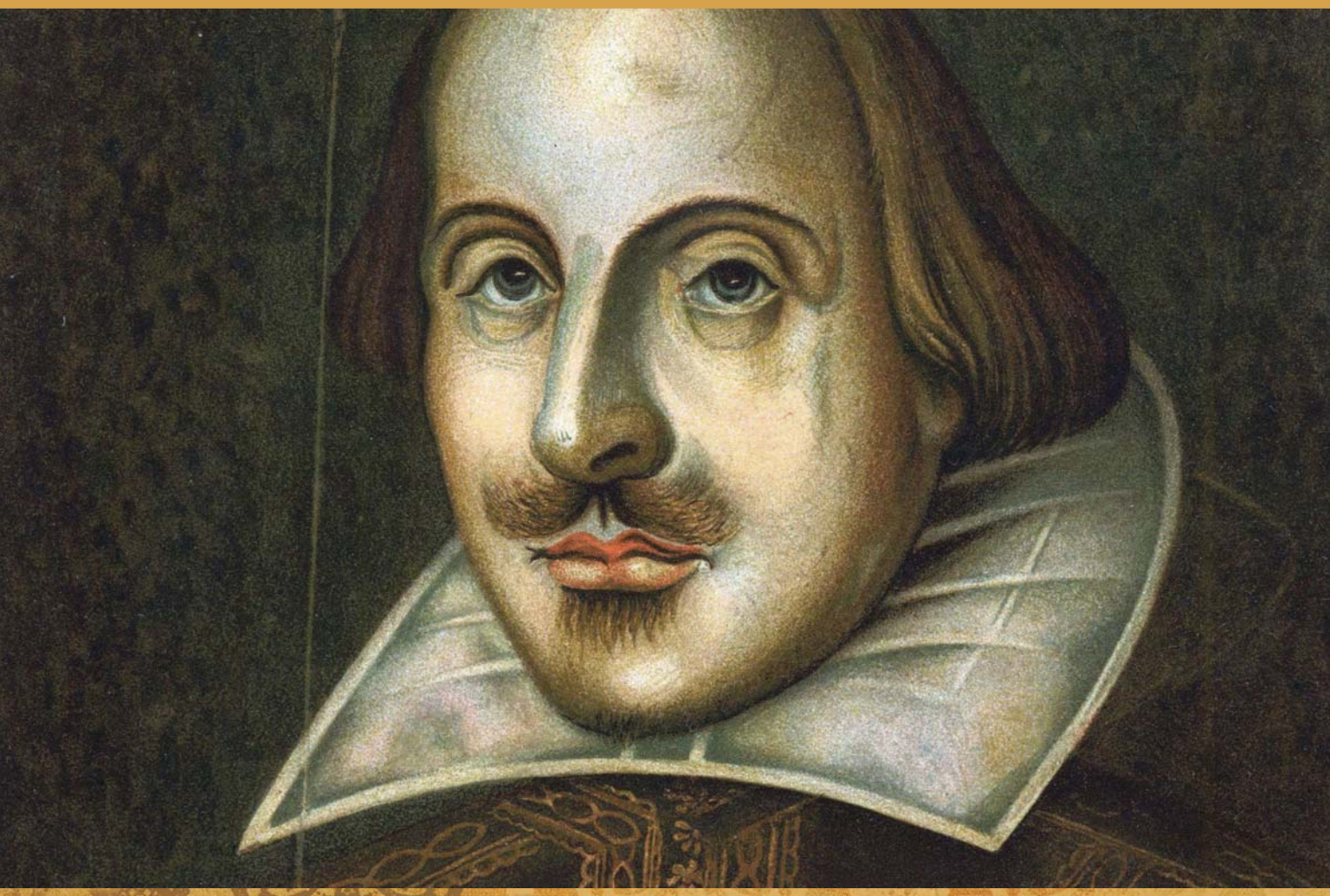
JUNE 2011
VOL. 83 | NO. 5

NEW YORK STATE BAR ASSOCIATION

Journal



Shakespeare Testifies – *Belott v. Mountjoy*

by William B. Stock

Also in this Issue

Diversity Roundtable
Reasonable Doubt
Trusts and Wills
Eyewitness Identification

NEW YORK STATE BAR ASSOCIATION

From surviving to thriving as you…

Automate Your Life

Looking for a safe, easy, and convenient way to pay your 2011 New York State Bar Association membership dues? **Look no further…**

…you may want to consider our Automated Installment Plan!

NEW! MORE DEBITING CAPABILITIES!

During the current economic downturn, you may want to consider enrolling in NYSBA's Automated Installment Plan (AIP) which enables you to pay your dues in up to FOUR (4) monthly installments, directly debited from your bank or credit card account.* More than 2,400 NYSBA members are now using this safe, convenient, paper-free alternative to mailed dues notices and we encourage you to take advantage of this great, secure service.

You can sign up online for our Automated Installment Plan when you go to www.nysba.org/renew2011. Or, for more information, call 518.463.3200, or visit www.nysba.org/aip.

The Automated Installment Plan – an easy, safe, and convenient way to pay your 2011 NYSBA membership dues!

Under stormy economic conditions…or any condition…
NYSBA delivers the help and benefits you need NOW.

As a member, you deserve nothing less.

For more information on this great benefit,
go to www.nysba.org/aip or call 800.582.2452 / 518.487.5577.

NYSBA

*1 payment, 2 payments, 3 payments or 4 payments on or about the 25th of the relative month(s). All installment payments must be completed by August 25th of the current billing year. Those opting into the installment payment program in May, June, July or August 1st of the current year may have their payments consolidated and accelerated to meet this requirement. Program enrollment is closed from May 2nd through August 31st of the current year. NYSBA dues are on a calendar year basis and are billed in October.

BESTSELLERS

FROM THE NYSBA BOOKSTORE

June 2011

Attorney Escrow Accounts – Rules, Regulations and Related Topics, 3rd Ed.

This new edition provides useful guidance on escrow funds and agreements, IOLA accounts and the Lawyers' Fund for Client Protection. The greatly expanded appendix features statutes, regulations and forms.

PN: 40269 / **Member $45** / List $55 / 330 pages

With CD of forms, regulations and statutes.

Best Practices in Legal Management

The most complete and exhaustive treatment of the business aspects of running a law firm available anywhere.

PN: 4131 / **Member $139** / List $179 / 498 pages

Choose a CD or USB flash drive containing all the forms.

Consumer Bankruptcy, 2nd Edition

This new edition covers consumer bankruptcy from both debtor and creditor perspectives. It provides official and procedural forms, as well as the local bankruptcy rules for New York's federal districts.

PN: 40456 / **Member $125** / List $170 / 770 pages

Counseling Content Providers in the Digital Age

Written and edited by experienced media law attorneys from California and New York, this book is an invaluable guide for anyone in the field of pre-publication review as well as attorneys responsible for vetting their clients' or firm's Web site. Includes forms, checklists and charts on CD.

PN: 4063 / **Member $50** / List $65 / 480 pages

Depositions: Practice and Procedure in Federal and New York State Courts, 2nd Ed.

A detailed text designed to assist young attorneys and experienced practitioners with all aspects of depositions.

Medical Malpractice in New York, 3rd Ed.

This book provides advanced insight into many aspects of the trial of a medical malpractice case.

PN: 41309 / **Member $95** / List $125 / 654 pages

New York Municipal Formbook, 3rd Ed., Revised 2010 (Forms on CD)

More than 230 new forms expand the scope of the premiere formbook for anyone whose practice touches on municipal law – includes topics such as agreements, bidding, environmental law, FOIL, labor law, liability, permits and zoning.

PN: 41606 / 2010 / **Member $150** / List $185

The Plaintiff's Personal Injury Action in New York State

This treatise answers the tough questions faced by the plaintiff's personal injury attorney every day – liens, special needs trusts, structures, Medicare and Medicaid, conflicts of interest, workers' compensation, no-fault, bankruptcy, representing a party in infancy, incompetency and wrongful death.

PN: 4181 / **Member $175** / List $225 / 1,734 pages

Post-Trial Practice and Procedures

The end of the trial is not necessarily the end of the civil litigation process. *Post-Trial Practice and Procedures* is the comprehensive guide to dealing with complex post-trial issues. The authors – experienced trial attorneys and an appellate justice – cover everything from challenging verdicts before and after the jury has been discharged, to post-verdict setoffs, to understanding the interest categories on damage awards and money judgments.

PN: 4175 / **Member $45** / List $60 / 242 pages

Protecting the Catastrophically Injured Personal Injury Plaintiff's Recovery

A must-have for personal injury attorneys, this book provides the most current insights into the field of structured settlements and analyzes the alternatives available to protect catastrophically injured plaintiffs' recoveries.

PN: 42230 / **Member $20** / List $30 / 82 pages

NEW!

Commercial Leasing, 2nd Ed.

This new edition addresses a multitude of issues critical to both the tenant and the landlord. Especially useful are the sample model leases that cover conditions favorable to both the landlord and the tenant. Includes forms, instructions and charts on CD.

Construction Site Personal Injury Litigation (2010)

Newly revised with updated case and statutory law, this book covers all aspects of actions under N.Y. Labor Law §§ 200, 240(1) and 241(6).

Contract Doctrine and Marital Agreements in New York

A unique, two-volume reference work covering a complex and challenging area of law.

Foundation Evidence, Questions and Courtroom Protocols, 3rd Ed.

This new edition, along with its collection of forms and protocols, has two new chapters: Direct Examination and Cross-Examination.

Insurance Law Practice, 2nd Ed. (2010)

Completely updated in 2010, *Insurance Law Practice* is an exhaustive and invaluable reference for attorneys who practice insurance law in New York State.

New York Lawyer's Deskbook and Formbook (2010–2011)

Award-winning and packed with new information and forms for use in over 25 practice areas.

New York Practice Monograph Series 2010–2011

This 16-book set comprises chapters excerpted from the 2010–2011 edition of the *New York Lawyer's Deskbook* and *Formbook*.

N.Y. Criminal Practice, 3rd Ed.

This valuable text of first reference has been reorganized and rewritten to reflect all changes in the law and practice since the publication of the second edition in 1998.

NYSBA Practice Forms on CD-ROM 2010–2011

More than 600 of the forms from *Deskbook* and *Formbook* used by experienced practitioners in their daily practice.

Expand your professional knowledge

1.800.582.2452 www.nysba.org/pubs **Mention Code: PUB1091**

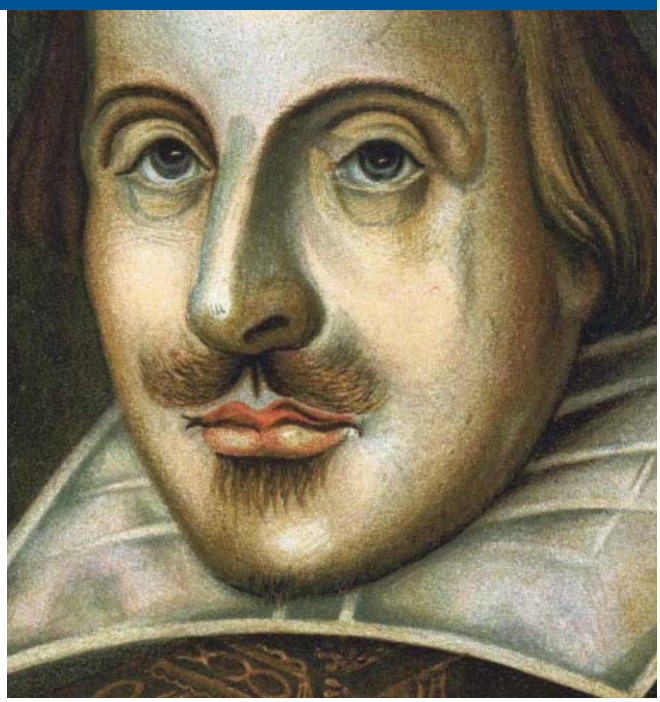
Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total.

NYSBA

NEW YORK STATE BAR ASSOCIATION
Journal

CONTENTS

JUNE 2011



SHAKESPEARE TESTIFIES – *BELOTT V. MOUNTJOY*

Are There Lessons for Today's Lawyer? 10

BY WILLIAM B. STOCK

DEPARTMENTS

5 President's Message
8 CLE Seminar Schedule
9 Best of the *Journal* – 2010
15 Burden of Proof
BY DAVID PAUL HOROWITZ
48 E-Discovery
BY STEVEN C. BENNETT
50 Meet Your New Officers
52 New Members Welcomed
57 Language Tips
BY GERTRUDE BLOCK
60 Index to Advertisers
60 Classified Notices
63 2011–2012 Officers
64 The Legal Writer
BY GERALD LEBOVITS

18 Do the Right Thing
Networking, Mentoring, Business and Leadership Development for the Diverse Attorney

25 The Flaw in New York's Reasonable Doubt Instruction
BY JOHN J. BRUNETTI

30 Summary Judgment Motion in a Will Contest: An Updated Proponent's Perspective
BY GARY E. BASHIAN

34 Usurpation of Trust Opportunities and Self-Dealing
BY JOHN R. MORKEN AND ILENE S. COOPER

41 Using an Expert to Evaluate Eyewitness Identification Evidence
BY SHIRLEY K. DUFFY

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $30. Library subscription rate is $200 annually. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

since we offer comprehensive, cost-effective coverage from CNA

The NYSBA endorses the Lawyers' Professional Liability plan administered by USI Affinity* and underwritten by CNA. Our LPL plan offers broad and affordable coverage tailored to suit the specific needs of your practice.

Find out why USI Affinity is the right choice for your practice. Call or go online today.

USI® AFFINITY

To request your **FREE** quote call

800.727.7770

or visit

www.mybarinsurance.com

*USI Affinity is the brand and marketing name for the licensed entity USI Insurance Services, LLC

LPL : Medical : Life & Disability : Personal & Financial : Other Liability

PRESIDENT'S MESSAGE

VINCENT E. DOYLE III

"Justice for All"

As a young child, I had a clear understanding that my father was a lawyer and exactly what that meant. As he often explained to me, his job was to help people. And they sure seemed to need his help. Phone calls came for my father all hours of the day and night. Sometimes they came from jail; sometimes they came during a family or neighborhood dispute. Sometimes the voices were loud and argumentative; sometimes they were soft, emotional, or even weeping. But they always asked the same question: "Is Lawyer Doyle there?" My father took the calls in private, so I was left to imagine what words of wisdom, comfort, or assurance he gave. But I knew he helped these people, as he did each day he left to go to work. Because he was a lawyer.

From a young age, I also was aware that my father was involved in organized bar activities. He spoke of projects and committees he worked on, hoping to improve the system. Though I was probably too young to have understood the term "idealistic," it seemed very heroic to me. To my great delight, my family was often included in bar events or trips. I am sure it made it easier for my father to participate, but including his family made us feel as though we were part of the work that kept him so busy. I have particularly fond memories of meeting a group of his friends at a weekend retreat. Later, I would come to understand that these friends were the members of the Executive Committee of the New York State Bar Association Criminal Justice Section. To me, they were my father's companions on his quest to help make things better for those who needed help. As I begin my term as president of this great Bar Association, I cannot help but reflect on how these lessons from my father have shaped my career in the law. My own experiences have reinforced the idea that helping people is what lawyers do best. The hallmark of our profession is service to others. At our best, we are imbued with a selfless devotion to the interests of those we serve – our clients. The rewards of our profession are many, but chief among them is the satisfaction of helping someone who reaches out to us with legal needs. I am proud to be a lawyer who answers those types of calls.

And I am equally proud to embrace the idealism of participation in bar activities. Because of the New York State Bar Association, I have had the chance to make a difference by advocating for necessary reforms, as well as by speaking and writing on the most important legal issues of our day. Alone, my efforts would have accomplished little. But our Association has a strong and respected voice, with significant influence in government and, more generally, in society. The Association allows us to speak for the profession and to pursue the ideals at the heart of that profession. Besides representing clients, my Association membership has been the most rewarding experience of my professional life.

I view the great privilege I have been given to serve this Association as an opportunity to pay it and the profession back for everything they have given me. These are interesting and challenging times for our profession. Technology continues to reshape our world – making it smaller and more connected and making communication more immediate. The economy continues to flounder while governments at all levels come to grips with budgetary crises of almost unprecedented proportion. As a result, our clients – the individuals, businesses, and government entities who rely on our help – have greater needs but fewer resources. At the same time, the legal market is still adjusting to the Great Recession, struggling to find meaningful opportunities for new law school graduates while they cope with monumental debt caused by an unsustainable explosion in the cost of legal education.

The profession must adapt to these challenges. Under the tireless and dedicated leadership of immediate past president Stephen P. Younger, and thanks to the work of the Association's Task Force on the Future of the Legal Profession, we have a blueprint for change. The work of the Task Force, now adopted as Association policy, included far-ranging recommendations to embrace technologic change, revamp client relations, and improve legal education while looking for ways to reduce its cost.

VINCENT E. DOYLE III can be reached at vdoyle@nysba.org.

PRESIDENT'S MESSAGE

As we move forward to implement these recommendations, however, we must not lose sight of what has made us what we are. We must remember that we are a profession, not a business or an industry. While the profession must adapt to a changing world, we must not let the world change what defines us – the soul of our profession. At our core, we help others. We put our service to others above all other interests, including our own. We pursue not our own good, but what is best for those we serve. We hold these values so dear that we have written them into our code of conduct, policing ourselves to fulfill this promise to others. No matter how much the world changes, we cannot abandon these principles.

Indeed, I see the most important role of the Association as preserving and protecting the soul of the profession. Above all, the Association is a member service organization. To paraphrase our distinguished past president Bernice Leber, the Association helps our members help clients. We can best do this by helping to preserve the essence of the profession: a learned vocation, with strong ethical underpinnings and high aspirational ideals. The Association does this by giving its members invaluable practical benefits – high quality continuing legal education courses, authoritative texts and periodicals, and useful forms and practice guides – along with the opportunity to participate in any number of Association sections and committees dedicated to advancing substantive areas of law or other issues of special concern to attorneys. And, of course, the Association gives us the opportunity to get to know some of the finest attorneys, and people, around – companions on our quest to better ourselves and the system in which we work. Simply put, Association membership and active participation nurtures the soul of this great profession.

During my term as your president, I will devote myself to this ideal, and to serving the profession by serving our members and their values. We will look for ways to increase the diversity of the Association and the profession. We will help provide more opportunities for lawyers in all practice settings to do meaningful and fulfilling pro bono work. We will make the Association relevant to all our members, and plan our events and activities to be as family friendly as possible. We will advocate for the profession and for needed reforms in the justice system. And we will look to ensure that everyone in our society has access to effective legal representation. The theme of the coming year will be "Justice for All." This phrase, spoken at the end of the Pledge of Allegiance, is the promise of our enlightened country – justice for everyone regardless of their race, creed, station, or wealth. It is a promise that helps keep us peaceful and indivisible as a society. But it is a promise that is only as good as our efforts to fulfill it – efforts led by attorneys. We plan, administer, and operate the system of justice in this country. We are uniquely suited to do so because that is what we do best: help others.

I look forward to the coming year of service to the Association and to each of you. ■

Forms Products
Electronic and Print

NYSBA's Document Assembly Products.

Automated by industry-leader HotDocs® software. Increase accuracy, save time and money. Access hundreds of forms, including many official forms promulgated by the Office of Court Administration.

New York State Bar Association's Surrogate's Forms—Powered by HotDocs®
NYSBA's Trusts & Estates Law Section, Wallace Leinheardt, Esq.
Product Code: 6229
Non-Member Price: $561.00
Member Price: $479.00

New York State Bar Association's Family Law Forms—Powered by HotDocs®
Willard DaSilva, Esq.
Product Code: 6260
Non-Member Price: $514.00
Member Price: $440.00

New York State Bar Association's Residential Real Estate Forms—Powered by HotDocs®
Karl B. Holtzschue, Esq.
Product Code: 6250
Non-Member Price: $613.00
Member Price: $523.00

New York State Bar Association's Guardianship Forms—Powered by HotDocs®
Howard Angione, Esq. & Wallace Leinheardt, Esq.
Product Code: 6120
Non-Member Price: $618.00
Member Price: $528.00

NYSBA's Forms Products on CD.

Access official forms, as well as forms, sample documents and checklists developed by leading attorneys in their fields of practices. Avoid reinventing the wheel in an unusual situation, and rely instead on the expertise and guidance of NYSBA's authors, as they share their work product with you.

Estate Planning and Will Drafting Forms on CD-ROM—2010
Michael O'Connor, Esq.
Product Code: 60957
Non-Member Price: $115.00
Member Price: $95.00

New York Municipal Law Formbook and Forms on CD-ROM (Revised 2010)
Herbert A. Kline, Esq.
Nancy E. Kline, Esq.
Access more than 1,350 forms (over 230 are new) for matters involving municipalities.
CD-ROM Only • Product Code: 616009
Non-Member Price: $170.00
Member Price: $130.00

New York Practice Forms on CD-ROM—2010-2011
Access more than 600 forms for use in daily practice.
Product Code: 615011
Non-Member Price: $315.00
Member Price: $280.00

Commercial Leasing
Joshua Stein, Esq.
Access over 40 forms, checklists and model leases.
Book with Forms on CD-ROM • Product Code: 40419
Non-Member Price: $210.00
Member Price: $165.00

CD-ROM Only • Product Code: 60410
Non-Member Price: $90.00
Member Price: $70.00

Adoption Law: Practice and Procedure in the 21st Century
Golda Zimmerman, Esq.
Access over 50 forms used in adoption practice.
Book with forms on CD-ROM • Product Code: 40204C
Non-Member Price: $200.00
Member Price: $165.00

CD-ROM Only • Product Code: 60204
Non-Member Price: $55.00
Member Price: $40.00

ALSO: NYSBA Downloadable Forms
Visit **www.nysba.org/pubs** for a list of all forms by practice area that you can download for instant use

$5.95 shipping and handling within the continental U.S. The cost for shipping and handling outside the continental U.S. will be based on destination and added to your order. Prices do not include applicable sales tax.
***HotDocs pricing includes shipping and handling.**

To Order call **1-800-582-2452** or visit us online at www.nysba.org/pubs Source Code: PUB1081

NYSBA

NYSBACLE

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

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

Women on the Move
June 1 New York City

Estate Litigation
June 1 Buffalo
June 2 Albany
June 3 Westchester
June 9 New York City

Ethics and Professionalism 2011
(9:00 am – 1:00 pm)
June 2 Long Island
June 7 Rochester
June 10 Buffalo
June 13 Westchester
June 16 Albany
June 20 Ithaca

Employment Law for the General Practitioner and Corporate Counselor
June 3 Albany
June 14 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 and Transactional Lawyers
(9:00 am – 1:00 pm)
June 7 Albany; New York City
June 22 Long Island

Contaminated Property: Addressing Regulatory Clean-Up and Transactional Issues
June 9 New York City
June 10 Albany

Matrimonial and Family Law: What the Lawyer Needs to Know About Disclosure and Trial Preparation
(9:00 am – 1:00 pm)
June 10 Albany
June 17 New York City

Gain the Edge
June 15 New York City
June 16 Long Island

Negotiation Strategies for Transactional Attorneys and Negotiation Strategies for Litigators
(Transactional Attorneys: 9:00 am - 12:35 pm)
(Litigators: 1:30 pm – 5:05 pm)
June 17 Albany

Putting in Together: An Introduction to Entertainment Law Practice
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)
Albany
(video conference from NYC)

To register

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

In Albany and surrounding areas dial (518) 463-3724 • Or fax your request to (518) 487-5618
www.nysba.org/CLE (Note: As a NYSBA member, you'll receive a substantial discount)

The Best of the Journal – 2010

In each issue of the *Journal*, we strive to publish a mix of articles, so all of our readers – practicing attorneys, public and private sector attorneys, retired attorneys – no matter what their area of interest and practice, will find something that will interest, educate or (occasionally) amuse. Many *Journal* articles emphasize the practical, focusing on new rules, new technologies and changes in different practice areas. In the past few years we have run updates on insurance law, criminal law and appellate decisions; articles on the new power of attorney rules and adoption of the new Rules of Professional Conduct; and articles on how new technologies affect gathering and preservation of evidence. Others, such as our history pieces, are of more general interest – articles on Tammany Hall's price for a judgeship, the fall of a Senior Judge of the Second Circuit Court of Appeals and what happened the last time the New York State Senate was tied. Some articles mix the practical and the intriguing – a 2010 piece on psychology and the client comes to mind. Then there are the *Journal* columns – each issue features a column on evidence, two language columns and a variety of writings on tax law, e-discovery, real property law and the occasional point of view piece.

With these thoughts, the Editor of the *Journal* decided it was time to recognize some of the best writing we have been privileged to publish in the past year. We hope to make it a yearly event. The criteria are clear writing, with just enough snap to keep readers awake; good scholarship; and a topic that, on some level, has something for all our readers. Each winner will receive a beautiful certificate, suitable for framing.

Column: **David Paul Horowitz**, Burden of Proof, "CPR for the CPLR," January 2010.

A painfully honest (and pained) assessment of the shortcomings and vagaries of the rules of state civil court proceedings.

Feature: It's a tie!

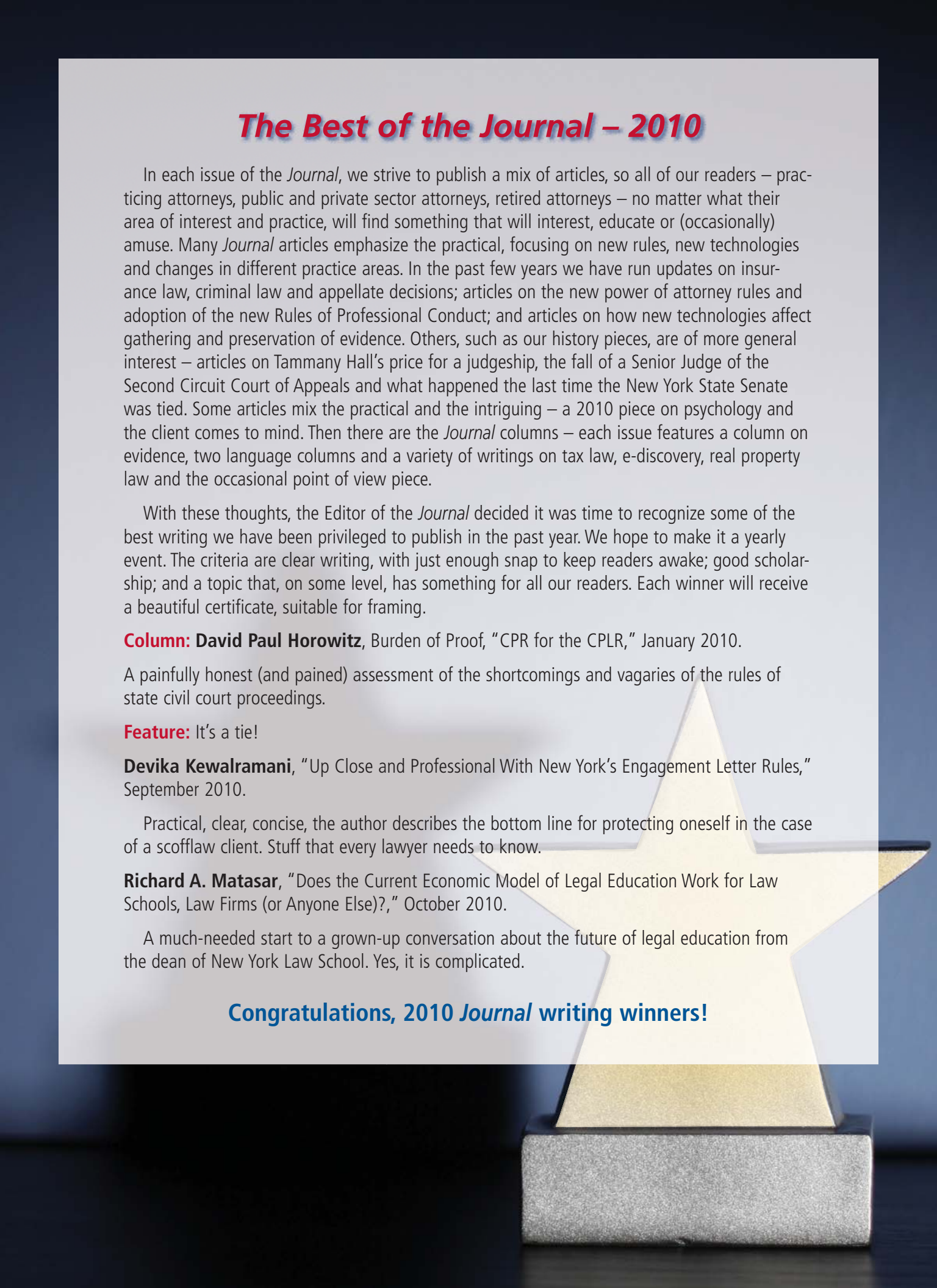
Devika Kewalramani, "Up Close and Professional With New York's Engagement Letter Rules," September 2010.

Practical, clear, concise, the author describes the bottom line for protecting oneself in the case of a scofflaw client. Stuff that every lawyer needs to know.

Richard A. Matasar, "Does the Current Economic Model of Legal Education Work for Law Schools, Law Firms (or Anyone Else)?," October 2010.

A much-needed start to a grown-up conversation about the future of legal education from the dean of New York Law School. Yes, it is complicated.

Congratulations, 2010 *Journal* writing winners!




Shakespeare
1609

Shakespeare Testifies – *Belott v. Mountjoy*

Are There Lessons for Today's Lawyer?

By William B. Stock

William B. Stock (wbstock@earthlink.net), appellate counsel to the Manhattan law firm of Cheven, Keely & Hatzis, received his B.A. in History from Yeshiva College and his J.D. from New York Law School. He also earned an M.I.L.S. degree from Pratt Institute.

Shakespeare "of Stratford upon Aven in the Countye of Warwicke gent"[1] [sic] was deposed. He was not asked profound queries about his inspiration for *Hamlet* or *Macbeth*, only five questions about the non-payment of a dowry. The interrogatories were initially in writing and "mynistred" verbally; Shakespeare's answers were taken down by an unknown hand. Yet they are the only actual words uttered by Shakespeare that were signed by him. His immortal verse and plays could always be disowned as a poet's imagination, but only his deposition reflects Shakespeare's human voice.[2]

> Legal proceedings in the Court of Requests moved with lightning speed compared to today.

The *Belott v. Mountjoy* lawsuit began in the Court of Requests in England in January, 1612 and reached a kind a resolution in December that same year. The documents lay unknown in the Public Records Office in London until they were unearthed in 1909 by an American researcher, Dr. Charles William Wallace, and his wife Hulda. This article will briefly discuss the story behind the *Belott* litigation and Shakespeare's key role in it and suggest lessons *Belott* may have for the attorney of today.

Every story, even tangentially about drama, should begin with a cast of characters and the locale. Christopher Mountjoy was a French Protestant who had fled to England in the wake of the St. Bartholomew's Day Massacre in 1572. He prospered as a maker of ladies' wigs and headgear. His claim to fame is that in about 1604 he was living in a house at the corner of Mugwell and Silver Streets with another tenant named William Shakespeare. Stephen Belott was Mountjoy's apprentice – and like him, also a Huguenot – who later became his son-in-law and, after a quarrel, his adversary in court.

Legal proceedings in the Court of Requests moved with lightning speed compared to today. The Bill of Complaint (equivalent to a modern-day summons and complaint) was dated January 28, 1612; the Answer was dated February 3, 1612. Their pleading system also allowed for something called a Replication (dated May 5, 1612) and a Rejoinder (undated). All were signed by attorneys. The Bill alleged, inter alia, that Mountjoy had promised Belott a dowry of 60 pounds[3] if he married Mountjoy's daughter Mary and also a legacy of 200 pounds. Not surprisingly, Mountjoy denied these allegations.[4]

On May 7th, a summons was issued to William Shakespeare and others to give evidence in Whitehall immediately.[5] Four days later, Shakespeare and two other non-parties did.

The text of the questioning began as follows:

> Interrogarories to be mynistred to Witnesses to bee produced on the parte and behalf of Stephan Belott Complainant against Christopher Mountjoye Defendant.
>
> 1. Inprimis whether doe you know the parties plaintiff and defendant and how longe have you known them and either of them. . . .[6]

Among those deposed on May 11, 1612, was Joan Johnson, a domestic in the Mountjoy household. She testified in remarkable part that

> [a]nd as shee Remembereth the deft did send and persuade one Mr. Shakespeare that laye in the house to persuade the plaintiff to the same Marriage/And more shee cannot depose.

More remarkable still, one Daniel Nicholas testified on May 11, 1612, and again to similar effect of June 19th that

> [o]ne William Shakespeare saye that did beare A good opinion of the plaintiff and affected him well when he served him, And did move the plaintiff by him the said Shakespeare to have [a] marriadge between his daughter Marye [and] the plaintiff. And for that purpose sent him the said Sh[akespeare] to the plaintiff to persuade the plaintiff to same, as Shakespeare told him this deponent which was effected and Solempnized upon promise of a porcion with her.

