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Journal

CONNECTING BY VIDEO TELECONFERENCE

Inside:

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New Rules for N.Y. Estates
Remedies in Arbitration Cases
Proof of Recurring Conditions
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ON THE COVER

This month's cover illustration simulates both sides of a typical arbitration hearing conducted with the help of teleconference equipment.

Cover Design by Lori Herzing

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President's Message

PAUL MICHAEL HASSETT

Common Law, Common Bond

It certainly is not essential to travel to the United Kingdom to understand the origins of the common law and its influence on our society and free societies everywhere. On the other hand, attendance at the American Bar Association's Annual Meeting program entitled "Common Law - Common Bond," which began in New York City and continued in London in mid-July, led to a broader understanding and a new perspective on how pervasive that common bond has been, not only between the two nations but also in their individual national existence.

At the beginning of the London portion of the meeting, on a Saturday afternoon at Runnymede, the ABA rededicated its Magna Carta Memorial at a ceremony attended by U.S. Attorney General Janet Reno. The inscription on the Memorial reads: "15 July 2000, the ABA returns this day to celebrate Magna Carta, foundation of the rule of law." The notion that even the King is subject to the law is second nature to us now, but almost 800 years ago it was an entirely new concept and one that would revolutionize the relationship between the government and the governed.

Two days later, the General Assembly at Royal Albert Hall formally opened the London Sessions of the Annual Meeting. The anthems of both nations, performed with spirit by the combined bands of the Scots Guards and the Corps of Royal Engineers, heralded welcoming remarks by the leaders of the profession on both sides of the ocean and set the stage for an address by the Rt. Hon. Tony Blair, former practicing lawyer and now Prime Minister of the United Kingdom. He established the context of the entire meeting in these words:

> British and American lawyers share a common bond, which goes deeper than a common heritage, or language, or even the way we think about and practice the law day by day. It has to do with the idea of law, a shared view of its role in society, and with respect for the rule of law itself.

Blair recounted that despite the Magna Carta, the Pilgrims were forced 400 years later to leave England in search of religious freedom and, in coming to America, brought with them the idea of government based on the consent of the governed. These first settlers from England were instrumental in founding a nation based on fundamental human rights and opposition to tyranny. Despite the fact that, in the words of Prime Minister Blair, "the conceptual tools and values of the common law became entrenched in the American legal establishment," the late 18th century marked the beginning of decades of conflict between the two nations. After the American Revolution and the establishment of the United States as a separate nation and the beginning of diplomatic relations between the two nations, the relationship remained strained well into the latter half of the 19th century. At a reception at the American ambassador's residence during the London meeting, Ambassador Philip Lader commented on the unusual nature of that relationship. He remarked that the first ambassador to the Court of St. James's, John Adams, would have found his role quite different: it would be difficult, he said, for Adams to present his credentials to George III and suggest that they just let bygones be bygones.

It was not until early in this century that the British and American peoples were joined once again by their common bond, which inspired them to commit their lives to the defense of freedom on European soil in World War I. That alliance was tested again two decades later when the very existence of the rule of law, of government with the consent of the governed, was threatened and when once again Americans gave their lives in testimony to their belief that the rule of law was not merely a philosophical tenet but the essential principle of their society.

A visit to the War Council Rooms, where Prime Minister Churchill and his council met more than 100 times during the infamous Battle of Britain, brought home the enormity of an air war on one's own soil and emphasized the commitment of the British people to survive that onslaught—their will to survive rooted in their freedom and that freedom rooted in the common law. The sound of Winston Churchill's inspirational words and the image of Queen Mother Elizabeth (whose official 100th birthday celebration occurred during the London sessions) walking among the rubble, refusing to leave the city, were powerful reminders of that devotion

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to freedom. That same devotion motivated our participation alongside our European allies, assisted by a considerable measure of national self-interest. The victory for our democratic institutions solidified the growing bond among English-speaking peoples but we are not, of course, without our differences. There are significant differences in our civil law systems and how we assure individual rights and liberties while sharing, again in the words of Prime Minister Blair, "the quality of the common law and the institutions which underpin it: an independent judiciary; an independent legal profession; and our unshakable commitment to the rule of law, without which no genuine democracy can exist." George Bernard Shaw may have had those differences in mind when he remarked that we are "two countries separated by the same language."

And so, as we end one century and begin another, it is well to consider the result of the two Great Wars in Europe; not only did democracy persevere and flourish against the challenge of its enemies but the influence of the common law has grown in Eastern Europe as we attempt to instill it in other societies who have labored for decades under totalitarian regimes. Can we just export these values as we do computer systems and commercial codes? Obviously the rule of law requires some nurturing culture in which to persist but it grew on our shores in the 17th century despite continuing differences between the colonists and the inventors of the rule of law. Perhaps our ideal of freedom will take hold in other nations, inspired by the fact that wherever the common law has been instilled: in Europe, in North America, in Australia, in South Africa and in India, freedom has survived despite considerable philosophical differences among its adherents. Prime Minister Blair summed it up thus: "We may have our differences; our disputes over trade or commerce; our perspectives may sometimes be at variance on this or that item of diplomacy. But . . . I say what unites is by an infinity more important than what may divide us." And what unites us? Our values, our devotion to a system of law which has survived almost eight centuries, and which is the essence of that common law and common bond.

As I left Royal Albert Hall that morning, I was struck by the irony of the spirited rendition of our national anthem by the British military bands—an anthem inspired by the British attack on Fort McHenry during the War of 1812.

DaSilva Named to *Journal* Board

Willard H. DaSilva of Garden City has been named to the *Journal*'s Board of Editors.

A veteran matrimonial law practitioner, DaSilva is one of only 75 attorneys in the United States invited to be a Diplomate of the American College of Family Trial Lawyers. He is listed in *The Best Lawyers in America* and in *Who's Who in America*.

As a member of the NYSBA, he has chaired the General Practice Section and served on the Continuing Legal Education Committee.

He is editor-in-chief of the ABA's *Family Advocate* magazine; founding editor of the ABA Section of Family Law *FAX News Update*; founding editor of *Matrimonial Law Journal*; co-editor of *Matrimonial CaseLaw*; editor and columnist for *Fair$hare* magazine; editor-in-chief of the *New York Domestic Relations Reporter*, published by Matthew Bender; and author of *New York Matrimonial Practice*, published by the West Group.

He is a council member of the American Bar Association Section of Family Law; a master and the secretary of the New York Family Law American Inn of Court; and past president of the American Academy of Matrimonial Lawyers, New York Chapter.

DaSilva is also a frequently quoted commentator in the *New York Times*, *Newsday*, *USA Today*, *Newsweek* and *U.S. News & World Report*. He has appeared on network and syndicated television programs, including the Today Show, the Phil Donahue Show, Regis Philbin Show, CNN's Sonya Live, and NBC Network News.

A graduate of New York University, he received his law degree from Columbia University Law School.

"We plan to expand the coverage of family law issues in the *Journal*, and we look forward to Bill's assistance in that effort," said Editor-in-Chief Howard F. Angione. "We hope to benefit from his distinguished background as an editor of numerous publications and as an author."

Technology Primer

Video Teleconferencing of Hearings Provides Savings in Time and Money

BY JUDITH A. LA MANNA

This is a "for example" primer. It is not just about labor arbitration hearings for labor and employment lawyers, but about the use of technology by lawyers to break out of old habits and find new ways to do our work. With an understanding of how the process is used in arbitration hearings, fears may be calmed and ideas may arise for introducing it to other areas of practice.

The use of video teleconferencing is catching on, as evidenced by the number of articles on the topic that is appearing in the legal literature.[1] It is being used for long-distance EBTs. It was used in a divorce trial to take the testimony of the husband from his prison cell. To help relieve congestion in districts with congested dockets, federal courts are using video teleconferencing so that judges with lighter schedules can conduct bench trials involving parties who may be many miles away in their home districts.

Labor arbitration, much like the judicial system, is a very habituated and entrenched process, as are so many of its practitioners. After serving as an arbitrator for more than 20 years, I, too, run the risk of being entrenched. In addition, colleagues consider me a technophobe. I was the last kid on the block to get e-mail and I do not like Web sites. So it is amazing to me that I am a proponent of video teleconferencing for arbitration hearings. But under the right circumstances for the right cases, I am waving the flag to say that video teleconferencing of arbitration hearings works. In particular, it saves me the wear and tear of travel, it can make scheduling easier and it can save the parties a great deal of expense.

In fact, a video teleconference hearing bears a very strong resemblance to being at a hearing in person. All it really takes to make a video teleconference arbitration hearing work is for the parties to have a decent connection, some enthusiasm and flexibility, and some willingness to do a little preparatory work in advance.

The Differences

There are hardly any. It is that simple.

In an in-person arbitration, the parties sit on opposite sides of the table and the arbitrator sits at the head of the table. At the onset, there is the usual round of introductions, some explanation to witnesses new to arbitration about the process and their role, and some need to shuffle through papers and deal with other preliminaries. Witnesses can be sequestered or not. Opening statements are made, witnesses are called, examined and cross-examined, objections are made and ruled on, parties ask for breaks, evidence is received, closing summations are made or the parties agree to file closing briefs by set dates.

This is essentially what happens in a televised hearing. The obvious difference, of course, is the location of the parties, who are not together in one room. The arbitrator is an image on a television screen, the parties are an image on another television screen, everyone has some sort of innocuous little microphone nearby, and a camera is focused on the room. The one procedural difference, because of the distance of the parties, is that exhibits must be forwarded to the arbitrator in advance of the hearing.

The Concerns

The big concern, mentioned by everyone who will even discuss using video teleconference equipment for

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hearings, involves being able to judge the credibility of witnesses. Another is the intrusiveness of equipment and technology problems into the process.

Witnesses Some of the worry about taking witness testimony via technology is a throwback to the days when attempts were made to use telephone conference calls at hearings. But a video teleconference is a giant step up from telephone-only teleconferencing. By using a camera/TV-like transmission of image and voice between locations, the parties can see as well as hear each other.

A witness discovers relief from "camera nerves" by involvement in testifying and interacting with people in the room.

There is a value in having the arbitrator see a witness as he/she testifies, of course. And there is also a real value, from my experience, to both witness and advocates when they can see that the arbitrator is listening and watching. But judgment of witness credibility is no more an issue at a video teleconference hearing than it is at an in-person hearing. In the first place, witness testimony is offered in many arbitration hearings to present history and position, and thus it is not always a matter of judging credibility. Further, credibility is only in small part judged by demeanor, such as swearing-in, face-reddening and fidgeting, which is behavior that is readily captured by the teleconference camera.

Beyond this, fortunately, there are aids to assist judging witness credibility in a video teleconference hearing. Remarkably, they are the same aids as those used at an in-person hearing. That is, it has been my experience that advocates are rarely shy about bringing questions about witness credibility to my attention, either in careful examination of that or another witness or later, in summation. Clues about credibility are also in what the witness says and in word usage. After years of listening at hearings, I have found that I can hear the sound of poor credibility while I am also taking notes. And let's face it, arbitrators rarely eyeball witnesses through the full time they are on the stand.

The camera itself is also an aid to testimonial credibility in video teleconference arbitration. First, it instills a certain, healthy discomfort to a person who is about to be televised, above and beyond the anxiety associated with waiting to be called to the stand. Ironically, a witness discovers relief from "camera nerves" by involvement in testifying and interacting with people in the room. A witness at ease is one who is prone to genuineness.

And witnesses do become comfortable in very short order when giving testimony by video teleconference. The witness ease factor, in fact, was remarked on by one of the parties at a video teleconference hearing I held. The advocate, concerned about witness discomfort, wanted assurance that we could remain open to stopping and scheduling an in-person hearing. Just hours into the morning session of our hearing he volunteered that, to his amazement, the witnesses seemed even more at ease than they had been at in-person hearings because—no offense to me, of course—they could not see the arbitrator.

Not only had the witnesses come to feel a part of the "conversation" in the room, the atmosphere of the room was different. We forget how unnerving it is for witnesses to see an arbitrator making notes, seemingly of their every word, while they testify. The "arbitrator factor" is less in a video teleconference hearing. We are not actually there, of course, and we are only present as a somewhat familiar and easy-to-tune-out "talking head." This is a sensation not unlike having the 6 o'clock news on television, playing in the background, while you eat dinner. Except every once and a while the arbitrator adds something into the conversation. Interactive TV. That gets their attention.

Equipment issues It is fair to say that the technology itself is the other big concern about video teleconference hearings. Okay. Actual video teleconference transmission takes a little getting used to.

With present technology and even if using the best equipment and connections, there is a 2-3 second delay before what you say is received and heard on the other side. This means that people do not react as fast as you speak, something we are used to in regular conversation. This also means that as you speak, you can hear your voice broadcasting to the other side, but delayed, which can throw you off a little. You get a sensation of being an actor in a foreign movie, your words and lip movement out of synch. Most participants adjust easily to this delay. If you pause after saying what you have to say and do not interrupt, you will not be annoyed all the time. This is not a big deal and, anyway, interrupting is rude.

Transmission options At least with the present stage of technology and the comfort level of the parties to arbitration hearings generally, video teleconferencing works best as a two-way transmittal. The arbitrator is alone at one location and the employer and union counsel plus witnesses—all of the parties who generally already know each other—are together at another location. In a sense, this helps to maintain the "neutral" mode of the arbitrator. But it also works well to allow the parties—who are usually geographically close to each other anyway—to exchange documents at the

table, take sidebars, review unfamiliar material, and take time for meaningful settlement discussions and stipulation agreements. Without a doubt, a three-way video teleconference would require considerably more advanced planning.

Exhibits At an in-person arbitration, an arbitrator enters a hearing room as a virtual blank slate about the case. We get only minimal information to identify the case (discipline or contract interpretation), the name of the grievant, the advocates and the parties they represent and we might possibly receive a copy of the grievance document and demand for arbitration. As in a court proceeding before a judge, it is not proper for an arbitrator to have received *ex parte* information. Evidence is to be offered at hearing, where objections can be ruled on.

A video teleconference arbitration is different. For it, the parties need to provide the arbitrator with their proposed exhibits in advance so that the arbitrator will have what the witness is looking at when testifying. An arbitrator does not have to examine those exhibits before actual hearing. But if he/she does (for example, to become familiar with the case in order to expedite the hearing), the arbitrator may see some evidence to which one side might have an objection. This is not the big deal it seems at first to be, for four basic reasons:

- As a practical matter, any pre-hearing review of proposed evidence will likely be cursory, as, for example, to assure that the material is arranged in some readily retrievable manner. (Of course, the parties could forward their exhibits to the arbitrator at about the last possible moment before hearing to further reduce likelihood of an in-depth review.)
- Arbitrators know that more needs to be heard about evidence to give it meaning in the context of the case, and that the information is expected to be provided in testimony at the hearing. Without that context, a document can only "speak for itself" in the most meager way, and evidence that "speaks for itself" usually will incur much debate anyway.
- Rules of evidence, which are more relaxed in arbitration hearings, allow in more by way of testimony and evidence than would be acceptable in a court proceeding (*e.g.*, hearsay evidence and testimony). It is normally left to the arbitrator to decide later the weight to be given to that evidence.
- An arbitrator is obliged to make a decision based only on testimony and evidence actually received. The proposed evidence sent to the arbitrator is not received formally until offered at the hearing. An objection to the evidence can be registered at hearing, and the matter sorted out then, as is done at an in-person arbitration.

It comes down to this. The reality is that the parties who choose to use video teleconferencing have already placed a certain degree of trust in the arbitrator, so that issues of "tainting" by evidence are not real.

Other technology matters No video recordings. Although the technology clearly permits this, electronic recordings are traditionally not allowed in arbitration hearings.

There should be some attention to the background behind the camera image and to positioning each of the cameras. Rather than being about how an "image" might have an impact on witness credibility, an issue that is raised when video teleconferences are used for EBTs (see box on page 14), these should be addressed to aid clarity of transmission, and to make that transmission as close to in-person vision levels as possible.

Getting Ready

Just as there needs to be some scheduling for in-person arbitration, the parties need to set a timeline and schedule for a video teleconference arbitration hearing. Sometimes a teleconference call is needed to cover the preliminaries, with attention focused on the matter of marking and offering exhibits to the arbitrator in advance of the hearing, by a scheduled date.

The parties can offer evidence to the arbitrator either by a process of mutual exchange, agreement and marking, or simply by sending in separate submissions.

When the parties use the mutual marking process, advocates exchange their proposed exhibits. By meeting or otherwise, they agree to those exhibits that are acceptable joint exhibits, acceptable employer or union exhibits and, with more attention, may even agree to the numbering of those exhibits as well. Each counsel also identifies those exhibits of opposing counsel that cannot be agreed upon. A single package of exhibits is thereby prepared, including those challenged exhibits in a separate, sealed envelope that can be opened by the arbitrator at hearing, as they are addressed. Each party will appear at the hearing with a conformed package of exhibits and the arbitrator will have an easy time finding the exhibits as testimony is received.

When the parties use the direct method, each advocate submits to the arbitrator one copy of each document that he/she believes should be in evidence. To make some order of this chaos, the arbitrator should direct some manner of arrangement, such as chronologically by date of document, as well as require that they be marked and numbered in that sequence. Each advocate must bring a fully conformed set of that package of evidence to hearing, to be prepared to offer the exhibits to opposing counsel during testimony.

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Teleconferencing in Litigation

When teleconferencing techniques are used in litigation, the results are likely to be most noticeable in three areas.

Witness preparation Using video teleconferencing allows attorneys to better prepare their clients and witnesses for questioning, both because the attorney-client review is face-to-face. Done by video teleconferencing, considerable attorney or client time that would otherwise be lost in travel can be saved. And by video recording the session and then reviewing the tapes with the witness, corrections can be made to any distracting witness habits, facial mannerisms can be pointed out, and testimonial responses examined.

Other appearance issues can be "tested," such as the color of background, the camera angle, and microphone settings. All parties benefit, as well, from the experience of being before the camera, making the witness and attorney more relaxed for the "real thing."

Depositions If a witness gives a deposition by video teleconferencing, that testimony is likely to be video recorded. Later, at a trial, that deposition record could turn into an ultimate "discredit" mechanism, if the witness comes across poorly. The benefit of witness preparation turns up particularly in this area.

Trial With the right software, distant counsel can receive "real time" transcripts from trials. By this means, as well as the actual video transmission, trial teams can be in separate geographic locations and still engage in informed strategy sessions with each other. The Federal Rules of Civil Procedure allow for testimony to be presented by video teleconferencing when there has been a showing of "compelling circumstances." (Fed. R. Civ. P. 43(a)).

CONTINUED FROM PAGE 10

Naturally, any arbitration proceeds most efficiently when the parties agree on the joint exhibits, to the numbering and admissibility of employer and union exhibits, and even to a list of stipulated facts. This applies, as well, to a video teleconference arbitration. But I do not require that the parties do this. It has been my practice to have each of the parties submit their proposed evidence directly to me. I specifically tell them they do not have to concurrently send a copy to opposing counsel, but that they are expected to provide the material at the actual hearing.

Unanticipated documents As sometimes happens even in person, a party in a video teleconference hearing may produce a new document, or one that was not included in its pre-hearing submission. When this has happened at my video teleconference hearings, the parties were comfortable with offering testimony and forwarding the document to me later. With a little description and some general sense of the content by all involved, this was not an issue. In one case, actually, we kept a list of missing documents for later mailing. Like the collective bargaining agreement, for example.

If there is an objection to the document, the matter of a missing exhibit could be more of a problem. An inability to review to rule on receipt might preclude certain testimony. With all the preparation on exhibits for a video teleconference, this would be a rare moment, if it occurred at all, but might warrant an adjournment or scheduling of a continuation hearing date, if the document could not be readily sent to the arbitrator during the hearing.

There are higher tech arrangements that can address this issue, and the issue of evidentiary documents generally, as well. Depending on the size of the document, the parties can fax limited amounts of material during a hearing. Interactive computers can be set up, location to location, with documents scanned in and forwarded. There is even a document camera, which allows the material to be "fed" in during the hearing. All of this can slow down the process considerably, and is usually more than is necessary. Better they should forward the evidence in the first place, and include everything.

I have sometimes asked the parties to provide a summary written statement of the grievance, the history leading to the grievance, and their positions. This can serve as the basis of their opening statement, so the request is a help, not a hardship. I do not require the parties to exchange that summary statement, unless they want to at the hearing.

At the Hearing

This is really simple. The arbitrator sits in one room, facing a television screen and camera and sets the camera to frame herself. Some systems allow the camera operator (the arbitrator) to "set" that position and to "set" other positions around the room. The arbitrator, once framed, can push a button and can see herself in a corner inset at any time, to check that her image is where it should be and transmitting that way to the parties. That inset disappears a few seconds after being checked, but can be set to remain.

The parties sit in their distant location and have their camera set on the witness stand. Microphones are set for each advocate position and the witness. (In my video

teleconference arbitration hearings so far, the distant camera has been pre-set onto the witness chair. In sophisticated systems, I could take control of the distant camera and even preset positions, to get a "look" at someone talking to the witness. This is an unneeded addition.)

Anyway, at the appointed time for the hearing to start, the "phone" rings and the television begins to exhibit some signs of techno-life as the call is being connected. Then suddenly, people at the remote location are on the television screen in your room and you are on the screen in their room.

A couple of other points help the process along. Microphones are on the hearing room table, so care has to be taken—and reminders given—that if documents are moved and shuffled they may either cover a microphone (huh?) or bump into it (ouch). Both sides have a mute button, to turn off the audio transmission. It is a good idea to develop a hand signal or a flash card to be able to remind each other on those occasions when the mute button of the other side has been left on.

Sidebars, Breaks, Etc. Using even the most basic of video teleconference equipment, taking breaks, sidebars and private time is a snap, and faster than at an in-person hearings.

At both types of hearing, the arbitrator sets a time for "return." At a video teleconference break, both locations set their mute buttons to prevent inadvertent audio transmission, and the arbitrator moves the camera off her image, upward or to the side. The parties see that there is a transmission, but not the arbitrator. After the allotted time, the arbitrator resets the camera onto her position, the parties look up and can start.

