NEW YORK STATE BAR ASSOCIATION

OCTOBER 2001 | VOL. 73 | NO. 8

Journal

LEGAL STEPS IN WTC AFTERMATH

Inside

Editorial Offices
One Elk Street
Albany, NY 12207
(518) 463-3200
FAX (518) 463-8844

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

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

Contents

Departments

On The Cover

This month's cover is a montage of scenes from the World Trade Center attack and forms that have been developed to help families of victims.

Cover design by Lori Herzing.

The *Journal* (ISSN 1529-3769), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $12. Periodical postage paid at Albany, NY with additional entry Endicott, NY. POSTMASTER: Send address changes to: One Elk Street, Albany, NY 12207.

President's Message

Steven C. Krane

"We Shall Never Yield"

They wanted us to be afraid. They wanted us to collapse into a heap of human rubble just like the steel and concrete towers they brought down on September 11. They wanted us to panic, to abandon our ordered society and the laws that bind it together. More recently, they have tried to make us afraid to open our own mail, for fear of contracting deadly diseases. They have failed miserably in these efforts. They have succeeded only in creating an American people united in resolve against them, and a world community that overwhelmingly condemns their actions.

There have been so many words written about the diabolical terrorist attacks on the United States. For an event that defies description, it has been a subject to which countless authors far more facile with the pen than I have applied their talents. I do not presume to add to their efforts. Indeed, words are inadequate to measure the cataclysmic loss of life and property; to portray the images of fire, smoke and death that will be forever etched in our minds; to pay tribute to the bravest of the brave, many of whom sacrificed their own lives in the valiant rescue effort; and to describe the immediate and irreversible psychological transformation that the attack worked on our culture and national psyche.

We will never be the same. For centuries to come, schoolchildren will learn about the war on terrorism that began in 2001, and will read the story of the decisive victory of the forces of freedom, a story that has only recently begun to unfold. As with December 7, 1941, and November 22, 1963, infamous dates of the 20th century, all of us will remember where we were on September 11, 2001, when we heard the news. For me, word came on the New York State Thruway. I was driving north to Albany to attend the two-day Access to Justice conference, organized by Justice Juanita Bing Newton, which otherwise would have been the focus of this column. Shortly after 9 a.m., our executive director, Pat Bucklin, called me to ask whether we should activate our Disaster Response Team in light of the events at the World Trade Center. I asked, in all innocence, "What happened at the World Trade Center?"

From that moment on, the resources of the New York State Bar Association were marshaled for disaster recovery. Our Committee on Mass Disaster Response had been formed in the wake of the crash of TWA Flight 800 to respond to emergencies in New York State. We were prepared for what prior to September 11 we thought would constitute a "mass disaster." We had established relationships with federal and state emergency management organizations and the National Transportation Safety Board, and had been involved in the preparation of legislation and regulations addressed to the rights of air crash victims. We knew what needed to be done, but now we needed to do it on an unprecedented and almost unfathomable scale. There would be thousands of victims whose families would need a broad range of legal services, beginning with the issuance of death certificates, to questions of estates, landlord-tenant, consumer credit, insurance and workers' compensation law, just to name a few. There would be thousands of lawyers whose offices were destroyed, or who would be unable to gain access to their offices indefinitely. And there would be lawyers who perished in the attack. Many people would need help.

The planning began at the Access to Justice Conference itself. On breaks, in the evenings, the bar leaders present—and there were many—met frequently to determine what services the organized bar could perform and to make preliminary determinations regarding how we could marshal the forces necessary to provide the maximum assistance possible. Where would the assistance come from? That turned out to be the easiest question to answer. We established a toll-free number (1-877-HELP-321) and e-mail address (help321@nysba.org) to serve as a clearinghouse of information. We were flooded with offers of pro bono assistance from lawyers all over New York, as well as from New Jersey, Connecticut, Pennsylvania, and throughout the nation. Our sections, most notably the Trusts and Estates Law Section, the Real Property Law Section and the Tort, Insurance and Compensation Law Section, immediately mobilized and developed plans to deal with the legal needs

Steven C. Krane can be reached at 1585 Broadway, New York, N.Y. 10036

of those who were affected by the attack. ABA President Bob Hirshon called on the afternoon of the 11th to offer his sympathies, to discuss the ABA's disaster response capabilities and to coordinate our respective activities in New York.

Letters of sympathy and offers of help arrived as well from bar associations across the United States and from all over the world. Lawyers from places as far away as Oklahoma, which has seen its share of man-made and natural disasters over the past few years, and the Islamic Republic of Iran offered their condolences and support. This worldwide sentiment was even more apparent at the recent meeting of the International Law and Practice Section of the Association in Rio de Janeiro, where lawyers from North and South America, Europe and Asia gathered to discuss issues of common interest. I came away from that meeting more convinced than ever that lawyers everywhere share a common bond, and that we as an international profession stand committed to government by the rule of law and justice for all.

Back home, leaders and members of the Association of the Bar of the City of New York, the New York County Lawyers Association and other county and special-interest bar associations from throughout the metropolitan area have worked selflessly side by side, all seeking only to do whatever they could to alleviate the suffering. Literally thousands of lawyers have called with but one repeated question: "How can I help?" All will be needed, as we respond to needs of those affected by the attack. People with temporary office space to donate, with computer or other office equipment to spare, or with office personnel to offer, called to make their willingness known. Lawyers displaced by the attack called as well, and we have been matching willing donors with those in need.

We have worked closely with the courts, particularly Chief Judge Kaye and Chief Administrative Judge Lippman, to deal with the myriad of problems and issues the attack engendered. We have worked with the offices of Governor Pataki and Mayor Giuliani and with state and federal legislators to help find solutions to the legal issues at hand. All have worked together in a spirit of unbridled cooperation. No egos, no suggestion of "turf." Just Americans working together, trying to cope with the unspeakable tragedy.

I do not need to tell anyone reading this message that it has been a remarkable few weeks. We have watched our country unite behind a common cause as only it can. We have seen the community of America bond together as never before. And we have seen the best side of the legal profession. Lawyers by the thousands seeking to help. For several days I had, literally in my pocket, a press release ready for issuance at the first sign of problems to warn lawyers that solicitation of clients is unethical and illegal, in the hope of preventing the venal displays we have seen in prior disaster situations. That press release has never been issued. It has simply not been needed. The behavior of the bar has been exemplary. It is unfortunate that it takes moments like these to restore our pride in ourselves as a profession, but so be it. We are seeing the best the legal profession has to offer. Our spirit of pro bono service cannot be restrained for long and is transcending all of the artificial barriers we have placed in its path. We are desperately needed by victims of war and are coming willingly to their aid. It is a very special time to be a lawyer. It is a time to be proud.

Let our enemies see how a free country responds to outrageous and senseless acts. Let them see how a country that prides itself on its justice system and framework of laws responds when struck a murderous blow. We shall heal, we shall endure, and we shall never yield.

EDITOR'S MAILBOX

Praise for Miller Article

I just received my September 2001 issue of the *Journal*, and wanted to thank Henry Miller, Esq. for writing an outstanding article, *Learning to Love: The Trial Lawyer's 14 Challenges*, and the *Journal* editors for choosing to print it.

The article was riveting, yet sad. It is a very true reminder that although the "system" may not work sometimes, things do work out in the end. Mr. Miller brought the trial alive for me—so much so that even though I had to put the article down several times, I couldn't wait to finish reading it and find out if the truth came out. I'm glad it did, and I hope Mr. Izzo can find justice. If Mr. Miller should ever decide to give up trial work, I am sure that he can find a publisher that will want his work on paper.

Shari Lee Sugarman, Esq.
Torre Lentz Gamell Gary & Rittmaster, LLP
Jericho, N.Y.

Special Procedures for Victims Of the World Trade Center Tragedy Provide Expedited Access to Assets

By Wallace L. Leinheardt

In the aftermath of the attack on the World Trade Center that killed many whose remains are unlikely to be found, two options are available to accelerate the procedures that must be followed to obtain death certificates and institute Surrogate's Court proceedings.

One option, involving an amendment made to the N.Y. Estates, Powers and Trusts Law (hereinafter EPTL) last year that speeds the process of having the Surrogate's Court declare someone to be dead, has been enhanced by an agreement of the Surrogate's Court Judges to waive some of the normal procedural requirements. The other is an "Expedited Death Certificate Procedure" established by the New York City Chief Medical Examiner's Office. It uses the principles in the EPTL amendment to establish standards for obtaining a death certificate without the need for a Surrogate's Court declaration of death.

EPTL Option Under EPTL 2-1.7, a person can be declared dead if a diligent search has been made and the individual cannot be located after a continuous absence of three years. An amendment to EPTL 2-1.7, effective August 30, 2000, allows death to be established in less than three years, if clear and convincing evidence indicates the most probable date of death. The statute also provides that exposure to a "specific peril of death" may be sufficient to determine, at any time after the exposure, that death occurred less than three years after an absence began.

The change was an outgrowth of the dilemma that arose when the remains of 16 passengers and one crew member on TWA Flight 800, which crashed on July 17, 1996, could not be found. Their names were on the manifest of those aboard the aircraft, and there were no indications that they had failed to board the flight. Based on that manifest, the Suffolk County medical examiner on September 25, 1996, issued death certificates for them even though their bodies had not been recovered.

After the World Trade Center attack, a group of volunteer attorneys with Surrogate's Court experience began a dialog on how existing law could be used to assist the families of victims whose remains would never be identified or would not be identified for many months.

An immediate problem was that, ordinarily, a notice of absence in such a proceeding has to be published in a paper of general circulation for four successive weeks. In the New York metropolitan area, the cost of publishing such a notice can be more than $1,000. The four-week requirement means that a hearing cannot be scheduled for six to eight weeks from the date the citation is issued. In addition, a guardian *ad litem* is normally appointed to protect the interests of the absentee and to file a report.

After the September 11 attack, the New York area Surrogates agreed that in a proper case arising from the World Trade Center, they would waive publication of the notice and provide instead for service on a designated individual. That designated individual would then serve as guardian *ad litem*. A return date for a hearing would be set in approximately two weeks.

The courts also indicated that they would grant Letters of Temporary Administration under N.Y. Surrogate's Court Procedure Act 901 (hereinafter SCPA) forthwith. Such Temporary Letters would enable the family members to have access to the absentee's funds and to take appropriate steps to protect the absentee's assets. See pages 16-20 for the sample form.

Expedited Death Certificates Although the Surrogate's Court procedures promised to provide great assistance to the victims' families, there was concern that until the EPTL process was completed and a death cer-

Wallace L. Leinheardt, a trusts and estates attorney who practices in Garden City, is a former chairman of the Surrogate's Court Committee of the Trusts and Estates Law Section of the NYSBA. On behalf of the NYSBA, he served as a liaison with other bar associations, relief agencies and government officials working to aid families of those who died in the World Trade Center attack. A graduate of Miami University in Florida, he received an LL.B. and an LL.M. from Brooklyn Law School.

tificate was issued, insurance companies, financial institutions holding Totten trust accounts, and trustees of IRA and 401(k) plans would not be willing to make payments that are normally permissible upon presentation of a death certificate without a probate or administration proceeding.

The solution was a successful effort to establish standards under which the New York City Chief Medical Examiner (whose office is responsible for issuing death certificates for all those killed in the World Trade Center complex) to issue a death certificate, based on the same type of proof that must be submitted to a Surrogate's Court in an EPTL 2-1.7 proceeding to establish exposure to a specific peril of death.

Printed on pages 10-14 are copies of the forms developed by the New York City Corporation Counsel's Office in collaboration with the Chief Medical Examiner.

Once the death certificate is issued, normal procedures can then be followed to obtain assets available to a decedent's named beneficiaries. The death certificate also provides the prerequisite to obtaining Letters Testamentary or Letters of Administration, without an EPTL 2-1.7 proceeding, if the victim also had assets that do not have a beneficiary designation and thus require an executor or administrator approved by the Surrogate's Court.

The expedited procedure is not available to all persons affected by the loss of a someone who died at the World Trade Center, however. It does not cover out-of-wedlock relationships (either heterosexual or homosexual, except for homosexual partners who have registered with the New York City Clerk, pursuant to Executive Law Order 123), a divorced parent of a minor child who would otherwise be eligible to receive Letters of Administration after becoming guardian of the property of the infant, and the next of kin of apparent victims who were not regularly employed but might have been at the World Trade Center at the time of the attack. A nominated executor who is not "next of kin" also does not appear to be a person who can use the expedited procedure to obtain a death certificate.

The expedited procedure does not change the nature of the joint account, a Totten trust account, a beneficiary under a life insurance policy or an IRA designation. It simply provides the death certificate required before an otherwise eligible beneficiary can process a claim.

As of late October, 1,860 applications for expedited death certificates had been received by the corporation counsel's office and 1,641 had been resolved. Only time will tell whether the low response to the procedure reflected the reluctance of relatives to acknowledge that loved ones had died, or circumstances that precluded eligibility under the rules promulgated by the medical examiner's office.

For those not eligible to obtain expedited death certificates, the EPTL 2-1.7 procedures must be used. When the process is complete, a death certificate can then be issued, clearing the way to obtain assets with beneficiary designations and to file for probate or administration if necessary.

Attorneys should be familiar with both types of proceedings in order to represent clients effectively. If the requirements for an expedited death certificate can be met, the process is not only faster but likely to be less emotionally painful for the family than court proceedings would be.

Other Issues Still unclear in late October was the question of who would be eligible to apply for the varied and substantial benefits being made available to victims. They may simply be available to the victim's next of kin, but it may also be necessary for an estate representative to be named. The question arises because a distributee or nominated executor of a will is ordinarily the person eligible to bring on an EPTL proceeding for a declaration of presumed death. There may also be conflict if the victim had a will that did not provide for distribution of the estate in accordance with the laws of intestacy.

In a further effort to expedite the process of making claims, Governor Pataki issued Executive Order No. 113.24 suspending the statute of limitations, waiving service of process, and waiving venue and jurisdiction requirements. Many attorneys are concerned that while this was done in an effort to accommodate the victims' families, the effect will be to confuse and mislead title companies and others dealing with estate issues, because proceedings may not be filed in the county where the decedent was domiciled. The Governor also directed companies licensed to issue insurance in New York State to make payment on their policies without a death certificate.

An Application for Appointment of a Temporary Administrator of the Estate of an Absentee may also be made pursuant to SCPA 901(2). When used in conjunction with the EPTL proceeding, a proposed administrator can obtain immediate relief to manage the assets and deal with the liabilities of an absentee. This proceeding may be commenced at any time, even before the full EPTL 2-1.7 process is complete.

Various chief clerks of the Surrogate's Courts in the metropolitan area have indicated an intention to provide same-day issuance of Temporary Letters to enable victims' families to avoid financial losses resulting from an inability to access the absentees' accounts.

Samples of the latest forms and procedures referred to in this article are available through the New York State Bar Association Web site, www.nysba.org.

AFFIDAVIT BY PERSON WITH PERSONAL KNOWLEDGE FOR ISSUANCE OF DEATH CERTIFICATE

STATE OF)
ss.:
COUNTY OF)

I, _____, being duly sworn, state as follows:

1. I reside at (insert street address, town/village, county, state and zip code).
2. I understand that this affidavit is made to assist in a determination that _____ (insert name of missing person) (the "missing person") died as a result of the disaster at the World Trade Center.
3. I am _____ to the missing person (state relationship to the missing person) and have personal knowledge of the whereabouts of the missing person on September 11, 2001. I last saw or heard from the missing person on _____.
4. The basis of my belief that the missing person was at the World Trade Center, or in its vicinity, on September 11, 2001, is as follows:

_____.

5. To the best of my knowledge, the missing person has not been seen or heard from since September 11, 2001.
6. The following efforts have been made to locate the missing person, without success:

_____.

7. The personal particulars of the missing person will be used to complete the death certificate. They are as follows:

(a) The missing person's usual residence: (insert street and house number and apartment number; city, town or location; county and state or foreign country; and zip code).

(b) Is this address inside the city limits of the city or town above?

(c) Did the missing person serve in the U.S. armed forces?

If yes, specify the dates of such service: From: _____ To: _____.

(d) Marital status:

[ ] Never Married [ ] Widowed [ ] Married or Separated [ ] Divorced

(e) Name of surviving spouse or domestic partner (if wife, give maiden name):

_____.

(f) Date of birth (month: spell-out, day, year):

_____.

(g) Age at last birthday _____ (if under one year, specify months and days).

(h) Social security number: _____.

(i) Usual occupation (kind of work during most of working lifetime, do not enter "retired"): _____.

(j) Kind of business or industry: _____.

(k) Birthplace (city and state or foreign country): _____.

(l) Education (check highest grade completed):

[ ] Elementary/Secondary (0-12) or

[ ] College (1-4 or 5+).

(m) Other names by which the missing person was known: _____.

(n) Name of the missing person's father: _____.

(o) Maiden name of the missing person's mother:

_____.

(p) The missing person's race (check all that apply):

[ ] White

[ ] Black

[ ] Asian

[ ] Other: Specify: _____ (Asian Indian, Chinese, American Indian, etc.)

(q) Ancestry (e.g., African American, Chinese, Cuban, German, Italian, Puerto Rican): _____.

(r) Was the missing person at work on September 11, 2001?

8. Nearest next of kin: _____.
9. Current address of nearest next of kin: _____.

_____
Signature

_____
Print name

_____
Address

_____

Telephone (include area code):
Day: _____
Evening: _____
Other: _____

Sworn to before me on the

_____day of _____, 2001.

_____

Notary Public

AFFIDAVIT BY GOVERNMENT OFFICIAL CONCERNING GOVERNMENT EMPLOYEES INVOLVED IN RESCUE EFFORTS FOR ISSUANCE OF DEATH CERTIFICATE

STATE OF)
ss.:
COUNTY OF)

I, _____, being duly sworn, state as follows:

1. I am the _____ (title) of _____ (division), with _____ (agency), located at _____ and am familiar with the records maintained by such office.
2. (Name, social security number, date of birth) was an employee of _____ assigned to assist in rescue and recovery efforts at the World Trade Center on September 11, 2001 and has not been heard from since that time.

_____
Signature

_____
Print Name

_____
Title

Sworn to before me on the

_____ day of _____, 2001.

_____

Notary Public

AFFIDAVIT BY REPRESENTATIVE OF THE AIRLINE

STATE OF)
ss.:
COUNTY OF)

I, _____, being duly sworn, state as follows;

1. I am the duly authorized representative _____ (provide title) of _____ (airline name).

My office is located at _____.

2. The enclosed document is the duly certified flight manifest of _____ (airline name), Flight # _____ which crashed into the World Trade Center on September 11, 2001.

_____
Signature

_____
Print name

_____
Title

Sworn to before me on this
_____ day of _____, 2001.

_____
Notary Public

AFFIDAVIT BY EMPLOYER FOR ISSUANCE OF DEATH CERTIFICATE

STATE OF)
ss.:
COUNTY OF)

I, _____, being duly sworn, state as follows:

1. I am the _____ (title) of _____ (firm or business) with offices located at _____ and am familiar with the records of the firm/business and the efforts described herein.
2. On September 11, 2001, said firm/business maintained offices at _____, New York, New York, within the World Trade Center complex.
3. (Name / Social Security number / Date of birth) was employed by said firm/business on September 11, 2001.
4. Said person is believed to have been at the offices located at _____ within the World Trade Center on September 11, 2001. The basis for my belief is_____.
5. To my knowledge, there has been no contact from said missing person since September 11, 2001.
6. The following efforts have been made to locate said missing person, without success: _____.

_____
Signature

_____
Print Name

_____
Title

Sworn to before me on this
_____ day of _____, 2001.

_____
Notary Public

SURROGATE'S COURT OF THE STATE OF
COUNTY OF _____

In the Matter of the Application of :
_____, :
for Letters of Temporary Administration :
and Letters of Administration
concerning the Estate of :
_____, :
Absentee and Alleged Deceased, :
and for a decree judicially declaring that :
the above-named absentee is deceased,
pursuant to New York Estates, Powers and :
Trusts Law Section 2-1.7(b), together with
Other and further relief. :

AFFIDAVIT IN SUPPORT OF JUDICIAL DECLARATION OF DEATH

Index No.

_____, being duly sworn, deposes and says, upon information and belief as follows:

1. I reside at _____, and am employed by _____, having an office at _____, in the capacity of _____.

2. The absentee and alleged decedent, _____, was also an employee of _____, in its New York City office, and held the position of _____.

3. In such capacity, _____ was _____ on the _____ floor of _____ World Trade Center in New York, New York, on Tuesday, September 11, 2001.

4. At 8:48 a.m. on Tuesday, September 11, 2001, an American Airlines airplane crashed into the top floors of the building located at One World Trade Center, causing an explosion and conflagration both within and without the building. At approximately 10:28 a.m. on Tuesday, September 11, 2001, the building located at One World Trade Center, New York, New York, collapsed.

5. _____ did not report to our office later that day, nor has she returned to work. Despite our efforts to contact _____, we have not been able to do so, nor have we received any communication from _____.

6. Based on the foregoing, it is believed that _____ was tragically killed in the disaster that occurred at the World Trade Center on Tuesday, September 11, 2001.

_____
Signature

Sworn to before me this
_____ day of _____, 2001

_____
Notary Public

Editor's Note: *This form and the Affidavit in Support of Judicial Declaration of Death on the previous page were developed by Mark Brosnan, counsel to the Public Administrator of Nassau County. This form also provides a guidance for other situations in which EPTL § 2-1.7(b) applies.*

SURROGATE'S COURT OF THE STATE OF
COUNTY OF _____

In the Matter of the Application of _____, _____,	:	**AFFIDAVIT IN**
for Letters of Temporary Administration and Letters of Administration concerning the Estate of	:	**SUPPORT OF PETITION FOR LETTERS OF TEMPORARY**
_____,	:	**ADMINISTRATION AND LETTERS OF**
Absentee and Alleged Deceased,	:	**ADMINISTRATION**
and for a decree judicially declaring that the above-named absentee is deceased, pursuant to New York Estates, Powers and Trusts Law § 2-1.7(b), together with other and further relief.	:	Index No.
	X	

STATE OF_____)
) ss.:
COUNTY OF _____)

_____, _____, with offices at _____, being duly sworn, hereby deposes and says, upon information and belief, as follows:

1. I am the Petitioner herein and have filed a Petition for Letters of Temporary Administration and Letters of Administration in the above-referenced proceeding (the "Petition"). Pursuant to New York Estates, Powers and Trusts Law ("EPTL") § 2-1.7(b), the Petition also seeks a decree adjudging and declaring that the absentee and alleged decedent, _____, died on September 11, 2001, at the World Trade Center, New York, New York, as a result of her exposure to a specific peril of death.

2. The absentee and alleged decedent, _____ (the "Alleged Decedent"), was _____.

3. Through counsel, my office has performed a preliminary investigation into the next of kin of the Alleged Decedent, through telephone interviews with the Alleged Decedent's _____.

4. The Alleged Decedent

[Complete the paragraph with information about missing person (e.g., age, citizenship, domiciliary, address]

[Complete the paragraph with information about family member who supplied information about the next of kin (State relationshjp to Alleged Decedent and other personal information).]

[Complete paragraph with information about Alleged Decedent's next of kin.]

Is Alleged decedent's next of kin a non-domiciliary alien?

In connection with Alleged Decedent's employment by _____, the Alleged Decedent worked in the office at the World Trade Center, New York, New York.

5. As more fully set forth in the accompanying affidavit of _____, to which the Court is respectfully referred, the Alleged Decedent was present in the World Trade Center at 8:45 a.m. on September 11, 2001, and has not been heard from since such time.

6. It is respectfully requested that the Court take judicial notice of the following facts:

a. At 8:48 a.m. on Tuesday, September 11, 2001, a hijacked Boeing 767 airplane en route from Boston's Logan Airport to Los Angeles International airport, designated as American Airlines Flight 11, disastrously crashed into the top floors of the building known as and located at _____ World Trade Center (the "Disaster").

b. This crash caused an explosion and conflagration both within and without the building.

c. At 10:28 a.m. on Tuesday, September 11, 2001, the building located at One World Trade Center, consisting of 110 stories, collapsed and formed an enormous smoke-filled pile of steel, concrete and other materials and debris.

d. At the time of the collapse, the building contained an undetermined number of men and women who are still missing.

7. Despite ongoing search and rescue efforts, the Alleged Decedent has not been found. The Alleged Decedent has not been heard from or seen by family members, neighbors, friends or co-workers since the Disaster.

8. As set forth in the accompanying affidavit of _____, the family of the Alleged Decedent has registered the name and other biographical information of the Alleged Decedent with the NYC Family Assistance Center. The Alleged Decedent has not been treated by any of the New York City, New Jersey or Nassau County hospitals which received victims from the Disaster.

9. No death certificate has yet been issued for the Alleged Decedent.

10. It is respectfully requested that the Court dispense with the requirement that a death certificate be filed upon the application for Letters of Administration, and that the Court exercise its discretion to accept alternate evidence of the Alleged Decedent's death in lieu of a death certificate in accordance with Rule 207.15 of the Uniform Rules for Surrogate's Court. 22 N.Y.C.R.R. § 207.15.

11. Pursuant to EPTL § 2-1.7(b), it is respectfully requested that the Court schedule a hearing for the purpose of determining whether the Alleged Decedent should be judicially declared deceased by reason of her exposure to a specific peril of death on September 11, 2001, at the World Trade Center, New York, New York.

12. Pursuant to SCPA § 403(2), it is also respectfully requested that the Court appoint a guardian *ad litem* to represent the interests of the Alleged Decedent, as an absentee, through and including the hearing and determination of the status of the Alleged Decedent. Moreover, based on the foregoing circumstances, Petitioner requests an order, pursuant to SCPA § 307(3), directing service of process upon the Alleged Decedent, as required by SCPA §§ 1003(1) and 902(1), by personal delivery of a citation and all other papers filed herein to the guardian *ad litem* appointed to represent the Alleged Decedent.

13. The Alleged Decedent owned an interest in a one-family dwelling and real property known as and located at _____ (the "Premises"). Letters of Temporary Administration must issue to the Public Administrator of _____ County in order that the Premises may be properly secured and insured. Additionally, the Alleged Decedent has an interest in a _____ vehicle, which needs to be removed and secured.

WHEREFORE, your deponent respectfully requests that the requested Letters of Temporary Administration be granted, and after a hearing, the issuance of a decree adjudging and judicially declaring that the Alleged Decedent is deceased, and the granting of Letters of Administration to her.

_____

Petitioner name

_____

Petitioner position

Sworn to before me this

_____ day of _____, 2001

_____

Notary Public

Records and Information Management Programs Have Become Vital For Law Firms and Clients

By Cristine S. Martins and Sophia J. Martins

When a U.S. District Court in New Jersey imposed a $1 million sanction on Prudential Insurance Co. in 1997 for having destroyed records, even though there was no evidence of willful misconduct, the ruling sent shock waves through corporations. In addition to the fine, Prudential was ordered to pay substantial attorney's fees and to present to the court within 30 days "a written manual that embodies Prudential's document preservation policy."[1]

The decision made Prudential and many other organizations startlingly aware of how records and information management (RIM) programs[2] have become an essential for all types and sizes of businesses, and for the law firms that represent them. The message has been reinforced by subsequent cases that have struggled with the availability of records in this Information Age.

