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Point of View

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by Scott R. Kurkoski

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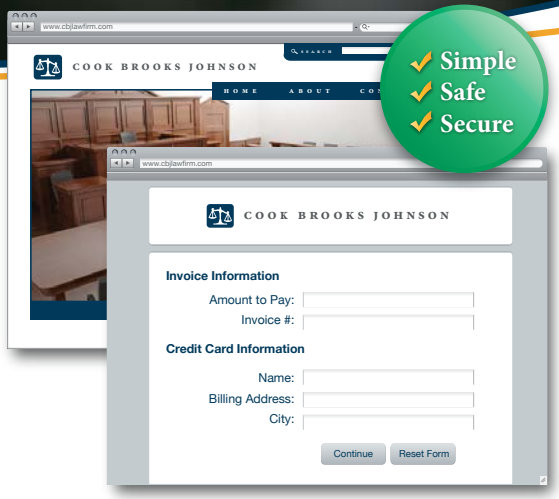

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NEW YORK STATE BAR ASSOCIATION
Journal

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DEPARTMENTS

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Court Funding: A Statewide Perspective

As attorneys, we know first hand the many negative consequences that can result from reductions in court funding. In fact, we also know that a fundamental prerequisite of access to justice is a judiciary with adequate funding. In keeping with this year's theme of "Justice for All," the State Bar has taken up a new initiative to examine this critical issue from a statewide perspective. We hope to learn more about how different communities are affected by funding cuts, find creative strategies to mitigate the impact of inadequate court funding, and apply this knowledge as we coordinate our efforts and advocate for reform.

The delays caused by reductions in court funding can have a devastating impact on the parties involved in criminal and civil litigation. For example, inherently difficult family court cases can become even more agonizing as they are drawn out over time; small businesses suffer because their resources are tied up in unresolved disputes; and some criminal defendants are incarcerated for inappropriate periods of time as they await disposition of their cases.

Moreover, the savings supposedly gained by cutting court funding may be overstated in light of the resulting losses often suffered by local economies. When judicial employees are laid off, their lost wages can have an exponential effect in the community, leading to decreased tax revenue. Delays in litigation can result in lost business opportunities. And protracted foreclosure proceedings can lead to extended residential vacancies, neglect, and reductions in property values. Indeed, experts have suggested that the "savings" supposedly realized by court cutbacks are significantly outpaced by the indirect losses they cause.

The American Bar Association recently adopted a resolution introduced by its Task Force on Preservation of the Justice System, which urged local, state, and federal policy-makers to develop sustainable strategies for adequately funding our justice system. The resolution also called upon state and local bar associations to document and publicize the consequences of cutbacks in court funding. The Task Force also issued a report describing some of the negative effects that reductions in court funding have had on communities nationwide. Strained judicial budgets lead to layoffs and hiring freezes, and inadequate staffing interferes with the proper administration of justice. The same economic crisis that has led to cuts in funding for courts also has led to cuts in funding for civil legal services, at the same time that the crisis has created a heightened need for those services. This places a great deal of pressure on already overburdened court systems, with consequences that affect criminal defendants, civil litigants, local economies, and the general public.

The State Bar has heeded the ABA's call to investigate and discuss this important issue. We have asked each of our Judicial District Vice Presidents to gather information about the effects of court funding cuts by reaching out to their local bar associations, administrative judges and practitioners. We aim to identify the types of matters that have been most seriously affected by cutbacks, to address unmet needs in various regions, and to highlight creative solutions that have helped to mitigate the negative effects of inadequate funding. Our sections and committees have pitched in to help as well, providing additional insight on how the court funding problems affect substantive practice in different fields. We will assemble all of this information into a report that will describe the impact of court funding cuts upon litigants, jurors, judges,

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judicial staff, attorneys and the public in each of their districts. We know that different communities have different needs and priorities, and we believe that this approach will give us a better perspective on the various challenges across the State.

We also will explore the issue of court funding during a special event at our 2012 Annual Meeting. This year's Presidential Summit will focus on two important issues: immigration representation and state funding for our justice system. I am thrilled that many prominent speakers have agreed to participate, including Hon. Richard C. Wesley of the United States Court of Appeals for the Second Circuit and the retired Chief Judge of the State of New York Judith S. Kaye. Judge Wesley and Judge Kaye will co-moderate a panel comprising NYSBA Executive Committee member Margaret Finerty, ABA Task Force on the Preservation of the Justice System member Elaine Jones, budget expert and former Secretary to the New York State Senate Finance Committee Abraham Lackman, and economist Roy Weinstein. American Bar Association President William T. Robinson III will deliver introductory remarks. I hope that many of you will join us later this month for what promises to be an engaging and informative event. ■

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Point of View

The Marcellus Shale: A Game Changer for the New York Economy?

By Scott R. Kurkoski

Scott R. Kurkoski (Skurkoski@binghamtonlaw.com) is a partner in the Binghamton, New York law firm of Levene Gouldin & Thompson, LLP where he is chair of the firm's oil and gas practice group. He is chair of the Broome County Bar Association Oil and Gas Committee and attorney for the Joint Landowners Coalition of New York, Inc. He also represents several landowner coalitions throughout New York.

The New York gas rush hit its peak in 2008 but was reduced to a trickle when the Department of Environmental Conservation began to work on the draft Supplemental Generic Environmental Impact Statement (SGEIS). New Yorkers who wish to see these opportunities come to our state have waited for more than three years for the DEC to complete its work and have watched as opportunities left our state for Pennsylvania, Ohio and West Virginia. This article addresses the impacts of gas drilling in New York and responds to some of the issues raised by Elisabeth Radow in her article published in the November/December issue of the New York State Bar Association *Journal*, "Homeowners and Gas Drilling Leases: Boon or Bust?"

After recognizing the potential lying beneath the ground upon which they lived and worked, New York landowners formed landowner coalitions to educate themselves about natural gas development and to give themselves better negotiating power to ensure improved lease terms. Coalition leaders formed the Joint Landowners Coalition of New York, Inc. (JLCNY) in January 2010, a nonprofit organization whose mission is to foster, promote, advance and protect the common interest of the people as it pertains to natural gas development through education and best environmental practices. The JLCNY now represents 38 landowner coalitions, over 800,000 acres and approximately 70,000 New Yorkers who are in favor of responsible gas development in our state.

The JLCNY members and their families live and work in the communities where drilling will occur. Many farm their land, continuing the work started by generations before them. They serve as the best stewards of the land, protecting it for future generations. They also recognize that development of our natural gas resources will be a game changer for New York by creating jobs, economic development and the promise for a better tomorrow for thousands of New Yorkers.

Overview of Natural Gas Production in New York and Hydraulic Fracturing

Natural gas production is not a new phenomenon in New York. Indeed, our state has a long history regarding the safe and responsible development of our oil and gas resources. More than 75,000 oil and gas wells have been developed in New York since the late 1800s, about 14,000 of which are still active.[1] Of these wells, approximately 90% have been hydraulically fractured to stimulate greater production.

The natural gas production process is an inherently technical one that employs scores of trained professionals. Geologists, hydro geologists, engineers, archaeologists and many other professionals are fully engaged in every step of the process including seismic mapping, land surveying and, ultimately, site selection. These professionals conduct environmental reviews, ensure the integrity of the well and ultimately oversee development and production.

Before any drilling activity commences, a site is first seismically mapped to determine the composition and structure of the subsurface. Seismic mapping not only provides an understanding of the density and expected production of the shale below, but also allows operators to evaluate any natural or man-made channels that may exist below the subsurface. Then, surveyors, environmental engineers and other professionals conduct field reconnaissance to identify environmental concerns such as wetlands, wildlife, fauna and streams that must be considered onsite. A surveying plan, grading plan and stormwater management plan are filed with the DEC and water management and withdrawal permits are secured.

Only after each and every one of these steps is completed can the drilling, fracturing and production process commence. Generally, the drilling process takes three weeks to complete. Hydraulic fracturing averages three to five days. The tall rigs many associate with gas development are only used during the drilling phase. What remains after drilling is an area, approximately one acre in size, that contains what is known as a "Christmas tree" valve and some small tanks and apparatus used to separate flowback from natural gas before the gas is shipped to market.

> [T]he average size of a multi-well pad for the drilling and fracturing phase of operations at 3.5 acres. Average production pad size, after partial reclamation, is estimated at *1.5 acres for a multi-well pad*.[2]

The process of horizontal drilling allows an operator to develop 640-acre shale units all from a single well pad. The result is a dramatic reduction of surface disturbance as compared to multiple 40-acre sites using conventional vertical wells.

Some have expressed concerns about what will be produced from the drilling process. The Radow article states that radium, chemical toxins and other ingredients, will be held in mud-pits and pose "a cumulative threat to the state's complex matrix of aquifers." This statement is incorrect in many respects.

First, the SGEIS mandates the use of closed-loop drilling systems which greatly eliminate the opportunity for surface spills or surface contamination. These systems have been endorsed by natural gas critics like the Earthworks Oil and Gas Accountability Project for their ability to limit land disturbance from natural gas and significantly mitigate environmental impacts.[3]

Closed-loop drilling employs mechanical processes that directly channel all drill cuttings, drilling muds, fracturing fluids and other production by-products directly to self-contained systems. In New York these systems will be outfitted with additional secondary containment systems according to the SGEIS, to ensure that none of these by-products have the opportunity to interact with the natural environment.

Furthermore, the SGEIS clearly addresses concerns about radioactive materials. The DEC says in the executive summary and chapter five of the SGEIS:

> [B]ased on the analytical results from field-screening and gamma ray spectroscopy performed on samples of Marcellus Shale NORM [naturally occurring radioactive material] levels in cuttings are not significant because the levels are similar to those naturally encountered in the surrounding environment.[4]

> [T]he results [of gamma ray spectroscopy tests], which indicate levels of radioactivity that are essentially equal to background values, do not indicate an exposure concern for workers or the general public associated with Marcellus cuttings.[5]

Fracturing Fluid Additives

Additive Type	Main Compound(s)	Purpose	Common Use of Main Compound
Diluted Acid (15%)	Hydrochloric acid or muriatic acid	Help dissolve minerals and initiate cracks in the rock	Swimming pool chemical and cleaner
Biocide	Glutaraldehyde	Eliminates bacteria in the water that produce corrosive byproducts	Disinfectant; sterilize medical and dental equipment
Breaker	Ammonium persulfate	Allows a delayed break down of the gel polymer chains	Bleaching agent in detergent and hair cosmetics, manufacture of household plastics
Corrosion Inhibitor	N,n-dimethyl formamide	Prevents the corrosion of the pipe	Used in pharmaceuticals, acrylic fibers, plastics
Crosslinker	Borate salts	Maintains fluid viscosity as temperature increases	Laundry detergents, hand soaps, and cosmetics
Friction Reducer	Polyacrylamide Mineral oil	Minimizes friction between the fluid and the pipe	Water treatment, soil conditioner make-up remover, laxatives, and candy
Gel	Guar gum or hydroxyethyl cellulose	Thickens the water in order to suspend the sand	Cosmetics, toothpaste, sauces, baked goods, ice cream
Iron Control	Citric acid	Prevents precipitation of metal oxides	Food additive, flavoring in food and beverages; Lemon Juice ~7% Citric Acid
KCl	Potassium chloride	Creates a brine carrier fluid	Low sodium table salt substitute
Oxygen Scavenger	Ammonium bisulfite	Removes oxygen from the water to protect the pipe from corrosion	Cosmetics, food and beverage processing, water treatment
pH Adjusting Agent	Sodium or potassium carbonate	Maintains the effectiveness of other components, such as crosslinkers	Washing soda, detergents, soap, water softener, glass and ceramics
Proppant	Silica, quartz sand	Allows the fractures to remain open so the gas can escape	Drinking water filtration, play sand, concrete, brick mortar
Scale Inhibitor	Ethylene glycol	Prevents scale deposits in the pipe	Automotive antifreeze, household cleansers, and deicing agent
Surfactant	Isopropanol	Used to increase the viscosity of the fracture fluid	Glass cleaner, antiperspirant, and hair color

Note: The specific compounds used in a given fracturing operation will vary depending on company preference, source water quality and site-specific characteristics of the target formation. The compounds shown above are representative of the major compounds used in hydraulic fracturing of gas shales.

Commonly Used Fracturing Fluid Additives[7]

It is important to understand that hydraulic fracturing fluid is composed primarily of water and sand. These two elements compose approximately 99.5% of all fracturing fluid components with the remainder being chemical additives that accomplish two primary goals: to control the proliferation of bacteria development in the drilling process and to aid in the unrestricted movement of the fluid throughout the wellbore. Only a handful of additives are used in each fracturing fluid solution with the most common found in everyday products. A list of more common additives is included in the graphic above. Solutions for individual well sites can be found online at www.fracfocus.org. It is a myth that the composition of fracturing fluid is a "secret." The contents of fracturing fluid is known to state regulatory agencies, emergency responders and residential homeowners as well. Indeed, in the SGEIS New York has proposed some of the strictest disclosure rules in the nation:

> *The Department's regime exceeds the requirements of 22 of the 27 oil and gas producing states reviewed* and is on par with the five states currently leading the country on chemical disclosure. Additionally, the enhanced disclosure requirements are equivalent to the *proposed requirements of the federal Fracturing Awareness and Responsibility (FRAC) Act of 2011.*[6]

Another area of concern often raised is the potential for groundwater contamination through migration of fracturing fluids from the fractured formation to groundwater aquifers. This has not occurred in more than 60 years of utilizing this technology and is confirmed in studies conducted by the U.S. Environmental Protection Agency. The basic reason this is unlikely to occur is that literally thousands of feet separate shale rock strata from its groundwater aquifer counterpart. In between are thousands of feet of impermeable rock which require fracturing to stimulate release of gases and liquids. Given the extensive mapping of the subsurface conducted before development, this potential becomes even more remote.

The DEC reports in the Executive Summary of the SGEIS that

> [c]hapters 5 and 6 contain analyses that demonstrate that no significant adverse impact to water resources is likely to occur due to underground vertical migration of fracturing fluids through the shale formations. The developable shale formations are vertically separated from potential freshwater aquifers by at least 1,000 feet of sandstones and shales of moderate to low permeability. In fact, most of the bedrock formations above the Marcellus Shale are other shales. That shales must be hydraulically fractured to produce fluids is evidence that these types of rock formations do not readily transmit fluids. The high salinity of native water in the Marcellus and other Devonian shales is evidence that fluid has been trapped in the pore spaces for hundreds of millions of years, implying that there is no mechanism for discharge of fluids to other formations.[8]

In fact, we have hydraulically fractured over one million wells in this country and never had an incident

of groundwater contamination from the process of hydraulic fracturing. This is a fact confirmed by the U.S. Environmental Protection Agency,[9] the Groundwater Protection Council,[10] recent studies conducted by Pennsylvania State University,[11] the University of Texas[12] and regulators in 15 different U.S. states[13] as well as the current Administrator of the U.S. Environmental Protection Agency.[14]

Any discussion about the environmental impacts of high volume hydraulic fracturing has to include the experience in Dimock, Pennsylvania, wherein 18 families were affected by Marcellus drilling operations. The operations led to methane migration and a surface spill. While these are serious matters, high volume hydraulic fracturing operations had not begun when these families began to experience problems.

The operator and the Pennsylvania Department of Environmental Protection came to an agreement confirmed in a Consent Order and Settlement Agreement dated December 15, 2010. The operator took action and provided the affected families with water treatment systems and a financial settlement worth twice their property values. DEP's Consent Order also mandated the plugging of three natural gas wells that were deemed beyond repair.

I have discussed Dimock with experts like former Director of DEC's Department of Mineral Resources, Greg Sovas. Mr. Sovas says:

> Given that NY's Division of Mineral Resources has required redundant casing and cementing of wells since the 1980's, it is highly unlikely that the situation in Dimock or any of the other gas migration incidents in PA would have occurred in NY. Now the Division is proposing a third string of pipe in the SGEIS to ensure protection of the groundwater.

Oil and gas drilling and production are industrial operations; accidents can and do occur. However, the affected wells in Dimock represent less than 1% of all Marcellus wells drilled in Pennsylvania. New York's stricter rules and regulations give the state better tools to avert such problems. While we seek to better utilize renewable resources, many believe that natural gas has an advantage over the hazards of coal, oil and nuclear power.

Renewable energy may be in our future but the renewables simply cannot come close to satisfying our energy needs. Failing to embrace natural gas development simply maintains the status quo – air pollution from coal-fired power-plant emissions, environmental devastation from strip mining, risks of offshore oil drilling and the threat of a nuclear power plant accident. Given these options, most believe that natural gas is our best energy option.

What About the So-Called Halliburton Loophole?

Those opposed to drilling often cite "the Halliburton Loophole," a term popularized by the film *Gasland*, to generate fear about the oil and gas industry. Critics suggest that former Vice President Dick Cheney influenced Congress to create an exemption to the Safe Drinking Water Act (SDWA). The phrase mischaracterizes the facts behind the Energy Policy Act of 2005. Further, the inference that this "loophole" allows corporations to pollute is absurd, especially given New York's stringent laws and regulations.

What occurred in 2005 was anything but an exemption to the SDWA. In 1997, the 11th Circuit of the U.S. Court of Appeals reached a decision in a case, *LEAF v. EPA* (118 F.3d 1467), which overruled U.S. EPA's previous determination that hydraulic fracturing was not covered under the class II underground injection program. This was a decision that contradicted standard practice and existing case law as hydraulic fracturing had never in its nearly 65-year history been regulated under SDWA but rather very effectively by the states. In overruling the EPA, the court's decision temporarily altered the purpose and intent of the class II underground injection program and as a result hydraulic fracturing and other programs were adversely affected by uncertainty on how to proceed.

In response to the court's decision, Congress clarified its original intent in the 2005 energy bill which was supported by nearly three-quarters of the U.S. Senate,[15] including then-Sen. Barack Obama of Illinois. In the U.S. House of Representatives, 75 Democrats joined 200 Republicans in supporting the final bill.[16] Again, this decision did not "exempt" hydraulic fracturing from "decades-old environmental laws governing safe drinking water and clean air" as claimed by the Radow article and, as evidenced by the voting record, wasn't ushered through by Vice President Dick Cheney.

Natural Gas Production and Home Mortgages – Unintended Consequences?

One of the main narratives the Radow article advances is that natural gas production is fraught with pitfalls for residential homeowners, suggesting that signing a gas lease will cause homeowners to default on their residential loans. The Radow article ignores the fact that resi-

dential mortgage lending is being conducted in oil and gas producing states throughout our country. Lending on homes with oil and gas leases is not a new phenomenon.

In most mortgages, the borrower gives the lender rights in real property interests such as easements and appurtenances. But an oil and gas lease grants the lessee nothing more than the right to enter the lessor's land for the purpose of drilling for and extracting oil or gas and has been interpreted as a license, not an easement.[17]

Accordingly, the lien of most mortgages does not attach to an interest in an oil and gas lease.

The New York Mortgage-Single Family-Fannie Mae/Freddie Mac Uniform Instrument contains the following no transfer clause:

> Lender may require Immediate Payment in Full of all Sums Secured by this Security Instrument if all or any part of the Property, or if any right in the Property, is sold or transferred without Lender's prior written permission.

An oil and gas lease will not violate this no transfer clause because it is not a sale or transfer of a "right" in the property since an oil and gas lease, as a license, gives no right in real property.[18] Rather, the rights and interests created by an oil and gas lease are considered personal property in New York for all purposes except taxation.[19]

However, one should be cautious about mortgages which provide for a lien extending to all rights in the property. While less common, clauses such as the following will allow a lender to acquire an interest in an oil and gas lease:

> [A]ll right, title and interest of Borrower in and to the Mortgaged Premises, including without limitation: . . . all oil, gas, mineral, timber, sand, gravel, water, natural resources and other such rights . . . and all leases affecting the Mortgaged Premises, which leases and all rents, royalties, income and other payments and rights thereunder are hereby assigned to Lender during the term hereof, and the possession of such leases and proceeds therefrom shall be delivered to Lender upon its demand.

The Radow article states: "It is worth noting that Wells Fargo, one of Chesapeake's lenders, stands among national lenders that do not grant mortgage loans to homeowners with gas leases." Interestingly enough, when I contacted Wells Fargo they had a much different opinion on their company's policy. Jason Menke, Communications Consultant with Wells Fargo Home Mortgage, stated:

> Wells Fargo has no set policy regarding lending decisions on properties where gas or other drilling and mining operations exist. We have made loans on properties where leases exist.

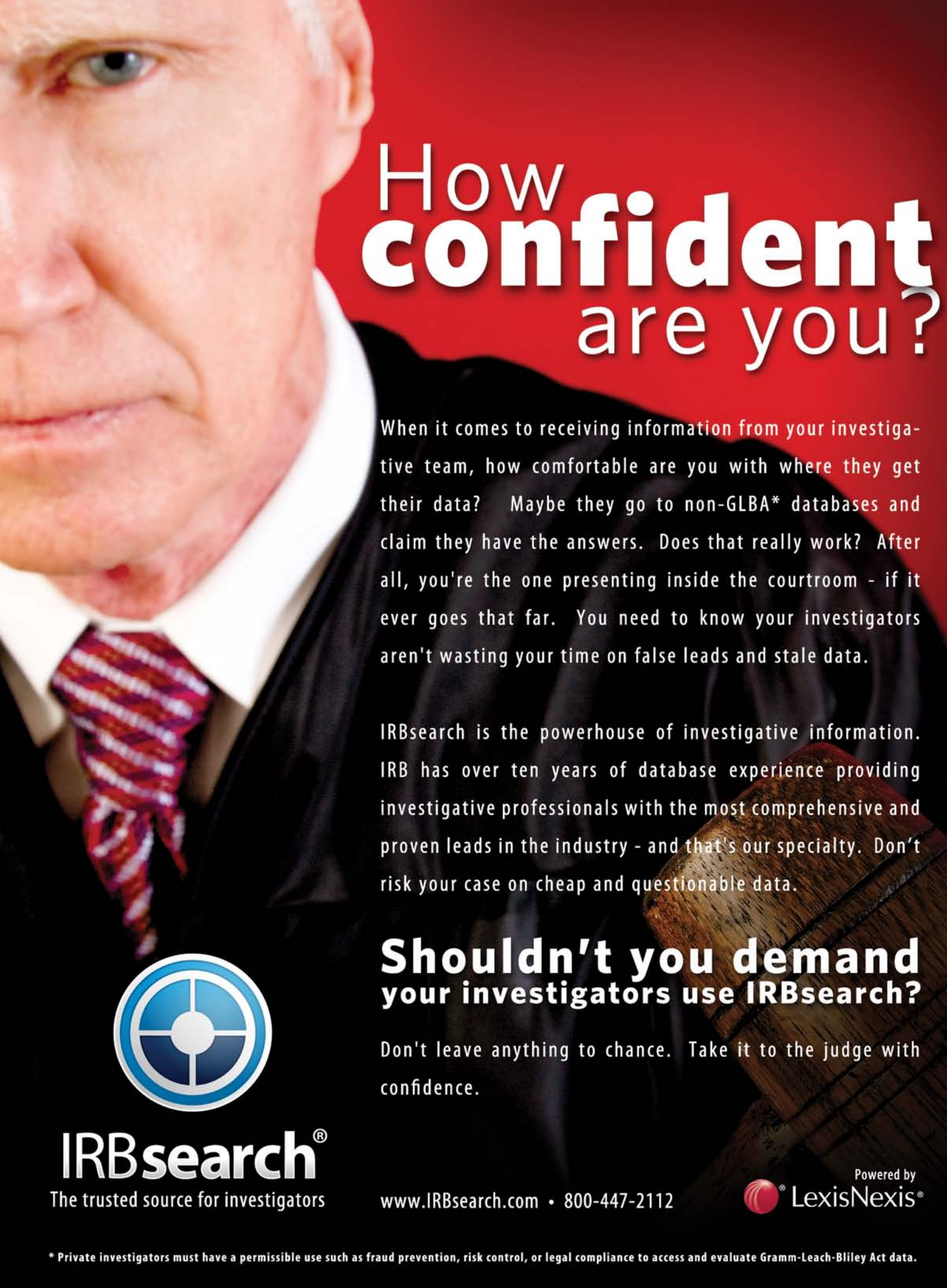
Wells Fargo is not alone in providing mortgages to properties with gas leases. One of our local banks, Chemung Canal Trust Company (CCTC) with offices in New York and Pennsylvania, has approved multiple mortgages for borrowers with existing gas leases. CCTC has also mortgaged properties where the subsurface oil, gas and mineral rights have been severed. It is the policy of the bank to consider all applications on a case-by-case basis, including those in markets that are within the Marcellus Shale footprint.

