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NEW YORK STATE BAR ASSOCIATION

Journal

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by Thomas A. Dickerson

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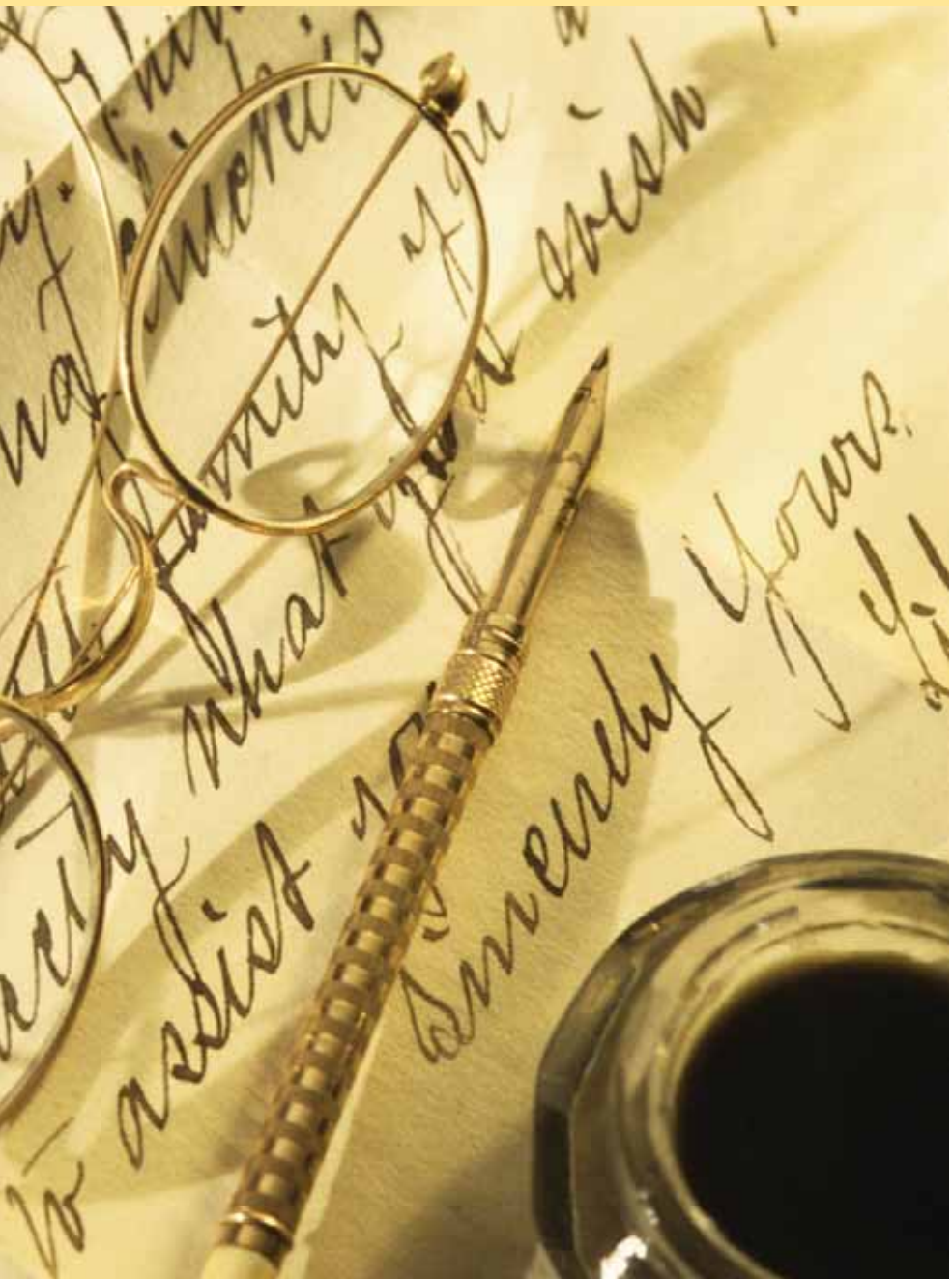

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Journal

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The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. Copyright © 2007 by the New York State Bar Association. The *Journal* (ISSN 1529-3769), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $18. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

A Meeting of the Minds

Mark H. Alcott

By the time you receive this issue of the Bar *Journal*, Annual Meeting 2007 might be a distant memory. But, as I write this message just days after Annual Meeting, I am still savoring the banquet of activity that characterized our State Bar Week.

Our Annual Meeting is always well attended, and the 130th Annual Meeting – the 100th held in New York City – was no exception. More than 4,600 of you attended nearly 10,000 events (obviously, many of you went to more than one event). More than 300 of you attended the 4th Annual Celebrating Diversity Reception; about 550 of you attended the President's Reception; nearly 700 of you attended the Trusts and Estates Law Section lunch; and almost 1,000 of you attended the Tax Section lunch. The attendance at these events and others grows each year.

This year, as President, I attended more than 20 events, and had the opportunity to address many of them. It was exhilarating to see the enthusiasm, to participate in the discourse and to take all of our Association initiatives to the next level. In other words, the attendance tells only one side of the story. The success of the Annual Meeting is also measured by the exchange of ideas and the opportunity for debate. State Bar Week is when we all come together for, if you will, a literal meeting of the minds. We consider the critical issues of the day and chart our course for the coming year.

This year's participants included Attorney General Andrew Cuomo, who spoke at the Commercial and Federal Litigation Section luncheon and at the Judicial Section's Annual Reception and Luncheon. The Presidential Summit, which drew a record crowd of about 500 people, featured distinguished panelists including Albert Rosenblatt, former Court of Appeals Associate Judge; John S. Martin, Jr., former United States District Judge for the Southern District of New York; and Shira A. Scheindlin, United States District Judge for the Southern District of New York.

Once again, Chief Judge Judith Kaye joined us for several of our Annual Meeting events, including what has become her annual address to the House of Delegates, to offer a preview of her upcoming State of the Judiciary address. This year in her address, she emphasized the need for judicial pay raises, calling for an all-out effort to end the practice by which judges must go to the Legislature, hat in hand, to seek an increase in compensation. She urged the Association to make judicial pay raises a priority, and that we have done – it is among our 2007 legislative priorities.

New York's judges have gone too long without a raise. Since the last salary increase in 1999, the value of judicial compensation has been eroded by nearly 20%, due to cost-of-living increases. New York's judges have lost ground vis à vis their federal counterparts, non-judicial employees and, of course, attorneys in the private sector, including brand new law firm associates.

By including in his Executive Budget the funding crucial to providing judges with the long-overdue pay raise they deserve, Governor Spitzer has clearly demonstrated that he shares the New York State Bar Association's belief that the quality of justice and of our legal system depends on the quality of our judiciary. An independent, well-qualified judiciary needs to be compensated in a fair, consistent manner that is as free from political interference as possible, and the Governor's budget proposal recognizes this.

MARK H. ALCOTT can be reached at president@nysbar.com.

PRESIDENT'S MESSAGE

For years, the New York State Bar Association has been advocating judicial salary increases, and we have strongly endorsed Chief Judge Kaye's comprehensive salary reform proposal. We will continue to collaborate on this initiative until it is accomplished.

This mutual effort between our Association and the courts is essential to many of our key initiatives, including, more recently, the revision to the draft proposal of the advertising regulations.

Last year, at our Annual Meeting, the House of Delegates adopted recommendations to deal with misleading lawyer advertising, an issue on which my predecessor, Vince Buzard, took the lead. Remarkably, just one year later, regulations promulgated by the New York State Unified Court System have gone into effect after an extensive comment period, during which many of our members raised a number of very real concerns. We brought these concerns before the courts, and I am pleased that most of them have been addressed, due to our collaboration with the four presiding justices of the Appellate Division, who were receptive, open and understanding throughout this process.

For example, we were successful in convincing the courts to sharply limit the extra-territorial reach of the draft regulations, a matter that had caused significant international concern.

Further, we proposed, and the Presiding Justices accepted, revisions to the definitions of "advertisement" and "solicitation," to ensure that a communication will not be deemed an advertisement or solicitation unless it is primarily designed to encourage the recipient to retain the lawyer or law firm. The definition of "advertisement" expressly excludes communications to existing clients or other lawyers, and the definition of "solicitation" expressly excludes writings prepared in response to a specific request of a prospective client. This language provides greater clarification and guidance to the bar, and alleviates concerns regarding communications not designed for retention purposes, such as holiday cards, law firm newsletters or the announcement of a new associate or partner.

Also significant is the application, to both plaintiff's counsel and defense counsel, of the current 30-day moratorium on soliciting wrongful death or personal injury clients, which will even the playing field and protect the families suffering a loss from overly aggressive marketing or any contact from either side. These and other revisions to the draft proposal reflect the mutual effort between the Association and the courts to implement a final product that will provide a balance between protecting the lawyer's right to advertise and protecting the public from overly aggressive or misleading advertisements.

Deceptive and overly aggressive advertising chips away at one of our core values, independence of the bar, because it tarnishes the public's perception of our profession. While most of these advertisements are benign and serve merely to advise the public that there are lawyers who can help them with their legal issues, a few are designed to take advantage of the public at a time of need and crisis. In the landmark U.S. Supreme Court decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), Justice Blackmun recognized this problem, stating that "[b]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." Thus, some regulation of legal advertising is both necessary and permissible.

I am proud that our Association took the initiative in urging the courts to adopt more stringent advertising rules, and I commend the work of our Task Force on Attorney Advertising, chaired by Bernice Leber. The hard work of the Task Force, both in crafting the recommendations and working with the courts to modify the draft proposal, were instrumental in this process. At the end of the day, it was our relationship of mutual respect with the court system that enabled us to have such a significant and positive impact on the final product. ■

NYSBACLE

Partial Schedule of Spring Programs *(Subject to Change)*

The New York State Bar Association Has Been Certified by the New York State Continuing Legal Education Board as an Accredited Provider of Continuing Legal Education in the State of New York.

Employment Law for the General Practitioner and Corporate Counselor: Current Law and Cutting-Edge Issues

Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 of ethics and professionalism; 0.5 of skills; 6.0 of practice management and/or professional practice

March 8	New York City
April 20	Syracuse
May 4	Albany
May 10	Buffalo

Legal Malpractice and Risk Management

(half-day program)

Fulfills NY MCLE requirement for all attorneys (4.0): 2.5 of law practice management; 1.5 of professional practice

March 23	Albany; Syracuse; Tarrytown
March 29	New York City
March 30	Melville, LI

Practical Skills Series: Family Court Practice

Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 of ethics and professionalism; 4.0 of skills; 2.0 of practice management and/or professional practice

April 17	Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester

The Examination Before Trial – A Primer on Depositions in Tort and Personal Injury Cases

Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 of ethics and professionalism; 3.5 of skills; 2.5 of professional practice

April 20	Albany; Buffalo; Melville, LI
April 27	New York City; Syracuse

Introductory Lessons on Ethics and Civility in Everyday Lawyering

(half-day program)

Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 of ethics and professionalism

April 20	New York City;
April 27	Albany; Buffalo; Melville, LI

Women on the Move IV

(half-day program: 1:00 – 5:15 pm)

(reception: 5:15 – 7:00 pm)

Fulfills NY MCLE requirement for all attorneys (4.5): 1.0 of skills; 1.0 of law practice management; 2.5 of professional practice

April 26	New York City

Equitable Distribution and Maintenance: Cutting-Edge Trends and Drafting, Litigating and Settlement Solutions

(half-day program)

†*Fulfills NY MCLE requirement (4.5) 4.5 of skills, practice management and/or professional practice*

April 27	Hauppauge, LI
May 11	Tarrytown
May 18	Rochester
June 8	Albany
June 15	New York City

Practical Skills Series: Basic Elder Law Practice

Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 of ethics and professionalism; 0.5 of skills; 5.5 of practice management and/or professional practice

May 2	Albany; Melville, LI; New York City; Rochester; Syracuse; Westchester

Sarbanes-Oxley and Hot Securities Litigation Topics

May 2	New York City

DWI on Trial – The Big Apple VII Seminar

(one-and-one-half-day program)

Fulfills NY MCLE requirement for all attorneys (10.5): 6.0 of skills; 4.5 of professional practice

May 3–4	New York City

† Does not qualify as a basic level course and, therefore, cannot be used by newly admitted attorneys for New York MCLE credit.

Third Annual International Estate Planning Institute

(two-day program)

†*Fulfills NY MCLE requirement (11.0): 11.0 of practice management and/or professional practice*

May 3–4 New York City

Introduction to Health Law

May 4 New York City
May 11 Melville, LI
May 17 Albany

Zealous Representation

(half-day program)

Fulfills NY MCLE requirement for all attorneys (4.0): 2.0 of ethics and professionalism; 2.0 of skills

May 4 Ithaca
May 11 Albany
May 17 Melville, LI
May 18 New York City

Keys to Effective Trial Advocacy with James McElhaney

Fulfills NY MCLE requirement for all attorneys (7.0): 7.0 of skills

May 8 Albany
May 9 Melville, LI

Litigating and Working Out a Problem Loan

(half-day program)

May 10 New York City
May 18 Syracuse

2007 Insurance Coverage Update

May 11 Syracuse
May 16 New York City
May 18 Albany; Buffalo; Melville, LI

Crisis Intervention Training

May 11 New York City

Practical Skills Series: How to Commence a Civil Lawsuit

Fulfills NY MCLE requirement for all attorneys (6.5): 1.0 of ethics and professionalism; 3.0 of skills; 2.5 of practice management and/or professional practice

May 15 Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester

Trust Planning

May 16 Albany; Tarrytown
May 17 Buffalo
May 23 Binghamton; Uniondale, LI
May 30 New York City; Rochester
May 31 Syracuse

Bankruptcy Restructuring

May 22 New York City

Basic Securities Law Concepts for the Business Practitioner

May 24 New York City

Automobile Crashworthiness Litigation: A New Look at Auto Cases in a World Without Title-Owner Liability

Fulfills NY MCLE requirement for all attorneys(7.0): 7.0 of professional practice

June 1 New York City

Practical Skills Series: Collections and the Enforcement of Money Judgments

Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 of ethics and professionalism; 1.5 of skills; 5.0 of practice management and/or professional practice

June 4 Albany; Hauppauge, LI; New York City; Syracuse; Westchester

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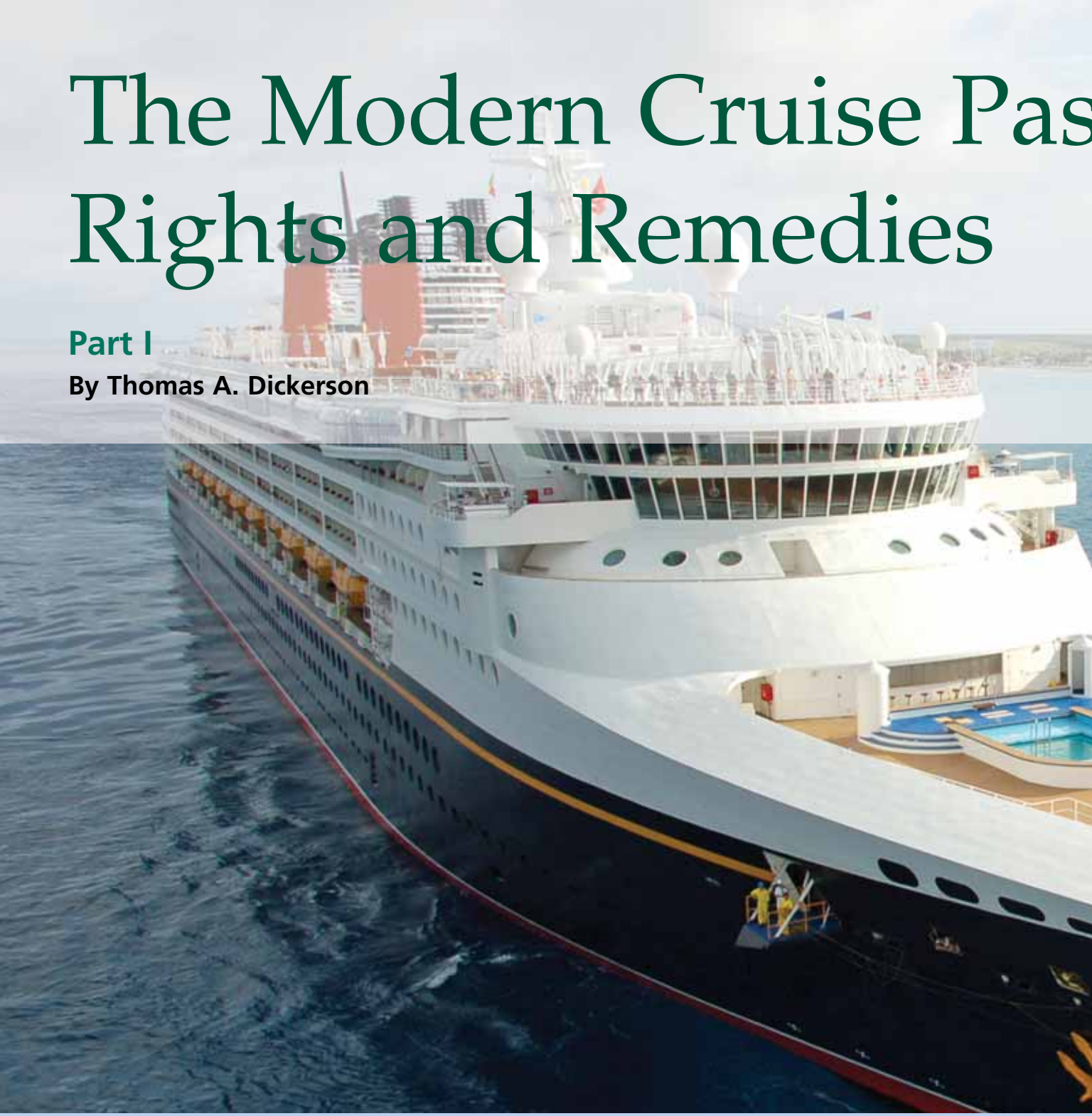
The Modern Cruise Pas Rights and Remedies

Part I

By Thomas A. Dickerson



ssenger's

Thomas A. Dickerson is an Associate Justice of the Appellate Division, Second Department of the New York State Supreme Court. Justice Dickerson is the author of *Class Actions: The Law of 50 States* (Law Journal Press, N.Y., 2007); *Travel Law* (Law Journal Press, N.Y., 2007); Article 9 of 3 Weinstein, Korn & Miller, *New York Civil Practice CPLR* (2005, 2006) and over 230 legal articles.

Floating Deluxe Hotels & Risky Shore Excursions

Modern cruise ships are best viewed as floating hotels[1] that transport their guests from exotic port to exotic port where they stay a few hours for shopping, snorkeling, scuba diving, jet skiing, parasailing and touring. While a cruise vacation may very well be the best travel value available, even the most luxurious floating hotels can harbor dangers – everything from slip-and-fall injuries to sexual assault to rogue waves to medical malpractice.

Although there can be problems on the cruise ship, generally, it is safer to be onboard than on a shore excursion where there may be uncertainty about the provider of the services. Is the provider insured, licensed and trained? Has the cruise line evaluated the reliability of the provider? Has the cruise line assumed responsibility for any injuries suffered by its passengers or has it disclaimed all liability for any injuries which passengers might sustain during the shore excursion? The danger of participating in shore excursions was recently demonstrated when 12 cruise passengers were killed during a stop-over in Chile. The passengers were part of a "64-member B'nai B'rith group that was traveling aboard the cruise ship *Millennium* . . . [who] had made a side excursion to see the mountains on a tour bus that tumbled more than 300 feet down a mountainside."[2]

21st Century Ships; 19th Century Passenger Rights

Passengers should be aware that the cruise ship's duties and liabilities are governed not by modern, consumer-oriented common and statutory law, but by 19th century legal principles,[3] the purpose being to insulate cruise lines from the legitimate claims of passengers. The policy enunciated by the Second Circuit Court of Appeals nearly 50 years ago in a case involving a passenger's physical injuries[4] applies equally today: "The purpose of 46 U.S.C. 183(c) . . . was to encourage shipbuilding and [its provisions] . . . should be liberally construed in the ship owner's favor."

Developments in Cruise Passengers' Rights

Since 2004,[5] four important developments in cruise passenger rights have occurred.[6] First, all cruise ships touching U.S. ports are now subject to the requirements of the Americans with Disabilities Act.[7]

Second, at least in the states of Florida[8] and Illinois,[9] cruise ships may now be held vicariously liable for the malpractice of the ship's doctor.[10]

Third, in Florida and other states in the Eleventh Circuit,[11] cruise ships may now be liable for the sexual assaults of their crew members or other passengers.[12]

Fourth, some states are becoming more active in monitoring the activities of cruise ships. For example, in August of 2006 Alaska enacted legislation which imposes "a $50 head tax on cruise passengers sailing to Alaska and subjects cruise lines to a host of new disclosures and environmental rules [such as] . . . require[ing] cruise lines to disclose to passengers the markup they charge for shore excursions . . . require[ing] cruise lines to get permits to discharge any wastewater in state marine waters . . . provid[ing] that a ship cabin must be reserved for an onboard 'ocean ranger' whose job it will be to monitor and enforce environmental statutes." The legislation also empowers citizens to file lawsuits against owners or operators of cruise ships for alleged violations of environmental statutes.[13] In September 2003 "California became the second state after Alaska to decide that federal regulations governing what cruise ships can and cannot dump are too weak, and to respond by implementing its own laws." After a state task force report found that pollutants "are routinely discharged from vessels into California's coastal waters," the state passed legislation that prohibits dumping of sewage sludge, hazardous materials and bilge water containing oil. It also instructs California's Environmental Protection Agency to ask the federal government to prohibit all such discharges within the state's national marine sanctuaries. Although the laws do not include limits on the expulsion of backwater (from toilets) or graywater (from sinks, showers and laundry), many see this as an important first step.[14]

Cruising as a Growth Industry

The cruise industry is growing rapidly. For example, "a record 8.9 million North Americans took cruises in 2004 . . . compared with about 6.9 million in 2000 and 4.4 million in 1995."[15] The advertising for cruise vacations is seductive, indeed. The newest cruise ships can exceed 150,000 tons and accommodate nearly 4,000 passengers. A recent study compared the *Titanic* at 882 feet long having a registered gross tonnage of 46,328 tons with the 3,838-passenger *Voyager of the Seas* at 1,020 feet long having a registered gross tonnage of 142,000 tons.[16]

The Bigger the Better

Bigger is better when it comes to cruise ships.[17] Royal Caribbean recently stated that it has placed an order for what will be the largest and most expensive cruise vessel in the world. Called *Project Genesis*, the 220,000-ton ship will have 5,400 berths and is scheduled for delivery in 2009. One of the largest cruise ships is the *Queen Mary 2* at 150,000 tons, a length of 1,132 feet, a cost of $780 million, a height of 23 stories from the waterline, with amenities that include "deluxe penthouses, a planetarium, the first Chanel and Dunhill shops at seas, a Veuve Liquot champagne bar and a 'pillow concierge' offering nine types of pillows."[18] The *Queen Mary 2* entered service in 2004.

Types of Onboard Accidents

Common travel problems experienced by cruise passengers on board the cruise ship include death and physical injuries caused by (1) slips, trips and falls;[19] (2) disappearances;[20] (3) drownings and pool accidents;[21] (4) flying coconuts;[22] (5) stray golf balls;[23] (6) discharged shotgun shells and cannons;[24] (7) food poisoning;[25] (8) gastrointestinal disorders, seasickness and fear;[26] (9) pirates;[27] (10) rogue waves;[28] (11) listing;[29] (12) defective exercise equipment;[30] (13) diseases such as Legionnaire's disease and respiratory infections;[31] (14) rapes and sexual assaults;[32] (15) fires;[33] (16) falling bunk beds;[34] (17) pool jumping;[35] (18) storms and hurricanes;[36] (19) spider bites;[37] (20) torture and hostage taking;[38] and (21) malpractice by the ship's doctor.[39]

Maritime Law

Cruise ships are common carriers; they were once held to a high standard of care, but more recently have been governed by a reasonable standard of care under the circumstances of each case.[40] The doctrines of comparative negligence[41] and assumption of the risk apply.[42] The doctrine of *res ipsa loquitur* may apply, thereby raising an inference of negligence.[43] Cruise ships

may be vicariously liable for the sexual misconduct of their employees[44] and the malpractice of the ship's doctor.[45] The seaworthiness doctrine has not yet been applied to actions involving passengers.[46] Maritime law will not imply a warranty of safe passage unless such warranty is expressly made a part of the passenger's contract[47] or is a warranty of merchantability.[48] With the exception of the application of the doctrine of vicarious liability for the sexual misconduct of crew members and the medical malpractice of a ship's doctor, cruise ships have not been held strictly liable for onboard accidents including slip and falls and food poisoning.[49]

All cruise ships touching U.S. ports, including foreign cruise lines, must comply with the requirements of the Americans with Disabilities Act.[50] State dram shop acts creating liability for the purveyors of alcoholic beverages to patrons that subsequently injure third parties have been inconsistently applied to cruise ships.[51] In *Voillat v. Red and White Fleet*,[52] alcohol was served by a catering company aboard a harbor cruise on San Francisco Bay. The alcohol turned some passengers courageous and flirtatious, resulting in a fight over a young woman. In the aftermath, Mr. Voillat, a young man (who was with the woman) was allegedly thrown overboard by another passenger, Mr. Monaghan (who wanted the young woman). Mr. Voillat did not surface and his decomposed body was found nearly one month later.

