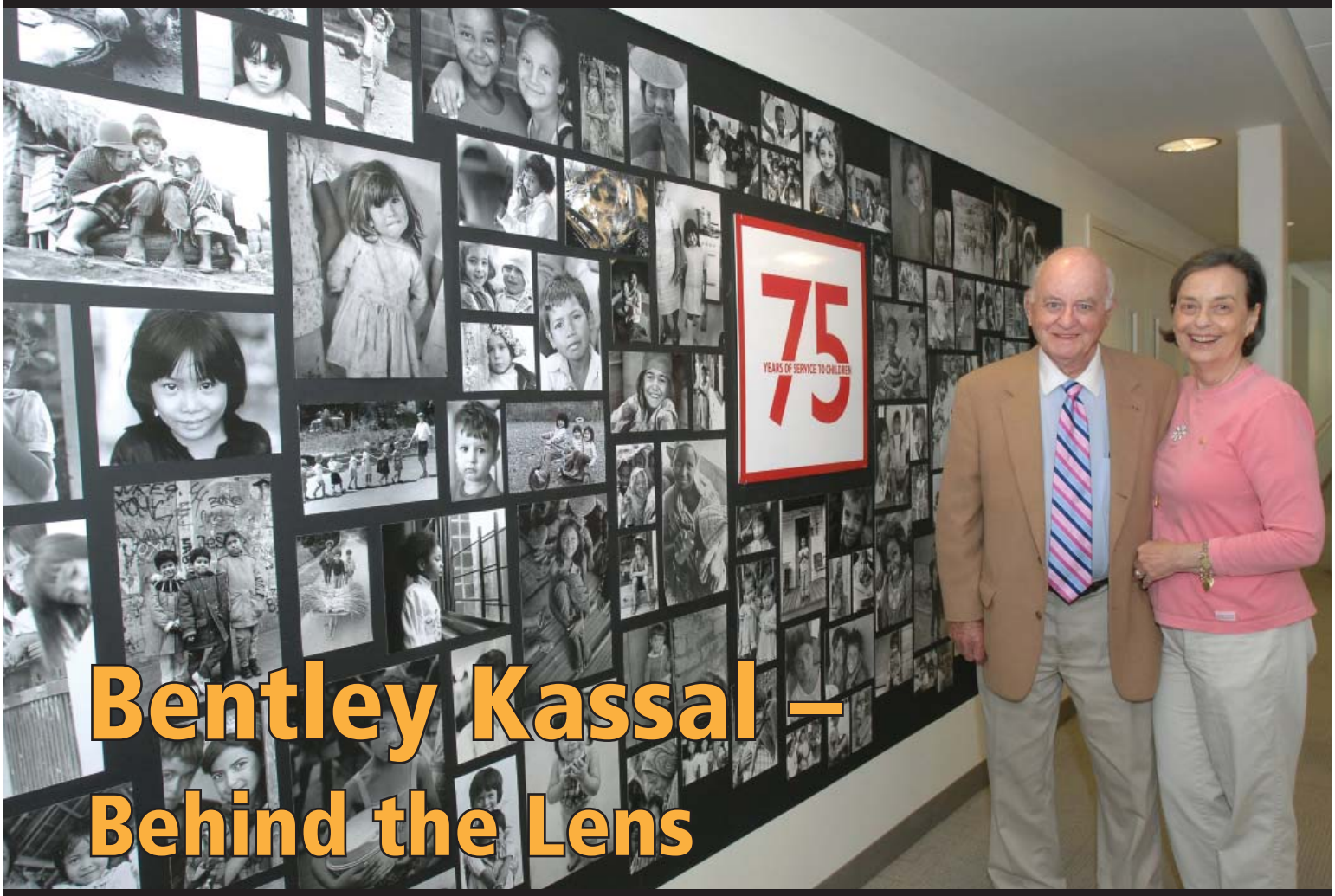
SEPTEMBER 2007
VOL. 79 | NO. 7

NEW YORK STATE BAR ASSOCIATION

Journal



Bentley Kassal – Behind the Lens

Judge, Attorney, Children's Advocate

by Skip Card

Also in this Issue

BESTSELLERS

FROM THE NYSBA BOOKSTORE

September 2007

Attorney Escrow Accounts, Second Edition

The Second Edition offers comprehensive coverage of the most common situations involving client funds and clearly discusses the legal and ethical issues encountered.
PN: 40266 / **Member $45** / List $55 / 266 pages

Collections and the Enforcement of Money Judgments, 2006 Revision

This classic text provides detailed guidance in the field of debt collections and enforcement of money judgments. Completely updated with the cumulative supplement.
PN: 4030 / **Member $105** / List $140 / 804 pages

Construction Site Personal Injury Litigation — New York Labor Law §§ 200, 240(1), 241(6)

Perhaps no single scheme of statutory causes of action has initiated more debate. This text provides a road map through this at-times confusing area of law. Includes a summary of key case developments.
PN: 4047 / **Member $80** / List $110 / 440 pages

Depositions — Practice and Procedure in Federal and New York State Courts

This detailed text covers all aspects of depositions. Topics include pre-trial discovery schedules, appropriate and inappropriate behavior at depositions, and motions for protective orders.
PN: 4074 / **Member $50** / List $65 / 478 pages

Foundation Evidence, Questions and Courtroom Protocols

This manual contains a collection of the forms and protocols that provide the necessary predicate or foundation questions for the introduction of common forms of evidence and the examination of witnesses.
PN: 4107 / **Member $48** / List $57 / 172 pages

Insurance Law Practice, Second Edition

Completely updated, the Second Edition provides a comprehensive approach to this complex area of the law. Includes five new chapters on disability insurance, workers' compensation insurance, professional liability coverage, insurance regulation, and agent and broker liability.
PN: 41256 / **Member $110** / List $140 / 1,382 pages

Legal Manual for New York Physicians, Second Edition

Co-published by NYSBA and the Medical Society of the State of New York, this comprehensive text is a must-have for physicians, attorneys representing physicians and those involved in the medical profession. Presented in an easy-to-use question-and-answer format.
PN: 41325 / **Member $90** / List $105 / 1,032 pages

New York Lawyer's Deskbook, Second Edition, 2006–2007

WINNER OF THE ABA'S CONSTABAR AWARD
The Second Edition consists of 25 chapters, each covering a different area of practice. Each chapter gives the nuts and bolts of practice in that particular area of law.
PN: 4150 / **Member $250** / List $325 / 2,068 pages

New York Lawyer's Formbook, Second Edition, 2006–2007

The *Formbook* is a companion volume to the *N.Y. Lawyer's Deskbook* and includes 21 sections, each covering a different area of practice.
PN: 4155 / **Member $250** / List $325 / 3,202 pages

N.Y. Municipal Formbook, Third Edition

A rich resource for attorneys dealing with local government as it affects employees, citizens and businesses. Over 1,100 forms covering all aspects of municipal law.
PN: 41606C / **Member $150** / List $185 / 3,318 pages

Practitioner's Handbook for Appeals to the Appellate Divisions of the State of New York, Second Edition

Covers the aspects of handling appeals to the New York State Appellate Division, addresses recent statutory changes and rule revisions, and includes commonly needed forms. A must for practitioners filing civil or criminal appeals.
PN: 4014 / **Member $48** / List $57 / 172 pages

Free shipping and handling within the continental U.S. The cost for shipping and handling outside the continental U.S. will be added to your order. Prices do not include applicable sales tax.

NEW!

Estate Planning and Will Drafting in New York, 2006 Revision

Provides a practical overview of the complex rules and considerations involved in the various aspects of estate planning in New York State. Includes numerous sample wills and checklists.
PN: 4095 / **Member $125** / List $160 / 822 pages

NYS Physician's HIPAA Privacy Manual

Designed to be a hands-on tool for health care providers and their legal counsel, this new publication provides guidance for a physician's office to respond to routine, everyday inquiries about protected health information.
PN: 4167 / **Member $75** / List $95 / 288 pages

Real Estate Titles, Third Edition

An all-time bestseller, this 2007 Edition is edited by James M. Pedowitz, Esq., a nationally renowned expert in real estate law and title insurance, and authored by some of the most distinguished practitioners in the field. This edition, consisting of 27 chapters, is an essential guide to the many complex subjects surrounding real estate law. Includes the new ALTA policies and TIRSA endorsements.
PN: 521007 / **Member $150** / List $180 / 1,632 pages

Coming Soon!

Practitioner's Handbook for Appeals to the Court of Appeals, Third Edition

This anticipated new edition will update topics on taking and perfecting criminal and civil appeals, alternative procedures for selected appeals and how to write and present the appeal.

Representing People with Disabilities, 2007 Revision

A comprehensive reference that covers the myriad legal concerns of people with disabilities. *Representing People with Disabilities* is the ideal reference for those who want a "one-stop" source that provides a thorough overview of the legal framework affecting individuals with disabilities.

Expand your professional knowledge

NEW YORK STATE BAR ASSOCIATION

1.800.582.2452 www.nysba.org/pubs

Mention Code: PUB0109

NYSBA

NEW YORK STATE BAR ASSOCIATION
Journal

EDITORIAL OFFICES
One Elk Street
Albany, NY 12207
(518) 463-3200
FAX (518) 463-8844
www.nysba.org

CONTENTS

SEPTEMBER 2007

BENTLEY KASSAL
Behind the Lens
BY SKIP CARD

10

Judge Bentley Kassal and his wife, Barbara.
Photo: Save the Children/Susan Warner.

DEPARTMENTS

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 © 2007 by the New York State Bar Association. The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), 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.

KATHRYN GRANT MADIGAN

Securing Our Legacy as the Voice of the New York Lawyer

A number of years ago, then NYSBA President Joshua Pruzansky reminded us of the importance of focusing on the fundamentals of leadership, especially the engine of any successful volunteer organization – the membership. In the real estate vernacular, it's members, members, members.

Our Association's constitution does not even mention members or serving their needs. For most of our 131-year history, it's been somewhat of a given. We didn't need to be a mandatory bar. Everyone knew that if you were licensed to practice in New York, you became a member of the State Bar. End of story.

That dynamic has evolved over time, as the number of bar associations in New York increased, to more than 200 by last count. Across the country, professional and other volunteer associations are in transition. Most face flat or declining membership. While we continue to grow each year, we are not keeping pace with the growth of New York lawyers. If we are to secure our legacy as the voice of the New York lawyer, we must grow faster. If we are to continue to influence public policy at the highest levels, advance the rule of law, do the public good and advocate for those who cannot speak for themselves, we must depend upon a stable, and growing, membership base.

As a local bar leader, I had at first viewed the State Bar as a competitor. That was before I had the proverbial "light bulb" moment, when I realized that we could make a compelling case for why every New York lawyer should belong to the State Bar, the local Bar, and yes, other substantive, ethnic or specialty bars. And no, one need not be a "bar junkie" to get the picture. Fundamentally, it is about making an investment in yourself, your professional and personal development and what that is worth to you.

Bar associations all bring different, and vital, programs and services to the table. I may not be typical (I have been called a lot of things but not "typical"): I am a sustaining member of NYSBA, my county bar, the women's bar, the ABA, a member of the National Academy of Elder Law Attorneys and a Fellow of the American College of Trust and Estate Counsel. My annual dues, which I paid out of pocket as a young lawyer, now exceed $2,000 each year. And they are a bargain at twice the price. The value I receive in professional and leadership development, networking with attorneys on the cutting edge of my practice areas, the unlimited opportunities for volunteerism and pro bono, legislative advocacy, and the life-long friends I have made, is, in the advertising lexicon, priceless!

This is the first year of our 2010 Membership Challenge, which is about mobilizing our members, our leadership and our staff to spread that word. While your local, women's, ethnic or specialty bars provide valuable services tailored to their respective membership, NYSBA has and will continue to offer statewide programs, services and influence unparalleled by any other association in New York.

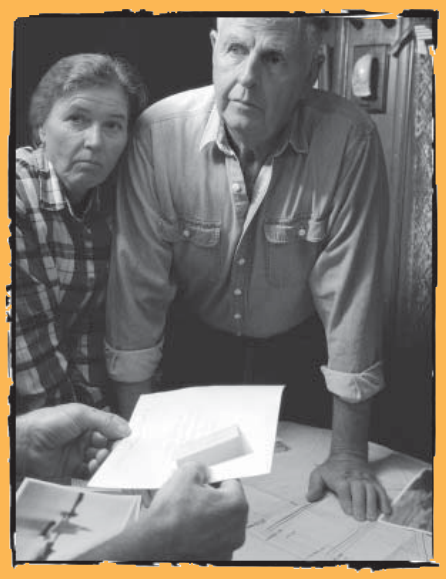
My challenge to you? Reach out to one non-member this year. Even more, if you are feeling ambitious. There is a reason we are members of NYSBA. Our membership provides value and relevance and informs who we are as lawyers, as bar and community leaders, and as human beings. If you also believe in the importance of one organization that speaks with one voice for all the lawyers in our state, it is time to pay that forward. I can think of no better way to "grow" our membership than by enlisting every one of our members. What better entrée into this great association than one who already understands the value?

Encourage that young lawyer, that mid-level associate, the solo on Main Street, the in-house counsel or attorney in public service to look us over for one year. And make sure they join one or more of our 23 Sections that relate to their area of practice. If they believe that their personal financial circumstances are such that they require a dues reduction, have them contact our Membership Department about our Dues Waiver Program. If, after one year, they are not convinced of the value, or the relevance, of belonging to the largest voluntary state bar association in the country, have them call me. Or better yet, tell me why on my blog. Just go to the link on our home page at www.nysba.org. ■

KATHRYN GRANT MADIGAN can be reached on her blog at http://nysbar.com/blogs/president.

There are millions of reasons to do Pro Bono.

(Here are some.)



Each year in communities across New York State, indigent people face literally millions of civil legal matters without assistance. Women seek protection from an abusive spouse. Children are denied public benefits. Families lose their homes. All without benefit of legal counsel. They need your help.

If every attorney volunteered at least 20 hours a year and made a financial contribution to a legal aid or pro bono program, we could make a difference. Please give your time and share your talent.

Call the New York State Bar Association today at
518-487-5640 or go to
www.nysba.org/probono
to learn about pro bono opportunities.

DO THE PUBLIC GOOD
VOLUNTEER FOR PRO BONO

Lawyer Referral and Information Service

Interested in expanding your client base?

Join the Lawyer Referral & Information Service

Why Join?

> Expand your client base
> Benefit from our marketing strategies
> Increase your bottom line

Overview of the Program

The New York State Bar Association Lawyer Referral and Information Service (LRIS) has been in existence since 1981. Our service provides referrals to attorneys like you in 41 counties. Lawyers who are members of LRIS pay an annual fee of $75 ($125 for non-NYSBA members). Proof of malpractice insurance in the minimum amount of $100,000 is required of all participants. If you are retained by a referred client, you are required to pay LRIS a referral fee of 10% for any case fee of $500 or more. For additional information, visit **www.nysba.org/joinlr**.

Sign me up

Download the LRIS application at **www.nysba.org/joinlr** or call **1.800.342.3661** or e-mail **lrs@nysba.org** to have an application sent to you.

Give us a call! 800.342.3661

NYSBA

ABA AMERICAN BAR ASSOCIATION

NYSBACLE

Tentative Schedule of Fall Programs *(Subject to Change)*

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

Henry Miller – The Trial

IMPORTANT NOTE: CLE Seminar Coupons and Complimentary Passes CANNOT be used for this program.

Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 ethics and professionalism; 6.5 skills

September 12 Westchester

Trust Your Planning: A Comprehensive Review of Trust Planning and Drafting Techniques

(Video Replay)

+Fulfills NY MCLE requirement (7.0): 0.5 ethics and professionalism; 6.5 skills and professional practice

September 19 Jamestown

Supplemental Needs Trusts

+Fulfills NY MCLE requirement (6.5): 0.5 ethics and professionalism; 6.0 practice management and/or professional practice

September 24 Tarrytown
September 25 Albany; Buffalo; Melville, LI
September 26 New York City

Construction Site Accidents: The Law and the Trial

Fulfills NY MCLE requirement for all attorneys (7.0): 4.0 skills; 3.0 practice management and/or professional practice

September 28 Albany
October 12 Uniondale, LI
October 19 Syracuse
November 15 New York City
November 16 Buffalo

Crisis Intervention Training

October 3 New York City

The Lawyer as Employer

(half-day program)

Fulfills NY MCLE requirement for all attorneys (3.5): 1.0 ethics and professionalism; 2.5 practice management and/or professional practice

October 3 Albany
October 10 New York City
October 17 Uniondale, LI

Update 2007

Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 ethics and professionalism; 6.5 practice management and/or professional practice

Live Sessions

October 5 Syracuse
October 19 New York City

+Video Replays (do not qualify for MCLE credits for newly admitted attorneys)

October 24 Binghamton
October 25 Utica
October 30 Albany; Buffalo
November 1 Rochester
November 7 Ithaca; Plattsburgh; Saratoga
November 8 Jamestown; Suffern
November 15 Uniondale, LI; Tarrytown
November 16 Canton
November 28 Poughkeepsie
November 30 Loch Sheldrake; Watertown

Practical Skills: Basic Matrimonial Practice

Fulfills NY MCLE requirement for all attorneys (7.5): 5.0 skills; 2.5 practice management and/or professional practice

October 10 Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester

Second Corporate Counsel Institute

(two-day program)

+Fulfills NY MCLE requirement (14.5): 4.0 ethics and professionalism; 10.5 practice management and/or professional practice

October 11–12 New York City

2007 No-Fault Insurance Update

October 11 New York City
October 12 Albany
October 18 Syracuse
October 19 Melville, LI
November 1 Buffalo

Handling the Failure to Diagnose Breast Cancer Medical Malpractice Case

Fulfills NY MCLE requirement for all attorneys (7.0): 4.0 skills; 3.0 professional practice

October 12 New York City

Real Estate Titles

October 12 New York City
October 26 Tarrytown
November 1 Albany
November 2 Melville, LI
November 14 Rochester

A Day in Discovery – Win Your Case Before Trial with Jim McElhaney

IMPORTANT NOTE: CLE Seminar Coupons and Complimentary Passes CANNOT be used for this program.

Fulfills NY MCLE requirement for all attorneys (7.0): .5 ethics and professionalism; 6.5 skills

October 16 Syracuse
October 17 Buffalo
November 7 Melville, LI
November 8 New York City

Risk Management for Attorneys – Don't Make Malpractice Your Nightmare

(half-day program)

Fulfills NY MCLE requirement for all attorneys (3.5): 2.5 ethics and professionalism; 1.0 practice management and/or professional practice

October 16 Buffalo
November 2 New York City
November 13 Uniondale, LI

† Does not qualify as a basic level course and, therefore, cannot be used by newly admitted attorneys for New York MCLE credit.

Prosecuting and Defending Medical Malpractice Claims

Fulfills NY MCLE requirement for all attorneys (7.0): 4.0 skills; 3.0 practice management and/or professional practice

October 17	Syracuse
October 19	Buffalo
October 26	Albany
November 1	Plainview, LI
November 2	Rochester
November 7	New York City

A Primer on Human Subject Research: Federal and State Law

Fulfills NY MCLE requirement for all attorneys (7.5): 7.5 professional practice

October 19	New York City

Practical Skills: Introduction to Estate Planning

Fulfills NY MCLE requirement for all attorneys (8.0): 1.0 ethics and professionalism; 2.0 skills; 5.0 practice management and/or professional practice

October 23	Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester

New York Appellate Practice

October 25	Rochester
November 2	Tarrytown
November 8	Hauppauge, LI
November 28	Albany
December 7	New York City

Ninth Annual Institute on Public Utility Law

+Fulfills NY MCLE requirement (7.0): 2.0 ethics and professionalism; 5.0 practice management and/or professional practice

October 26	Albany

New York's Fault Divorce Law at Age 40: Pleading and Proving Your Grounds Case

(half-day program)

+Fulfills NY MCLE requirement (4.0): 4.0 areas of professional practice

October 26	Buffalo
November 2	Albany
November 16	Melville, LI
December 7	Syracuse
December 14	New York City

Special Education Law Update

October 26	Buffalo
November 16	New York City
November 28	Albany

At the Ramparts: Challenges in Representing and Litigating With Public Companies in the Post-DURA/IPO/Sarbanes-Oxley Environment

+Fulfills NY MCLE requirement (7.0): 1.0 ethics and professionalism; 6.0 practice management and/or professional practice

October 30	New York City

Preparing and Drafting Organizational Documents for New York LLCS and Corporations

(half-day program)

November 7	Rochester
November 16	Albany
December 7	Uniondale, LI
December 11	New York City

+Fifth Annual Sophisticated Trusts and Estates Institute

IMPORTANT NOTE: CLE Seminar Coupons and Complimentary Passes CANNOT be used for this program.

(two-day program)

November 8–9	New York City

Practical Skills: Purchases and Sales of Homes

Fulfills NY MCLE requirement for all attorneys (6.5): 1.5 ethics and professionalism; 2.0 skills; 3.0 practice management and/or professional practice

November 13	Albany; Buffalo; Hauppauge, LI; New York City; Rochester; Syracuse; Westchester

White Collar Crimes

(half-day program)

November 14	New York City

Dealing With Your Client's Retirement Assets

(half-day program)

November 15	Buffalo
November 28	Syracuse
December 7	Albany
December 12	New York City

Ethics and Professionalism

(half-day program)

Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 ethics and professionalism

November 16	New York City
November 19	Tarrytown
November 28	Melville, LI
November 30	Albany
November 30	Syracuse
December 7	Rochester
December 12	Buffalo

Practical Skills: Basics of Civil Practice – The Trial

Fulfills NY MCLE requirement for all attorneys (7.0): 0.5 ethics and professionalism; 4.5 skills; 2.0 practice management and/or professional practice

November 27	Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester

Legislative Law and Lobbying

November 29	Albany

Securities Arbitration 2007: A Primer for the Practitioner

Fulfills NY MCLE requirement for all attorneys (7.0): 4.0 skills; 3.0 areas of professional practice

November 29	New York City

To register

or for more information call toll free **1-800-582-2452**

In Albany and surrounding areas dial (518) 463-3724 • Or fax your request to (518) 487-5618

www.nysba.org/CLE/fall2007 (Note: As a NYSBA member, you'll receive a substantial discount)

Bentley Kassal

Behind the Lens

Freelance writer **Skip Card** (skipcard@earthlink.net) is a copy editor for the *New York Post* and author of the hiking guidebook *Take a Hike New York City*. He has written for the *Journal* on topics ranging from baseball to environmentalism.

Photos: Save the Children/Judge Bentley Kassal.

By Skip Card

You can see much of Manhattan from Bentley Kassal's office in the Skadden Arps suite on the 48th floor of the Condé Nast Building, but the view is the least of the attractions. Kassal's crowded walls contain mementos ranging from his WWII Bronze Star citation to a burlap cross-stitch showing a mujahedeen warrior lopping the head off a Russian soldier – a macabre gift from an Afghan boy soldier.

Elsewhere, there's a 1962 "Kassal for Congress" bumper sticker, framed *New York Times* articles heralding Kassal's accomplishments as a politician and judge, editorial cartoons bearing his likeness, keepsakes from his year on a championship Harvard rugby team, and photographs of Kassal with Eleanor Roosevelt, Jack Kennedy and other notables, all souvenirs collected over a memorable and extraordinary 90-year lifetime.

But it's the faces of children that are most striking.

There's the calm South American girl draped in a hand-woven poncho, the Colombian boy wearing dusty cowpoke rags, two lithe Asian girls swaying through their dance steps, the softly crying boy sitting barefoot in the muddy streets of – well, who knows? Kassal has photographed so many children he is no longer sure where some shots were taken.

Most memorable – perhaps because you're sure you've seen it before – is the pale-skinned Lebanese girl with wild, dust-streaked blond hair and a patina of dirt coating her round face. Her wide-set dark eyes peer back at you – not pleading, exactly, and certainly not defiant, but slightly imploring.

Kassal took all the photos during more than 35 years of extensive travel to 158 countries on behalf of charitable organizations such as Save the Children and UNICEF. Although he has no formal training as a photographer and no offspring of his own, Kassal displayed a knack for capturing authentic images of children that deftly tug at philanthropic impulses.

"I wasn't looking for the most pitiable or difficult child," explained Kassal, seated behind his cluttered desk beneath the gazes of his young subjects. "I was looking for those who had hope and were not despairing and had a measure of life in their eyes.

"Look in their eyes. They're not sad. These are not depressing," he said. "I'd always attempt to find a child who needed assistance but was living life to the fullest under the circumstances."

Of all Kassal's accomplishments – a long list, including six years in the New York State Legislature and more than two decades on the bench, including a stint on New York State's highest court – he puts his charitable photography at the top.

"I think I affected more people's lives with my photography," he says. "I was able to see the need they have, and organizations like Save the Children were able to satisfy their needs and make their lives better."

Kassal's effect on others' lives isn't over. Recently, he was called to serve in New Orleans, part of a contingent of New York jurists who hope to help the Big Easy's decimated legal system get up and running following the chaos of Hurricane Katrina.

"I figure I might be able to do some good down there," Kassal said.

War, Law and Politics

Kassal grew up in New York City, a son of European immigrant parents who ran a liquor store at 46th and Lexington. An interest in photography and a career in the legal profession were on his mind from an early age.

"I always wanted to be a lawyer," he said. When he was about seven years old, his parents were involved in an auto accident. "I made notes of everything that occurred, including diagrams," he recalled.

"Why I was so motivated, I don't know," Kassal said. "I guess I had met some lawyers and was fascinated by the profession."

He attended Townsend Harris High School, earned a bachelor's degree in political science from the University of Pennsylvania and graduated from Harvard Law School in 1940. In his final year at Harvard, Kassal walked on to the Harvard Rugby Club – despite knowing little of the game – and earned a starting spot as the team's left wing. He played every minute of every game on an undefeated team that won the club-team equivalent of the national championship.

He entered the Army in January 1942, reporting for duty a month after the Pearl Harbor attacks. (An earlier application to be an agent for the Federal Bureau of Investigation received no reply from the bureau, then run by the notoriously anti-Semitic J. Edgar Hoover.) Serving as an air-combat intelligence officer in North Africa and the Mediterranean, Kassal earned a Bronze Star and three Bronze Arrowheads for his intelligence planning and first-day landings during major invasions.

It was during his Army years that Kassal began to develop a serious interest in photography and travel. Cameras could be bought in Europe, and photo processing was provided free by the Army's Signal Corps. Kassal participated in and photographed Allied landings in Sicily, Salerno and southern France.

November 1944, Nancy, France: Captain Bentley Kassal is awarded the Bronze Star.

"I'm a very physical type," he explained. Photography allowed Kassal to be outdoors, looking for subjects and manually manipulating lenses and shutters. "It was more of my nature."

After World War II, Kassal returned to New York City and went into private practice, slowly gaining experience and a solid reputation while becoming active in civic and liberal political organizations.

He entered the political arena in 1957, winning a seat in the New York State Assembly's 5th District, then in Manhattan's Upper West Side.

"I enjoyed enacting legislation that I saw as progressive," said Kassal, the first Reform Democrat elected to the New York Legislature. Among his notable accomplishments, Kassal was the author of the bill that created the New York State Council on the Arts, the first such organization in the United States.

"I enjoyed being a legislator. I enjoyed the give and take of legislative debate, being on my feet and arguing."

Kassal became known in the Assembly as a progressive reformer willing to take on entrenched interests. In a 1962 *New York Post* column, Murray Kempton hailed Kassal's attempt to push through a bill designed to compel powerful Con Edison to warn slum tenants five days before power would be cut off. "He was like Hillary on Everest, like Childe Roland at the dark tower, like John Uelses on his fiberglass pole," Kempton wrote.

Kassal's legislative career ended with an unsuccessful run for Congress, when he failed to win the August 1962 Democratic primary, despite endorsements from luminaries such as Eleanor Roosevelt and Hubert Humphrey. In a lifetime filled with accomplishments, the defeat marks one of Kassal's few disappointments.

"Being a congressman would have been the highlight of my life," Kassal said. "If I'd had my druthers, I'd rather be a congressman.

"But I derive great pleasure and satisfaction from being a proactive jurist in that I could make changes in the furtherance of justice."

A Seat on the Bench

Kassal resumed his work as a lawyer, slowly rebuilding his neglected solo practice into a lucrative career. In 1964,

while representing Café Au Go Go in Greenwich Village, he had the honor of springing comedian Lenny Bruce and café owner Howard Solomon out of jail after the pair was arrested for obscenity.

In 1969, Kassal gave up his revived law practice and successfully ran for civil court judge. The new job meant a cut in pay but a return to public service.

"I felt I could so something worthwhile about making the laws and the system of justice more equitable and fair," he said.

Ultimately, Kassal would spend 24 years in black robes. Today, when Kassal speaks, his words still have a judicial tone – opinions or instructions carry an air of quiet authority, while his personal views tend to be expressed in brief, careful sentences devoid of emotional hyperbole.

He calls the Iraq war "ill-conceived and based upon deception," and says U.S. involvement is "being continued because of the president's personal pride and not in the best interests of our country." His views on the government's treatment of terrorist suspects held in Guantanamo Bay are similarly disdainful.

"I see no legitimate basis in this war or any other war for depriving prisoners of basic human rights," he said. "All prisoners should have a right to trial with counsel provided and basic human-rights protections afforded to them."

Such opinions are a clear sign of what Kassal admits is a liberal-leaning philosophy that favors fairness and equity over statute or precedent. Among his noteworthy decisions as a judge was his ruling in *Morgan v. Morgan*, a 1975 divorce case. Mrs. Morgan had set aside her medical education so she could put her husband through law school. She asked the court to order her soon-to-be-ex to reciprocate and pay her tuition so she could attend medical school.

