NOVEMBER/DECEMBER 2005
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NEW YORK STATE BAR ASSOCIATION

Journal

To Fly, or Not to Fly…

How the CPLR got me flying

by David D. Siegel

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NEW YORK STATE BAR ASSOCIATION
Journal

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On the cover: David D. Siegel in 1964, next to the airplane (a Piper Colt) in which he first soloed. Page 13, the Piper Cherokee he later bought. Photos courtesy of the author.

DEPARTMENTS

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. Copyright © 2005 by the New York State Bar Association. The *Journal* (ISSN 1529-3769), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $18. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

A. VINCENT BUZARD

Privilege in Jeopardy

The attorney-client privilege is one of the most fundamental and sacred principles of our legal system. We, and our clients, are secure in the knowledge that we cannot be subpoenaed or otherwise forced to divulge what our clients tell us. Only with the protection of the attorney-client privilege can our clients tell us the whole story, and only then can we provide effective counseling or advocacy.

We must encourage our clients to be completely candid and forthright with us because when they hold back facts that to them may seem inconsequential, the lack of knowledge can impair or even defeat our ability to effectively represent them. When, even inadvertently, clients do not disclose the whole story or when we fail to ask all the right questions, the sudden surprise of finding out an important fact a client knew, but did not disclose, can be one of the most bone-chilling experiences endured by an advocate. The attorney-client privilege does more than encourage client candor. When clients tell the whole story, we are able to guide them, ensuring their voluntary compliance with the law. In short, the attorney-client privilege is indispensable to the efficient and effective functioning of the American justice system.

We face a serious threat to the privilege as an indirect result of a recent wave of corporate fraud. After the Enron and other scandals, in January 2003, then Deputy Attorney General Larry Thompson issued a memorandum which laid out guidelines on prosecutions of corporations. The guidelines state, in relevant part: "One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel."[1]

Not only is waiver of the attorney-client privilege taken into account by the Justice Department in deciding whether to indict a corporation, but waiver is also a factor in determining the sentence.[2] Other regulators, including the Securities and Exchange Commission, have adopted similar practices. The result is that the attorney-client privilege is being used as a bargaining chip by prosecutors and regulators on both the issues of indictment and sentencing. One noteworthy example: To head off an indictment, in September, the accounting giant KPMG promised not to use any claim of privilege to keep information from prosecutors investigating it for selling questionable tax shelters. In an article on the KPMG case, an attorney for the corporation said that waiver of the privilege helped save the company from destruction and that, in today's climate, other companies must do the same to avoid indictments.[3]

In New York, we have received a number of reports that inducing such waivers is an increasingly common practice. Obviously, this is an enormously alarming development, and it is no comfort when the prosecutors say that they only ask what facts were given to the lawyers, not for the legal advice. The point is that the client must be able to fully confide in his lawyer, without fear. Recent surveys by the Association of Corporate Counsel and the National Association of Criminal Defense Lawyers bear out the dangers of the assault on the attorney-client privilege.[4] The surveys reveal that, within the last year, numerous corporate counsel faced challenges to the attorney-client privilege from federal prosecutors or regulators; the corporations often felt they had no choice but

A. VINCENT BUZARD can be reached at president@nysbar.com.

to waive the privilege, because of the high stakes involved in a prosecution; and many corporate counsel felt that the erosion of the privilege was severely compromising honest attempts at candor and compliance.

In response to this disturbing trend, last year, the ABA created a Task Force on Attorney-Client Privilege.[5] In May 2005, the Task Force issued a report, and in August, the ABA House of Delegates adopted a resolution of the Task Force, which states that the privilege promotes compliance with the law through effective counseling, and promotes the proper and efficient functioning of our adversarial system of justice.[6] The resolution also opposes the erosion of the privilege flowing from the government practice of routinely seeking to extract a waiver of the privilege through the grant or denial of any benefit or advantage.

Because the issue of the threat to the attorney-client privilege strikes at the heart of what we do as lawyers, we as an association also have a duty to investigate the problem and find remedies. Therefore, we will take two important actions: establish our own task force and hold a summit. The task force will examine the problem, determine the extent to which people in corporations are being asked to waive the privilege, and develop rules to deal with the problem. We are pleased that the task force will be chaired by Stephen D. Hoffman of Siller Wilk LLP in New York City. Stephen is a NYSBA vice president representing the First Judicial District and a seasoned litigator.

Because the issue is so important, I plan to devote part of the President's Summit at the Annual Meeting to it. We are inviting prosecutors, regulators, and practitioners to discuss the issue, the practice, and the consequences. If you have been asked to have a client waive the attorney-client privilege to show cooperation or have otherwise observed that the privilege is being unduly eroded, I hope that you will write to me at President@nysbar.com. If you are a prosecutor and defend waivers of the attorney-client privilege, I would appreciate hearing from you, too. ■

1. Department of Justice Memorandum, "Principles of Federal Prosecution of Business Organizations," Jan. 20, 2003 <http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm>.

2. U.S. Sentencing Guidelines Manual § 8C2.5 cmt. n.12 (2004).

3. Robert S. Bennett of Skadden Arps Slate Meagher & Flom, *quoted in* Jonathan Glater, *The Squeezing of the Lawyer-Client Privilege*, N.Y. Times, Sept. 7, 2005.

4. *See* <www.acca.com/Surveys/attyclient.pdf> *and* <www.acca.com/Surveys/attyclient_nacdl.pdf>.

5. <http://www.abanet.org/buslaw/attorney-client/home.shtml>.

6. <http://www.abanet.org/buslaw/attorney-client/materials/hod/recommendation_adopted.pdf>.

NYSBACLE

Schedule of Fall Programs *(Subject to Change)*

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

Risk Management for Attorneys: How to Stay Out of Your Lawyer's Office
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Fulfills NY MCLE requirement for all attorneys (3.5): 2.5 in ethics and professionalism; 1.0 in practice management and/or areas of professional practice

December 2	Tarrytown

New York Appellate Practice
Fulfills NY MCLE requirement for all attorneys (7.0) (8.0 in NYC only): 0.5 in ethics and professionalism; 3.5 in skills (4.5 in NYC only); 3.0 in practice management and/or areas of professional practice

December 1	New York City

Divorce Law 2005: Part B and Maintenance at 25, the CSSA at Sweet 16
Fulfills NY MCLE requirement for all attorneys (7.0): 7.0 in practice management and/or areas of professional practice

December 2	Syracuse
December 9	Albany

Update 2005
†(Video Replays)
Fulfills NY MCLE requirement (8.0): 1.0 in ethics and professionalism; 7.0 in practice management and/or areas of professional practice

December 1	Poughkeepsie; White Plains
December 2	Loch Sheldrake; Melville, LI; Suffern; Watertown
December 7	Rochester
December 9	Jamestown

Ethics for Real Estate Attorneys
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 in ethics and professionalism

December 6	New York City

2005 Update on Evidence for the Criminal Practitioner
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.0): 1.5 in skills; 2.5 in practice management and/or areas of professional practice

December 2	New York City

Using the Internet for Legal Research with Leigh Webber
Fulfills NY MCLE requirement for all attorneys (6.5): 1.0 in ethics and professionalism; 5.5 in skills

November 29	New York City
November 30	Uniondale, LI

Intermediate Elder Law
Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 in ethics and professionalism; 6.0 in practice management and/or areas of professional practice

November 30	Buffalo; Melville, LI
December 5	Albany
December 6	New York City

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

November 30	Albany; Syracuse
December 6	Buffalo
December 8	Uniondale, LI
December 9	New York City; Tarrytown

Practical Skills – Basics of Civil Practice – The Trial
Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 in ethics and professionalism; 2.5 in skills and 3.5 in practice management and/or areas of professional practice

November 29	Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester

James McElhaney's Trial Evidence
Fulfills NY MCLE requirement for all attorneys (7.0): 7.0 in skills

November 30	New York City
December 1	Long Island

†Advanced Real Estate Practice
Fulfills NY MCLE requirement (7.0): 7.0 in skills, practice management and/or areas of professional practice

December 2	New York City

†Employment Law Litigation Institute
Fulfills NY MCLE requirement (7.0): 1.0 in ethics and professionalism; 6.0 in skills, practice management and/or areas of professional practice

December 2	New York City

Tax Issues in Real Estate Practice
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.5): 4.5 in practice management and/or areas of professional practice

December 2	Buffalo
December 6	Melville, LI
December 7	New York City
December 8	Syracuse

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Representing People with Disabilities
DWI on Trial – The Big Apple VI
Litigation, Civility and Ethics
Representing Physicians and Dentists in the Disciplinary Process
Long Term Care and the Law

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

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To Fly, or Not to Fly. . .

By David D. Siegel

It was the Civil Practice Law

Professor David D. Siegel is a Distinguished Professor of Law at Albany Law School and the Editor of the *New York State Law Digest*. He is the author of *Siegel's New York Practice*, 7th Edition; Commentaries on New York Civil Practice in *McKinney's Consolidated Laws* and on federal civil practice in the United States Code Annotated (U.S.C.A.); *Conflict of Laws* in the West *Nutshell* Series; and *Siegel's Practice Review*, his monthly newsletter on practice that commenced publication in April of 1993.

and Rules that got me flying.

Perhaps not altogether figuratively. The CPLR took to the books in 1962 and took effect a year later. A new practice act jars the bar as few other pronouncements can. All the lawyers were looking for a quick education in the new act. But there were few educators. I was one of the lucky ones. I was just starting in law teaching, and New York practice was my subject. I read the CPLR through twice. That alone can't make the reader an expert. But I also thought about it. That helped. And I studied its background reports closely. That helped more.

I quickly found myself in demand all around the state as a lecturer, speaking at many locations for our State Bar Association and the Practising Law Institute and before myriad local bar groups. I accepted almost any invitation. This was heady exposure for a young law teacher. (I ask our readers to accept that I was once young.)

I also remembered that all work and no play make Jack a dull boy. I was so enmeshed in the CPLR that it started to come out of me more as an ooze than a lecture. I needed escape.

Escape took the form of flying lessons at the Staten Island airport, a charming little field in almost the center of Staten Island, now long since become a shopping center, or something like that. The starting plane was a Piper Cub, a small high-wing tandem two-seater. My instructor sat in one seat, I in the other, both of us in earphones. Off we went. Delightful. I later realized that it's always delightful when you have an experienced and confident pilot in the other seat. I learned this best through the doctrine of Stark Contrast, when I was finally allowed to solo and had only myself to guide me.

I was wearing a complicated-looking calendar/stopwatch. On the left wrist. Had I happened to be wearing it on my right wrist, there'd be no story to tell here.

I soloed all around the Staten Island airport, a number of times. I forget whether I did this because it was the rule (until I got further clearance) or instinctively, as a matter of self-preservation.

My instructor now began to prepare me for the next step: clearance for cross-country flying. This means going far from base and landing at airports elsewhere. More significantly, it means leaving the warm security of the Staten Island airport.

All of this was in the air, however. Meanwhile, back on the ground, I continued to talk CPLR to all comers.

One of the comers was John Real, at the time the president of the Mount Vernon Bar Association. Would I give his members an after-dinner CPLR talk? Why sure. It was now early in 1963. I sat at John's right on the dais during dinner. We didn't know each other well, so scraping up conversation was some effort. All at once he blurted out, "Are you a pilot?" This astounded me. I wasn't quite a pilot – no license yet – but how could he even guess at my flying activities? I asked him that. He said, "Your watch."

I was wearing a complicated-looking calendar/stopwatch. On the left wrist. It was a Rolex that I ordered from Switzerland while I was in the army in Stuttgart, in Germany, way back in 1954. It was a beauty. Had I happened to be wearing it on my right wrist, there'd be no story to tell here.

John's assumption that I was a pilot came from the watch, which had nothing to do with it. It just happened to prove a catalyst for my next flying adventure. (Actually, for a lot more than that in my life, but that's another story.)

He said he had a plane and would I like to go up with him. Of course I would, and in a month or so I did. I had lunch at John's home in Katonah, after which he telephoned the Westchester airport and then drove us there. His plane had been taxied out of the hangar and was waiting for him.

It was a single-engine Piper Apache (retractable gear), and now here we were on a warmish day in mid spring, floating in the skies above Westchester, he piloting, and I just a bemused spectator – a status I should have stayed with forever, but didn't. I did on this trip, though.

He said, "Would you like to go to Great Barrington?" I'd never heard of it, but it proved to be a small and inviting town in southwestern Massachusetts, in the Berkshires. I looked at my watch. It was after 3 p.m. I said, "John, isn't it a little late for that?" He looked at me with surprise, maybe contempt, and said condescendingly, "You're in a plane."

We arrived at the Great Barrington airport in well under an hour. It's a charming airfield, nestled in the foothills of the Berkshires, just down the road a mile and a half from where I have now been living for the past 30+ years (that's another story). He had a beat-up old station wagon parked at the field and off we went down Route 71 to the house of his brother, Ray, the last house in Massachusetts before the New York border. A nice visit, and after an hour to two, back to Westchester.

This Berkshires airport was where I wanted to continue my flying lessons. I would now drive up on weekends, staying at a motel and learning more about flying from the late Walt Koladza, the airport's founder. (It's now named for him.) Walt convinced me to buy my own plane. (He was very convincing. He also happened to be the seller's agent.) I bought a Piper Cherokee 180. Four-seater, low-wing, stationary gear, and steady as an aircraft can be. I wish I could say the same for its new pilot. I parked it ("tied it down" in the jargon) at Linden airport in New Jersey, commuting distance from my Brooklyn apartment. I flew it to Great Barrington on weekends for continued lessons towards my license.

I was ultimately cleared for cross-country flying – solo only, no license yet – and off I went on a number of cross-country missions. I could write a book about those experiences. (Each of them is another story.) I would call it *A Fool and His Airplane*. I can't believe now, in retrospect, that I ever had the guts to chart those flights. On one of them, on July 11, 1964 – 160 years to the day after Burr killed Hamilton in Weehawken (that's another story) – I flew from Linden in New Jersey, to Scranton in Pennsylvania, to Binghamton and Cooperstown in New York, to the Great Barrington airport, and then back to Linden. All in a day.

On the last leg of that journey, guided on my special radio by the WOR transmitter (710 on the AM dial) that stood almost next to the Linden airport, I "flew the needle," just steadily aiming for the WOR antenna. While over the area of the George Washington Bridge, I saw a peculiar sight ahead, around midtown: a cloud starting at eye level but moving down instead of up. Nobody at Great Barrington had warned me of bad weather, so, dependent novice that I was, I continued my trek to Linden.

That peculiar cloud, my friends, was fog, and I flew right into it. (As an expert on civil procedure, I can tell you that an act of that kind makes one eligible for treatment as an incapacitated person under the Mental Hygiene Law, if not as a decedent under the Estates, Powers, and Trusts Law.) I had all kinds of sophisticated radio equipment in the plane that could have helped me avoid or evade the fog, but hadn't yet learned how to use it. I learned how to afterwards, from an instruction manual. The more immediate lesson came from another book. I learned that thou must honor fog with no less fervor than thy father and thy mother.

The 30 minutes or so that followed, in which I lost all orientation, felt like 30 years. It was a rapid series of events that should by all odds have resulted in the common death of my plane and me. But through a series of minor miracles – God bless WOR and its transmitter – I found the airport and landed, appreciative as never before of what it means to be alive.

Because the fool and his plane were not parted, I continued cross-country flying. I finally got my license. (I attribute this to government error.) Now I could take others up with me. Who would volunteer for this dangerous mission? My wife, some cousins, and at last my parents. My mother sat in the front passenger seat, hands held tightly in her lap lest she touch a button and destroy her family.

My father was in the plane, too. He feared flying, but had to show this confidence in me. He sat in the back seat, desperately feigning a smile and holding tightly to the little strap on his right. His expectation was that if the plane should suddenly go down, he would be saved by his little strap, which he assumed was independently attached to heaven. The plane didn't go down, but I did have a brush with a commercial airliner in the Bronx, just north of LaGuardia Airport. My folks didn't know it was a brush, however, and I didn't tell them. (Pilots are taught merely to smile in these circumstances.)

Planes don't turn on a horizontal. They bank in the direction of the turn. When my wife Rosemarie flew with me – again just a gesture of loyalty – she devised her own defenses. She was committed at all costs to the vertical. When the plane banked to the right, she leaned to the left, pressing into me. When the plane banked to the left, she leaned to the right, pressing into the door. While the plane was banking, in other words, Rosemarie wasn't.

Any plane anywhere within my vision concerned me. I wanted a commitment from all potential aircraft in North America that they would not go up until I was both up and down. No takers, however. My lookout for other planes was therefore a salient and always frightening part of my flying.

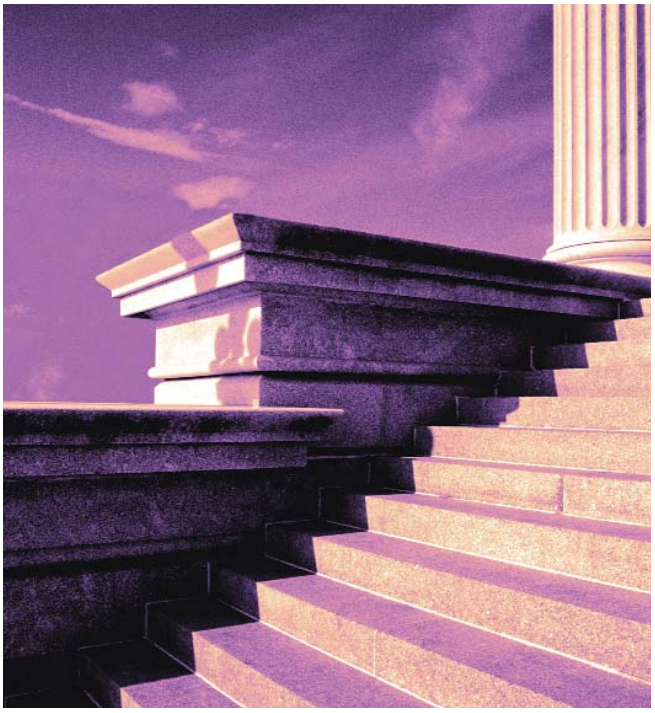
After several months of cross-country flying, I came to a shocking realization. This exhilaration that I thought I felt every time I flew was not exhilaration at all. It was terror. I came finally to acknowledge that my joy of flying depended unambiguously on a condition precedent: that someone else be flying the plane.

The clincher that got me to sell the plane (in 1965, about a year after I bought it) was another brush with an aircraft. Another nice Saturday morning, and here I am flying up to Great Barrington once again. Alone this time. I'm looking left and right for any sign of any movement in the air. Suddenly I draw a heavy intake of breath: a huge plane is rapidly closing in on me from the left. I'm done for.

Do you know what that huge plane was, my friends, coming at me from the left? It wasn't a plane at all. It was a minuscule bug climbing up the left window, catapulted by my peripheral vision and my imagination into an enemy aircraft.

Who needs this? Or this plane? I continued my flight to Great Barrington, landed, and told Walt Koladza to sell the plane for me. He did, and with the proceeds I bought the big farm my family and I have now owned since 1965, and permanently resided on since 1972.

The great advantage of a farm is that it requires no pilot and is never threatened by the flying farms of others. ■



Appealing an Arbitrator's Award

By Paul Bennett Marrow

What can be done when an arbitrator in good faith commits a significant factual or legal error in making an award? Article 75 of the Civil Practice Law and Rules limits judicial review of an award to circumstances involving clerical error[1] or to other factors that, for the most part, require a difficult threshold showing of intentional misconduct.[2] Accordingly, New York courts have been consistent in refusing to intervene for the purpose of correcting "mere" factual or legal errors that might be identified in the arbitrator's determination.[3]

As a result of this daunting finality, attorneys often will refuse to consider an arbitration clause when drafting and negotiating a commercial agreement. While a concern about finality certainly is well-founded, it still may be short-sighted to summarily exclude the possibility of arbitration. What many fail to consider is the possibility of including in the agreement a provision for an "internal" appeal, in other words, an appeal to another arbitrator. If drafted carefully, such a clause will be recognized and given effect by most of the major arbitration administrators.

