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NEW YORK STATE BAR ASSOCIATION

Journal

The Model Guardianship Part

A novel approach to protecting the interests of incapacitated persons.

by H. Patrick Leis, III

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DEPARTMENTS

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MARK H. ALCOTT

Voice of the Profession; Advocate for the Public

The ancient Roman deity Janus, symbol of all beginnings, used his two faces to stare resolutely in opposite directions: forward and backward. That image captures my mood as I take the helm of our Association, while concluding my tenure as President-Elect. I look forward with unrestrained enthusiasm to my term as President, which is now at hand; I look backward with great satisfaction on my term as President-Elect, which is receding into history. In this, my first President's Message, let me deal with both, starting with the year just ended, in which I chaired the House of Delegates.

And what a year it was, full of intense and fulfilling debate and decisions on issues of great consequence to the profession and the public we serve. In fact, it was more than a year; I presided over the House even before the beginning of my term. In January and April 2005, the House considered the legal disadvantages encountered by same-sex couples. Both the President-Elect and the President recused themselves from chairing that portion of the meeting, due to their strong personal views on the subject and their desire to participate in the debate; so I took the gavel.

Consequently, for a year and a half, I had a special opportunity to lead the House, work with the House, observe the House. But my experience with the House of Delegates started long before that. I stood at its podium for the first time in the late 1980s, to offer reports and resolutions on behalf of my section.

In those days, the House was sharply divided among different regions, practice environments and ideologies. Most important, there was a clear difference of opinion about the role of the House and, indeed, the role of the Association. The dominant view was that the State Bar was akin to a trade association. There was an "us against them" mentality toward the Office of Court Administration and the Legislature. According to this point of view, our job was to fight for the narrow special interests of lawyers, resist any legal or administrative reform that would affect lawyers, and keep away from "controversial" issues, however law-infused, that did not directly impact our day-to-day professional lives.

This philosophy manifested itself on the floor of the House where, for many, procedural maneuvering was more important than substantive debate. Indeed, the maneuvering was often designed to prevent substantive debate. Motions to amend, points of order and motions to table were the order of the day.

But, that was then. This is now. The House, like the Association for which it speaks, is now quite a different entity. Today, the House is the advocate for the public as well as the profession. It is the vigorous, clear voice of the New York legal community, but it is also a champion of the public interest. Today, the House almost never finds itself embroiled in pointless, procedural tangles. It is now a forum for civil debate and dialogue, a source of ideas and proposals, the embodiment of the ideals of our profession and a showcase for the talent of our profession.

No longer does the House avoid controversial issues. From suspending the death penalty, to increasing the passing score on the bar examination, to deciding what does and does not qualify as pro bono services, the House has faced tough issues head-on. And while there was understandable concern that doing this might drive members away, it appears that members understand the Association's changing role. Indeed, members expect the

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House to be on the front lines of cutting-edge, law-related issues, no matter the level of controversy. The touchstone must always be that these *are* law-related issues, and that each delegate brings to the debate his or her professional experience, legal expertise and clarity of thought as a lawyer.

The matters we dealt with in the House during my tenure as presiding officer reflect this rich diet. To recall just a few:

1. We strongly defended the independence of our judiciary and our court system, by

- opposing the proposal to forbid courts from considering international sources in interpreting the Constitution;
- resisting efforts to strip the courts of their power to grant habeas corpus relief;
- opposing the grossly misnamed and access-barring Lawsuit Abuse Reduction Act;
- supporting fair and reasonable compensation for our judges;
- deploring the intemperate and inappropriate criticism of the Supreme Court over the *Kelo* decision.

2. We took major steps to preserve and enhance the dignity, integrity and independence of our profession, and to protect our clients, by

- defending the attorney-client privilege;
- improving the oversight of lawyer advertising;
- overhauling and strengthening our ethics rules;
- providing for law practice continuity.

One might have expected the House, in confronting those divisive issues, to engage in heated, fierce and perhaps even intemperate debate. After all, lawyers regularly engaged in legal argument know that the fine line between zealous and excessive advocacy can be difficult to find. But that line does exist, and good advocates know it. It is possible to approach legal issues with both passion and compassion. Indeed, such an approach is crucial to success, both in the courtroom and the House of Delegates, and my experience in presiding over that body demonstrated as much.

It was an extraordinary year and a great ride for me, and I am enormously grateful for the opportunity. I am particularly grateful that I was in partnership with President A. Vincent Buzard, a true friend and an outstanding leader whose accomplishments were exceptional.

Now, facing forward, I look toward an even greater opportunity. I will unveil my detailed agenda and initiatives at the first House of Delegates meeting in Cooperstown, in a few weeks. But let me share with you my major themes, as follows:

1. Defend and strengthen core values.

2. Promote and implement major reform.

3. Enhance the practice of law.

4. Advance the rule of law.

The major issues confronting us and our public fall within these themes.

Our core values. There are four:

- independence of the courts;
- independence of the bar;
- diversity of the profession;
- access to justice for the poor and the disadvantaged.

We face enormous challenges in each of these areas. Our judges and our profession are under attack. As indicated above, we responded to those attacks during the past year, and will continue to do so during my tenure. Despite our efforts, racial minorities are still not adequately represented in the bar or in our Association; women still confront the glass ceiling. And the legal needs of the weakest and most vulnerable members of our society go largely unfilled. These issues will engage my full attention in the year to come.

Access to justice remains at the center of the Association's focus. We must continue to press for adequate funding of legal services, and we scored a major triumph in that area, under President Buzard's leadership, when the Legislature overrode the Governor's recent veto of legal services funding. But beyond government funding, lawyers have a special role to play in providing legal services to the poor through pro bono representation. The call to perform pro bono services, to "do the public good" in our Association's apt phrase, speaks to lawyers' finest instincts. The call reminds us why we chose to enter the profession in the first place, and we must respond. Lawyers dedicated to pro bono efforts should receive honors and incentives designed to encourage their continued service. Thus, one of my initiatives is that all lawyers who voluntarily self-certify to the Association that they have rendered a sufficient number of hours annually of free legal services to the poor will be awarded the official, honorific title "Empire State Counsel," which they can use on business cards and letterheads and in biographical reference books, together with an appropriate certificate, a listing on the Association's Web site and recognition at a public ceremony.

Over the next year, we must continue our effort to promote gender and ethnic diversity at all levels and in all facets of our profession, up to the highest tiers of the bench and bar, law firms, law schools and boardrooms. We have a number of committees and task forces tackling the issue of diversity. Further, we are working to develop and promote acceptance of flexible work arrangements and professional lifestyles to meet the needs of our members who have child care or other significant family responsibilities, and who need flex time or other innovative arrangements to help them pursue their careers.

Reform. Opportunity is knocking on issues of singular importance.

Judicial selection will take center stage. The United States Court of Appeals for the Second Circuit has expedited and is scheduled to hear the appeal in *LopezTorres v. New York State Board of Elections* this month. The Court

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NYSBACLE

Schedule of Spring 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.

The New Regime in Medicaid Planning – Changes Wrought by the Deficit Reduction Act of 2005
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June 5	Syracuse
June 8	Buffalo

Attorney Trust Accounts – What Every Attorney Needs to Know
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.5): 4.5 in ethics and professionalism

June 5	New York City
June 15	Melville, LI

Public Sector Labor and Employment Law in New York State
+Fulfills NY MCLE requirement (7.0): 1.0 in ethics and professionalism; 6.0 in skills and practice management and/or professional practice

June 6	New York City
June 8	Albany
June 9	Rochester

The New World of Real Estate Financing
Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 in ethics and professionalism; 2.0 in skills; 4.0 in practice management and/or professional practice

June 7	Rochester
June 9	Albany

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

June 7	Melville, LI
June 15	Rochester
June 16	Albany
June 22	Ithaca
June 23	Syracuse

Bridging the Gap: Crossing Over Into Reality II
(two-day program)
Fulfills NY MCLE requirement for all attorneys (16.0): 3.0 in ethics and professionalism; 6.0 in skills; 7.0 practice management and/or professional practice

June 8–9	New York City

Basics of Bankruptcy Practice
Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 in ethics and professionalism; 1.5 in skills; 5.0 in practice management and/or professional practice

June 13	Albany; Buffalo; Melville, LI; New York City; Rochester; Westchester
June 14	Syracuse

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

June 16	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.

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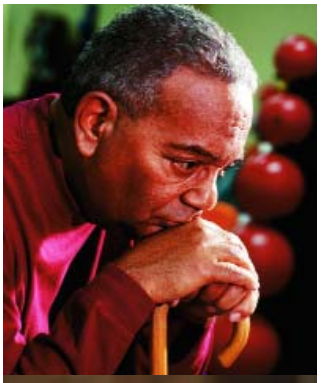
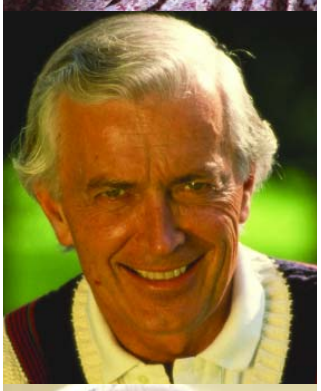
The Model Guardianship Part

A Novel Approach

By H. Patrick Leis, III





H. Patrick Leis, III, District Administrative Judge in Suffolk County since November of 2003, has served on the bench for 20 years. He was designated in February 2005 as the Presiding Justice of the newly created Model Guardianship Part for New York State and serves as Co-Chair of the Guardianship Task Force for the Second Judicial Department.

Chief Judge Judith S. Kaye, recognizing the importance of prioritizing and protecting the interests of incapacitated persons, announced in her 2005 State of the Judiciary address the establishment of a Model Guardianship Part in Suffolk County. Chief Judge Kaye envisioned a pilot court that would bring a holistic approach to guardianship proceedings.

Implemented in 2005, Suffolk County's model court is a work in progress. It integrates all pending cases involving the incapacitated person before one judge; provides specialized training for family members appointed as guardians; explores mediation as a tool in facilitating the resolution of conflicts; assures that allegations of abuse of incapacitated persons receive immediate attention; utilizes volunteers to monitor the status of the incapacitated person after a guardian has been appointed; and through the newly created position of court examiner specialist, oversees court examiner functions and guardians' compliance with their obligation to file timely reports and accountings.

Suffolk County's pilot guardianship court is a problem-solving court that is analogous to the recently established drug treatment courts, integrated domestic violence courts, mental health courts and community courts. In addition to determining legal issues, the pilot court addresses the need for maintaining or restoring trust, peace, and harmony within the incapacitated person's life. This holistic approach to guardianships is best described as restorative jurisprudence.[1]

In keeping with the Chief Judge's vision, every individual entering the Model Guardianship Part, whether suffering from cerebral palsy, mental retardation, head injury, dementia or Alzheimer's disease, whether a child or adult, has his or her needs addressed by the court in a caring, understanding and professional manner. Each respondent who is alleged to be in need of a guardian is entitled to receive from the judicial system the same dignity and respect we would want to receive were we or a loved one in the same position. "It is after all, the way a society treats its weakest and most vulnerable members that it ultimately will be judged."[2]

Having all of an alleged incapacitated person's legal proceedings assigned to one judge familiar with his or her pending case enables the court to discern the core issues driving the litigation.

