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Journal

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Cover Design by Lori Herzing.

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President's Message

LORRAINE POWER THARP

Legislative Advocacy

I have been inspired by the legislative advocacy and related actions of our state's first woman admitted to the bar, Kate Stoneman, as I prepare to participate in Albany Law School's program in her honor in late March. Recalling her work in the 1880s for legislation to allow women to participate in school elections, she commented, "I think it is called lobbying now, but in those days it was the simplest thing in the world to get inside the brass rail. We had the 'run' of the two houses and were allowed to come and go as we pleased."

She applied her advocacy skills again when, after passing the bar exam, she was turned down for admission to the bar based on the male terminology of the statute. As she told the story, facing the pending adjournment of the Legislature, she marshaled the support of educators and persons prominent in government to remedy this situation. A bill was quickly prepared, which passed the Senate and Assembly in just a few days with "hardly a dissenting vote." The afternoon upon securing this vote, she visited Governor Hill – accompanied by state and city representatives and the press – and obtained his signature on the amendment. The governor also happened to be the president of the State Bar Association (no one told me that dual role was possible!). Within three days, she successfully reapplied for admission. We are indebted, indeed, to the savvy Ms. Stoneman for this seminal achievement.

This vignette of legislative action drew my keen interest, not only in relation to our current efforts to assure equity and opportunity in the profession, but also as background to our work to ensure that our message is effectively heard in today's legislative process, above the cacophony of competing concerns and complexities. We need also to ensure that the necessary actions for justice are taken even in the wake of these difficult economic conditions.

In the past year, I have written and spoken to you about the concrete steps that we are taking to strengthen our legislative advocacy, coordinating with an increased presence in the media and public forums to promote understanding of the issues and how these have an impact on the citizens of our state. With the expertise of our members from all practice areas and perspectives, we continue to strive to be a voice of reason. Today, there are no easy issues, no simple solutions, and no paths without hurdles or forks in the road.

These facts of life are demonstrated by developments in mid-March regarding our persistent efforts to obtain legislation that would raise the dismally low assigned counsel rates for indigent criminal defendants and in Family Court matters. These considerations also are evident in the current debates about proposed changes in the tort system, another topic of our long-time effort to ensure that the process is fair to all concerned.

The governor's budget plan calls for establishment of an Indigent Legal Services Fund and an increase in the assigned counsel hourly rates, from the outmoded levels of $40 for work in court and $25 outside the courtroom, to $75 for felony and Family Court matters and $60 for misdemeanors. The revenue for these increases is to be derived from various fee increases and an increase in the biennial attorney registration (an additional $50 every two years). The critical importance of updating the assigned counsel rates is recognized and can be simply stated. As I told legislators in my testimony at budget hearings on February 24:

> These rates, which have remained unchanged since 1986 have had a devastating adverse impact on the practice of criminal defense law and the nature of representation afforded to indigents. Many experienced attorneys no longer can afford to handle assigned counsel cases and have left state court panels to accept federal court assigned counsel work, the rate for which rose to $90 per hour in 2002. Consequently, because of dwindling numbers, attorneys handling "state" assigned counsel matters now face an ever-increasing caseload, coupled with a decline in experienced practitioners. Ultimately the rights of those unable to pay for legal services are not properly protected. Too often indigent persons in need of an attorney in criminal or Family Court matters are denied access to justice because of the crisis in our assigned counsel system.

This critical need also was reflected in a case brought by the New York County Lawyers' Association, a co-sponsor of the assigned counsel plan in New York City,

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in the February 5 decision of Supreme Court Justice Lucindo Suarez directing assigned counsel rates of $90 in the City.[1]

On this, the 40th anniversary of *Gideon v. Wainwright*,[2] we remember the words of the Supreme Court in that landmark decision: ". . . in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." We also think about the observations of the New York State Court of Appeals 38 years ago in *People v. Witenski*[3] that "the right of counsel must be made 'meaningful and effective' in criminal courts on every level." Also on our minds is the extensive work of members of the profession in striving to provide such counsel under the strains of a system stretched beyond comprehension and the concerted efforts of our Association in seeking a regularized governmental funding source to truly realize the intentions of the courts in these decisions.

In my testimony to the Legislature, I reiterated that the cost for this counsel for the indigent is a societal responsibility, and spoke in support of the governor's proposed establishment of an Indigent Legal Services Fund as a permanent funding source. My testimony urged that the rates for counsel be set at constitutionally acceptable levels to ensure provision of adequate counsel. As developments unfold, we will continue to examine and address proposals for resolution.

As I gave this testimony to lawmakers, debate on proposals from medical, insurance and business entities for changes in the tort system were heating up in Washington and Albany. Here, too, with our diverse membership reflecting all perspectives, we have worked over the years to be a voice of reason, calling for constructive changes where needed and fair to all parties, but cautioning against the wholesale dismantling or erosion of the civil justice process in matters of liability. Consistent with House of Delegates' action for many years, we spoke in opposition to the federal Health Act of 2003, contending that authority for medical liability laws should continue to reside with the states. Let me share this with you:

> This would be an appropriate moment to take an objective look at the tort laws of New York. It is, after all, no secret that the U.S. Chamber of Commerce and its local counterpart, the Business Council of New York, have made bringing about major changes in the tort laws one of their top priorities. The New York State Legislature currently has before it bills that would, if enacted, substantially alter tort rights and defenses. Not surprisingly, practicing lawyers across New York have repeatedly expressed to me their concerns about these attempts to change the tort laws.

That paragraph was in former President Jim Moore's President's Message in the Bar *Journal* from April 1999. The more things change, the more they stay the same.

Our efforts will vigorously continue to assure that the justice system is accessible, fair and responsive to the needs of all.

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1. *See* Daniel Wise, *Suarez Raises Rates for Assigned Counsel Faults Pataki, Lawmakers for Failing to Act*, N.Y.L.J. Feb. 6, 2003, p. 1, col. 4.
2. 372 U.S. 335, 344 (1963).
3. 15 N.Y.2d 392, 395, 259 N.Y.S.2d 413 (1965).

Recent News Events Illustrate Ethical Dilemmas Associated With A "Difficult" Organizational Client

BY LOUIS P. DILORENZO

One of the most difficult situations a lawyer can face is the possession of information revealing that a client is about to do, or has done, something that is "wrong," particularly if it is something that will harm others or is criminal. Recent events in the business world involving Enron and others make it clear that these situations arise not only in the stereotypical cases (*e.g.*, criminal defense), but also in representing organizational clients, whether they be corporations, labor organizations or various types of business entities.

Suppose you learn that your corporate client (or, more accurately, a "constituent" – officer, employee, agent – of your corporate client) is about to dump toxic waste into a local waterway, or is about to hide from FDA authorities some potentially adverse effects of a new drug it is testing, or is misstating its financial condition on soon-to-be released public disclosure documents. As that organization's counsel – in-house or outside – what can you do? What must you do?

When dealing with these "difficult" clients – those who either refuse to do "right" or who affirmatively do "wrong" – we may always choose (and sometimes may be required) to attempt to persuade them to act differently or even to withdraw from their representation (in hopes of either influencing their behavior or making us feel "better").[1] But many times we will be unsatisfied with that outcome because our various efforts, including withdrawal, simply will not influence the wrongful conduct. Is there anything else we can do? Or must do? What ethical issues arise when we have a corporate or other organizational client (or individuals within that organization) that has embarked, or is about to embark, on a wrong path that may cause harm, whether it be to others associated with the organization, the organization itself or innocent third parties?

This article explores some of the ethical issues raised when an organizational client or its members appear poised to do the "wrong" thing. To help place some of this discussion in context as the relevant ethical rules are discussed, consider the hypothetical in the box accompanying this article.

Understanding Who the Client Is

Because various ethical obligations typically spring from the formation of an attorney-client relationship, it is initially important to understand when such a relationship is formed and, especially in the organizational context, with whom it is formed.

Traditionally, an attorney-client relationship arises when a person manifests to a lawyer an intent to obtain legal services from a lawyer and that lawyer either manifests consent to provide the services or fails to manifest a lack of consent to do so, and the lawyer knows or reasonably should know that the person is relying on the lawyer to provide those services.[2] Generally, the creation of an attorney-client relationship is determined by the reasonable expectation of the putative client and not by the lawyer's intent.

Once it is determined that an attorney-client relationship exists, the identity of the client in an individual context is readily apparent. In an organizational context, however, it is easier to lose sight of the client's identity. An organization only operates through its individual agents, thus often causing lawyers to treat those individuals as their "client." For ethical purposes, however, an entity theory is generally applied, which means that the client is the organization, and not the individuals who act on its behalf. Thus, for example, the New York Code of Professional Responsibility ("Code"), in its Ethical Considerations, explicitly provides that a lawyer employed or retained by a corporation or similar entity owes allegiance to the entity and not to any shareholder,

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director, officer, employee, representative or other person connected with the entity.[3] Similarly, the Restatement provides:

> By representing the organization, a lawyer does not thereby also form a client-lawyer relationship with all or any individuals employed by it or who direct its operations or who have an ownership or other beneficial interest in it, such as its shareholders.[4]

In the hypothetical, then, L's client clearly is ABC Food Processing Co., and not VP.

The Duty to Maintain Confidences and Secrets

Why is the identity of the client so important? The hallmark of an attorney's ethical obligations is the duty to maintain the confidences and secrets of her "clients." DR 4-101(B) of the Code states that a lawyer shall not knowingly:

> (1) reveal a confidence or secret of a client;
>
> (2) use a confidence or secret of a client to the disadvantage of the client; or
>
> (3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.[5]

Confidences and secrets, for these purposes, are broadly defined. While "confidences" refer to information protected by the attorney-client privilege, "secrets" refer to any other information gained in the professional relationship that the client has asked to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client.[6]

Consequently, the hurdle a lawyer faces when confronted with organizational wrongdoing and the desire to avoid, mitigate or rectify the consequences of that wrongdoing, is the duty of confidentiality; because, in virtually all cases, knowledge of that wrongdoing, past or future, will constitute a client confidence or secret. Certainly in the hypothetical, L's knowledge that ABC did not abide by the recall order is at least a secret (and may be a confidence).

Disclosing Organizational Wrongdoing

A natural reaction to discovering that an organizational client (or one of its constituents) is about to engage in conduct that will cause harm to itself or another, or has already engaged in conduct that may continue to cause harm, is to attempt to prevent that conduct or to mitigate or rectify the harm. The ethical issues in such a situation focus on whether, at one extreme, a lawyer for such a client is under any obligation to take any action or, at the other extreme, is even permitted to take corrective action, in the face of the duty to maintain client confidentiality. In the hypothetical, what can, or must, L do in light of her knowledge about the spoilage, the failure to recall and the possible risk of harm to others?

A Hypothetical Situation

L has been outside counsel to ABC Food Processing Co. for many years. In that role she has worked closely with VP, the company's vice-president for operations. In fact, VP has been L's only contact at the company over the years.

Recently, a batch of food distributed by the company was the subject of an FDA-ordered recall. The recall was caused by both a mislabeling problem and a minor spoilage problem. (The latter is capable of causing a minor adverse reaction – some nausea and vomiting – in a few highly sensitive individuals, but nothing more.)

The company had 120 days to complete the recall. Now, 125 days later, L has been advised by VP that he never complied with the recall order (he had made a business determination that the cost of compliance was simply too great given the relatively minor good to be served by a recall). Failure to abide by the recall order, if detected, is not criminal but will give rise to fines and penalties.

Protecting the Organization From Itself

Organizations, of course, "act" through others ("constituents"), such as officers, directors, employees or other agents. Consequently, when an organization engages in misconduct, it is because one of these individuals is engaging in that misconduct. What can an attorney do to protect an organizational client from the misdeeds of those very individuals who purport to act on its behalf?

DR 5-109(B) addresses this situation in some detail:

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside

> the organization. Such measures may include, among others:
>
> 1. Asking reconsideration of the matter;
>
> 2. Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
>
> 3. Referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

Although some have expressed concern that DR 5-109 requires an attorney to "monitor" and even to act disloyally toward an organizational client, the scope of this Disciplinary Rule is actually quite limited.

First, the rule imposes a duty on the lawyer only in circumstances where she "knows" that a covered form of misconduct is occurring or is about to occur.[7]

Second, the misconduct must be both related to the lawyer's representation and involve (i) a violation of an officer's, employee's or other person's legal obligation to the organization or (ii) a violation of law that reasonably might be imputed to the organization. DR 5-109 does not require disclosure if the misconduct is unrelated to the lawyer's representation or if the misconduct is simply "wrongful" conduct, but not otherwise a violation of a legal obligation owed to the organization or a violation of law that could be imputed to the organization.

Third, a lawyer is required to make a disclosure under this provision only if the misconduct is likely to result in "substantial" injury to the organization.

Thus, in fact, the circumstances are quite limited in which an attorney is required to act to protect an organizational client, in effect, from itself.

In addition, DR 5-109 narrowly defines the action that a lawyer is required to undertake in these circumstances. In recognition of the entity theory of representation, the lawyer is commanded to proceed "as is reasonably necessary in the best interest of the organization." Thus, clearly, the interests of the various officers, directors and other employees with whom the lawyer has dealt over time are irrelevant; the lawyer's conduct must be governed by what is in the best interests of the organizational client. The rule sets out a number of considerations that should guide the lawyer in determining how to proceed: (i) the seriousness of the violation, (ii) the consequences likely to befall the organization as a result of the violation, (iii) the scope and nature of the lawyer's representation, (iv) the responsibility in the organization and the apparent motivation of the person whose conduct or refusal to act is in issue, (v) the policies of the organization concerning the matter and (vi) any other relevant considerations. But in the end, the action taken must be designed to minimize disruption of the organization and the risk of revealing information to persons outside the organization.

The Disciplinary Rule also lists a number of measures that an attorney confronted with this situation should consider: (1) asking for reconsideration of the decision at hand; (2) advising that a separate legal opinion be obtained for presentation to the appropriate authorities within the organization; and (3) referring the matter to a higher authority within the organization including, if warranted by the circumstances, to the highest authority which can act in behalf of the organization (*e.g.*, its board of directors). Some commentators have interpreted this last proviso as not requiring a lawyer to make disclosure to corporate shareholders, since they generally are not the highest authority "which can act in behalf of the organization."[8]

Permitting at least some extra-organizational disclosure, when in the best interests of the organization, was specifically considered, and rejected, during the Model Rules debates.

What is the attorney's recourse if pursuing the matter up the organizational chain of command is not successful? Under New York's Disciplinary Rule, the lawyer's only recourse is (permissive) resignation:

> If despite the lawyer's efforts in accordance with DR 5-109, the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in a substantial injury to the organization, the lawyer may resign in accordance with DR 2-110.[9]

Significantly, the Disciplinary Rule makes no provision for the disclosure of the misconduct outside the organization. Thus there is no basis, at least under this rule, for a lawyer to report an organizational client to the "authorities" to prevent the wrongdoing or to minimize the effects of misconduct. This Disciplinary Rule's counterpart under the ABA's Model Rules of Professional Conduct (on which the Disciplinary Rule is modeled), Rule 1.13(c), similarly contains no provision for going outside the confines of the organization itself.[10] Permitting at least some extra-organizational disclosure, when in the best interests of the organization, was specifically considered, and rejected, during the Model Rule debates.[11] Nonetheless, at least four states have

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adopted a variation of this rule that permits (but does not require) disclosure to authorities outside the organization where the organization's highest authority has acted to further the personal or financial interests of that authority (which are in conflict with the organization's interests) and such disclosure is necessary to protect the interests of the organization.[12]

Consequently, the lawyer's obligation to protect the organization from itself is somewhat limited. In the hypothetical, L would have no duty to act on her information since VP's conduct is not likely to cause "substantial injury" to the company. Notwithstanding that L might not be required to act, is she permitted to do something? For example, is she allowed to seek out the company's president and advise her of what has happened, in hopes that she might still be able to rectify it? One would think that the answer is, or should be, "yes." However, some commentators have read this provision to be so restrictive that it not only fails to *require* an organization's attorney to "blow the whistle" within the organization unless all of the conditions of DR 5-109 have been met, it also prohibits a lawyer from *choosing* to do so.[13] Thus, under this interpretation, L in the hypothetical would actually be prohibited from reporting VP up the corporate ladder because the absence of a reasonable basis to believe that this misconduct will cause "substantial injury" takes it outside the scope of DR 5-109.[14] This interpretation appears to unduly restrict a lawyer's interaction with its organizational client.

Section 307 of Sarbanes-Oxley grants authority to the SEC to impose standards of conduct applicable to securities lawyers.

While it may be fair to say that, in the hypothetical, the rule does not require the attorney to "blow the whistle" even within the organization, to suggest that the lawyer would not be permitted to do so is unwarranted. There should not be any confidentiality concerns preventing intra-organizational disclosure in these circumstances, because by definition any confidential information the lawyer has "belongs" to its organizational client; disclosing that information to those higher up the corporate ladder would appear to be nothing more than disclosing a client confidence to the client. Given that both the Code and the Model Rules recognize that lawyers often serve in the broad role of counselor to a client,[15] it would seem entirely appropriate for L in our hypothetical to at least express her opinion to the company's president that the vice-president's actions, even if not likely to result in "substantial injury," nonetheless are not in the best interests of the company.

Protecting Third Parties From the Client

After considering the lawyer's obligations when the wrongful conduct poses a harm to the organization itself (*i.e.*, liability for failing to comply with a recall order), the next question is: What rules apply when the organization's actions pose harm to others? What effect, if any, does it have that a failure to follow through on the recall may cause some, albeit minor, harm to consumers? What if the spoilage issue was sufficiently serious that if enough of the product was consumed over a long enough period, the health consequences were far more serious, perhaps even fatal? Since L's knowledge (of both the spoilage and the failure to recall) is likely to constitute either a confidence or secret, the analysis must begin with DR 4-101, which prohibits disclosure of such information, except (as relevant to this discussion):

(1) when permitted under Disciplinary Rules or required by law or court order;

(2) when the disclosure is of a client's intention to commit a crime and the information is necessary to prevent the crime; or

(3) the disclosure is implicit in the lawyer's withdrawing a written or oral opinion or representation previously given by the lawyer, which is believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.

Disclosures required by the rules or law Although the Code clearly prohibits a lawyer from counseling or assisting a client in illegal or fraudulent conduct,[16] it really does not authorize the disclosure of wrongful client conduct to third parties (including the authorities) except in the most extreme circumstances. For example, DR 7-102 provides that a lawyer who learns that a client, in the course of the lawyer's representation, has perpetrated a fraud upon a third party or a tribunal, must promptly call upon the client to rectify the fraud and if the client refuses or is unable to do so, the lawyer is obligated to reveal the fraud, *except* when that information is protected as a confidence or secret. Since, in virtually all cases, this will be the case, this is a Rule without any significant import.[17]

As noted, New York's Code permits a lawyer to disclose client confidences when required by law to do so.[18] Consequently, a lawyer who is required to disclose information by court order may do so without violating the Code of Professional Responsibility.

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Although not applicable to our hypothetical, of interest to all lawyers representing public companies is the recent enactment of the Sarbanes-Oxley Act of 2002, also known as the Public Company Accounting Reform and Investor Protection Act of 2002. Its primary purpose is to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws.

Section 307 of Sarbanes-Oxley grants authority to the Securities and Exchange Commission (SEC or the "Commission") to impose standards of conduct applicable to securities lawyers. On November 21, 2002, the SEC published for public comment proposed rules prescribing minimum standards of conduct for attorneys appearing and practicing before the Commission. After soliciting and considering comments from interested parties, the SEC adopted final rules to implement Section 307 of the act on January 23, 2003.[19] The following, which are intended to supersede any contrary state ethics rule, are some of the highlights of the final rules:

An in-house and outside lawyer may use any contemporaneous records he or she creates to defend against charges of attorney misconduct.

(a) Both in-house and outside lawyers must report to the issuer's chief legal officer (CLO) or to both the issuer's CLO and chief executive officer (CEO) any "evidence of a material violation" of federal or state security laws, material breach of fiduciary duty arising under federal or state law, or a similar material violation of any federal or state law. Thus, an attorney's reporting obligation is triggered under the final rule only when he or she has "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is occurring, or is about to occur."[20]

(b) When presented with a report of a possible material violation, the CLO must investigate. A CLO who reasonably concludes that there has been no material violation must notify the reporting attorney of this conclusion. Conversely, if a CLO concludes that a material violation has occurred, is occurring or is about to occur, the CLO must insure that the issuer implements appropriate remedial measures and/or sanctions, including any appropriate disclosures. The CLO is also required to report up-the-ladder, within the issuer and to the reporting attorney, the remedial measures that have been taken in response to the material violation.

(c) If the reporting attorney does not receive, within a reasonable time, an appropriate response to the report from the CLO, the attorney *must* report evidence of a material violation up-the-ladder to the issuer's audit committee, or to another committee of independent directors if the issuer does not have an audit committee. If the issuer does not have an audit committee or another committee of independent directors, the attorney must then report to the issuer's full board. In the event the reporting attorney reasonably believes reporting evidence of a material violation to the CLO and CEO would be futile, the attorney may report directly to the appropriate committee or full board.

(d) An issuer may, but is not required to, establish a qualified legal compliance committee (QLCC) to investigate reports of material violations made by attorneys. A QLCC must consist of at least one member of the issuer's audit committee and at least two independent members of the issuer's board. A reporting attorney or a CLO to whom a report has been made may, as an alternative to reporting to an issuer's appropriate committee or board of directors, report evidence of a material violation to the QLCC.

(e) An in house and outside lawyer may use any contemporaneous records he or she creates to defend against charges of attorney misconduct. Furthermore, an attorney may reveal confidential information to the extent necessary to prevent the commission of an illegal act which the attorney reasonably believes will result either in perpetration of a fraud upon the SEC or in substantial injury to the financial or property interests of the issuer or investors. An attorney may also disclose confidential information to rectify an issuer's material violations when such actions have been advanced by the issuer's use of the attorney's services.

