NEW YORK STATE BAR ASSOCIATION

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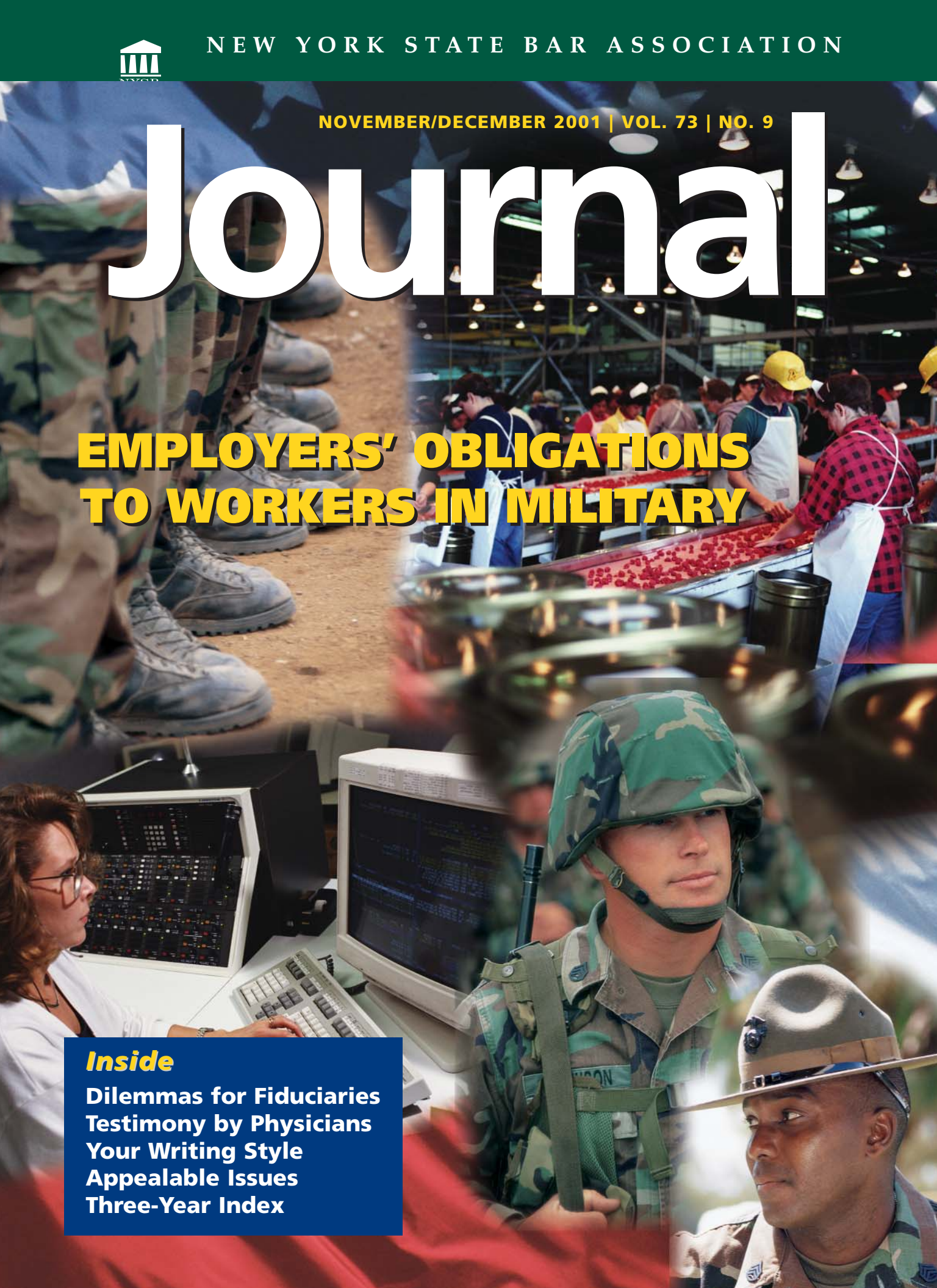
Journal

EMPLOYERS' OBLIGATIONS TO WORKERS IN MILITARY



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On The Cover

The montage of photos on this month's cover was assembled to reflect the transition from civilian to military service for members of reserve units who are being called to active duty in response to the actions of terrorists.

Cover design by Lori Herzing.

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President's Message

Steven C. Krane

"Mid-Term Letter"

As I write this message, I have just reached the half-way point in my term as the 104th President of our Association. The time has passed so quickly it is truly hard to believe that there are more days behind me at the helm than in front of me. One short year hardly seems long enough, and yet two years would probably be too long to hold this particular office. Like they say about prunes, you can't be sure whether one is enough or two are too many. I considered calling our president-elect, Lorraine Power Tharp of Albany, and suggesting that I might just "hold over" in office for a few months. I thought better of that idea, and rapidly reached the conclusion that I had better accept the fact that my term will end, as quietly as it began, at the stroke of midnight on June 1 next.

It has not been a particularly quiet six months. Tragedies and challenges notwithstanding, it continues to be a joy and a privilege to lead the New York State Bar Association through these times. We have accomplished much during the first half of my term, and we are by no means done. And so, I thought I would take this opportunity to bring all of you up to date on where we have been and where we are going. Here are the highlights:

Tragedy and Triumph In the interests of brevity, I will only update last month's President's Message, which described the Association's response to the horror of the September 11 attacks. Although the intensity of the *pro bono* and administrative work being done for those affected by the terrorist acts has diminished, we continue to help coordinate the relief effort and to be a facilitator of direct services to direct and indirect victims. The magnitude of the task required the conjunctive effort of a coalition of more than 50 state, local and special-interest bar associations (as well as the ABA), and several thousand attorney-volunteers. The entire disaster relief effort reflects the professionalism, dedication and selflessness of our members, as well as attorneys from all across the region. The September 11 disaster showed the bar at its best and we should be proud of all that we have been able to accomplish together.

Just as it seemed as if we could begin to return to at least a modest degree of normalcy, American Airlines Flight 587 crashed on November 12, for a brief time stirring fears of yet another terrorist attack. Within 24 hours of the crash, members of our Mass Disaster Response team and I were on site at the Javits Center in Manhattan, where relief services were being coordinated. Over the next week and a half, working in direct coordination and cooperation with federal, state and local agencies, and with the invaluable assistance of representatives of The Association of the Bar of the City of New York and the Legal Aid Society, we provided emergency legal assistance to scores of victims' families and referred countless others to appropriate attorneys and agencies. We were also successful in thwarting the efforts of a handful of attorneys who engaged in illegal solicitation of family members.

It would be impossible to list all of those volunteers who distinguished themselves in these difficult times, but three come to mind: David H. Tennant of Rochester and Robert J. Saltzman of Brooklyn, chair and vice-chair, respectively, of the Special Committee on Mass Disaster Response, who personally coordinated an immediate response to both disasters. We must also recognize Wallace Leinheardt of Garden City, whose activities as an officer of the Trusts and Estates Law Section led the way in establishing an expedited legal framework for dealing with the unprecedented number of victims. He will be featured in an upcoming *ABA Journal* article on the "lawyer heroes" responding to the September 11 attacks.

We have acquitted ourselves well in these efforts, and acted in a manner consistent with the highest traditions of the legal profession. Our Association is now established as a key member of the state's disaster response network, and we can expect to be called upon in the future to provide needed aid to victims of similar catastrophic events in New York. We know that it is futile to hope that the current disaster will be the last one, for there will always be another, natural or otherwise. All we can do is be ready when it comes.

Policy and Direction Our governing body has been dealing with significant issues of importance to our profession, government and society. In June, the House of Delegates approved reports dealing with issues as varied as artificial insemination and parental rights and the procedures for appointment of acting supreme court justices and judicial hearing officers. The House also approved a resolution backing the McCain-Feingold-Cochran bill that would have banned the use of "soft money" and "issue ads" that really advocate the elec-

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tion or defeat of particular candidates in federal elections. Unfortunately, procedural wrangling stalled efforts to pass meaningful campaign finance reform legislation, and it is difficult to predict when congressional attention will again shift to this subject in the future. In November, the House approved a set of reforms to the procedures associated with the appointment of guardians under Article 81 of the Mental Hygiene Law, while voicing its strong opposition to the Office of Court Administration's proposed rule that would require lawyers to send engagement letters to clients.

"Dispone Domui Tuae" Although not quite what Isaiah had in mind,[1] we have embarked on several projects intended to put our house in order. Responding to suggestions that our Sections were insufficiently integrated into the overall operation and policy-making structure of the Association, we convened in early June a conference of all Section leaders at the Bar Center in Albany. Among other efforts, we encouraged the Sections to be more integrated and play a more important role in Association affairs. Taking a broader look at the structure and operation of the Association is the Special Committee on Association Governance. This committee, chaired by Dennis R. Baldwin of Syracuse, is expected to report by April 2002 on a wide variety of issues, including the organization of the House of Delegates and Executive Committee; communication among committees, Sections and the Association; development of future leaders; diversity and options for different governance structures.

The Special Committee on Legislative Advocacy is likewise evaluating ways the Association can be more effective in influencing the activities of the Legislature. Although we already have a significant presence by virtue of our status as the voice of 67,000 lawyers in New York State, we can always improve our ability to advocate for the profession, secure needed reforms in the law, and improve public trust and confidence in the legal system. The committee, under the direction of A. Vincent Buzard of Rochester, is considering initiatives such as a key contact program for NYSBA members to work closely with their local legislators.

We undertake these projects with a firm grasp of the history and traditions of the Association, particularly as we enter our 125th Anniversary year. November 21, 2001, marked the anniversary of the Association's formation in Albany and was marked by a special proclamation by Governor Pataki. A special committee headed by John Hanna, Jr., of Albany is planning various events to commemorate the anniversary year. We will also be creating an authoritative history of the Association's first 125 years in collaboration with the publishers of *American Heritage* magazine.

Doing the Public Good Much has been done to promote access to our system of justice. History teaches that while societies may be based on the precept of equal justice for all, those that deny their citizens access to their justice system—or fail to lift barriers to that system—run the risk of losing their legitimacy. Without access, the justice system becomes illusory, and an illusory system is no better than no system at all. A convocation on Access to Justice, led by Deputy Chief Administrative Judge for Justice Initiatives Juanita Bing Newton, was held in Albany on September 11 and 12. Our own President's Committee on Access to Justice, co-chaired by C. Bruce Lawrence of Rochester and President-Elect Lorraine Power Tharp, held a retreat in Albany on October 31 and November 1. These conferences produced concrete recommendations and action plans for those seeking to solve the endemic problem of providing meaningful criminal and civil legal services to all.

More concretely, we have continued to be strong advocates for increased funding for criminal and civil legal services at both the federal and state levels, making our opinions on funding issues known to Governor Pataki, our state legislators, congressional leaders and the New York State IOLA Board. We were successful in convincing the Legal Services Corporation board, in view of the events of September 11 and the additional burdens those attacks presented for legal services providers, to extend the deadline previously set for those providers in New York to reconfigure their organization and develop an integrated statewide delivery system.

Well under way is the work of the Special Committee on Student Loan Assistance for the Public Interest, chaired by Henry M. "Hank" Greenberg of Albany. I created this committee to study problems created by the substantial law school debt incurred by law students as they enter practice as newly admitted attorneys, as well as how massive debt discourages law graduates from accepting lower-paying public service or legal assistance positions in the legal profession. The committee plans to explore innovative initiatives that address these problems to arrive at loan forgiveness options to assist law graduates—particularly those interested in the public service sector—such as through the creation of public authorities and the issuance of government bonds.

Our Own Backyard We continue to be vigilant in advocating and advancing the interests of attorneys in New York State. For example, this past June, we called upon the Federal Trade Commission to exempt lawyers from the provisions of the Gramm-Leach-Bliley Act, which requires providers of financial services to furnish clients with an annual disclosure statement regarding their privacy policies. We told the FTC that lawyers are already subject to stricter disclosure provisions under the Code of Professional Responsibility than any commercial enterprise. The FTC recognized that our concerns warrant "serious and thoughtful consideration" and promised to work with us to review these issues. We are hopeful that through cooperation we will be able to develop a workable solution to the problem.

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Multijurisdictional practice will be a focus of attention in the coming months, particularly once the ABA Commission on "MJP" issues its report. With that in mind, we have formed our own Special Committee on Multijurisdictional Practice, which is being chaired by Klaus Eppler of New York City. This committee will consider the issues connected with attorneys and law firms practicing in multiple states and will prepare us to comment effectively on the ABA Commission's report.

As I discussed in my September President's Message, MDP remains an issue of concern to the bar. On July 23, 2001, the presiding justices of the four departments of the Appellate Division signed a joint order amending the Code of Professional Responsibility to include the first rules anywhere in the country governing and restricting multidisciplinary practice. The two rules, which went into effect on November 1, 2001, are substantially the same as those approved by the House of Delegates in response to the April 2000 "MacCrate Report," and govern ancillary services by lawyers and the creation of contractual relationships between lawyers and non-lawyer professional services firms. We will be offering New York's new rules to the rest of the nation as proposed amendments to the Model Rules of Professional Conduct at the ABA's midyear meeting in Philadelphia in February 2002.

Looking Ahead The House of Delegates meeting in January 2002 will be the site of debate concerning the proposal of the Special Committee on Public Trust and Confidence in the Legal System to lift the veil of secrecy covering attorney disciplinary proceedings in New York State, at least at the point at which formal charges have been filed. (Effie Gunderson, take note). Committee Chair Ellen Lieberman of New York will lead the debate. As you know, I am personally a staunch supporter of this initiative. With that in mind, I plan to spend the next several weeks meeting with as many local bars and House delegations as possible to discuss the issues surrounding open disciplinary proceedings, in the hope of forging a consensus position acceptable to the House.

The January meeting will also be the location for a debate on a proposed definition of the practice of law, drafted by the Committee on the Unlawful Practice of Law under the chairmanship of Mark Solomon of Ithaca. Competition from outside the profession remains a critical challenge for lawyers in the 21st century. The public cannot effectively be protected against injury from those who would purport to render legal services without being admitted to the bar, in the absence of a clear definition of what actually constitutes the practice of law. This challenge was set forth by the ABA in July 2000, and has been the focus of nationwide attention. With no definition of the practice of law on the books in New York at present, we have an opportunity to take a significant step toward meaningful enforcement.

We have received the reports of the Commission on Fiduciary Appointments and the Office of the Special Inspector General for Fiduciary Appointments, created by the Office of Court Administration in early 2000. Anticipating that the NYSBA wanted to study and comment on these reports, which made recommendations for substantial changes in the fiduciary appointment system in New York State, I have formed a Special Committee on Fiduciary Appointments, which is being chaired by former President Joshua M. Pruzansky of Smithtown.

The NYSBA was host for an October 15 symposium on judicial election campaign practices. We were joined by Chief Judge Judith S. Kaye and Judge Albert M. Rosenblatt of the Court of Appeals as we explored, with several of the larger bar associations in the state, ways in which we can promote civility in judicial campaigns. Part of the program consisted of a panel discussion moderated by Chief Administrative Judge Jonathan Lippman, in which the parameters of judicial campaign oversight programs were discussed. A Special Committee on Judicial Campaign Conduct, chaired by Michael Klein of Syracuse, has been formed and asked, among other things, to formulate a flexible model plan that local bars around the state could consider and adapt for use in their own areas and to consider the extent to which the NYSBA should play a role in this process.

One of the lessons learned from the World Trade Center attacks is that we need a set of protocols to address problems associated with law practice disruptions. From the solo practitioner who dies, to the small firm whose storefront office is destroyed by fire, to the collapse of 110-story office buildings, we need to have mechanisms and protocols in place to help these lawyers or their successors to ensure that the interests of present and former clients, among others, are preserved. In formation is a special committee that will address these critical issues.

Finally, we will be conducting summits this spring on two critical issues affecting the legal profession and New York lawyers in particular. One summit will examine whether lawyers are taking full advantage of technological advances in their daily practices, and the extent to which the Association can help its members embrace and make the best use of what is available to them. Another will attempt to predict the future and assess coming trends in society, with a view toward determining what new services the legal profession should be prepared to perform for existing clients, or what new or expanded groups of clients should be served.

It's Your Turn Please do not hesitate to let me know what you think about any of our programs or initiatives, or to suggest projects or positions we should explore. I particularly welcome your e-mails at skrane@proskauer.com, but "snail mail" will work fine as well.

1. Isaiah 38:1, for those keeping score at home.

When Duty Calls: What Obligations Do Employers Have to Employees Who Are Called to Military Service?

By Eve I. Klein and Maria Cilenti

Within days after the terrorist attacks of September 11, 2001, more than 10,000 reservists were called to active duty, and military officials advised that call-ups could exceed the 35,000 reservists Defense Secretary Donald Rumsfield initially requested.[1] Indeed, two weeks later, the Pentagon authorized the mobilization of 42,000 additional reservists.[2] And in an effort to protect citizens of New York and to provide needed assistance in the clean-up efforts at the World Trade Center, Governor George Pataki mobilized approximately 6,000 members of the New York State National Guard.[3]

What does this mean for employers who employ reservists or other persons who enlist in the uniformed services? What accommodations must employers make for employees who are absent due to military service? Generally speaking, an employer may not discriminate against an employee with regard to hiring, retention, promotion or provision of any benefit of employment because the employee serves military duty. This prohibition against discrimination, coupled with the public policy of encouraging membership in the reserves, has worked to create four fundamental and general principles to guide employers:

First: Depending on length of service and employee qualifications, a returning service member is entitled to be escalated to the position he would have attained but for military service, or be re-employed in his original position or one of like seniority, status and pay.

Second: For a period not to exceed one year, returning service personnel may not be terminated except for cause.

Third: Service personnel are entitled to continue to accrue certain benefits during military leave.

Fourth: Upon re-employment, employees are entitled to the seniority, rights and benefits they would have attained had employment not been interrupted due to military service, free of discrimination.

The rights of employees in the uniformed services and the concomitant obligations of employers are governed by both federal law and state law.[4]

USERRA

The USERRA, enacted in October 1994, was meant to expand, codify and clarify the employment rights and benefits available to veterans and employees under its predecessor, the Veterans Reemployment Rights Act (VRRA). Congress enacted the USERRA (and the VRRA) to provide prompt re-employment to those who engage in non-career service in the uniformed services of the United States. The purpose of the statute is to encourage non-career service, minimize the disruption to the lives of service personnel and the business of their employers, and prohibit discrimination against employees because of their service.[5] The USERRA is liberally construed in favor of those who serve military duty.[6]

Coverage In a coverage provision extremely broad by employment law standards, "employer" is defined to include any person or entity that (1) pays salary or wages for work performed, (2) has control over employment opportunities, (3) has been delegated the performance of employment-related responsibilities, or (4) is a successor-in-interest to the employer and explicitly includes both federal and state[7] governments.[8]

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The class of persons covered under the USERRA is also exceedingly broad and includes anyone "who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service"[9] "on a voluntary or involuntary basis in a uniformed service under competent authority."[10] Virtually all facets of military service are covered, including active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, and absences for fitness examinations.[11] The term "uniformed service" covers the United States Armed Forces, the Army National Guard, the Air National Guard, the commissioned corps of the Public Health Service, and any other category of persons designated by the President during war or emergency.[12] Excluded from the definition of "uniformed services" is service in a state militia or other active duty in the service of the state. New York State service is covered by the New York Military Law, discussed below.

