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Journal

NEW BROWNFIELDS LAW CHANGES REMEDIATION PROCESS

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Survey of Appellate Judges

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October 2004

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(PN: 40863)

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On The Cover

The demise of waterfront industries such as the General Motors plant in Sleepy Hollow, pictured on the cover, which once employed over 1,500 workers before its demolition in 1996, created many sites that still await a complicated and costly remediation and redevelopment process. This issue's feature story reviews significant new legislation that provides incentives to spur cleanup efforts throughout the state.

Photograph by David C. Wilkes.
Cover design by Lori Herzing.

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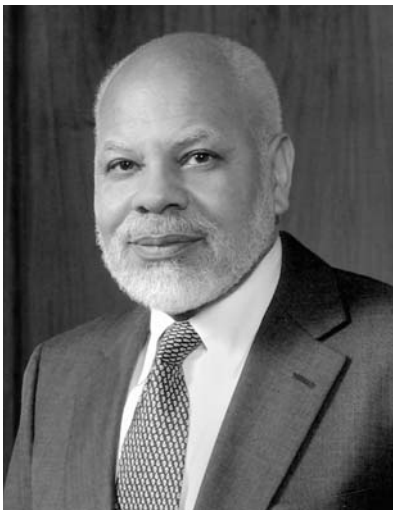
President's Message



KENNETH G. STANDARD

Balancing Act

I marked Labor Day by setting into motion a project to take aim at an issue that I believe needs our priority attention for the well-being of the profession – the quest for full and balanced lives for members of the bar.

In so doing, I empathized with the struggles of a New York City associate as she sought to give due attention to her caseload and to her family, including young children, and also sought to find time to volunteer professional services as well. I thought of the managing partner of a small firm who found that a number of new attorneys applying to the firm were geared almost exclusively to client matters and showed little interest in another requirement of the office – volunteering for bar and community activities. I also heard the frustration in the voice of an upstate attorney from a small firm who lamented that practice these days seems to have become more and more business and bottom-line oriented, and less focused on being an attorney and counselor at law. Then there was the situation of the corporate counsel whose legal department had steadily absorbed more and more work with the same number of attorneys.

The circumstances are diverse throughout our state but there is no doubt life in the law is an increasing challenge. We are at our best as lawyers when we live an enriched life that enables us to be part of the community in a meaningful way, to do pro bono work, to work with bar associations in making improvements in the legal system, while having time for family and personal interests. The demands of our practices, economic constraints and competitive pressures have in too many cases eliminated these opportunities. To most effectively draw on the wealth of talent within the profession, our offices need to reassess and perhaps adjust policies and procedures. Our profession needs to continue to attract and retain the best and brightest.

That is why I have appointed a Special Committee on Balanced Lives in the Law and assigned it the challenging mission of examining how and why our profession has gotten to its present state and determining if this is what we really want and, if not, what we can do about it. Past President Catherine Richardson is chairing the committee. This is not a downstate or upstate project. It will not focus on one size firm and work setting over another, but will examine the full variety of practice conditions and consider all aspects of this difficult issue. The committee's charge is an ambitious one. You can help. The committee needs to hear your experiences and ideas, as members of the bar in different career stages, settings and geographic areas.

Much of the malaise I have seen stems from trends in society that are affecting workplaces in general – the difficult economic climate, the competitive commercial environment, corporate restructurings resulting in a smaller number of people shouldering the same amount or even more of the work, the advancements in technology that enable us to be connected to laptops, cellphones, e-mail, etc. 24/7, and the heightened expectations and demands of clients/customers.

The realization that such conditions can cause unrelenting stress and that these pressures left unabated likely have a deleterious effect on workers' productivity and – yes, their well being – has resulted in a growing array of research and public attention. As I write this, *The New York Times* is publishing a series of articles on this subject, beginning with the headline, "Always on the Job, Employees Pay With Health" and citing estimates from the American Institute of Stress that "workplace stress costs the nation more than $300 billion each year in health care, missed work and the stress-reduction industry that has grown up to soothe workers and keep production high."

Members of the bar – from solo practitioners, to those in large firms, corporate departments and elsewhere – are affected by these circumstances. These factors are compounded by some limited to the legal profession – among them, our culture that leads us inevitably to put client needs before our own, which is admirable but can be dangerous; the increasing complexity of law and demands upon us for legal solutions to almost every clash in life; and the development of procedures, such as the billable hour, which were introduced with great hopefulness but that seem to have added to the problems for both attorneys and clients, in terms of the race

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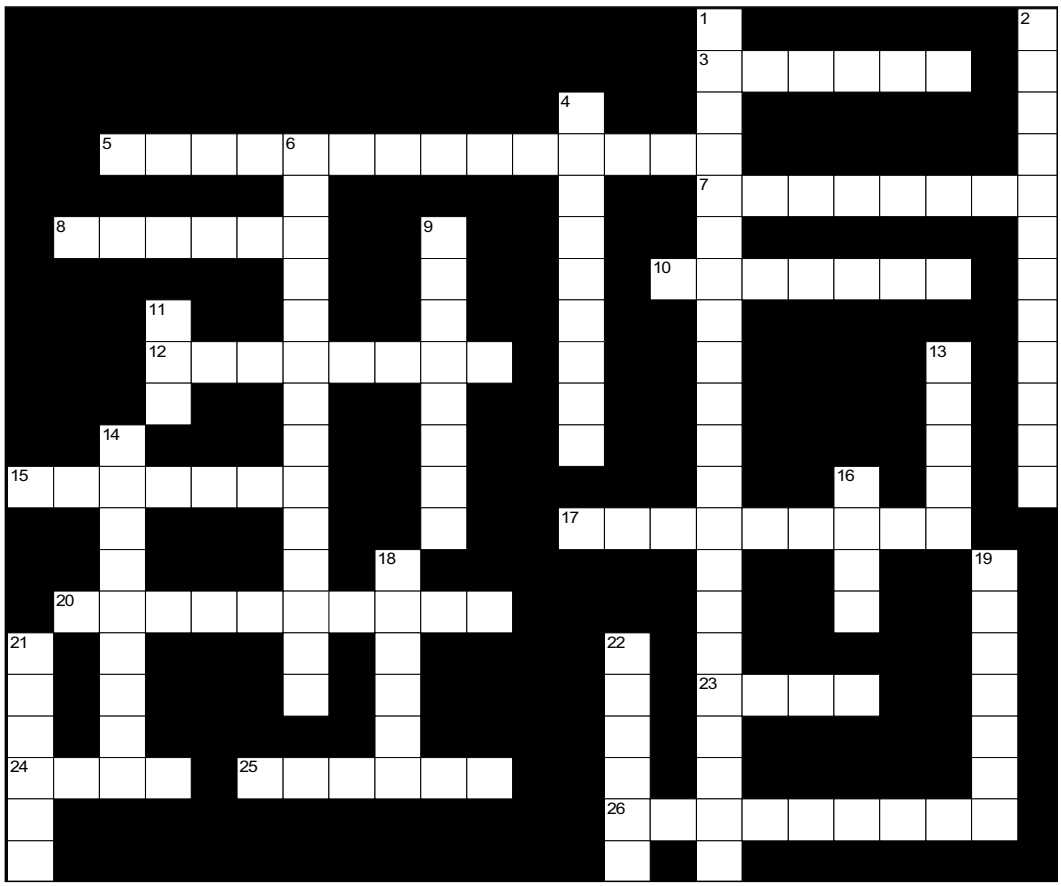
to make or exceed billable expectations and, some would say, to the detriment of imaginative lawyering.

Ten years ago in this *Journal*, Syracuse attorney John Beach wrote, "The billable hour as one measure of value to the client is here to stay. More and more, however, lawyers should be willing to honor the relevance of other factors as well. . . . [Alternatives to the billable hour] will vary from firm to firm, client to client, and situation to situation. Inevitably they will involve a new partnership of risk taking between lawyers and their clients in many matters beyond those traditionally covered by contingent fees." This change, he observed, would have the positive result of enhanced attorney-client communication and partnerships throughout the process of resolving the case at hand. I would add that it would serve to enhance the role of lawyer as counselor and problem-solver – the role that attracted so many of us to this profession. Going beyond use of the billable hour, by devising and utilizing additional means of measuring and compensating our work, is part of the equation to address these problems.

We have much to do. In addition to the development of practical and creative recommendations, we must persist in ensuring that these measures for improvement are implemented, and we must work to increase awareness of the issues and the consequences of inaction. All this will require change by individuals, by offices, by institutions – in essence, shifting the course of a large ship. We must consider it an investment in ourselves, in the lawyers in our offices, in our profession. I look forward to the committee's work and to your involvement. While the committee expects to engage in fact-finding efforts, including possible hearings and other forums, and will seek the perspectives of sections and other committees, don't wait for these opportunities to speak up. I urge you to share your thoughts on these issues now by e-mailing Catherine or me.

CROSSWORD PUZZLE

The puzzles are prepared by J. David Eldridge, a partner at Pachman, Pachman & Eldridge, P.C., in Commack, NY. A graduate of Hofstra University, he received his J.D. from Touro Law School. (The answers to this puzzle are on page 59.)



Real Appeal, by J. David Eldridge

Across

3 The documents considered by the court below and its judgment or order being appealed

5 When this is served upon your adversary and filed with the court you have taken the appeal (CPLR 5515)

7 A "Statement _____ Record on Appeal" is served when the questions presented can be determined without examination of pleadings and proceedings

8 How permission to appeal is obtained when not of right (CPLR 5516)

10 The number of minutes permitted for oral argument in a typical case

12 Where the respondent wins again

15 You must do this with your appeal by serving briefs within six months of the notice or your appeal is deemed abandoned

17 Appeal to the Court of Appeals taken as of right does not lie from a _____ order of an Appellate Division

20 The winner below

23 The conference you often have to attend (to see whether the case can be settled) pursuant to Rule 670.4

24 Otherwise known as a Request for Appellate Division Intervention (Rule 670.3(a))

25 A document or legal argument not contained in the record

26 When you don't need leave of court to appeal a decision (CPLR 5513)

Down

1 What the Appellate Division may grant, modify, limit, or vacate under CPLR 5518

2 This doctrine barring a litigated issue from being raised in subsequent proceedings does not apply on appeal

4 The party bringing the appeal

6 A ground for appeal as of right to the Court of Appeals (CPLR 5601)

9 Where the appellate court doesn't agree with the court below

11 Unlike the lower appellate courts, the Court of Appeals may only review questions of _____ (CPLR 5501(b))

13 Service of the notice of appeal automatically _____ many proceedings to enforce the judgment or order appealed from (CPLR 5519)

14 An argument or issue not raised below is not _____ for appellate review

16 An issue or determination with no practical effect on the existing controversy

18 When the reviewing court considers the underlying facts of the case "anew" (as opposed to just an error of law)

19 The one judgment or order you can't appeal from pursuant to CPLR 5511

21 The number of days you have to appeal from an order after service of notice of entry (CPLR 5513)

22 Resort to a superior court to review the decision of a lower court

Environmental Remediation Process Is Undergoing Sweeping Changes Mandated by New Brownfields Law

BY DALE DESNOYERS AND LARRY SCHNAPF

New York State is in the process of implementing what is perhaps the most significant piece of environmental legislation in the state in the past two decades. The measure, signed into law by Governor Pataki in October 2003 and recently amended by the Legislature,[1] makes sweeping changes to the state's environmental remediation programs.

The legislation (the "Brownfield/Superfund Act") amended the state's 1979 superfund law to add important liability reforms, established a comprehensive Brownfield/Superfund Cleanup Program (BCP), and infused the state superfund with $120 million.[2] The Brownfield/Superfund Act also created a $15 million fund for Technical Assistance Grants (TAGs), Brownfield Opportunity Area (BOA) grants and state oversight of the BCP. The New York State Department of Environmental Conservation (DEC) is in the process of developing guidance documents and regulations to carry out the new BCP.

In general, the measure provides incentives to clean up hazardous waste sites and specific standards for cleanups, especially for urban sites to be redeveloped for industrial use. This article reviews key features of the legislation and provides practical insights on how to use the program to remediate and redevelop contaminated sites in New York.

The New Title 14 Brownfield Cleanup Program

The BCP may be used for cleanups of hazardous waste and petroleum-contaminated sites. The Brownfield/Superfund Act defines a brownfield as real property, the reuse or redevelopment of which is complicated by the presence or perception of contamination.[3] The definition does not specify whether a certain amount of contamination must be present or if the contamination must be due to a release of hazardous substances or can be associated with contaminated fill material. Nonetheless, applicants should be prepared to discuss how the contamination that is present at the site has complicated the reuse or redevelopment of the site.

Eligible Parties Two kinds of applicants are eligible to apply for the BCP. They will have different obligations under the BCP, depending on their classification.

The first category is a "volunteer." This is any person not responsible for the contamination at the time of the BCP application, or one considered a potentially responsible party (PRP) solely on the basis of its ownership of a site that was contaminated prior to the time the applicant acquired title to the property.[4] A volunteer must investigate and clean up contamination at the site but is

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LARRY SCHNAPF is an environmental lawyer who works with Schulte Roth & Zable in New York City. He is an adjunct professor at New York Law School where he teaches "Environmental Problems in Business Transactions." He is Co-Chair of the Hazardous Waste/Site Remediation Committee of the NYSBA's Environmental Law Section and also serves as Co-Chair of the Section's Brownfields/Superfund Reform Task Force. He graduated from Rutgers University and received his J.D. from New York Law School.

not required to "chase the plume" or remediate contamination migrating off the site. If, however, contamination is migrating off a site, a volunteer will be required to perform a qualitative exposure assessment to evaluate the risk to public health and the environment of the off-site contamination.[5] While the obligation to perform an exposure assessment could involve sampling where potential receptors are located to determine if the receptors are being exposed to contaminants, the volunteer will not be required to characterize the extent of the exposure.[6] To maintain its status as a "volunteer" under the BCP, the applicant will have to use "appropriate care" in dealing with the contamination.[7] A volunteer who fails to exercise "appropriate care" by not taking reasonable steps will be treated as a "participant." When a volunteer is remediating a site, the DEC will be responsible for either remediating the off-site contamination or having PRPs address such contamination.[8]

The former Anaconda Wire and Cable Company in Hastings, on the Superfund list.

Photo by David Wilkes

The second category of eligible applicant is a "participant." It includes any applicant that does not qualify as a volunteer, such as a PRP.[9] A "participant" must investigate and characterize the nature and extent of contamination both on-site and emanating from the brownfield site. In addition, a participant may also be required to remediate contamination migrating off-site.

Eligible Sites Sites contaminated with hazardous wastes and petroleum are eligible for the BCP unless they have been classified as a Class 1 or 2 site on the DEC's Inactive Hazardous Waste Disposal Site Registry (the "Registry"), are on the National Priorities List (NPL),[10] are permitted Resource Conservation and Recovery Act (RCRA)[11] sites, are subject to an enforcement action or are subject to a cleanup order under Article 12 of the Navigation Law.[12] An application may also be rejected if the applicant has engaged in certain prohibited acts, or for "public interest" reasons.

Under the state superfund program, the DEC may place inactive hazardous waste sites with "consequential" amounts of hazardous waste on the Registry.[13] The Brownfield/Superfund Act does have amnesty provisions that allow volunteers that own Class 1 or 2 sites to enroll their sites into the BCP prior to July 1, 2005. After that date, those parties will be subject to the traditional superfund enforcement process.[14] Participants that own Class 1 or 2 sites are not eligible for the amnesty process.

The amnesty provision for Class 2 sites provides a potentially important incentive for remediating contaminated sites that could also possibly increase the potential value of the property. For example, while a participant who owns a Class 2 site is not eligible for the BCP, a volunteer who acquires the property from the participant could enroll in the BCP if it does so prior to July 1, 2005. Likewise, the older administrative orders on consent (AOCs) that were issued under the state superfund program often addressed only portions of a contaminated site, which were referred to as "operable units" (OUs). If a participant has completed an AOC for a particular OU, the AOC can be considered terminated and the participant could then transfer the property to a volunteer to complete the cleanup under the BCP.

Another important incentive is that once a BCP application for a brownfield site has been made, that site will not be listed in any spill report or on the Registry, so long as the applicant is acting in good faith and remains in the BCP.[15] This deferral is important because a site that is listed as a Class 1 or 2 site on the Registry is not eligible for the various BCP financial assistance programs and may be ineligible for the user-based cleanup standards available under the BCP. The deferral should serve as an impetus for property owners and municipalities to enroll their contaminated sites in the BCP.

The RCRA exclusion does not apply to interim status sites unless they are subject to a corrective action order. Interim status not only applies to facilities that treated, stored or disposed of hazardous wastes but can also include facilities that were registered as RCRA generators but may have stored waste beyond their allowable time limit. Because interim status "runs with the land" until releases of hazardous wastes have been remediated, purchasers can unwittingly acquire interim status

Overview of Existing Remedial Programs

The New York State Department of Environmental Conservation (DEC) is responsible for administering four remedial programs: the State Superfund Program for hazardous wastes, the Spill Response Program for petroleum contamination, the Environmental Restoration Program (ERP) for municipal brownfields, and the Voluntary Cleanup Program (VCP).[1] The New York State Department of Health (DOH) and the state attorney general also have roles in ensuring the cleanup of inactive hazardous waste disposal sites across the state.

To establish uniformity across its remedial programs, the DEC's Division of Environmental Remediation (DER) developed a draft *Technical Guidance for Site Investigation and Remediation* (DER-10) in December 2002. DER-10 establishes the minimum steps that must be followed in each remedial program. These steps include Site Characterization, Remedial Investigation, Remedy Selection, Remedial Design/ Remedial Action, and Operation, Maintenance and Monitoring (OM&M).[2]

The DEC has not, however, promulgated explicit regulations for remediating contaminated sites. Instead, the agency issued a series of guidance documents that established cleanup goals and objectives. The principal guidance for determining soil cleanup objectives and cleanup levels for VOCs (volatile organic compounds), SVOCs (semi-volatile organic compounds), heavy metals, pesticides and PCBs is the Technical and Administrative Memorandum (TAGM) 4046. The recommended soil cleanup objectives apply to in-situ (non-excavated) soil and excavated soil that will be placed back into the original excavation or consolidated elsewhere on a site.

Since December 2000, TAGM 4046 has also been used to develop soil cleanup objectives for gasoline and fuel oil contaminated soils that will be remediated in-situ. The Spill Technology and Remediation Series (STARS) Memo #1 provides guidance on the handling, disposal and/or reuse of ex-situ (excavated) non-hazardous petroleum-contaminated soil. STARS Memo #1 also provides guidance on sampling soil from tank pits and stockpiles. Excavated petroleum-contaminated soil must meet the guidance values listed in STARS Memo #1 before it can be reused off-site. The principal guidance document for establishing groundwater cleanup goals is the Technical and Operational Guidance Series (TOGS) #1.1.1.

Before passage of the Brownfield/Superfund Act, the DEC had also established the administrative voluntary cleanup program (VCP) to allow landowners, prospective purchasers and other volunteers to investigate and/or remediate sites that were contaminated with hazardous substances and petroleum. The work has been performed under the oversight of the DEC and DOH, and the volunteer pays the state's oversight costs. When the volunteer completes work, it receives a release from liability from the DEC, which has used a standardized Voluntary Cleanup Agreement (VCA) that is essentially non-negotiable. The DEC prepared a *Voluntary Cleanup Program Guide* in May 2002 that details the program requirements.[3]

The administrator of the state Environmental Protection and Spill Compensation Fund (the "Oil Spill Fund") and the attorney general also have authority over petroleum spills. Because a VCP liability release is binding only on the DEC, volunteers have had to request that the attorney general also execute a release, especially where volunteers are not required to remediate off-site petroleum contamination. Otherwise, the Oil Spill Fund Administrator would not be precluded from seeking reimbursement from volunteers for off-site petroleum migration.

1. ECL §§ 27-1401–27-1431; Nav. Law §§ 170–197; ECL § 56-0505.
2. DER-10 *available at* <http://www.dec.state.ny.us/wwebsite/der/guidance/der10dr.pdf>. Because the remedial programs have different statutory goals, individual cleanup projects may not be required to complete each of the investigative and remedial steps. For example, when there is a known spill event or the contamination is associated with an underground storage tank, a responsible party may skip certain portions of the Site Characterization process (*e.g.*, records review). In addition, the individual remedial programs continue to use different types of oversight documents used to implement response actions.
3. Previously, the regulated community had to rely on speeches for guidance on the scope of the program, a procedure that one of the authors (Larry Schnapf) has termed "rulemaking by speechmaking."

facilities and find themselves saddled with potential RCRA corrective action liability. Such RCRA corrective action can be time consuming and costly because the cleanup standards are technology-based. Allowing interim status facilities to be eligible for the BCP should help expedite the cleanup and redevelopment of these sites.

Petroleum-contaminated sites are eligible for the BCP unless they are subject to an enforcement action or cleanup order. DEC regional offices often resolve petroleum spills or leaks from underground storage tanks (USTs) by entering into a stipulation agreement (STIP) where the responsible party or a volunteer agrees to

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clean up the spill. Thus, there was a question whether STIPs fell within the definition of a cleanup order under the Navigation Law, which governs spills. The recent technical amendments clarified that the existence of a STIP would not preclude a site from the BCP.[16]

To help stimulate redevelopment of contaminated sites, the Brownfield/Superfund Act requires the DEC to establish a public database for each brownfield site.[17] In addition, each county must undertake a survey to inventory hazardous waste sites in its jurisdiction.[18]

Application Process A site owner or other entity willing to undertake a cleanup must submit an application for a Brownfield Cleanup Agreement (BCA) to the DEC to determine whether the entity is eligible for the program and to identify the reasonably anticipated reuse of the site. The DEC must notify the potential applicant within 10 days if the information is complete and, if not, specify what additional information is needed. The DEC must also contact the Oil Spill Fund administrator to determine if the applicant is responsible to the Oil Spill Fund for cleanup and removal costs incurred to respond to petroleum discharges. The fund administrator must respond to the DEC within 30 days. The DEC is required to use best efforts to approve or reject a BCA application within 45 days of its receipt.[19]

Where the significant threat consists of migration off-site and the applicant is a "volunteer," the DEC is responsible for the remediation of the off-site plume.

The Brownfield/Superfund Act contains specific requirements for the BCA. Each BCA will require payment of state costs, dispute resolution, commitments to investigate and (if necessary) remediate the site, citizen participation, and implementation and enforcement of any land use and engineering controls mandated by the DEC.[20]

The BCP calls for some degree of public participation in at least seven different stages of the application and cleanup process: when an original application is filed; before finalizing a remedial investigation work plan; before the DEC approves a proposed remedial investigation report; before the agency finalizes a remedial work plan; before the applicant commences construction at a brownfield site; before the DEC approves a final engineering report; and within 10 days of issuance of a certificate of completion.[21] The Legislature created these numerous opportunities for public comment even though the public has rarely provided comments on cleanups under the voluntary cleanup program (VCP). The multiplicity of public comment periods could lead to further delays in the cleanup process and add to transaction costs. Fortunately, the BCP Guide provides that only three of these notice periods require formal public participation, with the other notice requirements being satisfied by the publication of fact sheets.

