

MAY 2011
VOL. 83 | NO. 4

NEW YORK STATE BAR ASSOCIATION

Journal



The Lessons of *Kiryas Joel*

by Lou Grumet and Justin JaMail

Also in this Issue

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A Guide

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Back to the Future

It has always been human nature to try to predict what the future will hold. For example, consider TV shows like the *Jetsons* and classic films like *2001: A Space Odyssey*, which captured our imaginations and compelled us to think ahead.

At the beginning of my term, I challenged all lawyers to help move our profession forward by going back to the future. In this, my final President's Message, let me renew that challenge.

In the wake of the Great Recession, which so deeply affected our profession, we have entered what appears to be a period of recovery. During this time, it remains imperative to focus on how we can shape the future of our profession in a way that protects us from future economic threats. As I have often said over the past year, we are called to be stewards of our profession. It is our duty to play an important role in the evolution of our profession. This is an obligation that my mentors, including Judge Hugh R. Jones and Judge Richard J. Bartlett, considered to be paramount in their own professional lives.

Over the past year, we have endeavored to shape the future in many areas. And we have accomplished much. Space does not permit me to thank every person who made these successes possible. However, I would be remiss not to mention the tremendously talented officer team who supported our efforts this year: President-elect Vince Doyle; Treasurer and President-elect Designee Seymour James; Secretary David Miranda; as well as our phenomenal Executive Director, Patricia Bucklin.

Set out below is an overview of the important work we have done through the contributions of numerous dedicated volunteers.

Future of the Profession

Last June, we began exploring the future of the practice of law by bringing together some of the foremost thought leaders in our profession to form a Task Force on the Future of the Profession. The Task Force included managing partners, law school professors and deans, general counsel, technology experts and work-life balance consultants. Under the dedicated leadership of Linda Addison and T. Andrew Brown, the Task Force focused on (1) training new lawyers; (2) work-life balance; (3) law firm structure, particularly alternative billing methods; and (4) technology.

The Task Force held forums both upstate and downstate to gather the views of managing partners of firms of all sizes, general counsel, law school deans, and bar leaders. In addition, I emailed all State Bar members seeking their input on these important issues, which affect the practice of law for all lawyers in our state.

The result of this intense study is a comprehensive report, which the House of Delegates accepted on April 2. In the coming weeks, the report will be referred internally to State Bar sections and committees for development of proposals they deem appropriate to implement the recommendations. The report will also be shared with bar associations, law schools and other entities for their consideration. The Task Force's key observations include:



Training New Lawyers: Increasingly, clients do not want to pay for the work of new lawyers, many of whom have never interviewed a client or drafted a contract. To meet the demands of the modern client and law firm, new lawyers need more skills-based learning.

Work-Life Balance: To help lawyers integrate their work lives and personal lives and to find balance in the virtual 24/7 workplace, employers should consider policies that encourage flexible work arrangements and other initiatives that promote a healthy workplace.

Law Firm Structure: To stay competitive, law firms should engage in long-term examination of their structures and expand their use of alternative fee arrangements.

Technology: Emerging technologies are perhaps the glue that holds together all the issues covered in this study of the profession. The Task Force recommended that law firms employ systems-based analyses when considering the use of new technologies and that they invest in increased technology training for lawyers. While technology can be an impediment to work-life balance, it also can provide the means to achieve appropriate balance.

STEPHEN P. YOUNGER can be reached at syounger@nysba.org.

PRESIDENT'S MESSAGE

I encourage you to read the report at www.nysba.org/futurereport.

Government Ethics Reform

In the wake of recent political corruption scandals that have dominated the headlines in New York State, public confidence in our government is at an all-time low in our state. Serious concerns have been expressed about the strength of New York's ethics codes for government officials, and the call for reform has been raised in many quarters. While thousands of public servants – many of them lawyers – make positive contributions on a daily basis through their government service, the unethical actions of a relative few tarnish the hard work of those who are dedicated to serving the public good.

As a result, we formed a Task Force on Government Ethics to conduct a systematic review of public sector ethics issues that impact the legal profession. Led by Professor Patricia E. Salkin and Hon. Michael J. Garcia, the Task Force focused on four key areas: (1) financial disclosure by public officials; (2) honest services crime; (3) enforcement and due process issues; and (4) municipal ethics.

At its January 28, 2011, meeting, the House of Delegates unanimously approved the Task Force's report and recommendations. Key recommendations of the Task Force include: (1) requiring disclosure of indirect sources of income above a \$10,000 threshold with the exception that attorneys would not be required to disclose clients where such disclosure would harm the client or be detrimental to representation; (2) creating a single ethics commission to oversee both the executive and legislative branches of government; (3) imposing additional penalties for public officials found to have violated ethics laws, including suspension and expulsion from office; (4) subjecting public officials who violate confidentiality of ethics investigations to new penalties; (5) enacting tougher laws to give state and local prosecutors more tools to fight "honest services fraud"; and (6) adopting a

comprehensive municipal ethics code. The Task Force's full report can be viewed at www.nysba.org/tfgefinalreport.

Since the approval of this report, I have communicated the State Bar's recommendations to the Governor and our legislative leaders who are currently working on a comprehensive state ethics bill. Bar associations can and should play an important role in shaping the debate over government ethics and helping to restore the public trust. The State Bar has a responsibility to preserve the pillars of our democracy, including government ethics, and I am grateful for the work of our member volunteers who ensured that we were prepared to enter this debate in a timely and thorough way.

Legislative Successes

This past year, we were fortunate to experience some significant legislative successes, which led *Crain's Insider* to dub 2010 a "Banner Year" for the Bar. Some of our legislative victories included the passage of no-fault divorce, the creation of the Office of Indigent Legal Services to improve the criminal defense system for the poor, the approval of the Judiciary's \$15 million IOLA budget allocation to fund civil legal services for the poor, and the establishment of a commission to recommend long-overdue pay raises for our judges.

As the legislative session continues, we remain committed to advocacy on behalf of our profession and the public. We urge the Legislature to renew its support for the Judiciary's \$15 million allocation to help offset declining IOLA revenue, as well as the Judiciary's request for additional funding for civil legal services. We were disappointed at the level of budget cuts imposed on the Judiciary but are hopeful that the cuts will not deprive New Yorkers of access to our justice system. In addition, we have supported the Governor's proposed funding for the new Office of Indigent Legal Services.

We helped lead the successful effort to oppose caps on non-economic dam-

ages in medical malpractice cases. We are pleased that the proposed caps were not included in the Governor's budget agreement with the legislative leaders. These changes would go to one of our association's core values – promoting access to justice – and we spoke out vigorously against them. As noted above, we are involved in the ongoing debate on government ethics reform. We also succeeded in defeating an effort to abolish the spousal refusal doctrine for Medicaid eligibility.

On the federal level, we are fighting against the proposed 18% cuts to funding for the Legal Services Corporation, which in 2010 provided more than \$28 million for legal services programs in New York. Our efforts to overturn the red flags rule won the State Bar the ABA's Grassroots Advocacy Award. And, we were instrumental in the effort to secure a lawyer's exemption in the Dodd-Frank Act.

Our legislative successes are attributable to the vast expertise and tremendous dedication of our members, sections and State Bar staff. We can all take pride in these accomplishments, and I am very grateful for the work of those who contributed to our success.

Youth Courts

Another way our profession can affect the future is to provide opportunities for young people to become active participants in our society. The more than 100 Youth Courts operating in New York use positive peer pressure as an early intervention tool to help teens who have committed low-level offenses. Moreover, they educate young people about and instill respect for the rule of law. Teens who participate are trained to serve as jurors, judges and attorneys. They hear real-life cases of their peers involving minor offenses. Sanctions typically include community service, letters of apology and counseling.

To help strengthen Youth Courts in our state, our Special Committee on Youth Courts, which is led by Chief Judge Emeritus Judith S. Kaye and

Patricia L. R. Rodriguez, has been extremely active on several fronts. Last fall, the Special Committee held a forum in Albany to encourage local agencies to establish a Youth Court. As a result, the committee forged relationships with the Albany City School District, which is establishing a school-based Youth Court. This summer, they will begin training student members to hear school-related cases; the student members will begin hearing cases in September 2011.

In addition, the Special Committee sponsored a demonstration by the Greenpoint Youth Court held during the January 2011 House of Delegates meeting, as well as a special issue of the *Journal*, which is now in its second printing. The committee also drafted proposed legislation regarding Youth Courts and their role in juvenile justice in New York. Finally, the Special Committee is also working with the Association of New York State Youth Courts to develop a data collection program that will serve the needs of individual Youth Courts and be accessible to others seeking information and statistics on Youth Courts.

The State Bar is proud to support Youth Courts and their mission of providing a juvenile justice alternative that is operated for and by young people. There are numerous ways that our members can help Youth Courts. In addition to volunteering at your local Youth Court, you can contribute to The Bar Foundation's special fund for Youth Courts, which is named in honor of former Chief Judge Kaye. You can contribute online at www.tnybf.org.

Family Courts

Family Courts support the most vulnerable segment of society – our children – at the most vulnerable points in their lives. From foster care to child abuse and neglect, Family Courts make key decisions every day that can have lasting effects on children and their parents.

However, our Family Courts face overcrowded dockets, too few judges, and protracted delays. Under the lead-

ership of Judge Rita Connerton and Susan Lindenauer, and with guidance from experts on the front lines of our Family Courts, our Task Force on the Family Courts is tackling the problems faced in operating this important branch of our court system. The topics that the Task Force is exploring include: (1) What additional resources the Family Courts need, in what functional areas? (2) What improvements are required in case management and utilization of Family Court staff? (3) What new technologies can judges and attorneys use to improve efficiency? And (4) what operational improvements are needed to better serve our state's families?

In addition to focusing on these important topics, members of the Task Force on Family Courts are meeting with court officials from neighboring states to learn about the best practices that these states are using to ensure efficient operation of Family Courts in their jurisdictions. To date, Task Force members have met with judicial officers in New Jersey and Connecticut.

Given the influence Family Courts exert on the lives of our citizens, we must do all we can to ensure that members of the public have equal access to our justice system. The Task Force's work is ongoing and will continue into the upcoming Bar year. I look forward to what is sure to be a comprehensive and innovative report.

New York Law in International Matters

New York domestic law plays a critical role in governing a large number of cross-border business and international commercial transactions. However, the economic challenges that have confronted the legal profession and our global economy, coupled with strong competition from emerging financial centers abroad, have made it necessary to re-examine the role of New York law as an international standard. Indeed, shaping the future of our profession in New York must involve efforts to preserve the position of New York law as an international legal standard of choice for commercial transactions.

Our Task Force on New York Law in International Matters, led by Joseph T. McLaughlin and James B. Hurlock, is developing comprehensive recommendations to promote New York as an attractive environment for investment and as a preferred site for business endeavors. The Task Force is also examining the important role that New York courts and arbitration forums play in resolving international business disputes. The Task Force's report will be available later this year. It is my expectation that the Task Force's efforts in these areas will help re-establish New York law as a key standard in private international law and a force throughout the world.

* * *

We have endeavored this year to address the many concerns that face our profession. By fulfilling our role as stewards of the profession, we help achieve our ultimate goal of transforming the practice of law into a profession that is satisfying not only to the lawyers of today, but one that will be rewarding and fulfilling for generations to come.

As you can see, we have made great strides toward these goals. But there is still more to do, and we need the help of every member. Get involved in a section or committee. Volunteer to do pro bono. Become a mentor to a law student or new attorney. I firmly believe that it is our ongoing responsibility not only to shape our profession but also to nurture new lawyers and to serve as the mentors that we once benefited from. If I leave you with one thing, let it be a calling to continually seek to better our profession and to extend a helping hand to our new lawyers, who represent our future.

I am grateful for the opportunity to serve as your President, and for those who supported my journey, including first and foremost my wife and life's partner, Prue; my family; all those who served on our task forces and committees this year; and my partners at Patterson Belknap. It has been an honor and privilege. ■

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Wikileaks & Wikiwars –

Litigation Responses & Beyond

(6:00 pm – 7:00 pm)

May 2 New York City

Practical Skills: Basic Elder Law

May 3 Albany; Long Island; Rochester

May 4 Buffalo; New York City

May 5 Syracuse; Westchester

Dealing with Residential Foreclosures

May 5 Syracuse

May 9 Long Island

May 11 Westchester

May 13 Buffalo

May 17 Albany

May 20 Rochester

Commercial Litigation Academy

(two-day program)

May 5–6 New York City

DWI on Trial – The Big Apple XI

(May 5, 9:00 am – 5:00 pm;

May 6, 9:00 am – 12:00 pm)

May 5–6 New York City

Real Problems, Real Answers

(video replay)

(9:00 a.m. – 12:35 p.m.)

May 6 Canton

Healthcare Decision Making: Implementation of the Family Health Care Decisions Act, Recent Developments & Ethical Considerations

May 6 Albany

May 13 New York City

May 20 Buffalo

Insurance Coverage

May 6 Buffalo

May 13 Long Island; Syracuse

May 20 Albany; New York City

Green Construction

(9:00 am – 1:00 pm)

May 10 New York City

May 18 Rochester

Handling a No-Fault Case

May 11 New York City

Ethics & Professionalism

(9:00 am – 1:00 pm)

May 12 Syracuse

May 19 New York City

June 2 Long Island

June 7 Rochester

June 10 Buffalo

June 13 Westchester

June 16 Albany

June 20 Ithaca

Matrimonial & Family Law: What the Lawyer Needs to Know About Disclosure & Trial Preparation

(9:00 am – 1:00 pm)

May 13 Westchester

May 20 Long Island

June 10 Albany

June 17 New York City

12th Annual Institute on Public Utility Law

May 17 Albany

Estate Litigation

May 17 Long Island

May 19 Syracuse

May 24 Rochester

June 1 Buffalo

June 2 Albany

June 3 Westchester

June 9 New York City

Employment Law for the General Practitioner & Corporate Counselor

May 18 Buffalo

June 3 Albany

June 14 New York City

Starting Your Own Practice

May 20 New York City (live session)

Albany (video conference from NYC)

Practical Skills: How to Commence a Civil Lawsuit

May 23 Buffalo; Syracuse; Westchester

May 24 Albany; Long Island

May 25 New York City

Women on the Move

June 1 New York City

Practical Skills: Basics of Bankruptcy Practice

June 3 Buffalo
June 14 Albany; Long Island
June 15 New York City; Syracuse

Ethics for Business & Transactional Lawyers

(9:00 am – 1:00 pm)
June 7 Albany; New York City
June 22 Long Island

Gain the Edge

June 15 New York City
June 16 Long Island

Negotiation Strategies for Transactional Attorneys & Negotiation Strategies for Litigators

(Transactional Attorneys: 9:00 am - 12:35 pm)
(Litigators: 1:00 pm – 5:05 pm)
June 17 Albany

Entertainment Law

June 22 New York City (live session)
Albany (video conference from NYC)

Bridging the Gap

(two-day program)
July 19–20 New York City (live session)
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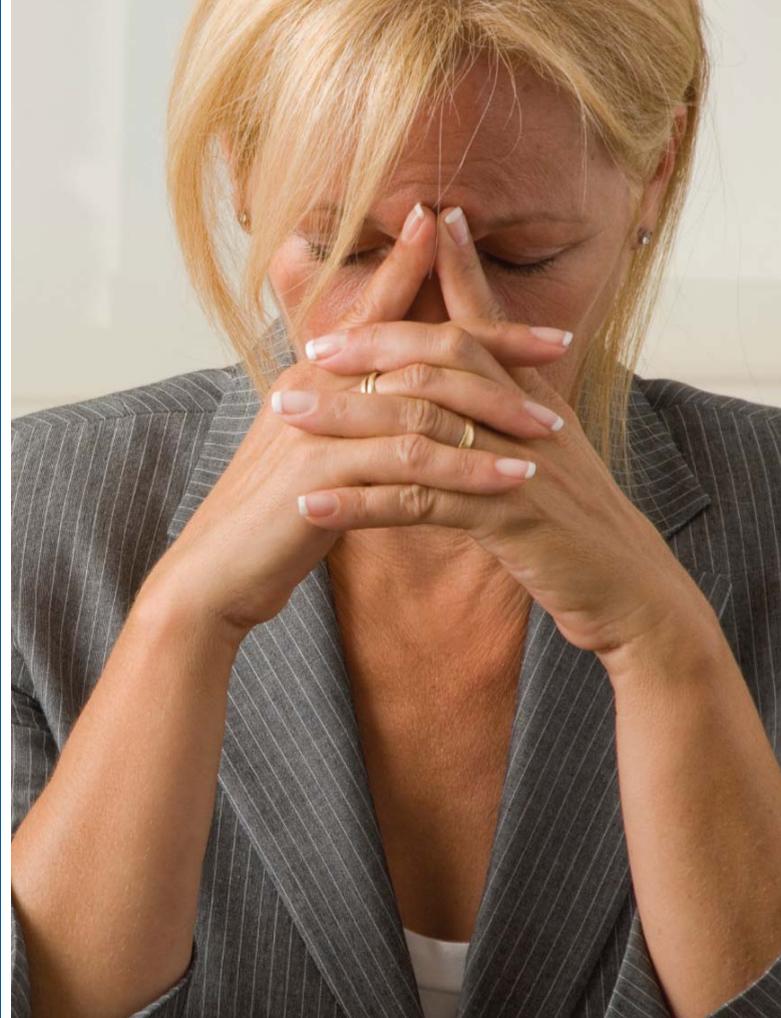
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The Lessons of *Kiryas Joel*

By Lou Grumet and Justin JaMail



LOU GRUMET (EmmaWill@aol.com) was the plaintiff in the case discussed in this article. He was the then-executive director of the New York State School Boards Association. Mr. Grumet is a former Assistant Commissioner of the State Education Department for the Education of Handicapped Children, a current member of the Grace Advisory Board, and a past executive director of the New York State CPA Society. He holds a J.D. from New York University School of Law, an M.P.A. from the University of Pittsburgh, and a B.A. from George Washington University.

JUSTIN JAMAIL is an associate with Morrison and Forester in Tokyo. He earned his J.D. from Fordham University School of Law and his B.A. from Columbia University.

As the executive director of the New York State School Boards Association, I fought a nearly decade-long series of suits to stop New York State from establishing a school district coterminous with the borders of the village of Kiryas Joel, a community comprised entirely of Satmar Hasidim, a sect of Hasidic Judaism. My colleagues and I considered this attempt to put a private religious organization in charge of a unit of government to be a flagrant violation of the New York State Constitution as well as the First and Fourteenth Amendments of the federal Constitution.

From 1990 until 1998, with the incredible legal services of Jay Worona, the Counsel of the New York State School Boards Association, I won victory after victory on this point, including three successful trips to the Court of Appeals and one to the Supreme Court of the United States. Many law schools use this case in Constitutional Law classes to emphasize that there are clear limitations to what government can do to help a religious community. Yet, the school district never shut down. The school

remains operational and has, in many ways, distinguished itself as an outstanding institution of its kind.

Twelve years after the last court decision, I have been revisiting these cases and reflecting on the motive, purposes, costs and rewards of litigation under the American system.

The Issue

The issue involved a rapidly growing village in Orange County known as the Village of Kiryas Joel. In 1989, the village requested the state to establish a school district within the village, which would serve only the Hasidic community that resided there. When the legislation was signed by Governor Cuomo, it was the first time in American history that a governmental unit was established for only a single religious group.

The legislation was overwhelmingly passed by both houses of the Legislature, with the Senate passing it during the middle of the night on the last day of the session as part of a package of bills. Although the Assembly

Speaker was strongly opposed to the bill, it passed the Assembly 150-1, with only the local assemblywoman voting against it.

History

The dispute which brought about the desire for a new school district was based on an intriguing fact pattern. The Satmar Hasidim is one of the largest Hasidic groups in the world. It had its roots in Satu Mare, Romania, in what was then a part of Hungary. Members of the group followed a charismatic leader, Rebbe Joel Teitelbaum, to the United States in the aftermath of the Holocaust. The

A school district is a key unit of local government in New York State.

Rebbe and his followers settled in the Williamsburg section of Brooklyn. Their numbers grew rapidly and they became one of the most powerful voting blocs in New York City. Since Brooklyn is the largest Democratic county in the state, this made them one of the most powerful blocs in the state as well.

In the 1970s, a large group of the Satmar, like many other city dwellers, chose to leave the city and establish a community in exurban Orange County. They bought land in the Town of Monroe, near Stewart Airport, and settled in. As they began building on the rural land they had purchased, they became involved in a series of conflicts with their neighbors concerning the style and density of the buildings. The ensuing zoning battle caused the Satmar to constitute their community into a new village. Under the New York State Village Law, a village can be created by 600 petitioners with contiguous properties. No other legislative approval is necessary.

The residents built a very restrictive community structure which was in many ways theocratic. The children were educated in yeshivas and many of the civil actions were settled by Jewish law. The village residents married among themselves and had very large families. Unfortunately, the small, closely related population produced a large number of disabled children who needed services. The community was unable to provide these services without government assistance, and decided, after much anguish, to send the disabled children to the Monroe-Woodbury School District, which served the geographic area. Monroe-Woodbury is a large suburban/rural school district with a long-term reputation for good educational services.

An ever-increasing number of disputes followed. One involved the busing of the students to school. Monroe-Woodbury scheduled the bus routes of its drivers by seniority, as provided in the union contract. The Satmar

wanted women bus drivers driving the girls and men bus drivers driving the boys, based on religious principles. Both sides felt very strongly and litigation ensued, ending in a decision which supported the district.

The district had provided services such as bilingual education and remedial services to the students in sites adjacent to the yeshivas. Following the United States Supreme Court decision in *Aguilar v. Felton*, the district believed it could no longer do that and offered the services only within district buildings. Again, litigation ensued. This time, it ended with the New York Court of Appeals, in a 1988 decision by Chief Judge Judith Kaye,¹ ordering the children to be served in a way consistent with the Supreme Court ruling.

It should be noted that the Monroe-Woodbury District also showed some insensitivity in serving the disabled students. A field trip to a Mc Donald's was quite upsetting to the parents of the strictly orthodox students, who ate only kosher food. Casting a developmentally disabled Satmar child as Rudolph the Red-Nosed Reindeer in a Christmas pageant created a major crisis.

Justice Souter described the situation in his 1994 Supreme Court opinion:

The residents of Kiryas Joel are vigorously religious people who make few concessions to the modern world and go to great lengths to avoid assimilation into it. They interpret the Torah strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio, and English language publications; and dress in distinctive ways that include head coverings and special garments for boys and modest dresses for girls. Children are educated in private religious schools, most boys at the United Talmudic Academy, where they receive a thorough grounding in the Torah and limited exposure to secular subjects, and most girls at Bais Rochel, an affiliated school with a curriculum designed to prepare girls for their roles as wives and mothers.

These schools do not, however, offer any distinctive services to handicapped children, who are entitled under state and federal law to special education services even when enrolled in private schools. Starting in 1984 the Monroe-Woodbury Central School District provided such services for the children of Kiryas Joel at an annex to Bais Rochel, but a year later ended that arrangement in response to our decisions in *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985). Children from Kiryas Joel who needed special education (including the deaf, the mentally retarded, and others suffering from a range of physical, mental, or emotional disorders) were then forced to attend public schools outside the village, which their families found highly unsatisfactory. Parents of most of these children withdrew them from the Monroe-Woodbury secular schools, citing "the panic, fear and trauma [the children] suffered in leaving their own community and being with people

whose ways were so different,” and some sought administrative review of the public school placements.

Monroe-Woodbury, for its part, sought a declaratory judgment in state court that New York law barred the district from providing special education services outside the district’s regular public schools. The New York Court of Appeals disagreed [in an opinion authored by Chief Judge Kaye], holding that state law left Monroe-Woodbury free to establish a separate school in the village because it gives educational authorities broad discretion in fashioning an appropriate program.²

The Solution

The village was unsatisfied – both with the decision of the Court of Appeals³ and the implementation by Monroe-Woodbury – and turned to the political process for help. At a meeting that included the village leadership, the Town Supervisor of Monroe, Assemblyman George Pataki and Congressman Ben Gilman, Assemblyman Pataki proposed creating a new school district coterminous with the Village of Kiryas Joel that would be under the control of the Satmar. A goal seems to have been to use the short-term crisis of the handicapped children to solve several other problems for the village.

A school district is a key unit of local government in New York State, with the power to tax, hire and fire teachers, open and close schools, finance the construction and operation of schools, prescribe textbooks, establish disciplinary rules, receive and distribute state and federal assistance, etc. Most particularly, this would give the Satmar control of their own publicly subsidized school bus network (from the beginning of the Kiryas Joel School District, money for busing was the tail that wagged the special education “dog,” according to the first and long-time superintendent of the district). The school buses would serve all the students, disabled as well as non-disabled, wherever they attended school.

At the time, Pataki was a minority member without much power in the Assembly, so he went to Assemblyman Joe Lentol, a Democrat who represented the Satmar enclave in Williamsburg, and asked him to sponsor a bill creating the new school district. He also asked the powerful Brooklyn Assemblyman Anthony Genovese to help convince Speaker Mel Miller to allow the legislation to pass. Then, as now, legislation has no chance of making it to a vote in either the Assembly or the Senate without the support of the majority leadership.

Miller, a lawyer from Brooklyn, rejected the idea immediately as unconstitutional. After his initial rejection however, Miller was persuaded by Genovese to allow the bill to go forward to solidify the support of the Williamsburg Satmar in certain city-wide elections. In a recent interview, Speaker Miller indicated that he was not concerned by the bill because he assumed that (1) it

wouldn’t pass the Senate, (2) Governor Cuomo would veto it, or (3) the courts would certainly overturn it.

Most observers assumed the proposed legislation would not go anywhere, and the large education lobbying groups did not lobby one way or the other. The night it passed came as a rude awakening, causing me and the President of the Teachers Union to have discussions concerning the threat that a new district carved out for a religious group might represent to our constituencies. We agreed that it was clearly unconstitutional, and we also worried that once such a district was approved, there would likely be many more special population districts. It was decided that I would speak with my former boss, Governor Cuomo, and ask him to veto the legislation.

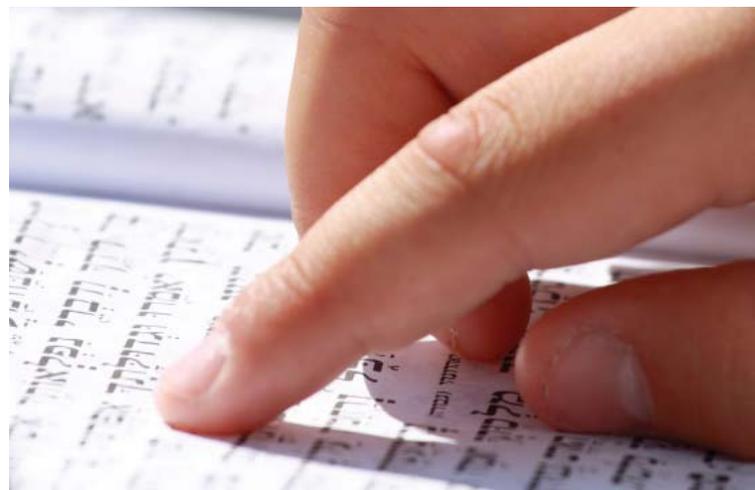
I met with the Governor several days later, after a *New York Times* story raised the constitutional issues in an article. At the meeting, the Governor indicated awareness of the legislation and made it clear that he was supportive. He indicated that the children in the district were all special education children who were not being served properly. The non-special education students would continue to be served in the private schools. I had previously run the state’s special education program and said the 13 kids involved at that time could be easily served in other ways under constitutional provisions. The Monroe-Woodbury School District had the responsibility to do so, and the State Education Department had an obligation to see that it was done. I noted that the legislation did not limit the services to the disabled.

Cuomo said that the Satmar didn’t ask for much legislatively, and he thought they were entitled to this law. He also asked who might challenge it in court; I said that I would.

Court

I challenged the law on its face, not on its application, and indeed, the village argued that the case was premature. My rationale was that the statute, by establishing a governmental unit for a religious group, was unconstitutional no matter how the village applied it. My challenge was also driven by my lack of resources for discovery.

