NOVEMBER/DECEMBER 2006
VOL. 78 | NO. 9

NEW YORK STATE BAR ASSOCIATION

Journal

Building Bridges Between Parallel Paths

The First New York Listening Conference for Court Officials and Tribal Representatives

by Marcy L. Kahn, Edward M. Davidowitz and Joy Beane

Also in this Issue

BESTSELLERS

FROM THE NYSBA BOOKSTORE

November/December 2006

Attorney Escrow Accounts, Second Edition

Completely updated for 2006, *Attorney Escrow Accounts*, Second Edition, offers comprehensive coverage of the most common situations involving client funds and clearly discusses the legal and ethical issues encountered.
PN: 40266 / **Member $45** / List $55 /164 pages

Collections and the Enforcement of Money Judgments, 2006 Revision

This classic text provides detailed guidance in the field of debt collections and enforcement of money judgments. Completely updated with the 2006 cumulative supplement.
PN: 4030 / **Member $105** / List $140 / 804 pages

Condemnation Law and Procedures in New York State

This timely book provides a thorough analysis of eminent domain law in New York State and includes a discussion of the U.S. Supreme Court decision *Kelo v. City of New London*.
PN: 4043 / **Member $65** / List $75 / 434 pages

Construction Site Personal Injury Litigation — New York Labor Law §§ 200, 240(1), 241(6)

Perhaps no single scheme of statutory causes of action has initiated more debate. This text provides a road map through this at-times confusing area of law. Includes a summary of key case developments.
PN: 4047 / **Member $80** / List $110 / 424 pages

Depositions: Practice and Procedure in Federal and New York State Courts

This detailed text covers all aspects of depositions. Topics include pre-trial discovery schedules, appropriate and inappropriate behavior at depositions, and motions for protective orders.
PN: 4074 / **Member $50** / List $65 / 450 pages

Foundation Evidence, Questions and Courtroom Protocols

This manual contains a collection of the forms and protocols that provide the necessary predicate or foundation questions for the introduction of common forms of evidence and the examination of witnesses.
PN: 4107 / **Member $48** / List $57 / 172 pages

Legal Manual for New York Physicians, Second Edition

Co-published by NYSBA and the Medical Society of the State of New York, this comprehensive text is a must-have for physicians, attorneys representing physicians and those involved in the medical profession. Presented in an easy-to-use question-and-answer format.
PN: 41325 / **Member $90** / List $105 / 1,002 pages

N.Y. Criminal Practice, Second Edition

Covers all aspects of the criminal case, from the initial identification through the trial and appeals. Completely updated with the 2006 Supplement.
PN: 4146 / **Member $120** / List $140 / 1,234 pages

New York Lawyer's Deskbook, Second Edition, 2005-2006

WINNER OF THE ABA'S CONSTABAR AWARD
The Second Edition consists of 25 chapters, each covering a different area of practice. Each chapter gives the nuts and bolts of practice in that particular area of law.
PN: 4150 / **Member $225** / List $275 / 1,970 pages

New York Lawyer's Formbook, Second Edition, 2005-2006

The *Formbook* is a companion volume to the *N.Y. Lawyer's Deskbook* and includes 21 sections, each covering a different area of practice.
PN: 4155 / **Member $225** / List $275 / 3,172 pages

Practitioner's Handbook for Appeals to the Appellate Divisions of the State of New York, Second Edition

Covers the aspects of handling appeals to the New York State Appellate Division, addresses recent statutory changes and rule revisions, and includes commonly needed forms. A must for practitioners filing civil or criminal appeals.
PN: 4014 / **Member $48** / List $57 / 172 pages

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

NEW!

Legal Forms on the Web — 2005-2006

Instantly available on the Web, over 700 forms featured in the *N.Y. Lawyer's Deskbook* and *N.Y. Lawyer's Formbook*, and used by experienced practitioners in their daily practice. Also available, hundreds of forms used in adoption, real estate, commercial leasing, estate planning and municipal practice. Download the forms in the practice area you need when you need them. See www.nysba.org for details.

Insurance Law Practice, Second Edition

Completely updated for 2006, the Second Edition provides a comprehensive approach to this complex area of the law. Includes five new chapters on disability insurance, workers' compensation insurance, professional liability coverage, insurance regulation, and agent and broker liability.
PN: 41256 / **Member $110** / List $140 / 1,382 pages

N.Y. Municipal Formbook, Third Edition

Forms on CD

A rich resource for attorneys dealing with local government as it affects employees, citizens and businesses. Over 1,000 forms covering all aspects of municipal law.
PN: 41606 / **Member $150** / List $185 / 3,318 pages

The Practice of Criminal Law under the CPLR and Related Civil Procedure Statutes, Fourth Edition

Presents in an orderly, logical way the rules and provisions of law concerning jurisdiction, evidence, motion practice, contempt proceedings and Article 78 and habeas corpus applications.
PN: 40696 / **Member $43** / List $50 / 194 pages

Coming Soon!

Estate Planning and Will Drafting in New York, 2006 Revision

Provides a practical overview of the complex rules and considerations involved in the various aspects of estate planning in New York State. Includes numerous sample wills and checklists.

December

New York Lawyer's Deskbook, Second Edition, 2006-2007

New York Lawyer's Formbook, Second Edition, 2006-2007

Early 2007

Representing People with Disabilities, 2007 Revision

Expand your professional knowledge

NEW YORK STATE BAR ASSOCIATION

1.800.582.2452 www.nysba.org/pubs

Mention Code: CL2956

NYSBA

HELPFUL
Member Discount Numbers

HARDWARE & LEGAL SOFTWARE

- AbacusLaw **800.726.3339**
- Dell™ **877.568.3355**
- CaseSoft **904.273.5000**
- Corel **800.545.1294**
- PCLaw **800.387.9785 x2**
- T.A.M.E.™ **888.826.3529**

LEGAL RESEARCH & ALERTS

- Loislaw.com **800.364.2512**
- CourtAlert **212.227.0391**

JURY RESEARCH

- JuryVoice™ **www.juryvoice.com**
  (*Code NYBAR-JV-001)

FINANCIAL SERVICES

- Bank of America
  Financial Services
  800.447.5555
  (Code CZP0 for NYSBA Rewards Amex)
  800.345.0397
  (Code EA0HS for CD, Money Market & IRA Accounts)
- NYSBA-Endorsed ABA Retirement Funds
  State Street Bank **800.826.8901**

INSURANCE PROGRAMS

- USI Bertholon-Rowland
  800.727.7770

OFFICE PRODUCTS & SERVICES

- AmeriVault **800.774.0235 x7880**
  (online data backup)
- MeetingBridge
  www.meetingbridge.com
- Overnight Delivery Services:
  DHL Express® **888.758.8955**
  (Code N32-YNYS)
  UPS® **800.325.7000**
  (Code C700170)
- Blumberg Forms Online
  800.221.2972 x565
- PennyWise **800.942.3311**

OTHER

- Car Rental Discount Programs:
  Avis® **800.698.5685**
  (Code A549100)
  Hertz® **800.654.2210**
  (Code 0013004)
- American Lawyer Media
  800.537.2128

For more information, go to:
www.nysba.org/MemberBenefits

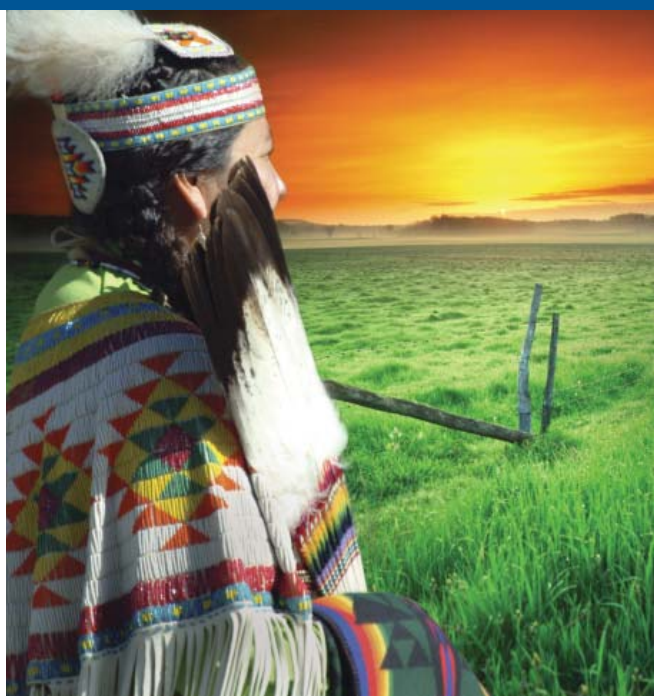
* If no code is provided, when contacting companies always mention your NYSBA membership number. Call 518.487.5577/800.582.2452 if you need this information.

NEW YORK STATE BAR ASSOCIATION
Journal

EDITORIAL OFFICES
One Elk Street
Albany, NY 12207
(518) 463-3200
FAX (518) 463-8844
www.nysba.org

CONTENTS

NOVEMBER/DECEMBER 2006



BUILDING BRIDGES BETWEEN PARALLEL PATHS

The First New York Listening Conference for Court Officials and Tribal Representatives

BY MARCY L. KAHN, EDWARD M. DAVIDOWITZ AND JOY BEANE

DEPARTMENTS

CARTOONS © CARTOONRESOURCE.COM

 The *Journal* (ISSN 1529-3769), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $18. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

Achieving Gender and Ethnic Diversity in the Profession

Mark H. Alcott

In my first message, which appeared in the June issue of the Bar *Journal*, I introduced the major theme of my presidency: defend and strengthen core values; promote needed reform. In the messages that followed, I have detailed what the Association is doing to protect the independence of the bar and the courts and to provide access to justice for the poor and disadvantaged, addressing all but one of our core values. In this issue, I turn to our remaining core value – diversity of the profession – and highlight two major areas that deserve our attention and require reform.

Gender Equity in the Workplace, Re-Entry into the Workforce

In 1975, women represented only 14% of all legal professionals working at medium-size and large law firms. By 1992, that number had risen to 37%. Today, women are a majority of our law students; a majority of new bar admissions; a majority of those entering our law firms. They bring with them great talent, energy and enthusiasm. Anyone who has been involved, as I have been for many years, in evaluating the performance of associates in the early years of their practice, knows that women not only hold their own, but in fact make up more than their share of superstars.

And yet, when we look at the same class several years later, a disproportionate number of women, including high performers, have left. After less than five years' employment, more than half of the female associates leave law firms. And nearly two-thirds of the minority female associates leave. This high attrition rate is distressing to women associates, wasteful to law firms, and a disservice to the profession, which is deprived of large numbers of experienced, talented lawyers at a key point in their careers.

Ultimately, although women make up about half of the associates at law firms nationwide, women account for only 17% of the partners in these firms. Even more abysmal are the statistics reflecting the numbers of women of color who become partners, as they are faced with a dual challenge, given that minorities – male and female – make up only 4.63% of the partners at large firms nationwide.

There are many reasons for the disparity that exists in top-level law firm positions, but certainly one is that, due to family needs and the desire to achieve a healthy work-life balance, women often are unable or unwilling, over the long haul, to devote the enormous number of hours required for these positions.

That is why it is imperative that law firms take a look at their policies and practices and self-evaluate the status of gender equity within their firm. We are working on a tool that will help them do so. Under the leadership of my predecessors, the Bar Association's Gender Equity Task Force, chaired by Carla M. Palumbo, was given the task of preparing a self audit for law firms and employers. The self audit is an internal assessment tool that will assist employers in achieving gender equity and improving the quality of life in their workplace. The self audit will be accompanied by "Principles of Best Practices" – a compilation of model policies and practices for employers to emulate in their workplace. The Task Force will also be encouraging law firms across the state to submit their own best policies and practices, to be included in an updated "Principles of Best Practices." If you are particularly proud of a policy or practice, this will be your opportunity to share it. We

MARK H. ALCOTT can be reached at president@nysbar.com.

can learn from each other and work together to achieve gender equity and improve the quality of life in law firms throughout New York.

We must also address the needs of women who, in balancing the demands of their profession, the needs of their family, and their desire for a satisfying personal life, leave their firm or withdraw from the profession, with the intent or the hope of returning. For some, the absences are brief. For others, the absences are lengthy. This time away from the profession is not, or should not be, a problem. A lawyer has a career life expectancy of 45 years or more. If she takes a leave of absence of a few months or a number of years, she can still have a very productive career.

For many, however, their time away from the profession becomes longer than originally intended, and the prospect of re-entry becomes a daunting challenge. Some are unable to surmount this challenge and are lost to the profession – either permanently or longer than circumstances require.

To address this issue, I have formed the Special Committee on Lawyers in Transition, chaired by Lauren J. Wachtler. The mission of this committee is to make re-entry to the profession less challenging, perhaps even to make the absences less extended, by creating programs that preserve the links between the profession and lawyers during their leaves and help them when they are ready to return. I am confident that the difficulties of re-entry can be eased by providing the lawyer, during her absence, with networking programs, CLE courses, lectures, social activities, mentoring, training, career counseling, public service activities and the like.

With these initiatives, we are approaching the gender gap from two angles. First, we are working to achieve gender equity and work-life balance in the workplace which will, in turn, decrease the number of women who find it necessary to leave the profession. Second, we are helping those who take a leave of absence, reaching out to encourage and assist them in re-entering the profession. Women are the future of our profession, and we must provide a hospitable work environment in which they can thrive.

Diversity on the Bench

Diversity in New York's judiciary, from the highest court down to the courts of our counties and cities, is essential to public confidence in and the independence of the judiciary.

Judge George Bundy Smith's recent departure from the Court of Appeals, leaving that Court without an African-American judge, reminds us all that there is much to do to increase racial diversity in New York's courts. A look at the numbers, however, serves as more than a reminder; it reveals just how serious the problem really is.

In 2003, persons of color represented just 13.7% of New York's judges. This lack of diversity on the bench has taken its toll on public confidence in New York's judiciary. While 76% of New York's white registered voters believe that the state's judges are fair and impartial, only 60% of Latino voters and 51% of African-American voters hold that belief. Further, a majority of African-American and Latino voters believe that they receive worse treatment from New York's judges than do other groups.

Increasing the number of minorities on the bench would cultivate confidence in the judiciary which, in turn, would strengthen the independence of the courts. Moreover, a diverse judiciary would result in judicial decisions that reflect insight and experiences as varied as New York's citizenry.

But how do we increase the diversity of our courts? First, we must employ a new mindset. In other words, we simply must make increasing the diversity of our courts a priority. In selecting our judges, no matter the method, we must strive for a judiciary that reflects the diversity of our society. Our Association is working to achieve that level of diversity in the judiciary. Indeed, in our diversity policy adopted in 2003, we recognize that diversity increases our "strengths, capabilities and adaptability" and that, through increased diversity, we can "more effectively address societal and member needs with the varied perspectives, experiences, knowledge, information and understanding inherent in a diverse membership." These principles also apply to our court system, and true change will come only when the public recognizes that we all benefit from a judiciary as diverse as New York's population.

Second, we must continue to find ways to help our minority members ascend to the bench. Our Task Force on Increasing Diversity in the Judiciary has presented "nuts and bolts" programs throughout the state designed to educate lawyers on how to make the transition from the bar to the bench. Promotional materials for these programs were directed at members of minority groups, with the hope of assisting minorities with the selection process.

In addition, to entice skilled lawyers to leave the financial security of private practice, we must continue to push for an increase in judicial salaries. The actual cost of living has risen more than 25% since the last judicial pay raise in 1999. New York state judges have received only two pay increases in the last 18 years. How can we reasonably expect to attract the best and brightest to the bench if those putting on a robe risk financial insecurity?

Achieving diversity in our profession requires our concentrated, sustained effort. Let's get to it. ■

NYSBACLE

Schedule of Fall Programs *(Subject to Change)*

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

Buying or Selling a Small Business
Fulfills NY MCLE requirement for all attorneys (6.5): 3.0 skills; 3.5 practice management and/or professional practice

November 8	New York City

Operating the New York Not-For-Profit Organization: Current Issues and Best Practices
Fulfills NY MCLE requirement for all attorneys (7.0): 0.5 ethics and professionalism; 1.0 skills; 5.5 practice management and/or professional practice

November 8	Buffalo

+Update 2006
(video replays)
Fulfills NY MCLE requirement (7.5): 7.5 practice management and/or professional practice

November 8	Ithaca; Plattsburgh; Saratoga
November 9	Jamestown
November 17	Poughkeepsie; Watertown
November 28	Melville, LI; Nanuet
November 29	Buffalo
December 1	Loch Sheldrake
December 5	Tarrytown

Ethics and Professionalism
(half-day program:)
Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 ethics and professionalism

November 9	Rochester
November 14	Albany
November 17	Tarrytown
November 30	Melville, LI
December 1	Syracuse
December 7	New York City
December 13	Buffalo

Update on Trucking Litigation and Claims
Fulfills NY MCLE requirement for all attorneys (7.0): 2.0 skills; 5.0 practice management and/or professional practice

November 9	Melville, LI
November 16	Syracuse
November 30	New York City

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

November 9	Albany
December 4	Tarrytown
December 6	New York City
December 7	Rochester
December 15	Buffalo

Administrative Hearings Before New York State Agencies
Fulfills NY MCLE requirement for all attorneys (7.0): 7.0 practice management and/or areas of professional practice

November 14	New York City

+Hot Topics in Real Property Law and Practice
Fulfills NY MCLE requirement (6.5): 6.5 skills; practice management and/or areas of professional practice

November 14	Melville, LI
November 17	Binghamton
November 28	New York City
December 13	Rochester
December 14	Tarrytown

Risk Management for Attorneys—Don't Make Malpractice Your Nightmare
(half-day program)
Fulfills NY MCLE requirement for all attorneys (3.5): 2.5 ethics and professionalism; 1.5 practice management and/or professional practice

November 14	Buffalo
December 4	New York City

Practical Skills—Forming and Advising Businesses
Fulfills NY MCLE requirement for all attorneys (6.5): 1.0 skills; 5.5 practice management and/or professional practice

November 15	Albany; Buffalo; Hauppauge, LI; Rochester; Syracuse; Westchester
November 16	New York City

+Eighth Annual Institute on Public Utility Law
Fulfills NY MCLE requirement (6.5): 6.5 skills, practice management and/or areas of professional practice

November 16	Albany

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

+Fourth Annual Sophisticated Trusts and Estates Institute

Fulfills NY MCLE requirement (13.5): 1.0 in ethics and professionalism; 12.5 skills, practice management and/or areas of professional practice

(two-day program)

November 16-17 New York City

+The New Medicaid Law

Fulfills NY MCLE requirement (7.5): 7.5 skills, practice management and/or areas of professional practice

November 17 Buffalo
November 20 Albany
November 30 Syracuse
December 1 New York City
December 6 Melville, LI
December 8 Tarrytown

Handling Tough Issues in a Plaintiff's Personal Injury Action

Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 ethics and professionalism; 3.0 skills; 3.0 practice management and/or professional practice

November 17 New York City
November 29 Rochester

Shared Parenting and Child Support; Real Problems and Real Solutions

(half-day program)

Fulfills NY MCLE requirement for all attorneys (4.5): 2.0 skills; 2.5 practice management and/or professional practice

November 17 Melville, LI
December 1 Buffalo
December 8 Syracuse

Practical Skills—Basic Workers' Compensation Law

Fulfills NY MCLE requirement for all attorneys (7.5): 0.5 ethics and professionalism; 2.0 skills; 5.0 practice management and/or professional practice

November 21 Albany; Buffalo; Melville, LI; New York City; Syracuse

Accounting for Lawyers

Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 ethics and professionalism; 5.5 skills; 0.5 practice management and/or professional practice

November 29 New York City
December 1 Albany
December 6 Buffalo
December 7 Melville, LI

Handling DWI Cases in New York State

Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 ethics and professionalism; 1.5 skills; 4.5 practice management and/or professional practice

November 30 Albany

Compensation, Tax and Estate Planning for Executives

December 5 New York City

New Federal E-Discovery Rules

(half-day program)

Fulfills NY MCLE requirement for all attorneys (3.5): 1.0 skills; 2.5 practice management and/or professional practice

December 6 New York City
December 8 Albany

Legislative Law and Lobbying – 2006

(half-day program)

December 7 Albany

+Advanced Real Estate Practice

Fulfills NY MCLE requirement (7.0): 7.0 skills, practice management and/or areas of professional practice

December 8 New York City

To register or for more information call toll free

1-800-582-2452

In Albany and surrounding areas dial (518) 463-3724
Or fax your request to (518) 487-5618
www.nysba.org/CLE/fall2006
(Note: As a NYSBA member, you'll receive a substantial discount)

NYSBA

Building Bridges Between Parallel Paths

The First New York Listening Conference for Court Officials and Tribal Representatives

By Marcy L. Kahn, Edward M. Davidowitz and Joy Beane

Introduction

"Excellent!" "Just keep them going!" "This was a fabulous, ambitious and historic undertaking!" These are some of the reactions of participants in the First New York Listening Conference to a two-day program on American Indian law and culture for court and justice system officials. Held in Syracuse from April 26–27, 2006, the Listening Conference ("Conference") brought together for the first time in history more than 140 participants from New York's federal and state court systems and the Indian Nations and Tribes residing in and recognized by New York State. The Conference convened state and federal judges and court officials in sessions with tribal judges, chiefs, clan mothers,[1] peacemakers and other representatives from the justice systems of New York's Indian Nations and Tribes, to exchange information and learn about our respective concepts of justice. It was sponsored by the New York Tribal Courts Committee ("Committee");[2] the New York State Judicial Institute;[3] and the Center for Indigenous Law, Governance and Citizenship of Syracuse University College of Law,[4] in affiliation with the New York Federal-State-Tribal Courts Forum ("Forum").[5] The feedback shows this was no ordinary judicial conference: its origins lie in an outreach process dating back several years on both national and state levels.

The first part of this article introduces the nine Nations and Tribes recognized by the state of New York. The second reviews the origins and development of the federal-state-tribal courts forum movement nationally and includes a synopsis of the development and work of the New York Forum. The third and fourth sections discuss Conference planning and implementation, and summarize the information presented at the Conference. The last section previews the next steps for the Forum after the Listening Conference.

Recognized Tribes and Nations

The Native American population of New York State originally consisted of the Haudenosaunee and Algonquian Nations. Presently, more than 82,000 Indians from those Nations and others reside in New York.[6] While Native Americans may be found in every county in the state, many from the Haudenosaunee and Algonquian

Marcy L. Kahn is a Justice of the New York State Supreme Court for the First Judicial District and co-chair of the New York Tribal Courts Committee. She is a graduate of Stanford University and of the New York University School of Law, where she was an editor of the *Review of Law and Social Change* and initiated a course on Native American Rights Law.