For the most part, those who choose arbitration are free to structure the proceedings as they wish. As one court aptly observed:

> Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.[4]

By including a contractual provision for an "internal" appeal, the parties create a private remedy that supplements the limited grounds for modification and vacatur available under Article 75. There is no express statutory authority for the creation of an appellate process,[5] but there is also nothing in the CPLR that prohibits it. In addition there is no compelling public interest in limiting the general flexibility given to contracting parties wishing to accept arbitration. Indeed, just the opposite is true. Moreover, if the provision recognizing the right to appeal does not otherwise run afoul of Article 75 or some other public policy concern, mutual consent should serve to assure the parties that the arbitration process will be conducted in a manner consistent with current trends in substantive law.[6]

Selection of a Forum for the Internal Arbitration Appeal

If the parties are prepared to provide for some form of appellate review, whom can they designate to administer the appeal? The draftsperson has at least two options:

- a provision granting jurisdiction to a court to review an arbitrator's award, or
- a provision authorizing an appeal to an appellate arbitrator.

Attempts to grant jurisdiction to a court have proved problematic. Some courts balk at the idea, citing concerns about allowing private parties the latitude to impose jurisdiction where it might otherwise not exist. Others are willing to recognize contractual mandates on the theory that jurisdictional concerns are trumped by the desire to

Paul Bennett Marrow <pbmarrow@optonline.net> is an arbitrator on the roster of the Commercial Panel for the American Arbitration Association and the National Arbitration Forum. He is a graduate of Case Western Reserve University and received his J.D. from New York Law School.

support arbitration. Much has been written on the subject, and a detailed examination of these positions is beyond the scope of this article.[7] The federal courts are split[8] and the U.S. Supreme Court has yet to speak on the subject. There are few state court rulings, and they evidence concerns similar to those raised by the federal judiciary.[9] To date, only one court in New York has considered the question, and the reaction was anything but supportive.[10] Our Court of Appeals has yet to consider the matter. All this suggests that trying to involve the judiciary pursuant to a private contract is, at best, unpredictable.

The alternative is to provide for an appeal to an appellate arbitrator.[11] This approach has a number of advantages:

- it is consistent with the philosophical underpinning for arbitration, in that it extends the flexibility afforded contracting parties seeking to resolve disputes through arbitration;
- it eliminates the uncertainty of trying to involve the judiciary in a manner not otherwise provided for in the enabling statutes;
- it eliminates concerns about confidentiality presented by an appeal through the judicial system; and,
- it presents an opportunity to structure the appeals process so as to maintain the goals of speed and efficiency.

But will the major arbitration facilitators accept the charge? They will. The rules of the CPR Institute for Dispute Resolution (CPR), Judicial Arbitration and Mediation Services (JAMS) and the National Arbitration Forum (NAF) all recognize the possibility of an arbitrator-based appeals process. Even the rules of the American Arbitration Association (AAA), while silent on the issue, appear to permit parties to agree to such a procedure.

The rules of both CPR[12] and JAMS[13] make provision for appellate review, provided that the parties agree to it in writing. The CPR procedure is available to parties to any binding arbitration conducted pursuant to the CPR rules or "otherwise,"[14] suggesting that CPR will administer an appeal from an award obtained under the rules of another facilitator. The JAMS procedure is available only for a review of an award made pursuant to the JAMS Comprehensive Arbitration Rules and Procedures.[15]

Both of these schemes envision a process resembling that of the courts for a first-level appellate review of a trial court's determinations. They permit an appeal based on law and/or fact, but the rules can be rigid. As with a court, failure to comply can mean that the "appellant" can lose the right to appeal. Notice must be given in a timely manner, and the parties must follow a set of directions that govern most issues, among them the following: selection of a tribunal or an individual appeals arbitrator; challenges and replacement of the tribunal or appeals arbitrator; the record on appeal; exchange of briefs; length of briefs; oral argument; compensation of the tribunal; and confidentiality of the proceedings.

The rules also address the scope of the appeal. Rule 8.2 of the CPR Arbitration Appeal Procedure allows an appellate award that modifies or sets aside the original award on the basis of errors of law or fact, or because the original award "is subject to one or more of the grounds set forth in Section 10[16] of the F.A.A. [Federal Arbitration Act] for vacating an award." Rule D of JAMS Optional Arbitration Appeal Procedure grants the power to affirm, reverse or modify the original award. Both schemes require a written statement explaining the decision of the appellate tribunal or arbitrator.

While the rules of the NAF[17] do not include any specific rules or procedures for an appeal, the possibility is recognized in Rule 1(D):

> Parties may modify or supplement these rules as permitted by law. Provisions of this Code govern arbitrations involving an appeal or a review de novo of an arbitration by other Arbitrators.

Rule 5(K) bypasses the internal appeals procedure and permits an appeal to a court with the limitation that the review is to be limited to substantive legal issues:

> Review and Enforcement. An Award may be enforced in any court of competent jurisdiction, as provided by applicable law. An Award may be reviewed by a court with jurisdiction to determine whether the Arbitrator properly applied the applicable law and whether the arbitration complied with applicable procedural and arbitration laws.[18]

Read together, these rules appear to offer a number of options. For example, parties can agree to a two-step appellate process. First, the aggrieved party may go to an appeals arbitrator or arbitrators *de novo* with no restrictions as to the subject matter of the appeal, and then to court "with jurisdiction," but the review will be limited to the application of and compliance with the laws governing the arbitration. In the alternative, parties can make direct application to a court with jurisdiction to undertake such a review. However, Rule 5(K) appears to be an attempt to confer jurisdiction on the courts, and, as has already been discussed, this can be unpredictable given the division of judicial opinion on the issue.[19]

Although the rules of the NAF recognize the possibility of an internal appeal, they are silent as to procedures. Thus the parties are free to make whatever provision they deem to be appropriate, provided that such arrangements are otherwise "permitted by law."[20] At the very least, the parties would require a reasoned decision and award. A *de novo* review would require a transcript. If they elect the two-step process mentioned above, a full and complete record of the hearing would therefore appear to be necessary.

As noted earlier, the rules for Commercial Arbitration of the AAA do not make mention of an appeals procedure, but neither do they prohibit it. Instead, the rules favor giving the parties maximum flexibility to develop procedures that serve them best. Rule R-1(a) provides, in part, that "[t]he parties, by written agreement, may vary the procedures set forth in these Rules." This broad authorization therefore makes it possible to "mix and match" rules to serve the specific needs of those seeking to construct a viable and efficient appellate process.

There appears to be no reason why this broad mandate cannot support an appeals procedure that calls for rapid disposition, yet fits within and is consistent with general AAA rules. More specifically, the parties might consider treating the appeal as an "Expedited Procedure,"[21] and adopt the applicable rules for such a procedure by reference. If not, they would have to draft the details into the arbitration clause itself.

It should always be remembered, however, that the final decision concerning administration by the AAA lies with the AAA itself. At the present time the AAA will accept administration of a clause that includes an appellate mechanism, provided that the parties detail the exact procedure to be followed. Anyone considering including this sort of provision in an agreement is well advised to first discuss the issue with AAA staff.[22] There is always the possibility that the AAA will refuse to accept administration on the grounds that a given clause is not specific enough, or that AAA policy has changed. The drafter might want to address such a contingency by indicating that under such circumstances, the appeal shall instead be filed with CPR, or some other facilitator willing to accept the charge.

Scope of the Clause Authorizing an Appeal

What about the substance of the authorizing clause itself? If the appeal is to be filed with either CPR or JAMS, the task is simplified by following the suggestions made in their rules.[23] In cases involving NAF and the AAA, however, things can get complicated because the parties are left to fashion their own procedures as best they can.

If an attorney is faced with the latter situation, a threshold question to consider is whether the appeal should be a *de novo* review of both the facts and the law, as provided for in the rules of CPR and JAMS, or limited to a review of legal issues alone. The decision has implications for the efficiency of the arbitration process.

If an appeal is to include a review of factual determinations, as well as legal ones, there is a real risk that the final resolution of the dispute will be delayed, and that the overall cost for the proceedings will escalate. For example, a review of the facts will require that the appellate officer or officers be provided with a written record of the hearing below. Transcription is expensive and availability is unpredictable, as the reporter may not respond promptly to requests for the completed product. Moreover, even if the transcript is immediately available, provision must be made for correcting errors. Correction of the record could be time consuming and expensive.

The rules favor giving the parties maximum flexibility to develop procedures that serve them best.

The mechanics of an appeal of all issues may not be the only force driving up costs and causing delay. A party whose presentation of facts is found to be not credible will almost always conclude that such a finding is wrong – but the possibility that another fact finder might find that party's proof credible does not mean that the first arbitrator was unfair. Affording parties the opportunity for review *de novo* opens the door for what is in actuality a second hearing on credibility, even where there was no bias. This truly renders the appeal a "second bite at the apple,"[24] causing the delay and additional costs inherent in such duplication.

By contrast, an appeal on the law limits the issues and can serve to level the playing field. If the law applicable to the dispute was misapplied at the hearing, the complaining party has been denied an appropriate opportunity to make out a proper case or defense. Even though no new findings of fact will be made, a reversal on the law may correct a substantial error, without the need for a wholesale review of every aspect of the hearing, especially credibility. This would also appear to be consistent with the general approach of the appellate courts to defer to the finder of fact regarding issues of credibility, as it is he or she who has heard and seen the witnesses firsthand.

Drafting an Appellate Remedy

For an attorney who wishes to protect a client without giving up on arbitration, care is required in the drafting of an appropriate contract clause. It would appear prudent to include the following elements, especially if a facilitator's rules do not provide for them:

- a declaration as to whether the appeal can include issues of fact and law;
- procedures for notice, selection of the appellate officer(s), challenges, record on appeal, exchange of

briefs, oral arguments, confidentiality, compensation of the appellate officer(s) and other administrative matters;

- a declaration that the final ruling of the appellate officer shall be in writing and state the grounds for such ruling, and may be reopened only to consider evidence that directly concerns the final ruling.

Conclusion

Some may argue that making provision for an appeal defeats the purpose of arbitration by adding another procedural layer. However, if the attorney and his or her client believe this to be so, they should simply not agree to an arbitration clause that includes an appeals procedure. Still others may argue that courts may not look kindly on clauses that chip away at the conclusiveness and finality of an award, and that the result will be a diminution of respect by the judiciary for this alternative dispute resolution process. However, in the past several years some courts have attempted to expand limited vacatur provisions by fashioning judicially made doctrines such as "manifest disregard,"[25] "public policy review,"[26] and "irrationality review"[27] of awards, indicating that they see a need for this kind of oversight, at least in some cases. By providing for an internal appeal, the courts will find less need to stake out their own reasons for vacatur. Further, if internal appeals procedures that rely on arbitrators become commonplace, they might reduce the chance that the New York State Court of Appeals will find it necessary to reject any attempt to confer jurisdiction on a court to review an arbitrator's errors on the law, thus leaving this avenue open.

Clearly, providing for, or agreeing to, a review of the merits of an arbitrator's award is not for everyone. Where a form commercial contract is standard in an industry and includes an arbitration clause designed to expedite resolution by recognized specialists of commonly encountered disputes, there would seem to be little need. But where the parties are prepared to voluntarily provide for such a mechanism, every effort should be made to accommodate them through careful drafting of an appropriate agreement. ■

1. CPLR 7510.

2. CPLR 7511; CPLR 7510 and 7514 provide details on judicial oversight of efforts to confirm an award, docket a judgment based upon an award and to enforce the judgment.

3. *Motor Vehicle Accident Indemnification Corp. v. Aetna Cas. & Sur. Co.*, 89 N.Y.2d 214, 652 N.Y.S.2d 584 (1996); *Lee v. Omni Berkshire Place Hotel*, 302 A.D.2d 286, 753 N.Y.S.2d 838 (1st Dep't 2003).

4. *Baravati v. Josephthal, Lyons & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994).

5. By contrast, consider the following: The English Arbitration Act of 1996, § 69 (1) provides: "Unless otherwise agreed by the parties, a party to arbitral proceedings may [upon notice to the other parties and to the tribunal] appeal

to the court on a question of law arising out of an award made in the proceedings." The New York Convention of 1958 Article 5, § 2 provides: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country." Article 27 of the Rules of Arbitration for the International Court of Arbitration (1998) of the International Chamber of Commerce provides: "Before signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form."

6. The arbitration process has been criticized as "lawless." *See* Robert Scott, *The Lawlessness of Arbitration*, 9 Conn. Ins. L.J. 355 (2002/2003); Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. Rev. 1, 28–32 (2004). Seeking to address this concern, Rule 20 D of the Code of Procedure for the National Arbitration Forum (NAF) provides: "An Arbitrator shall follow the applicable substantive law and may grant any remedy or relief provided by law in deciding a Claim, Response or Request properly submitted by a Party under this Code. Claims, Responses, remedies or relief cannot be unlawfully restricted." Rule 1 D of the Code of Procedure permits the parties to "modify or supplement" the rules "as permitted by law."

7. Law review articles: Diane P. Wood, *Brave New World of Arbitration*, 31 Cap. U.L. Rev. 383 (2003); Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 Harv. Negot. L. Rev. 171 (2003); Karon A. Sasser, *Freedom to Contract for Expanded Judicial Review in Arbitration Agreements*, 31 Cumb. L. Rev. 337 (2001); William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 Am. Rev. Int'l Arb. 531 (2000). Journal articles: Michael H. LeRoy & Peter Feuille, *The Revolving Door of Justice: Arbitration Agreements that Expand Court Review of an Award*, 19 Ohio St. J. on Disp. Resol. 861 (2004); Richard C. Solomon, *Appeals of Arbitration Awards by Agreement: Why They Should be Allowed*, 58 Disp. Resol. J. 58 (2003); Margaret Moses, *Party Agreements to Expand Judicial Review of Arbitral Awards*, 20 J. Int'l Arb. 315 (2003); James B. Hamlin, *Defining the Scope of Judicial Review by Agreement of the Parties*, 13 Mealey's Int'l Arb. Rep. 25 (1998); Stephen Hayford & Ralph Peeples, *Commercial Arbitration Evolution: An Assessment and Call for Dialogue*, 10 Ohio St. J. on Disp. Resol. 343 (1995).

8. The Fourth and Fifth Circuits recognize such contracts. *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141 (2d Cir. 1992); *Gateway Techs., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993 (5th Cir. 1995). The Seventh, Eighth and Tenth Circuits have refused. *Chi. Typographical Union v. Chi. Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991); *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992 (8th Cir. 1998); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001).

9. *Compare Crowell v. Downey Cmty. Hosp. Found.*, 95 Cal. App. 4th 730, 115 Cal. Rptr. 2d 810 (2d Dist. 2002) (interpreting the California Arbitration Act); *Dick v. Dick*, 210 Mich. App. 576, 534 N.W.2d 185 (1994) (interpreting Michigan arbitration statute); *and Chi., Southshore & S. Bend R.R. v. N. Ind. Commuter Transp. Dist.*, 289 Ill. App. 3d 533, 682 N.E.2d 156 (1st Dist. 1997), *rev'd on other grounds*, 184 Ill. 2d 151, 703 N.E.2d 7 (1998) (interpreting Illinois Arbitration Act); *with Primerica Fin. Servs., Inc. v. Wise*, 217 Ga. App. 36, 456 S.E.2d 631 (1995) (interpreting the F.A.A.).

10. *County of Chemung v. Civil Serv. Employees Ass'n*, 277 A.D.2d 792, 716 N.Y.S.2d 734 (3d Dep't 2000):

> The arbitration clause of the parties' agreement provides that the arbitrator's award shall be final and binding except that "in the event either party determines that the arbitrator has varied the terms or illegally interpreted the terms of [the agreement] . . . such aggrieved party shall have the right to submit that sole issue to the Court . . . and the Court shall have jurisdiction of that particular issue. *To the extent that this provision can be construed as broadening the scope of judicial review under CPLR article 75, it is of no effect.* (emphasis added)

11. This idea was first proposed by Circuit Court Judge Richard Posner in *Chi. Typographical Union*, 935 F.2d 1501.

12. *Available at* <http://www.cpradr.org>.

13. *Available at* <http://www.jamsadr.com>.

14. Rule 1.1, CPR Arbitration Appeal Procedure.

15. JAMS Optional Arbitration Appeal Procedure, paragraph B(1): "If all Parties agree to the Optional Appeal Procedure, any party may Appeal an Arbitration Award that has been rendered pursuant to the applicable JAMS Arbitration Rules and has become final." *See also* Rule 34, JAMS Comprehensive Arbitration Rulers and Procedures.

16. Section 10. Same; vacation; grounds; rehearing:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration
>
> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.
>
> (b) The United States district court for the district wherein an award was made that was issued pursuant to section 590 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 582 of Title 5.

17. Officially called the Code of Procedure (2003), *available at* <http://www.arbitration-forum.com>.

18. *See also* Rule 43(D), Code of Procedure: "An award is reviewable by a court of competent jurisdiction as provided by applicable law."

19. Code of Procedure Rule 48(A) and (B) provide: "(A) This Code shall be interpreted in conformity with 9 U.S.C. §§ 1–16 and 9 U.S.C. §§ 201–208 in the United States . . . (B) Unless the Parties agree otherwise, any Arbitration Agreement as described in Rules 1 and 2(C) and all arbitration proceedings, Hearings, and Awards are governed by the Federal Arbitration Act, 9 U.S.C. §§ 1–16."

20. Rule 1(D), Code of Procedure.

21. R-1(b) gives parties the flexibility to employ the Expedited Procedures in situations of their choosing. It provides in part: "Unless the parties or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds 75,000, exclusive of interest and arbitration fees and cost. Parties may also agree to use these procedures in larger cases."

22. My experience has been that the AAA stands ready to discuss drafting issues and welcomes the opportunity to advise counsel as to its policy on most issues.

23. The language suggested by CPR is as follows:

> An appeal may be taken under the CPR Arbitration Appeal Procedure from any final award of an arbitral panel in any arbitration arising out of or related to this agreement that is conducted in accordance with the requirements of such Appeal Procedure. Unless otherwise agreed by the parties and the appeal tribunal, the appeal shall be conducted at the place of the original arbitration.

JAMS requires that the parties implement the terms stated in a form that is available at www.jamsadr.com/rules/optional.asp.

24. Revised Uniform Arbitration Act § 201(b), reporter's notes B (B)(5).

25. "Manifest disregard" is not recognized in New York as grounds for vacatur or modification. *City of Buffalo v. Buffalo Police Benevolent Ass'n*, 13 A.D.3d 1202, 786 N.Y.S.2d 789 (4th Dep't 2004); *Banc of Am. Secs. v. Knight*, 4 Misc. 3d 756, 781 N.Y.S.2d 829 (Sup. Ct., N.Y. Co.), *overruled in part on other grounds*, *Morgan Stanley DW Inc. v. Afrid*, 13 A.D.3d 248, 788 N.Y.S.2d 11 (1st Dep't 2004).

26. *United Fed'n of Teachers, Local 2 v. Bd. of Educ.*, 1 N.Y.3d 72, 769 N.Y.S.2d 451 (2004); *Selman v. State*, 5 A.D.3d 144, 773 N.Y.S.2d 364 (1st Dep't 2004); *Barbee v. Nationwide Mut. Ins. Co.*, 194 A.D.2d 604, 559 N.Y.S.2d 70 (2d Dep't 1993); *Crosstown Operating Corp. v. 8910 5th Ave. Rest. Inc.*, 191 A.D.2d 384, 595 N.Y.S.2d 445 (1st Dep't 1993).

27. *Chaindom Enters., Inc. v. Furgang & Adwar, L.L.P.*, 10 A.D.3d 495, 781 N.Y.S.2d 504 (1st Dep't 2004); *see Gilman & Ciocia, Inc. v. Mindes*, 12 A.D.3d 162, 783 N.Y.S.2d 471 (1st Dep't 2004).

Anthony Michael Sabino is Professor of Law, The Peter J. Tobin College of Business, St. John's University, New York, and a partner in Sabino & Sabino, P.C. Professor Sabino is a graduate of St. John's University School of Law.

Transactions That Imperil National Security

A Look at the Government's Power to Say "No"

By Anthony Michael Sabino

"National security" is frequently defined as the safeguarding of our country's economic and business interests. Thus, insulating vital United States industries from potentially dangerous foreign control or influence is a primary national security objective. This issue was recently raised when IBM proposed to sell its personal computer business to Lenovo Group Ltd., the largest personal computer maker in the People's Republic of China. China may be America's largest trading partner, but that has not stopped it from being perceived as antagonistic at times to our national interests. As a result, the citizenship of the proposed buyer triggered a review by a relatively unknown but nevertheless extremely powerful government group, the Committee on Foreign Investment in the United States, also referred to as "CFIUS."

