SEPTEMBER 2006
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NEW YORK STATE BAR ASSOCIATION

Journal

Writers' Block

The Journal *peeks behind the column to meet one of the nation's most trusted legal-writing advisers: Gertrude Block*

by Skip Card

Also in this Issue

Discretionary Clauses Violate the Insurance Law

Beyond the Hold Notice in the Electronic Age

New York's Rockefeller Drug Laws, Then and Now

Navigating the New York City Civil Court

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September 2006

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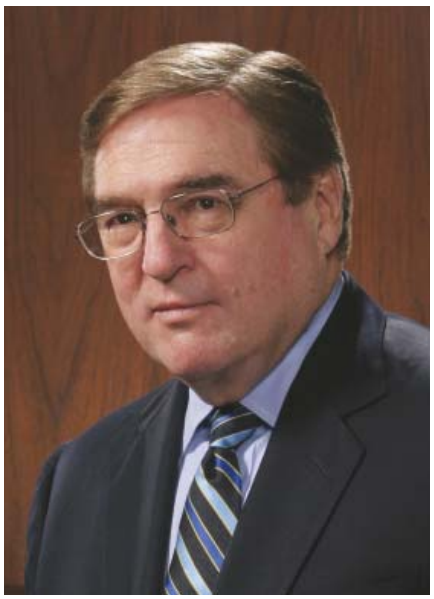
PRESIDENT'S MESSAGE

MARK H. ALCOTT



Advocates and Judges

The fundamental distinction between advocate and judge is second nature to all lawyers: the advocate pleads a case; the judge decides it. Most of our members have experienced the former role; a few have served in the latter capacity.

When it comes to selecting those who sit on New York's Court of Appeals, our Association plays the role of judge. Specifically, we evaluate and rate the candidates for the open seat nominated by the State Commission on Judicial Nomination. In so doing, we play an important part in the judicial selection process and render a valuable public service.

The State Bar will play this role frequently over the next year, as the Court of Appeals undergoes unprecedented change. Four of the Court's seven seats will be in play, as judges reach either the age of mandatory retirement or the conclusion of their 14-year terms. Specifically, the term of Associate Judge George Bundy Smith ends in September; Associate Judge Albert M. Rosenblatt, who reached age 70 in April, must retire at the end of this year; the term of Chief Judge Judith S. Kaye ends in March 2007; and the term of Associate Judge Carmen Beauchamp Ciparick will end not long thereafter.

The problematic constitutional mandate that requires our Court of Appeals judges to retire at age 70, and, as a practical matter, often forces them out at an earlier age, has caused this logjam. As reported in my last President's Message, I have appointed a Special Committee to take a hard look at that requirement and to recommend appropriate changes. The Committee, chaired by former Chief Administrative Judge E. Leo Milonas and including a prominent, diversified membership, is up and running, and will report its findings and proposals by the January 2007 Annual Meeting.

Meanwhile, attention is focused on the four seats that will open up over the next year. The process by which these seats will be filled is not as well understood as it should be, and the role played by our Association is even less so. This is an opportune time and place to explain how the process works, to describe what we have done over the past several weeks in implementing our role in this process, and to show the link between these events and the broader agenda I am pursuing as President.

Under New York's merit selection system of choosing Court of Appeals judges – which this Association promoted and has since its adoption in 1977 championed – the Governor appoints those judges from a small pool of candidates selected by the State Commission on Judicial Nomination. The Commission itself is an independent body whose 12 members are appointed as follows: four by the Governor, four by the Chief Judge and four by the Legislative leaders. It nominates no fewer than three and no more than seven candidates for each available seat. (The Commission has no other functions.)

The Commission's announcement of its nominees triggers a 30-day period for gubernatorial action. However, while the Governor must act within 30 days, he may not do so for the first 15 days after the Commission has released the names of its nominees. That creates a 15-day window for our Association to investigate, evaluate and rate the nominees.

We do so through the Committee to Review Judicial Nominations, an extraordinary, hardworking, blue-ribbon panel. Unlike most Association committees, this one has a strictly limited membership: no more than 15 members, including at least one from

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each judicial district, and no more than five alternates, including at least one from each judicial department. Within these strictures, I have assembled an outstanding group, including two former Court of Appeals judges, a former trial judge, four former State Bar presidents and outstanding practitioners from all over the state. Former president Maxwell S. Pfeifer is the Chair.

The job of the Committee is to rate each nominee as "well qualified," "qualified" or "not qualified." A "qualified" candidate is one who has demonstrated the qualifications regarded by the Committee as necessary to perform the duties of office. These qualities include experience, intellect, knowledge of the law, temperament, character and judgment. A "well qualified" candidate is one who, in the judgment of the Committee, possesses "pre-eminent" qualifications in each of these areas. A candidate who is "not qualified" lacks the necessary qualification in one or more of these areas.

To facilitate the Committee's evaluation, nominees provide extensive biographical information and copies of their writings, including – in the case of those who have already served on the bench – prior judicial opinions. Through the use of two- or three-member subcommittees, the Committee investigates each nominee, debriefs their references and others who know them, and interviews the candidates. The subcommittees then report their findings to the full Committee. In turn, the Committee as a whole reviews the subcommittee reports, interviews the nominees, discusses them at length, and ultimately, by secret ballot, votes on the ranking for each nominee. This takes place at a full-day session which all Committee members must attend in person.

If a Committee member determines that a candidate is less than "well qualified," the member provides a brief explanation of his or her reasoning. Moreover, if the Committee as a whole determines that a candidate is less than "well qualified," it prepares a brief statement explaining its reasoning.

The Committee concludes its activity by reporting its findings to me, as President. I, in turn, inform each nominee of his or her rating. In doing so, I advise those found to be less than "well qualified" of the reasons for their rating.

But that is not the end of our process. Any candidate found to be less than "well qualified" is given an opportunity to appeal. The appellate panel consists of the President, who acts as chair; the President-Elect; and seven geographically diverse Executive Committee members chosen by the President. The appellate panel, after reviewing the Committee's report and all of the underlying materials, conducts a hearing at which the candidate and the Committee Chair make presentations. The panel then makes a final decision on the candidate who has appealed.

When the entire process is completed, I transmit to the Governor the Association's final rating of each nominee. Our ratings are also released to the public. After the Governor has appointed the nominee to serve as judge, I convey our findings on the appointee to the Chair of the Senate Judiciary Committee for use in the confirmation process; on occasion, the Senate Judiciary Committee asks the Bar President to testify in person.

Of course, the process I have just described is extra constitutional. The Commission nominates the candidates, the Governor makes the appointment and the Senate confirms (or rejects) the appointee. Our role is merely advisory. Nevertheless, the Association's prestige, influence and reputation for fairness are such that it is almost inconceivable that the Governor would appoint anyone we found to be less than "qualified."

This year, on July 20, the Judicial Commission nominated seven candidates for the seat currently occupied by Judge Smith, including Judge Smith himself, together with Hon. Eugene F. Pigott, Presiding Justice, Appellate Division, Fourth Department; Hon. A. Gail Prudenti, Presiding Justice, Appellate Division, Second Department; Hon. Richard T. Andrias, Associate Justice, Appellate Division, First Department; Hon. James M. Catterson, Associate Justice, Appellate Division, First Department; Hon. Steven W. Fisher, Associate Justice, Appellate Division, Second Department; and Hon. Thomas E. Mercure, Associate Justice, Appellate Division, Third Department. The Association immediately sprung into action. Within 10 days, we initiated, conducted and completed the process described above. We found Judge Smith and Justices Andrias, Fisher, Mercure, Pigott and Prudenti to be "well qualified," and we found Justice Catterson to be "qualified." I conveyed our findings to Governor Pataki on August 2.

Throughout this process, the Association plays the role of a neutral evaluator. We do not endorse a particular candidate for the position; we do not establish a hierarchy of candidates; we do not rank the nominees vis-à-vis one another. Rather, we evaluate each candidate against a uniform standard of merit, and we draw no distinctions between those who achieve a particular rating.

That approach was questioned this year, because of Judge Smith's candidacy for re-designation. Many, including highly respected leaders of our profession and our Association, felt that, because of his distinguished tenure on the bench and his unique position as the Court's only African-American, Judge Smith deserved reappointment, and that the Association should say so. I sympathized with this position; and, indeed, in my speeches and in these pages, I have strongly called for continued racial diversity on the Court.

However, I made the judgment that we could not endorse a particular candidate – however worthy – without destroying our role as a neutral, independent evaluator of the judicial nominees. In short, I concluded that we

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NYSBACLE

Partial 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.

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

September 7	New York City
September 8	Melville, LI
November 2	Buffalo
November 30	Albany

+Gaining a Edge: Effective Writing Techniques for the New York Attorney
(video replay)
(half-day program)
+Fulfills NY MCLE requirement (3.0): 3.0 skills, practice management and/or professional practice

September 8	Canton

Henry Miller – The Trial
Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 ethics and professionalism; 6.5 skills

September 8	New York City
September 29	Uniondale, LI
October 20	Tarrytown
November 17	Albany

+The New Regime in Medicaid Planning
(video replay)
Fulfills NY MCLE requirement (6.5): 6.5 skills, practice management and/or professional practice

September 14	Jamestown

+Using Mediation: What You Need to Know to Make the Process Successful
(one-hour program)
Fulfills NY MCLE requirement (1.0): 1.0 in skills, practice management and/or professional practice

September 21	Telephone seminar

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

September 28	Melville, LI
October 5	Albany
October 13	Rochester
November 14	New York City

Managed Care
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.5): 4.5 practice management and/or professional practice

September 29	New York City

Update 2006
(live sessions)

September 29	Syracuse
October 27	New York City

+(video replays)

October 19	Albany
October 20	Utica
October 27	Binghamton; Canton
November 2	Rochester
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

Rise Above the Rest – Marketing Your New York Practice
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.5): 2.5 ethics and professionalism; 2.0 practice management and/or professional practice

October 3	Syracuse
October 4	New York City
October 5	Albany

Practical Skills Series – Basic Matrimonial Practice
Fulfills NY MCLE requirement for all attorneys (7.0): 4.0 skills; 3.0 practice management and/or professional practice

October 11	Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester

Gaining an Edge: Effective Writing Techniques for the New York Attorney by Hon. Gerald Lebovits
(half-day program)
Fulfills NY MCLE requirement for all attorneys (3.5): 3.5 skills

October 12	Rochester
October 13	Buffalo
October 17	New York City
October 26	Mt. Kisco
October 27	Saratoga Springs

+Ethical Issues in Matrimonial Cases: What's the Good Lawyer to Do
(video replay)
(half-day program)
Fulfills NY MCLE requirement (4.5): 4.0 ethics and professionalism; 0.5 practice management and/or areas of professional practice

October 13	Canton

Best Practices for New York Not-for-Profit Organizations

October 18	Albany
October 25	Syracuse
November 1	New York City
November 8	Buffalo

Shared Parenting and Child Support; Real Problems and Real Solutions in the 21st Century
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.5): 2.0 skills; 2.5 practice management and/or professional practice

October 20	Albany
November 3	New York City
November 17	Melville, LI
December 1	Buffalo
December 8	Syracuse

Practical Skills Series – Probate and Administration of Estates
Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 ethics and professionalism; 2.5 skills; 3.5 practice management and/or professional practice

October 24	Albany; Buffalo; Hauppauge, LI; New York City; Rochester; Syracuse; Westchester

The Keys to Effective Trial Advocacy with James McElhaney
Fulfills NY MCLE requirement for all attorneys (7.0): 7.0 skills

October 25	New York City
October 26	Syracuse

Buying or Selling a Small Business

October 27	Buffalo
November 1	Albany
November 8	New York City

Accounting for Lawyers

November 2	Syracuse
November 29	New York City
December 1	Albany
December 6	Buffalo
December 7	Melville, LI

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 3	Albany; Melville, LI
November 17	New York City
November 29	Rochester

Trucking Litigation and DOT Regulations
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.0): 2.0 skills; 2.0 practice management and/or professional practice

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

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

+Hot Topics in Real Property Law and Practice
Fulfills NY MCLE requirement (8.0): 8.0 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
(half-day program)

November 14	Buffalo
December 4	New York City

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

Writers' Block

The *Journal* Peeks Behind the Column to Meet One of the Nation's Most Trusted Legal-Writing Advisers: Gertrude Block

By Skip Card

Inside her tiny University of Florida office, language expert Gertrude Block logs onto e-mail and reads yet another plea from a lawyer who isn't quite sure how to put his legal expertise into words.

Some past examples from Block's in-box: An attorney wants to know if "ground for divorce" is preferable to "grounds" if there is only one cause. Another seeks the linguistic differences among the terms lawyer, attorney and counselor. One has a question about the Latin legalese "assuming arguendo." And yet another is chiming in on the simmering debate about the proper salutation for business correspondence now that "Dear Gentlemen" seems politically incorrect.

Block tackles each query, calling upon her considerable experience in linguistics and law, often delving into a host of thick reference works in the campus law library. She enjoys the work but, more to the point, she knows she provides a service to the legal profession. A good lawyer must learn to use language effectively and correctly, Block believes.

"It can't be done without words," she said. "Their tools are words."

Making distinctions about word usage and settling disputes over the proper use of language – specifically the language of the law and the courtroom – is at the core of Block's work as a linguist. Her book *Effective Legal Writing for Law Students and Lawyers*, originally published in 1981, was the first college guide designed to teach lawyers and would-be lawyers to write with precision. Today, her language columns appear in five law journals, including the New York State Bar Association *Journal*.

Block has also written numerous articles for legal and lay periodicals, conducted seminars on legal writing, served as an expert witness and consultant, and spoken before bar associations and other groups around the country. But it's through her advice columns that she has most endeared herself to New York attorneys eager to sound competent and professional.

Required Reading

Some attorneys consider Block's advice required reading.

"I read it every month," said Edmund Rosenkrantz, a partner in the New York City firm Migdal, Pollack & Rosenkrantz and a Block fan. "It's interesting, and it's witty."

"I'm very particular in my own documents," he said. "I like to be very precise." Other admirers of Block's work (call them "Blockheads," perhaps – although Gertrude herself likely would shudder at such coinage) say it's heartening to know someone is trying to halt the slow erosion of language skills in the legal profession.

Block's style also appeals to many lawyers. Her columns bear an air of competent authority and politeness more associated with "Dear Abby" than William Safire.

In answer to one writer who began his letter, "Please do something about the improper use of the word *parameter*," Block replied with a characteristic blend of humility and certitude: "Your faith in my ability to affect the way Americans use words is gratifying, but unfortunately not justified."

Freelance writer **Skip Card** is a copy editor for the *New York Post* and author of the new hiking guidebook *Take a Hike New York City*. He has written for the *Journal* on topics ranging from baseball to environmentalism.

When a lawyer challenged Block's answer to a question about double negatives and ambiguity by citing the "Square of Oppositions" (a fancy bit of Aristotelian logic), Block replied, "I confess that I was unaware of the 'Square of Oppositions.' The problem with an argument based on logic, however, is that language is not always based on logic."

Block ended her reply by citing examples from Chaucer and Shakespeare to support her argument.

Bridge to Linguistics

Despite her reputation and credentials, Block freely admits she stumbled into her career almost by accident. Her early schooling in Pennsylvania, Block said, took place "in a time when you studied grammar," and included four years of Latin. She attended Pennsylvania State University, earned a bachelor's degree in economics (plus a Phi Beta Kappa key), then took a job as an assistant buyer.

After marrying Seymour Stanton Block, she soon settled into a life dedicated to raising two children. The couple moved to Florida in 1944. Other dates, such as the year of Block's birth, her graduation or the couple's wedding, are not pertinent public information, Block said.

"I want people to think I'm young enough to be relevant but old enough to know what I'm talking about," she said.

Family responsibilities ebbed by the time the couple's youngest child was in high school, and Block began looking for something else to do. Correcting lawyers' language was not on her list.

"I was thinking of playing a lot of bridge," Block admitted. The thought of a wife devoted to acquiring international master points and studying the Stayman Convention horrified her husband, who felt it was a waste of time when the University of Florida offered courses near their Gainesville home. Block agreed.

"Intellectually, I needed something," Block said. "Bridge wouldn't do."

Back in college, Block earned a master's degree in English at the University of Florida, became fascinated with linguistics and worked toward earning her doctorate. But as she was set to defend her dissertation, her academic advisor transferred to another university, and the linguistics department began to emphasize exotic languages over semantics. She never earned a Ph.D.

Block began teaching English and humanities at the University of Florida, but knew her lack of a doctorate would keep her from receiving tenure. However, in the late 1970s, the university's College of Law started to put more focus on the written word, requiring applicants to submit essays and grading students in greater part on their ability to write and use language. The law dean phoned Block and asked her to join the faculty on a temporary basis, saying she could remain if the arrangement proved satisfactory to all.

Block started advising students, then began tutoring, then established a writing clinic. "It was pretty clear who needed help and who didn't," she recalled. The clinic soon proved extremely popular with students.

"As word spread that it really helped their grades, I found students sitting in the back of the class who didn't belong there," Block said.

Teaching English to lawyers soon became a career. Block attended all the basic law courses, where she learned legal terminology and studied the nuances of case law. When she couldn't find a suitable textbook for her English course, she wrote her own. The pioneering *Effective Legal Writing* is now in its fifth edition.

Block continued to teach as a writing specialist until she retired in 1990 and became an emeritus lecturer. Today, she maintains a tidy office ("I get distressed if I have a mess around me") at the Gainesville campus, where she works four or five days a week, mostly checking e-mail, researching answers to questions that will appear in her columns, and writing.

As noted, her office isn't spacious. "If you picture a big closet, that's it," she said. "If I have two visitors, one of them has to stand outside."

Block researches, writes and rewrites her language columns – a different version for each of the five law journals that publish it – at the university campus. Often, the column is set aside for a few days so Block can re-read her own words with a fresh eye.

"I never send my first draft," she said.

Since retiring from full-time teaching, Block has focused more on writing and publishing. Her book *Legal Writing Advice: Questions and Answers*, largely a collection of columns, was published in 2004 by W.S. Hein & Co. Today, Block is writing a new work, what she calls a "fun book" about peccadilloes in language.

Outside the office, she spends time with her family, including a new great-grandchild.

Gertrude's Rules

Part of Block's appeal as a judge in the court of language law stems from her Pennsylvania-born practicality and her willingness to see the English language as flexible and capable of growth.

"We all want the language to stay as it was when we learned it as children," she said, "which means the language of people who are long-since dead."

As a result, Block pooh-poohs several grammar rules that have been wrongly foisted upon past generations.

She sees no stigma attached to beginning a sentence with "And" (so long as it's not overused). She does not cringe at a split infinitive ("to boldly go"). After "compared," she might place either a "with" or a "to," regardless of whether the sentence stresses similarities or differences. She has given up on changing "I could care less," "more importantly" and the sentence-starting "Hopefully," grudgingly giving these grammatically incorrect phrases status as rule-bending idioms.

"In language, public acceptance always overcomes grammar, style, and even logic," she has written.

Yet, Block does admit to having "a sense of discomfort" about some words or phrases.

She doesn't care to hear people use "uninterested" or "healthy" when they mean "disinterested" or "healthful." She cringes at careless past-tense constructions like "drug" and "stunk," which ought to be "dragged" and "stank."

"That bothers me," she said. "It's not the way I learned it."

But Block also is quick to admit her own mistakes. She is chagrined that she long ago wrote "fragrant" in a column when she meant to write "flagrant." More famously, she gave a hilariously incorrect response when a New Jersey reader asked about the meaning of "agita."

Noting that she could find nothing in her usual reference sources, she ventured a "wild guess" that agita was a New York dialect pronunciation of "agitur," and therefore "the third person singular Latin subjunctive form of a verb meaning 'an action has been brought.'"

That reply, published in Block's "Language Tips" column in the New York State Bar Association *Journal*, drew an avalanche of shocked responses from Gotham attorneys quick to point out that "agita" was slang for mild heartburn or indigestion, usually used figuratively to mean anxiety or distress. Notably, Block was later able to trace the word's etymology and point out that its roots were Latin, not Italian or Yiddish as many readers claimed.

