FEBRUARY 2010
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NEW YORK STATE BAR ASSOCIATION

Journal

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By Peter E. Bronstein and David A. Typermass

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NEW YORK STATE BAR ASSOCIATION
Journal

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MICHAEL E. GETNICK

Help Wanted: IOLA in Crisis

"The legal profession owes it to itself that wrongs do not go without remedy because the injured has no advocate."

– Charles Evans Hughes, former Justice of the U.S. Supreme Court and Past President of the State Bar, 1917–1918

As I complete this President's Message, we are ushering in a new year knowing there is more to be done. Although many of us have gladly said good-bye to a grim 2009, not all is merry and bright as we face 2010. People are struggling. In New York, unemployment still hovers around 9%, just below the national average of 10.2%. One in eight Americans and nearly one in four children are food stamp recipients, including 10% of New Yorkers. And 3.9 million homes are in foreclosure nationwide, several thousand of them belonging to New York homeowners.

The market may be rebounding, but the residual effect of the recession is being felt in every town and city across our nation. Experts predict that it could take five years to recover the more than seven million lost jobs. Unemployment and homelessness have increased the number of people without access to basic needs, such as food, shelter and medical assistance, and legal services providers cannot meet the needs of those seeking legal help. Since the recession began, the Legal Aid Society reports a 16% rise in the number of clients seeking domestic violence help, a 20% increase in housing cases, a 30% increase in employment-related cases, and a 40% increase in health-related cases. The increased demand has forced the Legal Aid Society to turn away eight of every nine clients who seek help.

And the increased need comes at a time when funding is decreasing. The state is dealing with a budget crisis, and state appropriations for civil legal services, which were already inadequate, suffered an additional 12.5% reduction late last year when the Legislature passed the Governor's Deficit Reduction Plan. The Interest on Lawyer Account Fund, or IOLA, is a funding source for many civil legal services providers, but it too has fallen victim to the recession. The IOLA fund relies on the interest rate provided by banks holding IOLA accounts, and those interest rates have dropped from nearly 2.25% in 2007 to .31% at the end of 2009. As a result, the fund has only $8 million available for its more than 70 grantees this year, as opposed to $32 million last year. And while we were pleased that Congress added $30 million in civil legal services funding through the Legal Services Corporation for 2010 and removed the prohibition of providers' ability to accept attorney fees, the restriction on the use of non-federal funding still exists and hamstrings the ability of legal services organizations to make the most efficient and effective use of the funding they do receive.

One of the very highest priorities of the New York State Bar Association is increasing the availability of counsel in civil cases for those of limited means. Over the past few months, President-elect Stephen Younger and I, working closely with our Steering Committee on Legislative Priorities, wrote letters to and met with state and federal legislators, and testified before the state Senate on IOLA and the future of civil legal services. We continued to advocate for a permanent Access to Justice Fund within the state budget that is administered by a state-level agency. We applauded the Judiciary for including within the Unified Court System budget an emergency appropriation of $15 million to help offset the declining IOLA revenue, and urged state legislators to approve that appropriation.

What can you do to help? In the January/February 2010 *State Bar News*, Past President Kate Madigan, now a trustee of the IOLA fund, asked members to take a look at their firm's IOLA account, review the interest rate and determine whether the bank charges any service fees. She noted that some New York banks currently pay as much as 1% on IOLA accounts and

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do not charge service fees either to the account holder or to the IOLA fund upon transfer of the funds. If your bank does not offer competitive rates, please urge your bank to contact IOLA to renegotiate the interest rate and service fee on your IOLA account. Point out that this would encourage more firms to do business with the bank as well as have a direct positive impact on our commitment to access to justice. As Kate noted, if only half of the $3 billion in New York's IOLA accounts were deposited in banks paying 1% interest, IOLA would earn an additional $15 million. Visit the IOLA Web site at www.iola.org and click on "Banks" to learn which banks provide the highest yields on IOLA accounts.

This is a relatively simple step that you can take in this new year to do something good for those less fortunate and in desperate need of legal help. As a former legal services attorney and past president of the Legal Aid Society of Mid-New York, I truly believe in the value and the necessity of adequately funding programs that provide civil legal services to indigent New Yorkers. At the State Bar, we pledge to continue to do our part to advance the cause of equal access to justice. Please join us. ■

NYSBACLE

Tentative Schedule of Spring 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.

Persuasive Writing for Lawyers
(half-day program)
February 9 — New York City (6:00–9:00 pm)
February 18 — Westchester (9:30 am–12:30 pm)
February 19 — Albany (9:30 am–12:30 pm)

Gain the Edge – Negotiating Strategy for Lawyers
February 24 — New York City
February 25 — Long Island
February 26 — Albany
February 27 — Syracuse

Best Practices of Legal Management
February 25 — New York City

Auto Litigation
March 5 — New York City
March 12 — Buffalo; Long Island
March 19 — Albany; Syracuse

†Sixth Annual International Estate Planning Institute
(two-day program)
March 18–19 — New York City

Bridging the Gap Spring 2010
(two-day program)
March 24–25 — New York City

Depositions
April 7 — New York City
April 9 — Albany
April 23 — Syracuse
April 30 — Buffalo; Long Island

Health Law Fundamentals
April 9 — New York City
April 16 — Albany

Ethics and Civility
(9:00 am – 1:00 pm)
April 9 — Rochester
April 16 — Buffalo; New York City
April 23 — Albany; Long Island

Practical Skills: Family Court Practice
April 13 — Albany, New York City; Rochester; Westchester
April 14 — Buffalo; Long Island; Syracuse

†The Nuts and Bolts of Arbitrating Individual Employment Claims (Webcast)
April 16 — Albany

Practicing Matrimonial and Family Law in Chaotic Times – Part Two
(9:00 am – 1:00 pm)
April 16 — Long Island
April 23 — Westchester
May 14 — New York City
May 21 — Rochester
June 18 — Albany

†14th Annual New York State and City Tax Institute
April 22 — New York City

Practical Skills: Mortgage Foreclosures & Workouts
April 22 — Albany; New York City; Rochester
April 27 — Buffalo; Long Island; Syracuse
April 29 — Westchester

Women on the Move
April 29 — Albany

†Ethics & Professionalism (video replay)
April 30 — Canton

Immigration Law
(two-day program)
May 4–5 — New York City

Commercial Real Estate Leases
May 5 — New York City

Practical Skills: Basic Torts
May 6 — Albany; Buffalo; Long Island; Westchester
May 7 — New York City; Syracuse

DWI on Trial
(one-and-a-half-day program)
May 6–7 — New York City

Long Term Care
May 7 — Buffalo
May 14 — New York City
May 21 — Albany

2010 Insurance Coverage Update
June 18 — Albany; Long Island; Syracuse
June 25 — Buffalo; New York City

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Business Valuation Reports – The Importance of Proactive Lawyering

By Peter E. Bronstein and David A. Typermass

Lawyers see business valuation reports in many contexts and situations. Frequently prepared in divorce cases, these reports can be used in estate, tax and corporate cases as well. In a divorce, for example, such an appraisal can be the linchpin for substantial capital awards between spouses. Yet, attorneys and judges often don't pay enough attention to the appraisal process and how small changes in the assumptions and procedures can have a major impact on the bottom line.

Appraisers make judgments based upon parameters that they have chosen, often subjectively. As a result, an appraiser can come up with substantially different valuation results depending on the assumptions he or she uses. Understanding the key methodologies, concepts, and terms that underlie the typical business valuation report will help the practitioner understand the dangers implicit in failing to carefully assess and challenge, if necessary, the assumptions underlying each report.

The Neutral Appraiser

Many judges will accept as presumptively correct the findings made by a "neutral" appraiser who has been appointed by the court to produce an unbiased valuation report. Therefore it is crucial for the attorney to understand the process and to proactively find ways to advocate for the proper methodology before the appraisal is finalized. If the process is allowed to take its natural course, an appraiser will be appointed and after an investigation that might take place directly with the principal, and without any input from counsel or counsel's expert, a report will be issued. If a preliminary report is submitted and counsel does not understand that there are issues with the draft report that cut against the client's position, and counsel does not pose the right questions or offer the correct counter-arguments to the court's expert, the final report will box both the client and the appraiser into fixed positions.

The first step, then, is for the attorney to get to know the business at issue and to make sure the client completely understands the valuation process so that, together, the attorney and client can provide the appraiser with all the information necessary to produce a report that accurately reflects the positions most favorable to the client.

The Importance of a Preliminary or Draft Report

Unfortunately, all too often, once the final report issues the appraiser feels compelled to "defend" the decision to use a certain process and convincing a court to ignore the neutral's conclusion is very difficult. When possible, it is advisable to have the court and the neutral appraiser agree to

provide both sides with a preliminary or "draft" appraisal and to solicit comments from each side about the findings contained in that draft report. From the neutral's point of view such a debate over preliminary findings can save the expert from embarrassment later when he or she could be confronted with a fact or an authority that had been ignored or overlooked.

The draft report provides insight into the proposed analytical process. For example, let's say the preliminary report reveals that the appraiser has used a discount rate that assumes a low risk of disruption to a future income stream. Having the opportunity to convince the appraiser that the discount rate should be substantially higher – to take into account risks that he or she might not have understood or considered in the preliminary analysis – could greatly influence the bottom line.

The point is, every appraisal has a methodology or approach that leads to a final valuation conclusion. Even a small alteration can lead to a major change in the conclusion and a combination of such changes can radically alter the result. The attorney must proactively seek to understand that approach and its underlying concepts and, where possible, make sure that the expert has the advantage of the facts, circumstances, and analysis he or she needs. The preliminary or draft report affords the advocate the opportunity to suggest alternative databases, facts or methodologies and perhaps the chance to open the eyes of an appraiser to flaws or weaknesses in his or her analysis. When confronted with persuasive arguments rebutting some of the assumptions and conclusions of a draft, appraisers are more apt to accept suggestions than after issuing a final report that they might feel compelled to defend. If the advocate can convince the expert of the existence of an indefensible position in the draft, the expert still has the time to change the final report and can thereby avoid a rough cross-examination on the witness stand and possible damage to the expert's valuable reputation.

While judges may be wary of an "independent" business appraiser falling prey to the undue influence of an aggressive advocate and as a result may be tempted to forbid or limit any communications between attorneys and a neutral appraiser, such restrictions will only weaken the expert opinion, in that it will not address all the alternative approaches that counsel might want addressed. Failing to address issues early on in the process will inevitably lead to a longer and more complex cross-examination at trial and ultimately to the possibility of greater confusion for a court not schooled in financial analysis. A better course might be for appraisers to submit preliminary reports to counsel well in advance of trial so that any errors in fact or judgment can be corrected and all issues can be openly debated before a final report is made.

Avoid the "Neutral Trap"

Judges are understandably persuaded by court-appointed neutrals, for two reasons. First, the neutral is doing the judge a favor by accepting the assignment – and the court is grateful. Perhaps the court has imposed time deadlines, which require the neutral to set aside other work; or perhaps the neutral has been called in because the judge believes that the parties – or their lawyers – are difficult or abusive. Being appreciative of the expert's willingness to accept the assignment, the judge might not particularly want to see the expert battered in cross-examination. Second, unlike the partisan experts appointed by the parties, the court's expert is supposedly unbiased; therefore the court might be inclined to give more weight to the expert's opinion than to that of a "hired gun."

Yet the appraisal process is not an exact science, and independent or court-appointed appraisers can misunderstand the relevant facts. Helping the expert correct the mistakes in a draft report will ultimately save time and money, perhaps by shortening the trial or leading to a settlement in advance of a trial. The need for partisan experts might also be obviated where the independent appraiser has a chance to address all the relevant issues in a final valuation report. If appraisers' preliminary reports are vetted by the parties before they became final reports, the courts would receive better-reasoned and more error-free reports.

Equity would clearly be served if courts encouraged a more open and free-flowing discussion between counsel and a neutral appraiser ahead of trial. To avoid claims of undue influence, the courts could simply require that any attorney wishing to communicate with an independent appraiser about the preliminary report must include his or her adversary in any meetings, telephone calls or correspondence.

Methodology Concerns

The first question any evaluator must consider is what exactly is being valued. That may sound obvious, but it is particularly relevant in matrimonial matters where an intangible "asset" is more an intellectual construct of the courts and the evaluators than a traditionally accepted "thing of value." Intangible assets such as enhanced earning capacity, the increase in value of separate property, the value of a non-marketable license or career or

partnership, have particular and precise elements that are important to understand and define. The appraiser needs to analyze and understand the nature of the interest being valued. The definition of the interest being valued should be clearly communicated to both sides in the report since this definition frames all of the subsequent choices made by the appraiser, starting with which valuation methodologies will be used.

Once the interest being valued is clearly understood, one of the first questions to ask is whether the appraiser used an appropriate standard of value to value that interest. A standard of value is a definition of the kind of value the appraiser is seeking to obtain. Fishman, Pratt, and Morrison write in *Standards of Value* that there are two "premises of value" – "value in exchange" and "value to the holder" – which underlie every standard of value.[1] Value in exchange is defined as "the value of the business or business interest changing hands, in a real or hypothetical sale," whereas value to the holder represents "the value of a property that is not being sold but instead is being maintained in its present form by its present owner."[2] The fair market value[3] standard, perhaps the most commonly used standard of value, falls under the value in exchange premise and should be used to value businesses that have a likelihood of being sold. The investment value standard, another commonly used standard of value, which represents the value of an asset to its owner, falls under the value to the holder premise of value and is used for companies that will remain in the owner's hands after the case is over.

The standard of value used by an appraiser will depend on the unique facts of the business being analyzed and the purpose of the appraisal. For example, it is appropriate to value an interest in a publicly traded company using the fair market value standard but that standard may not be suitable to value a non-marketable interest in a private professional practice such as a law firm or a medical practice. A better standard of value for valuing non-marketable professional practices might be the investment value standard of value.

Once the attorney understands why a particular standard of value was chosen, the next question is, Did the appraiser use an appropriate valuation approach and underlying methodology? There are three primary valuation approaches: (1) the asset-based approach; (2) the income-based approach; and (3) the market-based approach. Within each of these approaches there are various techniques or methodologies an appraiser can use to calculate value. It is up to the attorney to understand how these methodologies work and to be able to evaluate their effectiveness in establishing a fair and reasonable valuation of the subject business.

Most appraisers will use two or more valuation methodologies in determining a final value for a business. Sometimes the appraiser considers one particular method to be the most reliable but uses additional methods as a reality check against the favored one. If it is not readily apparent, the attorney should question the appraiser about the weight given to each methodology used. The attorney should carefully examine any language in the report that credits or discredits the reliability of a particular methodology, especially if a discredited methodology still appears to have been used in determining the final result.

> The appraisal process is not an exact science, and independent or court-appointed appraisers can misunderstand the relevant facts.

If the appraiser is using a value in exchange standard of value, such as fair market value, it is often appropriate to apply certain discounts, such as a lack of marketability discount, in the valuation analysis. Conversely, a value to the holder analysis might not include such discounts because the holder is, in theory, retaining the business interest. Such discounts and premiums are highly subjective and can have a major impact on the final valuation, so their presence or absence must be seriously evaluated by the advocate. For example, if an attorney can persuade an appraiser that a 40% discount rate should have been applied to the client's business interest the attorney can, with one blow, substantially change the effect of the appraisal and consequently the cost of the divorce or, in a tax case, the taxes payable.

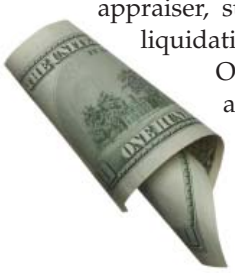
Sometimes an appraiser will factor in a discount or premium within his or her cost of capital rate, making it difficult for the attorney to segregate the appraiser's independent assumptions. The attorney must understand the reasoning underlying any such discounts used by the appraiser and, when necessary, vigorously question, challenge or defend their use.

Asset-Based Valuation Methods

An asset-based valuation method focuses on determining the value of a business by valuing its underlying assets. Asset-based methodologies are useful for businesses that have a significant amount of their value tied up in their

tangible assets and are highly appropriate for businesses in which the underlying assets represent the true value of the company, such as for a real estate holding company.

The most commonly used asset-based methodology is the net asset method, also known as the asset accumulation method. Under this method an appraiser adjusts the cost basis values of a company's assets and liabilities, which are found on its balance sheet, to the appropriate value based on the standard of value used by the appraiser, such as, for example, fair market value or liquidation value.[4]



Once the appraiser determines the appropriate values of the assets and liabilities on the balance sheet, he or she will deduct the total liabilities from the total assets to arrive at a net asset value for the company. Fair market values are appropriate if the company is being valued as a going concern. If, however, the company is to be liquidated and the assets sold off separately, then the standard of value would be a liquidation value. In such a case, the assets and liabilities would be adjusted to liquidation values. Liquidation values can be either orderly liquidation values or distressed liquidation values, depending on the specific circumstances of the company being liquidated.

The net asset method is appropriate when the projected income for the company is not a good indicator of the company's true value. One of the shortcomings of the net asset method is the difficulty in valuing intangible assets, such as goodwill, that may be on the balance sheet. The net asset method also does not take into consideration intangible assets that were never recorded on the balance sheet. A hybrid valuation methodology, the excess earnings method, which combines the net asset method with the capitalized income method (discussed in the following section), is sometimes used to value companies with significant intangible assets or goodwill. Attorneys should be aware that the excess earnings method, while still accepted by the courts, is currently disfavored by the Internal Revenue Service, which created it, and by many appraisers. While the current issues being debated among appraisers are beyond the scope of this article, it behooves the attorney to understand not only how certain methodologies work but also why they may or may not be in vogue within the appraisal community.

Income-Based Valuation Methods

When a company has a history of positive earnings, and its future expected earnings represent a substantial part of the company's estimated value, an income-based valuation approach is usually a suitable methodology. The two primary types of income-based methodologies are a discounted future income method and a capitalization of income method.[5] The discounted future income method should be used when a company's future income is expected to differ significantly from current income; the capitalization of income method should be used when a company's income in the future is expected to closely resemble the past.

Discounted Future Income Method

When using the discounted future income method the appraiser forecasts, or uses management's forecast of, several years of projected future earnings, or cash flows, and then discounts these projections back to present value using an appropriate discount rate. The advocate should make sure that the appraiser's forecast of projected future earnings uses a realistic terminal year growth rate. Make sure that the company projections go far enough into the future to a point where the company can realistically be forecasted to have reached a steady and sustainable long-term growth rate. Forecasts that show the subject company growing at an above-average growth rate into perpetuity should be a red flag for the advocate.

The discount rate is, essentially, the appraiser's best estimate for the rate of return an investor in the subject company would require, given the risk associated with his or her investment. The attorney should pay special attention to the discount rate used by the appraiser because the discount rate will be a big driver of the business's overall valuation. The higher the discount rate the lower the net present value of the cash flow will be. All else being equal, a more risky company with less predictable future cash flows will have a higher discount rate and a lower valuation than a company with more predictable cash flows.

An appraiser determines a discount rate by combining a risk-free rate, such as the return for U.S. treasury bonds, with one or more risk premium estimates. Discount

rates are highly subjective and can vary widely depending upon the underlying assumptions employed by the appraiser.

Most business appraisals of closely held companies use some variation of the build-up method to arrive at a discount rate. The build-up method literally "builds up" a discount rate by starting with the risk-free rate and then adding on risk premiums such as the equity risk premium, the small company risk premium, an industry risk premium and a company-specific risk premium. Equity risk, small company and industry risk premiums can be derived using public market data while the company-specific risk premium is based solely on the professional judgment of the appraiser. It is the most subjective of the risk premiums.

The advocate should always question the appraiser's basis for his or her selection of risk rates and risk premiums. If an appraiser fails to provide the attorneys with any details as to how he or she arrived at a particular discount rate it may be a sign that the appraiser may not be able to justify the risk premium assumptions. Certainly it is incumbent upon the advocate who is most harmed by the chosen discount rate to challenge the appraiser's underlying assumptions and, if those assumptions are not clear in a preliminary draft, to demand a detailed explanation in the final report.

Capitalization of Income Method

An appraiser using the capitalization of income method will take a base year estimate of the company's normalized income and then multiply that single income estimate by a capitalization rate to arrive at a valuation. A capitalization rate is essentially the discount rate appropriate for that company minus the company's estimated long-term growth rate.