(f) The final rules provide for civil penalties and remedies, and for discipline such as censure or being temporarily or permanently denied the privilege of practicing or appearing before the Commission. The final rules do not provide for criminal sanctions or private causes of action.

The final rules adopted by the SEC, prescribing standards of professional conduct for attorneys appearing and practicing before the Commission, do not include a number of provisions that existed in the proposed rules originally issued for public comment. Most notably, the final rules do not require an attorney dealing with ongoing or future violations to file a "noisy withdrawal" notice with the SEC, disclosing that he or she is withdrawing from the representation of an issuer and disaf-

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firming opinions, documents or other SEC filings that the attorney believes are materially false or misleading. Although the proposed "noisy withdrawal" provisions required an attorney to notify the SEC only that he or she was withdrawing for "professional considerations," the proposal drew numerous comments and substantial criticism since it effectively ensured that the Commission was aware there was problem.

Despite the fact that the final rules issued by the SEC on January 29, 2003, do not include "noisy withdrawal" provisions, the Commission has not foreclosed the possibility that similar provisions may be released under Section 307 of the Act. Indeed, on the very day the final rules regarding attorney professional conduct were issued, the SEC released for additional public comments proposed rules requiring a reporting attorney to withdraw upon failure to receive an appropriate response to reported evidence of a material violation.[21] Also, as an alternative to the "noisy withdrawal," the SEC proposed and solicited comments on a procedure requiring an issuer to disclose an attorney's withdrawal. The comment period applicable to these modified "noisy withdrawal" proposals expires after April 7, 2003.

Noticeably absent from the Model Rules formulation is any exception to prevent crimes involving, even substantial, financial injury.

In the hypothetical, there is no legal requirement that L disclose this information, even to protect others, so this exception to confidentiality is of no relevance.

Criminal conduct Although DR 4-101 permits disclosure of an intention to commit a crime (whether by a client or someone else) this too is a very narrowly drawn exception to client confidentiality.

First, this portion of DR 4-101 does not require disclosure under any circumstances, it merely permits it. No matter how heinous, how imminent, how certain the crime, the Code simply does not require disclosure. Second, DR 4-101 permits disclosure only to the limited extent necessary to prevent the crime. Third, this exception to confidentiality is triggered only by an intention to commit a crime in the future. There is no provision for even the permissive disclosure of a past crime, no matter the circumstance and even if the effects of that past act are continuing. Finally, the rule permits disclosure only if the conduct in question is actually a "crime." Other wrongful conduct, no matter how harmful, cannot be disclosed if it entails a client confidence or secret.

In the hypothetical, this exception does not permit L to act to protect others from the potential health risks posed by the spoiled food. Even assuming VP's decision to ignore the recall order was a crime, by the time L learned of it, it was past conduct. Thus, she had no knowledge of an "intention" to commit a crime in the future. The fact that the effects of this action will occur prospectively, and may be serious to some, does not justify disclosure.

As narrow as this exception is, the rule is even narrower in other jurisdictions. For example, the ABA Model Rule provides that disclosure of confidential client information is permissible only to prevent a "client" (no one else) from committing a criminal act that the lawyer believes is "likely" to result in "imminent" death or substantial bodily harm.[22] Disclosure is not permitted to stop all future criminal activity, only that which entails death or substantial bodily harm.

Noticeably absent from the Model Rules formulation is any exception to prevent crimes involving, even substantial, financial injury. Thus, an attorney with possession of client confidences revealing a clear scheme to wreak financial havoc on the world, for example, must sit quietly by (assuming she is not able to persuade her client to act otherwise). In addition, the requirement that death or bodily harm be "imminent" is extremely narrow. Consequently, under the Model Rules (unlike New York's Code), even if L was aware of an advance plan to ignore the recall and that conduct was criminal, she would not be entitled to disclose ABC's failure because this conduct carries no "imminent" threat of harm, even if it might eventually prove dangerous and even fatal.

Adding to the restrictiveness of the Model Rules is the fact that the scope of confidential client information under these rules is broader than under New York's Code. In New York, a confidence is information protected by the attorney-client privilege and a secret is any other information "gained in the professional relationship," and then only if the client has requested that it be held inviolate or the disclosure of it would be embarrassing or detrimental to the client.[23] Under the Model Rules, however, confidential client information is all information "relating to the representation of a client."[24] Thus it does not matter where or how the information is acquired (even information acquired before or after the representation can be "confidential" under this standard), nor does it matter whether the client has asked that the information be kept confidential or that its disclosure would be embarrassing or harmful to the client.[25]

Although most states generally have adopted the Model Rules, on this particular issue a majority of states have retained the formulation that appears in New York's DR 4-101, giving attorneys greater discretion to

act to protect others.[26] And a few states have gone even further, mandating the disclosure of client confidences to prevent certain types of crimes.[27]

As a result of the Ethics 2000 Report commissioned by the ABA, Model Rule 1.6 has been modified somewhat. Under the new formulation (awaiting adoption by individual states), disclosure of confidential client information is permitted to prevent "reasonably certain death or substantial bodily harm," as opposed to the former standard requiring "imminent" death or bodily harm. Interestingly, although the Ethics 2000 Commission also recommended permitting disclosure of client confidences to prevent a client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another or to mitigate or rectify such injury, thereby bringing the Model Rules into conformity with the position of the Restatement, the ABA's House of Delegates rejected that change.

Again turning to the hypothetical, neither New York's Code nor the Model Rules would require or even permit L to disclose confidential client information outside the organization to protect the safety of consumers.

Withdrawing the lawyer's own representations DR 4-101(C)(5) permits a lawyer to withdraw an oral or written representation or opinion he has given on behalf of a client to a third party, if he believes it is still being relied upon by a third party and it is based on materially inaccurate information or is being used to further a crime or fraud, even if in doing so he implicitly discloses a client confidence or secret.

This, too, is a fairly narrowly drawn exception to confidentiality. It does not authorize the explicit disclosure of confidential information; it merely permits a lawyer to withdraw a representation or opinion which he has given even if doing so implicitly suggests client wrongdoing. Even then, this "noisy withdrawal" is only permitted when the prior representation or opinion is still being relied upon by a third party. Thus, for example, this provision allows a lawyer who has prepared a written opinion to investors on behalf of a client for use in securing financing to "pull" that opinion if she has learned that it was based on false information provided by the client, even if by doing so the lawyer is effectively disclosing to those investors that there is something "wrong." Of course, once the investment funds have been obtained, the lawyer may no longer have any authority to act because the investors' reliance on the (mis)representation may be over.

Conclusion

The maintenance of client confidentiality is a cornerstone of the attorney-client relationship. The policy reasons supporting it are both numerous and well-known. But there are occasions when the requirements of confidentiality conflict with what the general public (and even lawyers) may perceive as the "greater good." As lawyers, it is important that we understand both when the rules of confidentiality permit and when they require us to disclose confidential information. While we would all like to do our part to protect others from wrongful conduct, in most instances our overriding commitment to maintain client confidences and secrets must govern.

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1. Withdrawal must be in accordance with the The Lawyer's Code of Professional Responsibility, Disciplinary Rule 2-110 (DR) provides:

> B. Mandatory withdrawal.
>
> A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:
>
> 1. The lawyer knows or it is obvious that the client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.
>
> 2. The lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule.
>
> 3. The lawyer's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.
>
> 4. The lawyer is discharged by his or her client.
>
> C. Permissive withdrawal.
>
> Except as stated in DR 2-110(A), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
>
> 1. The client:
>
> a. Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.
>
> b. Persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.
>
> c. Insists that the lawyer pursue a course of conduct which is illegal or prohibited under the Disciplinary Rules.
>
> d. By other conduct renders it unreasonably difficult for the lawyer to carry out employment effectively.
>
> e. Insists, in a matter not pending before a tribunal, that the lawyer engaged in conduct which is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.
>
> f. Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.
>
> g. Has used the lawyer's services to perpetrate a crime or fraud.
>
> 2. The lawyer's continued employment is likely to result in a violation of a Disciplinary Rule.

3. The lawyer's inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

4. The lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively.

5. The lawyer's client knowingly and freely assents to termination of the employment.

6. The lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

2. Restatement (Third) of the Law Governing Lawyers § 14 (2001); *see Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 455 (1978).

3. EC 5-18; *see* NYSBA Common Professional Ethics, Formal Opinion 743 (2001) (recognizing generally that the lawyer's client is the union, and not the union's members).

4. Restatement (Third) of the Law Governing Lawyers § 96 cmt. b. Of course, a lawyer, by her words or actions, may take on the representation of one or more individuals associated with an entity client (*e.g.*, officers, directors, employees), but that can create its own conflict problems. The Code recognizes that lawyer's current representation of both an organization and its officers may be permissible, but only where the lawyer is convinced that differing interests are not present. This is due to the fact that in the context of concurrent representation, the attorney owes the same duty of allegiance to the organizational officer as she does to the organization. Thus, both clients are entitled to representation free of conflicting interests. *See* EC 5-18.

   Relatedly, where the potential for conflict exists, an attorney has an obligation to make sure that an individual acting on behalf of an organization understands that the lawyer's relationship is with the entity and not with that of the individual. DR 5-109 specifically mandates that when a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders, or other constituents, and *it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing*, the lawyer must explain that she is the lawyer for the organization and not for any of the constituents. The Restatement (Third) of the Law Governing Lawyers § 14, cmt. f, similarly provides that

   > the lawyer must clarify whom the lawyer intends to represent when the lawyer knows or reasonably should know that, contrary to the lawyer's own intentions, a person, individually, or agents of an entity, on behalf of the entity, reasonably rely on the lawyer to provide legal services to that person or entity.

5. Limited exceptions to this obligation are recognized in New York. For example, DR 4-101(C) states that a lawyer may reveal:

   1. Confidences or secrets with the consent of the client, but only after a full disclosure.

   2. Confidences or secrets when permitted to do so under the Disciplinary Rules or when required by law or court order.

   3. The intention of a client to commit a crime and the information necessary to prevent the crime.

   4. Confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct.

   5. Confidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.

   In somewhat different terms, the ABA Model Rules of Professional Conduct, Rule 1.6(b), n. 8, provide that a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

   1. to prevent reasonably certain death or substantial bodily harm;

   2. to secure legal advice about the lawyer's compliance with these Rules;

   3. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or respond to allegations in any proceeding concerning the lawyer's representation of the client; or

   4. to comply with other law or a court order.

6. *See* DR 4-101(A). The definition of confidential information in the Model Rules is broader. It includes "information relating to representation of a client." Model Rule 1.6. Thus, it does not matter from where or even when the lawyer learns of the information so long as it relates to the representation, nor does it matter whether the client has asked that the information be kept confidential or that its disclosure would be either embarrassing or detrimental to the client.

7. Note that this Rule is not permissive, rather it imposes an affirmative obligation to "proceed as is reasonably necessary in the best interest of the organization." While it does not mandate a particular course of action in every case, it does nonetheless mandate action.

   Even in the absence of such a Rule, however, the failure of a lawyer to act to protect the best interests of the organization in these types of circumstances would likely subject the attorney to liability for a breach of his or her fiduciary duty to the organization anyway. *See*, *e.g.*, *FDIC v. Clark*, 978 F.2d 1541 (10th Cir. 1992) and *In re American Continental Corp.*, 794 F. Supp. 1424 (D. Ariz. 1992), two of several cases to come out of the savings and loan scandals of the late 1980s. *See also* Hazard & Hodes, The Law of Lawyering, § 4.8 (3d. ed. 2001).

8. George C. Harris, *Taking the Entity Theory Seriously: Lawyer Liability for Failure to Prevent Harm to Organizational Clients Through Disclosure of Constituent Wrongdoing*, 11 Geo. J. Legal Ethics, 597, 605 (1998).

9. DR 5-109(C). Of course, there may be circumstances in which the lawyer is required to withdraw from continued representation, such as where the lawyer's continued representation of the client will assist it in committing a fraud or illegal act. *See* DR 2-110.

10. *See* Hazard & Hodes, The Law of Lawyering § 17.12; *but see* Restatement (Third) of the Law Governing Lawyers § 96 RN (in which the Reporters express their view,

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Litigators Must Prepare for Risk That Insurers May Go Into Rehabilitation or Liquidation

By Margaret J. Gillis and John P. Calareso, Jr.

What do you do if you represent a plaintiff about to go to trial against a defendant whose insurer goes into rehabilitation? What do you do if you represent a corporate defendant in a case with very serious exposure, and your client's excess carrier goes into liquidation? If your client has a judgment against a carrier in liquidation, will the New York State Property and Casualty Fund pay your client the full amount of the judgment?

Many litigators have dealt with these issues recently as a result of the rehabilitation and liquidation proceedings concerning the Reliance Insurance Companies. Other insurance companies have followed in Reliance's path, and yet more may follow as a result of the severe losses from the September 11 tragedy and the recent slowdown in the economy. This article outlines the basics a litigator needs to know about the rehabilitation and liquidation process in New York, discusses the role played by the Property/Casualty Insurance Security Fund and its limitations, and concludes by using the Reliance rehabilitation and liquidation as a framework for discussing some problems litigators may confront.

Defining the Terms

New York Insurance Law § 7402 sets forth the grounds on which the superintendent of the New York State Insurance Department may support an application to the court for an order of rehabilitation against a domestic insurer.[1] According to section 7403(a), an order of rehabilitation "shall direct the superintendent . . . as rehabilitator, . . . to take possession of the property of [an] insurer and to conduct the business thereof, and to take such steps toward the removal of the causes and conditions which have made such proceeding necessary as the court shall direct."[2]

If the rehabilitation is successful, the superintendent may apply to the court for an order terminating the rehabilitation and permitting the insurer to resume possession of its property and conduct of its business.[3] If the efforts to rehabilitate the business of the insurer become "futile," the superintendent is authorized to apply for an order of liquidation.[4]

An order of liquidation may be obtained on the same basis as an order of rehabilitation.[5] As in rehabilitation, the superintendent takes possession of the property of the insurer.[6] However, under an order of liquidation the superintendent is also vested (by operation of law) with title to all property, contracts, and rights of action of the insurer.[7] As part of the superintendent's role as liquidator, he or she is to give notice to all creditors of the insurance company to present their claims.[8] The superintendent then identifies which claims are allowable, quantifies those claims, and makes an equitable distribution of the assets among them.[9] The superintendent, as liquidator, may also reinsure the policy obligations of the insurer and/or cancel all insurance policies and return premiums to the former insured.[10]

If the insurance company experiencing financial difficulty is not a New York domiciliary, then New York's superintendent and courts do not have jurisdiction to apply for and order rehabilitation or liquidation. However, they are not without recourse. When an out-of-state insurance company meets the requirements of

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§ 7402 the superintendent, under authority granted under §§ 7406 and 7407, may apply for an order granting the superintendent authority to conserve the assets of the foreign or alien insurer in the state and/or granting the superintendent ancillary liquidation authority over the insurer. Under an order of conservation or ancillary liquidation the superintendent takes possession of, and conserves, any property of the insurer located within the state of New York.[11] This is designed to protect the interests of those insured[12] in the state of New York from a complete loss if the out-of-state insurer undergoes a complete liquidation of its business.

Rehabilitation, liquidation, and conservation or ancillary liquidation are the primary tools available to the superintendent. Enforcement of orders of rehabilitation, liquidation, and conservation is carried out by the superintendent with the support of the Liquidation Bureau of the New York State Insurance Department. The Liquidation Bureau is a separate office of the New York State Insurance Department under the jurisdiction of the superintendent. It is charged with the day-to-day mission of rehabilitating, liquidating, or conserving the assets of companies put into the superintendent's control by the court. To this end, the Liquidation Bureau maintains and makes publicly available listings of domestic rehabilitation, liquidation, and conservation proceedings.[13]

Property/Casualty Insurance Security Fund

Claims still unpaid after the assets of an insolvent, authorized[14] insurer are distributed may be paid by the Property/Casualty Insurance Security Fund (the "Fund").[15] There are, however, limits on the moneys available from the Fund.

The procedural limitations on payments from the fund are similar to the limitations on recovery from the insolvent insurer's assets. That is, having a judgment in your client's favor does not automatically qualify for payment; only an "allowed" claim, for which a proper proof of claim is timely filed, is eligible for payment.[16] Payment from the fund may not exceed the limit of liability provided for in the insurance policy,[17] and is capped at a maximum of $1 million per claim.[18]

For the Fund's purposes, a claim is defined as "a claim of a policyholder or assured within the coverage of the policy, wherein such person suffered loss or damage under the coverage of the policy or where such person has paid an injured party claim, subject to allowance of such policyholder claim [under Article 74]."[19] This raises a question of what the maximum available payment is to an insured who has multiple "claims" made against it, all of which are covered by a single policy. For example, if the insured has claims made against it in three lawsuits, and all are covered by a single policy with a $5 million limit, may the insured seek $1 million from the Fund for each of those three suits, or are all three considered the insured's total "claim" against the policy, thus limiting the insured to $1 million of coverage for all the litigation?

As of the writing of this article, it appears that question has not yet been answered by the courts in New York. Resolution of claims in the Reliance liquidation may provide the answer. The obvious lesson for litigators is that, even assuming all the procedural requirements of presenting a judgment or other claim to the Fund can be met, the Fund cannot be considered a sure source of recovery.[20] Consequently, if your litigation strategy (as counsel for a plaintiff, co-defendant, or third-party plaintiff) included recovery from an insurance company (either directly or by way of indemnification of an insured) which goes into rehabilitation or liquidation, you will need to factor in the possibility of delay from a stay, determine whether it is in your client's interest to oppose the stay, and adjust your strategy to identify or emphasize other sources of recovery.

The Impact of a Rehabilitation Or Liquidation on Pending Litigation

An order of rehabilitation, primary or ancillary liquidation, or conservation typically includes two types of provisions which affect pending litigation. First, as noted above, an order of rehabilitation typically gives the rehabilitator possession of the insurer's property, including claims and suits against others. In a liquidation the liquidator is given both possession and title to that property. Consequently, whether an insurance company's claims as a plaintiff will go forward depends on the rehabilitator's or liquidator's evaluation of whether continuing the suit will be in the best interests of the insurer or its insolvent estate.

In the Reliance proceeding, which began as a rehabilitation, the rehabilitation order gave possession of all assets to the rehabilitator, who directed all litigation counsel representing Reliance as a plaintiff with a claim (or defendant with a counterclaim) involving more than $50,000 to provide a recommendation as to whether to continue. Under these circumstances many litigators who were facing immediate discovery or other deadlines appropriately advised the court and opposing counsel that they lacked authority to go forward, that they needed authority from the rehabilitator, and thus obtained extensions until they received the necessary direction.

The second type of provision affecting pending litigation is, of course, a stay of claims against the insurer and its insureds. For example, the stay provision in the rehabilitation order issued by Pennsylvania's Court of Common Pleas in the Reliance proceeding provided as follows:

> All actions currently pending against Reliance in the Courts of the Commonwealth of Pennsylvania or elsewhere are hereby stayed. All actions currently pending in the Courts of the Commonwealth of Pennsylvania or elsewhere against an insured of Reliance are stayed for 60 days or such additional time as the Rehabilitator may request. This Order shall not preclude any action from proceeding prior to the expiration of 60 days provided that the Rehabilitator and the parties to any such pending actions have so agreed to proceed.[21]

That provision, like many rehabilitation stays before it, immediately raised the following questions, among others: First, were New York courts bound by the "or elsewhere" provision? Second, to the extent the stay was effective in New York, did it apply to both primary and excess insureds?

The reach of a foreign state court's stay A stay issued as part of a rehabilitation or liquidation order in a foreign state is not automatically binding on the New York courts. A stay in a liquidation order is not binding unless New York and the state whose court issues the order are reciprocal states under the Uniform Insurance Liquidation Act[22] (UILA). In cases where the UILA reciprocity does not govern, if there is a dispute between the parties regarding whether the stay should be honored in an action pending in New York, a New York state court will apply a comity analysis. A federal court sitting in New York will look at principles of both comity and the abstention doctrine.[23] To some extent, the deck is stacked in the favor of the rehabilitator in such situations, because there are compelling policy reasons to honor the stay, such as ensuring that all claimants, policyholders, and creditors are bound by the same rules and procedures, that none receives preferential results by rushing to obtain and execute on a judgment, and that the rehabilitator's efforts to resolve the insurer's financial issues are not distracted by defending multiple suits in multiple jurisdictions.[24]

Nonetheless, courts have refused to apply the stay when allowing the action to go forward will not threaten the rehabilitation. In *Mutual Fire, Marine & Inland Ins. Co. v. Adler*,[25] for example, the U.S. District Court for the Southern District of New York refused to honor a stay issued in a Pennsylvania court's rehabilitation order, because permitting the action to go forward did not involve a direct threat to the insurer's assets and therefore its rehabilitation.

In the *Adler* case, the insurance company in rehabilitation ("Mutual") had issued a bond as security for the debts certain limited partners owed a partnership. The bond was assigned to a bank ("Barclays") as security for a Barclays loan to the partnership. When the partners began to default on their obligations, Barclays began to call on Mutual to pay the defaulting partner's shares under the bond. Mutual made some payments, then declared a "moratorium" on payments and commenced an action against the individual limited partners to recover amounts already paid to Barclays and other amounts Barclays claimed were due. When Barclays intervened in the action, alleging a superior claim to Mutual's (for the assets of the defaulting partners), Mutual argued Barclays claims were subject to the stay.

Courts have refused to apply the stay when allowing the action to go forward will not threaten the rehabilitation.