Two things emerge prominently from the testimonies of the non-Shakespeare witnesses of May 11th.

First, no one was absolutely certain what the terms of the dowry were. Johnson said "yt was Reported in the house" that the plaintiff was to have 50 pounds upon marriage. Nicholas said that Shakespeare told him plaintiff would receive "about the some of ffyftye pounds in money and Certayne Houshould stuffe." But no details were provided, and what Johnson and Nicholas testified to is obvious hearsay.

Second, Shakespeare played the role of a match-maker. But that is beyond the purview of this article.

The original text of Shakespeare's testimony is set out in a sidebar to this article. Its content and resulting impact were well set forth by the great scholar E.K. Chambers:[7]

> Obviously Shakespeare's own evidence was crucial. Unfortunately his memory failed him when he was examined on 11 May 1612. He had known the plaintiff and the defendant for ten years and could speak to the plaintiff's good behaviour as an apprentice and the defendant's good-will toward him. He had persuaded Belott to the marriage at the instigation of Mountjoy's wife. A portion had been promised, but he could not remember how much, or when it was to be paid, and knew nothing as to the alleged promise of a legacy or what goods had been promised to Belott.

Shakespeare's Testimony

William Shakespeare of Stratford upon Aven in the Countye of Warwicke gentleman of the Age of xlviii yeres or thereaboutes sworne and examined the daye and yere abovesaid deposethe & sayethe

1. To the first Interrogatory this deponent sayethe he knowethe the partyes plaintiff and deffendt and hathe know[ne] them bothe as he now remembrethe for the space of tenne yeres or thereabouts./

2. To the second Interrogatory this deponent sayeth he did know the comp[lainan]t when he was servant with the deffendant, and that duringe the tyme of his the complainantes service with the said deffendant he the said Complainant to this deponentes knowledge did well and honestly behave himselfe, but to this depontes remembrance he hath not heard the deffendant confesse that he had gott any great proffitt and comodytye by the said service of the said complainant, but this deponent saithe he verely thinckethe that the said complainant was A very good and industrious servant in the said service. And more he canott depose to the said Interrogatory:/

3. To the third Interrogatory this deponent sayethe that it did evydentlye appeare that the said deffendant did all the tyme of the said complainantes service with him beare and shew great good will and affecceon towardes the said complainant, and that he hathe hard the deffendant and his wyefe diverse and sundry tymes saye and reporte that the said complainant was a very honest fellowe: And this deponent sayethe that the said deffendant did make a mocion unto the complainant of marriadge with the said Mary in the bill mencioned beinge the said deffendantes sole chyld and daughter, and willinglye offerred to performe the same yf the said Complainant shold seeme to be content and well like thereof: And further this deponent sayethe that the said deffendantes wyeffe did sollicitt and entreat this deponent to move and perswade the said Complainant to effect the said Marriadge and accordingly this deponent did move and perswade the complainant thereunto: And more to this Interrogatye he cannott depose:/

4. To the ffourth Interrogatory this deponent sayth that the defendant promissed to give the said Complainant a porcion of monie and goodes in Marriad[ge] with Marye his daughter./ but what certayne porcion some he Rememberithe not./ nor when to be payed yf any some weare promissed, nor knoweth that the defendant promissed the defendant plaintiff twoe hundered poundes with his daughter Marye at the tyme of his decease./ But sayth that the plaintiff was dwellinge with the defendant in his house And they had Amongeste them selves manye Conferences about there marriadge which [afterwardes] was Consumated and Solempnized. And more he cann[ott depose]

5. To the vth Interrogatory this deponent sayth he can saye noth[inge] touchinge any parte or poynte of the same Interrogatory for he knoweth not what Implementes and necessaries of household stuffe the defendant gave the plaintiff in Marriadge with his daughter Marye./

Willm Shakper

There may be a deeper reason for Shakespeare's poor memory. A recent best-seller titled *Will in the World: How Shakespeare Became Shakespeare*[8] devoted a chapter to discussing why Shakespeare, almost uniquely among his contemporaries, seems to have left no records reflecting his personal views: no essays; no pamphlets; no personal papers; no letters. Beneath the glories of the Elizabethan era were intense political and religious pressures that could have persuaded a sensitive, perceptive man that the best policy to have in life was to keep a low profile on any controversial subject.[9]

The court ordered a second set of interrogatories on behalf of Belott for June 19, 1612. Curiously, someone wrote the name "William Shakespeare" next to the fourth interrogatory.[10] Yet the Bard of Avon never testified again. There were further interrogatories on behalf of Mountjoy on June 23, 1612, but again the testimony was inconclusive, and again Shakespeare did not appear.

The Court of Requests, apparently unwilling to "render a verdict on vaguely recalled hearsay evidence,"[11] referred the case to arbitration in the court of the French church, which found for Belott, but it only awarded him the sum of 20 nobles.[12]

It was unpaid a year later.

Does the *Belott* litigation have any lessons for the modern day practitioner?

First, one of the recurring themes of articles published in this journal is how lawyers can improve their work product. One way they can do so is to recall that, in theory, legal documents can last forever. Would Lincoln or Cardozo have imagined that decades after they ceased practicing law, scholars would search court archives to

find their words? No one knows on whom the light of posterity will shine, or whose client will be famous; therefore, one should practice law accordingly.

Second, with just a few small changes, the interrogatories and the written response would be in accordance with today's CPLR. It adds to an attorney's appreciation of the law to occasionally interrupt his or her busy practice to remember that he or she is part of a great chain of tradition stretching back hundreds of years.

Third, legal documents speak, even if by silence. Scholars have pored over the *Belott* papers and extracted much information about where Shakespeare lived and the kind of people he associated with. More important, in the words of Professor Wallace, these documents show Shakespeare "as a man among men."[13] Thus, they are unique. Even if no one threw in a question about the composition of *King Lear*, every legal document tells a story. It is up to lawyers to make sure the tale is well told.

There remains the question of Shakespeare's forgetfulness, which has already been touched on. Perhaps Shakespeare was honestly having trouble remembering the events of some 10 years before. He would die just four years later, in 1616, and he was past his play-writing prime.[14] If that is the case, then Shakespeare stands with the vast swath of humanity who have been deposed and have answered a question by saying they could not remember. Therefore, Reader, if you get such an answer at a deposition, you can take cold solace in that the deponent stands in the most august company possible. ■

1. Charles Nicholl, The Lodger Shakespeare 289 (Penguin Books 2007) (quoting the opening words of the deposition). This volume is one of the two primary bibliographic references for this article.

2. Shakespeare's Last Will and Testament is another personal document that is signed by Shakespeare, but it does not actually quote him.

3. Nicholl, *supra* note 1, p. xx. The author says the dowry would be worth about $12,000.

4. Such a lawsuit would be prohibited today by New York's Statute of Frauds. *See* N.Y. General Business Law § 5-701(a)(3); *see Daniels v. Daniels*, 243 A.D.2d 254 (1st Dep't 1997) (oral prenuptial agreement unenforceable).

5. The summons was marked "r Imed." Samuel Schoenbaum, William Shakespeare: Records and Images, 20 (London 1981). This volume is the second primary bibliographic source of this article (*Schoenbaum*). Quotations of Shakespearean-era documents are taken from *The Lodger Shakespeare* and *William Shakespeare: Records and Images*.

6. Schoenbaum, *supra* note 5, p. 24.

7. E.K. Chambers, William Shakespeare: A Study of Facts and Problems, 90, Vol. 2, (Oxford 1930).

8. Stephen Greenblatt, *Will in the World: How Shakespeare Became Shakespeare*, ch. 5 (W.W. Norton 2004).

9. Shakespeare was no naïf when it came to litigation. *See* Greenblatt, *supra* note 8, pp. 361–63, 364.

10. Schoenbaum, *supra*, note 5, p. 39. Perhaps this is analogous to the practice of an attorney during a modern deposition making a note to return to a point and question a witness further.

11. Schoenbaum, *supra* note 5, p. 39.

12. According to Michael LoMonico, *Shakespeare 101* p. 48 (Gramercy Books 2001), a noble was worth between $140 and $200 in 2001.

13. The phrase comes from the article by Charles William Wallace, New Shakespeare Discoveries: Shakespeare as a Man Among Men, *Harper's Monthly Magazine*, Vol. CXX, 496 (1910) (cited in various sources).

14. Nicholl, *supra* note 1, p. 276.

BY DAVID PAUL HOROWITZ

David Paul Horowitz (david@newyorkpractice.org) practices as a plaintiff's personal injury lawyer in New York and is the author of *New York Civil Disclosure* (LexisNexis), the 2008 Supplement to *Fisch on New York Evidence* (Lond Publications), and the *Syracuse Law Review* annual surveys on Disclosure and Evidence. Mr. Horowitz teaches New York Practice, Evidence, and Electronic Evidence & Discovery at Brooklyn, New York and St. John's law schools. A member of the Office of Court Administration's CPLR Advisory Committee, he is a frequent lecturer and writer on these subjects.

Just Sit There and Be Quiet

Introduction

Very often physicians are deposed in advance of trial, and the deposition testimony is used at trial pursuant to CPLR 3117(a)(4):

> [T]he deposition of a person authorized to practice medicine may be used by any party without the necessity of showing unavailability or special circumstances, subject to the right of any party to move pursuant to section 3103 to prevent abuse.[1]

The rule permits a physician's trial testimony to be obtained at a time convenient for the physician, and then permits the testimony to be read or, if the deposition is videotaped, shown to the jury.

The method of conducting the deposition is governed by CPLR 3113(c):

> Examination and cross-examination. Examination and cross-examination of deponents shall proceed as permitted in the trial of actions in open court. When the deposition of a party is taken at the instance of an adverse party, the deponent may be cross-examined by his own attorney. Cross-examination need not be limited to the subject matter of the examination in chief.

The Dispute at a Non-Party Physician's Deposition

In a medical malpractice action the plaintiff's counsel deposed several treating physicians to preserve their testimony for trial pursuant to Uniform Rule 201.15.[2] During one of the videotaped depositions, counsel for the non-party physician made repeated objections to, *inter alia*, form and relevance. The plaintiff's counsel objected to the actions of the attorney representing the witness, but no agreement could be arrived at during the deposition. The deposition was suspended, and the plaintiff's counsel moved for an order "precluding . . . [the non-party physician's] counsel from objecting at the videotaped trial testimony except as to privileged matters or in the event that she were to deem questioning to be abusive or harassing."

The Decision of the Fourth Department

The plaintiff's motion was, for all practical purposes, denied, and on appeal, the Fourth Department's memorandum decision addressed both the conduct of the attorney representing the non-party and the relief fashioned by the trial court:

> In its order deciding the motion, Supreme Court directed that plaintiff and defendants are to "consider providing general releases to the [physicians] . . . with respect to their initial treatment of [plaintiff]" and that, if such releases are provided, plaintiff will "be entitled to have a videotaped deposition of [the physicians] during which deposition the attorneys for the [physicians] shall not be permitted to speak." The order further provided that, if the general releases are not provided, then the attorneys for the parties and the physicians "shall seek to work out ground rules for a non-party deposition" of the physicians. The order then provided that, if the attorneys are unable to "work out ground rules," plaintiff will not be entitled to take the videotaped depositions of the physicians and they "are to be subpoenaed to testify" at trial.

We agree with plaintiff that counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pre-trial deposition. CPLR 3113(c) provides that the examination and cross-examination of deposition witnesses "shall proceed as permitted in the trial of actions in open court." Although counsel for the physicians correctly conceded at oral argument of plaintiff's motion in Supreme Court that she had no right to object during or to participate in the trial of this action, she nevertheless asserted that she was entitled to object during nonparty depositions and videotaped deposition questioning. We cannot agree that there is such a distinction, based on the express language of CPLR 3113(c). Indeed, we discern no distinction between trial testimony and pre-trial videotaped deposition testimony presented at trial. We note in addition that 22 NYCRR 202.15, which concerns videotaped recordings of civil depositions, refers only to objections by the parties during the course of the deposition in the subdivision entitled

"Filing and objections." We thus conclude that plaintiff is entitled to take the videotaped depositions of the physicians and that counsel for those physicians is precluded from objecting during or otherwise participating in the videotaped depositions.

Lastly, we note that the practice of conditioning the videotaping of depositions of nonparty witnesses to be presented at trial upon the provision of general releases is repugnant to the fundamental obligation of every citizen to participate in our civil trial courts and to provide truthful trial testimony when called to the witness stand. Contrary to nonparty respondents' contention, the fact that the statute of limitations has not expired with respect to a nonparty treating physician witness for the care that he or she provided to a plaintiff provides no basis for such a condition.[3]

The Impact of the Decision

The Fourth Department, while citing to the CPLR and Uniform Rules, cited no case law in support of its holding. Objections to relevance would not normally be permitted during the course of a deposition under the deposition rules set forth in Uniform Rules Part 221, and the counsel representing the parties at the deposition clearly have an incentive to make any necessary objections to form, just as they would at trial.

However, there are questions that potentially invade a privilege, such as medical questions of the witness that exceed the scope of the waiver of the medical privilege in the case. Additionally, the witness could be asked questions that could lead to an answer that incriminates the witness, such as questions directed to, for example, fraud in billing for services. In the underlying motion, counsel for the plaintiff had proposed permitting counsel for the non-party physician to make these objections. Should the attorney representing the non-party witness be prevented from asserting those privileges on behalf of the non-party witness client?

The deposition rules contained in Uniform Rules Part 221 permit counsel to confer with the witness in order to determine whether to assert a privilege:

> An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.[4]

"I'm beginning to think email stands for 'endless mail'."

The rules also permit counsel to direct the witness not to answer a question that invades a privilege:

> A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality.[5]

The Fourth Department's holding in *Thompson* is reminiscent of an early (albeit pre-deposition rules) case, *Spatz v. World Wide Travel Services, Inc.*,[6] where the court announced:

> Counsel is without authority to direct a witness to refuse to answer questions at an examination before trial.[7]

Like *Thompson*, *Spatz* offered no case citation for this proposition, yet most attorneys, confronted with a warning that *Spatz* did not permit an attorney to direct a witness not to answer a question, continued to do so. The deposition rules do not mention non-party witnesses or their counsel. Since counsel for the parties do not have a duty, or very often a motivation, to assert a privilege for the non-party witness, fairness would appear to require that the attorney defending the non-party witness be permitted to do so.

Conclusion

Under the rules, counsel for a party who represents a non-party at a deposition may make these objections, and direct a witness not to answer questions, where appropriate. The distinction under *Thompson* is the status of the counsel for the witness, not the witness's status. Whether this distinction warrants the disparate treatment mandated by the Fourth Department is an issue that may require further analysis. ■

1. CPLR 3117(a)(4).
2. *Thompson v. Mather*, 70 A.D.3d 1436 (4th Dep't 2010).
3. *Id.* at 1437–38 (citation omitted).
4. Uniform Rules Part 221.3 "Communication with the deponent."
5. Uniform Rules Part 221.2 "Refusal to answer when objection is made."
6. 70 A.D.2d 835 (1st Dep't 1979).
7. *Id.* at 835.

New York Lawyers – The Good We Do

EXPRESSIONS

Do you have a story to tell….

Have you worked on a special Pro Bono project?

Have you had a poignant experience you'd like to share?

Has your community service work improved the lives of others?

We invite you to submit your own stories of inspirational experiences, community service, pro bono activities or cases that have changed your life and your practice of law. Stories submitted may be featured in "Expressions," an online collection of essays that collectively highlight "New York Lawyers, The Good We Do." As a general guideline, submissions should be in the range of 750 to 1,000 words.

For a complete set of instructions please go to **www.nysba.org/thegoodwedoguidelines.**

Remarkable stories may be selected for expansion into video vignettes and will be posted under Expressions on the NYSBA website. Please join us in sharing the untold stories of New York lawyers making a difference – celebrate your good work and inspire others.

Email your submissions to **thegoodwedo@nysba.org.**

NYSBA

Do the Right Thing

Networking, Mentoring, Business and Leadership Development for the Diverse Attorney

During the New York State Bar Association's 2011 Annual Meeting, the NYSBA Committee on Diversity sponsored a roundtable discussion titled "Do the Right Thing." The panelists shared their thoughts on the challenges and best practices with respect to the crucial skills of networking, mentoring and business and leadership development. What follows is a slightly edited transcript of that discussion.

Panelists

Lillian M. Moy, Executive Director, Legal Aid Society of Northeastern New York

I. Javette Hines, Senior Vice President, Supplier Diversity and Sustainability, Citigroup (Citi)

Brenda L. Gill, Vice President, Head of Strategy for Global Accounts, Thomson Reuters Markets

Stacey Schwartz, Diversity Development & Programs Supervisor, Skadden, Arps, Slate, Meagher & Flom, LLP

Betty Lugo, Partner, Pacheco & Lugo, Attorneys at Law

James P. Chou, Past President, Asian American Bar Association of New York; Senior Counsel, Akin Gump Strauss Hauer & Feld LLP

William Edwards, Attorney, Enforcement Division, U.S. Securities & Exchange Commission

Introduction

Moy: These skills – networking, mentoring, business and leadership development – are so interrelated. Can we really have successful business development without good networking skills? Can we learn leadership skills from our mentors? Can we develop our leadership and business without good mentoring?

Hines: Business development is essential to ongoing success. My focus especially will be on mentoring as an essential ingredient to success. To find the right mentor,

broaden your conception of who and what a mentor can be. Look at various ways to initiate a relationship.

Gill: Owning your own career and brand is key to my offering. Always be aware of your brand. In one word, what would it be?

Schwartz: I spend a lot of time counseling associates on how associates are often branded with the attitude they project. Attitude is so important. You would be surprised at how being positive and cheerful about the work you do will help you get ahead.

Networking

Chou: My focus will be on networking, which is important for our careers. Many of us haven't been taught how to network and have had to learn this later in our careers. In my experience, networking can lead to many business and professional opportunities. You never know where a contact will lead -- your next client, a new mentor, a political appointment, etc.

Lugo: I believe that good networking skills are crucial to business development. In 1992 I founded the first Hispanic women-owned law firm in New York at One World Trade Center. In order to develop our business, both my business partner Carmen A. Pacheco and I drew from our business contacts and networked a great deal. We marketed ourselves and acted as our own publicist. As a result we have developed a brand that is well respected within our community and the legal profession. We attended and spoke at numerous conferences and events that specialized in our areas of practice: Banking, Corporate, Commercial and Insurance Litigation. We conducted free seminars for startup businesses in corporate and government offices, churches, libraries and banks. We assisted many small businesses in connecting with the Wall Street community in terms of joint venture, access to capital and business development.

Moy: Networking – how do you learn what your parents can't teach you?

AABANY [Asian American Bar Association of New York] has a wonderful presentation on how to learn more about networking that is applicable to many different contexts.

Chou: I started out as a typical associate – staying in my office and working all the time. I didn't really begin networking until I came to AABANY at the suggestion of my client – the then-law chair of the Manhattan Democratic Party – who I was working with on the landmark case of *Lopez Torres v. New York State Board of Elections*. He suggested that getting involved in a specialty bar was a good way to develop my career and explore opportunities. He was right – my involvement with AABANY opened a new world for me. I met, befriended and actively developed friendships with colleagues, mentors, and business contacts. Through these experiences, I have come to

Lillian M. Moy

understand that networking is not simply meeting people at a function. It is purposefully developing and cultivating a community of relationships that enrich and enhance both your life and career. It is an endeavor that requires that you have goals and objectives for your networking activities and to be intentional in pursuing those goals. It requires you to understand the message and "brand" that you want to communicate to others.

Good networking takes practice: attending different functions; knowing your "audience." After getting business cards, follow up by phone or email. Set up a lunch and cultivate the relationship.

Gill: Branding is a huge part of this: what is your message? Personal branding is the creation of a living asset. This includes developing an appearance that is uniquely distinguishable. Develop your best elevator pitch. Start by asking three trusted mentors to describe your unique characteristics. Use this information to help craft a message tailored to your audience – sometimes lawyers, sometimes business contacts. Start by showing your knowledge and tailor your conversation.

Moy: What do we say to people who say that is so phony and insincere?

Gill: It's human. Talk to people like you do your friend – not necessarily about business. I like the color you're wearing. Tell a success story. Someone came up to me after I did a PLI panel and said I would like to talk to you for 15 minutes. She made an appointment. She was on time; she had prepared a few questions.

Schwartz: The 15-minute telephone call – even if you're unemployed. Follow up and make it happen. It feels good to be able to help people. It may feel awkward but remember networking to make a move should be framed

Stacey Schwartz

William Edwards

I. Javette Hines

as a positive thing. I want to chat with you so I can learn more about your practice.

Moy: And what about using social networking?

Edwards: Social networking – I always counsel young lawyers that Facebook is a no-no because of the structure of Facebook. I like LinkedIn as a better tool for professional networking.

Hines: Definitely go with LinkedIn and limit your Facebook usage.

Gill: Do not take the card if you are not going to follow up. You can even use an old fashioned method such as email.

Mentoring

Hines: What is mentoring versus sponsorship?

Gill: Mentoring would often be someone who looks like me: I would talk about my next job. I might talk to them about friendship issues. I do distinguish mentoring from sponsorship. My sponsors have tended to be people who do not look like me. My sponsors were responsible for me getting the role I have at Thomson Reuters, which didn't previously exist. My sponsors knew my reputation and credibility and they would speak up for me when I was not there.

Edwards: Many of my mentors do not look like me and I deliberately looked to substantive experts to develop my own substantive expertise.

Schwartz: Formal mentorship at Skadden lasts three years or longer and your mentor and you have clearly defined roles. In our experience, a formal, tailored program seems to work better so the mentor and mentee understand the expectations, such as how often you will meet. Informal mentoring has been very helpful to me. I look for mentors who have work/life balance, which I seek to achieve, and I try to create relationships with women who balance work and personal life the way I want to balance it. She might be someone who has not necessarily achieved balance, but who works on it. I also enjoy being a mentor.

Lugo: I was mentored by Justice Irma Vidal Santaella, the first Hispanic woman elected to the Supreme Court, in Bronx County in 1984. I first met her after having received a congratulatory note on my passing the New York State Bar Examination. Judge Santaella wrote a similar letter to all attorneys with a Spanish surname who were on a list in the *New York Law Journal* as having passed the bar and invited them to meet with her. I visited with her in court and she was quite gracious and we became good friends. We started our firm in the World Trade Center at her recommendation as being a safe place for two women to start a firm. She continued to mentor us and invited us to social gatherings at her home where we met members of the judiciary, politicians, dignitaries and community leaders.

We in turn have mentored many young students, associates and businesses. We adopted Public School 274 in Bushwick section of Brooklyn, New York, and awarded scholarships to a group of fifth graders. We also follow their progress and assist them. We hire high school and college interns and mentor them in their interest in the legal field. We also actively mentor law students and young associates. I try to be very hands-on and mentor on the basics such as school, education, work ethic, courtesy, professionalism, respect, how to interact with people, even how to choose a mentor.

Edwards: Most important to me is to have substantive similarities. You might also want a co-racial confidante – someone in your ranks or above. It is very important to have someone to talk to when negative or biased comments come from a client or colleague. But on a day-to-

day basis there will be projects and assignments within your practice group, and it is absolutely essential to navigate with guidance. Knock on a door – be a pest. In New York City, so many lawyers are liberals and they would love to have an attorney of color seek them out. They will bend over backwards for you. Remember, you do have allies in the firm – seek them out as soon as possible.

Hines: How do you move from networking to mentoring?

Chou: Your relationships will develop and evolve differently. Some will be more experienced and ideally situated to mentor and help you navigate your career. There will be some with whom you can be more candid. Others will develop into peers with whom you bounce ideas regarding substantive work. The mentoring relationship will often develop on its own, and informally, but it does often require you to be proactive in seeking out the mentor's time.

Lugo: As a mentor, I'm proactive. I have told law students to get out and network. Always have at least one nice suit and go to different functions and meet people. If you're my mentee and you need clothes, then I will take you shopping for clothes. Mentees have to be able to follow through on their end to take full advantage of a mentoring relationship. Mentees have to have the ability and willingness to be on it – to have a professional appearance, to be accessible when the mentor can provide something valuable. The mentor must also take personal and family issues into consideration and be compassionate but proactive at all times.

Gill: To add, there is a continuum to what mentees should come prepared with. Mentees should be respectful of mentors' time. Prepare an agenda and questions for your mentor to advise on. Mentees can ask me for 15 to 20 minutes of my time but should do some research on my background and experience so that our time together is beneficially utilized.

Schwartz: I have seen how awkward it can be for partners to give candid feedback. Sometimes the partner is not fully satisfied with the work product but is reluctant to give criticism because they are afraid to hurt someone's development. Unfortunately, this is a place where it could be helpful to ameliorate the situation. Instead the partner will say, thanks, I'll take it from here and the associate doesn't know what he means by that. So, a mentee should follow up and ask for feedback that is candid and indicate their full appreciation of such feedback. We're conscious about that in our mentoring program, such as the importance of candid feedback and we try to help partners and senior associates surface the issues that associates need to work on. They have to get down to the details of the day in terms of what to get done.

Hines: Whether your mentoring relationship is formal or informal, guidance at the beginning is very helpful. Mentees should say to the mentor, feel free to be candid. If it's not working out, let me know.

Chou: I agree that a mentee has to come prepared. We're all very busy, and the mentees must be prepared and conscious of the time demands on all of us. Mentees will often need to be proactive in scheduling time with mentors.

Hines: When does that stop? What if your efforts to schedule time with your mentor are just not working out?

Chou: Everyone is different. There are some that you have to keep following up on before they schedule something simply because they're swamped. There are others where you know that after two or three calls without a response, it's time to move on.

Hines: What about reverse mentoring?

Edwards: I haven't had that experience but I would like to think that I try to give positive reinforcement to mentors for when they mentor their next person.

Gill: Thomson Reuters has a reverse mentoring program that is quite unique. Reverse mentoring is designed to help all participants gain a better understanding of the people who make up our business, share what we learn and make changes where needed. A reverse mentoring relationship involves an employee that is junior to, or of a different race, gender or sexual orientation than, the mentee, and who provides guidance to and shares experiences and insights with the mentee, who in this case is a more senior person. This creates a unique opportunity for

those at different levels in the organization to share their experiences with Senior Leadership. The purpose is to have candid dialogue about each person's unique set of experience – their perspective. Through the dialogue that typically occurs monthly over a period of six months, the mentee/mentor can discuss topics such as bias, diversity and cultural/regional differences. The reverse mentoring program helps the dominant group recognize that biases are natural, but there are negative outcomes that can arise from subconscious biases of the dominant group. It also helps people understand that some people can be the beneficiary of certain privileges based on how they look, while other people can suffer from negative assumptions based on how they look.

Moy: I don't play golf, tennis or squash. How can I build a book of business?

Edwards: Some suggestions include co-authoring an article, getting your name out there; asking your partner to bring you to meetings with clients. Build substantive expertise and align yourself with a leader.

Hines: Be varied in your expectations. I do own golf clubs but they are rarely used. Substantively, I'm at the top of my game. I'm also a writer and a singer and try to let people get to know me as a person. I believe in doing substantial community outreach and civic activities.

Lugo: I golf and I sing karaoke. Everyone likes to get up and sing after a few drinks. I go to many different community activities and local parades. I try to be very involved in events where I can help others, and I attend many community events to meet people, network and generate business.

Hines: From the community perspective, I work on State Bar issues, with my sorority, and The Links, Incorporated. In the past, I have also been active with the Association of Black Women Attorneys and the New York Metro Chapter of the National Black MBA Association.

Moy: So, does being a Bar leader lead to business?

Chou: In my experience, yes. Through my Bar involvement, I have gotten to know many in-house and general counsel. So my Bar service has definitely resulted in opportunities and new clients.

Lugo: Yes. You have to be proactive and let others know who you are and your specialty. It also provides you with a local platform for marketing. As former president of the Hispanic National Bar Association Region I, in 1993, and current chair of NYBSA Diversity Committee, I believe that Bar association activities helped me to market myself and my firm and we also began to take on high profile cases relevant to the community.

Moy: We asked the Bar presidents in the room for their thoughts about this: Ken Standard, no; Steve Younger, yes – had my best year; Assad Siddiqi, yes; John Higgins, led to many connections but not money.

Now, how about leveraging our own diversity as minority- or women-owned businesses?

Lugo: As minority- and women-owned businesses, we must seek out opportunities. To date, minority- and women-owned law firms and attorneys are still underrepresented in doing business with government and corporate America. I applaud Governor Paterson for recently passing a new law – the Business Diversification Act of New York. It requires state agencies to give 20% of their contracts to minority-and women-owned business enterprises – MWBEs. We plan to have a future CLE specifically on this act and how access to contracts for legal services with the state can be addressed. For start-

Brenda L. Gill

James P. Chou

Betty Lugo

ers, all minority and women attorneys should make sure they are certified with New York State as opportunities surface, especially for lawyers. This applies to partners and associates of large firms. There can be joint venture agreements so when networking, try to meet firms who want to work with you.

Hines: For example, TARP and the Dodd-Frank Act. There are lots of opportunities for diverse attorneys.

Chou: In recent years, many clients have emphasized diversity and have done the diversity movement a great service. For example, many companies are now emphasizing the importance of having diverse attorneys on the teams that are providing them legal services. Some clients actually scrutinize bills and billing descriptions to confirm that diverse attorneys are working on their matters and are not just showcased at pitches.

Hines: Law firms now have to look at diversity as a business essential through the procurement process.

Leadership and Career Development

Hines: Let's look at leadership and career development – what are the steps you took?

Gill: I'm what's called an "intrapreneur." Intrapreneurship is the act of behaving like an entrepreneur, except within a larger organization. It's an employee initiative to undertake something new, without being asked to do so. According to Wikipedia, "the intrapreneur focuses on innovation and creativity and transforms an idea into a profitable venture, while operating within the organizational environment." I created a value proposition that would help drive efficiencies within a group by harvesting/sharing the collective wisdom of that group. I developed a business and marketing plan and I strategically moved my career forward. I wanted to stay within the company so I re-tooled my career to get the job that I wanted. When I get a job, I'm already thinking of the next job and we all should be doing that.

Edwards: My focus at Wachtell was on white-collar work. I represented the defense side and the FCC noticed me. Six years later during my interview at the SEC, someone said, hey, I noticed you when you were there on the other side. So you never know what connections you make that will later become valuable. Your future is always in the background of what you're doing now.

Hines: How do you advise young associates who are focused on building a practice and developing a leadership tool kit?

Schwartz: Focus on who you are talking to during the networking process. What are the key relationship skills?

Chou: Be proactive. Take on service and leadership roles in the community.

Hines: What about derailment figures to being considered a leader?

Lugo: Have we made any changes? I believe that there are some opportunities for minority and women attorneys but we are still relegated to fighting for a small piece of the pie. Even as the first Hispanic women-owned law firm in New York, it is still difficult to compete for business with the larger firms who have historically received the lucrative work from government and corporate America.

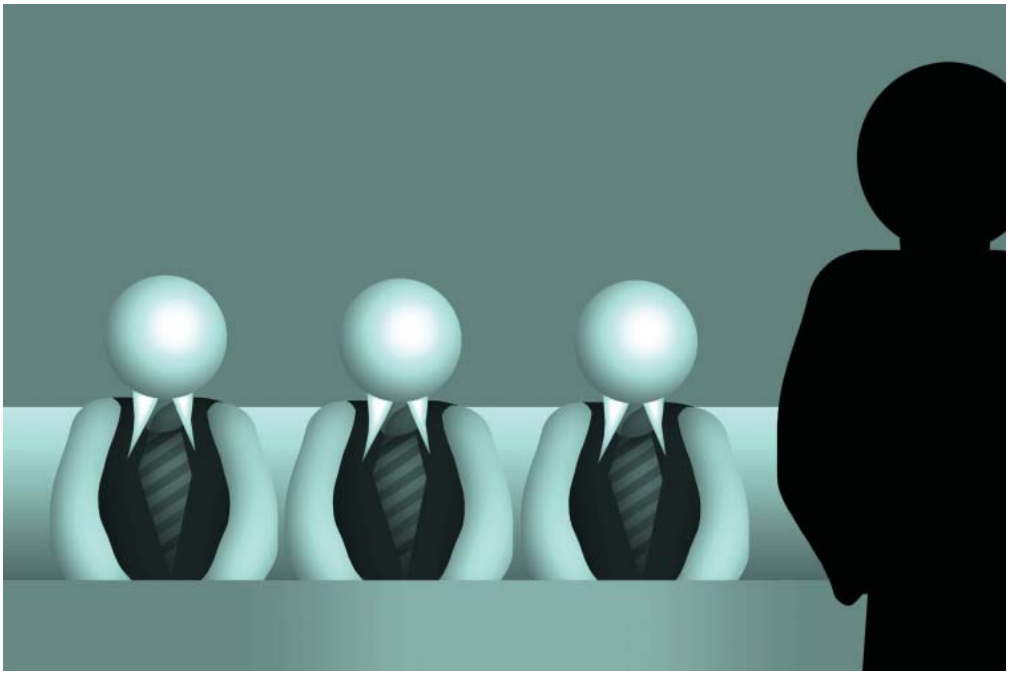
Gill: It starts with owning the room or acting as if we do. Sometimes we have to fake it until we make it and understand the law firm and corporate culture.

