet fear such a result.

Because New York's anti-SLAPP statute is so much narrower than California's, under which *GTMI* was decided, the defendants in *GTMI* would not have succeeded in their dismissal and motions for fees and costs

if the case had been decided under New York law. It is unlikely that an Internet poster, making defamatory statements or posting trade secret information about a corporate entity, can claim protection under New York's anti-SLAPP law. New York's anti-SLAPP statute is designed to protect only those citizens petitioning against public applicants or permittees. Therefore, filing an Internet identity suit on behalf of the hypothetical corporate plaintiff should not result in sanctions under New York's anti-SLAPP law.

Nevertheless, it is important for New York practitioners to beware of other sanctions and remedies available to victims of frivolous suits, such as Rule 11 or 22 N.Y.C.R.R. § 130-1.1, under Standards and Administrative Policies, before pursuing a legal action with the ulterior motive of inhibiting an Internet poster's speech.

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1. Barbara Arco, *When Rights Collide: Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation*, 52 U. Miami L. Rev. 587, 614 (1998) (quoting *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 816 (Ct. App. 1994) (hereinafter "Arco"):

   > The prototypical SLAPP suit is one in which a large land developer files a claim against environmental activists or neighborhood associations intending to chill their political or legal opposition to the filer's plans. The filer's purpose is to gain an economic advantage over its target, rather than "to vindicate a legally cognizable right."

2. 132 F. Supp. 2d 1261 (C.D. Cal. 2001) (defendants Reader and King's motions to dismiss granted). Based on the *GTMI* court docket, the court on May 4, 2001, granted Reader's motion for attorney's fees and costs in the amount of $37,276.83 and denied Reader's motion for sanctions against plaintiff's attorney. Also on May 4, the court granted King's motion for attorney's fees in the amount of $23,959.00, then amended the award to $17,969.25. (The final status of the case and awards is somewhat unclear from the docket, as the *GTMI* suit was dismissed without prejudice on July 20, 2001, for lack of prosecution.)

3. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991); *see also Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961) (antitrust liability can attach to petitioning activity that constitutes "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor").

4. 472 U.S. 479 (1985).

5. Many states with anti-SLAPP statutes, including New York, require a showing of actual malice by a defendant in order for a plaintiff to recover damages in a defamation case. *See, e.g.*, N.Y. Civil Rights Law § 76-a(2) ("Civ. Rights Law"). Actual malice, as explained by the *McDonald* Court and others, "means that the SLAPP plaintiff will have to prove that the communication provoking the lawsuit was made with knowledge of its falsity or reckless disregard thereof." Jennifer E. Sills, *SLAPPs (Strategic Litigation Against Public Participation): How Can the Legal System Eliminate Their Appeal?*, 25 U. Conn. L. Rev. 547, 580 (1993) ("Sills").

   Even without such a statutory actual malice requirement, remember that public figures have long been required to satisfy an actual malice standard in defamation cases. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Courts have often qualified corporations as public figures. *See, e.g.*, *GTMI*, 132 F. Supp. 2d 1265. In *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 280 (3d Cir. 1980), the court stated:

   > Application of the public figure rule to sellers such as Steaks, which through advertising solicit the public's attention and seek to influence consumer choice, therefore serves the values underlying the First Amendment by insulating consumer reporters and advocates from liability unless they have abused their positions by knowingly or recklessly publishing false information.

6. 52 Va. Cir. 26 (Va. Cir. Ct. 2000).

7. *See Ford Motor Co. v. Lane*, 67 F. Supp. 2d 745, 750 (E.D. Mich. 1999). The court ultimately denied the plaintiff's injunction against the defendant's publication of Ford's trade secrets on defendant's Web site because such an injunction constituted an invalid prior restraint of free speech in violation of the First Amendment.

8. 497 U.S. 1 (1990). In New York, *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 566 N.Y.S.2d 906 (1991), grants a more expansive opinion privilege than *Milkovich*.

9. Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 Duke L.J. 855, 924–25 (2000) (citing *Milkovich*, 497 U.S. at 18).

10. For a recent New York case following the decision in *Milkovich*, see *Flamm v. American Ass'n of Univ. Women*, 201 F.3d 144, 148 (2d Cir. 2000) ("[T]he dispositive inquiry here is the same: whether the challenged statement can reasonably be construed to be stating or implying facts about the defamation plaintiff").

11. Arco, *supra* note 1, at 620–21.

12. New York's anti-SLAPP statute allows the SLAPP victim to bring an immediate counteraction to recover damages where the action has been initiated or continued under specious circumstances. Available relief under New York law includes attorney's fees and costs, compensatory and punitive damages. *See* Civ. Rights Law § 70-a.

13. Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 Ohio St. L.J. 665, 739 (2000) ("Andrews").

14. *See, e.g.*, *Mortensen v. S&S Constr. Co.*, No. 46 61 26 (Cal. Super. Ct. Oct. 10, 1990), *aff'd sub nom. Mortensen v. Gibson, Dunn & Crutcher*, No. G010431 (Cal. Ct. App. 1992) (court found law firm liable for bringing SLAPP suit, and target won $80,000 verdict).

15. The Restatement (Second) of Torts § 682 (1977) defines this tort as "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process".

16. Restatement (Second) of Torts § 682, cmt. a (1977).

17. *See* Andrews, *supra* note 13, at 727–30 (citing, *e.g.*, *Poduska v. Ward*, 895 F.2d 854 (1st Cir. 1990) which affirmed an award for abuse of process, even though employer had won the underlying claim, because employer's "bad" motive of wanting to cause employee to feel awkward in the industry constituted abuse).

18. *See, e.g.*, *Sussman by & Through Guilden v. Bank of Isr.*, 56 F.3d 450 (2d Cir. 1995) (non-frivolous complaint filed in part to exert pressure on defendants was not filed for improper purpose, and pre-filing letter threatening lawsuit and warning of adverse consequences to defendants did not reflect improper purpose).
19. FRCP 11.
20. *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 22, § 130-1.1 (N.Y.C.R.R.). New York has declined to explicitly adopt Rule 11, believing "that an amendment to Part 130 of the Rules of the Chief Administrator requiring the attorney's signing of all court papers would be preferable." 1997 Recommendations of Advisory Committee on Civil Practice.