The court disagreed, finding that there would be no direct threat to Mutual's assets and the rehabilitation, unless and until Barclays obtained a judgment in the action. The court also observed that it "would not be in the interests of judicial economy to allow Mutual Fire's claim to go forward without at the same time adjudicating the rights of Barclays. Issuance of a stay will only lead to piecemeal litigation and the waste of the courts' and parties' resources that accompanies it."[26]

In *Dougherty v. Town of North Hempstead Board of Zoning Appeals*,[27] the Second Circuit followed a similar no-immediate-harm-to-the-insurer's-assets approach. In *Dougherty*, plaintiff appealed the district court's dismissal of his claim that the defendant zoning board and other town officials had violated his constitutional rights in denying his application for a building permit. Defendants were Reliance insureds, and defense counsel had been retained by Reliance. The Second Circuit denied the defendants' motion for a stay because

> [t]he motion came when the issues on appeal had been fully briefed, oral argument was only days away, and the impact on Reliance's assets occasioned by our going ahead with oral argument appear[s] to be de minimis. In addition, the 90-day period requested by the Pennsylvania court [in its October 3, 2000 liquidation order] has since expired. Under the circumstances, we decline to grant defendants' motion. Upon remand, any request for a further stay should be brought to the attention of the district court.[28]

Given its comments about the expiration of the stay in the Pennsylvania court's liquidation order, it appears that the Second Circuit panel deciding the *Dougherty* case was unaware of the initial 120-day stay in the December 14, 2001, ancillary order issued in the Reliance matter by the New York Supreme Court (which was later extended an additional 120 days). In a district court decision two weeks before the *Dougherty* decision, *Reliance Insurance Co. v. Six Star, Inc.*, the U.S. District Court

for the Southern District of New York was aware of the ancillary order, and found it to be one of the bases for honoring the stay.[29]

In *Six Star* one of the Reliance Insurance Companies ("Reliance") had commenced an action against Six Star and other defendants, seeking a declaratory judgment concerning the respective rights and obligations of Reliance and Six Star under a particular insurance policy. Defendants counter-claimed for similar relief, as well as for damages for breach of contract and misrepresentation. After the Pennsylvania liquidation order and New York ancillary order were entered, the *Six Star* defendants argued that they should be permitted to proceed with their counterclaims, at least through discovery.

Although the defendants' position would seem to be supported by the analysis in the *Adler* and *Dougherty* decisions (*i.e.*, proceeding with discovery would not create a "direct" threat to the assets of the Reliance estate), the court did not see it that way. The court first noted that pursuant to the McCarran-Ferguson Act[30] the states had "primary responsibility" for regulating the insurance industry. The court then reasoned as follows:

> "[W]ith the McCarran-Ferguson Act stating congressional policy that insurance regulation is up to the states, it is difficult to understand how . . . [a party] can maintain that a federal court should entertain a lawsuit where it will have to decide the amount and existence of liability that an insolvent . . . insurer owed to [the party]." . . . It is difficult to see what discovery would be in aid of if, as the state with jurisdiction over Reliance's assets and liquidation has determined, all claims for distributions from Reliance are required to be pursued through a state claims process.[31]

Finally, the court observed that it had no jurisdiction to review or overturn the state court order containing the stay and ruled that "in the interests of comity"[32] it would maintain the matter on its "suspense" calendar. The court also directed the liquidator and/or ancillary receiver to inform the court and all parties as to whether they wished to pursue the claims Reliance had asserted in the action.

From defendant-counterclaimant Six Star's perspective, discovery undoubtedly would have been in aid of presenting its claim in the liquidation proceeding. As discussed in more detail in the final section of this article, a contingent claim like Six Star's counterclaim would need to meet several tests before it could be an allowed claim entitled to payment. One of those tests is sufficient proof so that it may be reasonably inferred that Six Star would be able to obtain judgment upon its cause of action against Reliance. Discovery may have improved that proof substantially.

Moreover, the *Six Star* court stayed the counterclaims while giving Reliance's liquidator the option of going

forward in the action with Reliance's claims as a plaintiff. If the liquidator proceeds with Reliance's claims, it would seem that a ruling similar to that in the *Adler* decision would be appropriate. That is, if the liquidator was to be involved in the litigation in the Southern District in an effort to collect assets of the Reliance estate, the liquidator's attention and efforts were already going to be focused on that litigation and distracted to some extent from the liquidation. Furthermore, as in *Adler*, there would be no direct threat to Reliance's assets and the liquidation, unless and until Six Star obtained a judgment against Reliance in the action.

Making a case that a stay should apply to an insured with only excess coverage is much more difficult than when primary coverage is implicated.

Even assuming that analysis would succeed with a court, however, there are other considerations for a litigator who is trying to determine whether to press ahead in court in the face of a stay ordered as part of a liquidation. The Reliance Liquidation Order, for example, provided claimants with a significant incentive to honor the stay by providing that:

> Any person that fails to honor a stay ordered by this Court or violates any provision of this Order, where such person has a claim against Reliance, shall have their claim subordinated to all other claims in the same class, with no payment being made with respect to such claim until all others in the same class have been paid in full, in addition to any other remedies available at law or in equity.[33]

Consequently, a litigator who wins the battle over the stay may lose the war in the sense that even if the client obtains the proof needed to support a proof of claim, *and* the proof of claim is timely filed *and* the claim allowed, payment of the claim may be reduced or eliminated by subordination. Thus, a litigator whose strategy includes recovery from an insurance company (either directly or through a judgment against the insurance company's insured) that goes into rehabilitation or liquidation must carefully evaluate the risks and benefits of continuing to pursue the litigation and (obviously) must develop an alternate strategy for recovery from different sources.

Are excess insureds covered by the stay? Rehabilitation and liquidation orders staying litigation against the insurer and its insureds often contain only general language of the type noted earlier (in the stay in the Reliance rehabilitation proceeding) and do not distinguish between insureds with primary coverage and insureds with only excess coverage from the insolvent insurer.

Making a case that such a stay should apply to an insured with only excess coverage is much more difficult than when primary coverage is implicated. First, and most obviously, excess coverage is generally not triggered until primary coverage is tendered or exhausted. In addition, the rehabilitator or liquidator, standing in the shoes of the insurer, may have coverage disclaimer opportunities that do not ripen until the primary coverage is exhausted. For example, although Insurance Law § 3420 requires an insurer to disclaim coverage "as soon as is reasonably possible," courts have held that an excess insurer's "reasonable time" to disclaim coverage does not begin to run until the primary coverage limits (or policyholder's retained limit) have been exhausted.[34] Consequently, in most instances, the lawsuit will not be at a stage at which a threat to the excess insurer's estate is concrete enough to convince a court to refrain from proceeding with the action.

Furthermore, in cases where the client's exposure could reasonably be expected to exceed its primary coverage and a stay would be in the client's interest, the question of whether to pursue the stay also involves tactical issues, such as whether it is an appropriate time to disclose to an adversary that defense counsel perceives the case to present that significant a risk.

In the Reliance Insurance proceeding, the question was ultimately resolved by New York's ancillary Order, which stated that the stay applied to actions and proceedings in which Reliance

> is obligated to defend a party insured or any other persons it is legally obligated to defend by virtue of its insurance contract and in any other actions being defended by a primary or other underlying insurer where such primary or underlying insurer has tendered or offered its full policy limits or where said policy limits have been exhausted by payment of the underlying insurer's aggregate and [Reliance] is the next excess or umbrella layer of insurance.[35]

The Claims Process In a Liquidation Proceeding

Attorneys litigating for or against insurers and/or their insureds will likely know of a liquidation promptly, because the liquidator will seek to impose the stay against all adverse claims in the litigation. In order to protect (and try to collect) those claims, the claimant will have to timely file a proof of claim and the claim must be "allowed."[36]

The principal concern is knowing when the proof of claim has to be filed and how. Under Insurance Law § 7432(b): "Where a liquidation, rehabilitation or conservation order has been entered . . . against an insurer . . . [t]he superintendent shall notify all persons who may have claims against such insurer as disclosed by its books and records, to present the same to him within the time as fixed." That notice must specify the last day for filing proofs of claim, which will be four months after the entry of the liquidation order unless otherwise specified by that order.[37]

Theoretically, this requirement will trigger a notification from the superintendent to all potential claimants, including individuals involved in litigation with the company or its insureds. However, the notice requirement is limited to those individuals with claims "as disclosed by [the insurer's] books and records.[38] Furthermore, the manner of the notice is not uniformly prescribed and is left to the discretion of the court.[39] Finally, there is no assurance that the form of notification selected will actually reach counsel or the client. These are but a few of the practical concerns raised by the notice requirements of the Insurance Law, particularly in complex rehabilitations and liquidations like the Reliance proceeding.

One practical way to avoid these problems is to file the proof of claim without waiting for the notice. For example, some claimants who filed a proof of claim against Reliance in New York (in the ancillary proceeding) have had their claims forwarded to the liquidator in Pennsylvania and received confirmation that the claim will be paid. The risk of this approach, of course, is that if you do not manage to intuit what (beyond the statutory minimum)[40] the liquidator will require as to form and sufficient proof, the claim may be denied. Furthermore, the pre-notice claim approach will not assist a client who needs time to gather the information necessary to prove the claim.

The alternative to pre-notice filing is, of course, to stay on top of the notice process. Make sure your client is on the liquidator's or receiver's list by taking the affirmative step of notifying him or her in writing. In addition, notices are commonly published in a newspaper. (For example, the liquidation order in the Reliance proceeding provides that the notice will be published in the *Wall Street Journal*.) Identify the newspaper(s) which will carry the notice and track that information.

Assuming you have received the notice and the necessary information concerning the procedures and deadlines for filing the proof of claim, the next step is to identify the information needed for the proof of claim. The statutory minimum in New York is that the claim must be presented in the form of a written statement, setting forth the claim, the consideration therefor, any

securities held therefor, any payments made thereon, and verification that the payment claimed is justly owed by the insurer to the claimant.[41] If the claim is based upon a written instrument, then the claimant must also submit a copy of the instrument.[42] Needless to say, the claim must be properly filed, in accordance with the procedures identified by the liquidator, on or before the deadline.[43]

Before a claimant can recover from the assets of an insolvent insurer or from the Property/Casualty Insurance Security Fund, a claim must be "allowed" by the court. For a claim to be "allowed" it must have become absolute rather than contingent.[44] Insurance Law § 7433(c) provides, "No contingent claim shall share in a distribution of assets . . . [unless] . . . it becomes absolute against the insurer on or before the last day fixed for filing of proofs of claim, or there is a surplus and the liquidation is thereafter conducted upon the basis that such insurer is solvent."[45] This raises an obvious concern for the attorney who is mid-way through a lawsuit against an insurer or insured when the insurer goes into rehabilitation or liquidation. The claim at that point can hardly be said to be absolute.

New York's Insurance Law addresses this concern by providing that any person who has a cause of action against the insured of an insurer with an order of rehabilitation or liquidation against it has the right to file a claim even though that claim is contingent.[46] Such a claim *may* be allowed

> (A) if it may be reasonably inferred from the proof presented that such person would be able to obtain a judgment upon such cause of action against such insured; (B) if such person shall furnish suitable proof, unless the court for good cause shown shall otherwise direct, that no further valid claims against such insurer arising out of his cause of action other than those already presented can be made; and (C) if the total liability of such insurer to all claimants arising out of the same act of its insured shall be no greater than its total liability would be were it not in liquidation, rehabilitation or conservation.[47]

1. An insurer may be ordered into rehabilitation based upon: insolvency; refusal to submit records for inspection; failure or refusal to comply with an order of the superintendent to make good an impairment of its capital or minimum surplus; transferring or attempting to transfer substantially its entire property or business by contract of reinsurance or otherwise; a finding that further transactions would be hazardous to its policyholders, creditors, or the public; willful violation of its charter or any law; an officer's refusal to be examined under oath concerning its affairs; its failure to satisfy the requirements for incorporation; its failure to do business for a period of one year; its commencement of voluntary liquidation or dissolution; the fact that it has been the subject of an application for the appointment of a receiver, trustee, custodian, or sequestrator; its consent to such an order through a majority of its directors, shareholders, or members; its failure to complete organization and obtain a license within one year of incorporation; the failure to remove from office any officer or director found to be a dishonest or untrustworthy person; or if it has had an occurrence of an authorized control level event or a mandatory control level event. N.Y. Insurance Law § 7402 ("Ins. Law").
2. Ins. Law § 7403(a).
3. Ins. Law § 7403(d). The code also allows for any interested person to apply for an order terminating the rehabilitation upon due notice to the superintendent. *Id.*
4. Ins. Law § 7403(c).
5. Ins. Law § 7404 authorizes the superintendent to apply for liquidation on any of the grounds listed in § 7402(a) through § 7402(o). Ins. Law § 7404; *see supra* note 1 and accompanying text.
6. Ins. Law § 7405(a).
7. Ins. Law § 7405(b).
8. Ins. Law § 7405(a).
9. The process for equitable distribution of an insurer's fund is set forth in Ins. Law § 7405(f).
10. Ins. Law § 7405(c).
11. *An example of such an order*, the December 14, 2001 Order appointing New York's Superintendent of Insurance as Ancillary Receiver in the Reliance liquidation, issued by the New York Supreme Court for New York County, is available on NYSBA's Web Site at http://www.nysba.org/barjournal/InsurersRehabilitationorder.
12. When the term "insured" is used hereafter in this article, it refers to an insured to whom the insurer owes, as a minimum, a duty to defend in the litigation at issue.
13. These lists are available on the Internet at http://www.ins.state.ny.us/liquid1.htm or by calling the Liquidation Bureau.
14. Parties with claims against insolvent insurers who are incorporated in foreign states and over whose assets the New York State Superintendent of Insurance has not obtained possession through an ancillary order may face jurisdictional hurdles in trying to pursue the foreign state's guaranty association in a New York court. In *Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp*, 192 Misc. 2d 468, 746 N.Y.S.2d 776 (Sup. Ct., N.Y. Co. 2002), for example, a group of insurers commenced a declaratory action in state Supreme Court for a determination of the obligations of various insurers to indemnify defendant Foster Wheeler Corp. for certain asbestos-related injuries. The defendants in the action included various insurance companies who allegedly issued liability policies to Foster Wheeler, and the two New Jersey guaranty associations authorized to pay covered claims against the insolvent defendant insurers. Plaintiffs argued that Supreme Court had personal jurisdiction over the guaranty associations because they stood in the shoes of the insolvent insurers, and to the extent jurisdiction existed over the insurers it extended as well to the guaranty associations.

    The court disagreed and dismissed for lack of personal jurisdiction. The court first noted that "although a guaranty association stands in the shoes of an insurer for some purposes, the extent of the association's liability 'is strictly limited to statutorily defined "covered claims" and therefore its obligations are not necessarily coextensive with the insolvent insurer.'" The court then held that plaintiffs had to establish the minimum contacts necessary to invoke New York's long-arm statute over a nonresident defendant. It further ruled that establishing

those contacts required plaintiffs to show that the N.J. guaranty associations took action "purposefully directed" toward New York. The court held that the negotiation and brokering of the insurance in New York, for a New York insured (Foster Wheeler), were insufficient contacts to meet that burden and dismissed the case. *Id.* at 471; *see Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 715 F. Supp. 94 (S.D.N.Y. 1989), *aff'd on other grounds*, 896 F.2d 674 (2d Cir. 1990); *Frialator v. Guar. Fund Mgmt. Servs.*, 155 Misc. 2d 953, 590 N.Y.S.2d 989 (Sup. Ct., Erie Co. 1992).

15. Ins. Law § 7603(a)(1).
16. *See* Ins. Law § 7603(a)(1). How a claim becomes "allowed" is discussed in the last section of this article.
17. Ins. Law § 7608(c).
18. Ins. Law § 7603(b)(2).
19. Ins. Law § 7602(i).
20. In addition to the statutory limits on recovery, there is the practical problem of how much money the Fund has available. In the Reliance liquidation, for example, it is not clear how much money will be available to pay claims under primary policies, much less excess policies.
21. *Koken v. Reliance Ins. Co.*, No. 269 M.D. 2001 (Pa. Commw. Ct., Order dated May 29, 2001, ¶ 22). Paragraph 20 of the Order similarly enjoined institution or further prosecution of any action against Reliance or the rehabilitator, "obtaining preferences, judgments, attachments garnishments or liens, including obtaining collateral in any litigation, mediation or arbitration involving Reliance, the rehabilitator, or Reliance's assets or property," levying any execution, and making assessments against Reliance or offsetting them against any amounts otherwise payable to Reliance.
22. *See* Ins. Law §§ 7408–7415.
23. Some federal courts outside New York have held that the McCarran-Ferguson Act pre-empts in this area and that a federal court does not have jurisdiction over a case subject to state court rehabilitation or liquidation proceedings. *See, e.g.*, *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir.), *cert. denied*, 525 U.S. 1016 (1998) (state insurance regulatory proceeding precluded federal court from ordering arbitration under the Federal Arbitration Act because such an order would violate the provision in the McCarran-Ferguson Act stating that no Act of Congress is to be construed to invalidate, impair, or supersede any state law regulating insurance, unless the federal law specifically relates to the business of insurance); *Davister Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277 (10th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999). Neither the U.S. Court of Appeals nor the district courts within it appear to have followed this preemption analysis, and have instead upheld stays on the bases of comity and abstention.
24. *See, e.g.*, *Twin City Bank v. Mutual Fire, Marine & Inland Ins. Co.*, 646 F. Supp. 1139 (S.D.N.Y. 1986), *aff'd*, 812 F.2d 713 (2d Cir. 1987).
25. 726 F. Supp. 478 (S.D.N.Y. 1989).
26. *Id.* at 484.
27. 282 F.3d 83 (2d Cir. 2002).
28. *Id.* at 92 n.8.
29. *Reliance Ins. Co. v. Six Star, Inc.*, No. 01 Civ. 2165, 2002 U.S. Dist. LEXIS 3530 (S.D.N.Y. Mar. 5, 2002).
30. 15 U.S.C. §§ 1011–1015.
31. *Reliance Ins. Co.*, No. 01 Civ. 2165, 2002 U.S. Dist. LEXIS 3530, at *7–*8. *See* UILA, Ins. Law §§ 7408–7415. As noted earlier, the UILA requires all claims against an insurer placed in liquidation in a reciprocal state be filed in either the insurer's domiciliary state or in ancillary liquidation/receivership proceedings. States which have enacted the UILA, such as Illinois and New York, are "reciprocal" states. *See G.C. Murphy Co. v. Reserve Ins. Co.*, 54 N.Y.2d 69, 444 N.Y.S.2d 592 (1981).
32. *Reliance Ins. Co.*, 2002 U.S. Dist. LEXIS 3530, at *3. Unlike the Order of Rehabilitation, the Order of Liquidation in the Reliance Insurance proceeding specifically requested comity:

    > With respect to suits and other proceedings in which Reliance is obligated to defend a party, pending outside the Commonwealth of Pennsylvania and in federal courts of the United States, this Order constitutes the request of this Court for comity in the imposition of a 90-day stay by such courts or tribunals, and that those courts afford this order deference by reason of this Court's responsibility for and supervisory authority over the rehabilitation of Reliance, as vested in this Court by the Pennsylvania Legislature.

    A copy of the entire Order can be obtained from the Pennsylvania Department of Insurance's Web site by going to http://www.insurance.state.pa.us and clicking on "Order of Liquidation." *See Koken v. Reliance Ins. Co.*, 784 A.2d 209 (Pa. 2001) in which the Commonwealth Court of Pennsylvania listed suits around the country for which it was expressly requesting a stay.
33. *See* Reliance Liquidation Order, dated October 3, 2001, ¶ 23. A copy of this Order may be obtained as set forth *supra* in note 32.
34. *Gardner v. Ryder Truck Rental, Inc.*, 261 A.D.2d 505, 690 N.Y.S.2d 614 (2d Dep't 1999).
35. *In re Ancillary Receivership of Reliance Ins. Co.*, Index No. 405987/01 (Order dated Dec. 14, 2001, ¶ 7).
36. Ins. Law § 7433.
37. Ins. Law § 7432(b).
38. *Id.*
39. *Id.*
40. *See* Ins. Law § 7433(a).
41. Ins. Law § 7433(a)(1).
42. Ins. Law § 7433(a)(2).
43. An exception to the proof of claim requirement exists for all persons whose name appears on the books and records of the insurance company as policyholders or claimants. The superintendent is required to make a list of each such person within 30 days after the last date set for filing claims. Any person who appears on the list is deemed to have duly filed proof of claim. Ins. Law § 7433(b)(2). The plain risk of waiting to determine whether a claimant is on that list is that if the claimant is not, the time for filing a proof of claim is already well past. Proofs of claim filed after four months (or the time period specified in the notice) will not share in the distribution of the insurer's assets until all "allowed" claims have been paid. Ins. Law § 7432(c).
44. Ins. Law § 7433(d)(1).
45. Ins. Law § 7433(c). This provision should not be taken as encouragement to pursue litigation to judgment during this period. Ins. Law § 7433(d)(3) provides that a judgment against an insured rendered after the date of entry of the rehabilitation or liquidation may not be considered as evidence of liability or damages.
46. Ins. Law § 7433(d)(1).
47. Ins. Law § 7433(d)(2).

Effective Techniques For Impeaching Witnesses

EDITOR'S NOTE: With this issue the Journal *introduces an anticipated series of articles reflecting insights and information developed for Continuing Legal Education presentations by members throughout the state. The outlines will be edited to permit publication in a more condensed format than the normal CLE presentation. Endnotes will be provided for new concepts and authorities, but well-established principles will not be documented in detail.*

BY WALTER L. MEAGHER, JR.

Impeachment of one or more witnesses may very well dictate the outcome of a trial, and it is therefore vital for the litigator to remember some of the basic concepts that underlie this central trial technique.

Although a witness swears or affirms to tell the truth, witness credibility is deemed always to be in issue, and a witness is therefore subject to impeachment – that is, the witness's testimony may be discredited, usually achieved by means of cross-examination. Essentially, one is probing the knowledge or subjective feelings possessed by the witness that may affect that person's ability or desire to tell the truth.

Accordingly, the examiner may strive (1) to have the witness acknowledge facts about his or her background and/or prior acts that bear upon credibility, (2) to elicit prior statements or conduct that contradict current testimony and (3) to develop any interest, bias, or prejudice that might motivate the witness and thereby vitiate his or her testimony. Some of these relate to or suggest that a witness is not competent to testify, while others cast doubt on the trustworthiness of the testimony being offered or are a combination of both. By accomplishing some or all of the foregoing, the examiner may demonstrate the inherent probability that the testimony is false.