The Brownfield/Superfund Act provides that, once the BCA is executed and a work plan is prepared, a 30-day comment period begins. The DEC is required to publish notice of the BCA in the *Environmental Notice Bulletin* (*ENB*) and a local newspaper of general circulation. The DEC will also notify the chief executive officer and zoning board of each county, city, town and village in which the site is located, as well as site residents and other affected persons.[22]

Once an investigation is completed, the applicant will submit a final investigation report to the DEC. There will be a comment period (variously described as 30 and 45 days), and the DEC will determine the completeness of the investigation within 60 days.[23]

Within 20 days after the final investigation work plan report is completed, the DEC must determine whether the site poses a "significant threat." If the agency concludes that the release of hazardous wastes at the site poses a "significant threat,"[24] the DEC may defer placing the site on the Registry if a "volunteer" has executed a BCA and agrees to address the significant threat or the agency is in on-going "good faith" negotiations.

Where the significant threat consists of migration off-site and the applicant is a "volunteer," the DEC is responsible for the remediation of the off-site plume. It is required to identify potentially responsible parties for the site and to bring an enforcement action within six months to compel the PRPs to address the off-site contamination. If the DEC cannot identify PRPs within six months or is otherwise unable to bring such an enforcement action, it is required to use its best efforts to commence remediation of off-site contamination within one year of the completion of such enforcement action or completion of the volunteer's remediation, whichever is later.[25] The DEC has indicated that it does not intend to list a site on the Registry in such circumstances because the agency has sufficient enforcement authority and funding sources under the Brownfield/Superfund Act to address the off-site contamination.

If remediation is required, the applicant must submit a proposed remedial action work plan to the DEC. The work plan will be subject to a 45-day public comment

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period and, under certain circumstances, a public hearing. The DEC must use its best efforts to approve, modify or reject a proposed work plan within 45 days of receipt or within 15 days after the close of the comment period, whichever is later.[26]

Cleanup Standards In the past, the DEC has not promulgated cleanup standards for its remedial programs. This absence of cleanup standards has not only made it difficult for developers of brownfield sites to estimate their costs, but has also required property owners to expend significant legal and engineering resources negotiating site-specific cleanup standards. In recent years, the DEC has taken land use into account when developing cleanups under the VCP, but its official policy has been not to consider land use when developing cleanup standards under its other remedial programs.

The Brownfield/Superfund Act changes this by establishing four tracks for cleanups. The DEC is required to develop regulations establishing three generic "look-up" tables of cleanup standards: Unrestricted Use (*e.g.*, residential), Commercial Use and Industrial Use. The tables must be updated every five years.[27]

A Track 1 cleanup is designed to permit any unrestricted use without reliance on institutional or engineering controls for soil contamination. For groundwater, there is a "carve out" allowing a volunteer to qualify for Track 1 if it has reduced the quantity of groundwater contamination to "asymptotic levels" and proposes to implement long-term engineering or institutional controls to restrict groundwater use.[28]

Track 2 cleanups will need to achieve the cleanup levels set forth in the DEC look-up tables for the reasonably anticipated use without reliance on institutional controls for soil. Institutional controls may be used to satisfy groundwater cleanup standards.[29]

Track 3 cleanups will use the same formula/process used to develop the cleanup numbers for Tracks 1 or 2. However, parties will be permitted to use site-specific characteristics (*e.g.*, depth to groundwater) instead of the lookup tables to establish the cleanup levels.[30]

Track 4 cleanups will be similar to the existing process used for determining soil cleanup numbers. Institutional or engineering controls can be used. For remedies where a specific contaminant's exposure exceeds 10^{-6} ppm, the DEC can allow such contamination to remain without reliance upon institutional or engineering controls when the DEC commissioner determines that the proposed remedy will be protective of public health and the environment. In addition, the top two feet of soil (for residential uses) and top one foot of soil (for non-residential uses) must comply with the Track 2 tables.[31]

To meet the requirements of the four tracks, applicants may propose a remedy from a list of presumptive remedial strategies that may be developed by the DEC. These remedies may be developed for specific site types (*e.g.*, manufactured gas plant sites) or specific contaminants (*e.g.*, trichloroethylene).[32]

An applicant who proposes to adopt a cleanup track other than Track 1 must examine at least two remedial alternatives, including one that would satisfy Track 1. If the site does not pose a significant threat, the DEC could require the applicant to evaluate a Track 2 option as one of the remedial alternatives and could require the applicant to implement the Track 2 alternative.[33] While this alternatives analysis is not as onerous as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Remedial Investigation/Feasibility Study approach, it is still more burdensome than the approach of other states' brownfield programs and creates a disincentive for brownfield redevelopment. Requiring applicants to engage in remedial alternatives analysis is likely to result in unnecessarily increased transactional costs and project delays.

While the use of cleanup tracks suggests that property owners will have some flexibility in creating a remedial plan for a development, the legislation provides that the remedial action objectives should have a "target risk" that does not exceed an excess cancer risk of one in one million ("$1x10^{-6}$") for carcinogenic end points and a hazard index of one ("1 Hazard Index") for non-cancer end points. In addition, the DEC is required to consider five factors when developing these look-up tables.[34]

The DEC is authorized to exceed the "target risks" if the rural background levels exceed that risk level.[35] This requirement could pose an obstacle to redeveloping urban brownfield sites with fill material. Frequently, the fill material contains contaminants that are not a result of any discharges at the site but instead are associated with the material that was used for the fill, such as coal ash. Requiring applicants to remediate contaminated fill material does not even the playing field for brownfield sites and will encourage developers to locate their projects in undeveloped areas. Observers hope that the DEC will be able to adopt guidance that will take the presence of historic contaminated fill material into account when developing remedial actions for a site.

Hierarchy for Addressing Soil Contamination The Brownfield/Superfund Act requires all applicants to address sources of soil contamination using the following hierarchy:

- *Removal/and or treatment.* This is the most preferred approach. It involves removal and/or treatment of all free product, concentrated solid or semi-solid haz-

ardous substances, dense non-aqueous phase liquid, light non-aqueous phase liquid in soil and/or grossly contaminated soil "to the greatest extent feasible."[36]

• *Containment.* Any source remaining following source removal and/or treatment is to be contained. If full containment is not possible, it must be contained to the greatest extent feasible.[37]

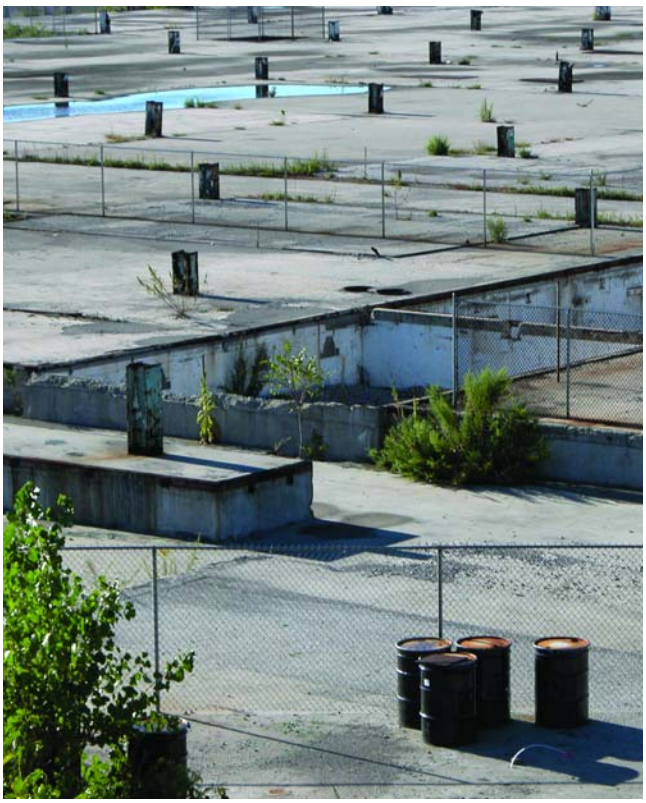
• *Elimination of exposure.* Exposure to any source remaining after removal, treatment and/or containment is required to be eliminated to the greatest extent feasible through additional measures such as alternative water supplies or methods to eliminate volatilization into buildings.[38]

• *Treatment of source at point of exposure.* Treatment of the source at the point of exposure, including wellhead treatment or management of volatile contamination within buildings, "shall be considered as a measure of last resort."[39]

• *Plume stabilization.* Plume stabilization as a method is to be evaluated for all remedies, and the further migration of contamination from the site must be prevented "to the extent feasible."[40]

The BCP remedial program must protect groundwater "for its classified use, the highest of which is drinking water." The DEC must promulgate regulations that "provide that groundwater use in Tracks 1 [*sic*, should probably be 2], 3 or 4 can be either restricted or unrestricted."[41] This approach to groundwater cleanups brings New York much closer to other states in the region that allow cleanups to be based on current groundwater use. Prior to the Brownfield/Superfund Act, New York State's policy was that all the groundwater in the state should be considered potable when developing groundwater cleanup standards. The DEC must use a Geographic Information System (GIS) to track remedial program information in conjunction with groundwater location and use, and within three years use the information to develop a short- and long-term groundwater remedial strategy. The strategy, once developed, is to govern all groundwater remediation programs.[42]

Institutional Controls and Environmental Easements If institutional and engineering controls are proposed as part of an approved remedial program, the applicant must determine the "long term viability" of the controls as well as the cost to the state to enforce the controls. The BCP Guide provides that financial assurances may be required to ensure the long-term effectiveness of the controls. A licensed professional engineer must file annual certifications that the controls are effective. The owner must certify every five years that the assumptions made in the qualitative exposure assessment remain valid and must resample groundwater-monitoring wells at site boundaries.[43] The DEC is considering providing waivers for the annual certifications and allowing biannual certifications, depending on site-specific conditions.



The 96-acre site of the GM facility in Sleepy Hollow, which once produced the Chevrolet Lumina minivan.

Photo by David Wilkes

The applicant must also create an "environmental easement" within 60 days of commencement of a remedial design that uses land use controls.[44] The easement may be enforced in law or equity by the grantor, or the state or local government against the owner of the burdened property, a lessee or any person using the land. The DEC is also required to establish a new database for sites subject to controls.[45]

Where sites are subject to environmental easements, the Brownfield/Superfund Act prohibits local governments from approving building permits or other applications that affect land use or development without first notifying and receiving approval from the DEC.[46] While this requirement was established to ensure that land use controls are adequately maintained and enforced, it does allow the DEC to become involved in local land use decisions.

The Brownfield/Superfund Act is silent on what happens if the local government does not notify the DEC of a planned project. In the absence of local government action, can an adjoining landowner who opposes the project file the notice with the DEC? Also unclear is what the statute of limitations is for the DEC

to take action. Can the agency wait a year or so before disapproving the project? If the project is extremely time-sensitive, can local government notification impose a time requirement for the DEC approval, after which the agency will be deemed to have consented to the proposed project?

Liability Release and Reopeners When the remediation is completed, the applicant must submit a final engineering report to the DEC. Upon determination that the remediation requirements have been or will be achieved, the commissioner shall issue a certificate of completion (COC).[47]

As part of the COC, the applicant receives a liability release and covenant not to sue (CNTS) that effectively "runs with the land." The CNTS applies to the applicant's successors and assigns and to persons who develop or occupy the brownfield site, provided they use "due care" and in "good faith" adhere to the BCA and the COC. The CNTS does not apply to persons responsible for the contamination under statutory or common law unless they were parties to the BCA, and it must be recorded within 30 days of issuance of the COC or within 30 days of acquiring title.[48] An applicant will not be liable under statutory or common law for claims arising out of contamination that was present on the effective date of the BCA and that is the subject of the COC. Participants will not be released from liability for natural resource damages under CERCLA.[49] The Brownfield/Superfund Act, however, does not address the situation where a federal trustee may have concurrent jurisdiction over the same natural resources (*e.g.*, waterfront property).

Upon determination that the remediation requirements have been or will be achieved, the commissioner shall issue a certificate of completion.

The Brownfield/Superfund Act is silent on what happens if the applicant fails to record the COC or files it beyond the 30-day period. Will the COC become void or is it voidable at the discretion of the DEC? Another unanswered question is what effect a reopener would have on the ability of an applicant to receive the brownfield tax credits. Will previously granted tax credits be recaptured?

The legislation also does not specifically provide that the CNTS applies to lenders. Presumably, lenders will be able to rely on the secured creditor exemption of Title 13 of the Environmental Conservation Law prior to foreclosing on contaminated property. However, it is unclear if a lender that fails to comply with the requirements of the secured creditor exemption after foreclosing on property, by failing to sell the property on a timely basis, could avail itself of the CNTS as a successor of the applicant.

The DEC may modify or revoke a COC for "good cause";[50] however, this term is undefined. Presumably, the DEC's interpretation of this term will be governed by the "arbitrary and capricious" standard. It would nonetheless be helpful if the agency could provide further clarification on what constitutes "good cause." Because of the ramifications of revoking a COC, the hope is that the DEC will rely primarily on its ability to reopen COCs and save the revocation remedy for only the most egregious cases.

Unlike the VCP, this release will bind not only the DEC but also all state agencies, including the Department of Health (DOH) and the Office of the Attorney General, that share enforcement power with the DEC, and the Office of the Comptroller, which has concurrent jurisdiction with the DEC over petroleum spills.

Although the release will provide contribution protection against third-party claims for matters addressed by the BCA, it does not appear to include third-party claims for personal injury or wrongful death arising out of that person's acts or omissions.[51] If contamination is no longer migrating from the site after the COC is issued, it would seem that a plaintiff would have difficulty trying to impose such liability on a purchaser who had complied with all the requirements of the COC.

One problem with the release is that it does not affect liability for investigation or remediation activities that are not included in the BCP work plan.[52] Under the VCP, the release extends to "Covered Contamination" and is not limited to specific activities. The limited nature of the release would seem to undercut its value.

As is typical under the federal superfund law (CERCLA) and the remedial programs of other states, there are certain circumstances where the liability release will not be effective. These reopeners include the following:

- Environmental conditions at the site are no longer protective of public health or the environment;[53]
- Non-compliance with the BCA, work plan or COC;[54]
- Fraud in participation in the BCP;[55]
- Change in standards that renders the remedy no longer protective;[56]
- Change in use of the site subsequent to the issuance of a COC;[57] and

• Failure to make "substantial progress" toward completion of proposed development within five years, or unreasonable delay by the applicant.[58]

While many of these reopeners are similar to the ones that were used under the VCP, environmental practitioners and their clients may find some of these reopeners problematic. For example, under the VCP, the remedy reopener was linked to site conditions no longer being protective of human health or the environment because of new information, newly discovered conditions or some failure of the remedy. The BCP reopener does not contain any period of limitation for new information or newly discovered conditions.

The VCP also had a reopener for changes in use that would result in a higher use and a more stringent cleanup than that approved under the VCP. The Brownfield/Superfund Act is confusing because it contains two "change in use" provisions.

One reference is the "change in use" reopener.[59] This reopener is the same as currently used in the VCP. The second reference to "change in use" requires applicants to notify the DEC 60 days in advance of transfers of property and erection of any structures or buildings on the site. The DEC then has 45 days to approve the change in use.[60] If the DEC determines that the change in use is unauthorized, it can exercise this reopener and require additional remediation.[61] This "change in use" provision is broader than the "change in use" reopener. While it is just a notice obligation, it could result in the DEC exercising one of the reopeners or triggering an enforcement action. The BCP Guide provides that the change in use notice requirement is primarily intended to enable the DEC to maintain up-to-date records and that the agency will not object to such change in use or require additional remedial activities solely because of a change in ownership absent "extraordinary circumstances." If a change in use will result in a physical alteration of the site, the BCP Guide provides that the DEC will evaluate whether the proposed change would likely result in an increase in the potential for exposure to hazardous waste or interfere with a proposed, ongoing or completed remedy. If the DEC makes such a determination, the BCP Guide provides that the agency will prepare a letter notifying the applicant that the proposed change in use will not be authorized within 45 days of the notice of the change in use.

The reopener for failure to make "substantial progress" is also problematic.[62] Inasmuch as a COC's issuance will be based on the satisfactory completion of a cleanup, there does not appear to be any justification for invoking a reopener based on economic or business developments that may be beyond the applicant's control where the remedy otherwise remains protective of human health and the environment. The recent amendments attempted to address this concern by extending the time period from three years to five years.

Transitioning from VCP to BCP The majority of VCP projects are in various phases of investigation and/or cleanup. One issue of concern has been what happens to the existing volunteers. The DEC stopped accepting new VCP applications as of October 31, 2003, and hopes to phase out the VCP.

Volunteers already accepted into the VCP or whose applications had been approved or were under review had until June 1, 2004, to transition to the BCP. Volunteers who did not choose to transition to the BCP will be required to complete their projects under the VCP.

A volunteer who transitioned to the BCP has not been required to resubmit documents or repeat work that was approved under the VCP but that may not meet the requirements of the BCP. All future work however, will have to comply with the BCP. The decision of whether to remain in the VCP or opt into the BCP required a site-specific and client-specific analysis that hinged on the nature of the cleanup and the tax credits or other financial incentives that might be available under the BCP. In some cases, it may be more beneficial to have remained in the VCP because of the broader reopeners (discussed earlier) and other enhanced enforcement rights that the DEC has under the BCP.

Financial Incentives for Brownfield Redevelopment

The Clean Water/Clean Air Bond Act of 1996 established a $200 million fund under the Environmental Remediation Program (ERP) to clean up contaminated properties owned by municipal governments.[63] Under the ERP, municipalities could obtain a State Assistance Grant (SAG) to conduct an ERP investigation or remediation at sites contaminated by releases of hazardous substances and petroleum.

The ERP had several disincentives, however. For example, the SAGs only covered up to 75% of certain eligible costs for municipally owned sites.[64] This meant that municipalities had to absorb the remaining 25% of the costs. As a result, the ERP is one of those few government programs where only a fraction of the available money has actually been spent. In addition, the local governments were required to share any profits (*i.e.*, funds received in excess of the project costs) with the state when brownfield properties were subsequently sold.

New York also has other programs, such as the Clean Water State Revolving Fund (CWSRF),[65] that could be used for some brownfield-related activities but have not been specifically targeted for brownfield redevelopment.[66]

1996 Bond Act Environmental Restoration Program Amendments The Brownfield/Superfund Act modifies the eligibility requirements for the ERP funding and establishes financial incentives for certain qualifying community-based organizations (CBOs) to undertake studies to facilitate redevelopment of qualifying areas and sites.

It is important to note that the ERP remains a distinct program from the Title 14 BCP. However, some of the new requirements of the ERP flow from the BCP. For example, the ERP now provides that engineering and institutional controls must be developed and maintained in accordance with the BCP requirements.[67] ERP remediation projects are supposed to use the same remediation goals of the state superfund.[68]

The legislation expands the definition of "municipality" to include qualifying CBOs that partner with the local government.[69] A CBO will be eligible for the SAG provided it is acting in partnership with the municipality where the brownfield is located and has not caused or contributed to a release of hazardous waste or petroleum, or generated, disposed of, or transported the same at the brownfield site. The CBO will not be eligible for ERP funds if more than 25% of its members, board members or officers are or were employed by a person responsible for contamination under the state superfund law or the Navigation Law. A municipality that generated, transported or disposed of wastes at the site is not eligible for such assistance. Private parties are also not eligible for funding.[70]

The SAG payments are increased to 90% for on-site contamination and 100% for off-site contamination.[71] The local government will also be allowed to use other federal or state assistance to satisfy its 10% cost-share obligation. SAG cost share will be recalculated if a municipality receives any payments from PRPs.[72] Local governments may also leverage SAG grants by applying for an SAG investigation grant and then having a private developer apply to the BCP to remediate the site and obtain tax credits for the redevelopment.[73]

In addition, proceeds from the sale of property that exceed the municipality's costs of property acquisition, including taxes, no longer have to be shared with the state.[74] Instead, the municipality will first recover its costs, the state will then be entitled to its costs (*i.e.*, the amount of the SAG) and then the local government will be able to keep any remaining proceeds from the sale. The state is required to use reasonable efforts to pursue responsible parties, but not those parties who are responsible parties solely because of ownership, for the full amount of the SAG.[75]

After completing the cleanup, the municipality may use the property for a public purpose or dispose of it. If sold to a PRP, the PRP must pay the amount of the SAG plus interest, in addition to any consideration received by the municipality.[76]

An important feature for many upstate county governments is the provision allowing taxing districts that are not foreclosing on a tax lien to be considered titleholders for purposes of receiving ERP investigation SAGs. The taxing authority may petition on 20 days' notice for an order granting the taxing district temporary incidents of ownership to conduct an ERP and receive an ERP investigation SAG. Relief shall be granted unless a party having the right of redemption has redeemed the parcel. The order will stay the foreclosure proceeding until the ERP investigation is completed. The report is to be delivered to the court, which shall then lift its stay of the foreclosure.[77]

A municipality receiving funds pursuant to an SAG, its successor, lender and lessee not liable under statutory or common law arising out of the presence of hazardous substances existing at the time of the SAG, shall each be indemnified by the state provided that they did not generate, transport or dispose of hazardous substances at site.[78] The liability exemption has the following reopeners: (1) failing to implement the approved work plan, including land use controls; (2) fraudulently showing cleanup levels were achieved; (3) causing a release; (4) changing the property's use; or (5) using the property in violation of ECL § 56-0511.[79]

Brownfield Opportunity Areas (BOAs) Urban areas often have sizeable areas of contiguous brownfields in their former industrial areas. State and federal brownfield programs have demonstrated that addressing brownfield sites on an area-wide basis can result in more efficient cleanups and generate redevelopment synergies. Building on this experience, the Brownfield/Superfund Act established a BOA strategy that is distinct from the ERP program. The BOA program will be administered by the DEC and the Department of State (DOS).

Sites located in BOAs as defined by General Municipal Law § 970-r shall receive a funding priority and preference over other sites. Municipalities and CBOs may receive up to 90% of the cost of studies that would assist an area being designated as a BOA. In addition, the state will provide up to 90% of the cost of nominating an area for designation as a BOA, including the preparation, creation and development of the information to be included in the nomination package. Municipalities and qualifying CBOs can also obtain up to 90% of the cost of conducting site assessments.

Brownfield Tax Credits Among the most powerful incentives established by the Brownfield/Superfund Act are the tax credits that may be available for parties who have participated in the BCP and have received COCs. The DEC estimates that the value of the tax cred-

its will be approximately $135 million when they become fully effective. Like any tax provision, the brownfield tax credits are extremely complex.

Many of the key terms and definitions refer to the Internal Revenue Code. Moreover, at this time, the state Department of Taxation and Finance (DTF) does not contemplate issuing any guidance or regulations interpreting the scope of the brownfield tax credits. Thus, environmental counsel and their clients should consult with tax specialists to determine the credits' applicability to a particular project, or consider obtaining advisory opinions from DTF.

Brownfield Redevelopment Tax Credit The first category of tax credit is the Brownfield Redevelopment Tax Credit (BRTC).[80] It is important to note that costs incurred prior to the execution of a BCA are not eligible for the BRTC. Costs incurred after the DEC executes the BCA, however, may be accrued until the COC is issued. The tax credit may not be claimed until after a COC is issued and then only for COCs issued after April 1, 2005. There had been some confusion as to whether a taxpayer could claim a BRTC for costs incurred prior to April 1, 2005, where the COC is issued after that date. The technical amendments clarify that eligible costs incurred prior to that date will be deemed to have been incurred in the first taxable year occurring on or after April 1, 2005.

The QTP Credit may be claimed for up to 10 years after the property is placed into service. An applicant need not own the property to claim the credit.

The BRTC is a refundable tax credit, but it may not be used to reduce a taxpayer's liability below its applicable alternative minimum tax. Any unused BRTCs will be treated as an overpayment of income tax for that taxable year, entitling the taxpayer to a tax refund.