Edward M. Davidowitz is a Justice of the New York State Supreme Court for the Twelfth Judicial District and co-chair of the New York Tribal Courts Committee. He is a graduate of Allegheny College and the Cornell Law School. He is the author of the *Practice of Criminal Law under the CPLR and Related Civil Procedure Statutes* and co-author of *Foundation Evidence, Questions and Courtroom Protocols*, both published by the New York State Bar Association.

Joy Beane is Executive Assistant to the Honorable Robert G.M. Keating, Dean of the New York State Judicial Institute, and counsel to the New York Tribal Courts Committee. She is a graduate of Fordham University School of Law and of Barnard College.

The authors wish to thank Valorie Perez, Esq., Senior Attorney at the New York State Judicial Institute, for her helpful assistance in the preparation of this article, and Kristen Sentoff, Pace University School of Law, Class of 2007, and Regina Gennari, Pace University, Class of 2008, for their research assistance. The authors wish to express their appreciation to Chief Judge Judith S. Kaye for envisioning this groundbreaking project and for affording them the opportunity to bring it to fruition. This endeavor is an illustration of her favorite four words: "I have an idea."

Nations continue to live in communities in New York's Indian country.[7] The Haudenosaunee Confederacy, also known as the Iroquois Nation, or Six Nations, is located, generally, in western, central and northwestern New York. It is composed of the following six Nations and Tribes: the Cayuga Indian Nation, the Mohawk Indians of Akwesasne,[8] the Oneida Indian Nation, the Onondaga Nation, the Seneca Nation[9] and the Tuscarora Nation. The Shinnecock Tribe and the Unkechaug Nation, both part of the Algonquian Nation, make their homes in eastern Long Island. Currently, the governments of the United States and New York State officially recognize the Cayuga Indian Nation, St. Regis Mohawk Tribe, Oneida Indian Nation, Onondaga Nation, Seneca Nation of Indians, Tonawanda Band of Seneca Indians and the Tuscarora Nation. The state also officially recognizes the Shinnecock Tribe and the Unkechaug Nation.

> Leaders continue to send members of their communities to the Forum meetings to serve as their "eyes and ears."

New York's Nations and Tribes have developed separate and unique justice systems. While many are firmly rooted in traditional justice values, they all vary widely. Some Nations, such as the Tuscarora and Onondaga, do not rely on written law or formalized court systems. Others have written laws and formal courts and procedures, such as the justice system established relatively recently by the Oneida Indian Nation.[10] For the most part, jurisdiction extends to all Indians whether or not they are members of the particular Nation.[11] The systems function and operate independently of each other.

Historical Developments

Federal-State-Tribal Courts Forums

The New York Tribal Courts Committee and the New York Federal-State-Tribal Courts Forum originate from a project of the Conference of Chief Justices, an organization of the chief judges of the courts of the 50 states, the District of Columbia and United States territories, whose mission is to improve the administration of justice in state court systems.[12] In 1985, the Conference created a committee to address state civil jurisdiction over Indians, after questions were raised by the United States Supreme Court's two decisions in *Three Affiliated Tribes v. Wold Engineering*.[13] The Committee on Jurisdiction Within Indian Country, later called the Tribal Relations Committee (TRC), held a series of panels and conferences on tribal jurisdiction.[14] The TRC obtained funding from the National Center for State Courts and the State Justice Institute to study tribal-state court relations, and set up demonstration forums in Arizona, Oklahoma, and Washington.[15]

In 1991, the TRC held a national conference in Seattle, Washington, with representatives of tribal, federal and state governments and justice systems. The TRC study and demonstration forums emphasized the need for cooperative efforts among federal, state and tribal entities,[16] and the idea of creating forums to address and to resolve jurisdictional conflict expanded after this initial conference. By 2003, 17 states had created tribal-state court forums.[17] In addition, the National Center for State Courts and the State Justice Institute published a 10-page guide for creating a forum, as encouragement for other states.

New York's Tribal Courts Committee and Forum

In 2002, Chief Judge Judith S. Kaye of the New York Court of Appeals created the New York Tribal Courts Committee to study the possibility of establishing a federal-state-tribal courts forum in New York and to explore how different justice systems might collaborate to foster mutual understanding and minimize conflict. She appointed Justice Marcy L. Kahn of the New York State Supreme Court to chair the Committee. Justice Edward M. Davidowitz, also of the New York State Supreme Court, soon joined the Committee and, under the guidance of Justices Kahn and Davidowitz as co-chairs, the Committee has worked for more than three years in a variety of ways to accomplish its mission.[18]

Emerging Issues and Consensus for a Forum

On May 22, 2003, the Committee met in Liverpool, New York, with representatives of New York's nine state-recognized Indian Tribes and Nations to ascertain their interest in developing a federal-state-tribal courts forum. Since then, meetings have been held semiannually in Liverpool and Syracuse, New York. The initial meeting sought to identify topics of special concern to the Nations.[19] Among the issues discussed were difficulty with implementing the Indian Child Welfare Act (ICWA),[20] especially in ensuring an appropriate tribal role in state family court decisions regarding the placement of Indian children through foster care or adoption;[21] tribal efforts to implement judicial systems and law enforcement through their own governments;[22] and the need to educate and train state court judges on Indian government and culture.[23] The Committee asked that tribal representatives discuss in their home communities the possibility of establishing a permanent forum in New York to address such issues.

At the group's second meeting on November 3, 2003, Native participants agreed to help establish a permanent federal-state-tribal courts forum in New York. Subsequently, the group focused on three main issues: the placement of Indian children by the state family courts



under ICWA; the resolution of jurisdictional conflicts arising from disparate rulings among federal, state and tribal justice systems; and the need to educate state and federal judges on tribal law and culture.[24]

During the three years following those initial meetings, members of the Committee and interested members of all nine Nations and Tribes have met every six months in Syracuse[25] as the New York Federal-State-Tribal Courts Forum Planning Group ("Planning Group") to address these and other issues of continuing and developing mutual interest.

Creating the Forum

In 2004, the group formalized the New York Federal-State-Tribal Courts Forum, creating and adopting an organizational structure and mission statement. Although these plans call for all nine State-recognized Nations to be members of the Forum, at this writing, in addition to the New York Unified Court System and the United States Courts for the Second Circuit, only the Oneida Indian Nation, St. Regis Mohawk Tribe, Seneca Nation of Indians, Shinnecock Tribe and the Unkechaug Nation have formally designated their members and alternate members to the Forum. While some of the Haudenosaunee Nations have not yet formally joined, their leaders continue to send members of their communities to the Forum meetings to serve as their "eyes and ears."

Committee Visits to the Nations

As part of the Forum's development, the Committee visited the Onondaga Nation longhouse, where they met with chiefs, clan mothers and council members from the Haudenosaunee, including the Onondaga Nation, Cayuga Indian Nation, Tonawanda Seneca Nation, Mohawk Nation Council and the Tuscarora Nation.[26] Members of the Committee also visited the Tuscarora and Oneida reservations, where they met with tribal officials and toured each Nation's territory.

First New York Listening Conference

The Development of the Listening Conference

As early as its second meeting, the Planning Group proposed an educational session at which tribal representatives could meet with federal and state judges to discuss the key issues previously identified by Native peoples in New York.[27] The prime importance of these issues was readily apparent – ICWA, jurisdiction and judicial education are all interrelated. Problems in one area could not be solved without, at the same time, successfully addressing each of the other issues.[28]

At the Planning Group meeting on March 24, 2005, the Committee proposed a New York Listening Conference to educate state judges on these core issues. The subcommittee formed to plan the Conference[29] was a diverse group that consisted of Natives and non-Natives; federal, state and tribal judges; court administrators; lawyers; tribal administrators; child protective workers; educators; and a tribal chief. The members' spirit of cooperation and perseverance was, by itself, a ground-breaking achievement.

The endeavor could not have succeeded without the professional support of several other entities. The New York State Judicial Institute, as principal sponsor of the event, oversaw every aspect of the Conference, ensuring that its state-of-the-art resources were deployed and that continuing legal and judicial education credit was provided. The Center for Indigenous Law, Governance and Citizenship at Syracuse University College of Law joined as co-sponsor from the earliest stages of the program's development, guiding the curriculum and helping to locate Native speakers. Professor Jo Ann Harris, scholar-in-residence at Pace University School of Law and 2006 Faculty Fellow at the Judicial Institute, served as consultant and project advisor. In addition, the United States Department of Justice, Bureau of Justice Assistance, Office of Justice Programs provided a grant to underwrite travel and accommodation expenses for Native American attendees. Enthusiastic encouragement and wise counsel were provided by the Tribal Judicial Institute[30] at the University of North Dakota School of Law.

The New York State Unified Court System Office of Court Administration and the United States Courts for the Second Circuit were fully commited partners, as were the Native Tribes and Nations: seven of the nine state-recognized Tribes and Nations sent presenters. A total of 140 participants – members of the federal and state judiciary and all nine Tribes and Nations – attended the Conference in Syracuse.

Conference Programs

Opening the Conference

On April 26, 2006, a Wednesday night, the New York Listening Conference opened with words of thanksgiving – The Words That Come Before All Else – from the Tadodaho, Sidney Hill, spiritual leader of the Haudenosaunee and the Onondaga Nation, followed by welcoming remarks from the Tribal Courts Committee and Conference co-chair, Justice Edward Davidowitz. Todd Weber, a Tribal Courts Committee member, opened the conference as moderator of the evening program

addressing principles of restorative justice and its use in traditional tribal judicial systems. Rena Smoke, coordinator of the Mohawk Council of Akwesasne Restorative Justice Program and director of its Akwesasne Community Justice Program, discussed the scope of services and inter-agency cooperation among the Akwesasne Justice Department, the State of New York, and the Provinces of Quebec and Ontario, Canada. She explained that restorative justice focuses on the harm of the wrongdoing, rather than on rules broken, and demonstrations of concern and commitment to the victims: the goal is to restore victims through actions of the wrongdoer in the presence of the community.

The Akwesasne Community Justice Program uses clan mothers and other community members as peacemakers who listen to both sides and guide participants through the justice process. Peacemakers are not decision makers and do not assume roles analogous to those of state court judges. Rather, they closely resemble facilitators who assist in bringing the parties to an acceptable, and just, solution. Both the perpetrator and the victim must agree to the process, and only misdemeanors may be settled in this manner. Ms. Smoke concluded by observing that the greatest challenge facing the Mohawk people has been the creation of a judicial and criminal court system that would embrace traditional cultural values while successfully working with federal and local procedures, both in Canada and the United States.

Murray MacDonald, a Crown Attorney for Stormont, Dundas and Glengarry Counties, Province of Ontario, provided a prosecutor's perspective on the Akwesasne restorative justice program, observing that his initial skepticism yielded to great enthusiasm for the program. MacDonald also noted that Canadian law favors the restorative justice approach to sentencing. He explained that although the provincial courts are not bound by findings from hearings conducted by clan mothers and peacemakers, they are generally followed.

In the second portion of the evening program, Valerie Staats, a Mohawk Turtle Clan Mother from the Six Nations/Grand River reservation in Ontario, Canada, and the President of the Native American Council on Alcoholism and Substance Abuse, Inc., presented a talk titled "Rekindling the Sacred Fires: Empowering Change, Transformation and Healing in Indian Country." She addressed issues of addiction, their relation to the punitive judicial process and the restorative and healing processes. Reverend Mike Smith, a member of the Men's Council of the Shinnecock Tribe, also spoke about restorative justice.

Morning Events

On Thursday, April 27, 2006, the Conference reconvened. Justice Marcy Kahn opened the proceedings, taking note of the remarkable gathering of state and federal judges, tribal justice system representatives and tribal leaders. Greetings were also offered by the Honorable Ann Pfau, First Deputy Chief Administrative Judge of the New York State Unified Court System, and by the Honorable Richard C. Wesley, Circuit Judge of the United States Court of Appeals for the Second Circuit, on behalf of their respective Chief Judges.

Brian Patterson, a member of the Oneida Indian Nation Men's Council, also welcomed the assemblage, focusing his remarks on the Guswhenta, or two-row wampum belt.[31] He explained that it represented two vessels traveling side by side, neither forcing its way into the other nor trying to steer the other, symbolic of the relationship between the Haudenosaunee and the federal and state governments. A lively, traditional welcoming dance by the Niagara River Iroquois Dancers followed.

> Clan mothers and other community members are used as peacemakers to listen to both sides and guide participants through the justice process.

The first substantive session of the morning, "Indian Country Jurisdiction 101: An Historical Review of Native American Tribal Sovereignty as Reflected in Federal and New York State Indian Law," presented the history of the exercise of sovereign jurisdiction by the Indian Nations since the founding of this country, discussing pertinent United States Supreme Court decisions, acts of Congress and federal and New York State executive policy.

Professor Robert Odawi Porter, a member of the Seneca Nation of Indians and Senior Associate Dean for Research, Professor of Law, and Dean's Research Scholar of Indigenous Nations Law at the Syracuse University College of Law, discussed the historical perspective of state and Indian affairs and the unique relationship between New York and the Indian Nations. While displaying the Guswhenta, Professor Porter explained that New York embraced an active role in Indian affairs and had followed the two-row wampum ideal for much of its history. The foundation for this relationship, he explained, was the Treaty of Canandaigua in 1794.[32]

Professor Jo Ann Harris followed, noting that, with few exceptions, the federal government has asserted primacy over the states in Indian affairs. She explained that

CONTINUED ON PAGE 16

Continued from Page 14

this position is rooted in the constitutional principle[33] that Indian nations are sovereigns and that, absent a specific delegation to states, only Congress has the power to engage in dealings with them that could affect their sovereign jurisdiction.

Forum delegate Peter D. Carmen, General Counsel of the Oneida Indian Nation, next described the interrelationship between jurisdiction and sovereign immunity in his primer titled "Indian Country Jurisdiction 101."

Professor Carrie Garrow, a member of the St. Regis Mohawk Tribe and the Executive Director of the Center for Indigenous Law, Governance and Citizenship at Syracuse University College of Law, emphasized the primacy of treaties and the importance of knowing the

> The constitutional principle is that Indian nations are sovereigns.

context in which they were written. She encouraged the audience to endeavor to understand the viewpoints of the federal, state and tribal governments, to better appreciate the significance of each treaty to the tribe.

The second session of the morning covered a representative group of the tribal justice systems in New York. Justice Davidowitz, as moderator, introduced the panelists: Joseph J. Heath, General Counsel for the Onondaga Nation; and Forum delegates Honorable Stewart Hancock, Chief Appellate Judge for the Oneida Indian Nation Court and a former Associate Judge of the New York Court of Appeals; Honorable Robert Pierce, Administrative Judge of the Supreme Court of the Seneca Nation of Indians and Councilor with the Seneca Nation Council; and Chief Harry B. Wallace, the elected Chief of the Unkechaug Nation Tribal Council. Each chronicled the history of the justice system of their respective Nations and made several proposals. Summaries of their remarks were distributed to the attendees and are briefly recounted below.

The Onondaga Nation. The Onondaga Nation does not have a separate court system, written laws or statutes. Instead, the Nation employs a community-based dispute resolution system originating at the clan level with its clan mothers. This involves an oral system of traditions and precedents that have existed for hundreds of years. If a solution is not reached, or a dispute is not resolved by the clan mothers, the issue is then brought to the tribal council, or to the longhouse where the parties can present their cases. They and the chiefs attempt to reach a consensus solution that will hold the wrongdoer responsible, benefit the community and help affected individuals. There is no police force, but there is a Nation patrol and a neighborhood watch. The Nation has entered into a written agreement with the Onondaga County Sheriff's Office: law enforcement officers may not enter the reservation unless invited by a chief or required to do so because of a life-threatening situation.

Criminal cases can be referred to the Onondaga Town Justice Court and can be returned by that court to the Nation if the offender accepts responsibility and the authority of the Nation. It is the Nation's belief that the community-based dispute resolution system founded on principles of restorative justice is a more beneficial way to resolve minor criminal matters.

The Oneida Indian Nation. In 1997, this Nation established a trial court, a peacemakers' division and a court of appeals. A court clerk was appointed as well as trial and appellate judges, who serve alternate terms. The Nation also enacted comprehensive penal law, criminal procedure law and civil procedure acts, which largely follow their respective counterpart statutes under New York State law. Criminal jurisdiction is limited to offenses committed by Indians on reservations and that constitute misdemeanors under New York law.[34] Civil jurisdiction extends to matters relating to conduct, activities or undertakings on the reservation. The rules of civil procedure, which generally follow the New York Civil Practice Law & Rules, apply to such actions.

Most criminal trials are held before a judge, without a jury, unless expressly requested by the defendant. A jury consists of six members selected from the Nation. The maximum sentence on all crimes is imprisonment for one year and/or a fine not to exceed $5,000. In any event, sentencing emphasizes restitution or the offender's reconciliation with the victim and the Nation; an offender is expected to right his wrongdoing. In large part, rules of evidence codify rules found in New York case law.

In 2000, the Oneidas created their own juvenile justice system, which governs children under the age of 16 who reside on the reservation and who are alleged to be juvenile offenders. Hearings are private – only interested parties may attend – and the proceedings are not considered criminal. Disposition options include placing the child with a guardian or relative, or in an institution, and restitution.

The St. Regis Mohawk Tribe. The St. Regis Mohawk Tribe has enacted a vehicle and traffic code and has its own traffic court. There are two peacemaker judges, whose decisions may be appealed to the tribal council. The Tribe also maintains its own police force which has nearly concluded the process of being officially recognized by the state of New York.

The Tribe is currently developing a family court, which is expected to begin operating in the spring of 2007. The court will address all aspects of family life and will have health and human services personnel, as well

as members of law enforcement and court administrative personnel, on its staff. The Tribe is currently determining the litigation and dispute resolution procedures to be used by its newest court.

The Seneca Nation of Indians. The Constitution of the Seneca Nation of Indians established a tribal court system composed of a peacemakers' court, a surrogate's court and a court of appeals for each of its two principal reservations. All court judges are elected to four-year terms. The peacemaker court, composed of three judges, handles disputes between Indians on each reservation. Its decisions can be reversed by the court of appeals, which is composed of six judges. That court's judgments are subject to appeal to the tribal counsel. Decisions by the tribal counsel are final and cannot be appealed.

The principles of substantive law upon which the courts rely are known as the "archives." Each court has a set of civil procedure rules. A judiciary law contains procedures for administrating the different courts.

The Unkechaug Nation. The Unkechaug Nation does not have a formal tribal justice system; matters are generally referred to the New York state courts. However, the Nation requests that its laws, customs and traditions be considered as the first choice of law when litigating issues in the New York courts, according to Chief Wallace. Regulations adopted in 1964 also provide that a violation of tribal rules may be brought before the tribal council, which, in turn, may refer state law violations to the Suffolk County police department. The Chief made clear, however, that this grant of jurisdiction was not intended to yield sovereignty issues to the state of New York.

Afternoon Session

At the morning session's conclusion, participants were treated to a stirring lunchtime keynote address by Chief Oren Lyons, Faithkeeper of the Onondaga Nation. Afterward, the Conference resumed with two concurrent sessions.

One panel focused on Indian children in the state family courts. It used frequently encountered scenarios to illustrate ICWA and its application in New York. Discussion was moderated by Justice Hugh Gilbert, Non-Native Co-Facilitator of the Forum, Supervising Judge of the Family Courts for the Fifth Judicial District and Chair of the Supervising Judges of the Family Courts outside the city of New York. The first speaker, James Bay, Assistant Executive Director of the St. Regis Mohawk Tribe Administration, spoke about the work of the Tribe on youth cases and its efforts to end youth displacement from the Nation. He emphasized the need for a tribal voice in proceedings dealing with Indian children in New York state courts.

Margaret Burt, an attorney specializing in trial and appellate work in the area of child welfare, answered questions regarding the use and interpretation of ICWA.

Indian Nations and Reservations in New York State[1]

Cayuga Nation of Indians
1,000 enrolled members.
Office: North Collins, Erie County

Oneida Indian Nation
630 enrolled members.
Oneida Nation Territory
Madison County (17,000 acres)

Onondaga Nation
1,475 enrolled members.
Onondaga Reservation
Onondaga County (7,300 acres)

St. Regis Mohawk Tribe
8,000 enrolled members.
St. Regis Mohawk Reservation
Franklin County (14,640 acres)

Seneca Nation of Indians
6,400 enrolled members.
Allegany Reservation
Cattaraugus County (22,640 acres)
Cattaraugus Reservation
Erie, Cattaraugus and Chautauqua Counties (21,680 acres)
Oil Springs Reservation
Allegany and Cattaraugus Counties (1 square mile)

Tonawanda Band of Senecas
1,200 enrolled members.
Tonawanda Reservation
Erie, Genesee, and Niagara Counties (7,549 acres)

Tuscarora Nation
1,200 enrolled members.
Tuscarora Reservation
Niagara County (5,700 acres)

Shinnecock Tribe
1,300 enrolled members.
Shinnecock Reservation
Suffolk County (400 acres)

Unkechaug Nation
283 enrolled members.

Poosepatuck Reservation
Suffolk County (60 acres)

1. **Sources:**

New York State Office of Children and Family Services, A Proud Heritage 62–63 (2001). Shinnecock Nation Official Web site: <http://www.shinnecocknation.com/history.asp> (last visited July 28, 2006).

The Six Nations of the Iroquois. See <http://tuscaroras.com/pages/history/six_nations.html> (last visited July 28, 2006).

U.S. Census Bureau, Census 2000 Summary File 1. See <http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US36&-_box_head_nbr=GCT-PH1&-ds_name=DEC_2000_SF1_U&-format=ST-8> (last visited July 31, 2006).

U.S. Environmental Protection Agency Indian Program. See <http://www.epa.gov/Region2/nations/index.htm> (last visited July 28, 2006).

She discussed the need to follow ICWA and, particularly, the often-overlooked aspect of ICWA that requires a Nation to be treated in the state courts as, essentially, a third parent with its own rights.

Jamie E. Gilbert, a Tuscarora Home School Coordinator at the Niagara Wheatfield School District in Sanborn, New York, addressed the social services, child protective and foster care services available to Indian children in state family courts. She characterized the Tuscarora Nation's experiences in state court as difficult and reminded the audience that courts should always respect and recognize the importance of clan mothers who intervene in ICWA cases as representatives of the Nation.

The other, concurrent afternoon session, "Criminal Jurisdiction in Indian Country: the Application of 25 U.S.C. § 232," was moderated by Justice Kahn and included three panelists: Forum member Honorable Hugh Scott, United States Magistrate Judge, Western District of New York; Peter Carmen; and Professor Harris. The panel discussed a series of hypotheticals illustrating situations frequently encountered by the courts, and addressed the effect of federal law on the jurisdiction of state courts over crimes committed by Natives or non-Natives in Indian country and on the authority of tribal courts to conduct criminal prosecutions, and the extent and limits of federal criminal jurisdiction.