If you disconnect, for example for a lunch break, the television image goes off and eventually the camera "goes to sleep." If you go away and return, you might become panicky that the camera has swiveled away from its set position. Just wait. The phone call will "ring" and the camera will wake up and return to its pre-set position, images will appear on the television and then the parties will be there, all in time to transmit your hello to the room. It is so cool.

Tips About the Technology

Much of this will come in the category of more than you need to know now, because there is no point in buying this equipment for most parties who participate in arbitration hearings. (A full system would cost from $5,000 to $10,000, exclusive of monthly fees for connection and long-distance charges.) Nevertheless, it is useful to know a little about the process to have some comfort with the technology.

Video teleconference transmissions should go over a digital line. This involves transmission rates in bits per second. The transmissions can go a line that uses the Integrated Services Digital Network (ISDN) technology, which essentially provides a telephone line with greater bandwidth. The minimum available speed is 128Kbs (128,000 bits per second, or 25,600 five-bit "words" per second), with a present top speed of 384Kbs. I am told that the 384Kbs speed uses three ISDN lines. The preferred type of line for video transmission is known as a T-1 and provides a dedicated digital connection. The T-1 line operates at 1.5Mbs (1.5 million bits per second, or 300,000 five-bit "words" per second), rents at a rate of about $1,000 per month (plus connection, installation, etc.) or a little less, but it transmits with a fluid image and involves a delay of only a few seconds.

These numbers have to do with the quality of the video transmission. The slower the line, the more likely that the image "frames" you get to see will appear in a

grainy and choppy, frame-by-frame surrealistic transmission. This means that while the Web camera you got for Christmas does transmit a fair image over the Internet, the present maximum Internet rate of 56Kbs (56,000 bits per second) is less than adequate for a hearing of several hours in length. Camera quality may have an impact on the image, but not nearly as much as the quality of the line on which the images are transmitted. Cheaper methods of good connection are being developed that will involve upgrading the Internet lines and using cable or the digital subscriber line (DSL) technology. ISDN band width is also expected to be dramatically improved within five years or so. Given these costs, it is not worth investing in one's own equipment if usage is not expected to be high.

The ability of the technology to duplicate almost entirely an in-person arbitration hearing is unquestionable.

In the meantime, there are places that already have the equipment and are connected to the right lines and also have the technical support staff to make a video teleconference hearing go smoothly. Private video teleconference services are available in most major cities. In the Syracuse area the services charge from $150 to $175 per hour of use, plus a stepped-up charge for the long-distance call if they place the call. An arbitration hearing may take an hour or last all day. These hourly rates might be prohibitive to most parties to an arbitration hearing, even when comparing the savings that might be had from avoided travel expenses alone.

It is worth investigating the availability of such equipment at larger local companies, colleges, hospitals, television stations, etc., who may be willing to rent scheduled time on their equipment. Instead of an hourly rate, a rate for a block of several hours might be acceptable. Be sure to have someone from the supplier's technical support available on the scheduled time, which the supplier is likely to want as well. And have the parties place the call from their side. To be sure everything is operating well, a pre-hearing try-out of the connection by the technical people is recommended close in time to the actual hearing.

Costs and Savings

Generally in arbitration the parties carry their own costs and share equally both the fee and the expenses of the arbitrator. Arbitrators charge for their time per hearing day and most arbitrators charge for time spent in excessive travel such as a trip that must take place the day before. We are reimbursed for airfare, hotel, rental car, meals, parking and other expenses incurred to attend a hearing.

A video teleconference arbitration hearing would involve reimbursement of the cost of the rental by the arbitrator of a video teleconference site, whatever costs of the parties for their site, a long-distance charge for the actual call and the costs associated with document mailings. Because no travel is involved, the parties can save the costs of reimbursement for hotel, transportation, and travel, as well as any added fee for travel time. Given the right arrangement for the cost of the video hearing, the savings can be significant. In the future, when the parties become more comfortable with the process and employ three-way transmittal, or more, the savings in lost time alone will be considerable, particularly for corporate and expert witnesses.

At present, video teleconferencing is being discovered by the legal profession in a variety of ways. Depositions are being taken and firms are using the method to prepare distant witnesses, saving huge amounts of lost time in travel for lawyers and clients while giving witnesses true rehearsal time and the ability to review their anticipated presentations. Video witness testimony is used at trial (for distant and expert witnesses) and some full trials have already been conducted by this process. Used in conjunction with other computerized software, real-time transcripts can be created to aid distant counsel and parties. Video teleconference equipment is even being used in the federal courts.

Conclusion

It will take time to get used to teleconference techniques. As with any technology, there will be some equipment or connection problems along the way. But the bigger factor, the ability of the technology to duplicate almost entirely an in-person arbitration hearing, is unquestionable.

Video teleconference arbitration hearings are not to be tried by people who cannot adjust to a measured pace. This is not a system for people who cannot engage in some advanced preparation. It is a system that will be usable in many cases, in a manner that is less costly and more time-efficient than that same hearing in person. Lights, camera, action.

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1. *See* Elaine McArdle, *Video Depositions: the New Weapon of Persuasion at Trial*, Lawyers Weekly USA, Jan. 25, 1999, p. B.1; Eric Berkman, *Live Video Slashes Deposition Costs, Speeds Court Dockets*, Lawyers Weekly USA, Jan. 24, 2000, p. B.3; and Samuel L. Davis, *A Practical Guide to Videoconferencing*, Trial Magazine, Mar. 2000, p. 48.

Shootings by Police Officers Are Analyzed Under Standards Based on Objective Reasonableness

BY J. MICHAEL MCGUINNESS

Recent cases in New York[1] and throughout the nation have demonstrated the trauma that citizens and law enforcement officers may experience from routine police encounters with criminal suspects. Because of the unique law enforcement context, a special set of rules has emerged that is substantially different from ordinary tort and criminal law principles.

Serving as a law enforcement officer thrusts an individual into a dangerous world of heavily armed criminals, along with duties to protect innocent citizens and bystanders. In a split second, officers are required to evaluate and instantaneously employ potentially deadly force against criminal suspects to combat apparent dangers to citizens, bystanders, fellow officers and themselves. However, officers may only use reasonable force to thwart the particular apparent danger. Scores of cases have recognized that "an officer oftentimes only has a split second to make the critical judgment of whether to use his weapon."[2] The officer is often alone in this nightmare, as a "pedestrian in Hell."[3]

The evolving body of use-of-force law mandates a complete factual assessment of the facts and circumstances "at the moment" of the particular use of force. The law expressly prohibits courts and juries from "Monday morning quarterbacking" in these cases.[4]

The most common form of alleged police misconduct is excessive force.[5] In use-of-force cases, the central issue is typically whether an objectively reasonable officer could have reasonably believed that the force employed was appropriate.[6] Contemporary use-of-force law strikes an appropriate balance affording jurors an opportunity to theoretically walk in the shoes of officers on the front line. This article addresses the principles set forth in *Graham v. Connor*,[7] a 1989 decision by the U.S. Supreme Court that established the standard to be employed in determining whether use of force by a law enforcement officer is excessive, particularly in "mistaken belief" cases.

An Officer's Essential Duty

Law enforcement work is a potentially deadly type of employment that involves protecting citizens from harm, investigating alleged or suspected crimes, apprehending and taking suspects into custody, and other related duties. Law enforcement officers are required to immediately respond to citizen requests for assistance in life-threatening environments and to protect everyone.

Officers are required by law to engage in defense of others and in self-defense, both of which are historically recognized complete defenses to alleged excessive force charges. Courts have recognized that police "must pursue crime and constrain violence, even if the undertaking itself causes violence from time to time."[8] The use of force, therefore, necessarily goes with the law enforcement turf. However, the degree and appropriateness of force is subject to scrutiny on a case-by-case basis[9] wherever the objectively reasonable threshold is exceeded.[10] In determining reasonableness, courts consider a number of factors including apparent dangers, the severity of the suspected crime, and whether the suspect is resisting or attempting to evade arrest.[11]

Law enforcement officers are required to react to *apparent dangers and apparent weapons* because typical conditions and lag time (see box on page 22) do not allow for an officer to wait to ascertain a precise weapon with certainty. Typical conditions in routine police encounters present the likelihood of frequent mistakes. Courts have long recognized the balance that law enforcement officers must employ:

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> The police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made in haste, under pressure, and frequently without the luxury of a second chance.[12]

Many of these split-second decisions to use force are correct, while some are mistaken. Under what circumstances does a *mistaken belief* that deadly force is necessary subject an officer to civil, civil rights or criminal liability? Generally, if the officer's mistaken belief is reasonable under the circumstances, then the officer is not subject to any civil or criminal liability under settled Supreme Court authority. The perceived danger must only be apparent, not real or actual, in order to justify the use of deadly force. New York courts have recognized that a police officer is not required to "await the glint of steel" before he or she can act to preserve his or her own safety because once the "glint of steel" appears, it is "often . . . too late to take safety precautions."[13]

Attempts to evade the officer, as well as furtive glances, sudden turns and ignoring requests to bring one's hands into view are common indicia of behavior that legitimately give rise to suspicion and prospective danger.

Encountering and surviving critical law enforcement incidents with criminal suspects is perhaps the foremost challenge to the law enforcement profession. Actual excessive force can subject an officer to multiple and overlapping charges, civil and criminal, in both state and federal courts.[14] The common thread that runs throughout these liability theories is the *objective reasonableness standard*.

Increasing Dangers

New York courts have observed that "'[s]carcely a day goes by in New York City' during which an innocent life is not lost to firearms wielded by criminals."[15] Street criminals are often better equipped with sophisticated weapons than are officers.

A number of factors have contributed to the environment that requires decisive police response to apparent danger.

First, civil rights advocates have challenged police for the failure to protect citizens from better-armed criminals. This phenomenon has been particularly prevalent in the alleged domestic violence context.[16] Law-abiding citizens demand instantaneous and decisive law enforcement responses to their legitimate needs. In 1990, New York City police responded to more than four million calls for assistance.[17] Actual mistakes and mistaken beliefs will inevitably occur.

Second, the streets of New York and the United States increasingly contain criminals wielding sophisticated high-tech illegal weaponry, bulletproof vests and special ammunition designed to kill law enforcement officers on the front line.[18] The streets in some areas are so full of illegal guns that they have been described as a "domestic Vietnam."[19] Law enforcement officers are usually the prime targets of these illegal guns. Courts have recognized these trends in applying excessive force principles in garden-variety police encounters. The Supreme Court has long recognized the "practical difficulties of attempting to assess the suspect's dangerousness."[20] Courts have also generally recognized that law enforcement officers are particularly vulnerable to unfounded claims of abuse.[21]

New York courts have recognized a common gesture that fuels the need for the use of force: the *sudden reach towards a pocket or the waistband area*. Such gestures present grave risks for officers and citizens. In *People v. Benjamin*,[22] the court explained:

> It is quite apparent to an experienced police officer, and indeed it may almost be considered common knowledge, that a handgun is often carried in the waistband. It is equally apparent that law-abiding persons do not normally step back while reaching to the rear of the waistband, with both hands, to where such a weapon may be carried. Although such action may be consistent with innocuous or innocent behavior, it would be unrealistic to require [the police] to assume the risk that the defendant's conduct was in fact innocuous or innocent. *. . . Indeed, it would be absurd to suggest that a police officer has to await the glint of steel before he can act to preserve his safety* (emphasis added).[23]

Law enforcement officers are trained to evaluate human behavior as a part of their basic functions. Attempts to evade the officer, as well as furtive glances, sudden turns and ignoring requests to bring one's hands into view are common indicia of behavior that legitimately give rise to suspicion and prospective danger.[24] Police encounters often occur at night, which substantially limits vision and enhances risk to everyone. Criminals often flee and take cover in uncertain terrain thus putting officers at a further disadvantage.

Potential for Multiple Claims Law enforcement officers are subject to civil, civil rights and criminal liability

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for excessive force and a broad range of other conduct.[25] Citizens have available a plethora of remedies to challenge alleged police abuse. A common legal standard underlies most of these alternative charges: *the objective reasonableness standard.*

The amount of deadly force since the early 1970s has dropped 50% in the major cities.[26] Nevertheless, state and federal prosecutors increasingly pound away with criminal prosecutions of law enforcement officers. However, there are certainly considerable numbers of documented cases of serious police abuse that meet the applicable liability standards.[27] Where an officer's conduct is objectively reasonable, he/she is entitled to summary judgment in civil cases and dismissal of criminal charges.

Courts have structured a contextual test for the analysis of law enforcement use-of-force claims. This methodology is grounded on the "reasonableness of the moment" standard.

Apparent Danger Requires Reasonable Force

If there is *apparent danger* to the officer or to any citizens, a law enforcement officer is required to stop the threat to the officer or citizen. In *Davis v. Freels*,[28] a leading police shooting case, the court explained:

> It is not necessary that the danger which gave rise to the belief actually existed; it is sufficient that the person resorting to self-defense at the time involved reasonably believed in the existence of such a danger, and such reasonable belief is sufficient even where it is mistaken.[29]

Professor Irving Joyner of North Carolina outlined the principles of the use of deadly force by police officers as follows:

> A police officer is justified in using deadly force when it is or *appears to be* reasonably necessary: 1. To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force (emphasis added).[30]

Even someone fleeing a misdemeanor crime may be subjected to deadly force. "[I]f the misdemeanant poses a threat of death or serious bodily injury to the officer or third persons, deadly force may be authorized."[31]

Analytical Methodology Courts have structured a contextual test for the analysis of law enforcement use-of-force claims. This methodology is grounded on the "reasonableness of the moment" standard.[32] Cases make clear that "only" the situation present "at the precise moment" of the use of force is to be factored into the "reasonableness inquiry."[33]

The Supreme Court has also held that use-of-force law also does not allow any evidence that may suggest the officers had any less drastic or less intrusive alternatives available to them.[34] In *Plakas v. Drinski*,[35] the Seventh Circuit explained how officers are not required "to use the least intrusive or even less intrusive . . . alternatives. . . . The only test is whether what the police officers actually did was reasonable."[36]

The Objective Reasonableness Standard

In *Graham v. Connor*,[37] the Supreme Court enunciated the parameters that are unquestionably the benchmark for use-of-force law. The Court explained:

> [T]he reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hind sight.
>
> The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. . . .
>
> [T]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including, the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.[38]

The Court in *Graham* explained how an officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.[39]

In *Tennessee v. Garner*,[40] the Supreme Court explained:

> [I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent the escape.[41]

In *Smith v. Freeland*,[42] the Sixth Circuit explained:

> [U]nder *Graham*, we must avoid our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face

> every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.[43]

In *Slattery v. Rizzo*,[44] an officer who shot the suspect was absolved of liability because it was objectively reasonable for the officer to have believed that the suspect was reaching for a gun, when in fact the object in the suspect's hands was actually a beer bottle. In *McLenagan v. Karnes*,[45] an officer was absolved of liability when the officer shot an unarmed suspect who appeared to be chasing another officer. Although the suspect was unarmed and handcuffed in front, the officer could not confirm there was no weapon. In *McLenagan*, the court explained:

> [A] suspect's failure to raise his hands in compliance with a police officer's command to do so may support the existence of probable cause to believe that the suspect is armed.
>
> We do not think it wise to require a police officer, in all instances, to actually detect the presence of an object in a suspect's hands before firing on him. . . .
>
> We will not second-guess the split-second judgment of a trained police officer merely because that judgment turns out to be mistaken, particularly where inaction could have resulted in death or serious injury to the officer or others . . . section 1983 does not purport to redress injuries resulting from reasonable mistakes.[46]

In *Sigman v. Town of Chapel Hill*,[47] the Fourth Circuit affirmed the trial court's grant of summary judgment to police officers who shot and killed a suspect whom the officers perceived was holding a knife and began walking towards them, stating: "[A] police officer need not, in all circumstances, 'actually detect the presence of an object in a suspect's hands before firing on him.'"[48] The court held that an officer may justifiably fire if he/she reasonably perceives that a suspect may have a weapon.

The "Could Have Believed" Standard

A number of cases have demonstrated how courts now routinely apply the "could have believed" standard in use-of-force litigation. If an officer reasonably *could have believed* that the suspect was armed, the shooting is justified. When criminal suspects reach into their pockets or waistbands in a law enforcement encounter, such almost always justifies the use of deadly force.

In *Wyche v. City of Franklinton*,[49] the plaintiff alleged that an officer used excessive force in shooting the decedent after a confrontation. The decedent had been acting bizarrely, causing a convenience store clerk to summon police. The officer responded and observed the decedent reach behind him. Fearing a weapon, the officer then shot the decedent in the leg. As the decedent continued to advance, the officer shot him a second time, killing him. The decedent was unarmed. The court explained:

> Caldwell is entitled to qualified immunity if he can establish that, in light of the clearly established principles governing the use of force to effect an arrest, he could, as a matter of law, reasonably have believed that his use of deadly force was lawful.[50]

In *Hunter v. Bryant*,[51] the Supreme Court adopted the "could have believed" standard in law enforcement use-of-force cases. This standard absolves the officer of liability "if a reasonable officer could have believed [the conduct in issue] to be lawful, in light of clearly established law and the information the [arresting] officers possessed."[52]

'Lag Time' and Shots in the Back

At first glance, cases involving "back shots" or shootings from a rear position may suggest that the shooting was unnecessary because the danger was leaving. However, ballistics studies reveal that a person can turn around in less time than it takes to fire even a drawn weapon.[1] Because of this recognized "lag time," cases with bullet trajectories from the rear are analyzed under the objectively reasonable standard.

Thus, it is not unusual for shots to enter a suspect in the side or in the back. In the time it takes to unholster, prepare and fire a weapon, often the position of the suspect has changed. After the first shot or warning, it is not unusual for a suspect to turn his or her back to the officer out of fear. These scenarios often justify back shootings, although on the surface they may appear suspicious.

1. *See* Earnest J. Tobin & Martin L. Fackler, *Officer Reaction - Response Times in Firing a Handgun*, 3 Wound Ballistics Rev. at 6 (1997); Mark Hansen, *Faster Than a Speeding Bullet: Study Says Quick Turns by Suspects Can Account for Gunshot Wounds in Back*, Sept. 1997 A.B.A. J. at 38 (Sept. 1997).

The following cases demonstrate far more difficult fact patterns but no liability.

In *Smith v. Freland*,[53] the officer saw a car run a stop sign and tried to stop the car. Instead of pulling over, the car led Officer Schulcz on a high-speed chase for several miles before turning down a dead-end residential street. During the pursuit, the driver, Mr. Smith, eluded several police cars, swerving towards several of them, and around one roadblock. Once on the dead-end street, Smith turned his car around on a lawn and faced Officer Schulcz's car. Schulcz thought the car was stuck in the lawn and began to close in on the car, in order to prevent Smith's escape. Officer Schulcz eventually got out of his car and began to approach Smith's car in order to arrest Smith.

Just as Schulcz approached, Smith backed up and drove forward, ramming Schulcz's car, and then backed up again to go around it. When Smith drove by, Schulcz shot into the passenger side of the car. The bullet went through the seat from behind and into Smith's right side, killing him. The court held that, as a matter of law, the seizure was not unreasonable. The court reasoned:

> After a dramatic chase, Officer Schulcz appeared to have trapped his man at the end of a dark street. Suddenly Mr. Smith freed his car and began speeding down the street. In an instant Officer Schulcz had to decide whether to allow his suspect to escape. He decided to stop him, and no rational jury could say he acted unreasonably.

The court further explained:

> Had [Smith] proceeded unmolested down Woodbine Avenue, he posed a major threat to the officers manning the roadblock. Even unarmed, he was not harmless; a car can be a deadly weapon. Finally, rather than confronting the roadblock, [Smith] could have stopped his car and entered one of the neighboring houses, hoping to take hostages. Mr. Smith had proven he would do almost anything to avoid capture; Officer Schulcz could certainly assume he would not stop at threatening others.[54]

In *Pittman v. Nelms*,[55] the court employed the objective reasonableness standard and held as a matter of law that a police officer did not use excessive force in shooting a fleeing suspect from the rear. In *Pittman*, two officers, Banks and Nelms, stopped a car belonging to a suspected drug dealer. After approaching the car, Banks leaned inside to speak to the driver, who then took off with Banks' arm still stuck inside the window. After Banks was thrown from the car, and the officer knew his partner was no longer in danger, Nelms fired his gun, hitting Pittman, a passenger, in the back. The court concluded that the shooting was objectively reasonable despite the back shot.[56]

In *Ford v. Childers*,[57] the Seventh Circuit held that a fleeing suspect's constitutional rights were not violated as a matter of law. The officer was held to have acted reasonably in shooting at a fleeing suspect, even though the officer could not be certain whether the suspect was armed. In *Ford*, Officer Childers was called to the scene of a bank robbery in progress. He could see the hands of the bank patrons in the air from outside, but he could not see the suspect or any weapon that the suspect may have been wielding. The suspect exited the bank carrying only a bag. Childers and his partner pursued the suspect and warned him to stop. When he did not stop running, both officers fired shots at the fleeing suspect. Thereafter, the suspect was captured and the officers found that he was shot in the back. The court explained that "a reasonable belief that danger exists may be formed by *reliance on appearances*." (emphasis added).[58] The lives of police officers depend on appearances. The court reasoned:

> In view of the totality of the information Officer Childers possessed when he fired at Ford, we hold that a reasonable jury could only conclude that Officer Childers had probable cause to believe that Ford posed a threat of serious physical harm to himself and/or to others. Thus, Childers' actions under the circumstances were objectively reasonable as a matter of law.[59]

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In *Krueger v. Fuhr*,[60] the Eighth Circuit held that a police officer's shooting of a fleeing suspect was objectively reasonable. Officer Fuhr responded to a call identifying the area in which a suspect was allegedly spotted. Fuhr believed that the suspect had just committed an assault and was possibly an escapee from a halfway house. While canvassing the area, Fuhr spotted the suspect, Krueger, and approached him with his weapon drawn. He then instructed Krueger to freeze. Krueger, instead, ran and Fuhr pursued him. Fuhr yelled for Krueger to stop; but Krueger continued and, as he ran, tried to pull something from his waistband. As Fuhr witnessed this attempt, he slowed his pursuit and fired four shots at the suspect. Two shots hit Krueger in the back and one hit him in the base of the skull, killing him. The "fact that Leroy Krueger was shot in the back [was insufficient to negate] the reasonableness of Officer's Fuhr's actions."[61]

Alleged excessive force cases typically arise from judgment calls made by law enforcement officers under the most difficult circumstances.