    Note that the statutory cap for sanctions awarded for frivolous conduct under § 130-1.1 is $10,000. *See Gordon v. Marrone*, 155 Misc. 2d 726, 590 N.Y.S.2d 649 (Sup. Ct., Westchester Co. 1992) (petitioner was properly assessed $10,000 maximum as sanction for frivolous conduct under § 130-1.1(c) for bringing retaliatory SLAPP suit without substantial legitimate purpose, notwithstanding that petitioner's claim was colorable). The *Gordon* court noted that § 130-1.1 "is clearly broader in reach than [FRCP] 11." *Id.* at 730. "By embracing frivolous conduct undertaken for improper purpose without limitation to specific acts as in the case of rule 11, i.e., filing, [§ 130-1.1] permits the court to consider more varied conduct." *Id.*
21. Since 1993, FRCP 11 makes sanctions permissive rather than mandatory, and courts imposing sanctions may take into account a number of factors, including whether the violation was willful. *See* FRCP 11(c)(1)(A). One of the conditions subject to which a court may impose appropriate sanctions is a 'safe harbor' provision giving parties 21 days to withdraw offending pleadings and avoid sanctions.
22. *See, e.g.*, *Sussman*, 56 F.3d at 458–59. *Sussman* noted the split in the circuits and adopted the holding of *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1991) (en banc), which singled out complaints and counterclaims for special treatment under Rule 11: "[I]t would be counterproductive to use Rule 11 to penalize the assertion of non-frivolous substantive claims, even when the motives for asserting those claims are not entirely pure." *Townsend,* 92 F.2d at 1362; *see Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986) (stating that Rule 11 is violated only when it is patently clear that a claim has absolutely no chance of success).
23. 28 U.S.C. § 1927.
24. Sills, *supra* note 5, at 575 (citing *Hamer v. Lake County*, 819 F.2d 1362, 1367 (7th Cir. 1987), which quotes *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (the prevailing defendant must show that the suit was "meritless in the sense that it is groundless or without foundation")).
25. Arco, *supra* note 1, at 624 (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764–67 (1980)). Note that the only meaningful difference between an award made under the court's inherent judicial power to sanction and an award made under 28 U.S.C. § 1927 is that awards under § 1927 are made only against attorneys, while an award made under the court's inherent power may be made against an attorney, a party, or both. Both inherent-power awards and awards made under § 1927 require findings of bad faith on the part of the plaintiff. *See Oliveri*, 803 F.2d at 1273.
26. *See* Andrews, *supra* note 13, at 724.
27. 803 F.2d 1265.
28. *Id.* at 1272 (quoting *Dow Chem. Pacific Ltd. v. Rascator Maritime S.A.*, 782 F.2d 329, 344 (2d Cir. 1986)).
29. *See* Cal. Code Civ. Proc. § 425.16; 10 Del. C. §§ 8136–8138; Fla. Stat. § 768.295; O.C.G.A. § 9-11-11.1; 14 M.R.S. § 556; Mass. Ann. Laws ch. 231, § 59H; Minn. Stat. §§ 554.01–554.05; R.R.S. Neb. §§ 25-21, 246; Nev. Rev. Stat. Ann. §§ 41.650–41.670; Civ. Rights Law §§ 70-a, 76-a; CPLR 3211, 3212; R.I. Gen. Laws §§ 9-33-1–9-33-4; Tenn. Code Ann. §§ 4-21-1001–4-21-1003; Rev. Code Wash. (ARCW) §§ 4.24.500–4.24.520.
30. This statement was added during the 1997 amendment of § 425.16. Subsequently, in 1999, the California Supreme Court in *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106 (Cal. 1999), definitively ended the idea that there was any proof requirement for the SLAPPee as to "public issue" where the act underlying the lawsuit was an activity falling under § 425.16(e)(1) or (2). For a discussion of this decision, see Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary on its Operation and Scope*, 33 Loy. L.A. L. Rev. 801, 824–26 (2000) ("Tate").
31. *See, e.g.*, *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628 (Cal. Ct. App. 1996).
32. *See, e.g.*, *Wilcox v. Superior Court*, 27 Cal. App. 4th 809 (Cal. Ct. App. 1994) (discussing actual malice standard); *see also Nicosia v. De Rooy*, 72 F. Supp. 2d 1093 (N.D. Cal. 1999) (dismissing plaintiff's libel suit against Internet poster for failure to sufficiently plead actual malice and, therefore, failure to show that plaintiff would probably prevail on his claims).
33. Tate, *supra* note 30, at 844–45 (internal citations omitted).
34. *See* Cal. Code Civ. Proc. § 425.16(e).
35. *See* Civ. Rights Law § 76-a(1). New York's anti-SLAPP law is embodied in Civ. Rights Law §§ 70-a and 76-a, and CPLR 3211 and 3212.
36. Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. Davis L. Rev. 965, 1037 (1999).
37. 167 Misc. 2d 647, 647 N.Y.S.2d 329 (Sup. Ct., N.Y. Co. 1995).
38. *See id.*
39. The New York anti-SLAPP law changed the common law by creating a new cause of action by placing restrictions on a public applicant's ability to access the court by requiring him to demonstrate that his claim has a substantial, rather than reasonable, basis in law or fact. *See id.* at 652–53.
40. *See id.* at 653.
41. Civ. Rights Law § 70-a(1)(a).
42. *See* Civ. Rights Law § 70-a(1)(b).
43. *See* Civ. Rights Law § 70-a(1)(c).
44. *See, e.g.*, *West Branch Conservation Ass'n v. Planning Bd.*, 222 A.D.2d 513, 636 N.Y.S.2d 61 (2d Dep't 1995).

Enhanced Notice Requirements In Property Tax Foreclosure Cases Give Owners More Protection

By David C. Wilkes

Prompted by the plight of a Rockland County woman who claimed that she had never received notice of a pending foreclosure based on an unpaid $58 property tax bill, New York's Real Property Tax Law (RPTL) now provides a more rigorous method of mailing municipal foreclosure notices to property owners, but it also raises questions about what to do if there is no evidence that the owner actually received notice of the pending foreclosure.

The revised RPTL § 1125, in effect since August 23, 2000, places greater emphasis on proving that a foreclosure notice was received, as opposed to whether a notice was sent, and thus represents a fundamental shift in the long-standing scheme of *in rem* proceedings.

Before the change, RPTL § 1125 required only that a municipality send foreclosure notices to interested parties by "ordinary first class mail." The principle that a municipality need only show that proper notice had been *sent*, with no requirement that a municipality ensure *receipt* by the intended party, had withstood a sweeping overhaul of other tax foreclosure statutes in 1995.[1] Under those amendments, article 11 of the RPTL specified that such notice was to be sent to those whose names and addresses were "reasonably ascertainable from the public record, including the records in the offices of the surrogate of the county."[2] Often, notices were not, in fact, received by the intended recipient, usually because the address in the public records was no longer where the party received mail. Even after the 1995 amendments, however, such non-receipt was of no consequence, so long as notice was mailed.

Now, however, RPTL § 1125 differentiates between those who own the property and those who hold a non-ownership interest such as a mortgage, a mechanic's lien, a judgment, or another form of lien. The person who owns property subject to a tax lien must be sent notice "by certified mail with a return receipt requested," while it remains sufficient for the municipality to send the others a notice by ordinary first-class mail.

Rockland Woman's Plight

The change in RPTL § 1125 came in the wake of a claim by a Rockland County woman that she had never received notice of a foreclosure on her townhouse in Spring Valley. Rockland County contended that it had attempted to notify Mireille Leroy of its pending foreclosure by mailing notices to her home address by first-class mail.[3] When a county sheriff's deputy arrived to serve eviction papers, Ms. Leroy said she had never been informed about the foreclosure or auction-sale of her home.

According to local newspaper reports, Ms. Leroy had bought the townhouse in 1996 from an owner who had qualified for a veteran's tax exemption. She did not qualify for the exemption to continue, and the county billed her the difference of $58.67. Her plight caught the attention of local state legislators, and the result was the change in RPTL § 1125.

The former procedure had required only an affidavit stating that the notice had been mailed to the address found in the public records.[4] When properly followed, the statutory mailing requirement gave rise to a rebuttable presumption that the item was received by the addressee.[5] Whether the notice was *actually* received was irrelevant. Claims that notices were never received were by far the most common defense to a foreclosure, although a property owner who sought to rebut the presumption faced a nearly insurmountable challenge. For example, in *T.J. Gulf, Inc. v. New York State Tax Commission*,[6] which involved a similar notice-mailing statute

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under the state income tax law, the court held that the challenging taxpayer would need to do more than merely deny receipt of the notice; rather:

> [T]o rebut the presumption, the taxpayer must show that routine office practices [of the governmental entity] were not followed or that those practices were performed so carelessly that it would be unreasonable to assume that the notice was mailed."[7]

The taxpayer in *T.J. Gulf, Inc.* was unsuccessful.

Proceedings Under RPTL § 1125

The sources from which municipalities must obtain the mailing addresses of taxpayers did not change when RPTL § 1125 was revised; municipalities are still obliged only to mail to those "whose name and address are reasonably ascertainable from the public record."[8] Whether by ordinary mail or by certified, return receipt requested mail, the foreclosure notice may still go to the same *wrong* address if that is the address in the public records. And if it is the wrong address, the owner's likelihood of receiving the notice is as poor as it was before the revision of RPTL § 1125.

If the municipality gets it right, however, and the green return receipt card is sent back with the recipient's signature, the municipality now has the advantage of a conclusive bar against a claim that the notice was not received. The address found in the public records is usually correct and a receipt card is likely to be signed and returned.

In contrast to past practice in the mailing of such notices, the municipality's duty may no longer end at the point of mailing.

The amended statute does not, however, specify the consequences that would follow if a receipt card was *not* signed by the intended recipient and returned. Is the mere *act* of mailing the notice in the manner required by the statute sufficient compliance with the requirements of due process, even though it can now be known that receipt never occurred? Should the municipality's receipt of a card marked "unclaimed" trigger greater efforts to locate the owner and serve him or her with notice in a different way? In contrast to past practice in the mailing of such notices, the municipality's duty may no longer end at the point of mailing when a return receipt card is not returned, or is returned stamped "unclaimed."