Risky Business: Shore Excursions

Prior to arriving at a port of call, the cruise ship's staff will give lectures about the shopping to be expected and the availability of tours such as snorkeling and scuba diving, archaeological site visits, catamaran rides, parasailing, helicopter rides and so forth. Cruise ships may generate substantial income from these tours,[53] which are typically delivered by independent contractors not subject to the jurisdiction of U.S. courts, and which may be uninsured, unlicensed and irresponsible.[54] Shore excursions are big business for the cruise lines.[55]

Types of Shore Excursion Accidents

The variety of accidents that may occur while on shore may involve the following: assaults, rapes, robberies and shootings;[56] horseback riding;[57] jet skis;[58] scuba diving;[59] snorkeling;[60] boat tours;[61] traffic accidents;[62] fist fights;[63] catamaran rides;[64] medical malpractice at local clinics;[65] abandonment on shore;[66] parasailing;[67] waterskiing;[68] helicopter and airplane rides;[69] personal watercraft rides;[70] wake boarding.[71]

In Part II, which will appear in a future issue of the *Journal*, we shall discuss a variety of procedural issues that arise in cruise passenger litigation. ■

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1. See, e.g., the following cases:

Ninth Circuit: *Deck v. Am. Haw. Cruises, Inc.*, 51 F. Supp. 2d 1057 (D. Haw. 1999) ("Cruise ships are a unique mode of transportation. Cruise ships are self-contained floating communities. In addition to transporting passengers, cruise ships house, feed and entertain passengers and thus take on aspects of public accommodations. Therefore cruise ships appear to be a hybrid of a transportation service and a public accommodation."). Eleventh Circuit: *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1241 (11th Cir. 2000) ("Cruise ships, in fact, often contain places of lodging, restaurants, bars, theaters, auditoriums, retail stores, gift shops, gymnasiums, and health spas. And, a public accommodation aboard a cruise ship seems no less a public accommodation just because it is located on a ship instead of upon dry land. In other words, a restaurant aboard a ship is still is restaurant. Very important, Congress made no distinctions – in defining 'public accommodation' based on the physical location of the public accommodation. We conclude, therefore, that those parts of a cruise ship which fall within the statutory enumeration of public accommodations are themselves public accommodations for the purposes of Title III.").

State Courts: Florida: *Carlisle v. Carnival Corp.*, 864 So. 2d 1, 8 (Fla. Dist. Ct. App. 2003) ("A cruise ship is a city afloat with hundreds of temporary citizens, some of whom are passengers and some of whom are the employees and agents of the cruise line who comprise the ship's crew, each of whom, within their particular sphere, owe a duty of reasonable care to the passengers."). New York: *Udell v. Hamburg-Am. Line*, 141 Misc. 754, 253 N.Y.S. 209 (N.Y. Mun. Ct. 1931), *aff'd*, 255 N.Y.S. 1011 (Sup. Ct., App. Term 1932) (liability of steamship company for loss of passenger's fur coat is that of an innkeeper).

Contra: Second Circuit: *York v. Commodore Cruise Line*, 863 F. Supp. 159 (S.D.N.Y. 1994) (passenger sexually assaulted by crew members; cruise ships are not floating hotels; no negligence for doors having locks with easy access from outside; policy of rescuing passengers outweighs increased security).

2. Parry, *Dead, Injured in Chilean Bus Crash Return Home*, J. News, Mar. 25, 2006 at 7B.

3. *See Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1369 (5th Cir. 1988) (cruise ship insulated from vicarious liability for medical malpractice of ship's doctor

based upon a rule; "[i]f the doctor is negligent in treating a passenger, however, that negligence will not be imputed to the carrier," followed by "[a]n impressive number of courts from many jurisdictions . . . for almost one hundred years"). Contra: *Nietes v. Am. President Lines, Ltd.*, 188 F. Supp. 219 (N.D. Cal. 1959); *Carlisle*, 864 So. 2d 1.

4. *Schwartz v. S.S. Nassau*, 345 F.2d 465, 467 (2d Cir. 1965).

5. Dickerson, *The Cruise Passenger's Dilemma: Twenty-First-Century Ships, Nineteenth-Century Rights*, 28 Tul. Mar. L.J. 447 (2004).

6. *See* Carothers, *Cruise Control*, Conde Nast Traveler, July 2006, at 56–62.

7. *Spector v. Norwegian Cruise Lines*, 545 U.S. 119 (2005).

8. *Carlisle*, 864 So. 2d 1, *petition for review by Florida Supreme Court granted*, 904 So. 2d 430 (Fla. Sup. 2005).

9. *Mack v. Royal Caribbean Cruises*, 838 N.E.2d 80 (Ill. App. Ct. 2005).

10. *Carlisle*, 864 So. 2d 1 (14-year-old passenger with ruptured appendix misdiagnosed by ship's doctor as suffering from flu; Florida Appellate Court rejects majority rule that cruise ships are not liable for torts of ship's doctors and holds that "where a ship's physician is in the regular employment of a ship, as a salaried member of the crew "the ship will be held liable for his negligent treatment of a passenger").

11. *Doe v. Celebrity Cruises, Inc.*, 287 F. Supp. 2d 1321 (S.D. Fla. 2003), *aff'd in part and rev'd in part*, 394 F.3d 891 (11th Cir. 2004).

12. *Stires v. Carnival Corp.*, 243 F. Supp. 2d 1313 (S.D. Fla. 2002) (head waiter sexually assaults passenger repeatedly referring to her as a "puta"); *Doe*, 287 F. Supp. 2d 1321 ("female passenger . . . alleges to have been sexually assaulted, raped and battered by a male crewmember . . . while ashore in Bermuda during a roundtrip cruise from New York to Bermuda." The Court held that a common carrier may be held strictly liable for its employee's intentional torts that are committed outside the scope of employment. Case tried to a jury which awarded $1 million in damages; judgment dismissed as to all defendants – operator, owner, caterer and service – because none of them are both a common carrier and the employer of the employee).

13. Jainchill, *Upside the Head Tax: Alaska Vote a Blow to the Cruise Lines*, Travel Weekly, Aug. 28, 2006, at 1; Carothers, *Stop Press*, Environment Pollution Progress, Oct. 2003, at 76.

14. Carothers, Stop Press, Environment Pollution Progress, Oct. 2003, at 76.

15. Solomon, *Voyage to the Great Outdoors*, N.Y. Times Travel Section, Oct. 2, 2005, at 12.

16. Conde Nast Traveler, Mar. 2000, at 163.

17. Jainchill, Travel Weekly, Feb. 13, 2006, at 1 (200,000-ton mega ship to cost $1.24 billion, hold 5,400 cruisers).

18. Perez, *Cunard's Grand Gamble, Marketplace*, Wall St. J., Oct. 2, 2003, at B1.

19. *Pratt v. Silversea Cruises, Ltd.*, No. C05-0693, 2005 WL 1656891 (N.D. Cal. July 13, 2005) (passenger suffered a broken hip, a torn ACL in her right knee and severe ankle injuries when she fell on cruise ship); *Ward v. Cross Sound Ferry*, 273 F.3d 520 (2d Cir. 2001) (slip and fall on gangway boarding ferry); *Morrow v. Norwegian Cruise Line Ltd.*, 262 F. Supp. 2d 474 (D. Pa. 2002) (minor passenger injured when the ladder she was climbing detached and fell backwards).

20. Cogswell, *Wife Settles, But Smith Family Sues Royal Caribbean*, Travel Weekly, July 10, 2006, at 45; Kelly, *Bruising For Cruising*, N.Y. Daily News, Mar. 8, 2006, at 4 ("24 Americans have disappeared from cruise ships since 2003 . . . the most recent to vanish was 26-year-old George Smith . . . who disappeared in August 2005 off a Royal Caribbean vessel during his honeymoon").

21. *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827 (9th Cir. 2002) (passenger drowns after falling off cruise ship); *Smith v. Mitlof*, 198 F. Supp. 2d 492 (E.D.N.Y. 2002) (water taxi capsizes, drowning one passenger and injuring others).

22. *McDonough v. Celebrity Cruises, Inc.*, 64 F. Supp. 2d 259 (S.D.N.Y. 1999) (passenger struck in head with rum-filled coconut (a drink called the "Coco Loco") dropped from a deck above).

23. *Catalan v. Carnival Cruise Lines, Inc.*, 1985 American Maritime Cases 1929 (D. Md. 1984) (passenger driving golf balls into sea strikes another passenger).

24. *Fay v. Oceanic Sun Line*, 1985 American Maritime Cases 1132 (N.Y. Sup. 1984) (skeet-shooting passenger discharges shot gun shell into another passenger); *Lawrence v. The IMAGINE . . . ! YACHT, LLC*, 33 F. Supp. 2d 379 (D.

Md. 2004) (passenger suffers hearing loss when crew member fires cannon; passenger later diagnosed with permanent hearing loss and tinnitus as a result of exposure to the cannon blast).

25. *Bird v. Celebrity Cruise Line, Inc.*, 428 F. Supp. 2d 1275 (S.D. Fla. 2005) (passenger "rushed to the emergency room several days after cruise ended . . . claims that she was diagnosed with bacterial enteritis, a disease she allegedly contracted as a result of poisoning from food").

26. *Hutton v. Norwegian Cruise Line*, 144 F. Supp. 2d 1325 (S.D. Fla. 2001) (cruise ship collides with cargo ship in English Channel, causing emotional injuries including severe fright, trouble sleeping, nerves, headaches, depression and shaking; many passengers also complained about aches, bumps and bruises of their neck, back and knees associated with the collision).

27. Klein, *After Attack, Cruise Ships Rethink Security*, Practical Traveler, N.Y. Times Travel Section, Dec. 4, 2005, at 6 ("Now the armed attack on the *Seaborne Spirit* off Somalia has the cruise industry checking its bearings on security. The *Spirit* was carrying 151 passengers and 161 crew members when it was fired upon at dawn from two small vessels off the Somalia coast.").

28. Dobnik, *Freak Wave Leaves Vivid Trip Images*, J. News, Apr. 19, 2005 at 3A ("a freak seven-story-high wave that smashed windows, sent furniture flying and ripped out whirlpools . . . the *Norwegian Dawn* carrying more than 2,000 passengers . . . about 300 other passengers – many from the affected cabins – decided to disembark early").

29. Jainchill, *Princess: Human Error Caused List*, Travel Weekly, July 31, 2006 at 6. (Princess Cruises said that human error was responsible for the list that injured 240 people aboard the *Crown Princess* on July 18 . . . human error also was determined to have caused the listing of another Grand-class ship, the *Grand Princess*. . . . In that incident, 27 people were injured when the ship tried to turn around and return to port after a passenger experienced cardiac arrest).

30. *Berman v. Royal Cruise Line, Ltd.*, 1995 American Maritime Cases 1926 (Cal. Sup. 1995) (passenger injured exercising on treadmill).

31. *See, e.g., Petitt v. Celebrity Cruises, Inc.*, 153 F. Supp. 2d 240 (S.D.N.Y. 2001) (passengers develop upper respiratory tract infection); *In re Horizon Cruises Litig.*, No. 94 Civ. 5270, 2002 WL 1000949 (S.D.N.Y. 2002) (Legionnaires' Disease and Norwalk Virus (the norvirus, as the Norwalk virus has been renamed), has been making unwelcome headlines in the cruise industry for a decade or more, most recently when the *Regal Princess* . . . tied up in New York early this month with 301 of 1,529 passengers and 45 of a crew of 679 stricken with the illness. The virus is so closely associated with cruise ships that it has come to be called the cruising sickness . . . cruise ships are an ideal vessel for spreading the virus, said Dave Forney chief of CDC's Vessel Sanitation Program."); Peterson, *Leading Passengers to Water*, N.Y. Times Travel Section, Sept. 28, 2003, at 8. ("You have 3,400 passengers in a relatively confined space for 10 days at a time, so if you have someone who throws up in an elevator or has an accident in a restroom, the risk becomes actually quite high for many people.").

32. *Stires v. Carnival Corp.*, 243 F. Supp. 2d 1313 (N.D. Fla. 2002) (head waiter sexually assaults passenger repeatedly calling her a "puta"); *Doe v. Celebrity Cruises, Inc.*, 287 F. Supp. 2d 1321 (S.D. Fla. 2003), *aff'd in part and rev'd in part*, 394 F.3d 891 (11th Cir. 2004).

33. Hepburn, *Caribbean Cruise Turns Deadly as Fire Scorches 100 Ship Cabins*, J. News, Mar. 24, 2006 at 3B ("a fire apparently started by a cigarette broke out on [the *Star Princess*] . . . leaving one passenger dead, 11 people injured and at least 100 rooms damaged"); Carothers, *Cruise Control, Stop Press*, Conde Nast Traveler, July 2006, at 54 ("experts are still investigating the March blaze aboard the *Star Princess*. . . . The cause of the fire has not yet been determined, but it appears to have spread along the outside of the vessel, burning up balcony furniture and polycarbonate dividers. As a relatively new addition to cruise ships, polycarbonate dividers are not covered by current fire codes").

34. *Angulo v. Carnival Corp.*, Index No. 03-04642 CA 25, May 5, 2005, Fla. Miami-Dade County Cir. Ct., 49 ATLA Law Rep. 112 (May 2006) ("Angulo, 48, was a passenger on a Carnival cruise ship. While in her cabin, she was struck in the head when the top bunk, weighing 115 pounds, became unhinged and fell open . . . jury awarded [her] about $333,600.").

35. *Brown v. New Commodore Cruise Line Ltd.*, 2000 WL 45443 (S.D.N.Y. 2000) (passenger jumps from deck above into pool below and suffers broken ankle after landing on "wooden bench about a foot short of the pool").

36. *Domblakly v. Celebrity Cruises, Inc.*, 1998 WL 734366 (S.D.N.Y. 1998) (passengers injured when cruise ship battered by hurricane).

37. *Ilan v. Princess Cruises, Inc.*, No. B151303, 2002 WL 31317342 (Cal. App. Oct. 16, 2002) (passenger failed to prove that he was bitten by a hobo spider); *Cross v. Kloster Cruise Lines, Ltd.*, 897 F. Supp. 1304 (D. Or. 1995) (passenger bitten by brown recluse spider).

38. *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230 (D.C. Cir. 2003) (passenger forcibly removed from cruise ship by Libyan authorities claims she was held hostage and tortured).

39. *Carlisle v. Carnival Corp.*, 864 So. 2d 1 (Fla. Dist. Ct. App. 2003), *petition for review by Florida Supreme Court granted*, 904 So. 2d 430 (Fla. Sup. 2005) (14-year-old passenger with appendicitis misdiagnosed by ship's doctor as suffering from flu, removed from ship and suffers ruptured appendix and rendered sterile after surgery; Florida Appellate Court rejects majority rule that cruise ships are not liable for torts of ship's doctors and holds that "where a ship's physician is in the regular employment of a ship, as a salaried member of the crew the ship will be held liable for his 'negligent treatment of a passenger'"); *Mack v. Royal Caribbean Cruises*, 838 N.E.2d 80 (Ill. App. Ct. 2005).

40. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959); *Ginop v. A 1984 Bayliner 27' Cabin Cruiser*, 242 F. Supp. 2d 482 (E.D. Mich. 2003) ("The general principles of admiralty law require that an owner exercise such care as is reasonable under the circumstances."); *Ilan*, 2002 WL 31317342 ("A shipowner owes passengers a duty to take ordinary reasonable care under the circumstances . . . a prerequisite to liability is that the shipowner have had actual or constructive notice of the risk-creating condition.") (citations omitted).

41. *Ginop*, 242 F. Supp. 2d 482 (passenger's failure to use reasonable care for his own safety was proximate cause of his injuries, not the negligence of the cruise ship).

42. *Petitt v. Celebrity Cruises, Inc.*, 153 F. Supp. 2d 240 (S.D.N.Y. 1999) (assumption of risk under the doctrine of comparative negligence is valid defense).

43. *O'Conner v. Chandris Lines, Inc.*, 566 F. Supp. 1275 (D. Mass. 1983) (falling bunk; *res ipsa loquitur* applied).

44. *Doe v. Celebrity Cruises, Inc.*, 287 F. Supp. 2d 1321 (S.D. Fla. 2003), *aff'd in part and rev'd in part*, 394 F.3d 891 (11th Cir. 2004).

45. *Carlisle v. Carnival Corp.*, 864 So. 2d 1 (Fla. App. 2003), *petition for review by Florida Supreme Court granted*, 904 So. 2d 430 (Fla. Sup. 2005).

46. *Kornberg v. Carnival Cruise Lines*, 741 F.2d 1332 (11th Cir. 1984).

47. *Jackson v. Carnival Cruise Lines*, 203 F. Supp. 2d 1367 (S.D. Fla. 2002) ("The general rule of admiralty law is that a ship's passengers are not covered by the warranty of seaworthiness, a term that imposes absolute liability on a sea vessel for the carriage of cargo and seaman's injuries . . . there is an exception to this rule if the ship owner executes a contractual provision that expressly guarantees safe passage.") (citations omitted).

48. *Bird v. Celebrity Cruise Line, Inc.*, 428 F. Supp. 2d 1275 (S.D. Fla. 1279) ("[C]ourts have manifested a strong reluctance to imply warranties in contracts governed by admiralty law.").

49. *Id.*

50. *Spector v. Norwegian Cruise Lines*, 545 U.S. 119 (2005).

51. *See* Edelman & Mercante, *The Floating Dram Shop*, NYLJ, May 6, 2006, p. 3, col. 3.

52. *Voillat v. Red and White Fleet*, No. CO3-3016, 2004 WL 547146 (N.D. Cal. 2004).

53. *See, e.g., Hernandez v. Quality Inn, Inc.*, NYLJ, Mar. 23, 1993, p. 21, col. 6 (Sup. Ct., N.Y. Co.) (parasailing accident on hotel beach; relationship between hotel and parasailing operator described as follows: "Hotel Calinda contracted with the parasailing concessionaire 'Deportes Aquaticos', received a monthly fee pursuant to the contract; and that employees of the hotel were responsible for regularly inspecting the activity and equipment of the parasailing concessionaire. The parasailing activity was conducted along the Hotel Calinda beach and signs were posted on the grounds of the hotel directing guests to the parasailing facility . . . plaintiff's husband was instructed by a clerk of the hotel's front desk to go to the beach area to sign-up for parasailing.") (citations omitted).

54. *See, e.g., Winter v. I.C. Holidays, Inc.*, NYLJ, Jan. 9, 1992, p. 23, col. 4 (Sup. Ct., N.Y. Co.) (tourists injured in bus accident; foreign bus company insolvent, uninsured and irresponsible; tour operator has duty to select responsible independent contractors).

55. Carothers, *Cruise Control, Stop Press*, Conde Nast Traveler, July 2006, at 56 ("Almost half of all cruise passengers – some five million a year – participate in shore excursions ranging from simple bus tours in port cities to more adventurous activities such as scuba diving trips and hot-air balloon rides"); Solomon, *Voyage to the Great Outdoors*, N.Y. Times Travel Section, Oct. 2, 2005 at 12 ("250 passengers from a Carnival cruise ship had signed up and paid $93 for the experience of floating in inner tubes through a rain forest cave. . . . Cruise lines now offer a buffet of shore excursions for their guests at every port of call. . . . Passengers can attend a race-car academy in Spain, get their scuba diving certificate in the Virgin Islands and even take a spin in a MIG fighter jet in Russia.").

56. *Gillmore v. Caribbean Cruise Line*, 789 F. Supp. 488 (D. Puerto Rico 1992); *Carlisle v. Ulyssess Line, Ltd.*, 475 So. 2d 248 (Fla. Dist. Ct. App. 1985); *See* Travel Weekly, Jan. 9, 1997 ("A dozen passengers sailing Holland America Line's *Noordam* were robbed at gunpoint at the Prospect Plantation in Ocho Rios, Jamaica.").

57. *Colby v. Norwegian Cruise Lines, Inc.*, 921 F. Supp. 86 (D. Conn. 1996) (horse-riding accident during shore excursion).

58. *Calhoun v. Yamaha Motor Corp., Ltd.*, 216 F.3d 338 (3d Cir. 2000) (rider of Yamaha WaveJammer jet ski dies after collision with anchored vessel off the Mexican coast).

59. *Carnival Cruise Lines, Inc. v. LeValley*, 786 So. 2d 18 (Fla. Dist. Ct. App. 2001) (judgment for passenger injured during cruise ship sponsored scuba dive reversed for concealing asthmatic condition from dive instructor).

60. *Mayer v. Cornell Univ., Inc.*, 909 F. Supp. 81 (N.D.N.Y. 1995), *aff'd*, 107 F.3d 3 (2d Cir. 1997), *cert. denied*, 522 U.S. 818 (1999) (bird watcher on tour of Costa Rica drowns during snorkeling expedition to Isle de Cano).

61. *United Shipping Co. v. Witmer*, 724 So. 2d 722 (Fla. Dist. Ct. App. 1999) (cruise passengers drown during boat tour in the Bahamas).

62. *Young v. Players Lake Charles, L.L.C.*, 47 F. Supp. 2d 832 (S.D. Tex. 1999) (intoxicated gamblers leave casino boat and have traffic accident).

63. *Petro v. Jada Yacht Charters*, 854 F. Supp. 698 (D. Haw. 1994) (two passengers fight each other on shore).

64. *Henderson v. Carnival Corp.*, 125 F. Supp. 2d 1375 (S.D. Fla. 2000) (passenger injured during catamaran trip).

65. *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061 (9th Cir. 2001) (sick passenger removed from cruise to inadequate and filthy intensive care facility in Bombay).

66. *Daniel v. Costa Armatori*, 1980 A.M.C. 2874 (D.D.C. 1980) (passenger abandoned on shore).

67. *In re Complaint of UFO Chuting of Haw., Inc.*, 233 F. Supp. 2d 1254, 1254 (D. Haw. 2001) ("[plaintiffs] went parasailing and rope [attaching] them to the boat snapped, causing [plaintiffs] to fall into the water").

68. *O'Hara v. Bayliner*, 89 N.Y.2d 636, 657 N.Y.S.2d 569 (1997) (water-skiing accident).

69. *See* Rogers, *Risky Business?*, Stop Press, Conde Nast Traveler, Feb. 2006, at 45 (flightseeing helicopter plunged into New York City's East River soon after takeoff injuring pilot and six tourists, which followed the crash of a four-passenger Cessna on beach near Brooklyn's Coney Island a month earlier, where pilot and three sightseers were killed. "More recently, on September 23, three passengers died after Heli USA Airways flightseeing helicopter plummeted into the sea off the island of Kauai. Flightseeing, known in the aviation industry as air-touring, be it aboard a hot-air balloon, a fixed wing plane, or a helicopter-attracts more that two million passengers a year and generates revenues in excess of $625 million in the United States alone.").

70. *In re Bay Runner Rentals, Inc.*, 113 F. Supp. 2d 795 (D. Md. 2000) (passengers sustain injuries when personal watercraft collides with a bulkhead).

71. *Wheeler v. Ho Sports Inc.*, 232 F.3d 754 (10th Cir. 2000) (wake boarder injured when he "attempted a difficult aerial trick, crashed face-first into the water").

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Sidestepping Sanctions

Last issue's column examined the power of courts to hold a person in contempt, and impose punishment for the offending conduct. This column concerns another arrow in the judiciary's quiver for curbing and punishing certain inappropriate behavior: costs and sanctions pursuant to N.Y. Court Rule 130-1. So, what are they, and how best to avoid them?