The "site preparation" credit includes costs that can be chargeable to a "capital account." This cost component may not only include remediation costs but also costs of excavation, temporary electric wiring, scaffolding, demolition costs, costs for fencing and security, and other costs to make the site usable for commercial, industrial, residential, recreational and environmental conservation purposes. Site acquisition costs, however, may not be used in determining the amount of the credit.[81] Applicants may claim credits for site preparation costs for up to five years after the issuance of the COC.

The Qualified Tangible Property Credit (QTP Credit) cost component is available for costs of buildings and improvements that are placed into service within three years of the issuance of a COC. To qualify for the QTP Credit, a property must satisfy the following conditions:[82]

- The property is depreciable pursuant to IRC § 167;
- The property has a useful life of four or more years;
- The property was purchased pursuant to IRC § 179(d);
- A COC has been issued for the property;
- The property is used for a business, recreational or environmental purpose; and
- The property is placed in service within three years of the COC.

The QTP Credit may be claimed for up to 10 years after the property is placed into service. An applicant need not own the property to claim the credit. Thus, a tenant may claim the credit for the cost of leased improvements, provided the tenant is not responsible for disposal or discharge of hazardous wastes or petroleum.[83]

As originally drafted, the QTP Credit had another recapture event when the property was sold within 12 years of the COC.[84] This would have substantially reduced the attractiveness of the BCP for residential projects since a developer that sold a condominium, townhouse or single-family residence on the brownfield site within 12 years of the COC could lose most if not all of the credit. It was less clear if a recapture event would be triggered by the sale of co-op units since this involves transfer of stock in the co-op and not transfer of title in land. Rental units do not appear to be subject to the recapture provision. The technical amendments attempted to address the issue by deleting any reference to "disposing" (selling) the property. However, the property would still have to be depreciable for a taxpayer to claim the QTP Credit.

Taxpayers who seek to claim the QTP Credit will not be able to claim the Investment Tax Credit or the Empire Zone Investment Tax Credit.[85] However, the BRTC may be larger in many cases than the Investment Tax Credit and the Empire Zone Investment Tax Credit and may be available for broader uses than the other credits.

The "on-site groundwater remediation" cost component refers to costs that are incurred to implement a "remediation work plan" required under a BCA. The technical amendments added costs associated with interim remedial measure work plans. For on-site groundwater remediation costs incurred prior to the issuance of the COC, the credit may be claimed in the year in which the COC is issued. Costs incurred after the COC is issued may be claimed in the taxable year in which the costs are incurred, for up to five years after the issuance of the COC.[86] This component presumably

includes both capital and operating costs. It is unclear to what extent a credit may be claimed for costs of a groundwater remediation system that is also designed to treat or capture contamination migrating off the qualified site.

Significantly, either a volunteer or a participant may claim the BRTC so long as it incurs eligible costs pursuant to a BCA and receives a COC. Thus, even parties responsible for the contamination may be able to take advantage of this tax credit, provided they enroll in the BCP and receive a COC. The credit may be claimed by individual partners in a partnership, members of limited liability companies and shareholders of New York "S" corporations.[87]

The percentage of the tax credit varies depending on whether the party is an individual or corporate taxpayer and whether the site is in an Environmental Zone.[88] The base tax credit is 12% for a corporate taxpayer and 10% for a non-corporate taxpayer.[89] If a site is in an Environmental Zone, the taxpayer may be eligible for another 8% tax credit. The taxpayer may add another 2% for unrestricted cleanups. Thus, the maximum BRTC for a corporate taxpayer is 22%, while non-corporate taxpayers may be eligible for a tax credit of up to 20%.

The BRTC is available to a taxpayer that has received a COC. Since a subsequent site owner would not have been issued the COC, it was initially unclear if the BRTC could be transferred with site ownership. The technical amendments attempted to address this concern by providing that COCs were transferable. In any event, where the applicant is an LLC, a partnership or a corporate entity, the BRTC should be available by transferring an ownership interest in the entity that received the COC.

Some timing issues will also need to be resolved. For example, if a site is transferred after a BCA is executed but prior to issuance of a COC, can a successor who completes the work claim the costs incurred by the seller? Similarly, can a purchaser acquiring the property after a COC, but before the certificate of occupancy, claim the BRTC for the costs of the improvements constructed by the seller?

Brownfield Remediation Tax Credit for Real Property Taxes The second category of brownfield tax credits is the Brownfield Remediation Tax Credit for Real Property Taxes ("Brownfield RPT Credit").[90] This tax credit is modeled after the Empire Zone RPT Program. The Brownfield RPT Credit is based on the number of jobs at a brownfield site, including employees of tenants and includes credits for eligible real property taxes, as well as certain payments in lieu of taxes. The Brownfield RPT Credit may be claimed for up to 10 years after issuance of the COC.

Unlike the Brownfield Redevelopment Tax Credit (BRTC), the Brownfield RPT Credit is limited to owners of the contaminated property who obtained a COC. However, also unlike the BRTC, the Brownfield RPT Credit is transferable to subsequent purchasers of the site who take title within seven years of issuance of the COC.[91] Like the BRTC, the Brownfield RPT Credit may be claimed by any individual partner in a partnership, member in a limited liability company, or shareholder in an S corporation to whom the COC has been issued.[92]

The Brownfield RPT Credit is calculated by applying a complicated formula. First, the amount of the eligible real property taxes is multiplied by either 25%, or 100% if at least one-half of the site is within an Environmental Zone. This product is then multiplied by an "employment number factor" (the average number of full-time non-executive employees who are employed at the site during the taxable year, including employees employed by lessees of the developer) as follows:

- For sites with at least 25 but fewer than 50 employees, the employment number factor is 25%.
- For sites with at least 50 but fewer than 75 employees, the employment number factor is 50%.
- For sites with at least 75 but fewer than 100 employees, the employment number factor is 75%.
- For sites with at least 100 employees, the employment number factor is 100%.[93]

The maximum credit allowed is $10,000, multiplied by the average number of employees over the taxable year.[94] Owners of property located in an Empire Zone may be able to take advantage of either an Empire Zone tax credit or the Brownfield RPT Credit. Once the taxpayer makes its election, it will not be able to switch for subsequent years in which the credit may be claimed.[95]

Because this tax credit is geared toward the creation of jobs, it does not provide much incentive for residential development. Other states, such as New Jersey, provide tax credits that are based on the occupancy rate for residential developments built on brownfield sites. In areas like New York City, where there is a critical need for low-income housing, such a tax credit could serve as a valuable incentive for building residential developments on brownfield sites.

Environmental Remediation Insurance Credit Finally, the Brownfield/Superfund Act establishes Environmental Remediation Insurance Credits for the lesser of $30,000 or 50% of the premium paid after the date of a BCA for qualifying brownfield sites.[96] This one-time credit is allowed in the year in which the COC is issued.[97]

Technical Assistance Grants The DEC is authorized to provide technical assistance grants (TAGs) of up to $50,000 to facilitate participation of a citizen group in the cleanup decision-making process for a site.[98] The source of the TAGs may be the $15 million appropriation and BCP participants (*i.e.*, responsible parties).

Title 13 Liability Reforms

New York was one of the first states to adopt a state superfund program when it enacted the Inactive Hazardous Waste Disposal Site Law in 1979.[99] Because the law predated CERCLA,[100] the New York program differed in some significant respects from the federal act.

One limitation was that the state superfund applied only to releases of hazardous wastes, which is a much narrower category than CERCLA hazardous substances. Under the state superfund law, the DEC can order the owner of the site and/or any other person responsible for the disposal of the hazardous wastes to develop a remedial program acceptable to the DEC and to implement the remedial program when the agency determines that a site poses a "significant threat" to the environment.[101] However, unlike the EPA's authority under section 106 of CERCLA,[102] the DEC cannot issue a cleanup order until after the alleged responsible party is provided with a hearing. Moreover, a party who has been issued an order after an administrative hearing can seek judicial review of that decision.[103] The DEC's inability to order a PRP to clean up a site without first conducting an administrative hearing substantially limited the usefulness of the state superfund program.[104] The DEC often relied on CERCLA to seek cost recovery from PRPs.

The innocent purchaser defense is available only to owners who had no reason to know that their property was contaminated.

Expanded Definition of Hazardous Wastes The state superfund applies to hazardous wastes. The Brownfield/Superfund Act expands the definition of "hazardous waste" to include hazardous substances.[105] The DEC estimates that this change will bring approximately 300 new sites under the jurisdiction of the state superfund program.

New Landowner Defenses The legislation adds act of God, act of war, third-party and innocent-purchaser defenses to the state superfund program[106] that are modeled after those in CERCLA.

The innocent purchaser defense is available only to owners who had no reason to know that their property was contaminated.[107] Since sites are brownfields because there is at least the perception of contamination, the innocent-purchaser defense will not be available to most brownfield developers. Because of this limitation, the U.S. Congress added a bona fide prospective purchaser (BFPP) defense to CERCLA as part of the Small Business Liability Relief and Brownfield Revitalization Act of 2002 (the "2002 CERCLA Amendments") to allow purchasers to knowingly acquire contaminated property without incurring CERCLA liability.[108]

Unfortunately, the New York Legislature did not include a BFPP defense in the Brownfield/Superfund Act, presumably because the Legislature preferred to have BFPPs remediate sites rather than receive immunity from liability. The absence of a BFPP defense is somewhat mitigated by the fact that COCs may be relied upon by subsequent purchasers, but the legislative decision to not include a BFPP defense was disappointing to environmental practitioners and their clients.

The Legislature also failed to enact a contiguous property owner's defense that would protect landowners whose property has been impacted by releases of hazardous substances migrating onto their property from an off-site source. This omission was not as important because of the differences between CERCLA and the state superfund program. Under CERCLA, a "facility" is a site where hazardous substances have come to be located; under the state superfund program, the DEC has historically interpreted a hazardous waste site to be the source of the contamination. Nevertheless, it would be comforting to purchasers and lenders if the DEC could develop guidance similar to that recently developed by the EPA for contiguous property owners.

All Appropriate Inquiry The Brownfield/Superfund Act adopted the new post-closing "appropriate care" requirements that were added to the CERCLA innocent purchaser defense in 2002, and also required the DEC to institute an "all appropriate inquiry" (AAI) rulemaking identical to that required of the EPA under the 2002 CERCLA Amendments. Until the DEC issues its AAI rule, the ASTM E1527 standard for Phase I Environmental Site Assessments will serve as the interim standard.[109]

Many in the private bar believe that the DEC should not simply adopt the AAI rule that will be promulgated by the EPA but instead review it for consistency with the state superfund program. For example, will the "appropriate care" requirements set forth in the AAI be consistent with the obligations contained in Title 14 of the ECL? Will the requirements for investigating adjacent properties be consistent with the public participation requirements of Title 14? In addition, the DEC may want to adopt a different definition of "environmental professional" or different procedures for filling data gaps.

Lender and Fiduciary Liability The Brownfield/Superfund Act also adds statutory liability exemptions for lenders and fiduciaries for claims filed under state law. These provisions are identical to the CERCLA

exemptions.[110] A lender will not be liable as owner or operator of contaminated property if it holds indicia of ownership primarily to protect its security interest and does not otherwise participate in the management of the property. Lenders may also foreclose on property without forfeiting their immunity from liability, provided they attempt to sell the property in a commercially reasonable manner.

Title 13 also now provides limited liability protection to fiduciaries.[111] The liability of fiduciaries is limited to the assets being held in its fiduciary capacity unless there is an independent basis for holding the fiduciary liable, including, but not limited to, the fiduciary negligently causing or contributing to the release or threatened release of hazardous waste at the site.

Because these exemptions use the same terminology as CERCLA, EPA guidance and CERCLA case law can presumably be relied upon to provide direction to lenders and their counsel.

Municipal and IDA Liability Exemptions The Brownfield/Superfund Act also creates a liability defense for municipalities that involuntarily acquire ownership or control of a contaminated site and do not "participate in development" of the site, provided they did not cause or contribute to the release of hazardous substances. Municipalities must provide notice to the DEC within 10 days of learning of a release or lose their exemption.[112]

This defense can be particularly useful to local governments to help them assemble parcels of smaller brownfield sites into a larger site that has greater development potential. It is unclear, however, what "participation in development" means. The DEC needs to clarify the scope of this term in its implementing regulations.

Navigation Law

The vast majority of contaminated sites in New York State are affected by petroleum contamination. The Oil Spill Prevention, Control and Compensation Law[113] prohibits the discharge of petroleum into the waters of the state or onto land from which the petroleum might drain into state waters.[114] Dischargers of petroleum are strictly liable without regard to fault for all cleanup and removal costs as well as direct and indirect damages.[115] Cleanup liability extends to discharges that occurred before the 1977 enactment date of the statute.

The Navigation Law does not expressly define who is liable as a "discharger." The term has been broadly construed to include not only operators of a facility where a release has occurred but also, in some cases, landowners who did not actively operate the source of contamination. In 2001, the New York Court of Appeals ruled in *State v. Green*[116] that, while the Navigation Law does not impose liability based solely on ownership of contaminated land, a landowner that can control activities occurring on its property, and who has reason to believe that petroleum products will be stored there, could be liable for cleanup costs as a discharger. Moreover, while the owners or operators of a "major facility" could assert defenses to liability based on acts or omissions solely caused by an act of war, sabotage, or government negligence,[117] owners or operators of smaller facilities could not assert these defenses.

Further complicating the lives of prospective purchasers of petroleum-contaminated sites was the fact that the release under the VCP included a reopener for off-site migration of petroleum, so that the purchaser might be required to remediate petroleum contamination that migrated from the site.

The Legislature added to the Navigation Law a third-party defense similar to that of CERCLA.[118] The recent technical amendments now clearly also establish a lender liability exemption in the Navigation Law that tracks CERCLA.

The Brownfield/Superfund Act did not enact the RCRA secured creditor exemption for owners and operators of underground storage tanks (USTs) regulated under the Bulk Petroleum Storage Act. However, the clarification of the secured creditor exemption in the technical amendments should provide comfort to lenders of brownfield sites contaminated with releases of petroleum from USTs.

Conclusions

The new Brownfield/Superfund Act, perhaps the most significant piece of environmental legislation enacted in New York State since 1979, brings the state's superfund program more in line with those of its neighboring states. The legislation provides the DEC with enhanced tools to implement an effective brownfield program. The incentives provided both to municipalities (through grants, liability relief and reduction of matching requirements) and private entities (through tax credits) could prove very helpful to certain projects.

Whether the legislation provides sufficient incentives to spur the development of contaminated sites in New York may well depend on how the DEC implements this new law. By all accounts, the agency appears committed to interpret its new authority in a manner that will promote the re-use of brownfields.

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1. The recent amendments will make a number of technical changes and corrections. S. 7726, 227th N.Y. Leg. Sess.
2. These funds would be provided by the sale of bonds sold by the Environmental Facilities Corporation (EFC). Approximately $33 million will continue to be appropriated to fund the state's Petroleum Spill Program.

3. N.Y. Environmental Conservation Law § 27-1405(2) ("ECL"). The DEC recently published draft guidance on the BCP. The guidance is available from the DEC Web site.
4. ECL § 27-1405(1)(b).
5. ECL §§ 27-1411(1), 27-1415(2)(b).
6. Unfortunately, the BCP Guide states that a volunteer must "characterize" contamination and evaluate "fate and transport" mechanisms. Some in the environmental bar are concerned that, because these are terms of art under existing remediation programs, volunteers could be asked to fully investigate off-site contamination.
7. ECL § 27-1405(1)(b).
8. ECL § 27-1411(6).
9. ECL § 27-1405(1)(a).
10. 40 C.F.R. § 300.425(b).
11. 42 U.S.C. §§ 6901–6992k.
12. N.Y. Navigation Law §§ 170–197 ("Nav. Law").
13. DEC's regulations define an "inconsequential" amount as an amount of hazardous waste that could never constitute a significant threat to the environment under any foreseeable exposure scenario. 6 N.Y.C.R.R. § 375-1.8(a)(1).
14. *See* ECL § 27-1405(2).
15. *See* ECL § 27-1405(2)(a).
16. The BCP Guide expanded the exclusion to include orders or STIPs issued under the Control of Petroleum Bulk Storage (ECL §§ 17-1001–17-1017).
17. ECL § 27-1415(7)(d).
18. ECL § 27-1303(1).
19. ECL § 27-1407.
20. ECL § 27-1409.
21. ECL § 27-1417(3).
22. ECL § 27-1417; *see* ECL § 27-1405(3).
23. *Compare* ECL § 1417(3)(e) *with* ECL §§ 27-1407(7).
24. *See* 6 N.Y.C.R.R. § 375-1.4(c). A significant threat is deemed to exist if the presence of hazardous waste at a site results in, or is reasonably likely to result in, a significantly increased risk to the public health; a significant adverse impact to fish and wildlife; a significant adverse impact due to a fire, spill, explosion, or the generation of toxic gases; or other significant environmental damage. 6 N.Y.C.R.R. § 375.1-4(a).
25. ECL § 27-1411(6).
26. ECL § 27-1411(4).
27. ECL § 27-1415(6)(c).
28. ECL § 27-1415(4). The cleanup tables must be in draft form by the fall of 2004. The DEC published for public comment a series of information sheets to describe the considerations that will be used for developing the tables of contaminant-specific Soil Cleanup Objectives (the "ASCO Guidance"). Once the soil cleanup numbers are proposed, public participation events will be held. Until the rulemaking is completed, approvals will continue to be made on a case-by-case basis by the DEC in consultation with the DOH.
29. *Id.*
30. *Id*.
31. *Id*.
32. ECL § 27-1415(8).
33. ECL § 27-1413(4).
34. The DEC must consider (1) existing standards, criteria and guidance (*e.g.*, the TAGM 4046 guidance document, the STARS guidance document); (2) the behaviors of children; (3) the protection of adjacent uses; (4) the toxicological, synergistic and/or additive effects of certain contaminants; and (5) the feasibility of achieving more stringent remedial action objectives based on experience under existing remedial programs, particularly where toxicological data are lacking. Based on this last criterion, the DEC may have to analyze historic cleanup levels achieved in the state superfund program, VCP and Oil Spill programs to develop the new table of numbers. ECL § 27-1415(6)(b).
35. ECL § 27-1415(6)(b).
36. ECL § 27-1415(5)(a)(i).
37. ECL § 27-1415(5)(a)(ii).
38. ECL § 27-1415(5)(a)(iii).
39. ECL § 27-1415(5)(a)(iv).
40. ECL § 27-1415(5)(b).
41. ECL § 27-1415(4).
42. ECL § 15-3109.
43. ECL § 27-1415(7)(b), (c).
44. *See* ECL § 71-3605.
45. *Id*.
46. ECL § 71-3607(2).
47. ECL § 27-1419(3).
48. ECL § 27-1421.
49. ECL § 27-1421(1).
50. ECL § 27-1419(5)(c).
51. ECL § 27-1421(6).
52. ECL § 27-1421(5).
53. ECL § 27-1421(2)(a)(i).
54. ECL § 27-1421(2)(a)(ii).
55. ECL § 27-1421(2)(a)(iii).
56. ECL § 27-1421(2)(a)(iv).
57. ECL § 27-1421(2)(a)(v).
58. ECL § 27-1421(2)(a)(vi). The technical amendments will lengthen the time period from three to five years. The BCP Guide provides that the DEC will consider the size, scope and nature of the proposed development in evaluating whether an applicant has engaged in unreasonable delay.
59. ECL § 27-1421(2)(a)(v).
60. ECL § 27-1425.
61. ECL §§ 27-1421(2)(a)(v), 27-1425(2).
62. *See* ECL § 27-1421(2)(a)(vi). This reopener has led to some confusion among developers and the regulated community. Applicants may use the BCP to perform cleanups at operating facilities and do not have to propose to redevelop the site. In such cases where redevelopment is not contemplated, this reopener will not apply. Of course, where no redevelopment is planned, the applicant will not be able to generate tax credits. However, the applicant could perform a cleanup and receive the protections established under the BCP.
63. ECL §§ 56-0101–56-0611. DEC regulations implementing the Bond Act are codified at 6 N.Y.C.R.R. §§ 375-4.1–375-4.9.
64. ECL § 56-0503(1).
65. The CWSRF is jointly administered by the Environmental Facilities Corporation ("EFC") and the DEC.
66. For example, municipalities can apply for low-interest loans from the CWSRF to satisfy the 25% cost share. The CWSRF can also be used for pre-finance design and construction costs incurred prior to reimbursement of the state share and costs that are ineligible for reimbursement under the Brownfield/Superfund Act.
67. ECL § 56-0503(2)(h).
68. ECL § 56-0505(3). This has caused some confusion because the state superfund does not address petroleum while the ERP does include petroleum-contaminated

sites. Some have asked how can a municipality remediate a site with petroleum contamination to the state superfund standards when the state superfund does not address petroleum? Senior DEC officials have indicated that the reference is simply to the pre-disposal remediation goal of the state superfund program.

69. ECL § 56-0502(5).
70. ECL § 56-0101(7).
71. ECL § 56-0503.
72. ECL § 56-0503(2)(c).
73. The local government would have to retain title to the property to be eligible for the SAG investigation grant but could lease or convey title to the property after the SAG-funded investigation is completed to maximize tax credits to the private developer. However, the developer would not have to hold title or even lease the property to claim the brownfield redevelopment tax credit (discussed below).
74. *Id*.
75. ECL § 56-0507.
76. ECL § 56-0505(4).
77. ECL § 56-0508.
78. ECL § 56-0509.
79. ECL §§ 56-0509(2), 56-0511.
80. N.Y. Tax Law § 21.
81. Tax Law § 21(b)(2).
82. Tax Law § 21(b)(3).
83. Tax Law § 21(a)(3).
84. Tax Law § 21(d). The recapture provision could possibly be triggered by the sale of condominiums constructed as part of a residential development. However, it is possible that the sale of the co-op units may not trigger the recapture provision. Developers of residential properties seeking to obtain tax credits should consult a tax specialist and may consider seeking a private letter ruling from the state Department of Taxation and Finance.
85. Tax Law § 21(c).
86. Tax Law § 21(a)(4).
87. Tax Law § 601(f).
88. An Environmental Zone refers to an area where the poverty rate is at least 20% of the population and the unemployment rate in the zone is at least 1.25% of the statewide unemployment rate as of the 2000 census. Tax Law § 21. This is generally the same definition as that of an "economic development zone" under General Municipal Law Article 18-B.
89. Tax Law § 21.
90. Tax Law § 22(b).
91. Tax Law § 22(a)(3)(i).
92. Tax Law § 22(a)(3)(ii).
93. Tax Law § 22(b)(3).
94. Tax Law § 22(b)(6).
95. Tax Law § 22(b)(7).
96. Tax Law § 23(a).
97. Tax Law § 23(c).
98. ECL § 27-1417(4).
99. ECL §§ 27-1301–27-1323. The state superfund regulations are set forth in 6 N.Y.C.R.R. pt 375-1.
100. 42 U.S.C. §§ 9601–9675.
101. ECL § 27-1313(3)(a).
102. 42 U.S.C. § 9606.
103. ECL § 27-1313(4).
104. The DOH may also order a responsible party to cleanup a significant threat under the Public Health Law, which will supercede any order issued by DEC. ECL § 27-1313(3)(a).
105. ECL § 27-1301(1). This is opposite to the approach used in CERCLA, where the term "hazardous substances" includes "hazardous wastes." 42 U.S.C. § 9601.
106. ECL § 27-1323(4).
107. ECL § 27-1323(4)(b)(i).
108. 42 U.S.C. § 9607(r).
109. ECL § 27-1323(4)(c).
110. ECL § 27-1323(1).
111. ECL § 27-1323(3).
112. ECL § 27-1323(2).
113. Nav. Law §§ 170–197.
114. Nav. Law § 173.
115. Nav. Law § 181.
116. 96 N.Y.2d 403, 729 N.Y.S.2d 420 (2001).
117. Nav. Law § 181(4).
118. *Id*.