New York courts have dealt infrequently with the question of what to do when a return receipt card is not returned with a proper signature, but they have consistently negated any presumption that the intended recipient actually received the notice. The general New York and federal rule is that there is no presumption of receipt when the sender includes a return receipt card that is not returned. In *State v. International Fidelity Insurance Co.*,[9] which involved the question of whether certain bond cancellation notices sent by an insurer were actually received, the court quoted an earlier case in observing that,

> "where the method of mailing requires the addressee to sign a return receipt, the presumption of receipt which attaches to first class mail is inapplicable, because the mailing cannot be received until the addressee signs for it." The certified mail distinction has blanket support in several Federal Circuits, and at least tacit support in the Second Circuit. In examining the underlying presumption and its origin, this court is convinced that the distinction is well taken.[10]

This seems to be the logical and likely approach for courts in situations arising under the revised RPTL § 1125.

The more significant question when the card is not returned is what additional measures must the municipality pursue to satisfy due process? The suggested answer is that the municipality must take any reasonable steps to locate the owner's true address from readily available sources that will not impose great cost on the municipality in relation to the scope of the entire foreclosure process.

Virtually all of the cases dealing with the issue of tax foreclosure notices recognize that service is required only upon those whose name and address are "known or readily ascertainable."[11] These cases *do not* impose a more in-depth and costly search for the recipient's proper mailing address, such as by hiring a private investigator. These cases make clear that even the requirement that municipalities mail a notice (as opposed to, for example, simple publication of notice in a newspaper) is an acceptable standard because it only imposes "a minimal burden on the [municipality]."[12]

So long as the additional procedure to locate the owner comes at little additional cost, the prudent course for the municipality appears to be to take some additional steps when it is clear that the mailed notice was not received. As a general rule, however, as the expense of additional efforts to locate an owner grows, the due process requirement diminishes.

It is safe to say that if the correct mailing information is not readily available in the official public records or some other easily obtainable resource such as the telephone book, a library, or the resources found on the Internet, the municipality is not likely to be required to use greater and more costly efforts to find the owner. In municipalities that routinely bring foreclosure proceed-

ings against hundreds or thousands of properties at a time, case law suggests that going to more expensive, time-consuming lengths is an unjustifiably great expense, even though more intensive efforts might produce better results.

Municipal Foreclosure Costs

The current RPTL § 1125 raises at least one other question in light of foreclosure provisions that permit the municipality to recoup its foreclosure-related expenses from the delinquent taxpayer.

RPTL § 1102 provides that a municipality's reasonable and necessary costs incurred in searching the public record, as well as legal services connected with foreclosing a tax lien, may be added to an individual's delinquent tax for purposes of calculating the amount necessary to redeem the parcel.[13] RPTL § 1102(e) permits a charge of up to $150 per parcel to be added to the delinquent tax "without substantiation" by the municipality, but it further states that a greater amount may be charged to the delinquent taxpayer "upon demonstration to the satisfaction of the court" that the additional costs were necessary. In practice, the combined costs of title searches, in-house and outside attorneys' time, municipal employees' time, and court filing fees typically add up to something more than $150 per parcel. This is particularly so in towns, villages and even small cities that are permitted to enforce their own taxes, because their use of the foreclosure process lacks the economies of scale enjoyed by a county or large city.

RPTL § 1125 provides property owners in New York with an additional degree of due process that may lead to greater efforts by tax-collecting municipalities to locate delinquent owners.

Unfortunately, this legislative scheme overlooks the fact that most properties are redeemed pursuant to RPTL § 1110 long before any substantive application is made to the court for foreclosure relief.[14] This is because the application to the court for a foreclosure judgment pursuant to either RPTL § 1131 or § 1136 is usually made in a single proceeding covering perhaps hundreds or even thousands of properties; the application for judgment may come long after many properties have already been redeemed.

Therefore, at the point when most taxpayers seek to redeem their properties, no application has typically been made to the court. It is thus unlikely that when a taxpayer redeems property, the foreclosure attorney would be in a position to seek court approval for charges that may exceed $150 per parcel. Making separate applications to the court to substantiate charges in excess of $150 on each such occasion, and the time spent waiting for court approval, would jeopardize many redemptions and make the prosecution of tax foreclosures overwhelming, particularly when the additional charges may not be much more than another $50 to $100 per parcel.

Further, because tax foreclosures often involve many parcels joined in a single proceeding, it is often impossible to accurately attribute costs on a per-parcel basis—particularly prior to the judgment of foreclosure—other than to simply estimate total costs from start to finish and divide by the number of parcels.

Under the current RPTL § 1125, the total cost of locating the delinquent taxpayer whose return receipt card is never returned with a proper signature must necessarily increase by some amount the per-parcel costs of the proceeding from what it would otherwise have been, making it more likely that the $150 "no questions asked" threshold will be exceeded more frequently and by a greater amount.

The best and simplest remedy for RPTL § 1102, in consideration of the practical mechanics of tax foreclosure proceedings, would be to establish several threshold charges that would increase from $150, in accordance with several factors that might include (1) the stage of the proceeding at which the parcel is redeemed, (2) whether the municipality had to resort to additional measures to attempt to locate the owner, and (3) whether the return receipt card was either never returned, or was returned stamped "unclaimed" (this assumes that the address on the card that was used by the municipality matched the address shown in the public records).

The proposed schedule of charges would be similar to the statutory costs provided by article 82 of the Civil Practice Law and Rules, by which a successful litigant may recoup various specific charges associated with litigation in accordance with the particular efforts that were required to obtain a judgment. The key difference in the proposed foreclosure fee charges would be that no court or clerk approval would be necessary, and instead, such fees would be allowed automatically in accordance with an articulated set of foreclosure events. This would be only a minor departure from the current scheme, but would account for the fact that charges in excess of $150 are likely, and multiple court applications would be unduly burdensome and unnecessary.

For example, if a delinquent taxpayer redeemed a parcel at an early stage of the proceeding, it is possible that the municipality would have taken only the pre-

liminary step of buying an index number and filing a List of Delinquent Taxes with the county clerk, pursuant to RPTL § 1122. At this stage, the $150 charge might still automatically apply. If a parcel were redeemed later, for example after a petition of foreclosure was created and filed pursuant to RPTL § 1123, an additional charge could be automatically allowed without substantiation pursuant to RPTL § 1102. Further charges could be similarly specified upon publication of notice of foreclosure pursuant to RPTL § 1124, upon posting of notice,[15] and then upon service of personal notice of foreclosure pursuant to RPTL § 1125. If a properly addressed return receipt card was returned as "unclaimed," and further time and effort were required to locate the property owner, an additional automatic charge would be allowed in a specified amount.

With such a system of presumptive costs associated with specific, identifiable events in a foreclosure proceeding, the mechanical problems associated with the current version of RPTL § 1102 would be eliminated, and the parties would have a more clearly defined method for determining charges.

Conclusion

The current version of RPTL § 1125 provides property owners in New York with an additional degree of due process that may lead to greater efforts by tax-collecting municipalities to locate delinquent owners. Municipalities may benefit as well, because when return receipt cards are signed and returned, time-consuming battles over whether notice was actually mailed will be avoided. Where an item mailed with a return receipt card comes back unclaimed, it seems that something more must be done to locate the delinquent owner; but the extent of those efforts must still be defined by the courts. The answer must be guided by the standards applicable in the general framework of due process necessary in tax foreclosures.

More work is also required by lawmakers to reform RPTL § 1102 so that municipalities will have the means to recoup their costs quickly and efficiently and without the need for multiple, unnecessary applications to the court.

