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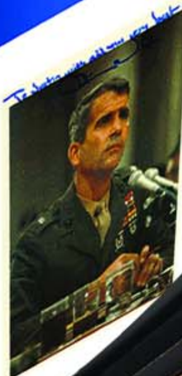
ELECTRONIC DISCOVERY



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

Advertising Representative
Network Publications
Sheri Fuller
Executive Plaza 1, Suite 900
11350 McCormick Rd.
Hunt Valley, MD 21031
(410) 584-1960
e-mail: sfuller@networkpub.com

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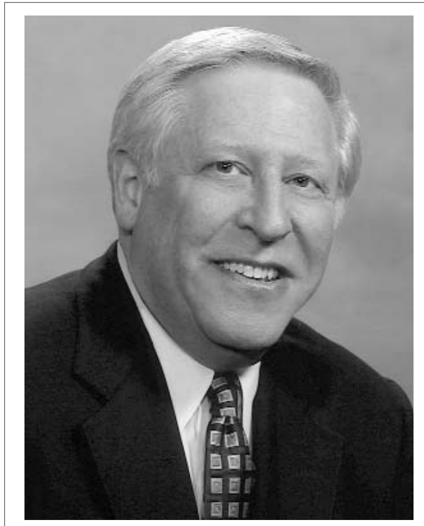
On the Cover

This month's cover illustration recalls three prominent individuals and a corporation whose headline-making court experiences have been affected by the types of issues explored in the article on electronic discovery.

Cover Design by Lori Herzing.

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. Copyright © 2003 by the New York State Bar Association. The *Journal* (ISSN 1529-3769), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $18. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

PRESIDENT'S MESSAGE



A. THOMAS LEVIN

Now You Know What I Did Last Summer

We are reformers in spring and summer; in autumn and winter, we stand by the old; reformers in the morning, conservers at night. Ralph Waldo Emerson.

Summer is the time when one sheds one's tensions with one's clothes, and the right kind of day is jeweled balm for the battered spirit. A few of those days and you can become drunk with the belief that all's right with the world. Ada Louise Huxtable

I am a part of all that I have met. Alfred, Lord Tennyson.

A committee is a group that keeps minutes and loses hours. Milton Berle.

With the coming of Labor Day, everyone tells me, the summer has come to an end. (Officially, we need to wait for the autumnal equinox, which is September 22.) It is common Bar lore that nothing much happens in the summer. Having now experienced my only summer as your president, I am going to take this opportunity to put that canard to rest.

As our readers are certainly aware, my term started on June 1, even though the installation ceremony occurred later in the month in Cooperstown. However, the action started right away, and on June 2 there I was in Albany, on the street in front of the (under renovation) Court of Appeals as we celebrated the passage of the long-awaited (and still not adequate) increase in 18-b assigned counsel fees. (Lorraine Power Tharp could not have found a better way to end her tenure.)

Ever since then, it has been a whirlwind of thoroughly enjoyable organized commotion. Getting the year's programs off to a flying start, I appointed new committees that are going to bring some challenging concepts to us in the months ahead. Among our newest committees are the Committee on Diversity and Leadership Development, the Special Committee to Review the Code of Judicial Conduct, Special Committee on the Jury System, and the Special Committee to Review the Annual Meeting. We also have existing Sections and Committees working on some new studies of both old issues and new ones.

June gave me some idea of the extent to which my credit card and my frequent flyer accounts would be intimately involved with my term of office. Without listing some of the gory details and the innumerable media interviews and conference calls, I attended a focus group in Clifton Park helping us study our publications, the Rockland County Bar Dinner, and a Cyberspace Law Committee meeting in NYC. I met with the Lord Chief Justice of Ireland at the Irish-American Bar, attended the Erie County Bar Dinner, met with our insurance administrators Bertholon-Rowland Corp., attended a symposium for the Lawyer Assistance Trust, met with a representative of Trial Lawyers Care to better publicize their need for lawyers to help people file claims for the federal 9/11 fund, participated in IOLA's 25th birthday celebration, and attended the New York Press Club installation event.

The end of June brought the quarterly Executive Committee and House of Delegates meetings, at which we approved new policies to assure expanded diversity in our membership and leadership, and continued our discussion of proposed changes in our governance. Action on these proposals should come to closure at the November House meeting.

At the end of the legislative session, the focus was on reform of the "Rockefeller Drug Laws," a subject on which we have been outspoken in urging the governor and legislative leaders to come to agreement. Our five-point proposal for breaking this logjam received a great deal of favorable attention across the state, leading to innumerable media interviews and editorial comments. Unfortunately, the issue remains unresolved.

Our legislative activity continued, with our involvement in revision of the laws that led to the *Desiderio* decision. Our litigation against the FCC to remove lawyers from the effects of the Gramm-Leach-Bliley law achieved success, as the FCC agreed not to enforce the law against lawyers while the litigation was pending, and the court denied the FCC's motion to dismiss the case, holding that there was no indication that Congress intended that lawyers be included in these regulations. We publicized our proposals for revision of the rules governing multi-jurisdictional practice, and published a Spanish version of our consumer information pamphlets. Our Family Law Section initiated a program to assist litigants who felt that they had been treated unfairly in cases before a judge who is under investigation for wrongful conduct.

A. THOMAS LEVIN can be reached at Meyer Suozzi English & Klein, PC, 1505 Kellum Place, Mineola, N.Y. 11501, or by e-mail at atlevin@msek.com.

PRESIDENT'S MESSAGE

July continued apace. I made a presentation before the Chief Judge's Commission on the Jury, attended the Family Law Section summer meeting in Vermont, the Committee on Attorneys in Public Service meeting in Latham, the Public Utility Committee summer meeting in Cooperstown, the Finance Committee meeting in NYC. I attended the celebration of the publication of the *Legal Manual for New York Physicians*, a joint effort of the State Bar (Health Law Section and CLE Committee, sponsors) and the State Medical Society. Then there was an enjoyable lunch with some of the Fourth District bar leaders, and the Tax Section summer meeting, at the Sagamore.

Then the dog days of August included attending a breakfast for Attorney General Spitzer, meeting with Senator Schumer to discuss our federal legislative interests, and then off to San Francisco for the National Conference of Bar Presidents, the Mid-Atlantic Bar meeting, and the ABA Annual Meeting. (More about this in a moment.) Then, off to Newport for the Elder Law and General Practice Section summer meetings (which at least enabled me to miss the blackout). The month closed out with the Lawyer Referral Service Committee meeting in Albany and Saratoga.

At the ABA meeting, we became involved in the controversial proposals to amend the ABA Model Rules to permit lawyers to breach client confidentiality under some circumstances. Our Executive Committee opposed these proposals without dissent. President-Elect Ken Standard was most eloquent on this subject, and he and I joined the leaders of the Florida Bar and California Bar, and various prominent ABA officials, including the new President-Elect Robert Grey, in opposing the proposed amendments. The proponents included 10 past presidents, the then current president and the incoming president of the ABA, and the ABA leadership put on a full court press all week in support of the proposals. I'm sorry to report that our opposition was unsuccessful, as we lost on the key vote by 218-201, but this was hardly a ringing endorsement of the amendments. Time will tell whether there is going to be a proposal to amend our Code of Professional Responsibility in a similar manner.

Our work and our activity continue. I hope to be able to keep you informed of my future travels and adventures, as the calendar gets fuller each passing day. With the coming of the election season, our Committee on Judicial Campaign Conduct has its program in place, ready to monitor judicial elections, in coordination with local bars, so that the candidates adhere to the Code of Judicial Conduct. Our Committee on Judicial Selection is also gearing up to participate in the process of selecting a new Court of Appeals judge, to fill the vacancy resulting from the elevation of Judge Wesley to the Second Circuit. I am also arranging meetings with local bar leaders in various regions of the state, to discuss issues of mutual concern, so keep an eye out for me.

We are a busy organization, indeed. My peripatetic summer has reinforced my great admiration for our many volunteers, and especially so for our outstanding staff. We recently were described in London's *Legal Week* as the most influential bar association in the United States. We owe all credit for that to our Committee and Section members, our hard-working officers and Executive Committee members, and most of all to the staff at the Bar Center.

Lastly, as I try to remind our members all the time, this is your State Bar. We are here to serve the interests of our members, and the public interest. We look forward to receiving your comments, favorable or not, and your ideas or suggestions. You can reach me at president@nysba.org or atlevin@msek.com or through the State Bar Center.

P.S. It's nice to know that someone is actually reading this page each month. In response to my Laurel and Hardy reference in last month's issue, two sharp-eyed readers brought to my attention that the "fine mess" quote was incorrectly attributed to Stan Laurel, when the phrase actually was uttered by Oliver Hardy. Congratulations and thanks to Edward L. Birnbaum and Richard G. Kass for bringing the error to my attention. But, nobody picked up that while the two comedians made a movie entitled *A Fine Mess*, the actual phrase which Oliver used in at least 14 films and many skits was "here's another *nice* mess you've gotten me into."

moving?

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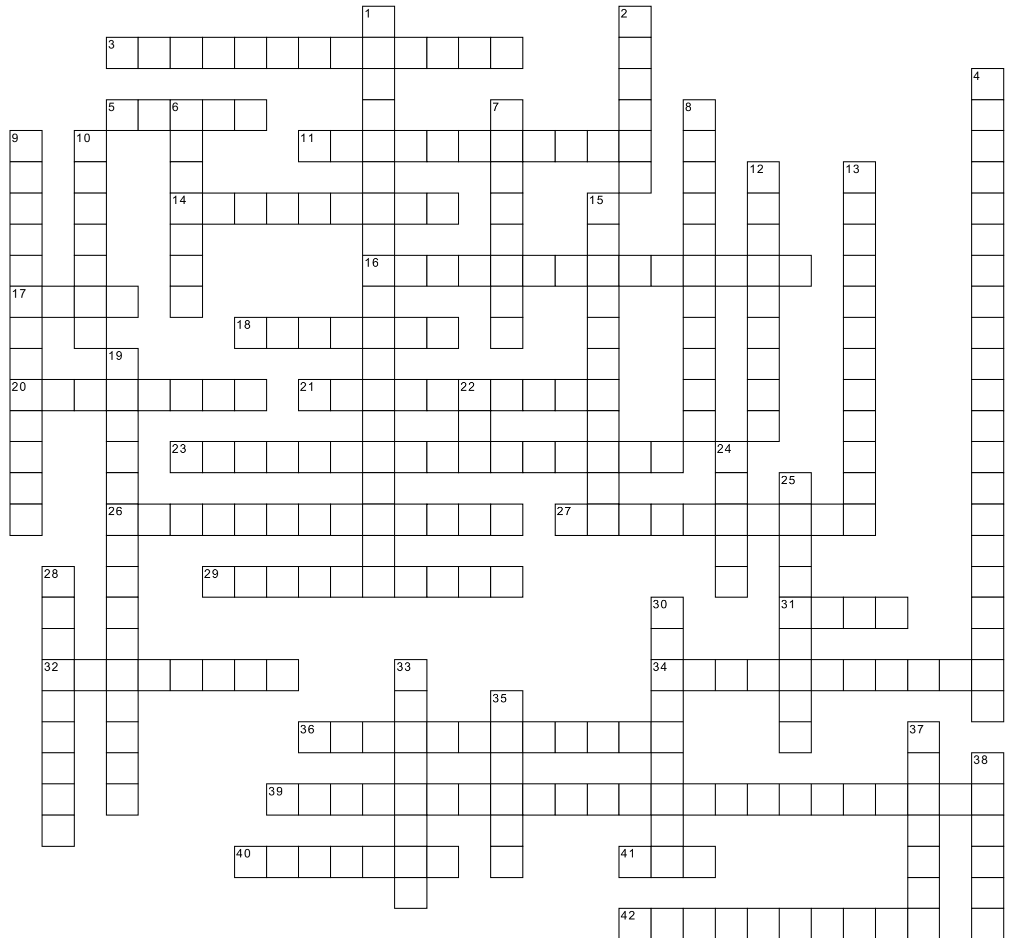
New York State Bar Association
MIS Department
One Elk Street
Albany, NY 12207
518.463.3200 - tel
518.487.5579 - fax
mis@nysba.org - email

CROSSWORD PUZZLE

The puzzles are prepared by J. David Eldridge, a partner at Pachman, Pachman & Eldridge, P.C., in Commack, NY. A graduate of Hofstra University, he received his J.D. from Touro Law School. (The answers to the puzzle are on page 56.)



Criminal Minds, by J. David Eldridge

Across

3 A recognized defense to a crime committed to avoid a more serious and imminent public or private injury (PL § 35.05)

5 The defense showing that the defendant was somewhere else when the crime was committed

11 A defendant's admission of a crime in exchange for conviction of a lesser offense

14 Criminal liability for assisting another in the commission of a crime (PL § 20.00)

16 Establishes the constitutional right to an attorney

17 Security posted with the court to insure defendant's return in future proceedings

18 You have the right to remain silent . . .

20 The only one allowed to enter a plea to an indictment against a corporation (CPL § 220.50)

21 Doctrine allowing warrantless search and seizure of fleeing felon

23 Conferring a benefit upon a public servant

26 Why an appellate court will not overturn a conviction based upon an involuntary admission wrongfully admitted into evidence

27 A court's formal questioning of a defendant as to the sentencing about to be imposed

29 Accusatory instrument filed by a grand jury charging one or more individuals with the commission of a crime (PL § 200.10)

31 An adjournment of a criminal action with a view to ultimate dismissal pursuant to PL § 170.55

32 What a person tenders when he knows there are insufficient funds to cover his instrument

34 What follows the filing of a simplified or criminal information charging a person with a misdemeanor (PL § 170.10)

36 Affirmative defense showing that defendant withdrew from and made substantial efforts to prevent commission of conspiratorial plan (PL § 40.10)

39 Term designating illegally obtained evidence

40 The providing of false testimony material to a criminal action (PL § 210.15)

41 What a person is charged with under VTL § 1192

42 Affirmative defense where defendant was induced to commit a crime he would not otherwise have committed (PL § 40.05)

Down

1 Any item readily capable of causing death or serious physical injury

2 Misdemeanor of initiating an individual into an organization through conduct creating substantial risk of physical injury (PL § 120.16)

4 Law providing for dogcatchers

6 Statutory defense relieving a minor defendant of certain criminal liability (PL § 30.00)

7 Innkeeper's statutory liability for selling alcohol to an intoxicated patron (General Obligations Law § 11-101)

8 An offense punishable by imprisonment of more than 15 days and less than one year (PL § 10.00)

9 What is required before a defendant can be convicted of a crime based upon the testimony of an accomplice (PL § 60.22)

10 New York's rule providing for mandatory disclosure to defendant

12 Group of citizens empanelled to view evidence and determine whether a bill of indictment should be had

13 Sexual conduct with another in return for a fee (PL § 230)

15 What the prosecution must provide a defendant pursuant to CPL § 30.30

19 Guards against unreasonable search and seizure

22 Where the defendant is released on his own without the need to post bail

24 Charging interest over 25%

25 An offense, other than a "traffic infraction," punishable by no more than 15 days of imprisonment

28 A sentence for a crime providing for the defendant's release into the community (PL § 65.00)

30 Doctrine allowing warrantless search and seizure where evidence or fruit of a crime is openly visible

33 Prohibited sexual intercourse with a married person (PL § 225.17)

35 A person who sustained physical or financial injury as the result of a crime (PL § 215.20)

37 What the jury foreperson must announce pursuant to PL § 310.40

38 A crime punishable by imprisonment in excess of one year

Pretrial Expert Disclosure In State Court Cases

Editor's Note: The following is another in a series of articles reflecting insights and information presented at a NYSBA Continuing Legal Education program. This digest of the speaker's presentation provides a general overview of pretrial expert disclosure.

By David Paul Horowitz

Pretrial disclosure of expert witness information[1] was enacted to eliminate "trial by ambush" by requiring parties, upon demand, to furnish specified expert information prior to trial, for experts the parties expect to call at trial. While far more restrictive than expert disclosure in federal practice, the provisions of the statute, CPLR 3101(d), can be critically important, and often are a source of contention.

The statute specifies the categories of expert information to be exchanged: the witness's identity;[2] the anticipated subject area of the testimony; the substance of the facts and opinions on which the expert is expected to testify; the qualifications of the expert; and a summary of the grounds for the expert's opinions. While there are three subparts to 3101(d)(1), subpart (i) sets forth the general exchange requirements noted here and the timing requirements, two areas that underlie most of the disputes that arise in expert disclosure.

Uses of the Response

CPLR 3101(d) enables a party to learn, in advance of trial, certain information about experts an opponent plans to call at trial. This information is only available upon demand, and shall furnish the qualifications of the expert, the areas of his or her testimony and the anticipated scope of the testimony. A "responsive" response to a CPLR 3101(d) demand should provide sufficient information to prepare topics and questions for cross-examination of the expert, and to ascertain the need for any rebuttal experts.

It is even possible that the response may lead to summary disposition of the case. Failure to adequately set forth the scope or foundation of the expert's anticipated testimony, or the failure to indicate an area to be covered by the expert where expert testimony is required in order to make out a *prima facie* case (*e.g.*, a design defect in a product liability case), can be the basis for a successful summary judgment motion prior to trial or a preclusion motion during trial.

Content of the Demand and Exchange, Generally

An expert demand should be served by all parties at the outset of disclosure. There is no requirement that the demand use any particular language, and even one that simply requests information pursuant to CPLR 3101(d)(1)(i) should be sufficient to trigger a complete response. It would be wise, however, to serve a demand tracking the specific categories of information enumerated in the statute and, where appropriate, to incorporate a demand for specific information subject to exchange under existing case law. Some practitioners serve lengthy and detailed demands for expert information that go well beyond what 3101(d)(1)(i) contemplates, and counsel should object to demands that go beyond what is required by the statute.

Good practice would suggest interposing a specific objection to each of them, along the lines of the method for interposing objections to disclosure set forth in CPLR 3122. This may lead the party seeking the information to move, early in the case, to compel a response, with the result being that the parties would obtain an early judicial determination of the adequacy of the ex-

David Paul Horowitz is the principal in the Law Office of David Paul Horowitz and a member of Ressler & Ressler, both in New York City, where he focuses his practice in plaintiffs' personal injury actions. Mr. Horowitz is an adjunct professor of law at New York Law School where he teaches New York practice. Currently, he is writing a book entitled *New York Civil Disclosure Practice*, to be published this winter by Lexis/Nexis. Mr. Horowitz is a graduate of the College of the City University of New York and received his J.D. from Fordham University School of Law. This article is excerpted from his CLE lectures on expert disclosure.

change. If the court found the response to be inadequate, the ruling would occur with time to supplement the response.

Just as it is good practice to track the language of the statute in the demand, it is likewise sound to do so in the response. Very often a response cannot be made to a demand made at the very beginning of a case, because it is often the situation that a party receiving a demand will not have identified conclusively the expert who will be called to testify at trial. This is generally not a problem because the statute does not specify a particular time for the expert disclosure. (More on the timing of a response appears below.) As a result, it is both permissible and common for an initial expert response to be no more than "plaintiff/defendant has not yet retained an expert to testify at the time of trial."

What about changes to the initial response, particularly in the case where a response has been served early in the case? CPLR 3101(h), "Amendment or supplementation of responses," applies to expert exchanges under 3101(d) even though there is nothing in the CPLR called an "amended" or "supplemental" expert exchange. Technically speaking, if expert information has been previously exchanged and a party determines that additional information is needed, the additional information to be provided concerning a previously exchanged area of testimony should be styled a supplemental expert exchange, while additional information concerning a new area of testimony should be styled an amended expert exchange. Most practitioners tend to identify all responses following the initial one as a supplemental exchange rather than an amended exchange; the use of one or the other should not ever cause a problem.

Disclosure concerning the expected testimony of any expert that goes beyond the scope of 3101(d) may be obtained only by court order "upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate."[3] Accordingly, if adversary counsel will not agree to provide the additional information requested, a motion will be needed.

Timing of the Expert Exchange

CPLR 3101(d)(1)(i) does not set a rigid timetable for disclosure. It simply provides that where a party "for good cause shown" retains an expert an insufficient period of time before the commencement of trial to give "appropriate" notice, there is no mandatory preclusion of the expert's testimony solely because of noncompliance with 3101(d)(1). This does not, of course, mean that an expert cannot be precluded due to a late expert exchange. In such cases, the court may, upon motion of any party, before or at the time of trial, make "whatever order may be just." It is important to note that there is a commonly held belief/perception that expert information must be exchanged at least 30 days prior to trial. There is no such rule.[4]

It has become more commonplace for courts to establish specific deadlines in Preliminary Conference Orders and Compliance Conference Orders for expert exchange. Courts in certain judicial districts have enacted specific timetables for furnishing responses. For example, the Third Judicial District, the first to do so, promulgated a rule under which the party who has the burden of proof on a claim or defense must serve its response to a 3101(d) demand before the filing of a note of issue, and the adverse party has 60 days after receiving this response to serve any answer. Unless the court directs otherwise, failure to comply leads to preclusion of the testimony of the expert who is the subject of the demand and response. This can be a devastating blow, especially in cases where expert testimony is required to make out a claim.