Re-employment Rights An employee who is called for military duty is entitled to re-employment if (1) the employee has given advance written or verbal notice to the employer, unless circumstances make it unreasonable to do so;[13] (2) the cumulative length of absence from employment with that employer, including prior service absences, does not exceed five years, with certain notable exceptions, including service in a time of war or national emergency;[14] and (3) the employee promptly reports to work or submits an application for re-employment within 14 or 90 days after completion of service, depending on the length of service.[15] An employee must also submit documentation (upon the employer's request and where it is readily available) to establish that the application is timely, that the service limitations have not been exceeded, and that the employee's separation from military service was not dishonorable.[16]

Because the statute does not further define what it means to submit an application for re-employment, courts take a case-by-case approach, focusing on the intent and reasonable expectations of both the employee and employer, in light of existing circumstances.[17] If an employee fails to report or apply for re-employment within the appropriate time frame, he shall not automatically forfeit his right to re-employment. Instead, such person is subject to the employer's policies and procedures with respect to absences from work.[18]

The requirements of re-employment are not absolute, however. An employer is not required to re-employ a person if (1) the employer's circumstances have so changed that they make re-employment unreasonable; (2) re-employment would impose undue hardship on the employer;[19] (3) the position the employee leaves is for a brief, non-recurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period;[20] or (4) the employer had legally sufficient cause to terminate the employee at the time he/she left for service.[21] Under all four circumstances, the employer has the burden of proving that the exceptions apply.[22]

Re-employment Positions If an employee's military leave is less than 91 days, the employee must be reinstated in the position that would have been attained if employment had not been interrupted (the "escalator principle," see box on this page), provided the employee is qualified to perform the duties of the position[23] or becomes so qualified after reasonable efforts by the em-

The Escalator Principle

What standard should determine whether an employer is obliged to escalate a returning service member to a position the individual "would have" attained but for military service?

Many courts have found the appropriate standard to be "reasonable certainty."[1] In some cases, such as an apprentice in training for journeyman status, it may be clear that the employee would have been promoted, with the benefit of the additional training and experience that would have been available. In other cases, it may be more difficult to establish that something "would have" happened, particularly when promotions are left to the employer's discretion. Such uncertainty should not vitiate an employee's claim, however. In *Fink v. City of New York*,[2] an employee of the New York City Fire Department was denied the opportunity to take a make-up promotional examination upon his return from service, an examination he likely would have passed, resulting in the loss of a promotion he likely would have received. Fink sued under the USERRA, succeeded on all claims before a jury, and successfully defended a motion for a judgment notwithstanding the verdict or for a new trial.[3]

1. *See, e.g., Chernoff v. Pandick Press, Inc.*, 419 F. Supp. 1192, 1198 (S.D.N.Y. 1976); *Lang v. Great Falls School Dist.*, 842 F.2d 1046, 1048 (9th Cir. 1988); *Tilton v. Missouri Pacific Railroad Co.*, 376 U.S. 169, 180 (1964).
2. 129 F. Supp. 2d 511, 518 (E.D.N.Y. 2001).
3. In fact, while the court in *Fink* found that the very-qualified plaintiff would have achieved his desired promotion with "reasonable certainty," the court questioned whether "reasonable certainty" even need be shown where a facially neutral policy of offering a promotional examination on one day only clearly has a disparate impact on employees serving military duty on that day. *Id.* at 523.

ployer to qualify the individual.[24] Following unsuccessful efforts to qualify the employee, the employer may reinstate the employee to the original position. The same rules apply to an employee whose military leave is more than 90 days, except if the employee cannot be qualified for the escalated position, the employer has the option of either reinstating her/him to the original position or placing the individual in a position of "like seniority, status and pay."[25] If, for any reason, an employee is not (and cannot be) qualified to perform in the escalated, original or comparable position, the individual shall receive any other position he/she is qualified to perform, and which is the "nearest approximation" to the escalated position (or, if that is not possible, to the former position), with full seniority.[26]

The USERRA provides additional protections for employees who become disabled or whose prior disability is aggravated while serving military duty. If a returning service member's disability makes the person unqualified to perform in an escalated position (after reasonable efforts to accommodate by the employer), then the employee may be reinstated in "any other position which is equivalent in seniority, status and pay" the duties of which he is qualified or would be qualified to perform with reasonable efforts by the employer. If the person is not so qualified, the employer must reinstate the employee in a position which is the "nearest approximation" in terms of "seniority, status and pay consistent with [the] circumstances of [that] person's case."[27] As such, the USERRA provides a disabled service member with greater reinstatement rights than those provided under the Americans With Disabilities Act.[28]

Cumulatively, these provisions are meant to virtually guarantee that a returning service member—including one who becomes disabled during service—will receive a position with the original employer if the person so chooses, unless reinstatement is impossible, unreasonable or imposes an undue hardship.

Rights, Benefits and Obligations While away on military leave, an employee must be treated as on a furlough or leave of absence and is entitled to accrue the same rights and "benefits of employment"[29] as employees of similar seniority, status and pay who are on non-military furloughs or leaves of absence.[30] Upon reinstatement, such employee is entitled to the seniority, rights and benefits associated with the position held at the time employment was interrupted, plus the additional seniority, rights and benefits that would have been attained if employment had not been interrupted.[31] The employee may be required to pay the costs, if any, of any employee-funded benefit continued pursuant to this provision. [32]

The USERRA requires employers to offer continuation of health insurance coverage for up to 18 months to service members absent due to military service.[33] The health plan may not require the employee to pay more than her/his normal share for that coverage if the period of military service does not exceed 31 days. Beyond 31 days, the employee may be required to pay up to 102% of the full premiums under the plan, comparable to the continuation coverage provisions under COBRA.[34] Coverage terminates under the USERRA (but not necessarily under COBRA) if the service member does not timely apply for re-employment.

The USERRA also makes explicit the rights of re-employed service members under their pension plans.[35] Specifically, no break in employment can be considered to occur because of an employee's military service, no forfeiture of benefits already accrued by a service member is allowed and service members need not re-qualify for participation in the pension plan by reason of absence for military service.

An employer must make any contributions on behalf of a re-employed service member that it would have made if he was not absent for military service.[36] In the case of a defined contribution plan where accrued employer-contributed benefits are contingent on employee contributions, those employee contributions must still be made. However, a returning employee is entitled to make the contributions after returning from service, at any time beginning with the date of re-employment, up until three times the period of the employee's military service, not to exceed five years.[37] Employers must make matching contributions only as the employee contributes. For the purposes of calculating either the employer or employee liability to the plan, the employee's compensation must be computed at the rate the employee would have received but for military service or, if that rate was not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately prior to service.[38]

Pay During Service The USERRA does not require the employer to pay a service member while on leave, unless the employer does so for non-military leaves. However, the employee is entitled, but not required, to use any accrued leave benefits.[39]

Adverse Employment Actions The USERRA prohibits an employer from taking any adverse employment action against an employee because of military service. An employer is considered to have violated the USERRA's anti-discrimination clause if the employee's military obligations are a "motivating factor" in the alleged discriminatory act, unless the employer can prove that the action would have been taken in the absence of the employee's military obligations.[40] (See box on page 14). The USERRA's "motivating factor" test is similar but slightly more beneficial to employers than applica-

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"Sole" Factor and "Motivating" Factor Compared

Historically, the USERRA's predecessor, VRRA, was interpreted by the Supreme Court to prohibit only those acts of discrimination that were motivated *solely* by an employee's reserve status.[1] In enacting the USERRA, Congress significantly broadened the protection afforded those in military service by including a "motivating factor" standard. Reservists now enjoy similar protections against discrimination as afforded to other statutorily protected classes.

Because the new USERRA language mirrors the standard long employed by the National Labor Relations Board (NLRB), most courts, including the Second Circuit, apply the NLRB's two-step burden-shifting approach: (1) the employee bears the initial burden of showing by a preponderance of the evidence that his military service was "a substantial or motivating factor" in the adverse employment action, and (2) if the employee satisfies this requirement, the burden shifts to the employer to affirmatively establish, by a preponderance of the evidence, that it would have taken the adverse action anyway, for a valid reason.[2] This approach applies to both "pretext" cases (in which the employer defends on the ground that it acted only for a valid reason) and "mixed motive" cases (in which the employer defends on the ground that, even if an invalid reason played a part in the adverse action, the same action would have been taken in the absence of the invalid reason).[3] If the employer meets this hurdle, no liability may be found.

Although the USERRA's change from a "sole factor" to a "motivating factor" standard favors employees, as it turns out, the "motivating factor" standard is beneficial from the employer's perspective in comparison to its application in the defense of discrimination claims brought under Title VII of the 1964 Civil Rights Act. This is because in the "mixed motive" context, the 1991 amendments to Title VII partially overrode existing case law to provide that once the employee establishes that a protected characteristic played *any* part in the employer's decision-making process, the employee is entitled to injunctive relief and attorneys' fees, even if the employer meets its affirmative burden of establishing that it would have taken the same action in the absence of the invalid reason.[4] By contrast, under the USERRA, the employer bears no liability once it establishes that it would have taken the same action irrespective of the discriminatory consideration.

1. *See Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981).
2. *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 394-95 (1983); *Gummo v. Village of Depew*, 75 F.3d 98, 106 (2d Cir. 1996), *aff'd on remand*, 159 F.3d 770 (2d Cir. 1998); *Hill v. Michelin North America, Inc.*, 252 F.3d 307, 311-12 (4th Cir. 2001); *Sheehan v. Department of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001). While some courts have nonetheless applied the *McDonnell Douglas* approach when analyzing discrimination claims under the USERRA, the *Fink* court concluded that the two frameworks are not particularly divergent since both require some showing that an adverse employment decision took place under circumstances giving rise to an inference of discrimination. *Fink v. City of New York*, 129 F. Supp. 2d 511, 519.
3. *Sheehan*, 240 F.3d at 1014.
4. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B), partially overruling *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

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tion of the "motivating factor" standard under other employment law statutes. (See box on page 17).

Termination Following Re-employment One very important distinction between the USERRA and other employment discrimination statutes is that the USERRA provides a person who is re-employed after a long-term military leave with short-term protection against discharge except "for cause," thereby giving an otherwise "at-will" employee the equivalent of contractual protection against termination. This protection remains in effect for (1) one year after the date of re-employment, if military service was more than 180 days, and (2) 180 days after the date of re-employment, if military service was more than 30 days but less than 181 days.[41]

Any termination within the above time frames must be reasonable under the circumstances and not undertaken as a means of avoiding the statutory protections. Courts also consider whether the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge.[42] These considerations comport with the traditional concepts of "just cause" long employed by labor arbitrators.

No Retaliation Provision The USERRA further prohibits an employer from taking any adverse employment action against an employee because the individual has taken an action to enforce a protection afforded under the USERRA.[43] The "motivating factor" standard also applies to the USERRA's no retaliation provision.

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Enforcement and Remedies A returning service member who believes that his employer has violated the USERRA may submit a written complaint to the Secretary of Labor, who "shall investigate such complaint."[44] The secretary may require by subpoena the attendance and testimony of witnesses and production of documents relating to any matter under investigation.[45] If the secretary determines that a violation has occurred, the secretary will first attempt to reach a voluntary resolution with the employer so that the USERRA requirements are met. If no resolution occurs, the secretary must notify the complainant of the right to proceed against the employer. If requested by the complainant, the secretary must refer the case to the attorney general for evaluation and, if so decided by the attorney general, enforcement proceedings.[46]

The statute does not mandate, however, that the service member proceed through either the Secretary of Labor or the attorney general as a jurisdictional prerequisite. Rather, a service member may file a complaint against the employer directly.[47]

Remedies under the USERRA include equitable and injunctive relief; make-compensation; liquidated damages in an amount equal to the make-whole compensation for "willful" violations (*i.e.*, requiring a showing that the employer knew or showed reckless disregard for whether its conduct was prohibited by USERRA); and attorneys' fees, expert witness fees and costs.[48]

State Law

In addition to the USERRA, the Military Law provides similar—and sometimes more generous—protections for employees who leave their positions to perform military service. The USERRA does not supersede any state law, policy, practice, plan, contract or agreement that provides for rights or benefits more beneficial to employees performing military service, and acts to preempt all more restrictive provisions.[49] Employers should be sure to apply whatever law or practice is more beneficial to the employee.[50]

"Motivating" Factor: Cases to Consider

What might a court look for in determining whether the employee's military obligations were a motivating factor in an adverse employment decision? As in other employment law contexts, the "factual question of discriminatory motivation or intent may be proven by either direct or circumstantial evidence" and "may be reasonably inferred from a variety of factors, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses."[1]

Cases for employers to keep in mind include:

- *Gummo v. Village of Depew*[2] The Second Circuit reversed summary judgment and determined that a jury could infer anti-reservist animus based on the employee's supervisor's (1) outward antipathy toward the statutory benefits afforded reservists, (2) hostile treatment of the Department of Labor investigator in another matter, (3) testimony that he could not afford more than one or two reservists on staff, and (4) complaints to local officials regarding the special treatment afforded reservists.
- *Hill v. Michelin North America, Inc.*[3] The Fourth Circuit likewise reversed summary judgment in favor of the employer based on the plaintiff's contention that his supervisor looked "distraught" when plaintiff informed him about his reserve obligations and expressed concern about a certain unit's ability to accommodate plaintiff's reserve schedule.
- *Robinson v. Morris Moore Chevrolet-Buick, Inc.*[4] The court held that the employee had met his initial burden of proof where (1) there were no complaints about the employee's performance prior to his request for military leave, (2) his supervisor was clearly angered by the employee's request for leave, and (3) there was close proximity in time between the employee's request for leave and adverse employment action.[5]

In light of these cases, employers should be sure that their supervisors are well informed regarding the USERRA's requirements.

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1. *Sheehan v. Department of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001).
2. 75 F.3d 98 (2d Cir. 1996), *aff'd on remand*, 159 F.3d 770 (2d Cir. 1998).
3. 252 F.3d 307 (4th Cir. 2001).
4. 974 F. Supp. 571 (E.D. Tex. 1997).
5. As in other employment law contexts, a single derogatory statement or "stray remark" by a supervisor may not be enough to meet the "motivating factor" standard. *See Luecht v. Department of the Navy*, 2000 U.S. App. LEXIS 27917 at * 11-12 (Fed. Cir. Nov. 7, 2000) (supervisor's comment that although employee was a disabled veteran he did not have to "babysit" him was not sufficient to meet the "motivating factor" standard).

As a practical matter, the vast majority of employees will be covered by the USERRA, which addresses in detail most issues facing returning service members. In certain circumstances, however, referral to state law will be required, such as when the employee is called up by the governor for state military duty,[51] in the case of public sector employees entitled to greater protections (*e.g.*, paid leave), and in all other instances where the state law affords additional protections.

Private Sector Employees A portion of the Military Law, known as the Soldiers' and Sailors' Civil Relief Act (SSCRA), affords employment protection to private sector employees who perform "military service" in the armed forces of the United States, the New York State militia or other active state duty.[52] In most cases, the SSCRA provides the same re-employment and restorative rights as the USERRA, but in several instances the SSCRA's benefits are superior to the USERRA's. The most distinguishable additional benefit is a one-year prohibition against discharge, except for cause, notwithstanding the length of service leave.[53] In addition, there is no maximum period of leave, and employees have a full 90 days after completion of service to reapply for employment, regardless of service length.[54] However, while the USERRA requires that a returning service member be reinstated to an escalated position or to his original position, the SSCRA only requires reinstatement to a position of like status, seniority and pay, thereby subjecting it to preemption when the escalated provision is a more favorable one.[55]

The SSCRA may be enforced in state court by an aggrieved employee directly through his own counsel or by the state attorney general. In either case, the court is required to "order a speedy hearing" and to "advance it on the calendar." The court may remedy any violation of the statute by injunctive relief and an award of back pay and lost benefits. The court shall not assess any court fees or costs against a person applying for military benefits.[56]

Public Sector Employees New York Military Law §§ 242 and 243 afford employment protections to public officers and employees absent on military duty in the service of New York State or the United States.[57] Although legislative history explains that section 242 applies "to public officers and employees performing reserve duty as members of the organized militia [of New York State] or of reserve forces or reserve components of the armed force of the United States," while section 243 "pertains to those absent on full-time active duty,"[58] in practice, the two provisions—which sometimes conflict—are read in tandem. This creates a somewhat convoluted set of overlapping protections difficult to navigate.[59] Despite this confusion, a practice appears to have developed whereby section 242 is primarily applied to provide reservists serving short-term military duty or attending short-term training with paid leave and benefits.[60] The perplexing interplay between sections 242 and 243 can only properly be resolved by legislative amendment, which seems particularly important in light of the high number of state call-ups not covered by the USERRA.

Military Law § 242 provides public employees rights over and above those provided by the USERRA. Most significantly, public employees on short-term reserve duty are entitled to continuation of their salary or other compensation for up to the greater of a total of 30 days or 22 working days in any one calendar year and not exceeding the greater of 30 days or 22 working days, in one continuous period of such absence.[61] Military Law § 242 also explicitly mandates that time absent for military service shall not constitute an interruption of continuous employment, nor shall the employee be subject, directly or indirectly, to any loss or diminution of time service, increment, vacation or holiday privileges, or any other right or privilege, regardless of how service interruptions are treated for other causes.[62]

Like private sector employees under the SSCRA, public sector employees are entitled to prompt reinstatement if they seek re-employment within 90 days after the termination of military service (irrespective of length of service). Returning public employees can also apply for restoration after 90 days. However, in that circumstance, reinstatement may take place at any time within one year after the termination of military service, in the discretion of the appointing authority.[63]

Upon restoration, a public employee is entitled to the rate of compensation the employee would have received had he remained in his position continuously. The employee shall be deemed to have rendered "satisfactory service" during an absence and shall not be subjected to any loss of time service, increment or other right or privilege, or be prejudiced in any way with respect to promotion, transfer, reinstatement or continuance in office.[64] If a public employee, by reason of injuries sustained while on military duty, is incapable of efficiently performing the duties of the position, the employee may be transferred to any vacant position in the same jurisdictional classification and in the same governmental unit, provided the individual applies in writing for such position and is found qualified.[65]

Finally, Military Law §§ 242 and 243 set forth special rules to protect public employees against the loss of pension benefits.[66] Time spent on military duty will not constitute an interruption in service for pension purposes. For public employees receiving compensation while on leave, required employee contributions to any pension or retirement system shall be deducted from

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Protection Against Forfeiture of Insurance

Employers and insurance companies should keep in mind that persons serving in the organized militia of the state are entitled to continue their health insurance policies for the first 60 days of military service, irrespective of their payment of premiums.[1] Persons called to active duty in a reserve component of the armed forces of the United States, including the National Guard, are entitled to have their life insurance policies remain in force while performing such military service and for a period of one year thereafter, notwithstanding their non-payment of premiums.[2]

1. Mil. Law § 316(3).
2. Mil. Law § 316(1).

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such compensation. For any period of military leave where a public employee is not in pay status, the employee has the option to remit contributions while on military duty or "within five years" thereafter.[67] To the extent that the employee makes pension contributions, absence while on military duty shall be counted in determining the length of total service for the pension or retirement system.[68] While engaged in the performance of military duty, the public employee or designated beneficiary, as the case may be, is entitled to all benefits of the pension and retirement system, except accidental disability and death benefits. (See box on this page).

The Military Law also provides for a variety of other protections unique to public service. For example, it provides for make-ups of missed promotional exams, extension of application periods for promotional exams, the creation of special eligible lists for promotions, crediting of military leave time as satisfactory service during a probationary period, and the creation of military re-employment lists.[69]

Conclusion

Given the number of reservists called up and the likelihood that more reservists will be called to active duty, it is important that employers understand their legal obligations under the federal and state military leave laws.