The final afternoon plenary session was titled "Problem-Solving: Hopes/Wishes for Justice Systems and the Interface Between Native and Non-Native Justice Systems." The panelists were Ms. Gilbert; Marguerite A. Smith, Esq., Shinnecock Tribal Representative, member of the Suffolk County Executive Task Force to Prevent Family Violence; Andrew Thomas, Chief of the St. Regis Mohawk Tribe Police Department; and Chief Oren Lyons. The speakers addressed areas of successful cross-jurisdictional efforts and identified others where similar initiatives might be fruitful, including the development of jurisdictional protocols. The group also emphasized the need for state courts to recognize the role of clan mothers; to continue educational efforts to understand the different cultures and communities within the different Indian Nations; to reach agreements between the Nations and the state on law enforcement and security issues; and to confront racism and issues of inequality.

Participants at the conference were also treated to generous expositions of Indian culture. Members of several Nations displayed and offered for sale their crafts, jewelry and beadwork. The conference ended with a ceremonial dance performed by the Oneida Nation Dancers and a traditional concluding message by the Tadodaho, Sidney Hill.

The feedback from those who attended the Listening Conference was overwhelmingly positive. This groundbreaking event enabled its participants to learn from one another in novel ways, thereby furthering understanding of one another's respective concepts of justice.[35] Even judges from judicial districts that do not encompass Indian territory learned that they, too, can be affected by emerging trends in Indian law.[36]

Next Steps

The programs and accomplishments of the First New York Listening Conference will be memorialized through the issuance of a publication under the auspices of the United States Department of Justice, Bureau of Justice Assistance. Additionally, the Forum will pursue strategies suggested at the Conference, for example, by convening regional small group meetings to address discrete local problems in particular judicial districts. One such gathering will bring together tribal clan mothers with law guardians who handle ICWA cases to educate the latter group on principles of governance and culture of the Tuscarora Nation. In addition, the clerks of the tribal courts resident in New York will have the opportunity to attend the annual training seminar offered by the New York State Association of Magistrates Court Clerks. State and federal judges from the Tribal Courts Committee will continue the committee's program of visits to New York's Indian country to meet directly with tribal leaders. The Judicial Institute will develop additional training programs based on the Listening Conference for judges of courts of record as well as town and village justices.

All in all, the participants in the First New York Listening Conference felt they had created a blueprint for building solid bridges between Native and non-Native justice systems in our state, while respecting their discrete, parallel pathways, as symbolized by the Guswhenta. ■

1. Clan mothers are tribal officials who represent their clans and are responsible for the welfare of the community. They are often instrumental in selecting the chiefs and have the power to remove them if their actions do not benefit the clan. The position is hereditary. *See* <http://sixnations.buffnet.net/Culture> (last visited July 19, 2006).

2. See "New York's Tribal Courts Committee and Forum," *infra*, for a description.

3. The New York State Judicial Institute, located in White Plains, is a year-round center for education and research designed to enhance the quality of the courts and ensure judicial excellence in New York. Inaugurated on May 5, 2003,

the Judicial Institute is the first judicial research and training facility built by and for a state court system.

4. The Center for Indigenous Law, Governance and Citizenship is a research-based law and policy institute focused on indigenous nations, their development and their interaction with the United States and Canadian governments. *See* <http://www.law.syr.edu/academics/centers/ilgc> (last visited July 17, 2006).

5. *See* "New York's Tribal Courts Committee and Forum," *infra*.

6. New York State Office of Children and Family Services, A Proud Heritage, at 1 (2001) *available at* <http://www.ocfs.state.ny.05/main/publications/Pub4629ProudHeritage.pdf>.

7. *Id.*

8. Three governmental bodies exist within the Akwesasne territory: the Mohawk Nation Council, which has its roots in the original Six Nations; the St. Regis Mohawk Tribe, which is the body of tribal governance recognized by the governments of the United States and the state of New York, and which operates in territory within the state of New York; and the Mohawk Council of Akwesasne, which operates entirely within the boundaries of Canada. Unless otherwise indicated, the references to the Mohawk people in this article will be to the St. Regis Mohawk Tribe.

9. The Seneca Nation formerly consisted of two separate tribal organizations, each recognized by the State of New York: the Seneca Nation of Indians, which occupies the Cattaraugus and Allegany reservations, and the Tonawanda Band of Seneca Indians, having its own reservation near Akron, New York. The Seneca Nation of Indians is currently recognized as the Seneca Nation by the governments of the United States and the State of New York. The Tonawanda Band, like the Onondagas, the Tuscaroras and the Cayugas, and in contrast with the Seneca Nation of Indians, still retains the traditional form of tribal government of the Haudenosaunee Confederacy, which involves government based on consensus. *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 877 n.1 (2d Cir. 1996); see "First New York Listening Conference," *infra*, for a discussion. In this article, the two Nations will be referenced separately and by their currently recognized names.

10. A more detailed description of some of these justice systems was presented at the Listening Conference and is discussed in "First New York Listening Conference," *infra*.

11. *See U.S. v. Lara*, 541 U.S. 193, 210 (2004) (criminal jurisdiction); Indian Civil Rights Act, 25 U.S.C. § 1301(2), (4).

12. Ralph J. Erickstad & James Ganje, *Tribal and State Courts: A New Beginning*, 71 N.D. L. Rev. 569 n.1 (1995); National Center for State Courts, History of the Conference of Chief Justices, at 14 (1993) ("CCJ History"), *available at* <http://ccj.ncsc.dni.us/HistoryPt1.pdf> (last visited July 31, 2006).

13. 476 U.S. 877 (1986); *Three Affiliated Tribes v. Wold Eng'g*, 467 U.S. 138 (1984). In those cases, a federally recognized Indian tribe living on the Fort Berthold reservation in North Dakota sued in North Dakota state court for negligence and breach of contract in connection with a non-Indian defendant's construction of a water supply system on Indian land. The Court held that the application of a North Dakota statute, which had conditioned resort by Indian tribes to jurisdiction of state courts for purposes of bringing suit against non-Indians on tribes' waiver of sovereign immunity and consent to application of state law in all cases, was impermissible and was preempted by federal law. *See* CCJ History *supra* note 12, at 29–30.

14. Erickstad & Ganje, *supra* note 12, at 570–73.

15. *Id*. at 571.

16. *Id*. at 572.

17. Marcy L. Kahn, address at meeting of New York Federal-State-Tribal Courts Forum Planning Group, May 22, 2003, at 2 (on file with the authors).

18. In addition to co-chairs Kahn and Davidowitz, the original members of the New York Tribal Courts Committee included the Honorable John F. Keenan, United States District Judge for the Southern District of New York; Karen Milton, Esq., Circuit Executive for the United States Courts for the Second Circuit; Mizzi Diamond, Esq., Executive Assistant to the Deputy Administrative Chief Judge for the Courts Outside of New York City; and Todd Weber, Esq., Principal Law Clerk to the Honorable Jan Plumadore, New York State Supreme Court Justice and Administrative Judge for the Fourth Judicial District. The Committee currently includes judges and court administrators from federal and state courts throughout New York.

19. In order to focus its efforts on developing solutions to conflicts and working toward mutual understanding, the group has entirely excluded from all of its discussions, including those held at the Listening Conference, any reference to issues of taxation, land claims, gaming and matters in litigation.

20. Indian Child Welfare Act, 25 U.S.C. §§ 1901–1923.

21. Minutes of meeting of New York Federal-State-Tribal Courts Forum Planning Group ("Planning Group Minutes"), May 22, 2003, at 2 (on file with the authors). *See* Indian Child Welfare Act, 25 U.S.C. § 1912(a); 18 N.Y.C.R.R. § 431.18(c).

22. Planning Group Minutes, May 22, 2003, at 2–3.

23. *Id.* at 3–5.

24. Planning Group Minutes, Nov. 3, 2003, at 1 (on file with the authors). Participants also suggested the creation of a database which would include relevant tribal laws, codes, traditions and precedents, for reference by state court judges in cases in which such information is relevant and for interested tribes. Several of the Nations have submitted copies of their written laws which are currently housed at the Judicial Institute. *Id*.

25. Meeting space has been provided through the generosity of the United States Courts for the Second Circuit and the leadership of Chief Judge John M. Walker. Logistical assistance has been facilitated by the Honorable Norman Mordue, Chief Judge of the United States District Court for the Northern District of New York, and Karen Milton, Esq., Circuit Executive for the United States Courts for the Second Circuit.

26. *Id*. at 1. These Nations all operate within the Grand Council of the Haudenosaunee.

27. Planning Group Minutes, Nov. 3, 2003, at 2–3.

28. *Id*. at 1–2.

29. Transcript of meeting of New York Federal-State-Tribal Courts Planning Group, Mar. 24, 2005, at 28, 36–37. *See* "New York's Tribal Courts Committee and Forum," *supra*.

30. The Tribal Judicial Institute at the University of North Dakota School of Law, founded in 1993, provides technical assistance and training to tribal justice system personnel throughout the country. *See* <www.law.und.nodak.edu/nplic/judicial/index.php> (last visited on July 24, 2006).

31. The two-row wampum, or Guswhenta, commemorates treaties of the Haudenosaunee with the United States and other nations. It represents the sovereignty of the Six Nations. The two rows of dark wampum symbolize two canoes traveling down the same river. Though they are traveling side by side, the boats do not cross paths. One represents the Haudenosaunee people, as well as their religion and traditions, while the other represents the other nation and its culture. The belt symbolizes that the two entities will never try to steer the vessel of the other; neither will they interfere with the internal affairs or beliefs of the other. The dark wampum is separated by three rows of white wampum, which symbolize peace, respect and friendship forever. *See* <http://www.akwesasne.ca/kaswentha.htm> (last visited July 19, 2006).

32. 7 Stat. 44 (Nov. 11, 1794). Signed by the Chiefs of the Six Nations of the Haudenosaunee and by representatives of the United States, the Treaty of Canandaigua established the peace and friendship between the United States and the Six Nations of the Haudenosaunee and acknowledged the lands reserved to the Onondaga Nation, Oneida Nation, Cayuga Nation and Seneca Nation.

33. U.S. Const. art. I, § 8.

34. The Indian Civil Rights Act prohibits tribal courts from imposing any criminal penalty that exceeds imprisonment for a term of one year. 25 U.S.C. § 1302(7); *see* Major Crimes Act, 18 U.S.C. § 1153 (re-posing exclusive jurisdiction in the federal government to prosecute certain enumerated major felonies).

35. This effort was aided by conference materials which were distributed on CDs, and which included reference materials on the New York Indian Nations, their culture and history, as well as a bibliography offering hyperlinks to other reference sources.

36. See, e.g., *In re Baby Boy C.*, 27 A.D.3d 34, 805 N.Y.S.2d 313 (1st Dep't 2005), which was discussed during the afternoon ICWA session. (Appellate Division, First Department declined to adopt the "existing Indian family" exception, which avoids application of ICWA in certain cases, holding that ICWA applied in case of private adoption, irrespective of whether the Indian child's birth parents had significant connections to the tribe; case originated in New York County).

BY DAVID PAUL HOROWITZ

David Paul Horowitz (dh15@nyu.edu) practices as a plaintiff's personal injury litigator in New York City. Mr. Horowitz teaches New York Practice at New York Law School, is a member of the Office of Court Administration's CPLR Advisory Committee, and is a frequent lecturer and writer on the subject.

Can an Old Dog Learn New Tricks?

Last issue's column reported on the promulgation of new rules governing deposition practice in New York state courts, scheduled to take effect on October 1, 2006. By the time this column is published, motions will have been made both to enforce the new rules and to seek sanctions and/or disclosure penalties for violations of the rules. Some time next year there should be enough lower court, and perhaps appellate, decisions to warrant a column on judicial enforcement of the new rules.

In the interim, until there is guidance from the courts, what does compliance with the new rules require? Can attorneys continue with their present tactics and techniques, or is change required? And, if change is required, for experienced attorneys, including the barking attorney from last issue's column, I repeat the question posed at the end of the last column: Can an old dog learn new tricks?

What Remains the Same; What Changes

Many will argue that the new rules simply codify the existing case law, and, therefore, everything remains the same. This position ignores the fact that there is a certain degree of variance in existing case law on important deposition procedures. It also ignores the fact that some issues were not, to this author's knowledge, previously addressed.

Directing Witnesses Not to Answer Questions

Variance in existing case law is perhaps best illustrated by comparing two well-known First Department cases addressing the propriety of an attorney directing a witness not to answer a question. In *Spatz v. Wide World Travel Service, Inc.*,[1] a 1979 decision, the First Department stated: "Counsel is without authority to direct a witness to refuse to answer questions at an examination before trial." However, in a 1999 decision, *Monica W. v. Milevoi*,[2] the First Department refused to permit further inquiry by the questioning attorney where the defending attorney had on more than 100 occasions directed the witness not to answer questions.[3] The First Department explained:

> As noted by this Court in *Wyda v. Makita Elec. Works* (162 A.D.2d 133), the broad discretion extended to Supreme Court to supervise disclosure . . . also extends to the Appellate Division . . . and it is not necessary that plaintiffs demonstrate an abuse of discretion to warrant reversal of the discovery order under review. . . . Defendants have not established that the line of inquiry they seek to pursue will avail them of any useful information relevant to the cause of the infant plaintiffs' impairment (*see*, *Osorio v. Olga Taxi Co.*, 23 A.D.2d 730 [no need for examination before trial to elicit facts that cannot be proven at trial]). Therefore, this Court declines to permit further examination in this area.[4]

Interestingly, the First Department in *Monica W.* did not cite *Spatz*.

These two contradictory cases have provided fodder for both sides involved in motion skirmishes over directions not to answer questions at a deposition.

What do the new rules say about this practice?

> § 221.2 Refusal to answer when objection is made
>
> A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.[5]

So, for starters, *Spatz*, which could not possibly have ever meant what it said,[6] is out since the new rule specifically contemplates a direction by counsel not to answer a question, under § 221.2(i), where there is a "privilege or right of confidentiality."

Most privileges are easy to identify, at least in the abstract. However, pinpointing when questioning at a deposition crosses over from foundation issues, to which a privilege generally does not apply, to a protected matter, is sometimes difficult. And, since counsel may be subject to discipline for disclosing privileged information, tight control over a witness at a deposition, and erring on the side of caution, is necessary.

The "right of confidentiality" is harder to define, although case law provides some guidance. For example, tax returns: "[B]ecause of their 'confidential and private nature' disclosure of tax returns is disfavored, and defendants are required to establish

that the information contained in the returns they seek 'is indispensable to this litigation and unavailable from other sources.'"[7] It necessarily follows that if the documents are "confidential and private" in nature so that their disclosure may only be had upon a special showing by the party seeking them, then questioning a witness concerning the contents of a tax return at a deposition is improper without the questioning party establishing entitlement to the information.[8]

Enforcing a Limitation Set Forth in a Court Order

Here, the new rules simply state a proposition that has always existed and which cannot be seriously disputed.

Section 221.2(ii) of the new rules does not distinguish between a written order and an order made verbally by the court, whether at a conference or in the course of seeking a ruling, be it in person before the court, telephonically, or on papers. The rule is written "to enforce a limitation set forth in an order of a court." So, where the scope of examination has, in some way, been limited by an order of the court, counsel may direct a witness not to answer a question so as to carry out the terms of, consistent with the intent of, the order.

What if the order, rather than limiting the examination, directs that a witness answer specific questions, or line of questioning? What happens to the attorney who, for example, believes that a question seeks "confidential and private" information, for which the requisite showing of entitlement has not been made? May counsel direct the witness not to answer, despite a clear order by the trial court directing that the question be answered? The new rules do not address this situation, so attorneys must fall back on existing case law and rules of procedure.

Plainly Improper and Significant Prejudice

Finally, § 221.2(iii) does, in fact, constitute a change in existing case law. The leading case prior to the adoption of the new rules, *White v. Martins*,[9] established the following rule:

> But there is always the possibility of questions that infringe upon a privilege, or that are so improper that to answer them will substantially prejudice the parties; or questions that may be so palpably and grossly irrelevant or unduly burdensome that they should not be answered. Thus, although the statute provides that the deposition shall proceed, it adds "subject to the right of a person to apply for a protective order." (Such a protective order may be obtained either by formal motion or by informal application for a ruling to the Justice designated to make such rulings.)[10]

Other courts have used different terminology in describing questions that need not be answered at a deposition:

> [U]nless a question is clearly violative of a witness'[s] constitutional rights, or of some privilege recognized in law, or is palpably irrelevant, questions [at an examination before trial] should be freely permitted and answered, since all objections other than those as to form are preserved for the trial and may be raised at that time.[11]

Under *White*, four distinct categories of questions were improper:

1. those that infringe upon a privilege;
2. those so improper that to answer them will substantially prejudice the parties;
3. those palpably and grossly irrelevant; and
4. those unduly burdensome.

Privilege is covered by § 221.2(i). Under the new rules, the last three categories are merged into one, requiring a dual showing before a direction not to answer may be given: "When the question is plainly improper and would, if answered, cause significant prejudice to any person." What exactly does this mean?

Presumably, "plainly improper" is the functional equivalent of "palpably improper." What is "palpably improper"? As the Second Department helpfully explained last year: "The demands were palpably improper in

that they were, inter alia, of an overbroad and burdensome nature."[12]

Are you starting to feel as though you are going in circles? At the end of the day, "plainly improper" will, in all likelihood be like pornography – a judge will know it when he or she sees it. Not much guidance, I know.

However, the inquiry does not end with "plainly improper." In order to direct a witness not to answer the "plainly improper" question, the question must also "cause significant prejudice to any person." Unfortunately, this element is not explained in the new rules, and case law, to my knowledge, does not offer guidance.

Hold on, we are not done yet. It is also a requirement under § 221.2 that "[a]ny refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor."[13] Fair enough. But there is a danger in making a "succinct and clear" statement on the record. What if your statement goes beyond being "succinct and clear"?

Speaking Objections

The new rules now codify in New York State practice the teachings of *Hall v. Clifton Precision*:[14]

> § 221.1(b) Speaking objections restricted.
>
> Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.[15]

Last issue's column quoted *Hall* and offered a practical suggestion or two to avoid running afoul of this section of the new rules.

Talking to Your Witness

What about the common practice of pulling the witness out of the deposition room to confer? The new rules address this practice in "succinct and clear" terms:

> § 221.3 Communication with the deponent
>
> An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

As always, the practice may continue with consent of all parties. Absent consent, the only basis is to determine whether a basis exists under one of the subsections of § 221.2 not to answer the question.

Does this bar conferring with the deponent in a way that does not "interrupt the deposition"? After a question is answered and before a new question is asked? On a lunch break during the deposition? Over dinner between days one and two of a deposition? Hard to tell with the way the rule is written.

Running Interference

Finally, obstructionist and other bad, but all-too-common, behavior is now barred by the new rules:

> Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

Interference of this sort has long been criticized by courts, perhaps best in a 2003 First Department opinion, *Orner v. Mount Sinai Hospital*:[16]

> That some of plaintiff's counsel's questions were inartful or otherwise imperfect did not give defense counsel license to react impatiently nor interfere as he did. A complete reading of the depositions reveals that defense counsel's attitude toward plaintiff's counsel was sardonic and unprofessional which, in turn, fostered an uncooperative attitude from defendants' witnesses. Indeed, "[d]efendants' counsel, in ordering his clients not to respond during depositions to questioning in areas which counsel unilaterally deemed to be irrelevant, and in continually objecting to matters other than form . . . effectively thwarted plaintiffs' efforts to depose defendants."

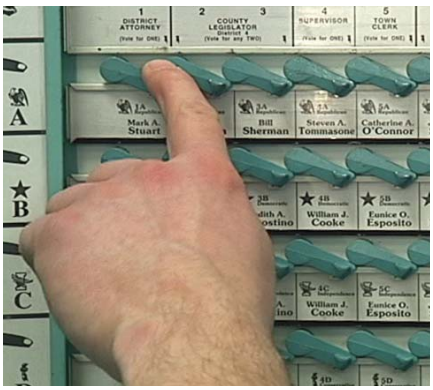
No grey area here under the new rules.

Conclusion

While the new rules are salutary in their intent, practical application of some of the provisions may be problematic, even for attorneys fully intent on complying with both the letter and spirit of the rules. Hopefully, members of the bar will work together to eliminate much of the contentiousness that has marred depositions in the past, and will, at the same time, temper their requests for judicial enforcement and penalties during a reasonable "break-in" period for the new rules. ■

1. 70 A.D.2d 835, 418 N.Y.S.2d 19 (1st Dep't 1979).
2. 252 A.D.2d 260, 685 N.Y.S.2d 231 (1st Dep't 1999).
3. *Id.* ("In the course of a deposition that extended over five days and produced a transcript of 815 pages, Quintina W. was asked some 103 questions concerning the nonparty siblings of the infant plaintiffs, to which counsel directed her not to respond. Other questions, which she was also directed not to answer, concerned her general medical history, her total number of pregnancies, including any abortions, and the medical history of the twins' father, including alleged alcohol abuse.") *Id.* at 261.
4. *Id.* at 264.
5. 22 N.Y.C.R.R. § 221.2.
6. It is my personal opinion, without case citation to back me up, that *Spatz* has led to the practice of certain attorneys to advise their clients not to answer questions at a deposition, rather than directing the witness not to answer, a distinction I have always believed was one without a difference.
7. *Nanbar Realty Corp. v. Pater Realty Co.*, 242 A.D.2d 208, 209, 661 N.Y.S.2d 216 (1st Dep't 1997) (citation omitted).
8. How to do this procedurally is another matter, which space here does not permit coverage.
9. 100 A.D.2d 805, 474 N.Y.S.2d 733 (1st Dep't 1984).
10. *Id.* at 805 (citations omitted). *See* CPLR 3113(b).
11. *Dibble v. Consol. R.R. Corp.*, 181 A.D.2d 1040, 1040, 582 N.Y.S.2d 582 (4th Dep't 1992) (citation omitted).
12. *Bongiorno v. Livingston*, 20 A.D.3d 379, 382, 799 N.Y.S.2d 98 (2d Dep't 2005) (citation omitted).
13. 22 N.Y.C.R.R. § 221.2.
14. 150 F.R.D. 525 (E.D. Pa. 1993).
15. 22 N.Y.C.R.R. § 221.1(b).
16. 305 A.D.2d 307, 309–310, 761 N.Y.S.2d 603 (1st Dep't 2003) (citation omitted).

BY WILLIAM S. GREENAWALT & DAVID A. KOENIGSBERG



WILLIAM S. GREENAWALT represented the referendum petitioners from Ardsley and Dobbs Ferry in the Supreme Court and Appellate Division cases discussed in this article.

DAVID A. KOENIGSBERG, an attorney, was a proponent of the referendum vote in Dobbs Ferry.

Move Village Elections to November

New York State's Election Law provides that the election for local village officers shall take place in March each year. Villages may, however, opt to change their election schedule. Changing the time of the village general election from March to November has the potential to save a village thousands of taxpayer dollars every year, increase voter participation, and provide a fuller discussion of local issues because of a longer campaign in better weather. The New York Village Law provides that a village's annual budget will be formulated in March and adopted in April.[1] Thus, the November election provides more seasoned officers time to review the budget instead of requiring them to vote almost immediately after a March election.

