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NEW YORK STATE BAR ASSOCIATION

Journal

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Legal Cases for Gender Equality

by Karen DeCrow

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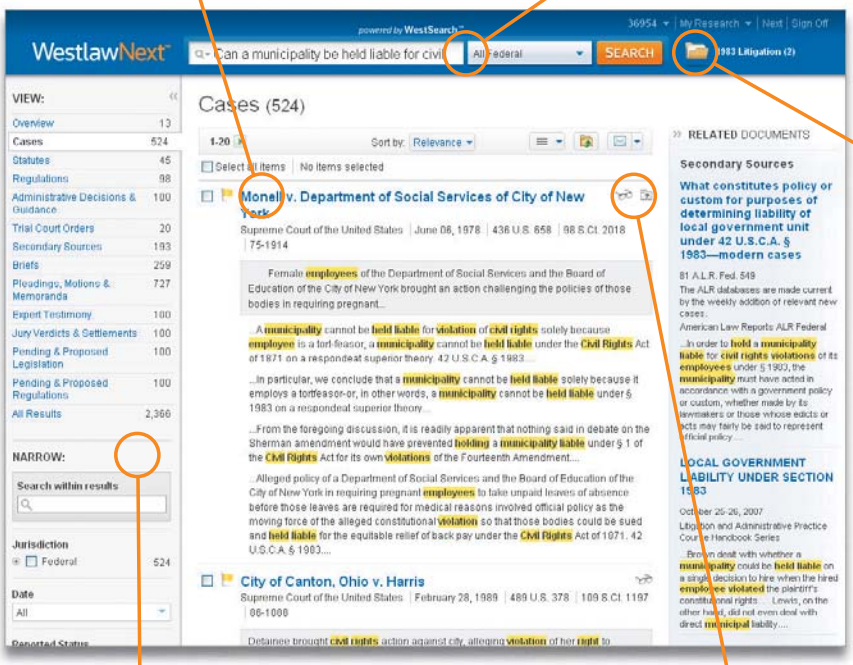

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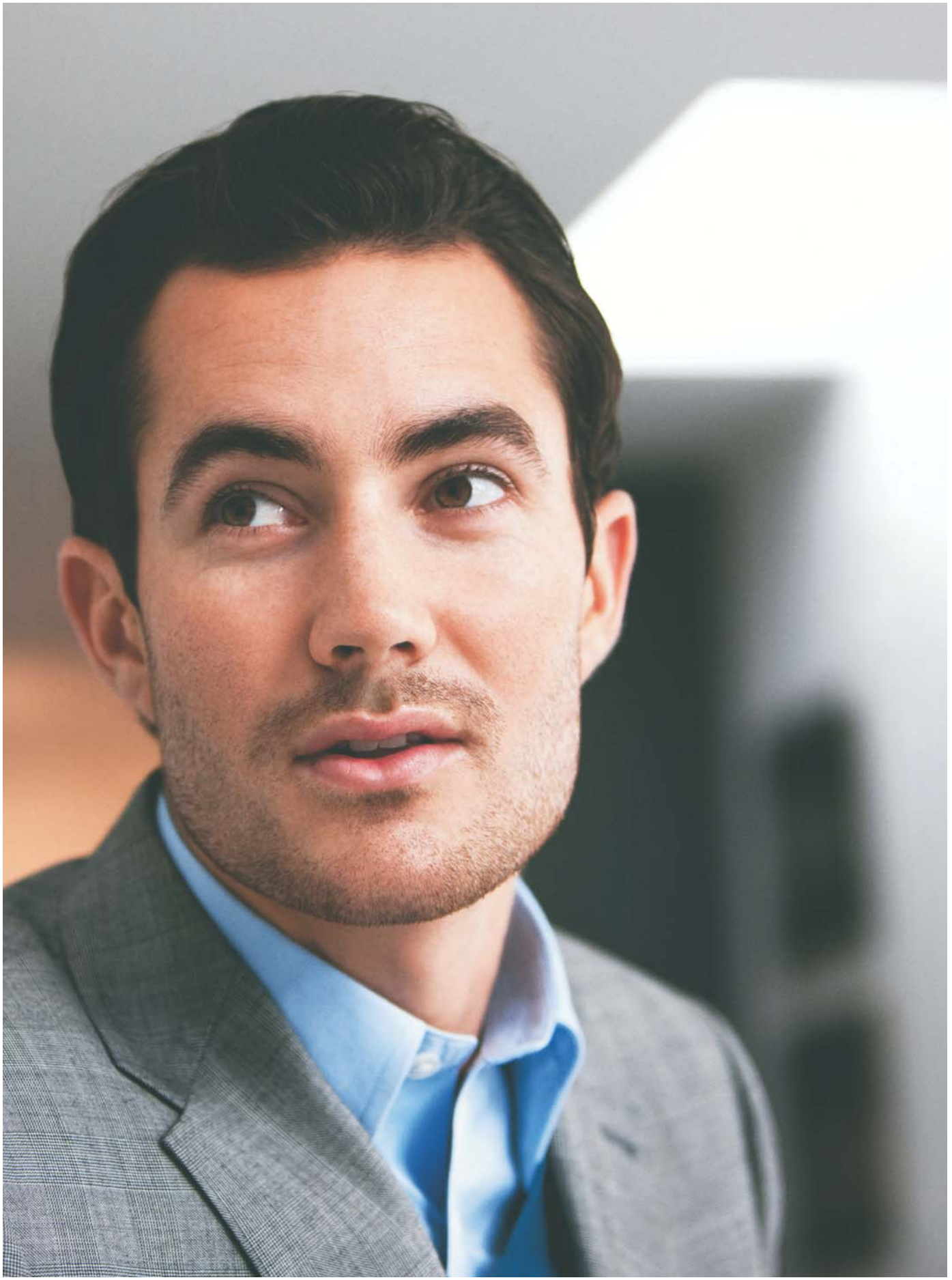

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February 2010

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Journal

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EUGENE C. GERHART
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Editor-in-Chief, 1961–1998

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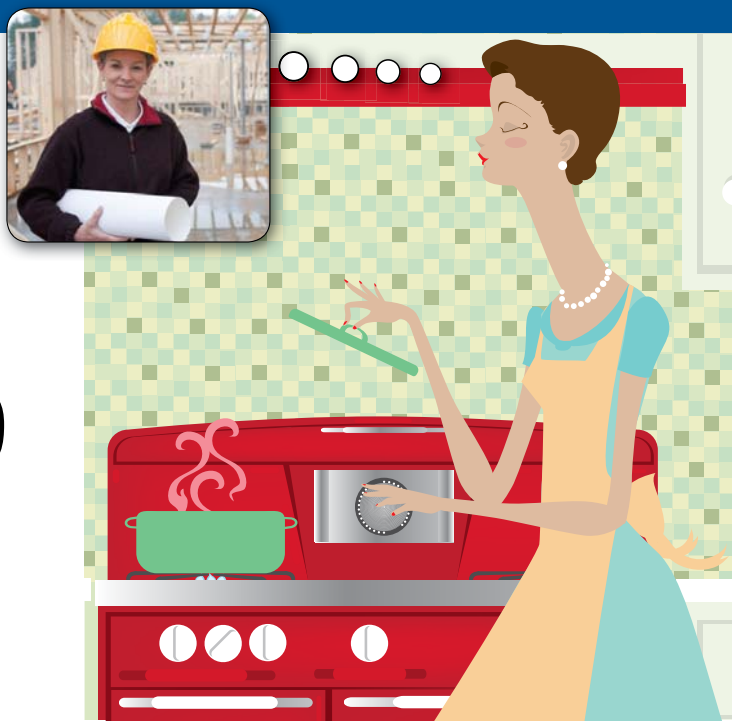

THE OPPORTUNITY TO BE PART OF THE WORLD

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Legal Cases for Gender Equality

BY KAREN DECROW

DEPARTMENTS

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MICHAEL E. GETNICK

Membership Challenge 2010: The Not-So-Impossible Dream

From our bank accounts to our 401ks to our business ledgers, we've all been watching the bottom line for quite some time now, out of concern for what the numbers will show. The situation is no different at the State Bar. We've been closely watching our investments, tracking our expenses, and working hard to do more with less. When I took the oath of office last June, I pledged to maintain the first-class level of services that our members have come to depend upon, as well as focus on the relevant, practical programs and initiatives that our members need during these difficult economic times. I am proud to report that, due in large part to these efforts, we are seeing evidence of sustained membership growth.

In 2007, then-President Kate Madigan issued an ambitious Membership Challenge, with the goal of increasing State Bar membership by 5% and section membership by 10% by 2010. It is Kate's foresight and leadership that put us on track to achieve the sustained growth we are seeing today.

Let's look at the numbers. For a sixth year in a row, our membership has increased. We now have more than 77,000 members, an increase of more than 1.5% over the last year. Moreover, since 2008, 18 sections have increased their ranks, and 14 of our sections have experienced growth ranging from 2.7% to 18.5%. This increase is due to a sustained commitment from State Bar leaders and staff to membership recruitment and retention, high-quality and relevant continuing legal education programs, and new and expanded resources to assist lawyers during the current fiscal crisis. The fact that our membership has grown this past year, despite a historic downturn in the economy that has negatively impacted the legal profession, speaks volumes about the tremendous value that membership in the State Bar provides.

Annual Meeting Is a Success!

The challenges associated with moving Annual Meeting to a new location, coupled with the down economy, were among our concerns as we planned the State Bar's 133rd Annual Meeting. Fortunately, I am pleased to report that our Annual Meeting, which was attended by about 5,000 people who collectively registered for more than 10,000 events, was a tremendous success. Nearly 1,100 attended the Tax Section luncheon – what I am told is the largest gathering of tax attorneys in the nation. Notably, the event featured Internal Revenue Service Commissioner Douglas Shulman, who chose our venue to make the significant announcement that the IRS would begin requiring large corporations to disclose on their tax returns that they are taking tax breaks that could be viewed as unacceptable to the IRS. Clearly, if you are a tax attorney, our Annual Meeting was the place to be.

Other successful section events included the Trusts and Estates Law Section meeting, attended by nearly 500 people, and the Real Property Law Section meeting, attended by more than 300 people. And more than 550 attended the Presidential Summit, which featured expert panels on two important and relevant topics – social media and wrongful convictions. If you missed this standing-room-only program, you can view the webcast at www.nysba.org/2010SummitWebcastArchive.

There were so many phenomenal moments during Annual Meeting week, and it is impossible to share them all, but here are some highlights:

We were honored that Court of Appeals Chief Judge Jonathan Lippman joined us at many events, including our House of Delegates meeting, where he spoke passionately about the Judiciary's budget request, which includes a desperately needed $15 million appropriation for civil legal services and funds for the long-overdue judicial pay increase. As President-elect Steve Younger stated, our Executive Committee voted unanimously to stand side by side with the Judiciary in support of its budget request. We are issuing a call to arms, asking each and every member to write their legislators urging that the Judiciary's budget request be approved. The Judiciary needs the support of the Bar. The annual caseload of the courts is at an all-time high, exceeding 4.7 million filings for the first time. Further, it is expected that the economic downturn will continue to bring additional cases to the courts. If the Judiciary does not receive the funding requested in its budget, it will be forced to reduce its

MICHAEL E. GETNICK can be reached at mgetnick@nysba.org.

workforce, potentially through layoffs, at a time when the courts' workload is increasing. Undoubtedly, this would jeopardize the fair and swift administration of justice. Again, I urge you to write your legislators in support of the Judiciary's budget.

Another highlight of Annual Meeting week was a luncheon honoring our fourth Empire State Counsel class, consisting of more than 1,400 attorneys who provided more than a quarter million hours of pro bono services for the poor. All designees had to provide at least 50 hours of pro bono service in 2009, but many went above and beyond by donating anywhere from 800 to 2,400 hours of free legal services to the poor.

For me, the most memorable moment was presenting Hazard Gillespie, who served as president of the State Bar from 1958–1959, with the Association's highest honor, the Gold Medal. At 99, Mr. Gillespie has been a member of the State Bar for nearly 60 years. He is senior counsel at Davis Polk & Wardwell, where after more than 75 years he still comes to the office every day, devoting his time to pro bono service.

In 1935, on the advice of his soon-to-be father-in-law, Mr. Gillespie gave up a shot at being an Olympic skier to attend Harvard Law School. His achievements as a lawyer are many, but he is most well known for his role in the United States Supreme Court landmark case of *Erie v. Tompkins*, and as the lawyer who backpacked into the Grand Canyon's Inner Gorge in 130-degree heat to collect a crucial piece of evidence from an airline crash. As State Bar president, he brought 347 young lawyers to Washington D.C. to be admitted to the United States Supreme Court, and he took time – from 8 a.m. to 3 a.m. the following day – to personally meet each and every one of them. And, he introduced the concept of traveling across New York to foster relationships with local bar associations and to build the State Bar's membership. As membership chair, he helped raise membership from 11,000 to 15,000 – a 36% increase!

Many people judge someone's career or life's work as to whether they were to the left or to the right. But, those people are looking in the wrong direction. Instead, they should be looking forward like Mr. Gillespie, a person who throughout his life has moved forward. More important, he has moved our profession forward. It was my tremendous honor to recognize him with our Gold Medal.

In introducing Mr. Gillespie, I stated that the best introduction I could give was to say that most achievements thought to be impossible are accomplished by somebody who did not know they were impossible. This brings me full circle, to where I began. When Kate introduced the Membership Challenge, there were many who thought it impossible. And that was before the recession led to significant layoffs within the legal profession. But the important thing is that, despite adversity, we have continued to move forward, listening and responding to our members' needs, ensuring that we remain relevant to our profession, in both the good and bad times. If you have not yet renewed your membership for 2010, I urge you to do so now. Lend your voice to the largest voluntary state bar in the nation; lend your expertise to our important work on behalf of the legal profession. As a 40-year member of this great Association, I can assure you that membership is a solid investment. ■

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

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

The Examination Before Trial – Honing Your Deposition Skills in Tort and Personal Injury Cases
April 7 New York City
April 9 Latham
April 23 Syracuse
April 30 Buffalo; Long Island

Health Law Fundamentals
April 9 New York City
April 16 Albany

Introductory Lessons on Ethics and Civility for 2010
(9:00 am – 1:00 pm)
April 9 Rochester
April 16 Buffalo; New York City
April 23 Albany; Long Island

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

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

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

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

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

Public Sector Law
April 28 New York City
May 20 Albany

Women on the Move
April 29 Albany

+Ethics and Professionalism (Video Replay)
April 30 Canton

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

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

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

Estate Planning After Divorce
May 6 Syracuse
May 7 Westchester
May 26 Long Island
June 2 Albany; Buffalo
June 9 New York City; Rochester

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

Tenant Screening and the Correction of Records
(9:30 am – 11:30 am)
May 11 New York City

Fraudulent Practices in Real Estate
May 13 New York City

Fraudulent Practices in Real Estate
May 13 New York City
June 8 Albany

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

Starting Your Own Practice

May 21 New York City

People's Law School Tenant Screening and the Correction of Records

(6:00 pm – 8:00 pm)

May 24 New York City

Avoiding Ethical Pitfalls for Solo and Small Firm Practitioners

(5:30 pm – 8:30 pm)

May 25 New York City

Advanced Document Drafting for the Elder Law Practitioner

June 2 Westchester
June 3 New York City; Syracuse
June 8 Long Island
June 10 Buffalo
June 11 Albany

Ethics and Professionalism

(9:00 am – 12:35 pm)

June 4 Rochester
June 7 Westchester
June 9 New York City
June 10 Long Island; Syracuse
June 17 Albany
TBD Buffalo; Ithaca

Representing a Political Candidate

(9:00 am – 1:00 pm)

June 18 Westchester
June 22 Albany
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June 24 New York City; Syracuse

2010 Insurance Coverage Update

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June 25 Buffalo; New York City

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Karen DeCrow thanks her law clerk, Robert S. Webb III, a second-year student at the Syracuse University College of Law, for his editorial assistance in the preparation of this article. She also thanks Robert Seidenberg, M.D., with whom she explored and shared the ideas included in this article, for his insights. Ms. DeCrow's bio is on page 19.

The Opportunity to Be Part of the World

Legal Cases for Gender Equality

By Karen DeCrow

Introduction

In recent decades sex discrimination has emerged as a prominent area of legal practice. Law schools teach courses on the subject, law firms have departments devoted to the practice, and law journals publish articles that illuminate the topic.

Gender roles are arbitrary and capricious. Sex role stereotypes have no place in society and certainly no legitimate place in our laws. The goal should be the eventual blurring of gender roles.

As attorneys we must each take a deep breath and put aside what we were taught as children, that males and females are different and their roles cannot be interchangeable in work or in play. Humans do differ greatly, one from the other, but not on the basis of sex.

For centuries the main stereotype has been that men rule the world outside the home and that women belong to and in the home. If feminism has accomplished one goal, it is to liberate women from that stereotype. Or, as the late Bella Abzug, member of Congress, put it, "a woman's place is in the house, and in the senate."

Marriage

For many of us, the stereotype is still too close. It is less than 40 years since the Supreme Judicial Court of Massachusetts decided *Green v. Commissioner of Corporations and Taxation*.[1] In *Green*, the court held that income received by Mrs. Green while she lived in New Hampshire was subject to Massachusetts tax by virtue of the established common law rule "that a wife's domicile, absent some marital wrong committed by her husband, follows that of her husband."[2]

A few years earlier, in *Meeker v. Meeker*,[3] a wife was forced to file for divorce in Pennsylvania, a state where

she did not live, because that is where her husband lived at the time. The Supreme Court of New Jersey held that the Meekers could not file for divorce in New Jersey because, although the wife lived there (and both had lived there at the time of their marriage), the husband now lived in Pennsylvania.

In 1964, in *Schneider v. Rusk*, the U.S. Supreme Court upheld a statute that provided that although an American male did not suffer loss of citizenship during his marriage to a foreign citizen, an American woman did.[4]

These decisions reflected a centuries-old tradition that determined not only the legal, but the social and economic conditions of marriage. Women were generally considered the property of their husbands. And, of course, one can move property at will.

Jury Duty

In 1961, in *Hoyt v. Florida*,[5] the U.S. Supreme Court ruled:

> Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civil duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.[6]

In 1970, in *DeKosenko v. Brandt*,[7] the plaintiff attempted to overturn N.Y. Judiciary Law § 599(7), which permitted women to claim exemption from jury duty because of their gender. The judge held:

> Her lament should be addressed to the "Nineteenth Amendment State of Womanhood" which prefers cleaning and cooking, rearing of children and television soap operas, bridge and canasta, the beauty parlor and shopping, to becoming embroiled in plaintiff's problems.[8]

Hoyt was overruled in 1975 by *Taylor v. Louisiana*,[9] when the Supreme Court held that the systematic exemption of women from juries constituted a violation of a rape defendant's Sixth Amendment right to a jury representative of the community.

In 1979, in *Duren v. Missouri*,[10] the Court nullified the option for women to decline jury duty because no such option was available to men.

Employment: In the Sky

The occupation of flight attendant used to have glamorous connotations. The "stewardess" got to travel the world. For a young person brought up in a small town or on a farm this was a dream come true. There was no shortage of applicants for every opening.

The job was open to women only, and whites only. No person of color need apply. Candidates had to be slim. There were weight requirements. They had to be single. Married women were excluded. And, they were supposed to be beautiful.

The job description sounded more like that of a film star rather than a person in charge of the safety of passengers. In *Diaz v. Pan American World Airlines, Inc.*,[11] expert witnesses testified that the job was, of necessity, held by women.

> Pam Am sought . . . to explain in psychological terms . . . [why] most airline passengers of both sexes prefer to be served by female stewardesses. . . . Th[e] environment, said Dr. Berne [their expert], creates three typical passenger emotional states with which the air carrier must deal; first and most important, a sense of apprehension; second, a sense of boredom; and third, a feeling of excitement. Dr. Berne expressed the opinion that female stewardesses, because of the nature of their psychological relationship as females to persons of both sexes, would be better able to deal with each of these psychological states. . . . He explained that many male passengers would subconsciously resent a male flight attendant perceived as more masculine than they, but respond negatively to a male flight attendant perceived as less masculine, whereas male passengers would generally feel themselves more masculine and thus more at ease in the presence of a young female flight attendant. He further explained that female passengers might consider personal overtures by male attendants as intrusive and inappropriate, while at the same time welcoming the attentions and conversations of another woman. He concluded that there are sound psychological reasons for the general preference of airline passengers for female flight attendants.[12]

Flight attendants had to be under the age of 32. This was supposedly because most airline passengers were businessmen who presumably liked being waited on by young women. This requirement had no rationale – the flight attendant was not there to be a date, she was there to save your life, when necessary.

