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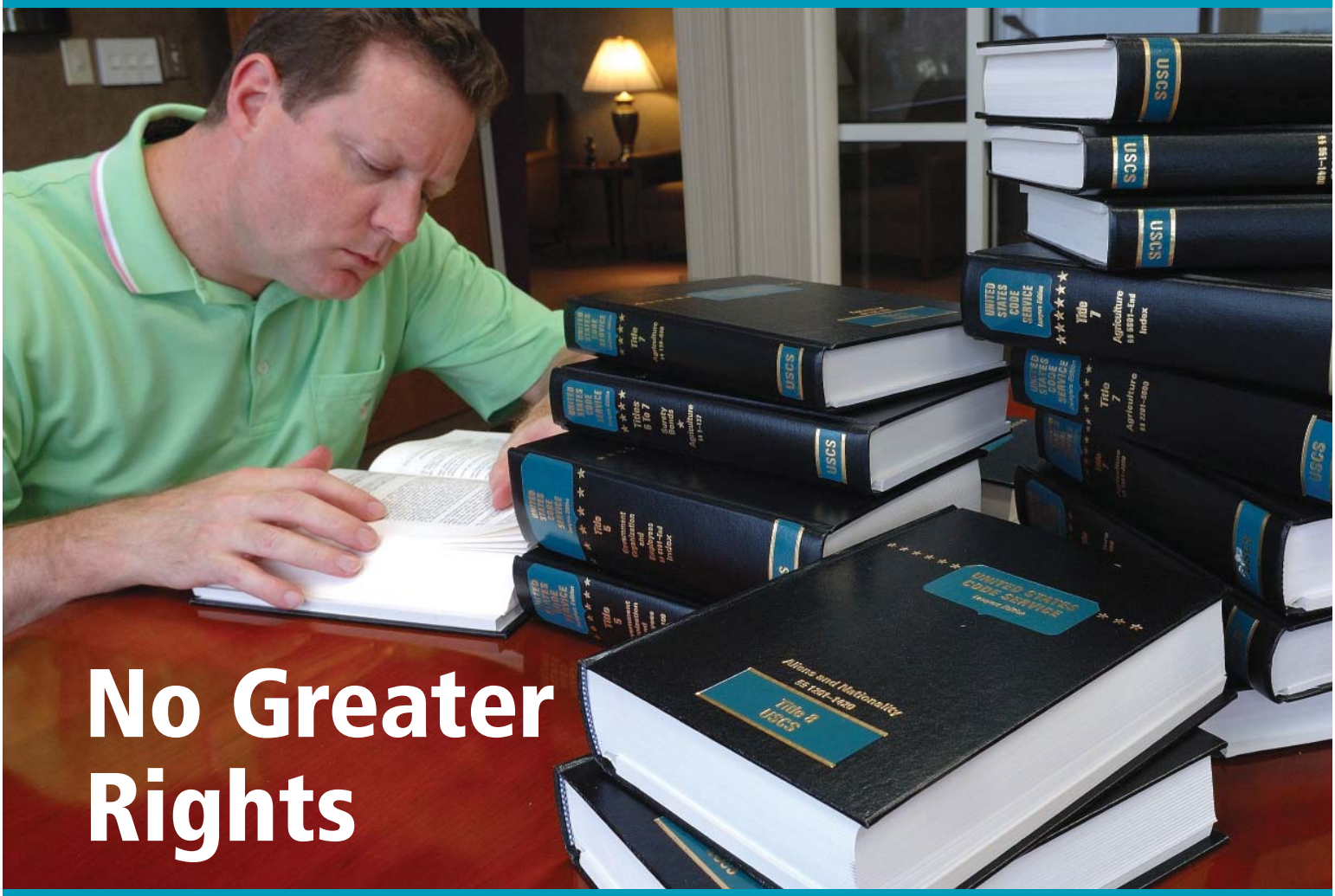
NEW YORK STATE BAR ASSOCIATION

Journal



No Greater Rights

The Limits of Pro Se *Litigation in New York Courts*

by Richard L. Weber

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DEPARTMENTS

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. Copyright © 2007 by the New York State Bar Association. The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $18. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

KATHRYN GRANT MADIGAN

Justice for All

As long as I can remember, access to justice has been the cornerstone of the State Bar's legislative and policy agenda. This past year, we went beyond the conceptual and embraced a number of initiatives intended to bridge the gap between the need for civil legal services for the poor and available state and federal funding. Despite the millions of hours of pro bono legal services provided each year by New York lawyers, we have an 80% "justice gap," which translates into thousands of citizens who do not get the help they need to avoid eviction, fight for health care or fight for other essentials.

Empire State Counsel

On June 1, 2006, Mark Alcott launched the Empire State Counsel Program to recognize members who render 50 or more hours of free legal services to the poor. In its initial year, 462 members were credentialed as Empire State Counsel. I plan not only to continue this outstanding program but to expand its breadth to include pro bono services rendered to not-for-profit, governmental or public services organizations – where the legal services are designed primarily to address the needs of the poor – or organizations specifically designed to increase the availability of legal services to the poor. You can self-certify for this designation at our Web site at www.nysba.org.

State Funding for Civil Legal Services

This was an historic year in New York State. For the first time, the Governor included funding for civil legal services in the Executive Budget. Funding this year more than doubled last year's appropriation, moving us from 30th place to 20th in state funding per poor person.[1] Yet we trail well behind our sister states of Massachusetts, New Jersey and Vermont, who provide two to four times the $5 we now spend for each poor person in our state.

We support the Report of the New York Equal Justice Commission which calls upon the state to create a permanent access to justice fund at a level of $50 million in the state budget, so that New York does not continue to be one of the seven states that fail to provide a stable funding mechanism for civil legal services.

Use of *Cy Pres* Funds

The *Cy pres* doctrine (from the French: "cy pres comme possible" meaning "as near as possible") is a court-approved method of distributing funds when the original purpose cannot be achieved. *Cy pres* can be used in any class action or mass tort action where the payment of damages to individual class members would be impossible, impractical or inappropriate. In such circumstances, judges and counsel can recommend that those funds be directed to civil legal services programs.

In January, our Special Committee on Funding for Civil Legal Services, chaired by Barbara Finkelstein and Bruce Lawrence, published a manual promoting the use of *cy pres,* which is a superb tool for the class action bench and bar. I have appointed a working group to develop an effective educational and marketing strategy, in partnership with our Bar Foundation, building on the models in other states such as the Chicago Bar Foundation, which last year received more than $3 million in *cy pres* funding. Clearly such awards provide significant opportunities to further advance the goal of access to justice.

Civil Gideon

Last year was the 40th anniversary of *Gideon v. Wainwright*, which established the constitutional right to counsel for indigent criminal defendants. If, instead of facing the loss of liberty, you face the loss of your home or a child, do you have a right to counsel? Many Americans believe that. While those instincts are right, that is not the case. Despite a clear social cost/benefit in providing counsel for the poor in such critical areas as housing and public benefits, there is no civil right to counsel. Last year, our Association endorsed a Civil Gideon Resolution urging states to provide a right to counsel to the poor in matters involving shelter, sustenance, safety, health and child custody.

Other states have taken up the challenge. California Governor Arnold Schwarzenegger has proposed a $5 million pilot project to provide representation in eviction, custody proceedings and other urgent civil legal matters. Never before have I felt so warm-

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KATHRYN GRANT MADIGAN may be reached on her blog at http://nysbar.com/blogs/president.

ly toward the Terminator. Housing advocates are finalizing proposed legislation for New York City, designed to create a right to counsel for poor tenants, age 62 and older, facing eviction. We know that for every dollar spent in New York City in preventive eviction legal services, $4 are saved from the costs associated with homelessness and increased public benefits. We know that medical costs also rise when tenants, especially senior citizens, lose their homes.

But when we talk about access to justice, it does not all come down to dollars and cents. It is about who we are as a society. And I believe that we, as a society, are measured by the way we care for our children, our poor and our frail elderly. Limited access to justice should not be considered inevitable – it should be considered unacceptable. And while we do indeed have miles to go in achieving the goal of access to justice for all New Yorkers, not just for those who can afford it, our Association is leading the way. I hope you will join us in this historic effort. ■

1. This information is provided by the American Bar Association Resource Center for Access to Justice Initiatives.

NYSBACLE

Partial Schedule of Fall Programs

(Subject to Change)

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

Henry Miller – The Trial
NOTE: CLE Seminar Coupons and Complimentary Passes CANNOT be used for this program.
September 7 New York City
September 12 Westchester

+Trust Your Planning: A Comprehensive Review of Trust Planning and Drafting Techniques
(Video Replay)
September 19 Jamestown

Supplemental Needs Trusts
September 24 Tarrytown
September 25 Albany; Buffalo; Melville, LI
September 26 New York City

Crisis Intervention Training
October 3 New York City

Medical Malpractice
October 4 Albany
October 19 Buffalo
October 25 Syracuse
November 2 Rochester
November 7 New York City
TBD Long Island

Update 2007
Live Sessions
October 5 Syracuse
October 19 New York City
+Video Replays
October 24 Binghamton
October 25 Utica
October 30 Albany; Buffalo
November 1 Rochester
November 7 Ithaca; Plattsburgh; Saratoga
November 8 Jamestown; Suffern
November 15 Tarrytown; Uniondale, LI
November 16 Canton
November 28 Poughkeepsie
November 30 Loch Sheldrake; Watertown

Practical Skills Series: Basic Matrimonial Practice
October 10 Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester

Second Corporate Counsel Institute
October 11–12 New York City

2007 No-Fault Insurance Update
October 11 New York City
October 12 Albany
October 18 Syracuse
October 19 Melville, LI

Women's Health/Medical Malpractice
October 12 New York City

Real Estate Titles and Transfers
October 12 New York City
October 26 Tarrytown
November 1 Albany
November 2 Melville, LI
November 14 Rochester

A Day in Discovery with Jim McElhaney
NOTE: CLE Seminar Coupons and Complimentary Passes CANNOT be used for this program.
October 16 Syracuse
October 17 Buffalo
November 7 Melville, LI
November 8 New York City

Risk Management
(half-day program)
October 16 Buffalo
November 2 New York City
November 13 Uniondale, LI

Health Law
October 19 New York City

Practical Skills Series: Introduction to Estate Planning
October 23 Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester

+Ninth Annual Institute on Public Utility Law
October 26 Albany

Special Education Law Update
October 26 Albany; Buffalo; New York City

New York's Fault Divorce Law at Age 40: Pleading and Proving Your Grounds Case
(half-day program)
October 26 Buffalo
November 2 Albany
November 16 Melville, LI
December 7 Syracuse
December 14 New York City

At the Ramparts: Challenges in Representing and Litigating With Public Companies in the Post-DURA/IPO/Sarbanes-Oxley Environment
October 30 New York City

+Fifth Annual Sophisticated Trusts and Estates Institute
NOTE: CLE Seminar Coupons and Complimentary Passes CANNOT be used for this program.
November 8–9 New York City

Practical Skills Series: Purchases and Sales of Homes
November 13 Albany; Buffalo; Hauppauge, LI; New York City; Rochester; Syracuse; Westchester

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

To register or for more information call toll free **1-800-582-2452**
In Albany and surrounding areas dial (518) 463-3724; or fax your request to (518) 487-5618
For a complete fall schedule, go to www.nysba.org/CLE/fall2007
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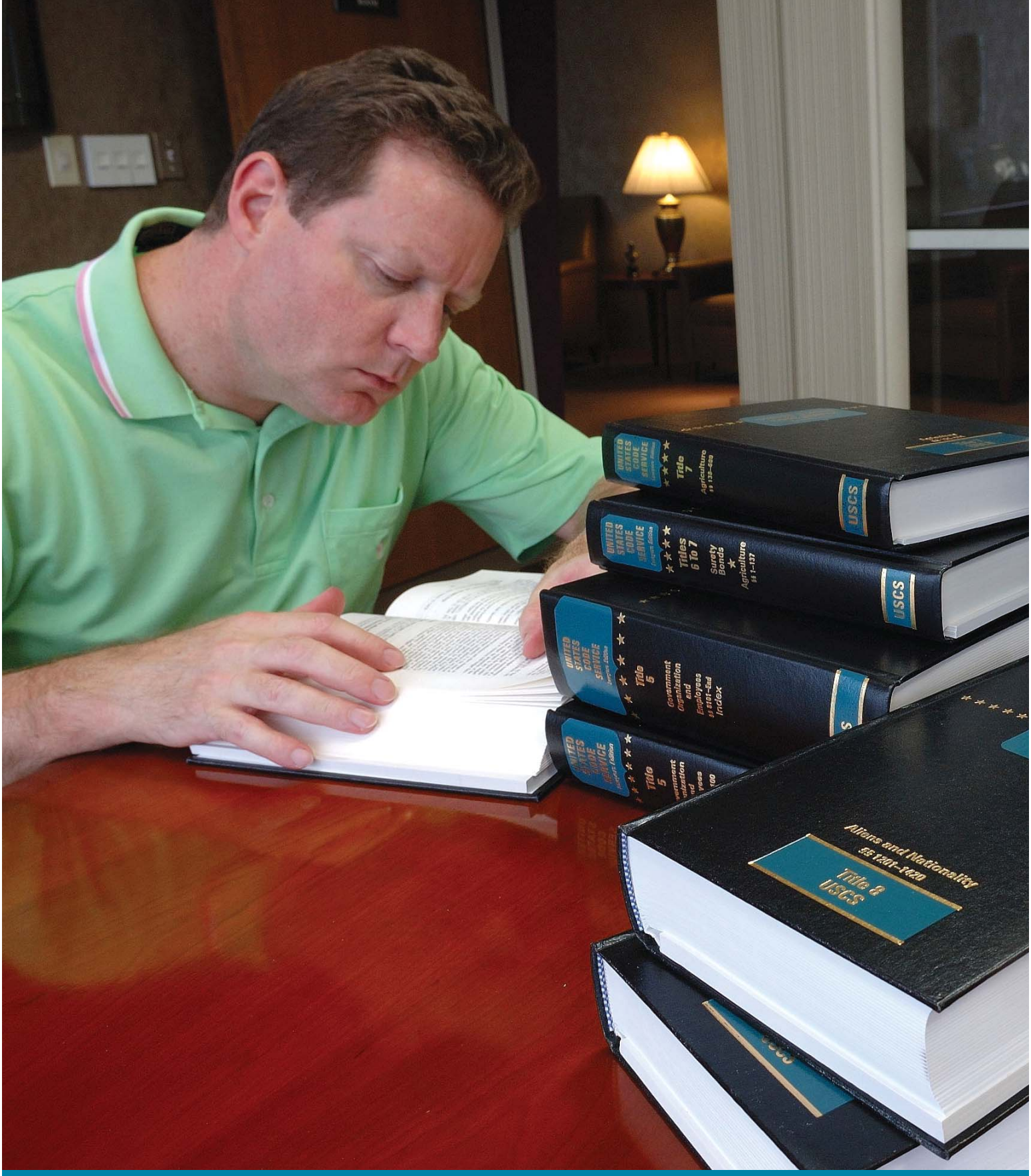
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No Greater Rights

The Limits of *Pro Se* Litigation in New York Courts

By Richard L. Weber

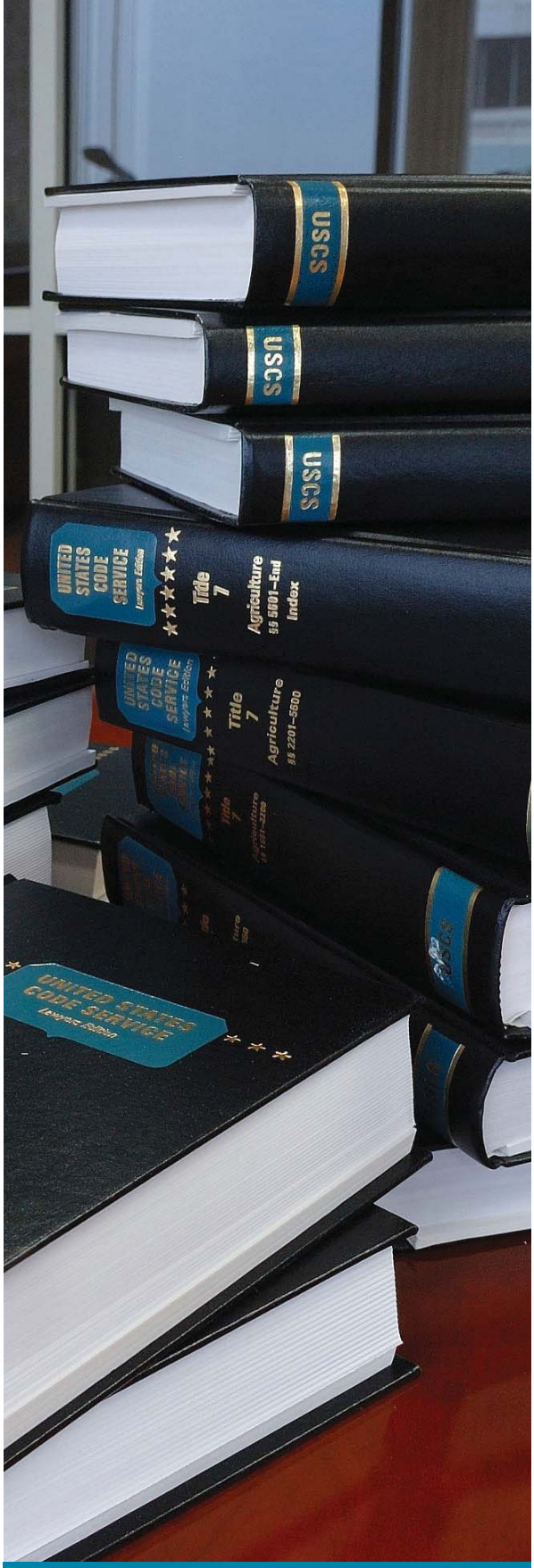
An over-zealous *pro se* litigant can present a unique problem for the courts, and a unique challenge for opposing counsel. An engaged attorney must balance the duty of zealous advocacy against the obligation to adhere to the Code of Professional Responsibility.[1] Lawyers may also restrain their zeal in order to preserve collegiality with members of the local bar, and their reputation and standing within the legal community. In contrast, a non-lawyer *pro se* litigant is not bound by the Code of Professional Responsibility, and has no reputation to preserve within the legal community. The *pro se* litigant's involvement in the legal system will likely end after he or she prosecutes or defends the case at issue.

A lawyer facing a motivated *pro se* litigant may become frustrated by unconventional or outrageous litigation tactics. Worse yet, it may seem that the *pro se* litigant is being coddled or excused by the court, forgiven for procedural irregularities and blatant breaches of decorum. This article outlines the limits of *pro se* representation in civil actions in New York State courts, and the remedies available for quelling an overzealous *pro se* litigant.

The Inherent Restrictions of *Pro Se* Status

In New York, a party may prosecute or defend a civil action in person or by attorney, except for a few statutory exceptions. A corporation or voluntary association must have an attorney.[2] Similarly, infants and incompetents have no standing to appear on their own behalf – an appropriate guardian is required to represent the interests of these parties.[3] Also, where a party has already engaged an attorney, the party is barred from proceeding *pro se* except by subsequent consent of the court.[4]

CPLR 105(c) provides that a *pro se* "party" is generally treated as an "attorney" for purposes of the rules of civil procedure.[5] However, a *pro se* litigant is not automatically entitled to all the privileges afforded to an engaged attorney.[6] An obvious example is service of process: CPLR 2103 bars service of papers by parties.[7] Similar provisions bar a *pro se* litigant from issuing a subpoena without court order,[8] or from certifying papers under CPLR 2105,[9] or from submitting an affirmation in lieu of an affidavit.[10] Depending on the particular forum, additional restrictions may exist. For example, a non-lawyer party cannot file a



Richard L. Weber (rweber@bsk.com) is an attorney in the Syracuse office of Bond, Schoeneck & King PLLC. He received his undergraduate degree from the State University of New York at Buffalo, and his law degree from the College of William and Mary School of Law.

summons to commence a proceeding in justice court – in the absence of an attorney, the summons must issue from the court clerk.[11]

Although *pro se* litigants are not afforded all the privileges of practicing attorneys, it would be an error to conclude that the New York State court system does not accommodate *pro se* litigants. It is common for the courts to grant *pro se* litigants certain "latitude" that might not be extended to attorneys, in order to provide the *pro se* litigant with an opportunity to make a full presentation of his or her case.[12] A review of case law demonstrates that courts may be influenced by the relative inexperience of a *pro se* litigant.[13] For example, a *pro se* litigant may be relieved from a stipulation where the lack of representation resulted in a stipulation that was unduly one-sided or unfair.[14] In one case, a *pro se* litigant was even relieved of the apparent abandonment of his claim where it was clear that the litigant never intended to create the abandonment.[15]

In addition to the informal latitude routinely granted to *pro se* litigants, the courts have promulgated policies and court rules that facilitate equal full access and opportunity for the self-represented.[16] This reflects the public policy of the state to facilitate "equal access to justice" for the self-represented, a policy that is continually being examined and revised by court officials.[17]

Curbing Abusive or Overzealous *Pro Se* Litigants

Pro se litigants are entitled to no greater rights in court than any other litigant, and cannot use their *pro se* status to deprive opponents of the same rights they would otherwise have against a represented litigant.[18] As a result, *pro se* litigants cannot use their status to excuse defective service of process or court orders,[19] or the failure to introduce an affidavit of merit to rebut a motion to dismiss for failure to prosecute,[20] or the failure to introduce required expert testimony at trial.[21] The "latitude" shown by the judiciary cannot save the *pro se* litigant from his or her own fundamental litigation errors, and cannot include the delivery of legal advice.[22] As is often documented in the case law, litigants appearing *pro se* do so at their own peril.[23]

Although courts are inclined to excuse minor breaches of decorum or procedure,[24] compelling circumstances warrant court action to limit or terminate the right of self-representation. The critical factor is whether the *pro se* litigant is *abusing the judicial process*.[25] Judges will act to protect the courts – and other litigants – from the negative impact of egregious or repetitive *pro se* litigation, including wasted court time and added cost to opponents.[26] Furthermore, the courts are willing to act where the conduct of the *pro se* litigant frustrates or exasperates the presiding justice.[27]

Once the *pro se* litigant crosses the threshold into abusive litigation, a wide range of remedies are available to quell his or her conduct. Options available to the court include imposing sanctions on the *pro se* litigant,[28] mandating court approval as a prerequisite to motion practice or commencement of further litigation,[29] and enjoining further self-representation by the *pro se* litigant.[30]

All litigants – *pro se* or otherwise – are subject to sanction and contempt orders.[31] Sanctions are appropriate where the *pro se* litigant engages in frivolous conduct.[32] However, it is incumbent on opposing counsel to document the exact grounds for any sanctions requested: sanctions demand a written order of the court setting forth the basis for the court's conclusion that the litigant's conduct was frivolous, as well as a justification for the amount of sanctions imposed.[33]

Pro se litigants are entitled to no greater rights in court than any other litigant, and cannot use their *pro se* status to deprive opponents of the same rights they would otherwise have.