1. John H. Cushman, Jr., *Military on the Move as Bush Talks With Putin*, N.Y. Times, Sept. 23, 2001, at B3
2. David E. Sanger & Steven Lee Myers, *President Says U.S. is "in Hot Pursuit" of Terror Group*, N.Y. Times, Sept. 29, 2001, at A1.
3. Statements of representatives of the N.Y.S. Division of Military and Naval Affairs, October 2001. For the first six weeks after the attack, the National Guard members called up by Governor Pataki were generally serving two weeks at a time. As of October 31, however, the Pataki administration said it would put more than 400 Guard troops on active duty for 90 days—"the longest call-up in decades"—to help patrol train stations, airports, bridges and tunnels. Paul Zielbauer, *States Assign More Troops After U.S. Terror Warning*, N.Y. Times, Oct. 31, 2001, at B11.
4. *See* the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301 *et seq.* and N.Y. Military Law §§ 242-244, 317-318 (hereinafter "Mil. Law").
5. 38 U.S.C. § 4301.
6. *McGuire v. UPS*, 152 F.3d 673, 675 (7th Cir. 1998).
7. Presumably in anticipation of an Eleventh Amendment challenge eventually reaching the Supreme Court (*see, e.g., Velasquez v. Frapwell*, 160 F.3d 389, 394 (7th Cir. 1998), *vacated*, 165 F.3d 593 (7th Cir. 1999)), Congress amended the USERRA in 1998 to provide that private suits against state employers "may be brought in a State court of competent jurisdiction in accordance with the laws of the State." 38 U.S.C. § 4323(b)(2). However, federal courts will have jurisdiction over claims against a state where the suit is brought by the attorney general or by an individual seeking only injunctive relief.
8. 38 U.S.C. § 4303(4). In addition, if an employer controls an entity incorporated or organized in a foreign country, it shall be liable for USERRA violations, unless compliance would violate the laws of that foreign country. 38 U.S.C. § 4319.
9. 38 U.S.C. § 4311(a).
10. 38 U.S.C. § 4303(13).
11. *Id*.
12. 38 U.S.C. § 4303(16).
13. If an employee mistakenly terms this notice a "resignation," it will not be construed as a waiver of his re-employment rights. *See Sykes v. Columbus & Greenville Ry.*, 117 F.3d 287, 296-97 (5th Cir. 1997).
14. 38 U.S.C. § 4312(a)(2).
15. 38 U.S.C. § 4312(e)(C), (D). If the period of service was less than 31 days, an employee must report to the employer not later than the first full calendar day following the completion of service plus eight hours for safe travel, unless unreasonable. For service between 31 and 181 days, re-employment applications must be submitted within 14 days of completion. For service over 180 days, re-employment applications must be submitted not later than 90 days after completion. *Id*. Persons hospitalized or incapacitated due to illness or injury sustained during military service shall report to their employer or submit an application for re-employment "at the end of the period that is necessary for the person to recover from such illness or injury, . . . such period of recovery not to exceed two years." 38 U.S.C. § 4312(e)(2)(A).
16. 38 U.S.C. § 4312(f).
17. *McGuire v. UPS*, 152 F.3d 673, 676 (7th Cir. 1998) (finding that returning employee had not applied for re-employment where he failed to contact human resources department as requested by his supervisor).
18. 38 U.S.C. § 4312(e)(3).
19. The definition of "undue hardship"—encompasses "actions requiring significant difficulty or expense" when considered in light of (a) the nature and cost required, (b) the overall financial resources of the facility involved, (c) the overall financial resources of the employer, and (d) the type of operations of the employer. 38 U.S.C. § 4303(15); *see* Americans with Disabilities Act, 42 U.S.C. § 12111(10)(A), (B)(i)-(iv).
20. 38 U.S.C. § 4312(d)(1)(C).

21. *Jordan v. Jones*, 84 F.3d 729, 732 (5th Cir.), *cert. denied*, 519 U.S. 976 (1996) (employer can refuse to reinstate reservist, if employer had legally sufficient cause to terminate reservist at time he left).
22. 38 U.S.C. § 4312(d)(2).
23. "Qualified" means "having the ability to perform the essential tasks of the position." 38 U.S.C. § 4303(9).
24. 38 U.S.C. § 4313(a)(1). "Reasonable efforts" means "actions, including training provided by an employer, that do not place an undue hardship on the employer." 38 U.S.C. § 4303(10).
25. 38 U.S.C. § 4313(a)(2).
26. 38 U.S.C. § 4313(a)(4). In addition, employees of the federal government may be offered a position of like seniority, status and pay at another federal agency if the former employing agency no longer exists or it is unreasonable to require that agency to reinstate the employee. 38 U.S.C. § 4314.
27. 38 U.S.C. § 4313(a)(3).
28. Under the ADA, an employer's obligation to reasonably accommodate a disabled employee does not generally require that the employee be given an alternative position.
29. 38 U.S.C. § 4311. The term "benefit of employment" should be construed broadly, and includes "any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment." 43 U.S.C. § 4303(2). *See also Hill v. Michelin N. Am., Inc.*, 252 F.3d 307, 312-13 (4th Cir. 2001) (denying returning reservist the opportunity to work in a division offering a more regular working schedule than the one to which he was assigned is denial of benefit).
30. 38 U.S.C. § 4316(b)(1)(B). An employer is not required to comply with this provision, however, if an employee "knowingly provides written notice of intent not to return to a position of employment after service in the uniformed service." 38 U.S.C. § 4316(b)(2)(A).
31. 38 U.S.C. § 4316(a).
32. 38 U.S.C. § 4316(b)(4).
33. 38 U.S.C. § 4317(a)(1)(A).
34. 38 U.S.C. § 4317(a)(2). Notably, unlike COBRA, the USERRA does not provide for termination of coverage in the event of the qualified beneficiary's non-payment of premiums, coverage under another group health plan or entitlement to Medicare.
35. 38 U.S.C. § 4318(a)(1)(A).
36. 38 U.S.C. § 4318(a)(2).
37. 38 U.S.C. § 4318(b)(2).
38. 38 U.S.C. § 4318(b)(3).
39. 38 U.S.C. § 4316(d).
40. 38 U.S.C. § 4311(b).
41. 38 U.S.C. § 4316(c).
42. *See, e.g.*, *Jordan v. Jones*, 84 F.3d 729, 732 (5th Cir.), *cert. denied*, 519 U.S. 976 (1996); *Couture v. Evergreen Int'l Airlines*, 950 F. Supp. 614, 622 (D. Del. 1996).
43. 38 U.S.C. § 4311(c)(1).
44. 38 U.S.C. § 4322(a)(2)(B).
45. 38 U.S.C. § 4326.
46. 38 U.S.C. §§ 4322, 4323.
47. 38 U.S.C. § 4323(a)(2). Actions against a federal agency are handled by the Merit Systems Protection Board. 38 U.S.C. § 4324.
48. 38 U.S.C. § 4323(d).
49. 38 U.S.C. § 4302.
50. The USERRA's preemption provision comports with earlier VRRA rulings. *Cronin v. Police Dep't*, 675 F. Supp. 847 (S.D.N.Y. 1987) (VRRA preempts New York law's limitation of pension credit). Likewise, the Mil. Law preempts all more restrictive rules, regulations and practices of local government bodies. *Board of Educ. v. Plicata*, 42 N.Y.2d 815, 396 N.Y.S.2d 644 (1977) (preempting Board of Education regulations); *State v. New York State Pub. Relations Bd.*, 187 A.D.2d 78, 592 N.Y.S.2d 847 (3d Dep't 1993) (more beneficial paid leave practice supersedes Mil. Law regarding the same).
51. Service in the state militia or other active duty of the state is exclusively covered by the Mil. Law, not the USERRA. Mil. Law §§ 6, 7, 242(1)(b), 301(1).
52. Mil. Law §§ 6, 7, 301(1).
53. Mil. Law § 317(4).
54. Under the SSCRA, however, if an employee attends certain training duty, including reserve duty training, he must re-apply for employment within 10 days after completion (or 60 days if for initial full-time training or active duty for training), regardless of the length of service. The SSCRA's 10-day notice requirement is more restrictive than the USERRA's 14-day requirement for leaves of over 31 days and less restrictive than the USERRA's next calendar day requirement for leaves of under 31 days. Mil. Law § 317(1), (2), (2-a), (3).
55. Mil. Law § 317(1)(c).
56. Mil. Law § 317(5).
57. Mil. Law §§ 242(1)(b), 243(1)(b). At one time, § 242 only covered "ordered" military duty. This distinction may be of less significance since the 1993 amendment to section 242 now covers "ordered" military duty "with or without the consent" of the public employee.
58. *See* Bill Memorandum, 1993 N.Y. Laws 2570 accompanying proposed amendments to §§ 242, 243 and 317 of the Mil. Law.
59. *Cf.* conflicting definitions of "military duty" and "public employee" and varying protections related to pension credits (discussed *infra* note 67), in Mil. Law §§ 242 and 243. The confusing interplay between these sections was confirmed in telephone conversations with representatives from the N.Y.S. Division of Military and Naval Affairs in October 2001.
60. *Id*.
61. Mil. Law § 242(5). Many public employers, such as the state judiciary and executive branch, are voluntarily providing supplemental paid leave to service members to show their support in the current war against terrorism.
62. Mil. Law § 242(4).
63. Mil. Law § 243(2).
64. Mil. Law § 243(5).
65. *Id*. However, the respective "reasonable efforts" and "reasonable accommodations" of the USERRA and ADA would be applicable in the first instance.
66. Mil. Law §§ 242(6), 243(4).
67. Section 242(6)(b) of the Mil. Law provides that contributions be remitted within five years after the date of termination of duty, whether or not the employee returns to work, while § 243(4) states that contributions must be made within five years of reinstatement to public service.
68. Section 243-a (added in 1991) of the Mil. Law provides service credit—without requiring employee contributions—in several major state retirement systems for those who served in the Persian Gulf War.
69. Mil. Law §§ 243(5)-(9), (11), (12), 243-b, 243-c.

Estates with Multiple Fiduciaries Pose Ethical and Practical Issues For Attorneys and Clients Alike

The following is the first of two articles devoted to the conflicts that can arise when an attorney represents multiple fiduciaries, the difficulties faced when fiduciaries serve in more than one capacity, the practical implications of the duty of impartiality and the need to avoid any appearance of self-dealing. This article examines these issues from the attorney's perspective. An article next month will consider these issues from the fiduciary's perspective.

No one can serve two masters, for either he will hate the one and love the other, or he will hold to one and despise the other. Matthew 6:24

BY JOHN R. MORKEN AND GARY B. FREIDMAN

The conflicts that can arise in the representation of estate or trust fiduciaries are limited only by the imagination of creative counsel. Sometimes the conflicts are obvious, sometimes subtle, sometimes apparent from the inception of the relationship, and sometimes they develop over time.

A typical example: You, the estates practitioner, are asked to attend a meeting with the named co-executors and co-trustees under the decedent's will. They want to retain you to handle the probate and administration. However, it soon becomes apparent that there are actual conflicts of interest between the estate and some of them in their individual capacities. It also becomes clear that potential conflicts may arise in their fiduciary capacities. Can you represent them as a group; and, if so, how?

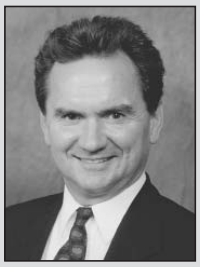
One of the individuals is already your client, and you also represent the closely held corporation of which he is president. One of the assets of the estate is an interest in that corporation. How do you advise this client regarding his respective responsibilities to the corporation and to the estate?

Another of these potential clients is the decedent's widow, who is the income beneficiary of a Q-TIP trust created under the will. At least some of the decedent's interest in the corporation will very likely end up in the Q-TIP trust. During the course of the meeting, she asks her brother-in-law, the president of the corporation, when she can expect "distributions" from the corporation. He does not respond. You know for a fact that the corporation is a "C corporation" that has never declared dividends. There are also potential conflicts with respect to funding, allocation and valuation. What do you do?

The fiduciary's task of being both faithful and sensible in his stewardship can be very difficult in the face of conflicting loyalties. Representation by the estate attorney in such a case presents similar problems.

Multiple Representation

Because co-fiduciaries have a common duty to the estate, there is no reason to presume adversity. An attorney counseling multiple fiduciaries may hear different opinions about how they expect to handle estate matters, but to suggest that such differences necessarily rise to the level of a conflict that would bar the attorney's representation under the ethical rules is not supportable.[1] There is no statutory ground of ineligibility of a fiduciary based solely on a potential conflict of interest.[2] As Surrogate Michael H. Feinberg of Brooklyn has ex-



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pressed it, "Where adverse interests are *not* involved, counsel is free to represent multiple clients."[3]

Indeed, although each fiduciary may hire her/his own attorney in the administration, the principle that lawyers, as a whole, will share one reasonable legal fee certainly provides a financial incentive for having one lawyer represent all fiduciaries, upon their consent.[4] Such benefits, in the words of Surrogate Feinberg, are "especially important considerations in the field of trusts and estates, where clients may be better served by retaining counsel to represent the family as a unit, including possible family-controlled entities in the context of estate planning, administration, and even litigation."[5]

Although attorneys may euphemistically say they represent an estate, it is well-settled that they represent the estate's fiduciaries.

The lack of an obvious conflict between co-fiduciaries convinced the Appellate Division, Third Department, to deny a motion for disqualification in *In re Dix*.[6] There, the co-fiduciaries "consulted the attorneys for their mutual benefit as prospective co-executors and it is difficult to visualize what could possibly have transpired between the parties to create a confidential relationship, one to the other, sufficient in character to call upon the attorneys now to withdraw because of such relationship."

The issue of disqualification in *Dix* came up in the context of a probate proceeding. The New York State Bar Association's Committee on Professional Ethics was asked in 1979 to answer the following questions related to an accounting proceeding:

> A lawyer represents two co-executors, one is a bank and the other is a principal beneficiary of the estate. The bank has allegedly extended the administration long past that period within which it should have been settled and has failed to account. Under the circumstances: (1) May the lawyer institute a proceeding on behalf of the executor-beneficiary to compel the bank to perform its duties? (2) If the executor-beneficiary retains other counsel to institute such a proceeding, may the lawyer represent the bank in connection therewith? (3) May the lawyer continue to represent the executors in connection with any matters relating to the estate?[7]

In answering these questions, the Committee on Professional Ethics reviewed Canons 5, 7 and 9 of the Code of Professional Responsibility. It then concluded that the first two questions had to be answered in the negative and that the third could be answered in the affirmative, provided such representation was limited to matters "as to which there is no conflict between the executors." The committee labeled the prospect of the attorney litigating against either of his former clients as "turncoat" representation, "even where there may be no misuse of confidential information."

Both *Dix* and Opinion No. 512 were pivotal to the decision in *In re Hof*.[8] There, the decedent's wife and a son from a previous marriage were appointed co-administrators. A falling-out occurred, and the attorney took the son's side against his stepmother in the accounting proceeding. The stepmother moved to disqualify the attorney. Following the Third Department's decision in *Dix*, the Surrogate denied the motion. The Second Department reversed and disqualified the attorney, relying in part on Opinion 512, and emphasized "the mere appearance of impropriety" as well as conflict of interest. In holding that the attorney could not continue to represent either fiduciary, the court stated: "The critical issue here, moreover, is not the actual or probable betrayal of confidence, but the mere appearance of impropriety and conflicts of interest (Code of Professional Responsibility, Canon 9)."[9]

Who Is the Client?

There is no general prohibition against an attorney representing an executor who has a potentially adverse individual interest against the estate.[10] However, in such a circumstance, the attorney must be careful to represent the client in her/his fiduciary capacity alone.[11] This is but an instance of the general proposition that an attorney may not represent two clients with conflicting interests.[12] For example, an attorney representing one co-administrator may not also represent that co-administrator's spouse with respect to a claim against the estate.[13]

The responsibilities of an estate attorney are somewhat muddied by the confusion over whether the client is the executor of the estate or its beneficiary. Although attorneys may euphemistically say they represent an estate, it is well-settled that they represent the estate's fiduciaries.[14] "Only persons, natural or legal, can retain an attorney. An estate is a *res*. An estate cannot enter into a retainer contract with counsel. A lawyer cannot communicate with an estate."[15] This is hardly a distinction without a difference, and it can lead to some troublesome problems. As Ordover and Gibbs point out, one area of confusion caused by the lack of clarity about whether the executor or the estate is the client, concerns the attorney-client privilege. Several decisions have held that there is no privilege between the fiduciary and her/his attorney, at least as to beneficiaries, before any litigation takes place.[16] As Ordover and Gibbs note, in

effect this results in the beneficiary being treated as the client, which "erodes the key relationship between the fiduciary and counsel."[17]

Regardless of the existence of the attorney-client privilege in this context,[18] the lawyer representing the executor still has a duty to serve the best interest of the estate to which the executor owes fiduciary responsibilities.[19] Both the New York State Bar Association Committee on Professional Ethics and the Bar Association of Nassau County Committee on Professional Ethics have issued opinions on similar questions concerning the duty of the executor's lawyer when the lawyer learns that the executor may be engaged in wrongdoing or even fraud.[20] The conclusion of the State Bar Committee's opinion is very significant, particularly in light of the current trend in the case law holding that there is no privilege between the executor and her/his attorney, except in the context of litigation. The questions posed to the committee were as follows: (1) What are the responsibilities of the attorney for the executor upon learning that the executor plans to breach its fiduciary duties? (2) Does the attorney for an executor have a duty to disclose to the beneficiaries or the court supervising the estate that the executor has taken action in breach of its fiduciary obligations? The committee concluded:

> For the reasons stated above, we conclude with respect to the first question that in such circumstances the executor's lawyer must request that the executor refrain from breaching its fiduciary duties, decline to assist such misconduct in any way, and consider whether withdrawal as counsel is required or advisable if the executor does not accept counsel's advice.
>
> With respect to the second question, we conclude that the lawyer should disclose the executor's past misconduct unless such disclosure is prohibited because the information qualifies as privileged or secret; determination of whether the information so qualifies turns on issue of law. In addition, counsel should request the executor to rectify the misconduct, withdraw from the representation of the executor if the executor declines to do so, and not assist in any conduct or communication that is false or misleading.

Self-Dealing

The prohibition against self-dealing by the fiduciary has been extended to the attorney for the fiduciary. In *In re Kellogg*,[21] the fiduciary's attorney was also retained as a broker for the sale of the estate's Greenwich Village townhouse. The attorney found a buyer for the property, the sale closed and the broker/attorney received a standard 6 percent brokerage commission. On the fiduciary's final accounting, a residuary beneficiary objected to the payment. There was no claim made that the property was not sold at fair market value or that the commission was more than a standard commission. Instead, the beneficiary contended that payment of the commission should be disallowed because, as attorney for the fiduciary, the attorney engaged in an impermissible conflict of interest when he acted as broker for the sale of an estate asset.

The Surrogate sustained the objection, holding that the payment of the commission to the attorney was "self-dealing," the same as if the fiduciary had been the broker and been paid a commission. Although the court could have simply based its decision on the line of ethics opinions holding that an attorney may act a broker in a transaction only where he does not participate in the transaction as an attorney or give legal advice to any of the parties,[22] it went further and held that the attorney for a fiduciary has the same obligation as the fiduciary to refrain from self-dealing with trust property:

> Having found that the attorney in this case engaged in self-dealing without the consent of all the beneficiaries the Court need not inquire whether he acted in bad faith or whether the estate incurred damages as a result of his conduct. The attorney was not entitled to a commission for his services as real estate broker.
>
> This rule, although harsh, is based upon the strong policy of this state that attorneys not place themselves in a position that might interfere with their ability to exercise their professional judgment freely or might adversely affect their ability to render legal advice. The facts of this case underscore the importance and value of this policy.
>
> It is evident from the record that [the attorney] failed to give [the fiduciary] appropriate legal advice concerning his obligations in selling the real estate. Petitioner's assertion that his fiduciary duty required him to sell the property for "fair market value or more" is not entirely correct. In a case involving self-dealing, an estate fiduciary was found to have the duty to "obtain the best price possible for the sale of decedent's real property." *In re Stalbe*, 130 Misc. 2d 725, 729 (N.Y. Sur. Ct., N.Y. Co. 1985).
>
> * * *
>
> Here, the conflict of interest is plain. Petitioner had an obligation to sell the property within a reasonable period of time at the highest possible price. It was not in the attorney's interest for the sale to be made to any purchaser other than his own, at any price. Petitioner had a need for maximum exposure to assist him in fulfilling his obligation. The attorney stood to gain only if other brokers were excluded, which he took active steps to ensure.