"The hundreds of letters I received left me with mixed feelings of humility and gratitude," Block recounted in *Legal Writing Advice: Questions and Answers*, "– the latter because I had not realized that so many New Yorkers read my column!" ■

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.

Dillenbeck's Back

A new client consults with you about a possible medical malpractice action, and she relates the following facts: On November 20, 2000, she went to a plastic surgeon for a facelift. After returning home, she experienced difficulty swallowing. She and her private-duty nurse each called the plastic surgeon's office a number of times, and were told that the doctor "would be out of the office for a period of time because he was hospitalized for surgery on his arm or hand."[1]

Based upon your interview of the client, and subsequent consultation with a physician, there appears to be a meritorious claim for negligently performed surgery and, based upon the story your client relates, you have a good-faith belief that the plastic surgeon had a physical problem with his hand that caused or contributed to a surgical mishap, in turn causing or contributing to your client's injuries. You believe the physician had an obligation to disclose his infirmity to the plaintiff. You commence an action against the plastic surgeon, alleging that the surgery was negligently performed, and also allege lack of informed consent. In the plaintiff's verified bill of particulars, you allege that the physician's disclosure "was inadequate" in that "upon information and belief" he did not disclose "a physical limitation from which [he] was suffering and which would impact on his ability to perform the surgical procedure."[2]

Thereafter, you move to compel the defendant physician to "provide authorizations for the release of medical records, appropriately redacted to exclude confidential communications, for the period commencing November 20, 2000, and terminating on December 31, 2000, and relating to medical or surgical treatment for a condition or conditions relating to his upper extremities."[3] You argue to the court that a medical problem with the defendant's arm or hand may have impacted on his ability to operate on the plaintiff, and that she should have been made aware of the doctor's condition before undergoing surgery. You explain to the court that the "mere facts and incidents of a person's medical history are not privileged," and therefore, the plaintiff is entitled to information regarding "the nature of the procedure and the date on which it was performed,"[4] and make clear you are not seeking any communications.

The defendant opposes the motion, arguing that the information sought is protected by the physician-patient privilege, and that the privilege has not been waived, thus precluding an inquiry into the disclosure sought by the plaintiff.

You go to court, confident that your motion will be granted, secure in the knowledge that you have properly pled that the defendant doctor's medical condition caused or contributed to the negligence that caused the plaintiff's injury. There is a dispute between the parties concerning the defendant's medical condition. The information sought is relevant and "material and necessary" to establishing the plaintiff's claims. The plaintiff's claims may not be provable without the disclosure sought. Given New York's liberal disclosure scheme,[5] you can't lose, right?

Oh, that life was so simple!

This scenario was presented to Justice Eileen Bransten of New York Supreme Court in *Brower v. Beraka*,[6] a case that provides an overview of the law on medical privilege in New York, and the high hurdles inherent in overcoming the assertion of the physician-patient privilege by a defendant. The case scenario is worthy of a law school final examination, and Justice Bransten carefully navigated the shoals on arriving at her decision. More on that later.

Along the way, Justice Bransten cited the most widely known case in the area, *Dillenbeck v. Hess*.[7] Tonia Dillenbeck was killed and her son, Michael Dillenbeck, was seriously injured when their automobile collided head on with another vehicle driven by the defendant, Sherry Hess, after the Hess vehicle allegedly crossed the center line and struck the Dillenbecks' vehicle. The plaintiff alleged that the defendant's intoxicated condition was a proximate cause of the accident. The plaintiff also sued two taverns on a dram shop theory.[8]

Hess received serious injuries in the accident, and at the hospital where she was taken after the accident a blood alcohol test was performed for diagnostic purposes. However, no test was administered by the police or by court order pursuant to Vehicle & Traffic Law § 1194 to determine Hess's blood alcohol level. If there had been, the results would have been admissible in both a criminal and civil proceeding. Hess was indicted on a number of charges, and was convicted of criminally negligent homicide. The hospital test results, finding a blood alcohol level of .27, were ruled inadmissible at the criminal

trial, with the court concluding that the test results were protected by the physician-patient privilege and that the privilege had not been waived.[9]

In the subsequent civil action, the plaintiff moved to compel the defendant to disclose any medical records, including any blood alcohol level test results, relating to her condition upon admission to the hospital after the accident. The plaintiff's motion was supported by ample proof of the defendant's apparent intoxication, together with the minutes from the defendant's sentencing hearing where she confirmed that a blood alcohol test had been performed. The defendant cross-moved for a protective order, asserting the physician-patient privilege. The trial court denied the plaintiff's motion and granted the cross-motion, holding that because the defendant had not affirmatively placed her physical condition in issue, the physician-patient privilege precluded discovery of her medical records. The Third Department affirmed, and granted leave to the Court of Appeals.[10]

The Court framed the issue before it:

> The issue on this appeal, therefore, is whether the information requested by plaintiffs, acquired by defendant's physician in the course of treating her for injuries incurred in the automobile accident and thus privileged under CPLR 4504, must be disclosed once it is established that defendant's physical condition is "in controversy" and thus subject to discovery under CPLR 3121(a), notwithstanding that defendant has not placed her physical condition in controversy or otherwise waived the privilege.[11]

The Court examined the development of the physician-patient privilege in New York:

> The physician-patient privilege, presently contained in CPLR 4504, is entirely a creature of statute. At common law, confidential communications between physicians and patients received no protection against disclosure in a legal proceeding. . . . New York State became the first jurisdiction to depart from the common-law rule when it adopted the physician-patient privilege by statute in 1828. In its current form, the privilege prohibits disclosure of any information acquired by a physician "in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." The privilege applies not only to information communicated orally by the patient, but also to "information obtained from observation of the patient's appearance and symptoms, unless the facts observed would be obvious to laymen." Moreover, the form in which the information is sought to be introduced is irrelevant, as the privilege operates whether the information is contained in a patient's medical files or is sought to be introduced at trial in the form of expert testimony.[12]

The Court explained that not everything learned by a physician was protected, because "a physician is not precluded from testifying concerning ordinary incidents and facts of a person's medical history that are obvious to those without professional training."[13] However, the Court concluded that the information obtained by a physician in administering a blood alcohol test was the product of the physician's professional training.

The Court of Appeals affirmed the decisions of the lower courts:

> In *Koump v. Smith*, we noted that a litigant does not waive the physician-patient privilege merely by defending a personal injury action in which his or her mental or physical condition is in controversy unless, in so defending, the litigant "affirmatively asserts the condition either by way of counterclaim or to excuse the conduct complained of

> by the plaintiff." Today, we hold that where a party defending a personal injury action validly asserts the privilege and has not affirmatively placed his or her medical condition in issue, the plaintiff may not effect a waiver of the privilege merely by introducing evidence demonstrating that the defendant's physical condition is genuinely "in controversy" within the meaning of the statute permitting discovery of medical records.[14]

So, in order to obtain a defendant's medical records, two conditions must be met. First, the defendant's medical condition must be in controversy. Second, in order to overcome the physician-patient privilege, there must be a waiver of the privilege by the defendant – for example, where the defendant affirmatively places his or her medical condition in controversy. Simply denying the allegations in a complaint does not constitute such a waiver.

Absent a waiver, the physician-patient privilege will bar the release of medical records, even in cases where those records are the only way to establish a claim or defense. The privilege will bar the exchange of medical records even where a compelling societal argument can be made for the exchange. Examples abound.

An unidentified assailant stabbed and killed a man, and there was reason to believe that the assailant had been wounded and was bleeding at the scene. Unable to identify the assailant, the Manhattan District Attorney's office served a subpoena upon a number of hospitals, seeking identifying information concerning individuals presenting to the hospitals on the date of the stabbing with injuries "caused by or possibly caused by a cutting instrument and/or sharp object, said injury being plainly observable to a lay person without expert or professional knowledge."[15] The hospitals refused to comply and the D.A. moved for contempt. One of the hospitals cross-moved to quash the subpoena, asserting the physician-patient privilege. While the D.A.'s office sought to couch the request in terms of injuries that would be observable by a layperson, the Court explained that the subpoena had been properly quashed because a determination of the cause of the wound necessarily involved the application of medical judgment.

Similarly, where a defendant convicted of diverting prescription drugs appealed his conviction, claiming that the evidence used to convict him was subject to the physician-patient privilege, the Court of Appeals agreed, overturned the conviction and ordered a new trial. The Court held that a provision in the Public Health Law, requiring physicians to notify the Commissioner of Health when prescription drugs were suspected of being diverted, did not render the privilege inapplicable.[16]

And where a woman alleged that her lover had knowingly infected her with herpes, the Fourth Department held that the trial court erred in ordering exchange of the defendant's medical records. Citing *Dillenbeck*, the court held, "[N]otwithstanding the fact that defendant's medical condition with respect to the herpes simplex virus is 'in controversy' (CPLR 3121[a]), defendant is entitled to invoke the physician-patient privilege to prevent discovery concerning that medical condition."[17]

So what did the court decide in the case of the plastic surgeon allegedly suffering from a hand or arm impairment that the plaintiff alleged caused or contributed to her injury?

Did the defendant physician place his medical condition in controversy, thereby waiving the physician-patient privilege?

> There is absolutely no indication that Dr. Beraka's defense is based on any arm impairment. He is not attempting "to excuse the conduct complained of by the plaintiff" on the basis of any physical condition. Nor did he at any time voluntarily disclose that he suffered from any arm condition during the relevant time. Thus, Dr. Beraka's *medical records* are not discoverable and an authorization will not be compelled.[18]

Must the defendant physician testify concerning whether he suffered from physical problems during the time in question, and whether he was receiving medical treatment for those problems?

> Although the scope of the physician-patient privilege is not strictly confined to "communications" between a doctor and patient, but rather includes "any medical information acquired by the physician through the application of professional skill or knowledge" (including information contained in a patient's medical records), the privilege does not extend to "the mere facts and incidents of a person's medical history." Therefore, an individual cannot "refuse to answer questions regarding matters of fact" concerning whether one suffered from physical problems or was under the treatment of a physician during a certain period of time.[19]

Does the defendant risk waiving the physician-patient privilege in giving this testimony?

> That facts and incidents of a person's medical history are discoverable but specifics, such as the name of the condition one suffers from, are not presents a dilemma for a defendant. If a defendant testifies to the "facts and incidents" of a medical condition, then that defendant may well subsequently be deemed to have waived the physician-patient privilege.[20]

Can appropriate relief be fashioned, allowing the plaintiff the disclosure to which she is entitled and protecting the defendant from inadvertent waiver of the physician-patient privilege?

> To avoid a waiver of Dr. Beraka's privilege and ensure that plaintiff can obtain information to which she is entitled, this Court will *compel* Dr. Beraka, at a deposition to be conducted within 30 days, to answer questions related to the facts and incidents of his medi-

cal history. Specifically, Dr. Beraka must disclose whether he suffered from any arm impairment and whether he was under the treatment of a physician for a condition related to upper-extremities between November 20, 2000 – the date of her facelift – and December 31, 2000. Dr. Beraka's compelled testimony cannot be deemed voluntary and, assuming that Dr. Beraka limits his answers to "the facts and incidents of his medical history" and that he in no other way injects his physical condition into the lawsuit, there will be no waiver of the physician-patient privilege as to his medical records based on his answers to plaintiff's counsel's questions.[21]

On the record before it, the court did not have the opportunity to address the issue of whether the defendant physician had waived the physician-patient privilege by informing his office staff of his medical condition and treatment received.

Whenever questions are posed or disclosure is otherwise sought involving medical information, the application of the physician-patient privilege must be considered and, where present, it must be promptly asserted by the attorney on behalf of the party or witness so as to avoid a waiver. Where it is clear that the privilege does apply, care must be taken to allow proper non-privileged foundation information to be exchanged. There will be times when parties have a good faith disagreement as to whether the privilege applies. Err on the side of asserting the privilege, while permitting all involved to make a proper record. Then, let the party seeking the disclosure make a motion to compel or, if interposing an objection is not sufficient protection, make a motion for a protective order. ■

1. *Brower v. Beraka*, No. 109514/03, 2006 WL 1724039 *1 (Sup. Ct., N.Y. Co. June 14, 2006) (Bransten, J.).
2. *Id.* at *1.
3. *Id.*
4. *Id.*
5. *See, e.g., Allen v. Crowell Collier Publ'g Co.*, 21 N.Y.2d 403, 288 N.Y.S.2d 449 (1968).
6. *Brower*, No. 109514/03.
7. *Dillenbeck v. Hess*, 73 N.Y.2d 278, 539 N.Y.S.2d 707 (1989).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 286.
12. *Id.* at 283–84 (citations omitted). *See* CPLR 4504(a).
13. *Id.* at 284.
14. *Id.* at 280–81 (citations omitted). *See* CPLR 3121(a).
15. *In re Grand Jury Investigation*, 98 N.Y.2d 525, 528, 749 N.Y.S.2d 462 (2002).
16. *People v. Sinski*, 88 N.Y.2d 487, 646 N.Y.S.2d 651 (1996).
17. *Doe v. Doe*, 16 A.D.3d 1146, 1146, 791 N.Y.S.2d 761 (4th Dep't 2005).
18. *Brower*, No. 109514/03 (citation omitted).
19. *Id.* at *2 (citations omitted).
20. *Id.* at *3 (citation omitted).
21. *Id.* (citation omitted).

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New York Insurance Department: Discretionary Clauses Violate the Insurance Law

By Daniel W. Gerber and Kimberly E. Whistler

On March 27, 2006, the State of New York Insurance Department (NY DOI) issued Circular Letter No. 8, whereby it determined that "the use of discretionary clauses violates Section 3201(c) and 4308(a) of the Insurance Law." On June 29, 2006, the NY DOI issued Circular Letter No. 14, superseding its previous opinion, arguably softening its tenor by using words such as "may" and "suggests," as well specifically including insurance policies, which it originally failed to mention in the body of its original opinion. Circular Letter No. 14 states, "the Department believes that the use of discretionary clauses are contrary to Sections 3201(c) and 4308(a) and Article 24." It further states that "the Department is drafting regulations that would prohibit the use of discretionary clauses in all new and existing accident and health insurance policies, life insurance policies, annuity contracts and subscriber contracts upon renewal, modification, alteration or amendment on or after the effective date of the regulation."

Potential Effects

This action by the New York Department of Insurance may have tremendous ramifications in the insurance industry. In addition to accident and health insurance policies, most disability policies contain some form of discretionary language. In light of the NY DOI's opinion, two questions immediately come to the forefront: first, whether this language will have any retroactive effect on pending or potential litigation; second, whether the Insurance Department has the authority to make such a unilateral determination.

The United States Supreme Court held in *Firestone Tire & Rubber Co. v. Bruch*[1] that discretionary clauses used in disability policies limit the court's review of a claim determination to an arbitrary and capricious or abuse of discretion standard. Similarly, discovery is limited to the administrative record.[2] Under this standard of review, denials of coverage are upheld as long as there is a single reasonable basis. Absent an arbitrary and capricious standard, courts employ a *de novo* review, which allows the claimant a new review based on the court's assessment of entitlement to benefits.[3] Additionally, discovery outside the administrative record is permitted, and the court itself would determine whether the participant is, or is not, disabled.

The California Experience

New York's recent position is not the first in the nation. In fact, California has issued a similar opinion and the legal action that has arisen with respect to that opinion is illustrative of the conflicts that may arise in New York. In 2004, the California Department of Insurance ("California DOI") issued an opinion finding that discretionary clauses in disability policies deprive insureds

of the protections afforded under state law and that such language would render the policy "fraudulent or unsound insurance" under the California Insurance Code. The California DOI also stated that discretionary clauses are "unintelligible, uncertain, ambiguous, or abstruse, or likely to mislead a person to whom the policy is offered, delivered or issued." The opinion stemmed from a case in the Northern District of California, *Rowe v. Planetout Partners & Unum Life Insurance Co.*,[4] concerning whether discretionary clauses in disability insurance policies were appropriate under California law.

On February 27, 2004, the California DOI issued a Notice to Withdraw Approval to several disability insurers doing business in California. This Notice, among other things, essentially withdrew the California DOI's prior approval of eight disability insurance policy forms, issued by five different insurers, which contained the discretionary clauses.

The DOI sent a letter to the judge in *Rowe* stating that while it has begun regularly disapproving discretionary clauses, any such disapproval would be effective "prospectively and not retroactively." Subsequently, a federal district court, also in the Northern District of California, in *Rosten v. Sutter Health Long-Term Disability Plan*,[5] found the California DOI's opinion to be persuasive and ruled from the bench that the discretionary clause in the particular policy violated California law. The court further held that the DOI's determination and its statutory authority were not preempted by the Employee Retirement Income Security Act (ERISA).

Interestingly, a contrary decision to *Rosten* was subsequently issued within the same federal district. In *Firestone v. Acuson Corp. Long Term Disability Plan*,[6] the court rejected the plaintiff's argument that the court must use a *de novo* standard to review the denial of her disability benefits as a result of the California DOI's opinion letter. The court found that because the plaintiff's insurance company was not among those listed in the California DOI's Notice to Withdraw Approval, the DOI's initial approval remained valid. It further held that such contract is binding and governs the obligations of the parties until the DOI revokes such approval.

ERISA's Role

Still to be determined is whether states have the authority to limit the language in a disability policy, or whether that authority is preempted by ERISA. In deciding whether preemption applies, it must be determined whether a policy being regulated by the state is the type of plan governed under ERISA. Plans excluded from ERISA include those issued by government employers, plans for employees of religious organizations, and plans where no employees participate – such as those solely for the business owners. In addition, a benefit plan may escape ERISA if, under 29 C.F.R. § 2510.3-1(f), the employers do not contribute to, endorse and receive no consideration in connection with the program; employee participation must be completely voluntary, as well.

If a plan is governed by ERISA, claims arising out of the plan may be preempted under ERISA. Under 29 U.S.C. § 1144, ERISA law supersedes state law "insofar as [it] may now or hereafter relate to any employee benefit plan." State law is defined to include "all laws, decisions, rules, regulations, or other State action having the effect of law."[7] Additionally, under § 1132, as well as § 1144, ERISA preempts all efforts to use state law to regulate employee benefits plans.

On the face of the statute, the courts would seem not to have the authority to limit the discretionary language in a disability benefit plan. This has not been the case, however. ERISA contains a provision that exempts from preemption any state law regulating insurance. The Supreme Court has applied this "saving" provision and upheld state laws. To illustrate: the Massachusetts law that mandated minimums for health care benefits to be included in policies;[8] California's "notice-prejudice rule";[9] the Illinois statute providing for independent medical reviews of determination of medical necessity by HMOs;[10] and the Kentucky law that allowed any provider in a managed care network to treat patients.[11]

The question now is whether a state law regulating the language of an employee benefit plan, such as the model law promulgated by the National Association of Insurance Commissioners (NAIC), would escape ERISA preemption if adopted by the states. Insurance commissions in states such as California,[12] Utah,[13] Illinois,[14] and Hawaii[15] have applied prohibitions against discretionary clauses. Perhaps these states are preempted from doing so under ERISA, but their actions have not yet been challenged, and the question has not been answered by the Supreme Court.

Unintended Consequences

Very real concerns have emerged with respect to the unintended consequences of these new state laws – such as New York's and California's. It seems inevitable that costs of disability insurance will rise and so will the number of uninsured. On November 14, 2005, Milliman, Inc., engaged by American's Health Insurance Plans on behalf of its member companies who sell disability income insurance policies, issued a report entitled "Impact of Disability Insurance Policy Mandates Proposed by the California Department of Insurance." The report estimates that the cost of premiums will increase by as much as 46% for group disability insurance policies and 33% for individual coverage, as a result of a higher incidence of litigation, higher cost per litigated claim and lower claim recovery rates. In addition, the report surmises that the range of products will decrease, the amount of protection insured under a policy will be reduced, claimants will be

discouraged from returning to work and overall financial security will decrease.