When it comes to the production of documents in discovery, sanctions can and have been imposed both for failure to produce documents and for their overproduction. In *Levene v. City of New York*,[3] Federal Judge Loretta A. Preska of the Southern District of New York dismissed the plaintiff's claims entirely for what she called the "dumping" of more than 10,000 pages on the defendants, as well as other failures to comply with discovery orders.[4] Relying on the factors set forth in *Spencer v. Doe*,[5] a 1998 Second Circuit decision that addressed similar issues, she concluded that dismissal was warranted in view of the duration of non-compliance with the discovery request, the fact that the plaintiff had been on notice that failure to comply could result in dismissal, the likelihood that the defendants would be prejudiced by continued delay of the proceedings, and her belief that a lesser sanction would not remedy the situation.[6] In essence, the plaintiff received the ultimate sanction for failing to limit the production to only the specific documents needed to move the case forward. From a RIM standpoint, one might wonder whether the suit would have continued successfully if the plaintiff had provided better organized files or a better index.

Nevertheless, overproduction of records is not as common as failure to produce records. During the same week in June 1999 that the *Levene* case was decided, the Second Circuit affirmed an adverse inference jury instruction based on a finding that the defendants had exhibited gross negligence in producing and preserving documents. The case, *Reilly v. NatWest Markets Group, Inc.*,[7] involved the last-minute production of documents that had been sought for months. The court had instructed the jurors that they could draw an adverse inference against defendants if they found that the defendants had delivered the documents in an untimely or incomplete fashion. The documents, which had been belatedly found in an office pantry and delivered to the plaintiffs only two days before trial, were also alleged to have been "sanitized" of all but publicly available information.[8]

It is important to note that the judge delivered the instruction to the jury based on a finding that defendants had been grossly negligent in locating and protecting

Cristine S. Martins is the president of Martins Consulting, a RIM and law library consulting firm based in Mineola. She lectures on RIM issues and has conducted more than 40 large-scale RIM projects as records manager for both a multi-national civil engineering firm and a Fortune 500 high-tech firm. A graduate of Adelphi University, she received a J.D. degree from Touro Law and an M.L.S. from the Palmer School of Library and Information Science at Long Island University.

Sophia J. Martins is a reference law librarian at Touro Law Center, Jacob D. Fuchsberg School of Law in Huntington. A former public library director and native of the Netherlands, she has designed libraries and conducted RIM projects for entities such as the city government of Newark, N.J. A graduate of Hofstra University, she received a J.D. degree from Touro Law and an M.L.S. from Queens College.

Photo by Cristine Martins

The documents and rolled drawings came into the warehouse in deplorable condition, and after inventory and reboxing, were much more uniform. This photo represents how they arrived at the warehouse.

the files in question, not on the basis that the defendants had intentionally withheld or destroyed evidence, and not on any finding that the defendants had acted in bad faith. The Second Circuit's opinion stressed that the level of fault necessary for supporting an adverse inference instruction should be considered on a case-by-case basis, saying that "a finding of bad faith or intentional misconduct is not a *sine qua non* to sanctioning a spoliator with an adverse inference instruction."[9]

But such a sanction could have been avoided if the documents had been filed and stored properly according to RIM principles, rather than stuck out of sight, probably unlabeled, in an office pantry. Imposition of RIM procedures can assure that documents are easily found; identified to answer specific discovery demands; and in good condition for easy copying, imaging or other reproduction methods.

Not knowing where records are can also be a problem, as the plaintiff's attorney in *GMA Accessories, Inc. v. Positive Impressions, Inc.*[10] learned in May 2000, when the federal court for the Southern District of New York ordered the plaintiff to pay all of the defendants' reasonable attorney fees and expenses incurred in repeated attempts to secure records from the plaintiff's warehouses. The plaintiff was ordered to pay an additional $10,000, and the plaintiff's attorney was sanctioned $5,000 for "misrepresentations to the court and tactical maneuvering."[11]

A spoliation charge was brought against the *GMA* plaintiff after the defendant had repeated problems inspecting records. The spoliation doctrine has gained in popularity in the past two decades and is likely to continue to do so, as both paper and electronic records policies come under the scrutiny of courts. Spoliation comes from the legal maxim *omnia praesumuntur contra spoliatorem*, which means "all things are presumed against the destroyer."[12] Most commonly, the sanction imposed for a finding of spoliation is an adverse inference against the party that fails to produce requested evidence.[13]

In the *GMA* case, the plaintiff claimed that it had inadvertently destroyed certain records when it moved all its records to the corporate offices in Secaucus, N.J., in early 2000. A paralegal for the defendant's firm testified credibly that he went to two separate locations in Secaucus in an attempt to inspect records but was told that the records he was there to inspect were really in a New York City location. The court also took into consideration the rather dramatic delivery of several large boxes of records to the courtroom in the midst of the hearing saying, "The Court finds this significant given the previous position taken by GMA, that the production was 'overly burdensome,' and inspection of the documents was the only means by which the discovery was made accessible to the defendant."[14]

Finding the paralegal's testimony credible, the court said the paralegal was "affirmatively misled"[15] in relation to the location of the documents, and the events related to trying to locate the records not only damaged the plaintiff's credibility but also led the court to find that the plaintiff had acted willfully. What the court found to be the plaintiff's willful conduct was the basis for imposing sanctions. Although this conduct was found to be willful, it is important to realize that even in the absence of willful misconduct, loss of records can damage credibility and sometimes lead to sanctions, as it did for Prudential Insurance.

Prudential Case

The Prudential case involved the destruction of files by Prudential employees in several locations after the commencement of an action against the company. Although the court found no evidence of willful misconduct, the sanctions imposed on Prudential for the destruction of this evidence were, considerable, a total of $1 million plus attorneys fees.[16] Even more interesting from a RIM perspective was the court's willingness to examine, in minute detail, the document-retention policies of Prudential. As part of its judgment, the court ordered Prudential both to implement a RIM program and to provide proof of its compliance by submitting a program manual to the court within 30 days of the judgment.[17]

Such a directive was almost unheard of until the decision in *Prudential* was published. This willingness of the court to essentially order the creation of a RIM program sent shock waves through not only big business, but also the RIM community. To this day, many information professionals point to this case as one of the most compelling reasons to implement RIM. Also, the newer cases regarding electronic records management and discovery are increasing awareness of the need for

CONTINUED ON PAGE 24

Records and Information Recovery In the Wake of September 11, 2001

For those who work with records and information, the television images of millions of pieces of paper floating down from the sky after the September 11 attack on the World Trade Center were a chilling sight.

Records professionals also knew the enormous, immediate impact that the attack would have on companies that did not have disaster recovery plans—not only for paper records but for the electronic records housed in the many destroyed computers in those buildings.

Off-site storage vendors, many of whom have warehouses across the Hudson River in New Jersey, were ready with hand trucks and personnel willing to walk boxes of records across the George Washington Bridge, which was closed to vehicular traffic in the hours immediately after the attack. Some off-site storage vendors reported losing trucks that had been transporting records to and from the World Trade Center and surrounding buildings that day, although their personnel were able to escape safely from the scene. Off-site storage of paper records, as well as backup systems for electronic records, would be put to the test in the following days.

Many companies that did have disaster recovery plans—mostly designed in more naive times in preparation for Y2K—were found lacking. As a result, many companies are reevaluating and revamping disaster recovery/business resumption plans that never thought to take into account such horrendous possibilities as those that occurred at the World Trade Center.

One of the best-known names in the risk insurance field, Marsh Inc., reported the loss of more than 290 persons out of approximately 1,900 employees in their family of companies that had offices in the two towers of the World Trade Center. Yet with such terrible losses, they were up and running from alternate locations, with most critical systems restored within four days. They have since set up a series of conference calls for their clients to discuss their response and the lessons learned from the site, indicating to them their own high level of preparedness for disaster.

Others were not so lucky. Most television viewers watched as the emergency response groups from New York City scrambled for a new command center. Less publicly, the engineers of the Port Authority borrowed conference rooms and work space from some of the companies that do contract work for them.

From a records standpoint, the Port Authority, as one example, was in a decent position to recover records—including key blueprints and schematics of the structures under their control—from the vendors who had been awarded their contracts. Any paper that was in the World Trade Center is, at this point, still a total loss, but because much of the engineering work of the Port Authority is done by outside contractors, the blueprints the authority needed immediately to begin assessment of damage or further threats to bridges, tunnels and other structures were readily available from other sources. In this respect at least, the Port Authority was extremely fortunate.

Most banking and financial institutions were also in a good position to recover their records—particularly their electronic data. Almost all of the big banking and financial institutions, many of whom were housed in the affected area, have invested heavily in backup systems. These include redundant, live, off-site backups that essentially replicate their entire computer system in a remote location. Because such systems cost a great deal of money and require highly trained information technology professionals to oversee them on a nearly constant basis, few firms other than banks and very large companies have invested in them.

Of all the lessons learned from that terrible day, perhaps the best is this—always have an emergency plan. Creation and revision of disaster recovery/business resumption plans skyrocketed to the top of just about every organization's list of hot projects in the days immediately after the attack, and remain a high priority. For those unfamiliar with this kind of plan, good information can be found on the National Archives and Records Administration Web site at www.nara.gov, as well as the Association for Records Managers and Administrators Web site at www.arma.org. The *Disaster Recovery Journal* is also an excellent source of information and can be found at www.drj.com.

Cristine S. Martins

CONTINUED FROM PAGE 22
integrated RIM policies and programs—meaning those that take into account not only paper records but also records in their electronic form. It is a well-established RIM maxim that the laws governing information apply to all records, regardless of their form.

Electronic Records

Wal-Mart and its attorneys recently dealt with the specter of electronic records discovery issues in *GTFM, Inc. v. Wal-Mart Stores, Inc.*,[18] in which Wal-Mart was ordered to pay $109,753.81, reduced from an initial claim of $245,549.36, in fees and expenses by the judge, who found that Wal-Mart had misrepresented the capacity of its central computers to track purchases. Claiming first that the computer system could only produce records from the previous five weeks, the defendant later disclosed that the computer system really could produce reports for a full year. Of course, by the time the defendant's MIS expert related this fact, it was too late to generate the reports that had been originally requested, although they would have been available if the defendant had acted immediately on the discovery request.[19]

Preserving electronic records for any length of years requires organized, scheduled maintenance and updating according to RIM principles.

In sanctioning the defendant, the judge ordered Wal-Mart to pay the plaintiff's fees and expenses resulting from Wal-Mart's failure to make accurate disclosure of its computer capabilities. Although the judge refrained from sanctioning Wal-Mart's attorneys, he did note that "whether or not defendant's counsel intentionally misled plaintiffs, counsel's inquiries about defendant's computer capacity were certainly deficient."[20] One can only wonder how this rather patient attitude will change as both attorneys and judges become more technically savvy.

AT&T also recently ran up against electronic discovery problems when it was sanctioned for unintentional spoliation of evidence involving certain computer reports. In *Telecom International America Ltd. v. AT&T Corp.*,[21] a federal judge in the Southern District of New York found that an adverse inference might be appropriate and ordered a separate hearing to determine whether to impose such a sanction. The judge also warned that AT&T could be held accountable for all costs and fees in conjunction with holding such a hearing.

The conflict arose over AT&T's assertion that certain computer data, which was sought by the plaintiff, was routinely destroyed within days of its creation. At trial, the facts proved that, in fact, before final purge from the computer system, the data was transferred to backup tapes that were routinely kept for one year. The judge found that if AT&T had responded properly to the plaintiff's discovery request, most of the data would have been available, but the delay caused much of the data to be lost due to the one-year retention policy. Although the judge did not find this act to be deliberate on the part of AT&T, he found enough cause to look into the prospect of imposing adverse inference sanctions.[22]

Some legal scholars have advocated saving electronic records longer than paper records, citing the ease of storage and the much smaller volume of space that electronic records take up as opposed to their paper equivalents.[23] This is a naive assumption. It fails to consider the rapidly changing state of both hardware and software. How many offices are still equipped to read 8-inch floppy disks or even the more recent 5.25-inch floppies? And even if the hardware still exists, what about software compatibility issues?

Preserving electronic records for any length of years requires organized, scheduled maintenance and updating, according to RIM principles. The magnetic tapes that are still very popular means of backing up systems must be periodically re-wound and copied to newer media because of media deterioration. In fact, any kind of magnetic media degrades over a period of years and should be put on a copying and updating schedule, which can be both time-consuming and costly. Also, old files need to be upgraded to newer versions of software or, alternatively, old hardware and software systems must be preserved and maintained so that older files can be accessed and used.

These activities all come under the realm of an integrated RIM program, but such safeguards require a great deal of time, coordination, expenditure of resources and commitment by the organization. Why then would any organization want to keep electronic files any longer than their paper counterparts? All things considered, at this point in our technological evolution, it is sometimes far simpler to deal with paper than electronic records, but the reality exists that we must do both. However, any RIM professional is unlikely to cite a justification for keeping electronic records longer than their paper counterparts. The laws are clear and do not typically make a distinction between retention periods for paper versus electronic records. The retention periods apply to the information contained in the record—not the media of the record itself.

RIM for Law Firms

Law firms are traditionally inundated with paper. Increasingly, information is also received and created in electronic form. Word-processed documents, images, and other kinds of data sets are taking up more and more space on law firm hard drives. Electronic discovery, which has been allowed under the Rules of Evidence for some time, is being used more often as attorneys become technically savvy. As a result, the information explosion has reached critical mass in many law firms.

Take, for example, the typical modern imaging project. Many larger law firms with top-level corporate clients have taken to hiring imaging vendors to create electronic images of large quantities of paper records received from the client as potential evidence. To facilitate searching, the law firm has the imaging vendor create an index entry for each document to go along with its image. If the cost to the client is warranted, each page is then run through optical character recognition (OCR) software to create a full-text searchable database of all the words on each piece of paper.[24]

After the imaging project is complete, the law firm typically receives back the original boxes of paper records, the electronic images, associated indexes and OCR files, plus yet another set of paper "blow-back" copies made from the images. The law firm generally returns the originals to the client, then retains its own copies in both electronic and paper format.

This poses a potential problem that only RIM can solve. Set policies and procedures for handling information—both electronic and paper—are required to make the best use of available storage space, both in the office and on the computer server. Ease and speed of retrieval become key with large collections of documents, which calls library-related skills into play. The creation of finding aids such as filing systems, catalogs and indexes are essential to locating needed materials quickly and efficiently.

This is true during both the active life of records and the inactive portion of their life cycle, particularly with records such as client files. Many law firms, large and small, tend to keep client files permanently. Although statutes of limitations may have run out on any possible causes of action arising from a particular case, the attorney may choose to keep the file even if there is no legal requirement. This is simply a business decision. Even though the attorney may not work with the client for many years, when a long-lost client does call, it is good policy to be able to retrieve old notes and the previous matter for future reference. Locating that file years later, however, can often prove more trouble than it is worth, unless a good RIM program is in place.

Photo by Cristine Martins

This photo represents one of the main danger situations for record storage, namely the possibility of water damage from the overhead pipe.

RIM for Clients

RIM has its place in litigation, because the litigiousness of modern society is a major reason why many organizations have implemented RIM. Costly delays in locating key evidence, a perception of uncooperativeness being portrayed to the court, and even the destruction of records before the expiration of their legally required retention periods have led to sanctions and monetary awards that have made big business take notice. Big business clients are not the only ones who should have records management policies in place, however.

Organizations of all sizes should have some sort of basic plan regarding how long they will keep records, together with where and how they plan to locate them when needed. This can be as simple as having a basement storage area with clearly labeled boxes for paper records, an extra CD or two burned at periodic intervals and stored in a remote location, and a basic knowledge of the laws that apply to that organization's records. Or it could be as complex as an integrated program having policy and procedure manuals with multi-level sign-offs, off-site storage contracts, computerized bar-coded inventory control, tape rotation services, and multiple

retention schedules to cover both the U.S. operation and international locations.

Whatever the size of an organization, some of the best advice an attorney can provide is to encourage it to create some sort of RIM program, and then audit it periodically. The advantages of RIM include:

- Measurable compliance with state and federal laws and all other governing regulations.
- A decrease in the physical space needed to store paper records, which can yield savings in real estate expenses.
- A timely "in the normal course of business" system for destroying obsolete records documented by written policies, procedures and a history of periodic destruction that is usually acceptable to courts and is not likely to incur a penalty or prejudice if a discovery request cannot be satisfied.
- The existence of written policies and procedures that ensure the protection of intellectual assets and prevent employees from discarding records at whim, a process that also lowers the risk of exposure due to records loss.
- Elimination of the costs associated with storing duplicate records.
- Ease, speed and convenience in locating needed records.

Conclusion

Both client organizations and the attorneys who must work with them benefit from having good RIM programs in place. With RIM, one of the biggest uncertainties of discovery—the fear that an opponent's treasure hunt for records will uncover a damaging document that did not have to be produced—is greatly reduced.

Although some lawyers and clients may mistakenly use the production of documents in a strategic way, it is hard to tell from the court opinions whether the parties were truly guilty of such behavior or whether the judges drew that conclusion from the circumstances. There is no doubt, however, that the inability to produce requested documents looks bad, regardless of the reasons the documents are not produced.

Businesses tend to look at bottom-line considerations such as reduction in office or off-site storage space costs when deciding to implement RIM. Although these are valid reasons, the benefits of RIM involve more than just saving money. The process can reduce the risks of litigation and provide business advantages in the Information Age.

---

1. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598, 617.
2. The premier RIM organization in the United States is the Association of Records Managers and Administrators, known as ARMA, International. Its web site is at www.arma.org. Other professional organizations that have an impact on RIM are the Association of Image and Information Management (AIIM) at www.aiim.org, the Society of American Archivists (SAA) at www.archivists.org, and the American Library Association (ALA) at www.ala.org.
3. 97 Civ. 7985, 1999 U.S. Dist. LEXIS 9031 (S.D.N.Y. June 11, 1999).
4. *Id*. at *9.
5. 139 F.3d 107 (2d Cir. 1998).
6. *Levene*, 1999 U.S. Dist. LEXIS 9031, at *14-15.
7. 181 F.3d 253 (2d Cir. 1999), *cert. denied*, 528 U.S. 1119 (2000).
8. *See id* at 261.
9. *Id*. at 268.
10. 1999 U.S. App. LEXIS 10030 (2d Cir. 1999).
11. *Plaintiff Company is Ordered to Pay Sanctions for Failing to Comply with Discovery Request; GMA Accessories, Inc. v. Positive Impressions, Inc.*, N.Y.L.J., May 10, 2000, p. 25 (hereinafter "*Plaintiff Company*").
12. Robert L. Tucker, *The Flexible Doctrine of Spoliation of Evidence: Cause of Action, Defense, Evidentiary Presumption, and Discovery Sanction*, 27 U. Tol. L. Rev. 67, 77 (1995).
13. *See* Richard D. Friedman, *Dealing with Evidentiary Deficiency*, 18 Cardozo L. Rev. 1961 (1997).
14. *Plaintiff Company*, *supra* note 8 at 25.
15. *Id*.
16. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598, 617.
17. *Id*.
18. 2000 U.S. Dist. LEXIS 16244, (S.D.N.Y. Nov. 8, 2000).
19. *See id*.
20. *GTFM, Inc. v. Wal-Mart Stores, Inc.*, 2000 U.S. Dist. LEXIS 3804 at *6 (S.D.N.Y. Mar. 28, 2000).
21. 189 F.R.D. 76 (S.D.N.Y. 1999).
22. *See id*.
23. Christopher V. Cotton, *Document Retention Programs for Electronic Records: Applying a Reasonableness Standard to the Electronic Era*, 24 J. Corp. L. 417 (1999).
24. Accuracy of OCR software can be as low as 35-40%. Good OCR often requires extensive Quality Control (QC) and can cost a great deal of money. Of late, many imaging vendors are utilizing "off-shore" labor to create detailed indexes and do QC. The lower rates for labor in countries such as the Philippines, India, and elsewhere, and the ease with which electronic data can be transferred, has made 100% QC a viable option for many vendors. There is the issue of data security, however, of which many client firms seem to be unaware.

View From the Bench

Lawyers Need Detailed Knowledge Of Rules for Using Depositions at Trial

BY JOHN P. DIBLASI

As a judge, I often see counsel lose the opportunity to make effective use of depositions during the course of a trial. Other times counsel will make a legally improper, but effective, use of a deposition while opposing counsel sits by and makes no objection. Where opposing counsel does successfully object, counsel (who is the proponent of the deposition) is often completely thwarted in making any further use of this prior sworn testimony.

N.Y. Civil Practice Law and Rules 3117 (hereinafter CPLR) sets forth the applicable law for using depositions during trial. It consists of four brief sections that every trial lawyer should known intimately. After all, what is the point in taking the depositions of parties and non-parties, if you do not know how to make effective use of them at trial?

Impeaching the Credibility of a Witness: CPLR 3117(a)(1)

CPLR 3117(a)(1) provides that "any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness."

Anyone who intends to read from a deposition for the purposes of impeachment, or for any other purpose, should always provide a copy of same to the court. This ensures a faster ruling by the court in the event of an objection, which will result in less disruption of your cross-examination. It is the courteous and professional thing to do. If you are not counsel using the deposition for impeachment purposes, and your adversary has not provided a copy to the court, it is usually in your interest to do so because you will probably be making objections to its use.

Even if the court has discussed the use of deposition testimony in its preliminary instructions to the jury, ask the judge to give an instruction to the jury with respect to the use of depositions immediately prior to your use of it.[1] Finally, make sure the deposition transcript has been verified by the witness or deemed verified, pursuant to CPLR 3116(a), a topic that will be discussed in greater detail later in this article.

When you are using an answer in a deposition to show a prior inconsistent statement, you are attempting to show that it is inconsistent with the witness's testimony at trial. The deposition testimony is not being offered for its truth but to attack the credibility of the witness. The point is to convince the jury that the witness is not being truthful. This attack on the credibility of the witness conforms with the preliminary instructions of the court.[2] These instructions give the jury suggested criteria for evaluating the credibility of a witness, including "the telling of an intentional falsehood." Inconsistent statements further form the basis for a request for charge of *Falsus In Uno*,[3] which states that if one has testified falsely as to any material fact, the jury is entitled, but not required, to reject the witness's testimony in its entirety.

The question-and-answer passage that the cross-examiner intends to read from the deposition must be inconsistent with the testimony given at trial. The court, upon timely objection, may determine as a matter of law that the deposition testimony the cross-examiner proposes to read is not inconsistent, and thereby preclude its use during cross-examination. In *Fowler v. Parks*,[4] the trial court excluded the use of deposition testimony for the purposes of impeachment. In affirming the decision of the trial court, the Appellate Division, First Department, held that counsel failed to lay a proper foundation for the use of the deposition testimony, that no contradictions were presented by the evidence and that any alleged inconsistencies were not material to the action.

JOHN P. DIBLASI became a justice of the Supreme Court, Westchester County, in 1995. Earlier, he had been a judge of the City Court of Mount Vernon, a member of the Public Employment Relations Board of Westchester County and an attorney in private practice specializing as trial counsel to the insurance industry. He has also served as an adjunct professor at Pace University School of Law and St. John's University School of Law. A graduate of Syracuse University, he received his J.D. degree from St. John's University School of Law.

Making a timely objection is critical. Nothing is gained if the jury hears the alleged inconsistency, even if it is later stricken by the court. If counsel has carefully read and indexed the client's deposition transcript, it becomes fairly easy to raise an objection, in advance of the reading, of any question and answer given by the client at the time he was deposed.

To attack the credibility of a witness with a prior inconsistent statement, your adversary must have elicited the inconsistent testimony during direct examination.

A common occurrence involves having counsel cross-examine a witness by merely reading questions and answers given at a deposition, then seek the witness's ratification of that testimony. Although arguably this has the same effect as reading an adverse party's deposition to the jury pursuant to CPLR 3117(a)(2), as evidence-in-chief, it is objectionable and should not be allowed. Based upon the court's instructions regarding the use of deposition testimony, it will create the false impression that the deposition answers are inconsistent with the trial testimony. Counsel for the witness should object.

Counsel will often read aloud deposition testimony to refresh the recollection of a witness. This should also be objected to. The deposition testimony may be used to refresh a witness's recollection, but in the same way as with any other document. It should be given to the witness, who then should be directed to read the specific excerpt to himself, not aloud. The witness is then asked if the deposition refreshes his recollection. If it does not, counsel is bound by the answer, and is then free to read the deposition testimony to the jury during his case-in-chief or in rebuttal.

Finally, you may not read into evidence the testimony of another party and then ask the witness whether he agrees or disagrees with the answer.

To attack the credibility of a witness with a prior inconsistent statement, your adversary must have elicited the inconsistent testimony during direct examination of the witness, or the cross-examiner must elicit the inconsistency on cross-examination of the adverse witness.

Assuming the inconsistent testimony was elicited on direct examination, you must ask the witness whether he made such a statement during direct. If he says "yes," then ask, without reading from the deposition, whether he ever testified differently.

For example, the plaintiff in a motor vehicle accident case testifies that the road conditions were clear and dry on the date of the accident. At his deposition he testified the roads were wet and slippery. The following questions could be asked:

Question: In response to your attorney's questions on direct examination, you testified that the road conditions on the day of the accident were clear and dry?

Answer: Yes.

Question: Is it true that you gave testimony before this trial that the road conditions were slippery and wet?

If the witness answers "yes," thereby admitting the inconsistency, there is no basis for the use of the deposition at this time. Counsel may later read this deposition testimony to the jury during his case-in-chief or in rebuttal to remind the jury of the inconsistency.

If the witness answers "no," or "I do not remember," you should continue as follows:

Ask the judge to instruct the jury with respect to the use of depositions, unless the court has already done so.

Question: Before this trial, did you appear at a deposition and give answers to questions under oath?

Answer: Yes.

Question: You were represented by your attorney at this deposition?

Answer: Yes.

Question: You certainly discussed the accident in question before the deposition?

Answer: Yes.

Question: You took an oath to tell the truth, in fact the same oath you took here today?

Answer: Yes.

Question: After the deposition, a booklet containing the questions and your answers under oath was given to you?

Question: You signed the deposition and again under oath swore to the truth and accuracy of your answers after you had the opportunity to review them?

Answer: Yes.

If the adverse witness responds in the negative or claims he does not recall any of the above questions, simply ask your adversary to stipulate to them. In most cases it would be foolish for opposing counsel to refuse to stipulate that a deposition of his client was taken, that answers were given under oath, that the deposition transcript was provided and that it was sworn to by the client and returned.

You will notice that the questions set forth above are not preceded by "is it true?" or followed by "is that correct?" As a general proposition, I would recommend that you not do this. Instead, use the inflection in your voice to ensure that everyone knows you are asking a question. From speaking to numerous jurors after trials,

I have found that anything an attorney does repeatedly annoys them—in particular, a litany of questions beginning with "is it true?" or ending with "is that correct?"

Earlier in this article, the issue of verification of the deposition by the witness was mentioned. This may become a critical issue during the trial. Pursuant to CPLR 3116(a), the deposition transcript "shall" be submitted to the witness for his review and to make any changes in answers. Further, when dealing with an adverse party, the transmittal letter must contain a 30-day notice to return the transcript signed. If it does contain notice and the adverse party does not return the transcript, it is deemed signed and may be used for any purpose at the trial as if it were signed.