The imposition of costs and sanctions for frivolous conduct is authorized by the Rules of the Chief Judge, which direct the Chief Administrator of the Courts, with the advice and consent of the Administrative Board of the Courts, to adopt rules providing for "the award of costs, including reasonable attorney's fees, or the imposition of financial sanctions, or both, for frivolous conduct in litigation by any party or attorney."[1] The rules implemented pursuant to this authority went into effect on March 1, 1998, and are found in Part 130-1 of the Rules of the Chief Administrator of the Courts.[2]

There are limitations on the application of Rule 130-1. Rule 130-1 costs and sanctions are not available in town or village courts, small claims courts, and family court proceedings commenced under Articles 3, 7, or 8 of the Family Court Act.[3] All judges of the Unified Court System have the power to award costs and sanctions under Rule 130-1. Rule 130-1 costs and sanctions may also be imposed by judges of the Housing Court of the New York City Civil Court.[4] Family Court support magistrates are authorized to make the factual determination that frivolous conduct has occurred. The finding must then be confirmed by a judge of the Family Court, who may then impose costs and sanctions.[5] Finally, Rule 130-1 sanctions are not available for requests for costs or attorney fees that are available under CPLR 8303-a.[6]

Penalties under Rule 130-1 are costs and/or a financial sanction. The costs that may be awarded are limited to "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct."[7] The financial sanction that may be awarded is capped: "In no event shall the amount of sanctions imposed exceed $10,000 for any single occurrence of frivolous conduct."[8]

The imposition of a sanction may be accompanied by other relief. Thus, a "serial litigant" was sanctioned $5,000 and ordered to pay the opposing party's attorney fees and costs associated with the appeal for bringing a subsequent action barred by *res judicata* and collateral estoppel.[9] In addition, the First Department directed the clerks of the court in Bronx and New York Counties, as well as the clerk of the First Department, to accept no more filings from the plaintiff without prior leave of those courts.[10]

Costs and sanctions under Rule 130-1 may only be imposed upon a party or attorney, whereas anyone appearing before or in the view and presence of a court may be held in contempt. Rule 130-1 is very broad in terms of the attorneys who may be penalized:

> Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.[11]

In order for an award of costs or sanctions to be imposed, an attorney or party must be found to have engaged in frivolous conduct. Frivolous conduct is defined as:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.[12]

An action may not be frivolous when commenced, but its continuation may be frivolous:[13]

> Although plaintiffs' complaint was not frivolous when it was filed, their continued pursuit of their claim became frivolous as the action progressed. New survey maps completed after the action began, including plaintiffs' own surveyor's map, showed that encroachment of defendants' bridge upon their property was nonexistent, or at best so insignificant as to render their continued litigation indefensible.[14]

Where issues of fact exist whether claims have been paid, the court will properly decline to find maintenance of the claims frivolous.[15] However, where it is clear that the parties did not intend a contract to be formed, Rule 130-1 is violated when an action is commenced alleging violation of the purported contract. The First Department reviewed the evidence in a dismissal motion and agreed with the motion court that "in view of defendants' clear showing of an intent not to be bound without a formal contract and the absence of credible evidence tending to show a meeting of the minds on all material terms, the action and filing of the notice of pendency were 'completely without merit in law,' and therefore sanctionable."[16] The appellate court found no basis to disturb the trial court's award of reasonable attorney fees and costs in the amount of $16,377.95.[17]

Something more than lack of care or attentiveness is required for the imposition of a Rule 130-1 penalty. In vacating an award under Rule 130-1 totaling $118,456, the First Department held:

> [A]lthough counsel could have been more careful or attentive in matters of pretrial preparation, none of his conduct was completely without legal merit, undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another, or asserted material factual statements that are false (22 NYCRR 130-1.1[c]). For instance, we cannot find that plaintiff and her attorney intentionally protracted the case while lacking a good faith belief in the merit of the action. Indeed, until the evidentiary rulings made shortly before trial, they were confident in their case. Nor is there a proper basis to conclude that they intentionally prepared and tendered altered exhibits. To the extent counsel proceeded with incomplete or improper exhibits, we do not find his conduct sanctionable. Counsel's conduct in belatedly providing notice of his planned expert testimony, and his ultimate inability to offer that testimony, similarly falls outside the definition of sanctionable behavior.[18]

Trial scheduling issues involving conflicting rulings from an assignment and trial judge were not sanctionable. In reversing a sanction of $1,500 and an award of $1,000 in counsel fees, the First Department held:[19]

> Here, appellant's lawyer had previously notified the witness to be available for trial on December 7. As soon as she learned that the witness was unavailable, she notified the court and opposing counsel. In addition, despite the fact that she had requested an adjournment to proceed to trial with this witness, she nevertheless agreed to continue with a different witness and to pay for deposition costs. Based on the uncontested facts, counsel's actions were neither intentional nor made in bad faith. Moreover, the record does not indicate appellant's counsel knowingly falsely represented anything or intended to delay the litigation. Accordingly, we find that the court abused its discretion in imposing sanctions against appellant's counsel.
>
> Although we need not reach defendant's remaining contention in light of our determination, we emphasize our disapproval of the assignment justice's ruling, which directly contradicted the trial judge's earlier decision, as violative of the "law of the case" doctrine.[20]

Deposition misconduct can result in a Rule 130-1 sanction. The Second Department ordered sanctions and supervision of remaining disclosure:

> Nevertheless, the record demonstrates that the plaintiffs' attempt to complete the deposition of Dr. Ho, ordered after the plaintiffs suc-

Where a reasonable opportunity to be heard is denied, the sanction must be vacated.

> cessfully moved to compel answers to nine questions marked for rulings at the first deposition session, was frustrated by counsel's making of extensive "speaking objections," which were not based on constitutional rights, privilege, or palpable irrelevance, and by Dr. Ho's repeated refusal to answer clear questions and his ultimate departure from the deposition during the afternoon. Under the circumstances, a monetary sanction in the amount of $1,500 is warranted to compensate the plaintiffs' counsel for the time expended and costs incurred in connection with the aborted deposition session. Moreover, it is apparent that supervision of the remaining outstanding discovery by the Supreme Court is warranted.[21]

Misstatements of fact to the court are sanctionable.[22]

> By representing to this Court that the structure remained partially completed and was deteriorating even though it had in fact been dismantled and by further representing that plaintiff acquired appropriate permits from the United States Coast Guard even though he had not and had in fact withdrawn his application for certification, plaintiff and his counsel have asserted material factual statements that are false (*see* 22 NYCRR 130-1.1[c][3]). Moreover, by pursuing this appeal despite the fact that the structure has been removed (and perhaps even sold, according to plaintiff's Coast Guard withdrawal application), plaintiff and his counsel have engaged in conduct that is "completely without merit." Under these circumstances, we impose a sanction of $1,000 against plaintiff personally and $1,000 against his counsel, James Morgan (*see* 22 NYCRR 130-1.1[b]).[23]

As the last excerpt states, an appeal may be determined to be frivolous. The appellate court may request submissions from the parties in determining whether an appeal is frivolous,[24] or the appellate court may impose a sanction *sua sponte*.[25] The First Department imposed a $2,500 sanction upon plaintiff's counsel for prosecuting a frivolous appeal:

> There is no merit to plaintiff's argument that, pursuant to the prior order of this Court the IAS court should have entered plaintiff's proposed judgment, inter alia, declaring that defendant is required to defend and indemnify plaintiff in the underlying action, rather than defendant's counter-proposed judgment, inter alia, declaring that defendant is only required to defend plaintiff in the underlying action. The prior order of this Court was clear in declaring that defendant's obligation was only to defend. Given this clarity, and the lack of any discernible basis for this appeal, we impose a sanction on plaintiff's attorney (22 NYCRR 130-1.1).[26]

Traditional due process requirements apply, and an application may be made by a party pursuant to CPLR 2214 or 2215, or upon the court's own initiative. A "reasonable opportunity to be heard" must be afforded.[27] The court is required to consider:

> (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and
>
> (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.[28]

Where a reasonable opportunity to be heard is denied, the sanction must be vacated.[29]

Rule 130-1 contains a signing requirement:

> Every pleading, written motion, and other paper, served on another party or filed or submitted to the court shall be signed by an attorney, or by a party if the party is not represented by an attorney, with the name of the attorney or party clearly printed or typed directly below the signature.[30]
>
> By signing a paper, an attorney or party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the paper or the contentions therein are not frivolous.[31]

Absent good cause, an unsigned paper shall be struck by the court, unless the omission of the signature is promptly corrected when brought to the attention of the attorney or party.[32] Where the trial court struck a plaintiff's complaint because it was not signed, the Second Department held that absent "any showing of confusion, prejudice to the defendant, or that the pleading was frivolous within the meaning of 22 NYCRR 130-1.1(c), we agree with the plaintiff's contention. 'The purposes of the rule are furthered where . . . the court exercises its discretion to permit [the] plaintiff leave to file and serve a properly signed pleading.'"[33]

A court may only impose sanctions pursuant to Rule 130-1 upon a written decision.[34] The written decision must set forth "the conduct on which the award or imposition is based, the reasons why the court found the conduct or frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate."[35] Where a court fails to specify the conduct found to be frivolous, and the reasons the conduct was frivolous, a penalty will be vacated.[36] If the court omits the reason why the penalty assessed was appropriate, the matter will be remanded for that determination to be made.[37] Thus, where a motion court awarded a $10,000 sanction against

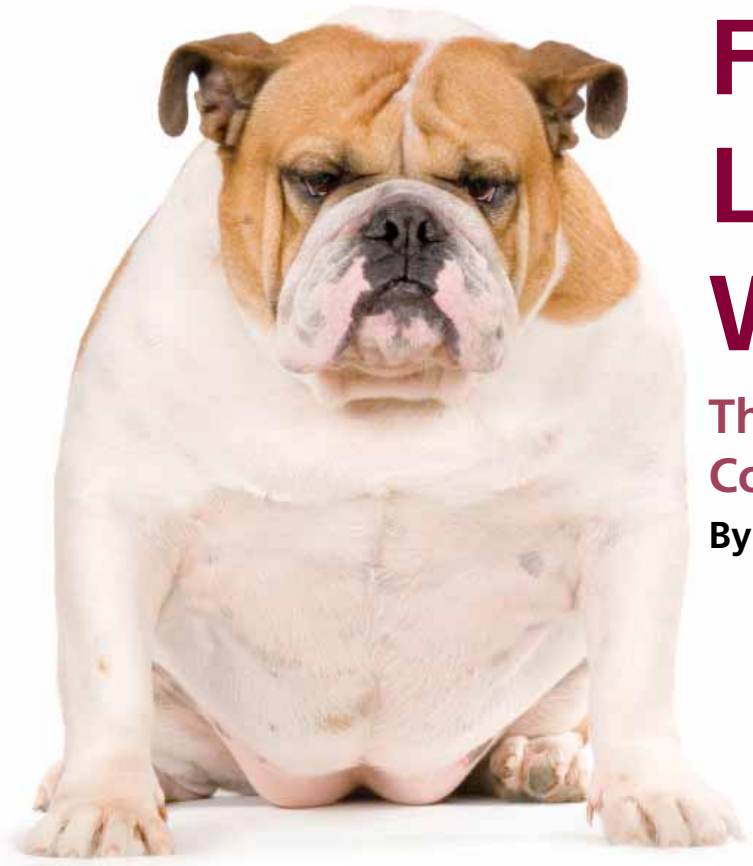
one of the attorneys in a case before it, the Fourth Department remanded the matter to the motion court for further proceedings. "Although Supreme Court adequately set forth 'the conduct on which the . . . imposition is based . . . and the reasons why the court found the conduct to be frivolous,' we agree with Schaffer that the court failed to set forth 'the reasons why the court found the amount . . . imposed to be appropriate.'"[38]

Any imposition of costs or a financial sanction must be entered as a judgment.[39]

Where a financial sanction is assessed against an attorney, the sanction is paid to the Lawyers' Fund for Client Protection.[40] If a financial sanction is assessed against a party, the sanction is "deposited with the clerk of the court for transmittal to the State Commissioner of Taxation and Finance."[41]

Rule 130-1 is not designed to, and should not, prevent attorneys from vigorously representing their clients, and advancing all possible legal arguments in support of their clients' positions. Sidestepping sanctions is attained while representing clients zealously, by making certain that claims are not frivolous, that measures are not undertaken to cause delay to the action or to harass someone, and that false statements are not made. Amen!

1. N.Y. Ct. Rules Standards & Admin. Pol. § 37.1 (22 N.Y.C.R.R.).
2. 22 N.Y.C.R.R. § 130-1.
3. 22 N.Y.C.R.R. § 130-1.1(a).
4. 22 N.Y.C.R.R. § 130-1.4.
5. *Id.*
6. 22 N.Y.C.R.R. § 130-1.5. CPLR 8303-a is titled "Costs upon frivolous claims and counterclaims in actions to recover damages for personal injury, injury to property or wrongful death."
7. 22 N.Y.C.R.R. § 130-1.1(a).
8. 22 N.Y.C.R.R. § 130-1.2.
9. *Tsabbar v. Auld*, 26 A.D.3d 233, 809 N.Y.S.2d 66 (1st Dep't 2006).
10. *Id.*
11. 22 N.Y.C.R.R. § 130-1.1(b).
12. 22 N.Y.C.R.R. § 130-1.1(c).
13. *Navin v. Mosquera*, 30 A.D.3d 883, 817 N.Y.S.2d 705 (3d Dep't 2006).
14. *Id.* at 884.
15. *LMK Psychological Servs., P.C. v. Liberty Mut. Ins. Co.*, 30 A.D.3d 727, 816 N.Y.S.2d 587 (3d Dep't 2006).
16. *Yenom Corp. v. 155 Wooster St., Inc.*, 23 A.D.3d 259, 805 N.Y.S.2d 304 (1st Dep't 2005).
17. *Id.*
18. *Sakow v. Columbia Bagel, Inc.*, 32 A.D.3d 689, 689, 822 N.Y.S.2d 5 (1st Dep't 2006) (citations omitted).
19. *Llantin v. Doe*, 30 A.D.3d 292, 817 N.Y.S.2d 57 (1st Dep't 2006).
20. *Id.* (citations omitted).
21. *O'Neill v. Ho*, 28 A.D.3d 626, 626, 814 N.Y.S.2d 202 (2d Dep't 2006) (citations omitted).
22. *Korbel v. Zoning Bd. of Appeals*, 28 A.D.3d 888, 814 N.Y.S.2d 301 (3d Dep't 2006).
23. *Id.* (citations omitted).
24. *Palmieri v. Thomas*, 29 A.D.3d 658, 814 N.Y.S.2d 717 (2d Dep't 2006); *Miller v. Dugan*, 27 A.D.3d 429, 810 N.Y.S.2d 517 (2d Dep't 2006).
25. *Morse Diesel Int'l v. Olympic Plumbing & Heating Corp.*, 22 A.D.3d 356, 801 N.Y.S.2d 898 (1st Dep't 2005).
26. *Id.* at 356 (citations omitted).
27. 22 N.Y.C.R.R. § 130-1.1(d).
28. 22 N.Y.C.R.R. § 130-1.1(c).
29. *Leskinen v. Fusco*, 18 A.D.3d 387, 796 N.Y.S.2d 54 (1st Dep't 2005).
30. 22 N.Y.C.R.R. § 130-1.1-a(a).
31. 22 N.Y.C.R.R. § 130-1.1-a(b).
32. 22 N.Y.C.R.R. § 130-1.1-a(a).
33. *Cardo v. Bd. of Managers*, 29 A.D.3d 930, 931, 817 N.Y.S.2d 315 (2d Dep't 2006) (citations omitted).
34. 22 N.Y.C.R.R. § 130-1.2.
35. *Id.*
36. *Campbell v. Obear*, 26 A.D.3d 877, 809 N.Y.S.2d 371 (4th Dep't 2006).
37. *Dwaileebe v. Six Flags Darien Lake*, 21 A.D.3d 1282, 801 N.Y.S.2d 172 (4th Dep't 2005).
38. *Id.* at 1282.
39. *Id.*
40. 22 N.Y.C.R.R. § 130-1.3.
41. *Id.*



From Lapdog to Watchdog

The Post-SARBOX Corporate Board

By Gwendolyn Yvonne Alexis

So, you have been invited to join the board of directors of a publicly traded company. *Congratulations*! An invitation to serve on the governing body of an established organization is an indication that you have become a jurist of note in the business community. However, before embarking upon this milestone in your legal career, there are a few things to consider.

Sarbanes-Oxley

The Sarbanes-Oxley Act of 2002 (SARBOX)[1] has greatly increased the liability of board members of publicly traded companies for corporate financial reports that mislead the investing public. In this regard, the Securities and Exchange Commission (SEC) does not distinguish between financial statements that fail to disclose important information and statements that contain actual misrepresentations; both shortcomings are deemed to be deceptive practices in violation of the nation's securities laws.

In 2002, faced with what appeared to be systemic accounting irregularities in publicly traded companies, the 107th Congress sought to enact a law that would both deter manipulative corporate transactions and improve the quality of oversight within the corporate environ. On the heels of the massive corporate wrongdoing of "Enron & Progeny," Congress enacted SARBOX, to cast a wide net of accountability within the corporate milieu.[2] Thus, even though accountants and attorneys were targeted as the professionals most culpable for inaction or collusion during this period of massive and pervasive corporate fraud, several other corporate habitués were identified as culpable because of complacency or negligence. Among those faulted were the boards of corporations that became the subject of SEC enforcement actions because of financial statements that failed to accurately reflect the corporate financial picture.

SARBOX accomplishes the objectives of deterrence and oversight by (1) elevating securities fraud to a federal crime cognizable by the Office of the U.S. Attorney, without the need for a referral from the SEC;[3] and (2) clearly establishing that where a board of directors exists, it is the *governing authority* of the corporation.[4] In other words, today's board is saddled with a watchdog function within the corporate hierarchy. And, given the possibility of an imposition of vicarious criminal liability upon the corporation (with a shareholder lawsuit against the board of directors certain to follow), it is incumbent upon the board to exercise due diligence in rooting out corporate wrongdoing. Moreover, clearly evidencing a congressional intent that criminal sanctions serve as a deterrent to corporate wrongdoing, § 805 of SARBOX directs the U.S. Sentencing Commission to review its sentencing guide-

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lines to make sure that they "are sufficient to deter and punish *organizational* criminal misconduct."[5]

Judging from recent headlines, corporate boards are beginning to feel the weight of their new responsibilities under SARBOX. Boards second-guessing management decisions has now become so routine that in a high-profile resignation from the General Motors Corp. board, the parting director accused the board of lacking independence because it accepted management's negative assessment of entering into an alliance with Renault SA and Nissan Motor Co. without having commissioned its own study of the pros and cons of an overseas alliance.[6] In short, the days when the board could be viewed as no more than an appendage to corporate management are past. The post-SARBOX board is striking out on its own and showing an independence of thought that ensures its ability to fulfill its fiduciary duty to the shareholders by carrying out its enhanced oversight functions.

A New Dynamic

Without a doubt, SARBOX has engendered a metamorphosis of the corporate board from lapdog into watchdog. This has resulted in an uncoupling of board interests from those of management, which has introduced a degree of tension into the once harmonious relationship between management and the board. This new board-management dynamic has led to the emergence of certain conditions precedent that must be satisfied if a listed company hopes to attract an elite cadre of accomplished individuals as members of its board of directors. Today, it is expected that, prior to agreeing to serve on the post-SARBOX corporate board, a prospective candidate will want to ascertain that the corporate suitor has the following corporate governance safeguards in place:

Board Audit Committee

An underlying assumption of SARBOX is that each corporate board will designate some of its members to constitute an "audit committee" for the purpose of overseeing the corporation's accounting procedures and financial reporting process. Only outside (independent) directors may sit on the audit committee. A key responsibility of the audit committee is to review company financial reports before they are filed with the SEC, which makes these filings available to the investing public through its EDGAR database. Although in the past, few top-level executives "signing off" on corporate financial statements paused to consider whether they were putting themselves at risk for charges of securities fraud, SARBOX makes it prudent for anyone in the position of vouching for the accuracy of a financial report to consider the possibility of being held criminally liable if the reports are subsequently found to contain inaccurate or misleading information. Violators of the securities laws are subject to heavy fines and imprisonment for up to 25 years under SARBOX-enhanced criminal sanctions.[7]

It should be noted that *securities fraud* does not require *scienter.* It is committed when one endorses company financial statements that contain material misstatements or omissions of fact that induce members of the public to purchase a company's stock or – as was the case with Enron – convinces current stockholders to continue holding a company's stock. Since SARBOX provides that the entire board will be designated as the audit committee where the board does not appoint one,[8] potential board members without financial or accounting expertise will be hesitant to join a board that has not already established an audit committee.

The audit committee has an additional function with respect to whistle blowing under SARBOX: it is designated as the top of the internal whistleblowing ladder for in-house or outside attorneys who have discovered corporate wrongdoing, such as misrepresentations or insufficient disclosures in company financial reports. Under the Code of Professional Responsibility for attorneys practicing before the SEC (adopted by the SEC under SARBOX mandate), attorneys are required to blow the whistle on corporate wrongdoing up the ladder to the audit committee, where satisfactory remedial action has not been taken after an attorney reports wrongdoing to those at the lower echelons of the corporate hierarchy.

"Financial Expert" on Audit Committee

Section 407 of SARBOX requires a company to disclose in its periodic financial reports whether the audit committee has one member who is a "financial expert," defined as someone with "an understanding of generally accepted accounting principles and financial statements." If there is no such financial expert on the audit committee, then a company must disclose the reasons why one has not been appointed. Of course, the need to disclose why an audit committee is operating without a financial expert is tantamount to a presumption that the presence of such an expert is necessary for an audit committee to function as intended. Clearly, where there are found to be material misrepresentations or omissions in a company's financial statements, the board that has failed to include among its members a financial expert (who may have discerned the errors and omissions) will be deemed to have been negligent.

Board Composed of Minimum of 75% Independent Directors

With either SARBOX or "best practices" mandating that key committees such as the audit committee, the nominating committee, and the compensation committee comprise only independent directors, it is difficult for the typical 12-person board to function where outside directors constitute less than 75% of its membership. Clearly,

the potential for conflict of interest rises exponentially where those evaluating the efficacy of management proposals are the very same individuals who developed the proposals and put them before the board!

Board With an Independent Chairman

Part and parcel of a board asserting control over its operations is that the company CEO does not call board meetings or set the agenda. Having a CEO in a position to insinuate himself or herself into all matters taken up by the board is contrary to the notion that the board is fulfilling its fiduciary obligation to the shareholders by keeping a critical eye on management (who is, after all, merely an agent of the shareholder owners). Where a company does not follow the practice of having a non-CEO Chair of the board, it should have a well-established policy of the board going into "executive session" in order to take up certain matters (such as evaluation of CEO performance) outside of the presence of the CEO. In this vein, the New York Stock Exchange has a rule requiring listed companies to hold regular meetings at which management is not present.

Ethics Program That Complies With U.S. Sentencing Guideline § 8B.2.1

U.S. Sentencing Guideline § 8B.2.1, added pursuant to a SARBOX directive, sets forth the requirements for an effective ethics program. An effective program will detect and prevent criminal conduct for which a listed company would be vicariously liable and thus subject to fines and other penalties – such as delisting or trading suspension. If a company has an ethics program in place that complies with the Guideline, it will not incur vicarious liability based upon the illegal acts of its employees in violation of the company's adopted ethics program. Therefore, having a § 8B.2.1 Ethics Program in place substantially reduces the likelihood that directors will become defendants in shareholder lawsuits based upon the misdeeds of company employees. Notably, adoption of a whistle-blowing system is an integral part of the "Compliance and Ethics Program" model set forth in Guideline § 8B.2.1. Thus, a company must have a well-publicized whistle-blowing policy in place in order to reap the benefits of the § 8B.2 safe harbor provision. In addition, the company ethics officer should be a person of significant rank within the corporate hierarchy in order to establish the corporation's commitment to its ethics program.

Open Lines of Communication Between Board and Stockholders

The post-SARBOX board dare not rely solely upon management to convey shareholder concerns. Again, the New York Stock Exchange has set the standard for open communication between shareholders and the board. Since 2003, the Exchange has required listed companies to provide shareholders and "other interested parties" (*e.g.*, outside whistle-blowers) with contact information for the board of directors.

Open Lines of Communication Between Board and Employees

The SARBOX-savvy executive will not join a board if the company restricts the board's access to employees. Walking around the plant floor is an excellent way for board members to acquire first-hand knowledge of the operations for which they are providing oversight. As the corporation's governing authority, the board is the last stop on the whistle-blowing ladder. Thus, it may be assumed that the pathway has been cleared for employees to get the ear of the board where whistle-blowing to individuals lower in the corporate hierarchy has not resulted in appropriate remedial action. However, this is one-way communication that occurs after-the-fact; *i.e.*, problems have already become critical and are therefore much harder to resolve. Far better to maintain open lines of communication and thereby create a situation in which the board can troubleshoot problems before they get out of hand – problems that management might consider too insignificant to put before the full board. (Typically, these "routine difficulties" are handled with internal memos and e-mail correspondence that later surface at the who-knew-what-and-when stage of congressional hearings.)

Board Budget for Consultants

Where the board is acting in areas in which it lacks expertise, such as evaluating a management proposal for incentive bonuses, the board is well advised to utilize outside consultants for advice. As an example, Fannie Mae recently came under fire for accounting violations that resulted in an overstatement of its profits for the period 1998 through 2004. During the investigation of these accounting irregularities, low-level accounting personnel testified that they felt pressured into straying from generally accepted accounting principles (GAAP) in order to report financial results that "hit" the projected profit lev-

An effective ethics program detects and prevents criminal conduct for which a listed company would be vicariously liable.

els necessary for top executives to receive their bonuses.[9] This type of systemic failure illustrates the importance of the board ascertaining beforehand that a bonus structure does not motivate undesirable behavior on the part of bonus candidates and those under their supervision. Structuring compensation packages is an area rife with minefields, as recent options-backdating scandals reveal. Therefore, the prudent board will want to seek outside counsel before approving executive compensation plans.