Hines: What is the nugget we want to leave the audience with about networking, mentoring and business relationships?

Hines: Don't check out before you check out. When it was taking more time than I wanted to get to the next level, the answer seemed to be start looking, leave. However, my mentor said wait for the right opportunity and whatever you do, don't check out before you actually "check out."
Edwards: Don't wait too long before you figure out what you want to be.
Gill: It's your career – manage it like a business. Own your success. Do not be defined by society's limitations. The difference between being ordinary and extraordinary is that little "extra."
Schwartz: Know your skills and be able to articulate them. I've always liked the acronym SOAR – Situations, Observe, Action, and get a Result. Keep that in your back pocket.
Chou: Don't just stay in the office all day and then go home. Go out and network and develop relationships. Get involved with Bar associations in your community because it will lead to work.
Lugo: Be positive, kind and responsible. Practice the golden rule. "Do unto others, as you would have others do unto you." We must always thank and appreciate each other and we must always be professional and courteous.

Questions and Answers

Question: As golf is used for bonding and assignments – you may be minimizing its role?
Gill: Maybe you don't play golf, but you have to find some other ways to get time with the right people.
Chou: There's always poker and X-box. The point is that there are other common passions and interests that will naturally lead to relationships.
Lugo: We should play golf.
Question: I never thought of asking anyone to be my mentor. Was that a mistake?
Gill: It's a very individualized decision.
Lugo: Do not limit yourself to your own group. Don't limit yourself to the legal field. Explore all opportunities.
Gill: There are lots of places in business or elsewhere. ■



John J. Brunetti is a judge of the New York Court of Claims, having been appointed in 1995. He is presently serving as an Acting Supreme Court Justice in Onondaga County, Syracuse, N.Y. This article first appeared, in a slightly different format, in the Spring 2011 *New York Criminal Law Newsletter*, a publication of the Criminal Justice Section of the New York State Bar Association.

The Flaw in New York's Reasonable Doubt Instruction

By John J. Brunetti

In its 1996 opinion in *People v. Cubino*,[1] the Court of Appeals dubbed the Criminal Jury Instructions 1st 6:20 (CJI) pattern instruction the preferred phraseology to be used by New York trial judges in conveying the concept of reasonable doubt: "The doubt, to be a reasonable doubt, should be one which a reasonable person acting in a matter of this importance would be likely to entertain because of the evidence or because of the lack or insufficiency of the evidence in the case (CJI 6:20, at 249)." Understandably, the Second Edition of CJI includes almost identical language, citing *Cubino*.[2] Aside from the fact that it uses one of the two terms to be defined (doubt) in its definition and uses the adjective "reasonable" to modify a "person" rather than a "doubt," the instruction's major flaw is its use of "matter of this importance" to describe the context in which jurors are acting. Its failure to provide jurors guidance in assessing the matter's importance results in each juror being free to ascribe whatever degree of importance he or she sees fit, resulting in the possible application of 12 different definitions of "reasonable doubt" in the same case.

What Preceded *Cubino*'s Adoption of CJI 1st 6:20?

Prior to 1777, in colonial New York, jurors were all on the same page when it came to the importance of the matter on trial because a right to a trial by jury meant a right to a jury aware of the possible penalty.[3] Knowledge of that fact makes it easy to understand why, up until 1889, New York state courts were receptive to defendants' complaints that trial courts failed to advise the jury of the penalty.[4]

Just four years later, in 1893, in *People v. Hughes*, our Court of Appeals approved of a definition of reasonable doubt analogizing voting guilty or not guilty in a criminal case to important decisions made by jurors in their daily lives – "very grave and serious matter, affecting their own affairs, they would not hesitate to act upon such conviction."[5] The Court relied upon an 1880 United States Supreme Court opinion that approved of an instruction in a federal criminal case analogizing the context of a juror's vote to "matters of the highest concern and importance to his own dearest personal interests."[6]

In 1910, in another federal criminal case, the U.S. Supreme Court approved language that retained the "hesitate to act" phrase, but transposed the focus of the

importance from the personal affairs of jurors to a "matter of like importance."[7]

In 1954, a third federal criminal case, *Holland v. United States*,[8] presented the Court with a return of the personal affairs analogy. In finding that the trial court mis-expressed the definition, the Court added that the analogy to personal affairs "should have been in terms of the kind of doubt that would make a person hesitate to act." According to the 2007 edition of a popular treatise on federal criminal jury instructions, the language recommended by the Supreme Court in *Holland* is found in the "most common definition" of reasonable doubt used by the federal trial courts.[9]

What Is the Problem With the Analogy to Personal Affairs?

Justice Murphy of the First Department, dissenting in the *Cubino* case that led to the Court of Appeals's approval of CJI 1st 6:20,[10] deemed the analogy to personal affairs a "fallacy of equating the degree of certainty we demand in matters of personal importance, with that constitutionally required in support of a juror's vote to convict one accused of crime." He then cited cases holding that such an instruction not only reduces but trivializes the burden of proof in criminal cases,[11] and quoted an oft-cited Vermont opinion containing the observation that decision-making in personal affairs "involves the balancing of advantages and disadvantages and the decision is reached upon a mere tip of the balance. . . . If people really did make important personal decisions only when convinced beyond a reasonable doubt as to their correctness, human activity would evidence far more inertia than it does."[12]

U.S. Supreme Court Justice Ginsburg's criticism of the personal affairs analogy centers on the fact that decision-making about future events necessarily involves risk-taking and has nothing to do with the resolution of conflicting positions concerning past events. She quoted a report by the Judicial Conference: "In the decisions people make in the most important of their own affairs, resolution of conflicts about past events does not usually play a major role. Indeed, decisions we make in the most important affairs of our lives – choosing a spouse, a job, a place to live, and the like – generally involve a very heavy element of uncertainty and risk-taking. They are wholly unlike the decisions jurors ought to make in criminal cases."[13]

A federal appeals court judge, writing about his days as a trial judge, had this to say about "hesitate to act": "Although, as a district judge, I dutifully repeated [the 'hesitate to act' standard] to juries in scores of criminal trials, I was always bemused by its ambiguity. If the jurors encounter a doubt that would cause them to 'hesitate to act in a matter of importance' what are they to do then? Should they decline to convict because they have reached a point of hesitation, or should they simply hesitate, then ask themselves whether, in their own private matters, they would resolve the doubt in favor of action, and, if so, continue on to convict?"[14]

Over the course of the 20th century, the "hesitate to act in personal affairs" analogy slowly made its way into New York jurisprudence[15] to the point where, in 1993, the concept was said by the Appellate Division, First Department to be "firmly embedded in the accepted definition of reasonable doubt."[16] Just three years later, the Court of Appeals "disembedded" the analogy to a juror's personal affairs,[17] saying "[t]he comparative characterization used in the instruction by the trial court in this case was less definitive and potentially more troublesome than the preferred language [CJI 6:20] and such variations should be avoided."[18]

Despite all of these criticisms, the 1994 decision of the U.S. Supreme Court in *Victor v. Nebraska*[19] placed its imprimatur upon a definition of reasonable doubt as "a doubt that would cause a reasonable person to hesitate to act . . . a formulation [the Court has] repeatedly approved,"[20] citing the case that approved of the analogy to personal affairs.[21]

The Lack of Universal Agreement

While the Constitution requires that the prosecution prove a criminal defendant's guilt beyond a reasonable doubt,[22] there is no universal agreement on a definition of "reasonable doubt."[23] In fact, the Seventh Circuit has both "admonished" the district courts in that circuit for defining "reasonable doubt"[24] and "forbidden" them from doing so.[25] Yet, empirical studies show that "reasonable doubt" is not self-explanatory,[26] and the failure to define the term "leaves the juror no choice but to use a standard of proof based on his own 'common sense.'"[27]

Unlike the Seventh Circuit, which exercises supervisory power over its district courts, the U.S. Supreme Court concedes that it has "no supervisory power over the state courts" as to how reasonable doubt should be defined.[28] The scope of the Supreme Court's review of state court reasonable doubt instructions is limited to determining whether or not the instruction invites the jury to convict on proof less than that required by the due process clause, i.e., whether or not the trial court "impress[ed] upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused."[29]

Closer to home, three years before *Cubino*'s adoption of CJI 1st 6:20 as the preferred phraseology, there was a lack of universal agreement among the departments of the Appellate Division on the definition of "reasonable doubt" and the propriety of equating "reasonable doubt" with "moral certainty." As the Third Department then explained:

> The terms "to a moral certainty" and "beyond a reasonable doubt" have been held to be synonymous by the

> First Department. However, the Second Department held that equation of "beyond a reasonable doubt" with "moral certainty" is error. We have found that a charge using the terms, taken as a whole, correctly placed the burden of proving guilt beyond a reasonable doubt upon the prosecution. In our view something additional to the mere use of the term 'to a moral certainty' that lessens the People's burden of proof is required to render a trial court's charge reversible error.[30]

Where Did CJI 1st 6:20 Come From?

The Pattern Instruction 6:20 on Reasonable Doubt that the Court of Appeals in 1996 dubbed the preferred phraseology for reasonable doubt instructions was first published in 1983 in Volume One of *Criminal Jury Instructions – New York*.[31] The Comment section that followed 6:20 provided no insight on where the phrase "matter of this importance" came from.

A WestLaw search of the entire national database (allcases, allfeds, US and NY-CS) with the phrase "matter of this importance" in the same paragraph as "reasonable doubt" turns up not a single case, except those decided after 1983 by New York courts and federal courts reviewing New York convictions. Only two New York cases contain "matter of like importance": one trial court opinion published in 1959[32] and one Appellate Division opinion published in 1989, six years after CJI 1st 6:20 was published.[33] The cases cited in that Appellate Division opinion do not contain the phrase "matter of like importance."[34] The 1959 trial court opinion cites the 1910 U.S. Supreme Court case (discussed earlier) that retained the "hesitate to act" phrase, but transposed the focus of the importance from the personal affairs of jurors to a "matter of like importance."[35]

The 1959 trial court opinion citing the 1910 U.S. Supreme Court's approval of "matter of like importance" was decided by Yates County Court when the District Attorney of Yates County was Lyman Smith, and since Judge Lyman Smith was the Chairperson of the CJI Committee, one might assume that Judge Smith crafted CJI 1st 6:20. One would be wrong. Judge Peter McQuillan, a member of the CJI Committee since its inception, reports that the precursor to CJI 1st 6:20 was a reasonable doubt instruction, crafted by an unknown author, based on the 1910 Supreme Court-approved language, which was handed down from judge to judge over the decades preceding formation of the CJI Committee.[36] The irony is that not a single Supreme Court case decided since 1910 contains "matter of like importance" and only four other cases in the allfeds database even mention it; yet, a century later, it stands as the cornerstone of New York's reasonable doubt instruction.

What Is the Problem With CJI 1st 6:20?

CJI 1st 6:20's reference to "matter of this importance" provides no guidance to jurors in assessing the importance of the matter and literally invites jurors to apply a lesser or greater standard depending upon each juror's subjective assessment of the matter's importance. In fact, the Seventh Circuit Court of Appeals has indirectly poked fun at CJI 1st 6:20 by saying "[j]udges' and lawyers' attempts to inject other amorphous catch-phrases into the 'reasonable doubt' standard, such as 'matter of the highest importance,' only muddy the water."[37]

The very language "in a matter of this importance" begs the compound question: in a matter of what importance and to whom? The defendant, the prosecution, the alleged victim, society? What if the juror's assessments of the degree of importance to each of those four groups differ? That circumstance may result in 12 jurors applying four distinct reasonable doubt standards. But there's more.

What if all 12 jurors interpret the instruction to mean a matter of importance to society? Does that mean that the standard of proof varies depending upon its impact on society? If Bernie Madoff had gone to trial on New York charges, would his jury have applied a different (lower?) standard than another jury deliberating on a misdemeanor DWI in the same building?

Since jurors receive no guidance in considering to whom the "matter of importance" refers when they are voting ("acting"), it would not be unexpected for some jurors to infer that the judge means "matter of importance" to the prosecution and defense. While most jurors are not lawyers, they are astute enough to appreciate the difference in importance between murder and petit larceny, rape and DWI, etc. In some cases they are actually told by the judge that an offense is of a lesser degree than another.[38] If jurors gauge the importance of the matter based upon the severity of the offense (which they are permitted to do since they receive no guidance from the court), the threshold the prosecution must meet in order to sustain its burden may fluctuate proportionately with that severity.

Because criminal case jury instructions are defendant-centric, it would be natural for one or more jurors to interpret the instruction to mean "matter of importance" to the defendant. As discussed above, jurors have a general appreciation of the difference in severity (and consequent difference in penalty) between certain types of offenses. However, jurors are not advised of the possible penalty for the offense on trial. In fact, jurors are expressly told that "in determining the issue of guilt or innocence, [they may not] consider or speculate concerning matters relating to sentence or punishment."[39] Are these two instructions contradictory? How is it possible for a juror to assess the importance of a matter to an accused without knowing the adverse consequences the convicted defendant may face?

Is "matter of this importance" actually intended to mean matter of importance to the defendant because of

the potential loss of liberty and stigma of conviction? The Supreme Court of the United States might have already answered that question in the affirmative 40 years ago when it decided that the due process clause requires that the guilt of an accused in juvenile delinquency and adult criminal cases be proven beyond a reasonable doubt:

> The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.[40]

If CJI 1st 6:20 Is Ever Reexamined

Any discussion of "reasonable doubt" definitions in general, and CJI 1st 6:20 in particular, must recognize two immutable facts. The first is that any definition of "reasonable doubt" will always express a subjective standard because, while the word "reasonable" may attempt to convey an objective standard, when it allows each juror to be the sole arbiter of his or her reasonableness, a subjective standard results.[41] Granted, most reasonable doubt instructions, including CJI,[42] give examples of doubts that are not reasonable, but that is not much help in defining what is a reasonable doubt.[43]

The second fact is that the noun "doubt" is derived from the Latin word *dubitare*, which means "to hesitate,"[44] and one of the dictionary definitions of "doubt" is a "hesitation to believe."[45] That circumstance makes use of "hesitate" proper in defining reasonable doubt, especially when the very case CJI 1st 6:20 is based upon included the words "hesitate to act."[46] It is the analogy to personal affairs, not the use of "hesitate," that the Court of Appeals and others have found objectionable.

Following the Supreme Court's lead in resorting to dictionary definitions in evaluating reasonable doubt instructions,[47] and using the dictionary definitions for "reasonable," "doubt," and "reason,"[48] a dictionary-based definition of "reasonable doubt" might read: "sensible basis for a hesitation to believe." Using that definition, an instruction to jurors might read: "If you have a sensible basis for hesitating to believe that all elements have been established as true, then that is a reasonable doubt."

Conclusion

Despite its shortcoming, CJI 1st 6:20 is probably here to stay. The chances of a case reaching the Court of Appeals on a reasonable doubt definition issue are remote because most trial judges are not likely to experiment with a reasonable doubt definition that the Court prefers. But the dutiful allegiance[49] of trial judges to the language preferred by the state's highest court should not preclude recognition of its need for reexamination, a need already recognized by the Seventh Circuit.[50] ■

1. 88 N.Y.2d 998, 1000 (1996).

2. CJI II: "It is a doubt that a reasonable person, acting in a matter of this importance, would be likely to entertain because of the evidence that was presented or because of the lack of convincing evidence."

3. See the exhaustive discussion of jury trial procedures in colonial New York in *U.S. v. Polouizzi*, 687 F. Supp. 2d 133, 169 (E.D.N.Y.), *vacated on other grounds*, 393 Fed. Appx. 784 (2d Cir. 2010).

4. *See People v. Ryan*, 8 N.Y.S.241, 243 (1889) (quoting *People v. Cassiano*, 1 N.Y. Crim. R. 505, as follows: "In *People v. Cassiano*, the jury inquired of the court what the punishment would be for the offense included in the indictment. This was not given; and the court, in its opinion, said: 'We think the information should have been given. In all cases the jury should know the effect of their verdict.'"). In *People v. Ryan*, the Court rejected the defendant's contention that his jury should have been informed of the penalty without its having asked.

5. 137 N.Y. 29, 40 (1st Dep't 1893).

6. *Miles v. U.S.*, 103 U.S. 304, 309 (1880).

7. *Holt v. U.S.*, 218 U.S. 245, 254 (1910) ("If you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt").

8. *Holland v. U.S.*, 348 U.S. 121, 140 (1954).

9. Leonard B. Sand et al., *Modern Federal Jury Instruction*, 4–13 (2007 ed., Matthew Bender).

10. *People v. Cubino*, 222 A.D.2d 346, 348–50 (1st Dep't 1995) (Murphy, J., dissenting), *aff'd*, 88 N.Y.2d 998 (1996).

11. *Id.* at 350; *see, e.g.*, *Scurry v. U.S.*, 347 F.2d 468, 470 (D.C. Cir. 1965), *cert. denied sub nom. Scurry v. Sard*, 389 U.S. 883 (1967) ("Being convinced beyond a reasonable doubt cannot be equated with being 'willing to act . . . in the more weighty and important matters in your own affairs.'"); *Commonwealth v. Rembiszewski*, 391 Mass. 123, 131 (1984) ("Equating the proof that the jurors might have wanted in making decisions with respect to their personal affairs with the degree of certitude necessary to convict the defendant tended to reduce the standard doubt to the standard in civil cases, proof by a fair preponderance of the evidence.").

12. *State v. Francis*, 151 Vt. 296, 303–04 (1989):

> We also believe it trivializes the proof-beyond-a-reasonable-doubt standard to compare it to decisions of personal importance in a juror's life. Making a decision about the guilt of an accused is dissimilar to deciding important personal matters. The latter often involves the balancing of advantages and disadvantages and the decision is reached upon a mere tip of the balance. If people really did make important personal decisions only when convinced beyond a reasonable doubt as to their correctness, human activity would evidence far more inertia than it does (citation omitted).

13. *Victor v. Neb.*, 511 U.S. 1, 24 (1994) (Ginsburg, J., concurring):

> A committee of distinguished federal judges, reporting to the Judicial Conference of the United States, has criticized this "hesitate to act" formulation "because the analogy it uses seems misplaced. In the decisions people make in the most important of their own affairs, resolution of conflicts about past events does not usually play a major role. Indeed, decisions we make in the most important affairs of our lives – choosing a spouse, a job, a place to live, and the like – generally involve a very heavy element of uncertainty and risk-taking. They are wholly unlike the decisions jurors ought to make in criminal cases." (quoting Federal Judicial Center, Pattern Criminal Jury Instructions 18-19 (1987) (commentary on Instruction 21)).

14. Second Circuit Chief Judge Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U.L. Rev. 979, 982–83 (1994) 25th James Madison Lecture, delivered at New York University Law School, Nov. 9, 1993.

15. *See, e.g.*, *People v. Baucom*, 154 A.D.2d 688 (2d Dep't 1989) ("In any event, we note that it was not error to instruct the jurors that reasonable doubt existed if they had a doubt upon which they believed 'a reasonable person would hesitate to act'" (quoting *People v. Quinones*, 123 A.D.2d 790, 793 (2d Dep't 1986); *see also* CJI 6.20 at 248)); *People v. Alston*, 211 A.D.2d 498, 498 (1st Dep't 1995) ("Nor do we find error in the court's description of reasonable doubt as a doubt that would make a 'reasonable person . . . hesitate to act'" (quoting *Quinones*, 123 A.D.2d at 793).

16. *People v. Morgan*, 199 A.D.2d 143, 144 (1st Dep't 1993); *see also People v. Simon*, 224 A.D.2d 458, 459 (2d Dep't 1996) ("It was also proper for the court to instruct the jury that a reasonable doubt was one upon which a reasonable person 'would hesitate to act.' This concept is contained in the Pattern Jury Instructions (*see*, 1 CJI [NY] 6.20) and 'is firmly embedded in the accepted definition of reasonable doubt' (*People v. Morgan*, 199 A.D.2d 143, 144, 605 N.Y.S.2d 85; *see People v. Alston*, 211 A.D.2d 498, 621 N.Y.S.2d 329; *see People v. Quinones*, 123 A.D.2d 793, 507 N.Y.S.2d 417))."

17. The objectionable language is reported in the Appellate Division opinion as "the quality and the amount of proof that you would require before you made an important decision concerning your own lives." *People v. Cubino*, 222 A.D.2d 346, 347 (1st Dep't 1995).

18. *People v. Cubino*, 88 N.Y.2d 998, 1000 (1996).

19. *Victor v. Neb.*, 511 U.S. 1 (1994).

20. *Id.* at 20–21.

21. *Holland v. U.S.*, 348 U.S. 121 (1954).

22. *In re Winship*, 397 U.S. 358 (1970).

23. See the exhaustive discussion in Hisham Ramadan, *The Challenge of Explaining "Reasonable Doubt*," 40 No. 1 Crim. Law Bulletin 1 (Winter 2004).

24. *U.S. v. Hall*, 854 F.2d 1036, 1038 (7th Cir. 1988) ("In response, the government concedes that this court has indeed *admonished the district courts* not to define reasonable doubt.").

25. *U.S. v. Glass*, 846 F.2d 386, 387 (7th Cir. 1988) ("This case illustrates all too well that '[a]ttempts to explain the term "reasonable doubt" do not usually result in making it any clearer to the minds of the jury.' *Holland v. United States*, 348 U.S. 121, 140 (1954). And that is precisely why this circuit's criminal jury instructions *forbid* them. *See* Federal Criminal Instructions of the Seventh Circuit 2.07 (1980).").

26. Ramadan, *supra* note 23, n.6.

27. Ramadan, *supra* note 23, n.20.

28. *Victor v. Neb.*, 511 U.S. 1, 17 (1994) ("[W]e have not supervisory power over the state courts, and in the context of the instructions as a whole we cannot say that the use of the phrase rendered the instruction given in Sandoval's case unconstitutional.").

29. *Id.* at 14–15 (1994) (citing *Jackson v. Va.*, 443 U.S. 307, 315 (1979)).

30. *People v. Zebrowski*, 198 A.D.2d 716, 720 (3d Dep't 1993).

31. The preface to CJI 1st Volume One states: "Prior publications and distributions include: Volumes 2 and 3 (CJI-NY), containing abstract or model charges for all degrees of virtually all substantive crimes defined in the Penal Law." That explains the references to CJI in cases decided prior to 1983, cited at the end of this note, albeit not on reasonable doubt, but rather various sections of the penal law. *E.g.*, *People v. Fischer*, 53 N.Y.2d 178, 183 (1981) ("recommended charge set out in Criminal Jury Instructions (3 CJI [N.Y.], Penal Law, § 215.51, p. 1650)").

32. *People v. Moore*, 20 Misc. 2d 48, 49 (Yates Co. Ct. 1959):

> [T]herefore became incumbent upon the prosecution in the instant case to prove the appellant guilty beyond a reasonable doubt. Reasonable Doubt has been defined as an actual doubt that you are conscious of after going over in your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt of which the defendant is entitled to have the benefit. *See Holt v. United States*, 218 U.S. 245, 254 (1910).

33. *People v. Hill*, 154 A.D.2d 887 (4th Dep't 1989) ("It was not error to instruct the jury that if they were 'satisfied that in entertaining such a doubt [they were] acting as a reasonable person would in a matter of like importance, then that would be a reasonable doubt' (see *United States v. Ivic*, 700 F.2d 51, 69, n. 11; *People v. Jones*, 27 N.Y.2d 222, 316 N.Y.S.2d 617, 265 N.E.2d 446; *People v. Rivera*, supra; *People v. Quinones*, 123 A.D.2d 793, 507 N.Y.S.2d 417, *lv. denied*, 69 N.Y.2d 749, 5121 N.Y.S.2d 1053, 505 N.E.2d 251).").

34. Note that none of the four cases cited in *Hill* contains "like importance" or "this importance" or "importance," and three of them approve the "hesitate to act" language. *People v. Rivera*, 135 A.D.2d 755, 755 (2d Dep't 1987) ("It was not error for the court to instruct the jury that if they had a doubt upon which they believed a reasonable person would hesitate to act, that was reasonable doubt." (see *United States v. Ivic*, 700 F.2d 51, 69, n.11; *People v. Quinones*, 123 A.D.2d 793, *lv. denied*, 69 N.Y.2d 749)"); *People v. Quinones*, 123 A.D.2d 793 (2d Dep't 1986) ("It was not error for the court to instruct the jury that if they had a doubt upon which they believed a reasonable person would hesitate to act, that was reasonable doubt." (*see U.S. v. Ivic*, 700 F.2d 51, 69 n. 11 (2d Cir. 1983) ("That model instruction read, in pertinent part, as follows: 'It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense – the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs.'").

35. *Holt v. U.S.*, 218 U.S. 245, 254 (1910) ("if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt").

36. Email discussion with Hon. Peter McQuillan, member of CJI 1st Committee, on July 23, 2010. Judge McQuillan immediately recalled that CJI 6:20 was based on language from a 1910 U.S. Supreme Court opinion that had been "around forever." The CJI Project Coordinator recalls that Judge Nathan Sobel had been working on a book of Criminal Jury Instruction for years before the CJI Committee was formed, but that most of Judge Sobel's work was "destroyed in a fire at the Court House one weekend. That which survived was also part of the discussions leading to the final charges."

37. *U.S. v. Glass*, 846 F.2d 386, 387 (7th Cir. 1988).

38. CPL § 300.50 authorizes a judge to submit lesser included offenses to a trial jury.

39. CPL § 300.10(2).

40. *In re Winship*, 397 U.S. 358 (1970).

41. Ramadan, *supra* note 23, n.13 ("One of the problems with the criminal standard of proof arises from the word reasonable, which is a qualifying adjective, referring to the degree. This qualifying adjective is subject to interpretation. . . . Professor Horowitz after reviewing empirical research suggests that diverse definitions of 'beyond a reasonable doubt' permit the jury to supply a subjective conviction standard that is much lower than the standard understood by lawyers. Irwin A. Horowitz, *Reasonable Doubt Instructions: Commonsense Justice and the Standard of Proof*, 3 Psych. Pub. Pol'y. & L. 285, 298–99 (1997). He concluded that '[b]ecause the courts have apparently resisted providing a quantities definition of the reasonable doubt standard and have suggested that it is an inherently qualitative notion, the way seems clear for courts, legislators and citizens to decide that lower certainty of guilt levels are acceptable.' *Id.* at 300–301.")).

42. CJI 2nd: "It is an actual doubt, not an imaginary doubt. . . . Whatever your verdict may be, it must not rest upon baseless speculations. Nor may it be influenced in any way by bias, prejudice, sympathy, or by a desire to bring an end to your deliberations or to avoid an unpleasant duty."

43. *See, e.g., U.S. v. Hernandez*, 176 F.3d 719, 728 (3d Cir 1999) ("Reasonable doubt is, therefore, a doubt based upon reason rather than whim, possibilities or supposition.").

44. Latin Verbs Flashcards, http://flashcarddb.com (*dubito*, *dubitare*, *dubitavi*, *dubitatum* means to doubt, hesitate).

45. Random House Unabridged Dictionary (1966).

46. *Holt v. U.S.*, 218 U.S. 245, 254 (1910) ("if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt").

47. See, e.g., *Victor v. Neb.*, 511 U.S. 1, 12–38 (1994), for an exhaustive discussion of dictionary definitions of terms used in reasonable doubt instructions culminating with: "On the one hand, 'substantial' means 'not seeming or imaginary'; on the other it means 'that specified to a large degree' Webster's Third New International Dictionary, at 2280."

48. Random House Unabridged Dictionary.

49. Newman, *supra* note 14 ("as a district judge, I dutifully repeated").

50. *U.S. v. Glass*, 846 F.2d 386, 387 (7th Cir. 1988) ("[j]udges' and lawyers' attempts to inject other amorphous catch-phrases into the 'reasonable doubt' standard, such as 'matter of the highest importance,' only muddy the water.").

Gary E. Bashian is a partner in the law firm of Bashian & Farber, LLP with offices in White Plains, N.Y. and Greenwich, Conn. Mr. Bashian is a past President of the Westchester County Bar Association, is presently on the Executive Committee of the New York State Bar Association's Trust and Estates Law Section as Vice Chair of the Estate Litigation Committee, and is a past Chair of the Westchester County Bar Association's Trusts & Estates Section. Mr. Bashian gratefully acknowledges the contributions of Andrew Frisenda, an associate at Bashian & Farber, LLP, in the preparation of this article. This article first appeared, in a slightly different format, in the Spring 2011 *Trusts and Estates Law Section Newsletter*, a publication of the Trusts and Estates Law Section of the New York State Bar Association.

Summary Judgment Motion in a Will Contest: An Updated Proponent's Perspective

By Gary E. Bashian

A motion for summary judgment pursuant to Civil Practice Law & Rules 3212 or 3211 (CPLR) is a powerful procedural tool that can end litigation immediately.

Summary judgment can deliver a swift and decisive victory in the outcome of a matter. It can limit the issues or award the broadest types of relief by ending all claims. When granted, it can avoid years of potential litigation and expense.

But for all its versatility, drafting a motion for summary judgment can be a daunting and complex undertaking. The facts (hopefully none in question) and the applicable law in any matter can make it difficult to identify issues with no triable issue of fact. Communicating the facts and the law clearly to the court to show that summary judgment should be granted is the challenge.

However, estate litigation can be surprisingly well suited to determinations based on summary judgment, which should not be forgotten by proponents who find themselves in a will contest. This is largely due to the fact that estate contests that reach the point of full-blown litigation are almost always based on one, a combination of, or all of the familiar objections to testamentary validity: the failure to duly execute the instrument pursuant to Estates, Powers & Trusts Law 3-2.1 (EPTL), the testator's lack of testamentary capacity, the fact that the instrument was the product of undue influence or fraud.

Although summary judgment can be granted only if the movant makes a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,"[1] this is by no means an insurmountable task, even in matters where it appears that issues of fact dominate the proceeding. This is especially true in Surrogate's Court, where the traditional aversion to granting summary judgment has been eroded over the last several years.

Indeed, a probate petitioner in Surrogate's Court holds a number of procedural advantages over an objectant when making a motion for summary judgment to dismiss objections.

Due Execution

From a proponent's perspective, the issue of due execution is perhaps best suited for summary judgment. After all, the requirements for due execution are clearly articulated in EPTL 3-2.1 and are often complied with by even the most novice of draftsmen, making it a particularly attractive issue for summary relief where a failure to duly execute has been alleged.

Summary judgment can deliver a swift and decisive victory in the outcome of a matter. It can limit the issues or award the broadest types of relief by ending all claims.

It is well established that the initial burden of proof regarding due execution is on the proponent. The "party who offers an instrument for probate as a will must show satisfactorily that it is the will of the alleged testator"[2] and that the instrument was duly executed.[3] To establish due execution, a proponent must show that: "(i) the testator signed at the end of the instrument; (ii) the testator either signed in the presence of at least two attesting witnesses, or acknowledged his/her signature to them; (iii) the testator declared to each of the attesting witnesses that the instrument was his/her will; and (iv) the witnesses signed at the testator's request."[4]

This is by no means a heavy burden for a proponent, as it must be proved only by a preponderance of the evidence.[5] Furthermore, a proponent is afforded a number of favorable presumptions regarding due execution. If the instrument was signed under the supervision of an attorney, it is presumed valid. In addition, where "a propounded instrument contains an attestation clause, it is inferred that the requisite statutory requirements were satisfied."[6] Finally, case law shows that only substantial, not strict, compliance with EPTL 3-2.1 need be present.

Accordingly, an alleged failure to comply with the strict and literal terms of the statute is not a basis for dismissing a petition for probate and is insufficient to make a showing that a will was not duly executed. The court may find that substantial compliance with the statute is in fact sufficient to establish due execution. Furthermore, compliance with EPTL 3-2.1's requirements may be found by inference from the conduct and circumstances surrounding execution of the will.[7]

Testamentary Capacity

When determining testamentary capacity, the court will consider the following factors: (1) whether the testator "understood the nature and consequences of executing a will"; (2) whether the testator "knew the nature and extent of the property" he or she was disposing of; and (3) whether the testator "knew those who would be considered the natural objects of his bounty and his relations with them."[8] When moving for summary judgment, it is the proponent's task to prove that, as a matter of law, the testator was legally capable of executing the instrument.