By using a single estimate in the capitalization of income method, the appraiser is assuming a constant income stream which will grow at the same rate into perpetuity. This reliance on a single income estimate places a higher premium on accuracy and is a reason why this method should be used only for companies whose future income is highly predictable and not expected to differ from the immediate past.

Built into the capitalization rate is the appraiser's estimate for any long-term growth in the business. The practitioner should make sure that the long-term constant growth rate used in the capitalization method is reasonable. Most appraisers tend to use long-term growth rates between 0% and 3%; anything higher than 3% should be questioned by the attorney as being overly optimistic and unsustainable.

Keys to Effective Valuation Advocacy

- Demand a draft or preliminary report
- Make sure the interest being valued is accurately defined
- Understand the standard of value – value to whom?
- Analyze the valuation approaches used and understand why other approaches were not used
- Understand how present value discount rates were calculated
- Question the appraiser's basis for the selection of risk rates and premiums
- Always respond to any draft or preliminary reports before they are finalized
- Use your analysis to advocate for a more favorable valuation appraisal
- Persuade the appraiser that adopting your reasoning in a final report will be easier to defend at trial

Normalized Income Estimate

No matter what valuation method is used, an appraiser's determination of normalized income should be a reasonable estimate of what a company's sustainable level of income will be in the future. This analysis should involve a careful examination of a company's historical income while taking into consideration estimates for growth and margins in the overall industry. In some cases the most recent years may be the best proxy for future income but in other cases the appraiser may want to take a weighted average of a few years of historical income. The attorney should make sure that the appraiser's assumptions regarding past income are reasonable in light of future expectations. For example, if future income is expected to be more like that of the recent past, then using an equally weighted average of the income from the previous five years may be inappropriate. The appraiser should also eliminate from historical income any non-recurring income, expenses or one-time events, and smooth out recurring income or expense items where necessary, thereby "normalizing" the income.

The attorney should be on the lookout for any questionable choices the appraiser made in his or her normalized income estimate since even small adjustments made to historical income will be magnified when growth and

capitalization rate assumptions are applied to that estimate.

Market-Based Valuation Methods

Market-based valuation methods can be very persuasive because they are relatively easy to understand and rely on actual market transactions. An appraiser using such a method will apply one or more valuation multiples, derived from either public or private market transactions, to the subject company to arrive at a valuation for that company.

The most important criterion in a market-based valuation analysis is the extent to which the subject company can reasonably be compared to other public or private companies for which transaction data exists. The more distinct a subject company is from its comparables the less reliable a market-based methodology will be. Sometimes an appraiser will find enough comparable companies in the same industry as the subject company but often the analysis will also use comparable companies from a similar industry. Good comparisons can be hard to find for small, privately held companies that may have unique characteristics. One of the most commonly used market-based methods is the guideline company method.

Guideline Company Method

For a business that has good public market comparisons the guideline company method may be quite useful. An appraiser using this method should provide an exhaustive analysis of how the subject company compares to the guideline companies to which it is being compared. The appraiser should examine and compare all the relevant financial metrics of the group of companies to determine which are the most relevant. Once the most relevant financial metrics are determined, these metrics are applied to the publicly traded prices for the guideline companies to determine a series of relevant market multiples – for example, price-to-sales. An appraiser will typically take an average or median market multiple and apply that multiple against the relevant financial metric of the subject company to arrive at a value for that company.

Sometimes it is not appropriate simply to use the average or a median market multiple. Multiples might need to be adjusted downward or upward before they are applied to the subject company depending on how comparable the subject company is to the group on the metric being considered. For example, the subject company may have only $10 million in sales whereas the guideline group averages $50 million in sales and has an average price to sales ratio of three times. It might be more reasonable to apply a lower multiple to the subject company than a three times multiple given its significantly smaller size relative to the comparable group. These types of decisions are highly subjective and therefore must be carefully scrutinized by the advocate.

The closer the subject company is to the group, in terms of key financial ratios and other relevant metrics, the fewer adjustments will have to be made and the less subjective the valuation will be. The advocate must make sure that the appraiser properly considers all the relevant and unique characteristics of the subject company. If the appraiser has to make large adjustments to the average or median market multiple it is a good indication that either the multiple is not very useful or the group is too different from the subject company on that particular financial metric.

Market-based methods should always be questioned if they produce a broad range of valuations depending on the different market multiples being applied. For example, if an appraiser finds that a price-to-sales multiple produces a vastly different valuation than a price-to-cash multiple, then it would appear that a market-based valuation needs more fine tuning because the multiples are not able to adequately capture all of the subject company's unique qualities.

Conclusion

Business valuation is often described as part art and part science because many of the techniques used by business appraisers require the use of subjective assumptions. Understanding when those subjective assumptions are being used and being able to evaluate their reasonableness is essential to a solid understanding of the business valuation process. Fortunately for those in the legal profession the underlying math used in most business valuations is not complex, and a solid understanding of the process can be attained with a modest amount of effort. The reward for that effort is the ability to question, and when necessary challenge, the choices made by the business appraiser. ■

1. Jay E. Fishman, Shannon P. Pratt & William J. Morrison, Standards of Value, 20–21 (2007).

2. *Id.* at p. 21.

3. Fair market value is the price that property would sell for on the open market. It is the price that would be agreed on between a willing buyer and a willing seller, with neither being required to act, and both having reasonable knowledge of the relevant facts. IRS Publication 561, *Determining the Value of Donated Property*, p. 2 (Rev. Apr. 2007).

4. Assets and liabilities are typically, but not always, entered on financial statements at their purchase/acquisition costs under the "cost-based" method of accounting. An asset-based approach is therefore frequently referred to as a "cost-based" approach.

5. An appraiser will use either earnings (net income from the income statement) or cash flows (from the cash flow statement) as the preferred measure of economic income. While an appraiser's use of either earnings or cash flows may be appropriate in certain cases, the practitioner should be aware that cash flows tend to be more reliable and less subject to manipulation than earnings from an income statement.

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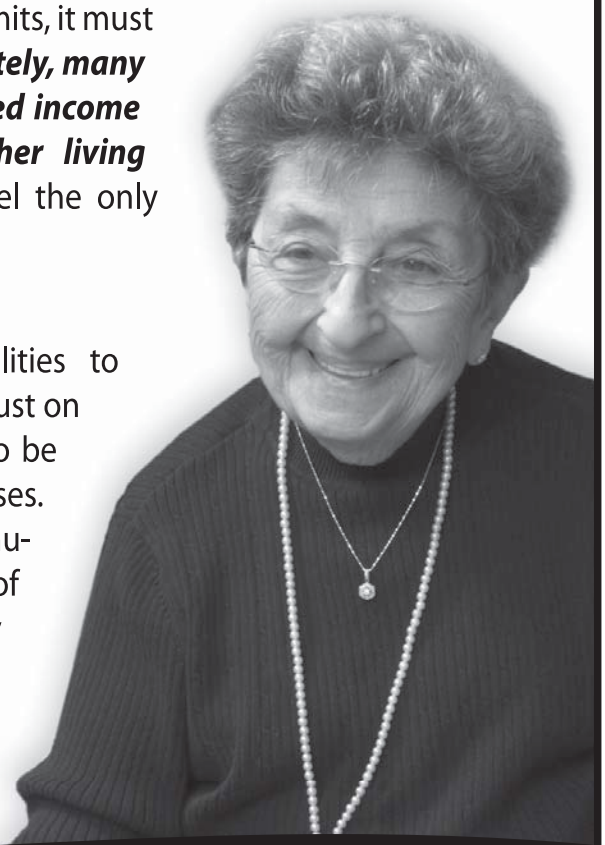
- *Do you wish to remain at home and avoid a nursing home?*
- *Are you applying for Community Medicaid to obtain home care?*

The Lifetime Care Foundation Community Trust can be an excellent resource for you.

HERE'S HOW:

Often, elderly people who suffer from medical disabilities are living on limited fixed income from pensions and social security. When this income exceeds Medicaid monthly limits, it must be used to pay for medical services. ***Unfortunately, many elderly people need every penny of this limited income to continue to pay for their rent and other living expenses.*** Without this income, they may feel the only option is to enter a nursing home.



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Signature Required

Summary judgment originated in England in 1855 and was adopted in New York as Civil Practice Rule 113 in the Civil Practice Act (CPA) in 1921.[1] Originally quite limited in scope, its application was expanded in 1932.[2] In the relatively brief period between its enactment and amendment,

> both bench and bar came to look upon the summary remedy as an integral part of the law. While the original enactment was fought by many who saw in it an encroachment upon the ancient right of trial by jury, the amendment encountered practically no opposition.[3]

The CPLR provided for summary judgment from its inception and a number of modifications have been made over the years, the most recent in 1997 when CPLR 3212(a) was amended to set a window post-note of issue beyond which summary judgment motions can only be made "with leave of court on good cause shown."[4]

For the court considering a motion for summary judgment,

> [i]ssue finding, as opposed to issue determination, is the key to summary judgment, and the court should refrain from resolving issues of credibility. Furthermore, the papers should be scrutinized carefully in the light most favorable to the party opposing the motion.[5]

Today, summary judgment is frequently sought, and not infrequently granted. Mistakes in summary judgment practice run the gamut, from waiting too long to make the motion, resulting in denial of the motion under *Brill*,[6] failing to annex as exhibits the pleadings,[7] and failing to furnish proper proof.[8]

Proof Required on Summary Judgment

Deposition transcripts are often submitted as proof in support of, or in opposition to, motions for summary judgment. Proof submitted in support of a motion for summary judgment must be in admissible form, as the most frequently cited case in New York civil practice, *Zuckerman v. City of New York*,[9] makes clear:

> To obtain summary judgment it is necessary that the movant establish his cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in his favor, and he must do so by tender of evidentiary proof in admissible form.[10]

The party opposing the motion may be permitted some latitude to submit, with explanation, proof that is not in admissible form:

> On the other hand, to defeat a motion for summary judgment the opposing party must "show facts sufficient to require a trial of any issue of fact." Normally if the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet the strict requirement of tender in admissible form. We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.[11]

While affidavits are the type of proof generally contemplated on summary judgment, other proof may be utilized:

> The Court of Appeals discussed the evidence necessary to grant or defeat a motion for summary judgment pursuant to CPLR 3212(b) in *Friends of Animals, Inc. v. Associated Fur Manufacturers, Inc.* In order to obtain summary judgment, a party must present evidentiary proof in admissible form sufficient to warrant the court to direct judgment as a matter of law. The same type of proof must be presented to defeat the motion, although reasons may exist why the opponent cannot present such proof. Affidavits are important to establish what the facts are and the person who signs an affidavit but has no knowledge of the facts is not advancing the case. Similarly, while other evidence may be submitted on the motion, it must be in an appropriate form or it cannot be considered

as evidence. Thus, in *Borchardt v. New York Life Ins. Co.*, a medical record that was not certified was insufficient to grant summary judgment.[12]

What happens when the proponent of summary judgment fails to supply required proof?

> The party who moves for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. Failure to make the requisite showing requires denial of the motion, regardless of the sufficiency of the opposing papers.[13]

The Court of Appeals has repeated this requirement time and time again:

> The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.[14]

CPLR 3116(a)

CPLR 3116(a) provides that a deposition transcript must be furnished to the witness "for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them."[15] This permits the witness to correct error in the transcript, whether as a result of faulty transcription or incorrect answer, but requires that the reason(s) for the change be set forth.

The witness must then sign the transcript "before any officer authorized to administer an oath," thus rendering the transcript, as well as any changes and the reasons for the changes, admissible to the extent permitted by law.[16] A witness wishing to make changes must both sign and return the transcript within 60 days, or the rule provides "it may be used as fully as though signed."[17] The rule further provides that "[n]o changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination."[18]

The Collision of Summary Judgment and CPLR 3116(a)

What happens when an unexecuted deposition transcript is submitted in support of a motion for summary judgment without proof that the deposition transcript had been forwarded to the deponent, more than 60 days had elapsed, and the deposition transcript had not been returned, thus permitting its use as if signed?

Simply put, it does not constitute admissible evidence in support of a motion for summary judgment and should not be considered by the court.[19]

As the Second Department recently explained:

> The Supreme Court properly denied the defendants' motions for *summary judgment* since they failed to submit sufficient evidence in admissible form to establish their entitlement to judgment as a matter of law. The defendants failed to show that the *unsigned deposition transcripts* of various witnesses they submitted in support of their motions had previously been forwarded to the relevant witnesses for their review pursuant to CPLR 3116(a). Hence, contrary to the defendants' contention, they were not admissible.[20]

A worthy overview of this important subject is found in Justice Braun's decision in *Palumbo v. Innovative*

Communications Concepts,[21] cited by the Second Department in *Pina*. *Pina*'s holding was re-affirmed by the Second Department last year in *Martinez*:

> The defendants failed to show that the unsigned deposition transcripts of the various witnesses, submitted in support of the defendant Lee's motion and relied upon by Liberty in its cross motion, previously were forwarded to the relevant witnesses for their review pursuant to CPLR 3116(a). The transcripts did not constitute admissible evidence. The translated affidavit that lacked the translator's attestation also did not constitute admissible evidence. Accordingly, the defendants failed to establish their entitlement to summary judgment.[22]

There is an exception permitting the use of an unexecuted transcript where proper proof of transmission has not been furnished. When a party moving for summary judgment utilizes an unexecuted transcript of its party witness, thereby "adopting" the contents of the transcript, and the transcript is then relied upon by a party opposing the motion, the transcript may be considered as proof submitted in opposition by the opposing party.[23]

A further exception permits the use of an unsigned deposition against a party where the deposition is being used against the party deponent as an admission. The First Department explained why, under this circumstance, the requirements of CPLR 3116(a) did not apply:

> [T]hese requirements are irrelevant to the instant case, because Ogden was merely seeking to use plaintiff's deposition as an *admission*, which need not be in deposition form. An unsigned but certified deposition transcript of a party can be used by the opposing party as an admission in support of a summary judgment motion.[24]

Records and Summary Judgment

Where affidavits and records are used in support of a summary judgment motion, they must be in admissible form. As the First Department, in an opinion affirmed by the Court of Appeals, stated:

> Special Term correctly observed that the rule in respect to summary judgment is that "to obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor, and he must do so by tender of evidentiary proof in admissible form." Applying this rule, Special Term determined that the defendant had failed to meet its burden since the hospital record which set forth information concerning the decedent's prior medical history was not certified[25] nor was an appropriate foundation laid to show that the history of diabetes reflected therein was necessary to treatment at the hospital. Moreover, held Special Term, the statement of the physician who attended the decedent at the hospital, which set forth additional facts concerning the medical history of the decedent, was not in affidavit form. Finally, Special Term found defendant's submissions insufficient to conclusively demonstrate that the misrepresentations allegedly made were "material."[26]

While the foundation for admission of a record may be established through deposition testimony, if the deposition testimony itself is not in admissible form, it cannot provide the necessary foundation for the admission of a record.

Where a party fails to demonstrate *prima facie* entitlement to summary judgment, whether as a result of the failure to submit proof in admissible form or some other defect, the motion must be denied outright without regard to the sufficiency to the opposition papers.[27] However, often a party opposing summary judgment will be reluctant to rest its opposition solely on the movant's failure to supply the necessary *prima facie* proof in admissible form and will interpose full opposition on the merits.

Conclusion

If submitting an unexecuted transcript in support of a motion for summary judgment, be prepared to submit proof, in admissible form, of the transmittal of the transcript in accordance with CPLR 3116(a) to the witness and the failure of the witness to timely return the executed transcript. The standard office transmittal letter utilized when a transcript is sent to the witness will not, in and of itself, suffice. An affidavit should be submitted, referencing the transmittal letter and averring that the transcript was forwarded to the deponent, more than 60 days had elapsed, and the deposition transcript had not been returned.

Otherwise, as the note left by the U.P.S. driver when I am not home to receive a package says, "signature required." ■

Where affidavits and records are used in support of a summary judgment motion, they must be in admissible form.

1. Bernard L. Shientag, J.S.C., Summary Judgment 3 (1941).
2. *Id.* at pp. 4–5.
3. *Id.* at p. 5.
4. CPLR 3212(a).
5. *Menzel v. Plotnick*. 202 A.D.2d 558. 610 N.Y.S.2d 50 (2d Dep't 1994) (citations omitted).

6. *Brill v. City of N.Y.*, 2 N.Y.3d 648, 781 N.Y.S.2d 261 (2004).

7. CPLR 3212(b).

8. *Id.*

9. 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980) (quoting *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979)).

10. *Id.* at 562 (citation omitted).

11. *Id.* (citations omitted).

12. Weinstein, Korn & Miller § 3212.09.

13. *Id.*

14. *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985) (citations omitted).

15. CPLR 3116(a).

16. *Id.*

17. *Id.*

18. *Id.*

19. *See, e.g., Martinez v. 123-16 Liberty Ave. Realty Corp.*, 47 A.D.3d 901, 850 N.Y.S.2d 201 (2d Dep't 2008).

20. *Pina v. Flik Int'l Corp.*, 25 A.D.3d 772, 808 N.Y.S.2d 752 (2d Dep't 2006) (emphasis added) (citations omitted).

21. 175 Misc. 2d 156, 668 N.Y.S.2d 433 (Sup. Ct., N.Y. Co. 1997), *aff'd*, 251 A.D.2d 246, 675 N.Y.S.2d 37 (1st Dep't 1998).

22. 47 A.D.3d at 902 (citations omitted).

23. *Ashif v. Lee*, 57 A.D.3d 700, 868 N.Y.S.2d 906 (2d Dep't 2008).

24. *Morchik v. Trinity Sch.*, 257 A.D.2d 534, 684 N.Y.S.2d 534 (1st Dep't 1999) (emphasis in original) (citation omitted) (citing *R.M. Newell Co., Inc. v. Rice*, 236 A.D.2d 843, 653 N.Y.S.2d 1004 (4th Dep't), *lv. denied*, 90 N.Y.2d 807, 664 N.Y.S.2d 268 (1997)).

25. This certification provision is only applicable to hospital records.

26. *Borchardt v. N.Y. Life Ins. Co.*, 102 A.D.2d 465, 466–67, 477 N.Y.S.2d 167 (1st Dep't) (citations omitted), *aff'd*, 63 N.Y.2d 1000, 483 N.Y.S.2d 1012 (1984).

27. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986); *Menzel v. Plotnick*, 202 A.D.2d 558, 610 N.Y.S.2d 50 (2d Dep't 1994).

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Protecting the Empire: A Practitioner's Primer on the New York False Claims Act

By Michael A. Morse, Bryan S. Neft and Peter S. Wolff

The federal government and the state governments across the United States spend billions of dollars to stimulate the economy and create jobs. How can we ensure that these taxpayer dollars are not the target of fraud, waste, and abuse? Although the federal and state governments employ thousands of law enforcement officers, and auditors, there are simply not enough government agents to police the billions in taxpayer funds spent each year. As a result of limited government resources, these funds have historically been an easy target for would-be criminals.

In 2007, the New York State Legislature took bold action to ramp-up the state's efforts to combat fraud, waste and abuse in government spending by enacting the New York False Claims Act (NY FCA).[1] The act became law on April 1, 2007, and applies to claims filed before, on, or after this date. Although patterned after the federal False Claims Act (federal FCA or FCA), the New York statute provides both traction for state *qui tam*[2] relators (i.e., whistleblowers) and incentives for state prosecutors and state entities that fall victim to fraud. This article examines the similarities and differences between the federal and New York FCAs, and discusses how the NY FCA may prove to be a powerful tool in combating fraud, waste and abuse of New York taxpayer funds.

"The Model of Success": The Federal False Claims Act

The federal False Claims Act[3] is widely regarded as the most effective tool for combating fraud against the federal government. The FCA generally prohibits any individual or business from submitting, or causing someone else to submit, to the government a false or fraudulent claim for payment. Those found to have violated the FCA are required to pay the federal government damages totaling three times the amount of the loss the government sustained, along with civil penalties ranging from $5,500 to $11,000 for each false or fraudulent claim. In addition to the damages and civil penalties, violations of the FCA can trigger a number of potential collateral consequences for defendants, such as disqualification from all future federal and state government contracts.

Congress enacted the FCA (often referred to as "Lincoln's Law") during the Civil War to combat fraud perpetrated against the federal government by suppliers

to the Union Army. The FCA was mostly used sparingly as an enforcement tool during the century that followed its enactment. It was largely ineffective at combating fraud against the federal government until the statute was dramatically revamped in 1986.