The court held that it was "objectively reasonable for Officer Fuhr to believe on the basis of this information he faced a serious and immediate danger of physical harm when Leroy Krueger pulled, or seemed to pull, a knife from his waistband." Police officers are not required to "forgo the use of deadly force to prevent their own death or serious physical injury whenever there is a possibility that another officer might later apprehend the fleeing suspect."

In *Forrett v. Richardson*,[62] a suspect who committed a burglary had tied up three people, murdering one and assaulting another. He was shot while trying to escape. Once he left the house, one victim was able to notify the police. The suspect fled in a stolen truck. The police responded to the call and were able to locate the truck within the hour, but there was no sign of the suspect or the firearms. The police canvassed the area and located the suspect, Forrett, in a residential neighborhood. He ran, and the police gave chase. The chase continued as Forrett eluded the police by vaulting fences, hiding in a shed, taking off a layer of clothing to change his appearance, and running. Finally, the officers trapped him in a yard that had a six-foot fence. The officers warned Forrett to stop but, as Forrett hesitated, the officers fired at him. Forrett attempted to jump the fence and, as he reached the other side, the bullets penetrated through the fence and hit him in the back. Forrett sued the officers for excessive use of force.

The court reasoned that "the only objectively reasonable conclusion to be drawn from this evidence is that, if the defendants had not shot him, he would have continued taking whatever measures were necessary to avoid capture."[63] The court concluded that "[t]he use of deadly force was objectively reasonable under these circumstances"[64] and it held that the plaintiff's rights were not violated as a matter of law.

In each of the foregoing cases, while none of the suspects clearly wielded a weapon at the time they were shot, each court ruled that the deadly force was reasonable given the appearance of the threat and evasion.

These and other cases demonstrate that the number of shots fired is generally not a determinative factor in the use of force inquiry. An officer is required to shoot until the threat is stopped. Modern police firearms will typically fire up to 15 rounds in a matter of three or four seconds. Thus, it is not unusual to have an extensive number of shots in a given encounter.

Conclusion

Alleged excessive force cases typically arise from judgment calls made by law enforcement officers under the most difficult circumstances.

Because of the proliferation of extensive use of illegal guns by criminals and the necessity of quick police action, some innocent citizens will inevitably be injured or killed by law enforcement officers, especially when such innocent citizens make gestures inferring that weapons are being retrieved. The *Graham* standard and contemporary use-of-force law strike an appropriate balance affording citizens remedies from truly unreasonable conduct yet protecting officers whose actions are consistent with reasonable beliefs even when mistaken.

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1. The recent high profile New York cases have spawned new rounds of analysis within the law enforcement and academic communities. The U.S. Civil Rights Commission has held hearings and has issued preliminary reports. In response, the New York City Police Department has fired back. *See*, *e.g.*, *NYPD Response to the Draft Report of the U.S. Commission on Civil Rights - Police Practices and Civil Rights in New York City* at http://www.ci.nyc.ny.us/htm/nypd/home.html.
2. *E.g.*, *Ford v. Childers*, 855 F.2d 1271, 1276 (7th Cir. 1988).
3. "The policeman's world is spawned of degradation, corruption and insecurity . . . . he walks alone, a pedestrian in Hell." William A. Westley, Violence and the Police (1970). "A police officer's life is always at risk, no matter how routine the assignment might seem." Floyd, Police

Deaths Mount Nationwide, at 1; National Law Enforcement Officers Memorial Fund, Inc. "On average, one police officer dies within the line of duty nationwide every 54 hours." *Id.* "There are more than 64,000 criminal assaults against our law officers each year resulting in more than 22,000 injuries." *Id.* Over 14,000 law enforcement officers have been killed. The Officers at 1. The most common source of death of officers occurs from murders committed by criminal suspects in the process of arrest. *See* Peak, Policing America: Methods Issues and Challenges, at 359 (1993).

4. *See Graham v. Connor*, 490 U.S. 386, 396-97 (1989); *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995).
5. *See* Gillespie, Hart & Boren, Police Use of Force (1998); Artwohl & Christensen, Deadly Force Encounters (1997).
6. A Confrontational Force Continuum "is generally recognized as a valuable analytical tool." The Continuum illustrates a graduated scale of officer reaction to the level of threat/force employed by a criminal suspect. *See* Hanna, *How To Handle Unreasonable Force Litigation* 353 Prac. L. Inst. at 360 (1998).
7. 490 U.S. 386, 396-97 (1989).
8. *Menuel v. City of Atlanta*, 25 F.3d 990, 997 (11th Cir. 1994).
9. *See Thomas v. Roach*, 165 F.3d 137, 143 (2nd Cir. 1999).
10. In civil cases, where the objective reasonableness test is met, the officer is entitled to qualified immunity from suit if "officers of reasonable competence could disagree" on the legality of the officer's actions. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Lennon v. Miller*, 66 F.3d 416, 420 (2nd Cir. 1995).
11. *Lennon* at 420, *citing Graham v. Connor*, 490 U.S. 386, 396 (1989).
12. *Parish v. Hill*, 350 N.C. 231, 245-46, 513 S.E.2d 547, 556 (1999), *quoting Whitley v. Albers*, 475 U.S. 312, 320 (1986) (omitting internal quotes).
13. *People v. Morales*, 198 A.D.2d 129, 130, 603 N.Y.S.2d 319 (1st Dep't 1993).
14. Excessive force claims are actionable in state criminal court via various homicide and felony assault charges. Title 18 of the U.S.C. § 242 provides a federal criminal remedy for excessive force. A plethora of civil and civil rights theories are applicable in actual police misconduct cases. *See*, *e.g.*, *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987); Avery, Rudovsky and Blum, Police Misconduct: Law and Litigation (3d ed. 1999); McGuinness, Law Enforcement Officer Legal Survival Guide (forthcoming 2000).
15. *People v. Marquez*, 149 Misc. 2d 166, 170, 563 N.Y.S.2d 987 (Sup. Ct., Bronx Co. 1990) (citations omitted).
16. 42 U.S.C. § 1983 and other cases are developing liability theories against law enforcement officers and agencies for failing to properly respond to domestic violence. *See* Avery, Police Misconduct at § 2.33; *Watson v. Kansas City*, 857 F.2d 690 (10th Cir. 1988).
17. *See* Peak, Policing America: Methods Issues and Challenges at 358 (1993).
18. *Id.* at 357-58.
19. *See* Gordon Witkin, Ted Guest & Dorian Freidman, *Cops Under Fire*, U.S. News and World Report, Dec. 3, 1990, at 32-44.
20. *Tennessee v. Garner*, 471 U.S. 1, 20 (1985); *Sigman v. Town of Chapel Hill*, 161 F.3d 782 (4th Cir. 1998) (reasonable perception of a weapon warrants deadly force).
21. *See*, *e.g.*, *Brooks v. Scheib*, 813 F.2d 1191, 1194 (11th Cir. 1987) (holding that officers working in high crime areas are likely subject to higher numbers of complaints).
22. 51 N.Y.2d 267, 434 N.Y.S.2d 144 (1980).
23. *Id*. at 271.
24. *See*, *e.g.*, *People v. Warren*, 205 A.D.2d 368, 613 N.Y.S.2d 375 (1st Dep't 1994); *People v. Alozo*, 180 A.D.2d 584, 580 N.Y.S.2d 298 (1st Dep't 1992); *People v. Rodriguez*, 177 A.D. 521, 575 N.Y.S.2d 911 (2d Dep't 1991).
25. Virtually every conceivable legal theory and prospective legal cause of action available in tort, civil rights and constitutional law is readily applicable to law enforcement officers in their daily duties. The broad range of prospective civil and civil rights liability of police officers include alleged excessive force, negligence, claims based on arrest and detention involving warrantless arrests, arrests under unconstitutional statutes and ordinances, malicious prosecution, abuse of process, retaliatory prosecution, illegal searches and seizures, illegal restraint, false arrest, abuse of process, deprivations through improper use of informants and undercover agents, deprivation of rights based on retaliatory actions, interrogations, denial of medical attention, denial of counsel, verbal abuse and harassment, failure to provide police protection in various contexts including domestic violence, conspiracies to violate civil rights, interference with family relationships, police pursuits, failure to disclose or act upon exculpatory evidence, negligence or deliberate indifference in the establishment or maintenance of roadblocks, misuse of weapons, defamation, invasion of privacy, discrimination

and more. *See* Avery, Rudovsky and Blum, Police Misconduct: Law and Litigation (3d ed. 1999).

26. Chevigny, *Police Violence: Causes and Cures*, 7 J.L. & Pol'y 85 (1998); *see* Edge of the Knife: Police Violence in the Americas, 66-67 (1995).
27. *See Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987); Avery, Rudovsky & Blum, Police Misconduct: Law and Litigation (1999) (cataloging cases).
28. 583 F.2d 337 (7th Cir. 1978).
29. *Id*. at 341.
30. Irving Joyner, Criminal Procedure in North Carolina, § 3.4 at 155 (1989).
31. *Id*. at 155 *citing Tennessee v. Garner*, 471 U.S. 1 (1985). *See United States v. Sanchez*, 914 F.2d 1355 (9th Cir. 1990); *Smith v. Freeland*, 954 F.2d 343, 357 (6th Cir. 1992).
32. *E.g.*, *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).
33. *Schulz v. Long*, 44 F.3d 643, 648 (8th Cir. 1995).
34. *Illinois v. LaFayette*, 462 U.S. 640, 647 (1983) (reasonableness of governmental activity does not turn on existence of alternative "less intrusive" means).
35. 19 F.3d 1143 (7th Cir. 1994).
36. *Id*. at 1149.
37. 490 U.S. 386 (1989).
38. *Id*. at 395.
39. *Id*. at 397.
40. 471 U.S. 1 (1985).
41. *Id*. at 11-12.
42. 954 F.2d 343 (6th Cir. 1992).
43. *Id*. at 347.
44. 939 F.2d 213 (4th Cir. 1991).
45. 27 F.3d 1002 (4th Cir. 1994).
46. *Id*. at 1007.
47. 161 F.3d 782 (4th Cir. 1998).
48. *Id*. at 787.
49. 837 F. Supp. 137 (E.D.N.C. 1993).
50. *Id*.
51. 502 U.S. 224 (1991).
52. *Id*. at 227.
53. 954 F.2d 343 (6th Cir. 1992).
54. *Id*. at 347.
55. 87 F.3d 116 (4th Cir. 1996).
56. *Id*. at 120.
57. 855 F.2d 1271, 1275 (7th Cir. 1988) (en banc).
58. *Id*. at 1275.
59. *Id*.
60. 991 F.2d 435 (8th Cir. 1993).
61. *Id*. at 440.
62. 112 F.3d 416 (9th Cir. 1997).
63. *Id*. at 421.
64. *Id*.

Proof of Recurring Conditions Can Satisfy *Prima Facie* Requirement For Notice in Slip-and-Fall Litigation

BY Y. DAVID TALLER

Proof that a "recurring hazardous condition" existed may serve as effective constructive notice when the plaintiff in a slip-and-fall case seeks to provide the required *prima facie* showing that the defendant either created the condition or defect that caused the accident or that the defendant had actual or constructive notice of the condition or defect.[1]

The concept of a "recurring condition" is not widely known, but it is a valuable tactic in opposing a defendant's request for summary judgment and in proving the plaintiff's case at trial. Unlike a defect such as a broken step, low handrail or sidewalk protrusion that is continually present, the typical recurring condition involves a hazard such as garbage that periodically appears on the stairs of an apartment building.

Simply stated, a recurring condition exists when a property owner has actual or constructive knowledge that a particular dangerous condition tends to occur on a regular basis. When that is true, the owner is charged with constructive notice of each specific recurrence of that condition.[2] Although the plaintiff need not prove that the defendant actually knew that the particular substance or object was present at the time of the accident,[3] the plaintiff must demonstrate that the defendant either created the condition by its own affirmative act, was aware of a specific condition yet failed to correct it, or was aware of an ongoing and recurring unsafe condition that regularly went unaddressed.[4]

By itself, however, the mere existence of a foreign substance is not sufficient to support a negligence claim.[5] To establish a *prima facie* case, the plaintiff must show that the defendant either created a dangerous condition[6] or had actual or constructive knowledge of it.[7] Furthermore, to constitute constructive notice, "'a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the owners'] employees to discover and remedy it.'"[8]

The plaintiff's burden of showing that the premises owner had constructive notice of a hazardous condition may also be satisfied by providing evidence that an "ongoing and recurring dangerous condition existed in the area of the accident which was routinely left unaddressed by the landlord."[9] A mere general awareness of some dangerous condition is legally insufficient to establish constructive notice,[10] but the threshold for liability is met, for example, when a landlord is shown to have negligently maintained the premises by failing to maintain a clean-up schedule adequate to prevent the creation of a dangerous condition.[11] Such evidence will be viewed in a light most favorable to the plaintiff.[12]

Appellate Decisions

The First and Second Departments of the Appellate Division seem to fall in step with a series of decisions regarding recurring hazardous conditions in stairways where the defendant failed to maintain an adequate clean-up schedule.

The First Department upheld a trial court's decision denying the defendant's motion for summary judgment in a case where the plaintiff alleged that she slipped on garbage in a stairwell that had accumulated over the weekend. In a strongly worded decision, the court found that the deposition testimony of the plaintiff and her mother regarding the frequent accumulations of garbage on the staircase over weekends when it was used by "a lot of guys hanging out there and partying and drinking" raised a triable issue of fact regarding constructive notice of a recurrent dangerous condition when coupled with the evidence of a gap in scheduled cleanings between mid-Sunday afternoon and mid-Monday morning and of the assignment over the entire weekend of a skeleton maintenance crew consisting of a single janitor responsible for two 14-story buildings

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containing some 112 apartments and their common areas. The court held that the plaintiff's proof tended to show that the defendant "negligently maintained the staircase by failing to have in effect a clean-up schedule sufficiently frequent to avoid the creation of a dangerous condition of which it had constructive notice."[13]

In *Ramos v. New York City Housing Authority*,[14] the plaintiff sued the city housing authority for injuries sustained in a fall on the stairwell in the authority's building. At the conclusion of trial, the trial court, without exception from the defendant, charged the jury on the imposition of liability based on a recurring hazardous condition. The theory is becoming the legal standard by which the sufficiency of the evidence must be judged.[15] The First Department found that because sufficient evidence existed that the stairwell in which plaintiff fell was used as a "hang out" and would regularly become cluttered with debris and soiled with vomit and human waste between scheduled cleanings, the jury was entitled to conclude that the plaintiff's fall was caused by a recurrent hazard routinely left unremedied by defendant.[16]

So long as plaintiffs can establish, through evidence in admissible form, the existence of a sufficiently recurring hazard on the defendant's premises, they will be able to survive summary judgment and proceed to trial.

In *O'Grady v. New York City Housing Authority*,[17] the First Department, relying on its past decisions, again affirmed the finding of a recurring condition as constructive notice of a hazardous condition. In *O'Grady*, the plaintiff was a firefighter responding to an alarm who was injured when he slipped on liquid leaking from garbage bags on the stairway in a building owned by the city housing authority. The appellate panel held that where there was ample evidence in the record that tenants would leave garbage in bags in the common areas, and that vagrants who slept in those hallways and stairwells at night would break open the bags in search of usable items. The court stated that the "ongoing pattern of such activity, along with the established routine of cleaning up and warning tenants, constituted constructive notice to defendant of this recurrent condition."[18]

In *Carlos v. New Rochelle Municipal Housing Authority*,[19] the Second Department further specified its evidentiary requirements for surviving summary judgment. In opposing the defendant's motion for summary judgment, the plaintiff had contended that the stairwell on the defendant's premises was often littered with debris and garbage, and the defendant was therefore on constructive notice of a recurring condition. The plaintiff submitted the affidavits of three non-party witnesses who alleged that they often noticed garbage and litter on the stairs prior to the accident. Two of the witnesses, who resided at the premises, said they had made complaints about this condition to the "porters and/or superintendents" prior to the plaintiff's accident.

The court in *Carlos* held that the defendant made a *prima facie* showing of the absence of actual or constructive notice of the allegedly dangerous condition. To withstand the motion for summary judgment, the court, relying on *Dwoskin v. Burger King Corp.*,[20] held that the plaintiff was required to show by specific factual references that the defendant had knowledge of the allegedly recurring condition of garbage and debris on the stairwell. It said the conclusory affidavits of the non-party witnesses were without probative value because they failed to identify how long the condition existed, the identity of the persons to whom notice of the condition was allegedly given, and when and how it was given.[21]

The plaintiff should therefore take care not only to be sure that the evidence in opposition to the defendant's motion is presented in admissible form, but also that it fulfills the requirements of the court in *Carlos,* identifying the length of time that the condition existed and the identity of the persons to whom notice of the condition was allegedly given, and when and how it was given. Without these specific facts, the affidavit will be held to be without probative value and will fail to defeat summary judgment.[22]

In *Kivlan v. Dake Brothers, Inc.*,[23] the Second Department held that the plaintiff did not need to prove, for purposes of her negligence action, that the landlord had actual knowledge of the presence of the particular substance, but that the plaintiff had only to demonstrate that the owner either created the condition by its own affirmative act, was aware of the specific condition yet failed to correct it, or was aware of an ongoing and recurring unsafe condition which regularly went unaddressed. The court, relying on *O'Connor-Miele v. Barhite & Holzinger*,[24] held that "where the plaintiff has established evidence of recurring oil spills and the accumulation of debris in the area where motor vehicles are permitted to park at defendant's convenience store/gas station, where motor oil and other automotive fluids are sold. In our view, such evidence raises genuine issues of fact as to whether defendant had actual knowledge of

and failed to properly remedy a recurring hazardous condition."[25]

Therefore, so long as plaintiffs can establish, through evidence in admissible form, the existence of a sufficiently recurring hazard on the defendant's premises, they will be able to survive summary judgment and proceed to trial.

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1. *Kalogerides v. Citibank*, 233 A.D.2d 298, 649 N.Y.S.2d 806 (2d Dep't 1996), *quoting Bradish v. Tank Tech Corp.*, 216 A.D.2d 505, 506, 628 N.Y.S.2d 807 (2d Dep't 1995); *Bykofsky v. Waldbaum's Supermarkets*, 210 A.D.2d 280, 281, 619 N.Y.S.2d 760 (2d Dep't 1994), *citing, inter alia, Eddy v. Tops Friendly Mkts.*, 91 A.D.2d 1203, 459 N.Y.S.2d 196 (4th Dep't), *aff'd* 59 N.Y.2d 692, 463 N.Y.S.2d 437 (1983).
2. *Columbo v. James River II*, 197 A.D.2d 760, 761, 602 N.Y.S.2d 959 (3d Dep't 1993).
3. *Weisenthal v. Pickman*, 153 A.D.2d 849, 850-851, 545 N.Y.S.2d 369 (2d Dep't 1989).
4. *See O'Connor-Miele v. Barhite & Holzinger*, 234 A.D.2d 106, 650 N.Y.S.2d 717 (1st Dep't 1996); *Mercer v. City of New York*, 223 A.D.2d 688, 689-690, 637 N.Y.S.2d 456 (2d Dep't), *aff'd* 88 N.Y.2d 955, 647 N.Y.S.2d 159 (1996).
5. *Lewis v. Metropolitan Transp. Auth.*, 99 A.D.2d 246, 249-250, 472 N.Y.S.2d 368 (1st Dep't), *aff'd* 64 N.Y.2d 670, 485 N.Y.S.2d 252 (1984).
6. *Id.* at 249.
7. *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837, 501 N.Y.S.2d 646 (1986).
8. *O'Connor-Miele v. Barhite & Holzinger*, 234 A.D.2d 106, 650 N.Y.S.2d 717 (1st Dep't 1996), *quoting Gordon v. American Museum of Natural History*, 67 N.Y.2d at 837.
9. *O'Connor-Miele v. Barhite & Holzinger*, 234 A.D.2d at 106-107.
10. *Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967, 969, 622 N.Y.S.2d 493 (1994).
11. *Compare Crosby v. Ogden Servs. Corp.*, 236 A.D.2d 220, 653 N.Y.S.2d 117 (1st Dep't 1997), *and Ramos v. New York City Hous. Auth.*, 249 A.D.2d 59, 671 N.Y.S.2d 74 (1st Dep't 1998), *with Ginsberg v. New York City Transport Auth.*, 247 A.D.2d 307, 668 N.Y.S.2d 464 (1st Dep't 1998); *cf., Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967, 622 N.Y.S.2d 493 (1994).
12. *Anderson v. Klein's Foods*, 139 A.D.2d 904, 527 N.Y.S.2d 897 (4th Dep't), *aff'd* 73 N.Y.2d 835, 537 N.Y.S.2d 481 (1988).
13. *Lopez v. New York City Hous. Auth.*, 255 A.D.2d 160, 679 N.Y.S.2d 398 (1st Dep't 1998.)
14. 249 A.D.2d 59, 671 N.Y.S.2d 74 (1st Dep't 1998.)
15. *See also Harris v. Armstrong*, 64 N.Y.2d 700, 702, 485 N.Y.S.2d 523 (1984).
16. *See also Megally v. 440 West 34th Street Co.*, 246 A.D.2d 346, 667 N.Y.S.2d 716 (1st Dep't 1998); *O'Connor-Miele v. Barhite & Holzinger*, 234 A.D.2d 106, 650 N.Y.S.2d 717 (1st Dep't 1996); *Alvarez v. Mendik Realty Plaza*, 176 A.D.2d 557, 575 N.Y.S.2d 25 (1st Dep't 1991), *lv. denied* 79 N.Y.2d 756, 583 N.Y.S.2d 191 (1992); *Weisenthal v. Pickman*, 153 A.D.2d 849, 851, 545 N.Y.S.2d 369 (2d Dep't 1989).
17. 259 A.D.2d 442, 687 N.Y.S.2d 352 (1st Dep't 1999).
18. *Id.*
19. 262 A.D.2d 515, 692 N.Y.S.2d 428 (2d Dep't 1999).
20. 249 A.D.2d 358, 671 N.Y.S.2d 494 (2d Dep't 1998).
21. S*ee also Young v. Fleary*, 226 A.D.2d 454, 640 N.Y.S.2d 593 (2d Dep't 1996).
22. S*ee id*.
23. 255 A.D.2d 782, 680 N.Y.S.2d 293 (3d Dep't 1998).
24. 234 A.D. 106, 650 N.Y.S.2d 717 (1st Dep't 1996).
25. *Kivlan v. Dane Brothers, Inc.*, 255 A.D.2d 782, 783, 680 N.Y.S.2d 293 (3d Dep't 1998).