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Shareholder Wars: Internal Disputes In Close Corporations Do Not Always Lead to Judicial Dissolution

BY PETER A. MAHLER

New York courts have long struggled with the question of whether a breakdown in personal relations between two 50% shareholders in an otherwise viable closely held business corporation warrants judicial dissolution. The answer has fluctuated, with some courts emphasizing the company's financial viability and others the loss of trust between the co-owners, as warring factions duel over the myriad business and personal disputes that can and often do erupt in close corporations.

A recent Appellate Division decision, in a contest between 50/50 owners of a close corporation that owned a number of apartment buildings, suggests anew the need for counsel in such cases to focus their presentation on the equities that militate for or against dissolution.

In the decision, *In re Fazio Realty Corp.*,[1] the Second Department dismissed a dissolution petition despite acknowledging undisputed evidence "that there exists considerable and apparently ever-increasing internal corporate conflict." The court focused on the petitioner's failure to show that the dissension precluded the "successful and profitable conduct of the corporation's affairs."[2] Denied a divorce, the *Fazio* shareholders presumably went home and continued profitably to throw frying pans at one another.

Section 1104(a) of the Business Corporation Law (BCL) authorizes a petition for judicial dissolution on any one of three grounds by holders of 50% of the corporation's voting stock. The first two grounds concern deadlock at the board and shareholder levels. Specifically, BCL § 1104(a)(1) authorizes dissolution when the votes required for board action cannot be obtained due to division among the directors as to management of the corporation's affairs. BCL § 1104(a)(2) authorizes dissolution when the shareholders are so divided that the votes required for the election of directors cannot be obtained.

The focus of this article is the third ground, contained in BCL § 1104(a)(3). This section authorizes a dissolution petition when "there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders." The inherently elusive definitions of "internal dissension" and "beneficial to the shareholders," together with the lingering influence of decisions pre-dating the enactment of BCL § 1104(a)(3), have made it difficult for the courts to create any bright-line rules or otherwise lend predictability to petitions brought under the section.

The Dissolution Dynamic

Dissolution petitions brought by 50% shareholders almost always rely on the catch-all ground of internal dissension. More often than not they also rest on one or both of the deadlock provisions. In many instances, however, allegations of deadlock fall short because the shareholders have never followed corporate formalities such as holding shareholder meetings or board elections.[3] The petition, therefore, may stand or fall on the petitioner's ability to demonstrate internal dissension and benefit to the shareholders from dissolution, terms not defined in the statute.

A petition for judicial dissolution under BCL § 1104 usually follows a period of mounting tension between the two 50% factions, and a failure by the principals to reach an accord for one to buy out the other or to sell the business to a third party or to find some other non-judicial means of achieving a business divorce. The dynamics often are such that one faction feels that just by bringing a dissolution proceeding it can gain an advantage in buy-out negotiations. Particularly in service companies without long-term customer contracts, the faction that believes it controls the customer relationships, and

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therefore can walk off with the dissolution spoils, may feel that blowing up the company is its best option. For the same reasons, the other 50% faction has a strong incentive to fight dissolution.

The BCL § 1104 dynamic is heavily influenced by the absence of a statutory buy-out right. In contrast, a dissolution petition brought under BCL § 1104-a for shareholder oppression gives the other shareholders the absolute right to avoid dissolution by electing to purchase the petitioner's shares for fair value under BCL § 1118.[4] The typical BCL § 1104-a petitioner is a minority shareholder looking to be bought out by the majority shareholder who likely is the natural buyer. In a 50/50 corporation there may be no one natural buyer. In other words, even though a 50% shareholder also has standing to seek dissolution under BCL § 1104-a,[5] he or she is unlikely to do so (*i.e.*, will be unable to avoid the BCL § 1118 trigger) if the game plan is to break up the company or to gain the negotiating edge in a voluntary buy-out.[6]

The real challenge for the respondent's counsel is to answer the petitioner's accusations without resorting to highly personal attacks against the petitioner and thereby playing into the petitioner's hand.

Once the proceeding is started, the interplay between the petitioner and the respondent usually follows a standard pattern. The petitioner alleges that on one or more business issues invariably described as critical, the two 50% factions are at complete odds and that their inability to reach a consensus is crippling the company's business relations and profitability. Savvy petitioner's counsel will spice the petition with allegations of devious or at least boorish behavior by the respondent shareholder in the hope of provoking tit-for-tat mudslinging in the respondent's answering papers. "You see, Judge," petitioner's counsel will urge at the initial hearing, "regardless of who's right or wrong, these parties obviously detest one another. They need a divorce!"

The respondent's answering papers ordinarily downplay management conflicts and point out that the shareholder-managers are still performing their respective duties, and that the company remains profitable. If the company has any non-shareholder employees, the "public" interest in keeping them employed and paying taxes will be trumpeted. The real challenge for the respondent's counsel – particularly when dealing with a client angered by what he or she perceives as betrayal by a business partner – is to answer the petitioner's accusations without resorting to highly personal attacks against the petitioner and thereby playing into the petitioner's hand. This usually is handled by trying to show that the petitioner is seeking dissolution in bad faith, *e.g.*, the petitioner has a separate business that will benefit from dissolution, or is using dissolution to steal customer relationships for a new business excluding the respondent, or is using dissolution to side-step buy-sell provisions in a shareholders' agreement.[7]

No matter how smartly played on both sides, the inescapable fact not lost on the court is that the co-equal business owners, for whatever reason, are not getting along. Should that be enough to grant, in effect, a no-fault business divorce, or should the court probe more deeply into the bona fides and depth of the alleged dissension? BCL § 1104(a)(3) also requires a finding that the shareholders are so divided that dissolution would be "beneficial to the shareholders." Beneficial how? Financially? Emotionally? Should the court give any consideration to the survival interests of the corporation as an entity distinct from its owners?

The Lead-Up to the Internal Dissension Statute

To address these questions it is helpful to understand the derivation of BCL § 1104, and the case law that preceded the addition of internal dissension as a ground for dissolution as part of the corporate law overhaul, culminating with the enactment of the BCL in 1961.

Statutory authority for judicial dissolution of New York corporations reaches back to the early 1800s.[8] During most of the 19th century, judicial dissolution was limited to petitions brought by a majority of the directors based on insolvency or because dissolution would be beneficial to the shareholders and not injurious to the public interest.[9] In 1876 judicial dissolution authority expanded to include petitions based on director and shareholder deadlock regarding management of the corporation's affairs, still requiring a showing of benefit to the shareholders and lack of injury to the public interest.[10]

In 1944, an amendment to § 103 of the General Corporation Law[11] (GCL) added a second ground for dissolution based on shareholder deadlock with respect to the election of a board of directors.[12] GCL § 117 mandated dissolution based on deadlock ("the court must make a final order dissolving the corporation"[13]) so long as the court also found that dissolution would be beneficial to the shareholders and not injurious to the public.

One of the earliest cases construing the 1944 amendments is the First Department's 1949 opinion in *In re*

Cantelmo,[14] where it reversed the trial court and denied a 50% shareholder's dissolution petition. The petitioner alleged "hopeless deadlock" between the shareholders, who were unable to agree upon a third, impartial director and therefore could not elect a board to control the corporation's business. The court disagreed, noting that the business was functioning actively and profitably, and that the petitioner had made no bona fide effort to agree upon a third director. Rather, the court found that the petitioner's object was "to force respondent out of the business and, in effect, to obtain for himself . . . the benefits to the corporation built up over the years by the joint efforts of both parties."[15]

Cantelmo obviously was no shareholder love-fest. The dissenting opinion refers to "two 50% stockholders, in irreconcilable dissension and engaged in constant legal warfare under circumstances where corporate success and efficiency imperatively demand co-operation."[16] Yet the court refused a business divorce, essentially ruling that the petitioner's bad faith and the company's profitability negated any finding of benefit to the shareholders.

To similar effect is a trial court decision several years later in *In re Bankhalter*,[17] denying a motion to vacate an order of reference on a dissolution petition.[18] The opinion describes "numerous disputes, marked with an acrimony reminiscent of matrimonial litigation," but then goes on to say that "not every unresolved conflict in corporate management is fatal. The stymie must pertain to matter material and essential to the existence of the corporation."[19]

The emphasis on corporate viability rather than the erosion of the shareholders' relationship seems to reach its pinnacle in a pair of decisions in 1954 by the Court of Appeals in *In re Radom & Neidorff*[20] and *In re Seamerlin Operating Co.*[21]

Radom involved a profitable music printing and lithography company in business for more than 30 years, owned equally by estranged siblings, one of whom sought dissolution based primarily on the other's refusal to co-sign his salary checks. The petitioner was president and ran the business by himself. The trial court held that the many accusations and counter-accusations in the parties' submissions showed a "basic and irreconcilable conflict between the two stockholders requiring dissolution, for the protection of both of them, if the petition's allegations should be proven" at a hearing.[22]

On interlocutory appeal, the Appellate Division reversed and dismissed the petition, citing an increase in the corporation's profits during the pendency of the proceeding and finding that the petitioner's failure to receive salary did not frustrate the corporate business and was remediable by means other than dissolution.[23]

The Court of Appeals affirmed. Finding it undisputed that "these two equal shareholders dislike and distrust each other" and that the petitioner "is in an uncomfortable and disagreeable situation for which he may or may not be at fault," the Court nonetheless held, "[t]here is no absolute right to dissolution under such circumstances."[24] The Court then added:

> Even when majority stockholders file a petition because of internal corporate conflicts, the order is granted only when the competing interests "are so discordant as to prevent efficient management" and the "object of its corporate existence cannot be attained." The prime inquiry is, always, as to the necessity for dissolution, that is, whether judicially-imposed death "will be beneficial to the stockholders or members and not injurious to the public."[25]

Three months later, the Court of Appeals decided *Seamerlin* where it reversed the Appellate Division's affirmance of a trial court order granting a dissolution petition. *Seamerlin* involved a single-asset real estate operating company that subleased portions of a commercial building to a separate business owned by one of the two shareholders and to a third-party business. The company consistently paid salary and dividends to its owners.

The petitioner sought dissolution based on director and shareholder deadlock. The petition accused the respondent shareholder, who had been judicially declared incompetent shortly before the proceeding, of various corporate improprieties, of using vile and abusive language and of threatening the petitioner with bodily harm. A referee reported that the dissolution should be denied because management was not paralyzed, the company was making a profit, and a sale of the corporation's leasehold interest would not realize much, if any, cash. The trial judge disagreed with the referee's findings and ordered dissolution, and the Appellate Division affirmed.[26]

The Court of Appeals' reversal turned primarily on the trial court's inability to overrule the findings of a referee appointed to hear and determine. More important for present purposes is the Court's narrowly framed dissolution standard, as follows:

> There were three questions of fact presented in the present case: (1) were the directors of Seamerlin unable to agree on a matter of corporate management; (2) would dissolution be non-injurious to the public; and (3) would dissolution be beneficial to the shareholders. All three questions must be answered in the affirmative before a dissolution will be warranted or may be ordered. Two of them were decided adversely to petitioner by the Referee.[27]

Buy-Sell Agreements Can Avert Dissolution Trauma

Paying a lawyer to prepare a well-tailored shareholders' agreement is not how most co-owners of a new business want to spend their scarce start-up dollars. Just as discussion of a pre-nuptial agreement may be anathema to betrotheds, co-owners in the bloom of a promising new business relationship may be ill-disposed to contingency planning for its demise.

Considering the modest life span of most multi-owner businesses, however, such planning makes consummate sense and is a highly worthwhile investment that can avert the uncertainty and trauma – both personal and financial – that typically accompanies judicial dissolution proceedings.

Shareholders' agreements can cover a wide range of corporate governance and ownership issues. Restrictions on stock transfers and provisions for buy-out of departing shareholders are among the most important features and litigation preventives.

There are many considerations in designing a buy-sell agreement. Here are just a few of them:

• Should the buy-back of shares, either by the company or the remaining shareholders, be optional or required? If a shareholder dies, a mandatory buy-back can prevent the remaining shareholders from having to take on as new partners the deceased shareholder's survivors, who typically are not employed by the company and whose interests usually conflict with that of the remaining shareholders. The buy-back often is funded by life insurance policies owned either by the corporation under a stock redemption agreement or by the shareholders under a cross-purchase agreement.

• Under what circumstances can a shareholder voluntarily sell his or her shares, and to whom? The right of first refusal is the most prevalent voluntary buy-sell mechanism for keeping shares out of the hands of strangers. The selling shareholder must present any bona fide third-party offer to the other shareholders of the company, who then have a stipulated time period within which to match the offer.

• What if there is no anticipated outside buyer for the shares? For many co-owned businesses there is no market for a non-controlling interest and a first refusal therefore does not provide an exit. A common alternative is the "shotgun" buy-sell agreement whereby a shareholder offers either to sell to the other shareholder or be bought out at the same price. Not knowing whether the other shareholder is a buyer or seller gives the offeror a strong incentive to set a fair price. A shotgun agreement is not advisable, however, for a shareholder with substantially lesser resources than the other.

• If there is no outside buyer and the shotgun approach is too uncertain, are there other valuation methods? There are any number of ways to stipulate value in the shareholders' agreement, including fixed share price with annual updates; book value; formulas such as multiple of net after-tax income plus net asset value; and valuation by the company accountant or an independent appraiser.

• Should the shareholders' agreement encourage a sale of the entire business as opposed to the separate shareholders' interests? "Tag-along" and "drag-along" provisions can be used to facilitate such a sale when Shareholder A finds a buyer by giving Shareholder B the right to be bought out (tag-along) or requiring Shareholder B to sell (drag-along) on the same terms and conditions.

• Can the commencement of a dissolution proceeding itself trigger a mandatory buy-out? The Second Department gave an affirmative answer in *In re Doniger*,[1] where the shareholders' agreement compelled sale upon "passage or disposition of shares in any voluntary or involuntary manner whatsoever, including but not limited to . . . judicial order, [or] legal process."

1. 122 A.D.2d 873, 505 N.Y.S.2d 920 (2d Dep't 1986).

The last notable decision predating the statutory addition of internal dissension as a separate ground for dissolution is *In re Pivot Punch & Die Corp.*[28] In *Pivot Punch*, a 50% shareholder whose employment by the corporation was terminated by a prior arbitration award, and who subsequently had no voice in the management of the business and received no income, sought dissolution based on the inability to elect a board of directors. The trial court, in a decision written by then-Justice Matthew Jasen before his elevation to the Court of Appeals, held that the petition prima facie set forth adequate grounds for dissolution, and granted a hearing.

Judge Jasen's analysis of the statutory requirement – that dissolution be beneficial to the shareholder – is significant as the first New York dissolution decision equating a close corporation and a partnership. As Judge Jasen wrote:

> In determining what is beneficial to the stockholders, the court must take into consideration the type of cor-

> poration we are dealing with in this case. We have here what is generally referred to as a close corporation, "one that has been organized by an individual or a group of individuals seeking the recognized advantages of corporations . . . but regarding themselves basically as partners."[29]

Judge Jasen next observed that the subject corporation "is simply a partnership consisting of [the petitioner and respondent], clothed with the benefits peculiar to a corporation, limited liability perpetuity and the like."[30] The opinion also cited federal tax law permitting close corporations to elect pass-through tax treatment as partnerships, and partnership law permitting dissolution at will.[31] Judge Jasen then turned to the heart of his analysis:

> In addition to the technical rules surrounding a partnership and perhaps from a purely moral point of view, more important, there exists between partners the highest degree of fidelity, loyalty, trust, faith and confidence. When these characteristics in a partnership cease, then the true partnership ceases, and when these characteristics cease between owners of equal, or verily, substantially equal, shares in a close corporation, the close corporation ceases to be beneficial to the deadlocked stockholders. In the opinion of this court, the benefit to the stockholders within the meaning of article 9 of the General Corporation Law, is adequately alleged.[32]

Pivot Punch's emphasis on the partner-like bonds and mutual fidelity of shareholders in close corporations is a significant counterpoint to cases such as *Cantelmo*, *Radom* and *Seamerlin*, which focus on corporate viability. As seen below, in the decades since the enactment of BCL § 1104(a)(3) authorizing dissolution based on internal dissension, persuading the court to view a contest between 50% shareholders, on the one hand, as more akin to a partnership dispute or, on the other hand, as a fight over corporate policies and viability, can make the difference between the grant and denial of a dissolution petition.

Adoption of Internal Dissension As Ground for Dissolution

The GCL and Stock Corporation Law were overhauled and consolidated in the new BCL enacted in 1961 and made effective in 1963. Provisions for judicial dissolution were codified in BCL Article 11. BCL § 1104, entitled "Petition in case of deadlock among directors or shareholders," included a new provision in subparagraph (a)(3) permitting dissolution on the ground of internal dissension. The legislative history indicates that the purpose of the new subparagraph "is to make clear that dissension between factions of shareholders, particularly in small corporations, which makes continued association unworkable and the continuance of the corporate business no longer advantageous to the shareholders, is also a reasonable ground for dissolution."[33]

Additional changes were made in BCL § 1111. BCL § 1111(a) expressly provides that dissolution of a corporation is within the court's discretion. BCL § 1111(b) also specifies criteria that the court "shall take into consideration" in making its decision. First, "the benefit to the shareholders of a dissolution is of paramount importance."[34] Second, "dissolution is not to be denied merely because it is found that the corporate business has been or could be conducted at a profit."[35] The absence of injury to the public interest is no longer a criterion as in the predecessor statute.[36]

The express addition of internal dissension as a separate ground for dissolution in BCL § 1104(a)(3), together with the de-emphasis on corporate profitability and the omission of the public-injury inquiry as dissolution criteria in BCL § 1111, suggest a legislative intent to liberalize the circumstances under which 50% shareholders can petition (as the *Radom* court put it) for the "judicially imposed death" of a close corporation. The case law in the decades following enactment of the BCL, however, indicates that the liberalization has taken hold sporadically and that, as in the Second Department's *Fazio* decision cited at the beginning of this article, corporate viability and profitability often trump shareholder acrimony.

Cases Denying Dissolution

Fazio is one of several significant appellate decisions denying dissolution petitions based on internal dissension, in which the courts seemingly elevate concern for the corporate body and fisc over the breakdown of mutual trust and loyalty between business partners.

In *In re Dubonnet Scarfs, Inc.*,[37] a divided First Department panel affirmed the dismissal without a hearing of a dissolution petition brought by 50% shareholders of a profitable knitwear manufacturing company with 61 employees. The record included evidence that the company had $2 million cash and another $1 million in near-liquid receivables. The respondent 50% shareholder had served as the company's CEO for 30 years; he denied the petitioners' allegation that he misrepresented his agreement (never implemented) to purchase their interest at fair value.

The majority found that internal dissension had not resulted in any deadlock and that the "only reason" the petitioners sought dissolution was to raise cash to satisfy their personal creditors. "Needless to say," the majority wrote, "the mere fact that a closely held corporation may have substantial liquid assets, and a stockholder has personal financial problems totally unrelated to the corporation do not, in and of themselves, state grounds for judicial dissolution" under the BCL.[38]

The *Dubonnet* dissent argued that internal dissension as used in the statute was intended to augment dead-

lock and is not limited to dissension respecting management of the corporation's affairs. Rather, it is broad enough to encompass the alleged internal dissension regarding the use of the corporation's substantial liquid assets. The dissent also pointed to BCL § 1111(b)(3)'s provision that the continued making of a profit by the corporation is not a bar to its dissolution.[39]

The dissension-leading-to-deadlock formulation in *Dubonnet* reappears in *In re Kaufman*.[40] There, the Second Department affirmed an order dismissing a dissolution petition where the "petitioner failed to demonstrate that the dissension between him and the respondent has resulted in a deadlock precluding the successful and profitable conduct of the corporation's affairs" or that the parties' disagreements "posed an irreconcilable barrier to the continued functioning and prosperity of the corporation."[41]

A number of significant decisions . . . conclude that the benefit to the warring shareholders from a business divorce outweighs the interest in continuing the corporate business.

In *In re Glamorise Foundations, Inc.*,[42] the First Department vacated a dissolution order and remanded the case for trial. The lower court had ordered dissolution under BCL § 1104(a)(3) based on the owners' disagreement over a business plan proposed by one of them, finding that "the relationship between the two principals had markedly deteriorated."[43] The appellate court disagreed, writing:

> The fact that the parties disagree over petitioner's plan for the company's future is not dispositive of the fundamental issue of whether the conditions of the statute have been satisfied such that the extraordinary step of judicial dissolution is warranted. And the initiation of this proceeding alone – or even the existence of multiple lawsuits between the parties – is similarly insufficient for this purpose.[44]

The *Glamorise* opinion notes the existence of multiple lawsuits between the parties and the issuance of a restraining order in the case before it. Intimating the rancorous tone of the parties' filings, the court added that

> the tenor of the lawsuit cannot be cited to bootstrap the arguments made or justify the relief sought. It is [respondent's] contention that petitioner deliberately created the underlying dispute for the very purpose of securing judicial dissolution and thereafter seizing the corporation for himself, his son and other management personnel. Indeed, despite the posturing of the parties, the corporation continues to flourish. It is petitioner's contention that the heart of the dispute involves the direction that the corporation will take in the future. Whether the differences on this issue are genuinely irreconcilable or terminal to the well-being of the corporation are among the issues to be determined at a hearing.[45]

In *In re Parveen*,[46] the First Department reversed an order of dissolution rendered after a trial between 50% owners of a pharmacy business. The opinion notes that the "relationship between the parties eventually broke down" over the issue of capital contributions. Nonetheless, the court found BCL § 1104 "inapplicable" because the petition "merely" alleged that there was only one shareholders' meeting since the venture's inception and that financial information was not regularly disseminated. The court also held that the petitioner's claim, that the respondent exercised sole control over the corporation's daily management, "does not create a cause of action for dissolution, because there are no allegations that [the respondent's] control gave rise to deadlock over a management decision."[47]

Cases Granting Dissolution

On the other side of the ledger are a number of significant decisions at the appellate and trial court levels granting dissolution petitions based on internal dissension, in which the courts conclude that the benefit to the warring shareholders from a business divorce outweighs the interest in continuing the corporate business.

In *In re Sheridan Construction Corp.*,[48] the Fourth Department affirmed a dissolution order involving five related corporations in the construction business owned equally by two brothers. The court observed that "fraternal strife resulted in a bitter feud," that there was "no hope of reconciliation between these two brothers in the 'foreseeable future,'" and that they could find "no common ground of agreement in any respect."[49] The brothers' disagreements and the intensity of their discord became so great that efficient management became "impossible" and therefore dissolution would benefit the shareholders and was the "only practical and feasible solution."[50]

In re Surchin[51] is a trial court decision granting dissolution based on deadlock and "serious internal dissension between the two parties" involving threats of personal violence, surreptitious monitoring of telephone calls and financial improprieties by the respondent. The court stated that in considering whether dissolution would be beneficial to the shareholders within the statute's meaning, the term includes "the mental and

physical well-being of a shareholder as well as financial gain to him."[52] The court's opinion relies heavily on *Pivot Punch*'s analogy of shareholders in close corporations to partners, and comments that "dissolution would be in order even if money was being made quite fully and readily by the corporation."[53]

In *In re Gordon & Weiss, Inc.*,[54] the First Department affirmed a dissolution order entered without a hearing, involving a profitable advertising business. The petitioner sought dissolution after trying unsuccessfully to buy out the respondent, and following several other lawsuits between the owners. The respondent accused the petitioner of bad faith in seeking dissolution based on nothing more than his desire not to continue in business with the respondent.