Since the 1986 amendments, the FCA has become the federal government's most effective and successful tool for combating waste, fraud, and abuse in federal spending. The federal government has in fact recovered in excess of $22 billion as a result of cases filed under the FCA since the amendments. Nearly one-half of all recoveries, and the majority of the largest settlements, have come from health-care related cases. The FCA has also been effective in combating fraud and abuse in connection with government contracts for defense, energy, construction, housing, natural disaster recovery, Iraq War reconstruction, and other forms of government procurement.

The act's success is due in large measure to lawsuits brought by whistleblowers ("relators") under the *qui tam* provisions of the FCA. In general, the *qui tam* provisions authorize any person or entity to file an FCA case on behalf of the federal government. As a reward for reporting the fraud, the whistleblower may be entitled to receive between 15% and 30% of the government's recovery in the action.

Recognizing the success of the public and private partnership in combating fraud, waste, and abuse in government spending, Congress recently amended the FCA to strengthen the law and broaden the scope of its protections. On May 20, 2009, President Barack Obama signed into law the Fraud Enforcement and Recovery Act of 2009 (FERA).[4] The FERA amendments to the federal FCA fill some judicially created loopholes and add teeth to the law just as billions of dollars in taxpayer funds are being spent to stimulate the economy and rescue the nation's financial institutions.

"A Long Time Coming": History of the NY FCA

Despite the success of the federal FCA, many states, including New York, repeatedly failed to enact similar statutes to protect the billions of dollars in state government spending. While there are many reasons why states have been slow to enact false claims laws, one reason given is that powerful lobbyists have worked diligently to defeat such laws.

In New York, however, a combination of strong legislative and executive leadership, along with substantial financial incentives from the federal government, came together in 2007 to pass a tough state false claims law. Nevertheless, the road to enacting the NY FCA was difficult. The idea of a false claims act in New York had existed as early as 2003, when then-New York State Attorney General Eliot Spitzer recommended the adoption of a state false claims act with a *qui tam* provision.[5] When this bill was introduced in the Legislature, however, two highly influential lobbying groups, the Healthcare Association of New York State and the State Medical Society, opposed its passage,[6] arguing that "the bill would lead to an epidemic of frivolous allegations."[7] Their opposition contributed substantially to the defeat of the bill.

The push toward legislation arose again when, in July 2005, the *New York Times* published a string of articles criticizing state authorities for losing billions to Medicaid fraud and abuse.[8] These articles attributed the losses to relaxed regulation and inadequate policing of New York's Medicaid program.[9] The *Times* estimated that fraud and abuse might account for as much as 40% of overall expenditures in the state's $44.5 billion Medicaid program.[10] The articles identified various abuses of the Medicaid program, including a dentist who billed for nearly 1,000 patients a day; a school district that in a single day referred over 4,000 students for Medicaid-funded speech therapy; and fraudulent medical transportation companies, which purportedly provided transportation for the injured and sick.[11]

Accordingly, in 2006, the New York State Assembly proposed a state false claims law modeled on the federal FCA.[12] This legislation would have imposed civil liability for the submission of any false claims to the state government.[13] Legislation proposed by the state Senate did not contain a similar provision.[14] The Senate, in addition to the Healthcare Association of New York State, opposed the proposal,[15] arguing that Medicaid fraud enforcement should remain a governmental responsibility.[16] Additionally, opponents argued that so-called bounty hunters, or *qui tam* relators, would bring frivolous *qui tam* actions,[17] and that the proposal would conflict with existing law and protocols, would inhibit provider compliance efforts, and would result in abusive litigation.[18] This was enough to, again, defeat false claims legislation in New York.

"Carrots and Sticks": The Perfect Mixture Needed to Pass the NY FCA

On January 1, 2007, the New York False Claims Act got a huge push from newly elected Governor Eliot Spitzer. In his first annual address to the Legislature, Governor Spitzer stated that "we must aggressively fight Medicaid fraud through a state False Claims Act . . . which I will propose this year."[19] The Legislature recognized that the "state is involved in the direct and indirect payment of tens of billions of dollars every year, and the payment of fraudulent claims has a significant adverse effect on the fiscal well being of the state,"[20] and submitted the legislation as an amendment to the state's finance law.[21] Governor Spitzer signed the NY FCA into law as part of the 2007 New York state budget.

At the same time, a key piece of the federal Deficit Reduction Act of 2005 (DRA)[22] became effective. The DRA amended the Social Security Act to provide that "if a State has in effect a law relating to false or fraudulent claims that meets the requirements of subsection (b), the Federal medical assistance percentage with respect to any amounts recovered under a State action brought under such law, shall be decreased by 10 percentage points."[23] Thus, states with false claims laws would be entitled to retain a 10% greater share of the proceeds than states without a false claims law.

The 10% entitlement is not automatic, however. To receive this additional return, a state false claims law would have to include certain provisions[24] and be approved by the Inspector General of the Department of Health and Human Services (HHS), in consultation with the U.S. Attorney General.[25] Fortunately, on August 7, 2007, the Inspector General of the HHS and the U.S. Attorney General approved the NY FCA.[26]

The Federal and New York FCAs: Similarities and Differences

In most respects, the NY FCA is substantially similar to the federal FCA, but there are certain substantive and procedural differences that are important to review and fully understand. The provisions of the NY FCA that differ from its federal predecessor can be generally grouped as follows: statutory penalties, initial obligation when fraud is suspected, initiating procedure, and related actions. The pertinent provisions of each act are discussed below.

Prohibited Conduct and Liable Parties

The NY FCA mimics the federal FCA insofar as they both impose liability upon people who present, or cause to be presented, false or fraudulent claims to an employee or officer of the government for payment or approval. The NY FCA, in addition, provides that "presenting" a false claim to an "agent of the State, or to any contractor, grantee or other recipient of State funds" will trigger a violation of the act. This added provision appears to be a significant effort by New York legislators to assist the state in identifying fraud that involves all government funds – wherever they may be found – when the false claim for the funds is presented, paid or approved. This language covers contractors, subcontractors, consultants, and other entities that contract directly or indirectly with New York. The 2009 FERA amendments to the federal FCA clarified Congress's similar intent to impose potential liability, as the New York statute already provides, for false claims made to any recipient of federal funds.

In one important respect, however, the NY FCA differs from the federal FCA – it does not permit any action to be filed against a state or local government. The New York law defines a "person" subject to the statute as "any natural person, partnership, corporation, association or any other legal entity or individual, *other than the state or a local government*."[27] While the federal FCA does not contain similar language, the U.S. Supreme Court has held that states are not "persons" for purposes of *qui tam* liability under the FCA.[28] However, local governments can be sued under the federal FCA for filing false or fraudulent claims, but the NY FCA eliminates this potentially significant source of false claims act recovery.

NY FCA's Broad Definition of False "Claim"

The NY FCA imposes liability for making "a false or fraudulent claim."[29] The definition of what constitutes a "claim" determines the scope of conduct that will trigger the liability provisions of the act. The New York law defines the term "claim" broadly to include, as its federal counterpart does, "any request or demand, whether under a contract or otherwise, for money or property."[30] In addition, a false "claim" under the NY FCA includes a false request or demand for government money or property made to "any employee, officer, or agent of the state or a local government,"[31] as well as to those listed in the federal act (contractors, grantees and other recipients of government funds). The Legislature has defined "state" very broadly to include "the state of New York and any state department, board, bureau, division, commission, committee, public benefit corporation, public authority, council, office or other governmental entity performing a governmental or proprietary function for the state."[32] Like the federal FCA, the NY FCA is triggered where the state government "provides any portion of the money, [or] property . . . requested or demanded."[33] The NY FCA also attaches liability if the state "will reimburse . . . for any portion of the . . . services requested or demanded."[34]

The Legislature's decision to include claims made to local government within the scope of the NY FCA is important for two reasons. First, this gives the NY FCA the ability to protect funds spent by a "county, city, town, village, school district, board of cooperative educational services, local public benefit corporation or other municipal corporation or political subdivision of the state."[35] Second, under the NY FCA, the New York Attorney General *and a local government* may bring a civil action.[36] The addition of local governments to the NY FCA provides hundreds of such governments with the opportunity to recover money for fraud schemes perpetrated against them.

Requisite State of Mind

Neither the federal FCA nor the NY FCA requires a defendant to have actual knowledge that he or she is submitting a false claim before liability will attach. Rather, liability attaches when a defendant acts "knowing" or "knowingly."

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> [T]he terms "knowing" and "knowingly" mean that a person, with respect to information –
>
> (1) has actual knowledge of the information;
>
> (2) acts in deliberate ignorance of the truth or falsity of the information; or
>
> (3) acts in reckless disregard of the truth or falsity of the information,
>
> and no proof of specific intent to defraud is required.[37]

Additionally (which might be of comfort to some), the NY FCA expressly states that "acts occurring by mistake or as a result of mere negligence are not covered by this article."[38]

Statutory Penalties

Both the federal and New York FCAs impose penalties upon persons who violate either statute, although the statutory penalties under the NY FCA are more stringent. Under the federal FCA, a defendant is liable "to the United States government for a civil penalty of not less than $5,000 and not more than $10,000, plus three times the amount of damages which the government sustains because of the act of that person."[39] In 1999, the U.S. Department of Justice issued a Final Rule increasing these penalty amounts to not less than $5,500 and not more than $11,000.[40]

In contrast, under the NY FCA, a defendant is liable "to the state for a civil penalty of not less than [$6,000] and not more than [$12,000], plus three times the amount of damages that the state sustains because of the act of that person."[41] Additionally, in New York, an actor is liable "to any local government for three times the amount of damages sustained by such local government because of the act of that person."[42]

Both the federal and New York FCAs provide for reduction of civil penalties under certain, prescribed circumstances. Penalties may be reduced under both statutes when: (1) the violator informs the government of the violation within 30 days after the violator first learned of the violation; (2) the violator fully cooperates with any government investigation; and (3) at the time the violator informed the government of the violation, there was no criminal prosecution, civil action, or administrative action under either FCA, and the violator did not know of any investigation into such violation.[43] Essentially, penalties may be reduced when the violator comes clean and fully cooperates with the government. Penalties may be reduced under the same circumstances in New York.[44]

Although statutory penalties are greater in New York, reduced penalties under the federal FCA are equal to or greater than those under the NY FCA. Under the federal FCA, the reduced penalties are limited to "not less than [two] times the amount of damages,"[45] while under the NY FCA, "the Court may assess not more than two times the amount of damages."[46] For example, when the government is damaged in the amount of $100,000, statutory penalties under both FCAs are $300,000. When the circumstances allow for a reduction of damages, the amount due under the federal FCA is between $200,000 and $300,000, while the amount due under the NY FCA is between $0 and $200,000. Given this illustration, it is obviously in the violator's best interest to voluntarily come clean to the government and cooperate fully with any investigation.

Filing Under the NY FCA

An action under the NY FCA may be filed in a federal or state court, with the New York State Supreme Court exercising jurisdiction over state court actions. In contrast, a federal FCA case can be filed only in the federal district court where the defendant may be found, resides, transacts business, or causes the false claims act violations to occur. The federal FCA expressly provides that federal district courts shall have pendent jurisdiction over state FCA claims. There is, however, a clear incentive for filing false claims act actions in federal court, even those a state attorney general initiates. Specifically, pendent jurisdiction relieves the state courts of the cost of administration of these claims, while providing litigants with the federal judiciary's substantial experience with FCA claims and its established caselaw on the subject.

Each of the 62 counties in New York serves as a seat for the state Supreme Court, New York's civil trial division. Each of the 62 county clerk's offices that may receive filings for the state Supreme Court must become comfortable with all the nuances of the seal provisions, which are an integral part of the NY FCA. False claim litigants and their counsel must likewise feel comfortable walking into any New York state court clerk's office and meeting with staff members who can assist them in making certain that the technical aspects of filing a case under seal are meticulously met. Most but not all federal district court clerks' offices are conversant with the NY FCA's seal provisions. Training 62 state clerk's offices to handle the delicate filing requirements designed to preserve the seal would be costly and time consuming. However, the more the NY FCA is used, the more that frauds perpetrated solely against the state and its agencies will be exposed, which will result in state court actions and which, in turn, will provide state clerk's offices with greater exposure to the NY FCA.

Both the federal and New York FCAs contain *qui tam* provisions that authorize a private individual, the relator, to bring an action on behalf of either the "government" or "the people of the state of New York or a local government."[47] Because the NY FCA authorizes the local govern-

ment to pursue relief in addition to the state of New York, there are procedural distinctions between the federal and NY FCAs regarding the filing of the complaint.

Under the NY FCA, a copy of the complaint and the material evidence must be filed *in camera* and remain under seal for 60 days.[48] If the allegations in the complaint allege a violation involving damages to a local government, the state Attorney General may at any time provide a copy of such complaint and written disclosure to the attorney general for such local government. However, if the allegations in the complaint involve damages only to a city with a population of one million or more,[49] or only to the state and such a city, then the Attorney General shall provide the complaint and written disclosure to the corporation counsel of such city within 30 days from the date the complaint was filed.[50]

Investigating Cases Under the NY FCA

Upon receipt of the false claims complaint, both the federal and New York FCAs require their respective attorneys general to investigate the *qui tam* relator's allegations of fraud. In particular, under the federal FCA, the "Attorney General diligently *shall investigate* a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General *may* bring a civil action under this section against the person."[51]

By contrast, the NY FCA authorizes the Attorney General to "*have the authority to investigate* a violation," and "if the Attorney General believes that a person has violated or is violating such section, then the Attorney General *may* bring a civil action on behalf of the people of the State of New York or on behalf of a local government against such person." In addition, a local government "*shall have the authority to investigate violations* that may have resulted in damages to such local government under [the NY FCA], and *may* bring a civil action on its own behalf to recover damages sustained by such local government as a result of such violations."[52] The differences between the statutory text of the federal and New York FCAs is that the U.S. Attorney General is required to investigate a violation under the federal FCA, while the New York State Attorney General and local government are authorized, but not required, to investigate a violation under the NY FCA. Additionally, the U.S. Attorney General, the New York State Attorney General, and New York local government are all authorized, but are not required, to pursue a civil action. Furthermore, in New York, the Attorney General "shall consult with the office of medicaid inspector general prior to filing any action related to the medicaid program."[53]

The state may elect to supersede or intervene and proceed with the action, or to authorize a local government that may have sustained damages to supersede or intervene, within 60 days after it receives both the complaint and the material evidence and information. If, however, the allegations in the complaint involve damages only to a city with a population of one million or more, then the Attorney General may not supersede or intervene in such action without the consent of the corporation counsel of such city. The Attorney General shall consult with the office of the Medicaid Inspector General prior to superseding or intervening in any action related to the Medicaid program.[54]

> The federal and New York FCAs provide for reduction of civil penalties under certain, prescribed circumstances.

The federal and state attorneys general, as well as local counsel, may move to extend the period under which the complaint remains sealed. Under both acts such a motion must be for "good cause" and may be supported by affidavits or other submissions *in camera*.[55] Neither act, however, defines the term "good cause."

Nevertheless, prior to the expiration of this 60-day period, or any extension, the New York Attorney General may elect to "file a complaint against the defendant on behalf of the people of the state of New York or a local government, and thereby be substituted as the plaintiff in the action and convert the action in all respects from a *qui tam* civil action brought by a private person into a civil enforcement action by the Attorney General."[56] When the Attorney General elects to convert the *qui tam* civil action into an action it will prosecute, "then the state shall have the primary responsibility for prosecuting the action."[57] The conversion of the action into an Attorney General enforcement action does not impact the rights of the *qui tam* relator to a portion of the proceeds.[58]

Under the federal FCA, the U.S. Attorney General also has 60 days (or longer if an extension is granted) to proceed with the action, in which case the action shall be conducted by the government.[59] The U.S. Attorney General's decision to proceed with the action also does not impact the rights of a *qui tam* relator to a portion of the proceeds.[60] Thus, when the U.S. government elects to proceed with the action, the government bears the responsibility for prosecuting the action, while the relator retains a right to a portion of the proceeds.

Pending State Action May Bar the *Qui Tam* Plaintiff's Case

The federal and New York FCAs also differ with respect to whether a second party may bring a related action. Under the federal FCA, when a *qui tam* action is brought, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action."[61] Under the NY FCA, however, a person

"may intervene or bring a related civil action based upon the facts underlying the pending action," if that person "has first obtained the permission of the attorney general to intervene or to bring such related action."[62] This is a meaningful distinction between the two statutes. In fact, if the New York State Attorney General's Office uses its authority effectively to permit second parties to commence their own action or intervene, a second party's participation may help to shape the scope and course of a litigation.

Of course, the opportunity for the New York Attorney General or local counsel to recover attorney fees and costs is completely contingent upon their initiating the false claims action or assuming control of an action brought by a *qui tam* relator under the NY FCA. The New York Legislature wisely both enacted this legislation requiring the enforcement of the NY FCA and provided the necessary funding. The office charged with enforcing the NY FCA, namely, the Attorney General's office or local government's counsel, has a compelling incentive to become actively engaged with a *qui tam* plaintiff's case early on – the promise of receiving their counsel fees and costs upon the resolution of the action. This provision empowers the New York Attorney General or the local government's counsel to make their intervention decisions with the knowledge that they will directly benefit from active prosecution of a NY FCA case.

In 2008 alone, New York, acting through the Attorney General, Medicaid Inspector General and other agencies, recovered $551 million that would otherwise have been lost due to Medicaid fraud.

The *Qui Tam* Plaintiff's Share of the Recovered Proceeds

Under both the NY FCA and the federal FCA, a *qui tam* plaintiff receives 15% to 25% of the proceeds of an action or settlement in cases where the government intervenes and 25% to 30% in cases where the government does not intervene, leaving the relator to prosecute the claim without any government resources or assistance. In addition, the *qui tam* relator is entitled to receive reasonable attorney fees, expenses, and costs. The defendant pays these attorney fees, expenses, and costs, all of which will not reduce the relator's share of the recovery by the state and/or local government.

In developing these recovery provisions, the Legislature recognized the integral role of *qui tam* relators in efforts to prosecute fraud, waste, and abuse. The message to potential relators and the *qui tam* bar is clear: private citizens who report false claim violations are integral to the effort to fight fraud – even where the recovery is ultimately based predominantly on the government's own information.

Fees and Costs Available for Initiating and Assuming Control of an Action

Under the NY FCA, when the state Attorney General or local counsel becomes involved in a false claims act action, either by initiating the action or by assuming control of an action previously brought by a *qui tam* plaintiff, the Attorney General and/or the local counsel shall be entitled to receive their reasonable attorney fees, expenses, and costs. A number of state false claims acts contain similar provisions. Surprisingly, the federal FCA has never contained such a potent funding tool. As a result, the federal government lacks similar incentives since the U.S. Attorney General does not have the ability to recoup the considerable resources it dedicates to fighting fraud.

Employee Protection Under the Act

An employee who knows that his or her employer is submitting false claims is placed in a precarious situation. The employee may refrain from reporting this conduct if he or she feels this will invite retaliation. Both the federal and New York FCAs provide protection that discourages employers from retaliating against an employee for either initiating or participating in a false claims action. The FCAs prohibit discrimination and authorize all relief necessary to make the employee whole, providing that any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of the lawful acts done by the employee on behalf of the employee or others, in furtherance of an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney fees.[63]

Under the federal FCA, a retaliatory action may be brought in "the appropriate district court of the United States," while, under the NY FCA, such an action may be brought "in the appropriate supreme court."[64] Claims for

retaliation under these provisions are governed by a six-year statute of limitations.[65]

Statutes of Limitations and Burdens of Proof

With respect to the time allotted for initiating a false claims action, both FCAs require a civil action to be commenced either six years after the date of the violation or three years after the date when the material facts are known or reasonably should have been known, whichever occurs later, but in no event more than 10 years after the date of the violation.[66] Additionally, a plaintiff in either a federal or New York action has the burden of proving all essential elements of the cause of action by a preponderance of the evidence.[67]

Office of the Medicaid Inspector General

In addition to the NY FCA, New York has a second method for combating Medicaid fraud. On July 26, 2006, New York established the Office of the Medicaid Inspector General (OMIG) as an independent, formal state agency in the New York State Department of Health.[68] The current Medicaid Inspector General, James G. Sheehan,[69] reports directly to the Governor.[70] Under New York law, the Inspector General is directed "to pursue civil and administrative enforcement actions against any individual or entity that engages in fraud, abuse, or illegal or improper acts, or unacceptable practices, perpetuated within the medical assistance program."[71]

Conclusion

New York, through the NY FCA and the OMIG, fights fraud through both the private and the public sectors. These statutes, working together, cover all possible avenues for detecting, reporting, and prosecuting Medicaid fraud. While both provisions are relatively new, there can be no doubt that numerous civil actions and recoveries for the state are forthcoming. In 2008 alone, New York, acting through the Attorney General, Medicaid Inspector General and other agencies, recovered $551 million that would otherwise have been lost due to Medicaid fraud. These results should only increase as greater knowledge and resources are committed to the public and private partnership for combating fraud embodied in the NY FCA.