Since calling in an outside pay consultant is the expected board *modus operandi* when negotiating a CEO's compensation package, getting management to allocate funds to the board for this purpose should not be a problem. However, management may resist if the board also requests that funds be allocated in order for it to consult with its own outside legal counsel at this stage. Yet, in view of the recent rash of board CEO firings, it is clearly advisable for the board to negotiate an exit package in conjunction with the hiring of a new CEO. Otherwise, the sacked CEO could be exiting with sums ranging from $20 million–$40 million to assuage a wounded ego, as several CEOs have recently.[10] Companies can assure potential board members that they will not be hampered in carrying out their due diligence obligations (even where the board is seeking a second opinion on a management proposal) by giving the board its own annual budget, one that it can allocate as it deems necessary to fulfill its fiduciary role.

Code of Ethics for Senior Financial Officers

Although § 406 of SARBOX makes adoption of a code of ethics for senior financial officers optional, it is unlikely that a company without such a code could manage to attract highly sought-after executives to its board. Section 406 requires the company without a code of ethics for its senior financial officers to state in its filed financial reports why it has not adopted such a code. One can only speculate what palatable reason a company could give for letting its senior financial officers operate in an ethical abyss. One cannot even speculate as to who would willingly join the board of such a company.

Conflict of Interest Review Procedure

There is a strong likelihood that a non-insider executive being courted for a board position has a previous history with the suitor company. The executive may be in the employ of (or the owner of) an organization that is a supplier, banker, or customer of the suitor company. Or, it may be that the executive is a personal friend of the CEO, someone in management, or an acquaintance of some other member of the board. Whatever the previous relationship, the potential for benefiting from the new role as a board member is ever present and, therefore, the prudent executive will want to protect herself or himself from conflicts of interest and self-dealing controversies down the line, as these would constitute a breach of fiduciary duty to the company's shareholders. The best protection against conflict-of-interest situations is for the board to have an established system of periodic conflict-of-interest checks for board members (*e.g.*, self-completed questionnaires) that take place at established intervals throughout the year. Moreover, there must be an unequivocal across-the-board policy prohibiting business dealings between the company and its board members or with any companies with which the board members are affiliated.[11]

Conclusion

SARBOX is both praised and cursed as the legacy of Enron & Progeny. As we approach the fifth year of the SARBOX-changed corporate milieu, rumblings of "regulation overkill" are being heard far and wide. And yet, even if a future Congress retreats on some of the mandated internal controls that have motivated the cries of legislative excess, this is unlikely to subdue the stream of oversight that ended the era of the rubber-stamp board. Perhaps this is as good a legacy as any. ■

1. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

2. To illustrate, SARBOX targets securities analysts, brokers and dealers in Title V; chief executive officers and chief financial officers in Title IX; attorneys, officers and directors in Title III; board audit committees in Title II; investment banks and financial advisers in Title VII; and external auditors in Title VIII.

3. SARBOX amended the U.S.C. by adding a new section, titled "Securities Fraud." *See* Pub. L. No. 107-204, 116 Stat. 745, § 807 (codified as amended at 18 U.S.C. § 1348).

4. U.S. Sentencing Guideline § 8B2.1, added by SARBOX, provides that the "governing authority" of a corporation is "(A) the Board of Directors; or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization." U.S. Sentencing Guidelines Commentary, § 8B2.1 (2004).

5. SARBOX, § 805(a)(5) (emphasis added).

6. Monica Langley, *GM Tensions Erupt as Kerkorian Ally Quits as Director*, Wall St. J., Oct. 7, 2006, at 1.

7. 18 U.S.C. § 1348 *amended by* SARBOX § 807.

8. "(B) if no such committee exists with respect to an issuer, the entire board of directors of the issuer." SARBOX § 2(a)(3)(B). Note, however, that where an audit committee exists, it is to be composed only of outside directors. Should this be interpreted as precluding inside directors from becoming de facto members of the audit committee when the entire board is designated as the audit committee because the board does not have a specified audit committee?

9. Office of Federal Housing Enterprise Oversight, *Report of the Special Examination of Fannie Mae* (May 2006) *available at* <http://online.wsj.com/public/resources/documents/ofheo20060523.pdf>.

10. For instance, a panel of arbitrators recently determined that Massachusetts Mutual Life Insurance Co. must pay $40 million to fired CEO Robert J. O'Connell because the CEO's actions, although questionable, did not amount to willful gross misconduct. In another example, a jury determined that Metris Co. should pay fired CEO Ron Zebeck $30.2 million. Joann S. Lublin, *How to Fire a CEO*, Wall St. J., Oct. 30, 2006, at B1, B3.

11. Staying on top of conflict-of-interest situations is extremely important. In 2005, more than half of the board members of the University of Medicine and Dentistry of New Jersey (UMDNJ) were forced to resign after acting Governor Richard Codey signed Exec. Order No. 65 (Nov. 2005) prohibiting anyone transacting business with a New Jersey State college from sitting on that institution's governing board. *No College Trustee Conflicts*, Star-Ledger, Nov. 19, 2005.

Frye Meets *Parker* and the Effect on Toxic Exposure Cases

By Dwight A. Kern and Robert J. Kenney, Jr.

The recent rise in toxic exposure lawsuits has renewed the dialogue about an old friend. The *Frye* "general acceptance" admissibility standard,[1] first shaped in 1923, created the initial "court as the gatekeeper" function that reigned for almost three-quarters of a century. The U.S. Supreme Court redefined the gatekeeper role in its 1993 *Daubert* decision, obliging federal courts to follow a new standard.[2] State courts, however, were left to decide whether to switch to *Daubert* or stay with *Frye*. Since that watershed moment, several states have continued their reverence to *Frye*.[3] Other states have chosen to follow *Daubert* or a combination of the two.

Gatekeeping Under *Frye* and *Daubert*

Daubert scholars have watched closely for interpretation and further definition of the new standard in the years that have followed. But *Frye* also has continued to evolve within the various jurisdictions that continue to follow it, often resulting in different tests for different expert testimony. This is especially true in cases alleging injuries from exposure to toxic substances.

Some *Frye* states have kept a strict interpretation of *Frye*, while others have allowed *Daubert* principles to creep into the analysis. Lawyers favoring *Daubert* have inspired this phenomenon through their continuous attempts to push *Daubert* standards into *Frye* jurisdictions.[4]

Frye requires courts to determine whether the basis of a proposed expert's opinion has gained sufficient *general acceptance* in a particular scientific field to be considered reliable and, thus, admissible at trial.[5] If the proponent

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of the opinion cannot establish general acceptance, then the expert may not convey the opinion at trial. Although this standard is noticeably strict, *Frye* jurisdictions allow reasonable means for parties to get their experts on the stand. As a New York intermediate appellate court acknowledged in *Parker v. Mobil Oil Corp.*,[6] the party proposing an expert's testimony can demonstrate general acceptance "through scientific or legal writings, judicial opinions, or expert opinions other than that of the proffered expert."[7]

While under *Daubert*, federal courts and *Daubert* state jurisdictions must still act as gatekeepers, they have altered that function in keeping with the Supreme Court's directive. According to *Daubert*, Congress intended to replace *Frye* with Rule 702 of the Federal Rules of Evidence. *Daubert* thus softened the expert admissibility standard in accordance with Rule 702, finding that the rule placed appropriate limits on the admissibility of expert testimony.[8] The *Daubert* Court focused on relevance and reliability, rather than on what the scientific community thought about a particular opinion or methodology.

In requiring courts to ensure "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand," *Daubert* outlined a number of factors for U.S. District Courts to consider when determining reliability. Those factors are: (1) whether a theory or technique "can be (and has been) tested," (2) "whether the theory or technique has been subjected to peer review and publication," (3) "a technique's known or potential rate of error," and "the existence and maintenance of standards controlling the technique's operation," and (4) whether a particular technique or theory has gained "general acceptance" in the relevant scientific community.[9] Thus, the more flexible *Daubert* test demoted the *Frye* "general acceptance" standard to just one of several admissibility components for expert testimony.

The main difference then between *Frye* and *Daubert* is that *Frye* courts do not determine reliability, but rather look to the scientific community for consensus on the expert's method. In contrast, *Daubert* courts make a reliability determination based on the soundness of the method as established through consideration of various factors. Another difference between *Frye* and *Daubert* is that, under *Frye*, courts are required to conduct the general acceptance inquiry only when a party seeks to rely upon novel scientific, technical or other expert concepts. Thus, where the general community or courts accept that a scientific or technical idea is well established, a *Frye* determination is not necessary.

For example, courts have determined that injury from exposure to lead-based paint is not a sufficiently novel theory of liability to trigger a *Frye* hearing.[10] Similarly, since courts consider the link between asbestos exposure and mesothelioma to be well documented, such a theory normally would not require a *Frye* analysis.[11] But a *Frye* determination may be necessary in limited situations, such as when an expert is called to determine whether a plaintiff's presence at a particular job location caused or contributed to his mesothelioma.[12]

On the other hand, the developing environmental and industrial exposure litigation involves many novel medical causation issues that are ripe for *Frye* review. The scientific community has not yet established a substantial nexus between many substances and injuries related to the litigation. Indeed, many plaintiffs have attempted to proffer expert witnesses who use unsubstantiated hypotheses or pure speculation as the bases for their opinions. This practice has resulted in successful *Frye* challenges.

Parker v. Mobil Oil Corp.

This trend is well illustrated by the *Parker* case in New York. In *Parker*, the plaintiff alleged that he developed acute myelogenus leukemia from 17 years of occupational exposure to gasoline containing benzene while he worked as a gas station attendant. The plaintiff intended to call causation experts without presenting evidence of the concentration level of benzene in the gasoline at the station. The experts employed no other methodology to establish the plaintiff's benzene exposure level. The defendants moved to preclude the plaintiff's experts under *Frye* and for summary judgment since the plaintiff's case would be meritless without expert testimony to establish causation. The trial court denied the defendants' motions and the defendants appealed. The Supreme Court of the State of New York, Appellate Division, Second Department reversed the trial court's decision and granted summary judgment to the defendants.

> The more flexible *Daubert* test demoted the *Frye* "general acceptance" standard.

In doing so, the Second Department recognized as scientifically reliable under *Frye* a three-step methodology recommended by the World Health Organization and the National Academy of Sciences. The procedure requires (1) proof of the plaintiff's level of exposure to the substance in question; (2) proof from a review of the scientific literature that the substance is capable of producing the illness (general causation) and the exposure level at which it will produce that illness (dose-response relationship or threshold); and (3) proof that the plaintiff's exposure to the substance likely caused the illness and an elimination of other possible causes (specific causation).

Far from meeting these requirements, the plaintiff's experts in *Parker* merely stated that the plaintiff's illness

was caused by "extensive" exposure to gasoline and that the plaintiff had an "abundant opportunity for exposure to benzene" and "ample opportunity for percutaneous exposure to benzene." The plaintiff's experts then attempted to link these very general statements to a study of oil refinery workers that found a relationship between increased levels of benzene exposure and leukemia. In doing so, the experts concluded that the plaintiff had "far more exposure to benzene" than the oil workers.

The *Parker* court reversed the trial court and dismissed the case, finding that the proposed experts' opinions were speculative because they (1) did not articulate with any specificity the plaintiff's benzene exposure level, (2) did not quantify the dose-response relationship between benzene and acute myelogenus leukemia and (3) did not address the specific causation in any fashion.

Parker, *Zaslowsky* and *Nonnon*

New York appellate courts have since differed on the application of the *Parker* test. In February 2006, the Appellate Division, Second Department upheld *Parker* in *Zaslowsky v. J.M. Dennis Construction Co.*[13] The plaintiff in *Zaslowsky* alleged that exposure to natural gas from a punctured gas line caused him neurocognitive dysfunction, asthma and respiratory problems. Citing *Parker*, the *Zaslowsky* court accepted the scientific reliability of the three-step analysis noted above; in doing so, the Second Department found that "there was no causal connection between the [*sic*] gas leak and the plaintiff's injuries."[14]

The Appellate Division, First Department has been hesitant to apply this rule. This reluctance was demonstrated by the First Department's June 2006 three-to-two split decision in *Nonnon v. City of New York*.[15] The *Nonnon* plaintiffs alleged that while living in the vicinity of an inactive New York City landfill for 16 years, they were exposed to carcinogens. The majority found that because epidemiology and toxicology, which the experts relied upon for their opinions, were not novel methodologies, a *Frye* determination was not warranted. The *Nonnon* court also distinguished its case from *Parker* saying that *Nonnon* "arose from a community with a disproportionate incidence of" disease near a massive toxic exposure site, not one plaintiff alleging his cancer was caused by exposure to one carcinogen from one source.[16] Thus, the court found the *Parker* test inapplicable because it was impossible to accurately measure all of the alleged carcinogens to establish the various plaintiffs' levels of exposure to them.

The dissenting judges saw *Parker* as "a case directly on point," arguing that the plaintiffs' experts had "failed to use generally accepted scientific methodology." The minority found the experts' conclusions speculative, "given the absence of any data, any reference to scientific authority or treatises, or other corroborating evidence."[17]

New York and other *Frye* courts have gone beyond the *Parker* debate, endorsing additional methodologies to establish medical causation in toxic exposure cases.[18] For example, a Florida court recently ruled that differential diagnosis is an acceptable methodology under *Frye*. Differential diagnosis is the process of eliminating potential causes until reaching one that cannot be ruled out or, if more than one cause remain, determining which of those that cannot be excluded is the most likely.[19]

> The current struggle over *Frye*'s modern application is every bit as important as the *Daubert* evolution.

Frye courts also may look to various forms of extrapolation that are considered generally accepted scientific methodologies. For instance, in a Pennsylvania case, *Trach v. J. Fellin*,[20] the plaintiff's expert relied upon clinical experience and clinical trials documented in the *Physician's Desk Reference* and product manufacturer's insert, to deduce that a massive overdose of Doxepin caused the plaintiff's acute symptoms. The *Trach* court held that the plaintiff's expert could logically infer that Doxepin's known side effects at the recommended dose would be heightened if taken in a significantly higher dose.[21] Thus, according to *Trach*, the combination of dose-response and extrapolation are generally accepted methodologies in the scientific community.[22] But the court also warned that extrapolation is only generally accepted in narrow circumstances such as when (1) the medical inquiry is new or the opportunities to examine a specific cause-and-effect relationship are limited, (2) the number of cases limits study of the disease or (3) ethical considerations prevent exposing individuals to a toxic substance for research purposes.

The Court of Appeals Rules on *Parker*

The New York Court of Appeals furthered this idea in its recent affirmation of *Parker*.[23] The Court agreed that the three-step analysis – showing a plaintiff's exposure, general causation and specific causation – was still necessary.[24] But, the Court differed from the Second Department in finding that dose-response is not required

to meet the test and that *Frye* does not necessarily oblige experts to "quantify exposure levels precisely." According to the Court of Appeals, experts can establish chemical exposure causation in many ways, "provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community."[25] Consistent with the Pennsylvania court's decision in *Trach*, the Court of Appeals sustained the use of extrapolation methods such as differential diagnosis, mathematical modeling, and qualitative reasoning for causation opinions. The Court also found that comparative studies would be appropriate – so long as the experts using them could show how the plaintiff's exposure related to the subjects in the studies.[26]

When the Court turned to the facts in *Parker,* it carried the analysis beyond *Frye*, framing the issue as "whether [the experts] provided a reliable causation opinion without using a dose-response relationship and without quantifying [the plaintiff's] exposure."[27] Thus, the Court saw the issue as one of foundation, not whether the methodology was acceptable in the scientific community. The Court of Appeals did not conduct a *Frye* analysis because the experts did not use novel methodology.[28]

The Court of Appeals found that the Second Department properly excluded the opinion of the plaintiff's first expert, a toxicologist and epidemiologist, because the expert failed to demonstrate that exposure to benzene as a component of gasoline caused the plaintiff's acute myelogenus leukemia (AML). This expert's citation to an epidemiological study of refinery workers was insufficient to establish causation. While claiming that the plaintiff had "far more exposure to benzene" than the refinery workers, the expert did not establish the worker's exposure level or how the plaintiff exceeded it. Thus, the plaintiff's first expert failed to support his conclusory statement, necessary for a proper foundation.[29]

Likewise, the plaintiff's second expert, a medical doctor specializing in occupational medicine and epidemiology, failed to back up his claims that the plaintiff frequently was exposed to excessive quantities of both liquid and vapor gasoline. Even though "an expert is not required to pinpoint exposure with complete precision," the expert's statement could not "be characterized as a scientific expression of . . . exposure level" at all.[30] Thus, the Second Department's exclusion of the plaintiff's second expert's testimony also was proper.

Both experts failed to look at the plaintiff's alleged exposure to benzene as a component of gasoline (as opposed to benzene either by itself or in some other compound). Neither expert cited to studies to establish a relationship between gasoline exposure and AML. Thus, their opinions lacked foundation and it was right to exclude them. On this basis, the Court of Appeals affirmed the Second Department's decision in *Parker*.

Conclusion

Wide speculation is developing that *Parker* may signal a transition to the *Daubert* standard or a hybrid analysis in New York because of the Court's statement that *Daubert* cases were "instructive." But, that is unlikely. The *Parker* Court pointed to *Daubert* decisions only in its analysis related to the established reliability of expert methodologies. The general acceptance of an expert's methodology – the test under *Frye* – remains one prong of the *Daubert* test. Thus, it was appropriate for the Court to look to those cases when addressing the *Frye* test. As the *Parker* Court shows, New York remains a *Frye* state. As a result, the general acceptance standard, first set out in *Frye*, is still the test in New York, as it is in many other states.

The current struggle over *Frye*'s modern application is every bit as important as the *Daubert* evolution. More and more, courts have recognized that reining in the *Frye* analysis is a necessary element of their gatekeeper function. Consistent with this development, courts in many *Frye* jurisdictions have continued to strike experts and grant summary judgment where plaintiffs cannot establish a causal connection between alleged exposure and injury. Defendants have succeeded under *Frye* by showing that courts have either rejected or simply not yet accepted an expert's methodology, by submitting defense expert statements that the methodology is not generally accepted or by distinguishing the methodology from those that have been accepted by courts.[31] The *Parker* foundation analysis has added to defendants' arsenal by better defining the weapons they can use to exclude experts, even when they meet the *Frye* test.

Parker is not the final word on this battleground. Courts now will grapple with *Parker*'s application both inside and outside New York. Experts will continue to present novel theories. And, *Frye*, like *Daubert*, will continue to evolve. But, as the recent cases demonstrate, this evolution contemplates *Frye*'s survival. ■

1. *Frye v. United States*, 293 F. 1013 (1923).
2. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).
3. Arizona, California, Florida, Illinois, Kansas, Maryland, Missouri, New York, North Dakota, Pennsylvania, Washington and District of Columbia are *Frye* jurisdictions.
4. *See DeMeyer v. Advantage Auto*, 9 Misc. 3d 306, 314–15, 797 N.Y.S.2d 743 (Sup. Ct., Wayne Co. 2005); *see also People v. Wesley*, 83 N.Y.2d 417, 422, 611 N.Y.S.2d 97 (1994).
5. *DeMeyer*, 9 Misc. 3d at 310.
6. 16 A.D.3d 648, 651, 793 N.Y.S.2d 434 (2d Dep't 2005).
7. *Id.* at 651 (citations omitted).
8. *Daubert*, 509 U.S. at 587–90.
9. *Id.* at 593–94.
10. *Munoz v. Puretz*, 301 A.D.2d 382, 383, 753 N.Y.S.2d 463 (1st Dep't 2003).
11. *Lustering v. AC&S, Inc.*, 13 A.D.3d 69, 786 N.Y.S.2d 20 (1st Dep't 2004); *Berger v. Amchem Prods.*, 13 Misc. 3d 335, 818 N.Y.S.2d 754 (Sup. Ct., N.Y. Co. 2006).
12. *DeMeyer*, 9 Misc. 3d at 317.

13. 26 A.D.3d 372, 810 N.Y.S.2d 484 (2d Dep't 2006).

14. *Id.* at 372.

15. 32 A.D.3d 91, 819 N.Y.S.2d 705 (1st Dep't 2006).

16. *Id.* at 106.

17. *Id.* at 124.

18. *DeMeyer*, 9 Misc. 3d at 312.

19. *U.S. Sugar Corp. v. G.J. Henson*, 823 So. 2d 104, 106 (Fla. 2002) (holding differential diagnosis, *inter alia*, to be generally accepted scientific methodology for connecting chronic exposure from chemicals in pesticides to a paralyzed phrenic nerve).

20. 817 A.2d 1102 (Pa. Super. Ct. 2003).

21. *Id.* at 1107.

22. *Id.* at 1118.

23. 7 N.Y.3d 434, 824 N.Y.S.2d 584 (2006).

24. *Id.* at 449–50.

25. *Id.* at 448.

26. *Id.*

27. *Id.* at 447.

28. *Id.*

29. *Id.* at 449.

30. *Id.*

31. *See Lewin v. County of Suffolk*, 18 A.D.3d 621, 795 N.Y.S.2d 659 (2d Dep't 2005) (*Frye* test applied where plaintiff claimed causal connection between birth defects and in utero exposure to pesticide Malathion); *Hooks v. Court St. Med.*, 15 A.D.3d 544, 790 N.Y.S.2d 679 (2d Dep't 2005) (holding that expert opinion relying primarily upon fact that plaintiff exhibited symptoms after the alleged malpractice occurred was insufficient under the *Frye* test and the expert's failure to cite to any scientific data of studies showing a causal link between the alleged product misuse and the injury subjected action to dismissal); *Selig v. Pfizer, Inc.*, 290 A.D.2d 319, 735 N.Y.S.2d 549 (1st Dep't 2002) (*Frye* test applied and case dismissed where no causal connection was established between heart attacks in men with preexisting coronary artery disease and use of the drug Viagra); *Kaczor v. Vanchem, Inc.*, 262 A.D.2d 1041, 691 N.Y.S.2d 831 (4th Dep't 1999) (finding that expert's opinion that elevated liver enzyme levels may have been caused by alleged chemical exposure had no basis and was properly dismissed); *Kracker v. Spartan Chem. Co.*, 183 A.D.2d 810, 585 N.Y.S.2d 216 (2d Dep't 1992) (holding that lack of medical or scientific evidence that cleaning product could have caused fatal illness required dismissal of complaint); *Lofgren v. Motorola, Inc.*, No. CV93-05521, 1998 WL 299925 (Ariz. Super. June 1, 1998) (finding plaintiffs' experts' novel theories as to a causal relationship between low-level to TCE exposures and the various diseases which are the subject of the suit are not generally accepted in any relevant scientific community and are predicated on unscientific and flawed methodologies); *Geffcken v. D'Andrea*, 41 Cal. Rptr. 3d 80 (2006) (dismissing mold exposure case where plaintiff's immunosciences mycotoxin antibody test had not gained general acceptance in the relevant scientific community); *Bernardoni v. Indus. Comm'n*, 840 N.E.2d 300 (Ill. App. Ct. 2006) (dismissing claim where plaintiff failed to demonstrate that multiple chemical sensitivity (MCS) was a generally accepted syndrome in the medical community); *Ruff v. Dep't of Labor & Indus. of State of Wash.*, 28 P.3d 1 (Wash. Ct. App. 2001) (dismissing claim for porphyria allegedly caused by a reaction to chemicals in claimant's workplace because claimant's tests and theory were not generally accepted in medical community rendering any testimony pertaining to them inadmissible).

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Expediting Permanency for Children With 588 Adoptions

By Ronald H. Cohen and Rachel Hahn

For many of the children in New York State's foster care system who cannot be reunited with their biological families, adoption is the goal. One strategy to expedite adoptions is through statutory mechanisms available pursuant to Chapter 588 of the Laws of New York.[1] Chapter 588 contains various statutory amendments to effect the Legislature's stated goal of expediting the adoption process.[2] However, this objective can only be achieved if the statutory provisions of 588 are properly implemented. This article discusses impediments to achieving expedited permanency, as well as guidelines for effective use of 588 in adoptions.

Chapter 588

The provisions in Chapter 588 can help expedite adoptions in two distinct ways. First, the amendments allow for the filing of an adoption petition and other required documentation (1) immediately upon the surrender of the child,[3] (2) upon entry of an order terminating parental rights,[4] or (3) while a termination case is pending.[5] Second, they allow for an adoption case to remain before the same judge who presides over the termination of parental rights (TPR) or surrender case. This is important because, when the adoption case is heard in a different county than the termination, or in the same county but before a different judge, the judge presiding over the adoption will not initially be familiar with the case history, the adoptive parent(s) or the child. In addition, the process of calendaring the adoption as a separate proceeding from the underlying termination – and before a different judge – causes another delay in achieving permanency.[6] In fact, on October 24, 2006, statutory amendments went into effect which codified the principle that it is preferable that all agency adoptions be filed before the same judge assigned to the related child protection matters ("One Family, One Judge").[7] Although the statute allows for choice of venue under limited circumstances, this does not apply to 588 adoptions, which "shall be filed in the county where the termination of parental rights proceeding or judicial surrender proceeding, as applicable, is pending and shall be assigned, wherever practicable, to the same judge."[8]

N.Y. Domestic Relations Law

Adoptions filed pursuant to Domestic Relations Law § 112(8) are unique in that they are filed before any free-

ing order is entered. Notably, the provisions in DRL § 112(8) give no direction as to circumstances which dictate the filing or timing of the filing of a petition beyond permitting it "while a termination is pending." In order to ensure that the filing of the adoption has no impact on any decision the judge might make in the termination matter, the statute prohibits the presiding judge from being aware of the adoption filing while the fact-finding in the termination is pending.[9] The adoption attorney files the adoption packet (with the exception of the TPR Order, Verified Schedule, and Affidavit Regarding Status of Appeal) while the termination is pending. The presiding judge should be notified of the filing of the adoption immediately after the oral ruling terminating parental rights, so the adoption can be calendared before that same judge.