As a *caveat,* it should be remembered that the mere fact that a witness has been impeached does not require the jury to disbelieve the testimony. What may sound or appear to be a complete discrediting of the witness may be viewed by the trier of fact as merely a faulty recollection of certain aspects of an event, susceptible of repair by rehabilitation of the witness on redirect. It would be the unusual case where variances do not exist between trial testimony and, for example, what may have been said at an EBT. Small discrepancies are probably not worth dwelling on, as the trier of fact likely will not attach much weight to them.

The Collateral Matter Rule

"Intrinsic" impeachment takes the form of challenging witnesses through the use of their own testimony. However, a witness may also be asked (assuming a good-faith basis exists to do so) about prior bad or immoral acts. If the answer of the witness is a denial of such act, however, the question arises as to whether other "extrinsic" evidence may be introduced to discredit the answer and prove that the bad act occurred.

In general, it may not be. Although cross-examination is permitted regarding a collateral or immaterial matter concerning which the witness has testified, the inquiry is concluded by the answer – the so-called "collateral matter" rule. The trial court has the discretion to properly restrict inquiry into such collateral matters.[1]

There are important exceptions, however. Where the evidence is also relevant to prove or disprove a substantive fact at issue in the case, or would demonstrate a motive to falsify testimony concerning a material issue, or would demonstrate a lack of opportunity or ability to observe and remember events, then the extrinsic evidence should not be excluded by the collateral matter rule. Put somewhat differently, if the extrinsic evidence has relevance independent of a device designed to discredit the witness generally, it does not violate the collateral matter rule and should be admitted.[2] For exam-

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ple, if an automobile accident plaintiff has given testimony at trial and/or at a pretrial deposition that he had not been drinking before the accident, a contradictory laboratory record should not be excluded.

Another way around the collateral matter rule exists when the witness volunteers collateral information on direct examination. This issue is discussed by the Court of Appeals in *Halloran v. Virginia Chemicals, Inc.*[3] In this products liability case, the principal issue was why a can of Freon exploded. The plaintiff testified on direct that his regular practice in heating the cans was to immerse them in a coffee tin of warm tap water. On cross-examination, he denied ever using an immersion coil for heating Freon cans. The defendant then offered a witness prepared to testify that he had seen the plaintiff on previous occasions using an immersion coil to heat Freon. The trial court sustained an objection that extrinsic evidence could not be used to impeach the plaintiff's denial. The Court of Appeals ordered a new trial after judgment for the plaintiff, stating that even if the witness's testimony were not admissible as evidence of a habit, the plaintiff had "opened the door" on the issue by his denial, and it thereby became material to the case.

Bias, Prejudice or Interest

Witnesses are often consciously or subconsciously biased concerning a party or the matter in issue. A witness may, for example, believe that jury verdicts are excessive and thus be inclined to favor the defendant, irrespective of the particular matter at hand. Some biases are more obvious: a family member testifying in an action in which another family member is a party, a business partner testifying on behalf of another partner, or a fired former employee testifying on behalf of a plaintiff suing the former employer.

In addition, such hostility or interest would provide the witness with a motive to falsify testimony. This may be proved by extrinsic evidence, inasmuch as a motive to falsify is not deemed to be collateral.[4]

Inconsistent Statements or Conduct

Generally, pointing out prior statements or conduct that contradict present trial testimony is considered to be the most effective form of impeachment. If the prior inconsistencies relate to a material issue, they may be proved by extrinsic evidence; if they pertain to a collateral matter, then they still might be established upon cross-examination, but are subject to the collateral matter rule (*i.e.,* the examiner is stuck with the answer). Further, a witness who has been confronted with a prior inconsistency is entitled to explain its occurrence (for example, that a statement made at the hospital was given while the witness was in a confused state).

What happens if a witness admits to the inconsistency, but attempts to minimize it? Such admission does not serve to terminate further questions. In that case, the trial court should permit the examiner to go beyond a mere recitation of the prior inconsistent testimony (for example, by simply reading relevant portions of a prior EBT).

On a related note, efforts that rely on pretrial deposition testimony enjoy a statutory basis in CPLR 3117(a)(1)–(3). Counsel should furnish a copy of the transcript of such deposition and all other transcripts to the court in advance. At trial, counsel should identify the date the witness was deposed and the fact that the witness was represented by counsel, and then refer to the page and line number (affording time for opposing counsel and the court to locate the section referred to). Counsel should pose the question as to whether the witness remembers the particular question found at the line, and then remind the witness that the answer he gave contradicts what he had testified to at the deposition. This is, of course, the foundation for admission of the impeachment evidence, and a variation may be used for any other writing, including the pleadings or affidavits in the case. Fertile areas for possible use are the plaintiff's bill of particulars and a notice of claim in a case in which one had to be served.

Prior Convictions Or Acts of Moral Turpitude

Convictions of recent vintage, particularly those for a felony or for an act involving moral turpitude, are admissible.[5] Those that are remote in time will probably be excluded as being more prejudicial than probative. Arrests or fines imposed for traffic infractions or violation of ordinances are inadmissible. For purposes of impeachment, a witness may not be asked whether she was or is currently under indictment for a particular crime, unless it were for the same matter to which testimony was being given.

A witness's answers are not binding on the party who calls the witness, and may be contradicted by other evidence in the case.

Prior conviction for a crime may also be proved by the introduction into evidence of a certificate of conviction. This should always be secured before the witness is examined on the subject of such conviction.

The Second Department recently considered the issue of cross-examination as it relates to wrongful acts. In *Platovsky v. City of New York*,[6] the court held that cross-examination regarding whether a stabbing victim had improperly kept a public document was proper in his personal injury action, as such an act would have some tendency to demonstrate moral turpitude. The extent to which an act is deemed to exhibit moral turpitude, and thus to be relevant to credibility, is a matter of trial court discretion. If a particular effort should be unsuccessful upon objection, an offer of proof should be considered.

Impeaching One's Own Witness

The general rule is that you cannot attack the credibility of your own witness. By calling the witness you are deemed to have vouched for his or her credibility. However, a witness's answers are not binding on the party who calls the witness, and may be contradicted by other evidence in the case.[7] CPLR 4514 addresses impeachment of a witness by a prior inconsistent statement. It states:

> In addition to impeachment in the manner permitted by common law, any party may introduce proof that any witness has made a prior statement inconsistent with his testimony if the statement was made in a writing subscribed by him or was made under oath.

It is well established, however, that a witness or the party for whom he or she was sworn may produce evidence in denial or explanation of the impeaching statements.[8] Accordingly, if the plaintiff calls the defendant as its witness and wants to introduce a prior contradictory statement, not made under oath or in writing, the plaintiff may do so, because the limitation does not apply to a party.

A witness's, as distinguished from a party's, prior inconsistent written statement, or statement made under oath, has no probative value. It merely affects the witness's credibility. As an example, assume that the plaintiff is required to prove notice of a defective condition. The plaintiff calls the janitor employed by the defendant. On direct examination the witness is asked whether prior to the accident he had knowledge that the step was broken. His testimony is that he did not have such knowledge. He is then shown a statement that he had signed in which he states that he did, in fact, know of the defective condition for several weeks prior to the accident. The witness, however, persists in his denial. Under those circumstances the written statement would be admissible, but only for the purpose of attacking the witness's credibility and not for any evidentiary value. If the plaintiff has no other proof of notice, he will have failed to make out a *prima facie* case.

Finally, the Pattern Jury Instructions provide a rich source for brush-ups in this area. Among them are interested witnesses (1:91), however, non-party witnesses where there has been an admission of evidence for a limited purpose (1:66) and *Falsus in Uno* (1:22).

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1. *See Bevilacqua v. City of Niagara Falls*, 66 A.D.2d 988, 411 N.Y.S.2d 779 (4th Dep't 1978).
2. *See Feldsberg v. Nitschke*, 49 N.Y.2d 636, 427 N.Y.S.2d 751 (1980).
3. 41 N.Y.2d 386, 392, 393 N.Y.S.2d 341 (1977).
4. *See People v Ashner,* 190 A.D.2d 238, 597 N.Y.S.2d 975 (2d Dep't 1993).
5. *See* CPLR 4513.
6. 275 A.D.2d 699, 713 N.Y.S.2d 358 (2d Dep't 2000).
7. *Carlisle v. Norris*, 215 N.Y. 400 (1915).
8. *See Ryan v. Dwyer*, 33 A.D.2d 878, 307 N.Y.S.2d 565 (4th Dep't 1969).

First Court Case to Interpret Property Condition Disclosure Act Holds Sellers Not Liable

BY KARL B. HOLTZSCHUE

In the first published case on the Property Condition Disclosure Act (PCDA),[1] a Civil Court judge in Richmond County[2] has held that sellers who provided the buyers with the required statement were not liable under the act or under common law fraud because they were not proven at trial to have actual knowledge of a defect in the premises.

Facts Proven at Trial

The sellers gave the purchasers a Property Condition Disclosure Statement (PCDS) answering "unknown" to question 20 about rot or water damage to structures. In all, the sellers answered "unknown" to 30 of the 48 questions.

The purchasers hired an inspector to look at the structures, but that inspection did not include an in-ground swimming pool that was placed mostly above ground. An adjustment was made in the purchase price to reflect that the deck around the pool was not in good condition. When the deck was removed after the closing, rot that could be seen on the main supports and body of the pool was deemed so severe that if it was left untreated the pool would collapse. A contractor found new patches around the bottom of pool to prevent the liner from pushing out. Debris under the deck obscured the rot, but if the deck had been removed the rot would have been visible.

The judge found after a trial that the sellers did not have constructive knowledge of the condition. The existence of the rot was not easily discoverable upon reasonable observation. The judge found that the evidence supported the sellers' claim that they did not have actual knowledge of the condition of the pool because it was not visible before they filled out the PCDS. It was not clear that the rot was patent, that is, discoverable upon reasonable inspection by the sellers or the purchasers. No evidence was introduced regarding prior repairs, so the purchaser failed to prove that the sellers had actual or constructive knowledge due to prior work. The sellers had rented the premises for nine years before 1999.

The statutory PCDS form does not ask about "material defects" in a swimming pool, the critical issue in this case and one of the few items not included in the lengthy list of "Mechanical Systems & Services" covered in questions 26 through 47. That omission forced the purchasers in this case to claim that rot should have been disclosed under question 20, which asks, "Is there any rot or water damage to the structure or structures?"

Right Result, But Wrong Reasons

The sellers were sued for improper completion of the PCDS. After a trial, the judge, on his own motion, also considered a possible claim for common law fraud. The purchasers lost on both causes of action. The result is correct on these facts under both the PCDA and the common law, but the reasoning of the opinion and analysis of the PCDA is faulty in many respects. The opinion does not cite a single case or article – on the PCDA, caveat emptor or other issues – except for two paraphrased quotations from Shakespeare.[3]

The following discussion is presented in an attempt to provide an interpretation of the statute by one who actively participated in its enactment,[4] with references to relevant books, articles and cases.

The result is surely correct under RPL § 465(2), because the PCDA provides a remedy against sellers who *provide a PCDS* only if the sellers had actual knowledge and willfully defaulted by lying when the sellers said "unknown" on the PCDS. The purchasers did not prove that the sellers had actual knowledge of facts contra-

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dicting their statement in the PCDS, so the purchasers properly lost the case.

The result is also correct under a common law fraud theory. The purchasers could also sue for common law fraud for a willful misrepresentation made in the PCDS, but they would win only if the sellers had actual knowledge (and, under the case law, the purchasers did not fail to use means available to them to discover the defect). The purchasers did not prove that the sellers had actual knowledge. The defect was not patent, it was latent. To be liable for a latent defect, the sellers had to have actual knowledge (here they had none) and a duty to speak (none shown here). The sellers could not be liable for a negligent misrepresentation, because the sellers did not have constructive knowledge either. Neither the sellers nor the purchasers had the means to discover the rot.[5] Consequently, the purchasers also properly lost on common law fraud.

The claim of misrepresentation in the PCDS alone will not support a cause of action for breach of contract.

Mistakes by the Purchasers

The purchasers in this case made two fatal mistakes.

First and foremost, they failed to have the inspector who inspected the house also inspect the swimming pool (although it is unclear whether an inspector had the duty to look behind the debris under the deck). Having a knowledgeable professional inspect all aspects of the residence should be the first priority in buying a home. Trying to get the seller to disclose observable defects should be a secondary effort.

Second, the purchasers should have tried to add the swimming pool to the list of equipment covered by the PCDS (or add a representation to that effect in the contract) and made that disclosure survive the closing. The sellers' attorney probably would have resisted the disclosure and strongly advised against survival. Survival-of-condition representations that can be inspected is rightly not customary in residential sales. The purchaser has the duty to get the property inspected.

On the other hand, in my opinion (and that of Professor Prosser), requiring disclosure by the seller of defects that are not discoverable by a reasonable inspection by the purchaser would be appropriate and fair. Unfortunately, such a disclosure requirement has been expressly rejected by New York case law.[6] One of the main virtues of the PCDA is that it provides some redress for this shortcoming in the New York law of caveat emptor.

Analysis of PCDA Remedies

The opinion correctly states that the purchasers were not entitled to the $500 credit under RPL § 465(1), because that remedy only applies if the seller fails to deliver the PCDS in a timely manner. Here, the sellers provided a timely statement, and the remedy provided under that section by its terms does not apply.

The only other remedy expressly provided in the PCDA is under RPL § 465(2), which states that a seller who *provides a PCDS* shall be liable for actual damages for a willful failure to perform the requirements of the PCDA, in addition to any other existing equitable or statutory remedies. In an attempt to interpret the PCDA, the judge looked at other consumer protection legislation, such as the statute on home improvement contracts that provides a private action for fraud and an injunction action by the state attorney general.[7] As a result of this comparison, the judge stated he did not find that the PCDA provides a specific right of action to the purchaser for "a breach of the Disclosure form" (the PCDS). Consequently, he held that the purchasers had no cause of action under the PCDA, saying that RPL § 465(2) has a "nebulous legal effect," fails to create a right of action for improper completion, is unclear and is therefore unenforceable.[8]

The judge states that it was not clear to him what RPL § 465(2) means.[9] He asks what does "requirements of this article" mean? Does it mean "truthful completion" of the PCDS? It clearly does mean that (as well as timely delivery). The essential requirements are (1) that the seller reveal its *actual* knowledge in response to the questions and (2) that the seller is responsible only for *willful* failure to comply. Accordingly, the seller is not responsible for "constructive" knowledge (knowledge that a reasonable seller should have known in the circumstances). That test was proposed in the original legislation, but was deliberately deleted from the final statute.[10] A constructive knowledge test was thought to be too much of a trap for the unwary seller. Under the same approach, the seller is liable only for a *willful* failure, not a negligent one. Intentional misrepresentation, such as outright lying, is actionable under the PCDA; negligent misrepresentation is not.

For example, if it could be shown that the sellers in this case had in the past received a proposal to repair the swimming pool (and had not had the repair done),[11] the purchasers might have argued that the sellers had constructive knowledge of the defect even if the sellers

claimed they forgot about the proposal and denied having actual knowledge at the time they delivered the PCDS. Would Question 20 about "rot" in structures (which does not expressly refer to swimming pools) have reminded the sellers of the repair proposal? Did the repair proposal refer to "rot"?[12] This clearly raises a question of credibility as to the sellers' actual knowledge at the moment of signing the PCDS. But if the sellers are believed by the trier of fact, the statute provides no remedy to the purchasers. In that case, the sellers did not have actual knowledge and were not in willful default of the requirement to disclose. It should be remembered that the stated purpose of the statute is to aid in the inspection process, not to set a trap for unwary and unsophisticated sellers using a "constructive" knowledge mechanism and vaguely worded questions.

The sellers in this case tried to protect themselves by answering "unknown" to 30 of the 48 questions. The judge rightly observed that an "unknown" answer should trigger a duty on the purchasers to inquire about the subject matter, especially where, as in this case, the sellers answered "unknown" to most of the questions. A purchaser who accepts a PCDS with "unknown" answers should be on notice that the subject matter should be inspected. Such a purchaser does not waive claims for defects; the purchaser can sue and win if the seller is proven to have lied about not knowing. This can be shown by evidence that the seller had actual knowledge of the defect (*e.g.*, by a prior report on the condition by a contractor or proof of active concealment or partial disclosure). Claims of partial disclosure may well increase when a PCDS is given.

In this case, however, the sellers answered "unknown" many times and still got sued and had to pay to defend a litigation. The judge rightly asked why a sellers' attorney would ever advise the clients to give a PCDS and expose themselves to litigation when they could decline to do so and just give a $500 credit at the closing. Many attorneys who have attended my lectures on the PCDA have come to the same conclusion.[13] This case should increase their numbers.

Analysis of Common Law Fraud Action

After finding no cause of action under the PCDA, the judge, on his own motion, analyzed whether the evidence provided at trial would support a cause of action for "breach of contract" [sic] or common law fraud. The judge rightly noted that delivery of a PCDS provides purchasers with a document that can be used against sellers in a common law suit for fraud or negligent misrepresentation. Thus, the PCDS gives purchasers an advantage in subsequent litigation. Moreover, the PCDA expressly states that it does not "limit any existing legal cause of action or remedy at law, in statute or in equity."[14]

The judge rightly noted that nothing in the PCDA required that information in the PCDS be included in the contract of sale. The PCDA merely requires that the PCDS be "attached" to the contract. The PCDS and the contract are separate documents.[15] Consequently, the claim of misrepresentation in the PCDS alone will not support a cause of action for breach of contract. But a misstatement in a PCDS can support a claim of fraudulent misrepresentation under the common law. If the sellers lied on the PCDS about their actual knowledge of the misstatement, they could be sued for fraud.

Would constructive knowledge support a fraud claim? It could as a theoretical matter, but the claim has almost never been made in recent caveat emptor cases, and the real hurdle in New York is to show that the seller had a duty to disclose the defect.[16] The judge rightly points out, I think, that the PCDA does not eliminate a common law cause of action based on constructive knowledge. By contrast, as discussed above, the PCDA does give the seller a defense to an action under the PCDA based on constructive knowledge.

Merger Clauses Do Not Protect Against Fraud

The judge states that any rights of the purchasers under the PCDA were merged in the contract and would not survive execution of the contract, based on the standard NYSBA contract "as is" clause disclaiming

reliance on prior statements as to condition and the standard merger clause as to all prior understandings.[17] While he was correct in observing that nothing in the PCDA indicates that a PCDS disclosure is intended to survive, he failed to take note of the many New York cases holding that such merger clauses do not prevent a fraud claim.[18] Consequently, a fraud action based on a PCDS misrepresentation is still available after contract signing and after the closing. While this is an error in the holding, it should not change the result, because no fraud was proven in this case.

If there is no PCDS, the purchaser must prove a misrepresentation amounting to fraud that is made other than in the PCDS.

The limitation to actual damages in RPL § 465(2) eliminates all other categories of damages under the PCDA, but does not limit damages under a common law fraud suit. The judge also rightly observed that the PCDA does not preclude a suit for specific performance.

Because the purchasers did not prove that the sellers had actual knowledge of the latent defect in this case, the judge rightly held that the purchasers should lose under a common law fraud theory.

Analysis of $500 Credit Remedy

The judge also did an analysis of RPL § 465(1), which requires that a seller who fails to provide a PCDS prior to the signing by the buyer of a binding contract of sale must give to the buyer at the closing a credit of $500 against the agreed-upon purchase price. In this case, the sellers did provide the PCDS in a timely manner, so they will not be required to give the credit.

As dictum, the judge stated that the requirement of a $500 credit at closing would be enforceable. He also correctly observed that a "willful failure" under the PCDA does not refer to a refusal to provide a $500 credit at closing. RPL § 465(1) makes no reference to any reason why the PCDS is not delivered as required, whether willful or otherwise. Any failure to deliver results in the $500 credit.

It is not true that the seller gets no relief from litigation by giving the credit. Giving the credit and denying the purchaser a PCDS deprives the purchaser of a document to use in litigation that could establish a written misrepresentation. If there is no such document, the purchaser must prove a misrepresentation amounting to fraud that is made other than in the PCDS.

As the judge observed, the PCDA makes no express provision of redress for a seller's refusal to give the $500 credit at closing. It logically follows, however, that a purchaser who does not receive the credit can sue for it after the closing as a breach of the statute.

Real Property Transfer Tax and HUD-1

By way of dictum, the judge offered his opinion that the state and city are entitled to collect transfer taxes on the original sale price, not on the price reduced by the $500 credit, because the credit is only given at the closing. I did not initially read the statute that way, but, as a savvy title insurance company attorney observed when I raised the question: "As to the state transfer tax, it is a two-dollar problem."[19]

Two different title companies have since reported that the state takes the same position as the judge. So, the logical advice is: pay the two dollars. It is wiser to finesse this issue than to even think about risking a contest on it. It then follows that the $500 credit should be shown on the HUD-1 Settlement Statement as a reduction in the amount due the seller in a line in section 500.