The New York Times recently published an article expressing similar concerns for homeowners with leases seeking mortgages. The article was titled "Rush to Drill for Natural Gas Creates Conflicts With Mortgages." The article motivated John F. Spall, Director of The Dime Bank in Honesdale, Pennsylvania, to state:

> I have been in private practice as a real estate attorney in Northeastern Pennsylvania for more years that I'd like to admit. My firm has offices in both Pike and Lackawanna Counties. I also operated a real estate business for a number of years and serve as a Director of The Dime Bank, which is headquartered in Wayne County. I have also served as local counsel to one of the major oil and gas companies operating in our area. I offer you all this in the way of background for what I'm about to say – that Ian Urbina's article in the New York Times this past week was seriously flawed. I reached out to him when I heard he was doing a story on this subject. Unfortunately, his deadline had already passed by the time I got his reply. I wish we had been able to talk, because he got so much so wrong.[20]

Natural gas production is occurring hand-in-hand with normal lending procedures right over the border in Pennsylvania. Spall cites many positive aspects of gas leases on residential property including, but not limited to, bonus payments enabling many customers to settle mortgages well before their expected maturation and lenders assigning gas lease revenues to themselves as a way of improving collateral on the loan. Spall also declares that review of mortgages on file in counties in the Northern Tier of Pennsylvania show many associ-

Continued on Page 16


How confident are you?
When it comes to receiving information from your investigative team, how comfortable are you with where they get their data? Maybe they go to non-GLBA* databases and claim they have the answers. Does that really work? After all, you're the one presenting inside the courtroom - if it ever goes that far. You need to know your investigators aren't wasting your time on false leads and stale data.
IRBsearch is the powerhouse of investigative information. IRB has over ten years of database experience providing investigative professionals with the most comprehensive and proven leads in the industry - and that's our specialty. Don't risk your case on cheap and questionable data.
Shouldn't you demand your investigators use IRBsearch?
Don't leave anything to chance. Take it to the judge with confidence.
IRBsearch®
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Powered by LexisNexis®
* Private investigators must have a permissible use such as fraud prevention, risk control, or legal compliance to access and evaluate Gramm-Leach-Bliley Act data.

Point of View

Continued from Page 14

ated with properties having gas leases and, in virtually all those cases, there are corollary assignments of leases to the lenders.

I frequently discuss oil and gas related title insurance issues with Gil Hoffman, Vice President and District Counsel of Chicago Title Insurance Company. Mr. Hoffman sent me his thoughts about the Radow article:

> From a title insurance perspective, certainly some oil and gas leases will be problematic. However, the more I have studied the title issues associated with oil and gas leases, the more comfortable I have become in my belief that mortgage financing and title insurance can coexist peacefully with oil and gas leases, in the great majority of cases. Certainly, some title issues will necessitate a bit of flexibility and creativity, but nothing extraordinary when compared with, say, canals, railroads, mines and transmission lines. Also, current and proposed environmental controls should serve to protect the market value of leased properties. The royalties generated by gas leases should enhance Lessor-Borrowers' ability to pay their mortgages, further reducing the risks associated with mortgage lending of leased property. Lenders and title companies need to grow past their generalized concerns when confronted with land affected by gas leases, recognize that the sky really isn't falling, and get on with the business of lending and insuring on gas-leased property, just as Adirondack area Lenders learned to live and loan while tolerating the reserved mineral rights present in so many titles in that region. We should be adjusting our practices to deal with the various title issues presented by modern gas leasing, rather than rejecting titles to gas-leased property.

Indeed, Fannie Mae recognizes "outstanding oil, water or mineral rights" as "acceptable . . . minor impediments" if "customarily waived by other lenders, as long as they do not materially alter the contour of the property or impair its value or usefulness for its intended purposes."[21] Similarly, Freddie Mac finds title insurance exceptions for oil, gas, water or mineral rights to be "acceptable if commonly granted by private institutional Mortgage investors in the area where the Mortgaged Premises are located," and if, among other things, "There is a comprehensive endorsement to the title insurance policy that affirmatively insures the lender against damage or loss due to the exercise of such rights."[22] (The other name for the TIRSA 9 Endorsement for residential mortgage title policies in New York is the Comprehensive Endorsement). For buyers, a "TIRSA Owner's Extended Protection Policy" can provide great coverage, for a small additional premium.[23]

> A poorly negotiated oil and gas lease may create issues for the landowner, and so, the best defense against problems is representation by competent counsel. A carefully negotiated oil and gas lease will protect the landowner and his mortgage lender, serve the needs of the lessee, and enable required title coverage.

Most practitioners in New York's gas-producing communities agree that the market will resolve these issues. Lenders with stricter policies towards oil and gas leases will simply lose market share to their competitors.

Digging Into Lease Negotiations

A carefully negotiated oil and gas lease is key to protecting the landowner. Most landowners understand today that lease negotiations must be conducted by competent professionals. Many have turned to landowner coalitions for oil and gas expertise and to increase their bargaining power with the power of a large block of acreage. Organizations like the Joint Landowners Coalition of New York and the National Association of Royalty Owners can also provide assistance.

Indeed, landowners are routinely negotiating special setbacks, protections and privileges in their leases. Dozens of addenda to the standard lease are now routine, including provisions addressing shut-in fees, indemnification, hold harmless, insurance, damages, facility placement, facility access, work timing, storage issues, water testing, remediation of damages, operations, vertical and horizontal pugh clauses, water usage, audit rights, reimbursement of tax rollbacks, protection of agricultural activities and erosion and sedimentation control requirements and reclamation provisions to ensure restoration of the property to its original condition.

Well-negotiated leases address facilities location in great detail and require consultation with the landowners as well as generous setbacks from water sources, habitation and other concerns. Many of these setbacks are required in the SGEIS itself. Pipelines are excluded from the lease and require separately negotiated agreements except to the extent required to connect the well pad with the gathering line system. Compressor stations are also excluded from the lease.

As is now common practice throughout the industry, many natural gas producing companies enter into separate agreements with property owners where a significant surface disturbance is planned. These agreements are separate from those that provide access to the property owner's mineral rights below and are

carefully negotiated to include special compensation and other incentives for the temporary inconveniences the landowner experiences while development proceeds.

Just below our state line, landowner-friendly leases are being signed with up-front payments of $5,750 an acre and 20% royalties. Five-year renewable terms are common but so are other arrangements. The lease is not indefinite and extensions are not indefinite unless legal counsel has failed to properly define terms, which is the whole point of negotiations in the first place.

Dependence on Foreign Oil

According to T. Boone Pickens, the U.S. imported 57% of its oil, or 333 million barrels in October 2011, sending approximately $36.4 billion to foreign countries. That's sending $816,086.64 per minute overseas instead of recycling those dollars back into our economy.[24] Pickens says:

> Foreign oil dependence continues to be an overlooked, yet fundamental barrier to economic recovery. Domestic natural gas is the only resource that can elevate the country from our economic turmoil by creating hundreds of thousands of American jobs and redirecting foreign oil money back into the hands of American businesses.
>
> In addition to its transformative economic potential, natural gas also has the benefit of being cleaner, cheaper, and more abundant than oil. When you consider all of this, it is unbelievable that our country keeps sending billions of dollars to OPEC nations for a foreign resource that is more expensive and does not make us safer or create jobs here in America.[25]

Every president since President Nixon has stressed the importance of reducing our dependence on foreign oil. Natural gas in New York and throughout our nation brings us closer than ever to achieving energy independence.

How Will Natural Gas Production Affect the Development of New Construction and the Economy?

To examine this it is again proper to look to our southerly neighbors. Let's compare Williamsport, Pennsylvania, with Ithaca, New York. Williamsport is in the middle of the developing Marcellus play in Pennsylvania. Ithaca is a town whose many residents have expressed concerns about natural gas development. What conclusions can be drawn between economic development and recovery in areas with and without natural gas production? The Bureau of Economic Analysis annually reviews the economic conditions of 366 metropolitan areas in the United States. It measures the gross domestic product (GDP) generated in each, identifies the sources of growth or decline and ranks the areas compared to others. In reviewing these statistics it is noticeable that Ithaca and Williamsport are similar communities in size, with populations of roughly 30,000 persons each and per capita incomes of slightly above $19,000 in both cases. Both have heavy populations of students. Thanks to natural gas production that is where the similarities end. Williamsport grew by 7.8% in 2010, earning it a ranking of seventh in the nation for GDP growth in 2010, while Ithaca gained only 1.0%, giving it a rank of 252 out of 366 metro areas. Williamsport grew by more than three times the national average of 2.5%, while Ithaca fell behind at barely two-fifths' the U.S. rate. Williamsport grew its economy by $247 million (in constant dollars), while Ithaca added only $35 million.[26]

Most landowners understand today that lease negotiations must be conducted by competent professionals.

Not too long ago the situation was different. In fact, just four short years ago in 2007, Williamsport was feeling the pains of economic contraction as jobs were leaving en masse. Williamsport faced a seemingly rust belt future. Ithaca's economy was $32 million larger and the gap widened over the two years that followed to $169 million; but, in 2010, natural gas companies and those who service them came to Williamsport in earnest as exploration ramped up. The results have been astounding. Williamsport now has a $43 million advantage over Ithaca. Growth such as this doesn't happen without new construction. The city is host to new and expanded hotels, eateries, commerce and industrial parks and, yes, residential developments. In fact, a massive residential development project that is expected to bring $16.5 million of revenue to the city[27] was just announced.

Of course, the benefits of natural gas production in Pennsylvania are not limited to the City of Williamsport. The Commonwealth as a whole is benefiting from the development of natural gas. According to the latest report from the Pennsylvania Department of Labor, the benefits realized by the state are as follows:

- As of the first quarter of 2011, Marcellus Shale related industries employed 214,000 Pennsylvanians
- From 2008–2011 employment grew by 63% in core Marcellus industries compared to an overall .9% growth rate for all industries in the Commonwealth
- The average wage in core Marcellus industries was $76,036, which is more than $29,800 greater than the average of all industry wages in Pennsylvania and

exceeds the Pennsylvania median household income (2009) by $26,535
- The average wage in ancillary Marcellus industries was $62,581, which is more than $16,400 greater than the average for all industries in Pennsylvania
- The Northern Tier Workforce Investment Area (WIA), which encompasses the most rapid growth in Marcellus Shale core industries in volume and percentage, saw an increase of 1,806 employees from 2008 to 2011 representing an employment increase of over 2,000%[28]

In addition to these benefits, the Pennsylvania Department of Revenue, at the direction of Governor Tom Corbett, released an analysis showing that companies engaged in and related to natural gas drilling activities in Pennsylvania have paid more than $1.1 billion in state taxes since 2006. Those taxes are in addition to the billions of dollars of infrastructure investments, royalty payments and permit fees paid by the industry. The Revenue Department's analysis, which breaks out tax payments from oil and gas companies and their affiliates through April 2011, indicates that 857 of these companies have already paid $238.4 million in capital stock/foreign franchise tax, corporate net income tax, sales/use tax and employer withholding to the state in 2011. These figures from the first quarter of this year already exceed by nearly $20 million the total tax payments made in all of 2010 (Pa. Dept. of Revenue Release, 5/2011). The analysis also identified $214.2 million in personal income taxes paid since 2006 attributable to Marcellus Shale lease payments to individuals, royalty income and sales of assets.[29]

Keep in mind, Pennsylvania is producing these economic numbers without a severance tax or ad valorem tax. New York has an ad valorem tax which taxes oil and gas production at the local level, producing tax revenues for the communities shouldering the burden of the development. The JLCNY produced estimated tax revenues for the Town of Windsor, New York, assuming the existence of five well pads over five years using average production numbers from Susquehanna, Bradford and Tioga counties in Pennsylvania. These five wells pads were estimated to produce $20,446,106.20 in local tax revenue with $13,361,260.07 paid to the Windsor School District. This is just one example of how all New York residents will enjoy economic benefits from natural gas development regardless of whether they are large landowners.

The benefits New York could accrue from natural gas production, given the current landscape and assuming no changes in tax structure, are significant even when using conservative estimates. For example, the SGEIS estimates there is potential for 54,000 new jobs and $2.5 billion in economic activity that may be created annually throughout the state. Many of these jobs would be in hard-hit places like Broome, Tioga and Chemung counties who have experienced economic malaise for years. The SGEIS predicts these counties would experience annual increases in employee earnings of approximately $254 million to

Estimate of Ad Valorem Tax Paid to Town of Windsor

Summary Table of Five Year Total of Estimated Ad Valorem Taxes Paid for One to Five Pads

Township Service	Number of Pads, Developed in 2-2-2 Sequence in Years 1 to 3				
	1	2	3	4	5
County Services	$961,240.17	$1,922,480.34	$2,883,720.50	$3,844,960.67	$4,806,200.84
Town Wide	$194,837.39	$389,674.78	$584,512.17	$779,349.56	$974,186.95
Town Wide Highway	$4,996.50	$9,993.00	$14,989.50	$19,986.01	$24,982.51
Town Hwy. Outside Village	$164,932.36	$329,864.72	$494,797.07	$659,729.43	$824,661.79
Fire Protection (Avg.)	$90,962.81	$181,925.62	$272,888.43	$363,851.24	$454,814.05
Avg. 2010-2011 School Taxes	$2,672,252.01	$5,344,504.03	$8,016,756.04	$10,689,008.06	$13,361,260.07
Five Year Total	$4,089,221.24	$8,178,442.48	$12,267,663.72	$16,356,884.96	$20,446,106.20

Input Variables:

Five Year Rolling Average Price	$9.80 /MCF	(from NYS ORPS, 2011, for Medina Wells)
Equalization Rate	66.50%	(from Town of Windsor)

Single Well Production Rates per: 2009–2010 Susquehanna/Tioga/Bradford Counties, PA

Table Courtesy of JLCNY Inc.
WWW.JLCNY.COM

$1.0 billion, or 4.7% to 18.7% of the 2009 total wages and salaries for the region.[30]

One of the benefits my firm regularly witnesses are donations to charities. Pennsylvania landowners receiving oil and gas bonuses and royalties have increased my firm's estate planning practice. Many of our clients tell us their first priority is giving to their church and local charities. They say they have been blessed and feel compelled to share their good fortune. Also, many oil and gas companies in Pennsylvania regularly make charitable donations to schools, organizations and the communities where they operate.

Conclusion

New York Times columnist David Brooks recently published an article titled "Shale Gas Revolution." He states:

> The United States is a country that has received many blessings, and once upon a time you could assume that Americans would come together to take advantage of them. But you can no longer make that assumption. The country is more divided and more clogged by special interests. Now we groan to absorb even the most wondrous gifts. A few years ago, a business genius named George P. Mitchell helped offer such a gift. As Daniel Yergin writes in "The Quest," his gripping history of energy innovation, Mitchell fought through waves of skepticism and opposition to extract natural gas from shale. The method he and his team used to release the trapped gas, called fracking, has paid off in the most immense way. In 2000, shale gas represented just 1 percent of American natural gas supplies. Today, it is 30 percent and rising. . . . A few weeks ago, I sat around with John Rowe, one of the most trusted people in the energy business, and listened to him talk enthusiastically about this windfall. He has no vested interest in this; indeed, his company might be hurt. But he knows how much shale gas could mean to America. It would be a crime if we squandered this blessing.[31]

New York is one of the prime locations in the Marcellus Shale world class gas play. Developed properly, the Marcellus and other producing formations in New York will be a game changer for our state and our nation, bringing us clean energy and proven economic benefits. There is real prosperity just across the border in Pennsylvania. There are well-paying jobs, new infrastructure and greater tax revenue. Our neighbors are benefiting from safe and responsible Marcellus Shale development. It is time to bring those benefits to New York. ■

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Feeling Neglected?

Introduction

Who among us hasn't felt neglected? Whether it is by a family member, friend, or colleague, the feeling that an insufficient amount of attention, or no attention at all, is being paid to us, is not a good feeling. Parties to litigation can feel neglected too, and the CPLR provides a mechanism for a party, or court, feeling neglected by another party to an action, to get the attention they crave.

CPLR 3216

CPLR 3216 provides a mechanism for both a party to an action, and the court presiding over that action, to prod a party to resume prosecution of the case. The prod is the service of a CPLR 3216 Notice, colloquially referred to as a "Ninety Day Notice." What makes the prod more effective than a barrage of calls, or letters, requesting that the dilatory party resume prosecution, is the accompanying provision that, where prosecution is not resumed and a note of issue is not filed within 90 days of the service, the action is dismissed.

The statute provides:

> R 3216. Want of prosecution
>
> (a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits.
>
> (b) No dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with:
>
> (1) Issue must have been joined in the action;
>
> (2) One year must have elapsed since the joinder of issue;
>
> (3) The court or party seeking such relief, as the case may be, shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed.
>
> (c) In the event that the party upon whom is served the demand specified in subdivision (b)(3) of this rule serves and files a note of issue within such ninety day period, the same shall be deemed sufficient compliance with such demand and diligent prosecution of the action; and in such event, no such court initiative shall be taken and no such motion shall be made, and if taken or made, the court initiative or motion to dismiss shall be denied.
>
> (d) After an action has been placed on the calendar by the service and filing of a note of issue, with or without any such demand, provided, however, if such demand has been served, within the said ninety day period, the action may not be dismissed by reason of any neglect, failure or delay in prosecution of the action prior to the said service and filing of such note of issue.
>
> (e) In the event that the party upon whom is served the demand specified in subdivision (b)(3) of this rule fails to serve and file a note of issue within such ninety day period, the court may take such initiative or grant such motion unless the said party shows justifiable excuse for the delay and a good and meritorious cause of action.
>
> (f) The provisions of this rule shall not apply to proceedings within rule thirty-four hundred four.

An amendment to CPLR 205(a), enacted in 2008, provides (in pertinent part):

> R 205. Termination of action
>
> (a) . . . Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.[1]

While CPLR 3216 uses the status neutral term "party," the statute is, by operation, primarily designed to afford

redress where it is the plaintiff who has allowed the action to languish. Thus, the party to be prodded is almost always the plaintiff, and the penalty for failing to respond to the prod is invariably dismissal of the plaintiff's action. It goes without saying that this is a penalty which penalizes only the plaintiff.

CPLR 3216 was enacted in 1967, long before the switch in New York State to commencement by filing in the Supreme and County Courts. A perhaps unintended result of the change was the newfound ability of the court system to monitor the progress of cases, in those commencement by jurisdiction courts, from the moment an index number was purchased, through to the final disposition of the case. This ability stood in stark contrast with commencement by service courts, where the court system could remain blissfully unaware of an action, often for years, until a party made a motion or a note of issue was filed. At some point following the implementation of Differentiated Case Management, court-served CPLR 3216 notices, which I believe based on anecdotal evidence were rare, began to be utilized by certain courts as a calendar control tool.[2]

In the case where a party moves for dismissal pursuant to CPLR 3216, the party facing dismissal has the opportunity to oppose the motion, explaining why the note of issue was not filed and, in the process, make a record for appeal.

Cadichon v. Facelle

On November 21, 2011, the Court of Appeals issued its decision in *Cadichon v. Facelle*.[3] In *Cadichon*, a medical malpractice action, the trial court "so ordered" a stipulation between the parties. The "so ordered" stipulation provided that the defendants produce certain party witnesses for examinations before trial, by dates certain, and complete additional discovery. The "so ordered" stipulation also contained the direction that a note of issue be filed by a date certain.

The Dismissal and First Department Decision

Before discussing the Court of Appeals decision, some background from the First Department decision is helpful.

The action was pending in Bronx County, and Justice Manzanet-Daniels, in her dissenting opinion joined by Justice Saxe, described the precise terms of the "so ordered" stipulation:

> The so-ordered stipulation entered that day provided that the physician defendants were to appear for EBTs on or before June 26 and July 10, 2007, respectively, and that the hospital defendants were to designate representatives to appear for EBTs on or before August 21, 2007. Defendants were ordered to designate a physician to perform the IME and to conduct the IME by July 16, 2007. The so-ordered stipulations stated that there were to be no further adjournments of the IME and that defendant Dr. May was to appear by July 10, 2007, without adjournment. Plaintiff was directed to file the note of issue on or before December 27, 2007.[4]

The plaintiff did not file a note of issue by the date set forth in the "so ordered" stipulation, and the trial court *sua sponte* dismissed the action for failure to prosecute.

The majority[5] of the First Department voted to affirm the dismissal, and explained their rationale for so doing, which the majority held included a number of procedural missteps by plaintiff:

> It is well settled that to vacate the dismissal of an action dismissed pursuant to CPLR 3216, a plaintiff must demonstrate both a reasonable excuse for the failure to comply with the 90-day demand to serve and file a note of issue and a meritorious cause of action. Plaintiffs failed to offer a reasonable excuse for their failure to file the

note of issue. Indeed, while plaintiffs contended that defendants' noncompliance with their discovery obligations was to blame, and that such noncompliance was preventing them from filing a note of issue, "[they] had [their] remedies during the lengthy period of general delay."