In the pilot court, empathy is the defining force. Envisioning oneself in the position of an alleged incapacitated person and attempting to understand his or her feelings of vulnerability, fear and hopelessness allows the judge to determine core issues and facilitates restorative jurisprudence.

Best Practices

Integration of cases is a cornerstone of the model part, incorporating the "one family one judge" formula successfully employed in the Integrated Domestic Violence Courts. Having all of an alleged incapacitated person's legal proceedings assigned to one judge familiar with his or her pending case enables the court to discern the core issues driving the litigation. Once the core issues are resolved, the collateral proceedings are often disposed of more effectively.

Moreover, integration of all legal proceedings involving the alleged incapacitated person, before one judge, minimizes court appearances, reduces costs, promotes comprehensive decision making, and prevents contradictory determinations of factual issues. The following types of cases have been heard in the pilot court: foreclosure actions; summary eviction proceedings; civil forfeiture proceedings; felony and misdemeanor criminal proceedings, including elder abuse; matrimonial actions; various civil proceedings; and applications for orders of protection in the family and district courts.

It is helpful for the judge presiding in the integrated guardianship part to have had prior judicial experience in the areas of criminal law, family law, and general civil litigation, in addition to guardianship law. This enhances the court's ability to serve the interests of incapacitated persons in an efficient and expedited manner.

The pilot court places a special emphasis on the physical arrangement of the courtroom, with the aim of ensuring that the alleged incapacitated person's experience in court is positive. Many respondents are physically frail, elderly or disabled. Others suffer from dementia or Alzheimer's disease and are easily agitated or disoriented when removed from familiar surroundings. Upon their arrival in the courtroom, they are addressed by the staff in a warm, comforting, and friendly manner in order to set them at ease and alleviate their fears.

In an effort to prevent alleged incapacitated persons from waiting at the courthouse unnecessarily, each case is assigned a specific time on the calendar. This practice is intended to prevent or at least minimize any physical discomfort that an alleged incapacitated person might endure while waiting for other cases to be heard.

Three counsel tables are placed strategically in the courtroom. Two tables sit adjacent to each other as in traditional courtrooms. The respondent and his or her counsel or health care aide sit at a third table which is located immediately in front of the other two and facing the bench. This eliminates distractions and permits the alleged incapacitated person to focus directly on the judge and converse in a relaxed, informal manner.

Recognizing that approximately one-third of Americans between the ages of 65 and 74 have hearing impairments and that over one-half the people who are 85 and older experience hearing loss,[3] the model part provides assisted hearing devices when needed. In addition, when the presence of the alleged incapacitated person has been waived, petitioners are asked to provide a photograph. Putting a face to a name helps to personalize the proceeding and allows the court to focus directly on the individual needs of each person alleged to be incapacitated.

Mediation

Cases assigned to the pilot court are among the most contentious. On the hearing date, the court conferences all cases on the record with the attorneys and their clients in an attempt to encourage a resolution of the pending issues through discussion and negotiation. The court has also incorporated mediation techniques into the conferencing of cases, which provides the parties with the opportunity to take control of the proceeding and forge their own agreement. This has resulted in a drastic reduction in the number of contested hearings. Simply listening and giving each party a chance to air his or her grievances and concerns often engenders a catharsis, paving the way to compromise and resolution.

In addition to conferencing cases, mediation is a valuable tool the court uses in helping to resolve conflicts that arise in the incapacitated person's family. The model part has successfully utilized mediation to assist in restoring

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communication, understanding, trust, and harmony among the family members of the incapacitated person.

In this method of resolving disputes, a neutral mediator assists the parties in identifying and understanding the issues driving the litigation with the ultimate goal of having the litigants reach an agreement. Mediators are trained to be attentive to the emotions and perceptions of the parties and to help them acknowledge the validity of each other's viewpoints.[4] The mediator stresses communication and understanding and serves more as a facilitator of discussion than a director of resolutions.[5]

Experience has shown that parties are more likely to honor an agreement reached through mediation because they crafted it themselves. Moreover, a mediator can devote more time than a court to the parties' issues and has the capacity to draw out deeply entrenched problems within the family. Where possible, it is important that mediators meet with the alleged incapacitated person in order to fully appreciate his or her particular interests and needs.

Volunteer mediators are assigned to guardianship matters through the Educational Assistance Corporation's (EAC) mediation program. The court has also established a roster of mediators who charge on a sliding-scale basis, and are assigned by the court in appropriate circumstances. In addition, the resource coordinator is trained as a mediator and is available to meet with the parties on the same day the court conferences the case.

Where one of the parties has an upper hand or exercises a great deal of control over the other, mediation may not be advisable.

Although mediation is generally used after the establishment of a guardianship, there are instances where it is enlisted before the hearing. As a general rule, however, hearings will not be adjourned pending mediation, as Mental Hygiene Law Article 81 hearings are time-sensitive and are required to be held within 28 days after the filing of the petition.[6] There are exceptions to this rule, but they are rare.[7]

It is important to note that parties in mediation are never required to reach an agreement. Further, confidentiality agreements are executed as a condition of mediation in order to ensure that nothing that transpires before a mediator may be used as evidence in a judicial proceeding.

Allegations of undue influence or coercion of the alleged incapacitated person are common. Where one of the parties has an upper hand or exercises a great deal of control over the other, mediation may not be advisable. Likewise, mediation is not appropriate in cases of alleged violence, elder abuse or coercion.

Monitoring

New York's Article 81 addresses the need to safeguard the assets and property of individuals found to be in need of guardians. The Legislature envisioned that this would be accomplished via the appointment of court examiners to review guardians' 90-day and annual reports. In practice, however, as annual accountings are not due until May of each year, a lengthy period may elapse between the appointment of a guardian and the filing of the first annual accounting. Therefore, any misappropriation of funds or omission on the part of the guardian may not be detected by the court examiners for well over a year. Thanks to the efforts of Honorable A. Gail Prudenti, Presiding Justice of the Appellate Division, Second Judicial Department, and Honorable Jonathan Lippman, Chief Administrative Judge for the State of New York, the position of court examiner specialist has been newly established in all the guardianship parts of the Second Department. The position has also been instituted in the First Department.

The court examiner specialist monitors compliance with the court's orders. At the conclusion of the guardianship hearing, the matter is adjourned for a compliance conference before the court examiner specialist who makes an inquiry as to whether the order and judgment was submitted and whether the guardian obtained a bond, received a commission, and filed a 90-day report.

A critical function of the court examiner specialist is to confirm that guardians are complying with judgments requiring the posting of bonds. In the pilot court, a written order is issued appointing a court examiner on the same day as the guardianship hearing. This order requires the examiner to report to the court examiner specialist in the event that the guardian has not obtained a bond within 30 days of the hearing. The importance of requiring fiduciaries to obtain bonds was illustrated by the recent prosecution of a court-appointed attorney guardian for the theft of over $2 million from the guardianship accounts of 14 incapacitated persons.[8] Fortunately, the guardian was bonded, and the guardianship estates were made whole by the bonding companies. Had bonds not been posted, a number of incapacitated persons would have lost their entire life savings.

A resource coordinator is assigned to the pilot court in order to closely monitor the health and welfare of individuals found to be incapacitated. While most guardians are well-intentioned, there are instances in which the personal needs of incapacitated persons have been compromised, even at the hands of caregivers who are family members. These circumstances underscore the necessity of enlisting monitors in the field after the establishment of guardianships.

In an effort to safeguard incapacitated persons already under the care of court-appointed guardians, the pilot court has, in conjunction with EAC, implemented a program by which volunteer case monitors are appointed. The resource coordinator oversees the appointment of the volunteer monitors and assists in their training in the area of gerontology and elder abuse.

The role of the monitor is to visit incapacitated persons in the community, whether they reside in their own home, another's home or a residential facility, and to assure that their personal needs are not being neglected. The monitor submits a written report to the court regarding the health, safety and welfare of the incapacitated person.

In addition, the resource coordinator marshals community resources and facilitates their availability to incapacitated persons, their guardians, families and caregivers. In this regard, the resource coordinator identifies local community resources including, but not limited to, public benefits, nursing homes, geriatric caregivers, adult daycare programs, respite care and home health care resources. The resource coordinator also serves as a liaison with Suffolk County community stakeholders, particularly Adult Protective Services, the District Attorney's office, the Sheriff's Department, the Police Department and the Suffolk County Task Force to Prevent Family

Violence. In sum, the resource coordinator assists in fulfilling the overall mission of the pilot court to provide a holistic problem-solving approach to guardianship proceedings, which gives priority to the emotional and psychological well-being of incapacitated persons who come before the court.

Pro Bono Initiative

Suffolk County's local Pro Bono Action Committee was established through the Deputy Chief Administrative Judge for Justice Initiatives, Honorable Juanita Bing Newton. The Committee has partnered with the Suffolk County Bar Association's Pro Bono Project in an initiative by which experienced elder law attorneys will mentor newly admitted lawyers in representing petitioners and drafting guardianship petitions on behalf of indigent parties.

Chief Judge Kaye's vision for a model guardianship court includes the implementation of a pilot public-guardian program to assume responsibility in cases in which incapacitated persons are of limited means and have no friend or relative willing to step in and serve as guardian. Because the pool of attorneys who are able to serve as pro bono guardians and assume the overwhelming and demanding responsibilities for a stranger is dwindling, this issue requires urgent attention on a statewide basis. The court system is working with Suffolk's Pro Bono Action Committee to explore the feasibility of implementing a pilot public-guardian program in Suffolk County.

Conclusion

Chief Judge Judith S. Kaye's initiative for a holistic, problem-solving approach to guardianship proceedings has already realized a profound impact: a more humane, empathetic and cohesive treatment of incapacitated persons.

Finally, guardianship proceedings in the pilot court provide the judge, the judge's staff, and the guardianship bar in general, with the unique opportunity of assisting those who are in dire need in a novel way and of observing the loving interaction among family members, caregivers and the incapacitated person. Whether parents, spouses, siblings, or friends, these selfless individuals provide loving care for those who suffer from debilitating illnesses and injuries. Moreover, dedicated and compassionate attorneys and volunteers who agree to accept the responsibility to act as guardians, monitors, and mediators are an integral part of the pilot court as well. The commitment and contributions of all of these dedicated individuals are immeasurable. It is hoped that the lessons being learned in the pilot court will serve to benefit the future of guardianship proceedings throughout New York State. ■

1. The concept of restorative jurisprudence is to be distinguished from the theory of restorative justice which involves offender accountability and repairing the harm done to victims in criminal law. For further discussion see *Restorative Justice Online*, the Centre for Justice and Reconciliation, Prison Fellowship International *at* <www.restorativejustice.org>.