While monetary sanctions can be an effective deterrent to some overzealous *pro se* tactics, rare cases may require more extreme intervention. In *Muka v. New York State Bar Ass'n*, the court faced a *pro se* litigant who had commenced hundreds of prior lawsuits in New York State courts, most of which were dismissed as lacking merit.[34] Frustrated, the *pro se* litigant turned her attention to the courts themselves, and filed suit against the state Supreme Court and its judges.[35] At that point, the bench concluded that enough was enough:

> [T]he right to appear pro se is not unlimited. . . . Insofar as any litigant unnecessarily consumes inordinate amounts of judicial time and energy, he or she deprives other litigants of their proper share of these resources. A balance must be kept. When it becomes clear that the courts are being used as a vehicle of harassment by a "knowledgeable and articulate experienced pro se litigant," the issuance of an injunction is warranted.[36]

The *Muka* court dismissed the plaintiff's claim against the defendant, and issued an injunction prohibiting the *pro se* plaintiff from commencing any civil action against the defendant in any New York State court unless she first engaged an attorney.[37]

In re Rappaport provides another instructive example. In that case, the court faced a *pro se* plaintiff who failed to produce duly-demanded documents, engaged in outrageous courtroom antics, and physically assaulted opposing counsel.[38] After "clear and repeated" warnings about

the misconduct, the court directed the *pro se* litigant to retain and appear by counsel of his choice; in the event he was unwilling to do so, the court would appoint counsel for him.[39] In revoking his right to self-representation, the court cited its concern that the actions of the *pro se* litigant "prevented the fair and orderly disposition" of the issues raised at trial.[40]

Sassower v. Signorelli provides a third instructive example. In that case, the *pro se* litigant filed suit against the Suffolk County Surrogate, who had required the litigant to account for his activities as a fiduciary. The Second Department affirmed the order of the lower court that enjoined the *pro se* plaintiff from commencing any further proceedings in the case. Noting its objection to "use of the legal system as a tool of harassment,"[41] the court set forth a compelling rationale for enjoining frivolous *pro se* claims and tactics:

> A litigious plaintiff pressing a frivolous claim can be extremely costly to the defendant and can waste an inordinate amount of court time, time that this court and the trial courts can ill afford to lose. Thus, when, as here, a litigant is abusing the judicial process by hagriding individuals solely out of ill will or spite, equity may enjoin such vexatious litigation.[42]

These three examples are not all-inclusive – the means by which a motivated *pro se* litigant can harass, obstruct or abuse the judicial process are too numerous to count. For that reason, each case of abusive *pro se* litigation requires a custom-tailored solution to the particular nature and level of misconduct at hand.[43]

Conclusion

When confronted with an overzealous *pro se* litigant, opposing counsel must tolerate a certain amount of latitude granted to the *pro se* party by the court. However, counsel must remain vigilant to assure that the court's latitude does not evolve into something more damaging. Counsel must take care to document any egregious or unwarranted conduct of the *pro se* litigant, and should seek prompt relief where the conduct of the *pro se* litigant becomes abusive of the judicial process. ■

1. *See generally Spremo v. Babchik*, 155 Misc. 2d 796, 804, 589 N.Y.S.2d 1019 (Sup. Ct., Queens Co. 1992).
2. CPLR 321(a).
3. CPLR 1201; *see also* Mental Hygiene Law art. 81.
4. CPLR 321(a); *Melnitzky v. City of N.Y.*, 1 A.D.3d 222, 767 N.Y.S.2d 97 (1st Dep't 2003).
5. CPLR 105(c); *Ryan v. Blupal Realty Corp.*, 45 Misc. 2d 542, 257 N.Y.S.2d 235 (App. Term, 1st Dep't 1965).
6. *See generally* 1 Weinstein Korn Miller, NY Civil Prac. ¶ 105.04.
7. CPLR 2103(a).
8. CPLR 2302(a).

9. CPLR 2105; *see also* 1 Weinstein Korn Miller, NY Civil Prac. ¶ 105.04.

10. *LaRusso v. Katz*, 30 A.D.3d 240, 818 N.Y.S.2d 17 (1st Dep't 2006) (affirmation of attorney/*pro se* party in support of motion was properly disregarded by court).

11. Uniform Justice Court Act § 401(a).

12. *See generally Duffen v. State of N.Y.*, 245 A.D.2d 653, 654, 665 N.Y.S.2d 978 (3d Dep't 1997); *Sloninski v. Weston*, 232 A.D.2d 913, 914, 648 N.Y.S.2d 823 (3d Dep't 1996) (noting supreme court "made every reasonable effort to afford plaintiff leeway during the trial so as to insure that he had an opportunity to make a full presentation of his case"); *Mosso v. Mosso*, 6 A.D.3d 827, 828, 776 N.Y.S.2d 599 (3d Dep't 2004) (noting "some latitude is appropriate" with *pro se* litigants, especially in proceedings "where a pro se litigant wishes to present evidence in her defense, but is frustrated from doing so through her own inexperience and lack of legal training").

13. *See generally Mosso*, 6 A.D.3d at 828 (latitude appropriate where *pro se* litigant "frustrated" from presenting evidence due to inexperience and lack of legal training); *Vill. of Attica v. Nutty*, 184 A.D.2d 1057, 584 N.Y.S.2d 252 (4th Dep't 1992).

14. *See* 105 N.Y. Jur. 2d, *Trial* § 263 (citing *144 Woodruff Corp. v. Lacrete*, 154 Misc. 2d 301, 585 N.Y.S.2d 956 (Civ. Ct., N.Y. Co. 1992)).

15. *Vill. of Attica*, 184 A.D.2d at 1057 (*pro se* respondents relieved of abandonment of claim, despite failure to comply with Rule 202.48 of the Uniform Civil Rules for the Supreme and the County Court).

16. *Self Represented Litigants: Characteristics, Needs, Services – The Results of Two Surveys*, Office of the Deputy Chief Administrative Judge for Judicial Initiatives (2005) (providing recommendations to ensure equal access to justice for self-represented litigants) *available at* <http://nycourts.gov/reports/AJJI_SelfRep06.pdf>.

17. *Self Represented Litigants, supra* note 16; *see also* Uniform Civil Rules for the Justice Courts §§ 214.2 (public posting of court hours) and 214.10 (simplified small claims procedure); *Sassower v. Signorelli*, 99 A.D.2d 358, 359, 472 N.Y.S.2d 702 (2d Dep't 1984) (noting public policy mandates free access to the courts); *Roundtree v. Singh*, 143 A.D.2d 995, 996, 533 N.Y.S.2d 609 (2d Dep't 1988) (noting small claims matters are "subject to informal procedures which are designed to facilitate the handling of minor claims and grievances without resort to the use of counsel").

18. *Goldmark v. Keystone & Grading Corp.*, 226 A.D.2d 143, 640 N.Y.S.2d 89 (1st Dep't 1996); *Roundtree*, 143 A.D.2d at 996; *Sloninski*, 232 A.D.2d at 914; *Brooks v. Inn at Saratoga Assoc.*, 188 A.D.2d 921, 591 N.Y.S.2d 625 (3d Dep't 1992); *Scott v. George*, 222 A.D.2d 1049, 635 N.Y.S.2d 864 (4th Dep't 1995); *Yule v. Comerford*, 140 A.D.2d 981, 529 N.Y.S.2d 653 (4th Dept 1988).

19. *Goldmark*, 226 A.D.2d at 144 (*pro se* petitioner served order to show cause by mail instead of required personal service); *Brooks*, 188 A.D.2d at 921 (failure to timely serve a complaint); *Kitch v. Markham*, 174 Misc. 2d 611, 665 N.Y.S.2d 1019 (Sup. Ct., Westchester Co. 1997) (failure to timely serve complaint); *Maddox v. State Univ. of N.Y. at Albany*, 32 A.D.3d 599, 819 N.Y.S.2d 605 (3d Dep't 2006) (failure to properly serve Article 78 notice of petition and petition).

20. *Yule*, 140 A.D.2d at 981-82; *Schneider v. Cookson Am., Inc.*, 267 A.D.2d 998, 700 N.Y.S.2d 886 (4th Dep't 1999); *see also Kanat v. Ochsner*, 301 A.D.2d 456, 457–58, 755 N.Y.S.2d 371 (1st Dep't 2003) (default judgment appropriate where *pro se* litigant failed to demonstrate reasonable excuse for default and meritorious defense to the action).

21. *Roundtree*, 143 A.D.2d at 995; *Duffen*, 245 A.D.2d at 654.

22. *See Davis v. Mut. of Omaha Ins. Co.*, 167 A.D.2d 714, 716, 562 N.Y.S.2d 883 (3d Dep't 1990).

23. *Id.* at 716; *Sloninski*, 232 A.D.2d at 914; *Banushi v. Lambrakos*, 305 A.D.2d 524, 759 N.Y.S.2d 345 (2d Dept 2003).

24. *See, e.g.*, *Chrysler Credit Corp. v. Smith*, 157 Misc. 2d 56, 595 N.Y.S.2d 912 (Civ. Ct., Kings Co. 1993) (despite failure of *pro se* defendant to submit answering papers or request oral argument on motion, court may hear the *pro se* litigant to determine whether formal oral argument is warranted on the motion); *In re Rappaport*, 109 Misc. 2d 640, 440 N.Y.S.2d 532 (Sur. Ct., Nassau Co. 1981) (noting courts must be "tolerant of minor infractions of courtroom procedure where an inexperienced party has only television attorneys as role models").

25. *See generally Sassower*, 99 A.D.2d at 359; *Spremo v. Babchik*, 155 Misc. 2d 796, 803, 589 N.Y.S.2d 1019 (Sup. Ct., Queens Co. 1992); *In re Rappaport*, 109 Misc. 2d 640.

26. *Sassower*, 99 A.D.2d at 359–60; *Spremo*, 155 Misc. 2d at 803; *Robert v. O'Meara*, 28 A.D.3d 567, 813 N.Y.S.2d 736 (2d Dep't 2006); *Sloninski*, 232 A.D.2d at 914 (noting a litigant's *pro se* appearance may not "deprive parties in opposition to their right to a fair trial"); *Martin-Trigona v. Capital Cities / ABC, Inc.*, 145 Misc. 2d 405, 409, 546 N.Y.S.2d 910 (1989).

27. *Kanat v. Ochsner*, 301 A.D.2d 456, 458, 755 N.Y.S.2d 371 (1st Dep't 2003) (defendants' course of conduct "intentionally calculated to frustrate and impede the court"); *Shreve v. Shreve*, 229 A.D.2d 1005, 1006, 645 N.Y.S.2d 198 (4th Dep't 1996) (court "exasperated" by the filing of numerous petitions by *pro se* litigant); *In re Rappaport*, 109 Misc. 2d at 642.

28. *See generally Winters v. Gould*, 143 Misc. 2d 44, 539 N.Y.S.2d 686 (Sup. Ct., N.Y. Co. 1989) (citing 22 N.Y.C.R.R. § 130.2); *In re Schermerhorn*, 28 A.D.3d 822, 812 N.Y.S.2d 698 (3d Dep't 2006).

29. *Harbas v. Gilmore*, 244 A.D.2d 218, 664 N.Y.S.2d 921 (1st Dep't 1997); *Melnitzky v. Apple Bank for Savings*, 19 A.D.3d 252, 253, 797 N.Y.S.2d 470 (1st Dep't 2005); *Duffy v. Holt-Harris*, 260 A.D.2d 595, 687 N.Y.S.2d 265 (2d Dep't 1999).

30. *See generally Harbas*, 244 A.D.2d at 218; *Spremo*, 155 Misc. 2d at 803–804.

31. 22 N.Y.C.R.R. §§ 130-1.1 *et seq.*; *Gabrelian v. Gabrelian*, 108 A.D.2d 445, 489 N.Y.S.2d 914 (2d Dep't 1985).

32. 22 N.Y.C.R.R. § 130-1.1(a). Note, however, that this section does not apply to conduct in town or village courts, small claims courts, or certain family court matters. *Id*.

33. 22 N.Y.C.R.R. §§ 130-1.1 *et seq.*; *see also In re Schermerhorn*, 28 A.D.3d 822 (sanctions reversed where trial court failed to provide a written order indicating basis of sanctions, reasons why litigant conduct was frivolous, and justification for the amount of sanctions).

34. *Muka v. N.Y. State Bar Ass'n*, 120 Misc. 2d 897, 466 N.Y.S.2d 891 (Sup. Ct., Tompkins Co. 1983); *see also Spremo*, 155 Misc. 2d at 802 (discussing *Muka*).

35. *Muka*, 120 Misc. 2d at 897.

36. *Id*. at 903.

37. *Id*. at 905.

38. *In re Rappaport*, 109 Misc. 2d at 640.

39. *Id*.

40. *Id*. at 643.

41. *Sassower*, 99 A.D.2d at 359.

42. *Id*.

43. *See generally Martin-Trigona*, 145 Misc. 2d at 409–10 (imposing injunction and sanctions); *Shreve*, 229 A.D.2d at 1006 (affirming order that *pro se* plaintiff obtain leave of court or representation prior to filing new motions in existing action); *In re Rappaport*, 109 Misc. 2d at 642 (ordering *pro se* plaintiff to obtain counsel, under penalty of court appointment of counsel for him).

BY DAVID PAUL HOROWITZ

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Is There a Doctor in the House? The Physician-Patient Privilege May Need One! (Part I)

New York State may justifiably be proud to have been the first jurisdiction to depart from the common law and adopt the physician-patient privilege, by statute, in 1828.[1] The Court of Appeals has explained:

> In its current form, the privilege prohibits disclosure of any information acquired by a physician "in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." The privilege applies not only to information communicated orally by the patient, but also to "information obtained from observation of the patient's appearance and symptoms, unless the facts observed would be obvious to laymen." Moreover, the form in which the information is sought to be introduced is irrelevant, as the privilege operates whether the information is contained in a patient's medical files or is sought to be introduced at trial in the form of expert testimony.[2]

The Physician-Patient Privilege in Personal Injury Cases

There are a number of exceptions to the application of the physician-patient privilege. Most practitioners have encountered the exception for plaintiffs who commence an action for personal injuries. This exception is premised on the concept of waiver: by bringing suit, the personal injury plaintiff places his or her medical condition affirmatively "in controversy,"[3] thus waiving, in whole or in part, the physician-patient privilege.[4]

A personal injury plaintiff's waiver of the physician-patient privilege is limited to those parts of the body and those conditions claimed to have been exacerbated or activated by the conduct of the defendant, and does not extend to unrelated injuries, illnesses, and treatments.[5] These limitations on the waiver apply in medical malpractice cases.[6]

It is the application and extent of the waiver in personal injury cases that is the subject of this column. I will also discuss my perception that there has been an expansion of the scope and application of the waiver in personal injury cases in recent years.

As with many things, the devil is in the details, and I offer the following hypothetical case as a framework for delving into those details.

Facts of the Case

Imagine the following case scenario: An expectant mother has pre-natal care with Dr. A. She is delivered by Doctor A, an obstetrician, at Hospital B, and her baby, an infant girl, is born with left shoulder dystocia. During the delivery, the mother sustains ruptures of tissue that Dr. A repairs in the hospital later that day. The infant remains an inpatient at Hospital B for two months, on Dr. C's pediatric service, and then is released home. When the mother calls Dr. A's office on the day of her discharge to make an appointment for a follow-up office visit, she is told by a nurse that Dr. A will be out for a few weeks because of surgery to his right arm earlier that day.

Months later, the infant is admitted for left shoulder surgery by Dr. D, an orthopedic surgeon, to Hospital E. Dr. D notes in the hospital record that he believes the condition of the infant's shoulder has been worsened by the actions of the mother, whom he believes suffers from Munchausen's Syndrome by proxy. While in Doctor D's private office for a follow-up visit following discharge from Hospital E, the infant is accidentally stuck with a used hypodermic needle, and is put on a prophylactic course of HIV medication. Two weeks later, while in the waiting room of Dr. F, the physician monitoring her HIV status, a wall-mounted television falls on the child, and re-injures her left shoulder. After six months, the infant tests negative for HIV infection.

The Disclosure Demands

The mother, as mother and natural guardian on behalf of the infant and on her own behalf, individually, commences an action against defendants "A" through "F" for the left shoulder injury to the infant. The action against defendants "A" through "E" is for medical malpractice, and the action against defendant "F" is for negligence. The plaintiff alleges in her complaint that Dr. A was suffering from his own arm injury at the time of the delivery, and that his arm injury was a proximate cause of the

infant's shoulder injury. The plaintiff also alleges that Dr. F knew, or should have known, that the television was in danger of falling.

The plaintiff claims, in her bill of particulars, the following injuries:

1. Left shoulder dystocia;
2. Left brachial plexus injury;
3. Surgery to the left shoulder;
4. Exacerbation of the left shoulder injury;
5. Future surgery to the left shoulder;
6. Pain and suffering; and
7. Mental anguish and loss of enjoyment of life.

After issue is joined, the defendants demand the following:

1. Authorization for the mother's pre-natal records from Dr. A;
2. Authorization for the mother's and infant's delivery records from Dr. A and Hospital B;
3. Authorization for the mother's post-delivery records from Dr. A and Hospital B;
4. Authorization for the infant's hospital records from Hospitals B and E;
5. Authorization for the infant's medical records from Drs. C, D, and F;
6. Authorization for all records of all treating physicians of the infant;
7. Independent medical exam (IME) of the infant by an orthopedist, a psychiatrist, and an HIV specialist; and
8. IME of the mother by psychiatrist.

Plaintiff also serves disclosure demands, requesting, among other things:

1. All medical records of Dr. A relating to any injury to, or medical condition of, his right arm, for the period running from two years before the delivery through one week after the date of Dr. A's delivery of the infant girl; and
2. The identity of the patients and staff present in the HIV clinic when the television fell.

Questions Presented

How should the court rule with regard to these disclosure demands? While you are welcome to wait for the next issue for my ideas on how the court should rule, wouldn't it be more fun to issue your own "rulings"? So, take a minute, and put a "Y" for yes and an "N" for no, to record your answers.[7] Next issue, we will see if we agree. ■

1. *Dillenbeck v. Hess*, 73 N.Y.2d 278, 539 N.Y.S.2d 707 (1989).
2. *Id.* at 284 (citations omitted). *See* CPLR 4504(a).
3. *See, e.g.*, *Dillenbeck*, 73 N.Y.2d 278.
4. *Koump v. Smith*, 25 N.Y.2d 287, 303 N.Y.S.2d 858 (1969). For an overview of privilege and waiver, see *New York Civil Disclosure*, ch. 8, *et seq.* (2007).
5. *Kohn v. Fisch*, 262 A.D.2d 535, 692 N.Y.S.2d 429 (2d Dep't 1999).
6. *Gill v. Mancino*, 8 A.D.3d 340, 777 N.Y.S.2d 712 (2d Dep't 2004).
7. Of course, being lawyers, or law students, or others involved with the legal profession, you are competitive, so you will score yourselves, *i.e.*, two out of 10, nine out of 10, etc. Only because you will then need to place your score in context (why else score it?), I offer the following thoughts on what your score (for correct answers) suggests: 0–4, you are qualified to be a law school professor; 4–8, you are qualified to be a judge or lawyer; and 9–10, you are wasting your time in the legal profession and should consider getting a real job.

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The Animal Welfare Act – What's That?

By Mariann Sullivan

With increasing attention being paid to the treatment of animals and the role of the law in regulating their care, many lawyers are surprised to discover that a federal law governing animal welfare is already on the books. While the Animal Welfare Act[1] (AWA or the "Act") is often criticized for its purported failings, such as limitations on the animals who are covered, inadequate standards of care, and poor enforcement, it is important to appreciate that it represents a fundamental federal policy that animals should be treated "humane[ly]" and that, without it, the lives of millions of animals would be very much worse than they are.

What Animals Are Covered?

The Act is something of a hodgepodge of provisions that have been added over the years and, somewhat confusingly, it uses a variety of ways to set forth the limitations on which animals are covered. First, a covered "animal" is defined both by its species and by the use to which the animal is put. Thus, the Act defines an "animal" as any "warm-blooded animal, as the Secretary [of Agriculture] may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet."[2] All other dogs are included as well, such as those used for "hunting, security, or breeding purposes." However, some animals are then excluded from this general definition. First, a provision enacted in 2003 provides that birds, rats, and mice are excluded, but only if they were bred for research, effectively excluding the vast majority of research animals. All horses *not* used for research are excluded.[3] And, even though the definition already set forth could not conceivably be interpreted to include them, the Act goes on to specifically exclude farm animals.

Thus, the Act, in spite of its expansive title, does not cover the vast majority of animals held by humans in the United States. Clearly, farm animals, nine to 10 billion of whom are killed every year, are the largest omission. The Act (with a few additions) covers only some animals, and only those used in three areas:

- in research (including product testing);
- on exhibition (including in zoos and circuses); and
- as pets.

Moreover, within each of these categories, the Act further limits coverage by applying only to certain actors and activities.

Which People Are Covered?

Dealers and Carriers

First, the Act covers all "dealers" of animals in any of these areas. A dealer is, in essence, someone who deals commercially in "animal[s]" for use in research, teaching, exhibition, or as a pet, or any dog for hunting, security, or breeding purposes. Retail pet stores selling pets only to the public, as well as certain dealers whose business is *de minimis*, are specifically excluded. The Act also covers "carriers," in other words, those who transport "animal[s]" for hire, though, of course, the definition of "animal" limits the carriers who are covered. Thus, for example, those who transport farm animals to slaughter are not covered by the Act.

Exhibitors
The Act covers "exhibitor[s]," those who exhibit "animal[s]" to the public for compensation, and includes carnivals, circuses, and zoos. However, state and county fairs, livestock shows, rodeos, purebred dog and cat shows, and "fairs or exhibitions intended to advance agricultural arts and sciences" are specifically excluded.[4]

It is no simple inquiry to ask whether a particular animal is covered by the Act.

Researchers
Research facilities are relatively broadly defined as institutions and individuals who use or intend to use live "animal[s]" in "research, tests or experiments" and either act in commerce or receive federal funding.[5] The primary exclusion is for elementary and secondary schools.

Pet Wholesalers
Those in possession of "animal[s]" used as pets are governed by the Act if they fit the definition of a "dealer" which, as noted, does not include retail pet stores or commercial carriers. Perhaps most notably, wholesale puppy breeders, often called "puppy mills," and the subject of much criticism, come within the definition of "dealer" and are thus covered by the Act. However, the expansive *regulatory* definition of "retail pet store" excludes from the Act's coverage those breeders who sell their animals directly to the public.[6] Hobby breeders, commercial "backyard breeders" and puppy mills that sell directly to the public are excluded, as well as facilities, no matter how large, that sell animals to the public via the Internet. The definition of "dealer" also does not include animal shelters or individuals who have pets and they are therefore not covered by the Act. However, since "carriers" of all covered animals are regulated by the Act, it governs all carriers of animals used as pets, including animals shipped by dealers, and dogs and other pets who accompany their families on airplanes and other carriers.

Statutory and Regulatory Requirements

It is no simple inquiry to ask whether a particular animal is covered by the Act. But, once it is figured out, a question remains about what such coverage entails. While the Act imposes licensing and record-keeping requirements, the most significant provision – from the point of view of the animals – requires the United States Department of Agriculture (USDA) to promulgate standards to govern the "humane" care, treatment, and transportation of animals including

> minimum requirements for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species.[7]

Thus, the Act does not, itself, set forth any standards by which animals are to be kept, but leaves that to the agency, with the crucial requirement that those standards be "humane." The statute also has two species-specific mandates, *i.e.*, the creation of standards for the exercise of dogs and for a "physical environment adequate to promote the psychological well-being of primates."[8] Finally, separate standards are to be promulgated for carriers.