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1. Real Property Law §§ 460–467 (RPL).
2. *Malach v. Chuang*, N.Y.L.J., Jan. 10, 2003, p. 23, col. 1 (Civ. Ct., Richmond Co.).
3. The opinion opens with an allusion to *Hamlet*: "To Disclose or not to Disclose: that is the question: / Whether 'tis nobler to complete the form, suffer possible litigation and expose one's fortune, / Or keepeth quiet and forfeit the $500?" It concludes with an adaptation of lines from *Macbeth*: "It is a law / Drafted by a legislature, full of sound and fury. / Achieving almost nothing."
4. This author has studied and written on caveat emptor for many years and participated in the enactment of the PCDA. *See* Holtzschue on Real Estate Contracts § 2.2.11 (PLI); New York Practice Guide: Real Estate § 2.11[5]; Warren's Weed New York Real Property, "Caveat Emptor" (analyzing over 130 cases); Holtzschue, *Disclosure Act: The New $500 Credit Option in Real Property Law*, N.Y.L.J., Nov. 13, 2002, p. 5. col. 2; Holtzschue, *Property Condition Disclosure Act Enacted*, 30 N.Y. Real Prop. L.J. 15 (Winter 2002); Holtzschue, *Caveat Emptor Ain't What It Used to Be: New Developments, Trends and Practice Tips*, 25 N.Y. Real Prop. L.J. 3 (Winter 1997).
5. If the purchasers could have proven that the sellers knew of the defect and lied about it, the purchasers could have won because they were not shown in this case to have the means to discover it themselves. That purchasers must use means available despite misrepresentation by sellers is firmly established in the New York cases. *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 184 N.Y.S.2d 599 (1959). In the great majority of cases the purchaser has been found to have the means available. Holtzschue on Real Estate Contracts § 2.2.11.1.3.
6. *Stambovsky v. Ackley*, 169 A.D.2d 254, 572 N.Y.S.2d 672 (1st Dep't 1991) (which discussed and expressly rejected the Prosser rule). See texts cited, *supra*, note 4.

7. General Business Law §§ 772, 774.
8. The use of "may" in the PCDS form, RPL § 462(2), which is meant merely to inform the purchaser, does not cast doubt on the mandatory language of the remedy section of the statute. The judge suggested that the PCDA must be redrafted to achieve the stated purpose of consumer protection. The author believes that the statute is sufficiently clear to be enforceable. Anyone who participated in the original legislative process would probably not welcome a redrafting attempt.
9. RPL § 465(2) provides:

   > Any seller who provides a property condition disclosure statement . . . shall be liable only for a willful failure to perform the requirements of this article. For such a willful failure, the seller shall be liable for the actual damages suffered by the buyer in addition to any other existing equitable or statutory remedy.

10. Holtzschue, *Property Condition Disclosure Act Enacted*, 30 N.Y. Real Prop. L.J. 15 (Winter 2002).
11. Neither of which was proven in this case, as the judge noted.
12. One of the problems with this case is that the purchaser was trying to tie the general question about rot in structures to the defective condition of the swimming pool. If there had been a question about material damage to the swimming pool, the purchasers might have had an easier case.
13. Holtzschue, *Disclosure Act: The New $500 Credit Option in Real Property Law*, N.Y.L.J., Nov. 13, 2002, p. 5, col. 2. For a contrary prior view that this author believes to be incorrect, see Krieger, *Property Condition Disclosure Act: Another Interpretation*, N.Y.L.J., June 27, 2002, p. 4, col. 4.
14. RPL § 467.
15. It is conceivable that a PCDS could be expressly incorporated by reference in the contract of sale. Such a move should be rejected by sellers, to prevent a breach of contract claim (including application of the six-year contract statute of limitations).
16. Extremely few New York cases have held that the seller has a duty to disclose defects. Compare one of the few, *Young v. Keith*, 112 A.D.2d 625, 492 N.Y.S.2d 489 (3d Dep't 1985) (failure to disclose serious disrepair of water and sewer systems held to be concealment of material fact with intent to defraud) with *Venezia v. Coldwell Banker Sammis Realty*, 270 A.D.2d 480, 704 N.Y.S.2d 663 (2d Dep't 2000) (seller had no duty to speak about contamination of groundwater, even where seller was plaintiff in class action against the polluter!). See texts cited, *supra*, note 4.
17. NYSBA Residential Contract of Sale paragraphs 12 and 28, respectively. *See Malach v. Chuang*, N.Y.L.J., Jan. 10, 2003, p. 23, col. 1 (Civ. Ct., Richmond Co.).
18. *See, e.g.*, *Bridger v. Goldsmith*, 143 N.Y. 424, 38 N.E. 458 (1894) (party who perpetrates fraud may not contract for immunity).
19. The rate of the New York State Real Estate Transfer Tax is $2 per $500 of consideration. Tax Law § 1402(a). The rate of the New York City transfer tax on one- to three-family houses is 1% (in this case, $5), where the price is $500,000 or less (1.425% if more). Tax Law § 1201(b)(2), (4).

Sharing Legal System Objectives As Russia Revives Trial by Jury

BY PATRICIA D. MARKS

Last year, a team of criminal justice professionals traveled to Velikiy Novgorod and Pskov to share information about jury trials. The teams included a County Court judge, Supreme Court justice, police investigator, commissioner of jurors, prosecutor and private defense attorneys. The members of the New York teams were joined by a Connecticut team of judges and lawyers. Each of us came from different backgrounds and experiences to discuss information about jury trials in the United States and our understanding of how jury trials would be implemented in these regions in Russia.

We came away with so much more. We had made new friends despite the barriers of language and culture. We had new colleagues with whom we could share experiences and advice. We hoped we had been able to dispel the notion that Americans come over to Russia to tell them that we do it better than any one else. All we could do is bring people together, describe our best practices and learn about theirs.

Jury Trial Revival in Russia

Russia had resurrected its jury trial system in 1993 and conducted jury trials on an experimental basis in several regions of Russia. Effective in July 2003, the Criminal Procedure Code of the Russian Federation has required most regions to have jury trials in serious criminal cases. To serve as a juror in Russia, a person must be a citizen and voter between the ages of 25 and 75. The code requires a jury consisting of 12 jurors and two alternates. Jurors have three hours to reach a unanimous verdict. If one is not reached within that time, a majority vote is sufficient to convict. The courts made no distinction between a conviction reached by a unanimous decision and a verdict obtained by a majority vote.

For Russia the implementation of trial by jury was an important step in promoting citizen involvement in government. Jury trial would fulfill certain basic purposes: involve citizens in the decision of factual issues in criminal cases; ensure that the verdicts of citizen juries

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Defenders Are Cautiously Hopeful

BY MARK W. BENNETT

As Russian courts begin jury trials after nearly a century without them, Russian criminal defense attorneys are hopeful that they will finally get to argue their cases free from the heavy hand of the centralized system that prevailed since the early days of the Soviet Union. The prospect of pitching their cases to a jury of peers, with a presumption of innocence and the prosecutor carrying the burden of proof, gives defense attorneys reason to be optimistic. They also have plenty of reasons to think it will not be easy, however.

History of Jury Trials in Russia

Jury trials were first established during the Russian legal reforms of 1864, and became a prominent feature of the czarist legal system. Indeed, the Bolshevik revolutionaries often requested jury trials when they were jailed prior to 1917. Jury trials were subsequently eliminated in Russia in 1922.

Despite their early success, jury trials also came under fire during this first iteration. One case encapsulated this disaffection. In 1878, a revolutionary named Vera Zasulich shot and killed a governor in the czar's government, then confessed to the murder. Despite her confession, the prosecutor, hoping to make an example

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are rendered fairly, impartially and in accordance with law; and ensure that the work of citizen juries is subject to meaningful judicial review without depriving juries of the power to make independent decisions on the issues presented for their determination.

As implemented, the code dramatically altered the role of the judge and prosecutors. Under the former system, all cases were judge trials often with two lay assessors. The judge's previous role was more akin to that of the prosecutor, and the prosecutor was more passive in presenting witnesses. The verdict was a majority opinion of the judge and two lay assessors who were referred to as "nodders," reflecting the widely held belief that the lay assessors always nodded in agreement with the judge's decision.

With the advent of the new code, a number of changes have been introduced, including trial by jury for serious crimes in all regions. Such trials had been held on an experimental basis for several years in Moscow and eight other provinces. We tapped into the information from that experiment by inviting Judge Alexander Kozlov from Moscow to be a presenter at our program. He had extensive experience with jury trials in Moscow. His contribution was enormous and very well received by the other judges.

As we met with different judges and administrators on a preliminary trip last May, we became aware that there were many concerns about the introduction of jury trials:

- Why jury trials? – the present system works well.
- The jury trial system will not be efficient.
- In the early stages of jury trials there was a high rate of acquittals, *e.g.*, 37% in Moscow; how can we avoid that?

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"Selling" Jury Trials to Judges

BY THOMAS A. STANDER

Although the Russian judges were warm and wonderfully friendly to us, we quickly learned that the concept of jury trials was not one that they would be quick to embrace. The judges had a number of concerns.

One of the first questions we were asked as we discussed the jury process was "what do we (as judges) do if the jury *gets it wrong*." The traditional role of the judge as prosecutor and as a defender of the public was difficult for them to balance with the notion that the jury would be the final decision maker. They also worried about the perception of justice if a greater percentage of defendants began to go free.

So how did we "sell" the concept of jury trials to our Russian counterparts? We couldn't say they are cheaper or faster or perhaps even better (at least from the Russians' point of view). So why have jury trials?

To foster democracy in Russia, we argued, the Russian people must not only be shown that they have a voice in electing the legislature and the executive branch, they must also feel they are part of the judicial branch. Only by being part of the judicial process do the people understand the role of the judge in society, and only by participation do people believe they are getting justice.

To this same purpose, we reasoned, the prosecution and police will be held to a higher standard. In due course, I believe, the process will also give prosecution and police a level of respect that has been absent in an era when their fairness has been suspect.

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of Zasulich, elected to pursue a jury trial. The prosecutor misinterpreted the depth of anti-czarist sentiment, however, and the jury acquitted Zasulich. The case was promptly used by those opposed to jury trials as a shining example of why ordinary citizens could not be trusted to decide important cases correctly.

Under the Soviet (and post-Soviet) system, criminal trials were held before either a judge sitting alone or a judge and two citizens known as "lay assessors," more commonly referred to as "nodders" – apparently because they either always nodded their agreement with the judge, or nodded off for lack of active participation in the proceedings. Defense lawyers were severely limited in presenting their case, and it showed in the results – only 0.5% of criminal defendants were acquitted.

In 1993, two years after the collapse of the Soviet Union, the Russian legislature (the Duma) brought criminal jury trials back to nine of Russia's 89 regions. In December 2001, the Duma passed a new Criminal Procedure Code extending the right to a jury trial to citizens in all Russian regions beginning in January 2003. Jury trials are to be available in all cases involving "serious crimes" – that is, all crimes for which the potential sentence is 10 years or more.

Optimism Tempered by Challenges

A jury trial provides, at least in theory, many new ways for a Russian defense attorney to present the client's case. Instead of presenting evidence and argument to an unreceptive government-staffed bench, a criminal defendant is now able to play to the more sympathetic citizens of the jury, who are more willing to hold the prosecutor to a strict burden of proof. The defense attorney also benefits from a tendency toward more strict preclusion of inadmissible evidence than in

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• Our role as judges changes – we are less powerful and less active.

• Prosecutors cannot be as passive and need to prepare and be ready to introduce evidence that is admissible.

• Jurors will not attend when summoned.

• How can we permit jurors to risk losing a job while serving on a jury trial?

• How do we provide security for jurors to prevent them from being tainted or threatened in any way?

• How do we keep jurors from hearing or seeing something that might affect their ability to serve?

• How will we develop the types of facilities that are needed to accommodate jurors?

We adapted the seminars to address the issues that the participants had identified.

When we returned in September, the number of participants had expanded to 49, including the American teams from Rochester and Connecticut. We were pleased to be joined by a defense attorney, Alexander Ivanov, from Moscow. He had extensive jury trial experience and interjected information throughout the seminar that was helpful.

Comparing Russian and U.S. Jury Trial Systems

The first segment of the seminars addressed each stage of a jury trial. We commented on the differences and similarities of the American and Russian jury trial systems. We described the American system at each stage and contrasted it with the Russian system as we understood it. The most interesting difference in the Russian justice system is the role that victims of a crime have in the trial. The code grants them an active role in selecting the jury, calling witnesses, questioning witnesses and making statements to the jury.

As Judge Kozlov described the jury selection process, we were struck by the similarities to our system in the United States. We found that the preliminary charge to the jury after the jury selection is so similar that we could share comments and experiences.

We did some role-playing exercises in jury selection and demonstrated the manner in which a jury would be selected. We also offered an exercise for the judges in preparing the written questions submitted to the jury based upon the crime scene fact pattern presented in a video and in written materials for the seminar.

We explored a demonstration of an eyewitness in the context of the crime scene scenario and learned about examination, leading questions and the manner in which such examinations should be conducted. The guidance we received from Judge Kozlov was to keep the questions simple. Leading questions could not be asked by either the prosecution or the defense. As a matter of style and procedure, Judge Kozlov would limit the

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bench trials. Further, in a Russian jury trial, a defendant can waive any self-incriminating statement, and the prosecution is thereafter prohibited from mentioning it at trial.

Given these changes in the system, defense attorneys are understandably more optimistic about presenting their cases. Indeed, with an acquittal rate that jumped from less than 1% to more than 25% during the early years of the jury trial experiment, defense attorneys have reason for optimism. This optimism has also led defense attorneys to think about attempting the "no holds barred" advocacy style typical in the United States, where defense lawyers will attempt almost any tactic, including playing to the racial or ethnic biases of the jury, to win acquittal for their client.

The optimism is tempered, however, by a realistic sense of the challenges defendants still face. The new code has brought many changes that provide a more even playing field for criminal defendants, but many obstacles remain.

In a Russian criminal proceeding, the preliminary hearing is held by the judge, and his or her decisions on introduction and suppression of evidence are based entirely on the investigative dossier (also known as the "protokol"). Thus, even when exculpatory evidence is available to the defense attorney, if it is not in the protokol, it is excluded from consideration by the jury. And because the content of the protokol is determined in the discretion of the judge at the preliminary hearing, the Russian judge continues to have a great amount of control over the strength of the defense case.

It is in these matters of discretion, and in view of the lack of reasonable appeal mechanisms from preliminary decisions of discretion, that defendants and defense attorneys find reason to be discouraged. As several defense attorneys stated at the May seminar, there is not much a defense attorney can do if the judge is biased against either the defendant or his attorney, and uses his or her discretionary powers to act on that bias. Thus, while jury trials offer a promise of opportunity for defendants to freely and fairly present their cases, defense attorneys worry that this promise will never fully be realized.

Russian defense lawyers also face constraints of public sentiment. There is a worry that pressing the jury trial system too far will lead to public sentiment against jury trials, and will lead ultimately to their repeal by the Duma. Unlike the United States, which has a strong con-

manner in which questions were posed and would interrupt without objection to guide the questioning.

Evidentiary aspects of a trial appear to be done by protocol, by admission of documents, by motions. The number of fact witnesses would be limited. Investigators, generally, did not testify. Many evidentiary issues appeared to be handled pre-trial by a preliminary ruling of court.

Preparing the Charge for the Jury

We discussed how Judge Kozlov would prepare his charge, including what he would communicate to lawyers regarding the preparation of the charge. He noted that one of the keys to preparing the charge to the jury were the written questions. It is important to keep the questions simple, in a format that the jury can understand, and focused on the issues to be resolved by the trial.

We described for him the process by which we prepare the elements of the charge and use an order identifying the act of the *actus reus* first, the culpable mental state or *mens rea* second and attendant circumstances in the remaining elements. He saw the Russian method as similar in that he would prepare the questions in the same manner.

With multiple defendants, it appeared he would provide multiple sets of written questions for the jury. With respect to multiple charges, it would depend on the charge and whether that arose out of the same acts. It appeared that charges arising out of the same act would be put into a single question regarding the occurrence of the event and then apparently what would be comparable to a culpable mental state and finally attendant circumstances.

Judge Kozlov described the detailed instructions that he gives regarding how the jurors should proceed through the written statements or verdict sheets. He described how, if the answer to the first question is "no," that the event did not occur, that would be the end of deliberations and the jury would report a verdict of acquittal. Something needs to be recorded on the verdict sheet, however, so the foreperson is required to record the verdict, and verify the verdict. The court must then review the verdict sheet to determine that it is complete and correct. Once the verdict is announced in the court, the verdict is final. Objections need to be raised by counsel prior to the verdict being announced in open court.

The Future of Jury Trials in Russia

Russia is committed to the integration of jury trials into their justice system. We hope to continue the process of exchange with our Russian counterparts, to share our experiences and learn from them as well. We look forward to continuing the exchange process in our work through the Russian American Rule of Law Consortium and the Open World project.

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stitutional history as the basis of the public's belief in the jury system, Russians are less sure that ordinary citizens can be trusted to properly determine the guilt or innocence of an accused, or that defendants who "appear" guilty can be acquitted on a procedural technicality. Many Russians point to the tactics of defense lawyers in the trial of O.J. Simpson, and the willingness of the jury to acquit Simpson, as a great weakness in the American jury trial system. If Russian defense lawyers push advocacy tactics too far too fast, it could put the system in danger of collapse.

State of Flux

The evolution of defense lawyers in the new Russian jury trial system remains unclear. Although Russian defense counsel will be freed from some restraints and have opportunities to advocate for their clients unimaginable in the former Soviet justice system, the jury trial system and public sentiment continue to constrain counsel in ways not found in the United States. One thing *is* certain, however: Russian defense counsel are entering a new and exciting challenge, and are eager to do what they can to grow into and expand their role as jury trial advocates.

Similarities and Differences In the Roles of Prosecutors

By Bret Puscheck

After our trip to Saint Petersburg to exchange concepts with Russian counterparts, I came away impressed that a universal truth exists among prosecutors. That truth is that, as representatives of the sovereign, the interest in a criminal prosecution is not in winning a case but in assuring that justice is served.

In practical terms, the role of the Russian prosecutor is most similar to that of the American prosecutor in respect to investigative responsibilities, but quite dissimilar in respect to the prosecutor's role in presenting a case at trial.

The Russian Criminal Code provides a concise description of each of the participants in a criminal proceeding, which naturally includes the prosecutor or "procurator." The procurator is authorized to carry out criminal prosecutions on behalf of the government and to oversee the procedural activities of investigative agencies. The code describes the procurator's investigative authority quite specifically, defining relationships with various investigative agencies and setting forth the prosecutor's ability to make charging decisions, approve indictments and forward criminal cases to court. The ability of the Russian procurator to initiate criminal prosecutions, determine whether to charge an individual with a crime and at what level, and to reduce or terminate charges is thus generally akin to the authority of American prosecutors.

The historic emblem for the city of Velikiy Novgorod, this crest appears above the judges' benches in both the city and oblast (regional) courts.

There is, however, no grand jury system to provide an additional level of review by a public body. An investigative agency that disputes a charging decision may ask for review by a "higher" procurator, but after review by this "higher" procurator, the decision to charge is absolute.

At the litigation stage, the difference from what is typically seen in the United States is most certainly attributable to the inquisitorial trial model predominant in Russia during the moratorium on the right to trial by jury between 1922 and 1993. The inquisitorial model had, as its centerpiece, a judge who served as the accuser rather than as an objective manager of legal procedure.

Typically, the procurator simply turned over to the court investigative reports referred to as the "protocol" and provided the judge with a list of witnesses. The judge decided which witnesses were to be called. The witnesses were instructed to provide testimony in narrative form, after which the procurator, the defense advocate and the judge asked questions.

By contrast, the U.S. practice of filing *omnibus* motions on behalf of criminal defendants results in pretrial hearings to address issues such as suppression of physical evidence, statements by the defendant and out-of-court identification procedures, before evidence is presented to a jury. Often, a great deal of strategy goes into a prosecutor's decision about how to conduct these pretrial hearings. A prosecutor may wish to limit pretrial testimony to reduce the potential for impeachment of witnesses with prior inconsistent statements at trial. Because of these considerations, a decision to adopt a case for prosecution involves a thorough review of the circumstances of the arrest and an evaluation of the admissibility of evidence.

Although the admissibility of evidence is settled for the Russian prosecutor at a pretrial hearing, the hearing is much less formal, akin to an offer of proof. Once evidentiary matters are resolved before trial, specific items of physical evidence are admitted during trial along the lines of a stipulation. Rarely, if ever, are technical police

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witnesses allowed to testify, even if they have discovered important items of physical evidence.

Another major distinction is the Russian practice that gives the victim of the crime the right to be heard at trial and to be represented by counsel, who can play an active role in the proceeding. A civil claim is often adjudicated as part of the criminal trial. This scenario has the potential to create problems for the prosecutor, who retains no authority over the questions the victim's attorney asks or the trial tactics the attorney uses. In the same vein, it certainly may become more difficult to protect a defendant's right to an objective trial, where a victim's advocates delve into the havoc wreaked upon their clients beyond issues material and relevant to a criminal adjudication.

The burden of proof on the prosecutor in both the U.S. and Russian systems is proof beyond a reasonable doubt, but Russia does not require a unanimous jury verdict. Jurors deliberate for no more than three hours. A unanimous verdict ends the case before the three-hour limit, but if a unanimous verdict is not reached, the jury is polled and a simple majority (7 to 5) is sufficient for conviction. An even split or less results in an acquittal.

In the final analysis, the role of the Russian prosecutor is similar to that of the American prosecutor with respect to investigative responsibilities, but dissimilar with respect to the role of the procurator in presenting a case at the pretrial stage and at trial. Given expansion of the right to trial by jury, however, the role of the procurator must necessarily evolve into a more active one in terms of trial presentation, and thus it may eventually resemble more closely the role of the prosecutor in American courtrooms.

"Watchers" Observe Crime Scenes

BY RONALD REINSTEIN

The Novgorod police and prosecutors describe the Russian approach to juries as "a new system with new challenges." Some view it as just another barrier to justice and yet another avenue to corruption through bribes or intimidation. Organized crime has reached high levels in contemporary Russia, an apparent reason for their concerns. Others see the new framework as a chance to finally have an active role in their government and its functions. The varied opinions are all valid from their own perspectives.

The Novgorod jury system would be unusual, viewed through the lens of the U.S. justice system. Russian police officers do not operate on the basis of trust. This is not surprising, given that they work in the shadow of the era of Stalin's Secret Police. One manifestation of this is the requirement that two private citizens, called "watchers," be present while crime scenes are being investigated. Whether the scene is at a remote location or in an apartment building in the center of the city, these two people watch the police to make sure that nothing is planted or moved. It is a relic of the old Soviet way, guaranteeing the integrity of a crime scene.