2. Hon. H. Patrick Leis, III, *Judicial Perspectives 2004*, Guardianship Practice in New York State s-xxix (Robert Abrams, ed. 2004).

3. National Institute on Aging, *Age Page, Hearing Loss*, U.S. Dept. of Health and Human Services, National Institute of Health, Sept. 2002.

4. Robert Grey, *Mediation in Guardianship Practice*, Guardianship Practice in New York State (Robert Abrams, ed. 2004).

5. C. Menkel-Meadow, L. Love, & A. Schneider, Mediation – Practice, Policy, and Ethics (2006).

6. *See* Mental Hygiene Law § 81.07(b).

7. Adjournments for the purpose of conducting mediation are only permitted where the court is satisfied that the status quo will be maintained. For example, the parties agree to the appointment of a temporary guardian who is given powers to maintain the health and welfare of the alleged incapacitated person during the pendency of the mediation.

8. Report of the Grand Jury, Supreme Court, Queens County, Issued Pursuant to Criminal Procedure Law § 190.85(1)(C), Concerning Thefts from Guardianships (Eighth Grand Jury, Sept. 2003–Mar. 2004 Term).

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.

"Will the Gatekeeper Let *Daubert* In?"

Last month's column reviewed *Frye*'s dominant role in determining the reliability of scientific evidence in New York state courts. In the parallel universe into which state court litigators occasionally cross – the federal courts in New York – *Daubert* governs the admissibility of scientific and technical evidence.

I come not to praise *Daubert*, nor to bury it, and have no intention of reinventing the wheel[1] by discoursing at length on *Daubert* qua *Daubert*. A good number of prior *Journal* articles have thoughtfully considered *Daubert*, and two recent ones provide a fine foundation on this topic, albeit from different perspectives.[2] Instead, the focus here is on the inroads, real and imagined, that *Daubert* has made in state practice.

In 1993 the United States Supreme Court decided *Daubert*.[3] This decision, along with subsequent cases refining *Daubert* and expanding its scope, represented a sea change from the federal courts' long-standing application of the *Frye* test. No longer was general acceptance within the scientific community to be the key. Instead, performing what the Court referred to as its "gatekeeping" function, federal district court judges were to make an initial determination, after a hearing, as to whether an expert was qualified to testify. The determination was to be made by applying a number of factors, among them whether the expert's concept had been tested, the known rate of error for the testing, whether the concept had been subjected to peer review, and whether the concept is generally accepted within the appropriate scientific community. The Supreme Court's subsequent ruling in *Kumho Tire*[4] extended the *Daubert* gatekeeping role and criteria from scientific testimony to all expert testimony.

Twice since *Daubert* was decided, the New York State Court of Appeals has reaffirmed that *Frye* remains the standard in New York,[5] most recently in 1996. The Court of Appeals in the 2000 *Andon* decision, reviewing the scope of expert disclosure permitted in an infant lead-paint exposure case, made clear its disdain for turning the "fact-finding process into a series of mini-trials."[6] "While open discovery is crucial to the search for truth, equally important is the need to avoid undue delay created by battling experts."[7] This language from *Andon* may be an important signal for the manner in which the Court of Appeals will evaluate the practical implications of using *Daubert* as a standard in state courts. If federal practice is any guide, implementing *Daubert* in New York would necessitate far more extensive motion practice and hearings than currently occur under *Frye*.

Despite the clear language from the Court of Appeals reaffirming *Frye*, the prospect of utilizing *Daubert* in state court proceedings has been advocated by attorneys, mainly those representing defendants, and has proved tantalizing to a number of judges at the trial level.

In applying *Frye* in analyzing whether a particular theory has gained general acceptance, New York state court judges often must review federal cases where *Daubert* was the standard used in assessing the same theory. In these situations, analysis and discussion of *Daubert* is all but inevitable. One early decision opined:

> *Frye* and *Daubert*, in the greater number of cases, will produce similar results. There may be instances, however, in which the criterion of general acceptance by the relevant scientific community will play a decisive and differentiating role. This is such a case. The present Federal rule, which dethrones the general acceptance test, is the expression of a reformist zeal to clear the underbrush and open all pathways to the truth. The *Frye* rule, in that context, is contrariant. Nevertheless, it faithfully reflects and supports the traditional reluctance of the common law to upset established liberty and property interests without good cause, supported by a preponderance of credible and reliable evidence.[8]

Appellate courts have approved the review of *Daubert* opinions by state trial court judges in this context. "We note that although federal courts use the broader *Daubert* test instead of the *Frye* standard in connection with determining the admissibility of scientific expert testimony, it is instructive to examine federal authority for purposes of discussion of accepted scientific methodology."[9]

In the first reported decision where a New York trial court applied *Daubert* to determine whether an expert was

qualified, the plaintiff had called an expert to testify concerning vehicle stability, and the expert sought to testify concerning a theory of vehicle dynamics he had developed. The court concluded that the expert was qualified to testify under *Daubert*, and explained its avoidance of *Frye*:

> Where, however, the evidence is not scientific or not novel, the *Frye* analysis is not applicable. Inasmuch as the testimony in the case at bar is that of an engineer, and inasmuch as the testimony is based upon, according to the witness, recognized technical or other specialized knowledge, the court finds that the stricter general acceptance standard of *Frye* is not applicable. The court will apply the reliability standard as derives from *Daubert* and *Kumho Tire*.[10]

Wahl was not appealed, but was criticized by another trial judge:

> This Court declines to apply *Daubert* to the facts of the pending case. Over the years, since *Wesley*, several trial courts, in New York, have decided to apply the *Daubert* standard rather than the general acceptance standard set forth in *Frye*. Nevertheless, whenever directly confronted with the issue, appellate courts have consistently rejected the idea that *Daubert* should be the controlling standard in New York rather than *Frye*.[11]

When trial courts have conducted *Daubert* or blended, self-styled "*Frye/Daubert*" hearings, and the rulings have been appealed, the appellate divisions have made clear that "New York has not adopted the *Daubert* standard, but rather continues to adhere to the *Frye* test for determining the admissibility of novel scientific evidence."[12]

In a recent decision the First Department held that the "[p]laintiff's unpreserved claim that the trial court should have applied the more flexible standard for admitting expert testimony articulated in *Daubert v. Merrell Dow Pharms.* is without merit; in any event, the *Daubert* standard would not yield a different result."[13]

While *Frye* is still supreme in New York, *Daubert* is out there, ever present, ever hopeful, waiting for an opening to permit it a starring, or at least regular, role in New York practice.

Where the expert's qualifications were at issue, rather than the theory espoused by the expert, the Second Department has cited *Daubert* and *Kumho Tire* (along with state authority) in reviewing an expert's qualifications.[14] "To establish the reliability of an expert's opinion, the party offering that opinion must demonstrate that the expert possesses the requisite skill, training, education, knowledge, or experience to render the opinion."[15]

While *Frye* is still supreme in New York, *Daubert* is out there, ever present, ever hopeful, waiting for an opening to permit it a starring, or at least regular, role in New York practice. While practical considerations may militate against *Daubert*'s adoption, and *Frye* clearly has staying power, the day may come when the perception is that *Frye*'s head-counting methodology is not suited to an ever-increasingly complex litigation arena.

So what is a litigator to do? Complacency is not recommended. While issues of admissibility often seem a long way off when an expert is first consulted, or, even later, when a CPLR 3101(d)(1)(i) response is served, it is crucial to consider any and all admissibility issues as early in disclosure (or before disclosure) as possible. There is no economy in expending time and money retaining an expert who, ultimately, is found not to be qualified.

Although *Daubert* may never become the standard in New York state courts, as a practical matter, any expert's prospective testimony should be probed and tested using the criteria set forth in *Daubert*. Even where *Daubert* plays no role in a court's determination of whether or not an expert is qualified to testify, its criteria provide a useful roadmap to be utilized by an adversary on cross-examination. It would be small consolation that an expert's testi-

mony is held to be admissible by a trial court when, thereafter, the expert's credibility is demolished in front of the jury by opposing counsel.

For now, follow *Frye*, but keep an eye over your shoulder for *Daubert*. ■

1. At some point very early in its history the wheel would, undoubtedly have been found unreliable under both *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923), and *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

2. Henry G. Miller, *The Daubert Debacle*, N.Y. St. B.J. (Mar./Apr. 2005) p. 24; Harold L. Schwab, *Is It Junk Or Genuine? Part I*, N.Y. St. B.J. (Nov./Dec. 2004) p. 10; Harold L. Schwab, *Is It Junk Or Genuine? Part II*, N.Y. St. B.J. (Jan. 2005) p. 25.

3. *Daubert*, 509 U.S. 579.

4. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

5. *See People v. Wernick*, 89 N.Y.2d 111, 651 N.Y.S.2d 392 (1996); *People v. Wesley*, 83 N.Y.2d 417, 611 N.Y.S.2d 97 (1994).

6. *Andon v. 302–304 Mott St. Assocs.*, 94 N.Y.2d 740, 709 N.Y.S.2d 873 (2000).

7 *Id*. at 747.

8. *Collins v. Welch*, 178 Misc. 2d 107, 678 N.Y.S.2d 444 (Sup. Ct., Tompkins Co. 1998) (citation omitted).

9. *Parker v. Mobil Oil Corp.*, 16 A.D.3d 648, 793 N.Y.S.2d 434 (2d Dep't 2005), *leave granted*, 6 N.Y.3d 702, 810 N.Y.S.2d 416 (2006) (citation omitted).

10. *Wahl v. Am. Honda Motor Co.*, 181 Misc. 2d 396, 693 N.Y.S.2d 875 (Sup. Ct., Suffolk Co. 1999) (citation omitted).

11. *DeMeyer v. Advantage Auto*, 9 Misc. 3d 306, 797 N.Y.S.2d 743 (Sup. Ct., Wayne Co. 2005) (citation omitted).

12. *Zito v. Zabarsky*, 2006 N.Y. Slip Op. 506, 2006 WL 205067 (2d Dep't 2006).

13. *Pauling v. Orentreich Med. Group*, 14 A.D.3d 357, 787 N.Y.S.2d 311 (1st Dep't 2005) (citation omitted).

14. *Hoffman v. Toys "R" Us, Ltd.*, 272 A.D.2d 296, 707 N.Y.S.2d 641 (2d Dep't 2000).

15. *Id*.