Essentially, the standards set forth by the USDA,[9] which are quite detailed, require little more than that animals be fed, watered, vetted, and kept in reasonably clean and safe enclosures that allow them to make species-appropriate postural adjustments. Indeed, even the "exercise" standards for dogs merely require that they be housed in groups or that their cages be a bit larger.[10] While this may not seem sufficient to some, even the most avid animal advocate would admit that the standards, when enforced, are a vast improvement over much of the behavior in these industries before the Act, and over current behavior in industries not covered by the Act, including agribusiness.

In addition to these general animal care standards, the USDA is tasked with promulgating regulations applying additional requirements to research facilities. These requirements include the minimization of pain and distress during experimental procedures, the consideration of alternatives to painful or distressing procedures, and that, subject to certain exceptions, no animal be subjected to more than one major operative experiment from which the animal is allowed to recover.[11] While these provisions obviously have some relevance to the actual experimentation, the USDA is, at the same time, prohibited from regulating on animal welfare grounds the design, outlines, or guidelines of research or experimentation. The implementation of these statutory requirements is to be accomplished by the establishment, in each facility, of an Institutional Animal Care and Use Committee (IACUC), with agency oversight. The IACUC also oversees compliance with the general animal care standards.

Along with the regulation of exhibition, research, and pet dealers, the Act deals with certain specific uses of animals. Section 2156 prohibits the knowing sponsorship or exhibition of an animal in an "animal fighting venture" if the animal has been moved in commerce (with a limited exception for any state in which cockfighting is legal, currently Louisiana), as well as the sale, purchase, transport, delivery or receipt of animals for such purpose. "Animal" is defined differently for this section as "any live bird, or any live dog or other mammal, except man."[12]

Another special section of the Act relates to limitations on the procurement of pets, or former pets, for research.

It requires various entities, such as animal shelters, to hold the animals for five days before a sale to a "dealer," to allow people whose pets have been lost to find them before they are sold for use in research. Notably, 14 states,[13] New York[14] included, have prohibited the sale of shelter animals for research, thus rendering this provision unnecessary in those states.

Enforcement

The subdivision of the USDA in charge of enforcing the Act is known as Animal Care (AC), which is under the aegis of the Animal and Plant Health Inspection Service (APHIS).

Inspections are required of research facilities once a year but other facilities are inspected only as the agency deems necessary. In 1998, AC implemented a "risk-based" inspection system, which uses several criteria, including compliance history, to determine the appropriate inspection frequency for each facility, ranging from every six months to every three years.[15] According to AC, all complaints from the public are reviewed, but do not necessarily result in an inspection.

Adequate inspection of the over 10,000 licensed facilities, many of which are quite large and in possession of many animals of varied species, each with vastly different needs, is unquestionably an enormous job. AC currently has approximately 110 inspectors to perform this task.[16]

Although the Act authorizes both criminal and civil penalties, generally the agency pursues civil penalties, which can include fines of up to $2,500 per violation per day and/or license suspensions and revocations.[17] In determining the penalty, the agency must consider "the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations."[18] Minor violations are frequently dealt with by a warning notice. Where serious violations are found, AC coordinates with the USDA's Investigative and Enforcement Services (IES) staff, which conducts further investigation and then returns the matter to AC for enforcement.

According to AC, it varies enforcement strategy depending on whether the facility actually wants to take better care of its animals. Thus, "for licensees and registrants who show an interest in improving conditions for their animals, AC actively pursues innovative penalties that allow the individuals to invest part or all of their monetary sanctions in facility improvements."[19] While the agency defends this practice as benefiting not only the facility, but the animals in its care, the practice has led to criticism that the agency is undermining the incentive to comply by requiring wrongdoers to do nothing more than simply come into compliance. The agency also commonly avoids the expense of prosecution by offering facilities the option of settling instead of being officially charged. Many such settlements state that the facility neither admits nor denies violating the Act[20] and thus permits it to inform the public that it has not been found in violation.[21]

In recent years, efforts have been made by animal protection advocates to encourage Congress to increase funding for enforcement. Notably, the agency has often requested less money for enforcement than Congress has appropriated,[22] demonstrating what many contend is a fundamental disinterest in the task. Regardless of the reasons, the amount appropriated for the current fiscal year, *i.e.*, $20 million, is certainly a minuscule percentage of the USDA's budget, which totals $92.8 billion.[23]

According to the USDA's own Office of the Inspector General (OIG), enforcement of the Act has been problematic, and, in fact, OIG's occasional audits of AC have been vehemently critical. The most recent of these audits ("Audit")[24] reviewed the 2003 and 2004 fiscal years and was released in September 2005. It set forth significant problems regarding the initiation of enforcement actions, particularly at the management level in the Eastern Region (the country is divided into two regions for management purposes). Even where inspectors have uncovered serious wrongdoing, and requested that the matter be referred to IES, management has failed to carry through.

> We found cases where the Eastern Region declined to take enforcement action against violators who compromised public safety or animal health. For example, one AC inspector requested an investigation of a licensee whose primate had severely bitten a 4-year-old boy on the head and face. The wounds required over 100 stitches. Although this licensee had a history of past violations, IES has no record of a referral from AC. In another case, the Eastern Region did not take enforcement action when an unlicensed exhibitor's monkey bit two pre-school children on separate occasions.

This lack of action is not isolated to a few incidents. During FY 2004, Eastern Region referrals to IES were down to 82 from an average of 209 in the prior two years. Moreover, of the 475 serious violations that were referred to IES from 2002 to 2004, management failed to take action against 126, and when action was taken penalties were often minimal. These problems were systemic and originated at a high management level. Thus, while the Audit opined that "most AC employees are highly committed to enforcing the AWA," it nevertheless reported that a majority of the Eastern Region veterinarians employed as AC inspectors who were interviewed "believe that the region does not support their work or does not enforce the AWA as aggressively as it should."

In addition to problems relating to the initiation of enforcement, the Audit was extremely critical of AC's practice of negotiating penalties. For example, as standard policy, AC offered a 75% discount on stipulated fines and other concessions as an incentive for violators,

including repeat violators, to settle. According to the Audit, this practice

> lower[s] the actual amount paid to a fraction of the original assessment. An IES official told us that as a result, violators consider the monetary stipulation as a normal cost of conducting business rather than a deterrent for violating the law.

Notably, this same criticism was leveled against the agency in an audit performed in 1995. Moreover, even where penalties were assessed, "IES did not comply with APHIS' internal cash controls to secure the collection of fines."

One example involved a zoo in Texas that was offered a stipulation discounting a $22,500 fine to $5,600 for violations that led to the death of a rhinoceros as well as the death, in a separate incident, of five gorillas from chlorine gas. Aside from the 75% reduction, in other cases additional concessions were made. For example, one exhibitor who failed to construct an adequate bear pen, which resulted in a bear biting a volunteer, and who also was

Improve Administration of the Animal Welfare Act

By James F. Gesualdi

Congress recognized the importance of animal welfare, that is, the "humane care and treatment" of animals, in the landmark Animal Welfare Act (AWA).[1] Improved administration of the AWA holds great potential for fostering further advances in animal welfare.

The Importance of Training Under the AWA

The AWA mandates training of research facility staff;[2] the regulations cover training[3] of animals, animal husbandry and training of veterinary staff to promote animal welfare.[4]

Within Animal Care (AC), the agency responsible for AWA enforcement, training field inspectors is essential to fostering consistent quality inspections. Training covers regulations, inspections and animal-specific biology and husbandry. Staff expertise is developed through preceptorships. AC also trains and educates regulated entities to promote animal welfare and foster AWA compliance.

The Importance of Office of Inspector General Audits in Recommending Corrective Action

The U.S. Department of Agriculture Office of Inspector General (OIG) conducts independent audits of departmental agencies to promote programmatic effectiveness[5] through specific recommendations that address and resolve any findings. These audits contain valuable lessons for the constructive advancement of animal welfare.

Brief Historical Note on Past AWA Audits

A review of past OIG audits shows repeat concerns and demonstrates the successful resolution of some important issues. For example, a 1995 audit found AC had inadequate authority to deny license applications or renewals.[6] Subsequently, AC's discretion to deny such applications and renewals was significantly expanded.[7] The 1995 audit also recommended the current Risk Based Inspection System (RBIS)[8] that targets problematic facilities for additional and more frequent inspections,[9] thus better allocating agency resources towards promoting animal welfare.

Review of the Most Recent AWA Audit

An important but understated finding in the 2005 audit is that there is evidence of effective AWA enforcement. For example, the audit shows that the AC's Western Region had lower numbers of alleged "violators" and repeat "violators,"[10] and "greater likelihood to refer alleged violators to [Investigative Enforcement Services (IES)] for formal investigation, and to pursue stipulated fines."[11] As the AC Western Regional Director stated, "AC's mission is to achieve compliance through inspection and education. However, if education does not have the desired impact on the violators' activities, then enforcement is the best way to achieve compliance. It punishes the violator and is a deterrent to others. In the Western Region, we do not decline any cases if there is evidence of violations in the investigation report. At a minimum, we would issue a formal warning."[12]

OIG concluded that clearer policy guidance would foster greater parity in regional enforcement activities and effectiveness.[13] Consequently, AC operating documents, like the comprehensive detailed Inspection Guides used by inspectors, were modified to provide uniform national standards and a clearly delineated enforcement pathway.[14] AC now requires documentation justifying decisions on whether to prosecute alleged violations.[15]

OIG favors AC's revised penalty assessment schedule that eliminates reductions for repeat or direct violators, and incorporates the compliance history, number of animals affected, severity of the alleged violations, and "willingness to work towards compliance" into the calculation of a given fine.[16] OIG agreed that congressional authority is needed for higher potential fines for research facilities (because they are not subject to license suspension or revocation like other types of facilities).[17]

Also, OIG found that AC and research facility Institutional Animal Care and Use Committees (IACUCs) need to improve monitoring of research activities through increased inspection of IACUCs with repeat violations, and that IACUCs and their members be fully trained "on protocol review, facility inspections and the AWA."[18] AC's Research Facility Inspection Guide was revised to explicitly require inspector verification of animal inventories and review of research protocols.[19]

The continuing shortcomings in the agency's database are a critical challenge. This database tracks inspections, as well as corrective actions requiring follow-up re-inspections to assure compliance. Developing a more reliable database is a work in progress, subject to availability of funding.[20]

cited for two other serious violations, 13 moderate violations, and one minor violation, agreed to pay a fine of $3,300, after the discount, and was then allowed to spend $1,650 of that to repair the facility. Another exhibitor who was cited for five serious violations involving failure to provide veterinary care, along with 15 moderate violations and three minor violations, agreed to pay $4,300 (after the discount) of which $3,300 was suspended, provided that the exhibitor remain in compliance for two years. Furthermore, for FYs 2002–2004, 76% of audited violators who agreed to a stipulated fine continued to commit violations, while 62% committed similar or the same violations.

Additional criticisms included that AC was so poor at monitoring the number of animals used in research that 13 of the 16 facilities audited were found to have misreported their numbers – without having been caught. Inspectors assigned to research facilities did not verify that they were being provided with a complete set of research protocols; they simply relied on the facilities'

Enhancing Administration and Enforcement of the AWA

The most immediate and effective way to enhance AC's administration of the AWA involves building consensus to promote animal welfare, and specific measures to achieve that end.

Build Consensus.

Great progress has been made in the name of animal welfare when different groups have worked together. In one instance, a broad coalition of groups with divergent views on the AWA worked cooperatively to get Congress to substantially increase AC's funding. The Marine Mammal Negotiated Rulemaking produced a comprehensive revision of the marine mammal regulations by consensus among all interested stakeholders, including nongovernmental organizations and the regulated and scientific communities.[21]

Increase Agency Funding and Resources.

As the Humane Society of the United States notes, "Like all laws, those dealing with animal protection are only as good as their enforcement, and good enforcement only goes as far as its budget allows."[22]

Additional AWA funding would add staff, including inspectors; increase inspection quality, frequency and follow up; provide additional internal and external training/outreach relating to substantive expectations and requirements; further develop staff expertise regarding particular species; support AC's proposed Animal Welfare Center for training and outreach;[23] improve AC's database; and increase IES investigative staff so as to promote faster and fairer investigations. There might also be targeted training based on AC's annual "Violation"[24] Summary[25] to focus activities in areas of greatest need or potential benefit, based upon instances of noncompliance or numbers of animals affected.

E-FOIA/Inspection Reports.

Inspection reports, including those presented on AC's Web site,[26] reflect the inspector's findings at the time of the inspection. Reinvent inspection reports to allow for positive comments to reinforce good behavior, and to allow prompt self-reporting and posting of a facility's remedial measures so as to encourage faster progress.

Substantive Modifications to AWA Regulations.

In light of recent natural disasters, written emergency contingency plans should expressly be required for all regulated entities.[27] To foster training/outreach, staff training requirements should be made uniformly more comprehensive.[28]

Monitoring Progress Through Annual Reports.

These improvements should be monitored through a formalized (and properly funded) annual AC report on animal welfare[29] to allow successes to be documented and shortcomings to be remedied.

Conclusion

Building consensus and working cooperatively to enhance AC's resources and capabilities is the best means for promoting animal welfare through the AWA. ■

1. 7 U.S.C. §§ 2131–2159.
2. 7 U.S.C. § 2143(5)(d).
3. *See, e.g.*, 9 C.F.R. §§ 2.131(b)(2)(i), (ii), 3.77, 3.108, 3.109.
4. *See, e.g.*, 9 C.F.R. §§ 1.1, 2.33, 2.40, 2.131, 3.108.
5. "About OIG" *at* <http://www.usda.gov/oig/about.htm>.
6. USDA, OIG Audit Report No. 33600-1-CH (Jan. 1995).
7. 69 Fed. Reg. 42089 (Jul. 14, 2004).
8. USDA, OIG Audit Report No. 33600-1-CH (Jan. 1995).
9. *See, e.g., Strategic Direction for the Animal Care Program*, Animal Welfare Info. Ctr. Bull., Winter 1999/2000; *Innovative Enforcement*, Animal Welfare Info. Ctr. Bull., Spring 1999.
10. USDA, OIG Audit Report No. 33002-3-SF (Sept. 2005) at 7–8 ("Audit Report").
11. *Id*. at 6–7.
12. *Id*. at 6.
13. *Id*. at 8.
14. "About OIG" *at* <http://www.usda.gov/oig/about.htm>.
15. Audit Report, supra note 10.
16. *Id.*
17. *Id*. at 13. *See also* APHIS AC Stakeholder Update: Inspection Guides Now Available (Mar. 23, 2007) at <http://www.aphis.usda.gov/animal_welfare/downloads/stakeholder/stakeholder7_03_23_2007.pdf>.
18. Audit Report, *supra* note 10 at 23.
19. *Id*. at 16–18.
20. *Id*. at 28–29.
21. 66 Fed. Reg. 239-01 (Jan. 3, 2001).
22. "Future Investment: A Little Funding Now Can Help A Lot of Animals in the Future" at <http://www.hsus.org/legislation_laws/citizen_lobbyist_center/future_investment.html>.
23. AC, "Center for Animal Welfare" (2007).
24. More accurately, "non-compliant" items as not based on adjudicated "violations."
25. <http://www.aphis.usda.gov/animal_welfare/downloads/violations/2006violations.pdf>.
26. <http://www.aphis.usda.gov/animal_welfare/efoia/index.shtml>.
27. 9 C.F.R. § 3.101(b) (marine mammal facility written contingency plans).
28. *See, e.g.*, 9 C.F.R. § 3.108 (marine mammal facility training programs).
29. *See* Animal Protection Accountability Improvement Act, H.R. 2193, § 4 (2007). *See, e.g.*, USDA, Animal Welfare Report Fiscal Year 2000; USDA, Animal Welfare Report Fiscal Year 2001.

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good faith in providing them with accurate records. Criticisms were also leveled against the IACUCs at the audited research facilities, for failure to effectively monitor both animal care and research protocols. As a result, most of the inspectors assigned to research facilities "believe there are still problems with the search for alternative research, veterinary care, review of painful procedures, and the researchers' use of animals."

Another area of performance found lacking involved AC's Licensing and Registration Information System (LARIS), which, the Audit said, "does not effectively track violations and prioritize inspection activities." LARIS, which is crucial to enforcement in that it not only records AC inspections, but archives violation histories, "generates unreliable and inaccurate information, limiting its usefulness to AC inspectors and supervisors."

Previous OIG audits have been similarly unfavorable. For example, a January 1995 audit report about research facilities and licensed dealers found that APHIS did not effectively use its enforcement authority, that refusals to admit inspectors were accommodated and that penalties were too low and too poorly collected to be a disincentive to violating the Act.[25] According to a 1996 audit, unqualified individuals were able to keep wild or exotic animals, including bears and tigers, as pets in circumvention of state law by obtaining AWA exhibitor's licenses.[26] A 1998 OIG audit that focused on airlines found that, for the more than two-year period of review, only 32% of 221 sample sites had been inspected and inspections were unsuccessful because inspectors could not predetermine when a registered carrier was actually transporting animals.[27]

Complaints about enforcement do not come only from within the agency. One example, as reported in the February 21, 2006 *New York Times*, involved a documentary regarding "Class B dealers" in "random-source" dogs, *i.e.*, dogs not specifically bred for research, showing:

> a kaleidoscope of horrors: dogs covered with wounds from fighting with other dogs over food; workers striking dogs. . . . At one point, he leads the investigators working with him to a table soaked in blood and a grassy field scattered with dog parts and rotting corpses. . . . He shows how dogs spend hours in the wet concrete kennels, without proper medical care. He estimates that five to eight dogs die each week, with the dead dogs sometimes lying undiscovered for long periods.[28]

In response to such enforcement failures, animal advocacy organizations have made numerous attempts to bring complaints about violations, or about the USDA's handling of its regulatory role, before the courts. However, these attempts have been largely unsuccessful.

The first roadblock is that the Act does not contain an express provision creating a private right of action, and the courts have held that none is implied.[29] Private individuals have no cause of action against someone who is violating the Act.

Moreover, even where a statutory cause of action exists, prospective AWA plaintiffs have failed to get into court. For example, the Administrative Procedure Act (APA) provides a right to bring suit against a government agency to any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,"[30] and permits a reviewing court to, *inter alia*, "compel agency action unlawfully withheld or unreasonably delayed."[31] However, animal welfare organizations attempting to sue the USDA for wrongful agency action under the APA have generally been found to lack standing[32] because, *inter alia*, they cannot satisfy the requirement that they, rather than the animals, have suffered an injury in fact. The one, limited, exception has been where an individual human was able to demonstrate aesthetic injury by having been personally exposed to animals living under inhumane conditions.[33] Obviously such plaintiffs are relatively rare, as many of the covered animals are not exposed to the public eye.

Proposals for Change

Among the recent successful efforts mounted by animal advocacy organizations to modify the Act were 2002 and 2007 amendments strengthening the penalties for the animal fighting provisions. On industry's side, the most recent successful effort was the 2003 removal of rats, mice and birds bred for research from the definition of "animal."

Currently pending in Congress is the Pet Safety and Protection Act (S. 714/H.R. 1280), which would prohibit Class B dealers from selling "random source" animals to research facilities. The Pet Animal Welfare Statute of 2005, known as PAWS, which was introduced in the 109th Congress but has not, as yet, been introduced in the 110th, would focus on regulating retail commercial breeders and Internet sellers.

Another, and somewhat broader, proposal is for the creation of a citizen's suit provision similar to that found in other federal statutes, including the Endangered Species Act and the Clean Air Act.[34]

Several years ago, the New York City Bar Association released a report[35] taking the position that a citizen's suit provision is not only as necessary for effective enforcement of the AWA as it is for such environmental statutes, but arguably even more so because of the minimal funding available to the enforcement agency.

The report suggests that a provision creating a cause of action enabling a private citizen to bring an action could be modeled directly on those in environmental statutes.[36] However, as the report acknowledges, the creation of a citizen's suit provision in the AWA presents particular constitutional challenges. Any citizen who brought suit pursuant to such a provision in federal court would have to meet the constitutional requirements for standing,

including injury in fact, a very tough standard to meet when it is the animals that have been harmed, not the person bringing the suit. Thus, the second, and far more difficult, legal challenge in creating citizen's enforcement is to craft it in such a way that it will not run afoul of Article III of the Constitution but, at the same time, will not limit its prospective plaintiffs to the rare humans who have suffered aesthetic injury by witnessing a violation of the Act. The proposal suggests two ways to meet this challenge. First, Congress could create a *qui tam* action, similar to that found in the False Claims Act;[37] alternatively, Congress could create a mechanism whereby the primary victims of violations, *i.e.*, the animals themselves, may bring an action, represented by guardians *ad litem*, in the same way that children and incompetent adults are regularly represented in the courts. Whether Congress can indeed create a cause of action on behalf of animals is a largely unanswered question, though, notably, there is nothing apparent in Article III of the Constitution, which limits federal court jurisdiction to "cases and controversies," to prevent it. The only court that has considered the issue, the Ninth Circuit, while holding that Congress had not created an implied cause of action on behalf of animals under the AWA and other statutes, opined that if Congress wished to do so, it could.[38]

Conclusion

Whether improved enforcement is to be had by a citizen's suit provision, substantially enhanced funding, or both, it is likely that there will be an increasing clamor to improve the care afforded to animals covered by the Act, as well as to expand the Act's scope. Indeed, as more and more bar associations begin to form animal law committees and sections, including, most recently, the American Bar Association, serious attention is starting to be paid to improving the laws that protect animals by providing penalties and enforcement mechanisms that parallel those found in other areas of the law. The Animal Welfare Act, which is the country's major animal protection law, and whose enforcement is the subject of sharp criticism from within the USDA itself, will certainly be a prime target for this type of attention. Lawyers who are interested in animals and concerned about their treatment would be well advised to familiarize themselves with its provisions, and, while being grateful for the work that has already been done, be ready to take part in the growing discussion concerning the law's future. ■

1. 7 U.S.C. §§ 2131 *et seq.*
2. 7 U.S.C. § 2132.
3. The separate Horse Protection Act (15 U.S.C. §§ 1821–1831) prohibits "soring," a painful practice used to accentuate a horse's gait.
4. 7 U.S.C. § 2132(n).
5. The National Institutes for Health also regulate the care of animals in funded research.
6. 9 C.F.R. § 1.1.
7. 7 U.S.C. § 2143.
8. 7 U.S.C. § 2143(a)(2)(B).
9. 9 C.F.R. §§ 3.1 *et seq.*
10. 9 C.F.R. § 3.8.
11. 7 U.S.C. § 2143(a)(3).
12. 7 U.S.C. § 2156(g)(5).
13. Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Maine, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, South Carolina, Vermont, and West Virginia.
14. N.Y. Agric. & Mkts. Law § 374(2)(e).
15. *See* <http://www.aphis.usda.gov/ac/newerafactsheet.html>.
16. Felicia Lee, *How Dogs Are Abused in a Scheme for Profit*, N.Y. Times, Feb. 21, 2006 *at* <http://www.nytimes.com/2006/02/21/arts/television/21dogs.html>.
17. 7 U.S.C. § 2149.
18. *Id.*
19. <http://www.aphis.usda.gov/ac/newerafactsheet.html>.
20. <http://www.aphis.usda.gov/ac/QandAfactsheet.html>.
21. *See, e.g.*, T. Jackman, *Ringling Circus Hired Private Eye to Infiltrate PETA, Fairfax Jury Told* Washington Post, Feb. 28, 2005 *at* <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/27/AR2006022701436.html> ("'Ringling's people take very good care of their animals,' [attorney Thomas J.] Cawley said, adding that the circus has never been convicted of violating the federal animal welfare act.").
22. Association of the Bar of the City of New York, *Report of the Committee on Legal Issues Pertaining to Animals of The Association of the Bar of the City of New York Regarding Its Recommendation to Amend the Animal Welfare Act*, 9 Animal L. 345, 348 (2003).
23. <www.usda.gov/agency/obpa/Budget-Summary/2007/FY07budsum.pdf>.
24. USDA, OIG Audit Report No. 33002-03-SF (Sept. 2005), *available at* <www.usda.gov/oig/webdocs/33002-03-SF.pdf>.
25. USDA, OIG Audit Report No. 33600-1-CH (Jan. 1995).
26. USDA, OIG Audit Report No. 33601-1-CH (June 1996).
27. USDA, OIG Audit Report No. 33099-0002-CH (Aug. 1998).
28. Lee, *supra*, note 16 (discussing *Dealing Dogs*, HBO documentary by Tom Simon & Sarah Teale. Ultimately, as a result of this private undercover investigation, which was corroborated by USDA officials, enforcement action was taken against this dealer, who was fined $262,700 and whose license was revoked).
29. *See, e.g.*, *Int'l Primate Prot. League v. Inst. for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir.), *cert. denied*, 481 U.S. 104 (1986); *In Defense of Animals v. Cleveland Park Metroparks Zoo*, 785 F. Supp. 100 (N.D. Ohio 1991).
30. 5 U.S.C. § 702.
31. 5 U.S.C. § 706(1).
32. Article III of the Constitution, requires, in brief, in order to have access to the federal courts, that (1) the plaintiff itself has suffered an "injury in fact," (2) the defendant caused the injury, and (3) the injury is redressable by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Although not constitutionally required, the federal courts also require that the interest the plaintiff seeks to protect must be "arguably within the zone of interests to be protected or regulated by the statute." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998).
33. *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998) (*en banc*), *cert. denied*, 526 U.S. 1064; *Alternatives Research & Dev. Foundation v. Glickman*, 101 F. Supp. 2d 7 (D.D.C. 2000).
34. This proposal has garnered the approval of the NYSBA Animal Law Committee.
35. *Report*, *supra* note 22.
36. For example, the Endangered Species Act (ESA), permits "any person" to bring such a suit against any person or the government alleged to be in violation of the ESA or regulations issued thereunder. 16 U.S.C. § 1540(g)(1)(A).
37. 31 U.S.C. §§ 3729 *et seq.*
38. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175–76 (9th Cir. 2004).