In doing your trial preparation, and to avoid being precluded from using the deposition transcript at trial, make sure all adverse parties have been served with their transcripts and given the 30-day notice to return it signed. It is the burden of the party seeking to use the deposition to show that the transcript was sent to the witnesses with the appropriate time for them to review, sign and return same. The proponent of the deposition must also show that the time in which the witness has to sign the transcript has expired.[5] If you have failed to do this, have the reporter who took the deposition available to come in and testify on your direct case regarding the answers given at the deposition. Certainly those answers that would constitute admissions against interest would be admissible.[6]

If a non-party refuses to sign, the officer before whom the deposition was taken must sign for the witness, setting forth the witness's refusal to sign and any reason that may have been given for said refusal. The officer signing under these circumstances must have been present during the entire deposition; this would normally be the court reporter. If a clerk administered the oath and was not present for the deposition, he cannot sign the deposition. In this situation, the only remedy is to make a motion to compel the witness to sign.

Finally, it is always better to have a signed transcript than one deemed signed. The fact that the adverse party has not returned a signed transcript does not preclude you from making a motion in advance of the trial to compel him to do so.

Continuing with the foundation:

Reading from the deposition of the plaintiff taken on such and such a date, page X, line X:

Question: What were the road conditions at the time of the accident?

Answer: Slippery and wet.

To the witness:

Question: Were you asked that question, and did you give that answer at your deposition? (Do not ask the witness if this refreshes his recollection.)

Answer: Yes. (Assuming we are in a perfect world.)

More often than not, most witnesses will try and explain away rather than admit the inconsistency, with an answer that in no way responds to the question. Request that the court strike the answer. Then read the deposition testimony again and repeat your question. In controlling a witness during cross-examination, it is always suggested that you ask leading questions, seek very limited information, and if you are receiving answers that are non-responsive, move to strike. Attorneys should make greater use of the court in moving to strike testimony that is not responsive.

Often the witness has changed the damaging answer given at the time of the deposition. This is done by right at the time the individual verifies the transcript. This does not mean you cannot ask the witness about the original answer given, the correction and the reason for it. Remember, if the witness corrected an answer given at the deposition, and did not give the reason therefor on the "correction sheet" annexed to the transcript returned, any such change as reflected in the deposition transcript should be objected to at trial.[7] This means that the witness cannot testify that he changed a deposition answer unless an explanation accompanied the change.

Deposition Testimony as Evidence-in-Chief: CPLR 3117(a)(2)

As a general proposition, nothing bores a jury more than a lengthy reading of the deposition of an adverse party; CPLR 3117(a)(2) allows exactly that. Any party may read into evidence the testimony of an adverse party. That testimony becomes evidence-in-chief, and is given the same weight and effect as if that witness had actually testified in front of the jury. Pursuant to CPLR 3117(d), by making such use of the adverse party's deposition you are not making the party your witness. Once again, if you intend to use it at trial, make sure you have served the deposition with the appropriate notice pursuant to CPLR 3116, and that you have either a verified original or a copy that is deemed verified pursuant to the CPLR.

If it is absolutely necessary to make out a prima facie case, you may have no choice but to read the deposition testimony of an adverse party, party or non-party witness. One advantage you have is that you are able to give certain answers the inflection and emphasis that you want the jury to hear. Certainly, to prevent the jury from falling asleep you must give the reading some inflection. What is often done in cases where lengthy readings are required, is to put an associate on the witness stand to read the answers. Usually the court will allow you to do this, and it makes it somewhat more interesting for the jury.

Often, counsel will call an adverse party to the witness stand to avoid a lengthy reading of deposition testimony. This is often a risky tactic if counsel has his client well-prepared to testify both on direct and cross-examination. For example, if the defendant is the first witness called by the plaintiff, which is very common, and the witness does well, it hurts the plaintiff's case. If he does not do well, by the time the jury gets the case for deliberation, the defendant's testimony is often a distant memory. Further, defense counsel will not be required to call his client as a witness and will not face a missing witness instruction.[8]

When reading into evidence a deposition as part of your case-in-chief, reserve the reading of the deposition for the end of your case. Your goal should be to emphasize a few key answers by the witness that were either helpful to your case or that called into question the credibility of the witness by showing a prior inconsistent statement.

Use of Deposition Testimony By an Unavailable Witness: CPLR 3117(a)(3)

Pursuant to CPLR 3117(a)(3), if a witness is dead, greater than 100 miles from the courthouse (unless the absence of the witness was procured by the party offering the deposition), the witness cannot testify due to age, infirmity or imprisonment, or the party offering the deposition cannot secure the presence of the witness by diligent efforts, then the deposition of any person may be used by any party for any purpose against any party who was either present at or had notice of the deposition.

What happens in the situation where counsel had the opportunity to be present and waived his appearance at an adverse party's or non-party's deposition? If counsel was given notice of the deposition under the rules of the CPLR and chose not to appear, the deposition may be used. Finally, this section provides that in "exceptional circumstances" the court in its discretion, and in the interest of justice, may allow a deposition to be read.

All of the above situations involve questions of fact that must be decided by the court before the depositions may be read in. Clearly it would be necessary to produce a certified copy of the certificate of death in the situation where the witness is dead. However, the deposition of a deceased witness was excluded where the deposition had not been completed at the time of death and the defendants had not had the opportunity for cross-examination.[9]

In a situation where the witness resides more than 100 miles from the courthouse, it may be necessary to obtain a private investigator to verify that fact immediately prior to trial, and to have the investigator ready to testify if necessary. In a situation where a person cannot testify due to age, sickness or infirmity, the presence of the treating physician, to testify as to the witness's condition, is essential.

If the witness's presence cannot be secured, an investigator should be retained to make diligent efforts to obtain the witness's cooperation and to testify regarding the reasons the investigator was unable to secure the witness's appearance. In *Nedball v. Tellefsen*,[10] the court held that where the diligent efforts to locate the witness amounted to a telephone call to the last known address and where an unidentified person stated that the witness had moved and left no forwarding address, the efforts were not sufficient to allow use of the deposition. Last year, in the case of *Marte v. Speaker*,[11] plaintiff's counsel was precluded from reading the deposition testimony of the incarcerated client. In affirming the trial court's decision, the Appellate Division, First Department, held that the plaintiff's incarceration did not constitute unavailability, particularly in light of the trial court's offer to assist in obtaining his appearance.

In *Miller v. Daub*,[12] the court held that the refusal of a non-party witness to comply with a subpoena did not make the witness unavailable. The court stated that counsel's remedy was to make a motion to hold the witness in contempt.

Counsel's hearsay representations to the court are generally insufficient to obtain the benefits of the unavailability provision over objection. However, where counsel has personal knowledge regarding the reasons for the unavailability of the witness, it is error to deny counsel the right to testify about those facts. In *Hill v. Hudson View Gardens, Inc.*,[13] the trial court refused to hear testimony from counsel regarding the physical condition of his 82-year-old client, who was unable to appear in court, and would not grant a continuance to allow a physician to examine the client and report to the court. The trial court refused to allow the reading of the unavailable witness's deposition testimony. The Appellate Division, First Department, reversed and remanded, holding that counsel's testimony regarding his personal knowledge of his client's physical condition should have been allowed, or a continuance given for a physician's examination and report.

When attempting to invoke the provision that allows the court to allow the reading-in of a deposition under exceptional circumstances and in the interests of justice, the application must be based upon a Notice of Motion. This contemplates an application being made in advance of the trial, although absent any prejudice there does not appear to be any reason why it could not be made orally at trial. In *Ratner v. Ratner*,[14] the petitioner-mother in a support proceeding, who resided in Israel, was allowed to proceed by deposition against the father who resided in New York. The court required the

mother to attach exhibits to her deposition and to respond to any written interrogatories served by the father. The father was also given the opportunity to question the mother by open commission. The court found that the father's rights were sufficiently protected in this matter because the mother had the burden of proof and if her answers were not responsive, the court would dismiss the petition. It was not disputed that the petitioner-mother had regular employment in Israel and contributed to both the child's and her own support, and that it would inflict extreme hardship on both if the mother was required to appear in person in New York. Further, the father had admitted his failure to make regular child support payments in the past.

CPLR 3117(a)(4) provides that as long as a physician's deposition was taken on notice to all parties, any party may use the deposition for any purpose. The doctor need not be unavailable, because this provision was enacted to recognize the difficulty in securing the presence of physicians at trial. The court may consider a protective order pursuant to CPLR 3103 "to prevent abuse." The court still retains the power to have the doctor appear in person and to be subjected to direct and cross-examination.

It would seem to be good practice to attempt to obtain a stipulation from your adversary in advance of the trial to allow the reading of a deposition by the party who is not available.

In all of the above situations, it would seem to be good practice to attempt to obtain a stipulation from your adversary in advance of the trial to allow the reading of a deposition by the party who is not available. In the absence of a stipulation, I would suggest that counsel should have a live witness give testimony to the court, based upon personal knowledge, regarding the reasons for the witness's unavailability or the exceptional circumstances that would warrant having the deposition read.

Upon the reading of any deposition testimony as evidence-in-chief of either an adverse party or unavailable witness, counsel may object at trial, other than to form, regarding the admissibility of any deposition question.[15] This follows the "usual stipulations," entered into at most depositions, that all objections except those "as to form" are preserved for trial. Thought should be given to making a motion *in limine* before the commencement of the trial regarding any parts of the deposition testimony that your adversary is likely to read-in and would be highly prejudicial if heard by the jury.

Using Part of a Deposition: CPLR 3117(b)

If another party reads only part of the deposition, either during cross-examination or during the case-in-chief, any other party may apply to the court to read those portions that in fairness should be read. Again, make sure the court has a copy of the deposition. This applies to both reading from depositions during cross-examination for the purposes of impeachment and to reading-in deposition testimony as evidence-in-chief. It is completely within the court's discretion to decide what will be read and when. This emphasizes the importance of indexing depositions, which is discussed below. The application to read-in the other portions of the deposition that in fairness should be read should be made immediately.

Assuming the application is granted, the next question becomes, when should the additional portions of the deposition be read? In *Villa v. Vetuskey*,[16] the Appellate Division, Fourth Department, held that it was improper for the trial court to permit the defendant's counsel to read from the plaintiff's deposition after the plaintiff's counsel had done so during his case-in-chief. It is not clear from the decision on what basis the plaintiff's counsel read from his client's deposition during his case-in-chief. It is a fair assumption, however, that it would have been on redirect to show a prior consistent statement, to rebut questioning by the defendant's counsel that suggested the plaintiff's testimony was a recent fabrication. The court held that the defendant was required to wait until the plaintiff rested and would then be allowed to read those portions that in fairness should be read in the defendant's case.

In *Gottfried v. Gottfried*,[17] the court held that the defendant could read those portions that should be read in fairness during the plaintiff's case-in-chief to prevent a false impression from being created. This ruling appears to be a more sensible approach to this situation, particularly during cross-examination.

Additional Considerations

Substitution of Parties and Prior Actions: CPLR 3117(c) If in your present action you have the same parties from a prior action, and you are dealing with the same subject matter, the depositions from the earlier action may be used for any purpose. The key is that the parties are the same, and that they were notified of the deposition taken in the prior action and were present or waived their appearance. In regard to the subject matter of the prior action, the same claims need not be asserted in the new action as long as the basic subject matter is the same.

Effect of Using Deposition Testimony: CPLR 3117(d) By taking the deposition of either an adverse party or non-party witness, you are not making that witness yours for the purpose of the trial. When a deposition is used for the impeachment of a witness on cross-examination, the examining party does not make the witness his by doing so, nor does the reading into evidence of an adverse party's testimony as evidence-in-chief. However when counsel reads into evidence the testimony of an unavailable witness or deposition testimony permitted under special circumstances, the witness becomes his own.

A party may introduce evidence that is contrary to his deposition testimony.[18] However, the party may not use his own deposition to impeach himself.[19]

Indexing Depositions

It is not enough to know the law pertaining to the use of depositions at trial. Counsel must be prepared to use them at the moment needed. This is clearly of critical importance in any jury trial, where a delay in locating the testimony counsel wishes to read will not only cause an embarrassing silence but may ultimately result in the jury losing the entire point behind the counsel's reading of the deposition transcript.

In preparation for trial, always read a deposition once to obtain an overall view of the testimony given. Create your own index covering every important point in the deposition. This index should include a brief summary of the testimony, and the page and line numbers where the points may be located. Do this preparation for ***all*** witnesses, whether yours or your adversaries. Use your index while carefully listening to the direct examination of the adverse party in the event of any unanticipated inconsistencies.

By the time cross-examination begins you will have the page and line numbers at your immediate disposal, so you may proceed quickly during your impeachment of the witness. Incorporate the page and line number from your index into the written questions or notes you intend to use on cross-examination, so that in the event an opportunity for impeachment comes up you will be able to quickly locate the page and line number you need.

When reading-in an adverse party's testimony during your own case, or the testimony of a witness who is unavailable, your index should enable you to swiftly narrow down the testimony you wish to read into evidence. Juries are bored and can become hostile to attorneys who are repetitive, so I would suggest keeping your readings to an absolute minimum. Your index will help you do this. Trials most often do not develop as we anticipate they will. They take on a life of their own, and it is the job of the trial lawyer to adjust as quickly as possible, with a view toward making the best possible presentation to the jury.

Finally, whether your adversary uses your client's deposition testimony during the case-in-chief or for impeachment purposes, you must always be ready to immediately make application to the court to read into evidence those portions of your client's testimony that should in fairness be read. This is impossible to do if in trial preparation you do not carefully consider and anticipate which sections your adversary might use. Further, if you do not have your own client's deposition indexed, it will be impossible to quickly identify the sections that should be read and to make your application to the court and avoid embarrassment in front of the jury.

Conclusion

Having the prior sworn testimony of witnesses is one of the greatest assets at your disposal during the course of trial preparation, and it is always enormously useful during the trial. Making sure you know what is in the deposition transcripts, having that information at your immediate disposal and understanding the law that controls its use, will be of enormous benefit to you and, most importantly, to your client.

---

1. N.Y. Pattern Jury Instructions 1:25 (PJI).
2. PJI 1:8.
3. PJI 1:22.
4. 222 A.D.2d 239, 635 N.Y.S.2d 579 (1st Dep't 1995), *leave denied*, 87 N.Y.2d 809, 642 N.Y.S.2d 858 (1996).
5. *Palumbo v. Innovative Communications Inc.*, 175 Misc. 2d 156, 668 N.Y.S.2d 433 (Sup. Ct., N.Y. Co. 1997), *aff'd*, 251 A.D.2d 246, 675 N.Y.S.2d 37 (1st Dep't 1998).
6. *Id*.
7. CPLR 3116(a).
8. PJI 1:75.
9. *Stern v. Inwood Town House, Inc.*, 22 A.D.2d 650, 252 N.Y.S.2d 1006 (1st Dep't 1964).
10. 102 Misc. 2d 589, 424 N.Y.S.2d 93 (Sup. Ct., Queens Co. 1980).
11. 273 A.D.2d 37, 708 N.Y.S.2d 398 (1st Dep't 2000).
12. 128 Misc. 2d 1060, 492 N.Y.S.2d 703 (Sup. Ct., N.Y. Co. 1985).
13. 13 A.D.2d 730, 214 N.Y.S.2d 477 (1st Dep't 1961).
14. 73 Misc. 2d 374, 342 N.Y.S.2d 58 (Fam. Ct., N.Y. Co. 1973).
15. *Mollerson v. The City of New York*, 178 Misc. 2d 803, 680 N.Y.S.2d 800 (Sup. Ct., N.Y. Co. 1998).
16. 50 A.D.2d 1093, 376 N.Y.S.2d 359 (4th Dep't 1975).
17. 197 Misc. 562, 95 N.Y.S.2d 561 (Sup. Ct., N.Y. Co. 1950).
18. *Yeargans v. Yeargans*, 24 A.D.2d 280, 265 N.Y.S.2d 562 (1st Dep't 1965).
19. *Mravlja v. Hoke*, 22 A.D.2d 848, 254 N.Y.S.2d 162 (3d Dep't 1964), *aff'd*, 17 N.Y.2d 822, 271 N.Y.S.2d 271 (1966).

Adapting Sanctions to Conduct Poses Centuries-old Challenge

BY DAVID O. BOEHM

At the head office of the Union Pacific Railroad in Omaha there is an old photograph of a sign that was nailed up along the right-of-way of the railroad somewhere in the Midwest about a century ago. It reads:

> "Notis! Trespassers will be persecuted to the full extent of two mungrel dogs which never was over sochible to strangers and 1 dubble brl shot gun which aint loded with sofa pillers. Dam if I ant getting tired of this hell raisin on my place." B.Criscom.

For centuries, as long as humanity has lived outside of what Locke and Rousseau chose to call a "state of nature," there has been a continuing effort to deal with wrongdoers in the community in ways that would inspire obedience to its laws. One of the stated purposes of our New York Penal Law is to "insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, and their confinement when required in the interests of public protection."

We have carried that idea of deterrence with us from the beginning of recorded history. History, however, keeps teaching us that it simply does not work. For example, under the Code of Hammurabi, as far back as 1740 B.C., thieves and receivers of stolen goods were put to death and yet, no doubt, thieves continued to engage in their enterprising employment and there continued to hang in Babylon, less attractive objects than the Hanging Gardens.

In ancient Rome, under the law of the Twelve Tables that was drawn up around 450 B.C., any slave who committed a theft in daylight would be first soundly lashed and then thrown to his death from the Tarpeian Rock; but if the theft was committed at night, or if the thief was armed and caught in the daytime, he was put to death regardless of whether he was a free man or slave. Nevertheless, theft surely continued during the life of the Roman Empire, as it did in Merrie Ole England, where stealing a loaf of bread could shorten one's life expectancy.

As Professor Packer, in his book *The Limits of the Criminal Sanction*, points out,

> the same deterrent effect on potential offenders might be achieved if 100 murders were disposed of by convicting 100 innocent defendants. The baronet's cousin in Dickens' novel, who, perplexed by the failure of the police to discover the murderer of the baronet's solicitor said, "Far better hang wrong fellow than no fellow," expressed the danger of any criterion of a rule of criminal procedure that is limited solely to preventing crime.

If not deterrence, then what of confinement? It at least serves the sanitary purpose of quarantining the felon and preventing him from committing further crime, not an unimportant consideration if his record is one of energetic recidivism. Actually, prisons represent a relatively recent reform in humanity's long-continuing experiment with criminal sanctions. Prison fortresses, such as the Bastille, Newgate and the Tower of London, represent historical exceptions; most crimes were punished by fines, execution or exile to the New World or Australia. Newgate was the prison from which lower-class lawbreakers were dragged to Tyburn to be hanged, and the Tower of London served a similar purpose for a more aristocratic clientele. The whipping post, the stocks and the pillories were used for lesser crimes and served adequately for private punishment and public entertainment.

Finally, in 1790, outraged by the traditional sentence of corporal and capital punishment, a group of Philadelphia Quakers proposed a new way of dealing with sentenced criminals, one they believed would be more ef-

DAVID O. BOEHM, a retired associate justice of the Supreme Court, Appellate Division, Fourth Department, is now senior counsel at Harris Beach & Wilcox, LLP, in Rochester. He attended St. Joseph's College in Philadelphia and received his J.D. degree from Temple University.

fective and more humane—extended incarceration. As they saw it, prison would be a place where wrongdoers would be reformed through productive labor, Bible study and solitary repentance. In 1830, Philadelphia opened the first structure specifically designed as a prison, whose name, the Eastern State Penitentiary, proclaimed it as a place where the convicts, by a long period of penitence, would be reformed. Prisoners were not permitted to talk to one another and were kept in solitary cells without access to letters, books or other diversions so that they could better contemplate their misdeeds and repent. Even at religious services on Sunday, they were kept isolated from their fellow prisoners by wooden barriers. Prisoners, while going to and from their cells, were compelled to walk silently and in lockstep down the corridors. Other states and Europe quickly copied this new and humane idea. But, in spite of all of the predictions of its well-meaning creators, penitentiaries became what they could not help becoming, institutions of utter horror. Prisoners broke down under the brutality of enforced isolation and many went mad. Like too many other ideological aspirations, the idea failed in practice and had to be abandoned.

The epitome of restitution was probably reached under Anglo-Saxon law at the time of Ethelburt, the King of Kent, who in 597 A.D. was brought into Christianity at Canterbury by Augustine.

One continuing and present criminal sanction takes the form of retribution. Society has the right, perhaps even the obligation, to impose some degree of punishment upon wrongdoers. This serves the important purpose of assuring its members that the laws they live under can effectively take the place of private revenge or vigilante justice. The lives of weak and innocent victims are thus not cheapened by the aggression of the thug and the lawbreaker, because those who harm others become subject to an appropriate retribution. That is one of the accepted purposes of a just society.

A new generation of reformers came up with a fresh idea, that of indeterminate sentences and parole—a system based on the belief that prisoners would be rehabilitated while in prison. Because, the thought went, the warden and prison guards were in the best position to determine when an inmate was sufficiently rehabilitated to be released, there should be, as a corollary, indeterminate sentences. Thus, if someone were sentenced for a crime calling for 15 years of incarceration, he would be sentenced instead to 5 to 15 years, and would be eligible for parole after 5 years, provided he had in that time become rehabilitated. Of course, this required the belief that at underfunded and understaffed institutions such as Auburn and Attica, where many inmates are sentenced for varying degrees of homicide, robbery, violent assaults, rape and the like, the social attitudes and deportment of the inmates could be altered after only a few years of confinement. The hope fathered the thought that being in prison transformed violent malefactors into law-abiding citizens and they could safely be released for the balance of their sentence under the guidance and care of an overwhelmed parole system. The purpose was laudable and deserved to succeed, but, as we know, this is one more unmet penal goal. Unfortunately, except for some notorious prisoners like Manson and Hinckley, release on parole is today based more on prison space overload than on individual rehabilitation.

Then there was the suggestion offered by former Governor Mario Cuomo some years ago to use barges to house prisoners instead of building more prisons. That idea was not new. It replicated what had been done in England in the 18th century, when convicts were held in decommissioned naval vessels moored in the Thames estuary.

Reformers have created another sentencing mode, that of restitution. But that idea has an even longer history. It originated in societies far more primitive than ours and merely represents the old rate of exchange of an eye for an eye expressed in different terms. Thus, under the Code of Hammurabi, someone who stole a domestic animal, like a pig or goat, had to make restitution. However, the amount of restitution depended on the status of the owner—the code acted like an early social register. Thus, if the animal was the property of one of the gods or of the king, payment was thirty-fold. But, if it was the property of a common man, restitution was only tenfold. Regrettably, if the thief was a pauper and lacked the ready cash, the debt was discharged by execution, literally.

The epitome of restitution was probably reached under Anglo-Saxon law at the time of Ethelburt, the King of Kent, who in 597 A.D. was brought into Christianity at Canterbury by Augustine. There again, justice was meted out in proportion to rank, and again the size of the payment, or *weregild* as it was called, was based on one's status in society. Thus if a man "lay" with the wife of a 12-hynde man (a wealthy landowner) he was obligated to pay the offended husband 120 shillings, but if he lay with the wife of a lesser 6-hynde man, compen-

sation was reduced to 100 shillings. If the lady were only the wife of a churl (a landless peasant), the damages went down to 40 shillings. The greater the wealth, the greater the injury.

One of the most prominent features of Anglo-Saxon law was the graduated scale at which injuries were valued. Tort lawyers did not flourish in those times, and the compensation for injury foreshadowed our modern workers' compensation schedules. A great toe that was struck off was worth 20 shillings; an arm broken above the elbow, 15 shillings; an ear stuck off, 12 shillings. In the reign of Aethelburt, damages for a struck-off thumb came to 20 shillings, but three centuries later, under the reign of Alfred the Great, they had increased to 30 shillings. Thus was inflation introduced into the criminal law.

If we again measured the crime by a cash amount, one cannot help but wonder what it would be for a crime like rape. Fortunately, today the *weregild* would be no different for Mrs. O'Grady than it would be for the Colonel's lady. One might, however, question the wisdom of any penal code that limited the amount of restitution to the value of what was stolen. As one skeptic suggested, the thief would literally have nothing to lose.

Restitution might be made more meaningful if it were accompanied by another sentencing mode that has been suggested, that of reconciliation. It is insufficient to have someone stamp "Paid" upon a restitution order, give the conscientious burglar a receipt and call it a day. Genuine reconciliation would require that the wrongdoer sit down with the victim, assuming the victim were willing, and genuinely seek that person's forgiveness. Restitution would then serve the effective purpose of being considerably more than a coerced economic apology. Again, we don't know how well this would work.

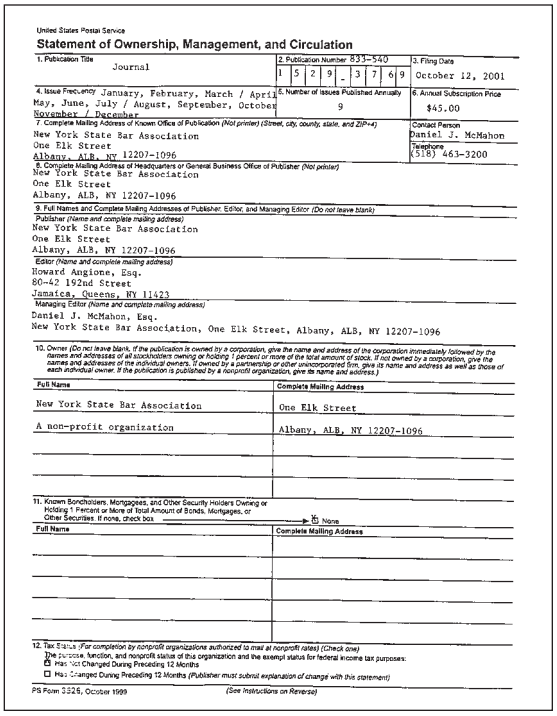
In spite of our continuing unsuccessful effort throughout history to deal with malefactors, civilized societies are obliged to continue experimenting with appropriate penal sanctions. It is appropriate that the sentences we impose reflect the changing standards and values of the society in which we live? In its fundamentals, human crime remains the same, but it is our striving to adapt criminal sanctions to what we have learned about human conduct and what we have achieved in our own morality that brings us closer to the goal of making our penal and criminal justice systems better ones.

We have, at least to some degree, moved away from the kind of retribution it is said Judge M.B. Gerry imposed when he sentenced one Albert E. Packer to death. Packer had killed and eaten five companions when they were caught in a Colorado blizzard in 1873.

"Stand up you man-eating son-of-a-bitch and receive your sentence," Judge Gerry reportedly said. "There were seven Democrats in Hinsdale County, but you, you voracious, man-eating son-of-a-bitch, you ate five of them. I sentence you to be hanged by the neck until you're dead, dead as a warning against reducing the Democratic population of this state."

Poor Mr. Packer should have first checked the political affiliations of his victims before including them in his menu.