As with due execution, the proponent has the burden of proving testamentary capacity by a preponderance of the evidence[9] but is also afforded the benefit of several presumptions. For example, until "the contrary is established, a testator is presumed to be sane and to have sufficient mental capacity to make a valid will."[10] In addition, a testator's testamentary capacity is assessed at the precise time of the propounded instrument's execution.[11] Also, a testator needs only a lucid interval of capacity to execute a valid will, and this interval can occur contemporaneously with an ongoing diagnosis of mental illness, including depression.[12] Moreover, courts have consistently recognized that the existence of self-proving affidavits executed by the attesting witnesses creates a presumption of testamentary capacity.[13] Each of these presumptions can be used with great effect to prove testamentary capacity and make the proponent's burden significantly easier to meet.

Undue Influence

Unlike due execution and testamentary capacity, which must be proved by the proponent of a will, undue influence must be proved by the objectant.[14] To establish that a testamentary instrument was procured by undue influence, an objectant must demonstrate by a preponderance of the evidence "that the influencing party had a motive to influence, the opportunity to influence, and that such influence was actually exercised."[15] This influence must have been so strong and pervasive that it subverted the

true intentions of the testator at the time of execution to the extent that, but for the undue influence, the testator would not have executed the instrument. Clearly, this is a rather high standard to meet. At a minimum, the objectant must make a showing of actual acts of undue influence, including proof of "time and places when and where such acts occurred."[16]

It may come as no surprise that the actual exercise of undue influence is rarely proven by direct evidence; rather, it is usually established by circumstantial evidence of a substantial nature.[17] Among the factors the surrogates consider when determining if undue influence prevents the probate of an instrument are the following: "(i) the testator's physical and mental condition; (ii) whether the attorney who drafted the propounded instrument was the testator's attorney; (iii) whether the propounded instrument deviates from the testator's prior testamentary plan; (iv) whether the person who allegedly wielded undue influence was in a position of trust; and (v) whether the testator was isolated from the natural objects of his bounty."[18] Often, an objectant will fail to offer evidence of any "actual acts" of undue influence at all, much less a single example raising an inference sufficient to meet the burden of proof to establish a prima facie case.

The actual exercise of undue influence is rarely proven by direct evidence; rather, it is usually established by circumstantial evidence of a substantial nature.

As illustrated in the matter of the *Will of Julia Elizabeth Taschereau*,[19] decided in 2010 by the New York County Surrogate's Court, actual and specific acts of undue influence can be difficult to establish. *Taschereau* discusses at length the nature of the evidentiary burdens an objectant alleging undue influence must meet, albeit in the context of a successful objection. In the *Taschereau* decision, Surrogate Webber provides a careful analysis of the facts of the case within the framework of the elements discussed above.

The case involved twin sisters battling over their mother's estate, whose primary asset was a co-op in Manhattan valued at approximately $475,000. The proponent lived near her mother, and the objectant resided in France. Both had a history of animus toward each other from the time they were children, a fact well known to the testifying witnesses. The proponent petitioned the court to probate the will one day after their mother's death. The propounded instrument left the testatrix's entire estate to the proponent, was signed at the proponent's insistence while the testatrix was recovering from an illness and contained significant changes from the prior will, which left her estate to her daughters equally.

The Surrogate's Court determined that, shortly before her death, the testatrix had health problems which made her dependent on the proponent, who had power of attorney, who managed the testatrix's finances and who herself increasingly depended on the testatrix for financial assistance. Testimony was also admitted into evidence showing that the proponent threatened to deny the testatrix visitation of the proponent's children, to whom she was devoted, when the testatrix provided financial assistance to the objectant or allowed the objectant to stay at the Manhattan co-op during her visits from France.

Circumstantial evidence, drawn from a long and detailed family history of strife between the sisters and their relationship with the decedent, formed the basis of a reasonable inference that undue influence had occurred. However, the lessons of *Taschereau* should not be lost on a petitioner seeking summary judgment in dismissing an objection based on undue influence. This is because the objectant's burden is set rather high. In *Taschereau*, this burden was met by an abundance of credible testimony from many close friends of the decedent, coupled with inconsistent and self-serving testimony from the proponent which, in the words of the court, sought "to manipulate the record."[20] It is uncommon for objectants to have the favorable facts and wealth of multisource testimony that were present in *Taschereau*. Petitioners may be able to leverage to their advantage the absence of facts such as those present in *Taschereau* when moving for summary judgment to dismiss objections based on undue influence.

Fraud

The objectant also bears the burden of proof by clear and convincing evidence when seeking to establish a prima facie case regarding the exercise of fraud in the procurement of an instrument.[21] In order to state a claim for fraud and defeat a motion for summary judgment on that issue, the objectant must show that there is an issue of fact as to whether the proponent or a third party "knowingly made a false statement to the testator which caused him to execute a will that disposed of his property in a manner differently than he would have in the absence of that statement."[22] Evidence of actual misrepresentation is necessary; a showing of "motive and opportunity" to mislead is insufficient.[23] It is important to note that "[m]ere conclusory allegations and speculation" are insufficient for an objectant to establish a prima facie case,[24] and that "[a]llegations must be specific and detailed, substantiated by evidence in the record."[25] Again, these allegations can be very difficult to substantiate. A petitioner should make clear in his or her motion the lack of specific examples offered by an objectant, as without such examples the objectant's argument must be dismissed.

Standing

Standing is an often overlooked avenue by which a petitioner may succeed on summary judgment. As with all litigated matters, the parties to contested probate proceedings must establish that they have the right to be heard before the court.

The Second Department decision in *In re Abady*[26] is a recent example of how a motion based on standing can benefit a petitioner. There, the objectant, who was the decedent's surviving spouse, filed objections to probate and notice of election. The petitioner moved for summary judgment pursuant to CPLR 3211(a), seeking dismissal on the grounds that the objectant had no standing due to her waiver of her right to any claims against the estate in two prenuptial agreements, one executed in 2001 and the other in 2006. The objectant sought to prove the prenuptial agreements invalid, arguing that they had not been properly acknowledged and that the execution of the 2001 agreement had been procured by fraud.

The Appellate Division, Second Department determined that the execution of the 2001 prenuptial waiver "substantially complied"[27] with the standards set forth in the Real Property Law and, by extension, the requirements of EPTL 5-1.1-A(e)(2), which provides that a waiver or release of a surviving spouse's right to an elective share of the deceased spouse's estate "must be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of the conveyance of real property."[28]

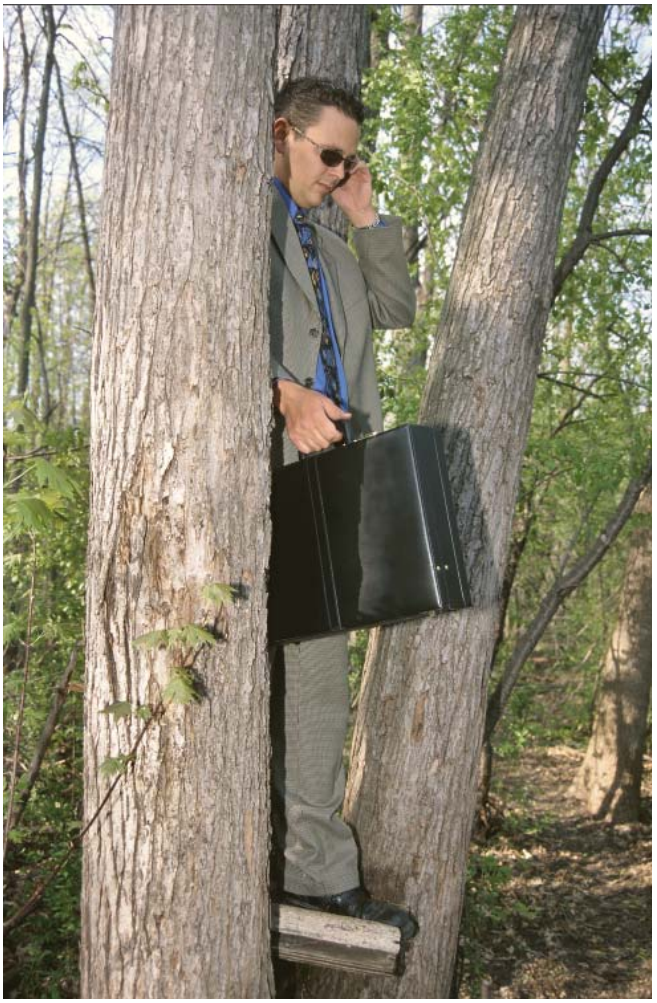
As the *Abady* court noted, there "'is no requirement that a certificate of acknowledgement contain the precise language set forth in the Real Property Law. Rather, an acknowledgement is sufficient if it is in substantial compliance with the statute.'"[29] Thus, the decedent's signature was not required on the waiver, as the objectant had argued, since the waiver was unilateral in form. Rather, both signatures would be required only if the waiver were bilateral in form pursuant to EPTL 5-1.1-A(e)(3)(C). In the end, the petitioner's motion for summary judgment to dismiss the objections was granted on the grounds that the 2001 waiver was properly executed and thus denied the objectant standing.

Conclusion

Estate litigators should bear in mind the foregoing key elements of summary judgment the next time they confront an objectant's claims. The presumptions in favor of a petitioner, and heavy burden of proof upon an objectant, make summary judgment a tactic that must be considered in counteracting many common objections. Some desperate objectants will attempt to present theories as factual questions, but mere speculation and conclusory allegations are not sufficient to raise triable issues of fact[30]—they are at most the "wailing and gnashing of teeth."[31]

1. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *see generally Friends of Animals v. Associated Fur Mfs., Inc.*, 46 N.Y.2d 1065 (1979).
2. *Rollwagen v. Rollwagen*, 63 N.Y. 504, 517 (1876).
3. *In re Kellum*, 52 N.Y. 517 (1873).
4. *In re Hirschorn*, N.Y.L.J., Nov. 5, 2008, p. 36, col. 3 (Sur. Ct., Westchester Co.) (citing *In re Kellum*, 52 N.Y. 517).
5. *In re Pirozzi*, 238 A.D.2d 833 (3d Dep't 1997).
6. *In re Hirschorn*, N.Y.L.J., Nov. 5, 2008, p. 36.
7. *In re Frank*, 249 A.D.2d 893 (4th Dep't 1998).
8. *In re Kumstar*, 66 N.Y.2d 691 (1985).
9. *See Estate of McCloskey*, 307 A.D.2d 737 (4th Dep't 2003).
10. *See In re Beneway*, 272 A.D. 463 (3d Dep't 1947).
11. *See In re Minasian*, 149 A.D.2d 511 (2d Dep't 1989).
12. *See In re Esberg*, 215 A.D.2d 655 (2d Dep't 1995).
13. *See In re Castiglione*, 40 A.D.3d 1227, 1228 (3d Dep't 2007).
14. *See In re Bustanoby*, 262 A.D.2d 407, 408 (2d Dep't 1999).
15. *In re Malone*, 46 A.D.3d 975 (3d Dep't 2007).
16. *In re Friedman*, 26 A.D.3d 723 (3d Dep't 2006); *see In re Fiumara*, 47 N.Y.2d 845 (1979).
17. *See In re Walther*, 6 N.Y.2d 49 (1959); *In re Burke*, 82 A.D.2d 260 (2d Dep't 1981).
18. *In re Hirschorn*, N.Y.L.J., Nov. 5, 2008, p. 36.
19. N.Y.L.J., Nov. 17, 2010, p. 34, col. 1 (Sur. Ct., N.Y. Co.).
20. *Id.*
21. *Simcuski v. Saeil*, 44 N.Y.2d 442, 452 (1978).
22. *In re Evanchuk*, 145 A.D.2d 559, 560 (2d Dep't 1988).
23. *In re Gross*, 242 A.D.2d 333, 334 (2d Dep't 1997).
24. *In re Seelig*, 13 A.D.3d 776, 777 (3d Dep't 2004).
25. *In re O'Hara*, 85 A.D.2d 669, 671 (2d Dep't 1981).
26. 76 A.D.3d 525, 526 (2d Dep't 2010).
27. *Id.*
28. *Id.*
29. *Id.* (quoting *Weinstein v. Weinstein*, 36 A.D.3d 797, 798 (2d Dep't 2007)).
30. *See generally In re Seelig*, 13 A.D.3d 776 (3d Dep't 2004).
31. Book of Matthew 13:42.

"Objection overruled."



Usurpation of Trust Opportunities and Self-Dealing

By John R. Morken and Ilene S. Cooper

"A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this, there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions."[1]

Estate practitioners will recognize this famous quote; it is from Chief Judge Cardozo's opinion in *Meinhard v. Salmon*.[2] What is not known by many estate practitioners, however, or is at least forgotten, is that *Meinhard* is not an estate or trust case. Rather, it was a lawsuit between joint venturers, the issue being whether a new lease, which had been entered into by only one of the joint venturers, was a business opportunity that had been usurped by that party. In a very close 4-3 decision, the New York Court of Appeals found that the defendant had violated his fiduciary duties to his co-venturer and had been guilty of self-dealing by entering into the new lease alone, without giving his co-venturer an opportunity to join him.

Meinhard is an excellent example of how our courts' view of fiduciary obligations has evolved. The quote above shows how the analysis of the fiduciary obligations of joint venturers became an analysis of fiduciary obligations generally, being considered analogous to the obligations owed by a trustee to a trust's beneficiaries. As one commentator has put it, "the term 'fiduciary' itself was adopted to apply to situations falling short of 'trusts,' but in which one person was nonetheless obligated to act *like* a trustee."[3]

The hallmark of a fiduciary relationship is that of undivided loyalty. That is not true, generally, in commercial cases. For instance, "no one talks about a duty of undivided loyalty between contracting parties. Certainly, the good-faith obligation exists, but that obligation is substantially weaker than and qualitatively different from fiduciary law's duty of loyalty."[4] In fact, as one commentator has explained, "[u]nlike the contractual relationship, undivided loyalty is the heart of the fiduciary relationship, especially for property fiduciaries like trustees and estate executors." Accordingly, the commentator continues, "[t]he picture that emerges from the case law

John R. Morken (jmorken@farrellfritz.com) and **Ilene S. Cooper** (icooper@farrellfritz.com) are Partners at Farrell Fritz, P.C. With gratitude to Joseph T. La Ferlita, Esq., an associate with Farrell Fritz, P.C., for his assistance in editing this article.

is that in contractual relationships the duty is 'don't screw the other side,' but with regard to fiduciary relationships the demand for the fiduciary is 'protect your beneficiary, not yourself.'"[5]

Analyzing whether there has been a breach of the fiduciary duty requires asking several key questions. First, in what circumstances do fiduciary obligations apply? Second, what does the obligation require a person to do?[6] If it is determined that a fiduciary relationship applies and the objected-to transaction allegedly constituted self-dealing, then "the fiduciary is charged with proving a negative, that its conduct was free from self-dealing."[7] If the fiduciary fails to do so, then the third question is asked: How are damages determined? When the violation is extreme, as in the case of self-dealing, the courts apply a no-further-inquiry rule, which is essentially that of strict liability, and treat the objected-to transaction as void. "Under this rule, a trustee is liable for all losses to the trust regardless of whether she acted reasonably or in good faith, and regardless of whether her actions caused the losses."[8] In such cases, "judges will resolve questions of doubt against the fiduciary."[9]

Meinhard provides an excellent illustration of a case involving breach of fiduciary duty, self-dealing, and strict liability, regardless of the defendant's good faith in the underlying transaction. The dissent, while finding a fiduciary obligation, did not see the particular transaction as falling within the scope of the defendant's obligations to the plaintiff (i.e., it was not proven that the business opportunity presented was in fact one that had to be shared) and found no basis for a conclusion that there had been bad faith or fraud.

While *Meinhard* establishes the standard for self-dealing cases and how they are to be reviewed, the entire subject matter of usurpation of trust opportunities demonstrates how these principles are to be applied. This article addresses cases involving usurpation of trust opportunities, followed by a review of damages and remedies in instances of self-dealing under *In re Rothko*,[10] and ends with a discussion of the need for judicial review, to help avoid the exposure that fiduciaries face in self-dealing cases.

The Definition of a Trust Opportunity

Undeniably, the most fundamental duty of a trustee is to display, throughout administration of the trust, complete loyalty to the interests of the beneficiary. That is, trustees may not place themselves in a position in which their own interest, or those of another, conflict, or possibly conflict, with the interest of the trust or its beneficiary.[11]

Self-dealing by the trustee is one type of conflict of interest. A trustee is prohibited from profiting personally at the expense of the trust, or letting his or her personal interests in a transaction supersede those of the trust. In keeping with these principles, it has been held that trustees cannot usurp a trust opportunity in order to enhance themselves or their interests at the expense of the trust or its beneficiaries. As one noted commentator has stated, "[a] trustee may not acquire for himself, individually, property which *should be* acquired for the trust."[12]

In determining whether a particular acquisition *should have been made* for the benefit of the trust, or is a "trust opportunity," estate-related opinions have generally relied on principles developed in the corporate setting.[13] In *O'Hayer v. de St. Aubin*,[14] the Appellate Division, Second Department agreed with the appellant that the trustee of a trust consisting of two corporations could "not divert to himself *opportunities for expansion which fell within the normal expectations*" of these corporations.[15] Rather, the court held that the "trustee was obligated to preserve and advance [the entities'] economic objectives and to promote new or extended activities *which legitimately would belong* [to the entities]."[16]

In *Wooten v. Wooten*, the Tenth Circuit opined that a trust opportunity exists not only in cases where the fiduciary acquires property entrusted to him or competes with the beneficiary in the purchase of property that the trustee has undertaken to purchase for the beneficiary, but also in instances where "the property purchased by the fiduciary for himself is *so connected with the trust property or the scope of his duties as fiduciary*, that it is improper for him to purchase it for himself."[17]

In the corporate setting, judicial opinions and treatises have defined a corporate opportunity in terms which coincide with the foregoing principles. It should be noted, however, that

> although directors and officers of a corporation are regarded as fiduciaries in relation to the corporation and its shareholders, and are generally held subject to fiduciary standards of good faith and fairness, they are not trustees as such or held to some of the strict standards of conduct governing trustees. For example, though subject to the rule of undivided loyalty to the corporation and its shareholders, any presumption of a breach of this duty usually may be overcome by a showing of disclosure, fairness and good faith in the particular transaction.[18]

In *O'Hayer v. de St. Aubin*, the court cited to *Burg v. Horn*,[19] in which the Second Circuit held that an acquisition of property would constitute a corporate opportunity only if the corporation had an interest or "tangible expectancy" in the property when it was purchased.[20] The New York Court of Appeals has held similarly.[21] Moreover, courts have ruled that "[t]he degree of likelihood of realization from the opportunity is . . . the key to whether an expectancy is tangible."[22]

The issue in *Burg* was whether the purchase of nine properties by two of the three directors of a corporation in their individual names usurped an opportunity of the corporation. In concluding that the relevant acquisitions

were not corporate opportunities subject to the imposition of a constructive trust, the court explained that

> [a]lthough some commentators have criticized the "interest or expectancy" test as vague and unhelpful . . . it clearly expresses the judgment that the corporate opportunity doctrine should *not* be used to bar corporate directors from purchasing any property which might be useful to the corporation, but only to prevent their acquisition of property *which the corporation needs or is seeking, or which they are otherwise under a duty to the corporation to acquire for it*. Thus, a director may not purchase for himself property under lease to his corporation . . . or draw away any existing customers of the corporation. . . . Nor may he purchase property *which the corporation needs or is resolved to acquire . . . or which it is contemplating acquiring. . . . He may not take advantage of an offer made to the corporation . . . or of knowledge which came to him as a director.* [23]

Significantly, the court rejected the plaintiff's contention that the directors were under a duty, as a matter of law, to acquire for the corporation any property within the corporation's "line of business," finding that such a standard was "too broad." Rather, the court held,

> [U]nder New York law a court must determine in each case, by considering the relationship between the director and the corporation, whether a duty to offer the corporation all opportunities within its "line of business" is fairly to be implied. [Hence] had the defendants been full-time employees of [the corporation] with no prior real estate ventures of their own, New York law might well uphold a finding that they were subject to such an implied duty. But as they spent most of their time in unrelated produce and real estate enterprises and already owned corporations holding similar properties when [the corporation] was formed, as plaintiff knew, we agree with Judge Dooling that *a duty to offer [the corporation] all such properties coming to their attention cannot be implied absent some evidence of an agreement or understanding to that effect.*[24]

Similarly, the court in *Lawrence v. Cohn* held that "courts must consider the totality of the circumstances . . . [including] the nature of the transaction involved, the personal interests of the fiduciary and the beneficiaries in that transaction, and the consequences of the conduct alleged" in determining whether a fiduciary has breached his or her duty of loyalty in such cases.[25]

Some courts, such as the First Department in *Alexander v. Alexander*, have applied the "line of business" test by considering whether the opportunity is the same as or is "necessary" for or "essential" to the line of business of the corporation, and whether "the consequences of deprivation are so severe as to threaten the viability of the enterprise."[26] If the answer to these considerations is in the affirmative, then the opportunity must be offered to the entity.[27] However, the *Alexander* court rejected as overbroad the argument that the "business opportunity" test embraces areas into which a corporation could naturally or easily expand its business.[28]

Another method of assessing corporate opportunity referred to in *Alexander*,[29] and relied on, in part, by the Second Circuit in *Burg*,[30] requires consideration of whether, at the beginning of the fiduciary relationship, the parties understood, or it was reasonable to conclude that the parties understood, that the director would simultaneously pursue other interests, even those related to or in direct competition with the business of the corporation. In *Burg*, the court found that under the circumstances the corporation understood that the two director defendants would be engaging in independent enterprises.

In what circumstances do fiduciary obligations apply? What does the obligation require a person to do?

Clauses contained in a will or trust may reduce the standard by which the fiduciary will be judged to one of honesty and good faith.[31] Such provisions are strictly construed, however. Therefore, a trustee's actions will not be approved if the trustee trespasses outside the boundaries of the powers granted. Hence, if the language used in the governing instrument does not specifically authorize self-dealing, the trustee will be held liable for breach of trust resulting from self-dealing.[32]

The Use of Trust Assets to Exploit an Opportunity

Regardless of the test employed, if a fiduciary uses trust or corporate assets to develop a business opportunity, the fiduciary may be estopped from denying that it was a trust or corporate opportunity, regardless of the trust's or corporation's ability to exploit it. In *O'Hayer*, the guilty trustee borrowed money from a corporation owned by the trust and loaned it to an entity that he and his family owned. As the Appellate Division ruled, the "siphoning off" of funds and the nature of the corporation's business purposes were significant factors in concluding that the trustee was guilty of self-dealing, which could not be legitimized by the very expansive provisions in the trust instrument allowing the trustee to self-deal.[33]

In *Burg*, the court approached the issue from a somewhat different perspective. The plaintiff had alleged that three of the nine properties purchased by the director defendants of the corporation in their individual name were paid for, in part, by loans improperly obtained from the corporation without disclosure of their purpose. The court held that "were this contention sustained, it would *not* alter the result that the properties were *not* corporate

opportunities, but it might justify the imposition of a constructive trust on the properties."[34] The court did not reach this determination, however, finding that the plaintiff had not contended that a constructive trust should be imposed because *either* the corporate loans were improper *or* a relationship of trust and confidence existed between the defendants and the plaintiff.

In *Equity Corporation v. Jones*,[35] the court held that a constructive trust would be imposed when the proof demonstrates that the loss of the corporation or the profit of the unfaithful fiduciary resulted from his wrongful use of corporate funds. The court, citing the well-known treatise *Scott on Trusts*, opined:

> Where a trustee in breach of trust transfers a trust fund to a third party the wronged beneficiary may reach the product of the property in the hands of the trustee. This right to follow property into its product . . . is not limited to cases of express trusts. The principle is a broad one. It is applicable not only where the wrongdoer is an express trustee, not only where he is a fiduciary, but whenever a person wrongfully transfers property in which another has the beneficial interest, whether legal or equitable, and receives other property in exchange therefore.[36]

The Effect of Offering Trust Beneficiaries or Corporations the Right to Participate in the Acquisition of a Release

It has been held that, despite a fiduciary's offer to include the trust beneficiaries or corporation in an acquisition otherwise considered belonging to the entity, the fiduciary will not be absolved from liability for self-dealing. To this extent, the court in *O'Hayer*[37] held that "the trust duties relating to the corporate business remained and could not be sloughed off by [the trustee's] invitation to [the beneficiaries who were contingent remaindermen of the trust] to join in the diversion of a corporate opportunity in breach of trust."

Similarly, in *Foley v. D'Agostino*,[38] the court held that the corporation's rejection of the opportunity to take over a rival business would not release the directors or officers from their obligation of loyalty and good faith to the corporation as long as they remained in office and were in the employment of the corporation. In reaching this result, the court relied upon the following proposition:

> [T]he fact that the competing business undertaken presented itself in the form of a corporate opportunity which the corporation was financially unable or for other reasons unwilling to undertake should be no excuse for an officer undertaking it individually. Despite the corporation's inability or refusal to act, it is entitled to the officer's undivided loyalty. If the two are competitive, the corporation, while not entitled to a general freedom from competition, is entitled to freedom from competition by those charged with the promotion of its interests.[39]

The burden of a fiduciary to show that the beneficiaries of the trust knowingly consented to the self-dealing transaction is indeed a very heavy one, requiring disclosure of "every bit of information."[40] Coupled with the fact that the fiduciary will almost always be in a superior position to the beneficiaries, it may well be that such releases are not worth the paper they are written on. Again, this is a reason to look to the court for advice and direction.

The Effect of an Exoneration Clause in the Will

Under circumstances in which the will of the decedent relaxes the prevailing rule requiring undivided loyalty of the fiduciary, the desire of the decedent will be enforced, subject to the requirement that the fiduciary act honestly and in good faith in the performance of his or her duties.[41] Thus, it has been held that "no matter how broad the provision may be, the trustee [will be held] liable if he [or she] commits a breach of trust in bad faith or intentionally or with reckless indifference to the interests of the beneficiaries, or if he has personally profited through a breach of trust." In addition, it is important to emphasize that "the language limiting the general rule is strictly construed so that the trustee's actions will not be approved if he trespasses outside the boundaries of the powers granted."[42]

A Summary of Assumption of Trust Opportunities as Self-Dealing

Instances of alleged self-dealing require the courts to consider the totality of the circumstances.[43] In short, it would appear that in order for an opportunity to be a trust opportunity, the opportunity must either (1) fall within the normal expectations and purposes of the trust; (2) fall within the scope of the trustee's duties as a fiduciary; (3) be necessary or essential to the business of the trust and threaten the viability of the trust, if it were not pursued; or (4) be a matter that the trustee was not authorized, expressly or impliedly, to pursue independent of the trust, provided that even if he or she is so authorized, the trustee did not wrongfully utilize trust funds to pursue the opportunity and otherwise operates in good faith.

Alternatively, a trustee may take advantage of an opportunity if (1) it is presented to the trustee in his or her individual, and not fiduciary, capacity; (2) the opportunity is not essential to the trust; (3) the trust holds no interest or tangible expectancy in the opportunity; and (4) the trustee has not wrongfully employed the resources of the trust in pursuing or exploiting the opportunity. Further, the trustee may take such advantage of the opportunity if the trustee was specifically authorized by the terms of the governing instrument to pursue the opportunity, and he or she does so honestly, fairly, and in good faith.

The Measure of Damages: Making the Beneficiaries Whole

As a remedy, the New York Court of Appeals in *Meinhard* made the injured plaintiff a co-tenant in the new lease with the defendant co-venturer. Making the injured party whole is not always so easy, however. *In re Rothko* is illustrative. The case involved the estate of the famous painter Mark Rothko and the improper sale of artwork by the executors of his estate. After trial, two of the executors were found by the surrogate court to be guilty of such conflicts of interest as to amount to "the equivalent of self-dealing," although they did not benefit directly from the sale of the Rothko's paintings. The court applied the "no further inquiry rule" but also made additional findings that the underlying transactions were neither fair nor in the best interests of the estate. The court held those two executors, as well as the third "passive" co-executor, to be jointly liable for considerable compensatory damages, which were to be measured by the difference between the fair market value of the paintings at the time of their sale and the amount actually realized.[44]

> When the wrongdoing consists of what amounts to "faithless misfeasance," such as self-dealing, then lost profits or appreciation damages will be included in the resulting surcharge.

In addition, the court held that the two who were guilty of the functional equivalent of self-dealing were also liable for "appreciation damages." The passive third co-executor was not found to be liable for appreciation damages.[45] These damages represented the increase in the market value of the sold – and therefore unrecoverable – paintings between the time of sale and the time of trial. The New York Court of Appeals agreed with the surrogate court in its finding, disagreeing with the dissents in the Appellate Division. The Court of Appeals wrote:

> Here, the executors, though authorized to sell, did not merely err in the amount they accepted, but sold to one with whom Reis and Stamos had a self-interest. To make the injured party whole in both instances the quantum of damages should be the same. In other words, since the payments cannot be returned, the estate is therefore entitled to their value at the time of the decree, i.e., appreciation damages. These are not punitive damages in a true sense, rather they are damages intended to make the estate whole. . . . [T]heir true character is ascertained when viewed in the light of overriding policy considerations and in the realization that the sale and consignment were not merely sales below value but inherently wrongful transfers which should allow the owner to be made whole.[46]

In 1997, the Court of Appeals, in *In re Janes*, analyzed the distinction between compensatory damages and appreciation damages.[47] According to the Court, "[w] here, as here, a fiduciary's imprudence consists solely of negligent retention of assets it should have sold, the measure of damages is the loss of the capital." Thus, the surrogate court's reliance on *In re Rothko* in imposing a "lost profit" measure of damages is inapposite because in that case, "the fiduciary's conduct consisted of deliberate self-dealing and faithless transfers of trust property."[48]

Accordingly, when the wrongdoing consists of what amounts to "faithless misfeasance," such as self-dealing, then lost profits or appreciation damages will be included in the resulting surcharge.[49] On the other hand, a passive fiduciary who is "merely" negligent in allowing her co-fiduciary to be guilty of "faithless malfeasance" will be charged only compensatory damages.[50]

Judicial Direction

Self-dealing cannot only be authorized by language in the governing instrument, but it also can be allowed by a court, upon a full and complete disclosure of all relevant information by the fiduciary, when it is shown that it is for the benefit of the estate.[51] Even when the instrument vests the fiduciary with broad discretion, including self-dealing, a proceeding for judicial approval to show that the subject transactions are to be made in good faith is clearly warranted and perhaps even required.[52] It should be noted that Surrogate's Court Procedure Act 2107(2) provides that "the court may entertain applications by a fiduciary to advise and direct in other extraordinary circumstances such as . . . where there is conflict among the interested parties."[53]

What should a fiduciary do when his co-fiduciary is the one who has done or proposes to do something that amounts to self-dealing? Estates, Powers & Trusts Law 10-10.7 provides, in part, that "[a] fiduciary who fails to act through absence or disability, or a dissenting fiduciary who joins in carrying out the decision of a majority of the fiduciaries if his or her dissent is expressed promptly in writing to his co-fiduciaries, shall not be liable for the consequences of any majority decision, *provided that liability for failure to join in administering the estate or trust or to prevent a breach of the trust may not thus be avoided*."[54] As a prominent commentator has stated, this section mandates that even where a minority fiduciary dissents, he or she "may not be exonerated for failing to participate in trust

Continued on Page 40

From the NYSBA Book Store >

Contract Doctrine and Marital Agreements in New York

Contract Doctrine and Marital Agreements in New York is a unique reference work covering a complex and challenging area of law. Beginning with basic principles of contract doctrine, the author tackles issues such as late-date acknowledgments, general and specific merger clauses, arbitration, severability and acceleration clauses, contractual child support and maintenance, custody, pensions, death benefits, waivers and modifications, option contracts, reconciliation and repudiation, ambiguity, rescission, statutes of limitations, merger, foreign divorce judgments, prenuptial agreements, cohabiting partners and ends with analysis of how courts have construed contractual language.

"Mr. Scheinberg's analysis is scholarly, his guidance is practical, and his personal commentary interesting. . . .There is simply nothing on our library shelves to compete with it."

Hon. Justice Sondra Miller
Chair, Miller Matrimonial Commission

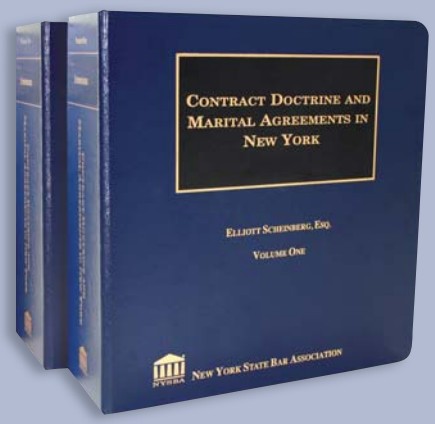
". . .this treatise is a work of vast scope and stands both as a piece of superb legal scholarship and as an invaluable resource for lawyers."