New Era for Estate Administration In New York Has Reduced Estate Tax But Many Requirements Still Apply

By Eugene E. Peckham

The new era for handling estates in New York that began on February 1, 2000 when the state eliminated the tax on estates that would not be subject to federal taxation has reduced the work required for many estates. Nevertheless, the process of administering an estate still requires adherence to long-established procedures and an understanding of how to determine whether estate taxes may be due.

The principal effect of the law is to make a New York estate tax return necessary only if the gross value of an estate exceeds the federal "exemption equivalent," which is fixed at $675,000 through December 31, 2001.[1] For the estate of anyone whose date of death is February 1, 2000, or later, New York imposes only what is commonly known as a "pick up tax," an amount equal to the maximum amount the federal government allows on the federal estate tax return as a credit for state death taxes.[2]

For an estate that totaled $675,000, the federal tax would be $220,550, except that federal law provides a "unified credit" for the first $220,550 in taxes due, and hence no federal or state tax would be payable.

For an estate worth $675,100, the federal tax would be $220,587, but the credit for state taxes would be $37. No federal tax would be due, but $37 would be payable to the state.

For a gross estate of $727,150, the federal return shows that the tax due would be $239,846, but a credit of $19,296 would be allowed for state taxes. The effect of the $220,550 unified credit would mean that no federal tax was due, but $19,296 would be payable to New York.

Only when a gross estate reaches $727,175 does federal tax become due. The federal return shows that the tax due for an estate of this size would be $239,855. The credit for state death taxes would be $19,304 and the federal tax due would be $1. From this point onward, the federal tax due increases rapidly:

- At $750,000, the credit for state death taxes is $20,400 and the federal tax is $7,350.
- At $800,000, the credit for state taxes is $22,800 and the federal tax is $24,450.
- At $900,000, the credit for state taxes is $27,600 and the federal tax is $58,650.
- At $1 million, the credit for state death taxes payable to New York is $33,200 and the federal tax is $92,050.

As the current federal exemption equivalent of $675,000 gradually increases to $1 million in 2006, so will the threshold for the imposition of New York State estate taxes.[3]

When the value of an estate does exceed the exemption equivalent, the familiar federal Form 706 must be filed no later than nine months after the date of death. The ET-90 form that was required for state taxes has been eliminated. In its place is New York Form ET-706, which must be filed only if a federal return is required.[4]

ET-706 is a simple two-page document based on the multi-page federal form and Internal Revenue Code (IRC) § 2011, which defines the federal credit for state death taxes. The main section of ET-706 is just 11 lines long. The key figure sought is the amount of the state death tax credit that was computed in preparing the federal Form 706. If the decedent was a New York resident who did not own any real estate or tangible personal property outside New York, the federal credit is the New York tax. If the decedent was not a New York resident, the New York tax will be the proportion of the federal credit represented by the value of realty and tangible personal property located in New York, divided by the federal gross estate. For New York State residents with out-of-state property, the adjustment is the value of the out-of-state property divided by the federal gross estate, times the credit, which is subtracted from the tax due to New York.

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In keeping with the nine-month deadline for federal returns, the first deadline for filing New York State ET-706 forms will arrive November 1, 2000. The former requirement that 90% of the estate tax be paid within seven months after the date of death has been eliminated.

Steps Eliminated

Gone from the list of necessary steps in handling a New York estate is the requirement that so-called "tax waivers" be obtained before financial institutions could release amounts of $30,000 or more without incurring the risk of liability for any taxes that might later be due on the funds.[5] The waivers, which required that the value of each account be identified, assured that New York authorities would have enough data to compute when an estate was likely to exceed the previous estate tax threshold of $300,000.

Similarly, it is no longer necessary to obtain a release before a financial institution can provide access to the contents of a safety deposit box,[6] another procedure that was designed to assure that a decedent's assets could not be concealed.

Also gone is the requirement that a copy of the estate tax return be filed with the Surrogate's Court together with a fee equal to the amount that was due when the petition for probate or administration was filed. However, the court may, by local rule, still require that the tax return be filed.[7]

Still in force are the requirements that an estate obtain releases of liens for real estate and file a formal Inventory with the Surrogate Court. No fees are associated with the filings, however.[8]

Current Estate Procedures

To settle an estate in this new era, the first step is still to probate the will and have the executor appointed, or secure the appointment of an administrator if there is no will. Once an executor or administrator is in place, however, the process of marshaling estate assets is simplified because the tax waivers are not required.

As always, however, the probate/administration process is not necessary if all the assets were held jointly with someone else who has survived, in accounts with a named beneficiary, or in Totten Trust accounts that were being held "in trust for" an individual. The amount of an asset that goes to a named beneficiary or to the person named in a Totten Trust account must be included, however, when determining whether the estate has a potential estate tax liability.

When the decedent had a joint account with his/her spouse, there is generally a presumption that half the amount belonged to the surviving spouse and thus only the other half is subject to taxation. If the joint holder was someone other than the decedent's spouse, there is a presumption that the decedent contributed all of the assets although the estate can endeavor to rebut the presumption and establish that the decedent owned only half of the asset.[9]

If there is no will, deeds to real property can be transferred by a deed from all of the heirs at law without the need to file for letters of administration. Even if there is a will, real property can also be passed by the heirs without probate unless the will has specified some other disposition of the property. To pass title to real property in these circumstances, a title company will usually require, in addition to a deed from the heirs reciting the transfer, an affidavit of heirship identifying all the decedent's distributees. If there was no will, an affidavit must affirmatively confirm that fact. If a will existed, the title company will require proof that it did not specify some other distribution of the property.

Estates under $20,000 If the value of personal property listed solely in the decedent's name does not exceed $20,000, Surrogate's Court Procedure Act § 1301 (SCPA) provides for the appointment of a "voluntary administrator."[10] An administrator is authorized to collect assets up to $20,000, pay the decedent's debts, and distribute

Filing Procedures for ET-706

The instructions for Form ET-706 provide that a completed form should be mailed to the N.Y.S. Estate Tax, Processing Center, P.O. Box 5556, New York, N.Y. 10087-5556.

If you use a private delivery service such as Airborne, DHL, FedEx or UPS, the return should be addressed to The Chase Manhattan Bank, N.Y.S. Government Tax Processing, 12 Corporate Woods Blvd-4th Floor, Albany, N.Y. 12211-2524.

In addition to the completed form itself with all schedules and supporting documents, the mailing should include the following items if they have not been previously submitted:

- A copy of the decedent's death certificate.
- A copy of the decedent's will (if one exists).
- Letters Testamentary or Letters of Administration (if they were obtained from the Surrogate's Court).
- A completed Form ET-14, Estate Tax Power of Attorney, if the executor/administrator wants the state Department of Taxation and Finance to contact the attorney, accountant or enrolled agent who is assisting with estate matters.
- If the decedent was not a resident of New York State at the time of death, Form ET-141, Estate Tax Domicile Affidavit, should be attached to the return.

the residue to the persons entitled to them either in intestacy under Estates, Powers and Trusts Law § 4-1.1 (EPTL) or under a will filed with the court.[11]

First preference for the voluntary administrator goes to the closest surviving heir at law.[12] If several individuals have equal rights (a decedent's children, for example), the others must waive their right to be appointed. If there was a will, the named executor has the first right to qualify,[13] but heirs at law must consent.

This proceeding greatly simplifies the process of transferring the assets of someone who left only a small estate, but it also applies when most of a wealthy individual's asserts are in trusts or in joint bank accounts and only $20,000 or less is in accounts that bear only the decedent's name.[14]

The small estate proceeding does not apply to property such as housekeeping items, family bible and other family mementos, pets, one motor vehicle and up to $15,000, all of which vest in and are set off to a spouse or children under 21 pursuant to EPTL § 5-3.1(a).

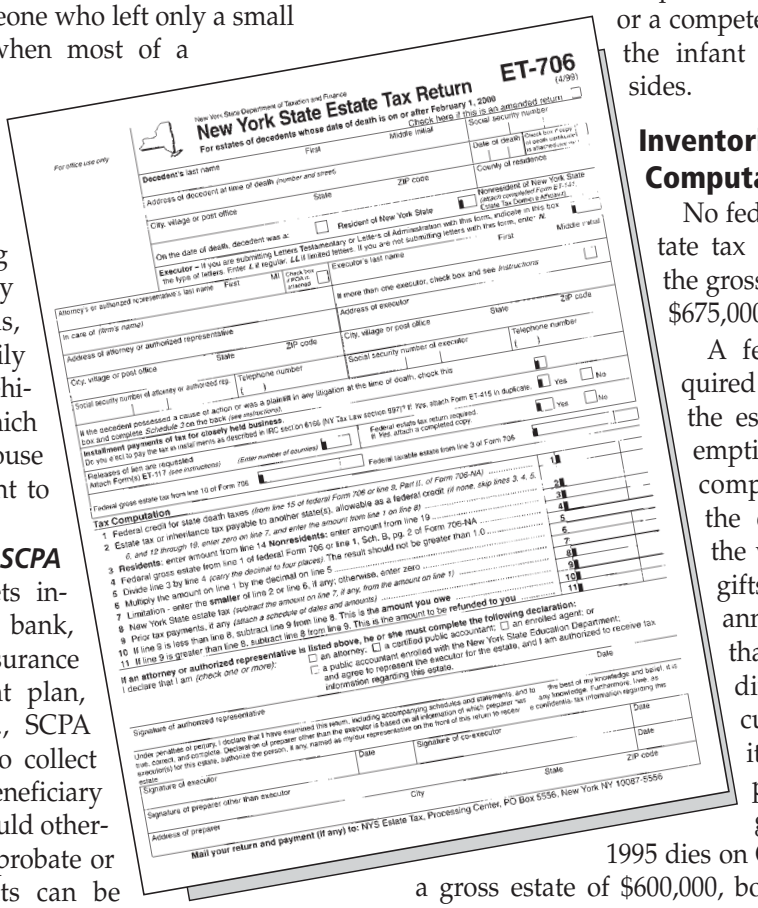
Assets obtainable under SCPA 1310 If the decedent's assets included amounts owed by a bank, credit union, stockbroker, insurance company, pension/retirement plan, hospital/nursing home, etc., SCPA 1310 provides a procedure to collect these sums if there was no beneficiary for the amounts and there would otherwise be no reason to file for probate or administration. The amounts can be paid to eligible relatives or creditors if they provide the decedent's debtor with a notarized affidavit describing their entitlement to the funds.[15]

A surviving spouse can obtain $30,000 immediately upon executing an affidavit that all payments made under the SCPA § 1310 do not exceed $30,000.[16]

Once 30 days have elapsed since death, a spouse, surviving child 18 or older, a father or mother, sister or brother, niece or nephew can obtain up to $15,000 upon executing an affidavit that gives the date of death and the individual's relationship to the decedent, states that no fiduciary has qualified or been appointed, and identifies the names and addresses of the persons entitled to the money paid.[17] The affidavit must also state that, to the best of the affiant's knowledge after diligent inquiry, the total of such payments under this provision does not exceed $15,000. Upon the request of the surviving spouse or one of these relatives, a creditor of the decedent or a person who has paid or incurred the funeral expense of the decedent may also present such an affidavit.

Once six months have elapsed, up to $5,000 can be paid under similar conditions to more remote distributees or to a creditor.[18]

Another useful provision for paying out small amounts is EPTL § 11-1.1(b)(19), which authorizes a fiduciary to pay up to $10,000 due to an infant or incompetent directly to the parent or a competent adult with whom the infant or incompetent resides.


New York State Department of Taxation and Finance

New York State Estate Tax Return **ET-706** (4/99)

For estates of decedents whose date of death is on or after February 1, 2000

Check here if this is an amended return

For office use only

Decedent's last name — First — Middle initial — Social security number

Address of decedent at time of death (number and street) — Date of death — Check box if copy of death certificate is attached

City, village or post office — State — ZIP code — County of residence

Resident of New York State — Nonresident of New York State (attach completed Form ET-117, Estate Tax Dueling Affidavit)

On the date of death, decedent was a:

Executor – If you are submitting Letters Testamentary or Letter's of Administration with this form, indicate in this box the type of letters. Enter *4* if regular, *4-I* if limited letters. If you are not submitting letters with this form, enter *N*.

Executor's last name — First — Middle initial

If more than one executor, check box and see *Instructions*

Attorney's or authorized representative's last name — First — MI — Check box if POA is attached

Address of executor

In care of (*firm's name*)

City, village or post office — State — ZIP code — Telephone number

Address of attorney or authorized representative

City, village or post office — State — ZIP code — Telephone number

Social security number of executor

Social security number of attorney or authorized rep.

If the decedent possessed a cause of action or was a plaintiff in any litigation at the time of death, check this box and complete Schedule 2 on the back (*see instructions*). — Yes — No

Installment payments of tax for closely held business. Do you elect to pay the tax in install ments as described in IRC sec on 6166 (NY Tax Law section 697)? If Yes, attach Form ET-415 in duplicate: — Yes — No

Releases of lien are requested — (*Enter number of counties*) — Federal estate tax return required. If Yes, attach a completed copy.

Attach Form(s) ET-117 (*see instructions*)

1 Federal gross estate tax from line 10 of Form 706 — Federal taxable estate from line 3 of Form 706

Tax Computation

1 Federal credit for state death taxes *(from line 15 of federal Form 706 or line 8, Part II, of Form 706-NA)* — 1

2 Estate tax or inheritance tax payable to another state(s), allowable as a federal credit *(if none, skip lines 3, 4, 5, 6, and 12 through 19, enter zero on line 7, and enter the amount from line 1 on line 8)* — 2

3 **Residents:** enter amount from line 14 **Nonresidents:** enter amount from line 19 — 3

4 Federal gross estate from line 1 of federal Form 706 or line 1, Sch. B, pg. 2 of Form 706-NA — 4

5 Divide line 3 by line 4 *(carry the decimal to four places)* The result should not be greater than 1.0 — 5

6 Multiply the amount on line 1 by the decimal on line 5 — 6

7 Limitation - enter the **smaller** of line 2 or line 6, if any; otherwise, enter zero — 7

8 New York State estate tax *(subtract the amount on line 7, if any, from the amount on line 1)* — 8

9 Prior tax payments, if any *(attach a schedule of dates and amounts)* — 9

10 If line 9 is less than line 8, subtract line 9 from line 8. This is **the amount to be paid with this return** — 10

11 If line 9 is greater than line 8, subtract line 8 from line 9. This is **the amount you owe** — 11

If an attorney or authorized representative is listed above, he or she must complete the following declaration:

I declare that I am *(check one or more)*: ☐ an attorney. ☐ a certified public accountant. ☐ an enrolled agent. or ☐ a public accountant enrolled with the New York State Education Department. and agree to represent the executor for the estate, and I am authorized to receive tax information regarding this estate.

Signature of authorized representative — Date

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer other than the executor is based on all information of which preparer has any knowledge. Furthermore, I/we, as executor(s) for this estate, authorize the person, if any, named as my/our representative on the front of this return to receive confidential tax information regarding this estate.

Signature of executor — Date — Signature of co-executor — Date

Signature of preparer other than executor — City — State — ZIP code

Address of preparer

Mail your return and payment (if any) to: NYS Estate Tax, Processing Center, PO Box 5556, New York NY 10087-5556

Inventories and Tax Computations

No federal or New York estate tax return is required if the gross value of an estate is $675,000 or less.

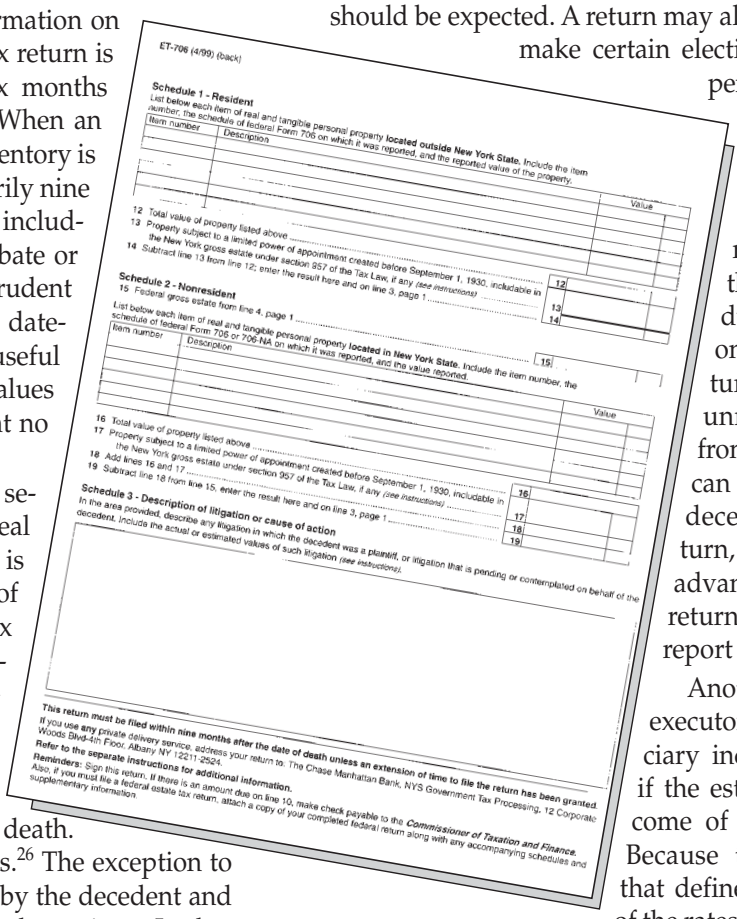
A federal return is required when the value of the estate exceeds the exemption equivalent, but in computing that number the estate must include the value of any lifetime gifts that exceeded the annual $10,000 amount that may be given to individuals without incurring any tax liability.[19] For example, if a person who made a gift of $100,000 in 1995 dies on October 1, 2000, with a gross estate of $600,000, both federal and New York returns will be due. Even though no tax was due at the time of the $100,000 gift, the $100,000 counts toward the computation of total gift transfers before and after death, and thus it is added to the $600,000 value of the estate when determining whether estate/transfer taxes may be due. The amount subject to estate/transfer taxes will therefore be $700,000, although the actual tax due will be comparatively small after the effect of the $675,000 exemption equivalent is computed.

Once the executor or administrator has determined the extent of the estates assets and liabilities, a formal Inventory must be filed with the Surrogate's Court.[20]

Even though no estate tax returns are due for small estates, assets that have shown a capital gain during the decedent's lifetime still receive a step-up in basis to their date of death value, or to the alternate value six months from the date of death if that is elected.[21] When these in-

herited assets are sold, long-term capital gains rates apply to any further gain in excess of the stepped-up basis, regardless of how soon after death the sale takes place. The capital gains holding period applicable to assets acquired from a decedent is always long-term.[22]

Now that fewer estate tax returns will be necessary, the formal Inventory required by the Surrogate's Court will become more important as the best method for establishing date-of-death value. Under § 207.20 of the Uniform Rules, estates are required to submit "a list of assets constituting the gross estate for tax purposes." Presumably, for an estate where no estate tax return is required, this means all assets that would be included in the gross estate as if a return were filed. The Inventory form itself requires information on all such assets.[23] When no estate tax return is required, the Inventory is due six months from the date letters are issued.[24] When an estate tax return is required, the Inventory is due when the return is due (ordinarily nine months from the date of death, but including extensions).[25] If there is no probate or administration, it would still be prudent to prepare a list of assets and their date-of-death values. This would be useful both to establish date-of-death values for basis purposes and to show that no estate tax return was required.


ET-706 (4/99) (back)

Schedule 1 - Resident

List below each item of real and tangible personal property **located outside New York State**. Include the item number, the schedule of federal Form 706 on which it was reported, and the reported value of the property.

Item number | Description | Value

12 Total value of property listed above 12

13 Property subject to a limited power of appointment created before September 1, 1930, includable in the New York gross estate under section 957 of the Tax Law, if any *(see instructions)* 13

14 Subtract line 13 from line 12; enter the result here and on line 3, page 1 14

Schedule 2 - Nonresident

15 Federal gross estate from line 4, page 1 15

List below each item of real and tangible personal property **located in New York State**. Include the item number, the schedule of federal Form 706 or 706-NA on which it was reported, and the value reported.

Item number | Description | Value

16 Total value of property listed above 16

17 Property subject to a limited power of appointment created before September 1, 1930, includable in the New York gross estate under section 957 of the Tax Law, if any *(see instructions)* 17

18 Add lines 16 and 17 18

19 Subtract line 18 from line 15; enter the result here and on line 3, page 1 19

Schedule 3 - Description of litigation or cause of action

In the area provided, describe any litigation in which the decedent was a plaintiff, or litigation that is pending or contemplated on behalf of the decedent. Include the actual or estimated values of such litigation *(see instructions)*.

This return must be filed within nine months after the date of death unless an extension of time to file the return has been granted.

If you use any private delivery service, address your return to: The Chase Manhattan Bank, NYS Government Tax Processing, 12 Corporate Woods Blvd-4th Floor, Albany NY 12211-2524.

Refer to the separate instructions for additional information.

Reminders: Sign this return. If there is an amount due on line 10, make check payable to the ***Commissioner of Taxation and Finance.*** Also, if you must file a federal estate tax return, attach a copy of your completed federal return along with any accompanying schedules and supplementary information.

Another still-required step is to secure the Release of Lien for any real property of the estate. The purpose is to discharge the lien for payment of the estate tax that applies under Tax Law § 982. This is done by filing either Form ET-30 or Form ET-85, together with Form ET-117. The ET-30 is used when a fiduciary has been appointed and nine months have not passed since the date of death. The ET-85 is used for all other cases.[26] The exception to this procedure is when title is held by the decedent and the surviving spouse as tenants by the entirety. In that case, Tax Law § 975(f) provides that the lien is automatically divested. Nevertheless, it is always safer to get the Release of Lien to remove any possible question. When received, the Release of Lien should be recorded in the County Clerk's Office to clear title to the real estate.