President's Message
Continued From Page 6

will review Judge John Gleeson's determination that New York's convention system unconstitutionally allows party leaders, rather than voters, to select the justices of the Supreme Court. Whatever the result on appeal, the issue of judicial selection will be very much in play. No system is perfect, but our Association has a long-standing policy in favor of merit selection, a policy I do not intend to abandon. We will take a close look at that policy in light of whatever the Second Circuit decides.

Moreover, three of the seven seats on our Court of Appeals will be up for reappointment, including the seat of Chief Judge Judith Kaye and the seat of our only African-American Associate Judge, George Bundy Smith. The Association will play an important role in vetting the qualifications of the candidates and will work hard to forge a relationship with the new Chief Judge. More to the point, we will take a close and skeptical look at the constitutionally mandated but archaic policy that forces still vigorous judges to leave the bench at age 70 (and, as a practical matter, even earlier).

The Court of Appeals will also decide, early in my term, the constitutional issues relating to same-sex couples. The Association is perfectly positioned to react, and it will do so. We have called on the Legislature to adopt a comprehensive solution for same-sex couples, allowing them to engage in marriage, civil unions or domestic partnerships, without specifying which of these solutions should be implemented. Whatever decision the Court reaches, the legislative issue will be in play, and we will be players.

Reform is also needed to reduce the obstacles faced by those with criminal records when attempting to return to society and their families after incarceration. Such barriers include the inability to secure employment, reunify with children, purchase property or reside in certain areas. The consequences of these barriers are far-reaching, affecting New York's families and communities, and have a disproportionate impact on minorities. The Association's Special Committee on Collateral Consequences of Criminal Proceedings, appointed by President Kenneth G. Standard, has been studying these issues, and its exceptional, ground-breaking report and recommendations will be released to the House of Delegates for discussion at the Cooperstown meeting.

The rule and practice of law. We face challenges and opportunities, at home and abroad. The Association has already spoken out on government practices and policies that, while designed to defend against terrorism, have the effect of eroding our liberties. But this is an issue which is not going away, and the Association's voice must continue to be heard.

Paradoxically, this is also a time when new democratic and legal institutions are struggling to emerge in parts of the world where they have previously been unknown. Our Association has great resources, a vast breadth and much to offer in this area, and we will do so.

What is common to each of these important issues is the manner in which we must approach them. In following the House's example, let us make ready for vigorous, intense debate that is both smart and responsive to the needs of the Association's members and the public. Together, if we act with both passion and compassion, we can find common ground and reach sensible solutions to even the most contentious issues.

Together, we can be not only the clear, compelling and effective voice of the profession but also the vigorous advocate for the public. ■

Tax Certiorari & Condemnation in the 9th Judicial District

By Thomas A. Dickerson

This is my third year presiding over the Tax Certiorari and Condemnation Law Part of the 9th Judicial District, which covers Westchester, Putnam, Rockland, Dutchess, and Orange Counties ("Tax Cert Part"). The Tax Cert Part manages numerous matters seeking, among other forms of relief, exemptions from real property taxes, reductions in real property tax assessments, and the resolution of a variety of eminent domain issues including valuation. The attorneys,[1] assessors,[2] and appraisers who have appeared in our Tax Cert Part are generally professional and knowledgeable and a pleasure to work with.

The Tax Cert Part also maintains a Web site[3] that contains Part rules and calendar[4] procedures, downloadable decisions, articles, publications, and important links.

Types of Property

The issues raised in the Tax Cert Part – particularly valuation and exemption issues – and the way in which they are analyzed and resolved have much to do with the type of real property in dispute. For example, the following types of real property have come before us within the context of trials or motions in either tax certiorari or eminent domain proceedings: two electricity-generating power plants,[5] one, oil- and gas-fired, the other, primarily, coal-fired (59-day trial); farmland including residence, barn and shed;[6] a continuing care retirement community[7] (73-day trial); a "home for the elderly";[8] a senior housing complex;[9] an adult home;[10] a branch bank;[11] single-family residences[12] including 11 townhouse-style structures;[13] apartment complexes;[14] shopping centers;[15] office buildings;[16] contaminated industrial property;[17] a burned-down bowling alley;[18] a luncheonette;[19] and various other commercial properties.[20]

Tax Exemptions

With respect to entities seeking an exemption from real property taxes, we have examined a cellular telephone tower,[21] a Free Loan Society,[22] a School Tax Relief (STAR) exemption,[23] a continuing care retirement community,[24] an adult home,[25] property owned by a religious order,[26]

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The Salvation & Praise Deliverance Center,[27] residences for clergy[28] and cultural organizations.[29]

Some Procedural Issues

We have also addressed a number of procedural issues involving the interpretation and application of 22 N.Y.C.R.R. § 202.59 to tax certiorari[30] matters and 22 N.Y.C.R.R. § 202.61 to eminent domain proceedings,[31] the proper service of tax certiorari petitions[32] and whether taxpayers are required to permit appraisers to perform interior inspections.[33]

Recent Developments

There have been a number of recent developments in the tax certiorari and condemnation law areas, including the continuing fallout in the realm of eminent domain law from the U.S. Supreme Court's decision in *Kelo v. City of New London*, the efforts of some communities to consider and implement revaluation programs, and the increasing incidence of selective reassessment cases in the tax certiorari field.

Proposed Changes in Eminent Domain Law

The U.S. Supreme Court's decision in *Kelo v. City of New London*[34] approved the taking of private property for transfer to benefit and complement the area surrounding facilities for a corporation, Pfizer, Inc.

> Those who govern the City were not confronted with the need to remove blight . . . but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. . . . We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.

The *Kelo* decision has generated many articles[35] and encouraged some New York State legislators to propose changes in New York's Eminent Domain Procedure Law providing for, among other things, greater control by elected officials,[36] greater compensation[37] and, even, jury trials on valuation.[38]

Selective Reassessment vs. Annual Reassessment

The selective reassessment of real property is a recurring issue in tax certiorari proceedings in New York State courts, particularly in the 9th Judicial District.[39] It may be, as suggested by one commentator,[40] that the incidence of selective reassessment, at least to the extent it involves reassessment to market on sale, is relatively rare in Nassau County and New York City because those taxing authorities "annually reassess all parcels (and hence) [r]eassessment on sale is thus permissible as part of these broader reassessment programs."[41] In the 9th Judicial District, however, only a few smaller municipalities in 2005[42] were in the New York State Office of Real Property Services (ORPS) annual reassessment program (now referred to as "Guidelines for the Annual Aid Program"[43]), *i.e.*, Pelham and the Town of Rye in Westchester County; Kent, Patterson, Southeast and Putnam Valley in Putnam County, and Milan, Northeast, Red Hook and Rhinebeck in Dutchess County. A number of other communities outside of Westchester County are in the midst of implementing revaluations as of this writing.

Because so few municipalities in the 9th Judicial District participate in an annual reassessment program, tax certiorari cases alleging selective reassessment are more likely to arise.

Another community in Westchester County, the Village of Bronxville, has recently approved a village-wide revaluation "aimed at making property taxes fair and equitable and ending widespread tax discrepancies."[44] The Village of Bronxville had previously initiated two studies,[45] the results of which are available on the Village's Web site.[46] The studies provide a valuable resource for communities interested in revaluation.

Annual Reassessment Programs

The ORPS annual reassessment program is based upon RPTL § 1573[47] and, according to ORPS, the advantages of participating in the program include achieving assessment equity for taxpayers, local control over the equalization rate, improved bond ratings, fewer court challenges to assessments and increased land assessments.[48] Generally, the ORPS program has been well received[49] and has been implemented by many municipalities[50] statewide. In addition, such a program implies that arm's-length, representative properties that have sold may be reassessed, using, as one factor, the sale prices of the subject property and comparable properties in the neighborhood "'so long as the implicit policy is applied even-handedly to all similarly situated property.'"[51] This would seem to apply to the initial assessment of newly created property[52] as well. In any event, because so few municipalities in the 9th Judicial District participate in an annual reassessment program, tax certiorari cases alleging selective reassessment are more likely to arise.

What Is Selective Reassessment?

The policy of selective reassessment has been found by the U.S. Supreme Court and New York courts to be a violation of the equal protection clause of both the United States Constitution and the New York State Constitution. But what exactly is selective reassessment? Generally, selective reassessment involves discrimination and a violation of equal protection. As the Supreme Court wrote in the often-cited case of *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*:[53]

> The Equal Protection Clause "applies only to taxation which in fact bears unequally on persons or property of the same class." . . . As long as general adjustments are accurate enough over a short period of time to equalize the differences in proportion between the assessments of a class of property holders, the Equal Protection Clause is satisfied. . . . [I]t does not require immediate general adjustment on the basis of the latest market developments. In each case, the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners."

The policy of selective reassessment has been found by the U.S. Supreme Court and New York courts to be a violation of the equal protection clause of both the United States Constitution and the New York State Constitution.

New York courts have also considered selective reassessment as a violation of equal protection.[54]

Specific Forms of Selective Reassessment

Selective reassessment takes many forms and has also been referred to as "reassessment upon sale"[55] and "improper assessment."[56] First, selective reassessment may involve reassessing individual properties at market rate when they are sold.[57] Second, a high coefficient of dispersion[58] may be a sign of selective reassessment.[59] Third, an increase in assessment based solely on the conversion of a 150-unit residential apartment complex to a condominium may involve selective reassessment.[60] Fourth, reassessments based on more than the value of subsequent improvements to an existing structure may involve selective reassessment.[61] And lastly there have been cases in which the issue of selective reassessment has been raised but no equal protection violations have been found, or the case was remanded for trial.[62]

Conclusion

The issues raised in the tax certiorari, tax exemption and condemnation law areas are exciting, indeed, and of considerable importance to municipal taxing authorities and real property taxpayers. ■

1. Westchester County Bar Association *at* <www.wcbany.org>; Tax Certiorari and Condemnation Law Committee, William E. Sulzer, Chairman, *at* <WES@GCVPC.com>; Rockland County Bar Association *at* <www.rocklandbar.org>, Tax Grievance Committee, Mark Goodfriend at <MNDJS2@aol.com> and Alan Simon, Chairpersons; Nassau County Bar Association *at* <www.nassaubar.org>, Condemnation and Tax Certiorari Committee, Edward C. Mohlenhoff, Chair, *at* <ecm@nytaxappeal.com>; Suffolk County Bar Association *at* <www.scba.org>, Tax Certiorari Committee, Scott Desimone, Chair; New York County Lawyers' Association *at* <www.nycla.org>, Condemnation Law Committee, Michael Rikon, Chair, *at* <mrikon@ggrgpc.com>. *See also* American Bar Association, Property Tax Committee, Melinda Blackwell, Chair, *at* <Melinda@txtax.com>, and David C. Wilkes, Vice Chair, *at* <dwilkes@huffwilkes.com>; Real Property, Probate and Trust Law Section, Condemnation Committee, Michael Rikon, Chair, *at* <mrikon@ggrgpc.com>; Monroe County Bar Association at <www.mcba.org>; Tax Certiorari Committee, Robert A. Feldman, Esq., Chairman, *at* <mailto:raf@wnhr.com>.