The key to almost all court decisions made on the timeliness of an expert exchange is prejudice to the demanding party who did not receive a timely response.

In view of the increasing use of individual court rules to establish exchange periods, it is crucial to find out whether a particular court employs them and, if it does, to comply with the requirement. It is good practice to create an internal diary deadline for an overall file review 30 or even 60 days in advance of the deadline for filing a note of issue in the case, which should include a review of the status of expert exchanges and a check of any applicable rules.

Even without a specific court rule, the amount of time that has passed between the date when the expert was first retained and the exchange of information is a factor to be considered by a reviewing court called to rule on timeliness. While many practitioners are loath to exchange expert information any earlier than is absolutely necessary, early exchanges serve to limit disputes to the adequacy of the information provided, and may be an aid to settlement. The benefit of a timely response is that a claim of laches may be made in response to a late challenge of the adequacy of the response, and many attorneys wait to challenge the substance of the response until the time of trial.

As a final note in this section, the key to almost all court decisions made on the timeliness of an expert exchange is prejudice to the demanding party who did not receive a timely response. Consequently, when opposing a motion to preclude on the ground of untimeliness, it is essential to argue and demonstrate that the opposing party has not suffered any prejudice. A careful search of prior discovery may provide a sufficient basis for demonstrating to the court that the demanding party had adequate notice of the claims being advanced by the expert. If, however, a preclusion order seems likely, offering a written report (if one exists), or even a deposition of the expert, may very well undermine, or serve to cure, the asserted prejudice.

Inadequate Responses

Very often an expert response is served that does not provide the information called for in the statute. Entire topic areas may be omitted, or the response may be so vague or jammed with boiler-plate language that no meaningful information is provided. When this happens, the demanding party must make a tactical decision whether to demand additional information – thereby allowing the responding party to cure any defects in the response – or to wait, hoping to gain preclusion or limitation of the expert's testimony by attacking the adequacy of the response at the time of trial.

The practice of many attorneys is to do the latter, and seek relief by way of a summary judgment motion or trial preclusion based on the inadequate response. However, a summary judgment motion on this ground generally must be made prior to the outside time for exchanging expert information,[5] so it will often prompt a supplemental expert exchange, which serves to correct the defects in the original response and denial of the motion. It would appear that upon receiving an inadequate response, the better practice is generally to write immediately to opposing counsel, specifying the omitted or inadequate information. If this does not yield an adequate supplemental response, a motion should be made to compel the exchange or, in the alternative, to preclude use of the expert. If time does not permit this approach, a motion *in limine* to preclude all or part of the expert's testimony should be made to the trial judge.

Limits on Expert Disclosure

Despite the purpose of the statute – to prevent an ambush at trial – CPLR 3101(d) does not require full disclosure of an expert. An expert's written report, if one has been prepared, generally is not available to the adverse party; it would be considered materials "prepared in anticipation of litigation" and would be provided only if a court orders its production.[6] Many experienced practitioners, however, specifically request that their experts not prepare a report. This is to avoid disclosure, in whole or in part, if the adverse party subpoenas the expert's file into court at time of trial, providing fertile ground for cross-examination.

In general, there also is no right to an examination before trial of an expert, excepting a party's treating doctor, dentist or podiatrist.[7] If, however, there has been spoliation of evidence, the expert who reviewed that evidence might be ordered to be deposed on that basis. If this occurs, counsel should limit the questioning to the expert's factual observations, not the opinions formulated as a result of those observations, consistent with the limitations courts may place on such disclosure under CPLR 3101(d)(2). This subsection provides that in the event of expert disclosure "the court shall protect against disclosure of the mental impressions, conclusions, opinions" of the expert.

Admissibility of Expert Testimony

Although this discussion has focused on pretrial expert information exchange, a practitioner must always do so with one eye to the trial. It is crucial to consider admissibility in selecting and noticing an expert. While the issue may seem a long way off when a CPLR 3101(d)(1)(i) response is first served, it cannot be ignored because a response that suggests a lack of foundation for admissibility may trigger a motion to dismiss or to preclude.

The standards are often easier to state than to apply in a given case, but they must be understood. New York State courts traditionally have followed and applied the *Frye*[8] test in determining whether an expert's testimony should be admitted, but more recently courts have begun to look to *Daubert*.[9]

In very basic terms, the role of a court under *Frye* is to decide if the scientific basis for the proposed testimony is generally accepted in the scientific community. Under *Daubert*, however, the general acceptance of the scientific community is not the key. Rather, in performing what the Supreme Court referred to as a "gate-keeping" function, the trial court makes an initial determination, after a hearing, as to whether the expert is qualified to testify. The tests to be applied are (1) whether the expert's concept has been tested, (2) whether it has been subjected to peer review, (3) what the known rate of error is and (4) whether the concept is generally accepted by the scientific community to which it belongs. In the later case of *Kumho Tire*,[10] the Supreme Court held these factors to be applicable not only to scientific testimony, but to all expert testimony.

As matters stand now, it appears that the "general acceptance" test of *Frye* will still be applied by New York

CONTINUED ON PAGE 14

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State courts where the issue is the reliability and admissibility of novel scientific evidence. However, experts may increasingly be held to the reliability standards of *Daubert* and *Kumho Tire*. The case of *Wahl v. American Honda Motor Co.*[11] provides a nice analysis of these issues.

As a caveat, this is an evolving area, and practitioners must pay close attention to new appellate cases on the subject. In the interim, it would be wise to consider the admissibility of a prospective expert under both *Frye* and *Daubert*.

Conclusion

While each case will present a unique factual context for the selection of an expert, it is difficult to overstate the importance of thinking through an "expert issue" early in the litigation, and then carefully monitoring pretrial compliance with CPLR 3101(d).

1. CPLR 3101(d)(1) ("Trial preparation" – "Experts").
2. The scope of this discussion does not include the special rules applicable to medical malpractice cases, which have additional and often controversial requirements, especially with regard to disclosure of the medical expert's identity. *See Thomas v. Alleyne*, 302 A.D.2d 36, 752 N.Y.S.2d 362 (2d Dep't 2002). Of course, medical experts are used in personal injury actions, and the more general provisions of CPLR 3101(d) still apply to them.
3. CPLR 3101(d)(1)(iii).
4. For a useful review of the apparently conflicting requirements regarding the timing of expert responses, see *Marks v. Solomon*, 174 Misc. 2d 752, 667 N.Y.S.2d 194 (Sup. Ct., Westchester Co. 1997).
5. *See* CPLR 3212.
6. CPLR 3101(d)(2).
7. *See* CPLR 3101(a)(3).
8. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
9. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).
10. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
11. 181 Misc. 2d 396, 693 N.Y.S.2d 875 (Sup. Ct., Suffolk Co. 1999).

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Does the Doctrine of Contractual Unconscionability Have a Role In Executive Compensation Cases?

BY PAUL BENNETT MARROW

In *In re Walt Disney Company Derivative Litigation*,[1] the shareholders of Disney challenged the propriety of a contract entitling Michael Ovitz to receive approximately $140,000,000 in exchange for services as president of Disney for about one year. The parties were at loggerheads over the application of the business judgment rule in a claim of corporate waste. The defendants argued that the *decision* to extend the contract to Ovitz was not unconscionable and therefore the decision was protected by the business judgment rule.

But wait! Why all the fuss over the business judgment rule? Isn't this really a dispute about the unconscionability of the contract itself and not the decision to enter into it? And isn't this really a case about the doctrine of contractual unconscionability?

Contractual unconscionability is something studied in law school and rarely considered afterwards. Why do practitioners often overlook advancing it as a viable and powerful argument? Probably because the doctrine:

- Is perceived as being somewhat irrelevant, given today's array of statutory schemes attempting to regulate all facets of commercial activity and contractual behavior; and
- The doctrine seems to mimic and duplicate other common law theories such as fraud and perhaps even the business judgment rule.

What many miss is that the doctrine is flexible[2] and that, within the context of the common law, it is unique and distinct from other theories, especially the business judgment rule. The *Disney* litigation is illustrative of the doctrine's exceptional flexibility.

A Brief Refresher

Contractual unconscionability is about the operation of terms in a contract. The theory was originally designed to defeat through equity contract terms that "no man in his senses and not under delusion would make on the one hand and as no honest and fair man would accept on the other."[3]

In New York, the Court of Appeals defines contractual unconscionability as a contract that is "so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms."[4]

Over time the concept has been codified. Today examples of such authority are found in the Uniform Commercial Code[5] (UCC) and the Real Property Law (RPL).[6] These statutes charge courts with the power *as a matter of law* to identify unconscionable terms and fashion an appropriate remedy – usually the refusal to enforce an offending term. These provisions operate independently of other efforts to regulate commercial activity and the contracting process.

There is no shortage of reported cases discussing what is and what is not an unconscionable term or condition. That said, slogging through it all leads to the inescapable conclusion that the waters are murky at best. In 1967, Professor Arthur Leff suggested that contractual unconscionability has two component parts: one procedural, and one substantive.[7]

Procedural contract unconscionability speaks to the negotiation or pre-contract stage of contract formation. Substantive contract unconscionability speaks to the actual operation of the contract. Courts throughout the United States have widely accepted this approach, although many have expressed concern about the wisdom of always requiring a showing of both components.

Procedural contract unconscionability is about overreaching that results in surprise. It is important to recognize that overreaching never comes about by acci-

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PAUL BENNETT MARROW serves of counsel to Banks Shapiro Gettinger Waldinger & Brennan, in Mt. Kisco. He is a graduate of Case Western Reserve University and received his J.D. from New York Law School.

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dent. The procedural component therefore almost always involves some degree of intentionality. For this reason, the doctrine is said to sometimes resemble other theories involving intentional torts such as fraud and duress.[8] Procedural contract unconscionability can have an impact on both parties to the agreement *and* others, while substantive contract unconscionability has an impact only on the parties to an agreement. The definition of substantive contract unconscionability is left to the case-by-case discretion of the court.

Is it per se unconscionable to pay someone an exorbitant amount of compensation? At first glance, the business judgment rule would seem to answer the question in the negative.

The court has the equitable power to refuse to enforce an unconscionable contract provision: it can "blue pencil" the provision and even rewrite the contract to achieve an equitable result. For instance, assume a contract with a liquidated damage clause that is insufficient to cover actual damages: The court can open the way for the plaintiff to recover a full measure of economic damages by refusing to uphold the liquidated damage clause. In this scenario, and all scenarios where the court resolves the issue through equity, there is an implicit recognition that the effect of the tainted clause is limited to the parties to the contract.[9]

The Link to the Disney Contract

As noted earlier, it is easy to overlook the doctrine of contract unconscionability because it seems to mimic other legal and equitable theories. Compare a claim in equity for the waste of corporate assets seeking restitution under a contract to avoid unjust enrichment with a case anchored to the theory of contractual unconscionability. While the underlying *theories* may appear at first to be identical because they are both rooted in unjust enrichment, they are not.

Corporate waste involves the application of the business judgment rule and (1) whether the *business decision* was unconscionable and (2) thus whether entering into the contract in the first place was appropriate. To the extent that unconscionability is a factor, judicial review is deflected from the unconscionability of the contract itself and instead focuses on the decision-making process. The operation of the agreement is secondary. On the other hand, an unconscionable contract case focuses on the substantive operation of the contract. The decision-making process is secondary. Each theory can produce a totally different result, despite an identical fact pattern.

This brings us to the complaint in the *Disney* litigation.[10] In 1995, the Walt Disney Company entered into an employment agreement with Michael S. Ovitz pursuant to which Ovitz agreed to serve as president of the company for five years. The plaintiffs alleged that in doing so the defendants breached their fiduciary duties because they "blindly approved an employment agreement with the defendant Michael Ovitz and then, again without any review or deliberation, ignored [another defendant's] dealing with Ovitz regarding his non-fault termination."[11]

The agreement provided that compensation would be limited if Ovitz was terminated for cause, defined in the agreement as gross negligence or malfeasance in the performance of duties. But if termination were "Non-Fault" he would receive lavish compensation. Ovitz clearly had good reason to want to be terminated on a "Non-Fault" basis. At least one member of the Disney Compensation Committee was assisted by an outside consultant.[12] Plaintiffs claimed that Ovitz failed to perform *any* of his duties as president of the company and that he was terminated ("Non-Fault") approximately a year into the term of the agreement under circumstances that wrongfully entitled him to compensation that plaintiffs allege amounted to over $140,000,000.

The plaintiffs claimed that (1) the circumstances surrounding the termination underscored Ovitz's total failure to perform; (2) this resulted in two letter agreements confirming the willingness of the Company and Ovitz to treat the termination as "Non-Fault"; and (3) this permitted Ovitz to collect compensation under favorable terms.

Based on this, the plaintiffs claimed that the defendants did not proceed in good faith, that the contract was a waste of Disney's assets and that the transaction fell outside the protection afforded by the business judgment rule.[13] Plaintiffs sought rescission and/or money damages from the defendants and Ovitz for damages sustained by Disney and the disgorgement of Ovitz's unjust enrichment. The plaintiffs, however, did not challenge either the original agreement or the subsequent letter agreements on the grounds that they were tainted with unconscionability.

Is it *per se* unconscionable to pay someone an exorbitant amount of compensation? At first glance, the business judgment rule would seem to answer the question

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in the negative.[14] The inquiry about unconscionability should not end there, however.

Many states, New York included, hold that when contractual unconscionability is involved, a contract framed as a mutual exchange is substantively unconscionable as a matter of law if it is actually a clear giveaway for nothing of value in return.[15] Most importantly under such circumstances, New York courts appear prepared to dispense with the requirement that procedural unconscionability must be shown to gain relief.[16] Within the context of the *Disney* case, this would mean that a contract to pay an exorbitant amount of compensation in exchange for an acknowledged failure to perform is contractually unconscionable.

The business judgment rule should not be applied in a manner that precludes review by courts of issues involving contract unconscionability.

It should be noted that the original contract did not *automatically* guarantee that Ovitz would collect $140,000,000 for about one year's effort. The termination provisions need not have come into play if Ovitz had performed as promised. The subsequent letter agreements and the circumstances surrounding them, however, created conditions allowing payment. This suggests contract unconscionability because of the alleged confirmation by the company that, in fact, Ovitz had not performed at all as required under the original agreement. Seen in this light, the letter agreements became the instrument entitling Ovitz to the windfall and thus would seem to support the claim of contractual unconscionability.

Why is this important? The business judgment rule supports a presumption in favor of a board of directors that a given decision reflects sound business judgment.[17] The plaintiff has the burden to rebut the presumption by showing, among other things, that the decision was unconscionable. If the plaintiff fails, the contract stands without concern for its operation. The Delaware Supreme Court recently explained that:

> To survive a Rule 23.1 motion to dismiss in a due care case where an expert has advised the board in its decisionmaking process, the complaint must allege particularized facts (not conclusions) that, if proved, would show, for example that: …(f) the *decision* of the Board was so unconscionable as to constitute waste or fraud. . . .[18]

Overcoming the presumption by showing that a given decision was unconscionable is virtually impossible. This is because when deciding whether sound business judgment has been exercised, a court is *required* to validate a transaction "if it can be said that ordinary businessmen might differ on the sufficiency"[19]of contract terms. From this one can reasonably conclude that unconscionable contract terms can be allowed to operate if a board can establish that reasonable people can differ about the propriety of entering into a given contract. In other words, application of the business judgment rule permits a board to substitute its judgment about the unconscionability of a contract term for the judgment of a court. This reality prompted one observer to note recently:

> Because the rule protects business decisions to such a degree as to render meaningless any scrutiny given to a decision, the rule recently has been used to effectively insulate business decisions from judicial review.[20]

The possibility of insulation from judicial review is avoided when the claim is about contractual unconscionability. The validity of a board decision notwithstanding, the claim directs the attention of the court to the validity of the suspect term or condition.

Some may argue that this approach is unnecessary and makes a mockery of the business judgment rule. This argument assumes that the business judgment rule was designed to address contract unconscionability, which it was not, and leads to the conclusion that a board of directors should be allowed to accept an otherwise unconscionable term if it can show that some other board, someplace, would be willing to debate the wisdom of such a decision. This would entitle a board of directors to substitute its judgment about unconscionability for the judgment of a court, a position that is not sanctioned by our system of jurisprudence. It would be tantamount to giving the fox complete reign over the chicken coop.

Conclusion

The business judgment rule is designed to relieve courts from having to second-guess corporate directors who exercise sound business judgment. By the same token, just because acceptance of a contract may be a sound business judgment, this does not change the reality that a contract can still be tainted by substantive unconscionability. Only a court can make that determination.

In short, the business judgment rule should not be applied in a manner that precludes review by courts of issues involving contract unconscionability. From this it reasonable to conclude that the doctrine of contract un-

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conscionability has application to some issues involving executive compensation.

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1. 825 A.2d 275 (Del. Ch. 2003), *prior motion to dismiss in same case reported at* 731 A.2d 342 (Del. Ch. 1998), *aff'd in part, rev'd in part sub nom. Brehm v. Eisner*, 746 A.2d 244 (Del. Sup. Ct. 2000).
2. *See Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10, 537 N.Y.S.2d 787 (1988). "The doctrine, which is rooted in equitable principles, is a flexible one. . . ." *See also State of New York v. Avco Fin. Serv.*, 50 N.Y.2d 383, 389–90, 429 N.Y.S.2d 181 (1980).
3. *Earl of Chesterfield v. Jannsen*, 28 Eng. Rep. 82, 100 (Ch. 1750); *see Avildsen v. Prystay*, 171 A.D.2d 13, 574 N.Y.S.2d 535 (1st Dep't 1991).
4. *Gillman*, 73 N.Y.2d at 10.
5. *See* UCC §§ 2-302, 2-719.
6. *See* RPL § 235-c.
7. Arthur A. Leff, *Unconscionability and the Code: the Emperor's New Clause*, 115 U. Pa. L. Rev. 485, 487 (1967).
8. *Maxwell v. Fidelity Fin. Servs., Inc.*, 184 Ariz. 82, 89 (1995).
9. There may be circumstances in which an unconscionable term can have an impact extending beyond the parties to a given contract. This would be the case where the procedural unconscionability, *i.e.*, overreaching, undermines the sanctity of the contracting process. Arguments are being worked out to address the question of whether or not embedded in the doctrine is a tort component giving rise to claims for consequential and punitive damages in such circumstances. Paul Bennett Marrow, *Crafting a Remedy for the Naughtiness of Procedural Unconscionability*, available in the Spring of 2004. A copy will be made available on request directed to pbmarrow@optonline.net. Many statutory schemes have been designed to attempt to regulate improper conduct in the commercial arena and many assume that they are all inclusive. But they are not. Most prominent are schemes designed to address consumer fraud, consumer rights, and insurance and securities sales practices. In addition, many states have adopted unfair trade practices legislation. *See, e.g.*, Cal. Bus. & Prof. Code § 17200; Conn. Gen. Stat. § 42-110(b); F.S. § 501.201 *et seq.*; Me. Rev. Stat. Ann. title 10, § 1212(1). But because these statutes are situation specific, it is not uncommon to discover judicial interpretations that exclude from their scope factual scenarios that would appear to involve contractual unconscionability. Judicial interpretations have even determined that the meaning of "unfair" within the context of some unfair trade practices legislation excludes unconscionable contracts on the grounds that the proper remedy is in equity, not law. *See Dep't of Business Regulation v. Nat'l Manufactured Hous. Fed'n, Inc.*, 370 So. 2d 1132, 1136 (Fla. 1979); *Point East One Condominium, Inc. v. Point East Developers, Inc.*, 348 So. 2d 32, 36 (Fla. 3d D.C.A. 1977). For a discussion of the Florida rules, see Federbush, *The Unclear Scope of Unconscionability in FDUTPA*, 74 Fla. B.J. 49 (July/Aug. 2000). *But compare Cheshire Mortgage Servs., Inc. v. Montes*, 223 Conn. 80, 105–106, 612 A.2d 1130 (1992); *People v. McKale*, 25 Cal. 3d 626, 159 Cal. Rptr. 811 (1979); *People ex rel. Lockyer v. Freement Life Ins. Co.*, 104 Cal. App. 4th 508, 128 Cal. Rptr. 2d 463 (2d Dist. 2 2002). This suggests that it may be a mistake to stop the analysis when it is determined that a given fact pattern doesn't fall within the four corners of a given statutory scheme.
10. All references are to the Second Amended Consolidated Derivative Complaint, C.A. 15452.
11. *In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275 (Del. Ch. 2003), *prior motion to dismiss in same case reported at* 731 A.2d 342 (Del. Ch. 1998), *aff'd in part, rev'd in part sub nom. Brehm v. Eisner*, 746 A.2d 244 (Del. Sup. Ct. 2000).
12. Plaintiffs claimed, however, that the consultant's services were ancillary to other advisory work being performed and in any case, did not include rendering any formal opinion or recommendation concerning the terms of the contract. *See* Second Amended Consolidated Derivative Complaint, C.A. 15452, paras. 7, 35, 43–45, 47; *see also* para. 68.
13. *Walt Disney Co. Derivative Litig.*, 825 A.2d 275. *See Gagliardi v. TriFoods Int'l, Inc.*, 683 A.2d 1049, 1052 (Del. Ch. 1996); *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984). The business judgment rule provides that directors of corporations are shielded from liability for their good faith exercise of business judgment. "Technically, the [Business Judgment Rule] has four essential elements: (1) good faith, (2) no self-dealing or self-interest, (3) an informed decision, and (4) a reasonable belief that the decision is in the best interest of the corporation." Kenneth B. Davis, Jr., *Once More: The Business Judgment Rule*, 2000 Wis. L. Rev. 573, n.1 (2000).
14. *But cf. Saxe v. Brady*, 184 A.2d 602 (New Castle 1962); *Grimes v. Donald*, 673 A.2d 1207 (1996).
15. *In re Friedman*, 64 A.D.2d 70, 84–85, 407 N.Y.S.2d 561 (2d Dep't 1978); *Maxwell v. Fidelity Fin. Servs., Inc.*, 184 Ariz. 82, 89–90, 907 P.2d 51 (1995), and cases cited therein at n.3; *Resource Mgmt. Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028 (Utah 1985).
16. *Gillman v. Chase Manhattan Bank, N.A.* 73 N.Y.2d 1, 12, 537 N.Y.S.2d 787 (1988); *State v. Avco Fin. Serv.*, 50 N.Y.2d 383, 429 N.Y.S.2d 181 (1980); *Brower v. Gateway 2000*, 246 A.D.2d 246, 676 N.Y.S.2d 569 (1st Dep't 1998); *Master Lease Corp. v. Manhattan Limousine, Ltd.*, 177 A.D.2d 85, 580 N.Y.S.2d 952 (2d Dep't 1992); *Friedman*, 64 A.D.2d at 84–86; *Hanover Ins. Co. v. Losquadro*, 157 Misc. 2d 1014, 600 N.Y.S.2d 419 (Sup. Ct., N.Y. Co. 1993); *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct., Nassau Co. 1969) (Wachtler, J.).
17. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. Sup. Ct. 1984); *see Brehm v. Eisner*, 746 A.2d 244, 264 n.66 (Del. Sup. Ct. 2000).
18. *Brehm*, 746 A.2d at 262 (emphasis added).
19. *Saxe v. Brady*, 40 Del. Ch. 474, at 22–23 (New Castle 1962).