The *Journal*'s 2001 Statement of Ownership, Management and Circulation



United States Postal Service

Statement of Ownership, Management, and Circulation

1. Publication Title	2. Publication Number	3. Filing Date
Journal	1 5 2 9 - 3 7 6 9	October 12, 2001

4. Issue Frequency: January, February, March / April, May, June, July / August, September, October, November / December

5. Number of Issues Published Annually: 9

6. Annual Subscription Price: $45.00

7. Complete Mailing Address of Known Office of Publication (Not printer) (Street, city, county, state, and ZIP+4)
New York State Bar Association
One Elk Street
Albany, ALB, NY 12207-1096

Contact Person: Daniel J. McMahon
Telephone: (518) 463-3200

8. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not printer)
New York State Bar Association
One Elk Street
Albany, ALB, NY 12207-1096

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not leave blank)
Publisher (Name and complete mailing address)
New York State Bar Association
One Elk Street
Albany, ALB, NY 12207-1096
Editor (Name and complete mailing address)
Howard Angione, Esq.
80-42 192nd Street
Jamaica, Queens, NY 11423
Managing Editor (Name and complete mailing address)
Daniel J. McMahon, Esq.
New York State Bar Association, One Elk Street, Albany, ALB, NY 12207-1096

10. Owner (Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)

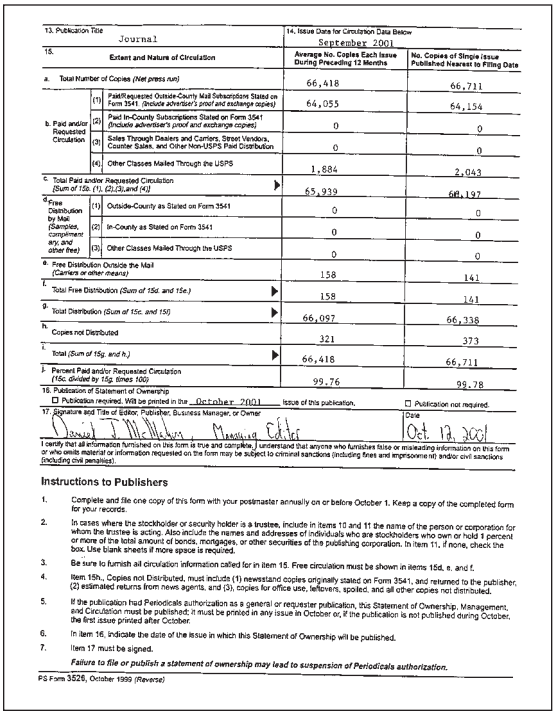
Full Name	Complete Mailing Address
New York State Bar Association	One Elk Street
A non-profit organization	Albany, ALB, NY 12207-1096

11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box → ☒ None

Full Name	Complete Mailing Address

12. Tax Status (For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one)
The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes:
☒ Has Not Changed During Preceding 12 Months
☐ Has Changed During Preceding 12 Months (Publisher must submit explanation of change with this statement)

PS Form 3526, October 1999 (See Instructions on Reverse)



13. Publication Title: Journal	14. Issue Date for Circulation Data Below: September 2001	
15. Extent and Nature of Circulation	Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies (Net press run)	66,418	66,711
b. Paid and/or Requested Circulation (1) Paid/Requested Outside-County Mail Subscriptions Stated on Form 3541. (Include advertiser's proof and exchange copies)	64,055	64,154
(2) Paid In-County Subscriptions Stated on Form 3541 (Include advertiser's proof and exchange copies)	0	0
(3) Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Non-USPS Paid Distribution	0	0
(4) Other Classes Mailed Through the USPS	1,884	2,043
c. Total Paid and/or Requested Circulation [Sum of 15b. (1), (2),(3),and (4)]	65,939	66,197
d. Free Distribution by Mail (Samples, complimentary, and other free) (1) Outside-County as Stated on Form 3541	0	0
(2) In-County as Stated on Form 3541	0	0
(3) Other Classes Mailed Through the USPS	0	0
e. Free Distribution Outside the Mail (Carriers or other means)	158	141
f. Total Free Distribution (Sum of 15d. and 15e.)	158	141
g. Total Distribution (Sum of 15c. and 15f)	66,097	66,338
h. Copies not Distributed	321	373
i. Total (Sum of 15g. and h.)	66,418	66,711
j. Percent Paid and/or Requested Circulation (15c. divided by 15g. times 100)	99.76	99.78

16. Publication of Statement of Ownership
☐ Publication required. Will be printed in the October 2001 issue of this publication. ☐ Publication not required.

17. Signature and Title of Editor, Publisher, Business Manager, or Owner — Date: Oct. 12, 2001

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

Instructions to Publishers

1. Complete and file one copy of this form with your postmaster annually on or before October 1. Keep a copy of the completed form for your records.
2. In cases where the stockholder or security holder is a trustee, include in items 10 and 11 the name of the person or corporation for whom the trustee is acting. Also include the names and addresses of individuals who are stockholders who own or hold 1 percent or more of the total amount of bonds, mortgages, or other securities of the publishing corporation. In item 11, if none, check the box. Use blank sheets if more space is required.
3. Be sure to furnish all circulation information called for in item 15. Free circulation must be shown in items 15d, e, and f.
4. Item 15h., Copies not Distributed, must include (1) newsstand copies originally stated on Form 3541, and returned to the publisher, (2) estimated returns from news agents, and (3), copies for office use, leftovers, spoiled, and all other copies not distributed.
5. If the publication had Periodicals authorization as a general or requester publication, this Statement of Ownership, Management, and Circulation must be published; it must be printed in any issue in October or, if the publication is not published during October, the first issue printed after October.
6. In item 16, indicate the date of the issue in which this Statement of Ownership will be published.
7. Item 17 must be signed.

Failure to file or publish a statement of ownership may lead to suspension of Periodicals authorization.

PS Form 3526, October 1999 (Reverse)

Now You See It, Now You Don't: Depublication and Nonpublication Of Opinions Raise Motive Questions

BY BENNETT L. GERSHMAN

The judicial opinion is the heart of the common law system. The judicial opinion is what law students study, lawyers research and argue, and judges apply through the doctrine of precedent. By authoritatively declaring and interpreting a general principle of law, the opinion promotes stability, certainty, and predictability of law. By its fidelity to authority and principle, the judicial opinion assures the legitimacy and accountability of our judicial process, and, for that matter, of our judges.

The judicial opinion, however, does not always live up to its role. Judicial opinions sometimes hide or misrepresent facts, are withdrawn from public scrutiny after having already been published, or are not even published at all. By these methods, the judicial opinion, which to many is the equivalent of a sacred text, becomes vulnerable to criticism over the motive for the alteration. And the suggestion of improper motive may undermine the legitimacy of the appellate judicial process itself.

The basis for these comments is a decision last year by the Eighth Circuit Court of Appeals in *Anastasoff v. United States*.[1] The court held that an Eighth Circuit local rule, which authorized nonpublication of opinions and explicitly stated that unpublished opinions were to have no precedential effect, was unconstitutional. The panel, in an opinion by Judge Richard S. Arnold, reasoned that a court rule purporting to confer upon appellate judges an absolute power to decide which decisions would be binding and which would not be binding went well beyond the "judicial power" within the meaning of Article III of the U.S. Constitution.[2]

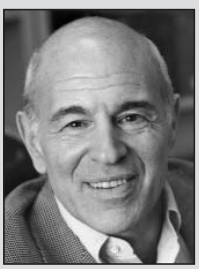
To be sure, *Anastasoff* addressed only one example of an appellate court deciding for itself the precedential effect of its prior written decisions simply by not allowing them to be published, or by not allowing them to be formally cited. But courts also apply other methods that manipulate judicial opinions to conceal information about the reasoning behind the decision, why the decision was altered, or why the decision was excised from public scrutiny. These methods include (1) misstating or distorting the facts, (2) altering factual findings or legal conclusions that were previously made, (3) excising opinions that have already been published, and (4) issuing opinions that are not even published.

Misrepresenting Facts

It is hardly a secret that courts misstate facts. Every lawyer involved in litigation probably can cite several instances of courts misstating or distorting the facts in a particular case. To be sure, the extent to which courts misrepresent facts is hard to measure. Most of the time the only persons who know about it are the attorneys who argued the case. And they are unlikely to criticize the court publicly. To give the court an opportunity to rectify a material misstatement, the lawyer may file a motion to reargue the case based on the court's mistaken description of the facts. But it is rare that a court will even acknowledge a mistake, let alone correct it.

Why do courts misstate facts? The volume of litigation sometimes may account for a court's lackadaisical attitude toward the facts of a case. There are also instances, however, in which there is little doubt that a court has closely examined and understood the factual record, and then produced a recitation and interpretation of the facts that not only is at variance with the record, but appears to have been deliberately reconstructed to achieve a particular result.

One well-known instance is *Harris v. New York*,[3] in which the U.S. Supreme Court held that statements elicited in violation of *Miranda v. Arizona*[4] may be used to impeach a defendant's credibility. In deciding this controversial question, the Court's majority declared:



BENNETT L. GERSHMAN, a professor at Pace University School of Law, is the author of *Prosecutorial Misconduct* (West Group, 2d ed. 1999) and *Trial Error and Misconduct* (Lexis Law Pub., 1997). He received the NYSBA award for outstanding contribution to criminal law education in 1991. A graduate of Princeton University, he received his J.D. degree from New York University School of Law.

"Petitioner makes no claim that the statements made to the police were coerced or involuntary."[5] However, it is absolutely clear that the record contains abundant evidence that such a claim was made, and that the facts in the case plausibly support such a claim.[6]

Another example of an arguably deliberate misrepresentation of the factual record is provided by Professor Anthony D'Amato, in describing the facts in a notorious Chicago murder case. D'Amato, who participated in the federal habeas corpus proceedings, convincingly argues not only that the defendant was factually innocent, but that the opinion of the Seventh Circuit Court of Appeals seriously distorted the facts. The most telling misrepresentation was the court's treatment of the time line for the murder to create a theory justifying the defendant's conviction. In doing so, the court had to discount the prosecution's own theory of the time line.

Critics have complained that courts frequently falsify or misrepresent facts. Dean Monroe Freedman, in a speech to the Federal Circuit Judicial Conference, protested the practice whereby judicial opinions "falsify the facts of the cases that have been argued," make "disingenuous use or omission of material authorities," or "cover up these things with no-publication or no-citation rules."[7]

Changing the Facts of an Already Published Opinion

The extent to which appellate courts change the substance of a previously published opinion is difficult to ascertain. There often is no way to study the question unless one is able to compare the original opinion, either in a slip sheet, advance sheet, or electronic format, with the version as it finally appears in a hardbound volume. There are occasions, of course, when a judicial opinion notifies its audience of a substantive change, typically by reciting that the original opinion has been amended. However, sometimes opinions are changed without any notice, so that it becomes very difficult for anyone other than the attorneys to know of the alteration.

For example, in *United States v. Valentine*,[8] the Eleventh Circuit vacated a sentence because the district judge committed plain error in failing to give the defendant notice that it was considering increasing the sentence from the sentencing range provided by the Federal Sentencing Guidelines. However, in the original opinion electronically reproduced on Westlaw,[9] the court included the following passages highly critical of the prosecutor:

> Responsibility for this error, we believe, lies equally with the Assistant United States Attorney ("AUSA"). When prosecuting a criminal case, an AUSA is both a representative of the United States and an officer of the court; as such, he or she is charged with ensuring that justice is done according to law.
>
> In Valentine's sentencing hearing, the district judge departed upward sua sponte from the guideline offense level, eventually arriving (through no guided means) at a sentence approximately three times as severe as the one mandated by the guidelines. The AUSA knew—or should have known—not only that an unguided departure was of questionable legality, but also that the district court, in imposing its sentence, had disregarded Burns' instructions. [*Burns v. United States*, 501 U.S. 129 (1991)]. The AUSA's obligation at sentencing (as an officer of the court) was to inform the district court of such error in the hope that the court would obviate the need for this appeal by remedying the error. The resources of this court, the district court (which now must conduct a new sentencing hearing), and the office of the United States Attorney (which has had to brief and argue this appeal as well as participate in a new sentencing hearing) are too limited to waste on unnecessary—and easily avoidable—litigation.

In the official version of the opinion formally published in Volume 21 of the Federal Reporter 3d Series, the above paragraphs were excised,[10] leaving only the isolated reference to the district court's commission of "plain error" in not affording the defendant notice of the proposed sentence. Moreover, there is no indication in the final published opinion why the original opinion was changed, or why the court's initial rebuke of the prosecutor was removed.

Another instance of a court altering findings contained in an originally published opinion is the opinion of the Second Circuit Court of Appeals in *United States v. Reyes*.[11] In *Reyes*, the Second Circuit reversed a narcotics conspiracy conviction because the prosecutor elicited inadmissible hearsay testimony from a government agent by contending that the testimony was merely "background," when in fact it was used to prove the truth of the information and thereby seriously prejudice the fair trial rights of the defendants. The following is a portion of the prosecutor's direct examination of the agent:

Question: [By Prosecutor]: Now, did you have further discussions with [Fernando and Francisco] [two other co-conspirators] at some time after one o'clock on September 20 of 1990?

Answer: [By Customs Agent Caggiano]: Yes

Question: And did those further discussions with these individuals cause you to believe that there were other people involved with them in this particular criminal activity?

Answer: Yes, I did.

Question: And who were those two individuals?

Answer: Would you repeat the question?

Question: Yes. As a result of your further conversations, did you come to a conclusion that there were other individuals involved in this criminal enterprise?

Answer: Yes, I did.

Question: And who were those other individuals?
Answer: Rafael Reyes and Jeffrey Stein.[12]

In its originally published version, in the form of a slip opinion as well as in the electronic reproduction, the Second Circuit found that the Assistant United States Attorney who prosecuted the case had unfairly manipulated the direct examination of the government agent by pretending to offer the testimony for the non-hearsay purpose of explaining the agent's state of mind, when in reality the prosecutor was using the testimony for the forbidden purpose of insinuating that other co-conspirators had acknowledged to the agent that co-defendants Reyes and Stein had participated in the conspiracy. The Second Circuit agreed that the trial prosecutor had used this proof

> not for the limited non-hearsay purpose for which the evidence was *apparently* offered, but *for the truth of what Fernando stated*. In addition, the Assistant United States Attorney [in his summation] seriously distorted and exaggerated what Fernando was reported to have said.[13]

However, in its amended opinion, contained in the official version published in Volume 18 of the Federal Reporter 3d Series, the passage above has been eliminated. In its place, the appellate panel wrote:

> We are assured by the Government and are fully convinced that the discrepancy between Caggiano's testimony and the summation was not intentional. Although the mistake had innocent origins, our concern is for its possible effect on the jury, especially in that it was coupled with the other hearsay testimony that communicated Fernando's implication of Stein.[14]

The court's absolution of the prosecutor of any misconduct in its revised opinion is curious. To an informed observer familiar with the record, the prosecutor in *Reyes* committed deliberate misconduct by questioning the agent under the guise of "background" for the purpose of introducing enormously damaging testimony that one co-conspirator had identified two other co-defendants as having participated in the conspiracy. Every experienced prosecutor is aware of how this pernicious tactic can subtly circumvent the hearsay rule and the Confrontation Clause.[15] A court is fully justified, as was the Second Circuit in its original opinion, in concluding that the prosecutor intentionally planted in the jurors' minds the unfair and highly damaging impression that the one defendant had implicated other defendants.

Another egregious instance of a court cleansing the record of references to prosecutorial misconduct is *United States v. Collicott*.[16] In *Collicott*, the Ninth Circuit Court of Appeals reversed a narcotics conviction because the trial judge erroneously admitted hearsay statements expressly insinuating the defendant's guilt under the mistaken exceptions for prior consistent statements and past recollection recorded. The trial error was obvious, and the prejudice considerable, as the Ninth Circuit concluded. However, in its original opinion, published in the official soft-cover Federal Reporter "advance sheets" as well as reproduced electronically, the court appended a footnote that harshly rebuked the trial prosecutor:

> Though the trial court erred in admitting Zaidi's prior statements, it did so only upon invitation from the Government. We admonish the Assistant U.S. Attorney in this case for engaging in prosecutorial overkill, a practice employed by a few overzealous prosecutors who try to slip in damaging evidence through the back door, without focus on the rules of evidence or the consequences on appeal, hoping that this scattergun approach will hit some evidentiary target.

Regrettably, and incomprehensibly, the appellate panel excised this footnote from its published opinion in the hardbound Volume 92 of the Federal Reporter 3d Series. Thus, the original opinion, containing an important judicial critique of a common, and flagrant, prosecutorial tactic of introducing damaging hearsay through the "back door," has been erased.[17]

Finally, there are occasions when an appellate court decides that it is appropriate to identify by name in a judicial opinion an attorney who has committed misconduct or otherwise violated rules of trial practice. Indeed, given the paucity of professional or other discipline of errant lawyers, and particularly of prosecutors, courts have suggested that such personal attribution might serve as an effective deterrent to misconduct.[18] So, in *United States v. Kojayan*,[19] the Ninth Circuit reversed a narcotics conviction because the prosecutor committed outrageous misconduct by lying to the jury and the trial judge about whether a particular cooperating witness was available to give testimony for the government. After the defense attorney argued in summation that a particular individual who was privy to the drug transaction could have been called as a government witness, but was not, the prosecutor made the following statement to the jury:

> The government can't force someone to talk. He has the right to remain silent. Don't be misled that the government could have called Nourian.

The prosecutor was lying, because as the opinion correctly notes, the witness had entered into a cooperation agreement with the prosecutor and had promised to testify truthfully in any matters in which the government might request his testimony. In reversing the conviction, the Ninth Circuit, in a scathing opinion by Judge Alex Kozinski, condemned the prosecutor for his deceit. Indeed, the misconduct was so flagrant that the court identified the prosecutor by name throughout the opinion, which was originally published electronically and in California's Daily Appellate Report.[20] However, in

the published decision of *Kojayan* that appears in the hardbound Volume 8 of the Federal Reporter 3d Series, the places in the original opinion where the prosecutor's name appeared have been changed to "the Assistant United States Attorney," or the "AUSA." Although the court's harsh rebuke remains, and the conviction vacated, the opinion now conceals the prosecutor's identity, and the court gave no reason why it suppressed that information.

Excising Published Opinions

Occasionally, courts issue opinions that are duly published in the regional reporter's "advance sheets" and given an appropriate numerical citation, only to be withdrawn when the opinion is formally reproduced in the hardbound volume of the reporter. When the reader goes to the particular pages of the bound volume, the reader encounters a series of blank pages where the earlier published opinion would have been reproduced. Moreover, there is no indication by the court of the reason for the removal of the opinion. Indeed, the deletion of some arguably controversial opinions raises troubling questions about the motivation for the deletion.

Federal courts of appeals, under a variety of differing and inconsistent rules, issue well over 10,000 unpublished opinions annually.

Two examples suffice. In *United States v. Tarricone*, originally published in a soft-cover advance sheet,[21] as well as electronically,[22] the Second Circuit Court of Appeals remanded the case to the trial court for a hearing to determine whether false testimony by the prosecution's cooperating witness affected the jury's verdict. The panel's opinion is emphatically clear that the federal prosecutors knew that their witness's testimony was false. The appellate panel wrote: "The government's action in deliberately soliciting testimony which it had every reason to believe to be false, and which it now concedes was false, is altogether unacceptable."[23] However, in Volume 11 of the Federal Reporter 3d Series, pages 24-26 are blank, and there is only an "Editor's Note" that this opinion has been withdrawn at the court's request. There is no explanation for the withdrawal.

Similarly, in *United States v. Escamilla*, published in the soft-cover advance sheets,[24] the Ninth Circuit Court of Appeals reversed a narcotics conviction because the trial prosecutor improperly introduced statements made by the defendant during a plea agreement which was later revoked. According to the court, the prosecutor engaged in "fundamental unfairness" by using the benefit of its plea bargain to convict the defendant, but denying the defendant his benefit of the bargain.[25] However, as in *Tarricone*, pages 465-469 of hardbound Volume 975 of the Federal Reporter 2d Series are blank, since the opinion was ordered withdrawn by the court. No explanation is given for the excision.

Unpublished Opinions

The opinion's role is drastically reduced by practices such as selective publication, summary disposition, and *vacatur* upon settlement. Unpublished opinions are an extremely common practice in the federal system. Federal courts of appeals, under a variety of differing and inconsistent rules, issue well over 10,000 unpublished opinions annually. There has been considerable academic and judicial commentary over the practice, much of it critical. The *Anastasoff* case, discussed above, is only the latest manifestation of the controversy.

Summary disposition occurs when a court announces its judgment of affirmance or reversal orally in open court or with a very brief (usually one sentence or one word) order without any explanation for the disposition. There are nearly as many summary dispositions as there are unpublished opinions. The precedential value of summary dispositions is unclear and varies from circuit to circuit.

Vacatur upon settlement is a practice whereby courts excise decisions in accordance with settlement agreements by the parties. Again, the use of this practice varies among the circuits. The *vacatur* has the effect of nullifying a court's decision without any explanation of the reasons. Thus, there may be confusion about the state of the law following *vacatur*, because the vacated judgment leaves a void regarding whether the vacated judgment was correct.

The dominant rationale for non-publication has been the explosion of the courts' dockets and the costs associated with expanded publication of routine cases that arguably do not establish new law. An efficiency rationale for limiting publication is the extent to which it helps alleviate the huge backlog of cases. If opinions are selectively published, judges can spend less time writing opinions and more time deciding a greater number of cases.

However, routinely suppressing decisions has several costs. Unpublished opinions, as Judge Patricia Wald wrote, "increase the risk of nonuniformity, allow difficult issues to be swept under the carpet, and result in a body of 'secret' law practically inaccessible to many lawyers."[26] This criticism has considerable merit. And now that the explosion in electronic reporting has made

unpublished opinions more accessible, there may be less need for such a rule. In any event, courts should permit anyone, party or nonparty, to petition a court to publish an unpublished opinion. Finally, the practice of *vacatur* upon settlement should be abolished, and courts should be prohibited from summarily disposing of a case without clearly explaining the reasons for the decision.

Conclusion

As this discussion has demonstrated, much of the law is hidden from the public's view. Judges control their cases, their dockets, and the manner and openness of the decision-making process. Nobody would disagree that the law needs to be visible to the public, and judges need to be accountable to the public. A court's written opinion reveals to the public the court's analysis, reasoning, and grounds for decision. The opinion provides a safeguard against judicial abuse of power or dereliction of responsibilities. Hiding or altering opinions without adequate explanation affects the legitimacy of the judicial process, and of the law.

---

1. 223 F.3d 898, *vacated*, 235 F.3d 1054 (8th Cir. 2000).
2. As discussed below, such "no publication," or "no citation" rule is commonplace in every federal circuit and many state courts, and has been the subject of extensive academic commentary.
3. 401 U.S. 222 (1971).
4. 384 U.S. 436 (1966).
5. *Harris*, 401 U.S. at 224. The statement is crucial because the Court later suggests that an involuntary statement probably could not be used to impeach. *Id*. at 229 n.2.
6. For an excellent discussion of the Court's misrepresentation, and the likely reasons, see Alan M. Dershowitz & John Hart Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 Yale L.J. 1198 (1971).
7. Monroe Freedman, Speech to The Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit (May 24, 1989), *reprinted in* 128 F.R.D. 409, 439 (1989).
8. 21 F.3d 395 (11th Cir. 1994).
9. 1994 WL 171600, *3 (11th Cir. Ga.) (The opinion as originally published at this cite no longer exists. The user is directed to the official decision).
10. *Valentine*, 21 F.3d at 398.
11. 18 F.3d 65 (2d Cir. 1994).
12. *Id*. at 67.
13. *Reyes*, No. 93-1570, slip op. at 1841. (The opinion as originally published at this cite no longer exists. The user is directed to the official decision).
14. *Reyes*, 18 F.3d at 69.
15. *See Mason v. Scully*, 16 F.3d 38 (2d Cir. 1994); *Zemo v. State*, 646 A.2d 1050, 101 Md. App. 303 (1994); *People v. Tufano*, 69 A.D.2d 826, 415 N.Y.S.2d 42 (2d Dep't 1979).
16. 92 F.3d 973 (9th Cir. 1996).
17. *See* Bennett L. Gershman, *Prosecutorial Misconduct in Presenting Evidence: "Backdooring" Hearsay*, 31 Crim. L. Bull. 99 (1995).
18. *See United States v. Modica*, 663 F.2d 1173 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).
19. 8 F.3d 1315 (9th Cir. 1993).
20. 93 Daily Journal D.A.R. 10030; 93 Cal. Daily Op. Service 5859, 1993 U.S. App. LEXIS 19873 (9th Cir. 1993).
21. 11 F.3d 24 (2d Cir. 1993).
22. 1993 U.S. App. LEXIS 31550 (2d Cir. 1993).
23. *Tarricone*, 11 F.3d at 26-27 (unpublished opinion).
24. 975 F.2d 568 (9th Cir. 1992).
25. *Id*. at 571-72 (unpublished opinion).
26. *National Classification Comm. v. United States*, 765 F.2d 164, 173 n.2 (D.C. Cir. 1985).

Phase-Ins, Phase-Outs, Refunds And Sunsets Mark New Tax Bill, a/k/a EGTRRA 2001

BY EUGENE E. PECKHAM

The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) allegedly reduces taxes by $1.35 trillion over a 10-year period. Many provisions of the legislation phase in or phase out over several years up until 2009. To stay within the $1.35 trillion limit, all provisions of the act sunset on December 31, 2010, and supposedly, the law will revert to the provisions in effect for 2001. Obviously, this will never happen.

Either Congress will extend the law, extend or accelerate some parts of it but not others, or terminate future phase-ins if projected budget surpluses do not materialize. In the meantime, lobbyists will have a field day trying to get the pet provisions that benefit their clients extended or accelerated. Members of Congress and candidates for Congress will happily collect campaign contributions from all the lobbyists and their clients who want something.

Because of all the phase-ins and phase-outs, tax planning by tax advisors for their clients is made more difficult. An extreme example is the repeal of the estate tax for the year 2010. Obviously, this makes it beneficial for very wealthy people to die in 2010; but who can or wants to plan for that? (See the September 2001 issue of the *Journal* for coverage of the estate tax changes.)

Rate Reduction

The centerpiece of the legislation is a reduction in the marginal tax rates. A new 10% bracket is created for the first $12,000 ($14,000 in 2008) of taxable income for joint filers, $6,000 ($7,000 in 2008) for single filers and $10,000 for heads of households. These amounts may be adjusted for inflation beginning in 2009.[1] The benefit of this new 10% bracket has appeared in the form of refunds to taxpayers who paid income tax in 2000,[2] with most taxpayers receiving $300 if single (5% of $6,000) or $600 if joint (5% of $12,000). However, many persons who paid Social Security and other taxes have been dismayed to find that because they had no taxable income on their return, they have received no refund. Thus, the persons with the lowest incomes who paid no income tax get no refund.

Along with the new 10% rate, the new law phases in reductions in all rates[3] as follows:

Calendar Year	Current 15% Rate	Current 28% Rate	Current 31% Rate	Current 36% Rate	Current 39.6% Rate
2001 (effective 7/1/2002)	Refund/ Credit	27.5%	30.5%	35.5%	39.1%
2002-2003	No change	27%	30%	35%	38.6%
2004-2005	No change	26%	29%	34%	37.6%
2006 and later	No change	25%	28%	33%	35%

Marriage Penalty Reduction

Another key feature of EGTRRA is a reduction in the marriage penalty, whereby married couples pay more tax than they would if they had each filed as single individuals. To reduce the penalty, the new law, beginning in 2005, increases in stages the standard deduction on a joint return until it equals twice the deduction allowed on a single return and also expands the top of the 15% bracket to twice that of single taxpayers.[4] The schedule is as follows:

Year	Standard Deduction	15% Rate
2005	174%	180%
2006	184%	187%
2007	187%	193%
2008	190%	200%
2009	200%	200%

EUGENE E. PECKHAM , a member of the *Journal*'s Board of Editors, is judge of the Broome County Surrogate's Court. He is a former partner in the Binghamton firm of Hinman, Howard & Kattell, LLP and a past chair of the Trusts and Estates Law Section of the NYSBA. A graduate of Wesleyan University, he received his J.D. degree from Harvard Law School.