While we do not disagree with the dissent's conclusion that some of the delay was occasioned by defendant, our decision rests on the record and controlling law which required plaintiffs to take action. Once served with a 90-day demand, plaintiffs were required to either seek an extension to comply with the 90-day notice, move to vacate the same. Plaintiffs did none of these things and their case was thus properly dismissed. Subsequent to dismissal, vacatur required a quantum of proof which plaintiffs utterly failed to satisfy with their first motion, and which they were unable to cure with their second motion.

Plaintiffs also impermissibly addressed the merits of their action for the first time on reply.

The excuse of law office failure offered on the motion to reargue and renew did not constitute a reasonable excuse. Further, plaintiffs failed to explain why they failed to present the excuse of law office failure on the original motion.[6]

The two dissenters saw the conduct of the parties differently:

The record shows that the discovery delays in this consolidated action were occasioned principally by defendants.

* * *

Since the discovery delays herein were caused by defendants, the case should not have been dismissed, even in the absence of a medical affidavit demonstrating the merit of the action. . . . In any event, the merit of the action was demonstrated, inter alia, through the affirmation of plaintiffs' physician, board-certified in internal medicine and gastroenterology.[7]

The dissenters then examined the "missteps" of plaintiff, and concluded that they ought to have been excused, and the dismissal vacated:

On the motion to renew, counsel explained that the conference resulting in the May 3, 2007 so-ordered stipulation was handled by an "of counsel" attorney, and thus, the December 27, 2007 deadline set by the court for the filing of the note of issue was not entered into the firm's calendar system as would ordinarily be done. Counsel further stated that had he known about the deadline, he would have moved for an extension of time to file the note of issue and/or to strike defendants' answers based on defendants' failure to comply with discovery. I would hold that this failure to calendar the date was, under the circumstances, excusable law office failure, particularly given defendants' delays and plaintiffs' inability, as a direct result thereof, to certify that discovery was complete. While this case was decided before the effective date of the amendment to CPLR 205(a), which provides that an action may not be dismissed under CPLR 3216 unless the judge sets forth "on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation," it is not without significance that plaintiffs did not engage in a pattern of neglect.

While I agree with the motion court that the better practice would have been for plaintiffs to have made a motion to compel discovery or for an extension of time to file the note of issue, the failure to take these steps should not result in dismissal of a meritorious cause of action. It is the long established public policy of this State to decide cases on their merits.[8]

The Court of Appeals heard the appeal as of right based upon the two-Justice dissent, and gave its own thumbnail sketch of the underlying events, including how the parties came to learn that the action had been dismissed:

> CPLR 3216 provides a mechanism for both a party to an action, and the court presiding over that action, to prod a party to resume prosecution of the case.

At issue on this appeal is the May 3, 2007 stipulation. At the time this stipulation was executed by the trial court and the parties, plaintiffs had complied with all discovery obligations, and Mrs. Cadichon had been deposed twice, once before and once after the consolidation of the actions. The order directed that Dr. Facelle be deposed by June 26, 2007; Dr. May on July 10, 2007; and representatives of Good Samaritan Hospital and Montefiore Medical Center by August 21, 2007, with plaintiff providing the hospital defendants with 30 days notice as to the names of the representatives plaintiffs wished to depose. The stipulation also directed plaintiffs' counsel to file the note of issue on or before December 27, 2007.

Also served upon and signed by plaintiffs' counsel was a "demand for service and filing of note of issue" which states as follows:

"THE COURT DEMANDS, PURSUANT TO CPLR 3216, THAT YOU RESUME PROSECUTION OF THE ABOVE ENTITLED ACTION, AND THAT YOU SERVE AND FILE A NOTE OF ISSUE [AS PER THE ANNEXED ONE PAGE STIPULATION DATED 5/3/07, I.E., BY 12/27/07]

AFTER THE RECEIPT OF THIS DEMAND.

"**YOUR DEFAULT IN COMPLYING WITH THIS DEMAND WITHIN THE 90-DAY PERIOD *WILL SERVE AS A BASIS* FOR THE COURT, *ON ITS OWN MOTION*, TO DISMISS THE ACTION FOR UNREASONABLY NEGLECTING TO PROCEED**" (emphasis supplied).

December 27, 2007 came and went. Plaintiffs did not file their note of issue by that date, allegedly because defendants had still not been deposed. Unbeknownst to the parties, the case was dismissed on December 31, 2007 and, for the first few months of the new year, plaintiffs attempted to schedule deposition dates, the court having failed to inform any of the parties of the case's dismissal. Counsel for Dr. Facelle agreed to produce his client for a deposition on April 7, 2008. Around that same time, in March 2008, Good Samaritan Hospital moved to dismiss the action, but those papers were returned to it by the Clerk's Office on the ground that the motion was moot. This was the earliest that any of the litigants had learned that the matter had been dismissed.[9]

Conclusion

In the next issue we will discuss the decision of the Court of Appeals, as well as several issues left open by the decision that practitioners may have to contend with. ■

1. The 2008 amendment to CPLR 205(a) was not at issue in the *Cadichon* case discussed below.
2. Much ink has been spilled on this topic, but regardless of one's position on the subject, their use is a fact with which practitioners must contend.
3. 2011 WL 5827989 (N.Y. Nov. 21, 2011).
4. 71 A.D.3d 520, 522 (1st Dep't 2010).
5. Presiding Justice Gonzalez and Justices McGuire and Roman.
6. 71 A.D.3d at 521 (citations omitted).
7. *Id.* at 522 (citation omitted).
8. *Id.* at 523 (citations omitted).
9. *Cadichon*, 2011 WL 5827989.

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Can a Non-Party Physician Be Compelled to Give Expert Testimony in a Medical Malpractice Action?

By Katherine W. Dandy and Steven W. Kraus

In medical malpractice actions, physicians who have treated the plaintiff but are not named as defendants in the case may be called to testify as non-party witnesses. When this happens, the scope of the doctor's testimony often comes into play. In particular, during a deposition or at trial, counsel for the plaintiff may try to take advantage of the witness's status as a medical provider by seeking to elicit the physician's expert opinion on issues relevant to the case. Such questioning is entirely proper when the witness testifying is the defendant doctor. The Court of Appeals has held that

> a plaintiff in a malpractice action is entitled to call the defendant doctor to the stand and question him both as to his factual knowledge of the case (that is, as to his examination, diagnosis, treatment and the like) and, if he be so qualified, as an expert for the purpose of establishing the generally accepted medical practice in the community. While it may be the height of optimism to expect that such a plaintiff will gain anything by being able to call and question (as an expert) the very doctor he is suing, the decision whether or not to do so is one which rests with the plaintiff alone.[1]

The *McDermott* rule does not apply, however, to the questioning of a *non-party* physician witness. The law in New York is clear that non-party physician witnesses cannot be compelled to answer questions that seek their expert opinions.[2] This rule applies to a treating physician as well.[3] A non-party physician may be questioned as to factual observations only, and not in his or her potential capacity as an expert witness.[4] The issuance of a protective order limiting to the facts the questions that may be posed to non-party physicians, and not allowing questioning as to their expert opinions, has been held to be a "provident exercise of discretion" by the trial court.[5]

In practice, the line dividing permissible factual observation and impermissible expert opinion is not always clear.[6] And the relevant case law contains little discussion of the specific questions or types of questions in dispute. While a non-party physician witness, in his or her capacity as a physician, "may possess knowledge of discoverable facts which goes beyond that which is derived from his direct contact with the [patient]," he or she cannot be treated as an expert witness in the same way a party

defendant can.[7] The court in *Horowitz* directed plaintiff's counsel to make every effort to avoid questions concerning treatment of other patients (both specifically and in general), treatment of his former partners, his present opinions or practices and knowledge or opinions of the pharmaceutical promotional practices and representations.

As a guiding principle, a non-party physician witness cannot be compelled to answer any question that calls for the physician to use his or her professional judgment in answering. The hypothetical scenarios plaintiffs frequently pose to defendant doctors have no place in a non-party physician deposition.

Certainly, questions that "call for professional or technical knowledge" may be characterized as seeking expert testimony and should not be permitted.[8] Nor should a plaintiff be allowed to seek causation testimony from a physician fact witness, which "by its very nature calls for professional or technical knowledge and is therefore more opinion than fact."[9] When testifying as a non-party, a physician cannot be compelled to give an opinion as to the nature, cause, extent and duration of a plaintiff's injury or disease, or as to the cause of death.[10]

In addition, objections to questions concerning, for example, the consequences of certain medical conditions or the significance of laboratory values will likely be sustained. A non-party physician witness cannot be called on to describe the usual characteristics and symptoms of a disease or the symptoms produced by a particular drug,[11] or to express his or her opinion as to the probability of the patient's recovery or the probable continuance, duration, or permanence of the disease or disability.[12] Testimony in these areas is typically within the province of an expert, not a fact witness.

As a procedural matter, before a non-party physician can even be compelled to testify at a deposition, certain conditions must be met. CPLR 3101(a)(4) permits pretrial disclosure from a non-party, "upon notice stating the circumstances or reasons such disclosure is sought or required." CPLR 3101(a) holds that such disclosure must be "material and necessary." Despite Second Department cases to the contrary, a party seeking discovery from a non-party witness does not have to show special circumstances – that is, that the information sought cannot be obtained through other sources.[13]

In most cases, the purpose of deposing a non-party treating physician is to elicit testimony relating to the services or care rendered by that physician. Once a plaintiff has a physician witness properly under oath for questioning, the opportunity to bolster the case with expert testimony from additional witnesses may be too tempting to resist. However, there is a process by which parties obtain expert testimony,[14] and when an attorney seeks an opinion from a physician during a non-party deposition or at

trial, the expert disclosure process is circumvented. Moreover, a physician's expert medical opinion is a valuable commodity and the doctor is entitled to compensation for expert testimony. Thus, as the courts have held, such witnesses cannot be compelled to give their expert opinion.

In practice, the line dividing permissible factual observation and impermissible expert opinion is not always clear.

The court's language in the relevant case law suggests that it is up to the witness and that he or she is entitled to refuse to answer questions that seek testimony in the nature of opinion evidence. Indeed, the Court of Appeals held long ago that "the better rule is not to compel a [non-party] witness to give his opinion as an expert against his will."[15] In the *Kraushaar* case the Court expressed support for "the rule in England holding that an expert witness cannot be compelled to give expert testimony but may contract to do so for an adequate consideration."

This principle remains unchanged under the current OCA rules governing deposition conduct.[16] Rule 221.2 addresses the questions that a witness may legitimately refuse to answer and provides that "[a] deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person." Most likely, the prohibition against compelling a non-party physician witness to give expert testimony fits within the "plainly improper" category (subsection iii). That said, although the so-called "new" deposition rules are five years old, the courts have not really fleshed out the "plainly improper" subsection. As a result, the issue of what is a proper line of questioning for a non-party physician witness is left open to broad interpretation, as well as to the possibility of continued abuses by attorneys. Plaintiff's counsel will likely attempt to blur the line between factual observation questions and expert opinion questions by relying on the broad scope of examination permissible at deposition under the current rules in order to get away with asking expert-type questions.

"We need to whittle The Big Three down to the Seven Dwarves."

Non-party physician witnesses must therefore be carefully and thoroughly prepared for their testimony, with the understanding that they are entirely within their rights to refuse to answer questions that seek their expert opinion. Moreover, defense counsel (and counsel for the non-party witness) are on firm legal ground in objecting to any attempt by plaintiff counsel to turn a non-party physician witness into an expert, and should be diligent in doing so.[17] Objections should be made to any questions that call for professional or technical knowledge, seek testimony on the issue of causation, call for the physician to use his or her professional judgment, pose hypotheticals, or seek testimony on, for example, the consequences or significance of lab values, medical conditions, or any aspect of the plaintiff's medical record. ■

1. *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 N.Y.2d 20, 29–30 (1964). As an exception, however, the courts have limited the circumstances in which a defendant in a medical malpractice action may be called upon to give expert testimony *against a co-defendant*. The Second Department held in the *Carvalho* case that in an action for malpractice brought against more than one physician, one defendant physician may not be examined before trial about the professional quality of the services rendered by a co-defendant if the questions bear solely on the alleged negligence of the co-defendant and not on the practice of the witness. *See Carvalho v. New Rochelle Hosp.*, 53 A.D.2d 635 (2d Dep't 1976).

2. *Fristrom v. Peekskill Cmty. Hosp.*, 239 A.D.2d 315 (2d Dep't 1997); *Waters v. E. Nassau Med. Grp.*, 92 A.D.2d 893 (2d Dep't 1983); *see also Piervinanzi v. Bronx Cross Cnty. Med. Grp.*, 244 A.D.2d 396 (2d Dep't 1997); *Wilson v. McCarthy*, 53 A.D.2d 860 (2d Dep't 1976).

3. *Cuccia v. Brooklyn Med. Grp.*, 171 A.D.2d 836 (2d Dep't 1991).

4. *See Waters*, 92 A.D.2d 893.

5. *Jones v. Cummings*, 55 A.D.3d 677 (2d Dep't 2008).

6. *See AXA Equitable Life Ins. Co. v. Melone*, 2009 N.Y. Slip Op. 32098U (Sup. Ct., N.Y. Co. 2009) (referring to the line between fact and opinion testimony as "elusive" and "very hard to draw").

7. *Horowitz v. Upjohn Co.*, 149 A.D.2d 467 (2d Dep't 1989).

8. *See De Long v. Erie*, 60 N.Y.2d 296, 307 (1983).

9. *AXA Equitable Life Ins. Co.*, 2009 N.Y. Slip Op. 32098U.

10. *See Meiselman v. Crown Heights Hosp.*, 285 N.Y. 389, 398 (1941).

11. *See Cole v. Fall Brook Coal Co.*, 159 N.Y. 59 (1899).

12. *See Griswold v. N.Y. Cent. & Hudson R.R. Co.*, 115 N.Y. 61 (1889).

13. *See Tannenbaum v. Tenenbaum*, 8 A.D.3d 360 (2d Dep't 2004); *Catalano v. Moreland*, 299 A.D.2d 881 (4th Dep't 2002).

14. *See* CPLR 3101(d)(1).

15. *People ex rel. Kraushaar Bros. & Co. v. Thorpe*, 296 N.Y. 223 (1947).

16. Part 221 of the Uniform Rules for Trial Courts.

17. *See, e.g., Brandes v. N. Shore Univ. Hosp.*, 22 A.D.3d 440 (2d Dep't 2005) (trial court properly sustained objections made when plaintiff counsel sought expert opinions from non-party physician).

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New Criminal Justice Legislation

By Barry Kamins

This column will discuss new criminal justice legislation signed into law by Governor Cuomo that contains amendments to the Penal Law, Criminal Procedure Law (CPL), Vehicle and Traffic Law (VTL) and other related statutes. It is recommended that the reader review the legislation for specific details as the following discussion will primarily highlight key provisions of the new laws.

New Crimes

The Legislature has created a number of new crimes. One of them, Assault on a Judge,[1] provides stronger protection for judges who are physically attacked by providing for enhanced penalties that already exist for certain groups – that is, peace officers, police officers, firefighters and emergency medical services professionals. Assault on a Judge (either a judge of a court of record or a justice court), causing serious physical injury without a weapon, while the judge is in the performance of his or her official duties, is now a Class C felony, punishable by up to 15 years in jail; normally, intentionally causing serious physical injury without a weapon is punishable by a maximum of seven years in jail, as a Class D felony.

The Legislature has responded to newspaper accounts of prostitutes working in the shadow of a Bronx elementary school by enacting the crime of Prostitution in a School Zone, a Class A misdemeanor.[2] A person will be guilty of the crime if he or she is over the age of 19 and commits the crime of prostitution during school hours within a school "zone" – that is, any property adjacent to the boundary line of a school, and when the defendant knows or reasonably should know that the prostitution activity is within the direct view of children attending such school.

New laws ban the sale of smoking paraphernalia (hookahs, water pipes, etc.) and shisha (tobacco mixed with syrup) to individuals under the age of 18.[3] In addition, it is now an unclassified misdemeanor to sell products marketed as bath salts but which contain mephedrone and MDPV (controlled substances).[4] These fake bath salts are already outlawed in three other states.

The Legislature has addressed the use of hidden compartments in motor vehicles that are almost always utilized to transport weapons, controlled substances and the proceeds of drug sales. Occasionally, these secret compartments will be "booby-trapped," causing serious risk to law enforcement. A new Class D felony, Obstruction of Governmental Duties by Explosive Device or Hazardous Substance, criminalizes the placement of an explosive, bomb, or hazardous substance in a compartment that hinders the work of law enforcement.[5]

Finally, a new Class A misdemeanor, Unauthorized Radio Transmission, prohibits an unofficial "pirate" radio station from broadcasting without FCC approval.[6] In addition, a new offense was enacted under the New York City Administrative Code, relating to the restraint of animals while outdoors.[7] It is now a violation to restrain an animal outdoors for longer than three continuous hours in any 12-hour period, and if an animal is restrained for longer than 15 minutes, it must be provided with adequate food, water and shelter.

Amendments

In addition to the new crimes mentioned above, the Penal Law has been amended to expand the definition of certain existing crimes. For example, Sexual Abuse in the First Degree has been amended to conform to prior amendments of the rape and criminal sexual act statutes (formerly known as sodomy). It is now a Class D felony for a child under the age of 13 to be subjected to sexual contact by a person who is 21 years of age or older.[8]

The sex offense statute was amended to expand criminal liability to a wider range of governmental employees who engage in sexual activity with inmates of state or local correctional institutions to whom they are not married. The amendment expands the definition of "employee" to include certain employees of the Department of Corrections and Community Supervision, the Office of Mental Health and the Office of Children and Family Services.[9]

The Legislature corrected a drafting oversight that was highlighted by the New York Court of Appeals in *People v. Boothe*.[10] When the Legislature enacted a series of insurance fraud penalties in 1998, it added a section defining a fraudulent health care insurance act. However, it failed to add a corresponding section that would have criminalized that act. The Court noted that the Legislature needed to amend the statute accordingly, which it has now done.[11]

The Legislature has responded to a series of intemperate protests taking place at military funerals around the country. It has increased the buffer zone around a funeral, memorial service or religious service from 100 to 300 feet; anyone making unreasonable noise within that zone is guilty of a Class A misdemeanor.[12] A new form of Promoting Prostitution has been added to respond to the distribution of very graphic business cards in certain residential neighborhoods. It is now unlawful to distribute obscene material to 10 or more people in a public place with the intent to advance or profit from prostitution.[13]

The gambling statute has been amended to make clear that coin-operated amusement machines (video games, pinball machines) that provide an extra ball, time or game are *not* "gambling devices."[14] In addition, the Legislature responded to the recent shooting of two state troopers by closing a loophole in the weapon statute that did not prohibit individuals with prior convictions for a felony or serious offense from possessing certain types of weapons. It is now unlawful for that class of individuals to possess muzzle-loading firearms, black powder rifles, black powder shotguns and antique firearms.[15]

The music piracy laws have been amended to expand the definition of a "recording" to include a hard drive, flash drive, memory card or other data storage device.[16] This will afford more protection to an industry that has been victimized over the last few years and where artists and music retailers have been deprived of hard-earned profits. In addition, the Railroad Law was amended to update the antiquated provisions relating to trespass on railroad property and to reflect the security challenges facing railroads and the public in the post-9/11 world. The new law increases the fine for trespass and prohibits the operation of various types of vehicles on railroad property.[17]

Finally, the law has been amended to further protect animals. In order to address this, an amendment increases the penalties for *attending* an animal fighting event. Currently, anyone who promotes animal fighting can be charged with a felony. Typically, during raids of animal fighting, the organizers were able to blend into the crowd as spectators, thereby evading any meaningful punishment. Previously, one who merely attends an event could only be charged with a violation. Attending an event now constitutes a Class B misdemeanor.[18]

Procedural Changes

A number of procedural changes have also been enacted by the Legislature. Under one provision, a new "180.80 clock" has been created for defendants who, after being released on their own recognizance, are re-committed to custody on a felony complaint, e.g; when they do not return to court and are arrested on a bench warrant. The new law does what many judges had been doing without express authorization by the Criminal Procedure Law: fix a new CPL § 180.80 period giving the prosecution a new deadline to dispose of the felony complaint by indictment or preliminary hearing.[19] The new time period commences from the time the court commits the defendant to the custody of the sheriff.

A second change closes a loophole in the statutory double jeopardy provisions of the Criminal Procedure Law. Under prior law, when a defendant was prosecuted in federal court for federal income tax offenses, state officials were barred from bringing similar charges under state law.[20] The new provision creates an additional exception to the existing bar on separate prosecutions based on the same criminal transaction.[21]

Two new changes will affect bail procedures. Under one new provision, a non-profit charity, organized under § 501(c)(3) of the United States Code, is now permitted to post bail on behalf of an indigent defendant, provided it does not charge a premium or receive compensation for doing so.[22] A second measure will make it easier for a defendant to post a bail bond secured by real property. In the past, it had been difficult for a person to post such a bond because of the complexity in determining the value of property for purposes of obtaining the bail bond. This forced defendants to bear the cost of using a bail bondsman, who is not required to use any particular system to verify the value of collateral. The procedure was also difficult to navigate by criminal law practitioners. Under the new measure, an individual can file an appraisal report with the clerk of the court, certified by a duly licensed state-certified general real estate appraiser as evidence

of the value of the real property. This will limit the individual's need to use a bail bondsman to determine the value of the collateral.[23]

The Legislature has enacted a new measure that will encourage individuals to assist drug users who are in danger of dying from a drug overdose; the measure substantially limits the prosecution of those individuals who are seeking emergency treatment or who are assisting those in need of such treatment.[24] New York is the fourth state to enact a Good Samaritan drug law. An individual cannot be prosecuted for possession of a controlled substance (except for an A-I felony or drug sales "involving sale for consideration or other benefit or gain") when he or she, in good faith, seeks health care for someone experiencing a life-threatening emergency, and the Good Samaritan is found in possession of drugs. The immunity also extends to the person seeking the emergency health care.

In addition, there is now an affirmative defense to a charge of Criminal Sale of a Controlled Substance (except for an A-I or A-II felony) when the controlled substance was obtained as a result of seeking or receiving emergency health care. The defense applies to the Good Samaritan or the person undergoing the emergency provided the defendant has no prior conviction for a Class A-I, A-II or Class B drug felony.