In Albany Supreme Court, Judge Lawrence Kahn (now of the Northern District) agreed that the legislation was unconstitutional. He stated that the law violated all



three prongs of the “Lemon Test”: It had a sectarian, not a secular purpose; it was designed to advance the religious beliefs of the village inhabitants; and it would entangle the state with the residents’ religious beliefs. My association was ruled to not have standing; but my standing, as a citizen taxpayer, was upheld.

The Satmar appealed, and the decision was affirmed by the Appellate Division, although with a strong dissenting opinion. It was then appealed to the state Court of Appeals. This prestigious court was widely thought to be the best in the nation. Interestingly, every member had been appointed by Governor Cuomo, who strongly supported the law that was being challenged. (He was also the first governor in history to appoint every member of the Court.) The Court had to deal with the issue of not having any evidence on the statute’s application and also whether the rationale for the law was religious or secular. In other words, were the children being discriminated against based on their culture, or was it an issue of religious beliefs? One of the amicus briefs strongly argued the Blaine Amendment should be considered as a basis for decision making, which the lower courts had not done. The brief also argued that the law was a direct affront to the constitutional provisions concerning establishment, over and beyond the issues underlying the prongs of the Lemon Test, and called for application of a strict scrutiny test. The Satmar argued that they were not establishing a religious entity, but were removing an obstacle to students receiving necessary services, an obstacle due to their religion.

The Court affirmed the decisions of the lower courts in an opinion by Judge George Bundy Smith,⁴ which focused on the second prong of the Lemon Test. A fascinating concurring decision was written by Chief Judge Kaye, which did not go to the Lemon Test or the Blaine Amendment. Instead, she went to the strict scrutiny test, which she thought was the appropriate test for a law that put a government entity under the de facto control of a religious organization. Judge Kaye argued that establishing a fully empowered school district went well beyond the need to provide services to a handful of children. Stressing her sense that the law was wildly out of proportion to the problem, Judge Kaye’s opinion was a thinly veiled rebuke of the Legislature.

Interestingly, the Court of Appeals, despite its general preference for resolving cases under New York state law wherever possible, did not make any ruling under the New York Constitution, thus clearing the way for a Supreme Court hearing, which was soon granted (by Justice Clarence Thomas). It is somewhat noteworthy that many church/state issues which could be decided on state constitutional provisions are ultimately decided by the Supreme Court. Indeed, the establishment clause is often considered a special province of the federal courts.

Once the Supreme Court granted certiorari, the national news media gave great coverage, with segments on *60 Minutes*, *Larry King Live*, *The Today Show*, C-SPAN, *Time Magazine* and National Public Radio, along with editorials in all the major dailies. I still believe that the heavy media coverage, which was almost unanimous in its support of my position, played an important role in all of the trials, including at the Supreme Court. Linda Greenhouse, the longtime Supreme Court reporter for the *New York Times*, said the case had “the makings of a potentially great Supreme Court case precisely because the issue it raises cuts across all the established categories and goes to the heart of the matter – to what extent may the secular state accommodate the needs of a religious population?” She noted that as more and more services get funding, a conflict between the Establishment Clause and the Free Exercise Clause was inevitable.

The arguments at the Supreme Court were quite dramatic. My lawyer was Jay Worona, the young counsel of the School Boards group. Jay was volunteering his time on evenings and weekends; he had never been to the Supreme Court, except as an observer once or twice. The Satmar were represented by Nat Lewin, the veteran high court litigator who had argued over two dozen cases. It had all the elements of David versus Goliath.

The justices immediately started asking about whether the benefits for the Satmar under the legislation were available to other religious groups, or indeed to the non-religious as well. Lewin said that the case was about children being denied services because of their religious beliefs. He argued that the village establishment had not been challenged, and the school district could follow village lines, even though New York law made it clear that only state legislation could create a school district, which was not an approved village service.

Justice Kennedy questioned where the district had been gerrymandered along religious lines. Justice Scalia hammered his points about the village residents being discriminated against because of expression of religious principles. The State Attorney argued the distinction between advancing religion and accommodating it. Justice O’Connor kept returning to the issue of neutrality among religions. Justice Souter asked about the strict scrutiny criteria that Judge Kaye raised at the state Court of Appeals. Justice Rehnquist questioned whether the segregation within the district was really religious or whether it was linguistic and cultural. The justices seemed to be debating each other more than questioning the attorneys presenting their cases.

Due to Justice Blackmun’s donating his conference notes to the Library of Congress, we know what happened during the Court’s deliberations. A couple of days after the hearing, the justices met in conference to consider the case. Contrary to the belief on both sides that the result was uncertain, the conference ended with a 6-3 major-

ity affirming the New York courts. According to Justice Blackmun's notes, that majority never wavered. The case was first assigned to Blackmun, but then it was reassigned to Souter to write the majority opinion. The decision was announced on the last day of the 1994 session.

Back to the Legislature

That might have resolved the dispute, but it did not. Four days later, Governor Cuomo submitted a new legislative proposal. Once again, it was put in front of the Legislature

During the time the case was being considered, Governor Cuomo faced a re-election campaign against State Senator George Pataki, creator of the original legislation. While campaigning in the Village of Kiryas Joel, Governor Cuomo promised to enact new legislation to solve the problem if the second law was declared unconstitutional. The speech was filmed by a crew who gave it to *60 Minutes*. When I heard of the promise, I compared it in the media to southern governors' reaction to *Brown v. the Board of Education* in the 1950s. *60 Minutes* ran a seg-

The statute, by establishing a governmental unit for a religious group, was unconstitutional no matter how the village applied it.

on the final day of its session. Once again, it was voted on in the middle of the night. While the first legislation did not receive any attention until it passed, the new legislation was opposed editorially by almost every newspaper in the state. The pressure of appearing to override the U.S. Supreme Court four days after it rendered a decision did not seem to affect the legislators. This time a handful of legislators opposed the legislation, but still it was an overwhelming vote in favor. Also, Speaker Miller, who didn't like the proposal, had been succeeded as speaker by Sheldon Silver, who was an extremely strong supporter. Speaker Silver had a second home in Orange County, and he knew the area well. He is also very sympathetic to religious accommodation issues.

The key difference between the two pieces of legislation was that the original named the Kiryas Joel district specifically; the second set forth supposedly neutral criteria, for the creation of new school districts (an attempt to deal with Justice O'Connor's issue of neutrality). The only problem was that the only district which could have been created under the stated criteria was Kiryas Joel. The transparent attempt to circumvent the courts infuriated the media, and I immediately filed new litigation. In a press conference, I referred to the second legislation as the "Son of Sham."

What followed was a series of somewhat bizarre events. In deciding a simple procedure motion, Judge Harris wrote an extremely lengthy opinion responding to the Supreme Court rationale in the first case. The case then moved to Judge Kahn, who had decided the first case in the Albany Supreme Court. Kahn surprised most observers by deciding that the second legislation was constitutional, basically because it might apply to some other district at some time. Therefore it was neutral. I appealed, of course, and the Appellate Division and the Court of Appeals swiftly overruled Kahn's decision. The Court of Appeals was unanimous, and there was no appeal to the Supreme Court.

ment on the issue the Sunday night before the election, which Pataki won.

After the second case was decided by the Court of Appeals, Speaker Silver's staff, the Satmar, the State Education Department and I attempted to find a way to serve the children within the boundaries of the Constitution. Several times we reached tentative agreements on an approach, only to have someone oppose the proposed agreement after discussing it with colleagues who were not in the room. The Hasids were concerned about religious principles. The state was concerned about precedent setting.

After Governor Pataki took office, he proceeded to introduce a third piece of legislation to solve the issue. His office claimed that more than 60 possible districts would meet the revised criteria. I sued again and deconstructed the criteria to show that only two possible districts could fit them – Kiryas Joel and Stony Point, a nearby Rockland County district which had a major problem brewing between its Latino community and the surrounding district. This time all three levels of courts in New York invalidated the law. The Court of Appeals chastised the Legislature for repeatedly attempting end-runs of court decisions, while the dissenting opinion suggested that trying to fix a problem was appropriate. Indeed, it suggested that the case no longer be looked upon as one of David versus Goliath.

Finally, the Satmar hired former Speaker Miller as a consultant to draft a fourth legislative proposal which was broad enough to possibly pass constitutional muster. I had left the School Boards Association by that time and it appeared to lose interest in pursuing the matter. Dissidents in the village who thought the law violated Talmudic principles filed litigation, but it didn't go anywhere. I believe that had the courts considered the law fully, it would have been struck down once again. It fascinates me that no other district has been created under the provisions of the fourth statute.

Lessons

The Kiryas Joel School District remains open, and it serves several hundred disabled Hasidic children from the surrounding region. The courts eliminated the most obviously unconstitutional provisions of state law. The cases are widely read in law school, as delineating the limits of how far is too far in establishment law cases. Indeed, Pat Robertson's counsel refers to the Supreme Court case as a bookend case. Interestingly there have been no more serious attempts to overturn the Lemon Test, which the Court uses to decide establishment provision cases.

So, one could argue that the case was successful in settling a highly controversial area of constitutional law. That is an oversimplification, however. The case did make it clear that a state cannot establish a governmental unit to serve only one group of religious individuals. It also took James Madison's view that neutrality among religious viewpoints is a primary consideration for determining what is constitutional and what is not. It did not consider the stricter separation views of Thomas Jefferson, which entail a complete separation of church and state. This is a critical distinction as governmental spending for faith-based organizations becomes more amenable to both liberals and conservatives.

But the real lesson is that the legislation should never have happened. It represented a total failure of the education system to live up to its responsibilities. The parents insisted on publicly funded isolation from society. It was not a religious choice in its purist form; it was a demand for funding their way of life. The school district, which had a legal responsibility to serve the disabled children in question, acted in almost total disregard of the law and with total disrespect for tolerating different lifestyles.

Most significant, the State Education Department, which has the statutory duty to enforce the provision of services to disabled youngsters, failed to intervene and ensure such services. It did not intervene with the district or the parents. It did not help the Legislature find an acceptable solution. The department kept such clean hands that everyone else got dirty ones. The Legislature acted as if this were a local issue and not a constitutional one. The legislators responded to political pressure rather than to their responsibilities to uphold the Constitution. The same can be said for two governors.

Interestingly, those who wanted to use public funding to support faith-based schools found another route – charter schools. While they existed in some scattered areas, they took off after the door to new school districts was closed by the Supreme Court. Faith-based organizations found support from governmental entities that was neutral and followed the Supreme Court parameters. Not one charter school has yet failed the test.

So an old lesson is in front of us: If the government had acted as it should have at all levels, or even at some

levels, the legislation and the ensuing litigation would have been unnecessary. Indeed, a troubling issue is that the government – at all levels – realized it had no need to act responsibly and follow its duties because those who were in government knew that the courts would act in its stead, a point that Speaker Miller admits freely.

Did litigation solve the problem? In some ways, yes. After 10 years of trials, thousands of hours of work, and an important precedent, it is clear that a governmental entity cannot be formed for one religious group. Yet, the school district still exists, pretty much as intended. Somehow, I'm not troubled by the continuation of the school district. Kids' needs are being met, and the provisions of the Constitution were upheld.

There are many purposes served and needs met by our system of litigation, but it's rare that any one case serves all of these purposes and meets all of these needs. In my case, I did not achieve my immediate purpose of shutting down the Kiryas Joel School District and pursuing an integrationist approach, which seemed to be required of the Monroe-Woodbury community. On the other hand, I did get confirmation from the courts that the Constitution is alive and well – and I believe this more than anything else satisfied the plaintiff in me. Whatever happened afterwards, whatever end-runs the Legislature and Governor later devised, the courts forced them to keep trying till they fixed the constitutional problem. Nothing brings home the checks and balances in our system of government like taking the government to court and forcing it to obey the Constitution.

Yes, I still think it's a problem that the students and teachers of the Monroe-Woodbury School District were deprived of an opportunity to learn tolerance and the value of diversity. But they weren't deprived by the Satmar's request; they were deprived by their government's response to the request – and lawsuits brought by me or anyone else are never going to solve that problem permanently. The problem can only be solved when the voters of New York remember that self-government requires cultivation and attention. It requires using the courts when the government goes astray.

Litigation can, and did, accomplish all that could be expected of a system of dispute resolution – my complaint was heard and, armed with a few lines from the Constitution and a small book of procedural rules, I was able to force compliance on people and institutions immeasurably more wealthy and powerful than I was. ■

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1. *Bd. of Educ. v. Weider*, 72 N.Y.2d 174 (1988).
 2. *Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 691–92 (1994).
 3. *Weider*, 72 N.Y.2d 174.
 4. *Grumet v. Bd. of Educ.*, 81 N.Y.2d 518 (1993).

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BURDEN OF PROOF

BY DAVID PAUL HOROWITZ



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Average Just Isn't Good Enough (Anymore): Part 2

Introduction

The previous issue's column began a review of *Dibble v. New York City Transit Authority*.¹ Since the first column went to press, the Court of Appeals has granted leave.² This issue's column completes our discussion of the First Department's analysis of the law (subject to an update if the Court of Appeals ends up deciding the case), as applied to the evidence at trial concerning the plaintiff's expert's use of an average reaction time in calculating the train operator's ability to bring the train to a stop without striking the plaintiff.

The previous column concluded with the critical question of fact identified by the First Department – whether the train operator “could have avoided hitting the plaintiff.”³

The Issue

The First Department in *Dibble* acknowledged that the “Court of Appeals has held that ‘a train operator may be found negligent if he or she sees a person on the tracks from such a distance and under such other circumstances as to permit him [or her], in the exercise of reasonable care, to stop before striking the person,’”⁴ and “[i]f there is a question of fact and ‘it would not be utterly irrational for a jury to reach the result it has determined upon . . . the court may not conclude that the verdict is as a matter of law not supported by the evidence.’”⁵

The Decision

The First Department concluded that “the jury’s determination that the acci-

dent could have been avoided was based on nothing more than a series of estimated stopping distances that incorporated purported average reaction time.”⁶ Agreeing with the defendant’s argument that the plaintiff’s case was based entirely on impermissible speculation, the First Department held that the jury verdict was based on insufficient evidence, as a matter of law:

[N]one of the variables utilized by the plaintiff’s expert to calculate possible stopping distances were established conclusively at trial. All were estimates or approximations. It was [the train operator] at his deposition who estimated his speed to be between 20 and 24 miles per hour as he approached the station. His conductor stated that the train might have been traveling at 25 miles per hour. Further, it was solely [his] estimate that he was about three car lengths away when he first saw debris to the left, almost under the platform at the beginning of the station. [He] further stated that the cars were 75 feet in length; in fact, as [the plaintiff’s expert engineer] subsequently acknowledged, the cars on the subject train were just 60 feet long. [The train operator] was the sole witness as to what exactly was visible as the train approached the station; he was also the sole witness as to how far away he was when he saw what he described as the debris moving.

The one undisputed fact is that [the plaintiff] was found with his severed foot beside him 40 feet into the station, that is, 40 feet from the location, the beginning of the station, where [the train operator] testified he first saw the debris. There was no evidence presented to indicate that the plaintiff was struck at the beginning of the station and then dragged for 40 feet. Indeed that scenario was roundly rejected. There was no blood evidence except in the location where [the plaintiff] was found, and he had no injuries consistent with being dragged or pushed by the train from the beginning of the station. This strongly suggests that the debris that [the train operator] first saw was not, in fact, the plaintiff whom he struck 40 feet further along.⁷

How the First Department Reached Its Decision

After reviewing the plaintiff’s engineering expert’s scenarios and resulting calculations, all of which indicated the operator would have been able to stop the train without hitting the plaintiff, the First Department proceeded to analyze scenarios the expert was not asked to apply at trial, and upon which he was not, according to the decision, cross-examined by the defendant:

[Plaintiff’s engineering expert], however, was not asked to apply, and did not apply, a four second reaction time to his original scenario where the train was traveling at

24 miles per hour. In such scenario, [the train operator] would have traveled approximately 141 feet (4 x 35.2) before he applied the brake, and a further 167 feet braking distance for a total stopping distance of approximately 308 feet, whereupon he would have unavoidably hit the plaintiff.

Such a scenario, of course, makes perfectly clear that [the train operator's] failure to exercise reasonable care could be established only by arbitrarily imposing upon [him] the purported average reaction time of one second. In other words, in determining that the defendant's train operator failed to exercise reasonable care because he could have stopped, the jury improperly equated negligence with possession of a motor skill that is essentially a reflex action. Moreover, in this case, the motor skill that determines the reaction time in any individual, and which is measured in seconds and fractions of a second, was assumed to be the purported average of just one second with no variability for identification, analysis and decision.⁸

You might be wondering where a four-second reaction time came from, since the plaintiff's engineering expert's calculations and testimony was based upon a one-second reaction time. In fact, the four-second reaction time came from the plaintiff's expert:

[Plaintiff's engineering expert] then applied the formula to a speed of 20 miles per hour and found that one second of reaction time would add 29.3 feet to the braking distance of 121 feet for a total stopping distance of 150.3 feet. Hence, [the plaintiff's engineering expert] testified, with 265 feet available, [the train operator] would have stopped with 112 (*sic*) feet to spare. Moreover, [the plaintiff's engineering expert] opined that at this speed, the train operator could have stopped before hitting the plaintiff even if he had needed four seconds of reaction

time (4 x 29.3). On the other hand, with 220 feet available, [he] opined that [the train operator] could have taken two seconds in reaction time and still stopped before striking the plaintiff.⁹

The decision does not explain whether this testimony was elicited by counsel for one of the parties or volunteered by the expert. However, it was the testimony that provided the foundation for the First Department's conclusion that an alternate scenario, never elicited during trial, existed which would have resulted in the plaintiff being struck by the train without proof of the train operator's negligence:

In our view, the court simply did not go far enough. As the defendants in this case assert, the use of an average reaction time of one second implicitly renders negligent

any train operator with a longer than average reaction time.

More egregiously, the record does not reflect that the plaintiff's expert provided any foundation or evidentiary support for his observation that the average reaction time of a train operator is one second. Much less was it established as the average reaction time for non-negligent train operators.

[Plaintiff's engineering expert] acknowledged that, in this case as in the cases of hundreds of other plaintiffs for whom he has testified, he uses one second for a train operator's reaction time even though he has never seen or conducted a study of reaction times of train operators. Indeed, when asked on direct how he arrived at the one second reaction time, [he] replied:

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“Well, there are many, many, many studies for automobile drivers. I myself have never seen a reaction time study for a train operator, I know of none. . . . [But reaction times for automobile drivers] [t]hey’ve pretty much all come to the conclusion it’s about a second for an auto driver under normal circumstances.”

The paucity of research on train operator reaction times notwithstanding, on cross-examination, [plaintiff’s engineering expert] testified to choosing one second because “that’s a reasonable average reaction time” of train operators. He defended the choice by stating that this was not a “complex situation,” that there was only one reaction required, that is throwing the brake, and that “there [was] no reason to think that [the train operator] had a reaction time slower than average.”¹⁰

Where was the testimony in the record establishing that a four-second reaction time could be considered “the exercise of reasonable care”? There was none. One can infer that the plaintiff’s expert, after giving his expert opinion utilizing the one-second reaction time, attempted to convey the magnitude of the train operator’s negligence by explaining that with a four-second reaction time the train could have been safely brought to a stop without striking the plaintiff. If this is what happened, and with the benefit of twenty-twenty hindsight a poor strategy, but it was not a concession that a four-second reaction time was reasonable.

The First Department then turned to the issue of the train operator’s individual reaction time:

Even were we to accept *arguendo* that an average reaction time for a train operator is indeed one second, the necessary corollary to [the plaintiff’s engineering expert’s] speculation is that there is no reason to assume that [the train operator’s] reaction time was the pur-

ported average. On the contrary, it is self-evident that if the average reaction time is deemed to be one second for train operators, then a number of all train operators will have a reaction time of less than one second, and correspondingly a number of all train operators a reaction time of more than one second. Moreover, as [the defendant’s engineer] testified, those in the 85th percentile will have a reaction time of two and a quarter seconds.

Nothing in the record indicates where [the train operator] might be found along that spectrum. But if, for example, [he] had been in the 85th percentile, two and a quarter seconds of reaction time and car lengths of 60 feet would have resulted in the plaintiff being struck even if [he] had put the train into emergency when he first saw the debris. Further, as [the defendant’s engineering expert] testified, and [the plaintiff’s engineering expert] conceded, reaction time also may be affected on any particular occasion by factors such as age and vision and other variables such as lighting or weather or time of day.

It is troubling that, aside from one suggestion made by [the defendant’s engineering expert] that the plaintiff’s dark clothing could have hampered [the train operator’s] analysis of the situation and thus increased his reaction time, no other attempt was made to apply any of the above mentioned factors or ranges to the train operator in this case. Had the effort been made, it would have become apparent to the jury that there was insufficient evidence to determine whether [the train operator] could have stopped without striking the plaintiff.¹¹

None of this analysis was part of the record at trial, because defense counsel did not inquire, and there is nothing in the decision that the defendant considered an operator in the 85th percentile to be qualified to operate a train.

Based upon its analysis of the plaintiff’s engineering expert’s testimony, the First Department also failed to credit the train operator’s testimony that he had sufficient time to stop the train from the time he first saw an object on the tracks:

For the foregoing reasons, we also reject the plaintiff’s contention that [the plaintiff’s engineering expert’s] merely provided scientific corroboration for [the train operator’s] concession that he could have stopped the train before hitting the plaintiff had he put the train into emergency when he first saw the debris. [The train operator’s] own speculation, in any event, was not an acknowledgment of negligence since it was made in the context of testimony as to [his] belief that what he first saw was debris and not a person.¹²

Thus, the First Department dismisses the train operator’s admission that he could have brought his train safely to a stop if he had placed the train into emergency when he first spotted the debris.

The World After *Dibble*

After *Dibble*, in order to pass muster with the First Department, the plaintiffs in a case involving a train operator’s ability to stop a train would appear to have to proffer evidence of, *inter alia*:

1. results of studies of average reaction times specifically for train operators;
2. reaction time studies utilized and relied upon by the entity in selecting operators to operate its trains;
3. hiring and retention criteria for train operators utilized by the entity operating the train (including reaction time evaluations); and
4. hiring and retention testing and evaluation of the train operator involved in the accident.

Since a major criticism of the plaintiff’s proof was the failure to establish that the operator in question had an average reaction time, and since the

court would presumably find the operator's own testimony about his reaction time speculative, just as it did the operator's testimony that he could have brought the train safely to a stop, disclosure may be required of, *inter alia*:

1. initial and subsequent medical evaluations of the train operator by the employer; and
2. medical records of the train operator.

Imagine the reaction to these disclosure requests! Furthermore, it may be necessary to add claims for negligent hiring and/or retention in order to obtain some of these records, as well as the benchmarks against which the individual operator's reaction time is measured. At deposition, questions regarding periodic re-testing and/or re-qualifying, and regarding what independent testing, or industry standards, the employer relied upon, may need to be asked.

What type of proof will suffice, going forward, concerning speed? The train operator's own estimate of his speed was critiqued by the First Department as being one of the "estimates or approximations,"¹³ none of which "were established conclusively at trial."¹⁴ What better proof could there be of the train's speed? How do you establish speed "conclusively" at trial?

Of course, the rejection by the First Department of an average reaction time for the operator of a train and the critique of the adequacy of the proof of certain variables at trial has application in many other types of cases where average reaction times are commonly used. It would, by parity of reasoning, extend to a case involving an automobile striking a pedestrian in a crosswalk.

Finally, the type of foundation that the First Department suggests is needed for an expert to testify concerning a person's average reaction time has elements of the type required by *Daubert*, rather than the generally more lenient requirement set forth in *Frye*.

Conclusion

Should you find yourself one day traveling to Lake Wobegone, whether on a train, bus, or plane, let's hope

that your train operator, bus driver, or airplane pilot, like all of the children in Lake Wobegone, is "above average." ■

1. 76 A.D.3d 272 (1st Dep't 2010).
2. 2011 N.Y. LEXIS 428, 2011 N.Y. Slip Op. 67676 (N.Y. Mar. 24, 2011).
3. *Dibble*, 76 A.D.3d at 277.
4. *Id.* at 277 (citation omitted).

5. *Id.* at 276 (citation omitted).
6. *Id.* at 277.
7. *Id.* at 277-78.
8. *Id.* at 279.
9. *Id.* at 278-79.
10. *Id.* at 279-80.
11. *Id.* at 280-81.
12. *Id.* at 281.
13. *Id.* at 277.
14. *Id.*

In Memoriam: S. Hazard Gillespie

S. Hazard Gillespie, 61st President of the New York State Bar Association, died at the age of 100 on March 7, 2011. Current NYSBA President Stephen Younger offers this tribute:

"With great sadness, the New York State Bar Association mourns the passing of Past President S. Hazard Gillespie of New York (Davis Polk & Wardwell LLP). Gillespie served as President of the State Bar Association from 1958 to 1959. He received the Bar's highest honor, the Gold Medal, in January 2010.

"Hazard was a monumental leader, a multi-talented individual and a true legend of the legal profession. He was an outstanding role model for generations of attorneys, teaching us all what it means to be a leader and a mentor. It was an extraordinary privilege and great pleasure to know him and call him my friend.

"As president of the State Bar, Gillespie was one of the first presidents to travel across the state in order to foster relationships with local bar associations while building the State Bar's membership. Other highlights include successfully advocating for the New York State Legislature to pass legislation that streamlined state income tax paperwork and personally endorsing 347 young lawyers to be admitted to practice before the U.S. Supreme Court. Prior to his presidency, Gillespie chaired the Membership Committee during a period when State Bar membership dramatically grew from 11,000 to 15,000.



"A graduate of Yale University and Yale Law School, Gillespie was senior counsel to Davis Polk & Wardwell. More than 75 years after he served as the firm's summer clerk, Gillespie still came to work every day at the firm's New York office, devoting his time to pro bono services. Gillespie served as U.S. Attorney for the Southern District of New York from 1959 to 1961.

"Known for his devotion to community service, Gillespie served as president of the Tappan Zee Bridge Preservation Coalition. He is a past chairman of the American Skin Association, where he remained a board member. He previously was vice president of the Yale Law School Association of New York and a director of the Legal Aid Society, the Union Settlement Association and the Hospital for Special Surgery."

A memorial service was held on March 30 at St. Bartholomew's Church in New York City.

He is survived by his wife, Adelma Park, two children, two stepchildren, two brothers, seven grandchildren and eight great-grandchildren.



STEVEN J. HOLLANDER (shollander@wfw.com) practices in the corporate group of Watson, Farley & Williams LLP, an international law firm. He concentrates in mergers, acquisitions, public and private securities issuances including securities registrations and filings, private equity and general corporate governance.

A Guide to Due Diligence of Commercial Contracts

By Steven J. Hollander

Law schools teach students black letter law and legal concepts; however, recent law school graduates are typically not ready for the day-to-day practice of law at firms because knowledge of the law does not necessarily equate into effective practice of it. Junior transactional attorneys are many times tasked with document review (similar to reviewing discovery materials in litigation, as explained below) where the attorneys must review thousands of pages of documents, many of which are contracts. A junior attorney may understand contract law, but may not know what to search for within the contracts he or she is tasked to review. After all, a law student may be able to explain that a contract is a mutual manifestation of an intent to be bound, that a contract may be unilateral or bilateral, or give the definition of the four corners test, but that is not relevant when a more senior attorney appoints a junior associate to review a contract and to inform such senior attorney of any provisions that may be problematic.

The purpose of this article is to provide a junior attorney with a basic overview of document review of a commercial contract. This article is a basic primer, not a final checklist, of issues to note and portions of the commercial contract to which a junior associate should pay special attention.¹

Why Are Contracts Reviewed?