The decision in *Kellogg* is in accord with established Court of Appeals precedent holding that an attorney for a fiduciary has the same duty of undivided loyalty to the *cestui* as the fiduciary himself.[23]

Advice, Direction and Full Disclosure

These cases and bar association opinions lead to the conclusion that the estate practitioner must balance three underlying principles in any case of multiple representation. This balancing is often difficult, because the three different principles may be at odds with each other in any given case:

First: Multiple representation is frequently requested of the estate attorney because such may be advantageous to the fiduciaries, the estate and the beneficiaries, all of whom are frequently parts of a single family.

Second: The attorney must avoid any appearance of "turncoat" representation and maintain an undivided loyalty to the client or clients.

Third: As counsel for the estate fiduciary or fiduciaries, the attorney also has fiduciary duties to the beneficiaries and to the estate.

These demands all converged in the estate of Dr. Arthur M. Sackler.[24] His will named his third wife, his four children, his first wife and an attorney as executors. From inception it was apparent that there was a multitude of conflicts. On virtually every issue at least some executors, in their individual capacities or through entities which they controlled, had claims at odds with either other executors or with the estate generally. Various law firms were retained to represent the executors in their individual and fiduciary capacities. While each executor had her/his own attorney in both individual and fiduciary capacities, they all recognized the benefit of having a "general counsel" to collectively represent them, solely in their representative capacity, and they therefore retained one firm for this purpose. Wisely, that firm obtained from each individual executor a written agreement that the firm would not face a conflict in defending the estate's position and representing other executors against any claim the executor brought against the estate in an individual capacity. Such agreement was consistent with the principle that clients generally may waive their right to conflict-free representation upon full disclosure.[25] Even with full disclosure and informed consents, however, the firm was concerned, and therefore an application was made to the Surrogate for advice and direction regarding the firm's role.

That concern was well-placed. Even upon full disclosure and consent, conflicts of interest may be such that a disqualification is still required.[26] A case in point is the estate of Milford E. Abel. There, co-trustees had a difference of opinion about how to treat the income beneficiary, the decedent's widow. One co-trustee, who had taken a more passive role with regard to administration, sided with objections filed by the income beneficiary. Accordingly, the law firm representing the widow filed a notice of appearance on behalf of the income beneficiary and the co-trustees after full disclosure and after written consents were obtained from both. Despite such consent and disclosure, the Surrogate disqualified the firm from representing the co-trustee "on the ground of a conflict of interest." The court went on to hold that because the firm should have been aware of the conflict of interest "prior to accepting the retainer, no fee can be awarded."[27] Several appellate decisions have likewise held that a firm may not recover legal fees in circumstances where its representation violated the Code of Professional Responsibilities because of particularly egregious conflicts.[28]

Even upon full disclosure and consent, conflicts of interest may be such that a disqualification is still required.

Accordingly, to avoid just this kind of dilemma, the law firm in *Sackler* sought advice and direction. In its application, the firm expressly noted that it would not represent any party against any of the other six executors in their capacities as executors, thus distinguishing *In re Hof*. The Surrogate approved the application, holding that the firm's representation, which was limited to representing the executors in their fiduciary capacity against the personal claims of the individual executors, would not give rise to an appearance of impropriety and would not result in it representing conflicting interests. The court cautioned, however, that its "mantle of approval" was not "carte blanche" and said it would remain sensitive to the need for the firm to retain an uncompromising loyalty to the estate.[29]

The focus of the Surrogate in *Sackler* on the undivided loyalty of the firm was consistent with Disciplinary Rule 5-105 (DR), which is the most important ethical rule governing conflicts of interest. In particular, subdivision C of the rule provides that a lawyer "may 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." The requirement that the lawyer can "competently represent" the "interest" of each client is clearly what prompted the Surrogate in his decision in *Sackler* to caution that it was not providing "carte blanche" approval for multiple representation. Presumably, it is this requirement that also prompted the Surrogate to disqualify the attorneys in *In re Abel*; the primary distinction being that in *Abel* the attorneys were repre-

When these issues have both been discussed and put in writing in the retainer letter, the clients can make an educated decision whether to proceed with one attorney or seek separate counsel.

senting a claimant individually, as well as a co-trustee, whereas in *Sackler* the law firm stated that in no event would it ever represent an executor individually in a claim against the estate.[30]

In *In re Roccesano*,[31] a law firm that had represented seven objectants in a probate contest moved for leave to withdraw from the representation of one when it learned of a potential conflict among the seven in the event that the probate contest was successful. A cross-motion was made to disqualify the law firm based on an allegation that one objectant had imparted confidential information. Because there was no proof that any such information had been imparted, the court rejected this claim and held that because the cross-movant was an attorney who was aware of the potential conflict from the outset of the representation, there was no basis for disqualification of the firm. It cited DR 5-105(C), which permits representation of multiple clients where the clients consent to a waiver of the conflict.

Presumably, written consent for multiple representation would be contained in the retainer letters signed by the clients.[32] What should the informed consent for multiple representation of co-fiduciaries contain? The following suggestions from *Simon's NY Code of Professional Responsibility* are helpful:

The disclosure [signed by each of the common clients] should include such considerations as:

• the advantages and risks of multiple representation;

• the situations that might cause the interests of one client to diverge from the interest of another client and how likely those situations are to occur;

• the harm it may cause to the various clients if the lawyer is forced to withdraw from the representation (including delay, increased expense, and the probable lack of any attorney-client privilege among the clients in the prior, joint representation);

• the effect on the attorney-client privilege if the clients get into a dispute with each other in the future.[33]

To implement these principles, some or all of the following subjects should be covered in a consent/disclosure letter when multiple fiduciaries are to be represented:

• Inform each potential client of her/his right to separate counsel in both individual and fiduciary capacities. In certain instances, the estate attorney might insist that before signing a retainer letter the potential client be represented individually.

• Specify in the retainer letter the capacity of representation, *i.e.*, as a fiduciary, not as a beneficiary or individually. Emphasize in this regard that counsel will not represent the client individually against the estate.

• Include a waiver by the clients of any future claims of conflict arising from the multiple representation, including a statement that the lawyer would not be conflicted out in defending the estate against any claim that the client might bring against the estate in his/her own individual capacity. In the event that one of the clients determines in the future to retain separate counsel in his/her fiduciary capacity, the consents could also include a waiver of any claim at that point that counsel cannot continue to represent the other fiduciaries.

• Spell out with specificity all potential areas of potential conflict.

• Describe the advantages and risks of multiple representation, emphasizing the latter, particularly if disqualification is necessary in the future, resulting in the need to hire new attorneys.

• Include a provision indicating that where litigation is brought by one client in her/his individual capacity against the others in their fiduciary capacities, the attorney's communication with the latter regarding the same will be privileged and not subject to disclosure, as will the attorney's work product.

• Have a provision explaining that the attorney-client privilege will not apply generally between the co-clients, nor will it apply to beneficiaries, at least when there is no litigation.

• Consider a provision stating that in the event the court determines that there is a conflict and disqualifies the attorney, while also holding that the estate is not obligated for the attorney's services, the clients will be individually responsible for fees.[34]

Some of these provisions might seem onerous, possibly causing the clients not to hire the attorney. However, that is precisely the point—the estate attorney should approach any multiple representation with a great deal of caution. Further, multiple representation where there are actual conflicts of interest should be avoided assiduously. In addition, when these issues have both been discussed and put in writing in the retainer letter, the clients can make an educated decision whether to proceed with one attorney or seek separate counsel.

Apply the Principles

Returning then to the hypothetical at the beginning of this article, the attorney can be in a position to represent all the individuals as co-executors, provided that no actual conflicts are apparent and that the decedent's widow is separately represented.

A retainer letter should include the provisions suggested above, with written consents and full disclosures being obtained from each client.

Full disclosure should also be made to the board of directors of the corporation in which the estate has an interest, and in no event should the attorney participate in any litigation between the estate and the corporation; for that they must retain separate counsel. Full disclosure should be made regarding the varying interests and decisions that the fiduciaries will have to make, with respect to matters such as allocation, funding, evaluation and distribution. For that reason, the attorney should insist that the decedent's widow have independent counsel representing her as a co-executor and individually, albeit with the understanding that the consulted attorney can still represent her in fiduciary matters unrelated to the Q-TIP.

Finally, as an extra caution, an application to the Surrogate might be considered.

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1. *See*, *e.g.*, *In re Flasterstein*, 27 Misc. 2d 326, 210 N.Y.S.2d 307 (Sur. Ct., Kings Co. 1960).
2. *In re Marsh*, 179 A.D.2d 578, 578 N.Y.S.2d 911 (1st Dep't 1992); *see generally*, Warren's Weed, Heaton on Surrogates' Courts § 33.02[5][I].
3. *In re Brandman*, N.Y.L.J., Nov. 15, 1999, p. 29, col. 3 (Sur. Ct., Kings Co.).
4. *See*, *e.g.*, *In re Mergentime*, 155 Misc. 2d 502, 503, 588 N.Y.S.2d 736 (Sur. Ct., Westchester Co. 1992).
5. *In re Brandman*, N.Y.L.J., Nov. 15, 1999, p. 29, col. 3 (Sur. Ct., Kings Co. 1999). NYSBA Comm. on Professional Ethics, Op. No. 512, 1979 (hereinafter "NYSBA Op.").
6. 11 A.D.2d 555, 199 N.Y.S.2d 958 (3d Dep't 1960).
7. NYSBA Op. 512.
8. *In re Hof*, 102 A.D.2d 591, 478 N.Y.S.2d 39 (2d Dep't 1984).
9. *Id.*
10. *In re Flasterstein*, 27 Misc. 2d 326, 210 N.Y.S.2d 307 (Sur. Ct., Kings Co. 1960).
11. *See In re Birnbaum*, 118 Misc. 2d 267, 460 N.Y.S.2d 706 (Sur. Ct., Monroe Co. 1983).
12. *See Green v. Green*, 47 N.Y.2d 447, 418 N.Y.S.2d 379 (1979).
13. *In re Belfer*, N.Y.L.J., Mar. 12, 1985 (Sur. Ct., Nassau Co.).
14. *See In re Schrauth*, 249 A.D. 847, 292 N.Y.S. 925 (2d Dep't 1937) ("there can be no such retainer as an attorney for an estate"); *In re Scanlon*, 2 Misc. 2d 65, 69, 150 N.Y.S.2d 511 (Sur. Ct., Kings Co. 1956).
15. Ordover and Gibbs, *Fiduciaries, Attorneys and Duty to Beneficiaries*, N.Y.L.J., Feb. 25, 1999, p. 3, col. 1.
16. *See*, *e.g.*, *In re Community Serv. Soc'y*, N.Y.L.J., Nov. 14, 1997, p. 26, col. 2 (Sur. Ct., N.Y. Co.); *see also In re Baker*, 139 Misc. 2d 573, 528 N.Y.S.2d 470 (Sur. Ct., Nassau Co. 1988).
17. Commentaries on the Model Rules of Professional Conduct 57 (3d ed. 1999) (which provides: "The lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate although he or she does not represent them. . . . Some courts have characterized the beneficiaries of a fiduciary estate as derivative or secondary clients of the lawyer for the fiduciary").
18. Abolition of the so-called attorney-fiduciary exception to the attorney-client privilege is the subject of proposed legislation, sponsored by, among others, the New York State Bar Association.
19. *See* NYSBA Op. No. 512.
20. NYSBA Op. No. 649 (1993); Bar Ass'n of Nassau County Comm. on Professional Ethics, Op. No. 97-10. (hereinafter "Nassau Bar Ethics Op.").
21. N.Y.L.J., Dec. 30, 1999, p. 25, col. 4 (Sur. Ct., N.Y. Co.).
22. *See*, *e.g.*, Nassau Bar Ethics Op. 92-18, N.Y.L.J., Aug. 12, 1992, p. 2, col. 1.
23. *In re Clarke*, 12 N.Y.2d 183, 237 N.Y.S.2d 694 (1962); *In re Bond & Mortgage Guarantee Co.*, 303 N.Y. 423 (1951). For an excellent discussion of *Kellogg* and its antecedents, see Ordover and Gibbs, *Duty of Fiduciary's Attorney to Beneficiaries*, N.Y.L.J., Feb. 28, 2000, p. 3.
24. *In re Sackler*, N.Y.L.J., May 16, 1989 (Sur. Ct., Nassau Co.).
25. *In re Abrams*, 62 N.Y.2d 183, 199, 476 N.Y.S.2d 494 (1984).
26. *See In re Kelly*, 23 N.Y.2d 368, 378, 296 N.Y.S.2d 937 (1968).
27. *In re Abel*, N.Y.L.J., Oct. 23, 1992, p. 26, col. 3 (Sur. Ct., Nassau Co.).
28. *See In re Winston*, 214 A.D.2d 677, 625 N.Y.S.2d 927 (2d Dep't 1995) ("An attorney who engages in misconduct by violating the Disciplinary Rules is not entitled to legal fees for any services rendered"); *In re Klenk*, 204 A.D.2d 640, 612 N.Y.S.2d 220 (2d Dep't 1994).
29. *In re Sackler*, N.Y.L.J., May 16, 1989 (Sur. Ct., Nassau Co.).
30. *See In re Brandman*, N.Y.L.J., Nov. 15, 1999, p. 29, col. 3 (Sur. Ct., Kings Co.) (which held that if a conflict is actual and not just potential, and if it is of a substantial nature, "dual representation is prohibited even if the parties consent").
31. N.Y.L.J., June 11, 2001, p. 34, col. 1 (Sur. Ct., Nassau Co.).
32. *See* ACTEC, Engagement Letters; A Guide for Practitioners (1st ed. 1999).
33. Simon's NY Code of Professional Responsibility Annotated (1998 ed.), DR 5-105.
34. This particular recommendation is problematic, as is the second recommendation in item 3. The authors believe that such should be enforceable, at least in most cases.

Need for a Testifying Physician To Rely on Reports by a Non-Testifying Physician Poses Evidentiary Problems

The following is the first of two articles devoted to issues that arise when one physician is asked to give trial testimony based on the report of a physician who is not testifying. In an effort to dispel the considerable confusion that surrounds these issues, this article examines New York State case law and identifies the legal criteria that govern these decisions. A second article, to appear next month, makes some proposals for clarifying the evidentiary rules.

BY MARCY S. FRIEDMAN

Evidentiary disputes frequently arise at trial regarding both the extent to which a physician may testify to an opinion that is based on the report of a physician who is not testifying and the circumstances under which the testimony about the report or the report itself may be admitted into evidence.[1]

Issues involving the extent to which a physician may rely on another physician's report typically arise when the other physician's report is not in evidence and that physician has not been called to testify. Under these circumstances, the report of the other physician is hearsay.

In many cases, hearsay objections to using the report of the non-testifying physician may be avoided by the simple expedient of admitting the report under the business records exception to the hearsay rule: N.Y. Civil Practice Law and Rules 4518(c) (hereinafter CPLR) makes certified hospital records routinely admissible as business records. Case law holds that a treating physician's office records, including expressions of medical opinion, are admissible as business records, without the necessity of calling the treating physician, where a foundation is laid by an authenticating witness from the treating physician's office, and the entries are germane to diagnosis and treatment.[2] CPLR 4532-a provides a simplified procedure for admission of X-rays, MRIs and other specified tests.

The hearsay issues addressed in this article are not implicated when there is an independent basis in the record for the admission of the report—that is, a basis under the business records or other recognized exception to the hearsay rule that is separate from the testifying physician's testimony that the report is reliable and that he or she relied on the report in formulating an opinion. In the absence of such an independent basis, the propriety of the testifying physician's reliance on the report will be analyzed by the courts in light of extensive case law governing the extent generally to which an expert's opinion may be based on hearsay.

Under the common law, expert opinion based on hearsay material was impermissible. It was settled that "opinion evidence must be based on facts in the record or personally known to the witness."[3] In *People v. Sugden*,[4] the Court of Appeals recognized two limited exceptions to this rule, holding that an expert may also rely on out-of-court material[5] if "it is of a kind accepted in the profession as reliable in forming a professional opinion" or if it "comes from a witness subject to full cross-examination on the trial."[6]

It is the reliability exception that is typically at issue in determining whether a physician may give an opinion based on another physician's report. As a review of the case law will show, this concern for reliability explains why the courts make a distinction between treating and non-treating physicians, with reliance on other physicians' reports by the former more liberally allowed. Concern for reliability, as well as for the right to confront witnesses, explains the further distinction made between reports that contain opinion on ultimate issues in the case and reports that record more objectively verifiable findings. Testimony based on the objective findings is more readily, although still cautiously, permitted.

Opinion on Ultimate Issues

In a leading case, *Borden v. Brady*,[7] the Appellate Division, Third Department, recognized the reliability ex-

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ception but held that it was error to permit a treating physician, the plaintiff's orthopedic surgeon, to give an opinion on the permanency of the plaintiff's condition based on a report of a neurologist to whom he had referred the plaintiff for evaluation. In so holding, the court noted that the report "constituted an expression of opinion on the crucial issue of the permanency of plaintiff's injuries and formed the principal basis for the expert witness' opinion on the same issue, not merely a link in the chain of data on which that witness relied."[8] The court also held that it was error to admit the neurologist's report into evidence and to permit it to be read to the jury, as *People v. Sugden* did not intend "to carve out such a new exception to the hearsay rule."[9]

A report used only for testimony obviously lacks the guarantees of reliability in a report actually relied upon for treatment decisions affecting a patient's health.

The fact that the court found error in admission of the report must not obscure that the case also determined the separate issue of whether the testimony could be based on the report, even if the report itself were not admitted. *Borden v. Brady* stands for the proposition that a testifying treating physician may not give an opinion regarding an ultimate issue in the case (*e.g.*, causation or permanence of the injuries) if the "principal basis" for the opinion is the report of a non-testifying physician, where there is no independent basis for admission of the report.

This result is consistent with *People v. Sugden*, which, while carving out an exception that permitted experts to rely on unadmitted material of a kind accepted as reliable in forming an opinion, continued to insist that there must be an independent basis for the opinion. That is, *People v. Sugden* did not give license to experts to base their opinions primarily on out-of-court material, even if reliable. Rather, it held that their opinions would not be rendered invalid based on their reliance on reliable out-of-court material, provided that there was an independent, non-hearsay basis for their opinions.

A fine concurrence in *Borden v. Brady* (Yesawich, J.) argued for broader reliance by testifying treating physicians on out-of-court reports than that sanctioned by the majority or envisioned by *People v. Sugden*. The concurrence agreed with the majority that the testifying physician was improperly permitted to give an opinion based on the out-of-court report. However, the basis for this agreement was not that the out-of-court report expressed an opinion on an ultimate issue but that the particular report was not in fact reliable. It had been obtained by the treating orthopedist not for use in the plaintiff's treatment but rather to reinforce the treating physician's diagnosis in the already pending personal injury suit. If the report had been obtained for treatment and hence was reliable, the concurrence would have permitted the testifying physician to rely even on the opinions in the report, based on the following reasoning: "Reliability of the material is the touchstone; once reliability is established, the medical expert may testify about it even though it would otherwise be considered inadmissible hearsay [citations omitted]. The underlying rationale is that since physicians make life and death decisions in reliance upon medical reports filed by other doctors and medical personnel, those reports, though not independently admissible in evidence, enjoy a singular trustworthiness."[10]

The *Borden v. Brady* concurrence points up the rationale for distinguishing between treating and non-treating physicians for purposes of determining whether they should be permitted to give opinion testimony based on the unadmitted reports of other physicians. A report used only for testimony obviously lacks the guarantees of reliability found in a report actually relied upon for treatment decisions affecting a patient's health.