The process for changing the date of a village's election appears on its surface to be relatively simple. A referendum to change the village election date may be placed on the ballot either by a resolution of the village board of trustees or by a petition of registered voters for a referendum and a favorable referendum vote.

However, two recent companion court cases highlight procedural pitfalls in the statutes that can be used to thwart the referendum process should a local board of trustees oppose such a change. Absent cooperation from a village's trustees, voters petitioning to have the question put to a referendum vote must have a thorough understanding of the state's Village Law and Election Law, to insure that the question is placed on the ballot. Petitioners need to know what are the various statutes deemed applicable by courts, their consequences, and how to navigate or challenge the decisional law to ensure that the petition process results in a referendum being held on the date sought.

The Statutory Structure

Section 15-104 of the Election Law provides that a general village election shall be held on the third Tuesday in March, unless a village adopts a proposition to elect its officers on a different date.[2] The board of trustees may adopt a resolution to have the election occur on the day of the regular November general election.[3] If its action is not challenged by local petitioners, it becomes final and the date is changed. If enough petitioners challenge the board's action, the proposed change is subject to a "permissive referendum" vote by the village. If the referendum vote is favorable to the board's action the election date will be changed.

Section 9-912 of the Village Law also authorizes the board of trustees to pass a resolution, and permits the voters to submit a petition, to place on the ballot for referendum the question of changing the voting date.[4] Where the village board opposes changing the time for the village election, and refuses or fails to adopt a resolution to do so, local voters by petition can force the board to place the question on the ballot. This is called a "mandatory referendum," which is conducted in the same way as a permissive referendum.[5] The requirements for the content and form of this citizen initiative petition are set forth in §§ 9-900 and 9-902(8) of the Village Law.

If the petitioners seek to hold the referendum vote at the annual March village election, or on a special village election date selected by the village board, the number of signatures necessary to compel the board to place the referendum on the ballot varies with the size of the particular village; but, even for villages with a population of 5,000 or more, the requirement does not exceed 200 registered voters.[6] In that case, the question shall be submitted at the next regular or special election for village officers, "held not less than thirty days after the filing of such petition."[7]

If, however, the petition demands that the referendum be held at a time other than the regular or a special village election, "such petition must contain twice the number of signatures otherwise required."[8] Thus, if voters seek to have the referendum held on a specific date, such as the date of the November general election, rather than in March, the petition must have double the number of signatures, or as many as 400 signatures for a village of 5,000 or more. In either case, "such referendum shall be held no less than thirty, nor more than sixty, days after the filing of such petition."[9] Accordingly, if the petition specifies a referendum date such as the November general election day, it must be filed between 30 and 60 days before the date for the proposed referendum.[10]

Another requirement, which figured prominently in two recent cases, is set forth in Election Law § 4-108. This law provides that when a petition seeks to have a village referendum held at the November general election, the village clerk must transmit to the County Board of Elections "at least thirty-six days prior to the election . . . a certified copy of the text of such . . . referendum, and a statement of the form in which it is to be submitted" to a vote of the people of the village.[11]

Petitions and Opposition in Westchester

In the fall of 2003, petition drives were mounted in the villages of Ardsley and Dobbs Ferry, in the Town of Greenburgh in Westchester County, to hold referenda to change each village's election day from March to November. In each case, the referendum process was initiated by means of citizen petitions submitted to the respective boards of trustees, requesting that a referendum be held on the date of the general election, November 4, 2003.[12] The petitions were submitted in anticipation of the boards' action at their mid-September meetings.[13]

The Ardsley petition required 200 signatures and had 431, and was filed on September 15, 2003. The Ardsley village manager was told on September 9, 2003, that the petition would be submitted on September 15 in advance of the Board Meeting that night. The petition was submitted, accompanied by a cover letter, a copy of Village Law § 9-912, a form of resolution for the Ardsley Board of Trustees, a notice of adoption of the resolution for transmittal by the clerk, and an abstract of the referendum question. At the meeting, the Mayor stated that the petition had been duly filed, and that Village Law § 9-912 required the Board to have the question placed on the November 4, 2003, ballot. But the Mayor said he was opposed to changing the village election date, and referred the matter to the Village Attorney for "study," saying it would be revisited at the Board's next meeting on October 7.

The Dobbs Ferry petition required 400 signatures and had 613, and it was filed with the clerk on September 22, 2003, with the same additional documents. At the Dobbs Ferry Board meeting on September 23, the Mayor acknowledged the filing, but stated that the "matter was referred to the Village Attorney and Village Administrator for appropriate action under the law." The Board did not pass the requested ministerial resolution asking the county Board of Elections to place the question on the November 4, 2003 ballot, nor was a special meeting of the Board called for that purpose.

None of the petition signatures in either village was challenged. The Dobbs Ferry clerk waited nine days and then certified on October 2, 2003, that all the signatures on the Dobbs Ferry petition were authentic and correct. The Ardsley clerk waited 22 days and similarly certified on October 7, 2003.

Petitioners Seek Relief

A majority of the trustees in each village opposed a change in the village election date and, as noted, neither Board passed a ministerial resolution placing the matter on the ballot, and neither clerk immediately transmitted the necessary paperwork to the Westchester County Board of Elections. On October 1, 2003, petitioners in both villages commenced CPLR Article 78 mandamus proceedings in the Supreme Court, Westchester County, by verified Petition and Order to Show Cause, to compel the villages and the County Board of Elections to place the question on the November ballot for referendum. In addition to the Mayor, the Board of Trustees and the Clerk of each village, the Commissioners of the

Westchester County Board of Elections were also named as Respondents in each suit, to insure swift compliance with any court orders. Each village filed a motion to dismiss the respective Article 78 proceeding and Petition.

Article 16 of the state's Election Law requires priority and expedited review of election law disputes concerning "any proposed . . . proposition or question"[14] brought by special proceeding. A hearing was held on October 8, 2003. The Ardsley petitioners prevailed, and the Ardsley referendum vote was held as requested, but the Dobbs Ferry petitioners were unsuccessful, and the vote was not conducted until March 2004. The technical grounds by which the courts distinguished these two petition efforts, rewarding one and frustrating the other, are examined below.

In court, the trustees of each village contended that they were not bound to hold the referendum on November 4, 2003, the date specified in the petitions, but had the discretion to determine, within the time limits prescribed by the Village Law, the special election date for the referendum vote.[15] The boards in both villages provided diversionary referendum dates and placed them before the court. The Ardsley Board, at its October 7, 2003, "revisitation" meeting, voted to hold the referendum at a special election on November 12, 2003. That date would have required the voters to vote twice in November 2003. The Dobbs Ferry Board represented to the court that it was "undertaking steps that will place the ballot referendum before the voters in the March 2004 general village election."

The petitioners contended, and the Westchester County Supreme Court held, that the referendum date specified in the petition controlled, and that the trustees had no discretion or power to schedule the referendum on a date other than the one designated in the Petition.[16] The court opined that the Legislature did not intend in Village Law § 9-912 to allow two elections in November, the general election and another special election. Using what it termed a "reasonable, appropriate and practical" construction, the court held that the phrase "regular election" in Village Law §§ 9-910 and 9-912 referred to the regular general election rather than the regular village election.[17] Thus by filing double the minimum number of signatures, the petitioners could have the referendum at the November general election if the petition specified that date. The court held that "in compliance with the language of the various statutes . . . the regular election date would be the regular election on November 4th [2003]."[18] The court also noted that no objections were filed to either set of petitions "within the five day period of time for filing such objection contained in Village Law § 9-902."[19]

The petitioners contended that since they had complied with the 30–60 day filing window specified in the Village Law prior to the November 4, 2003 referendum, the referendum should proceed on November 4. But the court did not consider this undisputed fact, or this statute, dispositive. Instead, the court went on to hold that under Municipal Home Rule Law (MHRL) § 23 and § 24, each petition had to be filed more than 45 days before the specified referendum date in order to allow the village clerk enough time to inspect the petition and transmit a certificate of examination and a copy of the proposal to the Westchester County Board of Elections.[20] The court held that the Ardsley petition had been timely filed on September 15, 2003, 50 days before November 4, and directed that the referendum be placed on the Ardsley November 2003 election ballot. On the other hand, the court held that because the Dobbs Ferry petition had been filed on September 22, 2003, 43 days before November 4, it was untimely under the 45-day provision, precluding a referendum on November 4, 2003.[21] On the basis of how this 45-day requirement fell, the Ardsley petition was granted, and the Dobbs Ferry petition was dismissed.[22]

The court found "no contradiction" between MHRL and Election Law § 4-108(1)(b), which was the primary statute urged by the village trustees. That provides that "at least thirty-six days prior to the election at which [a] . . . referendum is to be submitted," the village clerk shall transmit to the County Board of Elections "a certified copy of the text of . . . [the] referendum and a statement of the form in which it is to be submitted," and an abstract stating its purpose and effect in clear language.[23] The court found that the Legislature intended the six-day difference between 36 days and 30 days as a span of time for receipt of mail.[24]

The Ardsley Board of Trustees did not appeal the decision and order, and the referendum was duly placed on the November ballot by the County Board of Elections. The referendum passed 453–321,[25] and Ardsley's first November village election was held on November 2, 2004.

The Dobbs Ferry petitioners moved for reargument by Order to Show Cause on October 15, 2003. The petitioners' primary point on reargument was that MHRL § 23 and § 24 by their terms do not apply to citizen-initiative petitions. MHRL § 24(b) applies to a "local law adopted by a village" which is "subject to referendum on petition" (that is, a permissive referendum) when sufficient local electors, meaning registered voters, protest against the law by petition. MHRL § 23 applies to a local law adopted "subject to mandatory referendum," and only incorporates by reference the "certifi-

> Procedural pitfalls can be used to thwart the referendum process should a local board of trustees oppose such a change.

cation by the clerk" process for those petitions filed within 30 days "*after* the adoption of such local law . . . [*and*] requesting its submission at a special election" (emphasis added), which is not the November general election. Further, MHRL § 23 and § 24 require a greater number of petitioners than is needed for the citizen initiative petition procedure under the Village Law and the Election Law. Finally, MHRL § 24 refers to permissive referendum procedures under Village Law Article 9, not to mandatory referenda.

On October 22, 2003, the supreme court issued its opinion on submission of papers, granting reargument but adhering to its original determination.[26]

Dobbs Ferry Petitioners Appeal

The Dobbs Ferry petitioners appealed to the Appellate Division, Second Department, urging again that the 45-day time period in Municipal Home Rule Law § 23 and § 24 did not apply to the citizen initiative referendum process set forth in Village Law § 9-912. The trustees argued that MHRL § 23 and § 24 applied to all mandatory referenda in New York State, and that the "clerk review" specified there was necessary for the Dobbs Ferry petition.

The Second Department agreed with the Dobbs Ferry petitioners on this point, holding that MHRL § 23 and § 24 had no applicability to citizen initiative petitions, and that the lower court had "improperly relied" upon the MHRL to dismiss the Dobbs Ferry petition as untimely.[27] The Appellate Division left undisturbed the holding that the referendum date specified in the petitions was controlling, and that the village board could not substitute another date.[28] It held that the petitioners had indeed complied with the requirements of Village Law § 9-912 for citizen-initiated propositions to be considered by the electors of a village, including filing the petitions 30–60 days before the referendum date.[29]

The court, however, found a fatal impediment to the Dobbs Ferry referendum. Under Election Law § 4-108(1)(b), the village clerk is required to transmit to the Board of Elections, within 36 days before a proposed referendum vote, a certified copy of the text of the proposal that is to be voted on.[30] This required a village clerk to transmit the proposition "when it is *certain* that such proposal will in fact be placed on the ballot."[31] In the case of Dobbs Ferry, at the time the 36-day window deadline expired on September 29, 2003, the Dobbs Ferry Village Clerk had not yet completed her review of the petition for purposes of certification, and therefore, according to the court, could not timely forward a certified copy of the proposition's text to the Westchester County Board of Elections, pursuant to the Election Law.[32] Although voter signature cards are at the village clerk's office, and it could not take more than a few minutes to review a signature, the appellate court held that, in the absence of any evidence rebutting the clerk's statement "that she did not delay in her review of the petition and that she did not engage in inaction with respect thereto," the supreme court had properly dismissed the petition "under the circumstances,"[33] thereby precluding a November 2003 referendum vote in Dobbs Ferry.[34]

Guidelines and Reflections

As a result of these court decisions, several matters have been clarified about citizen efforts to change a village's election date. A significant result for citizen-petitioners is the holding that petitioners submitting double the minimum signatures can designate the November general election date for their referendum, and it must be observed. The trustees may not ignore that date and schedule the referendum for a different date. Although the cases involved petitions designating the referendum date for the general November election, and not for a regular or special village election, it appears that submitting double the required signatures mandates that the referendum be held on the date named therein, not a special election date set by a potentially unfriendly board.

Other points appear to require further examination and harmonizing through litigation or legislation. Although Village Law § 9-912 requires that the petition be filed between 30 and 60 days before the date specified for the referendum vote, it should be filed with the village clerk as close to the 60-day date as possible. As matters stand now, the Village Law's already narrow 30-to-60 day window

for the filing of petitions before the referendum has been pared back to 36-to-60 days, or perhaps even 45-to-60 days. This severe reduction results from the Appellate Division's engrafting Election Law § 4-108 onto Village Law § 9-912, holding that the village clerk has a mandatory period, but of unspecified duration, to review and certify the petition to the county Board of Elections. The Appellate Division has suggested that it must be filed an unspecified number of days greater than 36 days before the date of the proposed vote, to comply with the requirement of Election Law § 408(1)(b) that the village clerk is to certify the petition and transmit the paperwork to the Board of Elections.

Thus, as a practical matter, the petition should be filed near the 60-day outside limit to avoid or and to overcome any argument that not enough time was permitted for the clerk's review and certification.

Election Law § 4-108 should not be used to eviscerate or control the citizen-initiative petition process. The proposition that it takes more than a day, or at most two, for a village clerk with voter signature and address cards to review 400 or 600 petition signatures of local village residents, is not compelling. Giving a clerk, who is responsible to a village board that is hostile to a petition, the power to stretch "review" of the petition to seven days, or 22, and thus keep it from the ballot, is not consistent with the legislative structure.

The village trustees contended, and the courts found, that a clerk review was called for here. However, it has been held that in the absence of a statutory "clerk review" provision for the specific type of petition in question, the clerk has no power to review or to hold up submission of the petition, but must perform "strictly ministerial" duties in forwarding it.[35] Election Law § 4-108(1)(b) does not explicitly provide for any village clerk review of the petition. It provides only that the clerk shall do ministerial acts:

> [T]he clerk of such political subdivision, at least thirty-six days prior to the election at which such proposal, proposition or referendum is to be submitted, shall transmit to each board of elections a certified copy of the text of such proposal, proposition or referendum and a statement of the form in which it is to be submitted.

Moreover, § 4-108(b) does not require that the certified copy be transmitted to the Board of Elections only "when it is *certain* that such proposal will in fact be placed on the ballot." The Appellate Division has engrafted a substantive "clerk review" requirement onto Village Law § 9-912, as opposed to the ministerial acts set forth in § 4-108. The "certainty" standard is circular since it is not "certain" the proposal will be placed on the ballot until the clerk certifies. The court has also compounded the clerk's (and a village board's) ability to frustrate the citizen-initiative petition process by placing the burden of proof on the petitioners to show that the clerk delayed his or her review or "engaged in inaction" if, as would be expected, the clerk swears in an affidavit that he or she acted properly. Contradicting affidavits by petitioners would only create a question of fact on that point, and might not be decisive.

Moreover, leaving uncertain the number of days a village clerk must certify before the 36-day submission deadline in § 4-108 makes it extremely difficult and unpredictable for petitioners. The current state of the law severely truncates the 30-60 day window of § 9-912. Further legislative or judicial refinement of the procedural parameters for this citizen effort appears necessary.

In addition to being cognizant of these legal requirements and practical principles, proponents of the referendum process who desire to hold the referendum vote at the regular November election should, preferably before they start gathering signatures, check with the County Board of Elections to verify the Elections Board's deadlines for placing referenda on the ballot, and the type of documentation that must be supplied by the village clerk. At the time the petition is filed, the petitioners, as they did in Ardsley and Dobbs Ferry, should provide the village clerk with written notice of the deadline to transmit the proposition to the Board of Elections and remind the clerk of his or her duty to promptly and diligently review the petition to meet that deadline. As in Ardsley and Dobbs Ferry, the referendum proponents should also provide a written proposed form of resolution that tracks the language of the proposition as stated in the petition, and other ancillary documents, to assist the clerk in providing the necessary documentation to the Board of Elections.

Conclusion

Conducting local village elections in November instead of March can save local governments thousands of dollars, lead to fuller discussion of issues, and result in greater voter participation in local elections and better informed debate during the budget process. The March date can be changed through referendum. In the event a village's trustees do not pass a resolution setting a November election date, or setting a referendum date to vote on such a change, the citizens have the right to petition and to set the date for such a referendum. By gathering the signatures of several hundred voters and presenting the petition to the village clerk between 45 and 60 days before the date of the proposed vote, the citizens of a village have the power to effect change that, on the local level, will save money and increase participation in the democratic process. ■

1. See Village Law §§ 5-502–5-510 for changing the village's fiscal year.

2. Election Law § 15-104(1)(a). *See generally* J. Bellano, *A Change for the Better: Changing the Date of Village Elections*, N.Y. St. B.J. (Oct. 1996) p. 44.

3. Election Law § 15-104(1)(c). The village board may also resolve, subject to a permissive referendum, to have the village election conducted by the County Board of Elections, instead of by town or village election officials.

4. Village Law § 9-912(1), (2)(e).

5. Village Law § 9-900.

6. Village Law § 9-912(1).

7. *Id.*

8. *Id.*

9. *Id.*

10. Village Law § 9-912 does not say where the petition is to be filed, nor does it refer to any other statute's filing requirements.

11. Election Law § 4-108(1)(b). *See Broda v. Monahan*, 309 A.D.2d 959, 767 N.Y.S.2d 111 (2d Dep't 2003).

12. The drives were conducted by the Ardsley Good Government Committee and the Dobbs Ferry Good Government Committee.

13. In 1998, Mamaroneck's Clerk-Treasurer and Board of Trustees, who later campaigned against the referendum changing the date, nonetheless accepted and forwarded to the County Board of Elections on or about September 18, 1998, the petition filed September 11, 1998 for a referendum at the 1998 November general election on changing the Mamaroneck village election date to November, together with ancillary documents. See September 18, 1998 forwarding Letter of Leonard M. Verrastro, Mamaroneck Clerk-Treasurer.

14. Election Law §§ 16-100, 16-104(2).

15. See Transcript of Proceedings, *Nardecchia v. Abate*, Index No. 15693/03; *Broda v. Monahan*, Index No. 15694/03, at 55 (Sup. Ct., Westchester Co., Oct. 8, 2003).

16. *Id.* at 62–63.

17. *Id.* at 61–63.

18. *Id.* at 70.

19. *Id.* at 49–50; Village Law § 9-902(9).

20. *Nardecchia v. Abate*, Index No. 15693/03; *Broda v. Monahan*, Index No. 15694/03 at 66–67; MHRL § 24(1)(a); alternatively § 24(1)(a) required clerk certification not later than 30 days after its filing if that was an earlier date. Here, the 45-day backwards date was the earlier one.

21. *Nardecchia v. Abate*, Transcript of Proceedings, Index No. 15693/03 (Sup. Ct., Westchester Co. Oct. 8, 2003).

22. *Id.* The court said, "This is good news for one municipality and not so good news for the other." *Id.* at 66.

23. Election Law § 4-108(1)(b), (d).

24. *Id.* at 67–68. This is confusing, since MHRL says that the 30-day period is for the village clerk receiving a petition in response to "a local law adopted"; it does not refer to the County Board of Elections clerk.

25. *See Ardsley Election Date Proposal Passes*, The Journal News, Nov. 14, 2003.

26. *Broda v. Monahan*, Decision and Order, Index No. 15694/03 (Sup. Ct., Westchester Co., Oct. 23, 2003).

27. *Broda v. Monahan*, 309 A.D.2d 959, 767 N.Y.S.2d 111 (2d Dep't 2003).

28. *Id.*

29. The court did not consider petitioners' point that, even if *arguendo* there is any "review" period, since no objections to the petition had been made within the five-day period allowed under Village Law § 9-902(9), and since that was certainly an adequate review period, the Village Clerk had to forward the petition.

30. *Broda v. Monahan*, 309 A.D.2d 959, 767 N.Y.S.2d 111 (2d Dep't 2003) (quoting Election Law § 4-108(1)(b)).

31. *Broda*, 309 A.D.2d 959 (emphasis in original).

32. *Id.* The Dobbs Ferry clerk had asserted she had 30 days to complete the review under MHRL § 24(1)(a). In Dobbs Ferry, the referendum petition was signed by over 600 voters.

33. *Broda*, 309 A.D.2d 959. The Appellate Division Decision and Order was dated October 30, 2003, only five days before the November 4 election date. The County Board of Elections had raised practicality questions about placing the referendum on the ballot, and about absentee voters, many of whom had already voted on a ballot without the referendum. These points were not discussed by the court, but may have been part of the "circumstances."

34. Notwithstanding their victory in court, the Trustees passed a resolution to conduct the referendum during the March 2004 village election. The referendum passed by a vote of 787 in favor of changing the time of the village election, and 685 against. *See Dobbs Ferry Elections to Move to November*, The Journal News, Mar. 18, 2004. As a result, the Dobbs Ferry Village elections are held at the time of the regular elections in November each year, beginning in November 2005.

35. *Arditti v. Jacobson*, 180 Misc. 884, 44 N.Y.S.2d 750 (Sup. Ct., Nassau Co. 1943).

BY ELLIOTT WILCOX

Elliott Wilcox is creator of *The Trial Notebook: Lessons Learned from the Courtroom*. To sign up for his FREE weekly *Trial Tips Newsletter*, featuring trial advocacy tips and techniques, visit www.TrialTheater.com.

Powerful Openings

"Ladies and gentlemen, Madam Chairman, and distinguished members of the head table – thank you for letting me speak with you tonight. It is a real pleasure to be here at the Acme Company annual meeting. I just flew in from Duluth, and boy, are my arms tired. [Pause for laughter.] Let me apologize in advance, but I didn't know I was going to be called on tonight to speak . . ."

Ugh. If that's how the speech started, would you want to listen to any more? Unfortunately, that's exactly how many speeches start, wasting opportunities that are only available at the beginning of the presentation.