“Due diligence” is the term used to connote the review conducted by attorney(s) and other persons of documents

and the background research performed on a company and/or its assets. In the corporate context, typically contracts are reviewed when a person or company wants to acquire another company or its assets or wants to forge a relationship with another company, such as a joint venture relationship. The acquiring party performs due diligence in order to obtain a better understanding of the target’s business, legal and financial composition, value and liabilities. Oftentimes this understanding will affect the agreements relating to the acquisition or joint venture relationship.

The most common form of due diligence is “document review,” which is reviewing documents of and the contracts and agreements to which the target company is a party. Although due diligence is not required prior to a transaction, a prudent attorney may advise his or her client that due diligence is a necessary and/or customary prerequisite to a transaction.

The reason why due diligence is strongly recommended prior to consummation of a transaction is shown in the example of a potential purchase of real property. The potential property purchaser may research whether (1) the seller of the land is the owner of record, (2) anyone else has any claims relating to the ownership of the land, (3) there are breaks in the chain of title, and (4) any environmental concerns exist for which the purchaser would be liable. If, after due diligence, the potential purchaser learns that the property has significant environmental

liabilities attached to it, the potential purchaser may determine not to purchase the property, or may decide to reduce the purchase price or negotiate an agreement with the current owner to remediate the environmental concerns prior to a sale. Similar to the potential real property purchaser, an acquiring company will want to research the target company's contracts before finalizing a transaction in order to, among other things, understand what it is acquiring, the value of what it is acquiring and the potential negative implications of the acquisition. If the acquiring company learns of a significant liability or issue during due diligence, it may alter the acquisition price, cause additional negotiations that focus on such liability or issue, or terminate the acquisition. In a commercial or corporate transaction, it is common practice to, and actually may very well be malpractice not to, negotiate all representations and warranties relating to the subject matter of the transaction based upon information gathered from a review of all related commercial contracts.

While a potential transaction can be structured as an asset acquisition, merger, stock/equity purchase or joint venture, such potential transaction may be structured in a number of ways that may affect certain aspects of the review.

Extent of Review

When a junior associate is asked to review contracts, the associate should first ask the scope of the review he or she is required to perform. The client may be reviewing the contracts simultaneously and therefore may require only a review of the legal issues that may arise with the contract, compared with business features or specific contract terms. Alternatively, the client may not want to spend the additional funds for the attorneys to more thoroughly review the contracts (perhaps because the contracts constitute a trivial value to the overall transaction) and may only desire to know significant legal problems with the contracts, if any. If a client is not reviewing the contracts, the client may want an overview of the business portions of the contract, such as term, pricing and services to be rendered. One of the best ways to determine the scope of review is to understand the commercial basis for the transaction, which will help prioritize which contracts to review carefully and how thoroughly to review them. A significant portion of a company's value may be found in its contracts (for example, a manufacturer that produces and sells only the quantity of goods required by contract or the company's rights to certain third-party intellectual property); therefore, more careful contract review may be required when a company heavily relies on contracts for profits.

The features to review in typical commercial contracts can be generally divided between the "business" and "legal" features. "Business" features are the business terms of the contract that constitute the substance of the contract. What many lawyers forget (especially litigators), and what may be glossed over in law school, is that

the vast majority of executed contracts are not reviewed or challenged because each party fully performs its responsibilities. The "legal" features are the provisions that may be reviewed when there is a reason to review the contract – commonly because of a potential transaction or litigation over the contract. Equally important, a "business" issue may in fact become a "legal" one; for example, when one cannot terminate a contract upon reasonable notice but must wait until the contract expires pursuant to its own (business) terms, intervention of the courts – and injunctive relief – may be necessary to put an end to a harmful situation.

Depending on the legal features of the contract, review by special counsel may be worthwhile (such as an ERISA specialist to review an employment agreement).

Each contract's business and legal features are generally significant for various reasons, but may not be important to a particular client or transaction. By discussing the scope of the review with the client or senior attorney, a junior associate may not need to focus on each of the features discussed below or may need to particularly focus on certain features.

Business Features

The following is a non-exhaustive list of features that business people typically spend most of their time reviewing and understanding.

One- or Two-Sentence Description of Contract

When reviewing hundreds of documents, it is easy to forget why a certain contract was executed. It therefore is important to note the basic premise of the contract, in order to understand to the synopsis of the contract. The description may be as simple as "Company A sells bananas to Company B," but without this short description of purpose there is no context to the contract provisions to be summarized. Most other contractual provisions reviewed will not mention the purpose of the contract, which makes it difficult to determine whether a company wants to assume a contract.

Term/Termination

A businessperson frequently wants to know when a contract can or will expire. An acquirer may not want to acquire a company when its contracts are expiring, unless all or some of the contracts can be renewed or extended on the same or similar terms. If a contract can be terminated by one or both parties at any time, then such provision is notable because an acquirer may be fearful that the contract will be terminated as soon as it is acquired, which may cause a reduction in the value of the transaction, potentially interrupt business operations or worse.

If a party desires to terminate a contract without a default of the other party, the terminating party may be required to provide a certain amount of notice or pay a

penalty, or both. A junior associate should note when and how each party may terminate a contract.

Default and Cure

Although most parties typically adhere to their respective contractual obligations, the instances when a party is deemed in “default” of a contract may be important. A junior associate should note the effects that default may have on termination (e.g., whether a party has the ability to terminate the contract when the other party has defaulted) and whether there is a notice and cure period.² One should also take note of what actions are permitted when both parties are in default (e.g., whether a party can terminate the contract when it is also in default). Not all contracts will contain explicit default provisions, but could have a section that discusses how breaches of the contract should be handled.

A default of a party’s obligations (or termination of a contract) may affect other contracts. For example, the cov-

A potential acquiring company may want to be aware of this minimum commitment because the successor must adhere to it. A minimum commitment may allow a client to predict a minimum amount of profit (or loss) guaranteed by a contract. Typically, contracts containing minimum commitment provisions also provide for the termination of such contracts if such minimum commitments are not satisfied.

Related Party Transaction

A junior associate should note if an agreement is a related-party transaction (such as an agreement that is executed between sister or parent companies). Oftentimes, related-party agreements contain provisions that significantly favor one party (called “harmful” provisions) that would typically be negotiated between the contracting parties (or conversely not contain such protective provisions for a party), if the parties were not related.³ The acquirer may want to renegotiate the contract prior to the acquisition or

A junior associate should be sensitive to the wording in the contract in order to determine what is permissible, what is prohibited and which consents should be obtained.

enants to a loan agreement may provide that a party must not be in default in certain of its other contracts. By entering into default of such other contracts, even if the default is cured, there may be a technical violation of the loan agreement. Recently, due to the troubled economy, banks have become more critical of these technical breaches.

Payment

An obviously important “business” aspect to a contract is the payment obligations. A junior associate should understand all facets of how the payment mechanics in a commercial contract work, because it is an aspect of the contract that businesspeople typically will want to understand. A junior associate should be able to respond to the following questions: Who pays whom how much? How is the payment of consideration structured (commission, flat fee, variable, per unit, etc.)? How is the payment made? When is the payment made (before or after the services or goods are rendered)? These questions are vital to a business because most parties will adhere to a contract, and the parties will follow a contract’s binding provisions.

Minimum Commitment

Certain contracts contain a provision whereby one party commits to provide a minimum amount of a good or service. For example, a contract may provide that Company A will provide bananas for \$1.00 per pound to Company B, which will be no less than 1,000 pounds per month.

may refuse to assume the contract. In any event, an agreement between related parties is one that may require additional attention.

Exclusivity

If a party promises to provide goods or services exclusively, it precludes such party from expanding its business to certain customers or markets. Exclusivity provisions can take various forms and may be in a form or labeled differently than one might expect. In real estate transactions, for example, exclusivity takes the form of radius clauses (e.g., no other similar type of establishment within a certain distance from the property). In another exclusivity example, until early 2011 Apple was party to an exclusive contract with AT&T, requiring the iPhone (which is owned by Apple) to be used only with AT&T service. The AT&T exclusivity provision precluded Apple from contracting with other cell phone carriers such as Verizon to use the iPhone with their services, which decreased the number of potential iPhone users and therefore reduced Apple’s potential profits to be actualized if Apple could sell iPhones to Verizon and T-Mobile customers. In addition, in this type of situation, a junior lawyer must consider related, if not corporate, issues: such type of exclusivity may contain risks of potential litigation if the contracting party benefiting from the exclusivity has sufficient market power to foreclose markets and/or generate anti-competitive behaviors on such markets. The iPhone example can be translated to many different

business situations. If an acquirer is targeting a company and plans to profit by expanding the target's business to additional customers or markets, but is precluded from doing so because of an exclusivity provision, the acquirer should be aware of the provision's existence. In fact, any limitation on an acquirer's ability to conduct business is noteworthy.

Legal Features

The following is a non-exhaustive list of contract features that attorneys may review, but are usually not the focus of the businesspeople when the contract is initially drafted.

Change of Control/Transferability

An issue that arises frequently in document review is whether contracts contain provisions relating to a change of control of a party, or the ability for one party to transfer its contractual obligations to another. The parties will want to know whether a change of control or transfer of obligations (typically by assignment) is allowed, and whether the party undergoing a change of control or transfer of its obligations must adhere to any requirements.

Contracts may contain provisions that prohibit a change of control or a transfer without written permission from the other party. It is therefore commonplace for acquisition agreements to contain a condition precedent to consummating any transaction that the transferring parties or the parties that will undergo a change of control obtain consents from any counterparties to the contracts to permit a transfer or change of control.

Not all change of control provisions are drafted similarly. Certain provisions may prohibit a "change of control," while other contracts may define a prohibited "transfer," "assignment" or "acquisition." It is quite possible for a transaction to be structured in a manner that may be technically prohibited by one contract but permissible according to another contract, so a junior associate should be sensitive to the wording in the contract in order to determine what is permissible, what is prohibited and which consents should be obtained.

Depending upon which party is the surviving entity, a merger may be deemed a "transfer" by law and, therefore, may be prohibited if a contract prohibits "transfer" without additional language (a contract can always explicitly define "transfer," "assignment" or "change of control" to include a merger). The specific words used in a contract (and analysis of applicable state case or statutory law on such language) in similar situations can shed light needed to determine whether a contract prohibits a merger. The same applies in the case of an acquisition of equity of the target company or its parent company; depending upon state case or statutory law and the specific wording contained in the contract, such acquisition may be deemed an unauthorized assignment of a contract.

Governing Law

As noted in "Change of Control/Transferability" above, the governing law of a contract may be significant regarding the specific language prohibiting a change of control or a transfer, as well as other issues that arise as part of the due diligence process. A junior associate should therefore note the governing law so that if additional research is required regarding a potential issue, the associate will know under which state or foreign law to conduct his or her research. A typical "trap" should be remembered: if a contract between a U.S. party and another non-U.S. party from a country that is a signatory to the United Nations Convention on Contracts for the International Sale of Goods of 1980 does not *expressly* exclude the provisions of such Convention in the contract, then such Convention becomes the substantive law between the parties and governs the sale(s) under the contract, notwithstanding an explicit choice-of-state-law provision, which may lead to terms very different than those of the state law.

Indemnification

An indemnification provision provides that one party will compensate the other party for losses or liabilities incurred in connection with the underlying contract (or goods or services provided thereunder) and attributable to the payee's actions. Indemnification provisions are important because they focus on which conditions and which parties will be able to seek restitution from the other party.

A junior associate should focus on when an indemnification provision is the exclusive remedy (i.e., the aggrieved party is not able to seek other damages) and when such provision is triggered (for example, whether "negligence," "gross negligence" or some other standard triggers the provision). It is important to focus on whether indemnification provisions provided to each contractual party are mirror images of each other; if not, the junior associate should focus on which indemnification obligation is owed to whom. It is also important to note whether the indemnification provisions will apply to third-party (i.e., a person that is not a party to the agreement) claims or to claims only among the contractual parties.

Insurance Obligations

If indemnification is sought by a contractual party based on the indemnification provision of the contract (or a party makes a claim under any other provision of the contract), the aggrieved party would want the liable party to have the funds available to pay the aggrieved party, assuming the claim is valid. Although some companies may have cash reserves sufficient to pay any lawsuits or claims, many companies do not have significant amounts of excess cash and will instead maintain insurance to cover any potential payments arising from suits or

Any limitation on an acquirer's ability to conduct business is noteworthy.

claims. A party to a contract therefore may insist that the contract contain provisions that require the other party to maintain a minimum amount of insurance coverage; many times the contract will require that the other contractual parties are named as third-party beneficiaries to the insurance policy. When a party maintains insurance coverage, it ensures that a contract's indemnification provisions will be effective and one party will be able to indemnify the other, if required.

Insurance policies (which are contracts) may terminate pursuant to provisions that stop them from being applicable following the consummation of a transaction. On a side note, a junior associate representing the acquirer of that contract may be required to ensure that proper insurance coverage is maintained after a transaction. The junior associate may need to contact the insurance company to obtain confirmation that continuous coverage will be maintained or to obtain new insurance that meets the minimum requirements set forth in the commercial contracts being acquired and which will be effective as of the consummation of the transaction.

Right of First Offer/Right of First Refusal

Typically, a right of first offer (ROFO) is the provision in commercial contracts that the party holding the ROFO has the opportunity to enter into good faith negotiations with the other party before such other party negotiates with third parties. A right of first refusal (ROFR) is the provision in commercial contracts that provides the party holding the ROFR with the option to enter into a business transaction on the same terms and conditions as the other party to the contract has negotiated with third parties. A ROFR is more onerous than a ROFO because a ROFO obligates a party to negotiate in good faith *before* negotiating with third parties while a ROFR requires a party to give the ROFR holder an opportunity to enter into a transaction on the same terms and conditions *after* the parties have negotiated them. The distinctions between a ROFO and ROFR are understood with a simple illustration: Party A contracted that if he ever desired to sell his car, he would provide a ROFO to Party B. If Party A decides to sell his car, he must first negotiate with Party B; if the parties cannot reach an agreement, Party A may sell his car to anyone he pleases with no restrictions on terms or conditions. If Party A contracted that if he ever desired to sell his car, he would provide a ROFR to Party B, then Party A may negotiate a sale with any third party, but must give Party B the opportunity to purchase the car on the same terms and conditions that is negotiated with other parties.

Third parties may not want to spend time and money negotiating and determining whether to enter into a transaction when it knows another party holds a ROFR and therefore has the contractual right to conclude a transaction prior to anyone else. It is important for a junior associate to note any ROFO or ROFR because the existence of such conditions may affect the ability of a potential acquirer to acquire all desired assets in a transaction (which would affect price, among other things) or complete an acquisition. If a ROFO or ROFR exists, a potential acquirer may first require each ROFO or ROFR holder to waive its rights before continuing to pursue any potential negotiations or transactions.

Limitation of Liability

The limitation of liability provisions in an agreement do exactly what one would expect – they limit the amount one party is required to pay the other party, typically in cases of breach of contract or if damage is caused from a product or service. It is important to note a limitation of liability clause because if the target is acquired or the contract is assumed and then breached, the acquiring party may litigate but receive limited damages based on the limitation of liability clause.

Limitation of Warranty

Many companies provide a warranty or guarantee on their products or services. From an acquirer's perspective, a warranty or guarantee is important to understand regardless of whether it is giving or receiving such warranty or guarantee. If the target is acquired or the contract is assumed, then the acquiring party must continue to provide the same coverage, which may cost money. For example, if a company that is acquired provides a warranty for defective products, then the acquiring company must continue to provide the same warranty and pay for any damages caused by the defective product (subject to a limitation of liability clause in the contract between the damaged party and the acquired company). A client will therefore want to understand all the warranties and guarantees it may be acquiring, so it can determine the approximate cost when entering into an acquisition and negotiating price. If an acquirer is on the receiving end of a warranty or guarantee, then it will want to understand the scope of the contractual provision, so it can determine if the warranty or guarantee is sufficient for its needs. Finally, generally in commercial contracts with a party located in the United States, there is a clause limiting the purchaser's rights to the warranty of merchantability and warranty of fitness for a particular purpose, as provided statutorily under the Uniform Commercial Code (UCC) adopted by U.S. states. Absent such limitation (or exclusion) of warranty, the (protective) statutory provisions of the UCC apply for commercial contracts.

Non-competition

A covenant not to compete or a non-competition clause is a restriction under which one party agrees not to compete against another party in a similar business or profession. Although most commonly found in the employer/employee context (where an employee is prohibited from competing against the employer for a specified time period after the employment relationship terminates), it can also be found in the business context. A junior associate should indicate all forms of non-competition because it is possible that the restrictions will impede on a client's business objectives. For example, if a client intends to acquire a business in order to expand into a certain region but there is a commercial restriction from doing so, then the client should be made aware of the restriction so that it can determine its next steps. Finally, non-competition clauses may contain risks of potential antitrust litigation.

Confidentiality/Non-Disclosure

The existence of confidentiality or non-disclosure provisions in a contract may be important to note because a potential acquirer will not be entitled to inform others of the contractual provisions or the existence of a contractual relationship. The acquirer should be able to ascertain from the contract or from the target that is a party to the commercial agreement whether the acquirer is permitted to review the agreement. A potential acquirer may also want to use names of parties or contractual provisions for various purposes (in marketing materials, to use as leverage in negotiating against another customer, etc.), so it is important to know what information, if any, must remain private.

Intellectual Property Rights

It is important to note any intellectual property rights because such rights may impede on a potential acquirer's ownership of other assets. If an acquirer intends to utilize an asset in a certain manner and the intellectual property rights contained in a contract hinder such use, the potential acquirer may rethink the acquisition, reduce the purchase price or discuss a mutually acceptable alternative with the seller, which can be done only if the acquirer has knowledge of the intellectual property rights. Although intellectual property rights may take many forms, the rights most commonly appear in commercial contracts as licenses.

Document Review Report

Most clients will want a due diligence memorandum that compiles all the results from the due diligence and provides a legal analysis of the issues that arose during the contract review. Depending on what information should be included in such memorandum (which will typically correspond to the information desired by the client, as described in "Extent of Review," above), junior associates should take notes on each reviewed contract. Similar to

the manner in which a junior associate will determine the scope of information to be reviewed in contracts, prior to commencing the due diligence exercise, a junior associate should discuss the extent of the written product with his or her supervisors. At certain times a senior attorney may want a full description of each contract (that summarizes all of the above features in 1-2 pages) to include as an appendix to the memorandum to the client. Other times, to save on legal fees, the attorneys in charge may only require the associate to take notes on the minimal information the client desires. Either way, the most common method of taking notes on each contract is by creating, prior to the review, a standard template that includes a heading for each aspect of the contract that must be recorded.

Not all issues found during document review will be listed on the template because one cannot predict every issue that may arise (and any template that attempts such comprehensiveness will be long and unwieldy). Moreover, the issues for which a junior associate is searching may be found anywhere in the document. Ideally, a junior associate should review each contract in its entirety even if the client desires the attorneys to focus their review only on certain information. The junior associate may also wish to note by section reference or page number where the applicable provisions are found.

Conclusion

Although document review is considered by many junior associates to be an arduous task, it is much more than a rite of passage. Performing contract review may be time consuming, but junior associates can take away a lot of knowledge from their experience if they pay attention. By reviewing hundreds of contracts, associates begin to learn the structure of contracts, how the provisions interrelate and what are considered standard and non-standard provisions. Junior associates will also learn to recognize good (and poor) drafting by reading numerous agreements. The knowledge and experience from document review can be used as the cornerstone of an associate's development into a skilled draftsman, although it is certainly not the only method to become one. Junior associates should therefore regard document review as an opportunity to further their skill set as attorneys, while providing a necessary service to their clients. ■

1. Due diligence review for a transaction will encompass more than commercial contract review. Depending on the transaction and the structure, there are numerous additional documents to review, searches to complete, studies to perform and additional actions to take.
2. A notice and cure period requires the non-defaulting party to provide notice of the default to the other party and allow the defaulting party a specified period of time to fix such default.
3. Not all contracts executed between related parties contain provisions that are extremely beneficial for one party. However, when one party is able to control the other party, or a third person can control both parties, there is a much greater chance that the provisions will *not* be negotiated in the same manner as a contract between unrelated parties.



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2010 Review of Uninsured, Underinsured, and Supplementary Uninsured Motorist Insurance Law

By Jonathan A. Dachs

Consistent with recent history, 2010 was another busy and important year in this ever-changing and highly complex area of uninsured motorist (UM), underinsured motorist (UIM), and supplementary uninsured motorist (SUM) law.

GENERAL ISSUES

Insured Persons

The definition of an "insured" under the SUM endorsement (and many liability policies) includes a relative of the named insured and, while residents of the same household, the spouse and relatives of either the named insured or spouse.

"Named Insured"

In *Gallaher v. Republic Franklin Ins. Co.*,¹ the court held that the plaintiff, a volunteer fireman who was injured after exiting a fire company truck while in the process of directing traffic away from the scene of a motor vehicle

accident, was not a "named insured" under the fire company's policy because the "named insured" was the fire company and, thus, the term "you" as used in the definition of an "insured" referred only to the fire company, and did not refer to an employee of the fire company.

Residents

In *Konstantinou v. Phoenix Ins. Co.*,² the court noted that "[a] person is a resident of a household for insurance purposes if he or she 'lives in the household with a certain degree of permanency and intention to remain.'" Here, the court held that an individual who lived at college at the time of the accident was a resident of her mother's household, where she lived with her mother during summers, received mail, stayed every other weekend, and listed the household as her address on her car's title and insurance.

In *State Farm Mutual Automobile Ins. Co. v. Bonifacio*,³ the respondent testified that she lived most of her life

at her parents' residence in Yorktown Heights until she graduated from college in 2005. Shortly thereafter, she rented an apartment in Manhattan with two other people. Two months later, she began employment in Manhattan where she worked five days a week for 11 to 12 hours per day. The court held that the respondent had failed to establish that she was residing at her parents' residence at the time of the accident, despite the following evidence: her testimony that she visited her parents' home at least once a month; her parents maintained a room for her where she left some of her personal belongings; her driver's license still listed her parents' address as her home address; she still possessed a key to that residence; she had voted in Yorktown Heights (after the accident); and she had opened a bank account there. The court specifically noted that the respondent was emancipated from her parents, paid rent at the Manhattan residence, filed her own tax return, and was no longer listed as a dependent on her parents' tax returns. Insofar as the respondent was not a "covered person" under her parents' policy, the parents' insurer's petition to permanently stay arbitration was granted.

In *Allstate Ins. Co. v. Ban*,⁴ the court held that the claimants were residents of the household of someone insured by Allstate. The fact that prior to the accident the claimants had purchased a separate home, to which they intended to move after extensive renovations were completed, did not require a different conclusion. The claimants' undisputed testimony, confirmed by documents including driver's licenses and financial account statements, demonstrated that while they had sometimes reported their address as that of their new home in order to avoid confusion of claimant Jozsef Ban's mail with that of his father, of the same name, they had been living in the house owned by the named insured (Jozsef Ban's mother) for at least seven years prior to the accident, and had not yet moved to their new home. Thus, on the date of the accident, they "actually resided in the [named insured's] household with some degree of permanence and with the intention to remain for an indefinite period."

Occupants

Also included within the category of "insureds" are individuals "occupying" the insured vehicle, or any other vehicle being operated by the named insured or spouse.

In *Rosado v. Hartford Fire Ins. Co.*,⁵ the plaintiff was injured when he was struck by a box truck while standing outside a truck he utilized for his job making beer deliveries. After making a delivery to a bar, he wheeled his hand truck back to the driver's side of the delivery truck and opened a locked bay on the truck so that he could place empty cases of beer into it. At the time of the accident, he had not yet placed any of the empty cases into the truck. He was standing with his feet on the pavement, looking into a side bay of the truck and his hands were reaching

into the bay to rearrange the empty cases of beer, when he was struck by the box truck. He testified that 10 minutes had passed from the time he exited the truck. As a result of the impact with the box truck, he was pushed 10 to 12 feet and pinned between the truck and the box truck. On these facts, the court found "[i]n accordance with the liberal interpretation afforded the term 'occupying' [citation omitted]," that "the injured plaintiff was 'in' or 'upon' the delivery truck at the time of the accident such that he was 'occupying' the delivery of the truck within the meaning of the SUM endorsement." On the other hand, in *Gallaher*,⁶ the court held that a volunteer fireman, who had exited the fire truck and was directing traffic away from the scene of a motor vehicle accident, was not "occupying" the truck within the meaning of that term in the policy, i.e., "in, upon, entering into, or exiting from a motor vehicle," because his conduct in directing traffic was "unrelated to the [truck]" and was "not incidental to his exiting it."

In *Commerce & Industry Ins. v. Reiss*,⁷ the court held that the claimant was not an "occupant" of the vehicle at the time of the accident when she exited the vehicle in which she had been traveling, crossed the street, entered a restaurant, ate a bowl of soup, used the restroom, and was then walking back across the street toward the car when she was struck by a hit-and-run vehicle.

Owned Vehicles Exclusion

The SUM endorsement contains an exclusion for "bodily injury to an insured incurred while occupying a motor vehicle owned by that insured, if such motor vehicle is not insured for SUM coverage by the policy under which a claim is made."

In *New York Central Mutual Fire Ins. Co. v. Polyakov*,⁸ the court applied that exclusion to deny the SUM claim of an insured injured while riding a motorcycle he owned. The court observed that this exclusion was not ambiguous and that the "petitioner was entitled to have the provisions it relied on to disclaim coverage enforced."

Insured Events

The UM/SUM endorsements provide for benefits to "insured persons" who sustain injury caused by "accidents" "arising out of the ownership, maintenance or use" of an uninsured or underinsured motor vehicle.

"Use or Operation"

In *Liberty Mutual Fire Ins. Co. v. Malatino*,⁹ the court held that the claimant's injury, sustained when she was returning to work after taking a break in her employer's parking lot, as a result of her walking into a piece of sheet metal extending approximately five feet beyond the tailgate of a co-worker's parked pickup truck, arose out of the "use" of the truck, thereby entitling her to make an SUM claim. As noted by the majority of the court, "[u]se" of a vehicle

encompasses more than just driving, and extends to other incidental activities.” Although the truck was not being operated at the time of the accident, it was being used by the co-worker to transport the sheet metal to the junkyard after work. The court further stated, “Construing the language of the supplemental underinsured motorists policy liberally ‘in favor of the insured and strictly against the insurer,’ [citation omitted], and given the causal connection between the use of the pickup truck to transport the sheet metal and respondent’s injuries, we find that respondent’s request for arbitration falls within the scope of the parties’ agreement.”¹⁰

Claimant/Insured’s Duty to Provide Timely Notice of Claim

The UM, UIM and SUM endorsements require the claimant, as a condition precedent to the right to apply for benefits, to give timely notice to the insurer of an intention to make a claim. Although the mandatory UM endorsement requires such notice to be given “within ninety days or as soon as practicable,” Regulation 35-D’s SUM endorsement requires simply that notice be given “as soon as practicable.” A failure to satisfy the notice requirement vitiates the policy.¹⁶ The issue of late notice of claim may also be relevant to the determination of whether the

“Where an insurance policy requires that notice of an occurrence be given ‘as soon as practicable,’ notice must be ‘given within a reasonable [period of] time under all the circumstances.’”

In *Progressive Halcyon Ins. Co. v. Giacometti*,¹¹ the majority held that the claimant, a passenger, who, after the vehicle’s owner/operator had steered to the left, grabbed the steering wheel and pulled the vehicle to the right, causing the vehicle to go off the road, become airborne and crash into trees, did not have the express or implied permission of the owner/operator to use the vehicle. He did not have express permission to take control of the steering wheel, and the owner/operator did not impliedly consent to the claimant’s use of the vehicle in that matter.¹²

In *Kohl v. American Transit Ins. Co.*,¹³ the plaintiff was a passenger in a taxicab who injured a bicyclist when he opened the door into the bicyclist. The Court of Appeals held that the plaintiff was not insured under the taxi owner’s business automobile liability policy, which provided that it “shall inure to the benefit of any person legally operating” the insured vehicle in the business of the insured. In the view of the Court, “[t]he word ‘operating’ cannot be stretched to include passengers riding in the car or opening the door.”¹⁴

“Accidents”

In *Travelers Indemnity Co. v. Richards-Campbell*,¹⁵ where the claimants were intentionally struck by an individual who pleaded guilty to three counts of assault in the second degree, admitting that she intentionally struck them, the court held that the tortfeasor’s insurer was not obligated to provide coverage under the automobile insurance liability policy because the injuries were not the result of an accident, but, rather, an intentional criminal act. Moreover, the court held that the claimants’ SUM carrier properly disclaimed UM benefits because the claimants’ injuries were caused by intentional criminal acts and not by accidents.

alleged offending vehicle is “uninsured” in cases where there has been a disclaimer or denial of coverage based on such late notice (see discussion below).