Implementation of the provisions of DRL § 112(8) is discussed in a report titled *Accelerating Adoptions: The Chapter 588 Project*, which details a study conducted by New York City Families for Kids, a division of the Administration for Children's Services (ACS), in collaboration with New York University and funded by a multi-year grant from the W.K. Kellogg Foundation ("the Kellogg study").[10]

The Kellogg Study

The purpose of the Kellogg study was to determine whether the adoption process for children in foster care could be expedited by filing under Chapter 588, thus keeping a case in the same county, before the same judge, and on the court calendar from termination of parental rights through adoption.[11] The main criteria for cases included in the study were abandonment causes of action and cases which were not likely to be contested. A control group was established as well.

Project staff were assigned to complete the home studies and other required adoption documents. The staff also acted as a "communication link" between the agency, the court, the termination attorney, and the adoption attorney.[12] The Kellogg project staff was at all times aware of the status of both the adoption and the underlying case, ensuring there were no unnecessary delays between conclusion of the TPR, the calendaring the adoption, and finalization of the adoption.

The Kellogg study strongly demonstrated the significant usefulness of 588 in expediting permanency where the adoption attorney, with the assistance of the project staff, was continuously aware of the status of the underlying case. The study reported that 91 out of 119 cases in the service group (76%) proceeded from termination to final adoption in 4.44 months, median value (mean value: 4.69 months). Further, 24 of 119 cases (20%), which experienced some complication, proceeded to finalization in an average of 4.8 months, median value (mean value: 6.96 months). In total, 96% of these cases proceeded to finalization within approximately seven months. Conversely, 50 of 56 control cases proceeded to finalization in 21.61 months, median value (mean value: 21.2 months).[13] Adoptions in the service group were completed 17.2 months faster (median difference) when compared with the control group.[14]

The Kellogg study notes that this outcome resulted from the combination of filing under Chapter 588 and the dedicated project staff.[15] However, even with a statistical adjustment made to counter the effect of the staff, adoptions in the service group were completed on average 10.8 months faster (median difference) when compared to the control group.[16] Thus, the findings indicate that filing adoptions under Chapter 588, under the right circumstances, "did significantly shorten the time to adoption for children."[17]

Determining when it is appropriate to file a 588 adoption involves close consideration of the allegations in the termination case and its status.

When to File a 588 Adoption

Determining when it is appropriate to file a 588 adoption involves close consideration of the allegations in the termination case and the status of that case. While the allegations are an important component, it is just as critical to evaluate whether the case status will create a barrier to expediting the adoption. Barriers to completion of a termination case can include, among other things, service issues, contested proceedings (including matters that might ultimately result in suspended judgments), delays in filing proposed termination orders, and mental illness allegations.[18] The following examples demonstrate various courses that 588 adoptions may follow and provide analysis of how barriers can potentially affect expedited permanency.

Example 1

A TPR is filed on June 1, 2006. An adoption is filed on August 1, 2006. The sole allegation in the termination matter is abandonment. An inquest in the termination matter is held and the child is verbally freed for adoption on September 1, 2006. The court goes directly to disposition and petitioner's attorney is prepared that day with a proposed settlement

order. At disposition, petitioner's attorney advises the judge that an adoption has been filed pursuant to DRL § 112(8) and asks to have the matter calendared for finalization. The adoption is finalized on October 5, 2006, one month after the child was freed for adoption and two months after the adoption was filed.

This represents the ideal fact pattern for the filing of a 588 adoption. Barring unforeseen circumstances, a TPR proceeding where the sole allegation is abandonment can be fairly predictable in terms of the time frame for completion. An uncontested abandonment proceeding, once issue is joined, is virtually certain to be concluded in one or two court dates. In this example, the goal of expediting permanency was achieved.

Example 2

A TPR with allegations of permanent neglect is filed on December 15, 2005. The matter starts out contested but ultimately results in an inquest. The inquest is held on September 15, 2006. An adoption is filed on October 14, 2006 and the TPR order is also signed and entered on October 14, 2006. The adoption is finalized on December 15, 2006, two months after the child was freed for adoption and two months after the adoption was filed.

This is another example of the successful utilization of a 588 adoption. Unlike 588 adoptions which are filed while a termination case is pending (DRL § 112(8)), this adoption was instead filed upon entry of the order terminating parental rights (Social Services Law § 384(b)(11)). The adoption could have been filed while the termination was pending. However, because it started out as a contested matter, its conclusion was unpredictable. This barrier was ultimately removed and the adoption was filed shortly after the inquest, thus shortening the permanency time line.

Example 3

A TPR is filed on January 3, 2005. An adoption is filed on February 5, 2005. The allegations in the underlying termination matter include permanent neglect and mental illness. After issue is joined, the mother appears and contests the allegations. After a lengthy trial due to adjournments involving the production of records and expert testimony, parental rights are terminated on January 5, 2006, 11 months after the adoption was filed. The adoption is finalized on May 5, 2006, four months after the child was freed for adoption and 15 months after the adoption was filed.

Although this adoption was ultimately finalized, this is an example of improper use of a 588 adoption filing. Due to the nature of the allegations and the fact that the termination became contested, it did not conclude until 11 months after the adoption was filed. Significantly, by the time the termination matter was concluded, many documents in the adoption file were stale and had to be updated.

When deciding whether to file a 588 adoption, it is essential that the adoption attorney understand the status of the underlying termination matter.[19] Where the allegations are such that a lengthy trial may ensue, a 588 adoption filing is inappropriate in most cases. In Example 3, although the adoption was eventually finalized, the goal of expedited permanency was not achieved. The adop-

Recommendations

The goal of the expedited 588 adoption procedure can only be achieved if the procedure is utilized properly. The following are recommendations for effective use of 588 adoptions which can in turn assist in expediting permanency.

1. Before filing a 588 adoption, the adoption attorney should be in close contact with the attorney on the underlying termination matter.

2. Before filing a 588 adoption, the adoption attorney should analyze the allegations in the underlying termination matter and know the posture of the underlying case.

3. Under appropriate circumstances, the adoption attorney should file a 588 adoption. After filing, and in particular after the conclusion of the termination matter, the adoption attorney should expeditiously provide to the court those documents which remain outstanding (Termination Order, Verified Schedule, and Affidavit Regarding Status of Appeal).

4. After filing a 588 adoption, the adoption attorney should maintain close contact with the adoption and permanency court staff, as well as with the attorney on the termination matter.

5. When the adoption is filed pursuant to DRL § 112(8), the adoption attorney should ensure that the attorney in the underlying termination matter informs the judge at the conclusion of the fact finding that a 588 adoption is pending, so that the adoption can be calendared.

6. If the adoption cannot proceed expeditiously because the underlying case is still pending and documents in the adoption become outdated, the adoption should be withdrawn or dismissed and re-filed under appropriate circumstances.

tion attorney must track the course of the termination. The attorney in this instance could have determined that the adoption was not finalized expeditiously, withdrawn the adoption and re-filed at the appropriate time.

Example 4

A TPR is filed on January 15, 2005. An adoption is filed on March 11, 2005. Permanent neglect against the respondent mother is the sole allegation in the underlying termination matter. The proceeding is contested and results initially after trial in a finding with a suspended judgment on August 6, 2005. Ultimately, the suspended judgment fails and the respondent mother's parental rights are terminated. The order is signed on September 11, 2006. The adoption is finalized on January 13, 2007, four months after the child was freed for adoption and almost two years after the adoption was filed.

> When appropriately filed, a 588 adoption is an effective tool in expediting permanency.

Several problems are apparent in this 588 filing. First, the termination matter was contested and thereby its conclusion was unpredictable. Second, the matter resulted in a suspended judgment. Once it was established that a suspended judgment was entered and the child was not freed for adoption, the adoption attorney should have withdrawn the adoption. This again reinforces the importance of the adoption attorney tracking the termination case.

Example 5

A TPR is filed on February 1, 2005. An adoption is filed on December 15, 2005. The sole allegation in the petition is permanent neglect against the respondent mother. The matter is contested by the respondent mother. On February 15, 2006, the sixth court date, a finding is entered upon the mother's admission. A Suspended Judgment is entered against the respondent mother and an order signed on April 15, 2006. On May 15, 2006, the adoption is withdrawn by the adoption attorney.

This case, although it did not result in expedited permanency, represents an example of appropriate action taken by the adoption attorney when it became apparent that no adoption could take place. In this example, the adoption would have been filed at a time calculated to result in expedited permanency had the underlying case resulted in termination of the respondent mother's parental rights. However, in this instance the child was not freed for adoption and the attorney withdrew the matter.

Example 6

A termination petition alleging permanent neglect is filed on January 11, 2006. An adoption is filed on May 30, 2006. The termination matter is contested. After a trial, the child is verbally freed on May 15, 2006. However, no settlement order is submitted by the attorney in the termination case until August 5, 2006, which order is rejected. A subsequent order is submitted and signed on November 15, 2006, six months after the verbal freeing. The adoption is finalized on February 4, 2007, eight months after the child was freed for adoption and nine months after the adoption was filed.

In this example, the filing of the 588 adoption after the child was verbally freed appears to have been an appropriate utilization of the expedited adoption process. The proposed TPR Order with Notice of Settlement should have been filed within 14 days of the verbal freeing. The fact that this was a contested permanent neglect matter was not a barrier to expedited adoption due to the filing of the adoption after verbal freeing. However, the termination attorney, by delaying the submission of the proposed settlement order, compounded by the fact that the order had to be resettled, created additional barriers. Communication between the attorney on the termination and the attorney on the adoption is vital to successfully expediting an adoption. The adoption attorney's failure to withdraw the adoption after the termination order was not timely submitted and had to be resettled, which resulted in the adoption documents becoming stale, led to further delay in this adoption.

Example 7

A TPR is filed on September 1, 2003. The sole allegation in the petition is permanent neglect against the respondent parents. The respondent father is incarcerated, and does not appear until the fifth court date on May 24, 2004. Over the next year, the TPR is delayed as the respondent father is not produced on five consecutive court dates. An adoption is filed on November 30, 2004. The TPR matter is ultimately withdrawn as to the respondent father upon his surrender of parental rights on May 14, 2005. A finding of permanent neglect is made as to the mother on September 15, 2005, and the order is signed on October 30, 2005. The adoption is finalized on March 1, 2006, five months after the child was freed for adoption and 16 months after the adoption was filed.

One barrier that can affect the timing of the conclusion of a TPR matter is the incarceration of a respondent parent. Difficulties associated with the production of incarcerated parties can often result in multiple adjournments. In addition, there was a missed opportunity to do more to expedite permanency. Upon the signing of the TPR Order, the adoption file should have been complete and up to date, requiring only submission of a certified copy of the TPR Order, Verified Schedule, and Affidavit Regarding Status of Appeal on or about December 1, 2005. The adoption should not have lingered for an additional five months after the signing of the TPR Order.

Conclusion

In conclusion, when appropriately filed, after careful consideration of the status and nature of the underlying termination matter, a 588 adoption is an effective tool in expediting permanency. The agencies must evaluate the cases and inform adoptive parents about expedited procedures, when they are appropriate, including advising them that they will need an adoption attorney to proceed. An adoption attorney, before filing a 588 case, must first know and understand the posture of the termination case to determine if and when it is appropriate to file the adoption petition. If the adoption is filed too far in advance of the conclusion of the termination matter, certain required documents will become outdated and will need to be updated prior to finalization of the adoption, resulting in delays and redundant work by the adoption attorney and agency. Upon filing the adoption, the adoption attorney must sign and submit an "Affirmation of Readiness," affirming that he or she has reviewed the matter and all paperwork being filed with the packet.[20] Only after the attorney has in fact conducted a diligent review of the matter and determined that it is appropriate for filing under Chapter 588 should that adoption be filed as such.

The ideal situation for filing a 588 adoption occurs where there is a sole allegation of abandonment in the termination of parental rights case and the case is not likely to be contested. The time line for such a case is relatively short and predictable. Conversely, 588 adoptions should not be filed while a TPR is pending and the timing of the conclusion of the termination case cannot possibly be predicted. However, every termination matter nearing certain conclusion should be evaluated to determine whether a 588 adoption could be filed to expedite permanency for the subject child. The allegations in the termination matter and the status of the case must be considered by the adoption attorney in deciding whether to file under 588 and, if so, when to file. Every case must be considered on its own facts. ■

1. *See* 1991 N.Y. Laws ch. 588.

2. *See* Legis. Ann., Reg. Sess., Memorandum in Support by Assemb. Vann, at 320 (N.Y. 1991).

3. N.Y. Social Services Law § 383-c(10)(a) (SSL).

4. SSL § 384-b(11).

5. N.Y. Domestic Relations Law § 112(8) (DRL).

6. Trudy Festinger & Rachel Pratt, *Speeding Adoptions: An Evaluation of the Effects of Judicial Continuity*, 26 Soc. Work Research, vol. 4 (Dec. 2002).

7. DRL § 113(3)(b)(ii); 2006 N.Y. Laws ch. 185.

8. DRL § 113(3)(b)(i).

9. DRL § 112, Scheinkman, McKinney's Practice Commentary DRL § 112 (1999).

10. *See* Trudy Festinger & Rachel Pratt, *Accelerating Adoption: The Chapter 588 Project* (Administration for Children's Services 2000).

11. *Id.* at 1.

12. *Id.* at 5.

13. *Id.* at 14.

14. *Id.* at 15.

15. *Id.*

16. *Id.*

17. *Id.* at 1.

18. Barriers to Completion of Underlying Termination of Parental Rights Case:

> Contested Proceedings – matters contested by one or more of the respondents where the ongoing nature of a contested proceeding results in the case being conducted over a long period of time.
>
> Contested Proceedings that result in a Suspended Judgment – numerous adjournments for negotiations regarding conditions of a Suspended Judgment. If a Suspended Judgment is entered, the child is not free for adoption.
>
> Incarceration – one or more respondent(s) are incarcerated at the outset or during the course of a termination case. The failure of respondents to be produced causes delays.
>
> Service Issues – failure of the petitioner to promptly serve process on the respondent(s), or other party or parties upon whom service is required. These cases can be subjected to significant delays, for example, while petitioners endeavor to meet diligent search requirements for authorization to serve by publication.
>
> Attorney Delay (order not timely submitted) – attorney's failure to submit a proposed order, on Notice of Settlement, within 14 days of the verbal freeing of the child, or where the order must be re-settled.
>
> Court Delay – a TPR order is not timely signed.
>
> Delay Caused by the Need to Obtain Necessary Documents – delays due to the need to obtain certain necessary documents such as death and birth certificates.
>
> Mental Illness Allegation – delays due to production and review of medical records and testimony of experts.

19. The examples herein assume that the adoption attorney is not the attorney on the underlying termination case. Effective June 1, 2007, SSL § 374(6) will prohibit an attorney from representing both the authorized agency and the adoptive parents. The issue of dual representation is discussed in *In re Adoption of Gustavo G.*, 9 A.D.3d 102, 776 N.Y.S.2d 15 (1st Dep't 2004), where the appellate court held that the family court applied an unjustified per se disqualification rule of petitioner's attorney who had also represented the agency in the termination matter, and that in the instant case, the record showed that adoption was in the child's best interests. But see *In re Adoption of A. & Another, Infants*, 189 Misc. 2d 500, 733 N.Y.S.2d 571 (Fam. Ct., Queens Co. 2001), wherein the court held that "such dual representation presents an inherent conflict of interest and is thus inappropriate" (citing *In re Adoption of Vincent*, 158 Misc. 2d 942, 602 N.Y.S.2d 303 (Fam. Ct., N.Y. Co. 1993); *and* N.Y. St. B. Ass'n Committee on Professional Ethics Op. 708 (1998)).

20. DRL § 112-a(1).

The Need for Campaign Finance Reform in New York

By Justin S. Teff

Avella v. Batt[1] sounded the death knell for New York Election Law § 2-126. Section 2-126 forbade political parties from spending any money "in aid of the designation or nomination of any person to be voted for at a primary election . . . "; its purpose was to ensure party members equal opportunity at the primary.[2] The court determined in *Avella* that the prohibition is not sufficiently tailored to survive exacting First Amendment scrutiny. Though the decision is consistent with United States Supreme Court campaign finance jurisprudence, the result highlights the need in New York for reform that will withstand constitutional challenge.

Avella v. Batt

The facts in *Avella* arose from the contentious 2004 race for the Albany County District Attorney seat – in particular, the Democratic primary election contest between incumbent Paul Clyne and challenger David Soares.[3] During the primary season, the Working Families Party (WFP) expended $121,776.91 to promote the Soares candidacy.[4] Suit was instituted in Albany County Supreme Court by other party leaders requesting that the WFP be held in violation of § 2-126. The WFP responded that the statute was an unconstitutional burden on its First Amendment rights of free speech and association. The supreme court declared the WFP in violation and, relying on earlier New York decisional law, dismissed the assertion of unconstitutionality.[5]

The Appellate Division reversed and determined Election Law § 2-126 as written to be invalid. The rationale follows from the U.S. Supreme Court precedent established with *Buckley v. Valeo*,[6] the formative case in modern campaign finance law, and most recently reiterated in *Randall v. Sorrell*.[7] This line of cases considers the constitutionality of various federal and state campaign finance regulations and displays the current framework for examination of such laws. Most generally, the decisions instruct that political expression and association, of which contributions and expenditures are kinds, are fundamental First Amendment activities entitled to substantial protection. Any viable regulation in New York will need to be consistent with the *Buckley* line.

Campaign Finance Parameters

Buckley v. Valeo involved a challenge to the 1971 Federal Election Campaign Act (FECA) and 1974 amendments.[8] The reform-minded statute included: limitations on contributions to and expenditures by candidates and campaigns for federal office;[9] financial disclosure and reporting requirements;[10] additional public financing options in presidential campaigns;[11] and the creation of the Federal Election Commission (FEC) as a monitoring and enforcement mechanism.[12]

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The U.S. Supreme Court upheld the challenged contribution limits while striking down those on expenditures. The decision acknowledged that, in the context of modern campaigns, large sums of money are required to access most prevalent forms of mass communication. The Court reasoned that overall expenditure limits therefore constitute a more severe burden on First Amendment freedoms than do contribution limits, as an expenditure limit constrains the total amount, and thus the quantity and quality, of communication, whereas a contribution limit simply restricts each contributor's relative influence and requires the candidate to seek a greater number of donations. Applying strict scrutiny to the expenditure limits and a lesser scrutiny to those on contributions, the Court found the government's purported interest in preventing corruption and its appearance sufficient to overcome the lesser burden imposed by contribution limits, but insufficient to justify the severe burden of expenditure limits.

However well-intentioned, FECA and *Buckley* left available several roads for circumventing the strictures of the act, which were imaginatively trodden in the years that followed the Court's decision. Most notorious were the use of so-called soft money and issue advertising.

Soft Money

On the federal level, soft money refers to money gathered and spent by national, state and local political parties for federal election purposes that is not subject to the contribution limits and disclosure requirements of FECA. The soft money loophole took seed in the language of FECA, which defined contribution to include only donations given or spent "for the purpose of influencing any election for *Federal* office."[13] Contributors who had already given their maximum hard money donations to various federal candidates could therefore still give unlimited amounts of money to the parties' non-federal accounts, often on behalf of federal candidates, for the enumerated purpose of influencing state and local elections.

In the ensuing years, the permissible and actual uses of soft money expanded as the FEC addressed questions that arose concerning funding of mixed-purpose party activities. First, an FEC regulation permitted parties to allocate administrative expenses on a "reasonable basis" between federal and non-federal fund accounts.[14] In a series of advisory opinions, the FEC also allowed parties to partially fund with soft money such mixed-purpose activities as registration and get-out-the-vote drives.[15] In 1979, Congress again amended FECA to statutorily exempt certain state and local party activities from the definition of contribution and expenditure.[16] As a final slay, the FEC concluded that the parties could use soft money to pay for "legislative advocacy media advertisements," even if the ads mentioned the name of a federal candidate, so long as they met the express advocacy test.[17]

Collectively, these legal developments permitted political parties to amass and distribute, via non-federal accounts, substantial sums of soft money for mixed-purpose activities, free from FECA's contribution limits and disclosure requirements.

Issue Advertisements

Issue ads were a loophole that developed, allowing corporations and unions to bypass long-standing bans on their use of general treasury funds for federal election purposes, and individuals and certain other groups to expend unlimited money on certain political messages without having to disclose or report the spending.

General Treasury Spending

Beginning in 1907, Congress passed a series of laws that banned corporations[18] and labor unions[19] from contributions and expenditures in connection with federal elections.[20] The prohibition applied to "general treasury funds," defined as income from ordinary business activities and union member dues.

> In *Buckley*, the Supreme Court upheld the challenged contribution limits while striking down those on expenditures.

In response, organizations created separate political accounts, funded solely by contributions from members and ranks, to support candidates for federal election. FECA affirmed the earlier ban on corporate and union use of general treasury money, but permitted these entities to keep the separated funds, known today as political action committees (PACs), for participation in federal election activities. PACs are subject to contribution and disclosure requirements.[21]

The loophole was opened in *Buckley* when the Court, in order to preserve certain aspects of FECA from being lost on vagueness grounds, narrowly construed the term expenditure to apply only to ads which "in express terms advocate the election or defeat of a clearly identified candidate for federal office."[22] In *FEC v. Massachusetts Citizens for Life*,[23] the Court extended this narrow construction, the express-advocacy test, to the federal law provisions which prohibited corporate and union spending in connection with a federal election.

As a result, corporations and unions could thwart the ban on use of general treasury funds, as well as the

disclosure requirements, merely by crafting more subtle ads that did not use magic words such as "vote for," "vote against," "elect" or "defeat." As the Court observed in *McConnell*, "Little difference existed, for example, between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'"[24] Throughout the 1990s, unions and corporations spent extensive amounts of money from their general treasury funds to produce these issue ads in aid of federal candidates, none of which fell within disclosure requirements, effectively eviscerating the spirit of the law.

Individual Reporting

Section 434(e) of FECA required that "[e]very person (other than a political committee or candidate) who makes contributions or expenditures" aggregating over $100 in a year, file a disclosure statement with the FEC. Expenditures were further defined as the use of money "for the purpose of . . . influencing" the outcome of a federal election. To preserve this section from a vagueness challenge, the Court again limited the term expenditure to the express-advocacy standard.[25] As in other areas, the Court applied this construction only to independent expenditures, as money spent in coordination with a candidate or campaign would constitute a reportable contribution.[26] However, like unions and corporations, the narrow construction permitted individuals to spend limitless amounts of money on issue ads without having to disclose the source or amount.

Reasonable Regulations

In an effort to attend to the soft money debacle, Congress passed the McCain-Feingold Bipartisan Campaign Finance Reform Act of 2002 (BCRA).[27] Title I added § 323 to FECA, which prohibits (1) national political parties and their agents from soliciting, receiving, directing or spending soft money; (2) candidates for federal office and officeholders from the same; (3) state and local candidates from using soft money to affect federal elections; and (4) parties from circumventing these rules by using tax-exempt organizations that engage in political activities.[28] To prevent state and local parties from simply stepping to the fore, § 323(b) prohibits contribution of non-federal money to state and local parties for activities that affect federal elections.[29]

Title II was intended to foreclose both issue ad loopholes by implementing disclosure requirements for anyone who spends more than $10,000 a year on a new category of activity called "electioneering communications," and prohibiting unions and corporations from using general treasury funds to pay for such ads.[30] "Electioneering communication," is defined as a radio or television advertisement, which refers to a clearly identified candidate for federal office, and which is broadcast to the electorate of that candidate within 30 days of a primary or 60 days of a general election.[31] For corporations and unions, the rule applies only to general treasury funds; PACs remain free to pay for such ads out of the segregated political funds.[32]

The Supreme Court was immediately called to examine BCRA's constitutionality and upheld its major provisions in *McConnell v. FEC*.[33] The Court analogized the soft money ban to a contribution limit, as the new rules regulated only the source and amount of contributions, as opposed to the aggregate amount that could be spent.[34] Subject to the applicable lesser scrutiny, the Court again deemed the government's interest in preventing actual and apparent corruption sufficiently important to support each of the soft money provisions. Turning to the act's provisions on electioneering communications, the Court stated flatly that the government interests *Buckley* held sufficient to justify FECA's disclosure provisions – preventing actual and apparent corruption, and providing the electorate and enforcement agencies with information – were more than sufficient to justify the disclosure provisions in BCRA.[35]

> The reality is, as the Court observed in *McConnell*, "[m]oney, like water, will always find an outlet."