Allan E. Mayefsky, Esq.
President Emeritus, American Academy of Matrimonial Lawyers

"[A] sorely needed, comprehensive, cutting-edge integration of square peg Contract Law into the round hole of legal equities pertaining to families. . . . As a reference work, Contract Doctrine and Marital Agreements *will invariably become a touchstone for matrimonial lawyers."*

Patrick O'Reilly, Esq.
President Emeritus, American Academy of Matrimonial Lawyers;
Adjunct Professor of Law, SUNY Buffalo

NEW!



AUTHOR
Elliott Scheinberg, Esq.

PRODUCT INFO AND PRICES
4159 | 2011 | 1552 pp. 2 vols. (looseleaf)

Order Now!
$225 Nonmembers
$175 Members

$5.95 shipping and handling within the continental U.S. The cost for shipping and handling outside the continental U.S. will be based on destination and added to your order. Prices do not include applicable sales tax.

Get the Information Edge

1.800.582.2452 www.nysba.org/pubs

Mention Code: PUB1084

NYSBA

CONTINUED FROM PAGE 38

administration or failure to prevent a breach of the trust."[55]

Case law supports the same principle. For instance, "[t]he liability of a fiduciary for the wrongful acts of his [or her] co-fiduciary will depend on whether he [or she] knew or should have known of such acts without taking appropriate steps to prevent it."[56] If a fiduciary "negligently suffers his [or her] co-fiduciary to receive and waste estate assets if he [or she] has the means to prevent it by proper care, he [or she] becomes personally liable for the loss."[57] Moreover, "[i]t is also no defense that the defendant executor may have been only a passive player in any events complained of, for a fiduciary may be held accountable for wrongful acts of a co-fiduciary, of which he has knowledge."[58]

As the Appellate Division has written, in such cases

> the admonition of Lord Robertson, Lord President of the Scottish Court of Session, still resonates across nearly a century of development in this area of the law: If a man undertakes to act as a trustee, he must face the necessity of doing disagreeable things when they become necessary in order to keep the estate intact. A trustee is not entitled to purchase a quiet life at the expense of the estate.[59]

The lesson therefore is clear: whether you are the dissenting fiduciary or the fiduciary who contemplates entering into a transaction that might constitute self-dealing, it is wise to reach out to the courts for protection. ■

1. *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928).
2. *Id.*
3. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligations* 1988 Duke L.J., 879, 880 (1988) (emphasis in original).
4. Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 Cornell L. Rev. 767, 775 (2000).
5. *Id.* at 776.
6. DeMott, *supra* note 3, p. 882.
7. *In re Jakobson*, N.Y.L.J., Jan. 31, 2001, p. 32 (Sur. Ct., Nassau Co.) (citing *In re Greiff*, 92 N.Y.2d 341 (1998)).
8. Alexander *supra* note 4, p. 776.
9. *Id.* at 778.
10. *In re Rothko*, 43 N.Y.2d 305 (1977).
11. *See* George Gleason Bogert et al., The Law of Trusts and Trustees, § 543 (2009).
12. *Id.* (emphasis added).
13. *See Renz v. Beeman*, 589 F.2d 735, 745–46 (2d Cir. 1978); *Wootten v. Wootten*, 151 F.2d 147, 150 (10th Cir. 1945); *Blaustein v. Pan Am. Petroleum & Transp. Co.*, 293 N.Y. 281 (1944); *O'Hayer v. de St. Aubin*, 30 A.D.2d 419 (2d Dep't 1968) (citing *Burg v. Horn*, 380 F.2d 897 (2d Cir. 1967)).
14. *O'Hayer*, 30 A.D.2d 419.
15. *Id.* at 426 (emphasis added).
16. *Id.* (emphasis added).
17. *Wootten*, 151 F.2d at 149 (emphasis added); *see Renz v. Beeman*, 589 F.2d 735, 796–97 (2d Cir. 1978).
18. *See* Bogert et al., *supra* note 11.
19. 380 F.2d 897 (2d Cir. 1967).
20. *Id.* at 899.
21. *See Blaustein*, 293 N.Y. at 300.
22. *Am. Fed. Grp. Ltd. v. Rotherberg*, No. 91 Civ. 7860, 2003 WL 22349673, at *12 (S.D.N.Y. 2003) (citing *Abbott Redmont Thinlite Corp. v. Redmont*, 475 F.2d 85, 89 (2d Cir. 1973)).
23. *Burg*, 380 F.2d at 899 (emphasis added).
24. *Id.* at 899 (emphasis added).
25. *Lawrence v. Cohn*, 197 F. Supp. 2d 16, 34 (S.D.N.Y. 2002), *aff'd*, 325 F.3d 141 (2d Cir. 2003).
26. *See Alexander v. Alexander*, 147 A.D.2d 241 (1st Dep't 1989); *see also Design Strategies, Inc. v. Davis*, 384 F. Supp. 2d 649 (S.D.N.Y. 2005).
27. *Id.*
28. Alexander *supra* note 4, p. 249.
29. *Id.* at 247.
30. *Burg v. Horn*, 380 F.2d 897, 899–901 (2d Cir. 1967).
31. *See In re Balffe's Will*, 5 A.D.22, 24 (2d Dep't 1935); *O'Hayer v. de St. Aubin*, 30 A.D.2d 419 (2d Dep't 1968).
32. *See In re Akin*, N.Y.L.J., Oct. 23, 1989, p. 29 (Sur. Ct., Westchester Co.) (citing III Scott and Ascher on Trusts, § 222.2, 388–89 (4th ed.)).
33. *O'Hayer*, 30 A.D.2d at 426.
34. *Burg*, 380 F.2d at 901.
35. 294 N.Y. 8 (1st Dep't 1945).
36. *Id.* at 14 (citing 3 Scott on Trusts, § 507); *see* Restatement 2d, Trusts, § 170, cmt. l.
37. *O'Hayer*, 30 A.D.2d at 427.
38. 21 A.D.2d 60, 67–68 (1st Dep't 1964).
39. *Id.* at 67.
40. *In re Birnbaum*, 117 A.D.2d 409, 417 (4th Dep't 1986).
41. *See In re Balffe's Will*, 5 A.D.22 (2d Dep't 1935); *In re Akin*, N.Y.L.J., Oct. 23, 1989, p. 29 (Sur. Ct., Westchester Co.); *O'Hayer*, 30 A.D.2d 419.
42. *O'Hayer*, 30 A.D.2d at 423.
43. *Lawrence v. Cohn*, 197 F. Supp. 2d 16, 34 (S.D.N.Y. 2002), *aff'd*, 325 F.3d 141 (2d Cir. 2003).
44. *In re Rothko*, 84 Misc. 2d 830, 844 (Sur. Ct., N.Y. Co. 1975).
45. *Id.* at 879.
46. *In re Rothko*, 43 N.Y.2d 305, 322 (1977) (internal citations omitted).
47. *In re Janes*, 90 N.Y.2d 41, 55 (1997).
48. *Id.* at 55 (internal citations omitted).
49. *In re Witherall*, 37 A.D.3d 879, 881 (3d Dep't 2007).
50. *See In re Goldstick*, 177 A.D.2d 225 (1st Dep't 1992).
51. *See* John R. Morken & Gary B. Freidman, *Early Detection of Possible Pitfalls and Fiduciary Obligations Can Prevent Later Problems*, N.Y. St. B.J. (Jan. 2002) p. 22; *see also In re Scarborough Props.*, 25 N.Y.2d 553 (1969).
52. *In re Wallens*, 9 N.Y.3d 117 (2007).
53. SCPA 2107(2).
54. EPTL 10-10.7 (emphasis added).
55. Margaret V. Turano, McKinney's Practice Commentary, EPTL 10-10.7 (2002).
56. *In re Blumberg*, 29 Misc. 2d 536, 537 (Sur. Ct., Nassau Co. 1961).
57. *In re Rubin*, 147 Misc. 2d 981, 983 (Sur. Ct., Nassau Co. 1990) (internal citations omitted); *see In re Goldstick*, 177 A.D.2d 225 (1st Dep't 1992).
58. *In re Steinhardt*, N.Y.L.J., Aug. 11, 1989, at 19 (Sur. Ct., N.Y. Co.) (citing EPTL 10-10.7; *In re Rothko*, 84 Misc. 2d 830 (Sur. Ct., N.Y. Co. 1975), *modified by* 56 A.D.2d 499, *aff'd by* 43 N.Y.2d 305 (1977)).
59. *In re Goldstick*, 177 A.D.2d 225, 239 (1st Dep't 1992) (internal citations omitted).

Using an Expert to Evaluate Eyewitness Identification Evidence

By Shirley K. Duffy

Identification

The United States Supreme Court has recognized the inherent danger and unreliability of eyewitness identification.[1] New York courts also have recognized the need for objective procedures which minimize the chance of misidentification resulting in a wrongful conviction and allowed expert testimony regarding reliability of eyewitness identification within the discretion of the trial court.[2]

Neil v. Biggers[3] and *Manson v. Brathwaite*[4] stated the five factors that should be taken into account when evaluating the reliability of eyewitness identification: (1) witness opportunity to view the criminal during the crime; (2) the length of time between the crime and the identification; (3) the witness's level of certainty; (4) the accuracy of the witness's prior description; (5) the witness's degree of attention. These factors in addition to other research findings are evident in the many studies and protocols on eyewitness identification.

Studies done over many years have continually indicated that eyewitness identification "is the single largest source of wrongful convictions."[5] Researchers have conducted studies staging eyewitness identification situations, and studies have been repeated in the press and in academic journals, all indicating that "many factors can affect the accuracy of acquisition, storage and retrieval of memories."[6]

Eyewitness identification reliability is also greatly affected by the technique or techniques that are utilized by the criminal justice system.[7] At the present time, law enforcement officials conduct eyewitness identification

Shirley K. Duffy has practiced criminal law in Syracuse, N.Y. for the past 11 years. She is currently serving as a senior attorney with the Hiscock Legal Aid Society. She has also handled numerous criminal and family court appeals in the Appellate Division, Fourth Department and the New York Court of Appeals. She was assisted in the preparation of this article by Jason Fountain, Roy Franks and Edmund Kulakowski, law student interns at Syracuse University. The author also wishes to thank Robert Carmack, Mary Davison, Esq., and Robert Rickert, Esq. for reviewing the article. This article first appeared, in a slightly different format, in the Spring 2011 *New York Criminal Law Newsletter*, a publication of the Criminal Justice Section of the New York State Bar Association.

through a variety of procedural methods: "Live lineups," photo spreads and "show-ups" are common methods. Generally a live lineup proceeds with the eyewitness standing behind a one-way glass and he or she is asked to identify a suspect from a group of five to eight people standing in a line.[8]

> "The longer a person has to look at something, the better his memory will be."

In a photo spread, a group of six to 12 photographs is used instead of live actors, and the witness is asked to choose the suspect from the group.[9] Photo spreads have gained in popularity by law enforcement officials and are accepted in court just as live lineups.[10] This growth in popularity may be attributed to the fact that the suspect has no right to counsel with a photo spread, and they are easier to conduct than live lineups.[11]

The show-up is an inherently suggestive identification procedure.[12] Essentially the suspect is shown to the eyewitness who is asked whether or not that particular suspect was the perpetrator.[13]

It is well-established that severe limitations exist when using eyewitness identification evidence. Error rates as low as 25% have been reported, but this low rate cannot be assured.[14] One study, conducted in 1988, found that 52% of the 205 cases of wrongful conviction examined were attributed to erroneous eyewitness identification.[15] Other studies have shown error rates ranging from 45% to 60%.[16] The increased use of, and subsequent advancements in, DNA evidence has revealed many of these errors, including in the area of eyewitness identification.[17] Unfortunately, some types of crime do not leave DNA evidence, and exonerations in such cases are extremely low in comparison to cases in which DNA evidence was present.[18] For example, exonerations in rape cases are 20 times more likely than in robbery cases, because rape perpetrators leave far more evidence than perpetrators of robbery.[19] There are no major differences in the problems of eyewitness identification between those cases where DNA evidence is present and those where DNA evidence is absent.[20]

The statistics do not tell the whole story, however, and there are many adverse consequences stemming from faulty eyewitness identifications of an individual, including on a societal level. Of course, the most obvious result is that defendants are convicted and sentenced for crimes they did not commit.[21] The impact, of course, is devastating in death penalty cases.[22] Moreover, there is an adverse effect on the mistaken witness, who may experience profound distress over playing a role in a miscarriage of justice.[23]

Then, too, there are social effects stemming from wrongful convictions: Society is not served by wrongful convictions because the objectives of the criminal justice system (retribution, deterrence and incapacitation) are not realized.[24] The only "winner" when someone is falsely convicted is the real perpetrator of the crime.[25] Also, wrongful convictions cause an erosion of public trust in the criminal justice system.[26]

Acquisition, Retention, Retrieval

A number of factors affect eyewitness identification.[27] For one thing, various circumstances affect the eyewitness's acquisition of the identification and his or her ability to retain and retrieve the memory.[28] These factors are described by Loftus and Doyle[29] and presented by Higgins and Skinner.[30]

Factors Affecting Acquisition

Duration of the event "The longer a person has to look at something, the better his memory will be."

Stress and fear: "The typical finding is that those who are stressed during some event remember it less well when they are tested later, even though they are not stressed at the time of the later test."

Weapon focus: "The term weapon focus refers to the concentration of a crime witness's attention on a weapon – the barrel of a gun or the blade of a knife – and the resultant reduction in ability to remember other details of the crime."

Age: "Analysis suggests that children past twelve years of age are roughly equal to adults in their ability to recognize faces, but younger children are substantially less able."

Factors Affecting Retention

Time until retrieval: "The 'forgetting curve' shows that we forget a good deal of new information soon after we learn it, and that forgetting then becomes more gradual."

Post-event information incorporation: "[After the event] false information can be introduced into a person's recollection, and later this information may be reported as if it actually occurred."

Factors Affecting Retrieval

Confidence: "In short, the witnessing situations generally encountered in litigation – short, unexpected, often violent – are those in which a correlation between confidence and accuracy is the most difficult to find."

Biased lineups: "The most common problem with a lineup is that many of the distracters can be eliminated immediately – they are simply not plausible alternatives. The suspect is then available to be picked by default."

Sequential presentation of suspects: "With the sequential presentation, the researchers found a reduced rate of false identifications in the lineups that did not contain

the perpetrator. The reduction of false identifications occurred without loss of accurate identifications in the lineups in which the perpetrator was there."

Cross-racial identification: "It is well established that there exists a comparative difficulty in recognizing individual members of a race different from one's own."

These factors are a valid guide for developing questions for cross-examination of eyewitness identification witnesses.

In 1999, the United States Department of Justice's National Institute of Justice issued *Eyewitness Evidence: a Guide for Law Enforcement* (The Guide). The Guide attempted to take into account some but not all of the factors affecting eyewitness identification. Arguably, all such factors should be taken into account and the Guide does not go far enough in precluding faulty eyewitness identifications. However, it is a useful first step to improve current law enforcement practices in this ongoing, problematic area. The Guide was an effort to "bridge the gap between social science research and actual law enforcement practice," a gap that has traditionally existed for many years between the two areas.[31]

"With the sequential presentation, the researchers found a reduced rate of false identifications in the lineups that did not contain the perpetrator."

The Guide addressed the numerous issues surrounding eyewitness identification evidence, and made numerous suggestions on improving the process. These are discussed below along with an exposition of the limitations of the procedures as discussed by Donald Judges in his treatise. Since the Guide was published in 1999, a training manual has been made available to law enforcement to teach officers in the field the principles espoused by the Guide.[32]

The Guide makes various recommendations for the interviewing of eyewitnesses and in the procedures for conducting lineups, photo spreads and show-ups. Many of the recommendations for lineups are the same as photo spreads, so they are discussed together. When one procedure differs from the other, it is noted in the text.

The principles recommended for the interviewer apply to all of the identification procedures. The Guide recommends that the interviewer making first contact with the witness avoid contaminating the witness's independent recollection with post-event information.[33]

The Interview

The interviewer should ask open-ended questions such as, "What can you tell me about the car?" These are followed by close-ended questions such as, "What color was the car?"[34] The interviewer is cautioned to avoid using suggestive or leading questions such as, "Was the car red?"[35]

The Guide makes other recommendations for the preliminary investigating officer, when he or she processes the crime scene.[36] Multiple witnesses should be separated and advised not to talk to one another or other potential witnesses.[37] The witnesses also should be told to avoid contact with the media or listening and/or watching media coverage.[38] The Guide makes additional recommendations for the follow-up interview. As Judges points out, a number of these recommendations are consistent with many aspects of the cognitive interview.[39]

For the follow-up interview, witnesses should be encouraged to volunteer information and provide detail.[40] The interviewer is encouraged to have the witness use nonverbal communications, such as drawing, gestures or objects.[41] The witness should be told to mentally recreate the event, that is, to think about his or her feelings at the time of the event.[42] Moreover, the interviewer should avoid volunteering specific information about the event, as well as avoid interrupting the witness.[43] The witness should be cautioned not to guess and should be encouraged to address the interviewer if anything relevant comes to mind.[44]

The Guide makes further recommendations for the interviewer in processing the information.[45] Each element of the witness's statement should be assessed separately.[46] That is, each element should be compared to the entire story and to other sources of information.[47]

Lineups, Show-ups, Photo Spreads

The Guide also makes specific recommendations with regard to identification procedures. In composing the lineup or photo spread, the suspect should not unduly stand out, and there should be only one suspect per lineup.[48]

As Judges points out, the Guide's recommendations attempt to avoid "instruction bias."[49] The Guide recommends the following to avoid instruction bias: The witness should be told that it is just as important to clear the innocent as to identify the guilty, and that the perpetrator may or may not be in the lineup.[50] Moreover, he or she should be told that the individuals in the lineup may not look exactly like the suspect at the time of the incident because of changes in head and facial hair.[51] The interviewer should ask how certain the witness is of his or her

identification and should be assured that the police will continue to investigate if the identification is not made.[52]

The Guide makes many recommendations in composing the lineup to avoid "foil bias."[53] The Guide recommends the selection of fillers, who generally fit the description of the suspect.[54] If the suspect's appearance differs from the witness's description, the fillers should resemble the suspect with regard to salient features.[55]

> A description of the suspect should be obtained before the show-up.

However, complete uniformity is not required. Fillers should not so closely resemble the suspect that a person familiar with the suspect could not pick him or her out.[56] Further, the Guide recommends that fillers should be consistent with the suspect with regard to unique features, such as tattoos and scars.[57] Fillers should not be reused, and there should be four fillers for a live lineup and five fillers for photo spreads.[58]

Judges points out several limitations of these procedures. The Guide does not recommend separate lineups for multiple witnesses, rather it recommends different placement only.[59] Further, foil bias is inadequately controlled because a mock witness procedure is not used.[60] Rather, the "quick and dirty" approach is used wherein investigators view the spread once it is completed to ensure that the suspect does not stand out.[61] Judges also point out that lineup size, five for live lineups and six for photo spreads, is not adequate.[62] Lineups of these sizes may result in a 10% probability of false identifications.[63]

The Guide also recommends certain procedures for show-ups, wherein one suspect is displayed, and the witness is then asked if that subject is the perpetrator.[64] The Guide recognizes the inherent suggestiveness of the procedure but did not recommend eliminating its use,[65] which Judges found to be somewhat vexatious.[66]

The Guide recommends that a description of the suspect be obtained before the show-up.[67] Multiple witnesses should be separated, and if one witness makes a positive identification, then other less suggestive procedures should be used with the remaining witnesses.[68] A non-biased instruction that the individual may or may not be the suspect should be used.[69] Furthermore, a statement of witness certainty with regard to the identification and non-identifications should be obtained and documented.[70] The Guide also provides recommendations for the compilation and use of "mug books."[71] According to Judges, two major limitations of the Guide are the failure to endorse double-blind procedures[72] and the sequential lineup.[73]

The Guide attempts to compensate for not endorsing the double-blind method by offering a few guidelines. It recommends that the eyewitness makes a "post-identification certainty" statement, and that it be documented.[74] (Additionally, the interviewer should avoid displaying information about previous arrests and other statements that may influence witness selection.)[75] The investigator should avoid giving the witness feedback before the certainty statement is obtained.[76] Further, the witness should be instructed not to discuss the results of the identification procedure with other witnesses.[77] The Guide recommends documentation of the identification procedure but not necessarily videotaping.[78] Of course, there are limitations to videotaping because videotaping itself may influence the witnesses.[79]

The Guide also falls short of recommending the least error-prone identification procedure – that is, the sequential lineup.[80] The Guide does provide instructions for the sequential lineup if law enforcement chooses to use this method.[81] The sequential lineup greatly reduces the rate of mistaken identifications.[82] It is thought that the reason for decreased error rates with the sequential procedure is that the eyewitness makes comparisons between his or her own memory and the lineup member, rather than making comparisons among lineup members.[83]

Cross-Racial Identification, "Other Race" Effect

A cross-racial identification occurs where a victim/witness of one race identifies a suspect of another race as a perpetrator. A problem exists because cross-racial identifications by witnesses are more likely to result in wrongful convictions.[84] This greater tendency to misidentify suspects of another race has been dubbed the "other-race effect" or "own-race bias." There is some support that the own-race effect is strongest when a white witness must identify a black face.[85] While the majority of research has been conducted using white and black subjects, a recent study has noted the other-race effect between black and Hispanic subjects.[86]

Most research on the other-race effect has been done in controlled laboratory settings, as opposed to field research. Because of the lack of observation of the effect in actual criminal cases, some authors have expressed concern over the studies' generalizing to the courtroom context;[87] however, there is some evidence that the lab experiments do have high external validity.[88] Also, studies have shown a lack of correlation between recognition, accuracy and confidence, both generally and with respect to other-race photographs.[89]

In the last 20 years, research has been conducted in an attempt to discern whether the effect has a social or cognitive explanation. Some researchers have suggested that the inability to accurately encode and recognize other-race faces stems from a simple lack of contact with persons of other races.[90] This theory has not been heavily

supported, however, and many studies have argued that it is the quality – not the quantity – of the contact that results in increased ability to recognize other-race faces.[91] Originally, prejudice and racism were thought to be an explanation for lower recognition rates; however, recent studies have found no correlation.[92]

A cognitive interpretation for the "other-race effect" focuses on the physiognomic variability of faces. Specifically, the type of variability in faces, and not the amount of variability, is what accounts for differences in recognition accuracy.[93] Because different races can differ in the type of variability among their faces (e.g., hair color in whites, skin tone in blacks, etc.), relying on the facial cues that lead to variability in one's own race will be ineffective for encoding and recognition of an other-race face.[94]

Whatever the reason for the other-race effect, it has been extensively documented in laboratory research and has been shown to exist outside the lab as well. If cross-racial identification errors cannot be precluded at the source, then they need to be identified and remedied in the courtroom.

Traditional Safeguards

Traditional legal safeguards against the offer of inaccurate eyewitness testimony are the suppression hearing, cross-examination and the closing statement. But, these methods simply do not effectively alleviate misidentification resulting from the other-race effect.

The suppression hearing is designed to assess procedural errors, and so will be ineffective in uncovering any underlying bias on the part of the witness.[95] Further, suppression hearings are meant to protect against suggestiveness through police misconduct. Even the most thorough hearing will fail to investigate the witness's inherent recognition ability.[96]

The cross-examination of the identification witness is another tool that is meant to protect against inaccurate or unreliable identifications. Even though cross-examination is the traditional way to assess the credibility of a witness, the limitations of cross-examination will make it unlikely to reveal any impairment due to the other-race effect.[97] If a witness honestly believes that he or she suffers from no impairment in the ability to recognize other-race faces, for example, then no amount of cross-examination will tease out the other-race effect.[98] Because a witness's confidence in his ability has been shown to be completely unrelated to his cross-racial recognition ability, the jury's reliance on the witness's sincerity will be unfounded and improper.[99]

Counsel can use the closing argument to explain the other-race effect to jurors; however, courts have been reluctant to allow discussion of possible other-race recognition problems due to considerations that such statements will be racially inflammatory.[100] Further, discussion of cross-racial identification at closing argument usually will have a lack of factual foundation, as there will be no facts in evidence on the problems with cross-racial identification.[101] Furthermore, even if counsel could make some argument based on cross-racial identification impairment generally, counsel would have no basis for claiming that the current witness actually suffers from any impairment.[102]

Other Safeguards

Since traditional safeguards are not adequate to protect against undue reliance on inaccurate identification testimony, other safeguards need to be used. Two leading suggestions in the last 20 years have been to use expert testimony and/or a special jury instruction to educate the jury on cross-racial identification and the other-race effect. These suggestions have fostered mixed reviews for many different reasons.

A cross-racial identification occurs where a victim/witness of one race identifies a suspect of another race as a perpetrator.

For example, expert testimony could be used to describe the effect in general and to explain that research has shown that there is an increased likelihood of recognition error in cross-racial identification.[103] While admission of expert testimony on the other-race effect was met with initial hostility, recently some state and federal courts have allowed narrow use of such testimony.[104] In fact, at this point there seems to be no reason why expert testimony on the matter does not satisfy the standards originally set forth by the Court in *Daubert*, *Joiner*, *and Kumho Tire*, and eventually incorporated into Federal Rule of Evidence 702.[105] The reason that most State courts do not allow expert testimony on other-race effect is that identification reliability is common knowledge and available to the lay juror without expert help.[106] However, the New York Court of Appeals has recently ruled that allowing expert testimony on other-race effect must be considered by New York state courts.[107]

Another tool suggested to aid in calling the jury's attention to the problems of cross-racial identification is the special jury instruction. Courts have attempted to provide adequate instructions on considering racial differences in witness identification for the last 30 years,[108] but have largely been limited to special circumstances

where there are other indicia of unreliability.[109] The most important questions to answer are just what to say, and when to say it.[110] Recently, the Supreme Court of New Jersey held in *State v. Cromedy* that a special jury instruction on cross-racial identification is required where "identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability."[111] The court also held that the instruction should "alert the jury . . . that it should pay close attention to a possible influence of race."[112] Some New York jurisdictions have since followed the *Cromedy* ruling.[113]

Critics of the use of a special jury instruction on the other-race effect have argued that such instructions "put a judicial imprimatur, or a cloak of expertise, on questionable stereotypes about interracial recognition that may or may not reflect the recall capacity of a witness."[114] An instruction also allows the court to improperly "comment on the quality, or lack of quality, of one party's evidence."[115]

In conclusion, the best way to prevent wrongful convictions by inaccurate eyewitness identification evidence is at the source. Although the Justice Department's guidance does not go far enough because it does not incorporate double-blind and sequential lineup procedures, it is an important first step. Law enforcement should be encouraged to utilize the Guide. Again, the only winner of an erroneous identification procedure is the actual perpetrator. Further, expert opinion should be allowed to inform the jury of the limitations of this type of evidence. Adequate jury instructions should be provided to give the jury guidance on how to use this evidence in coming to a verdict.

Cross-racial-identification error poses unique problems in the realm of eyewitness testimony, primarily because most witnesses either do not know it exists or do not know that they suffer from it. The problem is magnified by the fact that the potential problems with recognition and identification are lost on most jurors. Further, because traditional safeguards against the admission of inaccurate eyewitness testimony (suppression hearings, cross-examination and closing arguments) fail to bring out the existence of any bias, attorneys who are aware of the other-race effect cannot educate the jurors properly. The use of expert testimony and special jury instructions has shown some promise; however, they carry an inherent ineffectiveness because they attempt to make jurors aware of the problem after the fact, with only mixed results. ■

1. *U.S. v. Wade*, 388 U.S. 218 (1967); *Gilbert v. Cal.*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967); *Simmons v. U.S.*, 390 U.S. 377 (1968).

2. *People v. LeGrand*, 8 N.Y.3d 449 (2007) (held that it is an abuse of discretion to exclude expert testimony on the reliability of eyewitness identifications where accuracy of the identification is an issue and there is little or no corroborating evidence); *see also People v. Abney*, 13 N.Y.3d 251 (2009); *People v. Morales*, 37 N.Y.2d 262, 271.

3. *Neil v. Biggers*, 409 U.S. 188 (1972).

4. *Manson v. Brathwaite*, 432 U.S. 98 (1977).

5. Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 Psychol. Pub. Pol'y & L. 765 (1995).

6. Edmund S. Higgins & Bruce S. Skinner, *Establishing the Relevance of Expert Testimony Regarding Eyewitness Identification: Comparing Forty Recent Cases with the Psychological Studies*, 30 N. Ky. L. Rev. 471 (2003).

7. Wells & Seelau, *supra* note 5, at 766.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. U.S. Dep't of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* 27 (1999).

13. Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence; A Guide for Law Enforcement*, 53 Ark. L. Rev. 231, 254 (2000).

14. Avrahim M. Levi & R.C.L. Lindsay, *Lineup and Photo Spread Procedures: Issues Concerning Policy Recommendations*, 7 Psychol. Pub. Pol'y & L. 770, 776 (2001).

15. Wells & Seelau, *supra* note 5, at 765, 766.

16. Richard A. Wise & Martin A. Safer, *A Survey of Judges' Knowledge and Beliefs About Eyewitness Testimony*, 40 Court Rev. 6, 7 (2003).

17. U.S. Dep't of Justice, *supra* note 12, at iii; *see also* Judges, *supra* note 13, at 232.

18. Laurie Gould, Brian Von Hatten & John W. Stickels, *Reforming the Use of Eyewitness Testimony*, 35 Okla. City. U.L. Rev. 131, 136 (2010).

19. *Id.*

20. Richard A. Wise, Kirsten A. Dauphinais, & Martin A. Safer, *Criminal Law: A Tripartite Solution to Eyewitness Error*, 97 J. Crim. L. & Criminology 807, 870 (2007).

21. Judges, *supra* note 13, at 234.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Higgins & Skinner, *supra* note 6, at 476.

28. *Id.*

29. *Id.*

30. *Id.* at 476–77.

31. Judges, *supra* note 13, at 234.

32. U.S. Dep't of Justice, *Eyewitness Evidence: A Trainer's Manual for Law Enforcement* (2003) (The manual builds on the principles in the Guide for purposes of classroom discussion and, for the most part, incorporates the suggestions of the Guide and will not be discussed further in this article.).

33. U.S. Dep't of Justice, *supra* note 12, at 13; Judges, *supra* note 13, at 264.

34. U.S. Dep't of Justice, *supra* note 12, at 13.

35. *Id.*

36. *Id.* at 15.

37. *Id.*

38. *Id.*

39. Judges, *supra* note 13, at 251 (The cognitive interview proceeds according to a particular set of general instructions that support the natural processes of memory retrieval.). *See generally id.*

40. U.S. Dep't of Justice, *supra* note 12, at 22.

41. *Id.* at 23.

42. *Id.*

43. *Id.*

44. *Id.* at 15.

45. *Id.* at 24.

46. *Id.*

47. *Id.* at 25.

48. *Id.* at 29–30.

49. Judges, *supra* note 13, at 257 (which occurs where a witness believes that the perpetrator is in the lineup and the witness is not given the option of replying that he or she is not present).

50. U.S. Dep't of Justice, *supra* note 12, at 31–32.

51. *Id.* at 32.

52. *Id.*

53. Judges, *supra* note 13, at 258 (which occurs where the selection of the innocent "fillers" (also known as the "foil") or "distractor individuals" bears little resemblance to the description of the suspect, so that the suspect in the lineup stands out).

54. U.S. Dep't of Justice, *supra* note 12, at 29, 30.

55. *Id.* at 29.

56. *Id.* at 29, 31.

57. *Id.* at 29–31.

58. *Id.*

59. U.S. Dep't of Justice, *supra* note 12, at 30; Judges, *supra* note 13, at 278.

60. Judges, *supra* note 13, at 261 (In a mock witness procedure people who did not actually see the event are given a pre-lineup description from the real witness and are then shown the lineup. If the mock witnesses select the suspect with a greater frequency than the other members of the lineup, the lineup is biased to highlight the suspect.).

61. *Id.* at 279.

62. *Id.* at 262.

63. *Id.*

64. U.S. Dep't of Justice, *supra* note 12, at 27.

65. *Id.*

66. Judges, *supra* note 13, at 276.

67. U.S. Dep't of Justice, *supra* note 12, at 27.

68. *Id.*

69. *Id.*

70. *Id.*

71. U.S. Dep't of Justice, *supra* note 12, at 17–18; Judges, *supra* note 13, at 276.

72. Judges, *supra* note 13, at 253 (in which the test is administered by an investigator who has only general background knowledge of the event and does not know who the perpetrator is, only that he or she may be present in the group).

73. *Id.* at 263 (in which individuals in the lineup are presented to the eyewitness one at a time. The witness is then asked which is the perpetrator, and is to give a yes or no answer. The procedure stops when the witness makes a positive identification. Thus, the sequential lineup results in fewer false positives).

74. Judges, *supra* note 13, at 279.

75. *Id.*

76. *Id.* at 279–80.

77. *Id.* at 280.

78. *Id.* at 281.

79. *Id.* at 283.