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1. *See* David C. Wilkes, *Real Property Interests May Be Significantly Affected by Sweeping Changes to RPTL*, N.Y. St. B.J., Vol. 69, No. 6, at 14 (Sept./Oct. 1997).
2. RPTL § 1125(1).
3. In fact, former Section 1125 required only one such notice.
4. *See* RPTL § 1128(1).
5. *See, e.g., Rosa v. Board of Examiners*, 143 A.D.2d 351, 352, 532 N.Y.S.2d 307 (2d Dep't 1988).
6. 124 A.D.2d 314, 508 N.Y.S.2d 97 (3d Dep't 1986).
7. *Id*. at 315.
8. RPTL § 1125(1).
9. 181 Misc. 2d 595, 694 N.Y.S.2d 896 (Sup. Ct., Albany Co. 1999), *aff'd in part, modified in part*, 272 A.D.2d 726, 708 N.Y.S.2d 504 (3d Dep't 2000).
10. *Id*. at 600 (citations omitted) (quoting *Metropolitan Life Ins. Co. v. Young*, 157 Misc. 2d 452, 454, 596 N.Y.S.2d 653 (Civ. Ct., N.Y. Co. 1993)).
11. *See Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950); *McCann v. Scaduto*, 71 N.Y.2d 164, 176, 524 N.Y.S.2d 398 (1987); *Congregation Yetev Lev D'Satmar v. County of Sullivan*, 59 N.Y.2d 418, 425, 465 N.Y.S.2d 879 (1983).
12. *See, e.g., McCann*, 71 N.Y.2d at 177.
13. RPTL § 1102(1)(e), (f).
14. *See* RPTL §§ 1110, 1111, 1112, 1114.
15. RPTL § 1124(4).

RPL Requires Disclosure Statement

Since March 1, most sellers of residential real property in New York State have been obliged to provide buyers with a "Property Condition Disclosure Statement" answering 48 specific questions about the property. A copy of the four-page statement is reproduced on the page at the right.[1]

As mandated by a new Article 14 of the Real Property Law (RPL) (§§ 460 through 467), the statement must be "delivered to a buyer or buyer's agent prior to the signing by the buyer of a binding contract of sale."[2]

If the statement is not delivered, "the buyer shall receive upon the transfer of title a credit" of $500 against the agreed-upon purchase price.[3]

The law specifies that the statement is "not a warranty of any kind," but a "knowingly false or incomplete statement by the seller . . . may subject the seller to claims by the buyer prior to or after the transfer of title."[4]

After providing the statement but before the buyer takes title or occupancy, sellers have an obligation to provide revised information if they acquire knowledge that renders a previously provided statement "materially inaccurate."[5]

Sellers who willfully fail to comply, "shall be liable for the actual damages suffered by the buyer in addition to any other existing equitable or statutory remedy."[6]

No statement is required in 14 specified circumstances, among them a "transfer by a fiduciary in the course of the administration of a descendant's estate, a guardianship, a conservatorship, or a trust."[7] Exceptions also apply to transfers from one co-owner to another, transfers as the result of a divorce decree, various forced sales, and transfers that involve newly constructed residential real property that has not previously been inhabited.

Agents representing a seller have the duty to inform sellers of the obligation to provide a statement.[8] Nothing in the article is to be construed as limiting any existing cause of action or remedy at law.[9]

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1. The Property Condition Disclosure Statement provided is reproduced from NYSBA's Residential Real Estate Forms, an automated document assembly system published by the New York State Bar Association, in collaboration with Matthew Bender and Company.
2. RPL § 462.
3. RPL § 465.
4. RPL § 462(2).
5. RPL § 464.
6. RPL § 465.
7. RPL § 463.
8. RPL § 466.
9. RPL § 467

Property Condition Disclosure Statement

Name of Seller or Sellers: _____
Property Address: _____

The Property Condition Disclosure Act requires the seller of residential real property to cause this disclosure statement or a copy thereof to be delivered to a buyer or buyer's agent prior to the signing by the buyer of a binding contract of sale.

Purpose of Statement:

This is a statement of certain conditions and information concerning the property known to the seller. This disclosure statement is not a warranty of any kind by the seller or by any agent representing the seller in this transaction. It is not a substitute for any inspections or tests and the buyer is encouraged to obtain his or her own independent professional inspections and environmental tests and also is encouraged to check public records pertaining to the property.

A knowingly false or incomplete statement by the seller on this form may subject the seller to claims by the buyer prior to or after the transfer of title. In the event a seller fails to perform the duty prescribed in this article to deliver a disclosure statement prior to the signing by the buyer of a binding contract of sale, the buyer shall receive upon the transfer of title a credit of five hundred dollars ($500.00) against the agreed upon purchase price of the residential real property.

"Residential Real Property" means real property improved by a one to four family dwelling used or occupied, or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons, but shall not refer to (a) unimproved real property upon which such dwellings are to be constructed or (b) condominium units or cooperative apartments or (c) property on a homeowners' association that is not owned in fee simple by the seller.

Instructions to the Seller:

(a) Answer all questions based upon your actual knowledge.
(b) Attach additional pages with your signature if additional space is required.
(c) Complete this form yourself.
(d) If some items do not apply to your property, check "NA" (Non-Applicable). If you do not know the answer check "Unkn" (Unknown).

Seller's Statement: The seller makes the following representations to the buyer based upon the seller's actual knowledge at the time of signing this document. The seller authorizes his or her agent, if any, to provide a copy of this statement to a prospective buyer of the residential real property. The following are representations made by the seller and are not the representations of the seller's agent.

General Information

1. How long have you owned the property? _____
2. How long have you occupied the property? _____
3. What is the age of the structure or structures? _____
   Note to Buyer - If the structure was built before 1978 you are encouraged to investigate for the presence of lead based paint.
4. Does anybody other than yourself have a lease, easement or any other right to use or occupy any part of your property other than those stated in documents available in the public record, such as rights to use a road or path or cut trees or crops?
   Yes No Unkn NA (If yes, explain below.)
5. Does anybody else claim to own any part of your property?
   Yes No Unkn NA (If yes, explain below.)
6. Has anyone denied you access to the property or made a formal legal claim challenging your title to the property? Yes No Unkn NA (If yes, explain below.)
7. Are there any features of the property shared in common with adjoining land owners or a homeowners association, such as walls, fences or driveways?
   Yes No Unkn NA (If yes, describe below.)
8. Are there any electric or gas utility surcharges for line extensions, special assessments or homeowner or other association fees that apply to the property?
   Yes No Unkn NA (If yes, explain below.)
9. Are there certificates of occupancy related to the property?
   Yes No Unkn NA (If no, explain below.)

Environmental

Note to Seller - In this section, you will be asked questions regarding petroleum products and hazardous or toxic substances that you know to have been spilled, leaked or otherwise been released on the property or from the property onto any other property. Petroleum products may include, but are not limited to, gasoline, diesel fuel, home heating fuel, and lubricants. Hazardous or toxic substances are products that could pose short- or long-term danger to personal health or the environment if they are not properly disposed of, applied or stored. These include, but are not limited to, fertilizers, pesticides and insecticides, paint including paint thinner, varnish remover and wood preservatives, treated wood, construction materials such as asphalt and roofing materials, antifreeze and other automotive products, batteries, cleaning solvents including septic tank cleaners, household cleaners and pool chemicals and products containing mercury and lead.

Note to Buyer - If contamination of this property from petroleum products and/or hazardous or toxic substances is a concern to you, you are urged to consider soil and groundwater testing of this property.

10. Is any or all of the property located in a designated floodplain?
    Yes No Unkn NA (If yes, explain below.)
11. Is any or all of the property located in a designated wetland?
    Yes No Unkn NA (If yes, explain below.)
12. Is the property located in an agricultural district?
    Yes No Unkn NA (If yes, explain below.)
13. Was the property ever the site of a landfill?
    Yes No Unkn NA (If yes, explain below.)
14. Are there or have there ever been fuel storage tanks above or below the ground on the property?
    Yes No Unkn NA
    If yes, are they currently in use?
    Yes No Unkn NA
    Location(s) _____
    Are they leaking or have they ever leaked?
    Yes No Unkn NA (If yes, explain below.)
15. Is there asbestos in the structure?
    Yes No Unkn NA (If yes, state location or locations below.)
16. Is lead plumbing present?
    Yes No Unkn NA (If yes, state location or locations below.)
17. Has a radon test been done?
    Yes No Unkn NA (If yes, attach a copy of the report.)
18. Has motor fuel, motor oil, home heating fuel, lubricating oil or any other petroleum product, methane gas, or any hazardous or toxic substance spilled, leaked or otherwise been released on the property or from the property onto any other property?
    Yes No Unkn NA (If yes, describe below.)
19. Has the property been tested for the presence of motor fuel, motor oil, home heating fuel, lubricating oil, or any other petroleum product, methane gas, or any hazardous or toxic substance?
    Yes No Unkn NA (If yes, attach report(s).)