Income Tax Returns

Regardless of whether estate tax returns are required, income tax returns will be necessary.

At the very least, the decedent's final federal and New York income tax returns should be filed. If the individual has died before the due date for the return covering the prior year (by April 15 or an extension), it will be necessary to file for both the prior year and the short year up to the date of death. If the return for the prior year has been filed, only the return covering income received up to date of death must be filed. No return is required if income is below the filing limit, which ranges from $7,050 for a single taxpayer under 65 up to $14,400 for a joint return when both spouses are over 65.[27] For a married taxpayer, a joint return filed for the year of death (with the consent of the fiduciary, if any) would include the surviving spouse's income for the whole year and the decedent's income up to death.[28]

Even if income is below the filing limit, it is a good idea to file a return. It notifies the income tax authorities of the death, making it clear that no further returns should be expected. A return may also be desirable to make certain elections. Medical expenses paid up to one year from death may be deducted on the decedent's final return, provided they are not deducted as a debt on the estate tax return.[29] Accrued and unreported income from Series E bonds can be included on decedent's final return, which can be an advantage if the final return would otherwise report low income.[30]

Another duty of the executor is to file fiduciary income tax returns if the estate has gross income of more than $600. Because the tax brackets that define the progression of the rates for estate income taxes are quite narrow, the top rate of 39.6% on the federal return is reached when there is only $8,450 of taxable income. It is generally advisable, therefore, to distribute the income to the beneficiaries so it will be taxed at their lower rates.[31] Again, the executor has a choice: to deduct estate administration expenses (executor's commissions, appraisal fees, attorney and accountant fees, etc.) either on the estate tax return or on the fiduciary income tax return.[32] If such expenses are paid in the final tax year of the estate, any excess deductions can be passed through to the beneficiaries to deduct on their personal returns as miscellaneous itemized deductions.[33] Capital losses and net operating losses, if any,

also are distributed out in the final year.[34] Obviously, if the estate is small enough so that neither estate taxes nor estate income taxes are due, the expenses should be deducted against income tax.

As a separate taxable entity, an estate can elect a fiscal year that must end, at the latest, on the last day of the month preceding the date of death.[35] An estate also is not required to pay estimated income tax for its first two fiscal years.[36] Frequently, what should be done for smaller estates that owe no estate tax is to elect a first and final tax year ending on the last day of the month preceding the date of death, distribute the assets to the beneficiaries before the end of the year, and wind up the estate. Then a fiduciary return can be filed to distribute out the administration expenses in excess of the estate's income as excess deductions for the beneficiaries to deduct on their personal returns.

Besides having more assets to deal with, the main difference in handling an estate with assets that exceed the current $675,000 exemption equivalent is the need to file federal and state estate tax returns.

Federal Form 706 requires information about all the decedent's assets at death and provides for the subtraction of allowable deductions. The principal deductions are administration expenses of the estate and debts of the decedent (IRC § 2053), charitable deduction (IRC § 2055), marital deduction (IRC § 2056) and the new family owned business deduction (IRC § 2057).

Accountings

The final step in the administration process is to determine whether an accounting is necessary.

If the surviving spouse and/or child or children are both the executors/administrators and beneficiaries, an accounting is probably not necessary. Because the same people have a dual capacity, they would only be accounting to and releasing themselves.

In other situations, an accounting is necessary if the fiduciary wants to be released from further liability to the beneficiaries. Frequently the account is settled informally without a filing in the Surrogate's Court. The account is prepared and presented to the beneficiaries, and they are asked to sign a receipt and release, discharging the executor from further liability.[37]

After an accounting has been completed, final distribution of the estate assets can take place. If an accounting is not filed with the court, the report set forth at § 207.42 of the Uniform Rules[38] should be filed with the court to show that the estate has been fully distributed.

Generally, a formal accounting proceeding in the Surrogate's Court is required only if the beneficiaries include minors or incompetents who cannot sign a valid release. It may also be required if the competent beneficiaries will not agree to sign releases.[39]

Conclusion

As always, planning before death can reduce the taxes and simplify the task of settling an estate. A review of the *Journal's* December 1999 issue on Trusts & Estates will identify other items that also need to be considered in both large and small estates.

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1. New York Tax Law § 971(a) (hereinafter "Tax Law") and 26 U.S.C. § 6018 (IRC).
2. Tax Law § 952.
3. IRC § 2010(c).
4. IRC § 6018(a)(3). Tax Law § 971(a).
5. Tax Law § 975(e) repealed by L. 1997 c. 389, pt. A, § 20. *See also* the Instructions for Forms ET-30 and ET-92.
6. *Id.*
7. Tax Law § 972(c).
8. Tax Law § 982(c) and Uniform Rules for Surrogate's Court § 207.20 (hereinafter "Uniform Rules"). See Form ET-117.
9. Treas. Reg. § 20.2040-1(a)(2). *See also* Groppe, et al., Harris 5th Edition: New York Estates, §§ 15:97 *et seq.*
10. The official forms for a small estate proceeding are Forms SE-2A and SE-2B in New York Surrogates Court Practice (Greenbook) Lexis Publishing, pp. SF201 -205. They are also available in the "New York State Bar Association's Surrogate's Forms on HotDocs" published by Matthew Bender & Co. Inc. and the NYSBA.
11. SCPA 1307.
12. SCPA 1303(a).
13. SCPA 1303(b).
14. Charles J. Groppe et al, New York Estates: Estate Planning and Taxation § 5.5 (5th ed. 1996) and Turano, Practice Commentary to EPTL § 1301 (McKinney's).
15. *See* 27 Carmody Wait 2d §§ 156:42.1, 156:43.1, 156:45.1 (2d 1997) for forms.
16. SCPA 1310(2).
17. SCPA 1310(3).
18. SCPA 1310(4).
19. IRC § 6018(a)(3).
20. Uniform Rules § 207.20(c). The Inventory is Form I-1 of the Official Forms for Surrogates Courts set forth at page SF-131 of the 2000 Greenbook.
21. IRC § 1014.
22. IRC § 1223(11).
23. 22 N.Y.C.R.R., Subtitle D, Ch. VII, Form I-1.
24. Uniform Rules § 207.20(a).
25. *Id.*
26. Tax Law § 982(c). See Instructions for ET-30 and ET-85.
27. See the chart at p. 14 of the Form 1040 instructions.
28. IRC § 6013(a)(2) and (3).
29. IRC § 213(c).
30. Rev. Rul. 68-145, 1968-1 C.B. 203; IRC § 454(a).
31. IRC § 1(e) and Form 1041 Instructions at p. 17.
32. IRC § 642(g).
33. Reg. 1.642(h) - 1 and 2. Form 1041, Schedule K-1 and Instructions thereto.
34. IRC § 6654(l).
35. See Carmody Wait 2d § 166.8 and 166.10 for Forms.
36. 22 N.Y.C.R.R.
37. Forms for an informal account and a receipt and release agreement are at 30 Carmody Wait 2d §§ 166.8 and 166.10.
38. 22 N.Y.C.R.R. §1.207.42.
39. Official Forms for an Accounting are at Forms JA-1 through JA-8 in Surrogate's Court Practice (Greenbook) pp. SF134 to SF162. They are also available in the "New York State Bar Association's Surrogate's Forms on HotDocs" published by Matthew Bender & Co. Inc. and the NYSBA.

Courts Differ on Standard Applicable When Parties in Arbitration Cases Seek Provisional Remedies

By James M. Wicks and Jennifer M. Mone

When courts in New York are asked to authorize provisional remedies in aid of arbitration, some apply a traditional three-prong test, estimating the likelihood of success, assessing the prospects for irreparable harm, and balancing the equities. Others, however, consider only whether the ultimate arbitration award may not be effective if the remedy is not granted.

Provisional remedies such as attachment and preliminary injunctions have long been tools available to litigators seeking to preserve the status quo and prevent irreparable harm during litigation. Requests for them in arbitration cases rely on CPLR 7502(c),[1] which was amended in 1985 to clarify that they would be available in these cases.

In litigation, the traditional three-prong test protects the due process rights of the non-movant, while ensuring a balancing of the equities between the litigants. Requiring applicants in an arbitration context to show only that an arbitration award could be rendered ineffectual without the remedy is a far more lenient test. Conceivably, without considering the likelihood of success or the possibility of irreparable damage, the potentially harsh remedies of attachment or injunction could be granted in cases that lacked merit. Indeed, a preliminary injunction or attachment could be granted for a non-meritorious claim even before an arbitration began, so long as there was an "arbitrable controversy."[2]

The reasons why some courts are not using the three-prong test in the arbitration context is not clear, although the very language of CPLR 7502(c) may be a factor in some decisions that have looked at only the potential effect on the ultimate arbitration award.

CPLR 7502(c) states that an application for an order of attachment or for a preliminary injunction may be entertained in connection with an arbitrable controversy, "but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." It goes on to say that the provisions of CPLR Articles 62 and 63, which govern attachments and injunctions, shall apply, "except that the sole ground for the granting of the remedy shall be as stated above."

This additional language, however, does not inevitably lead to the conclusion that the three-prong test should be abandoned. Professor Vincent Alexander's Practice Commentaries to CPLR 7502(c) provide an analysis that indicates the three-prong test remains appropriate. The commentary explains:

> Although ineffectiveness of the arbitration award is the sole ground for provisional relief, there is a conceptual difference between the ground, or basis, for the relief and the procedural conditions that may apply when such ground is established. . . . CPLR 7502(c) itself says that, aside from the ground for provisional relief, "the provisions of articles 62 and 63 of this chapter shall apply." Although CPLR Article 63, which covers injunctions, does not explicitly impose any additional conditions, traditional equity jurisprudence requires a showing of irreparable injury, likelihood of success on the merits and balancing of the equities. Finally, the last sentence of CPLR 7501 is intended simply to prevent

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> the court from inquiring into the merits of the dispute as a basis for denying arbitration or from intruding on the arbitrator's authority to make an ultimate determination on the merits. Preliminary screening of the merits for the separate and independent purpose of determining the appropriateness of provisional relief has no such effect.

Thus, to the extent lawmakers were concerned that courts might invade the province of the arbitrator by considering the merits of the dispute, as Professor Alexander explains, the inquiry into the merits for purposes of deciding a motion for provisional relief is merely a preliminary screening, which would not intrude on the arbitrator's authority.

An argument for applying the three-prong test can also be based on the apparent reason why the legislature adopted CPLR 7502(c), namely to resolve disputes that had questioned whether provisional relief was even available in connection with arbitrations. The legislators appear to have recognized that the need to protect the status quo during a pending arbitration was the same as the need to protect it during pending litigation.[3] Unfortunately, however, the legislative Memorandum from the Office of Court Administration did not shed light on whether the traditional three-prong test was intended to apply.[4]

Even decisions within the same department have applied different standards to applications for provisional relief brought under CPLR 7502(c).

Conflicting Decisions

Even decisions within the same department have applied different standards to applications for provisional relief brought under CPLR 7502(c).

In the most recent appellate decision construing CPLR 7502(c), *Cullman Ventures, Inc. v. Conk*,[5] the First Department held that the three-prong test for injunctive relief under Article 63 should be used in considering an application for preliminary relief under CPLR 7502(c).

In the *Cullman* case, the lower court had granted the petitioners' application under CPLR 7502(c) for a preliminary injunction staying an arbitration in Indiana pending resolution of an arbitration in New York. On appeal, the First Department determined that the relief in the New York arbitration would not be rendered ineffectual if the Indiana arbitration concluded first. The court then applied the "general criteria governing the issuance of injunctive relief to [the] application for a preliminary injunction under CPLR 7502(c)" and held that the petitioners had failed "to demonstrate a likelihood of success on the merits, irreparable injury, or that the equities balance in their favor."[6]

The *Cullman* decision was contrary to existing precedent, however. In two earlier decisions, panels in the First and Second Departments had considered only whether a potential award might be rendered ineffectual if a provisional remedy was not granted.[7]

The *Cullman* panel made no mention of the conflicting precedent. But indeed, one case cited by *Cullman* in support of its holding, *OTB*,[8] had used as its supporting authority cases that had refused to apply the three-prong test.[9] *OTB* relied on quotes from *H.I.G. Capital Management v. Ligator*, in which the First Department expressly held that whether the arbitration award would be rendered ineffectual was the "sole applicable standard," and that the standards of CPLR Article 63 did not apply.[10]

Although *Cullman* did not expressly state that it was overturning prior decisions, it was clear in stating that it concurred with the analysis set forth in Professor Alexander's commentary and that courts should now apply the three traditional factors in deciding motions under CPLR 7502(c).

In 1988, the First Department was faced with interpreting the attachment portion of CPLR 7502(c) for the first time in *Drexel Burnham Lambert, Inc. v. Ruebsamen*.[11] The lower court had denied Drexel's application to attach the assets of the respondents, who were non-residents and had recently suffered substantial financial losses.[12] The lower court had held that the grounds available for attachments in aid of arbitration were limited to those set forth in CPLR 6201(3), which required a finding that the respondents had an intent to defraud creditors or frustrate enforcement of a judgment.[13] The First Department disagreed with that interpretation of CPLR 7502(c), observing:

> A plain reading [of CPLR 7502(c)] indicates that, contrary to the interpretation given thereto by the Supreme Court, the language of the statute neither limits an order of attachment in aid of arbitration to the narrow circumstances set forth in CPLR 6201(3) nor requires that the petitioner demonstrate any affirmative conduct on the part of respondent(s). Indeed, . . . the foregoing section explicitly declares that 'the sole ground for the granting of the remedy shall be as stated above', and what is stated above is that 'the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.' . . . Thus, CPLR 6201(3) and CPLR 6301 are simply inapplicable to the instant situation.[14]

In *National Telecommunications Ass'n v. National Communications Ass'n*,[15] the petitioner moved for a prelimi-

nary injunction under CPLR 7502(c). Relying on *Drexel*, the First Department found:

> In arguing that petitioner has failed to demonstrate irreparable harm and a probability of success on the merits, respondent would have this court adopt an inappropriate standard for deciding whether relief should be granted under CPLR 7502(c), under which the ground for entertaining an application for a provisional remedy in aid of arbitration is whether the award 'may be rendered ineffectual' without it.[16]

Three other First Department decisions, before *Cullman* but after *Drexel*, also held that the three-prong test was not appropriate in considering a CPLR 7502(c) motion.[17] However, at least three other First Department decisions and four trial court decisions in the department before *Cullman* used the traditional three-prong approach.[18]

Even after the 1998 *Cullman* decision used the three-prong approach, confusion has continued in the trial courts. In a 1999 case, *Salomon Smith Barney v. Zielonka*,[19] the Supreme Court in New York County said "the First Department has held" that courts may only entertain an application for provisional relief in aid of arbitration "upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief."[20] The decision cited *H.I.G. Capital Management*, overlooking *Cullman*. Like most trial-level courts, however, the Court nevertheless went on to apply the three-prong test, noting that "even if this Court used the standards for granting a preliminary injunction set forth in Article 63 of the CPLR, *i.e.*, likelihood of success on the merits, irreparable injury and balancing of the equities," the applicant would be entitled to relief.[21]

Early this year, in *In re Application of David B. Lawrence, M.D.*,[22] the Supreme Court in Westchester County relied on the First Department's *Guarini* decision to hold that the only question was whether, under CPLR 7502(c), an arbitration award might be rendered ineffectual without provisional relief. The court did not cite the *Cullman* decision, nor did it apply the three-prong test. In fact, it simply held that the respondent's arguments under CPLR 6301 had "no relevance," given that the parties were bound by an arbitration agreement.

Conclusion

At least until CPLR 7502(c) is amended or the Court of Appeals rules definitively on the standards that should apply when provisional remedies are sought in arbitration cases, practitioners face a vexing dilemma. Must an applicant for a provisional remedy demonstrate only that the ultimate award might be rendered ineffectual in the absence of the remedy sought? Or must the applicant also show that the remedy is warranted after a review of whether the claim is likely to be successful, whether there is a prospect of irreparable harm, and whether the resulting equitable analysis supports a provisional remedy?

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1. CPLR 7502(c) states:

   Provisional remedies. The supreme court in the county in which an arbitration is pending, or, if not yet commenced, in a county specified in subdivision (a), may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose) if the application is made before commencement, except that the sole ground for the granting of the remedy shall be as stated above. The form of the application shall be as provided in subdivision (a).
2. *See, e.g.*, *Continental Chartering & Brokerage v. T.J. Stevenson & Co.*, 678 F. Supp. 58, 60 (S.D.N.Y. 1987) (if all that is required for the "extraordinary relief" of attachment is a showing that an arbitration award may be rendered ineffectual, then this would allow "practically everyone going to arbitration to attach the goods and chattels of his opponent, creating economic chaos").
3. *See* 2 McKinney's 1985 Session Laws of New York, at 3525 (Memorandum of Office of Court Administration) ("OCA").
4. *Id.*
5. 252 A.D.2d 222, 682 N.Y.S.2d 391 (1st Dep't 1998).
6. *Id.* at 230 (citing *New York Off-Track Betting Corp. v. New York Racing Ass'n*, 250 A.D.2d 437, 673 N.Y.S.2d 387 (1st Dep't 1998) ("OTB") and *Koob v. IDS Fin. Servs.*, 213 A.D.2d 26, 32, 629 N.Y.S.2d 426 (1st Dep't 1995)).
7. *H.I.G. Capital Management v. Ligator*, 233 A.D.2d 270, 650 N.Y.S.2d 124 (1st Dep't 1996) (sole applicable standard is whether award to which applicant may be entitled may be rendered ineffectual without such provisional relief; standards of CPLR Article 63 are not applicable) (citing *County Natwest Sec. Corp. USA v. Jesup, Josephthal & Co.*, 180 A.D.2d 468, 579 N.Y.S.2d 376 (1st Dep't 1992)); *accord Suffolk County Patrolmen's Benevolent Ass'n v. County of Suffolk*, 150 A.D.2d 361, 540 N.Y.S.2d 882 (2d Dep't 1989) (traditional preliminary injunction standard does *not* apply to a motion under CPLR 7502(c)).
8. *New York Off-Track Betting Corp.*, 250 A.D.2d 437.
9. *Cullman*, 682 A.D.2d at 391 (citing *OTB*, 673 N.Y.S.2d 387).
10. *But see Koob*, 213 A.D.2d at 32-33 (also relied upon by *Cullman*; applying traditional test under Article 63 in reviewing motion under 7502(c)).
11. 139 A.D.2d 323, 531 N.Y.S.2d 547 (1st Dep't 1988).
12. *Id*. at 325.
13. *Id.* at 326.
14. *Id.* at 327-28.
15. 189 A.D.2d 573, 592 N.Y.S.2d 591 (1st Dep't 1993).
16. *Id*. at 573, 580 N.Y.S.2d 289 (emphasis added).

17. The following decisions held that the three-prong test was not appropriate:

Guarini v. Severini, 233 A.D.2d 196, 650 N.Y.S.2d 4 (1st Dep't 1996) ("IAS Court properly refused to consider the merits of petitioner's admittedly arbitrable claims, as it would on a motion for a preliminary injunction under CPLR article 63, correctly noting that under CPLR 7502(c), the only consideration in deciding whether to grant a preliminary injunction is whether 'the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief'").

County Natwest Sec. Corp. v. Jesup, Josephthal & Co., 180 A.D.2d 468, 579 N.Y.S.2d 376 (1st Dep't 1992) ("the standard that governs in a case involving arbitration is whether the award 'may be rendered ineffectual without such provisional relief,' and the standards generally applicable to attachments pursuant to 6201(3), such as sinister maneuvers or fraudulent conduct, are not required to be shown in an application pursuant to CPLR 7502(c)").

See Habitations, Ltd. v. BKL Realty Sales Corp., 160 A.D.2d 423, 554 N.Y.S.2d 117 (1st Dep't 1990), which reached a conclusion similar to the *Natwest* finding.

18. The following cases considered traditional factors in making decisions on CPLR 7502(c) motions:

Leake v. Merrill Lynch, Pierce, Fenner & Smith, 213 A.D.2d 155, 623 N.Y.S.2d 220 (1st Dep't 1995) (finding respondent's application for a preliminary injunction under 7502(c) should have been granted "due to the likelihood of respondent's success on the merits, . . . and the prejudice that would flow from denying this relief").

Hill v. Reynolds, 187 A.D.2d 299, 589 N.Y.S.2d 461 (1st Dep't 1992) (denying provisional relief under CPLR 7502(c) on the ground that "irreparable harm has not been demonstrated").

Lebenthal & Co. v. Dean Witter, N.Y.L.J., Dec. 30, 1997, at 21 (Sup. Ct., N.Y. Co.) (ruling that under CPLR 7502(c), a petitioner "must show a likelihood that it will prevail on the merits, that it will suffer irreparable harm in the meantime, and that the balance of equities is in its favor").

Erickson v. Kidder Peabody & Co., 166 Misc. 2d 1, 4-5, 630 N.Y.S.2d 861 (Sup. Ct., N.Y. Co. 1995) ("By its terms, CPLR 7502(c) replaces only the 'grounds' which must be established for a grant of an attachment or injunctive relief, which are set forth in sections 6201 and 6301, respectively. The remainder of those articles still apply. Therefore, a party seeking provisional relief under CPLR 7502(c) must still establish, among other things, the existence of a valid cause of action and grounds for relief.").

Schneider v. Helmsley-Spear, N.Y.L.J., Oct. 19, 1995, p. 25 (Sup. Ct., N.Y. Co.) (denying provisional relief under CPLR 7502(c) because petitioners failed to show irreparable injury).

Saferstein v. Wendy, 137 Misc. 2d 1032, 523 N.Y.S.2d 725 (Sup. Ct., N.Y. Co. 1987) (noting that "the limitation of grounds in CPLR 7502(c) was not designed to make the court a simple rubber stamp," and thus considering the traditional threefold factors in deciding the CPLR 7502(c) motion).

19. Index No. 11902/91 (Sup. Ct., N.Y. Co. Sept. 27, 1999).
20. *Id*. at 6.
21. *Id*. at 7.
22. Index No. 17013/99 (Sup. Ct., Westchester Co. Jan. 21, 2000).