"I said, 'You're going to have that opportunity,'" Kassal recalled. The decision preceded by five years New York's "equitable distribution" rule, which mandates fairness and forbids discrimination against a wife in property settlements. Kassal later attended the woman's commencement ceremony at Albert Einstein Medical College in the Bronx.

In a case involving the America's Cup yachting race, Kassal was the lone dissenter in a 4-1 appellate court decision in which the majority upheld the San Diego Yacht Club's use of a catamaran to win a rematch against New Zealand racers in a traditional monohull sailboat. The San Diego sailors had reclaimed the Cup but did so by finessing the Cup rules' fine print.

"Even though technically it was not improper or illegal, it did violate my sense of fair play and sportsmanship," Kassal said. No catamaran has ever lost a race to a monohull, so to him the situation was as unfair as a heavyweight stepping into the ring against a featherweight. It simply wasn't right.

If Kassal sounds like one of those controversial "activist judges," he does not disagree.

"I was very proactive. If the existing decisions added up to being something that I didn't deem to be just, I would write the decision to make it just," Kassal said. "Justice was more important to me than precedent. Everything I did was proactive."

In 1985, at age 68, Kassal was appointed to a vacancy on New York's Court of Appeals and served from April to May. Close to the Court of Appeals's mandatory retirement age, he left that bench when the Court's spring term ended and returned to the Supreme Court's Appellate Division, where he served until retirement in 1993. His 15-page curriculum vitae notes he heard more than 14,000 appeals and had 254 opinions published in official law reports during his 24 years on the bench.

Story Behind the Shot

Kassal's life took another proactive turn in 1971, when a friend working for Save the Children saw his vacation snapshots and asked him to go on a photo assignment to the Pueblo Indian reservation in New Mexico.

Kassal went, the Save the Children publicists were pleased with the result, and over the next few years Kassal went on similar trips to Kenya, Afghanistan, Bhutan, Sri Lanka, Indonesia and Israel to get photos of children in need. On all trips, Kassal paid all his own expenses.

"He was what I call a true volunteer," said Susan Warner, manager of photography for the Connecticut-based Save the Children. "The judge never asked for reimbursements. He funded all his own trips. He did everything for the love of sharing his photographs."

Several years after Kassal began volunteering for Save the Children, the organization's headquarters burned down, and its entire photo inventory was reduced to ash.

"We lost everything," Warner said. "He was vital in rebuilding that." This year, to help mark its 75th birthday, Save the Children is exhibiting a collection of Kassal's photos in its office lobby.

"His photos are very iconic," she said. "They're beautiful black and white. They're timeless."

Kassal's most famous shot – showing the Lebanese girl with the dust-streaked blond hair – came just before Christmas during a 1974 trip to Beirut. When Kassal arrived, the busy workers in the field office said they didn't have the time or inclination to escort him anywhere.

After Kassal emphatically informed them he'd traveled 6,000 miles, the office reluctantly agreed to his demand for a driver to take him to the Bekka Valley. During the roughly one hour he had to shoot photos, Kassal spotted the little girl walking through a village.

As he has done so many times, Kassal found a way to put the child at ease and get the shot. His photo became a prominent image in Save the Children posters and advertisements for 15 years.

"I can get the right expression," Kassal said. "I'm smiling at all times – that's critical. It shows I'm not an ordinary tourist or somebody hostile."

At times, even his scenic photography had proactive results. Preservationists based in Sweden are using Kassal's photos of a giant Buddha carved into a mountainside in Bamiyan, Afghanistan, as they rebuild the statue destroyed in 2001 by the Taliban. Kassal had one of the few good photographs of the intact statue.

Kassal's life has taken other unusual turns. In 1986, at the age of 69, Kassal married Barbara Joan Wax, the 44-year-old sister-in-law of a close political supporter in the West Side Democratic Club. They have no children, another of his life's few regrets, and one he acknowledges with some sadness.

In 1997, Kassal became counsel in the Litigation Department of Skadden, Arps, Slate, Meagher & Flom. He accepted the position at a partner's invitation, although he is years older than all the firm's most senior partners. The firm makes use of Kassal's extensive experience at all levels of the legal system, and he regularly teaches seminars on topics such as effective courtroom technique.

"He provides great perspective to partners and, equally important, the younger associates," said John Gardiner, a partner in Skadden Arps' Litigation Department. "He provides a judge's eye, which is very important to litigators before they appear before judges."

Just as valuable is Kassal's sense of fair play, Gardiner said.

"He's one of the fairest guys you'd ever hope to meet," Gardiner said. "His view of the law is that it's supposed to do justice, and that's a pretty good way to view the law."

Kassal seems to enjoy his status as elder statesman at the prestigious firm. He is on a first-name basis with almost everyone, including lobby guards and the cooks in the Condé Nast cafeteria. Firm members regularly stop by to seek his advice. And, of course, the walls of his 48th-floor office provide a great place to display mementos.

"They call me 'Judge' here," Kassal said with a grin. "I like that title, and I don't discourage them." ■

BY DAVID PAUL HOROWITZ

David Paul Horowitz (dhorowitz@nyls.edu) practices as a plaintiff's personal injury litigator in New York City. Mr. Horowitz teaches New York Practice at New York Law School, is a member of the Office of Court Administration's CPLR Advisory Committee, and is a frequent lecturer and writer on the subject.

Is There a Doctor in the House? The Physician-Patient Privilege May Need One! (Part II)

Introduction

Last month's column posed a medical malpractice hypothetical, followed by a laundry list of disclosure demands by the parties in the action. You, reader, were thrown the gauntlet and challenged to decide the correct ruling for each of the disclosure demands. Well, you've had two months,[1] and it's time to show our cards.

What follows are my rulings, together with an explanation and citation, for the results I reached.[2] You, reader, can act as my appellate court, and I urge you to e-mail me with an explanation if you believe I should be reversed.

The Rulings:

Authorization for the Mother's Pre-Natal Records From Dr. A

The mother is the plaintiff twice over. First, she has sued in her representative capacity as the mother and natural guardian of her infant daughter, a legal requirement necessitated by the fact that her daughter, as a minor, does not have the legal capacity to bring suit on her own behalf. Second, she has sued individually, on her own behalf, to recover the moneys she spent on her daughter's medical care as a result of the injuries from the malpractice, and for the loss of her daughter's services.

Accordingly, the mother is considered a derivative plaintiff; that is, her claims arise through and solely as a result of the injuries sustained by her daughter. As a derivative plaintiff, the mother has not placed her medical condition in controversy or otherwise waived her medical privilege.

The defendant will argue that during the time the daughter was *in utero*, her medical condition and the medical condition of the mother were, for practical purposes, one and the same, and submits an affirmation from a medical expert detailing the relevance of the daughter's time *in utero* to its medical defense of the case. The plaintiff will argue that her daughter, while *in utero*, had no separate existence, that the records are the mother's alone, and that she, as a derivative plaintiff, has not waived her medical privilege.

I rule that the mother's pre-natal records are subject to disclosure, based upon the defendant's establishment of a proper evidentiary foundation through its submission of a physician's affirmation, and support my ruling with a recent Second Department case:

> While the mother did not waive the physician-patient privilege with respect to her own medical history by commencing this action in a representative capacity on behalf of the infant and derivatively on her own behalf, she is not entitled to assert that privilege with respect to medical records "pertaining to the period when the infant plaintiff was *in utero*, during which time there could be no severance of the infant's prenatal history from his mother's medical history." Since the affidavit of the defendants' medical expert established that the mother's medical records relating to the infant's gestation and birth were material and necessary to the defense of this action, the Supreme Court should have denied that branch of the motion which was for a protective order with respect to those records, and should have granted that branch of the cross motion which was to compel the production of authorizations for the release of those records.[3]

Authorization for the Infant's Delivery Records From Dr. A and Hospital B

There is no question that the infant's medical condition has been affirmatively placed in controversy by the commencement of the medical malpractice action brought on her behalf by her mother. The waiver of the privilege is not absolute, and does not extend to unrelated injuries, illnesses, and treatments.[4] The limitation on the waiver applies in medical malpractice cases.[5] In our case, the infant's medical privilege will be waived for related injuries and conditions.[6] The infant's medical history and records are "inextricably intertwined" with the mother's during delivery.[7]

Since the allegations in the action involve an injury to the infant's shoulder during delivery, I rule that all of the infant's delivery records are discoverable.

Authorization for the Mother's Post-Delivery Records From Dr. A and Hospital B

While the mother's pre-natal and delivery records are subject to disclosure, once the infant is delivered, the records of her post-delivery medical treatment from Dr. A and Hospital B are privi-

The entitlement to a psychiatric examination will depend upon the nature of the injuries claimed in the complaint and bill of particulars.

leged and not subject to disclosure. The "inextricably intertwined" argument advanced in connection with the pre-natal and delivery records is inapposite, as there is no medical nexus between any injury claimed to the child and the mother's post-delivery care. She is a derivative plaintiff, and has not waived her medical privilege.[8] The fact that she may have related certain facts of her medical history to the infant's physician does not constitute a waiver of her privilege, since they are merely facts and incidents of the medical history of the mother's family.

Accordingly, I deny the request.

Authorization for the Infant's Hospital Records From Hospitals B and E

This one's a gimme. Since the child is being treated in-patient at both facilities, and since the in-patient stays involve treatment for the injuries claimed in the lawsuit, the infant's medical condition has been affirmatively placed in controversy by the plaintiff; thus the privilege has been waived by the allegations in the complaint and the bill of particulars.[9]

Accordingly, I grant the request.

Authorization for the Infant's Medical Records From Drs. C, D, and F

Where doctors such as Drs. C and D treat the infant in the hospital, their entries into the hospital chart will be produced as part of the hospital records from their respective institutions. However, physicians often maintain separate records in their office, even if the patient is seen only at the hospital, and we know from the fact pattern that Dr. D saw the infant in his office. So their records, insofar as they relate treatment for the conditions related to the lawsuit, are subject to disclosure.[10]

Again, I grant the request.

Authorization for All Records of All Treating Physicians of the Infant

The plaintiff timely objects to the demand as being "overbroad, burdensome, and seeking privileged information." Here, some parsing of the demands is in order. While it is true that any treatment that the infant underwent for injuries and conditions related to those claimed in the lawsuit is subject to disclosure, treatment for unrelated illnesses, injuries or conditions would not be subject to disclosure.

Accordingly, I deny the request, without prejudice to the defendants to serve a new demand, demonstrating, for each medical provider, how the records requested are related to the injuries claimed in the lawsuit.

IME of the Infant by an Orthopedist, a Psychiatrist, and an HIV Specialist

The Orthopedic Examination

The defendants are clearly entitled to an orthopedic examination of the infant. Physical and mental examinations are addressed in CPLR 3121, and are permitted where "the mental or physical condition or the blood relationship of a party, or of an agent, employee or person in the custody or under the legal control of a party is in controversy."[11] Here, the condition of the infant's arm is in controversy. Hence, waiver; hence, physical exam.

The Psychiatric Examination

The entitlement to a psychiatric examination will depend upon the nature of the injuries claimed in the complaint and bill of particulars.[12] A clear-cut claim of psychiatric, psychological, or emotional injury will open the door to a psychiatric examination,[13] and any records of treatment. More problematic is the boiler-plate language, inserted in bills of particulars with the same thought and reflection that a lemming engages in while cliff-jumping, to the effect that the plaintiff was "depressed" or suffered "mental anguish" or "loss of enjoyment of life." This is perfectly appropriate where the plaintiff has received psychiatric or related treatment or counseling as a result of the negligence of the defendant, and the plaintiff seeks to recover for those injuries. It can potentially open the door to

far-reaching and otherwise unobtainable disclosure where there is no specific treatment or injury claimed.

In one case, where a personal injury plaintiff claimed "injury, pain, emotional upset, confinement to bed, and loss of enjoyment of life," the Fourth Department held:

> Given those broad allegations of injury and disability, we conclude that plaintiff's entire physical condition has been placed in controversy, especially insofar as plaintiff may have experienced other potentially debilitating problems before or since the accident . . . [s]uch other medical conditions are relevant to damages.[14]

The Second Department has held that "broad allegations of physical injury and mental anguish contained in [the] bill of particulars" entitled a defendant to "full disclosure regarding any medical or psychological treatment that the plaintiff may have received."[15]

Of course, if a party withdraws a claim, the waiver ceases, and disclosure should not be ordered.[16]

Based upon the plaintiff's claim in the bill of particulars of "[m]ental anguish and loss of enjoyment of life," I rule, reluctantly, that unless the claim in the bill is withdrawn, the defendant is entitled to any psychiatric or psychological records of the infant. I further rule that the defendant's request for a mental examination is deferred pending an *in camera* review of any records responsive to the request.

The HIV Examination

The plaintiff did not plead any HIV-related injury or illness in the bill of particulars, therefore that issue was not placed in controversy by the plaintiff, therefore there is no waiver.[17]

Any court considering ordering the release of confidential HIV information must follow the requirements of the Public Health Law. Public Health Law § 2782(1)(k) permits disclosure of confidential HIV information to "any person to whom disclosure is ordered by a court of competent jurisdiction pursuant to section twenty-seven hundred eighty-five of this article."[18] Public Health Law § 2785 permits disclosure where there is "a compelling need for disclosure of the information for the adjudication of a criminal or civil proceeding,"[19] and requires that all proceedings following an application for the release of confidential HIV information be conducted *in camera*.[20]

Accordingly, I deny the request.

I rule that unless the claim is withdrawn, the defendant is entitled to any psychiatric or psychological records.

IME of the Mother by Psychiatrist

We need not re-hash that the mother has not waived her medical privilege by commencing the action as both a representative and individually. However, the defendants have asserted a defense that the infant's injuries were caused or exacerbated as a result of the mother's medical condition of Munchausen Syndrome by Proxy.

Confronted with just such a claim by the defense, Justice Maltese in Supreme Richmond found:

> [T]he defendant has presented more than a mere probable cause to believe that the plaintiff [mother] has Munchausen Syndrome By Proxy, that has materially affected the cause of her son's medical treatment, which is relevant to this case. This is not a fishing expedition on the part of the defendant.[21]

The court offered two reasons for ordering the disclosure.

First, that the mother's "psychiatric profile may be so inextricably intertwined with the care and treatment rendered to [the child] that her psychiatric/medical condition is in question and therefore, the defendants are entitled to full disclosure regarding any psychiatric or psychological treatment she may have received."[22]

Second, the court found a waiver. "[Mother], by previously signing authorizations for [her] psychiatric records, as well as testifying as to her diagnosis and treatment diagnosis and treatment by her psychiatrist at her deposition, effectively waived her privilege, thus making those records discoverable."[23]

The court was certainly correct in holding that there had been a waiver as a result of the testimony and exchange of an authorization. However, the court's determination that the mother's records were subject to disclosure due to her psychiatric condition being "inextricably intertwined" with the medical care of her son was only supported with citation to cases discussing waiver by the plaintiff where the plaintiff affirmatively claimed, and sought compensation for, an injury.

Absent a waiver by the mother, I rule that the defendant's request for an IME of the mother is denied.

All Medical Records of Dr. A Relating to Any Injury to, or Medical Condition of, His Right Arm, for the Period Running From Two Years Before the Delivery Through One Week After the Date of Dr. A's Delivery of the Infant Girl

Needless to say, Dr. A has not interposed a claim in the lawsuit seeking recovery for any injury to himself, so he has not affirmatively placed his medical condition in controversy. A very similar fact pattern last year[24] led Justice Bransten in New York County to rule:

> There is absolutely no indication that [the doctor's] defense is based on any arm impairment. He is not attempting "to excuse the conduct complained of by the plaintiff" on the basis of any physical condition. Nor did he at any time voluntarily disclose that he suffered from any

arm condition during the relevant time. Thus, [the doctor's] *medical records* are not discoverable and an authorization will not be compelled.

* * *

To avoid a waiver of [the doctor's] privilege and ensure that plaintiff can obtain information to which she is entitled, this Court will *compel* [the doctor], at a deposition to be conducted within 30 days, to answer questions related to the facts and incidents of his medical history. Specifically, [the doctor] must disclose whether he suffered from any arm impairment and whether he was under the treatment of a physician for a condition related to upper-extremities between November 20, 2000 – the date of her facelift – and December 31, 2000. [The doctor's] compelled testimony cannot be deemed voluntary and, assuming that [the doctor] limits his answers to "the facts and incidents of his medical history" and that he in no other way injects his physical condition into the lawsuit, there will be no waiver of the physician-patient privilege as to his medical records based on his answers to plaintiff's counsel's questions.[25]

I adopt this ruling, *in toto*.

The Identity of the Patients and Staff Present in the HIV Clinic When the Television Fell

Had the television accident occurred anywhere but in a medical facility,[26] my ruling would be an easy one. Generally speaking, the identity of actual or potential witnesses to an accident, or more broadly, a transaction or occurrence, are discoverable.

However, there is a privilege issue involved for the patients in the HIV clinic. Disclosure of their identities would necessarily disclose, at the least, that they were being tested and/or monitored for HIV.

Two recent cases illustrate the range of possibilities.

In the first, the plaintiff sought the release of the names of patients who were present in the cardiac rehabilitation center where the plaintiff was receiving treatment at the time of the plaintiff's accident. The defendant ultimately sent redacted records and requested an *in camera* review, and after the review the trial court ordered the records exchanged. The Second Department reversed.

> While the plaintiff's request was not a request to discover the medical records of the other patients in the facility *per se*, exchanging the requested information would reveal that they were undergoing treatment for a cardiac related condition. Accordingly, the release would be barred by CPLR 4504(a).[27]

In the second, the names and addresses of patients in a hospital emergency room were subject to disclosure where the location of the patient within the emergency room did

not reveal information concerning the patient's medical status. The potential witnesses were in the adjoining emergency room beds to the decedent, in an area designated for "hold" patients. The defendant moved for a protective order, claiming the exchange would violate both HIPAA and the physician-patient privilege.

When it is claimed that information that is otherwise material and necessary intrudes on the physician-patient privilege, the privilege, if established, will trump materiality. Where the physician-patient privilege and the broad scope of disclosure compete, the test that has evolved is whether the information sought will reveal the patient's medical status. If it does, the privilege applies; if it does not, the privilege does not apply. Applying that test, the trial court held:

> In this instance, it does not appear that disclosure of the identity of the patients in the defendant's emergency room who were roommates of plaintiff's decedent on the evening in question would reveal their medical status. The Court therefore discerns no impediment to the requested disclosure under State law.[28]

Without even considering the impact of Public Health Law § 2780, I deny the request for the identity of patients, since their identification would necessarily entail disclosure of, at the very least, the fact that they were being tested and monitored for HIV treatment, but grant the disclosure of the identity of employees of the HIV facility.

Conclusion

There are two tactical points to keep in mind when issues involving medical privilege arise. First, the burden is always on the party seeking disclosure to demonstrate that the individual's physical or mental condition is in controversy.[29] Second, the party successfully asserting a privilege will be precluded at trial from introducing any evidence withheld as a result of the privilege.[30]

Courts often attempt to balance the physician-patient privilege being asserted by a party with arguments by parties seeking disclosure that the information sought is relevant to the claims and defenses in the litigation. However, a balancing process when a privilege is involved is inherently flawed. If there is a valid privilege for which there has been no waiver, it matters not that the matter sought is "material and necessary." A privilege, is a privilege, is a privilege.

I will now start checking my "in-box" every day for notification that I have been reversed. ■

1. Last "month's" column appeared in the July/August edition, so you had two months to figure this out.

2. Only I know whether I reached the result, and then sought authority, or was guided to the result by the authority I located.

3. *Lamy v. Pierre*, 31 A.D.3d 613, 614, 818 N.Y.S.2d 610 (2d Dep't 2006) (citations omitted); *See* CPLR 3101(a); *Scipio v. Upsell*, 1 A.D.3d 500, 767 N.Y.S.2d 254 (2d Dep't 2003). *Lamy* has been followed by a trial court in the First Department, *NCP v. City of N.Y.*, 16 Misc. 3d 1102(A), 2007 WL 1775503 (Sup. Ct., N.Y. Co. June 20, 2007).

4. *Kohn v. Fisch*, 262 A.D.2d 535, 692 N.Y.S.2d 429 (2d Dep't 1999).

5. *See, e.g., Gill v. Mancino*, 8 A.D.3d 340, 777 N.Y.S.2d 712 (2d Dep't 2004).

6. *See, e.g., Koump v. Smith*, 25 N.Y.2d 287, 303 N.Y.S.2d 858 (1969).

7. Remember that the infant's delivery records will be in a chart under the mother's name.

8. *Roman v. Turner Colours, Inc.*, 255 A.D.2d 571, 681 N.Y.S.2d 69 (2d Dep't 1998).

9. It's a gimme, so no citation is necessary. Not satisfied, *see, Koump v. Smith*, 25 N.Y.2d 287, 303 N.Y.S.2d 858 (1969).

10. *Id.*

11. CPLR 3121.

12. New York being a notice pleading jurisdiction, it is unlikely that the complaint will be particularly illuminating about the infant's injuries.

13. *See, e.g., Bobrowsky v. Toyota Motor Sales U.S.A., Inc.*, 261 A.D.2d 349, 689 N.Y.S.2d 183 (2d Dep't 1999).

14. *Geraci v. Nat'l Fuel Gas Distrib. Corp.*, 255 A.D.2d 945, 680 N.Y.S.2d 776 (4th Dep't 1998).

15. *Avila v. 106 Corona Realty Corp.*, 300 A.D.2d 266, 750 N.Y.S.2d 764 (2d Dep't 2002).

16. *Strong v. Brookhaven Mem. Hosp. Med. Ctr.*, 240 A.D.2d 726, 659 N.Y.S.2d 104 (2d Dep't 1997).

17. FYI. The infant tested negative for HIV six months after the accident. New York courts do not recognize a claim for "fear of AIDS" for a period beyond six months after exposure where the patient tests negative.

18. N.Y. Public Health Law § 2782(1)(k) (PHL).

19. PHL § 2785(2).

20. PHL § 2785(3).

21. *Heines v. Minkowitz*, 14 Misc. 3d 1210(A), 836 N.Y.S.2d 485 (Sup. Ct., Richmond Co. 2006).

22. *Id.*

23. *Id.*

24. *See* David Horowitz, *Dillenbeck*'s Back, N.Y. St. B.J., Sept. 2006, p. 14.

25. *Brower v. Beraka*, 12 Misc. 3d 408, 821 N.Y.S.2d 369 (Sup. Ct., N.Y. Co. 2006) (Bransten, J.) (citations omitted).

26. Or where the CIA or Department of Homeland Security was involved.

27. *Gunn v. Sound Shore Med. Ctr. of Westchester*, 5 A.D.3d 435, 772 N.Y.S.2d 714 (2d Dep't 2004).

28. *Foley v. Good Samaritan Hosp.* 11 Misc. 3d 1055(A), 815 N.Y.S.2d 494 (Sup. Ct., Rensselaer Co. 2006) (Ceresia, J.)

29. *Joyner v. Oakfield Ala. Cent. Sch. Dist.*, 284 A.D.2d 936, 726 N.Y.S.2d 312 (4th Dep't 2001).

30. *See, e.g., Roman v. Turner Colours, Inc.*, 255 A.D.2d 571, 681 N.Y.S.2d 69 (2d Dep't 1998).

"Then I made the mistake of telling my employees that if they didn't like the way I ran my company they could sue me."

George W. Kuney (gkuney@utk.edu) is Associate Professor of Law and Director of the Clayton Center for Entrepreneurial Law at the University of Tennessee College of Law. He is the author of *The Elements of Contract Drafting* (West 2003); *Contracts: Transactions and Litigation* (co-author Prof. Robert Lloyd, West 2006); and *California Law of Contracts* (CEB 2006), as well as law review and other articles dealing with business, contracts, Chapter 11, and insolvency issues. He earned his undergraduate degree from the University of California, Santa Cruz, his law degree from the University of California's Hastings College of the Law, and an M.B.A. from the University of San Diego.

Successor Liability in New York

By George W. Kuney

Successor liability is an exception to the general rule that, when one corporate or other juridical person sells assets to another entity, the assets are transferred free and clear of all but valid liens and security interests. When successor liability is imposed, a creditor or plaintiff with a claim against the seller may assert that claim against and collect payment from the purchaser.

Historically, successor liability was a flexible doctrine, designed to eliminate the harsh results that could attend strict application of corporate law. Over time, however, as successor liability doctrines evolved, they became, in many jurisdictions, ossified and lacking in flexibility. As this occurred, corporate lawyers and those who structure transactions learned how to avoid application of successor liability doctrines.[1]

There are two broad groups of successor liability doctrines: those that are judge-made (the "common law" exceptions) and those that are creatures of statute. Both represent a distinct public policy that, in certain instances and for certain liabilities, the general rule of nonliability of a successor for a predecessor's debts, following an asset sale, should not apply. This article addresses the status of the first group, judge-made successor liability.[2]

The current judge-made successor liability law appears to have developed because of and in reaction to the rise of corporate law in the last half of the 19th century and early part of the 20th century. It may be better characterized as a part of that body of law, much like the "alter ego" or "piercing the corporate veil" doctrines,[3] rather than as a creature of tort law, although it is used as a tool by plaintiffs who are involuntary tort claimants.

Many sources and authorities list four, five, or six basic types of situations in which judge-made successor liability has sometimes been recognized: for example, (1) express or implied assumption, (2) fraud, (3) *de facto* merger, (4) mere continuation, (5) continuity of enterprise, and (6) product line.[4] In fact, the matter is more complicated than that. Each of these species of successor liability has, within it, different subspecies with different standards and variations in the jurisdictions that recognize them. Some use a list of mandatory elements while others are based on a non-exclusive list of factors and considerations to be weighed and balanced in a "totality of the circumstances" fashion. Some approaches that relied on a flexible list of factors have evolved into one consisting of one or more mandatory elements. In any event, to state that there are only four, five, or six categories is to oversimplify the matter.[5]

The State of Successor Liability in New York

When examined in detail, the types of successor liability can be classified into five general species, each of which is specifically defined on a jurisdiction-by-jurisdiction basis. These are: (1) Intentional Assumptions of

Liabilities, (2) Fraudulent Schemes to Escape Liability, (3) *De Facto* Mergers, (4) The Continuity Exceptions: Mere Continuation and Continuity of Enterprise, and (5) The Product Line Exception.

When examining successor liability, especially when moving from one jurisdiction to another, one should keep in mind that there is variance and overlap between the species and their formulation in particular jurisdictions. The label a court uses for its test is not necessarily one with a standardized meaning applicable across jurisdictions. Accordingly, it is dangerous to place too much reliance on a name; the underlying substance should always be examined.

Intentional (Express or Implied) Assumption of Liabilities

Intentional assumption is probably the simplest of the successor liability species. Imposing liability on a successor that by its actions is shown to have assumed liabilities is essentially an exercise in the realm of contract law, drawing on doctrines of construction and the objective theory of contract.[6]

New York courts recognize the express or implied assumption exception to the general rule of nonliability. In the few cases which have addressed this exception, courts have looked at the language of the purchase agreement to determine whether the successor has expressly assumed any liabilities of the predecessor.[7]

Fraudulent Schemes to Escape Liability

Fraudulent schemes to escape liability by using corporate law limitation-of-liability principles to defeat the legitimate interests of creditors illustrate the need for successor liability to prevent injustice. If a corporation's equity holders, for example, arrange for the company's assets to be sold to a new company in which they also hold an equity or other stake, for less value than would be produced if the assets were deployed by the original company in the ordinary course of business, then the legitimate interests and expectations of the company's creditors have been frustrated.[8] By allowing liability to attach to the successor corporation in such instances, the creditors' interests and expectations are respected. The challenge, of course, is defining the standard that separates the fraudulent scheme from the legitimate one.

While New York courts recognize the exception to the general rule of nonliability for asset purchasers where "the transaction is entered into fraudulently to escape [tort] obligations,"[9] no published New York decision appears to have analyzed the contours of the fraud exception.

De Facto Merger

In a *statutory* merger, the successor corporation becomes liable for the predecessor's debts.[10] The *de facto* merger species of successor liability creates the same result in the asset sale context to avoid allowing form to overcome substance. A *de facto* merger, then, allows liability to attach when an asset sale has mimicked the results of a statutory merger except for the continuity of liability. The main difference between the subspecies of *de facto* merger among the various jurisdictions appears in how rigid or flexible the test is. In other words, how many required elements must be shown to establish applicability of the doctrine? On one end of the spectrum is the lengthy, mandatory checklist of criteria. On the other end is the non-exclusive list of factors to be weighed in a totality-of-the-circumstances fashion.

One of the traditional exceptions exists where there has been a "consolidation or merger of seller and purchaser."

One of the traditional exceptions to the general rule of nonliability exists where there has been a "consolidation or merger of seller and purchaser."[11] A transaction structured as a purchase of assets may be deemed to fall within this exception as a "*de facto* merger, even if the parties chose not to effect a formal merger."[12] In analyzing whether a *de facto* merger has occurred, the following points are considered:

> (1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation.[13]

Not all of these factors necessarily need be present for a finding of *de facto* merger.[14]

Continuation of the Business: The Continuity Exceptions

An exception with two distinct subcategories permits successor liability when the successor continues the business of the seller: mere continuation and continuity of enterprise. The two share roughly the same indications but continuity of enterprise does not require continuity of shareholders or directors or officers between the predecessor and the successor, a requirement said to be one of mere continuation's dispositive elements or factors.[15] Courts are not altogether careful or uniform in labeling which exception they are applying. There appear to be four general subspecies of mere continuation and three of continuity of enterprise. The similarity of these doctrines to those of *de facto* merger is striking.[16]

Mere Continuation

As New York appears to have adopted the more expansive continuity of enterprise doctrine, discussion of mere continual liability as an independent theory of recovery seems to be unnecessary, although the state of the law in this area of New York law is far from clear.