Not surprisingly, therefore, the case law consistently holds that a non-treating expert may not testify based on the report of another physician, where the report is not independently admitted and the other physician is not a witness at trial.[11]

The more difficult question, posed by the *Borden v. Brady* concurrence, is whether the apparent reliability of an out-of-court report that has actually been used in treating the plaintiff is sufficient to justify the treating physician's use of the report at trial as a principal basis for an opinion on a critical issue in the case. There are persuasive arguments in support of such use. As the *Borden v. Brady* concurrence implicitly argues, such a testimonial use acknowledges the out-of-court medical reality that treating doctors routinely refer their patients to other doctors for evaluation and testing, and rely on the other doctors' reports in determining the course of their patients' treatment. Allowing use of the reports at trial would also acknowledge the in-court reality that the high expert witness fees charged by medical experts, and the difficulties in scheduling their appearances at trial, make it infeasible for many plaintiffs to offer testimony from the several medical experts who may have been consulted about or participated in the plaintiffs' treatment.

On the other hand, the reliability of the out-of-court material is not the only factor the courts must consider in determining the permissible basis for an expert opinion. The interest of the opposing party in confronting witnesses on critical issues in the case must also be taken into account. A compelling argument may be made that this interest is unfairly overlooked by an evidentiary rule that would permit even a treating doctor either to base an opinion about a critical issue in the case primarily upon another doctor's report, or to testify about the contents of the other doctor's report when the other doctor is not subject to cross-examination.

Although this latter concern has not been expressly articulated by the courts, it may explain why the *Borden v. Brady* majority opinion remains good law. In *Schwartz v. Gerson*,[12] the testifying physician, a surgeon, gave testimony that he relied "in part" on the out-of-court report of another doctor in determining whether the plaintiff needed surgery. The report was also admitted into evidence and read to the jury. The court assumed, without deciding, that it was not improper to permit the surgeon's testimony. This assumption was, of course, consistent with *Borden v. Brady*, to the extent that it permitted the testifying treating physician's partial, as opposed to principal, reliance on another physician's out-of-court report. Citing *Borden v. Brady*, the *Schwartz v. Gerson* court further held that it was reversible error to admit the report, because it expressed an opinion on the "crucial issue" of causation of the plaintiff's injuries.[13] Although the court did not so note, there was also a question about the reliability of the report, because it was prepared by a doctor who had examined the plaintiff for his insurance carrier.

More recently, in *Brown v. County of Albany*,[14] the Appellate Division, Third Department, held, citing *Borden v. Brady*, that the plaintiff's treating doctor was properly precluded from giving his opinion on causation based solely upon the opinion expressed in the report of the orthopedist who had treated the plaintiff immediately after his accident. In reaching this result, the court reasoned that causation was a "central issue" in the case, and that the prior doctor's opinion was the "sole source" of the testifying physician's opinion on causation, not merely "a link in the chain of data" on which he relied.[15] The court also observed that the reliability of the prior doctor's opinion was in question, as it appeared to have been based on a history taken from the plaintiff regarding the accident. Notably, the *Brown v. County of Albany* court refused to allow the testifying physician's reliance on the prior doctor's opinion, notwithstanding that the prior treating doctor's records had in fact been admitted into evidence. The case thus appears to represent an exercise of the court's discretion to preclude expert testimony, whether or not based on admissible evidence, where its probative value is outweighed by the prejudice to the opposing party—here, deprivation of the opportunity to confront an adverse witness on a crucial issue.[16]

The line thus remains firmly drawn against testimony about an ultimate issue in the case, even by a treating physician, where the principal basis for the opinion is an out-of-court report containing a non-testifying physician's opinion on that issue. Even when a testifying physician is permitted to base an opinion in part upon an out-of-court report, use of the report is sharply restricted: The courts uniformly preclude admission of the report into evidence, absent a basis for admission independent of the testifying physician's reliance upon it. Moreover, it is clear that the courts will permit only limited testimonial references to the contents of the report, although the precise scope of the permissible testimony has not been defined. In *Borden v. Brady*,[17] one of the few sources of authority on the issue, the majority noted its disapproval of the treating physician's testimony to the extent it went beyond "identify(ing) the report" and "explain(ing) its significance in forming his opinion."[18]

Although there is scant authority concerning testimony based on, or about, a report that addresses matters that fall short of ultimate issues, under the standards set forth in *Borden v. Brady*, such testimony should be permitted by a treating physician if the report is reliable, and is not a principal basis for the opinion. One case on point, *Marulli v. Pro Security Serv., Inc.*,[19] held that the trial court properly permitted "limited reference" by the plaintiff's testifying succeeding treating physicians to the contents of a report prepared by the plaintiff's non-testifying original treating physician, where the report provided information regarding the care given to the plaintiff shortly after the accident.[20]

Opinion Based on Test Results

The courts have taken a more liberal, but still cautious, approach to testimony based on, and about, out-of-court reports that set forth and evaluate the results of so-called objective tests such as MRIs and X-rays. The courts continue to distinguish between treating and non-treating physicians for purposes of such testimony, but they give non-treating physicians broader latitude in testifying to opinions based on test results than in giving opinions about other issues.

Treating Physicians In a leading case, *Serra v. City of New York*,[21] the plaintiff's treating physician sent the plaintiff for an MRI in order to confirm a diagnosis. The Appellate Division, Second Department, held that an MRI report is data "of the kind ordinarily accepted by experts in the field," and that under the circumstances it was not error to permit the treating physician to testify

"with respect to" the MRI report.[22] The court further held that because no foundation had been laid to permit its admission under an exception to the hearsay rule, it was error, albeit harmless, to admit the MRI report into evidence. In *Pegg v. Shahin*,[23] the same court again held that it was "not error for the trial court to permit the (treating) physician to testify with respect to the MRI and X-ray report."[24] Citing *People v. Sugden* and *Serra v. City of New York*, the court noted that the treating physician had sent the plaintiff for tests in order to "confirm his diagnosis" and that the MRI and X-ray reports were data "of the kind ordinarily accepted by experts in the field."[25] A recent case, *Torregrossa v. Weinstein*,[26] is to the same effect.

The courts will not permit even a more objective report to form the basis for an opinion, where the report has not been used for treatment and therefore lacks indicia of reliability.

Under *Serra v. City of New York* and its progeny, then, the treating physician must have a basis, independent of the report of test results, for his or her diagnosis. However, the treating physician may testify about the contents of the report, although the report itself will not be admitted into evidence.

In the most recent case on the subject, *Sigue v. Chemical Bank*,[27] the Appellate Division, First Department, confirmed the importance of the requirement that the testifying physician have an independent basis for her or his opinion, even when relying on a so-called objective report of test results. The *Sigue* court held that the trial court committed reversible error in allowing the plaintiff's neurologist to testify as to the plaintiff's diagnosis based on an arthrogram report prepared by a non-testifying doctor. Citing *Borden v. Brady*[28] and *Brown v. County of Albany*,[29] the court reasoned that the report "constituted an expression of opinion on the crucial issues of the existence and severity of plaintiff's injuries and formed the principal basis for the neurologist's opinion on those issues, 'not merely a link in the chain of data upon which that witness relied.'" In holding that the testifying doctor should not have been allowed to give testimony based on the arthrogram report, the court also noted that the report was not addressed to the testifying doctor. The case thus further confirmed that the courts will not permit even a more objective report to form the basis for an opinion, where the report has not been used for treatment and therefore lacks indicia of reliability. Although *Sigue* did not cite the *Serra* line of cases from the Second Department, it is thus consistent with their central precepts.

Non-Treating Physicians The cases involving non-treating physicians have generally considered the admissibility of testimony based on a non-treating physician's own reading of unadmitted MRI or X-ray films, as opposed to testimony based on another physician's unadmitted report of an MRI or X-ray. These cases have taken pains not to find reversible error based on a non-treating expert's formulation of an opinion based on the expert's own reading of the unadmitted films. The same approach was followed in a recent case involving a non-treating expert's reliance on another physician's out-of-court report of a test.

Analysis of expert testimony based on unadmitted films of tests begins with *Hambsch v. New York City Tr. Auth.*,[30] in which the Court of Appeals stated that it was error to permit the plaintiff's expert to testify to an opinion as to the nature of the plaintiff's condition based on his reading of an X-ray of the plaintiff, without producing the X-ray and introducing it into evidence. Although the statement was in fact dictum (the Court of Appeals expressly noted that there was no objection to the expert's testimony "and the matter is not preserved for our review"[31]), subsequent courts have endeavored to distinguish *Hambsch*.[32]

In *Karayianakis v. L & E Grommery, Inc.*,[33] the Appellate Division, Second Department, was called upon to determine whether the trial court had erred in permitting the plaintiff's non-treating expert to base his opinion upon his review of X-rays that were not introduced into evidence. Citing *Hambsch*, the court noted that "[i]n situations where a medical expert's conclusions are based upon an analysis of X rays of a plaintiff's injuries, the failure to introduce the X rays into evidence may constitute error."[34] The court found the case before it distinguishable, as the expert's testimony was based on a physical examination of the plaintiff as well as on the X-rays. The court also noted that the references to the X-rays were minimal and "for the most part, served to confirm the conclusions drawn by the expert following his independent examination of the injured plaintiff."[35] The failure to produce the X-rays thus was held not to warrant reversal.

In *Pegg v. Shahin*,[36] which involved testimony by non-treating as well as treating experts, the court found no reversible error as a result of the non-treating experts' testimony based on unadmitted X-rays and MRI films. Citing *Karayianakis v. L & E Grommery*, the court reasoned that the failure to produce the X-rays and MRI films did not "warrant reversal," as the experts made physical examinations of the plaintiffs, and the references to the tests "for the most part, served to confirm

the conclusions drawn by the respective experts following their independent examination of these plaintiffs."[37]

In *Nuzzo v. Castellano*,[38] the Appellate Division, Second Department, confirmed the distinction that will be made between non-treating experts who examine the plaintiff and those who do not. This case held that the trial court "committed reversible error by allowing a plaintiff's expert, who had not physically examined the plaintiff, to testify as to a diagnosis . . . based, for the most part, on magnetic resonance imaging . . . films which were not in evidence."[39] Citing *Hambsch* and *Karayianakis v. L & E Grommery*, the court noted that the MRI was "not used merely to confirm the expert's opinion formed out of information from other sources but instead was used as a basis for her opinion."[40]

Most recently, in *Ferrantello v. St. Charles Hosp. & Rehab. Ctr.*,[41] the court applied the above reasoning to a non-treating medical expert's testimony based in part on a report of an MRI and an X-ray. The court held that the admission of the MRI report and X-ray was harmless error, but reasoned that the expert was properly permitted to give his opinion, as the expert had also examined the plaintiff, relied on other records that were properly admitted into evidence, and used the tests "primarily to confirm" his conclusions.

Case law provides workable and sound criteria for determining whether an out-of-court report may serve as a basis for a testifying physician's opinion.

Differing Reports Compared Like reports that contain opinions on ultimate issues in the case such as permanence or causation of injuries, reports of test results involve analysis of the test findings and their significance and, hence, express opinions. To a far greater extent than the opinion in reports on ultimate issues, however, the opinion in reports of test results is directly based upon data (*i.e.*, the films) from objective tests that can readily be made available to the opponent so the merits of the opinion can be evaluated.[42]

In giving greater latitude to testimony based on or about test result reports, the courts are implicitly making the pragmatic decision that these reports are sufficiently reliable to relieve the proponent of the report from the burden of producing the physician who wrote the report, and to justify a limitation of the right to confront witnesses.

However, the courts have hardly wholeheartedly embraced testimony about the reports. In the case of treating physicians, although the courts permit testimony about a report of a test result, they refuse to admit the report, thus affirming the well-settled precept that an expert may not be a conduit for hearsay. In the case of non-treating physicians, the courts have not affirmatively approved testimony about the test results. Indeed, in finding no reversible error as a result of the admission of the testimony, at least one court made a point of noting that the expert's references to the out-of-court tests were minimal. Moreover, in the case of both treating and non-treating physicians, the courts continue to insist that the physicians have a basis for their opinions independent of the test results.

Of course, an accurate diagnosis is in many cases impossible without a test such as an MRI or X-ray. Thus, even in the case of treating physicians, the insistence on an independent basis for the opinion is often little more than a fiction. In the case of non-treating experts who have made only a brief clinical examination, the fiction is even more apparent. It is invoked, however, based on the courts' adherence to the central tenet of *People v. Sugden* that an expert who considers out-of-court material must have an independent, non-hearsay basis for an opinion.

Conclusion

As review of the case law shows, the cases involving physicians' reliance on other physicians' reports have considered two issues—first, whether the testifying physician's opinion may be based on the out-of-court report of another physician and second, whether the testifying physician may testify about the contents of the other physician's report or the report itself may be admitted into evidence. The cases thus distinguish between the permissible basis for an opinion and the admissibility of the underlying data.

In determining whether an out-of-court physician's report constitutes a permissible basis for a testifying physician's opinion, the courts apply the reliability exception to the rule that expert testimony must ordinarily be based on the facts admitted into evidence at the trial or personally known to the expert. In applying the reliability exception, the courts consider not only whether the report is "of a kind accepted in the profession as reliable in forming a professional opinion,"[43] but also whether the particular expert who is basing an opinion on the report relied on the report under circumstances that show its trustworthiness. This second inquiry into the circumstances of the reliance explains the distinction routinely made by the courts between treating and non-treating experts. While the reasons for the distinction are not generally explained, it only makes

sense if understood as shorthand for a finding that the treating expert used the report not merely for purposes of giving an opinion at trial but for purposes of actually providing treatment to the plaintiff, and that such reliance by the treating expert on the report is probative of the report's reliability.

Finally, in assessing the propriety of using an out-of-court report as the basis for an opinion, the courts consider the substance of the opinion and its relation to the issues in the case. Thus, even if reliable, a report may not serve as the principal basis for a testifying physician's opinion on an ultimate issue in the case such as causation or permanence of the injuries. This result reflects a policy determination that the reliability of the report is insufficient to overcome the adversary's interest, even in a civil case, of confronting the witnesses against it on crucial issues.

In summation, case law provides workable and sound criteria for determining whether an out-of-court report may serve as a basis for a testifying physician's opinion. Unfortunately, however, the cases do not provide equally useful guidance regarding the admissibility of the out-of-court reports or of testimony about their contents.

The next article applies existing criteria to predict the outcome on issues that commonly arise but have not been the subject of appellate opinion. It also makes suggestions for how the courts should address, and consider expanding, the extent to which information is made available to jurors about the contents of the out-of-court reports.

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1. As used in this article, the term "report" includes reports made to a treating physician by a consulting physician to whom the plaintiff was referred; reports of test results; and office records of treating or consulting physicians. It does not include reports made for litigation, which are clearly inadmissible.
2. *See Wilson v. Bodian*, 130 A.D.2d 221, 519 N.Y.S.2d 126 (2d Dep't 1987).
3. *Cassano v. Hagstrom*, 5 N.Y.2d 643, 646, 187 N.Y.S.2d 1 (1959); *People v. Keough*, 276 N.Y. 141 (1937).
4. 35 N.Y.2d 453, 363 N.Y.S.2d 923 (1974).
5. As used in this article, the term "out-of-court material" means material that was prepared by a physician who is not a witness at trial and is not independently admitted into evidence under an exception to the hearsay rule—*e.g.*, as a business record.
6. *Hambsch v. New York City Tr. Auth.*, 63 N.Y.2d 723, 726, 480 N.Y.S.2d 195 (1984), citing *Sugden*, 35 N.Y.2d at 460. *See People v. Stone*, 35 N.Y.2d 69, 358 N.Y.S.2d 737 (1974).
7. 92 A.D.2d 983 (3d Dep't 1983).
8. *Id.* at 984.
9. *Id*.
10. *Id*.
11. *Erosa v. Rinaldi*, 270 A.D.2d 384, 704 N.Y.S.2d 891 (2d Dep't 2000); *Flamio v. State*, 132 A.D.2d 594, 517 N.Y.S.2d 756 (2d Dep't 1987). *See O'Shea v. Sarro*, 106 A.D.2d 435, 482 N.Y.S.2d 529 (2d Dep't 1984).
12. 246 A.D.2d 589, 668 N.Y.S.2d 223 (2d Dep't 1998).
13. *Id*.
14. 271 A.D.2d 819, 706 N.Y.S.2d 261, *leave denied*, 95 N.Y.2d 767 (2000).
15. *Id.* at 821.
16. *See* Richard T. Farrell, *Prince, Richardson on Evidence* § 4-101 (11th ed. 1995).
17. *See Borden v. Brady*, 92 A.D.2d 983, 984 (3d Dep't 1983).
18. *See Schwartz v. Gerson*, 246 A.D.2d 589, 668 N.Y.S.2d 223 (2d Dep't 1998).
19. 151 Misc. 2d 1077, 583 N.Y.S.2d 870 (App. Term, 2d Dep't 1992).
20. *Id.* at 1078.
21. 215 A.D.2d 643, 627 N.Y.2d 699 (2d Dep't 1995).
22. *Id.* at 644.
23. 237 A.D.2d 271, 654 N.Y.S.2d 395 (2d Dep't 1997).
24. *Id.* at 272.
25. *Id*.
26. 278 A.D.2d 487, 718 N.Y.S.2d 78 (2d Dep't 2000).
27. 284 A.D.2d 246, 727 N.Y.S.2d 86 (1st Dep't 2001).
28. *Borden v. Brady*, 92 A.D.2d 983 (3d Dep't 1983).
29. *Brown v. County of Albany*, 271 A.D.2d 819, 706 N.Y.S.2d 261, *leave denied*, 95 N.Y.2d 767 (2000).
30. *Hambsch v. New York City Tr. Auth.*, 63 N.Y.2d 723, 726, 480 N.Y.S.2d 195 (1984).
31. *Id.* at 725.
32. Although the status of the testifying physician, whether treating or non-treating, does not appear from the Court of Appeals decision in *Hambsch*, it appears from the Appellate Division decision (101 A.D.2d 807, 475 N.Y.S.2d 467 (2d Dep't 1984) that the case in fact involved the plaintiff's family physician.
33. 141 A.D.2d 610, 529 N.Y.S.2d 358 (2d Dep't 1988).
34. *Id.* at 610-11.
35. *Id.* at 611.
36. *Pegg v. Shahin*, 237 A.D.2d 271, 654 N.Y.S.2d 395 (2d Dep't 1997).
37. *Id.* at 273.
38. 254 A.D.2d 265, 678 N.Y.S.2d 118 (2d Dep't 1998).
39. *Id.* at 266.
40. *Id.*
41. 275 A.D.2d 387, 712 N.Y.S.2d 615 (2d Dep't 2000).
42. *See Holshek v. Stokes*, 122 A.D.2d 777, 505 N.Y.S.2d 664 (2d Dep't 1986).
43. *People v. Sugden*, 35 N.Y.2d 453, 460, 363 N.Y.S.2d 923 (1974).

Appeals Can Deal With the "Stain" Of Unpreserved Constitutional Issues If Criteria for Exception Are Met

BY PAUL GOLDEN

Strange but true: the appellate process is akin to dry cleaning. The customer who uses a dry cleaner must find and point out the stains that need special attention; the appellate attorney must find and point out errors in the proceeding below when he appears before the appellate court.

Just as the cleaning process is made easier if stains are treated immediately, with an eye to avoiding a permanent mark, the trial attorney should apply the "club soda rub" by raising a legal argument at trial, with an eye to an appeal. Ultimately, it is up to the dry cleaner whether the stains can be removed, based in part on the previous treatment, and it is the appellate court that decides whether the error below is remediable, based in part on whether the issue was raised at the proper stage of the case.

But what happens when, after filing a notice of appeal and examining the record below, appellate counsel discovers that the trial attorney had failed to raise a crucial constitutional issue that should have led to a result in the client's favor? Conventional wisdom is that it is simply too late; the "stain" is permanent, because New York appellate courts consistently rule that they do not hear such issues. This article examines the problem and provides some guidance on how attorneys can succeed, despite this rule.