Eleven years after *Diaz*, *Wilson v. Southwest Airlines*[13] established the job description for the job of flight attendant. It is not to make male passengers feel more masculine (whatever that might mean). It is to help ensure the safety of passengers.

Wilson concerned a group of men who wanted to be flight attendants for Southwest Airlines. They filed a class action suit against the company for hiring only women as flight attendants. Southwest defended its policy by stating that "female sex appeal" was a vital part of the corporate image. (Southwest's brand was the "love" airline.) The court held that what is essential is whether men are equally able to perform the tasks needed for the "essence" of the airline's business – the safe transportation of passengers. Thus, the finding was that Southwest's policy was illegal. The men won their case.

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Continued from Page 12

Other challenges involved pregnant flight attendants who did not choose to be grounded. Eventually, they were allowed to decide when to stop flying, after consulting their physicians; corporate headquarters could not make the determination. Another challenge was to the strict weight requirements. When the job of flight attendant was still equated with that of model or movie star, the women had to be stick thin. In Europe, however, I noted that the flight attendants were not necessarily thin, and not necessarily glamorous. This gave me the courage to attack the requirements as ridiculous.

Another challenge was to the strict weight requirements.

Decades later, I saw the news footage of the jet that had crash landed into the Hudson River after an unnerving encounter with a flock of birds. The pilot, Capt. Chesley Sullenberger III, was the hero, no doubt. But standing with him were the flight attendants who had risked their lives to guide each passenger to safety. It was obvious that these were seasoned employees who had taken advantage of seniority to work a desired flight. They were definitely middle-aged women. Their experience saved lives!

Employment: Unromantic, but Well Paying

It's a very hot summer day. I sit in my air-conditioned car, waiting at a road stop. Repair work is being done, and we are down to one lane. Finally a worker in the crew waves us along. I note that the person is female. She is sunburnt and hot. This is hard work.

I watch her and think about several cases I have brought to admit women into various highway departments. Should I feel guilty? I say to her, "You could be in a nice air-conditioned office."

"Right," she says. "Making one-quarter of what I am earning now!" *Res ipsa loquitur*.

> Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing.[14]

Lorena Weeks won the right to be a switchman at Southern Bell Telephone Company. Her case used Title VII of the Civil Rights Act of 1964 to overturn a "protective" law that prohibited women from lifting more than 30 pounds on the job. Most cases designed to bring women into the work force in jobs that require difficult physical labor are based on *Weeks*. It is the key case on bona fide occupational qualification.

Ms. Weeks charged that the telephone company would not consider her for the job of switchman purely on the basis of her sex. The court found that the company violated the Civil Rights Act when it refused to consider a female employee's application since the employer had failed to meet the burden of proving that sex is a bona fide occupational qualification and that females would be unable to be safe and efficient switchmen. In other words, Southern Bell could not prove that females would be unable to work as safe and efficient switchmen.

Southern Bell's contention that emergency work could require Lorena Weeks to use heavy equipment or be subject to late-hour call-outs was a speculative smoke screen for discrimination.

In 1969 the Equal Employment Opportunity Commission (EEOC) (the federal administrative agency which is charged with enforcing the Civil Rights law) held that state protective laws have ceased to be relevant to our technology or to the expanding role of the female in our economy. Because such laws tend to discriminate rather than protect, the Commission will not regard them as a defense to a Title VII charge.[15]

Performing tough, even unpleasant, work is worth the candle if it pays enough. As the court wrote: "Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks."[16]

Motherhood: Women, Children – and Fathers

Irony abounds on the subject of motherhood. On the one hand, a young girl is taught from the time she is a toddler, and a baby doll is placed in her arms, that the highest calling is that of a "mother." Young boys are not taught that their highest calling is that of father. If you doubt this, give a baby doll as a gift to a boy. Note the reaction of the parents. Perhaps panic.

Once a woman has her first child, her situation as an employee changes dramatically. Employment handbooks include the right to parental leave. (This is often called maternity leave.) But the subtle impression of a woman who has a baby is that she will not be as devoted to the job. Her career path may be littered with road blocks. She may be kept out of the loop or not given access to assignments with the prime clients or customers.

Here is what the U.S. Supreme Court held in 1908, in *Muller v. Oregon*.[17] It was the law of the Court and the law of the land until 1971:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in

> the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to have injurious effects upon the body, and as healthy mothers are essential to rigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.[18]

Thus, the Supreme Court classified women as mothers – or potential mothers. What was at stake here was nothing less than the future of the human species. *Muller* continues:

> Still again, history discloses the fact that woman have always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. . . . Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of rights.[19]

Limitations on personal and contractual rights of women are necessary.

> Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends on him . . . that her physical structure and proper discharge of her maternal functions – having in view not merely her own health, but the well-being of the race – justify legislation to protect her from the greed as well as the passion of man.[20]

The *Muller* language has been cited in excluding women from juries,[21] in allowing different treatment for men and women in licensing occupations,[22] and in keeping women out of state-supported colleges.[23]

Finally, in 1971, the U.S. Supreme Court untied the tight knot between women and children. In *Phillips v. Martin Marietta Corp.*,[24] the Court ruled that it is contrary to Title VII of the Civil Rights Act of 1964 for a company to refuse to hire a woman because she has pre-school-aged children when it does not refuse to hire men who have pre-school-aged children. This is the first Title VII case to go to the Supreme Court. This is the beginning of the acknowledgment of fatherhood (men also are parents).

Unfortunately, it is still the case that until and unless the care of children, and the housekeeping tasks, are accepted as responsibilities for women *and* men – success on the job will be for unmarried women, superwomen, and exhausted women only.

Case Files

I have been involved in a large number of women's rights cases. Here are two that are particularly close to me.

The Environment: Boys AND Girls Are Welcome

> That the operation of Camp Rushford for boys only, under the direction of the New York State Department of Environmental Conservation, be terminated as soon as the funds are available to make it co-educational: for the 1981 camping season, if possible, and if not, for the 1982 camping season.[25]

and . . .

> [t]hat the New York State Division of the Budget be directed to provide sufficient funds to convert Camp Rushford from a boys only camp to one providing facilities for both boys and girls.

Thus ordered the Hon. John O'C. Conway, Supreme Court of the State of New York, on March 9, 1981.

This saga incorporated every sex role stereotype imaginable and included not only much sound and fury, but also considerable humor. It started when I was approached by Lorca Sheppard, a 12-year-old student, and her father. Lorca, who was named after the Spanish poet, Federico Garcia Lorca, had seen a brochure advertising the state-run Rushford Environmental Education Camp for Boys, in Allegany County. She wanted to attend, but was excluded because she was female. Advertisements described the camp as open to boys aged 12 to 14 years old from Central and Western New York.

"I didn't think it was fair," she said. "It's a state camp. Everybody should be able to go to it."[26]

At the time Lorca was in seventh grade at the Jamesville-Dewitt Middle School. She told journalist Robert W. Andrews that her participation in the lawsuit grew out of a general conviction that women are too often at an unnecessary disadvantage in American society. She stated, "I think things should not lean so much towards one portion of the population . . . , towards men."[27]

She cited politics and the police force as examples. "I notice there aren't many women in elected positions. And there are not many women police on patrols. There should be," she said.[28] Even at her own school, she noted, the boys soccer team gets to play more games with other schools than the girls do. Lorca also said that most of her friends at school shared the same convictions she had about women's rights.

I'd known Lorca for some time. When she was six – and I was the National President of NOW – she participated in a protest, sponsored by NOW, against the Miss America Pageant in Atlantic City, New Jersey. We were conducting a mock beauty pageant, and I dressed as Wonder Woman and Lorca dressed as Little Wonder Woman. A photograph of the two "Wonder Women" was published in *People* magazine.

So, we began the legal fight. First, the argument was, where would the campers sleep? Girls can't be sleeping in the same bunk as the boys, we were told. We made several suggestions: Since there were four sessions (each two weeks long), they could alternate sessions for the boys and the girls. Or, they could divide the facilities into a boy's section and a girl's section, and they could go to camp together.

The next major argument was over bathroom and shower facilities. Were we suggesting that boys and girls shower together? We were not. We suggested they could create single-sex bathrooms from the existing boy's bathrooms.

Then it was argued that it was simply too dangerous for girls to go away from home. That argument was too silly even to address.

Because the camp's name included the word "education," we argued that limiting participation to boys is a violation of Title IX of the federal education act, in addition to being a violation of New York State education law.

On January 28, 1981, the *New York Times* ran an article: "A 12-year old girl has won her case against a state-operated summer camp for boys."[29]

On March 18, 1981, the *New York Times* continued its coverage:

> Wonder Woman and Little Wonder Woman have struck again, this time winning a victory over New York State in their struggle against sexism: The dynamic duo are Karen DeCrow, a lawyer and well-known feminist, and her young protegee, Lorca Sheppard, a 12-year-old Syracuse girl, who, it may be recalled, appeared in Wonder Woman costumes in Atlantic City six years ago to protest the Miss America Pageant.
>
> Now, as a result of a new effort, conducted in civilian clothes in State Supreme Court in Syracuse, New York State has been ordered to accept girls at Camp Rushford, an all-boys environmental camp in Allegany County.[30]

Then it was argued that it was simply too dangerous for girls to go away from home.

In addition to violating Title IX, the state was in violation of the provisions of § 40-c of the Civil Rights Act of the state of New York. Lorca Sheppard's victory was noted nationwide. For example, Jane Pauley, then the co-host of the NBC *Today* show, wrote: "Congratulations! Camps are for kids!"[31]

Lorca made history but didn't get to attend environmental education camp: by the time New York State integrated the facility, she was too old for the program.

Social Club, or a Part of Doing Business?

For many decades women were excluded from service clubs, a major part in the business life of any city, large or small. In Minnesota, the Minneapolis and St. Paul chapters of the Jaycees challenged the national organization's male-only policy by admitting women as full members.

The national organization penalized the chapters; the chapters filed discrimination claims. The national Jaycees claimed that as a private club it had a First Amendment right to exclude women, and that the Minnesota law prohibiting discrimination in places of public accommodation did not apply. The U.S. Supreme Court disagreed.[32] The Court held that the unselective membership policy and the large size of the Jaycees organization took it out of the category of a private group whose right to association is protected under the Constitution. Minnesota civil rights law applied; the Jaycees were required to admit women.[33] And in 1987 the U.S. Supreme Court applied the California law banning sex discrimination in any "business establishment" to the Rotary Clubs in the state.[34]

Why so much fuss over private clubs? What is so terrible if men want to gather, with no girls allowed? What made the grown-up version of the tree house such a target of lawsuits?

First of all, business is conducted in these clubs. Contacts are made. You need an accountant, a lawyer, a house painter? Find the right person at your Tuesday luncheon. But this issue goes beyond business and money, although that certainly is a motivation for going into court. What women were asking for, were demanding, were taking to court, was the opportunity to be part of the world. They wanted the opportunity to be central figures – outside of the home.

One such person is Bonnie Orendorff.[35] Seventeen years after the U.S. Supreme Court required the Jaycees to admit women as members, she was denied membership by the Rome, New York, Elks Lodge on January 4, 2001.

Although many local Elks groups were integrated by gender, this was one of the groups which remained single sex.

On Friday nights, Bonnie Orendorff prepared fried fish dinners for the men of the Rome Elks Lodge. She would then join her coworkers for a drink at the small bar where the wives of Elks and female lodge employees could socialize.[36] Down the hall at the lodge's main bar,

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the Rome Elks' exclusively male membership drank and talked; women were not allowed.

Orendorff knew that other Elks Lodges were moving towards gender equality. In fact, in 1995, the National Fraternal Organization had ordered its chapters to start admitting women.[37]

Hoping they could belong to the same club as their husbands and fathers, Orendorff, Deborah Lince-Milotte, Peggy Elia, and Laura Elia submitted their first applications to join the Rome Elks Lodge in 1999 and received the first of three rejections.

Bonnie Orendorff's husband, Roger, who had been an Elk for 20 years, supported his wife's desire to join the organization. He said of the Lodge's assertion that it was selective in admitting members, "that he ha[d] never seen a male's application denied in his [20] years as a member of the Rome lodge."[38]

Orendorff went on an Internet letter-writing campaign and gained support from the New York Civil Liberties Union. On April 19, 2001, she brought a complaint against the Elks before the New York State Division of Human Rights. On June 19, 2001, the Division of Human Rights dismissed the complaint.[39] The determination had relied on an interpretation of New York law: "Respondent is incorporated under the benevolent orders law and is therefore distinctly private and not a place of public accommodation."[40]

Bonnie Orendorff brought an Article 78 proceeding that August, seeking review of the determination by the New York State Division of Human Rights, a declaration that Executive Law § 292(9) is unconstitutional, and a review of the Rome Elks decision to deny her membership.[41]

Bonnie Orendorff's attorneys – I represented her, as a cooperating attorney with the New York Civil Liberties Union, as did lawyers from the American Civil Liberties Union Women's Rights Project – sought to change the construction of the Benevolent Orders Law and to have the New York rule consistent with the U.S. Supreme Court opinions in the Jaycees and Rotary cases.

In his decision of January 9, 2003, Judge Robert F. Julian enunciated what is the overall rule in New York State: "The Human Rights Law is to be construed liberally to accomplish the purposes enumerated therein."[42]

He concluded, "It was arbitrary, capricious and an abuse of discretion" for the New York State Division of Human Rights to have dismissed the complaint of Bonnie Orendorff.[43]

At first glance this case, like so many others, seems to have been merely a tangled web of procedural wrangling. But it has strong substantive importance in the history of women's efforts to be full participants in the outside world.

To my pleasure, Bonnie Orendorff kept in contact with me. Eventually she and her husband moved from Rome, New York, to Florida. She called to tell me the following: Shortly after they moved, she and her husband went to a fish fry being hosted by the Elks in their Florida town. When Bonnie introduced herself, many people in the room recognized her name. That lodge, which had many members, greeted her like a celebrity, a hero. They gave her a standing ovation.

Conclusion

It may be a source of amusement, or it may be a source of horror, but as recently as 1872,[44] the U.S. Supreme Court declared that it was God's will that women not be allowed to practice law:

> It is also to be remembered that female attorneys at law were unknown in England, and a proposition that a woman should enter the courts of Westminster Hall in that capacity, or as a barrister, would have created hardly less astonishment than one that she should ascend the bench of bishops, or be elected to a seat in the House of Commons.
>
> . . .
>
> That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth. In view of these facts, we are certainly warranted in saying that when the legislature gave to this Court the power of granting licenses to practice law, it was with not the slightest expectation that this privilege would be extended to women.

This is no longer the law in the United States. But even laws which have changed are still in our consciousness. Both women and men have these stereotypes and patterns in their heads.

Are changes in the law due to political modifications, or is it the converse? Does the law, in existential fashion, reverse our behavior?

Women's rights are part of the inexorable march of human rights across the planet, toward equality and justice. My goal in writing this article is to inspire readers to think more about the issues of equality between women and men, girls and boys. Think hard when an employment situation occurs which has a scent of differential treatment. (My test is if the fact pattern would have been different if the genders were reversed, it may be sexist.) My goal is to encourage parents to raise their sons and daughters as humans – not as separate species.

I urge readers to include gender cases in their legal work. If you represent employers, help them to follow the state and federal civil rights laws. This is not only the moral and ethical thing to do, it is good business. If they follow the law they will not be sued. They will be spared anguish, and they will save money.

Here's another suggestion: take an employment discrimination case representing a plaintiff. You will gain an education in how the corporate system operates in America (and increasingly, because of multi-national corporations, in the world). You will learn economics and sociology. And, based on my 36 years of practice, I can say – without hesitation – you will have a strikingly pleasurable time. ■

1. 364 Mass. 389, 305 N.E.2d 92 (Mass. 1973).
2. *Id.* at 391.
3. *Meeker v. Meeker*, 52 N.J. 59, 243 A.2d 801 (N.J. 1968).
4. 377 U.S. 163 (1964).
5. 368 U.S. 57 (1961).
6. *Id.* at 61–62.
7. 63 Misc. 2d 895, 313 N.Y.S.2d 827 (Sup. Ct., N.Y. Co. 1970), *aff'd*, 36 A.D.2d 796, 318 N.Y.S.2d 915 (1st Dep't 1971).
8. *Id.* at 898.
9. 419 U.S. 522 (1975).
10. 439 U.S. 357 (1979).
11. 311 F. Supp. 559 (S.D. Fla. 1970), *rev'd on other grounds*, 442 F.2d 385 (5th Cir. 1971).
12. *Id.* at 565–66.
13. 517 F. Supp. 292 (N.D. Tex. 1981).
14. *Weeks v. Southern Bell Tel. & Telegraph Co.*, 408 F.2d 228, 236 (5th Cir. 1969).
15. *See* 29 C.F.R. § 1604.1(b)(2).
16. *Weeks*, 408 F.2d at 236.
17. 208 U.S. 412 (1908).
18. *Id.* at 421.
19. *Id.* at 421–22.
20. *Id.* at 422.
21. *Commonwealth v. Welosky*, 276 Mass. 398, 414, 177 N.E. 656 (Mass. 1931).
22. *State v. Hunter,* 208 Ore. 282, 285, 300 P.2d 455 (Or. 1956); *Quong Wing v. Kirkendall*, 223 U.S. 59, 63 (1912); *People v. Case,* 153 Mich. 98, 101, 116 N.W.2d 558 (Mich. 1908).
23. *Allred v. Heston*, 336 S.W.2d 251 (Tex. Civ. App. 1960).
24. 400 U.S. 542 (1971).
25. *Sheppard v. Dep't of Envt'l Conservation, State of N.Y., & Div. of the Budget*, Index No. 80-6993 (N.Y. 1981).
26. Robert W. Andrews, *Area Feminist, 12, Sues Boys Camp*, Post-Standard, Dec. 25, 1980, at Dl.
27. *Id.*
28. *Id.*
29. Associated Press, *State Camp for Boys Told to Open to Girls,* N.Y. Times, Jan. 28th, 1981, at B7.
30. Alan Krebs & Robert McG. Thomas, Jr., *Victory Declared in Battle to Make Camp Coed*, N.Y. Times, Mar. 18, 1981, at C26.
31. Letter from Jane Pauley to author (Mar. 16, 1981) (on file with author).

Karen DeCrow

Karen DeCrow is a nationally recognized attorney, author, activist, and leader of the women's movement. She has devoted her legal career to cases promoting gender equality, eliminating age discrimination, and protecting civil liberties.

Born in Chicago, Ms. DeCrow earned her bachelor's degree from the Medill School of Journalism at Northwestern University in 1959. Over the next 10 years, she worked as a writer and editor, and she became active in the women's movement. In 1967, Karen founded the Syracuse Chapter of the fledgling National Organization for Women (NOW), and in 1974, she was elected National President of NOW, serving for two terms from 1974 to 1977. She is author of *Sexist Justice: How Legal Sexism Affects You* (NY Random House, 1974) and co-author of *Women Who Marry Houses; Panic and Protest in Agoraphobia* (with Robert Seidenberg, M.D.; NY McGraw-Hill Book Co., 1983). She has also written many articles and lectured worldwide on civil rights, feminism, parental rights, gender rights, and the Equal Rights Amendment.

In January 2009, Ms. DeCrow was the 19th recipient of the New York State Bar Association's Ruth G. Schapiro Award, which recognizes noteworthy contributions to the concerns of women. That October she was inducted into the National Women's Hall of Fame in Seneca Falls, New York. Ms. DeCrow has received innumerable other honors, including the "2008 Distinguished Lawyer Award" from the Onondaga County Bar Association and a "2009 George Arents Award" from Syracuse University. She earned her law degree from Syracuse University College of Law in 1972.