The first moments of a speech set the mood for the entire presentation. Start with a whimper, the audience predicts the rest of your speech will bore them. Ramble at the onset, they bet the rest of your speech lacks direction, too. But start your speech with power, energy, and conviction, they scoot to the edge of their seats, focus their eyes on you, and pay rapt attention. Successful openings can accomplish three objectives:

1. Grab the audience's attention. Effective openings capture the audience's attention from the very first word. Remember, it's not enough to just start strong – the rest of your speech must deliver on the promises you make with the opening.

2. Focus their attention (introduce the topic). When you begin, the audience may not be focused on you. You're competing with incoming Blackberry messages, catastrophes at home, even their desserts. You need them to focus on you and your presentation. Give the audience a reason to listen to your presentation. When they understand why the topic matters to them, they'll want to listen to the rest of your speech.

3. Connect with the audience. Smile. Look them in the eyes. Show enthusiasm. These first moments let you develop rapport with your audience. The more they like you, the more they want to listen to you.

Here are six techniques to help jump start your next presentation:

Start with a story. "As I drove past the guard gate and pulled into Sarah's driveway, I had no idea how much my life was about to change. It was early April, 1998 . . ." People's ears perk up when they hear a story.

Start with a question. "How confident do you feel about your retirement plan? Will you be able to maintain the lifestyle you've grown accustomed to?" A good question will pique your audience's interest and keep them listening for your answer.

Start with the benefits. "Imagine crafting an opening statement where your client's story comes to life. The jury leans forward, listening with rapt attention and nodding their heads in agreement. From the corner of your eye, you see your opponent writing (a very large) number on a piece of paper, hoping that you might still be willing to settle." Audience members want to know, "What's In It For Me?" Speak to their interests, and they'll reward you with their attention.

Describe their problem. "As the clock sounds 7 o'clock, you call home and apologize – you're going to miss dinner, again. Two hours later, you stop at the drive-thru for your high-carb, high-fat dinner. By the time you finally arrive home, the kids are already in bed, and you have just enough energy to watch a little TV before crawling into bed. Sound familiar? How many of you feel there aren't enough hours in the day? Let me tell you about a case management system that can add 1 1/2 to 2 hours to your day." If they recognize themselves in the problem you've described, they'll want to listen to your solution.

Start with a quote or poem. Others have already said it better than you can, so take advantage of their wisdom. "Henry Ford said, 'You can't build a reputation on what you're going to do.' Neither can this firm. If we're going to have a reputation as the best labor relations firm in the city, we need to achieve three objectives."

Start with a contradiction. Imagine a candidate addressing the national convention with this statement: "If you elect me, you'll pay more taxes next year." Would that grab your attention? Once the politician grabs audience attention, he explains how he wants them to pay a lower tax rate, but to earn significantly more money under a new job creation and development program. Audiences often pay more attention when they disagree with what you say. What accepted beliefs can you challenge? Start with the bombshell, and then explain your position.

Whether it's an opening statement or a speech to the local service organization, the first moments of your presentation are essential. Take the time to craft a dynamic opening, and your audience will give you their undivided attention. ■

J. Michael Hayes (jmh@jmichaelhayes.com) is an attorney with the Law Firm of J. Michael Hayes in Buffalo and practices in personal injury litigation. He is a graduate of the State University of New York College at Brockport and received his law degree from the State University of New York at Buffalo.

Subrogation Rights of Health Care Providers

By J. Michael Hayes

Independent Health Association and other health care providers have begun asserting "liens" or, more properly, subrogation claims for medical payments made.

Personal injury clients may not recover for medical expenses paid by a third party, like an insurance carrier, according to the CPLR.[1] For many years, liability insurance carriers pushed for limiting the recovery for collateral source payments. They succeeded in 1986 when section 4545(c) was enacted. It provides in applicable part:

> In any action brought to recover damages for personal injury . . . where the plaintiff seeks to recover for the cost of medical care, . . . [where] such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source such as insurance . . . [the court] shall reduce the amount of the award by such finding.

Thereafter, medical insurance providers must realize a potential subrogation right for monies paid to health care providers on behalf of the injured party and have sought to establish a right of repayment. Insurance providers routinely include subrogation language in contracts. They have also sought to retroactively modify their contractual arrangements by requiring a claimant to sign an agreement to reimburse them for payments made. In some cases, the modifications go so far as to require that the health insurer be repaid before the injured party recovers anything for his or her personal injuries.

The question of when and how an insurance carrier could assert its rights reached the Court of Appeals in 1996, when the Court held that "while the insurer had no lien on the funds, intervention was proper to permit the insurer to establish its contractual right to reimbursement of any medical expenses actually included in the settlement."[2] The case was remanded to the trial court for further proceedings to determine whether the settlement included reimbursement for medical expenses.

Since *Teichman*, medical insurance providers have been very assertive in pursuing their subrogation rights/claims. The First, Second and Third Appellate Departments have ruled that insurance providers have no right of intervention. Their rationale states that the purpose of CPLR 4545 is both to prevent double recovery by plaintiffs and to limit liability costs to policyholders.[3] The Second Department also observed that "intervention of various medical providers could create an adversarial posture between carriers and plaintiffs."[4] Such a situation could develop when the amount of insurance available is insufficient to adequately compensate the plaintiff, let alone repay the medical insurer.[5]

The Fourth Department chose a different path in *Independent Health Ass'n v. Grabenstatter*.[6] The plain-

tiff, Independent Health, commenced an action seeking repayment for medical expenses by Grabenstatter, based upon a provision of the contract stating that Independent Health had a lien for medical expenses paid. The court upheld such a "lien." However, since the insurer had not "proven" that the settlement had included reimbursement for identified medical expenses, the complaint was dismissed.

The Fourth Department has recently expanded its view to hold (in two 3-2 decisions) that the insurer or health care provider has an independent right to intervene.[7] These decisions also expressly concluded that CPLR 4545 did not preclude the insurer from recovering paid medical expenses from the tortfeasor. In each case the litigants attempted to petition the Court of Appeals; both appeals were dismissed as the cases were not "finally resolved."

Since then, the Fourth Department has maintained its consistency and recently, unanimously affirmed a health care provider's right "to assert an equitable subrogation claim against" the tortfeasor.[8]

Impediments to Settlement

Subrogation claim issues and considerations seem to apply to almost all personal injury cases. They may come into play whenever a private health insurer is involved, whether it is a fall-down, a dog bite, medical malpractice or a host of other common torts. The issues are especially germane to motor vehicle cases where additional personal injury protection (APIP) benefits may be involved. The regulations state that the company providing the APIP endorsement has a subrogation right against the responsible third party. The Court of Appeals has held that the statute of limitations in an APIP subrogation claim is three years.[9] However, should the plaintiff settle the action after the three-year period and the settlement includes compensation for medical expenses paid by APIP, one might expect the carrier could make a direct claim against the plaintiff under the provisions of the contract for health care between parties.

The downstate Departments are correct in reasoning that allowing intervention complicates negotiation and the potential for resolution of claims. Practically speaking, there is no problem when there is ample coverage. The attorney may even represent both the injured party and the health care provider without conflict in such cases. The attorney may recover and receive attorney fees on the personal injury settlement and may also represent the health insurance company, recover its expenditures for medical expenses and take a fee. The personal injury client should then benefit to the extent that expenses/disbursements are shared on a *pro rata* basis.

The issue becomes much more complicated where there is limited coverage – an attorney may not represent both the injured party and the health insurance company. There are competing claims for the same limited pool of money, and it is an obvious conflict of interest for the attorney attempting to represent two parties with competing claims.[10] This is nearly the exact problem anticipated in *Humbach v. Goldstein*.

There is another complication that plaintiffs' attorneys face. Assume the personal injury action can be resolved for the full policy. The plaintiff and his or her attorney have made no claim for medical expenses and their settlement does not contemplate that aspect of the case; their intent is to settle the case for the "injuries, pain and suffering." This will work provided the liability carrier will accept a general release limited to "only bodily injury, conscious pain and suffering" and where the general release also states that the settlement "shall not affect the subrogation rights of any individuals, corporations, insurance carriers or other entities." In these circumstances, both the plaintiff and the plaintiff's attorney should be protected and all the settlement funds should go to the client.

A problem is developing as liability carriers expand their releases to require that a plaintiff release, guarantee and indemnify against any and all liens (which may be acceptable) and all subrogation claims. This language is unacceptable and, logically, makes no sense. If the plaintiff were to settle for everything including the subrogation rights of his or her insurer, the plaintiff would

be violating the policy terms and the rights of the carrier. For example, the language of the Insurance Regulations for APIP endorsement is as follows:

> In the event of any payment for extended economic loss, the Company is subrogated to the extent of such payments to the rights of the person to whom, or for whose benefit, such payments were made. Such person must execute and deliver instruments and papers and do whatever else is necessary to secure such rights. Such person shall do nothing to prejudice such rights.[11]

If the defense carrier demands that any settlement of the personal injury action is contingent upon the plaintiff also releasing the subrogation rights of his or her insurer, this could result in a situation where the plaintiff is responsible for repaying his or her own carrier despite the fact that the plaintiff had not received any additional compensation in the settlement in consideration of the medical expenses.

The most recent version of language the writer sees as acceptable in a release is as follows:

> . . . we ever had, now have or which our heirs, executors or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents, and more particularly all claims *for only bodily injury and conscious pain and suffering* arising from an incident which happened on _____, in the County of _____, State of New York.
>
> The undersigned further represents that there are no liens by any hospital, ambulance service or other medical provider, Medicare, Medicaid, insurance company, or attorney enforceable against the proceeds of this settlement or against the parties, released, the _____ and/or any of its Subsidiaries, Divisions or other associated companies, or the persons, firms, or corporations making the payment herein. If such a lien is asserted against the proceeds herein, or against the released parties, or against _____ and/or any of its Subsidiaries, Divisions or other associated companies, or the persons, firm or corporation making the payment herein, then, in consideration of the payment made to the undersigned, the undersigned covenants to pay and satisfy such asserted lien, or to satisfy the same on a compromise basis, and to obtain in any event a release of the parties released herein, the _____ and/or any of its Subsidiaries, Divisions or other associated companies, or the persons, firm, or corporations making the payment herein, and to indemnify and hold harmless said parties from any costs, expenses, attorney fees, claims, actions, judgments, or settlements resulting from the assertion or enforcement of such lien by any entity having such lien *provided however this release shall not affect the subrogation rights of any individuals, corporations, insurance carriers or other entities.*

One argument proffered by defense counsel is a claim that if they exhaust their insured's policy, they will still be obligated to defend the insured in any subsequent action by the health care provider. This assertion is incorrect. A line of cases from the Second Department holds that once the policy is exhausted, the obligation of the insurer to defend or indemnify is released.[12]

Perhaps the only area where the plaintiff may be safe is for claims made under the plaintiff's own SUM policy. There appears to be no viable medical expenses subrogation right for SUM recoveries.[13] In a SUM claim, the policyholder is the claimant and the "first party." The Court of Appeals has determined that subrogation rights are exercisable only against third parties. However, one must still look to the language of the contract between the policy holder and the carrier.

This is an evolving area of the law and the practitioner must carefully consider all the nuances at the time of settlement negotiations, and prior to delivery of releases and distribution of any settlement proceeds. ■

1. CPLR 4545(c).
2. *Teichman v. Cmty. Hosp.*, 87 N.Y.2d 514, 640 N.Y.S.2d 472 (1996).
3. *Humbach v. Goldstein*, 229 A.D.2d 64, 653 N.Y.S.2d 950 (2d Dep't 1997), *leave dismissed*, 91 N.Y.2d 921, 669 N.Y.S.2d 263 (1998); *Halloran v. Don's 47 W. 44 St. Rest. Corp.*, 255 A.D.2d 206, 680 N.Y.S.2d 227 (1st Dep't 1998); *Berry v. St. Peter's Hosp.*, 250 A.D.2d 63, 678 N.Y.S.2d 674 (3d Dep't 1998).
4. *Humbach*, 229 A.D.2d 64.
5. *Berry*, 250 A.D.2d 63.
6. 254 A.D.2d 722, 678 N.Y.S.2d 220 (4th Dep't 1998).
7. *Omiatek v. Marine Midland Bank*, 9 A.D.3d 831, 781 N.Y.S.2d 389 (4th Dep't 2004); *Kaczmarski v. Suddaby/Indep. Health Ass'n, Inc.*, 9 A.D.3d 847, 779 N.Y.S.2d 394 (4th Dep't 2004).
8. *Oakes v. Patel & Health Now N.Y., Inc.*, 23 A.D.3d 1023, 803 N.Y.S.2d 455 (4th Dep't 2005).
9. *Allstate v. Stein*, 1 N.Y.3d 416, 775 N.Y.S.2d 219 (2004).
10. The Lawyer's Code of Professional Responsibility, DR 1-105(a).
11. 11 N.Y.C.R.R. § 65-1.3; *cf.* Insurance Law § 2307(b).
12. *See Hosp. for Joint Diseases v. Hertz Corp.*, 22 A.D.3d 724, 803 N.Y.S.2d 670 (2d Dep't 2005) (holding that "where . . . an insurer has paid the full monetary limits set forth in the policy, its duties under the contract of insurance cease").
13. *Shutter v. Philips Display Components Co.*, 90 N.Y.2d 703, 655 N.Y.S.2d 379 (1997).

"If you're found guilty and sent to prision for life I'm willing to give you a seven percent discount off my usual fee."

BY ART AND ERIC SAMANSKY

The Joke Shouldn't Be on You

Have you heard the one about the senior partner who walks to the podium and starts the speech with a joke?

To no one's surprise, it falls flat.

Senior partners at law firms, private practitioners, corporate general counsel, and other C-level corporate executives – from the chairperson to the chief technology officer – usually do not leave the boardroom for the comedy club circuit for good reasons. This is evidenced by occasional news reports on failed jokes or poor attempts at humor by executives, among others, at public forums.

For any lawyer or corporate executive, the pitfalls of the verbal pratfall are hardly worth chancing. And, while the hazards may be greater when uttered by a senior executive, danger lurks for speakers at any level representing an organization at an event.

First, there is the joke itself.

David Letterman of CBS, just to name one late-night television talk show host, typically works alongside four writers who toil away to develop a fresh daily monologue. By comparison, the joke most lawyers and corporate leaders might tell is virtually certain to have been heard, or read on the Internet, before – and often. At best, the audience listens politely. Or, audience members begin to talk knowingly to nearby seatmates about the joke and coming punchline, taking attention *away* from the speaker. The executive's thoughts are not advanced in either case. Moreover, attention lost is hard to get back.

Still more damaging, the joke may backfire once it is associated with the remainder of the speaker's remarks, or later when an unexpected client or corporate situation develops.

A highly skilled employment attorney that we know confided in us that he had learned his lesson years ago when, during a client-sponsored talk on sexual harassment laws and rules, he opted to tell a joke which previously had won laughter in dinner settings with friends. The joke centered on the use of the word "girls." Until the joke, the women in the audience had listened attentively to his commentary. "After the joke, the women clearly tuned out to anything I had to say," he said.

Moreover, even if the joke is novel or reasonably fresh, many attorneys and executives lack the comedic timing to pull it off. Some executives are so unaccustomed to joke telling that they fumble through it, easily botching their efforts. One former corporate chieftain of a globally known manufacturer, whom we heard some years ago, told his joke so poorly that he stumbled on the punchline and had to fix it mid-way through. It is impossible to know whether the marginal laughter had to do with the joke, or if it was "nervous laughter" due to the speaker's ineptness.

Even if the joke or quip is delivered without being bungled, it may not "translate" well into printed words or broadcast sound bites. And, considering the global nature of business, the joke may not translate well into another language, potentially confusing a few audience members.

Some could miss that the comment is supposed to be funny: such a misunderstanding may have business consequences, may require post-joke clarification, or may even affect a company's stock price. Some years ago, for example, the chief executive officer of a well-known company quipped in a question-and-answer session at a conference that he would like to buy one of his competitor's units. Shares of both companies declined despite many analysts dismissing the idea.

Surely countless men and women from all walks of life have tried the comedy stage after being told by friends and family how funny they are: only a few are truly amusing and even fewer actually make it. Attorneys and executives should not fall for the same staff-meeting praise as they prepare to deliver speeches and presentations.

Even then-United States Supreme Court nominee Judge Samuel Alito Jr. tried going for the laugh-line in his opening remarks at his Senate confirmation hearings in early January 2006. As some media reported, the attempt failed. And, for those who may have missed the moment, some in the media recited it.

Consider a January 9, 2006, Associated Press dispatch by Laurie Kellman that noted: "Nobody said a Supreme Court justice has to be a laugh riot. Even so, Samuel Alito Jr. might want to think about keeping his day job, assuming he gets it."

Other leaders sometimes suffer similar "in-print" reviews, which don't

reflect well on the person or the organization, and may detract from the message.

Then there are the potential consequences of the joke itself. What is benign to one person is hardly so to another. Ample evidence exists in media reports of various leaders apologizing for telling jokes that were seen as insulting, impolitic, or inappropriate.

Self-deprecating lines have consequences, too: not everyone with a "problem" or "condition" has the confidence of the speaker telling the joke. The joke may be more painful than funny to some in the audience. Clearly, this will not advance the corporate message, perception of the organization, or the reputation of the attorney.

Perhaps before considering the joke-telling approach, all speakers should review a *New York Times* article from December 31, 2005, by Adam Liptak, who reported on a study by Jay D. Wexler, a law professor at Boston University, about from-the-bench humor by U.S. Supreme Court Justices.

The article noted: "Lawyers get laughs sometimes, too, but it is a dangerous business. In the guidebook the court provides a stern warning to lawyers preparing to argue before it: 'Attempts at humor usually fall flat.'"

In short, humor is a potential third rail: lawyers and other executives would be well advised to watch where they verbally step. Clients, corporate compensation committees, and shareholders pay executives to represent the company enthusiastically, effectively deliver the strategic messages, and build the business, not to be funny. And that is no joke. ■

Art and Eric Samansky are principals of The Samansky Group (www.samanskygroup.com), a public affairs consultancy which includes presentation and speech training in its portfolio.

INDEX TO ARTICLES 2000–2006

This index places the articles in one of the following categories. Please note that all articles from January 2000–November/December 2006 are available online, to members.

TOPIC/ARTICLE AUTHOR ISSUE/Pg.

Administrative Law

Survey of Practice Before Administrative Law Judges Finds Counsel Are Often Poorly Prepared, Poppell, B., Mar./Apr. 2002 20

Antitrust Law

New York Antitrust Bureau Pursues Mandate to Represent State Interests in Fostering Competitive Environment, Cavanaugh, E., Jan. 2000 38

Appeals

Appeals Clinic – 7 Tips on Whether to Appeal, How to Write Better Briefs, Feathers, C., Feb. 2004 36

Update: Did the Appellate Odds Change in 2005?, Kassal, B., Oct. 2006 42

Update: Did the Odds Change in 2003?, Kassal, B., Nov/Dec. 2004 28

Update: Did the Odds Change in 2004?, Kassal, B., Nov./Dec. 2005 32

What Are the Odds? Appellate Statistics Reveal Patterns Among State and Federal Courts, Kassal, B., Jan. 2004 46

Arbitration / ADR (see also Labor and Employment)

Advocate's Perspective, An – Mediation in Commercial Cases Can Be Very Effective for Clients, Beha, J., II, Sept. 2002 10

Appealing an Arbitrator's Award: Suggested Approaches, Marrow, P., Nov./Dec. 2005 14

Coming to New York? An Unconscionable Mediation Agreement, Marrow, P., Jul./Aug. 2006 40

Courts Differ on Standard Applicable When Parties in Arbitration Cases Seek Provisional Remedies, Mone, J.; Wicks, J., Sept. 2000 35

Institution Versus Individual: The Arbitration Alternative to Litigation, Bennett, S., Nov./Dec. 2005 26

Mediation Can Help Parties Reach Faster, Less Costly Results in Civil Litigation, La Manna, J., May 2001 10

Should Mediation Be Available as an Option to Reduce Litigation in Contested Guardianship Cases?, Beane, L., June 2002 27

"Team Red Hook" Addresses Wide Range of Community Needs, Calabrese, A., June 2000 14

View From Abroad – Turkey Embraces Arbitration as Step Toward Global Economic Integration, Grant, T., June 2002 46

Attorney Professionalism

18-B Experience, The – Court-Appointed Attorneys Face Legal and Financial Challenges, Korgie, T., May 2001 5

Annual Mock Trial Competition Introduces High School Students to the Law and Court Procedures, Wilsey, G., Mar./Apr. 2000 10

Don't Tell Anyone (Our Confidentiality Rules Are Changing), Krane, S., May 2005 28

Estates With Multiple Fiduciaries Pose Ethical and Practical Issues for Attorney and Clients Alike, Freidman, G.; Morken, J., Nov./Dec. 2001 22

Ethics – "Touting" in 1963 Was Replaced by a Flood of Information About Lawyers, Craco, L., Jan. 2001 23

Forum, Committee on Attorney Professionalism, Feb.–Nov./Dec. 2003; Jan. 2004–Nov./Dec. 2006

In Memoriam: Charles E. Heming 1926–2003, Miller, H. Oct. 2003 42

In Memoriam: Lawrence H. Cooke 1914–2000, Kaye, J., Sept. 2000 50

Judiciary State Law Report of the Commission on Fiduciary Appointments, Jan. 2002 38

Justice Robert H. Jackson, Gerhart, E., Nov./Dec. 2000 42

New York State Judicial Institute, The, Keating, R., May 2005 10

Professionalism Award: An Exemplary Lawyer, Netter, M., Jul./Aug. 2002 52

Professionalism Award – Chronicle of a Career, Netter, M., May 2001 49

Recent News Events Illustrate Ethical Dilemmas Associated With a "Difficult" Organizational Client, DiLorenzo, L., Mar./Apr. 2003 8

Reflections on Building a Practice – Lessons from the Neighborhood Provide Secrets to Success, Nolan, K., May 2002 16

Tournament Teaches Skills for a Lifetime, Korgie, T., Mar./Apr. 2000 11

Tribute – William J. Carroll, May 2001 25

Using Threats to Settle a Civil Case Could Subject Counsel to Criminal Consequences, Holly, W., Jan. 2000 26

Banking / Finance Law

Confusury Unraveled: New York Lenders Face Usury Risks in Atypical or Small Transactions, Stein, J., Jul./Aug. 2001 25

Funding Terrorism, Hayden, D.; Feldman, H., Sept. 2005 23

Gramm-Leach-Bliley Act Challenges Financial Regulators to Assure Safe Transition in Banking Industry, Di Lorenzo, V., Oct. 2000 36

Bankruptcy

Life Insurance and Annuities May Insulate Some Assets From Loss in Unexpected Bankruptcy Filings, Bandler, B.; Starr, S., Jul./Aug. 2000 28

Books on Law

100 Years of Federalism (by Mark Curriden and Leroy Philips, Jr.), Moore, J., Mar./Apr. 2000 50

Arbitration: Essential Concepts (by Steven C. Bennett), Poppell, B., Jul./Aug. 2002 50

Business and Commercial Litigation in Federal Courts, 2d Edition (Robert L. Haig, editor-in-chief), Wesley, R., Jul./Aug. 2006 50

Commercial Litigation in New York State Courts (Robert L. Haig, editor-in-chief), Alcott, M., Jul./Aug. 2005 52

Contempt of Court: The Turn-of-the-Century Lynching That Launched Evidentiary Privileges (Grand Jury, Criminal and Civil Trials) (by Lawrence N. Gray), Boehm, D., June 2000 51

Greatest Player Who Never Lived, The: A Golf Story (by J. Michael Veron), Lang, R., Feb. 2001 57

INDEX TO AUTHORS 2000–2006

The following index lists the authors of all articles that have appeared in the *Journal* since the January 2000 edition. Below each author's name is the general classification category used for the article. The headline describing the content of the article appears under that classification category in the Index to Articles that begins on page 38.