The impact that the State of New York Insurance Department's Circular Letter No. 14 will have is unknown. The breadth of its reach will only be determined as the issues arise. Will parties attempt to void discretionary clauses in policies issued prior to this opinion? Will cases already determined under an arbitrary and capricious standard have to be re-tried under a *de novo* standard? The letter leaves these questions unanswered. ■

1. 489 U.S. 101 (1989).
2. *See, e.g., Miller v. United Welfare Fund*, 72 F.3d 1066, 1072 (2d Cir. 1995).
3. *Muller v. First Unum Life Ins. Co.*, 341 F.3d 119 (2d Cir. 2003).
4. No. C 03-1145 WHA.
5. Case No. C 03-4597 JSW.
6. 326 F. Supp. 2d 1040 (N.D. Cal. 2004).
7. *See* 29 U.S.C. § 1144(c).
8. *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724 (1985).
9. *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999).
10. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002).
11. *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003).
12. Cal. Ins. Code §§ 10291.5, 12921.9.
13. Utah Code Ann. § 31A-21-201(3).
14. Ill. Ins. Code § 143.
15. Haw. Rev. Stat. § 431:13-102.

SWEEPING CHANGES TO LAWYER ADVERTISING

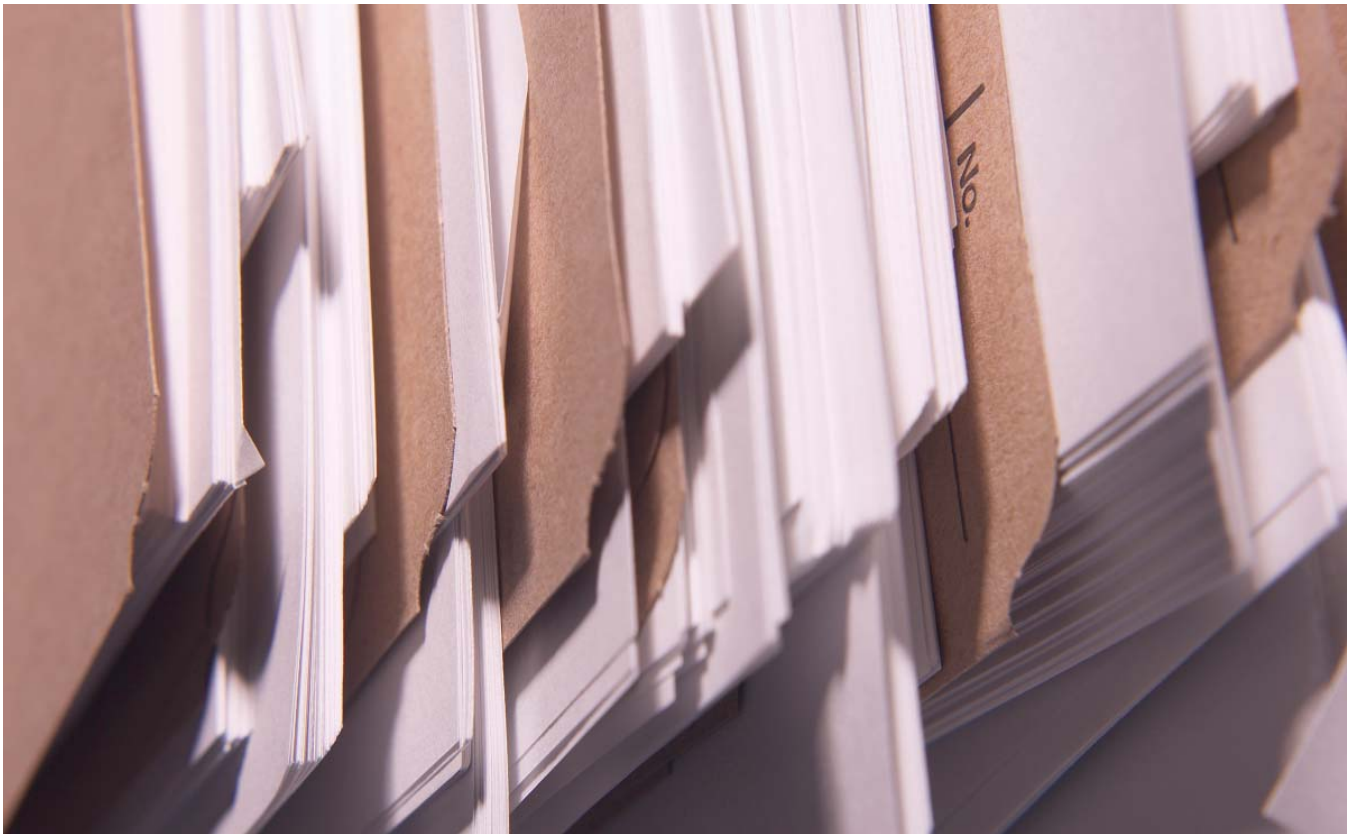
New Regulations Scheduled to Take Effect November 1, 2006

On June 13, 2006, the Office of Court Administration released proposed amendments to the Code of Professional Responsibility, as well as to 22 NYCRR part 130, to strengthen rules relating to lawyer advertising. These restrictions are being enacted to safeguard consumers from potentially misleading advertising and overly aggressive or inappropriate solicitation for legal services. The proposed amendments include the following:

- A 30-day moratorium on soliciting wrongful death or personal injury clients, to protect families suffering loss from overly aggressive marketing.
- Ban on using testimonials by current clients or paid endorsements.
- Restrictions on using statements likely to create an expectation about results or that compare the lawyer's services with those of other lawyers.
- Expansion of rules to cover computer and Internet-based advertising and solicitation, including restrictions on Web sites and e-mail, and bans on pop-up ads and chat-room solicitation.
- Ban on using nicknames, mottos or trade names that suggest an ability to obtain results.
- Requirement that ads stating "no fee will be charged if no money is recovered" disclose that the client will remain liable for other expenses regardless of the case outcome.
- Expansion of rules to cover out-of-state lawyers who solicit legal services in New York.
- Requirement to include disclaimers in certain ads and to label certain communications as "advertisements."
- Ban on fictionalized portrayals of clients, judges and lawyers or re-enactments of events that are not authentic.
- Ban on depicting the use of a courtroom or courthouse.
- Requirements to file all advertisements for legal services, including radio and television ads, with the lawyer disciplinary committees for review, and to translate all foreign-language ads into English before filing.

These sweeping changes are scheduled to take effect November 1, 2006. They were adopted as a result of the recommendations of both the New York State Bar Association Task Force on Lawyer Advertising and the committee specially appointed by the Administrative Board of the Courts last year to study this area. There is a 90-day comment period, which ends September 15, 2006.

The Bar's Committee on Law Practice Management has scheduled seminars in October to help attorneys understand these proposed significant changes and market their practices in ethical ways. (See page 43.) You can access the amendments at www.nycourts.gov/rules/proposedamendments.shtml. ■



Beyond the Hold Notice in the Electronic Age

By Diane S. Barrasso, with Erik Haas

Imagine you're sitting at your desk one day and a member of your Information Technology staff drops off a new laptop computer and then just walks away, leaving the installation to you. The instruction manual only goes so far. Trying to integrate with your firm's or company's network is complicated; without clear implementation guidelines you could cause a serious mess. Even if you are technically adept, you may not be aware of all the necessary software and network protocols. Without the guidance of professionals, you may inadvertently put the company's entire IT infrastructure at risk.

It is much the same with litigation hold notices encompassing electronic documents. Even the most brilliantly worded notice may not provide sufficient guidance to adequately inform the recipient of the hold obligations for electronic information. Rather, the hold notice should be accompanied by a balanced and documented implementation protocol that accounts for the sophistication and technological complexity of clients' information management systems.

Understanding that there is no "one-size-fits-all" approach to document preservation, this article highlights practical steps for identifying and addressing the challenges of implementing a hold notice in the electronic age.

The Risk

The legal press has recently been full of stories about costly electronic document preservation mistakes. The risk, of course, is sanctions, which are not insignificant. Penalties

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have ranged anywhere from cost shifting (*Zubulake v. UBS Warburg, LLC*[1]), to monetary sanctions (*United States v. Phillip Morris USA, Inc.*;[2] *In re Prudential Insurance Co. of America Sales Practices Litigation*[3]) and the awarding of attorney fees (*Metropolitan Opera Ass'n v. Local 100, Hotel Employees & Restaurant Employees International Union*[4]), to adverse inferences and negative outcomes (*Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*[5]).

The Challenges

With the abundance of electronic documents and variety of technical systems in place to manage today's business information, it is no easy task to identify all the information necessary to hold in anticipation of litigation. Moreover, the litigation hold obligations likely run contrary to technical protocols or strongly iterated policies that preclude the retention – or result in the automatic deletion – of otherwise responsive electronic documentation. And with the rapid pace at which e-mail and other electronic documents are generated, the implementation of hold notices encompassing the disparate information systems likely will cause the existing storage capacities to be quickly overwhelmed. Consequently, the significant challenges associated with implementation of an electronic hold notice are (1) to define the universe of electronic files and systems that must be preserved, (2) to "lock down" the environment so that relevant data is not inadvertently destroyed, and (3) to narrow the scope of electronic documents that must be held throughout the course of the litigation.

Immediate Actions

The onset of a document preservation effort should occur when there is reasonable expectation of an impending suit or, if that is not obvious, in response to a claim already filed.[6] A carefully thought-out preservation process and action plan is important for the duration of the matter, but having a quick response in key areas will provide invaluable security as the matter progresses.

Confirm Hold-Notice Compliance

Hold-notice compliance must take place at a number of different points: (1) central paper archives (usually with the assistance of a records manager), (2) central electronic archives (for server-located e-mail and other server data, including employee "home" directories, central departmental directories and databases, and for backup tape repositories and procedures), and (3) the desktop/office of the employee.

It is crucial to maintain a detailed audit trail of the steps taken to ensure compliance with the hold notice as it pertains to electronic documents. Simple processes, such as memorializing discussions with IT personnel to confirm that databases are not being overwritten and data tape backups are being preserved (at least while waiting to negotiate cut-off dates), will go a long way toward substantiating the client's good-faith effort to preserve documents down the road, which in turn may allow the client to avail itself of safe harbors from sanctions for inadvertent deletions.

Document preservation often is facilitated by training the individual employees to manage their own documents according to a plan. Their participation, and thus overall compliance, often is enhanced by efforts to standardize the process, reduce the technical hurdles, provide the tools necessary for compliance and train the employees on the process and the use of the preservation tools.

Discontinue Backup Tape Recycling

E-mail and other servers typically are backed up to tapes at regular intervals – *e.g.*, daily, weekly and monthly. Oftentimes the weekly and monthly tapes are "snapshots" of the server and do not necessarily contain the data that is on, say, the daily tapes. To preserve all backed-up files, therefore, it often is not sufficient to merely suspend the monthly recycling. Rather, with the potentially relevant and unique data contained thereon, it often is necessary to retain tapes pertaining to each backup interval.

Back Up Routinely Overwritten Fields

Certain databases may be very difficult to restore quickly and easily from backup tapes – *e.g.*, extensive, enterprise-wide financial systems. And, in some cases, the database workflow results in the daily overwriting of specific data fields. In these situations, it is good practice to take a full backup of the database and set it aside as a preservation copy – one separate and distinct from data that might be on backup tapes and one that is more easily restored than merely a partial backup of the data within the database.

Turn Off Automatic Janitorial Systems

Many corporate e-mail environments are designed to automatically delete messages of a certain age from the in-box and sent items (or whatever rule-base is designed into the application). These systems also help to free storage space on the mail server by encouraging users to delete or store messages. However, such systems inherently result in data loss unless there is user or system-wide intervention to interfere with a deletion. It often is possible to turn off the automatic deletion for select users who own, generate and receive relevant e-mails. Failure to do so can result in severe sanctions.[7]

Reverse the Tide

In addition to the janitorial systems discussed above, many firms have very strict policies against aggregating large volumes of e-mails or other e-files. Those policies are often reinforced with technology limitations, such as limits on the volume of e-mails that an employee may store, save or send. Thus many employees have acquired

the habit of deleting their files on a regular basis. A clear directive must be provided to the employees that this otherwise laudable behavior must be temporarily suspended while a technological alternative to deletion is crafted to capture the requisite documentation.

Triage Key Employees' E-files

The ability to readily delete electronic documents creates the risk that highly relevant files may not be preserved. Moreover, the ability to readily save electronic files may impose a heightened obligation in some instances to do so in order to avoid such data loss. Consequently, if the circumstances warrant, it may make sense to identify personnel that likely are central to the matter and immediately implement an expedited protocol to preserve their electronic documents. This may include, for example, taking a complete forensic snapshot of their computer, a copy of their server-located mailbox and a copy of their server-located home directory, for starters.

With that said, the costs associated with making duplicate copies of the data, and the further costs associated with processing and reviewing the data for relevancy at a later date, are often significant. These costs are most inflated when the bulk of the individual's data has no relevance to the matter, because you are paying to duplicate and cull all of it. No generalized rule can be applied here, other than to separately weigh the costs and benefits of the preservation approach per individual (or department) for each matter.

Review and Ensure Implementation of the Hold Protocol

In an ideal world and for serial litigants, a litigation hold process exists and can be implemented concomitant with the distribution of the hold notice. If a plan is not in place when the need to preserve arises, however, there may not be adequate time to design a complete plan before inadvertent destruction starts to happen. Hence, it is very important to differentiate between the immediate actions needed and those that can be more safely implemented after some time and thought. Once the necessary immediate-action steps have been completed, take the time to review the litigation hold processes and procedures to ensure they are sufficiently comprehensive to address the matter at hand. Following are steps to take and issues to keep in mind in conducting that review.

Obtain Policies

To the extent the company has written policies on document retention, whether applicable to paper or electronically stored information, obtain copies of these documents as part of your diligence on documenting the environment.

Re-publish Hold Notice

The original hold notice sent to employees likely will require revision to provide more detailed descriptions of documents or categories of documents to be retained. Moreover, the breadth of the hold notice usually must be expanded or narrowed to target more precisely those employees who are reasonably anticipated to maintain responsive documentation in the files.

Monitor Document Compliance

It is important to institute particular protocols for ensuring and tracking compliance with the notice as it pertains to electronic documents. For instance, the suspension of data media recycling should be logged and, if deemed appropriate, certified by the system custodians. Moreover, due to the ease with which electronic files may be deleted, some companies go so far as to have all noticed employees certify compliance. That approach sometimes is perceived as "scary" for the employee and can backfire by creating morale issues. Whatever the method used, tracking the individuals who have complied with even the simplest of tasks, like creating a folder in which to place potentially relevant documents, may go a long way to keeping the process on track. A well-defined audit trail of decisions and procedures also makes the process scalable if its scope needs be expanded. Finally, a documented plan is more readily defensible, and typically diminishes the adversary's appetite for investing resources in challenging the adequacy of the process.

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Prevent Inadvertent Creation of Work Product

With all the best intentions, information technology personnel may spring into action upon receipt of a document preservation notice and begin system-wide searches and

other activities in order to assist the effort behind the scenes. Or, IT employees may draw their own conclusions about what they can discard, such as backup tapes, based on the hold notice. It is important to educate IT personnel on exactly what they need to do and *not* do in response to preservation requirements.

Ensure an Adequate Attrition Plan

There are many opportunities for failed preservation, and one of the most commonly overlooked is the preservation of documents from departed or departing employees. Working with IT, records management and human resources departments, it is important to establish a process to catch relevant data before employees leave the company or change positions within the company. This holds true for both hard copy and electronic records.

It is easy enough to tell departing employees to not discard relevant files or to pass them on to their successor, but a little more challenging to ensure that their computers are not wiped clean or their server-based mailboxes and home directories are not deleted in the normal course of their departure. The IT personnel involved in the recycling or recovery of the departing employees' hardware must, therefore, be fully apprised of the hold requirements. A process must also be implemented to ensure that the documentation and data of former employees – *i.e.*, those who left before the hold notice is implemented – are identified and retained.

Propose Storage Alternatives

As noted, employees often have been indoctrinated by their IT department to delete files from the company's central servers or move files from network servers to their hard drives. Litigation preservation efforts are likely to compete with these data policies, with employees now being asked to save all their relevant data. Indeed, the hold obligations often will run squarely afoul of the technological limitations imposed on employees' ability to retain large volumes of e-mail or electronic documents.

To avoid significant frustration early on in the matter, it may be helpful to identify employees most likely to exceed storage limits and to work with IT in advance to expand their storage capacity on the back end. In addition, having a plan in place to react to employee storage needs after the preservation process begins, can be as easy as providing a help desk number (and a trained help desk) to expand capacity on an ad-hoc basis. Most important, a simple technological solution for complying with the hold obligations, *e.g.*, shifting files to a designated network folder, must be presented fairly quickly to the employees.

Identify and Notify Third Parties

While not the most difficult challenge, the preservation of third-party documents often is overlooked. Identifying relevant third parties and designing a suitable plan for communicating with those third parties may be accomplished during the meeting of the constituents, discussed below.

Meeting of the Constituents

It is essential to convene, as soon as possible after litigation is contemplated, a meeting with the client to review the client's information systems and the digital documentation potentially responsive to the claims or defenses of the anticipated litigation. The early assemblage of personnel helps ensure that no electronic storage source is missed (which might have dire consequences). The meeting also affords counsel the opportunity to adequately prepare for the enhanced electronic discovery disclosure obligations required by many courts. In fact, furthering the trend, the Supreme Court recently approved amendments to the Federal Rules of Civil Procedure (FRCP) that require, as of December 1, 2006, the disclosure of specific information concerning the parties' information management systems at an initial Rule 26 discovery conference.[8]

In addition to the information technologists, this meeting should include business unit managers, records managers, legal representatives, and other individuals who

will be assigned the day-to-day tasks of documenting the environment and compliance with the hold. The team should weigh in on the relevant data sources and protocols for implementing the hold. Bringing together these constituents early on also helps facilitate the requisite management approvals, resource allocations and process flow. The following are subjects that should be addressed.

Document the System Architecture

Perhaps the most essential goal for the initial meeting is to achieve an understanding of the metes and bounds of the client's information and data management systems. Given the rate at which technology is advancing, and the myriad systems employed to communicate and manage data, defining the electronic environment oftentimes is neither simple nor self-evident. It also is fairly uncommon for clients to have a current and documented overview of their systems.

It is crucial therefore to inventory the relevant information systems, including any applicable e-mail, document management systems, and databases. While e-mail is without question today's primary method of communication, the electronic means for sharing information are evolving rapidly and it is not uncommon for business units to communicate through Web sites, portals and e-rooms. The hold protocol must ensure that the business and IT owners of these systems preserve the documentation exchanged via these systems.

With respect to e-mail, moreover, it is important to remember to preserve the centralized servers as well as the employees' hard drives. The centralized e-mail servers often contain only the in-box, sent items and drafts, whereas folders created by an employee are often located only on the employee's hard drive. The result is that most employees' e-mail messages are not located where the IT department can easily access them.

Furthermore, when defining the environment, it is important to understand not only the current environment, but past and future ones as well. Past environments must be recognized to solicit details of legacy data and data migration during upgrades, and future environments must be understood to ensure that data preservation and integrity is maintained during ongoing technology upgrades. Indeed, depending on the scope of the production and the nature of an upgrade, it may be in the client's interest to defer upgrades until the contemplated production is complete. Distinguishing between and negotiating the procedures for the handling of accessible and inaccessible data will become an increasingly important component of the "meet and confer" process. Accordingly, it should be part of the procedure for defining the electronic portion of the environment.

Similarly, in defining the environment, it is important to identify prior and current custodians of discoverable information. Oftentimes standardized hold notice protocols do not call for, or provide a methodology for, the identification of prior custodians and the retention and preservation of their archived materials. The client's human resources department and the business unit owners frequently are useful resources for gathering the historical information, including organization charts and personnel records.

Identify the Inaccessible Data

Under the case law and new amendments (*i.e.*, Rule 26(b)(2)(B)), a distinction has been drawn between accessible and inaccessible data for the purposes of allocating the production costs among the parties. In short, the more difficult it is to retrieve the data, the greater the opportunity to shift part or all of the costs of production to the requesting party. Data contained in some media such as backup tapes are commonly viewed to be "inaccessible data." The burden of producing data from other categories of media may not be as clear. This should be flushed out with the technology experts at the initial meeting to prepare counsel to argue for cost shifting where appropriate.