    > Where waste of corporate assets is alleged, the court, notwithstanding independent stockholder ratification, must examine the facts of the situation. Its examination, however, is limited solely to discovering whether what the corporation has received is so inadequate in value that no person of ordinary, sound business judgment would deem it worth what the corporation has paid. *If it can be said that ordinary businessmen might differ on the sufficiency of the terms, then the court must validate the transaction* (emphasis added).

20. Lori B. Marino, *Comment: Executive Compensation and the Misplaced Emphasis on Increasing Shareholder Access to the Proxy,* 147 U. Pa. L. Rev. 1205, 1238 (1999). *See* Carl T. Bogus, *Excessive Executive Compensation and the Failure of Corporate Democracy*, 41 Buff. L. Rev. 1 (1993).

Shepard's® and KeyCite® Are Flawed (or Maybe It's You)

By Alan Wolf and Lynn Wishart

Sally Smith, a first-year associate at an Iowa law firm, is handed her first assignment. The client, a farm worker, was struck by lightning while picking corn. His worker's compensation claim was denied on the ground that lightning is a hazard unrelated to his employment. Sally's supervising partner advises her not to devote an inordinate amount of time to research, given the high cost of the firm's LexisNexis™ service and the relatively small size of the case.

Sally, who considers herself a good online researcher, goes to the Iowa state case law database and performs the "terms and connectors" search: (str! /3 lightning) and (work! /3 compensation).

The search brings up four cases, the most recent being *Mincey v. Dultmeier Manufacturing Co.*, 223 Iowa 252, 272 N.W. 430 (1937). *Mincey* is directly on point, but it applies the "increased risk" rule of *Wax v. Des Moines Asphalt Paving Corp.*, 220 Iowa 864, 263 N.W. 333 (1935), to deny this "act of God" claim. *Wax* reasoned that injuries produced by lightning or severe heat or cold were unrelated to employment because the general public was also subject to these forces.

Sally is careful to Shepardize *Mincey*, and the case appears to be good law. Her supervising partner, whose practice rarely involves worker's compensation claims, asks Sally a single question: "Did you Shepardize it?" Later that day, the client is told that he has no case.

In fact, *Mincey* is *not* good law. More than a dozen years before Sally found and Shepardized the case, the Supreme Court of Iowa unequivocally rejected the "increased risk" rule for an "actual risk" rule more generous to employees in *Hanson v. Reichelt*, 452 N.W.2d 164 (Iowa 1990). In *Hanson*, the court noted that employees required to work outdoors did not feel free to come out of the rain, a freedom enjoyed by members of the general public. Therefore, injury from exposure to the elements was, as the worker's compensation statute demanded, causally related to employment. Under *Hanson*, the farm worker's claim would have been allowed.

Sally would have fared no better if she had relied on Westlaw's KeyCite service. Should we blame Sally or the online citators for failing to determine whether her case was good law?

Failing to Look Forward in Time

To understand why *Mincey* appears to be good law, look at the timeline of Figure 1.

Hanson cited to *Wax* and explicitly overruled it, but *Hanson* did not cite to *Mincey*. When Shepard's and KeyCite processed *Hanson*, they added negative treatment codes to *Wax*, but they failed to look forward in time from *Wax* to find cases like *Mincey* that *explicitly* rely on *Wax*.

In short, *while the citation services send negative treatment backwards in time, they fail to finish the job by moving it forward in time.*

In correspondence with the authors, representatives of LexisNexis[1] and Westlaw[2] concede that their citators do not handle what Westlaw refers to as "implicit" citation.[3]

This omission might be understandable if *Mincey* had relied on the rule of law established in *Wax* without actually citing to the case; looking forward in time might require re-reading every worker's compensation case in Iowa. Where, as here, the reliance on a newly discredited prior case is explicit, the task of finding each and every subsequent *Mincey*-like case is a trivial[4] matter of crunching through an existing database.

Alan Wolf is a visiting associate professor of law at Benjamin N. Cardozo School of Law of Yeshiva University, and a professor of physics at The Cooper Union.

Lynn Wishart is director of the law library and professor of legal research at Benjamin N. Cardozo School of Law of Yeshiva University.

The authors wish to thank Tracy Bloch, now a second-year student at Benjamin N. Cardozo School of Law, for her assistance with research done for this article.

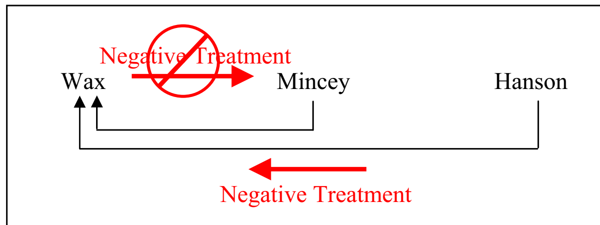

Figure 1

As a practical matter, in relying on Shepard's or KeyCite as Sally did, a lawyer adopts a non-standard meaning for the term "good law." For the citators, a case is bad law only if it is reversed or named in an overruling opinion. For the rest of us, a case also fails to be good law where a clearly overruling case *fails* to name our case.

To our great surprise, although others[5] have questioned the reliability of online citators (looking, for example, to the assignment of correct treatment codes), the failure to "propagate" negative treatment forward in time is virtually unknown, or at least undiscussed.

Reliance on Shepard's and KeyCite

Citation services perform a number of important tasks for a specified case, such as checking its subsequent history and finding later citing cases and secondary sources. Unfortunately, it appears to be a widespread belief among lawyers that citation services automatically find unrelated subsequent cases that clearly renounce a rule of law relied upon by our case.

From the handful of opinions discussing citators, it appears that judges are not immune from the belief that Shepard's and KeyCite are "one-click shopping" for the verification of case law.

> The process of "Shepardizing" a case is fundamental to legal research and can be completed in a manner [sic] of minutes, especially when done with the aid of a computer. Though we do not consider counsel's actions to be egregious in this case, we admonish all attorneys to ensure the validity of all cases presented before this court.
> *Meadowbrook, LLC v. Flower*, 959 P.2d 115 (Utah, 1998)

> [T]he Corporation Counsel is admonished that diligent research, which includes Shepardizing cases, is a professional responsibility, *see* Taylor v. Belger Cartage Service, Inc., 102 F.R.D. 172 (W.D. Mo. 1984), and that officers of the court are obliged to bring to its attention all important cases bearing on the matter at hand, including those which cut against their position. *See* Model Rules of Professional Conduct, Rule 3.3(a)(3).
> *Cimino v. Yale University*, 638 F. Supp. 952 (D. Conn. 1986)

We are not certain where the gap between what the citators do, and what most lawyers understand them to do, arises. Somehow, most lawyers have never come to the realization that in a case sequence such as *Wax–Mincey–Hanson*, online citators will declare *Mincey* to be good law. A small, and decidedly informal survey of law students, law professors and practitioners revealed that the situation rarely seems to have been considered at any stage of their legal education or practice.

Asked the question, "Does Shepardizing or KeyCiting a case correctly determine its status as good law?" most individuals answered in the affirmative. Some added caveats of the sort "but for the occasional human or computer error" and a few stated that, given their ignorance of the innermost workings of the citators, they would never rely on them to validate case law.

One practitioner did outline the forward propagation problem, but credited her awareness to an experience in which she relied upon a *Mincey*-like case that had Shepardized as good law. To her horror, opposing counsel brought a *Hanson*-like overruling case to the court's attention.

For the most part, questions about the reliability of the citators were met with a blank stare, suggesting an unshakable confidence in the "mojo" of clicking on the "Shepardize" or "KeyCite" button. When we outlined the *Wax–Mincey–Hanson* scenario, practitioners often reacted with a mild case of shell shock.

Promotional materials for Shepard's and KeyCite suggest that their citators provide comprehensive, one-click validation of case law. For the most part, their training materials are no more accurate.

> A *Shepard's* Citations report on *lexis.com* offers *full treatment and history analysis needed to verify the status of a case*. You get a complete and timely listing of authorities that have cited your case, with citing references organized by jurisdiction and court, followed by secondary sources.[6]

> With KeyCite, you can verify *instantly* whether your case, statute, administrative decision, or regulation is good law and find citing references to support and strengthen your legal argument. . . .
> It's easy to use. KeyCite takes minutes to learn, because it's based on symbols that appear in your Westlaw research results. These easy-to-recognize icons make it *nearly impossible to overlook history* that could undermine your argument.[7]

While Westlaw claims, but does not deliver, "instant" verification of case law, LexisNexis warns us that failing to use a citator may be a violation of a professional responsibility.

> Failure to update your authority may cause you to base arguments and findings on outdated law, which is worse than basing them on no law at all.
> Several courts have discussed the importance of proper updating and lawyers' professional responsibility to ensure the reliability of the authority they cite.[8]

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Comment by Westlaw

Thank you for sending us the draft of your article on the use of citators. I think you have a good point to make, and that many practitioners will profit from your analysis.

We have long been aware of the "A-B-C" problem (and the related A-B_1-B_2-C problem) you identify. The creation of KeyCite's *Table of Authorities* feature was principally motivated by the desire to contribute to the solution of the problem, used in just the way you describe.

Your A-B-C example is one of several issues that we discuss as problems of *implicit* citation. As we use the term, implicit citations are references that will be understood by the knowledgeable reader despite the absence of an explicit reference. In some kinds of literature, most citations are implicit. For example, film scholars would immediately recognize nearly any scene showing a baby carriage rolling down steps as a kind of a citation to *Battleship Potemkin*, though the connection is rarely made explicit, and many viewers will not know the reference.

In the *Hanson*[1] case, the operative language is "[w]e adopt the actual risk rule in cases involving injuries from exposure to the elements" and, a few lines later, "[b]ecause the district court's judgment is based on a rule of law we now renounce, we must reverse." Such language warns our editors to search the opinion for citations to cases that embody the old rule, and our editors properly tagged *Wax*[2] as being *abrogated* by *Hanson*.[3]

Now the experienced lawyer, reading the *Hanson* opinion, infers that, though not expressly stated, the opinion is rejecting all earlier cases that embrace the increased risk rule. One can imagine a citation system in which the editor undertakes to identify and tag all of the cases subject to this implied rejection. This would add a very different kind of step to the editorial process. In many instances determining the scope of such implied citations would be a relatively straightforward matter. But in many others the effect of a decision on the authority of uncited cases is unclear, and may remain unclear until still later cases explore the issues.

Adding history tags to a citation index calls for judgment and legal analysis, which is one of the reasons that all of the history in both KeyCite and Shepard's is supplied by legal editors rather than by automated systems. But the analysis of these implied citations is a much more difficult and uncertain matter. We feel that this kind of analysis is the proper province of judicial or scholarly analysis, and beyond the scope of the KeyCite editorial service.

KeyCite editors do systematically search for implicit citations when they are doing the direct history of a case. For example, for each federal appellate case we search for district court opinions in the same line of litigation, and will post a case as *affirmed* or *reversed* even if (as happens surprisingly often) the appellate court does not cite the opinion below. Apart from direct history (and with one other exception mentioned below), however, KeyCite is strictly limited to recording explicit citations.

There is, indeed, a very strong tendency for West to oversimplify matters in our promotional literature and, to a lesser extent, in our teaching materials. You are right that it is not strictly true that KeyCite (or any other service) provides really complete "one-click validation of case law."

Marketing and documentation are well outside my area of responsibility at West, but I am sympathetic to the dilemma faced by those who try to describe our products. It is simply the case that legal research is often an exceedingly complex process, and I think it justifiable, at least much of the time, to make generalizations that are not entirely accurate, for either marketing or pedagogical reasons.

Dan Dabney

Senior Director for Research and Development

Westlaw

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1. *Hanson v. Reichelt*, 452 N.W.2d 164 (Iowa 1990).
2. *Wax v. Des Moines Asphalt Paving Corp.*, 220 Iowa 864, 263 N.W. 333 (1935).
3. West avoids using the tag *overruled* unless the court specifically uses some form of the word "overrule." Shepard's also seems to have this policy, but with fewer tags to choose from in the Shepard's system, *Wax* gets a less descriptive *criticized* tag in Shepard's.

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We believe that several of these statements encourage an unjustified and unquestioning reliance on the citators.

The problem has become worse in recent years. The 1997 edition of *How to Shepardize* included the language:

> Usually a case you want to rely on cites other cases or sources of legal authority to establish its position. These sources are called the "underpinnings" of your case. In addition to Shepardizing your case, you need to Shepardize your case's underpinnings to make sure they are still good law, as well. If they are not, and your case has relied on them, then the precedential value of your case could be compromised.

This language was eliminated in more recent editions in response to marketplace pressures.[9] Westlaw's Dan Dabney similarly notes: "There is, indeed, a very strong tendency for West to oversimplify matters in our promotional literature, and, to a lesser extent, in our teaching materials. . . . I am sympathetic to the dilemma faced by those who try to describe our products. It is simply the case that legal research is often an exceedingly complex process, and I think it justifiable, at least much of the time, to make generalizations that are not entirely accurate, for either marketing or pedagogical reasons."[10]

We invite Shepard's and KeyCite to add explicit language to their instructional and promotional materials describing their failure to forward propagate negative treatment and to outline more effective approaches to validating case law.

Who Will Fall Victim To the Citator Gap?

We refer to case sequences like *Wax–Mincey–Hanson* as "ABC sequences." Case "A" announces a rule of law. Case "C" subsequently renounces the rule. Assume for the moment that the language of renunciation is unequivocal – "we reject the rule of case X" or "we overrule X." The "B" case(s) are similar cases, both factually and legally, that fall chronologically between A and C. B cases rely on the rule of case A, and may or may not explicitly cite to A.

When the C decision is handed down, the citators go back to each case named in C, which will usually include case A, and add the appropriate negative treatment codes. Case A will then Shepardize, correctly, as "bad law." But none of the B cases will receive any negative treatment, unless specifically named in C. If a lawyer finds a B case, or worse, a number of consistent B cases, they may incorrectly believe that a substantial body of law supports (or opposes) their position.

Not everyone who performs legal research is likely to fall victim to the ABC problem. For example, attorneys who limit their practice to one or a few narrow areas of the law will generally be aware of appellate decisions of the C type. So will legal scholars, who typically read every appellate decision in the area of their research. Many practitioners, however, are likely to do less thorough research, and may miss a C case. This category includes attorneys with diverse practices (such as Sally's supervising partner), new attorneys or attorneys new to a practice area. The largest group of potential victims are those who might otherwise do a thorough research job, but lack the time, staff or money for their best effort.

Whether an ABC problem is discovered may depend on which attorney finds and relies upon a B case, and the procedural posture of the new dispute. For example, if defense counsel relies heavily on a B case in a dispositive motion, opposing counsel is motivated to perform particularly thorough research to trump that case, and

may well find C. Or the court, through its own efforts, may become aware of the controlling case law. There are fewer bites at the research apple in the Sally Smith scenario. Finding only a B case that undercut her client's position, early in the representation, she simply sent the client home.

The likelihood of missing a C case is in part a function of one's approach to online research. The problem will most often arise with a full-text search such as the one done by Sally Smith: (str! /3 lightning) and (work! /3 compensation) didn't locate *Hanson*. However this combination would have caught it: lightning and (work! /3 compensation).

Hanson is a sunstroke case, not a lightning case, but the opinion does contain the phrase "as from lightning, severe heat or cold," 452 N.W.2d at 167. *Hanson* does not cite to lightning cases and the word might not have appeared in the opinion at all. Sally's search strategy is dangerously dependent on such fortuitous use of language. Our observations of online searching show that law students have a tendency to employ far more search terms and phrases in an initial search query than experienced searchers. Had they performed the search for Sally, they might have used: "struck by lightning" and "workers compensation" and risk and farm.

As previously noted, the B case may actually be a group of cases lying between A and C. The larger this group, the more likely a full text search will find a problematic B case, rather than the A or C cases which would be properly handled by a citator.

As an alternative to full-text searching, some lawyers will use Westlaw's Key Number Digest. The ABC problem might be mitigated with this approach, but for these particular cases it was not. While reviewing a case, Westlaw offers several headnote hierarchies as a means of finding additional cases. In *Mincey*, the most promising of these seems to be:

413 Workers' Compensation

413VIII Injuries for Which Compensation May Be Had

413VIII(D) Particular Causes, Circumstances, and Conditions of Injury

413VIII(D)6 Injuries by Elements or Act of God

413k639 k. Lightning. Most Cited Cases

Neither *Wax* nor *Hanson* appears in the last, most specific key number category, 413k639. If we search the topical sub-category (413VIII(D)6) "Injuries by Elements or Act of God" directly above the key number, we find both *Mincey* and *Wax*, but not *Hanson*. The sub-category may be expanded to produce a list of natural hazards:

6. INJURIES BY ELEMENTS OR ACT OF GOD, k637-k642

k637 In general

k638 Storms and floods

k639 Lightning

k640 Earthquakes

k641 Frostbite or freezing

k642 Sunstroke or heat prostration

Looking at the individual key numbers in this list, we find *Wax* by selecting 413k642, "Sunstroke or heat prostration"

Key numbers *didn't* make it easier to validate *Mincey* – to determine that a lightning case was bad law we had to move to the sunstroke cases![11] While lawyers appreciate the need to broaden a search beyond a very specific fact pattern, their motivation is generally to find *additional* authority for their position in factually analogous situations, not to validate the cases that fell into their initial narrow fact pattern.

Another tool in the online research arsenal is topical searching through Lexis's Search Advisor® or Westlaw's KeySearch.® In Search Advisor, if we start with the top level category of "Worker's Compensation" and follow a path through "Compensability," "Injuries" and "Normal Exertion," we find *Hanson*, *Mincey* and *Wax*. If we had taken the equally plausible path "Worker's Compensation," "Compensability," "Course of Employment," "Risks," then only *Hanson* would have been found. Although our results are no longer dependent on the precise words chosen for a full text search, they have become dependent on the particular path we take through several layers of categories. A bit of positive news – for both Search Advisor and KeySearch – for each of the paths that we tested (we don't claim to have tried all plausible paths) we were brought to the rule-killing case, *Hanson*.

Can Citators Fix the Gap?

For *Wax–Mincey–Hanson*, Sally Smith had a solution at hand, albeit a time-consuming one. Had she clicked on Table of Authorities (TOA) in KeyCite or Shepard's for *Mincey*, she would have seen citation information for each case cited in *Mincey*. Because *Mincey* cited to *Wax*, and *Wax* is now flagged as bad law, the TOA would have indicated a potential problem.

Of course finding a negative treatment symbol in a TOA is not the end of the story. It is then necessary to

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Comment by LexisNexis

Thanks for giving us an opportunity to review the article you and Lynn Wishart have prepared. Here are a few comments that I hope will be useful to you.