In other procedural changes, a court may now determine, *prior* to sentence, a defendant's eligibility for a certificate of relief from civil disabilities.[25] Finally, the groundwork for e-filing in criminal courts has been laid. The Chief Administrative Judge will create an Advisory Committee to evaluate the impact of e-filing in criminal courts and a report containing an evaluation and recommendation must be filed by January 1, 2012, and sent to the Governor, Legislature and Chief Judge.[26]

Crime Victims

Each year the Legislature enacts legislation to assist crime victims, and 2011 was no exception. Victims of domestic violence will benefit from a number of new laws. First, one new law closes a gap between federal and state anti-domestic violence laws by preventing individuals who are convicted of certain violent misdemeanors from purchasing firearms. Currently, a federal firearms dealer may not sell a firearm to a person who has been convicted of a misdemeanor involving domestic violence. The problem has been that, up to now, information about New York convictions had not been transmitted to the FBI's criminal background system, thus permitting individuals with prior convictions to purchase a gun.

Under the new law, when a defendant has been convicted of one of four misdemeanors (assault, menacing, forcible touching or criminal obstruction of breathing or blood circulation), and it has been established that the defendant is related to the victim in the manner specified under 18 U.S.C. § 921(a)(3)(A)(ii),[27] the clerk of the court must notify the Division of Criminal Justice Services (DCJS). DCJS must then notify the FBI and the defendant is identified as a person prohibited from purchasing and possessing a firearm. The court can make the above finding based upon an admission by the defendant or, after a hearing, in which the prosecution must prove beyond a reasonable doubt that the defendant is related or similarly situated to the victim as specified under federal law.[28]

The Vehicle and Traffic Law has been amended to make texting or using a portable electronic device while driving a primary offense.

Domestic violence victims will also benefit from a new law clarifying the date on which a final order of protection commences; it will now commence on the date of *sentencing* rather than "upon conviction."[29] An Address Confidentiality Program has been created that will authorize the use of designated addresses for victims and their children for the purpose of service of process and receipt of mail. Thirty-three other states have some form of this program, which permits the victim's new address to remain anonymous, thus preventing the batterer from locating the victim and committing further abuse.[30]

In addition, victims of Criminal Obstruction of Breathing or Blood Circulation are now eligible for monetary awards from the Office of Victim Services even if the victim did not sustain any physical injury.[31] The group of domestic violence victims eligible for support services has been expanded to include persons who are in an intimate relationship; the amendment also expands the crimes for which the victims are eligible for those services.[32] Finally, a Missing Vulnerable Adults Clearinghouse has been created to provide a coordinated plan to address the problem of missing adults with cognitive impairments, mental disabilities or brain disorders. Modeled on the "Amber Alert" system, New York will join four other states in taking steps to assist families of cognitively impaired adults in locating their missing loved ones.[33]

Vehicle & Traffic Law

The Vehicle and Traffic Law has been amended to make texting or using a portable electronic device while driving a primary offense. Under prior law, those who committed the offense of Use of Portable Electronic Devices could

not be stopped by a police officer unless the motorist was committing some *other* VTL offense. The new law permits the officer to stop the car solely for this offense.[34] The amendment also changes the rebuttable presumption found in the statute. A person who holds a portable electronic device is presumed to be using such device; the presumption can be rebutted by evidence *tending to show* that the operator was not using the device. A second amendment significantly expands the list of criminal convictions that disqualify an individual from becoming a school bus driver.[35] In all, 26 felony convictions have been added to the list, raising the total to 58.

Sex Offenders

Several new laws will affect individuals who must register as sex offenders. First, procedures for verifying the current addresses of sex offenders have been tightened. An offender who refuses to sign a verification form can now be charged with an E felony and such refusal may result in a revocation of parole or probation.[36] In addition, level two offenders must now register their place of employment.[37] The sex offender registry must now include the registrant's type of assigned supervision and the length of time of such supervision.[38] Finally, a person who is convicted of Attempted Unlawful Surveillance must now register as a sex offender.[39]

Sentencing and Parole

A number of changes have taken place in the area of sentencing and parole. The Department of Correctional Services and the Division of Parole have been merged into the Department of Correction and Community Supervision (DCCS).[40] DCCS has assumed responsibility for supervising people after they are released from prison. The Executive Law has been amended to substitute risk assessment procedures for the prior guidelines that governed discretionary release on parole.[41]

State Prisoners

Another new law clarifies that certain documents must accompany an individual being committed to state prison. A "sentence and commitment" (or certificate of conviction) and any order of protection must accompany the defendant.[42] This will permit DCCS to take the necessary steps to ensure that the order of protection is complied with during the period of incarceration.

Repeals and Extensions

Each year the Legislature enacts laws that either repeal or extend existing statutes. For example, a number of sentencing structures set to expire on September 1, 2011, were extended until September 1, 2013: minimum periods of incarceration for persistent violent felony offenders; indeterminate sentences for a felony; sentences for B and C violent felonies; sentences for second violent felony offenders; sentences for second felony offenders.[43] A number of prison programs as well as the ignition interlock device program and mandatory surcharge and crime victim fees were also extended to September 1, 2013.[44] The law suspending driving privileges for parents who fail to pay child support is extended until June 30, 2013.[45] Finally, the Interagency Task Force on Human Trafficking is extended until September 1, 2013.[46]

Other Legislation

A number of changes have been made in statutes other than the Penal Law and Criminal Procedure Law. The Legislature has enacted a significant training bill that requires the Municipal Police Training Council to establish training on the subject of crimes involving sexual assault with an emphasis on a victim-centered approach. The bill also mandates training for judges with respect to crimes involving sexual assault.[47] The Legislature has taken the first step in amending the State Constitution to increase the age until which supreme court judges can be certificated, from the age of 76 to 80 years.[48] The measure would also change the retirement age for judges of the Court of Appeals from 70 to 80.

Other new legislation authorizes local correctional facilities to house out-of-state prisoners with the approval of the appropriate local legislative bodies.[49] A barber's license will now be suspended or revoked if alcohol is sold on the premises to minors.[50] Finally, law enforcement officers within the Federal Protective Service have

been granted peace officer status. This will restore the status they had when they were previously agents of the U.S. Immigration and Customs Enforcement.[51]

1. 2011 N.Y. Laws ch. 148 (adding PL § 120.09, eff. Nov. 17, 2011).
2. 2011 N.Y. Laws ch. 191 (adding PL § 230.03, eff. Nov. 17, 2011).
3. 2011 N.Y. Laws ch. 131 (amending PHL § 1399-aa, eff. Jan. 1, 2012).
4. 2011 N.Y. Laws ch. 130 (amending PHL § 3306, eff. Aug. 14, 2011).
5. 2011 N.Y. Laws ch. 327 (adding PL § 195.17, eff. Nov. 1, 2011).
6. 2011 N.Y. Laws ch. 361 (adding PL § 190.72, eff. Jan. 31, 2012).
7. Local Law 10 (Admin. Code § 17-197, eff. May 1, 2011).
8. 2011 N.Y. Laws ch. 26 (amending PL § 130.65, eff. Nov. 1, 2011).
9. 2011 N.Y. Laws ch. 205 (amending PL § 130.05, eff. Nov. 1, 2011).
10. 16 N.Y.3d 195 (2011).
11. 2011 N.Y. Laws ch. 211 (amending PL § 176.05, eff. Nov. 1, 2011).
12. 2011 N.Y. Laws ch. 528 (amending PL § 240.21, eff. Mar. 21, 2012).
13. 2011 N.Y. Laws ch. 215 (amending PL § 230.20, eff. Nov. 17, 2011).
14. 2011 N.Y. Laws ch. 8 (amending PL § 225.00, eff. Mar. 25, 2011).
15. 2011 N.Y. Laws ch. 357 (amending PL § 265.01, eff. Jan. 30, 2012).
16. 2011 N.Y. Laws ch. 313 (amending PL § 275.00, eff. Nov. 1, 2011).
17. 2011 N.Y. Laws ch. 176 (amending Railroad Law § 83-a, eff. Jan. 16, 2012).
18. 2011 N.Y. Laws ch. 332 (amending Agriculture & Markets Law § 351, eff. Sept. 2, 2011).
19. 2011 N.Y. Laws ch. 565 (amending CPL § 530.60, eff. Oct. 23, 2011).
20. *See People v. Helmsley*, 170 A.D.2d 209 (1991).
21. 2011 N.Y. Laws ch. 186 (amending CPL § 40.20, eff. Oct. 18, 2011).
22. A.8158 (amending CPL § 500.10, eff. 90 days after Governor's signature).
23. 2011 N.Y. Laws ch. 305 (amending CPL § 500.10, eff. Aug. 3, 2011).
24. 2011 N.Y. Laws ch. 154 (amending PL § 220.03 and adding § 220.78, eff. Sept. 18, 2011).
25. 2011 N.Y. Laws ch. 488 (amending Correction Law § 702, eff. Aug. 17, 2011) (Corr. Law).
26. 2011 N.Y. Laws ch. 543 (amending Judiciary Law § 212, eff. Sept. 23, 2011).
27. The federal statute requires that the misdemeanor has, as an element, "the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim."
28. 2011 N.Y. Laws ch. 258 (amending CPL § 370.15, eff. Nov. 29, 2011).
29. 2011 N.Y. Laws ch. 9 (amending CPL § 530.12, eff. May 13, 2011).
30. 2011 N.Y. Laws ch. 502 (adding Executive Law § 108, eff. June 23, 2012) (Exec. Law).
31. 2011 N.Y. Laws ch. 502 (amending Exec. Law § 631, eff. Dec. 22, 2011).
32. 2011 N.Y. Laws ch. 11 (amending Soc. Services Law § 459-a, eff. Apr. 13, 2011).
33. 2011 N.Y. Laws ch. 222 (adding Exec. Law § 837-f-1, eff. Oct. 23, 2011).
34. 2011 N.Y. Laws ch. 109 (amending VTL § 1225-d, eff. July 12, 2011).
35. 2011 N.Y. Laws ch. 400 (amending VTL § 509-cc, eff. Feb. 12, 2012).
36. A.424 (amending Correction Law § 168-f, eff. 60 days after Governor's signature).
37. 2011 N.Y. Laws ch. 532 (amending Corr. Law § 168-b, eff. Sept. 23, 2011).
38. 2011 N.Y. Laws ch. 507 (amending Corr. Law § 168-b, eff. Sept. 23, 2011).
39. 2011 N.Y. Laws ch. 513 (amending Corr. Law § 168-a, eff. Sept. 23, 2011).
40. 2011 N.Y. Laws ch. 62 (eff. Apr. 1, 2011).
41. 2011 N.Y. Laws ch. 62 (eff. Sept. 27, 2011); *see* Philip M. Genty, *Outside Counsel: Changes to Parole Laws Signal Potentially Sweeping Policy Shift*, N.Y.L.J., Sept. 1, 2011.
42. 2011 N.Y. Laws ch. 177 (CPL § 380.65, eff. Sept. 1, 2011).
43. 2011 N.Y. Laws ch. 57.
44. *Id.*
45. 2011 N.Y. Laws ch. 101.
46. 2011 N.Y. Laws ch. 24.
47. 2011 N.Y. Laws ch. 506 (adding Exec. Law § 840, eff. Dec. 22, 2011).
48. A.8469; once it is signed there will be a constitutional amendment requiring passage by two successive legislatures and approval by the voters.
49. 2011 N.Y. Laws ch. 573 (adding Corr. Law § 500-0, eff. Sept. 23, 2011).
50. 2011 N.Y. Laws ch. 417 (amending General Business Law § 441, eff. Feb. 11, 2012).
51. 2011 N.Y. Laws ch. 407 (amending CPL § 2.15, eff. Aug. 17, 2011).

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Increasing Diversity Among Arbitrators

A Guideline to What the New Arbitrator and ADR Community Should Be Doing to Achieve This Goal

By Sasha A. Carbone and Jeffrey T. Zaino

Introduction

This article is primarily for women and minority arbitrators who are looking to establish their careers. The path to success is not always clear, and there are different approaches to consider. However, there are fundamental guidelines that we think every new arbitrator, whether diverse or not, should consider. To be successful, new arbitrators must take the initiative, seize control of their careers early on and continue at that pace. This article seeks to provide a basic reference on the subject of establishing a career in arbitration, keeping in mind that the challenges to becoming successful as a neutral can be even more acute for women and minorities.

Becoming a neutral can be rewarding and fulfilling, providing an opportunity to perform a crucial function necessary for this country's dispute resolution system. From incorporating alternative dispute resolution clauses in national and state legislation to court-mandated alternative dispute resolution (ADR) programs, ADR is increasingly a mainstay of our justice system. It is critical, therefore, that ADR neutrals reflect the diverse cultural makeup of its market. Diversity, as we see it, includes cultural, racial, geographic, language and gender differences.

Why is diversity important to ADR? Gwynne A. Wilcox, Esq., of Levy Ratner, P.C., in New York City, notes the following:

> I believe that increasing the diversity among arbitrators is extremely important to the process. While the diversity of the workforce has drastically changed over the years, it is evident that the arbitrator pool has not evolved to the same extent. The majority of arbitrators do not reflect the workers who appear before them and cannot identify with their realities as workers. Diversity among arbitrators will provide more credibility to the process in the eyes of the grievants. Also, a more diverse panel of arbitrators will provide a wider range of perspective and experiences that are often lacking among arbitrators who have had life experiences that differ greatly from those of the grievants.

A Look at the Numbers, a Greater Need for Diversity

There is no question that the ADR community is lacking in diversity. This can be attributed to a number of factors, including a lack or perceived lack of access for diverse candidates, failure by arbitral organizations to reach out to diverse candidates, and an arbitrator selection process that relies upon users to select neutrals to serve on their cases. And while corporations have been increasingly

vigilant in their employee diversity initiatives and require that their outside law firms employ and utilize diverse lawyers, they have not addressed the diversity issue in any coherent way when it comes to selecting neutrals to hear their disputes in arbitration. Arbitral associations continue to improve the diversity of the pool of arbitrators, but it is incumbent upon corporations to be mindful of diversity relative to the ADR process.

At the American Arbitration Association (AAA), creating and maintaining the diversity of our neutrals roster is part of our mission. While the AAA has made great strides, it recognizes that more work is needed. At the AAA, our overall Roster of Neutrals is approximately 23% diverse for gender and race. For the AAA's major divisions, the diversity varies depending upon the caseload: labor (27%), employment (42%), commercial (17%), construction (10%), and insurance (20%).

Despite the ongoing efforts to assist new arbitrators, certain fields have particular challenges. For example, breaking into the labor arbitration field is difficult because in order to be considered on most labor panels, you must be a truly neutral decision maker (i.e., a full-time decision maker or one in a profession considered neutral), which is not the case for other arbitration disciplines such as commercial, construction, international, or insurance. To be on the AAA's labor panel, an arbitrator cannot be an advocate for either unions or employers, or be employed by a government agency, company or union involved in labor-management disputes. Since the only source of income for many new labor arbitrators is their labor arbitration practice, this can pose significant financial and professional risks. Consequently, these arbitrators depend more on networking and visibility than arbitrators in other disciplines. In short, the need to network and develop a caseload, always critical for arbitrators, is even more important for nascent labor arbitrators.

Getting on a Panel Is Just the Beginning

Appointment to an arbitral panel or selection to become a neutral for an arbitral sponsoring organization is a significant achievement for a young arbitrator. The fact of selection means that the neutral has attained a high level of industry expertise or knowledge and has reached the point where that expertise can translate into the young arbitrator's selection as a panelist on arbitration cases. However, the new arbitrators may be unpleasantly surprised that acceptance as a member of an arbitral association's panel does not mean he or she will be selected for cases right away.

Yet, there is much a new arbitrator can do in this interim or transitionary period to increase visibility and gain training and practical experience. We list four examples below. While none of these elements assures success, taken together they provide best practices for positioning a neutral to leverage opportunities, which usually expand as the neutral becomes more active.

1. Mentoring

Mentoring should start when a professional is considering the ADR practice, and it should never end. Successful mentoring relationships can provide invaluable aid to building and managing an ADR practice. Mentorship is a tradition in many areas of alternative dispute resolution – for example, the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes provides that one of the obligations an experienced arbitrator has to the profession is to cooperate in training new arbitrators.

> To be successful, new arbitrators must take the initiative, seize control of their careers early on and continue at that pace.

When working with a mentor, it is useful to establish from the start goals and guidelines for how the relationship will work. Is the purpose of the mentorship to gain contacts, shadow the mentor in arbitration hearings, obtain advice or a combination of these goals? A new arbitrator should consider how often the mentor can reasonably be expected to be available and whether that fits the mentee's needs. These should be set early and communicated to the mentor to ensure that both parties start off on the right note.

Another consideration is the length of the mentorship period. Ideally, the mentoring relationship should have a timeline to help both parties manage expectations and goals.

There is no rule that arbitrators can only have one mentor. Using multiple mentors can provide increased exposure for the new arbitrator. For example, a mentor could be a highly experienced and work regularly but have a caseload limited to a few large ADR users or industry sectors (i.e., only private or public). Such exposure is valuable to the new arbitrator, but it could be limited. By researching the caseloads of mentors and using multiple mentors, the new arbitrator has a better chance of gaining exposure to different industries. Also, by using only one mentor the new arbitrator could run the risk of being negatively identified with one arbitrator or sector of an industry.

Shadowing experienced neutrals gives an inexperienced neutral the opportunity to observe peers' style and conduct. While the new arbitrator is not permitted to weigh in on any issues in the arbitration, shadowing

provides the additional benefit of allowing the new arbitrator the opportunity to consider how he or she would handle the issues if presiding over the case. Of course, the arbitrator hearing the case would need to obtain permission from the parties and the administrator.

Writing mock decisions is also a good way to hone skills. New arbitrators can write decisions of the case being observed for review by the arbitrator hearing the case. There are also many case scenarios available either through sponsoring organizations or, generally, on the Internet. New arbitrators can utilize these case scenarios to draft mock decisions, and have them reviewed by more seasoned arbitrators.

2. Pro Bono or Reduced Fee Work

Getting the first arbitration case can be difficult for the new practioner, but there are opportunities to serve on a pro bono basis or on reduced fee cases that may provide future opportunities.

Court-Sponsored ADR Programs

There are numerous court-sponsored ADR programs nationwide. Many of these programs require neutrals to serve pro bono on a minimum number of cases per year. Some programs allow a neutral who has completed his or her probono requirement to accept payment from the parties, provided they agree to the terms in writing in advance.

Bar Associations

The American Bar Association Section of Dispute Resolution urges arbitrators to devote at least 50 hours of pro bono ADR services annually. It has established a Pro Bono Committee to assist neutrals with locating opportunities. For example, many state and city bar associations have pro bono fee-dispute programs, which offer excellent experience.

Private ADR Providers

If an arbitrator is a member of a roster of neutrals for a private ADR provider, he or she should inquire as to whether there are opportunities to serve on a pro bono basis for hardship cases or on reduced fee cases, such as for expedited caseloads. While pro bono opportunities may be limited, expedited caseloads are gaining popularity for small-dollar disputes. These cases are often on a documents-only basis and provide a new neutral with an opportunity to handle a case on a smaller scale.

In addition to opportunities in arbitration, the new practioner should not foreclose other readily available ADR opportunities. Many local community mediation programs offer opportunities to mediate with the attractive benefit that they also often provide no-cost or low-cost training in exchange for a commitment to volunteer. This often enables the candidate to obtain experience in mediating disputes and to meet others embarking on similar careers.

3. Exposure – Networking Through Professional Organizations and Publishing Opportunities

Bar Associations

Almost every bar association in the United States has an alternative dispute resolution section, a mediation section and/or an international dispute resolution section. It is very important for those new to the field to get involved in these associations. The profession's leading thinkers are often members of these committees and involvement with them presents an unparalleled opportunity to network and learn about developments in the field.

Industry-Specific Organizations

Industry-specific organizations may provide new arbitrators opportunities for growth and development. For example, some of the 122 regional offices of the Better Business Bureau (BBB) have pro bono or modest honorarium ADR programs to handle consumer-to-business complaints and certain business-to-business disputes. The pro bono arbitrators receive internal training and observe a set amount of BBB arbitrations before being assigned a case.

Many state associations of realtors also have established ADR programs that use both mediators and arbitrators. These associations could provide opportunities for a new arbitrator to receive training and hear actual cases. Specifically in the area of labor law, most states have public employment relations boards that are quasi-judicial agencies that oversee public sector collective bargaining and adjudicate disputes using labor arbitrators who work pro bono or for a minimal fee.

Join Committees, Subcommittees

There are numerous opportunities to get involved by joining committees and subcommittees of bar associations and industry-specific organizations. Because of ADR's ever-evolving nature, there is always legislation to consider, case law to review, and best practices to create and evaluate. Joining these committees and subcommittees creates a real opportunity to shape the thinking on these topics, as well as to learn from colleagues.

Run for Office Within the Organization

Running for office within an organization provides opportunities not only to lead, but to learn and grow as a neutral. These offices are generally high profile, and the committees do substantive work and analysis that impacts the profession. Haydee Rosario, a new labor and employment arbitrator, notes the following:

> Gaining the acceptance of advocates on both sides of the aisle takes time, discipline and hard work. It does not happen overnight because each side needs to trust you before they select you to hear their cases.

> There is a process that needs to take place before you become acceptable as an arbitrator. Your participation in organizations such as the New York City Labor and Employment Relations Association (LERA) is an essential part of that process. LERA offers you the opportunity to network with other professionals and to learn about new developments, issues and practices in the field. Being part of LERA's Executive Committee has given me the opportunity to learn about changes in the labor and employment arena while working directly with many of the labor and management representatives in New York and New Jersey. This experience may prove to be invaluable in gaining the trust and credibility that I need as an arbitrator.

Attend Events: Speaking Events, Educational Programs, CLE Courses, Luncheons, and Other Networking Events

Bar associations, sponsoring organizations and law firms all provide ample opportunities for novice arbitrators to network at events and educational programs. To the extent that a neutral has a particular expertise in a noteworthy topic, speaking at an event is another way to gain exposure in the field. Start by approaching your sponsoring organization or bar association committee with an idea for a panel and topic, then work with more seasoned arbitrators to craft the presentation. Many sponsoring organizations law firms, and bar associations offer online seminars that have the added benefit of sharing your thoughts with potentially large audiences.

Publishing Articles

Publishing articles is another way to show the marketplace your subject matter expertise. Many organizations and journals have an ongoing need for articles, including those that focus on ADR. The field of ADR is ripe for articles covering recent case law developments. Whether it is a split among the Circuits on an ADR issue or best practices for limiting discovery in arbitration, neutrals should look for topics that interest them and that may provide an opportunity to get published. Aside from ADR specific topics, new arbitrators should also consider publishing on a topic specific to their area of expertise. Once published, obtain reprints and circulate.