The author (center) with Brigadier General Silva with a local sheik, business leaders, and an Iraqi Army officer. The photograph was taken between Balad and Baquba. Two of the Iraqis shown were later killed by assassination near that location.

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Religious Motif in Law and Nation Building

An American *Federalist* Perspective

By Frank V. Kelly

The role of the theologian and the lawyer are popularly considered to be mutually exclusive and are walled off in modern America. This conceit is of very recent vintage and quite parochial. Much of the world in which the United States is now earnestly engaged does not see much separation in these endeavors at all. The prevalence and power of imams, mullahs, and ayatollahs in nascent nations warrant a comparison with historical antecedents – including our own founding fathers.

The areas in which the United States has committed itself have a pervading sense of religion that is difficult for a contemporary American to fully appreciate. However, it was not too long in the past when America acknowledged a more public affirmation of religiosity.

The rule of law can be considered a cornerstone of a nation. It is said of our own country that we are a nation of laws, not men. When the law is subject to dictate by religious figures, the warp and woof of what each nation believes is right is tightly bound indeed.

The presence of religion in law and society has been explored by such thinkers as Professor Joseph Vining in "Recognition: The Neglected Metaphor."[1] Vining compares the role of lawyer and theologian in contemporary culture. But how does the analogy play out in American historical perspective? Interestingly, our founding fathers would have thought it odd that the relationship required expression or explanation. Alexander Hamilton and James Madison (and John Jay, not discussed in this article), in the person of Publius, author of the *Federalist Papers*, may be said to have exposited the roles of lawyer and theologian in public life. It is interesting to see the evolution of today's ethos from that genesis. *The Federalist Papers* is commonly held, among political scientists, to be one of the great works of the philosophy of government.

The Federalist began to appear in New York newspapers in the fall of 1787; the last number was published in those papers in the spring of 1788, and during that year the first edition of *The Federalist* as a bound book was also published. The first volume, containing numbers 1–36,

was published on March 22, 1788. The second volume, containing the balance, appeared on May 28, 1788.

Federalist Paper No. 1 was a call to the faithful, a pastoral message to believers that girded them and, it was hoped, strengthened their resolve. We may draw analogies to Paul's letters of the New Testament. Paul acknowledges the weakness of the human spirit. He says the body without the influence of the head is muddled in its direction. Hamilton instructs his readers in their course of dealing within the community and asks that they be on their guard against heretics and misguided prophets. Yet, in the interest of plural government, this newly revealed society of commonly interested citizens should be accommodating as an open community.

It is self-defeating, and here Hamilton speaks as a theologian and a savvy political lawyer, to tyrannically impose one's will upon another. "For in politics, as in religion, it is equally absurd to aim at making proselytes by fire and sword. Heresies in either can rarely be cured by persecution." The foregoing is a natural corollary in a society where Liberty and Plural Republican government are the communal articles of faith.

Hamilton makes his position, with regard to the proposed Constitution, well known: "You will, no doubt . . . have collected from the general scope of the [evidences of truth] that they proceed from a source not unfriendly to the new constitution." Upon taking this position, he clothes himself in the guise of a legal censor examining the ambient political condition. However, Hamilton's tone is that of expositor revealing the natural law manifest in America.

It is more difficult to read Federalist Paper No. 1 as a legal brief than to see it as a pastoral letter, directing and strengthening the adherents, and cajoling the opponents. However, as an advocate in the legal-political realm, Hamilton downplays the differences and stresses the universality of some concepts to bolster his case. He delineates a motif for the rest of the argument and ordinates the parameters of the conflict.

In Federalist Paper No. 78, Hamilton examines the role of the judiciary as a functioning arm of government. Specifically, a well-thought-out form appears – mode of appointment, tenure, and dynamic interaction between courts. Hamilton's work is sensible legal counsel. It is almost as if a modern lawyer were giving practical guidance to a corporate client wishing to grow and protect himself from liability at the same time.

It cannot be forgotten, for all its patent empiricism, that Hamilton is using his utmost reasoning power to encapsulate the prevalent theories on the primacy of the natural law in a form of government dedicated to the preservation and growth of this tenet. Publius, in this tenor, espouses reason and good behavior as touchstones for evaluation, without once alluding to particular normative values. Readers (read jurors or communicants) are left to their personal interpretation of the pervading theorem. There is an assumption within the *Federalist Papers* generally, that the good of one is toward the good of all. Even further, it seems that if Hamilton does not find a national spirit (which he assumes) he will implant one. The instrumentality toward our growth under the spirit of Liberty will be the Constitution. The Constitution, as the manifest will of the people, is to be superior to mere political expedient. It is meant to be the American Torah. In times of political turmoil, the Constitution's strength and stability will keep the faithful away from that which is unclean.

From a mechanistic (more temporal) standpoint, the superiority of the Constitution, as the will of the people, over subsequently enacted republican statutes, seems contrived as a brake on the passions of the moment, creating a thoughtful integration of exigency and ideology.

The shamans of the judiciary are empowered to mediate conflict between exigency and ideology with a distinct prejudice towards the preservation of the Constitution. It is certainly debatable whether or not the judiciary, arbiters of rationality and intergenerational expositors, are the least dangerous branch. Given the power of reason, natural law, ideology and social psychology, one wonders whether the sword and purse are effective counter-dialectical intervenors.

Federalist Paper No. 79 is a plea for stability with a goal of permanence. It is interesting that Hamilton's evaluation of factors contributing to the sovereignty of the judiciary are also those of contemplative significance. Hamilton argues for a Platonic model where all of the mundane basic human necessities are not a cause for worry. Thus, the federal government provides a monastic society dedicated to logic and metalegal thinking. In all fairness, this may be a gross overstatement of intent. It may just be that Hamilton wishes to take the judiciary

The author in a meeting with the local governing council.

out of the hands of grubby factionalism. One wonders what Hamilton, a man of the public realm, would think of depriving the judiciary of popular dynamism. Nonetheless, the paradigm remains, as there is historical precedent for removing the holy or the wise from pedestrian affairs.

Secondarily, in Federalist Paper No. 79, Hamilton asks that we allow judges to remain in active service to the Union until they wish to retire or have to be removed for cause. This recommendation has much currency as we are now making great strides in longevity, such that 60 is the new 40, and productive work life is greatly expanded. (This is countered on the other side by the argument against the intellectual decrepitude occasionally seen among the very senior on the bench. It is not unknown to many societies that the elders are the possessors of wisdom and attributes spiritual.) One can see the efficacy of reference to great age by looking at the Old Testament, where great age is imbued time and again to the great, wise and holy.

In Federalist Paper No. 80, Hamilton traces the outline of judicial power. A rational and persuasive case is made for the installation of the judicial branch into the symbiotic triune of federal government. Once prior Federalist Papers have been accepted, it is only natural that the proclamation of enactment should follow, ergo No. 80. Hamilton asks that we allow the head to lead the body in a leap of faith, that is, to believe that if we give to the federal judiciary some of the individual power, the sum will be greater than the whole.

Hamilton compares our new polity with that of other societies – most notably, the Italian and German states whose internecine difficulties accrue to no one's benefit. Hamilton then says jurisdiction empowered on paper must be authorized in spirit. Thus, the social contract, once negotiated and drawn, must now be signed. Or, in a Catholic analogy, having been baptized into the faith, one must receive the sacrament of confirmation to be an active communicant member and supporter of the belief system.

The subsequent works by Hamilton, and those by Madison, bespeak a canonical dogmatism of practical utopians; that is, men of vision setting the rules for goal attainment in the realm of competing interests and subjective interpretivism.

The mean for both Hamilton and Madison is a commonality of spirit with their readers in the temporal and spiritual ethos. The ideology strikes the reader on many levels, as good government supports its constituency on many levels. One can go so far as to say, that the support exists on subconscious or only semiconscious planes. As lawyers and prophets, Hamilton and Madison are within their rightful bailiwick in the *Federalist* exegesis.

Professor Vining's "Recognition: The Neglected Metaphor" describes in the contemporary West what has never been neglected in the Middle East. Can modalities in concert exist between theologians and the ideological orientation of the *Federalist Papers*?

The most striking coordination of theology and law, and most apparent, is the appeal to authority. The authority which is prayed to, is implied to contain the absolute ideal or the abstract good.

Our job then, as lawyers, is to codify and ordinate, so that the absolute ideal or the abstract good can be manifest in the case in controversy. Whether the ideal be justice or god, we strive within our spheres to attain it. Lawyers, as architects of society, are at liberty to create the covenant and the ark – our social contract, the Constitution, is an icon to the natural law deity and the institution of government is the worshipful church carrying the contract through time.

It is obvious, but worth stating, that the institutions of religion, as well as government, are run by people. Therefore, they are subject to the sociological context of their era in history. As such, it is difficult to objectively analyze the operation of the institution without being prejudiced by the ramifications or result of the actions of people who have gone before. Reconciling theology and politics is not easy. To some, it is not to be considered. But ignoring it or re-visioning it does not make the effect of religion on law and society go away.

The most striking coordination of theology and law, and most apparent, is the appeal to authority.

Perhaps the most pervading use of law and theology, as almost all other inquiring disciplines, is in the quest for meaning. The rationalization of reality and the human condition, in particular and generally, seems endemic to humanity. Various support systems make us comfortable traveling throughout our lives. When a support system

is outmoded, great passions are inflamed because of the basic insecurity engendered among the system's former adherents by the absence of its comforts. A renunciation of the goal along with the process is common when great institutions fail. Vining suggests that we should not have to go back to ground level to reconstruct our theory of the world. It would be wise to leave some strong walls standing in order to build a bigger and better house next time.

Our current focus on a part of the world imbued with omni-present religion, and a popular resurgence of religious strength in the United States, warrants a re-examination of where we wish the theory of god to take us in our temporal quest, or whether the theory of god should be better encapsulated and quarantined against incursion into public life. Yet, as the foregoing has argued, it is unlikely that religious predilection can be objectively delineated sufficient to disable all influence.

In a country of such strong though divergent religious confraternities, it may be argued that the institutions of the theory of god have never been on the wane. If nothing else, we can certainly say that metaphysics is in the media. Popular interest in metaphysical notions, to the extent they supervene nationality and cultural identity, is likely a reaction to existential malaise. People are distrustful of ubiquitous technological empiricism and want to have or ascribe meaning.

What is becoming increasingly important is the intertwining of religion and politics on a global scale. In the United States, patent establishment of interdiscipline between religion and politics is expressly proscribed. However, because many of the tenets of religion are deeply interwoven with the warp of everyday life, much is integrated unquestioningly. As we practice the proscription in the United States, the bright line emerges when we have antagonist institutions contending for establishment.

Transmigration between religious values and public social values or constitutional values is not disallowed and may not even be disavowed. A society does not spring full grown from nothing in a spontaneous generation of abstract thought. A society carries with it attributes of what was, stressing variously thesis, antithesis and synthesis. Regardless of in which direction the pendulum of current emphasis swings, the potentiality of harmonic oscillation always exists.

The framers of the *Federalist Papers* assert it is the people who embark on the social experiment of government, and the religious institutions that preceded the advent of the Union have served as model or contributor in some fashion or another. People seek to have confidence and belief in their institutions, temporal or spiritual. Institutions exist by convention as abstract constructs of the social human psyche. When institutions become staid and unresponsive, the constituency that gives it life feels deprived of the opportunities of that life and feels spiritually bankrupt.

The concepts of natural law, justice and other subjective constructs remain firmly entrenched in modern people. Our perpetual desire to understand and be comfortable with the world around us causes us to re-evaluate our goals and the modes of investigation of our universe.

Does one require the principles of order within the context of freedom to live a valid life? Are the principles of religious order antithetical to the concept of freedom?

The process of applying theological principles to the political realm is one that has been with us throughout history and is likely to continue. Alexander the Great was chief priest in addition to leader and general. The kings of the medieval period commanded as a divine right. Often in history leadership had a spiritual component – or at least leaders gave the appearance of spirituality.

Human beings interpret the absolutes of the natural law in a way that facilitates actualization of individual potential. Emanations of the subjective interpretations are established as rational ordinations inuring to the common good, the common good being only the individual good in aggregate. ■

1. *See* Joseph Vining, The Authoritative and the Authoritarian (U. Chi. Press 1986).

BY MARIAN C. RICE

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Maintenance of Conflict Procedures

It doesn't matter how long you have been practicing – whenever a new client or a new matter comes into the office – you feel that sense of satisfaction. Having to then reject that representation because of the existence of a non-waivable conflict is one of the most frustrating experiences an attorney faces. A far more frustrating experience, however, is to be the subject of a civil claim or grievance as a result of the existence of a conflict of interest that was missed or ignored. According to statistics compiled nationwide, 6.3% of all malpractice claims are asserted because of administrative errors that occur in the identification of conflicts.[1] Based solely upon anecdotal evidence, lawsuits against attorneys involving errors in identifying, analyzing and resolving conflicts in New York well exceed the nationwide statistics.

Conflicts of interest must be addressed every day of a legal career; they are the bane of every attorney's existence. No single topic in the Code of Professional Responsibility is more problematic than the determination as to whether a conflict exists between an attorney and client or former client. Attorneys who believe that the client's consent to a conflict immunizes the attorney or law firm from the consequences of conflict issues are sadly mistaken.

It is important to remember when analyzing a conflicts issue that the appearance of a conflict is nearly as devastating as the existence of a true conflict. The perception of whether a conflict exists is from the point of view of the client or potential client, and it is often made from the vantage point of hindsight after something has gone wrong. As a result, the process of conflicts identification and resolution should always err on the side of caution. The consequences of failing to do so can be embarrassing, expensive and time-consuming. If the conflict is sufficiently egregious, it can even threaten your ability to practice law.[2]

Identifying and resolving identified conflicts are difficult processes and outside the scope of this particular article. But before any conflicts analysis can take place, the law firm must have in place procedures designed to permit a review of the entities and individuals the firm *and* its attorneys have represented. The Rules require all law firms to maintain a conflicts check system and to have a policy in place pursuant to which the law firm regularly implements the system to screen for conflicts.[3] The Rule creates what amounts to a *per se* violation of the Disciplinary Rules and provides a basis upon which attorneys and law firms[4] may be found to have engaged in misconduct without the necessity of demonstrating intent. It is sufficient to show that the firm failed to keep contemporaneous records of engagements by clients and did not maintain a policy for checking past relationships with clients before new retentions were undertaken. However, the better practice is to reduce your conflict procedures to writing, documenting the commitment to compliance with the Rule. In 2003, the New York City Bar released a comprehensive ethics opinion addressing the issue of what constitutes an effective procedure for identifying conflicts of interest.[5] It is strongly recommended that the opinion be read by every practicing attorney with a critical eye to see how the attorney's current procedures compare to those found "effective."

System Basics

If you have not done so already, the first step is to select conflicts software that is user-friendly. In this day and age maintaining a manual card file for conflicts identification and analysis is no longer appropriate. Choosing the proper program is important – talk with colleagues in your area of practice, check out the Vendor Resource Guide at the NYSBA Law Practice Management Web site, attend local trade shows, read reviews in magazines devoted to law office computer systems and consult with a professional to make sure that your needs are met. Ideally, the program you select should be able to integrate with other office systems, provide easy access to conflict data for everyone in the office, and have the ability to search for spelling variations. In order to facilitate analysis, it must be able to show the firm's relationship with the client.

Standardized Intake

Once you have selected your software, all potential retentions with

new or existing firm clients (even if rejected) must be entered on standardized intake sheets and entered into the firm's system. No exceptions – everyone must be required to follow the same practice. A reasoned conflicts analysis can only be performed if this practice is rigorously and scrupulously maintained. At a minimum, the intake sheet, which should be modified to suit your practice areas, should contain the following information:

1. the name, address and contact number of the client and any entities related to the client;
2. the date of the intake;
3. the nature of the representation;
4. if the client is a new client without established terms of compensation, the terms and conditions of the engagement;
5. if the client is a new client, the identity of the person authorizing the engagement;
6. the names, addresses and contact numbers of all parties involved in the representation;
7. the terms/names which should be included in a conflict search. Identification of the terms that must be searched should not be left to the discretion of a clerical employee.

Remember that accuracy counts. A name misspelled will not be properly recorded in the law firm's conflict system and may form the basis for a missed conflict. Consistency counts as well. Those individuals charged with entering information into the conflict system must be taught to enter names and other information in the same manner every time it is done.

What to Enter

The ability to identify the existence of a conflict is dependent upon the extent of the information put into the conflict system. The current and former names of every person or entity represented by the law firm must be entered, *as well as* every person or entity represented by "of counsels," lateral hires and even suite members. Lateral hires and "of counsels" present special challenges. As lateral hires are brought into the firm, care must be taken to incorporate the new attorney's prior representations into the firm's system. While NYSBA Ethics Opinion 720 concludes that, unless protected as a client confidence or secret, the firm must seek the names of clients represented by a new lawyer (or if the former firm was small, all clients of the former firm), the opinion sidesteps the all-important issue as to how to obtain this information if the original firm refuses to voluntarily disclose it or if the lateral hire does not want any contact with the former firm prior to acceptance of the new employment opportunity.[6] Attorneys seeking to change law firms must be very cognizant of the impact that a proper conflicts analysis may have upon a prospective employer or even the attorney's current employer.[7] Before even interviewing a candidate, the question of whether a conflict might preclude a law firm from hiring the attorney or face losing a significant client must be effectively analyzed.[8]

The failure to perform such an analysis can be devastating. The decision in *Ogden Allied Abatement & Decontamination Services, Inc. v. ConEd*[9] presents a factual scenario that constitutes the ultimate nightmare for any associate. After making a job offer to an associate from an adversary law firm during a pending litigation, the new law firm withdrew the offer because the adversary law firm made a motion to disqualify when the associate gave notice. While the *Ogden* court did not disqualify the law firm that had made the offer to the associate because the associate did not actually start employment, the court soundly criticized the firm's conduct in continuing the interview process while discovery was underway.

The Code recognizes the existence of "of counsel" relationships, which it defines as a "continuing relationship with a lawyer or law firm, other than as a partner or associate."[10] If there is an 'of counsel' relationship, a law firm or an individual attorney may so indicate on the letterhead. However, as a usual practice, for purposes of analyzing conflicts of interest, the "of counsel" relationship should be treated as if the "of counsel" and the law firm are conducting business as a single firm.[11] As summarized by the New York State Bar Association: "[I]f a lawyer acting alone would be disqualified from a particular representation based on any of the rules enumerated in DR 5-105(D), then that disqualification is imputed to a law firm with which that lawyer has an 'of counsel' relationship."[12] In other words, where "of counsel" relationships exist, their conflicts are your conflicts. On a disqualification motion where the criterion is whether the conflict has tainted the court proceedings, the Second Circuit rejected the blanket imputation of an "of counsel's" conflicts to a law firm and instead took a more pragmatic approach in holding that the conflict would depend on the nature of the relationship between the "of counsel" and the law firm.[13] Finding that the relationship between the "of counsel" attorney and the law firm was attenuated and the attorney clearly continued to operate his sole practice in addition to serving as transactional counsel for certain enumerated firm clients and that adequate screening procedures negated any taint, the court denied the motion to disqualify. Notwithstanding the content of this decision, however, from the point of view of compliance with the Code, effective risk management and just plain good client relations, law firms having "of counsel" relationships should follow the one-entity rule.

Law firms having "of counsel" relationships should follow the one-entity rule.

In addition to the clients, every person or entity involved in every matter the firm, its attorneys and "of

counsel" has handled must be entered into the system. This includes the parties, related parties, attorneys, important witnesses and even experts. In the event a prospective client is rejected by the firm, the information on the prospective client must also be entered. Although technically the rejected prospective client need only be entered if confidential information was exchanged, including all rejected clients allows a firm to recognize the potential for a conflict and decide how to address it upfront rather than after the fact – that is, after a problem has arisen. In addition, any business entity for which any attorney at the firm serves as an officer or director or has a significant ownership interest in, or any municipality with which the attorney is formally involved – *e.g.*, the planning board, board of trustees, zoning board of appeals, etc. – should be entered into the conflict system.

Include in each entry the nature of the relationship (or role in the matter), the type of the representation in which the relationship between you and the party arose and whether the matter is active or inactive. For the purposes of conflicts analysis, it is important to keep accurate records of whether a matter is open or closed since the standard is different if the individual or entity is a former client.

When to Update

Since the Code provides that attorneys may not continue a representation in which a conflict exists, attorneys are obligated to constantly update the conflict entries on every representation. As with the need to maintain the confidentiality of client secrets and confidences, attorneys also need the assistance of staff to identify times when the conflict entries need to be updated. At a minimum, automatic updates must be made whenever a new client or matter is accepted (or rejected); whenever an individual's or entity's name changes; whenever a new party, expert, witness or attorney is added to existing representations; and whenever the relationship of a party changes, *e.g.*, adverse claims are asserted, businesses merge or split, divorces, etc.

When to Run the Conflict Search

More often than not, law firms that are diligent in their conflict check practices get it right on the intake but the procedures tend to fall down as the representation proceeds. A law firm practice of performing a conflicts check only at the intake does not comply with an attorney's obligations under the Code. Conflict checks should be performed before initial consultations, before a new file is opened, whenever a new party, attorney, witness or expert enters the representation and whenever the firm decides to interview a candidate for possible hire.