New York has a potent statute, which, if properly cultivated, utilized and protected, will reap significant rewards for the taxpayers of the state. Other states with similar laws have experienced a sizeable increase in their fraud recoveries. The next few years will be crucial to watch how the state, the Attorney General's Office and local government counsel, and *qui tam* relators, as well as the Medicaid Inspector General, will all utilize these fraud enforcement tools on behalf of New York taxpayers.

Only time will reveal the benefits to the taxpayers of the state Legislature's ambitious efforts to combat fraud. ■

1. N.Y. State Finance Law §§ 187–194. ("State Fin. Law").

2. "Qui tam" is the abbreviated form of a Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which means "who as well as for the king as for himself sues in this matter." Black's Law Dictionary 1282 (8th ed. 2004).

3. 31 U.S.C. §§ 3729–3733.

4. Pub. L. No. 111-21, 123 Stat. 1617.

5. Christina Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 Colum. L. Rev. 949, n.78 (May 2007) (citing Press Release, Office of N.Y. Attorney Gen., *Spitzer Calls for Passage of State False Claims Act* (June 12, 2003), *available at* http://www.oag.state.ny.us/media_center/2003/jun/jun12a_03.html.

6. *Id.* (citing Michael Luo & Clifford Levy, *As Medicaid Balloons, Watchdog Force Shrinks*, N.Y. Times, July 19, 2005, at A1).

7. *Id.* (citing Richard Perez-Pena & Danny Hakim, *Lawmakers Hit Deadlock on Medicaid*, N.Y. Times, Mar. 28, 2006, at B1).

8. A. Bateman, Jr., *The Coming Wave of Health Care Fraud and Abuse Prosecutions*, N.Y.L.J., July 23, 2007, p. 10, col. 1 (citing Clifford Levy & Michael Luo, *New York Medicaid Fraud May Reach Into Billions*, N.Y. Times, July 18, 2005, at A1).

9. *Id.*

10. *Id.*

11. *Id.*

12. James Lytle, *Meet the State's Brand New Medicaid Fraud Legislation*, N.Y.L.J., July 10, 2006, p. 9, col. 1.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Eliot Spitzer, *First Annual Message to the Legislature*, *available at* http://www.ny.gov/governor/keydocs/NYS-SoS-2007.pdf.

20. Carl Loewenson & Ruti Smithline, *New York's New False Claims Act*, N.Y.L.J., Apr. 23, 2007, col. 4 (citing 2007 NY S.B. 2064).

21. *Id.* (citing Senate Bill 2064, 2007 Bill Text NY S.B. 2064 (Jan. 30, 2007); Assembly Bill 4308, 2007 Bill Text NY A.B. 4308 (Jan. 20, 2007)).

22. Pub. Law 109-171, 120 Stat. 4.

23. 42 U.S.C. § 1396h.

24. These requirements are as follows:

> (1) The law establishes liability to the State for false or fraudulent claims described in [the federal FCA] with respect to any expenditure described in section 1396b(a); (2) The law contains provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as those described in [the federal FCA]; (3) The law contains a requirement for filing an action under seal for 60 days with review by the State Attorney General; [and] (4) The law contains a civil penalty that is not less than the amount of the civil penalty authorized under section 3729 of [the federal FCA].

25. 42 U.S.C. § 1396h(b).

26. Approval letter from Daniel Levinson, Inspector General, to The Honorable Andrew Cuomo, New York State Attorney General, can be found at http://www.oig.hhs.gov/fraud/docs/falseclaimsact/NewYork.pdf.

27. State Fin. Law § 188(6) (emphasis added).

28. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000).

29. State Fin. Law § 189.

30. State Fin. Law § 188(1).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. State Fin. Law § 188(4).

36. State Fin. Law § 190(1).

37. 31 U.S.C. § 3729(b); *see also* State Fin. Law § 188(3).

38. State Fin. Law § 188(3).

39. 31 U.S.C. § 3729.

40. 28 C.F.R § 85.3(a)(9).

41. State Fin. Law § 189(g)(i).

42. State Fin. Law § 189(g)(ii).

43. 31 U.S.C. § 3729.

44. State Fin. Law § 189(2).

45. 31 U.S.C. § 3729.

46. State Fin. Law § 189(2).

47. 31 U.S.C. § 3730; State Fin. Law § 190(2)(a).

48. 31 U.S.C. § 3730(b); State Fin. Law § 190(2)(b).

49. Only one city in the state of New York, New York City, has a population of one million or more.

50. State Fin. Law § 190(2)(b).

51. 31 U.S.C. § 3730(a) (emphasis added).

52. State Fin. Law § 190(1) (emphasis added).

53. *Id.*

54. State Fin. Law § 190(2)(b).

55. 31 U.S.C. § 3730(b)(3); State Fin. Law § 190(2)(b).

56. State Fin. Law § 190(2)(c) (emphasis added).

57. State Fin. Law § 190(5)(a).

58. State Fin. Law § 190(6).

59. 31 U.S.C. § 3730(b)(4).

60. 31 U.S.C. § 3730(c).

61. 31 U.S.C. § 3730(b)(5).

62. State Fin. Law § 190(4).

63. *See* 31 U.S.C. § 3730(h); *see also* State Fin. Law § 191(1) (providing for the same relief).

64. *Id.*

65. *United States ex rel. Mishra v. NYSARC*, 03-cv-7250 (S.D.N.Y. March 20, 2009).

66. 31 U.S.C. § 3731(b); State Fin. Law § 192(1).

67. 31 U.S.C. § 3731(c); State Fin. Law § 192(2).

68. N.Y. Public Health Law § 30 ("Pub. Health Law").

69. James G. Sheehan, New York's Medicaid Inspector General, spent 27 years as an Assistant U.S. Attorney, and spent the last five years as Associate U.S. Attorney for Civil Programs, where he was responsible for major cases and program initiatives. Mr. Sheehan has handled major cases in environmental enforcement, savings and loan fraud, and consumer frauds early in his career. Since the late 1980s, Mr. Sheehan has been primarily involved in health care, where he handled or supervised over 500 cases. These cases resulted in recoveries of over $700 million for the federal government. Mr. Sheehan worked with whistleblowers and their counsel in virtually every major health care case, including cases against SmithKline Beecham Clinical Laboratories ($325 million settlement) and Medco Health Systems ($155 million settlement). F. Sheeder, *Meet James G. Sheehan*, HCCA Compliance Today, vol. 10, number two, February 2008, pg. 14.

70. Pub. Health Law § 31(2).

71. Pub. Health Law § 32(6).

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Navigating the Murky Waters of Employment Waivers and Releases

By Eve I. Klein, Joanna R. Varon and Keith Greenberg

Lawsuits. Clients cannot bear to live with them and hope to live without them. In the context of employment disputes, an employer often seeks to prevent litigation by a former employee through the use of a waiver and release. In return for sufficient consideration, an employee agrees to waive any and all claims against his or her soon-to-be former employer and to release the employer from any liability arising from the employment or termination. Within the confines of traditional contract law issues, this arrangement appears relatively straightforward. However, the myriad state and federal statutes regulating the workplace have produced an array of varying limitations on an employer's ability to obtain an enforceable waiver of employment law claims. This article surveys the standards that must be met under the major federal employment statutes, as well as those under New York state employment laws, to achieve a valid waiver and release of claims without litigation.

General Waiver and Release

If an employee who signs a waiver later files a lawsuit, the employer would argue that the court should dismiss the case because the employee waived the right to sue. The employee would typically respond, however, that the waiver is not enforceable because it is legally invalid. Before addressing the employee's substantive claim, a court would initially determine whether the waiver is valid. As a general rule, "[t]he validity of waivers of discrimination claims are evaluated according to ordinary contract law principles."[1] Ordinary contract law prin-

ciples require that a release be knowing and voluntary and supported by consideration in order to be enforceable.[2] Similarly, "the severability of a [waiver provision] should also be determined according to contract law principles."[3] As a federal district court has noted,

> a knowing and voluntary waiver of the right to sue is not void solely because it also references a[n invalid provision]. . . . "You don't cut down the trunk of a tree because some of its branches are sickly." Put simply, the presence of a sickly [provision] does not render [a] [r]elease involuntary, unknowing, or otherwise void.[4]

In addition to ordinary contract law principles, employers should be aware of the various federal and state employment law statutes that limit or otherwise impose additional conditions on an employer's ability to validly release employment-related claims.

Title VII, ADA, EPA and Section 1981

An employee may waive or release an employer from liability for any past claim under Title VII of the Civil Rights Act of 1964,[5] the Americans with Disabilities Act (ADA),[6] the Equal Pay Act (EPA),[7] and 42 U.S.C. § 1981 ("Section 1981").[8] The analysis required to determine whether a waiver and release of a Section 1981, EPA or ADA claim is valid and enforceable is the same used to determine the validity of a Title VII waiver and release.[9] A prospective waiver of an employee's rights is void as a matter of public policy.[10]

A waiver of an employee's Title VII rights must be knowing and voluntary,[11] though a release form "need not enumerate the specific claims [that] an employee is waiving" in order to waive rights under Title VII.[12] In determining whether an employee entered a release knowingly and voluntarily, a number of circuit courts use a totality-of-circumstances test, which varies slightly among jurisdictions.[13] One iteration of the test considers:

> (1) the employee's education and business experience; (2) the employee's input in negotiating the terms of the settlement; (3) the clarity of the agreement; (4) the amount of time the employee had for deliberation before signing the release; (5) whether the employee actually read the release and considered its terms before signing it; (6) whether the employee was represented by counsel or consulted with an attorney; (7) whether the consideration given in exchange for the waiver exceeded the benefits to which the employee was already entitled by contract or law; and (8) whether the employee's release was induced by improper conduct on the defendant's part.[14]

Courts have found waivers invalid, for example, where the plaintiff "was not clearly advised of his right to seek counsel[,] . . . was not given a sufficient amount of time to review the release . . . [, and] was also deprived of a meaningful opportunity to negotiate the terms of the release."[15]

Certain circumstances and practices in the procurement of waivers and releases of Title VII claims may raise red flags. Where evidence of fraud or undue influence may exist or where enforcement of the agreement might be against the public interest, the courts will take a closer look behind the scenes of the waiver and release agreement. The standard for challenging a completed waiver and release of a Title VII claim is substantial. If a party to the agreement seeks to challenge the terms of the release, the party "must come forward with specific evidence sufficient to raise a question as to the validity of the release."[16]

Notably, a release of a Title VII claim may not require an employee to waive his or her right to bring an EEOC charge or limit the employee's right to testify, assist or participate in an investigation, hearing or proceeding conducted by the EEOC.[17]

FLSA

Generally, whether retrospective or prospective, an employee's rights under the Fair Labor Standards Act (FLSA) "cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate."[18] However, the waiver provision of the FLSA, found in § 216(c) of the act, provides an exception to this general rule.[19] The section states in relevant part:

> The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages.[20]

The waiver provision is presented as an alternative to litigation in addressing the employer's liability to an employee who is owed compensation as a result of a violation of § 206 (minimum wage) or § 207 (overtime) of the FLSA.[21] As a federal district court has explained:

> The waiver provision found in section 216(c) was added to the Act in 1949. Prior to that time employers had been reluctant to reach voluntary settlements with employees over claims for back wages because courts had held that any purported waiver or release of rights to unpaid compensation was null and void as against public policy and lacking in consideration. Thus an employer who settled a claim for back wages could never be sure that the employee with whom he settled would not later sue to collect liquidated damages and attorneys' fees. The addition of the waiver provision

was intended to change this situation and create an incentive for employers voluntarily to accept settlements supervised by the Wage and Hour Division.[22]

The statute speaks specifically to the supervision of payment, that is, only once an agreement has been given and payment has been made, does it appear that waiver can occur.[23] In other words, until the employee accepts the settlement and the payment of back wages is tendered, no waiver of FLSA claims has been effectuated.[24] As the U.S. District Court for the Northern District of Illinois recently noted, an employee can waive his or her right to participate in an FLSA collective action, as separate and apart from the individual right.[25]

An employee cannot waive his or her right to file an unfair labor practice charge under the NLRA.

Should an employer choose to pursue an approved settlement, the employer should contact the local district office of the Wage and Hour Division of the Employment Standards Administration of the U.S. Department of Labor (the "Department") and speak with an assistant director, who can guide the employer through that office's process for overseeing settlement. Generally, the process will involve a short investigation by the office in order to ensure that the settlement agreement does not deprive the employee of his or her rights under the FLSA. A prudent employer should consider the possibility that, in pursuing approval of an FLSA settlement by the Department, the employer may invite more scrutiny of its wage-and-hour practices than it might otherwise receive or desire. Another option is that a waiver of FLSA rights may be approved by a court in the course of litigation.[26]

NLRA

The National Labor Relations Board (NLRB) has long held that an employee cannot waive his or her right to file an unfair labor practice charge under the National Labor Relations Act (NLRA).[27] As a general matter, the NLRA permits employees to file an unfair labor practice charge if an employer interferes with their rights to organize; to form, join or assist a labor organization; to bargain collectively through representatives of their choosing; or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Provisions of severance agreements that limit an employee's ability to file an unfair labor practice charge to enforce such rights will be deemed unlawful.

ADEA

With the passage of the Older Workers Benefit Protection Act (OWBPA) of 1990,[28] the Age Discrimination in Employment Act (ADEA) underwent substantial revisions to its waiver provisions relative to the other federal antidiscrimination statutes. The OWBPA outlines with specificity the conditions for a waiver of ADEA rights and the manner in which the waiver process should proceed. It is important to note that a release of ADEA claims is not effective unless the release "conforms to the statute."[29]

The OWBPA requires an employee waiver to be knowing and voluntary[30] in order to be valid, and it establishes safe-harbor levels of compliance with that requirement.[31] The OWBPA "explicitly places the burden on the party asserting the validity of a waiver to demonstrate that the waiver was 'knowing and voluntary.'"[32] The waiver must be written so that it may be understood by the employee involved[33] or, if multiple employees are signatory to the waiver, so that it may be understood "by the average individual eligible to participate."[34] Furthermore, the waiver must specifically refer to rights or claims arising under the ADEA;[35] it cannot waive prospective rights.[36] Additionally, the employee, in exchange for the waiver, must receive additional consideration beyond that to which the employee is already entitled[37] and must be advised, in writing, to consult with an attorney prior to executing the agreement.[38] The OWBPA's knowing and voluntary standard also requires an employee to be given the option to revoke the agreement within seven days after the execution of the waiver.

The knowing and voluntary standard for the waiver of an ADEA claim varies, depending on the number of employees that the employer is discharging. When an employer discharges a single employee, the employee must be "given a period of at least 21 days to consider the agreement."[39] However, when "a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the [employee] is given a period of at least 45 days within which to consider the agreement."[40] Federal regulations explicitly state that a standardized formula or package of benefits that is available to two or more employees can constitute a termination program and trigger the group-layoff provisions of the ADEA.[41]

Where a waiver of an employee's rights is requested in a group-layoff situation, the ADEA requires employers to provide to employees what is sometimes known as "the birthday list."[42] The birthday list provides employees with comparative information relative to those selected and not selected for termination, so that the employee can make an informed decision about the waiver of a claim of age discrimination. Specifically, the statute requires an employer to inform

> the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to –
>
> (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
>
> (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.[43]

In a new set of administrative guidelines dated July 15, 2009, the EEOC addressed, among other things, the substantial variations in the way courts have interpreted the statute's "eligibility factors." For example, some courts have defined eligibility factors simply as "[a]ll persons in the Construction Division,"[44] while other courts have interpreted the term to require an explanation of the particular selection "criteria, such as job performance, experience, or seniority, [that] an employer relied on in deciding who to terminate."[45]

Finally, the absence of even one of the OWBPA's knowing and voluntary factors may be sufficient to invalidate a release of ADEA claims.[46] Courts have invalidated ADEA waivers, for example, where the employee's waiver of ADEA claims fails to make any reference to rights arising under the ADEA,[47] fails to provide job titles of others selected for a group layoff,[48] and fails to directly advise the employee to consult a lawyer before signing a waiver.[49]

If an employee's waiver of ADEA claims does not comply with the requirements of the OWBPA, the waiver will not bar a subsequent ADEA action by that employee.[50]

FMLA

An employee's ability to waive rights under the Family and Medical Leave Act (FMLA) has recently been expanded by a revision of the federal regulations that interpret the FMLA. Circuits have split over whether or not prior regulations should be interpreted to prohibit any waiver of FMLA rights[51] without, presumably, a Department of Labor process similar to the process required to obtain FLSA waivers. However, the revised regulation, effective January 16, 2009, prohibits only the waiver of prospective rights under the FMLA.[52] As a result, employees may waive retrospective rights under the FMLA without Department of Labor or court approval.

USERRA

The Uniformed Services Employment and Reemployment Rights Act (USERRA) protects the job rights of employees who voluntarily or involuntarily leave employment to undertake military service. Under USERRA, an employee who is activated for military duty is entitled to reemployment if

1. the employee has given advance written or verbal notice to the employer;
2. the cumulative length of absence from employment with that employer does not exceed five years;
3. the employee returns to work or applies for reemployment in a timely manner after the conclusion of his or her service; and
4. the employee has not been separated from service with a disqualifying discharge or under other-than-honorable conditions.

USERRA also requires employers to credit an employee's period of uniformed service as active employment for purposes of calculating the employee's "seniority and other rights and benefits determined by seniority" and requires employers to provide employees with the same non-seniority benefits it would provide to non-service members on a furlough or leave of absence.

Under USERRA, employees are prohibited from waiving their right to reemployment, even if they provide notice that they will not return to work. Employees may, however, waive their right to non-seniority benefits (*e.g.*, vacation leave), if they provide the employer written notice of their intent not to return to employment following their uniformed service.[53] Despite these limitations placed on the waiver of employees' USERRA rights, at least one federal court, albeit in a nonprecedential opinion, has held that employees may waive all of their rights under USERRA.[54]

New York State Law Claims

Waiver and release of workers' compensation claims in New York is governed by § 32 of the Workers' Compensation Law.[55] Under that section, a waiver is available only once an employee has filed a claim.[56] In order to ensure a waiver is valid, a waiver agreement between "the claimant or the deceased claimant's dependents and the employer, its carrier, the special disability fund . . . or the aggregate trust fund" must be approved by the Workers' Compensation Board[57] or its designee.[58]

The board will approve the agreement, unless:

> (1) the board finds the proposed agreement unfair, unconscionable, or improper as a matter of law;
>
> (2) the board finds that the proposed agreement is the result of an intentional misrepresentation of material fact; or,
>
> (3) within ten days of submitting the agreement one of the interested parties requests that the board disapprove the agreement.[59]

If the board disapproves of an agreement, "it shall duly file and serve a notice of decision setting aside the proposed agreement."[60] Finally, "[a]ny agreement submitted to the board for approval shall be on a form prescribed by the chair,"[61] which includes the Section 32

Agreement (Form C-32) and the accompanying Claimant Release (Form C-32.1) "or, alternatively, contain the information prescribed by the chair."[62]

The waiver of many New York state employment law claims is subject to evaluation in accordance with traditional contract principles.[63] These laws include the New York State Minimum Wage Act,[64] the New York State Human Rights Law,[65] and the New York City Human Rights Law.[66] A worker's right to New York state unemployment insurance may not be waived under any circumstances.[67]

Conclusion

The statutes, regulations, guidelines and caselaw discussed in this article demonstrate a complex maze of compliance that must be successfully traversed to achieve a valid waiver that courts and administrative agencies will respect and uphold. Underlying the various requirements to ensure a valid waiver and release is a simple and consistent theme: a fair waiver and release is likely to be a lasting and valid agreement. Despite the degree of complexity involved in their use, the waivers and releases – if drafted properly and fairly – can be an effective and relatively inexpensive way for employers to ensure against potentially expensive litigation. ■

1. *E.E.O.C. v. SunDance Rehab. Corp.*, 328 F. Supp. 2d 826, 838 (N.D. Ohio 2004), *rev'd on other grounds*, 466 F.2d 490 (6th Cir. 2006) (citing *Adams v. Philip Morris*, Inc., 67 F.3d 580, 583 (6th Cir. 1995)).