2. Westchester County Chapter John McGrory, IAO, President, *at* <jmcgrory@town.new-castle.ny.us>; New York State Assessors' Association *at* <www.nyassessor.com>, Patrick Duffy, President, *at* <pduffy@townofmanlius.org>; *see also* International Association of Assessing Officers at <www.iaao.org>.

3. <www.nycourts.gov/courts/9jd/taxcert.shtml>.

4. Calendar information is available <www.courts.state.ny.us>. For additional assistance please contact Ms. Brenda V. Mechmann, Principal Law Clerk; Mr. Efraim Nieves, Associate Court Clerk; and Ms. Laura Puja, Secretary to the Judge.

5. *See, e.g., In re Orange & Rockland Utilities, Inc.*, 4 Misc. 3d 1005(A) (Sup. Ct., Rockland Co. 2004), *subsequent proceedings*, 5 Misc. 3d 1010(A), 798 N.Y.S.2d 711 (Sup. Ct., Rockland Co. 2004), *and* 7 Misc. 3d 1017(A), 801 N.Y.S.2d 238 (Sup. Ct., Rockland Co. 2005).

6. *Johnson v. Kelly*, 2006 N.Y. Slip Op. 50649(U), 2006 WL 1023917 (Sup. Ct., Orange Co. Apr. 17, 2006) (appraisal stricken, petition dismissed).

7. *Miriam Osborn Mem. Home Ass'n v. Assessor of Rye*, 4 Misc. 3d 1009(A) (Sup. Ct., Westchester Co. 2004), *subsequent proceedings*, 6 Misc. 3d 1011(A) (Sup. Ct., Westchester Co. 2005), 6 Misc. 3d 1035(A) (Sup. Ct., Westchester Co. 2005), 7 Misc. 3d 1004(A) (Sup. Ct., Westchester Co. 2005), 8 Misc. 3d 1008(A) (Sup. Ct., Westchester Co. 2005), 9 Misc. 3d 1019 (Sup. Ct., Westchester Co. 2005); 11 Misc. 3d 1059(A) (Sup. Ct., Westchester Co. 2006), *and* 11 Misc. 3d 1065(A) (Sup. Ct., Westchester Co. 2006).

8. *Application of 325 Highland LLC v. Assessor of Mount Vernon*, 5 Misc. 3d 1018(A), 799 N.Y.S.2d 165 (Sup. Ct., Westchester Co. 2004) (recent purchase price in arm's-length transaction is best measure of true value of property).

9. *Nyack Plaza Housing Ass'n v. Town of Orangetown*, 7 Misc. 3d 1011(A), 801 N.Y.S.2d 237 (Sup. Ct., Rockland Co. 2005) (motion to preclude respondent from introducing evidence at trial of assessment class ratio granted; assessor required to assess all properties within its boundaries at a single, uniform overall percentage of value).

10. *Adult Home at Erie Station, Inc. v. Assessor of Middletown*, 8 Misc. 3d 1010(A), 801 N.Y.S.2d 776 (Sup. Ct., Orange Co. 2005). *Compare Jamil v. Vill. of Scarsdale Planning Bd.*, 4 Misc. 3d 642, 778 N.Y.S.2d 670 (Sup. Ct., Westchester Co. 2004), *aff'd*, 24 A.D.3d 552, 808 N.Y.S.2d 260 (2d Dep't 2005) (planning board's approval of assisted-living facility as special use in residential district upheld).

11. *Bank of N.Y. v. Assessor of Bronxville*, 4 Misc. 3d 1014(A), 791 N.Y.S.2d 867 (Sup. Ct., Westchester Co. 2004) (motion for mistrial granted due to illness of expert witness).

12. *Bock v. Assessor of Scarsdale*, 11 Misc. 3d 1052(A) (Sup. Ct., Westchester Co. 2006) (motion for summary judgment denied; no selective reassessment found); *Villamena v. City of Mount Vernon*, 7 Misc. 3d 1020(A) (Sup. Ct., Westchester Co. 2005) (new inspection and assessment ordered of residence; no

selective reassessment found); *Falbe v. Tax Assessor of Cornwall*, 8 Misc. 3d 1004(A) (Sup. Ct., Orange Co. 2005) (order directing village to pay tax refund vacated because of misrepresentations); *Young v. Town of Bedford*, 9 Misc. 3d 1107(A), 808 N.Y.S.2d 921 (Sup. Ct., Westchester Co. 2005) (use of current market value for initial assessment of newly created property; no selective reassessment found); *McCready v. Assessor of Ossining*, 2006 N.Y. Slip Op. 50719 (Sup. Ct., Westchester Co. 2006) (screening procedure for updating and correcting inventory data fair and reasonable; no selective reassessment found.

13. *Markim v. Assessor of Orangetown*, 9 Misc. 3d 1115(A), 808 N.Y.S.2d 918 (Sup. Ct., Rockland Co. 2005) (assessor failed to adequately explain assessment methodology; selective reassessment found), *modified*, 11 Misc. 3d 1063(A) (Sup. Ct., Rockland Co. 2006).

14. *MGD Holdings Hav, LLV v. Assessor of Haverstraw*, 8 Misc. 3d 1013(A), 801 N.Y.S.2d 779 (Sup. Ct., Rockland Co. 2005) (motion for summary judgment denied), *modified*, 11 Misc. 3d 1054(A) (Sup. Ct., Rockland Co. 2006) (motion to reargue granted and upon reargument earlier decision adhered to).

15. *Midway Shopping Ctr. v. Town of Greenburgh*, 11 Misc. 3d 1071(A) (Sup. Ct., Westchester Co. 2006).

16. *Reckson Operating P'ship LP v. Town of Greenburgh*, 2 Misc. 3d 1005(A), 784 N.Y.S.2d 923 (Sup. Ct., Westchester Co. 2004) (because purchasers of commercial buildings buy an "income stream" the income capitalization approach is the best method of determining value); *2 Perlman Dr., LLC v. Bd. of Assessors*, 9 Misc. 3d 382, 800 N.Y.S.2d 816 (Sup. Ct., Orange Co. 2005) (RPTL § 727(1) Moratorium; two exceptions reviewed); *MRE Realty Corp. v. Assessor of Greenburgh*, 8 Misc. 3d 1027(A), 806 N.Y.S.2d 446 (Sup. Ct., Westchester Co. 2005) (RPTL § 727(1) Moratorium; failure to timely file).

17. *D'Onofrio v. Vill. of Port Chester*, 8 Misc. 3d 1015(A), 801 N.Y.S.2d 777 (Sup. Ct., Westchester Co. 2005) (claimant's motion to exclude evidence at trial as to any diminution in the value of the property by reason of cleanup or remediation costs resulting from alleged environmental contamination granted).

18. *SKM Enters., Inc. v. Town of Monroe*, 2 Misc. 3d 1004(A), 784 N.Y.S.2d 924 (Sup. Ct., Orange Co. 2004) (petitioner's recycled 1996 appraisal submitted at the trial of 1997 tax assessment challenge stricken and 1997 petition dismissed).

19. *In re Vill. of Port Chester*, 10 Misc. 3d 1057(A) (Sup. Ct., Westchester Co. 2005) (claim dismissed as abandoned).

20. *In re Vill. of Port Chester*, 5 Misc. 3d 1031(A), 799 N.Y.S.2d 164 (Sup. Ct., Westchester Co. 2004) (condemnor ordered to pay advance payments into an escrow account pending outcome of condemnee's federal appeal in action challenging the condemnation proceeding on due process grounds; condemnor ordered to pay statutory interest of 6% on the advance payments); *In re Vill. of Haverstraw*, 9 Misc. 3d 1120(A) (Sup. Ct., Rockland Co. 2005) (motion seeking order directing condemnor to tender the remaining balance of the advance payment denied pursuant to Eminent Domain Procedure Law § 304(F) (EDPL)).

21. *Nextel of N.Y., Inc. v. Assessor of Spring Valley*, 4 Misc. 3d 233, 771 N.Y.S.2d 853 (Sup. Ct., Rockland Co. 2004) (Nextel's telecommunications equipment taxable as real property pursuant to Real Property Tax Law § 102(12)(I) (RPTL) or as common law fixtures).

22. *Gemilas Chasudim Keren Eluzer Inc. v. Assessor of Ramapo*, 5 Misc. 3d 1026(A), 799 N.Y.S.2d 160 (Sup. Ct., Rockland Co. 2004) (RPTL § 420-a(1)(a); although property was owned by tax-exempt organization it was not used primarily for the charitable activities of the society).

23. *Brodie v. Office of the Assessor*, 8 Misc. 3d 1001(A) (Sup. Ct., Rockland Co. 2005) (claim for STAR tax exemption barred by statute of limitations).

24. *Miriam Osborn Mem. Home Ass'n v. Assessor of Rye*, 4 Misc. 3d 1009(A) (Sup. Ct., Westchester Co. 2004), *subsequent proceedings*, 6 Misc. 3d 1011(A) (Sup. Ct., Westchester Co. 2005), 6 Misc. 3d 1035(A) (Sup. Ct., Westchester Co. 2005), 7 Misc. 3d 1004(A) (Sup. Ct., Westchester Co. 2005), 8 Misc. 3d 1008(A) (Sup. Ct., Westchester Co. 2005), 9 Misc. 3d 1019 (Sup. Ct., Westchester Co. 2005); 11 Misc. 3d 1059(A) (Sup. Ct., Westchester Co. 2006), *and* 11 Misc. 3d 1065(A) (Sup. Ct., Westchester Co. 2006).

25. *Adult Home at Erie Station v. Assessor of Middletown*, 8 Misc. 3d 1010(A), 801 N.Y.S.2d 237 (Sup. Ct., Orange Co. 2005) (request for tax exemption pursuant to RPTL § 420-1(1)(a) denied).

26. *Foreclosure of Tax Liens by Town of Mount Pleasant*, No. 03-11004 (Sup. Ct., Westchester Co. March 8, 2004) *available at* <www.nycourts.gov/courts/9jd/TacCert_pdfs/legionofchrist.pdf> (motion to stay Town of Mount Pleasant's tax lien enforcement proceeding denied; taxpayers required to pay a disputed tax prior to challenging the propriety of the tax in a court proceeding).

27. *Salvation & Praise Deliverance Ctr., Inc. v. Assessor & Bd. of Assessment Review of Poughkeepsie*, 6 Misc. 3d 1021(A), 800 N.Y.S.2d 356 (Sup. Ct., Dutchess Co. 2005) (bar claim action granted; RPTL Art. 7 petition dismissed as moot).