Conclusion

No one said this was easy. All of the above must be put into place before an attorney even begins the difficult process of effectively analyzing a conflict and deciding how an identified conflict should be resolved. The obligation to identify conflicts is the responsibility of every attorney – not just the senior attorneys in a firm. Above all, if a conflict comes to your attention, do not take the ostrich approach. Conflicts ignored become harder to address after the problem arises. ■

1. ABA Standing Committee on Professional Liability, *Profile of Legal Malpractice Claims 2000–2003* Table 5, p. 12 (ABA 2005).

2. *In re Lazroe*, 38 A.D.3d 17, 825 N.Y.S.2d 389 (4th Dep't 2006); *In re Green*, 36 A.D.3d 12, 827 N.Y.S.2d 67 (2d Dep't 2006); *In re DeSousa*, 36 A.D.3d 121, 826 N.Y.S.2d 306 (2d Dep't 2006).

3. 22 N.Y.C.R.R. § 1200.24 [DR 5-105(E)].

4. 22 N.Y.C.R.R. § 1200.3 [DR 1-102(A)(1)].

5. Ass'n of the Bar of the City of N.Y. (ABCNY), Formal Op. 2003-03, *Checking for Conflicts of Interest*.

6. NYSBA Comm. on Professional Ethics, Formal Op. No. 720 (8/27/99) ("NYSBA Op.").

7. It is recommended that any attorney contemplating a change in employers read James Altman, *Ethical Problems Caused by Job Searches*, N.Y.L.J., Oct. 20, 2000, p. 24, col. 1; James Altman, *A Young Lawyer's Nightmare*, N.Y.L.J., Feb. 16, 2001, p. 16, col. 1.

8. Absent the former client's consent, a lawyer changing firms may not undertake representation adverse to the former client if (1) moving lawyer personally "represented" the client or otherwise acquired relevant confidences or secrets of the client, and (2) moving lawyer would be undertaking representation in the same matter or in a matter that is substantially related to one in which the moving lawyer or the old firm previously represented the former client. Absent the client's consent, if the moving lawyer is disqualified from engaging in representation under this rule, the moving lawyer's new law firm is also disqualified. NYSBA Op. No. 723 (10/12/99).

9. 6 Misc. 3d 1012(A), 800 N.Y.S.2d 351 (Sup. Ct., N.Y. Co. 2000).

10. 22 N.Y.C.R.R. § 1200.7(A)(4) [DR 2-102(A)(4)].

11. *See, e.g.*, ABA 90-357; ABCNY Formal Op. 1995-8 ("attorneys will need to keep in mind that for purposes of analyzing conflicts of interest, 'of counsel' relationships are treated as if the 'counsel' and the firm are one unit"). ABCNY Formal Op. 2000-4.

12. NYSBA Op. No. 773 (1/23/04).

13. *Hempstead Video, Inc. v. Inc. Vill. of Valley Stream*, 409 F.3d 127 (2d Cir. 2005).

"It's Crunch-Time, Caldwell. That's the time between graduating from law school and becoming a partner."

BY JOSHUA S. RUBENSTEIN

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2006 New York State Legislative Session: Changes Affecting Trust & Estate Law

There was significant legislative activity affecting estate and trust planning and administration in New York during the 2006 legislative session. Important areas addressed include transfer-on-death securities registration, parental rights, after-born children, guardianship of infants, dissolution of private foundations, disposal of remains and anatomical gifts.

Estates, Powers and Trusts Law

Section 4-1.4 of the Estates, Powers and Trusts Law (EPTL) has been amended to provide that a parent whose rights were terminated (or, in some cases, suspended) is disqualified from sharing in intestacy a distributive share of the child's estate. The purposes of the section is to prevent a parent found to have abused a child, as well as parents who abandon children, from sharing in that child's estate. This change is effective January 1, 2007.[1]

EPTL 5-3.2 has been amended to provide that in order for an after-born child to take a share of a testate estate, such child must have been born during the testator's life or in gestation during the testator's life and born after the testator's death. This change is effective immediately with respect to decedents dying on or after July 26, 2006.[2]

Section 13-4.12 of the EPTL has been amended to provide that the effective date of New York's Transfer on Death security legislation is January 1, 2006, with respect to decedents dying on or after that date.[3]

Insurance Law

Insurance Law § 4240(d)(2) has been amended to require the payment of interest on death benefits for individual and group variable annuities. This change is effective immediately.[4]

Not-For-Profit Corporation Law

Section 102(a)(19) of the Not-For-Profit Corporation Law (NPCL) has been amended to define the term "person." This change is effective April 9, 2006.[5]

Section 102(a)(19) of the NPCL has been repealed. This change is effective July 26, 2006.[6]

NPCL § 303(a) has been amended to permit a domestic corporation intending to file the consent of the Attorney General to reinstate such corporation pursuant to § 1014 to reserve a corporate name. This change is effective July 26, 2006.[7]

Section 608 of the NPCL has been amended by adding a new paragraph (e), to enable membership corporations unable to obtain the necessary quora under their certificates and by-laws to petition the Supreme Court for an order enabling them nonetheless to conduct business. This change is effective April 9, 2006.[8]

Section 608(e) of the NPCL has been amended to provide that the petition be to the Supreme Court in the judicial district where the office of the corporation is or was located. This change is effective July 26, 2006.[9]

A new § 608(f) has been added to the NPCL defining the term "person." This change is effective July 26, 2006.[10]

Section 719(a)(4) of the NPCL has been amended to conform its requirements to the new procedures for carrying out a plan of dissolution and distribution of assets. This change is effective April 9, 2006.[11]

NPCL § 1001 has been amended to set forth simplified procedures for the plan of dissolution and distribution of assets of Type B, C or D corporations with assets to distribute. This change is effective April 9, 2006.[12]

Section 1001 of the NPCL has been amended to provide that if the dissolving corporation has no assets, or assets other than a reserve fund (not to exceed $25,000), the plan shall so state. This change is effective July 26, 2006.[13]

Section 1002 of the NPCL has been amended to simplify the approval process for the plan of dissolution of Type B, C or D corporations with no assets to distribute (except a reserve fund not to exceed $25,000). This change is effective April 9, 2006.[14]

NPCL § 1002 has been amended to regulate the number of directors or members required to approve a plan of dissolution. This change is effective July 26, 2006.[15]

A new § 1002-a has been added to the NPCL setting forth the procedures for carrying out the plan of dissolution and distribution of assets prior to filing the certificate of dissolution with the Department of State. This change is effective April 9, 2006.[16]

Section 1002-a of the NPCL has been amended to conform to the new methods of receiving judicial and non-judicial approval for the plan of dissolution. This change is effective July 26, 2006.[17]

Section 1003 of the NPCL has been amended to permit dissolution with Attorney General, as opposed to Supreme Court, approval. This change is effective April 9, 2006.[18]

NPCL § 1003 has been amended to reflect that affixation to the plan of Attorney General approval is not always required. This change is effective July 26, 2006.[19]

Section 1005 of the NPCL (with respect to procedures after dissolution) has been repealed. This change is effective April 9, 2006.[20]

Section 1006(a) of the NPCL has been amended specifically to prohibit a dissolved corporation from commencing any new activities. This change is effective April 9, 2006.[21]

NPCL § 1007 has been amended to make conforming changes to the procedure for giving notice to creditors. This change is effective April 9, 2006.[22]

Section 1007 of the NPCL has been amended to provide that the plan of dissolution must be authorized and approved before notice to creditors may be sent. This change is effective July 26, 2006.[23]

Section 1008 of the NPCL has been amended to make conforming changes with respect to notice to the Attorney General where assets are required to be used for a particular purpose. This change is effective April 9, 2006.[24]

NPCL § 1008(a)(15) has been amended to clarify the procedure when assets are earmarked for a particular purpose. This change is effective July 26, 2006.[25]

Section 1009 of the NPCL was amended to make conforming changes with respect to references to other means of dissolution. This change is effective April 9, 2006.[26]

Section 1009 of the NPCL was amended to make further conforming changes with respect to references to other means of dissolution. This change is effective July 26, 2006.[27]

Section 1012 of the NPCL (dealing with annulment of a dissolution) has been amended to conform to the changes for methods of dissolution. This change is effective April 9, 2006.[28]

A new § 1014 has been added to the NPCL, authorizing dissolution by proclamation of the Secretary of State of a domestic corporation formed pursuant to NPCL that has failed for a period of at least five years to file its annual report with the Attorney General pursuant to EPTL 8-1.4 and Article 7-A of the Executive Law. The name of a corporation so dissolved must be reserved by the Secretary of State for one year, and such a corporation, with the consent of the Attorney General, may be reinstated if it has filed all delinquent annual reports. This change is effective April 9, 2006.[29]

Section 1014 of the NPCL has been amended to clarify the method of notice and of reservation of names in the case of the dissolution of a domestic corporation by proclamation. This change is effective July 26, 2006.[30]

Section 1109(c) of the NPCL has been amended to coordinate judicial dissolutions with non-judicial dissolution plans. This change is effective April 9, 2006.[31]

NPCL § 1115(a) has been amended to eliminate reference to § 1005 with respect to dissolutions. This change is effective April 9, 2006.[32]

Section 1212(b) of the NPCL has been amended to coordinate a receiv-

er's actions with non-judicial dissolution plans. This change is effective April 9, 2006.[33]

Public Health Law

Section 4201 of the Public Health Law (PHL), dealing with the ability to give binding instructions with respect to the disposition of one's remains, has been amended to (1) make technical corrections to definitions, to the hierarchy of individuals with the right to carry out the wishes of a decedent, and to the written instrument by which one gives instructions; (2) provide that subsequent instruments revoke prior instruments; (3) protect agents, funeral directors and cemeteries who act reasonably and in good faith; (4) provide that disputes be resolved by special proceedings in courts of competent jurisdiction; (5) provide that in the event of conflict, § 453 of the General Business Law (dealing with funeral service contracts) prevails; (6) provide that this section does not abridge any provision of the Anatomical Gift Act; and (7) provide that this section does not alter the enforceability of a contract for funeral services. This change is effective August 2, 2006, the effective date of the original legislation.[34]

PHL § 4301 has been amended to permit organ and tissue donors to register in the New York State Organ and Tissue Donor Registry. This change is effective February 12, 2007.[35]

Section 4310 of the PHL has been amended to make registration with the New York State Organ and Tissue Donor Registry a recordation of consent, not intent, so that consent is not subsequently required. This change is effective February 12, 2007.[36]

PHL § 4351 has been amended to allow checking the New York State Organ and Tissue Donor Registry before having to obtain consent to an anatomical gift from a decedent's family members. This change is effective February 12, 2007.[37]

Surrogate's Court Procedure Act

Section 103(27) of the Surrogate's Court Procedure Act (SCPA) has been amended to change the definition of "infant" to include a person under 21 who consents to the appointment of a guardian after the age of 18. This definition is not applicable to New York's Uniform Transfers to Minors Act (UTMA) statute. This change is effective immediately.[38]

SCPA 1707(2) has been amended to extend the office of a guardian of the person or property of an infant until age 21, if the infant consents. This change is effective immediately.[39]

Vehicle and Traffic Law

Section 502(1) of the Vehicle and Traffic Law (VTL) has been amended to require the application for a driver's license to include the opportunity to register with the New York State Organ and Tissue Donor Registry. This change is effective February 12, 2007.[40] ■

1. 2006 N.Y. Laws ch. 285, § 1 (signed on July 26, 2006).
2. 2006 N.Y. Laws ch. 249, §§ 1, 2 (signed on July 26, 2006).
3. 2006 N.Y. Laws ch. 11, § 1 (signed on March 21, 2006).
4. 2006 N.Y. Laws ch. 381, § 1 (signed on July 26, 2006).
5. 2005 N.Y. Laws ch. 726, § 1 (signed on October 11, 2005).
6. 2006 N.Y. Laws ch. 434, § 1 (signed on July 26, 2006).
7. 2006 N.Y. Laws ch. 434, § 3 (signed on July 26, 2006).
8. 2005 N.Y. Laws ch. 726, § 2 (signed on October 11, 2005).
9. 2006 N.Y. Laws ch. 434, § 2 (signed on July 26, 2006).
10. *Id*.
11. 2005 N.Y. Laws ch. 726, § 3 (signed on October 11, 2005).
12. 2005 N.Y. Laws ch. 726, § 4 (signed on October 11, 2005).
13. 2006 N.Y. Laws ch. 434, § 4 (signed on July 26, 2006).
14. 2005 N.Y. Laws ch. 726, § 5 (signed on October 11, 2005).
15. 2006 N.Y. Laws ch. 434, § 5 (signed on July 26, 2006).
16. 2005 N.Y. Laws ch. 726, § 6 (signed on October 11, 2005).
17. 2006 N.Y. Laws ch. 434, § 6 (signed on July 26, 2006).
18. 2005 N.Y. Laws ch. 726, § 7 (signed on October 11, 2005).
19. 2006 N.Y. Laws ch. 434, § 7 (signed on July 26, 2006).
20. 2005 N.Y. Laws ch. 726, § 8 (signed on October 11, 2005).
21. 2005 N.Y. Laws ch. 726, § 9 (signed on October 11, 2005).
22. 2005 N.Y. Laws ch. 726, § 10 (signed on October 11, 2005).
23. 2006 N.Y. Laws ch. 434, § 8 (signed on July 26, 2006).
24. 2005 N.Y. Laws ch. 726, § 11 (signed on October 11, 2005).
25. 2006 N.Y. Laws ch. 434, § 9 (signed on July 26, 2006).
26. 2005 N.Y. Laws ch. 726, § 12 (signed on October 11, 2005).
27. 2006 N.Y. Laws ch. 434, § 10 (signed on July 26, 2006).
28. 2005 N.Y. Laws ch. 726, § 13 (signed on October 11, 2005).
29. 2005 N.Y. Laws ch. 726, § 17 (signed on October 11, 2005).
30. 2006 N.Y. Laws ch. 434, § 11 (signed on July 26 2006).
31. 2005 N.Y. Laws ch. 726, § 14 (signed on October 11, 2005).
32. 2005 N.Y. Laws ch. 726, § 15 (signed on October 11, 2005).
33. 2005 N.Y. Laws ch. 726, § 16 (signed on October 11, 2005).
34. 2006 N.Y. Laws ch. 76, § 1 (signed on June 7, 2006).
35. 2006 N.Y. Laws ch. 639, § 1 (signed on August 16, 2006).
36. 2006 N.Y. Laws ch. 639, § 2 (signed on August 16, 2006).
37. 2006 N.Y. Laws ch. 639, § 3 (signed on August 16, 2006).
38. 2006 N.Y. Laws ch. 518, § 3 (signed on August 18, 2006).
39. 2006 N.Y. Laws ch. 518, § 5 (signed on August 18, 2006).
40. 2006 N.Y. Laws ch. 639, § 4 (signed on August 16, 2006).

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Uninsured Motorist/ Supplementary Uninsured and Underinsured Motorist Update – Part II

A Review of Cases Decided in 2006

By Jonathan A. Dachs

Developments from 2006 with respect to general issues pertaining to the areas of uninsured motorist (UM), underinsured motorist (UIM), and supplementary uninsured motorist (SUM) law were discussed in the previous issue of the *Journal*. Part II will discuss several additional general issues addressed by the courts in 2006, as well as other issues more specific to these separate categories of coverage.

Arbitration Awards – Scope of Review

In *CNA Global Resource Managers v. Berry*,[1] the court observed that "'in the interest of preserving the independence of the arbitral process and conserving judicial resources, the courts have been assigned a minimal role in supervising arbitration practice.' Even though the scope of judicial review of an award rendered after a compulsory arbitration, such as that undertaken pursuant to a SUM policy, is greater than that in the case of consensual arbitration such review is nonetheless limited to the statutory grounds delineated in CPLR 7511." Thus, the burden is on the movant to demonstrate that the award was irrational, arbitrary and capricious, in violation of public policy or in excess of the arbitrator's powers. "On review, an award may be found to be rational if any basis for such a conclusion is apparent to the court based upon a reading of the record."

Insofar as the arbitrator's decision on liability was based upon testimony in the record, it was not arbitrary and capricious. Moreover, although the failure by an arbitrator to grant an adjournment may, under certain circumstances, constitute an abuse of discretion constituting misconduct under CPLR 7511(b)(1)(I), where, as in this case, the petitioner had "more than enough time prior to the hearing" to obtain the necessary evidence, "no misconduct on the part of the arbitrator existed which would support the vacatur of the subject arbitration award."

The court further held that an arbitrator acts in excess of his or her powers when the arbitrator considers the question of whether there was actual physical contact with a hit-and-run vehicle and reviews evidence that there may have been no contact between the allegedly offending vehicle and the vehicle operated by the claim-

ant seeking UM benefits, because "it is well settled that a court, and not an arbitrator, must resolve" that issue.

In *State Farm Mutual Automobile Ins. Co. v. MVAIC*,[2] the court held that where the petitioner was properly served with a notice of intention to arbitrate, but nonetheless failed to appear at or participate in the arbitration, there was no basis, pursuant to CPLR 7511(b), upon which to vacate the arbitration award rendered against it.

In *Nationwide Mutual Ins. Co. v. Michaels*,[3] the court held that the mere allegation that certain rulings of the arbitrator established partiality in favor of insurers was insufficient to establish actual bias or the appearance of bias.

Conflicts of Law

Allstate Ins. Co. v. Tupin[4] concerned an accident that occurred in New York between a vehicle in which the claimant was a passenger and a vehicle licensed by and registered to a resident of Rhode Island and driven by a resident of New York. The alleged insurer for the offending vehicle disclaimed coverage on the basis of late notice six months after it received notice of the loss. After finding that the laws of New York and Rhode Island conflicted on the issue of whether this disclaimer was timely, the court engaged in a conflicts of law analysis to determine which state's law to apply. Applying the "center of gravity" or "grouping of contacts" doctrine, the court noted that the subject policy was written and issued in Rhode Island, the owner of the vehicle was a Rhode Island resident, and the vehicle was licensed and registered in Rhode Island, and, thus, applied Rhode Island law. The court then went on to hold the disclaimer invalid because the insurer "failed to provide any documentation or case law to support its claim that its six-month delay in disclaiming coverage was reasonable as a matter of law," and "under Rhode Island law," "any doubts as to coverage are to be resolved in favor of the insured and against the insurer."

In *King v. Car Rentals, Inc.*,[5] a cross-border case, the court decided on the law to be applied based on dominant contacts. Ali rented an automobile in New Jersey from defendant Car Rentals, a New Jersey corporation that did business solely in New Jersey as a licensee of defendant Avis, a Delaware corporation that has substantial business activity in New York. Ali had just moved out of his sister's apartment in Manhattan, where he had been living for six months after graduating from New York University while waiting for a job to start in Manhattan. In the meantime, he moved into his parents' home in Metuchen, New Jersey. Ali's intent, as unequivocally expressed in his deposition testimony, was to move back to New York City after training, in Chicago, for his new employment in Manhattan. Ali then drove to Connecticut, where he picked up the plaintiff, who was employed in Connecticut, but resided in both Kings Park, New York, and Hamden, Connecticut. The two drove to Canada for the New Year's weekend. On the return trip, outside of Montreal, in the Province of Quebec, Canada, the vehicle left the roadway and turned over in a ditch, allegedly injuring the plaintiff. The dispute centered around the responsibility of the owner, because New York and New Jersey have different rules. New York law provides that a plaintiff who is seriously injured in an automobile accident may recover damages for pain and suffering against the owner of the car, because of the provisions of N.Y. Vehicle & Traffic Law § 388 (VTL), which makes an owner vicariously liable. Under New Jersey law, the vehicle owner is vicariously liable only if the driver was the employee or agent of the owner. In rendering the choice of law options, the court considered a number of factors: The plaintiff was unquestionably a resident of New York and carried a New York license; Ali was living only temporarily in New Jersey and intended to return to New York; neither party had any interest in Quebec and Quebec had no interest in an accident involving two non-Canadians; Car Rentals, the liable party, was a New Jersey business and the car was rented in New Jersey. The court concluded that despite New York's interest in protecting its residents, New Jersey's law would apply. Although New York is unique in holding owners vicariously liable, that policy must yield to New Jersey's countervailing interest in protecting its domiciliary, the vehicle owner, from vicarious liability that it deemed to be unwarranted.

This decision contains an excellent discussion and analysis of the choice of law rules.

Statute of Limitations

In *Liberty Mutual Ins. Co. v. Cooper*,[6] the court held that "[a] Demand for Arbitration of an uninsured motorist claim is subject to the six-year statute of limitations which runs from the date of the accident or from the time when subsequent events rendered the offending vehicle uninsured."[7]

The court observed, in *Travelers Indemnity Co. v. Yagudaev*,[8] "The party seeking the demand has the burden of showing that a later accrual date than the date of the accident is applicable." Thus, where the claimants were not aware that the offending vehicle was uninsured until the alleged owner testified at his examination before trial that his vehicle was not of the same color and description as the offending vehicle previously identified, the court found that the claimants sufficiently demonstrated that an accrual date later than the date of the accident was applicable "as the claim with respect to the unidentified hit and run vehicle only was realized upon discovery of the misidentification of the . . . vehicle."

Actions Against Brokers – Failure to Procure Insurance

In *Hoffend & Sons, Inc. v. Rose & Kiernan, Inc.*,[9] the Court of Appeals rejected an action by a policyholder against its insurance broker for failure to obtain a policy that would

have covered its loss, in the absence of proof of a specific request for the coverage in question – a prerequisite to the trigger of the common-law duty of a broker either to obtain the coverage that a customer requests or to inform the customer of an inability to do so, and in the absence of proof that the policyholder had a "special relationship" with the broker sufficient to impose upon the broker any additional duties with regard to the procurement of insurance.[10]

The court in *Zaki v. Hereford Ins. Co.*,[11] found existence of only "the standard consumer-agent insurance placement relationship," stating that "it cannot transform [the plaintiff's] difficulty into a new, expanded tort opportunity for peripheral redress. The record simply does not support plaintiff's effort in this manner to shift to defendant insurance agent the customer's personal responsibility for initiating and obtaining appropriate coverage."

In *Luna v. Hyundai Motor America*,[12] the defendant rental car company conceded that while it had purchased the supplementary *liability* insurance that the plaintiff had ordered when she rented the car, it neglected to purchase the uninsured/underinsured motorist insurance she also ordered at that time. The court held that the rental car company "is responsible for providing the UM coverage it admittedly failed to procure."