The Preservation Rule in General

Appellate courts have two guidelines for determining whether issues may be considered on appeal, and sometimes they work against each other. The first is that parties should raise their objections at the first available opportunity in the court below. The second is that courts should uphold the integrity of the judicial system.

An appellate court generally will refuse to hear any issue in a civil case if the proponent did not raise it at the appropriate stage before the lower court, thereby "preserving" it for the appeal.[1] Otherwise, a party might abuse the process by deliberately saving a certain argument for a higher court, thereby preventing his adversary at the trial stage from curing the error or rendering it moot through a factual showing or a legal countermeasure.[2] The preservation rule should have limits, however, because it can lead to unjust results and run contrary to the goal of maintaining public confidence in our legal system. Courts cannot consistently rule in favor of parties based on technicalities, rather than on fairness.

One exception to the preservation rule is that a party can raise an argument for the first time on appeal if the issue (1) is purely legal, (2) appears on the record, and (3) could not have been refuted if it had been timely raised below. This kind of unpreserved issue thus can serve as a basis for removing a "stain." For example, when the state neglected to argue in the trial court that a particular statute protected it from liability to persons injured on its land, the higher court considered and accepted this argument on appeal.[3] Similarly, when defendants in the lower court failed to argue that the default judgment against them was a nullity because the plaintiff's motion for a default judgment did not include the required affidavit setting forth the facts of the claim, the appellate court considered and accepted this unpreserved argument.[4]

Effect of the Rule on Constitutional Issues

Constitutional issues, of course, can also be purely legal in nature, and they are the most serious legal issues an appellate court has to face. Nevertheless, one of the most permanent "stains" that can be found in a case is constitutional error. If the question of law is constitutional in nature but is not raised below, an appellate court will not normally review it. (For purposes of this article, this approach is referred to as the "constitutional

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preservation rule.") For example, appellate courts have refused to consider the following unpreserved constitutional arguments: that a foreclosure sale deprived a party of due process because of the failure to give notice of the sale,[5] that a statute unconstitutionally deprived a party of the common-law right to sue for a private nuisance,[6] or that a statute unconstitutionally distinguished between defamation against a man and against a woman.[7]

This means that in certain cases, appellate courts affirm decisions that have effectively condoned a constitutional violation. As one might imagine, this has sparked some controversy. The highest court of one state indicated that if an appellate court were to affirm such a decision simply on the "pretext" that it had not been raised below, it "would, in effect, nullify the Constitution."[8] The same court warned that this practice could lead to courts "open[ly] defying fundamental law."[9] Unfortunately, New York appellate courts (and most other appellate courts across the nation) have thus far ignored this danger.

One of the most permanent "stains" that can be found in a case is constitutional error.

Why are appellate courts generally willing to hear unpreserved legal issues that appear on the record, but almost always refuse to consider unpreserved legal issues that fall within the area of constitutional law? The answer is unclear, because it is difficult to find a legitimate rationale for this distinction among the decisions that have upheld it.

In one early case, the New York Court of Appeals held that it would not hear a certain constitutional issue because the party had "waived" the right to challenge the constitutionality of a law.[10] Yet this reason is not fully satisfactory. Almost as an intuitive matter, it should not be easier to waive the right to contest a law's constitutionality than to waive the right to raise some lesser issue of law. In any event, more recent cases do not cite "waiver" as the basis for the constitutional preservation rule.

Generally, the Court of Appeals does not even try to explain why it developed the rule but simply relies on a leading legal treatise, *Powers of the New York Court of Appeals* by Henry Cohen and Arthur Karger.[11] For example, it cites this treatise when holding that it is "important"[12] not to consider a constitutional argument unless it is properly raised below, or when holding that this is the "settled rule."[13] From this, one might assume that Cohen and Karger had explained the basis for this doctrine and recommended that the Court continue to uphold it. They did not. Instead, they complained that the Court has never explained why it created this "unique" rule, and they even described the rule as having a "dubious basis."[14] It therefore appears odd that the Court of Appeals cites this treatise as authority on this issue. It is comparable to a filmmaker advertising his movie by indicating that it was reviewed by a famous critic—but neglecting to admit that it received a bad review.

Unfortunately, by maintaining the vitality of this rule, the Court also effectively prevents lower appellate courts from hearing unpreserved constitutional issues. All four Departments of the Appellate Division have imposed the same rule on themselves.[15] This too appears odd and illogical, for two reasons. First, the Court of Appeals has expressly contrasted its powers with those of the Appellate Division, and indicated that the Appellate Division does have the right to hear and decide unpreserved constitutional issues.[16] The intermediate appellate courts' self-imposed rule therefore is contrary to dicta from the Court of Appeals. Second, the Appellate Division rule is odd in that it cites Court of Appeals cases in support of the rule, which in turn rely on Cohen and Karger's treatise. However, this treatise speaks only to the power of the Court of Appeals, not the Appellate Division. Moreover, as indicated above, this treatise in fact criticizes the constitutional preservation rule.

Another and somewhat more understandable reason that appellate courts may decline to consider unpreserved constitutional issues—even though it is unvoiced—is that they are "bound by principles of judicial restraint not to decide constitutional questions unless their disposition is necessary to the appeal."[17] In effect, this means that if a court can find a way of avoiding a constitutional issue, it will. Courts may have developed this judicial restraint for reasons having to do with history. The U.S. Supreme Court has been accused of causing the Civil War, because it issued the *Dred Scott*[18] decision—only the second time it ever held federal legislation unconstitutional. Since then, appellate judges might have come to believe that they could insulate themselves from criticism by simply avoiding constitutional issues altogether.

Circumventing the Constitutional Preservation Rule

At first glance, the constitutional preservation rule appears impossible to overcome. New York appellate courts cite it as a blanket rule and do not generally specify any exceptions. Fortunately, there are a number of back doors that might be available to the appellate attorney, some of which have been tried and some not. A

good lawyer should at least attempt to open one or more of them.

The most effective claim is simply that the constitutional argument was raised below, if the claim can be based on some aspect of the trial court record. This is like a customer who tells the dry cleaner that he tried (without success) to remove the stain when it first appeared. If the trial attorney raised any argument that touched on the constitutional issue, the appellate attorney should consider making this claim. A court may rule that the issue was raised by objection, motion, or an answer.[19] However, it appears that a general objection, in which the court would be unable to infer that the objection was based on a specific constitutional ground, does not preserve the issue for appeal.[20]

If it is clear that the trial attorney raised no constitutional argument, the appellate attorney may still achieve success under certain circumstances. There is authority for the proposition that if the constitutional question sufficiently involves the "public interest," or if the issue should be heard in the "interest of justice," it may be raised at any time. In *Massachusetts National Bank v. Shinn*,[21] the Court of Appeals held that a potential violation of the New York State Constitution concerning the prohibition of a certain kind of land lease involved "grave public policy," and thus heard the unpreserved issue.

The *Massachusetts National Bank* rule is fair and logical. As noted above, appellate courts normally refuse to hear unpreserved constitutional issues, and a central reason may be waiver. However, in other legal contexts, courts will not give effect to waiver of a right if that waiver would violate public policy.[22] Therefore, it could be argued that an appellate court should hear an unpreserved constitutional issue which concerns public policy because a party has no power to waive that constitutional issue at the trial stage. Unfortunately, the Court of Appeals has cited *Massachusetts National Bank* with regard to this aspect of the case only once in the past 100 years, and then only to rule that the subject matter in the later case was not one of public policy.[23] Thus, it is difficult to predict whether a particular issue involves sufficient "public policy" considerations to justify review, and it is unclear whether any appellate court would even follow *Massachusetts National Bank* in the 21st century, at all.

This should not dissuade an appellate attorney from making an unpreserved public policy argument however, especially if it can be argued that the public policy at issue directly affects identifiable third parties—*i.e.*, parties who have not been named or have not appeared in the lawsuit. The Court of Appeals has indicated that, generally speaking, it will consider unpreserved arguments that affect such third parties.[24] Therefore, if the lower court's ruling concerns the public policy of the state and directly affects third parties, it may be better to stress the fact that the judgment improperly affects parties who were unable to protect their rights in the matter at hand, instead of arguing constitutional law.

If the appellate court accepts the argument that the "third party" approach forms a valid non-constitutional basis for overturning the trial court's determination, the appellate attorney need not be concerned whether the court reaches the potentially forbidden constitutional issue. To return to our dry cleaner, it would be similar to a customer presenting a shirt with overlapping stains, one that did not need to be properly treated ahead of time, and one that did. If the customer asks the dry cleaner to remove the former, there is a chance that the process will remove the latter as well.

Aside from the exception based on public policy, there is no express exception to the constitutional preservation rule. Fortunately, courts are sometimes willing to hear unpreserved constitutional issues and simply do not call attention to their result-oriented approach. For example, if a judge erroneously charges a jury, this creates an issue of pure law that should be heard by the appellate court, regardless of whether it was preserved by a proper objection. Yet if the error imbedded in the charge involved a constitutional issue, the appellate court should not hear it under a strict application of the rule. Nevertheless, one appellate court held that it was reversible error when the lower court invoked an unconstitutional statute in its charge to the jury, even though the trial attorney did not properly object.[25] Perhaps the appellate attorney successfully used the "overlapping stain" method, and simply stressed the error in the jury charge without invoking the Constitution.

Another case also reveals the value of the "overlapping stain" approach. If a party claims on appeal that the controlling statute is unconstitutional without first having raised it below, the appellate court is not likely to hear the issue. However, if the party rephrases the argument and contends that the lower court unconstitutionally interpreted the statute, the attorney may find success. This is a subtle, but crucial, distinction. For example, in *In re Jacob*,[26] the lower court was required to determine if an unmarried partner of a child's biological mother could become the child's second parent by means of adoption. Although the statutory language seemed to indicate that an unmarried partner could not do so, the appellants successfully argued to the Court of Appeals that the lower court's construction of the adoption law violated the constitutional guarantee of equal protection.

The dissenting judge protested that the constitutional claims were raised for the first time on appeal and ar-

gued that the Court should have been foreclosed from considering them. Yet the majority ruled in favor of the appellants, opting for a nonrestrictive reading of the clause that avoided "constitutional doubts." The *Jacob* case thus provides an exciting method to avoid the constitutional preservation rule.

In a rare circumstance, one can be guaranteed a review of an unpreserved constitutional argument if the U.S. Supreme Court directs a lower appellate court to do so. In *Childs v. Childs*,[27] the Appellate Division refused to hear the appellant's unpreserved argument that a statute violated the equal protection clause, in that the statute permitted a court to grant counsel fees in divorce actions only to wives, and never to husbands. The Court of Appeals dismissed the appeal. However, the appellant filed a petition for certiorari to the U.S. Supreme Court. The high Court struck down a similar Alabama statute, and two weeks later vacated the previous order of the Appellate Division, remanding the case for further consideration. The Appellate Division then, for the first time, considered the statute's constitutionality because of the "gravity of the issue," despite the fact that the appellant had not raised the issue at trial.

This leads to yet another approach that might be taken by the appellate attorney. Although New York cases provide minimal guidance for the attorney seeking to avoid the constitutional preservation rule, one can look to other states' case law on the issue. For example, an appellate court would probably not want to uphold a case in which the plaintiff succeeded on a constitutional claim that had no basis in law, even if the issue had not been preserved. Although a case with this holding apparently has not been decided in New York, a New York appellate court has applied similar logic in a non-constitutional context. It ruled that a party had no right to maintain its action to set aside a certain kind of fraudulent transfer, even though this issue had been unpreserved.[28] The court stated that it could not ignore the issue, because it "might become a misleading precedent." A New York appellate tribunal therefore might be ready to apply similar reasoning in a case involving a constitutional issue.

In California, an appellate court has already employed such reasoning. There, as here, the courts generally do not hear constitutional issues raised for the first time on appeal. Nevertheless, a California appellate court considered one such unpreserved issue, ruling that it could not allow recovery for a certain cause of action based on the equal protection clause, because the clause provided no foundation for this relief. As the court stated,

> It would be as if a litigant had obtained a monetary recovery against a state-owned liquor store based on the Eighteenth Amendment to the United States Constitution, and on appeal the court was required to affirm the judgment because the liquor store's attorney had forgotten to mention that, oh by the way, the Eighteenth Amendment had been repealed a half-century earlier.[29]

Although New York appellate courts are not likely to overturn the constitutional preservation rule as a whole in the near future, the courts might be convinced not to apply it blindly in all cases. It is worth noting that in many cases citing the rule, courts take pains to explain that even if they were to reach the constitutional argument, they would reject it;[30] a dry cleaner who does not believe that a mark on clothing is really a stain in the first place would not be interested in discussing whether the stain could be removed. In any event, the courts' dicta seem to indicate that they are unwilling to simply ignore constitutional issues solely on the basis of the constitutional preservation rule. For that reason, a New York appellate court might be convinced that it should not interpret the rule so stringently as to allow an obvious constitutional flaw to go uncorrected, and that it should follow guidelines provided by the courts of certain other states.

In a rare circumstance, one can be guaranteed a review of an unpreserved constitutional argument if the U.S. Supreme Court directs a lower appellate court to do so.

For example, New York appellate courts refuse to review unpreserved constitutional challenges to statutes.[31] However, if an appellate court were faced with a statute that was facially unconstitutional, the appellate attorney should at least attempt to convince the court to follow the logic adopted in certain other jurisdictions. In several states, a constitutional challenge to a statute can be raised for the first time on appeal, if its unconstitutionality is obvious and apparent.[32] And at least one state, Wyoming, has a lesser standard, and apparently will review a statute's constitutionality even if its unconstitutionality is not so obvious: "The constitutionality of a statute is fundamental in nature, and, therefore, we may address that issue despite it not being properly raised below."[33] Perhaps the breakthrough in New York on the constitutional preservation rule will come on the review of a poorly conceived piece of legislation.

Conclusion

Given the importance of constitutional arguments to litigation of almost any type and description, there is

need for hope that New York appellate courts will consider bending the technical rules on preservation when it is necessary. Appellate judges may simply be waiting for the right case, and the right kind of argument, to remove the worst kind of "stain."

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1. *See, e.g., McMillan v. State*, 72 N.Y.2d 871, 872, 532 N.Y.S.2d 355 (1988); *see also Cooper v. City of New York*, 81 N.Y.2d 584, 588, 601 N.Y.S.2d 432 (1993).
2. *See Telaro v. Telaro*, 25 N.Y.2d 433, 439, 306 N.Y.S.2d 920 (1969).
3. *Sega v. State of New York*, 60 N.Y.2d 183, 190, n.2, 469 N.Y.S.2d 51 (1983).
4. *Hann v. Morrison*, 247 A.D.2d 706, 708, 668 N.Y.S.2d 764 (3d Dep't 1998).
5. *Melahn v. Hearn*, 60 N.Y.2d 944, 945, 471 N.Y.S.2d 47 (1983).
6. *Pure Air & Water, Inc. v. Davidsen*, 246 A.D.2d 786, 787, 668 N.Y.S.2d 248 (3d Dep't 1998).
7. *Matherson v. Marchello*, 100 A.D.2d 233, 241, n.4, 473 N.Y.S.2d 998 (2d Dep't 1984).
8. *City of Ralston v. Balka*, 530 N.W.2d 594, 599 (Neb. 1995) (citation omitted).
9. *Id.*
10. *Vose v. Cockcroft*, 44 N.Y. 415, 424 (1871).
11. Henry Cohen & Arthur Karger, Powers of the New York Court of Appeals (rev. ed. 1952).
12. *Wein v. Levitt*, 42 N.Y.2d 300, 306, 397 N.Y.S.2d 758 (1977).
13. *Di Bella v. Di Bella*, 47 N.Y.2d 828, 829, 418 N.Y.S.2d 577 (1979).
14. Cohen & Karger, *supra* note 11, § 169, at 641-43.
15. *Liquidation of Transit Cas. Co v. Digirol*, 223 A.D.2d 488, 636 N.Y.S.2d 791 (1st Dep't 1996); *Dowsett v. Dowsett*, 172 A.D.2d 610, 570 N.Y.S.2d 950 (2d Dep't 1991); *see Pure Air & Water, Inc. v. Davidsen*, 246 A.D.2d 786, 787, 668 N.Y.S.2d 248 (3d Dep't 1998); *In re Michael Anthony F.*, 177 A.D.2d 1031, 1031, 578 N.Y.S.2d 316 (4th Dep't 1991).
16. *In re Barbara C.*, 64 N.Y.2d 866, 868, 487 N.Y.S.2d 549 (1985); *Di Chiaro v. New York City Police Prop. Clerk*, 32 N.Y.2d 767, 768, 344 N.Y.S.2d 956 (1973).
17. *Clara C. v. William L.*, 96 N.Y.2d 244, 250, 727 N.Y.S.2d 20 (2001) (citation and internal quotation marks omitted).
18. *Dred Scott v. Sandford*, 19 How. 531 (1857).
19. *See Housing & Dev. Admin. v. Community Hous. Improvement Program, Inc.*, 83 Misc. 2d 977, 980, 374 N.Y.S.2d 520 (Civ. Ct., Kings Co. 1975), *modified*, 90 Misc. 2d 813, 396 N.Y.S.2d 125, *aff'd*, 59 A.D.2d 773, 398 N.Y.S.2d 997 (2d Dep't 1977).
20. *See Gonzalez v. State Liquor Auth.*, 30 N.Y.2d 108, 112-13, 331 N.Y.S.2d 6 (1972).
21. 163 N.Y. 360 (1900).
22. *Summit Sch. v. Neugent*, 82 A.D.2d 463, 468, 442 N.Y.S.2d 73 (2d Dep't 1981).
23. *Park of Edgewater, Inc. v. Joy*, 50 N.Y.2d 946, 948-49, 431 N.Y.S.2d 457 (1980).
24. *Johnson Newspaper Corp. v. Stainkamp*, 61 N.Y.2d 958, 960-61, 475 N.Y.S.2d 272 (1984).
25. *Carroll v. Harris*, 23 A.D.2d 582, 583, 256 N.Y.S.2d 715 (2d Dep't 1965).
26. 86 N.Y.2d 651, 636 N.Y.S.2d 716 (1995).
27. 69 A.D.2d 406, 419 N.Y.S.2d 533 (2d Dep't 1979).
28. *Magoun v. Quigley*, 115 A.D. 226, 100 N.Y.S. 1037 (1st Dep't 1906).
29. *Bonner v. City of Santa Ana*, 53 Cal. Rptr. 2d 671, 679 (4th Dist. 1996).
30. *Liquidation of Transit Cas. Co v. Digirol*, 223 A.D.2d 488, 636 N.Y.S.2d 791 (1st Dep't 1996); *Burkins v. Scully*, 108 A.D.2d 743, 744, 485 N.Y.S.2d 89 (2d Dep't 1985); *Matherson v. Marchello*, 100 A.D.2d 233, 241, n. 4, 473 N.Y.S.2d 998 (2d Dep't 1984).
31. *Pure Air & Water, Inc. v. Davidsen*, 246 A.D.2d 786, 787, 668 N.Y.S.2d 248 (3d Dep't 1998); *Teachers' Retirement Sys. v. Welch*, 244 A.D.2d 231, 232, 664 N.Y.S.2d 38 (1st Dep't 1997); *Matherson*, 100 A.D.2d at 241, n. 4.
32. *Smith v. Costello*, 861 S.W.2d 56, 58 (Tex. 1993); *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983).
33. *Bredthauer v. TSP*, 864 P.2d 442, 447 (Wyo. 1993).

So Just What *Is* Your Style?

BY SUSAN MCCLOSKEY

Every day, we're reminded that clothing is a robust form of self-expression. When we see a young man with dyed orange hair, multiple nose studs, and raveled jeans, we know that he is saying something about himself that a man dressed in pin stripes and French cuffs would never consider saying.