Ongoing Evaluation and Review

Marketing yourself as a neutral is an ongoing process. New neutrals often lament that they are not being selected for cases as often as they think they should, despite their experience. New arbitrators should review their resume quarterly to make sure that it is current. Having your resume reviewed by other arbitrators or mentors is very important.

Give an honest assessment of your per diem, cancellation fee and study time fees. A new neutral should consider whether his or her rate is reasonable and competitive.

Neutrals should also consider taking advantage of opportunities for ongoing review of technique, style and writing skills through refresher and ADR training courses.

New arbitrators should not be afraid to take a stand. Neutrality and respect should be a primary concern; timidity, however, can hurt your reputation. The most successful arbitrators have strong personalities and make tough decisions without worrying about alienating individual ADR users or advocates.

4. What ADR Providers and Users Should Do and What They Are Doing

Sponsoring organizations that administer arbitrations bear a great degree of responsibility in both the recruitment and maintenance of diverse neutrals. It is not enough to have diverse neutrals on the roster; sponsoring organizations must ensure that there are opportunities for advancement in the field.

There are numerous ways that sponsoring organizations can provide assistance to diverse neutrals starting out in the field. At the outset, it is important for sponsoring organizations to commit to investing in diverse neutrals. This means that sponsoring organizations commit to provide resources to diverse neutrals early on in their careers, and continue that commitment. Many of the resources are readily available to sponsoring organizations, and are often utilized, albeit in a piecemeal way. In order to have a substantial impact on the profession, there needs to be a systematic way to provide these resources to those trying to establish themselves in the field.

Publish Written Opinions; Allow Easy Access by ADR Users

When researching unknown or new arbitrators, most ADR users seek written opinions. This can be challenging. LexisNexis and Westlaw offer some redacted arbitration opinions, but the majority of these opinions come from experienced arbitrators. Published opinions are usually selected from complicated, unusual and/or extraordinary cases. New arbitrators' opinions are rarely selected, which limits exposure.

Some ADR providers publish opinions but mostly by experienced arbitrators. So if a new arbitrator has published opinions, there needs to be a vehicle for easy access. Both ADR providers and users should collectively determine a method for publishing and widely distributing opinions of new arbitrators, possibly by developing easily accessible web pages and other electronic tools. ADR users need such a resource to obtain information about unknown and new arbitrators. Parties want a substantive reason for selecting the new arbitrator – whether obtained from referrals, resumes or published opinions.

Opportunities for Arbitrators to Publish and Showcasing New Arbitrators With Photographs and Q&A

One way for sponsoring organizations to provide exposure to diverse neutrals is to encourage publication in

their journals or newsletters. This is a low cost, high impact way to provide advancement opportunities.

Putting a "name to a face" is vital in the arbitration industry, especially for new arbitrators. Many new arbitrators are now developing web pages with pictures, testimonials and other useful information. ADR providers should assist with this effort by developing methods and/or better vehicles for showcasing new arbitrators. For new arbitrators in the labor field, the AAA implemented a pilot program in 2010 in which five labor arbitrators were spotlighted in an electronic publication that used a Q&A format and included photographs. Many of the questions were provided by ADR users, such as:

- What past professional and/or personal experiences have you had that make you a better arbitrator?
- What is the most difficult decision you had to make on a case that you presided over?

The *AAA Arbitrator Spotlights* were sent, via an email blast, to hundreds of ADR users.

Review of Ranking to Provide Guidance to Arbitrators

Once neutrals become members of a roster, they don't know if they are being listed on actual panels presented to the parties or what their level of acceptability is unless they are being selected for cases. For some, there is a long period – sometimes six months to a year – before being selected for a case. We propose that sponsoring organizations periodically share information with neutrals to let them know whether they are being listed and the number of cases for which they have been listed, and how parties are ranking the neutral if a list/strike process is being utilized.

Permanent Panels for New Arbitrators

A new arbitrator should seek, where possible, permanent panel assignments. Many ADR providers and large users have established permanent panels for their less complicated caseloads, geared towards new arbitrators who have substantive experience. For example, there could be specific discipline disputes in the labor-management context that are assigned permanent panels. Typically, the per diem is determined by the parties and there are set requirements for both the arbitrator's study time and cancellation fees. Many permanent panels are established because the volume of disputes. Such permanent panels work on a rotation basis and have annual reviews of the panel and fee structure. The parties must mutually agree on all arbitrators on the permanent panel.

ADR Providers and Users Need to Sponsor More New Arbitrator Programs and Meet-and-Greet Events

By sponsoring professional and social networking events, ADR providers and users can provide greater exposure, which benefits new arbitrators. In May 2010 and June 2011, the New York City Bar Association and AAA co-sponsored successful panel programs with 12 new arbitrators. More than 150 ADR users attended each program.

Ruth Moscovitch, a new arbitrator panelist on the May 2010 program, stated, "There is no question that I have benefited from the experience and exposure. Many people came up to me afterward to give me positive feedback, and I continue to hear that people are asking about me. I also got two new cases from the AAA, so that has been a tangible result."

Bring Together ADR Users, Providers, and Experienced and New Arbitrators to Discuss Collectively How This Goal Can Be Achieved

There is a need for more communication and dialogue about developing new arbitrators. This should no longer be an academic exercise, but an industry-wide effort. There should be actual initiatives and a clear understanding that investing in new arbitrators is mutually beneficial. The main players – ADR users, providers, experienced arbitrators, and new arbitrators – have to be on board and ready to make changes. Representatives from each group should meet annually or semi-annually to discuss goals, specific caseloads for new arbitrators, resources, and steps towards implementing programs.

Use New Arbitrators, Reaching Out to Women and Minorities, on Specific Caseloads to Provide Exposure and Experience

The best way to assist a new arbitrator is by putting him or her on a case. Plenty of arbitration caseloads involve straightforward factual and legal issues. These types of cases should not be decided by experienced arbitrators with high per diems but by new, less expensive arbitrators. The perceived risk factor for the ADR users is reduced and these cases provide an opportunity for the ADR user to create a larger pool of arbitrators. Seeing an arbitrator in action is the only true way for the ADR user to achieve an absolute comfort level. ADR providers offer less-complicated case services and try to utilize new arbitrators. For example, the AAA offers Labor Rapid Resolve where an arbitrator will hear up to three cases in a single day for a reduced flat fee. These types of cases, heard mostly by new arbitrators, usually involve suspension or discipline issues.

Conclusion

It can take several years for the novice arbitrator to achieve success in the field. This is true even for the arbitrator with stellar credentials and an active practice. While all professions demand that practitioners market and promote themselves to achieve broader success, arbitration's commitment to the highest ideals of fairness and access to justice is reflected in the path to success. They enhance and advance an arbitrator's career and are the foundation for the future of the entire profession. ■

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A Match Made in Albany: The Uneasy Wedding of Marriage Equality and Religious Liberty

By Frank Gulino

With passage of the Marriage Equality Act,[1] New York became the sixth state in the nation to allow same-sex partners to marry and only the third state to do so through legislation.[2] In a dramatic late-night vote, the State Senate passed the bill legalizing same-sex marriage on June 24, 2011, and Governor Andrew M. Cuomo signed the bill into law the same night.[3] As Governor Cuomo noted in a memorandum announcing its passage, the Marriage Equality Act "grant[s] same-sex couples the freedom to marry . . . as well as hundreds of rights, benefits, and protections that have been limited to married couples of the opposite sex."[4] According to the Act, "[a] marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex."[5] The law became effective 30 days after its enactment, and the first same-sex marriages were performed under the Act on July 24, 2011.[6]

Passage of the bill permitting same-sex marriage in New York was neither easy nor inevitable. On the contrary, it came only after days of intense negotiations between the Democratic Governor, who championed the legislation, and Senate Republicans concerned about the rights of religious organizations to be exempted from provisions of the Act that were antithetical to their beliefs.[7] Despite the compromises made by proponents and opponents, however, inclusion in the Act of so-called "religious exceptions" has proved unsatisfactory to some on both sides of the gay marriage issue. Whether the civil rights granted to same-sex couples and the exceptions granted to religious organizations under the Act will be compatible – and workable – over the long haul remains to be seen.

The Road to Same-Sex Marriage in New York

In its preamble to the Marriage Equality Act, the New York State Legislature declared that "marriage is a fundamental human right . . . ."[8] That declaration echoed the words of the U.S. Supreme Court in *Loving v. Virginia*, the 1967 landmark decision that struck down state laws forbidding interracial marriage.[9] In *Loving*, the Court noted that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit

of happiness by free men"[10] and described marriage as "one of the 'basic civil rights of man,' fundamental to our very existence and survival."[11] For more than 35 years after *Loving*, not a single state permitted partners of the same sex to exercise the "vital personal right" and "basic civil right" to marry, until Massachusetts' highest court legalized same-sex marriage in 2003.[12] It took eight more years for marriage equality to come to New York.

Passage of the Marriage Equality Act followed years of unsuccessful court challenges to New York's ban on same-sex marriage and failed attempts to legislate the right of same-sex couples to wed.[13] The most recent court challenge led to the New York Court of Appeals' 2006 decision in *Hernandez v. Robles*,[14] where a divided Court held that the limitation of marriage to opposite-sex couples was valid under the New York State Constitution and that "any expansion of the traditional definition of marriage should come from the Legislature."[15]

In an unusual coda to its opinion, the Court in *Hernandez* also expressed its "hope that the participants in the controversy over same-sex marriage will address their arguments to the Legislature [and] that the Legislature will listen and decide as wisely as it can. . . ."[16] Following the *Hernandez* Court's hopeful call for action by the Legislature, the Democratic-controlled State Assembly passed a same-sex marriage bill in 2007, but the bill stalled in the Republican-controlled State Senate.[17] Then, on December 2, 2009, after passage of another same-sex marriage bill by the Assembly, the Senate – with a Democratic majority – decisively rejected the legislation.[18] As recently as 2010, it appeared likely that the Court of Appeals would recognize out-of-state same-sex marriages before the Legislature would pass a law permitting such marriages to be performed in the State of New York.[19] That changed in the summer of 2011 with passage of the Marriage Equality Act.

Initial Reactions to Passage of the Marriage Equality Act

In the days that followed its enactment, praise for the same-sex marriage legislation came from a variety of prominent sources. President Barack Obama remarked that the New York law reflected a move "in a direction of greater equality," which he called "a good thing."[20] Secretary of State Hillary Clinton – who represented New York in the U.S. Senate before joining the President's cabinet – called the law "historic" and said that it "upheld the basic rights of gay people."[21] But the praise was far from universal.

Despite inclusion of language in the Marriage Equality Act designed to exempt religious organizations from its provisions, opponents of gay marriage were far from satisfied. The Catholic bishops of New York, for instance, issued a statement on the day of the Act's passage, declaring themselves "deeply disappointed" by the legislation and reaffirming the Church's teaching that "marriage is the joining of one man and one woman. . . ."[22] The Bishop of Brooklyn, in particular, expressed his belief that passage of the Act was "another 'nail in the coffin' of marriage . . . ."[23] And on the day after the first same-sex wedding ceremonies were conducted, a lawsuit was filed by a citizens group "challenging the legality of the process that brought gay 'marriage' legislation to the floor of the New York State Senate . . . ."[24]

Inclusion of "Religious Exceptions" in the Act: Is Anybody Happy?

In its original form, the same-sex marriage bill included no exemptions for religious organizations, but was instead "'roughly' the same as the [bill] defeated in 2009" by the State Senate.[25] Indeed, only 10 days before the bill was passed and signed into law, it had been reported that the Governor "flatly said 'no' when asked . . . if his bill will include . . . religious exemptions" sought by Republicans.[26] But by June 22, Governor Cuomo and legislative leaders from both parties were saying that "they supported several additional religious exceptions to [the] gay marriage bill and were in critical negotiations over wording."[27]

In the bill's final form, the so-called "religious exceptions" included language providing, in pertinent part, that

> (1) a religious organization "shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a [same-sex] marriage";
>
> (2) a religious organization's refusal to provide the "services, accommodations, advantages," etc., called for by the Act "shall not create any civil claim or cause of action or result in any state or local government action to penalize, withhold benefits [from], or discriminate against" the organization; and
>
> (3) no clergyman or minister shall be required to solemnize a same-sex marriage, and the refusal by a clergyman or minister to perform any marriage "shall not create a civil claim or cause of action or result in any state or local government action to penalize, withhold benefits [from], or discriminate against such clergyman or minister."[28]

The bill passed by the Senate also contained an inseverability clause, guaranteeing that the legislation would fail in its entirety if the religious exceptions were successfully challenged in court.[29] In the end, with the inclusion of the religious exceptions, the Act passed the Senate by a 33-29 vote.[30]

There is little doubt that the amendment to add religious exceptions was key to passage of the New York same-sex marriage legislation and that debate over the language of the exceptions dominated negotiations in the days leading up to the final vote.[31] But there is considerable doubt about whether the Act has done

anything to resolve the tensions between those who support same-sex marriage and religious groups for whom same-sex marriage is seen as an assault on long-held, deeply felt beliefs.

The religious exceptions that enabled passage of the Act are not without precedent in same-sex marriage legislation; nor is the dissatisfaction with such exceptions.

The debate about whether the right of same-sex partners to marry can co-exist with the freedom of religious groups who define marriage as the union of a man and a woman is not a new one.

Vermont and New Hampshire, the states that legalized gay marriage through legislation prior to New York, also included language to protect religious organizations from the provisions of their marriage equality laws.[32] And in both states, critics argued that the religious exceptions did not go far enough to protect the liberties of those who oppose gay marriage.[33]

The debate about whether the right of same-sex partners to marry can co-exist with the freedom of religious groups who define marriage as the union of a man and a woman is not a new one. Indeed, the debate was acknowledged when the Supreme Judicial Court of Massachusetts made that state the first to permit same-sex marriage, in *Goodridge v. Department of Public Health*.[34]

In *Goodridge*, the court addressed the concerns of religious groups, declaring that "[its] decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons. It in no way limits the personal freedom to disapprove of, or to encourage others to disapprove of, same-sex marriage."[35] But in 2007, a skeptical author predicted that "[t]he movement for gay marriage [was] on a collision course with religious liberty."[36] Among the consequences that the author forecasted would flow from legalizing same-sex marriage were "government compulsion of religious institutions to provide financial or other support for same-sex married couples and government withdrawal of public benefits from those institutions that oppose same-sex marriage."[37]

It is concern over a "collision course" between same-sex marriage rights and religious freedoms that New York legislators and Governor Cuomo sought to avert by amending the bill that became the Marriage Equality Act. But the religious exceptions that were the source of so much contention for proponents and opponents alike have not entirely satisfied those on either side of the debate.

Criticism of the religious exceptions in the New York law has surfaced, not unlike the criticism that was leveled against the religious exception provisions in the Vermont and New Hampshire gay marriage statutes at the time of their passage in 2009.[38] One editorial denounced the New York law's religious exceptions as falling "woefully short of protecting genuine exercise of religion for those who believe that marriage between a man and woman is the rational, civilized and divinely prescribed standard of sexual conduct."[39] On the other side, a New York legal scholar – who had wed his same-sex partner under Massachusetts law two years earlier – welcomed the Act's passage but opined that "[r]eligious exemptions allow marriage discrimination to continue" and that "to permit religious discrimination is to permit private discrimination."[40]

The unhappiness on both sides is understandable, and will continue as long as religious institutions argue the issue from the perspective of their right to religious liberty and gay marriage supporters argue from the perspective that same-sex couples are entitled to marry as a matter of equal protection. Religious institutions are legitimately concerned about an erosion of the liberty to practice their beliefs, a liberty guaranteed by the First Amendment, in the face of laws that are antithetical to those beliefs. And same-sex couples are legitimately concerned about the denial of equal protection under the law, a protection guaranteed by the Fourteenth Amendment, that results from being barred from civil marriage.

Viewed in this context, religious exemptions will be seen as making little sense in a statute designed to afford citizens the equal protection guaranteed to them under the Constitution. On the other hand, such exemptions will inevitably be seen as insufficient by religious groups faced with a statute that declares that their beliefs are, in effect, unlawful. As one legal author pointed out in 2010,

> there is no legal justification for a religious exemption if the right to same-sex marriage is based in equality. At the same time, there are various and compelling non-legal arguments for the appreciation of religious liberty. In the end, we must decide whether equality must make room for liberty (and liberty for equality).[41]

For now at least, New York is making an effort to see whether religious liberty can co-exist with same-sex partners' right to enjoy the same array of rights and protections that heterosexual married couples have enjoyed under the civil law of the state.

Now That New York's Elected Representatives Have Decided the Issue, What's Next?

The legal effects of the Marriage Equality Act, in areas like personal taxation and employee benefits, are less than clear and are already fodder for commentary.[42] The Act's

societal impact may not be known for years.[43] But one thing is certain: Same-sex couples in New York will now be entitled to numerous legal rights previously available only to married heterosexual couples. Governor Cuomo's statement that the Marriage Equality Act "grant[s] same-sex couples . . . hundreds of rights, benefits, and protections that have been limited to married couples of the opposite sex"[44] was no exaggeration. Indeed, in 2008, it was reported that then-Governor David A. Paterson's directive to state agencies to recognize out-of-state same-sex marriages was "likely to involve as many as 1,300 statutes and regulations in New York governing everything from joint filing of income tax returns to transferring fishing licenses between spouses."[45]

The New York Court of Appeals, in *Hernandez v. Robles*, stated that it was "not for [the Court] to say whether same-sex marriage is right or wrong. . . ."[46] Rather, the Court added, "the present generation should have a chance to decide the issue through its elected representatives."[47] In the summer of 2011, the elected representatives of the State of New York did what they could to "decide the issue."

In *Hernandez*, the Court exhorted the Legislature to decide whether same-sex marriage should be legal in New York, expressing its hope "that those unhappy with the result – as many undoubtedly will be – will respect it as people in a democratic state should respect choices democratically made."[48] For many, the Marriage Equality Act is an imperfect result. But, as the Court of Appeals suggested, the legislation should at least be respected, if not applauded, by those on both sides who are unhappy with it. In an imperfect world, the Act is the result of the Legislature's honest effort to protect the liberties of those whose religious beliefs forbid same-sex marriage while granting civil rights to same-sex couples so long denied them. ■

1. 2011 N.Y. Laws ch. 95, *available at* http://public.leginfo.state.ny.us/menugetf.cgi (Marriage Equality Act).

2. The other states that have legalized same-sex marriage are Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire. In Massachusetts, Connecticut and Iowa, same-sex marriage came as the result of decisions by those states' highest courts. *See Goodridge v. Dep't of Pub. Health*, 440 Mass. 309 (2003); *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135 (2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). Prior to New York, only Vermont and New Hampshire had permitted same-sex marriage through legislation. *See* Vt. Stat. Ann. tit. 15, § 8 (2009); N.H. Rev. Stat. Ann. § 457:1-a (2009). (The District of Columbia has also legalized same-sex marriage legislatively. *See* D.C. Code § 46-401(a) (2009).)

3. Sandhya Somashekhar, *New York Legalizes Same-Sex Marriage in Win for Gay Rights Advocates*, Washington Post, June 25, 2011, http://www.washingtonpost.com/politics/new-york-senate-votes-to-legalize-same-sex-marriage-in-win-for-gay-rights-advocates/2011/06/15/AG3XDqjH_story.html?hpid=z1 (Somashekhar); Kieryn Graham, *Cuomo Signs New York's "Marriage Equality" Legislation*, newzchief.com, June 25, 2011, http://newzchief.com/cuomo-signs-new-york%E2%80%99s-%E2%80%9Cmarriage-equality%E2%80%9D-legislation.html.

4. http://www.governor.ny.gov/press/062411passageofmarriageequality.

5. Marriage Equality Act, *supra* note 1, codified at N.Y. Domestic Relations Law § 10-a(1) (DRL) (eff. July 24, 2011).

6. Jesse Solomon & Steve Kastenbaum, *First New York Couples Wed Under New Same-Sex Marriage Law*, CNN.com, July 25, 2011, http://edition.cnn.com/2011/US/07/24/new.york.same.sex. marriage/index. html?eref=edition; Chris Hawley, *It's Official: First Gay Marriages Performed in New York*, Saratogian, July 24, 2011, http://www.saratogian.com/articles/2011/07/24/news/doc4e2c5df6c2f87266546054.txt.

7. Somashekhar, *supra* note 3.

8. 2011 N.Y. Laws ch. 95, § 2, *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A08354&term=2011&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y. Under the Marriage Equality Act, "[a] marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex." DRL § 10-a(1).

9. *Loving v. Virginia*, 388 U.S. 1 (1967).

10. *Id.* at 12.

11. *Id.* (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

12. *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309 (2003).

13. Unsuccessful court challenges to New York's ban on same-sex marriage include *Anonymous v. Anonymous*, 67 Misc. 2d 982 (Sup. Ct., Queens Co.

1971); *In re Cooper,* 187 A.D.2d 128 (2d Dep't), *appeal dismissed*, 82 N.Y.2d 801 (1993); *Raum v. Rest. Assocs., Inc.*, 252 A.D.2d 369 (1st Dep't), *appeals dismissed*, 92 N.Y.2d 946 (1998), 95 N.Y.2d 824 (2000); *Hernandez v. Robles*, 7 N.Y.3d 338 (2006). Following the *Hernandez* decision by the Court of Appeals, there were two unsuccessful attempts by the Legislature to enact gay marriage legislation before passage of the Marriage Equality Act. *See infra* notes 17 and 18 and accompanying text.

14. 7 N.Y.3d 338 (2006).

15. *Id*. at 361.

16. *Id*. at 366.

17. *New York Assembly Passes Gay Marriage*, http://www.365gay.com/news/new-york-assembly-passes-gay-marriage/ ("[i]n June 2007, the New York State Assembly voted 85-61 in favor of a marriage equality bill. That bill stalled in the Senate . . . .").

18. Jeremy W. Peters, *New York State Senate Votes Down Gay Marriage Bill*, N.Y. Times, Dec. 2, 2009, *available at* http://www.nytimes.com/2009/12/03/nyregion/03marriage.html?_r=1&hp.

19. *See* Frank Gulino, *After* Godfrey v. Spano*: Is New York's High Court Ready to Recognize Out-of-State Same-Sex Marriages?*, N.Y. St. B. Ass'n J. (May 2010), p. 30, 34.