Structural

20. Is there any rot or water damage to the structure or structures?
    Yes No Unkn NA (If yes, explain below.)
21. Is there any fire or smoke damage to the structure or structures?
    Yes No Unkn NA (If yes, explain below.)
22. Is there any termite, insect, rodent or pest infestation or damage?
    Yes No Unkn NA (If yes, explain below.)
23. Has the property been tested for termite, insect, rodent or pest infestation or damage?
    Yes No Unkn NA (If yes, please attach report(s).)
24. What is the type of roof/roof covering (slate, asphalt, other.)?
    Any known material defects?
    Yes No Unkn NA (If yes, explain below.)
    How old is the roof? _____
    Is there a transferable warrantee on the roof in effect now?
    Yes No Unkn NA (If yes, explain below.)
25. Are there any known material defects in any of the following structural systems: footings, beams, girders, lintels, columns or partitions?
    Yes No Unkn NA (If yes, explain below.)

Mechanical Systems & Services

26. What is the water source (Circle all that apply - well, private, municipal, other)?
    If municipal, is it metered?
    Yes No Unkn NA
27. Has the water quality and/or flow rate been tested?
    Yes No Unkn NA (If yes, describe below.)
28. What is the type of sewage system (Circle all that apply - public sewer, private sewer, septic or cesspool)?
    If septic or cesspool, age? _____
    Date last pumped? _____
    Frequency of pumping? _____
    Any known material defects?
    Yes No Unkn NA (If yes, explain below.)
29. Who is your electric service provider? _____
    What is the amperage? _____
    Does it have circuit breakers or fuses? _____
    Private or public poles? _____
    Any known material defects?
    Yes No Unkn NA (If yes, explain below.)
30. Are there any flooding, drainage or grading problems that resulted in standing water on any portion of the property? Yes No Unkn NA (If yes, state locations and explain below.)
31. Does the basement have seepage that results in standing water?
    Yes No Unkn NA (If yes, explain below.)

Are there any known material defects in any of the following (If yes, explain below. Use additional sheets if necessary.):

32. Plumbing System?	Yes	No	Unkn	NA
33. Security System?	Yes	No	Unkn	NA
34. Carbon Monoxide Detector?	Yes	No	Unkn	NA
35. Smoke Detector?	Yes	No	Unkn	NA
36. Fire Sprinkler System?	Yes	No	Unkn	NA
37. Sump Pump?	Yes	No	Unkn	NA
38. Foundation/Slab?	Yes	No	Unkn	NA
39. Interior Walls/Ceilings?	Yes	No	Unkn	NA
40. Exterior Walls Or Siding?	Yes	No	Unkn	NA
41. Floors?	Yes	No	Unkn	NA
42. Chimney/Fireplace or Stove?	Yes	No	Unkn	NA
43. Patio/Deck?	Yes	No	Unkn	NA
44. Driveway?	Yes	No	Unkn	NA
45. Air Conditioner?	Yes	No	Unkn	NA
46. Heating System?	Yes	No	Unkn	NA
47. Hot Water Heater?	Yes	No	Unkn	NA

48. The Property is located in the following School District: _____ Unkn

Note: Buyer is encouraged to check public records concerning the property (e.g. tax records and wetland and flood plain maps.)

The seller should use this area to further explain any item above. If necessary, attach additional pages and indicate here the number of additional pages attached.

_____
_____
_____
_____
_____

Seller's Certification: Seller certifies that the information in this property condition disclosure statement is true and complete to the seller's actual knowledge as of the date signed by the seller. If a seller of residential real property acquires knowledge which renders materially inaccurate a property condition disclosure statement provided previously, the seller shall deliver a revised property condition disclosure statement to the buyer as soon as practicable. In no event, however, shall a seller be required to provide a revised property condition disclosure statement after the transfer of title from the seller to the buyer or occupancy by the buyer, whichever is earlier.

Seller _____ Date _____

Seller _____ Date _____

Buyer's Acknowledgment: Buyer acknowledges receipt of a copy of this statement and buyer understands that this information is a statement of certain conditions and information concerning the property known to the seller. It is not a warranty of any kind by the seller or seller's agent and is not a substitute for any home, pest, radon or other inspections or testing of the property or inspection of the public records.

Buyer _____ Date _____

Buyer _____ Date _____

POINT OF VIEW

A New Paradigm for Lawyers?

BY ROBERT P. BORSODY

The terrorist attacks last fall caused many Americans to re-examine their lives, their relationships, values and purposes on this earth. This is true especially of the New York City lawyer who, like myself, could have been in the World Trade Center at that tragic time, but was not.

Perhaps now is also the time to re-examine how we practice law, for law practice, especially in New York City, can often be corrosive to the soul and heart of practitioners. Over time, it can also become a pain of the mind and body. This may be one reason why attorneys, as a group, have some of the highest rates of divorce, heart attacks, strokes, drug and alcohol addiction and suicide. How did it get this way? Is a different paradigm possible for the practice of law?

Some lawyers are working hard to point the way to a different paradigm for the practice of law. They are exploring the question, can a lawyer can be a healer; can a lawyer ever be a peacemaker—and make a living?

A concept and a practice has arisen called Holistic Law. The concept and the practice is new enough so that the definition is still developing. Holistic Law approaches disputes differently, looking for a resolution that will not inevitably involve litigation, but rather a solution that will take the interests of all parties into consideration. Holistic Law practice has its own professional association, the International Alliance of Holistic Lawyers, which just celebrated its tenth anniversary.

Bill van Zyverden, a Vermont lawyer, is the founder of the Alliance. In a recent newsletter he says that Holistic Law "is concerned with the 'whole' client: past, future, body, mind, spirit and unified field connection to each other and all that is. Our role becomes a sharing of our own humanity as equals, as Spiritual companions." When Bill opened his practice in 1992 at the "Holistic Justice Center" in Middlebury, Vt., a *New York Times* reporter noted that a fellow lawyer asked if he was practicing "wimpy law." Many members of the Alliance practice in small towns. Bill van Zyverden still practices in a small town in Vermont, wears blue jeans to work and bills out at $80 an hour. The question that I have put to myself after becoming aware of this concept is: "Will it play in the Big Apple?"

Before September 11, 2001, I had doubts. Now, however, I am hopeful that New York lawyers might be open to suggestions for alternative ways of looking at their practice.

When I started practicing on Wall Street, I read a book by Erwin O. Smigel called *The Wall Street Lawyer, Professional Organization Man?* It characterized a good lawyer as one who is "methodical, prudent and disciplined." This description is still useful. A lawyer who represents clients in significant transactions must engage in thorough and exhaustive research and find all the cases and all the precedents that favor the client's position. There are, of course, ethical obligations to represent client with the utmost vigor. Canon 7 requires "zealous" representation of a client.[1] However, the Canons of Ethics also state, "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm."[2] In addition, Canon 8 encourages improvement of the legal system.

Holistic practitioners may take more time with a client to understand the client's life and lifestyle and the client's business, going beyond the immediate facts of the proposed deal or the perceived conflict. In structuring a transaction in the context of the broader picture, holistic lawyers can fulfill their obligations to clients and may also provide some healing advice that could address not only the clients' immediate problems but also prevent them from reoccurring.

Holistic practitioners are often concentrated in particular areas of law, such as family law, where, instead of just aggressively representing a client in a divorce, they urge the client to look at a broader, longer view that considers the effect on the children and how the children will view the client in years to come. However, even a lawyer representing commercial or corporate clients versus neighborhood and community interests can also serve his client well by looking beyond the normal parameters of the matter.