32. *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).
33. *Id.*
34. *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).
35. *Bonnie D. Orendorff v. Benevolent & Protective Order of Elks Lodge No. 96 & N.Y. State Div. of Human Rights*, 195 Misc. 2d 53, 753 N.Y.S.2d 703 (Sup. Ct., Oneida Co. 2003).
36. Aaron Gifford, *Women Turn to Courts to Join Rome Elks Club Other Central New York Lodges Allow Women as Members and Leaders*, Post Standard (Syracuse), July 18, 2001, at Al.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Bonnie D. Orendorff*, 195 Misc. 2d at 55.
41. *Id.*
42. *Id.* at 62. *See Arnot Ogden Mem'l Hosp. v. State Div. of Human Rights*, 67 A.D.2d 543, 546, 416 N.Y.S.2d 372 (3d Dep't 1979); *N.Y. State Div. of State Police v. H. Carl McCall*, 98 A.D.2d 921, 470 N.Y.S.2d 916 (3d Dep't 1983).
43. *Bonnie D. Orendorff*, 195 Misc. 2d at 62.
44. *Bradwell v. The State*, 83 U.S. 130 (1872).

BY DAVID PAUL HOROWITZ

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

We All Do It

I do it. You do it. Newly minted attorneys do it. Legends of the bar do it. Even judges can do it.

What is "it"? Use "ss:" at the start of affidavits, immediately below the caption, that's what. As in:

State of New York)
)ss:
County of New York)

Now ask yourself: Have you ever seen an affidavit without the "ss:"? I bet you haven't. Until recently, I hadn't either. Every New York state court affidavit I have ever seen has had it. Every federal court affidavit I have ever seen has had it. Every affidavit from every other state I have ever seen has had it. Even affidavits from Louisiana have had it.

Think about the number of affidavits you draft every year. Then multiply that by the 1,180,386 attorneys in the United States.[1] That's a staggering number of affidavits, generated each and every year, going back hundreds of years. And each one has "ss:" on it.

So What?

So what?

I don't know what it means. I'll bet you don't know what it means. Neither do those newly minted attorneys nor legends of the bar. Even judges don't know what it means.

Recently, when I did come across an affidavit *sans* "ss:," I began what I thought would be a quick search for the meaning of the term, and its legal significance (in order to criticize its omission). I was simply looking for confirmation of the English translation of the Latin phrase that I had been told many years ago "ss:" abbreviated.

As a newly minted attorney (in the days when law offices still used "red-lined" paper for original documents filed with the court or served upon adversaries), I was blessed with the best teacher a neophyte lawyer can have: a skilled, seasoned, and no nonsense (and what today would be referred to as "old school") legal secretary, one Kitty Roth.[2] In addition to the finer points of grammar, proper salutations, and the difference between "cc:" and "bcc:" (back in the days when people actually used carbon paper), Kitty once told me that "ss:" stood for what, to my untrained ear, sounded like "*situs siculi*." Remembering from law school that "*situs*" was Latin and had something to do with geography, and being ashamed to ask what "*siculi*" (*sic*) meant, I made a noise intended to convey "I knew that already," and returned to my grunt work.

With Kitty's "*situs siculi*" as my starting point, I did an online search for the Latin words.[3] I quickly confirmed that I was correct in my understanding of "*situs*": "The manner of lying, the situation, local position, site of a thing."[4] "*Siculi*" was more problematic. There is a Latin word "*siculi*," but it means "The Siculians or Sicilians, an ancient Italian people on the Tiber, a portion of whom, driven thence, migrated to the island of Sicily, which derived its name from them."[5] While I am second to no one in my admiration of Sicilian culture and cuisine, I could not believe that affidavits in the United States (not to mention our mother country) for hundreds of years have borne a reference to the ancient people of Sicily. Realizing I must have misunderstood Kitty, I searched for Latin words with a similar spelling and sound. "*Sicubi*" was a good candidate and seemed to have a corresponding, albeit slightly redundant, definition: "if in any place, if anywhere, wheresoever."[6] Other candidates included "*sicut*" (*so as*, *just as*, *as*)[7] and "*sicubi*" (*a little dagger*).[8]

By now thoroughly distracted from the legal work at hand, I turned to a legal dictionary for the answer. *Ballentine's Law Dictionary* defined "ss." as:

> Abbreviation of scilicet, used most often in the caption of affidavits, for example:
> State of New York County of Monroe }ss:

Scilicet? Back to *Ballentine's*:

> Scilicet: To-wit; that is to say, abbreviated "ss.," "s.," or "scil." An allegation of fact in a pleading in form dispensing with proof of the precise circumstance alleged.

Helpful? I don't know about you, but I really don't understand the definition. It may mean the practice of setting forth, in the United States, a state and county rather than the "precise" location where an affidavit was executed. Fortunately, *Ballentine's* contains a cross-reference for "ss:"

> TERM: apud London videlicet, in parochia Beatae Mariae de arcubus, in ward de Cheap. TEXT: At London, that is to say, in the parish of St. Mary-le-bow, in the ward of Cheap. An old form for designating the venue. ALSO: See SS.

Well, at least we are back in the world of venue, which appears to make sense in the manner in which "ss:" is used in affidavits (although

the cross-reference leads you back to "To-wit."

Time for a new dictionary. *Black's Law Dictionary*[9] offers the following:

> ss. *abbr.* 1. Sections. 2. *Subscripsi* (i.e., signed below). 3. Sans (i.e., without). 4. (Erroneously) scilicet. "Many possible etymologies have been suggested for this mysterious abbreviation. One is that it signifies *scilicet* (= namely, to wit), which is usually abbreviated *sc.* or *scil.* Another is that *ss.* represents '[t]he two gold letters at the ends of the chain of office or "collar" worn by the Lord Chief Justice of the King's Bench . . . .' Max Radin, *Law Dictionary* 327 (1955). Mellinkoff suggests that the precise etymology is unknown: 'Lawyers have been using *ss* for nine hundred years and still are not sure what it means.' David Mellinkoff, *The Language of the Law* 296 (1963). In fact, though, it is a flourish deriving from the Year Books — an equivalent of the paragraph mark: '¶ .' Hence Lord Hardwicke's statement that *ss.* is nothing more than a division mark.

So much for *scilicet*.

Don't Feel Bad

You've used "ss:" your whole professional life. Could it really be that all this time you have incorporated a meaningless element into every affidavit you have ever drafted? Yes, but don't feel bad: you are in good company. As the leading legal lexicographer of our generation, Bryan A. Garner, explains: "An early formbook writer incorporated it into his forms, and ever since it has been mindlessly perpetuated by one generation after another."[10]

Why Do I Do It?

Now firmly convinced that "ss:" is a meaningless historical artifact, I continue to include it in affidavits I draft. Why? Fear. Certain that "ss:" has no known meaning, and hence can have no legal significance, I could draft affidavits, *sans* "ss:," confident that the omission should not have the slightest impact on the admissibility of my affidavits, while making certain to include the venue of the affidavit. And yet, I would not be able to sleep having drafted such an affidavit for fear that a clerk would reject the affidavit, that a judge would strike the affidavit from the record or elect not to consider the affidavit a competent proof in support of whatever application gave rise to its submission. Small consolation to my client if an appeal was required to prove my point, something the respondent in *Babcock v. Kuntzsch*[11] learned over 100 years ago. The issue? "The principal contention of the appellant is that the affidavit thus used was a nullity, because the venue therein did not contain the words 'City of Syracuse,' and the letters 'ss.,' and that the court had no power or jurisdiction to amend the affidavit by inserting them."[12] When the issue was raised at the trial level, the court denied the application and ordered the affidavit be amended.[13] The Fourth Department made clear that the omission of the venue of the affidavit was potentially a fatal defect:

> The weight of authority in this state seems to be to the effect that the venue of an affidavit is prima facie evidence of the place where it was sworn to, and, in the absence of a venue or statement in the jurat as to where it was taken, it would contain no evidence that it was sworn to within the jurisdiction of the officer administering the oath, and, without evidence that it was taken by a proper officer, within his jurisdiction, would be regarded as a nullity, unless the presumption would be that it was taken within his jurisdiction.[14]

However, "the omission does not invalidate the oath, or render the affidavit a nullity, when it is shown, as

So, even appellate judges do it.

in this case, that it was duly administered by a proper officer within his jurisdiction, and the omission of the venue may be supplied by amendment."[15] Noting that section 723 of the then-effective Code of Civil Procedure "requires the court, in every stage of an action, to disregard an error or defect in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party,"[16] the Fourth Department affirmed the decision of the trial court.

Seven years later, citing *Babcock*, the First Department reached the same conclusion in *Fisher v. Bloomberg*,[17] although not without provoking a pithy dissent by Presiding Justice Van Brunt: "I dissent. The attachment was also amended in a material point." In *Fisher*, the defendant moved to vacate an order of attachment, and the plaintiff moved by order to show cause to correct a defect in one of the affidavits upon which the attachment was based:

> The defect sought to be supplied was the omission of the venue. Both motions were heard together, at the close of which an order was made granting leave to the plaintiff within ten days to amend such affidavit *nunc pro tunc* by inserting the venue, viz., "County of New York, ss."[18]

The First Department affirmed, citing, *inter alia*, *Babcock*:

> The venue is only *prima facie* evidence of the place where an affidavit is sworn to. Here, the affidavit, while it does not contain a venue, purports to have been sworn to before a notary public of Kings county, whose certificate of authority to administer an oath was filed in the county of New York. The omission of the venue, however, at most made the affidavit *prima facie* a nullity, but the affidavit was, in fact, sworn to within the jurisdiction – as appears from the affidavit used to procure the amendment – of the notary who administered the oath, and, therefore, the omission of the venue did not invalidate the oath, nor did it render the affidavit a nullity when it appeared that the oath was duly administered.[19]

So, even appellate judges do it.

Conclusion

Having shared this legal mystery, I continue, for reasons aforestated, drafting affidavits all bearing the meaningless "ss:." However, each time I do so, or come across "ss:" in an affidavit from another party, I can't help smiling. ■

1. As of 2009 according to the American Bar Association. *See* http://new.abanet.org/marketresearch/PublicDocuments/2009_NATL_LAWYER_by_State.pdf.
2. In those days, my office used Dictaphones and, as a native New Yorker, I was a bit of a fast talker. Nonetheless, Kitty managed to convert my ramblings into clear and coherent prose.
3. Charlton T. Lewis, A Latin Dictionary (1879) *available at* http://www.perseus.tufts.edu/hopper/resolveform?redirect=true&lang=Latin.
4. Charlton T. Lewis, A Latin Dictionary (1879) *available at* http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.04.0059%3Aentry%3Dsitus2.
5. Charlton T. Lewis, A Latin Dictionary (1879) *available at* http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.04.0059%3Aentry%3DSiculi.
6. Charlton T. Lewis, A Latin Dictionary (1879) *available at* http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.04.0059%3Aentry%3Dsicubi.
7. Charlton T. Lewis, A Latin Dictionary (1879) *available at* http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.04.0059%3Aentry%3Dsicut.
8. Charlton T. Lewis, A Latin Dictionary (1879) *available at* http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.04.0059%3Aentry%3Dsicula.
9. 8th Ed. 2004.
10. A Dictionary of Modern Legal Usage (2d ed. 1985).
11. 85 Hun. 33, 32 N.Y.S. 587 (4th Dep't 1895).
12. *Id.*
13. *Id.* at 588.
14. *Id.*
15. *Id.*
16. *Id.*
17. 74 A.D. 368, 77 N.Y.S. 541 (1st Dep't 1902).
18. *Id.* at 369.
19. *Id.* (citation omitted).

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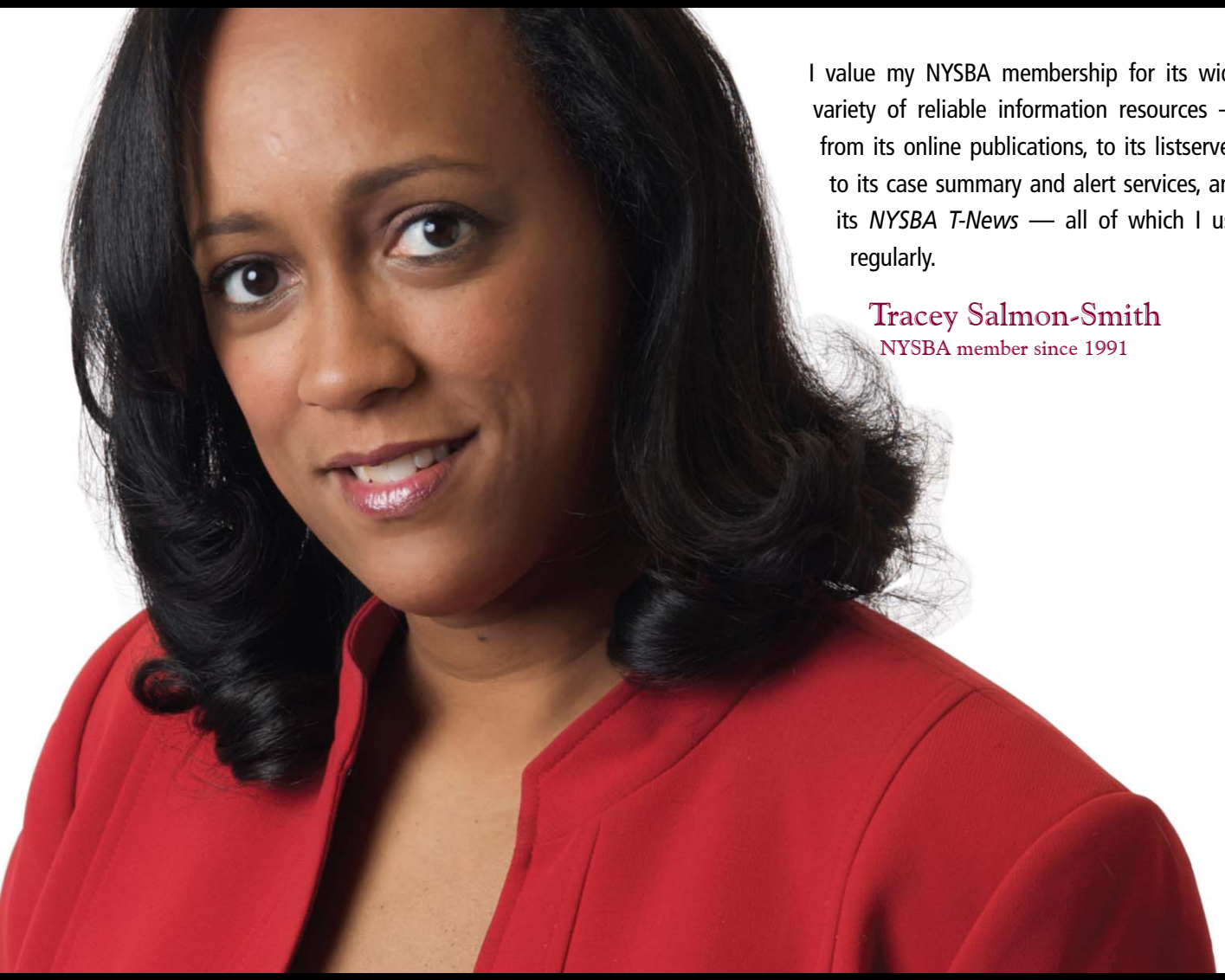

I value my NYSBA membership for its wide variety of reliable information resources — from its online publications, to its listserves, to its case summary and alert services, and its *NYSBA T-News* — all of which I use regularly.

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2009 New York State Legislative Session Changes Affecting Trust and Estate Law

By Joshua S. Rubenstein

Despite the introduction of nearly 60 trusts and estates–related bills in the New York State Legislature, only a small handful passed both the Assembly and the Senate. These include a new default simultaneous death rule, technical guardianship changes, anatomical gift clarification, and sweeping changes to New York's power of attorney law. The low volume of legislation was likely caused by the June 8, 2009, "coup," which prevented any bills from passing the Senate for the remainder of the session.

Estates, Powers and Trusts Law

Section 2-1.6 of the EPTL was repealed in its entirety and replaced with a new § 2-1.6, eliminating New York's long-standing simultaneous death test and replacing it with the 120-hour survivorship requirement found in the 1993 version of the Simultaneous Death Act. This change is effective July 21, 2009, provided, however, that (1) actions pending on that date shall not be impaired, and (2) the new rules of construction shall apply to instruments executed prior to that date unless there is a clear indication of a contrary intent.[1]

Surrogate's Court Procedure Act

Section 1750-b(1)(a) of the SCPA has been amended to fix a technical error, deleting the word "court" from "surrogate court decision-making committee." This change is effective immediately.[2]

Section 1757(2) of the SCPA has been amended to extend the time by which a court must confirm the appointment of a standby guardian 60 days to 180 days after the assumption of his or her duties. This change is effective immediately.[3]

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General Obligations Law

The title heading of Title 15 of Article 5 of the General Obligations Law (GOL) has been amended to read, "Statutory Short Form and Other Powers of Attorney for Financial Estate Planning." This change is effective September 1, 2009, for powers of attorney executed on or after that date. Powers of attorney executed before that date will remain valid, but will become subject to certain of the provisions in the new law, expanding their use for benefits and health care purposes, providing enforcement procedures and establishing standards of care.[4]

GOL § 1501 has been repealed and replaced with three new sections – § 5-1501, § 5-1501A and § 5-1501B. Section 5-1501 contains definitions governing Title 15 of Article 5 of the GOL, including new definitions for a "monitor" and a "statutory major gifts rider." Section 5-1501A creates the presumption that powers of attorney survive the principal's incapacity and provides that if a guardian is appointed for the principal, the agent shall thenceforth account to the guardian. Section 5-1501B sets forth the requirements for a valid power of attorney, including that it be in at least 12-point typeface and signed by both the principal and the agent (but not necessarily at the same time); it contains the correct wording of the "caution to the principal" and "important information for the agent." To make most gifts or transfers, the power must be accompanied by a statutory major gifts rider. The power becomes effective as to an agent when signed by that agent, or at such date or on the occurrence of such contingency as the power may specify. A "person" other than an individual may use other forms of powers of attorney. This change is effective September 1, 2009, for powers of attorney executed on or after that date. Powers of attorney executed before that date will remain valid, but will become subject to certain of the provisions in the new law, expanding their use for benefits and health care purposes, providing enforcement procedures and establishing standards of care.[5]

GOL § 5-1502A has been amended to delete the authority to revoke, create or modify trusts from a power of attorney. This change is effective September 1, 2009, for powers of attorney executed on or after that date. Powers of attorney executed before that date will remain valid, but will become subject to certain of the provisions in the new law, expanding their use for benefits and health care purposes, providing enforcement procedures and establishing standards of care.[6]

GOL § 5-1502B has been amended to delete the authority to revoke, create or modify trusts from a power of attorney. This change is effective September 1, 2009, for powers of attorney executed on or after that date. Powers of attorney executed before that date will remain valid, but will become subject to certain of the provisions in the new law, expanding their use for benefits and health care purposes, providing enforcement procedures and establishing standards of care.[7]

GOL § 5-1502C has been amended to delete the authority to revoke, create or modify trusts from a power of attorney. This change is effective September 1, 2009, for powers of attorney executed on or after that date. Powers of attorney executed before that date will remain valid, but will become subject to certain of the provisions in the new law, expanding their use for benefits and health care purposes, providing enforcement procedures and establishing standards of care.[8]

GOL § 5-1502D has been amended to add the power to make deposits to and withdrawals from bank accounts, provided however, that the power to add or delete joint tenants or beneficiaries of Totten trusts be conveyed in a statutory major gifts rider. This change is effective September 1, 2009, for powers of attorney executed on or after that date. Powers of attorney executed before that date will remain valid, but will become subject to certain of the provisions in the new law, expanding their use for benefits and health care purposes, providing enforcement procedures and establishing standards of care.[9]

GOL § 5-1502F has been amended to require that the power to change beneficiary designations in life insurance policies must be conveyed in a statutory major gifts rider. This change is effective September 1, 2009, for powers of attorney executed on or after that date. Powers of attorney executed before that date will remain valid, but will become subject to certain of the provisions in the new law, expanding their use for benefits and health care purposes, providing enforcement procedures and establishing standards of care.[10]

GOL § 5-1502G has been amended to provide that all powers are exercisable with respect to any estates, trusts or other funds in which the principal is interested, regardless of whether such estates, trusts or other funds are specifically identified "at the giving of the power of attorney." This change is effective September 1, 2009, for powers of attorney executed on or after that date. Powers of attorney executed before that date will remain valid, but will become subject to certain of the provisions in the new law, expanding their use for benefits and health care purposes, providing enforcement procedures and establishing standards of care.[11]

Subdivision 13 of GOL § 5-1502I has been amended to replace the phrase "personal relationships and affairs" with "personal and family maintenance." This change is effective September 1, 2009, for powers of attorney executed on or after that date. Powers of attorney executed before that date will remain valid, but will become subject to certain of the provisions in the new law, expanding their use for benefits and health care purposes, providing enforcement procedures and establishing standards of care.[12]

GOL §§ 5-1505 and 5-1506 are repealed and replaced with 10 new sections.