20. David Jackson, *Obama: New York's gay marriage vote 'a good thing'*, USA Today, July 1, 2011, http://content.usatoday.com/communities/theoval/post/2011/06/obama-no-news-on-gay-marriage/1. Andrew Quinn, *Clinton Calls New York Gay Marriage Vote "Historic,"* canada.com, http://www.canada.com/life/Clinton+calls+York+marriage+vote+historic/5016494/story.html (Secretary of State Hillary Clinton) (Quinn). *See also* Anna Duckworth, *SF Mayor Celebrates Gay Pride, Praises New York Gay Marriage Ruling*, KCBS, http://sanfrancisco.cbslocal.com/2011/06/25/sf-mayor-celebrates-gay-pride-praises-new-york-gay-marriage-ruling/.

21. Quinn, *supra* note 20.

22. Timothy M. Dolan, et al., Statement of the Bishops of New York State, June 24, 2011, http://www. nyscatholic.org/pages/news/show_newsDetails.asp?id=538.

23. Jose Bayona & Christina Boyle, *Religious Leaders Bash Gay Marriage Law, Vow to Ban Pols Who Supported Measure*, NYDailyNews.com, June 26, 2011, http://articles.nydailynews.com/2011-06-26/local/29724126_1_gay-marriage-law-religious-leaders-catholic-schools.

24. New Yorkers for Constitutional Freedoms, *NYCF Files Suit Against State Senate*, http://www.nycf.info/position-papers/same-sex-marriage/409-nycf-files-suit-against-state-senate.

25. Stan Brooks, *New York Gay Marriage Gains Support in GOP Senate*, CBSNewYork.com, June 14, 2011, http://newyork.cbslocal.com/2011/06/14/ny-senator-greg-ball-proposes-religious-exemption-to-gay-marriage-bill/.

26. *Id*.

27. Michael Gomley & Michael Virtanen, *Gay Marriage New York: Senate Bill Inches Toward Showdown*, HuffPost New York, June 22, 2011, http://www.huffingtonpost.com/2011/06/22/gay-marriage-new-york_n_881993.html.

28. Marriage Equality Act, *supra* note 1, codified at DRL § 11.

29. The inseverability clause provides that the Marriage Equality Act "is to be construed as a whole, and [that] all parts of it are to be read and construed together" and that "any part of [the Act] shall be adjudged by any court of competent jurisdiction to be invalid, the remainder of [the Act] shall be invalidated." 2011 N.Y. Laws ch. 96, § 3.

30. Elizabeth Tenety, *Religious Exceptions Within New York's Gay Marriage Bill,* Washington Post, June 24, 2011, http://www.washingtonpost.com/blogs/under-god/post/religious-exceptions-within-new-yorks-same-sex-marriage-bill/2011/06/24/AG87ZtjH_blog.html.

31. Danny Hakim, *Exemptions Were Key to Vote on Gay Marriage*, N.Y. Times, June 26, 2011, at A20, *available at* http://www.nytimes.com/2011/06/26/nyregion/religious-exemptions-were-key-to-new-york-gay-marriage-vote.html (Hakim) ("Language that Republican senators inserted into the bill legalizing same-sex marriage provid[ing] more expansive protections for religious organizations . . . helped pull the legislation over the finish line Friday night.").

32. Vt. Stat. Ann. tit. 18, § 5144(b); *id.* tit. 8, § 4501(b), tit. 9 § 4502(*l*); N.H. Rev. Stat. Ann. § 457:37 (2009). *See* Hakim, *supra* note 31. In Vermont, the law that legalized same-sex marriage included exceptions much like those inserted into the New York law, including a section that exempts members of the clergy from having to solemnize a marriage and specifying that "any refusal to [solemnize a marriage] shall not create any civil claim or cause of action." Vt. Stat. Ann. tit. 18, § 5144(b). The New Hampshire same-sex marriage law also exempted religious institutions, providing, for instance, that "[e]ach religious organization . . . has exclusive control over its own religious doctrine, policy, teaching and beliefs regarding who marry within their faith. . . ." N.H. Rev. Stat. Ann. § 457:37 (2009).

33. As one commentator argued in 2009, at the time that the Vermont statute was passed, "the Vermont [religious exception provision] certainly could go farther. I would like to see protections for individuals – not just organizations. Still [the provision is] a vast improvement over the [laws in] other states that have implemented gay marriage without concern for its repercussions on the traditionally religious." David Benkof, *In Vermont Gay Marriage Law, a Hidden Victory for Religious Freedom*, NYDailyNews.com, April 14, 2009, http://www.nydailynews.com/opinions/2009/04/14/2009-04-14_a_hidden_victory_for_religious_freedom.html. Similar criticism was leveled against the religious exception language included in the New Hampshire gay marriage statute. It was reported at the time that the New Hampshire law was enacted, for instance, that "[a]nti-gay marriage organizations have said [the religious exception language in] this bill does not go far enough, that it doesn't protect businesses such as florists and photographers that would come into contact with the wedding party." Steve Williams, *New Hampshire Approves Gay Marriage – With Exceptions*, care2.com, June 4, 2009, http://www.care2.com/causes/new-hampshire-approves-gay-marriage-with-legal-exceptions.html.

34. 440 Mass. 309 (2003).

35. *Id*. at 337 n. 29.

36. Roger Severino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Freedom*, 30 Harv. J.L. & Pub. Pol'y 939, 942 (2007).

37. *Id*. at 943.

38. *See* note 33 *supra*.

39. Editorial, Deseret News, July 10, 2011, http://www.deseretnews.com/mobile/article/700150590/ Editorial-Same-sex-marriage-and-the-peril-of-religious-exemptions.html.

40. Bennett Capers, *Giving a Blessing to Bias*, N.Y. Times, June 29, 2011, *available at* http://www.nytimes.com/roomfordebate/2011/06/29/are-religion-and-marriage-indivisible/same-sex-marriage-religious-bias-is-bias-period.

41. Marc D. Stern, *Liberty v. Equality; Equality v. Liberty*, 5 Nw. J. L. & Soc. Pol'y 307, 317 (2010).

42. *See* Monique Warren, *What Does NY's Marriage Equality Act Mean to Employers?*, June 30, 2011, http://www.benefitslawadvisor.com/2011/06/articles/erisa-plan-administration/what-does-nys-marriage-equality-act-mean-to-employers/ (Warren). As Warren notes, "[s]ame-sex spouses must be treated just like opposite-sex spouses for . . . employee benefits that are not covered by the federal Employee Retirement Income Security Act of 1974 ('ERISA') . . . because ERISA preempts New York's Marriage Equality Act to the extent that it applies to self-funded ERISA-covered employee benefits." *Id*. (Under the federal Defense of Marriage Act (DOMA), marriage is defined as "a legal union between one man and one woman" and "spouse" is defined as "a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7.) The same author also calls the effect of the Marriage Equality Act with respect to New York income taxes "less than clear" since § 607(b) of N.Y. Tax Law "specifically provides that an individual's marital status for state tax law is the same as the individual's marital status for federal rate-setting purposes" while the federal DOMA "recognizes only heterosexual unions for federal purposes [and] the Internal Revenue Code does not recognize same-sex marriages for federal income tax purposes." Warren, *supra*.

43. The lack of clarity about the societal impact of the Marriage Equality Act is hardly a surprise so soon after its enactment. As legal scholars noted when writing on the legal and cultural legacy of the Supreme Court's *Loving* decision (*see supra* notes 9–11and accompanying text), the societal impact of that landmark case was "less well-defined" than its unquestionable legal legacy even 40 years after the decision was handed down. *See* John D. Gregory & Joanna L. Grossman, *The Legacy of* Loving, 51 How. L.J. 15, 52 (2007).

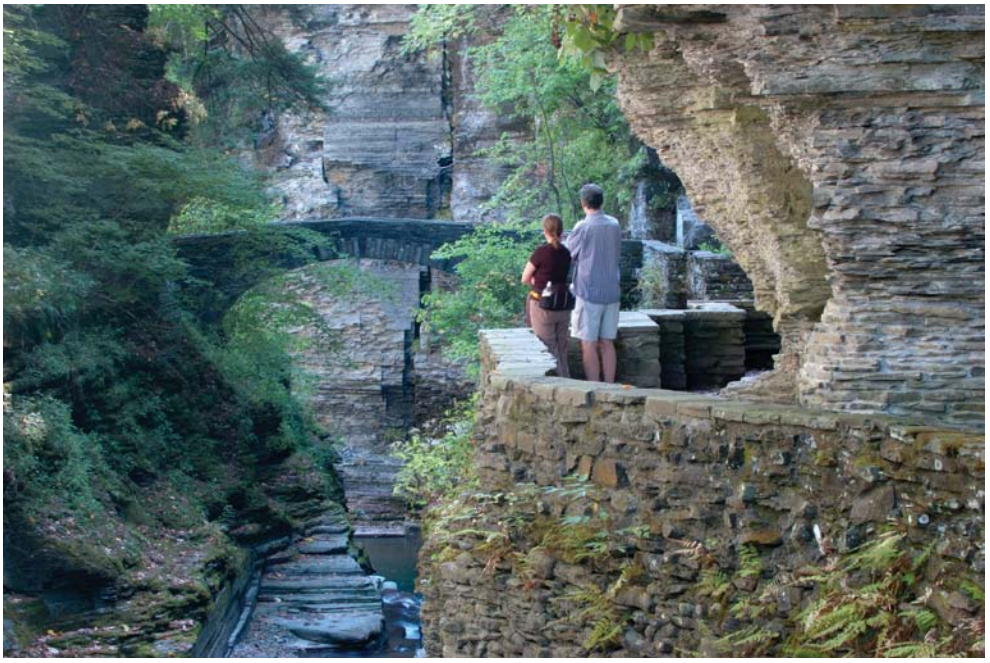
44. *See supra* note 4 and accompanying text.

45. Phillip Anderson, *Paterson Directs State to Recognize Same Sex Marriages From Other States, available at* http://www.thealbanyproject.com/showDiary.do?diaryId=3228. In addition, the federal General Accounting Office, in 2004, noted the existence of then more than 1,100 federal statutory provisions in which marital status is a factor in determining or receiving benefits, rights, and privileges. U.S. Gen. Accounting Office, *Defense of Marriage Act: Update to Prior Report*, Jan. 23, 2004, at 1, http://www.gao.gov/new.items/d04353r.pdf.

46. 7 N.Y.3d 338, 366 (2006).

47. *Id.*

48. *Id.*



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Public Trust Doctrine Should Protect Public's Interest in State Parkland

By Gregory Berck

Introduction

New York State has had a long and prominent role in the preservation and protection of its parklands and historic sites. The state is home to both the oldest state park in the nation – the Niagara Reservation founded in 1885 – and the oldest publicly funded historic site – Washington's Headquarters State Historic Site, dating back to 1850. New York is also home to the largest state-protected area in the contiguous United States, the 6.1-million-acre Adirondack Park established in 1892, which is also the largest National Historic Landmark in the country. The year 1904 saw the establishment by New York State of the Catskill Park, a 700,000-acre private/public park preserve with a constitutionally protected wild forest, similar in structure to the Adirondack Park.

New York State has also been the birthplace and home of some of the United States' greatest conservation and preservation advocates, including Theodore Roosevelt, the first president to make land conservation a national topic; landscape architect and renowned park designer Frederick Law Olmstead; topographical engineer Verplanck Colvin; and nature photographer Seneca Ray Stoddard. It can be argued that the modern state park system was brought fully to realization by New York's controversial public builder Robert Moses, whose provocative approach to public works projects nonetheless helped lead to the formation of the park system.[1] Today, the New York State Park System is made up of 178 parks and 35 historic sites constituting over 325,000 acres of protected landscape. The parks include scenic assets, heritage areas and various types of recreational opportunities as well as "some of the state's most imperiled and significant biological treasures."[2]

The Legislature, in establishing the State Office of Parks and Recreation in 1972, said, "The State of New York is abundant in natural, scenic and other recreational resources, which for over a century have educated, edified, uplifted and delighted our citizens. The establishment and maintenance of a statewide system of parks, recreation and historic preservation are hereby declared

to be policies of the State."[3] The State of New York and her people have a vested interest in all parkland, and the Laws of 1993 codify this vested interest:

> The Legislature hereby finds and declares that there are over one hundred ninety State parks, recreational facilities and historic sites situated across the State and more than two hundred fifty thousand acres of land under the jurisdiction of the office of parks, recreation and historic preservation. This system of State parks, recreational facilities and historic sites contains unique and irreplaceable natural, ecological, historic, cultural, and recreational resources. The residents of the State have expressed their strong interest in and support of actions designed to protect these critical resources.[4]

Additionally, the Legislature has recognized the importance of historic sites for the state park system and has codified 11 of the state's historic sites.[5] New York has added statutory protections to its parkland and historic sites to emphasize the importance of these lands to the state and its citizens. Section 31.03 of the N.Y. Parks, Recreation and Historic Preservation Law states:

> The urban and regional areas of the State are rich in cultural and natural resources of statewide significance associated with our growth and attainments over time. . . . It is the State's interest to protect, preserve, enhance and promote the natural and cultural resources found in significant historic settings that reveal the State's heritage.

In creating the New York Park Preserve System, the Legislature directs the Office of Parks, Recreation and Historic Preservation (OPRHP) to "maintain the integrity of park land, flora, fauna, and scenic vistas; restore and maintain historical and archeological sites; and provide for the management of all unique, rare or endangered species of flora and fauna within park preserve areas."[6]

The Public Trust Doctrine commentator David Slade has written, "We are a tiny planet with very serious 'carrying capacity problems, and are in dire need now of sound and wise environmental stewardship.'"[7] Natural sites and heritage areas are often looked down upon by entities concerned primarily with fiscal results. This is a mistaken view. These natural areas are the most important sites in the United States and in New York. We must keep these areas open and pristine for future generations.

In 2010, the administration of Governor David Paterson ordered the closure of 64 state parks and 15 historic sites unless $11 million were added to the parks budget. In response to the proposed closures, Dennis R. Reidenbach of the National Park Service (NPS) reminded the Governor that "[u]nder the Land and Water Conservation Fund (LWCF), New York has received approximately $230 million in LWCF assistance since 1965" and "the closure of any State park or historic site that has received LWCF and/or Federal Lands to Parks [FLP] assistance would be viewed by the NPS as being in noncompliance with Federal requirements for those programs,"[8] thus jeopardizing millions in federal LWCF and FLP assistance.

To prevent these closures, the Legislature shifted $11 million from the Environmental Protection Fund to the parks budget. With this compromise in place, Governor Paterson promised not to close any state parks or historic sites. As the Cuomo administration commenced, Governor Cuomo declared that he would not close any in 2011; Andrew Beers, the Acting Commissioner of OPRHP, repeated this statement. Despite these statements of support, OPRHP has compromised three state parks (Woodlawn Beach, Knox Farm, Joseph Davis Park) and shuttered one historic site (the Herkimer Home). This article contends that the closing and alienation of state parks and historic sites, without the consent of the Legislature, is in violation of the Public Trust Doctrine, a common law doctrine that the citizens and courts in the United States have used to protect our parks and historic sites, and argues that the State Environmental Quality Review Act has been violated as well. It concludes with recommendations on how the state can better protect its public lands and meet its duties under the Public Trust Doctrine.

History of the Public Trust Doctrine in the United States and in New York

The Public Trust Doctrine originated in the Roman Empire 1,500 years ago.[9] "The institutes assured the citizens of Rome that all could approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations."[10] The Doctrine then became vested in two titles: (1) *jus publicum*, the collective rights of the public to fully use and enjoy trust lands and waters for commerce, navigation, fishing, bathing and other related public purposes; and (2) *jus privatum*, the private proprietary rights in the use and possession of trust land.[11] Regardless of who owns the land and holds title to it, the state or sovereign is responsible for protecting the public interest.

Through common law, the concept of the Public Trust Doctrine is rooted in our society and our courts. The U.S. Supreme Court has held that the Public Trust Doctrine "is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide."[12] Although water rights helped develop the Public Trust Doctrine, the doctrine is now amphibious. Many commentators and courts have recognized that the Public Trust Doctrine also applies to land resources above the water table:

> The Public Trust Doctrine has evolved in our own time from an ancient code, designed to keep the seas, shorelands and fish open to the public, to a modern doctrine of environmental stewardship. Although it remains pegged to "navigable" waters in most states, it is clear

> that the principles inherent in the Public Trust Doctrine can be, perhaps should be, applied to all publicly-held resources.[13]

In modern times the Public Trust Doctrine has been used to protect parks and historic sites as well. Parks have evolved with a joint purpose of beneficial enjoyment and as a vehicle for preserving significant natural and cultural resources for future generations. This is explicit in the National Park Service Organic Act[14] and has been the guiding principle in New York statutory language, the courts' application of public trust to municipal parks, and the practice of the state with regard to the forest preserve and management of state parks. The Supreme Court of California has held that

> [t]he public trust is more than an affirmation of state's power to use public property for public purposes; it is an affirmation of duty of state to protect people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when abandonment of that right is consistent with purposes of trust.[15]

Parks, historic sites and heritage area resources in New York State are without question a public trust asset.

"New York has a long tradition of extending public trust protections to municipal parks by requiring specific state legislative authorization for sale, alienations, or non-park uses of the land."[16] The Court of Appeals has made several keynote decisions supporting the applicability of the Public Trust Doctrine,[17] holding that "our law is well settled: dedicated park areas in New York are impressed with a public trust for the benefit of the people of the State."[18]

The New York Legislature Has Acted Consistently With the Virtues of the Public Trust Doctrine

The New York State Constitution embodies elements of the Public Trust Doctrine. Article XIV § 1 states: "The lands of the State . . . constituting the forest preserve . . . shall be forever kept as wild forest land. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private . . ."[19] Article XIV § 3 states, "Forest and wild life conservation are hereby declared to be the policies of the State."[20] Although the New York Constitution does not explicitly state that "the forest shall be held in trust for the people," it can be deemed to be a codification of the Public Trust Doctrine.

The Legislature has passed laws that accept the concepts of the Public Trust Doctrine.[21] New York Public Lands Law authorizes the use of state-owned submerged lands as long as the use is consistent with the original purpose for which the submerged lands were intended.[22] The Legislature also expressed the critical environmental importance of these state-owned lands by including seven factors that must be considered before the appropriate agency authorizes a land grant or lease:

1. the environmental impact of the project;
2. the values for natural resource management, recreational uses, and commercial uses of the pertinent underwater land;
3. the size, character and effects of the project in relation to neighboring uses;
4. the potential for interference with navigation, public uses of the waterway and rights of other riparian owners;
5. the effect of the project on the natural resource interests of the state in the lands;
6. the water-dependent nature of the use; and
7. any adverse economic impact on existing commercial enterprises.[23]

This law recognizes that property owned by New York can be leased and granted, but the public interest cannot be extinguished.

Finally, the New York Constitution also recognizes that the state canal system as a public trust in Article XV § 1: "Disposition of canals and canal properties prohibited."[24] The state's canal system is a public trust. The N.Y. Canal Law provides that

> on preparation of a Canal Recreationway Plan for the State's Canal System provides that the plan shall include: . . . provisions which protect the public interest in such lands and waters for purposes of commerce, navigation, fishing, hunting, bathing, recreation and access to the lands and waters of the state, and otherwise encourage increased public access through the establishment of parks, scenic byways and recreational trails on the canal system.[25]

New York Executive Law authorizes the Department of Environmental Conservation to create master plans for all state-owned lands.[26] These master plans are intended to have the force of law as the Legislature authorized their creation. The master plans are also guiding documents that will help all future parties responsible for state parks understand what the intended purpose of the park is. It is critical that OPRHP respect the original purposes of all master plans.

New York Environmental Conservation Law (ECL) also reflects the purposes of the Public Trust Doctrine. "All the waters of the state are valuable public natural resources held in trust by this state, and this state has a duty as trustee to manage its waters effectively for the use and enjoyment of present and future residents and for the protection of the environment . . . ."[27] And, "[t]he waters impounded by any dam hereafter constructed for power purposes on any stream or waterway in the State shall be impressed with a public interest and open to the public to fish thereon . . ."[28] Again, the Legislature has recognized that regardless of any changes that are allowed to occur on state-owned waterways, the waterways and (lands) must still be available for the public's use., evidence that the Legislature recognizes the importance of the Public Trust Doctrine with respect to parks, historic sites and

heritage areas. If the Office of Parks, Recreation and Historic Preservation acts to temporarily or permanently shutter any state park or historic site, the agency will violate principles expressed in the laws of New York and will be in violation of the Public Trust Doctrine.

Public Trust Doctrine in Action in the Courts

The Public Trust Doctrine is the main vehicle by which New York courts have protected the public's rights to parkland. One of the earliest applications of the Public Trust Doctrine in New York came out of the Court of Appeals in *Brooklyn Park Commissioners v. Armstrong* in 1871.[29] In that case, the issue was whether the Borough of Brooklyn could sell and convey property that was given to it in trust to be used for a public park.[30] The Court held that because "[t]he city took the title to the lands

> The Public Trust Doctrine's purpose is to protect all public spaces.

. . . for the public use as a park, and held it in trust for that purpose . . . receiving the title in trust for a special public use, it could not convey without the sanction of the legislature. . . ."[31] This was the first case recognizing that the Legislature must act before a municipality can remove a park from the public's use. The trend toward requiring legislative approval for changes to parks continued with further decisions from the Court of Appeals.[32]

The *Handbook on the Alienation and Conversion of Municipal Parks,* distributed by OPRHP, highlights that all cases dealing with the Public Trust Doctrine have focused on the alienation of "municipal" parkland.[33] Contrary to the principles inherent in the decisions of our courts, and the notion of the public interest, OPRHP reasons that since all of the cases have dealt with municipal parks "the discontinuance or conveyance of State parkland, is most often, governed by statute, so legislative authorization is not required."[34] OPRHP concludes that municipal parks differ from state parks because there is no case law dealing with the discontinuance or conveyance of state parkland or historic sites. The reason for the lack of case law is clear: OPRHP had not closed a state park or a historic site. Thus there has been no cause/injury justifying a lawsuit against OPRHP. Additionally, statutes cited in the *Handbook* as justification for the contention that "discontinuance or conveyance" of state parks being exempt from legislative authorization do *not* provide sufficient support for this argument.[35]

The OPRHP handbook cites Parks, Recreation and Historic Preservation Law §§ 3.09(1), 3.17, 3.19, and 13.09.[36] However, these statutes all deal with the acquisition of parkland, utilities, licenses and easements; none references OPRHP's power to close or alienate parks. The *Handbook* further cites four statutes from the ECL.[37] These statutes do not reference an authority granted to the Commissioner or any other figure at OPRHP to discontinue, close or alienate state parks. These statutes authorize acquiring real property; acquiring and managing forest, trails and parkland; operating and maintaining the 6th park region; and the authority to acquire lands from the federal government for use as reforestation, parkland, and game management. Finally, the *Handbook* cites five statutes from New York Public Lands Law.[38] These statutes authorize (1) methods of handling abandoned state lands; (2) the Commissioner of the Office of General Services (OGS) to sell strips of abandoned canal lands; (3) the transfer of title of lands outside Adirondack and Catskill Preserves for use as additional forest preserve lands; (4) OGS to sell or transfer lands once used by militia; and (5) OGS to acquire any real property as deemed necessary for the purposes and functions of the department. None of these statutes authorizes OPRHP to discontinue, close or alienate state parks or historic sites.