Quick *Voir Dire:* Making the Most of 15 Minutes

By Thomas F. Liotti and Ann H. Cole

For art and science can not exist but in minutely organized particulars.
William Blake, *Jerusalem* [1818-1820] To the Public

Voir dire is a blend of art and science. During a well-executed *voir dire*, trial attorneys use their presentation skills to glean as much information as possible from prospective jurors while planting the seeds of the case in the jurors' minds.

Lawyers must learn to search for sources of bias for and against the client, when to stop asking questions of jurors believed to be favorable, how to rehabilitate a juror the prosecution seems to have successfully removed for cause, and how to use a juror who will surely be excused for cause as a foil to educate the rest of the panel.

As with most aspects of trial work, only practice can help an attorney turn *voir dire* into an art form. The suggestions here are designed to provide a framework for lawyers preparing for jury selection.

The late Cat E. Bennett was a pioneer in the field of jury selection,[1] and all who have followed have tried to build upon her work. Much of what we write here applies to both civil and criminal trials. Ever since the Court of Appeals in *People v. Jean*[2] approved time limits for *voir dire* of 15 minutes in the first round and 10 minutes in each round thereafter, lawyers have been forced to focus on what is really important and eliminate unnecessary questions.

Do your warm-up exercises before you begin *voir dire*. We recommend that you practice public speaking, preferably on controversial subjects so that you lose a sense of self-consciousness and become more confident. Practice engaging your audience, asking them questions and studying their reactions. Another good exercise is to engage strangers in conversation. Observe how long it takes you to get them talking or answering your questions. The ride up to your office on the elevator is an opportune time for such endeavors. Remember what you said that elicited their responses. Adopt some of those questions or comments into your *voir dire*.

Study the Case, Define the Objective Even before specific *voir dire* questions are contemplated, read everything you can about the case and visit the scene.

To persuasively argue the defense case, you must be able to paint a word picture of your case. You must first clearly define and distill the key issues and the key facts. At this point you may need to determine your prospects for essential nullification. If the law is bad for you, determine whether something about the facts or the conduct of your adversaries will make the jurors angry, so angry that they may overlook the letter of the law or purposely disregard it, providing your client with a more equitable street justice. You can never start too soon to get the jury angry with your opponent.

And, of course, if the judge is not the fair and impartial arbiter that he or she should be, you may want to get the jury angry at your judge as well, especially since he or she will make the legal rulings and charge on the law. If a judge is late, get to the courtroom early. Get set up

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and be ready to go. Keep looking at your watch, shaking your head. Jurors are taking time off from work. They already think that the legal system is a big time waster. Their time is valuable. You care about their time. Does the judge? Does your adversary? Stand in the well of the courtroom looking like you are ready. Point to that courtroom clock. Point back toward the judge's chambers. Shake your head some more. You can reinforce this later when you ask the jurors questions about their work, their time and whether they will be able to give their full attention to the case. Start with the basic premise that jurors do not want to be there and they view you as being a part of the system that has interrupted their lives. You have to show them that you care about their time, that you are not a part of the system and that you too resent having your time wasted and so does your client.

How do the potential jurors carry themselves? Is one of them likely to be like Henry Fonda in* Twelve Angry Men*?

Focus on the Goal Lines Do you want to get an acquittal? Get divorced? Win a monetary award? Do you want punitive damages? When combined with the facts of your case, each of these objectives will lead you to search for a particular type of person with particular biases.

For example, a plaintiff's attorney will not want a doctor on the jury of a medical malpractice case if the issue is a close judgment call. But, what if there was particularly egregious behavior on the part of the defendant doctor? You might very well want to have more competent colleagues who will come down on the defendant very hard.

Profile Establish a profile ahead of time to determine what kind of jurors you want. Very often you want anti-establishment, anti-authoritarian jurors. We are always mindful of *Batson v. Kentucky*.[3] Deliberately try not to, even inadvertently, discriminate on the basis of race, gender or national origin.

Thus, we do not establish a "cognizable group" that we favor or to which we are opposed. When prospective jurors are immigrants, we want to know what hurdles they encountered in their assimilation. We are interested in their attitudes, not the color of their skin. Every juror must be considered as an individual.

Voir dire would be unnecessary if we simply generalized about people or categorized them on the basis of their skin color. For example, generally we like jurors who are angry. A judge once asked us about a cognizable group against which he thought we might be discriminating. In that case we assured the judge, in a jocular way, that our only cognizable group was to find the dumbest people that we could find. He assured us that it would not be a problem in that particular county.

Body Language Before engaging each prospective juror in conversation, take a good look at all of them.

What are they reading, if anything? What does it mean if a prospective juror is reading the *New York Times* as compared to the *New York Post*? How are they dressed? It is said that you can tell everything about a man's wealth by his shoes.

Particularly for women, do they have a modern or traditional haircut? Do they wear a lot of accessories?

A word of caution, always keep in mind that a prospective juror who works or does not work full time might not be dressed as he/she normally would be. Therefore, what does it say if a businessman wears a suit and tie for jury duty?

How do the potential jurors carry themselves? Does this tell you if they will be a leader or a follower? Is one likely to be like Henry Fonda in *Twelve Angry Men*? If necessary, will he/she stick to a position even if no one else feels a certain way? Don't be afraid to ask. This may be your hold-out juror. A mistrial or hung jury may be a victory in your case.

Which jurors like you and your client? Which smile at you and laugh at your jokes? Can you make eye contact with each juror you are willing to sit? Does each look at your client? Or, do any sit with cold looks on their faces and arms crossed?

Background Information and Preparation In all likelihood, the court where your case will be tried will have booklets that are given out to jurors. Become familiar with the text.

Also, most courts now show a video to potential jurors to prepare for jury duty. Take a look at it. You can ask questions about the jurors understanding of it, which will help you to glean information about their intelligence, their level of information retention and their ability to communicate information to others. All are critical aspects of deliberation, and asking will help to create a bond with the prospective jurors.

Keep an eye out for monuments or other items around the courthouse that may be a source of initial pleasantries. For example, on a courthouse in Mineola the words "Justice, God's Idea, Man's Ideal" are etched at the entrance. Ask potential jurors what those words mean to them.

Talk to the commissioner of jurors, who possesses a wealth of knowledge about the jury pool or typical se-

lection procedures. You want to know more about jury service than your adversary or even the judge. Find out when and how much jurors get paid. For how long must their employers pay them? Look at the statutes that allow jurors to be excused for health, hardship or other reasons. You want to empathize with jurors and show them that you care about them.

To our surprise, on a recent case, we learned from the commissioner of jurors that although our jury selection was occurring mid-week, we would nonetheless be getting a fresh batch of jurors, not rejected or recycled from other cases. Often when you begin jury selection in the middle of a week you are faced with jurors who have been "rejected" during *voir dire* in another matter. You must inquire whether this is the first panel each juror has been on during this jury service. If it is not, inquire about the effects of the previous "rejection" and its possible impact on your case.

Questionnaire The Office of Court Administration typically has a one-page questionnaire that jurors complete. Prepare blank questionnaires ahead of time so you can listen more than you write. Take careful notes on your prepared form.

The questionnaire tells of any prior jury service. If potential jurors deliberated to verdict, you may not want them. Why? Conviction rates are high. If they were on a criminal case that went to verdict, they may have voted to convict. You have to ask if they were satisfied with their jury service. Were they fair to both sides? If they say yes, then you may have a juror who voted to convict. If the juror, on the other hand, tells you about how they thought the police were shady or that they distrusted them, that gives you a different perspective on the juror's attitude.

Additional Requests Before *voir dire* you must determine what you want to (and likely can) limit in the way of proof against your client. To limit the proof, you must also curtail your *voir dire*, limiting your questions only to those topic areas that will be important at trial.

If your case is complex or has received media coverage, you may want extra challenges or more time for *voir dire*. Make a written motion to that effect. Each judge will treat this request differently, so you must ask around if you lack personal familiarity. If the judge will not expand your time, consider posing particular questions to the entire panel, and follow up with focused questions to those who respond. Then ask the rest of the panel how they feel about their follow-up responses.

Requests for Inquiries by the Court There are some questions you may not want to ask; appearance is everything. Therefore, you should request, in writing, that the court ask those questions for you.

For example, the typical question, "Is there any physical, emotional or mental reason why you cannot serve as a juror?" You may not want to ask the question that causes a juror to admit to a bladder problem or that he/she was sexually abused as a child.

Techniques This is not a science. Are you a good judge of character? The lawyer should concentrate on asking the questions while a juror consultant should make the notes, preparing the basis for challenges, both for cause and peremptory reasons.

Because you have unlimited challenges for cause, the more jurors you can remove for cause the better. You will have to determine what will impede their ability to be fair and impartial, then ask those jurors questions designed to elicit the desired response.

There are some questions you may not want to ask; appearance is everything. Therefore, you should request, in writing, that the court ask those questions for you.

You want to reveal some of the worst parts of your case to the jurors, but not all in the first round. You introduce the case incrementally and in pieces. If you give them too much in the beginning then you may shock otherwise good jurors into disqualification. To win a challenge for cause, the attorney must get the juror to say that he/she cannot be fair. It needs to come from the juror's mouth, not just the attorney's. In the first part of *voir dire* you introduce the subject matter. Ask jurors:

- "Is there anything about that subject that offends you?" "Look at my client, look him in the eyes, now in your heart of hearts, tell me if you presume him innocent?"
- "Nowhere in the United States Constitution does it say that the People are entitled to a fair trial. Would you be satisfied with someone of your like mind presiding as a juror in your own trial or that of a member of your family or a close friend?"
- "Is this a level playing field or is it already slanted against my client before we even start?"
- "How many of you would require my client to take the stand and testify in his own behalf?"
- "How many of you would require that he vindicate himself?"

Seek Insights into the Jurors' Thoughts *Voir dire* means to "speak the truth." How forward and rude. We barely know these prospective jurors and we are asking them to speak the truth about their private thoughts and experiences.

We have only 1.5 minutes per juror to put the juror at ease, get acquainted and try to find out what is really on their mind. Then we ask the jurors to do all the talking. It is not a perfect system, but it is all we have.

Ask the jurors to talk to you, any time you get an opportunity to know them better, make requests:

- "Talk to me now."
- "Help me out here."
- "Can you be fair to my client?"
- "Now can you follow this case wherever it may lead?"
- "Can you be a trier of fact?"
- "Can you critique the evidence, evaluate it, turn it inside-out in searching for the truth, in trying to find out what happened?"

In a criminal case you might ask:

- "Are you afraid of the police?" "You will be forced to look at police misconduct in this case. Can you do that?"
- "I am telling you up front that my client allegedly made a confession. The police will say he gave himself up. But, in looking at that statement, will you go beyond it? Will you have the courage to determine whether the police overreached in dealing with my client?"

In a civil case, you might say:

- "You will hear evidence in this case about my client's injuries and damages. I will be asking you for compensatory and punitive damages. Do you agree that people deserve to be compensated for their injuries resulting from negligence?"

You must advocate for your client every moment you spend in front of the jury. In the end, the jurors you select will decide your client's fate. Therefore, you must invest some time and resources into preparing your jury selection methodology. Proper preparation will allow you to maximize your time and efforts in front of the jury.

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1. *See* Bennett and Hirschhorn, Bennett's Guide to Jury Selection and Trial Dynamics in Civil and Criminal Litigation, (1995).
2. 75 N.Y.2d 744, 551 N.Y.S.2d 889 (1989).
3. 476 U.S. 79 (1986). *See also People v. Blunt*, 162 A.D.2d 86, 561 N.Y.S.2d 90 (2d Dep't 1990); *People v. Kern*, 75 N.Y.2d 638, 555 N.Y.S.2d 647 (1990); *People v. Garcia*, 217 A.D.2d 119, 636 N.Y.S.2d 370 (2d Dep't 1995).

Reviewing Documents for Privilege: A Practical Guide to the Process

BY DANIEL A. COHEN

Reviewing documents for privileged material is no picnic; actually, it's sheer drudgery. Compiling a privilege log to reflect privilege assertions is even greater drudgery, but careful planning from the start can make the entire process more efficient and effective.

A clear understanding of the grounds for asserting privilege in federal discovery proceedings is vital as the documents are reviewed. When a strategy for preparing a suitable privilege log is also in place, the chances are good that the review can be completed without errors or needless duplication of effort.

Although the temptation exists to plunge into the documents when they first arrive, the critical first step is to prepare a full duplicate set. The originals are then set aside in separate files, where they will be available for reference if a document is lost, accidentally destroyed or inappropriately marked during processing.

In determining whether a privilege applies, presume that every privilege asserted as a basis for withholding documents or producing them in redacted form will be subject to challenge, and that ultimately the court will conduct an *in camera* review of every document at issue. While it is critical to be aggressive in protecting privileged material that could adversely affect a client's present and future litigation, it is also true that an inability to support privilege assertions can erode your credibility with the court and tie up a client's resources in litigation.

Therefore, it is vitally important to (1) have a good faith basis for every privilege assertion, and (2) scrupulously maintain the relevant documents in an organized fashion that enables ready production for *in camera* review.

Rather than claiming privilege for anything that "looks" privileged and worrying about the details only after challenges arise, speak with the client to obtain a feel for the circumstances of the case and gather all the relevant background information. This includes (1) the general chronology of events leading up to the litigation, (2) when the client first anticipated that litigation might arise, and (3) the key players, *i.e.*, in-house and outside counsel, investigative staff, and company employees involved in pre-litigation activity. Preserve this information in a file memorandum for ready reference as documents are reviewed.

In addition, for each potentially privileged document, if the relevant information is not otherwise determinable, consult with your client about (1) who wrote the document and for what purpose, (2) who received it, (3) what positions each author or recipient held, (4) how the document fits into the chronology of relevant events, and (5) its approximate date.

The principal grounds for privilege assertions are attorney-client communications and attorney work product. Other privileges also apply, *e.g.*, the federal self-evaluation privilege,[1] or a privilege recognized under the state whose law governs the issue, *e.g.*, the accountant's privilege.[2] If a document is relevant both to state and federal claims, however, a privilege recognized only under state law will not prevent discovery.[3] Where a document as a whole is not privileged or protected, but contains within it portions that are (*e.g.*, portions of corporate minutes that reflect communications with counsel), the correct course is to produce the document in redacted form.

Attorney-Client Privilege

A communication is privileged if made (1) between a client or his representative and the lawyer or his representative, (2) in confidence, (3) to facilitate rendition of legal services.[4] A client's communications with outside experts, *e.g.*, accountants, when made at the attorney's direction to facilitate rendition of legal advice, are similarly privileged.[5] When an otherwise privileged com-

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munication has attachments, each relevant attachment must individually satisfy the criteria for falling within a claimed privilege.[6] Thus, each attachment should appear as a separate entry on the privilege log.

Voluntary disclosure to a third party, including voluntary production of privileged documents in prior litigation or regulatory proceedings, destroys the privilege.[7] However, the privilege *may* still attach if the prior disclosure was compelled (*e.g.*, pursuant to court order),[8] or alternatively, was "inadvertent."[9] Further, disclosure to another party's counsel under a "common interest" or "joint defense" agreement may preserve the privilege.[10]

Investigative reports prepared in the ordinary course of business are not work product, even if litigation ultimately ensues.

The mere fact that an attorney has received or originated a communication does not render it privileged. Communications that do not qualify for privilege include:

(1) *Business Advice*: Legal advice is privileged, but business advice is not.[11] This test applies both to communications to or from in-house counsel and those to or from outside counsel.[12]

(2) *Lawyer's Meeting Notes*: A lawyer's contemporaneous notes of a client's otherwise non-privileged meeting with a third party generally are not privileged.[13]

(3) *Factual Investigations*: The mere fact that an attorney conducts a factual investigation does not render factual reports about the investigation privileged.[14] But the report may be subject to attorney-client privilege if the purpose was to provide legal advice, or to protection as work product if it was prepared in anticipation of litigation.

(4) *"Cc" to Counsel*: Merely "copying" a lawyer on a document addressed to a third party, or transmitting an existing document to a lawyer, does not shield it from disclosure.[15] However, *the fact that* a document was transmitted to counsel may be subject to privilege if the transmittal was for purposes of obtaining legal advice.[16] Thus, transmittal letters to counsel may be withheld and, although the value is often marginal, "cc" lines reflecting transmittal to counsel of non-privileged documents may be redacted.

Work Product Protection

Work product protection extends to (1) documents and tangible things otherwise discoverable that are (2) prepared in anticipation of litigation or for trial (3) by or for another party or by or for that party's representative.[17] By definition, the applicable federal rule covers documents created by or at the direction of a party as well as those created at the direction of counsel.[18]

Ordinary and attorney work product Work product includes both (a) "ordinary" work product," *i.e.*, facts gathered in the course of the investigation and (b) "opinion" or "attorney" work product reflecting the "mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."[19] Ordinary work product enjoys only qualified protection (*i.e.*, is subject to a "substantial need" test), while the prohibition against disclosing attorney work product is generally absolute. Communications that embody counsel's legal theories should be designated both work product and, if applicable, privileged attorney-client communications.

Work product protection attaches once the threat of litigation is imminent.[20] The protection may attach even if the documents were prepared in anticipation of litigation *other than* the current litigation.[21] However, the protection attaches only to documents *created* in anticipation of litigation or for trial, not to pre-existing documents that were *obtained* or *reviewed* for that purpose.[22]

Status of investigative reports Investigative reports prepared in the ordinary course of business are not work product, even if litigation ultimately ensues.[23] To constitute work product, the report must have been created *because of* existing or expected litigation.[24]

The protection for such reports extends not only to documents created in order to aid existing or prospective litigation, but also to documents that "are intended to inform a business decision influenced by the prospects of the litigation."[25] However, documents that would have been prepared in substantially the same form *irrespective* of the litigation are not protected.[26]

Effect of waiver Voluntary disclosure of work product to a third party does not necessarily destroy the protection. The key issue is whether the disclosure "is inconsistent with the maintenance of secrecy from the disclosing party's adversary."[27]

Thus, by voluntarily disclosing work product to the government, a grand jury target waives the protection, while a party who has done so in the process of assisting the government's investigation of a common adversary has not waived the protection in civil proceedings against that adversary.[28] Although voluntary disclosure of privileged attorney-client communications normally constitutes a "subject matter" waiver of all documents

of like character, voluntary disclosure of work product generally waives the protection only for the items actually disclosed.[29]

Creating Privilege Logs

A party who objects to some or all of a discovery request on privilege grounds must disclose what documents are being withheld "in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."[30] Failure to identify such documents and the basis for withholding them can result in a finding of waiver of privilege.[31]

Timing issues At least two federal courts, by local rule, require service of the log at the time of the response to the discovery request at issue.[32] Some opponents may try to interpret the rule as meaning that the privilege log should be made available when objections are made to the discovery requests themselves. The customary interpretation of the rule, however, is that the log is due when non-privileged documents are made available for inspection and copying.

As is true for other litigation document, creation of the log should not be rushed. The privilege log will be the focus of any subsequent privilege challenges, and sloppy logs invite adverse rulings. Further, although you can always later amend or supplement the log or withdraw privilege claims, frequent revisions may affect the log's overall credibility. Therefore, if you require more time to complete the log, you should notify your adversary and obtain a suitable extension.

Log contents For each document withheld, the privilege log should state (1) the document type (letter or memorandum), (2) general subject matter, (3) date, (4) author(s), (5) addressee(s), (6) other recipients, and (7) privileges asserted (including any privileges based on governing state law).[33]

Identify each addressee or recipient who is an attorney (stating, for outside counsel, their law firm affiliation, and whom they represent), either directly on the log or in a cover letter. Normally, two separate logs should be produced: one log for withheld documents, and a separate log for redacted documents.

The latter should identify the redacted documents by "Bates"[34] numbers and set forth the basis for the redactions. Numbering the documents on the log in sequence will enable the parties and the court to ascertain readily which documents are being challenged.

Style and organization When creating a log, be consistent, *e.g.*, characterize all documents of the same type in the same way; use a consistent methodology for logging print-outs of chained e-mails that bear multiple dates, authors and recipients; describe all materials having the same subject matter in a uniform fashion.

When identifying subject matter, give a succinct description that accurately characterizes the material but do not disclose the contents of the communication. The objective is not to hide the ball, but to enable your adversary and the court to evaluate the privilege assertions intelligently. Both determining what privileges may apply and describing a communication's subject matter usually involve fine legal judgments based on a close reading of the documents; they are therefore a lawyer's responsibility, not a paralegal's.

Exceptions to document-by-document log Normally, each document withheld must be identified. However, courts "retain some discretion to permit less detailed disclosure in appropriate cases."[35] More limited disclosure is appropriate "if (a) a document-by-document listing would be unduly burdensome and (b) the additional information to be gleaned from a more detailed log would be of no material benefit to the discovering party in assessing whether the privilege claim is well grounded."[36]

The privilege log will be the focus of any subsequent privilege challenges, and sloppy logs invite adverse rulings.

For example, where a document request seeks production of a law firm's files pertaining to a litigation, blanket claims of attorney-client privilege and/or work product would cover most documents created by the firm and most communications with its client. In such circumstances, a court "may permit the holder of withheld documents to provide summaries of the documents *by category* or otherwise limit the extent of his disclosure."[37] Similarly, parties commonly do not log otherwise privileged documents relating to the litigation that are created after its commencement.

Interplay with other objections Ordinarily, privilege logs are furnished only for documents that fall within discovery demands to which a party is otherwise responding. Where the party objects to an entire request on other grounds, *e.g.*, relevance, undue burden, or untimeliness, common sense dictates—and common practice is—to reserve all privilege objections, and hold off producing a privilege log pending resolution of the more general objections.[38]

Record-keeping Even if the log you produce to adversaries is not numbered, the log maintained at your firm should be. Each privileged document should go into a file folder bearing the corresponding number, or

be inserted behind a corresponding numbered tab in a document binder.

For redacted documents, the folder or tab entry should contain the document in both redacted and unredacted form. If you create these folders or tabbed binders at the same time you produce the log to your adversary, you will ensure that you can account for every document on the log before any privilege challenges ensue.

Conducting a privilege review involves four critical skills—preparation, carefulness, consistency and organization.

Whenever a privilege log is sent to an adversary, put a copy in the "litigation binder," to serve as a record of what log was produced at any given time for any given adversary.