Shepard's Citations is enormously helpful in providing the citation information that permits attorneys to decide whether or not their cases are "good law," but you are quite correct that citation services have gaps in the ABC-type scenarios you outline.

Shepard's uses "questioned by" to help provide "bad law" information under certain circumstances that seem relevant to your discussion. For example, let's say case A is the foundation case that case B relies upon. Later, case A is overruled by case C for the foundation proposition, but case C does not cite case B. However, case D subsequently states that case C has overruled case B "sub silentio." Shepard's will show that case B was "questioned by" case D, which allows a researcher Shepardizing case B to find case C without resort to TOA.

Instances of legislative "overruling" are handled similarly using "superseded by statute as stated in." In this scenario, case A is the foundation case that case B relies upon. The legislature subsequently enacts a statute designed to undo the court's holding in case A. (The legislature's intention may or may not be disclosed in the legislative history.) Down the road, case C indicates that case A is no longer good law because of the legislature's action. Shepard's will then show that case A has been "superseded by statute as stated in [case C]." If case C mentions that case B is no longer good law, Shepard's will likewise indicate that case B has been "superseded by statute as stated in [case C]." Or if it takes an even later case, case D, to point out that case B has also been damaged by the legislative action, Shepard's will show that case B has been "superseded by statute as stated in [case D]."

Regarding your discussion of Table of Authorities, the context seems to suggest it is a KeyCite-only feature. Shepard's on LexisNexis also has Table of Authorities, and I believe our TOA feature can be more helpful than KeyCite's under the circumstances you discuss. Because Shepard's indicates when your decision "follows" another case, this information is also pulled into the TOA report. So you will instantly see the cases that your case relied upon, because they are identified as having been followed, and if one (or more) of those cases has a red Signal, TOA will quickly take you to what may well be the hidden weaknesses in the foundation of your case.

A good example of TOA in action is *Juncker v. Tinney*, 549 F. Supp. 574 (D.C. Md. 1982). *Juncker* followed *Parratt v. Taylor*, 451 U.S. 527 (1981), which was subsequently overruled by the Supreme Court. The Shepard's TOA for *Juncker* plainly shows the red Signal on the *Parratt* decision as well as an indication that *Juncker* followed *Parratt*.

Historically, our "How to Shepardize" materials emphasized the importance of Shepardizing "generations" and "underpinnings" to expand your research and be sure the precedential value of your starting case had not been compromised. Here, for example, is some language from the 1997 edition of "How to Shepardize":

> Usually a case you want to rely on cites other cases or other sources of legal authority to establish its position. These sources are called the "underpinnings" of your case.
>
> In addition to Shepardizing your case, you need to Shepardize your case's underpinnings to make sure they are still good law, as well. If they are not, and your case has relied on them, then the precedential value of your case could be compromised.

More recently, we have responded to marketplace pressures to shorten our "how to" materials, and this language was one casualty of our condensation efforts.

In today's fast-paced world, we continue to get feedback from law students, faculty who teach legal research and also from practicing attorneys, most of whom recommend that our "how to" materials need to be even shorter – but when your article is completed, I'd like to pass it along to the people who write these materials so they can consider your suggestions for improvement.

Jane W. Morris, J.D.
Director, Customer Programs, Citations and Caselaw
Editorial LexisNexis

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study the problem with the underlying authority, to see if it has an impact on one's case.

In Figure 2 we modify Figure 1 to show the value of the TOA.

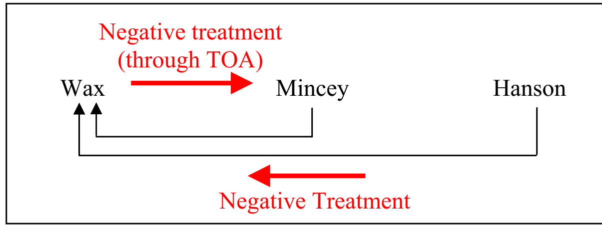

Figure 2

On page 2 of the Westlaw online training materials for KeyCite we find the statement (emphasis supplied):

> You will know ***immediately*** when looking at a case or statute if there is reason to question whether you should cite it.

Buried on page 12 there is an acknowledgment that case validation is not always a trivial matter, and the TOA may be required.

> The Table of Authorities is a useful tool to find a hidden weakness in a case that appears to be good law. It shows whether the cases cited in a case have negative history. This helps you avoid getting "blind-sided" by using a case that has no negative history, itself, but relies on one that does.[12]

Unfortunately, clicking on "TOA" invokes no greater level of magic than clicking on "Shepardize." Consider the chain of four cases, AB_1B_2C, in Figure 3. A is the rule-making case. B_1 follows A, and cites to it. B_2 follows A and B_1, but only cites to the more recent case, B_1. Finally, C is the rule-breaking case that makes A, B_1, and B_2 bad law. C, it so happens, cites only to A.

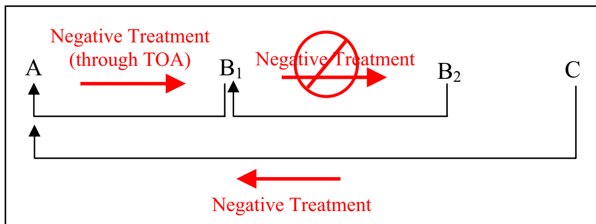

Figure 3

Shepard's and KeyCite will properly add negative treatment codes to A when they process C, because A was cited in C. Is this information propagated back up the chain of cases from A to B_1 to B_2? Not directly, and in any event, not very far. The problem with A reaches as far as B_1, but only, as discussed above, through the TOA. The problem with A and B_1 does not reach B_2 at all. Since B_2 does not cite to A, its TOA is "clean." A four-case chain of this sort may be a relatively common event. A judge writing a B_2 opinion in 2003 may cite to a B_1 opinion in 2000, but may not feel that it is necessary to cite to an A case that dates to 1920.

If one's research leads initially to B_2, the only way to be certain that it is good law is to review each case in its TOA, then the TOA for each of those cases, and so on, back to the origin of the rule of law. The number of cases to be checked quickly becomes prohibitively long. This is the task that Shepard's and KeyCite, with their vast resources, cannot perform across their entire case law database, and it is a task that lawyers cannot generally afford to perform in every research assignment.

One example of an AB_1B_2C case sequence occurs in the context of "exhaustion of remedies" in California. The rule-making "A" case is *Alexander v. State Personnel Board*, 22 Cal. 2d 198, 199, 137 P.2d 433, 434 (1943) ("The rule that administrative remedies must be exhausted before redress may be had in the courts is established in this state."). A "B_1" case that relies on *Alexander* is *Alta Loma School District v. San Bernardino County Committee*, 124 Cal. App. 3d 542, 554, 177 Cal. Rptr. 506, 513 (4th Dist. 1981). A "B_2" case that cites to *Alta Loma* but *not* to *Alexander* for the mandatory character of the exhaustion rule is *Cal-Air Conditioning, Inc. v. Auburn Union School District*, 21 Cal. App. 4th 655, 672, 26 Cal. Rptr. 2d 703, 712 (3d Dist. 1993). Finally, *Alexander* is explicitly overruled in the "C" case, *Sierra Club v. San Joaquin Local Agency Formation Committee*, 21 Cal. 4th 489, 510, 87 Cal. Rptr. 2d 702, 717 (1999) ("We hereby overrule *Alexander*, *supra*, 22 Cal. 2d 198, 137 P.2d 433, and hold that, subject to limitations imposed by statute, the right to petition for judicial review of a final decision of an administrative agency is not necessarily affected by the party's failure to file a request for reconsideration or rehearing before that agency.").

The sequence is summarized in the table below. Only the relevant entries have been filled in. If a researcher finds *Alexander*, its Shepard's flag indicates that it is bad law. The status of *Alta Loma* can be determined by scrutinizing its TOA. If, however, *Cal-Air* is located, neither the Shepard's flag nor the TOA indicates a problem with the case.

Role	Case	Shepard's [KeyCite]	TOA
A	*Alexander*	Red [Red] Overruled by *Sierra Club*	
B_1	*Alta Loma*	Yellow [Yellow] Distinguished by a case outside the sequence	Red symbol for *Alexander* (one of 34 entries in the TOA)
B_2	*Cal-Air*	Blue [Green] – no negative treatment	Yellow symbol next to *Alta Loma* (not suggesting invalidity)
C	*Sierra Club*		

We leave it to others to determine how often scenarios of the ABC or AB_1B_2C type occur. For our purposes

it was sufficient to find a few examples that established that Shepard's and KeyCite did not attempt "forward propagation" of negative treatment.

Conclusion

The few hours of legal research training received by most law students and practitioners creates a sense that case validation is a simple matter. It is not. As Dan Dabney observes: "As a practical matter, most of the legal research world has to go about its business without grappling with the issues of implicit citation or Cutter's rule. As a result, a lot of lawyers are relying on techniques that might not work, and they're taking chances that they're not even aware of."

Neither LexisNexis nor Westlaw provides "one-click" validation of case law. Both companies can solve the ABC problem, and we encourage them to do so, but they cannot solve the AB_1B_2C problem (or the ABC problem where B fails to explicitly cite A).

We wish we could offer lawyers a new one-click approach to case validation, but the nature of language and our legal system precludes any simple solution to this problem. To insure reliance on good law requires additional time devoted to legal research. Ideally one takes the time to find the foundational "A" cases as well as rule-changing "C" cases, rather than relying on full text searching of narrow fact patterns which is more likely to find potentially problematic "B" cases. Good research habits, such as exploring secondary sources (particularly when working in an unfamiliar area of law), the use of TOAs, topical or key number strategies to broaden searches and a reduced dependence on complex full text searches, may keep this added burden to manageable levels.

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1. "[Y]ou are quite correct that citation services have gaps in the ABC-type scenarios you outline." E-mail from Jane W. Morris, Director, Customer Programs, Citations and Case law, Editorial LexisNexis (July 18, 2003) (on file with authors).
2. "Apart from direct history (and with one other exception mentioned below), however, KeyCite is strictly limited to recording explicit citations." E-mail from Dan Dabney, Senior Director for Research and Development, Westlaw (July 10, 2003) (on file with authors).
3. *Id.*
4. Dan Dabney of Westlaw disagrees that the solution is trivial, arguing that adding a red flag to these cases "would cause a great proliferation of meaningless red flags." *Id.* The authors agree that red flags are inadvisable and suggest instead the addition of a new color or icon for potentially problematic implicit citations. As with the yellow icon, legal researchers can choose whether or not the (brown?) symbol merits further attention.
5. *See, e.g.*, William L. Taylor, *Comparing KeyCite and Shepard's for Completeness, Currency, and Accuracy*, 92 Law Libr. J. 127 (2000); Jane W. Morris, *A Response to Taylor's Comparison of Shepard's and KeyCite*, 92 Law Libr. J. 143 (2000) (looking at, *e.g.*, multi-day backlogs in data entry, and the vagaries of assigning treatment codes); James F. Spriggs II & Thomas G. Hansford, *Measuring Legal Change: The Reliability and Validity of Shepard's Citations*, 53 Pol. Res. Q. 327 (2000) (looking at the validity of treatment codes); Donald R. Songer, *Case Selection in Judicial Impact Research*, 41 W. Pol. Q. 569 (1988) (looking at, *e.g.*, whether a case's reference to "Miranda warnings" will trigger a Shepard's entry to the *Miranda* opinion).
6. <http://web.lexis.com/lawschoolreg/tutorials/updating/page3.htm> (emphasis supplied) (last visited July 27, 2003).
7. <http://west.thomson.com/store/product.asp?product%5Fid=KeyCite&catalog%5Fname=wgstore> (emphasis supplied) (last visited July 27, 2003).
8. <http://web.lexis.com/lawschoolreg/tutorials/updating/page2.htm> (last visited July 27, 2003).
9. Morris, *supra* note 1.
10. Dabney, *supra* note 2.
11. *Id*. Dan Dabney explains the rationale for this indexing as an application of "Cutter's rule," "whereby items are posted only to classifications that are at the finest level of articulation the item calls for." In effect, Cutter's rule, which "has often been criticized, and not without reason," prevents double-posting cases like *Wax*, *Mincey* and *Hanson* to other key number categories.
12. <http://training.westgroup.com/programs/using_wl/menu_lb.asp?course=using_wl_lb> (click on "Using KeyCite to verify good law" to launch the tutorial in a separate window) (last visited July 27, 2003).

Electronic Discovery Can Unearth Treasure Trove of Information Or Potential Land Mines

By Lesley Friedman Rosenthal

Attorneys confronting electronic discovery for the first time may feel like the protagonist Berenger in Ionesco's absurdist play *Rhinoceros*. All around him, Berenger's friends and loved ones develop "rhinoceritis," a not-fatal disease in which people turn into rhinoceroses. Electronic discovery can be that way: it is in some ways an absurd world, but everybody seems to be in it these days.

Many lawyers and litigants perceive a treasure trove – or potential land mines – hidden among back-up, residual and replicate data. They may be right. Just ask Monica Lewinsky, Jack Grubman and Bill Gates. But one need not be handling headline matters to notice the broad impact of "e-discovery." Many cases may now require attorneys to search, analyze, produce, and manage electronic data, including deleted or archived files.

What is so unusual about electronic discovery?

- Clients – and adversaries – can be sanctioned for improper document retention practices under criteria that are rapidly evolving;
- For businesses involved in litigation, electronic discovery can increase discovery costs many times over – or help realize significant litigation efficiencies – or both;
- Courts have begun shifting the cost of producing electronic documents in accordance with new rules.

It is worth knowing what kinds of electronic data there are; how data is backed up, discarded and retained; and what happens if the client gets it wrong. It is also worth learning how enterprising lawyers in nearly every area of practice may do digital detective work; how much electronic discovery really costs; and who is likely to pay those costs.

E-mail and Other Electronic Files Are Ubiquitous

Employees exchanged about 2.8 billion e-mails every day in 2000.[1]

As was widely reported in the *National Law Journal* and elsewhere, one of those e-mails, from a Merrill Lynch analyst, called the stock of a certain Internet company "a piece of junk" and "a powder keg."[2] At the same time, Merrill Lynch was giving the company – a Merrill Lynch client – the firm's highest stock rating. That e-mail, and others like it, led Merrill Lynch to announce the $100 million settlement of civil enforcement proceedings last year. The trail of e-mails uncovered by the Office of the New York State Attorney General has formed the basis for dozens of class action lawsuits, borrowing generously from the AG's court filings and the e-mails they quote.

What sets electronic data apart from other kinds of information is that it can be generated quickly and stored cheaply.[3] On servers, hard drives and other electronic media worldwide, data mounts up by the nanosecond. By one measure, 99.997% of all information storage is now in electronic form; printed material of all kinds makes up less than .003 percent of all stored information.[4]

Nearly all critical business records, and much personal correspondence, are now generated and stored electronically.[5] E-mails, word-processed documents, Excel spreadsheets, and PowerPoint presentations linger on servers worldwide. Many companies are finding out the hard way that they don't know what documents they hold in inventory, let alone which ones they have destroyed.

Most of the documents are probably innocuous, but it takes just one provocative e-mail to create a public relations disaster or a litigation liability – or a bonanza.

Lesley Friedman Rosenthal is a litigator and a member of the communications and technology practice group at Paul, Weiss, Rifkind, Wharton & Garrison LLP. She graduated from Harvard College, studied at Oxford University, and received her law degree from Harvard Law School.

Ms. Rosenthal presented a version of this article to the Justices of the New York Supreme Court, Commercial Division, at the New York State Judicial Institute in May 2003.

Karen Ziman assisted in the preparation of this article.

Electronic data has a bad habit of hanging around, even after one thinks one has discarded it. There is a real disconnect between what electronic information people retain and what they want to retain. One reason electronic files are so permanent has to do with the way they are stored on the computer. Deleting a file does not actually erase the file itself. Deleting only removes the "pointer" that the computer uses to find the file's data on the hard drive. The data itself still exists – at least until it gets overwritten by another file:

> "Deleting" a file . . . simply finds the data's entry in the disk directory and changes it to a "not used" status – thus permitting the computer to write over the "deleted" data. Until the computer writes over the "deleted" data, however, it may be recovered by searching the disk itself rather than the disk's directory. Accordingly, many files are recoverable long after they have been deleted – even if neither the computer user nor the computer itself is aware of their existence. Such data is referred to as "residual data."[6]

Deleting a file has been likened to scratching out part of a book's table of contents in an attempt to erase a chapter – that may make it harder for the casual reader to find what he or she is looking for, but for the determined reader, the pages are still bound into the book.

E-mail messages are even harder to delete, because multiple copies of them often exist, not just on the sender's computer but also on servers and the computers of the addressees, the cc's and the bcc's. Deleted e-mails may also exist because they were backed up – on any one or more of the above users' systems – before they were deleted. Deleted computer files are discoverable.[7]

Understanding Backup Is Critical to Managing E-Discovery

A backup tape is a copy of information, generally made for the purpose of disaster recovery in the event of a system failure or natural disaster. Backup programs often compress data, to reduce the amount of physical space required on the backup media.

Backup tapes typically contain documents created by system users, such as e-mail messages, word-processing documents, spreadsheets, database entries and the like – but also often include copies of the system files required to make the computer's operating systems function properly. Thus, a volume of information that may seem enormous at first glance may contain a manageable amount of usable information for purposes of discovery.

Sometimes, a large volume of information on backup tapes is a "red herring," fooling judges (or even an uninformed adversary) into thinking that the amount of data to sift through is unmanageable. It is important to understand the differences between three kinds of backup:

- Full backup – a complete backup of all information contained on the system.
- Selective backup – specific files and directories are selected, for example to avoid backing up unnecessary program or system files or to focus on data files in known user directories.
- Incremental backup – only those files that have changed since the last backup are copied.

Most companies with a comprehensive policy use a mix of full and incremental backup.

A lawyer embarking on electronic discovery should understand a company's backup protocol and backup schedule before determining a document production plan.

Object Lessons in Document Retention

Linnen v. A.H. Robins Co. One of the most frequently discussed cases in connection with spoliation of electronic evidence is *Linnen v. A.H. Robins Co*.[8] This Fen-Phen case demonstrates the pitfalls of not knowing what backup the client has, and not automatically suspending a document management protocol upon notification of a claim.

Plaintiffs in this litigation requested e-mails sent or received by 15 named individuals that referenced specific topics relating to the drug and its associated risks. Wyeth produced only a small number of e-mails in hard copy form, claiming that it did not have a "mass storage" device or other backup tapes. However, Wyeth ultimately admitted to the existence of more than 1,000 backup tapes that had been held for a previous litigation. It then maintained that a search of the backup tapes was unnecessary because the company had instructed its employees to save relevant documents and had already produced them.

Plaintiffs moved to compel production of the backup tapes, claiming that the tapes might contain communications and documents that had been deleted from the computer system at some point in time and thus were only available on backup tapes. Wyeth characterized the motion as a "multimillion dollar fishing expedition."

The court rejected Wyeth's characterization, declaring that the cost involved was one of the risks taken on by companies that have made the decision to avail themselves of the computer technology now available to the business world.[9] The court ordered the defendant to begin compliance by restoring a specified sample of backup tapes and producing responsive documents or communications, and reserved any decision to require additional tapes to be restored until the potential for relevant and responsive documents was more fully explored through review of the restored sample tapes. Wyeth was sanctioned by being required to bear all costs and fees associated with the e-mail discovery

What Is a Sensible Document Retention Policy?

There's nothing new about document retention policies – or spoliation of evidence, for that matter – but electronic discovery brings complexities all its own, and the stakes can be high.

Businesses and individuals are well within their rights to destroy old documents – electronic or otherwise – so long as they have well-thought-out policies that square with the laws and are consistently applied.

Courts tend to look with approval on document retention policies that:

✓ comply with applicable regulations – which may vary from industry to industry,

✓ comport with developing case law,

✓ are instituted in good faith, *i.e.:*

- provide reasonably ready access to needed information
- take account of the frequency and magnitude of complaints that might render destroyed documents relevant
- make a reasonable space/cost calculus

✓ are consistently applied, and

✓ provide for suspension and preservation of evidence if a claim is anticipated or brought.

issue. The anticipated cost of restoring data from 17 months of e-mail backup tapes approached $1.75 million.

To make matters worse, Wyeth did not suspend its document retention policy or begin saving new backup tapes until four months after the action was initiated, and three months after plaintiffs' first document production request. Accordingly, the court issued a jury instruction that an adverse inference may be drawn from the fact that documents were destroyed by Wyeth.

Boeing The Boeing case[10] is an object lesson about how expensive litigation can be when a company doesn't keep track of what backups it has, and what information resides on what tapes.

In the fall of 1998, a Seattle plaintiff's attorney was preparing discovery requests to be sent to Boeing in a shareholder stock fraud suit. During a prediscovery deposition, he learned that the company had 14,000 backup tapes of company e-mail stored in a warehouse. Boeing sought to narrow the scope of production, but the company could not determine whose e-mails were on which tapes without first resurrecting the tapes. The judge ordered it to restore all 14,000 tapes. Not surprisingly, it chose to do so internally, at its own expense, rather than to avail itself of the "assistance" of plaintiff's counsel or a court-appointed special master. Once it did, several of the e-mails were suggestive enough to persuade the company to settle for $92 million.