2. *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539, 540–41 (8th Cir. 1987).

3. *SunDance Rehab. Corp.*, 328 F. Supp. 2d at 838.

4. *Wastak v. Lehigh Valley Health Network*, 342 F.3d 281, 292 (3d Cir. 2003) (citations omitted). *See, e.g., McCall v. U.S. Postal Serv.*, 839 F.2d 664, 666 n* (Fed. Cir. 1988) ("Even if an [employee's] attempted waiver of his right to file EEOC charges is void, that would not affect the validity of the other portions of the agreement.").

5. *Hampton v. Ford Motor Co.*, 561 F.3d 709, 716 (7th Cir. 2009).

6. *Rivera-Flores v. Bristol-Myers Squibb Caribbean*, 112 F.3d 9, 12 (1st Cir. 1997).

7. *E.E.O.C. v. SunDance Rehab. Corp.*, 466 F.3d 490, 499 (6th Cir. 2006).

8. *Torrez v. Pub. Serv. Co. of New Mexico, Inc.*, 908 F.2d 687, 689 (10th Cir. 1990); *see also Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339, 1352–53 (11th Cir. 1983).

9. *Rivera-Flores*, 112 F.3d at 11–12.

10. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974).

11. *Id.* at 52 n.15.

12. *Hampton*, 561 F.3d at 716; *see also Smith v. Amedisys Inc.*, 298 F.3d 434, 443 (5th Cir. 2002) ("There is no obligation, however, under Title VII or federal common law, that a release must specify Title VII or federal causes of action to constitute a valid release of a Title VII claim.").

13. Craig Robert Senn, *Knowing and Voluntary Waivers of Federal Employment Claims: Replacing the Totality of Circumstances Test with a "Waiver Certainty" Test*, 58 Fla. L. Rev. 305, 307–308 (2006).

14. *Hampton*, 561 F.3d at 716–17 (citations omitted).

15. *Cole v. Gaming Entm't, L.L.C.*, 199 F. Supp. 2d 208, 213 (D. Del. 2002).

16. *Hampton*, 561 F.3d at 716.

17. *EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085, 1089–90 (5th Cir. 1987); *see EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 456 (6th Cir. 1999); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1542–43 (9th Cir. 1987).

18. *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352 (11th Cir. 1982) (internal citations omitted)).

19. 29 U.S.C. § 216(c).

20. *Id.*; *see, e.g., Niland v. Delta Recycling Corp.*, 377 F.3d 1244, 1247 (11th Cir. 2004).

21. 29 U.S.C. § 216(b).

22. *Sneed v. Sneed's Shipbuilding, Inc.*, 545 F.2d 537, 539 (5th Cir. 1977) (emphasis added) (internal citations omitted).

23. 29 U.S.C. § 216(c).

24. *See, e.g., Sneed*, 545 F.2d at 539 ("For there to be a valid waiver section 216(c) simply requires (a) that the employee agree to accept the payment which the Secretary determines to be due and (b) that there be 'payment in full.'"); *but compare Lynn's Food Stores*, 679 F.2d at 1353 ("An employee who accepts such a payment supervised by the Secretary thereby waives his right to bring suit for both the unpaid wages and for liquidated damages, provided the employer pays in full the back wages."), *with Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986) ("When private disputes are compromised, the people memorialize their compromise in an agreement. This agreement (the accord), followed by the payment (the satisfaction), bars further litigation. Payment of money is not enough to prevent litigation. If a potential defendant in a tort suit pays $1,000 to the plaintiff, who cashes the check, this does not alone extinguish the plaintiff's right to sue. The $1,000 might be a part payment. There must also be a release.").

25. *See Brown v. Sears Holdings Mgmt. Corp.*, No. 09-C-2203, 2009 WL 2514173 (N.D. Ill. Aug. 17, 2009).

26. *Lynn's Food Stores, Inc.*, 679 F.2d at 1353 ("The only other route for compromise of FLSA claims is provided in the context of suits brought directly by employees against their employer under section 216(b) to recover back wages for FLSA violations. When employees bring a private action for back wages under the FLSA, and present to the district court a proposed settlement, the district court may enter a stipulated judgment after scrutinizing the settlement for fairness.").

27. *See U-Haul Co.*, 347 NLRB No. 34, at *13, 347 NLRB 375 (2006).

28. 29 U.S.C. § 626(f).

29. *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 428 (1998).

30. *See, e.g., Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1534 (3d Cir. 1987).

31. 29 U.S.C. § 626(f)(1).

32. *Am. Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 117 (1st Cir. 1998) (citing 29 U.S.C. § 626(f)(3)).

33. 29 U.S.C. § 626(f)(1)(A).

34. *Id.*

35. 29 U.S.C. § 626(f)(1)(B).

36. 29 U.S.C. § 626(f)(1)(C).

37. 29 U.S.C. § 626(f)(1)(D).

38. 29 U.S.C. § 626(f)(1)(E).

39. 29 U.S.C. § 626(f)(1)(F).

40. *Id.*

41. 29 C.F.R. § 1625.22(f)(iii)(B).

42. Interview by Susan Wornick with Robert Sanders, Regional Director – Boston Office, Equal Opportunity Employment Commission, in Boston, Mass. (Nov. 28, 2008).

43. 29 U.S.C. § 626(f)(1)(H); *see, e.g., Currier v. United Techs. Corp.*, 393 F.3d 246, 251 n. 4 (1st Cir. 2004).

44. Understanding Waivers of Discrimination Claims in Employee Severance Agreements, http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html (citations omitted).

45. *Id.*

46. *See, e.g., Tung v. Texaco Inc.*, 150 F.3d 206, 209 (2d Cir. 1998).

47. *Hodge v. N.Y. Coll. of Podiatric Med.*, 157 F.3d 164, 167 (2d Cir. 1998).

48. *Adams v. Ameritech Servs., Inc.*, 231 F.3d 414, 431 (7th Cir. 2000).

49. *Am. Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 118 (1st Cir. 1998) ("Because American failed to directly advise their employees to consult a lawyer before making the election, we rule, as a matter of law, that American failed to meet its burden under the OWBPA.").

50. *Oubre*, 522 U.S. at 428 ("[T]he release cannot bar the ADEA claim because it does not conform to the statute.").

51. *See, e.g.*, *Taylor v. Progress Energy Inc.*, 493 F.3d 454 (4th Cir. 2007); *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003).

52. 29 C.F.R. § 825.220.

53. 29 C.F.R. § 1002.152.

54. *Jolley v. Dep't of Hous. & Urban Dev.*, 299 Fed. Appx. 966, 969 (Fed. Cir. 2008).

55. N.Y. Workers' Compensation Law § 32 ("Workers' Comp. Law").

56. Workers' Comp. Law § 32(a).

57. *Id.*

58. N.Y. Comp. Codes. R. & Regs. tit. 12, § 300.36 (N.Y.C.R.R.) ("The agreement shall be reviewed by the chair, a designee of the chair, a member of the board, or a Workers' Compensation Law Judge, who will make a determination whether to approve or disapprove the agreement.").

59. Workers' Comp. Law § 32(b).

60. Workers' Comp. Law § 32(c).

61. 12 N.Y.C.R.R. § 300.36(b).

62. *Id.*

63. *Bachiller v. Turn On Prods., Inc.*, No. 00 Civ. 8701 (JSM), 2003 WL 1878416 (S.D.N.Y. Apr. 14, 2003).

64. *Simel v. JP Morgan Chase*, 05 CV 9750, 2007 WL 809689 (S.D.N.Y. Mar. 19, 2007).

65. *Bachiller*, 2003 WL 1878416, *4 ("The 'totality of the circumstances' standard 'is somewhat more stringent than the analysis called for under ordinary [New York State] contract law, for determining whether a release of discrimination claims was executed knowingly and voluntarily.' *Nicholas v. NYNEX, Inc.*, 929 F. Supp. 727, 730 (S.D.N.Y. 1996). Accordingly, since Plaintiff has waived her federal claims, she has also waived her claims under New York State and New York City Human Rights Law. *See Laramee v. Jewish Guild for the Blind*, 72 F. Supp. 2d 357, 360 (S.D.N.Y. 1999).").

66. *Id.* By contrast, for example, the waivers of claims under the New Jersey Law Against Discrimination (LAD) are evaluated through a "totality of the circumstances" analysis. *See Blum v. Lucent Techs., Inc.*, 2005 WL 4044579, at *6 (N.J. Super. App. Div. May 30, 2006) ("[t]he proper standard upon which to evaluate a waiver of a claim under LAD [(Law Against Discrimination)] is the 'totality of the circumstances.'. . . Under the 'totality of the circumstances' standard, [the court] must consider the following factors: (1) the plaintiff's education and business experience, (2) the amount of the time the plaintiff had possession of or access to the agreement before signing it, (3) the role of the plaintiff in deciding the terms of the agreement, (4) the clarity of the agreement, (5) whether the plaintiff was represented by or consulted with an attorney, and (6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.").

67. N.Y. Labor Law § 595 (2008) ("No agreement by an employee to waive his rights under this article shall be valid.").

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A "Moot Point" Is an Ongoing Concern for Everyone

By Joseph F. Castiglione

The New York State Unified Court System's latest Annual Report reveals that in 2007 more than 4.5 million cases were filed statewide in New York trial courts.[1] In that year about 10,000 records on appeal were filed with the respective Appellate Divisions, and 221 records on appeal were filed with the Court of Appeals.[2] These are extraordinary filing numbers for a one-year period and should serve as a reminder that practitioners need to be constantly aware that a client's case could be lost in this sea of litigation by becoming what courts consider "moot." The numbers should simultaneously remind practitioners to continually question whether opposing litigation should be dismissed for having become moot. As mootness can occur unexpectedly in litigation if not properly addressed, and concomitantly could be pursued as a legitimate means to oppose continued litigation, practitioners must be concerned with the potential for a moot point occurring in litigation.

This article discusses the concept of mootness in New York civil litigation, including a court's lack of jurisdiction over moot controversies, the application of mootness primarily in construction-project related litigation, and methods for lawyers to comply with their obligation to inform a court that a controversy is potentially moot.

Actual Controversies

The legal authority of a New York state court "extends only to live controversies."[3] A "live" or "actual controversy" contemplates a situation in which "the rights of the parties will be directly affected by the determination of the [court] and the interest of the parties is an immediate consequence of the judgment."[4] However, an actual or live controversy can become moot by either the "passage of time or change in circumstances."[5] As explained by the Court of Appeals, "the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy."[6]

Mootness could arguably affect any type of litigation because every court's subject matter jurisdiction depends on the continued existence of an actual controversy. New York jurisprudence recognizes as a "fundamental principle that a court's power to declare the law is limited to determining actual controversies in pending cases."[7] If a

case lacks the necessary "actual controversy" the matter is considered not "justiciable," and therefore implicates the court's subject matter jurisdiction.[8] The question of subject matter jurisdiction is raised because mootness triggers the jurisprudential prohibition against courts issuing what are deemed "advisory opinions."[9]

Advisory opinions are considered judicial opinions that would not "have an immediate, practical effect on the conduct of the parties."[10] New York courts have historically recognized that "[t]he courts of New York do not issue advisory opinions for the fundamental reason that in this State 'the giving of such opinions is not the exercise of the judicial function.'"[11] This limitation on function "is not merely a question of judicial prudence or restraint; it is a constitutional command defining the proper role of the courts under a common-law system."[12] Therefore, mootness does not deprive a court of valid subject matter jurisdiction over the underlying asserted actual controversy but, rather, effectively precludes a court from issuing an advisory opinion when the asserted controversy is no longer deemed a live dispute by the court.

Mootness seemingly applies to any controversy that can be effectively concluded without a formal court decision; and any determination about whether mootness may apply is generally going to be "fact-driven."[13] However, the Court of Appeals has provided more direct guidance when determining mootness in litigation involving construction projects.

Mootness in Construction Litigation

The Court of Appeals extensively addressed mootness in litigation involving construction projects in *Dreikausen v. Zoning Board of Appeals of the City of Long Beach*, and shortly thereafter in *Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preservation Commission*.[14] In *Dreikausen*, the Court identified and discussed "several factors significant in evaluating claims of mootness."[15] In *Citineighbors*, the Court quoted *Dreikausen*'s explanation, "[t]ypically the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy," noting that when "the change in circumstances involves a construction project, we must first consider how far the work has progressed towards completion."[16] However, even though there may be "substantial completion" of the underlying project, the Court of Appeals has explained that "[b]ecause a race to completion cannot be determinative,"[17] "other factors bear on mootness in this context as well."[18]

The Court expounded in *Dreikausen* that "[c]hief among [the mootness factors to consider] has been a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation."[19] New York appellate courts stringently apply this "chief" mootness consideration in litigation. Appellate courts routinely dismiss proceedings where the complaining party fails to try to preserve the status quo or prevent the other party from moving forward with the contested action, by seeking *both* preliminary injunctive relief before the lower court and an injunction on appeal; seeking only preliminary injunctive relief is not enough.[20]

The "chief" mootness consideration is also routinely applied by courts in litigation involving an agency's State Environmental Quality Review Act (SEQRA)[21] review when the action is considered moot.[22] The Court of Appeals directly noted that parties contesting an agency action "on SEQRA grounds may safeguard their challenge against mootness by promptly requesting injunctive relief."[23]

Relative to construction-project litigation, the Court of Appeals's decision in *Citineighbors* highlights the consideration of financial means in the context of a request for injunctive relief. There can be a very substantial financial disparity between parties in large-scale construction-project litigation. A party contesting any decision or action relating to a large-scale construction project may intentionally omit pursuing injunctive relief based upon its asserted inability, or simple unwillingness, to provide the appropriate financial undertaking for the injunction.[24] These decisions can have significant adverse consequences, as made clear by the Court in *Citineighbors*.

In *Citineighbors*, the Court determined that both the petitioners' failure to seek appropriate injunctive relief to enjoin construction based upon the petitioners' alleged "'monetary constraints'" and their perceived "unlikelihood of success" on the merits constituted "nonfeasance."[25] The Court sternly rebuked the petitioners' failure to take the appropriate actions to preserve the status quo:

> In short, petitioners simply assumed that Supreme Court would not grant them injunctive relief or, in the alternative, would require an undertaking in an amount more than they could or wanted to give. Under *Dreikausen*, however, petitioners were required, at a minimum, to seek an injunction in the circumstances presented here. Having pursued a strategy that foisted all financial risks (other than their own legal fees and related expenses) onto the property owner and the developer, petitioners may not expect us to overlook the substantial completion of this construction project.[26]

As such, a party's unwillingness to provide the appropriate financial undertaking, and even a party's alleged financial inability, are seemingly unacceptable reasons for not trying to preserve the status quo by seeking appropriate injunctive relief. Thus, practitioners should be vigilant to avoid any "half-hearted request for injunctive relief," as it may be strongly construed against their client if an

adversary asserts that the controversy has subsequently become moot.[27] A basic good faith effort to try to preserve the status quo seems to be the predicate standard in litigation relating to construction projects.

Additional mootness factors in construction-project related litigation include "whether work was undertaken without authority or in bad faith, and whether substantially completed work is 'readily undone, without undue hardship.'"[28] The work and hardship considerations should include identifying and weighing financial expenditures made by a party in moving forward with a construction project or approval.[29] When considering these work/bad-faith/undue hardship factors, the courts are also cognizant that builders have "every business incentive to complete the building as quickly as possible so as to profit from their investment and avoid paying interest on construction loans."[30] However, any finding that work was in bad faith or without authority weighs against mootness.[31]

The substantial completion and additional mootness factors ultimately provide greater clarity for practitioners endeavoring to avoid, or conversely to raise, the issue of mootness in construction-project related litigation. These factors, while limited here to construction-project related litigation, may help to provide some guidance when considering whether an actual controversy in non-construction related litigation is potentially moot.

Mootness Exception for Discretionary Review

There is an exception that allows courts to consider a moot controversy. New York jurisprudence affords courts "discretion to review a case if the controversy or issue involved is likely to recur, typically evades review, and raises a substantial and novel question."[32] The Court of Appeals noted in *Dreikausen* that "[c]ourts also have retained jurisdiction notwithstanding substantial completion [of a project in construction related litigation] in instances where novel issues or public interests such as environmental concerns warrant continuing review."[33] If a court determines that all elements exist and the mootness exception applies to any particular case, the "court may reach the moot issue even though its decision has no practical effect on the parties."[34] If, however, "there is a realistic likelihood that the issues presented [in the case] will recur with an adequately developed record and with a timely opportunity for review," the judicially recognized "exception to the mootness doctrine does not apply."[35]

Attorney's Obligation

Practitioners have an affirmative and ongoing obligation to raise the issue of mootness in litigation "when a change in circumstances renders the controversy between the parties potentially moot."[36] This continuing obligation extends to facts that constitute a "change in circumstances" that may render what started as an actual controversy potentially moot. But how do practitioners properly raise the facts that constitute the "change in circumstances"?

The issue of mootness implicates a court's subject matter jurisdiction, and the "'lack of subject matter jurisdiction is not waivable, but may be [raised] at any stage of the action, and the court may, *ex mero motu* [on its own motion], at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action.'"[37] As such, in any lower court proceeding or on appeal, if facts constituting the "change in circumstances" are already in the record before the court, a party should have the opportunity to raise the issue of mootness in a merits brief. This method is consistent with the principle that a court can refuse to proceed with any case on its own volition, when existing record facts show that the court lacks subject matter jurisdiction. However, when facts constituting the "change in circumstances" are outside of the record, how does a practitioner best raise mootness?

During any lower court proceeding or even on appeal, an appropriate avenue to raise mootness appears to be through a motion to dismiss for lack of subject matter jurisdiction under CPLR 3211(a)(2).[38] A motion to dismiss based upon lack of subject matter jurisdiction can be made before service of a responsive pleading or "at any subsequent time" – *i.e.*, any time before the lower court or even when on appeal.[39] Through a motion to dismiss, parties have the opportunity to introduce new facts or other matters – by the motion's supporting affidavits – that are not already in the record.[40] Practically speaking, a motion to dismiss may generally be the preferred method to raise mootness: the motion can obviate the court and parties addressing the merits of the underlying case and be limited to the specific facts showing that a change in circumstances has rendered the controversy moot.[41]

The consequences of an actual controversy becoming moot are comprehensive and final: a court will generally dismiss a proceeding or appeal if the court determines that the underlying controversy is moot; however, "vacatur of an order or judgment on appeal may also be an appropriate exercise of discretion when necessary 'in order to prevent a judgment which is unreviewable for mootness from spawning any legal consequences or precedent.'"[42]

Conclusion

New York's staggering volume of cases underscores the sentiment that courts cannot and should not expend already strained judicial resources on potentially moot controversies in litigation. Lawyers generally have an affirmative obligation to inform a court when a controversy is potentially moot, so practitioners in litigation need to be vigilant and take the necessary actions to ensure the continued viability of their client's case; however, vigi-

lance is a two-way street, and practitioners should also continually be aware that, when the appropriate change in circumstances exists, mootness is a practical option to oppose continued litigation.

A "moot point" is an ongoing concern for everyone in litigation. If a practitioner fails to appreciate the significance of a potentially moot point in litigation, the point of this article may be moot. ■

1. New York State Unified Court System, Report of the Chief Administrator of the Courts, Annual Report 2007, at p. 21 (released April 2009), *available at* http://www.courts.state.ny.us/reports/annual/pdfs/2007AnnualReport.pdf.

2. *Id*. at pp. 20–21, p. 19.

3. *See Saratoga Co. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 810–11, 766 N.Y.S.2d 654 (2003); *see also Gonzalez v. Gonzalez*, 57 A.D.3d 896, 897, 870 N.Y.S.2d 410 (2d Dep't 2008) (stating that "the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted").

4. *Hearst Corp., v. Clyne*, 50 N.Y.2d 707, 714, 431 N.Y.S.2d 400 (1980); *see also Gonzalez*, 57 A.D.3d at 897.

5. *See Hearst Corp.*, 50 N.Y.2d at 714.