In *McGovern-Barbash Assoc., LLC v. Everest National Ins. Co.*,¹⁷ the court noted that “[w]here an insurance policy requires that notice of an occurrence be given ‘as soon as practicable,’ notice must be ‘given within a reasonable [period of] time under all the circumstances.’ An insured’s failure to satisfy the notice requirement constitutes ‘a failure to comply with a condition precedent which, as a matter of law, vitiates the contract’” (citations omitted).

In *Prince Seating Corp. v. QBE Ins. Co.*,¹⁸ the court noted that “absent some evidence of an agency relationship, even timely notice of an accident by an insured to a broker is not effective and does not constitute notice to the insurance company, as a broker is considered to be an agent only of the insured” (citations omitted). In this case, although there was no evidence that a principal-agent relationship between the broker and the insurer existed, the court held that summary judgment could not be granted to the insurer based on its late notice defense where the plaintiff gave timely notice to the broker because “the terminology of the policy, including the notice provision in which the words ‘we,’ ‘us,’ and ‘our,’ referring to ‘the company providing this insurance,’ were used to describe who should be notified, is ambiguous.”¹⁹

In determining whether notice was timely, factors to consider include, *inter alia*, whether the claimant has offered a reasonable excuse for any delay, such as latency of his or her injuries, and evidence of the claimant’s due diligence in attempting to establish the insurance status of the other vehicles involved in the accident.²⁰ The inter-

pretation of the phrase “as soon as practicable” continues, as always, to be a hot topic.

In *Tri-State Ins. Co. v. Furboter*,²¹ the court held that the respondent’s delay of 16 months in notifying the petitioner of his claim for underinsurance benefits was “attributable to the belief of his various treating physicians that his injuries were relatively minor and would resolve with treatment.” Thus, where the respondent gave notice promptly after he was made aware of the worsening and permanent nature of his injuries, such notice was deemed timely under the circumstances.

In *American Transit Ins. Co. v. Brown*,²² the Court of Appeals held, “Defendant Brown failed to provide a valid excuse for his failure to use reasonable diligence in providing plaintiff insurer with notice of the underlying personal injury action,” where the notice was sent to an old and incorrect address of the insurer because he was never advised of the insurer’s change of address. In so holding, the Court adopted the view of the dissenting justices at the Appellate Division, that there is no obligation on the part of a liability insurer to advise of a change of address, especially when the insurer’s address easily could have been ascertained via the Internet.

It should be remembered that for coverage claims under New York liability policies issued on or after January 17, 2009, insurers will be required to demonstrate prejudice from the late notice, unless the notice was delayed by more than two years. Still undecided, and to be litigated, is the question of whether that two-year period, which shifts the burden of proving or disproving prejudice, must be measured separately for each of the policy provisions pertaining to notice – i.e., notice of accident or claim, and notice of lawsuit.

Discovery

The UM and SUM endorsements contain provisions requiring, upon request, a statement under oath, examination under oath, physical examinations, authorizations, and medical reports and records. The provision of each type of discovery, if requested, is a condition precedent to recovery.

In *GEICO v. Mendoza*,²³ the court held that where the insurer presents a justifiable excuse for its failure to seek discovery, “a temporary stay of arbitration will be granted in order to allow the insurer to obtain the information sought.” Here, a justifiable excuse was shown to exist, i.e., “the parties were involved in good faith communications regarding liability for the accident, and the insurer reasonably relied on the assurances by the respondent’s attorney that a different insurance carrier was accepting liability for the losses suffered in the accident, and that he was not planning on making an uninsured motorist claim.”

In *Travelers Indemnity Co. v. United Diagnostic Imaging, P.C.*,²⁴ the court stated that “[a] court should only order

disclosure to aid in arbitration pursuant to CPLR 3102(c) if ‘extraordinary circumstances’ exist.” Moreover, “[t]he test for ordering disclosure in aid of arbitration is ‘necessity,’ as opposed to ‘convenience.’ Thus, court-ordered disclosure to aid in arbitration is justified only where that relief is ‘absolutely necessary for the protection of the rights of a party’ to the arbitration” (citations omitted).

In *State Farm Mutual Automobile Ins. Co. v. Urban*,²⁵ the court held that it was error to direct discovery in the event the matter proceeded to arbitration since the petitioner’s failure to move to stay arbitration within the applicable 20-day period to do so “is a bar to judicial intrusion into the arbitration proceedings.” Moreover, by repudiating liability for the claim in an earlier disclaimer/denial letter, the insurer could not thereafter insist upon adherence to the terms of its policy, including those pertaining to pre-arbitration discovery.

It should be remembered that pursuant to 2008 N.Y. Laws chapter 388, effective January 17, 2009, a new Insurance Law § 3420(d)(1) was created, which provides, with respect to liability policies that afford coverage for bodily injury or wrongful death claims where the policy is a personal lines policy other than an excess or umbrella policy, that within 60 days of receipt of a written request by an injured party or other claimant who has filed a claim, an insurer must confirm in writing whether the insured had a liability insurance policy in effect with that insurer on the date of the occurrence, and specify the limits of coverage provided under that policy. If the injured person or other claimant fails to provide sufficient identifying information to allow the insurer, in the exercise of reasonable diligence, to identify a liability policy that may be relevant to the claim, the insurer has 45 days from the initial request to ask for more information, and then another 45 days after such information is provided to furnish the requested insurance information. Pursuant to an amendment to Ins. Law § 2601(a) (“Unfair Claim Settlement Practices”), the failure to comply with these disclosure requirements may result in departmental sanctions, including financial penalties.

Petitions to Stay Arbitration Filing and Service

CPLR 7503(c) provides, in pertinent part, that “[a]n application to stay arbitration must be made by the party served within twenty days after service upon him of the notice [of intention to arbitrate] or demand [for arbitration], or he shall be so precluded.” The 20-day time limit is jurisdictional, and, absent special circumstances, courts have no jurisdiction to consider an untimely application.

In *State Farm Mutual Automobile Ins. Co. v. Urban*, discussed above, the claimant sent a letter to his insurer, by certified mail, return receipt requested, informing it that he intended to arbitrate a claim for SUM benefits, since the accident in which he was injured involved a

motorist who left the scene of the accident. That letter contained information concerning the policy number, claimant's name and address, and a warning that unless within 20 days of receipt thereof the insurer applied to stay arbitration, it would "be precluded from objecting that a valid agreement was not made or complied with and from asserting in court the bar of a limitation of time." Notwithstanding that the letter was received on December 26, 2008, it was not until April 8, 2009, that the insurer denied the SUM claim. Thereafter, on June 10, 2009, the claimant sent the insurer a "Request for Arbitration" with the American Arbitration Association. The insurer moved to stay arbitration within 10 days after receipt of that "request."

In finding the insurer's Petition to Stay Arbitration untimely, the court observed that the letter received by the insurer on December 26, 2008, was a proper notice of intention to arbitrate, to which the 20-day period to seek a stay applied. The subsequent service of the Request for Arbitration filed with the AAA did not reset the 20-day period. Thus, the petition was time-barred, thereby preventing the insurer from raising any issues regarding insurance coverage for the offending vehicle or physical contact with the alleged hit-and-run vehicle.²⁶

In *United Services Automobile Association v. Kungel*,²⁷ the court held that although the petitioner erroneously served the petition and notice of petition one day prior to purchasing an index number and filing process with the court,

the recent amendment to CPLR 2001 was enacted expressly "to fully foreclose dismissal of actions for technical . . . non-prejudicial defects" in commencement . . . regardless of whether the defendant objected in a timely and proper manner, so long as "the mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process" does not prejudice a substantial right of a party (citations omitted).

Burden of Proof

In *American International Ins. Co. v. Giovanielli*,²⁸ the court stated that "[i]n a proceeding to stay arbitration of a claim for uninsured motorist benefits, the claimants' insurer has the initial burden of proving that the offending vehicle was insured at the time of the accident, and thereafter the burden is on the party opposing the stay to rebut that prima facie showing" (citations omitted). In this case, the petitioner made a prima facie showing that the alleged offending vehicle was insured by Lloyd's at the time of the accident by submitting the police accident report containing the vehicle's policy number, as well as correspondence from the insurer's representative identifying Lloyd's as the insurer of the vehicle.²⁹ In opposition, Lloyd's failed to establish a lack of coverage or a timely and valid disclaimer of coverage. Thus, the Petition to Stay Arbitration was properly granted. In *Progressive*

Preferred Ins. Co. v. Williams,³⁰ the court held that the "petitioner's own submissions showed that the policy previously issued to the driver of the offending vehicle had been terminated before the accident" via a notice of cancellation that contained the required statement regarding proof of financial security, as mandated by Vehicle & Traffic Law § 313(1)(a). Thus, the court denied the Petition to Stay Arbitration of an uninsured motorist claim *without a hearing*.

In *Integon National Ins. Co. v. Montagna*,³¹ after the petitioner established, prima facie, that the respondent carrier insured the offending vehicle, the burden shifted to that carrier to establish a lack of coverage on a timely and valid disclaimer of coverage. Although that carrier came forward with rebuttal proof showing that its policy did not cover the vehicle, the petitioner presented additional proof of insurance, which overcame the rebuttal proof. Accordingly, the petition to permanently stay arbitration was granted.

In *GEICO v. O'Neil*,³² the court held that the petitioner met its prima facie burden of showing that the offending vehicle was insured on the date of the accident by submitting a New Jersey DMV record indicating coverage. The burden then shifted to the purported insurer for the offending vehicle to prove that it never insured the vehicle or that its coverage was terminated prior to the accident. The affidavit of the purported insurer's junior underwriter did not rebut the DMV record, failing as it did to provide any grounds upon which to find that the information set forth therein was erroneous. Accordingly, the court granted the Petition to Stay Arbitration and directed the purported insurer to provide coverage for the subject loss.

In *Mid City Construction Co., Inc. v. Sirius American Ins. Co.*,³³ the insurer offered no evidence as to standard office practices for mailing disclaimer letters, and the court held that the affidavit of the claims representative was insufficient to raise a triable issue of fact since he did not have personal knowledge of the mailing of the disclaimer letter. The court further noted that a certified mail receipt, standing alone, was insufficient to raise a triable issue as to actual mailing.

In *GEICO v. Brunner*,³⁴ an underwriter who testified at the framed issue hearing failed to offer "evidence of an office [procedure] geared to insure the likelihood that [endorsements reducing the coverage limits] are always properly addressed and mailed."

In *AutoOne Ins. Co. v. Umanzor*,³⁵ the Petition to Stay Arbitration was unverified, and the petitioner offered no evidentiary proof that the claimant was not a "resident relative" of the insured, entitled to coverage as an insured under its policy. Thus, the court held that the petitioner failed to sustain its initial burden of demonstrating that a factual issue existed as to the resident relative status of the claimant.

Arbitration Awards

Scope of Review

In *Falzone v. New York Central Mutual Fire Ins. Co.*,³⁶ the court noted, “Arbitrators are not required to provide reasons for their decisions.” The Court of Appeals, in its decision, also observed that “a court may vacate an arbitration award only if it violates a strong public policy, is irrational, or clearly exceeds specifically enumerated limitations on the arbitrator’s power. Even when an

employer, a self-insured company, and was in the regular course of his employment, the exclusivity provisions of the Workers’ Compensation Law precluded the claimant from arbitrating a claim against his employer. The court noted that “although petitioner is self-insured, it is required to provide uninsured motorist benefits pursuant to Insurance Law § 3420(f)(1).” Thus, the court held, “Given the public policy of this State requiring insurance against injury caused by an uninsured motorist [citation

A vehicle is considered “uninsured” where it was, in fact, covered by an insurance policy at the time of the accident, but the insurer subsequently disclaimed or denied coverage.

arbitrator has made an error of law or fact, courts generally may not disturb the arbitrator’s decision” (citations omitted).

In *Progressive Northeastern Ins. Co. v. Turek*,³⁷ the court held that “the arbitrator neither committed misconduct (see CPLR 7511(b)(1)(i)) nor exceeded his authority (see CPLR 7511(b)(1)(iii)) when he considered the issue of liability in determining whether the [claimant was] entitled to [uninsured] motorist benefits under [the SUM endorsement].” Moreover, the arbitrator did not err in considering the testimony of a non-party witness on the issue of whether “the claimant’s negligence was the sole proximate cause of the accident.”

In *MVAIC v. NYC East-West Acupuncture, P.C.*,³⁸ the court observed,

It is well settled that “[a]djourments generally fall within the sound exercise of an arbitrator’s discretion pursuant to CPLR 7506(b), the exercise of which will only be disturbed when abused.” The burden falls to “the party seeking to avoid an arbitration award to demonstrate by clear and convincing proof that the arbitrator has abused his discretion in such a manner so as to constitute misconduct sufficient to vacate or modify an arbitration award.” Arbitral misconduct is established not by the refusal of an adjournment, but where the refusal forecloses “the presentation of material and pertinent evidence to the [movant’s] prejudice” [citations omitted].

Here, the court held that the arbitrator’s decision not to grant a postponement in order to allow MVAIC to investigate an adversary’s contention was within his sound discretion and powers.

UNINSURED MOTORIST ISSUES

Self-Insurance

In *Elrac, Inc. v. Exum*,³⁹ the court rejected the contention of the UM carrier that since the accident occurred while the claimant was operating a motor vehicle owned by his

omitted], we find that a self-insured employer is required to provide mandatory uninsured motorist benefits to employees and that the Worker’s Compensation Law does not preclude the employee from filing such a claim against the employer.”

Insurer’s Duty to Provide Prompt Written Notice of Denial or Disclaimer (Ins. Law § 3420(d))

A vehicle is considered “uninsured” where it was, in fact, covered by an insurance policy at the time of the accident, but the insurer subsequently disclaimed or denied coverage.⁴⁰

In *Hunter Roberts Construction Group, LLC v. Arch Ins. Co.*,⁴¹ the court stated,

The insurer bears the burden to explain the reasonableness of any delay in disclaiming coverage. The reasonableness of any delay is computed from the time that the insurer becomes sufficiently aware of the facts which would support a disclaimer. Although the timeliness of such a disclaimer generally presents a question of fact, where the basis for the disclaimer was, or should have been readily apparent before the onset of the delay, any explanation by the insurer for its delay will be insufficient as a matter of law. Where the basis was not readily apparent, an unsatisfactory explanation will render the delay unreasonable as a matter of law. If the delay allegedly results from a need to investigate the facts underlying the proposed disclaimer, the insurer must demonstrate the necessity of conducting a thorough and diligent investigation [citations omitted].

In *Magistro v. Buttered Bagel, Inc.*,⁴² where the insurer did not have a readily apparent basis for a denial or disclaimer until it conducted an investigation into the underlying incident and its insured’s awareness of the circumstances surrounding it, the court held that the denial only three weeks after receiving the investigator’s report and becoming aware that the insured had known

about the incident, during which time the insurer consulted with counsel, was timely as a matter of law. In *New York Central Mutual Fire Ins. Co. v. Ramirez*,⁴³ on the other hand, the court held that the insurer did not establish that its delay in disclaiming on the ground of late notice was justified by a necessary or diligently conducted investigation into the possible grounds for the disclaimer.

In *Blue Ridge Ins. Co. v. Empire Contracting and Sales, Inc.*,⁴⁴ the court held that an insurer's commencement of a declaratory judgment action can constitute a notice of disclaimer pursuant to Ins. Law § 3420(d). In *Henner v. Everdry Marketing and Management, Inc.*,⁴⁵ the court reiterated that "a reservation of rights does not qualify as a timely disclaimer."

The *Henner* court also explained that an insurer "will be estopped from later raising a defense that it did not mention in the notice of disclaimer."⁴⁶ Accordingly, the court held that where the insurer disclaimed on the ground that its insured did not provide timely notice of the accident and also raised certain policy exclusions, but did not disclaim on the ground that the plaintiffs failed to provide it with timely notice of the accident, the insurer was precluded from relying upon that defense.

In *Mid-City Construction Co., Inc. v. Sirius America Ins. Co.*,⁴⁷ the court held that a 54-day delay in providing written notice of disclaimer precluded effective disclaimer, even though the insured's own notice of the incident was untimely.

In *Hunter Roberts Construction Group, LLC v. Arch Ins. Co.*,⁴⁸ the court held that a four-month delay in disclaiming was not justified by alleged difficulties in the insurer's investigation of the claim because the insurer failed to explain "why anything beyond a cursory investigation was necessary" to determine whether the insured gave timely notice of the claim.

In *Progressive Northeastern Ins. Co. v. Lamba*,⁴⁹ the court held that a disclaimer sent 71 days after the insurer was placed on notice of the claim, and 55 days after the insurer obtained all of the information upon which the disclaimer was based by way of a recorded interview with the insured, was untimely as a matter of law. The court rejected the insurer's contention that the delay was actually only 35 days because it had to wait for the insured to return the executed interview transcript before disclaiming based thereon.

In *Travelers Indemnity Co. v. Orange & Rockland Utilities, Inc.*,⁵⁰ the court noted that Ins. Law § 3420(d), by its terms, is limited to disclaimers "for death" or "bodily injury" and is, therefore, inapplicable in an action pertaining to a breach of contract and breach of warranty pertaining to the construction of a home, and/or a claim involving pollution insurance.

In *Konstantinou v. Phoenix Ins. Co.*,⁵¹ the court noted that "disclaimer pursuant to [Ins. Law] §3420(d) is unnecessary when a claim falls outside the scope of the policy's

coverage portion. Under those circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed" (citations omitted).⁵²

In *York Restoration Corp. v. Solty's Construction, Inc.*,⁵³ the court held that the insurer was not required to provide prompt notice of disclaimer where the claimant was not an insured under the policy on the date of the accident, since no coverage existed.

An insurer "will be estopped from later raising a defense that it did not mention in the notice of disclaimer."

Non-Cooperation

It is well established that "[a]n insurance carrier that seeks to disclaim coverage on the ground of lack of cooperation must demonstrate that it acted diligently in seeking to bring about the insured's cooperation; that the efforts employed by the insurer were reasonably calculated to obtain the insured's cooperation; and that the attitude of the insured, after his [or her] cooperation was sought, was one of 'willful and avowed obstruction.'"⁵⁴

In *AutoOne Ins. Co. v. Hutchinson*,⁵⁵ the court observed that "since a disclaimer based upon lack of cooperation penalizes the injured party for the actions of the insured and 'frustrates the policy of this State that innocent victims of motor vehicle accidents be recompensed for the injuries inflicted upon them,' an insurer seeking to disclaim for noncooperation has a heavy burden of proof" (citing *Thrasher*, 19 N.Y.2d 159).

In that case, the insurer's letters demanding that its insured appear at an examination under oath made reference to his purported status as a claimant for no-fault benefits and warned him that the failure to appear could result in the denial of such benefits, despite the fact that there is no indication that the insured was injured in the accident and sought no-fault benefits. Under these circumstances, the court held that the trial court should not have determined that the insurer validly disclaimed coverage without conducting a hearing. Accordingly, the court remitted the case to the supreme court for an evidentiary hearing to determine the issue of whether the insurer validly disclaimed coverage.

In *Hunter Roberts Construction Group, LLC v. Arch Ins. Co.*,⁵⁶ the court held that the heavy burden of establishing noncooperation was not met, where the evidence established that the investigator called the insured's main

business number three times and was told that he would have to supply the name of the individual with whom he wished to speak. There was no indication that the investigator ever went to the office personally or ever made a specific demand to produce an appropriate person for interview, and there was no indication that further efforts would have been futile.

Cancellation of Coverage

One category of an “uninsured” motor vehicle is where the policy of insurance for the vehicle had been canceled prior to the accident. Generally speaking, in order to effectively cancel an owner’s policy of liability insurance, an insurer must strictly comply with the detailed and complex statutes, rules, and regulations governing notices of cancellation and termination of insurance, which differ depending upon whether, for example, the vehicle at issue is a livery or private passenger vehicle, whether the policy was written under the Assigned Risk Plan, and/or whether it was paid for under premium financing contract.

In *Tobias v. Liberty Mutual Fire Ins. Co.*,⁵⁷ the court observed that “[t]he insurer has the burden of proving the validity of its timely cancellation of an insurance policy.” Once that initial burden is met, the burden shifts to the party disputing coverage to establish noncompliance with statutory cancellation requirements as to form and procedure.⁵⁸

In *Progressive Northeastern Ins. Co. v. Akinyooye*,⁵⁹ the court held that the respondent insurer demonstrated that its insured was provided with a notice of intent to cancel and a cancellation notice fully compliant with N.Y. Banking Law § 576 more than one year prior to the subject accident. Thus, the Petition to Stay Arbitration of a UM claim was denied.

In *Lincoln General Ins. Co. v. Williams*,⁶⁰ the court observed that “[w]here an insured initiates a policy cancellation, the insurer is not required to send to the insured any notice of termination described in Vehicle & Traffic Law § 313.” However, the insurer is still required to file a notice of termination with the Commissioner of Motor Vehicles within 30 days after the effective date of the cancellation for that cancellation to be effective against third parties.⁶¹

In *Eveready Ins. Co. v. Smith*,⁶² the court rejected the SUM insurer’s contention that the alleged offending vehi-

cle was insured on the date of the accident. Its insurer did not file a notice of termination with the Commissioner of the Department of Motor Vehicles because “[a]ccording to the version of Vehicle and Traffic Law § 313(2) which was in effect on the date of the accident and at the time of the termination of the policy, an insurer was not required to file a notice of termination with the Commissioner due to a nonrenewal of a policy of liability insurance (see VTL former § 312[2]).” The court added that “[t]o the extent that regulation contained in 15 NYCRR 34.3(4) provides to the contrary, it is inconsistent with the legislative intent of the version of Vehicle and Traffic Law § 313(2) applicable to this case” (citations omitted).

Stolen Vehicle

Automobile liability policies generally exclude coverage for damage caused by drivers of stolen vehicles, drivers operating without the permission or consent of the owner, or drivers operating a vehicle outside the scope of the permission given. In such situations, the vehicles at issue are considered “uninsured” and the injured claimant will be entitled to present an uninsured motorist claim.

In *State Farm Fire & Casualty Co. v. Hayes*,⁶³ the court observed that “[t]he strong presumption of permissive



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use afforded by Vehicle & Traffic Law § 388, can only be rebutted by substantial evidence sufficient to show that the driver of the vehicle was not operating the vehicle with the owner's consent" (citations omitted). The court further noted that "[t]he determination of the fact-finding court should not be disturbed on appeal unless its conclusions could not be reached on any fair investigation of the evidence, especially where, as here, the determination turns largely upon the credibility of witnesses" (citations omitted).

In *Progressive Halcyon Ins. Co. v. Giacometti*,⁶⁴ the court held that the claimant, who, after the vehicle's owner/operator steered the vehicle to the left, grabbed the steering wheel and pulled the vehicle to the right, causing the vehicle to go off the road to the right, become airborne and crash into trees, did not have the express or implied permission of the owner/operator to use the vehicle. He did not have express permission to take control of the steering wheel, and the owner/operator did not impliedly consent to the claimant's use of the vehicle in that manner.

In *State Farm Mutual Automobile Ins. Co. v. Taveras*,⁶⁵ the court upheld the trial court's finding, after a framed issue hearing, that the evidence of theft and non-permissive use was insufficient to overcome the presumption of permissive use. In so concluding, the hearing court properly took into account the owner's failure to adequately explain his substantial delay in calling the police to report the alleged theft, which call immediately followed an alleged assault on the owner and his friends by a mob of angry people.

UNDERINSURED MOTORIST ISSUES

Trigger of Coverage

In *New Hampshire Ins. Co. v. Bobak*,⁶⁶ the court observed that "[SUM] coverage will be available [only] where the limits of liability of the motor vehicle liable for the damages are in a lesser amount than the bodily injury liability insurance limits of coverage provided by the insured's polic[ies]."

Exhaustion of Underlying Limits

In *Kemper Ins. Co. v. Russell*,⁶⁷ the tortfeasor had \$50,000 in liability coverage, but the plaintiff's counsel failed to timely commence an action against the tortfeasor. Accordingly, counsel settled the legal malpractice action brought against him by the claimant with a payment of \$50,000. In a proceeding by the claimant's SUM carrier to stay arbitration of his SUM claim, the majority of the court, as a matter of first impression, granted the insurer's Petition to Stay Arbitration on the ground that the primary insurer paid nothing insofar as the claimant was forced to recover damages in a separate legal malpractice action. "As the other driver's policy limit was not exhausted by payment, respondent's own SUM coverage does not

come into play."⁶⁸ This case is expected to be heard and decided by the Court of Appeals in the coming year.

Settlement Without Consent

In *Eveready Ins. Co. v. Vilmond*,⁶⁹ although the claimant reached an agreement to settle with the tortfeasor for a specific amount, and accepted and negotiated a settlement check for that amount before obtaining the SUM insurer's consent to settle, there was no proof that she ever executed a release. Thus, the court held that she did not violate the terms of her policy or prejudice the SUM insurer's subrogation rights and, therefore, denied the insurer's Petition to Stay Arbitration.

Priority of Coverage

In *State Farm Mutual Auto. Ins. Co. v. Thomas*,⁷⁰ the court noted that both New York and New Jersey SUM policies contain a "priority of coverage" provision, pursuant to which where an insured is entitled to SUM coverage under more than one policy, the order of priority is:

- (a) A policy covering a motor vehicle occupied by the injured person at the time of the accident;
- (b) A policy covering a motor vehicle not involved in the accident under which the injured person is a named insured; and
- (c) A policy covering a motor vehicle not involved in the accident under which the injured person is an insured other than a named insured.

Furthermore, coverage under a lower priority policy applies "only to the extent that it exceeds the coverage of a higher priority policy." ■

1. 70 A.D.3d 1359 (4th Dep't), *lv. to appeal denied*, 14 N.Y.3d 711 (2010).
2. 74 A.D.3d 1850, 1851 (4th Dep't), *lv. to appeal denied*, 15 N.Y.3d 712 (2010).
3. 69 A.D.3d 864, 865 (2d Dep't 2010).
4. 77 A.D.3d 653, 654 (2d Dep't 2010).
5. 71 A.D.3d 860, 861 (2d Dep't 2010).
6. 70 A.D.3d at 1360.
7. 28 Misc. 3d 1208(A) (Sup. Ct., N.Y. Co. 2010).
8. 74 A.D.3d 820, 822 (2d Dep't 2010).
9. 75 A.D.3d 967, 968-69 (3d Dep't 2010).
10. The dissenting opinion observed that "[i]f respondent had walked into the parked truck itself, her injuries would not have arisen out of the use of the vehicle [citing *Wooster v. Soriano*, 167 A.D.2d 233 (1990), and *McConnell v. Fireman's Fund Am. Ins. Co.*, 49 A.D.2d 676 (1975)]. The same result should follow when she walked into materials protruding from the bed of the truck." The dissenter added, "Rather than expanding the application of the statute and regulation requiring coverage for injuries arising out of a 'motor vehicle's ownership, maintenance or use,' we should adhere to the current rule that looks to whether the 'circumstances constituted an 'ongoing activity relating to the vehicle' which would necessitate a conclusion that the vehicle was in use" (citations omitted).
11. 72 A.D.3d 1503, 1504, 1509 (4th Dep't 2010).
12. *Id.* at 1510-11. The dissenting opinion focused on the "use" of the vehicle, rather than its "operation." As stated by the dissenter, "[u]se' and 'operation' of a motor vehicle are, of course, not interchangeable, inasmuch as 'one who uses a vehicle does not necessarily have to be operating it [citation omitted].' The 'use' of a vehicle 'includes more than driving or riding in an automobile; it extends to utilizing the vehicle as an instrumental means to an end in any

manner intended or contemplated by the insured. 'Operation' is interpreted more narrowly than 'use' and is defined as the exercise of direction and control over the vehicle necessary to move the vehicle from one point to another (i.e., driving the vehicle)." In the view of the dissent, "The meaning of the term 'use' is the pivotal issue in this case. The noun 'use' has been defined as, *inter alia*, 'the fact or state of being used,' and the verb 'use' has been defined as, *inter alia*, 'to carry out a purpose or action by means of' [citation omitted]. In other words, 'utilize' is a synonym of 'use.'" Accordingly, the dissent concluded that the claimant "used" the vehicle at the time of the accident in the sense that the vehicle facilitated the travel giving rise to the accident." He also concluded that the claimant's use of the vehicle was permissive "at least to the extent that [he] traveled in the vehicle," especially where there was no evidence that the owner/operator resisted the efforts of the claimant to assume control of the vehicle.