Arthur Andersen The Andersen story is, among other things, a lesson about consistent application of a document retention policy. It is also a prominent example of the need to suspend a document retention policy once the duty to preserve is triggered.

Andersen employees destroyed thousands of Enron-related documents, even though it knew of an informal inquiry into Enron by the SEC. Andersen maintained that the shredding was routine compliance with a policy designed to protect client confidentiality. In reality, the destruction was initiated by Andersen lawyers and managers with a newfound interest in the firm's theretofore-ignored document retention policy, only after the SEC inquiry had commenced. Andersen's inconsistently applied policy, and its failure to suspend it when required, was a major factor in the firm's obstruction of justice conviction and ultimate demise.

Doing Digital Detective Work

The 2.8 billion daily e-mails are only the tip of the electronic evidence iceberg. Electronic evidence may also reside in records of instant-message sessions, chat rooms, unified message systems that combine e-mail records with voice mail tapes, digital TV recorders, MP3 players and global positioning system satellite records that track vehicle locations.

Electronic evidence might be found – and will be sought, and must be searched for – at the office, on servers, mainframe computers, and desktop computers; in employees' homes, on PCs or laptops, or on Palm Pilots, BlackBerrys, or cell phones; and in a company's remote locations worldwide. Each of these sources and locations should be considered when framing or responding to document requests.

Moreover, electronic files contain more information than just the "content." Electronic files contain "metadata," which reveals when documents were created and by whom; whether, when, how, and by whom it was modified; and who received a blind copy. This can be valuable information for a party seeking to prove that a document was backdated, tampered with, or forged. It can also provide valuable information in a contract dispute about the origin of certain clauses or what was negotiated out of the document from a prior draft.

How is this mine of electronic data – and metadata – recovered, reviewed, and if appropriate, readied for production in litigation? Electronic data discovery (EDD) is now a $1 billion a year industry and growing

exponentially. Several firms, including the Big Four accounting firms, as well as Applied Discovery Inc., Computer Forensics, Daticon, Kroll Ontrack, and others, have made a business out of "computer forensics": recovering deleted files for companies that are embroiled in litigation, undergoing regulatory review, or attempting to document workplace misconduct.

Differences in Cost Structure Between Paper and Electronic Discovery

In general, the costs of electronic discovery are higher up front than paper discovery, but may present significant efficiency gains in the long term. In paper discovery, documents must be processed by making working copies, stamping Bates numbers, storing boxes in a central repository, and scanning and coding documents so images can be stored in a database. Paper discovery typically flows for many months, with perhaps $10,000 or more for copying charges in one month and $30,000 for scanning and coding charges in another month.

By contrast, an e-discovery bid typically includes all the anticipated costs up front. Those bids can run into the seven figures. Electronic discovery enables documents to be quickly processed with automated technology that displays all documents in a common file format, assigning unique ID numbers and storing the full text in a convenient repository. These costs are oftentimes added to the costs of traditional paper discovery.

Electronic evidence might be found – and will be sought, and must be searched for – at the office, on servers, mainframe computers, and desktop computers; in employees' homes, on PCs or laptops, or on Palm Pilots, BlackBerrys, or cell phones; and in a company's remote locations worldwide.

Manual discovery processes are time consuming, labor intensive and error prone in the review stage. After an initial investment in electronic discovery tools, full-text searching may allow the review team to find key documents more reliably, in a shorter period of time. A joint prosecution or defense group may access the entire document collection, even at disparate locations worldwide, through secure sites on the Internet. The ability to redact privileged information once and for all, or apply annotations online, all from one shared repository, may further increase efficiencies and avoid waiver problems.

As with paper discovery, the ultimate goal of any discovery project is to identify and produce only those documents that are responsive and not privileged or otherwise objectionable. E-discovery may streamline this process by ensuring that only those documents designated as responsive are produced from the total collection, with redactions intact. E-discovery also allows attorneys to produce a responsive collection of documents in either paper or electronic format.

Once the documents have been mounted on an electronic system, both full text and metadata can be searched with e-discovery technology, accessing documents with new search terms at various points in the case.

Legacy Applications May Impose Hidden Costs

Many companies use a jumble of technology platforms, incompatible, outdated or unlinked systems, applications and servers that – individually or collectively – do not lend themselves to easy access. Tapes, the most common backup, are designed more for disaster recovery than archival purposes and are therefore difficult to index and search.

The data in legacy applications, such as old e-mail programs, may be difficult to restore and search. And the farther back a company has to go to retrieve records, the worse the legacy problem gets – partly because savvy lawyers may insist that corporations produce records in their native formats.

The requesting party should be aware, however, that the cost of restoring such "legacy systems" may fall to it, if it fails to persuade the court of the likelihood of unearthing relevant information compared with the expense of doing so. In one recent employment discrimination case from the Northern District of Illinois,[11] the court held that plaintiff employees were entitled to defendant's e-mails that referenced the employees, but plaintiffs had to pay the $8,000/month to license the e-mail program (no longer in use by defendants) that was necessary to view the e-mails on the backup tapes.

Cost Shifting

Ordinarily, the American Rule gives us the presumption that each party will bear its own costs of production. However, courts are increasingly likely to shift some of the costs to the requesting party under certain circumstances.

In considering the issue of cost-shifting, a leading decision is *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*[12] *Rowe* raised the question of whether and to

what extent to shift the costs of electronic discovery of information that was stored on archival tapes originally created only for disaster recovery. *Rowe*'s eight-part balancing test considered the following:

1. Is the discovery request an e-mail fishing expedition? Overly broad requests can lead to cost-shifting if not outright denial. Requests seeking "any and all" e-mail communications in a broad time span or among a large group of people are particularly vulnerable.

2. How likely is it that the search will be successful? Early depositions getting at the heart of who communicated on what subjects with whom via e-mail can be invaluable in this regard.

3. Will the e-mail provide any critical new information? Or can other avenues (correspondence files that include printouts of relevant e-mails, for example) fill the bill?

4. Is there a business purpose for retaining e-mail? If there is an ongoing business purpose, then the cost and burden will likely remain with the producing party. If the purpose of retaining is to protect against electronic disaster, then shifting costs to the requesting party may be more appropriate.

5. Who will benefit from the e-mail restoration? The party seeking electronic discovery is more likely to avoid cost-shifting if it can show some business or evidentiary value to the producing party as well.

6. Is the total cost of the proposed production substantial? This requires expert testimony and a sound understanding of the adversary's data systems, again gleaned through pre-discovery depositions or interrogatories if possible.

7. Which side is most able to control the costs of production?

8. Are both sides equally able to pay the costs of production?[13]

Some commentators have noted with concern, however, that the eight *Rowe* factors may tend to favor the responding party, shifting the costs of electronic discovery too readily.[14]

New Developments – *Zubulake I & II*

Responding to such concerns, U.S. District Judge Shira Scheindlin has recently issued a pair of decisions that somewhat modify the *Rowe* analysis. In *Zubulake v. UBS Warburg LLC*,[15] an employment discrimination case, the plaintiff equities trader sought e-mails available from the backup tapes and archived media of her former employer. The company used an automated backup process, and also saved e-mails from traders' desks in searchable format. UBS initially produced only 350 pages. It did not review any of the backup tapes or the e-mails, estimating that to do so would cost $300,000 and $175,000 respectively, exclusive of attorney time. Plaintiff moved to compel.

In a May 2003 ruling, the court performed a three-step analysis to ascertain the appropriate scope and burden of discovering electronic data.[16]

The *Zubulake* court would only entertain the possibility of shifting the cost of production where the data was relatively inaccessible.

First, it examined the responding party's computer systems and the accessibility of the data. The court found three types of accessible data: active, online data; near-line data; and offline storage/archives. Backup tapes or erased, fragmented or damaged data were considered inaccessible.[17] The court would only entertain the possibility of shifting the cost of production where the data was relatively inaccessible. The court found that UBS's optical disks were easily accessible, and therefore that UBS should bear the expense of producing the requested information. However, the court decided that backup data on tapes was relatively inaccessible, and accordingly proceeded to the next step in the analysis.

Next, having determined that the backup data was relatively inaccessible, the court sought to ascertain what kind of data might be found on the inaccessible media. Because this was a fact-sensitive inquiry, the court ordered the responding party to restore and produce a small sample of the backup tapes, both to determine what kind of information the documents contained and to determine the actual cost involved.[18]

Step three determined whether the production costs should be shifted. The *Zubulake I* court announced a new seven-part test:

1. The extent to which the request is specially tailored to discover relevant information;

2. The availability of such information from other sources;

3. The total cost of the production, compared to the amount in controversy;

4. The total cost of the production, compared to the resources available to each party;

5. The relative ability of each party to control costs and its incentive to do so;

6. The importance of the issues at stake in the litigation; and

7. The relative benefits to the parties of obtaining the information.[19]

Not all factors are weighted equally. The first two factors, which according to the court comprise a "marginal utility test," weigh the most heavily. While certain factors pertain to the relative cost of a production, the absolute wealth of the parties is not a relevant factor. The cost of responding may not be unduly burdensome when considering the cost of the production compared to the amount in controversy, *i.e.*, a $100,000 expense may be reasonable in a multi-million dollar case.[20]

After UBS concluded the required sample restoration, Zubulake moved to compel production of all remaining backup e-mails at UBS's expense. In July 2003, the court ruled in *Zubulake II* that UBS must perform the restoration and pay for 75% of the costs, but that Zubulake must shoulder the remaining 25%. UBS was also ordered to pay for any costs incurred in reviewing the restored documents for privilege.

Zubulake I and *Zubulake II* are noteworthy, for litigators, trade regulatory lawyers and anyone else responsible for counseling clients about document retention policies. Firms that routinely record and store e-mails and other electronic documents would be well advised to consider whether their existing policies meet all corporate interests in light of these new developments. Interestingly, because the *Zubulake* court would only entertain the possibility of shifting the cost of production where the data was relatively inaccessible, these decisions may incentivize corporations to limit or even eliminate search capabilities on data residing in legacy systems and on backup tapes. Such strategic restricting of "accessibility" could set the stage for a shifting of costs to prospective plaintiffs. At the same time, plaintiffs' attorneys should study these decisions in order to apprise clients of the risk of having significant electronic discovery costs shifted to them.

Privilege Considerations

As with traditional discovery, courts have ways of making recalcitrant litigants cooperate with e-discovery.

Attorneys facing such an adversary may consider moving for these new types of relief: an order compelling a party to search its own servers and backup tapes at its own expense; appointment of a special master or referee to review information retrieved from the computer system by a court-appointed computer forensics specialist; an order permitting a movant access to its adversary's computer system; and/or motions for sanctions for failing to preserve and produce data from backup tapes, possibly resulting in monetary penalties, adverse jury instructions, and even a judgment on the merits.

However, attorneys and judges should be sensitive to issues of privilege and confidentiality in considering motions to compel.

Such considerations featured prominently in the decision of the U.S. District Court for the Southern District of California in *Playboy Enterprises v. Welles*.[21] There, the plaintiff moved to compel access to the defendant's hard drive to uncover deleted e-mails. There was some suggestion that the defendant had intentionally deleted all her incoming and outgoing e-mails, without regard to the litigation, and there was a dispute about whether the deleted e-mails were even recoverable. Accordingly, the court appointed a computer expert to create a "mirror image" of the defendant's hard drive in an effort to retrieve the deleted data, and directed the parties to meet and confer to designate such expert. The expert would serve as an officer of the court and be required to sign the protective order in the case. To the extent the computer specialist would have direct or indirect access to information protected by the attorney-client privilege, the court ordered that such "disclosure" would not result in a waiver of the attorney-client privilege. The mirror image was to be given to defendant's counsel, who would print and review any recovered documents, produce to plaintiff any responsive communications, and record any documents withheld on the basis of privilege. Finally, although plaintiff's counsel was paying for the expert, defendant's counsel was entrusted with maintaining the mirror image for the duration of the litigation. Counsel and the expert also would be required to submit to the court a report on the success of retrieving all or part of the total data on the hard drive.

What's Next

Some commentators have recommended amendments to federal[22] and state[23] discovery rules to address electronic discovery issues. The Texas Rules of Civil Procedure have already been amended to address the unique nature of electronic discovery.[24] The Sedona Conference, a think tank dedicated to the advanced study of law and policy, recently issued a set of "Best Practices" for electronic discovery.[25]

There are numerous ways for practitioners to keep up with fast-breaking developments in the sometimes bizarre, "rhinoceros" world of electronic discovery. The Bureau of National Affairs (BNA) publishes a monthly newsletter, *Digital Discovery and E-Evidence*. E-mail case summary alerts and a bimonthly publication on electronic discovery are available through Applied Discovery, a member of the LexisNexis Group. Lawyer Lounge, an Internet resource center focusing on law office technology, publishes an interactive page on electronic discovery at http://lawyerlounge.com/ediscovery.

Attorneys and judges are being called upon with increasing frequency to manage electronic discovery issues. Some of the areas with the most at stake for litigants – the viability of their document retention policies

Checklist for Electronic Discovery Planning and Management

The key to effective handling of electronic discovery issues is early planning and management:

❒ ***Understand*** the nature of the evidence likely to be sought and its relevance to the claim or potential claim;

❒ ***Agree*** – or obtain a ruling, if need be – on the breadth of evidence to be produced, including agreement on relevant search terms if appropriate;

❒ ***Identify*** the point persons – including an IT manager, or even an outside computer expert, if necessary – responsible for overseeing the search, the identification, and review of information for producible material;

❒ ***Allocate*** costs, giving due consideration to factors found controlling by the courts;

❒ ***Perform*** a pre-production review of the electronic documents for privileged or confidential materials; and

❒ ***Determine*** when, whether and to what extent the client should suspend recycling of backup tapes and other routine document destruction policies.

and cost shifting in discovery, for example – seem to be the ones most in flux. Attorneys counseling clients on such issues might be well advised to join the rampaging rhinos.

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1. Dana Hawkins, *Office Politics in the Electronic Age*, US News & World Report Online (Feb. 2000).
2. *See, e.g.*, David Hechler, *New York's AG Takes on the Street*, Nat'l L.J., Dec. 23, 2002.
3. *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (explaining that electronic data is so voluminous because, unlike paper documents, "the costs of storage are virtually nil. Information is retained not because it is expected to be used, but because there is no compelling reason to discard it"), *aff'd*, 2002 WL 975713 (S.D.N.Y. May 9, 2002).
4. Peter Lyman & Hal R. Varian, *How Much Information?* (2000), *available at* <http://www.sims.berkeley.edu/how-much-info>.
5. *See* Wendy R. Liebowitz, *Digital Discovery Starts to Work*, Nat'l L.J., Nov. 4, 2002, at 4 (reporting that in 1999, 93% of all information generated was in digital form).
6. Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. Rev. 327, 337 (2000) (footnotes omitted).
7. *See, e.g.*, *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652 (D. Minn. 2002) ("[I]t is a well accepted proposition that deleted computer files, whether they be e-mails or otherwise, are discoverable."); *Simon Prop. Group L.P. v. MySimon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000) ("First, computer records, including records that have been 'deleted,' are documents discoverable under Fed. R. Civ. P. 34.").
8. 1999 Mass. Super. LEXIS 240 (Mass. Super. June 16, 1999).
9. *But see McPeek v. Ashcroft*, 202 F..R.D. 31 (D.D.C. 2001) ("What alternative is there? Quill pens?").
10. *See* Julius Melnitzer, *Keeping Track of the Invisible Paper Trail: What Legal Departments Can Learn from Boeing's Experience*, Corporate Legal Times, Feb. 2003, *available at* <http://www.cltmag.com/editorial/technology/feb03.cfm>.
11. *Byers v. Illinois State Police*, 2002 U.S. Dist. LEXIS 9861 (N.D. Ill. 2002).
12. 205 F.R.D. 421 (S.D.N.Y. 2002).
13. *Id.* at 429.
14. *See, e.g.*, Adam I. Cohen & David J. Lender, Electronic Discovery: Law and Practice § 5.04(c) (Aspen Law & Business, publication forthcoming 2003) ("If courts simply conduct an absolute comparison of the eight *Rowe* factors, the responding party will need to attain just one more factor to shift the costs to the requesting party. This is a dramatic shift from earlier cases, which were more inclined to follow the presumption in traditional document production, requiring the responding party to pay.").
15. 02 Civ. 1243, 2003 U.S. Dist. LEXIS 7939 (S.D.N.Y. May 13, 2003) ("*Zubulake I*"); *Zubulake v. UBS Warburg LLC,* 216 F.R.D. 280 (S.D.N.Y. 2003) ("*Zubulake II*").
16. *Zubulake I*, 2003 U.S. Dist. LEXIS 7939, at *36.
17. *Id.* at *24.
18. *Id.* at *37.
19. *Id.*
20. *Id*. at *28.
21. 60 F. Supp. 2d 1050 (S.D. Cal. 1999).
22. *E.g.*, Scheindlin & Rabkin, *supra* note 6 (advocating amendments to Rule 34 to rectify issues identified).
23. Proposed Model Rule Regarding Production of Data or Information in Electronic Form; Cost-Shifting and Safe Harbor [Electronic Discovery; Provisions for], *available at* <http://www.kenwithers.com/articles/index.html>.
24. Tex. R. Civ. P. 196.4 (Electronic or Magnetic Data).
25. The Sedona Conference, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (Mar. 2003), *available at* <http://www.thesedonaconference.org/publications_html>.

The Role of Trial Court Opinions In the Judicial Process

BY JOHN B. NESBITT

Why should trial court judges write opinions? The question arose at the National Judicial College last summer. As the instructor in a seminar on logic and legal reasoning explained the rules and fallacies associated with categorical, hypothetical and disjunctive syllogisms, I took notes for later study. A Minnesota trial judge of obvious experience and confidence sat nonplussed with his arms folded across his chest. When we spoke at a break, he smiled and said, "You know, John, we were elected to make decisions, not explain them. Don't over-think this stuff."

This recalled remarks a New York State Supreme Court justice made at "judge school" held shortly after I was elected. Extolling the virtues of short bench rulings, the justice drove home his point with the aphorism that one should not write when one can talk, and not talk when one doesn't have to. All this I had already heard at the feet of retired Court of Claims Judge Robert M. Quigley, who embraced (with tongue in cheek) the maxim – *scriptum manet* – that which is written remains. For, as Lincoln taught us, it is better to be thought a fool than to open one's mouth and remove all doubts.

Levity aside, serious practical considerations discourage opinion writing on the trial level. Perhaps foremost is the time and effort needed to do an adequate job. In private practice, lawyers spend much of their time preparing, assembling and composing writings to persuade others. Trial judges have their hands full just digesting this material, much less explaining it. Some of it, such as unfiltered transcripts, other written evidentiary materials and even the judge's own notes, often does not easily yield the relevant information without culling the extraneous and making some interpretive effort on what remains. The pace of the proceedings may be such that the trial judge cannot expect the lawyers to produce the type of memorandum of law or brief one could expect at the appellate level, drafted after sitting down with a settled record, greater opportunity to fully respond to opponent's arguments, and the benefit of adequate time to draft and polish the perfect brief.

Finally, these hurdles aside, when the trial judge does write an opinion, do the lawyers and litigants really care about anything except the result? In most cases, probably not.

Institutional Obligations

Nevertheless, there are some very good reasons for doing a written opinion notwithstanding the time taken away from other cases and the lack of interested audience.[1] Two involve the judicial bottom line.

First and certainly foremost, some form of explanation is often obligatory – it's part of the judge's job description. Statutes in many cases dictate at least a statement of the essential facts found, given the unique function of trial judges as fact finders in non-jury cases.[2] Any litigator or trial judge knows that credibility assessments depend as much on how the testimony or evidence is presented as well as what is presented. A cold record on appeal cannot preserve the dynamics of the trial or proceeding that reflect upon the veracity of witnesses or probative value of exhibits and other evidence.[3] A trial judge's decision can and should do so in making the findings on contested issues of fact.[4]

Second, much of a trial judge's job involves discretionary decisions. By this I do not mean to join the debates of the meta-thinkers of jurisprudence, Hart, Dworkin, Posner, etc., regarding whether law *qua* law is inherently a discretionary discipline; I have something much more pedestrian in mind. In many areas of law, such as child custody determinations, no system of deductive logic will take you very far in reaching a result. These are basically on-balance, "totality-of-circumstances" judgments, with some guidance from the presumptive, defeasible type of general propositions that provide a conceptual framework or angle of vision for a judge to use in thinking about the problems presented.

JOHN B. NESBITT is a County Court judge in Wayne County and a member of the *Journal*'s Board of Editors. While in private practice, he served as president of the Wayne County Bar Association. He is also a former assistant district attorney in Wayne County. A graduate of St. Lawrence University, he earned his J.D. from Syracuse University College of Law.