Tom Lynch, an environmental counsel and litigator at a traditional corporate law firm in Maryland who is also a member of the International Alliance of Holistic Lawyers, described the evolution in his representation of a company that became aware of pollution problems at one of its facilities. The company prudently took immediate damage-control measures to address the contamination problem quietly and efficiently. For several years, on Tom's advice, it avoided communication with the media and its neighbors out of fear that disclosing past problems might lead to litigation. When a company representative had to appear at a public meeting as a part of the process to upgrade its treatment system, Tom was chosen to speak. He

had just finished reading *Seeing Law Differently, Views From a Spiritual Path* by Alan Reid, a Canadian lawyer, and the book gave him an inspiration. At the meeting, he apologized to the community for having advised his client to maintain a low profile. Instead, he and his environmental consultant disclosed precisely what had been done to remediate the problem and invited the community to participate in plant tours during which the state-of-the-art environmental clean-up equipment could be examined. The community's concern and anger were dissipated by this cathartic event, and the community has worked with the company since then. Expensive litigation was avoided, and the relationship between the company and the community was significantly improved. This approach was consistent with the basic premise and major tenets of holistic and compassionate lawyering. Compassion, information sharing, cooperation and understanding on both sides encouraged community and commonality of purpose. There was no call for blame and no need for the waste of resources in litigation.

Many traditional lawyers could see disaster in this direction because less litigation could mean fewer legal fees. However, in the long run, a practice that encourages resolution of disputes without the expense of litigation can flourish. Abraham Lincoln said, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man."

Most lawyers do not go to court and are rarely involved in litigation. Many practice "transactional law," buying and selling businesses, setting up businesses, counseling their clients on contractual relationships with other businesses, and dealing with the requirements of governmental agencies that hold their clients in regulatory thrall. Business lawyers might not be able to change their practices dramatically overnight, but they can make a difference in small ways. Indeed, many such lawyers have been trying in some ways to "do the right thing." Like Moliere's Monsieur Jourdain in *Le Bourgeois Gentilhomme*, who is amazed to discover he had been speaking prose for 40 years without knowing it, many lawyers may be surprised to know they have been practicing some holistic law without knowing it.

Almost all lawyers are fine, decent and honest people. From the young, idealistic lawyer who has recently graduated, to the older, seasoned lawyer, who has seen it all, many lawyers have been implementing some of the holistic principles described above. This includes the customary courtesies extended to opposing counsel and the cautionary observation to a client that a course of action could have long-term, unintended and unpleasant consequences. In these and many other ways, many lawyers have helped to make the practice of law a little less abrasive and life more bearable for some clients and their opponents. They might, however, be embarrassed or indignant to find themselves grouped with "holistic lawyers," fearing it was bad for business.

The good news is that it could be very good for business. The longer and broader view of a client's interest is always good for lawyers. Furthermore, it can be entirely consistent with the Canon of Ethics. When a client comes to a lawyer, flushed with the heat of incipient battle, seething from a wrong, or excited about a possible deal or sale of a new business, he certainly expects the lawyer to point out pitfalls and even hopes to learn about unexpected advantages and possibilities. But he would also appreciate the lawyer pointing out an approach that would benefit both sides of the deal. The other party is not going to disappear. Within a particular industry, paths may cross again and that other party may be in a position to help or harm the client in the future; how the lawyer constructs the deal and conducts the transaction could determine whether the result is helpful or harmful.

Will the "high-powered, corporate lawyers" in a big firm in a big city practice think of applying any of these principles in the way they make a living, or will they believe these principles are inconsistent with the maxim that "Business is Business"? They may believe it would be too risky to change the way the business of law is conducted, and take comfort in the feeling that a successful practice is their contribution to the world. They should know, however, about the story Abraham Lincoln used to tell. A brilliant and eloquent frontier lawyer had spent his life in anxious, unending and exclusive pursuit of big fees, unconcerned with the issues of the day: slavery, states' rights, free soil, or other community concerns. Before the lawyer died, he ordered his own tombstone and directed that under his name be placed the inscription: "A Successful Lawyer and a Good Man." The local town council refused to approve the inscription. Members said it was against the law to bury "two men in one grave."

Lawyers can change—to make themselves healthier and happier, and to better their country. It starts with each individual lawyer. It spreads to the lawyer's firm, to colleagues and perhaps to the courts and to the governmental agencies, and then to the broader legal community and the community as a whole. Then it can spread across the country and, in this Web-based international community, it can spread to the rest of the world. Where it must start, however, is in the consciousness of each individual lawyer.

Lawyers interested in the subject may wish to read *Transforming Practices: Finding Joy and Satisfaction in the Legal Life* by Steven Keeva (Lincoln

CONTINUED ON PAGE 57

Language Tips

By Gertrude Block

Question: New York attorney Roberta Arnone asks what the approved language is for noting that a document is attached to a message being sent over the Internet. She uses the word *enclosure*, but is tempted to add the phrase *by attachment* in parentheses.

Answer: To my knowledge there is no "approved language" to indicate that a document has been attached to a letter sent via the Internet. Ms. Arnone's suggested form seems sensible and clear. In my e-mails to which documents are attached, I use the word *attachment*, and that form is the one I see most often in e-mails that I receive containing attached documents.

If other readers prefer a form different from either of the two above, both Ms. Arnone and I would appreciate knowing what they are.

From the Mailbag:

In the November/December *Language Tips*, I responded to an e-mail containing three questions, sent by Attorney Robert S. Moskow, who practices in Morristown, N.J. The final question stumped me. Mr. Moskow wrote, "The 'night owls' in our office are at a loss as to the meaning of the word *agita*. Although we believe that the word is spelled 'agita,' we cannot find any verification that it is the correct spelling. The common use suggests nerves and seems to be a version of 'agitate,' but we cannot find it in the dictionary or determine its roots. We are not even sure that that is the correct spelling. Can you shed some light on this subject?"

Although I doggedly searched for the meaning and usage of *agita* in a number of legal and lay dictionaries, I was unable to help Mr. Moskow and his "night owl" associates. I finally made a "wild guess" (which should warn me never to make another wild guess). I wrote, "Is it possible that *agita* is a New York pronunciation of *agitur*, a third person singular Latin subjunctive meaning "an action has been brought"?

Mr. Moskow, it turns out, had made a much better guess than I. But having experienced what I hoped might be a stroke of insight, I e-mailed the column and then was away from my office for about a month. On returning, I checked my e-mail and discovered page-after-page of responses, all from New Yorkers, all on the subject of *agita*, and the overwhelming majority correctly answering the question of its meaning and usage. It seems that Mr. Moskow and this "flatland furriner" (remember "Snuffy Smif"?) may be the only persons in doubt about the meaning of *agita*.

In all, I have received more than 100 e-mailed and slow-mailed messages. As is my custom, and being at first unaware of the immensity of the task, I sent e-mails thanking the correspondents who had set me right, but after e-mailing perhaps 25 appreciative responses, I gave up. So those correspondents who failed to receive my thanks now know why they haven't heard from me.

The responses ranged from humor, to helpfulness, to sarcasm, to incredulity that anyone could be so stupid. In the event that readers who do not practice in New York may be interested, here are quotations from some of the responses New York attorneys mailed.

Attorney David Howe wrote: "Your most recent column provoked mild agita, as I was alarmed to see that someone writing for the *NYSBA Journal* was unfamiliar with the word. It is an Italian word employed regularly by New Yorkers of all ethnicities. Its literal meaning is indigestion, but it is most commonly used figuratively to mean anxiety, as in "You're giving me agita." [As I wrote Mr. Howe, although *agita* is an Italian noun, its origin is Latin: from *agitare* (to agitate). *Agita* would be the Latin imperative form.]

Attorney Robert J. Cubitto, wrote: "I chuckled when I read your 'wild guess' about *agita*. Clearly you are neither from New York nor of Italian descent . . . You will not find *agita* in a standard Italian dictionary. I am, however, surprised that the word does not appear in any dictionaries of American slang. . . . A song named 'Agita' appeared in Woody Allen's film 'Broadway Danny Rose,' sung by the actor Nick Apollo Forte, who played the character Lou Canova. Mr. Forte wrote the song himself."

Attorney P. Skomorowsky wrote: 'I always enjoy your column . . . but most especially so in the November/December *Journal*. 'Agita' is an expression, commonly heard around New York, derived from the verb *agitare* (to trouble, to get worked up about something). One can get agita . . . often from one's teen-aged children, resulting in digestive interference."