13. 59 A.D.3d 681 (2d Dep't 2009), *aff'd*, 15 N.Y.3d 763 (2010).
14. See also Norman H. Dachs & Jonathan A. Dachs, *Coverage in Context: Defining "Use" of a Motor Vehicle*, N.Y.L.J., Sept. 14, 2010, p. 3, col. 1.
15. 73 A.D.3d 1076 (2d Dep't 2010).
16. See *Tower Ins. Co. of N.Y. v. Miles*, 74 A.D.3d 410 (1st Dep't 2010); *Bigman Brothers, Inc. v. QBE Ins. Corp.*, 73 A.D.3d 1110 (2d Dep't 2010).
17. 79 A.D.3d 981 (2d Dep't 2010).
18. 73 A.D.3d 884 (2d Dep't 2010).
19. See *Jeffrey v. Allcity Ins. Co.*, 26 A.D.3d 355 (2d Dep't 2006).
20. See *Tri-State Ins. Co. v. Furboter*, 71 A.D.3d 682 (2d Dep't 2010); *Ponok Realty Corp. v. United Nat'l Specialty Ins. Co.*, 69 A.D.3d 596 (2d Dep't 2010); *Bauerschmidt & Sons, Inc. v. Nova Cas. Co.*, 69 A.D.3d 668 (2d Dep't 2010).
21. 71 A.D.3d 682 (2d Dep't 2010).
22. 66 A.D.3d 447 (1st Dep't 2009), *rev'd*, 14 N.Y.3d 809 (2010).
23. 69 A.D.3d 623 (2d Dep't 2010).
24. 73 A.D.3d 791 (2d Dep't 2010).
25. 78 A.D.3d 1064, 1066 (2d Dep't 2010).
26. See also *Allstate Ins. Co. v. Raynor*, 78 A.D.3d 1173, 1174 (2d Dep't 2010) (insurer required to move to stay arbitration within 20 days after receipt of a letter from claimant's counsel claiming, *inter alia*, SUM benefits and containing a notice of intention to arbitrate and stating that unless the insurer applied to stay arbitration within 20 days after receipt of the notice, it would thereafter be precluded from objecting, *inter alia*, that a valid agreement to arbitrate was not made or complied with, and not to wait until after the claimant subsequently served a Request for Arbitration upon it).
27. 72 A.D.3d 517 (1st Dep't 2010).
28. 72 A.D.3d 948, 949 (2d Dep't 2010).
29. See also *AutoOne Ins. Co. Hutchinson*, 71 A.D.3d 1011, 1012 (2d Dep't 2010) (petitioner made a prima facie showing that the offending vehicle was insured by Nationwide through the submission of a police accident report containing the vehicle's insurance code); *GEICO v. O'Neil*, 74 A.D.3d 1068 (2d Dep't 2010).
30. 78 A.D.3d 578 (1st Dep't 2010).
31. 69 A.D.3d 626 (2d Dep't 2010).
32. 74 A.D.3d 1068, 1069 (2d Dep't 2010).
33. 70 A.D.3d 789, 790 (2d Dep't 2010).
34. 69 A.D.3d 853, 854 (2d Dep't 2010).
35. 74 A.D.3d 1335, 1336 (2d Dep't 2010).
36. 64 A.D.3d 1149, 1150 (4th Dep't 2009), *aff'd*, 15 N.Y.3d 530 (2010).
37. 71 A.D.3d 899, 900 (2d Dep't 2010).
38. 77 A.D.3d 412, 415-16 (1st Dep't 2010).
39. 73 A.D.3d 431, 432 (1st Dep't 2010).
40. See *Progressive Preferred Ins. Co. v. Townsend*, 79 A.D.3d 893 (2d Dep't 2010) ("Once the petitioner disclaimed liability coverage of the subject vehicle under the livery use exclusion provision of the subject policy, the vehicle was rendered an uninsured motor vehicle under the policy, as required by Insurance Law §3420(f)(1).").
41. 75 A.D.3d 404, 409 (1st Dep't 2010).

42. 79 A.D.3d 822 (2d Dep't 2010).
43. 76 A.D.3d 1078, 1079 (2d Dep't 2010).
44. 73 A.D.3d 959 (2d Dep't 2010).
45. 74 A.D.3d 1776, 1778 (4th Dep't 2010).
46. *Id.* at 1777.
47. 70 A.D.3d 789 (2d Dep't 2010).
48. 75 A.D.3d 404, 409 (1st Dep't 2010).
49. 79 A.D.3d 719 (2d Dep't 2010).
50. 73 A.D.3d 576, 577 (1st Dep't), *lv. to appeal dismissed*, 15 N.Y.3d 834 (2010).
51. 74 A.D.3d 1850, 1852 (4th Dep't), *lv. to appeal denied*, 15 N.Y.3d 712 (2010).
52. See also *Herdendorf v. GEICO Ins. Co.*, 77 A.D.3d 1461 (4th Dep't 2010).
53. 79 A.D.3d 861 (2d Dep't 2010).
54. *Thrasher v. U.S. Liab. Ins. Co.*, 19 N.Y.2d 159 (1967). See *Johnson v. GEICO*, 72 A.D.3d 900 (2d Dep't 2010).
55. 71 A.D.3d 1011, 1013 (2d Dep't 2010).
56. 75 A.D.3d 404 (1st Dep't 2010).
57. 78 A.D.3d 928 (2d Dep't 2010).
58. See also *Auto One Ins. Co. v. Forrester*, 78 A.D.3d 1174 (2d Dep't 2010).
59. 70 A.D.3d 956 (2d Dep't 2010).
60. 73 A.D.3d 778 (2d Dep't 2010).
61. Vehicle & Traffic Law § 313(2).
62. 79 A.D.3d 1040 (2d Dep't 2010).
63. 78 A.D.3d 1063 (2d Dep't 2010).
64. 72 A.D.3d 1503, 1504 (4th Dep't 2010).
65. 71 A.D.3d 606 (1st Dep't 2010).
66. 72 A.D.3d 1647, 1649 (4th Dep't 2010).
67. 75 A.D.3d 724 (3d Dep't), *lv. to appeal granted*, 15 N.Y.3d 711 (2010).
68. The dissenting opinion focused on the fact that the claimant did obtain the full amount of the "limits of liability" of the tortfeasor's policy, albeit from another carrier, thus fulfilling the purpose of the SUM statute and scheme.
69. 75 A.D.3d 640, 641 (2d Dep't 2010).
70. 75 A.D.3d 644, 647 (2d Dep't 2010).



"Bad news, Stevens. While monitoring your email I discovered that you're monitoring my email."



THOMAS A. DICKERSON, JOHN M. LEVENTHAL and **CHERYL E. CHAMBERS** are Associate Justices of the Appellate Division, Second Department. **JUSTICE DICKERSON** is the author of *Class Actions: The Law of 50 States*, Law Journal Press, 2011; "Consumer Protection," chapter 98 of *Commercial Litigation in New York State Courts*, 3d Edition, R. Haig, Ed., Thomson Reuters 2010; Article 9 (New York State Class Actions), Weinstein Korn & Miller, *New York Civil Practice CPLR, Lexis-Nexis (MB)* 2011, and "Consumer Law 2010: The Judge's Guide to Federal and New York State Consumer Protection Statutes," available at www.nycourts.gov. **JUSTICE LEVENTHAL** presided over the nation's first dedicated felony Domestic Violence Court, from June 1996 to January 2008. He is a frequent lecturer on evidence, elder abuse, guardianship, domestic violence and other criminal law issues before bar associations, law schools, civic groups, court administrators and governmental agencies and has written extensively on these topics. **JUSTICE CHAMBERS** was appointed to the Appellate Division in February of 2008. She worked in the Kings County District Attorney's Office from 1985 to 1994. In 1995, she was elected to the New York City Civil Court, where she served through 1998. She was then elected to the New York State Supreme Court (2nd Judicial District, Kings County) in 1999.

New York State Consumer Protection Law and Class Actions in 2010

By Thomas A. Dickerson, John M. Leventhal and Cheryl E. Chambers

In 2010, consumer protection law underwent a number of developments, including changes in the area of consumer class actions. In addition, the Dodd-Frank Wall Street Reform and Consumer Protection Act, "the most important change in consumer protection law since the late 1960s,"¹ was signed into law on July 21, 2010. This article reviews recent consumer protection law cases as well as several consumer class-action cases reported during 2010.

PART I

Mandatory Arbitration

Until recently, New York courts have, generally, enforced mandatory arbitration clauses in consumer contracts including class-action waivers, notwithstanding prohibitive costs.² However, recent cases suggest that courts are subjecting such clauses to greater scrutiny.³ In *Frankel v.*

Citicorp Insurance Services, Inc.,⁴ a class action challenging the repeated and erroneous imposition of \$13 payments for the defendant's "Voluntary Flight Insurance Program," the defendant sought to compel arbitration and stay the class action relying upon a unilateral change of terms notice imposing a class-action waiver set forth in a mailed notice sent to the plaintiff. In remitting, the Appellate Division, Second Department, noted that, "[s]ince there is a substantial question as to whether the arbitration agreement is enforceable under South Dakota law," the trial court should have "temporarily stay[ed] arbitration pending a framed-issue hearing." At such a hearing the trial court should consider, *inter alia*, the issues of unconscionability, adequate notice of the change in terms, viability of class action waivers and the "costs of prosecuting the claim on an individual basis, including anticipated fees for experts and attorneys, the availability of attorneys willing to undertake such a claim

and the corresponding costs likely incurred if the matter proceeded on a class-wide basis.”⁵

Paying Arbitration Costs

In *Brady v. Williams Capital Group, LP*,⁶ a case involving an employee/employer dispute over the enforceability of an “equal share” provision regarding the payment of arbitration costs, the Court of Appeals held that a “litigant’s financial ability is to be resolved on a case-by-case basis and the inquiry should at a minimum consider the litigant’s ability to pay fees and costs, the expected differential between the costs of arbitration and litigating in court and whether the cost differential deters bringing claims in the arbitral forum.”

Gift Cards Again

The struggle between gift card issuers (a multibillion dollar business) and cooperating banks and consumers over the legality of excessive fees, including expiration or dormancy fees, goes on with gift card issuers trying to morph themselves into entities protected from state consumer protection statutes by federal preemption. In three New York State class actions, purchasers of gift cards challenged, *inter alia*, the imposition of dormancy fees by gift card issuers.⁷ The most recent battle is over whether or not actions that rely upon the common law and violations of salutary consumer protection statutes, such as N.Y. General Business Law §§ 349, 396-I (GBL) and CPLR 4544, brought by New York residents against gift card issuers and cooperating banks are preempted by federal law.⁸ Although this issue seemingly was resolved earlier in *Goldman*,⁹ in 2010 the court in *L.S. v. Simon Property Group, Inc.*¹⁰ (a consumer class action challenging, *inter alia*, a renewal fee of \$15 imposed after a six-month expiration period) raised the issue anew by holding that the claims stated therein were preempted by federal law. This may not bode well for gift card purchasers in New York State. In addition, this may be an area for legislative efforts to limit, if not otherwise prohibit, expiration dates and service fees of any kind as enacted by other states.¹¹

Backdating

It is disappointing, indeed, to discover that some “consumer oriented” big-box retailers may be taking advantage of their customers. In *Argento v. Wal-Mart Stores, Inc.*,¹² the court granted certification to a class of customers who alleged that the defendant violated GBL § 349 by routinely backdating renewal memberships at Sam’s Club stores. “[A]s a result of the backdating policy, members who renew after the date upon which their one-year membership terms expire are nevertheless required to pay the full annual fee for less than a full year of membership.” The defendant admitted that Sam’s Club had received \$940 million in membership fees in 2006.¹³

Slack Fill

In *Waldman v. New Chapter, Inc.*,¹⁴ the court found that the packaging of a retail product violated GBL § 349.

In 2009, Plaintiff purchased a box of Berry Green, a “Spoonable Whole-Food.” . . . Berry Green comes in a box that is 6 5/8 inches tall. . . . The box contains a jar that is 5 5/8 inches tall. . . . And the jar itself is only half-filled with the product. . . . [GBL § 349 claim stated in that] defendant’s packaging is “misleading” for purposes of this motion . . . Plaintiff alleges that that packaging “gives the false impression that the consumer is buying more than they are actually receiving” and thus sufficiently pleads that the packaging was “misleading in a material way” [under a slack fill theory].

The court also found for the plaintiffs in their claim for violation of GBL § 350. Quoting *Mennen Co. v. Gillette Co.*, the court said that “[a]s an initial matter [GBL § 350-a] expressly defines ‘advertisement’ to include ‘labeling.’ Thus the statute includes claims made on a product’s package. In addition . . . excessive slack fill states a claim for false advertising under § 350.”¹⁵

Insurance Claims

In *Wilner v. Allstate Insurance Co.*,¹⁶ insured homeowners suffered property damage as a result of a storm that caused a hillside to collapse. The court sustained the plaintiffs’ GBL § 349 claim including a request for punitive damages and attorney fees. The plaintiffs alleged that the

defendant purposely failed to reach a decision on the merits of their insurance claim in order to force the plaintiffs to bring suit against the Village before the statute of limitations expired because if they did not do so, the defendant could refuse reimbursement of the claim on the ground that the plaintiffs had failed to protect the defendant’s subrogation rights. . . . Presumably, the purpose of this alleged conduct would be to save the defendant money, if the plaintiffs initiate the suit, the plaintiffs have to pay for it, whereas if the defendant initiates its own suit, the cost will fall upon the defendant.

The court found that “the plaintiffs successfully pleaded conduct on the part of the defendant which was misleading in a material way” and “the plaintiffs’ belief as to their responsibilities under the contract of insurance is a question of fact.”

Excessive Mortgage Fees

In *Cohen v. J.P. Morgan Chase & Co.*,¹⁷ the court held that the collection of allegedly illegal post-closing fees in violation of the Real Estate Settlement Procedures Act (RESPA) would be misleading under GBL § 349. “There is authority under New York law for finding that collecting an illegal fee constitutes a deceptive business

conduct. . . . If it is found that collection of the post-closing fee was in fact illegal under RESPA, then [the] first element of § 349 is established.”

Dating Services

In *Robinson v. Together Member Service*,¹⁸ the court awarded the consumer the entire \$2,000 contract price paid to a dating service.

The agreement entered into between the parties does not comply [with GBL § 394-c]. Specifically . . . plaintiff paid a membership fee in excess of the allowable amount . . . the services to be provided to her were open-ended as opposed to having a two-year period. While plaintiff was told she would get five referrals, the number of referrals was not to be provided to her on a monthly basis, as required . . . since [defendant] did not provide a specified number of referrals monthly, the maximum allowable charge was \$25. Clearly, plaintiff was grossly overcharged.

PART II

Objector’s Attorney Fees

In *Flemming v. Barnwell Nursing Home and Health Facilities, Inc.*,¹⁹ a majority of the Court of Appeals declined to award an objector her counsel fees, noting that “the language of CPLR 909 permits attorney fee awards only to ‘the representatives of the class,’ and does not authorize an award of counsel fees to any party, individual or counsel, other than class counsel. Had the Legislature intended any party to recover attorney fees it could have expressly said so.” The dissent, however, noted that “[w]hatever the faults and virtues of the class action device, no one disputes the need to control class counsel’s fees – and nothing furnishes so effective a check on those fees as an objecting lawyer.” Hopefully, the majority’s holding will be ameliorated in future cases where the objector’s input is found to be helpful,²⁰ unlike in this case where the trial court found that “her objections had neither assisted the court nor benefitted the class.”

Bonus Minutes

In *Morrissey v. Nextel Partners, Inc.*,²¹ consumers entered into contracts with the defendant “for the purchase of a ‘bonus minutes’ promotional rate plan. . . . Plaintiffs were also required to enroll in defendant’s ‘Spending Limit Program,’ which imposed a monthly fee for each phone based on their credit rating. . . . Plaintiffs . . . alleged that defendant’s notification of the increased Spending Limit Program maintenance fee, which was ‘burie[d]’ within a section of the customer billing statement . . . constitutes a deceptive practice.” In granting certification to the spending limit sub-class on the GBL § 349 claim only, the court noted, “Plaintiffs allege, however, that the small typeface

and inconspicuous location of the spending limit fee increase disclosures were deceptive and misleading in a material way,” citing two gift card cases²² and one credit card case²³ involving inadequate disclosures.

Fees in Absence of Common Fund

In another interesting fee case, *Louisiana Municipal Employees’ Retirement System v. Cablevision Systems Corp.*,²⁴ the defendants agreed to pay counsel’s attorney fees as part of a proposed settlement “which became void upon the nonconsummation of a transaction contemplated in the settlement agreement.” The plaintiffs, however, asserted that they obtained a benefit for the class (share price increased), were entitled to an award of attorney fees pursuant to CPLR 909 and because no common fund had been created to fund such an award, the plaintiffs sought to have defendants pay. In limiting the scope of CPLR 909, the Appellate Division, Second Department, held that “[a]lthough CPLR 909 also provides that ‘if justice requires, [the court in its discretion may] allow recovery of the amount awarded from the opponent of the class,’ cases²⁵ interpreting this statutory provision uniformly require a showing of bad faith or other improper conduct on the part of a defendant before approving an award of fees directly against it.” Finding no bad faith, the court reversed the trial court’s award of \$2.1 million in attorney fees.²⁶

Clearly, there will be an increase in federal class actions.

No Penalty Class Actions

CPLR 901(b)’s prohibition of class actions seeking a penalty or a minimum recovery has been applied by New York courts in antitrust actions under GBL § 340 (Donnelly Act; *Sperry v. Crompton Corp.*²⁷) and to claims brought under the federal Telephone Consumer Protection Act (*Giovanniello v. Carolina Wholesale Office Machine Co., Inc.*²⁸). However, CPLR 901(b) has not been applied in class actions alleging a violation of GBL §§ 349, 350 (*Cox v. Microsoft Corp.*;²⁹ *Ridge Meadows Homeowners’ Association, Inc. v. Tara Development Co., Inc.*³⁰), Labor Law § 220 (*Pasantez v. Boyle Environmental Services, Inc.*;³¹ *Galdamez v. Biordi Construction Corp.*³²) and Labor Law § 196-d (*Krebs v. The Canyon Club*³³) as long as the penalty damages are waived and class members are given the opportunity to opt out.

Make a Federal Case Out of It

Perhaps, on the basis of comity and to discourage forum shopping, the federal courts in the Second Circuit have routinely referred to CPLR 901(b) in class actions brought

by New York residents (*Leider v. Ralfe*³⁴ (“NY C.P.L.R. § 901(b) must apply in a federal forum because it would contravene both of these mandates to allow plaintiffs to recover on a class-wide basis in federal court when they are unable to do the same in state court”). However, a plurality of the U.S. Supreme Court in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Insurance Co.*³⁵ rejected this concept:

The question in dispute is whether Shady Grove’s suit may proceed as a class action. Rule 23 . . . creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his class as a class action. . . . Thus, Rule 23 provides a one-size-fits-all formula for deciding the class-action question. Because § 901(b) attempts to answer the same question – i.e., it states that Shady Grove’s suit “may *not* be maintained as a class action” (emphasis added) because of the relief it seeks [it] cannot apply in diversity suits unless Rule 23 is *ultra-vires*. . . . Rule 23 automatically applies “in all civil actions and proceedings in the United States district courts.”

Recent federal court decisions have addressed the ramifications of *Shady Grove*.³⁶ Clearly, there will be an increase in federal class actions and defendants may be less anxious to remove such cases to federal court under the Class Action Fairness Act.³⁷ Lastly, the Legislature may wish to revisit CPLR 901(b).³⁸

More Tiny Print

In *Pludeman v. Northern Leasing Systems, Inc.*,³⁹ a class of small business owners who had entered into lease agreements for POS terminals asserted that the defendant used “deceptive practices, hid material and onerous lease terms. According to plaintiffs, defendants’ sales representatives presented them with what appeared to be a one-page contract on a clip board, thereby concealing three other pages below . . . among such concealed items . . . [were a] no-cancellation clause and no warranties clause, absolute liability for insurance obligations, a late charge clause, and provisions for attorneys’ fees and New York as the chosen forum,” all of which were in “small print” or “microprint.” The Appellate Division, First Department certified the class⁴⁰ noting that “liability could turn on a single issue. Central to the breach of contract claim is whether it is possible to construe the first page of the lease as a complete contract. . . . Resolution of this issue does not require individualized proof.” Subsequently, the trial court awarded the plaintiff class partial summary judgment on liability on the breach of contract/overcharge claims.⁴¹

Cy Pres Settlement

In *Fiala v. Metropolitan Life Insurance Co., Inc.*,⁴² and a related federal class action,⁴³ the trial court approved a proposed settlement providing for a total payment of

\$50 million to resolve both federal and state cases. Of particular interest was \$2.5 million allocated for *cy pres* distribution to The Foundation for the National Institutes of Health, which “will allocate the funds to national, health-related research projects.” The court noted,

There is little New York law⁴⁴ applying the *cy pres* rule to class action settlements . . . there is no prohibition against employing this well-recognized doctrine, oft applied by the federal courts. . . . Many of the non-closed-block class members would have to be located at great expense [which] would have greatly depleted the \$2.5 million and left these class members with little benefit.

In addition, the court approved of the payment of \$25,000 for objector’s counsel fees and incentive awards “ranging from \$1,000 to \$1,500” to class representatives. “This award, the court believes, will encourage class representatives to bring needed class actions without worry that their expenses will not be covered.”

Community Telephone Poles

Not since the 1980s case of *Loretto v. Teleprompter Manhattan CATV Corp.*⁴⁵ have the courts been called upon to address the equities of the use of private property in New York City by telecommunication companies for the allegedly uncompensated placement of terminal boxes, cables and other hardware. In *Corsello v. Verizon New York, Inc.*,⁴⁶ property owners challenged the defendant’s use of “inside-block cable architecture” instead of “pole-mounted aerial terminal architecture,” often turning privately owned buildings into “community telephone pole(s).” On a motion to dismiss, the Appellate Division, Second Department held that an inverse condemnation claim was stated, noting that the allegations “are sufficient to describe a permanent physical occupation of the plaintiffs’ property.” The court also found that a GBL § 349 claim was stated for

[t]he alleged deceptive practices committed by Verizon . . . of an omission and a misrepresentation; the former is based on Verizon’s purported failure to inform the plaintiffs that they were entitled to compensation for the taking of a portion of their property, while the latter is based on Verizon’s purported misrepresentation to the plaintiffs that they were obligated to accede to its request to attach its equipment to their building, without any compensation, as a condition to the provision of service.

The court also found that although the inverse condemnation claim was time barred, the GBL § 349 claim was not. “A ‘defendant may be estopped to plead the Statute of Limitations where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action.’” The court also denied class certification,⁴⁷ finding the proposed class definition overbroad,

an absence of predominating questions of law or fact and atypicality.