CONTINUED ON PAGE 58

CJC, but the CJC may still be a basis for discipline.

The Commission determines whether to admonish or censure judges publicly, remove them from office, or retire them for disability, subject to review before the Court of Appeals at the judge's request. The Commission may also issue a confidential letter of dismissal and caution containing suggestions and recommendations after concluding an investigation and instead of a disciplinary proceeding. The Commission may send a confidential letter of caution to a judge when a disciplinary proceeding is sustained.

Lack of knowledge that an act or omission is improper is no defense.[16] But guidance is available. New York advisory opinions can be accessed on Westlaw's NYETH-EO database. New York disciplinary determinations can be obtained from the NYETH-DISP database. New York advisory opinions are inaccessible on LEXIS, but New York disciplinary opinions can be obtained on LEXIS by clicking "States Legal — U.S.," "New York," "Agency & Administrative Materials," and "New York Commission on Judicial Conduct Opinions." Judges and the public may also access ACJE advisory opinions for free on New York's Unified Court System Web site[17] and Commission information, including determinations, on the Commission's Web site.[18]

Timeliness

Judges should render justice, but not at the expense of making litigants wait. The RGJC requires judges to "dispose of all judicial matters promptly, efficiently and fairly."[19] In New York, all judges must report to the Chief Administrator of the Courts all cases undecided within 60 days after final submission and any undecided motion for interim maintenance or child support within 30 days after final submission.[20] In summary proceedings like matters in the New York City Civil Court's Housing Part, judges must resolve within 30 days after final submission cases involving nonhazardous or hazardous violations and within 15 days after final submission cases involving immediately hazardous violations or injunctions.[21]

Administrators must remind Supreme Court justices to resolve motions. The deputy chief administrative judge for courts inside and outside New York City must tell the justice that a motion "has been pending for 60 days after final submission."[22] If a motion is "unusually complex," the justice may apply to the local administrative judge no later than 20 days after final submission to designate the motion "complex."[23] If the administrative judge agrees, the justice has 120 days to decide the motion.[24]

In one case, *In re Greenfield*, a New York State Supreme Court justice delayed issuing opinions between seven months and nine years.[25] Some litigants were forced to begin proceedings against the justice to compel him to render decisions. Despite a strong dissent, the Court of Appeals declined to sanction him. The court noted that imposing sanctions under the RGJC would be appropriate if a judge purposely concealed delays or failed to cooperate with an administrative judge's efforts to assure that decisions are rendered timely.[26] The court found that the justice's actions were not a "persistent or deliberate" neglect of judicial duties that would warrant formal penalties. When *Greenfield* was decided, the rules requiring judges to report late decisions had been promulgated only recently and were loosely enforced.[27] Numerous courts have since disagreed with *Greenfield*.[28] Most commentators believe that judges who issue decisions late act unethically.

Today, the rules requiring judges to report cases are enforced strictly. Court administrators keep close track of undecided cases, remind judges about undecided cases, and adjust judges' caseloads to enable judges to dispose of undecided matters promptly. Were *Greenfield* decided today, the court might render a different decision.

> An unethically written opinion is a black mark that defines a judge, while the honest, just, well-written opinion is celebrated.

Candor

Candid judges give real reasons for their decisions. A judge uncomfortable with doing so should decide the case differently or on different grounds.[29] A judge who recognizes that the real reason for deciding a case is inappropriate should use the occasion to reconsider.

Our democratic process requires reasoned opinions.[30] But reasoned opinions aren't necessarily candid. Candid opinions help readers — litigants, lawyers, law students, appellate judges, and the public — understand precedent and outcomes and decide for themselves whether judges are doing their jobs.[31] A lack of candor reveals a lack of integrity.[32]

Candor has its limits, however. Precedent, collegiality, the lawyers' and litigants' personalities, and politics test those limits, and judges should avoid revealing their personal thoughts in the guise of candor.[33]

An opinion isn't easy to write.[34] The result isn't always pleasant. The law can be complex. It can lead to peculiar results. A judge shouldn't talk about the opinion in the opinion. Judges shouldn't state how difficult the opinion was to write, how much the judge worked on the opinion, or the effort the judge made to ensure a

fair opinion. Justice Oliver Wendell Holmes made an ethical appeal to his readers when he wrote in his dissent in *Lochner v. New York* that "[t]his case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should study it further and long before making up my mind."[35]

Judges who say how deliberate, conscientious, hard-working, honest, or smart they are will leave readers unpersuaded. An opinion should resolve issues, not be a vehicle for self-congratulation.

Judges might also be unsure about the opinion's result. A tentative opinion is a draft opinion that a judge issues seeking comment before the final decision.[36] In a dubitante opinion, a judge expresses findings of fact and conclusions of law with reservations.

The public expects judges to decide difficult controversies. Litigants know that one side will lose and the other will win. A judge must deal with the good, the bad, and the ugly. Judges must bring finality to disputes[37] and take responsibility for their decisions.[38]

Humility and Humanity

Some judges get so caught up with their power that they lose sight of their goal: to "be both lawyer and philosopher of the highest grade, blessed with saving common sense and practical experience as well as sound comprehensive learning."[39] Judges should write intelligent, honest, and clear opinions that adhere to ethical and moral principles. Harvard Law Professor Lon Fuller synthesized that rare quality of great judges: "[T]heir fame rests on their ability to devise apt, just, and understandable rules of law . . . [T]hey were able to bring to clear expression thoughts that in lesser minds would have remained too vague and confused to serve as adequate guideposts for human conduct."[40] Some non-judges naively believe that judges have supernatural powers. Judges are lost souls when they take to heart the compliments and honorifics they receive.[41] Judges must never confuse the law's power with its dignity.

An example of an immodest opinion is *Bianchi v. Savage*.[42] The court treated the New York landlord-tenant issue in that case as if civilization itself depended on the court's ruling. The judge's lack of modesty is endless. He used the royal "we" and "us"; he used capitals, italics, italicized capitals, and exclamation marks. To emphasize, the judge used adverbs, adjectives, Latin, metadiscourse, and self-congratulatory phrases. Justice Holmes in *Haddock v. Haddock* used a more modest approach when he wrote, "I do not suppose that civilization will come to an end whichever way this case is decided."[43]

An opinion should resolve issues, not be a vehicle for self-congratulation.

Judges must rely on their humanity to write opinions that offer just solutions to all. Judges who attempt to write literary masterpieces will lose sight of "the holy function of justice."[44] Justice demands just solutions, not brilliant opinions or purple prose.[45] Judges must not use opinions to display their intelligence. Modesty, humility, and dignity are essential in opinion writing.

Dicta and Public Policy

Judges should be careful about creating or relying on dicta.[46] Dictum is "[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision."[47] Overusing and misusing dicta lead readers to confuse dicta with findings and holdings. Public confidence in the judiciary isn't promoted if the public doesn't understand what the opinion holds and why.

Dictum arises when judges try to resolve too many contentions.[48] Some issues are more important than others. Some contentions are argued heatedly, but a judge will discover later that the contention isn't relevant to the ultimate determination. A judge may resolve a somewhat minor issue in a short paragraph or two. Overly considering minor claims detracts from important issues and sounds defensive.[49]

Courts should discuss all the separate grounds for an opinion's holding. Doing so doesn't create dicta.[50] It's important for lawyers to argue in the alternative; they don't know whether a judge will reach an argument. But judges who use alternative holdings, as opposed to separate arguments for a single holding, dilute opinions and perplex readers. Readers might mix up findings with ruminations when judges hold in the alternative.

Judges sometimes use dicta to lecture about policies ancillary to the issues before them. Judges may use public policy to supplement, but not supplant, existing legal rules.[51] Judges who disagree with a rule should state why it's unwise and may appeal to the legislature to change the law.[52] They must not mislead the reader into believing that policy — not the law — is the basis for the holding.[53] To take a landlord-tenant example, a court that considers whether a tenant is entitled to remain in an apartment should decide the case on legal grounds. A judge who discusses homelessness or slumlordism risks letting the reader believe that the case was decided for personal or political reasons. The discussion might also reflect prejudice: It might imply that a party falls into a category not established in the particular case.

Next issue: This three-part column continues with tone, temperament, facts, claims, issues, and standards of review. ■

1. For an excellent review of ethical legal writing for New York practitioners and judges, see Gary D. Spivey & Maureen L. Clements, *The Ethics of Legal Writing*, an unpublished two-part manuscript for a Continuing Legal Education course the authors gave at the New York Court of Appeals in April

2002 and June 2003. Several citations in this article are taken from that manuscript.

2. *See generally* Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals (1960).

3. *See* http://www.uscourts.gov/guide/vol2/ch1.html (last visited Aug. 4, 2006).

4. *See* http://www.abanet.org/cpr/mcjc/toc.html (last visited Aug. 4, 2006). In December 2005, the ABA issued its Final Draft Report to amend the Model Code. *See* http://www.abanet.org/judicialethics/finaldraftreport.html (last visited Aug. 4, 2006).

5. *See* http://www.abanet.org/cpr/mcjc/preamble_term.html (last visited Aug. 4, 2006).

6. *See* McKinney's Vol. 29, Judiciary, *available at* http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Code_of_Judicial_Conduct/CJC.pdf (last visited Aug. 4, 2006).

7. N.Y. Const. art. VI, § 20(b)(4).

8. 22 NYCRR Part 100. The RGJC are also available at http://www.courts.state.ny.us/rules/chief-admin/101.shtml#top (last visited Aug. 4, 2006).

9. Ann. Rpt., N.Y. St. Comm'n on Jud. Conduct 56 (2005).

10. 22 NYCRR 100.6(E).

11. *Id.* Part 101.

12. Contact the Advisory Comm'n on Jud. Ethics, Office of Ct. Admin., 25 Beaver St., Rm. 1170, New York, N.Y. 10004.

13. Judiciary Law § 212(2)(*l*)(iv). A candidate who complies with an ACJE Judicial Campaign Ethics Subcommittee opinion is less protected than one who complies with a full ACJE opinion. The candidate is innoculated only for one election cycle from a Commission on Judicial Conduct investigation. For advisory opinions for judicial candidates, see Jud. Campaign Eth. Ctr., http://www.nycourts.gov/ip/jcec/opinions-list.shtml (last visited Aug. 4, 2006).

14. Ann. Rpt., *supra* note 9, at 55; N.Y. St. Comm'n on Jud. Conduct, *available at* http://www.scjc.state.ny.us/General%20Information/general.htm (last visited Aug. 4, 2006). For articles explaining judicial ethics and judicial discipline in New York, see Gerald Stern, *Judicial Error That is Subject to Discipline in New York*, 32 Hofstra L. Rev. 1547 (2004); Gerald Stern, *The Changing Face of Judicial Elections*, 32 Hofstra L. Rev. 1507 (2004); Gerald Stern, *Is Judicial Discipline in New York State a Threat to Judicial Independence?*, 7 Pace L. Rev. 291 (1987); Gerald Stern, *What Claiborne Did*, N.Y. Times, Oct. 20, 1986, at A27. For historical reasons, the Commission's jurisdiction extends to all New York judges but Housing Part judges, who may be disciplined only by the Chief Administrator of the Courts.

15. Ann. Rpt., *supra* note 9, at 56.

16. *In re Feinberg*, 5 N.Y.3d 206, 214-15, 800 N.Y.S.2d 529, 533-34, 833 N.E.2d 1204, 1208-09 (2005) (per curiam).

17. *See* http://www.courts.state.ny.us/search/ethics_opinions.asp (last visited Aug. 4, 2006).

18. *See* http://scjc.state.ny.us (last visited Aug. 4, 2006.)

19. 22 NYCRR 100.3(B)(7).

20. *Id.* 4.1; *accord* CPLR 4213(c) (requiring judges to render decisions "within sixty days after the cause or matter is finally submitted or within sixty days after a motion under rule 4403, whichever is later, unless the parties agree to extend the time").

21. 22 NYCRR 208.43. Current protocol requires New York City Civil Court judges in the plenary and Housing Parts to submit reports every 30, 60, and 90 days informing administrators of any undecided case.

22. *Id.* 202.8(h)(1) (eff. Oct. 1, 2006).

23. *Id.* 202.8(h)(2)(i).

24. *Id.* 202.8(h)(2)(ii).

25. 76 N.Y.2d 293, 295–96, 558 N.Y.S.2d 881, 882–83, 557 N.E.2d 1177, 1178-79 (1990) (per curiam).

26. *See id.* at 298, 558 N.Y.S.2d at 883, 557 N.E.2d at 1179.

27. *Id.* at 299, 558 N.Y.S.2d at 884, 557 N.E.2d at 1180.

28. *See, e.g.*, *In re Kilburn*, 157 Vt. 456, 457, 599 A.2d 1377, 1378 (1991) (collecting cases).

29. *See generally* Robert A Leflar, *Honest Judicial Opinions*, 74 Nw. U. L. Rev. 721 (1979).

30. *See generally* John B. Nesbitt, *The Role of Trial Court Opinions in the Judicial Process*, 75 N.Y. St. B.J. 39 (Sept. 2003).

31. Nancy A. Wanderer, *Writing Better Opinions: Communicating With Candor, Clarity, and Style*, 54 Me. L. Rev. 47, 49 (2002).

32. For an uncandid opinion, see *People v. Evans*, 85 Misc. 2d 1088, 1093, 1097, 379 N.Y.S.2d 912, 917, 920 (Sup. Ct. N.Y. County 1975) (Greenfield, J.), in which the court, acquitting of rape a defendant who told his accuser "I could kill you; I could rape you; I could hurt you physically," wrote: "So bachelors, and other men on the make, fear not. It is still not illegal to feed a girl a line, to continue the attempt, not to take no for a final answer, at least not the first time."

33. For two melodramatic and perhaps overly candid opinions, see *Webster v. Reproductive Health Srvcs.*, 492 U.S. 490, 537, 538 (1989) (Blackmun, J., concurring & dissenting) ("I fear for the future."); *People v Davis*, 43 N.Y.2d 17, 39 n.*, 400 N.Y.S.2d 735, 747 n.*, 371 N.E.2d 456, 468 n.* (Breitel, C.J., dissenting) (explaining personal opposition to death penalty).

34. Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 Cornell L.Q. 274, 278 (1929) ("[A]fter canvassing all the available material at my command, and duly cogitating upon it, [I] give my imagination play, and brooding over the cause, wait for the feeling, the hunch — that intuitive flash of understanding which makes the jump-spark connection between question and decision . . . .").

35. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). For a discussion of Justice Holmes's ethical appeal in *Lochner*, see Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 Va. L. Rev. 1351, 1381 (1986).

36. For the pros and cons of writing tentative opinions, see Philip M. Saeta, *Tentative Opinions: Letting a Little Sunshine into Appellate Decision Making*, 20 Judges' J. 20 (Summer 1981).

37. *See* Mortimer Levitan, *Professional Trade-Secrets: What Illusions Should Lawyers Cultivate?*, 43 A.B.A. J. 628, 630 & 666 (July 1957) (arguing that judicial opinions shouldn't vacillate).

38. Griffin B. Bell, *Style in Judicial Writing*, 15 J. Pub. L. 214, 218 (1966).

39. Cuthbert W. Pound, *Defective Law — Its Cause and Remedy*, 1 N.Y. St. B. Ass'n Bull. 279, 285 (Sept. 1929).

40. Lon L. Fuller, *An Afterward: Science and the Judicial Process*, 79 Harv. L. Rev. 1604, 1619 (1966).

41. Mortimer Levitan, *Professional Trade-Secrets: What Illusions Should Lawyers Cultivate?*, 43 A.B.A. J. 628, 630 (July 1957).

42. 83 Misc. 2d 1007, 373 N.Y.S.2d 976 (White Plains City Ct. 1975). This opinion, written by an Acting City Judge, should be read in the unofficial version. The State Reporter charitably lowercased the capitals in the Official Reports.

43. 201 U.S. 562, 628 (1906) (Holmes, J., dissenting).

44. Piero Calamandrei, Eulogy of Judges 85-86 (1935) (John Clark Adams & C. Abbot Phillips, Jr., trans., 1942) (quoted with some changes in Robert A. Leflar, Appellate Judicial Opinions 109 (1974)).

45. For an extreme example of ostentatious writing, see *Goldin v. Artache*, N.Y.L.J., Aug. 26, 1986, at 6, col. 3 (Sup. Ct. N.Y. County) (Wright, J.).

46. Joyce J. George, Judicial Opinion Writing Handbook 242 (4th ed. 2000) ("[D]icta in opinions . . . are not encouraged.").

47. Black's Law Dictionary 485 (8th ed. 1999).

48. Robert G. Simmons, *Better Opinions — How?*, 27 A.B.A. J. 109, 111 (Feb. 1941).

49. Judges ought not be defensive. As the Supreme Court of California wrote long ago, "An opinion is not a controversial tract, much less a brief in reply to the counsel against whose views we decide. It is merely a statement of conclusions, and of the principal reasons which have led us to them." *Holmes v. Rogers*, 13 Cal. 191, 202 (1859) (Baldwin, J.) (petition for rehearing).

50. *See Woods v. Interstate Realty*, 337 U.S. 535, 537–38 (1949) (Douglas, J.).

51. *See* 1 John H. Wigmore, Evidence in Trials at Common Law § 8a, at 616 (Peter Tellers rev. ed. 1983) (stating that policy should supplement technical legal rules); James D. Hopkins, *Public Policy and the Formation of a Rule of Law*, 37 Brook. L. Rev. 323, 323 (1971) ("To base a decision on the ground of public policy . . . brings into the case . . . the exercise of community control quite apart from statute, judicial precedent or doctrine.").

52. *See People v. Graham*, 55 N.Y.2d 144, 152, 447 N.Y.S.2d 918, 922–23, 432 N.E.2d 790, 794–95 (1982) (Fuchsberg, J.) (noting that parties may appeal to legislature if they're unhappy with statute).

53. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1409 (1995) (suggesting that judges refrain from commenting on "broader political and social policies" unless commentary is about conduct outside court affecting issues in court).

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

We represent a large local corporation as sole outside counsel, and the fees generated are quite significant to our firm. I am the partner in charge, and responsible for the assignment of this client's matters. For the past two years, a senior associate in our firm (let's call him "Brad") has worked closely with me in serving this client. As time went by, Brad began to fill in for me at meetings held at the client's place of business. Nearly all of those sessions included the client's General Counsel/Vice President for Legal Affairs (I'll identify her as "Linda").

Brad has just informed me that Linda wants him to become the principal attorney on the client's account. According to Brad, we really have no choice in this matter. Should I refuse to go along with this "takeover," Linda will (again, according to Brad) begin using other law firms. In addition, our firm allocates credits in favor of the person who brings in a client's business. Under our system, I am now, as the lead attorney, receiving all the credit for billings that result from this client's matters. That credit will go to Brad if he becomes lead counsel.

As if this were not enough, Brad further advised me that Linda has told him that she will send her company's matters to his next firm (as long as no conflicts exist), should he be fired or choose to leave. However, he insisted that he is happy with our firm, and wants to stay.

Both Brad and Linda are single, and I suspect they are romantically involved. Aside from my own personal losses, I believe there are risks for the firm if the proposed change is made. His statements to the contrary notwithstanding, Brad could leave and take the client with him. Even if this does not happen, there could be a bad ending to the affair, which could also result in the loss of this important client.

This is a mess, but my initial reaction was that I have no choice but to go along. However, my own ego and wallet aside, I have started to feel that there is something unethical about all of this. I have thus far avoided contacting Linda for verification of Brad's story, because I am still trying to decide how to handle things if he accurately reported her wishes. Any advice you can provide would be most appreciated.

Sincerely,
Partner With a Problem

Dear Partner:

There are essentially two ways to view your situation. If the facts are as described by Brad, then you and your firm are being complimented on having assigned such an able person to do the legal work for this client. It therefore may be that Brad is being chosen over you as principal attorney because of his legal talent, as well as for his personal compatibility with the General Counsel/VP for Legal Affairs, and those other client officers and employees with whom Brad interacts.

On the other hand, if Brad is having an affair with Linda, and is not being preferred based on legal merit, there are obvious difficulties. One immediate question would be whether Brad is billing his time for legal work only, and not for personal time being spent with Linda. More importantly, can Brad use his own best judgment, without undue influence from Linda, when advising the client? And what happens if or when Brad and Linda experience problems with or end their relationship?

Given the importance of the client to your firm, and assuming for the moment that you want Brad to stay on, you should evaluate the Disciplinary Rules to identify any violation that could cause difficulties for either you, the firm or for Brad.

To begin, DR 1-104(A) requires your law firm to make reasonable efforts to ensure that all lawyers in the firm conform to the Disciplinary Rules. And DR 1-104(B) specifies that a lawyer with direct supervisory authority over another lawyer must make reasonable efforts to ensure that the other lawyer conforms to the DRs. In the case of a violation, DR-104(D) makes you, as Brad's supervising attorney, responsible for his conduct should you ratify that conduct, or fail to take remedial action at a time when consequences could be, or could have been, avoided or mitigated.

DR 5-111 covers "Sexual Relations with Clients." Subsections B(1) and B(2) might be applicable to Brad. B(1) precludes a lawyer from requiring or demanding sexual relations from a client incident to any professional representation. B(2) precludes a lawyer from coercing, intimidating or using undue influence in entering into sexual relations with a client. If you have reason to believe that there might possibly be such a DR violation by Brad, then you have an ethical obligation to inquire.

Under the circumstances, Brad is the only person you can ask about the relationship. Whether Brad denies or admits the existence of a sexual relationship with Linda, it would be appropriate to discuss the DRs and the dangers of such a relationship while it is ongoing, as well as what might happen at its end. Also, if there is such a relationship, Brad should know whether the client has any policy against an employee fraternizing with a vendor.