Almost nothing is known about the internal functioning of CFIUS because of the highly sensitive nature of its deliberations, and there is precious little on the record that details its operations. But, in view of the ever more global and multinational nature of the economies of the United States and those with whom it trades, and the likelihood of more deals resembling IBM-Lenovo, corporate counsel must develop a better awareness of CFIUS and the legal framework in which it operates. The purpose of this article, albeit limited by inherently scarce source material, is to provide as much information as is publicly available to guide corporate counsel when handling matters that may raise concerns involving national security.

Little Known Powers

The current CFIUS was formulated in late 1988, pursuant to what are commonly called the "Exon-Florio" amendments to the Cold War era's Defense Production Act of 1950.[1] The law empowered the Chief Executive to investigate and, if necessary, block foreign takeovers of American businesses on national security grounds.[2]

Then-President Ronald Reagan constituted the Committee, delegated power to it by Executive Order, and put the Secretary of the Treasury in charge.[3] The Treasury Secretary has promulgated regulations governing the functioning of CFIUS under that authority.[4]

The Treasury Secretary (or the Secretary's designee) acts as chair, and is joined at CFIUS by 11 other Cabinet members and Executive department heads: the Secretaries of State, Defense, Homeland Security (the most recent addition), Commerce, the Attorney General,

as head of the Justice Department, and the President's National Security Advisor. Other CFIUS members are the U.S. Trade Representative and the Assistant to the President for Economic Policy, and representatives from each of the following: the Office of Management and Budget, the President's Council of Economic Advisers, and the Office of Science and Technology.[5] As chair, the Secretary of the Treasury may invite representatives of other agencies to participate as he or she deems appropriate.[6]

CFIUS is charged with reviewing the national security implications of particular corporate takeovers, and all members of the Committee are responsible for reviewing the proposed merger or acquisition from the perspective of their area of expertise within the Executive branch. "Given the national security-related nature of the CFIUS review process, it is generally protected from public disclosure, subject only to certain exceptions."[7]

CFIUS Procedures

The specific mandate of CFIUS, pursuant to the 1988 law, is to investigate and "determine the effects on national security of mergers, acquisitions, and takeovers . . . by or with foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States."[8] If a proposed merger or acquisition implicates the national security concerns safeguarded by the Exon-Florio amendments, the involved parties are required by federal regulation to give notice to the Committee.[9]

If the Committee deems an inquiry is justified, then that investigation must commence no later than 30 days after the Executive branch receives written notification of the anticipated transaction.[10] Interestingly, if the Committee makes a unanimous decision not to undertake an investigation, the matter is closed, and CFIUS takes no further action.[11] This provides closure for the affected parties: no action by the Committee within the prescribed time frame brings the certainty that no questions linger and the parties may proceed with their transaction. Parenthetically, it should be noted that the legislative history contemplates that if the Executive branch does not act within 30 days after receiving notice of a potential transaction, the President is foreclosed from acting to prevent the merger.[12]

Once it is determined that an investigation is warranted, CFIUS has 45 days in which to complete its work.[13] As could be expected, if the Committee decides to investigate, then the businesses in question typically make detailed presentations to the Committee, by way of documents and sometimes appearances and discussions, to address any national security issues.[14] Information and documents filed by the parties with CFIUS are deemed confidential, are immune from disclosure pursuant to the Freedom of Information Act, and can only be made known in limited circumstances.[15] For example, such

At Press Time

CFIUS and its workings continue to generate controversy, and there are calls for congressional revision to its underlying statutory authority. In late September 2005, the Government Accountability Office (GAO) released an extensive critique of CFIUS, contending, among other things, that there exists a tension between the view of the Treasury Department, which tends to favor an open investment market and whose Secretary is CFIUS's chair, and the Justice and Defense Departments, which seek to apply a "broader view of what might constitute a threat to national security." *See* "Defense Trade: Enhancements to the Implementation of Exon-Florio Could Strengthen the Law's Effectiveness," GAO-05-686 (September 28, 2005), available at <www.gao.gov/cgi-bin/getrpt?GAO-05-686>. In particular, the GAO asked Congress to consider amending the law "by more clearly emphasizing the factors that should be considered in determining potential harm to national security."

Worthy of mention is the battle for Unocal, as few matters implicate national security as much as our pressing need for reliable sources of oil. As widely reported, China's state-owned oil company, CNOOC, bid on Unocal, a U.S. oil company. Opponents of the deal proclaimed dire repercussions if an American energy company was in fact sold to an entity clearly controlled by the government of a major foreign power and, furthermore, one with its own massive energy needs. *See* Lynch, *Chinese Oil Firm Drops Pursuit of Unocal*, USA Today (August 3, 2005) p. 1, col. 2; "CNOOC Drops $18.5 Bln Unocal Bid Amid U.S. Opposition," Bloomberg.com (August 2, 2005), available at http://www.bloomberg.com/apps/news?pid=71000001&refer=home&sid=ah3uSZmkLLBI. Indeed, the interplay between Unocal, CNOOC, and the preferred (by some at least) American suitor Chevron, suddenly brought CFIUS and all its intricacies to public light.

And to prove it is not asleep at the switch, the Senate Banking Committee, chaired by Senator Richard Shelby of Alabama, has scheduled hearings to "lay out the case for putting more teeth into" CFIUS reviews, no doubt spurred on by the recent Lenovo and Unocal scenarios. BusinessWeek, October 10, 2005, at p. 51. Whatever the end result, CFIUS will remain a controversial topic as concerns for national security continue to clash with the pull of a global economy.

information and documents can be disclosed to the Congress or any authorized congressional committee.[16]

Not much is said about what CFIUS is supposed to address in its inquiry. After all, matters of national security can be (and usually are) fairly broad and subject to differing interpretations.[17] The statute provides guidance: items to be considered, to determine any risk to national security, include defense production, the capability and capacity of U.S. industries to meet national defense requirements and, notably, "the control of domestic industries and commercial activities by foreign citizens as it affects the capabilities and capacity of the United States to meet the requirements of national security."[18] The last is rather broad, and would seem to bestow the most latitude upon the Committee to act upon what it deems to be a matter of national security.

CFIUS will make a report to the President upon the completion or termination of its investigation and simultaneously issue a recommendation.[19] Its report will include all information relevant to national security issues. If the Committee is not unanimous in its recommendation to the President, the chair will present the differing views of the Committee for the Chief Executive's further consideration.[20]

Presidential Review

The Committee can only make reports and recommendations to the Chief Executive; it cannot act by itself as it is only an investigative body. If there are national security concerns, then the President must make specific findings that "there is credible evidence . . . to believe that the foreign interest exercising control might take action that threatens to impair the national security," and other legal avenues do not, in the President's judgment, provide "adequate and appropriate authority for the President to protect the national security" with respect to the proposed transaction.[21] Significantly, such findings by the Chief Executive are not subject to judicial review.[22] However, the requirement that the President make explicit findings as to the proposed transaction's impact on national security speaks to the need for a well-reasoned decision by the Chief Executive.

Such definitive findings by the President would be significant in and of themselves. However, their real significance lies in what follows from such findings, because the President is then empowered to take action, for such time as he or she deems appropriate, to "suspend or prohibit any acquisition, merger, or takeover, of a person engaged in interstate commerce in the United States" by a foreign entity.[23] The President therefore enjoys the power to completely prohibit a contemplated transaction.

If the President decides he or she must act in the interests of national security, the President must make an announcement within 15 days after CFIUS completes its investigation.[24] In addition, the President may direct the Attorney General to proceed to the federal courts and seek appropriate judicial relief to enforce his or her orders.[25] If the President does act pursuant to this statutory power, he or she must immediately report both the action and the mandatory factual findings underlying that action, in writing, to the Congress.[26] We can deem this public disclosure as evidence of a check and balance upon presidential power.

Because of its confidential nature, we can look to only a few scattered instances of the Committee in action. One recent and public example of the power of CFIUS is found in the bankruptcy reorganization of failed telecom giant Global Crossing. Reported as *In re Global Crossing Ltd.*,[27] the debtor's plan of reorganization called for it to emerge from bankruptcy by means of a combined purchase by two Far Eastern buyers.

But, one of the purchasers was "a Hong Kong entity, and Hong Kong is now under the political control of the People's Republic of China."[28] In the proceedings before him, Bankruptcy Judge Robert Gerber acknowledged that the presence of the Chinese government "plainly made securing approval from CFIUS, which focuses in significant part on national security concerns, difficult or impossible."[29] The bankruptcy court observed that the process of securing the Committee's approval was moving apace, but there was no assurance it would ever be granted. Ultimately, the Hong Kong buyer withdrew its part of the bid, due to these CFIUS concerns, and the debtor's reorganization was financed by the remaining purchaser.

Mitigating Security Concerns

Lenovo's purchase of IBM's personal computer business was in fact approved by CFIUS. The government allowed the estimated $1.25 billion (U.S.) acquisition, with the seller "overcoming national security concerns" by including, as part of the transaction, the blocking of Lenovo's access to the identity of federal government customers and by going so far as to physically seal off buildings in a North Carolina office park the two companies will occupy after the sale. It was reported that CFIUS members from the Departments of Justice and Homeland Security were especially concerned about Chinese infiltration of computer systems within the federal government, and the sealing of the two buildings was demanded by federal officials, due to a perceived threat of industrial espionage.[30]

One can imagine the national security concerns that necessitated such strong measures. After all, Lenovo is at least influenced, if not controlled, by its founder, the Chinese Academy of Sciences, a branch of the Chinese government.[31] The restrictions come as no surprise in view of the obvious sensitivity of the identity of IBM's customers in the U.S. government, the information to be

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gleaned from doing business with them, and the high value of computing technology in military applications, which no doubt drove the demand for a physical separation. Notably, the companies' acquiescence and the Committee's approval came as the statutory 45-day review period was nearing its end, and after CFIUS had commenced a formal investigation at the behest of leading Congressmembers who were seeking to delay the sale and then conduct a more extensive probe.[32]

Navigating the Process

Today, where does this leave American (and even foreign) businesses and their legal counsel? We know little about the interior workings of CFIUS, its predilections or its modes of analysis. The statutory framework which created the Committee ensured that it would be able to function well out of the public spotlight, and for good reason. Obviously, the highly sensitive nature of the national security issues with which the Committee grapples demands secrecy, lest the very security the Committee is mandated to preserve would be at grave risk.

Furthermore, CFIUS is a creature of the Executive branch, comprises members of the departments created by Article II of the Constitution, and is largely populated with presidential appointees and confidantes. Constituent members of the Committee change at least with every change of administration at the White House, if not more often. In addition to changing the appointees, no doubt points of view and priorities change with the prevailing winds of politics, diplomacy, and policy, both foreign and domestic. As might be expected, CFIUS is consistently viewed by some as too intrusive and by others as too passive. Therefore, a keen awareness of the opinions and agendas of the Committee's members is essential.

The legal and, more particularly, the statutory infrastructure of CFIUS can be addressed with greater certainty because the controlling law is fairly clear. First, the Exon-Florio amendments provide an explicit and fairly tight timetable for Executive action. Once notice is served on CFIUS by the Treasury Department, the Committee has a comparatively brief 30 days in which to decide whether or not to proceed. Potential corporate partners can take some comfort that within a month the government will either act or not. If the latter, then the Committee's silence is deemed its consent, and the Executive branch is prohibited from future action or revisiting the proposed transaction, at least on these national security grounds.

In the event CFIUS deems it wise to investigate, once more a relatively brief time frame is activated. In any business transaction, 45 days pass quickly, and certainly may be considered superior to other forms of governmental investigation that may drag on for months and stifle proposed transactions. Another positive aspect of CFIUS is its highly confidential operations, which result in a minimized risk of disclosure and are of great value to businesses in a competitive and sometimes hostile environment.

More important, CFIUS does not operate in a vacuum. Even with what little we know of its inner secrets, the scant case law tells us that the proposed takeover partners are given their opportunity to present their best case to the Committee, and in fact possibly more than once. Indeed, it is a fair assumption that in recent inquiries the affected parties were permitted not only to respond to inquiries from CFIUS, but had the chance to allay the government's national security concerns. There is every appearance, and in the future there can be every expectation, that the CFIUS process will provide ample opportunity for interaction, discussion, and negotiation. In short, the proposed merger partners will not only have their chance to be heard, they will be afforded an opportunity to modify their transaction so as to remove obstacles based upon concerns for the nation's security.

The proposed merger partners will not only have their chance to be heard, they will be afforded an opportunity to modify their transaction so as to remove obstacles based upon concerns for the nation's security.

At the same time, the process gives the Chief Executive ample means to provide for the national defense. First, the very mechanism itself gives the President the luxury of having his or her top Cabinet officers or their designees apply all the powers of investigation and analysis to the situation at hand. Assured that the top advisors are involved, and that the law mandates they deliver to the White House a detailed report of the Committee's findings, the President will have ample due diligence in hand to support a final decision. To be sure, that is another key aspect: the Committee does not have the final say. Only the President can make an executive decision.

If the President decides national security demands action, it is within the Chief Executive's rights to simply terminate the transaction. That would of course be decisive, but note well that the President can employ the Justice Department to seek other and proper relief in

court as well. This not only gives the President options, it places the Judicial branch in its proper constitutional role of reviewing executive action. With this in mind, one can better appreciate the foresight of the Legislative branch in placing this further check and balance into the process. All things considered, CFIUS and the process statutorily required by Exon-Florio works well, albeit in the shadows, to ensure national security.

The Future

What is the future for CFIUS and the law under which it operates? Concomitantly, what is the future for contemplated mergers and acquisitions between American and foreign companies? There was enough of a public outcry against the IBM-Lenovo transaction to prompt an interest in modifying the law. Indeed, with countries such as China awash in billions of U.S. dollars, some business groups are calling to empower the Committee to prohibit deals on economic grounds as well.[33] As we have seen, CFIUS is clearly limited to investigating and making recommendations to the Chief Executive, and must base its actions upon national security concerns alone. But that can change, if Congress so desires.

Could we see a strengthening of CFIUS and its powers to influence or even block proposed acquisitions of U.S. corporations by foreign buyers? Might the scope of the Committee's inquiries be expanded from the present grounds of only national security to also encompass economic issues or additional matters? Is it possible that the process would be made more open to public scrutiny? What if Congress decides to exercise greater oversight of the process, or perhaps even reclaim the power of review from CFIUS? After all, what is done by Congress can be undone, and many outcomes are possible.

It remains to be seen how CFIUS will function in the future, if it will continue as it has or be the subject of great change. But for now, matters of national security, including the potential merger of American businesses with foreign entities that initiate such concerns, will remain a matter of executive decision and Executive Orders. ■

1. *Codified at* 50 U.S.C. app. § 2158, *et seq.* (as amended). CFIUS was first organized in 1975 simply to monitor foreign investment in the United States. Exec. Order No. 11,858, 40 Fed. Reg. 20263 (May 7, 1975), *reprinted in* 15 U.S.C. § 78b note; *see also* U.S. Department of Treasury CFIUS, Exon-Florio Provision, *available at* <www.treas.gov/offices/international-affairs/exon-florio>.

2. 50 U.S.C. app. § 2170; *see* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, tit. V, § 5021, 102 Stat. 1107, 1425, *et seq.* (1988).

3. Executive Order No. 12,661, 54 Fed. Reg. 779 (Dec. 27, 1988), *reprinted in* 15 U.S.C. § 78b note ("Exec. Order 12,661"), 53 Fed. Reg. 43999 (Oct. 26, 1988); *see also* Interim Memoranda of President *reprinted in* 50 U.S.C. app. § 2170 (Historical and Statutory Notes).

4. *See* 31 C.F.R. §§ 800.101–800.702, *cited by LTV Aerospace & Defense Co. v. Thomson-CSF, S.A.* (*In re Chateaugay Corp.*), 155 B.R. 636, 645 n.10 (S.D.N.Y. 1993) ("*LTV I*"), *aff'd*, 198 B.R. 848 (S.D.N.Y. 1996) ("*LTV II*").

5. Exec. Order 12,661; *see also LTV I*, 155 B.R. 636.

6. Exec. Order 12,661.

7. *In re Global Crossing Ltd.*, 295 B.R. 720, 722 (S.D.N.Y. 2003) (ordering an *in-camera* review of CFIUS materials, and not permitting public disclosure, "by reason of national security nature of the information in question").

8. 50 U.S.C. app. § 2170(a).

9. 31 C.F.R. § 800.402, *cited by LTV I*, 155 B.R. at 645 n.10; *see also* Exec. Order 12,661.

10. 50 U.S.C. app. § 2170(b); *see also* Exec. Order 12,661.

11. *Id.*

12. *See* H.R. Rep. No. 100-576, at 925 (1988) (Conf. Rep.), *as reprinted in* 1988 U.S.C.C.A.N. 1547, 1958.

13. 50 U.S.C. app. § 2170(b). *See also* H.R. Rep. No. 100-576.

14. *See, e.g.*, *LTV II*, 198 B.R. at 853.

15. 50 U.S.C. app. § 2170(c); *see also* Exec. Order 12,661.

16. 50 U.S.C. app. § 2170(c); *see also* 31 C.F.R. § 800.702, *followed by In re Global Crossing*, 295 B.R. 720, 724–25.

17. *See* H.R. Rep., 100-576, 926, 1988 U.S.C.C.A.N. 1547, 1959 (legislative history declares "[t]he term 'national security' is intended to be interpreted broadly without limitation to particular industries").

18. 50 U.S.C. app. § 2170(f).

19. Exec. Order 12,661.

20. *Id.*

21. 50 U.S.C. app. § 2170(e).

22. *Id.*

23. 50 U.S.C. app. § 2170(d); *see LTV II*, 198 B.R. at 852 n.3 (citing 31 C.F.R. § 800.101) (discussing history of how bid by French defense firm, at the time owned by the French government, to purchase the missile business of the bankrupt LTV Co. was withdrawn after vociferous congressional opposition and a CFIUS inquiry).

24. 50 U.S.C. app. § 2170(d).

25. *Id. See also* H.R. Rep., at 927, U.S.C.C.A.N. at 1960 (legislative history states "appropriate relief" is a deliberately broad term, intended to give the President flexibility to deal with any foreign control attempt that might pose a threat to national security).

26. 50 U.S.C. app. § 2170(g). Parenthetically, the statute further provides that, in the case of "an assessment of the risk of diversion of defense critical technology," said assessment shall be provided to the Executive branch member responsible for that sector, 50 U.S.C. app. § 2170(j), and the President or the President's designee shall make a quadrennial report to the Congress on any "coordinated strategy by 1 or more countries or companies" to acquire U.S. firms involved in critical technologies, and also report on industrial espionage conducted directly or directly assisted by foreign governments against American companies "aimed at obtaining commercial secrets related to critical technologies." 50 U.S.C. app. § 2170(k); *see also* 50 U.S.C. app. § 2170a(a) (prohibiting purchase of U.S. defense contractors by entities controlled by foreign governments); 50 U.S.C. app. § 2170b(a) (mandatory report by President to Congress on foreign industrial espionage).

27. 295 B.R. 720 (S.D.N.Y. 2003).

28. *Id.* at 732.

29. *Id.*

30. Moody, *Lenovo's Purchase of IBM PC Unit Wins U.S. Clearance* (Mar. 9, 2005, Update 4), *available at* <www.bloomberg.com/apps/news?pid=71000001&refer>; *see also* Kessler, *Congressmen Scrutinize IBM, Lenovo Deal*, USA Today (Jan. 28, 2005) at 5B; Crock, *Seeing Red Over Big Blue's China Deal*, BusinessWeek (Feb. 14, 2005) at 45 (reporting of national security issues being raised by Homeland Security and the FBI regarding Chinese access to military applications and encryption technology).

31. Kessler, *supra* note 30; Crock, *supra* note 30.

32. *Id.*

33. *See* Crock, *supra* note 30.

Institution Versus Individual

The Arbitration Alternative to Litigation

By Steven C. Bennett

Arbitration has a long history in the United States and other countries. Traditionally, however, other than in special circumstances (such as organized labor relations) arbitration has been most popular with commercial institutions.