28. *Congregation Knesset Israel v. Assessor of Ramapo*, 8 Misc. 3d 1021(A), 803 N.Y.S.2d 17 (Sup. Ct., Rockland Co. 2005) (motions for summary judgment denied; synagogue seeks tax exemption for residence in which rabbi resides; whether rabbi full time officiant or a part-time clergyman must be resolved at trial); *Congregation Sherith Yisoel Vilednki v. Town of Ramapo*, 5 Misc. 3d 1027(A), 799 N.Y.S.2d 159 (Sup. Ct., Rockland Co. 2005) (motion seeking permission to depose the tax assessor denied).

29. *Otrada, Inc. v. Assessor of Ramapo*, 9 Misc. 3d 1116(A), 808 N.Y.S.2d 919 (Sup. Ct., Rockland Co. 2005) (assessor reduced 100% tax exemption to 67%; 100% tax exemption for 2003 restored), *modified sub nom. Russian Aid Ass'n v. Town of Ramapo*, 11 Misc. 3d 1058(A) (Sup. Ct., Rockland Co. 2006).

30. *Rose Mount Vernon Corp. v. Assessor of Mount Vernon*, 1 Misc. 3d 906(A), 781 N.Y.S.2d 628 (Sup. Ct., Westchester Co. 2003), *aff'd*, 15 A.D.3d 585, 791 N.Y.S.2d 572 (2d Dep't 2005) (notes of issue for 1996–2002 vacated pursuant to 22 N.Y.C.R.R. § 202.21(e) and tax assessment review proceedings for 1996–1999 dismissed for failure to file income and expense statements with Westchester County Clerk pursuant to 22 N.Y.C.R.R. § 202.59(b), (d)(1)); *Miriam Osborn Mem. Home Ass'n v. Assessor of Rye*, 4 Misc. 3d 1009(A) (Sup. Ct., Westchester Co. 2004) (discovery of petitioner's balance sheets for all years in question to aid in 22 N.Y.C.R.R. § 202.59(c) audit granted); *Midway Shopping Ctr. v. Town of Greenburgh*, 11 Misc. 3d 1071(A) (Sup. Ct., Westchester Co. 2006) (notes of issue and petitions dismissed; lack of authority and standing and failure to comply with 22 N.Y.C.R.R. § 202.59(b), (d)(1)).

31. *In re Rockland County Sewer Dist. No. 1*, 9 Misc. 3d 1106(A), 806 N.Y.S.2d 448 (Sup. Ct., Rockland Co. 2005) (note of issue and certificate of readiness dismissed for failure to exchange trial appraisals pursuant to 22 N.Y.C.R.R. § 202.61(a)(1)).

32. *See, e.g.*, *Majaars Realty Ass'n v. Town of Poughkeepsie*, 10 Misc. 3d 1061(A), 809 N.Y.S.2d 482 (Sup. Ct., Dutchess Co. 2005) (petition dismissed for failure to serve the superintendent of schools pursuant to RPTL § 708(3)); *275 N. Middletown Rd. v. Kenney*, 10 Misc. 3d 1067(A) (Sup. Ct., Rockland Co. 2006) (motion to dismiss petition pursuant to RPTL § 708(3) denied; service on secretary to superintendent of schools sufficient; no prejudice shown); *Commerce Dr. Assocs. LLC v. Bd. of Assessment Review*, 10 Misc. 3d 1071(A) (Sup. Ct., Orange Co. 2005) (motion to dismiss petition pursuant to RPTL § 702(2) for improperly serving Town of Waywayanda instead of Town of Woodbury denied; no prejudice shown); *In re Orange & Rockland Utilities, Inc.*, 11 Misc. 3d 1051(A) (Sup. Ct., Rockland Co. 2006) (motion to dismiss petition pursuant to RPTL § 708(3) for failure to serve superintendent of schools granted).

33. *Schlesinger v. Town of Ramapo*, 11 Misc. 3d 697, 807 N.Y.S.2d 865 (Sup. Ct., Rockland Co. 2006) (motion pursuant to 22 N.Y.C.R.R. § 202.59(e) to require taxpayer to permit an appraiser to do an interior inspection in order to complete a preliminary and trial ready appraisal denied; review of building permits on file would provide a reasonable alternative means of evaluating the interior of residence).

34. *Kelo v. City of New London*, __U.S.__, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005).

35. *See, e.g.*, Scharfenberg, *Yes, Towns Can Seize Land, But Aren't There Limits?*, N.Y. Times Sunday Edition, Westchester Section, Feb. 5, 2006, p. 1; Brenner, *Homes Taken, Lives Rebuilt*, New York Times Sunday Edition, Westchester Section, July 31, 2005, p. 1; David C. Wilkes & John D. Cavallaro, *This Land Is Your Land?*, N.Y. St. B.J. (Oct. 2005) p. 10.

36. Goldstein & Rikon, *Brodsky Bill Attacks the Real Problem With Condemnation Powers*, N.Y.L.J., Oct. 26, 2005, p. 3 (describing a bill proposed by Assemblyman Richard Brodsky: "it provides that the elected officials of each town . . . shall approve or disapprove any exercise of any power to condemn . . . by majority vote subject to executive approval"). Caher, *"Kelo"-Related Bills Pass Senate Judiciary Body*, N.Y.L.J., May 3, 2006, p. 2 ("Spurning calls to go slow, the state Senate Judiciary Committee yesterday advanced four bills by three different lawmakers intent on safeguarding New Yorkers. . . . They are S5938 . . . [t]he bill 'clarifies that the exercise of eminent domain powers should be reserved for those public infrastructures and services commonly provided by government' such as 'transportation, public safety, recreation, water supply and sanitation facilities'[;] . . . S5961 . . . would amend the state Constitution to bar the taking or transfer of private property to another private party for purposes of economic development. S5936 . . . would amend the Eminent Domain Procedure Law to permit the state to take property for economic development reasons only in blighted areas[;] S7358 . . . would prohibit the use of eminent domain to transfer land from one private owner to another").

37. *See* Bradley, *Seeking a Balance in Eminent-Domain Law Use*, The Journal News, Letters to Editor, Feb. 13, 2006, p. 4B (describing Assemblyman Bradley's proposed eminent-domain legislation); *see also Eminent Dispute*, The Journal News, Editorial Section, Jan. 30, 2006, p. 48; Kettner, *Examining the Nuances of Eminent Domain Law*, The Journal News, Letters to Editor, Feb. 17, 2006, p. 68.

38. *See* Bradley, note 37, *supra*.

39. *See, e.g.*, *Stern v. Assessor of Rye*, 268 A.D.2d 482, 702 N.Y.S.2d 100 (2d Dep't 2000) (selective reassessment); *Feldman v. Assessor of Bedford*, 236 A.D.2d 399, 653 N.Y.S.2d 38 (2d Dep't 1997) (selective reassessment); *DeLeonardis v. Assessor of Mount Vernon*, 226 A.D.2d 530, 532, 641 N.Y.S.2d 83 (2d Dep't 1996) (selective reassessment); *Feigert v. Assessor of Bedford*, 204 A.D.2d 543, 544, 614 N.Y.S.2d 200 (2d Dep't 1994) (selective reassessment); *Bock v. Assessor of Scarsdale*, 11 Misc. 3d 1052(A) (Sup. Ct., Westchester Co. 2006) (no selective reassessment found); *Markim v. Town of Orangetown*, 6 Misc. 3d 1042(A), 800 N.Y.S.2d 349 (Sup. Ct., Rockland Co. 2005), *subsequent proceeding*, 9 Misc. 3d 1115(A), 808 N.Y.S.2d 918 (Sup. Ct., Rockland Co. 2005) (selective reassessment), *modified*, 11 Misc. 3d 1063(A) (Sup. Ct., Rockland Co. 2006); *Young v. Town of Bedford*, 9 Misc. 3d 1107(A), 808 N.Y.S.2d 921 (Sup. Ct., Westchester Co. 2005) (no selective reassessment); *MGD Holdings Hav, LLC v. Assessor of Haverstraw*, 8 Misc. 3d 1013(A), 801 N.Y.S.2d 779 (Sup. Ct., Rockland Co. 2005) (motion for summary judgment denied), 11 Misc. 3d 1054(A) (Sup. Ct., Rockland Co. 2006) (motion to reargue granted and upon reargument earlier decision adhered to); *Villemena v. City of Mount Vernon*, 7 Misc. 3d 1020(A), 801 N.Y.S.2d 243 (Sup. Ct., Westchester Co. 2005) (no selective reassessment); *Carter v. City of Mount Vernon*, No. 19301/02 (Nov. 25, 2003) (Rosato, J.) (selective reassessment); *Teja v. Assessor of Greenburgh*, No. 14628/03 (May 27, 2004) (Rosato, J.) (selective reassessment).

40. Siegel, *Reassessment on Sale*, N.Y.L.J., Aug. 2, 2005, p. 16.

41. *Id*.

42. It is anticipated that in Dutchess County in 2006 three municipalities will be doing revaluations, and in 2007 a consortium of seven additional municipalities will also be undertaking revaluation.

43. ORPS Guidelines for the Annual Aid Program *at* <http://www.orps.state.ny.us/reassess/annualaid/overview.htm>.

44. *See, e.g.*, Adely, *Bronxville Board OKs Revaluation*, The Journal News, March 14, 2006, p. 12A ("'Revaluation is the only viable option to restore equity in our tax rolls,' Mayor Mary Marvin said last night"); Adely, *Village Revisits Taxation Fairness*, The Journal News, Jan. 24, 2006, p. 1 ("Tax talk continues to dominate Bronxville as the village proceeds with a review of its tax-assessment practices, which came under fire last year over allegations that some properties were undervalued while other were unfairly overtaxed. Village taxpayers began a push for revaluation after two residents released a report charging that tax assessments were inequitable and ignored changes to home values when homeowners did major renovations and expansions"); Medina, *The Tax Assessment Report That Roared*, New York Times Sunday Edition, Real Estate Section, March 6, 2005, p. 5.

45. David C. Wilkes, *A Legal Analysis of Assessment Practices and Property Tax Equity in the Village of Bronxville*, September 12, 2005 ("if the Village Board should choose to direct a revaluation, it should do so following a thorough modeling of the tax impacts that would occur and detailed consideration of any means of mitigating the most severe impacts, such as through the Homestead Tax Option and transitional assessments"); Robert Eckert, *Assessment Practices and Effective Tax Rate Variations in Bronxville*, Sept. 8, 2005 ("The following study examines Bronxville's assessment practices relative to its handling of building permits and examines effective tax rate variations inherent in the current assessments. . . . While the 19.6% COD may be legally acceptable under New York State case law, our opinion is that the variations in effective tax rates inherent in the Bronxville assessment represent a significant

departure from both good assessment practices. . . . The Village should conduct further studies to examine strategies for bringing effective tax rates in line with the standard articulated in the New York State Real Property Tax Law"); *see* Medina, *A Showdown on Taxes in Bronxville*, N.Y. Times Sunday Edition, Westchester Section, July 24, 2005, p. 1.