Subdivision 14 of GOL § 5-1502I has been renumbered subdivision 15, and a new subdivision 14 has been added to continue preexisting patterns of gifts not to exceed $500 per year in the aggregate. This change is effective September 1, 2009, for powers of attorney executed on or after that date. Powers of attorney executed before that date will remain valid, but will become subject to certain of the provisions in the new law, expanding their use for benefits and health care purposes, providing enforcement procedures and establishing standards of care.[13]

GOL § 5-1502J has been amended to expand powers with respect to benefits from military service to benefits from governmental programs and civil service as well. This change is effective September 1, 2009, for powers of attorney executed on or after that date. Powers of attorney executed before that date will remain valid, but will become subject to certain of the provisions in the new law, expanding their use for benefits and health care purposes, providing enforcement procedures and establishing standards of care.[14]

GOL § 5-1502K has been amended to expand powers with respect to records, reports and statements to health care billing and payment matters as well. This change is effective September 1, 2009, for powers of attorney executed on or after that date. Powers of attorney executed before that date will remain valid, but will become subject to certain of the provisions in the new law, expanding their use for benefits and health care purposes, providing enforcement procedures and establishing standards of care.[15]

GOL § 5-1502L has been amended to require that the power to change beneficiary designations of retirement benefits must be conferred in a statutory major gifts rider. This change is effective September 1, 2009, for powers of attorney executed on or after that date. Powers of attorney executed before that date will remain valid, but will become subject to certain of the provisions in the new law, expanding their use for benefits and health care purposes, providing enforcement procedures and establishing standards of care.[16]

GOL § 5-1502M, titled "Construction – Certain Gift Transactions," has been repealed. This change is effective September 1, 2009, for powers of attorney executed on or after that date. Powers of attorney executed before that date will remain valid, but will become subject to certain of the provisions in the new law, expanding their use for benefits and health care purposes, providing enforcement procedures and establishing standards of care.[17]

GOL § 5-1502N has been redesignated as § 5-1502M. This change is effective September 1, 2009, for powers of attorney executed on or after that date. Powers of attorney executed before that date will remain valid, but will become subject to certain of the provisions in the new law, expanding their use for benefits and health care purposes, providing enforcement procedures and establishing standards of care.[18]

GOL § 5-1502O has been redesignated as § 5-1502N. This change is effective September 1, 2009, for powers of attorney executed on or after that date. Powers of attorney executed before that date will remain valid, but will become subject to certain of the provisions in the new law, expanding their use for benefits and health care purposes, providing enforcement procedures and establishing standards of care.[19]

GOL § 5-1503 has been amended to permit certain modifications to statutory major gifts riders as well as to statutory short form powers of attorney. This change is effective September 1, 2009, for powers of attorney executed on or after that date. Powers of attorney executed before that date will remain valid, but will become subject to certain of the provisions in the new law, expanding their use for benefits and health care purposes, providing enforcement procedures and establishing standards of care.[20]

GOL § 5-1504 has been amended to prevent third parties from refusing to honor a statutory short form power of attorney without reasonable cause. It shall be deemed unreasonable if the cause is that it is not a form prescribed by the third party or that there has been a lapse of time since the execution of the power of attorney or that it was executed by the principal and agents on different dates. A special proceeding as authorized by GOL § 5-1510 shall be the exclusive remedy for such a violation. No third party shall be liable for honoring a power of attorney in the absence of actual knowledge of its invalidity. Financial institutions where the principal has an account are deemed to have actual notice following receipt of a written notice of revocation. Third parties may require the agent to execute an affidavit that the power of attorney is in full force and effect, upon which they may rely in the absence of actual knowledge to the contrary. Only statutory short form powers of attorney must be accepted in accordance with this section. This change is effective September 1, 2009, for powers of attorney executed on or after that date. Powers of attorney executed before that date will remain valid, but will become subject to certain of the provisions in the new law, expanding their use for benefits and health care purposes, providing enforcement procedures and establishing standards of care.[21]

GOL §§ 5-1505 and 5-1506 are repealed and replaced with 10 new sections.

- GOL § 5-1505 sets forth the standard of care and fiduciary duties of the agent, and the requirement to disclose records to certain parties, as well as the procedure by which an agent may resign.

- GOL § 5-1506 provides that an agent shall be uncompensated, except as provided in the power of attorney, but may be reimbursed for reasonable expenses, actually incurred.
- GOL § 5-1507 sets forth how the agent may sign for the principal and that the signature is an attestation to the validity of the power of attorney, except as to third parties with actual knowledge to the contrary.
- GOL § 5-1508 provides that unless otherwise provided, co-agents must act jointly but may act without an unavailable co-agent in the event of emergency and following the death, resignation or incapacity of such co-agent. Principals may designate successor agents.
- GOL § 5-1509 permits a principal to appoint a monitor to review the records of the agency.
- GOL § 5-1510 creates a special proceeding to determine all matters with respect to powers of attorney.
- GOL § 5-1511 provides the manner for termination or revocation of a power of attorney. Unless expressly provided to the contrary, the execution of a power of attorney revokes any and all prior powers of attorney executed by the principal.
- GOL § 5-1512 provides that powers of attorney executed in another state in compliance with the laws of that state are valid in New York.
- GOL § 5-1513 sets forth the statutory short form power of attorney.
- GOL § 5-1514 provides that all gift-giving powers beyond those authorized in § 5-1502I(14) must be set forth in a statutory major gifts rider to a statutory short form power of attorney, or in a non-statutory power of attorney executed as provided in § 5-1514(a), (b). This section sets forth permitted gift transactions and prevents a gift to the agent unless expressly authorized. This section also sets forth the form of statutory major gifts rider. A statutory major gifts rider must be executed simultaneously with the execution of the short-form power of attorney and must be both acknowledged in the same manner as a deed conveying real property and executed in the presence of two witnesses who are not potential gift recipients.

These changes are effective September 1, 2009, for powers of attorney executed on or after that date. Powers of attorney executed before that date will remain valid, but will become subject to certain of the provisions in the new law, expanding their use for benefits and health care purposes, providing enforcement procedures and establishing standards of care.[22]

Public Health Law

Section 4307 of the Public Health Law has been amended to clarify that the statutory prohibition against the sale or purchase of organs does not prohibit conditioning the donation of an organ on the donor's receipt of a matching donation, such as with a paired kidney exchange. This change is effective immediately.[23] ■

1. 2009 N.Y. Laws ch. 92, § 1.
2. 2009 N.Y. Laws ch. 12, § 1
3. 2009 N.Y. Laws ch. 260, § 1.
4. 2008 N.Y. Laws ch. 644, § 1, as amended by 2009 N.Y. Laws ch. 4, § 1.
5. 2008 N.Y. Laws ch. 644, § 2, as amended by 2009 N.Y. Laws ch. 4, § 1.
6. 2008 N.Y. Laws ch. 644, § 3, as amended by 2009 N.Y. Laws ch. 4, § 1.
7. 2008 N.Y. Laws ch. 644, § 4, as amended by 2009 N.Y. Laws ch. 4, § 1.
8. 2008 N.Y. Laws ch. 644, § 5, as amended by 2009 N.Y. Laws ch. 4, § 1.
9. 2008 N.Y. Laws ch. 644, § 6, as amended by 2009 N.Y. Laws ch. 4, § 1.
10. 2008 N.Y. Laws ch. 644, § 7, as amended by 2009 N.Y. Laws ch. 4, § 1.
11. 2008 N.Y. Laws ch. 644, § 8, as amended by 2009 N.Y. Laws ch. 4, § 1.
12. 2008 N.Y. Laws ch. 644, § 9, as amended by 2009 N.Y. Laws ch. 4, § 1.
13. 2008 N.Y. Laws ch. 644, § 10, as amended by 2009 N.Y. Laws ch. 4, § 1.
14. 2008 N.Y. Laws ch. 644, § 11, as amended by 2009 N.Y. Laws ch. 4, § 1.
15. 2008 N.Y. Laws ch. 644, § 12, as amended by 2009 N.Y. Laws ch. 4, § 1.
16. 2008 N.Y. Laws ch. 644, § 13, as amended by 2009 N.Y. Laws ch. 4, § 1.
17. 2008 N.Y. Laws ch. 644, § 14, as amended by 2009 N.Y. Laws ch. 4, § 1.
18. 2008 N.Y. Laws ch. 644, § 15, as amended by 2009 N.Y. Laws ch. 4, § 1.
19. 2008 N.Y. Laws ch. 644, § 16, as amended by 2009 N.Y. Laws ch. 4, § 1.
20. 2008 N.Y. Laws ch. 644, § 17, as amended by 2009 N.Y. Laws ch. 4, § 1.
21. 2008 N.Y. Laws ch. 644, § 18, as amended by 2009 N.Y. Laws ch. 4, § 1.
22. 2008 N.Y. Laws ch. 644, § 19, as amended by 2009 N.Y. Laws ch. 4, § 1.
23. 2009 N.Y. Laws ch. 362, § 1.

Marvin V. Ausubel is a retired partner and Of Counsel to the litigation department of Fried, Frank, Harris, Shriver & Jacobson. He is a Fellow, American College of Trial Lawyers, and a former Adjunct Professor, Brooklyn Law School, and Special Master, Appellate Division, First Department. He received his J.D. from Harvard Law School.

The Rise and Fall of Martin Thomas Manton

By Marvin V. Ausubel

Martin Thomas Manton was born in Brooklyn, New York, on August 2, 1880, into an Irish family. He was a devout and prominent Catholic layman who served as president of the Catholic Club and the Catholic Association for International Peace. Msgr. William E. Cashin, rector of the Roman Catholic Church, said that Judge Manton "has been a fine, clean-living man."[1] When he died at age 66, he had lived both the American dream and the American disaster. He was a federal judge for 22 years and a one-time candidate for a nomination to the United States Supreme Court, who resigned in disgrace from the bench when he was accused of receiving more than $400,000 from individuals with business before his court. He was tried and convicted of conspiracy to obstruct justice and served 19 months in a federal penitentiary.

Law School

Manton worked his way through Columbia Law School, and in 1901 he was admitted to the New York bar. He began practicing law in Brooklyn, but in due course he moved his offices to Manhattan. In about 1913 he formed the law partnership of Cockran & Manton with W. Bourke Cockran, a former U.S. Representative and a Democratic leader. Manton had a most successful practice. He was reputed to be worth a half million dollars, and he enjoyed an excellent reputation.

Judicial Career

In 1916 President Woodrow Wilson appointed Manton to the United States District Court for the Southern District of New York. He became at age 36 the youngest federal judge ever appointed. Two years later, in 1918, he was elevated to the United States Court of Appeals for the Second Circuit, and through seniority he became Senior Circuit Judge of the Court (the equivalent of the position of Chief Judge today). One of the most revered courts in the country, the Second Circuit at that time included the distinguished judges Learned Hand, Augustus Hand, Charles Merrill Hough and Thomas Swan. As Senior Circuit Judge, Manton was considered the tenth most important judge in the land. At the time Circuit Judges received a salary of $12,500 per annum.

In 1922 President Warren G. Harding was required to appoint a judge to the United States Supreme Court to succeed Justice William R. Day. The last Catholic to sit on

the high Court was Chief Justice Edward Douglas White, who had died the year before. The Day vacancy was regarded as the "Catholic seat" on the Court. The eastern hierarchy of the Church lobbied the president to appoint Manton. However, Manton ran into opposition from the Court's Chief Justice and former U.S. president, William Howard Taft; President Harding ultimately appointed Pierce Butler of Minnesota to the Court.

Extra-Judicial Business Activities

While serving as a judge, Manton owned or controlled 12 corporations, among them several that were heavily invested in realty. Manton's official and confidential secretary, Marie D. Schmalz, was made treasurer of at least two of these companies. Many of the real properties held or controlled by Manton's enterprises were highly mortgaged.

The Crash

Manton was keenly and substantially affected by the "Great Depression." His business enterprises were heavily in debt, and by June 1934 he personally owed more than half a million dollars. Rumors began to circulate that Judge Manton was on the take.

Towards the end of 1937, Thomas E. Dewey, the New York County District Attorney,[2] decided to conduct an investigation of Judge Manton's affairs to determine whether there was a basis for prosecuting him under New York's income tax laws. This investigation lasted about one year; it was thorough and broad. Because the country was in the depths of a massive depression with a scarcity of available jobs, Dewey was able to recruit highly talented people for his office.

The Manton investigation was directed by Assistant District Attorney Murray I. Gurfein.[3] He was aided from time to time by Assistant District Attorneys Frank S. Hogan,[4] Victor J. Herwitz, Lawrence E. Walsh[5] and Aaron Benson. A.J. Gutreich supervised the accounting phase of the inquiry.

The investigation culminated in six charges accusing Manton or his corporations of having received more than $400,000, only a minuscule portion of which was repaid. Half of the charges related to sums received from persons acting for companies interested in litigation before the Second Circuit. The other half concerned transactions involving persons who aided Manton financially under circumstances that would expose the judge to criticism.

Schick

One of the charges involved *Schick Dry Shaver Inc. v. Dictograph Products Corp.*[6] Schick, a manufacturer of electric razors, brought a patent infringement suit

against Dictograph in the U.S. District Court for the Eastern District of New York and prevailed. Dictograph appealed.[7]

Looking for a reversal, Archie M. Andrews, who controlled Dictograph and a number of other companies, met with a "confidential man," George M. Spector. During the pendency of the appeal, it was alleged, Andrews gave $52,000 to Spector, who in turn gave or "loaned" that sum to corporations owned or controlled by Judge Manton.

On April 12, 1937, a divided Second Circuit reversed the District Court with Manton voting for reversal. Within seven weeks of the reversal, Spector paid out an additional $25,000 by giving (1) more than $20,000 to Marie Schmaltz, (2) $3,000 to Forest Hills Terrace Corp. (a Manton company) and (3) slightly less than $2,000 to one of Manton's creditors.

John L. Lotsch and Fort Greene National Bank

Another charge involved John L. Lotsch and the Fort Greene National Bank of Brooklyn. Lotsch was a lawyer and banker. He was chairman of the Board of Directors of the Fort Greene National Bank of Brooklyn.

Lotsch was indicted for soliciting a bribe while acting as a Special Master. He was acquitted by directed verdict but reindicted for extortion. He obtained a writ of habeas corpus which the District Court dismissed. He appealed to the Second Circuit.[8]

Manton had, on January 6, 1936, obtained a $37,500 "loan" from Lotsch's Fort Greene National Bank of Brooklyn. When Lotsch's appeal from the District Court's order came before a panel of the Circuit Court,[9] Manton did not recuse himself, even though he had the financial dealing with Lotsch's bank. The Second Circuit, including Manton, reversed the District Court and ordered the indictment dismissed.

American Tobacco

Louis Samter Levy was a law school classmate of Judge Manton. The two kept in touch. Levy became a partner in the Manhattan firm of Chadbourne & Stanchfield, which eventually added Levy's name to the firm masthead.

Chadbourne, Stanchfield & Levy represented American Tobacco. The company's president was George W. Hill, whose assistant was a company vice president, Paul Hahn. American Tobacco's advertising agency was Lord & Thomas, whose president was Albert Lasker. The agency earned commissions of about $2.8 million annually from American Tobacco's advertising business.

In 1931 a Manhattan lawyer named Richard Reid Rogers, who was a stockholder in American Tobacco, brought two stockholders' suits against the company claiming that its officers illegally paid themselves substantial bonuses. He requested that they be required to return those bonuses to the company and be restrained from paying themselves future bonuses. He sought more than $10 million in damages. The viability of this suit was before the Second Circuit in 1932.

The New York County District Attorney had been investigating Judge Manton's activities for at least a year, and a grand jury had been impaneled nearly nine months.

Around this time Judge Manton told his friend Levy that he needed money and suggested a $250,000 loan be made to his business partner James J. Sullivan. Levy went to American Tobacco[10] and spoke with Paul Hahn, who suggested that the money could be borrowed from Albert Lasker. Hahn sent Sullivan to Lasker who extended the loan. One month later the appeal was argued before the Circuit Court. Both suits were dismissed in a split decision, with Judge Manton writing the majority opinion.[11]

Of the $250,000 lent to Sullivan more than $232,000 went into business enterprises owned and controlled by Manton. Withdrawals from Sullivan's account for the benefit of Manton's corporations began about a month before the favorable appellate decision. None of the money was ever repaid.

Dewey Brings Charges

The New York County District Attorney had been investigating Judge Manton's activities for at least a year, and a grand jury had been impaneled nearly nine months. In January 1939, District Attorney Dewey delivered a letter to Congressman Hatton W. Summers of Texas, Chairman of the House Judiciary Committee, setting forth in detail the six charges against the judge and intimating that they were grave enough to warrant impeachment. Dewey's office was prepared to cooperate with the federal government in connection with this matter.

The subject of the charges was made public on January 30, 1939, and the very next day Manton tendered his written resignation,[12] which was promptly accepted by President Franklin Delano Roosevelt. Manton was directed to clean up his affairs by February 7, 1939, and not to sit on any cases in the interim.

The U.S. Attorney Acts

Almost contemporaneously with Dewey's letter to Chairman Summers, U.S. Attorney General Frank Murphy[13] announced that the Department of Justice was investigating allegations of misconduct by Judge Manton to determine whether there was a basis for action by the U.S. government. Judge Manton said that he welcomed the investigation and responded to the charges by saying, "[H]asn't a judge the right to buy stocks and bonds?" By the time the investigation was completed at least two of the subjects of inquiry, James J. Sullivan and Archie M. Andrews, had died.

By April 1939 the investigation produced a conspiracy indictment of (1) Judge Manton, (2) John L. Lotsch, (3) William J. Fallon, (4) George M. Spector, and (5) Forest W. Davis and included several unindicted co-conspirators.

The case was set down for trial for May 1939. Eventually, Lotsch and Davis pleaded guilty and turned state's evidence. Fallon also took a plea on the eve of trial but did not testify.

The Case Against Manton

The indictment was a single count invoking two sections of a "conspiracy" statute. The defendants were charged with obstructing justice with intent to defraud the United States. The maximum penalty for a conviction of violating this statute was two years' imprisonment and a $10,000 fine. Neither Manton nor his co-defendants were indicted for violating the more stringent "judicial bribery" statute, which would expose a violator to the more draconian maximum punishment of 15 years' imprisonment and a fine of $20,000.

It has been theorized that the government elected to proceed under the conspiracy statute because of the greater latitude of permissible evidence. Moreover, with respect to Manton, the consequences of the conviction and any substantial imprisonment would be more significant than the particular length of the sentence itself.

The charge of conspiracy on the part of a federal appellate court to sell justice was unprecedented in the 150-year history of this nation. Indeed, there had been no evident parallel in the history of Anglo American high judiciary since Sir Francis Bacon, the Lord Chancellor of England, was removed from office for a similar offense more than 300 years earlier.[14]

The prosecution team was headed up by U.S. Attorney John T. Cahill.[15] The prosecution's case had solid documentary evidence such as notes, checks and ledger sheets; live witnesses such as co-defendants John L. Lotsch and Forest W. Davis; and transcripts of testimony given by Judge Manton in collateral proceedings. It introduced testimony that Manton requested the destruction of incriminating evidence. Finally, it established through Manton's own admission that in less than a year, between June 1934 and May 1935, he went from being more than $500,000 in debt to being $750,000 in the black. All this on a salary of $12,500.

There was a lot for the prosecution to work with. For example, Alfred F. Reilly, president of the Case Company, took the stand concerning the patent infringement case of *Art Metal Works v. Abraham & Straus, Inc.*[16] His company, as manufacturer of the contested cigarette lighters, was required to indemnify the defendant. Reilly testified that he paid William Fallon, the "bag man," $39,850 for a favorable decision for the defendant. He further testified that Manton called three days before he resigned from the bench to ask if "Bill" Fallon was on Reilly's payroll. In addition, in the course of this call Manton asked Reilly to destroy evidence in the Case Company records showing payments to Fallon.