A St. John's University law professor wrote, among other kind and helpful remarks, that to say that "my adversary is giving me agita" is to state that my esteemed opponent is aggravating me, particularly giving me an upset stomach in a literal sense. It is one of those words, like *kosher* that in our linguistic melting pot is incorporated into everyday American English. It is not unlike the Italian *banca rotta,* literally "broken bench," a Renaissance symbol of insolvency that evolved into the English "bankruptcy."

Finally, a helpful law school senior wrote that agita is "probably another word for heartburn. It may be Yiddish."

My thanks to all who wrote. The volume of responses gave me mixed feelings of dismay and delight, the latter outweighing the former. I never realized that *Language Tips* had so many interested readers who were willing to help.

Gertrude Block is the writing specialist and a lecturer emeritus at Holland Law Center, University of Florida, Gainesville, FL 32611. Her e-mail address is Block@law.ufl.edu.

THE LEGAL WRITER
CONTINUED FROM PAGE 64

"You're a better man than I, Gunga Din." Unless you mean "I Gunga Din." "Where's the beef jerky?" Unless you mean "Where's the beef, jerky?"

Be positive about appositives. Appositives are nouns or pronouns that rename other nouns or pronouns. Commas must frame nonrestrictive appositives. *Correct:* "The Supreme Court, Appellate Division, First Department, is in New York County." *Correct:* "Judge A, who presides in Chemung County, and Judge B lectured last week." (And note the absence of a comma after "Judge B.") "Judge John Smith, Jr., is presiding." Strunk and White argue that "Jr." is restrictive and therefore that no comma is needed before or after "Jr."[3] Thus, add a comma fore and aft, depending on the named person's preference. Use commas to set off appositive dates, places, and explanatory phrases. "The lecture will be held in Rochester, New York on November 19, 1999 a Friday" requires commas after *New York* and *1999*.

The name game. Use commas to set off phrases that describe nouns or phrases and to separate names and titles. This example covers both categories: "Judge X (title, noun, and name), the supervising judge of the Housing Part, New York City Civil Court, Richmond County (phrase that describes the title, noun, and name), is a Housing Court judge."

Keep going. Avoid commas if possible by inverting the sentence: "Judge Y, after reviewing the papers, granted the motion." *Becomes:* "After reviewing the papers, Judge Y granted the motion." "Even when doing simple tasks, choices must be made." *Becomes:* "Choices must be made even when doing simple tasks."

Explanatory commas. X: "How is your wife Carol?" Y: "As opposed to my other wife? My wife, Carol, is fine." The lack of commas in this bigamy quiz would be correct if the writer has more than one wife. The issue is whether the person is defining, or nonrestrictive. If yes, commas go front and back.

Next Month: Which hunting, runaway commas, verbal hesitation, serial killers, and related comma concerns.

1. *The Legal Writing Handbook* § 25.2.2, at 689 (2d ed. 1998).
2. In typing, add two spaces before a zip code: "The court attorney works at 141 Livingston Street, Brooklyn, New York 11201."
3. William Strunk Jr. & E.B. White, *The Elements of Style* 3 (3d ed. 1979).

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, currently assigned to Brooklyn and Staten Island. An adjunct professor and the Moot Court faculty advisor at New York Law School, he has written numerous articles and *Advanced Judicial Opinion Writing*, a handbook for New York State's trial and appellate courts, from which this column is adapted. His e-mail address is Gerald.Lebovits@law.com.

POINT OF VIEW
CONTINUED FROM PAGE 55

Wood, Illinois, Contemporary Books, 1999), *Why Lawyers (and the Rest of Us) Lie and Engage in Other Repugnant Behavior* by Mark Perlmutter (Bright Books, 1998), and *Practicing Therapeutic Jurisprudence, the Law as a Helping Profession* by Stolle, Wexler and Winick (1 Carolina Academic Press, Durham, N.C., 2001).

Helpful organizations and programs include: Wainwright House, 260 Stuyvesant Ave., Rye, N.Y. 10580, (914) 967-6080, <www.wainwright.org>; Omega Institute, 150 Lake Drive, Rhinesbeck, N.Y. 12572, (845) 266-4444, <www.eomega.org>; The New York Open Center, 83 Spring St., New York, N.Y. 10012, (212) 219-2527, <www.opencenter.org>; International Association of Holistic Lawyers, P.O. Box 753, Middlebury, Vt. 05753, (802) 388-7478, <www.iahl.org>; Renaissance Lawyers Society, P.O. Box 949, Stone Ridge, N.Y. 12484, <www.renaissancelawyer.com>.

1. *See* Lawyer's Code of Professional Responsibility, DR 7-101 (hereinafter "Code").
2. *See* Code, EC 7-10.

ROBERT P. BORSODY has practiced law in New York City for 37 years and was formerly associated with the New York firm of Sullivan & Cromwell. He directed a federally funded project of health and law research and test case litigation in the 1970s, and served as chair of the Public Health Committee of the NYSBA for four years. He later founded a health law firm. He received both his undergraduate degree and his law degree from the University of Virginia.

New Members Welcomed

FIRST DISTRICT
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Perri Al-Rahim
Lisa L. Albert
Jessica Jacqueline Albrecht
Jill N. Alintoff
Margaret Smith Allison
Annaise Alviar
Keisha M. Amey
Richard H. An
Laura A. Angel-Lalanne
Alison Mary Arcuri
Jordan Steven Arnold
Tara Nicole Auciello
John Anthony Aviles
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Marina A. Bezrukova
Eric Stanley Black
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Philip Michael Blumberg
Linda R. Blumkin
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Yanitza Nannette Brignoni
Tor E.P. Brodtkorb
Daniel L. Brook
Jonathan Michael Brundige
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Molly Canick
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Joseph Cerullo
Michelle Christina Cerullo
Jeffery Millard Chamberlain
John S. Chambers
Susana M. Chavez
Andrew W. Cheng
Padmaja Chinta
Dutch D. Chung
Randolph Winston Clarke
Eric J. Cleary
Peter Francis Coates
Heather Jill Cohen
Michael M. Cohen
Kevin Paul Colan
Edwin M. Collins
Brett Evan Cooper
Erin Bernadette Corcoran
David P. Crowe
Amanda Beth Cunningham
Louis Anthony Curcio
Patrick Colman Daly
Joel Wesley Darrington
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Louis John Deljuidice
Anne K. Desutter
Arlo Devlin-Brown
Shari Beth Domow
Torin A. Dorros
Joshua M. Dubofsky
Carrie Lynn Durant
Christine Isabelle Marie Durland
Jennean Marie Endres
Ann-Charlotte Kerstin Engstrom
Michael Roman Ertel
Eric M. Eusanio
Joy Naomi Fallek
Denis Michael Farrell
Riqueza Vernetta Feaster
David Joseph Fein
Kevin Earle Feinblum
Maria E. Felix
Alan David Feller
Jason David Fernbach
Igor Fert
Beth Ivy Fingerman
Jessica Lee Finkelstein
Shari Beth Finkelstein
Stefanie Aimee Firtell
Jimmy Fokas
Michelle Rachael Forrest
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Geoffrey F. Heffernan
L Allison Heller
Kieran Patrick Hennigan
Joseph Andrew Herz
Elson Ho
Ida Hoghooghi
Rebecca Houghton
John Arthur Houlihan
Robert Daniel Innocentin
Marisa Iozzi
Tamarah Eve Isenberg
Michael Andrew Jaffe
Anita Magdalena Jaskot
Nicole Elena Joseph
Leonard Kahn
David J. Kanfer
Chia Kang
Jonathan Marcos Kaplan
Tracy L. Karsch
Susan G. Kaufman
Timie Kavouklis
James Francis Kelly
Robert M. Kim
Soh Hyong Kim
Bernadette Kelly Kirwin
Amy Frances Kleitman
Natasha G. Kohne
Yasmin Kok
Thomas Reid Kopff
Paul Richard Koppel
Daniel S. Kratka
Lauren Pamela Kraus
Mark B. Kravitz
Kazuya Kuwada
Kathryn V. Kwak
Jennifer L. Lallite
Joseph M. Lamicela
Rachel Mara Laveman
Jenny Nahyoung Lee
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Carl Winslow Leighton
Mark Joseph Lemire
David Aaron Lewis
Michael S. Lieber
Herve N. Linder
Christopher Donald Lindquist
Sin Yen Ling
Elliot Wesley Lipins
Russell Lawrence Lippman
Jeanne Marie Locicero
Kristen Johanna Lonergan
Gina S. Love
Phillip Lum
Deborah Lynn Mains
Amy Lynn Marcus
Sasson Gur Marcus
Rose A. Marino
Gabriel Joseph Marous
Alison Lee Marquez
Kerry Frances Marsicoveters
Andre Rudolph Mattis
Thomas R. May
Lauren Beth Mazur
Mary A. Mchale
Zana Michelle McIntosh
Jennifer Meredith
Lara Maria Merkel
Bethany Barbara Mongeau
Kim Denise Moore-Ward
Payam Moradian
Maurizio J. Morello
Henry Morris
Gloria Mshelia
John C. Muccitori
Eric David Muller
Meghan M. Murphy
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Jodi Nagel
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Shawn Patrick Naunton
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Amanda L. Oren
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Sean Patrick O'Toole
Shonna L. Owen
Rosanne Palumbo
Sung Uk Park
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Lisa Margaret Pisciotta
Matthew Vincent Pontillo
Tama William Potaka
Joanna Elizabeth Pressman
April Franchon Preston
Tara Christine Prigge
George B. Raine
Jamie Beth Rainerman
Louis Andrew Raniero
Katherine M. Reihing
Sonya Reiss
Michael John Riela
Ryan Evan Roberson
Andrew Charles Robertson
Andre Keith Roger Charbonneau
Tracey Sharon Rogers
Rachel Marjan Rokhsar
Michel Marie Rose
David L. Rosenband
Benjamin Michael Roth
Jason Michael Rothschild
Arthur D. Russell
Andrea Russo
Gregory Matthew Saiontz
John Jeffrey Salvo
Jocelyn Santo
Jean-Paul Saulnier
David B. Saxe
Edward F. Sayago
John C. Scalzo
Jill Marie Schatz
Nance L. Schick
Rebecca Ann Schleifer
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Melanie Brook Siegel
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Elene M. Spanakos
Emily Copland Stein
Michael A. Stoker
Sahara Gayle Stone
Walter J. Storey
Joshua William Sussman
Anthony Michael Tessitore
Lorina A. Tester
Kara Isabelle Theard
Jonathan Eric Turco
Nicholas Raymond Turner
Oren Uziel
Eleanor Vale
Carla A. Varner
Miguel Antonio Villarreal
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S. Eric Wang
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Eliezer A. Weiss
Elizabeth Robin Weiss
Dori Ellen Weissman
James M. Westerlind
Anne-marie Whelan
Michael Wieder
Jeffrey Martin William
John Wesley Williams
Mark Jason Woodward
Alissa Joy Wool
Steven J. Zaloudek
Andrea Ellmers Zeuschner
Hallie Ziesmer
Jacklyn Alyce Zimmermann
Anthony Roche Zupka