Temporary closures, even if only for a year and with the intent to reopen a state park or historic site, violate the Public Trust Doctrine. In *Bates v. Holbrook*, the Court held that structures could not be considered "temporary" when "authorized to remain until the completion of the work" on a project that would take at least three years.[39] In *Friends of Van Cortlandt Park*, the Court held that "there may be *de minimis* exceptions from the public trusts doctrine . . . ."[40] The park area at issue in *Van Cortlandt Park* would have been out of public use for five years. Although the Court did not lay out examples of "*de minimis*" exceptions, a temporary closure or a lease of a park or historic site is unlikely to be acceptable to New York courts. Contracts limited in scope for the purposes of operation and management of parks, similar to current arrangements with Central Park in New York City, may be acceptable; however, these contracts must not allow for any changes to a park's essential purpose and its intended use described in its master plan.

OPRHP incorrectly believes that legislative action is not required to authorize the discontinuance or conveyance of state parkland or historic sites. The law set out by the Court of Appeals, most recently in 2001, is the law that should be applied to state parks and historic sites.[41] Specific legislative action is required prior to the discontinuance or conveyance, including a lease that does not guarantee public enjoyment and protection of municipal parks and state parks, because there is no appreciable difference between municipal and state parks. Both types of parks are intended for the use and enjoyment of the public, and taxpayer revenue funds the operations of state and local parks. The only difference is the entity that owns and operates that park. At its roots, the Public Trust Doctrine does not distinguish between the public's interests in state-owned or municipality-owned properties; it

is concerned only with the promise that park resources be protected and remain open for the public's use. No New York court will find persuasive OPRHP's contention that legislative action is not required to close a state park or historic site.

Different State Approaches to the Public Trust Doctrine

Application of the Public Trust Doctrine is left to the states. This allows states to strengthen and improve their own version.

Hawaiian Constitution

Hawaii's is the strongest Public Trust Doctrine in the country. The Doctrine is set forth in the Hawaii Constitution: "All public natural resources are held in trust by the State for the benefit of the people."[42] Thus, the state holds all public natural resources in trust for not only the current generation, but also all future inhabitants of Hawaii. This forces the State of Hawaii to consider the impacts of its decisions regarding public lands and natural resources, well beyond the immediate future.

While New York common law has adopted its own variation of the Public Trust Doctrine through various Court of Appeals decisions and the "forever wild" protection in the state constitution at Article XIV § 3, New Yorkers should not have to rely on an ever-evolving judiciary to protect property that rightfully belongs to current and future generations. The Public Trust Doctrine has been a strong legal tool in Hawaii because it is ingrained in the Hawaii state constitution. Recent threats to state parkland are cause to consider constitutional protections, and at the least, codification by designation of state parks, natural and cultural resources under Article XIV § 3.

California: Protecting Ecology and Natural Resources

California's Public Trust Doctrine has recognized the importance of ecology and natural resources to the state.

> There is growing public recognition that one of the most important public uses of the tidelands – a use encompassed within the tidelands trust – is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.[43]

The California Public Trust Doctrine does not just protect the recreational uses of the public's land; it also protects the environmental purpose of the land.[44] "The public may use such properties . . . as well as for environmental . . . purposes. These lands may be conveyed to private persons only to promote trust uses, and grants not made for that purpose remain subject to the rights of the public."[45]

As New York negotiates its way through the current fiscal crisis, the state will undoubtedly seek out public-private partnerships to take some burden off of the general fund and the taxpayers and may attempt to sell or lease public parks in an effort to alleviate budget constraints. New York courts have allowed private and public entities to form partnerships with municipalities for the purpose of operating parks so long as the land is used for its *intended* public purpose.[46] A partnership does not mean handing unilateral responsibility for the operation of a state park to a municipality or private company. The state must not be allowed to sell a park or abandon it financially and then, for example, permit a natural section of that park to be turned into a recreation area. California courts have long recognized the value of natural and ecological areas, and it is important that New York courts do the same. The Public Trust Doctrine is intended not only to keep public land for current and future generations but also to make sure the public lands keep their original characteristics and purpose.

The Wisconsin Approach

The Wisconsin approach says that courts have the responsibility to act as a check on the legislature when the legislature approves removing public land from the public's use. The Wisconsin approach creates a second method through which courts may prohibit public lands from being closed or used for another purpose even if the legislature authorizes the change. The diversion or alienation of public parks would be permitted based on an analysis of five criteria:

> 1. Public bodies will control the use of the area. 2. The area will be devoted to public purpose and open to the public. 3. The diminution of the [area of original use would be] small compared with the entire area. 4. [That none of the public uses of the original area would be] destroyed or greatly impaired. [And] 5. That the disappointment of those wanting to use the public area in its former use is negligible compared to those wanting to use the area in its new condition.[47]

When used appropriately, these five criteria act as a check and balance on legislative power.

New York courts should consider the Wisconsin approach. The Public Trust Doctrine is integral to protecting public lands and the courts have an obligation to ensure that the Legislature is protecting the public trust interest and acting in the public's best interest. Beyond the oversight benefit this approach offers, it also makes it very difficult to take public lands away from the public. Once land is dedicated to the people of the state, it should be exceedingly difficult to transfer that land away from the people. The Wisconsin approach offers a strong judicial method to protect the key elements of the Public Trust Doctrine.

New Jersey's Evolving Approach

The New Jersey Supreme Court has recognized that the Public Trust Doctrine is an evolving principle that can be molded to fit an ever-evolving world.[48] "The public trust doctrine, like all common law principles, should

not be considered fixed or static but should be molded and extended to meet changing conditions and needs of the public it was created to benefit."[49] The New Jersey Public Trust Doctrine also recognizes the unique right of the people to use tidal waters and public lands for health and recreation, "accessible to the public for recreation and health, including bathing, boating and associated activities."[50]

New Jersey's evolutionary approach makes the Public Trust Doctrine a powerful common law principle. David Slade has written, "the doctrine is evolving[;] it is in motion,"[51] further explaining that the Doctrine "has been used to ban jet skis . . . require leasing of bottomlands for marinas . . . and reserve groundwater for future use."[52] The Public Trust Doctrine truly has no limit to its scope when it comes to protecting public resources, which can be constantly expanded through an evolutionary approach to the Doctrine.

New Jersey's approach is a way that the New York Legislature and courts should consider. As New York's economy continues to struggle, state parks and historic sites are a resource that all New Yorkers can utilize. Unlike many for-profit entertainment options, state parks offer a low-cost alternative. Despite the economic difficulties that many families are suffering through, parks can offer a temporary reprieve from these struggles, and the Public Trust Doctrine protects that social purpose. Whether they are wealthy or indigent, current and future generations of New Yorkers are entitled to the use of our state parks, historic sites and heritage areas. If New York recognizes an evolutionary approach to the Public Trust Doctrine, the State will understand that parks must receive greater protection than ever before. If we take away the public's right to access public lands, very little may be left for the least fortunate among us. This right must not be infringed upon and the Public Trust Doctrine is the sharpest sword that can be used in the fight to keep parks open and accessible.

The State Environmental Quality Control Act Must Be Obeyed if a Park or Historic Site Is Slated for Closure

The State Environmental Quality Control Act (SEQRA) took full effect in New York on November 1, 1978.[53] According to the N.Y. Department of Environmental Conservation (DEC) website, "SEQRA applies to all State or local government agencies including districts and special boards and authorities whenever they must approve or fund a privately or publicly sponsored action. It also applies whenever an agency directly undertakes an action." SEQRA casts a wide net of responsibility over governmental bodies in this state as a declaration of a state policy to protect our environmental and natural resources. SEQRA also requires the government to complete an Environmental Impact Statement (EIS) when certain conditions are met.[54]

An EIS provides a means for agencies, project sponsors and the public to systematically consider significant adverse environmental impacts, alternatives and mitigation. An EIS facilitates the weighing of social, economic and environmental factors early in the planning and decision-making process.[55]

Certain governmental actions classified as "Type I Actions"[56] carry a presumption that the proposed action will have a detrimental impact on the environment and an EIS is required. Under SEQRA, "the acquisition, sale, lease, annexation or other transfer of 100 or more contiguous acres of land by a State or local agency" is considered a Type I action.[57] Nearly every state park and historic site in New York will fit within the confines of the "100 or more contiguous acres of land" definition and therefore an EIS will be required before OPRHP, any other agency or the executive acts to close or lease a state park or historic site. SEQRA also directs agencies to consider alternatives and provide for mitigation as a way of minimizing impacts.[58] These alternatives should include fund-raising possibilities, strict enforcement of already required state park fees and any other reasonable method to keep state parks and historic sites open to the public. It is also the responsibility of the DEC to then take a hard look at the EIS and ensure that the agency has considered all reasonable alternative and mitigation measures.

In addition to the SEQRA regulations, the DEC has released an advisory opinion supporting the contention that OPRHP must follow SEQRA before the Legislature acts to alienate "municipal" parkland.[59] The advisory opinion goes further, stating, "Parkland alienation clearly affects the environment. Over eighty years ago in *Williams v. Gallatin* . . . the Court of Appeals explained, '[a] park is a pleasure ground set aside for the recreation of the public, to promote its health and enjoyment.'"[60] Referring to significant parks in the state, the advisory opinion adds, "They are the breathing space of New York's metropolitan area. Smaller neighborhood parks, as do larger parks, provide essential playground and recreational space for young families, small children and senior citizens."[61] Although the DEC is attempting to limit the scope of environmental protections to municipal parks, this advisory opinion clearly recognizes the benefits that parks provide the people of this state. In light of this, there is no colorable reason that SEQRA and the legislative action requirement of the Public Trust Doctrine would not apply to state parks in the same manner that these restrictions apply to the alteration and alienation of municipal parks.

Conclusion

The New York court system and the Legislature have recognized and applied the Public Trust Doctrine. They have used the doctrine with some success; however,

> [t]he Public Trust Doctrine is by no means a panacea. But, with the Doctrine's inherent flexibility to evolve

> as the mores and needs of society evolve, as our scientific understanding advances, and as we recognize more every day that our natural resources are suffering under the weight of modern society, the Doctrine's essential place in resource stewardship is abundantly clear.[62]

Both the state and the OPRHP have espoused a view that state parks and historic sites are immune to the Public Trust Doctrine. Yet, they have formulated this view without any corroborating legal precedent. Legal precedent dictates that legislative approval is needed when closing or altering municipal parks. But, it needs to be made clear by the appropriate authorities that the Public Trust Doctrine's purpose is to protect all public spaces, not just those owned and operated by municipalities. The Public Trust Doctrine does not discriminate based on ownership and neither should New York. ■

1. Robert Caro, The Power Broker: Robert Moses and the Fall of New York (1974).
2. D.J. Evans & David E. VanLuven, *Biodiversity in New York's State Park System: Summary of Findings*, Report prepared by the New York Heritage Program for the New York State Office of Parks, Recreation and Historic Preservation (Jan., 2007).
3. N.Y. Parks, Rec. & Hist. Preserv. Law § 3.01.
4. *Id*.
5. Parks, Rec. & Hist. Preserv. Law § 19.05.
6. Parks, Rec. & Hist. Preserv. Law § 20.02(2).
7. David C. Slade, The Public Trust Doctrine in Motion, 273 (2008).
8. D. Reidenbach, letter to Governor David A. Paterson (Mar. 31, 2010).
9. *See* David C. Slade, Putting the Public Trust Doctrine to Work, xvii (1991).
10. *Id*. at xvii.
11. *Id*. at xix.
12. *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 454 (1892) states: "[W]ith trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State."
13. *Id*. at 215.
14. 16 U.S.C. § 1. "The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified . . . which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."
15. Slade, *supra* note 7, p. 274; *Nat'l Audubon Soc'y v. Superior Court* (*Mono Lake Case*), 33 Cal. 3d 419, 441 (Cal. 1983).
16. Cyane Gresham, *Improving Public Trust Protections of Municipal Parkland in New York*, 13 Fordham Envtl. L.J. 259, 268 (2002).
17. *See Brooklyn Park Comm'rs v. Armstrong*, 45 N.Y. 234 (1871); *Williams v. Gallatin*, 229 N.Y. 248 (1920); *Friends of Van Cortlandt Park v. City of N.Y.*, 95 N.Y.2d 623 (2001).
18. *Friends of Van Cortlandt Park*, 95 N.Y.2d at 631.
19. N.Y. Const. Art. XIV § 1.
20. N.Y. Const. Art. XIV § 3.
21. Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights and State Summaries*, 16 Penn St. Envtl. L. Rev. 1, 84.
22. N.Y. Pub. Lands Law § 75 "authorizes grants, leases . . . for the use of state-owned land underwater . . . consistent with the public interest . . . for purposes of navigation, commerce, fishing, bathing and recreation."
23. Pub. Lands Law § 75(f)(i)–(vii).
24. N.Y. Const. Art. XV § 1.
25. N.Y. Canal Law § 138-c(1)(c).
26. N.Y. Exec. Law § 816.
27. N.Y. Envtl. Conservation Law § 15-1601.
28. Envtl. Conservation Law § 15-1713.
29. *Brooklyn Park Comm'rs v. Armstrong*, 45 N.Y. 234 (1871).
30. *Id*. at 243.
31. *Id*.
32. *See Williams v. Gallatin*, 128 N.E. 121, 122 (N.Y. 1920) ("A park is a pleasure ground set apart for recreation of the public. . . . It need not, and should not, be a mere field or open space, but no objects, however worthy . . . which have no connection with park purposes, should be permitted to encroach upon it without legislative authority plainly conferred . . . ."); *see also Friends of Van Cortlandt Park*, 95 N.Y. 2d at 630 "([O]ur courts have time and again reaffirmed the principle that parkland is impressed with a public trust, requiring legislative approval before it can be alienated or used for an extended period for non-park purposes.").
33. Handbook on the Alienation and Conversion of Municipal Parkland at fn. 47, Office of Parks, Recreation and Historic Preservation *at* http://www.nysparks.com/publications/documents/AlienationHandbook.pdf.
34. *Id*. at 16.
35. *Id*. at fns. 48–50 (emphasis added).
36. *Id*. at fn. 48.
37. *Id*. at fn. 49.
38. *Id*. at fn. 50
39. *Bates v. Holbrook*, 171 N.Y. 460, 468 (1902).
40. *Friends of Van Cortland Park*, 95 N.Y.2d at 631.
41. *Id*. at 630.
42. Haw. Const. Art. XI § 1.
43. *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971).
44. *City of Los Angeles v. Venice Peninsula Props.*, 644 P.2d 792 (1982).
45. *Id*. at 793–94.
46. Emphasis added.
47. *State v. Pub. Serv. Comm'n*, 275 Wis. 112, 114 (1957).
48. Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights and State Summaries*, 16 Penn St. Envtl. L. Rev. 1, 23.
49. *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 309 (1972).
50. *Id*. at 306.
51. Slade, *supra* note 8, p. 268.
52. *Id*.
53. Envtl. Con. Law §§ 3-0301(1)(b), 3-0301(2)(m), 8-0113.
54. 6 N.Y.C.R.R. § 617.1(c).
55. 6 N.Y.C.R.R. § 617.1(d).
56. 6 N.Y.C.R.R. § 617.4(a)(1)–(2).
57. 6 N.Y.C.R.R. § 617.4(b)(4).
58. 6 N.Y.C.R.R. § 617.2(a), (f).
59. Alison H. Crocker, NYS DEC, Petition of New Yorkers for Parks for a Declaratory Ruling or Advisory Opinion with Respect to SEQRA and Alienation of Municipal Parkland: http://www.ny4p.org/pdfs/planningforparks/DEC_SEQRA_Advisory_113007.pdf.
60. *Id*. at 3.
61. *Id*.
62. Slade, *supra* note 7, p. 272.

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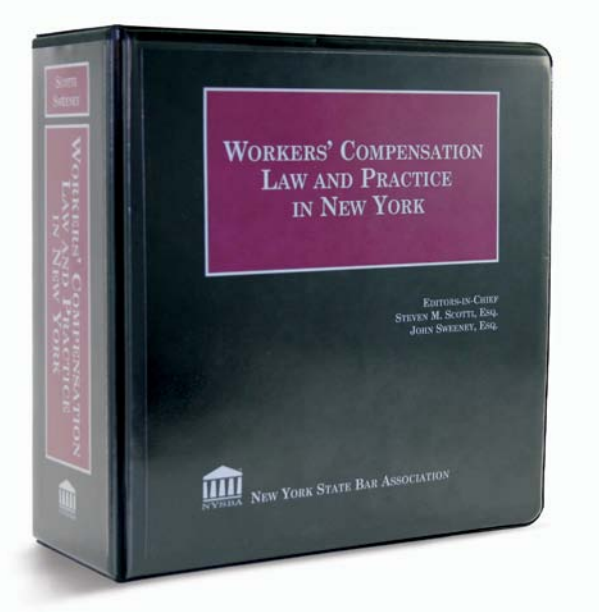

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Notifying Your Clients and Terminating Representation Where Appropriate

If you have not already done so, you should notify all current and former clients that you are closing your New York practice. A lawyer, as a fiduciary, owes his or her clients the duty of keeping them informed about their business, which includes the clients' relationships with the lawyer. Failure to notify clients that your law office has moved or closed breaches your duty to preserve and protect your clients' legal rights and interests.[1] Timely notice that you are closing your New York practice and moving to a new address will fulfill your duty to notify.

If you do not intend to continue representing your current clients, you should formally terminate your representation of them. Under Rule 1.16(c), you may voluntarily withdraw from representation of a client if your withdrawal will not have a material adverse impact on the client's interest.

Assuming that termination is desirable and appropriate, and will not prejudice your clients, you must take certain steps in order to fulfill your ethical obligations during withdrawal, including (1) seeking permission from the court to withdraw from representation, if any courts in which you currently represent clients so require; (2) giving your clients reasonable notice and allowing them time to find alternate counsel; (3) refunding fees advanced that have not been earned; and (4) returning to the clients any property or papers they entrusted to you.

Records You Must Maintain

Under Rule 1.15(d)(1), there are eight categories of documents you must maintain for seven years after the events they record, which are:

(i) records of all deposits in, and withdrawals from, accounts maintained under Rule 1.15(b) and any other bank account that concerned or affected your legal practice showing the date, source, and description of each deposit and the date, payee and purpose of each withdrawal or disbursement;

(ii) records for special accounts showing the source and amount of funds, for whom the funds were held, and the description, amounts, and names of persons to whom the funds were disbursed;

(iii) copies of all retainer and compensation agreements with clients;

(iv) copies of all statements to clients or other persons showing disbursements to them or on their behalf;

(v) copies of all bills to clients;

(vi) copies of all records of payments to persons for services rendered, such as investigators, not in your regular employ;

(vii) copies of all retainer and closing statements filed with the Office of Court Administration; and

(viii) all checkbooks, check stubs, bank statements, pre-numbered cancelled checks, and duplicate deposit slips.

Take care to ensure you are maintaining all the records required by this Rule. Note, however, that electronic copies will satisfy your obligations for all those subcategories requiring that you maintain "copies." This will reduce storage space and costs.

Records You Should Maintain

Under New York law, your clients have broad rights to the contents of their respective files.[2] It is not too broad a statement to say that your client files are not actually yours, but property entrusted to you by your client. Your clients, therefore, can exercise their option to request their respective files from you, and, if they do, you are obligated to provide their files to them. Therefore, you should take care to

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maintain client files carefully, in the event your clients or former clients request them.

This is not to say that you have a duty to preserve every document, down to the last handwritten calendar entry, in each of your client's files. Instead, you should take certain reasonable steps to ensure you are preserving all necessary hard-copy and electronic material, while at the same time not burdening yourself with unnecessary moving and storage expenses.

- First, consult your engagement letters and related correspondence with your clients: did you provide them with a document retention policy or otherwise make any promises or agreements regarding storage and preservation of client files? If so, you must either satisfy those obligations or, if they now appear overly burdensome, contact your clients to make alternate arrangements.
- Second, you should maintain all documents your clients would reasonably expect you to maintain, such as original documents, documents the client provided you, and documents the client may need in order to continue the transaction or litigation.
- Third, you should maintain any documents reasonably useful to your client's assertion of any claim or defense in the matter for which you were retained, especially if the relevant limitations periods have not expired. Additionally, you should take care to maintain relevant and useful documents on criminal matters and on matters for minor clients, even if the matters are closed.

Precisely which documents should be maintained will vary from client file to client file, and you may exercise discretion – tempered with a healthy dose of caution – in evaluating each file and determining what documents should be maintained and which may be destroyed. Administrative documents, such as routine correspondence, memoranda or notes about staffing the matter, or conflict-checking memoranda, can usually be safely destroyed. Finished work product for which the client paid and documents relevant to the strategy of a transaction or litigation, such as research memoranda and communications with the client about plans and tactics, should be preserved. Whether or not to preserve other documents will involve a judgment call: for example, a draft document may be important to one file and thus should be preserved, but a draft document in another file may not be important and could be destroyed. Therefore you must evaluate the importance of the documents in a file to the litigation and/or transaction in order to determine whether the documents should be maintained. If you harbor any doubts as to whether a document should be preserved, you should keep it.

You also do not have a duty to preserve client files indefinitely, and in determining how long you must maintain files, you, again, may exercise discretion tempered with caution. Some files, particularly criminal matters or civil matters with potential criminal implications, such as tax-related matters, should be maintained for longer periods. Before destroying any files as "stale," you should consult your malpractice insurance carrier to ensure you are in compliance with the carrier's document retention policies.

Proper Storage and Destruction of Files and Records

Rule 1.6 requires lawyers to refrain from knowingly revealing their clients' confidential information, which includes all information protected by the attorney-client privilege, anything that is likely to embarrass or harm the client if revealed, and anything that the client requested be kept confidential. Your duty to maintain your clients' confidences continues even after the lawyer-client relationship has ended. Therefore, you must take care when storing – and, when appropriate, destroying – files to ensure that your clients' confidential information remains confidential.