In connection with the case of *Smith v. Hall*,[17] another patent infringement suit, Almon Hall testified he paid a total of $69,000 to Fallon and accountant Forest W. Davis for a favorable decision. Bank transfers and other records documented his story. Hall received from Fallon a $5,000 note signed by Manton and made out to Davis, as well as a receipt from Fallon that was to be returned when a favorable decision was forthcoming. The case was argued on February 14, 1936, before a panel consisting of Judges Manton, Thomas W. Swan and Harrie B. Chase. The decision was scheduled for March 2, but Hall received a telegram from Fallon, dated February 29, advising him that the decision would be delayed. Subsequently Fallon told Hall that one of the Judges Hand had seen the opinion and raised questions as to its propriety. Fallon said that Manton told him that the other members of the panel would have to be paid as well. On April 6 a decision in Hall's favor was handed down. Manton wrote for the court, with the other panel members concurring.

Hall further testified that Fallon informed him that Manton recommended he retain Thomas G. Haight of Jersey City, a former Circuit Judge, to argue his case before the Supreme Court because he felt that Hall's attorneys did not present his case well before his panel in the Circuit Court. Haight and Davis corroborated Hall, with the latter making it crystal clear that Hall's payment was a bribe to Manton, and the former confirming that Manton was involved in recommending him.

In John Lotsch's testimony for the government, he discussed the $10,000 bribe he gave Manton to fix a case in a Connecticut prosecution in which Lotsch was charged with bribery. The presiding judge, Edwin S. Thomas, did indeed direct a verdict of acquittal of Lotsch.

There were suggestions of a "frame-up" against a distinguished judge.

The defense called a number of witnesses, including Manton's secretary, Marie Schmalz. Manton's principal hope for acquittal was his own testimony, but the prosecution had done a formidable job in attacking the judge's credibility. Manton also called a parade of eight character witnesses, including John W. Davis[18] and Alfred E. Smith.[19]

Summations

The theme of the defendant's closing argument was that the prosecution relied on the testimony of witnesses with criminal records and of co-conspirators, whether indicted or not. In contrast with this array of unreliable persons was the high caliber of the defendant's witnesses and Manton's sterling reputation – which was vouched for by most trustworthy affiants.

There were suggestions of a "frame-up" against a distinguished judge. And with specific respect to Lotsch, the other co-conspirators and the prosecution witnesses, the defense argued that they were jailbirds given a "wholesale delivery" so that they might walk "arm in arm with the prosecutor through the courtroom."

"What is it that stands out in this case more than anything else? It is the atmosphere of suspicion. With the atmosphere that has been created in this courtroom you ladies and gentlemen of the jury are asked to suspicion a man into jail. You can't do that."

The prosecution's closing argument stressed the supporting documentary evidence, which showed the conversion of the courthouse into a "counting house." Cahill pointed to Manton's glaring conflicts of interest, failures to recuse himself and greed. While not excusing those litigants who bribed the judge, he said he saw them as the victims of "the greatest blackmail scheme ever devised," painting a "picture of brokers and brewers and moneylenders lugging the cash into the judge's chambers. Cash leaves very few traces."

Verdict

In little more than three hours of actual deliberation the jury returned a guilty verdict as to both defendants.

Appeals

When Manton took his appeal to the Second Circuit, the only judge on that court who had not previously served with him was the recently appointed Charles Clark.[20] Thus, a specially constituted Second Circuit was chosen, consisting of retired Supreme Court Justice George Sutherland, Associate Supreme Court Justice Harlan F. Stone[21] and Judge Clark. On December 4, 1939, this court unanimously affirmed the conviction and sentence of two years' imprisonment in Lewisburg federal prison plus a $10,000 fine.[22]

On February 26, 1940, the U.S. Supreme Court denied Manton's petition for a writ of certiorari.[23] Justice Murphy, who was the Attorney General that had directed the federal investigation which resulted in the conviction, and Justice Stone, who sat on the Second Circuit panel that affirmed the conviction, took no part in considering Manton's last application. The denial of this last application brought to an end the Manton saga. He died less than seven years later, in utter disgrace.

Conclusion

Justice Sutherland, who wrote for the specially constituted Second Circuit affirming Manton's conviction, noted that Manton was one of three judges in each of the "corrupt" cases. He wrote:

> We cannot doubt that the other judges who sat in the various cases acted honestly and with pure motives in joining in the decisions. No breath of suspicion has been directed against any of them and justly none could be. And for aught that now appears we may assume for present purposes that all of the cases in which Manton's action is alleged to have been corruptly secured were in fact rightly decided. But the unlawfulness of the conspiracy here in question is in no degree dependent upon the indefeasibility of the decisions which were rendered consummating it. Judicial action whether just or unjust, right or wrong, is not for sale; and if the rule shall ever be accepted that the correctness of judicial action taken for a price removes the stain of corruption and exonerates the judge, the event will mark the first step toward the abandonment of the imperative requisite of even handed justice proclaimed by Chief Justice Marshall more than a century ago, that the judge must be "perfectly and completely independent with nothing to influence or control him, but God and his conscience."[24]

1. He wrote a significant dissenting opinion in the obscenity litigation instigated by Bennett Cerf concerning the book *Ulysses* by James Joyce, *United States v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934). Judges Learned Hand and Augustus Hand held the book was not obscene. Manton voted to ban it.

2. Dewey had previously served as Chief Assistant U.S. Attorney for the Southern District of New York. He was District Attorney from 1938 to 1941, followed by service as New York's governor from 1943 to 1954. He was twice defeated as Republican candidate for U.S. president.

3. Murray I. Gurfein eventually was appointed a judge in the U.S. District Court for the Southern District of New York. His decision in that court in the Pentagon Papers case was ultimately adopted by the U.S. Supreme Court. Thereafter he was elevated to sit in the Court of Appeals for the Second Circuit. *See United States v. N.Y. Times Co., et al.*, 328 F. Supp. 324 (S.D.N.Y. 1971).

4. Frank S. Hogan succeeded Dewey as New York County District Attorney, serving from 1942 to 1973.

5. Lawrence E. Walsh subsequently became a judge in the U.S. District Court for the Southern District of New York. He gave up his judgeship to serve as Deputy U.S. Attorney General (1957–1960). After leaving this public service he became a partner in Davis, Polk.

6. 16 F. Supp. 936 (E.D.N.Y. 1936).

7. *Schick Dry Shaver, Inc. v. Dictograph Prods. Co.*, 89 F.2d 643 (2d Cir. 1937).

8. 86 F.2d 613 (2d Cir. 1936).

9. *Id.*

10. Indeed, Levy and his firm represented American Tobacco in the pending appeals in the two stockholders' suits.

11. *Rogers v. Hill*, 60 F.2d 109 (2d Cir. 1932); *Rogers v. Guaranty Trust Co. of N.Y.*, 60 F.2d 114 (2d Cir. 1932), *rev'd on other grounds*, 288 U.S. 123 (1933).

12. Compare Manton's resignation with the refusal of Illinois Governor Rod R. Blagojevich, who was impeached and convicted by the Illinois State Senate on January 29, 2009, by a vote of 59-0.

13. Frank Murphy was eventually appointed as Associate Justice of the Supreme Court, and he recused himself when Manton filed a petition for a writ of certiorari to his Court.

14. Bacon, a knighted man of letters, philosopher, and former Member of Parliament, in 1621 was accused of corrupt dealings in chancery suits, *i.e.*, accepting bribes from litigants who appeared before him. He did not defend himself and sent in a confession of guilt to the charges, although he later wrote he was not swayed by the gifts he received.

15. Cahill eventually became a founding partner of the firm of Cahill, Gordon.

16. 70 F.2d 641 (2d Cir. 1934). This case was heard before Judges Manton, Learned Hand and Chase. When this case was re-heard by the Second Circuit in 1939, after Judge Manton's conviction, the new panel consisted of Judges Learned and Augustus Hand and Robert P. Patterson. This time, the judges were unanimous in siding with Judge Learned Hand's dissent, and Judge Manton's 1934 opinion was overturned. 107 F.2d 944 (2d Cir. 1939).

17. 83 F.2d 217 (2d Cir. 1936), *aff'd*, 301 U.S. 216 (1937).

18. John W. Davis was the unsuccessful Democratic candidate for president of the United States in 1924. He was the founding member of the firm of Davis, Polk, a distinguished and frequent advocate before the Supreme Court and an attorney with a peerless reputation.

19. Alfred E. Smith, the unsuccessful candidate for president in 1928, was New York governor (1919–1920 and 1923–1928).

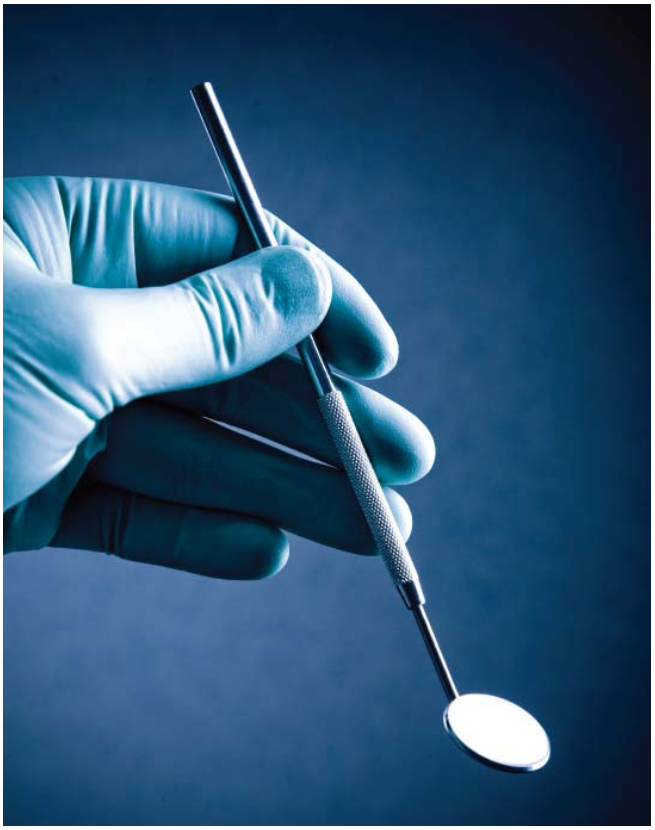
20. Clark had previously been the dean of Yale Law School.

21. Stone had previously been the dean of Columbia Law School.

22. Manton was released after 19 months' incarceration.

23. 309 U.S. 664 (1940).

24. 107 F.2d 834, 846 (2d Cir. 1939).



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Some information provided in this article is excerpted from the Peer Review Manual of the New York State Dental Association Council on Peer Review and Quality Assurance. The article was prepared with the assistance of NYSDA's Dr. Judith Shub, Assistant Executive Director, Health Affairs; Mr. Lance Plunkett, General Council; and Dr. Steven Damelio, Chairman of the Council on Peer Review and Quality Assurance.

Peer Review

An Alternative Dispute Resolution Process to Dentistry Malpractice Claims

By Jody Erdfarb, Jeffrey Galler and Judith Shub

Patients who are dissatisfied with their dental treatment will often contact an attorney to discuss their grievances and explore litigation. On many occasions, however, attorneys will decide not to accept a potential client because either the alleged misconduct did not rise to the level of malpractice or the amount of recoverable damages would be too small compared to the potential costs of litigation. In such instances, an attorney may suggest that the client seek relief through the Peer Review process of the New York State Dental Association (NYSDA), which represents over 70% of the licensed dentists practicing in New York State.

Peer Review is available to patients treated by a dentist who is a member of the NYSDA. The association does not offer Peer Review to patients who received treatment in Article 28 clinics,[1] in dental schools, or in situations where treatment was provided under the auspices of the state Medicaid program. Other alternatives exist for those patients to resolve their complaints. Accordingly, this article will focus on various aspects of Peer Review as an alternative dispute resolution process.

The NYSDA's Peer Review process results in the expeditious and conclusive resolution of a patient and dentist dispute. The process is administered by dentist-volunteers in each of the NYSDA's 13 geographic components, under the auspices of the NYSDA's Board of Governors and its Council on Peer Review and Quality Assurance. Of the many benefits to the Peer Review process, the service is free to the parties, and all cases are handled in a timely manner.

A group of impartial dentist-volunteers oversee and conduct the Peer Review process. These individuals conduct mediation in the initial stages to allow the dentist an opportunity to offer the patient a full or partial refund. If the parties cannot reach a settlement during the mediation, a hearing will then be conducted. At the hearing, three members of a Peer Review committee will review the patient's records and perform individual

clinical examinations, which will serve as a basis for their findings. The hearing is more informal than, say, a trial. For example, the parties do not cross-examine a witness or introduce outside witnesses at a hearing. While each party may be represented by counsel, the parties' attorneys do not act in a formal representative role other than to advise their clients. In addition, the Peer Review process is kept confidential. Confidentiality is protected by the "Agreement to Submit to Peer Review" ("Agreement") – the cornerstone of the process – as well as N.Y. Education Law § 6527.

Finally, Peer Review provides an alternative to litigation for resolving patient complaints about dental treatment, placing the decision in the hands of impartial professionals rather than in the hands of laypeople. Findings are based on objective assessments of treatment as opposed to the biased opinions of "expert witnesses" selected to advocate for a side.

The Legal Context for Peer Review

The NYSDA has operated the Peer Review and Quality Assurance program since the early 1980s. It is conducted as a form of arbitration and is therefore protected by Article 75 of the Civil Practice Law and Rules. The process is established through a standard contractual agreement between the parties. Accordingly, the parties enter a contract, the Agreement, that sets up and steers the review process. The contract includes waivers of both parties' right to subsequently sue the other party on the same set of facts. Also, the contract expressly stipulates that the parties will select the Peer Review process as the method for resolving the patient's complaints and agree to accept the findings of the Peer Review committee as the final resolution to the dispute.

Central to Peer Review is the concept that the standard dentist-patient relationship is itself a type of service contract. Pursuant to that service contract, the dentist agrees to provide appropriate care consistent with the prevailing standards for treatment. In return, the patient agrees to cooperate with the course of treatment and pay the fees charged. As a result, when a Peer Review committee determines that the dentist has failed in his or her obligation to provide appropriate care that is consistent with the prevailing standards for treatment, the dentist forfeits the fees for that treatment. The process does not authorize arbitrary financial awards for failing to perform adequately.

Long ago, a New York state court upheld the legitimacy of the process in *Zupan v. Firestone*,[2] which was affirmed by the New York State Court of Appeals. The NYSDA has modified the process in the years since *Zupan* to address concerns under Article 75. Specifically, the NYSDA has sought to make Peer Review more like binding arbitration so that it would be upheld and enforced in court, if necessary.

When a Patient Should Pursue Peer Review

Consider the following example: A patient named John Smith contacts his attorney regarding what he believes to be improperly performed dental work. Dr. Mary Jones apparently fabricated, inserted and cemented in place a fixed prosthesis (non-removable bridge) for Smith. The agreed-upon fee for the dental treatment was $5,000, of which Smith has paid $2,000. Smith is, however, unhappy with the bridge, claiming that the bite is uncomfortable, the aesthetics are unacceptable, and the crowns fit poorly, which has caused gum inflammation. Smith not only refuses to remit the outstanding $3,000 balance, but also would like Dr. Jones to refund his $2,000 deposit, so that he can have another dentist redo the bridge in a more acceptable manner. Dr. Jones refuses to refund the deposit and demands payment of the outstanding $3,000 balance, claiming that her work was satisfactory and that the patient's demands are simply a pretext for non-payment.

The attorney would like to help Smith but has some reservations. Does Smith have the time and fortitude for protracted litigation? Will the client present well to a jury? Does the relatively small amount involved justify the time and expense that would be expended on filings, depositions, written discovery, motions, expert reviews, and trial? If this litigation assessment leads the attorney to decline the case, the attorney can still advise the disgruntled patient that his grievance may be settled through the Peer Review mechanism. The attorney can feel comfortable in assuring the patient that the complaint would be handled courteously, fairly, and expeditiously.

In 2008, over 90% of Peer Review complaints were resolved within 60 days. The majority of Peer Review cases resulted in findings in favor of the patient.

Initiating a Peer Review Complaint

The first step is to request a copy of the Agreement. A patient may obtain this contract from the New York State Dental Association in Albany or from one of its component branches throughout New York State (see sidebar on page 37).

The Agreement to Submit to Peer Review

The NYSDA urges patients to consult with an attorney prior to signing the Agreement, since it is a legal, binding contract between the patient and dentist. Among other provisions, the parties agree to authorize the NYSDA to resolve their dispute, agree to participate in the Peer Review, and agree to waive any other legal process relating to the issue. The Agreement clearly explains that Peer Review dispute resolution considers only the fees charged by the treating dentist and does not provide for punitive or compensatory damage awards.

The patient initiates the Peer Review process by submitting an Agreement to the component dental society

representing the geographic area where treatment was rendered. The patient fills out the "Patient's Statement" section of the document, which asks for the patient's and dentist's names, addresses, and phone numbers; the dates and nature of the treatment provided; the fees and outstanding balance involved; the specific complaint regarding the treatment provided; and the patient provides copies of any pertinent bills, receipts, and dental records from any subsequent treating dentists. The patient is also required to provide an authorization to the treating dentist to release a copy of the patient's clinical records and radiographs to the Peer Review committee, and an authorization for the committee to resolve the patient's complaint by evaluating the patient's records and performing a clinical examination.

The signed Agreement is mailed to the local dental society, where the date of receipt is officially recorded. This date is significant because it helps determine if the dental treatment in question was within the two-and-a-half-year statute of limitations for Peer Review. The dental society then sends the Agreement to the dentist who is the subject of the complaint. The dentist then has two weeks to complete and sign the "Dentist's Statement" portion of the document and submit it to the dental society, along with a copy of the patient's records and all relevant billing and payment information.

Non-compliance is not an option. All NYSDA members are required to participate in Peer Review, comply with the requests of the Peer Review committees, participate in the Peer Review process, and abide by the decision of the Peer Review committees. A member who fails to comply would be deemed guilty of a serious ethics violation and be subject to disciplinary proceedings.

Determining a Patient's Peer Review Eligibility

The component chairman of the Peer Review and Quality Assurance committee studies the signed documentation and determines if the case is eligible for Peer Review. In some cases requests for Peer Review are denied. For example, the dentist is not a member of the NYSDA at the time the Agreement is signed; or, more than two-and-a-half years have elapsed since the date of the dental treatment. Dental treatment has clearly defined points where treatment is considered to have been completed. For instance, in orthodontics, treatment is completed at the time a patient's braces are removed and retainers are provided. In endodontics, root canal therapy is deemed complete when the canals are filled. In prosthetic dentistry, treatment is completed when a bridge is inserted in the patient's mouth and cemented in place. Accordingly, if a dentist cemented a bridge on January 1, 2007, and the dental society received the signed Agreement from the patient on August 1, 2009, the statute of limitations would have expired, and the case would not be reviewable. However, under the tolling rule (known as the continuous treatment doctrine) the two-and-a-half-year limitation begins accruing on the very last day of treatment. For example, if a patient had a bridge placed on September 1, 2009, which was later chipped and then repaired by the dentist on January 1, 2010, the patient would have two-and-a-half years from the January 1, 2010, treatment date to file a complaint.

Additional reasons to deny a request for Peer Review include the following:

1. The patient refused to place the outstanding fee balance in the component dental society's escrow account pending the outcome of Peer Review.
2. The dispute between the patient and dentist does not relate to the appropriateness of the treatment or the quality of care.
3. Either party has commenced a legal action against the other party that is pending or has been resolved by settlement or court order.
4. The patient has submitted a complaint about the same treatment to the New York State Education Department's Office of Professional Discipline, and the complaint has not been dismissed on jurisdictional grounds.
5. The disputed treatment was performed under the auspices of the New York State Medicaid program, or in a hospital, dental school, clinic, or other Article 28 facility.

In 2008, approximately 20% of the signed Agreements that the NYSDA received were not suitable for Peer Review for these and various other reasons.

Once the chairman has determined that a patient complaint is reviewable, the chairman will make certain that he or she has all the necessary information and documentation. Then, the chairman will assign a member of the committee to attempt to mediate the dispute. If the mediation is unsuccessful, the case will then proceed to a hearing.

The Role of an Attorney During Peer Review

While neither party needs to retain legal representation for the Peer Review process, the parties may, nevertheless, choose to do so. If an attorney is retained, the attorney will receive all correspondence between the parties, may confer with his or her client during the mediation process, and may be present at the Peer Review hearing. If either party retains counsel, the mediation cannot be resolved until the represented party has had an opportunity to discuss an offer with his or her attorney. In fact, the mediator will urge a represented party to consult with his or her attorney before deciding whether to settle the dispute or proceed to a hearing.