46. *See* Village of Bronxville homepage <www.villageofbronxville.com> (follow "Departments & Services" hyperlink; then "Village Assessor" hyperlink).

47. Eckert, note 45, *supra* ("To encourage (annual reassessment) New York State [RPTL § 1573] provides State Aid of up to $5 per eligible parcel to municipalities that keep assessments at 100% of market value each year. For special assessing units [New York City and Nassau County], uniformity must be maintained within each class. . . . Section 1573 of the RPTL (requires eligible assessing units to) (1) Annually maintain assessments at 100 percent of market value, (2) Annually conduct a systematic analysis of all locally assessed properties, (3) Annually revise assessments where necessary to maintain the stated uniform percentage of value, (4) Implement a program to physically inspect and re-appraise each property at least once every six years and (5) comply with applicable statutes and rules").

48. ORPS Guidelines for the Annual Aid Program *at* <http://www.orps.state.ny.us/reassess/annualaid/overview.htm>.

49. *See* ORPS Evaluation of the New York State Office of Real Property Services Annual Reassessment Program, <www.orps.state.ny.us/reassess/exsummary.htm>.

50. *See* ORPS Selective Assessing vs. Fair Assessing, <www.orps.state.ny.us/reassess/selectivevsfair.cfm> ("In 2004, approximately, 370 cities and towns, ranging in size from towns with a few hundred parcels to New York City, are conducting reassessments. Of those, approximately 280 are committed to keeping assessments at market value annually").

51. *Stern v. Assessor of Rye*, 268 A.D.2d 482, 483, 702 N.Y.S.2d 100 (2d Dep't 2000).

52. *See, e.g.*, *Young v. Town of Bedford*, 9 Misc. 3d 1115(A), 808 N.Y.S.2d 921 (Sup. Ct., Westchester Co. 2005) ("it is appropriate on the initial assessment of newly created property for an Assessor to consider, among other factors, [and so long as the implicit policy is applied even-andedly to all similarly situated property] the current market value (of the newly created property and of comparable properties in the Town of Bedford) to reach a tax assessment").

53. 488 U.S. 336, 344 (1989).

54. *Corvetti v. Town of Lake Pleasant*, 227 A.D.2d 821, 823, 642 N.Y.S.2d 420 (3d Dep't 1996) ("We reach the same conclusion with regard to plaintiffs' 42 USC § 1983 equal protection claim since their allegation that 'it was the official policy of [defendants] to assess property pursuant to a 'welcome neighbor' policy of arbitrarily increasing the assessments of new residents of the town"); *Chasalow v. Bd. of Assessors*, 202 A.D.2d 499, 609 N.Y.S.2d 27 (2d Dep't 1994) ("It has also been held that 'gross disparities' in the taxation of similarly situated taxpayers can constitute a violation of the constitutional right to equal protection of the laws . . . if a classification between taxpayers is palpably arbitrary or involved an invidious discrimination, an equal protection violation will be found"); *Nash v. Assessor of Southampton*, 168 A.D.2d 102, 109, 571 N.Y.S.2d 951 (2d Dep't 1991) ("A tax classification will only violate constitutional equal protection guarantees 'if the distinction between the classes is 'palpably arbitrary' or amounts to 'invidious discrimination'").

55. Siegel, *Reassessment on Sale*, N.Y.L.J., Aug. 2, 2005, p. 16 ("unless there is a planned revaluation or a comprehensive plan to review the assessments of all properties in the assessing unit, reassessment on sale violates the Equal Protection Clauses of the federal and New York state constitutions").

56. *Schwaner v. Collins*, 17 A.D.3d 1068, 1069, 794 N.Y.S.2d 233 (4th Dep't 2005).

57. *See, e.g.*, *Krugman v. Bd. of Assessors of Atlantic Beach*, 141 A.D.2d 175, 184, 533 N.Y.S.2d 495 (2d Dep't 1988) ("The respondents' practice of selective reassessment of only those properties in the village which were sold during the prior year contravenes statutory and constitutional mandates. In order to achieve uniformity and ensure that each property owner is paying an equitable share of the total tax burden the assessors, at a minimum, were required to review all property on the tax rolls in order to assess the properties at a uniform percentage of their market value. The respondents' disparate treatment of new property owners on the one hand and long term property owners on the other has the effect of permitting property owners who have been longstanding

recipients of public amenities to bear the least amount of their cost. . . . This approach lacks any rational basis in law and results in invidious discrimination between owners of similarly situated property"); *Stern v. Assessor of Rye*, 268 A.D.2d 482, 702 N.Y.S.2d 100 (2d Dep't 2000) ("However, rather than adding the value of the improvement to the prior assessment . . . the properties were reassessed to a comparable market value that included the value of the improvement."); *Feldman v. Assessor of Bedford*, 236 A.D.2d 399, 653 N.Y.S.2d 38 (2d Dep't 1997) ("The petitioner also claims that the challenged assessment was part of a systematic endeavor by the respondents to reassess only those properties in the town that were sold"); *DeLeonardis v. Assessor of Mount Vernon*, 226 A.D.2d 530, 641 N.Y.S.2d 83 (2d Dep't 1996) ("utilizing the recent purchase price as a basis for determining the increase in assessed value of property on which improvements have been made pursuant to building permits, while similarly situated properties which have not been improved are not subject to reassessment, results in discriminatory treatment of the petitioner by imposing upon him a tax burden not imposed upon owners of similarly situated property"); *Feigert v. Assessor of Bedford*, 204 A.D.2d 543, 614 N.Y.S.2d 200 (2d Dep't 1994) ("The petitioners herein have offered substantial proof that the 1991 assessment of their property is based directly upon the resale of the property in 1983"); *Schwaner v. Collins*, 17 A.D.3d 1068, 794 N.Y.S.2d 233 (4th Dep't 2005) ("the petition sets forth specific examples of gross disparities in the assessed value of allegedly comparable property"); *Adams v. Welch*, 272 A.D.2d 642, 707 N.Y.S.2d 691 (3d Dep't 2000) ("respondent's 'selective reassessment' was not rationally based and therefore was improper"); *Averbach v. Bd. of Assessors of Delhi*, 176 A.D.2d 1151, 575 N.Y.S.2d 964 (3d Dep't 1991) (allegations that "assessments were made pursuant to an illegal 'welcome stranger' assessment procedure"); *Gray v. Huonker*, 305 A.D.2d 1081, 758 N.Y.S.2d 731 (4th Dep't 2003) (house selectively reassessed "that was not based on a policy 'applied evenhandedly to all similarly situated property within the [jurisdiction]'"); *Markim v. Assessor of Orangetown*, 6 Misc. 3d 1042(A), 800 N.Y.S.2d 349 (Sup. Ct., Rockland Co. 2005) (selective reassessment found).

58. *See* ORPS Assessment Equity in New York: Results From the 2004 Market Value Survey, <www.orps.state.ny.us/ref/pubs/cod/2004mvs/reporttext.htm> ("The primary means of measuring assessment uniformity is a statistic known as the coefficient of dispersion (COD). The COD measures the extent to which the assessment ratios from a given roll exhibit dispersion around a midpoint. . . . Assessing units with good assessing practices have low CODs, showing little deviation of individual assessment ratios from the median ratio. . . . Conversely, an assessing unit with little assessment uniformity would have widely varying assessment ratios among the sampled parcels, resulting in high dispersion around the median and, therefore, a high COD. Widely varying ratios result in unequal tax bills for properties of equal value").

59. A high COD may also be explained by changing market conditions and the decision not to participate in an annual assessment program. *See, e.g.*, David C. Wilkes, *A Legal Analysis of Assessment Practices and Property Tax Equity in the Village of Bronxville* (Sept. 12, 2005) ("An assessor in a community that does not regularly revalue might with all good intention seek to moderate the amount of assessment increases in an effort to minimize overall dispersion in the assessment roll. Indeed, with a coefficient of dispersion (COD) of just under 20%. . . . Bronxville's assessment roll is not egregiously random (as some Westchester rolls are)"); Joseph K. Eckert, *Assessment Practices and Effective Tax Rate Variations in Bronxville* (Sept. 8, 2005) ("While the 19.6% COD may be legally acceptable under New York State case law, our opinion is that the variations in effective tax rates inherent in the Bronxville assessment represent a significant departure from . . . good assessment practices"). *See, e.g.*, *Waccabuc Constr. Corp. v. Assessor of Lewisboro*, 166 A.D.2d 523, 560 N.Y.S.2d 805 (2d Dep't 1990) ("A high coefficient of dispersion indicates a high degree of variance with respect to the assessment ratios under consideration. A low coefficient of dispersion indicates a low degree of variance. In other words, a low coefficient of dispersion indicates that the parcels under consideration are being assessed at close to an equal rate (see 9 N.Y.C.R.R. 185-4.4)"); *Chasalow v. Bd. of Assessors*, 202 A.D.2d 499, 609 N.Y.S.2d 27 (2d Dep't 1994).

60. *Towne House Vill. Condo. v. Assessor of Islip*, 200 A.D.2d 749, 607 N.Y.S.2d 87 (2d Dep't 1994) ("Such an increase in assessment is prohibited by statute [Real Property Law § 339-y(1)(b); RPTL § 581]. Even were the assessor not prohibited from assigning a higher assessment . . . there was no rational basis in law for reassessing only the subject property. Such a 'selective reassessment' is improper as a denial of equal protection guarantees").

61. *See, e.g.*, *Stern v. City of Rye*, 268 A.D.2d 482, 702 N.Y.S.2d 100 (2d Dep't 2000) ("reassessment upon improvement is not illegal in and of itself. Here, the petitioners' properties were reassessed after recent improvement. However, rather than adding the value of the improvement to the prior assessment . . . the properties were reassessed to a comparable market value that included the value of the improvement . . . "); *Villemena v. City of Mount Vernon*, 7 Misc. 3d 1020(A), 801 N.Y.S.2d 779 (Sup. Ct., Rockland Co. 2005) (no selective reassessment found; new assessment ordered); *Bock v. Assessor of Scarsdale*, 11 Misc. 3d 1052(A) (Sup. Ct., Westchester Co. 2006) (assessor presented facially reasonable explanation for changing assessments on real property based upon the cost of improvements which appears to be fair and comprehensive; no selective reassessment found); *Teja v. Assessor of Greenburgh*, No. 14628/03 (May 27, 2004) (Rosato, J.) ("Petitioners' argument, briefly stated, is that the only allowable increase in valuation above the assessment of June 1, 2001 could be one based solely on the addition of the kitchen appliances, which cost $14,513.28. Anything more than this they contend is a 'welcome stranger' increase based on the purchase price of $1,175,000.00 paid in April 2002. (There was no town-wide reassessment of all similarly situated properties.). This valuation technique is unconstitutional because it is a selective reassessment which denies equal protection guarantees"); *Carter v. City of Mount Vernon*, No. 19301/02 (Nov. 25, 2003) (Rosato, J.) (assessment increased 48.9% after sale based upon "'certain improvements 'having been made to the property, without proper permits, by the prior owner'"; assessor failed to "even identify, or enumerate just what specific renovations or improvements" were made; assessment held invalid); *Young v. Town of Bedford*, 9 Misc. 3d 1107(A), 808 N.Y.S.2d 921 (Sup. Ct., Westchester Co. 2005) ("the prohibition against reassessment of improved property 'utilizing the recent purchase price as a basis for determining the increase in assessed value of a property on which improvements have been made' (does not apply) to the initial assessment of newly created property on vacant, unimproved land").