Develop Search Criteria

The initial meeting presents the opportunity to discuss with the technology and business constituents search terms that may be used to query the electronic data for responsive documentation. The sheer volume of the electronic documentation often precludes the traditional page-by-page review. One alternative for dealing, in part, with this volume of information is provided by the new federal rules, which contemplate allowing adversaries to take a "sneak peek" at unfiltered data without the concern of waiver of privilege of the information that might be maintained therein. Frankly, that is not an approach that has gained much traction with many clients, for obvious reasons. The use of search terms for privilege review is certainly a more palatable strategy. Moreover, particularly in the event the parties can reach an accord on the terms to use, the substantive review for production may be handled on a search-criteria basis. That approach often is compelling to both sides in that it is quicker, generates more relevant responses and is less costly.

Identify an IT Spokesperson

For the purposes of responding to discovery inquiries related to the client's information systems, a client representative should be identified as early in the process as possible. Indeed, some local rules (*e.g.*, District of New Jersey Civil Rule 26.1(d)(1)) require counsel to identify such a representative. It may make sense to identify an outside consultant, if familiar with the client's systems, to fill that role.

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Negotiate Parameters of Electronic Production

As mentioned previously, the FRCP and state courts are beginning to dictate how parties handle electronic discovery, from preservation through production, as well as impose sanctions for failure to do so properly. The safest way to avoid the risk of sanctions is to reach an agreement with the adversary as to exactly what is and what is not going to be produced or retained. In practice we have found that the broader the stipulation, the more control the parties have over the risks and costs associated with the preservation and production of electronic documentation. The following are factors to take into consideration in preparing for and participating in the negotiation of such an agreement.

Check Local Rules

There have been significant advancements in judicial consideration of electronic discovery issues in recent years. In some instances, those considerations have made their way into the courts' local rules. It is advisable to review those rules to ensure the contemplated disclosures are consistent with what is required by the forum in which the litigation is pending.

Define Electronic Discovery Goals

Begin preparing a list of key items to negotiate with adversaries. Then, once the items are apparent, make sure to quickly bring them to the attention of your adversary and obtain a documented response. To the extent any of these topics impact the nature or scope of the preservation effort, it is best to resolve the items at the earliest possible time.

Specify the Data Sources to Be Produced and Preserved

By the time of negotiating what will and will not be preserved, the environment should at least be documented (see above). This includes the document custodians and data locations, and the existence of third-party documents. A thorough understanding of the environment will help focus the negotiation on those items that are difficult to preserve due to volume, technical difficulties, or otherwise.

Clearly, the preservation of the old backup tapes – or not overwriting newly created tapes – is a key issue to resolve. Retaining a large number of tapes imposes huge burdens on the IT department, adversely impacts departmental budgets, and disrupts overwrite schedules and procedures. Conversely, once the tapes are recycled or discarded, the information is gone forever. Working with opposing counsel very early in the matter to define which tapes can and cannot be recycled will put all parties on the same page and reduce the likelihood of challenges in the future. At the same time, early agreement could have the added benefit of relieving some of the IT burden by limiting the number of tapes to be preserved indefinitely.

Specify the Cut-Off Dates

In many cases, there is a relevant time period that dictates the production parameters; this can influence the volume and ease of preservation. Establishing cut-off dates for preservation, on both ends of the timeline, during the earliest phases of discovery, can limit the number of backup tapes to be held (see below), the number of archive boxes at issue and the storage space requirements on mail servers, file servers and in the office in general.

Clearly Document the Discussions

In the highly technical lexicon of electronic discovery, it is critical to make sure all negotiations are clearly and accurately documented and that the documentation represents the proper technical language – this will avoid ambiguities in the future. It helps to have any agreements reviewed by company-employed or case-hired technical experts to make sure all "jargon" bases are covered.

Other Negotiations

Other items that don't necessarily involve preservation but are equally important to discuss during the early negotiations include the scope of the production, production format (native vs. image; multipage vs. single page; document coding; etc.), definitions of the metadata to be produced, any search terms that might be used to limit the data collection, and any agreements for inadvertent disclosures of privileged material.

The Future

Document preservation is an important component of the new frontier of electronic document discovery. The costs and risks associated with the implementation of electronic hold notices are substantial, as discussed earlier. These can be even further mitigated if, in advance of the anticipation of litigation, steps are taken to facilitate rapid compliance while minimizing risk. Some options receiving attention are as follows.

Well-Defined System Architectures and Custodians

A large part of the challenge in preservation is the need to fairly quickly locate the information which can be preserved and that which doesn't have to be. From a litigation risk management perspective, the best system architectures will facilitate compliance and rapid response while at the same time limit the preservation to potentially relevant information. For example, architectures that are departmentally based will often make it easier to apply technology-based rules, such as suspension of auto-delete procedures, to the specific departments or users involved in a particular litigation. It is

not unheard of to group departmental users on unique servers to make it easier to include or exclude their data from preservation events.

Automatic Hold Protocols

Companies now can (or soon will be able to) make the fundamental decision of whether to take the discretion out of the hold process by creating automatic hold protocols. Investments in records management processes, such as e-mail archiving systems, will enable companies to more effectively apply records retention schedules to electronic documents and may even facilitate rapid, automated identification and preservation of litigation-relevant information.

Enhance Searchable Privilege Designation Protocols

The early meetings with company management are a good opportunity to educate or re-educate the employees about convenient ways to facilitate electronic privilege review and to put in place a simple process for tagging privileged documents at the source. Use mechanisms like standardized footnotes set up by macro and require, in addition to the standard privilege statements, (1) the identification of the lawyer for whom the work is done or to whom the communication is directed, and (2) a phrase/word identifying the nature of the privileged communication, *e.g.*, "Antitrust litigation." A few extra steps here can result in large cost savings and greater accuracy later in the document review process.

Dedicated Vendors

Securing a specialist's advice concerning the client's systems, files and ability to preserve and produce requisite documentation in a timely manner provides counsel with a real advantage during the early, and important, stage of the litigation. Thus, establishing working relationships with electronic discovery vendors who have an understanding of the client's systems, in advance of the onset of litigation, will greatly facilitate compliance with the enhanced disclosure obligations pertaining to electronic discovery. ■

1. *Zubulake IV*, 220 F.R.D. 212 (S.D.N.Y. 2003).
2. 327 F. Supp. 2d 21 (D.D.C. 2004).
3. 169 F.R.D. 598, 617 (D.N.J. 1997).
4. 212 F.R.D. 178 (S.D.N.Y. 2003).
5. No. 502003CA005045XXOCAI, 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005).
6. *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422 (S.D.N.Y. 2004).
7. *United States v. Phillip Morris USA, Inc.*, 327 F. Supp. 2d 21 (D.D.C. 2004).
8. 2006 U.S. Order 06-20, Apr. 12, 2006 (eff. Dec. 1, 2006).

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New York's Rockefeller Drug Laws, Then and Now

By Edward J. Maggio

Thirty years ago, tougher sanctions and more severe penalties for drug offenders were seen as the solution to the drug epidemic perceived to be rampaging throughout the nation. Urged by unhappy constituencies, states rushed to tighten laws and increase punishments for those caught buying, using, or selling drugs, and New York was no exception. In 1973, Governor Nelson Rockefeller enacted a set of harsh mandatory sentencing laws for drug offenses and second felony offenders. The idea behind the new laws was to deter criminals and to quarantine users, so the plague of drug addiction could be contained.

Today, New York maintains some of the most punitive sentences for drug offenders in the nation. However, increased scrutiny of these laws and their effect has led many to believe that the Rockefeller Drug Laws have failed at both deterring drug use and protecting society from its effects, and that reform is necessary.

Governor Rockefeller's Crusade

Since the early 1900s, narcotic and drug use has concerned the American public.[1] During the 1970s, Americans' attitude took a particularly negative turn. Many proponents of harsh drug sanctions asserted that the use of illicit drugs undermined societal values and rules, and diminished the nation's productivity.[2] Some New York politicians contended that rehabilitation efforts had failed, that the epidemic of drug abuse could be quelled only by the threat of inflexible and exceptionally severe punishment,[3] and began to urge mandatory sentencing for drug offenders. Some, however, demurred. In a letter to Governor Rockefeller dated May 8, 1973, Mayor John Lindsay asked Governor Rockefeller to reconsider changes to New York's drug sentencing laws, noting that

> mandatory minimum penalties have never worked . . . the criminal justice system will not be able to process fairly, expeditiously, and effectively the resultant stream of A-felony cases that will flood an already overloaded felony case processing system in the State Supreme Court.[4]

Mayor Lindsay recommended broad-based, pragmatic approaches to target top-level drug dealers and reduce the drug menace. The proposal did not sway the governor, however.[5] This was, at least partly, a personal crusade, because the governor had been deeply affected by a close friend, whose family was torn apart by heroin addiction.[6]

By May of 1973, Governor Rockefeller's mission had gained support, and he convinced the Legislature to consider his proposals. The Legislature eventually passed one of the nation's toughest sentencing schemes for drug offenders, establishing mandatory incarceration periods for those convicted of the unlawful possession and sale of controlled substances based on the measured weight of the drug involved in the case.[7] Generally, a judge was required to impose a sentence of 15 years to life for anyone convicted of selling two ounces, or possessing four ounces, of narcotic drug (typically cocaine or heroin).[8] These laws became known as the Rockefeller Drug Laws.

Laws Under Scrutiny

In 1977, the Association of the Bar of the City of New York and The Drug Abuse Council formed the Committee on New York Drug Law Evaluations. The committee's report criticized the effectiveness of the laws. Noting that although, under the new laws, the state had spent $76 million dealing with the drug problem,[9] heroin use and crimes related to heroin were as widespread in the late 1970s as they were before the laws went into effect.[10]

Around this time, the Legislature enacted one of the first reforms of the Rockefeller Drug Laws. The arrest, trial and incarceration of marijuana offenders had created a substantial drain on criminal justice resources and the prison system. Legislators decriminalized the use and simple possession of marijuana in amounts less than 7/8ths of an ounce.[11] And in 1979, the Legislature amended the laws to increase the weight of drugs required to trigger the 15-year-to-life sentence for both sale and possession of drugs.

However, by the mid-1980s, crack, a highly addictive and smokable form of cocaine, was being distributed by drug dealers at low cost and in small quantities. Drug dealers battled for control of their market, and violence and addiction increased exponentially, reaching epidemic proportions in the late '80s.[12] The solution focused on removing from society the people who were regularly seeking or distributing small vials of crack in neighborhoods. This led to another change in the Rockefeller Drug Laws, which *lowered* the drug weight threshold for cocaine possession[13] and gave more power to the police and prosecutors. Since the 1988 amendment, the laws remained essentially unchanged until the Pataki administration.

Controlled-Substance Felonies in the Current System

Controlled substance offenses are classified according to the type and weight of the drug possessed or sold.[14] These offenses are categorized for sentencing purposes in felony classes. (A wide range of crimes (drug- and non-drug-related) are grouped within each felony class.) Class A felonies are the most serious and receive the most severe penalties. Class E felonies are the least serious.[15]

The severity of the Rockefeller Drug Laws, as enacted in 1973, was heightened substantially by the Second Felony Offender laws. Increased prison sentences are mandatory for all repeat ("predicate") felons, including those convicted of the lowest level of felony (Class E).[16] Predicate offenders face significantly more prison time, even if both felonies are nonviolent minor drug offenses or the prior felony occurred many years before the current one.[17]

In general, those convicted of a felony drug offense receive an indeterminate sentence that is composed of a minimum and maximum period of imprisonment, depending upon the specific felony count.[18] The Rockefeller Drug Laws mandate a sentence of at least the statutory minimum, regardless of the prior history, character, and circumstances of the individual, his or her role in the offense, or the threat posed to society.[19] As noted, those who have prior felony convictions face substantially increased prison time, as required under the Second Felony Offender law. If, for example, a defendant's conviction for a $10 sale is a second felony, the shortest sentence he or she could receive is four-and-one-half to nine years in prison.[20]

The "loophole" in the sentencing laws results from mechanisms that permit drug offenders to escape imprisonment by cooperating with the authorities. Prosecutors can recommend lifetime probation for defendants who provide information that can help lead to the apprehension of other drug criminals.[21] It is therefore possible that a top drug dealer with important intelligence about the drug trade in an area of New York could provide information to the authorities and escape the state's drug sentencing scheme. In contrast, low-level drug users or low-level members of a drug trade operation (mules) face the full force of the state. Prosecutors decide whether to charge or plea bargain. The sentence for a defendant may be known, and apparent, ahead of time. If a prosecutor decides to seek a felony charge instead of a misdemeanor, there is little that the judge can do to alter the sentence if a conviction is in fact obtained.

It is argued that the Rockefeller Drug Laws, in conjunction with the Second Felony Offender law, have disabled judges from exercising sentences tailored to the specific conduct of individual defendants. Judges also face limitations in diverting nonviolent drug offenders to substance abuse treatment programs or imposing constructive intermediate sanctions rather than long-term incarceration.[22] Public funding for substance abuse treatment exists for only 71,000 individuals, on average, each year; estimates of the number of people in New York requiring treatment have ranged from yearly averages of 246,000 to 860,000.[23]

Drug Laws Today

The results of the Rockefeller Drug Laws over the years have not been satisfactory to advocates of tough drug policies in New York. The reality is that the laws have had little deterrent effect on drug use and drug crimes.[24] Yet, their impact on the criminal justice system in the last 30 years is significant. In New York, as across the United States, drug felonies are the single most significant factor underlying the remarkable growth of prison populations.[25] The number of people imprisoned for drug offenses in New York has increased steadily since 1973, but at a dramatically steeper rate since the 1980s.

The aggressive law enforcement response to the spread of crack cocaine in the 1980s, particularly in New York City, targeted street-level drug transactions and drug use.

Few drug offenders have succeeded in having disproportionately harsh sentences overturned as unconstitutional.

This brought thousands of people into the criminal justice system who were charged with felony conduct and ultimately sentenced to a local or upstate prison facility.[26] Mandatory sentencing laws for drug and predicate felony offenders have increased the overall percentage of convicted offenders who receive prison sentences.[27]

These are the statistics: in 1980, 9% of the prison population was serving time for drug felonies; in recent years the number has climbed to approximately 34%.[28] In 1973, the state's prison population was approximately 10,000; by 1980, it was about 20,000. Between 1980 and 1992, New York's prison population tripled, to almost 62,000. As of January 1, 2002, of the approximately 70,000 inmates incarcerated in 70 New York State prisons, 19,164 were locked up for drug offenses.[29] Maintaining that many people in the state's correctional system has exacted staggering social and economic costs.

Most Drug Felons Are Minorities

Another disturbing result of the Rockefeller Drug Laws is the disproportionate effect on minorities. Most of the people arrested, prosecuted and convicted of drug crimes in New York over the past few decades were non-white. Blacks and Hispanics have represented on average over 85% of the individuals indicted for drug felonies and 94% of drug felons sent to prison.[30] While whites constituted only on average 5.3% of the total population of drug felons in prison in New York, Blacks and Hispanics constituted 94.2%.[31] In an average year, almost 30,000 people are indicted for drug felonies, and 10,000 are sent to prison; approximately 90% of them are Blacks and Hispanics.[32]

Deference to the Legislature

The mandatory, long-term sentencing structure of the Rockefeller Drug Laws, particularly in conjunction with the Second Felony Offender laws, has raised the concern that the laws are unconstitutional, as they violate constitutional prohibitions on cruel and unusual punishment. However, the judiciary has been reluctant to use the Eighth Amendment argument because of concern for the separation of powers in the U.S. political system.

The Court of Appeals has made it clear that courts should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes.[33] In *People v. Broadie*, the Court expanded the doctrine of deference, noting that while the courts possess the power to strike down punishments as violative of constitutional limitations, the power must be exercised with special restraint because a legislature may distinguish among the ills of society that require a criminal sanction, and prescribe, as it reasonably views them, punishments appropriate to each situation.[34]

Because the Rockefeller Drug Laws were based in rational policy grounds and did not target specific members of society, other constitutional claims against the drug sentencing scheme have been considered too weak to be valid arguments against the harsh sentences. New York courts have also found it difficult to settle on objective tests by which they could scrutinize the proportionality of legislatively mandated sentences in specific cases.[35] Few drug offenders have succeeded in having disproportionately harsh sentences overturned as unconstitutional. For example, the Court upheld the constitutionality of a 15-year-to-life sentence for a 17-year-old girl, with no prior criminal record, who had sold a few grains more than two ounces of cocaine to an undercover officer.[36] The dissenting judge (as well as the trial court and the Appellate Division) found the sentence to be so cruel and unusual as to "shock the conscience."[37]

> Notwithstanding the Legislative desire to create mandatory minimum sentencing guidelines for the State of New York, I think it's still the law of this country that the punishment must fit the crime. . . . The question is whether or not the defendant is the type of person, by the facts presented in this case, such that, constitutionally, this would be inappropriate, to serve fifteen years to life.[38]

The Court of Appeals has also pointed out that the harsh mandatory sentencing has failed to deter drug trafficking or control the epidemic of drug abuse in society. It has resulted in the incarceration of many offenders whose crimes arose out of their own addiction and for whom the costs of imprisonment would have been better spent on treatment and rehabilitation.[39] The Court made clear that a decision on the constitutionality of the state's drug laws is not an endorsement of their wisdom.[40]

Recent Reforms

In recent years, Governor Pataki has worked to modify the Rockefeller Drug Laws. He supported the Felony Drug Law Reform Act of 2001 (FDLRA), introduced in the New York State Senate. Intended to retarget drug offenders at the top level, the act quickly came under fire due to its broad construction and lack of substantive changes.[41] The FDLRA, in essence, failed to make any real reforms; a judge's hands were still tied in deciding the proper sentence for a drug offender and long sentences for the possession of small quantities of drugs were still possible.[42]

Three years later, Governor Pataki expressed interest in more substantive changes to the drug offender sentenc-

ing scheme, and on December 15, 2004, he signed a bill that brought an end to the harsh 15-year-to-life sentences for the highest level drug offenders. Although the bill did not permit judicial discretion in sentencing, it doubled the weight of drugs an offender must possess or intend to sell to trigger prison sentences.[43] The specific cornerstones of the reform package of 2004 included: replacing the indeterminate sentencing structure for class A-I drug offenders from 15 to 25 years to life with determinate sentences ranging from eight to 20 years; doubling, from four ounces to eight ounces, the threshold possession weights required for an A-I drug felony conviction, and from two ounces to four ounces for an A-II drug felony conviction; allowing class A-I drug offenders currently in prison to immediately petition for re-sentencing; and reducing the prison time an offender is required to serve before becoming eligible for drug treatment programs.[44]

These reforms complemented the legislation Governor Pataki signed a year before that permitted merit time credit for those serving a sentence for an A-I drug felony.[45] As a result, nearly 80% of the drug offenders sentenced to prison annually could be eligible for a shorter sentence. Of the approximately 14,000 currently in custody for a felony drug conviction, 446 are class A-I drug felons, serving life sentences with minimum terms of 15 years or more. The bill ultimately allowed these 446 inmates to petition for a reduction in their mandatory sentences.[46] The remaining drug offenders in prison serve, on average, 2.6 years.[47] The new legislation also reduced the lengthy minimum sentences for class A-I felons and shortened sentences for all other non-violent felons.[48]

In 2005, additional changes were enacted. A merit time allowance was put into place for A-II offenders – identical to the process created earlier for A-I offenders. The discretionary re-sentencing of class A-II drug offenders was enacted, again building upon the earlier reforms.[49] The new law has an effect on A-II sentences and applies to those inmates who are more than three years from a parole eligibility date (and 12 months from work release eligibility).[50] The new statute allows judges the discretionary power that was missing earlier. They can impose a wider range of determinate sentences during the re-

Judicial Discretion

In January 2001, the New York State Bar Association House of Delegates adopted a report by the Association's Special Committee on Enhancing Public Trust and Confidence in the Legal System, which recommended that the Legislature review and revise the state's mandatory sentencing laws for drug offenders. While some of the recommendations contained in the report were enacted in the years since – such as doubling the weight thresholds for the various levels of drug felonies, replacing mandatory life sentences for class A offenders with determinate sentences and allowing A-I and A-II offenders to petition for re-sentencing – other needed reforms have been debated, but not implemented.