Attorneys may attend the Peer Review hearing, but they may neither field questions from a party nor ask questions. Attorneys may, however, direct their ques-

The New York State Dental Association Component Dental Societies (effective 2009)

New York County Dental Society (Manhattan)	6 E. 43rd St., Fl. 11 New York, N.Y. 10017	212-573-8500	Ms. Ellen Gerber Executive Director EGerber@nycdentalsociety.org
Second District Dental Society (Brooklyn-Staten Island)	111 Ft. Greene Pl. Brooklyn, N.Y. 11217	718-522-3939	Mr. Bernard Hackett Executive Director bhsdds@msn.com
Third District Dental Society (Albany, Columbia, Greene, Rensselaer, Sullivan, Ulster)	950 New Loudon Rd. Ste. 400 Latham, N.Y. 12110	518-782-1428	Ms. Kathleen Moore Executive Director director@third-district.org
Fourth District Dental Society (Clinton, Essex, Franklin, Fulton, Hamilton, Montgomery, Saratoga, Schenectady, Schoharie, Warren, Washington)	981 Route 146 Clifton Park, N.Y. 12065	518-371-0224	Dr. G. Gleason Executive Director fourthdistrictds@nycap.rr.com
Fifth District Dental Society (Herkimer, Jefferson, Lewis, Madison, Oneida, Onondaga, Oswego, St. Lawrence)	6323 Fly Rd., Ste. 3 E. Syracuse, N.Y. 13057	315-434-9161	Ms. Amy Pozzi Executive Director apozzi@5dds.org
Sixth District Dental Society (Broome, Chemung, Chenago, Cortland, Delaware, Otsego, Schuyler, Tioga, Tompkins)	55 Oak St. Binghamton, N.Y. 13905	607-724-1781	Dr. Alfonso Perna Executive Director sdds@stny.rr.com
Seventh District Dental Society (Cayuga, Livingston, Monroe, Ontario, Seneca, Steuben, Wayne, Yates)	255 Woodcliff Dr. Fairport, N.Y. 14450	585-385-9550	Ms. Lori Bowerman Executive Director LBowerman@7dds.org
Eighth District Dental Society (Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans, Wyoming)	3831 Harlem Rd. Buffalo, N.Y. 14215	716-995-6300	Ms. Vicki Prager Executive Director vprager@8thdistrictdental.org
Ninth District Dental Society (Dutchess, Orange, Putnam, Rockland, Westchester)	364 Ellwood Ave. Hawthorne, N.Y. 10532	914-747-1199	Ms. Alice Flanagan Executive Director Alice@ninthdistrict.org
Nassau County Dental Society (Nassau)	377 Oak St., #204 Garden City, N.Y. 11530	516-227-1112	Ms. Gabriele Libbey Executive Director NassauDental@aol.com
Queens County Dental Society (Queens)	86-90 188th St. Jamaica, N.Y. 11423	718-454-8344	Mr. William Bayer Executive Director execdirqcds@aol.com
Suffolk County Dental Society (Suffolk)	1727 Veterans Memorial Hwy., #200 Islandia, N.Y. 11749	631-232-1400	Ms. Jane Meslin Executive Director suffolkdental@optonline.net
Bronx County Dental Society (Bronx)	3201 Grand Concourse Bronx, N.Y. 10468	718-733-2031	Dr. Robert Yeshion Executive Director bronxdental@optonline.net

tions to and through the chairman, who is undoubtedly permitted to respond to an attorney's questions about the proceedings.

The Mediation Process

In the mediation process, the parties can resolve the dispute before undergoing an actual hearing. Unlike a Peer Review hearing, mediation leads to neither adverse nor positive findings regarding the merits of the clinical care.

The mediator assigned to the case will contact both parties by telephone, ascertain the total fees involved in the treatment under review, and offer to help settle the dispute. Under no circumstances, however, will the medi-

ator attempt to determine the validity of the patient's complaint. When the mediator informs the parties that only a Peer Review hearing can result in what might be referred to as an "all-or-nothing" decision regarding the treatment under review, meaning that the dental treatment either was or was not acceptable, the parties are then often amenable to the mediation process and arrive at a compromise.

In many instances during mediation, the dentist will offer the patient a full or partial refund in an effort to settle the matter rather than proceed to a full-blown hearing. If the dentist offers the patient a full refund, the case is closed. If the dentist offers the patient a partial refund, however, the patient may choose to accept or refuse the offer. Often, the patient will make a counteroffer, and the mediator will then try to help the parties find an acceptable compromise.

In 2008, of the over 200 cases accepted for Peer Review, approximately 50% were settled in mediation.

The Peer Review Hearing

When a dispute cannot be resolved through mediation, the Peer Review committee schedules a hearing to evaluate the quality of care or the appropriateness of the treatment under review. Hearings are conducted in a "neutral" location – that is, in a private, non-party dental office. Those present at the hearing include the patient, the dentist, a lay observer, a panel of three general, non-party dentists who are members of the standing Peer Review committee, and a presiding chairman. The chairman does not vote or participate in the discussion at the hearing but merely officiates, ensuring that everyone present understands the proceedings, the NYSDA's procedures are followed, and the parties' rights are protected. In the event a complaint involves a dental specialist, dentists who are comparably board certified in the same specialty will be appointed as the three panel members.

At the hearing, both parties are given the opportunity to review all the records, present their case-in-chief, and answer any questions posed by the panel members as they attempt to understand the patient's complaint and the history of the dental treatment. Each panel member will review all the records scrupulously, question both parties, and conduct an independent clinical examination of the patient.

After the hearing, the committee will dismiss the parties and reach a majority decision in closed session. The chairman then writes a report on the proceeding and the findings, which serves as the foundation of the decision letter sent to the parties, and closes the case.

The Peer Review Decision

The panel's decision, in favor of either the dentist or the patient, is binding. Once the case proceeds to a Peer Review hearing, the possibility of a partial refund no longer exists. When the patient has received more than one distinct type of treatment, however, at times the panel may reach a decision partially in favor of the dentist and partially in favor of the patient. For example, if a patient's disputed treatment involved a removable denture and a filling, the panel might determine that the denture procedure was acceptable, while the filling procedure was unacceptable.

If the hearing committee determines that the treatment under review was inappropriate or did not conform to standards of acceptable treatment, the committee may require the dentist, in addition to refunding the patient's payment, to complete specific continuing education courses within a given time frame.

Within two weeks after the hearing, the committee will send a formal decision letter to the parties. This letter includes details of the case such as the parties involved, the dates of treatment, the patient's specific complaint, the issues in dispute, the resolution of the case, the findings, the outcome based on those findings, and the instructions for appealing the decision.

In 2008, approximately 60% of all Peer Review hearings resulted in a decision in favor of the patient.

The Appeal Process

Either party may appeal the Peer Review decision within 30 days of the date of the decision letter. Members of the New York State Council on Peer Review and Quality Assurance review the appeals. The members will grant an appeal on only the two following grounds: (1) the discovery of new significant and material evidence that could not have been available at the time of the hearing or (2) the commission of a significant procedural irregularity.

Conclusion

The Peer Review process involves many additional issues that are beyond the scope of this article, ranging from multi-dental procedure cases to the effect of a collection action the dentist commences against the patient to situations where the dentist is a NYSDA member in one geographic component of New York State and treated the patient in a different component.

For additional information, attorneys and patients are urged to contact the New York State Dental Association located at 20 Corporate Woods Blvd., Suite 602, Albany, New York 12211, or one of the component branches throughout New York State. ■

1. N.Y. Public Health Law art. 28. These clinics are certified by the New York State Health Department.

2. 91 A.D.2d 561, 457 N.Y.S.2d 43 (1st Dep't 1982), *aff'd*, 59 N..Y.2d 709, 463 N.Y.S.2d 439 (1983).

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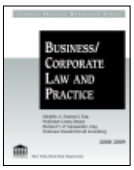

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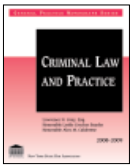

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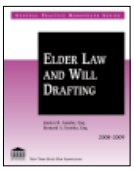

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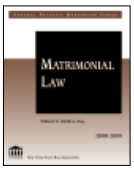

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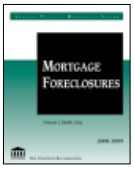

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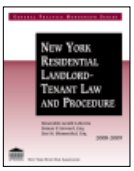

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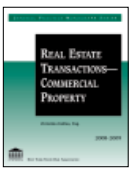

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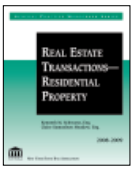

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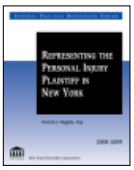

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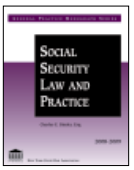

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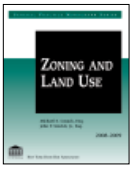

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Thomas A. Dickerson is an associate justice of the Appellate Division, Second Department of the New York State Supreme Court. Justice Dickerson is the author of *Class Actions: The Law of 50 States* (Law Journal Press, 2010) and "Consumer Law 2009: The Judge's Guide to Federal and New York State Consumer Protection Law," available at www.courts.state.ny/courts/9jd/taxcertatd.shtml.

New York State Consumer Protection Law and Class Actions in 2009: Part I

By Thomas A. Dickerson

In 2009, the area of consumer protection law underwent a number of developments, which included changes in the area of consumer class actions. The first part of this article reviews recent consumer protection law cases, while Part II, which will appear in a subsequent issue of the *Journal*, reviews several consumer class action cases reported during 2009.

Preemption and the Truth in Lending Act

The federal government has enacted a number of laws to protect consumers, and the Truth in Lending Act (TILA) is especially significant. As with many federal statutes, the question as to whether federal consumer laws preempt their state counterparts often arises.

In *People v. Applied Card Systems, Inc.*,[1] the New York State Attorney General alleged that Cross Country Bank, a purveyor of credit cards to "consumers in the 'subprime' credit market," had "misrepresented the credit limits that subprime consumers could obtain and . . . failed to disclose the effect that its origination and annual fees would have on the amount of initially available credit." On the respondent's motion to dismiss based upon preemption by TILA, the New York Court of Appeals held that "Congress . . . made clear that, even when enforcing the TILA disclosure requirements, states could use their unfair and deceptive trade practices acts to 'requir[e] or obtain[] the requirements of a specific disclosure beyond those specified.'" The Court pointedly noted that "Congress only intended the [Fair Credit and Charge Card Disclosure Act] to preempt a specific set of state credit card disclosure laws, not states' general unfair trade practices acts."

The Arbitration Clause and the Class Action Waiver

Another significant consumer issue concerns whether credit card consumers, for example, can waive their class action right. This is one of those fine-print problems where lay consumers, who are unsophisticated in the art of contractual language, are unaware of the terms of a credit card agreement until it is too late.

In re American Express Merchants' Litigation[2] involved a consumer antitrust class action which raised a matter of first impression. In noting that state courts frequently enforce mandatory arbitration clauses contained in commercial contracts based on "the strong federal policy in favor of arbitration," the Court of Appeals addressed the enforceability of an arbitration clause featuring a class action waiver. Such a waiver is simply "a provision which forbids the parties to the contract from pursuing anything other than individual claims in the arbitral forum." The Court held that the class action waiver in the American Express Card Acceptance Agreement could not be enforced in this case because to do so would grant the company "de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery."[3]

Gift Cards and the Threat of Dormancy Fees

In three class actions, consumers challenged the imposition of dormancy fees by gift card issuers.[4] Gift cards, a multi-billion-dollar business,[5] may eliminate the headache of choosing a perfect present, but the recipient might find some cards a pain in the neck. Many cards come with enough penalizing fees and restrictions, many of which are hidden and covert, that a consumer might be better off giving a check. The most troubling penalties include expiration dates, maintenance fees, and dormancy fees.[6] While dormancy fees have faced legal scrutiny in recent years, it would not be surprising if consumers took aim at other penalties.

In *Lonner v. Simon Property Group, Inc.*,[7] consumers challenged gift card dormancy fees of $2.50 per month, seeking damages under three causes of action: (1) breach of contract, (2) violation of General Business Law § 349 (GBL), and (3) unjust enrichment. On the defendant's motion to dismiss, the Appellate Division, Second Department found that the plaintiffs had pleaded sufficient facts to support causes of action for a violation of GBL § 349 and a breach of contract claim based upon a breach of the implied covenant of good faith and fair dealing.

Next, in *Llanos v. Shell Oil Co.*,[8] consumers challenged gift card dormancy fees of $1.75 per month, asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and violation of GBL § 349. On the defendant's motion to dismiss the complaint as preempted by GBL § 396-I and for failing to state a cause of action, the Second Department held that GBL § 396-I did not preempt the *Llanos* claims and remitted the matter for consideration of the merits of each cause of action.

Finally, *Goldman v. Simon Property Group, Inc.*[9] involved another group of consumers who challenged dormancy fees. The Second Department held that no private right of action existed under GBL § 396-I and that CPLR 4544 applied to business gifts which involve a consumer transaction. The appellate court also restored demands for injunctive and declaratory relief, as well as allowing the plaintiffs to plead unjust enrichment and money had and received as alternative claims to the breach of contract cause of action. In an earlier 2006 decision in the same action, the appellate court had held that federal law did not preempt these claims.[10]

Mid-Term Price Increases and the Question of Class Certification

Decided in 2006, *Emilio v. Robison Oil Corp.*[11] concerned electricity consumers who commenced an action asserting claims for breach of contract, breach of the covenant of good faith and fair dealing, and violation of GBL § 349. According to the consumers, the defendant company unilaterally increased the price of electricity after it entered into fixed price contracts with the consumers. On the plaintiff's motion to amend the complaint, the Appellate Division, Second Department held that the "plaintiff should also be allowed to assert his claim under [GBL] § 349 based on the allegation that the defendant unilaterally increased the price in the middle of the renewal term of the contract." Three years later in the same action,[12] the appellate court certified the class of electricity consumers; even though the "defendant may have issued three similar contract versions at different times," a court was permitted to establish "sub-classes based on the particular contract at issue."[13]

Bait Advertising in the World of Computer Financing

Advertising is built on a system of acceptable consumer manipulation. The law, however, has recognized that a line is crossed where a company's advertisements misrepresent its intentions and, in essence, bait consumers into making a purchase and then leaving them without the promised warranty, rebate or services. In *Cuomo v. Dell, Inc.*,[14] the New York State Attorney General commenced a special proceeding alleging violations of Executive Law § 63(12) and GBL Article 22-A with respect to the respondent's business practices of selling, financing and servicing its computers. On the respondent's motion to dismiss, the trial court held that Dell's advertisements offer promotions "such as free flat panel monitors . . . include offers of very attractive financing, such as no interest and no payments for a specified period [limited to] well qualified customers . . . 'best qualified' customers [but] nothing in the ads indicate what standards are used to determine whether a customer is well qualified." The attorney general submitted evidence indicating that as few as 7% of New York applicants qualified for the promotions. In fact, most applicants, if approved for credit, were offered very high interest rates with revolving credit accounts ranging from 16% to 30% interest and not the prominently advertised promotional interest deferred. In deciding that such

conduct was deceptive and improper bait advertising, the court determined that Dell had manipulatively advertised its financing promotions in a manner that attracted prospective customers even though the company had no intention of actually providing the advertised financing to the majority of interested consumers.

Advertising and Rotten Apartments

A number of former tenants, whose leases were terminated because of water intrusion and mold, commenced several class actions that had been removed from federal court to state court. In *Sorrentino v. ASN Roosevelt Center, LLC*,[15] the plaintiffs alleged that the defendant property owners "continued to market and advertise their apartments and continued to enter into new lease agreements and renew existing lease agreements even after discovering the water infiltration and mold-growth problems." The problem was that the defendants did so without disclosing the problems to potential renters. Accordingly, the plaintiffs claimed that they had suffered both financial and physical injury as a result of the defendants' deceptive acts. The court found that the plaintiffs had pleaded the elements necessary to state a claim under GBL § 349.[16]

The Story of Timberpeg Homes and False Advertising

In *DeAngelis v. Timberpeg East, Inc.*,[17] the plaintiffs purchased a "Timber Frame Home" and expected the defendant to deliver the building materials and construct the home on their property. The defendant provided the former but not the latter. As a result, the plaintiffs brought an action, alleging "that Timberpeg engaged in consumer-oriented acts by representing itself, through an advertisement . . . as the purveyor of a 'package' of products and services necessary to provide a completed Timberpeg home." According to the plaintiffs, such language and conduct were false and misleading since Timberpeg was only responsible for delivering the building supplies. The appellate court held that the plaintiffs stated causes of action under GBL §§ 349 and 350 against the defendants.

The Misleading Insurer

An insurance agreement is a purchased product just like any other good despite the fact that a consumer might not always view insurance in such a manner. Purchasers of insurance coverage can equally fall victim to unlawful deceptive consumer practices. In 2005, the Appellate Division, Third Department held in *Elacqua v. Physicians' Reciprocal Insurers*,[18] that when covered and uncovered insurance claims give rise to a conflict of interest between an insurer and its insured, the insured is entitled to independent counsel of his or her choosing at the expense of the insurer. A few years later,[19] in allowing the plaintiff to amend her complaint asserting a violation of GBL § 349, the appellate court addressed the issue where a "partial disclaimer letter sent by defendant to its insureds . . . failed to inform them that they had the right to select independent counsel at defendant's expense, instead misadvising that plaintiffs could retain counsel to protect their uninsured interests at [their] own expense." The court found disturbing the fact that the defendant continued to send similar letters to its insureds, failing to inform them of their rights, even after the court's decision in 2005. Acknowledging that the "threat of divided loyalty and conflict of interest between the insurer and the insured is the precise evil sought to be remedied," the court therefore held that the defendant's failure to inform plaintiffs of their right to counsel under the insurance agreement, together with the fact that the defendant failed to provide conflict-free representation, constituted harm within the meaning of GBL § 349.

> Purchasers of insurance coverage can equally fall victim to unlawful deceptive consumer practices.

The Case of Craftsman Tools

In *Vigiletti v. Sears, Roebuck & Co.*,[20] consumers alleged that defendant Sears marketed its Craftsman tools as "Made in USA" although "components of the products were made outside the United States as many of the tools have the names of other countries, e.g., 'China' or 'Mexico' diesunk or engraved into various parts of the tools." In dismissing the GBL § 349 claim, the trial court found that the plaintiffs had failed to establish an actual injury. Specifically, the court highlighted the fact that the plaintiffs had failed to set forth allegations that they had paid an "inflated price for the tools . . . that [the] tools purchased . . . were not made in the U.S.A. or were deceptively labeled or advertised as made in the U.S.A. or that the quality of the tools purchased were of lesser quality than tools made in the U.S.A." The trial court also found that the plaintiffs did not allege the element of causation, stating in particular that the "plaintiffs have failed to allege that they saw any of these allegedly mislead-

ing statements before they purchased Craftsman tools." Finally, the court determined that the plaintiffs did not establish territoriality since there were "no allegations that any transactions occurred in New York State." ■

1. 11 N.Y.3d 105, 863 N.Y.S.2d 615 (2008).

2. 554 F.3d 300 (2d Cir. 2009).

3. *See* Weinstein Korn & Miller, New York Civil Practice, CPLR, Section 901.06[4], Lexis-Nexis (2d ed. 2009). *See also Tsadilus v. Providian Nat'l Bank*, 13 A.D.3d 190, 786 N.Y.S.2d 468 (1st Dep't 2004) (motion to stay class and enforce arbitration agreement enforced. "The arbitration agreement is enforceable even though it waives plaintiff's right to bring a class action"); *Raneri v. Bell Atl. Mobile*, 304 A.D.2d 353, 759 N.Y.S.2d 448 (1st Dep't 2003) ("given the strong public policy favoring arbitration . . . and the absence of a commensurate policy favoring class actions, we are in accord with authorities holding that a contractual prescription against class actions . . . in neither unconscionable nor violative of public policy").

4. *See Lonner v. Simon Prop. Group, Inc.*, 57 A.D.3d 100, n.1, 866 N.Y.S.2d 239 (2d Dep't 2008) ("Virtually all gift cards have expiration dates and are subject to a variety of fees, including maintenance fees or dormancy fees" (*see Gift Cards 2007: Best and Worst Retail Cards: A Deeper View of Bank Cards Doesn't Improve Their Look*, Office of Consumer Protection, Montgomery County, Maryland, at www.montgomerycountymd.gov)).