80. David L. Feige, *"I'll Never Forget that Face": The Science and Law of the Double-Blind Sequential Lineup*, 26 Champion 28, 29 (2002).

81. U.S. Dep't of Justice, *supra* note 12, at 34–35.

82. Feige, *supra* note 80, at 29.

83. *Id.*

84. Sheri L. Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 Cornell L. Rev. 934, 936 (1984).

85. John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 Am. J. Crim. L. 207 (2001); Johnson, *supra*, note 84, at 938–41.

86. Otto H. MacLin & Roy S. Malpass, *Eyewitness Identification: Racial Categorization of Faces: The Ambiguous Race Face Effect*, 7 Psychol. Pub. Pol'y & L. 98 (2001).

87. Deborah Bartolomey, *Cross-Racial Identification Testimony and What Not to Do About It: A Comment on the Cross-Racial Jury Charge and Cross-Racial Expert Identification Testimony*, 7 Psychol. Pub. Pol'y & L. 247, 230 (2001).

88. Johnson, *supra* note 84, at 941–43.

89. *Id.* at 942.

90. *Id.* at 944, MacLin & Malpass, *supra* note 86, at 99.

91. MacLin & Malpass, *supra* note 86, at 100 (noting the difference between experience hypotheses posed by other researchers).

92. Johnson, *supra* note 84, at 943.

93. Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 Psychol. Pub. Pol'y & L. 230, 236 (2001).

94. *Id.*

95. Johnson, *supra* note 84, at 951–52 (As Johnson states, "The witness's individual recognition impairment just does not fit the focus of suppression hearings.").

96. *Id.* at 953.

97. *Id.*

98. *Id.*

99. *Id.*

100. Johnson, *supra* note 84, at 955–56.

101. *Id.*

102. *Id.* at 956–57.

103. *Id.* at 959.

104. Rutledge, *supra* note 85, at 218–20 (listing a breakdown of use in the federal system).

105. *Id.*

106. Rutledge, *supra* note 85, at 220–21.

107. *People v. Abney*, 13 N.Y.3d 251 (2009) (held that it was an abuse of discretion to not hold a *Frye* hearing on the admissibility of cross-racial identification expert testimony when eyewitness testimony was the only evidence against the defendant).

108. *U.S. v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972).

109. *State v. Cromedy*, 727 A.2d 457 (N.J. 1999).

110. Johnson, *supra* note 84, at 975–77.

111. *Cromedy*, 727 A.2d at 467.

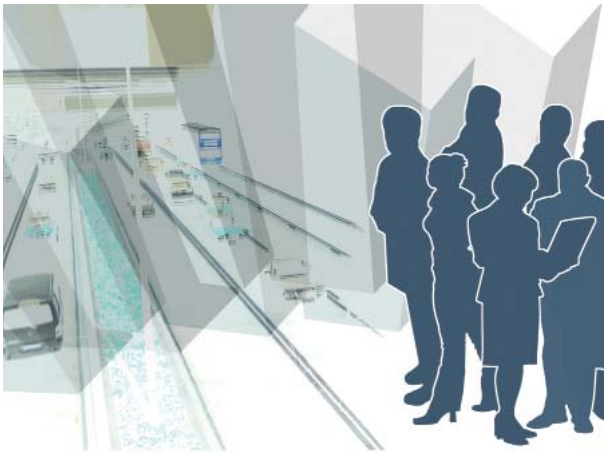
112. *Id.*

113. *See Applewhite v. McGinnis*, No. 04 Civ. 6153 (PKC)(JCF) 2005 U.S. Dist. LEXIS 41970 (S.D.N.Y. Nov. 29, 2005); *see also People v. Ellison*, 8 A.D.3d 400 (2d Dep't 2004).

114. Bartolomey, *supra* note 87, at 247.

115. *Id.*

BY STEVEN C. BENNETT



Steven C. Bennett (scbennett@jonesday.com) is a partner in the New York City offices of Jones Day, and Chair of the firm's E-Discovery Committee. He teaches a course on electronic discovery at New York Law School. The views expressed are solely those of the author, and should not be attributed to the author's firm or its clients.

Data Security for Lawyers

Lawyers were always, to some degree, information managers.[1] Today, however, the use of information-management technologies in a law firm has become ubiquitous. Clients demand "24/7" access to counsel, and lawyers expect to be able to work on matters from any location. Lawyers and clients, moreover, routinely collaborate on legal matters, exchanging vast amounts of confidential information in the process. Not all such information is technically privileged (or subject to work product protection), but much of it, in the wrong hands, could be devastating to a client (or a lawyer).[2] Despite these potential (and quite serious) concerns, many lawyers continue to assume a sharp division exists between legal practice and information management skills.[3] For some lawyers, technology (and, specifically, data management) issues are "someone else's problem" (often, either the secretary, the paralegal or the junior associate on a matter).[4]

Yet, increasingly, today, lawyers face risks of security breaches, hacking, and other loss or theft of confidential information. The American Bar Association "Ethics 20/20 Working Group" recently published two papers on this topic, noting that lawyers may require guidance to "ensure that their use of technology complies with their ethical obligations to protect clients' confidential information."[5] Two other major ethics opinions on lawyer use of technology, one in New York[6] and one in California,[7] also addressed these questions. This article briefly summarizes the professional responsibility concerns outlined in these recent opinions and suggests practical solutions for law firms to consider.[8]

Awareness

Few of the Model Rules of Professional Conduct deal specifically with the use of technology. State and local bar associations, moreover, have had to play "catch up" in issuing opinions on ethics issues associated with technology use. As a result, lawyers may develop the impression (from lack of clear ethics restrictions on legal technology) that all technology is "fair game" for use, so long as conventional ethics responsibilities (*e.g.*, preservation of attorney-client privilege) are fulfilled.

But protection of client interests is not limited to safeguarding privilege. Attorneys, according to Model Rule 1.1, owe their clients a basic duty of competent representation, which includes "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[9] The Model Rules, moreover, do not "exhaust the moral and ethical considerations that should inform a lawyer[.]"[10] Indeed, the Rules require lawyers to protect "information relating to the representation of a client,"[11] not simply privileged information. Comments to the Rules make clear that a lawyer "must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision."[12]

These obligations, however, are not absolute. Thus, the ABA recognizes that "there may be a gap between technology-related security measures that are ethically required and security measures that are merely consistent with 'best practices.'"[13] Whether ethically required, or simply a matter of "best practices," a lawyer should, at the very least, be aware of potential data security problems and "stay abreast of technological advances" that may enhance (or challenge) the lawyer's ability to protect confidential client information.[14] In substance, these authorities suggest, "look before you leap."

Potential Precautions

The ethics authorities address confidentiality concerns in a variety of contexts: cloud computing, use of personal computing and communications devices (laptops, cellular telephones, flash drives and more) as well as physical systems (photocopiers) and the Internet (gmail, Facebook and others). There is, of course, no one-size-fits-all solution to these various circumstances. But several essential precautionary principles can be derived:

- The degree of caution required in use of technology may increase

where a lawyer receives "extraordinarily sensitive" information from a client.[15] Thus, for example, medical information, social security numbers, credit card numbers and detailed financial information all might require special attention.[16]

- Where security precautions are "readily available and relatively inexpensive," or may "already be built into the operating system" on a computer, the lawyer may consider use of such precautions.[17]
- Activation of password protection features, available on most mobile devices, may be appropriate.[18]
- Consultation with appropriate information technology, privacy and security professionals, especially where new technology systems are developed and implemented, may be necessary.[19]

Finally, the ABA specifically references the possibility of lawyers obtaining "cyberliability insurance" to cover potential losses from technology-related events, such as "cyberattacks or the expense of post-cyberattack compliance obligations[.]"[20] Such liability may arise from a host of sources, including a burgeoning corps of state statutes on data breach notice and data security obligations.[21] Because the degree of precaution may depend upon client directions, moreover, discussions with the client about security issues may be appropriate. The client's consent or specific security directions might also be set out in the terms of an engagement letter (or addendum at the appropriate time), to make clear what precautions are necessary, who will implement and supervise the precautions, and who will pay for the efforts.[22] ■

1. *See generally* Steven C. Bennett, *The Lawyer as Information Manager*, 37 Capital U. L. Rev. 729 (2009).

2. For a recent example of a law firm hacking incident resulting in regulatory inquiries and threats of a malpractice claim from a client, see Sharon Nelson, *U.K. Law Firm is Hacked, E-mail Exposed, May Face Data Breach Fines*, Oct. 6, 2010, www.ridethelightning.senseient.com; John Leyden, *Anti-Piracy Lawyers' Email Database Leaked After Hack*, Sept. 27, 2010, www.theregister.co.uk.

3. *See* Paul Lippe, *Are Law Firms Long-Term Greedy Enough?*, Feb. 3, 2011, www.abajournal.com (noting change coming to legal profession, including various technology innovations, and suggesting that "most lawyers won't, at least initially," embrace such changes, but will "try to expel the foreign antibody of change"); *see generally* Gary A. Munneke, *Legal Skills for a Transforming Profession*, 22 Pace L. Rev. 105 (2001) (calling for development of new skill sets for law students and lawyers, including "technology and information management"); Richard Susskind, *Legal Profession Is on the Brink of Fundamental Change*, www.business.timesonline.co.uk (Oct. 19, 2007) (noting "market pull" toward legal service "uptake of information technology").

4. One recent survey revealed that fully two-thirds of legal professionals wish they could spend less time organizing information, and that a clear majority admit to deleting or discarding work information without completely reading it. *See* Lexis/Nexis, 2010 International Workplace Productivity Survey, www.mulivu.com ("information overload" is a "phenomenon driving American white collar and legal professionals towards an 'information breaking point'").

5. *See* ABA Commission on Ethics 20/20 Working Group on the Implications of New Technologies, Issues Paper Concerning Client Confidentiality and Lawyers' Use of Technology, Sept. 20, 2010, *available at* www.abanet.org (ABA Issues Paper); *see also* ABA Commission on Ethics 20/20 Working Group on the Implications of New Technologies, Issues Paper Concerning Lawyers' Use of Internet Based Client Development Tools, Sept. 20, 2010, *available at* www.abanet.org.

6. *See* New York State Bar Association, Committee on Professional Ethics, Using An Outside Online Storage Provider to Store Client Confidential Information, Opinion 842, Sept. 10, 2010, *available at* www.nysba.org (NYSBA Op. 842).

7. *See* State Bar of California, Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2010-179, *available at* www.ethics.calbar.ca.gov (Cal. Op. 2010-179).

8. For additional suggestions on data security for law firms, *see generally* Ed Finkel, *Cyberspace Under Siege*, Nov. 1, 2010, www.abajournal.com; Jack Newton, *Ten Best Practices for Securing Your Practice's Data*, Oct. 2010, wwwabanet.org; Pat Archbold, *Risky Business*, Mar. 2010, www.iltanet.org; Anthony E. Davis & Michael Downey, *Protecting and Securing Confidential Client Data*, Nov. 5, 2010, www.law.com.

9. *See* Steven C. Bennett, *Has Information Technology Raised the Level of Professional Competency?*, The Discovery Standard (2006), www.lexisnexis.com.

10. ABA Model Rules, Preamble, § 16.

11. ABA Model Rules, Rule 1.6.

12. ABA Model Rules, Rule 1.6, cmt. 16.

13. *See* ABA Issues Paper ("For example, it may be consistent with best practices to install sophisticated firewalls and various protections against malware (such as viruses and spyware), but lawyers who fail to do so or who install a more basic level of protection are not necessarily engaged in unethical conduct. Similarly, it might be inadvisable to use a cloud computing provider that does not comply with industry standards regarding encryption, but it is not necessarily unethical if a lawyer decides to do so.").

14. *See* NYSBA Op. 842 (lawyer must take "reasonable care" to ensure confidentiality). The California Bar suggests that, before using a particular technology, the lawyer should take "appropriate steps to evaluate" (1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; (2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; (3) the degree of sensitivity of the information; (4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; (5) the urgency of the situation; and (6) the client's instructions and circumstances, such as access by others to the client's devices and communications. *See* Cal. Op. 2010-179.

15. *See* NYSBA Op. 842.

16. *See* Cal. Op. 2010-179 ("The greater the sensitivity of the information, the less risk an attorney should take with technology. If the information is of a highly sensitive nature and there is a risk of disclosure when using a particular technology, the attorney should consider alternatives unless the client provides informed consent.").

17. *See* Cal. Op. 2010-179.

18. *See id.* ("activating password protection features on mobile devices, such as laptops and PDAs, presently helps protect against access to confidential client information by a third party if the device is lost, stolen or left unattended"); *see also* ABA Issues Paper (suggesting use of "strong passwords").

19. *See* Cal. Op. 2010-179 ("If the attorney lacks the necessary competence to assess the security of the technology, he or she must seek additional information or consult with someone who possesses the necessary knowledge, such as an information technology consultant.").

20. *See* ABA Issues Paper (cyberliability policies may cover obligations not otherwise covered by a lawyer's professional liability or general liability insurance).

21. *See id.* (ABA guidance must "operate within an increasingly large body of law that governs data privacy, some of which already applies to lawyers. For example, Massachusetts recently adopted a rigorous law on data privacy, which applies to many lawyers and law firms (including those outside of Massachusetts) that have confidential information about Massachusetts residents.") (citation omitted).

22. *See* Cal. Op. 2010-179 (attorney should not use technology for representation, "absent informed consent by the client or the ability to employ safeguards to prevent access to confidential client information"); *see also* ABA Model Rules, Rule 1.6, cmt. 17 ("A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.").

MEET YOUR NEW OFFICERS

President
Vincent E. Doyle III

Vincent E. Doyle III, a partner of the Buffalo law firm Connors & Vilardo LLP, took office on June 1 as president of the 77,000-member New York State Bar Association. The House of Delegates, the Association's decision- and policy-making body, elected Doyle at the organization's 134th annual meeting, held this past January in Manhattan.

A resident of Elma, Doyle is a trial and appellate attorney whose practice includes civil and white collar criminal litigation, and representation of professionals in disciplinary proceedings, as well as advising on legal ethics matters. He received his undergraduate degree from Canisius College and earned his law degree from the University at Buffalo Law School, *magna cum laude*.

Active in the State Bar for 20 years, Doyle most recently chaired the House of Delegates and co-chaired the President's Committee on Access to Justice. He served for four years as a member-at-large of the State Bar's Executive Committee and on the House of Delegates. He previously chaired the Criminal Justice Section, the Special Committee to Ensure Quality of Mandated Representation, and the Task Force to Review Terrorism Legislation. He also is a member of the Trial Lawyers Section, Committee on Legislative Policy, Membership Committee, Committee to Review Judicial Nominations, Committee on the Tort System, and the Task Force on Wrongful Convictions. He is a Fellow of the New York Bar Foundation.

Doyle sits on the Advisory Committee on Criminal Law and Procedure to the Chief Administrative Judge of the State of the Courts of New York, and was appointed by retired Chief Judge Judith S. Kaye to the Commission on the Jury, a blue-ribbon panel charged with formulating ways to improve the jury system in New York. He previously served on the Grand Jury Project, also by appointment by Judge Kaye. He also is a member of the New York State Judicial Screening Panel for the Fourth Judicial Department. Doyle is a Fellow of the American College of Trial Lawyers.

An active member of the Bar Association of Erie County, Doyle served on its Board of Directors from 2003–2006. He is a past president of that association's Aid to Indigent Prisoners Society, which administers the Assigned Counsel Program in Erie County.

President-elect
Seymour W. James, Jr.

Seymour W. James, Jr., of New York City, took office on June 1 as president-elect of the 77,000-member New York State Bar Association. The House of Delegates, the Association's decision- and policy-making body, elected James at the organization's 134th annual meeting, held this past January in Manhattan. As the current president-elect, James chairs the House of Delegates and the President's Committee on Access to Justice (formed to help ensure civil legal representation is available to the poor). In accordance with NYSBA bylaws, James becomes president of the Association on June 1, 2012.

James, a resident of Prospect-Leffert Gardens, received his undergraduate degree from Brown University and earned his law degree from Boston University School of Law.

James is the attorney-in-charge of the Criminal Practice of The Legal Aid Society in New York City. In that capacity, he is responsible for the Society's trial, parole revocation and appellate criminal practice.

Active in the State Bar since 1978, James most recently served three terms a Treasurer of the Association. He is a member of its House of Delegates, the Finance Committee, the Membership Committee, and the Special Committee on Strategic Planning. Within the Criminal Justice Section, James serves as a member-at-large of its Executive Committee. He served as the Vice President for the 11th Judicial District from 2004–2008 and on numerous committees, including the Nominating Committee, the Special Committee on Association Governance, the Committee on Legal Aid, the Committee on Attorneys in Public Service, the Task Force on Increasing Diversity in the Judiciary, and the Committee on Diversity and Leadership Development. He is a Fellow of the New York Bar Foundation.

James is a past president of the Queens County Bar Association and has served on a number of that association's entities, including its Judiciary Committee. He currently serves as a member of the board of directors for the New York State Defenders Association. He also is a member of the Macon B. Allen Black Bar Association and a former member of the Board of Directors of the Metropolitan Black Bar Association.

In addition to his bar association activities, James is a member of Chief Judge Lippman's Justice Task Force, the New York State Permanent Sentencing Commission, the Departmental Disciplinary Committee for the First Judicial Department, the Committee on Character and Fitness for the Second Judicial Department and the Independent Judicial Election Qualification Commission for the Second Judicial Department. He also serves as the secretary of the Correctional Association.

James has served as an Adjunct Professor of Law at CUNY Law School and on the faculty of the Benjamin N. Cardozo School of Law Intensive Trial Advocacy Program.

Secretary
David P. Miranda

David P. Miranda, a partner of the Albany law firm Heslin Rothenberg Farley & Mesiti P.C., has been re-elected to a second term as secretary of the New York State Bar Association.

Miranda, a resident of Voorheesville, received his undergraduate degree from the State University of New York at Buffalo and earned his law degree from Albany Law School.

Miranda is an experienced trial attorney whose intellectual property law practice includes trademark, copyright, trade secret, false advertising, and patent infringement, as well as licensing, and Internet-related issues. A past chair of the Electronic Communications Committee, Miranda is the Executive Committee Liaison for that committee. He served as a member-at-large of the State Bar's Executive Committee from 2006–2010, and chaired the Young Lawyers Section from 2002–2003 and was that section's delegate to the American Bar Association from 1998 to 2000. He is a member of the Commercial and Federal Litigation Section, the Committee on Continuing Legal Education, the Committee on the Annual Award, and the Membership Committee. Miranda also served on the Task Force on E-Filing and the Special Committee on Cyberspace Law.

Miranda is a past president of the Albany County Bar Association. In 2009, he served on the Independent Judicial Election Qualification Commission for the Third Judicial District of the State of New York. In 2002, then-Chief Judge Judith Kaye appointed him to the New York State Commission on Public Access to Court Records.

He received the Capital District Business Review's 40 Under Forty Award for community involvement and professional achievement in 2001. He was editor-in-chief and contributing author of *The Internet Guide for New York Lawyers* in 1999 and 2005, and is the author of "Defamation in Cyberspace: *Stratton Oakmont, Inc. v. Prodigy Services Co.*," published in the *Albany Law Journal of Science & Technology*. He is an arbitrator of Intellectual Property disputes for the National Arbitration Forum.

Treasurer
Claire P. Gutekunst

Claire P. Gutekunst of New York City is the new treasurer of the State Bar.

Gutekunst is a partner at Proskauer Rose LLP in its Litigation and Dispute Resolution Department. For more than 25 years, she has been an advocate for corporate, law firm and individual clients in resolving complex commercial disputes. She practices in the state and federal courts, in domestic and international arbitrations and as an advocate or mediator in mediations.

Active in the State Bar for 23 years, Gutekunst served as vice-president of the First Judicial District of the State Bar's Executive Committee. She co-chairs the Special Committee on Rules for Consideration of Reports. She previously chaired the Membership Committee, Committee on Women in the Law and the Strategic Planning Advisory Committee. She is a member of the Commercial and Federal Litigation Section's Executive Committee and the Committee on Diversity. She also is a Maryann Saccomando Freedman Fellow of The New York Bar Foundation.

Gutekunst is a frequent speaker and author on issues relating to trial practice and alternative dispute resolution. She is a member of the Executive Committee and the National Task Force on Diversity in ADR of the International Institute for Conflict Prevention and Resolution (CPR). From 1997 to 2006, Gutekunst served on the New York State Judicial Screening Committee and the First Department Judicial Screening Committee. She also chairs the Advisory Council of the YWCA-NYC's Academy of Women Leaders.

Gutekunst received her undergraduate and master's degrees from Brown University and her law degree from Yale Law School.

NEW MEMBERS WELCOMED

FIRST DISTRICT

Vishal Mahendra Agraharkar
Sadia Ahmed
Tomer Liav Alcalay
Joseph John Alexander
Kristina M. Allen
Richard Degive Allison
Zakia Alqaisi
Lucas Craig Arment Anderson
Asari A.c. Aniagolu
Gregory James Apgar
Ekaterina Hristova Apostolova
Erin Ressa Applebaum
Stephanie Michelle Aronzon
Elliott Thomas Ash
Pooja Bhagwan Asnani
Kathiana Aurelien
Alexandra Fortune Awai
Roxana Azizi
Darren Todd Azman
Matthew Scott Azus
Gavin Emmett Back
Yedidiah David Bader
Alaina F. Baebler
Christopher F. Baeza
Edward David Baker
Jason Earle Banks
Neil Howard Bareish
Andrew Sterling Barnes
Andrew Krahling Baroody
Renee Jennifer Bartuccio
Kelley Anne Garrity Basham
Marie Elizabeth Baskin
Michael Helmut Bauscher
Charles W. Baxter
Jordi Stacy Bayer
Robert Becker
Wesley Conger Bell
Jennifer Nicole Bellusci
Kate Sonja Belzberg
Michelle Nicole Berger
Michael Joshua Berkovits
Trevor Franklin Berrett
Darya A. Betin
Robert Moritz Blum
Matthew Blumenstyk
Adam Jason Bobkin
Jonathan Scott Bodner
Annette Boglev
Brian Bolin
Lauren Krista Botcheos
Jordan Ashley Botjer
Thomas Preston Bottomy
Adam Braveman
Frank A. Bress
Andrew D. Briker
Dylan Stimpson Brown
Arthur Daniel Buckley
Emily L. Budhu
Christopher M. Buerger
Angela Marie Buhrke
Laura Rose Bull
Jason David Cabico
Erika Shen Cabri
Matthew Alan Caldwell
Michael Anthony Calogero
Jocelyn Ann Campanaro
Christopher James Capuzzi
Sarah Lindsay Caragiulo
Kelly Lynn Cataldo
Brian James Cathey
Melissa Danielle Caudle
Melissa Anne Causey
Adriel I. Cepeda Derieux
Steven Chan
Liliana Chang
Aubrey Dawn Charette
Chun Chen
David Hao Cheng
Srikant Cheruvu
Alfred Joseph Chianese
Connie Y. Chiang
Samuel Burkett Chiszar
Jon Michael Choate
Kyu Won Choi
Anne Marie Choike
David Anthony Christie
Michelle Kyung-sun Chun
Jonharold A. Cicero
Shawn Raymond Clark
Joseph Cohen
Joshua Nathaniel Cohen
Vanessa Beglin Cohen
Justin Matthew Collins
Cialinett Miguelina Colon
Danielle Martine Comanducci
Anna Fleder Connolly
Lindsey Jean Conrad
Philip J. Coran
Nicole Phillips Cordeau
Constantine D. Coritsidis
Sara Corris
Eliot Chase Cotton
Timothy Joseph Cournoyer
Matthew John Cowan
Andrew Marc Cromer
Miles Matthew Crowder
Jeffrey Jerome Cunningham
Sara Nichole D'agostini
Michael Patrick Davey
Fred Naif David
Katie Danielle Day
Nicole M. De Santis
Tanya Paula De Sousa
Anne O'Donnell Dean
Joseph Delerme
Jean Kathryn Delisle
Romanie Hv Dendooven
Adam Matthew Denhoff
Jason Alan Denrich
Deborah Beth Diamant
Thomas Swan Dick
Kate Elizabeth Digeronimo
Flavia A. Dilonez
Michael George Distefano
Josephine Danica Djekovic
Stephen Frank Doddato
Mark Thomas Doerr
Jessica Anne Dorfman
Timothy John Doyle
Debora Terencio Duval
Dalia Esther Edel-Levine
Elycia D. Edelman
Felicia Einhorn
Nicole Sasha Eisenman
Scott Andrew Eisman
Zeh Sheena Ekono
Parisa Elahi
Justin Charles Elliott
Jacqueline Kate Elson
Ross Michael Epstein
George Walton Evans
Rebecca Long Everhardt
William Robert Fair
Matthew Heston Farmer
Bryan Glidden Faubus
Adam Brian Felsenthal
Zachary Bloom Fields
Iris Teresa Figueroa
Colleen Marie Fleming
Scott Russell Foglietta
Genevieve Odile Fontan
Kashif Anthony Forbes
Christine Anne Ford
Anthony Thomas Forte
Lindsay H. Fox
Marlena Christina Frantzides
Lindsay Allison Freeman
Lauren Amy Friedberg
Michelle Maloney Friend
Alexander Phillip Fuchs
Thomas Douglas Gammino
Meredith Brooke Garfunkel
Madelon Anne Gauthier
Helam Aglog Gebremariam
Catherine Elaine Geddes
Susanne Gellert
Pierre Nicholas Gemson
Michelle Genet
Anand George
Karla S. George
Sandy Magdy Ghobrial
Joshua Lawrence Giesey
Lauren Nicole Gillespie
Andrew Dale Gish
Andrew David Gladstein
Michael Rory Glanzman
Hilary E. Glassman
Joshua Sinoor Gohari
Eric Scott Gold
Aaron Serling Goldberg
Kate Hoffman Goldwasser
Jonathan David Goodman
Kimberly Ann Gordon
Samuel Jay Gordon
Ashley Marie Gorski
Benjamin Henry Graf
Kristen Emily Grauer
Deron L. Green
Allison Rebecca Greenfield
Sondra Denise Grigsby
Scott Stewart Grinsell
Zijian Guan
Helen Gugel
Corina Marie Gugler
Francisco Jose Guzman Anrique
Pauline Terry Ha
Kristen Lynn Haase
William Edward Hackwelder
Abraham Kiechul Hahn
Claire Sophia Hallowell
Brandon William Halter
Anna Sophie Harman
Jessica Harooni
David Moffat Harris
Tandis Miryam Hassid
Theodore Jeffrey Hawkins
Scott Ross Hechinger
David Helwani
Mary Catherine Hendrix
Brechje Elisabeth Maria Hertoghs
Robert Matthew Hilton
Andrew Michael Hirsch
Dina Rachelle Hoffer
Andrew George Hope
Justin Raymond Hoyt
Matthew J. Hrutkay
Justin Paul Hughes
Adam James Hunt
Jillian Lee Hunt
Shaimaa Hussein
Saeko Inaba
Matthew Jason Jacobs
Steven Edward Jacobs
Jordan Adam Jodre
Mary Kathleen Johnson
William Daniel Johnston
Chloe Melissa Jones
Dudley G. Jordan
Laura Michelle Just
Anna Kadyshevich
Jodi B. Kalagher
Michael Kanatake
Helen Kang
Sara T. Kang
Joshua Adam Kass
Raquel Kellert
Daniel J. Kelman
Iain Leslie Cooper Kennedy
Scott Cameron Kessenick
Jisoo Kim
Oh-yoon Kim
Michelle Sabrina King
Megan Elizabeth Kinsella
Nikolay Kodes
David Ross Kolker
Ling Wu Kong
Jordan H. Koss
Paul Justin Kremer
David Jason Krieger
Evan Asher Kubota
Lauren Kurtz
Andrew James Kutas
Jennifer Kwon
Scott R. Labby
Dana Marie Lai
Lindsey Susan Lamonica
Nicole Marie Lamontagne
Christine Catharina Lamsvelt
Elizabeth Darrow Langdale
Edward Langer
Lee Francis Langston
Richard Marc Langweber
Jason Lau
Marlo Ann Leach
Alvin Young Lee
Jennifer Kim Lee
Ju-hyun Annmarie Lee
Sae Hyun Lee
Alla Lefkowitz
Eli Lefkowitz
Kyle Raymond Leingang
Rafael Lengua
Noam Lerer
Bradley Peter Lerman
Karen Isabel Leyva
Yanting Li
Kristin Lia
Robert Wei-pang Lin
Malaika Makembe Lindo
Douglas Chance Lionberger
Matthew Stuart Livits
Nicholas Netram Loaknauth
Andrew Vere Metcalfe Lodder
Alison Marie Craven Looman
Sheila Lopez
John Thomas Loyal
Allison Marie Lucier
Brandie Jill Lustbader
Marina I. Lytko
Sean Lamasney Macgregor

Tareq Mahmud
Jared Benjamin Make
Era Makoci
Patrick Edward Manchester
Amiel Y. Mandel
Michelle Mandelstein
Yara Maria Mansour
Matthew Anhua Mao
Anne Alexandra Marchessault
David Joshua Margulies
Daniel Robert Marx
Paul R. Marzetti
Jeana Marie Bisnar Maute
Lee A. Mayberry
Michael Andrew Mazalatis
Denise Justine Mazzeo
Bridget Teresa McBratney
Miriam Leah McCann
Fiona Rose McCarthy
Miriam Rodgers Mcclure
Colleen Ann McCormack-Maitland
Chanelle Arneta McCoy
Barry Clayton McCraw
Meghan N. McDermott
Tara Dawn McDevitt
Ashley Joi McDowell
Sean Michael McFarlane
Aileen Marie McGill
Jason David McKim
Jessica Lee McKinney
Corinne Christine McLaughlin
Joanne Elizabeth McNamara
Lani Evelyn Medina
Annie Lynn Mehlman
Elan A. Mendel
Zeev Menes
Anna L. Mercado
Marc Jonathan Metson
Andrew Stephen Midgett
Jeffrey Alan Miller
Nicholas David Millman
Benjamin Philip Mills
Adam Shawn Mintz
Abiskar Mitra
Ryan Gary Mitteness
Douglas Viel Moliterno
Mary Elizabeth Monahan
Rebecca Eunhye Moon
Todd William Moore
Brigid Theresa Morris
Robyn Gail Morris
Michael Patrick Morrissey
David Alexander Munkittrick
Lauren Marisa Murphey
John Francis Murphy
Andrew Albert Myers
Aditya Guha Nagarajan
Adam Brett Nagin
Gidon Nam
Heather Lea Navo
Annie Nazarian
Meaghan Sarah Nelson
Yelena Nersesyan
Dina Nesheiwat
Edward Bota Newton
Jennifer Emily Nicholls
William Patrick Nicholson
Seth Ross Niedermayer
Brittany Maria Nilson
Lata Padmini Nott
Daniel Elliott Nussen
Erica Anne O'Brien
Benjamin Puamana Oklan
Laura Shoshana Olch
Matthew William Olinzock
Mojoyinola Morolayo Onijala
Simon M. Orner
Kevin Osowski
Ann-Elizabeth Ostrager
Nathan Criticos Pagett
Gina Young Pak
Robert S. Palumbo
Johnny Fuhua Pan
Mohammed Raza Panjwani
Aditi Niranjan Paranjpye
Daniel Neil Park
Michelle Young Suh Park
Seo Rak Park
Adam Frank Paulson
Thomas Doyle Peeney
Neelima Penta
Carlos Fernando Perez
Jehan Pernas
Alexandria M. Perrin
Benjamin Stewart Persina
Michael James Pesa-Fallon
Mark Daniel Pezold
Michael Anthony Pignatiello
Daniel Aaron Pincus
Andrea Paz Pons
Kristen Pearce Poole
Charles Michael Post
Lydia Livingston Potter
Christina Theresa Prusak
Mekhala Raghupathy
Galen Edward Rahmlow
Clare Marie Raj
Harold Nathaniel Randall
Nandini Rao
Jeremy Aaron Raphael
Daniel John Ray
Andrew Stanislaus Read
Gretchen Marie Reeser
David Kerr Reid
Jaclyn Karen Reyle
Ian Aaron Ribald
Elizabeth Courtney Roache
Tejuana Antoinette Roberts
Kevin James Rooney
Yvette A. Rosario
Israel D. Rose
Jared Evan Rosen
Ariella Judith Rosenberg
Phillip Alan Rosenberg
Emily Sara Rosenblum
Elliot Jeffrey Rosner
Joseph Anton Roy
Michael James Ruder
Sarah Teresa Russo
Andrew David Saal
Lauren Brette Sabol
James Louis Saeli
Daniel Samy Said
Samuel Carl Salganik
Jeffrey Ilan Salomon
Jennifer Wallner Saltzman
Howard R. Sanders
Rachel Angela Santamaria-schwartz
Kevin J. Saponaro
Nina Rachel Sassoon
Virginia Harlow Sayer
Bryce Kwang Schunke
Alexandra Ross Schwartz
Andie Michelle Schwartz
David Barry Schwartz
Shyka Samantha Scotland
Genevieve Elizabeth Scott
Jonathan Reed Scott
T. Jakob Sebrow
Sean Thornton Seelinger
Alexander Jay Sellinger
Tamara Sepper
Nupur Shah
Anushila Shaw
Jack Shaw
Monica Edna Shaw
David Benjamin Sherman
Brandon David Sherr
Stephanie Michelle Sherry
Naushin Fatema Shibli
Kimberly Ann Shubert
Patrick Evan Sigmon
Debora Silberman
Cassius Kirkpatrick Sims
Dominika Smereczynski
Benjamin Martin Smith
Lauren Sydney Smith
Mark Daniel Sokolik
Jorge Solis
Boris Marat Sominsky
Kyung-rak Mark Son
Louis Vincent Sorgi
Laura Buckley Sousa
Katharine Meghan Southard
David J. Spielman
Andrew Charles Spillane
Nanda Srikantaiah
Kathryn Ann St. Peters
Jennifer A. Stadler
Christopher James Stanley
Rachel Jennifer Stanton
Ondrej Staviscak Diaz
Moses Elchanan Sternstein
Aaron Charles Stine
Adrian Stubbs
Hajin Suh
Michael James Sullivan
Drew William Sumner
Jantira Cathryn Supawong
Kate Mireille Supnik
Crystal Suri
Lucus William Swanepoel
Jonathan Michael Swisher
Max Brandon Talpalar
Mussie Michael Teklezghi
Kelly Rose Terranova
Krishan Yogi Thakker
Amber Johanna Thiel
Candace Lynn Thompson
Tuuli Inkeri Timonen
Amanda Janet Tobin
Brendan Patrick Tracy
Stacey Lynn Trimmer
Katherine Tsai
Eralda Tushe
Gregory Olmsted Tuttle
Christian Urrutia
Holly A. Vandersluis
Jacqulyn N. Vann
David Scott Velez
Amit Ramnik Vora
Michael Dale Wagman
Curtis Richard Waldo
Chi Wang
Karen Sophia Wang
Qing Wang
Matthew William James Webb
Alex Scott Weinberg
Stuart A. Weinberger
Deborah Sharon Weiner
Stephanie Ruth Weiner
Adam Benjamin Weiss
Matthew Adam Weiss
Peter Grant Weiss
Perri Rachel Weissman
Allison Lynne Westfahl Kong
Farah Lisa Whitley-Sebti
Jeremy David Wilson
Kristiana Alyce Wilson
Daniel Isaac Wolf
Matthew Dale Wolf
Rebecca Wolinsky
Amy Beth Wolper
Janine J. Wong
May Kay Wong
Huan Xiong
Ryan Michael Yanovich
Matthew Martin Yelovich
Ping Yeung
Abigail Monique Yevnin
Tae Sang Yoo