6. *Dreikausen v. Zoning Bd. of Appeals of the City of Long Beach*, 98 N.Y.2d 165, 172, 746 N.Y.S.2d 429 (2002); *Citineighbors Coalition of Historic Carnegie Hill v. N.Y. City Landmarks Pres. Comm'n*, 2 N.Y.3d 727, 728–29, 778 N.Y.S.2d 740 (2004); *see also Saratoga County Chamber of Commerce, Inc.*, 100 N.Y.2d at 811.

7. *See In re David C.*, 69 N.Y.2d 796, 798, 513 N.Y.S.2d 377 (1987); *see also Workmen's Comp. Fund Self-Insurers' Ass'n v. State Indus. Comm.*, 224 N.Y. 13, 16, 119 N.E. 1027 (1918) (stating "[t]he function of the courts is to determine controversies between litigants").

8. *See Cuomo v. Long Island Lighting Co.*, 71 N.Y.2d 349, 354–58, 525 N.Y.S.2d 828 (1988) (holding that the "nonjusticiable dispute" was "outside the subject matter jurisdiction of this court"); *see also Police Benevolent Ass'n of the N.Y. State Troopers v. N.Y. State Div. of State Police*, 40 A.D.3d 1350, 1353 n.2, 838 N.Y.S.2d 199 (3d Dep't 2007) (stating "[t]he lack of a justiciable issue implicates the subject matter jurisdiction of a court"); *see also Morrison v. Budget Rent A Car Sys., Inc.*, 230 A.D.2d 253, 258–59, 657 N.Y.S.2d 721 (2d Dep't 1997).

9. *See Saratoga County Chamber of Commerce, Inc.*, 100 N.Y.2d at 810–11 (identifying the plaintiffs' challenges, which the court deemed to be moot, were "requests for advisory opinions." Further holding that a court's "jurisdiction . . . extends only to live controversies," and courts "are prohibited from giving advisory opinions or ruling on 'academic, hypothetical, moot, or otherwise abstract questions.'"); *see also Gonzalez*, 57 A.D.3d at 897 (holding that "[c]ourts are prohibited from rendering advisory opinions and 'an appeal will be considered moot unless the rights of the parties will be directly affected"); *Becher v. Becher*, 245 A.D.2d 408, 409, 667 N.Y.S.2d 50 (2d Dep't 1997) (holding that the "underlying controversy had been rendered moot and [] the judicial determination sought would constitute the rendering of an advisory opinion").

10. *See King v. Glass*, 223 A.D.2d 708, 708, 637 N.Y.S.2d 187 (2d Dep't 1996); *see also Employers' Fire Ins. Co. v. Klemons*, 229 A.D.2d 513, 514, 645 N.Y.S.2d 849 (2d Dep't 1996).

11. *See Cuomo*, 71 N.Y.2d at 354 (internal brackets omitted); *County of Monroe v. City of Rochester*, 39 A.D.3d 1272, 1273, 834 N.Y.S.2d 817 (4th Dep't 2007).

12. *N.Y. Pub. Interest Research Group, Inc. v. Carey*, 42 N.Y.2d 527, 529, 399 N.Y.S.2d 621 (1977).

13. *See Dreikausen*, 98 N.Y.2d at 172–73.

14. 2 N.Y.3d at 729–30.

15. *Dreikausen*, 98 N.Y.2d at 172–73; *see also Citineighbors*, 2 N.Y.3d at 729.

16. *Citineighbors*, 2 N.Y.3d at 728–29 (quoting *Dreikausen*, 98 N.Y.2d at 172).

17. *Citineighbors*, 2 N.Y.3d at 729 (internal quotes omitted); *see also Dreikausen*, 98 N.Y.2d at 172.

18. *Citineighbors*, 2 N.Y.3d at 729; *see also Dreikausen*, 98 N.Y.2d at 173.

19. *Id.* at 173; *Citineighbors*, 2 N.Y.3d at 729.

20. *See Imperial Improvements, LLC v. Town of Wappinger Zoning Bd. of Appeals*, 290 A.D.2d 507, 507–508, 736 N.Y.S.2d 409 (2d Dep't 2002); *see also Save the Pine Bush Inc., v. City of Albany*, 281 A.D.2d 832, 832–33, 722 N.Y.S.2d 310 (3d Dep't 2001); *see also Gorman v. Town Bd. of the Town of E. Hampton*, 273 A.D.2d 235, 236, 709 N.Y.S.2d 433 (2d Dep't 2000); *see also Schaffer v. Zoning Bd. of Appeals of Town/Vill. of Harrison*, 22 A.D.3d 501, 501, 803 N.Y.S.2d 644 (2d Dep't 2005).

21. *See generally* N.Y. Environmental Conservation Law §§ 8-0101–8-0117.

22. *See Many v. Vill. of Sharon Springs Bd. of Trustees*, 234 A.D.2d 643, 645, 650 N.Y.S.2d 486 (3d Dep't 1996); *see also Sutherland v. N.Y. City Hous. Dev. Corp.*, 20 Misc. 3d 1115(A), *4, 2008 WL 2663599 (Sup. Ct., N.Y. Co. 2008), *aff'd*, 61 A.D.3d 479, 877 N.Y.S.2d 43 (1st Dep't 2009); *see also Save the Pine Bush Inc.*, 281 A.D.2d at 832–33.

23. *See Citineighbors*, 2 N.Y.3d at 730; *see also Vill. of Sharon Springs Bd. of Trustees*, 234 A.D.2d at 645.

24. *See also* CPLR 6312(b) (requiring as a prerequisite for an injunction that the requesting party "shall" provide an undertaking to compensate for "all damages and costs which may be sustained by reason of the injunction").

25. 2 N.Y.3d at 729.

26. *Id*. at 729–30; *see also Dreikausen*, 98 N.Y.2d at 174.

27. *See Dreikausen*, 98 N.Y.2d at 174. The consequences of a party's failure to seek the appropriate injunctive relief may seem, at times, unduly severe. However, the potential consequences to any party moving forward with a construction project when their opponent actually endeavors to maintain the status quo through seeking proper injunctive relief, but the requested injunctive relief is denied, can be equally severe. As long as a party seeks to properly maintain the status quo, even though they are denied the requested injunctive relief, it is irrelevant if the opposing party subsequently completes construction of the underlying project and then raises mootness. The courts have determined that, in those circumstances, "relief remains available 'even after completion of the project' because 'structures . . . most often can be destroyed.'" *Schupak v. Zoning Bd. of Appeals of the Town of Marbletown*, 31 A.D.3d 1018, 1020, 819 N.Y.S.2d 335 (3d Dep't 2006) (quoting *Dreikausen*, 98 N.Y.2d at 172).

28. *Citineighbors*, 2 N.Y.3d at 729 (quoting *Dreikausen*, 98 N.Y.2d at 173).

29. *See Citineighbors*, 2 N.Y.3d at 729 (noting "property owner and developer had already spent roughly $25.7 million"); *see also Save the Pine Bush Inc., v. City of Albany*, 281 A.D.2d 832, 832–33, 722 N.Y.S.2d 310 (3d Dep't 2001) (identifying that "[d]uring the pendency of this appeal, the current owner of the parcel expended over $1 million" in moving forward under contested SEQRA review); *Save the Pine Bush Inc. v. Cuomo*, 200 A.D.2d 859, 860, 606 N.Y.S.2d 818 (3d Dep't 1994) (finding "[p]etitioners failed to seek a stay pending appeal and the City has expended millions of dollars on the project").

30. *Citineighbors*, 2 N.Y.3d at 730; *see also Dreikausen*, 98 N.Y.2d at 174.

31. *Id*. at 173.

32. *See Saratoga Co. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 811, 766 N.Y.S.2d 1654 (2003); *Hearst Corp., v. Clyne*, 50 N.Y.2d 707, 714–15, 731 N.Y.S.2d 400 (1980). A party's efforts to maintain the status quo in construction-project litigation by seeking appropriate injunctive relief is not an exception to mootness, but will generally obviate subsequent potential mootness claims. *See* endnote 27 *supra*.

33. 98 N.Y.2d at 173.

34. *See Saratoga County Chamber of Commerce, Inc*., 100 N.Y.2d at 811; *see also Schermerhorn v. Becker*, 64 A.D.3d 843, 845, 883 N.Y.S.2d 325 (3d Dep't 2009) (reiterating all elements must be met for exception to apply).

35. *See Citineighbors*, 2 N.Y.3d at 730; *but see also Schermerhorn*, 64 A.D.3d at 845 (applying the mootness exception).

36. *See Spano v. Wing*, 285 A.D.2d 809, 811, 728 N.Y.S.2d 809 (3d Dep't 2004); *see also Wellman v. Surles*, 185 A.D.2d 464, 466, 586 N.Y.S.2d 341(3d Dep't 1992). The obligation to raise mootness is seemingly intended in part to prevent the "dissipation of judicial resources" and "prevents devaluation of the force of judicial decrees." *See Cuomo*, 71 N.Y.2d at 354.

37. *Fin. Industry Regulatory Auth., Inc. v. Fiero*, 10 N.Y.3d 12, 17, 853 N.Y.S.2d 267 (2008) (quoting *Fry v. Vill. of Tarrytown*, 89 N.Y.2d 714, 718, 658 N.Y.S.2d 205 (1997)).

38. *See also generally e.g., Imperial Improvements, LLC v. Town of Wappinger Zoning Bd. of Appeals*, 290 A.D.2d 507, 736 N.Y.S.2d 409 (2d Dep't 2002) (raising mootness by motion during appeal).

39. *See* CPLR 3211(e).

40. *See* CPLR 2214(b).

41. Practitioners should consult their court clerk about preferred procedure to determine if a motion to dismiss versus a merits brief would be the preferred procedure for raising mootness. If the motion to dismiss method is used, a practitioner should always remember to consult the lower court's local rules and/or the appellate court's appellate rules of practice for motions to the court.

42. *Gonzalez*, 57 A.D.3d at 897 (quoting *Hearst Corp., v. Clyne*, 50 N.Y.2d 707, 718, 731 N.Y.S.2d 400 (1980)); *see also Saratoga County Chamber of Commerce, Inc*., 100 N.Y.2d at 811.

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Preserving Issues for Appeal, Without Exception

When an objection was overruled during the trial in the movie *A Few Good Men*, neophyte trial attorney Lt. Cdr. JoAnne Galloway, played by Demi Moore, continued her protestation by saying "I strenuously object." Most lawyers probably chuckled at this maneuver, agreeing with the chiding appraisal later given by her co-counsel Lt. Sam Weinberg, played by Kevin Pollak: "'I strenuously object?' Is that how it works? Hm? 'Objection.' 'Overruled.' 'Oh, no, no, no. No, I STRENUOUSLY object.' 'Oh. Well, if you strenuously object then I should take some time to reconsider.'"[1]

Despite our amusement at Galloway's gaffe, many lawyers today make a similar, procedurally unnecessary move. After a court overrules an objection, rejects a requested charge or denies a motion, the lawyer asks the court for an exception. In most instances, the court plays along and responds that counsel has an exception. Yet the Civil Practice Law & Rules and the Criminal Procedure Law neither provide for nor require an "exception" to preserve an issue. CPLR 4017, titled Objections, provides that

> [f]ormal exceptions to rulings of the court are unnecessary. At the time a ruling or order of the court is requested or made a party shall make known the action which he requests the court to take or, if he has not already indicated it, his objection to the action of the court.[2]

Similarly, in criminal cases, a "protest need not be in the form of an 'exception.'"[3] Counsel can preserve an issue in various ways, such as objecting, moving to strike testimony or evidence, moving for a mistrial, or requesting specific action like limiting or curative instructions.[4]

To be sure, preservation is an important concept in the arena of appellate review. Lack of preservation can foreclose review of an issue on appeal. "Failure to so make known objections, as prescribed in [CPLR 4017] or in section 4110-b, may restrict review upon appeal in accordance with paragraphs three and four of subdivision (a) of section 5501."[5] Those subdivisions, included in CPLR 5501, titled "Scope of review," state that

> [a]n appeal from the final judgment brings up for review . . . (3) any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant, and any charge to the jury, or failure or refusal to charge as requested by the appellant, to which he objected; [and] (4) any remark made by the judge to which the appellant objected.[6]

The rule is similar in criminal courts:

> For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same.[7]

The purpose of the preservation rule is to require parties to raise issues with the trial court at a point where opposing parties can be heard and the court has an opportunity to address the issue and take corrective action to remedy any problems.[8] "If the court omits any issue of fact raised by the pleadings or evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury."[9] It would be unfair to permit parties to sit idly by while a perceived error is committed in their presence and then complain about that error when it is too late to address it through a simple correction, such as a jury instruction, and the only available remedy is a new trial. Courts will not countenance such gamesmanship.

If a party was rewarded with a second chance to prevail at trial due to the party's own inaction, the other party would be prejudiced and judicial resources would be wasted. Out

of fairness, however, a party is not required to object until the first available opportunity after he or she is aware of the objectionable action.[10]

The degree to which preservation of an issue will affect the outcome of an appeal depends on the court in which the appeal is pending. The Appellate Division *may* consider any question of law or fact, but unpreserved issues are considered only "as a matter of discretion in the interest of justice."[11] The court has considerable discretion and need not consider arguments concerning issues that were not properly raised in the trial court. Unlike the Appellate Division, the Court of Appeals has a narrower scope of review and can only decide questions of law that were properly preserved.[12] The Court of Appeals does not have general factual review power or the authority to review matters in the interest of justice. Thus, failure to preserve an issue at trial will entirely prevent review of that issue by the Court of Appeals.[13]

Trial counsel should take great care to preserve all possible issues for future review. Appellate counsel is limited by the record on appeal, including the requests and objections made by trial counsel. To preserve an error in the admission of evidence or a charge to the jury, a party must make his or her position known to the trial court. The argument must be specifically directed at the alleged error in order to fulfill the preservation requirement; a general objection will not suffice to attack a specific aspect of the trial.[14] An objection or motion preserves the argument only as to the ground or basis stated.[15] Even a challenge to the constitutionality of a statute must be raised in the trial court, or the issue may be precluded as unpreserved for appeal.[16] Limited exceptions to the preservation doctrine exist for errors relating to the jurisdiction of the court or where there was a fundamental, non-waivable defect in the mode of procedure.[17] The preservation rule does not deprive criminal defendants of the right of review because they can still request that the Appellate Division apply its interest of justice jurisdiction to address unpreserved issues.

Preservation is specifically addressed by statute in the area of jury charges. To preserve a challenge to a jury charge, a party must object to the charge as given or request additional charges in response to the court's inquiry.[18] "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating the matter to which he objects and the grounds of his objection."[19] Under CPLR 4110-b, any party "may" request specific charges. This is permissive, not mandatory. A party may still object to charges even if no request was made, although a better practice would be to provide the court with the party's own request at or prior to the charge conference, rather than merely objecting to the opponent's requests. Although a formal objection again after the jury is charged may not be absolutely essential as long as a charge was clearly requested during the charge conference,[20] an objection at the conclusion of the charge is advisable. Otherwise, counsel risks appearing to have abandoned or withdrawn the request.[21] While the Appellate Division may review an unpreserved challenge to jury charges that are fundamentally flawed,[22] counsel should not rely on this permissive review but should object to ensure that the issue is preserved.

Objections and trial motions ensure that only admissible evidence is received and proper procedures are followed during trials. If the objection or motion is unsuccessful, however, counsel's action in bringing the perceived error to the trial court's attention preserves the issue for future review. Because failure to preserve an argument can be dispositive and for-

ever bar correction through the appellate process, especially at the Court of Appeals, trial counsel must strive to preserve all potential issues for appellate review. On appeal, counsel for appellants would be wise to address preservation by noting that each argument was properly preserved, by arguing that preservation was unnecessary due to the jurisdictional or non-waivable fundamental nature of the error, or by requesting that the Appellate Division invoke its interest of justice jurisdiction to review the issue despite the lack of preservation. Counsel for respondents may be able to avoid review of the merits by informing the court that issues are unpreserved. As a rule, while no attorney needs to "strenuously object," counsel at all levels should be aware of the importance of preserving issues for appeal. No exceptions. ■

1. *A Few Good Men*, Castle Rock Entertainment, 1992.

2. CPLR 4017.

3. CPL § 470.05(2).

4. *People v. Brooks*, 26 A.D.3d 596, 811 N.Y.S.2d 131 (3d Dep't 2006).

5. CPLR 4017.

6. CPLR 5501(a)(3), (4).

7. CPL § 470.05(2).

8. *People v. Gray*, 86 N.Y.2d 10, 20–21, 629 N.Y.S.2d 173 (1995); *People v. Baker*, 24 A.D.3d 810, 804 N.Y.S.2d 492 (3d Dep't 2005); *People v. Richard*, 30 A.D.3d 750, 817 N.Y.S.2d 698 (3d Dep't 2006), *lv. denied*, 7 N.Y.3d 869, 824 N.Y.S.2d 614 (2006) (issue raised in a CPL § 330.30 motion did not preserve argument, as that was too late to correct the problem); *People v. Perry*, 27 A.D.3d 952, 811 N.Y.S.2d 223 (3d Dep't 2006), *lv. denied*, 8 N.Y.3d 883, 832 N.Y.S.2d 496 (2007); *see also* CPL § 470.05(2).

9. CPLR 4111(b).

10. *People v. Yanas*, 36 A.D.3d 1149, 828 N.Y.S.2d 663 (3d Dep't 2007) (objection at sentencing properly preserved issue as to post-release supervision, where that component of sentence was not mentioned at plea allocution); *People v. Russ*, 19 A.D.3d 746, 796 N.Y.S.2d 444 (3d Dep't 2005) (People did not fail to preserve argument where court raised and decided matter sua sponte in a written decision, as People had no opportunity to object).

11. CPL § 470.15(3), (6).

12. N.Y. Const. art. VI, § 3(a); CPL § 470.35(2).

13. *People v. Baumann & Sons Buses, Inc.*, 6 N.Y.3d 404, 813 N.Y.S.2d 27 (2006); *Davis v. St. Joseph's Children's Servs.*, 64 N.Y.2d 794, 795, 486 N.Y.S.2d 914 (1985).

14. *People v. Finger*, 95 N.Y.2d 894, 716 N.Y.S.2d 34 (2000); *People v. Gray*, 86 N.Y.2d 10, 629 N.Y.S.2d 173 (1995); *see also People v. Parker*, 29 A.D.3d 1161, 1162 n.1, 814 N.Y.S.2d 818 (3d Dep't), *aff'd*, 7 N.Y.3d 907 (2006).

15. *Bloodgood v. Lynch*, 293 N.Y. 308, 313 (1944); *Curanovic v. N.Y. Cent. Mut. Fire Ins. Co.*, 22 A.D.3d 975, 803 N.Y.S.2d 234 (2005); *People v. Rogers*, 15 A.D.3d 682, 788 N.Y.S.2d 716 (2005).

16. *Baumann & Sons Buses, Inc.*, 6 N.Y.3d at 408; *People v. Riddick*, 34 A.D.3d 923, 823 N.Y.S.2d 594 (3d Dep't 2006), *lv. denied*, 9 N.Y.3d 868, 840 N.Y.S.2d 898 (2007).

17. *People v. Gray*, 86 N.Y.2d 10, 629 N.Y.S.2d 173 (1995); *cf. In re Michael FF.*, 210 A.D.2d 758, 621 N.Y.S.2d 112 (3d Dep't 1994) (failure to object to competency of deposition supporting juvenile delinquency petition, a nonjurisdictional latent defect, renders argument unpreserved).

18. *People v. Woodridge*, 30 A.D.3d 898, 817 N.Y.S.2d 748 (3d Dep't 2006), *lv. denied*, 7 N.Y.3d 852, 823 N.Y.S.2d 782 (2006); *Pyptiuk v. Kramer*, 295 A.D.2d 768, 744 N.Y.S.2d 519 (3d Dep't 2002).

19. CPLR 4110-b.

20. *Arbegast v. Bd. of Educ. of S. New Berlin Cent. Sch.*, 65 N.Y.2d 161, 164 n.1, 490 N.Y.S.2d 751 (1985).

21. *Id.*

22. *Wagner Trading Co. v. Tony Walker Retail Mgmt. Co.*, 307 A.D.2d 701, 764 N.Y.S.2d 156 (4th Dep't 2003); *Redmond v. Schultz*, 152 A.D.2d 823, 544 N.Y.S.2d 33 (3d Dep't 1989).