5. *See* Alterio, *Store Closings Deal Blow to Holiday Gift-Card Sales*, J. News, Nov. 27, 2008, p. 1 ("The National Retail Federation estimates that gift-card sales will dip 5% this holiday season to $24.9 billion, down from $26.3 billion last year.").

6. Consumer Reports, *Gift-Card Gotchas*, Dec. 2006, p. 8.

7. 57 A.D.3d 100, 866 N.Y.S.2d 239 (2d Dep't 2008). *See also Sims v. First Consumers Nat'l Bank*, 303 A.D.2d 288, 289, 750 N.Y.S.2d 284 (1st Dep't 2003).

8. 55 A.D.3d 796, 866 N.Y.S.2d 309 (2d Dep't 2008).

9. 58 A.D.3d 208, 869 N.Y.S.2d 125 (2d Dep't 2008).

10. *Goldman v. Simon Prop. Group, Inc.*, 31 A.D.3d 382, 383, 818 N.Y.S.2d 245 (2d Dep't 2006).

11. 28 A.D.3d 417, 813 N.Y.S.2d 465 (2d Dep't 2006).

12. *Emilio v. Robison Oil Corp.*, 63 A.D.3d 667, 880 N.Y.S.2d 177 (2d Dep't 2009).

13. *See also People v. Wilco Energy Corp.*, 284 A.D.2d 469, 728 N.Y.S.2d 471 (2d Dep't 2001) ("Wilco solicited contracts from the public and, after entering into approximately 143 contracts, unilaterally changed their terms. This was not a private transaction occurring on a single occasion but rather, conduct which affected numerous consumers. . . . Wilco's conduct constituted a deceptive practice. It offered a fixed-price contract and then refused to comply with its most material term – an agreed-upon price for heating oil.").

14. *Cuomo v. Dell, Inc.*, 21 Misc. 3d 1110(A), 873 N.Y.S.2d 236 (Sup. Ct., Albany Co. 2008).

15. 579 F. Supp. 2d 387 (E.D.N.Y. 2008).

16. In *Sorrentino v. ASN Roosevelt Ctr., LLC*, 588 F. Supp. 2d 350 (E.D.N.Y. 2008) and *Ventimiglia v. Tishman Speyer Archstone-Smith Westbury, L.P.*, 588 F. Supp. 2d 329 (E.D.N.Y. 2008), the U.S. District Court remanded all of the class actions back to Nassau County Supreme Court. Earlier the court had found that the New York Court of Appeals would recognize an independent cause of action for medical monitoring, and that the plaintiffs "have stated a rational basis for exposure to a disease-causing agent and there is a rational basis for their fear of contracting the disease."

17. *DeAngelis v. Timberpeg E., Inc.*, 51 A.D.3d 1175, 858 N.Y.S.2d 410 (3d Dep't 2008).

18. 21 A.D.3d 702, 800 N.Y.S.2d 469 (3d Dep't 2005).

19. *Elacqua v. Physicians Reciprocal Insurers*, 52 A.D.3d 886, 860 N.Y.S.2d 229 (3d Dep't 2008).

20. *Vigiletti v. Sears, Roebuck & Co.*, No. 2006-05286, 2573/05 (Sup. Ct., Westchester Co. Sept. 23, 2005) (Rudolph, J.), *aff'd*, 42 A.D.3d 497, 838 N.Y.S.2d 786 (2d Dep't 2007).

BY MICHAEL RIKON

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The Highest and Best Use Concept in Condemnation

In a condemnation trial, the property to be awarded just compensation must be valued on the highest and best use of the property, even though the owner may not have been utilizing the property to its fullest potential when it was condemned.

The leading case for this proposition is the Court of Appeals decision *In re Town of Islip (Mascioli)*.[1] In *Mascioli*, Judge Wachtler stated:

> Ordinarily, the potential uses the court may consider in determining value are limited to those uses permitted by the zoning regulations at the time of taking. When, however, there is a reasonable probability of rezoning, some adjustment must be made to the value of the property as zoned. An increment should be added to this amount if there is a reasonable probability of rezoning to a less restrictive category.[2]

The Court affirmed a value based on the probability of rezoning residentially zoned land to business. It is important to note that the standard employed to find the market value was "a knowledgeable buyer," which means a sophisticated realtor with a full understanding of the methods and means required for potential development.

All Parcels Are Valued as One Economic Unit

Individual adjoining parcels of real property must be valued together. The reason is, if the parties controlled all the contiguous land the combined parcels would have greater development potential and value.

In *Johnson v. State of New York*,[3] the court noted that to establish the propriety of valuation of the parcels as one economic unit, claimants must show that the subject parcels are contiguous and that there is unity of use and ownership.[4]

Joint control over the subject parcels is enough to establish the party's unity of ownership for valuation purposes.[5] Joint control arises from the relationship of the fee holders despite differences in actual title.[6]

As stated in *Guptill Housing Corp. v. State of New York*,

> it would be contrary to common sense and the rule of just compensation to conclude anything but that the two tracts should be treated as one for the purposes of severance damages in this particular case. . . . [T]he paramount constitutional requirement of just compensation must be allowed to prevail over the niceties of legal title advanced by the State.[7]

The law of this state follows a fundamental appraisal principle known as the rule of the larger parcel. *The Dictionary of Real Estate Appraisal*, Fourth Edition, contains two definitions for "larger parcel," as follows:

> In condemnation, the tract or tracts of land which are under the beneficial control of a single individual or entity and have the same, or an integrated, highest and best use. Elements for consideration by the appraiser in making a determination in this regard are contiguity, or proximity, as it bears on the highest and best use of the property, unity of ownership, and unity of highest and best use.
>
> In condemnation, the portion of property that has unity of ownership, contiguity, and unity of use, the three conditions that establish the larger parcel for the consideration of severance damages in most states. In federal and some state cases, however, contiguity is sometimes subordinated to unitary use.

Valuation of a Wetlands Parcel

As noted above, since property must be valued on its highest and best use, an owner is not precluded from offering evidence that zoning and other restrictions in effect on title vesting could with reasonable probability be challenged.

Take, for example, the valuation of a parcel subject to wetlands regulations. If a regulatory agency refuses to issue a permit allowing the property to be developed, the regulatory restriction will be deemed to effect the property's economic destruction.

As the Court of Appeals held in *Spears v. Berle*,[8]

> a land use regulation – be it a universally applicable local zoning ordinance or a more circumscribed measure governing only certain designated properties – is deemed too onerous when it "renders the property unsuitable for any reasonable income, productive or other private use for which it is adapted and thus destroys its economic value, or all but a bare residue of its value."[9]

The N.Y. Environmental Conservation Law (ECL) provides that if a property owner is aggrieved by the denial or limited issue of a permit, the owner may challenge by a CPLR Article 78 proceeding. If the court finds that the state Department of Environmental Conservation (DEC) commissioner's determination constitutes a taking, the court may either set aside the determination or require that the parcel be taken under the power of eminent domain.[10]

If the parcel is condemned before any application for a permit is filed, the value of the property must be adjusted accordingly by the condemnation court because there existed the probability of securing a valuable environmental permit.[11]

The formula of how to value a condemned wetlands parcel was clarified by Honorable Abraham G. Gerges sitting for Supreme Court, Richmond County, in *In re City of New York (Staten Island Bluebelt System – Phase 2)*.[12] In the decision, the court distilled the available caselaw to provide the following formula: A claimant must utilize a wetlands expert to provide an opinion that will set forth factual details pertaining to the conclusion that no economically viable use of a former owner's land exists. In the court's words "to establish that the wetlands regulations, as applied to the subject property, are confiscatory in nature," a claimant has to show by "'dollars and cents' evidence that under no use permitted by the regulation under attack would the property be capable of producing a reasonable return; the economic value, or all but a bare residue of the economic value, of the parcel must have been destroyed by the regulations at issue."

Therefore, one starts with an opinion from an expert that, in the expert's opinion, the regulated property has no reasonable return or economic value. This opinion must be based on an analysis of comparable wetlands parcels and how those parcels fared when making an application for a permit from the DEC, or, some other factual predicate.

Once such an opinion is obtained, the real estate appraiser is supposed to value the property "as regulated."

Obviously, if the parcel is not totally restricted, *i.e.*, it is not 100% wetlands but only partially mapped as wetlands or adjacent wetlands, the wetlands expert may offer the opinion that a certain number of homes could be built on the property. If that is the case, the appraiser should value the property by indicating a fair market value for each buildable unit.

But, if the wetlands expert indicates that the property presently cannot be developed, the property is to be valued as fully restricted under state DEC regulations, and that no allowance DEC would grant would produce a reasonable economic return.

The appraiser then appraises the property as regulated. This "regulated value" is to be determined by using whatever can be established by other sales of wetlands or other undevelopable parcels.

Once the appraiser analyzes these "restricted" sales, the expert indicates a value of the subject parcel as "restricted by the regulation." Added to this figure is an increment over and above the property's restricted market value, representing the property's enhanced value to a knowledgeable buyer in light of the reasonable probability of a successful constitutional court challenge.

The increment added to the restricted value must be supportable. A case cited by Justice Gerges, *Berwick v. State of New York*,[13] indicated that "the law follows the realities of the marketplace, which are that a knowledgeable buyer would adjust his purchase price to offset the cost in time and money for applying for a permit and challenging its denial in court as confiscatory."

The best explanation is to provide, as an example, the decision made by the Appellate Division, Second Department in *Estate of Berwick v. State of New York*.[14]

In *Estate of Berwick*, the court found that property designated 100% tidal wetlands had a recreational value of $16,300. It then found an adjusted value of $504,847 for the land without restrictions. It applied a 75% increment to $488,547 ($504,847 less the residential value of $16,300) or $366,410 and added back the recreational value of $16,300 to arrive at $382,700 as total just compensation.

Reasonably Probable

A highest and best use must be established as reasonably probable. A claimant does not have to prove every aspect of the highest and best use in the near future absolutely. But a use that is no more than a speculative or hypothetical arrangement in the mind of the claimant may not be accepted as the basis for an award.[15] For example, a vacant parcel of land may be valued as a subsidized housing site provided there is a proper showing of probability that a subsidy would have been granted, and upon proof that such a project could or would have been constructed in the foreseeable future. The fact that governmental activity is required to achieve a use does not necessarily disqualify the use from consideration.[16]

The standard employed in a condemnation case is that of a prudent real estate investor. A claimant is never limited to what the owner has done to its property. Rather, the law allows a condemnee to have its property valued on the basis of what could be reasonably accomplished by a prudent, knowledgeable real estate investor.

The Court of Appeals has stated in *Keator v. State of New York*:[17]

> It is the general rule that "just compensation" is to be determined by reference to the fair market value of the property at the date of taking, and that the fair market value is the price for which the property would sell if there was a willing buyer who was under no compulsion to buy and a willing seller under no compulsion to sell. In the determination of the fair market value, the condemnee is entitled to have the appraisal based on the highest and best available use of

> the property irrespective of whether he is so using it. That is, considering the best use to which the property could reasonably be put, what is its fair market value?[18]

What the courts are talking about is a probability of change, which is always allowed as the predicate of a valuation. Such consideration is not limited to highest and best use or zoning changes. Some other examples in condemnation cases include the following:

- In *In re City of New York [149th Avenue]*,[19] the court found that there was a reasonable probability of the adjacent upland owner securing title to the lands in the bed of a former creek, which no longer existed, since the proof was that the city had been granting such deeds.
- In *In re City of New York*,[20] a developer, in the midst of an assemblage to build a nursing home, was stopped short of the full assemblage by the condemnation proceeding. The court valued the property on the basis of a reasonable probability that he would have completed his assemblage.
- In *Schwartz v. State of New York*,[21] the court valued the property on the basis of a reasonable probability that there would be a waiver of a restrictive covenant affecting the use of the property.
- In *Campbell v. State of New York*,[22] the court valued the property, long used pursuant to a revocable license, on the basis of the reasonable probability of the continuation of the non-revocation of that license.
- In *Zappavigna v. State of New York*,[23] the court held that, having received preliminary approval for his subdivision plan, it was reasonably probable that the owner would receive final approval and the land would be used as a residential subdivision.
- In *Central School District No. 1 of Town of Smithtown*,[24] the court held that it was proper to value the land based on its joiner with other property, with the value based on the probability, not as an accomplished fact.
- In *Walker v. State of New York*,[25] the court found the property should be valued based on the reasonable probability that the property owner could have purchased a right of way across a former railroad right of way.
- In *Bero v. State of New York*,[26] it was held that value of the property could be proved based upon the reasonable probability of securing a permit to mine gravel from the banks of an adjoining river.
- In *Erie Lackawanna Railway Co. v. State of New York*,[27] the court held that, although a railroad held title under the Railway Act of 1850, under which it received only a permanent easement for railway purposes during the continuance of its corporate existence and on abandonment, the title reverted back to the original owners, the possibility of the abandonment was so remote and speculative that the possibility of the reverter had no value and the entire award went to the railroad.

Highest and Best Use Does Not Apply to Tax Assessment Cases

The concept of highest and best use does not apply to tax assessment cases. New York's constitution sets two different standards for valuation. The cardinal principle of property valuation for tax purposes set forth in the state constitution is that the property "[a]ssessments shall in no case exceed full value."[28] Whereas, in a condemnation, Article 1, § 7 of the New York State Constitution provides that "[p]rivate property shall not be taken for public use without just compensation." In condemnation, the property must be valued at its highest and best use regardless of actual use. To put it another way, the big difference in condemnation and tax certiorari cases is that the law requires the award to be based on a parcel's highest and best use in a just compensation claim, while a tax certiorari determination will require an inquiry as to the property's condition and ownership on the applicable valuation date.[29] The "Cardinal Principle of Valuation" in a tax reduction case has been interpreted to require valuation of improved property according to its existing use, not a potential one contemplated in the future.[30]

Highest and Best Use – Well Founded in Appraisal Practice

The concept of highest and best use is well founded in appraisal practice. Regardless of whether property has been condemned, in valuing any parcel of real estate an appraiser must make a highest and best use of the land analysis as though the property were vacant and as though it were improved. This is an essential part of the valuation process.[31]

The definition provided by the Appraisal Institute is "the reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, and financially feasible and that results in the highest value."[32]

The Uniform Standards of Professional Appraisal Practice, commonly referred to as USPAP, adopted by the Appraisal Standards Board of the Appraisal Foundation sets forth the following:

> [W]hen necessary for credible assignment results in developing a market value opinion, an appraiser must: (a) identify and analyze the effect of existing land use regulations, reasonably probable modifications of such land use regulations, economic supply and demand, the physical adaptability of the real estate, and market area trends; and (b) develop an opinion of the highest and best of the real estate. Under (b), USPAP noted in a comment that "an appraiser must analyze the relevant legal, physical, and economic factors to the extent necessary to support the

appraiser's highest and best use conclusion(s)."[33]

Conclusion

Every property valued in a condemnation proceeding must be valued on its highest and best use, which valuation can also consider a reasonable probability of re-zoning or relief from other regulatory restrictions. Highest and best use is not a static concept, but one that fluctuates pursuant to changes in market value, land use regulations and available engineering techniques. An appraiser must study and find the highest and best use of a property regardless of its actual use at title vesting. ■

1. 49 N.Y.2d 354, 426 N.Y.S.2d 220 (1980).
2. *Id.* at 360–61.
3. 10 A.D.3d 596, 781 N.Y.S.2d 764 (2d Dep't 2004).
4. *See also Erly Realty Dev. v. State of N.Y.*, 43 A.D.2d 301, 303–304, 351 N.Y.S.2d 457 (3d Dep't 1974).
5. *Guptill Holding Corp. v State of N.Y.*, 23 A.D.2d 434, 437, 261 N.Y.S.2d 453 (3d Dep't 1965).
6. *Di Bacco v State of N.Y.*, 46 A.D.2d 461, 363 N.Y.S.2d 121 (3d Dep't 1975).
7. 23 A.D.2d at 437.
8. 48 N.Y.2d 254, 422 N.Y.S.2d 636 (1979).
9. *Id.* at 262.
10. ECL § 25-0404 for Tidal Wetlands. *See* ECL § 24-0705 for Freshwater Wetlands.
11. *Chase Manhattan Bank, N.A. v. State of N.Y.*, 103 A.D.2d 211, 479 N.Y.S.2d 983 (2d Dep't 1984).
12. Index No. 4012/04 filed July 27, 2007.
13. 107 A.D.2d 79, 486 N.Y.S.2d 260 (2d Dep't 1985).
14. 159 A.D.2d 544, 552 N.Y.S.2d 409 (2d Dep't 1990).
15. *Triple Cities Shopping Ctr., Inc. v. State of N.Y.*, 26 A.D.2d 744, 272 N.Y.S.2d 207 (3d Dep't 1966), *aff'd*, 22 N.Y.2d 683, 291 N.Y.S.2d 801 (1968).
16. *In re Shorefront High Sch.*, 25 N.Y.2d 146, 303 N.Y.S.2d 47 (1969).
17. 23 N.Y.2d 337, 296 N.Y.S.2d 767 (1968).
18. *Id.* at 339 (citations omitted).
19. N.Y.L.J., Oct. 20, 1971, p. 17, cols. 6, 7 (Sup. Ct., Queens Co.) (Tessler, J.).
20. 40 A.D.2d 597, 335 N.Y.S.2d 945 (1st Dep't 1972).
21. 72 A.D.2d 490, 426 N.Y.S.2d 100 (3d Dep't 1980).
22. 39 A.D.2d 615, 331 N.Y.S.2d 75 (3d Dep't 1972), *aff'd*, 32 N.Y.2d 952, 347 N.Y.S.2d 205 (1973).
23. 186 A.D.2d 557, 588 N.Y.S.2d 790 (2d Dep't 1992).
24. 78 Misc. 2d 60, 355 N.Y.S.2d 947 (Sup. Ct., Suffolk Co. 1974) (Lazar, J.).
25. 33 N.Y.2d 450, 354 N.Y.S.2d 626 (1974).
26. 33 A.D.2d 88, 305 N.Y.S.2d 309 (3d Dep't 1969), *aff'd*, 27 N.Y.2d 977, 318 N.Y.S.2d 505 (1970).
27. 38 A.D.2d 463, 330 N.Y.S.2d 700 (4th Dep't 1972).
28. N.Y. Const. Art. XVI, § 2; N.Y. Real Property Tax Law § 301.
29. *Northville Indus. Corp. v. Bd. of Assessors of Town of Riverhead*, 143 A.D.2d 135, 136, 531 N.Y.S.2d 592 (2d Dep't 1988).
30. *Gen. Motors Corp. Foundry Div. v. Assessors of Town of Massena*, 146 A.D.2d 851, 536 N.Y.S.2d 256 (3d Dep't 1989); *see also Adirondack Mountain Reserve v. Bd. of Assessors of Town of N. Hudson*, 99 A.D.2d 600, 471 N.Y.S.2d 703 (3d Dep't), *aff'd*, 64 N.Y.2d 727, 485 N.Y.S.2d 744 (1984).
31. Appraisal Institute, The Appraisal of Real Estate 60 (12th ed. 2001).
32. *Id.* at p. 305.
33. USPAP Standards Rule 1-3, U-17-18, (2008–2009 ed.).

ATTORNEY PROFESSIONALISM FORUM

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I practice in a small town in upstate New York. I am a general practitioner and my one large client owns a local business that employs many local residents. Upon graduation from law school, I hung out my shingle 15 years ago. Other than the three years I spent at law school, I have lived in town all of my life. When working for my clients, including the local business owner, I frequently find myself on the opposite side of neighbors or people I grew up with in contract negotiations, small claims actions, collections matters and employment issues. While I understand that I am an advocate and need to ensure that my clients' interests are protected, it seems that my neighbors fail to understand that I work for the other side. Needless to say, this makes me uncomfortable, especially in matters where the other side does not hire counsel. I tell them that I do not represent their interests, but it seems like it falls on deaf ears. Is there anything I need to do to protect my clients, as well as myself, when this situation arises?

Signed,
Walking a Tightrope

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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BY ELLIOTT WILCOX

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

The Power of the Pause

Every single second of every single moment was filled with the sound of his voice when you think back upon it you have to admit you were just absolutely amazed I mean did this guy even need to breathe it didn't seem like it because he just kept going and going and going without regard to oxygen or audience expectations almost as if the thought of pausing would let someone else start talking and that would simply be unacceptable for him so rather than pausing for even a moment and letting you think about what he was saying he just kept talking and talking and . . .

Whoa, buddy! Stop! Take a breath!