In Memoriam

David Brian Arnold
Minnetonka, MN

Clarence S. Barasch
New York, NY

Karen Z. Bell
White Plains, NY

Edwin S. Clare
Commack, NY

John J. Dawson
Phoenix, AZ

Stanley Harwood
Centerport, NY

William Irwin Kohn
Cleveland, OH

Ronald S. Konecky
New York, NY

John R. Lovrich
Frankfurt Am Main, Germany

Harold A. Lubell
New York, NY

Charles G. Porreca
Rochester, NY

Rebecca Nicole Quatinetz
New York, NY

David C. Reid
Pittsford, NY

Kathleen Riedy
Croton-on-Hudson, NY

Burton B. Roberts
New York, NY

Edward T. Sieban
East Rockaway, NY

John P. Stern
Chiyoda-ku Tokyo, Japan

Philip Tripolone
Syracuse, NY

John G. Ward
Forest Hills, NY

Harry E. White
New York, NY

James B. Zane
New York, NY

Yusuke Yoshimoto
David Allen Zachary
Steven John Zaorski
Nan Zhang
Zhijin Zhang
Kelvin Yeong Ziegler
Genan Faye Zilkha
James Edward Zimmer
Michelle Catherine Zolnoski
Julia Ruth Zousmer

SECOND DISTRICT
Suayip Serkan Acikgoz
Sparkle Leah Alexander
Jennifer Lissette Anzardo
Charli Britt Baldinger
Matthew Seth Barkan
Sigalle Barness
Karina Barska
Pinni Bohm
James Earl Briggs
Meredith Julia Campbell
Leon John Carney
Michael Timothy Carr
Michael Chessa
Andy Chiu
Ida Como
Justin W. Denton
Egle Dykhne
Adriane Simone Eisen
Andrew Christopher Ellis
Alicia Annmarie Foy
Laura A. Franklin
John Peter Gagliolo
Jack Glanzberg
Danielle Lauren Gough
Nicole Alexandra Greene
Daphney Guillaume
Marina Gutman
Adam Christopher Hagedorn
Matthew Peter Hayes
Benjamin Daniel Hecht
Kemar Alanzo Hermitt
Marina Josovich
Nataliya Kaplun
Benjamin David Katzenberg
Glen Alan Kendall
Alexander Kerzhner
Alex Kleyman
Michele Nina Lampach
Calvin Lee
Eunice Yoonhee Lee
Steckley Louise Lee
Victoria Marie Lee
Jennifer Marie Littell
Jiang Ying Lu
Eric Michael Motika
Ike Stephen Okoli
Brendan Matthews Palfreyman
Talia Peleg
Karen Kwatetso Quartey
Natalie Resto
Elizabeth Rosado
Melissa Johanna Rutigliano
Sharon Heather Saffra
Adam D. Scheinman
Daniel Schick
Marianna Shafir
Yana Siganur
Steven A. Snyder
Andrew Klay Sonpon
Melanie Trinidad
Munonyedi Maryann Ugbode
Ehiabhi Uwa
Robert Wu
Ewelina Zukowska

THIRD DISTRICT
Sara Branch Keegan
Oleg Kotov
Kristin Lagonegro
Benjamin Mark Wilkinson
Michael S. Williams

FOURTH DISTRICT
Alyson S. Clark
Christopher Drake Hemstead
Ashley N. King
Elizabeth Stuart
Andrew Comstock Whalen

FIFTH DISTRICT
Ashley Lauren Cassel
Gregory Wright Dewan
William Walter Gaughan

SIXTH DISTRICT
Jill Mary Partridge

SEVENTH DISTRICT
Emily Elizabeth Gordon
Mario Jose Gutierrez
Hilary Anne Homer
Andrew L. Mancilla
Steven Howard Tarcza

EIGHTH DISTRICT
Benjamin Lee Leonard

NINTH DISTRICT
Michelle Reese Andrew
Roxana Bernal
Kevin Michael Brady
Jennifer Danielle Caggiano
Cameron Cole
David Jeffrey Cooperberg
Rodrigo Sebastian Da Silva
Shahzad Aftab Dar
William Anthony Diaz
David L. Dick
Margot McDowell Dickson
David F. Eisenberg
Francesca De Garia Eugene
Tiffany Synobia Fendley
Kathleen Joan Fleming
Rebecca Eve Freedman
David Howard Green
Jeffrey Louis Haberman
Danielle M. Harris
Danielle Marie Hinton
Vyacheslav Istomin
Ryan Peter Kaupelis
Matthew Wayne Kerner
Beyza Kanay Killeen
Caitlin Elizabeth Kilroy
Elizaveta Korotkova
Benjamin Ronald Leroy
Raychel Alexandra Maguire
Nathan Davis Markey
Melissa Lauren McDarby
Ryan James McLeod
Lisa Joann Munoz
Timothy James Nast
Helen Uchechi Okoronko
Uriel Rabinovitz
Patricia Ann Ranieri
Natalie Jorquera Reyes
Jared Michael Rosen
Louis David Rubin
Thomas Scappaticci
Jamie Schenk-Allyn
Jonathan Peter Shaub
Bonnie Sue Simon
Andrea C. Sisca
Sarah Amy Steckler
Tara Ann Sturtevant
Matthew Thomas Swansen
Elizabeth Marie Tetro
Benjamin Avi Tulis
Yani Elvira Vilca
Schenley D. Vital

TENTH DISTRICT
Daniel W. Aiello
Philippe R. Andre
John Joseph Anzalone
Leon B. Applewhaite
Tracy Sandra Auguste
Melissa Lauren Baum
Michael Ross Bluman
Alexandra T. Busa
Michael G. Capeci
Arturo Andres Castro
Cherish Nina Celetti
Christine Cheng
Richard Anthony Cheng
Nicholas Choe
Kate McCaul Cifarelli
John T. Conboy
Erin McCall Conway
Kyle Allan Croce
Johanna Carmen David
Nicole Marie DiGirolamo
Gina Rose Dolan
Timothy John Donnelly
Melissa Sue Doris
Warren McCarthy Dubitsky
Sean Christopher Eccles
Carly Beth Eisenberg
Nadine Etienne
Andrew Brett Federman
Michael Feinstein
Rosanna A. Franzi
William Francis Garbarino
Peter Vincent Giattino
Daniel Aryeh Glass
Kara Michelle Glassner
Steven Joseph Helfont
Lucas Samuel Hikaru Holstein
Eric Joseph Horbey
Matthew Terence Howard
Joseph John Jeziorkowski
Alon Katz
Zahra Ijaz Khan
Serge Krimnus
Brian Andrew Lacoff
Jared Matthew Langenthal
Colin Jacob Lareaux
Christopher James Lieber
Danielle Paula Light
Michael Francis Lotito
Richard Louis
Richard Grillo Louis
Stefanie R. Marra
Sarah Lauren Marx
Seth Justin Meyer
Tatiana Miranda
Monika Vij Mohan
Rebecca Jean Moulton
Jonathan Y. Movtady
Rima Nayberg
Ivonne Norman
Robert Eugene O'Connor
Brendan Thomas O'Dea
Amanda Amelia Perticone
Justin Michael Piccione
Jonathan Mark Pollack
Andrew Kenneth Preston
Amy Catherine Raupp
Jacob Rekant
Robert E. Ribis
Aaron James Rogers
Philip A. Rydz
Steven Bradley Saal
Rachel McConnell Sampers
Alexandra Joy Scholl
Christopher William Shishko
Kiran Siddiqi
Tara Nicole Simoldoni
David T. Sirotkin
Michael Anthony Terzuoli
Kevin Thomas
Sarunya Tubtim
Katrina Giovanna Vetrano
Erin Leigh Wandy
Jacquelyn Rose Weisman
April Joy Winecke
Kathleen Lynn Wright
Andrea Elizabeth Wyatt
Stephanie Zervas
Katie Elizabeth Zizza

ELEVENTH DISTRICT
Saadya T. Bendelstein
Kathryn M. Cafaro
MaryAnn Catalano
Daniel Choi
Cynthia J. Conza
Jillian Marie Cordeira
Princess Stephanie Dahan
Rachel Beth Drucker
Chikodi Ebere Emerenini
Evan Claire Ennis
David Scott Erickson
Aleksandra Fridman
Euphemia Gravesande
Artemio Guerra
Ji-young Hwang
Michael Gregory Jonczyk
Eric L. Kang
Nadya Kramerova
Remington James Merry
Jonathan N. Misk
Michael John Orosch
Andrea Ioana Pantor
John G. Poppe
Aleksander Piotr Powietrzynski
Gregory Ian Radwan
Patricia Marie Rocourt
Julio Cesar Roman
Matthew A. Sarles
Jessica Nicole Scheiber
Jeremy Arch Schlosser
Jhosandys Sears
William Seo
Robert Michael Seppanen
Veronica Khemraj Sewnarine
Jenny Ann Silver
Michelle Christine Spiegel
Ilana Gail Turko
Jennifer Wang
Karen N. Wilson
Jason Wu
Yuxiao Xing
Lu Yao
Lotus Young
Fei Yu

TWELFTH DISTRICT
Sharon Michelle Adler
Melissa Lynne Baumgartner
Thomas Anthony Boyle
Joseph John Donatiello
Kim A. Fontaine
Benjamin Abram Goldstein

Daniel Ross Goodman
Yona Lebovic
Jennifer Meredith Liebman
Vianney Lopez
Larrisa P. Rouse
David Marc Rubenstein
Justin Lawrence Siebel
Jennifer Shapell Smith
Gregg Matthew Stankewicz
Cara Hillary Suvall
Dianna Marie Todino
Rayna J. White

THIRTEENTH DISTRICT

Salvatore Frank Calcagno
Alexandra Kate Formica
Evan Andrew Foxx
Yelena Kogan
Alexandra Terrone

OUT OF STATE

Matthew Balina Aboyme
Moritz Abramovitz
Alexander Griffiths Acree
Ayako Adachi
Kathleen M. Agnelli
Stacy Alevy
Nicholas James Alexiou
Farhan Ali
Mohamed-sherif Ahmed Ali
Clara Joanne Altman
Olachi C. Amadi
John Beverly Anderson
Mary Ann Ralph Andrews
Sara Melina Anoushirvani
Kelley Marie Anthes-Smith
Jared Lawrence Apner
Amelia Hubbard Ashton
Frankl Auteri
Jennifer Marie Avery
Gregory Richard Baden
Faraj Abdussalam Bader
Kasey Lee Baker
Sunkarie Lamrana Ballah-conteh
Aditi Banerjee
Lindsay Ryan Baretz
Michal M. Barlowski
Andrea Esther Baron
Evan Kendall Barquist
Amanda Lee Bassen
Mahmet Baysan
Daniel Warren Beebe
Isaac Charles Beerman
Scott Powell Bell
Derek Sterling Bentsen
Benjamin Marc Berlin
Marc David Bianchi
Pia Biswas
Samuel Peter Blatchley
Jonathan Howard Blonstein
Scott W. Bodkin
Joshua Bryant Boone
Jeffrey Scott Bosley
Richard Phillips Breed
Richard Frank Britschgi
Leah Anne Brndjar
Andrene Karen Brown
Kerri Louise Brugger
Maurizio Brun
Emily J. Buchbinder
Stephanie Grace Buckler
Adrienne Lynn Buckman
Brian Timothy Burgess
Anne Arundel Burnett
Dionne Maria Burrowes
Jonathan Matthew Busch
Elizabeth Catherine Buten
Amie Lynn Cafarelli
Matthew Thomas Cahill
Eduardo Calapiz
Colin Aubrey Nathaniel Caleb
Timothy Michael Callahan
Margaret A. Camp
David Ian Cowden Campbell
Kevin Douglas Canberg
Dimin Cao
Stephanie Leigh Carman
Eleonore Anne Marie Caroit
Yu Lee Carpenter
Erica Mary Carroll
Jeffrey William Carter
Timothy John Carter
Massimiliano Caruso
Lisa Ann Casey
Joseph Elmo Cauda
Jena Lea Cauley
Brendan William Caver
Steven Chun-yu Chang
Jean Marc Chanoine
Ewa Chartynowicz
Priyanka Chaudhuri
Gengzhao Chen
Tsai-fang Chen
Jenntyng Chern
Kun Cho
Anna Teresa Chrzanowska
Shih-pan Chuang
Joseph Cianflone
Christopher Sewall Clay
William Francis Clayton
Brent Kenneth Clore
Maxime Cloutier
Alyce Berne Cobb
Katherine Frances Collins
Laura Bradshaw Collins
Angel David Colon
Melinda Colon
Sarah Heaton Concannon
Xi Cong
Jeanne Marie Cook
Michael Alan Cooper
Connie J. Corsentino
Timothy Matthew Corsi
Caitlin Roberts Cottingham
Cory Moncur Cozzens
Anna Louise Cronin-Scott
Edward Stewart Crosland
Jon Rogers Croteau
Megan Anne Crowley
Emmanuel P. Cruz
Jacqueline Claire Cuozzo
Kathleen Claire Cushing
Katherine Anne Czech
Christopher Scott D'Angelo
Michelle Imbeah Danso
Jeffrey Michael Davis
Julia De Cadenet
Anne Margaret Dellis
Nathan Edward Denning
Stefanie Ann Zalewski Desai
Sean Fitzmichael Devlin
Allie Nicole Diamond
John-Austin Diamond
Nasim Dibaee
Yue Ding
Ronald A. Dinicola
Robert Matthew Dipisa
Jeffrey Michael Dirmann
Brian William Disler
Adriana Dolgetta
Ryan Burke Dooley
Deborah Damayanthi Doraisamy
Gina Dorcelus
Irina Dosoretz
Elizabeth E. Drigotas
David Jeremy Driscoll
James Joseph Duffy
Ondi Ann Dybowski
Tracy Olivia Ebanks
Andrew Carl Egan
Brooke Elizabeth Eisenhut
Zeeshan Mohammed Elahi
Renee Louise Erickson
Rita Maria Espinosa Arguello
Karin Audrey Esposito
Andrew Michael Esterday
Michael James Faison
Frank Michael Falcon
Yuan-yi Fang
Lisa Jayne Fauth
Michael Joel Feiger
Minghao Feng
Andrew Mark Ferencevych
Rebecca Lynn Fink
Daniel Bartlett Fligsten
Dana Michelle Foley
Robert Michael Ford
David McCambridge Fox
Luke Omari Icah Frankson
Thomas James Fraser
Brian R. Frazelle
Lisa Renee Freedman
Emily Jean Freimuth
John Drennen Gagnon
Diego Fabian Galer
Yun Gao
Nicholas Alexander Gard
Aileen Dowling Gardner
Gabriella Rocca Garofalo
Iykemi Vee-ann Gefu
Stephen Thomas Geist
Rita Ann Gesualdo
Nevin Merrill Gewertz
Dena Ghobashy
David McMichael Ginn
Janine Faith Goodman
David Lang Goodwin
Carleton Russell Goss
Stephen James Gough
Zachary Logan Gould
Wayne D. Gray
Emily Marie Graybill
Michael A. Graziul
Robert Michael Greco
Joshua R. Greene
Andre Martin Gregorian
Lyndsey Marie Grunewald
Krystle Shantel Guillory Tadesse
Guy F. Guinn
Justin Michael Gundlach
Wei Guo
Yunfei Guo
Gregory Boris Hafkin
David Harris Haft
Erica Blayre Haggard
Jason Robert Halpin
Eric Steven Hammesfahr
Liran Han
Kathleen Anne Hanahan
Derek James Hanson
Francoise Marie-anne Haralamb
Scott Thomas Harrison
Thomas Edward Hashagen
Andrea Anna Hastreiter
Eiichiro Hata
Mari Hattori
Joseph Morad Hekmat
Eric Matthew Helman
Kevin Scott Henderson
Latrice Chenette Hight
Michael Oliver Hill
Adam Warren Himmelberger
Chad Michael Hinson
Thomas Charles Hodge
Andrew Louis Hoffman
Mark Douglass Holmes
Guang Hong
Koen Hoornaert
Toshiyuki Hori
Tarek Houdrouge
Matthew Paul Hranitz
Jeanne Orrisa Hruska
Eric Tso-jen Hsu
Yiting Hu
Theresa Laun Huh
Howard Owen Hunter
Chukwuemeka Nnamdi Igboeli
Gonzalo Garcia-Fuertes Iglesias
Aoi Inoue
Sonja Kristen Ipsen
Masahiko Ishida
Kimi Ishii
Brittani Kirkpatrick Ivey
Syrion Anthony Jack
Jennifer Ann Jackson
Daniel Jacobson
Ru-uen Jang
Aaron F. Jennings
Paul Emmanuel Jeter
Yuqin Jin
Thomas Scott Johnson
David Charles Johnston
Debbie Yatzkan Jonas
Michael John Jones
Richard Nathan Joseph
Jonathan Max Justl
Vincent Hoyin Kan
Takaharu Kanayama
Daniel Lawrence Kane
Doo Ung Kang
Hyowon Kang
Maryann Min Jo Kang
Courtney E. Kapes
Dalit Rivka Tsipora Kaplan
Ayla Shaheem Karmali
Anna Marie Karner
Naoko Kashiwagi
Adam Robert Kaster
Yumiko Kato
Rachel Shana Owen Katzman
Erica Margaret Kelly
Jocelyn Seija Kelly
John Patrick Kelly
Lisa Khachaturian
Sana Rahman Khan
Francis Cornelius Kiley
Shinwha Kim
Deena Beth Klaber
Katarzyna Klaczynska
Linda A. Klang
Brendan James Klaproth
Michelle Jamie Kline

Olympia Clair Knight
Steven Thomas Knipfelberg
Kendra Whitney Kocovsky
Wataru Kondo
Carl Andrew Konschak
Anne Myriam Korenblit
Stephen Benjamin Kosmin
Kathryn Frances Kosstrin
Kalliopi Paleoudis Kousis
Andrew Brandon Koussevitzky
Kristin Michele Kramer
Gabriella Monica Kranz
Jonathan Brett Krisch
Benjamin Jacob Krohmal
Ya-hsuan Ku
Ayako Kuroda
Katherine Elmlinger Lamm
Kevin Aaron Landau
Philip Randolph Lauderdale
Michael Nicholas Lazorchak
Christopher Brett Leach
Brian Chung-wai Lee
Christine Inkyung Lee
Dong Hyoung Lee
Julie Lee
Kiyoung Lee
Phillip Jeung Lee
Richard Michael Lee
Rosa Ahram Lee
Sharon Lee
Sumi Lee
Sun Goo Lee
Yeow Wee David Lee
Lorraine Margaret Leete
Frank James Lefebvre
Andrew Thomas Leimbach
Ryan Albert Lema
Jennifer Lerman
Jesse Ethan Levine
Junyan Li
Mingpei Li
Wei Li
Kevin F. Liang
Lee Garson Licata
Ludivine Olivia Lille
Jacob Thomas Lillywhite
Michael Jess Lipari
Alvin Ambrose Liu
Juexi Liu
Yang Liu
David Jason Lizmi
Kenneth Lobo
Cori Ellen Lombard
Christopher Manuel Lopez
Dana Lorann Lord
Glenn William Lortscher
Donato Silvano Lorusso
Eric Loubet
Thomas Steven Lough
Simone Lucatello
David Kirkpatrick Lukmire
Kristin Yuk Inn Lum
Wen Luo
Patrick J. Lynch
Claudia Patricia Macmaster
Robin Elizabeth Magrath
Sean Christopher Malin
Timothy Hanford Marciniak
Ari Hillel Marcus
Shannon Veronica Marsh
Melissa Ellen Matles
John Paul Joseph Mattiace
Carlos Maycotte
Benjamin Jay Mayer
Michael Francis McKeon
Amaka Megwalu
Nazneen Dinyar Mehta
Michael Robert Menter
Vincent Roy Healey Milburn
Dahlia Miller
Ian Stern Millican
Andrew George Mirisis
Vivek Kartik Mohan
Gregory Charles Montalbano
Paul Thomas Mooney
Nicholas James Morales
Stewart Thomas Moran
Elizabeth Annette Morris
Lucy Rhiannon Morris
Lauren Elizabeth Morse
Molly Ann Moynihan
Yifat Nahmias
Boaz Nahshoni
James Andrew Newton
Denis Fomanka Nkeh
Dustin Nash Nofziger
Jessica Erin Nutt
Shawn Andrew Oakley
Okechi Chituru Ogbuokiri
Onome Ngozi Okpewho
Takako Onitsuka
Soren Elliot Packer
Todd Anthony Palo
Melissa Gay Panjer
Louis Paonessa
Mel Maurice Liwanag Paraiso
Nohitha Parimi
Sungjoon Park
Ankur Kanti Patel
Giancarlo Pellegrini
Erin Leigh Pinder
Amanda Gail Plisner
Raphaella Marie-paule Poteau
Chelsea Morgan Priestap
Omar Kareem Qadeer
Siluvai Mary Sheeba Raj
Caroline A. Reckler
Mary Elizabeth Reidy
Joshua David Reifler
Matthew Barry Reisig
Elizabeth Maria Renieris
Peter Ryan Reynolds
Scott Richard
Emma Elizabeth Roarty
Samuel Augusto Rosado
Jonathan Douglas Ross-Harrington
Tania Saigol Roth
Michelle Margaret Rothman
Patrick Timothy Rowe
Justin Charles Russell
Mawhabahullah Ali Sadiqi
Maninder Kaur Saini
Brenda A. Salvatore
Harout Jack Samra
Benjamin Ross Sautelle-smith
Silja Anne Schaffstein
Lisa Kimberly Schroeder
Guinevere Sharon Marion Seaward
Lauren Elizabeth Seffel
Jeffry Cole Severson
Christopher Michael Shea
Robert Jeffrey Shore
Alden Michael Shorter
Edward Olav Siclari
Maria Fernanda De Almeida Prado E Silva
Daniel Hershey Silverman
Crystal Simpkin
Vanessa Marie Skawski
Jonathan Patrick Skinner
Michael Jonathan Smikun
Amber Nikea Smith
Marta Joanna Smolarz
Eloris Ann Snyder
Robert Edward Snyder
Nellie Maria So
Sergio A. Solera
Juliette Jaewon Song
Cedric Soule
Aba Stevens
Steven Frederick Strauss
Gauri Subramanium
Jangwon Suh
Mikhail Aleksandrovich Suvorov
Madhavi Swamy
Jason Michael Swergold
Douglas Tan
Jamie D. Taylor
Mihoko Teshima
Marissa Dawn Tillem
Robert Lawrence Todd
Kazuhiro Tomita
Micheal Alexander Tompkins
Christina Elisabeth Tretter
Christopher Tsaganeas
Danielle Patrice Turnipseed
Khara Ashlynn Tusa
Shin Young Um
Aswin Van Rooijen
Jorge Alejandro Vargas
Fame Morton Varon
Rebecca Bacon Vernon
Lutisha Stacia Vickerie
Bradley James Vogel
Richard Anthony Walawender
Joseph Yu-hsi Wang
Kun Wang
Shaokai Wang
Fleming Leight Ware
Kristina Beth Watson
Jay M. Waxman
Bridget Leanne Welborn
Laura Page Wexler
Spencer James Willig
Ijeoma Wogu
Sherra Tinyi Wong
Melissa Marie Wright
Nicole Denise Wright
Charles Haosi Wu
David Christopher Wyrtzen
Bin Xu
Can Xu
Xinglu Xu
Le Ye
Noriko Yodogawa
Diqing Yu
Jessica Yuen
Elena Zafirova
Fathima Shahina Zahir
Elena Adina Zahradnikova
Kenneth Zaremba
Ji Zhang
Yanijiao Zhang
Julie Ilene Zibulsky
Anna Zieba

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.

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: A letter from a reader contained the following statement, which he had seen in an article written by an area charter-school teacher: "I never present myself as a stone of wisdom in class, which is a good thing, because that's a fine way to sink like a rock." The reader asks: "Is that a new meaning for the phrase 'store of wisdom'"?

Answer: No, *stone* is not a new meaning of *store*. The drafter of the article was probably trying to create a metaphor, but his choice of *stone* caused his metaphor to "sink like a rock." Instead of a metaphor, he created a malapropism.

Malapropisms – the ludicrous choice of inappropriate, but similar-looking words – are not new; they've probably been around at least since Old English, and probably earlier. They were made popular, however, by a character called Mrs. Malaprop, in Richard Steele's 18th century play *The Rivals*, who was famous for her usual choice of the wrong word in a phrase. Two of the blunders in that play were her description of a person as "a progeny of learning" who was "the very pineapple of politeness."

Since then, many famous – and some not-so-famous – people have stumbled in their effort to use flavorful speech. The following are some examples:

> "This is unparalyzed in our state's history." Gib Lewis, Speaker of the Texas House.
>
> "Republicans understand the bondage between a mother and her child." Vice President Dan Quayle.
>
> "Well, that was a real cliff-dweller." Baseball player and manager Wes Westrum, after a close game.
>
> "The police are not here to create disorder; they're here to maintain disorder." Chicago Mayor Richard Daley.

My favorite legal malapropism, by a lawyer in a malpractice case, is: "Navy physicians advised plaintiff that they could not perform a vasectomy on the plaintiff. However they advised his wife to have a tubal litigation." Another favorite is a memo by an assistant law school dean, who sent an email to the faculty saying: "We are now able to provide lockers for faculty members. Please see me for an assignation." And a judge, in a federal court of appeals decision, had this to say: "The previously stated duties could only be performed while the vessel was under weigh.'"

Perhaps the most unfortunate malapropism was the one committed by a person who was introducing a well-known speaker, there to give the valedictory address. The introducer said, "This address is being presented in memory of the speaker, John Jones." (He meant, of course, "in honor of" since the speaker was seated just behind him, looking healthy – not deceased.)

Question: Is there a problem with the following item from the *New York Times*? "Osama bin Laden . . . was the son of the Saudi elite whose radical, violent campaign . . . redefined the threat of terrorism for the 21st century."

Answer: Yes there is, and congratulations for noticing it. The problem is a "misplaced modifier," and it's become so common that even the two *Times* journalists who wrote the piece fell prey. What they intended to write was that bin Laden, son of the Saudi elite, incited the violent campaign, But what the journalists wrote was that the Saudi elite had incited the violent campaign. The misstatement was apparent to grammatically cognizant readers, especially since numerous members of the Saudi elite have indicated approval of bin Laden's death.

In law, this difference is important, courts having held strictly to what the language stated, rather than what the drafter intended. Court cases indicate this possibility. In the context the reader quoted, the grammatical problem can be avoided by strategically placed commas.

From the Mailbag I:

A reader has commented, in reference to a column published some time ago about the ungrammatical adjective *irregardless*, that when he was in law school, his first-year Contracts professor, well-known academic Harold Havighurst called on a student who, in his response to a question, used the word *irregardless*. Professor Havighurst repeated, "Irregardless?" The puzzled student repeated the word several times. Finally, however, he realized his error and corrected it. Professor Havighurst smiled and continued the class discussion as if nothing had happened. (The reader wrote that he is certain that none of the students in that class have used the word *irregardless* since.)

From the Mailbag II:

Another reader wrote, "Sometime ago you invited readers to send in words that were used only as negatives. I found one, *impervious*, which I've never seen as an affirmative." The suggestion is close, but not valid. I too had never seen the affirmative of impervious, but there it is, listed in *The American Heritage Dictionary* (1985 edition).

The same reader commented that the word *pent* seems to be seen only in one expression, in Gilbert and Sullivan's *Mikado*:

> My object all sublime
> I shall achieve in time –
> To let the punishment fit the crime –
> The punishment fit the crime;
> And make each prisoner *pent*
> Unwillingly represent
> A source of innocent merriment!
> Of innocent merriment! (my emphasis on *pent*)

I'm not sure that the adjective *pent* qualifies as a word if it is used only in one expression – the *Mikado* lyric partially quoted above. I've seen *pent* only in the phrase "pent-up" and would be interested to know whether readers have seen it used alone elsewhere. The word *pent*, meaning "confined, penned up," is the past participle of the verb *pen* and is well-established in English etymology, but virtually ignored today. Thanks to both readers for their interesting comments. ■

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

the allegations in paragraph 10 of the complaint, except denies the allegation that defendant made fraudulent representation to plaintiff."

Don't deny an allegation by affirmatively alleging contrary facts. Doing so might lead to a court's deeming your allegation admitted. If a complaint contains an allegation that has some truth to it even though it's misleading or inaccurate, deny the allegation and then admit only those facts that are true according to your client's version of what happened. Assume that the allegation in the complaint is as follows in paragraph 4: "4. Defendants' audit department told management to institute new audit procedures in 1994 and 1996."[7] Your answer might look like this: "4. Deny the allegations contained in paragraph 4 of the complaint, except admit that defendants, during the relevant period, continually improved their compliance function."[8]

If you're responding to an allegation in the complaint that contains a single sentence with multiple allegations, you may deny the entire allegation and admit only a specific fact (see earlier example), or you may deny the entire allegation even if the allegation contains some facts you don't dispute. Allegation in complaint: "6. Defendant fraudulently represented to plaintiff that the car defendant sold to plaintiff (a) was new; (b) had never been involved in an accident; and (c) had side, front, and knee airbags."[9] The key to this allegation is that the plaintiff alleges that the defendant "fraudulently represented" facts. Deny the entire allegation if that's untrue.

Responding to an allegation in the complaint that's vague or ambiguous can be difficult. If the allegation is unintelligible, one intelligent way to answer it is to state the following: "9. Plaintiff's allegations in paragraph 9 of the complaint are vague and ambiguous; defendant cannot determine whether to admit or deny them; thus, defendant denies each allegation in that paragraph."[10] You may also move under CPLR 3024(a) for a more definite statement. If you don't understand the allegation, under no circumstance should you ignore it.