Recent developments have made arbitration a more desirable option in disputes between corporations and consumers, employees and franchisees, for example. Institutions, in particular, have become increasingly interested in pursuing arbitration in the context of disputes with individuals.

Arbitration provides unique benefits to institutions, although there are some disadvantages as well. Individuals and their counsel, however, concerned about abuse of arbitration, have increasingly sought to challenge arbitration procedures on a variety of grounds. Efforts have also been made to place legislative limits on arbitration.

For institutions, the best way to obtain the benefits of arbitration, and avoid the risk of a challenge, is to adopt fair, neutral procedures for their arbitration system.

Basic Elements of Arbitration Law

Arbitration is a creature of contract. The power of arbitrators to conduct arbitration, and the terms under which an arbitration is to be conducted, are generally governed by the agreement of the parties.

The Federal Arbitration Act (FAA),[1] establishes a "liberal federal policy favoring arbitration agreements."[2] Parallel state statutes generally embody this policy as well. Under the FAA and parallel state law, where an agreement to arbitrate exists, a lawsuit over an issue subject to arbitration may be stayed, and the parties compelled to arbitrate rather than proceed with litigation.[3] The results of arbitration are typically final and binding on the parties, except on limited grounds (such as "corruption" of the arbitration process).[4]

An arbitration award, once confirmed by a court, becomes a judgment, which may be enforced in the same manner as any other judgment.[5] An award denying relief to a claimant, moreover, will generally have *res judicata* and collateral estoppel effects.

Benefits of Arbitration to Institutions

Avoiding Runaway Verdicts

Arbitration is conducted before one or more individual arbitrators, rather than by jury trial. Waiver of the right to jury trial, in favor of arbitration, is generally valid.[6] Arbitrators may be chosen for their special knowledge of an industry or area of law. Arbitrators on standing panels may develop particular expertise as a result of repeated experience in adjudicating disputes in a particular area.

Steven C. Bennett <scbennett@jonesday.com> is a partner in the New York City offices of Jones Day, and teaches Arbitration Law at Brooklyn Law School. He is the author of *Arbitration: Essential Concepts* (ALM 2002). He is a graduate of Macalester College and he received his law degree from New York University. The author wishes to acknowledge the research assistance of Steven G. Gyeszly, an associate in the Houston Jones Day offices.

Avoiding Class Actions

The existence of an arbitration clause generally channels litigation away from court and into arbitration, which may effectively preclude class action in court.[7] Absent specific authority in the applicable arbitration clause or rules, courts generally have no authority to order consolidation of arbitration proceedings, or class-wide arbitration.[8]

State law in certain jurisdictions permits consolidation of related arbitration proceedings.[9] The Revised Uniform Arbitration Act, § 10(a), also grants authority to a court to order consolidation of related arbitration proceedings. Arbitrators, moreover, generally retain authority to determine whether a specific arbitration agreement or applicable arbitration rules permit consolidation of arbitration.[10] Institutions may also specifically provide in their rules that no class action arbitration will be permitted.[11]

Avoiding Extensive Discovery

Generally, arbitration proceedings are not conducted under rules like the Federal Rules of Civil Procedure (FRCP), which provide broad devices for discovery. Arbitration proceedings are typically meant to be conducted quickly, such that drawn-out discovery proceedings are necessarily avoided, or at least limited.[12]

Non-party discovery, although possible, may be cumbersome in arbitration. The FAA, and parallel state statutes, permit enforcement of subpoenas issued by arbitrators, but only on application to a court. The appearance of a non-party witness, moreover, is typically not for both pre-hearing deposition and the hearing itself.[13]

Limiting Remedies

Many arbitration agreements place limits on the remedies that arbitrators may award. Because the power of an arbitrator is derived from contract, such limits will typically be effective in the context of arbitration. Limitations on awards of punitive damages may be among the most popular forms of remedy restrictions in arbitration.[14]

Other limitations, such as shortening the time to bring a claim, may be included in an arbitration clause. The application of such a limitation is generally a matter for the arbitrator to determine.[15] "Loser pays" provisions, by which attorneys fees may be awarded, are also sometimes included as part of arbitration provisions and rules.[16] "Loser pays" provisions may deter frivolous and marginal claims.

Protecting Confidentiality

Arbitration pleadings and proceedings are generally private. Arbitration awards (and settlements) are typically not publicized. Parties are free to agree (in the arbitration clause, or by choice of arbitration rules) that special confidentiality protections will apply.

Resolving Jurisdictional Conflicts

Arbitration agreements are a special form of forum selection clause. Instead of facing disputes about the appropriateness of one judicial forum or another, arbitration channels disputes into a single forum. Arbitration may be particularly attractive for institutions with far-flung operations, such as businesses conducted through the Internet, which could conceivably establish jurisdiction virtually anywhere in the country or, indeed, the world.[17]

Structuring According to Needs

The structure of arbitration proceedings can be substantially affected by the choices of the parties, including the specific terms of the arbitration agreement, the specific organization chosen to administer the arbitration, and the characteristics of the arbitrators. By contrast, the rules for most court proceedings, and the identities of judges and

Grounds for revocation of arbitration agreements, as other matters of contract, are generally governed by individual state law.

jurors chosen to resolve disputes, are largely beyond the control of the parties.

Institutions that are "repeat parties" in arbitration have particular advantages, in that they can determine what is, or is not, effective in one arbitration proceeding, and adapt their arbitration programs accordingly.

Disadvantages of Arbitration for Institutions

The low cost, speed, and efficiency of arbitration may actually increase the willingness of claimants to pursue claims. Although empirical evidence on this point is mixed,[18] note that arbitration pleading requirements are minimal; the sufficiency of an arbitration pleading typically is not tested by a motion to dismiss; claims that might otherwise be dismissed as legally invalid may proceed to hearing in arbitration; and motion practice is limited. Again, because formal rules of procedure, such as the summary judgment procedure permitted under the FRCP, do not generally apply in arbitration, factually unsupported or highly tenuous claims may proceed to hearing. Limits on discovery may also sometimes work to the institution's disadvantage in this regard.

Informal hearing processes are the norm – arbitration agreements and rules rarely require strict adherence to rules of evidence.[19] Hearsay and other forms of suspect evidence are often admitted in arbitration proceedings. Many arbitrators will take all evidence offered "for what it's worth," placing principal emphasis on the weight of the evidence, rather than its admissibility.

Only limited rights of appeal exist. Even where an arbitrator may have committed an error of law, courts generally will not upset an arbitration award. In cases of egregious "manifest disregard" of law, however, relief may sometimes be granted.[20]

Cumbersome procedures may disadvantage the institution when it acts as a claimant. In certain instances, such as the termination of an employee and the attempt to ensure that the employee does not misuse trade secrets, or collection on a debt owed by a consumer, the institution may be a claimant, and may prefer the more complete processes of a court for protection of the institution's rights. Some institutions have adopted "one way" arbitration programs, giving the institution the option to pursue an action in court on its own claims, but requiring individual claimants to pursue arbitration, to the exclusion of litigation. Such "one way" programs have occasionally been criticized.[21]

Increasing Arbitration of Statutory Rights

Perhaps one of the largest disincentives to arbitration between institutions and individuals was the historical view that arbitrators could not resolve statutory claims.[22] Absent the ability to ensure that arbitration would encompass all claims by individuals, institutions had limited incentives to pursue arbitration. Indeed, the use of arbitration could conceivably give an individual "two bites at the apple" in any dispute with an institution. Modern precedent, however, has consistently favored arbitration of statutory claims.[23]

Remaining Challenges to Arbitration

Legislative Efforts to Restrict Arbitration

The plaintiffs' bar, and others, have sought legislative solutions to perceived abuses of the arbitration system by institutions. To date, no serious efforts at wholesale reform of the FAA have been proposed. Proposals for federal restrictions of arbitration in specific areas, however, have been repeatedly made.[24]

Similar legislative limitations on arbitration agreements have been proposed at the state level. These initiatives, however, are potentially "preempted" by the Federal Arbitration Act.[25]

Invalidation on Common Law Grounds

The FAA does not create a federal common law regarding the enforceability of arbitration agreements. Instead, the FAA establishes that arbitration agreements are as enforceable as any other contracts, but may be avoided "upon such grounds as exist at law or in equity for the revocation of any contract."[26]

Grounds for revocation of arbitration agreements, as other matters of contract, are generally governed by individual state law. What the FAA makes clear is that the grounds must be of general application; a state may not have one rule for the validity of contracts in general and another rule for the validity of arbitration agreements.

Separability Hurdle

A contract containing an arbitration agreement is viewed as actually *two* contracts – the main contract and the contract to arbitrate.[27]

A general allegation that the contract is void (on fraud or other grounds) may itself be a subject for arbitration.[28] Due to the "separability" doctrine, it may be difficult to avoid arbitration merely by claiming that a contract containing an arbitration clause is void. Any claim regarding the invalidity of the contract must be directed at the arbitration clause itself.

Unconscionability

Unconscionability is a state law concept, derived from general principles of contract law. The precise law of unconscionability varies from state to state.

Adhesion alone may not be grounds for invalidating an arbitration agreement. Many contracts in the modern commercial environment are contracts of adhesion. The mere fact that the individual must "take it or leave it" with regard to a contract does not automatically invalidate the contract. The individual typically has at least the "leave it" choice in responding to the proffered contract.[29]

Where both procedural and substantive unconscionability appear, an arbitration clause may be invalidated.[30] Proof of procedural unconscionability may include indications that the individual did not have a meaningful choice, such as: (a) lack of experience and education of the party claiming unconscionability; (b) whether the contract contained "fine print"; or (c) "high-pressure tactics" and any disparity in the bargaining power of the parties.[31] Proof of substantive unconscionability may include indications that the terms of the agreement unreasonably favor one party over another.[32]

Challenges on Substantive Grounds

- *Prohibitive fees:* Where the fees for filing or pursuing arbitration are prohibitively high for the individual, an arbitration clause may be held unconscionable.[33] The mere fact that an arbitration agreement is silent as to who pays the cost of arbitration, however, does not automatically invalidate the agreement.[34]
- *Biased panel:* Where the institution adopts a procedure for selection of arbitrators that may result in biased decision making, the arbitration provision may be challenged.[35]
- *Inaccessible location:* An arbitration clause specifying a location for arbitration that is at great distance from the individual may be invalidated.[36]
- *Restriction of statutory rights:* Although the mere fact that statutory rights are involved will not generally invalidate arbitration, express restrictions on statutory rights may be grounds for challenge of an arbitration provision.[37]
- *Lack of mutuality:* Some courts have held that, where an arbitration clause provides the exclusive remedy for the individual, but not the institution, the clause lacks "mutuality" and may be unconscionable.[38]

Making of Agreement Also Subject to Challenge

The FAA and parallel state statutes generally require a written agreement to arbitrate.[39] The arbitration agreement need not have been signed by the individual resisting arbitration, so long as there is evidence of an agreement to arbitrate.[40]

Difficult circumstances may arise where it is unclear whether the individual knew of, and consented to, the arbitration provision. Thus, for example, with "shrink wrap" agreements (which become effective based on a consumer's use of a product) or "click-wrap" agreements (which become effective based on a consumer's online activity) challenges may be mounted premised on the consumer's lack of awareness and consent.[41] Similarly, arbitration provisions in an employee handbook may not be effective, where the employer disclaims an intent that the handbook constitutes an employment contract.[42]

Where both procedural and substantive unconscionability appear, an arbitration clause may be invalidated.

Maximizing the Effectiveness of Arbitration

For institutions interested in making use of arbitration, the first step is to do a thorough review of the costs and benefits of arbitration. Arbitration is not a panacea, and what may work for one institution's problems may not work in a different setting.

To ensure that an arbitration mechanism is most likely to be enforceable, an institution should attempt to make the arbitration system fair and equitable under the circumstances. Thus, although none of the following specific features are absolutely required, an institution may wish to consider:

1. Clear notice: The arbitration provision may be prominently featured in the agreement (bold, capitals, underline) or may be prominently set out against the other provisions (first, last or some special heading).
2. Clear waiver of rights: The arbitration provision may clearly state the rights that the individual is giving up in arbitration. The rights waived generally include, at a minimum, the right to a jury trial and ordinary rights of appeal. Other, specific rights (such as statutory rights) may also be expressly waived.
3. Clear consent: The individual's consent to the arbitration provision may be separately gathered (as by initials at the point of the agreement calling for arbitration). With online contracts, a separate click on an icon (such as "I agree," or "I consent") may be used.
4. Reasonable fees: The institution may offer to pay the cost of arbitration, or may otherwise ensure that the individual's obligation to pay filing fees and administrative costs of arbitration does not become prohibitively burdensome.
5. Neutral arbitrator: The arbitrator may be chosen from a pool that is not biased in favor of the institution, using a procedure that gives the individual some role in the selection of the arbitrator.

6. Fair procedures: The arbitration process may include reasonable ability for both sides to gather evidence and present their positions. Often, merely providing that the arbitrator retains discretion to adopt procedures necessary to establish a fair result will suffice.
7. Fair limits on remedies: The arbitration provision may limit the remedial power of the arbitrator, but limitations that conflict with statutory rights may be viewed with particular concern.
8. Balanced application: Although an institution may reserve the right to institute proceedings against the individual in court (versus an arbitration system), the reasons for the different treatment, and the reasonable nature of the treatment, should be apparent.
9. Severability: An arbitration clause may provide that, if some portion of the arbitration system is held to be unenforceable, the remaining portions of the system will nevertheless be enforced.

Model arbitration systems are available, and may be used either wholesale by an institution or as the basis for adapting an arbitration system to the particular needs of the institution.[43] ■

1. 9 U.S.C. §§ 1–14, 201–208.

2. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

3. FAA §§ 3 (stay of proceedings pending arbitration), 4 (petition for order directing arbitration to proceed).

4. FAA §§ 9–10.

5. FAA § 13.

6. *See, e.g.*, *Smith v. Am. Arbitration Ass'n, Inc.*, 233 F.3d 502, 507 (7th Cir. 2000); *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1202 (9th Cir.), *cert. denied*, 525 U.S. 982 (1998); *Dilliard v. Merrill Lynch*, 961 F.2d 1148, 1155 n.12 (5th Cir. 1992).

7. *See, e.g.*, *Zawikowski v. Beneficial Nat'l Bank*, No. 98 C 2178, 1999 U.S. Dist. LEXIS at *5–6 (N.D. Ill. Jan. 11, 1999); *Hunt v. Up N Plastics*, 980 F. Supp. 1046, 1047 (D. Minn. 1997); *Collins v. Int'l Dairy Queen, Inc.*, 169 F.R.D. 690, 694 (M.D. Ga. 1997). *See generally* Steven C. Bennett, Arbitration: Essential Concepts 61 (2002).

8. *See, e.g.*, *Gov't of the U.K. v. Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993) (no consolidation); *Am. Centennial Ins. Co. v. Nat'l Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991) (same); *Baesler v. Cont'l Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990) (same). *See generally* Richard Jeydel, *Consolidation, Joinder and Class Actions*, 57:4 Disp. Resol. J. 24, 25 (2003) ("[A]s a general rule, unless the parties, issues, and arbitration clauses are consistent, and have expressly provided for consolidation (or where a court finds that a party is impliedly bound by the arbitration clause), separate proceedings may be unavoidable."); Samuel Estreicher & Kenneth J. Turnbull, *Class Actions and Arbitration*, N.Y.L.J., May 4, 2000, p. 3, col. 1 (noting that "federal courts have ruled that they have no power to order classwide arbitration unless the agreement expressly provides for it," but noting contrary state law authority); Thomas E. Carbonneau, Cases and Materials on the Law and Practice of Arbitration 28 (2d ed. 2000) (same, but arguing that, if the parties agree to class-wide arbitration, courts should enforce the agreement as written).

9. *See, e.g.*, Cal. Civ. Proc. Code § 1281.3; Ga. Code Ann. § 9-9-6; Mass. Gen. Laws ch. 251, § 2A; N.J. Stat. Ann. § 2A:23A-3.

10. *See Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447 (2003) (recognizing authority of arbitrator to interpret arbitration agreement to permit class action arbitration).

11. *See, e.g.*, NASD Code § 12(d) ("a claim submitted as a class action shall not be eligible for arbitration"); NYSE Constitution and Rules, Rule 600(d)(i) (same).

12. *See, e.g.*, AAA Commercial Arbitration Rules, Rule 21 (arbitrator may direct production of documents and identification of witnesses "consistent with the expedited nature of arbitration").

13. *See* FAA § 7 (court may compel attendance before arbitrator).

14. *See* Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 Tul. L. Rev. 1, 37 (1997) (criticizing courts for being too willing to enforce remedy restrictions).

15. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84–85 (2002) (time limit is presumptively matter for arbitrator to decide).

16. *See* AAA Commercial Arbitration Rules, Rule 43(d)(ii) (arbitrator may award attorneys fees where all parties have requested such an award, or it is authorized by law or the arbitration agreement).

17. *See* Steven C. Bennett, *Arbitration Clauses May Cure Internet Jurisdiction Woes*, 2/2002 A.A.A. ADR Currents 20–23 (2002).

18. *See generally* Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. Ill. L. Rev. 695 (2001) (suggesting that arbitration clauses may provide net benefits to both parties); Theodore O. Rogers, *The Procedural Differences Between Litigating in Court and Arbitration: Who Benefits?*, 16 Ohio St. J. Disp. Resol. 633 (2001).

19. *See, e.g.*, AAA Commercial Arbitration Rules, Rule 31(a) ("Conformity to legal rules of evidence shall not be necessary.").

20. *See Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998) (vacating award).

21. *See Trumbull v. Century Mktg. Corp.*, 12 F. Supp. 2d 683 (N.D. Ohio 1998). *But see Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003) (arbitration agreement giving employer right to alter or terminate agreement, on an annual basis, was supported by sufficient consideration and mutuality of obligation).

22. *See, e.g.*, *Wilko v. Swan*, 346 U.S. 427 (1953) (holding that agreement to arbitrate claims under Securities Exchange Act of 1934 was invalid); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (holding that employee was not precluded from bringing Title VII discrimination claim, even though collective bargaining agreement provided for arbitration of disputes arising out of employment).

23. *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Sherman Act antitrust claims arbitrable); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (RICO claims arbitrable); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (claims under Securities Act of 1933 and Securities Exchange Act of 1934 arbitrable) (overruling *Wilko*, 346 U.S. 427); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (Age Discrimination in Employment Act claims arbitrable) (distinguishing *Gardner-Denver* line of cases); *Green Tree Fin. Corp. – Ala. v. Randolph*, 531 U.S. 79 (2000) (Truth in Lending Act claims arbitrable).

24. *See* Drahozal, *supra* note 18, p. 708 nn.104–105 (noting proposals to ban arbitration for certain types of contracts or claims or to permit parties to opt out of arbitration after a dispute arises).

25. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (Montana statute requiring that, in franchise agreements, arbitration clause must be typed in underlined capital letters on the first page of the contract preempted by FAA).

26. FAA § 2.

27. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

28. *See, e.g.*, AAA Commercial Arbitration Rules, Rule 7(b) (recognizing that an arbitrator "shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part").

29. *See Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991) (forum selection clause in passenger ticket enforceable).

30. *See Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 676 N.Y.S.2d 569 (1st Dep't 1998).

31. *Id.* at 253.

32. *Id.* at 254.

33. *See id.* at 255 (filing fee for arbitration of dispute regarding personal computers and software was prohibitively high; remanding for appointment of arbitrator using alternative procedure); *Cole v. Burns Int'l Sec. Servs., Inc.*, 105

F.3d 1465 (D.C. Cir. 1997) (enforcing arbitration between employee and employer only on condition that employer pay all fees of arbitrator).

34. *See Green Tree Fin. Corp. – Ala. v. Randolph*, 531 U.S. 79 (2000).

35. *See Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (employer breached duty of good faith and fair dealing by, among other things, adopting an arbitration procedure that required all arbitrators to be selected from a list established by employer). *But see Woods v. Saturn Distrib. Corp.*, 78 F.3d 424 (9th Cir. 1996) (no "evident partiality" where arbitration panel consisted of two Saturn dealers and two Saturn employees).