In *Ward v. County of Allegany*,[13] the plaintiff – the administrator of the estate of a deputy sheriff killed in the line of duty when his patrol car was struck by another vehicle – sought a judicial declaration that the defendant county, the decedent's employer, was liable to pay SUM benefits. The court affirmed the grant of summary judgment to the defendant on the ground that the documentary evidence established as a matter of law that the defendant did not procure SUM coverage that was applicable to the decedent's accident. The pertinent declarations in the policy made clear that no SUM endorsement was part of the automobile insurance coverage and that the defendant did not procure such coverage. Thus, the court rejected the plaintiff's contention that SUM coverage was provided under the defendant's $250,000 Self-Insured Retention. In addition, the court rejected the plaintiff's alternative contention that the defendant waived its right to deny the existence of SUM coverage, finding that "[t]he County Attorney's ill-advised admission concerning the existence of such coverage cannot be regarded as the intentional and knowing relinquishment of a known right of Defendant." Moreover, "where 'there is no coverage under the policy, the doctrines of waiver and estoppel may not operate to create such coverage,' and 'where the issue is the existence or nonexistence of coverage . . . , the doctrine of waiver is inapplicable.'"[14]

Uninsured Motorist Issues

"Uninsured" Motor Vehicle

In *Allstate Ins. Co. v. Vitiello*,[15] the court held that the offending vehicle,

> which was owned by a non-resident and, if insured at all at the time of the accident, was insured by an out-of-state carrier not authorized to transact business in the State of New York and not subject to personal jurisdiction in this State, was an "uninsured motor vehicle" within the meaning of Insurance Law article 52

Insurer's Duty to Provide Prompt Written Notice of Denial or Disclaimer

A vehicle is considered "uninsured" where the offending vehicle was, in fact, covered by an insurance policy at the time of the accident, but the insurer subsequently disclaimed or denied coverage. Insurance Law § 3420(d)

requires liability insurers to "give written notice as soon as is reasonably possible of . . . disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." The statute applies when an accident occurs in the state of New York, and the insurer will be estopped from disclaiming liability or denying coverage if it fails to comply with this statute. The timeliness of an insurer's disclaimer or denial is measured from the point in time when it first learns of the grounds for the disclaimer or denial. It is the insurer's responsibility to explain its delay in disclaiming coverage. A failure by the insurer to give notice of disclaimer as soon as is reasonably possible precludes effective disclaimer or denial.[16]

In *Legum v. Allstate Ins. Co.*,[17] the court held that Insurance Law § 3420(d) does not apply to claims that do not involve "death or bodily injury."

In *City of New York v. Welsbach Electric Corp.*,[18] the court observed that an insurer's assertion of untimely notice as a defense in an answer may constitute a notice of disclaimer. Further, the court held that a stipulation to extend the time to answer a complaint does not constitute a waiver of the right to a timely disclaimer or the right to rely upon an untimely disclaimer insofar as in such a situation there is no "intentional relinquishment" of the untimely disclaimer claim.

In *Allstate Ins. Co. v. Swinton*,[19] the court held that a 34-day delay in issuing a disclaimer was unreasonable. (This appears to be the shortest delay held unreasonable by the Appellate Division, Second Department, to date. Notably, the court cited with approval *West 16th Street Tenants Corp. v. Public Service Mutual Ins. Co.*,[20] a First Department case that held a 30-day delay unreasonable as a matter of law.) Although the insurer asserted that its delay resulted from its claims adjuster's investigation of whether the insured attempted to notify the insurer through its agent, it failed to produce the claims adjuster at the framed issue hearing, and, thus, failed to substantiate its assertion.[21]

On the other hand, in *Schoenig v. North Sea Ins. Co.*,[22] the court noted that "[w]hile Insurance Law § 3420(d) speaks only of giving notice 'as soon as is reasonably possible,' investigation into issues affecting an insurer's decision whether to disclaim coverage obviously may excuse delay in notifying the policyholder of a disclaimer." In that case, although the total delay in issuing the disclaimer was 46 days, the first 25 days of that period included the insurer's reasonable efforts to investigate the reasons for the insured's late notice, including a canceled appointment by the insured/claimant. The disclaimer, issued 21 days "after the insurer became aware that the plaintiff had breached the notice provision," was deemed "reasonable under the circumstances of this case."

For the purpose of determining whether a liability insurer has a duty promptly to disclaim in accordance with Insurance Law § 3420(d), a distinction must be made between (1) policies that contain no provisions extending coverage to the subject loss, and (2) policies that do contain provisions extending coverage to the subject loss, and which would thus cover the loss but for the existence, elsewhere in the policy, of an exclusionary clause. It is only in the former case that compliance with Insurance Law § 3420(d) may be dispensed with.

The court observed that an insurer's assertion of untimely notice as a defense in an answer may constitute a notice of disclaimer.

In *Ciasulo v. Nationwide Ins. Co.*,[23] the court held that where the insurer denied coverage based upon a policy exclusion for "bodily injury to an insured while occupying a motor vehicle owned by that insured, if such motor vehicle is not insured for SUM coverage by the policy under which a claim is made," it was required to issue a timely disclaimer.

In *Liberty Mutual Ins. Co. v. Goddard*,[24] the court held that the insurer was not required by Insurance Law § 3420(d) to issue a timely disclaimer because its denial of coverage on the ground that the collision at issue was intentional and staged was based upon a lack of coverage and not a policy exclusion.[25]

The Court of Appeals, in *New York Central Mutual Fire Ins. Co. v. Aguirre*,[26] held that "the policy's requirement to fill out and return a proof-of-claim form is an exclusion or a condition of coverage," thus requiring the insurer to timely disclaim pursuant to Insurance Law § 3420(d) for the insured's failure to complete and return such a form. In this case, where the insurer sent the claimants a letter directing their "immediate completion and return" of the notice-of-claim forms, the Court held that the insurer expected receipt of the completed forms "right away, or without substantial loss or interval of time after they were sent" and, thus, the insurer became aware of its basis for denying coverage, *i.e.*, the claimant's failure to complete and return the forms long before it disclaimed. The Court added that the fact that the claimant never returned the forms and/or that its letter did not set a precise deadline for their return did not extend the insurer's time to disclaim or deny coverage, or excuse its delay in doing

so. Indeed, the majority rejected the insurer's argument that it could not disclaim as soon as reasonably possible until after it received the filled out proof-of-claim forms because it could not evaluate whether the claimants had timely provided the facts until the forms were reviewed. As stated by the Court, "The simple answer to this conundrum, of course, is for the insurer to set a deadline for return of a proof-of-claim form. And, of course, if the insurer suspects fraud in this case, it can still fight the claim in arbitration on this basis."[27]

In *Continental Ins. Co. v. Bautz*,[28] the court recited the well-known rule that "[a]n insurance carrier that seeks to disclaim coverage on the ground of lack of cooperation 'must demonstrate that it acted diligently in seeking to bring about the insured's co-operation; that the efforts employed by the insurer were reasonably calculated to obtain the insurer's co-operation; and that the attitude of the insurer, after his [or her] co-operation was sought, was one of "willful and avowed obstruction" [*Thrasher v. United States Liab. Ins. Co.*, 19 N.Y.2d 159, 168-169, 278 N.Y.S.2d 793].'" In *Bautz*, the court held that the insurer failed to demonstrate that it met these requirements to disclaim on the ground of lack of cooperation.

On the other hand, in *Allstate Ins. Co. v. Rico*,[29] the court held that the insurer's disclaimer based upon its insured's lack of cooperation was valid and effective where the evidence showed that the insured and her husband made repeated misrepresentations designed to hide the fact that the driver of the insured's vehicle at the time of the accident was the insured's husband, who was not licensed to drive.

In *USAA v. Ogilvie*,[30] the court held that when the first notice of an accident is given to the insurer by an injured party, the failure of the insurer specifically to refer to that notice in its disclaimer letter results in the disclaimer being invalid. Where, as in this case, the only notice was given by the injured party, "the disclaimer must address with specificity the grounds for disclaiming coverage applicable to both the injured party as well as the insured."[31]

In *Hernandez v. American Transit Ins. Co.*,[32] the court held that since neither the plaintiff nor the insured ever notified the insurer of the accident, the insurer had no duty to disclaim liability, notwithstanding the fact that it was made aware of the accident by counsel to one of the insured's co-defendants in the personal injury action. The duty to disclaim is not triggered by receipt of notice from a third party.

A proper notice of disclaimer must apprise with a high degree of specificity of the ground or grounds on which it is predicated. In *State Ins. Fund v. Utica First Ins. Co.*,[33] the insurer's disclaimer contained two grounds: (1) that the policy was not in effect on the date of the accident; and (2) that an employee exclusion applied. Although the first ground was erroneous, the disclaimer was not deficient as ambiguous because the second ground was accurate and sufficient. Moreover, the insurer acted properly by promptly sending copies of its disclaimer to the attorneys and insurers of other potential claimants after being notified of their existence.

In *Allstate Ins. Co. v. Swinton*,[34] the court observed that the insurer could have immediately disclaimed coverage based upon a lack of timely notice, and thereafter disclaimed in a separate letter on the additional ground that the driver was not listed as an insured driver once that fact was ascertained.

Cancellation of Coverage

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

In *Progressive Northeastern Ins. Co. v. Barnes*,[35] the court held:

> Pursuant to Vehicle and Traffic Law § 313(2)(a), the insurer was required to file a notice of cancellation with the Commissioner of the Department of Motor Vehicles no later than 30 days following the effective date of the cancellation of its policy, and the failure strictly to comply with this provision results in an invalid termination of coverage as to third parties (Veh. & Traf. L. § 313[3]).

The court, in *Erie Ins. Co. v. Williams*,[36] held that the claimant was a member of the named insured's household for purposes of this VTL § 313(3) because on the date of the cancellation, he "actually resided in the insured's household with some degree of permanence and with the intention to remain for an indefinite period of time." More specifically, although the Record established that the claimant and the named insured were "platonic roommates," they were living together "as members of a single household and indeed were sharing the costs of maintaining their vehicles and the insurance thereon." Thus, the cancellation of the named insured's policy was effective as to the claimant as well, and the policy was not in effect on the date of the accident.

In *Chubb Group of Ins. Carriers v. DePalma*,[37] the court applied the law of Connecticut, the state with the most significant contacts with the parties involved and the subject policy of insurance, to determine that the purported cancellation by the additional respondent was invalid and ineffective because it did not contain the warnings required by Connecticut Statutes Annotated § 38a-343.

Under Connecticut law, as under New York law, "when written notice of cancellation is required, an insurer must strictly comply with policy provisions and statutory mandates."[38]

And, in *Progressive Direct Ins. Co. v. Trilla*,[39] the court held that the tortfeasor's insurer, a North Carolina company not licensed or authorized to do business in New York State, complied with the applicable North Carolina statute, North Carolina General Statutes § 58-35-85, when it canceled its policy.

Stolen Vehicle

Automobile insurance policies generally exclude coverage for damages caused by drivers of stolen vehicles and/or drivers operating without the permission or consent of the owner. In such situations, the vehicle at issue is considered "uninsured" and the injured claimant will be entitled to make an uninsured motorist claim.

In *Stanley v. Punch*,[40] the court noted that VTL § 388 does not apply to vehicles that were "'neither registered nor ever operated or used in New York' (*see Fried v. Seippel*, 80 N.Y.2d 32, 40 [1992])."

By amendment to subchapter 1 of Chapter 301 of Title 49, United States Code, signed by President George W. Bush and effective August 10, 2005, states are prohibited from holding leasing or rental companies vicariously liable for accidents involving their leased or rented vehicles. The effect of this federal provision is to nullify VTL § 388 as it applies to leasing companies or rental agencies. Specifically, the new law provides:

> An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if – (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).

In *Graham v. Dunkley*,[41] Justice Polizzi of the Supreme Court, Queens County, held that VTL § 388 is a legislative act within the New York State Legislature's inherent authority pursuant to the United States Constitution, Tenth Amendment, and that the Transportation Equity Act is an unconstitutional exercise of congressional authority under the Commerce Clause of the U.S. Constitution, Article I, § 8. As stated by the court,

> The issue of supremacy of congressional legislation over New York State law is not one to be simply assumed, for Congress has only those powers to legislate that are conferred on it by the United States Constitution. The substantive law of torts is not to be faintly acquiesced to legislation by Congress, particularly when there is no preponderance of constitutional authority to support such a conclusion. While the court's decision is strictly limited to the facts of this case, this court cannot wholly exempt a corporate class of tortfeasor from liability to otherwise innocent men, women and children, who seek recompense in the courts of the State of New York when they become sick, seriously injured, permanently maimed or even killed, directly as a result of a dangerous instrumentality owned by that corporate class of tortfeasor who is doing business in the State of New York and subject to the laws of the State of New York, unless otherwise directed by the New York State Legislature.[42]

In *Country-Wide Ins. Co. v. National Railroad Passenger Corp.*,[43] the Court of Appeals, answering questions certified to it by the Second Circuit, held that the uncontradicted statements of both the owner and the driver that the driver was operating the vehicle without the owner's permission will not *necessarily* warrant a court in awarding summary judgment for the owner. In most circumstances, the court will, but not as an absolute or invariable rule. In short, whether summary judgment is warranted depends on the strength and plausibility of the disavowals, and whether they leave room for doubts that are best left for the jury. Here, the Court noted that the contemporaneously filed accident report, the fact that the driver accepted punishment for taking a vehicle without authority, and the lack of any evidence to the contrary, was enough to convince the Court that permission was not granted. However, the Court left open the possibility that proof could be submitted that would make the issue of permission a jury question, even if the owner and driver submitted evidence both denying permission.[44]

In *State Farm Mut. Auto. Ins. Co. v. Ellington*,[45] the court held that the uncontradicted testimony of a vehicle owner that the vehicle was used without his or her permission did not, by itself, overcome the presumption of permissive use.

In *Bernard v. Mumuni*, the court held that triable questions of fact existed as to whether the owner of a vehicle gave a friend to whom he entrusted the vehicle implied consent to drive it, and whether that friend gave implied consent to his son, who held only a learner's permit, to drive the car when he left the keys on the table of his house. Moreover, the court observed, "It is well established that, when the owner of a vehicle places it under the unrestricted control of a second person, the owner's consent to use of the vehicle may reasonably be found to extend to a third person whom the second person permits to drive it."[46]

Hit-and-Run

One of the requirements for a valid uninsured motorist claim based upon a hit-and-run is "physical contact" between an unidentified vehicle and the person or motor

vehicle of the claimant. In *New York Central Mutual Fire Ins. Co. v. McLeary*,[47] the court held that a boat that slipped from a trailer on a boat launch, which the claimant saw coming towards her, but could not avoid, attempted to push it away and was caused to fall to the ground and become injured, was not an integral part of the vehicle to which the trailer was attached, and, therefore, did not give rise to a valid hit-and-run claim.

Another requirement for a valid "hit-and-run" claim is a report of the accident within 24 hours, or as soon as reasonably possible, to a police officer, peace or judicial officer, or to the Commissioner of Motor Vehicles. In *Progressive Northeastern Ins. Co. v. Lau*,[48] the claimant testified at a framed issue hearing that after he was struck, as a pedestrian, by an unidentified vehicle, someone placed a call to 911 informing emergency services of the accident. After being taken by ambulance to the hospital, where he was treated and released, the claimant went the next day to the local police precinct, where he reported the accident and requested a copy of a police report, which, had not, in fact, been made. On these facts, the court rejected the insurer's contention that the claimant failed to comply with the reporting requirements for a hit-and-run claim. Specifically, the claimant's inability to produce a police report did not preclude his claim in view of the "very liberal interpretation" of the 24-hour reporting requirement pursuant to which the courts have accepted "police contacts that fall far short of obtaining a police report." Here, the arrival of the ambulance corroborated the claimant's contention that someone reported the accident to 911 on his behalf within 24 hours of the accident, and the claimant's own oral report at the police station constituted sufficient compliance.

Yet another requirement for a valid hit-and-run claim is the filing of a statement under oath that the claimant has a cause of action against a person whose identity is unascertainable. In *Ins. Co. of State of Pennsylvania v. Dentale*,[49] the court held that this requirement only applies where *neither* the owner *nor* the operator can be identified.

Insurer Insolvency

The SUM endorsement under Regulation 35-D includes within the definition of an "uninsured" motor vehicle a vehicle whose insurer "is or becomes insolvent." Under that endorsement, any and all insolvencies, whether or not covered by a Security Fund, give rise to a valid SUM claim.[50] In cases involving mandatory UM coverage, as opposed to SUM coverage, only insolvencies that are not covered by a Security Fund give rise to a valid UM claim.

In *American Transit Ins. Co. v. Barger*,[51] the Liquidation Bureau sent out a similar letter with respect to the status of Legion Insurance Company as insolvent and in liquidation and noting that the Public Motor Vehicle Liability Security Fund ("PMV Fund"), which would otherwise provide coverage, was "financially strained." This court held that the letter from the Liquidation Bureau did *not* constitute a disclaimer of liability or a denial of coverage. As explained by the court, "The letter states in part that if the claim is on the trial calendar, the Liquidation Bureau will attempt to settle the claim. The very text of the letter reveals the availability of compensation from the Liquidation Bureau and the PMV Fund." Thus, the court held that the remedy of the claimant, who did not purchase SUM coverage, was with the PMV Fund and not with his uninsured motorist carrier.

> A requirement for a "hit-and-run" claim is a report of the accident within 24 hours or as soon as reasonably possible.

In *Nationwide Mutual Ins. Co. v. Carlini*,[52] the respondents were passengers on a bus that was involved in an accident in New Jersey. The bus was insured by a liability policy with Security Insurance Company, which had a deductible/self-insured retention of $250,000. The bus company subsequently filed a petition in bankruptcy. The respondents immediately filed a claim for UM benefits with their own insurer, contending that the bankruptcy of the bus company was equivalent to having no insurance, thus implicating the UM coverage.

In the context of a motion to vacate the claimant's default in opposing a petition to stay, the court held that the movants did not demonstrate a meritorious defense because they could not establish that the offending vehicle was uninsured. Relying upon the decision of the Supreme Court, New York County in *Fireman's Fund Ins. Co. v. Wisham*,[53] which held that, under similar circumstances, the vehicle can be considered an "uninsured motor vehicle" for purposes of SUM coverage (Insurance Law § 3420(f)(2)), but *not* for purposes of UM coverage (Insurance Law § 3420(f)(1)), the court held where, as here, the claimant only purchased mandatory UM coverage, the vehicle was considered "insured" because the claimant could look to the Motor Vehicle Accident Indemnification Corp. (MVAIC), up to the same limits as found in the mandatory endorsement.

Underinsured Motorist Issues

Exhaustion of Underlying Limits

Insurance Law § 3420(f)(2) provides that as a condition precedent to the obligation of the insurer to pay under the supplementary uninsured/underinsured motorist insurance coverage, the limits of all bodily injury liability bonds or insurance policies applicable at the time of the accident shall be exhausted by payment of judgments or settlements. In *Zaki v. Hereford Ins. Co.*,[54] the court

observed that "[t]he statutory scheme thus requires primary insurers to pay every last dollar, and requires a plaintiff to accept no less, prior to the initiation of an underinsurance claim." Since in this case, the plaintiff settled his claim for personal injuries against the tortfeasor for $24,000, which was $1,000 less than the $25,000 limit of the tortfeasor's coverage, the court rejected the plaintiff's claim, notwithstanding its recognition and understanding of "the financial predicament which motivated plaintiff to accept less than the entire primary policy from the responsible vehicle."

Policy Limits

In *Penna v. Federal Ins. Co.*,[55] the insured brought suit seeking a declaration that her policy provided $1 million SUM coverage. The insurer argued that the maximum SUM coverage afforded the plaintiff under the policy's "drive other car" endorsement was $50,000, relying upon the fact that the schedule in that endorsement listed $50,000 next to "Uninsured Motorist Limit." The plaintiff countered that the policy provided $1 million of SUM coverage, relying upon the fact that the schedule in the declarations page of the policy listed $25,000/$50,000 next to "Uninsured Motorists," and $1 million next to "SUM Coverage." Since the "drive other car" endorsement did not list SUM coverage at all, and stated that "[t]his endorsement changes only those coverages where a premium is shown in the Schedule or in the Declarations," and a premium was shown for the $1 million of SUM coverage on the business policy's declarations, the plaintiff contended that the $1 million of SUM coverage was incorporated by reference into the "drive other car" endorsement. Reading the policy and the "drive other car" endorsement together, the court concluded that they were reasonably subject to either of the two interpretations proffered by the parties. Given the rule that ambiguities in an insurance policy are to be construed against the insurer and in favor of the insured, the construction favoring the plaintiff prevailed. As such, the plaintiff was entitled to a judgment declaring that the policy provided her with SUM coverage in the sum of $1 million.

Offsets

In *Musgrove v. American Protection Ins. Co.*,[56] the court held that the plaintiff, a police officer who was injured in the line of duty when an underinsured vehicle collided with his police vehicle, whose salary and medical expenses during the period of his disability were paid by his employer, the Village of Lake Success, pursuant to General Municipal Law § 207-c (GML), and who received a settlement from the underinsured motorist's liability insurer, and thereafter filed a claim for underinsured motorist benefits with the insurer of the police vehicle, was not obligated to reimburse the village for the money paid to him pursuant to GML § 207-c. As stated by the court,

> A municipality's right, pursuant to General Municipal Law § 207-c(6), to the reimbursement of the salary and medical expenses it had previously paid to or on behalf of an officer injured in the line of duty, is subject to the limitations articulated in the no-fault provisions of Insurance Law § 5104. Insurance Law § 5104(a) limits the items of damage that may be recovered in an action commenced by a person injured in a motor vehicle accident against another motor vehicle operator or owner, here the uninsured motorist, to non-economic loss, i.e., pain and suffering, plus only that economic loss which exceeds basic economic loss, defined by statute as $50,000 for medical and hospital expenses, lost wages, and incidental expenses, with certain exceptions not applicable here. The plaintiff's UIM claim, by definition, could only seek recovery only for non-economic loss and economic loss greater than basic economic loss. Thus, there can be no Insurance Law § 5104(b) lien imposed upon any amount he might recover on account of non-economic loss in the arbitration which will determine that claim. Where no Insurance Law § 5104(b) lien attaches, there can be no recovery under General Municipal Law § 207-c(6).[57]

The court distinguished *City of Newburgh v. Travis*,[58] in which the court had held that payments made to a police officer injured in the course and scope of his employment were analogous to those payments set forth in the policy's offset provisions, *i.e.*, "all sums paid or payable under any worker's compensation disability benefits or similar law," and were, therefore, also subject to offset, on the basis that the Village of Lake Success, unlike the City of Newburgh, was not self-insured and had nothing to offset since any arbitration award would be paid by its insurer. Moreover, the policy in *Musgrove*, unlike in *City of Newburgh*, did not contain a specific offset provision. ■

1. 10 Misc. 3d 1074(A), 814 N.Y.S.2d 560 (Sup. Ct., Kings Co. 2006) (citation omitted).
2. 25 A.D.3d 740, 807 N.Y.S.2d 570 (2d Dep't 2006).
3. 35 A.D.3d 1189, 828 N.Y.S.2d 739 (4th Dep't 2006).
4. 11 Misc. 3d 1080(A), 819 N.Y.S.2d 846 (Sup. Ct., Queens Co. 2006).
5. 29 A.D.3d 205, 813 N.Y.S.2d 448 (2d Dep't 2006).
6. 10 Misc. 3d 1072(A), 814 N.Y.S.2d 562 (Sup. Ct., Kings Co. 2006).
7. *See also Allcity/Empire Ins. Co. v. Mirghani*, 11 Misc. 3d 1080(A), 819 N.Y.S.2d 846 (Sup. Ct., Kings Co. 2006) ("There is a six year statute of limitations for SUM claims; this is based on contract law – insurance falls under contract law.").
8. 11 Misc. 3d 1080(A), 819 N.Y.S.2d 852 (Sup. Ct., Queens Co. 2006).
9. 7 N.Y.3d 152, 818 N.Y.S.2d 798 (2006).
10. *See* Norman H. Dachs & Jonathan A. Dachs, *Court of Appeals: Deciding and Deciding Not to Decide*, N.Y.L.J., July 6, 2006, p. 3, col. 1, analyzing this decision. *See also Curiel v. State Farm Fire & Cas. Co.*, 35 A.D.3d 343, 826 N.Y.S.2d 391 (2d Dep't 2006).
11. N.O.R., N.Y.L.J., July 17, 2006, p. 24, col. 1 (Civ. Ct., Queens Co.).
12. 25 A.D.3d 321, 808 N.Y.S.2d 38 (1st Dep't 2006).