In affirming dissolution, the court stated that "this is a service corporation" in which client services are performed by the two owners who "are not working together." The court also referred to BCL § 1111(b)(3) as a change from the "earlier thinking" (for which it cited *Radom*) which "stressed the distinction between the corporation as an entity and the shareholders, and as long as the former could continue to function profitably the relationship between the shareholders was of no moment."[55] Noting that the relationship between shareholders in a closely held corporation "closely approximates the relationship between partners," the court reasoned that "when a point is reached where the shareholders who are actively conducting the business of the corporation cannot agree, it becomes in the best interests of those shareholders to order a dissolution."[56]

The First Department affirmed another dissolution order in *In re T.J. Ronan Paint Corp.*,[57] involving a ferocious dispute between two 50% owners of a paint manufacturing business. The dissolution proceeding was preceded by protracted litigation including fraud claims between the two 50% owners, during which one of them was excluded from the corporation's offices. The trial court found that the "massive" court files evinced "bitter antagonistic dissension" between the parties, including attempts to secure intervention by the district attorney.[58]

On those facts the appellate court held that the "degree of dissension, reflected by the intense personal hostility, poses an irreconcilable barrier to the continued functioning and prosperity of the corporation, a hopeless deadlock which mandates dissolution as the only viable remedy."[59] As in *Gordon & Weiss*, the court opined that the loyalty and good faith expected of shareholders in close corporations, as in partnerships, is destroyed when "dissension becomes the order of the day."[60]

Finally, in *Goodman v. Lovett*,[61] the Second Department affirmed a dissolution order entered without a hearing where the two owners had not spoken with each other in years after disagreeing over profit distributions. The differences and animosity between the shareholders were sufficient to prevent the continued efficient operation of the corporation without regard to the underlying reasons and without ascribing fault. "Rather, the critical consideration is the fact that dissension exists and has resulted in a deadlock precluding the successful and profitable conduct of the corporation's affairs."[62]

Conclusion

The addition of internal dissension as separate ground for dissolution clearly was meant to expand the availability of the dissolution remedy. Because every corporate dissolution case comes with unique facts, however, any attempt by the Legislature or the courts to set hard-and-fast dissolution criteria is doomed to failure.

Cases decided under the internal dissension statute exhibit something of a split personality, depending on whether the court views the corporation, successful or not, as more akin to a partnership terminable at will, or as an entity distinct from its owners, to be maintained if financially viable notwithstanding internecine warfare. Arguably, this duality is inherent in the statute's requirement that the petitioner establish both the existence of internal dissension and that the factions are so divided that dissolution would be beneficial to the shareholders. In other words, the statute can be read such that the cessation of shareholder hostilities itself is an adequate benefit of dissolution, or it can be read to require some other benefit (*i.e.*, financial) that may be hard to show when the business is otherwise viable and making money.

The best insurance against the uncertainty of business divorce is a shareholders' agreement with reasonable buy-sell provisions. Other techniques include arbitration agreements, voting trusts and appointment of provisional directors.[63] Clients starting new business ventures with co-owners should be strongly encouraged to make the up-front investment in these types of consensual arrangements to minimize the later risk of a judicially imposed death – or life – sentence for their corporation.

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1. *In re Fazio Realty Corp.*, 781 N.Y.S.2d 118 (2d Dep't 2004).
2. *Id.* at 119.
3. *See, e.g., In re Parveen*, 259 A.D.2d 389, 687 N.Y.S.2d 90 (1st Dep't 1999) (there can be no deadlock where contending factions never attempted to elect directors).
4. For a comprehensive review of the law governing shareholder oppression, dissolution and valuation proceedings under BCL §§ 1104-a and 1118, see the author's two-part article in the May/June and July/August 1999 NY State Bar Journal, Vol. 71, Nos. 5 and 6.

5. *In re Cristo Bros.*, 64 N.Y.2d 975, 489 N.Y.S.2d 35 (1985).
6. As noted by the Court of Appeals in *Cristo*, *id.*, the legislative history of BCL § 1118 contains no indication why it accorded buy-out rights for dissolution petitions under BCL § 1104-a but not under BCL § 1104.
7. *See In re Clemente Bros.*, 19 A.D.2d 568, 239 N.Y.S.2d 703 (3d Dep't 1963) (reinstating bad faith affirmative defense in dissolution proceeding).
8. For a discussion of the early history of dissolution legislation, see *Hitch v. Hawley*, 132 N.Y. 212 (1892). *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 84, 6 N.Y. Ch. Ann. 68 (1831), is one of the earliest cases holding that New York courts have no common law authority to dissolve corporations and that statutory remedies are exclusive.
9. *Hitch*, 132 N.Y. at 217.
10. *Id.* at 218.
11. The GCL was repealed by 1973 N.Y. Laws ch. 451, § 2. See discussion *infra* at "Adoption of Internal Dissension as Ground for Dissolution."
12. *See In re Superb Diamond Cutting Corp.*, 183 Misc. 876, 878, 51 N.Y.S.2d 651 (Sup. Ct., N.Y. Co. 1944).
13. The text of GCL §§ 103 and 117 is set forth in *In re Cantelmo*, 275 A.D. 231, 232, 88 N.Y.S.2d 604 (1st Dep't 1949).
14. *Cantelmo*, 275 A.D.2d 231.
15. *Id.* at 233.
16. *Id.* at 235.
17. 128 N.Y.S.2d 81 (Sup. Ct., N.Y. Co. 1953).
18. The *Bankhalter* petitioner was a one-third shareholder whose consent was required for any action by the board or shareholders. Former GCL § 103 and current BCL § 1104(b) both permit shareholders with less than 50% of shares to seek dissolution when the certificate of incorporation has super-majority voting requirements for board action or elections. Unlike its predecessor, BCL § 1104(b) sets a one-third minimum.
19. *Bankhalter*, 128 N.Y.S.2d at 83, 85.
20. 307 N.Y. 1 (1954).
21. 307 N.Y. 407 (1954).
22. *Radom & Neidorff*, 307 N.Y. at 6–7.
23. *Id.* at 7.
24. *Id.* at 6, 7.
25. *Id.* at 7 (citations omitted) (quoting *Hitch v. Hawley*, 132 N.Y. 212, 221 (1892); GCL § 117).
26. *In re Seamerlin Operating Co.*, 307 N.Y. 407, 413–14 (1954).
27. *Id.* at 417 (citations omitted).
28. 15 Misc. 2d 713, 182 N.Y.S.2d 459 (Sup. Ct., Erie Co.), *modified on other grounds*, 9 A.D.2d 861, 193 N.Y.S.2d 34 (4th Dep't 1959).
29. *Id.* at 715 (quoting N.Y.S. Law Review Comm'n and New York Leg. Doc. No. 65K [1948] p. 389 *et seq.*).
30. *Id.* at 715–16.
31. *Id.* at 716.
32. *Id.*
33. McKinney's Cons. Laws of N.Y., Legislative Studies and Reports, BCL § 1104 (2003).
34. BCL § 1111(b)(2).
35. BCL § 1111(b)(3).
36. "The additional criterion embodied in Section 117 of the [GCL] that the dissolution be 'not injurious to the public' has been omitted; the revisers felt that in the types of corporations subject to the BCL, the interests of the shareholders should override the public interest in the continuance of the business." 4 White, New York Corporations § 1111.01[2], text accompanying n.10.
37. 105 A.D.2d 339, 484 N.Y.S.2d 541 (1st Dep't 1985).
38. *Id.* at 343.
39. *Id.* at 345–46.
40. 225 A.D.2d 775, 640 N.Y.S.2d 569 (2d Dep't 1996).
41. *Id.* at 775–76.
42. 228 A.D.2d 187, 188, 643 N.Y.S.2d 94 (1st Dep't 1996).
43. *Id.* at 188.
44. *Id.* at 189.
45. *Id.*
46. 259 A.D.2d 389, 687 N.Y.S.2d 90 (1st Dep't 1999).
47. *Id.* at 391.
48. 22 A.D.2d 390, 256 N.Y.S.2d 210 (4th Dep't 1965).
49. *Id.* at 391–92.
50. *Id.* at 392.
51. 55 Misc. 2d 888, 286 N.Y.S.2d 580 (Sup. Ct., N.Y. Co. 1967).
52. *Id.* at 892.
53. *Id.*
54. 32 A.D.2d 279, 301 N.Y.S.2d 839 (1st Dep't 1969).
55. *Id.* at 281.
56. *Id.*
57. 98 A.D.2d 413, 469 N.Y.S.2d 931 (1st Dep't 1984).
58. *Id.* at 415.
59. *Id.* at 421.
60. *Id.*
61. 200 A.D.2d 670, 607 N.Y.S.2d 52 (2d Dep't 1994).
62. *Id.* at 671.
63. 4 White, New York Corporations § 1104.05.

Quirk in New York UCC Provisions Puts Signers of Company Checks At Risk for Personal Liability

By Paul Golden

Your client, an employee of a small company, informs you that he had signed a $50,000 company check to pay for its supplies. His employer then went bankrupt, the check bounced, and now the supplier seeks relief directly from your client. He asks whether, by merely signing that company check, he could be held personally liable. The answer "no" would be a normal business expectation, and would also be the proper answer in almost every state, but not in New York.

Personal liability for the full value of a principal's check? One noted commentator wrote that the law "seems too monstrous to be true," and that to a businessman, this law must seem like "some sort of joke."[1] Even a New York court admitted that the result "may seem harsh."[2] Depending on the size of the check, one innocent signature could wipe out your client's life savings. But if the law is a nightmare for some, it is a dream come true for others. For example, it is normally extremely difficult or impossible to collect on a corporate debt once the corporation files for bankruptcy. But if your client wants to collect on a principal's check in which the agent did not protect himself with certain esoteric language, your client may collect from that agent with relatively little effort. In either case, an attorney must be ready to present the most convincing legal arguments on this controversial and somewhat unresolved issue.

History

New York State has a long and unclear legal history concerning when an agent is liable for a principal's monetary obligations on negotiable instruments. Negotiable instruments (such as checks) are signed, written, and unconditional promises or orders to pay a specified sum of money on demand or at a definite time payable to order or bearer.[3] When an authorized agent signs a negotiable instrument in which the principal's name appears, the principal is liable. The only question is whether the agent has also personally guaranteed payment.

Good policy reasons protect those who take negotiable instruments from agents' claims of limited liability. Those who take negotiable instruments should be able to determine easily whose obligation they hold. If takers are forced to accept instruments with the fear that the signer may later claim limited liability based on some extrinsic evidence, commercial paper will become unreliable. To avoid this result, the law ordinarily presumes an agent personally liable if he signs a negotiable instrument but fails to properly indicate his limited liability. The law also limits the signer's ability to overcome that presumption.

A decision by Benjamin Cardozo noted that before a statute was developed, courts had developed unclear distinctions to determine where liability would rest. "The refinement of distinction was mystifying even to the courts. It must have been more mystifying to business men in the quick transactions of the market."[4] For years, agents could not be sure how to sign their names without potentially exposing themselves to liability. In 1893, the Court of Appeals held that even when the principal's name appeared on a promissory note, and the signing officers described themselves on the note as "President" and "Treasurer," the language was an individual promise.[5]

This was remedied partially in 1897, when the New York Legislature passed the Negotiable Instruments Law, the nation's first uniform law. It provided in relevant part, "Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized."[6] The statute itself clarified very little. It did

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not indicate what words an agent had to write to indicate that he signed merely in a representative capacity. Thus, some courts still held that even if a check indicated the corporation's name, and an agent signed it using both his name and the office he held in the corporation, the agent was still individually liable.[7] The statute also did not address whether the agent could use parol evidence (oral statements, for example) to prove that the taker had known that the agent was free of personal liability.

New York State has a long and unclear legal history concerning when an agent is liable for a principal's monetary obligations on negotiable instruments.

But regardless of the statute's ambiguity, the Court of Appeals described it as explicit. It held that the statute had swept away subtleties, and that if a note indicated to any person with "common sense" that the maker signed only as an agent or as a representative, the maker could not be held personally liable (if he had the authority to sign it).[8] In certain cases, courts also permitted agents to introduce parol evidence to disprove that a note was an individual obligation, even if the note failed to explicitly indicate the agency status.[9]

In 1952, the first Official Text of the Uniform Commercial Code (UCC) was completed. Article 3 was to be the successor to the Negotiable Instruments Law. But the early version of the UCC did not fully adopt New York law on this subject. Under that version, the agent would be automatically liable if he signed a negotiable instrument without disclosing his representative capacity. He would not be permitted to introduce parol evidence, except for the purposes of reformation. The New York Law Revision Commission noted the discrepancy,[10] and the UCC's final version on this issue was revised to adopt the New York standard. The New York Legislature then adopted the law, making it effective as of 1964. The relevant statute reads in part: "An authorized representative who signs his own name to an instrument: . . . except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity."[11]

The UCC, unlike the Negotiable Instruments Law, finally guides agents on how to sign in a "representative capacity." It provides, "Except as otherwise established the name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a representative capacity."[12] This was a change because certain courts had held officers personally liable even if they had written the name of their office on the instrument. If the agent describes himself on the instrument as "agent," without revealing his office, this would also be sufficient as long as the principal is indicated.[13] Moreover, at least one court has apparently held that if the agent only writes the word "by" just before his name, and does not bother to add "agent," it denotes agency (but not enough to avoid liability as a matter of law).[14] An even more overt method not described in the UCC is for an agent to add an explicit clause indicating that he is not personally liable.[15] Of course, most people who sign checks do not draft any of this kind of language. This is because almost no one is even aware of the law.

What happens when the agent does not use any of the magic language? In 1978, the Court of Appeals gave a thoughtful analysis of the statute in *Rotuba Extruders, Inc. v. Ceppos*, a case in which the principal's name was indicated in the promissory note.[16] In *Rotuba*, the principal corporation filed for bankruptcy when the due date for notes approached. Unfortunately, the agent signed only his name on the note, without using any word such as "by" or "for" to indicate he was acting in a representative capacity. He also failed to indicate his corporate position or office on the instrument.

The agent argued that he should be permitted to prove by parol evidence that he had no personal obligation. The Court held that a signer may introduce such evidence in an attempt to prove the parties had an agreement, understanding, or course of dealing that the agent was not to be held individually liable.[17] But the agent in *Rotuba* had no such proof. He primarily argued to the Court that he had a subjective belief that he was not to be held liable. He had not claimed that he had disclosed his intention when he provided the promissory notes to the creditor. Also, he did not present any evidence that the parties had any previous sequence of prior conduct necessary to constitute a "course of dealing" in which the agent was not to be held individually liable. Therefore, the Court prohibited the agent from introducing any parol evidence on the matter, and the payee was entitled to relief as a matter of law.

Rotuba concerned a promissory note, and not a check. One could argue that the rule made sense in the context of a promissory note. Businessmen often prepare their own promissory notes, so they are free to draft them in any way they see fit. They are expected to include language that clarifies all liability issues. Conversely, checks are almost always preprinted by banks, and have

limited blank space. They do not invite additional legal jargon. But regardless of their practical difference, New York courts do not distinguish between the two types of instruments. Both the First and Second Departments, as well as a New York federal court, have cited *Rotuba* in support of their decisions that when a check contains the printed name of the principal, but the check was signed by an agent who failed to specifically indicate he was doing so in a representative capacity, the individual agent may be held liable.[18] Other state courts, including the Supreme Court of Texas, ruled identically.[19]

Article 3 Is Revised

In 1990, Article 3 was revised. The applicable section provides, "If a representative signs the name of the representative as drawer of a check without indication of the representative status and the check is payable from an account of the represented person who is identified on the check, the signer is not liable on the check if the signature is an authorized signature of the represented person."[20] The drafters revised the statute to overrule cases holding that agents who had simply signed checks were liable.[21] As the Official Comment indicates, "Virtually all checks used today are in personalized form which identify the person on whose account the check is drawn. In this case, nobody is deceived into thinking that the person signing the check is meant to be liable."

There was another subtle but crucial change in the statute. It concerned the issue of against whom parol or extrinsic evidence would be admissible. In the unrevised statute, arguably even someone who admittedly knew that the agent did not intend to be liable, could hold that agent liable. The following example reveals one method. The agent who signed the instrument and the payee may have had a long relationship, in which it was understood that only the principal, and not the agent, would be liable under such instruments. What if the named payee tried to avoid collection problems by simply transferring the instrument to his wife for nominal consideration? She would not be a holder in due course because she did not take it for value in good faith.[22] As a mere holder, she would normally take it subject to the agent's defense.[23] But the unrevised statute only permits the agent to introduce extrinsic evidence to prove his status as an agent against an immediate party.[24] In this situation, if the payee's wife sought to collect from the agent, the agent would not be entitled to introduce such evidence because she was not an immediate party. The unrevised statute was open to this kind of abuse.

The revised Article 3 closed the loophole. It indicates that (subject to the revised law on checks) the only person who takes an instrument absolutely free of the claim that the agent was not personally liable is a holder in due course who had no notice that the representative did not intend to be liable. It provides, "With respect to [non-holders in due course], the representative is liable on the instrument unless the representative proves that the original parties did not intend the representative to be liable on the instrument."[25] Under the revision, in the above example, because the original payee's wife was not a holder in due course, the agent could still introduce extrinsic evidence against her, even though she was not an immediate party.

The bad news is that New York has not yet adopted the revised Article 3, even though 48 states (all except South Carolina) have done so. Moreover, the New York Legislature apparently failed to adopt it because of issues having nothing to do with this particular section within the article.[26] So for the time being, the unrevised statute applies.

Representing the Payee

If your client is the payee of a check who seeks relief directly against the agent who signed it, he has some incredible advantages. They may be so great that he can obtain relief via summary judgment, avoiding both a lengthy discovery process and the chance that a court will resolve factual issues against him.

The payee should emphasize to the court the difference between the New York statute and the revised one. In a recent case, the Court of Appeals ruled that by failing to revise Article 3, the New York Legislature had intentionally chosen to retain an existing rule within that article. It thus refused to apply certain concepts outlined in the revised article.[27] If you represent the payee, you can similarly argue that the New York Legislature consciously chose to retain the rule that provides little protection to agents.

If the agent drafted a check to be paid directly to your client, your client is an immediate party, and he is potentially more vulnerable. Your client will have to defend himself against the agent's allegations that the parties had previously established that the agent would not be held liable. But if he is not an immediate party, then pursuant to our unrevised statute, he would have no worries. This is because, as noted above, the statute only allows immediate parties to establish a lack of personal obligation by referring to evidence outside the four corners of the contract. The agent would be automatically liable, without regard to any evidence of a previous understanding between the original parties.

But it is not that simple. Although the unrevised statute literally allows only immediate parties to produce extrinsic evidence, at least one New York court has not interpreted it in this manner. Instead, it ruled that only a holder in due course would take an instrument

free of the agent's defenses based on extrinsic evidence.[28] In that case, the president of a corporation signed promissory notes in the name of his corporation, without identifying his representative capacity. His corporation later filed for bankruptcy. As part of his attempt to escape personal liability, he argued that he and the original payee had a long course of dealing in which it was understood that he signed only as a representative, and not as an individual. But the plaintiff who sought to hold him liable was not the original payee. The plaintiff had purchased the notes from the payee, and thus was not an immediate party to the transactions. Under the statute, there should have been no controversy. But the court did not focus on the statute's "immediate party" language. Instead, it noted that the plaintiff had a close relationship with the original payee, and had purchased the notes at a steep discount, in a bulk transaction not in its regular course of business. In other words, the plaintiff was probably aware of the corporation president's defense. Thus, it ruled that the plaintiff might not be a holder in due course, and denied summary judgment in the plaintiff's favor. At least one non-New York court ruled otherwise, and followed the statutory language, holding that although the plaintiff was not a holder in due course, it also was not one of the original parties to the note. Therefore, the defendant would not be permitted to prove limited liability through parol evidence.[29] But it does not appear that any reported New York case has thus far interpreted our statute in that literal manner, although some have come close.[30]

If the agent failed to disclose his representative capacity on the check, and the check also failed to name the principal, the signer is personally liable as a matter of law.

If the holder of the instrument was not a party to the original transaction, but is also not a holder in due course, then he is in a state of limbo. If the judge follows certain New York case law, being a holder in due course is critical. The agent may introduce extrinsic evidence, meaning your client may lose the presumption that the agent is liable. But one can present a strong argument that the previous case law on this issue is only dicta. That court did not analyze the difference between holders in due course and non-immediate parties. If a court hears these exact issues and arguments for the first time, it may be inclined to follow the actual language of the statute. A court may be even more likely to do so if one argues that the New York Legislature intentionally chose to keep the statute as is. That is, the Legislature intentionally declined to revise the "immediate party" language.

In rare cases, the payee may obtain relief without worrying about extrinsic evidence or holder in due course issues. If the agent failed to disclose his representative capacity on the check, and the check also failed to name the principal, the signer is personally liable as a matter of law.[31] In such a case, the agent will not be permitted to introduce extrinsic evidence on the agency issue, even if the case is between immediate parties, and even if the person who took the check knew that the agent signed it only as a representative. Therefore, before proceeding further, the attorney should attempt to discover the principal's exact name, and compare it with the name written on the check. Under the majority position, when the principal's name was printed inaccurately, the agent was automatically liable. New York was described as following that majority position.[32] For example, in one case, the check indicated that the principal was "J.G.S. Produce Co.," but apparently the actual principal's name was "JGS Produce Corp." Therefore, the defendant who signed the check was personally obligated.[33]

Representing the Agent

What if your client is the unfortunate agent? He also has many litigation strategies. First, he can attempt to prove that the parties had an agreement, understanding, or course of dealing concerning the agent's lack of liability. As with any other litigation strategy, if the facts are in your favor, the defendant should get into as much detail as possible; but if they are not, you may decide to keep the defendant's affidavit vague.

One must keep in mind the rationale for the statute. The Court of Appeals held that the statute made logical sense, because creditors of small corporations often demand that officers personally obligate themselves on corporate commercial paper.[34] Therefore, the best defense is to prove that the rationale does not apply. In other words, one must claim that because of the parties' relationship, or the type of transaction involved, no reasonable businessman would have expected a personal obligation.