The Association believes that the expansion of judicial discretion is vital to real progress in the problem of drug abuse. Specifically, the Association recommends:

- That judges be allowed to deviate, under specific circumstances, from the present mandatory sentencing provisions and to divert non-violent addicted defendants to drug treatment programs instead of prison. For example the district-attorney-sponsored Drug Treatment as Alternative to Prison (DTAP) program and the court-approved Comprehensive Alcohol and Substance Abuse Treatment (CASAT) program have proven track records, and should be an option for the trial court – for first-time and prior non-violent addicted offenders. Thus, depending on the circumstances of the individual case, non-violent class B, C, D and E felony offenders could be "sentenced" to drug treatment programs rather than mandatory prison terms.

- All diversion programs, including programs like DTAP, should be specifically authorized by statute, with basic uniform standards for eligibility and administration.

- If the district attorney does not recommend a DTAP diversion plan, the defendant may appeal directly to the trial judge, who may order diversion to a CASAT program.

- Drug court parts should be established for every county.

- Sending offenders to treatment, rather than prison, has the potential of saving the state a great deal of money. To realize that goal, treatment programs must be fully funded and any legislative reforms must include those resources.

sentencing of an A-II drug offender. For a first offense, the range is between three and 10 years, while second felony offenders with prior non-violent convictions have a six-to-14-year range. Second felony offenders with a prior violent offense face an eight-to-17-year range. Regardless of the category, all sentences must feature a five-year post-release supervision period.[51] The Legislature also enacted a similar re-sentencing procedure with judicial discretion for A-I drug offenders.[52]

The effects of drug abuse and drug trafficking on the public welfare should not be lightly considered or dismissed. However, the costs and impact of the Rockefeller Drug Laws, along with the Second Felony Offender law, should be examined if the interests of the state in connection to the war on drugs are not being met. The changes prompted by Governor Pataki, and whatever approach is taken by his inevitable successor and Albany legislators will draw continued attention and scrutiny from the general public. The future extent of discretion provided to New York judges in making individual sentencing decisions, the relation between the weight of drugs to specific years to be served in a prison facility, and eligibility requirements for defendants seeking drug treatment instead of long-term incarceration, are the major issues of concern.

Whatever changes develop in the sentencing laws for drug offenders over the next few years, the impact will reach beyond New York State. The federal government and other states may well follow New York's path to reform and make significant changes in sentencing schemes. While the war on drugs will not be abandoned, the line in the sand from decades ago may be redrawn in a quite different manner. ■

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2. J. Kaplan, Heroin: The Hardest Drug (1983); *see Carmona v. Ward*, 576 F.2d 405, 411–12 (2d Cir. 1978).

3. *People v. Broadie*, 37 N.Y. 2d 100, 115, 371 N.Y.S.2d 471, *cert. denied sub nom. Broadie v. New York*, 423 U.S. 950 (1975).

4. Letter from J. Lindsay to Honorable Nelson A. Rockefeller (May 8, 1973), Disapproval Recommended, p. 2.

5. *See id*. at p. 6.

6. J. Stashendo, *Rockefeller Drug Laws Prevail Despite Sentencing Reforms*, Buffalo News, May 30, 1995.

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8. A. Wilson, (2000). Rockefeller Drug Laws Information Sheet: Partnership for Responsible Drug Information [On-line], *available at* <http://www.prdi.org/rocklawfact.html>.

9. Drug Abuse Council, The Nation's Toughest Drug Law: Evaluating the New York Experience (1977).

10. *See id.*

11. J. Galliher & S. Murphy, The Process of Marijuana Decriminalization in the United States: 1973–1978 (1986).

12. Davenport, *supra* note 1.

13. Penal Law § 220.06(5).

14. Penal Law art. 220.

15. Less serious violations of the criminal law are misdemeanors, which are also classified by degrees.

16. Penal Law § 70.06.

17. J. Fellner, *Cruel and Unusual: Disproportionate Sentences for Drug Offenders, Human Rights Violations in the United States*, Vol. 9, No. 2(B), New York: Human Rights Watch (1997).

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19. Fellner, *supra* note 17.

20. *See id.*

21. Penal Law § 65.00.

22. Fellner, *supra* note 17.

23. *See id.*

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28. Fellner, *supra* note 17.

29. Charles Brooks, *Opposition to Rockefeller Drug Laws Intesify*, Amsterdam News (Mar. 6, 2003) vol. 94, iss. 10.

30. Bureau of Statistical Services of the New York State Division of Criminal Justice Services (DCJS), (2004). *available at* <http://criminaljustice.state.ny.us>.

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33. *Solem v. Helm*, 463 U.S. 277 (1983).

34. 37 N.Y.2d 100, 371 N.Y.S.2d 471 (1975).

35. *Solem*, 463 U.S. 277.

36. *People v. Thompson*, 83 N.Y.2d 477, 611 N.Y.S.2d 470 (1994).

37. *See id.*

38. *Id.* at 490 (Bellacosa, J., dissenting) (quoting from the trial court decision).

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41. J. Fellner, *Failing the State, A Critque of Felony Drug Law Reform Act of 2001 Proposed by Govenor Pataki*, Human Rights Watch J. (2001). *Available at* <http://www.hrw.org>.

42. *See id.*

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44. DCJS, *supra* note 30.

45. *See id.*

46. M. O'Donnel, *Pataki Signs Bill Softening Drug Laws*, N.Y. Times (Aug. 31, 2005).

47. DCJS, *supra* note 30.

48. *See id.*

49. 2005 of N.Y. Laws ch. 644.

50. Barry Kamins, *2005 Legislation Affecting the Practice of Criminal Law*, N.Y. St. B.J. (Jan. 2006) p. 20.

51. Penal Law § 70.71.

52. Kamins, *supra* note 50.

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Navigating the New York City Civil Court

A Guide to Variations From Supreme Court Civil Practice

By William Ramos

Many civil-practice attorneys in New York City appear in both New York State Supreme Court, a court of general jurisdiction, and New York City Civil Court, a court of limited jurisdiction. Rules and procedures in the Civil Court are generally governed by the New York City Civil Court Act. The rules of civil practice in the Supreme Court are found in the Civil Practice Law and Rules, but the CPLR also applies in the Civil Court unless it contravenes the Civil Court Act in a particular area. This overlap has created confusion among practitioners, leading some, for example, to commence in Civil Court actions over which the court has no subject matter jurisdiction, or to move to dismiss actions based on rules and procedural grounds that are not applicable in Civil Court.

A clear understanding of these differences can help practitioners in both courts avoid committing errors that can result in harsh consequences for their clients, or simply cause undue delay. This article addresses three areas where the distinctions between the Supreme Court and the Civil Court often prove troublesome to practitioners: personal jurisdiction, subject matter jurisdiction, and the availability of provisional remedies.

The Reach of the New York City Civil Court

A court cannot adjudicate the legal responsibilities of a defendant unless it has acquired jurisdiction over the person of the defendant, *i.e., in personam* jurisdiction. In some instances, the court may lack personal jurisdiction, but still may have power over the particular thing ("res") before it, that is, jurisdiction *in rem*. In the New York City Civil Court, the power of the court over the defendant is limited by the defendant's contacts, or a "res" presence, within the territorial limits of the City of New York. If a basis for jurisdiction exists, however, the reach of a Civil Court summons extends beyond the territorial limits of the court, albeit not as far as its Supreme Court counterpart.

The Jurisdictional Bases

In CPLR 301 the Legislature provided for the general *in personam* jurisdiction of the Supreme Court, and in so doing incorporated the traditional, common law bases for the exercise of such jurisdiction developed prior to the adoption of the CPLR itself. General *in personam* jurisdiction is based on a defendant's presence in the forum, and when it exists the court has jurisdiction over the defen-

dant in any lawsuit, even in suits that are unrelated to the defendant's activities within the forum.

The common law bases for general *in personam* jurisdiction over individuals are personal delivery of the summons within the state, domicile within the state, and consent to sue, either express or implied. In the case of corporations, the bases are doing business within the state, incorporation within the state, consent and agency. Although conferring jurisdiction based on "doing business" in the state is more obviously directed at corporations, some courts have also applied it to individuals.

The Civil Court Act (CCA) does not contain a specific provision analogous to CPLR 301. However, the provisions of the CPLR govern the proceedings in all courts of the state and before all judges, except, as noted above, where the proceeding is regulated by an inconsistent statute. Accordingly, CPLR 301 is applicable to Civil Court. The critically important difference, however, is that the "presence" must be within New York City, as opposed to the state as a whole. If a defendant is a domiciliary or resident of New York City, the Civil Court would have general *in personam* jurisdiction over the defendant. There are other bases, however. For instance, in *FNCP Spiegel Inc. v. Dimmick*,[1] an out-of-state domiciliary sought to domesticate an unsatisfied New Jersey judgment against a defendant. The underlying cause of action over the New Jersey defendant had no New York City nexus. Nevertheless, the court held that the defendant can be deemed present in New York City under CPLR 301 because he was permanently employed in that city. Thus, he was subject to general *in personam* jurisdiction in New York City, even over a cause of action having no connection to the city.

Where general *in personam* jurisdiction is not applicable, a defendant may be sued where the claim arises or is related to the defendant's activities in the forum, sometimes referred to as specific *in personam* jurisdiction. The main statute conferring specific *in personam* jurisdiction in New York State is CPLR 302, more commonly referred to as the "long-arm" statute. The Civil Court Act has its own long-arm statute, which is analogous to CPLR 302(a). Specifically, CCA § 404(a) extends the Civil Court's jurisdiction to cover both an individual or corporate defendant who is not "present" in New York City, when such a defendant:

1. transacts any business within the city of New York or contracts anywhere to supply goods or services in the city of New York; or
2. commits a tort within the city of New York, except as to a cause of action for defamation of character arising from the act; or
3. owns, uses or possesses any real property situated within the city of New York.

Civil Court's long-arm provision, CCA § 404(a), differs from its Supreme Court counterpart, CPLR 302(a), in two respects. Where CPLR 302(a) is designed to permit the Supreme Court to exercise jurisdiction over non-domiciliaries of the state if the cause of action arises within New York, CCA § 404(a) carries the contact required a step further. The cause of action not only must have acceptable minimum contacts with New York, but also minimum contacts with New York City. The other difference is that the language of CPLR 302(a)(3), which permits the exercise of jurisdiction where a tort was committed outside of, but causes injury within, New York, has not been included in CCA § 404(a). As a result, in tort cases the Civil Court Act provides a narrower basis for jurisdiction over non-New York City residents than does its CPLR counterpart.

Aside from the foregoing, however, CCA § 404(a) is the "functional equivalent" of the Supreme Court's long-arm statute, CPLR 302(a), and is "tailored to fit the jurisdiction of the Civil Court." Indeed, the statute was drafted along the lines of CPLR 302 by the Joint Legislative Committee on Court Reorganization to achieve uniform judicial application of long-arm jurisdiction, practice and procedure. The overriding policy of uniformity renders construction of one statute (CPLR 302) "a guiding precedent" for the other. Thus, in Civil Court, most extraterritorial personal jurisdiction issues may be resolved by resort to cases decided under either long-arm statute – CPLR 302 or CCA § 404.

Besides the Civil Court Act's long-arm statute, other state-wide long-arm statutes covering specific types of cases have been made implicitly applicable to the New York City Civil Court through CCA § 404(b), which provides that as long as a claim arose within an area the court serves, service may be made in such a manner and at such place, regardless of city or state line, as would confer jurisdiction on the Supreme Court in a like case. For instance, the nonresident motorist statute, Vehicle & Traffic Law § 253 (VTL), provides that a nonresident driving in New York, or driving a vehicle in New York with the nonresident owner's permission, is deemed to have appointed the Secretary of State as his or her agent for the service of process with respect to any claim emanating from "an incident or collision" growing out of "the use or operation of the vehicle" in New York. The statute then requires, *inter alia*, that the summons be served on the Secretary of State on behalf of the defendant. Such service to the Secretary of State is deemed personal service and gives any court personal jurisdiction over the person served in such manner.

In some cases, where personal jurisdiction is lacking *in rem* jurisdiction may be available. *In rem* jurisdiction acts upon a particular thing (the "res") within the state, rather than directly upon the person of the defendant, and may be divided into three classes. The first class affects the rights of the entire world in the particular *res*. An example would be an action to register title to land under the Real

Property Law. The second class affects rights in the *res* of only the named parties to the action. Examples would be a mortgage foreclosure action and a replevin action. In the third class, *quasi in rem* jurisdiction, the plaintiff cares nothing about the *res* itself; rather, the plaintiff seeks a money judgment but cannot obtain personal jurisdiction. A judgment of the court which has only *in rem* jurisdiction operates only upon the specific property subject to the jurisdiction of the court, and has no force upon the personal assets of the defendant. Where, however, a defendant in an action in which the court has only *in rem* jurisdiction fully litigates the merits of the action, seeking full exoneration of the allegations against him or her in the complaint, along with *res judicata* and full faith and credit, this inverse invocation of the court's power constitutes a full submission to its jurisdiction and the ultimate judgment will be *in personam*.[2]

A judgment of the court that has only *in rem* jurisdiction operates only upon the specific property subject to the jurisdiction of the court, and has no force upon the personal assets of the defendant.

Pursuant to CPLR 314, the Supreme Court has "in rem jurisdiction over all property located in New York" and "attachment jurisdiction over property but only up to the value of the property." The analogous statute in the Civil Court Act is CCA § 405, which modifies CPLR 314 to fit the limited subject matter jurisdiction of Civil Court. CCA § 405(a) confers upon the Civil Court *in rem* jurisdiction over real property located in New York City, limiting it to the real property actions available in Civil Court as delineated in CCA § 203. CCA § 405 also confers on the Civil Court *in rem* jurisdiction over replevin actions and actions for foreclosure of a chattel lien, pursuant to CCA § 202. Finally, CCA § 405-c provides for the court's *quasi in rem* jurisdiction.

Extraterritorial Reach of the Civil Court Summons

While the Civil Court's jurisdiction is circumscribed by a defendant's residence, activities or a *res* presence within the city, the Civil Court summons extends beyond the territorial limits of the court, although it is more limited in its reach than its Supreme Court counterpart. In the Supreme Court, the CPLR permits service outside the state whenever the defendant is a domiciliary, or a basis for jurisdiction otherwise exists under either CPLR 301 or 302. This is accomplished by CPLR 313, which permits service on such a defendant, with full personal effect, anywhere in the world.

CCA § 403 sets forth the territorial limits on the reach of the Civil Court summons. In enacting CCA § 403, the Legislature has provided that "[s]ervice of a summons . . . shall be made only within the City of New York unless service beyond the city be authorized by this act or by such other provision of law, other than the CPLR, as expressly applies to courts of limited jurisdiction or to all courts of the state." Pursuant to CCA § 403, the basic unit for summons service is the City of New York. Service beyond the city is the exception to the rule. Thus, if no statute specifically permits extraterritorial service in a Civil Court action, service is restricted to the territorial limits of the City of New York.

However, in the Civil Court Act and in several statewide statutes, the Legislature has authorized extraterritorial service for matters pending in the Civil Court. If the contacts enumerated in CCA § 404(a) are within the City of New York, CCA § 404(b) permits the service of the summons beyond the city limits, with the same reach and effect as in Supreme Court practice, and permits service in such long-arm cases to be made outside the state. Thus, when long-arm jurisdiction exists in a Civil Court action, the city lines disappear as barriers and the service can be made anywhere at all.

VTL § 253 furnishes a similar basis for jurisdiction as CCA § 404(a), but provides for a different method of service. Rather than permitting the service of the summons anywhere, VTL § 253 allows for the service of the summons on the Secretary of State, and by implication, permits service upon a nonresident motorist under the long-arm statute.

Similarly, Business Corporation Law § 306 (BCL) provides for service upon the Secretary of State. In Supreme Court practice the Secretary of State is a statutory agent, appointed to receive service for a domestic corporation or for a foreign corporation authorized to do business in New York State. Such service is deemed to provide the court with personal jurisdiction over the corporation.

Service under BCL § 306 can be used in the Civil Court, albeit on a more limited basis. BCL § 306-c explicitly makes the service on the Secretary of State available in Civil Court whenever "the office of the corporation is within the territorial jurisdiction of the Court." As in Supreme Court, such designation is possible no matter where the claim arose, because a domestic or a licensed foreign corporation designates the Secretary of State as agent for service on any claim.

However, even where the domestic or foreign corporation has no office within New York City, BCL § 306 substituted service is available indirectly through CCA

§ 404 which, as discussed above, is the Civil Court's long-arm statute. When a claim arises from a corporation's minimum contacts with the city, CCA § 404(b) provides that the Civil Court process can be served anywhere Supreme Court process could be served, regardless of state and city lines. The court, in *Woodbury Automotive Warehouse Inc. v. Island Speed Auto Supplies, Inc.*,[3] thus reasoned that because Supreme Court process can reach a corporate defendant through service on the Secretary of State under BCL § 306, so too may Civil Court process in long-arm cases. In *Woodbury*, the claim of conversion arose from the corporation's contacts with the city, thus invoking CCA § 404(b).

There is another instance in which service outside New York City or New York State is permitted, but it does not provide jurisdiction over the person of the defendant. Such service is authorized in the "in rem" type of cases available in Civil Court, under CCA § 405. CCA § 408 also authorizes extraterritorial service on third-party defendants, persons against whom counterclaims or cross-claims are asserted, a defendant stakeholder, and a person whom a court has ordered joined as party. CCA § 407 permits such service upon an attorney or clerk or agent, as authorized by CPLR 303.

Subject Matter Jurisdiction of the City Civil Court

Another significant difference between the Civil Court and the state Supreme Court is that there are limits to the types of litigation that the Civil Court is empowered to adjudicate, and limits on the remedies that the Civil Court can grant. Indeed, whenever jurisdiction of the Civil Court is questioned, its proponent must be able to show that the particular claim falls within a specific law or constitutional provision that confers subject matter jurisdiction on the court. While the New York State Constitution sets the "ceiling" up to which the Legislature may grant subject matter jurisdiction, it is the Civil Court Act that ultimately and narrowly defines the parameters of the Civil Court's subject matter jurisdiction to hear claims, and also circumscribes its power to grant remedies to claimants.

$25,000 Limitation

Tracking the language of the state constitution, the Civil Court Act provides that the Civil Court "shall have jurisdiction of actions and proceedings for the recovery of money," which would include such matters as the ubiquitous personal injury action. However, the amount sought may not exceed $25,000, except in an action transferred to it from Supreme Court, as discussed below.

There is also an important difference in equity jurisdiction. The Supreme Court has general equity jurisdiction, and with it the inherent power to fashion a remedy necessary for the proper administration of justice. Civil Court has limited equity jurisdiction, as the New York State Constitution provides only that Civil Court "shall exercise such equity jurisdiction as may be provided by law." Thus, Civil Court may not exercise the ordinary powers of a court of equity, absent a specific grant of power. In addition, the fact that a complaint seeks a money judgment does not necessarily bring it within the jurisdiction of Civil Court if equitable relief is required.

There are, however, some exceptions to the equity restriction. CCA § 905 expressly authorizes Civil Court to entertain any defense to a claim, whether the defense is legal or equitable. For example, the Civil Court may permit a defense of equitable estoppel in an action attacking the validity of a contract. Similarly, Civil Court can entertain a claim based on an equitable doctrine that is not a form of equitable relief. For instance, the Civil Court has the authority to grant a judgment against an individual defendant by "piercing the corporate veil." Ultimately, where the Civil Court lacks subject matter jurisdiction to grant a specific remedy, only that request for relief need be denied and the action may continue on the remaining counts for which the court is empowered to grant the relief which is sought.