Mortgages

In *Dowd v. Alliance Mortgage Co.*,⁴⁸ a class of mortgagees alleged that the defendant violated Real Property Law § 274-a (RPL) and GBL § 349 by charging a “‘priority handling fee’ in the sum of \$20, along with unspecified ‘additional fees’ for providing her with a mortgage note payoff statement.” The Appellate Division, Second Department granted class certification to the RPL § 274-a and GBL § 349 claims but denied certification as to the money had and received causes of action “since an affirmative defense based on the voluntary payment doctrine . . . necessitates individual inquiries of class members.” ■

1. NCLC Reports, *Consumer Credit and Usury/Deceptive Practices and Warranties Editions*, Vol. 29, July/Aug. 2010. See also Gretchen Morgenson, *It's Not Over Until It's in the Rules*, <http://www.nytimes.com/2010/08/29/business/29gret.html>.
2. See *State v. Philip Morris Inc.*, 30 A.D.3d 26 (1st Dep't 2006), *aff'd*, 8 N.Y.3d 574 (2007); *Tsadilas v. Provident Nat'l Bank*, 13 A.D.3d 190 (1st Dep't 2004); Weinstein Korn & Miller at 901.06[4] (WKM).
3. Another shift in enforcement may be reflected in the First Department's recent decision in *Nachmani v. By Design, LLC*, 74 A.D.3d 478 (1st Dep't 2010) finding that the language “in accordance with the AAA Commercial Rules” appearing in a mandatory arbitration clause is a choice of law provision and not a forum selection provision. See Steven H. Reisberg & Kristen M. Pauley, *First Department Decision Raises Drafting Issue for Arbitration Clauses*, N.Y.L.J., Aug. 24, 2010, p. 4, col. 1.
4. 80 A.D.3d 280 (2d Dep't 2010).
5. See generally *Scott v. Cingular Wireless*, 160 Wash. 2d 843 (Wash. Sup. En Banc 2007).
6. 14 N.Y.3d 459 (2010).
7. See *Lonner v. Simon Prop. Grp., Inc.*, 57 A.D.3d 100 (2d Dep't 2008) (“Virtually all gift cards have expiration dates and are subject to a variety of fees, including maintenance fees or dormancy fees.”) See *Gift Cards 2007: Best and Worst Retail Cards: A Deeper View of Bank Cards Doesn't Improve Their Look*, Office of Consumer Protection, Montgomery County, Md. at www.montgomerycountymd.gov. See also *Llanos v. Shell Oil Co.*, 55 A.D.3d 796 (2d Dep't 2008); *Goldman v. Simon Prop. Grp., Inc.*, 58 A.D.3d 208 (2d Dep't 2008).
8. See, e.g., *SPGGC, LLC v. Ayotte*, 488 F.3d 525 (1st Cir. 2007); *McAnaney v. Astoria Fin. Corp.*, 665 F. Supp. 2d 132 (E.D.N.Y. 2009).
9. *Goldman v. Simon Prop. Grp., Inc.*, 31 A.D.3d 382, 383 (2d Dep't 2006).
10. N.Y.L.J., July 21, 2010, p. 26, col. 5 (Sup. Ct., Nassau Co.).
11. See Conn. Gen. Stat. 42-460 (prohibits expiration dates), Conn. Gen. Stat. 3-65c (prohibits service fees); Ill. Rev. Stat. Ch. 815, 505/2SS(b) (minimum expiration period 5 years, all post-purchase fees prohibited, face value of gift card may not be reduced in value and the holder may not be penalized in any way for non-use or untimely redemption); Mont. Code Ann. 30-14-108(1) (expiration date prohibited; all service fees including dormancy fees prohibited).
12. 66 A.D.3d 930, 932 (2d Dep't 2009).
13. See also *Dupler v. Costco Wholesale Corp.*, 249 F.R.D. 29 (E.D.N.Y. 2008). In *Dupler*, the court granted certification to a class of customers that alleged that the defendant failed to properly disclose its backdating policy, wherein “certain customers who decide to purchase a new annual membership after expiration of the old membership are provided with a term of membership less than 12 months.” The court held that GBL § 349 covers claims based on omissions as well as actual misrepresentations.
14. 714 F. Supp. 2d 398 (E.D.N.Y. 2010).
15. 565 F. Supp. 648, 655 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1437 (2d Cir. 1984).
16. 71 A.D.3d 155, 165–66 (2d Dep't 2010).
17. 608 F. Supp. 2d 330, 350 (E.D.N.Y. 2009).
18. 25 Misc. 3d 230 (Civ. Ct., Richmond Co. 2009).
19. 15 N.Y.3d 375 (2010).
20. See, e.g., *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D.3d 63 (2d Dep't 2006) (proposed settlement and certification of settlement class remanded; objector successfully challenged proposed settlement as it “provided insufficient value to class members, that it contained no injunction against, or admission of liability by, the defendants”); see WKM at 908.14[4].
21. 72 A.D.3d 209 (3d Dep't 2010).
22. *Goldman v. Simon Props. Grp., Inc.*, 58 A.D.3d 208 (2d Dep't 2008); *Lonner v. Simon Props. Grp., Inc.*, 57 A.D.3d 100 (2d Dep't 2008).
23. *Sims v. First Consumers Nat'l Bank*, 303 A.D.2d 288 (1st Dep't 2003).
24. 74 A.D.3d 1291 (2d Dep't 2010).
25. See *Huff v. C.K. Sanitary Sys., Inc.*, 260 A.D.2d 892 (3d Dep't 1999); *Loretto v. Grp. W Cable*, 135 A.D.2d 444 (1st Dep't 1987); WKM at 909.03.
26. *In re Cablevision Sys. Corp. Shareholders Litig.*, 21 Misc. 3d 419 (Sup. Ct., Nassau Co. 2008).
27. 8 N.Y.3d 204 (2007).
28. 29 A.D.2d 737 (2d Dep't 2006).
29. 8 A.D.3d 39 (1st Dep't 2004).
30. 242 A.D.2d 947 (4th Dep't 1997).
31. 251 A.D.2d 11 (1st Dep't 1998).
32. 13 Misc. 3d 1224(A) (2006) (Sup. Ct., N.Y. Co. 2006), *aff'd*, 50 A.D.3d 357 (1st Dep't 2008).
33. 22 Misc. 3d 1125(A) (Sup. Ct., Westchester Co. 2009).
34. 387 F. Supp. 2d 283 (S.D.N.Y. 2005).
35. 130 S. Ct. 1431 (2010).
36. See *Holster v. Gatco, Inc.*, 618 F.3d 214 (2d Cir. 2010) (Telephone Consumer Protection Act (TCPA) class action; CPLR 901(b) precludes federal courts in New York from exercising jurisdiction); *Pefanis v. Westway Diner, Inc.*, 2010 WL 3564426 (S.D.N.Y. 2010) (plaintiffs may “now seek liquidated damages authorized by [New York Labor Law] as part of a Rule 23 class action in federal court”); *McBeth v. Gabrielli Truck Sales, LTD*, 2010 WL 3081534 (E.D.N.Y. 2010) (claim under Labor Law § 663(1) allowed under FRCP 23 pursuant to *Shady Grove*).
37. See WKM at 901.10[3]. See also *Sorrentino v. ASN Roosevelt Ctr., LLC*, 731 F. Supp. 2d 316 (E.D.N.Y. 2008); *Ventimiglia v. Tishman Speyer Archstone-Smith Westbury, L.P.*, 588 F. Supp. 2d 329 (E.D.N.Y. 2008).
38. See Thomas A. Dickerson, *State Class Actions: Game Changer*, N.Y.L.J., Apr. 6, 2010, p. 6, col. 4; WKM at 901.28.
39. 10 N.Y.3d 486 (2008) (In sustaining the fraud cause of action against the individually named corporate defendants, the Court of Appeals noted that “it is the language, structure and format of the deceptive Lease Form and the systematic failure by the sales people to provide each lessee a copy of the lease at the time of its execution that permits, at this early stage, an inference of fraud against the corporate officers in their individual capacities and not the sales agents.”).
40. *Pludeman v. N. Leasing Sys., Inc.*, 74 A.D.3d 420 (1st Dep't 2010).
41. *Pludeman v. N. Leasing Sys., Inc.*, 27 Misc. 3d 1203(A) (Sup. Ct., N.Y. Co.), *reargument denied*, 2010 WL 3462147 (Sup. Ct., N.Y. Co. 2010).
42. 27 Misc. 3d 599 (Sup. Ct., N.Y. Co. 2010).
43. *In re MetLife Demutualization Litig.*, E.D.N.Y., 00 CV 2258 (Weinstein, J.).
44. See *supra* note 2; WKM at 908.07.
45. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *rev'g* 53 N.Y. 2d 124 (1981), *aff'g* 73 A.D.2d 849 (1st Dep't 1979).
46. 77 A.D.3d 344 (2d Dep't 2010).
47. *Corsello v. Verizon N.Y., Inc.*, 76 A.D.3d 941 (2d Dep't 2010).
48. 74 A.D. 3d 867 (2d Dep't 2010).



As a U.S. citizen or permanent resident, you pay federal income tax on your worldwide income. However, if you are paying taxes in multiple countries, you may be entitled to a foreign tax credit against your U.S. income tax. You may even qualify for benefits under tax treaties. But can you ever exclude some of your income earned overseas from your U.S. taxes? Yes, sometimes you can. A U.S. citizen or resident alien – the latter means you hold a green card – living and working abroad may be entitled to a foreign earned income exclusion, and housing benefits as well. The maximum exclusion is adjusted annually for inflation. For 2011, you can exclude up to \$92,900 from your U.S. income, constituting a nice benefit of working overseas. For 2010, it was \$91,500.

To claim the foreign earned income exclusion, you must use IRS Form 2555 and attach it to your Form 1040. Some taxpayers can use a shorter Form 2555-EZ.

To be entitled to this tax benefit: (1) your “tax home” must be in a foreign country; (2) you must have “foreign earned income”; and (3) you must be either a U.S. citizen who is a bona fide

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Big Tax Perk for Working Overseas

resident of a foreign country for the entire year, a U.S. resident alien who is a citizen or national of a country with which the United States has an income tax treaty and who is a bona fide resident of a foreign country for the entire year, or a U.S. citizen or a U.S. resident alien who is physically present in a foreign country for at least 330 full days during any 12 consecutive months.

Each of these hurdles has traps. Only *earned* income qualifies, meaning salary, wages, commissions, bonuses, professional fees and tips. Plus, the pay must be for your *foreign* work only, not pay you receive for services in the United States.

Example

You are a U.S. citizen and bona fide resident of Kazakhstan, working there all year. Your salary is \$76,800 a year, plus a \$6,000 cost-of-living allowance and a \$6,000 education allowance. Your employment contract does not state that you are entitled to these allowances only while outside the United States. You work a five-day week, and after subtracting vacation, work a total of 240 days a year. You worked in the United States for six weeks (30 workdays). To figure your pay for work done in the United States, take the number of days worked in the United States (30) divided by the number of days paid (240) and multiplied by the total income (\$88,800) = \$11,100. Your U.S. source earned income is \$11,100, and that amount does not qualify for

the exclusion. The rest of your pay does.

If you claim the foreign earned income exclusion, you can't claim a foreign tax credit or deduction on the same income, even though you may be paying foreign taxes on it. In fact, if you claim a foreign tax credit or deduction for foreign taxes on the excluded income, the foreign earned income exclusion may be considered revoked. How do you decide whether you get a larger tax benefit out of the exclusion or credit? You should crunch the numbers both ways. But here's a guide: if you pay no foreign tax, claim the foreign earned income exclusion; if your foreign tax rate is lower than your U.S. rate, you should usually claim the exclusion; and if your foreign tax rate is higher than your U.S. rate, you should probably claim the foreign tax credit instead.

Home vs. Abode

You must meet *either* a bona fide residence or a physical presence test. You can only claim you're a bona fide resident in your “tax home.” Your tax home is your main place of business, employment or post of duty, regardless of where you maintain your family home. If you don't have a main place of business (maybe you're on the road most of the time or work out of your apartment), your tax home may be the place you regularly live.

If your “abode” is in the United States, you can't have a tax home in a

foreign country. Your “abode” is your home, residence, domicile, or place of dwelling. “Abode” has a domestic meaning, unlike your “tax home” where you do business. Your abode depends on where you maintain economic, family, and personal ties.

If you have fewer than 330 days abroad even for good reasons – that’s tough.

Example 1

You work on an offshore oil rig in the territorial waters of Nigeria and work 28 days on, 28 days off. You return to your family residence in the United States during your off periods. Your abode is in the United States; therefore, you cannot claim the foreign earned income exclusion.

Example 2

You work for a manufacturer in Ohio. Your employer transfers you to London for at least 18 months. You distribute business cards showing your business and home address in London, and you rent your Ohio home and put your car in storage. You move your family, furniture, and pets to a home your employer rents for you in London. You lease a car and get a British driving license, open London bank accounts, join a local business league, etc. Your abode and tax home are both in London.

The location of your tax home depends on whether your assignment is temporary or indefinite. If you are temporarily absent from your tax home in the United States, you don’t qualify for the foreign earned income exclusion. If your work assignment abroad is “indefinite,” your new place of employment becomes your tax home, allowing a foreign earned income exclusion. But expectations change.

If you expect your employment abroad to last one year or less (and it does) it is likely “temporary.” If you expect it to last more than a year, it is “indefinite.” If you expect it to last for a year or less, but later revise your expectations to more than a year, it becomes indefinite.

Physical Presence

Even if you aren’t a bona fide resident of a foreign country, you can still qualify for the exclusion if you meet the physical presence test. You must be physically present in a foreign country for 330 full days during 12 consecutive months. A full day is 24 consecutive hours beginning at midnight. You can count days you spent abroad for any reason, even days on vacation!

Notably, the 330 days need not be consecutive. They are based purely on length of stay, not what kind of residence you establish, your intentions about returning, or the nature or purpose of your stay abroad. But if you have fewer than 330 days abroad even for good reasons – illness, family problems, vacation back in the United States, or your employer’s orders – that’s tough. The only exception is if you fall below the 330 days because war or civil unrest requires you to leave the country.

When you leave the United States to go directly to a foreign country or when you return directly to the United States from a foreign country, the time you spend over international waters doesn’t count toward your 330-day total.

Housing Costs

In addition to the foreign earned income exclusion, you can claim an exclusion or deduction for housing. The housing exclusion applies to amounts you receive from your employer, while the deduction applies to amounts you pay with self-employment earnings. Your housing exclusion/deduction is your total housing expenses minus a base housing amount.

The base housing amount is 16% of the \$91,500 exclusion, multiplied by the number of days you qualify.

Sixteen percent of \$91,500 is \$14,640, or \$40.11 per day. Multiply \$40.11 by the number of days and subtract it from your total housing expenses to find your housing amount. However, you must reduce your housing amount by any U.S. government (or similar nontaxable) allowance you receive to compensate you for housing expenses.

Housing expenses include reasonable expenses for housing in a foreign country for you, your spouse and dependents that live with you. You can count housing expenses only for the part of the year you qualify for the foreign earned income exclusion, and only up to a limit generally equal to 30% of the maximum foreign earned income exclusion. For 2010, this means an annual limit of \$27,450, or about \$75.21 per day. However, the actual limit may be higher depending on the location of your foreign tax home. Housing expenses include: rent; the fair rental value of housing provided in kind by your employer; repairs; utilities (but not telephone charges); insurance; nondeductible occupancy taxes; nonrefundable fees to secure a leasehold; furniture rental; and residential parking. Housing expenses do not include: lavish or extravagant expenses; deductible interest and taxes; costs of buying property, including principal payments on a mortgage; costs of maids, nannies, gardeners, etc.; pay television subscriptions; improvements that increase the value or prolong the life of property; purchased furniture; or depreciation or amortization of property or improvements.

Conclusion

If you work abroad, you probably have a tax adviser who keeps these rules straight. Companies sending workers overseas usually have an accounting firm handle U.S. and foreign tax return filings for employees, and may have a tax equalization program to ensure that employees taking foreign assignments don’t end up worse off. Nevertheless, you should understand the basics because you can influence some of these rules. ■



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E-Discovery Meets the Cloud

Cloud computing is the “buzzword du jour” in the computer industry.¹ Use of this form of computing service (in its many permutations) has grown dramatically in recent years and shows little sign of abating.² For lawyers involved in ediscovery, however, cloud computing represents a new, and significant, challenge. This article summarizes some of those challenges and suggests some of the key steps required to manage the litigation risks of cloud computing.

The Federal Rules of Civil Procedure, and most equivalent state rules, require parties in litigation to produce not just documents (or electronically stored information) in their physical possession, but also materials in their “control.”³ But what does “control” mean? Some courts suggest that control means the legal or practical ability to obtain materials, even if a party does not possess them.⁴ Others suggest that the “practical ability” standard is too loose.⁵

To date, no court has definitively ruled that placement of documents or other information on a cloud server does (or does not) wrest control from the user (within the meaning of the Rules). The answer may depend on whether the user has a legal obligation to maintain records (whether stored in the cloud or on the user's own computers),⁶ and whether the terms of service between the user and the cloud provider contemplate preservation and

retrieval of information from the cloud provider, in the event of a discovery request.⁷ Even where parties lack sufficient control over evidence, some courts have imposed an obligation to give opposing parties notice of the existence of information in the hands of third parties, so that a subpoena (if necessary) may be obtained.⁸ And a party might even have an obligation to notify third parties of the existence of litigation, to avoid the risk of spoliation.⁹

The Rules generally provide a “safe harbor” to prevent sanctions for “routine, good-faith operation” of an electronic information system.¹⁰ Again, there are no cases interpreting this provision in the context of cloud computing. But some courts have imposed spoliation sanctions in circumstances where a third party (or company employee), arguably within the producing party's control, failed to maintain essential information.¹¹

Given this lack of certainty in the case law, what should a lawyer do? As in all matters related to litigation, attorneys must acknowledge that they bear responsibility (if not ultimate responsibility) for the conduct of discovery.¹² As one court reminded the bar, Rule 26 requires that a lawyer sign every discovery request and response. Such a signature constitutes a certification, after reasonable inquiry, that the response (or request) is complete, accurate and proper.¹³ Further, as the

now-famous *Zubulake* series of opinions make clear, counsel must become familiar with their clients' information systems and must be prepared to explain the need for retention of information to all “key players” involved in operating those systems.¹⁴

Under Rule 26(f), moreover, parties (typically through their counsel) are required to meet to discuss “issues related to disclosure” of documents and electronically stored information. Courts, sometimes citing the “Sedona Conference Cooperation Proclamation,” have emphasized that lawyers must conduct discovery in a “diligent and candid manner,”¹⁵ and must not “unilaterally assume a narrow interpretation” of discovery obligations, without consulting the adversary.¹⁶

There may be circumstances where a party's relationship with a cloud computing vendor is so attenuated that control is entirely lacking.¹⁷ Arguments may also arise that some cloud-stored information is “not reasonably accessible” within the meaning of the Rules.¹⁸ Similar arguments have been made in the context of back-up tapes, especially when stored off-site for disaster recovery purposes.¹⁹ But a lawyer must be prepared to discuss those circumstances with opposing counsel, and may not simply permit events to unfold in ways that could ultimately preclude recovery of needed information, if so agreed, or so ordered by the court.²⁰

As this new method for computing service develops, lawyers must educate themselves about the technology. ABA Model Rule 1.1 requires that lawyers provide “competent representation to a client.” Competent representation requires the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” The more “technical or complex” the requirements of a matter, “the more difficult it may be for the lawyer to meet the ‘competency’ standard in providing such services.” In accordance with these basic principles, lawyers must at least have a working understanding of the technology.²¹ As the technology is new, and with ethics rules and opinions still developing, lawyers must also keep track of new professional responsibility pronouncements in the area.²²

Lawyers cannot “pass the buck” regarding management of cloud-based ediscovery. Model Rule 1.3 requires that lawyers “act with reasonable diligence and promptness in representing a client.” Further, Model Rules 5.1–5.3 make clear that lawyers must supervise the paraprofessionals and administrative staff who work at their direction.²³ In short, lawyers must face up to the realities of the new cloud computing world. ■

1. Cloud services essentially constitute a form of outsourcing, where a user can obtain data storage, software, infrastructure, development tools and other services from a provider outside the user’s own computer environment. A cloud may be “public,” with the provider offering services to, and hosting data from, a number of users, or “private,” dedicated to a limited set of users (or some hybrid of the two). See Eric Knorr, *What You Need to Know About the Year of the Cloud*, Dec. 30, 2010, www.computerworld.com.

2. See generally Judith Lamont, *Cloud Computing: It Can Work for You*, Jan. 2011, www.kmworld.com (“Few technology areas are showing the kind of dynamic growth evident in cloud computing. . . . With its potential for cost savings, greater flexibility and a reduced burden to in-house IT departments, cloud computing is attractive to both large enterprises and small to medium-sized businesses[.]”); Mike Healey, *State of Cloud 2011: Time For Process Maturation*, Jan. 2011, www.analytics.information-week.com (noting dramatic rise in use of cloud computing, due principally to cost savings and flexibility of operation).

3. See Fed. R. Civ. P. 34(a) (party must produce documents in its “possession, custody or control”).

4. See, e.g., *In re NTL Sec. Litig.*, 2007 WL 241344 (S.D.N.Y. Jan. 30, 2007) (test for control construed “broadly”); *ICE Corp. v. Hamilton Sundstrand Corp.*, 2007 WL 4239453 (D. Kan. Nov. 30, 2007) (control includes “any right or ability to influence the person in whose possession the documents lie,” such that “records can be obtained easily” from third party source).

5. See *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 532 (D. Md. 2009) (“fact that a party could obtain a document if it tried hard enough” does not give “control”) (citing *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1426 (7th Cir. 1993)).

6. See *Tomlinson v. El Paso Corp.*, 2007 WL 2521806 (D. Colo. Aug. 31, 2007) (because ERISA did not permit company to delegate its record-keeping obligations to a third party, company deemed in control of records, despite their deposit with a service provider).

7. See *Babaev v. Grossman*, 2008 WL 4185703 (E.D.N.Y. Sept. 8, 2008) (pursuant to depositor arrangements, defendants had sufficient control over their bank records to retrieve them); *Tetra Technologies v. Hamilton*, 2008 WL 3307150 (W.D. Okla. Aug. 7, 2008) (cellphone service subscriber had legal right to obtain telephone records); *Flagg v. City of Detroit*, 252 F.R.D. 346 (E.D. Mich. 2008) (city had control over text messages held by third-party service, and could be required to give consent to release of data by service).

8. See *Silvestri v. GM Corp.*, 271 F.3d 583, 591 (4th Cir. 2001).

9. See *Sanchez v. Stanley-Bostitch, Inc.*, 1999 WL 639703 (S.D.N.Y. Aug. 23, 1999); *Clark Constr. Grp. v. City of Memphis*, 229 F.R.D. 131 (W.D. Tenn. 2005) (city held accountable for acts of third-party construction manager who shredded evidence after city knew of litigation).

10. See Fed. R. Civ. P. 37(e). Significantly, the Rule 37 “safe harbor” does not prevent sanctions under sources other than the Rules themselves. See *Nucor Corp. v. Bell*, 251 F.R.D. 191, 196 n.3 (D.S.C. 2008).

11. See, e.g., *World Courier v. Barone*, 2007 WL 1119196 (N.D. Cal. Apr. 16, 2007) (adverse inference for destruction of hard drive by defendant’s husband); *In re WRT Energy Sec. Litig.*, 246 F.R.D. 185 (S.D.N.Y. 2007) (sanctions against plaintiff who allowed third party to destroy relevant evidence); but see *Ecor Solutions, Inc. v. State*, 2007 N.Y. Misc. LEXIS 7840 (N.Y. Ct. Claims Oct. 31, 2007) (no spoliation sanction, despite “massive deletion” of data by state’s consulting engineer).

12. See *In re Sept. 11th Liab. Ins. Coverage Cases*, 243 F.R.D. 114, 125 (S.D.N.Y. 2007) (“Discovery is run largely by attorneys, and the court and the judicial process depend upon honesty and fair dealing among attorneys.”).

13. See *Mancia v. Mayflower Textile Servs. Co.*, 1253 F.R.D. 354 (D. Md. Oct. 15, 2008).

14. See *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004).

15. See *Home Design Servs., Inc. v. Trumble*, 2010 WL 1435382 (D. Colo. Apr. 9, 2010) (citing Sedona Conference Cooperation Proclamation, available at www.thesedonaconference.org).

16. See *JSR Micro, Inc. v. QBE Ins. Corp.*, 2010 WL 1338152 (N.D. Cal. Apr. 5, 2010) (citing Sedona proclamation).

17. See David Chou, *Understanding Cloud Computing and Cloud-Based Security*, Mar. 9, 2010, www.soamag.com (for some applications, cloud computing is like public transportation: “It is easier to use as you don’t need to know how to operate it and it costs less. However, you don’t have control over its operation, schedule, or routes.”).

18. See Fed. R. Civ. P. 26(b)(2)(B); see also *Barrera v. Boughton*, 2010 WL 3926070 (D. Conn. Sept. 30, 2010) (holding data “not reasonably accessible”).

19. See *Calixto v. Watson Bowman Acme Corp.*, 2009 WL 3823390 (S.D. Fla. Nov. 16, 2009).

20. See *Cache La Poudre Foods, LLC v. Land O’Lakes, Inc.*, 2007 WL 2521116 (D. Colo. Aug. 31, 2007) (once litigation hold is in effect, “a party cannot continue a routine procedure that effectively ensures that potentially relevant and readily available information is no longer ‘reasonably accessible’”).

21. See generally Steven C. Bennett, *Has Information Technology Raised the Level of Professional Competency?*, E-Discovery Standard (2006), available at www.lexis-nexis.com/litigation-news.

22. One excellent source of information on new technologies is the ABA Legal Technology Resource Center. See www.abanet.org/tech/ltrc.

23. This issue has arisen in the context of “outsourcing” of legal services to vendors and part-time professionals. In that context, recent ethics opinions stress that the principal counsel involved in a matter retains ultimate responsibility for supervision of all work. See Steven C. Bennett, *The Ethics of Legal Outsourcing*, 36 N. Ky. L. Rev. 479 (2009).



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Megan Maureen
Woodhouse
Kathryn Alice Worthington
Christopher Gerard
Wosleger
Kathleen E. Wright
Alexander Wu
Benjamin Wu
Jingjin Wu
Shunit Yaacobi
Mayumi Yamaguchi
Masato Yamanaka
Jason Yampolsky
Yuni Yan
Heding Yang
Robert Chiu-haw Yang
Anush Yegyzarian
Lisa Marie Yemm
Ellen T. Yiadom
Vassiliki Yiannoulis
Xiaoyao Yin
Adam Lowell Yokell
Amanda Koeun Yoon
Bohee Yoon
Danica Sophia You
Wenting Yu
Qi Yue
Michael Benjamin Zand
Mari Katherine Zang
Tatiana Rose Zebrowski
Boris Zeldin
Diane Moyu Zhang
Mei Zhang
Yiqun Zhang
Huan Zheng
Weiwei Zhu
David Adam Ziegler
Matthew C. R. Ziegler
Ali Grace Ziegrowsky
Jason Alec Zimmerman
Maragarita Zippin
Lauren Brooke Zuffante
David Reuben Zylberberg

SECOND DISTRICT
Bolanle Akinrimisi
Elaine Albenda
Lee D. Apotheke
Maria Aragona
Andrew Banks
Craig Anthony Bresciani
Matthew Lee Brod
Matthew Alexander Brown
Michael Leroy Brown
Victoria Marie Cantrella
Inna Chumikova
Tabitha June Crosier
Philip James Duncan
Lauren Beth Edelman
Jacob C. Elbogen
Erica Whitney
Fernstermacher
La-toya Krystal Franklyn
Ian Keith Friedman
Martha Upton Fulford
Kathleen A. Gallagher
Benjamin G. Goldstein
Leah Goodridge
Mary J. Goodwin
Shannon Leigh Heery
Sonam Henderson
Kinshasa K. Hillery
Philip Richard Hirschfeld
John Nathaniel Holt
Howah Hung
Matthew Sean Ingles
Katie Nicole Jay
Alison Jenik
Hari Nathan Kalyan
Richard Kurdziel
Rachel E. Lappin
Matthew J. Laroche
Michael Scott Liben
Michael Lousteau
Leah Marie Martin
Colin Thomas McLaughlin
Matthew George Miller
Sarah Allison Mitchell
Rebecca Lynn Molln
Melissa L. Morris
Leslie Arin Nadelman
Judah Marley Nathanson
Adrian G. Neil
Alina Novikova
Mathew Orlando
Jill Pamela Ormandy
Andrew Robert Pfau
Andrey I. Plaksin
Samuel E. Proctor
Leah Rabinowitz
Maria Consuela Regina
Reiss
Daniel Roger Roediger
Jennifer A. Sayad
Prabhjot Kaur Sekhon
Rena Angeli Seth
Inessa Shalevich
Tara Ann Shear
Lee Redfearn Shubert
Regina Shulimovich
Zahra Alexis Smith
Tristan Snell

Inessa Spevakova
Jamie L. Stroud
Robert Louis Thony
Oliver Roderick Tobias
Tim Volkheimer
Jody L. Walker
Emily Gail Warner
Yaakov S. Weisner
Laurie Eileen Wheelock
Harris R. Wiener
Emilie Frances Williams
Mahogany Daafine
Williams
Peter Hirst Wiltenburg
Joseph Wohlgenuth
Ezra Elliot Zonana
THIRD DISTRICT
Angela Elizabeth Arnold
Marie Aveni
Brendan Bannigan
Gregory Stewart Berck
Michael P. Bersak
Andrew Larry Beyda
Judith Anne Blackwell
Benjamin Bodner
Michael Manley Bookser
Lori Bovee
Jennifer Joy Brimley
Jennifer Marie Champagne
Ali Asghar Chaudhry
Sara Cirba
Mikael Ari Cohn
Daniel Kleinsmith
Delbridge
Lauren Deluca
Marwa E. Elbially
Jamie Feldman
Marisa Franchini
Jonathan David Gillerman
Daniel J. Gregware
Sarah Katherine Hansen
Danielle Eileen Holley
Lauren Anne Holupko
Samantha Howell
Jonathan Kerr
Andrew Mark King
Amanda Kateri Kuryluk
Sita Legac
Kate Teresa Loughney
Maja Lukic
Brian Murray Lusignan
Gregor N. Macmillan
Sara Kathryn Mase
Matthew Douglas Mattice
Ken McCauley
Brittney Marie McMahon
Stephanie J. Myers
Leila Naghibi
Catherine A. Neuhauser
Amy Rose Ottaviano
Lynne Papazian
Michael Joseph Pape
Alex Paradiso
Joshua Pennel
Diego Salim Perez
Miles Hampson Plant
Michael Prisco
Sebastian Patrick Przbyla

Anne Theresa Redcross
Daniel J. Rosenthal
Aaron M. Schue
Melinda Bea Seiden
Brian B. Selchick
Amanda Sherman
Jennie Shufelt
Joseph Slater
Scott Toth
Edward Howard Townsend
Lauren Kay Van Buren
Dilay Melek Watson
Robin Lee Wheeler
Alexander Moore Wilson
Andrew Bridger Wilson
FOUR DISTRICT
Luke John Babbie
Seamus John Barron
Michele Ann Bowen
Heather Brondi
Christopher Robert Burke
Darlene Eng
Jesse Harper
Gregory Hoffman
Stephanie Hughes
Rebecca Kannan
Bryan Liam Kennelly
Renee L. Litz
Daniel Patrick Maloy
Anthony Morelli
Melissa Renee Pageau
Nikki C. Pappas
Meredith Lynn Perry
Jennifer Lynn Sacco
William Whelly
Nathaniel Charles White
FIFTH DISTRICT
Bryan T. Arnault
Susan C. Azzarelli
Zack Everett Baisley
Justin Frederick Brotherton
Eva Marie Burger
Mark George Burgreen
Christopher C. Canada
Chelsea Lynn Cerio
Elizabeth Marie Cesari
Anthony W. Chau
Daniel Charles Cummings
Erica D'orazio
Alix Demartino
David R. Duflo
Brian Mark Dunn
Lucien Alton Elliott
Gregory D. Eriksen
Zachary Daniel Forward
Michael James Gilbert
Kevin Andrew Grossman
Daniel Nathan Guisbond
Benjamin Nathan Hatfield
Tyler Thomas Hendry
Andrew S. Horsfall
Brian Thomas Hughes
Louis Jim
Jon R. Kammerzelt
Melissa Anne Krause
Anne Loretta Lafez
Kristin Lagonegro