One way to prove limited liability is to show the parties' previous course of dealing. For example in one case, the parties had conducted business for years, the payee invoiced the corporation instead of the agent, and payment was traditionally made via promissory notes in the corporate name, signed by the agent without indicating his representative capacity. The court held

that this supported the agent's contention that he had signed the notes in a representative capacity only.[35]

Another helpful consideration is that purpose of the check. Who benefited from the transaction? If it was in payment for goods purchased by the principal from the payee, and if the principal was the one who was contractually obligated to pay for the goods, this is another strong argument in the agent's favor.[36]

If you can prove that it is not customary to ask for a personal guarantee for the kind of transaction at issue then this is also good ammunition for the alleged personal debtors.[37] You might consider subpoenaing documents from your adversary to try to prove that in similar transactions it never asked for personal guarantees. Moreover, one can demand the right to depose the plaintiff's principals on this and other issues. Such discovery might be burdensome enough to obtain a good settlement offer, at the very least. And in some cases you might get useful information. For example, if the one who accepted the instrument maintained an account on its books under the principal's name instead of the agent's name, this may establish that the taker understood that the agent only acted as a representative.[38]

Even if your client has few or no favorable factual arguments, a purely legal argument can be attempted. You can argue against personal liability by citing the same source that the Court of Appeals relied on in *Rotuba*: White & Summers's treatise. The same section of that treatise also states, "The payee of a corporate check with the corporate name imprinted on its face probably expects less from the individual drawer than the payee of a corporate note may, where both the corporate name and the maker's name may be either handwritten or typewritten."[39] The authors continued this line of thought, stating that "we think a court should be more reluctant to find an agent personally liable who has signed a corporate check than in the case of a similar indorsement of a corporate note."[40] Therefore, inasmuch as New York's highest court believes that the White & Summers treatise is authoritative in one respect on this statute, perhaps the remainder of the quotation should be applied as well. At least one (non-New York) state court cited this portion of that treatise, when it ruled in favor of an agent who signed a corporate check.[41]

The Court of Appeals has provided another basis for the agent to argue that the law is not as open and shut as it may seem. It specified in *Rotuba* that the "nature of the transaction" gave no indication that the agent only intended corporate liability,[42] and it ruled against the agent by distinguishing it from a certain Pennsylvania case.[43] In *Pollin*, the checks revealed the corporate name, and the agent who signed the checks failed to indicate his office. But the checks showed that they were payable from a special payroll account set up by the corporation. This was enough for the Pennsylvania court to rule in the agent's favor, that the check disclosed that the individual signed it in a representative capacity. In view of the way the New York Court of Appeals cited this case with favor, there is little choice but to compare other cases with it. In other words, if you can successfully argue that the check reveals that it is for an obligation not ordinarily assumed by an agent, your client may avoid liability.

Conclusion

The most important consideration for attorneys litigating such check cases is whether any factual issues remain unresolved. The payee must do everything possible to convince the court that there are only legal issues involved in the case. The agent, on the other hand, must fight as hard as possible to make it appear that there is a possibility of a disputed issue of fact. If so, a jury may be able to hear the case, and the agent would have a greater chance of success. A jury would probably be likely to bend the technical rules of the UCC to relieve an agent from liability on a principal's check. But if the court is faced with only legal issues, it is less likely to deviate from the statute and risk the chance of being reversed on appeal.

Even if an attorney does not practice commercial litigation, that attorney can still use the information in this article to assist clients. An attorney should advise any clients who regularly make payments by check that if they wish to avoid personal liability, they must add certain language to the checks. To be safe, an agent should stamp each check with the necessary language. Better yet, the corporate official should demand that the principal prepare checks with a small notice indicating that only the principal, and not the agent, may be held liable.

Finally, the statute is not set in stone. New York prides itself on being the financial center of the country. With that status comes the responsibility to assure that the state's laws are logical and fair, and fit reasonable persons' expectations. By revising the law to make it conform with laws in 48 other states, the New York Legislature would take a step consistent with the state's status as a financial center. The remainder of Revised Article 3 may have some objectionable components, but this change could be made without adopting other elements of the revised article.

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1. Thomas M. Quinn, Quinn's Uniform Commercial Code Commentary and Law Digest, § 3-403(A)(7)(a), at 3-174-175 (2nd ed. 1991).
2. *Fin. Assocs. v. Impact Mktg. Inc.*, 90 Misc. 2d 545, 546, 394 N.Y.S.2d 814 (Civ. Ct., N.Y. Co. 1977).
3. UCC § 3-104.
4. *New Georgia Nat'l Bank v. Lippman*, 249 N.Y. 307, 311, 164 N.E. 108 (1928).

5. *Casco Nat'l Bank v. Clark*, 139 N.Y. 307, 34 N.E. 908 (1893).
6. Negotiable Instruments Law § 39.
7. *Werner v. Emerson Hotel & Rest. Co.*, 192 N.Y.S. 273 (1st Dep't 1922).
8. *New Georgia Nat'l Bank*, 249 N.Y. at 311.
9. *Hoffstaedter v. Lichtenstein*, 203 A.D. 494, 196 N.Y.S. 577 (1st Dep't 1922); *see Central Bank of Rochester v. Gleason*, 206 A.D. 28, 200 N.Y.S. 384 (4th Dep't 1923).
10. 1955 Report of N.Y. Law Rev. Comm'n, vol. 2, p. 225.
11. UCC § 3-403(2)(b).
12. UCC § 3-403(3).
13. Official Comment 3, UCC § 3-403.
14. *Dollar Dry Dock Bank v. Alexander*, 197 A.D.2d 662, 602 N.Y.S.2d 885 (2d Dep't 1993).
15. *East River Savings Bank v. Samuels*, 284 N.Y. 470, 478, 31 N.E.2d 906 (1940).
16. 46 N.Y.2d 223, 413 N.Y.S.2d 141 (1978).
17. *Id.* at 229.
18. *Thunderball Mktg., Inc. v. Riemer*, 273 A.D.2d 29, 709 N.Y.S.2d 45 (1st Dep't 2000); *Tropical Ornamentals, Inc. v. Visconti*, 115 A.D.2d 537, 495 N.Y.S.2d 729 (2d Dep't 1985); *see Carador v. Sana Travel Serv. Ltd.*, 700 F. Supp. 787 (S.D.N.Y. 1988), *aff'd*, 876 F.2d 890 (2d Cir. 1989).
19. *Griffin v. Ellinger*, 538 S.W.2d 97 (Tex. 1976).
20. Revised UCC § 3-402(c).
21. Official Comment 3, Revised UCC § 3-402.
22. UCC § 3-302(a)(2).
23. *See* UCC § 3-306.
24. James J. White & Robert S. Summers, Uniform Commercial Code, § 13-5 at 467 (4th ed. 1995).
25. Revised UCC § 3-402(b)(2).
26. Gerald T. McLaughlin & Neil B. Cohen, *New York and Revised UCC Articles 3 and 4*, N.Y.L.J., Mar. 12, 1998, p. 3, col. 1.
27. *Mouradian v. Astoria Fed. Sav. & Loan*, 91 N.Y.2d 124, 131, 667 N.Y.S.2d 340 (1997).
28. *Combine Int'l v. Berkley*, 141 A.D.2d 465, 529 N.Y.S.2d 790 (1st Dep't 1988).
29. *Wang v. Wang*, 393 N.W.2d 771, 774 (S.D. 1986).
30. *Bankers Trust Co. v. Javeri*, 105 A.D.2d 638, 481 N.Y.S.2d 362 (1st Dep't 1984); *see Arde Apparel, Inc. v. Matisse Ltd.*, 240 A.D.2d 328, 658 N.Y.S.2d 627 (1st Dep't 1997).
31. UCC § 3-403(2)(a).
32. *In re Turner*, 49 B.R. 231, 234–35 (Bankr. D. Mass. 1985).
33. *Tropical Ornamentals, Inc. v. Visconti*, 115 A.D.2d 537, 495 N.Y.S.2d 729 (2d Dep't 1985).
34. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231, 413 N.Y.S.2d 141 (1978).
35. *Combine Int'l v. Berkley*, 141 A.D.2d 465, 529 N.Y.S.2d 790 (1st Dep't 1988).
36. *Arde Apparel, Inc. v. Matisse Ltd.*, 240 A.D.2d 328, 658 N.Y.S.2d 627 (1st Dep't 1997); *see Chips Distrib. Corp. v. Smith*, 48 Misc. 2d 1079, 266 N.Y.S.2d 488 (Sup Ct., Nassau Co. 1966) (applying Pennsylvania law).
37. *Arde*, 240 A.D.2d at 330.
38. *See Golden Distrib., Ltd. v. Save All Tobacco, Inc.*, 134 B.R. 770, 773 (Bankr. S.D.N.Y. 1991).
39. James J. White & Robert S. Summers, Uniform Commercial Code, § 13-4 at 495 (2nd ed. 1980).
40. *Id.*
41. *Valley Nat'l Bank v. Cook*, 665 P.2d 576, 578 (Ariz. Ct. App. 1983).
42. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231, 413 N.Y.S.2d 141 (1978).
43. *Id.* (citing *Pollin v. Mindy Mfg. Co.*, 236 A.2d 542 (Pa. Super. Ct. 1967)).

Survey Shows Preferences Of Northeastern Judges At Appellate Argument

By David Lewis

Anyone who has spent any time in the northeastern United States knows that New York is not part of New England and that New England is not part of New York. You begin to see the many differences – some subtle, some less so – between them after you have spent a little more time in either place.

In 2003, I mailed an appellate judicial survey to every state and federal appellate judge in New England and New York to investigate what the differences were between the preferences of appellate judges in New England and those in New York. This article compares the responses regarding the judges' preferences at oral argument. Do New England appellate judges like advocates to use all of their time even though they have covered all of their points? Have appellate judges in New York already made up their minds before oral argument?

Methodology

The survey consisted of 86 questions organized into seven separate sections covering different topics. Potential responses consisted of five choices ranging from strongly agreeing with the question (#1) to strongly disagreeing with the question (#5) with "no preference" in the middle (#3). Mean scores as well as standard deviations were calculated for each individual court, the courts within the federal First and Second Circuits and for every court in New England and New York. The survey achieved a 55.7% overall response rate in New England and a 38.6% overall response rate in New York.

The survey was conducted under the auspices of the Speakers Bureau of the Council of Appellate Lawyers, the first national appellate bench-bar organization.[1] The survey was based on a similar one conducted in California by Charles A. Bird, Esq. and Webster Burke Kinnaird, Esq. The results of that survey appear in the *Journal of Appellate Practice and Process*.[2]

Understanding the Graphs

The graphs display two sets of data: mean scores and standard deviations. The mean scores are the bars. They reflect a particular court's or group of courts' level of agreement or disagreement with the question asked. Basically, the more bar that appears, the more the court or group of courts disagreed with the question.

The standard deviations are shown on a line running between the bars. They reflect a court's or group of courts' level of consensus: the higher the standard deviation line goes on a bar means that the judges within that court or group of courts expressed answers that varied more with each other than a court or group of courts where the standard deviation line crosses lower on a bar.

The New York courts included within "NY-ALL" are the Court of Appeals and the four Appellate Departments. The New England courts included within "NE-ALL" are all of the appellate courts in Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire and Maine.

Value of Oral Argument

Question #1: *I often make up my mind on important points during oral argument.*

Comment: The judges in all of the courts, New York and New England, state and federal, expressed no preference on this question. The First Circuit was slightly more in agreement, but the elevated standard deviation indicates a lack of consensus. The important point from the mean scores and the fairly high standard deviations is that some judges may very well have made up their minds prior to oral argument. The smart advocate will

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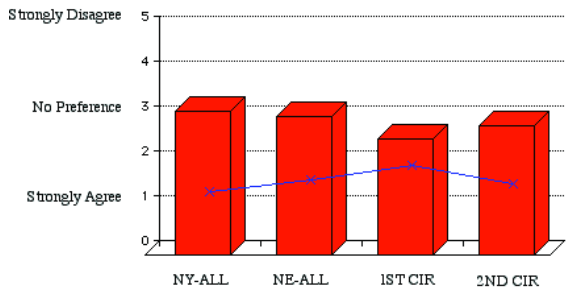
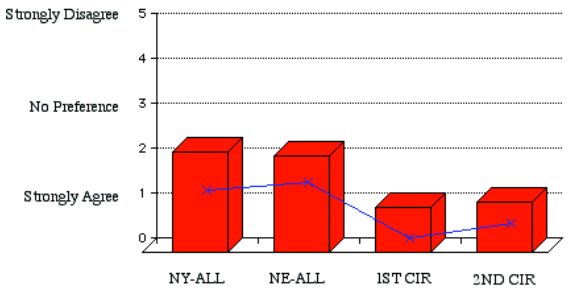
be prepared to deal with that potential problem and make the particular judge reassess the issues presented.



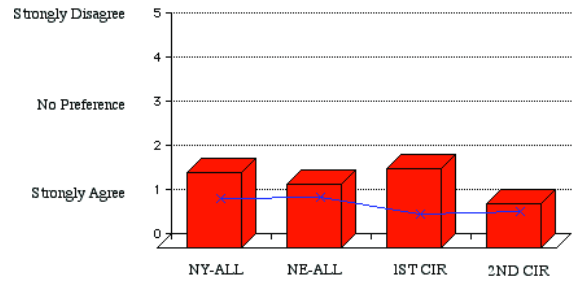
Question #2: *I often find oral argument helpful in shaping a good decision, even if it doesn't affect the disposition.*

Comment: The comparison here is not between the appellate courts of New England and New York, but between the state and federal appellate courts. The federal circuit courts agreed much more strongly, with much greater consensus, that oral argument was helpful to their decision-making process. The state courts agreed, but less strongly and with elevated standard deviations.



Question #3: *I expect counsel to strictly abide by their time estimates unless the court indicates counsel may exceed that time.*

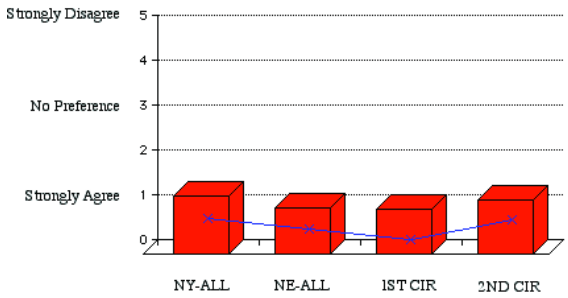
Comment: The graph says it all: watch the light and wrap up when it turns red. Unless, of course, the court keeps asking you questions or expressly lets you finish making a point. Bear in mind, however, that as with many other things on appeal, more is generally not better.



Do New England appellate judges like advocates to use all of their time even though they have covered all of their points? Have appellate judges in New York already made up their minds before oral argument?

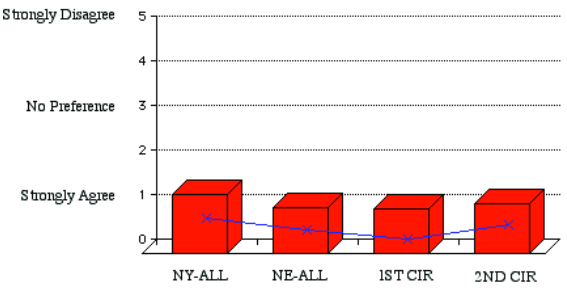
Question #4: *I appreciate it when counsel ceases argument upon making all planned and responsive necessary points even though his or her available time has not yet expired.*

Comment: Again, the graph needs no explanation. Make your points as succinctly as possible and sit down when you are finished. Even if you have more time available. The court will notice and will think better of you.



Question #5: *I appreciate a candid response* (e.g., *"I don't know") when counsel does not know the answer to a question, rather than avoiding the question or answering non-responsively.*

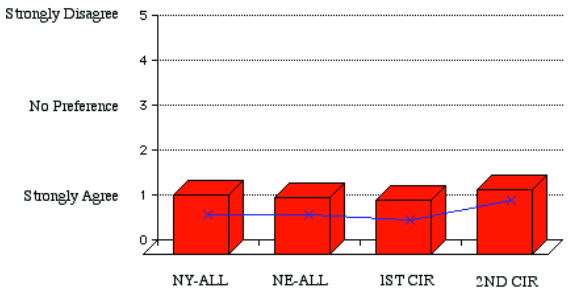
Comment: The rule remains the same whether you are arguing an appeal in New York or New England and whether you are in a state or federal court: if you do not know the answer, say so.



Oral argument is your only chance – and a very short one at that – to speak to the judges and clear up any misconceptions.

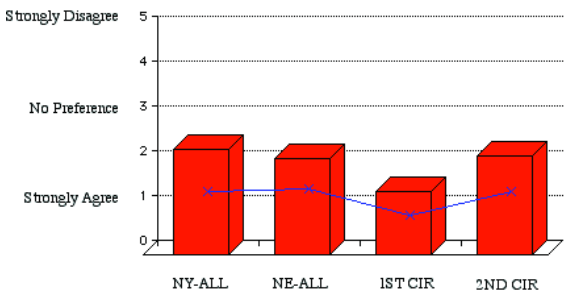
Question #6: *I believe argument is more effective when it is narrowly focused as opposed to attempting to address all issues raised in the briefs.*

Comment: The general message presented by the last few questions and responses from the judges should be abundantly clear by this point: do not waste your time or the court's. Pick the one or two best issues in your case and hammer them home. And do not fall into the self-deceptive trap of convincing yourself that your case has four or five excellent appellate issues. People that do even a fair amount of appellate work will tell you – if they are being honest – that the case with more than two or three really good issues is exceedingly rare.



Question #7: *It bothers me when counsel uses oral argument simply to reiterate those points raised in the briefs.*

Comment: The courts were consistent with their responses, although the First Circuit expressed a slightly stronger agreement and internal consensus. The lesson? Oral argument is your only chance – and a very short one at that – to speak to the judges and clear up any misconceptions or misunderstandings about your case. The judges will in all likelihood have read your brief before oral argument. They do not need to go through it again. Do your case a favor and think up something fresh.

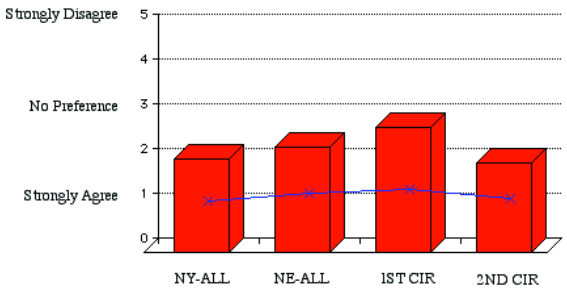


Opening the Argument

Writers on the practice of oral argument differ about whether attorneys should start their appearances with the traditional "may it please the court," state a less formal greeting ("Good morning") or just launch into the argument after self-identifying for the record. A series of questions sought to discover which opening the judges preferred.

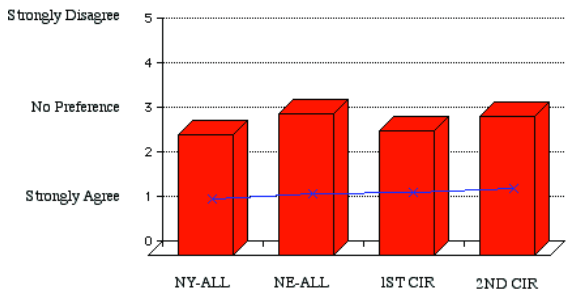
Question #8: *The traditional opening is a good way to start when I'm on the panel.*

Comment: New York and Second Circuit judges agreed moderately more than the New England or First Circuit judges did, but not by a great deal. The First Circuit came the closest to expressing no preference on an attorney's opening.



Question #9: *An informal opening is a good way to start when I'm on the panel.*

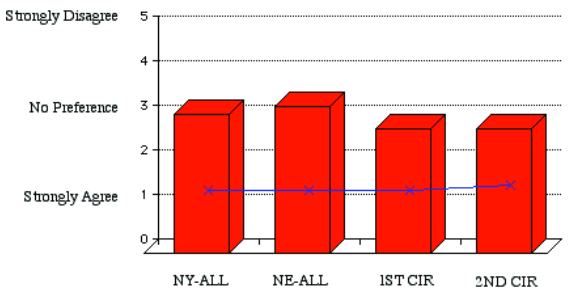
Comment: Interestingly, the informal opening drew a more lukewarm response than the traditional opening, which several courts agreed that they liked to hear. Combined with the answers to the previous question, the traditional opening seems to be the safest, least conspicuous choice in any state or federal appellate court in New York or New England.



Appellate courts, wherever they may be, are extremely busy places that need to make efficient use of their time.

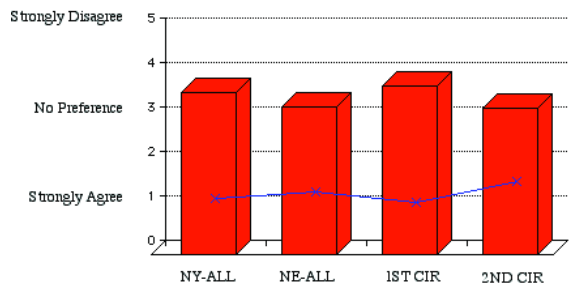
Question #10: *A direct launch is a good way to start when I'm on the panel.*

Comment: The answers were similar to those to the "informal opening" question. Generally no preference, but they are beginning, at least in New England, to edge up slightly toward disagreement with the practice. Confirmation of this trend is seen with the responses to the question about an informal opening. It appears that the traditional "may it please the court" remains the best way to begin in the state and federal appellate courts of New York and New England.



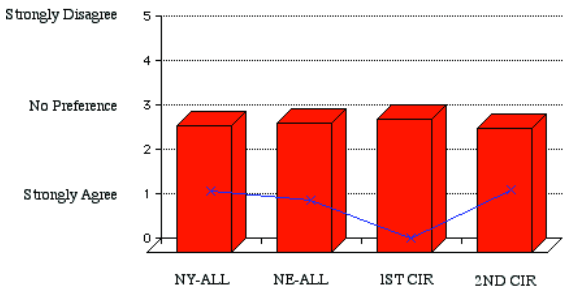
Question #11: *The phrase "your honors" grates on my ears.*

Comment: The judges appear either to not have a preference or to almost disagree outright with the question.



Question #12: *When responding to my questions, I prefer counsel to refer to me by name* (e.g., *"Justice Doe").*

Comment: These responses indicate that there is no penalty for not using a judge's name during oral argument. The responses also dovetail nicely with the general advice to not use a judge's name during oral argument, because you do not gain anything if you are correct, but look foolish if you are wrong.



Conclusion

The judicial preferences all reflect the fact that appellate courts, wherever they may be, are extremely busy places that need to make efficient use of their time. The courts tend to prefer a traditional opening, they don't want attorneys to use more time than they are allotted, and they notice and appreciate it when an attorney sticks to the one or two good issues in a case, forcefully makes those arguments and then sits down – even if the attorney has time remaining.

In terms of differences that might be present between New York and New England, the responses indicated that the preferences of appellate judges in all seven states regarding oral argument are, for the most part, similar in New York or New England, regardless of whether you are in state or federal court.

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1. The council's web page is at <http://www.abanet.org/jd/ajc/cal/home.html>.
2. Charles A. Bird & Webster Burke Kinnaird, *Objective Analysis of Advocacy Preferences and Prevalent Mythologies in One California Appellate Court*, 4 J. App. Prac. & Process 141 (2002).