Supplementation Upon further review, you may find that the log inadvertently omitted some privileged documents, or contained some mistaken information regarding dates, authors, recipients, etc., or that some privilege assertions were erroneous.

When this happens, the best practice is to timely amend or supplement the privilege log and, if appropriate, the document production to correct any errors. Similarly, if a follow-up review shows that privileged materials were inadvertently produced, contact your adversary promptly to obtain their return.

Conclusion

Conducting a privilege review involves four critical skills—preparation, carefulness, consistency and organization. The process is also holistic, because the basis for asserting (or not asserting) privilege for certain documents often turns on their relationship to other documents.

Although taking a thoughtful, holistic approach does not guarantee that an adversary or the court will endorse the privilege assertions, it will maximize the likelihood of successfully defending those assertions that matter most.

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1. *See Sheppard v. Consolidated Edison Co.*, 893 F. Supp. 6 (E.D.N.Y. 1985).
2. *Commercial Union Ins. Co. v. Talisman, Inc.*, 69 F.R.D. 490 (E.D. Mo. 1975).
3. *Wm. T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982).
4. Weinstein & Berger, 3 *Weinstein's Federal Evidence* § 503.10 (2d ed. 1997).
5. *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989).
6. *Leonen v. Johns-Manville*, 135 F.R.D. 94, 98 (D.N.J. 1990).
7. *Permian Corp. v. United States*, 665 F.2d 1214, 1219-22 (D.C. Cir. 1981).
8. *Leonen v. Johns-Manville*, 135 F.R.D. 94, 99 (D.N.J. 1990).
9. *Hydraflow, Inc. v. Enidine, Inc.*, 145 F.R.D. 626, 638 (W.D.N.Y. 1993).
10. *United States v. Schwimmer*, 892 F.2d 237, 243-44 (2d Cir. 1989).
11. *United States v. Adlman*, 68 F.3d 1495, 1499 (2d Cir. 1995).
12. *United States Postal Serv. v. Phelps Dodge Ref. Corp.* 852 F. Supp. 156, 160 (E.D.N.Y. 1994).
13. *New Orleans Saints v. Griesedieck*, 612 F. Supp. 59, 63 (E.D. La. 1985), *aff'd*, 790 F.2d 1986 (5th Cir. 1986).
14. *Diamond v. Mobile*, 86 F.R.D. 324, 328 (S.D. Ala. 1978).
15. *Phelps Dodge*, 852 F. Supp. at 163-64 (E.D.N.Y. 1994).
16. *See Leonen*, 135 F.R.D. 94, 98 (D.N.J. 1990) (motive for communication is relevant to privilege determination).
17. Fed R. Civ. P. 26(b)(3).
18. 8 Wright et al., *Federal Practice & Procedure* § 2024, at 361 (1994).
19. Fed. R. Civ. P. 26(b)(3).
20. *Occidental Chem. Corp. v. OHM Remediation Servs. Corp.*, 175 F.R.D. 431, 438-39 (W.D.N.Y. 1997).
21. *Jumper v. Yellow Corp.*, 176 F.R.D. 282, 286 (N.D. Ill. 1997).
22. *Zucker v. Sable*, 72 F.R.D. 1, 3 (S.D.N.Y. 1995).
23. *Mission Nat'l Ins. Co. v. Lilly*, 112 F.R.D. 160, 163 (D. Minn. 1986) (denying protection to reports prepared by attorneys in ordinary course of adjusting a "possibly resistible" claim).
24. *See United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998).
25. *Id.* at 1197-98.
26. *Id.* at 1202.
27. *GAF Corp. v. Eastman Kodak Co.*, 85 F.R.D. 46, 51-52 (S.D.N.Y. 1979).
28. *Republic of Philippines v. Westinghouse Elec. Corp.*, 132 F.R.D. 384, 390-91 (D.N.J. 1990).
29. *Pittman v. Frazer*, 129 F.3d 983, 988 (8th Cir. 1997).
30. Fed. R. Civ. P. 26(b)(5).
31. *Burns v. Imagine Films Entertainment,* 164 F.R.D. 589, 594 (W.D.N.Y. 1996).
32. *See* U.S. Dist. Ct. Rules S. & E.D.N.Y., Civil Rule 26.2(c).
33. *See* U.S. Dist. Ct. Rules S. & E.D.N.Y., Civil Rule 26.2(a)(2)(A).
34. The "Bates" terminology is a holdover from the days when it designed a hand-operated stamp that advanced numbers automatically. This chore is now largely handled by photocopying machines that place a number on documents as the duplicates are made.
35. *In re Imperial Corp. of Am.*, 174 F.R.D. 475, 477-78 (S.D. Cal. 1997).
36. *S.E.C. v. Thrasher*, 92 Civ. 6987, 1996 U.S. Dist. LEXIS 3327, at 2 (S.D.N.Y. Mar. 19, 1996).
37. *Id.*
38. *But see Burns v. Imagine Film Entertainment, Inc.*, 164 F.R.D. 589, 593-94 (W.D.N.Y. 1996) (denying privilege assertions where responding party refused to furnish a log or explain basis of its privilege assertions until court first ruled on relevance and burden objections).

APPENDIX: SAMPLE PRIVILEGE LOG

XYZ Services Corp. v. Jack Jones[*]

No.	Date	Type	Author	Addressee	Other Recipients	Topic	Privileges Asserted
1.	circa 1/94	Notes	Coleman	None	Adams; Bing; Eckert	Investigation of Jones	Work product
2.	1/15/94	Report	Coleman	Adams	Bing; Eckert	Jones investigation summary	Attorney-client; Work product
3.	2/1/94	Letter	Adams	Eckert; Fish	Bing	Potential litigation - Jones	Attorney-client; Work product
4.	2/8/94	Memo	Fish	Gray	Eckert	Preparation of complaint	Work product
5.	2/10/94	Notes	Gray	None	N/A	Conversation w/ Dietrich re Jones investigation	Attorney-client; Work product
6.	2/10/94	Memo	Gray	Fish	Eckert	Conversation w/ Dietrich re Jones investigation	Attorney-client; Work product
7.	2/11/94	Memo	Eckert	Fish	N/A	Theories of liability	Work product
8.	2/13/94	Draft	Fish	None	Adams; Bing; Eckert	Draft complaint	Work product
9.	2/13/94	Letter	Fish	Adams; Bing	Eckert	Draft complaint	Attorney-client; Work product
10.	circa 2/94	Annotations	Coleman	None	N/A	Notes on draft complaint	Work product
11.	Undated	Chart	Coleman	None	N/A	Payments to Jones	Work product

* *XYZ in-house counsel involved in this matter include:* Alan Adams, Beth Bing; *XYZ employees involved in pre-trial investigation include:* Charles Coleman, Dixie Dietrich. *The law firm of Eckert & Fish (E&F) has acted as outside counsel. E&F attorneys include:* Evan Eckert, Francis Fish. *E&F paralegals include:* George Gray.

OFFICIAL FORM

Reproduced on these two pages are the two sides of a new form issued by the Office of Court Administration for use when a Request for Judicial Intervention is needed.

UCS-840(REV 1/2000)

REQUEST FOR JUDICIAL INTERVENTION

COURT	COUNTY	INDEX NO.	DATE PURCHASED

For Clerk Only
IAS entry date
Judge Assigned
RJI Date

PLAINTIFF(S):

DEFENDANT(S):

Date issue joined: _____ Bill of particulars served (Y/N): [ ]Yes [ ]No

NATURE OF JUDICIAL INTERVENTION (check ONE box only AND enter information)

[ ] Request for preliminary conference

[ ] Note of issue and/or certificate of readiness

[ ] Notice of motion (return date:_____)
Relief sought _____

[ ] Order to show cause
clerk enter return date:_____)
Relief sought_____

[ ] Other ex parte application (specify:
_____)

[ ] Notice of petition (return date:_____)
Relief sought _____

[ ] Notice of medical or dental malpractice action
(specify:_____)

[ ] Statement of net worth

[ ] Writ of habeas corpus

[ ] Other (specify: _____
_____)

NATURE OF ACTION OR PROCEEDING (Check ONE box only)

ENVIRONMENTAL	
[ ] Contested	-CM
[ ] Uncontested	-UM
COMMERCIAL	
[ ] Contract	-CONT
[ ] Corporate	-CORP
[ ] Insurance (where insurer is a party, except arbitration)	-INS
[ ] UCC (including sales, negotiable instruments)	-UCC
[ ] *Other Commercial	-OC
_____	
REAL PROPERTY	
[ ] Tax Certiorari	-TAX
[ ] Foreclosure	-FOR
[ ] Condemnation	-COND
[ ] Landlord/Tenant	-LT
[ ] *Other Real Property	-ORP
_____	
OTHER MATTERS	
[ ] *_____	-OTH

* If asterisk used, please specify.

TORTS	
Malpractice	
[ ] Medical/Podiatric	-MM
[ ] Dental	-DM
[ ] *Other Professional	-OPM
_____	
[ ] Motor Vehicle	-MV
[ ] *Products Liability	-PL
_____	
[ ] Environmental	-EN
[ ] Asbestos	-ASB
[ ] Breast Implant	-BI
[ ] *Other Negligence	-OTN
_____	
[ ] *Other Tort (including intentional)	-OT
_____	
SPECIAL PROCEEDINGS	
[ ] Art. 75 (Arbitration)	-ART75
[ ] Art. 77 (Trusts)	-ART77
[ ] Art. 78	-ART78
[ ] Election Law	-ELEC
[ ] Guardianship (MHL Art. 81)	-GUARD81
[ ] *Other Mental Hygiene	-MHYG
_____	
[ ] *Other Special Proceeding	-OSP
_____	

In many courts, failure to use this new form is now a basis for refusing to accept an RJI application.

Check "YES" or "NO" for each of the following questions:

Is this action/proceeding against a

YES NO
[ ] [ ] Municipality: (Specify_____)

YES NO
[ ] [ ] Public Authority: (Specify_____)

YES NO
[ ] [ ] Does this action/proceeding seek equitable relief?
[ ] [ ] Does this action/proceeding seek recovery for personal injury?
[ ] [ ] Does this action/proceeding seek recovery for property damage?

Pre-Note Time Frames:
(This applies to all cases except contested matrimonial and tax certiorari cases)

Estimated time period for case to be ready for trial (from filing of RJI to filing of Note of Issue):

☐ Expedited: 0-8 months ☐ Standard: 8-12 months ☐ Complex: 13-15 months

Contested Matrimonial Cases Only: (Check and give date)

Has summons been served? ☐ No ☐ Yes, Date_____

Was a Notice of No Necessity filed? ☐ No ☐ Yes, Date_____

ATTORNEY(S) FOR PLAINTIFF(S):

Self Rep.*	Name	Address	Phone #
☐			
☐			

ATTORNEY(S) FOR DEFENDANT(S):

Self Rep.*	Name	Address	Phone #
☐			
☐			

*Self Represented: parties representing themselves, without an attorney, should check the "Self Rep." box and enter their name, address, and phone # in the space provided above for attorneys.

INSURANCE CARRIERS:

RELATED CASES: (IF NONE, write "NONE" below)

Title	Index #	Court	Nature of Relationship

I AFFIRM UNDER PENALTY OF PERJURY THAT, TO MY KNOWLEDGE, OTHER THAN AS NOTED ABOVE, THERE ARE AND HAVE BEEN NO RELATED ACTIONS OR PROCEEDINGS, NOR HAS A REQUEST FOR JUDICIAL INTERVENTION PREVIOUSLY BEEN FILED IN THIS ACTION OR PROCEEDING.

Dated:

_____
[SIGNATURE]

_____
[PRINT OR TYPE NAME]

_____
ATTORNEY FOR

ATTACH RIDER SHEET IF NECESSARY TO PROVIDE REQUIRED INFORMATION

\forms\rji2000.wpd

EULOGY

In Memoriam: Lawrence H. Cooke 1914 - 2000

Following is the eulogy that Chief Judge Judith S. Kaye delivered at the funeral of former Chief Judge Lawrence H. Cooke on August 21 at St. Peter's Roman Catholic Church in Monticello, N.Y.

Judge Cooke was Chief Judge of the Court of Appeals from 1979 to 1985. He served as a member of the Journal's Board of Editors from 1984 to 1997. He died August 17 at the age of 85.

Leaving New York City early this morning, I thought of the many, many times I have traveled these familiar roads coming home to Monticello—coming home from college and law school, coming home to introduce Stephen, my husband, to my mother and father, coming home to celebrate the centennial of my high school, the retirement of our fabulous Chief Judge, the naming of the Lawrence H. Cooke Sullivan County Courthouse, and on and on. Invariably in coming home there has been a sense of excitement, anticipation, joy. Always my heart beat just a little faster as we approached Sullivan County, and Monticello, and Broadway, and encountered the wonderful people, lifetime friends, here in my hometown.

Today, of course, the emotions are very different as my lifetime friends gather to bid farewell to a lifetime hero, Chief Judge Lawrence H. Cooke, the Chief, or—as he was widely known—just plain "Larry." As we each privately struggle with our own sweet memories and sense of loss, what comes first to mind is to convey profound sympathies to the people who were nearest and dearest to him, to his children Edward, George and Lauren and their spouses, to his grandchildren and great-grandchildren—every one of them a source of pride for him—and of course to Alice, his "saintly wife" (those are his words, not mine, but I concur fully in the sentiment). Theirs was an incredible love story of more than 61 years. You just can't speak of Larry without immediately thinking of that beautiful, gentle lady who was his strength and his anchor.

These last few days since his passing, we have been challenged to sum up his greatest achievements, his lasting contributions, the legacy of the rich and productive life of Chief Judge Lawrence H. Cooke.

My own instincts took me immediately to the record books, the vital statistics—that's a lawyerly thing to do—beginning with his election as Town Supervisor, then a distinguished trial and appellate judge, ultimately Judge and Chief Judge of the state's highest court, Chief Judge of the entire New York State court system, head of the National Center for State Courts and nationwide Conference of Chief Justices. He served this state brilliantly to the very last minute permitted by law, then continued to contribute his prodigious talents as counselor, law professor and Judicial Screening Committee Chair. The vital statistics alone bespeak a life of public service, of rectitude and high integrity, a life dedicated to the law and the principle of justice for all.

Can anyone question that he lived out his father's advice to the letter: "If in doubt, take the high road"? Do the right thing.

You know, too, from a moment's glance at the record books, that this was a person of boundless energy and capacity. "Waste not, want not." Again, one of his life principles; and again, he was true to it. His legendary workday began at 4 a.m., I am told. (I have to admit that I have this only on secondhand authority.)

He believed that change, improvement, betterment was possible—whether of the individual, or the court system or society at large—and he committed himself with every fiber of his being to actually making things better. As the chief executive officer of the court system, he instituted dozens of bold reforms, from greater openness and efficiency, to community dispute resolution centers, to upgraded facilities, to measures assuring equal opportunity. He was far ahead of his time in actively supporting and advancing women and minorities in the courts—and as a personal beneficiary of those efforts I am most grateful to him.

Can anyone question that he lived out his father's advice to the letter: "If in doubt, take the high road"?

The books show us, too, that as a judge Lawrence Cooke's commitment to fairness and justice was the core of his jurisprudence, whether constitutional rights, or protection of free speech, or protection against discrimination and arbitrary government action. As Chief Judge, he helped to place the Court of Appeals, as well as our court system

generally, at the very apex of state judiciaries.

Truly an exemplary life. A life well lived.

But would any of us who lived and worked alongside Larry sum up his greatest achievements, his legacy, simply from the record books and vital statistics? I think not. Surely he would not have measured the significance of his life that way. To speak only from the cold records is to ignore his amazing warmth, his through-and-through genuineness, humility and sincerity, the marvelous down-to-earth quality of his personality. His commitment to individual justice was not abstract or bookish, and it was not confined to the courts. At the center of all the things he did, whether professional or personal, was the simple fact that he liked, and believed in, and cared about, people. People were important to him.

So many of us here have stories of his inexhaustible kindness and sensitivity, how he touched our lives in some uniquely meaningful way, with a birthday card, a holiday greeting, a telephone call, a note or postcard, an appointment to a committee, a chat at the local diner over a piece of pie, an evening with his cherished fellow volunteer firemen. He wasn't just born with the love of his community, he earned it every single day.

Joe Traficanti years ago told me one of my favorite stories typifying Larry. It was about Barney and Ethel, who operated the service station in Accord, where Larry often stopped for gas and ice cream on the trip between Albany and Monticello. Even as his license plate moved up from County Court to Supreme Court, to Court of Appeals Number One, to Barney and Ethel he was always known as "Larry." The Town Court Justice, by contrast, they called "Judge Lipton." I think Tony Kane hit it right on the nose when he said, "His mission was to treat everyone equally." However high he rose in public life, however powerful he became, however long the list of his accomplishments, Larry treated everyone, everyone, with kindness and respect. The fact is, he changed a lot of things, but some things never changed. His hat size never changed. His concern for people never changed, and he never deviated from his own fundamental values. Always he took the high road.

Having been born and raised in Monticello, I cannot remember a day in my own life when I did not know, and greatly admire, Larry, from the time he and Alice shopped in our store—they were adored by my parents—to the miraculous day I was appointed a Judge of the Court of Appeals and served on the Court with him—imagine, *two* citizens of Monticello on the Court at the same time—to our last visit not long ago. As the Court's Junior Judge, I had the privilege of not only watching and learning from a master but also regularly receiving news from home, like an illness in the Cooper family or a fire at Cohen's Hardware. I cannot begin to calculate, or acknowledge, the impact of this great man on my own life. I am confident that many others feel the same about his impact on their lives. And isn't *that*, in the end, the most significant contribution any of us can hope to make, the most lasting legacy of all?

I overstated a bit at the outset when I said that always before today I felt a sense of joy coming home. Truth to tell, my last trip home was to visit Larry at the hospital and, while we were happy to see one another, joy was not exactly the predominant emotion of the day. Oh, there were jokes and chuckles—Larry's twinkling wit, his great sense of humor, his concern for his visitor never left him. But it was clear that he was debilitated and in pain. Above all, he simply, desperately wanted to go home. Not long after, I learned that he had indeed gone home, that he had passed peacefully just as he wished, at home, in the bosom of his loving family.

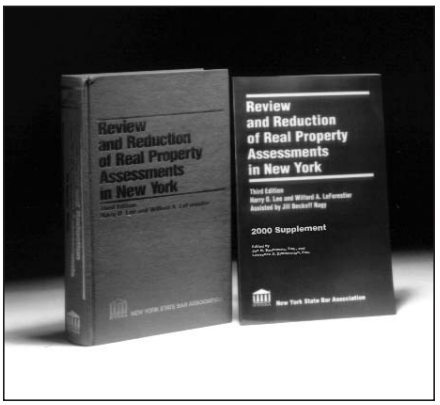
Lawrence H. Cooke (1984 photo)

I agree with George Cooke's words quoted in the newspaper the other day. You think you prepare for things like this—surely we've anticipated this day for some time now—and still it is so hard. Hard for his wonderful family, and hard for all of us. Hard to stop thinking about the remarkable person who is no longer with us—the trademark hat, the one-of-a-kind smile, the humor, the energy, the caring, the courage. Hard to stop thinking about the lessons exemplified by his life, lessons that will forever be with us: to apply your talents to the fullest to help others; treat all people equally, with kindness, dignity and respect; walk the high road, however difficult that may at times be; stand up for what you believe is right and fair; above all, be true to yourself.

A life of love and family. Of kindness and goodness to other people. Of accomplishment and contribution to society. A life well lived. Truly, a life well lived.

Review and Reduction of Real Property Assessments in New York

Third Edition



Authors

Harry O. Lee, Esq.
Wilford A. Leforestier, Esq.
Lee & Leforestier
Troy, NY

The answer to the question "How much are the taxes?" and inferentially, "What is the amount of the assessment?" could be the deciding factor in whether a sale of real property even reaches the contract stage. Even if no sale is contemplated, a successful challenge of an unfair assessment will ensure that your client is not wasting valuable income on exorbitant taxes. *Review and Reduction of Real Property Assessments* discusses step-by-step the procedures for the review of real property assessments.

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Especially noteworthy are the introduction of the small claims procedure for homeowners, discussion of major changes in methods of proof allowed in tax assessment proceedings and expanded treatment of special valuation problems.

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POINT OF VIEW

Treatment Option for Drug Offenders Is Consistent With Research Findings

BY ALAN I. LESHNER

The program that New York's chief judge, Judith Kaye, has instituted to give nonviolent drug-addicted defendants the option to enter treatment programs instead of being sentenced to prison sends the clearest signal to date that we as a nation are moving beyond the simplistic, false thinking that has long pitted criminal justice and treatment approaches against each other. It appropriately treats public health and public safety approaches to drug problems as complementary strategies, not incompatible alternatives.

This policy is consistent with 20 years of scientific research showing that drug treatment for addicted criminals has yielded consistently high returns for society. Drug-addicted offenders who receive treatment during and after incarceration use 50% to 70% fewer drugs than those who are untreated. Treated offenders are also 50% to 60% less likely to end up back in prison. Nor are these merely transient effects; they hold for at least four years after release.

The importance of these findings becomes glaringly obvious in light of the huge correlation between drug abuse and crime. Studies from the National Institute of Justice show that 50% to 80% of inmates in jails and prisons have drug abuse problems serious enough to merit treatment. By helping many of these individuals to live law-abiding lives, appropriate treatment can save the public tens of millions of dollars annually. Treating an individual on parole or probation costs only half as much as housing that individual in prison—$10,400 versus $20,000. Various studies show a cost saving of $4 to $7 for every $1 invested in drug treatment.

Given these statistics, it is foolish not to blend criminal justice and treatment approaches, providing drug abusers with treatment when we have them in the relatively controlled circumstances of prison, probation, or parole. It makes no sense to keep warehousing and re-warehousing addicted offenders when we can break the recidivism cycle with strategically administered treatment interventions.

New York is not the first state to follow the scientific evidence in this way, although it is the first to do so comprehensively. The blending trend started in 1994, when a dozen jurisdictions across the nation set up experimental "drug courts" in an effort to shrink overwhelming dockets of drug-related criminal cases. Drug courts handle only nonviolent drug-related crime, and route addicted criminals to appropriate treatment rather than prison. They have been so successful that authorities have now established more than 300 drug courts, with hundreds more in the planning stages.