Kristin Marie Lagonegro
Daniel Paul Laraby
Nicholas Domnik Mangold
Nina T. Marano
Natalie Elizabeth Matychak
Mary Miner
Nicholas Ryan Moore
Brett Steven Noonan
Shannon T. O'Connor
Courtney John Osterling
Lawson S. Parker
Nicholas A. Passalacqua
Thomas John Paul
Annaleigh E. Porter
Darius I. Ravangard
Jane Francine Raven
Elisha Rachel Rudolph
Nicole Alicia Sabasowitz
Kurt David Schultz
Chelsea L. Selby
Honora Kelly Spillane
Christopher M. Stringham
Elizabeth Anne Urciuoli
Heather Alene Deforest
Vincent
Jonathan Nelson Ward
Joshua S. Werbeck
Derek Sean Wild
Leah Ann Witmer
Stephen Ray Yoder

SIXTH DISTRICT

Tarek Abdel-aleem
Nathan William George
Berti
Michael R. Capone
Delton F. Caraway
Brandon Robert Cotter
Shane Eaton
Matthew Steven Erie
Sabrina Germain
Adam Hatch
Jared Alexander Johnson
Max Lafer
Anne L. Lafex
Stephanie Marie Milks
Bradley John Moses
Michael Edward Nyre
William J. Porta
David Spector
Zachary Thomas Wentworth

SEVENTH DISTRICT

Jordan C. Alaimo
Matthew Thomas Austin
Vineeta Sinha Baronos
Erika R. Britt
Shane E. Brooks
Alexander Morris Budd
John Christopher Busby
Christine Katherine Callanan
Amanda J. Carden
T Barry Carrigan
Thomas Barry Carrigan
Patrick Thomas Chamberlain
Robert William Clark
Gregory Joseph Colavecchia

Amanda Leigh Connors
Jeremy A. Cooney
Claudia Ann Culbertson
Bianca Stella D'Angelo
Brian James Demott
Sanjeev Devabhakthuni
Carey Elizabeth Dever
Sean Christopher Eldridge
Jayme Lynn Feldman
Andrew David Fiske
Mark Andrew Foti
Timothy E. Fox
Patrick Michael Gallagher
Paul Gelbard
Taren Greenidge
Peter J. Gregory
Rebecca Ellen Hatch
Christopher William Helming

Colleen Danielle Holland
Alisa Burns Hoy
Anthony Joseph Iacchetta
John David Kelley
Adam Ahmad Khalil
Wende Janine Knapp
Rachel Anne Krone
Stephanie Octavie Lamarque
Colleen Terese Loughran
Meagan Mahar
Jennifer Kathleen Meldrum
Patricia A. Mellon
Vincent M. Miranda
Aaron Isaiah Mullen
Sarah Newcomb
Sarah Ann Pellerin
Megan P. Peter
Maureen N. Polen
Randi Nicole Proukou
Nicholas John Reeder
Dominic J. Ricci
James Lawrence Riotto
Mallorie C. Rulison
Meghan J. Schubmehl
Bernard Francis Sheehan
Josie M. Sheppard
Garen Jessica Sinden
Andrew Thomas Spong
Kara Elizabeth Stoddart
Jennifer Mary Thompson
Sunny I. Tice
Kenneth Tyler
Gregory David Verdibello
Connie O. Walker
Jack Wessel
David J. Wilks
Brenda Michelle Williamson

EIGHTH DISTRICT

Dina Lynn Allen
Brian Joseph Alterio
Heather J. Anderson
Richard Ernest Anstey
Gevork Arutunian
Matthew S. Baczkowski
Melanie Jane Beardsley
Craig Kiley Beideman
Christopher Berardi

Pasquale Vincent Bochiechio
Denise Mary Brown
Elizabeth Anne Bruce
Emma Louisa Buckthal
Shannon Kimberly Buffum
Brendan Shawn Byrne
Joseph Calimeri
Tomas James Callocchia
Kevin Daniel Canali
Vera Cedano
Randolph Vincent Clower
Emily Mae Cobb
Erin Lynn Cody
Caitlin Marie Connelly
Nola R. Cornett
James B. Cousins
Jeffrey Carl Crocker
Kathryn Grace D'Angelo
Daniel D. Day
Adam Patrick Deisinger
Joseph Edward Demarco
Amanda Faith Dermott
Kathleen Fitzgerald Dolan
Trevor Paul Duffy
Kelly R. Dunn
Thomas Robert Elliot
Kristin Farrell
John J. Fenz
Jeffrey T. Fiut
C. Kenneth Foit
John Robert Ford
Stuart Patric Frame
Jay William Frantz
Jaime Nicole Gard
Keith William Gaylord
Brendan James Gilbert
Nicole Brianna Godfrey
Robert P. Goodwin
David Michael Gottfried
James Saverio Halt
Lindsay Virginia Heckler
Joseph Pauly Heins
Christopher J. Heller
Denise Amanda Herman
Nicholas James Hoffman
Rebecca Cronan Hoffman
Ryan O'Donnell Holbrook
Elizabeth A. Holmes
Michael Randolph Hungerford
Michael James Ingham
Ramon Irizarry
Jonathan Wayne Jacobs
Adam Phillip Jason
Rachel Elizabeth Jones
Nathanael C. Kapperman
Stacy Mara-beth Katz
Seth Alexander Kelley
Andrew Joseph Kowalewski
Daniel Patrick Kukulka
Christopher R. LaFever
Thomas J. Lang
Pamela Sue Lanich
Ashley E. Lewis
Katherine Liebner
Daniel Joseph Ligman

Linda J. Lovell
Catherine Irene Lynch
Kyle William Mack
Elise Laura Malinowski
Katherine Veith Markel
James Marra
Rachel Katharine Marrero
Mollie Catherine McGorry
Charles Benjamin McLeod
Jenelle Faso Messer
Gregory Martin Michalek
Sarah N. Miller
Kathleen Gard Moriarty
Richard Scott Mullen
Jessica Nichole Mussell
John C. Nelson
Eric Richard Netzloff
Heather Neu
Jeffrey B. Novak
Peter Charles Obersheimer
Crystal-lyn Joy Orta
David Richard Panepinto
Ryan Kenneth Parisi
Neil Anthony Pawlowski
Matthew K. Pelkey
Jenna Louise Piasecki
Steven Paul Przybyla
Kevin Michael Quinn
Jason Nicolas Racki
Joshua Israel Ramos
Joshua N. Reiner
Jeremy Lynn Richards
Fernando Carlos Rivera-Maissonet
Jennifer Lynn Rizzo
Anthony Michael Rossi
Nicholas Michael Rossi
Lissette M. Ruotolo
Rebecca Elizabeth Sarles
Ashley Violet Schaub
Kristen Leigh Schaub
Richard Mark Scherer
Amanda C. Schieber
Vanessa C. Schmidt
Daniel J. Schuller
Tara L. Short
David James Simoni
Patrick J. Slagle
Lee M. Sobieski
Sheela Srinivasan
Andrew James Stimson
Yimell Marie Suarez Abreu
Lauren Emily Swartz
Charles Robert Van Ee
Eric James Vogan
Jordan L. Walbesser
Rebecca J. Wanat
Cory John Weber
Michael T. Welsh
Carrie Lee Weremblewski
Ashley R. Westbrook
Anne Marie Wheeler
Michael C. Wild
William John Winspear
Scott D. Woodruff
Andrew William Wright

NINTH DISTRICT

Thomas Joseph Akacki
Alana Renee Bartley
Gregory Dane Basso
Kevin M. Bush
Jose Orlando Castaneda
Zoragina Castillo
Michael Vincent Colvin
Jenna M. Comizio
Amy M. Coughenour
Ann Donan Davidson
Shayna Bakulesh Desai
David L. Dick
Daniella Lichtman Esses
William Fowlkes
Tiffany E. Gallo
Brenda Danielle Giuliano
Jonathan Gordon
Amanda Bryn Haberman
Caitlin Moran Hayes
Matthew Charles Heerde
Matthew Kidd
Ryenne Guy Konan
Michael Edward Kremen
Todd Paul Kulkin
Grace Lee
Todd Evan Lerner
Kalin Marie Light
Karen Kaplen Lutt
Rachael Mac Donald
Monroe Y. Mann
Allison Jill Marden
Sean Kevin Monahan
Antonette Marie Naclerio
Meghan O'Donnell
Audrey Jean Parma
Michael Bernard Pierorazio
Dean Anthony Pinto
Makenna Erin Porch
Maria Ines Raij
Stephen J. Repsher
Elimelech Rosenbluh
Jason S. Saad
Melissa A. Scappatura
Derek Scott Selby
Bora Seo
Noah Schotten Sexton
Michelle Marie Sherger
Jeremy Stern
Tiombe Patrina Tallie
Elizabeth Anne Tomlin
Michelle Lynn Trier
Nina Mahesh Varindani
Alejandro Vera
Megan Cecile Wagner
Patricia Carol Wik
Michael J. Williamson
Eva Zajkowski
Nicole Marie Zippilli

TENTH DISTRICT

Salvatore V. Agosto
Elizabeth L. Anderson
Tzvi Eliezer Ausubel
Ian Alexander Axelrod
Tiffany Lamona Ballard
David Alex Bamdad
Matthew David Barocas
Jason Max Barrer

Matthew F. Bates
Nicole Alexandra Behar
Roseanne Patricia Beovich
Kellyn Elyse Bergstrand
Christopher Adam Bianco
David Bloom
Benjamin Robert Blum
Richard Alden Brodt
Christopher Patrick Byrnes
Vincent Andrew Candurra
John Peter Cestaro
Jennifer Chandler
Joseph M. Charchalis
Preet Kaur Chhabra
Joseph Leonard Ciccio
John T. Conboy
Cara Patricia Cronin
Matthew Peter Cueter
Stephanie L. Cunha
Eric Lloyd Dantes
Michelle Ann Dantuono
Candice Loren Deaner
Bernadette Evangeline
Tuthill Dein
Anthea Blaise Dexter-Cooper
Joseph James Dipalma
Michelle Lynn Dipuma
Adam B. Dressler
Alyssa Pamela Dunn
Asha V. Edwards
Maggie P. Emma
Christina Jean Essopos
Michael Farina
Steven Charles Farkas
Mitchel Scott Feffer
Ronald James Ferraro
Bradley Adam Fishman
Ashleigh Marie Garvey
Dionisio D. Georgatos
Melanie Anna Goldberg
Melissa Goldberg
Neal S. Greenfield
Kevin Griffiths
Jessica Marie Griswold
Emina Hadzic
Roy Ahron Hakimian
Audley Harris
Christopher Steven Henn
Matthew James Hereth
Evans Michael Hillen
David Henry Hoepfner
Sarah Anne Hogan
Jessica Brynn Hosenbold
Casey Richard Huffmire
Taylor Denise James
Christina Marie Takemoto
Kempner
Christina Jin Kim
John R. Klein
Aruthur Thomas Kontaxis
Vladlen Kontorov
Martha Lapsatis
Peter Alexander Laserna
Justin B. Lieberman
Christopher Michael Lynch
Morgan Healy Mackay
Erin Nicole Mackin

Andrea R. Maimone
Sharon Lisa Markowitz
Jordan Alexander Meisner
Jonathan C. Messina
Marissa Anne Meyer
Carlos Eduardo Montilla
Brenda Ninoska Morales
Jacqueline Marie Muratore
Graham T. Musynske
Adam Keith Pallack
Laura J. Parker
Anthony D. Pegion
Michael Francis Pellegrini
Christopher Persad
Nadia M. Pervez
Fred B. Peters
Aneeba Rehman
Benjamin J. Rodkin
Matthew Rozea
Franca Sachs
Timothy William Salter
Jenifer Ann Scarcella
Julie Schaul
Todd Adam Schwartz
Joseph E. Scolavino
Mark Terrence Scopinich
Jeffrey Ian Scott
Melanie Shoshana Shurka
Sharon Durst Simon
Matthew Brian Simonds
Steven Frederick Smith
Tiffany C. Smith
Frederick Benjamin Soller
Leland Scott Solon
Joshua Howard Stern
Jenna Mary Frances Suppon
Jamie D. G. Svenson
James Tierney
Michael Arthur Toomey
Richard C. Toscani
Christina Rose Totino
Margaret Mary Trainor
Tuyet-Hanh Victoria Tran
Bernadette Tuthill
Alex Umansky
Michelle Lynn Walsh
Heather Willis Wine
Ebony L. Woods
Henry Yi
Nan Zhang

ELEVENTH DISTRICT
Louis Mario Adimando
Giyang An
Alex G. Antzoulatos
Abigail Hyeon Mee
Beaudoin
Itria C. Benito
Daniel Buchinger
Vincent Juan Camacho
Ferdusi Chowdhury
Thomas Charles Eck
Richard B. Epstein
Cindy Espinosa
Michael Gerard Forlenza
Jason Adam Gang
Heidi Megan Gootnick
Avraham Gorin

Evan Joshua Gotlob
Gillian Jaye Halpern
Andrew L. Howlett
Steven C. Hsu
Edward James Hynes
Meng Ji
Jingli Jiang
Yoorok Jung
Melissa Anne Kelly
Dustin Marc Konigsberg
David Kuznia
Salvatore Leonardo Laurita
Joseph Lee
Qi Luo
Wi Luo
Peter Sung Ma
Robert J. Masters
Simeon Quiogue Mesina
Rene Myatt
Kawon Oh
Lin Pang
Fernando Andres Paredes
Sarah Esther Park
Bradley Arthur Parker
Peter Paul Pavlou
Seni Papat
Alexis Nicol Ruginis
Daniel Sanchez
Diana Gladys Santos
Joel Schmidt
Nilay Shah
Peter Elliot Shapiro
Elizabeth Patricia Siegel
Yaakov Singer
Yi Song
Sewnarine Desmond
Sukhdeo
Leonid Talisman
Dayna Tann
Ervin Taushani
Tuneria Racquel Taylor
Laura Ann Reges Valden
Judith L. Vaughan
Barbara Ann Vazquez
Monica Marie Villarreal
Matthew Wallace
Linda Wang-Lee
Tenzin Wangyal
Deborah Ellen Wassel
Joseph Thomas Welsh
Qinyu Xiang
Cheng Xing
Heekyong Yoon

TWELFTH DISTRICT
Adebunmi O. Adeseun
Erik James Aho
Eric Patrick Bacaj
Allison Yvette Brockington
Catherine Rose Carbonaro
Matthew Joseph Connahan
Justin Victor Daly
Jacquelyn Alena Diccio
Kathryn Kitt Dyer
Ruben Dario Fernandez
Wilton Rene Fernandez
Melissa A. Gonzalez
Martha Jane Kashickey
Shayna Lynne Kessler

Stephen Michael Knoepfler
Sylvie Jill Levine
Diana J. Lewis
Masateru Marubashi
Benjamin Joseph Marzolf
David E. McCune
Ana Isabel Munoz
Katherine Ann Murdock
Ronald N. Nfor
Abigail Onyinyechi
Nwaohuocha
Michelle Laura Parris
Avni Praful Patel
Elizabeth Ann Reingold
Carla Ida Rock
Ariel Ruth Rothstein
Alana Faye Rubenstein
Rachel Sanjurjo
Elineth Sanz
Taylor J. Shann
Denise Lauren St. Just
Markus Szejnberg
Eric Marc Valentin
Renata Vizental
Naomi Michelle Weinstein
Tiffany Lynn Wichman

THIRTEENTH DISTRICT
Borislav Chernyy
Phillip J. Colasanto
Bryan Harris Feldman
Yevgeniya Grinberg
Mary Ann Harvey
Yan Katsnelson
Mary Alice McLaughlin
Patrick Thomas Nelligan
Asad Rizvi
Oleg Rozdolsky
Mary Antoinette Salderelli
Alex Tovstolug

OUT OF STATE
Zeena Adil Abdul-Rahman
Britta Abeshaus
Cecile Abramowicz
Joseph Paul Adamczyk
Joseph Adamson
Michael Paul Addis
Daniel Hanan Adler
Saadia Ahmad Bhatti
Steven Michael Ahrendt
Thomas Robert Ajamie
Chad Albert
Hillary Marie Alberts
Jacob Albertson
Nefertiti Johnson Alexander
Alexander George
Alexiades
Zhan Kengazyevich
Alimbayev
Sarah Beth Allemohamad
Kathryn Beth Allibone
Pierre- Olivier Ally
Ainash Tuyakbaevna
Alpeissova
Jason Henry Alperstein
Avni Jayprakash Amin
Richard Amster
Brett Darren Anders

Christopher E. Angell
David G. Angerbauer
Michael H. Ansell
Michael Aphibal
Julianne Matis
Apostolopoulos
Laura Elizabeth Appleby
Koji Araki
Laila Arand
Catalina Arango
Rachel Beth Arroyo
Tonbofa Eva Ashimi
Albert Constantine Asphall
Shari Lauren Astalos
Jahad Bassam Atieh
Sivan Atiram
Jerald David August
Daniela Pulcini Aulie
Ryan Patrick Avery
Vincent M. Avery
Wesley Avery
Wesley Dunn Avery
Seth M. Ayarza
Leila Babaeva
Jung Hwan Bae
Daeyong Baek
Merritt Baer
Merritt Rachel Baer
Anyia Baez
Julian Alexander Baez
Joon Kee Bahng
Raya Bakalov
Ava V. Baker
Logan Lawson Baker
Nadir Bakhit
Jenny Paula Balestrini
Frank James Balsamello
Rajesh Bandla
Jongsik Bang
Deepti Bansal
Rebecca Jane Barban
Brandon Philip Barber
Brendon Barr
Jonathan Peter Barra
Michael Johnston Barry
Nazanin Baseri
Mehmet Basoglu
Craig Steven Baumgarten
Lauren Marie Bayer
Webster Beary
Jennifer Ashley Bellikoff
Tsipora Bengi
Hans Martin Jorgen
Bengtzen
Lucas Bento
Sam Berger
Ketevan Betaneli
Preethi Bhashyam
Jonathan Bialosky
Alessandro Bianchi
Sarah Michele Bienkowski
Kelly Biringler
Stephen John Bishop
Stephen Patrick Blake
Krystyna Marie Blakeslee
Pauline L. Blondet
Aydin Bonabi
Pierre Bonamy

Willard Sands Boothby
Charles L. Brackbill
Mitchell Bragg
Elicia Estefania Bravo Garcia
Ashley E. Brickles
John Paul Bringewatt
Alan Brunker
Brian Daniel Buehler
Michael A. Buffardi
Meridel Jane Bulle-vu
Sarah Hunter Burghart
Timothy Gerard Burroughs
Jessica Denise Burt
Michal Bussi
Jeffrey Scott Cain
Andrea C. Cainafrani
Daniella Marie Calenzo
Elaine Call
Kristine Marie Campanelli
Kendra Suzanne Canape
Jennifer-Ann Cantwell
Yang Cao
Joseph Alan Capo
Rhina Margarita Cardenal
Ryan Stephen Carlson
Danielle Christina Carmona
Matthew Clayton Carroll
Brian Carter
Michael Henry Casanover
Ernesto Cerimele
Rana Ceylan
Tasaya Chaichumporn
Jad Chamseddine
Christopher Chang
Won Kyung Chang
Ya-wen A. Chang
Peter Forster Chapman
Emily Chayoun
Natalie M. Chedid
Rachel M. Chen
Sylvia Yun-chu Chen
Yini Chen
Lun Yin Cheng
Mark Chereshinsky
Jia-Haw Justin Cheung
Maurice Thomas Chevalier
May K. Chiang
Minseo Choi
Alexius Chong
Rishad Ahmed Chowdhury
Panagiotis Demetrios Christakis
Caitlin Teresa Christie
Anuradha Chudasama
Joseph Michael Cianflone
Andrea Chiara Cianfrani
Sandra Clapaud
Kwesi Awenate Cobbina
Gregory John Cobucci
Michael A. Coffino
Krista Ann Cohane
Corey M. Cohen
Deborah Cohen
Robert Lee Doughton Colby
Sarah Grace Coleman
Adam E. Collyer
Aimee Comne
Aimee Louise Comrie
Kevin Emmett Connolly
Albert Cooley
Adam Michael Cooper
Gregory Coordes
Krysta Corinn Copeland
Joseph William Cormier
Megan E. Corrado
Casey Cosentino
Daniel Grogan Costelloe
Peter Russell Cotter
Carl Nicholas Cottone
Fiona Elizabeth Cousland
Denny Cowger
Nicholas Craft
Andrew Knight Crawford
Ryan L. Currie
Casey Alexander Cwynar
Gerolamo Da Passano
Yuki Daijo
Alexander Richard Daniels
Jon Asher Daniels
Karl Thomas Dannenbaum
Paul Danzinger
Rahil Darbar
Michael Stephen Darby
Fulvio Donggaas Dawilan
Ayodele Omosefe Dayisi
Steven De Eyre
Piero De Mattia
Andrew Arthur De Mello
Diane Marie Degroat
Tatyana Delgado
Jinting Deng
Liyun Deng
Kurt Michael Denk
Amha Habtemariam Derres
Virginia Desmoulin
Salim Dharssi
Lawrence Edgar Diamond
Karen Dicke
Zachary Alan Dietert
Matthew Michael Dimaggio
Kristen Nykoel Dinardo
Joseph Anthony Dipisa
Anna DiSalvo
Marjan Foruzani Disler
Jenny Doege
Leonard Vincent Don Diego
Roberta Mourão Donato
Julie Brooke Dorfman
Benjamin Emmanuel Dors
Wilnick Dorval
Dennis Doyle
Joshua Druck
Andrew Dructor
Philip Duncan
James Coleman DuPont
James Thomas Durkin
Aisling Marie Dwyer
Erik J. Dykema
Nikolai N. Dythchenko
Lauro Da Gama E Souza
Jared Eber
Jason Matthew Ebert
Matthew Edgar
Hilary Dawn Edwards
Andrew Stuart Ellington
Izukanne Emeagwali
Rebecca Lisa Emory
Gloria Enge
Margarita A. Essayan
Sundra Victoria Essien
Nicholas John Evanovich
Brian James Ewart
Stephanie Anne Fajuri
Tania Christine Faransso
Farah Christine Vinta Fard
Olivia Trammell Farmer
Lyndsey Caryn Farncombe
John Farrell
Ryan Ward Federer
Abigail Fee
Benjamin Nathan Feit
Eli Aaron Feldman
Katherine Cotter Fennell
Lindsey Ferioli
Ronald Andrew Ferrara
Elizabeth Mary Fialkowski
Anthanette Michelle Fields
Maxwell Morris Fine
Brian Clifton Finucane
Eric Firkel
Daniel Seth Fischler
Laura Schlesinger Fisher
Cristin Gill Fitzgerald
Peter Gerard Flynn
Peter Jonathan Fontaine
Ellen Haberler Fontanella
Michael D. Ford
Danielle Lauren Fortier
Adrienne Elise Fowler
Peter Daniel Fox
Lisa-Ann Margaret Fraser
Mariah Freark
Claudia Frutos-Peterson
Go Fujimoto
Hironori Fujita
Eriko Fukoe
Masahide Fukuda
Eric Fung
Yee Lick Eric Fung
Michael Benjamin Fusco
Paul George Galindo
Daniel P. Gallagher
John Andrew Gallagher
Mary Catherine Gamble
Bijan Ganji
Any Garcia
Venkata Lakshmi Garimella
Ryan Stephan Gauthier
Sarah Ann Geers
Daniel Kleven Gelb
Alexandre Jonathan Gelblat
Eleonora Gerasimchuk
Andrea Louise Giannattasio
Julius Henry Giarmarco
Andres Gil
Michael James Gilles
Adam Lincoln Gilson
Arthur D. Giroux
Andrea Lee Gittleman
Eric Daniel Giuliano
Erin Gavlich
Adam D. Gold
David Stanley Gold
Ross Jared Goldband
Garth D. Goldberg
Benjamin Goldman
Michael Jacob Golub
Andrew C. Gomez
David Preston Gonzalez
Joshua Ryan Goodbaum
Katherine Elizabeth Goodman
Jillian Grace Gordon
Yasuki Goto
Murray Gottheil
Amy Gough
Andrew Graeve
Joseph P. Graham
Jason Toby Green
Robyn Sara Greene
Ariel Esther Greenstein
Marilu E. Gresens
Bhupinder Grewal
Patrick Griffith
David Zahler Gringer
Scott Gripp
Florian Grisel
Marybeth Grunstra
April Gu
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Sachiko Jensen
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Hao Jiang
Bin-A Jo
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Kirsten Katherine Johnson
Meggan Grace Johnson
Shaina Rhondes Johnson
Tyler Johnson
Linda Johnston
Angela Anita Jones
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Keith Aaron Jones
Devyani Kacker
Aurelie Kahn
Nicholas Edward Kaiser
Chitra Malini
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Tomoko Kamikawa
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Stephanie Kao
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 Zachary Sadoff Launer
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 Byunghoon Lee
 Doo Hee Lee
 Eun Hye Lee
 Heeseung Lee
 Hyun J. Lee
 Il Ho Lee
 Jae Hun Lee

Jaehong Lee
 Jocelyn Wang Lee
 Joonil Kim Lee
 Jun Hee Lee
 Kenneth Lap Ken Lee
 Kongjin Lee
 Michel Lee
 Sang Wha Lee
 SangWha Lee
 Victor Lee
 Wing Sze Lee
 Yun Lee
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 Chun-chi Lin
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 Lipton
 Michael Noah Litrownik
 Mike Litrownik
 Fang Liu
 Kathleen Jean Liu
 Xiao Jeff Liu
 Yingli Liu
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 Sarah Catherine Long
 Ashley Loveall
 Matthew John Loven
 Lorna Lowe
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 Mahoney
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 Maldonado
 Michael Malecz
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 Carl Lawrence Malm
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 Marne Marotta
 Sean Michael Marotta
 Jonathan Marshall
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 Philippe Martinet

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 Jose Antonio Masini-Torres
 Ben Massarsky
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 Mendoza-Tolentino
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 Michalak
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 Theodore Nathan Nemeroff
 Anastasia Hayley Newell
 Thy Chanh Nguyen
 Nicholas Niles
 Daisuke Niwa
 Michael Noonan
 Timothy Daniel Norton
 Benjamin David Novak
 Joseph Nullmeyer
 Rogan Patrick Nunn
 Roman Nurpeissof
 Kelly Ann O'Brein
 Kelly Ann O'Connell
 Philip Patrick O'Leary
 Nebojsa Obradovic
 Sadettin Ocak
 Akiko Ogawa
 Aaron Peron Ogletree
 Jin Woo Oh
 Haruka Okihara
 Bertram Chukwudum
 Okpokwasili
 Maryanne Oiseomata
 Omorebokhae
 Mahalia Linda Herrera
 Operario
 Emilia Cristina Ordolis
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 Magnus Oskarsson
 Hiroe Otake
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 Eric David Reiser
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 Adam Romig
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 Dena Michal Roth
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 Svetlana Rovenskaya
 Tiffany Rowe
 Elizabeth Rozin
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Julie Bendix Rubenstein
 Kevin Francis Rudolph
 Caitlin M. Russo
 Kayleigh N. Russo
 Margaret Clare Churchill
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 Rajeh Adnan Saadeh
 Bryan Leland Patrick
 Saalfeld
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 Sophie Beatrice Sahlin
 Laura Salvatori
 Regina Sam
 Michael Charles Sampson
 Johanna Dessire Sanchez-
 Acosta
 Shemika Erae Sanford
 John Joseph Santoliquido
 Donald Ndiva Sanyi
 Jessica Maria Saraceno
 Katherine Stephanie Sauser
 Jamie A. Schafer
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 Winterhalder
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 Koki Yamada
 John Matthew Yandell
 Chen Yang
 Jung Hun Yang

Rong Yang
 Yi Yang
 Wenting Yao
 Jih-ching Yeh
 Kevin Yeh
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 Amanda Nicole Zane
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 Samara C. Zimmerman
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 Difan Zou
 Jaime Lauren Zuckerman

Foundation Memorials

A fitting and lasting tribute to a deceased lawyer can be made through a memorial contribution to The New York Bar Foundation. This highly appropriate and meaningful gesture on the part of friends and associates will be felt and appreciated by the family of the deceased.