Example: In 2001, the standard deduction is $4,550 for single taxpayers and $7,900 on a joint return, while top of the 15% bracket is $27,050 for singles and $45,200 for joint filers. Assuming no adjustments for inflation, in 2009 the standard deduction would remain $4,550 for singles but would be $9,100 for joint filers, while the top of the 15% bracket would remain $27,050 for single but be $54,100 for joint filers.

Another provision gradually increases the refundable earned income credit for married couples over the years 2002 to 2008.[5] In 2008, the maximum increase in this credit for a couple with two children is to be $631.80, a modest saving but not a major benefit for low-income persons.

Changes in Exemptions and Deductions

Under present law, personal exemptions phase out for adjusted gross income (AGI) amounts over certain limits, while itemized deductions are reduced by 3% of the excess of AGI over a certain limit. The new law cuts these reductions to two-thirds of the prior amount in 2006 and 2007, one third in 2008 and 2009 and eliminates them in 2010.[6]

Example: In 2001, a married couple with two children would have their exemptions reduced by $4,200 and their itemized deductions by $900. In 2006 and 2007, the reductions would be $2,800 and $600. In 2008 and 2009, the reductions would be $1,400 and $300.

The exemption amount for the alternative minimum tax (AMT) is increased to $49,000 for joint returns and $35,750 for single returns beginning in 2001 and ending after 2004.[7] The new law also allows taxpayers to use their newly increased child tax credit against their AMT liability beginning in 2002.[8]

Credits Another major feature of EGTRRA is the increase in the child tax credit for each child under 17 from $500 to $1,000, but again the change is spread out over 10 years. The credit goes up to $600 for 2001 to 2004, $700 from 2005 to 2008, $800 in 2009 and $1,000 in 2010.[9] The credit is also made refundable beginning in 2001 to the extent of 10% (15% after 2005) of earned income in excess of $10,000.[10] Thus in 2001 a couple with earned income of $15,000 and one child will get a refundable credit of $500.

The child and dependent care credit that is available for child and dependent care expenses such as day care is also increased for tax years beginning in 2003. The former credit was 30% of employment-related expenses up to $2,400 for one child and $4,800 for two (including other dependents physically or mentally incapable of self-care). The credit rate decreased to 20% as AGI increased to $28,000. The new rates start at 35% and decrease to 20% at $43,000 AGI and the dollar limits increase to $3,000 and $6,000.[11]

Example: Assume a taxpayer with AGI of $12,000 in 2003, two children and $2,000 of employment-related expenses: the credit will be $700 (35% x $2,000). Assume a second taxpayer with AGI of $43,000 in 2003 with one child and $16,000 of employment-related expenses: the credit will be $3,000 (20% x $16,000 = $3,200, but limited to $3,000).

The credit for qualified expenses for adopting a child increases to $10,000 for both regular and special needs adoptions for tax years beginning in 2003. Also, the phase-out of this credit will begin at $150,000 of modified AGI instead of at $75,000.[12]

Education

There are now at least eight different deductions and credits specifically to encourage education.[13] Logic would suggest that, if tax simplification were the goal, these could be combined into one or two, but now we have a ninth, a new higher-education tuition deduction for tax years 2002 to 2005, which disappears in 2006 unless, of course, Congress extends it. The interaction between all of these education benefits is mind-boggling, with some allowed to be used in combination with others and others not, together with various levels at which the benefit phases out. A whole new profession of college planning counselors has grown up to try to help parents negotiate this minefield of education credits and deductions.

For example, the new tuition deduction is an above-the-line deduction for AGI limited to $3,000 in 2002 and 2003 ($4,000 in 2004 and 2005) for qualified expenses paid for taxpayer and dependents when the taxpayer's AGI is less than $65,000 on a single return or $130,000 on a joint return, but is limited to $2,000 in 2004 and 2005 if AGI is less than $80,000 or $160,000 joint. The deduction is disallowed if the Hope and Lifetime Learning Credit is taken for the same expense, and it is reduced for any exclusion taken for Education Savings Bonds, Education IRA or IRC § 529 Qualified Tuition.[14]

The deduction for student loan interest of $2,500 per year was previously limited to a maximum of 60 months, but the limit has been repealed. In addition, the phase-out range of the deduction has been increased to $50,000 to $65,000 of AGI on a single return and $100,000 to $130,000 on a joint return.[15]

IRC § 529 (Qualified Tuition Program Deduction) formerly could be set up only by a state. In New York, this is the program that is run by TIAA-CREF and allows a $5,000 deduction per taxpayer per year off New York State income tax. The new law permits private colleges and universities to establish these programs. More significant is the provision that distributions from these pre-paid tuition savings programs will be excluded from gross income when withdrawn and used for higher-education expenses, subject as above to coordination with the other exclusions and credits.[16]

The education IRA also has been significantly improved. The amount that can be contributed has been

increased from $500 to $2,000 effective in 2002. The phase-out range is also increased to $95,000 to $110,000 of AGI for single taxpayers and $190,000 to $220,000 for married taxpayers. A further change is to allow the money to be withdrawn for elementary and secondary school tuition and expenses as well as college costs. Lastly, the money withdrawn from the IRA can be excluded from gross income, and in addition the Hope and Lifetime Learning Credits may be claimed in the same year, as long as the money is not used for the same expenses.[17]

Retirement Plans

The contribution limits for all types of retirement plans will be phased in over the years as follows:

Year	IRA[18]	401(k) and 403(b)[19]	SIMPLE[20]
2002	$3,000	$11,000	$7,000
2003	$3,000	$12,000	$8,000
2004	$3,000	$13,000	$9,000
2005	$4,000	$14,000	$10,000
2006	$4,000	$15,000	
2007	$4,000		
2008	$5,000		

After the phase-in is completed, each type of plan will have a cost-of-living adjustment thereafter.

In addition, for people over 50, additional catch-up contributions will be allowed as follows:

Year	IRA[21]	401(k) and 403(b)[22]	SIMPLE[23]
2002	$500	$1,000	$500
2003	$500	$2,000	$1,000
2004	$500	$3,000	$1,500
2005	$500	$4,000	$2,000
2006	$1,000	$5,000	$2,500

Example: In 2002, persons over 50 can put $3,500 into either a regular or Roth IRA and in 2008 it would be $6,000. For a 401(k) plan, the contribution for those over 50 is $12,000 in 2002 and in 2006, and thereafter it would be $20,000. Similarly, for a SIMPLE plan it is $7,500 in 2002 and $12,500 for 2006 and after.

The annual limit on yearly contributions to defined contribution plans will be increased to $40,000[24] beginning in 2002, and for defined benefit plans the annual limit on benefits will go up to $160,000[25] beginning in 2002. Both will be indexed for inflation thereafter.

Conclusion

EGTRRA is a hodgepodge of phase-ins, phase-outs and even in some cases phase-ins that terminate before 2010 and go back to where they started from. It is backloaded in that many of the tax benefits are put off until the latter part of the 10-year period. The whole law sunsets on December 31, 2010.[26] It is a very confusing law and tax simplification it is not. It makes tax planning even more difficult. All of this to stay within the agreed $1.35 trillion budget cost. Certainly future Congresses will be pressed to extend many of its provisions if there are budget surpluses or eliminate them if there are not. To say the least, the law has many flaws, but we are stuck with it for the time being.

---

1. IRC § 1(i)(1), *as amended by* Pub. L. No. 107-16, § 101(a), 115 Stat. 41.
2. IRC § 6428, *as added by* Pub. L. No. 107-16, § 101(b), 115 Stat. 42.
3. IRC § 1(i), *as amended by* Pub. L. No. 107-16, § 101(a), 115 Stat. 41.
4. IRC §§ 63(c)(7), 1(f)(8), *as amended by* Pub. L. No. 107-16, §§ 301(b), 302(a), 115 Stat. 53.
5. IRC § 32(b)(2)(B), *as amended by* Pub. L. No. 107-16, § 303(a), 115 Stat. 55.
6. IRC §§ 151(d)(3)(E), 68(f), *as amended by* Pub. L. No. 107-16, §§ 102(a), 103(a), 115 Stat. 44.
7. IRC § 55(d), *as amended by* Pub. L. No. 107-16, § 701(a), 115 Stat. 148.
8. IRC § 26(a), *as amended by* Pub. L. No. 107-16, § 201(a), (e), 115 Stat. 45, 47.
9. IRC § 24(a), *as amended by* Pub. L. No. 107-16, § 201(a), 115 Stat. 45.
10. IRC § 24(d), *as amended by* Pub. L. No. 107-16, § 201(c)(1), 115 Stat. 46.
11. IRC § 21, *as amended by* Pub. L. No. 107-16, § 204, 115 Stat. 49.
12. IRC § 23, *as amended by* Pub. L. No. 107-16, § 202, 115 Stat. 47.
13. IRC §§ 25A (Hope and Lifetime Learning Credits), 530 (Education IRA), 135 (Education Savings Bonds), 221 (Education Loan Interest Deduction), 127 (Employer Provided Educational Assistance Exclusion), 529 (Qualified Tuition Program Deduction), 162 (Deduction for Education Expenses as Ordinary Business Expenses).
14. IRC § 222, *as added by* Pub. L. No. 107-16, § 431(a), 115 Stat. 66.
15. IRC § 221, *as amended by* Pub. L. No. 107-16, § 412, 115 Stat. 63.
16. IRC § 529, *as amended by* Pub. L. No. 107-16, § 402, 115 Stat. 60.
17. IRC § 530, *as amended by* Pub. L. No. 107-16, § 401, 115 Stat. 57.
18. IRC § 219(b)(1)(A), *as amended by* Pub. L. No. 107-16, § 601(a)(1), 115 Stat. 94.
19. IRC § 402(g)(1)(A), *as amended by* Pub. L. No. 107-16, § 611(d), 115 Stat. 98.
20. IRC § 408(p)(2)(E), *as amended by* Pub. L. No. 107-16, § 611(f), 115 Stat. 99.
21. IRC § 219(b)(5)(B), *as added by* Pub. L. No. 107-16, § 601(a), 115 Stat. 94.
22. IRC § 414(v)(2)(B)(i), *as added by* Pub. L. No. 107-16, § 631(a), 115 Stat. 111.
23. IRC § 414(v)(2)(B)(ii), *as added by* Pub. L. No. 107-16, § 631(a) 115 Stat. 111.
24. IRC § 415(c)(1)(A), *as amended by* Pub. L. No. 107-16, § 611(b), 115 Stat. 97.
25. IRC § 415(b)(1)(A), *as amended by* Pub. L. No. 107-16, § 611(a), 115 Stat. 96.
26. Pub. L. No. 107-16, § 901, 115 Stat. 150.

Timing the Transfer Of Tax Attributes in Bankruptcy Can Be Critical to the Taxpayer

By Lorentz W. Hansen

Filing a petition in bankruptcy may entitle a debtor to an automatic stay that will hold creditors, including the Internal Revenue Service, at bay.[1] But the automatic stay won't have the same effect on that old archenemy, the Internal Revenue Code itself.

The bankruptcy sections of the Internal Revenue Code can deprive the debtor of valuable tax attributes just at the time the bankruptcy laws permit the debtor's property to be taken for the benefit of creditors.[2] The tax attributes that may be lost by a bankrupt debtor on filing a petition in bankruptcy include, among others, pre-bankruptcy net operating loss carryovers, casualty and theft loss carryovers, capital loss carryovers and excess charitable contribution and tax credit carryovers.[3]

This article deals primarily with the treatment in chapter 11 and chapter 7 bankruptcies of a debtor's net operating losses and capital losses that date to years prior to the calendar year in which bankruptcy is declared, focusing on the key issue of timing. Casualty and theft losses, if they exceed the taxpayer's income for the year of the casualty or theft, also can be treated as net operating losses for carry back and carry forward purposes. Essentially, this means that when business or casualty/theft deductions exceed income, the excess, after required modifications, may be "carried" to designated previous years (carry back years) and/or designated subsequent years (carryover or carry forward years), and then claimed as a deduction in those other years under I.R.C. § 172. In the bankruptcy context, the practitioner must carefully consider what might happen to these deductions.

I.R.C. § 1398 Captures Debtor's Tax Attributes

When an individual files a petition in bankruptcy under chapter 7 or chapter 11 of title 11 of the U.S.C., I.R.C. § 1398 provides that, in addition to the transfer of the debtor's assets and liabilities to the bankruptcy estate by operation of the bankruptcy laws, an impressive list of tax attributes will also be transferred to the bankruptcy estate.[4] Of those that can be lost, the most sorely missed undoubtedly are net operating loss carryovers (including, as noted above, business, casualty and theft loss carryovers) and capital loss carryovers.

In practice, I.R.C. § 1398 (added in 1980) may be a Code provision "more honored in the breach than the observance." Many tax practitioners—as well as Internal Revenue Service agents—simply are unaware of I.R.C. § 1398. Many bankrupt taxpayers undoubtedly have unfairly profited by failing, inadvertently or otherwise, to observe I.R.C. § 1398, avoiding the required forfeiture to their bankruptcy estates of favorable tax attributes. When seeking discharge from debts they may simply bear those financial ills they have, rather than fly to others they know not of, as may be found in this section.

A bankruptcy estate succeeds to and takes into account the listed tax attributes of the debtor—called "items"—to the extent existing on the first day of the taxable year of the debtor, in which the bankruptcy proceeding was commenced. For this purpose the Code creates a new taxable entity, the bankruptcy estate, which succeeds to these tax attributes and files its own tax return.[5]

The change in the tax forms resulting from the taxpayer's filing of a bankruptcy petition is not a complex matter. The tax return usually consists of a covering or transmittal Form 1041 (U.S. Income Tax Return for Estates and Trusts), which is a fiduciary income tax return on which is entered minimal information, to which is attached a Form 1040 (U.S. Individual Income Tax Return). The latter contains the actual facts and figures, which are somewhat similar to those on a Form 1040 as filed by a non-bankrupt individual taxpayer, but modified by I.R.C. § 1398 to take into account the special circumstances of a bankruptcy estate.[6]

Lorentz W. Hansen practices tax law in White Plains, New York. 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. in Taxation from New York University Graduate School of Law.

The Danger of Overlooking I.R.C. § 1398

During administration of the bankruptcy, estate accountants and attorneys may have prepared tax returns for the debtor unaware that losses claimed on the returns were actually unavailable to the debtor during bankruptcy. The debtor may even have been allowed to claim these losses after consideration by the Internal Revenue Service.[7]

Trustees in bankruptcy may prepare tax returns for the bankruptcy estate and pay taxes not actually owed, unaware that the debtor's pre-bankruptcy tax attributes are available to the bankruptcy estate during administration of the estate. If and when an audit or litigation brings to light the correct treatment of these tax attributes, memories may have dimmed and records may have been lost or destroyed, or the statute of limitations on refunds may have expired.

In one case (in which the writer was involved), an attempt had to be made in court to reconstruct events going back 25 years, because I.R.C. § 1398 had been overlooked by the trustee in bankruptcy and by the taxpayer's certified public accountants. Losses belonging to the bankruptcy estate had not been claimed by the bankruptcy estate, resulting in payment of income taxes by the estate that it did not owe. On the other side of coin, the losses had instead been erroneously claimed on 10 consecutive individual income tax returns by the bankrupt taxpayer, with the result that taxes that *were* owed were *not* paid. The result was a claimed deficiency, interest, penalties and, again, litigation.

Election of Tax Periods by the Debtor

An initial decision that the taxpayer who files bankruptcy faces, concerns the composition of the tax year itself. Losses may present problems if they arise during the calendar year in which bankruptcy is declared, but prior to filing the petition in bankruptcy. In such a case tax attributes may be lost through transfer to the bankruptcy estate, but only if the debtor elects to close his taxable year early, when the bankruptcy proceeding commences. This short-period election, if made by the debtor, terminates the debtor's taxable year on the day before commencement of the bankruptcy proceeding.[8] The first taxable year of the bankruptcy estate itself then begins on the next day, the day the petition in bankruptcy is filed. For the debtor, the second of the two short tax periods into which the debtor's own calendar year is divided would also commence on the day the petition in bankruptcy is filed.[9]

The election, if mistakenly made, could result in forfeiture by the debtor, to the debtor's bankruptcy estate of a net operating or capital loss carryover deduction arising during the short tax year preceding bankruptcy—*i.e.*, the first of the two short periods into which the debtor's calendar year is divided.[10] Thus, a loss arising in this period would become the property of the bankruptcy estate under the I.R.C. § 1398 timing rule. The loss for that short period would be in existence as of the first day of the second short taxable year—*i.e.*, the period of the calendar year that begins with the filing of the bankruptcy petition.[11]

Absent the election, the bankruptcy estate would absorb only those losses arising in the calendar year or years preceding the calendar year in which the petition was filed. Losses in the calendar year the petition was actually filed would continue to be available to the bankrupt debtor on his own individual income tax return, both for the calendar year in which the petition was filed and for subsequent years if available under the carryover provisions of the Code. This is true because any loss that did not exist as of the first day of the taxable year of the debtor in which the petition was filed, does not become an attribute of the bankruptcy estate.

For example, if a business debt owed to the taxpayer becomes a bad debt and worthless on March 1, 2000, it would provide an ordinary deduction and, if large enough, a net operating loss that could be carried to other years under I.R.C. §§ 166 and 172. If the taxpayer declares bankruptcy on July 1, 2000, and makes the short-period election, the taxpayer's short-period taxable year would end on June 30, 2000, the day before the bankruptcy proceeding commenced. Consequently, the bad business debt recognized for tax purposes on March 1, 2000, would become the property of the taxpayer's bankruptcy estate because it existed on the first day of the short taxable year in which the bankruptcy commenced—July 1, 2000.[12]

On the other hand, if a business debt of the taxpayer becomes bad and worthless on March 1, 2000, and if the taxpayer declares bankruptcy on July 1, 2000, but does *not* make the short-period election, the deduction continues to be available to the taxpayer, not his bankruptcy estate. This is true even though the business debt actually became worthless before the petition in bankruptcy was filed. Because the bad debt was not a tax attribute of the taxpayer as of January 1, 2000, the first day of the taxable year in which the bankruptcy proceeding was commenced (that is, the full calendar year), the bankruptcy estate does not succeed to it. Instead, the taxpayer can claim the business bad debt deduction on his own calendar-year tax return for the year 2000.[13] It should be noted, however, that although the taxpayer may be able to carry it forward if it is large enough, the taxpayer is not allowed to carry it back to prior, pre-bankruptcy years and claim tax refunds. Generally speaking, only the bankruptcy estate can carry net operating losses back to taxable years of the debtor preceding bankruptcy.[14]

Of course, the short-period election is not always to be avoided. If the debtor makes money instead of losing it

just before declaring bankruptcy, the election could be used favorably. It would transfer income tax liability from the debtor to the bankruptcy estate so that the debtor, who received the income subject to the taxes, may not be liable for payment of such taxes. Returning again to our hypothetical dates, assume that the election is made to terminate the debtor's year. With the filing of a bankruptcy petition on July 1, 2000, the income tax liability shown on the debtor's tax return for the short period ending June 30, 2000, like other existing debts of the debtor, would become a liability of the bankruptcy estate.

Assume further that the taxpayer earned $50,000 the first half of calendar year 2000 and filed for bankruptcy on July 1, 2000. If the election to terminate the debtor's taxable year is made, the bankruptcy estate becomes liable for the income taxes on the $50,000. But, absent the short-period election, the taxpayer would have to report the $50,000 on his own calendar-year tax return for the year 2000, along with any other income, and must pay tax on it himself.

There are two caveats here. First, the assets of the estate may be insufficient to pay the debtor's income tax liability for the short tax year preceding bankruptcy. Because this income tax liability would not, like some others, be dischargeable in bankruptcy, the debtor may be saddled with the remaining unpaid amount of taxes upon the conclusion of the bankruptcy proceeding.[15] Second, the election is not allowed if the debtor has no assets other than those exempt from creditors' claims. Because the bankruptcy estate would be unable to pay the taxes, allowing the election would serve no purpose other than, possibly, tax deferral.[16]

Effect of Tax Attributes Transfer on the Bankruptcy Estate

The tax losses inherited by the debtor's bankruptcy estate under I.R.C. § 1398 become available to the estate to offset income of the estate, if any—including interest or dividend income and gain from liquidation of the debtor's assets, such as the debtor's personal home.[17] The bankruptcy estate may be entitled to exclude gain on the sale of the debtor's principal residence, generally $250,000 on an individual return and $500,000 on a joint return.[18]

The bankruptcy estate's tax losses may also be diminished by cancellation of debt (COD) income arising from the debtor's discharge in the bankruptcy proceeding. The bankrupt debtor is not actually taxed on this COD income.[19] But, if any of the debtor's nondeductible debts are discharged in bankruptcy, any losses acquired from the bankrupt debtor or realized by the estate itself will be reduced.[20] Finally, any carryover losses successfully running this gauntlet are returned to the debtor, as are any remaining assets of the estate, following bankruptcy.[21]

Hand-me-down loss carryovers, originally acquired by the bankruptcy estate from the debtor, can be augmented by losses realized by the bankruptcy estate itself in the course of administration.[22] However, net operating losses of the estate are first exposed to shrinkage by carry back to taxable years of the debtor preceding the commencement of the bankruptcy case.[23] Any refunds generated by such a carry back of net operating losses by the estate to pre-bankruptcy years of the debtor, would become assets of the estate. This, of course, benefits creditors of the estate, but not the bankrupt debtor.[24]

Capital losses of the debtor are also transferred to the bankruptcy estate. But they may only be carried forward (or "over" in the language of the Code), first to the estate and subsequently to the debtor, if any remain on conclusion of the bankruptcy proceeding.[25]

Reacquisition of Tax Attributes Upon Bankruptcy "Termination"

The reacquisition of tax attributes by the debtor after bankruptcy is more complicated than the acquisition of the debtor's pre-bankruptcy tax attributes by the bankruptcy estate. Under the Code, a debtor succeeds to the tax attributes that are held by a bankruptcy estate—if any remain—on "termination" of the estate.[26]

A key issue that arises from this general proposition is how the word "termination" is to be interpreted, because there is no definition in the Code. There are two possibilities. A bankruptcy estate could "terminate" on the date a chapter 7 plan of distribution is approved by the bankruptcy court or, in a chapter 11 case, on the date the plan of reorganization is confirmed by the bankruptcy court; or, a bankruptcy estate could "terminate" on a later date, when a formal decree closing the estate is entered.

At first blush the question appears to be one of "History's Mysteries" (with apologies to the History Channel), but, as more fully discussed below, the operation of the bankruptcy laws and legislative history support the view that the earlier dates are those that Congress intended when I.R.C. § 1398 was enacted.

The importance to the taxpayer is clear: any remaining tax losses could boost the "fresh start" the debtor enjoys as a result of the discharge in bankruptcy. Further, the sooner such losses can again be claimed by the debtor as offsets to income, the better, because the debtor must count the years during which the bankruptcy estate was undergoing administration in computing the net operating loss carryover period—even though the losses were only available to the bankruptcy estate and thus beyond the debtor's reach during those intervening years.[27]

By its terms, I.R.C. § 1398(i) provides that on "termination" of a bankruptcy estate, an individual debtor

succeeds to and may take into account the previously discussed tax attributes, as listed in I.R.C. § 1398(g). The scope of this provision is limited to bankruptcies under chapter 7 (straight liquidations) and chapter 11 (reorganizations).[28]

As indicated earlier, each of these proceedings gives rise to a separate taxable entity—the bankruptcy estate. In the chapter 7 and chapter 11 context, the unique transfer of the debtor's pre-bankruptcy assets and liabilities from the debtor to the bankruptcy estate is undoubtedly intended to simplify and expedite the debtor's fresh start. In other bankruptcies, however, including those brought under chapter 9 (rehabilitation of a debtor municipality), chapter 12 (rehabilitation of a debtor family farmer with anticipated income from farming) and chapter 13 (rehabilitation of a debtor individual with anticipated future income), no such entity "mitosis" (creating two taxpayers out of one) occurs.[29]

"Termination" of a Chapter 11 Reorganization

A chapter 11 reorganization gives rise to less ambiguity than a chapter 7 liquidation in applying the word "termination" to an event in the bankruptcy proceeding. As noted above, the writer believes that the word "termination," correctly interpreted, refers to the date on which the chapter 11 plan of reorganization is confirmed by the bankruptcy court, not the later date when the bankruptcy estate is closed by formal decree discharging the trustee, canceling the trustee's bond and closing the administration of the estate. Two reasons support this.

First, given the practicalities of a bankruptcy proceeding, the confirmation date is the fairest and most logical date for the transfer of tax attributes from a chapter 11 bankruptcy estate to a debtor. Second, the legislative histories of the Bankruptcy Reform Act of 1978 and the Bankruptcy Tax Act of 1980, both relevant to this issue, establish that the confirmation date, not the closing date, was probably the date Congress had in mind when it used the word "termination" in the Bankruptcy Tax Act of 1980. This history is discussed in some detail below.

Numerous events of significance occur on the date of confirmation of a chapter 11 plan of reorganization. A court order confirming a chapter 11 plan of reorganization is a final judgment for *res judicata* purposes and determines all rights and duties of debtors and creditors under the bankruptcy laws.[30] Confirmation of the plan also constitutes an *in rem* judgment providing for disposition of the assets of the bankruptcy estate;[31] and, unless the plan itself or the court order confirming the plan provides otherwise, decisive changes occur in the legal status of the parties involved in the bankruptcy on confirmation.