If the plaintiff has sued multiple defendants, you address the claims aimed at your client. No need to respond to the allegations aimed at the other defendant(s). To ensure that you haven't admitted something in error, the best practice is to state expressly that the specific allegations in the complaint don't apply to you. Example: "12. Because plaintiff is not pleading a claim against Defendant John Justice, Defendant Justice does not respond to the allegations in paragraphs 12–20 of the Second Cause of Action."[11]

Sometimes exhibits will be attached to a complaint. The plaintiff might refer to a document in the following manner: "A true and complete copy of the rent-stabilized lease is attached to this complaint as Exhibit 2."[12] If that allegation is true, admit it. If it's untrue, deny it. To avoid conceding the document's authenticity, state the following: "Exhibit 2, attached to the complaint, purports to be a copy of the rent-stabilized lease."

A plaintiff may do more than just attach an exhibit. Be careful when a plaintiff interprets or paraphrases a document. The plaintiff might take the language out of context, reword the language in the plaintiff's favor, or do both. The best method to respond to these allegations is to admit that the document exists, if you know that it exists, but to deny every allegation that interprets the document. Example: "6. Denies the allegations in paragraph 6 of the complaint, except admits that the lease exists and refers the court to that document for its complete terms."[13] If the plaintiff quotes verbatim a portion of a document, make sure that the quotation isn't taken out of context. When in doubt, deny the allegation, admit that the document exists, and refer the court to the document (see immediately preceding example).

In a complaint, a plaintiff should allege facts, not law. When the plaintiff alleges law, the best approach is to respond to the allegation, even though you don't have to. You don't want the court to deem your silence an admission. Assume that the complaint alleges the following: "30. Defendant's failure to service the equipment violated section 349 of the New York General Business Law."[14] Your response: "30. States that paragraph 30 of the complaint contains conclusions of law as to which no response is required. To the extent that paragraph 30 contains any factual allegations, defendant denies those allegations."[15]

When you're in doubt about whether to respond to an allegation in the complaint, respond to it anyway.

At the end of the complaint, the plaintiff will have a "demand for relief." This demand isn't an allegation. It's the relief the plaintiff seeks on each cause of action. If the plaintiff includes a demand for relief in the body of the complaint, respond to it. Assume that the complaint alleges the following: "21. On this FIRST CAUSE OF ACTION (breach of contract), plaintiff is entitled to compensatory damages from defendant in the amount of $150,000."[16] Your response: "21. Denies the allegations contained in paragraph 21 of the complaint."[17]

After each cause of action, the plaintiff may have a reallegation paragraph. *Example:* "Plaintiff realleges each and

every allegation contained in paragraphs 1 through 10 above as though set forth fully and at length herein." Your answer should mirror the plaintiff's reallegation paragraphs. Before you respond, determine whether you've responded to the earlier allegations. Also determine whether the earlier allegations applied to you or a co-defendant.

When you're in doubt about whether to respond to an allegation in the complaint, respond to it anyway.

A defendant has specific pleading requirements under CPLR 3016(f) in claims for sale and delivery of goods, performance of labor or services, or furnishing of materials. The requirements apply only if the plaintiff serves a verified complaint that describes and numbers the items of the plaintiff's claim and states the reasonable value or agreed price of each item. If the plaintiff doesn't comply with the requirements, the defendant need not provide a detailed response.[18] If the plaintiff's complaint satisfies these two requirements, your verified answer must specify which items you dispute and whether each dispute pertains to delivery, performance, reasonable value, or agreed price.[19] If the plaintiff doesn't quite comply with the requirements but is close enough to complying, provide the itemized response anyway. If you fail to deny the plaintiff's itemized claims with specificity, a court might deem them admitted and grant the plaintiff summary judgment.[20]

Under CPLR 3015(a), you must plead with specificity and particularity your defense that a condition precedent wasn't satisfied. Failing to satisfy CPLR 3015(a) means that you waive the condition-precedent defense and are precluded from raising that defense. Look at CPLR 3015 for other things you must plead with specificity.

The authenticity of a signature on a negotiable instrument will be deemed admitted unless you specifically deny it in the answer.[21]

If you're relying on a prior judgment, decision, or administrative tribunal's ruling, state that you're pleading a prior ruling and relying on it.[22] Indicate the nature of the ruling and the connection it has with the current lawsuit.

In New York City Civil Court actions, you must specifically deny the following items in your answer: (1) ownership, operation, or control of a vehicle or building in a negligence action if the vehicle or building is properly identified in the complaint;[23] (2) genuineness of a signature on a written instrument, provided that the defendant demands that it be proved;[24] (3) the plaintiff's or the defendant's existence as a corporation.[25]

Ethics

Answer the complaint in good faith. A frivolous denial in your answer might subject you to costs or other sanctions. If you know that the allegation is true, it's improper for you to deny it based on a purported lack of knowledge or information. Not answering truthfully might cause the court to strike your denial and possibly deem your response an admission.[26] In egregious circumstances, the court might strike your answer and grant summary judgment for the plaintiff.[27] A court may also award additional costs to the prevailing party for each unjustifiable denial of certain matters.[28]

In the next issue, the *Legal Writer* will discuss affirmative defenses, counterclaims, and cross-claims. ■

1. *American Tobacco Co. v. Riggio Tobacco Corp.*, 37 Misc. 2d 23, 24, 234 N.Y.S.2d 51, 52 (Sup. Ct., N.Y. Co. 1962) (noting that the admission must be material and relevant).
2. *Doyle v. Buturlinsky*, 26 A.D.2d 717, 717, 271 N.Y.S.2d 349, 350 (3d Dep't 1966); *Rouse v. Champion Home Builders Co.*, 47 A.D.2d 584, 584, 363 N.Y.S.2d 167, 167 (4th Dep't 1975).
3. CPLR 3015(a).
4. CPLR 3015(d).
5. CPLR 3016(f).
6. Adapted from 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 15:531, at 15-55 (2006; Jan. 2011 Supp.).
7. *Id.* at § 15:545, at 15-56.
8. *Id.*
9. Adapted from *id.* at § 15:550, at 15-57.
10. Adapted from *id.* at § 15:552, at 15-57.
11. Adapted from *id.* at § 15:554, at 15-58.
12. Adapted from *id.* at § 15:555, at 15-58.
13. Adapted from *id.* at § 15:556, at 15-58.
14. *Id.* at § 15:558, at 15-59.
15. Adapted from *id.* at § 15:558, at 15-59.
16. Adapted from *id.* at § 15:560, at 15-59.
17. *Id.*
18. *Id.* at § 15:573, at 15-60.
19. CPLR 3016(f).
20. Barr *et al.*, *supra* note 6, at § 15:572, at 15-60.
21. CPLR 3015(d) (applies to all pleadings, not just answers).
22. CPLR 3015 (c).
23. Civ. Ct. Act § 1102(a).
24. Civ. Ct. Act § 1102(b).
25. Civ. Ct. Act § 1102(c).
26. Barr *et al.*, *supra* note 6, at § 15:532, at 15-55.
27. *Id.*
28. Civ. Ct. Act § 1102(d).

Gerald Lebovits is a Criminal Court judge in New York County, an adjunct professor at St. John's University School of Law, and a lecturer-in-law at Columbia Law School. He thanks court attorney Alexandra Standish for researching this column. Judge Lebovits's email address is GLebovits@aol.com.

CLASSIFIED NOTICES

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

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

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

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

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

ARAB AMERICAN LAWYER

Joseph F. Jacob, BS, MBA, JD, admitted NY, NJ, Arabic Native is available for your Middle East/Arabic commercial transactions & documents drafting and review. Telephone: (518) 472-0230 or email: jfjacob@jacoblawoffices.com. Visit www.JacobLawOffices.com.

MOVING?
let us know.

Notify OCA and NYSBA of any changes to your address or other record information as soon as possible!

OCA Attorney Registration
PO BOX 2806, Church Street Station
New York, New York 10008

TEL **212.428.2800**
FAX **212.428.2804**
Email **attyreg@courts.state.ny.us**

New York State Bar Association
MIS Department, One Elk Street
Albany, NY 12207

TEL **518.463.3200**
FAX **518.487.5579**
Email **mis@nysba.org**

INCORPORATION SERVICES

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

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

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

LLM IN INTERNATIONAL PRACTICE

Degree conferred by Ryszard Lazarski University, Warsaw, Poland, and Center for International Legal Studies, Salzburg, Austria. Two 2-week sessions in Salzburg and one 2-week session in Warsaw over three years. See www.cils.org/Lazarski.htm. Contact CILS, Matzenkopfgasse 19, Salzburg 5020, Austria, email cils@cils.org, US fax 509-3560077, US tel 970-4601232.

Full Service Per Diem Law Firm
"There When You Can't Be"
www.nyperdiems.com

We Cover Supreme, Civil, No-Fault, Federal & More - Queens, Bronx, NYC & More.

Professional Attorneys
Immediate Confirmation
Reports within 24 hours
Reasonable Rates

ZUNIGA & RINALDI
(877) 737-8539
repulaw@gmail.com

WWW.NYPERDIEMS.COM

REFER US YOUR DISABILITY INSURANCE CASES

Attorneys Dell & Schaefer - Our disability income division, managed by Gregory Dell, is comprised of eight attorneys that represent claimants throughout all stages (i.e. applications, denials, appeals, litigation & buy-outs) of a claim for individual or group (ERISA) long-term disability benefits. Mr. Dell is the author of a Westlaw Disability Insurance Law Treatise. Representing claimants throughout New York & nationwide. Referral Fees 212-691-6900, 800-828-7583, www.diAttorney.com, gdell@diAttorney.com.

MEMBERSHIP TOTALS

NEW REGULAR MEMBERS 1/1/11 - 5/3/11	4,745
NEW LAW STUDENT MEMBERS 1/1/11 - 5/3/11	410
TOTAL REGULAR MEMBERS AS OF 5/3/11	66,663
TOTAL LAW STUDENT MEMBERS AS OF 5/3/11	2,765
TOTAL MEMBERSHIP AS OF 5/3/11	69,428

INDEX TO ADVERTISERS

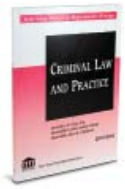
Attorneys Dell & Schaefer Chartered	60
Center for International Legal Studies	60
Jewish Guild for the Blind	21
Law Offices of Joseph F. Jacob, PLLC	60
Speckin Forensic Laboratories	23
The Company Corporation	60
USI Affinity	4
West, a Thomson Reuters Business	cover 4
Zuniga & Rinaldi	60

The latest **NYSBA Monograph Series**

Business/Corporate Law and Practice

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

2010-2011 • 860 pp. • PN: 405190
Non-Mmbr Price: $80 / **Mmbr Price: $72**



Criminal Law and Practice

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

2010-2011 • 160 pp. • PN: 4064990
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Debt Collection and Judgment Enforcement

Author: Paul A. Peters, Esq.; William Ilecki, Esq.

2010-2011 • 222 pp. • PN: 42380
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Elder Law and Will Drafting

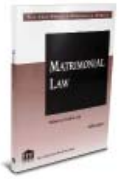
Authors: Jessica R. Amelar, Esq.; Bernard A. Krooks, Esq.

2010-2011 • 318 pp. • PN: 40820
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Limited Liability Companies

Author: Michele A. Santucci, Esq.

2010-2011 • 326 pp. • PN: 41240
Non-Mmbr Price: $80 / **Mmbr Price: $72**



Matrimonial Law

Author: Willard H. DaSilva, Esq.

2010-2011 • 314 pp. • PN: 412190
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Mechanic's Liens

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

2010-2011 • 152 pp. • PN: 403190
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Mortgage Foreclosures

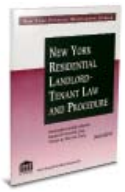
Author: Francis J. Smith, Esq.

2010-2011 • 90 pp. • PN: 41400
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Mortgages

Authors: Philip C. Kilian, Esq.; Christopher P. Daly, Esq.

2010-2011 • 246 pp. • PN: 41380
Non-Mmbr Price: $80 / **Mmbr Price: $72**



New York Residential Landlord-Tenant Law and Procedure

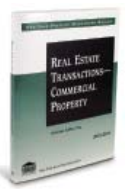
Authors: Honorable Gerald Lebovits; Damon P. Howard, Esq.; Victor S. Faleck, Esq.

2010-2011 • 366 pp. • PN: 41690
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Probate and Administration of Decedents' Estates

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

2010-2011 • 188 pp. • PN: 419690
Non-Mmbr Price: $80 / **Mmbr Price: $72**



Real Estate Transactions—Commercial Property

Author: Christina Kallas, Esq.

2010-2011 • 344 pp. • PN: 40370
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Real Estate Transactions—Residential Property

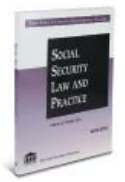
Authors: Kenneth M. Schwartz, Esq.; Claire Samuelson Meadow, Esq.

2010-2011 • 554 pp. • PN: 421400
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Representing the Personal Injury Plaintiff in New York

Author: Patrick J. Higgins, Esq.

2010-2011 • 454 pp. • PN: 41910
Non-Mmbr Price: $80 / **Mmbr Price: $72**



Social Security Law and Practice

Author: Charles E. Binder, Esq.

2010-2011 • 196 pp. • PN: 422900
Non-Mmbr Price: $65 / **Mmbr Price: $57**

Zoning and Land Use

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

2010-2011 • 210 pp. • PN: 42400
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total. Prices do not include applicable sales tax.

To purchase the complete set of 16 Monographs, or for more information

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

Mention Code: PUB1085

NYSBA

HEADQUARTERS STAFF EMAIL ADDRESSES

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

Keith J. Soressi
Associate Executive Director
ksoressi@nysba.org

Richard Rifkin
Special Counsel
rrifkin@nysba.org

BAR SERVICES
Mark Wilson, *Manager*
mwilson@nysba.org

EXECUTIVE SERVICES
Andria Bentley, *Executive Services Counsel*
abentley@nysba.org

Teresa B. Schiller, *Executive Services Counsel*
tschiller@nysba.org

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

CONTINUING LEGAL EDUCATION
H. Douglas Guevara, *Senior Director*
dguevara@nysba.org

Debra York, *Registrar*
dyork@nysba.org

CLE PROGRAMS
Jean E. Nelson II, *Associate Director*
jnelson@nysba.org

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

Cindy O'Brien, *Program Manager*
cobrien@nysba.org

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

Kirsten Downer, *Research Attorney*
kdowner@nysba.org

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

Joan Fucillo, *Publication Manager*
jfucillo@nysba.org

LAW PRACTICE MANAGEMENT
Katherine Suchocki, *Director*
ksuchocki@nysba.org

FINANCE AND HUMAN RESOURCES
Paula M. Doyle, *Senior Director*
pdoyle@nysba.org

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

Cynthia Gaynor, *Controller*
cgaynor@nysba.org

LEGAL AND GOVERNMENTAL AFFAIRS
Kathleen R. Mulligan-Baxter, *Senior Director*
kbaxter@nysba.org

COUNSEL'S OFFICE
GOVERNMENTAL RELATIONS
Ronald F. Kennedy, *Director*
rkennedy@nysba.org

Kevin M. Kerwin, *Assistant Director*
kkerwin@nysba.org

LAWYER ASSISTANCE PROGRAM
Patricia F. Spataro, *Director*
pspataro@nysba.org

LAWYER REFERRAL AND INFORMATION SERVICE
Eva Valentin-Espinal, *Coordinator*
evalentin@nysba.org

PRO BONO AFFAIRS
Gloria Herron Arthur, *Director*
garthur@nysba.org

MARKETING AND INFORMATION SERVICES
Richard J. Martin, *Senior Director*
rmartin@nysba.org

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

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

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

Lucian Uveges, *Database Administrator*
luveges@nysba.org

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

WEB SITE
Barbara Beauchamp, *Editor*
bbeauchamp@nysba.org

MEMBERSHIP SERVICES
Patricia K. Wood, *Senior Director*
pwood@nysba.org

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

CHIEF SECTION LIAISON
Lisa J. Bataille
lbataille@nysba.org

PRINT AND FACILITIES OPERATIONS
Roger E. Buchanan, *Senior Director*
rbuchanan@nysba.org

BUILDING MAINTENANCE
GRAPHICS
PRINT SHOP
Gordon H. Ryan, *Print Shop Manager*
gryan@nysba.org

PUBLIC AFFAIRS AND ADMINISTRATIVE SERVICES
LAW, YOUTH AND CITIZENSHIP PROGRAM
Eileen Gerrish, *Director*
egerrish@nysba.org

MEDIA SERVICES AND PUBLIC AFFAIRS
Lise Bang-Jensen, *Director*
lbang-jensen@nysba.org

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

Brandon Vogel, *Media Writer*
bvogel@nysba.org

THE NEW YORK BAR FOUNDATION
Rosanne M. Van Heertum
Director of Development
rvanh@tnybf.org

THE NEW YORK BAR FOUNDATION

2011-2012 OFFICERS

M. Catherine Richardson, *President*
One Lincoln Center, Syracuse, NY 13203

John J. Kenney, *Vice President*
10 East 40th Street, 35th Fl., New York, NY 10016

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

John H. Gross, *Treasurer*
150 Motor Parkway, Ste. 400, Hauppauge, NY 11788

Cristine Cioffi, *Assistant Secretary*
2310 Nott Street East, Niskayuna, NY 12309

DIRECTORS

Lawrence R. Bailey, Jr., *White Plains*
Marion Hancock Fish, *Syracuse*
Emily F. Franchina, *Garden City*
Sheila A. Gaddis, *Rochester*
Sharon Stern Gerstman, *Buffalo*
Michael E. Getnick, *Utica*
Robert L. Haig, *New York*
Frank M. Headley, Jr., *Scarsdale*
Stephen D. Hoffman, *New York*
John R. Horan, *New York*
Glenn Lau-Kee, *New York*
Kathryn Grant Madigan, *Binghamton*
Joseph V. McCarthy, *Buffalo*
Martin Minkowitz, *New York*
Kay Crawford Murray, *New York*
Patrick C. O'Reilly, *Buffalo*
Carla M. Palumbo, *Rochester*
Richard Raysman, *New York*
Lesley Friedman Rosenthal, *New York*
Sanford J. Schlesinger, *New York*
Justin L. Vigdor, *Rochester*
Lucia B. Whisenand, *Syracuse*

EX OFFICIO

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

James B. Ayers, *Albany*
Vice Chair of The Fellows

JOURNAL BOARD MEMBERS EMERITI

HOWARD ANGIONE
Immediate Past Editor-in-Chief

ROSE MARY BAILLY
RICHARD J. BARTLETT
COLEMAN BURKE
JOHN C. CLARK, III
ANGELO T. COMETA
ROGER C. CRAMTON
WILLARD DASILVA
LOUIS P. DILORENZO
PHILIP H. DIXON
MARYANN SACCOMANDO FREEDMAN
EMLYN I. GRIFFITH
H. GLEN HALL
PAUL S. HOFFMAN
JUDITH S. KAYE
CHARLES F. KRAUSE
PHILIP H. MAGNER, JR.
WALLACE J. MCDONALD
J. EDWARD MEYER, III
JOHN B. NESBITT
KENNETH P. NOLAN
EUGENE E. PECKHAM
ALBERT M. ROSENBLATT
LESLEY FRIEDMAN ROSENTHAL
SANFORD J. SCHLESINGER
ROBERT J. SMITH
LAWRENCE E. WALSH
RICHARD N. WINFIELD

2011-2012 OFFICERS

VINCENT E. DOYLE III
President
Buffalo

SEYMOUR W. JAMES, JR.
President-Elect
New York

DAVID P. MIRANDA
Secretary
Albany

CLAIRE P. GUTEKUNST
Treasurer
New York

STEPHEN P. YOUNGER
Immediate Past President
New York

VICE-PRESIDENTS

First District
Ann B. Lesk, *New York*
Jay G. Safer, *New York*

Second District
Manuel A. Romero, *Brooklyn*

Third District
Lillian M. Moy, *Albany*

Fourth District
Rebecca A. Slezak, *Amsterdam*

Fifth District
Thomas E. Myers, *Syracuse*

Sixth District
Mark S. Gorgos, *Binghamton*

Seventh District
June M. Castellano, *Rochester*

Eighth District
David L. Edmunds, Jr., *Buffalo*

Ninth District
Hon. Arlene Gordon-Oliver, *White Plains*

Tenth District
Emily F. Franchina, *Garden City*

Eleventh District
David Louis Cohen, *Kew Gardens*

Twelfth District
Steven E. Millon, *Bronx*

Thirteenth District
Grace Virginia Mattei, *Staten Island*

MEMBERS-AT-LARGE OF THE EXECUTIVE COMMITTEE

Samuel F. Abernethy
Hon. Margaret J. Finerty
Eileen D. Millett
Sherry Levin Wallach
Oliver C. Young

NYSBA

MEMBERS OF THE HOUSE OF DELEGATES

First District
Aaron, Stewart D.
Abella, Zachary J.
Abernethy, Samuel F.
Abramowitz, Alton L.
Adler, Roger B.
Alcott, Mark H.
Anello, Robert J.
Berke-Weiss, Laurie
Berman, Scott M.
Blessing, Peter H.
Bohorquez, Fernando A., Jr.
Brown, Earamichia
Burns, Howard W., Jr.
Chambers, Hon. Cheryl E.
Chang, Vincent Ted
Cheng, Pui Chi
Christian, Catherine A.
Cohen, Carrie H.
Collazo, Ernest J.
* Cometa, Angelo T.
Conley, Sylvia Jeanine
Crespo, Louis
DeGrasse, Hon. Leland G.
DeMarco, Joseph V.
Di Pietro, Sylvia E.
Draper, Thomas G., Jr.
Drayton, Joseph Michael
Ellerin, Hon. Betty Weinberg
Eng, Gordon
Eppler, Klaus
Feinberg, Ira M.
Finerty, Hon. Margaret J.
Fink, Rosalind S.
Fontaine, R. Nadine
* Forger, Alexander D.
Gallagher, Patrick C.
Galligan, Michael W.
Gesinsky, Loren
Glanstein, Joel C.
Goldberg, Evan M.
Grays, Taa R.
Green, Prof. Bruce A.
Gutekunst, Claire P.
Gutheil, Karen Fisher
Haig, Robert L.
Hanks, Kendyl T.
Hawkins, Dennis R.
Ho, John Si
Hoffman, Stephen D.
Hollyer, A. Rene
Honig, Jonathan
James, Hon. Debra A.
† James, Seymour W., Jr.
Kahn, Michele
Kanter, Gregg Herbert
Kaplan, Matthew E.
Kennedy, Henry J.
Kera, Martin S.
Kiernan, Peter J.
* King, Henry L.
Kobak, James B., Jr.
Kornreich, Edward S.
Larson, Wallace L., Jr.
Lau-Kee, Glenn
†* Leber, Bernice K.
Lesk, Ann B.
Levy, M. Barry
Lieberman, Ellen
Lindenauer, Susan B.
Lupkin, Jonathan D.
* MacCrate, Robert
Marino, Thomas V.
McNamara, Michael J.
Medenica, Olivera
Miller, David S.
Miller, Michael
Minkoff, Ronald
Minkowitz, Martin
Morril, Mark C.
Moses, Barbara Carol
Moxley, Charles J., Jr.
Nathanson, Malvina
Nelson, Lester
Nijenhuis, Erika W.
Opotowsky, Barbara Berger
Parker, Bret I.
* Patterson, Hon. Robert P., Jr.
Prager, Bruce J.
Prowda, Judith B.
Reed, Thomas A.
Richman, Steven H.
Robertson, Edwin David
Rosner, Seth M.
Rothstein, Alan
Russell, William T., Jr.
Safer, Jay G.
Schindel, Ronnie
Sen, Diana Sagorika
Seymour, Samuel W.
* Seymour, Whitney North, Jr.
Sigmond, Carol Ann
Silkenat, James R.
Smith, Hon. George Bundy
Sonberg, Hon. Michael R.
Spiro, Edward M.
†* Standard, Kenneth G.
Stern, Mindy H.
Swanson, Richard P.
Syracuse, Dana V.
Syracuse, Vincent J.
Tesser, Lewis F.
Walsh, Jean T.
Wang, Annie Jen
Wolff, Adam John
Wolk, Lawrence J.
Yates, Hon. James A.
Yavinsky, Hon. Michael J.
†* Younger, Stephen P.
Zuchlewski, Pearl
Zulack, John F.

Second District
Bonina, Andrea E.
Cohn, Steven D.
Doyaga, David J., Sr.
Gerber, Ethan B.
Hernandez, David J.
Kamins, Hon. Barry
Longo, Mark A.
Lonuzzi, John A.
Lugo, Betty
McKay, Hon. Joseph Kevin
Napoletano, Domenick
Park, Maria Y.
Romero, Manuel A.
Slavin, Barton L.
Sunshine, Hon. Jeffrey S.
Sunshine, Hon. Nancy T.

Third District
Ayers, James B.
Barnes, James R.
Baynes, Brendan F.
Burke, Walter T.
Costello, Bartley J., III
Davidoff, Michael
DeFio Kean, Elena
Doherty, Glen P.
Fernandez, Hon. Henry A.
Fernandez, Hermes
Glasheen, Kevin P.
Greenthal, John L.
Hacker, James E.
Hanna, John, Jr.
Hurteau, Daniel Joseph
Kahler, Annette I.
Kaplan, Edward Ian
Liebman, Bennett M.
Miranda, David P.
Moy, Lillian M.
Pettit, Stacy L.
Privitera, John J.
Roberts-Ryba, Christina L.
Rosiny, Frank R.
Ryan, Rachel
Salkin, Prof. Patricia E.
Schofield, Robert T., IV
* Yanas, John J.

Fourth District
Baker, Carl T.
Coffey, Peter V.
Healey, Andrew J.
Herrmann, Diane M.
Hoag, Rosemary T.
Ladouceur, Michelle H.
Lais, Kara I.
Martin, Trinidad
McAuliffe, J. Gerard, Jr.
McMorris, Jeffrey E.
McNamara, Matthew Hawthorne
Onderdonk, Marne L.
Rodriguez, Patricia L. R.
Russell, Andrew J.
Slezak, Rebecca A.
Stanclift, Tucker C.
Watkins, Patricia E.

Fifth District
Fennell, Timothy J.
Fish, Marion Hancock
Foley, Timothy D.
Gensini, Gioia A.
†* Getnick, Michael E.
Gigliotti, Hon. Louis P.
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
Fortino, Philip G.
Gorgos, Mark S.
Grayson, Gary J.
Gutenberger, Kristin E.
Lewis, Richard C.
†* Madigan, Kathryn Grant
Mayer, Rosanne
Orband, James W.
Pogson, Christopher A.
Rich, Richard W., Jr.
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.
Johnson, Timothy R.
Kingsley, Linda S.
Kurland, Harold A.
Laluk, Susan Schultz
* Moore, James C.
Moretti, Mark J.
Murray, Jessica R.
* Palermo, Anthony R.
Schraver, David M.
Stapleton, T. David, Jr.
Tennant, David H.
Tilton, Samuel O.
* Vigdor, Justin L.
Walker, Connie O.
* Witmer, G. Robert, Jr.

Eighth District
Cassata, Hon. Joseph J.
Convissar, Robert N.
† Doyle, Vincent E., III
Edmunds, David L., Jr.
Effman, Norman P.
* Freedman, Maryann Saccomando
Gerstman, Sharon Stern
Hager, Rita Merino
†* Hassett, Paul Michael
Manias, Giles P.
Nelson, John C., III
Russ, Arthur A., Jr.
Schwartz, Scott M.
Seitz, Raymond H.
Smith, Sheldon Keith
Young, Oliver C.

Ninth District
Amoruso, Michael J.
Arnold, Dawn K.
Brown, Terryl
Burke, Patrick T.
Burns, Stephanie L.
Byrne, Robert Lantry
Cohen, Mitchell Y.
Cusano, Gary A.
Cvek, Julie Anna
Dohn, Robert P.
Fay, Jody
Fedorchak, James Mark
Fontana, Lucille A.
† Fox, Michael L.
Goldenberg, Ira S.
Gordon-Oliver, Hon. Arlene
Markenson, Ari J.
Marwell, John S.
Miklitsch, Catherine M.
* Miller, Henry G.
Nachimson, Steven G.
* Ostertag, Robert L.
Preston, Kevin Francis
Rauer, Brian Daniel
Ruderman, Jerold R.
Sachs, Joel H.
Sanchala, Tejash V.
Sandford, Donald K.
Selinger, John
Singer, Rhonda K.
Starkman, Mark T.
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.
Collins, Richard D.
DeHaven, George K.
Ferris, William Taber, III
Fishberg, Gerard
Franchina, Emily F.
Gann, Marc
Good, Douglas J.
Gruer, Sharon Kovacs
Hayden, Hon. Douglas J.
Hendry, Melanie Dyani
Karabatos, Elena
Karson, Scott M.
Krisel, Martha
Leventhal, Steven G.
†* Levin, A. Thomas
Luskin, Andrew J.
Makofsky, Ellen G.
McEntee, John P.
Pachman, Matthew E.
* Pruzansky, Joshua M.
Randazzo, Sheryl L.
* Rice, Thomas O.
Schoenfeld, Lisa R.A
Shulman, Arthur E.
Tollin, Howard Michael
Zuckerman, Richard K.

Eleventh District
Cohen, David Louis
DeFelice, Joseph F.
Gutierrez, Richard M.
Lee, Chanwoo
Nizin, Leslie S.
Risi, Joseph J.
Taylor, Zenith T.
Vitacco, Guy R., Jr.

Twelfth District
DiLorenzo, Christopher M.
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
Bouveng, Carl-Olof E.
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*

BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part VII — The Answer

The *Legal Writer* continues its series on drafting litigation documents. Because the bulk of the answer is contained in the Response to Allegations section of the answer, the *Legal Writer* will now discuss that section in depth. The *Legal Writer* will continue in the next issue with techniques for asserting affirmative defenses, counterclaims, and cross-claims.

Response to Allegations

Once you've admitted an allegation in the complaint, that admission stands. If you, the defendant, amend your answer to deny that allegation, the plaintiff may use the original admission as evidence of a fact you've admitted.[1] You may introduce evidence to explain or minimize the admission.

Address every allegation in the plaintiff's complaint, including those allegations in the introduction and the summary of the case, as well as any statement about jurisdiction and venue.

General denials are blanket statements in which you deny the entire complaint. Although the CPLR doesn't authorize or prohibit general denials, the courts disfavor them.[2] A court might determine that your general denial was made in bad faith and sanction you. That consequence depends on whether the complaint is detailed and well-pleaded. If it's a bare bones complaint, a general denial may be appropriate. As the *Legal Writer* will discuss in the upcoming months in its article on motions, a better option might be to move to dismiss the complaint.

General denials are prohibited in the following cases: (1) a contractual condition precedent;[3] (2) the validity of a signature on an instrument;[4] and (3) schedule of goods.[5]

As discussed in part VI of this series, under CPLR 3018(a) you have three ways to deny an allegation contained in the plaintiff's complaint. First, based on your personal knowledge, you may unconditionally deny an allegation. Second, you may deny an allegation that you allege is false based on second-hand knowledge, even if you have no personal, first-hand knowledge that it's false. Third, you may state that you have insufficient information about whether an allegation is true. Don't speculate or make an educated guess about whether the allegation is true. Examples of the three ways to deny an allegation:

1. Defendant denies the allegation in paragraph 1 of the complaint.
2. On information and belief, defendant denies each allegation in paragraph 2 of the complaint.
3. Defendant denies knowledge or information sufficient to form a belief about the truth of each allegation in paragraph 3 of the complaint.

Depending on which numbering technique you use to draft the answer (see part VI of this series), you may also deny substantial portions of the complaint at the same time.

1. Defendant denies each allegation in paragraphs 1, 4, 5–10, 20–30.
2. On information and belief, defendant denies each allegation in paragraphs, 2, 11–19, 31, 32.
3. Defendant denies knowledge or information sufficient to form a belief about the truth of each allegation in paragraph 3, 33–40.

If the plaintiff's complaint contains multiple allegations in a single paragraph, you may respond differently to each allegation. If any allegation lets you deny it unconditionally, deny the entire paragraph and explain the exceptions to the other allegations you aren't denying. Example:

1. Defendant denies the allegations in paragraph 12 of the complaint, except admits that defendant sold the lawnmower to plaintiff. Based on information and belief, defendant denies the allegation in paragraph 7 that the lawnmower failed to perform as guaranteed.[6]

It's best not to answer an allegation by admitting it and then following with an exception. This method might inadvertently result in your making admissions. *Example:* "10. Defendant admits

CONTINUED ON PAGE 58

> When a plaintiff alleges law, the best approach is to respond to the allegation, even though you don't have to.

Find the CLE that fits your needs at

www.nysba.org/CLE

Search by any or all of the following categories:
Topic, Area of Practice, Keyword, Date, Format, Location, Number of Credits and/or Credit Type.

Our online CLE center also offers quick links to the Mandatory CLE Rules and a CLE Credit Tracker that will keep track of your CLE Credits for you.

Scan this code with your phone
to go to www.nysba.org/CLE

NYSBA

Periodicals

ADDRESS CHANGE – Send To:
Records Department
NYS Bar Association
One Elk Street
Albany, NY 12207
(800) 582-2452
e-mail: mis@nysba.org