NYSBACLE

Partial Fall 2004 Seminar Schedule

(Subject to Change)

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

PROGRAM	DATE	LOCATION
Residential Mortgages	October 12	New York City
	October 20	Uniondale, LI
	October 29	Buffalo
	November 4	Westchester
Microsoft Word for the Law Office with Leigh Webber	October 14	New York City
	October 15	Westchester
	October 28	Buffalo
	October 29	Syracuse
Health Care Provider Transactions: Practical Issues and Skills	October 15	New York City
	October 28	Albany
	November 5	Rochester
Bridging-the-Gap: Intellectual Property	October 19	New York City
	October 26	Buffalo
	October 27	Albany
	November 3	Syracuse
Advice From More Experts: More Successful Strategies for Winning Commercial Cases in Federal Courts	October 22	New York City
Products Liability: Great Cases Revisited	October 22	Albany; Uniondale, LI
	November 5	Buffalo; New York City
Update 2004 (live sessions)	October 22	Syracuse
	November 5	New York City
† Enforcement of Federal and State Health Care Laws: 2004 Update and Initiatives for the Coming Year	October 26	New York City
Securities Arbitration 2004: A Primer for the Practitioner	October 26	New York City
Practical Skills: Probate and the Administration of Estates	October 27	Buffalo; Melville, LI; New York City; Rochester; Syracuse
	October 29	Albany; Westchester
Suing and Defending Municipalities	October 28	New York City
	November 3	Albany
	November 10	Buffalo
	November 19	Westchester
	December 3	Uniondale, LI
Gathering and Presenting Evidence in the 21st Century (half-day program)	October 29	New York City
	November 12	Uniondale, LI
Henry Miller — The Trial	October 29	Uniondale, LI
	November 5	Westchester
† Matrimonial Update 2004	October 29	Syracuse
	November 5	Buffalo
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POINT OF VIEW

Teed Off: The Rise in Golf Rage And Resulting Legal Liability

BY ROBERT D. LANG

Rages, of various grades and orders, are giving rise to new claims in lawsuits. "Road" rage on the highway, "check-out" rage at the supermarket, "air" rage on airplanes with flight attendants – these and other incidents are occurring with increased frequency. One of the latest manifestations is "sports rage," the intense, destructive and seemingly mindless activities being manifested on golf courses, now commonly referred to as "golf rage."

Sports have long been viewed as an ideal outlet for competitiveness, a good way to get exercise, and an opportunity to instill positive values such as teamwork and grace under pressure. Recent events have highlighted the increased frequency of serious – and sometimes fatal – incidents of sports rage, not only involving players but also coaches and spectators.

The increase in sports rage among spectators may not rise to the level of soccer moms attacking referees for a blown call, but there does appear to be an increasing number of adults acting worse than spoiled children in harassing and abusing other players, parents and referees. For example, in *Kramer v. Arbore*,[1] the Appellate Division affirmed the denial of summary judgment where, in a recreational senior league hockey game, a stick-swinging incident arose when one player retaliated after being cross-checked. The injured player sued the league. The court denied the defendant's motion for summary judgment. Citing that both players described the refereeing as "poor" and "terrible," the court held that "[i]f the referees were not penalizing players for repeatedly violating the rules by checking other players, then it may have been foreseeable that the illegal conduct would continue and, indeed, escalate, as occurred here."[2]

Violence in golf is particularly unusual because golf has long been considered to be a sport of gentlemen and fair play. Indeed, it is one of the few sports where players are required to call penalties on themselves (*e.g.*, inadvertently moving a ball) and where an "honor code" is in effect – players are not to improve their lie even when out of sight of their playing opponents. This self-policing is all the more significant when compared with most sports, where players do their best to hide their violations. Imagine, for example, a soccer player admitting that she tripped an opponent, an offensive lineman in football volunteering that he held a pass rusher or a basketball player admitting that he pushed off in order to get a rebound. As such, on one level, golf rage is surprising.

Golf has always been etiquette-driven. Golfers are required to wait their turn before hitting; to record their score on each hole honestly; to stand perfectly still without making any noise of any kind when others are hitting; and to be respectful, not only to the other golfers in their group but to other golfers on the course as well.

To be sure, in the past, golfers have long been known to express their frustration, if not rage. Throwing an offending putter in the water, followed by the ball that was involved in a missed putt, is part of the history of the game, however ungentlemanly it may be.[3] A study commissioned by the Hyatt Hotels & Resorts showed that 29% of male business executives with a handicap of 15 or under, have broken at least one golf club in a fit of rage.

Part of the reason for golf rage is the consumption of alcoholic beverages on the course. In addition, new golfers, although anxious to play, may not be educated in proper golf etiquette, giving rise to improper actions on the golf course, whether real or imagined, by other golfers already hot under the collar from their own problems.

Violence against golf equipment is one thing; violence against golfers is another.

To some extent, golf rage may be a mirror of society. If so, we may all be in trouble:

• In Ontario, Canada, a 220-lb. golfer, enraged that another golfer's group had repeatedly "hit into" another foursome, attacked the offending golfer, punching him in the face several times and then kicking him as he lay on the ground. The injured golfer suffered cracked ribs and damage to his knee requiring surgery. At his trial, the attacking golfer claimed that he was merely defending himself, saying that the smaller golfer was brandishing a sand wedge. Ontario Court Judge Norman Douglas did not believe that story, calling it "an insult." The judge sentenced the defendant, a prison guard by occupation, to three months of house arrest and 18 months of probation.

• In *State v. Fricke*,[4] Clyde Martin and two of his neighbors were playing golf at the Jack Nicklaus Golf Center. After teeing on the 15th hole, the defendant, who was playing alone, approached the threesome saying, "I want to play through." The two neighbors, although viewing the defendant as arrogant, allowed him to play through. Instead of teeing off and moving on, the defendant began to talk to one of the threesome about golf clubs. Martin said he did not understand why the defendant was starting a conversation about golf clubs when he had wanted to play through and told the defendant, "Mister, just hit the ball and move on." The defendant con-

tinued talking, rather than playing. Martin then stated, "Mister, hit the %$#ing ball and go on." The defendant flew into a rage and exclaimed, "No one talks to me like that."

With this, both men approached each other. The defendant held his golf club in both hands "like a club and hit Martin in the mouth." Satisfied, the defendant then attempted to tee off (finally). One of the uninjured members of the threesome attempted to stop the defendant by knocking over his golf bag. However, the defendant picked up the bag and continued playing. Ultimately, the defendant finished his round of golf and, hardly upset with his encounter on the 15th tee, shot a 68.

At trial, the defendant claimed that the injured golfer, Martin, "ran into the club." Not surprisingly, given this "excuse," the jury found the defendant guilty of assault.

• In May 2002, at the Lakeside Golf Course, near Fort Wayne, Ind., Frank's threesome was moving slowly, ahead of Holly's foursome. After finishing their round, Frank drove onto the golf course to retrieve his seven-iron, which he had left on the 17th fairway. On his way back to the clubhouse, Frank yelled out to Holly while he was in the middle of his back swing, resulting in a poor shot. Later in the parking lot, a fistfight broke out between the two, and the 41-year-old Frank allegedly pulled out a gun against the 63-year-old Holly, who, according to a witness, was acting "like a rabid dog."

Frank was charged with a felony count of pointing a firearm and a misdemeanor battery charge. The six-member Allen Superior Court jury deliberated three hours, before finding Frank not guilty, apparently rejecting the state's allegation that Frank instigated the fight.

• A group of three young players in New Berlin, Mo., were playing behind a 50-year-old man and his 11-year-old son. The twosome were playing slowly. Frustrated at the waiting, the threesome overtook the father and son, taunting the father, who then ran at the trio "like a crazed man." When the three golfers struck back in self-defense, the father was killed.

Nor are people or golf equipment the only objects of golf rage.

• On December 29, 2000, a New York golfer having a bad day on the links used his titanium driver to club to death a rare black swan, "Alex," who unfortunately waddled too close to a golfer at the 17th hole at Donald Trump's exclusive Trump International Golf Club in West Palm Beach, Fla.

Wagner killed the swan with one swing of his driver. Apparently, it was one of the few instances that day in which Wagner was accurate with his clubs, because he claimed to have lost 14 balls while playing. When approached by "Alex," Wagner, rather than take a drop and use another ball, allegedly said, "I'm not going to give another perfectly good $4.00 ball to a god damned duck!" It would have been better if he had instead said to the swan, "You're fired."

Wagner was charged with a misdemeanor, which carries a maximum penalty of one year in jail and a $5,000 fine. Rather than go to trial, Wagner entered a plea providing for 30 hours of community service at a New York animal rescue league, a $2,500 contribution to an animal rescue league in West Palm Beach and an $800 reimbursement to the Palm Beach County Sheriff's Office. In addition, Donald Trump banned Wagner from playing at any of his courses worldwide, stating, "I would have hoped that there could have been a more gentle way of solving the problem. After all, we weren't dealing with an alligator here."

Once you have witnessed a law partner, associate, client or potential client in a full-blown "golf rage," it is hard to think of them at the office the same way in which you did so before. The same is true, of course, in how they may view you if you lose your cool in that manner on the links. Accordingly, and for every good reason, it is incumbent upon golfers to avoid venting their rage on other golfers, thereby avoiding criminal and civil liability.

Robert D. Lang is a member of D'Amato & Lynch in New York City, where he is head of the casualty defense department. An article he wrote for the *Journal* in August 2000, "Lawsuits on the Links: Golfers Must Exercise Ordinary Care to Avoid Slices, Shanks and Hooks" has been widely quoted in a variety of publications.

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1. 309 A.D.2d 1208, 765 N.Y.S.2d 118 (4th Dep't 2003).
2. *Id.* at 1209.
3. For one example, at the 2002 Ryder Cup, after three-putting the 18th hole, thereby causing his team to lose the best ball match, Sergio Garcia threw the offending golf ball into the lake and then repeatedly kicked his golf bag.
4. 1993 Ohio App. LEXIS 3008 (Ohio Ct. App., Warren Co. 1993).

Attorney Professionalism Forum

To the Forum:

Over the past 15 years, I have handled a variety of matters for a married couple – let me call them Mr. and Mrs. Andrews – and their two adult children, John and Betty (also fictitious names). Two years ago, Mr. Andrews died and I was engaged by the family to settle his estate. About one year later (a year ago), I was retained by Betty to represent her in a divorce proceeding. Most recently, John, who is a successful contractor and developer of luxury homes, engaged my services to convert his business from a partnership to a limited liability company, and to defend him in a rather complex construction litigation filed by a homeowner. John paid me a retainer on account for the litigation, and I anticipate a substantial legal fee by the time the action is concluded.

John just called and has put me in an awkward position. He told me that since his father's death, his mother's health has been deteriorating (she has Parkinson's disease) and he has been totally responsible for her care. This includes paying her bills, maintaining her house, and driving her to all her doctor appointments. His sister Betty moved to California after her divorce, and is unable to share this burden. John has also advised me that although his mother's physical health has declined, her intellect has not, and she refuses to move to an assisted-living facility.

After describing his "caretaker" role, John told me that his mother wanted a new will prepared that gave her house to John (in gratitude for all that he was doing) and her remaining property (consisting of a minimal amount of cash) to him and his sister in equal shares. Also, since Betty now resided in California, his mother felt that it would be more practical if I, rather than Betty, served as co-executor with him under this will. He then ended the conversation by telling me that he would pick up a draft of the will next week, when he comes by for his EBT preparation. He also instructed that under no circumstances did he want me to bill his mother, given her limited income, and that he would take care of my fee. I am confused. First, can I even represent Mrs. Andrews in this matter at the same time I represent her son? If I can represent both of them, shouldn't Mrs. Andrews herself have contacted me? What are my ethical and professional obligations in this situation?

Sincerely,

Willing But Worried

Dear Willing:

Lawyers who represent couples or families in trusts and estates matters often face the basic but always important question of which person is the actual client. It is not uncommon for a husband to consult an attorney to prepare a will for his wife, or, as in your case, for an adult child to engage an attorney to prepare a will for an elderly parent. In these situations, the attorney must be able to clearly identify the client, avoid potential conflicts of interest, and at all times strive to maintain independence of judgment on behalf of that client.

John has asked you to prepare his mother's will. Nevertheless, it is she, and not her son, with whom you must confer regarding her testamentary intentions. Although John may have correctly communicated her wishes, your responsibility is to elicit directly from her the information necessary to prepare the will, including the identity of the persons to whom she desires to leave her property, and her directions regarding their respective shares. In the process, you should also assess her testamentary capacity. All of this may seem obvious, but you may be inclined to do otherwise given your long-standing relationship with the entire family and your present representation of John.

Your first step should be to confirm that Mrs. Andrews actually wants to change her will, and, relatedly, to retain your services to do so. You seem uncomfortable with pursuing the representation, perhaps because you view it as an impermissible form of solicitation. However, since you indicate that Mrs. Andrews is a former client, it is not prohibited under DR 2-103(A) (solicitation of employment from prospective clients in person or by telephone barred except from "close friend, relative, former client or current client"). It is not unusual for a

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

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client whose spouse has died to update a will, and by calling her to confirm that she wants to do so you demonstrate that you are both conscientious and sensitive to her legal needs.

Assuming that Mrs. Andrews engages your services, Canon 5 ("A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client") must be kept in mind throughout the representation. Neither John's directives regarding the terms of his mother's will, nor your desire to please John and maintain him as a client, are permissible interests for you to consider in advising Mrs. Andrews. "The professional judgment of a lawyer should be exercised . . . solely for the benefit of the client and free of compromising influence and loyalties. Neither the lawyer's personal interests, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client" (EC 5-1).

Simultaneously representing John on a commercial litigation and his mother in the preparation of a will are unrelated matters and would not necessarily violate DR 5-105 (Conflict of Interest; Simultaneous Representation), but if you think that John's sentiments will compromise your duty to independently represent Mrs. Andrews in any way, then you must decline the representation (*see* DR 5-107(B) (". . . [a] lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate his or her professional judgment in rendering such legal services . . ."; *accord* ABA Formal Op. 02-428).

You also should be aware of any potential conflicts of interest stemming from your prior representation of Betty, Mrs. Andrews' daughter. Since your representation of Betty was in connection with a divorce, which is not the "same or a substantially related matter" as your work for Mrs. Andrews, you are not required to obtain Betty's consent to represent her mother (DR 5-108(A)(1)). However, you cannot reveal any confidential information previously imparted by Betty as you advise her mother, without first obtaining Betty's consent (DR 5-108(A)(2)).

John's offer to pay your fee is another factor that could impinge on your ability to exercise independent judgment in representing Mrs. Andrews. As noted by EC 5-22, "if a lawyer is compensated from a source other than the client, the lawyer may feel a sense of responsibility to someone other than the client." Accordingly, DR 5-107(A) expressly prohibits the lawyer from accepting payment from one other than the client unless the client agrees. Therefore, you must disclose to Mrs. Andrews her son's offer to pay your fee, and obtain her consent prior to accepting payment from him. Of course, John's generous offer may be withdrawn after you advise him that you cannot prepare the will based on his directives, but rather only upon consultation with his mother.

If Mrs. Andrews engages your services, be certain to avoid any suggestion that she appoint you as a fiduciary under the will, notwithstanding John's advice that you name yourself as co-executor. EC 5-6 cautions that "[a] lawyer should not consciously influence a client to name the lawyer as executor, trustee, or lawyer in an instrument." Even where an appointment is made without any such influence, "care should be taken by the lawyer to avoid even the appearance of impropriety." If of her own accord Mrs. Andrews asks you to serve as an executor, remember to advise her of the financial impact (statutory commissions and legal fees), and prepare an acknowledgment of your disclosure in accordance with SCPA 2307-a.

Finally, you should reject John's offer to deliver a draft of the will to his mother, unless authorized in advance by Mrs. Andrews. Allowing him to serve as a courier will give him access to the confidences of your client, which is proscribed by DR 4-101(B)(1) ("[a] lawyer shall not knowingly reveal a confidence or secret of a client"). Similarly, if John makes inquiry about his mother's will, do not discuss the terms of the instrument since the information you will be disclosing may be confidential. Of course, if Mrs. Andrews insists upon the presence of John at meetings with you, or gives you permission to discuss her will with him, you would not be violating your obligation to protect the client's confidences (DR 4-101(C)(1)).

In short, if you are confident that you can exercise your professional judgment solely for the benefit of Mrs. Andrews, devoid of any influence by John, and are aware of the issues that often arise in the context of family representation, politely thank John for the lead but advise him of your obligation to confer directly with his mother on this matter. By doing so, you will be fulfilling your duty of loyalty to your client, and will be exhibiting attorney professionalism.

The Forum, by
Susan F. Gibralter
Bertine, Headley, Zeltner,
Drummond & Dohn, LLP
Scarsdale, NY

LETTERS TO THE FORUM:

We received the following letter in response to the Forum published in the July/August issue of the Journal. *The question is reprinted for your convenience.*

To the Forum:

I recently had an unsettling experience in a litigated matter, in which I felt that my client was interfering with the exercise of my professional judgment.

I represent a corporate client in a highly technical and specialized area of the law. We were served with a discovery request that called for the production of numerous confidential documents. Procedural principles unique to this practice area require the court to conduct a tedious, lengthy *in camera* inspection of each individual document prior to its production. Technically, such a hearing is scheduled upon a motion to compel discov-

CONTINUED ON PAGE 52

ery or on a motion for a protective order. As a practical matter, however, there is no legal or factual basis for opposing the former or making the latter, because no relief will be granted to either side without the hearing. In fact, research and experience has taught me that such hearings are invariably ordered in every case, and that no judge has ever failed to do so.

Reaching the conclusion that a hearing to review the confidential documents was inevitable, I consented to one without a motion being made, and because I viewed such motion practice as a mere technical formality I did not consult my client in advance. To be clear, I did not stipulate to the production or admissibility of any documents at the hearing, nor did I waive any applicable privilege. However, my client vociferously objected, and threatened to take its future business elsewhere.

While I aspire to high standards of professionalism, including the waiver of mere formalities (see EC 7-38), I am concerned that my client is trying to pull the steering wheel out of my hands. Further, I am concerned that my relationship with this client may have been irreparably damaged. Was I right in waiving unnecessary motion practice?

Sincerely,
Baffled

To the Forum:

Re: Baffled

Gentlemen:

Would the client accept being billed for motion practice which the attorney believes is unproductive, and could result in sanctions or antagonizing the judge? Must the lawyer discuss with the client a matter which pertains to the lawyer's ethical obligation to avoid vexatious litigation, particularly where there is no advantage to the client?

For Baffled, please consider that the client may be seeking a way of settling the litigation, while blaming you for the outcome and reducing your fee.

Very truly yours,
David M. Goldberg
Brooklyn, NY

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I am a new (*i.e.*, lowly) associate in a large firm. We represent a large corporation that has been sued by a person injured on its property, and I have been assigned to the case. The injured person is represented by a law firm in another state. One of the members of the plaintiff's firm is admitted in New York, and he is the one who signs the pleadings and discovery documents in the matter. However, it is the firm's non-New York lawyers who contact me regarding case status, evaluation, scheduling, etc.

A few days ago I was working late, reviewing the plaintiff's responses to our discovery demands. The plaintiff had included a stack of documents (employment records, medical records, accident reports, etc.) as part of those responses. These documents were held together by rubber bands, and were not bound in any other manner.

The last two pages clearly got into that stack unintentionally, and just as clearly were not supposed to be disclosed. They constituted a letter from the plaintiff himself to his attorneys, and it was addressed to the attorney in the firm who is admitted in New York. The letter detailed the financial hardship the plaintiff was having resulting from his inability to work. He asked the New York attorney for an "additional" loan because he had exhausted the "first" loan made to him by another member of the firm (one who is not admitted in New York).

The contents of the letter shocked me. However, because it was late I could not find a partner to give me some guidance, and I had a client meeting scheduled for the first thing in the morning to discuss the plaintiff's responses. That meeting took place, and although I was not altogether comfortable in doing so, I decided not to tell the client's representative about the letter because I had not talked to one of my superiors first.

After the meeting I got a chance to discuss the matter with a partner in my firm. He told me not to tell the client. He also directed me to write a letter to the plaintiff's counsel in the near future, advising that we would report his conduct to the Ethics Committee unless he agreed to reduce the initial settlement demand that had been made some time before.

I am not comfortable with keeping the information from the client, nor am I comfortable with threatening the plaintiff's attorney in this manner. In addition, don't I have an individual obligation under the disciplinary rules to report unethical conduct to the Ethics Committee once I become aware of it? One other small matter: I am afraid I will be fired if I disobey a partner's directive. Some advice would be most welcome.

Signed,
Frustrated First-Year Associate

Editor's Mailbox

Editor's Note: An article in the July/August Journal *on issues facing law guardians prompted letters from two practitioners in the field. Their comments are printed below, followed by a response from the author of the article.*

Role of Law Guardian

While I believe the article on law guardians is right on point, I have serious reservations regarding the Sample Letter to Parents that accompanied the article. It tells parents that it may "be necessary for me to make recommendation to the Court." As the author noted, "Providing a law guardian's report to the judge . . . is improper." It is, and so is a recommendation.

In *Weiglhofer v. Weiglhofer* [1 AD3d 786 (3d Dep't 2003)], the court stated that the law guardian is "the attorney for the children [cites omitted] and not the investigative arm of the court." *Weiglhofer* and more recent cases stand for the proposition that the law guardian is the child's advocate and not someone who is supposed to "recommend" to the court.

It is also improper for a law guardian to communicate with the parents absent prior approval of counsel. The letter may cause a parent to contact the law guardian without speaking to counsel. This would be improper – as improper as it would be for a parent's attorney to send such a letter to the child. The letter also makes it appear that such communication might be important toward assisting the law guardian in making his/her recommendations. I believe this would be misleading and I believe the various Grievance Committees would agree.

Steven Z. Mostofsky
Brooklyn, NY

Differing Views

There are some differing views, rules and laws relative to the practice of law guardians in the state, and I believe they are worthy of some mention.

First, I would urge that a court-appointed law guardian not write to the child's parents at the outset, and that the letter directed to them as proposed by Mr. Muldoon is a violation of DR 7-104, which requires that an attorney not communicate directly with a party in the litigation who is represented by another attorney. Similarly, as mentioned in the article, attorneys and/or agents for neither parent may speak with the child. (See the NYSBA Committee on Professional Ethics Opinion 656, which addresses the law guardian's role as counsel.) Instead, the safer course would be to obtain written permission of counsel before having any contact with the parents. (Indeed, the statewide Order of Appointment under Part 36 of the Rules of the Chief Judge, specifically includes this provision.)

In addition, the letter proposed by Mr. Muldoon suggests that the attorney for the child may make "recommendations" to the court, evaluate, and express views that are not the child's. This is contrary to the role of "attorney and counselor," which is the sole role of the law guardian, as opposed to a guardian *ad litem*. A child may be considered incompetent due to age. (The First Department, for example, specifically permits a law guardian to assess the client and deem him/her "impaired," upon which the attorney may choose to express the client's position to the Court but not "advocate" that position. The impairment might be a lack of understanding of a risk of harm in a position asserted by the client, or the failure to recognize a danger inherent in that position.) This is not necessarily a bar to having counsel do what the canons of ethics mandate: "The duty of a lawyer, both to the client and to the legal system, is to represent the client zealously within the bounds of the law." (EC 7-1.) There is no exclusion for law guardians. EC 7-7 also provides that "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer." This is not inconsistent with EC 7-11, which states that "the responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client."

One of the most significant roles of the law guardian is to advise the client. According to EC 7-8 of The Code, a lawyer "should advise the client of the possible effect of each legal alternative." In addition, the law guardian's advice to the client "need not be confined to purely legal considerations." The lawyer should "bring to bear upon this decision-making process the fullness of his experience as well as the lawyer's objective viewpoint," and may "emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions."

Since disputes concerning what is best for the client must ordinarily be resolved in the client's favor, the lawyer does not have to approve of the client's position (EC 7-17), and, while appearing in court, should refrain from expressing a personal opinion concerning the matter at hand. (EC 7-24.)

While it is true that there are departmental differences in the standards applied to the practice of law guardians, with the downstate attorneys having the more strict advisor/advocate view than our upstate colleagues, it can hardly be said that the Canons of Ethics, Ethical Code or Disciplinary Rules are to be applied differently depending on venue.