If there is no trustee, the fiduciary status of the debtor in possession terminates.[32] On confirmation of the plan, any remaining property not distributed or to be distributed to creditors by the terms of the plan vests in the debtor, free and clear of liens.[33] It is also at this point that the debtor ordinarily receives a discharge.[34] The discharge operates to eliminate the personal liability of the debtor for discharged debts and gives rise to the so-called "discharge injunction" for the protection of the debtor.[35] This release of the debtor from his debts is, of course, the most important element of the debtor's fresh start.[36]

Tax consequences also abound. If any debts are discharged, confirmation of the plan gives rise to cancellation of indebtedness income which, in any event, is not taxable.[37] On confirmation of the plan, and concomitantly with the debtor's discharge, the bankruptcy estate reduces any leftover tax attributes.[38] As indicated above, this reduction equals the sum of any discharged debts that would not have been deductible by the debtor if the debtor actually had paid them. Conversely, if actual payment of the indebtedness would have entitled the debtor to a tax deduction, the discharged debt will not reduce the tax attributes of the bankruptcy estate available for distribution to the debtor.[39] And as noted, on confirmation of the plan, the discharge injunction arises.[40]

The question of determining the proper termination date follows from the preceding concepts. As mentioned above, not only the debtor's property but also the debtor's tax attributes are transferred to the bankruptcy estate at commencement of the bankruptcy proceeding.[41] That these transfers of property and tax attributes should take place simultaneously follows logically from the fact that the debtor's tax attributes, like the debtor's property, may have value from the standpoint of the bankruptcy estate and the creditors. In addition, many important tax consequences flow from property rights, and the debtor's tax attributes therefore should be transferred at the same time as the debtor's property.[42]

Using the later date—the date of the final decree which subsequently "closes" the bankruptcy estate—cuts against this logic. The official end of the bankruptcy case is often a "mere formality,"[43] but there can be long delays in handling the final administrative details and securing a final decree closing the estate. It would indeed be unfortunate to have the clock run out during this period and to have the net operating loss carryover period expire. Under federal tax rules (but not state), the years that a net operating loss is the property of a bankruptcy estate and thus available for use by the estate are counted in computing the total carryover period under I.R.C. § 172.[44] Further, the final year apparently counts as two years: the taxable year of the estate in which the date of termination falls counts as one, and the taxable

year of the debtor in which the estate terminates is another, and counts toward the total.[45]

This could be a trap for the unwary. In one case the discharge occurred in 1986, but the final decree was not entered until 1995.[46] Thus, 10 years would have passed, quite possibly without any of the parties being aware that the clock was ticking against the debtor on the 15-year carryover period for net operating losses (for net operating losses arising in 1998 or later years, the period is 20 years).[47] It should be noted that capital losses do not present quite the same problem in this regard, because they can be carried forward indefinitely—until the taxpayer's death, when any that remain go to the grave with the taxpayer.[48]

Legislative History of the Termination Date

A comparison of two statutes, the Bankruptcy Reform Act of 1978 and the Bankruptcy Tax Act of 1980, and their respective legislative histories supports the theory that the earlier confirmation date, not the later closing date, should be the date the debtor succeeds to the tax attributes of the bankruptcy estate. At first blush, the Bankruptcy Reform Act of 1978 seems to favor the later closing date. Title 11, section 346 of the U.S.C., part of that earlier act, states: "After such case is *closed* or dismissed, the debtor shall succeed to any tax attribute."[49] That is not the end of the story, however, because this section of the Bankruptcy Reform Act of 1978 was intended to apply to state and local taxes only, not federal taxes.[50]

In the course of drafting the Bankruptcy Reform Act of 1978, congressional committees (the Senate Finance Committee and two House Committees—Ways and Means and Judiciary) were unable to agree on new legislation governing federal taxation of bankruptcy estates.[51] Consequently, 11 U.S.C. § 346 was denominated a "special tax provision" not meant by Congress to change income tax statutes or decisions then applicable to federal income taxation of bankruptcy estates. Existing federal tax laws were not reformed until two years later, when the Bankruptcy Tax Act of 1980 was enacted.[52]

In the two-year interval between the Bankruptcy Reform Act of 1978 and the Bankruptcy Tax Act of 1980, changes of attitude seem to have occurred, affecting both the wording and concepts of the bankruptcy tax laws. For one thing, the earlier Bankruptcy Reform Act of 1978[53] provides that after a debtor re-acquires tax attributes not used by the bankruptcy estate, the debtor may, in applying any applicable carryover limitation, ignore the period during which the tax attributes were available for use by the bankruptcy estate only.[54]

The timetable found in the later federal income tax provision (Bankruptcy Tax Act of 1980) does not ignore this period. Instead, in counting the number of carryover years for any applicable limitation period, the period during which any net operating loss acquired by the estate from the debtor is available to the estate must be taken into account by the debtor, if and when the net operating loss reverts to the debtor.[55] This change, which kept the clock ticking on the carryover period during bankruptcy, apparently gave rise in the minds of the drafters of the 1980 law to the thought that a different, earlier date—the confirmation date—was needed for the "closing" date referred to in the Bankruptcy Reform Act of 1978.

Because of the foregoing, the differing language used in these two tax systems (federal and state), regarding the timing of the transfer of tax attributes from a bankruptcy estate to a debtor, may be critical. The provision applicable to the states reads, as noted earlier: "After such a case [a chapter 7 or 11 bankruptcy proceeding] is *closed* or dismissed, the debtor shall succeed to any tax attribute acquired by the estate under paragraph 1 of this subsection [this includes any loss carryovers] but not utilized by the estate."[56] The federal tax law provision reads quite differently, stating: "In the case of a *termination* of an estate, the debtor shall succeed to and take into account the items referred to in paragraphs (1) [net operating loss carryovers], (2), (3), (4), (5), and (6)."[57]

The Senate Finance Committee Report on the Bankruptcy Tax Act of 1980[58] provides insight into what may have been behind this change in wording between the Bankruptcy Reform Act of 1978 and the Bankruptcy Tax Act of 1980, when the word "termination" was substituted for the word "close."

No-disposition Rule. Under the bill, a transfer (other than by sale or exchange) of an asset from the bankruptcy estate to the individual debtor *on termination of the estate* would not be treated as a "disposition giving rise to recognition of gain or loss."[59]

In other words, the Congress that provided in I.R.C. § 1398(i) that debtors should succeed to the tax attributes of their bankruptcy estates on "termination" of the estate also had in mind that it was on "termination" of a bankruptcy estate that any remaining assets of the estate would be transferred to the individual debtor.

Certainly, knowledge may be imputed to Congress that, under 11 U.S.C. § 1141(b), any remaining property of a bankruptcy estate typically is transferred to a chapter 11 debtor on *confirmation* of the chapter 11 plan.[60] (This remaining property could include the debtor's reorganized business, if the plan contemplates continued operation of the business by the debtor.) Indeed, at least one court has actually referred to the "confirmation" of a chapter 11 plan as the "termination" of the bankruptcy estate.[61] Consequently, that court found that expenses incurred subsequent to the confirmation date are not ad-

ministration expenses of the bankruptcy estate itself but, rather, are obligations of the individual debtor, who had regained possession of the property of the bankruptcy estate under the terms of the plan on confirmation of the plan. It therefore is apparent that if the case law and statutes are to be harmonized, "confirmation" must be seen as synonymous with "termination."

In sum, when Congress substituted the termination date for the closing date as the date when the debtor would succeed to the tax attributes of the bankruptcy estate, it is reasonable to suppose that Congress had in mind that the all-important date, from the debtor's standpoint, was the date when any remaining property of the estate re-vests in the debtor—in other words, the date of confirmation of the debtor's chapter 11 plan. Nor would keeping tax attributes in limbo pending the technical closing of the estate provide a better "bright line" test, because both the confirmation date and the closing date envisage the signing of a judicial decree.

"Termination" of a Chapter 7 Straight Liquidation

The event in a chapter 7 straight liquidation that corresponds most closely to the confirmation of a chapter 11 plan of reorganization is probably the date of court approval of the trustee's plan of distribution. Before that date, the trustee[62] should have disposed of any assets of the debtor in which third parties had an interest as co-owners, consignors or lienholders, and should have "reduced to money" (*i.e.*, sold at public auction or private sale) the remaining assets of the bankruptcy estate.[63] The trustee's plan of distribution must then conform to the statutorily prescribed pecking order of creditor's rights.

There are six stages in this hierarchy, starting with priority creditors and ending with the debtor himself, if any surplus remains (the sixth and final stage of the distribution).[64]

After entry of the court order of distribution, which also provides for the trustee's compensation, the trustee issues checks in payment of each creditor's dividend. For general unsecured creditors this may be an across-the-board percentage of their allowed claims (5.51 percent in one reported case);[65] or, of course, they may receive nothing. Thus, with the entry of the court-approved order for distribution, any surplus or abandoned (usually valueless) property of the bankruptcy estate vests in the debtor.

A determination that the entry of the distribution order is the proper date for the debtor to succeed to the tax attributes of the bankruptcy estate recognizes the legal and economic realities of a chapter 7 bankruptcy proceeding, and is in full accord with the previously cited legislative history linking distribution of property to the debtor with "termination" of the debtor's bankruptcy estate. Unfortunately, not all tribunals agree with this approach.

The *McGuirl* Case

In a case dealing with a chapter 7 bankruptcy, the U.S. Tax Court reached a different conclusion, and the case may have been incorrectly decided. In *McGuirl v. Commissioner*,[66] the findings of fact and conclusions of law were set forth in a "memorandum" opinion issued by a single judge rather than by one of the panels which often do so in "regular" Tax Court opinions. Memorandum opinions are usually fact-driven and are not officially reported. They are not considered binding precedents by the Tax Court (and therefore should be cited with care).[67]

The *McGuirl* opinion asserts that a bankruptcy estate terminates on the date of the final decree, or "closing" of the estate, not the date of entry of the property-distribution order. The court therefore ruled that as long as a bankruptcy estate is undergoing administration—in other words, right up to the closing date—tax attributes are still the property of the bankruptcy estate and not yet available to the individual debtor, who in *McGuirl*, was the taxpayer. The court's "final decree" theory, however, was *obiter dictum* and questionable, for several reasons.

For one, the Internal Revenue Service, as is its custom in net operating loss cases, wheeled in its doctrinal machinery—the notorious "black hole" defense to net operating loss carryovers. This defense is often insurmountable because neither the taxpayer nor the Internal Revenue Service has kept sufficient records to rebut it. Thus, the taxpayer in *McGuirl* had failed to produce proof at trial of his modified taxable income for the *carry back* years (the "black hole"); nor had he made a timely election to relinquish carry back rights, permitted by the Code since 1976.[68] Consequently, there was no way of determining how much, if any, of the net operating loss, after being carried back and used to offset income in the carry back years, would be available to reduce the taxes in the later "carry forward" years in which deductions were claimed.

In addition, the taxpayer in *McGuirl* wanted to claim a deduction for tax year 1993. However, his net operating loss would not have been available to him for tax computation purposes in 1993, even if his bankruptcy estate were deemed to have terminated on the date he was arguing for, which was October 13, 1995. This is obvious in view of the fact that I.R.C. § 1398 would bar use by the taxpayer of a carryover loss of his bankruptcy estate in 1993 when (as even the taxpayer conceded) his bankruptcy estate did not "terminate" until 1995.

However, he countered with the novel argument that use of a carryover loss on a tax return for any given taxable year depends on when the tax return for that year

was filed (his 1993 tax return was not filed until 1996, after the bankruptcy), rather than when the tax year itself actually occurred (1993 presumably occurred in 1993, which was during the bankruptcy years). This theory, which would give a taxpayer freedom of choice as to the taxable year in which losses could be used, was patently leaky, as the *McGuirl* court noted.[69] (The taxpayer in *McGuirl* represented himself, and although he had legal training, he apparently had not been practicing law.)

From the opinion it appears that at least two grounds for upholding the Internal Revenue Service's position were present, in addition to the argument based on the definition of the word "termination." Nevertheless, the court addressed the issue, stating as follows:

> Any remaining net operating loss belonging to the estate will be returned to the debtor-taxpayer after the termination of the estate. Section 1398(i). "Termination of the estate" refers to the closing of the estate. Bankruptcy Code, 11 U.S.C. § 346(i)(2) (1978); see also *Firsdon v. United States*, 95 F.3d 444, 446 (6th Cir. 1996), *aff*. 75 AFTR 2d 95-528, 95-1 USTC par. 50,040 (N.D. Ohio 1994); *Beery v. Commissioner*, 72 T.C.M. (CCH) 1013 (1996). The debtor is then free to use the net operating loss as a carryover, section 1398(i), or carry back, as long as the net operating loss arose before the commencement of the bankruptcy case. Section 1398(j)(2)(B).[70]

Thus, the court cited 11 U.S.C. § 346(i)(2) in support of its view that under federal tax law the termination date is the closing date. But as described above, Congress expressly intended that 11 U.S.C. § 346(i)(2) would not become part of the Internal Revenue Code. Indeed, this section actually provides a better understanding of what Congress did *not* mean than what it *did* mean when using the word "termination." The substitution of "termination" for "closing" actually reinforces the taxpayer's interpretation in *McGuirl* rather than that of the Internal Revenue Service or the Tax Court.

Special Concerns on Certain Assets and Liabilities

There is one problem that might occur if the transfer of tax attributes is deemed to take place before the formal closing date. If, on the confirmation date, a bankruptcy estate still holds assets having speculative value and built-in tax liabilities, determination of the exact amount of the bankruptcy estate's income might have to be postponed until the property is liquidated and a final computation made. If a carryover loss had already passed from the bankruptcy estate to the debtor, the bankruptcy estate's income tax liability when the asset is sold would be higher than it should be. This aspect of picking an earlier termination date is noted and discussed in *Collier on Bankruptcy*.[71]

However, the problem raised in that discussion may not be present in very many cases, because the trustee presumably has liquidated ("reduced to money," in the statutory phrase) assets of the debtor before submitting the chapter 7 plan of distribution; and the assets remaining in a chapter 11 plan may have been returned to the debtor in a nontaxable transfer on confirmation of the plan of reorganization. In any case, a solution of sorts might be found by requiring amended returns, such as were required before the 1997 repeal of I.R.C. § 1034, which permitted a rollover of gain on the sale of a principal residence. If a taxpayer failed to replace the principal residence during the applicable rollover period, an amended return had to be filed and tax (with interest) paid.

Another possible solution would be to add another of the ever-popular recapture provisions to the Internal Revenue Code.[72] In the latter case, any tax attributes previously transferred to the debtor could be recaptured for use by the estate, and the debtor would then have to report additional income equal to the undeserved tax attributes previously claimed.

Conclusion

Attorneys, accountants and tax preparers should keep in mind that filing a petition in bankruptcy may have significant tax consequences. The impact of making or not making the short-period election to close the taxpayer's taxable year on the day before the petition in bankruptcy is filed should be weighed.

Further, after discharge in bankruptcy, one should consider reclaiming any tax attributes surviving bankruptcy as of a date that is earlier than the formal closing of the estate—*i.e.*, immediately following court approval of a chapter 7 plan of distribution or a chapter 11 plan of reorganization. Using the earlier date could help the taxpayer/former debtor by providing a tax-saving jump start to the debtor's "fresh start."

---

1. 11 U.S.C. § 362.
2. Internal Revenue Code of 1986, as amended by 26 U.S.C. § 1398 (hereinafter "I.R.C." or the "Code").
3. I.R.C. § 1398(g). Casualty and theft losses can become net operating losses for carry back and carryover purposes under I.R.C. § 172(d)(4)(C).
4. I.R.C. § 1398(g).
5. I.R.C. §§ 1398(c), 1399, 6012(a)(9).
6. *See* 2000 Form 1041 Instructions, p. 8. The bankruptcy estate must obtain its own EIN (employer identification number) and file its tax return by the 15th day of the 4th month following the close of its tax year. Married filing separately income tax rates apply to bankruptcy estates. I.R.C. §§ 1(d), 1398(c)(2), (e).
7. *Beery v. CIR*, 72 T.C.M. (CCH) 1013 (1996). In *Beery*, the Internal Revenue Service erroneously allowed a net operating loss claimed on a refund application by the debtor long after the debtor had filed a petition in bankruptcy. Eleven years later it came to light that the loss had been

claimed by both the debtor (incorrectly) and the debtor's bankruptcy estate (correctly). Litigation followed.

8. I.R.C. § 1398(d)(2)(i).
9. I.R.C. § 1398(d)(2)(ii).
10. *Id*.
11. I.R.C. § 1398(g).
12. *Id*.
13. I.R.C. §§ 172(b), 1398(g).
14. I.R.C. § 1398(j)(2)(B).
15. 11 U.S.C. § 523(a)(1); S. Rep. No. 96-1035, at 26 (1980).
16. I.R.C. § 1398(d)(2)(C); S. Rep. No. 96-1035, at 27 (1980).
17. I.R.C. § 1398(e).
18. I.R.C. § 121. *See In re Bradley*, 222 B.R. 313 (Bankr. Tenn. 1998). Recent cases overwhelmingly (9-1) allow the bankruptcy estate itself to claim the $250,000 ($500,000 on a joint return) exclusion of gain from the sale of the debtor's principal residence, under I.R.C. § 121. *See also In re Popa*, 218 B.R. 420 (Bankr. Ill. 1998); *Godwin v. Commissioner*, 96-1 USTC & 50,287 (Bankr. Ohio 1996). *Contra In re Winch*, 226 B.R. 591 (Bankr. Ohio 1998).
19. I.R.C. § 108(a)(1).
20. I.R.C. § 108(b)(1).
21. I.R.C. § 1398(i).
22. I.R.C. § 1398(c)(1), (e).
23. I.R.C. § 1398(j)(2)(A).
24. I.R.C. § 139(j)(2)(B); *see* 11 U.S.C. 541(a)(7). *See also Segal v. Rochelle*, 382 U.S. 375 (1966). In addition, nonbusiness administration expenses can create a loss that can be carried backward or forward, but only to taxable years of the bankruptcy estate. I.R.C. § 1398(h)(2).
25. I.R.C. §§ 1212(b), 1398(g)(5).
26. I.R.C. § 1398(i) The writer wishes to acknowledge the guidance given to him in understanding bankruptcy law and practice by Prof. Lawrence P. King's Collier on Bankruptcy (15th ed., rev. 1999); William Tatlock's *Discharge of Indebtedness, Bankruptcy and Insolvency,* Tax Management Portfolio, 540 (2000); Timothy E. Travers, Bankruptcy Desk Guide (Lawyers Coop. Pub. 2000).
27. *Firsdon v. United States*, 95 F.3d 444, 446-47 (6th Cir. 1996). *See* note 54.
28. I.R.C. § 1398(a).
29. I.R.C. §§ 1398(a), 1399.
30. 11 U.S.C. § 1141(a); *see Stoll v. Gottlieb*, 305 U.S. 165 (1938).
31. 11 U.S.C. § 1141(b), (c).
32. *Jay Bee Enterprises*, 207 B.R. 536, 538 (Bankr. Ky. 1997).
33. 11 U.S.C. § 1141(b), (c).
34. 11 U.S.C. § 1141(d)(1)(A).
35. 11 U.S.C. §§ 524(a)(2), 1141(d)(1)(A); *see Collier on Bankruptcy* vol. 15, p. TX2-53, *supra*, note 26.
36. H.R. Rep. No. 95-595, p. 128.
37. I.R.C. § 61(a)(12). *See Collier on Bankruptcy*, vol. 15, p. TX2-54, *supra*, note 26.
38. I.R.C. § 108(b).
39. I.R.C. § 108(e)(2).
40. 11 U.S.C. § 362(c)(2)(C).
41. I.R.C. § 1398(f), (g).
42. *See Commissioner v. Ferrer*, 304 F.2d 125 (2d Cir. 1962). Passive activity losses may be transferred from the bankruptcy estate to the debtor on transfer of the interest in the passive activity that generated the losses, before "termination" of the estate, if necessary. I.T. Reg. 1.1398-1(d).
43. *North Am. Car Corp. v. Peerless*, 143 F.2d 938 (2d Cir. 1944) (decided under the Bankruptcy Act of 1898).
44. *Beery v. Commissioner*, 77 T.C.M. (CCH) 1289 (1999). *See* note 54.
45. *See* I.T. 1.172-4(a)(2), *cited in* Tatlock, *Discharge of Indebtedness, Bankruptcy and Insolvency*, A-37 (2000), *supra*, note 26.
46. *Leavell v. Commissioner*, 11 T.C.M. (CCH) 2387 (1996).
47. I.R.C. § 172(b)(1)(A).
48. Capital losses of an individual do not expire until the death of the individual. *See* I.R.C. § 1212(b); Rev. Rul. 54-207, 1954-1 C.B. 147.
49. 11 U.S.C. § 346(i)(2) (emphasis added).
50. *See* Historical and Revision Notes—Legislative Statements to 11 U.S.C. § 346.
51. See H.R. Rep. No. 95-595, at 124, 274, 275 (1995).
52. S. Rep. No. 96-1035, at 30 (1980) *quoted in* Bankruptcy Tax Act of 1980, Law and Explanation, Commerce Clearing House, Inc. The legislative history was more convoluted than this summary, which is, however, essentially correct.
53. 11 U.S.C. § 346(i)(2).
54. 11 U.S.C. § 346(i)(2). Various bills in both Houses of Congress would conform state and local tax rules to the Internal Revenue Code of 1986 in this regard. HR. 333; S.220, 420, 107th Congress. All of these bills provide that for state and local income tax purposes a post-bankruptcy debtor must include the years the bankruptcy estate was undergoing administration in calculating any carry-forward period. *See* Bankruptcy Reform Act of 2001 § 719, Special Provisions Related to the Treatment of State and Local Taxes, amending 11 U.S.C. § 346(i)(2). The provisions of these bills do not seem to address (and instead seem to perpetuate) the difference in terminology between the Bankruptcy Reform Act of 1978's use of the word "closed" and the Bankruptcy Tax Act of 1980's use of the word "termination." At present, these bills are on hold due to a revised legislative agenda following the terrorist attack on the World Trade Center, and because the proposed reforms tighten bankruptcy laws and are viewed as "anti-consumer" at a time when the economy is under recessionary pressure. (For the status and text of this and other congressional legislation log on to the Library of Congress' Web site <thomas.loc.gov>.)
55. *Firsdon v. United States*, 95 F.3d 444, 446-47 (6th Cir. 1996).
56. 11 U.S.C. § 346(i)(2) (emphasis added).
57. I.R.C. § 1398(i) (emphasis added).
58. Pub. L. No. 96-589.
59. Senate Finance Committee Report on the Bankruptcy Tax Act of 1980 (emphasis added).
60. *See* 11 U.S.C. § 1141(b); *Jay Bee Enterprises*, 207 B.R. 536 (Bankr. Ky. 1997).
61. *In re Hirsch-Franklin Enterprises, Inc.*, 63 B.R. 864, 872 (Bankr. Ga. 1986).
62. Chapter 7 requires that a trustee always be appointed, unlike chapter 11, in which the individual debtor may continue to control the business in a fiduciary capacity as a "debtor in possession." *See* Timothy E. Travers, Bankruptcy Desk Guide, 540 (2000), *supra*, note 26.
63. *Id.*
64. 11 U.S.C. § 726(a)(1)-(6).
65. *In re Wilson*, 190 B.R. 860 (Bankr. Mo. 1996).
66. 77 T.C.M. (CCH) 1289 (1999).
67. Kafka & Cavanagh, *Litigation of Federal Tax Controversies* (2d ed. 1999).
68. I.R.C. § 172(b)(3).
69. 77 T.C.M. (CCH) 1289 (1999) note 8, p. 10.
70. *McGuirl v. Commissioner*, 77 T.C.M. (CCH) 1289 (1999).
71. Vol 15, & TX 2.07(3), *supra*, note 26.
72. *See* I.R.C. §§ 1245, 1250. These complicated recapture provisions are undoubtedly cited by flat-tax advocates in any parade of Internal Revenue Code horrors.

State Income Tax: Not All Trusts Must Pay

BY PHILIP J. MICHAELS AND LAURA M. TWOMEY

Trusts created by New York grantors are not necessarily subject to New York State income tax. Many trusts may be paying New York State income tax, when it could be easily avoided. New York Tax Law sets forth a clear method for avoiding the tax that is simple to implement in many instances. It is worthwhile to consider whether steps should be taken to eliminate the state income tax on a trust, especially for trusts that anticipate large capital gains in the near future.

Section 601(c) of the Tax Law imposes an income tax on all of the income of a "Resident Trust,"[1] *i.e.*, an irrevocable trust created by a New York resident or a revocable trust that became irrevocable while the creator was a resident of New York State.[2] Nonetheless, the law in New York has evolved so that so-called Resident Trusts will *not* be subject to tax if (a) the trustee, (b) the trust principal and (c) the trust's sources of income are all located out of state.

This exception to the rule originated in *Mercantile-Safe Deposit and Trust Company v. Murphy*.[3] In the *Mercantile* case, the state attempted to tax a trust created by a New York resident but administered by a Maryland trustee for the benefit of New York beneficiaries.[4] The state argued that the trust was subject to tax because the trust satisfied the definition of a "Resident Trust" under the statute.[5] The Court of Appeals found that it was unconstitutional under the Fourteenth Amendment to tax a trust merely because of the residency of the grantor, where the assets were in the possession of an out-of-state trustee, and the beneficiaries, although residents, had no present right to control or possess the trust assets.[6] As a result of the *Mercantile* case, a trust cannot be taxed merely because it is a "Resident Trust."[7] There must be other contacts with New York State.

In 1992, the decision in *Mercantile* was codified in section 105.23 of the tax regulations.[8] Essentially, the regulation states that Resident Trusts will not be subject to tax if the following three-part test is satisfied:

- All of the trustees are domiciled outside of New York State;
- The entire principal of the trust, including real and tangible property, is located outside of New York State; and
- All income and gains of the trust are derived from or connected with sources outside of New York State, determined as if the trust were a non-resident.

Using this rule, it is quite simple to construct a situation that removes a "Resident Trust" from the purview of New York's income tax. In many instances, merely changing the trustee from a resident to a non-resident is all that is required. For example, in the Income Tax Advisory Opinion brought by Charles B. Moss, Jr., in 1994, the commissioner of taxation and finance found that a "Resident Trust" was no longer subject to state income tax because the trustee had sold his New York residence and moved to another state.[9]

The ruling held that the first part of the three-part test described above was clearly satisfied because the sole trustee was no longer domiciled in New York. The second part of the test was satisfied because all of the trust's assets were located out of state. The trust's assets consisted of (a) cash, U.S. government obligations and marketable securities held in an account at a bank in New York City and (b) several loans owed by various trusts and companies. All of the trust's assets were deemed to be intangible assets. The ruling concluded that intangible property was located in the domicile of the trustee, and consequently all of the property was located out of state because the trustee was not domiciled in New York.

Finally, the ruling held that the third prong of the test was satisfied, because none of the trust's income was attributable to New York sources. The test for New York source income is (a) income attributable to real property or tangible personal property located in New York or (b) income attributable to a trade or business being carried on in the State of New York. Because the trust did not hold real estate or tangible personal property and because it did not have any income attributable to a trade or business being carried on in New York State, this test was satisfied as well.

It is interesting that in the Moss ruling the trust ceased to be subject to state tax even though many of the trust assets remained in an account with a New York City bank. Because the tax commission has adopted the view that intangibles are located in the domicile of the trustee, the entire corpus of the trust can be moved out of state simply by changing the trustee to a non-resident. Hence, the Moss ruling shows that tax liability of a trust can be eliminated without changing the trust's investment manager or custodian bank. The simple solution described above will only apply, however, where a trust does not hold any New York real property and does not have income derived from a trade or business in New York.

What if your client would like to save New York income taxes, but for non-tax reasons would like manage-

ment and investment powers to remain with an individual who happens to be a resident of New York? The Advisory Opinion brought by Laura J. Silver in 2000 demonstrates a feasible solution.[10] In this ruling the petitioner, a New York resident, created a Delaware LLC and funded it with cash, government obligations and marketable securities. The petitioner then made a gift of a 99 percent LLC interest to a trust that she created for third parties, naming a non-resident trustee. The petitioner retained a 1 percent LLC interest and named herself as the managing member of the LLC.