The Legislature has conferred equity jurisdiction on Civil Court in certain areas, but with the proviso that the economic impact of equitable relief not exceed $25,000. For instance, the court may hear a claim for rescission or

reformation of a contract if the dispute involves no more than $25,000. In *Talbot Typographics v. Tenba, Inc.*,[4] the court held that an action to recover assets allegedly transferred in violation of the Bulk Sales Act was effectively "an action for rescission that can be maintained in the Civil Court." In addition, CCA § 208(c) confers jurisdiction over a counterclaim for an accounting between partners after a dissolution of the partnership, but only if the amount in dispute is $25,000 or less.

The Civil Court Act also grants Civil Court jurisdiction over proceedings for the recovery of chattels – when, again, the value of the property does not exceed $25,000. The primary object of such an action is the recovery of the property itself, with damages for the taking and detention, and secondarily, the recovery of a sum of money equivalent to the property taken and detained. If the plaintiff wins in a replevin action, the judgment awards the plaintiff possession of the chattel. If the plaintiff does not have the chattel, the judgment must also fix the value of that chattel. This enables the sheriff to enforce the judgment in the same manner as an ordinary money judgment.

> Civil Court has limited subject matter jurisdiction with regard to arbitration.

In a similar vein, CCA § 202 grants Civil Court jurisdiction over an action and proceeding for the foreclosure of a lien on personal property where the amount sought does not exceed $25,000. As a logical complement to CCA § 202, Lien Law § 201-a provides that a special proceeding to determine the validity of a lien "may be brought in any court which would have jurisdiction to render a judgment for a sum equal to the lien." Thus, Civil Court has jurisdiction over lien-related proceedings regarding personal property. However, unlike the court's monetary jurisdiction in an action to recover chattels, it is limited by the value of the lien on the property, and not by the value of the property itself.

CCA § 203 also empowers Civil Court to render affirmative equity relief in real property actions, but uniformly restricts the power to a $25,000 ceiling. For example, it enables the court to hear an action for the foreclosure, redemption or satisfaction of a mortgage on real property where the amount of the mortgage lien does not exceed $25,000. Similarly, it enables the court to hear an action for the foreclosure of a lien arising out of a contract for the sale of real property where the amount of the lien sought to be foreclosed does not, at the time the action is commenced, exceed $25,000. Because of this $25,000 limitation, real property-related actions are extremely rare in Civil Court.

The Civil Court also has jurisdiction to hear one type of declaratory judgment, which is to "make a declaratory judgment with respect to any controversy involving the obligation of an insurer to indemnify or defend in an action in which the amount sought to be recovered does not exceed $25,000." As is more fully explained below, such $25,000 limitation is obviated when the third-party, declaratory action is transferred from Supreme Court to Civil Court, pursuant to CPLR 325(d), along with the underlying main action.

Civil Court also has limited subject matter jurisdiction with regard to arbitration. It can entertain the threshold question of arbitrability, but only if this question arises within the pending action before it. It has jurisdiction, however, to confirm an already rendered award as long as the relief awarded is within Civil Court's $25,000 monetary limit.

Finally, Civil Court has the power to order restitution in the context of vacatur of a judgment. If the judgment already has already been paid, in whole or in part, whether voluntarily or by way of an execution, the judgment debtor may be entitled to have the money refunded. Civil Court has the power to order restitution with respect to one of its own judgments. The restitution can be directed in the order granting the vacatur or modification, or in a separate order. "The allowance of the relief by order clarifies that the judgment debtor will not be put to the burden of a separate plenary action to recover what has already been paid."

Exceptions to the $25,000 Limitation

As the preceding discussion illustrates, where Civil Court is provided subject matter jurisdiction to award money damages or to grant equitable relief there is a firm $25,000 limitation on the court's power. There are, however, some well-defined exceptions to this ceiling. For instance, Civil Court has jurisdiction to hear landlord-tenant summary proceedings in which, in addition to a judgment of possession, a judgment for rent may be rendered in any sum, unrestricted by the $25,000 cap.

Civil Court's jurisdiction over summary proceedings, however, must be distinguished from its power over other types of plenary landlord-tenant actions, in which the cap remains. In an action for rent based upon a lessee's alleged breach of an agreement, there may not be jurisdictional facts permitting the maintenance of a summary proceeding. In such a case, the landlord's remedy is an action at law for such sums as may be legally shown to be due under the agreement – but this is limited to $25,000. An ejectment action in Civil Court is an alternative available to a property owner if circumstances

render a summary proceeding pursuant to Real Property Actions & Proceedings Law Article 7 (RPAPL) improper, but the assessed valued of the real property must be $25,000 or less.

Another exception to the monetary ceiling involves counterclaims. Contrary to common belief, however, the exception does not swallow the rule, because not all types of counterclaims are covered. CCA § 208 provides that the monetary ceiling does not apply to "counterclaims for money only," but it does apply to "counterclaims the subject matter of which would be within the jurisdiction of the Court if sued upon separately." This has been interpreted to mean that the monetary ceiling does apply to counterclaims if they are for anything other than money alone. For example, in *Schochat v. Otero*,[5] the court held that although it had "jurisdiction over a counterclaim for replevin for recovery of a chattel, it was deprived of such jurisdiction and all such remedial authority when the chattel is valued at over $25,000." Similarly, in *Apollon Water Proofing & Restoration Corp. v. Arthur Brandt*,[6] the court held that while it had subject matter jurisdiction over a counterclaim – for a declaratory judgment action seeking a declaration that an insurer had a duty to defend and indemnify an insured pursuant to CCA § 212 – jurisdiction did not exist where the monetary amount involved in the underlying action was more than $25,000.

The last and perhaps most important exception to Civil Court's monetary ceiling is where the action has been "involuntarily" transferred from Supreme Court to the Civil Court under CPLR 325(d). This statute empowers the Supreme Court to transfer a pending action to a lower court without the parties' consent. CPLR 325(d) expands the monetary jurisdiction of the lower court, but only for the cause of action so transferred. A transfer under this section requires that the lower court would have been able to exercise jurisdiction "but for" the amount of damages demanded. In other words, the transferred action could have been brought there originally if the amount in controversy had been below the lower court's monetary jurisdiction. Thus, the Civil Court will not automatically have or derivatively acquire jurisdiction upon transfer simply because the Supreme Court had jurisdiction when the action was commenced there.

For example, in *Spinelli v. Sassower,*[7] an action was commenced in Supreme Court, New York County, with regard to activities that took place in Westchester County. The summons was served on the defendant in Westchester County. This service provided jurisdiction over the defendant in Supreme Court, since process is statewide in Supreme Court. The Supreme Court transferred it to New York City Civil Court, pursuant to CPLR 325(d). The Civil Court, however, dismissed the action because the court lacked personal jurisdiction over the defendant, since the defendant did not reside, transact business or have any other contact with New York City, which would have

allowed extraterritorial service beyond the confines of New York City. Dismissal was warranted, the Civil Court reasoned, because Supreme Court within New York City was authorized to transfer the case to a lower court only if the lower court had both personal jurisdiction and subject matter jurisdiction other than monetary jurisdiction.

Provisional Remedies in the City Civil Court

The last significant difference between the New York City Civil Court and the Supreme Court concerns the limited availability of provisional remedies in the Civil Court. While the four provisional remedies available in Supreme Court (attachment, injunction, receivership and notice of pendency) can be sought, only one of them is identical to the remedy in Supreme Court. CCA § 209(d) provides that "a notice of pendency may be filed with the county clerk, as provided in Article 65 of the CPLR in any action within the court's jurisdiction in which the same may be filed in a like action in the Supreme Court." While the other provisional remedies are available in Civil Court, they must fit within a narrow set of circumstances.

For example, the provisional remedy of receivership – where a person is appointed by the court to take control of a designated property during the litigation, manage or dispose of it under a judgment – is available in only three types of actions in Civil Court. A receiver may be appointed in an action for foreclosure of a mortgage on real property brought pursuant to CCA § 209-c. A receiver may also be appointed in an action "for elimination or correction of a nuisance or demolition of a building" pursuant to Multiple Dwelling Law § 309(b). Finally, a receiver may be appointed in conjunction with a proceeding for enforcement of a judgment pursuant to CCA § 1508.

The provisional remedies of injunction or restraining notice are restricted by the Civil Court Act to certain limited categories. The Civil Court Act states that no injunction or restraining order shall issue out of the Civil Court except pursuant to certain specified statutes. CCA § 209(b) authorizes an injunction or restraining order with regard to a replevin action for the recovery of chattel. In such action, an order of seizure may be issued pursuant to CPLR 7109, as well as an order for a return of the chattel pursuant to CPLR 7103-c. Injunctive relief may also be granted where a unique chattel is involved, pursuant to CPLR 7102(d). Civil Court may also issue an injunction or restraining order pursuant to Multiple Dwelling Law § 306 and Article 53 of the Housing Maintenance Code, in conjunction with enforcement of housing standards. An injunction or restraining order may be issued pursuant to RPAPL § 211. Finally, an injunction or restraining order is available in conjunction with a proceeding for enforcement of a judgment pursuant to CCA § 1508.

Moreover, the availability of the provisional remedies of injunction or restraining order and receivership are restricted in Civil Court to the enforcement of only one type of judgment – for money. CCA § 1508 explicitly states that the remedies of injunction or restraining order and receivership may only be utilized in furtherance of enforcement of money judgments. Such a restriction exists because, unlike Supreme Court, Civil Court's subject matter jurisdiction over enforcement proceedings generally is limited to money judgments and, in addition, its power to enforce money judgments is limited to personal property. CCA § 1504 provides that "an execution may be levied in [Civil Court] against the personal property of the judgment debtor." Further, CCA § 1505 makes it clear that "an execution of [Civil Court] may not be levied against real property." Finally, the Civil Court is vested with the power to enforce only its own money judgments; it has no power to enforce a judgment of a different court.

> A significant difference between the New York City Civil Court and the Supreme Court concerns the limited availability of provisional remedies in the Civil Court.

If enforcement of a money judgment is sought against the judgment debtor herself, it can be carried out by mere motion. Where the judgment creditor wishes to enforce a judgment against some other party, the creditor is required to bring a special proceeding against that third party. In Civil Court, special proceedings for enforcement of money judgments are required where a party is seeking delivery of property not in possession of the judgment debtor or is seeking payment of a debt owed to the judgment debtor.

However, Civil Court is not vested with jurisdiction to hear all such special proceedings. The first restriction is that Civil Court has the requisite power only if the respondent has certain residential or business contacts with the City of New York. In addition, these special proceedings are subject to the monetary limits of Civil Court. Even if the judgment had been entered in Civil Court and the respondent has the required minimum contacts with the city, Civil Court may not preside over the proceeding if the amount of the judgment exceeds the $25,000 limit. For example, in *17 John Street, LLC v. Davidi-QDS*,[8] the court had before it a case in which the petitioner alleged that the respondent made a fraudulent transfer of the judgment debtor's corporate assets in order to frustrate enforcement (the respondent owned 50% of the

corporation's capital stock). The respondent had not been a party to the underlying nonpayment summary proceeding, in which the petitioner had recovered a $71,870 judgment for unpaid rent, later reduced to $35,000 by the corporate debtor. Enforcement of the judgment against the respondent required a special proceeding, which was begun. However, the court dismissed the special proceeding because the amount of the judgment debt exceeded $25,000 – even though that judgment originated in the Civil Court and the respondent had the required minimum contacts with New York City.

The court held that while CPLR 5221 grants Civil Court authority to hear a special proceeding for enforcement of its own judgments, it was not intended to override the $25,000 jurisdictional boundary as set forth in the New York State Constitution and in the Civil Court Act. Two related factors led to the court's conclusion. First, a special proceeding is an independently prosecuted case, in which jurisdiction is obtained by original process. Second, as this is a new matter, the judgment creditor would obtain a new money judgment against the third party. Under these circumstances, Civil Court will not automatically have or derivatively acquire jurisdiction over the special proceeding simply because it had jurisdiction over the original action in which the judgment was rendered.

If a judgment falls outside the Civil Court's enforcement powers, as in *John Street*, the party seeking enforcement of the judgment must look to CCA § 1505, which states that upon docketing a transcript with the county clerk, the Civil Court judgment would be the equivalent of a Supreme Court judgment for purposes of enforcement under CPLR 5018(a). A proceeding then can be brought in the Supreme Court to enforce the judgment against the real or personal property of the debtor.

An exhaustive examination of all the differences between Supreme Court and Civil Court practice is beyond the scope of this article; nevertheless, in order to successfully navigate the waters of the New York City Civil Court, practitioners must be fully aware of those differences in prosecuting or defending a case in that forum. ■

1. 163 Misc. 2d 152, 619 N.Y.S.2d 935 (Sup. Ct., N.Y. Co. 1994).
2. *See, e.g., Powsner v. Mills*, 56 Misc. 2d 411, 288 N.Y.S.2d 846 (Sup. Ct., Nassau Co. 1968).
3. 155 Misc. 2d 381, 588 N.Y.S.2d 536 (N.Y.C. Civil Ct., Richmond Co. 1992).
4. 147 Misc. 2d 922, 560 N.Y.S.2d 82 (N.Y.C. Civil Ct., N.Y. Co. 1990).
5. N.Y.L.J., May 24, 2000 (N.Y.C. Civil Ct.).
6. 172 Misc. 2d 888, 659 N.Y.S.2d 694 (N.Y.C. Civil Ct., N.Y. Co. 1997).
7. 155 Misc. 2d 147, 589 N.Y.S.2d 230 (N.Y.C. Civil Ct., N.Y. Co. 1992).
8. N.Y.L.J., Feb. 9, 1999 (N.Y.C. Civil Ct.).

BY DAVID P. MIRANDA

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GEICO v. Google and the Use of Trademarks by Search Engines

A consumer using a trademark on an Internet search engine, seeking specific goods or services, will sometimes be referred to an advertisement for the trademark owner's competitor. Because of the comprehensive effectiveness of search engines such as "Google" and Yahoo!," the consumers often type in the name of the goods or services they are seeking, rather than attempt to remember a multitude of domain names. In *GEICO v. Google*, one of the nation's leading insurance companies claimed that Google violated the Lanham Act and engaged in unfair competition by using GEICO's trademarks to sell advertising on its Internet search engine.[1]

Google, through its "ad words" advertising program, sells the opportunity to have advertisements appear alongside search engine listings. Such advertisements appear as "sponsored links" and permit advertisers to place paid ads next to the search engine listings associated with the trademark term.

GEICO alleged that Google, by selling this opportunity to advertisers (1) directly violated the Lanham Act by using GEICO's trademark as a keyword to place sponsored links alongside search engine results in a manner that is likely to cause consumers confusion as to the source, affiliation or sponsorship of those links; and (2) contributed to third-party violations of the act by knowingly encouraging advertisers to use such trademarks in the heading or text of their ads in a manner that is likely to confuse consumers. GEICO also contended that, according to its business model, potential customers can obtain GEICO rate quotes directly from the company online; thus, Google's sponsored links are misleading because of the implied association of those sites with the GEICO search term.

GEICO sought preliminary and permanent injunctions barring Google from selling advertising related to the GEICO mark, and sought actual and punitive damages. In Google's motion for judgment, the district court found that GEICO did not produce sufficient evidence to establish that the mere use by Google of the GEICO trademark as a search term or keyword, even in the context of Google's advertising program, violated either the Lanham Act or Virginia common law. The court also found GEICO failed to produce sufficient evidence to establish that advertisements not specifically referencing GEICO's trademark in their text, or headings, violate the Lanham Act, even though Google's advertising program enables those ads to appear when a user searches GEICO's trademarks. However, the court did find that GEICO presented sufficient evidence to survive the defendant's motion on the narrow issue of whether advertisements that include GEICO's trademarks in their headings or text violate the Lanham Act.[2]

Although the court notes that this decision is limited to the unique facts of the case, the decision is significant because it is at variance with other decisions on this issue. Many courts have grappled with the problem of "likelihood of confusion" when determining trademark infringement with respect to Internet search engines.[3] A finding of likelihood of confusion is a highly factual issue, the assessment of which depends largely on the particular circumstances of each case. To establish likelihood of confusion, a plaintiff must prove that the defendant's use of its trademark is "likely to confuse an ordinary consumer as to the source or sponsorship of the goods."[4]

Recognizing that traditional factors of trademark law are sometimes difficult to apply to the Internet, GEICO argues that Google's use of its trademark causes "initial interest" confusion. In the Internet context, "initial interest" confusion describes the distraction or diversion of a potential customer from the Web site initially sought, to another site, based upon the user's belief that the second site is associated with the one originally sought, or that the second site provides the goods or services sought. Inherent in this concept is the risk that the user will be satisfied with the second site, or sufficiently distracted, and will not arrive at, or return to, the site originally sought.[5]

Although the court found that GEICO failed to establish a likelihood of confusion stemming from Google's use of its trademark as a keyword, it held that Google could potentially be liable for trademark infringement in those instances where the trademark GEICO appears, either in the heading or text of the ad placed on Google's Web site. This finding was based upon a survey performed by Google, in which a high percentage of respondents experienced some degree

of confusion when viewing the ads in question.[6]

There are several other related cases pending against Google involving the same issue – *i.e.*, whether search engine sales of trademark words constitute trademark infringement.[7] Cases brought by American Blind and Wallpaper Factory are pending in the Northern District of California and the Southern District of New York, and other courts have looked at the issue of trademark infringement from a different perspective than the Eastern Virginia District Court.[8] Furthermore, a French court, in the case of *Louis Vuitton Malletier v. Google*, has held that Google's ad policies regarding trademarks violate French law, and held the ruling applied to all Google sites, not just the Google.fr site.[9]

From a marketing perspective, using a competitor's trademark as a "paid for" keyword on a search engine remains one of the most cost-effective and successful means of competing for consumers on the Internet. Continued use of this tactic with respect to the trademarks of others will likely provoke litigation and the potential for trademark infringement until the law is more firmly clarified. As search engine usage continues to proliferate, such use of trademarks will have larger financial implications. If the Virginia district court's decision is applied, the sale of another's trademark by a search engine will be permissible, but use of that trademark in a "paid for" ad will come under closer scrutiny. ■

1. *GEICO v. Google*, No. 1:04CV507, 2005 WL 1903128 (E.D. Va. 2005).
2. *Id.* at 2.
3. *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 366 (4th Cir. 2001); *Petro Stopping Ctrs. LP v. James River Protolium, Inc.*, 130 F.3d 88 (4th Cir. 1997).
4. *People for the Ethical Treatment of Animals*, 263 F.3d 359.
5. *GEICO*, 2005 WL 1903128; *Brookfield Commc'ns, Inc. v. Westcoast Entm't*, 174 F.3d 1036, 1064 (9th Cir. 1999); *Bihari v. Gross*, 119 F. Supp. 2d 309, 320–21 (S.D.N.Y. 2000).
6. Following the decision, the parties reached an undisclosed settlement regarding the issues.
7. *Google v. Am. Blind & Wallpaper Factory*, No. C 03-05340 JF, 2005 WL 832398 (N.D. Cal. 2005).
8. *Id.*
9. [T.G.I.] [civil court] Paris 2005, Feb. 4, 2005, *available at* <http://www.linksandlaw.com>.

BY ELLIOTT WILCOX

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

"Our next speaker needs no introduction . . ." (Yes, he does)

The emcee walks to the center of stage and taps the microphone. "Ladies and gentlemen, our next speaker needs no introduction." Then, for the next seven minutes, he proceeds to introduce the speaker who "needs no introduction."

Have you heard a great speaker receive a poor introduction? Speakers often overlook the importance of their introductions. Don't squander this opportunity to improve your presentation. A proper introduction can establish your credibility, focus the audience's attention on a common purpose, and arouse the audience's interest in your topic. Does your introduction fulfill these tasks? If not, here are some tips for crafting and delivering an effective introduction.

Write Your Own Introduction.

There is a lot of preparation involved in drafting an effective introduction. Don't foist that work upon your emcee and simply hope for the best. Instead, prepare your own introduction. Try to keep it to a single sheet of paper, and use a font size of 36 point or higher so that the emcee can easily read it. E-mail it to the emcee a week or so before the meeting, and bring a spare copy with you, in case he or she loses your copy. As you write your introduction, ask yourself three questions:

- Does the introduction set up the importance of the topic?
- Does the introduction establish the speaker's expertise?
- Does the introduction make the audience want to listen to the presentation?