During the middle of a dinner, Deputy Prosecutor Sergi Shahnazam notified me that he had been informed of a murder. I was invited to accompany him and his partner to the scene. En route, he briefed me about their policies and procedures, including the watchers. If they cannot find two people to fulfill this requirement, he said, the entire case runs the risk of being dismissed by the court. Without watchers, the case can be lost, even if every other detail has been performed impeccably. In their region, which encompasses large, uninhabited areas, impartial civilian observers can be in short supply, especially with little advance notice. He said they have had to go as far as an hour away to find two people to accompany them. Watchers are not legally obligated to participate, he noted, and their assistance is purely voluntary.

CONTINUED ON PAGE 42

RONALD REINSTEIN is an investigator with the homicide squad of the Rochester Police Department.

Left to right: Igor Shukoff, Anastasiya Demkiv-Naumchenkova, Patricia D. Marks, Ronald Reinstein, Natella Ivova, Bret Puscheck

Best Practices in Jury Management: Comparing Russia and New York

By Charles G. Perreaud

In New York, our approach to jury management has focused on a strong set of management objectives, also described as best practices, that define the climate and culture of the process. The jury reform efforts of Chief Judge Kaye have resulted in legislative reform and strong judicial and administrative support for the jury system. Some key elements have been:

- Budgetary support.
- The ability to implement change.
- Commitment to the jury as an institution.
- Developing public trust and confidence.

The key element to both the New York jury reforms and the Russian system at this point is funding. About 25 years ago, New York instituted unified court budgeting and centralized operational functions, unified non-judicial employees under a statewide classification and salary plan, and established a strong central administration with regional district administrative judges and non-judicial administrators. In Russia, it appears that judicial regions or departments have strong planning in place, but it is unclear how the administrative structure, salaries, benefits and related components are similar between regions.

In Russia we met with administrators who are focusing on building facilities, building jury courtrooms, implementing administrative systems for payroll and personnel, and tackling the nuts and bolts of a new system. In both Novgorod and Pskov, resources or the lack of them seem to be a critical factor. Russian judges who visited Rochester in 2001 consistently commented about our level of budgetary support and their lack of it.

We try to devote great effort to issues involving respect of jurors' time, the commitment to the institution and the continuous improvement of public trust and confidence in the jury system.

Russians have a history of a belief in planning and appear to have embraced training. Planning on a grand scale was one of the strongest suits of the Soviet system, and I sense it has not been abandoned. Court officials and judges seem to be a mix of both veterans and younger people with great enthusiasm to make jury reform succeed.

I believe that the Russian jury system will grow and become a strong institution. The Russians appear to have the talent to plan for acceptance of the jury system, together with the legislative and judicial support to move ahead. Once the resources are in place, they will be able to reach out to their citizens and establish public trust and confidence. Such a climate and culture of best practices can then help the jury system evolve from being an experiment to an institution with a strong foundation and the ability to flourish.

Charles G. Perreaud is commissioner of jurors in Monroe County.

When we arrived, I saw several officers standing outside an eight-story apartment building. On the stairs just outside the top-floor apartment was the partially clad body of a woman in her fifties. Three officers were present, with a male civilian and a female civilian identified as the two watchers. The two watchers stood in the middle of the crime scene taking no apparent, active role, observing what was unfolding as the deputy prosecutor took charge. He reviewed what had been done, then requested several additional tasks regarding the processing of the scene. He took me through the scene, explaining what had been done and what else he had ordered. His role at that point was more a detective than a prosecutor. All parties at the scene answered to him and questioned nothing he requested. He explained that he would be in charge of everything that transpired from the time he arrived until the prosecution of the suspect, including forensic evaluation and interviews of any witnesses and suspects.

While this was all occurring, he was called to speak with one of the officers. He returned looking disgusted. He said one of the watchers had simply walked away and gone back into his apartment, a seemingly innocuous event that had put his case in jeopardy. The watchers are not required to stay, nor can one demand that they do so. Later I asked him what pressing need had dragged the watcher away. He responded, "He had a potato in the oven and he needed to get it out." He shook his head as we surveyed the scene. "This is an obvious obstacle, as you see. Even though we are moving ahead in the system we are constantly dragged back in time, always by our own means."

which they acknowledge was not incorporated into either Restatement § 96 or its Comment, that there is nothing in Rule 1.13 (and presumably by analogy DR 5-109) which precludes a controlled disclosure of confidential information outside the organization in limited circumstances (*i.e.*, the wrongdoing is clear, the injury to the client organization is substantial, and disclosure would clearly be in the best interest of the organization), provided that disclosure is limited to only that which is reasonably necessary to protect the organization.

11. *See* Hazard & Hodes, The Law of Lawyering § 17.12; Stephen Gillers, *Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure*, 1 Geo. J. Legal Ethics 289 (1987).
12. *See* Maryland Rules of Professional Conduct, Rule 1.13(c); Mich. Rules of Professional Conduct, Rule 1.13(c) ; N.H. Rules of Professional Conduct, Rule 1.13(c); and N.J. Rules of Professional Conduct, Rule 1.13(c).
13. Hazard & Hodes, The Law of Lawyering § 17.11.
14. *Id.* at Illustration 17-6. In a variation on this illustration, these same commentators recognize that if the refusal to comply with the recall order were to constitute a "crime," the lawyer would have no choice but to demand that the vice-president reconsider his decision and, if that did not result in a change in action, report this conduct to higher authorities within the organization, because a criminal matter "must normally be considered per se 'substantial.'" *Id.* at Illustration 17-7.
15. EC 7-8; Model Rules of Professional Conduct 2.1.
16. DR 7-102(A).
17. *See, e.g.*, NYSBA Op. 674 (1994).
18. DR 4-101; *see* Model Rule 1.6.
19. *See* Implementation of Standards for Professional Conduct for Attorneys, 68 Fed. Reg. 6296 (Feb. 6, 2003) (to be codified at 17 C.F.R. pt. 205).
20. 68 Fed. Reg. at 6301.
21. *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6324 (proposed Feb. 6, 2003) (to be codified at 17 C.F.R. pt. 205).
22. Rules of Professional Conduct 1.6. The scope of the lawyer's duty to maintain confidentiality in the face of harm to others was one of the most hotly contested provisions during the adoption of the original Model Rules of Professional Conduct. *See generally* George L. Harris, *Taking the Entity Theory Seriously: Lawyer Liability for Failure to Prevent Harm to Organizational Clients Through Disclosure of Constituent Wrongdoing*, 11 Geo. J. Legal Ethics 597, 599 n.2. At one point, a draft of the Model Rules called for mandatory disclosure of client confidence and secrets in order to prevent physical harm or injury, but that was rejected. *Id*.
23. DR 4-101(A).
24. Model Rule 1.6(a).
25. *See* Model Rule 1.6, Comment.
26. The Restatement (Third) of the Law Governing Lawyers deals with this issue in two distinct sections. In the first, Section 66, it provides that a lawyer may disclose confidential client information when the lawyer reasonably believes that the disclosure is necessary to prevent reasonably certain death or serious bodily harm to a person. Thus, unlike the Model Rules, this permits disclosure even if the client is not the person about to commit the criminal act and even if that act is not likely to result in "imminent" (just "reasonably certain") death or bodily harm. In Section 67, the Restatement permits the disclosure of confidential information when the lawyer reasonably believes that the disclosure is necessary to prevent a crime or fraud, provided the crime or fraud threatens "substantial financial loss," the loss has not yet occurred, it is the client who intends to commit the crime or fraud (personally or through a third person), and the client has employed or is employing the lawyer's services in the matter in which the crime or fraud is committed. In addition, disclosure is permitted even if the crime or fraud has already occurred if the disclosure is necessary to prevent, rectify or mitigate the loss.
27. Twenty-seven states, and the Model Code, permit the disclosure of client confidences in order to prevent any future crime, two states (Florida and Virginia) mandate disclosure to prevent any crime, and 20 states and the Model Rules do not permit disclosure to prevent just any crime. On the other hand, 37 states and both the Model Rules and the Model Code permit disclosure to prevent death or injury (under various circumstances, *e.g.*, imminent, reasonably certain, etc.), while 11 states require such disclosures, and one state (California) does not permit disclosure even in those circumstances. Thirty-six states and the Model Code permit disclosure to prevent criminal fraud, four states (Florida, New Jersey, Virginia and Wisconsin) require disclosure to prevent criminal fraud, and nine states and the Model Rules do not permit disclosure to prevent criminal fraud. Finally, 38 states and the Model rules and Model Code do not permit disclosure of client confidences to prevent non-criminal fraud; nine states permit such disclosures; and two states (New Jersey and Wisconsin) require such disclosures. For a state-by-state listing, see Morgan & Rotunda, 2003 Selected Standards on Professional Responsibility, App. A (following Model Rules of Professional Conduct) (prepared by Attorneys' Liability Assurance Society, Inc.).

Attorney Professionalism Forum

To the Forum:

I am a lawyer who has developed a certain reputation for having expertise in legal ethics, and represent other attorneys with disciplinary problems or ethical concerns. Now I've got a problem of my own. Recently, I was consulted by a personal injury lawyer who has had an offer to participate in a group lawyer advertising program for which O.J. Simpson is a speaker.

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

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

Sincerely,

Ethicist with an Ethical Dilemma

Dear Ethicist:

Even a doctor can have trouble diagnosing his own symptoms.

There is no clear-cut answer to your question. At most, I can give you some issues to think about—but, as with so many ethical questions containing shades of gray, only you can decide what to do. In this case, it sounds as if what you decide may have an impact not only on the profession, but on your own self-esteem as well.

First, and perhaps foremost, you are not obligated to accept the proposed representation. Other than with court-appointed representation or representation of unpopular clients who cannot find another lawyer, an attorney is under no moral or professional obligation to accept any particular employment. And here, another factor may be at work that militates against a voluntary engagement. If your distaste for O.J. Simpson's endorsement of personal injury attorneys is so great that you cannot exercise impartial legal judgment on behalf of your prospective client, you may have a conflict of interest; and absent the client's consent after full disclosure, you must decline the representation (*See* DR 5-101(A)).

However, if your feelings are not so strong as to rise to the level of a conflict of interest, you should bear in mind that, as an ethical matter, attorneys are not "responsible" for the views of their clients. Just as criminal defense attorneys should not be viewed as morally accountable for the acts of those they represent, you are not endorsing the moral appropriateness of these ads should your potential client participate in the program, against your advice. On the other hand, even without a clear conflict of interest you simply may decide, as a matter of your own moral or professional views, that you do not want to lend your assistance to this enterprise by advising a client who clearly wants to participate.

There is yet another factor to consider. Before recoiling from what is personally and professionally distasteful, bear in mind that your potential client will surely find another lawyer to take on the representation. Therefore, do not believe that by declining the representation you can prevent the advertising program from going forward, or even slow it down. Indeed, your presence may be more beneficial than your absence, because another lawyer might not bring your ethical expertise or professionalism concerns to the table. Thus, an opportunity might be lost to shape the thinking of your prospective client concerning the issues presented by the ads. Ethical Consideration 7-8 is very instructive in this regard. Among other things, it tells us that a lawyer should advise not only on the legal issues, but also on the effect each legal alternative may have — and that the lawyer may emphasize the moral aspects of the client's decision-making.

What this means is that is it would be more than just ethically permissible to advise your client of your own concerns; it would be wholly consistent with a guiding Ethical Consideration. So long as you respect your prospective client's right to disagree and to make the ultimate determination, ex-

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

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

pressing your own views on this matter would be carrying out the highest ideals of the profession.

—The Forum, by
James M. Altman
Bryan Cave LLP
New York City

QUESTION FOR NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I am a litigator who practices with a small firm. I am involved in a federal case in which my relationship with my adversary, a partner in a large, national firm, has taken a turn for the worse. I requested her consent to a two-week adjournment of a summary judgment motion so that I could go on a previously-scheduled family vacation. No trial date had been set, and I therefore didn't see a problem. However, after (purportedly) consulting with her client, my adversary called me back and advised that although she would have been willing to agree to the adjournment, her client refused to give his consent.

As it turned out, I was still able to join my family for the vacation, but not without working nights and weekends in order to comply with the motion schedule. Not long after this incident, the same lawyer telephoned me to request an adjournment of another motion in the case, based on her own personal health. She declined to specify the health problem. I was angry that I had to make personal sacrifices because of my adversary's intransigence; I was suspicious of the *bona fides* of her health problem; and I was inclined to repay her lack of civility in kind. On the other hand, there was still no scheduled trial date in the case and no demonstrable prejudice to my client by the requested adjournment. Ultimately, I gave consent, but I feel more than a bit used. This is likely to come up again—if not with her, then with someone else—so my question is this: What were my professional obligations to my adversary?

Steamed in Syracuse

Lawyer's Bookshelf

Legal Muscle, by Rick Collins, Esq.; Legal Muscle Publishing, Inc., East Meadow, N.Y., 2002, 433 pages, $49.95. Reviewed by Thomas F. Liotti.

Legal Muscle is a book for lawyers and lay people alike, written by a former prosecutor turned defense attorney. Rick Collins, a body-builder himself for more than 20 years, has written the definitive work, a veritable bible in the legal and drug industry on the possession, sale and use of steroids.

The value of a book with this information is illustrated by a recent article in the *New York Times,* which reported that prescriptions for anabolic steroids have "soared in recent years, to 1.5 million in 2001 from 806,000 in 1997, according to IMS Health, a company that monitors drug sales," although it is "impossible to know how much is being taken for legitimate medical needs."[1]

But why so much interest in steroids when they are barred in the United States except by prescription? Perhaps a recent quote from the HBO television series "Six Feet Under" gives the rationale, to wit: "Men Are the New Women." That's not to sound sexist or pejorative or to suggest that the taking of high dosages of steroids – a/k/a testosterone, the male hormone – reflects a narcissism that is harmless. It does suggest, though, a national preoccupation by men with looking ever so "beautilicious."

Apparently the Department of Justice feels that there are too many Arnold Schwartzeneger wanna-bes out there ingesting higher and higher quantities of steroids, readily available in Mexico and under the counter or by mail and Internet order here in the United States.

Although steroids have not caused any known psychiatric disorders such as psychoses and hallucinations or, for that matter, documented ill medical effects, they have ratcheted up male aggression and produced hair on the backs of some women who use them.

While steroids are ruled out of most organized sports programs because of concerns that their use would unnaturally skew athletic achievement and give users a big advantage over non-users, there is a larger and larger segment of the population undergoing a metamorphosis in the underground, making the rest of us look almost petite (hah, fat chance!). Compare, for example, the adipose-laden, endomorphic physique of Babe "the King of Swat" Ruth with the mesomorphic physiques of today's sluggers. Is it just coincidence that during the 70 years or so that it took to break the Babe's record, steroid use has been on the rise? Now it seems that one or more athletes are capable of surpassing the Babe's record nearly every season.

In any event, Mr. Collins has convincingly and authoritatively shown that the use of steroids coupled with proper exercise – to wit, large amounts of weight lifting – can lead to better health. Ninety-seven-pound weaklings are a thing of the past. A new generation of Americans is ready to take names and kick butt.

President Bush should take heed, aerobic sports such as running will help cardiovascular conditioning, but not improve strength beyond Lilliputian status. For that, "yah he vil need iron, yah, big veights." Steroids are moving Americans away from their televisions and putting them into gymnasiums. No one has yet to determine that steroids will increase our intelligence. For that, we will have to await Mr. Collins' next book. But what do we do in the meantime? Ingest steroids and lift? Feed them to our incredibly shrinking older generation; give them with impunity to those who are HIV-positive or those with osteoporosis and other degenerative conditions? Steroids will increase muscle mass; they will not make you grow taller. This is not Miracle Grow; it will not affect bone.

In any event, for lawyers it is a matter of how much time you wish to spend in front of the mirror versus in the courtroom. Even if you need your steroid-ingested clients to carry your bags for you, Collins' book will assist you in defending or, heaven forbid, prosecuting these cases. Steroids may be a wave of the future, promising better health for all of us rather than the *Reefer Madness* image suggested by the Drug Enforcement Administration, among others. Collins' book, like *Gulliver's Travels*, has lifted us out of the world of Lilliput and brought us to Brobdenagg. But this time, instead of showing us the imperfections of the human body, he has given us enormous, huge and big, very big, insights into steroid use that will greatly benefit the human condition now and for generations to come.

Collins has consulted on and been involved in more than 1,000 steroid cases worldwide. If these drug cases are a cottage industry, then Collins owns the cottage. His book provides all of the essentials for any lawyer or "musclehead" – the term applied to bodybuilders. Do these drugs produce deleterious side effects? They are already being used to counter the ill effects of chemotherapy, but many also believe that the drugs possess the potential to produce super humans and to either stop or curtail the aging process.

Bodybuilders have been popping steroids for almost 50 years. It is past time that more scientific research be done, particularly by world health organizations, to determine whether the ingestion of these drugs is really worth worrying about or if we should simply end the black market by allowing for personal use. No matter what, there will be many of us who prefer to remain hopeless couch potatoes than show off the new physiques or more

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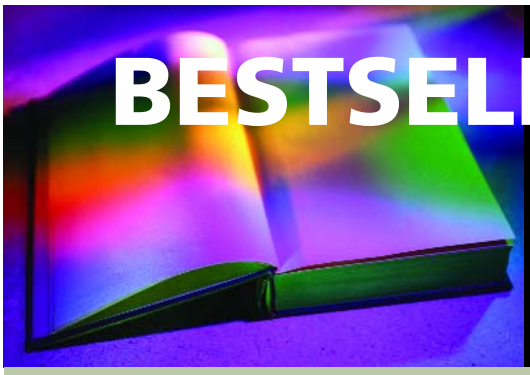

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POINT OF VIEW

Woe Unto You, Lawyers in the Tax Shelter Business

BY ALVIN D. LURIE

Taxes have not been popular with mankind since the beginning of recorded civilization. "To tax and to please, no more than to love and be wise," said Burke, "is not given to men."

One may presume we have had tax shelters as long as there have been taxes – not all abusive, to be sure. What can be more benign, if not blessed, than the parsonage allowance? When the disciple Luke coined his admonition, "Woe unto you, lawyers," he was probably not scolding them for their involvement in tax shelters; but that may have been because in biblical times, and for many centuries since, the connection between lawyers and tax shelters was a carefully kept secret.

No more. An intrepid chairman of the Tax Section of the American Bar Association didn't mince words when, speaking to the Ways and Means Committee about the aggressive use of tax products to reduce tax liabilities, he called "the linchpin of these transactions[,] the opinion of the professional tax advisor."[1] Putting a finer point on it, another chairman of that body called it an "ethical failing – the lack of professionalism – that is clearly a factor in the tax shelter problem."[2]

Can there be any doubt that Bittker and Eustice, in their classic *Federal Income Taxation of Corporations and Shareholders,* writing of business transactions cast to mask their true substance, were of a similar mind when they cautioned that "the lawyer's passion for technical analysis of the statutory language should always be diluted by distrust of a result that is too good to be true"?

What Price Civilization

If "taxes are what we pay for a civilized society," as the great jurist Holmes put it, one must infer that a sizeable portion of the Fortune 500, and other highly successful corporations, their executives and other very high net worth individuals do not think civilization is worth the price. How else explain the rapidly growing proliferation of "abusive" tax shelters employed by would-be taxpayers most able to pay ("would be," that is, but for the tax shelters they have used) who have exempted themselves from declaring the full amount of their presumptive income and resultant tax liabilities?

In one recent case,[3] American Home Products (now Wyeth), paid a $7 million fee to the promoter of the scheme, plus $4.5 million to tax-indifferent foreign partners necessary to its accomplishment, as well as other heavy transaction costs, rather than pay a capital gain tax on $605 million of gain; the scheme had enabled it to offset the gains by claiming a comparable amount of paper losses, while actually incurring only $8 million of real losses. The mechanism was to create a partnership with a foreign partner not subject to U.S. taxation (hence "tax indifferent"), for the purpose of engaging in a series of securities purchases and sales allowing the partnership to claim a massive tax gain that was allocated to the foreign partner, and a massive tax loss assigned to the U.S. corporation. To put this in context, that "American" company, which in its most recent quarter alone reported net income of more than $1.57 billion, denied the U.S. Treasury almost $212 million by hiding income in a shelter so flimsy it couldn't stand up against a knock on the door.

As these lines are being written, a new kind of morality play has been playing out in the boardroom of a giant company: the directors of Sprint have summarily fired its two top executives for having employed an elegant tax shelter designed by the company's auditor, Ernst & Young, to eliminate taxes on almost $300 million of ordinary income on the gains they realized on exercising stock options. The "shocked" reaction of the board of directors to this gaming of the system cannot help but remind one of Claude Raines's "I'm shocked, shocked" retort to being informed of the corruption in *Casablanca* (the movie). For the record, E&Y stands by its advice, and the IRS is just in the investigation phase. But it is not hard to foresee litigation between the two dismissed executives and the Sprint auditors, and perhaps other professional firms implicated in the development and/or blessing of the program.

Several decisions in January 2003 will further strengthen the hand of the IRS Commissioner.

It is axiomatic that no one is obliged to pay more than his fair share of taxes. Another great jurist, Learned Hand, said it better than anyone else:

> Any one may so arrange his affairs that his taxes shall be as low as possible. He is not bound to choose that pattern that will best pay the Treasury. There is not even a patriotic duty to increase one's taxes.

Little could the learned judge have known what mischief his words would lead to more than a half century later, inducing a later judge to observe that "the freedom to 'arrange one's affairs' does not include the right to engage in financial fantasies." The corollary of paying no more than one's share is paying no less, as Hand himself made

clear in deciding the famous *Gregory*[4] case – probably the seminal tax shelter decision – against the taxpayer.

The paired precepts – pay no more but pay no less – are the foundation stones on which a sound tax system must rest. They are flouted by these transactions, when tens of thousands of taxpayers less able to pay are obliged to pay more than their share to make up the amount by which the shelter-seeking taxpayers have paid less than their fair share.