SECOND DISTRICT
Aliaa Ezzat Abdelrahman
Mark I. Aronson
Glenn D. Bell
William Boltrek
Betty-Anne Marie Bryce
Cesar De Castro
Gerald Keith Deaguiar
Donna Marie Dwyer
Daniel Jason Fox
Christopher Salvatore Guardino
Katherine M. Jaskot
Ian Russell Kaplan
Michael Alexander Kushner
Naeemah Lamont
Pietra Grazia Lettieri
Leon Lubarsky
Yury Maltser
Stephen Novakidis
Wilhemina Efua Nyarko
Michelle Patrice Patten

Tara Adams Ragone
Edward M. Rappaport
Cateline Samedi
Stan Schuldiner
Thomas J. R. Stadnik
Robert Donald Vinokur
John A. Vitucci

THIRD DISTRICT
Timothy Scott Brennan
Marie Chery-Sekhobo
Kathleen Hope Courtney
Darren P. Cunningham
Melissa Franolich
Stacy Marie Frederick
Nicole Elizabeth Gantner
Salvatore Anthony Gatto
Christopher Edward Gurda
Michael Patrick Hale
Shannon Lynn Hale
Timothy Tuoti Hollis
Alexis S. Komarow
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The Pause That Refreshes: Commas

BY GERALD LEBOVITS

For most of us, commas induce comas. We know that we must eliminate unnecessary commas. We agree that commas must enclose parenthetical words. But what's the difference between a comma splice and a serial comma?

Commas, like all punctuation, have many uses, including writing persuasively. Punctuation can speed readers up or slow them down. Em dashes ("—") grab readers, semicolons pause, periods arrest. Recast sentences to add or excise commas if you want your reader to get through your material slowly or quickly. Consider in a custody-dispute case the persuasive effect of asyndetons, or using commas instead of conjunctions, and polysyndetons, or using conjunctions instead of commas. The following examples, with some editing, come from Laurel C. Oates et al.[1] Objective style: "Mr. Lundquist had certain responsibilities regarding his daughter Anna's care: *He drove her to school, checked her homework, and took her to medical appointments.*" Persuasive style favoring the father: "Mr. Lundquist had several significant responsibilities regarding his daughter Anna's care: *He drove her to school, and checked her homework, and took her to medical appointments.*" Persuasive style favoring the mother: "Mr. Lundquist had minimal responsibilities regarding his daughter Anna's care: *He drove her to school, checked her homework, took her to medical appointments.*"

Set off on the right foot. Commas set off dates or addresses—but not zip codes.[2] "The opinion is dated March 6, 1955, and signed by the judge." Many modern authorities argue that the comma after the year looks awkward and interrupts. But the comma is necessary. If the comma feels cumbersome, rearrange the sentence: "The opinion, which the judge signed, is dated March 6, 1955."

Begin and end on high notes. Use commas after closings ("Sincerely yours,") and informal salutations ("Dear Art,"). Formal salutations require a colon ("Dear Mr. Arthur:").

You're entitled. Commas go before titles: "John Doe, J.D." "Jane Roe, Esq."

Some nonessential information. Commas set off phrases that add nonessential information to preceding clauses that begin with words like *despite*, *including*, *irrespective of*, *particularly*, *perhaps*, *preferably*, *probably*, *provided that*, *regardless of*, and *usually*.

Tag: you're it. Commas set off tag questions. "The attorney read the court rules, didn't she?"

A good question. No comma after a question mark or an exclamation point after a quotation. "'Dismiss the petition!,' the tenant insisted." *Becomes:* "'Dismiss the petition!' the tenant insisted."

Double trouble. Use a comma to omit *and* or *but* between double adjectives. "She is a strong, careful writer." "As a youth, Judge Y went to new, hip joints; now he must go for a new hip joint." Noncoordinate adjectives are unpunctuated because they carry equal weight: "Under his robes, the judge wears a gray flannel suit." Thus, do not use a comma to separate two adjectives before a noun when the first adjective modifies the second adjective or when the second adjective and the noun form one unit. But add a comma before a word that belongs to two or more phrases. *Incorrect:* "Justification was his first, and ultimately his only excuse." In that sentence, delete the comma after *first* or, if the comma remains, add a comma after *only*, because the sentence means, "Justification was his first excuse; justification was his only excuse." Use commas to separate two parts of a double comparative: "The more, the merrier."

Be positive about appositives. Commas must frame nonrestrictive appositives.

Introduce yourselves. Use an introductory comma for clarity after an introductory word, clause, or prepositional or participial phrase or subordinate clause. *Introductory word:* "Frankly, Judge Friendly wrote the opinion." Without the comma, a reader might believe that the judge's name, or nickname, is "Frankly Judge Friendly." *Introductory phrase:* "Although Judge Smith gave her court attorney explicit instructions for revising, the draft opinion got worse." Without the comma, a reader might confuse "revising" with "revising the draft opinion." *Introductory clause:* "In German, nouns are always capitalized." Without the comma, a reader who reads quickly might believe that the introductory phrase was, "In German nouns," *not* "In German."

Am I making myself clear? Use or omit mid-sentence commas for clarity: "The problem, in Judge X's opinion, is that *A v B* is not cited." *Vs.* "The problem in Judge X's opinion is that *A v B* is not cited." The former refers to Judge X's belief. The latter refers to Judge X's decision. Use or cut commas to eliminate confusion:

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