Continuity of Enterprise

As previously indicated, unlike the more traditional and long-standing mere continuation exception, the continuity of enterprise theory does not require strict continuity between the predecessor and the successor – although the degree or extent of continuity of owners, directors and officers is a factor.[17] Further, continuity of enterprise generally does not require dissolution of the predecessor upon or soon after the sale, which is often a factor – and sometimes a requirement – in jurisdictions applying the mere continuation doctrine.[18] All the variations of the continuity of enterprise exception derive from *Turner v. Bituminous Casualty Co.*[19] V ariations in the application of the *Turner* factors create the three subspecies.

In *Turner,* the Michigan Supreme Court expanded the four traditional categories of successor liability and, in so doing, developed the continuity of enterprise theory.[20] The court adopted the rule that, in the sale of corporate assets for cash, three criteria would be the threshold guidelines to establish whether there is continuity of enterprise between the transferee and the transferor corporations.

1. There is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations;
2. the seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible; and
3. the purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.[21]

The Michigan Supreme Court did not address the limits of the continuity of enterprise exception again until 1999, in *Foster v. Cone-Blanchard Machine Co.*[22] In *Foster*, a plaintiff, injured while operating a feed screw machine, sued the corporate successor after receiving a $500,000 settlement from the predecessor corporation.[23] The court held that "because [the] predecessor was available for recourse as witnessed by plaintiff's negotiated settlement with the predecessor for $500,000, the continuity of enterprise theory of successor liability is inapplicable."[24]

The continuity of enterprise theory does not require strict continuity between the predecessor and the successor.

The *Foster* court thus resolved two issues left open in *Turner*. First, the Michigan appellate decisions prior to *Foster* cited *Turner* for the proposition that the continuity of enterprise test comprised four elements or factors, following the four items enumerated in the *Turner* court's holding and not the three listed in its announcement of the rule.[25] The *Foster* court clarified that, in fact, only three items are involved in the *Turner* rule, and they are required elements.[26]

Second, the *Foster* court held that the "'continuity of enterprise' doctrine applies only when the transferor is no longer viable and capable of being sued."[27] The underlying rationale of *Turner*, said the court, was "to provide a source of recovery for injured plaintiffs."[28] According to Justice Brickley, *Turner* expanded liability based on the successor's continued enjoyment of "certain continuing benefits": "[T]he test in *Turner* is designed to determine whether the company (or enterprise) involved in the lawsuit is essentially the same company that was allegedly negligent in designing or manufacturing the offending product."[29]

The *Foster* decision thus appears to return Michigan law to its state immediately after *Turner* was decided: continuity of enterprise is a recognized doctrine of successor liability and the doctrine has three required elements. To the extent that intervening decisions had narrowed *Turner* with the addition of a fourth factor – whether

the purchasing corporation holds itself out to the world as the effective continuation of the seller corporation – that particular revision appears to have been reversed. Further, to the extent that *Turner*'s "guidelines" had been considered factors by other courts adopting the continuity of enterprise, *Foster* made it clear that it interpreted the rule as one comprising three elements.

At least one New York Supreme Court has adopted the three-criteria test of *Turner*.[30] "[1] whether there was a continuation of the enterprise of the original entity; [2] whether the original entity ceased its ordinary business operations and dissolved promptly after the transaction; [3] and whether the purchasing entity assumed those liabilities and obligations of the seller normally required for an uninterrupted continuation of the seller's operation."[31] Interestingly, the court did not seem to require a destruction of the plaintiff's remedies in order to satisfy the second prong of the continuity of enterprise test.[32] The court stated, "In the first sale, of course, [the predecessor] did not dissolve promptly, but continued on, in some form, for several years. What seems to be of greatest importance, however, is that it was completely out of the coffee granulizer business."[33] This application of *Turner* (without the destruction of remedy requirement) begins to look more like a hybrid of *Turner* and *Ray v. Alad Corp.*, discussed below.

Not all New York courts have adopted continuity of enterprise. Most important, the New York Court of Appeals has not addressed this exception since it expressly decided not to adopt it in *Schumacher v. Richards Shear Co.* Additionally, in 1984, the Supreme Court of Monroe County noted that *Schumacher* refused to adopt the continuity of enterprise exception.[34]

The Product Line Exception of *Ray v. Alad Corp.*[35]

In *Ray*, the California Supreme Court recognized the product line exception to the general rule of successor nonliability. This is a species of liability that is very similar to continuity of enterprise, and the court articulated the following "justifications" for imposing liability on a successor corporation:

> (1) the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk spreading role, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's goodwill being enjoyed by the successor in the continued operation of the business.[36]

The term "justifications" is somewhat ambiguous as to whether it connotes required elements or non-exclusive factors to be balanced, much like the *Turner* guidelines.

Like the Michigan Supreme Court in *Foster,* which revisited *Turner* well after the original opinion was issued, the California Supreme Court returned to *Ray* some years later to "clarify" things. In *Henkel Corp. v. Hartford Accident & Indemnity Co.*,[37] the California Supreme Court referred to these three justifications as "conditions," thus suggesting that they were essential elements under the product line exception. Despite its name, the product line theory of successor liability appears only rarely, if at all, to have been applied in a reported decision to a successor that had acquired merely one of many product lines from the predecessor; in nearly all reported cases, it appears to have been applied to sales of substantially all of a predecessor's assets.[38] In fact, one court has emphasized that the "policy justifications for our adopting the product line rule require the transfer of substantially all of the predecessor's assets to the successor corporation."[39]

The product line doctrine, where accepted, breaks into two distinct subspecies, which differ only as to whether *Ray*'s "virtual destruction of the plaintiff's [other] remedies" condition is strictly required in order to permit recovery.

The N.Y. Court of Appeals analyzed both the product line and continuity of enterprise exceptions in *Schumacher*, ultimately stating, "[w]e do not adopt the rule of either case [*Turner* or *Ray*], but note that both are factually distinguishable in any event."[40] This language has "resulted in a debate and some disagreement as to whether or not the Court of Appeals has rejected the two additional exceptions, or simply found the two exceptions inapplicable to the facts in that case."[41] The Supreme Court, Appellate Division, Third Department has adopted the product line exception,[42] while the First Department has not.[43] No N.Y. Court of Appeals decision has resolved this split in the lower courts.

Conclusion

The purpose of the successor liability doctrines was to provide contract and tort creditors with an avenue of recovery against a successor entity in appropriate cases when the predecessor that contracted with them or committed the tort or the action that later gave rise to the tort had sold substantially all of its assets and was no longer a viable source of recovery. Its various species acted as a pressure relief valve on the strict limitation of liability created by corporate law. The doctrine is in the nature of an "equitable" doctrine insofar as it is invoked when strict application of corporate law would offend the conscience of the court. In large part, the doctrine remains intact and still serves that purpose. ■

1. *See* George W. Kuney, *A Taxonomy and Evaluation of Successor Liability*, 3 Fla. St. U. Bus. Rev. 1 (2006). Note: list other of author's articles, if desired, rather than mentioning them in the text at the conclusion.

2. A detailed jurisdiction-by-jurisdiction analysis and explanation of the state of judge-made successor liability law may be found at <www.law.utk.edu/Faculty/APPENDIXKuney.htm>. The author intends to update this analysis at least twice a year so that it remains current.

3. *See generally* Steven L. Schwarcz, *Collapsing Corporate Structures: Resolving the Tension Between Form and Substance*, 60 Bus. Law. 109 (2004).

4. *See Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49 (Alaska 2001) (discussing varied approaches to determination of whether successor liability was a creature of contract and corporate law or tort law as part of its choice of law analysis and concluding that successor liability is a tort doctrine designed to expand products liability law; collecting cases and other authorities on both sides of the issue).

5. The variance in states' approaches to successor liability and to the related doctrines of alter ego or piercing the corporate veil are one of the reasons that the federal courts have adopted a uniform federal common law of these subjects under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). *See United States v. Gen. Battery Corp.*, 423 F.3d 294, 298–301 (3d Cir. 2005) (collecting authorities).

6. Michael J. Zaino, *Bielagus v. EMRE: New Hampshire Rejects Traditional Test for Corporate Successor Liability Following an Asset Purchase*, 45 N.H. B.J 26 (2004).

7. *See, e.g., Hartford Acc. & Indem. Co. v. Canron, Inc.*, 43 N.Y.2d 823, 402 N.Y.S.2d 565 (1977) (finding no express or implied assumption by a successor in a purchase agreement); *Valenta Enters., Inc. v. Columbia Gas of N.Y., Inc.*, 116 Misc. 2d 536, 539, 455 N.Y.S.2d 996 (Sup. Ct., Broome Co. 1982) (finding neither express assumption of liability nor anything "presented to the court which would warrant a finding of implied commitment to assume such responsibilities."); *Emrich v. Kroner*, 79 A.D.2d 854, 854, 434 N.Y.S.2d 491 (4th Dep't 1980) (finding that, "from the terms of the purchase agreement . . . [the successor] agreed to assume the tort liability of [the predecessor] arising out of incidents occurring after the closing date").

8. Causation is a required element of all species of the fraud exception. *See, e.g., Milliken & Co. v. Duro Textiles, LLC*, 2005 WL 1791562 (Mass. Super. Ct. June 14, 2005) (discussing need for causation, but also that judgment creditors could look to company's long term prospects, not just immediate insolvency).

9. *See Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 245, 464 N.Y.S.2d 437 (1983).

10. G. William Joyner, III, *Beyond Budd Tire: Examining Successor Liability in North Carolina*, 30 Wake Forest L. Rev. 889, 894 (1995).

11. *See Schumacher*, 59 N.Y.2d 239.

12. *In re N.Y. City Asbestos Litig.*, 15 A.D.3d 254, 256, 789 N.Y.S.2d 484 (1st Dep't 2005).

13. *Id.*; *see Sweatland v. Park Corp.*, 181 A.D.2d 243, 245, 587 N.Y.S.2d 54 (4th Dep't 1992).

14. *In re N.Y. City Asbestos Litig.*, 15 A.D.3d at 256 (citing *Fitzgerald v. Fahnestock & Co.*, 286 A.D.2d 573, 730 N.Y.S.2d 70 (1st Dep't 2001)).

15. Rest. 3d Torts § 12, cmt. g.; Am. L. Prod. Liab. 3d § 7:20 (2004). *See, e.g., Holloway v. John C. Smith's Sons Co.*, 432 F. Supp. 454, 456 (D.S.C. 1977) (denying summary judgment to the defendant successor in a products liability suit because (1) the business continued at its same address with virtually all of the previous employees; (2) the successor was responsible for maintenance and repairs on the products sold by the predecessor prior to its sale of assets; (3) the successor continued manufacturing the same or similar products as the predecessor; and (4) the successor held itself out to the public as a business entity under a virtually identical name as its predecessor; not requiring continuity of ownership and control but calling the doctrine applied "mere continuation" anyway.); *see also Mozingo v. Correct Mfg.*, 752 F.2d 168, 175 (5th Cir. 1985) (applying Mississippi law and citing *Holloway & Cyr v. B. Offen & Co.*, 501 F.2d 1145 (1st Cir. 1974) (upon which Holloway relied) as cases following the continuity of enterprise theory); Am. L. Prod. Liab. 3d § 7:22 (noting that the court in Holloway denied summary judgment to a successor despite a lack of continuity of ownership even though the court treated its ruling as an application of the mere continuation theory); 2 Madden & Owen on Prod. Liab. § 19:6, n. 25 (3d. ed. 2003) (noting an increasing number of courts have adopted the

continuity of enterprise exception including the *Holloway* court and the Ohio Supreme Court in *Flaugher v. Cone Automatic Mach. Co.*, 30 Ohio St. 3d 60 (1987)) (this treatise is authored by David Owen, the Carolina Distinguished Professor of Law at the University of South Carolina); Richard L. Cupp, Jr., *Redesigning Successor Liability*, 1999 U. Ill. L. Rev. 845, 854 n.44 (1999) (noting that states following the continuity of enterprise approach include South Carolina (citing *Holloway*); Ohio (citing *Flaugher*), Alabama, Michigan, Mississippi, and New Hampshire (citing *Cyr*); Philip I. Blumberg, *The Continuity of the Enterprise Doctrine: Corporate Successorship in United States Law*, 10 Fla. J. Int'l L. 365, 375 (1996) (collecting cases applying the continuity of enterprise theory, including *Holloway* and *Flaugher*); 30 S.C. Jur. Products Liability § 12 (stating the court in *Holloway* denied the successor's motion for summary judgment "where the evidence indicated that the [successor] was a mere continuation of the predecessor corporation"); Rest. 3d Torts § 12, cmt. c (citing only Alabama, Michigan, and New Hampshire as jurisdictions that have adopted the continuity of enterprise theory).

16. *Gladstone v. Stuart Cinemas, Inc.*, 878 A.2d 214, 221 (Vt. 2005). Cases from the beginning of the last century in Idaho preserve another term that seems to capture all or part of the *de facto* merger, mere continuation, and continuity of enterprise exceptions: "reorganization."

17. *Mozingo*, 752 F.2d at 174 (noting that the traditional mere continuation exception requires identity of stockholders, directors and officers); *see also Savage Arms Inc. v. W. Auto Supply*, 18 P.3d 49, 55 (Alaska 2001) (mere continuation theory requires "the existence of identical shareholders").

18. *See, e.g.*, *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 882 (Mich. 1976) (dissolution of the seller soon after the sale one of four enumerated factors indicating continuity of enterprise).

19. *Id.*

20. *Id.*

21. *Id.* at 879 (citing *McKee v. Harris-Seybold Co., Div. of Harris-Intertype Corp.*, 264 A.2d 98, 103, 105 (1970)). These are three of the four factors from *McKee* used to determine whether liability will arise under the *de facto* merger form of successor liability.

22. 597 N.W.2d 506 (Mich. 1999). In the interim, the court cited *Turner* in three decisions, none of which clarified the key *Turner* holding. *Jeffery v. Rapid Am. Corp.*, 529 N.W.2d 644, 656 (Mich. 1995) (citing *Turner* for the proposition that corporate law principles should not be rigidly applied in products liability cases); *Stevens v. McLouth Steel Prods. Corp.*, 446 N.W.2d 95, 99 (Mich. 1989) (citing *Turner* as a case where the Michigan Supreme Court discussed the doctrine of successor liability in the context of a products liability suit); *Langley v. Harris Corp.*, 321 N.W.2d 662, 664 (Mich. 1982) (citing *Turner* for the proposition that an acquiring corporation maybe held liable for products liability claims arising from activities of its predecessor corporation under a continuity of enterprise theory but then holding that the *Turner* rationale will not allow a corporation to seek indemnity from the plaintiff's employer in a products liability suit). One appellate court decision between *Turner* and *Foster* concluded that satisfying the fourth consideration in *Turner* (the purchasing corporation's holding itself out as a continuation of the selling corporation) was not sufficient for a finding of successor liability where the first three considerations were not met. *Pelc v. Bendix Mach. Tool Corp.*, 314 N.W.2d 614, 620 (Mich. Ct. App. 982) (Where a successor bought only 8% of the assets of another corporation in a bankruptcy sale and did not meet the first three criteria of *Turner* but held itself out as a continuation of the liquidating corporation, the mere continuation test was not satisfied. The court noted that to impose successor liability in such circumstances would effectively be an adoption of the broader "product line exception").

23. *Foster*, 597 N.W.2d at 508.

24. *Id.*

25. *Fenton Area Pub. Sch. v. Sorensen-Gross Constr. Co.*, 335 N.W.2d 221, 225 (Mich. Ct. App. 1983); *Lemire v. Garrard Drugs*, 291 N.W.2d 103, 105 (Mich. Ct. App. 1980); *Powers v. Baker-Perkins, Inc.*, 285 N.W.2d 402, 406 (Mich. Ct. App. 1979); *Pelc*, 314 N.W.2d at 618; *State Farm Fire & Cas. Ins. Co. v. Pitney-Bowes*, 1999 WL 33451719, at *1 (Mich. Ct. App. Apr. 2, 1999).

26. *Foster*, 597 N.W.2d at 510.

27. *Id.* at 511.

28. *Id.* Justice Brickley, in dissent, disagreed with the majority as to the underlying rationale of *Turner.*

29. *Id.* at 513.

30. *Salvati v. Blaw-Knox Food & Chem. Equip., Inc.*, 130 Misc. 2d 626, 633, 497 N.Y.S.2d 242 (Sup. Ct., Queens Co. 1985).

31. *Id.* at 628 (citing *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 879 (Mich. 1976)).

32. *Id.* at 626.

33. *Id.* at 633.

34. *Radziul v. Hooper, Inc.*, 125 Misc. 2d 362, 365, 479 N.Y.S.2d 324 (N.Y. Gen. Term 1984).

35. 560 P.2d 3 (Cal. 1977).

36. *Id.* at 9.

37. 62 P.3d 69, 73 (Cal. 2003).

38. George W. Kuney & Donna C. Looper, *Successor Liability in California*, 20 CEB Cal. Bus. L. Pract. 50 (2005).

39. *Hall v. Armstrong Cork, Inc.*, 692 P.2d 787 (Wash. 1984) (refusing to apply product line test to successor that purchased but one of many asbestos product lines).

40. *Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 245, 464 N.Y.S.2d 437 (1983).

41. *In re Seventh Judicial Dist. Asbestos Litig.*, 6 Misc. 3d 749, 752, 788 N.Y.S.2d 484, 486 (Sup. Ct., Ontario Co. 2005).

42. *See Hart v. Bruno Mach. Co.*, 250 A.D.2d 58, 679 N.Y.S.2d 740 (3d Dep't 1998).

43. *City of N.Y. v. Charles Pfizer & Co., Inc.*, 260 A.D.2d 174, 176, 688 N.Y.S.2d 579 (1st Dep't 1999) ("We decline to follow the Third Department in adopting the 'product line' theory of successor's liability as adopted in certain other jurisdictions. . . . We understand the Court of Appeals to have rejected this theory in *Schumacher v. Richards Shear Co.*").

"He has a brilliant legal mind but he rarely brings it to court."

Are Medicare, Medicaid, and ERISA Liens?

Resolving "Liens" in Personal Injury Settlements

By J. Michael Hayes

Medicaid

The definitive pronouncement regarding Medicaid as a "recovery right" is in *Arkansas Department of Health and Human Services (ADHS) v. Ahlborn*.[1] Federal Medicaid laws provide for joint federal and state funding of medical care for individuals who are not able to pay for their own health care.[2] A requirement of that statute is that states take reasonable measures to recover payments made for a client's benefit that were necessitated by third parties.[3] To the extent of payments made, the state acquires the right of the individual as subrogor, and the state of Arkansas had enacted legislation that gave ADHS a "statutory lien on any settlement, judgment or award."[4] ADHS's position was it was entitled to recover the full amount of its expenditures, despite the stipulated fact in that case that the compromise settlement for the injuries, medical expenses and other losses was only one-sixth the total value of the case.

In contrast with the Arkansas legislation, the federal Medicaid enabling statute prohibits states from placing liens against personal injury settlements.[5] The United States Supreme Court held that the Arkansas lien provision "violates Federal Law" and affirmatively prohibited Arkansas from asserting a lien on the recovery. The Court

J. Michael Hayes (jmh@jmichaelhayes.com) is a principal attorney in the Law Offices of J. Michael Hayes, a plaintiff's personal injury firm located in Buffalo. He earned his undergraduate degree from SUNY Brockport, and his law degree from SUNY Buffalo School of Law.

did recognize, however, that "there is no question that the State can acquire an assignment of the right or chose in action [subrogation], to receive payments for medical care."[6]

New York State has long taken the same position as Arkansas, that it has a "lien" on any third-party recoveries where medical expenses have been paid by Medicaid.[7] That New York believed it had a lien as opposed to a subrogation right, one only has to look to the title of Social Services Law § 104-b: "Liens for public assistance and care on claims and suits for personal injuries." It would appear that the federal Medicaid Act's "anti-lien" provision had escaped practitioners and legislative attention in New York and elsewhere, from its inception to the present.

The reality, as articulated by the Supreme Court, is that at best, states have a right of subrogation and they may proceed directly against the responsible third party, the tortfeasor. Alternatively, a state may intervene in the plaintiff's personal injury action. Finally, the state may recover its proportionate share of the settlement or recovery from the claimant directly, provided it represents compensation for medically related expenses.

Medicare

In this confusing world of liens versus subrogation rights and equitable allocation, Medicare is among the most amorphous. Medicare, 42 U.S.C. § 1395, and Medicaid, 42 U.S.C. § 1396, have much in common, including their enabling legislation. The accepted wisdom seems to be that Medicare has a right to seek recovery against any entity that has received any portion of a third-party payment if those third-party funds would have covered injury-related medical expenses that were paid by Medicare.[8] Some authors and the federal government feel that even where the settlement does not expressly include damages for medical expenses, a "lien" nonetheless vests. Medicare does recognize and honor judicial decisions for specific funds, such as lost wages, in a settlement that are obviously not related to medical services. Medicare does not claim a lien on those designated funds.

With the expansion of Medicare in 2006 to include medicines and drugs, there are now two separate governmental claimants on the recovery of expenses: Medicare claims reimbursement, as well as future credit, for injury-related care in the form of physician and hospital treatments; and, with Part D drug prescription expansion in 2006, Medicare Prescription Drug Plans (PDP) also expect reimbursement from recoveries from liable third parties for those expenses.

Before one can determine the actual rights of the government and obligations of the claimant, one must examine the enabling legislation; 42 U.S.C. § 1395y(b)(2)(B) has been commonly recognized as such. That section requires repayment of "recouped funds."[9] It sets the statute of limitations within which the United States must file a claim as three years from the "period beginning on the date on which the item or service was furnished."[10] Under the enforcement section,[11] double damages may be sought where there was a payment for the services and the United States did not receive that reimbursement.

Section 1395y(b)(2)(B)(iv), "Subrogation rights," may be of most significance to practitioners. This section provides that the "United States may bring an action against any or all entities that are or were required or responsible . . . to make payment with respect to the same item or service (or any portion thereof) under a primary plan."[12] Second, "[t]he United States shall be subrogated (to the extent of payment made under this subchapter for such an item or service) to any right under this subsection of an individual or any other entity to payment with respect to such item or service under a primary plan."[13] As has been observed, the right of subrogation differs significantly, having different powers and authority from that of a "statutory lien." Obviously, under either analysis, if an individual recovers moneys from a third party for health care benefits that were actually paid by an insurer or Medicare, the payor is entitled to recoupment.

> What result is reached if the personal injury settlement specifically excludes medical expenses?

All these statutes and rights assume and have as a predicate that the injury settlement, in one form or another, includes both reimbursement for past medical expenses and consideration for future expenses. There is no disagreement that Medicare is entitled to recoup expenditures where the claimant's settlement included consideration for those items. Certainly, the injured claimant should not be permitted to collect and retain moneys paid by an independent provider. The literature suggests that if the settlement does not specifically account for future medically related expenses, Medicare will pay no further medical expenses until the settlement proceeds have been exhausted.

As an alternative, one might consider, What result is reached if the personal injury settlement or verdict specifically excludes medical expenses? What if the release provides that the provider, Medicare, retains the right to bring an action independently? The articulated position of the government is that if a liability insurer pays for medical care in satisfying a judgment or settlement against its insured, the United States has the right to recover Medicare payments for that care from the judgment or settlement. In negotiations, however, the govern-

ment takes the position that it is entitled to recover from the plaintiff, the Medicare recipient, regardless of the scope of recovery or the form of the release. The government aggressively attempts to ignore the very language of the statute that it quotes to support its position.

Certainly, if Medicare has paid for medical services for which a qualifying primary plan (*e.g.*, an insurance policy or self-insured entity) is primarily responsible, the United States may bring a claim against that primary plan for reimbursement.[14] Moreover, Medicare secondary payer suits may be filed against primary insurance providers as well as "any entity, including a beneficiary, provider, supplier, physician, attorney, State agency or private insurer that has received a primary payment."[15]

Interestingly, the government claims to be restricted in that it asserts that state courts have no jurisdiction to adjudicate the existence or enforceability of a potential Medicare claim, citing *Estate of Barbeaux v. Lewis*.[16] The government accedes to no waiver of sovereign immunity which would provide a state court with jurisdiction to adjudicate the existence or amount of a potential Medicare claim.

Can, then, Medicare compel the claimant's attorney to also represent Medicare in state court? Can Medicare compel the claimant's attorney to represent its subrogation interests in a court in which there is no jurisdiction over the claim, while simultaneously refusing to participate in the litigation and share the costs thereof? A significant further consideration is that it is an ethical violation to represent two different clients who are fighting over the same pool of money. The Attorney General represents the government and is qualified to obtain the government's money from the tortfeasor. It is recommended that the claimant's attorney, as an alternative to explaining this conflict of interests to the Grievance Committee, lets the government represent its own interests. The government has an independent right to do so; let it negotiate its own settlement or resolution. Restrict the claimant's claims to personal injury, pain and suffering.

ERISA

The controlling statutory language is found in ERISA, 29 U.S.C. § 1132(a)(3)(B), which authorizes the "plan fiduciary to obtain other appropriate equitable relief." The U.S. Supreme Court has interpreted the meaning of this phrase in *Mertens v. Hewitt Associates*[17] and *Great-West Life & Annuity Insurance Co. v. Knudson*.[18] These court rulings recognize that a plan or fiduciary does have a claim (equitable lien) on funds that can clearly be traced to money being held by the injured party.

Sereboff v. Mid Atlantic Medical Services, Inc.[19] deals with a more broadly written provision. The agreement in that case was that the plan was entitled to full reimbursement from all recoveries from a third-party liability recovery. The U.S. Supreme Court held that the ERISA plan was entitled to full recovery of its expenditures after reduction for the costs of litigation, including attorney fees.[20] While the Court repeatedly used the term "equitable lien," it meant "subrogation lien" and further observed that "[a] subrogation lien . . . is an equitable lien impressed on moneys on the ground that they ought to go to the insurer."[21] Translated, it appears to say that where a plaintiff has recovered medical expenses that were funded by the ERISA provider, those recovered funds actually belong to the provider, hence the use of "lien."

A significant further consideration is that it is an ethical violation to represent two clients who are fighting over the same pool of money.

The majority of the ERISA health insurance plans have, in varying forms, a subrogation/equitable lien provision.[22] Without addressing each individual plan nationwide, certain principles would seem to stand out. First, all the cases are premised on the assumption that the injured party recovered compensation from a third party in a liability situation. Also, this compensation, the recovery, is not only for injuries, pain and suffering, but also for past and future medical expenses paid, and to be paid, by the ERISA provider. Upon any recovery, therefore, the insurer rightfully seeks reimbursement of moneys it has paid or will pay. Medical expenses proven and/or claimed by the injured party, should be remitted back to the payor under the constraints of equitable subrogation. "CPLR 4545(c) . . . was enacted in 1986 in order to prevent duplicate recoveries for, among other things, costs of medical care. This statute does not alter [a provider's] traditional remedy because 'a defendant still may be held responsible in subrogation.'"[23] Rather, those identifiable funds should go to the payor. The above analysis applies in instances where the claimant receives a general recovery for injuries and past and/or future expenses.

What result is reached, however, where the injured claimant only advocates and promotes claims for bodily injury, pain and suffering? What result is reached where the injured party specifically does not make any claims for medial expenses? Where the recovery provision is for

medical expenses recovered, ERISA providers would/should be free to intervene and assert their own claims and causes of action. The salient result in that situation would be that a plaintiff is free to consume the funds recovered for his or her clearly defined claim, the injuries. The issue may still be muddy where the ERISA contract lays claim to any third-party recovery, regardless whether medical expenses are included.

Recommendations

So how does the practicing attorney reconcile all these apparently conflicting and overlapping rights and claims? The solution may be as simple as advising the medical provider of the pending claim. Almost all insurance policies have notification requirements. Perhaps it would be prudent to provide the carrier, Medicaid, Medicare or ERISA, with a copy of the complaint when the action is started. Maybe the provider should be put on written notice that it is free to retain its own counsel and either start a separate lawsuit or intervene in yours. Then, the lawsuit itself must be carefully articulated throughout the litigation to make it clear and precise that the claims being made do not include any for medical treatment or drug expenses. Any action for recovery of medical expenses must be at the health insurer's initiative. Finally, upon settlement, the release must be for the bodily injuries, pain and suffering only and specifically preserve those potential medical expense claims.

As a practical matter, it is recommended that the plaintiff's attorney decline to pursue the medical expenses on behalf of Medicaid, Medicare or ERISA. To do so could create a potential conflict: if your personal injury client is inclined to accept a proffered settlement and the state or other provider objects to the amount of the settlement or to its proportionate share, a conflict is created. It is an obvious conflict of interest for the attorney to attempt to represent two parties with competing claims.[24] The plaintiff should be clear in his or her allegations that recovery is being sought for "bodily injury, pain and suffering only" and that medical expenses are never pled or alleged. If counsel receives a "Notice of Lien" from the local state authority, counsel should advise the authority in writing that he or she will not, and is ethically prohibited from, representing the government's or provider's interests relative to medical expenses.

It would appear to be that, as with subrogation claims for medical expenses generally,[25] plaintiffs should continue to provide only the restricted release to liability carriers that protects the subrogation rights of other carriers or entities.