13. 34 A.D.3d 1288, 824 N.Y.S.2d 542 (4th Dep't 2006).

14. *Id.* at 1290 (citations omitted).

15. 35 A.D.3d 459, 460, 824 N.Y.S.2d 735 (2d Dep't 2006) (citations omitted).

16. *See Allstate Ins. Co. v. Cruz*, 30 A.D.3d 511, 817 N.Y.S.2d 129 (2d Dep't 2006); *Schoenig v. N. Sea Ins. Co.*, 28 A.D.3d 462, 813 N.Y.S.2d 189 (2d Dep't 2006); *see also City of New York v. Welsbach Elec. Corp.*, 11 Misc. 3d 1085(A), 819 N.Y.S.2d 847 (Sup. Ct., N.Y. Co. 2006).

17. 33 A.D.3d 670, 821 N.Y.S.2d 895 (2d Dep't 2006).

18. 11 Misc. 3d 1085(A), 819 N.Y.S.2d 847 (Sup. Ct., N.Y. Co. 2006).

19. 27 A.D.3d 462, 811 N.Y.S.2d 108 (2d Dep't 2006).

20. 290 A.D.2d 278, 279, 736 N.Y.S.2d 34 (1st Dep't 2002).

21. *See also AIG Centennial Ins. Co. v. Chunasamy*, 29 A.D.3d 786, 818 N.Y.S.2d 95 (2d Dep't 2006) (delay of over three months unreasonable as a matter of law).

22. 28 A.D.3d 462, 813 N.Y.S.2d 189 (2d Dep't 2006).

23. 32 A.D.3d 889, 823 N.Y.S.2d 85 (2d Dep't 2006).

24. 29 A.D.3d 698, 815 N.Y.S.2d 650 (2d Dep't 2006).

25. *See also GEICO v. Spence*, 23 A.D.3d 466, 805 N.Y.S.2d 625 (2d Dep't 2005) (since the insurer was endeavoring to adduce evidence of fraud – *i.e.*, a staged accident – which may have established that the occurrence or collision was not covered, there was no need for it to disclaim in a timely fashion).

26. 7 N.Y.3d 772, 820 N.Y.S.2d 848 (2006).

27. *See also N.Y. Cent. Mut. Fire Ins. Co. v. Gonzalez*, 34 A.D.3d 816, 825 N.Y.S.2d 132 (2d Dep't 2006) (insurer's timely commencement of proceeding to stay arbitration – within 20 days of receipt of Notice of Intention to Arbitrate, and within 26 days of receipt of untimely Notice of Intention to Make Claim – constituted a timely, sufficient denial of coverage or disclaimer).

28. 29 A.D.3d 989, 815 N.Y.S.2d 718 (2d Dep't 2006).

29. 28 A.D.3d 353, 814 N.Y.S.2d 114 (1st Dep't 2006).

30. 12 Misc. 3d 1157(A), 819 N.Y.S.2d 213 (Sup. Ct., N.Y. Co. 2006).

31. *See also Steinberg v. Hermitage Ins. Co.*, 26 A.D.3d 426, 809 N.Y.S.2d 569 (2d Dep't 2006) ("[W]here the insured is the first to notify the carrier, even if that notice is untimely, any subsequent information provided by the injured party is superfluous for notice purposes and need not be addressed in the notice of disclaimer issued by the insurer [citations omitted]. Here, the claimant's attorney did not directly notify the defendant of the accident until after the insured had done so. Thus, the defendant was not required to cite the claimant's failure to provide direct notice in the disclaimer letter it had already issued to the insured").

32. 31 A.D.3d 343, 819 N.Y.S.2d 264 (1st Dep't 2006).

33. 25 A.D.3d 388, 807 N.Y.S.2d 351 (1st Dep't 2006).

34. 27 A.D.3d 462, 811 N.Y.S.2d 108 (2d Dep't 2006).

35. 30 A.D.3d 523, 817 N.Y.S.2d 120 (2d Dep't 2006).

36. 32 A.D.3d 1228, 821 N.Y.S.2d 318 (4th Dep't 2006).

37. 31 A.D.3d 443, 818 N.Y.S.2d 541 (2d Dep't 2006).

38. *Id.* at 444 (citation omitted).

39. 28 A.D.3d 375, 813 N.Y.S.2d 714 (1st Dep't 2006).

40. 35 A.D.3d 188, 827 N.Y.S.2d 110 (1st Dep't 2006).

41. 13 Misc. 3d 790, 827 N.Y.S.2d 513 (Sup. Ct., Queens Co. 2006).

42. *See* Joseph D. Novahicka, *Federal Preemption of Vehicle and Traffic Law § 388*, N.Y.L.J., Dec. 14, 2006, p. 4, col. 4.

43. 6 N.Y.3d 172, 811 N.Y.S.2d 302 (2006).

44. *See also Eagle Ins. Co. v. Lucia*, 33 A.D.3d 552, 824 N.Y.S.2d 9 (1st Dep't 2006).

45. 27 A.D.3d 567, 810 N.Y.S.2d 356 (2d Dep't 2006).

46. 22 A.D.3d 186, 188, 802 N.Y.S.2d 1 (1st Dep't 2005), *aff'd*, 6 N.Y.3d 881, 817 N.Y.S.2d 210 (2006) (citations omitted).

47. 35 A.D.3d 1284, 826 N.Y.S.2d 869 (4th Dep't 2006).

48. 11 Misc. 3d 1079(A), 819 N.Y.S.2d 850 (Sup. Ct., Queens Co. 2006).

49. 32 A.D.3d 854, 821 N.Y.S.2d 115 (2d Dep't 2006).

50. *See Am. Mfrs. Mut. Ins. Co. v. Morgan*, 296 A.D.2d 491, 745 N.Y.S.2d 726 (2d Dep't 2002).

51. 13 Misc. 3d 386, 819 N.Y.S.2d 654 (Sup. Ct., N.Y. Co. 2006).

52. 12 Misc. 3d 718, 814 N.Y.S.2d 856 (Sup. Ct., Nassau Co. 2006).

53. 6 Misc. 3d 1017(A), 800 N.Y.S.2d 345 (Sup. Ct., N.Y. Co. 2005).

54. N.Y.L.J., July 17, 2006, p. 24, col. 1 (Civ. Ct., Queens Co. 2006).

55. 28 A.D.3d 731, 814 N.Y.S.2d 226 (2d Dep't 2006).

56. 32 A.D.3d 916, 823 N.Y.S.2d 165 (2d Dep't 2006).

57. *Id.* at 918 (citations omitted). *See* Ins. Law § 5102(c).

58. 228 A.D.2d 497, 644 N.Y.S.2d 281 (2d Dep't 1996).

Preparing for Your First Oral Argument

By Steven C. Bennett

Sooner or later, as a junior litigator, you get your chance to make your first oral argument in court. The argument may be on a routine discovery motion, or perhaps something more substantive, like a motion to dismiss or a motion for summary judgment. The motion may be part of an evidentiary hearing or trial, or even an appellate argument. No matter the size and importance of the matter, and no matter the context and format, your heart may skip a beat or two as you realize you are about to be tested by a new and challenging experience that your one law school moot court experience may not have sufficiently prepared you to encounter.

This article aims to identify some of the most basic considerations that should go into preparing for your first oral argument. The substance of what you say will depend on the individual case, and your client's position. But the basic elements of preparation for oral argument are fairly standard. A good grounding in these basics will help you prepare for even the most unusual arguments.

Know What You Want

Courts do not exist to decide hypothetical questions. Most judges, moreover, are very practical, "bottom line" people. Expect to be asked, early, and perhaps in several different ways, exactly what you want the court to do.

You may have stated in your motion papers (or opposition) the relief you seek. If so, be prepared to explain why you seek that specific relief. If your position has been only generally stated in writing, moreover, expect the court to ask for more details (and be prepared to give them, even if not asked).

Consider providing the court with a form of order to sign, or offering to prepare such an order. If the court is not inclined to grant all the relief you request, consider what "bare minimum" relief you might accept. If the court may rule against you, consider whether there are worst-case scenarios that you may wish to avoid.

Know How Much Time You Have

In appellate settings, the court will typically allocate a specific amount of time to each side for argument. In lower courts, the ground rules may be much more fluid, and not transparent. If you do not have experience with the particular judge, you should inquire. Ask colleagues at your firm. Call the judge's chambers. Consult the calendar of events on the court's docket for the session, and figure your time from the number of matters the court must handle in the session.

If none of these methods are satisfactory, consider agreeing with your adversary, in advance of the argument, on how much time the parties will request at the outset of the argument. At very least, when you begin to speak, tell the court how long you plan to take and confirm that the timing is acceptable. If you wish to reserve rebuttal time, say so at the outset of your argument.

As you prepare, time your practice presentations, and work to eliminate points that may not be useful to develop, given limited time. Build into your schedule time for questions from the court (indeed, questions are often the focus of oral argument). Have ready a "short form" of your argument, which you can use if the court gives you less time than you had expected, or if the court overwhelms your argument time with questions.

Develop a Theme

The psychological principle of "recency and primacy" is a key aspect of persuasion. The first things that an audience

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(judge) hears, and the last things, may be the things that have the most impact. A short, simple, potent central theme, which can be articulated early in the argument, and repeated (at least) at the close of the argument, is key.

A good theme should focus on the reasonableness and fairness of your position. It should, if possible, provide a common thread throughout your arguments. It should frame the issue in such a way that, if the court agrees with your theme, you will win most, or all, of the relief you request. Your theme also should frame the issues in a way that will require the other side to respond, on the terms that you dictate.

Develop a Structure

No judge can absorb all your argument, much less agree with it, if the logic of the argument is not transparent. Indeed, most judges will interrupt an advocate if the judge is not sure "where this is going." Thus, some form of road map is often essential, to help guide the court through your points.

You should, if possible, briefly outline the structure of your points at the outset of your argument as part of, or shortly after, stating your theme. With some "hot" benches, this may be your one and only opportunity to summarize your central points. If the bench is less active, this will be your opportunity to remind the court of how your entire argument hangs together. During the argument, moreover, reference to your structure will help ease you through transitions.

Memorize an Opening

For most novice advocates, the first words spoken are the toughest. Once the words start to flow, nervousness fades, and focus on the activity takes hold. Memorize the first few sentences of your opening to "jump start" the process and to ensure that your theme, at least, is stated exactly as you prefer.

Prepare an Outline

Do not simply read your argument. Nothing could be more boring – for you and for the court – and nothing could be less likely to respond to unplanned issues and questions as they arise during the argument. Instead, prepare an outline of your main points, and sub-points. Use the outline as a reference during your argument, to make sure that you cover all of the essential elements of your position. If the court raises a question that relates to a point on your outline, skip ahead to answer that question, and then try to get back to the logical flow of your outline. If you are the second speaker, and there is a vital point that your adversary has raised in the initial argument, consider doing the same, jumping ahead on your outline to address that point first, and then returning to the remainder of your outline.

Prepare to Answer Questions

The best oral advocates welcome questions from a court. Such questions help reveal the court's tentative reaction to the case, and help illuminate any problem areas that require the advocate's attention. The question-and-answer interaction, moreover, establishes credibility and rapport. Thus, the general attitude in response to questions from the bench should be "I'm glad you asked me that question," never anything that sounds even remotely like "don't bother me with such an irrelevant question."

Answer questions directly. Few judges have patience for long-winded explanations, especially those that hide the answer to the judge's question. If you must concede a point, do so forthrightly, and then provide your (brief) explanation for why the concession is not critical.

Do not ignore questions put to your adversary. Often, the questions, and especially the answers, can be particularly useful in highlighting strong points in your argument.

Prepare to Respond to Your Opponent

Oral argument is a multi-party game. Questions and arguments from your adversary may be as important to your persuasiveness as questions from the court. Think through such questions in advance of the argument. Read your adversary's submissions to the court carefully.

Make a list of the essential points for the other side, to which you may need to respond. In outlining your argument, consider how best to incorporate those responses into the other points you hope to make. Consider whether there are some points that you need not address, unless the court, or your adversary, emphasizes them in the course of the argument.

Practice Your Language and Non-Verbal Communication

What's written on paper is not always what comes out in oral argument. Difficult words, case names, acronyms and other phraseology can come out poorly in the heat and nervousness of battle. Oral argument practice can help.

Be especially cognizant of how you call the parties in the action. If there are multiple parties, and multiple positions, such as "plaintiff-appellant – cross-appellee," make sure that you can clearly and efficiently refer to your clients and your adversaries during the argument.

Relax

Most good oral advocates are not born; they're made from experience and perseverance. Your first oral argument will not be perfect, but you will get through it, and you will learn from the experience. Indeed, the more you plan for your first argument the more you will learn, as you come to see that no matter how well you prepare, something unpredictable may, and probably will, occur. That is part of the challenge, and the fun, of oral advocacy. ■

BY DAVID P. MIRANDA

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Copyright Infringement Lawsuit Against YouTube

The availability of digital video recordings, and the ease with which they can be posted on the Internet, has raised a host of copyright and public policy issues. Video clips of television programs and sporting events, as well as full-length movies, can be found on video-sharing Web sites within minutes of public release. Enforcement of copyright protections by the creators of the underlying works is particularly difficult as a result of the ease with which virtually any digital recordings may be searched and retrieved on the Internet.

Earlier this year entertainment company Viacom International, Inc., and its related companies began a lawsuit against YouTube, Inc., and its parent company, Google, Inc.[1] Viacom's motion picture labels include Paramount Pictures and DreamWorks. Its television channels include TV Land, Nickelodeon, VH1 and Comedy Central. The lawsuit, commenced in the United States District Court for the Southern District of New York, asserts multiple causes of action for direct, contributory and vicarious copyright infringement arising out of YouTube's unauthorized use of Viacom's copyrighted entertainment materials.

The YouTube Web site, located at www.youtube.com, allows visitors to upload their own videos, permitting millions of Internet users to search for and watch them. Most videos on the site are short video clips ranging from 15 seconds to five minutes in length. In addition to permitting users to register with the site and upload videos in a variety of formats, YouTube also allows anyone to copy code from its Web site and incorporate video clips emanating from YouTube's site onto other Web sites. Even though YouTube is only two years old, it has become one of the most popular Internet sites, with over 100 million videos shown daily; it was recently purchased by Google for $1.65 billion. Although YouTube is intended to provide a means for individuals to download their own personal videos for viewing on the Internet, it has rapidly developed a voluminous library of copyrighted materials placed on the site by unauthorized third parties. As YouTube's popularity has grown, it has struck licensing deals with CBS, NBC, SONY, BMG and Warner to air video and music clips and to share advertising revenue generated via those clips. Although attempts were made to negotiate a license with Viacom and its subsidiaries, those efforts were unsuccessful and the lawsuit was commenced.

Copyright owners have the exclusive right to reproduce, distribute, publicly perform and display their copyrighted works.[2] In order to successfully bring a claim for direct copyright infringement, Viacom must establish that the defendant copied, reproduced or distributed Viacom's copyrighted works. In order to establish contributory copyright infringement, Viacom must prove YouTube's knowledge of the infringing activity and actual assistance in or inducement of the infringement. Vicarious liability is found where an operator has the right and ability to control users and obtains a direct financial benefit from allowing the acts of infringement. Under the doctrine of vicarious liability, one may be found liable without specific knowledge of the infringing act.

Viacom contends that the defendant YouTube encourages individuals to upload videos to its site and has filled its library with thousands of episodes and significant segments of Viacom's popular copyrighted programming. Viacom asserts that although the videos available on YouTube are uploaded by users in the first instance, they are part of YouTube's library, are displayed on YouTube's Web site, which the defendants control and from which they directly profit. Viacom further contends that when a user uploads a video, YouTube copies the video into its own software format, making it available for viewing on its own Web site. The defendants' use of infringing works, including those of Viacom, has made an enormous contribution to the explosive growth and value of YouTube, says Viacom.

Pursuant to the Digital Millennium Copyright Act, certain safe harbor defenses may be available to YouTube if it has in place certain policies and takes reasonable measures to remove the allegedly infringing works upon notification by the copyright owner.[3] Viacom argues, however, that the measures taken by YouTube to remove the copyrighted works are ineffectual, alleging that more than 150,000 unauthorized clips of their copyrighted programming have been viewed 1.5 billion times. Viacom contends that YouTube removes only the specific infringing clips identified, rather than

all infringing works that can reasonably be located, and that because of the nature of YouTube's service, there are often multiple postings of the same or nearly identical infringing works, one or more of which remain on the Web site even after notification. Further, Viacom states that because YouTube offers features that allow users to designate certain "friends" as the only persons allowed to see the videos they upload, it prevents copyright owners from finding all infringing videos.

Viacom contends that YouTube has the ability to invoke further protection for the copyrighted works of others, but fails to do so. For example, YouTube takes additional measures for content to which it has acquired licenses through its various business partnerships with other copyright holders, using filtering technology to identify and remove copyrighted works for companies with which it has licensing deals. Furthermore, YouTube is able to proactively review and remove pornographic videos from its library, but refuses to do the same for videos that infringe Viacom's copyrights.

Although the case is in its early stages and there has been no indication of the court's inclinations on the matter, the case is significant because it is one of the first to address the unique issues affecting YouTube, and similar services. The fundamental question for the courts is not whether companies like Viacom have the right to control the use, reproduction and distribution of their copyrighted works on the Internet, because most certainly they do; but rather, whether a service like YouTube is obligated to review every clip that's downloaded onto its site for possible copyrighted content. If the court finds YouTube does not have that obligation, then it falls upon the copyright owner, Viacom, to identify each and every item of copyrighted material and ensure that it is removed. ■

1. *Viacom Int'l, Inc. v. YouTube, Inc.*, No. 07 Civ-2103 (S.D.N.Y.).
2. 17 U.S.C. § 106.
3. 17 U.S.C. § 512.

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

Two years ago, I took on a negligence case on a contingent fee basis. At the time, I believed that the claim possessed merit and had real monetary value. However, the more work I do on the case, the lower the chance of success seems. More to the point, it now appears that the cost of the time I have spent on this matter grossly exceeds the possible recovery, assuming that there is a recovery at all. Am I allowed to withdraw after putting in so much work? If so, what is the best withdrawal procedure? Is there an approach I can take to mitigate the consequences of a withdrawal?

Sincerely,

Wanting Out

Dear Wanting Out:

Your question raises important issues regarding an attorney's right to terminate his or her employment, and related duties to the client.

Initially, you should review the executed retainer letter to determine if a withdrawal provision or procedure had already been agreed upon.

A meeting with the client should be the next step. If it goes well, you might be able to eliminate frustration on both sides and come to an amicable parting. You can explain that when you accepted the matter, your assessment of the facts led you to believe that there would be a favorable and lucrative outcome. However, as the case has developed you have determined that going forward would likely not result in success. If your client then knowingly and freely assents to the termination of employment, you are permitted to withdraw under DR 2-110(C)(5), provided you have not yet taken the matter to a tribunal.

However, you should consider withdrawal very cautiously and carefully. According to EC 2-32, "[a] decision by a lawyer to withdraw should be made only on the basis of compelling circumstances and, in a matter pending before a tribunal, the lawyer must comply with the rules of the tribunal regarding withdrawal." The same Ethical Consideration also provides that if, after careful consideration, you choose to withdraw, you must do so in a way that minimizes the possible adverse effect on, and prejudice to, the rights of your client. To that end, you should (a) give due notice of withdrawal, (b) suggest other counsel, (c) deliver to the client the papers to which he or she is entitled, (d) cooperate with subsequent counsel, and (e) generally minimize the possibility of harm, including refunding any compensation not earned.

In short, you must assess whether terminating the employment after the work you have already put in will prejudice your client, and whether you could successfully help the client find new counsel to adequately handle the matter if the client decides to proceed. If you can find another lawyer to assist the client, you can suggest an agreement to new counsel under which you are compensated for your time, to be paid from any future proceeds of the suit.

Of course, not all partings are smooth. If the client does not agree to terminate the employment, certain actions taken by the client allow for permissive withdrawal. DR 2-110(C) sets forth the circumstances under which a lawyer is permitted to withdraw where the lawyer does not need the permission of a tribunal. Withdrawal may occur if the client:

(a) insists on presenting a claim without merit or that cannot be supported by a good faith argument;
(b) persists in using the lawyer's services in a course of action that the lawyer knows to be criminal or fraudulent;
(c) insists that the lawyer take action that is illegal or prohibited by the Disciplinary Rules;
(d) by other conduct renders it unreasonably difficult for the lawyer to carry out employment effectively;
(e) insists, in a matter not pending before tribunal, that the lawyer engage in conduct contrary to his or her own judgment and advice, that may or may not be prohibited under the Disciplinary Rules;
(f) deliberately disregards an agreement or obligation to the lawyer as to expenses or fees; or
(g) uses the lawyer's services to perpetrate a crime or fraud.

If you have concluded that your client has a meritless claim, and your client refuses to heed your judgment or advice that the claim is in fact meritless, the continued representation may violate the DR 7-102(A)(2) prohibition against the assertion of an unwarranted claim. Thus, DR 2-110(B)(2) may make withdrawal mandatory because pressing the claim would amount to a violation of a Disciplinary Rule. Similarly, such a determination on your part would also allow permissive withdrawal under DR 2-110(C)(1)(a) and DR 2-110(C)(2). The Code quite clearly forbids advocating meritless and frivolous claims.

Additional reasons for permissive withdrawal include instances where:

(a) the lawyer's continued employment is likely to result in a violation of a Disciplinary Rule,

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

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(b) the lawyer cannot work with co-counsel,
(c) the lawyer's mental or physical condition renders it difficult to carry out effective employment,
(d) the lawyer's client knowingly and freely assents to the termination of employment, or
(e) the lawyer believes in good faith that in a proceeding before a tribunal, the tribunal will find the existence of other good cause for withdrawal (DR 2-110(C)).

It should be noted that Model Rule 1.16(b)(6) lists an unreasonable financial burden on the lawyer as a ground for permissive withdrawal. Though the Disciplinary Rules do not contain this provision, it can lead to ineffective representation pursuant to DR 2-110(C)(1)(d), or may constitute "other good cause for withdrawal." DR 2-110(C)(6); N.Y. Ethics Op. State 653 (1993); DR 2-110(B). However, it is important to look at this Model Rule cautiously and not to give it an overly expansive reading; one of the inherent qualities of contingency fee cases is the assumption of a financial burden, which is part of the knowing risk that is taken in exchange for a chance to realize a fixed portion of a settlement or verdict.

Finally, keep in mind that there are instances where a lawyer **must** withdraw, which occur when:
(a) the rules of a tribunal require such withdrawal,
(b) the lawyer knows the client is bringing the legal action for the purpose of harassment or malicious injury,
(c) the lawyer knows that if he or she continues with the employment, there will be a violation of a Disciplinary Rule,
(d) the lawyer's mental or physical condition prevents him or her from carrying out the employment effectively or
(e) the lawyer is discharged by the client (DR 2-110(B)).

The Forum, by
Anastasia B. Byrnes, Esq.
New York, New York

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am a real property lawyer who has never handled a negligence case. A close friend of mine, Buddy, was recently injured in a slip and fall while he was shopping in a local retail store. The store owner's insurance company has offered a nominal amount to Buddy for his injuries.