BY WILLIAM H. MANZ

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Recent Developments: Records and Briefs

Appellate records and briefs can be invaluable research tools. They contain facts, legal arguments, primary and secondary authorities, and other information not included in the case reporters.[1] While these materials have always been accessible, the ease of availability has varied by court and date. Briefs from the New York Court of Appeals are available on microfilm or microfiche beginning with cases from the early 1930s, while such coverage for the Appellate Division dates from the early 1970s.[2] More recently, selected records and briefs for newer New York Court of Appeals and Appellate Division decisions have been made available online by Westlaw, LexisNexis, HeinOnline, and the Unified Court System Web site.[3]

The availability of older records and briefs has been more restricted, however. When researching his book *Cardozo: A Study in Reputation*, Seventh Circuit Judge Richard A. Posner noted how difficult and time consuming it was to obtain the 20 briefs from the Cardozo cases that he wanted to examine.[4] This is because virtually all of the records and briefs from older cases, such as those needed by Judge Posner, are still available only in thick, hard-copy volumes, many of which have not been touched in decades. Therefore, depending on storage conditions, they may be dirty, dusty, and unpleasant to handle. Because the volumes are heavy and cumbersome, with sometimes deteriorating bindings, photocopying their contents can be difficult, if not impossible. The books are usually buried deep in closed library stacks or housed in off-site storage. Thus, if a particular volume is not located on-site, the researcher may have to make an appointment to use the materials.

Because only a small number of records and briefs can be bound in a single volume, the storage space requirements are enormous. For example, the State Archives collection of Court of Appeals briefs (1847–1993) consists of 16,856 volumes, and its Third Department collection (1896–1983) contains 7,413. At one time, the Bar Association housed much of its collection at a storage site in Long Island City, while some volumes were shelved on the upper level of its main reading room, accessible by climbing an open circular metal stairway and then navigating a narrow, railed walkway. At the New York County Lawyers' Association Library some more recent Appellate Division materials are located in a main floor stacks area; its earlier Court of Appeals and Appellate Division records and briefs are on one level in the library's basement stacks; and its extensive collection of First Department records and briefs (1906 to the early 1930s) is shelved on 10-foot-high wooden stacks, which take up most of a large, high-ceilinged basement storeroom.

Because of their size, significant collections have been available to researchers at only a few locations. In addition to the Bar Association, New York County Lawyers' Association, and the New York Law Institute libraries in Manhattan, records and briefs collections can be found at the Fourth Department Library in Rochester, the Buffalo and Brooklyn Supreme Court libraries, and the New York State Library and Archives.[5] Adding to the difficulties, the different collections are not identical, which can mean trips to various locations to examine all the requisite briefs.[6]

This situation will change in the near future because of a major project now underway to scan and make available in free online format all the older Court of Appeals and Appellate Division briefs. The project is a partnership between the Internet search giant Google and the Law Library Microform Consortium (LLMC), a non-profit consortium based in Hawaii, long known in the law library community as a major supplier of microfiched and digitized legal materials.[7] LLMC's role has been to work with the donor libraries in collecting the materials and to supply the needed metadata;[8] Google has handled shipping the materials to its headquarters in California, and is doing all the scanning.

The material donated by New York Law Institute and the Bar Association libraries in New York City totals approximately 48,000 volumes. The Bar Association library shipped records and briefs of the Court of Appeals

(ca. 1850–1920), the Appellate Division (1896–1940), the New York Superior Court (1871–1892), the Appellate Term (1874–1931), and the Appellate Division's predecessor, the General Term. The New York Law Institute sent records and briefs of the Court of Appeals from 1941–1959 and those of the Appellate Division from 1941–1970. Shipping the volumes was a major project. It took the staff of the Bar Association Library from January until August 2009 to remove the volumes from basement stacks. The removal of more than 15,000 volumes (occupying 4,400 feet of linear shelf space) from the New York Law Institute Library began in February 2009; the task was not completed until June.

Google is performing the scanning at its headquarters, Googleplex, in Mountain View, California, using its own proprietary equipment. The volumes are guillotined and then fast fed through a high-speed scanner capable of producing 6,000 images an hour. One major problem in the process involves the large fold-out exhibits (photos, maps, diagrams, etc.) that are sometimes included as part of the court record. These were found in approximately 8,000 of the first scanned volumes, and metadata needed to be devised for each of them. According to LLMC, the large-sized exhibits had to be detached and "diverted into a separate scanning flow, with the resulting images being melded back into the main digital stream at a later stage."[9]

After being scanned, the paper copies are sent to Underground Vaults and Storage, Inc., which places them in permanent storage in unused areas of a working salt mine beneath Hutchinson, Kansas. The facility is 650 feet below ground and has 1.7 million acres of storage space; ceilings are 16 feet high and each storage bay is the size of a football field. Described by the company as the "most secure and elusive underground storage facilities in the world,"[10] the old salt mine "provides a clean, cool, and dry environment";[11] it is also used by Hollywood and a variety of other businesses to store materials

Although the briefs now being scanned are from older cases, which, except for some landmark opinions, are often of little interest to the practicing bar, this material should prove invaluable to historians. As previously noted, Judge Posner relied on them when preparing his book on Cardozo. This author has researched this material for *Journal* articles on the *Lemmon* slavery case from the 1850s (General Term and Court of Appeals briefs), and the Bat Masterson-Benjamin Cardozo face-off at a 1913 libel trial (briefs and the court record).[12] Also, because memorandum opinions in the case reporters often omit the facts, legal arguments, and the names of attorneys, this writer found trial records invaluable when writing a short history of the *Palsgraf* case,[13] particularly when researching the Long Island Railroad's other negligence cases and the law practice of Mrs. Palsgraf's attorney, Matthew W. Wood.

Realizing that attorneys are most likely to be interested in records and briefs from more recent cases, LLMC is hopeful of including in the scanning project materials now available on microfilm and microfiche. Accordingly, Google is now currently investigating the feasibility of such an expansion by using samples lent by the Bar Association Library. It is testing to ascertain the quality of the images derived from scanning them, which, as of this writing, have been good. In addition to the quality of the images, the level of expense involved in scanning film and fiche will determine whether Google expands the project to include film- and fiche-based materials. Whether the project is expanded even further to include new briefs as they become available probably will be determined by privacy issues, including concerns about making freely available to the public documents that might possibly contain sensitive information, and which are now only easily accessible to members of the legal community.

The target date for the completion of the initial installment of New York hardcopy materials is February or March 2010. The scanned records and briefs will be available to LLMC subscribers in pdf format at its Web site. They will also be freely available on Google although whether the format will be pdf or html has not yet been determined. On Google, the contents of the briefs will be searchable by keyword, meaning that this vast body of previously almost impenetrable material will be accessible to both attorneys and historians.[14] ■

A major project is now underway to scan and make available in free online format all the older Court of Appeals and Appellate Division briefs.

1. For example, approximately three-quarters of the cases cited in briefs for cases decided by the Supreme Court during the 1996 October Term were not cited in the Court's majority opinions. William H. Manz, *Citations in Supreme Court Records and Briefs: A Comparative Study*, 94 Law Libr. J. 267, 272 tbl. 6 (2002).

2. The William S. Hein Co. coverage of records and briefs on microform begins with 1934. The company had been steadily extending retrospective coverage, but finally stopped because of a declining number of subscribers to its retrospective collection. More recently, West Court Record Services completed microfiche for the period 1928–1934. For a more detailed description of availability of New York records and briefs, see William H. Manz, *Researching New York Records and Briefs*, N.Y. St. B.J. (Feb. 2007), p. 30.

3. LexisNexis, Westlaw, and the Court System briefs are in html format. Only Hein makes the records and briefs available in pdf format.

4. Richard A. Posner, Cardozo: A Study in Reputation 132 (1990).

5. Retrieval methods used by library staffs vary. At the New York County Lawyers' Association Library, most of the volumes are designated by year and volume number. Individual records and briefs can then be located by consulting the entries in old, hand-written ledgers.

6. For example, when researching the history of the *Palsgraf* case, this author used the records and briefs collections at New York County Lawyers' Association Library, the Bar Association Library, the Brooklyn Supreme Court Library, and the New York State Library in Albany.

7. For further information on LLMC, see LLMC: Law Library Microform Consortium, http://www.llmc.com.

8. Metadata for a document include such information as size, author and publication date. TechTerms.com, Metadata, http://www.techterms.com/definition/metadata (last visited Sept. 28, 2009).

9. *Progress on NY Records & Briefs Project*, LLMC-Digital Newsletter, Aug. 18, 2009, at 3, *available at* http://www.llmc.com/Newsletter/Issue36_August_2009.pdf.

10. Hutchinson Facility – The Salt Mine, Underground Vaults & Storage, http://www.undergroundvaults.com/aboutus/hutchinson.cfm. With regard to security, the company states that protections include "biometric scans, video cameras, redundant authorizations, steel vault doors, blind passwords, anonymous storage, restricted personnel access, infrared monitors, and more that we cannot reveal." *Id*. Perhaps the most notable materials stored here have been sensitive Cold War era documents, and Hollywood films. The Hutchinson mine is the largest storage facility for the movies and television industry in the world, and one-quarter of the storage area is devoted to the films. *Id*.

11. *Id*.

12. *See* William H. Manz, *"A Just Cause for War": New York's Dred Scott Decision*, N.Y. St. B.J., Nov./Dec. 2007, at 10; William H. Manz, *Benjamin Cardozo Meets Gunslinger Bat Masterson*, N.Y. St. B.J., July/Aug. 2004, at 10.

13. *See* William H. Manz, The Palsgraf Case: Courts, Law and Society in 1920s New York (2005).

14. A somewhat similar breakthrough in accessibility occurred when the 178-volume *English Reports*, containing over 100,000 cases from 1220 to 1865 was first published on a searchable DVD and then later online.

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> .

It's Not About You!

He's only been speaking for 10 minutes, but already you're sorry you re-scheduled that root canal appointment. So far he's discussed what his plans are for the board, who he wants to partner with, how he prepared for this position, and how he wants you to help him during his term as chairman. You sit in the audience, trapped, thinking to yourself, "So what? Who cares? I've got a billing quota to make, a brief due next Tuesday, and the temperature in here is freezing. Who cares about what you want?"

Sound familiar? We've all listened to speakers drone on about what they've done, what they want to do, how they want to do it, and who they want to do it with (or to).

Worse yet, some of us have done the exact same thing. Whether arguing a summation, presenting a community program, or speaking with our kids, we talked about what ***we*** want, rather than what our audience wants.

Let's be blunt: **audiences don't care what you want.**

It's not about you. Audiences are composed of people who care about what ***they*** want. They want to be healthier, happier, smarter, safer, and richer. They want to be better parents, investors, communicators, leaders, or lovers. They want to be more productive, more efficient, have more pleasure in their careers, and avoid the pitfalls and perils of public and private life. Audiences listen to speakers because they want us to enhance their lives.

Do you want to be a successful speaker? Do you want the audience to listen to your every word? Would you like your audience to think, act, or feel differently when you're done speaking? You need to begin by understanding one simple fact: **It's not about you.**

Tune into W.I.I.F.M. Don't start your speech by saying, "I would like . . ." or "I want . . ." Instead, start your speech by turning the dial to W.I.I.F.M. That is the radio station every audience member is tuned into: "What's In It For Me?" Remember, you're competing with all of the other ideas and concerns spinning through your audience's minds. They're thinking about their jobs, their families, what they have to do tomorrow, who they need to talk to, bills they need to pay, whether or not they turned off the iron before they left the house this morning, and a dozen other concerns. If you can't give your audience something of value, they tune you out and switch to one those competing thoughts.

Sit in your audience. Want them to pay attention? Start by thinking about your speech from your audience's point of view. What do they want to learn? What do they want to do differently? How can you help them improve? Tune into your audience's wants, needs, and desires. Ask yourself, if I was sitting in the audience, would I be interested? If I didn't know this speaker, would I care about what they have to say? Is this a worthwhile use of my time? If you answer, "No," ask yourself, "Why not?" Are you talking about what you care about, or are you talking about what they care about? Find out what your audience wants, and give it to them.

Provide more than they expected. If you are speaking to advertise your firm or your legal expertise, don't spend time talking about how great you are or how wonderful your firm is. **They don't care.**

Instead, talk about the benefits you can provide. Can you help their business save money? Can you protect them from potential lawsuits? Can you help them plan for retirement or to avoid a messy probate situation? That is what the audience cares about.

This approach even applies to jury trials. Do you want them to find the defendant liable? To tell the plaintiff he has no case? To find someone guilty? I bet you're already ahead of me by now: **they don't care about what you want.**

Think to yourself, "If I was sitting in the jurors' seats, why would I care about this case? What's in it for me?" When you can answer that question and tie it in to the outcome your client desires, you have a successful trial presentation on your hands.

So what do they care about? They want to walk out of that courtroom and feel they've done their civic duty. They want to think they've been fair. They want to know they've been just. Talk about what they want. Show them how their verdict prevents an injustice.

Remember: it's not about you. To present successfully, talk about what your audience cares about. ■

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

As I write this the hour is late and it has been a long day. Just before shutting down my computer I took one last look at my e-mails and I saw an odd one from an adversary's law firm. The message was "fyi" and below was an attachment symbol. The message was "from" a paralegal in my adversary's office whom I had met and remembered. I double-clicked to check the "to" list and it was composed entirely of members of my adversary's law firm, individuals, including experts associated with my adversary's case and my adversary's client. I was on the list but I just did not seem to belong on it. Nevertheless I clicked on the attachment and saw the title of the attached "Confidential-Case Plan Report Analysis of Case Including Problems and Recommendations." At this point it became obvious that this was an internal memo sent to the law firm, associated support individuals and the client. It was not meant for me. My cursor is now at the bottom of the e-mail on the box with an arrow pointing down and the question is "Do I press down?" And further if I do press down and read, what do I do then? As I say it has been a long day, it is late at night, and I sure as hell could use some cheering up.

Sincerely,

Poised on the Edge

Dear Poised:

The answer to your question is, at least facially, simple. The answer is yes. You may click on the box, scroll down and read the communication. In fact, you may use the information obtained. But background is important to an understanding of the relevant rule.

As you may be aware, the New York State Bar Association appointed a committee – the Committee on Standards of Attorney Conduct (COSAC) – which spent several years reviewing the New York Lawyer's Disciplinary Code. It adopted the Model Rule approach and, while it did not adopt the substance of every one of the Model Rules of Professional Conduct (as promulgated by the American Bar Association), it did in this case. The Committee proposed to the Presiding Justices of the four Appellate Divisions the exact wording of Model Rule 4.4, and the Justices adopted it as one of the rules governing the conduct of attorneys in the State of New York. Specifically, Rules of Professional Conduct, Rule 4.4 states as follows:

> (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

The official comment of the American Bar Association states "[f]or purposes of this Rule, 'document' includes e-mail or other electronic modes of transmission subject to being read or put into readable form." The official comments to the New York Rule do not contain this sentence, but the reporter's notes for COSAC clearly indicate that this Rule is intended to apply to e-mails and other electronic transmissions. The Rule is new – the former Code of Professional Responsibility contained no such provision and did not address this issue. However, the reporter's notes appear to explain the thinking of COSAC in adopting Rule 4.4, and illustrate some of the issues. The notes state as follows:

> This formulation places a modest burden on the innocent receiving lawyer, but enables the sender, upon receipt of notice, to take whatever steps the sender considers advisable. The current Disciplinary Rules do not contain a comparable rule, but the provision is needed to guard against breaches of confidentiality and other harms to clients that inevitably arise, even among careful and conscientious lawyers, with the proliferation of e-mail, faxes and other electronic means of communication.
>
> Rule 4.4(b) is deliberately simple in form and simple to implement, leaving to the courts and ethics committees the complex, case-by-case task of determining when lawyers should be able to read, retain, or use the information contained in inadvertently sent documents. A more detailed rule on inadvertently transmitted documents would likely be difficult to apply and enforce, and could not possibly anticipate all of the situations that will arise as technology evolves.

Again, then, the answer to the question, according to the recently adopted Rules of Professional Conduct, is a simple yes. However, to many lawyers who vigorously argue against the receiving lawyer's ability to read (much less use) the information obtained, the answer is anything but simple.

This is not the first time the issue has been addressed in this column; it was the subject of the Forum in the *Journal* of July/August 2003. As noted, there was no comparable rule at the time. The conclusion reached by the Forum was "by returning or

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destroying the errant fax, you would be merely preserving the clear right of your adversary to keep communications with his/her client confidential, and by so doing would be promoting the integrity of the legal system as a whole." In support of its view, the Forum cited American Bar Association Committee on Ethics and Professional Responsibility Formal Opinion 92-368. That Opinion stated: "[a] satisfactory answer to the question posed cannot be drawn from a narrow, literalistic reading of the black letter of the Model Rules." It spoke of confidentiality and stated further that "if the Committee were to countenance, or indeed encourage, conduct on the part of the receiving lawyer which was in derogation of the strong policy in favor of confidentiality, the Committee would have to identify a more important principle which supports an alternative result. . . .We conclude that their importance pales in comparison to the importance of maintaining confidentiality." The Opinion concludes:

> The preamble to the Model Rules correctly notes that "virtually all difficult ethical problems arise from the conflict between a lawyer's responsibility to clients, to the legal system and to the lawyer's interest in remaining an upright person while earning a satisfactory living." Similarly, the same introduction observes that "a lawyer is also guided by personal conscience and the approbation of professional peers." In this instance, those principles . . . all come together to support our conclusion that receiving counsel's obligations under those circumstances are to avoid reviewing the materials, notify sending counsel if sending counsel remains ignorant of the problem and abide by sending counsel's direction as to how to treat the disposition of the confidential materials. This result not only fosters the important principles of confidentiality, avoids punishing innocent clients and conforms to the law of bailment, but also achieves a level of professionalism that can only redound to the lawyer's benefit.

The Forum came to the same result and conclusion, as indicated by the passage quoted above regarding the confidential fax inadvertently sent to an adversary.

The purpose in setting forth the reasoning of these two opinions is that they express the position of a substantial number of attorneys on this subject, about which they are quite passionate. Many feel that the answer to this question involves a fundamental perception of what the practice of law is all about.

However, as was stated in the Forum, "unfortunately no clear guidance is furnished by the Code, as there is no Disciplinary Rule or Ethical Consideration which directly addresses the inadvertent discovery of confidential materials." That is no longer true. With Rule 4.4(b) as proposed by COSAC, and *as adopted by the Presiding Justices*, there is guidance, and the guidance requires no more than that the receiving attorney simply notify the sending attorney of the receipt of the materials.

Furthermore, Ethics Opinion 94-382 has been withdrawn by the American Bar Association Standing Committee on Ethics and Professional Responsibility, by way of Formal Opinion 05-437. It did so because in February 2002 the ABA Model Rules of Professional Conduct were amended, and narrowed the obligation of the receiving lawyer. The ABA Model Rules established the Rule as it is set forth in the rules applicable to New York attorneys under Rule 4.4(b). Formal Opinion 05-437 states: "The Rule does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer." It should also be noted that on close examination a rule requiring a lawyer to not read the material, or not to use it, has limited practical application.

Certainly, one can come up with examples of accidental disclosure that few would hesitate to use. One might be confidential material coming into the hands of a criminal defense lawyer. A plaintiff's attorney receives material inadvertently sent by defense counsel to the effect that the defendant chemical company has deposited dangerous chemicals into the environment, which are slowly poisoning school children. Information is received that the physician defendant did in fact commit the negligent act that crippled the plaintiff. Or documentary proof accidentally arrives that the defendant drug company has tests proving that its latest pain medication caused the death of some patients. If we speak of the integrity of the judicial process, one can reasonably ask how that integrity is maintained by keeping secret evidence that should be seen by the trier of the facts, be it a court or jury, to ensure that is reaches a just result. All this being said, you should check out Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure. This rule imposes much stricter regulations.

In conclusion, there are passionately held opinions on both sides of this issue. That being said, the Rules of Professional Conduct as established by the four Presiding Justices of the State of New York impose no obligation on the receiving lawyer to refrain from reading the material, keeping the material, and using the information discovered.

The Forum, by
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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Is it correct to refer to an individual as "The Honorable Judge Smith . . ."? I think that identification is redundant, but I have seen the title written that way in some publications.