Between the documents you *must* maintain and the documents you *should* maintain, you may be looking at a substantial amount of paper. However, anything you maintain as a paper copy, as opposed to an original document, can just as easily be maintained electronically, which will drastically reduce the required storage space and fees. For example, five categories of documents you must maintain under Rule 1.15(d)(1) – subsections (iii), (iv), (v), (vi), and (vii) – specify your need to maintain copies. Electronic copies will satisfy your obligation to preserve these documents under this rule. Similarly, electronic documents of non-original documents in your client files, such as copies of correspondence, will satisfy your obligation to preserve client materials. This reduces the amount of paper you must maintain to original documents and documents in three of the eight categories under Rule 1.15(d)(1), subsections (i), (ii), and (viii).

After determining what documents must be maintained in paper form and what may be maintained electronically, you can establish what documents can be destroyed. Because the client's right to the file supersedes yours, you should not destroy any documents in a client's file – even paper copies of documents you intend to maintain electronically – without consulting with the client. After receiving client approval, review the records again before destruction to make sure no original documents or other documents you must or should retain are in the set to be destroyed.

Your final step in your document preservation and destruction obligations is to preserve or destroy the documents in a manner consistent with your obligations to maintain your clients' confidences and, for those documents being maintained, to preserve them in a manner from which they can be maintained. This involves steps such as:

- Consulting with your malpractice carrier and clients before destroying any documents from client files;

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• Your responses to interrogatories must be in writing.[6]

• Answer each interrogatory separately.[7]

• Answer each interrogatory "fully."[8] Your responses to each interrogatory should be complete based on the responding party's knowledge.[9]

• Repeat the interrogatory question in your response.[10] Don't include your responses without re-writing the interrogatories. For example, if you're responding to Interrogatory No. 1, you'd write:

> Interrogatory No. 1
> Identify the individuals who provided information or drafted responses, or both, to plaintiff's interrogatories.
> Response to Interrogatory No. 1
> Paul Shark and John Roberts

Write clearly. Avoid legalese. Don't be flippant, insulting, obnoxious, or sarcastic.

• You may respond to an interrogatory by referring to a response you made to a prior interrogatory. *Example:*

> Interrogatory No. 2
> Identify each person you know or believe has knowledge or information about plaintiff's efforts to mitigate its damages.
> Response to Interrogatory No. 2
> See response to Interrogatory No. 1 of these interrogatories.

• The person supplying the responses to the interrogatories must swear under oath that the responses are true. You, the attorney, may not affirm. It's your client who will provide the answers to the interrogatories; thus, your client is the one who must provide that certification. Attach a separate certification page to the response. *Example:*

> CERTIFICATION[11]
>
> STATE OF NEW YORK
>
> COUNTY OF NEW YORK
>
> Jane Jackson, being duly sworn, affirms that she is an officer of Law Corp., the plaintiff in this action; that she has read the foregoing Plaintiff's Answers to Defendants' First Set of Interrogatories and is familiar with the contents thereof; and that she knows the contents to be true, based on her personal knowledge and her review of company records, except with respect to those matters stated on information and belief, which she believes to be true.
>
> Jane Jackson's Signature
>
> Notary signature, date, and stamp

Common Objections

Under CPLR 3133(a), you needn't answer an interrogatory if you have a good-faith objection. A court may, however, order you to provide the requested information even if you've objected to an interrogatory.

Seasoned practitioners know that disclosure disputes are time-consuming and expensive. Object sparingly. Don't object for the sake of objecting. If you object, narrow your objections. Respond as much as possible to the interrogatory instead of responding with a blanket objection. If you follow this advice, you and your client will look credible.

• Object and state the reason for your objection with "reasonable particularity."[12] If you don't object and state the ground(s) on which you object, a court might determine that you've waived your objection.[13] *Example:*

> Interrogatory No. 3
> Identify all the employees at Rock Corp. and their role and involvement in this lawsuit.
> Response to Interrogatory No. 3
> Rock Corp. objects to this interrogatory on the ground that the question is overbroad and seeks information neither relevant to the issues in dispute in this action nor reasonably calculated to lead to the disclosure of admissible evidence.[14]

• Alternatively, you may object and then provide a substantive answer. *Example:*

> Response to Interrogatory No. 3
> Rock Corp. objects to this interrogatory on the ground that the question is overbroad and seeks information neither relevant to the issues in dispute in this action nor reasonably calculated to lead to the disclosure of admissible evidence.
> Subject to and without waiving this objection, Rock Corp. identifies each of its employees who were involved with the contract at issue in this lawsuit from 2008 and 2010:
> Alex Branch, Executive Director, [address].
> Bob Crawford, Director, [address].
> Cole Dewey, Manager, [address].
> David Evans, engineer, [address].[15]

• If the interrogatories contain a Definitions section, as the *Legal Writer* discussed in the last issue, determine whether you need to object to a term. Assert your objection by labeling it "Objections to Definitions." *Example:*

You needn't answer an interrogatory if you have a good-faith objection.

> Objection to Definition No. 1
> Rock Corp. objects to the request's definition of "Rock Corp." to the extent that the definition includes "And Roll Corp.," whose only connection to Rock Corp. is through a joint venture.[16]

• If the interrogatories contain an Instructions section, as the *Legal Writer* discussed in the last issue, determine whether you need to object because the request is unreasonable or unauthorized. Assert your objection by labeling it "Objections to Instruction No. [1, 2, 3, and so forth]." *Example:*

> Objection to Instruction No. 1
> Rock Corp. objects to the instruction to disclose all relevant information pertaining to the period

between January 1, 1990, and January 1, 2010. That period is unduly broad and would require Rock Corp. to disclose information neither relevant to the issues in dispute in this action nor reasonably calculated to lead to the disclosure of admissible evidence. Rock Corp. will disclose all responsive information pertaining to January 1, 2008, and January 1, 2010.[17]

• You may include a "General Objections" section to raise overarching objections against particular requests. *Example:*

General Objection No. 1
Rock Corp. objects to each request to the extent it seeks information and documents that are part of the record in any public, administrative, or judicial proceeding on the ground that the documents are as publicly available and equally accessible to Joe Victim [requester] as they are to Rock Corp. No legitimate purpose would be served for Rock Corp. to incur the time and expense to provide this information or reproduce these documents.[18]

• Interrogatories may seek information that's "'material and necessary' to the prosecution or defense of the action."[19] Interrogatories outside this scope are overbroad. Example of your objection:

Interrogatory No. 4
[copy the exact interrogatory]
Response to Interrogatory No. 4
Rock Corp. objects to this interrogatory on the ground that the question is overbroad and seeks information neither relevant to the issues in dispute in this action nor reasonably calculated to lead to the disclosure of admissible evidence.[20]

• Interrogatories must request information with "reasonable particularity."[21] Thus, an interrogatory that's vague or ambiguous is objectionable. Here's an example of your objection:

Interrogatory No. 5
[copy the exact interrogatory]
Response to Interrogatory No. 5
Rock Corp. objects to this interrogatory. The interrogatory is unintelligible because it contains vague or ambiguous terms.[22]

After you assert the objection, you may want to interpret the term(s) that are vague or ambiguous to suit your client's needs and answer the interrogatory. No need to do more than object to the interrogatory.

Disclosure disputes are time-consuming and expensive. Don't object for the sake of objecting.

• An interrogatory is unduly burdensome when it seeks relevant information but would be time-consuming or costly to respond. Here's an example of your objection:

Interrogatory No. 6
[copy the exact interrogatory]
Response to Interrogatory No. 6
Rock Corp. objects to this interrogatory. The expense, time, and effort that would require Rock Corp. to answer the interrogatory would far exceed the value of the information a response would provide.[23]

• You have ways to respond to overbroad, burdensome, vague, or ambiguous interrogatories. The first method: Object to the interrogatory, interpret the interrogatory, and answer the interrogatory using your interpretation. An example of this method is the either Response to Interrogatory No. 3, above. The second method: Object to the interrogatory. Don't provide an interpretation to the interrogatory. Don't provide a substantive answer to the interrogatory.

Using the first method shows you've made an effort to comply with the request. Also, the propounding party might be satisfied with your answer and not pursue the matter further. But this method is time-consuming. It requires extra time to provide a substantive answer. And by providing a substantive answer, you risk exposing harmful information about your client and your client's case.

You may pick one method throughout your response. Or you may interchange the methods you choose. One method might work best for one interrogatory. Another method might work best for another interrogatory.

• If the interrogatory is repetitive, here's an example of your objection:

Interrogatory No. 7
[copy the exact interrogatory]
Response to Interrogatory No. 7
Rock Corp. objects to this interrogatory. The interrogatory makes the same inquiry made in a prior interrogatory.[24]

• If the interrogatory seeks financial information, here's an example of your objection:

Interrogatory No. 8
[copy the exact interrogatory]
Response to Interrogatory No. 8
Rock Corp. objects to this interrogatory. The interrogatory inquires into Rock Corp.'s finances without good cause and with no direct relation to the claims or defenses in this case.[25]

• If the interrogatory calls for a legal opinion, here's an example of your objection:

Interrogatory No. 9
[copy the exact interrogatory]
Response to Interrogatory No. 9
Rock Corp. objects to this interrogatory. It calls for a legal opinion not expressly related to the facts of this case.[26]

• If the interrogatory seeks confidential or privileged[27] information, here's an example of your objection:

Interrogatory No. 10
[copy the exact interrogatory]
Response to Interrogatory No. 10
Rock Corp. objects to this interrogatory. It seeks information protected from disclosure by the attorney-client privilege. By asserting this response, Rock Corp. does not admit that the acts referred to in the interrogatory occurred.[28]

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When you disclose confidential information but seek to prevent the parties from improperly using or disclosing the information, consider (1) a confidentiality agreement that binds the parties from disclosing the information or (2) obtaining a confidentiality order that the court so-orders subjecting the parties to the court's contempt powers.

Documents

You might be asked in the interrogatories to provide documents. You have a few options to respond to these requests:

• Comply: Provide the requested documents. Label each piece of paper with consecutive numbers. Use a Bates stamp or affix computer-generated labels to each page.[29] You may use your own labeling scheme to identify the documents you've provided. The first page you provide could be "D1," the second "D2," and so forth, if you're the defendant. If you're the plaintiff, you may label the document "P1," "P2," "P3," and so forth. Whatever numbering scheme you use is your choice. Labeling each document will help you keep a clear record of what you've produced. Keep a copy of everything you've produced, with the numbering scheme, for your records.

• Don't comply: Offer reasons why you're not complying with the request. Your objection might be that your response is privileged or that the request is burdensome, vague, or overbroad. You may object with the same reasons you would to a document request under CPLR 3120.[30] The propounding party may move a court to compel your response.

• Alternative solution: Invite the propounding party (who's seeking documents) to inspect and copy the documents at a designated time and place. If the propounding party asks for voluminous records, put the burden on that party to inspect, select, and copy the documents.

Tailor your responses to interrogatories to your case. Never submit a cut-and-paste job to expedite the process.

In the next issue, the *Legal Writer* will continue with civil-litigation documents: motion practice. ■

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1. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, *New York Civil Practice Before Trial* at § 29:250-251, at 29-30, 29-31 (2006; Dec. 2009 Supp.)
2. *Id.* at § 29:284, at 29-33.
3. CPLR 2103(e).
4. CPLR 2101(b).
5. Barr et al., *supra* note 1, at § 29:301, at 29-34.
6. CPLR 3133(b).
7. *Id.*
8. *Id.*
9. Barr et al., *supra* note 1, at § 29:283, at 29-33.
10. CPLR 3133(b).
11. Adapted from Barr et al., *supra* note 1, CD-ROM, Forms, chap. 29, Bill of Particulars & Interrogatories, 29-30: Response to Interrogatories.
12. CPLR 3133(a).
13. Barr et al., *supra* note 1, at § 29:324, at 29-36.
14. Adapted from Barr et al., *supra* note 1, at § 29:323, at 29-36.
15. *Id.*
16. Adapted from Barr et al., *supra* note 1, at § 29:330, at 29-36, 29-37.
17. Adapted from Barr et al., *supra* note 1, at § 29:331, at 29-37.
18. *Id.*
19. Barr et al., *supra* note 1, at § 29:340, at 29-38.
20. Adapted from Barr et al., *supra* note 1, at § 29:333, at 29-37.
21. CPLR 3133(a).
22. Adapted from Barr et al., *supra* note 1, at § 29:333, at 29-37.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. CPLR 3101(b).
28. Adapted from Barr et al., *supra* note 1, at § 29:333, at 29-37, § 29:360, at 29-39.
29. Barr et al., *supra* note 1, at § 29:312, at 29-35.
30. Barr et al., *supra* note 1, at § 29:311, at 29-35.

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Attorney Professionalism Forum
Continued from Page 53

- When converting paper files to electronic form, using a reliable vendor for the conversion;
- Preserving emails in a file separate and apart from your email program, which may automatically delete emails after a set period;
- Storing all records to be maintained, whether in paper or electronic form, in a secure location in which the records are unlikely to be lost or damaged;
- When destroying files, using a reliable vendor for shredding and disposal;
- Maintaining a log or index of complete client files destroyed as stale;
- When storing electronic files, maintaining a means by which they can be accessed. For example, if your electronic files are stored on CD or DVD, make sure you have a computer with a CD or DVD drive. If your files are saved on a particular kind of software, make sure you maintain that software on your computer. You will not fulfill your duty to preserve documents if they are stored in an electronic form you cannot access!

Conclusion

While moving an office is rarely a trouble-free process, by taking reasonable and proper steps to fulfill your ethical obligations, you can reduce potential future headaches. Re-familiarize yourself with your duties to keep your clients informed, to preserve the documents required by the Rules and all documents that may be necessary or useful to your clients, and to keep your clients' information confidential, and, when determining which documents to preserve and which may be destroyed, temper your discretion with care and caution.

The Forum, by
Vincent J. Syracuse and Amy S. Beard
Tannenbaum Helpern Syracuse & Hirschtritt LLP
New York, New York

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am an associate at a 50-person general practice firm in New York City with a practice in real estate law and litigation. Every day I receive numerous letters, faxes and emails from clients and adversaries which I always try to answer. My practice is to also use letters or email when it is necessary for me to communicate with an adversary on an important subject. But although I try to be diligent, for reasons that no one has been able to explain, it seems that my adversaries ignore my correspondence, especially emails. Do adversaries have an obligation to respond to my letters and email? How much time do they have to respond to us? Is there anything we can do if our adversaries don't respond? On a related topic, I learned in law school that lawyers have an obligation to communicate with clients and answer their questions. But, my problem is that I get so many telephone calls and emails and that I can't seem to keep up with them. What are my obligations to my clients? How much time do I have to respond? A friend told me that there is a 24-hour rule but I can't seem to find it. Finally, while I am on the topic, I find that many lawyers in our firm use text messaging and email to communicate with us. These communications should be protected by attorney-client privilege but I am concerned that they emails may get to the wrong person and that I could be criticized for not protecting my client's confidences. Is it proper to communicate with clients electronically?

Sincerely,
Communication Challenged

1. *In re Cardoso*, 200 A.D.2d 42, 47 (2d Dep't 1994) (lawyer who abandoned his law office and, a few months later, his practice, without notifying his clients, breached duties owed to his clients); *Vollgraff v. Block*, 117 Misc. 2d 489, 493 (Sup. Ct., Suffolk Co. 1982) (law firm was obligated to inform clients of the firm's dissolution).

2. *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P.*, 91 N.Y.2d 30, 36 (1997) (approving "an expansive general right of the client to the contents of the attorney's file, upon termination of the attorney-client relationship, more closely conforms to the position taken by the courts of this State on the client's broad rights to the contents of the file when representation ceases on a matter still pending" and finding "no principled basis upon which exclusive property rights to an attorney's work product in a client's file spring into being in favor of the attorney at the conclusion of a represented matter.") (citations omitted).

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Please provide a clear explanation of how to use *who, whom, that* and *which*. No name, please, as I may be the only reader of your column who needs the answers.

Answer: Not so. Many readers will welcome an answer, and some readers may not know enough to ask the question.

Today the distinction between *who* and *whom* is mainly ignored; newspaper journalists, especially, seldom make the distinction. They use *who* and *whom* as both the subject and object of verbs. However, meticulous writers continue to observe the rule: Use *who* as the subject and *whom* as the object of the verb in its own clause. To decide whether to use *who* or *whom*, substitute *who* for *he* and *him* for *whom*:

After the concert I met the pianist *who* is the performer.

After the concert I congratulated the pianist *whom* I met backstage.

In the first sentence, the pianist is the subject of its own (the second) clause. You can test your judgment by paraphrasing the clause: The pianist (*he*) was the performer.

In the second sentence the personal pronoun (*him*) is the object of its own (the second) clause, and the relative pronoun *whom* is therefore the objective form is the proper word to use. I met the pianist (*him*) backstage.

This rule has no exceptions. But sometimes it is tricky to apply. You have to remember that it applies to the function of the pronoun in its *own* clause:

The candidate became enraged at any challenger who questioned his authority.

In the first clause, the noun-phrase *any challenger* is the object of the preposition *at*, so if you considered only that part of the sentence, you would substitute *him* for *the challenger*. But in its own clause (the second) *the challenger* is the subject, so substitute *he* or *who* when you consider the sentence as a whole. "The candidate became enraged at any challenger *who* questioned his authority." (Who questioned his authority? The challenger, thus *he*.)

The rule applies also to all the sentences, below:

The subject *who* police identified as John Jones was arrested.

(The police identified John Jones; John Jones (*he*) was arrested.)

Now I know the identity of the man *whom* the victim recognized.

(The victim recognized him.)

The rule also applies to the relative pronouns *whoever* and *whomever*.

Whoever has finished the project can leave now.

The traditional rule about the pronouns *who*, *that*, and *which*, also promulgated by language purists during the 18th century, has now been modified, so there is no longer wide agreement about its use. Older Americans protested vigorously when I wrote a few years ago that, in general, human beings are referred to as *who* and nonanimate beings as *that* or *which*, with the notable exception that pets who are regarded as members of the family are also referred to as *who*.

The stray dog that bit my neighbor's child was euthanized.

I spanked my puppy Boss, who had bitten me while we were playing.

However, current usage has created another exception (one that many traditionalists reject): "The audience was composed of people that could understand Chinese." Under the "new" rule, *who* still generally refers only to persons, *but* if the person is thought of as a member of a group, class, or species, *that* is proper. So choose for yourself.

Another rule that has been relaxed is the rule that distinguishes *that* from *who* or *which*. This rule is also rejected by some older Americans. Traditionally, *who* has been used in nonrestrictive clauses (now called nonessential clauses) to refer to persons, and *that* to refer to non-persons. A clause is considered "non-essential (or non-restrictive) when it adds information to a clause that has identified the individual(s) concerned. A clause is considered "essential" if is needed to identify the individual(s). Thus:

Bob Jones, the person *who* related the facts to me, is my friend. (His name identifies him, so commas surround the clause beginning with *who*).

The information *that* I then reported to you contained those facts. (The word "information" is needed to identify the individual concerned, so no commas surround *that*).

The person *that* related the facts to me belongs to a society of animal lovers.

A sizable number of traditionalists regard this newer version – the preference for the pronoun *that* when the person referred to is a member of a group – as incorrect. Again usage is in flux, the older usage considered the only correct choice. But decide for yourself; either is acceptable.

Potpourri:

My thanks to the reader who sent this anecdote:

> The difference between a delusion and a hallucination: "Delusion is thinking a judge will grant a motion by the defendant in a criminal case. Hallucination is hearing a judge grant the motion."

From Justice Vince Dalsimer's court and repeated in *The Howls of Justice*, by Harry T. Shafer and Angie Papadakis. ■

Gertrude Block (Block@law.ufl.edu) 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.).

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† *Delegate to American Bar Association House of Delegates* * *Past President*

BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part XII — Responding to Interrogatories

In the last issue, the *Legal Writer* discussed writing interrogatories. In this issue, we'll discuss responding to interrogatories.

After you've been served with interrogatories, you must respond. Here's a step-by-step guide to responding to interrogatories:[1]

• Determine your deadline to respond. As discussed in the last issue of the *Legal Writer*, you have 20 days to respond.

• Give your client a copy of the interrogatories. You'll need your client to help you respond.

• Review the interrogatories.

• Determine which interrogatories seek information that's burdensome or vague. We'll discuss later in this column what you need to do when an interrogatory is burdensome or vague.

• Determine which interrogatories are objectionable. We'll discuss later on in this article what objections to assert and why.

• Determine which interrogatories seek information that your client doesn't have.

• Determine which interrogatories address the same issues. Address them once instead of repeating yourself.

• Determine whether you'll need more than 20 days to respond to the interrogatories. Determine how you'll get an extension. The best way is to contact the party that served you with the interrogatories to ask for an extension. If that party agrees, put the terms of your agreement in a letter or stipulation. If your adversary refuses to give you extra time, move the court to extend your time to respond.

• Determine from the information or documents your client has given you what might be privileged or confidential. Don't divulge or turn over privileged or confidential information. If applicable, understand your client's business; you might need to know what information or documents are sensitive and proprietary.

• Draft preliminary answers to the interrogatories. You have several options on how you'll respond: (1) answer the interrogatory completely without objecting to it; (2) object to the interrogatory as improper; (3) state that the responding party (and its agents, employees, or attorneys) have insufficient information to answer the interrogatory; or (4) move the court for a protective order denying or limiting the use of the interrogatories.

• Send the preliminary answers to your client to review.

• Meet with your client to get additional information or clarification about the case and the issues. You or your client might need to interview other people like corporate officers, directors, members, agents, or employees to answer the interrogatories.

• Make sure your clients understand that they must swear under oath about the truth and accuracy of their responses.

• After getting your client's input, review the responses. Send them back to your client for further review.

• If you're providing documents in response to the interrogatories, mark the documents so that you catalogue and identify what you're sending to your adversary.

• Write clearly. Avoid legalese. Don't be flippant, insulting, obnoxious, or sarcastic. Although your responses need not be filed with the court, write the responses with the trier-of-fact (judge or jury) in mind.[2] Understand that your adversary might use the response to interrogatories against your client as an admission or to impeach your client.

• Don't obfuscate the facts. If you're disclosing information that's harmful to your client's case, put it in the best possible light for your client. Make your client likeable. Be honest: Include the good and the bad facts.

• Include your client's certification under oath.

• Serve the response to interrogatories on each party in the case.[3] If a party is represented by an attorney, serve the attorney. Serve a copy — not the original — of the response to interrogatories.[4] Retain the original. Neither the original interrogatories nor the response to interrogatories need be filed with the court.

Format of Your Responses

• Put the case caption at the top of your response.

• Title your document to identify who's responding to the interrogatories, who propounded the interrogatories, whether you're responding to an initial or follow-up set of interrogatories, and whether your responses are supplemental responses.[5] *Example:* "Defendant XYZ's Responses to Plaintiff Joe Johnson's Second Set of Interrogatories."

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