1. 547 U.S. 268, 126 S. Ct. 1752 (2006).
2. 42 U.S.C. §§ 1396–1396v.
3. 42 U.S.C. § 1396a(a)(25)(A).
4. Ark. Code Ann §§ 20-77-307(c), 20-77-307(a).
5. 42 U.S.C. § 1396p.
6. *AHDS*, 126 S. Ct. at 1763.
7. Social Services Law § 104-b.
8. 42 U.S.C. § 1395y(b)(2)(B)(ii).
9. *Id.*
10. 42 U.S.C. § 1395y(b)(2)(B)(vi).
11. 42 U.S.C. § 1395y(b)(3)(A).
12. 42 U.S.C. § 1395y(b)(2)(B)(iii).
13. 42 U.S.C. § 1395y(b)(2)(B)(iv).
14. *See* 42 U.S.C. § 1395y(b)(2)(B)(ii).
15. 42 C.F.R. § 411.24(g); *see also* 42 U.S.C. § 1395y(b)(2)(B)(iii).
16. 196 F. Supp. 2d 519, 522 (W.D. Mich. 2001); *Mitchell v. Health Care Serv. Corp.*, 633 F. Supp. 948, 949 (N.D. Ill. 1986).
17. 508 U.S. 248 (1993).
18. 534 U.S. 204 (2002).
19. 126 S. Ct. 1869 (2006).
20. *Id.* at 1873.
21. *Id.* at 1877.
22. *See* J. Michael Hayes, *So What's ERISA All About?*, N.Y. St. B.J., Oct. 2005, p. 22.
23. *Blue Cross & Blue Shield of N.J. Inc., v. Philip Morris USA Inc.*, 3 N.Y.3d 200, 785 N.Y.S.2d 399 (2004) (citing *Fisher v. Qualico Constr. Corp.*, 98 N.Y.2d 534, 538–39, 749 N.Y.S.2d 467 (2002)).
24. Disciplinary Rule 5-105(A).
25. *See* J. Michael Hayes, *Subrogation Rights of Health Care Providers*, N.Y. St. B.J., Nov./Dec. 2006, p. 32.

Trading on the Pink Sheets

The Lesson of Yukos Oil

By Elena A. Popova

Introduction

The disclosure requirements of Rule 12g3-2(b)[1] and Form F-6 do not seem to offer sufficient protection to investors in American Depository Receipts (ADRs) bought in over-the-counter (OTC) markets. The Securities and Exchange Commission (SEC) disclosure exemptions do not take into account the naiveté of United States investors as to foreign business practices that are against legal, moral and ethical standards adhered to by all U.S. companies. The fact that these securities are traded on pink sheets does not provide a sufficient warning, since investors' rationality is manipulated through a deliberate shift of focus from these companies' often outrageously illegal and risky business practices and business environment, to companies' marketing schemes which rely on controlled media reports, and emphasize their institutional investors and their large capitalization.

The increasing popularity of ADRs among U.S. investors and the incompatible accounting and regulatory standards abroad make this problem more acute than ever, and it calls for a legislative response. This article discusses the prominent Russian company Yukos Oil, and highlights some issues that could easily arise with other companies operating in emerging economies in the near future.

The Foreign Business Reality

Yukos Oil attracted attention worldwide when it inherited prized Russian oil-producing concerns during an era of privatization and began trading its securities in the United States in 2001.[2] Its stock price had an impressive run as it increased six-fold in just over two years.[3] However, in 2004, the stock price rapidly deflated and stopped at around $2.00, the price at which it remains today.[4] The reason for this deflation was the Russian government's attack on the company's assets for practices that were – and still, in many respects, are – the norm for the Russian businesses. The practices that came under scrutiny included money-laundering schemes, bribery of government officials, contract murders and corporate fraud.

In a volatile political environment, money and assets previously owned by the government can flow in unpredictable ways and often find their way into the pockets of people hiding behind corporate structures. To operate and succeed in an environment where law enforcement is selective, requires embracing certain practices and procedures that would raise eyebrows in the developed capital world. Nevertheless, these adaptations are essential in order for an individual or a company to survive in the face of the competition. By many accounts, Yukos was an active participant in deeds that were unacceptable or even illegal in the United States or Europe. For

Elena A. Popova (eap212@nyu.edu) is a solo practitioner in Manhattan. She earned her undergraduate degree from New York University and her law degree from Brooklyn Law School.

example, forcible exclusion of bidders from the auction where Yukos was sold to its former owners, resulted in a bargain price of $350 million.[5] And, the money with which it was purchased at the auction came from the profits of Yukos' parent company, Bank Menatep, which is rumored to have embezzled funds from the entrusted accounts of the Chernobyl Nuclear Tragedy Fund and the Communist Party of the Soviet Union Organization.[6] The Bank was also investigated for money laundering and its mafia connections.[7]

Standards of shareholder protection vary among countries – not always in shareholders' best interests. Yukos's majority shareholders disregarded minority interests and siphoned large sums of money from the company. They did so by forcing certain subsidiaries to sell oil to their corporate parents at below-market prices; the oil was then resold to third parties at the standard prices of $18 per barrel (international) and $10.50 per barrel (domestic).[8] According to Yukos's 1996 financial data, the company's revenue was $8.60 per barrel of oil, which the government concluded to be an understatement of earnings by at least 30 cents per dollar.[9] Not only did this hurt the interests of minority shareholders, it attracted government investigations as the subsidiaries began to default on their government loans.[10] These investigations were reopened several years after the incident, and resulted in criminal convictions and the forced sale of the company's main production unit.[11]

Risk calculation in foreign investment is also affected by a particular country's corporate and securities laws, as well as the stability and impartiality of its judiciary.

Risk calculation in foreign investment is also affected by a particular country's corporate and securities laws, as well as the stability and impartiality of its judiciary. For instance, after Yukos borrowed from foreign investors during the late 1990s, it secured its debt on Yukos shares and on guarantees from the Yukos subsidiaries.[12] After the ruble crashed, Yukos defaulted on its loans and shielded its collateral from foreclosure through fraudulent conveyances.[13] Subsidiary control was transferred to offshore companies, and no state action was ever filed against them.[14] Furthermore, Yukos's minority shareholders were disqualified from voting on the transfers because that would have been considered an antitrust violation under the Russian law.[15]

Finally, Russian business is plagued by illegal remedies including contracted killings.[16] In 2005, Yukos's former security chief Alexei Pichugin was convicted for ordering the murders of Vladimir Petukhov, the mayor of Nefteyugansk in 1998 after his public demand that Yukos pay back taxes owed to the region, and of the former senior manager of Yukos's parent Bank Menatep and his wife, after the manager threatened to publicly disclose off-the-books transactions.[17] Pichugin was sentenced to 20 years in prison.[18]

Applying the Law to Foreign and Domestic Issuers

U.S. securities laws do not differentiate between foreign and domestic securities issuers, requiring that they all comply with the Securities Act of 1933 (the "Securities Act") and the Securities and Exchange Act of 1934 (the "Exchange Act"). The former requires company disclosure with respect to newly issued and offered securities, such as the type of stock issued, insider interests, contracts out of the ordinary course of business, and the issuer's financial data. The Exchange Act demands the continuous and regular flow of information after the Initial Public Offering occurs.

Aside from line-item disclosure requirements, courts have also held that issuers must disclose any other information that is likely to influence investors' decisions to buy, sell or hold the company's securities. Such information should allow investors to evaluate management capabilities and the integrity of, complexities of cash flow, or the company's business operations. The SEC, Attorney General's Office, and other government regulators have created civil and criminal penalties for companies and their insiders who provide misleading or false information.

Additionally, companies with either $5 million or more in assets, 500 or more shareholders as of the last day of the fiscal year, or 300 or more U.S. shareholders are required to disclose: (1) organizational and financial structure of business; (2) compensation of directors, officers, and underwriters; (3) compensation of other individuals with over $20,000 in annual payments; (4) balance sheets for the past three years, certified by a registered accounting firm; (5) any other financial statements which the Commission may deem necessary or appropriate for the protection of investors; and (6) copies of material contracts, which the Commission may deem necessary or appropriate for the proper protection of investors and to insure fair dealing in the security. Notwithstanding these requirements, some foreign companies do not have to comply because the application of these laws to foreign companies has raised difficult issues.

First, the growing popularity of foreign securities among investors means that the United States has a financial interest in the presence of foreign issuers in the United States. The flow of foreign issuers into the United States facilitates the influx of foreign capital to the U.S. economy and prevents the outflow of U.S. investor money abroad. Furthermore, greater disclosure obligations of foreign issuers in the United States often clash with more lenient foreign laws, which these companies have followed for years prior to having access to U.S. markets. Also, the heavy financial burden associated with disclosure demands provides the United States a competitive disadvantage when compared to more lenient foreign regulatory forums. Moreover, when the SEC was adopting the predecessor of exemption Rule 12g3-2(b), it had visualized a trend of unifying accounting and disclosure principles, and has become satisfied with the amount of information provided by foreign companies in their home markets.

The information requested on Form F-6 has no distinct relevance to an investor's decision to buy or sell ADRs.

Accordingly, the SEC decided to withdraw the disclosure requirement of § 12(g) of the Exchange Act and § 5 of the Securities Act. Instead, the SEC introduced an exemption section, Rule 12g3-2(b), and a short form registration statement F-6 that became available to companies whose shares were floating involuntarily on the U.S. market. A foreign company that would go public at home, and then introduce its foreign securities through ADRs in the United States is not acting voluntarily and is eligible to take advantage of these exemptions.

There are numerous advantages for foreign companies claiming exemptions under Rule 12g3-2(b) and Form F-6. First, Rule 12g3-2(b) only asks for the filing of documents that are required to be filed in a company's home country. Therefore, if the issuer's native country has no disclosure rules or lacks effective law enforcement, a company is free to refrain from disclosure. Second, a company only needs to disclose "material" information. Since materiality is a word of a general import, it is likely to have different interpretations based on cultural customs and norms; accordingly, it may have a limiting effect on the information disclosed. In a case where disclosures are in a foreign language, the SEC has determined that a translated summary is sufficient, a ruling that opened the door to disclosure vagaries. The SEC has also removed its jurisdiction for determining the truthfulness and adequacy of the information provided pursuant to the Rule 12g3-2(b). Finally, the disclosures are unlikely to be seen by the investors; they are not easily accessible since they are not listed on the SEC Web site and are only available for viewing in the Washington DC library during its nine-to-five weekday hours of operation.

The SEC estimates that an issuer will have to spend about one hour filling out the short disclosure Form F-6. This is far cry from the 425 hours that U.S. public companies are expected to spend on their 1933 Act registration statements. Form F-6 focuses on the administration of the ADRs and requires a company to describe them as well as the fees that would be imposed on their holders, the deposit agreement (if any), other agreements relating to the custody of the deposited securities or the issuance of the ADRs, material contracts between the depository and the issuer of the deposited securities relating to such securities, and the opinion of counsel regarding the ADR's legality.

The information requested on Form F-6 has no distinct relevance to an investor's decision to buy or sell ADRs. It does not aid in the calculation of risk because a company's methods of business operations, and policies and procedures are not disclosed. Moreover, the Sarbanes-Oxley requirements do not apply to foreign issuers that claim Rule 12g3-2(b) exemption, leaving investors in the dark.

Regulatory Exemptions for Pink Sheet Traded Foreign Companies

The supply and demand for foreign stocks has dramatically risen, a fact that can no longer be ignored. When the Rule 12g3-2(b) exceptions were adopted, the SEC did not expect that the securities of foreign issuers would be in high demand.[19] This is no longer true, as shifting macroeconomics as well as the creation of electronic bulletin boards, on-line discount brokerage houses, and ADRs attract U.S. investors to foreign stocks.

According to the Bank of New York, following a relative cool down, an interest in ADRs is on the rise again. In 2004, companies from 29 countries established 126 new ADR programs, a 54% jump from 2003's 82 programs from 25 countries.[20] The year was also marked by a record $11.3 billion of raised capital, with the help of 1,858 sponsored Depository Receipt programs from 73 countries.[21] The 2004 list was topped by Russian Mobile Telesystems, which raised $1,729,600,000.[22] Emerging market issuers, led by companies from India and China, made up 62% of all new ADR programs in 2004.[23]

Also, the SEC allows foreign companies to claim disclosure exemptions if their securities involuntarily floated into U.S. markets.[24] The reality is that these companies are able to engage in substantial activities in the United States to solicit investors in many ways and still

claim regulatory disclosure exemptions.[25] These companies speak openly about their marketing efforts in the United States, as Yukos did in its pleadings to the U.S. Bankruptcy Court in 2004, after it claimed disclosure exemptions of Rule 12g3-2(b) and short Form F-6.[26]

The trend of aligning accounting and regulatory principles around the world that was claimed by the SEC in the 1980s remains just that – a trend. Since the Sarbanes-Oxley Act in 2002, the regulatory gap has actually widened. The U.S. securities laws protect the unsophisticated investor, instead of placing the burden of investor education on the companies that sell securities. No reassessment has been made regarding the level of protection that foreign laws offer investors since 1967.[27] Furthermore, outside of the United States, the burden of education generally rests on investors rather than on companies.

The fact that these companies are trading on pink sheets, which are the leading providers of pricing and financial information for the OTC securities markets, does not give the type of warning that it should. These companies have strong international reputations as well as large capitalization (Yukos's market capitalization prior to 2003 was over $40 billion), and investors are likely to perceive them as part of a separate prestigious class among the crowd of thinly capitalized pink sheet companies. Seen in this light, many unsophisticated investors believed that the only reason why Yukos's shares were trading on pink sheets was an internal business decision rather then an investment warning. This perception can be based on a general familiarity with the company's brand, its market share, capitalization, and other qualifications.

The public opinion is further influenced by the popularity of foreign companies among institutional investors, who buy shares at a discount. Investors generally believe that institutional buying warrants stability and lessens the chance for stock manipulation. Further, institutional investment in a company's stock adds value in the eyes of unsophisticated investors, as these institutions usually have the necessary resources and can determine the value of their investment. Because these companies are able to sell to sophisticated investors without having to register securities offerings with the SEC through the rule of private placement, unsophisticated investors are not provided with any more information regarding a company's risks.

Foreign issuers should not be allowed to benefit at the expense of investors' ignorance. If these companies flock to U.S. markets in order to achieve higher valuation of their securities, they should be willing to subject themselves to the jurisdiction of U.S. courts, follow higher disclosure standards, and accept the greater risk of enforcement. Foreign companies should not be allowed to claim regulatory exemptions in the United States and then advertise such around the world or even in the United States, such as Yukos stated in its pleadings to the United States Bankruptcy judge, that they have registered with the SEC.[28]

U.S. investors have fewer resources against foreign companies than are available against domestic companies.

The fact that the SEC has no jurisdiction to prosecute foreign companies that provide it with information creates an incentive for untruthful disclosure documents and fraudulent press releases. In Russia and other foreign countries, selected individuals are often in control of both national businesses and media companies, creating conflicts of interest.[29] For the few remaining independent media outlets in Russia, a recent concern has been contract killings of journalists. Since Vladimir Putin became President of Russia, 13 leading journalists have been murdered and no one has been brought to justice in any of the slayings.[30]

If fraud stemming from inadequacies in the disclosure regulations indeed takes place, U.S. investors have fewer resources against foreign companies trading their ADRs in the United States than are available against domestic companies. U.S. courts are unlikely to intervene if a foreign government's interest is at stake. For instance, a U.S. court will not have jurisdiction over a matter in which a foreign government has claimed a significant interest. Alternatively, a private litigation, even if initially successful, may turn sour if investors are unable to reach the assets of the company in order to satisfy a judgment.

Conclusion

While our country is interested in attracting foreign issuers to our capital markets, this should not be accomplished in a manner that could potentially increase securities fraud. It is my belief that U.S. investors should be provided more information and greater protection against the greater and unfamiliar risks brought by foreign issuers entering from emerging markets, even if they trade in OTC markets, rather than those posed by local public companies.

The SEC has to create special rules for the securities of foreign companies that trade on U.S. capital markets, whether they are listed or trading OTC. Each foreign country's companies stand in a class of their own, bringing the mentality and business practices native to their origin and not necessarily appreciated by the average U.S. investor.

The SEC should consider adopting a new approach that will take into account the political intricacies of different geographical regions. Additionally, the SEC should attempt to obtain enforcement powers over foreign companies and require truthful and complete filings from

foreign companies. U.S. investors should have the tools that will allow them to make sense of the foreign business practices and the risks accompanying their investments, which will allow them to make more conscious and educated decisions regarding investing in foreign companies that go public in the United States. ■

1. "Exemptions for American Depositary Receipts and Certain Foreign Securities," U.S. Securities and Exchange Commission.

2. Yukos initiated its ADR Level 1 program in March 2001. Each ADR represents 4 Yukos shares. Yukos: Investor Relations, available at <http://yukos.com/New_IR/Stock_information.asp> (last visited April 4, 2007).

3. Stock appreciated from approximately $11 to high $60s in 2003. Pink Sheets—Electronic Quotation and Trading System for OTC Securities, *available at* <http://www.pinksheets.com/quote/chart.jsp?symbol=YUKOY&duration=2-6-9-0-0-560> (last visited April 4, 2007).

4. *Id.*

5. Mikhail Khodorkovsky, Wikipedia, The Free Encyclopedia, *available at* <http://en.wikipedia.org/wiki/Mikhail_Khodorkovsky> (last visited April 8, 2007); Bernard Black et al., *Russian Privatization And Corporate Governance: What Went Wrong?*, 52 Stan. L. Rev. 1731, 1743 (July, 2000); Konstantin Korotov et al., *Mikhail Khodorkovsky and Yukos*, INSEAD, Fontainebleau, France and Singapore (2003) *available at* <http://www.sovest.org/gb/Yukos_a_case_study.pdf> (last visited April 3, 2007); Khodorkovsky Michail Borisovich: Information Database – Free Lance Bureau of Federal Investigations, *available at* <http://web.archive.org/web/20010502000628/>; <http://www.cifnet.com/~sherebon/friends/hodorkovsky/1.html> (last visited April 3, 2007); "David Hoffman, The Oligarchs: Wealth and Power in the New Russia (2002); Vladimir Ladni, *Blood and Oil*, Komsomolskaya Pravda (July 8, 1998) (speculating that Khodorkovski and Yukos were likely to be behind the attack).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. University of Pittsburgh School of Law, Jurist Legal News and Research, <http://jurist.law.pitt.edu/paperchase/2006/08/former-yukos-security-chief-sentenced.php> (last visited April 4, 2007); *World Briefing, Europe: Russia: Ex-Security Chief For Yukos Sentenced to Twenty Years for Murder*, N.Y. Times (Mar. 31, 2005); *available at* <http://query.nytimes.com/gst/fullpage.html?res=9F07E6D8133FF932A05750C0A9639C8B63> (last visited April 4, 2007).

17. *Id.*

18. *Id.*

19. Adoption of Rules Relating to Foreign Securities, Exchange Act Release No. 8066, [1966-1967 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,443, at 82,863 (Apr. 28, 1967). The adopting release noted: "The Commission has determined that the continuing improvement in the quality of the information now being made public by foreign issuers, together with the improvement which may reasonably be expected to result from recent changes and current proposals for change in relevant requirements, warrants the provision of an exemption from Section 12(g) for those foreign companies which have not sought a public market for their securities in the United States through public offering or stock exchange listing, and which furnish the Commission certain information which they publish abroad pursuant to law or stock exchange requirement or which they send to their security holders." *See also* Edward F. Greene, *et al.*, *Hegemony or Deference: U.S. Disclosure Requirements in the International Capital Markets*, 50 Bus. Law. 413 (1995).

20. Bank of New York 2004 Review of the Depository Receipt Market, *available at* <http://160.254.123.37/files/QM6102.pdf> (last visited April 4, 2007).

21. *Id.*

22. *Id.*

23. *Id.*

24. Integrated Disclosure System for Foreign Private Issuers, Securities Act Release No. 6360, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,054, at 84,646 (Nov. 20, 1981) ("The format of Form 20-F is proposed to be substantially revised to facilitate its use in the integrated system and to conform some of the language with corresponding provisions of the proposed Regulation S-K or to clarify the existing requirements.").

25. Specifically, in 2002, Yukos's then CEO, Mikhail Khodorkovsky, was a keynote speaker at the Baker Institute in Houston, talking about the need for investment in Russian companies such as Yukos. Mr. Khodorkovsky had also been a regular keynote speaker at the Cambridge Energy Research Associates (CERA) conference in Houston, the largest oil and gas conference in the world, which is held annually. Mr. Misamore, Yukos's CFO, and Mr. Gladyshev, Yukos's Manager of Investor Relations had also met regularly in the United States with the investment management arms of major U.S. investment banking firms, large asset management firms, and major institutional investors, selling approximately 15% to 19% of its common stock to large institutional investors in the United States. Yukos Oil Company's Opposition to Appeal of the Bankruptcy Court's December 16, 2004 Temporary Restraining Order, 2004 WL 3114334 (S.D. Tex. 2004). Since CERA makes speech transcripts only available to its members their content could not be quoted for purposes of this article. For a similar argument see also Greene, *et al.*, *supra* note 19.

26. *Id.*

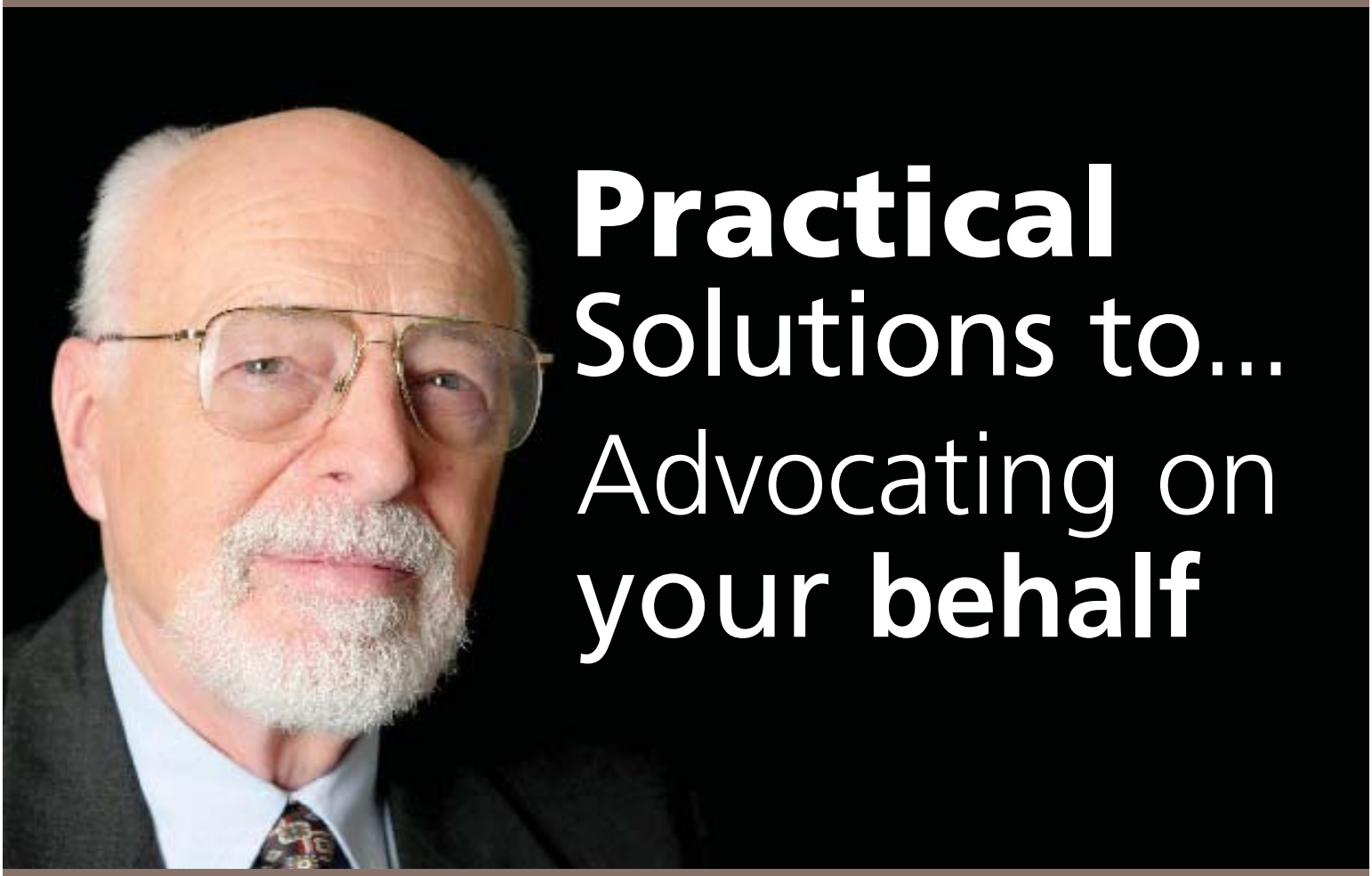
27. Greene, *et al.*, *supra* note 18.

28. Yukos Oil Company's Verified Emergency Motion for Temporary Restraining Order and Preliminary Injunction, Case No. 04-47742-H3-11, U.S. Bankruptcy Court, Southern District of Texas, Houston Division (Dec. 14, 2004).

29. For instance, Izvestia and Komsomolskaya Pravda are owned by Vladimir Potanin, Russia's Metals magnate. Boris Berezovsky, a self-exiled oil and auto magnate owns Kommersant, a well-known Russian business journal, as well as Nezavisimaya Gazeta (translated as "Independent Newspaper") and Noviye Izvestia (translated as "New News"). Khodorkovsky acquired Moskovskiye Novosti or in translation Moscow News, a newspaper that was used as a propaganda tool for foreigners by Joseph Stalin. Peter Baker, *Moscow Paper Opens New Era; Revitalized Weekly Is Voice of Skepticism Under Putin*, Washington Post (January 4, 2004); Profile: Mikhail Khodorkovsky, BBC News, UK Version, Business (16 June, 2004) *at* <http://news.bbc.co.uk/1/hi/business/3213505.stm> (last visited April 4, 2007).

30. The list provided by Committee to Protect Journalists (CPJ) is as follows: Igor Domnikov, Novaya Gazeta July 16, 2000, Moscow (may have been mistaken for another investigative reporter who focused on oil industry corruption); Sergey Novikov, Radio Vesna, July 26, 2000, Smolensk (owner of independent radio station that often criticized the provincial government; three days before the killing, Novikov participated in a television panel on alleged corruption in the deputy governor's office); Iskandar Khatloni, Radio Free Europe/Radio Liberty, September 21, 2000, Moscow (had been working on stories about human rights abuses in Chechnia); Sergey Ivanov, Lada-TV, October 3, 2000, Togliatti (reported on corruption of local politicians); Adam Tepsurgayev, Reuters, November 21, 2000, Alkhan-Kala (reported about Chechen war); Eduard Markevich, Novy Reft, September 18, 2001, Reftinsky (often criticized local officials); Natalia Skryl, Nashe Vremya, March 9, 2002, Taganrog (business reporter who was investigating the struggle for control of a metallurgical plant); Valery Ivanov, Tolyattinskoye Obozreniye, April 29, 2002, Togliatti (investigative reporter on crime and government corruption); Aleksei Sidorov, Tolyattinskoye Obozreniye, October 9, 2003, Togliatti; Dmitry Shvets, TV-21, Northwestern Broadcasting, April 18, 2003, Murmansk (reported on several influential politicians); Paul Klebnikov, Forbes Russia, July 9, 2004, Moscow (exposed Russia's billionaires); Magomedzagid Varisov, Novoye Delo weekly, June 28, 2005, Makhachkala (political analyst who often criticized Dagestan political opposition); Anna Politkovskaya, Novaya Gazeta, October 7, 2006, Moscow (investigative reporting on human rights abuses by the Russian military in Chechnia). *Thirteen Murders, No Justice*, CPJ, *available at* <http://www.cpj.org/Briefings/2005/russia_murders/russia_murders.html> (last visited April 4, 2007).

NEW YORK STATE BAR ASSOCIATION



Practical Solutions to... Advocating on your **behalf**

When it comes to legislative affairs, there are many ways in which the New York State Bar Association's experienced leadership advocates on your behalf. The Association comments on scores of bills annually. We work actively to influence government policy for the advancement of the profession – and your practice. The Association is and will continue to be a vigorous advocate for:

- Re-organization of New York's court system
- Access to civil justice system for both low and middle-income consumers
- Judicial salary reform
- Merit selection of judges
- Equal legal rights for same-sex couples
- The Compact for Long Term Care
- No-fault divorce

And, the Association's advocacy efforts reach far and wide – well beyond the walls of the New York State Legislature. Several of our other efforts include:

- Opposing mandatory retirement – the Association's House of Delegates unanimously approved a report calling on firms to end the practice of mandatory retirement
- Honoring attorneys who change the lives of poor New Yorkers – the Association created the Empire State Counsel credential program to give special recognition to members who provide 50 hours of free legal services to the poor

We champion your interests. We protect your profession and move it forward.

As a member, you deserve nothing less.

For more information on these great benefits, go to www.nysba.org.

NYSBA

Gail C. Conway (gcconwayesq@aol.com) is former Director and currently Consultant to Pace Women's Justice Center Elder Abuse Programs. She received her undergraduate degree from the University of Buffalo, and her law degree from Pace University School of Law.

Reporting Elder Abuse

Legal Requirements for Physicians

By Gail C. Conway

Beatings, sexual abuse, humiliation, wrongful loss of property, even homicide – these alarming terms describe incidents of elder abuse and financial exploitation. The victimization of older persons is an emergent problem involving at least hundreds of thousands of Americans, and one that threatens to grow larger as our population ages.[1]

For a variety of reasons, these crimes are characterized by being, in large part, hidden.[2] Some older persons who have impaired mental capacity, may be unable to fully comprehend what has befallen them or to seek assistance to remedy the situation. Competent persons may not wish or may not be able to report their predicament; the perpetrators of these events are often family members to whom the victim has an emotional attachment. Some sufferers are isolated (often by intentional acts of their abusers or exploiters), or may not know how to seek out the necessary help, or because of their dependency on the abuser may opt to remain in the situation and accept the consequences. Victims may be embarrassed by having fallen prey to schemes that have resulted in a loss of assets. Finally, victims of sexual abuse are loath to discuss these crimes with anyone.