Most recently, *Randall v. Sorrell* involved a challenge to the Vermont Campaign Finance Reform Act of 1997, which included overall campaign expenditure limits and exceedingly low contribution limits. The Court struck the expenditure limits outright, expressly declining to stray from *Buckley*.[36] The Court then struck the contribution limits on grounds that the limits were so restrictively low – $400 for governor, lieutenant governor, and other statewide offices, $300 for state senate races, and $200 for state representative races – as to constitute a restriction on the amount, quantity and quality of speech, and thus were not narrowly tailored to achieve the government's professed interests.[37]

Some guidelines can be gleaned from the Supreme Court's pronouncements in this area. The Court has con-

sistently declined invitation to discard the fundamental framework enunciated in *Buckley*. It has held contribution limits permissible, so long as they are not so unreasonably low as to constitute a severe burden on First Amendment freedoms. While limitations on coordinated expenditures are permissible,[38] the Court's decisions to date have found no compelling government justification for ceilings on independent expenditures. It also seems that most reasonable disclosure requirements present a surmountable First Amendment burden.

Campaign Finance Reform in New York

Against the backdrop of *Buckley*, the Third Department's decision in *Avella* appears entirely correct.[39] Yet the result merely underscores the need for New York to promulgate reasonable campaign finance regulations that will survive First Amendment scrutiny.[40] Comparatively, New York has among the highest per-election contribution limits.[41] Contribution and disclosure requirements consistent with FECA and BCRA have been countenanced by the Supreme Court and should be considered in New York. At the very least, New York's Election Law has its own set of campaign finance peculiarities deserving of attention.

The Limited Liability Company Loophole

Under current New York law, limited liability companies (LLCs), although similar in nature to corporations, are not subject to the same contribution limits by which other corporate entities must abide. The discrepancy results from an opinion of the State Board of Elections determining that LLCs should be treated as individuals for purposes of the contribution limit in state and local elections.[42] While a corporation or other "joint-stock association" is restricted to a $5,000 aggregate contribution per calendar year,[43] an individual may presently contribute up to $150,000.[44] The board's opinion was based in part upon a similar edict by the FEC in 1995.[45] However, the FEC reversed this ruling in 1999, and an LLC is now considered a partnership[46] for purposes of contribution limits in federal elections.[47] There is no justifiable reason for this exception, and the loophole should be closed in New York as well.[48]

The Parent-Subsidiary Loophole

Although corporations are subject to a maximum outlay of $5,000 per year, for contribution purposes each subsidiary corporation that is independently controlled and does not exchange political funds with its parent is considered a separate entity subject to its own $5,000 limit.[49] As such, a parent corporation and nine subsidiaries may collectively donate $50,000, a result which seems counterintuitive. Under federal law, the parent and its subsidiaries are considered one, specifically to prevent circumvention by suspiciously related entities.[50] Indeed, under federal law, corporate and union general treasury (non-PAC) contributions are forbidden altogether.

Political Party and Soft Money Loopholes

Soft money takes its own form in New York. The law does provide that individuals, PACs and unions may contribute no more than $76,500 to a constituted political party committee each year for candidate-related expenditures.[51] However, the law also allows these entities to contribute unlimited amounts of money to political parties for "housekeeping" and administrative, non-candidate expenditures.[52] Due to the housekeeping loophole, an unlimited amount of soft money may be given to the party, even after the maximum has been given to each supported candidate.

Constituted political party committees and sub-committees are also not "contributors" in the same sense as other organizations, and there is no limit on the amount of money a party committee can transfer to a candidate.[53] With the court's decision in *Avella*, it would seem that a political party can contribute extensive amounts of money to any candidate at any stage of the election cycle.

Demand Side Regulations

Though contribution limits have the laudable goal of reducing the influence of each political donor, the reality is, as the Court observed in *McConnell*, "[m]oney, like water, will always find an outlet."[54] As a testament to the resilience of political spending, the 2004 election cycle saw an enormous surge in the use of certain 527 political organizations as a means of circumventing BCRA and other federal election spending laws. Yet campaigning and mass communication in the modern era is profoundly, often prohibitively, expensive, with even the cost of a single literature mailing running in the thousands of dollars. If campaign finance reform is to have any meaningful effect, regulations must be demand-side, as opposed to supply-side oriented.

By far the most expensive aspect of campaigning is communicating with voters by television, radio and newspapers, and no viable candidate above a very local level can run without the use of such media. The Internet is an excellent lower cost mechanism for reaching many people, but this alone does not yet suffice. Options such as reduced cost advertising and communications should be explored. Although public financing options have not had the desired effect on the national level, and may well not on the state level, such a system could have a meaningful outcome for candidates who qualify in local races and would be especially efficacious in races for judicial office.

Addendum

In *Kermani v. New York State Board of Elections*,[55] decided July 25, 2006, the Northern District of New York partially

enjoined enforcement of Election Law § 2-126. The court found that the plaintiff had proved a likelihood of success on the merits of his First Amendment claim that § 2-126 imposes an unjustifiable burden on political party expression. The court enjoined enforcement of § 2-126 immediately as it relates to independent and uncoordinated expenditures, but stayed the injunction for one year as it relates to contributions and coordinated expenditures to permit the Legislature to enact a new scheme. ■

1. 33 A.D.3d 77, 820 N.Y.S.2d 332 (3d Dep't 2006).

2. *See Theofel v. Butler*, 134 Misc. 259, 236 N.Y.S. 81 (Sup. Ct., Queens Co.), *aff'd*, 227 A.D. 626 (2d Dep't 1929); *see also* Op. St. Bd. of Elec. 1986-1.

3. *Avella*, 33 A.D.3d at 337.

4. *Id.* at 335.

5. *Avella v. Batt*, 6 Misc. 3d 158, 785 N.Y.S.2d 305 (Sup. Ct., Albany Co. 2004). Prior to *Avella*, the last official pronouncement on § 2-126 was from the Fourth Department in *Baran v. Giambra*, 265 A.D.2d 796, 705 N.Y.S.2d 740 (4th Dep't), *lv. denied*, 93 N.Y.2d 1040 (1999), which had determined the section constitutional. The State Board had also specifically opined that § 2-126 prohibited one political party from using its funds to influence another's primary. *See* Op. St. Bd. of Elec. 1983-7.

6. 424 U.S. 1 (1976).

7. 126 S. Ct. 2479 (2006).

8. Fed. Elec. Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3; FECA Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

9. 18 U.S.C. § 608.

10. 2 U.S.C. §§ 431–442.

11. Internal Revenue Code, 26 U.S.C. §§ 6096, 9001–9012, 9031–9042.

12. 2 U.S.C. §§ 437(c)–441.

13. 2 U.S.C. § 431(8)(A)(i) (emphasis added).

14. 11 C.F.R. § 102.6. In 1990 the FEC promulgated fixed allocation rates to clarify the term "reasonable basis." 11 C.F.R. § 106.5.

15. FEC Advisory Op. 1978-10, 1978-50.

16. 2 U.S.C. §§ 431–455.

17. FEC Advisory Op. 1995-25.

18. The 1907 Tillman Act (ch. 420, 34 Stat. 864, codified 2 U.S.C. § 441b) prohibited all corporate and national bank contributions in connection with federal elections. The 1925 Federal Corrupt Practices Act (Pub. L. No. 68-506, § 302, 43 Stat. 1070, codified 2 U.S.C. § 441b) extended the definition of contribution to include anything of value.

19. The 1939 Hatch Act (ch. 410, 53 Stat. 1147 (codified as scattered sections of 5 and 18 U.S.C.)) began to restrict labor union contributions in connection with federal elections; the 1940 Amendments to the Hatch Act (ch. 640, 54 Stat. 767) primarily prohibited various political and campaign activities by federal employees or organizations using federal funds. The 1943 War Labor Disputes Act (Smith-Connally) (Pub. L. No. 78-89, § 9, 57 Stat. 163, codified 2 U.S.C. § 441b) temporarily prohibited unions from making contributions from general treasury funds in federal elections altogether. The 1947 Labor Management Relations Act (Taft-Hartley) (Pub. L. No. 80-101, § 304, 61 Stat. 136, codified generally 29 U.S.C. §§ 151–166; 2 U.S.C. § 441b) made the wartime prohibition permanent, and expanded it to include any expenditures made in connection with federal elections, including primary elections.

20. The ban includes not-for-profits and charitable organizations.

21. All federal PACs must register with the FEC. *See* 2 U.S.C. § 433.

22. *Buckley v. Valeo*, 424 U.S. 1, 44 (1976).

23. 479 U.S. 238 (1986).

24. *McConnell v. FEC*, 540 U.S. 93, 126–27 (2003).

25. *Buckley*, 424 U.S. at 80.

26. *See, e.g., id.* at 46–47.

27. Pub. L. No. 107-155, 116 Stat. 81.

28. 2 U.S.C. § 441i(a), (d), (e), (f).

29. 2 U.S.C. § 441i(b); *see* 2 U.S.C. § 431(20)(A).

30. 2 U.S.C. § 441b(b)(2).

31. 2 U.S.C. § 434(f)(3).

32. 2 U.S.C. § 441b(a), (c).

33. 540 U.S. 93 (2003).

34. *Id.* at 138–43.

35. *Id.* at 196.

36. *Randall v. Sorrell*, 126 S. Ct. 2479, 2490–91 (2006).

37. *Id.* at 2499–2500.

38. In *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (*Colorado II*), the Court reiterated that coordinated expenditures are contributions, that limits on coordinated expenditures are subject to intermediate scrutiny, and that the government's interest in preventing circumvention of contribution limits is sufficiently important to justify such limits.

39. The Third Department explained that insofar as the statute prohibited not only coordinated expenditures, but independent expenditures as well, it was not narrowly tailored to serve a compelling government interest.

40. New York Election Law applies generally to state and local elections, as federal law preempts in any contest involving a federal office. In *Seltzer v. N.Y. State Democratic Comm.*, 293 A.D.2d 172, 743 N.Y.S.2d 565 (2d Dep't 2002), the court specifically held that § 2-126 is preempted by FECA in the context of elections for federal office. *See* Op. St. Bd. of Elec. 1977-2.

41. *See* Suzanne Novak & Seema Shah, *Paper Thin: The Flimsy Facade of Campaign Finance Laws in New York State*, Brennan Center for Justice, NYU Law School, 2006 *available at* <http://www.brennancenter.org/dynamic/subpages/download_file_36590.pdf>. New York's election limits are computed using a formula and determine the maximum a candidate for any particular state or local office may receive from a single contributor for the primary and general elections. *See* Elec. Law § 14-114(1).

42. Op. St. Bd. of Elec. 1996-1.

43. Elec. Law § 14-116; *see* Op. St. Bd. of Elec. 1974-1. This limit does not apply to corporate PACs. *See also* Elec. Law § 14-116; Op. St. Bd. of Elec. 1976-1.

44. Elec. Law § 14-114(8).

45. FEC Advisory Op. 1995-11.

46. A partnership in New York is permitted to contribute up to $2,500 in the name of the partnership without attributing it to individual partners, but any greater contribution must be attributed to each partner whose share exceeds $99. Elec. Law § 14-120(2). Each partner is then subject to the contribution limits for individuals.

47. 11 C.F.R. § 110.1(g). The LLC will be treated as a corporation if it (a) has shares that are publicly traded, or (b) has opted to be treated as a corporation for tax purposes, or has made no choice at all.

48. Banks and not-for-profit corporations are held to the $5,000 limit per calendar year. *See* Ops. St. Bd. of Elec. 1977-1, 1974-75.

49. Op. St. Bd. of Elec. 1977-11.

50. 2 U.S.C. § 441a(a)(5); 11 C.F.R. §§ 100.5(g)(2), 110.3(a)(1)(i).

51. 9 N.Y.C.R.R. § 6214.

52. Elec. Law § 14-124(3).

53. Elec. Law § 14-114(3); *see* Op. St. Bd. of Elec. 1994-1.

54. *McConnell v. FEC*, 540 U.S. 93, 224 (2003).

55. No. 1:06-CV-0589, 2006 WL 2190716 (N.D.N.Y. July 25, 2006). Peter Kermani is Chair of the Albany County Republican Party and Committee.

Collateral Complexities

Understanding CPLR 4545

By Barbara DeCrow Goldberg

New York's "collateral source rule," CPLR 4545, can potentially reduce a verdict in a personal injury action by thousands or even hundreds of thousands of dollars. The rule requires that "collateral source" payments to a plaintiff, such as Social Security disability benefits or payments from private medical insurance, be set off against the verdict, provided that they correspond to a category of economic loss for which the jury awarded damages and, with respect to future benefits, are "reasonably certain" to continue.

While the rule is easily stated, its application can be problematic. This article will discuss the requirements of the collateral source rule and recent decisions concerning such issues as how and when a request for a set-off must be asserted; whether payments to family members qualify as "collateral source reimbursement"; whether the collateral source rule bars a health insurer from recovering benefits paid to the plaintiff; and whether actual receipt of benefits, as opposed to entitlement, is required.

The Applicable Statute

History

At common law, an injured plaintiff's recovery could not be reduced by "collateral source" payments from third parties. The underlying rationale was that a tortfeasor who had caused the plaintiff's injury should not be permitted to save money by showing that the plaintiff had the foresight to procure benefits such as insurance.

Beginning in 1975, however, the New York State Legislature limited the common law rule in response to a perceived "medical malpractice crisis" in insurance. Set-offs for collateral source payments were first allowed in medical malpractice actions and, with the enactment of CPLR 4545(c) in 1986, were extended to all actions for personal injury, property damage and wrongful death. This evolution of the collateral source rule coincided with an increasing emphasis on making the plaintiff whole, rather than punishing the defendant, as the proper objective of compensatory damages. The stated purpose of CPLR 4545(c) was to eliminate windfalls and double recoveries for the same loss.[1]

The Current Statute

For all practical purposes, CPLR 4545(a), applicable to medical, dental and podiatric malpractice actions, and CPLR 4545(c), applicable to all other personal injury, property damage and wrongful death actions, are identical.[2] These sections provide that the trial court "shall," upon finding that an item of economic loss was or will, with reasonable certainty, be replaced or indemnified

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from a collateral source, reduce the plaintiff's award accordingly, after making an adjustment to account for any premiums paid by the plaintiff. CPLR 4545(b), applicable to certain actions for personal injury and wrongful death against a public employer, is narrower in scope and allows a set-off for past but not future collateral source reimbursement "paid for, in whole or in part, by the public employer."[3]

> While an award for lost pension benefits is properly reduced by disability pension benefits, an award of lost earnings is not.

CPLR 4545 specifically excludes life insurance and Medicare benefits, as well as those collateral sources "entitled by law to liens against any recovery of the plaintiff." Most recently, with the enactment of subdivision (d) in 2002, voluntary charitable contributions were exempted from the statutory definition of "collateral source" reimbursement. Thus, for example, if a church or synagogue were damaged by fire as a result of a contractor's negligence during renovations, and the congregation contributed money for repairs, the contractor could not reduce an award for property damage by the amount of the contributions.

Establishing Entitlement to a Set-Off

Timeliness

A defendant seeking a collateral source set-off must first raise the issue in a timely manner. In *Bongiovanni v. Staten Island Medical Group*,[4] the court held that "any application for a set-off utilizing a collateral source of payments must be either requested verbally immediately after the jury renders a verdict that includes loss of earnings, or as part of the written single post-trial motion contemplated by CPLR 4406, which shall be made within 15 days of the jury verdict in accordance with CPLR 4405."[5]

Later, in *Wooten v. State*,[6] the Appellate Division held that a defendant must plead collateral sources of payment as an affirmative defense. Although in *Wooten* the state had not done so, it was allowed to amend its answer on appeal. The court reasoned that notwithstanding the state's failure to plead the issue as an affirmative defense, the state had raised it in a timely manner by seeking discovery and moving to fix the amount of the set-off and that, accordingly, there was no surprise or prejudice to the claimant.[7]

If the request is not made before the entry of judgment at the latest, the court is likely to find a waiver.[8] It is not clear, however, that the request must be included within the defendant's post-trial motion pursuant to CPLR 4404(a), or that it is subject to the 15-day requirement. Notwithstanding the language in *Bongiovanni*, the Appellate Division in *Wooten* ruled that a request would be timely if it was made before the entry of judgment, and that the 15-day rule of CPLR 4405 did not apply. As a practical matter, however, there is no "downside" to including a request for a collateral source hearing in the defendant's motion to set aside the verdict.

Discovery

Timely discovery of collateral source reimbursement is also essential. The court in *Bongiovanni* held that discovery of collateral sources of payment should not be deferred until after a jury verdict, but should be done in pre-trial discovery or elicited at trial, unless "it is clearly established pre-trial or during the trial that any applicable collateral sources of payments will be addressed in a post-trial hearing as soon after the trial as is practical to the court."[9]

While some defense counsel, with the apparent acquiescence of their adversaries, *do* conduct collateral source discovery post-verdict, the safer course is to raise the issue before the verdict, in order to clarify that discovery concerning collateral source payments will be done later, and foreclose any argument that the issue has been waived.

The "Correspondence" Requirement

In *Oden v. Chemung County Industrial Development Agency*,[10] decided in 1995, the Court of Appeals held that, in order for a defendant to be entitled to a set-off, a collateral source payment must correspond to a particular category of loss for which the jury awarded damages. In *Oden*, the plaintiff, an injured ironworker, was entitled to receive $141,330 in disability retirement benefits over his lifetime. The defense argued that this amount should be applied to *all* the awards for future economic loss, which would largely have eliminated those awards.

The plaintiff, however, argued that collateral source reductions should be allowed only in those categories of economic loss that corresponded to analogous collateral source payments. The Court of Appeals agreed, reasoning that, as a statute in derogation of common law, CPLR 4545(c) was to be strictly construed. The Court held that at most, the disability retirement benefits could be set off against the plaintiff's award for lost ordinary pension benefits, in the amount of $66,000. They could not, however, be applied to other categories of economic loss such as lost earnings or medical expenses, since they had not been shown to "replace" those categories of loss.

The Court pointed out (as a reason why the retirement benefits did not necessarily correspond to lost earnings) that notwithstanding his retirement as an ironworker, the plaintiff could still have earned income from other employment without the loss of his disability retirement pension benefits.

Whether, in a given case, the necessary correspondence is present is, according to *Oden*, a matter of "proof and factual analysis." The Court indicated that the "necessary linkage" could be established by requesting a detailed itemization of damage awards under CPLR 4111(f).

Pension Benefits

Following *Oden*, the courts have typically declined to reduce awards for lost earnings by pension or retirement benefits, holding that while an award for lost pension benefits is properly reduced by disability pension benefits, an award of lost earnings is not.[11] Indeed, the Court of Appeals itself, in its 2002 decision in *Fisher v. Qualico Contracting Corp.*,[12] reaffirmed its holding in *Oden* that an individual's retirement pension benefits, paid in lieu of ordinary pension benefits, could not be set off against an award for lost future earnings, since the benefits did not replace, duplicate or correspond to lost earnings.

The appropriate focus, however, should be on the function that a particular collateral source payment serves and the requirements for its receipt, rather than the particular title or description given to it. If "direct correspondence" between a lost earnings award and a collateral source payment described as a "disability pension" or the like can be established, then a set-off should be allowed.

Possible support for such an argument is provided by *Abar v. Freightliner Corp*.[13] There, the supreme court reduced an award for past lost earnings by the amount of a lump-sum payment the plaintiff received from the New York State Teamsters Conference Pension and Retirement Fund, representing retroactive disability pension payments. The plaintiff argued that this was improper, since the payment constituted a pension benefit which did not replace or indemnify past earnings. The Appellate Division held that the set-off was properly allowed, stating, "our review of Abar's pension and benefit plan leads us to conclude that the payment he received was a collateral source as it 'replaced or indemnified' Abar's past lost earnings." In particular, Abar would not have received the payment unless he was disabled and was receiving Social Security Disability benefits; no additional contributions were required to be made on his behalf for him to receive the benefit payment; and the benefit payment did not reduce the amount of his retirement pension.

Though *Abar* was decided before *Oden*, the *Abar* decision has never been overruled and is fully consistent with *Oden*. The payment received by the plaintiff "replaced or indemnified" his lost earnings, thereby establishing the necessary "correspondence" with the award for lost earnings required by *Oden*.

Similarly, in *Iazzetti v. City of New York*,[14] decided in 1998, the Appellate Division found a direct correspondence between an injured sanitation worker's three-quarters disability pension and the jury's award for lost earnings and pension benefits.[15] That same year, however, in *Gonzalez v. Iocovello*,[16] a different panel of the First Department, citing *Oden*, held that the defendant's motion to reduce an award for lost earnings by the amount of an injured police officer's accident disability pension was properly denied. The rationale was that the defendant failed to demonstrate, "with reasonable certainty," that the accident retirement benefits would replace the award.

Later, in *Terranova v. New York City Transit Authority*,[17] the trial court allowed the defendant an opportunity to establish the necessary correspondence between an accident disability pension and an award of lost earnings, but then concluded, after a hearing, that the defendant had failed to meet its burden with "reasonable certainty." Accordingly, the court declined to reduce an award for lost earnings by the amount of a three-quarters disability pension received by a fireman injured in the line of duty. The court, however, suggested that one means of establishing such direct correspondence would be to review the legislative history and examine the legislative intent in the creation of the Fire Department accident disability pension benefit.

Property Damage – Insurance Proceeds

In the *Fisher* case noted above, the plaintiff's home was destroyed by fire, and an issue arose as to how the proceeds from the plaintiff's homeowner's insurance policy should be set off against the verdict. The Appellate Division found that the plaintiff was entitled to damages for the lesser of the decline in market value or the restoration cost. The Court of Appeals affirmed and held that the insurance proceeds corresponded to the jury's award for diminution in market value. This had the effect of eliminating the award, since the damages for diminution in market value were $480,000, compared to a restoration cost of $1,330,000; the insurance paid $1,050,000.

Social Security Payments to Family Members

Social Security benefits paid to a plaintiff's spouse and/or minor children[18] potentially represent collateral source payments which can reduce an award for lost earnings, on the theory that the benefits replace the earnings and support which the injured plaintiff can no longer provide.

In *Hayes v. Normandie LLC*,[19] the trial court allowed a set-off where the plaintiff's wife received Social Security payments "as a direct result of her husband's lost wages." The court also allowed a set-off for Social Security Disability payments to the plaintiff's son, *even though the son was not a party to the action*, since the benefits he received were intended to replace the lost earnings caused by his father's disability. Thus, the plaintiff's award for future lost earnings would be reduced by future Social Security benefit payments to his son until the son's majority, emancipation or death, whichever came first.

The Appellate Division agreed that "the Social Security payments received by plaintiff and his family members were intended to compensate for lost earnings and thus [were] properly treated as collateral source payments."[20] The Appellate Division, however, relied on *Oden* to hold that the defendant was not entitled to a set-off for pension benefits.

The "Reasonable Certainty" Requirement

Proving past collateral source payments is relatively easy and can be done through Social Security, workers' compensation or insurance records; indeed, in many cases the parties stipulate to set-offs for past collateral source reimbursement, thereby obviating the need for a "collateral source hearing" on this issue. In order to be entitled to a set-off for future benefits, however, the defendant must prove that the benefits are "reasonably certain" to continue. Satisfying this requirement may be more problematic, since the language "reasonably certain" has been interpreted as meaning "highly probable," so as to require proof by "clear and convincing" evidence.

Future Social Security Benefits

Plaintiffs sometimes contend that it is not "reasonably certain" that Social Security benefits will continue into the future, since the Social Security Administration is already operating at a deficit, and the criteria for the receipt of benefits may change. To date, however, the courts have allowed set-offs for future benefits, provided the defendant can project the amount with the requisite "reasonable certainty."

Two of the leading cases in this regard are *Caruso v. Russell P. LeFrois Builders, Inc.*[21] and *Bryant v. New York City Health & Hospitals Corp.*[22] In *Caruso*, the Appellate Division reasoned that not to allow a set-off for future benefits would actually be contrary to the statute, since the legislative history of CPLR 4545 specifically identifies Social Security disability benefits as one example of future payments that are intended to be included within the scope of the statute.

In *Bryant*, the plaintiffs argued that Social Security survivor benefits, to be paid in the future, should not be considered collateral source reimbursement because they are not received pursuant to a "contract or other enforceable agreement." The Court of Appeals rejected this argument, reasoning that such an interpretation "would categorically read Social Security out of the statute as a potential source for offsetting future recovery," even though the statute explicitly refers to Social Security as an example of a collateral source.

The Court concluded that "a more reasonable interpretation of the statute," which would give effect to both the words and the intent of the Legislature, would be that Social Security benefits can be used to offset future losses provided that "with reasonable certainty" they will indemnify the plaintiff. Application of the "contract or otherwise enforceable agreement" requirement was limited to situations where the plaintiff did not have a protected interest in a government entitlement.

> The result in *Giventer* does not mean that private insurance payments can never be set off against an award for future medical expenses.

Once it is established that future Social Security benefits are "reasonably certain" to continue – *i.e.*, according to the expert testimony at trial the plaintiff is totally disabled and his condition is permanent[23] – it is necessary to establish the amount. This is typically accomplished through expert testimony, based on the plaintiff's current benefits and the "cost of living" adjustments used by the Social Security Administration. Using the cost of living adjustments, an expert economist can project the total disability benefits that the plaintiff will be entitled to receive until he or she becomes eligible for retirement benefits, which are *not* treated as collateral source payments with respect to a lost earnings award.