There is a danger that a judge may "wander off the reservation," perhaps very innocently, and with best intentions. One tool the appellate courts use to monitor the trial bench is to look for evidence that the judge undertook an analysis consistent with the particular facts as well as general principles laid down.[5] They do this by requiring an explanation of decision, to which they will give deference, but the absence of an explanation may encourage reversal on grounds of an "improvident" exercise of discretion, or more pointedly, an "abuse" of discretion.[6] Even more embarrassing in such situations, the appellate court may reverse, remand and direct assignment to a different judge, which I take to mean that the judge reversed was so derelict that he or she cannot be trusted to do it right a second time.

These two "woodshed avoidance" reasons for trial court opinions are certainly motivating. But other institutionally based reasons are equally or more reflective of why trial judges write, three of which I would mention.

With experience, study and reflection, many judges develop faculties of intuitive insight and practical reasoning that allow them to reach decisions very quickly and very well.

The first comes from what it means to be a lawyer and part of a noble profession. Much of legal practice in general, and the litigation part of it in particular, involves a dialogue with one's peers, albeit in a very structured, disciplined format. We want our work to be the best it can be, and we judge ourselves, and are judged by our colleagues, on that basis. One important way that a judge participates in this dialogue, respecting and encouraging the good work of fellow attorneys before the bench, is to respond in kind – with a competent piece of legal analysis that reciprocates the professionalism of the bar.

The second reason in this vein for writing trial court opinions relates to the particular parties affected by the ultimate dictate of the court and the public perceptions of the judicial system. I am continually surprised at how people will submit willingly, albeit begrudgingly, even bitterly, to an unfavorable result with devastating personal consequences. They do so, I believe, because they accept the ideal of the rule of law, the notion of justice made sure through law. This ideal presumes a judicial system premised upon an extant body of law and a judiciary willing to apply that law even-handedly and fairly.

Nothing breeds more disrespect and contempt than the perception that the system treated a party differently than it would another, for an improper or no reason. Without an explanation of the judge's legal and factual premises, and dispositive rationale, the losing litigant is left to indulge in self-satisfying speculation that the judge "cooked the books." Although a written decision may not dissuade the litigant and the public from believing that the judge was wrong in a particular case, it nevertheless reinforces, as Holmes would say, that the game was played by the rules.[7]

The third institutionally based reason for trial court opinions involves cases where the judge has the opportunity to advance the development of law through the medium of the case before the court. Trial judges have a unique vantage point in the judicial hierarchy. While the appellate courts properly lead the way, trial courts play a role by drawing attention to and deciding in the first instance solutions to new or unsettled issues. Appellate judges value that role because of the particular experiences and perspectives that trial judges bring to the table. A metaphor often used is that of the law as a multi-authored chain novel.[8] One more closely tied to my experience of snowshoeing up the Adirondack high peaks is the obligation to break trail when it's your turn. No matter how tired you are or how insignificant your efforts compared to those of your companions, being part of the enterprise means taking your turn when it is time. I believe this same idea applies to trial judges writing and publishing decisions that address issues affecting others beyond the immediate parties.

Instrumental Values

Apart from the reasons for trial court opinions that address the needs or expectations of an external audience, there may be intrinsic benefits to be served by writing. This may be called the "getting it right" or instrumental value.

Judicial decisions at their best result from a dynamic yet disciplined interplay of conceptual (law) and empirical (fact) analysis. With experience, stud, and reflection, many judges develop faculties of intuitive insight and practical reasoning that allow them to reach decisions very quickly and very well.[9] For these judges, the discipline of opinion writing provides a medium to recover, confirm or retool the premises and structure of their reasoning process.[10] This two-step process – discovery and justification – is one that masters of the art have long recognized.[11] Judge Henry J. Friendly wrote that a judge should "have trained himself to test his conclusions by assaying to put them in writing, and to express them fairly, clearly, and cogently."[12] Judge Frank Coffin ob-

serves, "A remarkably effective device for detecting fissures in accuracy and logic is the reduction of the results of one's thought processes."[13]

Judge Posner takes the matter a step further by suggesting that the act of opinion writing can be constitutive rather than simply reflective of one's thinking.[14] I would agree and add that it can be enabling as well. A new judge without a font of experience, knowledge or confidence can quickly become intimidated by the complexity of the issues that arise, and often the judge has no built-in framework or orientation to even begin working through those issues. In these situations, by breaking down a case and tackling it in manageable bites, you get your arms around it and glean (with hope) a path to resolution. The process of decision drafting – "thinking through your fingers" – facilitates this. What is an exercise of confirmation and justification for the experienced judge can be a journey of discovery for the novitiate.

In either case, the challenge of writing an analytically crisp decision forces a judge to think about his or her thinking. It requires the judge to be clear about which propositions are being offered to support which others, which propositions are being inferred from which others, and what is the mode of inference between propositions serving as premises and the conclusions drawn. At the end of the day, the culmination of this process is traditionally formalized by the judge syllogistically, a conclusion deduced from major and minor premises, the paradigm of categorical reasoning. Of course, getting to those premises, the ultimate predicates of decision, may be the real work of the judge. The process involves cumulative chains of argument employing a range of reasoning methods – deductive, inductive, analogical – and selection of the legal and evidentiary artifacts to which those methods will be applied.[15]

The Advocates

Advocates who understand the process of trial court writing are in a better position to present their cases in a form of maximum utility to a judge. To the extent a memorandum of law is user-friendly, the more the judge will refer to it. And to that extent, there may even be a "halo" effect when it comes to the decisional path the judge follows.

Advocates sometimes fail to appreciate the time constraints a trial judge faces. Most judges have or can readily gain an understanding of the legal concepts applicable to a case from a variety of sources, but they are entirely dependent on the parties for bringing forward the facts of legal consequence to their case. Accordingly, there are few better places for advocates to spend their time than in presenting clear, concise, complete and correct exposition of the facts upon which a decision will ultimately depend. Unlike law professors, judges and advocates cannot assume facts convenient for their purposes. Notwithstanding otherwise brilliant analysis, there is no more sure prescription for decisional error than to misstate or omit pertinent facts. Indeed, it was E.B. White who wrote of the "eloquence of facts" and the power they bring to a piece of writing. If so, then the advocate and judge better get them right.

Last, bad writing is not always better than no writing. As lawyers, we tend to over-write. This usually signals either a lack of understanding of what you want to convey or a lack of confidence in your ability to convey it. I think the answer is to remember the words of the French aviator and poet Antoine Saint-Exupery that perfection is achieved "not when you have nothing left to add, but when you have nothing more to take away."

Judges can afford to be self-indulgent in their writing; advocates cannot. State the argument with precision, clarity and perspicacity. Don't bury or scatter it among the cases and authorities discussed to support the argument. There is no guarantee that the judge will recover it accurately. Be parsimonious in what you write. No judge wants to feel like a mouse in a maze, taking the long route when a more direct one is available. If care is taken in these areas, the more likely the lawyer's work will be found at the judge's elbow when writing a decision, and there is no higher compliment than that.

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1. There are a few books and many articles on the subject of judicial opinion writing. The most readable and useful work I have found is by Judge Gerald Lebovits, *Advanced Judicial Opinion Writing: A Handbook For New York State Trial and Appellate Courts* (7th ed. 2001); it is recommended by the *2002 Official Style Manual for the New York State Reports* published by the State Reporter.
2. *See, e.g.*, CPLR 4213(b) ("The decision of the court may be oral or in writing and shall state the facts it deems essential.").
3. Judge Learned Hand, reflecting on the appellate court function, once observed: "[Where] you get a cold record of witnesses in absolute conflict, [i]f you do not start with some bias, it is almost impossible, at least for me, to tell which is lying and which is not. I used to try cases; and God knows, I was unsure about it even then." Learned Hand, The Spirit of Liberty 244 (3d ed. 1960).
4. *See* Joyce J. George, Judicial Opinion Writing Handbook 185–88 (4th ed. 2000).
5. *See, e.g.*, *Graci v. Graci*, 187 A.D.2d 970, 590 N.Y.S.2d 377 (4th Dep't 1992).
6. *See, e.g.*, *American Sec. Ins. Co. v. Williams*, 176 A.D.2d 1094, 575 N.Y.S.2d 397 (3d Dep't 1991).
7. *See* Michael Hertz, *"Do Justice!": Variations of a Thrice-Told Tale*, 82 Va. L. Rev. 111 (1996) (discussing the variations of the famous story of Justice Holmes' rejoinder to Judge Hand's goodbye salutation to Holmes to "do justice," to which Holmes replied, "That is not my job. My job is to play the game according to the rules.").
8. Ronald Dworkin, Law's Empire 228–38 (1986).

9. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv. L. Rev. 1733, 1756 (1995).
10. Kevin W. Saunders, *Realism, Ratiocination, and Rules*, 46 Okla. L. Rev. 219, 233 (1993).
11. Richard A. Posner, The Problems of Jurisprudence 73, 91 (1990).
12. Henry J. Friendly, *Reactions of a Lawyer – Newly Become Judge*, 71 Yale L.J. 218, 222 (1961).
13. Frank M. Coffin, The Ways of a Judge: Reflections from the Federal Appellate Bench 57 (1980) ("The act of writing tells us what was wrong with the act of thinking.").
14. Richard A. Posner, *Judges' Writing Styles (And Do They Matter)*, 62 U. Chi. L. Rev. 1421, 1448 (1995).
15. See the much more graceful, insightful and articulate description of this phenomena in Benjamin N. Cardozo, *The Nature of the Judicial Process* 47–50 (1921). I also esteem and recommend the work of Professor Scott Brewer in this area. *See* Brewer, *On the Possibility of Necessity in Legal Argument: A Dilemma for Dewey*, 34 J. Marshall L. Rev. 9 (2000); *Traversing Holmes's Path Toward a Jurisprudence of Logical Form*, *in* The Path of the Law and its Influence: The Legacy of Oliver Wendell Homes, Jr., (Burton ed. 2000); *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument By Analogy*, 109 Harv. L. Rev. 923 (1996).

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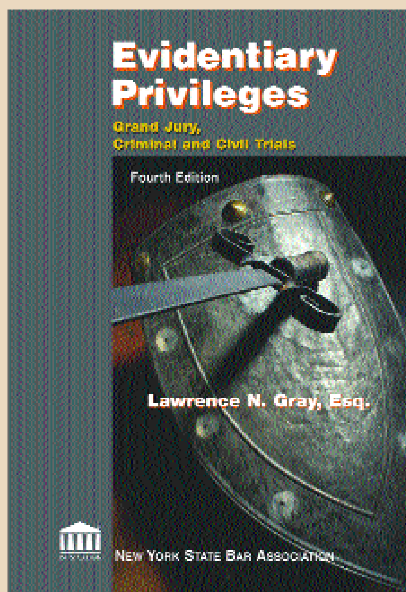

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So Your Client Wants to Buy At a Foreclosure Sale: Pitfalls and Possibilities

By Bruce J. Bergman

Late night television infomercials have for years touted the purchase of foreclosed properties as a path to riches available even to the uninitiated. Propelled by unalloyed enthusiasm, the voluble pitchmen and sundry financial mahatmas are persuasive, supported by testimonials from ordinary folks who enthusiastically boast of much success following the methods promulgated by the cheerleaders. For those without cable access and so denied the chance to fall under the spell of real estate impresarios, there always seems to be an enticing story heard about a friend who bought a foreclosure, turned it over quickly and garnered the proverbial handsome profit – with ease.

Can it all be so? It *can*, sometimes, but it is not necessarily as easy or risk-free as the program purveyors suggest. And for the uninformed, it can be conspicuously Barmecidal. Although the underlying framework of lending and foreclosure is inherently designed to render a foreclosure sale purchase a bargain, unmentioned in the rosy prognoses are the shrouded perils, including: the question of value, the erosion of the equity, holdover tenants, title problems, real estate tax issues, the tenuous physical condition of the property and some of the obscure nuances attendant to judicial foreclosure sales.

Understanding the Foreclosure

A better appreciation of some possible dangers in purchasing at a foreclosure sale emerges when the foreclosure process is understood. Presenting this in elemental fashion to a prospective sale bidder can prove instructive.[1]

If a lender contemplates taking a mortgage (which is the pledge of real estate as security for debt), the presentation needs to address two evaluations – a business decision and a legal decision. If, for example, someone wishes to borrow $400,000 to buy a house worth $500,000, the loan to value ratio is 80%, perhaps a typical limit many lenders would consider prudent. The ultimate question they ask themselves is, "In the event of a default and a foreclosure, will someone pay $400,000 to buy a house worth $500,000?" The reasonable answer is "yes."

Then the lender proceeds to the *legal* decision. Based upon a title search, and assuming that the contemplated loan is to be a first mortgage, will the mortgage be in a first lien position so that the mortgage will be superior to all other interests that might later attach?[2] If the answer to that inquiry is also in the affirmative, the lender knows that in the unwelcome event of default necessitating a foreclosure, any *later* mortgages, judgments or liens will be extinguished by the foreclosure proceeding so that the original scenario is forever frozen in time – a foreclosure sale purchaser paying $400,000 to buy a $500,000 property.

Foreclosures in the Real World

That's the theory, but it doesn't always work that way in practice. Although speedy non-judicial foreclosure pursuant to Real Property Actions & Proceedings Law Article 14 (RPAPL) exists in New York, it is unavailable for residences, and it has limitations even for commercial properties.[3] That leaves only judicial foreclosure, which is prone to considerable delay. Graphically expressed, here is what can happen:

Bruce J. Bergman is a partner at Certilman Balin in East Meadow, where he heads the mortgage foreclosure department. He is the author of the three-volume treatise *Bergman on New York Mortgage Foreclosures*, Matthew Bender & Co., Inc. (rev. 2003), a member of the USFN, the American College of Real Estate Lawyers, an adjunct associate professor of real estate at New York University's Real Estate Institute and a special lecturer in law at Hofstra Law School. A graduate of Cornell University, he received his J.D. from Fordham University School of Law.

MORTGAGE PROCEEDS		$400,000
(LOAN AT 15% DEFAULT INTEREST)		
EQUITY CUSHION		$100,000
	*	
PERCEIVED VALUE OF PROPERTY		
AT INCEPTION OF MORTGAGE LOAN		$500,000
	*	
	*	2 Yrs. Interest at 15% Adds
	*	$120,000 to Debt and Erases Equity
	*	
DEBT AT END OF TWO YEARS IF		
NO PAYMENTS MADE ON MORTGAGE		$520,000
	*	
DEBT AT CONCLUSION OF FORECLOSURE		
WITH ADDITION OF LEGAL FEES, COSTS,		
DISBURSEMENTS AND ALLOWANCES		
IN FORECLOSURE ACTION		$530,000
LOSS AT FORECLOSURE SALE TO LENDER:		
DIFFERENCE BETWEEN VALUE AND		
DEBT OWNED		$ 30,000

Even if the interest on the mortgage was 8%, most mortgages contain a provision for a rate upon default that is higher than the note rate and could easily be *considerably* higher than the 15% default rate in the example. In the New York City metropolitan area, for example, a combination of court delays and a borrower dedicated to contesting the case could readily stretch duration of the action to two years or more. Although a foreclosure sale purchaser may have no concern about the trauma and angst generated by the earlier combat in the case, the time factor translated into interest accrual. In turn, that increased the mortgage debt and thereby eroded – and in this example, eliminated – the equity cushion.

Is It a Bargain?

It doesn't take much for litigation and the time it devours to upset the lender's initial formulation. While foreclosure sale purchasers *would* typically pay $400,000 for a $500,000 house, when the debt that the lender must be paid out of foreclosure sale proceeds becomes $480,000 or $495,000, or actually exceeds the property's value, then there may be no bargain to be had. (The lender could choose to accept less money than is due rather than take the property back to resell, but that is a less likely result.)

Even in a garden variety foreclosure that suffers no detainment and only minor legal expense, *some* interest and expenses accumulate, consequently reducing the equity. At this point, a key commandment for any foreclosure sale purchaser is *know the value of the property*. Quite simply, this is the paramount consideration, because it is the relationship of that value to all the potential expenses to be incurred that either generates a profit or causes a loss.

The prospective foreclosure sale buyer must decide in advance of bidding how much to pay for the property. Obviously, the bidder must plan its own equity cushion between what is bid and the expected resale price, with a sufficient margin for a profit *after* allowing for the unexpected problems.

What Will the Price Be?

While knowing what the property is worth is much of the battle, being aware of the bid price range is critical too. Because counsel for the foreclosing plaintiff may not know what the plaintiff's bid (or upset price) will be until a very short time before the sale – or may be unwilling to reveal that information – the bidder should be independently well-armed with knowledge.

A typical notice of sale published in a newspaper recites an approximate sum due, and that, in turn, is based upon the filed judgment of foreclosure and sale. Although that sum will consist of all principal and interest as computed by the referee, the actual computation relates back to some date around the time the referee prepared his calculations. That will likely be months (or sometimes years) prior to the date of the judgment. This requires adding interest (at the default rate if applicable) from the "as of" date in the referee's report of amount due until the date of the judgment.[4]

In addition to the aggregate of principal and interest – which itself bears interest – the judgment will also recite and assess costs, disbursements, (most often) allowances and legal fees, all of which items may also accrue interest. What that rate of interest will be can be critical in determining the ultimate sum due, especially if there is a long hiatus between entry of judgment and conduct of sale. (This can occur when there are bankruptcy filings, lengthy settlement efforts or protracted post-judgment litigation, none of which are uncommon.)

Once the judgment is entered, interest accrues at the prevailing legal rate,[5] currently 9%. But there is an exception to that rule. If the mortgage explicitly provides that some particular interest rate shall apply and not merge into the judgment, then the intention of the parties will control.[6] Thus, a high default rate of interest that survives the judgment could precipitously boost the sum due.

There is then the subject of hidden advances. Of course, the judgment quantifies, in numerals, the amount due. But it also authorizes additions to the sum due, not in numbers, but in categories expressed in prose, such as entitling the plaintiff to add on or collect advances made to protect the lien of the mortgage. For

example, if real estate taxes were in arrears and loss of title to the taxing authority (and concomitant extinguishment of the mortgage) was to occur subsequent to judgment but before the foreclosure sale, the plaintiff might elect to pay those taxes, thereby increasing the debt due. Depending upon the type and location of property, as well as the duration of the tax default, this sum could be thousands, tens of thousands, or hundreds of thousands of dollars.

Categories of authorized advances that can increase the upset price also include sums paid to prior mortgagees or for hazard insurance premiums, among others. Hence, some measure of uncertainty lurks here too.

Even when the full sum due the foreclosing plaintiff is finally unearthed, the terms of sale can create the further addition of interest upon the ultimate bid price. Because the closing is almost invariably declared to be 30 days after the sale, the terms of sale will often impose interest on the bid beginning with the 31st day. Contemplating that interest is lost to the plaintiff as of the very first day after the auction, some terms of sale will decree interest due on the bid beginning immediately. Obviously, the larger the bid and the more the delay until closing, the greater becomes this further expense to the bidder.[7]

Even in a garden variety foreclosure that suffers no detainment and only minor legal expense, some interest and expenses accumulate, consequently reducing the equity.

The Pitfalls

Being familiar with the particular methodology of the foreclosure sale is important too. This is decidedly *not* the no-money-down realm of other real estate schemes. Instead, 10% of the amount bid is a normal requirement, usually in the form of cash, certified check or bank check payable at the auction to the referee. (Third-party checks may not be accepted.)

Critically, the purchase is almost invariably *not* subject to obtaining a mortgage. That means that at the foreclosure sale closing (usually, as noted, about 30 days after the auction sale) the bidder needs the balance of the purchase price in cash.

A bidder who erroneously assumed that a mortgage would be forthcoming to finance the purchase might then default for want of funds to close title. And there could be any number of other reasons why a bidder might be unable to close or experience a change of heart. The bid deposit is then at risk, but only to the extent of that deposit.[8] (Should a subsequent foreclosure sale yield the same or a greater sum, the bid deposit would be refunded.)

The cost of money then becomes an important part of the profit equation. Factoring in the length of time necessary to put the property in salable condition, advertise it and close on a resale means that the purchase price advanced for each parcel is unavailable to earn interest or otherwise be invested. The successful foreclosure sale bidder is not playing with someone else's money.

Title issues are another immediate concern. In New York, the goal of the foreclosing party is to extinguish all subsequent interests, accomplished by naming and serving all persons with positions subordinate to the mortgage being foreclosed. Did the attorney for the foreclosing plaintiff do that? The bidder will need a title search to know, although even if diligence confirms the efficacy of what the lender did, it is hardly unusual for defendants to come to court after the sale swearing that they were never served. That is a potential time-killer.

Observe too that the property will be sold subject to any number of possible interests, for example, prior mortgages (this could have been a *second* mortgage in foreclosure), prior judgments, zoning ordinances and tenancies, if any, among other things. Despite the general proposition that the mortgage would not have been consummated in the first place if there were liens *senior* to the mortgage to be delivered, there are exceptions. That is to say, there could be various encumbrances not subject to extinguishment by the foreclosure which therefore continue to burden the property. This is something the purchaser must examine in advance, because it is an integral part of what is being bought. Title insurance doesn't cover such interests.