Like a tattoo or a string of pearls, the words we choose and the way we arrange them on the page tell our readers a great deal about who we are, how we think, and what we value. As a legal writer, you are probably reminded of this fact less often than other professional writers are. The circumstances of your work seldom permit the ongoing conversation about style that journalists, fiction writers, and scholars routinely conduct with their editors. You're often left to develop your style by guess and by golly, testing the effectiveness of one device over another under the pressure of deadlines and the requirements of courts, colleagues, and clients. Without much opportunity for choice or reflection, experimentation or feedback, you realize one day that you *have* a style but are hard-pressed to say what it *is*.

The questions that follow give you a chance to identify the elements of your style, to make yourself conscious of the way you typically express your thoughts. What you discover may delight you or send you searching for your college copy of Strunk & White. But it will certainly redirect your attention from *what* you've written to the nuts-and-bolts details of *how* you've written it. In reflecting on your answers, you may decide that your present style is perfectly suited to your ends. Or you may see that you've developed some stylistic tics that you and your readers would do better without.

Read all of the questions to orient yourself, then select a 500-word passage of your writing that accurately reflects your style at its best. Look for a passage made up of at least a few paragraphs and only a few quotations and citations. Answer the questions in whatever order you wish, but aim to answer them all, even if you can devote only scattered moments to the work. The few questions that involve word counts and calculations of averages are tedious, but your answers will reveal the bedrock of your style. The commentary after each question will help you interpret what you discover.

The Style of Your Paragraphs

1. What is the average length of your paragraphs? Divide the total number of sentences in your sample by the number of paragraphs to determine the average.

Once you've established the baseline length of your paragraphs (five sentences is fairly typical), take a look at the longest paragraph in your sample. Is it significantly above the average length? Is its length justified by the point you're developing? Bear in mind that readers' hearts often sink when they confront a long, unbroken block of text. Check the paragraph to see if it can be divided into smaller units.

Then look at the shortest paragraph in your sample. If it's made up of only a sentence or two, make sure that you've fully developed your point. If you have, then decide whether the paragraph merits the emphasis that brevity bestows. Remember that a single-sentence paragraph is a piece of heavy stylistic artillery that is most effective when seldom used.

2. How many of these paragraphs begin with a sentence that accurately indicates the paragraph's focus?

Caught up in your argument or analysis, you may sometimes omit the topic sentence, which alerts the reader to the paragraph's focus. Be especially critical of any paragraph that opens with a quotation or a reference to a case. Almost always, such a paragraph needs a new opening sentence that tells the reader why the quotation or case merits notice. Remember also that judicial readers often refresh their memories about the content of documents by rereading the topic sentences of each paragraph. Your job is to make sure these sentences reveal the scaffolding of your argument.

SUSAN MCCLOSKEY is the president of McCloskey Writing Consultants in Verbank, N.Y. She provides writing and editorial services and writing seminars to law firms and law departments nationwide. She received her Ph.D. from Princeton University and was a tenured professor of English literature at Vassar College. Her Web site is at www.susanmccloskey.com; she may be reached at mwcinc@aol.com.

3. Do you use transitions to express the relationship between one sentence and the next in a paragraph?

In a well-written paragraph, the implicit logical connections among sentences may by themselves underscore the coherence of your point. But sometimes it's necessary to make the connections explicit. Legal writers overwhelmingly use conjunctive adverbs and prepositional phrases as a paragraph's glue, opening sentence after sentence with *Furthermore* or *In addition*. Consider trading in these old stand-bys for transitions with a little more pizzazz, such as coordinate conjunctions (*e.g., and, but*), demonstrative adjectives (*e.g., this, those*), personal pronouns (*e.g., he, they*), consistent grammatical subjects, and repeated words or phrases.

A mix of sentence lengths—long, short, and in between—gives a passage its rhythm and aids the reader in attending to your points.

4. Do you use transitions to show your reader how the paragraphs are related to each other?

Readers rely on you to indicate how a new paragraph relates to the one preceding it, especially when you're presenting a complex analysis or argument. The transitional devices mentioned in Question 3 work *between* paragraphs as well as *within* them. Sometimes the usual transitional words or phrases do the job handsomely. Sometimes you can open a new paragraph by referring to the preceding paragraph's point (*As this long history of tax delinquency makes plain . . .*) or by repeating a word or phrase from the previous paragraph's final sentence. Variety of transition is a hallmark of good style.

The Style of Your Sentences

5. What is the average length of your sentences? Divide the total number of words in your sample by the number of sentences to determine the average. How many sentences are more than ten words above the average? How many are more than five words below?

A mix of sentence lengths—long, short, and in between—gives a passage its rhythm and aids the reader in attending to your points. Variety of sentence *length* usually indicates that you're also employing a variety of sentence *types*. Shorter sentences tend to be simple (with a single subject-verb pair). Longer sentences tend to be complex (with an independent clause and one or more subordinate clauses), compound (with two or more independent clauses), or compound-complex (a sometimes unwieldy combination of multiple independent clauses and subordinate clauses). A variety of sentence length and type is an aspect of good style.

If you find that your longest sentences are more than ten words above the average, be careful. Legal writers are justly notorious for single sentences that sprawl across a page in a riot of *ands* and *buts*, semicolons, dashes, interspersed citations, and parenthetical asides. A good rule of thumb in revision is to reevaluate any sentence over about two-and-a-half lines. It probably contains a natural dividing point, most often at a conjunction. If the sentence is perfectly clear, you may not need to break it up; a long sentence now and then contributes to the rhythm and variety a good writer aims for. But no reader can take in a massive sentence on a single reading, and a single reading is all a writer is entitled to expect.

After a few longer sentences, readers come upon a short one with relief. If you're inclined to write mostly long sentences, be sure to provide this relief, especially when you want to emphasize a point. Short sentences are especially effective at the beginnings and ends of paragraphs.

6. Are all of your sentences declarative? Does your sample contain any questions, commands, or exclamations?

Most sentences in any legal document are properly declarative, filled with statements about the facts and the law. But it's a good idea to vary the succession of declarative sentences now and then, especially when you wish to emphasize a point. Exclamations are fairly rare in legal writing—even when they're warranted! But rhetorical questions and commands, if seldom used, can be quite powerful: *Do American citizens expect their government to eavesdrop on their telephone conversations?* Or, *Imagine the circumstances of an employee long subjected to her supervisor's discriminatory practices*. When you're revising, look for opportunities to call attention to a point by rephrasing a declaration as a question or command.

7. How do your sentences characteristically open?

Most sentences open with their grammatical subject: *Consolidated presents this motion for partial summary judgment*. But a string of sentences following this pattern quickly becomes monotonous. Legal writers sometimes vary their openings by using an initial adverb (*e.g., Therefore, First*), adjective (*Untimely but unrepentant*, the claimant . . .), prepositional phrase (*On May 12th or After the decision by the trial court*), or subordinate clause (*When the judge denied the motion . . .*). Used seldom, expletive constructions (*e.g., It appears that or There are*) and coordinating conjunctions (*e.g., And, But, Or, For, Yet, So*) can join the mix. Your aim is to keep your reader reading attentively. You can achieve that aim by creating an interestingly varied texture of sentence patterns.

8. In how many of your sentences is the subject right next to the verb?

No matter how you open the sentence, you can enhance its clarity simply by keeping the subject and verb

together. Notice the wide gap between subject and verb in this sentence: *Defendant, having resisted our requests for discovery until the court ordered its compliance, having then produced partial responses or none at all, having sought the shelter of the attorney-client privilege for matters of public record, and having prolonged these proceedings beyond the limits of human patience, drags its feet yet again by seeking a continuance*. The sentence is easier to take in (and its author's exasperation no less apparent) when the litany of the defendant's bad behavior precedes or follows a reunited subject and verb: *The defendant drags its feet yet again by seeking a continuance*.

The Style of Your Words

9. What percentage of the words in your sample are nouns and verbs?

Count the number of each. Tally as a single verb even those composed of multiple parts—*e.g., will have been waiting, had petitioned, was seeking*. Divide the number of nouns and verbs by the total number of words in your sample to determine the percentage. If you want an even finer sense of your style, cancel the articles (*a, an, the*), prepositions (*e.g., in, over, under, around, through*), and conjunctions (*e.g., and, but, or, so, yet*) from the total and use that figure as the divider.

If the percentage of nouns and verbs is high, your style makes good use of the parts of speech essential to meaning. Well-chosen nouns and verbs make it possible to prune adjectives and adverbs and give your style precision and economy. This sentence needs such pruning: *Multiple requests uniformly directed toward the question of how defendant company made its determination on the matter of plaintiff's entitlement to benefits are plainly objectionable on the ground of relevancy to the matter at hand.* With greater precision of noun and verb, it can be briefly refashioned: *On the ground of relevancy, we object to requests about how the defendant determined the plaintiff's entitlement to benefits.*

If the percentage of nouns and verbs is low, take a closer look at a few sentences to see if you can reduce the number of adjectives and adverbs by choosing more precise nouns and verbs.

Another way to boost your reliance on nouns and verbs is to reduce the number of prepositional phrases in a sentence. Legal prose is often marred by the writer's tendency to construct sentences out of one prepositional phrase after another: *Our examination* **of** *the material included a review* **of** *the accuracy* **of** *selected 1999 billings* **by** *the company and an evaluation* **of** *procedures employed* **by** *the company* **in** *the selection* **of** *its appraisers.* A revision relying on verbs and nouns to do the sentence's work can easily reduce eight prepositional phrases to two: *We checked the accuracy* **of** *selected 1999 billings and evaluated the company's procedures* **for** *selecting appraisers.*

10. How many of the substantive words in your sample—that is, everything except articles, prepositions, and conjunctions—are words of one or two syllables? How many are words of more than two syllables?

A vigorous style relies whenever possible on words descended from native English, rather than imported Latin, stock. You can tell one from the other by a simple, fairly reliable, test: Anglo-Saxon derivatives tend to be short, usually one or two syllables; nouns name tangible things. Latin derivatives tend to be many syllables; nouns name abstractions. So if you find your prose filled with Latinate words, such as *initiate*, *demonstrate*, *vehicle*, and *compensation*, restore its energy by substituting English words—in this case, *start*, *show*, *car*, and *wage*.

11. How many of your verbs are in the active voice? How many are passive? How many are linking verbs?

A verb is in the active voice when its subject performs the verb's action: *Smith sued Jones for breach of contract*. Here, *Smith* is the subject, and he did the suing. A verb is in the passive voice when the subject does not perform the verb's action: *Jones was sued by Smith for breach of contract*. Here, *Jones* is the subject, but he did not do the suing. Smith did, but he's been demoted from the subject to the mere object of a preposition. Reserve passive verbs for circumstances in which you do not know who acted, the actor is irrelevant, or you wish to be diplomatic. (*Mistakes were made* is famously more face-saving than *My client messed up.*)

The verb is the most important word in a sentence, and a good writer makes the most of it, preferring active verbs to passive and linking ones. Active verbs tend to be brief and vivid: *stop*, *go*, *begin*, *end*; by contrast, passive verbs need two or more words for their formation: *was stopped*, *had been going*, *will have been begun*, *is being ended*. Because active verbs require a writer to specify an actor for the verb's action, they avoid baffling statements such as *A motion was made*. Who made it? The plaintiff? The defendant? Passive verbs prompt such questions; active verbs answer them: *Plaintiff moved the court for a temporary injunction.*

Linking verbs (most often, forms of the verb *to be*) are useful, indeed indispensable. They are also boring. Your style will be stronger if you change the weak *is* in *A judge is an interpreter of the law* to the strong and active *A judge interprets the law*.

12. How many Latin words or phrases appear in your sample? How many words or phrases qualify as "legalese"?

A good legal stylist restricts the use of Latin to recognized terms of art, such as *habeas corpus* or *prima facie*. Commonly used words and phrases, such as *inter alia* or *arguendo*, don't belong in that category and have perfectly serviceable English equivalents (*among other*

things and *for the sake of argument*, respectively). The best legal prose follows a simple guideline: When you can express your thought in common English words, do.

Clients and courts have united to protest the legalese that makes a 21st century lawyer sound like a Victorian-era scrivener. Most legal writers now feel a prick of conscience when they resort to such language and have banished *aforementioned*, *the undersigned*, *pursuant to*, and other such fiddle-faddle. Some forms of legalese have resisted these outcries, but should still be avoided, including *said*, *such*, and *same*, the use of *within* as an adjective (*the within property*), and all members of the *here-* family (*hereinabove*, *hereinbelow*, *heretofore*, *hereinafter*, etc.).

A Few Odds and Ends

13. Is the opening sentence of your sample a bit of legal boilerplate (e.g., Comes now, Such-and-such, to petition this esteemed Court for so-and-so)? Or is it genuinely interesting—the kind of sentence that encourages a reader to keep reading?

Journalists have long known that a reader's interest diminishes as the column-inches increase. That's why good journalists pack into the opening sentence or paragraph the kinds of information that readers read to get.

By contrast, legal writers have conditioned their readers to skim boilerplate openings and hope that by paragraph two or three the writer will have gotten to the point. Why make your reader wait? A brief that begins with an assertion such as *This is a case of fraud* is likely to make even a jaded reader sit up straight and read with interest. Opening sentences and paragraphs deserve the best, most engaging writing a writer can muster. While it's true that most consumers of legal prose are captive audiences, obliged by their job descriptions to read whatever a lawyer submits, there's no reason to treat captives badly. An engaging opening is the harbinger of good things to come.

14. Does your passage contain quotations? Have you quoted only what you need to quote to support your point? Have you introduced the quotation in an effective way?

Most readers of legal documents admit that when a block quotation presents itself, so does the temptation to skip it altogether. Given this fact of human nature, a careful legal writer follows these three guidelines:

First, quote only when you or your reader needs the authority you're quoting. Second, quote only the parts of the passage that genuinely serve your point. When you use ellipses or asterisks to trim a passage to its essence, make sure you don't also skew its meaning. Third, write a lead-in that will preserve the quotation's point even if a reader skips the passage. *The court held* is never a good lead-in. Distill the essence of the quotation in the sentence that introduces it: *The court held that in imposing punitive damages, the jury acts in a quasi-judicial capacity.*

15. *Does your passage contain any figures of speech?*

Lawyers often insist that figurative language is risky, no matter how striking or memorable it may be. It's certainly the case that a legal document is an unlikely place for irony, humor, or droll understatement. A reader not expecting such rhetorical flourishes may misinterpret them, causing more problems than any neat turn of phrase is likely to solve.

But caution need not banish all the pleasures of language well used. When you have a point you especially wish to emphasize, express it vividly, using all the resources of language. When Justice Marshall wished to oppose discrimination on the basis of gender, he did not content himself with abstraction and generality. Instead he wrote, *A sign that says "men only" looks very different on a bathroom door than a courthouse door*.[1] In everything you write, aim to craft one well-turned sentence. The effort will hone your skill, give you satisfaction, and delight your readers.

Creating a Profile

When you've finished answering the questions, create a profile of yourself as a writer. If you've discovered, for instance, that you tend to write long paragraphs, long sentences, and long words; that your verbs are usually passive; that you rely on adjectives and adverbs instead of strong nouns and verbs; and that you've searched your sample in vain for a single neatly turned phrase, then reassess the effect of your style on those who read it. You can make your documents more effective and your readers happier to read them by giving your prose greater variety.

If you've discovered that your diction and sentence structures are admirably varied, but that your paragraphs lack strong introductions, internal cohesion, and helpful transitions, focus on developing them with greater care and skill.

And if you've found that every aspect of your prose passes muster, congratulate yourself—and then raise the bar a notch or two.

If you're serious about developing your style, consider completing this questionnaire annually. Doing so will remind you that your style is not simply a happy or unhappy accident, something that happens to you when you sit down to write. Instead, you can make and remake your style, dismantle and make it again. By showing you what your style consists of, these questions will help you decide how the making should go.

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1. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 468-69 (1985).

Index to Authors—1999-2001

The following index lists the authors of all articles that have appeared in the Journal *since the January 1999 edition. Below each author's name is the general classification category used for the article. The headline describing the content of the article appears under that classification category in the Index to Articles that begins on page 48.*

Errata

The following is the biography of Lorentz W. Hansen that should have appeared on page 44 of the October issue.

Lorentz W. Hansen practices tax law in White Plains. He graduated from Harvard University and received an LL.B. from Columbia University School of Law, where he was a Harlan Fiske Stone Scholar, and an LL.M. in Taxation from New York University Graduate School of Law.

Index to Articles—1999-2001

This index places the articles in one of the following categories:

Appeals

Arbitration / Alternative Dispute Resolution

Antitrust Law

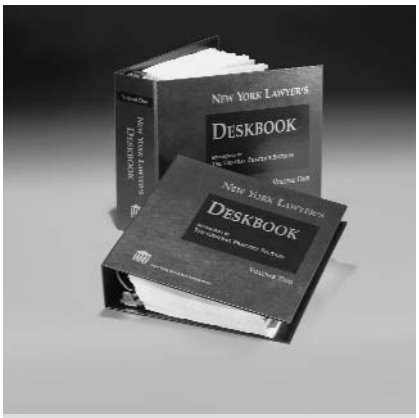
Banking / Finance Law

Bankruptcy

Business Law

Children and the Law

Civil Procedure



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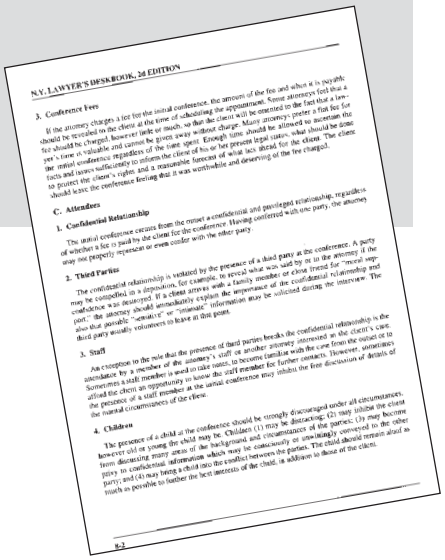
N.Y. LAWYER'S DESKBOOK, 2d EDITION

3. Conference Fees

If the attorney charges a fee for the initial conference, the amount of the fee and when it is payable should be revealed to the client at the time of scheduling the appointment. Some attorneys feel that a fee should be charged, however little or much, so that the client will be oriented to the fact that a lawyer's time is valuable and cannot be given away without charge. Many attorneys prefer a flat fee for the initial conference, regardless of the time spent. Enough time should be allowed to ascertain the facts and issues sufficiently to inform the client of his or her present legal status, what should be done to protect the client's rights and a reasonable forecast of what lies ahead for the client. The client should leave the conference feeling that it was worthwhile and deserving of the fee charged.

C. Attendees

1. Confidential Relationship

The initial conference occurs from the outset a confidential and privileged relationship, regardless of whether a fee is paid by the client for the conference. Having conferred with one party, the attorney may not properly represent or even confer with the other party.

2. Third Parties

The confidential relationship is violated by the presence of a third party at the conference. A party may be counselled in a deposition, for example, to reveal what was said by or to the attorney if the confidence was destroyed. If a client arrives with a family member or close friend for "moral support," the attorney should immediately explain the importance of the confidential relationship and also that private "sensitive" or "personal" information may be solicited during the interview. The third party usually volunteers to leave at first point.

3. Staff

An exception to the rule that the presence of third parties breaks the confidential relationship is the attendance by a member of the attorney's staff or another attorney interested in the client's case. Sometimes a staff member is used to take notes, to become familiar with the case from the outset or to afford the client an opportunity to know the staff member for further contacts. However, sometimes the presence of a staff member at the initial conference may inhibit the free disclosure of details of the marital circumstances of the client.

4. Children

The presence of a child at the conference should be strongly discouraged under all circumstances, however old or young the child may be. Children (1) may be distracting; (2) may inhibit the client from discussing many areas of the background and circumstances of the parties; (3) may become privy to confidential information which may be consciously or unconsciously conveyed to the other party; and (4) may bring a child into the conflict between the parties. The child should remain absent as much as possible to further the best interests of the child, in addition to those of the client.