36. *See Keystone, Inc. v. Triad Sys. Corp.*, 292 Mont. 229, 971 P.2d 1240 (1998) (invalidating clause that required Montana corporation to arbitrate in California, where Montana had statute generally requiring dispute resolution in state); *Paterson v. ITT Consumer Fin. Corp.*, 14 Cal. App. 4th 1659, 18 Cal. Rptr. 2d 563 (Ct. App. 1993) (holding arbitration clause unconscionable in part on ground that it required California consumers to arbitrate in Minnesota). *But see Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 980 (2d Cir. 1996) (rejecting unconscionability claim).

37. *See Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280, 1286 (11th Cir. 2001) (agreement that limits remedies available for federal statutory claims "cannot adequately serve" deterrent function of such statutes), *reh'g denied*, 294 F.3d 1275 (11th Cir. 2002); *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244 (9th Cir. 1994) (restrictions on time to bring claim, and ability of arbitrator to assess punitive damages and attorneys fees violated Petroleum Marketing Practices Act).

38. *See, e.g., Arnold v. United Cos. Lending Corp.*, 204 W. Va. 229, 511 S.E.2d 854 (1998); *Iwen v. U.S. W. Direct, Inc.*, 293 Mont. 512, 977 P.2d 989 (1999). *But see Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 179 (3d Cir. 1999); *We Care Hair Dev., Inc. v. Engen*, 180 F.3d 838, 842 (7th Cir. 1999).

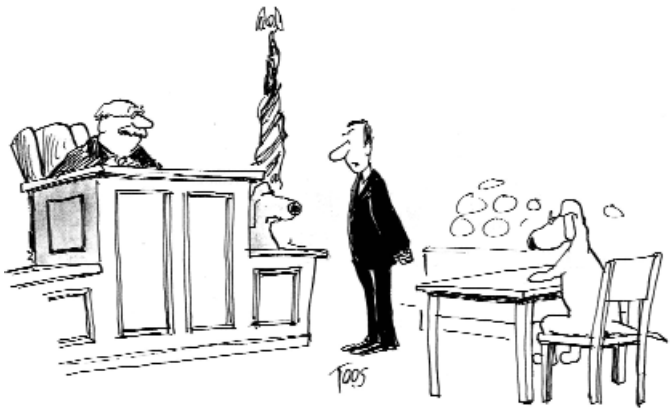
39. *See* FAA § 2 ("written position" for arbitration is enforceable).

40. *See Thomson – CSF, S.A. v. AAA*, 64 F.3d 773, 776 (2d Cir. 1995) (ordinary principles of contract, such as incorporation by reference, determine whether non-signatory may be bound to arbitrate).

41. *See Specht v. Netscape, Inc.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001) (finding no unambiguous assent to arbitration in on-line license agreement), *aff'd*, 306 F.3d 17 (2d Cir. 2002). *But see Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (enforcing shrink wrap arbitration agreement); *In re RealNetworks, Inc.*, 2000 U.S. Dist. LEXIS 6584 (N.D. Ill. 2000) (on-line agreement for arbitration enforceable). *See generally* Steven C. Bennett, *Click-Wrap Arbitration Clauses*, 14:3 Int'l Rev. L., Computers & Tech. 397 (2000).

42. *See Phox v. Atriums Mgmt. Co.*, 230 F. Supp. 2d 1279 (D. Kan. 2002).

43. *See, e.g.*, AAA, *National Rules for the Resolution of Employment Disputes* (2002); AAA, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship* (1995); AAA, *Supplementary Procedures for Consumer-Related Disputes* (2003) *available at* <www.adr.org>.



"Isn't it true that the prosecution offered you a bone to testify?"

Bentley Kassal <BKassal@Skadden.com>, a retired associate justice of the Appellate Division, First Department, also served as a judge in the Civil Court, as a justice of the Supreme Court, New York County, and was an associate judge at the New York Court of Appeals for the April/May 1985 term. He also served as a New York State Assemblyman for six years. Judge Kassal received his law degree from Harvard and has been counsel to the litigation department at Skadden, Arps, Slate, Meagher & Flom LLP since 1997.

Update:
Did the Odds Change in 2004?
Appellate Statistics in State and Federal Courts[1]

By Bentley Kassal

Appellate attorneys in New York need not guess or "shoot from the hip" when a client asks, "What are my chances for a successful appeal?" The statistics presented in this article, from the principal New York state courts and two important U.S. Circuit Courts of Appeal, are culled from the official data provided by the New York State Office of Court Administration and the Administrative Office of the United States Courts and are dispositions on the merits.

This article follows up on the statistics presented in the previous article in this series by presenting New York appellate data for these courts:

1. New York Court of Appeals – Civil and Criminal Appeals, including:
   (a) Avenues to the New York Court of Appeals; and
   (b) General conclusions about the New York Court of Appeals.
2. The Four Departments of the Appellate Division of the New York State Supreme Court.
3. Appellate Terms of the New York State Supreme Court for the First and Second Departments of the Appellate Division (the only two in New York State).

In addition, this article presents statistics for the United States Court of Appeals for the Second Circuit and for the District of Columbia.

However, for the first time, we are now covering the four-year period, 2004, 2003, 2002 and 2001 for all these courts. The 2004 statistics are the first, presented at the left hand side and the next three to the right are in the same yearly order as above. Another significant change: for the first time, in order to present more accurate figures, "other" and "dismissal" statistics are excluded because they are clearly not dispositions on the merits after argument or submission.[2] In addition, dispositions of criminal cases are now being included for all courts, except the U.S. Circuit Court of Appeals.

New York Court of Appeals

A Comparison of the Percentages for Appellate Statistics for 2004, 2003, 2002, 2001 and 2000:

Civil Cases					
	2004	2003	2002	2001	2000
Affirmed	58	51	47	48	57
Reversed	37	39	44	44	35
Modified	5	10	9	8	8
Criminal Cases					
	2004	2003	2002	2001	2000
Affirmed	81	70	70	69	72
Reversed	15	21	28	29	21
Modified	4	9	2	2	7

Avenues to the Court of Appeals in 2004[3]

Thirty-one of the decided civil cases arrived at the Court of Appeals by dissents, as a matter of right, with 20 in 2003. Seventy appeals reached the Court of Appeals by grant of leave, with 65 in 2003. However, in 2004, although only 31 cases arrived by leave granted from the four departments of the Appellate Division, this represents a sharp increase of more than 50% over the 20 granted in 2003.

Court of Appeals – Significant Other Statistics[4]

1. Time for Deciding Appeals.[5] The average time from:
   (a) Argument or submission to disposition in normal course was 46 days;
   (b) Filing a notice of appeal to calendaring for oral argument was 6.2 months, same as previous years;
   (c) Readiness (all papers served and filed) to calendaring for oral argument was 1.5 months, the same as previous years;
   (d) Filing of Notice to Appeal to the public release of decision was 284 days.
2. Filings
   (a) In 2004, there were 296 (285)[6] Notices of Appeal, 235 were Civil (230) and 61 Criminal (55).
3. Dispositions in 2004
   (a) 185 appeals were decided, including 136 civil (130) and 49 criminal (46).
   (b) 1,222 (1,377) Motions were decided with the average time from return date to disposition 56 days for civil.
   (c) Motions for Leave to Appeal: Civil cases – there were 901 applications and 75 or 8.3% (8.2%) granted.
   (d) Review of determinations of State Commission on Judicial Conduct – two determinations reviewed and two suspensions ordered.
   (e) Certifications – discretionary jurisdiction to review certified questions from certain federal courts and other courts of last resort – in 2004. Four cases were accepted.

The Four Departments of the Appellate Division of the Supreme Court of the State of New York

Civil Statistics for 2004 (2003, 2002 and 2001 in parentheses):				
	First	Second	Third	Fourth
Affirmed	66 (69) (68) (67)	62 (59) (62) (60)	78 (79) (78) (78)	70 (66) (63) (62)
Reversed	21 (18) (18) (19)	28 (29) (28) (29)	11 (10.5) (11) (12)	12 (19) (17) (18)
Modified	13 (13) (14) (14)	10 (12) (10) (11)	11 (10.5) (11) (10)	18 (15) (20) (20)
Criminal Statistics for 2004 (2003, 2002 and 2001 in parentheses):				
	First	Second	Third	Fourth
Affirmed	93 (93) (93) (93)	90 (90) (88) (89)	87 (86) (85) (88)	87 (88) (87) (89)
Reversed	2 (2) (3) (3)	6 (6) (7) (6)	6 (8) (6) (5)	4 (3) (5) (4)
Modified	5 (5) (4) (4)	4 (4) (5) (5)	7 (6) (9) (7)	9 (9) (8) (7)

Comments for Appellate Divisions

The civil statistics for 2004 are relatively similar to those for the previous three years, with no significant changes. There is no significant change in the criminal statistics.

Again, the Second Department had a total of 11,088 dispositions, both civil and criminal, more than three-and-one-half times the First Department's 3,005. Nevertheless, the Second Department had 1,991 oral arguments in contrast to 1,198 for the First Department, less than a two-to-one ratio.

In civil cases, the Third Department's much higher affirmance percentage is the result of the CPLR Article 78 Administrative Appeals from the determinations of state agencies with the applicable "substantial evidence" standard.

Appellate Statistics for 2004 for the Appellate Terms of the First and Second Departments

Appellate Term statistics are presented for the second time in this form and they are now divided into "civil" and "criminal" for comparison, with the figures for prior years in parentheses:

Civil Statistics for 2004 (2003, 2002 and 2001 are in parentheses):		
	First Department	Second Department
Affirmed	73 (67) (59) (62)	57 (62) (51) (56)
Reversed	17 (24) (26) (23)	34 (34) (38) (36)
Modified	10 (9) (15) (15)	9 (4) (11) (8)
Criminal Statistics for 2004 (2003, 2002 and 2001 are in parentheses):		
	First Department	Second Department
Affirmed	80 (80) (73) (75)	57 (62) (51) (56)
Reversed	16 (12) (22) (23)	34 (34) (38) (36)
Modified	4 (8) (5) (2)	19 (4) (11) (8)

Comments for Appellate Terms

Although the Second Department had a total of 940 dispositions, civil and criminal, which was more than two-and-a-half times the total of 359 in the First Department, the number of oral arguments in the Second Department, 306, was almost the same as the First Department's total of 285. In 2003, the First Department had 333 total dispositions to the Second Department's total of 1,505, almost one-to-three. However, the number of oral arguments in the First Department was 334, or 31 more than the Second Department's total of 303.

The statistical studies report by the Office of Court Administration does include two other groupings: "dismissed" and "other." These two categories are not what are deemed "dispositions on the merits" in that "dismissals" may result from non-appealable orders and therefore are not determinations on the merits, and the category "others" includes stipulations or settlements after the filing of the records on appeal.

The First Department had significantly higher affirmances and fewer reversals in 2004 in comparison with re-adjusted comparable categories and comparable numbers for prior years. The Second Department was relatively the same as in 2003. However, in comparing the First Department with the Second Department for 2004, the affirmance rate in the First is 17% higher than the Second and significantly higher for 2004 than the similar statistical results for 2003.

U.S. Circuit Court of Appeals for Second Circuit and District of Columbia

(12-month period ending September 30, 2004)[7]
Appeals terminated on the merits (Civil Cases Only)

Second Circuit[8]				
Affirmed	66	(61)	(65)	(61)
Dismissed	16	(21)	(18)	(21)
Reversed	1	(1)	(2)	(2)
Remanded	17	(17)	(15)	(16)

District of Columbia[9]				
Affirmed	**83**	**(78)**	**(92)**	**(89)**
Dismissed	**3**	**(2)**	**(1)**	**(3)**
Reversed	**12**	**(18)**	**(--)**	**(7)**
Remanded	**2**	**(2)**	**(7)**	**(1)**

General Comments

The pattern noted last year continues in the comparison of these statistics with those for the New York Court of Appeals. Generally there is a much higher percentage of affirmances in the Second Circuit than in the New York Court of Appeals.[10]

1. This is the third successive article on this subject. Bentley Kassal, *What Are the Odds? Appellate Statistics Reveal Patterns Among State and Federal Courts*, 76 N.Y. St. B.J. (Jan. 2004) p. 46; *Update: Did the Odds Change in 2003? Appellate Statistics in State and Federal Courts* 76 N.Y. St. B.J. (Nov./Dec. 2004) p. 28.

2. As defined in the Court of Appeals Annual Report, "other" includes anomalies which did not result in an affirmance, reversal, or modification ("other" included judicial suspensions, acceptance of a case for review pursuant to Court Rule 500.17). "Dismissal" also includes non-appealable orders, as well as stipulations or settlements after the filing of records on appeal.

3. From the 2004 statistical route to the Court of Appeals, referred to as the "Basis for Jurisdiction" in the Annual Court of Appeals Report.

4. From the Annual Report of the Clerk of the Court of Appeals for 2004.

5. Excluding Constitutional questions, stipulations for judgment absolute and "other."

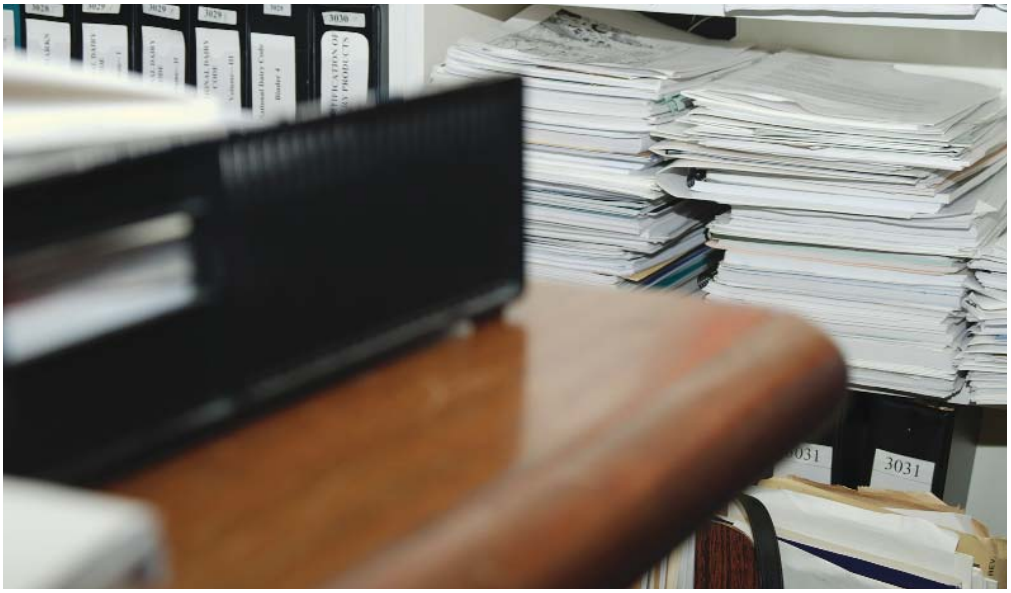
6. Figures in parentheses are for 2003.

7. These figures only include those specifically set forth and do not include "other." Like the state appellate courts, "other" is similarly excluded.

8. Appeals Terminated on the Merits, during the 12-month period ending September 30, 2004. Includes only "other U.S. Civil" and "other U.S. Private" proceedings. Does not include "other" but does include "remanded."

9. The high affirmance rate is attributed to the fact that most of these cases involve review of decisions of federal administrative agencies and therefore a different standard of review.

10. The reports containing the above statistics are directly available. For the New York state courts, the information may be obtained at the Web site <www.nycourts.gov> ("Courts," "Court Administration" and "reports"). For the United States Circuit Courts, contact the Administrative Office of the United States Courts, One Columbus Circle N.E., Washington, D.C. 20544 or search its Web site, <www.uscourts.gov.secondcircuit>.



Robert A. Barrer
<rbarrer@hiscockbarclay.com>
is a partner at Hiscock & Barclay, LLP, in Syracuse, where his practice is concentrated in complex commercial and tort litigation. Mr. Barrer formerly served as a Law Clerk for the Honorable Howard G. Munson, then-Chief Judge of the United States District Court for the Northern District of New York. He is a graduate of Skidmore College and Syracuse University College of Law.

Unintended Consequences

Avoiding and Addressing the Inadvertent Disclosure of Documents

By Robert A. Barrer

It is practically impossible to function in a busy law practice and not be confronted with issues of inadvertent disclosure of documents. The problem transcends practice areas and is not limited to the litigation area where a privileged document is inadvertently disclosed in the course of discovery or disclosure proceedings. Consider the following scenarios:

- In the course of your practice you receive a document or information that was unintentionally revealed. Perhaps the inadvertence is obvious, such as a letter addressed to someone else that was mistakenly placed in the wrong envelope. Or, you may make the determination much later, such as where the document is included in document production or with drafts of other documents.
- An e-mail message comes to you because you are on the wrong distribution list or the sender's e-mail program auto-filled in your name by mistake.
- You recognize that a document or information – such as a memorandum highlighting the strengths and weaknesses of your adversary's legal argument – was inadvertently disclosed to you, but only after reading it.
- You, or your assistant, receive a frantic call from another office warning of a facsimile sent to your fax number by mistake.
- Someone sent you a document by e-mail and when you open it you see that it is full of comments, track changes or redlines. Even worse, these comments, changes or redlines are not hidden and they reveal glaring weaknesses in the adversary's case. (Not to mention the subject of "metadata," discussed later, that is embedded in a document.)

These incidents occur all the time. And, unfortunately, they happen to everyone. This article provides a review of some of the more common situations that arise, the controlling authority in the area, and some practical suggestions on how to avoid the problem or address it when it does occur.

Disciplinary Rules

It may be surprising to learn that New York does not have specific rules that govern what attorneys must do when confronted with issues of inadvertent disclosure. Rather, attorneys in New York must be guided by concepts[1] and general ethical principles[2] in the Code of Professional Responsibility and decisional law in the state and federal courts. Several Ethical Considerations are relevant, but the key for proceeding in a manner that will prevent the imposition of discipline and avoid court sanction are the Disciplinary Rules (DR).

The general catch-all DRs are 1-102(a)(4) and (5). These two DRs prohibit a lawyer from engaging in conduct "involving dishonesty, fraud, deceit, or misrepresentation"[3] or that is "prejudicial to the administration of justice."[4] While all attorneys must aspire to meet this standard, there is no particular reference or applicability to inadvertent disclosure.

By contrast, DR 4-101 imposes upon lawyers the affirmative duty to not only safeguard the confidences and secrets of their clients, but also to take steps to ensure that those individuals working for them (such as paralegals and assistants) do the same. Here, the New York lawyer must protect a client's confidences and secrets, and ensure that those who work for and with the lawyer do the same. Unintentionally revealing documents or other confidences and secrets may be a violation of DR 4-101(b)(1).[5] Failing to ensure that others who work for and with you safeguard your client's confidences and secrets may be a violation of DR 4-101(d).[6]

DR 4-101 likely covers the inadvertently disclosing lawyer, but what about the receiving lawyer? For the recipient who wants guidance, at least three DRs are relevant: DR 7-101(a)(1) mandates that a lawyer must act with civility and courtesy and avoid offensive tactics;[7] DR 7-106(c)(5) requires that a lawyer adhere to local customs and courtesies of the bar;[8] lastly, DR 9-101(c) prohibits a lawyer from attempting to influence a tribunal with improper or irrelevant grounds, such as with improperly obtained material.[9]

Although not formally applicable in New York, the American Bar Association (ABA) Model Rules of Professional Conduct have a rule on point. Model Rule 4.4(b) provides that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."[10] The official comment to the rule suggests that further obligations are likely imposed by substantive law as opposed to ethical responsibilities.[11]

A question is raised if the lawyer receives the document in other than a representational capacity. For example, if a lawyer faces the threat of a malpractice claim and receives an inadvertently disclosed document addressing the strengths and weaknesses of the adversary's claim against the lawyer (as opposed to the lawyer's client), the receiving lawyer has *not* received that document "relating to the representation of the lawyer's client." The lawyer may be free to use the document, in this circumstance, to defend himself or herself from the claim and the sending lawyer may be out of luck.

Bar Association Opinions

Surprisingly, the New York State Bar Association (NYSBA) has no formal opinion on point. There are, however, four opinions that tangentially cover the issue.