Private Medical Insurance

At least one court has held that insurance benefits provided through the plaintiff's employer are not "reasonably certain" to continue, since the plaintiff may be laid off or simply decide to change jobs. In *Giventer v. Rementeria*,[24] where the infant plaintiff sustained severe brain damage at birth, the trial court rejected the defendants' argument that future benefits from the mother's employee health insurance plan should be set off against the jury's award for future medical expenses. The court reasoned that if, for example, the mother lost her job or the employer or insurance company changed benefits, the loss of coverage would be beyond her control.

Likewise, to allow set-offs for future payments would require the mother to remain at her existing position, even if she wanted to change jobs. The court reasoned that Mrs. Giventer had a right to change jobs or stop working altogether, and that to treat her employee health insurance as a collateral source would require her to work in order to provide her son with the care which he required, and which the jury had found that the defendants were obligated to provide.

Alternatively, the defendants argued that the plaintiffs should be required to enroll in a managed health care plan where the defendants would pay the premiums. The court rejected this argument as well, pointing out that an HMO might or might not approve home nursing care as opposed to care in a residential institution, whereas the jury's award would permit the plaintiff and his parents to obtain the care they chose, without any of the constraints which accompany managed care. Because of potential limitations such as pre-approval, an HMO would not "replace" what the jury awarded and therefore could not be considered a collateral source.

The result in *Giventer* does not mean that private insurance payments can never be set off against an award for future medical expenses. Cases where a plaintiff belongs to an HMO or purchases private health insurance and maintains it at his or her own expense are distinguishable from *Giventer*. If the plaintiff continued to pay premiums and maintained an insurance policy after being injured, there is a strong argument that the plaintiff is "reasonably certain" to receive insurance benefits in the future. Certainly the statute contemplates future medical insurance payments as collateral source reimbursement, since it provides that the set-off will be reduced by "an amount equal to the projected future cost to the plaintiff of maintaining such benefits."

The Lien Problem

CPLR 4545 excludes those collateral sources "entitled by law to liens against any recovery of the plaintiff." Thus, although the statute refers to workers' compensation as an example of collateral source reimbursement, the defendant will not be entitled to a set-off if a workers' compensation lien has been asserted. The collateral source rule is similarly inapplicable where there is a Medicaid or Department of Social Services lien.

An issue that frequently arises with respect to medical insurance payments is whether the insurer can assert a lien or recover the payments under a theory of equitable subrogation. Indeed, health insurers have sometimes gone so far as to attempt to intervene in an action to recover the benefits paid.

The seminal case from the Court of Appeals regarding an insurer's intervention in a personal injury action is *Teichman v. Community Hospital of Western Suffolk*,[25] which was decided in 1996. In *Teichman*, the parties settled a medical malpractice action on behalf of the infant plaintiff. The infant plaintiff's health insurer, MetLife, sought to intervene in the action to recover the monies it had expended on behalf of the infant. The Court of Appeals held that intervention was proper in order to allow MetLife to attempt to recoup covered medical payments, if any, which were paid to the plaintiffs as part of the settlement.

Because *Teichman* involved a settlement, the Court held that CPLR 4545 was inapplicable and did not reach the issue of whether it would bar an insurer's claim to reimbursement from the proceeds of a verdict awarding damages for medical expenses. Subsequent cases, however, suggest that an insurer has a right to subrogation in such circumstances.

In *Fisher v. Qualico Contracting Corp.*,[26] where the plaintiff's homeowner's insurance completely offset the jury's award for diminution in market value after the plaintiff's home was destroyed by fire, the court commented that "a defendant may still be held responsible in subrogation to the homeowner's insurer, as apparently was the case here."

> Plaintiffs are not necessarily immune from subrogation claims.

Two years later, in its 2004 decision in *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris USA Inc.*,[27] the Court again indicated that a defendant could potentially be held liable in subrogation to a plaintiff's health insurer. In *Blue Cross*, several health insurers alleged that the defendant tobacco companies engaged in deceptive practices designed to mislead the public regarding the dangers of cigarette smoking. The United States Court of Appeals for the Second Circuit certified a question as to whether the insurers' claims for the costs of services they had provided to their subscribers were too remote to permit recovery under § 349 of the General Business Law. While the New York Court of Appeals answered the certified question in the affirmative, holding that the insurers were not entitled to recover under the General Business Law, it rejected their argument that this, together with CPLR 4545(c), would immunize the tobacco companies from liability. Reaffirming its statement in *Fisher*, the Court held that the collateral source rule did not alter the insurers' traditional remedy because the tobacco companies could still be held responsible in subrogation – although it might be difficult if not impossible for the insurers to prove a subrogation action, since they would have to establish the elements of each subscriber's claim.

Citing both *Fisher* and *Blue Cross*, the trial court in *Principe v. City of New York*,[28] in a 2006 decision, denied the plaintiff's motion "to extinguish 'the purported liens and/or subrogation rights'" asserted by the plaintiff's health insurer. The court phrased the issue as "whether New York's collateral source rule . . . operates to negate the health insurer's right of subrogation," and concluded that it did not do so – particularly where a claim for contractual, as opposed to equitable, subrogation was concerned. The court reasoned that to hold otherwise would be inconsistent with *Blue Cross*, *Fisher*, and *Teichman*.

The practical effect of these decisions appears to be that while a plaintiff may not recover damages that have been reimbursed by insurance, that does not preclude the plaintiff's health or property damage insurer from seeking recovery in subrogation from the defendant and/or its insurer.

While the focus of the more recent cases, at least, appears to be on the health insurers' potential recovery from the *defendant*, plaintiffs are not necessarily immune from subrogation claims, particularly in the context of settlements. CPLR 4545 does not apply to settlements, and the Court of Appeals in *Teichman* allowed intervention after the action had been settled. If the insurer in such a case prevailed in its attempts to recoup covered medical payments, the plaintiff's recovery would be reduced accordingly. It is therefore essential for plaintiffs' counsel to ensure that a settlement is fashioned in such a way as to make it clear that it does not include recovery for reimbursed medical expenses.[29]

Must the Plaintiff Actually Be Receiving Benefits?

A final issue concerns "entitlement," as opposed to "receipt," of benefits. In *Young v. Tops Markets, Inc.*,[30] the plaintiff, although fully disabled from working, had not applied for Social Security disability benefits. The defendants, arguing that the plaintiff would be awarded benefits if he were to apply, sought a set-off for the projected amount of the disability benefits to which he would be entitled. A divided panel at the Appellate Division, Fourth Department denied the application, holding that the plaintiff, who had never applied for Social Security benefits, was not "legally entitled" to their "continued receipt."

The two dissenting justices considered the requirement of an actual award of benefits inconsistent with *Bryant*'s recognition of future Social Security benefits as collateral source reimbursement,[31] and the legislative history of CPLR 4545. They would have ordered a hearing to determine both the plaintiff's eligibility for benefits and the amount of benefits he would be entitled to receive.

The practical effect of the majority's holding in *Young* is to enable a plaintiff to obtain a windfall recovery by not applying for disability benefits until after judgment has been entered in his or her favor. Once the judgment has been entered the plaintiff is free to apply for both retroactive and future benefits – benefits which would have been set off against the verdict under CPLR 4545 had the plaintiff applied for them in advance of the trial! Such a result appears to be at odds with the intent and purpose of the statute.

Young was decided in 2001. To date, the other departments of the Appellate Division have not specifically addressed the issue, and it remains to be seen whether they will follow *Young*, or how the Court of Appeals will rule if and when the issue reaches the state's highest

court. Given the legislative history, however, a strong argument can be made that if the defendant can establish both "entitlement" to benefits, in the sense of the plaintiff's total disability, and "reasonable certainty" as to the amount of benefits that the plaintiff would receive if he or she were to apply, a set-off should be allowed. "Reasonable certainty" in this context could be established by offering medical testimony as to the permanency of the disability, together with evidence – perhaps from a representative of the Social Security Administration – that if the plaintiff were to apply he or she would be awarded benefits, together with economic testimony projecting the amount of benefits based on the plaintiff's earnings before the injury.

Conclusion

The application of CPLR 4545 is fraught with pitfalls for the unwary. Unresolved issues include the questions of whether and under what circumstances a defendant can demonstrate "direct correspondence" between an accidental disability pension and an award of lost earnings; the interplay between CPLR 4545 and an insurer's subrogation rights; and whether other departments of the Appellate Division or the Court of Appeals will follow *Young*. Further developments regarding these and other issues concerning the collateral source rule will bear careful watching by both sides in a personal injury action. ■

1. *See* 1986 N.Y. Laws ch. 220, § 36.

2. Subdivisions (a) and (c) state in pertinent part as follows:

> [E]vidence shall be admissible for consideration by the court to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source such as insurance (except for life insurance), social security (except for those benefits provided under title XVIII of the social security act), workers' compensation or employee benefit programs (except such collateral sources entitled by law to liens against any recovery of the plaintiff). If the court finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to the premiums paid by the plaintiff for such benefits for the two-year period immediately preceding the accrual of such action and minus an amount equal to the projected future cost to the plaintiff of maintaining such benefits. In order to find that any future cost or expense will, with reasonable certainty, be replaced or indemnified by any collateral source, the court must find that the plaintiff is legally entitled to the continued receipt of such collateral source, pursuant to a contract or otherwise enforceable agreement, subject only to the continued payment of a premium and such other financial obligations as may be required by such agreement.

3. CPLR 4545(b) provides in pertinent part as follows:

> In any action against a public employer or a public employee who is subject to indemnification by a public employer with respect to such action or both for personal injury or wrongful death arising out of an injury sustained by a public employee while acting within the scope of his public employment or duties, where the plaintiff seeks to recover for the cost of medical care, custodial care or rehabilitation services, loss of earnings or other economic loss, evidence shall be admissible . . . to establish that any such cost or expense was replaced or indemnified . . . from a collateral source provided or paid for, in whole or in part, by the public employer, including but not limited to paid sick leave, medical benefits, death benefits, dependent benefits, a disability retirement allowance and social security. . . . If the court finds that any such cost or expense was replaced or indemnified from any such collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to the contribution of the injured public employee for such benefit.

The Court of Appeals, in *Iazzetti v. City of N.Y.*, 94 N.Y.2d 183, 701 N.Y.S.2d 332 (1999), held that subdivision (b), not subdivision (c), applies to actions brought by public employees against their employers; and that the Legislature did not repeal subdivision (b) by implication when it enacted subdivision (c), applicable to all personal injury and wrongful death actions. Accordingly, in an action brought by a public employee, a public employer such as the City of New York is not entitled to collateral source reductions for future damages.

4. 188 Misc. 2d 362, 366–67, 728 N.Y.S.2d 345 (Sup. Ct., Richmond Co. 2001).

5. *See Loperena v. City of N.Y.*, 2002 WL 31163423 (Sup. Ct., N.Y. Co. 2002).

6. 302 A.D.2d 70, 753 N.Y.S.2d 266 (4th Dep't 2002).

7. *See Woods v. Kurz*, 258 A.D.2d 932, 685 N.Y.S.2d 361 (4th Dep't 1999); *Ferrara v. Bronx House, Inc.*, 163 Misc. 2d 908, 622 N.Y.S.2d 864 (Civ. Ct., Bronx Co. 1994).

8. *See Ventriglio v. Active Airport Serv.*, 257 A.D.2d 657, 682 N.Y.S.2d 915 (2d Dep't 1999).

9. *Bongiovanni*, 188 Misc. 2d at 366.

10. 87 N.Y.2d 81, 637 N.Y.S.2d 670 (1995).

11. *See, e.g.*, *Hayes v. Normandie LLC*, 306 A.D.2d 133, 761 N.Y.S.2d 645 (1st Dep't 2003); *Boshnakov v. Bd. of Educ.*, 277 A.D.2d 996, 716 N.Y.S.2d 520 (4th Dep't 2000).

12. 98 N.Y.2d 534, 749 N.Y.S.2d 467 (2002).

13. 208 A.D.2d 999, 617 N.Y.S.2d 209 (3d Dep't 1994).

14. 256 A.D.2d 140, 681 N.Y.S.2d 507 (1st Dep't 1998).

15. The Court of Appeals, in *Iazzetti v. City of N.Y.*, 94 N.Y.2d 183, 701 N.Y.S.2d 332 (1999), did not reach this issue.

16. 249 A.D.2d 143, 672 N.Y.S.2d 293 (1st Dep't 1998).

17. 11 Misc. 3d 214, 805 N.Y.S.2d 518 (Sup. Ct., Richmond Co. 2005).

18. Minor children are entitled to such benefits until they reach the age of 18, unless they are attending college, in which case the benefits continue until the age of 19.

19. 2002 WL 1748675 (Sup. Ct., N.Y. Co. 2002), *aff'd*, 306 A.D.2d 133, 761 N.Y.S.2d 645 (1st Dep't 2003).

20. *Id.* at 134 (citation omitted).

21. 217 A.D.2d 256, 635 N.Y.S.2d 367 (4th Dep't 1995).

22. 93 N.Y.2d 592, 604, 695 N.Y.S.2d 39 (1999).

23. *Cf. Schifelbine v. Foster Wheeler Corp.*, 3 Misc. 3d 151, 776 N.Y.S.2d 146 (Sup. Ct., Allegany Co. 2002), *aff'd*, 4 A.D.3d 736, 772 N.Y.S.2d 140 (4th Dep't 2004).

24. 184 Misc. 2d 744, 705 N.Y.S.2d 863 (Sup. Ct., Richmond Co. 2000).

25. 87 N.Y.2d 514, 640 N.Y.S.2d 472 (1996).

26. 98 N.Y.2d 534, 749 N.Y.S.2d 467 (2002).

27. 3 N.Y.3d 200, 785 N.Y.S.2d 399 (2004).

28. 11 Misc. 3d 879, 813 N.Y.S.2d 872 (Sup. Ct., Richmond Co. 2006).

29. Examples of how this may be accomplished are provided by *Singh v. Long Island Jewish Med. Ctr.*, 11 Misc. 3d 1054(A), 815 N.Y.S.2d 496 (Sup. Ct., Queens Co. 2006), and *Del Rossi v. Defendant V*, 6 Misc. 3d 454, 724 N.Y.S.2d 816 (Sup. Ct., Suffolk Co. 2004).

30. 283 A.D.2d 923, 724 N.Y.S.2d 921 (4th Dep't 2001).

31. *Bryant v. N.Y. City Health & Hosp. Corp.*, 93 N.Y.2d 592, 695 N.Y.S.2d 39 (1999).

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Has the Court of Appeals Defined What Is Meant by a "Claim of Right" in Adverse Possession Cases?

Adverse possessors must meet the "OCEAN" mnemonic in order to succeed. For a minimum of 10 years, their possession must be: Open, Continuous, Exclusive, Actual and Notorious. In addition, their possession must be hostile and under a claim of right.[1] Hostility is readily understood. "All that is required is a showing that the possession constitutes an actual invasion of or infringement upon the owner's rights. . . . Consequently, hostility may be found even though the possession occurred inadvertently or by mistake."[2]

But, what is a claim of right?

Conflicting Views Prior to 2006

Before 2006, all of the Judicial Departments except the Third held that adverse possessors who enter upon land *knowing* it not to be theirs cannot establish a claim of right because they are aware from the start that they are on somebody else's land.[3] The logic supporting this position was best summarized in *Falco v. Pollitts*[4]: "Possession under a claim of right is incompatible with knowledge or a belief that one does not own the land in question but that ownership rests in another."[5]

In *Birkholz v. Wells*,[6] the Third Department rejected the notion that knowledge alone defeats adverse possession. It affirmed an award of adverse possession because the evidence at trial justified the lower court's finding that "during the 10-year statutory period, [the adverse possessors] or their predecessors in title [had not] recognized or acknowledged any superior claim to the disputed property."[7]

With *Birkholz*, the Third Department decided that an adverse possessor's claim of right should be examined differently from the way its fellow Appellate Divisions approached the issue. If the other elements of the OCEAN mnemonic were satisfied, the Third Department would require proof that the adverse possessors *recognized or acknowledged* ownership in another before it would rule against them.

Journey to the Court of Appeals

Birkholz begot *Walling v. Przybylo*.[8] The Wallings and the Przybylos are neighbors. When the Przybylos built their home in 1991, the Wallings had been living in the subdivision for about four years. Before the Przybylos' arrival, the Wallings already had begun to maintain a portion of what would become the Przybylos' property.

The Przybylos were unaware that the Wallings had been occupying a portion of their land until 2004 when a survey commissioned by the Przybylos uncovered the encroachment. Based upon the survey, the Przybylos asserted their ownership over the disputed wedge of land. The Wallings countered by commencing an action for adverse possession. Both sides moved for summary judgment. Each partially succeeded.

The property at issue consisted of what County Court Judge John S. Hall, Jr. characterized as a "grassy lawn area" and a "wooded portion." Judge Hall awarded the Wallings adverse possession to the "grassy lawn area" because they had cultivated and improved that area. The wooded area, being virginal, was neither cultivated, improved nor enclosed by them. Consequently, Judge Hall denied the Wallings' claim to the "wooded portion."

The Przybylos moved to reargue and renew the motions based upon new evidence that, if believed by the trier of fact, would establish that the Wallings knew the wedge did not belong to them even before they had purchased their property. That new evidence came in the form of an affidavit by Charles Maine. Mr. Maine and his wife once owned the entire subdivision and thus were predecessors in title of both the Wallings and the Przybylos.

In their affidavit, the Wallings averred that before purchasing Lot 22, they had asked Mr. Maine – the then owner – to point out its boundaries. According to the Wallings,

> We then walked to the rear of the lot, and Mr. Maine pointed to a large tree situated at the end of a stone wall. . . . That tree had a strand of barbed wire running right through it and had a length of orange plastic survey tape tied to the barbed wire. This tree, Mr. Maine indicated, was the northwesterly corner of lot 22.[9]

Mr. Maine's recollection of the events leading up to the sale to the Wallings was completely different.

> I personally walked the property with Mr. Scott Walling . . . and pointed out where the property corner stakes were and still are located. . . . I *never* identified the property line to Mr. Walling . . . by a tree with remnants of barbed wire.[10]

This clash created a textbook issue of fact warranting the denial of the Wallings' summary judgment motion assuming, of course, that the Wallings' knowledge was germane in deciding whether they had occupied the wedge under a claim of right.

Add to the mix the Wallings' 1986 survey of their property (Lot 22). Although that survey never became part of the record, the anecdotal information was that the Wallings' 1986 survey was consistent with the Przybylos' 2004 survey of their property (Lot 23). If subpoenaed at trial, the 1986 survey of the Walling property would show the same boundary line between Lots 22 and 23 as was shown on the 2004 survey of the Przybylo property. This could be further proof that the Wallings knew they were encroaching from the get-go.

In opposing the motion, the Wallings advanced the *Birkholz* rule. Because they had never recognized or acknowledged the Przybylos' title to the disputed parcel, proof of their knowledge about the true state of the title, standing alone, would not be enough to overcome their adverse possession.

Judge Hall, adopting the view held outside the Third Department, reasoned that the claim of adverse possession would be undone if the Wallings had known from the beginning that they did not have title to the wedge. Because there was a dispute over what the Wallings knew, Judge Hall amended his earlier decision by denying summary judgment to the Wallings.

Walling v. Przybylo: The Third Department Opines

The Wallings appealed. Because the OCEAN mnemonic was otherwise met, the only issue addressed by the Third Department was "whether possessors, whose possession is otherwise open, hostile and continuous for the statutorily-prescribed period of time, can obtain property by adverse possession despite their knowledge that another party holds record title."[11] The court answered: Yes, provided that before the expiration of the statutory period the Wallings had not *overtly acknowledged* that someone else was the true owner of the wedge.[12]

Leave to appeal to the Court of Appeals was granted, putting the "*knowledge alone*" rule of the First, Second and Fourth Departments on a collision course with the Third Department's "*overt acknowledgment*" criterion. Which principle was the iceberg and which was the *Titanic* was decided by the Court of Appeals on June 13, 2006, in *Walling v. Przybylo*.[13]

The Wallings Win, But Did the Third Department?

The Court of Appeals affirmed the Appellate Division "[b]ecause actual knowledge that another person is the title owner does not, in and of itself, defeat a claim of right by an adverse possessor."[14] The Court cast aside the entire body of First, Second and Fourth Department case law with these words: "Conduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessors."[15]

The Answer to the Title of This Article Is: No.

Except for its ap-pearance in a quotation taken from the Third Department's opinion, the word "acknowledgment" does not appear in the Court of Appeals's decision, however. Moreover, the Court's holding that "actual knowledge . . . does not, *in and of itself* defeat a claim of right" infers that there is something else which, when joined with knowledge, would negate a claim of right. Hence, it remains unclear whether an adverse possessor's knowledge that title resides in another, plus the possessor's acknowledgment thereof, would invalidate a claim of right. Because the Court of Appeals neither specifically disavowed nor adopted the Third Department's view that an "overt acknowledgment" can checkmate a claim of right, it is likely that the lower courts will consider such acknowledgments when deciding adverse possession cases.

This leaves open questions such as what constitutes an acknowledgment of title in another? If an adverse possessor mentions that he or she is encroaching upon a neighbor's land to a fellow member of a bowling team who testifies to the conversation at trial, is that an acknowledgment of title in another? Or, must the acknowledgment be made to the record owner who, based upon that acknowledgment, can be assured that 10 or more years of inaction on his or her part will not lead to title vesting in the adverse possessor? Can an acknowledgment be rescinded or revoked?

Conclusion

In *Walling*, the Court of Appeals flirted with a "might is right" rule for adverse possession. It eschewed the premise that knowledge alone defeats a claim of right but it did not endorse the Third Department's "overt acknowledgment" benchmark for deciding claims of right. By stating that the "[Przybylos'] failure

to assert their rights in a timely manner prevents [them] from prevailing on this appeal,"[16] the Court came close to holding that a claim of adverse possession is a pure statute of limitations question if the remaining elements of the OCEAN mnemonic exist.

Walling does not go that far, however. Like the Sphinx, it leaves us with an enticing riddle: While knowledge of the true title *in and of itself* will not overcome a claim of adverse possession, what factor, when coupled with knowledge, will? ■

1. *Belotti v. Bickhardt*, 228 N.Y. 296, 302, 127 N.E. 239 (1920).
2. *Gore v. Cambareri*, 303 A.D.2d 551, 553, 755 N.Y.S.2d 728 (2d Dep't 2003) (quoting *Katona v. Low*, 226 A.D.2d 433, 434, 641 N.Y.S2d 62 (2d Dep't 1996)).
3. First Department: *Joseph v. Whitcombe*, 279 A.D.2d 122, 719 N.Y.S.2d 44 (1st Dep't 2001); Second Department: *Bockowski v. Malak*, 280 A.D.2d 572, 720 N.Y.S.2d 557 (2d Dep't 2001); Fourth Department: *City of Tonawanda v. Ellicott Creek Homeowners Ass'n, Inc.*, 86 A.D.2d 118, 449 N.Y.S.2d 116 (4th Dep't 1982).
4. 298 A.D.2d 838, 747 N.Y.S.2d 874 (4th Dep't 2002).
5. *Id.* at 839.
6. 272 A.D.2d 665, 708 N.Y.S.2d 168 (3d Dep't 2000).
7. *Id.* at 667.
8. 24 A.D.3d 1, 804 N.Y.S.2d 435 (3d Dep't 2005), *aff'd*, 7 N.Y.3d 228, 818 N.Y.S.2d 816 (2006).
9. *Walling*, 7 N.Y.3d 228 (2006), Record on Appeal at 77.
10. *Walling*, 7 N.Y.3d 228 (2006), Record on Appeal at 130.
11. *Walling*, 24 A.D.3d at 3.
12. *Id.* at 4.
13. *Walling*, 7 N.Y.3d 228.
14. *Id.* at 230.
15. *Id.* at 232–33.
16. *Id.* at 232.

"For what it's worth my client would like to point out that the get-away car was a hybrid."

BY ELLIOTT WILCOX

Elliott Wilcox is a professional speaker and a member of the National Speakers Association. He has served as the lead trial attorney in over 140 jury trials, and teaches trial advocacy skills to hundreds of trial lawyers each year. He also publishes *Trial Tips*, the weekly trial advocacy tips newsletter for <www.trialtheater.com>.

Start With the End in Mind

You paid top dollar for this CLE program because the lecturer is the world's expert on the subject. No doubt, he knows his stuff – for the past two hours you've heard every conceivable fact, theory, and idea on the subject. Unfortunately, he's organized the presentation so poorly that you can't understand how any of the ideas relate to each other. Now, starting the third hour, you throw your hands up in disgust, mutter, "What a waste of money," and consign yourself to reading the handouts later.

Poor organization hampers, even destroys, great material. It doesn't matter how strong your message is if the audience can't follow your presentation. By contrast, strong organization helps audiences remember the information, move to a logical conclusion, and think, feel, or act differently than they did when you started your speech.