Above and beyond your discussion with Brad, and irrespective of his answers to your inquiries, you should confirm his information. In that regard, you should bear in mind that a general counsel does not always control the choice of attorney. If someone other than Linda engaged your services in the first instance, and that person is presently the CFO or CEO, you should verify with him or her that the other officers are aware of the choice of Brad as principal attorney in your stead. If Brad's information is confirmed, diplomacy is called for. Thank the client's officers (including Linda) for using your firm, say how much you appreciated working with the client, that you are, of course, always available for a particular matter or as a backup to Brad if needed, and that you are happy Brad has been so satisfactory

for the client's legal needs. As long as you want this client to continue with your firm, we recommend that you are perceived as a group of happy, cooperative professionals.

At least for the present time, we also recommend a review of Brad's billings, and a discussion of the work he is doing for the client (all without your billing the client for this supervisory time). Shadowing Brad without cost to client is prudent until you are comfortable that the transition is appropriate.

The Forum, by
Miriam Maccoby Netter
Delmar, NY

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I work in a large law firm which recently hired a high-powered marketing director. The marketing director has organized our partners into teams to approach the general counsels of certain large corporations we have not previously represented, and to pitch our firm's capacity to provide high quality, cost-effective legal services. We are doing research about those corporations and their businesses so that we can sit down with in-house counsel and make a presentation. We intend to demonstrate how retaining us to perform certain legal services could help make their company more profitable, while getting better legal services at lower cost.

Given the recent ferment in New York about the rules regarding lawyer advertising and solicitation, I'm wondering: is such marketing professional?

Sincerely,
Solicitous About Solicitation

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.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

NEW MEMBERS WELCOMED

FIRST DISTRICT
Michael Joshua Alef
Fiona Mary Allen
Kathryn Therese Allen
Aref H. Amanat
Christina H. An
Brian Dahilig Ancheta
Leslie T. Annexstein
Benjamin Adam Aronovitch
Pierre-lu Arsenault
Jordan A. Ast
Christine Louise Aubin
Sandra J. Badin
Mehrsa Baradaran
Alysa M. Barancik
Yaacov Barselah
Marissa Hana Bellow
Lindsay Marissa Bender
Gary Frederick Bendinger
Leslie N. Bettison
Joshua Alexander Birbach
Joseph I. Borstein
Bryan Edward Bowdler
Ambre Jae Brandis
Joshua Isaac Brodsky
Kevin Charles Brosseau
Douglas Benedict Brown
Anne Tracy Buckman
James Sollee Buino
Benjamin Samuel Burger
Lauren Bush
Emily Sarah Bushnell
Theodore S. Calabrese
Margaret Harrison Campbell
Micala A. Campbell
Kathleen Marie Carney
Robert Francis Carroll
Melissa Anne Carter
Gloria S. Chan
Lisa Ann Chaney
Judy Jung-yoon Chang
Allison Mattera Charles
Andres Miguel Chavez
Julius Chen
Rachel M. Cherington
David Barry Chubak
Keefe Bryant Clemons
Justine Liv Clisham
David George Clunie
Arlana S. Cohen
Brad Evan Cohen
Lawrence James Conlan
Justin Stuart Cooke
Anya Coverman
Brian Thomas Crowley
Joseph B. Crystal
Arthur Joseph Cutillo
Erez Joseph Davy
Lorraine Isabelle De Germiny
Gina M. Del Chiaro
Luciana Pires Dias
Michael J. Dillon
Ihsan Dogramaci
Rachel Suzanne Josine Dooley
Neil Adam Dubnoff
Alison Entrekin Dunlop
Michael Adam Ead
Oreen M. Ead
Imri Eisner
Roger Pierre El Asmar
Daniel M. Esterling
Patrick J. Eyers
Frank P. Falco
Marcus Asher Fellman
Javier O. Figueroa
Jared M. Fishman
Artem Fokin
Candice Dana Fordin
Tammara Michelle Fort
Tiffany Marie Foskey
Mariana Trindade Franca Pereira
Samantha Marie French
Amanda Carton Fried
Adam Mark Garelick
Steven Genack
William I. Gibbs
Gregory Seth Glickman
Aaron Norman Goldberg
Sagi Goldberg
Osvaldo J. Gonzalez
Joan Marie Gooddard
David L. Gordon
Jamie Nicole Gordon
Joshua A. Gordon
SarahJayne Hall
Kevin Patrick Hands
Gregory Toivo Hannibal
Wendy Peterson Harper
Harold E. Hartman
Ryan Seth Hecker
Cathy R. Hershcopf
Ronald Allan Hewitt
Charles P. Hoffman
Jacqueline Kate Hollander
Ramsey Patrick Homsany
Daniel Joseph Howley
Sonja N. Huang
Natalie H. Hwang
Kenneth Steven Jannette
Tejal M. Jesrani
Martha Jane Johnstone
Lindsey Branye Jones
Kristen France Kaminski
Benjamin Ryan Kelleher
Erin Patricia Kelly
Sean P. Kelly
Christa Ann Kenin
Ellyn D. Kessler
Samia Khamis
Sarah B. Kickham
Max P. Kirchner
Michael Andrew Korn
Jared G. Kramer
Rachael Trudelle Krueger
Heather Eileen Johnson Kukla
Joel S. Laciura
Allyson J. Lanahan
Christine I. Laurent
David G. Lazarus
John Clark Lennon
Rachel Elizabeth Lerner
Jeremy Ezra Lese
Scott Levy
Benjamin Marc Lowin
James Joseph Lucchese
Andrew Michael Lupin
Shilpa Mankar
John George Marfoe
Neil Matthew Margolies
Yara Maria Martinez
Maria Soledad Matteozzi
Debbie McAvan
Alice Leslie McCarthy
Natalie E. McClurg
Katherine Miriam McGrail
Jennifer Ann McGuinness
Lori Ann McMullan
Jason Robert Meltzer
Bruce S. Mendelsohn
Aaron W. Menzi
James D. Metzger
Christina Emily Michaud
Allison N. Miller
Paula L. Miller
Carl W. Mills
Robert S. Mobassaly
Michelle Mobley
Jake D. Molland
Aileen L. Montana
Jennifer Rea Moore
Daphne P. Morduchowitz
David Andrew Morris
Jasmine Leilani Moy
Carlos Christopher Murillo
Beth Anne Norton
Steven P. O'Brien
Erin Anne O'Leary
Jeffrey Michael Olinsky
Stuart Oran
Tsuyoshi Orihashi
Russell Travis Otten
Jennifer D. Panciera
Michael D. Pantano
Jeanette Marie Park
Stephen Neil Penner
Lauren B. Perlgut
Claire Elizabeth Peter
Olya Petukhova
Matthew Steven Raalf
Faiza Norelle Rahman
Alexander Rakosi
Jeffrey Boyd Rasmussen
Jonathan Robert Ratchik
Prathima Chintala Reddy
Premila K. Reddy
Laura Anne Reeds
Cate F. Reilly
Matthew John Reynolds
Paula Cho Ro
Pallavi Rohatgi
Javier Romero
Allison Rae Rosen
Marla Jude Rosenthal
Benjamin Sahl
Robert Christopher Sarvis
Joseph Sasson
Elizabeth Ann Schmid
Martin Schmidt
Scott Mathew Schreiber
John Paul Schwartz
Ramya Seetharaman
Eric David Seltzer
Jonathan Shade
Michael S. Sheena
Joseph Isaac Sheftel
Gretchen S. Silver
William J. Simmons
Tannaz Simyar
Anil Sugrim Singh
Paul Jacob Sirkis
Kam Fai Siu
Philip Andrew Skalski
Donald Scott Smedley
Alan Patrick Smith
Christopher Francis Smith
Dana Statsky Smith
Laesha J. Smith
Barbara L. Smithers
Nicholas Tramaine Spencer
Jenny Baker Stapleton
Carol Ann Sterling
Terrell Thomas Stevens
Jonathan David Stewart
Sarah Elizabeth Stewart
Noemi Strauss
Jonathan Michael Struggles
Ramin J. Taheri
Rui Tang
George Ter-Gevondian
Robert William Thompson
Jessica Celeste Tones
Emilio Andres Torres-Lumsden
Charles David Trefethen
Megan Elizabeth Tucker
Susannah Tempe Vale
Kurt Andrew Van Derslice
Glorimari Vargas
Venkatesh Vijayaraghavan
John-Paul G. Vojtisek
Virginia Maree Wallin
Keith Thomas Walsh
Anting Jennifer Wang
Anton A. Ware
Brandyne Shawnee Warren
Ashley Ford Waters
Neil L. Weinberg
David J. Weiss
Edward Mitchell Welch
Marla E. Wieder
Elliot M. Wittlin
Helena E. Wolin
Feng Xu
Cindy Yang
Gregory Mark Yenik
Jang Hyuk Yeo
Seok-ho Bryan Yoon
Karen Marie Zakrzewski
Michael Jon Zammit
Joshua E. Zelkowitz

SECOND DISTRICT
Brian Brody
Asya Domashitsky
Rachel E. Freier
Daniel Gewirtz
Kenneth Harton
Isaac D. Hurwitz
Curtis E. Iiams
Kolapo Lawrence Kalejaye
Nancy E. Kashuck
John R. Lovrich
Jordan Michael O'Brien
Mychel Russell-Ward
Perry Waddell
Christopher Wimmer

THIRD DISTRICT
J. Michael Harrison
Kimberly A. Hunt
Andrew H. Wood

FOURTH DISTRICT
Paul J. DiConza
Erin E. Hayes

FIFTH DISTRICT
Marty Jonathan Anderson
Karen DeCrow
James D. Harris

SIXTH DISTRICT
Davee Laurent Datta
Elizabeth Joan Mannion
Erin Lyn Passetti

SEVENTH DISTRICT
Richard James Doe
Richard Raymond Gross

EIGHTH DISTRICT
Cheryl A. Brown
Justin Lee Jablonski
Samuel D. Magavern
Michael Joseph Norris

NINTH DISTRICT
Lara R. Corchado
Maria Curran
Emily Karr-Cook
Moira Laidlaw

Nathan Aaron Shook
Edward M. Weber

TENTH DISTRICT
Jose Raul Heredia Schulenburg
Roxanne Luella Jones
James M. Marrin
Diana Ruiz
Margaret Williams
Jeffrey P. Yong
Kimberly Zoob

ELEVENTH DISTRICT
Richard Maury Creditor
Christina Fortunato
Tamara Monet Harris
Jennifer Liebre Kob

TWELFTH DISTRICT
P. Kalyn Johnson
Alan Joseph Lloyd
Penney Vachiraprapun

OUT OF STATE
Saif Musvi Agha
Iiya Alekseyeff
Richard J. Angowski
Joseph Ascoli
Gabrielle Bafkas
Jay Tsachi Baitner
Scott Jay Bakal
Gopal Krishnan Balachandran
Athina Balta
Paige Elizabeth Baran
Stanley Alan Barg
Laura Marie Barrese
Meghan Brennan Barrett
Brett C. Bartlett
Micaela Prendergast Bennett
Tamir Blank
Seth G. Blaylock
Karen Sarah Bloom
Gleb V. Bondarenko
Bradley Joseph Bondi
Charlotte Anne Bonsch
Julie Mary Bowe
Sean Barry Bowers
Florion Bregasi
Tim Broking
Stanley Joseph Brown
Romaine Allistair Campbell
Monalisa A. Captan
Melisa Chan
Yana Chechelnitsky
Hsin-yi Chen
Leo Lanie Clarke
Nicholas Ferris Cohen
David Beebe Collier
Kimberly Cozza Collins
Anna G. Cominsky
Nathan Andrew Cook
George W. Cooke
Bernard John Cooney
Benjamin Jay Cooper
Katie Leigh Cooperman
Kathy Madeline Coppola
Jeremy Scott Crawford
James Laurence Crinion
Catherine Alice Cugell
Michael Collins D'aries
Ushang Damachi
Franz F. Davis
Michael Peter Davis
Matthew Duane Dean
Christopher Joseph Decosta
David Delboccio
Anelia Gueorguieva Dimitrova
Ivan Jay Dodeles
Tamar Donikyan
Milana Saigina Draughn
Patrick William Duncan
Maura Jane Dundon
Carrie Sue Duranceau
Ryan James Dziernniejko
Kaila Obstfeld Eisenkraft
Sara Ellen Fanton
George Fuad Farah
John P. Fazzio
Jay B. Feldman
Julia Fidenzio
Lawrence Joseph Finnell
Daria Michelle Fisher
Neil S. Fishman
Lawrence F. Flick
Brian Jamieson Fonville
Ami Vinod Gadhia
Robert C. Garay
Raymond Garguilo
Stephen Flaherty Gillen
Alfredo L. Gonzalez
Maurice Gonzalez
Gelu Goran
Michael Julian Gottlieb
Yaron Eli Gottlieb
Christopher Lauren Graham
Mark D. Grossman
Christian William Habersaat
Katrin Helga Hallgrimdottir
Nellie Ruth Halloran
Sang Woo Han
Brigid Anne Harrington
Allison Nicole Hatchett
James C. Haynie
Jose Raul Heredia-Schulenburg
Larry Hiller
Pei-shan Ho
Audra Wallis Hollifield
James Joseph Holman
Michael Andrew Honig
Maeghan Kate Hurley
Jeannine Renee Idrissa
Francis Anthony Italiano
Annie M. Jacob
James Michael Jardinella
Ellen M. Javor
Michael Charles Jensen
Brent William Johnson
Steven Michael Johnson
Ifeyi Naledi Jones-lecointe
Taesoo Jung
Sahil Kabse
Yoshihiko Kadokawa
Clint Brandon Kakstys
Isaiah Richard Kalinowski
Alexandra Hope Kaufman
Kimbley Ann Kearney
Darren Kenneth Kearns
Sharon Elizabeth Kelly
Roberta Frances Kety
Justus Nathan Njoroge Kihungi
James Alan Kilpatrick
Jaeseung Kim
Nicole Miah Kim
Sung Min Kim
Robert M. Kitson
Sara Jennifer Klein
Mark Anthony Kleyna
Yosuke Kobayashi
Deirdre Russo Kole
Irene Nicole Komandis
Judy Sue Young Kwok
Thomas Joseph Kyle
Timothy Michael Lamoriello
Loryn Michelle Lawson
Mildred Lecorps
Hwang Lee
Kyung Cheon Lee
Stephanie Dea Lee
Daniel Enrique Leza
Erica Dee Liu
Thomas Roy Lunde
Jose Francisco Mafla
Marcello Luca Magro
Mariel Teresa Martinez
Aky Mbalewe Onuoha
John Michael McDonnell
Katherine Margaret McNeill
Takehiro Miki
Brian J. Mohin
An Moonen
Bruce Waylen Moorhead
Robert Edward Moran
Enrique Morando
Ruth Moscovitch
Joseph Michael Murphy
Keith James Murphy
William Dudley Newcomb
Yoel Ephraim Novick
Dolores O'Hare
Michael J. O'Neill
Daniel J. O'Phelan
Christina Mary Olsson
Jessica Rose Oser
Maryann Palazzolo
Brian Scott Pantaleo
Yusun Park
Jeannette Bartlett Paull
Demetrios Pavlou
Alexander D. Pencu
Michael Philip Pettit
Russell John Platzek
K. C. Podlas
Noah B. Pollak
Stephanie Necole Potts
Norman M. Powell
Liora Rachel Powers
Harshal K. Purahit
Susan Manchester Quigley
Hashim Rahman
Joshua Hartley Rahman
Mohar Ray
Michael Daniel Rehm
Gideon Reitlblat
Erika Rene Reu
Federico Andino Reynal
Andrew Hunter Reynard
Holly E. Rich
Rebecca Lee Rigdon
Peter James Riley
Megan Stokes Marion Roberts
Jennifer Johnson Roden
Lisa Marien Rodriguez
Susan Emily Rohol
Ilan Rotem
Beth Jessica Rotenberg
Elaine Rubinson
Olga V. Ruda
Dacia Mary Russell
Andrew Craig Samson
Wataru Sasaki
Kevin Joseph Savage
Erin Lynne Scanga
Yuliya M. Schaper
Alfred Crew Schielke
Daniel Adam Schlanger
Erin Beth Schneiderman
Michael Ecuyer Schonberg
Daniel John Scognamiglio
Christopher Seidman
Dinah Abigail Seiver
Carolyn Joan Seugling
Bella Katy Sewall
Efrat Shalom-Berensohn
Beata Shapiro
Brian Eugene Shea
Judy Wen Qi Shen
Chia-Lin Simmons
Scott Stuart Sinrich
Sandesh Sivakumaran
Charisa Smith
Shantanu Sood
Kathryn Jane Spaziani
Jaclyn Strassberg
Bumkyu Sung
Lena M. Surilov
Siyu Jolene Tan
Yoshitaka Tanaka
Nima Robert Taylor
Kaushika Thakrar
Yezhisai Thirumavalavan
Mara Rita Timourian
Katelyn Marie Torpey
Hironobu Tsukamoto
Pema Tenzin Tulotsang
Ryan Keith Tyndall
Adam James Van Alstyne
Adam Christian Vandervoort
Alyson Nicole Villano
Sarah Block Wallace
Barbara Freedman Wand
Denise Barton Ward
Scot Daniel Warner
Christopher Lamont Weaver
Megan Susan Weber
Shuangjuan Wei
Rasheedah Taliah West
Michael Patrick Whalen
Warren Aaron Wienburg
Tracey Kohl Wishert
Tingting Wu
Wei Yang
Tomomichi Yoshihara
Shelly Ann Youree
Hao Yu
Joseph Reda Zakhary

In Memoriam

Richard Lee Blatt
Chicago, IL

Martin W. Felcher
New York, NY

George T. Greenfield
New York, NY

Robert E. Heath
Holley, NY

Samuel H. Klagsbrun
Bayside, NY

Paul S. Kleidman
Fishkill, NY

Karen A. Partyka
Amsterdam, NY

Ralph Ranald
New York, NY

Foundation Memorials

A fitting and lasting tribute to a deceased lawyer can be made through a memorial contribution to The New York Bar Foundation. This highly appropriate and meaningful gesture on the part of friends and associates will be felt and appreciated by the family of the deceased.

Contributions may be made to The New York Bar Foundation, One Elk Street, Albany, New York 12207, stating in whose memory it is made. An officer of the Foundation will notify the family that a contribution has been made and by whom, although the amount of the contribution will not be specified.

All lawyers in whose name contributions are made will be listed in a Foundation Memorial Book maintained at the New York State Bar Center in Albany. In addition, the names of deceased members in whose memory bequests or contributions in the sum of $1,000 or more are made will be permanently inscribed on a bronze plaque mounted in the Memorial Hall facing the handsome courtyard at the Bar Center.

THE NEW YORK BAR FOUNDATION

The *Journal*'s 2006 Statement of Ownership, Management and Circulation

United States Postal Service
Statement of Ownership, Management, and Circulation

1. Publication Title	2. Publication Number	3. Filing Date
Journal	1 5 2 9 - 3 7 6 9	September 26, 2006
4. Issue Frequency: January, February, March/April, May, June, July/August, September, October November/December	5. Number of Issues Published Annually: 9	6. Annual Subscription Price: $96.00

7. Complete Mailing Address of Known Office of Publication (Not printer) (Street, city, county, state, and ZIP+4)
New York State Bar Association
One Elk Street
Albany, ALB, New York 12207-1096
Contact Person: Daniel J. McMahon
Telephone: (518) 463-3200

8. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not printer)
New York State Bar Association
One Elk Street
Albany, ALB, New York 12207-1096

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not leave blank)
Publisher (Name and complete mailing address)
New York State Bar Association
One Elk Street
Albany, ALB, New York 12207-1096
Editor (Name and complete mailing address)
David C. Wilkes, Esq.
200 White Plains Road, #510
Tarrytown, New York 10591-5808
Managing Editor (Name and complete mailing address)
Daniel J. McMahon, Esq., New York State Bar Association
One Elk Street
Albany, ALB, New York 12207-1096

10. Owner (Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)

Full Name	Complete Mailing Address
New York State Bar Association	One Elk Street
a nonprofit organization	Albany, ALB, New York 12207-1096

11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box → ☐ None

Full Name	Complete Mailing Address

12. Tax Status (For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one)
The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes:
☐ Has Not Changed During Preceding 12 Months
☐ Has Changed During Preceding 12 Months (Publisher must submit explanation of change with this statement)

PS Form 3526, October 1999 (See Instructions on Reverse)

13. Publication Title: Journal	14. Issue Date for Circulation Data Below: September 2006	
15. Extent and Nature of Circulation	Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies (Net press run)	67,890	67,723
b. Paid and/or Requested Circulation (1) Paid/Requested Outside-County Mail Subscriptions Stated on Form 3541. (Include advertiser's proof and exchange copies)	64,220	64,277
(2) Paid In-County Subscriptions Stated on Form 3541 (Include advertiser's proof and exchange copies)	0	0
(3) Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Non-USPS Paid Distribution	0	0
(4) Other Classes Mailed Through the USPS	2,918	2,933
c. Total Paid and/or Requested Circulation (Sum of 15b. (1), (2),(3),and (4))	67,138	67,210
d. Free Distribution by Mail (Samples, complimentary, and other free) (1) Outside-County as Stated on Form 3541		
(2) In-County as Stated on Form 3541		
(3) Other Classes Mailed Through the USPS		
e. Free Distribution Outside the Mail (Carriers or other means)	353	238
f. Total Free Distribution (Sum of 15d. and 15e.)	353	238
g. Total Distribution (Sum of 15c. and 15f)	67,491	67,448
h. Copies not Distributed	399	275
i. Total (Sum of 15g. and h.)	67,890	67,723
j. Percent Paid and/or Requested Circulation (15c. divided by 15g. times 100)	99.48	99.65

16. Publication of Statement of Ownership
☒ Publication required. Will be printed in the November/December 2006 issue of this publication. ☐ Publication not required.

17. Signature and Title of Editor, Publisher, Business Manager, or Owner: Daniel J. McMahon, Managing Editor — Date: Sept. 27, 2006

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

Instructions to Publishers

1. Complete and file one copy of this form with your postmaster annually on or before October 1. Keep a copy of the completed form for your records.
2. In cases where the stockholder or security holder is a trustee, include in items 10 and 11 the name of the person or corporation for whom the trustee is acting. Also include the names and addresses of individuals who are stockholders who own or hold 1 percent or more of the total amount of bonds, mortgages, or other securities of the publishing corporation. In item 11, if none, check the box. Use blank sheets if more space is required.
3. Be sure to furnish all circulation information called for in item 15. Free circulation must be shown in items 15d, e, and f.
4. Item 15h., Copies not Distributed, must include (1) newsstand copies originally stated on Form 3541, and returned to the publisher, (2) estimated returns from news agents, and (3), copies for office use, leftovers, spoiled, and all other copies not distributed.
5. If the publication had Periodicals authorization as a general or requester publication, this Statement of Ownership, Management, and Circulation must be published; it must be printed in any issue in October or, if the publication is not published during October, the first issue printed after October.
6. In item 16, indicate the date of the issue in which this Statement of Ownership will be published.
7. Item 17 must be signed.

Failure to file or publish a statement of ownership may lead to suspension of Periodicals authorization.