NYSBA Formal Opinion No. 749 holds that it is improper for a lawyer to employ technology to surreptitiously examine and trace e-mail or "mine" into documents for hidden information.[12] This includes embedded metadata. Metadata literally means "data about data." Software programs, including, for example, Microsoft® Word and Corel® WordPerfect®, embed metadata that is not always visible or even intended to be seen by the user.[13] The degree to which technology can assist in mining metadata is accelerating rapidly, and this opinion counsels that technology does not preclude ethical behavior.

NYSBA Formal Opinion No. 782[14] expands upon the coverage of Formal Opinion No. 749. Citing DR 4-101(b), Formal Opinion No. 782 admonishes that attorneys have an affirmative duty to use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences and secrets.

NYSBA Formal Opinion No. 700 provides that when a lawyer receives an unsolicited communication from a former employee of an adversary's law firm regarding alteration of documents, the receiving lawyer may not further communicate with that individual and should seek judicial guidance or other advice on how to proceed and use, if at all, the information.[15] In the example given, a prosecutor receives an unsolicited communication from a former staff member of a law firm who advises that the law firm has been materially altering documents that are being submitted to the prosecutor. The opinion counsels that the receiving attorney must cease communication with the former law firm employee and, if criminality is suggested, seek the guidance of the appropriate tribunal.

NYSBA Formal Opinion No. 596 addresses the situation where an insurance company insures both the plaintiff and the defendant in the same accident and holds that it is inappropriate for the defendant's lawyer to obtain a copy of the plaintiff's file directly from the insurer, but instead must be guided by the appropriate discovery rules of the tribunal.[16] Although it would certainly be easier, and in some cases highly more productive, to gain this information informally, the opinion counsels that there is no shortcut around the traditional discovery process simply because of a fortuitous coincidence of relationship to the same insurance company.

Unlike the NYSBA, the ABA has two formal opinions on point. ABA Formal Opinion No. 94-382 provides that a lawyer who receives, on an unauthorized basis, materials of an adversary party should, upon recognizing the privileged or confidential nature of the materials, either refrain from reviewing them or review them only to the extent required to determine how to proceed appropriately. The lawyer should notify the adversary that the lawyer has the materials and await instructions or refrain from using them until a definitive resolution of the proper disposition can be obtained from a court.[17] This opinion modifies an opinion from two years previous that did not address the possibility of seeking court guidance on the disposition of the inadvertently disclosed material. The earlier opinion, ABA Formal Opinion No. 92-368, provides that a lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is

clear that they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer, and abide by the instructions of the lawyer who sent them.[18]

The New York County Lawyers' Association has one opinion[19] on point that essentially tracks ABA Formal Opinion No. 92-368. The Association of the Bar of the City of New York (ABCNY) has an excellent and very thorough decision on the issue of inadvertent disclosure.[20] ABCNY Formal Opinion No. 2003-4 holds that a lawyer who receives an inadvertent disclosure of information should promptly notify the sender and refrain from further reading of or listening to the communication and should follow the sender's directions regarding destruction or return of the communication. If, however, the receiving attorney believes in good faith that the communication may be retained and used, the receiving attorney may, subject to the conditions expressed in the opinion,

Basic Rules and Principles

Inadvertent disclosure (the transmission and receipt of unintended information or documents) is an unfortunate byproduct of the busy practice of law. It can, and does, happen without warning. The consequences range from simple embarrassment to a threat to your license to practice. There are distinctions between the ethical duties for the sender and the recipient in terms of how to proceed when faced with the issue. What follows are the basic rules and principles.

1. Protect the confidences and secrets of your clients and make sure that your firm and all of its employees and staff have a clear understanding of the ethical rules governing the area.

2. Take steps to ensure that documents disclosed during the course of formal discovery are properly screened for client confidences and secrets and redacted where appropriate. Consider a formal protective order that specifically addresses the consequences of inadvertent disclosure.

3. Practice extreme caution in the transmission of documents by mail to ensure that materials are not misdirected and enclosures go to whom they are intended. Review all enclosures and match letters with envelopes to make sure that there are no mistakes.

4. Practice extreme caution in the use of electronic mail. Do not allow your mail program to "auto fill" the name of a recipient without double checking to make sure that the correct recipient is chosen.

5. Consider a scrubbing program to remove "metadata" from word processing programs before transmitting documents electronically. Better yet, send documents as digital images (for example a .PDF file) to avoid disclosing confidential matters such as track changes or hidden comments.

6. The sender of inadvertently disclosed information must promptly notify the recipient that the disclosure has occurred and request that the information or documents be returned without further disclosure or copying; notify your client of the facts and your plan for correction.

7. The sender of inadvertently disclosed information should take all steps necessary to rectify the problem including an application to the appropriate court or tribunal. If the inadvertent disclosure is your fault, your efforts should be at your cost.

8. A recipient of inadvertently disclosed information must promptly notify the sender of the fact that the disclosure has occurred and refrain from making any further disclosure or copying until a dispassionate consideration of the facts takes place.

9. In reflecting upon the consequences of an inadvertent disclosure, a recipient should consider whether the disclosure: (a) is one that must be returned immediately without further consideration; (b) may be considered a waiver of a privilege and therefore useable; (c) is of such a nature that failure to consider or use the information would be a breach of the duty of zealous representation. Proceed cautiously and discuss the situation with a trusted colleague. Consider an affirmative request on your part to the appropriate court or tribunal.

10. If unethical or illegal conduct is suggested by the inadvertent disclosure, in addition to notification of the sender, the recipient must also consider contacting the appropriate court or disciplinary authority and await a definitive ruling.

submit the communication for *in camera* consideration by a tribunal.

According to ABCNY Formal Opinion No. 2003-4, where the receiving attorney has been exposed to the content of the communication prior to knowing or having reason to know that the communication was misdirected, the receiving attorney is not barred from using the communication. However, the receiving attorney must notify the sending attorney and permit the sending attorney to promptly take whatever steps he or she believes are necessary to prevent any further disclosure.

Court Decisions

As a general proposition, the voluntary disclosure of a document protected by the attorney-client privilege serves to waive any claim of privilege as to that document.[21] However, if the disclosure is inadvertent, the privilege will not be waived unless the producing party's conduct was "so careless as to suggest that it was not concerned with the protection of the asserted privilege."[22] While there are certainly New York cases on point, some of the more detailed analysis on the subject has come from the federal courts.

One such opinion was issued by the United States District Court for the Southern District of New York in *United States Fidelity & Guaranty Co. v. Braspetro Oil Services Co.*[23] There, the court provided a lengthy discussion of the standards to be applied in determining the waiver of the attorney-client privilege. This was especially important in light of a confidentiality order provision that specifically provided that an inadvertent disclosure would not be considered a waiver if prompt action were taken to correct it. In the circumstances presented, the court had a relatively easy time concluding that the inadvertent disclosure of two letters out of a 400,000 page document production would not effect a waiver of the attorney-client privilege. One key aspect of the case that assisted the court in making its determination was the highly regimented procedure put in place by the transmitting law firm for the review, and re-review of privileged materials. Although errors were certainly made, the fact that there were procedures in place that satisfied the requirements of DR 4-101(d) appeared to provide a safe harbor.

It should be a given that a law firm has in place a program, plan or policy for dealing with confidential information, as required by DR 4-101(d), so as to minimize the likelihood of inadvertent disclosures. In both *AFA Protective Systems, Inc. v. City of New York*[24] and *New York Times Newspaper Division v. Lehrer McGovern Bovis, Inc.*,[25] the First and Second Departments, respectively, addressed the general rule that disclosure of a privileged document ordinarily operates as a waiver of the privilege unless it is shown that (a) the client intended to maintain the confidentiality of the document; (b) reasonable steps were taken to prevent disclosure; (c) after discovering the disclosure, the party asserting the privilege acted promptly to remedy the situation; and (d) the parties who received the documents will not suffer undue prejudice if a protective order against use of the document is issued.[26]

The Do's and Don'ts

Following the general principles taken from the various authorities discussed above, here are some guidelines for the practitioner confronted with issues of inadvertent disclosure. After stopping to take a deep breath and consider your options, there are certain things that a lawyer: (a) must do, (b) should do, (c) may do and (d) must not do with the inadvertently disclosed information.

First things first. If you are the recipient, you *must* stop smiling because it could just as easily be you in that position.

You *must* notify the sender of the fact that an inadvertent disclosure has taken place.

> Where the receiving attorney has been exposed to the content of the communication prior to knowing or having reason to know that the communication was misdirected, the receiving attorney is not barred from using the communication.

By contrast, if you are the one who has made the inadvertent disclosure, you *must* notify your adversary immediately and request that the document be returned without further disclosure and copying. Prompt action is required. Further, you *must* notify your client what has transpired and what steps you have taken (at your expense) to rectify the situation. It would be wholly inappropriate to bill your client for steps taken to rectify your mistake. Candor is key. If the mistake was the client's, then the notion of correcting the mistake at your expense would, of course, not be present.

Following the steps that you have taken to retrieve the inadvertently disclosed document, you *must* review firm and individual procedures to ensure that there are safeguards in place to minimize inadvertent disclosures in the future. As discussed above, the presence or absence of such safeguards may be determinative of a court's ultimate judgment whether your inadvertent disclosure can be used against your client.

You *should* consult with someone else to make sure that the course that you intend to follow is appropriate. That person could be a colleague or partner in your office, or in another office, who is not connected with the particular case or transaction. In a large firm, a department chair or chief ethics officer can be consulted. In more serious matters where unethical conduct or criminality is disclosed, an application for judicial guidance or referral to the bar's grievance committee may be warranted.

You *may* be required to return the document without retaining a copy. Whether this occurs will depend on the circumstances of the disclosure and will be treated later in this article.

You *may* be able to exploit the information if you receive it in your individual capacity as opposed to your representational capacity.[27]

You *may* be able to utilize the information if you reviewed it before realizing that it is privileged.

You *may* always consult with a court for a dispositive ruling on privilege waiver while preserving the information until the ruling is obtained.

You *may* always consider the legal argument that there has been a waiver of a privilege. There is no downside to seeking a ruling from the presiding judge or a court of appropriate jurisdiction, taking care to preserve the confidential information, such as by submitting the document *in camera*, until a dispositive ruling can be obtained.

Absent careful consideration, you *must not* make copies of the document and *must not* make a further disclosure until the situation has been properly analyzed. Court review and approval may be required.

Use of the Information

It is said that you cannot "un-ring" a bell. The same is often true in the case of inadvertent disclosure. Once it has been reviewed, it is difficult if not impossible to "unlearn" the information disclosed.

For example, what if the disclosure is of an adversary's settlement position? Or, what if the disclosure comes in the course of a business transaction and reveals a confidential negotiating position? ABCNY Formal Opinion No. 2003-04 poses the following scenario. You receive a document that states simply: "offer $100,000, but you have authority to settle for up to $300,000."[28] If you ignore this information, you may be breaching your duty to your own client. This is a major problem for the sending lawyer. However, the reality (and the sad truth) of this situation is that it is not your (the receiving lawyer) problem because you would be doing your own client a disservice by ignoring the information. In other words, where the inadvertently disclosed information transmits facts that cannot be ignored, such as settlement authority or the identity of a heretofore unknown witness, the receiving lawyer cannot "un-ring" the bell and should be free to use the information to his or her client's advantage. By contrast, if the inadvertently disclosed information was a lawyer's memorandum analyzing the strengths and weaknesses of a case, few would argue that the receiving lawyer should be permitted to offer the document into evidence or as an exhibit to a motion.

If unethical or illegal conduct is suggested, what should be done? You must still notify the sender, but you should also contact the appropriate court or disciplinary authority and await a definitive ruling. The following scenario was presented in the November-December 2004 edition of the New York State Bar Association *Journal*.[29] In a personal injury action the defense counsel receives a copy of a letter from the plaintiff to his counsel complaining that he has used up the first "loan" and is in dire need of a second "loan" to tide him over until the end of the case. Does this ever happen? Review the facts of *In re Arensberg*[30] (it is a violation of DR 5-103(b)[31] for an attorney to advance or guarantee financial assistance to a client). In this situation, the attorney who receives the inadvertent disclosure should notify the sending attorney and contact the tribunal and the appropriate disciplinary authorities.

What if the disclosure suggests that an attorney has surreptitiously tape recorded a conversation? While it is *legal* for a lawyer to tape record a witness interview without the knowledge and consent of the witness, several bar associations have stated that it is *unethical* to secretly tape

Your name is on the letter that you sign and it is your responsibility to make sure that your intent is carried out.

record conversations.[32] Remember that under DR 1-103(a), New York attorneys are obligated to report conduct that raises "a substantial question as to another lawyer's honesty, trustworthiness or fitness as a lawyer" to the appropriate authority and to cooperate in any investigation thereof.[33] If you learn that an adversary has surreptitiously tape recorded a conversation, advising the presiding tribunal and the appropriate disciplinary authorities appears to be in order.

Some Practical Suggestions

You can lessen the likelihood of inadvertent disclosure issues by practicing with care and without haste. Review enclosures and envelopes to make sure that what you intend to send to your client does not go to your adversary. Avoid signing letters and simply handing a letter to your assistant without making sure that the correct enclosures go to the intended recipient. Blaming your assistant for a mistake is never helpful and always unproductive. Your name is on the letter that you sign and it is your responsibility to make sure that your intent is carried out.

When documents are transmitted by electronic mail, give serious consideration to sending them in Adobe® PDF[34] format instead of Microsoft® Word or Corel® WordPerfect®. If it is necessary to transmit documents in Microsoft Word or WordPerfect, make sure that all track changes and comments that reveal confidences and secrets are removed. Consider "scrubbing" the document before transmission, using commercially available software.

Using electronic mail is unavoidable. Before clicking the send button, make sure that the address in the "To" box is your intended recipient's. Take special care when your e-mail program has an automatic fill feature that completes the name after entry of only a few letters. The name that is filled in may not be that of your intended recipient. Consider placing a macro warning on the bottom of your externally sent e-mail messages that cautions against unintended disclosures and seeks the return of erroneous transmissions.

When confronted with inadvertent disclosure issues, tread lightly and carefully. Do not sacrifice your client's legal position. Do not sacrifice your license to practice law, your reputation or your integrity. Treat your adversary as you would expect to be treated. ■

1. In the broadest sense, the Canons of Ethics address the basic concepts from which the rules are derived. In the area of inadvertent disclosure, three of the Canons are relevant. *Canon 4*: A lawyer should preserve the confidences and secrets of a client. *Canon 7*: A lawyer should represent a client zealously within the bounds of the law. *Canon 9*: A lawyer should avoid even the appearance of professional impropriety.

2. *See generally* EC 4-1, EC 7-1, EC 7-38, EC 9-2.

3. DR-1-102(a)(4) (N.Y. Comp. Code, R. & Regs. tit. 22, § 1200.3(a)(4) (N.Y.C.R.R.)).

4. DR 1-102(a)(5) (22 N.Y.C.R.R. § 1200.3(a)(5)).

5. DR 4-101(b)(1) (22 N.Y.C.R.R. § 1200.19(b)(1)).

6. DR 4-101(d) (22 N.Y.C.R.R. § 1200.19(d)).

7. DR 7-101(a)(1) (22 N.Y.C.R.R. § 1200.32(a)(1)).

8. DR 7-106(c)(5) (22 N.Y.C.R.R. § 1200.37(c)(5)).

9. DR 9-101(c) (22 N.Y.C.R.R. § 1200.45(c)).

10. ABA Center for Prof. Resp., Model Rules for Professional Conduct, 4.4(b), *available at* <http://www.abanet.org/cpr/mrpc/mrpc_home.html>.

11. ABA Center for Prof. Resp., Model Rules for Professional Conduct, 4.4(b) Comment 2:

> If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person."

Available at <http://www.abanet.org/cpr/mrpc/rule_4_4_comm.html>.

12. NYSBA Comm. on Professional Ethics, Op. 749, (12/14/01) ("NYSBA Op.").

13. According to Microsoft® (per its support Web site), "whenever you create, open, or save a document in Word 2002, the document may contain content that you may not want to share with others when you distribute the document electronically. This information is known as metadata. Metadata is used for a variety of purposes to enhance the editing, viewing, filing, and retrieval of Microsoft Office documents. Some metadata is easily accessible through the Word user interface. Other metadata is only accessible through extraordinary means, such as by opening a document in a low-level binary file editor. . . . Metadata is created in a variety of ways in Word documents. As a result, there is no single method to remove all such content from your documents." Corel®, in its support Web site for its WordPerfect® products, echoes the statements of Microsoft®. Examples of information that may be embedded in a document as metadata includes the author's name, initials, company or organization name, computer name, identity of network server or hard drive where the document resides, other file properties and summary information, non-visible portions of embedded OLE objects, the names of previous document authors, document revisions, document versions, template information, hidden text and comments.

14. NYSBA Op. 782 (12/8/04).

15. NYSBA Op. 700 (5/7/98).

16. NYSBA Op. 596 (12/5/88).

17. ABA Standing Comm. on Ethics and Professional Resp. Op. 94-382 (7/5/94) ("ABA Op.").

18. ABA Op. 92-368 (11/10/92).

19. N.Y. County Lawyers' Ass'n Op. 730 (7/19/02).

20. ABCNY Comm. on Professional and Jud. Ethics Op. 2003-4 (2003) ("ABCNY Op."), *available at* <http://www.abcny.org/Ethics/eth2003.html>.

21. *See United States v. Rigas*, 281 F. Supp. 2d 733, 737 (S.D.N.Y. 2003).

22. *Johnson v. Sea-Land Serv., Inc.*, 99 Civ. 9161, 2001 U.S. Dist. LEXIS 11447 (S.D.N.Y. Aug. 8, 2001).

23. 97 Civ. 6124, 98 Civ. 3099, 2000 U.S. Dist. LEXIS 7939 (S.D.N.Y. June 7, 2000).

24. 13 A.D.3d 564, 788 N.Y.S.2d 128 (2d Dep't 2004).

25. 300 A.D.2d 169, 752 N.Y.S.2d 642 (1st Dep't 2002).

26. *See generally Yaa Lengi Ngemi v. Bd. of Educ.*, 03 Civ. 1457, 2005 U.S. Dist. LEXIS 543 (S.D.N.Y. Jan. 11, 2005) (prompt action should serve to remedy the inadvertent disclosure); *Mfrs. and Traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 522 N.Y.S.2d 999 (4th Dep't 1987) (rejecting prior harsh approach to waiver of privilege due to inadvertent disclosure and holding that intent to waive is required and burden is on party asserting privilege to show lack of intent to waive).

27. *See* Model Rule 4.4(b): "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."

28. ABCNY Op. 2003-4 (2003), *available at* <http://www.abcny.org/Ethics/eth2003.html>.

29. Attorney Professionalism Forum, N.Y. St. B.J. (Nov./Dec. 2004), p. 38.

30. 159 A.D.2d 797, 553 N.Y.S.2d 859 (3d Dep't 1990). *See also In re Cellino*, ___ A.D.3d ___, 798 N.Y.S.2d 600 (4th Dep't 2005) (improper for attorney to extend loans to client through company funded and controlled by attorney and owned by cousin of attorney).

31. DR 5-103(b)(1) (22 N.Y.C.R.R. § 1200.22(b)(1)).

32. *Compare Mena v. Key Food Stores Co-op, Inc.*, 195 Misc. 2d 402, 758 N.Y.S.2d 246 (Sup. Ct., Kings Co. 2003), *with* ABCNY Op. 2003-2 (2003), *available at* <http://www.abcny.org/Ethics/eth2003.html>, *and* NYSBA Op. 328 (1974), *as clarified by* NYSBA Op. 515 (1979).

33. DR 1-103(a) (22 N.Y.C.R.R. § 1200.4(a)).

34. Adobe® Portable Document Format ("PDF") is a publicly available specification used by standards bodies around the world for electronic document distribution and exchange. A PDF document is a digital replica that does not permit editing and eliminates the transfer of metadata information.