Military School. Looking for a shortcut formula to organize your speech? The Army teaches a simple but effective method for outlining presentations: "Tell 'em what you're gonna tell 'em. Tell 'em. Then tell 'em what you told 'em." This basic format usually involves an opening, a body (with three main points), and a conclusion.

Write From the Inside Out. When using this formula, many lawyers waste a significant portion of their preparation time trying to craft "perfect" openings. When writing your first draft, don't get hung up on the opening. It's easier when you write your presentation from the inside out – start with the body before working on your opening and conclusion. List your key points and put them in order, starting and finishing with your strongest points, placing the weaker points in the middle, to take advantage of primacy and recency. Once you have your main points listed, expand upon those ideas with supporting material: quotes, statistics, and stories. After you finalize the body, you'll have invested enough thought to know exactly what your audience should take away from the presentation. With that focus in mind, it will be easier to draft your beginning and conclusion.

Start With the End in Mind. Before putting pen to paper (or fingers to keyboard), ask what you hope this audience will think, feel, or do differently when you finish your presentation. Too many times, we start a presentation without thinking about why we're writing it. I once heard a closing argument where the defense attorney focused all of his energies yelling about law enforcement in general and one police department in particular. If his goal was to make people hate police officers, it was a well organized speech. Unfortunately for his client, that wasn't the goal of the argument.

To avoid that error, every time you craft a presentation, write the answer to this question on top of your paper: *"What do I want this audience to think, feel, or do differently when I'm done speaking?"* Starting with the end in mind simplifies your speech writing. Examine each point in the speech to make sure it supports that goal. If it doesn't, be brave enough to eliminate that point. The result is a focused presentation that the audience understands, remembers, and acts upon.

Start on Common Ground. When organizing your speech, find common ground with your audience before moving to the solution or success story. For example, if you spoke to inner city kids about how you escaped from poverty to make your first million, you wouldn't start by talking about the million bucks. They can't relate – none of them are millionaires. But they will all relate to those days when your family shared a two bedroom apartment with a second family and you studied in the hallway because no one paid the power bill.

Does your audience share a common legal problem? If your skills will help them save money or avoid lawsuits, don't start by talking about your solution. That's not common ground. Instead, tell the story of the problem. When everyone in the audience says, "Hey, he's talking about me," or "That's the problem our company faces," then they're ready to hear your solution.

Great presentations don't just "happen." Invest the time to organize your presentation, and your audience will understand, remember, and act upon your great material. ■

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am a mid-level partner at a major law firm, specializing in commodities contracts regulation. A client of mine in the financial services industry has devised a transaction that he would like to implement. Without going into the details, suffice it to say that the client proposes to bring together some 20 or 30 high net worth individuals to pool their money and form an investment vehicle. The structure raises novel questions of commodities and securities regulation, such that each of these individuals would need to conclude, to a high level of confidence, that participating in the transaction will not expose him or her to civil and/or criminal penalties. I have examined the issues, and in principle I believe that we can achieve the requisite comfort level, subject, of course, to the actual facts pertaining to the transaction as a whole and to each person's participation.

My client would like me to offer my services as counsel on these matters to each of the targeted individual participants, to address both the overall facts and the individual's specific circumstances, and also to render legal advice. We have discussed fees – of course each client would, in one way or another, bear the cost of my representation – but we have not decided whether to propose that I be paid purely on an hourly basis, or only if the deal actually closes.

There are two practical reasons why my client is urging me to accept this role, apart from the fees I will earn. First, I have already done the basic work, so this will be more efficient for each individual than hiring his or her own lawyer – and my client is especially concerned that the passage of time that would result from bringing in many new attorneys could erode the commercial opportunity, or allow the idea to leak. Second, the area is so specialized and some of the issues are so novel that it would not be easy to find lawyers who could replicate my efforts independently; it would serve no one's interests to get less than the best advice available.

I am convinced that what my client wants makes eminent sense from a purely business perspective, but something tells me that I should be concerned about conflicts and about whether my participation would constitute prohibited solicitation. Do you have any advice for me?

Sincerely,

Commodities Counsel

Dear Commodities Counsel:

Your situation does indeed raise the issues you describe. However, your ability to identify these issues indicates that your ethical compass points true – and, if you are diligent and cautious in your approach to this matter, you may be able to ethically and professionally proceed with the representations you desire.

Because you should not solicit potential clients if you have a belief that a conflict or potential conflict exists in the representation, you should begin by analyzing the facts from a conflicts perspective. Your actions in this situation will be governed by DR 5-105, the Disciplinary Rule that covers conflicts of interests and simultaneous representation. You might also reacquaint yourself with DR 5-107, which requires attorneys to avoid influence by one other than the client, and DR 5-109, which governs a lawyer's actions when representing an organization.

DR 5-105(A) and (B) set forth the general rule that a lawyer shall decline or discontinue representation "if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected" by the representation of another client, "or if it would be likely to involve the lawyer in representing differing interests." Conversely, DR 5-105(C) authorizes a lawyer to represent multiple clients if "a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved." Expanded views on the framework established by DR 5-105 are offered in Ethical Consideration (EC) 5-15 and EC 5-19, both of which speak to the thoughtful caution required of a lawyer engaging in representation of multiple clients.

The question is whether the representation you have described is one in which you can successfully represent the interests of your original client, and those of the other investors, without running afoul of the Disciplinary Rules noted above.

Certainly, the facts you describe suggest that there are legitimate advantages and economies that might cause those parties to favor your joint representation. However, more information may be needed before you can answer the question of whether that joint representation will create any immediate conflicts, or could

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

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cause conflicts to arise later during the course of the transaction.

Let's start with your current client. The facts you present suggest that he may believe that, first and foremost, you will be "his" lawyer. Does he expect that you will be loyal to him above the other prospective investors? Without question, he will have to be told that this is not possible. Furthermore, will this "novel transaction" prevent you from acting independently with respect to each potential client? If the transaction or your role in it prevents you from giving any of the potential investors independent and reliable advice, tailored to that investor's needs, you should not represent that investor. Indeed, your relationship with your current client – whose idea the investment structure was – potentially implicates the prohibitions of DR 5-107(B). That section prevents you from allowing your client "to direct or regulate [your] professional judgment in rendering such legal services or to cause [you] to compromise [your] duty to maintain the confidences and secrets of [that] client."

It must be remembered that your role will be to advise all your clients on legal matters as those matters affect their interests. You have said that they must be able to rely on your advice and your analysis of the transaction as it relates to them. Will they be able to do this? Consider the ease with which you could be viewed as an "advocate" for the transaction, or your original client, rather than the other investors' interests. Can you truly resist an urge to "sell" the transaction to the potential investors?

Alternatively, if the transaction requires the creation of an entity that would, in turn, hire you to provide it legal counsel, the provisions of DR 5-109 might be implicated. DR 5-109 governs the lawyer's role when representing an organization, and generally makes it clear that in such circumstances the lawyer represents the organization and not its constituent members. Representation of the investment entity would, in all likelihood, prohibit you from individually representing any of its members.

Because you have not yet spoken to the other potential clients, you cannot yet know whether a real or potential conflict exists among these other investors, or between them and the original client. In this regard, EC 5-16 provides a road map and guidance on how to assess the viability of joint representation and how to ensure that you give each of the parties the full disclosure necessary to proceed with the joint representation.

Specifically, EC 5-16 requires that the following steps be taken before proceeding with the joint representation: (1) you must fully explain the implications of common representation to each client; (2) you must provide sufficient information to each client to permit the client to appreciate the potential conflict; (3) your guidance on these points must take into account the sophistication of each client, making sure he or she understands the significance of the conflict; (4) you should accept or continue employment only if each client consents in writing; and (5) if there are any circumstances that, if known, might cause any of the clients to question your undivided loyalty, you should also advise all of the clients of those circumstances.

Should you find it appropriate to proceed, it also will be necessary to explain to each in your initial conversation that you will be unable to withhold his or her confidences from each of the other investors to this transaction. City Bar Formal Opinion 2001-2. That alone may act as a significant deterrent to the joint representation.

Finally, EC 5-16 requires you to determine whether you can ethically proceed by applying the following test: "If a disinterested lawyer would conclude that any of the affected clients should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the client's consent."

If, given all these rules, you still feel that you can ethically proceed to represent multiple parties to the transaction, there is another issue, one you have also correctly identified. That is, there remains a limit on your ability to solicit the prospective investors as your clients. As you are no doubt aware, unless any of the prospective investors is "a close friend, relative, former client or existing client" you are prohibited from personally contacting or calling them to solicit their employment of you for this transaction. DR 2-103(A)(1).

Further, if you intend to solicit the prospective investors in writing, you must comply with the new provisions of DR 2-103, which took effect on February 1, 2007. Under the new rules, any such written solicitation must be filed with your attorney disciplinary committee. DR 2-103(C)(1). Also, in drafting such a written solicitation, you should pay close attention to the requirements of DR 2-103(A)(2), which identifies the prohibited content of such a solicitation.

On a related note, you cannot simply rely on your current client to provide a natural entrée to the other prospective investors. You must exercise caution in asking your current client to put himself in the position, in effect, of "referring" these potential clients to you. Such an arrangement could raise an appearance of loyalty between you and your current client that makes it impossible for you to ethically represent any of the prospective investors.

All in all, while there are numerous hurdles to overcome before the arrangement you propose may be put in place, it does appear possible to accomplish your goal without violating the Disciplinary Rules and Ethical Considerations. However,

you must pay close attention to what they require of you, and in general treat all of the potential participants with the same degree of fairness, reasonableness, and professionalism you owe your current client.

The Forum, by
Robert T. Schofield
Whiteman Osterman & Hanna LLP
Albany, New York

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am employed by a firm that does a substantial amount of defense work on behalf of insurance companies. Of course, when one of their insureds is sued, we appear for the named defendant, and do not purport to represent the insurance company. Recently, we were asked to appear for a certain corporate client being sued for a substantial amount of money.

We interposed general denials to the allegations of the complaint, the verified answer stating that it was based on information contained in the client's files. The litigation proceeded. However, in response to demands for discovery and inspection, employees of the client told me that they did not have certain basic documents which one would expect to be part of the company's records. They continued to give me this same response even though sanctions, including striking the answer, have been threatened during court conferences. If the court strikes our pleading as a result of what the other side characterizes as deliberate obstruction and "stonewalling," the insurance company may be on the hook for a large judgment.

Under these circumstances, should I report what I believe is client obstinacy to the insurance carrier, which is at risk, knowing it may deny coverage because of non-cooperation by the insured, or should I do my best to tough it out and attempt to justify the client's position in court?

Sincerely,
Loyal But to Whom

MEMBERSHIP TOTALS

New Regular Members 1/1/07 - 1/31/07	**637**
New Law Student Members 1/1/07 - 1/31/07	**104**
Total Regular Members as of 1/31/07	**70,786**
Total Law Student Members as of 1/31/07	**3,031**
Total Membership as of 1/31/07	**73,817**

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: In the sentence, "I [presumed/assumed] erroneously that you would have access to the New York State Bar Association *Journal*," which of the bracketed verbs is correct? (Although I majored in English and have been a lawyer for 26 years, I am worried about writing to you lest I err grammatically.)

Answer: My thanks to Attorney Mitchell Shapiro, who sent this question. Anyone who, like Mitchell Shapiro, cares enough about using proper grammar to worry about it need have no concern about his own usage.

The verbs *presume* and *assume* are often synonymous in lay usage, as they are in the sentence Mr. Shapiro sent. In that sentence, both verbs mean "take for granted without proof." Lay dictionaries also generally regard them as synonyms, as in the following court opinions cited in *Words and Phrases*:

> To "presume" is defined by Webster as "to assume" to be true, or entitled to belief without examination or proof. *Ferrari v. Interurban St. Railway Co.*, 103 N.Y.S. 134, 136, 118 App. Div. 155 (1907).
>
> The word "presume" is defined as meaning "to venture, go, or act by an assumption." *Pearce v. State*, 132 S.W. 986, 987, 97 Ark. 5.
>
> [The] word "presume" means "to assume beforehand." *Commonwealth v. Lavery*, 73 N.E. 884, 188 Mass. 13 (1905).

However, in some contexts each verb can be used when the other would be incorrect. For example, the verb *assume* means "take upon oneself," in the statement, "She assumed the privileges of friendship." *Assume* can also mean "appropriate or seize," as in the statement, "The insurgents assumed power."

Other contexts in which *assume* would be proper and *presume* would not are when *assume* means "undertake," as in the context "assume an obligation." It also means "take on duties," in the statement, "He will assume office next year." Finally, it can carry the idea of feigning or pretending, as in, "He assumed a humility he did not feel."

The verb *presume*, like *assume*, can mean "to undertake," but in a slightly different context. In the statement, "He presumes to speak for his spouse," we don't know whether he was granted that permission or merely "assumed" it. *Presume*, particularly in the negative, carries the idea of acting "with impertinent boldness," in a sentence like, "Do not presume to speak for others."

In legal contexts *presume* carries the sense of "take for granted in the absence of proof to the contrary." Dictionaries also list *assume* with that meaning, but *presume* is used in legal contexts when that meaning it intended.

Generally, however, the two words can be used alternatively, in the sense that they both mean, "to take for granted without proof," but be sure to check their contexts. What one court said about *presume* can be said about *assume* as well:

> The word "presume" has many different meanings, and is flexible and often partakes of the context in which it appears. *Cloud v. State*, 202 S.W.2d 846, 848, 150 Tex. Cr. R. 458 (1947).

As for the adverb *presumably*, it means, "fit to be assumed as true in advance of conclusive evidence; fair to suppose by reasonable supposition or inference; what appears to be entitled to belief without direct evidence." That is the careful (and wordy) definition given by the court in *Kurth v. Continental Life Insurance Co.*, 234 N.W. 201, 202, 211 Iowa 736 (1931).

Question: Is it now correct to begin a sentence with a conjunction; for example, *and*, *for*, *but*, *nor*, and *or*? I see this more and more often in supposedly "educated" writing. I was taught that conjunctions join parts of sentences, but never begin sentences.

Answer: This is the first time I've heard about such a rule, and I can't find any indication that it ever existed, even after searching the books of conservative grammarians. H.W. Fowler, an authoritative conservative grammarian whose first book was published in 1926, has nothing to say about starting sentences with conjunctions, except to warn readers not to repeat the conjunctions. Fowler cites, for example, as a statement to be avoided:

> *But* he did not follow up his threats by any prompt action against the young kind, *but* went off to Germany to conclude the campaign against his brother Lewis of Bavaria (emphasis added).

Fowler calls the repeated *but* construction an example of "wheels within wheels," and he disapproves of it, as would most people.

Sometimes the admonitions of an elementary school teacher may stick in our memory for years, and that may be the source of this "rule." Perhaps the reader's second-grade teacher wearied of reading student compositions that read something like this:

> My mother took me to the store. And we rode the escalator. And she bought me some popcorn. And then I asked for more to eat. But she said no. And I cried.

You can imagine that after reading 20 or more such compositions the teacher might well say, "Don't begin sentences with *and* or *but*."

Conjunctions are useful linking words. Judiciously chosen, they provide a connection between the ideas expressed in the previous sentence or paragraph to the ideas about to be introduced. They also function as guidelines, telling the reader in what direction you intend to proceed.

The reader who expressed his disapproval of sentences that begin with the short conjunctions he listed might not object to using longer conjunctive adverbs, connecting words like, *however, moreover,* and *nevertheless*. These do the same job, but they are more formal and have the advantage that they can be inserted into the middle of the sentence or placed at the end, positions not possible for *and* and *but*. ■

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). Her most recent book is *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co., 2004).

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reader, not the writer: "Humble writers rank the reader's convenience ahead of their own. They work hard so the reader doesn't have to."[4] Knowing who your readers are and what they need count among the most important things in all kinds of writing. One must write differently for different readers; different readers need different things. The vain write for themselves. They lose an opportunity to persuade because they're self-absorbed: They don't write to make it easy for the reader to agree with them. They write to flatter themselves or so that others flatter them. Their susceptibility to flattery is cyclical. When they aren't flattered, it's because the reader didn't appreciate good writing.

Legal writers must appreciate that the reader is smart, not stupid. The humble writer conveys the information the reader needs, neither more nor less. The humble assume that the legal reader is a busy professional. They write concisely and succinctly. They're sparing not only with words and pages but also with citations, quotations, and number of issues and arguments raised. They're concerned with doing what's best for their client, not with exhibiting their profundity and research.

What's best for the client is what's best for the reader. The humble won't insult the reader with metadiscourse or unneeded history or givens. The humble aren't pompous. They write clear, simple prose in plain English. They don't think that plain English dumbs down writing. They avoid the bureaucratic passives, negatives, and nominalizations. They won't use legalisms or fancy, foreign, or uncommon words and phrases. They won't accuse, embarrass, or threaten. They respect precedent and follow court rules. They won't cheat, exaggerate, fudge, or overstate — with writing style or with fact or law.

The humble understate. By understating, they naturally come upon the essence of powerful writing. They emphasize content, not style; they write for the ear, not for the eye. They call no attention to their writing. In doing their best not to distract from their message, they effect the right tone: no affected tone at all.

Nor do the humble write in a conclusory way. They don't assume that the reader agrees with them just because they say so. That makes the humble show, not tell, and showing is persuading. They won't need or want to rely on writing that raises hackles and skepticism — false adverbial excesses like "obviously"; false injections of narcissistic and irrelevant personal beliefs and emotions like "I feel" and "I believe"; and false emphatics like aggressively shouting at readers with bold or italicized text. They don't use sarcasm and invective. They don't delude themselves with illusions; they respect their readers and themselves. They therefore give accurate citations to the record, pinpoint citations to case law, and quotations to testimony, cases, contracts, and statutes. They also cite authority to give fair credit, and in return their citations bolster their arguments.

To bolster their arguments further, the humble attempt to understand their adversary's arguments. The humble, unlike the vain, don't assume that their adversary's machinations are clearly frivolous, certainly sanctionable, and undoubtedly mendacious. By understanding opposing arguments and dealing with them honestly, the humble blunt opposition preemptively and overcome the contrary through fair and often winning rebuttal. The vain can't do that.

Both the humble and the vain care about typographical errors and citing correctly, although for different reasons. The humble care that readers might lose the message; the vain worry about how they'll be thought of. But mistakes crop up in the writing of the vain more often than in the writing of the humble.

The humble make fewer mistakes because they follow two legal-writing maxims the vain ignore. First, the humble edit and revise. They, unlike the vain, don't assume they'll get it right the first time, or the third. One perceptive writer explained the process: "Humble writers realize that their writing is not the product of genius, and so are willing to revise, and revise some more. Being realists, they can look at their own writing with a critical, objective eye, and see its flaws."[5]

The humble assume that legal readers are busy professionals.

The second is that the humble seek advice from others. They welcome suggestions, adopt the good ones, and learn from them. If the vain ask for suggestions, it's because they seek compliments, not critique. When they get constructive criticism rather than compliments, the vain reject it, are defensive and ungracious about it, and don't profit from it for the next project.

Because the vain ultimately fail at writing, others will write their next project, or the project after that one. If they're lucky, the humble will write their next project. Sadly for the vain — and more sadly still for reader and client — that won't stop them from criticizing others' writing. They'll always believe that they write better than others or that they're too important to write.

Humility isn't weakness or false humility. It's the wisdom to see your faults and the strength to correct them. Humility isn't the subservient belief that you should treat others well because they're better than you. It's the courage to respect others without cheap flattery. Humility isn't passivity. It's taking a stand with integrity and professionalism. Humility is the first and best virtue. Not merely of legal writing but for life. ■

1. Proverbs 11:2 (New Int'l Version).
2. Luke 14:11 (New Int'l Version).
3. *See generally* Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. Davis L. Rev. 127 (1998).
4. Raymond P. Ward, Writer's Corner, *Humility*, [Winter 2003] Certworthy 7, 7, *available at* http://home.earthlink.net/~thelegalwriter/sitebuildercontent/sitebuilderfiles/2003winter.pdf (last visited Dec. 26, 2006).
5. *Id.*

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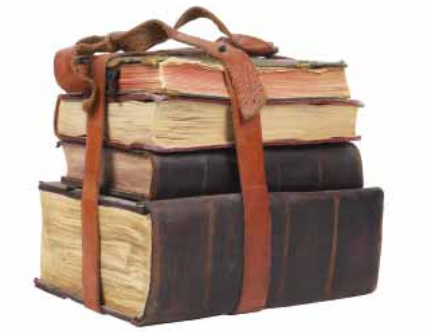

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at New York Law School. His e-mail address is GLebovits@aol.com.

Sin and Virtue in Legal Writing: Vanity and Humility

The word "pride" refers to self-respect and joy in the success of oneself and of the people and institutions we identify with. Excessive pride is vanity. As the source of all sin, vanity is the worst of the seven deadly, cardinal sins. The vain have hubris. They are narcissistic. They devote themselves not to others, but to being important or attractive to others. They have unjustified self-confidence. They fail to credit others. They are arrogant, boastful, and defiant.

The opposite of vanity is humility. Humility is the first virtue because it removes vanity. As the Old Testament observes, "When pride comes, then comes disgrace, but with humility comes wisdom."[1] The New Testament agrees: "For everyone who exalts himself will be humbled, and he who humbles himself will be exalted."[2]

The best legal writers are humble about their writing and their writing skills. The best legal writing has humility. The humble write for their readers, don't let their ego interfere, and take responsibility for their writing. One must have pride in self and work to write well. But vanity leads to poor legal writing.

The vain think they know it all.[3] That's a problem in legal writing. Legal writing is the hardest of the legal arts to master. Successful legal writing requires years of study and effort. Without innate talent one can't be a great writer, but one can't even be a good writer, regardless of innate talent, without study and effort. Nothing important is easy, and legal writing is important. For lawyers, it's the key to communication. Writing reflects thinking and understanding. One can't be both a good lawyer and a poor writer. Learning to write takes humility. Humility begins with an openness to learn.

For many law students, legal writing is a hated subject. Too much work for too few credits. Too much criticism; too many corrections. Yet legal writing is writing that counts, writing on which people rely, writing that affects rights and responsibilities. The required level of accuracy, brevity, and clarity is unlike anything seen before. In college, a student can begin a writing project the night before it's due. Not in law school. Legal writing requires research and advance preparation. In college, a student can cite references simply to explain where information comes from. Not in law school. Legal writing requires precision in citation to support factual and legal propositions in the form of logical argument. In college, a student can explore a subject until the minimum page limit is reached. Legal writing requires application of fact to law, sometimes unclear fact and unsettled law, until the maximum page limit is reached.

The vain believe that their cleverness compensates for effort. The humble realize that learning a difficult and important subject like legal writing takes study. Only the humble accept a writing teacher's criticism other than as it affects a grade. The vain have too much ego invested in their writing. Every suggestion is an attack on them personally. They think, or pretend, they know more than their writing teachers. To challenge or show off, the vain announce in class that someone else years ago taught the matter at hand differently. In not expending the required effort, the vain show slothfulness, not smarts. The humble study and accept criticism. The humble learn. The vain resist.

Resistance is futile. Not every lawyer must excel at legal writing. But most must. Most lawyers are professional writers. Lawyers are the world's best-paid writers. So demanding is legal writing it requires a lifetime of study to excel. Writer's block may not afflict a lawyer. No matter how good a lawyer is at writing, the lawyer can always get better. A lawyer must always work at writing. If not, writing skills calcify. The humble forever seek to improve their writing. They read about writing. They practice. As time permits, they take continuing legal education courses on writing. The vain do so rarely. When they do, it's because they're told they must, and it's less to learn than to confirm what they already think they know.

> The vain write for themselves.

Knowing that we don't know is the first sign of knowledge. That means starting important writing projects with a plan. The precise way to plan an important writing project is open to debate. The point isn't which plan is best — this way to outline or that — but to think about writing goals and not to assume it'll come out right without planning and thought.

Planning and thought count to the humble because what counts is the

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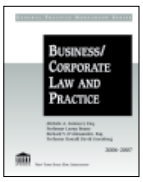

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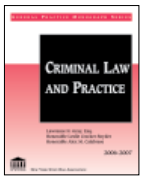

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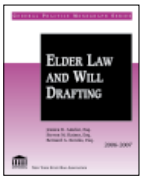

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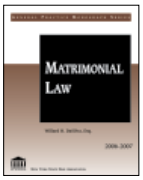

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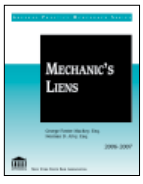

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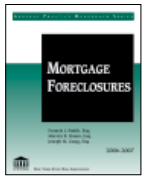

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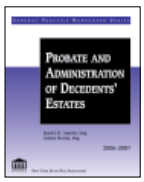

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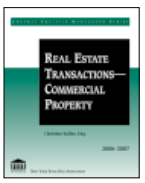

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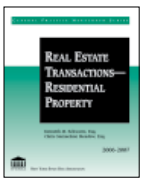

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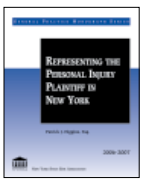

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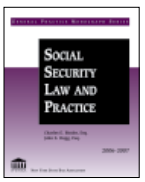

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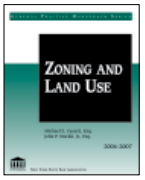

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