Contributions may be made to The New York Bar Foundation, One Elk Street, Albany, New York 12207, stating in whose memory it is made. An officer of the Foundation will notify the family that a contribution has been made and by whom, although the amount of the contribution will not be specified.

All lawyers in whose name contributions are made will be listed in a Foundation Memorial Book maintained at the New York State Bar Center in Albany. In addition, the names of deceased members in whose memory bequests or contributions in the sum of \$1,000 or more are made will be permanently inscribed on a bronze plaque mounted in the Memorial Hall facing the handsome courtyard at the Bar Center.



willing to disassociate themselves from the past and enter the modern age. To help Luddite lawyers, the New York State Unified Court System Web site now has an e-filing manual and a “Frequently Asked Questions” section.³¹

New York’s e-filing system is easy to use. To take part, one must be a “registered and authorized filing user,” a title granted after completing and submitting an online form.³² Following initial registration, licensed New York

Your e-document will be judged by how well readers understand you.

lawyers gain an identification name, password, and access to e-filing in every court participating in the system.³³ For service of interlocutory documents, users must provide a primary e-mail address where documents may be served; the e-mail address may be the party’s e-mail address or the attorney’s e-mail address if the party is represented.³⁴ Documents may be filed on the NYSCEF Web site day or night.³⁵

Taking into account this trend toward technology in the courtroom, lawyers can help online readers, specifically judges, rule for their clients. Today, lawyers rely on hypertext, portable document format (PDF) files, and bookmarks — terms once reserved for professors offering interactive learning courses — to create effective e-documents.

This column explores how to use the electronic tools to write persuasive, user-friendly e-documents.

Know Whom You’re Writing For — Plan and Organize Accordingly

Write for your readers. Be kind to them. Before you create a document that can be e-filed, plan its layout and content. Your e-document will be judged by how well readers understand you. Basic editing and drafting rules apply.

Logical paragraphs, sturdy sentences, and focused persuasion yield effective results.

Give your readers a clear and accessible organizational plan. Cognitive-process experts stress the importance of “chunking” information together and displaying it in coherent, “self-contained” steps.³⁶ This is because the human mind can “process only about three to four chunks of information at a time.”³⁷ Chunking also allows for white space on the page, allowing the reader to focus on the text and giving the human eye time to relax before moving to the next topic. Don’t bore readers with non-essentials. Use a concise and direct style, with short paragraphs, to accommodate the limits of a computer screen; label the topics with headings and subheadings.³⁸

Consider whether the document can be read in an online environment. Some judges will print your materials. Most will read them on their computers.

Screen readers quickly lose concentration and focus. Accommodate your readers by ensuring your e-documents are usable — meaning easy to read.³⁹

Seven usability tools apply to e-documents:⁴⁰

- **Enable skimming.** Accommodate impatient and busy online readers by helping them skim through documents. Use short summaries and topic sentences. Carefully sculpted headings and topic sentences that introduce paragraphs allow skimmers to grasp your legal arguments quickly. Online readers glance at documents, hoping to find bullet points, outlines, and numbered lists. A reader’s attention is always attracted to lists. They provide easy and organized ways to process information.⁴¹
- **Omit needless words.** Screen readers can’t, or won’t, absorb lots of words. Every word counts in an online setting. Cutting half your words will make your content more prominent. It’ll also shorten the route your reader must take to get to your content.⁴²

- **Don’t force your readers to think.** Don’t let readers work too hard. Effective e-documents identify each step of an argument and explain assumptions. To facilitate the reader’s experience, e-writers should “connect the dots” to “make the logical structure intuitive.”⁴³
- **Make it simple.** Avoid synonyms. An argument that uses the same words for the same things is easier to follow. Less is more in e-documents. Satisfy readers. Writers will meet their readers’ expectations by following standard writing formulas, relying on normal capitalization, and structuring rudimentary sentences.⁴⁴
- **Use white space.** Online readers need breaks. Writers should provide ample white, or blank, space throughout their document. Space gives the brain and eyes a much-needed rest. This can be achieved through wide margins, indenting, and space between paragraphs.⁴⁵
- **Put the most important content in the top left of the page.** Online readers’ eyes gravitate toward the top left of the page.⁴⁶ According to eye-tracking studies, screen readers process information in an F-shaped pattern, “looking down the left side for structural cues and then focusing on headings and first sentences of paragraphs.”⁴⁷ Writers should place the most important headings and information there.⁴⁸
- **Test your document.** Test your document by having those who know nothing about your case read it.⁴⁹ Ask them whether it’s difficult to read or comprehend. Determine whether any questions linger or remain unanswered. Your readers, who don’t know your case like you do, should walk away feeling that your arguments are clear.

Making e-Files Readable

Online writers must consider the relationship between their readers and the

online device. Readers must be able to adapt to the functionality of new technology, and writers should ensure that this transition is seamless. Factors like screen-type and operating system are beyond the writer's control. Other things aren't. Good e-writers always think about the reader's navigational needs.

You'll help your readers by choosing a good font. Writers should use standard, easily read symbols and avoid difficult-to-read characters. The Seventh Circuit recommends Century, a typeface designed for books.⁵⁰ The Supreme Court and the Solicitor General also use Century.⁵¹

E-Filing in PDF is Cheap and Easy

Courts require e-filing in PDF.⁵² To file through the NYSCEF, software is required to convert documents from word processed files to PDFs.⁵³ Using PDF doesn't take great skill or expertise: "the technical requirements for creating and reading PDF files are minimal."⁵⁴

Courts prefer PDF to Word or WordPerfect documents due to the security needs of legal documents.⁵⁵ PDF preserves a document's formatting, integrity, and pagination.⁵⁶ PDF files can be secured by using passwords, thereby avoiding unauthorized changes or alterations.⁵⁷ Authors can even prevent their readers from cutting and pasting words into separate documents.⁵⁸ PDF allows writers to add digital signatures to verify a document's authenticity.⁵⁹

E-filing with PDF is cost-efficient. Another benefit is "the consistent accessibility of PDF files from any computer."⁶⁰ But the biggest advantage to PDF is a reader's ability to interact with the document. PDF files can be made "key-word searchable" so that readers can seamlessly make their way through the document by inserting any word of interest.⁶¹

The Adobe Reader is available to download for free online.⁶² Adobe Reader has links to software to convert word-processed documents to PDF. Documents converted to PDF from

a word-processing program are key-word-searchable. To add other material to your brief a scanner might be useful for converting paper documents into high-quality e-files.⁶³ Essentially, these files are digital photographs of the paper documents; they are not word-searchable. Some of the more sophisticated programs, including the Adobe Acrobat Pro series, will recognize text using optical character recognition (OCR) software. If the image is crisp and clean the OCR will work well. But poorly scanned paper briefs can result in the document's appearing "grainy" in PDF format, making it difficult to use the OCR function and for readers to navigate.⁶⁴

Make PDF Work for You and Your Reader

To create easily navigable documents for your reader, take advantage of PDF's generous tools. Don't be afraid to overuse, even saturate, the document with anything that'll grab your reader's attention.

Through PDF's "navigation pane," you can include a table of contents, commonly referred to as "bookmarks."⁶⁵ Bookmarks are effective: "the reader can click on different levels of the table of contents and be taken to that point in the document."⁶⁶

Another tool is "thumbnails." Slightly different from bookmarks, thumbnails allow readers to view "graphical representations of each page in the document."⁶⁷ These tools give writers full rein over documents and allow writers to determine exactly where their readers should focus their attention.

Hypertexting to Simplicity: The CD-ROM

Keeping things simple for the demanding, often-lazy online reader is the overarching theme of good e-filing. One way to cater to the lazy is to use hypertext in your documents. With

a click of a mouse, this technology immediately sends the reader, through hyperlinks, to a transcript, exhibit, or legal authority. It organizes a document in a way that cannot be achieved on paper.⁶⁸ Hypertexting ties loose ends by allowing readers to sift through piles of documents that, in paper form, would be tedious and messy. Thanks to hypertexting, gone are the days of "plunking down the brief to look up the case or dig through boxes for key documents."⁶⁹

One medium often associated with hypertext is the CD-ROM. On a single CD, readers can access a brief, review the record, and consult the authorities cited.⁷⁰ A CD-ROM acts as a "placeholder" for paper submissions, requiring less storage space than multiple copies of paper briefs.⁷¹

CD-ROM briefs are particularly persuasive when combined with intelligent writing. Briefs submitted on CDs can be tailored to the judge's reading preferences, if you know them. Also possible are different fonts, organizational preferences, and audio/video options that allow the judge to listen to or watch a brief rather than read it.

The advantages of CDs and hypertexting cannot be overstated. Through their use, lawyers can now create interactive documents. If a reader wishes

Good e-writers always think about the reader's navigational needs.

to consult a case or statute cited in the brief, a simple click on the citation will suffice.⁷² Through the New York State Unified Court System, lawyers can instantly send their readers to a supportive decision.⁷³ This simplicity gives lawyers a heightened assurance that their reader, no longer forced to sift through piles of paper, will consult their materials.

Lawyers considering submitting briefs on CD-ROM should not overuse the features available to them. CD-ROM users run the risk of seeing shocking or disturbing images or videos.⁷⁴ The editor should be care-

ful. Writers should also be conscious that the sophistication and complexity of technological material might overwhelm some readers.⁷⁵ Always ensure that material submitted in a hyperlink benefits your case.

Be Conscious of the Information You Emit

Broadcasting easily accessible private information increases identity theft. E-filers must be aware of the information they upload. The Federal Rules of Civil Procedure limit disclosing private information. Only the last four digits of an individual's social-security number, taxpayer number, or financial-account number may be disclosed.⁷⁶ The Rules also specify that documents be redacted to include no more than an individual's year of birth or the initials of a minor's name.⁷⁷

Rather than rely on redaction, New York court users must indicate whether the document to be filed contains "health information, a social security number, a credit card number, a bank account number, an individual's date of birth, an individual's home

information might remain accessible despite being highlighted in black, covered by a black box, or written in white, so as to disappear into the page.⁸³ Removing information and re-saving the file might not be enough. It's possible for deleted text to be retrieved from earlier versions of a document.⁸⁴ To avoid filing a document comprised of "hidden data,"⁸⁵ the court suggests that lawyers save documents under a new name after they delete private information or, better yet, that they invest in software designed to redact files.⁸⁶

Don't Re-Invent the Wheel: Good Writing is Still Good Writing

Electronic communication is here to stay. Whether the courts already require e-filed documents or are developing new rules to permit them, lawyers must adapt to this technological reality. In the not-so-distant future, all courtrooms will be digital. Lawyers will be expected to know how to file documents online. As a result, lawyers must know how to turn electronic documents into effective advocacy tools.

help you create a winning tech-rhetoric document of which you'll be proud.

In the next issue, the Legal Writer resumes our regular scheduled topic: writing the answer. ■

1. Ann Pfau, *E-Filing Has Taken a Significant Step*, N.Y.L.J., Jan. 25, 2010, at 9, col. 5 (noting that Chapter 367 of the Laws of 1999 implemented a voluntary pilot project to test e-filing in New York State).
2. Paul H. Aloe, *Civil Practice*, 60 Syracuse L. Rev. 717, 719 (2010).
3. Marco B. Koshykar, *E-Filing Court Documents: The Possibilities and Progress of E-Filing in New York*, Syracuse Sci. & Tech. L. Rep. 1, 6 (Spring 2004).
4. *Id.*
5. *Id.*
6. William A. Fenwick & Robert D. Brownstone, *Electronic Filing: What is it? What are its Implications?*, Santa Clara Computer & High Tech. L.J. 181, 203 (2002)
7. *Id.*
8. *Id.*
9. Pfau, *supra* note 1, at 9, col. 6.
10. *Id.*
11. *Id.* Chief Administrative Judge Pfau pointed to the three main changes that came with implementing Chapter 416: (1) "e-filing is no longer an 'experiment,' subject to a series of sunsets and requiring renewed legislative authority every two or three years," (2) "legislative approval is no longer required to expand the program; rather the court

Keeping things simple for the demanding, often-lazy online reader is the overarching theme of good e-filing.

address, a minor child's name, or trade secrets."⁷⁸ If the answer is yes, access to the information will be restricted to the consenting parties, the clerk, and the court.⁷⁹

Uncertain are the implications for lawyers who fail to redact documents through e-filing.⁸⁰ New York courts have yet to consider a valid malpractice claim against a lawyer responsible for unlawfully dispersing private information.⁸¹ To avoid any dispute, lawyers ought to remain conscious, not only of e-filing's rules and regulations, but also the means by which they redact their documents.

The U.S. District Court for the District of New Jersey recently advised counsel of the futility of several commonly relied-on redaction techniques.⁸² Among the concerns are that private

Electronic tools are only half the story. Good writing is still good writing, regardless of a writer's ability to adapt to new technology. Technology isn't the great savior. It should be approached with caution. Don't go overboard and include too much information in filings. Just because the technology exists doesn't mean you should use it. Overusing technology is risky: It'll make your documents difficult for your readers to read.

Mastering the online environment, coupled with strong legal-writing skills, will make it easy for the court to rule for you and to want to rule for you. The nuts and bolts of writing an e-document doesn't require lawyers to be tech-savvy. But understanding how important it is to use online tools — and especially how to use them — will

system is authorized to promulgate rules permitting voluntary participation in e-filing in additional counties and in more classes of cases," and (3) "the legislation provides for the establishment of a program of mandatory e-filing in certain jurisdictions in specific types of cases." *Id.* at 14, col. 5.

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Please let me know whether *that* is needed in the following sentences:

- (1) Nowhere is it alleged (that?) the landlord violated any safety regulation.
- (2) Neither did I make any substantial upgrades to the house which would trigger modern codes, assuming (that?) they apply.
- (3) Should it be *which* or *that* in the second example: “upgrades to the house *which* would trigger . . .” or “upgrades to the house *that* would trigger”?

Answer: In asking these questions, Olean Attorney Edward J. Wagner has done a favor to many readers who are ignorant about these matters.

In Question (1), it is not grammatically necessary to add the word *that*, but I would include it because if *that* is omitted, “alleged the landlord” looks like a phrase. This ambiguity might cause readers to hesitate, then re-read the sentence. Therefore include *that* to avoid waste of time.

A recent newspaper column contained a similar confusing omission of *that*: “The judge held the stick was a deadly weapon.” Add the word *that* and you avoid the impression that “The judge held the stick . . .” is a subject-verb-object construction. So write: “The judge held *that* the stick was a deadly weapon.”

The answer to Question (2) is that correct grammar does not require the word *that*. But the sentence may be clearer if you include *that*. The phrase, “alleged the landlord” might be confusing. But the sentence is still ungrammatical because it lacks a comma before *which*. To be correct, the sentence should read “substantial upgrades, which would trigger modern codes, . . .” The pronoun *which* is non-restrictive.

For those readers who were not taught grammar because they “tested out” of grammar classes in middle school, here is a short explanation of the restrictive pronoun *that* and the non-restrictive pronoun *which*.

The reader’s Question (3) points out the difference between restrictive and non-restrictive pronouns. The restrictive pronoun *that* “restricts” the meaning of the rest of the sentence, raising the question, “What upgrades?” (Answer, “Substantial upgrades that would trigger the codes.”) So the restrictive relative pronoun *that* is correct.

Substantial upgrades *that* would trigger modern codes . . .

Substantial upgrades, *which* would trigger modern codes, . . .

In sentence (2), *which* is a non-restrictive clause, indicating that previously the “substantial upgrades” have been identified. Thus, the sentence now states that *all* the upgrades will trigger modern codes. But non-restrictive relative clauses must be enclosed in commas; so place a comma before *which* and after *codes* to make the sentence grammatically acceptable.

It seems appropriate here to discuss a question that Attorney Wagner did not mention, but that other attorneys often ask. The question is, in what circumstances do we use *that*, *which*, and *who*? For example, what pronoun would you select for each of the following sentences?

- (a) My dog Pug sniffs at every tree trunk (*that/which*) we pass during our morning walk.
- (b) I have a friend (*that/who*) plays basketball every day after work.
- (c) Many people (*that/who*) used to drive their cars to work are now joining car pools.

In sentence (a), readers are unanimous in choosing the pronoun *that* to modify “tree trunks.” The traditional grammatical rule states that human beings are identified as *who* or *whom*, and objects as *that*. The answer would not be unanimous if the sentence began, “My dog Pug (*who/that*) sniffs at every tree trunk we pass on our morning walk.” Readers would then select *who* or *that* depending on whether they consider Pug “human” enough to refer to him as a human

being. (Pet owners would be more likely to choose *who*.)

In sentence (b), the majority of readers would choose *who* (particularly those readers who have been taught grammar). However, the grammatical rule that requires *who* to refer to humans and *that* to refer non-humans is currently eroding, being honored more in the breach than in the observance. Grammarians now approve of *that* instead of *which* when the reference is to members of a group or class. And in sentence (c), most Americans would therefore probably choose *that*, car-poolers being thought of as members of a group. But the traditional rule is still in force; so, if you prefer, always choose *who* when referring to persons.

As to the decision about whether to use *that* or *which*: *Which* is considered more formal than *that* and is acceptable to some educated persons in statements like: “Social security is an entitlement *which* is impervious to congressional attack.” Grammarians, however, still prefer the restrictive pronoun *that* in formal contexts.

From the Mailbag

From Jacob M. Braude’s *Lifetime Speaker’s Encyclopedia*:

You can always tell a barber
By the way he parts his hair;
You can always tell a dentist
When you’re in a dentist’s chair;
And even a musician –
You can tell him by his touch;
You can always tell a lawyer,
But you cannot tell him much.

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Levy, M. Barry
Lieberman, Ellen
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Lupkin, Jonathan D.
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Miller, Michael
Minkowitz, Martin
Morril, Mark C.
Moses, Barbara Carol
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Nelson, Lester
Nijenhuis, Erika W.
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Safer, Jay G.
Schindel, Ronnie
Sen, Diana Sagorika
Seymour, Samuel W.
* Seymour, Whitney North, Jr.
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Sonberg, Hon. Michael R.
Spiro, Edward M.
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Walsh, Jean T.
Wolff, Adam John
Yavinsky, Hon. Michael J.
+ Younger, Stephen P.
Zuchlewski, Pearl
Zulack, John F.

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Doyaga, David J., Sr.
Gerber, Ethan B.
Hernandez, David J.
Kamins, Hon. Barry
Longo, Mark A.
Lonuzzi, John A.
McKay, Hon. Joseph Kevin

Park, Maria Y.
Romero, Manuel A.
Sunshine, Hon. Jeffrey S.
Sunshine, Hon. Nancy T.

THIRD DISTRICT

Ayers, James B.
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Baynes, Brendan F.
Costello, Bartley J., III
Davidoff, Michael
DeFio Kean, Elena
Doherty, Glen P.
Fernandez, Hon. Henry A.
Fernandez, Hermes
Glasheen, Kevin P.
Greenthal, John L.
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Hanna, John, Jr.
Hurteau, Daniel Joseph
Kahler, Annette I.
Kaplan, Edward Ian
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Rosiny, Frank R.
Ryan, Rachel
Salkin, Prof. Patricia E.
* Yanas, John J.

FOURTH DISTRICT

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Herrmann, Diane M.
Hoag, Rosemary T.
Ladouceur, Michelle H.
Lais, Kara I.
Martin, Trinidad
McAuliffe, J. Gerard, Jr.
McNamara, Matthew Hawthorne
Onderdonk, Marne L.
Rodriguez, Patricia L. R.
Slezak, Rebecca A.
Stancliff, Tucker C.
Watkins, Patricia E.

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Fennell, Timothy J.
Fish, Marion Hancock
Foley, Timothy D.
Gensini, Gioia A.
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Howe, David S.
Humphrey, Mary R.
Ludington, Hon. Spencer J.
McArdle, Kevin M.
Myers, Thomas E.
Pellow, David M.
* Richardson, M. Catherine
Stanislaus, Karen
Tsan, Clifford Gee-Tong
Virkler, Timothy L.

SIXTH DISTRICT

Barreiro, Alyssa M.
Denton, Christopher
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Gorgos, Mark S.
Grayson, Gary J.
Gutenberger, Kristin E.
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Mayer, Rosanne
Orband, James W.
Pogson, Christopher A.
Sienko, Leonard E., Jr.

SEVENTH DISTRICT

Burke, Philip L.
+ * Buzard, A. Vincent
Castellano, June M.
Chapman, Richard N.
Gould, Wendy Lee
Harren, Michael T.
Hetherington, Bryan D.
Jackson, La Marr J.
Kingsley, Linda S.
Kurland, Harold A.
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Moretti, Mark J.
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Schraver, David M.
Stapleton, T. David, Jr.
Tilton, Samuel O.
* Vigdor, Justin L.
* Witmer, G. Robert, Jr.

EIGHTH DISTRICT

Cassata, Hon. Joseph J.

Convissar, Robert N.
+ Doyle, Vincent E., III
Effman, Norman P.
* Freedman, Maryann Saccomando
Gerstman, Sharon Stern
Hager, Rita Merino
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Manias, Giles P.
Russ, Arthur A., Jr.
Schwartz, Scott M.
Seitz, Raymond H.

NINTH DISTRICT

Amoruso, Michael J.
Brown, Terry
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Burns, Stephanie L.
Byrne, Robert Lanry
Cohen, Mitchell Y.
Cusano, Gary A.
Dohn, Robert P.
Fedorchak, James Mark
Fontana, Lucille A.
+ Fox, Michael L.
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Marwell, John S.
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Miller, Henry G.
Nachimson, Steven G.
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Rauer, Brian Daniel
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Singer, Rhonda K.
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Stone, Robert S.
Strauss, Barbara J.
Strauss, Hon. Forrest
Van Scoyoc, Carol L.
Wallach, Sherry Levin
Weis, Robert A.

TENTH DISTRICT

Asarch, Hon. Joel K.
Block, Justin M.
* Bracken, John P.
Bucaria, Thomas A.
Chase, Dennis R.
Fishberg, Gerard
Franchina, Emily F.
Gann, Marc
Good, Douglas J.
Gruer, Sharon Kovacs
Hayden, Hon. Douglas J.
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Randazzo, Sheryl L.
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Shulman, Arthur E.

ELEVENTH DISTRICT

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DeFelicce, Joseph F.
Gutierrez, Richard M.
Lee, Chanwoo
Nizin, Leslie S.
Risi, Joseph J.
Taylor, Zenith T.
Vitacco, Guy R., Jr.

TWELFTH DISTRICT

Masley, Hon. Andrea
Millon, Steven E.
* Pfeifer, Maxwell S.
Price, Hon. Richard Lee
Quaranta, Kevin J.
Sands, Jonathan D.
Summer, Robert S.
Weinberger, Richard

THIRTEENTH DISTRICT

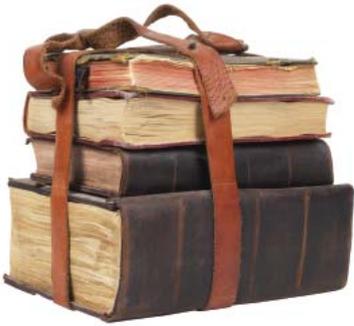
Behrins, Jonathan B.
Dollard, James A.
Hall, Thomas J.
Mattei, Grace Virginia

OUT-OF-STATE

Kurs, Michael A.
Millett, Eileen D.
Perlman, David B.
Ravin, Richard L.
Torrey, Claudia O.
* Walsh, Lawrence E.
Weinstock, David S.

† Delegate to American Bar Association House of Delegates

* Past President



E-Filing: Mastering the Tech-Rhetoric

The Legal Writer interrupts our regularly scheduled program — the multi-part series on writing civil-litigation documents — to discuss a hot topic: electronic filing, or e-filing. As technology advances, all lawyers need to know about e-filing. The topic is also critical because the New York State Unified Court System is moving toward mandating e-filing throughout the state.

Twelve years ago, when New York introduced a voluntary pilot project to test e-filing,¹ it appeared unlikely that e-filing would take off. The first case was e-filed on November 22, 2000.² By 2002, only 300 lawyers had registered with the New York State Courts Electronic Filing System (NYSCEF). High implementation costs,³ privacy and confidentiality concerns,⁴ and the computer hesitancy, and in some cases illiteracy, of senior lawyers⁵ explained the initial reluctance. But the undeniable advantages of e-filing, including the rarity that documents submitted electronically would be lost or misfiled,⁶ the ability of lawyers to file materials at any hour,⁷ and the benefit of practically instant accessibility,⁸ have led to technological advances. At the end of 2009, more than 200,000 cases and more than 500,000 documents⁹ had been filed, and more than 13,000 lawyers had registered with NYSCEF.¹⁰

Substantial changes have occurred in the area of e-filing. On September 1, 2009, Chapter 416 came into effect, significantly altering the e-filing landscape.¹¹ Chapter 416 made e-filing no longer a pilot program.¹² E-filing is now required in certain commercial

cases in Supreme Court, New York County,¹³ and in commercial and tort cases in Supreme Court, Westchester County.¹⁴ As of June 2011, all commercial cases, including breach of contract actions, must be commenced electronically in Supreme Court, Westchester County.¹⁵ The e-filing system is currently optional for tort, commercial, and tax certiorari cases in 15 counties of the Supreme Court.¹⁶ Two other counties, Broome and Erie, permit e-filing Supreme Court cases.¹⁷ The system is also available in New York City Civil Court no-fault actions,¹⁸ probate and administrative proceedings in five counties of the Surrogate's Court,¹⁹ and the Court of Claims.²⁰

New York's Appellate Division, First Department, requires practitioners to file ten copies of a brief or appendix, and one of those copies must be a PDF: "Effective July 1, 2010, pursuant to amendments to rule 600.11, each party perfecting or answering an appeal shall file, in addition to the requisite number of paper copies, one searchable PDF copy of the brief via e-mail. Effective September 1, 2010, each party filing an appendix (or record on appeal) shall file, in addition to the requisite number of paper copies, one searchable PDF copy of the appendix (or record on appeal)."²¹ The Second, Third, and Fourth Departments do not provide for e-filing. Although the Fourth Department's rules provide that "submission to the Clerk's Office by electronic means will be accepted,"²² e-filing is not yet in place. The Fourth Department allows litigants to file a companion CD-ROM of the records, appendices, and briefs if the

litigants consent to filing a CD-ROM.²³ The CD-ROM must be identical to the printed record. The benefit of submitting a companion CD-ROM is that you can use hyperlinks, explained later in this article.

To expand mandatory e-filing, further legislative action is required:²⁴ "Although Chapter 416 envisions voluntary e-filing, the new legislation gives OCA [Office of Court Administration] authority to make e-filing mandatory in certain cases, but the authority for mandatory e-filing is temporary and will expire absent further legislative action on September 1, 2012."²⁵

Lawyers should expect, however, that voluntary e-filing will become mandatory e-filing before September 2012. Chief Judge Jonathan Lippman recently stated that he hopes for a "digital courthouse."²⁶ The Chief Judge said that "he will seek authority to require all state courts to implement mandatory electronic filing" in all New York state courts.²⁷ He believes that mandatory e-filing will take about 12 to 18 months to implement.²⁸ E-filing has many benefits, he explained, including efficiency and saving New Yorkers money.

As lawyers gravitate toward electronic filing in state courts, the practice has become widespread at the federal level.²⁹ E-filing has been required in all New York federal district courts since 2004 and in the Court of Appeals for the Second Circuit since January 2010.³⁰

The trend is obvious. Courts are rapidly requiring electronic filing, and lawyers are becoming more and more

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