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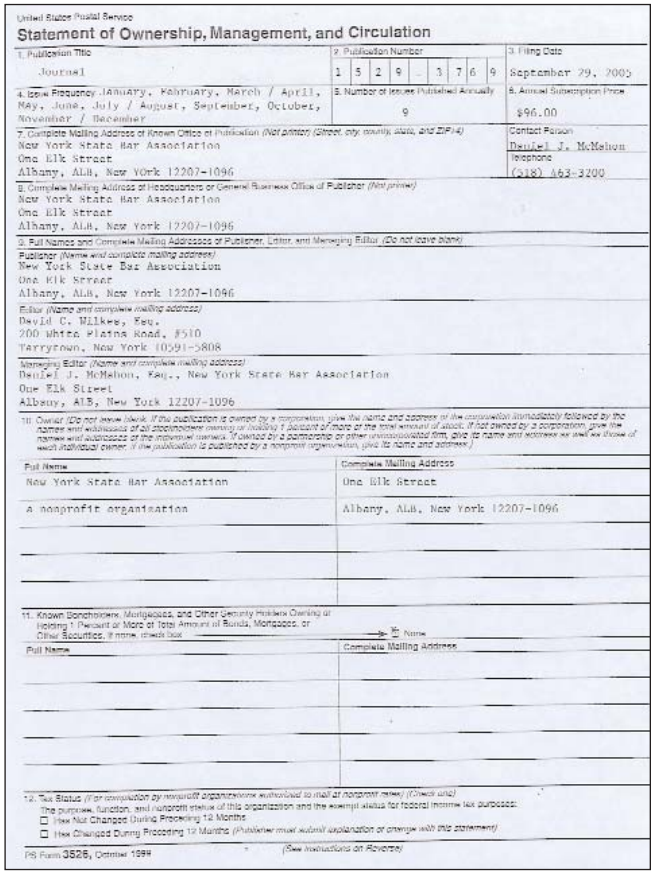

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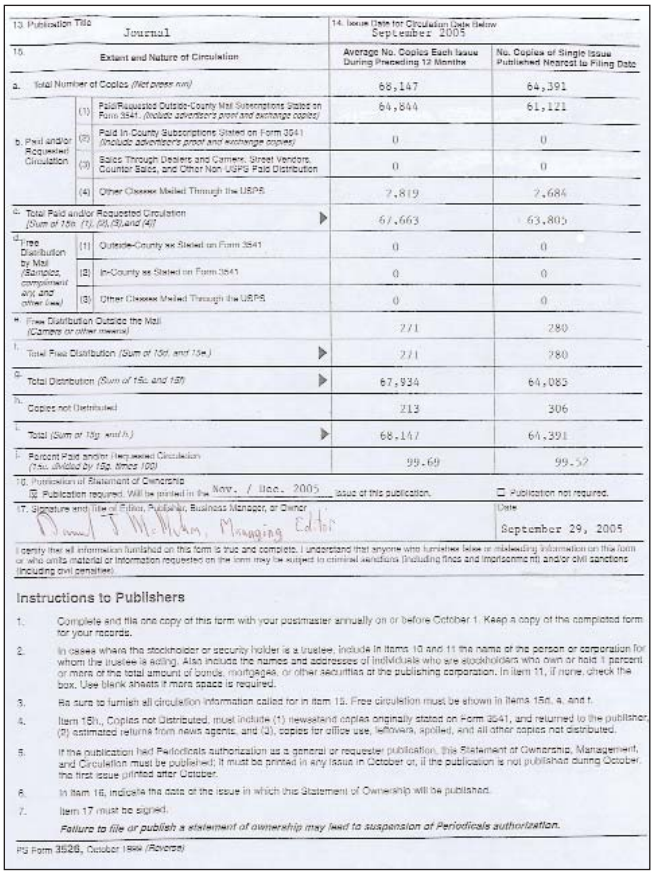

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PS Form 3526, October 1999 (Reverse)

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I recently was retained by an insurance carrier to defend both a corporation and one of its former officers in a civil securities fraud case. Both prospective clients are covered by the same insurance policy, and share a common interest in defending the claims made against them, for which both are exposed to potential liability. There is one wrinkle here, however, which gives me pause: My two potential clients are embroiled in a separate, unrelated litigation in which the individual client claims that compensation is owed by her former employer, the corporate client. This employment dispute has been pending for some time now, and has nothing to do with the merits of the fraud case for which I have been retained. My clients have both assured me that the issues in the two cases are entirely distinct, and that they are willing to execute a written waiver of any potential conflict. Nonetheless, I still feel a little uncomfortable representing two clients who are at each other's throats, albeit in a different, unrelated forum. Is there a real conflict, or is it all in my mind?

Sincerely,
A Cautious Counselor

Dear Cautious:

The question posed here is whether the divergence of interests in the employment dispute precludes you from defending both clients in a case in which they are accused of the same, unrelated wrongdoing, *i.e.*, the plaintiff's securities claims. Simply put, the issue is whether the two situations are sufficiently related to cloud your ability to give faithful and zealous representation to each client.

The Lawyers' Code of Professional Responsibility (Code) provides, in Disciplinary Rule 5-105, that

> [a] lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).
>
> DR 5-105(A).

By way of reference to subsection (C), the Code carves out an exception to the general proscription against representing multiple clients who might have differing interests. This exception applies only "if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved." DR 5-105(C), 22 N.Y.C.R.R. § 1200.24(C).

Further, one of the Code's Ethical Considerations, echoing the theme of DR 5-105(A), urges that a lawyer carefully weigh the possibility that his or her professional judgment may be impaired by representing two parties with diverse interests. It provides that a lawyer "should never represent in litigation multiple clients with differing interests." EC 5-15. In view of these concerns, there are some areas of practice, most notably criminal defense work, in which representation of multiple defendants is generally impermissible. *See* NYCLA Eth. Op. 707, 1995 WL 901716 (1995) (lawyer may not represent multiple defendants in criminal investigation). However, there is authority for the view that in some narrowly defined circumstances, a lawyer can represent both a corporation and individual corporate employee in a criminal investigation. ABCNY Eth. Op. 2004-2.

In considering the ethical perils of multiple representation, Professor Roy Simon of Hofstra University School of Law has described three categories of simultaneous representation conflicts: (a) immaterial conflicts, which are "remote and unlikely to affect a lawyer's judgment"; (b) consentable conflicts, in which a divergence of interest may be waived with the informed consent of all affected clients; and (c) non-consentable conflicts, which are so serious that they cannot be waived. Simon's *New York Code of Professional Responsibility Anno.* (2005 ed.) at 674. Professor Simon observes that "[t]he vast majority of conflicts fall somewhere in the middle – they are material but *consentable*." *Id*. at 675. Your situation appears to fall within the "consentable" category.

In Formal Opinion 2001-3, the Association of the Bar of the City of New York considered a situation in which a lawyer is asked to defend a new litigation client which may have a possible cross-claim against a pre-existing corporate client of the same law firm. The two matters and representations are unrelated. Under those circumstances, the City Bar concluded that the lawyer can limit the scope of representation to defending the litigation client against the claims of the plaintiff, and not assert the cross-claim against the pre-existing corporate client in the other matter, provided that the lawyer also does not purport to advise

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

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the corporate client concerning the potential claim against the lawyer's new litigation client. *See* ABCNY Formal Op. 2001-3 <www.abcny.org/eth2001.html> at 2.

Of course, the clients' informed consent should be obtained in such a situation. According to the City Bar: "In the context of litigation, a lawyer defending a client in an action who determines that there are potential cross-claims between the lawyer's client and another party also represented by the same law firm in an unrelated matter may, with the informed consent of the client whose engagement is being limited, limit her engagement to the defense of the case, and exclude representation of the client against the other client." *Id.* at 3. The lawyer, after making full disclosure and obtaining the client's written waiver of the conflict and written acceptance of the limitation of representation, may refer the litigation client to other counsel for the limited purpose of seeking advice on the potential cross-claims against the lawyer's other client.

The same ethics committee, in ABCNY Formal Op. 2001-2, also considered the simultaneous representation in a transaction of two corporate clients with potentially varying interests. The City Bar concluded that a lawyer "may represent multiple clients in a single matter, with disclosure and informed consent, so long as a disinterested lawyer would believe that the law firm can competently represent the interests of each." *Id*. at 1. The "disinterested lawyer" test involves a number of factors, including the sophistication of the clients, the nature of the conflict, the likelihood of exposing client confidences and the lawyer's relationship with the clients. *Id.*

Also noteworthy is a 2001 opinion of the Nassau County Bar Association Committee on Professional Ethics, Nassau Formal Op. 2001-05 <www.nassaubar.org/ethic_opinions>, which considers a situation in which a lawyer seeks to defend a stockbroker and a brokerage firm in the same arbitration. The brokerage firm is responsible for all defense costs and the individual broker is responsible for any indemnity payments. The ethics committee opined that the arrangement is permissible, provided the lawyer carefully explains to each client, preferably in writing, the ramifications of the joint representation: "Prior to entering upon the representation of both clients, however, the lawyer must advise each client of the potential conflict and its implications and the consequences of an actual conflict should [it] become manifest," in which case the lawyer may have to withdraw from the representation. *Id*. at 4.

In your situation, the potential conflict between your clients already exists, in that the litigation between them has been commenced. However, since the compensation issue in that dispute is not related to the fraud claims that you are being asked to defend, and since you have had no contact with the employment litigation, your representation does not create an immediate conflict for you as attorney. Thus, provided you obtain a written waiver and informed consent from both of your clients, and conclude that there is no risk of disclosing confidences or secrets of one of your clients to another such that your representation would adversely affect either in the earlier, unrelated litigation, it appears you may accept the representation.

Your letter of retention should clearly restrict the scope of your representation. Moreover, if the facts of the case change such that information obtained in the second litigation becomes germane to the first, you may need to reevaluate your position and could become obligated to withdraw from the representation, in part or entirely.

The Forum, by
Barry R. Temkin
Fiedelman Garfinkel & Lesman
New York, NY

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I am a sole practitioner with a general practice. One area in which I practice is real property transactions and mortgage foreclosures for local banks. The mortgage foreclosure business is highly competitive and quite lucrative. However, keeping the business of the lenders requires aggressive litigation and quick results.

Recently a local bank for which I do a lot of this type of work asked me to become an "officer" of the bank, pursuant to a resolution of the Board of Directors, for the sole and expressly limited purpose of providing the affidavits of merit necessary to support applications in foreclosure actions. Foreclosures are frequently successful upon the default of the property owner. The courts are therefore adamant in requiring competent affidavits of merit from an officer of the plaintiff corporate lender. Obtaining such affidavits sometimes slows things down so the bank has devised this method of expediting the process.

I am a little uncomfortable with this proposal as I am also the attorney of record in these actions, and, of course, not an employee of the bank, but would not like to lose the client. Is it OK to go along with the bank's request under the Disciplinary Rules? Is there any other ethical problem with my agreeing to do this?

Thanks for your help.

Sincerely,
Concerned

INDEX TO ARTICLES 2000–2005

This index places the articles in one of the following categories. Please note that all articles from January 2000–November/December 2005 are available online, to members.

TOPIC/ARTICLE AUTHOR ISSUE/Pg.

Trial Practice

Trusts and Estates

Women in Law

INDEX TO AUTHORS 2000–2005

The following index lists the authors of all articles that have appeared in the Journal *since the January 2000 edition.*

Below each author's name is the general classification category used for the article. The headline describing the content of the article appears under that classification category in the Index to Articles that begins on page 44.

NEW MEMBERS WELCOMED

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Pedro Luis Bahamonde
Andrew John Baldauf
Dawn Elizabeth Barker
Miguel L. Barrios
Sari Bashi
Richard Christian Beatty
David Colin Bennon
Marc Harris Berkman
Jeremy Beyda
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Gabriel Philip Brier
Saleda Suni Bryant
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Hungkyu Chun
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Roderick John Coyne
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Michael Avi David
Kristi A. Davidson
Adekunle A. Deru
Elan R. Dobbs
Karen J. Dodson
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Malene Duncan
Mark R. Dwyer
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Toshiki Enomoto
Michael John Erlinger
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Laura Jean Forman
Silvia Gaviria
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Jefferson Jonathan Jones
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Elliot Insup Lee
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Sari Nicole Maltz
Tricia Caroline Marlar
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Michael James McCarthy
Kathleen Burns McNamee
David Menchel
Alyssa Marie Morano
Christen Anne Morgan
Ayana Elizabeth Murphy
Orly Natan Salsberg
James E. Nelson
Kirsten M. Nelson
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Connie Weifen Pong
John Richard Popp
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Ydalim Ramon
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Kelly Rodden
Rebecca Anne Saenger
Lee Hull Saladino
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Stephanie H. Schloss
Amy Christine Schultz
Jeffrey D. Scott
Vinay Shandal
Stuart David Shapley
Louis S. Shoichet
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Michael David Silberfarb
Matthew David Silverman
Candice Cheree Sirmon
Benjamin D. Stern
Christopher Robert Strianese
Sagi Tamir
Jochem Hylke Tans
David Cheng Toe Teh
Jason Harrison Terrana
Ronald T. Thomson
Caren Elizabeth Van Winkle
Veronica Vela
Philipp K. Wagner
Jacob J. Waldman
A. Nzengha Waseme
Michael Jonathan Wernke
Sean Thomas Wright
Sylvia Catherine Wu
Aram Yang
Emily Margaret Zarins
Drew Jacob Zimmerman

SECOND DISTRICT
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Craig Andrew Hanlon
Andrea Lisa Hirschhorn
Kerry Anne Newman
Jordan David Tolman
Sarah Margot Nu Williams

THIRD DISTRICT
Kevin Charles Joseph
Autondria Shirnae Minor
Bruce Thomas Roepe

FOURTH DISTRICT
Erin Kathleen Hayner

SIXTH DISTRICT
Ouida Faith Binnie-Francis
Kimberly N. Rothman

SEVENTH DISTRICT
Sammy Azzouz
Robert W. Croessmann
Mary Ann Hyland
Reed N. Summers

EIGHTH DISTRICT
Derek R. Brownlee
Rebecca J. Talmud

NINTH DISTRICT
Marcy Isaacs Hasin
Silvia Metrena
Kathleen M. Moffit
Kerri Leslie Sanchez
Richard A. Schlossbach
Michael John Zadjelovich
John Eric Ziobro

TENTH DISTRICT
M. Victoria Abad Curran
Michael Adler
John V. Bach
Leo G. Callaghan
Jordan Endler
Robert Michael Fischette
Christopher Gomoka
Mekalaradha Masilamani
Susan Alford Matlock-Siris
David Saul Shor
John B. Turano
Shari Lash Weissbach

ELEVENTH DISTRICT
Desa Calder
Elizabeth Rita Haynes
Jianjun Lan
Steven James Salamone
Juan Vera

TWELFTH DISTRICT
Jennifer Rose Benischek
Raynette N. Bernard
Yoshi Meke Bird
Jean-Louis Cauvin
Mioko Catherine Tajika
Caryn Fae Yukelson

OUT OF STATE
Eithar A.M. Abutaha
Rehan Akram
Alejandro Enrique Aleman
Syh Aji-mvo Ambe
James Ansbro
Dimitrios Antonopoulos
Dawn C. Ballin
Miriam A. Barhoush
Michael Adly Baseluos
Michael Alan Becker
April Lynn Bennett
Alyssa Ann Bergman
Fabrice Guy Blonde
Jeffrey Philip Bollinger
Viktor Rolf Gerhard Braun
John F. Brown
Bryan Cabot Brunson
Lucy Jane Budman
Nolan Christopher Burkhouse
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Sybil Martiale Elias
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Noriko Fukuda
Edgardo Francisco Galleno
Sharon O. Gans
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Daisy Priscilla Garces
Kelly Anne Gaughan
Courtney Elizabeth Gengler
Michael Paul Glasser
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Sandhya Gupta
Michael Patrick Hackett
Jonathan Hadida
Glen F. Haley
Jenette Hernandez
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Frederick Andrew Hessick
Zengguang Huo
Virgilio Garcia Icasiano
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Yuko Ina
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Khalid Reede Jones
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Kyuyoung Lee
Sang Kook Lee
Son-mi Ryan Lee
Michele Calderon Lefkowitz

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Bertram Louis Levy
Ning Li
Leta Liou
Anna Esther Lumelsky
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Frank John Macphail
Kathleen Ann Marron
Antony Martinez
Robert M. McCaffery
Robert Alexander McConneghy
Maria Ignatova McMahon
Maria Kostantina Medetis
Jordana Sari Mendelowitz
Kimmo Juhani Mettala
Christine Mikail
Sang Moon
Stephen E. Moore
Jonathan Hays Mosier
Tetsuyuki Noda
Michael Patrick O'Donnell
John Frederick O'Driscoll
Rebecca Susan O'Kelly
Ross Andrew Oliver
Patrick Cunningham Oxford
Mary Catherine Ozdogan
Lynette Paczkowski
Michelle Maya Pang
Yvonne Pang
Anna Maria Pannella
Juan Carlos Partida
Asika K. Patel
Robert Edward Paul
Catherine Mei Payulert
Sara Edith Perea
Susan Elizabeth Perry
Eric Ryan Plant
Robert Stuart Plotkin
Ray Shannon Pool
Elena Portales
Kenneth M. Portner
Johnda Bentley Powers
David John Przygoda
Preston James Quesenberry
Ivan Eric Raiklin
Leena Anil Raut
Sunil G. Raval
Stuart Martin Rees
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Susanne Bettina Richter
Sean James Riley
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Holger Schelling
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Peter Hastings Sheehy
Tanya Sheridan
Scott Lawrence Shuchart
Robert James Sisson
Andrew Brian Smith
Annalyn Garrett Smith
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Yun C. Song
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John George Stepanovich
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Amber Nadine Stokes
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Scott Edward Szorcsik
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Tzvetomir Stoiantchev Todorov
Paul Aaron Tuchmann
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Nicole Voegeli
Tatiana Vostok
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Erica Lorraine Wardle
Melanie Westover
David Parker Willis
Diana Merrill Woodman
Kevin Edward Woods
Michi Yamagami
Fan Yang
Haruyuki Yoshikawa
Laurel Anne Zabel
Jinan Zhang
Xilin Zheng
Li Zhuo
Saul Moshe Zipkin
Brian Jay Zwaig

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.

In Memoriam

John S. Delaney
Iselin, NJ

Adolph Johnson Eckhardt
Baldwin, NY

Roger A. Kiley
Saratoga Springs, NY

Jack L. Sanders
Buffalo, NY

Bryan R. Simmerman
Schenectady, NY

Carlton F. Thompson
Binghamton, NY

MEMBERSHIP TOTALS

New Regular Members
1/1/05 - 10/04/05 _____ 7,290

New Law Student Members
1/1/05 - 10/04/05 _____ 856

Total Regular Members
as of 10/04/05 _____ 65,894

Total Law Student Members
as of 10/04/05 _____ 3,119

Total Membership as of
10/04/05 _____ 69,013

Circuit noted that the appellees' "creative phraseology border[ed] on misrepresentation."[13] The court also noted that incoherent writing is "not only improper but ultimately ineffective."[14]

Lawyers shouldn't use adverbial excessives like "obviously" or "certainly." Overstatement is unethical while understatement persuades. In that regard, shouting at readers with bold, italics, underlining, capitals, and quotation marks for emphasis raises ethical concerns of overstatement.[15] Nor should lawyers use cowardly qualifiers like "generally" or "usually" to avoid precision.

Courts must dispose of motions and cases quickly. Courts might sanction lawyers for wasting the court's time with poor writing. As one court sarcastically put it when faced with incoherent pleadings, "the court's responsibilities do not include cryptography."[16]

Plagiarism

Lawyers must not present another's words or ideas as their own. Doing so deceives the reader and steals credit from the original writer. Plagiarism, prohibited in academia, can affect a lawyer's ability to practice. In one case, the Appellate Division, Second Department, censured a lawyer dismissed from law school for plagiarizing half his LL.M. paper who failed to disclose his dismissal in his bar application.[17] In another, the Appellate Division, First Department, censured a lawyer who plagiarized the writing sample he submitted as part of his application for the Supreme Court (18-B) criminal panel for indigent defendants.[18]

Lawyers reuse form motions and letters, law clerks write opinions for their judges, and some judges incorporate parts of a litigant's brief into their opinions.[19] But plenty remains of the obligation to attribute to others their contributions, thoughts, and words.