Why This Topic?

Why is the topic important for this particular audience? If the topic's importance isn't immediately apparent to the audience members, tell them why it should be. Will you help them avoid a problem, or fix a problem they already have? Each audience member wants to know, "What's In It for Me?" If you can show them, they'll pay more attention to your presentation.

Why This Speaker?

Why are you qualified to speak about this subject? Do you have the education, experience, or training to speak about this topic? Unless you're famous (A-list famous, by the way, not B-list famous) the audience probably doesn't know why you're qualified to present this topic. Help them understand.

Why Should I Listen?

What benefits will the audience receive? ("You'll learn how to avoid becoming a victim of identity theft.") What will they learn? ("Do you know the five most important questions you should ask before hiring an attorney?") How will their lives be improved? ("Would you like to pay less in federal taxes next year?") Get the audience excited about the topic and give them something to look forward to during the presentation.

How to Present an Introduction.

When you introduce someone, you want to prepare the audience for the speech and the speaker. Here are some tips to add more impact to the introduction:

- **Read the introduction in advance.** If the speaker has an unusual name, write out the phonetic spelling so you don't mispronounce it. If the speaker provided you with a written introduction, read it aloud to get comfortable with the language.
- **Don't upstage the speaker.** The audience wants to hear the speaker, not the introducer. I once heard someone introduce a nationally renowned attorney. The introducer spoke for 15 minutes. The attorney only spoke for about 30. No one in the audience (not even the introducer's mom) came to hear the introducer. We came to hear the famous attorney. Understand that you're not the star of the show – the speaker is.
- **Don't steal the speaker's thunder.** Does the speaker have a "signature story" or favorite war story? Don't give away the substance of the speaker's presentation. Tell the audience the subject area, but don't "preview" the speech content.

- **Don't surprise the speaker.** If the speaker didn't give you a written introduction, tell the speaker what you will say in your introduction. If the speaker knows what you'll say in advance, he or she can prepare accordingly or ask you to change the material. If you surprise the speaker with an embarrassing story or an obscure anecdote, chances are, you'll throw off her focus. Remember, the introduction isn't the focus of the meeting – it's the speaker. Your job is to help the speaker perform at his best.
- **Don't praise the speaker's skills.** "Our next speaker is the greatest thing since sliced bread." Even if she is, it's hard to live up to such a flowery introduction. Some audience members may even take such comments as a challenge. When you tell them the speaker is funnier than Will Rogers, some audience members will lean back, cross their arms, and think to themselves, "Oh yeah? You're supposed to be funny? Prove it." Instead, let the audience determine the speaker's skills for themselves.

A speaker's introduction can set the tone for the entire presentation. If you invest the time to craft it carefully and deliver it properly, the audience will eagerly welcome the speaker and the presentation. ■

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I'm not sure if what follows is an appropriate question for the Forum, but I'll ask it anyway.

I think that many matrimonial lawyers are dissatisfied with their matrimonial law practices. I know I am. In my opinion the dissatisfaction is understandable, because we deal with clients who, for the most part, are unhappy, hurt, scared, vulnerable, insecure, angry and even vindictive.

I have taken an informal survey of my fellow matrimonial attorneys and find that many are unhappy as well. I heard one colleague say, "It wouldn't be a bad field, if I didn't have to deal with clients." Another example: A prominent attorney who was lecturing at a CLE program reviewed the rule that prohibits matrimonial lawyers from having sex with their clients. He then added, "Have sex with them? I don't even want to speak with them." You get the idea.

I know that there are some matrimonial lawyers – a minority, I believe – who profess to love their work. What is their secret?

Sincerely,

Dissatisfied

Dear Dissatisfied:

Your question is very appropriate. There are indeed matrimonial lawyers who enjoy their work. Does that mean that each returns home happy every night? No. If you are going to work on difficult problems and with clients who are suffering, you have to expect frustrations. On the other hand, the non-monetary rewards can be greater than in other areas of practice.

Without pretending that each item would be endorsed by every matrimonial lawyer, what follows are certain procedures and approaches that may prove helpful.

Don't be afraid to charge an initial consultation fee. If you are doing your job correctly, the client will gain a great deal of valuable information at the very first meeting. Why should you give that away? The response to the bill will also help you weed out clients who are not willing to pay a reasonable fee for your services.

Make it clear to the client that you are a "straight shooter." Tell him or her that you will always be honest, and that you expect the same. If that message is favorably received, the client will always tell the truth to you – and to the court – even when it pinches. Point out that this is in his or her own best interest, since credibility with the court depends on consistent honesty. If doubts about this appear, you can refuse to take on clients who are looking for an attorney to advance their agenda, irrespective of the truth. Even if a dishonest client slips through, you will be able to remind the client of this conversation when he or she asks you to do something improper. In a similar vein, you might be reminded by the client about something you said yourself; so if you wish to stay on the straight and narrow, assume that each client is tape recording every conversation the two of you have, in person or on the phone.

Give the client a realistic appraisal of expected results. Consistent with what is mentioned above, the client should always be told the truth, even if it is something he or she doesn't wish to hear.

Once the case is underway, don't think that your job is to get as big a piece of the pie as possible. Rather, your goal should be a fair settlement. You can point out that seeking more than a fair settlement will increase costs and reduce the size of the pie the client ultimately will receive. You can even draw a circle and indicate to the client that he or she should want to keep the lawyers' piece of the pie as small as possible – because as that piece grows, the client's share shrinks. This can alert you to those individuals who are vindictive. They are the ones who would rather give you the money than their spouses.

Clients should always be reminded of the benefits of reaching a fair settlement, as opposed to going to trial. They should be told that when they reach a settlement, they know what they have and what it will cost. On the other hand, most clients cannot afford a full trial, or the risks of an adverse result. Tell clients that when they go to trial one of three things will happen: the client will be unhappy, the spouse will be unhappy, or both will be unhappy. This often results in an appeal process which can take years, and lead to even more expense and uncertainty.

The foregoing approach to cases also helps your relationship with your fellow attorneys and the court. Perhaps more important, a reputation for fairness will benefit all of your clients.

Now for the law office maintenance/cash flow practical side.

You may be thinking that all of this weeding out of vindictive or dishonest clients, and an emphasis on fairness as opposed to take-no-prisoners litigation, may not leave enough clients to earn a living. However, that fear is not borne out by the experience of older

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

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practitioners who have lived by these precepts. Many have been matrimonial attorneys for decades, and have not had any difficulty in supporting themselves and their families. Even if you do have to sacrifice some money along the way by refusing to take on individuals who will clearly be problem clients, isn't it worth the price to get up in the morning and look forward to going to the office?

With regard to payment of bills, retainers can be placed in escrow and monthly client bills paid out from that source. Placing retainers in escrow is controversial. A number of prominent attorneys in the matrimonial field have expressed the view that if the law were changed to require this they would no longer do matrimonial work because they live off their retainers. However, it can work, and here are some of the advantages:

Virtually all law offices have cash flow problems from time to time. On a Thursday, when you know you need an influx of cash by Friday, you may be tempted to take a case you would ordinarily turn down. If you know the retainer will go into escrow, you have eliminated the temptation.

If you are sharing your fee with another attorney, you will only remit his or her share after the fee is earned.

Clients may be more willing to put up larger retainers because they have the assurance that the money remains theirs until it is earned. Any unused portion of the retainer will be refunded to them at the end of the case or their termination of the attorney's services.

One caveat: you must have the client's consent in writing to acknowledge the escrow arrangement, and that the retainer remains his or her money until fees are earned. If you fail to obtain that statement, you are commingling your money with other clients' funds in the escrow account. This is a serious violation of the Lawyer's Code of Professional Responsibility. DR 9-102. The client's consent should appear in the retainer agreement.

After receiving a large retainer, don't be disappointed if the client and his or her spouse reconcile; be happy for them. Remember that when you refund the unused portion of the retainer that it was always the client's money, not yours, and so isn't coming out of your pocket.

As far as the day-to-day contact with clients is concerned, don't be tempted to "duck" calls. Even if you have a voice mail system in the office, pick up your own phone unless you are presently engaged with another client, or working on something that requires your undivided attention. This does not mean, of course, that there won't be calls you would love to avoid. However, keep in mind that if you consistently want to duck a particular client you know you have a problem. It would be better to ask that client to come in and see you, without charge for that appointment. You can then work together to address the problem in your relationship. You can then resolve the situation, either by coming to an understanding and going on with the case, or by ending the relationship by having the client hire other counsel or, if necessary, by your formal withdrawal.

Keeping clients informed should never be an issue. At the first consultation tell the client you are conscientious about returning calls and responding to e-mails, but that if you are on trial you can't always get back to them the same day. You are required to provide the client with copies of all documents that come into and go out of your office.

If you make a mistake, admit it. If the client has sustained a loss as a result of your mistake, make good the loss. You will have turned a negative into a positive. It should also be noted that if the mistake is the result of not keeping up with developments in the field, you should endeavor to remedy that situation through appropriate Continuing Legal Education programs. It should go without saying that if you don't acquire the skills you need to practice in this field and do not keep them up to date, you will feel insecure and unhappy.

As a final matter of professional practice, civility is a must – even if others are not always civil to you.

To close on a more personal level, it is obviously true that practicing in this field is not a 9-to-5 job, but it shouldn't be more than, say, 60 hours a week. You need time with your family and personal pursuits to avoid burnout, so build that into your week. And take vacations – you need them to recharge your batteries.

It is to be hoped that these few suggestions will be of some help. Don't forget that handling a matrimonial case in a professional and skillful fashion will mean that you have helped someone during a very difficult period.

The Forum,
by George J. Nashak, Jr.
Queens, NY

LETTERS TO THE FORUM

The following is a response to the question posed by "Tugged in Two" in the May 2006 Forum. The answer, from Barry Temkin, was featured in the June 2006 Forum.

Re: Tugged in Two

"Tugged in Two" should abide by the wishes of the policyholder in view of the explicit (and unusual) provision in the policy requiring her consent to settlement.

Eugene R. Anderson
New York City

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am working on a hotly contested civil action arising from a commercial real estate deal gone awry. The trial is several months away, and the parties are now engaged in settlement discussions, which are pretty far along.

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Please comment on the use of the possessive of a noun or pronoun before a gerund, as in, "There was no reason for his losing his temper."

Answer: The reader who sent this example of a gerund is one of the few persons who can even recognize a gerund. In the sentence he submitted, the gerund is the word *losing*, and the possessive form *his* is correct. The possessive form is not only correct, it is logical. In the reader's example, it is not the person himself who is unreasonable, what is unreasonable is his losing his temper.

Similar logic applies to all the following constructions:

- Because of his leaving, the event was cancelled.
- Prior to the bank's filing, the plaintiff withdrew.
- Our raising the issue was a mistake.
- His failing to respond turned out to be costly.

But many people today are unaware of gerunds, and most of those who follow the gerund rule do so because "it sounds right," not because they know the rule. Using gerunds can sometimes cause awkward constructions like, "He was aware of the situation's occurring." And it is usually possible to avoid the gerund construction. The sentences above can be constructed differently, avoiding the problem. Here they are, in the same order:

- Because he (had) left, the event was cancelled.
- Before the bank filed, the plaintiff withdrew.
- It was a mistake for us to raise the issue.
- His failure to respond turned out to be costly.

But if you do use the "gerund construction," especially if it is preceded by a personal pronoun (*my, your, his, her, its, our, their*), grammarians agree that you should use the possessive form, not the objective form:

- Your extending the offer was appreciated. (Not "you extending the offer . . .")
- My arriving on time depends on the weather. (Not "me arriving on time . . .")
- His refusing to respond to my questions caused the delay. (Not "him refusing . . .")

Question: The way it is commonly used, the phrase *more importantly* irritates me. People say, "More importantly, one should be honest." You would not say, "It is more importantly to be honest," so why start out with *more importantly*?

Answer: Attorney Donald L. Schoenwald, who sent this question has plenty of company in his dislike of the *-ly* mistakenly tacked onto *more important*. As his illustration indicates, the phrase *more important* is a truncated version of "what is more important . . . ." So because one would say, "What is more important is to be honest," one should say, "More important, one should be honest." Reversing the sentence structure also makes clear which construction is correct. One would say, "Honesty is more important," not "Honesty is more importantly."

However, majority usage, not logic, eventually determines what is correct, and if the incorrect but wide usage continues, "more importantly" may eventually become "correct." If so, even though grammarians don't like it, they will be forced to justify it!

Question: I am wondering about a phrase I hear on the media: ". . . an estimated a hundred thousand people were present." Is that usage correct?

Answer: No, there should be only one indefinite article. You don't need both *an* and *a* before "hundred thousand." Keep the *an*; delete the *a*: ". . . an estimated hundred thousand people were present" is correct. You could also re-state the sentence as, "It was estimated that a hundred thousand people were present." Then you would use the indefinite article *a* instead of *an*.

Question: In newspaper and magazine articles I am now seeing the word *there's* in places where I would use *there are*. For example, I'd like to know whether *there's* is correct in a statement like, "There's many reasons for my answer."

Answer: No. In the sentence above, the correct verb should be *are*, because the noun *reasons* is plural. In this construction, the adverb *there* is a grammatical expletive. (It is unrelated to the expletives you may have used as a child, after which your mother washed your mouth out with soap.)

Traditionally, the singularity or plurality of the verb following the expletive *there* has always been decided by the number of the noun *there* referred to. You would say, "There is a cause of action . . ." or "There are several causes of action." Thus, because the noun *reasons* is plural in the sentence above, the proper verb to use is *are*.

That usage is still correct. However, recently common usage has treated the expletive *there* as if it were singular in number, so that combining a singular *there's* with a plural subject has become common, though that usage is non-standard. The probable reason for the popular usage is that some nouns that are grammatically singular have a plural meaning; for example, "There's a lot of difficulty." By analogy to "There's a lot of difficulty" people say, "There's many difficulties." *A lot*, however, is different from most nouns in that it is a collective noun-phrase, a grammatical singular with a plural meaning.

The change to *there's* before plural nouns has not occurred with *there is*. People don't say, "There is many ways . . . ." And only time will tell whether the new "singular" status of *there* will eventually become so widespread as to become acceptable. As always, usage will decide. ■

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noun results in brighter, more concise writing. Especially intern intensive adverbs, also called adverbial excesses: "absolutely," "actually," "certainly," "completely," "extremely," "greatly," "obviously," "plainly," "really," "surely," "truly," "undoubtedly." Intensive adverbs exaggerate and bluff. They raise the hackles of the best lawyers: skeptical lawyers.

Adjectives modify**.** As Mark Twain wrote, "As to the Adjective: when in doubt, strike it out."[4] Consider: The sentence "The man is very large" is trivial and verbose. "The man is huge" is memorable and concise. Most descriptive, though, is, "The man is six-feet five-inches tall and weighs 394 pounds." If you give the man's height and weight, you needn't say that he is "very large" or "huge." Your readers will figure it out for themselves.

Which is stronger: "The allegations are completely untrue" *or* "The allegations are false"? The latter.

Don't Lead With Lead. "The books the judge owned were the Official Reports." *Becomes:* "The judge owned the Official Reports." "The New York State Office of Court Administration's new policy resulted in increased morale among nonjudicial employees." *Becomes:* "The New York State Office of Court Administration's new policy increased morale among nonjudicial employees."

Throttle Throat Clearers. Don't introduce what you plan to write. Just get to the point. Throat clearers, also called metadiscourse, include hundreds of running starts like "The court recognizes that . . . ." and "It appears to be the case that . . . ." Anyway, if you use preambles like "speaking as a lawyer," your reader won't know whether you're bragging or offering a disclaimer.[5]

Rebut Redundancies. Trim fat, even though a waist is a terrible thing to mind, especially for the nutritional overachiever. A favorite, from Alexander Hamilton: America must develop "a capacity to provide for future contingencies as they may happen."[6] Take stock: As Judge Albert Rosenblatt observed, "a lawyer's stock in trade [is] the lawyer's use of words."[7] If words are a lawyer's stock-in-trade, lawyers have an excessive inventory. Talk is cheap. Supply exceeds demand.

Redundancy is the unnecessary repetition of words or ideas. Some redundancies can't be avoided. One example from the language of the law is "self-incrimination." "Self-" already means "in." But try to get legal writers to change the expression to "self-crimination." Other redundancies are silly. "Excess verbiage," for example, is redundant because verbiage is excessive by definition.

Here are some wordy phrases that can best be called repetitive redundancies, all from the Department of Redundancy Department: "A period of two years" *becomes* "two years"; "Accidental slip" *becomes* "slip"; "Advance planning" *becomes* "planning"; "Adequate enough" *becomes* "adequate"; "Afford an opportunity" *becomes* "allow," "let"; "Aggregate total" (either, not both); "All-time record" *becomes* "record"; "Am (is, are) going to" *becomes* "will"; "Any and all" *becomes* "any"; "Appreciate in value" *becomes* "appreciate"; "As of this date" *becomes* "today"; "As yet," "as of yet" *become* "yet"; "At about" *becomes* "about"; "At an early date" *becomes* "soon"; "At approximately" *becomes* "about"; "At the present time" *becomes* "now"; "At the present writing" *becomes* "at present," "currently," "now"; "At this particular point in time" *becomes* "now"; "At the time when" *becomes* "when"; "Audible to the ear" *becomes* "audible"; "Basic fundamentals" *becomes* "basics"; "Because of the fact that" *becomes* "because"; "Both . . . as well as" *becomes* "both . . . and" *or* "as well as," without the "both"; "By and through" *becomes* "by"; "By the time" *becomes* "when"; "Class-action lawsuit" *becomes* "class action"; "Close proximity" *becomes* "close," "near"; "Collide together" *becomes* "collide"; "Combine together" *becomes* "combine"; "Come in contact with" *becomes* "meet," "touch"; "Completely finished" *becomes* "finished"; "Complete stop" *becomes* "stop"; "Consensus of opinion" *becomes* "consensus"; "Consequences that would (or *will*) result from" *becomes* "consequences of"; "Cooperate together" *becomes* "cooperate"; "Current incumbent" *becomes* "incumbent"; "Deliberate lie" *becomes* "lie"; "Divide up" *becomes* "divide"; "Due to the fact that" *becomes* "because" (or, if possible, delete entirely); "Duly noted" *becomes* "noted"; "During the time that" *becomes* "during"; "During such time as" *becomes* "during."

"Each and every" (either, not both, or "us all"); "Eight in number" *becomes* "eight"; "Enclosed herewith is" *becomes* "enclosed is"; "Endorse on the back" *becomes* "endorse"; "Estimated to be about" *becomes* "about," "estimate to be," or "estimated at"; "Every single" *becomes* "every"; "Equally as" *becomes* "as . . . as," "equally"; "Exactly analogous" *becomes* "analogous"; "Exact same" *becomes* "same"; "Excessive number of" *becomes* "too many"; "False illusion" *becomes* "illusion"; "False misrepresentation" *becomes* "false representation" or "misrepresentation"; "Few in number" *becomes* "few"; "Filled to capacity" *becomes* "filled"; "Final result" *becomes* "result"; "First and foremost" (either, not both; even when "foremost" adds something to "first," "first and foremost" is a cliché); "Final outcome" *becomes* "outcome," "result"; "Final destination" *becomes* "destination"; "For the amount of" *becomes* "for"; "For the reason that" *becomes* "because"; "Foreign import" *becomes* "import"; "Forward progress" *becomes* "progress"; "Free gift" *becomes* "gift"; "From and after" (either, not both); "Fused together" *becomes* "fused"; "Future plans" *becomes* "plans."

"General public" *becomes* "public"; "Good and ready" *becomes* "ready"; "Green in color" *becomes* "green"; "He left on Monday" *becomes* "He left Monday"; "Honest truth" *becomes*

Talk is cheap. Supply exceeds demand.