The ruling held that the first prong of the test was satisfied because the trustee of the trust was domiciled out of state. Given that the trust's sole asset was the 99 percent LLC interest, the ruling found that all of its assets were deemed to be intangibles and thus located in the domicile of the non-resident trustee in satisfaction of the second test. The third prong was satisfied because none of the trust's income was New York source income. The trust owned no real estate or tangible personal property in New York. Further, the LLC was not conducting a trade or business in New York, and thus none of its income was attributable to a trade or business in New York. The ruling indicated that if an entity merely purchases and sells assets on its own account, it will not be considered to be carrying on a trade or business in New York.

The Silver trust was not subject to New York tax even though the petitioner, a New York resident, was the manager of the LLC and had complete control over the LLC's investments and distributions. The Silver ruling demonstrates that a New York resident trustee can retain control of a trust's accounts, yet avoid the tax, merely by exchanging his or her title as trustee for that of manager of an LLC or managing partner of a limited partnership (assuming an amenable out-of-state party could be found to serve as trustee). This creates an excellent planning opportunity for New York resident clients who wish to maintain a level of control over the trust assets.

When choosing an out-of-state trustee, it is important to consider the tax law of the trustee's state of domicile. Some states, for example California[11] and until recently, Florida, impose a tax based in part on the trustee's residence, regardless of whether the trust was created by a non-resident. If the law of the trustee's residence is likely to govern, the trust law of the trustee's residence must also be reviewed.

When changing the trustee of a testamentary trust, one would need to seek court approval of the old trustee's resignation and the appointment of the new trustee.[12] At that time, many practitioners would also ask the court to transfer the situs of the trust to the state where the new trustee resides. In this proceeding, the New York courts would relinquish jurisdiction over the trust to the court in the trustee's jurisdiction. While the transfer of situs may be a good idea because it establishes clarity regarding which court will have jurisdiction over the trust and which state's law will govern the trust,[13] an actual transfer of situs is unnecessary to eliminate tax liability under regulation 105.23. As such, it appears possible that a trust could be situated in New York for governing law purposes and yet not be subject to New York income tax. Because an *inter vivos* trust, in most cases, would not need court permission for a change of trustees, an *inter vivos* trust could presumably remove itself from the grasp of New York income tax without a court proceeding.

Determining whether a Non-resident Trust will be subject to state income tax involves an entirely different analysis. A Non-resident Trust is defined as any trust that is not a "Resident Trust,"[14] but generally is either (a) an irrevocable trust created by a nonresident, (b) a revocable trust created by a nonresident or (c) a revocable trust that later became irrevocable when the grantor was a non-resident. A Non-resident Trust is only subject to state income tax on income and gains derived from or connected with New York source income.[15] As in the case of a Resident Trust, New York source income consists of all income from real or tangible property located in the state, plus all income attributable to a trade or business carried on in the state.

The domicile of the trustee is not a factor in determining the taxability of a Non-resident Trust.[16] A New York domiciliary can thus serve as trustee of a Non-resident Trust without causing the trust to be subject to state income tax. In addition, the assets of a Non-resident Trust can be held by a New York banking institution without fear of generating New York source income because, as explained above, the activity of trading securities on one's own account is not deemed to be carrying on a trade or business in New York State.[17] As a result, grantors from other states may wish to name New York trustees and use New York banks because doing so will not result in the trust paying an income tax to New York State. This is especially useful if the grantor's home state bases its income tax on the residency of the trustee; in such cases, the use of a New York fiduciary would enable the trust to avoid payment of income tax in both states.

Thus, families with trusts created by New York grantors should consider taking steps to eliminate the trust's liability for state income tax. Often this would involve merely appointing a trustee that resides out of state. The tax savings could be significant for trusts that accumulate income each year, and for trusts that anticipate capital gains in the future. Moreover, non-residents should review the possibility of using New York fiduciaries and banking institutions as a way to avoid income tax in their home states.

---

1. N.Y. Tax Law § 601(c).

2. Tax Law § 605 (b)(3)(B), (C); N.Y. Comp. Codes R. & Regs. tit. 20, § 105.23(a) (hereinafter N.Y.C.R.R.).
3. 15 N.Y.2d 579, 581 (1964).
4. *Id*. at 580.
5. *Id*.
6. *Id*.
7. *Mercantile-Safe Deposit and Trust Co. v. Murphy*, 15 N.Y.2d 579, 581 (1964).
8. 20 N.Y.C.R.R. § 105.23(c).
9. *Petition of Charles B. Moss Trust*, Income Tax Advisory Opinion, TSB-A-94(7) I (Apr. 8, 1994).
10. *Petition of Laura J. Silver*, Income Tax Advisory Opinion, TSB-A-00(2) I, (Mar. 29, 2000) (hereinafter cited as Silver Ruling).
11. Cal. Rev. & Tax Code § 17742(a).
12. N.Y. Surrogate's Court Procedure Act §§ 715, 716 (hereinafter SCPA).
13. The governing law of a trust is a question of fact which depends on the grantor's intent and the location of the beneficiaries and the trust assets. *See* Bogart, The Law of Trusts and Trustees § 297 (2d ed. 1992) (text corresponding to footnotes 22-33). Generally, the transfer of situs and the presence of the trustee are not determinative, but are strong factors in favor of applying the law of the trustee's state. SCPA §§ 715, 716. Practically speaking, however, unless the instrument specifies New York as the governing law, a court that has assumed jurisdiction over the trust is likely to apply its own law if there are no objections from the parties.
14. Tax Law § 605(b)(4)(B).
15. Tax Law § 601(e); 20 N.Y.C.R.R. § 139.1.
16. *Id*.
17. *See* Silver Ruling.

Philip J. Michaels is a partner at Fulbright & Jaworski LLP, and Laura M. Twomey is an associate. They were assisted in preparing the article by summer associate Kelly Michael.

Language Tips

By Gertrude Block*

Question: I have two questions, both exemplified by the "Whereas" language of the following hypothetical Modification of Lease Agreement:

- Whereas, . . . (herein called the "Lease"), and
- Whereas, . . . (herein called "Premises") . . . ;
- Whereas, all capitalized terms used but not defined in this agreement shall have the meanings ascribed to them in the original Lease.

My questions are (1) Why the use of parentheses in the "Whereas" clauses? (2) Couldn't the drafter of this Agreement have chosen a better phrase than "capitalized terms"?

Answer: Attorney R.M. Frome, who submitted these questions, believes that commas should be substituted for the parentheses in this Agreement. Parentheses, he argues, are out of place except in "huge, long sentences where you run out of punctuation marks," which is not the case here. He says that commas would be more appropriate because they would not break up the sentence (and the reader's thought process). In general, I agree with Mr. Frome that commas could have been substituted, although I did not find the parentheses in the document confusing.

As for a better phrase than "capitalized terms" in the Agreement, if there is one, I do not know of it. The phrase seems clear and precise. Perhaps other readers may agree with Mr. Frome, however, and will come to his aid in choosing a more appropriate phrase.

From the Mailbag:

In response to the June "Language Tips" column, Glenn Campbell, who practices in the Chancery/Commercial Bar in London and is a member of both the English and New York State Bars, writes that while it is true that many solicitors and barristers refer to a limited company in the plural, the Chancery Bar uses the singular. This usage, he said, is based on the 1890s House of Lords' decision in *Saloman v. Saloman Brothers Ltd*., that a company is a separate legal personality, while a partnership is a group of individuals. Thus, the Chancery usage mirrors American usage, which refers to corporations and other entities using the singular pronoun "it."

John Berry, a Briton who practices in New York City, writes that he also prefers American usage. He says he always uses a singular verb to refer to entities like committees, sports teams, etc., and would say, "X Company announces that it will merge with Y company," "England has lost the cricket match," or "the jury reached its decision." He says that although many Britons use the plural, he considers plural pronouns in these statements to be incorrect.

However, as I wrote to Mr. Berry, this is a matter of style, not correctness, and the majority of Britons seem to prefer plural pronouns to refer to entities like those listed.

Another New York City reader wrote that the June "Language Tips" reminded him to ask which of the following sentences is correct:

- We appreciate you helping us with this question.
- We appreciate your helping us with this question.

The correspondent writes, "Somehow I tend to favor the second approach, but I'm not sure why." His intuitive response is correct: The word *helping* in this sentence is a gerund, which requires the possessive form of the noun or pronoun that modifies it. If you have forgotten that grammatical explanation (as most of us have), a commonsense explanation is also available. The gerund *helping* substitutes for the noun *help*. Because you would say, "We appreciate your help," you would also say, "We appreciate your helping." In "Your being present caused a problem," is similar to "Your presence caused a problem." (Nobody would say, "You presence caused a problem.")

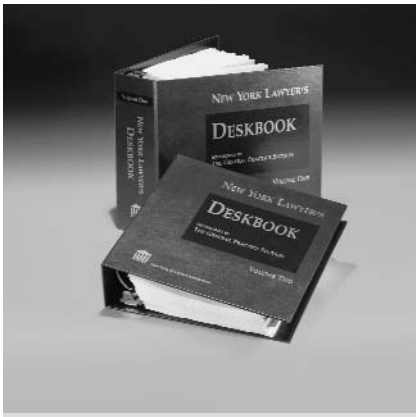
Vermont attorney Charles H.B. Braisted writes that he has two more pet peeves to add to the list readers have sent. The first is the incorrect use of *less* for *few*. He cites, for example a proposed amendment to the New York General Business Law. The proposed amendment states " . . . sells investment services to *less* than 6 persons." Because the noun *person* is a "count noun," that is, the individuals mentioned can be counted, the correct referent is *fewer*. "Non-count nouns" include among others, *rice*, *information*, *contentment, happiness*. So one would say, "much happiness, but many joys; little information, but few facts," etc. More should be said on this subject, but it will have to await a future column.

Another of Mr. Braisted's pet peeves is the misuse of *of* for *have,* resulting in the construction, "I would of done this." This error results from the acceptable informal abbreviation *would've* for *would have*, which people spell the way it's pronounced. Mr. Braisted also objects to the expression *too good of a shot*, which, of course, is non-standard. The inserted, unnecessary *of* may be by analogy to the phrase *too much of a shot*, or *too little of a good thing*, both of which are standard English.

Readers Mike Reineke of Sugarland, Texas, and Theda Snyder of Encino, California, were among SEVERAL who noticed an error in my answer to a question about acronyms in the June issue. The reader asked about the use of *a* or *an* preceding the "acronym" *MVA* (motor vehicle accident). I answered, correctly, that *an* was correct because a vowel sound begins *MVA*, but that when a consonant sound begins an abbreviation like *UF* (University of Florida), *a* is correct.

However I ignored the fact that neither of those abbreviations are acronyms because neither creates a word. An acronym is a word coined from the initial letters of a name. However, the answer I gave above does apply in acronyms (like *radar, UNICEF, FEMA*, or *NASA*).

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



1998 (Supp. 2001) • approx. 1,600 pp., loose-leaf, 2 vols. • PN: 4150

List Price: $185 (incls. $13.70 tax)

Mmbr. Price: $160 (incls. $11.85 tax)

(Prices include 2001 Supplement)

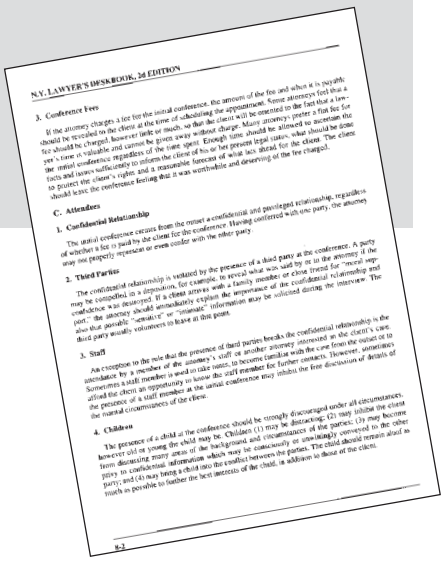
2001 Supplement

PN: 51501

List Price: $95 (incls. $7.04 tax)

Mmbr. Price: $85 (incls. $6.30 tax)

- **A step-by-step guide for handling a basic case or transaction in 24 areas of practice.**
- **Includes a new chapter on Elder Law by Steven M. Ratner, Esq.**


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

3. Conference Fee

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 compelled 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 unobtrusively explain the importance of the confidential relationship and also that possible "sensitive" or "traumatic" information may be solicited during the interview. The third party usually volunteers to leave at this point.

3. Staff

An exception to the rule that the presence of third parties breaks the confidential relationship is the introduction 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 members 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 unwittingly overheard by the other party, and (4) may bring a third into the conflict between the parties. The child should remain aloof as much as possible to further the best interests of the child, in addition to those of the client.

8-2

New York Lawyer's Deskbook
Second Edition

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.

New attorneys will benefit from the clear, basic review of the necessary steps involved in handling a particular transaction or in understanding a particular subject area. By focusing on the handling of basic transactions, the *Deskbook* fills the gap between sketchy outlines, which are of little help to the novice attorney, and the voluminous reference sources, which very often are difficult to understand.

Practitioners who are familiar with a subject area will benefit from the numerous "Practice Guides" and from using the *Deskbook* as a refresher to reinforce their own methods of practice.

The Second Edition has expanded the *New York Lawyer's Deskbook* into a two-volume set. Incorporating the 2001 Supplement, it updates the original text; adds a new chapter on Elder Law; features coverage of the newly revised Article 9 of the UCC and a detailed summary of the new Estate and Gift Tax Legislation; chapters on zoning and land use and commercial real estate; and coverage of Kendra's Law, electronic filing, amendments to the ethics rules, Mandatory Continuing Legal Education rules, external appeals of health plan treatment denials, and the signature line requirement for court documents, among others.

Contents

". . . exactly the book I was looking for—and could not find—when I began to practice in New York."

Jill Nagy, Esq.

". . . one of the finest deskbooks that has ever been published."

Lucian L. Lodestro, Esq.
Lodestro, Vanstrom & Edwards

New York Lawyer's Formbook
Second Edition

Compiled and written by leading practitioners from throughout New York State, the *New York Lawyer's Formbook* consists of 20 sections, each covering a different area of practice. The purpose of the *Formbook* is to familiarize new practitioners, or practitioners who may not be familiar with a particular area of law, with forms and various other materials used when handling a basic transaction in that area of law.

Included in the *Formbook* are copies of official forms, commonly used commercial forms, original forms developed by the authors and a wide variety of miscellaneous material which the authors use in their daily practice. Many of the sections contain sample clauses, worksheets, letters, checklists, charts, questionnaires and other informative exhibits.

The *Formbook* is a companion volume to the *New York Lawyer's Deskbook*. Many of the forms and materials included in the *Formbook* are referred to in the *Deskbook*. Although both the *Formbook* and the *Deskbook* are excellent resources by themselves, when used together their utility is greatly increased.

This revised edition, which incorporates the 2001 Supplement, expands the original publication into a two-volume set.

It adds a new chapter of Elder Law forms and a new chapter of Mortgage documents.

Contents

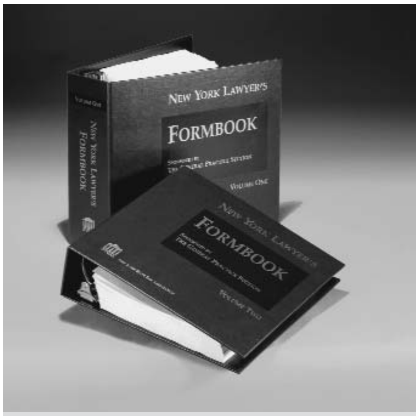
". . . an excellent tool for every practitioner."

Muriel S. Kessler, Esq.
Kessler and Kessler
New York, NY

"Appropriate professional practice will surely be improved by the use of this volume."

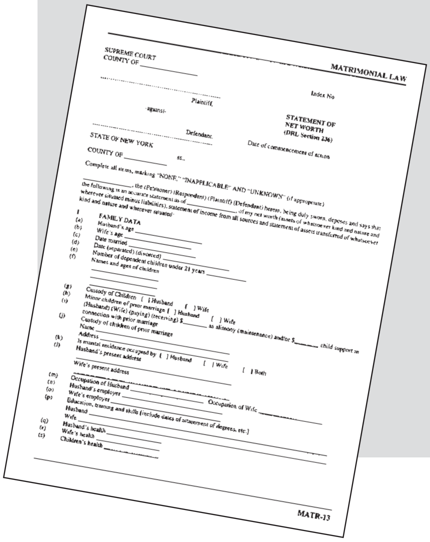
Lewis R. Friedman
Acting Supreme Court Justice
Bronx, NY, now deceased

- **Includes over 2,000 pages of forms, checklists and other exhibits used by experienced practitioners in their day-to-day practice.**
- **Covering 20 areas of practice, the *Formbook* is an excellent companion to the *New York Lawyer's Deskbook*.**



1998 (Supp. 2001) • approx. 2,000 pp., loose-leaf • PN: 4155
List Price: $185 (incls. $13.70 tax)
Mmbr. Price: $160 (incls. $11.85 tax)
(Prices include 2001 Supplement)

2001 Supplement
PN: 51551
List Price: $95 (incls. $7.04 tax)
Mmbr. Price: $85 (incls. $6.30 tax)


SUPREME COURT
COUNTY OF
MATRIMONIAL LAW
STATEMENT OF NET WORTH (DRL Section 236)
MATR-13

To order
Call 1-800-582-2452
Source code: cl1446

New York State Bar Association

CONTINUED FROM PAGE 64

not write well" is ambiguous. It means either "Some write well and some do not write well" or "No one writes well." "All these cases are not applicable" *means* "Not a single case is applicable," but the writer meant, "One or more of these cases is inapplicable."

Not/because. Placing a *not* before a *because* allows for an explanation different from what you mean. "I will *not* write this brief *because* I am tired" *may mean* "I will not write this brief, not because I am tired, but for a different reason."

The wordy no. "No *other* alternative" *becomes* "No alternative." "No such *a* reason" *becomes* "No such reason." "No such *a* thing" *becomes* "No such thing."

Be positive about negatives. The word *negative* is pretentious for *unfavorable* or *no*. "The judge's response was in the negative" *becomes* "The judge said no." *Affirmative* is pretentious for *favorable* or *yes*. "The judge's response was in the affirmative" *becomes* "The judge said yes."

The "if not" conundrum. Does the phrase "a necessary, if not critical, factor" mean that "the factor may be critical" or that "the factor is not critical"? Strike this ambiguous *if not* construction.

Drop double positives, not just double negatives. Do not use two imperatives in one sentence. Use only one *requires*, *must*, or *should*. "The statute *requires* that a plaintiff *must* . . ." *becomes* "The statute *requires* that a plaintiff . . . ." *Or* "Under the statute a plaintiff *must* . . . ." "The statute *requires* that a plaintiff *should* . . ." *becomes* "The statute *requires* that a plaintiff . . . ." *Or* "Under the statute a plaintiff *should* . . . ."

Requiem for requirement. Lawyers often write that a statute *requires* that a litigant do something. But the statute may require only that a litigant do something to secure a remedy. The problem is that the writer does not complete the sentence. Consider: "The Penal Law requires that the People prove defendant's guilt." If the Penal Law were to require that proof, the People might go to jail if they failed to prove guilt. The Penal Law requires only that the People prove guilt before a defendant may be found guilty.

Do not reasonably doubt. Some legal expressions are ambiguously framed in the negative. Use them and you will be found guilty as charged. One example: "Found not guilty beyond a reasonable doubt" *becomes* "Not found guilty beyond a reasonable doubt."

A few exceptions arise to not being so negative. Among the exceptions are litotes, meiosis, and hidden negatives. Use litotes for understated negative emphasis. From Lloyd Bentson to Dan Quayle during the 1988 vice presidential debate: "I knew Jack Kennedy. Jack Kennedy was a friend of mine. And, Senator, you're no Jack Kennedy." From Justice Felix Frankfurter: "One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution."[3] From New Jersey, our not-incontiguous sibling state: "Mrs. Barber is the kind of a wife who stands by her husband in all the troubles he would not have had if he had not married her."[4] Use hidden legal negatives without overusing them. For example, *constructive*, as in *eviction*, *notice*, or *possession*, is not real but may be treated as real. And use meiosis, not to deceive, but to understate: "Justice Brandeis wrote a dissent or two in his lifetime."

To avoid whispering sweet little nothings, Orwell had a Golden Rule. Memorize this, he wrote, to radiate positive energy: "A not unblack dog was chasing a not unsmall rabbit across a not ungreen field."[5] Writers should write for the ear, not the eye. But apply the smell test to negatives. When it comes to *aye's* and *no's*, the nose knows best. Writing in the negative is an affirmative way not to get to yes. Negatives make your glass half empty and your glasses half blurry. Of that I am positive.

---

1. James D. Hopkins, *Notes on Style in Judicial Opinions*, 8 Trial Judges J. 49 (1969), *reprinted in* Robert A. Leflar, *Quality in Judicial Opinions*, 3 Pace L. Rev. 579, 585 (1983).
2. Witkin calls this the double-negative directive. *See* Bernard. E. Witkin, Manual on Appellate Court Opinions § 82, at 146 (1977) ("Many courts have abandoned the double negative form and use an affirmative direction.").
3. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).
4. *Bondarchuk v. Barber*, 135 N.J. Eq. 334, 334, 38 A.2d 872, 872 (Super. Ct. 1944) (Jayne, V.C.).
5. George Orwell, *Politics and the English Language*, *in* 4 The Collected Essays, Journalism and Letters of George Orwell 127, 138 (1968).

GERALD LEBOVITS is a judge of the Housing Part, New York City Civil Court and a former principal court attorney in Supreme Court, Criminal Term, New York County. An adjunct professor of law and the Moot Court faculty advisor at New York Law School, he is the author of *Advanced Judicial Opinion Writing*, a handbook for New York State's trial and appellate law clerks and court attorneys. This column is adapted from that handbook. His e-mail address is Gerald.Lebovits@law.com.

MEMBERSHIP TOTALS

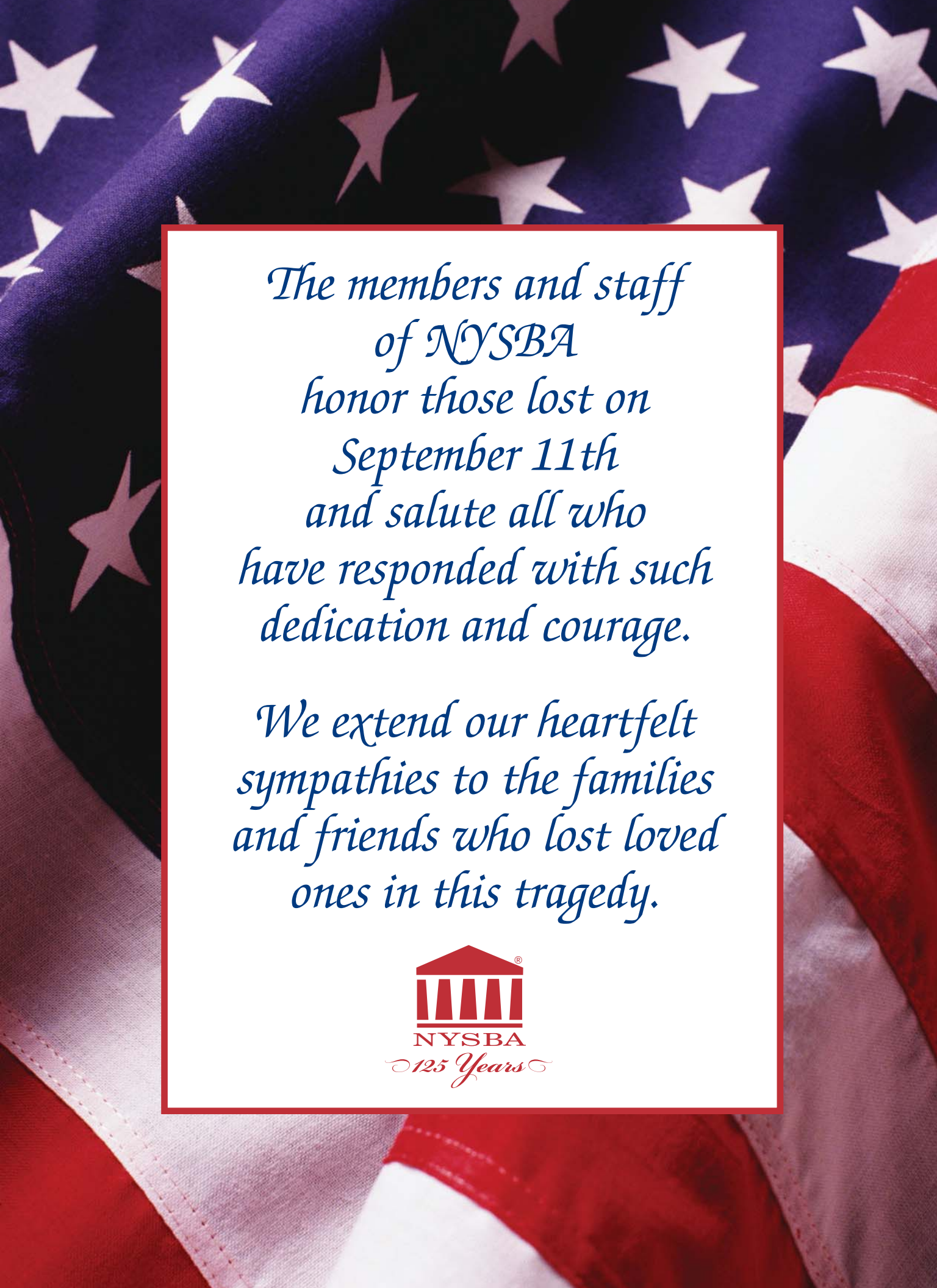
NEW REGULAR MEMBERS
1/1/01 - 10/30/01 _____6,961

NEW LAW STUDENT MEMBERS
1/1/01 - 10/30/01 _____1,339

TOTAL REGULAR MEMBERS AS OF
10/30/01 _____63,001

TOTAL LAW STUDENT MEMBERS
AS OF 10/30/01 _____4,818

TOTAL MEMBERSHIP AS OF
10/30/01 _____67,819



The members and staff of NYSBA honor those lost on September 11th and salute all who have responded with such dedication and courage.

We extend our heartfelt sympathies to the families and friends who lost loved ones in this tragedy.