One of the most powerful tools in your presenter's toolbox is the pause. That brief moment of silence after a profound thought can sometimes be more important that the words themselves.

Why Pause?

Imagine reading a newspaper without a single comma, period, or paragraph indentation – just word after word after word. How far could you read before losing your train of thought? A speech without any pauses feels the same way to the listener.

Do you want the audience to remember your message? To understand it? Do you want them to take the message home, and incorporate it into their lives? If so, you need to give them a chance to stop and reflect upon what you've said.

A pause lets us think. Many speakers ask their audiences rhetorical questions, and then move immediately to their next subject. This robs the audience of their chance to think about how your ideas could affect their lives. Pausing for a moment lets the audience answer the question or wrap their minds around your message.

A pause lets us laugh. Many humorous moments in speeches are lost because the speaker steps on the laugh line. It may take more than a second for the audience to catch the punch line – give them the chance to laugh.

A pause helps us absorb ideas. Your message travels at the speed of sound. Even in the largest of rooms, it travels from your mouth to the listener's ears almost instantly. Sometimes, it takes a few extra seconds for the message to travel those last few inches of its journey, from the ear to the brain. If you pause for a moment, you will let your message complete its journey.

When to Pause

There are several opportunities in every speech where you might consider pausing:

- After you say something important.
- After you ask the audience a question.
- When you want the audience to think.
- When you ask the audience to remember a moment in their past.
- After you say something funny.
- When you hit an emotional moment.
- As a transition between points.

Look through the outline of your speech and find the moments where your audience needs to mentally "breathe." Notate your outline or make a mental note, so that you purposely pause at the appropriate moment.

How to Pause

Most speakers underestimate the amount of time they've paused. What seems like an eternity onstage may be only two or three seconds. Here are three tips for holding the pause for maximum impact:

Count silently. "One Mississippi, two Mississippi, three Mississippi, four Mississippi . . ." and then resume.

Look around. Make eye contact with three different members of the audience before continuing. If you look to members in the far corners of the room, you'll give the impression of making eye contact with everyone in the room.

Get uncomfortable. Pause for one second longer than feels comfortable. The pause won't be nearly as long as you think it is. You'll feel uncomfortable, but your audience won't.

Effective speakers know how to pause at the right moment. They hold their pauses long enough to let the audience think, feel or laugh. If you master the skill of pausing in your presentation, you will give your audience the opportunity to walk away with your message stuck firmly in their heads. ■

EMPIRE STATE COUNSEL

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: What do you think of the disturbing trend to use *would have* to express a condition that did not occur, in a sentence stating a condition contrary to fact?

Answer: Attorney Arthur M. Tasker, who sent this question, referred to the failure to use the (correct) subjunctive mode, and it was clear that he regrets the almost complete loss of the subjunctive, both in speech and in writing. The subjunctive mode was traditionally used as it appears (italicized) in the following sentences:

If *he had asked* the proper question, he would have received a favorable response.
If I *were* you, I would take the job.
If I *had been* in the car, I would have been injured.

The rule that governs these three sentences represents one category of the subjunctive: When a dependent clause beginning with *if* expresses a condition that is either contrary to fact, doubtful, or highly improbable, the past tense is used in the dependent clause to express present time (*were*); and the past perfect tense (*had been*) to express past time.

That rule is the most common use of the traditional subjunctive mode, and even it is ignored by many English speakers, although careful authors and journalists still observe it. But you can begin to see by this partial explanation of the subjunctive mode why the majority of English speakers ignore the subjunctive. It is still alive, however, in expressions like, "Be that as it may," "God forbid," and "Heaven help us."

The subjunctive mode is also traditional in dependent clauses expressing demand, resolution, strong request or urgency. For verbs other than *be* the simple present tense of the verb is correct, except for the third person singular, which drops the usual *s*. When the verb *be* occurs in the dependent clause it is correct for all three persons. The following sentences indicate correct grammatical usage:

It is important that she *eat* her lunch on time. (Not *eats*)
It is required that he *hand* the receipt to the customer. (Not *hands*)
It is necessary that the employee *be* polite to customers. (Not *is*)

Finally, the subjunctive mode is traditionally correct in "wish" clauses. When the phrase "I wish" begins a sentence, the verb in the following (dependent) clause must be in the past tense to express present time and in the past perfect tense to express past time:

I wish I *could* attend. (Not *can*)
I wish I *were* taller. (Not *was*)
I wish he *had tried* harder. (Not *tried*)

Indo-European, the basis for practically all European languages including English, possessed a much more complex grammatical system than we have today; speakers of English have "leveled" English grammar. Americans who teach English as a second language do not teach the subjunctive mode. In fact, ironically, many of them are unaware that it exists, although their French, German, and Spanish students still use the subjunctive, which their native languages have preserved.

Attorney Tasker, now retired, received his J.D. from the Cardozo School of Law. He is old enough to have been taught the subjunctive mode in elementary school, and he deplores its virtual disappearance. I can sympathize. The subjunctive is complicated, but its disappearance obliterated some useful distinctions.

From the Mailbag

My thanks to Attorney Frank G. Helman, who sent me the lyric of a song that employs zeugma copiously and comically. He wrote that he was familiar with the rhetorical device of zeugma, but didn't know its name until he read the November/December issue of "Language Tips." The first and last verses are reprinted below. The authors are the British duo, Flanders and Swann:

"Have Some Madeira, M'Dear,"
She was young, she was pure, she was new, she was nice
He was old, he was vile, and no stranger to vice,
He was base, he was bad, he was mean.
He had slyly inveigled her up to his flat
To view his collection of stamps
And he said as he hastened to put out the cat,
The wine, his cigar and the lamps:
"Have some Madeira, M'dear
You really have nothing to fear
I'm not trying to tempt you, that wouldn't be right
You shouldn't drink spirits at this time of night.
Have some Madeira, M'dear
It's very much nicer than beer.
I don't care for sherry, one cannot drink stout
And port is a wine I can well do without
It's simply a case of chacon à son gout.
Have some Madeira, M'dear!"

. . .

"Have some Madeira, M'dear!"
The words seemed to ring in her ear.
Until the next morning she woke up in bed
With a smile on her lips and an ache in her head
And a beard in her earhole that tickled and said
"Have some Madeira, M'dear!"

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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like their coffee black" or "A gourmet likes black coffee.")

Comply with local rules and all applicable rules of procedure. Learn about the judge who'll preside over your case.

Be Brief

Respect the court's time. Be concise and succinct without sacrificing clarity. Judges will thank you by maintaining interest.

Careful preparation and organization will help you focus and address your issues. Don't rush through your arguments. Say what you must say to strengthen your client's case. Complex ideas require several sentences or paragraphs to express, and precision should never be sacrificed for concision. Nevertheless, don't say more than you need to say, and make every word count.

The surest way to be succinct is to drop loser arguments.

Often, time factors and client considerations require a quickly written, general document, such as boilerplate. But the virtue of boilerplate is also its vice: It's written quickly, but it considers unlike cases alike, it includes old law, it's often riddled with miscitations, and it usually goes unread.

Keep your sentences and paragraphs short without being choppy. Each sentence and paragraph should express one idea. If you choose precise words and effective transitions, you'll normally keep your sentences shorter than 20 words and your paragraphs shorter than 250 words. Long sentences and paragraphs are less effective. They'll lose the judge's attention and complicate an issue unnecessarily. Each sentence should contain one small idea, and no more. Each paragraph should contain one large idea, and no more.

Use transitions to link one paragraph to the next. Transitional phrases like "in addition," "by contrast" and "in the alternative" help make logical relationships between your paragraphs. They also avoid the weighty conjunctive adverbs like "additionally," "along the same lines," "however," and "moreover." The best transitions, though, repeat in the first sentence of the paragraph a word or concept from the last sentence of the preceding paragraph.

Replace coordinating conjunctions with a period and start a new sentence. The coordinating conjunctions are "and," "but," "for," "so," "nor," and "yet." Starting new sentences shortens your sentences and makes them more concise, even though doing so might add text.

The surest way to be succinct is to drop loser arguments.

Don't start sentences with "In that." ("In that the judge recused herself . . . ." *Becomes:* "The judge recused herself because her cousin was a litigant.")

Eliminate prepositions like "of"; turn them into possessives instead. (*Incorrect:* "The contract of Mr. Jones." *Becomes:* "Mr. Jones's contract.") Prepositions also lead to nominalizations, which are wordy and conclusory, in which writers prefer nouns to verbs. (*Incorrect:* "Ms. Jones committed a violation of the law." *Becomes:* "Ms. Jones violated the law.")

Discard redundancies like "advance planning" (write "planning") and "due and payable" (write "due").

Avoid metadiscourse. Cut wordy running starts and throat clearers like "the fact is that" and "the first thing I will argue is that." Just say what you have to say. Especially avoid metadiscourse that vouches for your position and thus raises integrity issues. Examples: "it is black-letter law that," "it is hornbook law that," "it is well-settled that," "it is axiomatic that," and "I believe that."

Reject unnecessary repetition. Say it once and in one place. This doesn't interfere with the Legal Writer's advice about weaving your case theory throughout your brief. The theory is a theme, a message, not repeated words or arguments. You build your theory in your presentation of the facts, the law, and the analysis. That's how you persuade. You don't persuade by repeating arguments, simply by changing the wording.

Delete all double-identification in parentheses. *Incorrect example:* "The case arises from a breach of contract (the 'contract') between Mr. and Mrs. Smith (collectively, the 'Smiths') and Mr. Brown ('Brown')." *Incorrect example:* "The Plaintiff owes the Defendant ten dollars ($10.00)." It's unnecessary and boring to say things twice. Write as you speak.

Forgo footnotes or limit them to when they're relevant. Information worth mentioning is worth mentioning in the text, not in footnotes. Never use footnotes to avoid exceeding the page limit. You want to call attention to what is important, not to hide information in footnotes or, worse, in endnotes.

Stop using string citations except if your client's position would benefit from explaining authority or a split in authority.

Don't try to cram in as many words as you can to meet the page limit. Fewer but well-thought-out words will improve clarity and thus be more persuasive.

If the specifics of your case involve voluminous or abstract information like financial data, statistics, or medical records, include visual aids: charts, tables, pictures, and summaries to communicate your points. Make the court's job easy. Judges love visuals.

Don't waste the court's time with undisputed fact, law, or issues. Mention that they're undisputed and move on.

Review to Improve

Through the writing process, especially between drafts, continuously edit to improve content, organization, citing, sentence and paragraph structure, and word choice. When you've written a final draft, you can start proofreading to spot errors. Don't rush this process. Your final product will be greatly improved if you devote the time to turn an average product into a worthy one.

Re-read your draft, think, and make changes. Keep your reader in mind when you review for organization, clarity, tone, style, and length.

First, review to improve macro-organization. Paragraphs are the building blocks of thought. Determine whether each paragraph develops one point; whether the discussion of each concept is grouped all in one place; whether its position within the brief is appropriate; whether the first paragraph of each section sets the roadmap for the details that come next; whether transitions between paragraphs connect the concepts; and whether the last paragraph in each section reaches the conclusion set out in the first paragraph.

Second, review to improve your small-scale organization. Review sentences within each paragraph. Determine whether the first sentence is a topic sentence or a transitional sentence that connects one paragraph to the next; whether each sentence expresses one idea only; whether transitions between sentences connect them to convey the point; whether sentences move from short to long, from simple to complex, and from old to new; and whether the last sentence answers that paragraph's thesis.

Then review your narrative. Use stylistic and grammatical devices to persuade. For example, end each sentence with your climax; the end of each sentence is the stress point. Begin each sentence with something important, too, because the beginning of each sentence is the second greatest stress point. This means you should use the middle of each sentence, paragraph, and section to bury information you must include but which you wish to de-emphasize. With this technique, you can use short sentences and paragraphs for emphasis and long sentences and paragraphs to de-emphasize and bury information.

Use punctuation for similar effect. To force the judge to dwell on your sentence, use lots of commas and semicolons. To make the judge rush through your point, eliminate your punctuation.

Rhetorical devices also play a strong role in persuasion. They can push a judge's buttons to rule for your client. Rely on original metaphors (without mixed metaphors or clichés); parallel structure to match nouns with nouns and verbs with verbs; and antithesis to contrast opposites concisely.

Always consider the active voice and the passive voice. The active voice describes a sentence where someone does something to someone or something, with a subject-verb-object combination, or who does what to whom. (*Example:* "The robber shot the victim.") The active is always more concise and direct than the single passive voice. (*Example:* "The victim was shot by the robber.") The double passive, by contrast, hides the actor. (*Example:* "The victim was shot.") Prefer the active voice except when the actor is unimportant or when you want to downplay the actor's conduct.

Except for quiet understatement, prefer positive words, clauses, and sentences to negative ones. (*Example:* "Do this" instead of "Do not do that.") Affirmative sentences are assertive and clear. Negatives are ambiguous and leave room for misconceptions. (*Example:* Lender: "You owe me $100." Borrower: "I do not owe you $100." The borrower just admitted owing some money, although less than $100. The borrower should have said, "I owe you nothing.")

Write even negatives in the positive. (*Incorrect example:* "The nonmonied spouse must not be prevented from . . . ." *Becomes:* "The nonmonied spouse must be allowed to . . . .") Avoid these words: "barely," "denial," "disapprove," "except," "hardly," "neglect to," "neither," "never," "nor," "not," "other than," "prohibit," "provided that," "scarcely," "unless," and "void."

Eliminate generalities and cowardly qualifiers like "generally," "typically," or "usually," except if referring to an exception to the general rule. In that case, state the rule first, and then the exception.

Beware vague referents. Each "his," "hers," "they," "their," and "its" must refer to one group, person, or thing only. Conversely, be aware of inelegant variation, in which a writer uses different words to mean the same thing. Inelegant variation confuses, whereas repetition has power.

Put subjects next to their predicates. If some modifiers are necessary, put them next to the word or phrase they modify. But don't characterize. Characterizations weaken your message.

Then review to improve your tone and style.

Omit abbreviations and contractions except in signals and citations. Make your tone formal and professional.

Improve readability by including stylistic variety. Not every sentence should be a simple declarative sentence or structured as a dependent clause followed by an independent one. Nor should every sentence be the same length. Be creative. Once all the information you need is in the brief and everything else is out, concentrate on the style that makes your document attractive and readable.

Show the court that you care about the details. Proofread to eliminate typographical errors and to correct grammar and spelling mistakes. Use your word-processing program's grammar-correction function. But also review your work word for word on a hard copy.

Then improve the document's appearance. Appearance is nearly as important as content. Design has aesthetic but also pragmatic relevance. Judges appreciate design that facilitates legibility. Follow the court's rules

about font, type size, margins, alignment, and headings. Your firm might also have its own rules. Follow them as well. When the choice is yours, single space while double-spacing between paragraphs. Add one space between sentences, not two. Include page numbers. Try Century font, not Times New Roman. Use right-ragged, not full, justification. Use 12–14 type size, nothing smaller or larger. Most important, include plenty of white space to enhance readability.

Don't use bold, italics, quotation marks, or underlining to emphasize or to show sarcasm. These false devices dilute content and irritate readers. Prefer italics to underlining to make the text cleaner. Prefer English words, but use italics for foreign words and phrases not commonly used in English when you must use them. Set headings, subheadings, and titles in boldface, large, or italicized type in your argument section to distinguish captions from text.

Last, include a table of authorities with correct formatting for dot leaders; don't use the tab bar to format dot leaders. Your table of authorities should contain all the authorities cited or referred to in your argument section and the page where you mention each one. Create it after you draft and proofread your entire document to avoid omitting a statute or case and to avoid mispagination.

When you have a good draft, but only after you have a good draft, give it to a good editor — a colleague who can play devil's advocate to find typographical errors, weaknesses in your arguments, and ways to improve your structure.

Know when to submit your brief. Edit late, after you've put your brief aside a few times, but submit your brief on time. Most good lawyers are perfectionists. They take pride in excelling. Briefs can always be improved. But knowing when to stop editing is as important as investing enough time to edit carefully.

Conclusion

Persuade by writing with your reader in mind. The better you get at persuading through writing, the higher your chances of winning.

Further Readings:

Gerald Lebovits, *Write to Win*, 72 Queens Bar Bull. 11 (Dec. 2008), *available at* http://ssrn.com/abstract=1320665.

Gerald Lebovits & Martha Krisel, *Finding Your Voice as a New Attorney: Thoughts from the Employer and the Court*, 58 Nassau Lawyer 11 (Jan. 2009), *available at* http://ssrn.com/abstract=1332115.

Gerald Lebovits & Lisa Solomon, *Powerful Writing Techniques to Help You Persuade Judges and Win Clients* (American B. Ass'n CLE delivered at Los Angeles, Cal., in Oct. 2009), *available at* http://ssrn.com/abstract=1498914.

Gerald Lebovits, *Winning Through Integrity and Professionalism*, The Advocate (Bronx County B.J.) 4 (Summer 2009), *available at* http://ssrn.com/abstract=1463718.

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

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BY GERALD LEBOVITS

Persuasive Writing for Lawyers — Part II

In the second part of this two-part column, the Legal Writer continues with three more ways to persuade: honesty, brevity, and revision.

Be Honest

To be persuaded, judges must believe in you, not merely in your arguments. Messengers count for as much as the message. Judges will believe in you if you prove your case without distractions and overpromising and if you make them feel smart, not stupid.

State the facts accurately, clearly, and completely. Don't misrepresent facts, either affirmatively or by omission. Misstatements signal a lack of knowledge of the case or, worse, a desire to avoid unfavorable aspects of your case. Prove your integrity — and make it easy for the court to find your facts — by giving record citations.

Stick to relevant, determinative facts. Don't disperse the reader's attention by reciting facts, procedure, people, and dates that don't advance your theory.

Avoid fallacies. A fallacy is invalid reasoning that leads to incorrect conclusions. Judges will reject untruthfulness and hold it against you and your client. Judges will be quick to spot inconsistencies or flaws in your argument. Make sure that each premise is correct. Develop your argument through a logical syllogism. Don't skip premises. Build your argument block by block.

Use pinpoint, or jump, citations to cases. If the court wants to verify the context or the rule, it should be able to do so immediately, and it will be able to do so if you use pinpoints. Don't waste the court's time by forcing it to scroll through the entire case to find the relevant part. Pinciting makes it easy for the court to confirm that the law says exactly what you say it says. Being reliable when citing the law makes you credible. At the trial level, attach to your brief a copy of the most relevant cases and statutes, and highlight the part you reference.

When there's adverse law, cite it and distinguish it from your case. You show candor to the court if you bring it up before your opponent does. You also eliminate the surprise factor and the opportunity for opposing counsel to diminish your credibility.

Review all your citations when you proofread. Make sure that all citations are consistent and follow the applicable uniform rules of citation. In federal court, use Bluebook citations. In New York State courts, use the Official Style Manual, nicknamed the Tanbook.

Most judges hate pompous language, jargon, and legalese. Turgid writing irritates. Simple, plain English is clear. Use Anglo-Saxon English, not foreign or fancy words, unless you have no monosyllabic English equivalent. Don't be boring; engage your reader. But make sure the court understands every word without driving it to the dictionary.

Eliminate overstatement. If you object to opposing counsel's statements, tie them to a specific misstatement or mistake and move on. Make fair statements, and prefer understating. Judges hate exaggeration.

Avoid intensifiers like "clearly" or "obviously." They add extra words, they irritate skeptical judges, and they hide lazy writing. Instead of writing that something is "clear," explain why it is clear. Explain why your argument is valid; don't just say it is. Besides, fact and law are seldom clear or obvious. When you write that something is clear, you raise the bar unnecessarily: You need to prove not only that you're right but that you're clearly right. Unless you're dealing with phrases of art like "clear and convincing evidence," you don't need to prove that something is clear; you need to prove only that it satisfies the standard or burden of proof.

> Messengers count for as much as the message.

Eliminate sexist language. Sexist language is insulting. And sexist language affects credibility because it makes the judge trip on your style instead of on your content. Sexist language represents the male or female as the norm, gratuitously identifies the referent's gender, and demeans and trivializes. Gender-neutral language avoids gender bias, it projects fairness and clarity. Don't use "he," "his," or "him," "she" or "her," or "he/she." Don't alternate between the genders. Instead, make the references plural or delete the antecedent altogether. (*Incorrect example:* "A gourmet likes her coffee black." *Incorrect fixes:* "A gourmet likes their coffee black" or "A gourmet likes his/her coffee black." *Correct:* "Gourmets

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