A few words on fees are also warranted. The Second Department recently issued a definitive decision affirming the Family Court's right to appoint private pay law guardians. *Plovnick v. Klinger* [2004 N.Y. App. Div. LEXIS 10117, decided July 30, 2004]. "Private attorneys" who are assigned counsel for children at $75 are not required to file under Part 36. Further, the reference that "interim fees for a private pay law guardian may be

Continued on page 54

appropriate" has been codified in Part 36. Indeed, the OCA-generated Order of Appointment specifically calls for a retainer (which may be zero at the judge's discretion) and for the allocation of fees to be paid upon billing (which is to take place no less often than every 60 days). See, paragraphs 2–7, OCA Order of Appointment, http://courts.state.ny.us/ip/gfs/LawGuard_11_03.pdf.

Jo Ann Douglas
Manhattan

Author's Response

To some extent, the letters recognize the geographical differences that exist in practicing law. Ideally, ethical rules should not depend upon the county or judicial department an attorney practices in, and the same should be true of procedural and substantive application of the law. Yet the fact is there are different grievance (or disciplinary) committees for each department, which do not always interpret the Code of Professional Responsibility in the same way. Too, there are unwritten rules of practice within New York State, depending in part on the region one practices in.

The difference in roles of law guardian and guardian *ad litem* is discussed in Douglas Besharov's Practice Commentary to McKinney's Family Court Act § 249. He notes that "the role of the 'Law Guardian' remains ambiguous and subject to controversy. It seems fair to say, though, that the Legislature used the term to denote something other than simply a lawyer for the child and something other than the traditional guardian ad litem." The article noted the Third Department's position that "guardians ad litem should not normally be appointed when minors are subjects of proceedings in Family Court, but that law guardians or counsel of their own should represent the minors." *Fargnoli v. Faber* [105 AD2d 523, 524, 481 NYS2d 784 (3d Dep't 1984)].

As to the propriety of writing to parents, the sample letter contains nothing specific about the case but is rather a notification of the law guardian's appointment. In addition, each parent's attorney is "cc'd" in on what is a form letter. In appointing a law guardian, the order employed by many Family Court judges includes a direction that "all individuals, educational facilities, medical care providers and others having information about these children shall release same to the Law Guardian."

The decision on compensating Family Court law guardians in *Plovnick v. Klinger*, (decided while the article was being printed), is controlling in the Second Department, and is perhaps "definitive" for other departments. I suspect, however, that the Fourth Department's decision in *Lynda A. H. v. Diane T. O.* [243 AD2d 24, 673 NYS2d 989 (4th Dep't 1998)], will remain good law for its geographical area until the Court of Appeals makes a ruling that is truly definitive.

The issue of a law guardian "report," addressed in *Weiglhofer v. Weiglhofer* [1 AD3d 786, 766 NYS2d 727 (3d Dept 2003)], will likely be refined over time. I do not read the decision as barring a "recommendation." Rather it states (fn. 1): "While Law Guardians, as advocates, may make their positions known to the court orally or in writing (by way of, among other methods, briefs or summations), presenting reports containing facts which are not part of the record or making submissions directly to the court ex parte are inappropriate practices." Most custody cases are settled, often by the active involvement of a law guardian. I would think that a law guardian may properly make preliminary recommendations (without ex parte communication or violating the advocate-witness rule), rather than awaiting trial itself.

Gary Muldoon
Rochester

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: A repetition I find wordy is the combination *and so*. For example, "It looks like rain and so I'd better take an umbrella." Is that combination acceptable?

Answer: The phrase *and so*, judging by its wide use, seems to be acceptable to the general public, but because brevity is desirable and the two words are not synonymous, it would be better to choose whichever word you want and delete the other. The pairs *but yet* and *but still* are also redundant, the second word of each pair being a synonym of the first. Why use both?

Readers of this column have also criticized writers who use the redundant *the reason is because*, both *reason* and *because* conveying the same meaning. *The reason is that* expresses the same idea and is preferred by careful speakers. Some readers also object to: "He had no other choice than to concede," arguing with some validity that if there is no second choice, why not say, "He had no choice but to concede"? One redundancy heard below the Mason-Dixon line is, "He didn't have but twenty dollars in his wallet," when "He had only twenty dollars in his wallet" would be shorter and also grammatical.

These and other similar phrases are used to add emphasis. In the last two illustrations, the words *other* and *didn't have but* add emphasis to a statement that the briefer and grammatical statements lack. This device is not a confined to Western languages. In his book *The Miracle of Language*, Charlton Laird writes that to a Hottentot *go* means "to see," and *go-go* means "to examine" – that is, to continue to look

CONTINUED ON PAGE 55

CONTINUED FROM PAGE 54

at something until the object has been completely observed.

The person who drafted the following English sentence hoped to gain emphasis by adding a second *or not* to the statement, "We intend to move into the house next month whether or not the landscaping is complete or not." Those speakers who attach redundant adverbs to adjectives hope to add emphasis in phrases like: *too overdone, perfectly honest, well-renowned*.

Redundancy is also used to make unimportant statements seem important. Drafters of the following announcement of a study of ways to reduce casualties during a fire attempted that technique:

> The behavior of individuals within a building during a fire situation has often been one of critical determining factors relative to the eventual outcome of the fire incident. We will consider the individual relative to his physical, psychological, cultural, and time constraints during a fire occurrence within a building. The behavioral dynamics of the individual will usually be predicated and initiated by the many variables which are considered in the individual's perception of the threat created by the fire situation. . . . Psychologically and physiologically the human individual is not able to adjust to adaptable tolerance levels for the products of a fire occurrence.

In the paragraph above a fire is never called "a fire." It is "a fire situation," "a fire incident," and "a fire occurrence." The accomplishments of the study are stated redundantly, in long sentences full of abstract language and psychological terminology (*e.g.*, "behavioral dynamics," "predicated and initiated," "tolerance levels"), phrases intended to impress. But, given an intelligent reader, these efforts fail; it is better to express your ideas clearly, briefly, and forcefully, without unnecessary fanfare. The advice that less is more applies.

That being said, it is true that some repetition is built into English grammar. For example, we add an unnecessary *s* to count-nouns like *book*, al-though an adjective indicating plurality precedes it (*five books* not *five book*). Even when number is indicated by the noun or pronoun, English grammar insists on the repetition of that number in the verb, to indicate singular or plural: We can't say, "People has come" or "Persons is coming." (Nor can we delete the plural verb *are* before *coming*.)

And, although the rule is being breached by many, we still require, for grammatical correctness, the repetition of a verb in statements like, "I always have assisted and always will assist the indigent." (That statement is often changed to, "I always have and always will assist the indigent," briefer, but still not acceptable.)

This is a long answer to a short question, but the idiosyncrasies of the English language and of its speakers are always intriguing.

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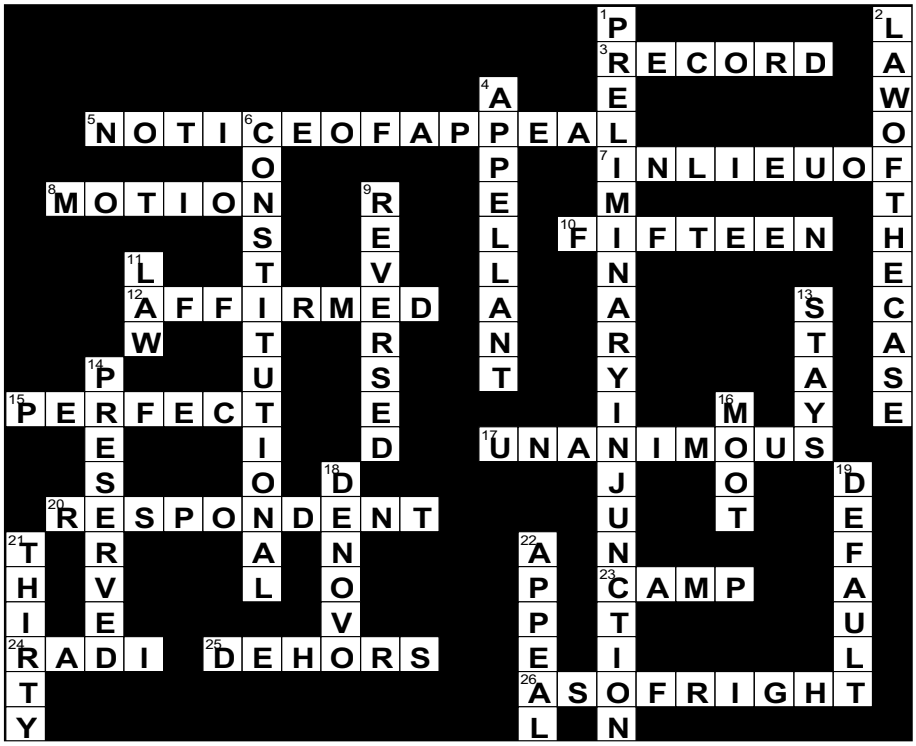
Answers to Crossword Puzzle on page 8.



MEMBERSHIP TOTALS

NEW REGULAR MEMBERS
1/1/04 - 9/13/04 _____6,321

NEW LAW STUDENT MEMBERS
1/1/04 - 9/13/04 _____927

TOTAL REGULAR MEMBERS AS OF
9/13/04 _____64,138

TOTAL LAW STUDENT MEMBERS AS OF
9/13/04 _____3,560

TOTAL MEMBERSHIP AS OF
9/13/04 _____67,698

on authority spells a positivist approach to the law in which cases count for more than reason, distinctions among cases are ignored, and reasoning is hidden by long, dull discussions of authority. Over-reliance on authority also leads to disorganized legal writing in which the factual minutiae of cases are discussed paragraph after paragraph and in which citations are strung together at length. Unless the weight of the authority is important, cite cases for their rules, not as ends in themselves. Then discuss the facts of cases only to distinguish or analogize them to the facts you're arguing.[9]

Cite only to support your arguments and themes — or to contradict the other side's arguments and themes.

Relying on cases instead of arguments will mislead or miscue your reader to your client's detriment. Not all precedent is binding, and not all statutes can be interpreted at face value. As Illinois Chief Justice Schaefer explained, "lawyers tend to treat all judicial opinions as currency of equal value . . . . Yet, when the judicial process is viewed from the inside, nothing is clearer than that all decisions are not of equal value . . . ."

And droning on about cases is stultifying. After all, "few things [are] more boring than . . . page after page of case discussion in which each paragraph begins: 'In *A v. B* . . .'; 'In *C v. D* . . .'; 'In *E v. F* . . . .' By the third one, the reader feels like saying 'who cares?'"[10]

Explanatory Parentheticals

Use a parenthetical following your case citation if your citation reference is unclear, such as when your reference supports your proposition inferentially or indirectly and you don't explain the reference in your text. Use a parenthetical to explain the point you make in the preceding sentence of your text. Don't use a parenthetical to add information that doesn't explain your preceding sentence. *Correct:* "Defendant committed a tort. *See X v. Y*, 1 N.Y.3d 1, 11 (2011) (listing elements of tortuous wrongs)." *Incorrect:* "Defendant committed a tort. *X v. Y*, 1 N.Y.3d 1, 11 (2011) (observing tartly that 'torte' means 'pie' in French)."

Use a parenthetical following your cited authority if a fact from your case precedes the citation. It's bad form to compose the following sentence and then append the following citation: "Petitioner is not yet entitled to attorney fees. *Solow v. Wellner*, 86 N.Y.2d 582, 589 (1995)." The citation needs a "*see*" and a parenthetical to explain why the author cited *Solow*. The sentence and the citation should read: "Petitioner is not yet entitled to attorney fees. *See Solow v. Wellner*, 86 N.Y.2d 582, 589 (1995) (holding it premature to review award for attorney fees when case is remitted to recalculate abatement award)." Remember, however, to "[u]se an explanatory parenthetical only for information that is simple and not part of the argument. And resist the temptation to use explanatory parentheticals to avoid the hard work of explaining complicated and important authority."[11]

Avoid using articles in your citation parentheticals, but use articles if the parenthetical reads poorly without them.

If the entire parenthetical is a quotation, (1) the parenthetical should begin with a capitalized first letter, even if a bracketed alteration is required; (2) a period or four ellipses should go at the end of the parenthetical before closing the quotation if the quotation is an independent clause; and (3) a final period should follow the closing parenthetical.

Begin explanatory parentheticals with a lowercase present participle or gerund ("finding," "holding," "noting," "stating," "ruling"). This technique is harder than writing whatever comes to mind, but introductory present participles or gerunds focus explanatory parentheticals. Parentheticals beginning with present participles or gerunds are rare in New York but standard in federal court. Key present participles or gerunds for parentheticals:

"Finding" (fact or law that leads to a holding).

"Holding" (essential factual and legal findings that lead to the final determination and the conclusion itself).

"Stating" (dictum or concurrence). Contracts "provide" and statutes "create," "abolish," "prohibit," "define," and "provide." Neither contracts nor statutes "state" or "say."

"Ruling" (non-case-specific announcement of legal standard).

"Arguing" (concurrence or dissent; neither majority appellate opinions nor trial judges "argue").

"Contending" (judges, including dissenters, never "contend").

Note: Don't use the vague "indicating" in a citation parenthetical.

Preferred Citations

Prefer a higher court to a lower court. In New York, prefer the Court of Appeals most of all. If you cite a Court of Appeals or Appellate Division opinion on point, you'll rarely need to cite a trial-court opinion.

In New York, prefer a New York State court to a federal court (unless your issue raises a federal constitutional question and the federal courts have set a threshold).

In New York, prefer the Second Circuit to another federal circuit.

In New York, prefer any federal court to any non-New York State state-court.

In New York, prefer your Appellate Division Judicial Department or Appellate Term Judicial District to another Appellate Division Department or Appellate Term District.

Prefer a court of coordinate jurisdiction in your appellate jurisdiction to a court of coordinate jurisdiction in another appellate jurisdiction.

Prefer fully affirmed opinions to those modified on other grounds.

Prefer unanimous opinions to majority opinions.

CONTINUED ON PAGE 61

CONTINUED FROM PAGE 60

Prefer majority opinions to plurality opinions.

Prefer plurality opinions to concurring opinions.

Prefer concurring opinions to dissenting opinions.

Prefer a case on all fours to a case with distinctions.

Prefer most cases to most secondary authority.

Prefer signed opinions to memorandum opinions.

Prefer memorandum opinions to per curiam opinions, except when the per curiam opinion allows no reservations and contains no wriggle room.

Prefer unanimous authority to split authority.

Prefer newer cases to older cases, unless the older case is seminal authority. Then site the seminal authority and the new case.

Prefer a case that goes your way to a case that goes the other way, even when citing black-letter law.

Prefer a famous, highly regarded judge or author to a less highly regarded judge or author. Cite a disgraced judge's opinion only if you have no other authority on point, and even then beware.

Prefer a holding to a finding.

Prefer ratio decidendi to obiter dictum.

Prefer a published opinion to an unpublished opinion.

Prefer an officially reported opinion to an unofficially reported opinion, such as a *New York Law Journal* opinion. When you cite a *New York Law Journal* opinion, always verify whether the opinion has been reported officially and whether the decision has been reversed.

Prefer a constitution to a statute.

Prefer a statute to a rule or regulation.

Prefer a statute to a case, but cite both (citing the statute first) if the case explains how to apply the statute.

Prefer a reference in the text of a case or secondary authority you're citing to a reference in a footnote of a case or secondary authority.

Next month: Accuracy in citing, string citing, ordering authority, pinpoint citations, and parallel citing.

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

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1. To download a free copy, visit <courts.state.ny.us/reporter/Styman_Menu.htm>.
2. The Bluebook: A Uniform System of Citation (17th ed. 2000).
3. St. John's Law Review, New York Rules of Citation (4th ed. 2001).
4. Association of Legal Writing Directors & Darby Dickerson, ALWD Citation Manual: A Professional System of Citation (2d ed. 2002).
5. For a comparison of the *Bluebook*, the *Tanbook*, *ALWD* (first edition), and the *St. John's Rules of Citation*, see Gerald Lebovits, *New Edition of State's "Tanbook" Implements Extensive Revisions in Quest for Greater Clarity*, 74 N.Y. St. B.J. 8 (Mar./Apr. 2002). *ALWD*'s second edition repaired its New York errors, not by fixing them, but by deleting them without replacing them with correct ones.
6. 111 N.Y. 1, 56, 18 N.E. 692, 706 (1888) (Ruger, Ch. J.).
7. 200 U.S. 321, 337 (1905).
8. Cuthbert W. Pound, *Defective Law — Its Cause and Remedy*, 1 N.Y. St. Bar Ass'n Bull. 279, 282 (Sept. 1929).
9. *See* Deborah A. Schmedemann & Christina L. Kunz, *Synthesis: Legal Reading, Reasoning, and Writing* 41–B50 (1999) (explaining how to fuse cases to note governing rule or pattern).
10. Paula Samuelson, *Good Legal Writing: Of Orwell and Window Panes*, 46 U. Pitt. L. Rev. 149, 159 (1984).
11. Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* § 17.4, at 244 (4th ed. 2001).

LANGUAGE TIPS
CONTINUED FROM PAGE 55

Potpourri

Have you noticed that your *problems* are disappearing? The word *problem* is now being replaced by the word *issue*. So there are plenty of issues around, but few problems. I can recall a time when the word *issue* meant something that, when decided, would solve a problem. Now that problems are becoming issues, the implication is that they are solvable. Now, perhaps, we will eventually reach that halcyon day when problems no longer exist.

The use of language to avoid an unwanted implication is not new. For example, *The New York Times* reported some time ago that the president of the New York Zoological Society changed the name of the Central Park and Bronx Zoos. They are now "Wildlife Conservation Parks." The change was no doubt prompted by the pejoration of the word *zoo*, now describing places filled with unruly persons. ("It's a zoo out there.")

An emeritus professor of chemistry suggested in a letter to the *Chemical and Engineering Journal* that chemists "abandon the word *chemical* to the dark forces," and replace it with the word *compound*. He reasoned that *chemical* is used by everybody to mean something harmful and unnatural, as for example, in the phrases *dangerous chemicals*, *chemical weapons*, and *chemicals in foods*. And William Safire reported that a physician had written that the title *health care provider* distressed him. He wants to be called *doctor* or *physician* – perhaps to remove his profession from that large but less prestigious group of other health care providers?

Given these suggestions, how do lawyers feel about being called *attorneys*?

GERTRUDE BLOCK is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association). Her new book, *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co.), will be published this fall.

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The Legal Writer

Write the Cites Right — Part I

By Gerald Lebovits

To write it right, you've got to cite the sites. Citing is more than Bluebooking. Citing is more than helping your reader find your citations. Citing is legal method. The way you cite can determine whether a court will accept your argument.

Tanbook, Bluebook, and ALWD

Cite according to the New York State Style Manual, called the *Tanbook*,[1] when you write for a New York State court. *Bluebook*[2] when you write for a federal court. Because the *Bluebook* miscites all its New York examples, use the St. John's Rules of Citation[3] in conjunction with the *Bluebook* for New York citations. *ALWD*, pronounced "All Wid,"[4] is a *Bluebook* rival. Now in its second edition, *ALWD* has fixed its first-edition mistakes,[5] but it still lacks accurate New York examples for New York practitioners. *ALWD*, moreover, isn't in common use. Of New York's 15 law schools, only Fordham and New York Law Schools use *ALWD* in their first-year legal-writing programs, and even these schools' law reviews still *Bluebook*.

Headnotes & Syllabuses

Never cite headnotes or syllabuses or, worse, quote from them. But skim them to save research time.

For a case in which a court quotes a headnote, see the New York Court of Appeals's 1888 *People v. O'Brien*,[6] an example of opinion writing from a bygone era.

Because of the Supreme Court's 1905 *United States v. Detroit Lumber Co.*,[7] every syllabus to a United States Supreme Court opinion includes a footnote stating that the syllabus has been prepared for the reader's convenience but is not part of the opinion.

Signals

No signal precedes a citation that supports your proposition directly. Thus, no signal after a quotation.

"*Contra*" if your citation contradicts your proposition directly.

"*See*" if your citation supports your proposition indirectly or by inference. When using "see," explain the citation in your text or in a parenthetical or bracket following your citation. Example: If you discuss the facts of your case and then cite a case, "*see*" must precede your citation at the end of your sentence because your cited case did not discuss the facts of your case.

"*See also*" before a second citation if the first citation supports the proposition directly but the second supports the proposition only indirectly. This signal is always lowercased ("*see also*") and preceded by a semicolon.

"*But see*" if your citation contradicts your proposition indirectly.

"*E.g.*" if your citation gives one or more examples to support your proposition directly. Do not write that "courts have held" or that "at least one court has held" and then cite one case only. Use "*e.g.*," or write "one court has held." Your reader might suspect that your research disclosed but one case and that you are exaggerating.

"*See, e.g.*," if your citation gives one or more examples to support your proposition indirectly.

"*Cf.*" if your citation supports your proposition by analogy.

"*Accord*" is different from "*see also*." Use "accord" when a citation from another jurisdiction supports your proposition. Also, use "accord" to cite a second authority after quoting a first authority if the second authority supports the original proposition. Example: The Court of Appeals has noted that "'the appropriate date for measuring the value of marital property has been left to the sound discretion of the trial courts . . . .' *McSparron v. McSparron*, 87 N.Y.2d 275, 287 (1995); *accord* Domestic Relations Law § 236(B)(4)(b)."

"*But cf.*" if your citation contradicts your proposition by analogy.

"*Compare . . . with*" to compare one proposition and citation with another proposition and citation.

"*Id.*" and "*see id.*" as short-form citations that refer unambiguously to a single, immediately preceding citation.

Emphasize arguments and themes, not authority.

It's better to italicize than to underline. If you underline signals, be careful not to underline commas not italicized in signals that end with commas. *Correct:* "*See, e.g.*," and "*e.g.*," *or* "See, e.g.," and "e.g.,". *Incorrect:* "*See, e.g.*," and "*e.g.*," *or* "See, e.g.," and "e.g.,". The same rule applies to cases. Don't italicize or underline too much. *Correct: McSparron v. McSparron*, 87 N.Y.2d 275 (1995). *Incorrect: McSparron v. McSparron,* 87 N.Y.2d 275 (1995), *or* McSparron v. McSparron, 87 N.Y.2d 275 (1995).

Citation Placement

It's not graceful to place a citation at the beginning or in the middle of sentences. Doing so is the sign of an insecure scholar. Emphasize arguments and themes, not authority. Cite the source in a separate sentence that consists solely of the citation. Cite only to support your arguments and themes — or to contradict the other side's arguments and themes.

Citing in separate citational sentences assures that the rules from the cases, not the cases themselves, are stressed: Lawyers and "judges too often fail to recognize that the decision consists in what is done, not in what is said by the court in doing it."[8] Over-reliance

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THE NEW YORK STATE BAR ASSOCIATION ANNOUNCES A MAJOR NEW PUBLICATION

Commercial Leasing

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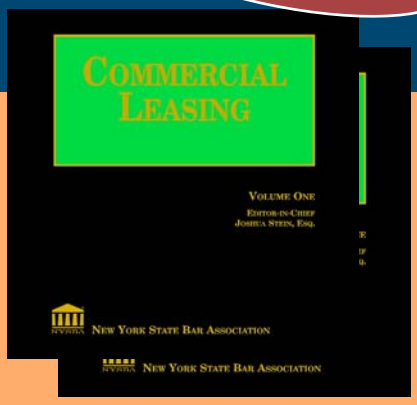

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