That did not actually happen in the American Home Products case, but only because the appeals court reversed the holding of the trial court that would have allowed achievement of the sought-after tax avoidance. The central proposition relied on by the court was the so-called Business Purpose Doctrine, which, as applied to this case, meant that an entity such as a partnership injected into a transaction for no non-tax business purpose would not be recognized for tax purposes. There have, however, been countless cases where the shedding of one's fair tax burden has been successfully accomplished because the IRS did not catch up with the scheme (sworn secrecy is an important currency demanded of participants by the promoters of many abusive tax arrangements), or, if it does, the Commisioner's determination is overturned in court.

Not Just the Principle . . . It's Very Personal

That is a proper prism through which to view the nature of the abusive tax shelter problem. It affects us all in a very personal way, because our tax liabilities will be affected by the inability of the system to collect taxes when they are due. It also affects the tax system, which rests heavily on the willingness of taxpayers generally to voluntarily self-assess themselves. And that, in turn, depends upon the perception that the system is fair and evenly enforced.

These perceptions can only survive so many public reports of tax avoidance in high places through schemes too clever by half. Such reports also affect adversely "the attitude of some taxpayers toward their tax-paying responsibilities," in the words of a recent tax shelter report by the New York State Bar Association Tax Section, inducing a copy-cat mentality ("if everyone is doing it, why shouldn't I?").

Shelters have been with us from the beginnings of the income tax, usually at the command of Congress. Indeed, pension plans have been dubbed "the quintessential tax shelter," with no pejorative connotations. The clergyman's parsonage allowance provides shelter in two senses of the word, as does the homeowner's mortgage deduction. But as shelter is found by inventive tax planners within and between the interstices of sections of the Tax Code, in places not considered by the Congress, or in words of a tax statute taken out of context, that is the beginning of the drift towards designer shelters. As Judge Hand wrote, Congress cannot be thought to have covered every transaction whose "facts answer the dictionary definitions of each term used in the statutory definition." Nevertheless, arguing for the transaction's sanction from the literal words of the statute is legitimate planning, and has won many a day in court.

Tangled Webs Weaved

My focus here is not tax planning per se, that is, the arrangement of one's business or investment affairs in a way to pay the least taxes consistent with the economic and business realities, but rather the aggressive marketing of elegant, convoluted avoidance techniques to taxpayers – more often than not corporations and very high net worth individuals – for the sole purpose of earning outsized fees, on the extraction of a commitment of confidentiality from the prospect so as to protect the exclusive and repetitive commercial use of the avoidance strategy by its designer (and, of course, to prevent its detection and dismantling by the IRS).

The shelter patterns have been many and varied, constructs that demand admiration for their ingenuity no less than condemnation for their abuse of the system, "tangled webs weaved to deceive," in the poet's phrase. Thomas Pynchon used a phrase in *Gravity's Rainbow* that has attached itself improbably to one of my synapses: "transmogrify common air into diamonds through Cataclysmic Carbon Dioxide Reduction." He wasn't talking about tax shelters; but doesn't the changing of air to diamonds speak to the process of constructing tax gems out of thin air? As far as I know there is no such thing as cataclysmic carbon dioxide reduction; but tell me what is a Bond & Option Sales Strategy, the proper name of the BOSS shelter discussed in the next paragraph? And what is one to make of Currency Options Bring Reward Alternatives, a scheme marketed under the name COBRA, which is now the subject of a suit brought against Ernst & Young, its closely affiliated law firm McKee Nelson, and two outside law firms who supplied some of the design and supporting legal opinions, plaintiffs' complaint sounding in almost every deadly sin imaginable (including racketeering)? Then there is the even more brazenly named COSS, which I understand stands for Compensatory Option Sale Shelter ("shelter" right there in the title!).

An exemplar of the art of the shelter designer – at once brilliant in its construction, bold in its reach, facile in its handling of intricate tax concepts, but flawed at least as much in its naiveté as in its unconscionability – was marketed by PriceWaterhouse Coopers as the BOSS. It consisted of a series of contrived steps enabling taxpayers to claim losses for liabilities they never really assumed and capital outlays that they in fact recovered, founded on a stretched reading of basis rules and the deconstruction of the transaction into discrete parts each of which, taken alone, technically passed muster under a particular Tax Code section, but which taken together artificially inflated the tax basis by exploiting the unforeseen interaction of separate tax

rules. The IRS killed it with a "caveat emptor" press release.

For a time the IRS was overwhelmed, if not overmatched, by the plethora of such schemes that ran across the entire spectrum of tax law – income tax, gift and estate tax, pension and welfare benefit law, and charitable entities. The IRS responded with a stream of regulations and rulings designed to drive "potentially abusive tax shelters" into the sunlight, by identifying particular transactions that it deemed especially suspect, and forcing their registration, disclosure as part of taxpayers' returns, and the maintenance of lists of participants by organizers and sellers. Early in 2002 the Treasury issued its "Enforcement Proposals for Abusive Tax Avoidance Transactions," and, by the time these lines are in print, it will have issued its latest "final" regulations, a comprehensive set of requirements that should go a long way toward taming the beast.

A January to Remember

Several decisions in January 2003 will further strengthen the hand of the IRS Commissioner, two of which coincidentally went against Merrill Lynch, a principal purveyor of tax structured strategies. One, a decision by the Tax Court struck down a tactic that venerable house devised for its own use to manufacture an overstatement of basis by a mere $400 million that would have achieved more than $30 million of tax savings.[5] (The decision is, of course, appealable.) The other decision, which is described above, went against American Home Products, an M/L client, which was looking to avoid a capital gain tax of some $212 million.[6]

A third decision this past January is quite bizarre. It is not a tax shelter decision as such, but it did grow out of a very crude tax shelter scheme, designed and administered by a Honolulu businessman, Kersting, that almost 2,000 taxpayers bought into, as a way to claim entirely artificial interest deductions.[7] The issue was decided in a test case that would, by agreement among the taxpayers, determine their respective tax liabilities; and, of course, the court denied the deductions. The problem was that the IRS trial attorney was so determined to win a favorable result that he bought the testimony of two of the participants, offering to reduce their tax assessments by the amount of their attorneys' fees in return for their testimony regarding the artificiality of the scheme. Of course, he concealed from the trial court the settlement with the witnesses. The appellate court was so outraged by what it called a "fraud upon the court" that it imposed on the IRS itself the sanction of providing to every one of the taxpayers whose liability was affected by the decision in the test case the same result as the IRS had granted to the "cooperative" witnesses (perhaps the first tax shelter in which the IRS itself was complicit).[8] The case is proof that there can be such a thing as too zealous a pursuit of tax shelters by the IRS.

Punishment Befitting the Crimes

If the IRS attorneys in that case went over the line, other, higher IRS officials in recent weeks have made clear the government's determination to squelch what is seen as an assault on the integrity of the tax system. We will "not be gentle," said veteran IRS tax specialist Richard Wickersham, in addressing an employee benefits seminar in Los Angeles. Beyond just tax penalties, he warned, "there is a criminal side."

The chief counsel of the IRS, B. John Williams, in a speech to the Tax Section of the NYSBA, given at the Annual Meeting this past January, reminded lawyers, those working in government and those in private and corporate practice, that we are all officers of the court, with the sanctions and responsibilities that implies. He also urged his listeners not to write penalty-protecting opinions. He did not need to point out that protection for the client might not be there when push came to shove, even against the imposition of fraud penalties.

A more personal question for the lawyer is what protection will be available to the protector, *i.e.*, the opinion writer, against recourse not only by the government, but by disgruntled taxpayers who relied on the opinion? As the luncheon speaker, the chief counsel presumably did not want to spoil his hosts' lunches with such unappetizing speculations. As one who paid for his own lunch that afternoon, I am under no such constraints.

Alvin D. Lurie, chairman of the NYSBA's Special Committee on Pension Simplification, has a private practice in New Rochelle. Earlier, he was an assistant commissioner of the Internal Revenue Service for employee plans and exempt organizations.

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1. Stefan Tucker, March 10, 1999.
2. Letter from Paul J. Sax, to Sen. Moynihan (Mar. 21, 2000).
3. *Boca Investorings P'ship v. U.S.*, 314 F.3d 625 (D.C. Cir. 2003).
4. *Gregory v. U.S.*, 187 F.2d 101 (2d Cir. 1951).
5. *Merrill Lynch & Co. v. Comm'r*, 2003 U.S. Tax Ct. LEXIS 3, 120 T.C. No. 3 (2003).
6. *Boca*, 314 F.3d 625.
7. *Dixon v. Comm'r*, 90 T.C. 237 (1988).
8. *Dixon v. Comm'r*, 316 F.3d 1041 (9th Cir. 2003).

Membership Totals

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1/1/03 - 3/17/03 _____342

Total Regular Members as of
3/17/03 _____67,753

Total Law Student Members as of 3/17/03_____4,820

Total Membership as of
3/17/03 _____72,573

Language Tips

By Gertrude Block

Question: What is the "generally accepted usage" of the words *accept*, *adopt*, *approve*, and *ratify*, when these words are used by a corporate board of directors reviewing minutes or acting upon a committee report?

Answer: To respond like a lawyer, "It depends." In lay usage, *accept* came into Middle English as "accepten" (from Latin "acceptare," through French accepter"). The modern English meaning is "to receive with consent, to take without protest, to endure, or to tolerate." The verb "receive" is listed as a synonym.

But *Black's Law Dictionary* says that to *accept* "[m]eans something more than to receive." It includes the meanings "to adopt, to agree to carry out provisions, to keep and retain."[1] *Words & Phrases* quotes from *McIntyre v. Zac-Lac Paint & Lacquer Corp.*,[2] which says that in general, [accept] means to receive with favor, to assent or agree to, to embrace [or] to adopt."

Webster's Third says that *adopt* (Latin "adoptare," through Middle French "adopter") means "to take by free choice into a close relationship not previously existing," and "approve" is a synonym.

Legal definitions, however, are more precise. *Black's* says that *adopt*, besides having the meaning "mak[ing] [something] one's own (property or act)," has an additional meaning, "putt[ing] into effective operation," for example, in the case of a constitution, constitutional amendment, ordinance, court rule, or by-law.[3]

Words & Phrases quotes *Wolf v. Lutheran Mutual Life Insurance Co.*[4] saying that *adopt* means "to take or receive as one's own what is not so naturally." This definition mirrors *Webster's Third*, but adds the sense of putting something into "effective operation."

As synonyms of *approve*, from Latin "approbare": "ad" ("to") plus "probare" ("to test"), *Webster's* lists *sanction* and *endorse*, defining *approve* as "to judge and find commendable," "to express, often formally, agreement with and support of." *Words & Phrases* agrees, quoting from *Western Hospital Ass'n v. Industrial Accident Board*,[5]: "to regard or comment upon as worthy of acceptance, commendation, or favorable attention; to form or express favorable judgment concerning."

Black's includes *ratify* as a synonym of *approve,* defining *approve* as "to confirm, ratify, sanction, or consent to some act or thing done by another."[6] However, the lay meaning of *ratify* distinguishes it from *approve*; *Webster's* says that *ratify* extends permission to a future act while *Black's* definition limits *ratify* as "to authorize or otherwise approve retroactively, an agreement or conduct."

Words & Phrases seems to concur with the lay definition of *ratify*, as authorizing an act that occurs in the future, as well as one that has already occurred. It quotes from *Nunnally v. Hilderman*,[7] which distinguishes "adoption" from "ratification": "Ratification is adoption and confirmation by one person with knowledge of all material facts, of an act or contract performed . . . in his behalf by another who at the time assumed without authority to act as his agent." Thus *ratification* includes the authority to approve and accept a previously unauthorized act.

From the Mailbag

In the July/August "Language Tips," a lawyer based in Spain asked whether one "makes" or "takes" a decision. The answer was that "to make a decision" is idiomatic. However, reader Donna Ross writes, "Having lived in Europe for many years, I would venture that not only in Spain but in the U.K. generally, one "takes" a decision (Spanish *tomar una decision*). Your response, therefore, applies strictly to American English, not to the English spoken on the other side of the pond."

My thanks to Ms. Ross for her valuable comment. My response, however, was to the reader's question, whether "take" or "make" was idiomatic American English. As George Bernard Shaw once said, "England and America are two countries separated by a common language."

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

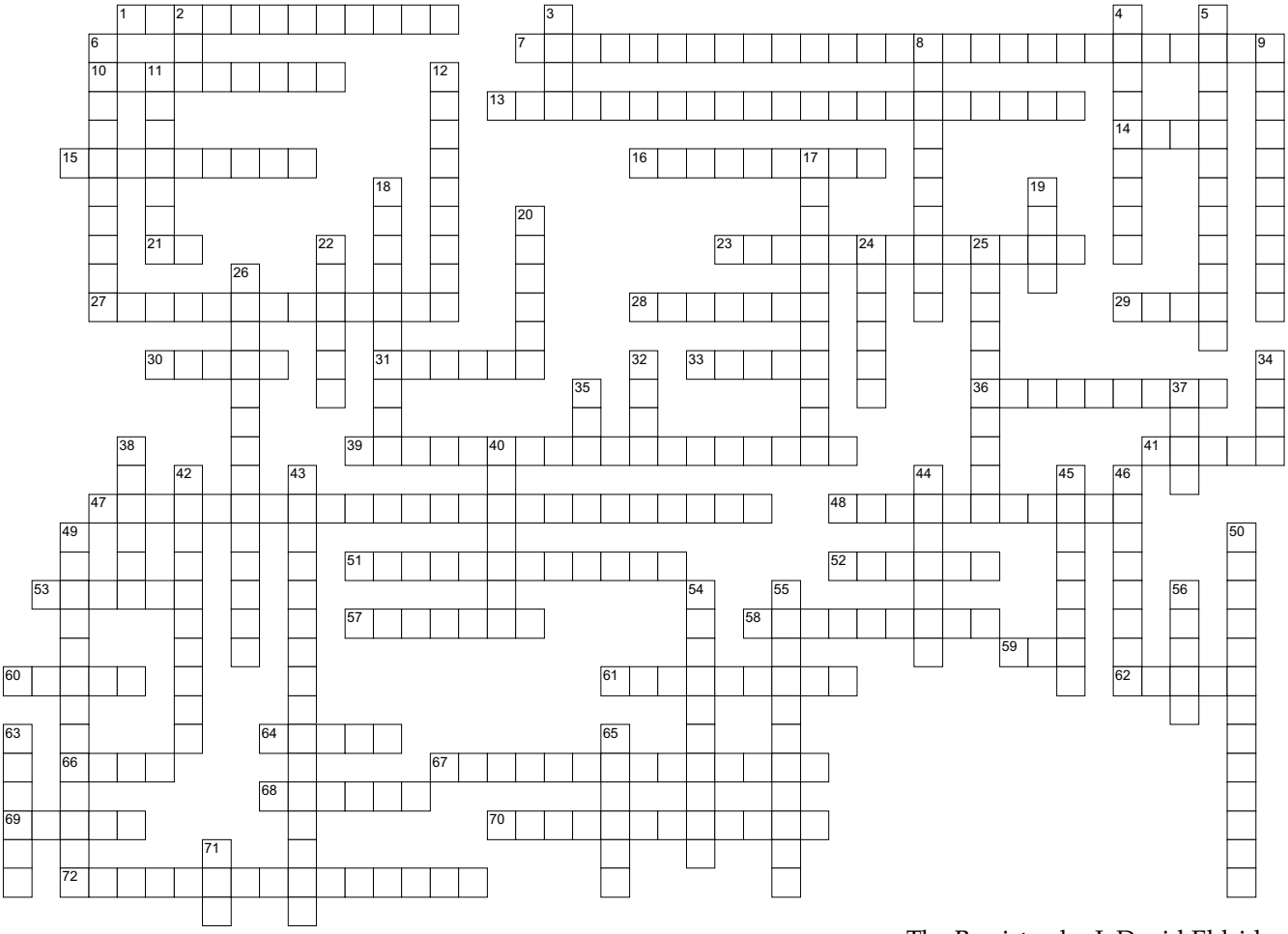
1. Black's Law Dictionary 12 (6th ed. 1990).
2. 131 S.E.2d 640, 642 (Ga. Ct. App. 1963).
3. Black's Law Dictionary 49 (6th ed. 1990).
4. 18 N.W.2d 804, 808 (Iowa 1945).
5. 6 P.2d 845, 848 (Idaho 1931).
6. Black's Law Dictionary 102 (6th ed. 1990).
7. 373 P.2d 940, 942 (Colo. 1962).

CROSSWORD PUZZLE

With this issue, the Journal *introduces the first in an anticipated series of crossword puzzles with a legal theme.*

The puzzles are being prepared by J. David Eldridge, a partner at Pachman, Pachman & Eldridge, P.C., in Commack, NY. A gradute of Hofstra University, he received his J.D. from Touro Law School.

Answers to this puzzle will be printed in the next issue.



The Barrister, by J. David Eldridge

Across

1 Average greatest point on shore touched by ocean

7 A structure or use not in compliance with zoning but allowed because it predates code

10 Lat. According to law

13 Remedy preserving status quo during determination of parties' rights under lease

14 A burden or load

15 A lease granting the right to extract petroleum products from land

16 Absence of opportunity for sexual intercourse between husband and wife

21 Lat. And

23 Vehicle barring debt collection in bankruptcy

27 Taking of private property by state for public use

28 A writ commanding law enforcement to arrest a person and bring him before magistrate

29 Lat. No one; no man

30 To confer as being deserved or merited

31 First draft of legal instrument in civil law

33 Lat. A sailor

36 Clause prohibiting action against provisions of a will

39 Rigid interpretation of statute

41 Maker of a check

47 Device to dispense with an action prior to serving responsive pleadings

48 To copy in final draft

51 Protected individual specifically designated in an insurance policy

52 To ratify, uphold and approve, i.e., the truth

53 A thief

57 Pecuniary compensation or indemnity recovered in court

58 Goods identical with others of the same kind or nature

59 Old English, Jurisdiction of a manor court
60 In old records, a native place
61 An employment contract requiring employee to promise not to join a union
62 To relinquish or surrender
64 To render void and of no effect
66 Our equals
67 Specific power of courts established in *Marbury v. Madison*
68 Lat. A loan for consumption upon agreement that like kind will be returned
69 Naphtalite who assisted Moses in the wilderness
70 Local governmental unit
72 Procedural device to dispose of case when facts are not disputed

Down

2 External manifestation of will
3 Spoken
4 Ascertainment of that which was previously unknown
5 Power of the court to decide issue based upon control over subject matter and parties
6 Failure to exercise reasonable care
8 Result when guilty as charged
9 Federal law of 1882 punishing polygamy
11 Fit for sale
12 Type of zoning based on district-and-use
17 Law passed after the fact
18 Government's inducement to commit a crime for the purpose of prosecution
19 Standard rules of accounting
20 The running of a prescribed period of time to its end
22 Common-law action against finder of lost goods wrongfully converted for another's use
24 To transfer to another
25 Lat. Of its own kind or class
26 How a lawyer should never act
32 To put out or eject
34 Code governing non-criminal procedures
35 To have good legal title
37 Court order arresting judicial proceeding
38 Lat. Theft
40 Financial arrangement between group where the last one surviving wins all
42 The state of being unable to pay debts as they become due
43 Ancient Roman law passed without consent of the people
44 Special proceeding to review administrative determination
45 Old English. An inn licensed for the entertainment of strangers
46 A professional licensed to practice law
49 Landmark case requiring federal courts to apply local state law
50 The inducement to a contract
54 Property pledged as security for a debt
55 A basic law which determines the constitution of a government, state or nation, and regulates the manner of its exercise
56 Lat. "and the following": Abbr.
63 Applicant for relief from court
65 A meeting of voters nominating delegates for office
71 An emergency remedy of brief duration to maintain status quo

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LAWYER'S BOOKSHELF
CONTINUED FROM PAGE 46

assertive personalities that high doses of testosterone may afford us.

Rick Collins has an inspiring, unorthodox style of writing which combines his athleticism and his expertise in the law. In this well-stocked, single volume, paperback, 8 1/2" x 11" module, he has given us 433 pages of the laws of anabolic steroids in all states and the federal government, a glossary of terms, an index and an entire chapter entitled "The Real Dangers Revealed." Aside from learning about this esoteric subject, in reading Collins' book you may become more health conscious, or at least develop a knowledge of cutting-edge health and legal points. It is not heavy lifting, but it may change your life in or outside of the courtroom. Unfortunately, the only negative in Collins' book is that he has been compelled to self-publish it. That may limit the market from that of a major publishing house, but he has opened the door, and it is predicted that the demand for this book will far exceed the supply. Once that happens, major publishers and writers will come to the fore. Predictably, and remember you heard it here first, that will soon happen.

THOMAS F. LIOTTI is the chair of the NYSBA Criminal Justice Section and co-author of *Village, Town and District Courts of New York* (West Group 1995–Present). He is also a former NCAA All-American, Olympic Trials participant and head swimming coach of the U.S. Merchant Marine Academy at Kings Point.

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1. *See* Gina Kolata, Jere Longman, Tim Weiner & Timothy Egan, *With No Answers on Risks, Steroid Users Still Say 'Yes,'* N.Y. Times, Dec. 2, 2002 at 1, A19.