I have agreed to represent Buddy on his claim against the store owner. Buddy has limited funds. He and I have agreed that I would take care of all the expenses connected to the representation, and that we would split the recovery equally. Since our friendship goes back many years, I have not put our agreement in writing.

Is there anything I have overlooked?

Sincerely,
Buddy's Friend

party? Anyone he could dig up!"[3] "Families are like fudge. Mostly sweet with a few nuts."[4] "Madness takes its toll; please have exact change."[5] "Some people are wise, and some, otherwise."[6] Are rhetorical questions effective? What do you think? Readers want answers, not questions. Some writers use rhetorical questions to make readers think or to involve them. Do you agree? Rhetorical questions fail because you don't know how the reader will answer the question or how involved the reader wants to be. False ethical appeals are attempts to convince a reader that you're credible, ethical, honest, or meticulous because you say so. Instead of telling the reader that you exhaustively researched the law, discuss your research exhaustively. Let your writing speak for itself. Some false, unnecessary appeals: "It is well settled that"; "it is hornbook law that"; "this author has carefully considered the facts and concludes that . . . ."

6. Hate Legalese. Use simple and common words that readers understand. Legalese is the antithesis of plain English. All legalisms can be eliminated. The only loss will be the legalese, and the gain will be fewer words and greater understanding. *Incorrect*: "Enclosed herewith is my brief." *Correct:* "Enclosed is my brief." *Incorrect:* "The defendant has a prior conviction." *Correct:* "The defendant has a conviction." Eliminate these words: "aforementioned," "aforesaid," "foregoing," "forthwith," "hereinafter," "henceforth," "herein," "hereinabove," "hereinbefore," "per" (and "as per"), "said," "same," "such," "therein," "thereby," "thenceforth," "thereafter," "to wit," "whatsoever," "whereas," "wherein," and "whereby." Legal writing is planned, formal speech. If you wouldn't say it, don't write it. Write "earlier" or "before," not "prior to." Write "after" or "later," not "subsequent to." Legalese makes for bad lawyering: I am, inter alia, an attorney, hereinafter a per se bad attorney, for utilizing said aforementioned legalese.

7. Hate Pomposity. Be formal but not over the top. Stay away from IQ or SAT words. No one will be impressed. You'll look bovine, fatuous, and stolid, not erudite, perspicacious, and sagacious. The fewer syllables in a word, the better. Prefer simple and short words to complex and long words: "Adjudicate" *becomes* "decide." "Aggregate" *becomes* "total." "Ameliorate" *becomes* "improve" or "get better." "As to" *becomes* "about" or "according to." "At no time" *becomes* "never." "Attain" *becomes* "reach." "Commence" *becomes* "begin" or "start." "Complete" *becomes* "end" or "finish." "Component" *becomes* "part." "Conceal" *becomes* "hide." "Demonstrate" *becomes* "show." "Donate" *becomes* "give." "Effectuate" *becomes* "bring about." "Elucidate" *becomes* "explain." "Implement" *becomes* "carry out" or "do." "In case" or "in the event that" *becomes* "if." "Incumbent upon" *becomes* "must" or "should." "Is able to" *becomes* "can." "Necessitate" *becomes* "require." "Per annum" *becomes* "a year." "Possess" *becomes* "own" or "have." "Proceed" *becomes* "go." "Procure" *becomes* "get." "Relate" *becomes* "tell." "Retain" *becomes* "keep." "Sufficient" *becomes* "enough." "Terminate" *becomes* "end," "fire," or "finish." "Utilize" *becomes* "use."

Pomposity arises when writers go out of their way to sound intelligent but then err. For example, you'll sound foolish if you try to use "whom" and then use it incorrectly. *Incorrect:* "Jane is the person who defendant shot." *Better:* "Jane is the person whom defendant shot." *Best*: "Jane is the person defendant shot." *Incorrect:* "Whom shall I say is calling?" The answer is, "He [or *she*] is calling." *Better:* "Who shall I say is calling?" *Best:* "Who's calling?"

You'll also sound pompous if you misuse reflexive and intensive pronouns like "myself," "yourself," "yourselves," "ourselves," "herself," "himself," "themselves," and "itself." Consider this dialogue between A and B. *Incorrect:* A: "How are you? B: "Fine. And yourself?" *Correct:* A: "How are you?" B: "Fine. And you?" Why would anyone say "How are yourself?"

8. Hate Abbreviations, Contractions, and Excessive or Undefined Acronyms. Don't use these abbreviations: "i.e.," "e.g.," "re," "etc.," and "N.B." Be formal: use "facsimile," not "fax." Leave contractions, which are friendly and sincere, for informal writing, e-mails, and Legal Writer columns. Eliminate "aren't, "couldn't," "don't," "haven't," "it's," "isn't," "shouldn't," "wouldn't," and "you're." An acronym is an abbreviation formed from the first letter of each word of a title. Define terms and nouns you'll frequently use in your legal document: Department of Housing Preservation and Development (DHPD); New York Stock Exchange (NYSE). Don't use quotation marks or "hereinafter referred to as" to set out the acronym: Judge Me Not Corporation ("JMNC") *becomes* Judge Me Not Corporation (JMNC). Common legal acronyms need not be defined: CPLR, not Civil Practice Law & Rules (CPLR). If you use acronyms, use articles that modify the acronym, not the word. *Example:* "An NYPD officer," not "A NYPD officer." A person's name or title need not be defined. *Incorrect:* "John Smith (Smith)" or "John Smith, the architect (the Architect)."

9. Hate Mystery and History. Legal documents aren't mystery novels. Don't wait to surprise your readers until the end. Don't bury essential issues in the middle, either, or give your readers clues along the way, hoping they'll catch them on time. Few will try to decipher what you have to say. Also, don't inundate your readers with the history of the case law or statute. Readers don't want a history lesson.

Legalese makes for bad lawyering.

Stay away from IQ or SAT words.

They want current law and how it applies.

10. Hate Inconsistency. Be consistent in tone: Don't be formal in one place and informal in another. Be consistent in point of view: Don't use your point of view in one place and the reader's in another. *Example:* "Writers must not shift your point of view." Be consistent in reference: Don't write "my client" in one place, "this writer" in another, and "plaintiff" in a third. Be consistent in voice: Don't write "you" in one place and "I" in another. Be consistent in style. *Examples:* If you use serial commas in one place, use them everywhere. If you write "3d Dep't" in one citation, don't write "3rd Dept." in another.

11. Hate Nominalizations. A nominalization is a verb turned into a noun. Nominalizations are wordy. They hide. They're abstract. *Example:* "The defendant committed a violation of the law." *Becomes:* "The defendant violated the law." Don't bury your verbs. Most buried verbs end with these suffixes: "-tion," "-sion," "-ment," "-ence," "-ance," and "-ity." Use strong verbs: "Allegation" *becomes* "allege." "Approval" *becomes* "approve." "Assistance" *becomes* "assist." "Complaint" *becomes* "complain." "Conclusion" *becomes* "conclude." "Conformity" *becomes* "conform." "Consideration" *becomes* "consider." "Decision" *becomes* "decide." "Description" *becomes* "describe." "Dissatisfaction" *becomes* "dissatisfied." "Documentation" *becomes* "documents." "Enforcement" *becomes* "enforce." "Evaluation" *becomes* "evaluate." "Examination" *becomes* "examine." "Finding" *becomes* "found." "Holding" *becomes* "held" or "holds." "Identification" *becomes* "identify." "Indemnification" *becomes* "indemnify." "Knowledge" *becomes* "know." "Litigation" *becomes* "litigate." "Motion" *becomes* "moved." "Notation" *becomes* "noted." "Obligation" *becomes* "obligate" or "oblige." "Opposition" *becomes* "oppose." "Performance" *becomes* "perform." "Preference" *becomes* "prefer." "Reference" *becomes* "refer." "Registration" *becomes* "register." "Reliance" *becomes* "rely." "Review" *becomes* "reviewed." "Ruling" becomes "rule." "Settlement" *becomes* "settle." "Similarity" becomes "similar." "Statement" *becomes* "state." "Technicality" *becomes* "technical."

12. Hate Negatives. Watch out for negative words: "barely," "except," "hardly," "neither," "not," "never," "nor," "provided that," and "unless." *Example:* "Good lawyers don't write in the negative." *Becomes:* "Good lawyers write in the positive." Eliminate negative combinations: "never unless," "none unless," "not ever," and "rarely ever." Don't use "but," "hardly," or "scarcely" with "not." Use "but" instead of "but however," "but nevertheless," "but that," "but yet," and "not but." Eliminate negative prefixes and suffixes: "dis-," "ex-," "il-," "im-," "ir-," "-less," "mis-," "non-," "-out," and "un-." Use negatives only for negative emphasis: A: "How are you?" B: "Not bad."

13. Hate Attacks or Rudeness. Condescending language, personal attacks, and sarcasm have no place in legal writing. Attacking others won't advance your reasoning. This behavior, possibly sanctionable, distracts readers and leaves them wondering whether your substantive arguments are weak. Wounding your adversary, your adversary's client, or the judge is ineffective. Instead, be courteous and professional. Never be petty. But if you must attack, aim to kill, metaphorically speaking.

In the next column, the Legal Writer will continue with the next baker's dozen of don'ts. Following that column will be three columns on grammar errors, punctuation issues, and legal-writing controversies. Together with the two preceding columns on legal writing's do's, this series represents legal writing's do's, don'ts, and maybes. ■

1. Ecclesiastes 3:1.

2. William Shakespeare, As You Like It, act 2, scene 7, *available at* http://www.shakespeare-literature.com/As_You_Like_It/10.html (last visited Feb. 22, 2007).

3. My Favourite Punsters: Stan Kegel, *available at* http://workinghumor.com/puns/stan_kegel.shtml (last visited Feb. 22, 2007).

4. *Pun* ny Oneliners, *available at* http://workinghumor.com/puns/oneliners.shtml (last visited Feb. 22, 2007) (attributed to Theresa Corrigan).

5. *Id.* (attributed to Goeff Tibballs).

6. *Id.* (attributed to Phylbert).

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Is there a chance you could do something in your column about the correct use of *nor*? Is it proper only when preceded by *neither*, or is it all right to use it alone, as in, "There was no candy in the jar, nor was there any in the cupboard"?

Answer: Senior Deputy County Counsel Judy Luby, of Monterey Park, California, asked this question, which I cannot recall having been asked before, although I've frequently seen both *nor* and *neither/nor* used incorrectly.

First, if you use the words *neither . . . nor* to connect two singular subjects, the verb you use must be singular: "Neither a bluebird nor a robin *is* commonly seen here in the winter." If *neither . . . nor* connects two plural subjects, the verb must be plural: "Neither rumors nor people's memories *are* found to be reliable." (This rule applies also to other pairs: *either . . . or*, and *not only . . . but also*.)

But suppose one of the pairs is singular and the other is plural, what do you do? For example, what is the correct verb in the following sentence? "Neither rumor nor people's memories *is/are* found to be reliable." In that situation the rule is that the subject closer to the verb decides the number of the verb, so in the cited sentence, you would choose *are*. Grammarians often dub this the rule of "attraction," the number of the closer noun "attracting" the number of the verb.

However, if applying the rule of attraction results in a sentence that sounds awkward, I would merely change the order of the subjects to avoid that result. Applying the rule to the same sentence when the subjects are reversed would result in what I consider an awkward statement: "Neither people's memories nor rumor *is* found to be reliable."

The word *nor* may be used alone, as long as the clause containing *nor* contains no other negative. "She has committed no misdemeanor, *nor* has she been accused of one." The word *nor* is the only negative in its clause, although there is a negative in the previous clause. Had the word *one* been replaced by *none*, there would have been two negatives in that clause so it would have been ungrammatical (and confusing): "She has committed no misdemeanor, nor has she been accused of none."

Therefore, if you do use a negative (like *no*, *none*, *nothing*, or *never*), in a clause, be sure that all other verbs and expressions in that clause are positive:

No injury occurred to *either* passenger.

He has *never* attended *any* meetings.

None of the participants requested further help.

Question: A word that was once only a noun, but that I now often see as a verb, is *disrespect*. When did it become a verb and is it currently considered correct?

Answer: I don't know exactly when it became a verb, but *disrespect* is not listed as a verb in the *American Heritage Dictionary*'s 1985 edition (AHD). It is listed as a verb, however, in *Webster's Third*, 1993 edition. The reader is right that it is now widely used. It is so common that it is often abbreviated (in the past tense) to *dissed*, as in "He dissed me." The abbreviation *dissed* is not listed in *Webster's Third*, but it may soon be, as either slang or colloquial usage.

The abbreviation *dis* parallels the similar shortening of other words that have become popular. The noun *metamorphosis* became a respectable verb, *to metamorphose*, and then was shortened to *morph*, which is colloquial. The noun *pornography* became an adjective, *pornographic*, and then, in an abbreviation of the original noun, it was listed as *porno* in the 1985 AHD. Since then it has dropped the second *o* and has become *porn*.

That's the way of language; its speakers change it to suit their whims. Before 2002, we used *embed* only when referring to objects. During the Iraqi war the military began to *embed* human beings into operations abroad. Finally we created the noun *embed* from the verb, so we now have human *embeds*.

When words change into new categories, readers send indignant e-mail. Sometime ago I quoted a university administrator who complained that a fellow-administrator was "just desking in his office." Readers protested. One wrote, "If *desking* is okay, why not, 'I *office* here and *administrate* next door'?" On checking, I found that in fact, the verb *office* is not new, having appeared in *The Nation* magazine in 1892 in the locution, "An attorney officing in the same building . . . " (But my spell checker still protests that word.)

The verb *administrate*, a backformation, is newer. First came the verb *administer*. From the verb we got the noun *administration*. Then from that noun came the backformation, the verb *to administrate*. That new verb is unnecessary, and it now often replaces the perfectly good original verb *administer*.

The process of backformation has created other unnecessary verbs like *orientate* (from the original verb *orient* to the noun *orientation* and back to *orientate*. The verb *to obligate* is a backformation that began with the verb *to oblige*. Backformation has also given us the silly verb *to notate*, from *notation*, the noun form of the original verb *to note*. But such is the way of words – or perhaps, more accurately, those who speak them.

Remember Emily Dickinson's lines:

> A word is dead when it is said, some say.
> I say it just begins to live that day.

Potpourri

Don't attempt to use the idioms of a foreign language. Case in point: Recently, when an American correspondent commented on television, "You can rest assured that . . . ," the Iraqi Security Adviser responded, "You can be rest assured . . . " ■

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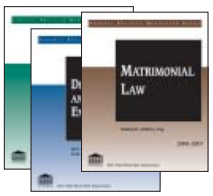

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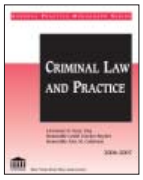

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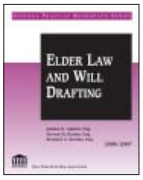

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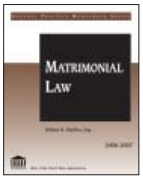

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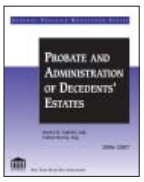

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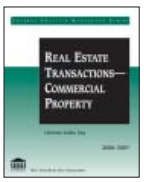

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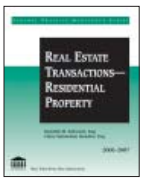

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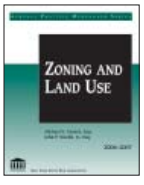

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Ossining, NY

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Andan Eddy
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Abbie Greenberger
Aaron Greenblatt
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Lori-Ann Hymowitz
Betsey Jean-Jacques
Andrew Michael Jensen
Talat Kayar
Dena Kesselman
Sam Khantsis
Morae Kim
Philippe Abner Knab
Elton Kohila
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Joseph John Meany
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Jeffrey John Provenzano
Ian Hugh Silverman
Sydney Jolie Taylor

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Patrick Robert Cummings
Ral James Mazza
Denise Marie Resta-Tobin
Hilary D. Stanley
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Jon Philip Thayer
Christopher John Torelli

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Marilyn Suchecki Mense
Deana Domenica Previte
Robert James Spencer

SIXTH DISTRICT
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Alyssa Hochberg Fontaine
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Rose-Carline Delicieux
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Graham Georffrey Van Epps

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Samyukt Bajaj
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Sheehan, Dennis P.
Smyk, Stephen D.
Tyler, David A.

SEVENTH DISTRICT
Barney, Brian J.
Brown, T. Andrew
Buholtz, Eileen E.
†* Buzard, A. Vincent
Castellano, June M.
Doyle, Hon. John D.
Lawrence, C. Bruce
Lightsey, Mary W.
†* Moore, James C.
* Palermo, Anthony R.
Reynolds, J. Thomas
Schraver, David M.
Schultz, Jill K.
Smith, Thomas G.
Tilton, Samuel O.7
* Vigdor, Justin L.
* Witmer, G. Robert, Jr.

EIGHTH DISTRICT
Brady, Thomas C.
Doyle, Vincent E., III
Edmunds, David L., Jr.
Embser, James T.
Evans, Lydia V.
Fisher, Cheryl Smith
* Freedman, Maryann Saccomando
Gerstman, Sharon Stern
†* Hassett, Paul Michael
Lamantia, Stephen R.
McCarthy, Jeremiah J.
McCarthy, Joseph V.
Meyer, Harry G.
O'Donnell, Thomas M.
Porcellio, Sharon M.
Sconiers, Hon. Rose H.
Subjack, James P.
Young, Oliver C.

NINTH DISTRICT
Burke, Patrick T.
Byrne, Robert Lantry
Campanaro, Patricia L.
Casey, Bridget M.
Dohn, Robert P.
Enea, Anthony J.
Fontana, Lucille A.
Gordon Oliver, Arlene Antoinette
Gouz, Ronnie P.
Kranis, Michael D.
Lagonia, Salvatore A.
Markhoff, Michael S.
Marwell, John S.
* Miller, Henry G.
Murray, Conal E.
†* Ostertag, Robert L.
Sciortino, Sandra B.
Selinger, John
†* Standard, Kenneth G.
Thornhill, Herbert L., Jr.
Townley, Rosemary A.
Van Scoyoc, Carol L.
Wallach, Sherry Levin
Welby, Thomas H.
Wilson, Leroy, Jr.

TENTH DISTRICT
* Bracken, John P.
Buonora, John L.
Cartright, Valerie M.
Castillo, Nelson A.
Chase, Dennis R.
Clarke, Lance D.
Duffy, James P., III
Elder-Howell, Andrea M.
Fishberg, Gerard
Franchina, Emily F.
Gann, Marc
Giorgio, Frank, Jr.
Gross, John H.
†* Levin, A. Thomas
Levy, Peter H.
Luskin, Andrew J.
Makofsky, Ellen G.
Margolin, Linda U.
Mihalick, Andrew J.
* Pruzansky, Joshua M.
Purcell, A. Craig
* Rice, Thomas O.
Robinson, Derrick J.
Smolowitz, Barry M.
Steinberg, Harriette M.
Stempel, Vincent F., Jr.
Thompson, Charlene R.
Walsh, Owen B.
Winkler, James R.

ELEVENTH DISTRICT
Cohen, David Louis
Dietz, John R.
Goldblum, A. Paul
James, Seymour W., Jr.
Lomuscio, Catherine
Lonuzzi, John A.
Nashak, George J., Jr.
Terranova, Arthur N.
Wimpfheimer, Steven

TWELFTH DISTRICT
Chavez, Daniel M.
Friedberg, Alan B.
Millon, Steven E.
* Pfeifer, Maxwell S.
Schwartz, Roy J.
Stansel, Lynn
Summer, Robert S.
Weinberger, Richard

OUT OF STATE
Cahn, Jeffrey Barton
* Fales, Haliburton, II
* Walsh, Lawrence E.

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* *Past President*

BY GERALD LEBOVITS

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Do's, Don'ts, and Maybes: Legal Writing Don'ts — Part I

In the last two columns, the Legal Writer discussed 26 things you should do in legal writing. We continue with a baker's dozen of things you shouldn't do: 13 things writers should hate.

1. Hate Boilerplate. Boilerplate is laziness. It's boring and intimidating at the same time. Readers know when you do a cut-and-paste job. They won't read boilerplate. Don't recycle your legal arguments. If you or the person from whom you've copied your boilerplate made errors in the original document, you'll repeat them in your boilerplate. Each client and case is unique. Boilerplate won't be specific to your case. Boilerplate is fine for contracts or forms. It's unacceptable in a legal argument.

2. Hate Clichés. Avoid clichés like the plague. Clichés make writers look as if they lack independent thought. They're banal. Eliminate the following: "all things considered," "at first blush," "clean slate," "exercise in futility," "fall on deaf ears," "foregone conclusion," "it goes without saying," "last-ditch effort," "leave no stone unturned," "lock, stock, and barrel," "making a mountain out of a molehill," "nip in the bud," "none the wiser," "pros and cons," "search far and wide," "step up to the plate," "tip of the iceberg," "wait and see," "wheels of justice," "when the going gets tough," and "writing on a clean slate."

3. Hate Misrepresentations and Exaggerations. Be honest. Mistakes are excused. Purposeful misstatements and negligent misquoting aren't. Honesty is the best policy. It's also the only policy. To prevent misrepresentations, cite fact and law accurately, using the record for facts and original sources for law. But don't obsess. Obsessing over accuracy leads to including irrelevant details. Obsessing will make you overly cautious, force you to over-explain, cause you to submit a document late, and lead you to hate being a lawyer. Exaggerating is a form of misrepresenting. Understate not only to show integrity but also because understating persuades. Understating calls attention to content, not the writing or the writer. Also, concede what you must to make you honest and reasonable.

4. Hate Expletives. "Expletive" means "filled out" in Latin. Avoid expletives: "there are," "there is," "there were," "there was," "there to be," "it is," and "it was." *Examples:* "*There are* three issues in this case." *Becomes:* "This case has three issues." "*There is* no fact *that* is more damaging." *Becomes:* "No fact is more damaging." "The court found *there to be* prosecutorial misconduct." *Becomes:* "The court found prosecutorial misconduct." Also eliminate double expletives*: "It is* obvious that *it will* be my downfall." *Becomes:* "My mistake will be my downfall." *Exceptions:* Use expletives for emphasis; for rhythm; to climax (end with emphasis); or to go from short to long or from old to new. *Emphasis examples:* "It was a full metal jacket bullet that killed John." Here, the author emphasizes the object that killed John, not that John was killed. "It was Judge Beta who wrote the opinion." Here, the author emphasizes Judge Beta's authorship even though it would have been more concise to write "Judge Beta wrote the opinion." *Rhythm example:* "To everything there is a season."[1] This example would have been different had the author written "To everything is a season." *Climax example:* "There is a prejudice against sentences that begin with expletives" is better than "A prejudice against sentences that begin with expletives exists." The climax should not be on "exists."

5. Hate Mixed Metaphors, Puns, Rhetorical Questions, and False Ethical Appeals. Metaphors compare two or more seemingly unrelated subjects. Metaphors make the first subject equal to the second: "All the world's a stage/ And all the men and women merely players."[2] In this example, Shakespeare compared the world to a stage, and men and women to actors. Mixed metaphors combine two commonly used metaphors to create a nonsensical image: "He tried to nip it in the bud but made a mountain out of a molehill." Puns fail because they transform formal legal writing to informal writing. Puns are for children, not groan readers. A pun is a figure of speech that uses homonyms as synonyms for rhetorical effect. *Examples:* "Whom did the mortician invite to his

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