At the national level, the blending concept underlies a joint initiative of Drug Czar General Barry McCaffrey, Attorney General Janet Reno, and Secretary of Health and Human Services Donna Shalala. Titled "Breaking the Cycle," the program uses treatment interventions to attack each link in the chain that leads from addiction to crime and incarceration, only to be repeated over and over again in many individuals' lives. The initiative, recently presented to 900 state and local law-enforcement officials earlier this year, includes special drug courts that handle cases involving nonviolent drug offenders, intensive drug monitoring in the federal criminal justice system, and a crash program to expand prison drug treatment programs.

This growing trend is a welcome sign that we are finally ready to go beyond naive and outmoded objections to the blending approach. One such objection is that drug abuse treatment coddles criminals. On the contrary, an approach that integrates corrections and recovery makes greater demands on criminals than one that relies only on prison. When progress in treatment is added to other conditions for parole, individuals cannot simply wait out their terms. When drug courts sentence nonviolent drug-addicted offenders to treatment, these individuals must fully comply with stringent treatment and monitoring requirements—and make progress—or face penalties, including re-incarceration.

Another objection to treating drug-addicted offenders has been based on the mistaken belief that prison inmates are poor candidates for treatment. This objection has been advanced by people who think that addicts, and especially prisoners, are weak-willed or fundamentally unwilling to change their ways, and so are unlikely to stay the arduous course to recovery. In fact, scientific research has documented that legal pressure for treatment—as an alternative to incarceration, in exchange for a shortened sentence, or to keep a conditional parole—can actually improve the likelihood of success in drug treatment.

As we move forward with this blended approach, however, it will be critical that we stay completely consistent with what the scientific evidence shows. This has not always been the case. For example, a recent study found that although 40% of U.S. jails and prisons claim that they offer some form of drug treatment, many of these programs are too brief or use untested, simplistic techniques. The scientific studies show that drug treatment needs to attend to the whole individual to be effective, whatever its setting. In this respect, too, New York sets a good example: its court-mandated treatment will generally last two years

CONTINUED ON PAGE 55

Lawyer's Bookshelf

May It Please the Court! by Leonard Rivkin with Jeffrey Silberfeld, published by Carolina Academic Press, Durham, N.C. (www.cap-press.com), 2000, 437 pages, $30, hardcover. Reviewed by Ellin M. Mulholland.

As one century ends and another begins, the legal literature now includes the professional autobiography of a lawyer whose career spanned the last half of the 20th century.

May It Please the Court! written by Leonard Rivkin with his law partner, Jeffrey Silberfeld, details the life in the law of the founding partner of the firm now known as Rivkin, Radler & Kremer. Its main office is now in Uniondale on Long Island.

The book is a fascinating work—far more gripping than the countless legal novels that line the shelves of libraries and far more instructive than the "how to" manuals that are offered as part of the continuing legal education courses now mandated for practicing attorneys in New York State.

From humble beginnings in the 10-feet-deep back room of a storefront office in Freeport to 94,000 square feet on three floors in a magnificent office complex in Uniondale, Leonard Rivkin's practice has increased and multiplied. Initially, he represented plaintiffs, injured parties on whose behalf he brought lawsuits. As time went by, he was retained by defendants, corporations, global manufacturers, banks and insurance companies against whom lawsuits were brought.

Above all, Leonard Rivkin reveals himself as a litigator, a real-life trial lawyer who handled, tried and settled some of the most significant lawsuits of the past 50 years.

Does *May It Please the Court!* explain the autobiographer's huge success in the law? The answer is yes.

In this autobiography we meet a lawyer of immense dedication and unwavering determination. We observe a man sure of his talent and unafraid to expend the hours, days, months and sometimes years needed to learn the intricacies of his clients' cases and to represent their interests to the best of his ability. Although Leonard Rivkin is now retired from the active practice of law, we see that he still follows his own superb advice—he markets the firm that bears his name and he extols the advantages of a firm able to represent clients in litigation on a national basis.

Proud of his accomplishments as only a lawyer who has achieved the preeminence of the author should be, Leonard Rivkin does not hesitate to share with his readers the pain of a judicial inquiry into his practice, or the joy when all charges against him were dismissed by New York's highest court, the Court of Appeals. He also admits that, like every lawyer who ever practiced, he did not win the hand of every prospective client he courted.

In this candid autobiography, Leonard Rivkin's love of and respect for the law shines forth. Fortunately, his unremitting hard work was rewarded by the great satisfaction and fun he enjoyed. Throughout, the authors memorialize and provide insights into some of the most fiercely contested and difficult civil lawsuits of the last century: the Staten Island gas tank disaster, the bank failure of Franklin National, the Agent Orange herbicide used in the Vietnam War, and the controversies concerning environmental and hazardous waste insurance coverage.

May It Please the Court! does please, and should please not only the courts and practitioners of the law but also anyone interested in reading the history of American civil law and the life of a lawyer of "grace, charm and class," as Leonard Rivkin was described by Victor Yannacone, one of his adversaries in the Agent Orange litigation.

ELLIN M. MULHOLLAND was for many years a trial lawyer with Herzfeld & Rubin, P.C., in New York.

New York Zoning Law and Practice, 4th Edition, by Patricia E. Salkin, published by West Group, December 1999, 1,878 pages, $350, three looseleaf-bound volumes, bimonthly newsletter and forms on disk, updated annually. Reviewed by James F. Gesualdi.

All practitioners have certain books they rely on for their core practice areas. Over the years, *New York Zoning Law and Practice* has been such a book for the land use practitioner. Although regularly supplemented with new pocket parts, this venerable treatise has until very recently been without a comprehensive update and revision.

For nearly two decades, the first three editions of *New York Zoning Law and Practice* were written by Professor Robert M. Anderson of the Syracuse University College of Law. They always served as a comprehensive, reliable and fairly user-friendly resource. They were often a great place to start research, verify findings or confirm the validity of one's own experience. Given the myriad of changes in the land use field, those who have depended on these volumes, as well as others whose efforts would be aided immeasurably by frequent recourse to them, should welcome the freshly minted Fourth Edition by Patricia E. Salkin.

The author, associate dean and director of the Government Law Center of Albany Law School, has held leading roles in the governmental, planning and legal communities. Her varied and substantial experience adds a richness and universality to the treatise's already very readable text. It also comports well with the reality of today's multidisciplinary world of land use regulation and practice. The important and diverse challenges inherent in the regulation of land use, es-

pecially through the zoning of numerous different localities, provides fertile ground for attorneys, planners and other professionals to grapple with a seemingly endless array of issues.

The three-volume, looseleaf-bound Fourth Edition contains 45 chapters, together with appendices and tables. The chapters include some of the foundational building blocks for land use practice, including sources of zoning authority, constitutional and legislative limits on the zoning process and the substance of zoning, types of zoning regulation, sample definitions and various zoning code provisions, and municipal and regional planning. Another group of chapters focuses on specific uses, including non-conforming uses, uses with unique relations to public welfare, commercial and industrial uses, telecommunications facilities, gasoline stations, mobile and manufactured homes, exclusionary zoning/affordable housing, senior housing, planned unit developments, and signs. Subdivision controls are also covered. Yet another cluster of chapters delves into zoning administration and practice before building agencies and zoning boards with respect to variances and special use permits, and before the courts with respect to the enforcement of land use controls or challenges to the controls or other zoning decisions. The historically thorough text includes a number of increasingly important and sometimes controversial areas of zoning.

A chapter has been added on the evolving and increasingly important area of the mediation of land use disputes. Communities, professionals and policymakers alike can greatly benefit from an improved understanding and eventual adoption of conflict resolution techniques. To the extent that such initiatives are successful in addressing the "fear of the unknown" that is often at the center of many land use actions, the potential benefits are most appealing.

The contents and format of the new edition also reflect other societal and technological advances. The new section on the use of the Internet for land use law research provides a thorough overview of legal, planning and municipal resources readily available via the Internet. There is also a new section on the emerging area of telecommunications facilities and the Federal Telecommunications Act of 1996.

The new edition carries over and expands upon the model forms in earlier editions. They include forms relating to zoning administration, enforcement and subdivisions. Some of the updated forms take into account recent changes in New York State zoning-related legislation by expressly incorporating statutorily required elements in the forms themselves. Even if not used directly, the forms provide a handy reference guide to items that a practitioner's own forms or documents should contain. Especially helpful are the checklists for different types of situations and/or reviews (*e.g.*, zoning enforcement and subdivision review). All the model forms are also provided on computer disks.

Newly added statutory appendices make it easy to find specific legislation or particular provisions relevant to a given situation. One identifies sources of technical assistance that are especially valuable in complex or novel situations. These resources include the NYSBA's Municipal and Real Property Law Sections and the New York State Committee on Open Government, which provides assistance on issues involving the Freedom of Information Law and the Open Meetings Law.

Two important areas that could be developed in future updates are the interplay of zoning and land use regulation with environmental review under the State Environmental Quality Review Act (SEQRA), and zoning regulation of home offices or occupations and telecommuting beyond the traditional analysis of home occupations. Most municipalities and zoning codes remain ill-equipped to deal with challenges inherent in the changing nature of work and the workplace.

The use and proper administration of SEQRA remains one of the biggest challenges in the land use area. Indeed, appropriate application of SEQRA to zoning matters can be a powerful tool in a municipality's review and/or reshaping of an application. The new edition does provide a full range of environmental review forms for implementing various aspects of SEQRA. In addition, a review of the Web sites that *New York Zoning Law and Practice* lists for the Government Law Center of Albany Law School and Pace Land Use Law Center leads to some potentially helpful articles on SEQRA.

JAMES F. GESUALDI is a solo practitioner in Islip, Long Island. He has represented numerous land use applicants, community groups and has served as municipal attorney for local government boards. He is also a member of the American Planning Association and the American Institute of Certified Planners.

CONTINUED FROM PAGE 53

and participants will be monitored with repeated drug tests.

State and local officials should follow this example and join in implementing the new blended approach to drug problems throughout the nation. The message from the science is absolutely clear. It is a mistake not to treat addicts while they are under criminal justice control. The sooner the new strategy is deployed in every community, the sooner we will reduce the public health and safety consequences of drug abuse and addiction.

ALAN I. LESHNER has been director of the National Institute on Drug Abuse, one of the National Institutes of Health, since February 1994. Earlier, he had been the deputy director and acting director of the National Institute of Mental Health and had held a variety of senior positions at the National Science Foundation. Before joining the NSF, he was a professor of psychology at Bucknell University. He received a degree in psychology from Franklin and Marshall College and his master's and Ph.D. degrees in physiological psychology from Rutgers University.

Language Tips

By Gertrude Block

Question: If you are watching a football game but are really not interested in it, are you "uninterested" or "disinterested?"

Answer: Ten years ago you probably would have been "uninterested." Today the odds are you would say you were "disinterested."

Unfortunately, the virtual disappearance of the adjective *uninterested* is one of the many distinctions that English has lost, with a concomitant loss of the contrasts in meaning that make a language specific and colorful. The distinction between *uninterested* (having no interest) and *disinterested* (being without bias) has vanished, with *disinterested* being used for both meanings. Because the meanings have merged, it would no longer be judicious to call a judge "disinterested."

The leveling of English grammar has been accompanied by a corresponding semantic leveling. It has occurred, for example, in the word-pair *reluctant* and *reticent*. In recent years, *reticent* has come to mean *reluctant*, with the loss of the former distinction in meaning of the two words. Dictionaries still define *reluctant* as "unwilling" or "averse," often followed by "to" and a verb: "She was reluctant to testify," or immediately preceding a noun, "He was a reluctant witness."

Now, however, people who ought to know better (journalists, for instance) have decided that *reticent* is a synonym of *reluctant*. Dictionaries would inform them that it is not: *reticent* means "characteristically silent or terse." Remember "reticent Calvin Coolidge"?

If you confuse *credible* with *credulous*, you have lots of company, but you are still wrong. What is *credible* is "believable." In contrast, *credulous*, which means "naive or gullible," is often used in a deprecatory sense. Only people can be credulous; situations or occurrences are often credible. Both adjectives are much more frequent in the negative. *Incredulous* often means "skeptical" or "expressing disbelief." A plaintiff's statement was "incredible," and the defense was "incredulous" when it was made.

Where has *lend* gone? Apparently into oblivion. The erstwhile noun *loan* has become a verb, usurping the verb *lend*. Now *loan* is both a noun and a verb. What used to be, "Lend me the money; I'll repay your loan when I can," has become "Loan me the money; I'll repay your loan when I can." Perhaps that distinction wasn't important enough to retain, and its loss is a gain in simplicity.

But lawyers should retain the difference between *foregoing* ("going before") and *forgoing* ("giving up completely, forsaking"). That difference applies to other words; the *fore-* prefix means "before," as in "foreordained" or "forefront"; the less-common *for-* carries the sense of exhaustion or prohibition, as in *forgo* or *forbid*. Yet many print journalists have abandoned that valuable distinction.

Do you know the difference between *enormity* and *enormousness*? Few writers do, but the former is pejorative, the latter merely a factual statement. While *enormity* describes something tremendously wicked, outrageous and exceeding moral bounds, *enormousness* describes something tremendous in size. Lawyers should also distinguish *forcible* from *forceful*, the former describing an action accomplished by force, the latter meaning merely "full of force or effective." Unpleasant associations dominate *forcible*. To describe a person with a strong personality, you would use *forceful* not *forcible.*

Finally, the word-pair *observation* and *observance*. Both nouns descend from the verb *observe*, which can mean "to watch or notice, to make a scientific comment, or to comply with." Some of these meanings appear in the noun *observation*, others in *observance*. A comment about something is an observation, but complying with a custom is an observance.

Call the loss of distinctions "language leveling" or "sloppy English," depending on your point of view. If the entire subject lacks interest, consider the question, "Do you believe that society is suffering from ignorance and apathy?" and the answer, "I don't know and I don't care."

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The author welcomes the submission of questions to be answered in this column. Readers who do not object to their names being mentioned should state so in their letters. E-mail: Block@law.ufl.edu

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Eggleston, John D.
Elacqua, Angela M.
FitzGerald, Peter D.
Higgins, Dean J.
Hoffman, Robert W.
Hoye, Polly A.
Jones, Matthew J.
Keniry, Hon. William H.
Tishler, Nicholas E.

Fifth District
Amoroso, Gregory J.
Buckley, Hon. John T.
Burrows, James A.
DiLorenzo, Louis P.
Doerr, Donald C.
Dwyer, James F.
Fennell, Timothy J.
Getnick, Michael E.
Gingold, Harlan B.
* Jones, Hon. Hugh R.
Klein, Michael A.
Mawhinney, Donald M., Jr.
Priore, Nicholas S.
Rahn, Darryl B.
†* Richardson, M. Catherine
Sanchez, Ruthanne
Uebelhoer, Gail Nackley

Sixth District
Anglehart, Scott B.
Denton, Christopher
Drinkwater, Clover M.
Hutchinson, Cynthia
Kachadourian, Mark
Kendall, Christopher
Madigan, Kathryn Grant
Mayer, Rosanne
Peckham, Eugene E.
Perticone, John L.
Reizes, Leslie N.

Seventh District
Bleakley, Paul Wendell
Buzard, A. Vincent
Castellano, June M.
Dwyer, Michael C.
Getman, Steven J.
Heller, Cheryl A.
Lawrence, C. Bruce
†* Moore, James C.
* Palermo, Anthony R.
Reynolds, J. Thomas
Small, William R.
Trevett, Thomas N.
* Van Graafeiland, Hon. Ellsworth
* Vigdor, Justin L.
†* Witmer, G. Robert, Jr.

Eighth District
Attea, Frederick G.
Church, Sanford A.
Dale, Thomas Gregory
Eppers, Donald B.
Evanko, Ann E.
Freedman, Bernard B.
†* Freedman, Maryann Saccomando
Gerstman, Sharon Stern
Graber, Garry M.
* Hassett, Paul Michael
McCarthy, Joseph V.
O'Donnell, Thomas M.
Omara, Timothy
Palmer, Thomas A.
Pfalzgraf, David R.
Webb, Paul V., Jr.

Ninth District
Aydelott, Judith A.
Berman, Henry S.
Galloway, Frances C.
Gardella, Richard M.
Giordano, A. Robert
Golden, Richard Britt
Headley, Frank M., Jr.
Herold, Hon. J. Radley
Klein, David M.
Kranis, Michael D.
Manley, Mary Ellen
McGlinn, Joseph P.
Miklitsch, Catherine M.
* Miller, Henry G.
Mosenson, Steven H.
O'Keeffe, Richard J.
* Ostertag, Robert L.
Scherer, John K.
Steinman, Lester D.
Stewart, H. Malcolm, III
Walker, Hon. Sam D.
Wolf, John A.

Tenth District
Abrams, Robert
Asarch, Joel K.
†* Bracken, John P.
Capell, Philip J.
Corcoran, Robert W.
Dietz, John R.
Filiberto, Hon. Patricia M.
Fishberg, Gerard
Futter, Jeffrey L.
Gutleber, Edward J.
Karson, Scott M.
Levin, A. Thomas
Meng, M. Kathryn
Mihalick, Andrew J.
O'Brien, Eugene J.
†* Pruzansky, Joshua M.
Purcell, A. Craig
Roach, George L.
Rothkopf, Leslie
Spellman, Thomas J., Jr.
Walsh, Owen B.
Wimpfheimer, Steven

Eleventh District
Bohner, Robert J.
Darche, Gary M.
DiGirolomo, Lucille S.
Glover, Catherine R.
James, Seymour W., Jr.
Nashak, George J., Jr.

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

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

RES IPSA JOCATUR

Does the FDA Have Jurisdiction Over "Miracles"?

BY JAMES M. ROSE

Alexandros Chemedes, the owner of AlChemMe Pharmaceuticals Inc., had a dream one night. In it, a complicated chemical formula appeared in a visual diagram. He heard a deep voice say, "If you make it . . ." but he could not hear the rest. The substance kept cracking open small spherical shells until the dream ended.

He was aware of the dream that led Elias Howe to invent the sewing machine[1] and the divine inspiration that caused James Watson and Francis Crick to intuit that DNA took the form of a double helix. Al Chemedes believed his dream to be a divine inspiration. He set upon manufacturing the formula he had envisioned. He then used it without success to try to crack open a variety of substances, including walnuts, a bowling ball and a stale bagel. One day while he was suffering from a flu virus, he mistakenly inhaled a powdered version of the substance and felt better within hours.

Test confirmed that his concoction, which he named Miricol, could destroy the tough outer protein shell, or capsid, of a single virion. Tests on mice showed that it was a drug capable of killing all foreign viruses in the body. This meant that Miricol could cure *any* disease caused by a virus, including warts, flu, AIDS, rabies, polio, small pox, chicken pox and herpes.

He began to develop a protocol to apply for testing rights from the Food and Drug Administration. Since 1938, new pharmaceuticals cannot be marketed without extensive tests to assure that they are safe and have no harmful side effects. After the 1962 Thalidomide tragedy, the laws were tightened to provide a lengthy procedure for testing new pharmaceuticals.[2] AlChemMe Pharmaceuticals had on retainer a Washington, D.C., law firm that specialized in complying with FDA regulations and in lobbying, Dross, Piffel, Arcania and Vestibuhl. It was told to seek speedy approval of the drug.

Al Chemedes also told his brother-in-law, Benny Fischel, an attorney, about Miricol. Benny had a best friend, Will Ling, who was dying of a disease caused by a virus. Benny begged Al Chemedes to give the drug to his friend, but the Dross law firm warned Chemedes that he could not sell it or even give it away, and that no doctor could prescribe it without first obtaining FDA approval. No tests in which Ling could participate would be ready in time. If the drug were given away and worked, the results would be readily apparent. The publicity that would follow such a violation of law would bring pressure on the FDA to civilly and perhaps criminally prosecute Chemedes, and this might delay the approval of Miricol.

Al Chemedes thought he had a solution. He declared that the drug was divinely inspired because it had appeared to him in a dream, just as many prophets and biblical forefathers had been divinely inspired in their dreams.

However, a senior partner in the Dross firm opined that a First Amendment defense to a charge under the Food and Drug Act would not be successful because of previous case law involving the Church of Scientology's Hubbard Electrometer, or "E-meter."[3] As long as the food or drug or device was intended for use in the body, it would fall within the jurisdiction of the federal watchdogs.[4]

Chemedes explained his predicament to his brother-in-law and Benny's twin brother, Arty Fischel. Together, they practiced in the law firm started by their father, Oliver, and now known as the O. Fischel Law firm of New York State. Their clients included numerous parking lot owners.

Arty came up with novel remedy. He simply modified the bailment language on the back of parking lot tickets given out by his clients. Will Ling was told that the Church of God the Biochemist was hiring him to be a warehouseman. The church paid him $10 to act as a temporary warehouseman for its valuable Miricol product. The contract required him to keep the pills safe from all harm. Because of the FDA regulations, the contract strictly forbid him from consuming the pills. It explicitly provided that he was not permitted to take the pills three times a day with meals for two weeks.

If Ling took the pills and violated the contract, exclusive jurisdiction to litigate the violation and impose damages was vested in a specific arbitrator, Pete L. Bailey, an attorney with the O. Fischel Law Firm of New York. The contract provided that, in the event of breach, liquidated damages would consist of the return of the $10 that the church had paid Will Ling to keep the pills safe and $100 in damages, the amount that the church paid AlChemMe Pharmaceuticals to produce the pills.

Will Ling took the pills three times a day for two weeks and recovered from the disease. He cheerfully paid the liquidated damages to the church. When FDA officials made inquiries, he told them that he was simply a bad bailee who should not be entrusted with anything valuable.

1. In which Howe saw warriors carrying spears with holes in the spearheads. He used that configuration to formulate the sewing machine needle with a hole near the front in 1846.
2. *See* 21 USC § 301-397 and 21 CFR Part 866.
3. *Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir 1969). This case mentioned in dicta that adulterated food used by a religion would fall within the jurisdiction of the FDA.
4. For example, a tampon constitutes a medical device for purposes of regulation and must be properly labeled with a warning sign about toxic shock syndrome, *Moore v. Kimberly-Clark Corp.*, 867 F.2d 243 (5th Cir. 1989), *rehearing denied*, 873 F.2d 297.

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