Paralleling legislation to bring child abuse to the attention of appropriate authorities, the majority of states have enacted into law some form of mandatory reporting of suspected elder abuse and exploitation. Most of these laws require certain persons who are engaged in health care, social work, law enforcement and various other occupations to inform designated authorities. Currently the laws of 37 states and the District of Columbia specifically require physicians to report suspected cases of elder abuse and/or financial exploitation which they may encounter in their practice of medicine.[3] In addition, seven states mandate that "any person" must report such suspicions.[4] In most cases, failure to comply with these laws may lead to a criminal conviction, with financial penalties and even jail time. In addition to those states where reporting is required, almost every other state has statutes that encourage voluntary reporting of suspected cases of adult abuse.[5]

Every state's law is unique; therefore, it would behoove each physician to become familiar with the requirements of the state in which he or she practices, and to become conversant with the specific provisions in that jurisdiction.

First, *what* is necessary to report, and about *whom*? Typically, these statutes have language requiring physicians and other designated reporters who have reasonable cause to suspect or believe, or who know, have observed or have received information, that there has been some abuse or exploitation of an individual. Some

laws are fairly detailed as to the kind of abuse that might be present; for example, the Alabama statute calls for "abuse, neglect, exploitation, sexual abuse, or emotional abuse" to be reported,[6] while California law includes incidents of abandonment and isolation as triggers for reporting.[7]

Recently, there has been a spate of interest in the relationship of abuse of older victims and mortality. One study concluded that persons who have suffered abuse die sooner than they might have otherwise,[8] and others have expressed the fear that some deaths might even have been intentionally inflicted.[9] In response to these suspicions, state statutes may require mandated reporters such as physicians to inform authorities where there is cause to believe that a person has died as a result of abuse or neglect,[10] and even may explicitly state that the death of the victim does not relieve the physician of the responsibility to report abuse.[11]

In many jurisdictions, physicians are not required to report suspected adult abuse concerning every victim. The statutory language often specifies that the sufferer be "vulnerable" or "endangered" or "incapacitated," as defined in the pertinent section of the statute. Other state codes, however, mandate reporting based simply on the age of the victim. For example, Connecticut law requires reporting where there is reasonable cause to suspect or believe that *any* elderly person, defined as any resident of the state who is 60 years of age or older, has been abused, neglected, exploited or abandoned.[12]

Although the relevant statutes of most states are silent as to where the alleged victim is residing, there are some exceptions to this. New Jersey's reporting requirements are applicable to those situations where the victim is living in an institution,[13] while the law of Missouri limits the physician's reporting obligation to those circumstances where the adult is an "in-home services client."[14]

The laws of most states, such as Maine and Rhode Island,[15] call for immediate reporting upon suspicion of

State Statutes Mandating Reporting by Physicians of Suspected Adult Abuse and/or Exploitation

Ala. Code § 38-9-8(a) (1992 & Supp. 2005). (Alabama)
Alaska Stat. § 47.24.010(a) (2004). (Alaska)
Ariz. Rev. Stat. Ann. § 46-454A,B (2005). (Arizona)
Ark. Code Ann. § 12-12-1708 (Supp. 2005). (Arkansas)
Cal. Welf. & Inst. Code § 15630 (West 2001 & Supp. 2006). (California)
Conn. Gen. Stat. § 17b-451(a) (2003 & Supp. 2006). (Connecticut)
D.C. Code Ann. § 7-1903(a)(1) (2004 & Supp. 2006). (District of Columbia)
Fla. Stat. Ann. § 415.1034(1)(a) (West 2005 & Supp. 2006). (Florida)
Ga. Code Ann. § 30-5-4(a)(1)(A) (West 2003). (Georgia)
Haw. Rev. Stat. § 346-224(a)(1) (1995). (Hawaii)
Idaho Code Ann. § 39-5303(1) (2002). (Idaho)
320 Ill. Comp. Stat. Ann. 20/4(a-5), 20/2(f-5) (West 1999 & Supp. 2006). (Illinois)
Iowa Code Ann. § 235B.3(2) (West 2000 & Supp. 2006). (Iowa)
Kan. Stat. Ann. § 39-1431(a) (2000 & Supp. 2005). (Kansas)
Ky. Rev. Stat. Ann. § 209.030(2) (LexisNexis 1999 & Supp. 2005). (Kentucky)
La. Rev. Stat. Ann. § 14-403.2C (2004 & Supp. 2006). (Louisiana)
Me. Rev. Stat. Ann. tit. 22, § 3477-1-A (2004 & Supp. 2005). (Maine)
Md. Code Ann., Fam. Law § 14-302(a) (West 2006). (Maryland)
Mass. Gen. Laws Ann. ch. 19A § 15(a) (2002 & Supp. 2006). (Massachusetts)
Mich. Comp. Laws Ann. § 400.11a (West 1997 & Supp. 2006). (Michigan)
Minn. Stat. Ann. § 626.557, Subd. 3 & § 626.5572, Subd. 16 (West 2003 & Supp. 2006). (Minnesota)
Miss. Code Ann. § 43-47-7(1)(a) (2004 & Supp. 2006). (Mississippi)
Mo. Ann. Stat. § 660.300(1) (2006). (Missouri)
Mont. Code Ann. § 52-3-811(1), (3) (2005). (Montana)
Neb. Rev. Stat. § 28-372(1) (1995 & Supp. 2004). (Nebraska)
Nev. Rev. Stat. § 200.50935 (2005). (Nevada)
N.H. Rev. Stat. Ann. § 161-F:46 (2002 & Supp. 2005). (New Hampshire)
N.J. Stat. Ann. § 52:27G-7.1(a) (West 2001 & Supp.2006). (New Jersey)
Ohio Rev. Code Ann. § 5101.61(A) (West 2004). (Ohio)
Okla. Stat. Ann. tit. 43A § 10-104 (West 2001 & Supp. 2006). (Oklahoma)
Or. Rev. Stat. § 124.060 (2005). (Oregon)
S.C. Code Ann. § 43-35-25 (Supp. 2005). (South Carolina)
Tenn. Code Ann. § 71-6-103(b)(1) (2004 & Supp. 2005). (Tennessee)
Tex. Hum. Res. Ann. § 48.051(a)(c) (Vernon 2001). (Texas)
Vt. Stat. Ann. tit. 33, § 6903(a)(1) (2001 & Supp. 2005). (Vermont)
Va. Code Ann. § 63.2-1606 (2002 & Supp. 2006). (Virginia)
Wash. Rev. Code Ann. § 74.34.035(1), (2), (3) (West 2001 & Supp. 2006). (Washington)
W. Va. Code § 9-6-9(a) (2003 & Supp. 2006). (West Virginia)

abuse. Some statutes specify other time frames: for example, Vermont allows the reporter 48 hours.[16] In many jurisdictions reports may be by telephone, but often a follow-up written report will be necessary. Typically, reports must be made to the appropriate social service agency, and/or to local law enforcement. For example, the Idaho statute requires that in cases where abuse or sexual assault has resulted in death or serious injury, the reporter must not only immediately communicate this to the designated agency but also, within four hours, to law enforcement.[17]

These are some of the requirements of the laws, but what if the physician fails to comply with these provisions? What potential *penalties* might he or she face as a result of this omission? First, most of these statutes provide that a criminal charge, classified as a misdemeanor, may be brought for failure to report as required. Characteristically, the statutes specify that to convict, this failure must be "knowing" or "willful." Upon conviction for these misdemeanors, the sentence may be a fine, jail time or both. For example, the Mississippi statute prescribes a fine of up to $5,000, or six months in jail, or both.[18] In addition, if the convicted person is a member of a profession licensed or regulated by that state, the court must notify the appropriate state licensing or regulating agencies. California law imposes a basic penalty of a fine of not more than $1,000 or imprisonment for up to six months; where there has been willful failure to report a death or great bodily injury associated with abuse, the prescribed punishment may be increased to up to one year in prison or a $5,000 fine, or both.[19]

About one-third of the states currently have specific laws that abrogate any testimonial privilege at court or administrative proceedings.

In addition to criminal consequences, a physician may be civilly liable for failure to report. For example, Minnesota law provides that a mandated reporter who negligently or intentionally fails to report is liable for damages caused by this failure.[20]

Where a physician does comply with the statutory requirements, the question arises as to what protections are available. First, virtually all of these statutes include provisions that grant immunity from civil and criminal liability for reporters who act in good faith.[21] Further, the laws of several states mandate confidentiality as regards the reporting process.[22] Last, there are safeguards against reprisals in employment situations; for example, Wisconsin law forbids discharge, retaliation, or discrimination against a person reporting in good faith.[23]

Another concern that may arise in regard to the physician's role in reporting as required is the question of privilege, *i.e.*, doctor-patient confidentiality. Most states, following the lead of New York in 1828, have adopted statutes that establish physician-patient privilege.[24]

Provisions in various state codes have addressed this potential ethical conflict in two ways. First, the laws of several jurisdictions explicitly abrogate privilege in physician-patient communications regarding the doctor's obligation to report abuse or exploitation. For example, the Maryland statute states that "[n]otwithstanding any law on privileged communications, each health practitioner . . . who contacts, examines, attends, or treats an alleged vulnerable adult, and has reason to believe that the . . . adult has been subjected to abuse, neglect, self-neglect, or exploitation" must report such information.[25]

The second issue with regard to the question of doctor-patient confidentiality is that of testimonial privilege. About one-third of the states currently have specific

State Statutes That Mandate Reporting by Any Individual of Suspected Adult Abuse and/or Financial Exploitation

Del. Code Ann. tit. 31 § 3910(a) (1997). (Delaware)
Ind. Code Ann. § 12-10-3-2, 9(a) (West 2001). (Indiana)
N.M. Stat. Ann. § 27-7-30A (LexisNexis 2003). (New Mexico)
N.C. Gen. Stat. § 108A-102 (2005). (North Carolina)
R.I. Gen. Laws § 42-66-8 (1998 & Supp. 2005). (Rhode Island)
Utah Code Ann. § 62A-3-305 (Supp. 2006). (Utah)
Wyo. Stat. Ann. § 35-20-103(a) (2005). (Wyoming)

laws that abrogate any testimonial privilege at court or administrative proceedings.[26] A physician practicing in these jurisdictions, who has knowledge regarding alleged abuse or exploitation of a patient he or she has attended, may not exclude such evidence when called upon to be a witness in certain cases. Interestingly, the code of the state of Indiana includes a contrary provision, providing that an individual may not be excused from testifying on the basis of privilege, "unless the individual is . . . a physician."[27]

The two applications of the annulment of privilege may appear combined in one statute in some states. For example, South Carolina's law states: "The privileged quality of communication between . . . a professional person and that person's patient . . . are abrogated and do not constitute grounds for failing to report or for the exclusion of evidence in any civil or criminal proceeding resulting from a report made pursuant to this chapter."[28]

What about those jurisdictions where physician-patient privilege is established in the law as well as the requirement for reporting, but there is no provision for abrogation of the privilege? Although an in-depth analysis of such ethical dilemmas is beyond the scope of this article, it should be noted that the American Medical Association's (AMA) Code of Ethics provides some guidance. These rules forbid breaches of confidentiality, unless "provided for by law or by the need to protect the welfare of the individual or the public interest."[29]

Further, the AMA's publication *Diagnostic and Treatment Guidelines on Elder Abuse and Neglect* states: "While there is little case law on this area [reporting requirements and ethical dilemmas], most experts would agree that a physician's legal duty to report cases of suspected abuse would supersede doctor-patient confidentiality issues."[30]

Finally, as leaders of a health care "team," doctors should be aware that in virtually all states where they are required to report elder abuse, other health care workers are also mandated to report such suspicions. This group typically includes nursing personnel, therapists, mental health personnel and others associated with the care of the patient.

Elder abuse and exploitation is a growing and tragic societal problem. The eradication of this threat to older citizens depends on the efforts of many segments of the community. It is to be hoped that physicians will continue to be aware of this menace and to assume their crucial role in combating it.

State Statutes That Encourage Voluntary Reporting of Suspected Adult Abuse and/or Financial Exploitation

Colo. Rev. Stat. Ann. § 26-3.1-102(1)(b) (West 2002 & Supp. 2005). (Colorado)
N.D. Cent. Code § 50-25.2-03 (1999). (North Dakota)
35 Pa. Cons. Stat. Ann. § 10225.302(a) (West 2003 & Supp. 2006). (Pennsylvania)
S.D. Codified Laws § 34-12-51 (1998). (South Dakota)
Wis. Stat. Ann. § 46.90(4)(a) (West 2003 & Supp. 2005). (Wisconsin)

1. *See* Nat'l Ctr. on Elder Abuse, Admin. on Aging, The National Elder Abuse Incidence study: Final Report (1998).

2. *See, e.g.*, Molly Dickinson Velick, *Mandatory Reporting Statutes: A Necessary Yet Underutilized Response to Elder Abuse*, 3 Elder L.J. 165 (1995).

3. *See* sidebar: *State Statutes Mandating Reporting by Physicians of Suspected Adult Abuse and/or Exploitation*.

4. *See* sidebar: *State Statutes That Mandate Reporting by Any Individual of Suspected Adult Abuse and/or Financial Exploitation*.

5. *See* sidebar: *State Statutes That Encourage Voluntary Reporting of Suspected Adult Abuse and/or Financial Exploitation*. New York is the only state that currently has no general adult abuse reporting statutes.

6. Ala. Code § 38-9-8(a).

7. Cal. Welf. & Inst. Code § 15630(b).

8. M. Lachs, C. Williams, S. O'Brien, K. Pillemer & M. Charlson, *The Mortality of Elder Mistreatment*, 280 JAMA 428–32 (1998).

9. J. Cheshes, *Gray Murder*, Modern Maturity 56 (Mar./Apr. 2002).

10. *See, e.g.*, S.C. Code Ann. § 43-35-35.

11. *See, e.g.*, Ky. Rev. Stat. Ann. § 209.030(2).

12. Conn. Gen. Stat. § 17b-451(a).

13. N.J. Stat. Ann. § 52:27G-7.1(a).

14. Mo. Ann Stat. § 660.300(1).

15. Me. Rev. Stat. Ann. tit. 22 § 3477(1); R.I. Gen. Laws § 42-66-8.

16. Vt. Stat. Ann. tit. 33 § 6903(a).

17. Idaho Code Ann. § 39-5303(1).

18. Miss. Code Ann. § 43-47-7(1)(c).

19. Cal. Welf. & Inst. Code § 15630(h).

20. Minn. Stat. Ann. § 626.557 (subd. 7).

21. *See, e.g.*, Nev. Rev. Stat. § 200.5096.

22. *See, e.g.*, Colo. Rev. Stat. Ann. § 26-3.1-102(7)(a).

23. Wis. Stat. Ann. § 46.90(4)(b).

24. See J. Clark, *Confidential Communications in a Professional Context: Attorney, Physician, and Social Worker*, 24 J. Legal Prof. 79, 83 (Spring 2000), for a discussion of the history of physician-patient privilege.

25. Md. Code Ann. Fam. Law § 14-302(a).

26. *See, e.g.*, Ariz. Rev. Stat. Ann. § 46-453A.

27. Ind. Code Ann. § 12-10-3-11(b).

28. S.C. Code Ann. § 43-35-50.

29. AMA Policy E-10.01(4).

30. AMA: Diagnostic and Treatment Guidelines on Elder Abuse and Neglect, at 21 (1992).

BY JAMES A. GARDNER

James A. Gardner (jgard@buffalo.edu) is the Joseph W. Belluck and Laura L. Aswad Professor of Civil Justice, State University of New York, University at Buffalo Law School. He earned his undergraduate degree from Yale, and a law degree from the University of Chicago.

New York's Judicial Selection Process Is Fine – It's the Party System That Needs Fixing

After a long period of mounting public dissatisfaction with New York's distinctively undemocratic system of judicial elections, the federal courts have finally forced the issue onto the state legislative agenda by striking down the current system on federal constitutional grounds. Reform proposals abound, most of which would make the system either more democratic, by opening up candidate access to the primary ballot, or less democratic, by substituting a system of executive appointment. None of these proposals, however, is likely to produce much of an improvement because none of them addresses the real problem. New York's method for choosing judges is basically sensible and structurally sound. The dysfunction lies, rather, in New York's party system, which is utterly moribund. Until the state develops a well-functioning system of competitive and publicly accountable political parties, no reform to the judicial selection process can be expected to produce meaningful change.

The Real Problem

New Yorkers have long been dissatisfied with their system for electing judges, which has existed in its current form since 1921. In 1977, this dissatisfaction resulted in a constitutional amendment that removed the Court of Appeals from the electoral system and substituted a system of gubernatorial appointment.[1] Lower court judgeships, however, remain elective offices. Although public dissatisfaction with judicial elections has not routinely prompted widespread movements for reform, it has manifested itself in more subtle ways, such as ballot rolloff and a general loss of confidence in the quality of state trial judges and the quality of justice. By 2003, Chief Judge Judith Kaye thought the problem serious enough to appoint a Commission to Promote Public Confidence in Judicial Elections (the "Feerick Commission"), which studied the problem and produced a set of recommendations for reform.[2]

While the Feerick Commission's proposals were circulating, the federal District Court in Brooklyn dramatically altered the landscape with its decision in *López Torres v. New York State Board of Elections*,[3] which invalidated on federal constitutional grounds New York's method of electing trial judges. In affirming the District Court's decision, the Second Circuit ruled that the structure of the state's system of judicial nominating conventions violates associational rights of party members that are protected by the First Amendment.[4] Specifically, the court held that "the First Amendment affords candidates and voters a realistic opportunity to participate in the nominating process,"[5] an opportunity that the current system of judicial selection unconstitutionally fails to provide. In view of these rulings, the state now faces an urgent need to replace the invalidated system. If it does not, the District Court has said that it will impose a system of open primaries for elective judicial offices.

While this outpouring of concern over New York's dysfunctional judicial selection process is understandable, I shall argue here that it is misplaced. Although the judicial selection system

is broken, to be sure, its malfunction is only a symptom of a much more deeply rooted problem: the dysfunction of New York's political parties and, in consequence, the state's system of party democracy itself. Until these problems are addressed, no reform to the judicial selection process is likely to produce a significant improvement. In fact, there is nothing wrong with the structure of New York's judicial selection institutions, which, at least on paper, are capable of working perfectly well; indeed, the underlying design premises of the present system are sound and sensible.

The problem, rather, is with the behavior of actors *within* the institution. Evidently the party officials who in practice run the judicial selection process have entirely the wrong incentives; they, and the parties for whom they act, lack the slightest degree of accountability for undesirable behavior. A well-functioning party system can serve as a powerful tool of democratic accountability. In New York, this system has failed miserably. What we ought to have is a system in which parties compete to satisfy an obvious public demand for meaningful choice among the best possible candidates for judicial office. What we have instead is a system in which the parties collude for their private advantage, and in which they treat judgeships as a species of patronage that is theirs to dispense, on terms satisfactory to them alone. Instead of being the beneficiary of party competition, the people of New York have been shut out of the deal.

A Fair System, at Least on Paper

In its fundamental structure, New York's system for electing supreme court justices can be best understood as an entirely reasonable response to the very real difficulties that inhere in any attempt to design a method for selecting judges in a democracy. Because of the peculiar combination of independence and accountability that judges in a democracy must possess, there is no way to select judges that does not face potentially serious flaws. The two principal methods for selecting judges – appointment and election – sit at opposite ends of a spectrum ranging from the least to the most democratic. Yet too much democracy can be as disruptive to the success of a judicial selection system as too little.

When approached in the right spirit, a system of judicial appointment, in which the governor or other chief executive does the appointing, can without a doubt produce outstanding judges. The main potential problem with appointment, however, is its susceptibility to abuse by the appointing official. Abuse of the appointing power most commonly takes the form of patronage appointments, in which judges are elevated to office on the basis of their personal loyalty to the governor, or as a reward for having performed some kind of service to the governor or the governor's party – a condition of appointment.

Until 1845, New York, like all states admitted in the nation's first 40 years, utilized a system of gubernatorial appointment of judges. In 1846, however, the state switched to electing its judges, for two reasons. First, a Jacksonian impulse toward greater democracy swept the nation during this period, a trend from which New York was not immune. This impulse was driven by an assumption – not always well explored – that all or nearly all public officials, including judges, should be popularly elected. In New York, however, the switch to an elective judiciary also responded to a widespread belief that the state's governors had been distributing judgeships as a kind of patronage.[6] In New York, then, the election of judges rests historically on the belief that elected judges will be more independent, fairer, and more impartial than appointed judges.

The election of judges is by no means, however, a panacea. Electing judges, to be sure, addresses the problem of gubernatorial patronage to some degree, but does so by switching the object of judges' dependence from the governor to the public. In a democracy, of course, the dependence of officials on public approval is normally thought to be desirable, but when the officials in question are judges, the practice raises at least three well-known potential problems. First, it is possible, and perhaps likely, that the public will be unable meaningfully to evaluate the qualifications of judicial candidates and the performance of sitting incumbents. Second, an elective judiciary raises the possibility that judges will pander to public opinion in their decisions rather than impartially applying the law. This is especially a concern after the U.S. Supreme Court's highly unfortunate decision in *Republican Party of Minnesota v. White*,[7] which held that many commonplace state ethics rules restricting the scope of judicial campaigning violate the First Amendment. Third, requiring judges to run for election requires them to raise the necessary funds, and the need to raise money opens judicial candidates to a different kind of corruption: the excessive influence of monied special interests.

> Most states select their judges using some kind of hybrid system.

Because both appointment and election raise such potentially serious problems, most states select their judges using some kind of hybrid system that is deliberately structured to avoid each of the extremes. The most common method by far is the so-called "Missouri Plan," in which judges are appointed initially by the governor, often from a list of candidates recommended by a bipartisan or nonpartisan screening commission, and then stand periodically for democratic review in uncontested, nonpartisan retention elections.[8] New York's present system, adopted in 1921, was designed

in the same spirit. It offers, on paper, a perfectly sensible and plausible way to combine the advantages of appointment and election, while avoiding the worst of their respective risks.

New York's system of electing supreme court judges proceeds in three stages. The first consists of a primary election, not of judicial candidates, but of delegates.[9] These delegates are selected by each party's rank-and-file membership for the sole purpose of attending a judicial nominating convention. Because delegates exercise no function other than the selection of the party's judicial candidates, the system clearly contemplates that delegates will be elected by party members on the basis of their ability to evaluate the qualifications of potential judicial candidates. In the second stage, the elected delegates convene at their respective judicial nomination conventions to select their party's judicial candidates.[10] Under the circumstances, it seems clear that the system contemplates that the delegates, selected for their expertise in things judicial, will nominate only the very best candidates that their parties are capable of inducing to run. Up to this point, incidentally, the system bears a distinct resemblance to the federal Electoral College, which was designed to deal with what was thought at the time to be an analogous problem: the incompetence of the people to select a president. The Framers' solution, echoed in the 1921 New York judicial convention plan, was that where the people are deemed incompetent to perform some necessary function of democratic oversight, their role should be limited to the election of competent intermediaries who will make the actual decisions.

The New York system, however, is more democratic than the Electoral College in that it provides for a third and final stage in which the selection of judges is referred back to the people for a final decision. Delegates to the judicial nominating conventions do not select judges, but instead merely designate nominees to run as candidates of their respective parties. The ultimate choice among what the system contemplates will be highly qualified, competing candidates for judicial office is reserved for the people through direct popular election.[11]

As a matter of design, this system provides an admirably balanced mix of popular participation and professional expertise. By including the people at both the beginning and the end of the process, it seems well calculated to secure all the benefits of popular participation in judicial elections as a guard against official patronage. At the same time, by leaving the actual identification of judicial candidates to individuals who are selected precisely for that purpose, the system secures the benefits of quality and competence associated with appointment by informed and well-qualified experts, while avoiding the pitfalls of public incompetence in the identification and evaluation of the qualifications of good potential judges. On paper, then, New York's method for selecting supreme court judges ought to work as well as any other.

On paper, New York's method for selecting supreme court judges ought to work as well as any other.

A Failed Party System

The problem today, of course, is that the state's judicial selection system simply isn't working as intended. The public continues to do what is asked of it. The parties, however, are not by any means performing the role assigned to them under the law. Indeed, the parties have perverted the operation of the system to the extent that it is barely recognizable as democratic. Although official patronage has successfully been marginalized, the public in fact plays no meaningful role. Contrary to its design assumptions, New York's system has been deformed into one that dispenses patronage, but the patronage is handed out by the political parties rather than by the governor. The result is a judicial selection process dominated by party officials that is every bit as corrupt as the pathologies of appointment and election that it was so carefully designed to avoid.

How exactly is this happening? What are the parties doing to thwart the proper operation of the system? Here are just four of the most egregious offenses:[12]

1. The parties are extorting benefits, such as donations of money and services, from judicial candidates, including from sitting judges who seek reelection or election to a higher court.
2. The parties are attempting to influence the behavior of sitting judges by creating an informal, and extralegal, form of judicial promotion in which candidates must pay their dues in lower or specialized courts before the party will consider nominating them for supreme court.
3. The parties are not seeking out, and indeed are driving away, many highly qualified candidates, who are unwilling either to be extorted or to put in long service in a specialized lower court in which they have no interest, and then to have that service subjected to review not by voters, but by party officials.
4. Worst of all, the parties are colluding to thwart the possibility of meaningful popular choice, and to maintain their own power over judicial selection, by cutting deals about whom to run, when, and where, including cross-endorsement deals within judicial districts and even non-opposition

and cross-endorsement deals that cross district boundaries.

In short, the parties are not *competing*, as they should, for the approval and votes of the electorate. Given the crucial role assigned to the parties by the state judicial selection system, the system cannot possibly function properly if the parties fail to play their assigned role. Why don't they do so? The short answer is that New York's party system has become so completely dysfunctional that it no longer serves any positive role in the democratic process.[13]

No Meaningful Party Democracy

Although the reasons behind the collapse of New York's system of political parties are complex, I believe it is possible nonetheless to trace much of the present dysfunction to one, and possibly two, underlying issues: (1) the bipartisan gerrymander of the state Legislature, and (2) the three-men-in-a-room problem.

Political scientists have long argued that political parties are essential to any kind of meaningful popular control over government. The theory of party democracy, often called the responsible party model, goes something like this:[14] In a mass democracy, the people cannot and do not participate actively in the formulation of policy, and thus do not exercise any form of direct control over government policy. Instead, the people exercise a form of indirect control in that, if a majority of the populace feels that its wants are not being satisfied, it can replace the set of rulers in power with an alternate set; it can, that is, "vote the bums out." According to political scientists, this form of indirect popular control requires political parties because only parties can provide the coherent, unified sets of rulers who will assume collective responsibility to the people for the manner in which government power is used. For this system to work, each party must promote a coherent program of policies designed to satisfy the people's wishes. The party that wins a majority of the offices of government in the election then takes over the entire power of the government and the entire responsibility for what the government does, and uses its power to put its program into effect. If it does a good job, the voters will keep it in power. If it does not, the voters will turn it out and designate a competing party to run things more to their liking.

In New York, any possibility of meaningful party democracy has been utterly thwarted by the parties' collusive legislative gerrymander, an arrangement that has for 30 years allocated firm control of the state Assembly to Democrats and of the state Senate to Republicans[15] – an impressive achievement in a state in which registered Democrats outnumber registered Republicans by approximately five to three.[16] This gerrymander fatally undermines the operation of the state's system of party democracy because it thoroughly thwarts the ability of the electorate to hold any party accountable for the actions of the government. Because of the gerrymander, not only can neither party be voted out of the chamber it controls, but no single party can ever control the entire government. Since neither party can be disciplined by the voters, neither party has any incentive to be responsive to the voters' wishes – exactly the kind of incentive that a well-functioning party system is supposed to provide. Under these circumstances, the parties are entirely free to run the judicial selection process (as well as any other aspect of state governance) however they want without fear of retribution from the voters. If they choose to run the system collusively rather than competitively, the voters are virtually powerless to stop them.

In New York, the problems flowing from the collusive gerrymander of the

state Legislature are compounded by another charming local custom: government by three men in a room. In this system, the messy complexity of an actual representative legislature is stripped down to a simple system in which essentially all significant legislative power is delegated by the Assembly to the speaker and by the Senate to the majority leader. These two legislators then negotiate the legislative agenda of the state directly and personally with the governor, behind closed doors. This practice further destroys the accountability of the political parties not only because of its opacity, but because it delegates and concentrates legislative power in the hands of individuals who are beyond the reach of public retribution. In this system, all significant legislative policy decisions are made by the two legislative leaders, yet only a tiny fraction of the electorate has any power to hold the leaders electorally accountable. The leaders consequently lack any incentive at all to be responsive to the wishes of the vast majority of New York voters, and the only voters they need to worry about are voters in their own safely gerrymandered districts, so they need not really worry about their own constituents either. Such a system has more in common with a hereditary aristocracy than a democracy.

Break Up the Bipartisan Gerrymander

Proposals for reforming New York's judicial selection process fall generally into one of two opposing camps: those that would make the process less democratic by creating a system of gubernatorial and mayoral appointment; and those that would make the process more democratic by instituting a more open form of primary elections. Neither type of proposal is likely to make much of a difference in the operation of the selection process, or in the ability of the parties to subvert that process for their own benefit, until the defects in the party system outlined above have been addressed.