To avoid plagiarizing, lawyers should cite the sources:

- On which they relied to support an argument;
- From which they paraphrased language, facts, or ideas;
- That might be unfamiliar to the reader;
- To add relevant information to the lawyer's argument;
- For specialized or unique materials.[20]

Courts don't forgive lawyers who plagiarize.[21] A federal district court in Puerto Rico, for example, reprimanded a lawyer who copied verbatim a majority of his brief from another court's opinion without citing that opinion.[22]

Lawyers must quote accurately.[23] A reader who checks a quotation and finds a misquotation will distrust everything the lawyer writes.[24] To quote accurately, lawyers must use quotation marks, even if the lawyer omits or changes some words. Lawyers must use ellipses to note omissions and put changes in brackets.[25] The key to honest writing is to use quotation marks when quoting even a few key words and then to cite. That's the difference between scholarship and plagiarism.

Lawyers must not substitute practice forms for their professional judgment. While not plagiarism, it's bad lawyering to rely on forms or boilerplate. One federal district court in New Jersey sanctioned a lawyer for reproducing without analysis a complaint from a Matthew Bender practice form.[26] As part of the sanction, the court ordered the lawyer to attend either a reputable continuing-legal-education class or a law-school class on federal practice and procedure and civil-rights law.[27] The court concluded that despite the availability of practice forms and treatises, lawyers are "expected to exercise independent judgment."[28]

Court Rules

Most courts have rules that govern the length and format of papers. Under the Second Circuit's Local Rule 32, a brief must have one-inch margins on all sides and not exceed 30 pages.[29] New York State courts have their own rules.[30] State and federal courts in New York and elsewhere may reject papers that violate the courts' rules regarding font, paper size, and margins.

Lawyers shouldn't cheat on font sizes or margins. And they must put their substantive arguments in the text, not in the footnotes. In one illustrative case, the Second Circuit declined to award costs to a successful appellant whose attorney "blatantly evaded" the court's page limit for briefs by including 75 percent of the substantive arguments in footnotes.[31] Lawyers must edit and re-edit their work to set forth their strongest arguments in the space allowed. A court may, in its discretion, grant a lawyer leave to exceed page limits. Conversely, lawyers shouldn't try to meet the page limit with irrelevancies or unnecessary words for bulk.[32]

Lawyers who ignore court rules risk the court's disdain.[33] Worse, the court can dismiss the case.[34] The Ninth Circuit did just that when an appellant disregarded its briefing rules.[35] The appellant's lawyers submitted a brief that didn't cite the record or provide the standard of appellate review. Instead, the brief exceeded the court's word-count limit and cited cases without precedential value.[36] The lawyers also submitted a reply brief that had no table of contents or table of authorities.[37] The court stated that despite the appellant's poorly written briefs, it examined the papers and decided that appellants were not entitled to relief on the merits.[38] Other than to comment on the lawyers' ethics and briefing errors, the court didn't explain its reasoning for dismissing the appeal.[39]

Even if a court doesn't have rules about a brief's format and length, lawyers shouldn't burden the court with prolix writing. In a 1975 New York Court of Appeals case decided before the court instituted rules to regulate brief length, the court sanctioned a lawyer who submitted a 284-page brief about issues "neither novel nor complex."[40] To illustrate the brief's absurdity, the court broke down the number of pages it devoted to each issue, including 50 pages for the facts,

CONTINUED ON NEXT PAGE

126 for one argument, and 4 to justify the brief's length.[41]

Lawyer's Role as Advisor

Lawyers must mind the Disciplinary Rules when advising a supervising attorney or a client. Lawyers are often asked to prepare memorandums for a supervising attorney or a client directly. A memorandum is intended to predict objectively how the law will be applied to the facts of the client's case, not to persuade the reader what the law should be. A memorandum must take a position, but it must also provide the strongest arguments for and against the client's position. A skewed memorandum is no strategic or planning tool.

Lawyers mustn't give unsolicited advice to non-clients. Publicly discussing the law, however, is essential to understanding how the law works and applies. The Disciplinary Rules allow lawyers to write about legal topics, but they forbid lawyers to give unsolicited advice to non-clients.[42] A lawyer who participates in an on-line chat, for example, should notify the other participants that the discussion doesn't create a lawyer-client relationship, that none of the communications are confidential, and that the advice is general in nature and not intended to provide specific guidance. The notice should contain unequivocal language that non-lawyers will understand.

Clients pay the bills. They can use their economic influence to pressure lawyers to break the law or violate a Disciplinary Rule. A lawyer is prohibited from assisting a client to engage in unlawful or fraudulent conduct.[43] A lawyer can choose to refuse to aid or participate in conduct the lawyer believes is unlawful, even if there's some support for the argument that the conduct is legal.[44] The Disciplinary Rules recognize that when clients place their lawyers in an ethical quandary, and when it is unclear whether the lawyer will be advising a client to commit legal or illegal conduct, the lawyer should err on the side of not advising rather than face possible disciplinary action.

Conclusion

Ethics permeates all aspects of the legal profession. The way a lawyer writes can establish the lawyer's reputation as ethical and competent. Reputation is a lawyer's most precious asset. By embodying the profession's ethical ideals in their writing, lawyers will insure that their reputation remains positive and increase the possibility that their clients will prevail in litigation. ■

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct at New York Law School. He thanks court attorney Justin J. Campoli for assisting in researching this column. Judge Lebovits's e-mail address is GLebovits@aol.com.

1. DR 7-102(a)(5) (22 NYCRR 1200.33(a)(5)).
2. 22 NYCRR 130-1.1(c)(3).
3. *See In re Abrahams*, 5 A.D.3d 21, 22–27, 770 N.Y.S.2d 369, 371–75 (2d Dep't 2003) (per curiam), *appeal dismissed*, 1 N.Y.3d 619, 808 N.E.2d 1273, 777 N.Y.S.2d 13 (2004).
4. *See Duncan v. AT&T Communications, Inc.*, 668 F. Supp. 232, 234 (S.D.N.Y. 1987).
5. *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (citation omitted).
6. Except when the other side is absent. See Part I of this column.
7. Margaret R. Milsky, *Ethics and Legal Writing*, 85 Ill. B.J. 33, 34 (1997) (noting that citing record enhances lawyer's credibility).
8. *DeRosa v. Chase Manhattan Mtge. Corp.*, 15 A.D.3d 249, 249, 793 N.Y.S.2d 1, 2 (1st Dep't 2005) (mem.).
9. Michael R. Smith, Advanced Legal Writing: Theories and Strategies in Persuasive Writing 122 (2002).
10. Wendy B. Davis, Writing Clinic, *An Attorney's Ethical Obligations Include Clear Writing*, 72 N.Y. St. B.J. 50, 50 (Jan. 2000) (calling clear legal writing an ethical obligation).
11. George Orwell, *The Politics of Language*, *in* 4 The Collected Essays: Journalism and Letters of George Orwell 165–69 (1968).
12. Laura E. Little, *Hiding With Words: Obfuscation, Avoidance, and Federal Jurisdictional Opinions*, 46 UCLA L. Rev. 75, 101 (1998).
13. *Wilson v. Meeks*, 52 F.3d 1547, 1558 (10th Cir. 1995).
14. *Id.*
15. *See United States v. Snider*, 976 F.2d 1249, 1251 n.1 (9th Cir. 1992) (Kozinski, J.) (referring to brief's bold-faced font, capital letters, and quotation marks for emphasis, the court wrote that "[w]hile we realize counsel had only our welfare in mind in engaging in these creative practices, we assure them that we would have paid no less attention to their briefs had they been more conventionally written").
16. *Duncan*, 668 F. Supp. at 234.
17. *See In re Harper*, 223 A.D.2d 200, 201–02, 645 N.Y.S.2d 846, 847 (2d Dep't 1996) (per curiam).
18. *In re Steinberg*, 206 A.D.2d 232, 233, 620 N.Y.S.2d 345, 346 (1st Dep't 1994) (per curiam) (citing DR 1-102(a)(4) (22 NYCRR 1200.3 (a)(4)); *see also Kingvision Pay Per View, Ltd. v. Wilson*, 83 F. Supp. 2d 914, 916 n.4 (W.D. Tenn. 2000) (noting that lawyer failed to give credit to source).
19. Linda H. Edwards, Legal Writing Process, Analysis, and Organization 10 (2002).
20. Terri LeClercq, *Failure to Teach: Due Process and Law School Plagiarism*, 49 J. Legal Educ. 236, 245 (1999).
21. *See, e.g.*, Wayne Scheiss, *Ethical Legal Writing*, 21 Rev. Litig. 527, 538-39 (2002) (documenting courts reprimanding lawyers for plagiarism).
22. *See Pagan Velez v. Laboy Alvarado*, 145 F. Supp. 2d 146, 160–61 (D.P.R. 2001).
23. *See generally* Gerald Lebovits, Legal Writer, *You Can Quote Me: Quoting in Legal Writing — Part I*, 76 N.Y. St. B.J. 64 (May 2004); Gerald Lebovits, Legal Writer, *You Can Quote Me: Quoting in Legal Writing — Part II*, 76 N.Y. St. B.J. 64 (June 2004).
24. *See* Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 Suffolk U. L. Rev. 1, 30–31 (1997) (providing example of courts sanctioning lawyers for misquoting).
25. Louis J. Sirico, Jr., *A Primer on Plagiarism*, Second Draft 11 (May 1988).
26. *See Clement v. Pub. Serv. Elec. & Gas Co.*, 198 F.R.D. 634, 635–36 (D.N.J. 2001); *see also DeWilde v. Guy Gannett Publ'g Co.*, 797 F. Supp. 55, 56 n.1 (D. Me. 1992) (reprimanding attorney for copying opposing counsel's memorandum of law).
27. *See Clement*, 198 F.R.D. at 636.
28. *Id.*
29. Local Rule 32(a), *available at* http://www.ca2.uscourts.gov/Docs/Rules/LR32.pdf (last visited June 20, 2005).
30. *See, e.g.*, 22 NYCRR 500.1(k) (Ct. App.); 600.10(a)(1) (1st Dep't); 670.10.1(f) (2d Dep't); 800.8(a) (3d Dep't); 1000.4(h) (4th Dep't).
31. *See Varda, Inc. v. Ins. Co. of N. Am.*, 45 F.3d 634, 640 (2d Cir.1995).
32. Thomas R. Haggard, *Good Writing as Professional Responsibility*, 11 S.C. Law. 11, 11 (May/June 2000).
33. *See, e.g.*, *La Reunion Francaise, S.A. v. Halbart*, No. 96-CV-1445, 1998 WL 1750128, at *1 n.1 (E.D.N.Y. Sept. 28, 1998) (expressing court's disfavor with plaintiff's using "microscopic font and half-inch margins" to circumvent page limit); *LaGrange Mem'l Hosp. v. St. Paul Ins. Co.*, 317 Ill. App. 3d 863, 876, 740 N.E.2d 21, 32 (2000) (reprimanding lawyers for exceeding page limits).
34. *See, e.g.*, *Richmond v. Springfield Rehab. & Healthcare*, 138 S.W.3d 151, 154 (Mo. App. S.D. 2004) (dismissing case because lawyer's briefs did not conform to court's rules); *Frazier v. Columbus Bd. of Educ.*, 70 Ohio St. 3d 1431, 1431, 638 N.E.2d 581, 582 (Ohio 1994) (same).
35. *See N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145, 1146–47 (9th Cir. 1997).
36. *Id.* at 1146.
37. *Id.*
38. *See id.* at 1147.
39. *Id.*
40. *Slater v. Gallman*, 38 N.Y.2d 1, 4–5, 339 N.E.2d 863, 864–65, 377 N.Y.S.2d 448, 450–51 (1975).
41. *See id.* at 5 n.1, 339 N.E.2d at 865 n.1, 377 N.Y.S.2d at 450 n.1; *accord Stevens v. O'Neill*, 169 N.Y. 375, 376, 62 N.E. 424, 424 (1902) (per curiam) (commenting on how typewriters rather than pens allow verbosity).
42. DR 2-104(e) (22 NYCRR 1200.9(e)).
43. DR 7-102(a)(7) (22 NYCRR 1200.33(a)(7)).
44. DR 7-101(b)(2) (22 NYCRR 1200.32(b)(2)).

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: What is your view of the verb *conflate*? I have seen increasing use of this apparently obscure word in both judicial opinions and in print.

Answer: As Attorney Edward A. Steen noted, the verb *conflate* is evolving – and expanding in the process. Originally it was used to describe the practice of biblical authors to combine variant texts into one text. In his 1927 *Introduction to the New Testament*, A.H. McNeile uses it with that meaning: "The custom of the former (S.C. Matthew) was to conflate the language of his sources when they overlapped."

But the meaning of *conflate* has expanded and now means "to blend, mix, merge, or commingle." In the process, it has become somewhat of a fad word. Attorney Steen sent me an illustration of its use in a letter to the editor written by a self-declared "twentysomething." He wrote, "I've been to rock concerts, and I'm not naive enough to conflate the hormonal excitement one feels with a genuine force for political change."

Linguists call the process of expansion in the meaning of words "generalization." One good example of generalization is the word *lady*, which once applied only to the wife of a lord. Then it expanded to indicate any upper-class woman. And due to our democratic tendency to apply honorifics to everybody, we now refer to all women as ladies, tending to denigrate the word *woman*. There are salesladies and cleaning ladies, and even ladies who are in prison. A recent newspaper item recounted that one *lady prisoner* in a local jail had kicked a guard.

The word *thing* has undergone perhaps the greatest generalization. In Old English, that word had a specific meaning. A "thing" was an assembly hall in which lawmakers gathered for legal purposes. Now a *thing* can mean almost anything. Dictionaries define it as "an entity, existing in space or time." We even call *things* items whose names we cannot recall. What word could be broader than that?

On the other hand, words can narrow in meaning over the years, a process called "specialization." Our word *deer* used to mean any wild creature, but it has narrowed so that currently it means only a hoofed ruminant mammal of the family *Cervidae*. The word *fowl* meant "bird," as it did in Chaucer's "The Parlement of Fowles." The word *meat*, borrowed from Old High German, meant "food," and throughout the King James Bible was used with that meaning, as in the phrase "meat and drink."

And the word *corn* meant any grain. When in Keats's "Ode to the Nightingale," we read the touching lines about Ruth, daughter-in-law of Naomi, who "sick for home . . . stood in tears amid the alien corn," we tend to think of poor Ruth mourning in a cornfield. But Keats more likely envisioned her in a field of wheat.

Language changes more quickly today than it used to, and the processes of generalization and specialization occur both suddenly and widely. My thanks to Attorney Steen for an interesting question.

From the Mailbag I:

Attorney Jeffrey S. Goldstein wrote that he was unclear about the distinction between abbreviations and acronyms, discussed in the July/August column. When the abbreviation is pronounced as a word, it is an acronym: NASA and AWOL are examples. When the abbreviation is pronounced as individual letters, it is an abbreviation: BVD, DNA, and UFO. In other words, *abbreviation* is the general term; acronyms are a particular type of abbreviation.

From the Mailbag II:

A reader who does not want to be named has taken issue with my comments in the July/August *Journal* "Language Tips," in which I discussed the ungrammatical dropping of prepositions in statements like, "The privacy problem is another area of the law that there's going to be a lot of attention paid in the future." (Missing is the preposition *to*.) I theorized that some persons drop prepositions because they have been told it is incorrect to place them at the end of sentences, a grammatical rule that has actually never existed. The reader wrote:

> You may be correct that there is no rule against ending a sentence with a preposition. Nevertheless, many readers and listeners are annoyed by a phrase or sentence that ends with a preposition and may discount the substance of a message that comes in a form that they may perceive as bad or careless English.

The reader's point is well taken that the use of "bad or careless English" unfavorably affects the content of speech or a document. Older persons may react more strongly against seeing or hearing a preposition at the end of a sentence, although that usage is widely acceptable in current writing. So in writing to a person whom you would expect to object to a preposition at the end of a sentence, by all means put it in the middle; just don't omit it. That *is* ungrammatical.

One of my favorite short poems on the subject follows. It answers no questions, but it should leave you smiling.

> The Naughty Preposition
>
> I lately lost a preposition;
>
> It hid, I thought, beneath my chair;
>
> And angrily I cried, "Perdition!
>
> Up from out of in under there!"
>
> Correctness is my *vade mecum*,
>
> And straggling phrases I abhor,
>
> And yet I wonder, "What should he come
>
> Up from out of in under for?"
>
> By Morris Bishop

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

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BY GERALD LEBOVITS

Legal-Writing Ethics — Part II

The Legal Writer continues from last month, discussing ethical legal writing.

The Facts

Lawyers must set out their facts accurately. They may never knowingly give a court a false fact,[1] especially a false material fact. Giving a court a false material fact can subject the lawyer to court-ordered and disciplinary sanctions.[2] In an illustrative case, the Appellate Division, Second Department, suspended a lawyer for five years for repeatedly providing courts with false facts.[3]

To write ethically and competently, lawyers must communicate the factual basis of their clients' claims and defenses. One federal district court in New York noted that two types of substandard fact pleadings can lead to dismissal or denial: (1) a pleading written so poorly it is "functionally illegible" and (2) a pleading so "baldly conclusory" it fails to articulate the facts underlying the claim.[4] As the Ninth Circuit explained, "[a] skeletal 'argument,' really nothing more than an assertion, does not preserve a claim. Especially not when the brief presents a passel of other arguments . . . . Judges are not like pigs, hunting for truffles buried in briefs."[5]

Lawyers must choose which facts to include in their pleadings. Omitting important adverse facts is not necessarily dishonest.[6] Lawyers may omit facts adverse to the client's position and focus on the facts that support their arguments. It might be poor lawyering or even malpractice to inform the court of all the cases' pertinent facts. A criminal-defense lawyer, for example, can be disbarred for telling the court the client is guilty without the client's consent.

But lawyers who omit facts lose an opportunity to mitigate adverse facts. Being candid with the court about facts adverse to the client's position, moreover, gives credibility to the lawyer's arguments. And the court is more likely to consider the lawyer's other arguments credible.

To prove they are using facts honestly, lawyers must cite the record.[7] They may not add to their record on appeal new facts not part of the record before the trial court. Thus, the Appellate Division, Second Department, sanctioned two lawyers for including new information in their record on appeal and then certifying that their record was "a true and complete copy of the record before the motion court."[8]

Writing Style

A lawyer's writing must project ethos, or credibility and good moral character: candor, honesty, professionalism, respect, truthfulness, and zeal.[9] To evince good character, lawyers should write clearly and concisely.[10] They should avoid using excessively formal, foreign, and legalistic language. They should also avoid bureaucratic writing. Bureaucratic writers confound their readers with the passive voice and nominalizations.

The active voice: "The plaintiff signed the contract." The passive voice: "The contract was signed by the plaintiff." The double-passive voice: "The contract was signed." Think: "Mistakes were made." A lawyer who uses that phrase is hiding the name of the person who made the mistake. The passive voice is wordy. The double-passive voice omits an important part of a sentence — the "who" in "who did what to whom" — a necessary feature unless the object of a sentence is more important than the subject.

Nominalizations are verbs turned into nouns. Nominalization: "The police conducted an investigation of the crime." No nominalization: "The police investigated the crime." Nominalizations are wordy and make sentences difficult to understand. They can also make writing abstract and conclusory.

Lawyers who combine the passive voice with nominalizations are poor communicators. Worse, they might be trying to disguise, confuse, or warp.[11] The following illustrates how vague writing damages a lawyer's effectiveness and credibility: "The court clerk has a preference for the submission of documents." To correct the sentence, the lawyer writer must do three things. First, remove the two nominalizations. The sentence becomes: "The court clerk *prefers* that documents be *submitted*." Second, remove the double-passive. Who submits? The judge? The police? Without the double passive, the sentence becomes: "The court clerk prefers that litigants submit documents." Third, explain. What documents? Submit them where? With the explanation, the sentence might read: "The court clerk prefers that litigants file motions in the clerk's office."

Subject complements also deceive readers. They appear after the verb "to be" and after linking verbs like "to appear" and "to become." "Angry" is the subject complement of "The judge became angry." This construction hides because it does not explain how the judge became angry. Compare "Petitioner's claim is procedurally barred" with "Petitioner is procedurally defaulted because he did not preserve his claim."

Lawyers shouldn't use role reversal to disguise what happened. A lawyer who reverses roles moves the object of the sentence to the first agent or subject in the sentence. Compare: "Police Shoot and Kill New Yorkers During Riot" with "Rioting New Yorkers Shot Dead."[12]

Skeptical courts can easily spot obfuscation. In one such case, the Tenth

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