Answer: You are correct; that title is redundant. Properly, write either "The Honorable John Smith" or "Judge John Smith." The honorific must include the capitalized definite article "The"; the word "Honorable" by itself is insufficient. But the use of both titles, "Judge" and "The Honorable" is redundant, as is the double identification" Attorney Jack Jones, Esq." or the title "Dr. Mary Jones, M.D," although they too are often seen.

Allen Morris, retired Clerk of the Florida House of Representatives and expert on this subject, writes in his manual *Practical Protocol for Floridians*, that, in Florida, everyone who has ever received a commission over the Great Seal of the State is awarded the title "The Honorable." And once awarded, the title remains with the individual for life, just as everyone who has received the title "Judge" retains that honorific for life.

He adds that the title is not "gender-oriented." (He also pointed out that the sign on the door of the men's room in the Supreme Court building, which reads "Justices" is inappropriate because it indicates that the room is "unisex.")

The title "The Honorable . . ." should not be abbreviated. The abbreviations "The Hon." or "Hon." are inappropriate. Remember, also, that since the honorific is a title of esteem, one should never use it to refer to oneself. Nor should one ever address oneself as "Esquire," although others may properly use either "Esquire" or "Esq." to refer to other lawyers.

But some lawyers strongly object to being addressed as either "Esq." or "Esquire." One lawyer, who heads a law firm, wrote that either honorific irritates him so much that he does not consider hiring a lawyer who has used it when applying for a position. He added, "I believe that this practice is not only inappropriate, but improper, conveying precisely the image that the bar is currently attempting to negate: that lawyers are officious, self-serving practitioners."

Another correspondent wrote that he opposes all titles that identify an attorney except "Lawyer." He wrote:

> Except in relation to specific employments, where I function as such, please do not address or refer to me as "Attorney" (agent), "Counselor" (advisor), or "Advocate" (pleader, hired gun). As titles, or as general descriptions of persons, those terms are degrading because they are limiting. Like the expression "Mistress" and "Decent Burial," they carry the implication of "only" or the lack of something. The term "Lawyer" refers to my training and presumed competence.

Question: How do you know whether or not to double the final consonant of a verb to indicate past tense? For example, should the past tense of *fit* be spelled *fited* or *fitted?*

Answer: The correct spelling is *fitted*. When a single-syllable word ends in a single consonant that follows a vowel, double the consonant before a suffix that begins with a vowel. Examples are *rub/rubbed, sip/sipped,* and *rig/rigged.* (So when the *New York Times* reported that Sarah Palin had commented that a Democratic candidate for President "palled around" with undesirable individuals, the doubled consonant was correct.)

In verbs of two or more syllables, double the final consonant before the suffix when the suffix begins with a vowel. Examples are *refer/referred; infer/inferred; control/controlled*. But when verbs having more than one syllable end with a consonant preceded by a single vowel, do not double the final consonant before a suffix when the accent falls on the first syllable of the root word. Examples are *benefit/benefited; differ/differed; catalog/cataloged; profit/profited.* (All the verbs in that list (*benefit*, *differ*, *catalog*, and *profit*) are accented on the first syllable.) But when the accent falls on the second syllable of the root verb, as in *regret/regretted; permit/permitted; refer/referred*, the consonant of the second is usually doubled.

Potpourri

Have you noticed that when two *t*'s or two *d*'s appear in the middle of a pair of words, both members of the pair sound the same? There is no difference in the sound of *traitor* and *trader, latter* and *ladder, hearty* and *hardy, Plato* and *Playdoh.* How do you tell whether a person is saying, for example, *latter* or *ladder*? Of course, you can usually tell by the context, but there's another way most people don't think about: As a native speaker, you shorten the vowel in the word that has two *t*'s in the middle and lengthen the vowel sound in the word with the two *d*'s. So in *Play-doh*, for example, the *a* sound is held longer than the *a* sound in *Plato*, distinguishing the two words. Try it yourself, with all the words listed.

You might also add the question: "Why are words pronounced the same whether they have either two *t*'s or two *d*'s? The answer is that when words with consonants in the middle are surrounded by vowels the consonants are affected by the voiced vowels, so they become voiced as well.

A good illustration of that effect is a popular 1944 song whose lyrics seem nonsensical. If you are old enough, you may recall the opening lines. Mairzydoatsndozyoatsnlittlelamzedivy; a kiddelydivytoo, wouldn't you?" (Readers may sing along with me.) The

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).

lyrics may be misspelled, but the point is valid: The way we pronounce words and the deletion of pauses between them strongly affects our pronunciation of all the language. For readers too young to recall the song, the normal pronunciation of those lyrics is, "Mares eat oats, and does eat oats, and little lambs eat ivy. A kid'll eat ivy too, wouldn't you?"

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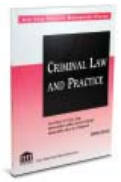

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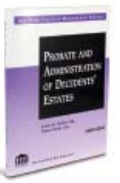

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you seek, clearly and without gaps in logic.

Create a table of contents. The table of contents presents the point headings and subheadings. For most judges it's the first page, after the questions presented, they'll read. An effective table of contents signals an approachable document.

Select only your strongest, best-supported arguments.

The table of contents with point headings sets out your brief's roadmap. It lets you maintain focus and keep your goals in sight throughout the drafting process.

Be Organized

Your reader must understand your brief. An organized brief is easy to read. It's methodical. It cuts to the chase. If you prepare before you start writing, the organization flows naturally.

Start your brief with an introductory statement or summary of argument. Identify the nature of the case, your claim, your theory of the case, and the remedy you seek. This statement should be concise, but it should serve as an overview of your position and the outcome you intend. Judges want to understand the big picture before they read the details. Persuasive writing in this sense is an inverted pyramid. Judges want the conclusion first so that they know whether they have the jurisdiction to grant your proposed remedy. Giving the conclusion first also gives judges context for what they read later.

Then state the facts of the case. This is the most important part of the brief; judges interpret facts to determine what relief they can and will grant. Judges won't know the facts other than through the briefs and the admissible evidence. It's up to you and opposing counsel to present the facts — facts you and your adversary will glean from the affidavits, affirmations, exhibits, and deposition, hearing, or trial transcripts. You need to present your client's version of the facts convincingly. Use the facts section to win the court over. Tell the judge what really happened.

Engage the judge by telling a compelling story. Set the scene by describing the background. Bring the characters to life with forceful verbs and concrete nouns, not conclusory and exaggerating adjectives and adverbs. Introduce the conflict and guide the reader to the remedies that should result. Don't be conclusory. Show; do not opine. Tell a story; don't quote witness after witness.

Your story needs a logical narrative that leads directly to your desired outcome. The narrative need not be chronological, although a chronological narrative often works best. The events, the characters, and the theory must come together in a credible plot. Maintain the judge's focus by starting, developing, and ending your narrative on a high note.

Your fact statement must meet two tests. First, it should stand alone. Anyone reading your facts must understand your case without reading any other document. Assume that the judge knows nothing about your case. Mention only those facts relevant to your sought-after relief. Cull the meaningful from the mundane. You'll know which facts are worth mentioning in your facts section by whether you'll argue them later in your argument section. Second, your facts section should be persuasive without being argumentative. Save the argument for the argument section.

Beyond those two tests, you must write the facts in a way that impresses the court that how you present the facts is the only way the facts should be viewed. Through perspective and organization, don't let two sentences go by without making it obvious, without argument, which side you represent. Make the focus of your facts statement support your client's theme.

Take the opportunity from the start of your fact section to paint your client favorably. Make the judge empathize with your client. Judges will feel comfortable resolving the case in your client's favor if they can step into your client's shoes. Humanize clients by naming them throughout your brief.

When you organize your argument section, be prepared to acknowledge and accurately state the applicable legal standard. Show the court that it can rule in your favor because your client's case satisfies the standard. At the trial-court level, the standard is the burden of proof with the correct presumptions. On appeal, the standard review depends on the type of lower-court or administrative decision, order, judgment, or decree you're appealing. If several standards apply, mention and apply them all.

Once you've identified the standard, organize to explain why the standard works to your client's advantage. Then tie the standard to the substantive sections of the brief by explaining how the standard has been satisfied. If the standard is a de novo review on the law, for example, emphasize that the trial court's adverse legal conclusions don't bind the appellate or reviewing court. Offer citations to show how the highest court in your jurisdiction has applied the standard in similar cases. Include the specifics of your case that make the standard apply and how the court should enforce it.

Introduce the questions presented or issue statements by exploring your deep issue persuasively and in no more than 75 words. The questions you pose foretell what the judge must decide. The judge will filter your brief through the issues you present. That forces you to argue issues, not caselaw. You've already developed your issues and listed them as point headings in your table of contents. You've framed them to allow one possible answer: the one you want. Now develop the arguments to get that answer.

Outline and organize each issue in your argument section using the CRARC method, the Legal Writer's patent-pending improvement over the IRAC method. CRARC stands for Conclusion, Rule, Analysis, Rebuttal and Refutation, and Conclusion.

In the first Conclusion section, state the issue persuasively. Begin with a strong topic sentence to introduce the issue. Summarize your argument first and then explain. This initial section must capture the judge's interest by announcing a logical syllogism that ends with your conclusion.

In the Rule section, present the rules of law that support your conclusion. After each rule, support it with your best authority. Move from the specific to the general and from the binding to the merely persuasive.

Discuss in detail particularly favorable or unfavorable cases, pointing out the similarities and differences of the decision with the facts in your case. Explicitly stating the reasons you reference a particular authority will emphasize its importance. Otherwise, be brief with your citations; explain their relevance only in parentheticals. It's the novice who devotes paragraph after paragraph to discussing cases, as if cases were more important than the rules for which the cases are cited.

Save quotations for those times when paraphrasing will fade the nuance or when you can't explain the law in your own words more concisely or more convincingly than the authority you're quoting.

Block quotations are distracting and often go unread. In those rare cases when you need block quotations — if you're asking the court to interpret a statute or contract or if you need to lay out a multi-part test from a seminal case — introduce them before the quoted text. That'll force your reader to understand their import.

For all other references to the law, paraphrase. Each time you explain the law you have a new opportunity to advance your theory.

In the Analysis section, apply the law to the facts — facts mentioned in your facts section. This is the CRARC's most important part. Show the reader how the rules apply to your facts. Describe factual details by creating images with which the reader can identify. Be specific. Also, cite the record when you refer to the facts. Doing so strengthens your brief, makes it seem reliable, and helps readers find information when they search the record.

Include the language of the legal test when you apply the facts. This engages the reader in your case theory. Your goal is to get your readers to arrive at your conclusion on their own.

If your rule is well established, your statement of the law will be brief and condensed. Extensive legal analysis will be necessary only when the law is unclear or when it turns on novel or uncommon grounds. Don't give more rules than the court needs to decide the case. You're not in law school any more.

Deal with issues, not your adversaries' motives and personalities.

Mention consistency between the policy of the applicable rules and your facts. Judges want to know that they're deciding justly, not simply deciding logically. Judges want to decide correctly and for the right reasons.

In the Rebuttal and Refutation section, state the other side's arguments fairly by setting up a straw man without repeating the rules you laid out in your Rule section. One goal in persuasion is to show that you're right because you are right more than that you're right because the other side is wrong. But the Rebuttal and Refutation section is your opportunity to weaken the other side. Failing to address unfavorable arguments in advance is strategically wrong and sometimes unethical. Not mentioning unfavorable law or contrary arguments won't make them go away. The judge might find them, and your opponent might bring them up and use them against you. Don't assume that your reader or opponent is stupid. Distinguishing the facts of your case and explaining why a statute or case doesn't apply will advance your position.

Distinguish the law on which your opponent relies. Explain why your opponent's arguments are flawed or unsubstantiated. Show that your opponent's theory of the case is invalid. Do so in an order that works for your client. You don't need to follow your opponent's order. Just as you should order your lead arguments in your Rule section from your strongest to your weakest, you should order the arguments in your Rebuttal and Refutation section from your strongest to your weakest, not from your opponent's strongest to weakest.

Point out inaccuracies in your opponent's description of the facts or interpretation of those facts. Punch holes into your opponent's case, but exclude defensive or wordy references to opposing briefs — and especially don't suggest that your opponent or the judge below is lying or stupid. Deal with issues, not your adversaries' motives and personalities. Always address the court and your opponent respectfully, although not obsequiously, even if they're unworthy of your respect. Judges love civility and professionalism because they can reach a decision without being distracted by hostility.

In the final Conclusion section, state the relief you seek. You provided the legal issue in the first Conclusion section. Now press the entire argument forward by tying the legal issue and your arguments to the relief you seek. Be specific when describing how the judge should decide your case. Most times judges are forbidden to give you more than you ask for. You can't be too direct in stating what you want for your client.

The Legal Writer continues in the next issue of the *Journal* with three more way to persuade: honesty, brevity, and revision. ■

Gerald Lebovits is a judge at the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at Columbia Law School and St. John's University School of Law. This two-part column is based on an unpublished article by the same title he wrote with Lucero Ramirez Hidalgo for a Continuing Legal Education program he gave for the Practising Law Institute in November 2009. Judge Lebovits's e-mail address is GLebovits@aol.com.

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EDITOR'S MAILBOX

Did the Odds Change?

We received the following note from Bentley Kassal, the author of "Update: Did the Appellate Odds Change in 2008?", which appeared in the November/December 2009 Journal *on page 35.*

I have received calls about the percentage of motions of leave to appeal at the Court of Appeals in 2008. Here are the statistics:

For 2008, the official court statistics disclose that the Court of Appeals granted 6.8% of the motions for leave to appeal in civil cases, which is down from 7% granted in 2007. The average time from return date to disposition for such applications in 2008 was 60 days, while in 2007 it was 62 days.

Thank you,
Bentley Kassal

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BY GERALD LEBOVITS

Persuasive Writing for Lawyers — Part I

Winning writing is persuasive writing. For you to persuade, readers, especially judges, must believe that you, as a lawyer, seek the correct result and that you have the arguments, fact, and law to support it. Your job is to help them.

Judges are busy, skeptical professionals. They can spare but limited time to consider your case. Judges must be able to extract the gist of your case quickly. You must write effectively by transmitting only necessary information favoring your position. The way to persuade is to assert your position with accurate, confident, credible, simple, short, and strong arguments supported by good storytelling and citations to authority, all written in clear, concise, precise, and plain English. To persuade, you must make it easy for the court to rule for your client and to want to rule for your client.

This column offers some suggestions on how to persuade through preparation, organization, honesty, brevity, and editing.

Be Prepared

To tell a persuasive story, you need to know the background, the characters, the conflict, and the issues. Spending the time to learn the facts, research the law, outline your arguments, and structure your brief is time well spent. So is starting early and setting time aside to write without distractions. Use good time-management techniques.

Before all else, learn the facts. Gather information from your client, read the relevant documents, and talk to necessary witnesses. Ask questions. Don't stop until you understand the key details. Avoid surprises.

Then consult your local rules and all applicable rules of procedure. They'll determine your page limit, deadlines, format, and content. Knowing the rules from the start will save headaches later.

Then frame the facts into legal issues and narrow your legal research. You don't need to know everything about the law before you start. It's enough to know everything by the time you're done. Trying to know everything leads to procrastinating. Like the vice of scapegoating, procrastinating is the enemy of doing it right and getting it done.

Once you're confident that the court has the jurisdiction to address your client's claim or defense, identify the arguments that'll give your client the remedy it seeks. Select only your strongest, best-supported arguments. Discard weak issues. What you include is as important as what you exclude. Focus on a few strong arguments, not many weak ones.

Arrange your issues in order of strength; lead with your best points first. If two issues are equally strong, lead with the argument that'll give your client the greatest relief. Two exceptions: First, consider the logic of your issues. Trace the elements of a statute or the factors of a test. If a statute or the leading case established an order in which you should articulate the factors, follow that order. Second, begin with a threshold issue, such as service of process, jurisdiction, or the statute of limitations, if you have one.

Develop a case theory, or theme. It should be an emotional message, communicated in a simple, understated, unemotional way. The theory should summarize your case. The theory should, if accepted, secure your remedy. Weave your theory into every part of your brief.

Work your case theory into your statement of facts by phrasing your case theory persuasively. You're not writing a law-review article or historical treatise with a neutral view of the facts. You're writing to make sure that the reader agrees with the facts as you tell them. Include your theory in every opening paragraph after each heading and subheading. Weave it into your presentation of the law and your facts.

Outline your brief before you start writing. To do so, come up with point headings. Well-written point headings provide a quick summary of your argument and answer each question presented. There should be one point for each ground on which relief can be granted; if the court agrees with that point it can grant relief, even if it disagrees with all else.

A point heading comprises a conclusion or an action that the writer wants the court to take, together with the reasoning that justifies that outcome. An effective point heading, when combined with subheadings that break up complex issues, will concisely cite the applicable law, describe how the law applies to the facts at issue, and arrive at a conclusion. It'll avoid hypotheticals and abstractions. It'll be argumentative.

Reading the headings in order shows your theory of the case with logical reasoning, and the remedy

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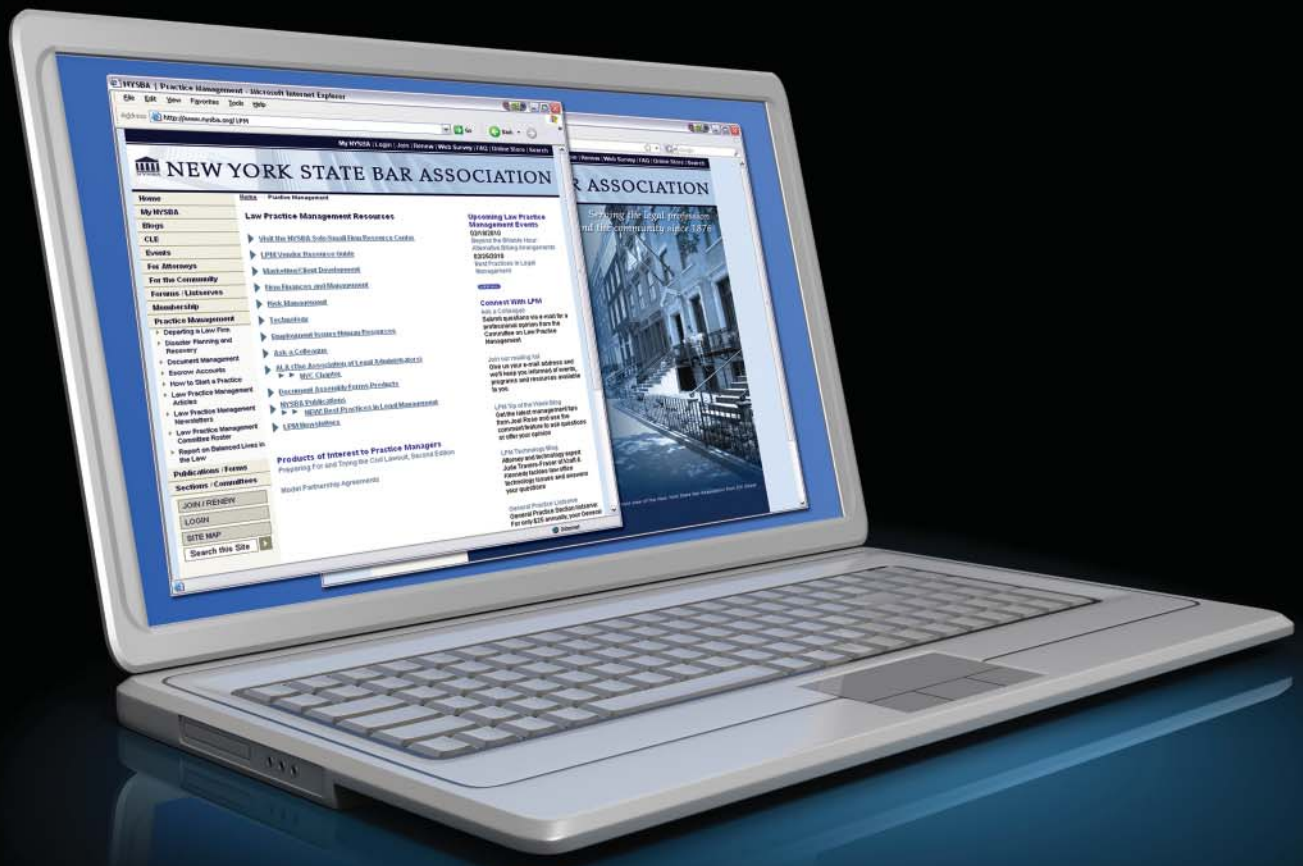

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