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Shannon Patricia McNulty
Jaime Melissa McPhee
Christopher Michael McRorie
David Thomas McTaggart
Kenneth Robert McVay
Rachel Anne Meeropol
Daysi Maria Mejia
David Frank Menschel
Michael N. Meola
Jennifer Lynne Mercer
Daniel Adam Messeloff
Kathleen L. Metinko
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Jennifer Jenkins Middleton
Ioana A. Mihaltu
Mark A. Mikullitz
Brady W. Mills
Olivia C. Milonas
Paul Mishkin
Jennifer Anne Mo
Crystal Monahan
Concepcion Altea Montoya
Julian Jamal Moore
Stacey Michon Moore
Simone Indira Moore-Baker
Alexandra Josephine Moosally
Andrea Hoong Morgan
Jonathan Edward Morrill
Geoffrey A. Mort
Michelle Mullen
Daniella Machnikoff Muller
Gabrielle Lisa Muller
Marcus Sean Muller
James Edward Munoz
Laura Elena Munoz
Rose Jennifer Murphy
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Andrew W. Needham
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Nicole E. Nelson
Tracy L. Nesom
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Kenneth A. Newby
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Hoai D. Ngo
Minh Van Ngo
Angel P. Nguyen
Matt Michael Nichols
Barbara A. Nohrr
Ann Elena Nolan
Craig Radley Nussbaum
Terence Joseph O' Leary
Joshua Garet Oberman
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Carol W. Ohlandt
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Heather Gresham Okoro
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Katherine Koenig Olsen
Matthew William Olsen
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Patricia C. O'Prey
Barak Y. Orbach
Karen G. O'Reilly
Sheryl Lynn Orr
Laurie L. Page
Clair Elizabeth Pagnano
Mohammed Ali Panjwani
Joan M. Papke
Diana Paraguacuto-Mahed
Tatziana Paraguacuto-Mahed
Jennifer Sally Parietti
David Paris
David S. Paris
Michael John Parrish
Averardo Peruzzi Pascarella
Kyle A. Pasewark
Ersilia Lynn Passaro
Yera Patel
Cynthia Alison Patrick
David Paul
Vernon Lee Payne
Sheila Merri Peluso
Wendy Hope Perlmutter
Sherita M. Perry
Tal Perry
Paige M. Petersen
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Sheldon A. Philp
Patrick Pickett
Damian J. Pieper
Eddy Pierre Pierre
Eric Francis Pierson
Leila Rachele Pittaway
Gregory M. Poehler
Joshua Killion Porter
Neil Leon Postrygacz
Robert Jeffrey Powell
Brian Andrew Preifer
Brett Randall Prieur
Jung Frederick Pryjma
Andrew Sekou Quinn
Lori Jean Quinn
Susmita Meenakshi Ramani
Porfirio F. Ramirez
Haroon Rashid
Mark Anthony Rasile
Rebecca Naomi Reder
James Regan
Jessica H. Ressler
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Phillip Morgan Ricks
Charles David Riely
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Issachar Rosen-Zvi
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Mark Sanford Silverman
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Scott Adam Simon
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Brendan Nicholas Snodgrass
April Christine Snyder
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Jamian Spadavecchia
Danielle Joy Spector
Jeffrey Thomas Spinazzola
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Kinga Katalin Sugar
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Ryan Patrick Sullivan
Stephen K. Sullivan
Jonathan Howarth Sutcliffe
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Diana Thuy Swartz
Jean Marie Swieca
Suzanne R. Sylvester
Philip C. Tam
Stacy L. Tamburrino
Amanda Anne Tarkow
James P. Taylor
Kimbarly H. Taylor
Penny P Tehrani
Benjamin Ross Tessler
Ruchi Thaker
Philip Thamarappally Thomas
Suma Samuel Thomas
A. Scott Tinkham
Tal Tirosh
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Matthew Tollin
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Preeti Torres
Jeffrey A. Trimarchi
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Jason Mendoza Valino
Marijke Karin Van Ekris
Alexandra Diana Van Nes
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Ivanyla D Vargas
Vimy Varghese
Irene Michelle Vavulitsky
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Tudor Catalin Velea
Melanie Velez
Brian Patrick Verminski
Susan M. Vernon
Waleska Anne Vernon
Michelle Olga Vesecky
Barbara J. Vining
Louis Vitale
Alexandra M. Vulliez
Kaiser Wahab
Jonathan K. Waldrop
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Nadia A. Wallace
William Stewart Wallace
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Zhen Zheng
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Grazia Maria Zorub
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Brett David Beecham
Marianne Elizabeth Bertuna
Marnie A. Bevington
Denis T. Brogan
Daniel J. Byrnes
Elaine F. Cates
Erin Kathleen Colgan
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Richard A. D'Amura
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Michael A. Flake
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David R. Hassel
Rosharna Delilah Hazel
Breda A. Huvane
Tony Jackson
Baimusa Kamara
Peter Alland Kempner
James W. Kirshner
Joseph Lassen
Richard Michael Levy
Steven M. Narow
Christopher R. Neufeld
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Richard Duy Nguyen
Jason Scott Pergolizzi
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Lee Elliott Rankin
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Kenneth P. Thompson
Gina Andree Tones
Kira Treyvus
Lekha Ann Varghese
Mashawna Mary Ann Vernon
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Christianne Beaury
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Jonathan Berstein
Robert C. Black
Kristen L. Broden
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Jennifer L. Hairie
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Lee Carey Kindlon
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Michael J. Simolo
Jeremy H. Speich
Amanda R. Stern
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Mia D. Van Auken
Anthony M. Wilmarth
Anne C. Wojewoda
John D. Zaremba

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Jennifer L. Buckley
Anthony S. Casale
Tina M. Champion
Killeen Cirilla
Shauna M. Collins
Marnie M. Dzialo
Amanda Farrell
Joshua L. Farrell
Teneka E. Frost
Stephen A. Gargiulo
Leah Hallenbeck
Robert K. Hughes
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Melanie LaFond
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William B. Lotze
Jason P. Mallette
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Jennifer Ukeritis

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Todd C. Carville
Jeffrey Liu
Meghan M. Mahaney
John R. O'Connor
Brian A. Phillips
Paul J. Pimpinella
James S. Skloda
Debra A. Verni

SIXTH DISTRICT
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Thomas F. Farrell
William C. Green
Denice A. Hamm
Chris Hammond
Jeffrey Michael Jacobs
Halle McCutchen Jones
Maria E. Lisi-Murray
Wilton G. McDonald
Susan B. McNeil
Lars P. Mead
Todd H. Miller
Victoria J. Monty
Dai Noguchi
Wesley A. Roe
Virginia Tesi

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Michael Ballman
Carl J. DePalma
Perry Duckles
Aaron J. Hiller
Anthony F. Pagano
Donna P. Suchy

EIGHTH DISTRICT
Andrea N. Anderson
John M. Aversa
John Louis De Fazio
Natalie A. Grigg
Rebecca D. LaCivita
Michele Louise Sterlace-Accorsi

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Marcia L. Adelson
Sarita Bhandarker
Rhona Bork
Stephen D. Chakwin
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Brian Conley
Barry A. Cozier
William E. Curtin
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Dawn K. Friscoe
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Sonna F. Goldstein
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Roni Lynn Jacobson
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Helen C. Lebrecht
Felipe Lecaros
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Prassana Mahadeva
David Harold Martin
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Joan H. McCarthy
Janet Mary Murphy
Raymond W. Murphy
Michelle A. Nolan
William Fred Norton
Alice H. Oshins
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Justin G. Powell
Maria-Alana Salome Recine
Tova R. Rosenberg
David S. Rubackin
Kate Tenney Ruggieri
Maurice J. Salem
Russell C. Savrann
Alfred Schaefler
Jay C. Sherman
Colleen Mary Smith
Douglas Joseph Smith
Paul Edward Svensson
Paul G. Thomas
Elena Marie Tsougranis
Maria Iris Valentin
Michelle Marie Vitullo
Lance R. Whitman
Samantha Caroline Williams
Cora Yanacek

TENTH DISTRICT
Zeena Judith Abdi
Jeffrey J. Amato
Jason Franklin Arnold
Fredrick M. Ausili
Heather Nicolle Babits
Bobby Bakhchi
Aimee-Joan Caparas Baldillo
Danielle Marie Borelli
Christopher Charles Brocato
Frank P. Bruno
Danielle Louise Buckhardt
Nicole M. Burns
Susan C. Carman
Tanya Joan Chor
Debbie Chun
Nicholas Cifuni
Sandra Cirincione
Diana M. Coen
Patrick Michael Conroy
Lee D. Cornell
Joseph Tancredi Darr
Marianne De Rosa
Paul Demetriou
Bartholomew J. Divita
Victoria C. Donohue
Daniel S. Drucker
Roni Faye Epstein
Paul J. Farrell
Matthew T. Fella
Karen A. Fielder
Andrew T. Garbarino
Michael P. Giampilis
Pamela Jennifer Halprin
Adam I. Hasson
Jeffrey Y. Hirth
Kylie Higgins Hollosi
Melissa C. Ingrassia
Jonathan B. Jacobs
Mandana Kavoussi
Gary M. Kavulich
Tracy Keehner Weggeland
Michael F. Kelly
Graham Kistler
Rebecca S. Kittrell
Bryan Matthew Konoski
Jacob Thomas Kubetz
Bonnie Scheer Kurtz
Lesley Joel Lanoix
Christopher Victor Lerch
Lev J. Lewin
Matthew I. Littman
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Susannah C. Lyson
Bradford Steele Magill
Cheryl Y. Mallis
Shannon Daly Marchell
William McCabe
Michelle Keri McCarthy
Christopher Jude McGuire
Marc Matthew Mullen
Lisa R. Nakdai
Howard M. Nemetsky
Stacey Ramis Nigro
Kyle Eric Norton
Kenneth W. O'Donnell
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Charles James Pendola
Jason Penighetti
Stephen Erich Rach
Stacey Ramis Nigro
Michael Edward Ratner
Peter T. Ridge
Margalie Rodriguez
Kimberly M. Romano
Debby R. Rosenfeld
Christine Thea Rubinstein
Christopher Jon Ruckh
Peter Anthony Saad
Nadia Natasha Seeratan
Lisa J. Silverman
Linda Ann Silverstein
Kim M. Smith
Scott Peter Sorel
Jennifer Spirn
Jaclyn D. Streit
Brian P. Sullivan
John Karl Tegelman
Christopher D. Tinnerello
Sophia Magdalene Tsantes
George J. Tsunis
Cynthia C. Vigilante
Ingrid J. Villagran
Vivienne Marie Weinreb
Kyle Oakley Wood
Robert T. Wu
Italo Andres Zanzi
Aaron E. Zerykier

ELEVENTH DISTRICT
Rhoda Marie Alvarez
Mark Bastian

Blair Burroughs
Benjy Montesa Corpuz
Tanya Simone Foster
Kelesha Ann Fowler
Gillian Frances Frasier
Aaron Goldsmith
Sangjoon Han
Diane Kosteas
Jeffrey Nicholas Lanci
Yumari L. Martinez
Mayank V. Munsiff
Carrie Lynn O'Connell
Impirika Quinzon
Mitesh Satish Raniga
Irosha Ratnasekera
Alan Jay Schiff
Ran Zev Schijanovich
Ali Nicole Shusterman-Goldsmith
Eric L. Spinner
Jessie Thomas
Dennis E. Warren
Rong Wei

TWELFTH DISTRICT
Marco Antonio Angel
Karen Elizabeth Antoine
Michael Philip Bloomfield
Tara R. Goffney
Michael J. Keenan
George K. Kuntu-Blankson
Lamont H. Littlejohn
Lumarie Maldonado Cruz
Barbara F. Newman
Pilar Elena Pereyra
Troy Scott Quiles
Damaris Cindy Rosario
Ian Matthew Sack
Lorna Kathryn Spencer
Tal Zvi Zarsky

OUT OF STATE
Farida Zohra Abbadi
Thomas Abbate
Selim Ablo
Eric Ira Abraham
Shara Abraham
Adam C. Abrams
Miguel Angel Adame-Martinez
Roy Ahiezer
Laleh Alemzadeh
Imhotep Alkebu-lan
Kevin James Allen
Fernando A. Alonso
Peter P. Alpi
Adam Ambrogi
Nimalan Amirthalingam
Adi Amrany
Christopher Anderson
Mark J. Anderson
Juhi Mehta Anello
Joanna P. Angelides
Angela Angelovska-Wilson
Todd Anthony
Caroline Antonacci
Michael M Antovski
Kelly Arcidiacono
Adam Arkel
Richard Arnholt
Kei Asatsuma
Dana W. Atchley
Takuro Awazu
Marie-amelie Barberis
Kim L. Barfield
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Sanjay N. Beri
Monica Berry
Eugene K. Bertman
Katia Bianchini
Anna K. Birus
Patricia Ann Black
Sharon Annette Blackman
Juan Carlos Carlos Blanco
Tomas Bliznikas
Georg Blumauer
Mary F. Boehlert
Gretchen Borchelt
Lisbeth Bosshart
Federico Botta
David Bowden
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Erin Marie Brady
Sherri Braunstein
Robert C. Brighton
Thomas R. Brooks
Thomas James Brooks
Dana A. Buchwald
Molly Buie
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Jason Burt
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Steven Cantarutti
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Daniel Owen Carroll
Garret J.W. Chan
Alan C. Chang
Eric Chang
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Sue Kim Chen
I-Jung Chiang
Ping Chiang
Sann Ching
Chipila O. Chipepo
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Illae Cho
Sarra Cho
Pil Sun Choi
Young-Jun Choi
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Jack Cieszynski
Anderson Edward Clipper
Alexandra Coler
Michael Joseph Collins
Lisa M. Colone
Eric Randal Columbus
Michael Comas
Lisa Compagno
Natasha Concepcion
Damian Peter Conforti
Brenda Cooke
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Harold Lionel Daniel Coppel
Andrew G. Costello
Andrea Carolina Couttenye
Jonathan D. Cox
Tim Cramm
Joan Ann Cunnison
Gavin J. Curley
Everett Joseph Cygal
Carole Dagher
Descera Daigle
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Julie Michelle Davis
Margaret Anne Mcauliffe De Guzman
Anthony Decicco
Jannell DeGennaro
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Lisa Michelle Dickinson
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Megan E. Gailey
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Peter Joseph Gallagher
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Bonnie Lynn Gauch
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Melgar S. Gayao
Jennifer Grace Gebbia
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Deborah Anne Gitin
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Ian Goes
Jarrod Goldfeder
Aryeh Seth Goldman
Tal Jacob Golomb
Kenneth B. Goodman
Meghan Goodwin
Gianina Gotuzzo
Rajeev Kumar Goyle
Noah Gradofsky
Brooke Grandle
Devon Grant
Charles Carlton Gray
Gabriel Joaquin Gray
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Preetpal Grewal
Darren John Griffith
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Anthony John Hall
Michelle Z. Hall
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Hermine Serena Hayes-Klein
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Andrea Hopewell
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Kimberly Johnston
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Michael J. Kehoe
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James Hollace Kennedy
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Hyunchoong Kim
Joo-mee Kim
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Hurr Ko
Victoria Yee Ying Ko
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Gregg Luna
Yonatan Lupu
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Diane Alexa MacDonald
Timothy H. Madden
Bertrand R. Madsen
Andrew Michael Mae
Shlomy Maman
Sandra Manios
Alexandra M. Mareiniss
Scott Michael Marinelli
Dean Wilburforce Martin Leslie
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Lucille L. Marvin
Sebrina Mason
Adrienne Mastromonaco
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Saloni Nagin Mavani
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Ryoko Moriyama
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Yong Pan
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Pedro Perez
Myrna Perez-Drace
Pablo Perhacs
Assata Njeri Mccreary Peterson
Lee Petherbridge
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Kimberly Ann Pikul
Michael G. Pitman
James Edward Pittman
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fellow who threatened to detonate a bomb. *United States v. Hash*[13] hashes out a case of a cannabis cultivator. *United States v. Funmaker*[14] merrily details the exploits of a defendant who had fun making fires. And in *Worm v. American Cyanamid Co.*,[15] a family of Worms sued a herbicide producer.

If you must pun, don't get carried away. In *Oregon Natural Resources Council v. March*,[16] the district court's first decision, about a contract to build a dam, was reversed. On remand, the district court might've left well enough alone after its first sentence: "The dam case is back. When the case was here before, there was only a dam plan. Now there is half a dam."[17]

Cringe at commenting on your prose. Writing about your writing distracts the reader and, depending on the comment, shows weakness or self-congratulation: "In a manner of speaking," "if you will," "so to say," "no pun intended," "you should pardon the expression," "appellant's argument – to avoid a cliché – mixes peaches and pomegranates."

Develop your own style. No one style represents the ideal. Your style will command attention if you don't bore your reader. No longer does the profession prefer solemn, stuffy, ponderous legal writing. Be serious, but interest your reader. Then press your reader forward, with restraint focused on substance. Leave no stone unturned to elude the rock and the hard place by writing on a clean slate. Follow that advice and you'll land on your own two feet, not between Scylla and Charybdis.

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

1. A good, lengthy list of impermissible clichés is found in Bryan A. Garner, The Elements of Style § 7.16, at 198–99 (1991).
2. The adage "A verbal contract isn't worth the paper it's written on" is illogical. "Verbal" relates to words, oral or written.
3. Harper Lee, To Kill a Mockingbird 205 (1960).
4. Saying on countless coffee mugs and T-shirts.
5. *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 372, 374 (5th Cir. 1977) (Goldberg, J.).
6. *In re Charlotte K.*, 102 Misc. 2d 848, 848, 427 N.Y.S.2d 370, 371 (Fam. Ct., Richmond Co. 1980) (Leddy, J.).
7. *Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 187 (1st Cir. 1989) (Selya, J.).
8. *Commonwealth of Mass., Dept. of Pub. Welfare v. Sec'y of Agric.*, 984 F.2d 514, 518 (1st Cir.) (Selya, J.), *cert. denied*, 510 U.S. 822 (1993).
9. 422 F.2d 824, 824 (9th Cir. 1970) (Duniway, J.).
10. 211 Cal. App. 3d 17, 19, 259 Cal. Rptr. 185, 185 (2d Dist. 1989) (George, J.).
11. 197 Va. 104, 111, 87 S.E.2d 776, 780 (1955) (Miller, J.).
12. 961 F.2d 145, 145 (9th Cir. 1992) (Noonan, J.).
13. 956 F.2d 63, 64 (4th Cir. 1992) (Phillips, J.).
14. 10 F.3d 1327 (7th Cir. 1993) (Wood, J.).
15. 5 F.3d 744 (4th Cir. 1993) (Niemeyer, J.).
16. 677 F. Supp. 1072 (D. Or. 1987) (Burns, J.).
17. *Id.* at 1073.

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The Legal Writer

Writing on a Clean Slate: Clichés and Puns

By Gerald Lebovits

Unless you practice between Scylla and Charybdis, you'll want to avoid clichés and puns like the plague. That's an open-and-shut case. But some exceptions – distinctions with a difference – prove the rule. Learning the pros and cons of clichés and puns is its own reword.

Clichés

The word "cliché" comes from the French "clicher," to stereotype. Clichés are rhetorical or proverbial. Rhetorical clichés are popular because of their quick wisdom and catchy sounds. Proverbial clichés are metaphorical ("apple of his eye," "apple does not fall far from the tree").

As a general rule, last, but not least, knock off clichés. All things considered, nip them in the bud. Clichés fall on deaf ears. They paint the writer with a broad brush as a copier with limited independent thought. They're avoidable and banal.[1]

But sometimes clichés are just the ticket – if you twist them and if they're not stale. At first blush, after all, the sum and substance of clichés is that they're not carved in rock:

- "To add insult to perjury . . . ."
- "An unwritten law isn't worth the paper it isn't written on."[2]
- "No truer words were ever silenced."
- "Tried and untrue."
- "Bankruptcy is a fate worse than debt."

Clichés are also effective when used as word-play to make a memorable argument:

- Atticus Finch closing to the jury, arguing that whites falsely accused his African–American client of rape: "This case is as simple as black and white."[3]

Puns

Puns are for children, not groan readers. If you inflict cruel and unusual punishment, you might be sent to jail until you end your sentence with a preposition.

- "This is a case without appeal."
- "Old lawyers never die. They just lose their appeal."[4]
- "There's no justice on the New York State Court of Appeals. Only judges preside there."

Only clever and original puns, used rarely, are acceptable in legal writing.

- "Defendant, charged with petit larceny, suffers from kleptomania. When it gets bad, he takes something for it."
- "Defendant, guilty of forging U.S. currency, proved that imitation is the sincerest form of flattery."

Do you like the puns that follow? The first is funny and insults no one. The second shows that over-used and obvious puns are the lowest form of humor. The third is childish and mean.

- From *Kentucky Fried Chicken*: "And the bizarre element is the facially implausible – some might say unappetizing – contention that the man whose chicken is 'finger-lickin' good' has unclean hands . . . . We find a kernel of truth in all Kentucky Fried's contentions and therefore affirm."[5]
- From Staten Island Family Court:[6]

> Is a girdle a burglar's tool or is that stretching the plain meaning of section 140.35 of the Penal Law? This elastic issue of first impression arises out of a charge that the respondent shoplifted certain items from Macy's Department Store by dropping them into her girdle.
>
> Basically, Corporation Counsel argues that respondent used her girdle as a kangaroo does her pouch, thus adapting it beyond its maiden form.
>
> The Law Guardian snaps back charging that with this artificial expansion of section 140.35's meaning, the foundation of Corporation Counsel's argument plainly sags.

- From the First Circuit, when a grocery worker claimed sexual discrimination: "Having taken stock of plaintiff's case, we find the shelves to be bare."[7]

How do you spell R-O-L-A-I-D-S? In an opinion that considered whether the U.S. Department of Agriculture's Food and Nutrition Service properly fined the Commonwealth of Massachusetts, the First Circuit used the following puns: "Finding the penalty hard to swallow, the Commonwealth serves up a gallimaufry of issues for appellate mastication. Although these issues contain some food for thought, they lack true nutritive value."[8]

Puns are for children, not groan readers.

Some can't resist humor when they see interesting names in the style of a case. In *Plough v. Fields*,[9] the court opened with this: "In spite of its title, this case does not involve the age old struggle of mankind to wrest a living from the soil . . . ." In *Silver v. Gold*,[10] the court began by noting that "[d]espite its title, the case before us does not involve the relative merits of precious metals in the commodities market . . . ." In *Short v. Long*,[11] the court ended thus: "The judgment of the trial court is affirmed, and that is the 'long' and 'short' of it."

Legal writers shouldn't pun when it comes to case names. It's too easy, like shooting fish in a barrel, and too obvious. Often the best humor is coincidental. Consider *United States v. Van Boom*,[12] an explosive opinion about a

Continued on page 61

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