"truth"; "I would appreciate it if" *becomes* "please"; "If and only if" *becomes* "if" or "only if" (except to emphasize or if you mean "if, among other things"); "If and when" (either, not both); "If that is the case" *becomes* "if so"; "In addition to . . . also" (either, not both); "In many cases" *becomes* "often"; "In the event that" *becomes* "if"; "In the month of May" *becomes* "in May"; "In the near future" *becomes* "soon"; "In rare instances" *becomes* "rarely"; "In routine fashion" *becomes* "routinely"; "Insofar as" *becomes* "so far as"; "Interpersonal relationship" *becomes* "relationship"; "Inveigh in strong terms" *becomes* "inveigh"; "Is currently in progress" *becomes* "in progress"; "Join together" *becomes* "join"; "Kills bugs dead" *becomes* "kills bugs"; "Large in size" *becomes* "large"; "Large number of" *becomes* "many"; "Last but not least" *becomes* "last"; "Logical corollary" *becomes* "corollary"; "Live audience" *becomes* "audience"; "Lucrative profits" *becomes* "profits"; "Mass exodus" *becomes* "exodus."

"Mix together" *becomes* "mix"; "More better" *becomes* "better"; "Most unkindest" *becomes* "most unkind," "unkindest"; "Mutual cooperation" *becomes* "cooperation"; "Necessary essentials" *becomes* "essentials"; "Necessary requirements" *becomes* "requirements"; "Never before in the past" *becomes* "never before"; "New innovation" *becomes* "innovation"; "No doubt but that" *becomes* "no doubt that," "doubtless," "undoubtedly"; "Nothing whatsoever" *becomes* "nothing"; "On a daily basis" *becomes* "daily"; "On a timely basis" *becomes* "timely"; "On the condition that" *becomes* "if"; "On the ground that" *becomes* "because"; "One and the same" *becomes* "the same"; "One of the purposes" *becomes* "one purpose"; "One of the reasons" *becomes* "one reason"; "Ongoing process" *becomes* "process"; "Old adage" *becomes* "adage"; "Old proverb" *becomes* "proverb"; "Over again" *becomes* "over" or "again"; "Overall total" *becomes* "total"; "Overexaggerate" *becomes* "exaggerate"; "Over with" *becomes* "over"; "Passing phase" *becomes* "phase"; "Past experience" *becomes* "experience"; "Past history" *becomes* "history"; "Period of time" *becomes* "period," "time"; "Personal belongings" *becomes* "belongings"; "Personal opinion" *becomes* "my opinion," "his opinion"; "Personal friend" *becomes* "friend"; "Plan ahead" *becomes* "plan"; "Please be good enough to forward" *becomes* "please send"; "Point of view" *becomes* "opinion," "perspective"; "Postponed until later" *becomes* "postponed"; "Proceed ahead" *becomes* "proceed"; "Provided that" *becomes* "if."

"Qualified expert" *becomes* "expert"; "Quite a few" *becomes* "many"; "Raise the question" *becomes* "ask"; "Rational reason" *becomes* "reason"; "Reason why" *becomes* "reason" or "why" (not both); "Recur again" *becomes* "recur"; "Remaining balance" *becomes* "balance"; "Refer back to" *becomes* "refer to"; "Regard as being" *becomes* "regard"; "Remand back to" *becomes* "remand to"; "Repeat again" *becomes* "repeat"; "Revert back to" *becomes* "revert to"; "Round in shape," "round in form" *become* "round"; "Rise up" *becomes* "rise"; "Sad tragedy" *becomes* "tragedy"; "Set a new record" *becomes* "set a record"; "Several in number" *becomes* "several"; "Shoddy in appearance" *becomes* "shoddy" (or "appeared shoddy," if you later explain that it really was not shoddy); "Similar to" *becomes* "like"; "Something else besides" *becomes* "something else," "besides"; "Small in size" *becomes* "small"; "Small number of" *becomes* "small," "few"; "Standard cliché" *becomes* "cliché"; "Still goes on" *becomes* "continues," "goes on"; "Still remains" (either, not both, unless you mean that the corpse is not moving); "Strictly forbidden" *becomes* "forbidden"; "Suffered the loss of" *becomes* "lost"; "Sufficient number of" *becomes* "enough"; "Sum total" (either, not both); "Surrounded on all sides" *becomes* "surrounded"; "Surviving widow" *becomes* "widow"; "Sworn affidavit" *becomes* "affidavit."

"Telling revelation" *becomes* "revelation"; "Temporary respite" *becomes* "respite"; "Temporary suspension" *becomes* "suspension"; "Terrible tragedy" *becomes* "tragedy"; "That we have at hand" *becomes* "that we have"; "The fact that" *becomes* "that" (almost all the time); "The reason why" *becomes* "the reason"; "This morning at 7:15 a.m." *becomes* "this morning at 7:15," "7:15 a.m.," or "7:15 this morning"; "To all intents and purposes" (replace or delete); "Totally devoid" *becomes* "devoid"; "True and correct" (either, not both); "True facts" *becomes* "facts"; "Trusting that this suggestion will" *becomes* "I hope that"; "Unexpected surprise" *becomes* "surprise"; "Unsolved problem" *becomes* "problem"; "Unless and until" (either, not both, or rephrase); "Until such time as" *becomes* "until"; "Usual custom" *becomes* "custom"; "Utterly false" *becomes* "false"; "Visible to the eye" *becomes* "visible"; "Whether or not" *becomes* "whether" (except to emphasize or to give equal weight: "The case will be tried whether it rains or not").

Prepositional Phrases. Convert prepositional phrases to adverbs or adjectives: "Are in need of" *becomes* "need"; "At that point in time" *becomes* "then"; "At this point in time" *becomes* "now"; "At your earliest convenience" *becomes* "as soon as possible" "at once," "immediately," "now," "soon"; "Of extreme importance" *becomes* "extremely important"; "Of great complexity" *becomes* "complex"; "On a regular basis" *becomes* "regularly"; "On many occasions" *becomes* "often"; and "One of the things" *becomes* "one thing."

Parallel Language. French was England's official language from the Norman conquest in 1066 until 1385. But the populace continued to speak English. Thus, lawyers began a parallel language.[8] We have the luxury in modern America to return to our roots by speaking one tongue — English — not both English and French and sometimes Latin, too. Just because something is good enough to say once doesn't mean it's good enough to say

twice. Cease and desist in any way, shape, manner, or form from using doublets, triplets, and quadruplets for the rest, residue, and remainder of your careers. This rule is part and parcel of good legal writing.

Here are some doublets and triplets that can be shortened: "Acknowledge and confess" (either; not both); "Act and deed" *becomes* "contract," "deed"; "Agree and covenant" *becomes* "agree"; "Aid and abet" *becomes* "aid"; "All and singular" *becomes* "all"; "Assuming, arguendo, that" *becomes* "assuming that" or "if"; "Bind and obligate" *becomes* "require"; "Cancel, annul, and set aside" *becomes* "annul," "cancel"; "Capable and able" (either, not both); "Cease and desist" *becomes* "stop"; "Deem and consider" *becomes* "believe," "find"; "Do and perform" *becomes* "do"; "Duty and obligation" *becomes* "duty"; "Fit and proper" *becomes* "fit"; "Force and effect" *becomes* "force"; "Fraud and deceit" (either, not both, depending on the context); "Free and clear" *becomes* "free"; "Give and grant" *becomes* "give"; "Give, devise, and bequeath" *becomes* "give."

"In any way, manner, shape, or form" (delete); "Keep and maintain" *becomes* "keep"; "Last will and testament" *becomes* "will"; "Made and entered into" *becomes* "made"; "Null, void, and of no effect" *becomes* "null" or "void"; "Order, adjudge, and decree" *becomes* "order" for a legal motion, "adjudge" for a legal judgment, "decree" for equity; "Pardon and forgive" (either, depending on the context, but not both); "Rest, residue, and remainder" *becomes* "balance," "rest," or "all other property"; "Save and except" *becomes* "except"; "Separate and apart" (either, not both); "Shun and avoid" *becomes* "avoid"; and "Et cetera, et cetera, et cetera" (unless you're a "King and I" afficionado).

What "of" It?[9] Try this test. Count the number of Fs:

FINISHED FILES ARE THE RESULT OF YEARS OF SCIENTIFIC STUDY COMBINED WITH THE EXPERIENCE OF YEARS

You counted three, right? Try again. The correct answer is in this endnote.[10] You missed the "f" in the three "of's." People don't see the word "of." That's why "of" is verbiage, to be cut whenever you can. Below are some suggestions:

- Ply your possessives: "This is the opinion *of* the judge." *Becomes:* "This is the judge's opinion."
- Sentence inversion: "I'm a member *of* the Association *of* the Bar *of* the City *of* New York." *Becomes:* "I'm a New York City Bar Association member."[11]
- Nix nominalizations: "He committed a violation *of* the Penal Law." *Becomes:* "He violated the Penal Law." Nominalizations are verbs converted to nouns. Prefer verbs to nouns and, when in doubt, to strike out adverbs and adjectives.
- All ofs are off course: Delete "of" after "all" ("All *of* New York loves the New York State Bar Association") and "both" except when a pronoun follows ("all of us studied law"; "both of us studied law").
- Not off of the wall: Delete "of" after "alongside," "inside" (unless you mean "in less than"), "off," and "outside."
- As of: "The attorney has not arrived *as of* yet." *Becomes:* "The attorney has not arrived yet." *Or* "The attorney has not yet arrived."
- Off "of" prepositional phrases: "By means of" *becomes* "by"; "During the course of" *becomes* "during"; "For the period of" *becomes* "for"; "For the purpose of" *becomes* "for," "to"; "The issue of (or *as to*) whether" *becomes* "whether"; "On the grounds of" *becomes* "because" (and note that if you give one ground, do not use "grounds").
- "Of" abstractions: Excise "type of," "kind of," "matter of," "state of," "factor of," "system of," "sort of," "nature of."
- "Of" negativity: A negative phrase using an "of" *becomes*, with a prefix, a "dis-," "in-," "non-," or "un-." *Example:* "The lack of consistency" or a "negative" anything *becomes* (depending on your meaning) "The inconsistency" or "dis-X," "non-X," or "un-X," depending on the word.
- Delete "of" in dates and years: "Ten days of notice." *Becomes:* "Ten days' notice"; "Fifty-one years of age." *Becomes:* "Fifty-one years old"; "July of 2006." *Becomes:* "July 2006" (not "July, 2006").
- "Of which" legalisms: "The stipulation Smith signed, which stipulation provided that . . . ." *Becomes:* "The stipulation Smith signed provided that . . . ." *Or* "Smith signed a stipulation providing that . . . ."

Legal writing shouldn't be clipped or casual. Explanation and persuasion can take pages, and sometimes volumes. But to make every word tell, don't write 4/8 when you can write 1/2. Whether you design memorable legal argument or architecture meant to last, recall that less is more, more or less. We remember the short and forget the long, assuming we read it at all. ■

Cease and desist in any way, shape, manner, or form from using doublets, triplets, and quadruplets for the rest, residue, and remainder of your careers.

1. Note that what "precedes" comes immediately beforehand. Anything earlier is "previous."

2. Even worse than not using ellipticisms is elegant variation: using different words for "brought," such as "sold for," "fetched," or "obtained." For the power and clarity of repetition, see Gerald Lebovits, The Legal Writer, *What's Another Word for "Synonym"?*, 74 N.Y. St. B.J. 64 (Jan. 2002).

3. Albert M. Rosenblatt, *Lawyers as Wordsmiths*, 69 N.Y. St. B.J. 12, 13 (Nov. 1997).

4. Mark Twain, The Tragedy of Pudd'Nhead Wilson Ch. 11 (Pudd'nhead Wilson's Calendar) (1894).

5. For more on throat-clearers, see Gerald Lebovits, The Legal Writer, *Writers on Writing: Metadiscourse*, 74 N.Y. St. B.J. 64 (Oct. 2002).

6. Alexander Hamilton, Federalist 33.

7. Albert M. Rosenblatt, *Brief Writing and Oral Argument in Appellate Practice* 24 Trial Lawyers Q. 22, 22 (1994).

8. A remarkable history of the language of the law, from "Before the Normans" to "Law Language in America," is found at David Mellinkoff, The Language of the Law 33–282 (1963).

9. For more on this topic, see Gerald Lebovits, The Legal Writer, *"Of" With Their Heads: Concision*, 73 N.Y. St. B.J. 64 (Nov./Dec. 2001).

10. Six. Example taken from quiz e-mailed to the author

11. Anticipating this column, the Association of the Bar of the City of New York recently changed its name to the New York City Bar Association. *Compare* http://www.abcny.org *with* http://www.nycbar.org.

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EDITOR'S NOTE

In June 2006, Robert A. Barrer was honored with a Burton Award for his article, "Unintended Consequences: Avoiding and Addressing the Inadvertent Disclosure of Documents," which was published in the November/December 2005 *Journal*.

Described as "the Pulitzer of the legal profession," the Burton Award is dedicated to the enrichment and refinement of writing in the legal profession and honors lawyers who use clear, concise language to comment on important legal issues. The awards are presented by the Burton Foundation, a nonprofit, cultural, and academic organization devoted to promoting the legal profession, in association with the Library of Congress and the Law Library of Congress. Award recipients were selected from nominations by deans of all the law schools in America and also by managing partners of the 1,000 largest U.S. law firms. This year's awards dinner was held in the Great Hall of the Library of Congress in Washington, D.C.

Barrer is a partner at Hiscock & Barclay, LLP's Syracuse office, where he is the firm's CLE Coordinator and liaison with the New York State CLE Board. ■

Attorney Professionalism Forum
Continued from Page 49

At her deposition, several months ago, my client's in-house counsel testified that the contract that underlies the case was "fully" executed when it crossed her desk. However, my file contains a copy that was received from the other party during discovery which is signed by one of its officers, but not by one of my client's, as opposed to the one that my client's in-house counsel produced, which bears signatures from both sides.

I recently learned from another source, namely my client's former office manager, that the contract was not signed at the time in question by the officer whose signature appears on the document, which raised the possibility that in-house counsel intentionally lied at her deposition. When I confronted her about it, she was evasive, leading me to conclude that indeed she may have lied.

I am close to settling the case, but I am unclear as to what my obligations are to the other side. How sure do I have to be that in-house counsel lied at her deposition? If she did lie, how much am I required to reveal in our negotiations? What do I do if the negotiations break down?

Sincerely,

Perplexed by Possible Perjury

President's Message
Continued from Page 6

must preserve the distinction between advocate and judge; we could not simultaneously be both advocates for one candidate and judges of all the candidates. The Executive Committee supported my decision. Accordingly, we adhered to our traditional role.

The process described above has important implications for two of the major themes of my Presidency: to preserve and defend core values and to promote and implement needed reform. Independence of the judiciary is a core value of our Association and our profession, and a cornerstone of America's legal system. By working to ensure that only outstanding, meritorious, fully qualified individuals are appointed to the Court of Appeals, and by conducting a neutral evaluation of the candidates, we help to preserve an independent bench. Moreover, through our participation in this process, we demonstrate that merit selection of judges is feasible and realistic, and we further the Association's longtime goal of achieving that reform elsewhere in the system. ■

NEW MEMBERS WELCOMED

FIRST DISTRICT
Elissa Robin Aaronson
Katerina Abdilova
Linda Jeannine Acevedo
Alastair Jan Agcaoili
Farah Sajjad Ahmed
Robert D. Aicher
Allyson Rachel Albert
Anna Aleksander
Chava Menucha Allswang
Nilly Alshech
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Harel Israel Arnon
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Matthew Jack Bacal
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Katherine Louise Ballengee
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Matthew Jacob Borah
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Jennifer Michelle Brown
Erika Bree Browne
Keith Richard Bruno
Jane Holst Byrialsen
Cynthia Ann Caillavet
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Jacqueline Britt Cheney
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William Chou
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BY GERALD LEBOVITS

The Department of Redundancy Department: Concision and Succinctness — Part II

The Legal Writer continues from last month, discussing concision techniques.

"To" Can Be Too Much. "To" can be stilted and legalistic.

Trim "to" stilts: "Cite to the record" *becomes* "cite the record"; "Help to prepare" *becomes* "help prepare"; "In a position to" *becomes* "can"; "In addition to" *becomes* "and," "besides"; "In an attempt to" *becomes* "to"; "In an effort to" *becomes* "to"; "In order to" *becomes* "to"; "In order for" *becomes* "for"; "In regard to" *becomes* "in"; "In relation to" *becomes* "about," "concerning," "with"; "Is able to" *becomes* "can"; "Is applicable to" *becomes* "applies to"; "Is authorized to" *becomes* "may"; "Is binding upon" *becomes* "binds"; "Is unable to" *becomes* "cannot"; "Make application to" *becomes* "apply to"; "Similar to," "in a manner similar to" *become* "like"; "So as to" *becomes* "to"; "Where is he going to?" *becomes* "Where is he going?"; "With reference to" *becomes* "about"; "With regard to" *becomes* "about"; "With respect to" *becomes* "about," "on."

Lessen "to" legalisms: "Had occasion to" (rephrase or delete); "Is required to" *becomes* "must"; "Is unable to" *becomes* "cannot"; "Previous to" *becomes* "before";[1] "Prior to" *becomes* "before"; "Proceeded to" *becomes* "went" (or delete); "Pursuant to" *becomes* "under"; "Subsequent to" *becomes* "after," "later"; "To the effect that" *becomes* "that"; "Unto" *becomes* "to"; "With a view to" *becomes* "to"; "With the object being to" *becomes* "to."

Crush Compound Prepositions. Replace compound prepositions with a more concise expression or word: "in connection with," "in relation to," "in case of," "in the instance of," "on the basis of."

Prohibit Pleonasm. Pleonasms are unnecessarily full expressions. Pleonasms are double subjects, or pronominal appositions: "The court, *it* held that . . . ." *Becomes:* "The court held that . . . ." "The law clerk, who e-mailed me, *she* likes me." *Becomes:* "The law clerk, who e-mailed me, likes me."

Use Ellipticisms. Ellipticisms prevent word repetition: "At the estate sale the judge's robes brought $100, the judge's books brought $1000, and the judge's gavel brought $10." *Becomes:* "At the estate sale the judge's robes brought $100, the judge's books, $1000, and the judge's gavel, $10."[2]

Mind Your "Manner" Phrases. "He appeared in court in a disheveled manner." *Becomes:* "He appeared in court disheveled." "She dresses in a grotesque [*hasty*] manner." *Becomes:* "She dresses grotesquely [*hastily*]." "He acted in a negligent manner." *Becomes:* "He acted negligently" or "He was negligent."

The Nature of Character. Excise "nature" and "character" if you can: "Acts of a hostile nature [or *character*]" *becomes* "hostile acts."

Factor Out Degrees. Excise "factor" and "degree" if you can: "Plaintiff relied on [delete *the factor of*] surprise." "The juror showed [delete *a*] great [delete *degree of*] interest in the case."

Mortgage Your Modifiers. If you use vigorous verbs and concrete nouns, you will not need to bolster lifeless verbs and vague nouns with wordy modifiers.

Liquidate Legalisms Forthwith. Whereas some believe that legalisms add content, as noted hereinabove, *supra*, legalisms are amateurish substitutes for clear exposition. You're now forewarned: Res ipsa loquitur. As Judge Rosenblatt explained, "The shift in the language of the law has, I submit, taken a healthy turn toward economy and exactitude, with no loss of color. The turgid phrases of yesteryear have undergone some down-sizing."[3]

In addition to being pretentious, legalisms are unnecessary. Which word can you cut in the following sentences? The empty legalism: "I enclose *herewith* a copy of the court's opinion." (Delete "herewith.") "You're advised *herein* not to use 'herein.'" (Delete the first "herein.") Richard Nixon's resignation letter of August 9, 1974, to Secretary of State Henry Kissinger: "I *hereby* resign the Office of President of the United States." (President Nixon could have deleted the "hereby.") "Defendant has a *prior* conviction." Delete "prior." (The "has" already suggests that defendant doesn't have a future conviction.)

How do you make legal jargon shorter and more concrete? By eliminating legal jargon: "In the instant case" or "in the case at bar" *becomes* "here" or "in this case." (*Or*, even better, go right to the facts of your case with a thematic transition.) "The court below" or "the lower court" (name the court, especially if more than one "court below" or "lower court" heard the case).

Abjure Unnecessary Adjectives and Adverbs. Choosing the right, specific vigorous verb or concrete

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