Let's start with appointment. Virtually all proposals to replace the current elective system with an appointive one attempt to avoid the problem of gubernatorial patronage by making use of a bipartisan screening commission.[17] Under such proposals, the governor may appoint only candidates who have been cleared by the commission, which will in theory forward to the governor the names only of the most qualified candidates to be found in the state. Until the party system is fixed, however, this is a false hope.

The theory of bipartisan candidate screening proceeds on the premise that political parties with opposing interests will be able to find common ground only by settling on candidates who are uncontroversially of the highest quality. However, as their current behavior indicates, if the parties are not publicly accountable, they are both willing and able to reach agreement on other grounds besides candidate quality, and one such ground has been, and is likely to continue to be, the parties' mutual, private advantage.

In assessing the likelihood that an independent judicial screening commission will produce better-quality judges than the highly politicized system now in place, it is also instructive to look at a similar area, facing similar problems: redistricting. Numerous of the reform proposals are based on the proposition that gerrymandering will stop, and genuinely competitive elections will be possible, only if the redistricting function is taken from the Legislature and given to an independent redistricting commission, usually of bipartisan composition.[18] Yet recent studies of the work of independent redistricting commissions already in operation have consistently found no good evidence that these commissions produce districting plans that are more competitive, or state legislatures that are more responsive, than when redistricting is performed by the legislature itself.[19] There is no reason to suppose a

different result for independent, bipartisan judicial screening commissions.

Then there is the elephant in the room that nobody really wants to acknowledge: For 30 years New York has used just such a judicial nominating commission to screen candidates for gubernatorial appointment to the Court of Appeals. Has this system produced the best possible high court? Has the commission successfully purged partisanship and patronage entirely from the appointment equation? Seemingly not. Although the nominating commission method seemed to work relatively well for a while, it has not lived up to its potential in some time. I don't mean to suggest by any means that recent appointments to the Court of Appeals have been of poor quality, but in a state with what is surely the greatest accumulation of legal talent in the nation, perhaps in the world, the appointment process cannot honestly be said to have elevated, or even to have considered, the very best of the best. There is no reason to suppose a screening commission would produce any better results if its charge were extended to lower court judges; indeed, the federal experience suggests that considerations other than quality tend to become much more important as one descends the judicial hierarchy, and that is true even in the presence of a reasonably well-functioning and accountable party system on the national level.

The other family of reform proposals making the rounds – and the one that will be imposed by the U.S. District Court should the Legislature fail to act – would move in the opposite direction by further democratizing the judicial selection process through a system of open primaries. Such primaries would create alternative routes to nomination for elective judgeships by permitting voters to consider not only the "official" candidates backed by state and local party leaders, but also "unofficial" candidates who, though not supported by party leaders, command significant support among the party rank and file. The motivation behind such a reform seems to be to break the leadership's stranglehold over nominations and allow independent, insurgent candidates to crack open the system.

Until New York acquires a meaningful system of party competition, however, this too is unlikely to produce any great improvement. As an initial matter, the open primary proposals have all the flaws associated with excessive popular involvement in judicial selection. First, the public has little basis on which to evaluate the candidates. Second, judicial campaigns tend to be of low salience for the majority of voters and turnout is far lower in judicial races than in races further up the ballot.[20] Low turnout is even more of a problem in primaries, the only phase of the process that these reforms would affect, and those who do turn out tend disproportionately to be party activists and loyalists,[21] who would likely support the inside party candidate in any case. As a result, the parties are likely to be just as dominant under an open primary system as under the current system.

Furthermore, even in a more open system of primary selection, candidates supported by the formal party organization will still have a huge advantage over independent party candidates because they and only they will have access to party campaign resources and expertise. At most, all an open primary is likely to do is to allow party outsiders who are rich enough to self-finance their own campaigns to bring themselves to the attention of the party leadership. Interparty cross-nomination and noncompete deals will still

NYSBA on Selecting Judges

The New York State Bar Association has supported a merit system of judicial selection since 1973. In 1993 the Association's House of Delegates approved "A Model Plan for Implementing the New York State Bar Association's Principles for Selecting Judges" (the "Model Plan") that would amend the New York State Constitution to replace the current selection process with a merit selection system. Key components of the Model Plan include the following:

- The proposal would cover the Supreme Court, including the Appellate Division; County, Family and Surrogate's Courts; the Court of Claims; the Civil and Criminal Court of the City of New York; full-time city courts outside New York City; and the District Courts.
- Nonpartisan nominating commissions would propose three "highly qualified" candidates for each judicial vacancy.
- A statewide nominating commission would propose candidates for appointment by the Governor to the Court of Claims.
- Four department-wide nominating commissions would propose candidates for appointment by the Governor to the Appellate Division.
- A New York City nominating commission would propose candidates for appointment by the Mayor to trial courts in New York City.
- Judicial district nominating commissions would propose candidates for appointment to Supreme, County, Surrogate's, Family and District Courts outside New York City, with appointment being made by the Governor in the case of Supreme Court and the chief elected official of the county in the case of the other courts.

The Model Plan has served as a key resource in the development of current legislation to implement a merit-selection system and efforts by the Association to reform the current process for selection of New York's judges.

allow parties to marshal the resources to crush outsider campaigns, and as a result the parties will still have ample means to co-opt serious independents. What is needed is a system that gives parties an incentive to choose the very best candidates, and to offer them competitively to the public. An open primary system does not do that, and the parties will lack such an incentive until the public is able to hold them accountable for their behavior.

Such accountability will not be possible until, at a minimum, the bipartisan gerrymander of the state Legislature is broken up. Only when political parties are forced actually to compete with one another for control of the Legislature can voters influence the content of governmental policy. Only when the voters have the ability to dislodge one party from legislative power and install its competitor will they have the ability to hold parties accountable for their behavior, thereby providing the parties with meaningful incentives to alter their behavior to conform to public wishes. Obviously, the Legislature will not undertake this task by itself. The electorate could do it, of course, but the parties seem to have a knack for mutual self-preservation that leads them to mollify the public – or enough of the public to avert a threat – just before the point that it gets angry enough to do something. That leaves the courts in the best position to address the problems posed by the offending gerrymander.

The Second Circuit's decision in *López Torres* is troubling in many respects, but its most troubling feature by far is that the court simply misanalyzed the problem. The reason New York's system of judicial selection is dysfunctional has little to do with its underlying legal structure, which the court precipitously invalidated. It has instead everything to do with the dysfunction of New York's party system. As a rule, I am disturbed when a federal court steps in to dictate to a state how it has to structure its internal political system,[22] and I would much rather see this matter handled by state courts as a matter of state constitutional law, which furnishes many potentially promising grounds on which to restrain abuse of the redistricting process. If federal courts are going to intervene, however, I would rather see such intervention where it would do some good – to break up the state's collusive, bipartisan legislative gerrymander – than to invalidate a specific and perfectly reasonable choice made by New Yorkers about how to set up a particular aspect of their democratic self-governance. ■

1. N.Y. Const. art. VI, § 2(c), (e).
2. Commission to Promote Public Confidence in Judicial Elections, Report to the Chief Judge of the State of New York (June 29, 2004) ("Feerick Comm'n Report").
3. 411 F. Supp. 2d 212 (E.D.N.Y. 2006).
4. *López Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161 (2d Cir. 2006).
5. *Id.* at 187.
6. Peter J. Galie, The New York State Constitution: A Reference Guide 128–29 (1991); Peter J. Galie, Ordered Liberty: A Constitutional History of New York 82–83, 105–06 (1996).
7. 536 U.S. 765 (2002).
8. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. Chi. L. Rev. 689, 714–26 (1995).
9. N.Y. Election Law §§ 6-106–6-124 ("Elec. Law").
10. Elec. Law §§ 6-124, 6-126, 6-158(5).
11. N.Y. Const. art. VI, § 6(c).
12. These and similar practices are common knowledge among the bench and bar. The specific items listed in the text are culled from a *Buffalo News* investigative series by Michael Beebe and Robert J. McCarthy, "Courting Big Money" (July 14, 2002), "Putting Politics First: Democratic Boss Wields Big Power in Choice of Judges" (July 15, 2002) and "Appeal for Reform" (July 16, 2002); the Feerick Comm'n Report; and the opinions of the District and Circuit courts in *López Torres*.
13. The one exception may be at the level of statewide office, especially governor. Here, the system functions to some degree as it ought, though not nearly as well as it might.
14. This account relies mainly on Austin Ranney, *The Doctrine of Responsible Party Government* 10–14 (1954). *See also* American Political Science Ass'n's Committee on Political Parties, *Toward a More Responsible Two-Party System*, 44 Am. Pol. Sci. Rev. Supp. 15–24 (1950).
15. Gerald Benjamin, *Reform in New York: The Budget, the Legislature, and the Governance Process*, 67 Alb. L. Rev. 1021, 1052–53 (2004). For earlier accounts, see Richard Lehne, *Legislating Reapportionment in New York* (1971); Calvin B.T. Lee, *One Man, One Vote: WMCA and the Struggle for Equal Representation* (1967).
16. N.Y. State Board of Elections, County Enrollment Totals (Nov. 1, 2005), *available at* <http://www.elections.state.ny.us/NYSBOE/enrollment/county/county_nov05.htm>.
17. This is the method currently employed to select candidates for the Court of Appeals. N.Y. Const. art. VI, § 2(d)(1). Most proposals for judicial appointment typically would merely extend this system, or something very like it, to lower court elections. *See, e.g.*, New York State Bar Association, *Report of Action Unit #4 of the New York State Bar Association: A Model Plan for Implementing the New York State Bar Association's Principles for Selecting Judges* (May 14, 1993), at 7–9. Even the Feerick Commission, whose charge did not include consideration of switching to an appointive system, recommended that the judicial nominating system be modified to include bipartisan screening commissions in each judicial district. Feerick Comm'n Report at 19.
18. Bipartisan composition is the most common format for existing independent redistricting commissions. *See, e.g.*, Ariz. Const. art. 4, § 1(3); N.J. Const. art. II, § II(1)(b); Wash. Const. art. II, § 43(2).
19. *See, e.g.*, Alan I. Abramowitz, Brad Alexander & Matthew Gunning, *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. Politics 75, 79 (2006); John G. Matsusaka, *Institutions and Popular Control of Public Policy*, USC Center in Law, Economics and Organization, Research Paper No. C06-14, at 24 (Nov. 2006), *available at* <http://ssrn.com/abstract=946828>; Seth Masket, Jonathan Winburn & Gerald C. Wright, *The Limits of the Gerrymander: Examining the Impact of Redistricting on Electoral Competition and Legislative Polarization* (paper presented at annual meeting of American Political Science Association, Aug. 31–Sept. 3, 2006).
20. For example, in 2006, more than a quarter of voters in the First Judicial District did not record a vote for Supreme Court justice. In the Second Judicial District, more than a third did not cast a vote for Supreme Court. In the Eleventh and Twelfth, nearly one-third did not cast such a vote. *See* N.Y. State Board of Elections Home Page, <http://www.elections.state.ny.us>.
21. *See, e.g.*, Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 J. L. Econ. & Org. 304, 321–22 (1998).
22. *See* James A. Gardner, *Forcing States to Be Free: The Emerging Constitutional Guarantee of Radical Democracy*, 35 Conn. L. Rev. 1467 (2003).

BY ELLIOTT WILCOX

Elliott Wilcox is a professional speaker and a member of the National Speakers Association. He has served as the lead trial attorney in over 140 jury trials, and teaches trial advocacy skills to hundreds of trial lawyers each year. He also publishes *Trial Tips*, the weekly trial advocacy tips newsletter <www.trialtheater.com>.

The Rule of Three

Bill sat down at his desk and began writing. Friends, Romans . . . Lend me your ears. "Wait, that ain't right," he said, "let's try it again." Friends, Romans, countrymen, noblemen . . . Lend me your ears. "Nope, still not right." Friends, Romans, countrymen . . . Lend me your ears! "Aha! Music to my ears!"

Hundreds of years later, "Friends, Romans, countrymen" is still music to our ears. Why? Because Shakespeare followed a principle called the Rule of Three. Rather than using a single example or phrase, he grouped three samples together.

Why Three? Why Not Two? Or Four?

There is a certain musical quality to words or phrases when the Rule of Three is followed:

- I came, I saw, I conquered
- Life, liberty, and the pursuit of happiness
- Snap, Crackle, Pop

If you add or subtract a word from each grouping, it doesn't appeal as strongly to the ear. But when you combine them in groups of three, the words flow from the tip of your tongue.

As you prepare your presentation, consider opportunities to expand (or contract) the number of phrases you will use to demonstrate your point. Your audience probably won't remember every point of your speech, but the rhythm of three will help them remember elements of your speech. Adding alliteration makes the phrasing even more memorable. Consider the difference between "He spoke powerfully" and "He spoke with power, poise, and panache." Starting all three phrases with a similar sound helps the audience "sing along" to the rhythm of your presentation, and etches the phrase into their heads.

The Humor of Three.

Comedians employ the Rule of Three to great comic effect. Doug Stevenson, creator of the *Story Theater* program, uses a simple phrase to demonstrate how comedians establish (and then break) a pattern to create humor with the Rule of Three. To get the full effect, repeat the phrase aloud, pausing after each word for maximum impact: "Apples . . . Oranges . . . Plywood."

It's not the world's funniest example, but it shows how the pattern works. The first two words establish the pattern, sending the train down the tracks. Your brain starts looking for comparisons between the two items ("Let's see, they're both round, they're both fruits, they're both edible…") "Plywood" gets a laugh because it breaks the pattern. The third item derails the train. When the third item doesn't fit into the pattern, your brain reacts with surprise. Even famous comedians employ this pattern. In *A Wild and Crazy Guy . . .*, Steve Martin uses the Rule of Three when leading the audience in "The Non-Conformist's Oath":

- "I promise to be *different* . . .
- "I promise to be *unique* . . .
- "I promise not to repeat things other people say."

To get a bigger laugh with this pattern, pause after the second item. Give your audience a moment to process the pattern before you derail the train.

The Memorable Power of Three.

Your audience will remember your points more easily if you use three examples, three illustrations, or three stories to highlight each point. Read through your speech and look for opportunities to take advantage of the Rule of Three. Start with the main point of your speech. If the audience doesn't remember anything else about your presentation, what one point do you want them to take home with them? What single idea do you want them to remember? What image do you want to brand into their memories? (Did you notice how the Rule of Three helped to highlight the issue?) Review your presentation. How many examples, illustrations, or stories do you use to demonstrate the main point? If you have only one or two examples, create some more examples and bring the total to three. Do you have more than three examples? Eliminate the weakest examples and keep only your three strongest. When you use three supporting examples, your audience will remember the point.

You can also highlight phrases by repeating them three times. Don't merely parrot the phrase over and

Continued on Page 61

BY PAUL BENNETT MARROW

Paul Bennett Marrow (pbmarrow@optonline.net) is an attorney and arbitrator. He practices in Chappaqua, N.Y. He is a member of panels for the AAA, ADR Systems, NAF, NAM, NSE and NASD. He is a Fellow (FCIArb) of the Charter Institute of Arbitrators, London, England.

Motion Practice and Arbitration Proceedings From the Perspective of the Arbitrator

Arbitration is supposed to be a relatively quick, less formal and more efficient way to resolve a dispute, leading many to conclude that in this forum motion practice is out of place.

That supposition is a mistake. That's what this article is about.

The conclusion assumes that all arbitration proceedings are the same, when clearly they are not. And it also assumes that the law and the governing rules of the various arbitration providers are designed to discourage motion practice when without a doubt this is not the case. This said, the practitioner should keep in mind that most arbitrators discourage motion practice for a host of important reasons. Improperly used, motion practice can frustrate the process, create unwarranted delay and impose unnecessary expense. Indeed, with these concerns in mind, the American Arbitration Association (AAA) offers its arbitrators a course of instruction entitled "Dealing with Delay Tactics in Arbitration," designed to sensitize the neutral about the possibilities for the misuse of motion practice.

The time line for most arbitration proceedings is pretty short-lived. Usually it's only weeks from the commencement of a proceeding to the exchange of pleadings and the pre-hearing conference (sometimes called a preliminary hearing). Discovery is more times than not very limited and it isn't unusual for an arbitrator to insist on beginning the hearings within a few months at the most. In theory, the pre-hearing phase should be so condensed and efficient that there shouldn't be any need for motion practice. But often things just don't turn out like they are supposed to and one or more parties may feel that an intervention by the arbitrator is needed or try to use motion practice as a way to manipulate the process.

Motions are nothing more than a request that an arbitrator do something to assist one of the parties and if a pending matter is complex and the parties are having difficulties, such a request may be appropriate. Indeed, in many situations the goals of arbitration may be undermined or even defeated if the arbitrator isn't brought in to assist. However, what many fail to understand is that, by design, arbitrators aren't judges or referees. Their authority is very limited when it comes to non-cooperation. The challenge for the arbitrator is to balance the obligation to assist with the temptation to take on the role of referee.

Types of Motions

Motion practice tracks the phases of the arbitration process and can be divided as follows: pre-conference motions, pre-hearing motions and post-hearing motions. Motions made during any of these phases involve either housekeeping matters or substantive issues.

Pre-conference motions are rare because of the short time line between the commencement of the proceedings and the pre-hearing conference. Arbitrators use the pre-hearing conference to determine what the discovery needs of the parties will be and to confirm the ground rules for the hearing itself. The most common pre-conference motion is one for interim relief, usually in the form of an injunction or a restraining order. In addition, motions are sometimes made seeking to either sever or consolidate claims or parties.

Motions made during the pre-hearing conference typically involve requests for an order directing some form or another of discovery, confirmation of deadlines and directions concerning the filing of briefs and other administrative matters. The arbitrator's decisions in this area are final and are for the most part beyond review by a court.

The rules of all the major facilitators, the AAA, International Institute for Conflict Prevention and Resolution (CPR), JAMS and National Arbitration Forum (NAF) give the arbitrator broad discretion and authority to issue orders and directives concerning such applications. The arbitrator has the authority to control the extent and timing of the discovery process. The rules of JAMS are the broadest, with Rule 17 giving indepth details about the manner and scope of discovery as of right under the rules as well as the scope of the authority the arbitrator has. Rule 21 of the Commercial Rules of the AAA doesn't speak to broad discovery, but instead mentions only the production of documents and other information. However, the rules governing large and complex commercial matters (Rule L-3(c)–(f)) do speak to discovery beyond that provided for in the standard commercial rules.

Motions made in the time span between the pre-hearing conference and the hearing itself are most often about non-compliance. Most common

are demands for enforcement of commitments and obligations involving discovery. In addition, it is commonplace for motions to be made seeking amendment of pleadings, issuance of subpoenas and postponements of the actual hearing.

While motions involving substantive issues – usually seeking dismissal as a matter of law or summary judgment – can be made at any time, such motions are most often made during the first two phases. These motions are rarely granted and are usually held in abeyance pending the completion of the hearing. Most arbitrators fear that an award based on such a motion will be challenged on grounds that the losing party wasn't given a fair opportunity to prove a case.

Post-hearing motions are technical in nature as they usually are directed at the terms of the final award and therefore limited in content to matters provided for by either the applicable arbitration law or the rules of the forum directing the proceedings.

From the Perspective of the Arbitrator

Discovery motions can serve to underscore the tensions between the needs of the parties and the powers of the arbitrator. These motions typically involve complaints about non-compliance. While the authority of the arbitrator to order discovery and to place limitations on the scope of discovery is broad, the ability of the arbitrator to enforce his or her orders and directives is quite limited. The arbitrator's greatest power is the authority to exclude or preclude. Once made, such an order self-executes, requiring nothing further from the arbitrator.

But what about the power to punish for non-compliance? Unless the parties agree otherwise, governing statutes deny arbitrators any authority to punish. Neither the Federal Arbitration Act (FAA) nor CPLR Article 75 grant authority to an arbitrator to impose a fine or penalty or to hold a party in contempt. However, the arbitrator is not totally without disciplinary authority. If the proceeding is governed by the FAA, there is no prohibition against an arbitrator awarding attorney fees and/or punitive damages. Such is not the case if the CPLR governs, unless the parties agree otherwise. Here there is authority for the arbitrator to apportion fees and expenses subject only to the terms of the arbitration agreement and judicial review pursuant to CPLR 7513.[1] Moreover, arbitrators have the authority to make negative inferences from the failure of a party to comply with an order or commitment to produce documents or other evidence,[2] without running the risk of exceeding his or her powers.[3]

The rules of the AAA are silent as to the authority of an arbitrator to impose sanctions for non-cooperation. CPR Rule 15 authorizes the arbitrator to impose a "remedy it deems just including an award on default." JAMS Rule 29 permits the arbitrator to impose an "appropriate" sanction. NAF Rule 31(c) gives the arbitrator the power to exclude witnesses, testimony or documents if a party fails to exchange information as required by Rule 31(a) and (b). However, these rules notwithstanding, the practitioner needs to be mindful that they are subordinate to applicable statutes and are always reviewable by courts.

Dispositive motions present a unique challenge for the arbitrator. Many arbitrators refuse to consider, much less rule on, these motions because of the possibility that a resulting award will be vacated on the grounds that the arbitrator refused "to hear evidence pertinent and material to the controversy."[4] The rules of the AAA, CPR and NAF are silent as to the authority of an arbitrator to entertain dispositive motions; only JAMS has a rule that specifically addresses the issue.[5] Moreover, if the contract and/or arbitration clause fail to require interpretation by application of law, under the rules at least of the AAA, there is no obligation for the arbitrator to do so.

Finally, post-award motions are limited in scope. CPLR 7509 and 7511 give the arbitrator authority to consider and rule on applications to correct errors, with the proviso that the resulting modification doesn't affect the merits of the decision upon the issues submitted. This authority isn't found in the FAA. The rules of the various facilitators generally allow for post-award applications to an arbitrator for the reasons specified in the CPLR. However, the CPR Rule 14.5 allows a motion addressed to an arbitrator for clarification of the provisions of an award. Rules 42 and 43 of NAF provide the broadest authority to apply to an arbitrator. Rule 42 allows the arbitrator to correct clerical and administrative errors and Rule 43 goes so far as to permit the arbitrator to re-open the hearing and reconsider an award, most notably on the grounds that an issue submitted was not decided and provided for in the award.

Conclusion

There is a place in an arbitration proceeding for motion practice. But the scope of the practice is very limited. Arbitration is a function of an agreement by the parties to take any dispute out of the court system and, in the process, to strip from any dispute strategic manipulations designed to delay and frustrate. Arbitrators are not judges. An arbitrator's role is to facilitate the parties in accordance with the terms of their contractual obligations. Arbitrators are not referees. Motions, when made, should be structured to insure that the arbitrator isn't called upon to do something that is beyond his or her scope of authority. ■

1. *See Schwab, Katz & Dwyer v. Yukevich*, 167 Misc. 2d 1004, 641 N.Y.S.2d 505 (Sup. Ct., N.Y. Co. 1996).

2. *Schwartz v. N.Y. City Dep't of Educ.*, 22 A.D.3d 672, 802 N.Y.S.2d 726 (2d Dep't 2005); *Better Health Med. PLLC v. Empire/Allcity Ins. Co.*, 11 Misc. 3d 1075(A), 816 N.Y.S.2d 693 (Civ. Ct., N.Y. Co. 2006).

3. CPLR 7511(b)(1)(iii).

4. 9 U.S.C. § 10(a)(3); or failed "to follow the procedure of" CPLR art. 75 (CPLR 7511(b)(1)(iv)).

5. *See* Rule 18, "Summary Disposition of a Claim or Issue."

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am a real property lawyer who has never handled a negligence case. A close friend of mine, Buddy, was recently injured in a slip and fall while he was shopping in a local retail store. The store owner's insurance company has offered a nominal amount to Buddy for his injuries.

I have agreed to represent Buddy on his claim against the store owner. Buddy has limited funds. He and I have agreed that I would take care of all the expenses connected to the representation, and that we would split the recovery equally. Since our friendship goes back many years, I have not put our agreement in writing.

Is there anything I have overlooked?

Sincerely,

Buddy's Friend

Dear Buddy's Friend:

Your friendship with Buddy must not blind you to your ethical and legal obligations as a lawyer. You are now handling a plaintiff's personal injury action on a contingency fee basis, and must abide by the rules. There are limitations on your legal fee, and you should confirm any fee agreement with Buddy, in writing.

Appellate Division rules limit contingent fees in personal injury cases. An attorney representing a plaintiff in such an action may charge fees on a sliding scale, or elect to take one-third of the sum recovered. The sliding scale is as follows: 50% of the first $1,000 of the sum recovered; 40% of the next $2,000 of the sum recovered; 35% of the next $22,000 of the sum recovered; and 25% of any amount recovered over $25,000.

The "sum recovered" for purposes of either type of fee arrangement is calculated by adding costs as taxed, with interest on any judgment, and then subtracting expenses, such as disbursements for expert testimony and investigative or other services that would properly be charged to the prosecution of the claim. Fees in excess of the scheduled percentages constitute unreasonable and unconscionable compensation, in violation of the Code of Professional Responsibility. 22 N.Y.C.R.R. §§ 603.7(e) (1st Dep't), 691.20(e) (2d Dep't), 806.13 (3d Dep't), and 1022.31(b) (4th Dep't). Therefore, your 50% fee would be unreasonable and unconscionable under the applicable Appellate Division rules, assuming the sum recovered will be above $1,000.

Effective August 16, 2006, N.Y. Judiciary Law § 488(2) was amended to allow a lawyer to pay, on the lawyer's own account, court costs and expenses of litigation. In such circumstances, the total paid to the lawyer from the proceeds of the legal action may include a separate amount equal to such costs and expenses. Such costs and expenses need not be repaid by the client if the matter proves unsuccessful. 2006 N.Y. Laws Ch. 635, Legislative Memorandum A11763A.

Consistent with the changes to the Judiciary Law, DR 5-103(B)(2) now provides that a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter. DR 5-103(B)(3) states that in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, a lawyer may pay, on the lawyer's own account, court costs and expenses of litigation. In such cases, the total paid to the lawyer from the proceeds of the action may include an amount equal to the costs and expenses incurred. Therefore, your agreement to pay the expenses of Buddy's action is now permitted under Judiciary Law § 488(2) and the Code of Professional Responsibility.

Whether your contingent fee is to be based on the sliding scale or on a simple one-third of the net recovery, your agreement with Buddy needs to be in writing. DR 2-106(D) requires that promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined. Furthermore, 22 N.Y.C.R.R. § 1215.1 requires a written letter of engagement with the client. A single document can serve as both the letter of engagement and the statement confirming the contingent fee arrangement. Although there are some exceptions to the § 1215 engagement letter requirement provided for in § 1215.2 (for example, where the fee to be charged is expected to be less than $3,000), it is still the better practice to prepare the letter.

In addition, the rules of the First and the Second Departments require that in any action for personal injuries, the lawyer sign and file a retainer statement with the Office of Court Administration (OCA) within 30 days of entering into the retainer agreement with the client. 22 N.Y.C.R.R. §§ 603.7 (1st Dep't); 691.20 (2d Dep't). At present, there is no such filing requirement under the Third or the Fourth Department rules.

In sum, you need to modify your contingency fee arrangement to conform to the Appellate Division's limitations, and must enter into a written retainer agreement/letter of engage-

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

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are 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.

ment with Buddy. If the legal action will be brought in the First or the Second Department, you also need to file a retainer statement with OCA.

The Forum, by
David M. Hayes
Bond, Schoeneck & King, PLLC
Syracuse

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am the managing partner of a fairly large firm in New York City. As if meeting associates' sharply rising salary expectations is not enough, we have a challenging new issue facing us.

Increasingly, we are being pressured by important and longstanding clients to meet certain "diversity targets" as a condition for continuing to represent them. Clients are demanding that the racial, gender and ethnic composition of our firm's associates and partners more closely mirror the profession's diversity. Others require that our engagement teams on their matters reflect diversity in a meaningful way, with minority and women lawyers having important roles to play at all levels. We are required to fill out detailed questionnaires and disclose information that, frankly, is of a proprietary nature: where we recruit, how many white and minority candidates we interview and hire, etc.

At the same time, we are facing client pressures from another direction. At least one government official has suggested that clients exert their economic influence by pulling back their work from law firms doing pro bono work for the Guantanamo detainees.

These actual and suggested demands by our clients – to whom we owe a duty of loyalty and whose business we both want and need – about who we are and what we do apart from our representation of them, raise troubling issues that challenge our independence as professionals. What advice do you have for us?

Sincerely,

A Besieged Firm Leader

Seeking Reader Response

In a first for the Attorney Professionalism Forum, the Committee on Attorney Professionalism would like to solicit readers' views about the increase in the salaries for first-year associates at large Manhattan law firms, currently $160,000, and higher.

What does this increase mean for the legal profession in New York? What sense, if any, does such an increase make for the law firms initiating such increase? What sense, if any, does such an increase make for the law firms matching such increase? What effect does this have on the lives of lawyers – partners as well as associates – working at those firms? What effect does this have on the clients of such firms and what, if any, responses are such clients likely to make? What effect does this have on the other lawyers in New York State, who do not work at such large law firms? What cumulative effect does this have on the overall legal culture in New York? And, if you view this with concern and worry, and believe the overall effects of such an increase are negative, what antidotes would you suggest?

Send your comments by September 30, 2007, to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org. Please put "Attorney Professionalism Forum" in the subject line. Comments and views will be included in the Attorney Professionalism Forum published in the November/December 2007 issue of the *Journal*.

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: This may seem like a trivial question, but why do people add *up* to verbs like *hurry* when *up* is not needed for clarity and just plain *hurry* means the same thing? Shouldn't we be avoiding wordiness?