As to tenancies, in a perfect world, the defaulting borrower, or his tenants, would quietly depart the foreclosed premises after the foreclosure sale and before the closing. In this conspicuously imperfect world, however, many such people recognize that they can continue to live rent free until the legal system ousts them. How long after the foreclosure such holdovers will finally be constrained to depart is problematical. It might consume but a few weeks in some upstate areas of New York, but it easily takes many months in New York City and a few months even in Nassau and Suffolk Counties. Such a morass both incurs legal fees and denies physical possession of the property for whatever period until entry is finally available. This is yet another infirmity that must be quantified when addressing the foreclosure purchase.

Real estate taxes are still another consideration. There are four issues here:

• The amount of real estate taxes affects the value of the property so those taxes need to be determined in advance.

• Any exemptions that benefited the property, such as for veterans or seniors, will be lost upon a resale, unless the new purchasers so qualify.

• In New York, real estate taxes that are a lien on the property must be paid out of sale proceeds, but those taxes will, of course, accrue until the property is sold, and therefore are another carrying charge that must be accounted for.

• In the unusual circumstance of such a directive in the judgment, the terms of sale will shift the obligation to pay outstanding real estate taxes to the foreclosure sale purchaser.

Thus, a $400,000 bid price could suddenly become $410,000 – or much more.

Nor can transfer taxes be dismissed as irrelevant. Although, as a matter of statute, transfer taxes are the obligation of the seller, the better rule is that this responsibility can be altered by contractual agreement.[9] Counsel to foreclosing plaintiffs will frequently shift the burden of paying transfer taxes to the bidder in the terms of sale. Because in many instances this sum can be thousands of dollars, bidders must listen carefully to terms of sale read by referees and be aware of this possible – indeed likely – responsibility.

Any hope that rent arrears that may have accrued at the foreclosed premises can be collected by the bidder is dashed as a matter of law. A claim for pre-foreclosure sale rent has no legal basis,[10] and New York law is clear that such arrears are unrecoverable.[11]

Perhaps the most discomforting hidden surprise is the condition of the foreclosed premises. Before the foreclosure auction, a prospective bidder can (and certainly should) view the outside of the property to assess the value of that parcel in that neighborhood. Until the hammer falls at the auction sale, however, the borrower continues to own the property and need not – and typically will not – afford entry to strangers. Although a lender has certain rights in this regard and could become a mortgagee in possession, or have a receiver of the premises appointed to assume physical control or secure the premises against vandalism should it become vacant, those situations are the exception. Usually, the interior of the property is unavailable to be seen, either because the occupants deny entry or because the property is sealed.

The inside condition is thus a critical imponderable. Paint could be chipped or be lead-based, appliances non-functional or removed, piping pulled out or burst – any imaginable ill that could afflict a neglected or abandoned property. Sometimes disgruntled borrowers – or others – willfully destroy the premises. The would-be bidder must leave room in the valuation for a worst-case situation.

Ultimately, time becomes an inescapable element in planning for a profit. The most accurate calculation of market value combined with a sage purchase price eventually will be banished to irrelevance if all the possible problems consume too much time. So it is exigent to estimate the duration from foreclosure sale purchase until resale. During that time, money has a cost, taxes and utilities must be paid, tenants must be evicted, repairs must be made. In the end, there will be closing costs, legal fees and, if the foreclosure sale purchaser doesn't assume the task, brokerage fees. It all might not be so alluring in the end.

The Best Case

Having endeavored to flush out the landmines, we should not deter the ardent. If there really is value in the property under foreclosure, it is reasonable to assume that besieged borrowers would rescue that equity by selling the property themselves and satisfying the mortgage. They have an absolute right to do so, which is precisely why in times of prosperity or increasing real estate values most foreclosure cases never arrive at the auction sale stage.

Sometimes, though, the borrower-owners are husband and wife involved in an acrimonious divorce. The bitterness is such that they cannot agree upon a sale and so they suffer a foreclosure. That one could be a bargain.

Then there is the owner who, for whatever reason suffers a surfeit of judgments and liens on the property. Because together with the mortgage those other liens aggregate more than the value of the property, it cannot be sold. But in a foreclosure, all those liens are extinguished and a wise bidder *can* buy a $500,000 house for $400,000, or a $300,000 house for $125,000 – or however the numbers develop.

There remains some further comfort for bidders. One source of such comfort is the maxim that a good faith foreclosure sale purchaser is insulated from liability for prior rent overcharges where the purchaser had no notice of this existence of rent overcharge claims.[12] (But that protection does not extend to a subsequent purchaser.[13])

To be sure, yet other issues have an impact upon the process: risk of loss after the foreclosure sale and before delivery of the deed;[14] the bidder's possible liability for prior rent overcharges;[15] reversal of the foreclosure on appeal.[16]

The problems don't evaporate, but an astute awareness of them might level the playing field or present a

chance to earn a profit. Care and practical wisdom can legitimize the theories of those late-night acolytes.

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1. For a far more detailed review of foreclosure basics, see 1 *Bergman on New York Mortgage Foreclosures,* Chapter 2, "Overview and Guide to the Basics of Mortgage Foreclosure Concepts and Strategies," Matthew Bender & Co., Inc. (rev. 2003).
2. Real estate taxes and certain statutory "super liens" will be superior even to an earlier recorded mortgage, but these concepts are understood by mortgage lenders and represent a risk factor for which they presumably plan in advance.
3. For an explanation of the availability and infirmities of non-judicial foreclosure (more accurately foreclosure of mortgage by power of sale) see 1 *Bergman on New York Mortgage Foreclosures*, Chapter 8, Matthew Bender & Co., Inc. (rev. 2003).
4. For a more complete review of the interest principles see 2 *Bergman on New York Mortgage Foreclosures* § 27.04, Matthew Bender & Co., Inc. (rev. 2003).
5. CPLR 5004; *Taylor v. Wing*, 84 N.Y. 471 (1881); *European Am. Bank v. Peddlers Pond Holding Corp.*, 185 A.D.2d 805, 586 N.Y.S.2d 637 (2d Dep't 1992).
6. *Banque Nationale De Paris v. 1567 Broadway Ownership Assocs.*, 248 A.D.2d 154, 669 N.Y.S.2d 568 (1st Dep't 1998); *Marine Mgmt. v. Seco Mgmt.*, 176 A.D.2d 252, 574 N.Y.S.2d 207 (2d Dep't 1991).
7. Perhaps in part because issues such as this necessitate disposition at the closing, the question of whether this interest mandate is enforceable has not been the subject of reported litigation. Unofficially, however, there is an unreported case ruling that the interest must be paid: *Bankers Trust Co. of California, etc. v. Roberta Hall as Guardian of the Person and Property of Jean L. Bogan, et al.*, short form order, Oct. 1, 2002, Sup. Ct., Queens Co., Martin J. Schulman, J., Index No. 6532/98.
8. *See* 3 Bergman on New York Mortgage Foreclosures § 30.07[3], Matthew Bender & Co., Inc. (rev. 2003).
9. *Regency Sav. Bank v. Terry Ross Assocs.*, N.Y.L.J., Nov. 27, 2002, p. 21, col. 4 (Sup. Ct., Queens Co., Price, J.); *LaSalle Nat'l Bank v. Taylor*, Index No. 4604/96. *See Trefoil Capital Corp. v. Creed Taylor, Inc.*, 125 Misc. 2d 152, 479 N.Y.S.2d 308 (1984), *rev'd other grounds*, 121 A.D.2d 874, 504 N.Y.S.2d 112 (1st Dep't 1986). For a more thorough review of this subject, see 3 *Bergman on New York Mortgage Foreclosures*, § 30.05[1][f], Matthew Bender & Co., Inc. (rev. 2003).
10. *Bankers Trust Co. v. Glasser,* N.Y.L.J., Nov. 18, 1998, p. 25 (Dist. Ct., Suffolk Co., Spinner, J.) *See* 3 Bergman on New York Mortgage Foreclosures § 31.10, Matthew Bender & Co., Inc. (rev. 2003).
11. *Bankers Trust Co.*, N.Y.L.J., Nov. 18, 1998, p. 25 (citing *Metropolitan Life Ins. Co. v. Childs Co.*, 230 N.Y. 285 (1920)).
12. *See* 3 Bergman on New York Mortgage Foreclosures § 31.01[6], Matthew Bender & Co., Inc. (rev. 2003).
13. *Gaines v. New York State Div. of Hous. & Community Renewal*, 230 A.D.2d 631, 646 N.Y.S.2d 106 (1st Dep't 1996).
14. N.Y. General Obligations Law § 7-105; *Tischler v. Key One Corp.*, 67 A.D.2d 886, 413 N.Y.S.2d 710 (1st Dep't 1979).
15. *See* 3 Bergman on New York Mortgage Foreclosures § 31.02[4], Matthew Bender & Co., Inc. (rev. 2003).
16. *See* 3 Bergman on New York Mortgage Foreclosures § 31.03[5], Matthew Bender & Co., Inc. (rev. 2003).

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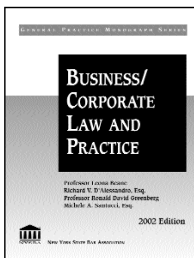

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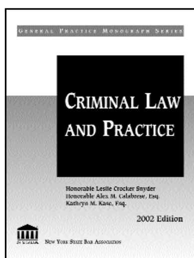

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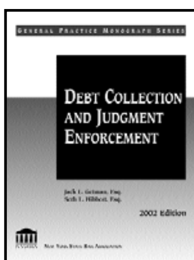

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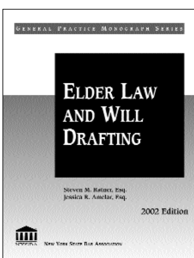

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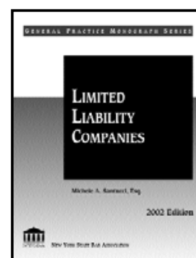

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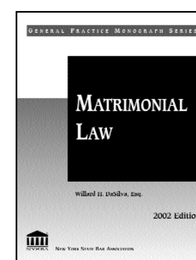

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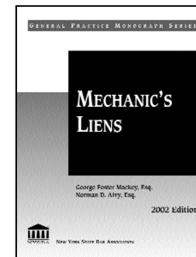

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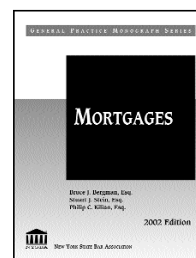

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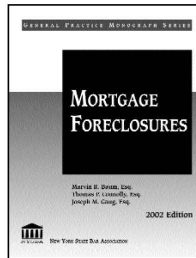

This monograph guides the practitioner through the basics of a mortgage foreclosure proceeding. With its helpful practice guides and many useful forms, this is an invaluable resource.

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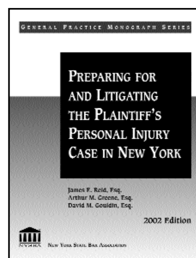

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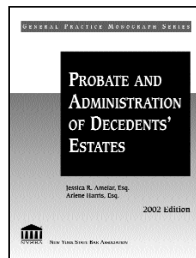

The authors, experienced trusts and estates practitioners, provide a step-by-step guide for handling a basic probate proceeding and for completing the appropriate tax-related forms.

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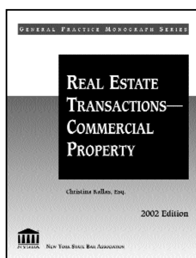

This latest edition provides an overview of the major issues an attorney needs to address in representing a commercial real estate client and suggests some practical approaches to solving problems that may arise in the context of commercial real estate transactions.

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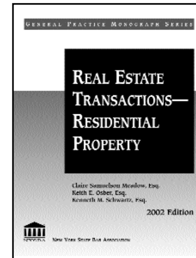

This reference is a practical guide for attorneys representing residential purchasers or sellers. This invaluable monograph covers sales of resale homes, newly constructed homes, condominium units and cooperative apartments.

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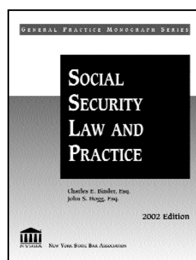

The Social Security Act is "among the most intricate ever drafted by Congress." This monograph offers valuable, practical advice on how to muddle through the enormous bureaucracy. With analysis of the statutes and regulations, the authors guide you through the various aspects of practice and procedure.

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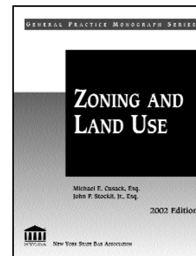
Zoning and Land Use



This publication is devoted to practitioners who need to understand the general goals, framework and statutes relevant to zoning and land use law in New York State. It provides a broad discussion of zoning and land use in New York.

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Attorney Professionalism Forum

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism, and is intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

The Attorney Professionalism Committee welcomes these articles and invites the membership to send in comments or alternate views to the responses printed below, as well as additional questions and answers to be considered for future columns. Send your comments or your own questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.

To the Forum:

I am a sole practitioner with a busy, suburban law practice devoted largely to real estate, trusts and estates, and civil litigation. Two months ago, I suffered a heart attack, had bypass surgery and was unable to work full time for about six weeks. Fortunately, my two paralegals and secretary carried the ball and averted any crisis with my ongoing matters. I am 61 years old and although I planned to retire at age 65, my recent bout of ill health and developing addiction to the golf channel have me thinking otherwise. However, I am concerned that if prior to my planned retirement I become ill again and am unable to service my clients, I will be in violation of an ethical rule or regulation. Does the Code of Professional Responsibility impose specific requirements upon sole practitioners to plan in advance for a sudden inability to work? What are my professional responsibilities, if any, to my clients? Although I have taken the required CLE credits in ethics, none of the courses that I've attended have covered this topic.

Sincerely,
Anxious in Amityville

Dear Anxious:

The Code of Professional Responsibility does not impose a specific requirement on a sole (or any) practitioner to protect clients in the event of a sudden inability to continue in practice. However, several rules and ethical considerations, along with general principles of attorney professionalism, are relevant to your concerns.

Under DR 2-110(B)(3), a lawyer must withdraw from representing a client where his "mental or physical condition renders it unreasonably difficult to carry out the employment effectively." The withdrawing lawyer is advised by EC 2-32 to minimize harm to a client by giving him or her due notice of the withdrawal, suggesting alternative counsel, and returning the client's property, including unearned compensation. Of course, a problem can arise where your inability to conduct your practice is unexpected – *e.g.*, a heart attack – which renders you unable to take the steps suggested by EC 2-32. The practical solution is to plan in advance and appoint another attorney to take such steps for you.

Canon 6 advises a lawyer to represent a client competently (EC 6-1), and to use proper care to safeguard the interests of the client (EC 6-4). Under DR 6-101, the lawyer who "neglects a legal matter" fails to act competently. Should you suddenly be unable to conduct your practice because of illness or death, your clients' matters could be neglected, and their interests seriously prejudiced as a result. A court date could be missed; a statute of limitations could expire; a closing could be delayed because funds in your escrow account could not be withdrawn. Arranging for coverage in the event of an unforeseen inability to work therefore appears necessary under the Code. By failing to make such arrangements in advance, the inference could be drawn that you are not fulfilling your obligations to represent competently, and to protect, your clients and their interests.

Further, a lawyer has the obligation to protect the confidences and secrets of his or her clients (DR 4-101(B)). If you were to appoint another attorney as your agent to inventory your files and to notify your clients in the event of your unavailability, you would be helping to minimize disclosure of privileged information. An attorney who reviews your files will be aware of the requirement to maintain the clients' confidences that appear in the files. A family member or other non-attorney reviewing your clients' files may, on the other hand, inadvertently reveal privileged information since he or she will be unaware of a lawyer's obligation to protect such information. You may even want to authorize that attorney to represent your clients. This could be accomplished by obtaining your clients' consent to such an arrangement in advance, either in a retainer agreement or letter of engagement. Taking these steps could avoid a claim that you had failed to protect client confidences.

You also have responsibilities with respect to clients' funds and other property that may have come into your hands. Failure to attend to such property during your disability could be deemed a violation of your fiduciary responsibilities under DR 9-102. Not opening mail containing estate checks or checks in settlement of litigation delays the payment of those funds to your clients, and therefore may violate DR 9-102(C)(4). That section requires the attorney to "promptly pay or deliver to the client . . . funds . . . in the possession of the lawyer which the client . . . is entitled to receive." Subsection (D) of DR 9-102, which imposes

requirements regarding bookkeeping records, is also implicated if you suddenly are unable to practice. There is no provision in the Code relieving a lawyer of the duty imposed by DR 9-102(D) to keep certain bookkeeping records for seven years based on an unexpected cessation of practice. Given that fact, and in view of DR 9-102(H), which requires a law firm upon dissolution to make arrangements for maintaining the records required to be kept under DR 9-102(D), it may be inferred that you have an obligation to designate another attorney to review your files so that the bookkeeping and storage requirements of 9-102(D) are complied with if you are unable to continue practicing law.

Attorney professionalism is often equated with dedication of service to clients, competence and the display of good judgment. By formulating a plan today to insure that your clients will not be harmed by an unexpected inability to practice law in the future, you will not only be insuring compliance with the Code – you will also be exhibiting attorney professionalism.

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

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I am a second-year law student and hope to concentrate my practice in family law.

My sister, Mary, had her divorce finalized about a year ago. She tells me that throughout the legal process of her divorce she was very impressed by her husband's attorney, Mr. Hans Summ. She says that he was very polite, organized and efficient at all the depositions and conferences that she attended and seemed incredibly knowledgeable and sophisticated throughout the proceedings.

Mary believes that Mr. Summ's expertise and professionalism resulted in getting her volatile ex-husband to come to an agreement and thus spared her the trauma of a trial.

As part of Mary's property settlement she received their summer home in Lake Chautauqua in upstate New York. Mary has now decided to sell the summer home and she called Mr. Summ to represent her in the sale. Mr. Summ not only agreed to do so but also asked Mary to go to dinner with him. I know my sister has been very lonely and depressed as a result of her divorce and she was both surprised and delighted at Mr. Summ's invitation.

Somehow, although I am not sure why, Mr. Summ's agreeing to represent her on the sale of the property and inviting her to dinner don't seem right to me.

Is it proper for Mr. Summ to represent my sister? Is there anything wrong with his asking my sister out to dinner?

Sincerely,
Worried in Williamsville

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POINT OF VIEW

Representing an Incapacitated Person at a Fair Hearing

By Marvin Rachlin

A Medicaid applicant's or recipient's right to a Fair Hearing has been mandated and statutorily guaranteed since the enactment of the Medicaid program.[1] The right to a Fair Hearing cannot be limited or interfered with in any way.[2]

The denial, discontinuance, suspension or reduction of previously authorized benefits are basic Medicaid actions that assure an individual's right to a Fair Hearing.[3] The right to be represented by counsel is assured, and any notice issued by Medicaid must include a statement of the right to be represented by counsel.[4]

Being authorized to represent a client at a Fair Hearing is usually as simple as being retained by the individual or a family member of the individual.

Pursuing a Fair Hearing on behalf of a deceased individual is less simple. Letters Testamentary or Letters of Administration are necessary for anyone to transact any of the affairs of the estate, which includes the request and prosecution of a Fair Hearing. For this reason New York State requires proof of the issuance of such letters before allowing an attorney to proceed on behalf of a decedent.

Consider the position of New York State when a Fair Hearing is requested on behalf of an individual who lacks capacity, who had not previously executed a Durable Power of Attorney, and who does not have an appointed guardian or any family.

Any attempt to represent such an individual at a Fair Hearing will result in the New York State administrative law judge refusing to permit you to proceed because you have not been "authorized" to represent the individual. Typically, you will be advised to have a guardian appointed who can then authorize you to proceed.

This policy continues in spite of a regulation that requires a written authorization to represent – "[e]xcept where impracticable." The regulation goes on to require such authorization by anyone "other than an attorney."[5]

Why Medicaid insists on the appointment of a guardian before an attorney can represent an incapacitated individual is without explanation.

Refusing to permit an attorney to represent the individual under such circumstances violates the rights of such individual by effectively delaying or denying the right to a Fair Hearing that is statutorily guaranteed for all Medicaid applicants and recipients.

Incapacitated individuals requiring various levels of Medicaid care have been deemed to be disabled within the purview of the Americans with Disabilities Act (ADA)[6] by every level of the federal judiciary.[7]

The issue is whether New York State can refuse to permit the representation of a disabled person until a court-authorized guardian is in place.

The ADA defines a public entity as "any State or local government."[8] The statute then goes on to provide that any qualified individual with a disability, by reason of such disability, may not be "excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[9]

The U.S. Supreme Court, in the *Olmstead* case,[10] established a standard for the statutory affirmative defense to a claim of violation of an individual's rights pursuant to the ADA. The statutory defense is that the requested service would "fundamentally alter the nature of the service, program, or activity."[11] The Supreme Court defined a fundamental alteration by requiring the state to compare the resources available to the state with the cost of providing the services requested by the disabled individuals and then determine whether the state metes out these services equitably.[12]

A disabled individual with capacity can authorize an attorney to represent such individual at a Fair Hearing. Does the sole difference of lacking the capacity to authorize such representation permit the state of New York to erect an impediment to proceeding with the Fair Hearing by requiring the appointment of a guardian, and does such impediment violate the incapacitated individual's rights pursuant to the ADA?