NYSBA
125 Years

New Members Welcomed

FIRST DISTRICT
Melissa Claire Abramowitz
Heather Suzanne Adivari
Janey J. Ahn
James I. Alexander
Lyra J. Altman
Ariel Aminetzah
Daniel M. Anderson
Heather Anne Andrysiak
Liciana Aquino
John Micheal Armbruster
Laine A. Armstrong
Richard Jinyong Bach
Gustav F. Bahn
Daniel Bamdas
Richard C. Beck
Gary Edwin Bedsole
Jason Charles Benton
James Patrick Bergin
Carl-Fredrik Berglind
Tracy Victoria Bergmann
Ariel Berschadsky
Laury Ann Betha
Cecile Dominique Beurrier
Mark E. Bini
Ayesha Carmen Blackwell
Colleen Bloch
Jerome Howard Block
Brian William Bolster
Craig Jonathan Brill
Scott Michael Brown
Susan Ilene Brown
Janice Grant Brunner
Gary Brian Budoff
Lauro M. Bueno
Lawrence Edward Buterman
David R. Cahill
Sharanjit K. Calay
Patrick Francis Campos
Philip C. Canelli
Robert Daniel Canova
Alyssa K. Caples
Roert Sean Carmine
Justo A. Chamas
Nabanita Chaterjee
Sujata Chaudhri
Roberta B. Cherman
Leona S. Choe
Douglas Tzyh-Yun Choo
Catherine Rose Ciarletta
Robert W. Claeson
Anthony M. Colarusso
Manuel Alberto R. Colayco
Jeremy Spencer Colgan
Nicolas Commandeur
Timothy Concannon
Anna C. Connors
Kevin Michael Costantino
Frank Covello
Reiko E. Cyr
Peter D. Dahm
Rannylin Stephanie Dalley
Stuart Richard Daroca
Libby Skye Davis
La Shann Moutique De Arcy
Julio Andrade De Castro
Carolina Christina De Onis
Kevin John Deloatch
Stephen P. Dempsey
Annalisa Dentoni-Litta
Rachel Erin Deutsch
John James Devenny
Jonathan A. Doft
Joshua S. Eisenberg
David Elbaum
Andrew Mark Eliot
Susan Elter
David S. Escoffery
Steven Shih-Ming. Fang
Stephen J. Federbusch
Natascha Bianca Maria Feenstra
Jeremy P. Feigelson
Jennifer Dawn Felber
Elizabeth Feld
Jennifer Feldsher
Steven M. Field
Natasha Jan Finlen
Wayne R. Finley
Renee M. Fishman
Paul B. Flanagan
Sabrina L. Flaum
Cara Beth Fleming
Kimberly Rae Fox
Jamii Lynne Friedman
Joseph Michael Gambino
Christopher L. Garrett
Nicole L. Giacco
Luisa Maria Giraldo-Stoss
Ralph Glass
Shari Michelle Goldsmith
Julissa A. Gomez
Batya Goodman
Steven R. Gordon
Brian D. Gottlieb
Lionel Gougne
Robert J. Grados
Sandi F. Greene
Richard John Grossi
Pamela Leigh Gurley
Jeanne M. Haney
Christopher S. Harrison
Brian William Healey
Jonathan Harris Hecht
L. Alison Heller
Michael Dennis Helsel
Edward Stockton Horton
Ling Huang
Frank J. Hutton
Serkan Ictem
E Nkonye Iwerebon
Peter Izanec
Jane Jihyun Jaang
Jeanane Marie Jiles
Amy Christine Johnson-Spina
Bronwen Clare Jones
Stephen Monnig Jordan
Kenneth R. Kalstein
Steven Kamerman
Mitchell L. Kaplan
Robin Bradley Kar
Alexander S. Katz
Daniel Joseph Katz
Melvin Katz
Andrew H. Kaufman
Douglas P. Kaufman
Siobhan Marie Keegan
Stacey T. Kelly
C Annette Kelton
Joshua David Kestler
Donald S. Kim
Edward Kim
Jihwan Kim
Reyoung Kim
Wilson Kimball
Gregory Francis Kinzel
Tracey L. Kitzman
Jamie Deborah Knoll
Anna Kozoulina
Melissa J. Krakowski
Jennifer Elizabeth Kruer
Joseph C. Krummel
Stephanie C. Kueffner
Holly Kay Kulka
Andrew Seth Kushnick
Christina Bitzer Labrie
Andrew Nikhil Langham
Melissa Jayne Larocca
Hayley Nicole Lattman
Charisse Mary Lee
Teresa A. Lee
Elizabeth Lenas
Jonathan J. Lerner
Alan H. Levine
Gregory Scott Levine
Gail Cho Hui Lin
Katherine Liu
Henry Llewellyn Lloyd
Anthony A. Lo Presti
Fo-ching Lu
Scott Adam Lyons
Jorge Martin
Brian Guenther Maxey
David C. Mayer
Margaret Liu McConnell
Gina Maria McGillicuddy
Lauren A. Mcmillen
Karin Mcnair
Laura McQuade
Shelley Janine McQuade
Jennifer Cannon Meyer
Andrew Meyers
Steve Milankov
Marcia Ann Miller
William John Miller
Sheedeh Moayery
Christopher P. Moore
Jessica Ann Mordas
Constance Moss
Alessandra K. Murata
Jason Nagel
Stephen H. Nakamura
Preeti Narayan
Dimitri Nemirovsky
Joseph E. Neuhaus
Christine Sharyn Nickles
Hugh Stynes O'Beirne
James J. O'Brien
Jeffrey Robert O'Brien
Michael P. O'Brien
Mitchel H. Ochs
Matthew Finnbar O'Halloran
Jean Ann O'Hare
William S. Ohlemeyer
Maritza Uloma B. Okata
Andrew Timothy Oliver
Katherine J. Chuang Page
Brigette B. Pak
Tobey Palan
Eyal Paltin
Rita Pang
Brian Keith Parker
Dyanna C. Pepitone
Amanda J. Pestcoe
Leo Plank
David James Polgreen
Nadia Juanita Pollard
Evo Popoff
Ron Emmanual Prashker
Tyson Anwar Pratcher
Michael J. Principe
Orna Rabinovich-einy
Louis Abraham Rabinowitz
Jorge A. Ramirez
Humberto Miguel Reboredo
Sally O. Reed
Erin Kelly Regan
Katherine Marie Richardson
Caroline I. Rinke
Avrom J. Robin
S. Craig Rochester
Donald W. Rose
Laura E. Ross
Kirsten Anne Rostedt
Jeffrey Alan Roth
Barrie Alayna Rubenstein
Jacqueline Pilar Rubin
Linda A. Russo
Karen B. Saggese
Jeremy M. Saland
Anamika Samanta
Stephanie J. Sanet
Francisco Santiago
Robert G. Schacht
Richard Ira Scharlat
Philip S. Schlesinger
Allison J. Schoenthal
Mark Schonfeld
Jami Gorman Schultz
Nicolas Schuster
Tzachi Schwartz
Matthew Jay Scooler
Amy Elizabeth Semet
Sean Christopher Serpe
Tikvah Shachter
Anita D. Shapiro
Michael Lee Sher
Kristoffer M. Shields
Irene Shor
Gregory P. Silberman
Francine N. Silverstein
Michael Lawrence Simes
Marc Alexander Simonetti
Gunwanti Singh
Jennie E. Smith
Mark Andrew Smith
Katayoun Soudmand
Brooke Heather Spigler
Julian A.C. Stapleford
Melanie K. Stapp
Shannon L. Steege
Diana E. Stein
Jarod Stern
Blanch V. Stovall
Scott Aaron Sukovich
Matthew S. Symon
Lester Szeto
Cindy R. Taber
Manuel Jose Tavarez
Gayle A. Taylor
Irene M. Ten Cate
Joshua David Thomas
Roman Vladislavovich Troitsky
David C. Tyler
Hidehiro Utsumi
R Michael Vagnucci
Michael R. Vanderlinden
Carlos M. Velazquez
Stephanie Kara Vogel
Alan Nathan Walkow
Adam M. Walsh
David Scott Warner
Ian Jon Warren
Margaret L. Wendlandt
Christopher Patrick Wershoven
Kelly Louise Wick
Sara Fiedler Wienkes
Tiffany B. Williamson
Earl A. Wilson
Georgia K. Winston
Steven Winston
Alexander Charles Witkowski
Andrew Wolff
Roberta Woolley
Andrew S. Wurzburger
Bong Won Yeon
Wesley Meredith Yett
Vera Vassileva Zlatarski
Leila M. Zubi
Yael Zur

SECOND DISTRICT
Harvey Burko
Gina Marie Condello
Suzanne M. DeMeyer
Saul Glassman
Karen Rita Hennigan
Lawrence L. Kaye
Teresa Natasha Kerr
Robert Stuart Ludlum
Karyn Monat
Yvens Nelson
Arnold Saphirstein
Franklin R. Schwartz
Irina Shteynberg
Joseph G. Taras
Julie Teperow
Michael Valentine
Michael D. Velasco
Peter J. Weinman

THIRD DISTRICT
William J. Dwyer
Samuel J. Finnessey
Samuel John Finnessey
March Gallagher
Novlette R. Kidd
Bennett M. Liebman
James E. Nixon
Dana Leslie Rudikoff
Laura Amy Sprague

FOURTH DISTRICT
Robert W. Hemsworth
Lydia H. Meunier
Daniel Jeremy Rase
Charles R. Schwartz

FIFTH DISTRICT
Tina Louise Hartwell
Sandra L. Holihan
Chui-jae Lee
Hannah Lee
David A. Renzi

SIXTH DISTRICT
Stephen C. Roe

SEVENTH DISTRICT
Jennifer Belle-Oudry
Brett E. Dawson
Jeffrey Franklin De Voesick
Emily P. Derevenko
Heather Renee La Dieu
Joseph M. Noto
William Henry Verhelle

EIGHTH DISTRICT
Michael S. Deal
Christopher M. Duggan
Evan T. Jones
Tehsheng Ma
Nicholas Robert Spampata

NINTH DISTRICT
Yash P. Aggarwal
Brooke Jospe Barona
Christopher A. Boies

Ellen M. Boyle
Michael K. Burke
Eric Scott Darmofal
Mary Ellen DiPalma
David Lawrence Gerstner
Robin B. Gross
William R. Henrick
Michael J. Hersh
Paul J. Marino
Wanda Y. Negron
Mark A. Saltzman
Andrew M. Shabasson
Deborah Sherman
John M. Vanlindt
Leslie Dienes Weiss

TENTH DISTRICT
Richard E. Aibel
Susan Altamore Carusi
Martha L. Arce
Mary Shiny Baby
Colleen M. Boyle
Wayne A. Brown
Joanne Ciminera
Sandra Courbois
James A. Defelice
Peter J. Famighetti
Frederick A. Friedman
David P. Fritz
E. Gordon Haesloop
Leonard Halpern
John A. Herchenroder
Joseph T. Hopkins
Joseph S. Hubicki
Matthew V. Jakubowski
George L. Karavias
James J. Lillie
Sumner L. Lipsky
Christopher J. McGrath
Jonathan C. Misher
John E. Morris
Ariel Reinheimer
Jonathan A. Sambur
Frank N. Schellace
Joanne Scheno
Gregory G. Shaub
Sherry E. Sherman
Stephen A. Skor
Patricia Stern
Johanne M. Tingue
Seymour Trager
Allan S. Turisse
Daniel E. Wenger
John Zervopoulos

ELEVENTH DISTRICT
John M. Allen
Mark Eric Bruh
Victor A. Buglione
Stephanie I. Elmore
Mary P. Flynn
Katherina Ginnis
Nicholas Gisonda
Andrew A. Keats
Avi Kestenbaum
Alan G. Lebenbaum
Glenn A. Reitman
Paris T. Rosvolos
Murray E. Singer
Gary P. Wollan

TWELFTH DISTRICT
Abukari Abdulai Alhassan
Wilfred I. Anigekwu
John A. Barone
Annabelle Berrios
Elba I. Castro
Marion Conde Da Silveira
Lauren Mary Coyne
Melissa R. DiPalo
Ana Judith Guzman
Thomas R. King
Helen Lai
R. Michael Meo
Keith Anthony Miller
Denis O'Connor
Judith T. Scholl
Jeremy Isaac Senderowicz
Kristin Lynn Vassallo
Jessica Wales

OUT-OF-STATE
Ronald Abraham
Geraldine B. Acuna
Megna Kumari Adnani
Doron Afik
Perri Al-Rahim
Antigone Joan Andersen
Patrick Ayer
William A. Back
Dario J. Badalamenti
Cory R. Balzano
Kali Shereece Banks
Tibor M. Baranski
Danielle Elaine Barbuto
Orietta Patrizia Barletta
Joerg J. Bartussek
Richard J. Benning
Marcela Bermudez
Mirko Bibic
Rachel Samara Black
Mary Elizabeth Bogan
David Aiden Bredin
Geoffrey J.L. Brown
Joseph A. Burke
Sonya Leigh Byars
Ana M. Cabassa
Mark Francis Carpanini
Linda Rose Caruso
Richard E. Castiglioni
Sami Ismet Catovic
Biswajit Chatterjee
Youngsoo Choi
Anthony Richard Christiano
Jeremi L. Chylinski
Arnold Scott Clark
Craig John Conte
Jeffrey Neal Cooper
Scott Logan Cunningham
Gregory Lee Curtner
Eric S. Dawson
Danielle Nicole Deluca
Christopher L. DeMayo
Fabrice Jean Deperrois
Joshua Brett Deringer
Parul Prabodh Desai
Sebastian Deschler
Delphine Di Menza
Richard E. Dominguez
Scott D. Donlan
Bryan Vincent Doto
Richard Francis Douglas
Tanya Narelle Dunne
Carla Duque
Jennifer Mary Erickson
Jennifer Robertson Escott
Denise Errico Esmerado
Nathan F. Fahrer
Christopher Michael Farella
Teresa Maurea Pantoja Da C. Faria
Erin Deirdre Farrell-Milosavljevie
Ann Elizabeth Favale
Deborah E. Feder
Michael K. Feldman
Romain J. Felix
Pietro Matteo Fioruzzi
Lauren Elizabeth Fleischer
Stefanie Jill Fogel
Mara A. Folz
Brian Christopher Fournier
Gregg Alan Fowler
Vincenzo Franco
Lawrence Michael Frangiosa
Koichi Fujinami
Pablo D'Avila Garcez Bentes
Olivier W. F. Gely
Edward Joseph Germick
Manjit Singh Gill
Jane R. Goldberg
Matthew Nicholas Goldin
Eugenia Gonzalez-Rivas
Dina Anna Grassi
Rebecca Graydon
Jurg R. Greter
Leo L. Grigolia
Bennett S. Gross
Dubravka Grujic
Rupa Gupta
Yehuda Y. Halpert
Danish Hamid
Sarah Jayne Harp
George N. Harris
Carol A. Hawk
Catherine L. Hazlewood
Loriann Hellmann
Kristina Marie Hendrickson
Evan Stanley Henschel
Csaba Henter
Kyun Heo
Carsten Herresthal
Desiree Kelly Holzlein
Malcolm A. Hope
Joseph M. Horn
Kathryn Ann Hutchins
Amy Jo Iannone
Timothy Michael Idland
Kentaro Ishihara
Christopher Gerard Izzo
Jinseok Jang
Yi Jiang
Holly Michelle Johnson
Anne Margaret Joseph
Judy Supei Jou
Alexandro J. Junco
Chaho Jung
Youngjin Jung
Edward Uimo Kang
Wen-Shing Kao
Elaine Kaplansky
Kinga Kapuscinski
Memduh Karakullukcu
Adam J. Kearney
Frederick Edwin Kearns
Lashon Kimberly Kell
Valerie Felicia Kennedy
Guy Keren
Darci R. Keyes
Sang Hun Kim
William Francis Kiniry
Kelly Jean Kirk
Andrew Blair Knapp
Christopher Konzelmann
Lawrence Joel Kotler
Joseph H. Kwon
Mike Ruoxin Lai
Sara Jane Lamberg
Gretchen Elise Lambert
Susanne Larsen
Magdalena Maria Laski
Ming Wai Lau
Laura Lavie
Erich Sanbeck Lee
Joshua Aaron Levy
Sarah Elizabeth Light
Yao Lin
Thomas Anton Linthorst
Elisabeth Ament Lipton
John Joseph Locurto
Shoshana Lopatin
Thomas Philip Lutz
Michael J. Lynch
Grant W. Lynds
Anne Margaret Macgregor
Mitsutoshi Maeda
Michael Charles Maher
Yoshiko Makino
Vladimir Maly
Tricia Leigh Mangone
Connor P. Manning
Peter V. Marchetti
Elyse Adler Marcus
Kurosh Lee Marjani
Christanthony Marryshow
Arturo Meglio
Liat Ahuva Menahemi-stadler
Brett Lawrence Messinger
Michele Meyer
Ruth M. Meyer
Brian Mikesh
Ivan Vojislav Miletic
Arthur James Momjian
Daniel Montalvo
Marvin Orville Morris
Michele Moseley-Jones
Gregory E. Mulroy
Jougkuk Mun
Richard A. Munn
Kevin Sean Murphy
Crystal Elizabeth Nagy
Eileen Napolitano
Ling Li Ng
Kristina Norlander
Perry Isev Novotny
April C. O'Connor
Brigid Osei-Bobie
Michael J. O'Sullivan
Eyitope Akingbade Oyolola
Panayotis Papapashalis
Aaron J. Papps
Eric M. Parham
Jin Park
Min-Gyu Park
Salem Park
Seunghwan Park
Younggoog Park
Anne Marie Paskalis
Vijayant Pawar
Jane Ely Pearce
Lorena Elaine Perez
Barbara Perkins
James John Perkins
Michael Joseph Perrucci
Stacey Lynn Pinchuk
Margarita Platkov
Jason Michael Pratt
Shana Eve Rabinowitz
Maurizio Ragazzi
Snezana Rajsic
John H. Ray
Carmelo Reale
Patricia Rose Reddy-Parkinson
Jeffrey G. Regenstreif
Kevin Watt Rethore
Ana Cecilia Reyes
Brittany Leigh Roberts
Angus W. Rose
Andrew Harris Rosen
Morey S. Rosenbloom
Dennis M. Rothman
Mark Edward Ruddy
Jennifer Leigh Sanyshyn
William Senande
Cristina Maria Senoner
Te-yen Shao
Yasuhiro Shimada
Alon Shiri
Vladislav Shvartsman
Samuel R. Simon
Susan Assunta Simone
Andrew D. Singer
Dale Amar Smith
John Joseph Snyder
Michelle Leigh Speyer
Rosa Giulietta Spinelli
Kathryn Bishop Stanley
Heiner E. Staschcu
Ronald Steinvurzel
Alexander Marcus Stokas
Joshua Matthew Stone
Peter K. Stris
Hiroto Sugano
Sunje Sung
David Jeffrey Sussman
Ken Suzuki
Imre Stephen Szalai
Michal Tal
John Joseph Tambascia
Soo Chuen Tan
Anthony Dominic Tancini
Jie Tang
Georgia Marie Joachim Thomas
Bryan F. Tiggs
Marielle Ting
Kevin Lee Todd
William David Todd
Robert Jacek Tomkowicz
Andre Gene Travieso
Walter Dana Venneman
Kevin P. Von Bargen
Hope Alison Wachter
Randi S. Weaver
Jeffrey G. Weiss
Dalila Argaez Wendlandt
Stephanie Joy Willman
John Kevin Winters
Timothy P. Wixted
Jay Marshall Wolman
Chuan-ni Wu
Katherine Ruth Scobey Wynn
Fatin Jeha Wysk
Jiyeon Yang
Jingmei Ye
Ying-chun Yeh
Lewis Stanley Yelin
Stephen George Yoder
Naohiko Yokoshima
Xiaohui Yu
Karen L. Zdanis
Richard Joseph Zecchino
Zhan Zhao
Tobias Eli Zimmerman
Michael Jay Zinna
Raziel Zisman

In Memoriam

Forrest N. Case
Slingerlands, NY

Linda K. Gronlund
Greenwood Lake, NY

Lawrence Katzman
Watertown, NY

Standish F. Medina
New York, NY

William H. Pohlmann
Ardsley, NY

H. Jackson Sillcocks
Orleans, MA

Robert M. Spies
Chadds Ford, PA

Joanne F. Weil
New York, NY

Thomas Wilson
Somerville, NJ

Headquarters Staff E-mail Addresses

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

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

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

Governmental Relations
C. Thomas Barletta, *Director,* tbarletta@nysba.org
Ronald F. Kennedy, *Assistant Director,* rkennedy@nysba.org

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

Human Resources
Richard V. Rossi, *Director,* rrossi@nysba.org

Law Office Economics and Management
Stephen P. Gallagher, *Director,* sgallagher@nysba.org

Law, Youth and Citizenship Program
Gregory S. Wilsey, *Director,* gwilsey@nysba.org
Emil Zullo, *Assistant Director,* ezullo@nysba.org

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

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

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

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

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

Pro Bono Affairs
Diane Burman, *Director,* dburman@nysba.org

The New York Bar Foundation

2001-2002 OFFICERS

Richard J. Bartlett
President
1 Washington Street
P.O. Box 2168
Glens Falls, NY 12801-2963

Emlyn I. Griffith
Vice President
225 North Washington Street
Rome, NY 13440-5724

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

Randolph F. Treece
Treasurer
445 Broadway
Albany, NY 12207

DIRECTORS

John P. Bracken, *Islandia*
Cristine Cioffi, *Niskayuna*
Angelo T. Cometa, *New York City*
Maryann Saccomando Freedman, *Buffalo*
Robert L. Haig, *New York City*
Jules J. Haskel, *Garden City*
Paul Michael Hassett, *Buffalo*
John R. Horan, *New York City*
Susan B. Lindenauer, *New York City*
Robert L. Ostertag, *Poughkeepsie*
Joshua M. Pruzansky, *Islandia*
Thomas O. Rice, *Garden City*
M. Catherine Richardson, *Syracuse*
Hon. Shira A. Scheindlin, *New York City*
Justin L. Vigdor, *Rochester*

Journal Board Members Emeriti

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

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

2001-2002 OFFICERS

Steven C. Krane, President
New York
Lorraine Power Tharp, President-Elect
Albany
Frank M. Headley, Jr., Treasurer
Scarsdale
A. Thomas Levin, Secretary
Mineola

Vice-Presidents

First District:
Mark A. Alcott, New York
Stephen D. Hoffman, New York
Second District:
Edward S. Reich, Brooklyn
Third District:
James B. Ayers, Albany
Fourth District:
Peter D. FitzGerald, Glens Falls
Fifth District:
James F. Dwyer, Syracuse
Sixth District:
Hon. Eugene E. Peckham, Binghamton
Seventh District:
C. Bruce Lawrence, Rochester
Eighth District:
Joseph V. McCarthy, Buffalo
Ninth District:
Joseph F. Longo, White Plains
Tenth District:
A. Craig Purcell, Hauppauge
Eleventh District:
Gary M. Darche, Flushing
Twelfth District:
Lawrence R. Bailey, New York

Members-at-Large of the Executive Committee

Sharon Stern Gerstman
Michael E. Getnick
Matthew J. Kelly
Gunther H. Kilsch
Bernice K. Leber
Susan B. Lindenauer

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

Members of the House of Delegates

First District
Alcott, Mark H.
Baker, Theresa J.
Barasch, Sheldon
Batra, Ravi
† Bing, Jonathan L.
Bonner, Thomas J.
Brett, Barry J.
Buckley, Hon. John T.
Cashman, Richard
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.
Miranda, David P.
Murphy, Sean
Netter, Miriam M.
Pierro, Louis W.
Samel, Barbara J.
* Tharp, Lorraine Power
Tippins, Timothy M.
Treece, Hon. Randolph F.
* Williams, David S.
* Yanas, John J.

Fourth District
Cioffi, Cristine
Clements, Thomas G.
Coffey, Peter V.
Doern, James E D
FitzGerald, Peter D.
Harper, David A.
Hoye, 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.
Michaels, Joanne E.
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
†* Pruzansky, Joshua M.
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

Getting to Yes: Affirmative Writing

By Gerald Lebovits

Which is the better Golden Rule? "Do unto others what you want them to do unto you" *or* "Do not do unto others what you would not want them to do unto you"? The answer depends on whether you emanate positive or negative energy.

Everyone knows that "thou shalt not never use no double negatives." But there is more to know about *no* than that. Clarity and honesty, in law and elsewhere, require that you prefer positives to negatives: "An affirmative statement is preferable to a negative one. The reader may doubt the scope of the negative."[1] Not for nothing, but here are some tips to help you whisper sweet little somethings.

Write even negatives in the positive. "Do not write in the negative" *becomes* "Write in the positive." "This argument is not without support in the cases" *becomes* "The cases support this argument." "We remand for proceedings not inconsistent with this opinion" *becomes* "We remand for proceedings consistent with this opinion."[2] "Do not appear in court before 9:30 a.m." *becomes* "Appear in court at 9:30 a.m. or later." "The nonmonied spouse must not be prevented from . . ." *becomes* "The nonmonied spouse must be allowed to. . . ."

Negative vibrations. The emphatic negative is not infrequent among legal writers. "Totally null and void and of no further force or effect" *becomes* "Void."

Prefer negational antonyms to negatives. Write *false* instead of *not true* and *true* instead of *not false*. "Respondent was not present" *becomes* "Respondent was absent."

Nix negative words. If you can, avoid *barely*, *denial*, *disapprove*, *except*, *hardly*, *neglect to*, *neither*, *never*, *nor*, *not*, *other than*, *prohibit*, *provided that*, *scarcely*, *terminate*, *unless*, *void*.

Knock negative prefixes and suffixes. Be on guard for *dis-*, *ex-*, *il-*, *im-*, *ir-*, *-less*, *mis-*, *non-*, *-out*, *un-*.

Eliminate negative combinations. Cut *never unless*, *none unless*, *not ever*, *not otherwise*, *not unlike*, *rarely ever*. Rarely use *seldom ever* and seldom use *rarely ever*: "The attorney rarely ever [or *seldom ever*] shows up on time" *becomes* "The attorney rarely [or *hardly ever*] shows up on time." Or "The attorney rarely if ever shows up on time." Do not use *but*, *hardly*, or *scarcely* with *not*. "I could not but laugh" *becomes* "I could but laugh."

One but is better than two. Use *but* instead of *but however*, *but nevertheless*, *but that*, *but yet*, *but what*, and *not but*. "The court does not question but that defendant is liable" *becomes* "The court does not question that defendant is liable." *Or*, in the positive, without metadiscourse: "Defendant is liable." "I do not own but one CPLR" *becomes* "I own but one CPLR." *Or* "I own only one CPLR."

Use "not" as a negative, not as a positive. "I need to know whether you *cannot* go to trial" *becomes* "I need to know whether you *can* go to trial."

Do you care about this? "The partner could care less who her associate will be" *becomes* "The partner could *not* care less who her associate will be."

Negative measurements do not add up. The phrase "no less than four" can mean "at least four" or "four or more." "No smaller than" can mean "as large as," "at least as large as," or "the smallest." "No more than" can mean "the maximum" or "the most." "The maximum" or "the most" can be limiting negatives (*everything is less*) or a positive (*the best*).

Negative pregnants. A *negative pregnant* is a deadly affirmative. Lender: "You owe me $100." Borrower: "I do not owe you $100." The borrower just admitted owing some money, though less than $100. The borrower should have said, "I owe you nothing."

Affirmative pregnants. An "affirmative pregnant" is a deadly negative. Lender: "You owe me $100. Borrower: "I paid you $50." The borrower just admitted owing $50. The borrower should have said, "I owed you only $50, and I paid you already."

Never-never land. The word *never* means *not ever*. "I never made that argument last July" *becomes* "I did not make that argument last July."

> ***Clarity and honesty, in law and elsewhere, require that you prefer positives to negatives.***

Not only . . . but also. "Not only do I like civil practice but also family law" *becomes* "Not only do I like civil practice but I also like family law." *Or* "I like not only civil practice but also family law." *Or*, in the positive, "I like civil practice and family law."

So . . . as, as . . . as. Some (but not all) sticklers suggest using *so . . . as* in only negative combinations: "The prosecutor is not so clever as the defendant." All sticklers suggest using *as . . . as* in positive combinations: "The prosecutor is as clever as the defendant."

Every and all negatives. "Not everyone is a good writer" *means* "Some write well and some do not write well." The sentence "Everyone does

Continued on page 58