Answer: That's a good question because it calls attention not only to the redundance of words like *up* and *to*, but points out the myriad meanings of small words, particularly *up*, which not only possesses a meaning of its own, but also often changes the meaning of the word it modifies.

The adverb *up* was spelled *uppe* and meant "on high" in Old English; it came into Middle English with its modern spelling and literal meaning of "upward" or "to a more upright position." It still has that literary meaning in "He looked up," or "She sat up." But it has also developed numerous figurative meanings in modern English. It means "dependent on" in the statement, "It's up to us." In "He's up to no good," *up* means "scheming or planning." Added to *stir*, it means "cause" in the context, "Stir up trouble," but "thoroughly" in the context "stir up the sauce."

In phrases like *hurry up*, *hurry* by itself would be enough. That is true also for *call up* (our friends), *open up* (the door), *polish up* (the silver), *lock up* (the house), *warm up* (the leftovers), *clean up* (the kitchen), and *fix up* (the old bicycle). In each of these contexts you could omit the word *up* without impairing clarity or meaning. But in each phrase, it does have purpose: it can be argued that *up* adds urgency to the verb that precedes it.

Words that enhance the word they accompany are called intensifiers. So *hurry up* seems more urgent than *hurry*. And although "*Fill* the gas tank" is enough, "*Fill up* the gas tank" indicates that the tank is to be filled to the brim. In "tear it up," *up* means "completely." The word *up* tells you to do two different things to a door, both indicating completion in the sentence, "We open *up* the store in the morning, and close it *up* at night." And when we tell our child to "drink up" her milk, she understands that you mean she should empty the cup.

The two-letter word *up* can change the meaning of the word it accompanies; for example, in "work up an appetite," we really don't have to "work." To "think up excuses," we do have to think, but not in the usual sense. "To dress" means something quite different from "to dress up," and while "to give" is positive, "to give up" is negative. In the statement, "A contract is up for renewal," *up* can mean "due" or "under consideration."

There are many more contexts in which *up* is used, and if your native language is English you probably know them all. But pity the poor foreigner who is trying to learn all of the idioms that contain *up*.

Question: I once worked with a female partner who preferred not to have "Esq." attached to her name. Her reason was that it was a "male-oriented" designation. I now see that many women do add "Esq." Is that considered appropriate?

Answer: When it was previously asked, that question generated more mail than any other, and no consensus was reached. Perhaps the subject is less controversial now.

As far as the honorific itself is concerned, women have as much right as men to use it. Etymologically, *Esquire* or *Esq.* had nothing to do with lawyers of either sex. It derived from the Latin word *scutarius* ("shield bearer"), and when it entered Middle English it referred to a squire, usually an English "gentleman," who aspired to knighthood and who could achieve that rank by apprenticing himself to a knight. Somewhat later, it became a title of respect that the English used to refer to a commoner who had attained the rank of gentleman.

But when it crossed the ocean, the title encountered an American culture that disdained social rank, so the title came to indicate occupation, not social status. By the 19th century, in this country, the title indicated that the individual was a justice of the peace or an associate judge. Then the honorific expanded to include lawyers. It carried a masculine connotation only because no women were lawyers. Now that lawyers can be either men or women, both should be entitled to use the honorific.

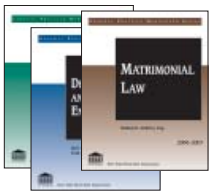
The question then became whether lawyers should use the title *Esquire* (*Esq.*) to refer to themselves or whether it should only be used by others when addressing or referring to lawyers. And that's where the disagreement occurs. Many lawyers argue vigorously that lawyers should never refer to themselves as "Esq." For example, one lawyer wrote that the term "exacerbated the impression that lawyers are a posturing, self-serving group." Another wrote that when two applicants for a position with his law firm added "Esq." to their signatures, they thereby disqualified themselves from consideration.

Should lawyers include "Esq." on the letterhead of their stationery? Although some correspondents considered that practice as acceptable as the initials "J.D.," most disapproved. Almost all opposed adding "Esq." to their signatures at the end of the letters. One correspondent wrote that she had "nothing but contempt for this offensive practice." Another wrote that the attempt to "legitimize aggrandizement" by calling herself "Esq." was "absolute nonsense." Still another wrote: "Anyone who calls himself a gentleman probably isn't."

But a few lawyers considered it appropriate to add the title after their signatures. One lawyer wrote that his law school had awarded him an L.L.B., so he substitutes "Esq." instead of those initials (which, he said, nobody recognizes). Another wrote that it is as correct to add "Esq." as to add "Ph.D." or "M.D." Though correspondents disapproved of lawyers' referring to themselves as "Esq.," almost all agreed that the honorific "Esq." should be added to refer to lawyers regardless of their sex. ■

GERTRUDE BLOCK is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association). Her most recent book is *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co., 2004).

The latest **NYSBA Monograph Series**



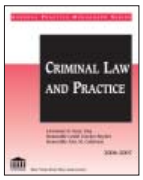
Complete Set of 15 Monographs

2006-2007 • 4,104 pp. • PN: 40006GP
• Non-Mmbr Price: $650 / **Mmbr Price: $550**

Business/Corporate Law and Practice

Authors: Michele A. Santucci, Esq.; Professor Leona Beane; Richard V. D'Alessandro, Esq.; Professor Ronald David Greenberg

2006-2007 • 782 pp. • PN: 40516
• Non-Mmbr Price: $80 / **Mmbr Price: $72**



Criminal Law and Practice

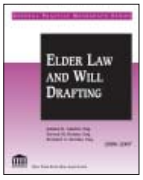
Authors: Lawrence N. Gray, Esq.; Honorable Leslie Crocker Snyder; Honorable Alex M. Calabrese

2006-2007 • 202 pp. • PN: 40646
• Non-Mmbr Price: $80 / **Mmbr Price: $72**

Debt Collection and Judgment Enforcement

Authors: Jack L. Getman, Esq.; Paul A. Peters, Esq.

2006-2007 • 160 pp. • PN: 42386
• Non-Mmbr Price: $80 / **Mmbr Price: $72**



Elder Law and Will Drafting

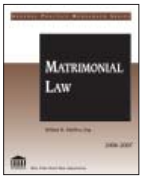
Authors: Jessica R. Amelar, Esq.; Steven M. Ratner, Esq.; Bernard A. Krooks, Esq.

2006-2007 • 284 pp. • PN: 40826
• Non-Mmbr Price: $80 / **Mmbr Price: $72**

Limited Liability Companies

Author: Michele A. Santucci, Esq.

2006-2007 • 332 pp. • PN: 41246
• Non-Mmbr Price: $80 / **Mmbr Price: $72**



Matrimonial Law

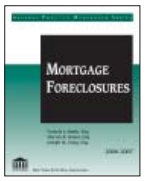
Author: Willard H. DaSilva, Esq.

2006-2007 • 268 pp. • PN: 41216 •
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Mechanic's Liens

Authors: George Foster Mackey, Esq.; Norman D. Alvy, Esq.

2006-2007 • 148 pp. • PN: 40316 •
Non-Mmbr Price: $80 / **Mmbr Price: $72**



Mortgage Foreclosures

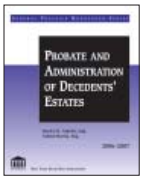
Authors: Francis J. Smith, Esq.; Marvin R. Baum, Esq.; Joseph M. Gaug, Esq.

2006-2007 • 82 pp. • PN: 41416
• Non-Mmbr Price: $80 / **Mmbr Price: $72**

Mortgages

Authors: Bruce J Bergman, Esq.; Philip C. Kilian, Esq.

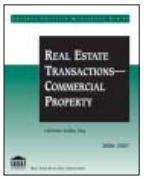
2006-2007 • 246 pp. • PN: 41386
• Non-Mmbr Price: $80 / **Mmbr Price: $72**



Probate and Administration of Decedents' Estates

Authors: Jessica R. Amelar, Esq.; Arlene Harris, Esq.

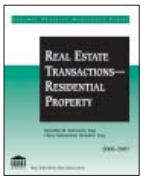
2006-2007 • 184 pp. • PN: 41966
• Non-Mmbr Price: $80 / **Mmbr Price: $72**



Real Estate Transactions—Commercial Property

Author: Christina Kallas, Esq.

2006-2007 • 330 pp. • PN: 40376
• Non-Mmbr Price: $80 / **Mmbr Price: $72**



Real Estate Transactions—Residential Property

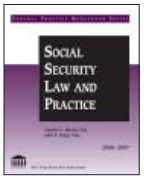
Authors: Kenneth M. Schwartz, Esq.; Claire Samuelson Meadow, Esq.

2006-2007 • 442 pp. • PN: 42146
• Non-Mmbr Price: $80 / **Mmbr Price: $72**

Representing the Personal Injury Plaintiff in New York

Author: Patrick J. Higgins, Esq.

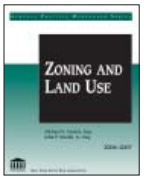
2006-2007 • 380 pp. • PN: 41916
• Non-Mmbr Price: $80 / **Mmbr Price: $72**



Social Security Law and Practice

Authors: Charles E. Binder, Esq.; John S. Hogg, Esq.

2006-2007 • 206 pp. • PN: 42296
• Non-Mmbr Price: $65 / **Mmbr Price: $57**



Zoning and Land Use

Authors: Michael E. Cusack, Esq.; John P. Stockli, Jr., Esq.

2006-2007 • 110 pp. • PN: 42396
• Non-Mmbr Price: $70 / **Mmbr Price: $62**

**Free shipping and handling within the continental U.S. The cost for shipping and handling outside the continental U.S. will be added to your order. Prices do not include applicable sales tax.

To order or for more information about these titles

Call** 1-800-582-2452 or visit us online at **nysba.org/pubs

Mention Code: PUB0111

NEW MEMBERS WELCOMED

FIRST DISTRICT
Ricardo Abraham
Erin Hillary Abrams
Adam Ross Adler
Zvi E. Adler
Paola Agrati
Guillermo Aguilar-Alvarez
Luz Camelia Alava
Justin Anthony Alfano
Melissa Andrews
Michele Lauren Angell
Krista L. Ashbery
Jorge Avitia
Marion Bachrach
Julene Elizabeth Beckford
Yelena Bekker
Jefferson Eliot Bell
Brianne Biggiani
Catherine Elizabeth Bissell
Eric Alwin Boden
Ross I. Bogatch
Candida Bologna
Robert Cameron Bonelli
Pamela Bookman
Scott Bowman
Beatrice Clay Branch
Victoria Braun
Benjamin Henry Brodsky
Kyle David Bryant
Celine Aude Burgaud
Scott Ethan Burk
Brian Byun
Katherine L. Caldwell
Jonathan David Canfield
Lauren Pamela Caruso
Luisa H. Cetina
Kay Z.J. Ch'ien
Elisa Eunha Chae
Jay W. Cho
John O'Meara Christie
Michelle Chui
Mark T. Ciani
Nicole Sara Rose Clayton
Stephen Jadie Coates
Elizabeth S. Cohen
Lee Anne Colamarino
Donald David Conklin
Carolyn Cope
Georgina Ann Costello
Mandy Deroche
Michael DeRose
Daniel Christian Doeschner
Anthony Alexander Donn
Deborah Swindells Donovan
Michelle Echeverria
Tor Bernhard Ekeland
Marwa Elborai
Avi Yakir Eldor
Lynn Elliot
Haley Jo Eppler
Jeffery Fang
Michael Philip Favretto
Moira Fitzgerald
David I. Flamholz
Benjamin Folkinshteyn
Ricky Yukho Fong
Robert Foote
Brian P. Fredericks
Amanda Leigh Gabai
Melissa Joy Gambol
Vance Gathing
Jared Gianatasio
Amanda Burrell Gilman
Anouck Cicely Giovanola
Peter Matthew Grabiel
Alexander Lloyd Greenberg
Tangela Nicole Griffin
Sonal Gupta
Hae Won Han
Robert B. Hander
William Thomas Hennessy
Susan Amelia Hensler
Joshua Mac Herman
Gregory S. Hoffnagle
Curtis Walton Hogan
Cecilie Howard
Kelvin Hsu
Jenny Ann Hughes
Joshua David Hurwit
Benita Del Hussain Ugochukwu
Arinzechukwu Ike
Shigeyuki Ito
Aparajitha Janardhanan
Brian Michael Janson
Juan Luis Jaramillo
Audrey Anne Jeung
Glenn M. Johnston
Ariel Joseph
Srikanth Katragadda
Joanna Milkova Kazakova
Patrick S. Kennedy
Amy Beth Kletnick
Jennifer L. Kostyu
Valeria Kozhich
Leah E. Laben
Anne Lai
Rachel Alden Lavery
Joseph John Lavin
Karine Law
Crystal Lee
Grace Lee
John King Lee
Andrew Levine
Matthew Levitan
Alyssa Litman
Dan Litvin
Joana M. Lucashuk
Jamie R. Lynn
Timothy E. Magee
Mojdeh Malekan
Deborah M. Marshall
John Charles Matthews
Isaac Messulan
Christina Farida Migally
Philip A. Mirrer-Singer
Jennifer A. Morgan
Lucy Emmalyn Muzzy
Tibor Nagy
Peter Gregory Naismith
Dorollo Nixon
Johanna Eileen O'Rourke
Minna Oh
Orieroghene Okumakpeyi
Tristan Ostrowski
Daniel Paretsky
Khari Nkrumah Parson
Krista Lynne Patterson
William Barton Patterson
Joseph John Perkovich
Elizabeth Ann Perlak
Efstratios Philippis
Brett M. Pinkus
Samantha Lauren Plitnick
Ralia E. Polechronis
Rebecca Porath
Christina Lee Porter
David D. Postolski
Evelyn Rose Marie Protano
Nicolas Thomas Olivier Puygrenier
Howard Raber
Erin B. Ratner
Maximiliaan Endymion Rijkenberg
Roland Gustaf Riopelle
Jonathan Robbin
Evelyn Roberts
Mark W. Robertson
Kenneth Rosenfeld
Olga Rozdolska
Neill Russell
Eric Rutkow
Mary Lynn Santanello
Jessica Sloane Saunders
Barry Schachter
David Albert Schnurman
Brian Walter Schreyer
Joseph Arthur Schwartz
Jessica Waggoner Segall
Grissel Seijo
Joseph Sensenbrenner
Heather Lynne Shaffer
Kaveh Shahrooz
Joseph Aaron Sherinsky
Katherine Jane Sherinsky
Jonathan Leighton Shih
Victoria Shusterman
Apin Jonathan Silber
Tara Singh
Peter Brian Siroka
Janaki Sivanesan
Catherine Ann Skulan
Andrew Sloss
Lauren Nicole Slusser
Jessica Lynn Slutsky
Deven A. Smith
Krista Ann Smokowski
Peter Andrew Solimine
Mark Srulowitz
Megan A. Stombock
Whitney Erin Street
Rachel Fan Stern Strom
Nicole Marie Stryker
Danielle Claire Sullivan
Melissa Beth Sussman
Thomas Karl Sylvester
Tyler Winscomb Thorn
John C. Timmermann
Gino Tonetti
Gino Gabriel Tonetti-Tieppo
Christine Tramontano
Michael Joseph Troha
Sarah Kao-yen Tsou
Debra S. Turetsky
Shweta R. Udeshi
Scott Michael Univer
Shilpi Vinod Upadhyaya
Christopher John Updike
Armando Valdes
Timothy Filmore Van Voris
Julie Ann Velasquez
Victoria Vinarsky
Denise Wahba
Dennis Michael Wallace
Andrea Wang
Sanjay Vilas Wavde
Angela Ann Weir
Robert Bendner Weiss
Miriam Young Werner
Patricia Ann Wheeler
Susan C. White
Wendy Marche Williams
Wenwen Xia
Sean Young
Tracy Ann Zanco
Michael Zargari
Brenda Lynn Zelin

SECOND DISTRICT
Michael B. Abel
Travis J. Arrindell
Anthony Louis Burns
Josephine Castro
Margie Ponciano Colinayo
Cynthia Helen Conti-Cook
Israel D. Elbogen
Elodie Gal
Naomi C. Gardner
Akiva M. Goldfarb
Shawn Clark Graham
Mariya Gurevich
Excylyn Hardin-Smith
Osarhiemen Iyinbo
Mark H. Jaffe
Rachel Deborah Jaffe
David Jonathan Jensen
Michael Kauffman
Julien David Laor
Jillian M.C. Modzeleski
Deana Nassar
Ivan Pantoja
Theresa Anne Robitaille
Danielle Mary Rodriguez
Natan T. Shmueli
Kenneth F. Smith
Caryn Stucchio
Latrice Monique Walker

THIRD DISTRICT
Anat A. Alon-Beck
Joseph Battaglia
Sherri J. Brooks
Benjamin T. Decker
Richard Michael Goldman
Onchan Inkhamfong
Sharif Kabir
Jasper L. Mills
Joseph J. O'Hara
Carlotta Palmer
Ariel Elaine Solomon
Gerasimos Stamoulis
Melissa Beth Wartel
Hsiu-Yuan M. Yang
Christina Zola

FOURTH DISTRICT
Wendy DeForge
Matthew J. Werblin

FIFTH DISTRICT
Dmitrii Andreev
Nestor Berge
Gigi Elizabeth Meyers
Michael Ranieri
Amy Marie Smith

SIXTH DISTRICT
William J. Greener

SEVENTH DISTRICT
Leslie A. Affronti
Paul Guerrieri
Rachel Munsaf
Julie Wescott

EIGHTH DISTRICT
Leslie P. Cohan
V. Christopher Eaggleston
Ja Harr Pennington

NINTH DISTRICT
Leslie Baum
Katherine Dandy
Christina Maria Feo
Kevin Peter Fitzpatrick
Juan C. Gonzalez
Evelyn L. Guevara
Heather Marie Haralambides
Mary Veronica Hunt
Michael Alan Jakowsky
Seth Daniel Lasko
Bruce Raymond Lozito
Stacey Michelle Rancourt
Henry Rouda
Megan Kristine Smith

TENTH DISTRICT
Deborah Ariel
Michele N. Beier
Russell B. Blaymore
Jason Ray Breit
Jonathan Mark Cader
Jessica Cepriano
Dina Marie Colon Karman
Jennifer Rachelle Cook
Erin Leigh Deacy
Tara Ann DiGregorio
Theresa Ehle
Dorothy Eisenberg
James Raymond Finn
Patrick James Garvey
Jeremy Steven Glicksman
Elefteria Maria Gomes
Aimee Lynn Kaplan
Charles Watt Kaser
Elinor J. Kim
Rebecca Lynn Klide
David J. Kozlowski
Jeffrey Lubin
Brian W. Masie
Cara Marie Molloy
Lauren Mickay Nickerson
Monika Raince
Bryon J. Rose
Hyejung Shin
Jamila Shukry
Matthew Lee Spindler
Lauren Brooke Sutton
Lesley Anne Tse

ELEVENTH DISTRICT
Jane Clare Abrahim
Margot Danya Albert
Roman Mikhail Avshalumov
Josephine Swigert Benton
Marybeth Campfield
Soledad V. Diaz
Ilona Dzhamgarova
Franchesca Fernandez
Heather Martin Madey
Geoffrey Christopher Martin
Kyung-sun Na
Gregory Scott Newman
Emily Sharpe
Susan Soojin Shin
Robert J. Strohl
Noreen C. Will
Jane J. Yoon

TWELFTH DISTRICT
Bahar Ansari
Adrian Carlos Anthony
Rekha Trivikram

OUT OF STATE
William D. Alexander
Peter Altenbach
Jing An
Chika Araki
Carol Ann Helen Armenti
Marcela Maria Arrocha-Peralta
Jose E. Arvelo
Elizabeth P. Askey
Benilda Bacorro
Shinho Bae
Jesse Baer-Kahn
Peter Baker
Joseph F. Barletta
Ciatta Z. Baysah
Jill Berry
Michael R. Bielski
Heather C. Bishop
Corwin Albert Bliss
Sorel Bosan
Sean M. Brett
Allison M. Britt
Sarah Bromberg
Alexandra Buechner
Ping Cai
Dominick C. Capozzola
Lindsey Ann Carr
Yu-Ling Chang
Bih-Lih Chen
Wen Chen
Stuart L. Chinn
Elizabeth Christian
Welson Chu
Kent William Collier
Rachel Cook
Annamaria Csenterics
Carys Damon
Maxime Damphousse
Jerima Dampier
Elizabeth F. Defeis
Bernd Paul Delahaye
Nicholas John Diceglie
Leslie Ann Dougiello
Nuala Doyle
Sunday Obinali Duru
Monika J. Ellacott
Jody Chaya Erdfarb
Elif Eroglu
Grace Afolake Ewegbeje
Cristian A. Smart Eyzaguirre
Justin Fappiano
Julie Filimonov
Alison FitzGerald
Virginia C. Foreman
Florence Fricaudet
Floripe B. Garcia
Aram Gavoor
Richard Arthur Gelski
Daniel Thomas Gluck
Marla Goodman
Suganda Gopal
Szymon Gostynski
Thomas Marshall Greenwood
Samantha Groffman
Tia Gubler
Jiwon Ha
Jason Hadid
Todd A. Hamblet
Alex Hassid
Joshua N. Hergan
Megan HeuSerges
Kelly Hilgers
Futapa Hirano
Eric George Houston
Brian S. Hsu
Adam Hubertz
Jane E. Hunt
Motohiro Ikehara
Harukuni Ito
Karim Kahatt
Zachary S. Kahn
Melanie Karkos
Saeko Kawashima
Adebayo Keleko
Nihan Keser
Dongjun Kim
Hyungsig Kim
John O'Hyun Kim
Eiji Kobayashi
Shuta Kobayashi
Shiho Koizumi
Anika Kotecha
Megan Kriegstein
Christie Krol
Scott M. Krompinger
Martin Arthur Kuppers
Masashi Kusaka
Julie B. Kushner
Gabriela Lanza
Desiree LeClercq
Tae Hwi Lee
Joan Lelma
Aikaterini Leris
Dru Levasseur
Arthur Levi
Joshua S. Levy
Andrew Lillis
Jay Liotta
Sam Lipstein
Benjamin Stephen Litman
Zhen Liu
Juan Pablo Llambias
Hsui-Pei Lo
Ann Hyatt Logan
Ying Lu
Gina Marisa Lupino
Dan Malasky
Steven Jay Mandelbaum
Enrica Manduco
James R.F. Marlow
Mark Marsella
Daniel McLoughlin
Declan McUeever
Chi Metu
Justin A. Meyers
Peter Mitchell
Nicole Mondschein
Rochelle Musgrove
Jeffrey Nass
Laura Notley
Eamonn Martin O'Hanrahan
Yasuhide Ono
Masahiro Otsuki
Sabrina Oumellal
Fumiyuki Oya
Anna Agnieszko Pankiwicz
Sang Park
Joseph Michael Patricola
Susanne Y. Peticolas
Mark Piech
Ignacio Pinto-Leon
Katja Plaustajner
Bonnie Puckett
Justine R. Quinn
Christopher Radcliffe
Ensanur Rahman
Karabeth Ann Randolph
Lenka Richards
Robert Riether
Julie Catherine Rinne
Krista N. Robertson
Anna M. Robinson
Priscilla A. Rodriguez
Suzette Toneke Rodriguez
Geoffrey E. Rosenblat
Richard Earl Rowe
Richard Rubin
Soraya Rudofsky
Kathy Rudzik
Kelly Kilduff Ruggiero
Jason Rutz
Tomoyuki Saito
Michael C. Salerno
Malini Sangha
Ivette Santos
Kumi Sato
Jean Scally
Patricia Ann Scearce
Christina Marie Schmid
J. Jordan Scott
Kyoung Seok Seo
Sarah Skelcher
Stanley Smotritsky
Benjamin B. Speciale
Nina J. Spiegel Kotick
Daniel Spurlock
Ashima Srivastava
Tamas Sziraczki
Chun Hua Tan
Shiva Eliza Tayebi
Victoria Taylor
Nycole Alicia Thompson
Joseph Luther Tucker
Anna Tymofyeyeva
Luke Martin Pio Tynan
Kohsei Ugumori
Meena G. Untawale
Christina J. Valentine
Polibio M. Valenzuela
Danae Larissa Van Der Straten Ponthoz
Maria V. Vilela
Edwin Pandes Villarico
Chumpicha Vivitasevi
Wichard S. Von Hoff
Matthew Walsh
Yin-Chin Wang
Yujia Wang
Kingsley C. Wara
David A. Weintraub
Amy E. White
Jennifer Wu
Yuping Xiong
Seung Jong Yang
Chenbo Zhang
Xiaomeng Zhang

In Memoriam

Joseph M. Costello
Plandome, NY
Kenneth T. Gibbons
Scotia, NY
Peter A. Silverstein
Great Neck, NY

and Euphemisms. Jargon is terminology that relates to a specific profession or group. Don't use words or phrases only you or another lawyer might know. *Examples:* "In the instant case" or "in the case at bar" *becomes* "here" or "in this case." Or, better, discuss your case without resorting to "here" or "in this case."

Eliminate slang from formal legal writing. Slang is made up of informal words or expressions not standard in the speaker's dialect or language and which are used for humorous effect. Use "absent minded" instead of "out to lunch," "drag" or "take" instead of "schlep," "jewelry" or "money" instead of "bling," "marijuana" instead of "weed," "police" instead of "Five-O," "stolen goods" instead of "loot" or "stash," and "respect" instead of "props."

Don't use colloquialisms. Colloquialisms are expressions that aren't used in formal speech or writing. *Examples:* "gonna" and "ain't nothin."

19. Hate Typos. Typos tell readers you don't care. No one will take your writing seriously if you make obvious errors in grammar, punctuation, spelling, or syntax. Typos distract readers from the substance of your writing and make you appear unprofessional. No typo is subtle. Readers give typos greater weight than they deserve. Readers who see small typos assume that the writer didn't get the big things right. The solution is to proofread. Use someone you trust to proofread. Use your word-processing program's spell and grammar checkers. Edit on a hard copy. Read your hard copy backward. Read it out loud if the document is important. Go from big edits to small ones: Verify that your arguments make sense, that each sentence segues into the next, that your style is consistent, and that each sentence is grammatically correct and free of spelling errors.

Readers who see small typos assume that the writer didn't get the big things right.

Do away with trendy phrases. They're here today, gone tomorrow. *Examples:* "bottom line," "cutting edge," "interface," "maxxed out," "need-to-know basis," and "user-friendly." Eliminate the trendy "-ize" suffixes: "concretize," "finalize," "maximize," "optimize," "prioritize," and "strategize."

A euphemism is a word or phrase that replaces a negative, offensive, or uncomfortable word or phrase. Some euphemisms for dying: "passed away," "passed on," "checked out," "kicked the bucket," "bit the dust," "bought the farm," "cashed in their chips," and "croaked." "Sanitation engineer" and "sanitation worker" are euphemisms for "garbage man." "Hooker," "call girl," "escort," "working girl," and "sex workers" are all euphemisms for "prostitute." Replacing one euphemism for another won't eliminate negativity or discomfort. Replacing one euphemism for another perpetuates negativity and discomfort.

If you're quoting from a witness's testimony and the slang, colloquialism, or euphemism is material to your case, then quote it.

20. Hate Adverbial Excesses. Adverbial excesses weaken and obscure. They suggest that those who disagree with you are stupid. They also make a good, skeptical reader question whether you're right. Is it really obvious? Eliminate "absolutely," "actually," "almost," "apparently," "basically," "certainly," "clearly," "completely," "extremely," "incontestably," "nearly," "obviously," "plainly," "quite," "really," "seemingly," "surely," "truly," "undeniably," "undoubtedly," "utterly," "various," and "virtually." The exception is if you're confessing an error: "I'm clearly wrong" is clearly O.K.

21. Hate Cowardly Qualifiers. Leave no room to equivocate. Be brave and decisive. It's better to be wrong than cowardly. Eliminate doubtful, hedged, timid, and weaselly equivocations, phrases, and words: "apparently," "at least as far as I'm concerned," "basically," "conceivably," "evidently," "if practicable," "practically," "perhaps," "probably," "purportedly," "in effect," "it may well be," "it might be said," "it is respectfully suggested," "it seems," "more or less," "nearly," "rather," "seemingly," "somewhat," "sort of," "virtually," and "would contend." Don't cowardly combine letters and numbers. *Incorrect:* "two (2)." Legal writing isn't a check that can be forged. Also, eliminate cowardly expressions. Not only are "at or near," "on or about," and "on or before" equivocal, these expressions, which signal approximations, may not precede exact places or times. Use "at or near," "on or about," or "on or before" only when you're writing a complaint and you don't know exact places or times. Use "generally," "typically," and "usually" if you need to discuss an exception to a rule, rather than the rule. *Example:* "Generally, a municipality is not liable for its failure to provide police protection. An exception arises when a municipality and an injured party have a special relationship. A special relationship arose here."

22. Hate Foreign, Latin, and Archaic (Old English) Words. Lawyers love romance languages: French, Italian, and Spanish. Don't use foreign words. They won't help you sound more educated or sophisticated. And don't mix foreign languages with English unless you're quoting or repeating dialect. Use Latin, a dead language, only when the word or expression is deeply ingrained in legal usage ("mens rea," "supra") and when no concise English word or phrase can substitute. Use "agendas" not "agendums"; "appendixes"

not "appendices"; "curriculums" not "curricula"; "dogmas" not "dogmata"; "formulas" not "formulae"; "forums" not "fora"; "indexes" not "indices"; "memorandums" not "memoranda" or "memorandas"; and "syllabuses" not "syllabi." Replace Latin terms with their well-known English equivalents. "Ab initio" *becomes* "from the start." "Arguendo" *becomes* "assuming" or "for the sake of argument." "Ergo" *becomes* "therefore." "Ex contractu" *becomes* "in contract" or "contractual." "Inter alia" *becomes* "among others." "In toto" *becomes* "on the whole." "Ipso facto" *becomes* "by itself" or "necessarily." "Pro se" *becomes* "self-represented" or "unrepresented." "Sui generis" *becomes* "one of a kind" or "unique." "Via" *becomes* "by" or "because of." Eliminate archaic words like "behooves," "betwixt," "eschew," and "hither." *Example:* "It behooves you to eschew archaic words."