A Fair Hearing is a time-sensitive administrative proceeding. It must be requested within 60 days of the Medicaid determination that is the subject of the appeal.[13] If the issue is a reduction or discontinuance of a service, then a request for a hearing must be made before the effective date of the proposed action, which is usually 10 days.[14]

By establishing a requirement that an incapacitated individual must have a court-appointed guardian, prior to representation, the state is effectively denying such individuals the basic right to a Fair Hearing and the right to continuing aid for a service already in place. For those individuals who are denied a service, their right to appeal such denial also faces the impediment that a guardian must first be appointed.

If the policy of New York State is that an attorney is not authorized to represent an incapacitated individual, then it follows that such attorney is not

authorized to request the Fair Hearing, thereby effectively denying the right to a Fair Hearing to every incapacitated person who has no representative available in the form of someone who has received a Durable Power of Attorney, no family member who can be a spokesperson and no court-appointed guardian.

It is unusual that New York State does not question the right of a family member to authorize an attorney to represent an incapacitated individual at a Fair Hearing because there is no statutory authority for such authorization.

The demand to permit the legal representation of an incapacitated individual without authorization should be judged by the standards of the ADA as defined by the *Olmstead* case.

The state can justify its position by claiming that the relief demanded would fundamentally alter the Medicaid or Fair Hearing program.

It is undisputed that every individual applicant or recipient of Medicaid has the right to a Fair Hearing. To extend this right to incapacitated individuals incapable of authorizing legal representation, would not fundamentally alter the program because it would not alter the program at all. It would simply assure that a right already guaranteed by the program not be denied to certain individuals who happen to lack the capacity to authorize a representative to act on their behalf.

Even the case of *Rodriguez by Rodriguez v. City of New York*,[15] which is generally seen as the case that narrowed the Medicaid home care program, relied in its decision on the premise that the ADA applies only to "services they in fact provide." As disastrous as this was for home care, it protects the incapacitated individual seeking representation at a Fair Hearing.

Fair Hearings are definitely a service that New York State in fact does, and legally must, provide.

No attorney should be prevented from representing an incapacitated individual at a Fair Hearing, nor can there be a prerequisite that a guardian first be appointed to authorize such representation.

MARVIN RACHLIN is of counsel to Vincent J. Russo & Associates of Westbury, Islandia and Lido Beach. He is a former chief counsel to the Nassau County Department of Social Services.

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1. 42 U.S.C.A. §§ 1396–1396v, N.Y. Social Services Law §§ 20, 22, 34; N.Y. Comp. Codes R. & Regs. tit. 18, pt. 358 (N.Y.C.R.R.)
2. Vincent J. Russo & Marvin Rachlin, New York Elder Law Practice – 2003, §§ 9:1, 9:2 (West Group 2003); 18 N.Y.C.R.R. § 358-3.1(a).
3. 18 N.Y.C.R.R. § 358-3.1(b)(3).
4. 18 N.Y.C.R.R. § 358-2.2.
5. 18 N.Y.C.R.R. § 358-3.9
6. 42 U.S.C. §§ 12101–12213.
7. *Olmstead v. L.C. by Zimring*, 527 U.S. 581 (1999); *Rodriguez by Rodriguez v. City of New York*, 197 F.3d 611 (2d Cir. 1999); *Fisher v. Oklahoma Health Care Auth.*, No. 02-5192, 2003 U.S. App. LEXIS 14191 (10th Cir. July 15, 2003).
8. 42 U.S.C. § 12131(1)(A).
9. 42 U.S.C. § 12132.
10. *Olmstead v. L.C. by Zimring*, 527 U.S. 581.
11. 28 C.F.R. § 35.130(b)(7).
12. *Olmstead*, 527 U.S. at 607; *see* Russo & Rachlin, *supra* note 2 § 7:37 at 488.
13. 18 N.Y.C.R.R. § 358-3.5(b)(1).
14. 18 N.Y.C.R.R. §§ 358-2.5, 358-3.6.
15. 197 F.3d 611 (2d Cir. 1999).

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Language Tips

By Gertrude Block

Question: How does one indicate ellipses – words omitted when quoting someone's writing?

Answer: Authorities are not unanimous, but their advice does not differ significantly. The University of Chicago Press, in *The Chicago Manual of Style* (1982), prefers the following: From within a quoted passage, indicate an ellipsis by ellipsis points (dots), never by asterisks. The points are printed on the line and separated by one typewriter space from the quoted material and from each other and the following material. (For example, the sentence above, if language were omitted, would read: "The points are printed on the line and separated . . . from each other and the following material.")

The *Chicago Manual of Style* indicates material omitted between sentences by four dots: a period and three ellipsis dots. When the omission is at the beginning of the sentence, the first dot (the period at the end of the full sentence quoted) comes directly after the final word of the quoted sentence. Thus, the material above, quoted with ellipses, would read, "Between sentences, omitted material is indicated by . . . a period and three ellipsis dots. . . . directly after the final word quoted."

When the omitted material comes at the end of the sentence, the first three ellipsis dots are separated by spaces, the fourth following without a space, indicating the period at the end of the sentence. The passage above would then read, "Between sentences, omitted material is indicated by . . . a period and three dots . . .."

With regard to omission of one or more paragraphs, if the quoted material is poetry, the University of Chicago Press indicates the omission as follows:

> Of thee I sing, baby,
>
> You have got that certain thing, baby,
>
> Shining star and inspiration
>
> Worthy of a mighty nation,
>
> . . . . (Ira Gershwin)

However, in a prose quotation, the Chicago Press requires four dots, following quoted material, to indicate one or more paragraphs omitted. The first dot immediately follows the last quoted word, to indicate a period; the other three dots are spaced. And if the material in the next quotation is not the first sentence of that paragraph, three spaces precede it to indicate ellipsis.

The Associated Press Stylebook treats ellipsis in general like the University of Chicago *Manual*, but uses space more economically, in accordance with modern trends. An ellipsis is treated as a three-letter word, with a space before and a space after the ellipsis, but none between the points (...). To indicate language deleted at the end of one paragraph and at the beginning of the following paragraph, ellipsis dots are placed in both locations.

In a story, the AP omits ellipses at the beginning or end of direct quotations.

- *Original quotation:* "However, it has become evident to me that I no longer have a strong enough political base in Congress."
- *Shortened quotation:* "It has become evident to me that I no longer have a strong enough political base."

In short, there is little agreement among authorities, giving you leeway to choose the method you prefer.

From the Mailbag I

In the May *Language Tips*, an attorney asked me to settle an argument between himself and his colleagues about the word *notwithstanding*. The questioner quoted the following statement as the subject of the argument: "Notwithstanding the preceding paragraphs, you shall pay into the fund the sum of $1,000.00." He asked, "When a previous paragraph states that you shall *not* pay $1,000.00, I believe that this statement relieves the necessity of paying that amount, but fellow lawyers have said that I'm wrong. Who is correct?"

I answered correctly that because *notwithstanding* means "in spite of" or "not prevented by," the statement quoted means that you must pay the $1,000.00. So far, no problem. But there *was* a problem, because in answer to the question "Who is correct?" I wrote, "You are." *WRONG*. Those two words made the response self-contradictory. I hasten to change the words, "You are" to "They are." And I thank David Cartenuto, of Sleepy Hollow, who caught the error.

From the Mailbag II

A regular correspondent wrote, "What is *tatparasha*? It sounds like a disease."

It's a grammatical term for a compound word whose first part limits its second part. One example is *shoebox*. The first syllable of *shoebox* (*shoe*) limits the meaning of the second syllable (*box*).

Once you begin thinking about the subject, examples come easily. A few are *landlocked, roadway, eardrop,* and *hairbrush.* But there's little besides self-satisfaction in knowing the meaning of *tatparasha*. It's difficult to drag it into a conversation. (I know, I've tried.)

Gertrude Block is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association).

Crossword Puzzle answers from September 2003 issue:

Across

3. JUSTIFICATION
5. ALIBI
11. PLEABARGAIN
14. ACCESSORY
16. SIXTHAMENDMENT
17. BAIL
18. MIRANDA
20. ATTORNEY
21. HOTPURSUIT
23. UNLAWFULGRATUITY
26. HARMLESSERROR
27. ALLOCUTION
29. INDICTMENT
31. ACOD
32. BADCHECK
34. ARRAIGNMENT
36. RENUNCIATION
39. FRUITOFTHEPOISONOUSTREE
40. PERJURY
41. DWI
42. ENTRAPMENT

Down

1. DANGEROUSINSTRUMENT
2. HAZING
4. AGRICULTUREANDMARKETS
6. INFANCY
7. DRAMSHOP
8. MISDEMEANOR
9. CORROBORATION
10. ROSARIO
12. GRANDJURY
13. PROSTITUTION
15. SPEEDYTRIAL
19. FOURTHAMENDMENT
22. ROR
24. USURY
25. VIOLATION
28. PROBATION
30. PLAINVIEW
33. ADULTERY
35. VICTIM
37. VERDICT
38. FELONY

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(Here are two.)

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THE LEGAL WRITER
CONTINUED FROM PAGE 64

> like of his lawyer. Likewise, the would-be lawyer raised on the hit television series, *L.A. Law*, to believe a law degree is that golden ticket to a glamorous career of big money, fast cars and intimate relationships among the beautiful people may think twice before sending in his or her law school application when word of this case gets out.[12]

Some opinions are famous for their humor. *Miles v. City Council of Augusta*[13] concerns whether Blackie the Talking Cat was exempt from paying taxes. While discussing Blackie's free-speech rights, the judge pretended that he actually spoke to Blackie. To the Fifth Circuit that opinion was the cat's meow, not a cat-o'-nine-tails. The district court's cataclysmic opinion was the catastrophic catalyst that catapulted the catatonic reviewing court to use every categorical "cat" catechism known to felinekind. No one can tell whether you will purr or hiss if you read the Fifth Circuit's opinion.[14] Read it anyway. It has nine lives. And you should have *Miles* to go before you sleep.

For erudite humor in opinion writing, study anything by Judge Alex Kozinski of the Ninth Circuit.[15] Few of us can write like Judge Kozinski does. Even fewer should try. It takes a lifetime of study to succeed. It takes a lifetime appointment to dare. Judge Kozinski, rated among the greatest American opinion writers, believes that it is not enough to be right. To Judge Kozinski, a judge must also be remembered.

Perhaps Judge Kozinski's greatest hit is *United States v. Syufy Enterprises*,[16] an antitrust action against movie theaters. The court's opinion obliquely contains 207 movie titles. A few might give this star-chambered opinion das boot, but you should read it before it's gone with the wind. See how many movie titles you can spot.

To see how humor can fail, compare Judge Kozinski's work to the opinion in *Republic of Bolivia v. Philip Morris Companies, Inc.*[17] The defendant moved to transfer a tobacco case from Brazoria County, Texas, to the District of Columbia. Over Bolivia's opposition, the court granted the motion:

> The Court seriously doubts whether Brazoria County has ever seen a live Bolivian . . . even on the Discovery Channel.
>
> . . .
>
> [T]here isn't even a Bolivian restaurant anywhere near here! Although the jurisdiction of this Court boasts no similar foreign offices, a somewhat dated globe is within its possession . . . . [T]he Court is virtually certain that Bolivia is not within the four counties over which this Court presides, even though the words Bolivia and Brazoria are a lot alike and caused some real, initial confusion until the Court conferred with its law clerks . . . . Bolivia, a hemisphere away, ain't in south-central Texas, and . . . . the District of Columbia is a more appropriate venue (though Bolivia isn't located there either). Furthermore, as . . . the judge of this Court simply loves cigars, the Plaintiff can be expected to suffer neither harm nor prejudice by a transfer to Washington, D.C., a Bench better able to rise to the smoky challenges presented by this case, despite the alleged and historic presence there of countless "smoke-filled" rooms.[18]

I close by hanging my hat on this amusing thought:

> It is an unfortunate truism that not all of life's moments are happy occasions; nor can one artificially impose humor where it naturally does not belong. To pretend otherwise would be akin to living in Monty Python's "Happy Valley," where anyone found breaking the law by not being happy at all times is brought before the merriest of judges and sentenced to "hang by the neck until you cheer up."[19]

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

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1. *See, e.g.*, Thomas E. Baker, *A Review of Corpus Juris Humorous*, 24 Tex. Tech. L. Rev. 869 (1993) (book review); Richard Delgado & Jean Stefancic, *Scorn*, 35 Wm. & Mary L. Rev. 1061 (1994) (arguing that judges often heap scornful humor on defenseless litigants); Adelberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. Miami L. Rev. 693 (1987); Susan K. Rushing, *Is Judicial Humor Judicious?*, 1 Scribes J. Legal Writing 125 (1990).
2. George Rose Smith, *A Primer of Opinion Writing, For Four New Judges*, 21 Ark. L. Rev. 197, 210 (1967). Justice Smith eventually changed his mind, though. *See* George Rose Smith, *A Critique of Judicial Humor*, 43 Ark. L. Rev. 1, 25 n.60 (1990) (declaring that "that part of the Primer disapproving judicial humor is hereby overruled, set aside, held for naught, and stomped on!").
3. *In re Rome*, 218 Kan. 198, 207, 542 P.2d 676, 685 (1975) (per curiam) (quoting 1924 Canons of Judicial Ethics).
4. William L. Prosser, The Judicial Humorist: A Collection of Judicial Opinions and Other Frivolities vii (1952).
5. Benjamin N. Cardozo, *Law and Literature*, 39 Colum. L. Rev. 119, 122, 52 Harv. L. Rev. 471, 483, 48 Yale L.J. 489, 501 (1939) (simultaneously published), *reprinted from* 14 Yale Rev. [N.S.] 699 (July 1925).
6. *Compare* David B. Saxe, *Not a Time for Humor*, Nat'l L.J., Aug. 14, 1989, p. 13 (con), *with* Richard W. Wallach, *Let's Have a Little Humor*, N.Y.L.J., Mar. 30, 1984, p. 2, col. 3 (pro) (explaining in margin that Justice "Wallach . . . has practiced what he preaches about humor in judicial opinions").
7. 1 U.S. [Cranch] 137 (1803).
8. 347 U.S. 483 (1954).
9. Lord MacMillan, *The Writing of Judgements*, 26 Canadian Bar Rev. 491, 493 (1948) ("[I]n all the best examples of judicial levity the lighter passages are not dragged in by the ears for the mere purpose of display but are strictly relevant to the issue and really advance the argument."). Our Canadian colleagues, by the way, are kidding cousins. Recognized as the best judicial parody is Canada's *Regina v. Ojibway*, 8 Crim. L.Q. (Can.) 137 (Sup. Ct. 1965) (Blue,

J.) (finding that a pony is a bird); *see* Jerry Buchmeyer, *Judicial Logic: Birds and Ponies*, 45 Tex. B.J. 1345 (1982).
10. 192 A.D.2d 1115, 1116, 596 N.Y.S.2d 250 (4th Dep't 1993) (mem.).
11. 938 F.2d 1092 (10th Cir.) (Brorby, J.), *cert. denied*, 502 U.S. 961 (1991).
12. *Id.* at 1093 (citations omitted).
13. 551 F. Supp. 349 (S.D. Ga. 1982) (Bowen, J.).
14. *See* 710 F.2d 1542 (11th Cir. 1983). The *Miles* opinions are so notable the West Group published a book in their honor. *See* Blackie the Talking Cat and Other Favorite Judicial Opinions (1996).
15. *See, e.g.*, *White v. Samsung Elec. Am., Inc.*, 989 F.2d 1512, 1521 (9th Cir.) (Kozinski, J., dissenting from denial of rehearing en banc) ("For better or worse, we *are* the Court of Appeals for the Hollywood Circuit.") (emphasis in original), *cert. denied*, 508 U.S. 951 (1993). Then read David A. Golden, *Humor, the Law, and Judge Kozinski's Greatest Hits*, B.Y.U. L. Rev. 507 (1992).
16. 903 F.2d 659 (9th Cir. 1990).
17. 39 F. Supp. 2d 1008 (S.D. Tex. 1999) (Kent, J.).
18. *Id.* at 1009–10. For a discussion of the judge's opinion-writing style in this and other cases, see Steven Lubet, *Bullying from the Bench*, 5 Green Bag 11 (2001).
19. Marshall Rudolf, Note, *Judicial Humor: A Laughing Matter?*, 41 Hastings L.J. 175, 200 (1989) (citations omitted).

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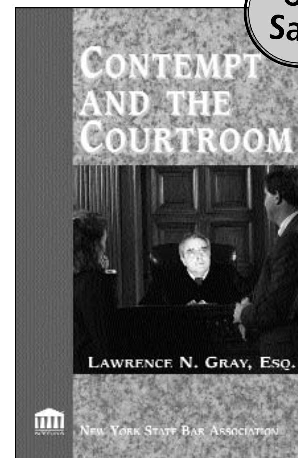

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THE LEGAL WRITER

Judicial Jesting: Judicious?

BY GERALD LEBOVITS

Many warn against using humor of any kind in a judicial opinion. Nearly all warn against using humor that does not assist the opinion's utility, goes outside the record, or ridicules or offends a litigant, the disinterested reader, or a cause of action.[1] Questionable humor has no place in writing meant to create precedent and reflect reasoned judgment. And this assumes that the opinion's author is funny. In the case of judges, that's rarely true. There are few funny judges, after all – only funny people who've made career mistakes.

The master, Justice George Rose Smith, once wrote, "Judicial humor is neither judicial nor humorous. A lawsuit is a serious matter to those concerned in it. For a judge to take advantage of his criticism-insulated, retaliation-proof position to display his wit is contemptible, like hitting a man when he's down."[2]

Lightening wit is typically unenlightening. A judicial opinion demands propriety and professionalism. Humorous opinions, written to satisfy some need to be humorous, can cross the line. Some humor offends by exclusion and false notions of superiority. Humor also deflects from accountable decision making and judicial responsibility. It's one thing to have a sense of humor and grace on the bench, or to be clever during an after-dinner speech. It's another to express humor in writing. As recited in a judicial disciplinary opinion, "Under the heading of 'Ancient Precedents' in the canons of judicial ethics adopted in 1924 by the American Bar Association this appears: 'Judges ought to be more learned than witty; more reverend than plausible; and more advised than confident. Above all things, integrity is their portion and proper virtue.'"[3]

Dean Prosser agreed. He wrote that "the bench is not an appropriate place for unseemly levity. The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig."[4] That, however, did not stop him from compiling opinions for his book on the subject, *The Judicial Humorist*. Dean Prosser doubtless took his title from Gilbert and Sullivan's *The Mikado*. Sir William Gilbert, a lawyer, had the Lord High Executioner sing about persons who could be executed and not be missed, including "that *Nisi Prius* nuisance, . . . The Judicial humorist – I've got *him* on the list!"

Justice Cardozo's approach to humor was more tolerant than Dean Prosser's, but Cardozo did not recommend it. He explained that "the form of opinion which aims at humor . . . is a perilous adventure, which can be justified only by success, and even then is likely to find its critics almost as many as its eulogists."[5] New York State judges have been on opposite sides of this question. In the Appellate Division, First Department, for example, Justice David Saxe rejects humor, while the late Justice Richard Wallach favored it as effective and memorable.[6]

Effective and memorable is truly funny humor that pokes fun at law or society, is in good taste, and does not belittle the litigants, demean the judiciary, or make future litigants apprehensive. And the humor must not dominate the opinion. The humor must be brief.

Judicial humor also has no place in important opinions. Would our perception of *Marbury v. Madison*[7] be different if Chief Justice John Marshall had used a few off-color asides? What if in *Brown v. Board of Education*[8] Chief Justice Earl Warren had been a punning prankster?

But humor is acceptable when it's inherent in, relevant to, or complements the subject.[9] Two examples. In *Peevey v. Burgess*,[10] the Appellate Division, Fourth Department described how the defendant, a tobacco chewer, had attached a homemade spittoon to his pickup truck's emergency brake release. The truck needed repair. When the defendant's mechanic released the brake to go down a ramp, "six ounces of spit" sprayed into the mechanic's face. The mechanic, "disoriented," fell out of the pickup truck, which rolled down the ramp and struck another mechanic. With deadpan humor, the Fourth Department concluded "that it was . . . reasonably foreseeable that defendant's conduct . . . could . . . be a proximate cause of injury to a third party."

Lightening wit is typically unenlightening.

In the second case, *United States v. Prince*,[11] the defendant so desperately wanted the court to relieve his public defender that he relieved himself on his defender's table in front of the jury. From the Tenth Circuit's opening paragraph:

> While the public's perception of lawyers seems to reach new lows every day, parents – we are told – still encourage their children to enter this profession. But the parent who happens to read this opinion may not be so quick to urge a loved child to become a lawyer after learning how the defendant in this case expressed his extreme personal dis-

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