PS Form 3526, October 1999 (Reverse)

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: The associates in this office are involved in a debate about whether to use the singular or the plural verb in a sentence like the following, "He is one of those people who (refuse/refuses) to take 'no' for an answer." Each side is unwilling to accept the other's view, and we agreed to let you decide.

Answer: This is an easy question to answer because logic, grammar, idiom, and the "authorities" all agree that the plural verb *refuse* is correct. First, logic requires the choice of the plural verb *refuse* in the reader's question because the verb *refuse* refers to the plural noun-phrase, "those people," in the reader's question. The reader's meaning is that, besides the person he singles out, there are numerous people who will not take "no" for an answer.

Second, according to grammar, the verb *refuse* must be plural because of the grammatical rule that verbs agree in number with their closest antecedent noun or pronoun. In order for a singular verb to be correct, the sentence would have to be re-written: "The person refuses to take 'no' for an answer."

Third, the statement is idiomatic. If you ask people who speak English as their native language to fill in the blank in the sentence above, the majority would instantly choose the plural verb. Only if they scrutinized the sentence and then noticed that the word *one* appeared early in the sentence, would they conclude (as did some of your colleagues) that the words *who* and *that* referred to a single individual.

Fourth, authorities are virtually unanimous in their choice of the plural verb, so if you prefer to use the singular form of the verb, you'll have to ignore their advice.

Question: Have you noticed the new meaning for the word *robust*? It seems that *robust* has become a current favorite of politicians and journalists, but I am not sure of its meaning. Can you enlighten me?

Answer: I wish I could, but the currently popular adjective *robust* has not yet achieved any clear meaning. Among those who use it most, it is a catch-all term whose meaning is vague at best. Still you will find it liberally scattered on the pages of your daily newspaper like the mushrooms that pop up daily in our front yard. Probably, the word *robust* will either eventually gain standard status with a consensus meaning or disappear from its current popularity as a fad word.

The adjective *robust* came from the Latin noun *robus,* which meant "oak." Because of the strength and power implied in that noun, it then became a Latin adjective *robustus*, meaning "powerful, strong, or oaken." It was borrowed into English around 1540 with the same meaning. Traditionally, and currently, *robust* combines ideas of "healthy, hearty, vigorous, strong," and "full of vitality." Traditionally, it has been used to refer only to humans and to other animate beings.

But advertisers have borrowed the adjective to market their products, personifying products like wine and even cologne (for men) with human "robust" qualities. Does "robust" wine have a flavor heartier than its competitors? Is a "robust" cologne more manly than other colognes? The computer industry has adopted the adjective *robust,* describing as robust "a system that can recover gracefully from the whole range of exceptional inputs and situations in a given environment."

So it is not surprising that politicians and journalists have also borrowed *robust* as an appropriate modifier, endowing it with new and equally vague meanings. For example, in a front-page article on September 25, *New York Times* reporter Michael Slackman wrote, "Security Council resolution 1701 was seen as the best way to halt the war . . . by giving Israel assurances that . . . a **robust** international force [would] prevent Hezbollah militants from attacking." And President Bush recently described the actions of the United Nations as **not** *robust*, during an interview in which he commented, in response to a question, "I'd like to see more **robust** United Nations action." (My emphasis.)

But the disadvantage of plucking from the dictionary a word that has an accepted meaning, and then adding to or changing that meaning, is that nobody is certain what the new meaning is. Sometimes that obscurity is intended. Then the disadvantage becomes an advantage.

For example, words like *outsource, rendition*, *earmark* and (most recently) *pretext* have traditionally been neutral, having no unpleasant connotation. Now, with their newly assigned meanings, those words have become euphemisms to conceal behavior that some people consider offensive.

So what did President Bush intend when he expressed a desire for more robust UN action? Did he mean more "powerful"? More "hearty"? Or perhaps, more "vital"? Or was he using the definition of *robust* as computer gurus use it, to mean "agile"? We may find out later.

Below are comments made by some people who used words well:

Justice Oliver Wendell Holmes: *"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."* (*Towne v. Eisner*, 245 U.S. 418, 425 (1918))

Alexander Pope: *"Words are like leaves; and where they most abound, Much fruit of sense beneath is rarely found."*

Emily Dickinson: *"A word is dead when it is said, some say. I say it just begins to live that day."*

Benjamin Franklin: *"If you would not be forgotten, As soon as you are dead and rotten, Either write things worth reading, Or do things worth the writing."* (*Poor Richard's Almanac*) ■

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

HEADQUARTERS STAFF EMAIL ADDRESSES

EXECUTIVE
Patricia K. Bucklin
Executive Director
pbucklin@nysba.org
John A. Williamson, Jr.
Associate Executive Director
jwilliamson@nysba.org

ADMINISTRATIVE SERVICES, MEETINGS AND MEDIA RELATIONS

ADMINISTRATIVE SERVICES
Sebrina Barrett, *Director*
sbarrett@nysba.org

The New York Bar Foundation
Rosanne M. Van Heertum
Director of Development
rvanh@tnybf.org

Law, Youth and Citizenship Program
Eileen Gerrish, *Director*
egerrish@nysba.org
Rebecca Varno, *Program Manager*
rvarno@nysba.org

MEDIA SERVICES AND PUBLIC AFFAIRS
Andrew Rush, *Director*
arush@nysba.org
Patricia Sears Doherty, *Sr. Writer*
psearsdoherty@nysba.org
Monica Finch, *Editor, State Bar News*
mfinch@nysba.org

BAR SERVICES
Frank J. Ciervo, *Director*
fciervo@nysba.org

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

CONTINUING LEGAL EDUCATION
Terry J. Brooks, *Senior Director*
tbrooks@nysba.org
Debra York, *Registrar*
dyork@nysba.org

CLE PROGRAMS
Jean E. Nelson II, *Associate Director*
jnelson@nysba.org
Leslie A. Fattorusso, *Staff Attorney*
lfattorusso@nysba.org
Katherine Suchocki, *Staff Attorney*
ksuchocki@nysba.org
Cheryl L. Wallingford, *Program Manager*
cwallingford@nysba.org

CLE PUBLICATIONS
Daniel J. McMahon, *Director*
dmcmahon@nysba.org
Marsha Hordines, *Research Attorney*
mhordines@nysba.org
Patricia B. Stockli, *Research Attorney*
pstockli@nysba.org
Mark Wilson, *Publication Manager*
mwilson@nysba.org

LAW PRACTICE MANAGEMENT
Pamela McDevitt, *Director*
pmcdevitt@nysba.org

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

FINANCE
Kristin M. O'Brien, *Director*
kobrien@nysba.org
Cynthia Gaynor, *Controller*
cgaynor@nysba.org

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

COUNSEL'S OFFICE

GOVERNMENTAL RELATIONS
Ronald F. Kennedy, *Associate Director*
rkennedy@nysba.org

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

LAWYER REFERRAL AND INFORMATION SERVICE
Audrey Osterlitz, *Coordinator*
aosterlitz@nysba.org

PRO BONO AFFAIRS
Cynthia Feathers, *Director*
cfeathers@nysba.org

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

DESKTOP PUBLISHING

MARKETING

MIS
John M. Nicoletta, *Director*
jnicoletta@nysba.org
Jeffrey Ordon, *Network Support Specialist*
jordon@nysba.org
Sonja Tompkins, *Records Supervisor*
stompkins@nysba.org
Gregory A. Vincent, *Database Administrator*
gvincent@nysba.org
Paul Wos, *Data Systems and Telecommunications Manager,*
pwos@nysba.org

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

MEMBERSHIP SERVICES
Patricia K. Wood, *Senior Director*
pwood@nysba.org
Megan O'Toole, *Membership Services Manager*
motoole@nysba.org

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

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

BUILDING MAINTENANCE

GRAPHICS

PRINT SHOP
Matthew Burkhard, *Production Manager*
mburkhard@nysba.org

THE NEW YORK BAR FOUNDATION

2006-2007 OFFICERS

John R. Horan, *President*
825 Third Avenue, New York, NY 10022

M. Catherine Richardson
Vice President and Chair of The Fellows
One Lincoln Center, Syracuse, NY 13202

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

Hon. Randolph F. Treece, *Treasurer*
445 Broadway, Albany, NY 12207

DIRECTORS

James B. Ayers, *Albany*
Jonathan G. Blattmachr, *New York*
Cristine Cioffi, *Niskayuna*
Charles E. Dorkey, III, *New York*
Emily F. Franchina, *Garden City*
John H. Gross, *Hauppauge*
Robert L. Haig, *New York*
Paul Michael Hassett, *Buffalo*
Frank M. Headley, Jr., *Scarsdale*
Barry M. Kamins, *Brooklyn*
John J. Kenney, *New York*
Henry L. King, *New York*
Steven C. Krane, *New York*
Glenn Lau-Kee, *White Plains*
Bernice K. Leber, *New York*
A. Thomas Levin, *Mineola*
Kay Crawford Murray, *New York*
Carla M. Palumbo, *Rochester*
Sharon M. Porcellio, *Buffalo*
Richard Raysman, *New York*
Thomas O. Rice, *Garden City*
Sanford J. Schlesinger, *New York*
Lorraine Power Tharp, *Albany*
Justin L. Vigdor, *Rochester*
Lucia B. Whisenand, *Syracuse*

EX OFFICIO

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

JOURNAL BOARD MEMBERS EMERITI

As a tribute to their outstanding service to our Journal, we list here the names of each living editor emeritus of our Journal's Board.

HOWARD ANGIONE
Immediate Past Editor-in-Chief
ROSE MARY BAILLY
RICHARD J. BARTLETT
COLEMAN BURKE
JOHN C. CLARK, III
ANGELO T. COMETA
ROGER C. CRAMTON
LOUIS P. DILORENZO
MARYANN SACCOMANDO FREEDMAN
EMLYN I. GRIFFITH
H. GLEN HALL
PAUL S. HOFFMAN
CHARLES F. KRAUSE
PHILIP H. MAGNER, JR.
WALLACE J. MCDONALD
J. EDWARD MEYER, III
KENNETH P. NOLAN
ALBERT M. ROSENBLATT
SANFORD J. SCHLESINGER
ROBERT J. SMITH
LAWRENCE E. WALSH
RICHARD N. WINFIELD

2006-2007 OFFICERS

MARK H. ALCOTT
President
New York

KATHRYN GRANT MADIGAN
President-Elect
Binghamton

JAMES B. AYERS
Treasurer
Albany

MICHAEL E. GETNICK
Secretary
Utica

A. VINCENT BUZARD
Immediate Past President
Rochester

VICE-PRESIDENTS

FIRST DISTRICT
Bernice K. Leber, *New York*
Susan B. Lindenauer, *New York*

SECOND DISTRICT
Barry Kamins, *Brooklyn*

THIRD DISTRICT
Hon. Rachel Kretser, *Albany*

FOURTH DISTRICT
Nicholas E. Tishler, *Niskayuna*

FIFTH DISTRICT
David M. Hayes, *Syracuse*

SIXTH DISTRICT
James C. Gacioch, *Binghamton*

SEVENTH DISTRICT
C. Bruce Lawrence, *Rochester*

EIGHTH DISTRICT
Sharon Stern Gerstman, *Buffalo*

NINTH DISTRICT
Henry S. Berman, *White Plains*

TENTH DISTRICT
Hon. Joel K. Asarch, *Hempstead*

ELEVENTH DISTRICT
Seymour W. James, Jr., *Kew Gardens*

TWELFTH DISTRICT
Lawrence R. Bailey, *New York*

MEMBERS-AT-LARGE OF THE EXECUTIVE COMMITTEE

Vincent E. Doyle, III
David L. Edmunds, Jr.
Timothy J. Fennell
Glenn Lau-Kee
David P. Miranda
David M. Schraver
Peter J.W. Sherwin
Lauren J. Wachtler

MEMBERS OF THE HOUSE OF DELEGATES

FIRST DISTRICT
† Alcott, Mark H.
Alden, Steven M.
Badway, Ernest Edward
Barson, Alan D.
Bienstock, Peter
Borsody, Robert P.
Brett, Barry J.
Brown, Geraldine Reed
Burns, Howard W., Jr.
† Campos-Galvan, Manuel
Caraballo, Dolly
Chambers, Hon. Cheryl E.
Cheng, Pui Chi
Chin, Sylvia Fung
Christian, Catherine A.
* Cometa, Angelo T.
Davis, Tracee E.
Dimon, Samuel J.
Eppler, Klaus
Ferrara, Lucas A.
Fish, Daniel G.
Flood, Marilyn J.
* Forger, Alexander D.
Frank, Paul M.
Fries, Richard S.
* Gillespie, S. Hazard
Grays, Taa R.
Gredd, Helen A.
Green, Prof. Bruce A.
Gregory, Prof. John D.
Gross, Marjorie E.
Haig, Robert L.
Hariton, David P.
Harris, Joel B.
Hayden, Hon. Douglas J.
Hoffman, Stephen D.
Hollyer, A. Rene
Horan, John R.
Katter, Ronald J.
Kiernan, Peter J.
* King, Henry L.
Kobak, James B., Jr.
Kougasian, Peter M.
† * Krane, Steven C.
Kuntz, Dr. William F., II
Lansner, David J.
Leber, Bernice K.
Leo, Robert J.
Lesk, Ann B.
Levinsohn, Robert J.
Lieberman, Ellen
Lindenauer, Susan B.
* MacCrate, Robert
Martin, Edwina Frances
McQueary Smith, Prof. Beverly
McShea, Sarah Diane
Milito, Christopher Scott
Miller, Michael
Millett, Eileen D.
Minkowitz, Martin
Mitchell, Thomas J.
Moreland, Thomas H.
Nathanson, Eugene
Nathanson, Malvina
Opotowsky, Barbara Berger
* Patterson, Hon. Robert P., Jr.
Paul, Gerald G.
Reed, Thomas A.
Richman, Steven H.
Rifkin, Richard
Robertson, Edwin David
Rosenthal, Lesley Friedman
Runes, Richard N.
Safer, Jay G.
* Seymour, Whitney North, Jr.
Sherman, Carol R.
Sherwin, Peter J.W.
Sherwood, O. Peter
Silkenat, James R.
Sonberg, Hon. Michael R.
Spitzmueller, Janiece Brown
Stenson, Lisa M.
Wachtler, Lauren J.
Walsh, Susan J.
Warner, Rita Wasserstein
Williams, Bryan R.
Younger, Stephen P.

SECOND DISTRICT
Branda, Rose Ann C.
Cohn, Steven D.
DiGiovanna, Lawrence F.
Golinski, Paul A.
Kamins, Barry
Longo, Mark A.
Romero, Manuel A.
Slavin, Barton L.
Sunshine, Hon. Nancy T.
Szochet, Diana J.

THIRD DISTRICT
Ayers, James B.
Carlucci, James A.
Cloonan, William N.
Copps, Anne Reynolds
Davidoff, Michael
Dixon, Philip H.
Dolin, Thomas E.
Doyle, Hon. Cathryn M.
Farley, Susan E.
Fernandez, Hermes
Gold, Majer H.
Greenberg, Henry M.
Higgins, John Eric
Kelly, Matthew J.
Kinum, John B.
Kretser, Hon. Rachel
Martinelli, Patricia
Meislahn, Harry P.
Miranda, David P.
Moy, Lillian M.
Netter, Miriam M.
Perino, Justina Cintron
Potter, James T.
Privitera, John J.
Sandner, James R.
Schofield, Robert T., IV
† * Tharp, Lorraine Power
Thornton, Timothy B.
* Williams, David S.
* Yanas, John J.

FOURTH DISTRICT
Breedlove, Brian H.
Burke, J. David
Caffry, John W.
Coffey, Peter V.
Cullum, James E.
Ferradino, Stephanie W.
Haelen, Joanne B.
McAuliffe, J. Gerard, Jr.
Rider, Mark M.
Sterrett, Grace
Tishler, Nicholas E.

FIFTH DISTRICT
Fennell, Timothy J.
Gall, Erin P.
Getnick, Michael E.
Girouard, Theresa M.
Greeley, Kristin B.
Hayes, David M.
Julian, Hon. Robert F.
Longstreet, Ami S.
Mitchell, Richard C.
Pellow, David M.
Priore, Nicholas S.
* Richardson, M. Catherine
Rivera, Ramon E.
Weinstein, Ellen Stempler

SIXTH DISTRICT
Campanella, Ottavio
Cummings, Patricia A.
Egan, Shirley K.
Gacioch, James C.
Gorgos, Mark S.
† Madigan, Kathryn Grant
May, Michael R.
Sheehan, Dennis P.
Smyk, Stephen D.

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

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

NINTH DISTRICT
Berman, Henry S.
Campanaro, Patricia L.
Casey, Bridget M.
Enea, Anthony J.
Gordon Oliver, Arlene Antoinette
Gouz, Ronnie P.
Kranis, Michael D.
Lagonia, Salvatore A.
Lau-Kee, Glenn
Markhoff, Michael S.
Marwell, John S.
Miklitsch, Catherine M.
* Miller, Henry G.
Milligram, Steven I.
Murray, Conal E.
† * Ostertag, Robert L.
Seiden, Hon. Adam
† * Standard, Kenneth G.
Townley, Rosemary A.
Tyre, Margaret H.
Wallach, Sherry Levin
Welby, Thomas H.
Wilson, Leroy, Jr.
Zeltner, Peter P.

TENTH DISTRICT
Asarch, Hon. Joel K.
* Bracken, John P.
Buonora, John L.
Cartright, Valerie M.
Castillo, Nelson A.
Clarke, Lance D.
Cooper, Ilene S.
D'Angelo, Frank G.
Duffy, James P., III
Elder-Howell, Andrea M.
England, Donna Marie
Giorgio, Frank, Jr.
Glanzer, Mona N.
Kossove, Scott E.
† * Levin, A. Thomas
Levy, Peter H.
Makofsky, Ellen G.
Margolin, Linda U.
Medican, William A.
Mihalick, Andrew J.
* Pruzansky, Joshua M.
Quinlan, Robert F.
* Rice, Thomas O.
Santemma, Jon N.
Shulman, Sir. Arthur E.
Smolowitz, Barry M.
Sperendi, Michael F.
Stempel, Vincent F., Jr.
Tell, M. David
Thompson, Charlene R.
Tully, Rosemarie
Walsh, Owen B.

ELEVENTH DISTRICT
Cohen, David L.
Dietz, John R.
Goldblum, A. Paul
Haskel, Jules J.
James, Seymour W., Jr.
Leinheardt, Wallace L.
Lomuscio, Catherine
Nashak, George J., Jr.
Terranova, Arthur N.
Walsh, Jean T.
Wimpfheimer, Steven

TWELFTH DISTRICT
Bailey, Lawrence R., Jr.
Chavez, Daniel M.
Kessler, Muriel S.
Millon, Steven E.
* Pfeifer, Maxwell S.
Sands, Jonathan D.
Schwartz, Roy J.
Stansel, Lynn

OUT-OF-STATE
* Fales, Haliburton, II
Peskoe, Michael P.
Ravin, Richard L.
* Walsh, Lawrence E.

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

BY GERALD LEBOVITS

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct at New York Law School. For their research suggestions to all three parts of this column, he thanks court attorney Alexandra Standish and Gerald Stern, Special Counsel to the New York State Judicial Institute and a Town and Village Justices Continuing Judicial Education Program faculty member. Judge Lebovits's e-mail address is GLebovits@aol.com.

Ethical Judicial Writing — Part I

No judicial function is more important than deciding cases ethically.[1] Judges resolve disputes. They create, apply, and enforce rights and obligations.[2] Judges affect lives. Society trusts judges to rule fairly and impartially, irrespective of issue or litigant. Judges, who must behave with integrity, professionalism, and respect, must be ethical on and off the bench. Judicial ethics are scrutinized in written opinions. Judges leave their mark in written opinions. An unethically written opinion is a black mark that defines a judge, while the honest, just, well-written opinion is celebrated. This three-part article addresses ethical issues that arise in judicial writing, with a New York focus.

Codes, Rules, Commissions, and Beyond

Judges must write within the bounds of the law and the bounds of ethics. They must look for guidance to the law in the jurisdiction where they preside, but no code or rule addresses judicial opinion writing directly.

Federal judges have their own code of judicial conduct. United States Circuit, District, Court of International Trade, Court of Federal Claims, Bankruptcy, and Magistrate judges must comply with the Code of Conduct for United States Judges.[3]

The American Bar Association formulated the Model Code of Judicial Conduct in 1972.[4] The ABA wrote the Model Code, as the preamble explains, so "that judges . . . respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system."[5] The New York State Bar Association has adopted the Model Code, known as the New York Code of Judicial Conduct (CJC).[6]

The New York State Constitution provides that "[j]udges and justices . . . shall . . . be subject to such rules of conduct as may be promulgated by the chief administrator of the courts with the approval of the court of appeals."[7] Pursuant to the State Constitution, Judiciary Law § 212(2)(b) directs the Chief Administrator of the Courts to "[p]romulgate rules of conduct for judges and justices of the unified court system with approval of the court of appeals." The Administrative Board of the Judicial Conference promulgated the Rules Governing Judicial Conduct (RGJC) in 1972.[8] New York's Chief Administrator of the Courts adopted the RGJC with the Court of Appeals's approval.[9]

The RGJC and the CJC are nearly parallel. The CJC consists of canons and sections. The canons set out broad standards; the sections, delineated under each canon, set out specific rules. Commentaries after each section explain the purpose and meaning of the canons and sections. The RGJC consists of rules, not canons. The Chief Administrator of the Courts has not adopted the CJC's commentaries. Where inconsistencies arise between the RGJC and the CJC, the RGJC prevails, except that the CJC prevails regarding a non-judge candidate for elective judicial office.[10]

The Advisory Committee on Judicial Ethics (ACJE) advises New York judges who have ethical questions.[11] A judge who telephones an ACJE member or staff attorney might get some informal, oral guidance, although the member or staff attorney will often recommend that the query be posed in writing. E-mailed inquiries are not accepted. A judge who writes to the ACJE will get a written answer from the full Committee.[12] The ACJE issues confidential opinions and publishes them without identifying information. A judge who follows the ACJE's written advice is presumed to have acted ethically if faced with a complaint to the New York State Commission on Judicial Conduct.[13]

The Commission on Judicial Conduct is the agency authorized "to receive and review written complaints of misconduct against judges, initiate complaints on its own motion, conduct investigations, file Formal Written Complaints and conduct formal hearings . . . subpoena witnesses and documents, and make appropriate determinations as to dismissing complaints or disciplining judges. . . ."[14] The Commission's staff investigates complaints about "improper demeanor, conflicts of interest, violations of defendants' or litigants' rights, intoxication, bias, prejudice, favoritism, gross neglect, corruption, certain prohibited political activity and other misconduct on or off the bench."[15]

The Advisory Committee interprets only the RGJC, not the CJC. The Commission currently considers alleged violations of the RGJC, not the

Continued on Page 51