23. Hate Vague Referents. Readers hate writing that's unclear about what or to whom writers are referring. Be careful with "it," "that," "this," "such," "which," "he," "his," "him," "she," "her," "they," and "them." Writers use these referents for concision. But it's better to be clear than concise. Use these referents if they refer to one thing only. Otherwise, use as many words as you need to make your writing clear. *Example:* "They won't understand you as such." Here, the writer doesn't clarify who won't understand you. Also unclear is what "as such" refers to. *Example:* "He told Judge John Doe that he should do some research." In this example, it's unclear to whom the second "he" refers: Judge John Doe or the person who spoke to Judge Doe. *Example:* "Plaintiff failed to deliver the widgets after defendant failed to pay for them. That started the lawsuit." It's unclear what started the lawsuit — plaintiff's failure to deliver or defendant's failure to pay. Or both. Clarify vague referents by using different nouns; by repeating the same nouns; by making one antecedent singular and another plural; or by rewriting the sentence to sharpen the antecedent.

24. Hate Elegant Variation. Elegant variation is the technique by which a writer uses different terms to identify one idea, person, place, or thing. Use different words to mean different things. Don't use synonyms to say the same thing. It's wrong to reach for a thesaurus in this way. *Incorrect:* "The prosecutor wanted to indict the defendant. That's why the Assistant District Attorney [the prosecutor] secured a grand jury true bill [indictment] against the suspect who was arraigned [the defendant]." To be understood, be repetitious.

Repeating articles, nouns, prepositions, and verbs adds power and helps comprehension. Repetition makes writing powerful and clear. Repetition cures inelegant variation. *Examples:* "In Selma, as elsewhere, we seek and pray for peace. We seek order. We seek unity."[1] (Repetition of "seek.") "But this time, the world was not silent. This time, we do respond. This time, we intervene."[2] (Repetition of the words "this time.") In lengthy lists or for poetic value, repeat "because," "that," and similar words. Then make your lists parallel. *Examples:* "The court found *that* the attorney lied and *that* his behavior is sanctionable." "Lawyers advocate *because* they have something to say and *because* they're paid to advocate."

25. Hate Personal Opinion or Emotion. Don't interject personal opinion or emotion. Eliminate "I (or *we*) think," "I (or *we*) feel," and "I (or *we*) believe." Don't vouch for your client.

26. Hate Logical Fallacies. A fallacy is an invalid way of reasoning. Excessive reliance on logic is problematic. Accepting a fallacy is worse: Fallacies lead to incorrect conclusions. Here are some logical pitfalls.[3] Post hoc fallacy: Assuming that because one thing happens after something else, the first caused the second. *Examples:* "Every time I brag about how well I write, I submit something with lots of typos." The fallacy is that if you don't brag about your writing, you'll submit a typo-free document. "I never had any problems with the pipes. Only after you moved in did the pipes burst." The fallacy is that if the tenant had never moved in, the pipes would be intact. Dicto simpliciter: Applying the general rule to the exception. *Example:* "Judge X never learned grammar, but she writes well." The fallacy is that because Judge X never studied grammar, no one need study grammar. Hasty generalizations: Jumping to conclusions without adequate sampling. *Example:* "Lawyer Z never edits his briefs. All lawyers from Lawyer Z's firm are lazy." The fallacy is that Lawyer Z, who doesn't edit, is lazy or that because Lawyer Z is lazy, all attorneys from the firm must be lazy. Circular reasoning: An argument that begs the question of the truth of its conclusion by assuming its truth. *Example:* "A good brief begins with a strong opening because a strong opening makes a brief good." The fallacy is that a good brief is a good brief because a strong opening is a strong opening.

Resuming in the November/December *Journal*, the Legal Writer will address the do's, don'ts, and maybes relating to grammar errors, punctuation issues, and legal-writing controversies. ■

It's better to be wrong than cowardly.

1. Excerpt from President Lyndon B. Johnson's "We Shall Overcome" speech on Mar. 15, 1965, *available at* http://www.americanrhetoric.com/speeches/lbjweshallovercome.htm (last visited Feb. 22, 2007).

2. Excerpt from Elie Wiesel's "The Perils of Indifference" speech on Apr. 12, 1999, *available at* http://www.americanrhetoric.com/speeches/ewieselperilsofindifference.html (last visited Feb. 22, 2007).

3. For an excellent discussion of logical fallacies, see Gertrude Block, *Effective Legal Writing* 254–56 (5th ed. 1999).

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at St. John's University School of Law. He thanks court attorney Alexandra Standish for assisting in researching this column. His e-mail address is GLebovits@aol.com.

CLASSIFIED NOTICES

RESPOND TO NOTICES AT:
New York State Bar Association
One Elk Street
Albany, NY 12207
Attn: Daniel McMahon

DEADLINE FOR SUBMISSIONS:
Six weeks prior to the first day of the month of publication.

NONMEMBERS:
$175 for 50 words or less; plus $1 for each additional word. Boxholder No. assigned—$75 per insertion.

MEMBERS:
$135 for 50 words and $1 for each additional word. Payment must accompany insertion orders.

SEND ADS WITH PAYMENT TO:
Network Publications
Executive Plaza 1, Suite 900
11350 McCormick Road
Hunt Valley, MD 21031
(410) 584-1960
cmartin@networkpub.com

ATTORNEY WANTED

Prominent Capital and Saratoga Region Law Firm seeks lateral hire with 3 to 5 years corporate commercial lending and transactional experience for associate position. Salary and benefits are competitive. Please forward resumes and salary requirements to Box J 07-01, New York State Bar Journal, One Ek Street, Albany, NY 12207. Inquiries will be held in strict confidence.

FLORIDA SUPREME COURT APPROVED ARBITRATION TRAINING

FLORIDA SUPREME COURT APPROVED ARBITRATION TRAINING ($275.00)*
- March 17, 2007
- April 21, 2007
- May 19, 2007
- October 27, 2007
- December 1, 2007

9:A.M. – 1:15 P.M.

ADVANCED ARBITRATION TRAINING ($125.00)*
Same Dates
2:00 P.M. – 5:15 P.M.
*$350.00 for Both Sessions
Location: Fort Lauderdale, Florida
Meah Tell, Esq. and Geraldine Waxman, J.D.
(954) 741-1311 Fax (954) 476-6687
practlsolutions@aol.com

INCORPORATION SERVICES

Add business formation services to your practice without adding demands on your resources.

Help clients incorporate or form limited liability companies with America's leading provider of business formation services. We can also assist in out-of-state qualifications.

Call us today at 800-637-4898 or visit www.corporate.com/nylaw to learn more.

LAW BOOKS

The Lawbook Exchange, Ltd. buys, sells and appraises all major lawbook sets. Also antiquarian, scholarly. Reprints of legal classics. Catalogues issued in print and online. Mastercard, Visa and AmEx.

(800) 422-6686; Fax: (732) 382-1887; www.lawbookexchange.com.

LAW PRACTICE FOR SALE

NH Seacoast Law Office. Well-established successful thriving practice available immediately. Opportunity for high income, new lifestyle, and strong presence in the NH Seacoast. Step into immediate caseload, intake calls, successful advertising campaign, website, extensive office equipment, computer systems, forms, procedures, case processing system, and excellent staff all in-place. Excellent location and facilities. Long-term lease with option. Currently Personal Injury, Medical Malpractice, Civil Rights, Employment Litigation. Room for expansion. Sternlawoffice.com. Dover, N.H. Contact Frank Mesmer (603)-668-1971

OFFICE SPACE AVAILABLE

Instant Office Space: NY or Newark Plug and Play space for lawyers and other professionals at the historic National Newark Building and/or in Tribeca at 305 Broadway, NY; varying sized offices; spacious workstations; dual NJ and NY presence; reception, multi-line phones, t-1 internet, Video Conferencing, custom voicemail; virtual offices too; flexible terms; ideal for temporary trial HQ in Newark and NY; office facilities in NJ available for as little as $450 per month, NY for as little as $500 per month and virtual offices for as little as $250. www.lawsuites.net; 646-996-6597 [brokers protected]

PRESENTATION SKILLS FOR LAWYERS
CONTINUED FROM PAGE 49

over again. Instead, work the phrase into the presentation at three different times. For example, to show your audience the importance of speaking with a lawyer before making a major decision, you could emphasize a single phrase:

- Before you speak with the insurance company, talk to a lawyer first.
- Before speaking with the police, *talk to a lawyer first.*
- Before you sign that contract, ***talk to a lawyer first.***

By the time you reach the third repetition of the phrase, your audience will not only remember the phrase, they will plug it into the statement for you.

The memorable power of three also applies to your speech organization. In a speech with a single point, you can use the Army's method of speech organization: "Tell 'em what you're gonna tell 'em, tell 'em, then tell 'em what you told 'em." In a presentation with multiple points, organize your speech around three major points. Four will be too many, two will be too few. Limit (or expand) your presentation to those three significant points. Your audience can't memorize your entire speech, but if you organize your presentation according to the Rule of Three, your presentation will be a success. ■

MEMBERSHIP TOTALS

NEW REGULAR MEMBERS
1/1/07 - 7/17/07 _____ 5,176

NEW LAW STUDENT MEMBERS
1/1/07 - 7/17/07 _____ 338

TOTAL REGULAR MEMBERS
AS OF 7/17/07 _____ 65,576

TOTAL LAW STUDENT MEMBERS
AS OF 7/17/07 _____ 1,983

TOTAL MEMBERSHIP AS OF
7/17/07 _____ 67,559

HEADQUARTERS STAFF EMAIL ADDRESSES

Executive
Patricia K. Bucklin
Executive Director
pbucklin@nysba.org

John A. Williamson, Jr.
Associate Executive Director
jwilliamson@nysba.org

Administrative Services, Meetings and Media Relations
Administrative Services
Sebrina Barrett, *Director*
sbarrett@nysba.org

The New York Bar Foundation
Rosanne M. Van Heertum
Director of Development
rvanh@tnybf.org

Law, Youth and Citizenship Program
Eileen Gerrish, *Director*
egerrish@nysba.org

Rebecca Varno, *Program Manager*
rvarno@nysba.org

Media Services and Public Affairs
Andrew Rush, *Director*
arush@nysba.org

Jon Sullivan, *Manager of Media Services*
jsullivan@nysba.org

Patricia Sears Doherty, *Editor, State Bar News*
psearsdoherty@nysba.org

Bar Services
Frank J. Ciervo, *Director*
fciervo@nysba.org

Meetings
Kathleen M. Heider, *Director*
kheider@nysba.org

Continuing Legal Education
Terry J. Brooks, *Senior Director*
tbrooks@nysba.org

Debra York, *Registrar*
dyork@nysba.org

CLE Programs
Jean E. Nelson II, *Associate Director*
nelson@nysba.org

Kimberly Hojohn, *CLE Program Coordinator*
khojohn@nysba.org

Katherine Suchocki, *Staff Attorney*
ksuchocki@nysba.org

Cheryl L. Wallingford, *Program Manager*
cwallingford@nysba.org

CLE Publications
Daniel J. McMahon, *Director*
dmcmahon@nysba.org

Marsha Hordines, *Research Attorney*
mhordines@nysba.org

Patricia B. Stockli, *Research Attorney*
pstockli@nysba.org

Mark Wilson, *Publication Manager*
mwilson@nysba.org

Law Practice Management
Pamela McDevitt, *Director*
pmcdevitt@nysba.org

Finance and Human Resources
Paula M. Doyle, *Senior Director*
pdoyle@nysba.org

Finance
Kristin M. O'Brien, *Director*
kobrien@nysba.org

Cynthia Gaynor, *Controller*
cgaynor@nysba.org

Legal and Governmental Affairs
Kathleen R. Mulligan-Baxter, *Senior Director*
kbaxter@nysba.org

Counsel's Office

Governmental Relations
Ronald F. Kennedy, *Director*
rkennedy@nysba.org

Lawyer Assistance Program
Patricia F. Spataro, *Director*
pspataro@nysba.org

Lawyer Referral and Information Service
Eva Valentin-Espinal, *Coordinator*
evalentin@nysba.org

Pro Bono Affairs

Marketing and Information Services
Richard J. Martin, *Senior Director*
rmartin@nysba.org

Desktop Publishing

Marketing

MIS
John M. Nicoletta, *Director*
jnicoletta@nysba.org

Jeffrey Ordon, *Network Support Specialist*
jordon@nysba.org

Sonja Tompkins, *Records Supervisor*
stompkins@nysba.org

Gregory A. Vincent, *Database Administrator*
gvincent@nysba.org

Paul Wos, *Data Systems and Telecommunications Manager*
pwos@nysba.org

Web Site
Barbara Beauchamp, *Editor*
bbeauchamp@nysba.org

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

Megan O'Toole, *Membership Services Manager*
motoole@nysba.org

Chief Section Liaison
Lisa J. Bataille
lbataille@nysba.org

Print and Facilities Operations
Roger E. Buchanan, *Senior Director*
rbuchanan@nysba.org

Building Maintenance

Graphics

Print Shop
Matthew Burkhard, *Production Manager*
mburkhard@nysba.org

THE NEW YORK BAR FOUNDATION

2007-2008 OFFICERS
John R. Horan, *President*
825 Third Avenue, New York, NY 10022

M. Catherine Richardson
Vice President and Chair of The Fellows
One Lincoln Center, Syracuse, NY 13202

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

Lorraine Power Tharp, *Treasurer*
One Commerce Plaza, Albany, NY 12260

DIRECTORS
James B. Ayers, *Albany*
Jonathan G. Blattmachr, *New York*
Cristine Cioffi, *Niskayuna*
Charles E. Dorkey, III, *New York*
Emily F. Franchina, *Garden City*
John H. Gross, *Hauppauge*
Robert L. Haig, *New York*
Paul Michael Hassett, *Buffalo*
Frank M. Headley, Jr., *Scarsdale*
Barry M. Kamins, *Brooklyn*
John J. Kenney, *New York*
Henry L. King, *New York*
Steven C. Krane, *New York*
Glenn Lau-Kee, *New York*
Bernice K. Leber, *New York*
A. Thomas Levin, *Garden City*
Kay Crawford Murray, *New York*
Carla M. Palumbo, *Rochester*
Sharon M. Porcellio, *Buffalo*
Richard Raysman, *New York*
Thomas O. Rice, *Garden City*
Sanford J. Schlesinger, *New York*
Justin L. Vigdor, *Rochester*
Lucia B. Whisenand, *Syracuse*

EX OFFICIO
Susan B. Lindenauer, *New York*
Vice Chair of The Fellows

JOURNAL BOARD MEMBERS EMERITI

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

Howard Angione
Immediate Past Editor-in-Chief
Rose Mary Bailly
Richard J. Bartlett
Coleman Burke
John C. Clark, III
Angelo T. Cometa
Roger C. Cramton
Louis P. DiLorenzo
Maryann Saccomando Freedman
Emlyn I. Griffith
H. Glen Hall
Paul S. Hoffman
Charles F. Krause
Philip H. Magner, Jr.
Wallace J. McDonald
J. Edward Meyer, III
Kenneth P. Nolan
Eugene Peckham
Albert M. Rosenblatt
Sanford J. Schlesinger
Robert J. Smith
Lawrence E. Walsh
Richard N. Winfield

2007-2008 OFFICERS

KATHRYN GRANT MADIGAN
President
Binghamton

BERNICE K. LEBER
President-Elect
New York

JAMES B. AYERS
Treasurer
Albany

MICHAEL E. GETNICK
Secretary
Utica

MARK H. ALCOTT
Immediate Past President
New York

VICE-PRESIDENTS

FIRST DISTRICT
Claire P. Gutekunst, *New York*
Susan B. Lindenauer, *New York*

SECOND DISTRICT
Barry Kamins, *Brooklyn*

THIRD DISTRICT
Hon. Rachel Kretser, *Albany*

FOURTH DISTRICT
Nicholas E. Tishler, *Niskayuna*

FIFTH DISTRICT
David M. Hayes, *Syracuse*

SIXTH DISTRICT
David A. Tyler, *Ithaca*

SEVENTH DISTRICT
David M. Schraver, *Rochester*

EIGHTH DISTRICT
Sharon Stern Gerstman, *Buffalo*

NINTH DISTRICT
John S. Marwell, *Mount Kisco*

TENTH DISTRICT
John H. Gross, *Hauppauge*

ELEVENTH DISTRICT
Seymour W. James, Jr., *Kew Gardens*

TWELFTH DISTRICT
Steven E. Millon, *Bronx*

MEMBERS-AT-LARGE OF THE EXECUTIVE COMMITTEE

Vincent E. Doyle, III
David L. Edmunds, Jr.
Hermes Fernandez
Michael Miller
David P. Miranda
Peter J.W. Sherwin
Lauren J. Wachtler
Stephen P. Younger

MEMBERS OF THE HOUSE OF DELEGATES

FIRST DISTRICT
Aaron, Stewart D.
Abernethy, Samuel F.
†* Alcott, Mark H.
Alden, Steven M.
Anello, Robert J.
Badner, Lisa Ray
Badway, Ernest Edward
Barson, Alan D.
Bartlett, Linda G.
Bienstock, Peter
Blanchard, Kimberly S.
Borsody, Robert P.
Boyers, Hon. Seymour
Brett, Barry J.
Brown Spitzmueller, Janiece
Brown, Geraldine Reed
Burns, Howard W., Jr.
† Campos-Galvan, Manuel
Caraballo, Dolly
Chambers, Hon. Cheryl E.
Cheng, Pui Chi
Chin, Sylvia Fung
Christian, Catherine A.
Cohen, Carrie H.
Collazo, Ernest J.
* Cometa, Angelo T.
Crespo, Louis
Davis, Tracee E.
Donoghue, Gail
Draper, Thomas G., Jr.
Drayton, Joseph Michael
Eppler, Klaus
Finerty, Hon. Margaret J.
Fink, Rosalind S.
* Forger, Alexander D.
Frank, Paul M.
Fries, Richard S.
Gesinsky, Loren M.
* Gillespie, S. Hazard
Grays, Taa R.
Gredd, Helen A.
Gross, Marjorie E.
Gutekunst, Claire P.
Haig, Robert L.
Hariton, David P.
Harris, Joel B.
Hoffman, Stephen D.
* King, Henry L.
Kobak, James B., Jr.
Kougasian, Peter M.
†* Krane, Steven C.
Kuntz, Dr. William F., II
Larson, Wallace L., Jr.
Leber, Bernice K.
Leo, Robert J.
Lieberman, Ellen
Lindenauer, Susan B.
* MacCrate, Robert
Martin, Edwina Frances
Mazzarelli, Hon. Angela M.
McEnroe, Diane Crosson
Miller, Michael
Millett, Eileen D.
Minkowitz, Martin
Moreland, Thomas H.
Morril, Mark C.
Nathanson, Eugene
O'Neill, Paul J., Jr.
* Patterson, Hon. Robert P., Jr.
Paul, Gerald G.
Reed, Thomas A.
Rifkin, Richard
Robertson, Edwin David
Rosenthal, Lesley Friedman
Rosner, Seth
Rothstein, Alan
Russell, William T., Jr.
* Seymour, Whitney North, Jr.
Sherman, Carol R.
Sherwin, Peter J.W.
Sigmond, Carol Ann
Silkenat, James R.
Smith, Hon. George Bundy
Sonberg, Hon. Michael R.
Steinberg, Lewis R.
Stenson, Lisa M.
Tesser, Lewis
Wachtler, Lauren J.
Williams, Bryan R.
Younger, Stephen P.
Zulack, John F.

SECOND DISTRICT
Adler, Roger B.
Branda, RoseAnn C.
Cohn, Steven D.
Golinski, Paul A.
Kamins, Barry
Longo, Mark A.
Romero, Manuel A.
Slavin, Barton L.
Sunshine, Hon. Jeffrey S.
Sunshine, Hon. Nancy T.
Szochet, Diana J.

THIRD DISTRICT
Ayers, James B.
Breen, Michael L.
Casserly, Timothy E.
Cloonan, William N.
Copps, Anne Reynolds
Davidoff, Michael
Doyle, Hon. Cathryn M.
Farley, Susan E.
Fernandez, Hermes
Gold, Majer H.
Greenberg, Henry M.
Greenthal, John L.
Higgins, John Eric
Higgins, Patrick J.
Kelly, Matthew J.
Kretser, Hon. Rachel
Lally, Sean P.
Lynch, Margaret Comard
Meislahn, Harry P.
Miranda, David P.
Moy, Lillian M.
Netter, Miriam M.
Perino, Justina Cintron
Potter, James T.
Powers, John K.
Sandner, James R.
Schofield, Robert T., IV
†* Tharp, Lorraine Power
* Williams, David S.
* Yanas, John J.

FOURTH DISTRICT
Breedlove, Brian H.
Burke, J. David
Caffry, John W.
Coffey, Peter V.
Cullum, James E.
Ferradino, Stephanie W.
Haelen, Joanne B.
Rider, Mark M.
Rodriguez, Patricia L. R.
Sterrett, Grace
Tishler, Nicholas E.

FIFTH DISTRICT
Gall, Erin P.
Getnick, Michael E.
Greeley, Kristin B.
Hayes, David M.
Larose, Stuart J.
Longstreet, Ami S.
Marris, Karin Huntley
McClusky, James P.
Mitchell, Richard C.
Pellow, David M.
Peterson, Margaret Murphy
Priore, Nicholas S.
* Richardson, M. Catherine
Stanislaus-Fung, Karen

SIXTH DISTRICT
Cummings, Patricia A.
Denton, Christopher
Egan, Shirley K.
Gorgos, Mark S.
† Madigan, Kathryn Grant
May, Michael R.
Sheehan, Dennis P.
Smyk, Stephen D.
Tyler, David A.

SEVENTH DISTRICT
Barney, Brian J.
Brown, T. Andrew
Buholtz, Eileen E.
†* Buzard, A. Vincent
Castellano, June M.
Doyle, Hon. John D.
Lawrence, C. Bruce
Lightsey, Mary W.
†* Moore, James C.
* Palermo, Anthony R.
Reynolds, J. Thomas
Schraver, David M.
Schultz, Jill K.
Smith, Thomas G.
* Vigdor, Justin L.
* Witmer, G. Robert, Jr.

EIGHTH DISTRICT
Brady, Thomas C.
Doyle, Vincent E., III
Edmunds, David L., Jr.
Embser, James T.
Evans, Lydia V.
Fisher, Cheryl Smith
* Freedman, Maryann Saccomando
Gerstman, Sharon Stern
†* Hassett, Paul Michael
Lamantia, Stephen R.
Manias, Giles P.
McCarthy, Jeremiah J.
McCarthy, Joseph V.
Meyer, Harry G.
O'Donnell, Thomas M.
Porcellio, Sharon M.
Sconiers, Hon. Rose H.
Subjack, James P.
Young, Oliver C.

NINTH DISTRICT
Burke, Patrick T.
Byrne, Robert Lantry
Campanaro, Patricia L.
Casey, Bridget M.
Dohn, Robert P.
Enea, Anthony J.
Fontana, Lucille A.
Gordon Oliver, Arlene Antoinette
Gouz, Ronnie P.
Kranis, Michael D.
Lagonia, Salvatore A.
Markhoff, Michael S.
Marwell, John S.
* Miller, Henry G.
Murray, Conal E.
†* Ostertag, Robert L.
Sciortino, Sandra B.
Selinger, John
†* Standard, Kenneth G.
Thornhill, Herbert L., Jr.
Townley, Rosemary A.
Van Scoyoc, Carol L.
Wallach, Sherry Levin
Welby, Thomas H.
Wilson, Leroy, Jr.

TENTH DISTRICT
* Bracken, John P.
Buonora, John L.
Cartright, Valerie M.
Castillo, Nelson A.
Chase, Dennis R.
Clarke, Lance D.
Elder-Howell, Andrea M.
Fishberg, Gerard
Franchina, Emily F.
Gann, Marc
Giorgio, Frank, Jr.
Gross, John H.
†* Levin, A. Thomas
Levy, Peter H.
Luskin, Andrew J.
Makofsky, Ellen G.
Margolin, Linda U.
Mihalick, Andrew J.
* Pruzansky, Joshua M.
Purcell, A. Craig
* Rice, Thomas O.
Robinson, Derrick J.
Smolowitz, Barry M.
Steinberg, Harriette M.
Stempel, Vincent F., Jr.
Thompson, Charlene R.
Walsh, Owen B.
Winkler, James R.

ELEVENTH DISTRICT
Cohen, David Louis
Dietz, John R.
Goldblum, A. Paul
James, Seymour W., Jr.
Lomuscio, Catherine
Lonuzzi, John A.
Nashak, George J., Jr.
Terranova, Arthur N.
Wimpfheimer, Steven

TWELFTH DISTRICT
Chavez, Daniel M.
Friedberg, Alan B.
Millon, Steven E.
* Pfeifer, Maxwell S.
Schwartz, Roy J.
Stansel, Lynn
Summer, Robert S.
Weinberger, Richard

OUT-OF-STATE
Cahn, Jeffrey Barton
* Fales, Haliburton, II
Tilton, Samuel O.
* Walsh, Lawrence E.

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

BY GERALD LEBOVITS

Do's, Don'ts, and Maybes: Legal Writing Don'ts — Part II

In the last column, the Legal Writer discussed the 13 things you shouldn't do in legal writing. We continue with 13 more don'ts — the things writers should hate.

14. Hate Incorrect Tenses. Mismatched tenses confuse readers. State current rules in the present tense, past rules in the past tense, and past facts in the past tense. Past fact but current rule: "The court held in *Alpha v. Zeta* that statutory rape is illegal even if the victim consents." Past fact and past rule: "Until the court reversed *Zeta v. Alpha*, the rule was that . . . ." Past fact: "The defendant ran the red light." (Not "runs.") Past but still-valid rule: "This court has held that . . . ." Past fact, permanent truth in dependent clause: "Albert Einstein proved that E equals mc^2."

15. Hate Metadiscourse. Metadiscourse is discourse about discourse. It's throat clearing. Get to the point without a running start that occupies space but adds nothing. Delete the following: "After due consideration," "as a matter of fact," "bear in mind that," "for all intents and purposes," "it appears to be the case that," "it can be said with certainty that," "it goes without saying that," "it is clear that," "it is important (or *helpful* or *interesting*) to remember (or note) that," "it is significant that," "it is submitted that," "it should be emphasized that," "it should not be forgotten that," "the fact of the matter is," and "the point I am trying to make is that." *Example:* "Please be advised that your hair is on fire." *Becomes:* "Your hair is on fire."

16. Hate "Of." Readers who see "of" know you're wordy. Eliminate "of" by creating possessives or by inverting or rearranging the sentence. *Possessive example:* "The foregoing constitutes the decision and order of the court." *Becomes:* "This opinion is the court's decision and order." *Rearranging and inverting examples:* "I am a fan of the Doors." *Becomes:* "I am a Doors fan." "Because of Judge Doe's status as a judge . . . ." *Becomes:* "Because Judge Doe is a judge . . . ." "He's a justice of the Supreme Court of the State of New York." *Becomes:* "He's a New York State Supreme Court justice." "You're not the boss of me." *Becomes:* "You're not my boss."

> Get to the point without a running start that occupies space but adds nothing.

If the possessive looks awkward, keep the "of." "Subdivision B's remedies." *Becomes* "The remedies of Subdivision B." "The Fire Department of the City of New York's (FDNY) policies." *Becomes:* "The policies of the Fire Department of the City of New York (FDNY)."

Delete "as of." "The attorney has not filed the motions as of yet." *Becomes:* "The attorney has not filed the motions yet." Don't use "of" prepositional phrases: "Along the line of" *becomes* "like." "As a result of" *becomes* "because." "Concerning the matter of" *becomes* "about." "During the course of" *becomes* "during." "In advance of" *becomes* "before." "In case of" *becomes* "if." "In lieu of" *becomes* "instead of." "In the event of" *becomes* "if." "On the grounds of" *becomes* "because." "Regardless of whether or not" *becomes* "regardless whether." "With the exception of" *becomes* "except." Also, eliminate "type of," "kind of," "matter of," "state of," "factor of," "system of," "sort of," and "nature of."

17. Hate Redundancies. Redundancy is the unnecessary repetition of words or ideas. "Advance planning" *becomes* "planning." "Adequate enough" *becomes* "adequate." "Any and all" *becomes* "any." "As of this date" *becomes* "today." "At about" *becomes* "about." "At the present time" *becomes* "now." "At the time when" *becomes* "when." "By the time" *becomes* "when." "Complete stop" *becomes* "stop." "During the time that" *becomes* "during." "Each and every" *becomes* "each" or "every," but not both. "Few in number" *becomes* "few." "For the reason that" *becomes* "because." "If that is the case" *becomes* "if so." "In the event that" *becomes* "if." "Necessary essentials" *becomes* "essentials." "Necessary requirements" *becomes* "requirements." "On the condition that" *becomes* "if." "Several in number" *becomes* "several." "Sworn affidavit" *becomes* "affidavit." "True facts" *becomes* "facts." "Until such time as" *becomes* "until." "Whether or not *becomes* "whether."

18. Hate Jargon, Slang, Colloquialisms, Trendy Locutions,

CONTINUED ON PAGE 58