8-2

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Written and edited by leading practitioners, the *New York Lawyer's Deskbook* consists of 24 chapters, each covering a different area of practice. Each chapter is intended as a starting point for new practitioners or for practitioners who may not have previously encountered a particular subject area.

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Contents

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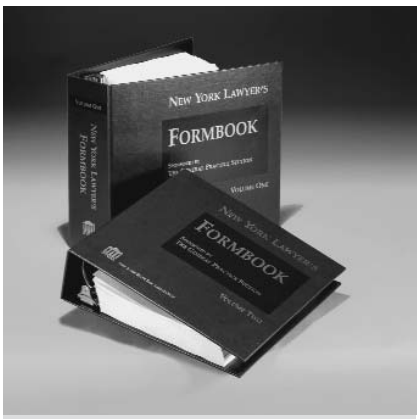

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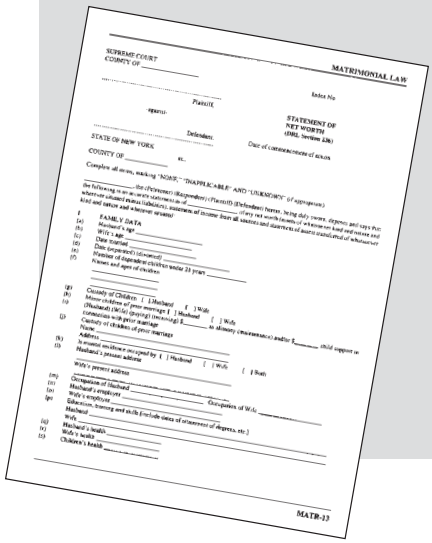

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Language Tips

By Gertrude Block

Question: These questions may seem simple, compared to some you receive, but I'm hoping you can shed some light on them: (1) When signing one's name with a suffix, is there one correct format? For example, my name is Robert S. Moskow II. My secretary invariably changes the signature block to read "Robert S. Moskow, II." How should my name appear in the signature block? Is there one correct form or can either form be used? (2) The abbreviation "cc" used to refer to carbon copy. Now that carbon copies are no longer used, is this still the proper way to indicate copies? (3) The "night owls" in our office are at a loss as to the meaning of the word *agita*. We are not even sure that is the correct spelling. Can you shed some light on this subject?

Answer: (1) In names that include a suffix, the one you chose, Robert S. Moskow II, is preferred. See, for example, the citation in *The Associated Press Stylebook and Libel Manual* at 102. The *New York Times Manual of Style and Usage* prefers "Robert S. Moskow 2d.," but neither source includes a comma.

(2) In the current computer age, "cc" is still used to mean "copies." When only one copy is intended, the single initial "c" is often substituted. The abbreviation "bc" stands for "blind copy," meaning that the original recipient will not be informed that a copy of the document (usually a letter) has been sent. Another option is "xc" for "xerographic copy," which is the type of duplicate that is typically meant today.

(3) As to the meaning of the word *agita*, if that is the correct spelling, I have been unable to be of help in finding either the meaning or the usage, although I have checked a number of lay and legal dictionaries as well as *The Oxford English Dictionary* and *Words and Phrases*. Is it possible that *agita* is a New York pronunciation of *agitur*, a third person singular Latin subjunctive meaning "an action has been brought"? (*Ballentine's Law Dictionary*, 3d. ed. 1969.) I hope that this wild guess turns out to be correct.

Question: Attorney R. M. Frome sends the following sentence and asks, "Does this mean that the Tenant is or is not in default?" Here is the sentence: "Landlord certifies that Tenant is not in default in payment of rent except basic rent for May 2001."

Answer: This sentence is an example of what I call "negative ambiguity," though that problem usually results from using two negatives when one affirmative would do. The sentence means that the Tenant is in default of payment for only the basic rent for May 2001. The sentence would have been clearer if it had been stated affirmatively.

Mr. Frome also objects to the use of parentheses, except "in huge sentences that run on forever." He submitted as an illustration of the unnecessary use of parentheses the following sentence:

Tenant warrants and represents to Landlord that Tenant did not negotiate with, employ or deal through any broker (except ABC Brokerage Co.) in connection with this Lease.

Mr. Frome finds the use of parentheses in that sentence objectionable, but it seems all right to me, although an argument can be made that they were not necessary. In fact, no punctuation is required before or after the *except ABC Brokerage Co.* phrase, although commas would be an acceptable alternative to the parentheses.

One comment on the punctuation, which Mr. Frome did not ask about: Although many reputable writers now omit the final comma in a list, in legal writing that omission may cause litigation. A comma after *employ* would obviate any possible ambiguity: ". . . Tenant did not negotiate with, employ, or deal through any broker . . ." In addition, a comma after "employ" would avoid the awkwardness of the phrase "employ through a broker."

Question: The expression *abide the event* often comes up in legal opinions, but its meaning escapes me. *Black's Law Dictionary* (7th ed. 1999) does not define the expression. Attorney Gary Muldoon, who submitted the question, added that *Words and Phrases* for New York lists exactly 10,000 references to *abide the event*!

Answer: The phrase *abide the event* has the same meaning in lay and legal use. *Abide* means "await," and the phrase implies that when certain circumstances ("the event") occur, a conclusion will be reached. The *Oxford English Dictionary* says that the first use of *abide* (with the same meaning of "await") was in 1000 A.D. Currently, an appellate court stated that it meant "on final outcome of litigation the side finally successful in the first case should be successful in all." (*Words and Phrases*, Permanent ed. 1946 updated annually.)

From the Mailbag

Arbitrator and mediator John E. Sands, of West Orange, N.J., e-mailed an amusing anecdote about double negatives, which were discussed in an earlier "Language Tips" column. He recalled that a linguistics professor told his class, "In some languages, a double negative can mean a positive or an intensified negative, but in no language does a double positive yield a negative." At that, a wag in the back row remarked, "Yeah, sure."

Along those lines, I recall a comic strip showing an angel handing an English person a package of nouns, pronouns, adjectives, prepositions and conjunctions, and asking "Is that enough to create your language?" The person answered, "Hopefully."

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, *in-*, *non-*, or *un-*. "The lack of consistency" or a "negative" anything becomes (depending on your meaning) "The inconsistency" or "dis-X," "non-X," or "un-X," depending on the word.

Delete "of" in dates and years. "Four years of prison" becomes "Four years' imprisonment." *Or* "Four years in jail." "Ten days of notice" becomes "Ten days' notice." "Forty-six years of age" becomes "Forty-six years old." "October of 1999" becomes "October 1999" (not "October, 1999").

Lose "of which" legalisms. "Small Claims Court, the jurisdiction of which is often in doubt, is . . . ." becomes "Small Claims Court, whose jurisdiction is often in doubt, is . . . ."[3] "The contract Jones signed, which contract provided that . . . ." becomes "The contract Jones signed provided that . . . ." "After negotiating, Jones and Smith signed a stipulation, which stipulation resolved their differences" becomes "After negotiating, Jones and Smith signed their stipulation, which resolved their differences." *Or* "After negotiating, Jones and Smith signed a stipulation that resolved their differences."

Writing should be economical, not clipped, casual, or abrupt. Sometimes length enhances readability, exposes meaning, and increases persuasion. President Abraham Lincoln could have cut a few words at Gettysburg by saying, "We cannot dedicate, consecrate, or hallow this ground." But he said it better by expanding his parallel structure: "We cannot dedicate, we cannot consecrate, we cannot hallow this ground." President George W. Bush could have let it go with "We will not tire, falter, or fail." Instead, he stressed America's resolve following September 11, 2001, by saying, "We will not tire, we will not falter, and we will not fail."[4]

The best writing is not always the shortest writing. The best writing, however, is always fat-free. Trimming fat is hard. A waist is a terrible thing to mind. But you can safely remove *of* without paying too high (*of?*) a price. Offing the *of* will give your readers more time to reflect on your arguments while they relax in front of the TV watching *All My Children*. And that advice is not off the wall.

1. Mortimer Levitan, *Some Words That Don't Belong in Briefs*, Wis. L. Rev. 421, Vol. (1960).
2. Do not use an apostrophe if the possessive looks awkward: "Subdivision A's remedies" becomes "The remedies of Subdivision A." "The New York City Police Department's (NYPD) policies" becomes "The policies of the New York City Police Department (NYPD)."
3. Writers may use *whose* for people and things. We need not rewrite our national anthem—honoring a flag "whose broad stripes and bright stars . . . were so gallantly streaming."
4. Address Before Joint Session of Congress, September 20, 2001.

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Chambers, Hon. Cheryl E.
Christian, Catherine A.
* Cometa, Angelo T.
Cuyler, Renaye B.
Davis, Bonni G.
Davis, Evan A.
DeFritsch, Carol R.
Eisman, Clyde J.
Eppler, Klaus
* Fales, Haliburton, 2d
Farrell, Joseph H.
Field, Arthur Norman
Finerty, Hon. Margaret J.
Fink, Rosalind S.
* Forger, Alexander D.
Freedman, Hon. Helen E.
* Gillespie, S. Hazard
Goldstein, M. Robert
Gross, Marjorie E.
Haig, Robert L.
Handlin, Joseph J.
Harris, Martha W.
* Heming, Charles E.
Hirsch, Andrea G.
Hoffman, Stephen D.
Horowitz, Steven G.
Jacoby, David E.
Jaffe, Barbara
Kilsch, Gunther H.
* King, Henry L.
Kougasian, Peter M.
† Krane, Steven C.
Landy, Craig A.
Leber, Bernice K.
Lieberman, Ellen
Lindenauer, Susan B.
* MacCrate, Robert
Mandell, Andrew
Miller, Michael
Miller, Sonia E.
Minkowitz, Martin
Opotowsky, Barbara Berger
* Patterson, Hon. Robert P., Jr.
Paul, Gerald G.
Pickholz, Hon. Ruth
Quattlebaum, Poppy B.
Raubicheck, Charles J.
Rayhill, James W.
Rifkin, Richard
Robertson, Edwin D.
Roper, Eric R.
Rosner, Seth
Rubenstein, Joshua S.
Safer, Jay G.
Scarborough, Robert H.
Schumacher, H. Richard
* Seymour, Whitney North, Jr.
Silkenat, James R.
Sloan, Pamela M.
Souther, Eugene P.
Stenson, Lisa M.
Vitacco, Guy R., Sr.
Yates, Hon. James A.

Second District
Cerchione, Gregory T.
Dollard, James A.
Doyaga, David J.
Fisher, Andrew S.
Hesterberg, Gregory X.
Kamins, Barry
Lashley, Allen
Morse, Andrea S.
Reich, Edward S.
Sunshine, Nancy T.
Terrelonge, Lynn R.

Third District
Ayers, James B.
Bauman, Harold J.
Cloonan, William N.
Connolly, Thomas P.
Dorsey, Richard J.
Flink, Edward B.
Friedman, Michael P.
Higgins, Patrick J.
Kelly, Matthew J.
Klein, Frank
LaFave, Cynthia S.
Leistensnider, Ruth E.
Lester, Kelly Mooney
Maney, Hon. Gerard E.
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Murphy, Sean
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Pierro, Louis W.
Samel, Barbara J.
† Tharp, Lorraine Power
Tippins, Timothy M.
Treece, Hon. Randolph F.
* Williams, David S.
* Yanas, John J.

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Cioffi, Cristine
Clements, Thomas G.
Coffey, Peter V.
Doern, James E D
FitzGerald, Peter D.
Harper, David A.
Hoye, Hon. Polly A.
Keniry, Hon. William H.
Russell, William E.
Tishler, Nicholas E.

Fifth District
Doerr, Donald C.
Dwyer, James F.
Fennell, Timothy J.
Fetter, Jeffrey M.
Getnick, Michael E.
Gingold, Harlan B.
Klein, Michael A.
Kogut, Barry R.
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Priore, Nicholas S.
Rahn, Darryl B.
Renzi, David A.
†* Richardson, M. Catherine
Rizzo, James S.
Uebelhoer, Gail Nackley

Sixth District
Beehm, Angelina Cutrona
Denton, Christopher
Drinkwater, Clover M.
Folmer, John B.
Gacioch, James C.
Lewis, Richard C.
Mayer, Rosanne
Peckham, Hon. Eugene E.
Reizes, Leslie N.
Wayland-Smith, Tina

Seventh District
Bleakley, Paul Wendell
Buzard, A. Vincent
Castellano, June M.
Clifford, Eugene T.
Dwyer, Michael C.
Grossman, James S.
Harren, Michael T.
Heller, Cheryl A.
Lawrence, C. Bruce
†* Moore, James C.
* Palermo, Anthony R.
Reynolds, J. Thomas
* Van Graafeiland, Hon. Ellsworth
* Vigdor, Justin L.
Wallace, David G.
†* Witmer, G. Robert, Jr.

Eighth District
Attea, Frederick G.
Doyle, Vincent E., III
Edmunds, David L., Jr.
Eppers, Donald B.
Evanko, Ann E.
Evans, Sue M.
* Freedman, Maryann Saccomando
Gerstman, Sharon Stern
Gold, Michael A.
Graber, Garry M.
†* Hassett, Paul Michael
McCarthy, Joseph V.
Mohun, Michael M.
O'Connor, Edward J.
O'Mara, Timothy M.
Palmer, Thomas A.
Pfalzgraf, David R.
Porcellio, Sharon M.

Ninth District
Aydelott, Judith A.
Fedorchak, James M.
Gardella, Richard M.
Geoghegan, John A.
Golden, Richard Britt
Goldenberg, Ira S.
Headley, Frank M., Jr.
Herold, Hon. J. Radley
Klein, David M.
Kranis, Michael D.
Longo, Joseph F.
Manley, Mary Ellen
* Miller, Henry G.
Mosenson, Steven H.
O'Leary, Diane M.
* Ostertag, Robert L.
Riley, James K.
Stewart, H. Malcolm, III
Walker, Hon. Sam D.

Tenth District
Abrams, Robert
Asarch, Hon. Joel K.
†* Bracken, John P.
Filiberto, Hon. Patricia M.
Franchina, Emily F.
Gutleber, Edward J.
Kramer, Lynne A.
Levin, A. Thomas
Levy, Peter H.
Meng, M. Kathryn
Mihalick, Andrew J.
Monahan, Robert A.
Perlman, Irving
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Purcell, A. Craig
†* Rice, Thomas O.
Roach, George L.
Rothkopf, Leslie
Spellman, Thomas J., Jr.
Tully, Rosemarie
Walsh, Owen B.

Eleventh District
Bohner, Robert J.
Darche, Gary M.
Dietz, John R.
Fedrizzi, Linda F.
Glover, Catherine R.
Nashak, George J., Jr.
Nizin, Leslie S.
Terranova, Arthur N.
Wimpfheimer, Steven

Twelfth District
Bailey, Lawrence R., Jr.
Friedberg, Alan B.
Kessler, Muriel S.
Kessler, Steven L.
Millon, Steven E.
†* Pfeifer, Maxwell S.
Schwartz, Roy J.
Torrent, Damaris Esther
Torres, Austin

Out-of-State
Chakansky, Michael I.
* Walsh, Lawrence E.

THE LEGAL WRITER

"Of" With Their Heads: Concision

BY GERALD LEBOVITS

I hope this question is not off of the wall, but did you ever see the TV soap "All of My Children"? If you did, you are the only one. The show is *All My Children*. *Of* is one word writers can cut.

To be concise is to use only necessary words. To be succinct is to use only necessary content. The goal of concision and succinctness is to get the most thoughts in the shortest space—to make every word tell. Write as if you will be paid more if you use fewer words. Do not write "2/8" when you can write "1/4." Brevity is not simply about the number of pages. Brevity is about everything, down to the size of the word and the number of syllables. Lengthy, thick briefs always lend meaning to the phrase "weight of authority." Get right to the point in an instant, er, instantly.

Which words can be cut? Lots of 'em: "A discussion of some words that don't belong in briefs could probably be condensed into this concise statement: about fifty percent of them."[1]

Of is a big part of the wordiness problem. Deleting *of* is a big part of the solution. Here are some ways to get out of *of*.

Play with possessives. "The foregoing constitutes the order and decision of the court" becomes "This (or *the above*) is the court's order and decision."[2]

Invert or rearrange. "I am a fan of the Beatles" becomes "I am a Beatles fan." "Because of Judge B's status as a judge" becomes "Because Judge B is a judge." "You're not the boss of me" becomes "You're not my boss." "Joint Committee to Preserve the Independence of the Judiciary" becomes "Joint Committee to Preserve Judicial Independence [or *an Independent Judiciary*]." "The Supreme Court of the State of New York" becomes "The New York State Supreme Court."

Normalize nominalizations. Good writers prefer verbs to nouns. Nominalizations turn verbs into nouns. "Criminal possession of stolen property" becomes "Criminally possessing stolen property." "The forensic expert carried out an analysis of the blood sample" becomes "The forensic expert analyzed the blood sample." "The solution was the result of the paralegal's careful inspection of the papers" becomes "The paralegal solved the problem by inspecting the papers carefully." "He committed forgery by the writing of a bad check" becomes "He committed forgery by writing a bad check."

All, both. Delete *of* after *all* ("All New York loves baseball") and *both* except when a pronoun follows ("all of us studied legal writing"; "both of us studied legal writing").

What of it? Delete *of* after *alongside*, *inside* (unless you mean "in less than"), *off*, and *outside*. Use *except for* to replace *outside of*. "Except for Judge X, who was appointed, all the judges in the county were elected."

Delete "as of." "The attorney has not filed the motion *as of* yet" becomes "The attorney has not filed the motion yet. "Or "The attorney has not filed the motion."

Off "of" prepositional phrases. Phrases to rephrase include the following: *Along the lines of* becomes *like*. *As a result of* becomes *because*. *At the rear of* becomes *behind*. *By means of* becomes *by*. *By reason of* becomes *because of*. *By virtue of* becomes *because of*. *Concerning the matter of* becomes *about*. *During the course of* becomes *during*. *First of all* becomes *first*. *For the duration of* becomes *during*. *For the period of* becomes *for*. *For the purpose of* becomes *for*, *to*. *Has the option of* becomes *may*. *Have a need of* becomes *need*. *In advance of* becomes *before*. *In back of* becomes *behind*. *In case of* becomes *if*. *In excess of* becomes *more than*, *over*. *In front of* becomes *before*. *In furtherance of* becomes *to further*.

In hopes of becomes *to*. *In lieu of* becomes *instead of*. *In receipt of* becomes *have received*. *In terms of* becomes *at*, *by*, *for*, *in*, *with*. *In the absence of* becomes *absent*. *In the amount of* becomes *for*. *In the course of* becomes *during*. *In the direction of* becomes *toward*. *In the event of* becomes *if*. *In the immediate vicinity of* becomes *near*. *In the interests of* becomes *for*. *In the midst of* becomes *amid*. *In the nature of* becomes *like*. *In the neighborhood of* becomes *about*, *near*. *In the process of*, *the process of* (delete entirely).

> ***Brevity is about everything, down to the size of the word and the number of syllables.***

Is comprised of becomes *consists of*. *On the basis of* becomes *after*, *because of*, *by*, *on*. *On the grounds of* becomes *because*. *On the part of* becomes *among*, *by*. *Regardless of whether or not* becomes *regardless whether*. *The act of* (delete entirely). *The issue of* [or "as to"] *whether* becomes *whether*. *The question of whether or not* becomes *whether*. *The occurrence of* (delete entirely). *With the exception of* becomes *except*.

Eliminate "of" abstractions. Abstractions include *type of*, *kind of*, *matter of*, *state of*, *factor of*, *system of*, *sort of*, *nature of*. "He is the kind of [sort of, type of] person who would . . . ." becomes "He would . . . ."

Negative "of." A negative phrase that uses an *of* becomes, with a prefix, a *dis-*

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