62. *See, e.g.*, *Nash v. Assessor of Southampton*, 168 A.D.2d 102, 571 N.Y.S.2d 951 (2d Dep't 1991) ("Whether the delay in the implementation of a comprehensive reassessment of all of the parcels in a taxing jurisdiction can result in equal protection violation . . . it cannot be said, on the present record, that the Town acted in bad faith . . . , [in the reassessment of 150 waterfront parcels because of] the rapid rate of appreciation of property"); *Mundinger v. Assessor of Rye*, 187 A.D.2d 594, 590 N.Y.S.2d 122 (2d Dep't 1992) ("The reassessment program . . . would be justified . . . if waterfront residential property appreciated at a higher rate than non-waterfront residential property," and using two different methods of assessing Class I property); *Chasalow v. Bd. of Assessors*, 202 A.D.2d 499, 609 N.Y.S.2d 27 (2d Dep't 1994) ("Indeed, it is well settled that a system of assessment which is challenged on the ground of inequality may nevertheless survive judicial scrutiny if the assessing authority demonstrates that the classification which results in unequal treatment bears a rational relation to the achievement of a legitimate governmental objective")], the reclassification of Class II property to Class I property); *Acorn Ponds v. Bd. of Assessors*, 197 A.D.2d 620, 603 N.Y.S.2d 491 (2d Dep't 1993) ("There is no proof in the record that the failure to reassess all Class I property when the petitioner's property was reassessed resulted in disparate tax treatment of a constitutional dimension" considering the method of dividing "the Town into four neighborhoods for valuation purposes"); *Akerman v. Assessor of Hardenburg*, 211 A.D.2d 916, 621 N.Y.S.2d 154 (3d Dep't 1995) (petitioners have not established that the formulas used by respondents were improper or inequitable or that the assessments violate constitutional requirements and the methodology for partially assessing real property); *MGD Holdings Hav, LLC v. Town of Haverstraw*, 8 Misc. 3d 1013(A), 801 N.Y.S.2d 779 (Sup. Ct., Rockland Co. 2005) (motion for summary judgment denied; fact issues to be resolved at trial); *Markim v. Assessor of Greenburgh*, 6 Misc. 3d 1042(A), 800 N.Y.S.2d 349 (Sup. Ct., Rockland Co. 2005) (partial assessments appropriate upon notice to taxpayers).

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The Whole Truth?

The Problem With "Truth in Lending"

By Gwen Seaquist and Alka Bramhandkar

Attorneys who represent clients in a typical real estate closing are confronted with numerous forms. One that is particularly confusing and difficult to explain to clients is the Truth in Lending (TIL) Disclosure Form. While it is intended to clarify for consumers various numbers related to the actual cost of borrowing money, it often has the effect of bewildering them instead.

Unfortunately, the confusion is not unique to clients. We conducted a survey of attorneys, many of whom are engaged in active real estate practices, to assess their level of comprehension of the TIL. Our data indicate that even those attorneys who believe they understand the Annual Percentage Rates (APR) are, in fact, as confused as their clients. This article explains how the APR and some of the other figures provided on the TIL form are actually calculated.

The Legal Basis of the "APR"

In 1968, Congress passed a host of consumer protection laws including Truth in Lending Act,[1] a federal law that applies to any consumer credit transaction. Under Truth in Lending, borrowers must be provided with a "meaningful disclosure of credit terms so that consumers will be able to compare more readily the various credit terms available to them."[2] As a result, creditors are required to clearly and conspicuously disclose certain key terms and costs before consummating a credit transaction.[3]

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The act provides for a Truth in Lending Disclosure form that appears, in part, as follows:

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate. 5.07%	FINANCE CHARGE The dollar amount the credit will cost you. $110,367.50	AMOUNT FINANCED The amount of credit provided to you or on your behalf. $256,683.10	TOTAL OF PAYMENTS The amount you will have paid after you have made all payments as scheduled. $367,050.00

Here is a brief explanation of how these numbers are computed:

- Annual Percentage Rate is the percentage a borrower can use to comparison shop. We will discuss this calculation in the next section.
- Finance charge is equal to total payments minus the amount financed. This is the total interest the borrower would pay over the life of the loan. (An attorney can explain to the client that if the borrower pays a little more than the monthly payment, substantial savings can be generated.)
- Amount financed is always less than the loan amount. As discussed in the section on "APR and Different Categories of Loan Related Costs," banks deduct certain costs from the original loan amount to calculate the amount financed. These costs reflect a combination of costs banks are legally required to reflect in the APR calculation, as well as other loan-related costs that banks may choose to reflect in their APR figure.
- Total payments are calculated by multiplying the monthly payments by the number of months in the term of the loan.

Most clients immediately notice that the "Annual Percentage Rate" does not match the interest rate on the face of their note. Nor does the "Amount Financed" match their loan amount. Why is the Annual Percentage Rate different than the rate of interest? And why is the Amount Financed different from the amount borrowed? In order to understand these apparent disparities in the numbers, we use some actual figures, presented in Tables 1 and 2.

How Is APR Calculated?

To determine APR, one must first determine the amount financed. This amount is not necessarily the original loan amount, but rather is the original loan amount minus certain closing costs. In the example, shown in the above chart, the clients "borrowed" $260,000, the bank subtracted two closing costs: the loan level price adjustment of 0.875%, or $2,275, and interest on the loan (STI) until the start of the note in the amount of $1041.90. These two "closing costs" are deducted by the bank from the original loan amount, making the *amount financed* $256,683.10. One will note that the amount financed is actually the amount the client has left to spend at the closing. Now, if one takes this lesser amount of money over the same 30 years at the same rate of interest, then the amount it costs to borrow the money increases. This is because the borrowers are now "borrowing" less money over the same period of time. The APR shows the cost of borrowing the lesser amount of money.

It is interesting to note the two different points at which APR comes into play for the customers borrowing money from a bank. The first introduction to APR is when potential borrowers walk into Bank A and ask how much it will cost to borrow $200,000. Truth in Lending requires that they get the same answer at Banks A, B and C. If each of the banks subtracts the same closing costs from the loan amount to show the customers how much it will cost to borrow the money, then each bank is disclosing the borrowing rate based upon an agreed rate, the APR. At this stage in the process, the purpose of the law is to provide potential customers with consistent information. The problem with this concept is that the banks do not consistently subtract the same closing costs when making their calculation, thereby defeating the purpose of "comparison shopping" using the APR.

Truth in Lending does not provide a complete list of what fees must be included in the APR calculation, but instead only provides a general overview. This means that each lender has some latitude to decide which fees to include in the APR. The result is that on the same loan amount, different lenders can possibly calculate a different APR.

APR and Different Categories of Loan-Related Costs[4]

APR could be used for comparison shopping only if every bank used the same costs to calculate the actual credit available. Pursuant to Truth in Lending, several loan-related fees and costs are divided into three major categories. The regulations allow some flexibility to lending institutions to calculate the net amount disbursed (and therefore, the APR). The first category includes the following costs, which are usually reflected in the APR by most lenders:

- Discount and origination points;
- Prepaid interest (lender can choose to include interest for anywhere from 1 to 30 days)
- Private mortgage insurance;
- Document preparation fee;
- Loan processing and underwriting fees.

If one takes the original loan amount of $260,000 and deducts the total required fees of $3,316.90, the actual amount available at the closing is $256,683.10. This is the amount financed/disbursed or the actual amount of credit available to the client "at the table." The monthly payment of $2,039.17 is based on the full loan amount of $260,000. When these monthly payments (in their present value terms) are related to the actual amount disbursed of

$256,683.10 (always lower than the amount on the note) one arrives at an APR of 5.07%.

The second category of costs includes those costs that the bank has the option of including in its calculation of APR. The only cost in this category is the loan application fee.

> If the borrower chooses to prepay the loan, whether to refinance or as a result of the due-on-sale clause, prior to maturity, the actual cost of the loan will be higher than the APR.

The last category refers to expenses that are necessary to close the loan, but generally paid to third parties. These are never included in the APR estimates and include: title/abstract fees; escrow; attorney fees; notary fees; home inspection; recording; transfer taxes; credit reports; appraisals; and credit life insurance. Table 2 displays third-party fees associated with the loan example.

In the following discussion, we will explain how the APR varies based on an individual lender's interpretation of the rules and intent of the Truth in Lending laws.

As discussed above, the lender does have the option of including or not including the loan application fee in its calculations. In addition to this option, however, lenders are inconsistent in calculating the fees that they are required to deduct in calculating APR.

For example, the legislation in its current form allows the lending institutions to calculate prepaid interest based on one to 30 days. At the time of the loan application, the bank may not know if the loan is going to close on the first, 15th or 30th of the month, all dates that affect the prepaid interest calculation. Many banks calculate the prepaid interest based on the maximum number of days in the month. In our example, the APR of 5.07% is based on interest for 30 days. But the bank also has the option of calculating the APR using only one day of prepaid interest. In that case, the same loan would reflect an APR of 5.01%. (These calculations are summarized in Table 3.) Therefore, if the borrower is not aware of how many days' interest is reflected in the APR, the borrower may end up making a poor choice based on the disclosure of APR.

The impact of incorporating optional fees could also mislead the borrower when comparison shopping. Going back to our previous example, suppose that the lender charges a loan application fee of $450. The lender may choose to disclose an APR based on required and optional fees. The total bank costs on our $260,000 loan are $3,766.90, which in turn, increase the APR to 5.10%.

Furthermore, the APR could go up by almost 0.09% if the financial institution includes charges that they are *not* legally required to incorporate in the APR calculation. The true cost (which is never disclosed by the lender) should also incorporate all expenses paid to third parties. Because lenders encourage borrowers to use the services approved by the lender, such as appraisal and title insurance, this APR of 5.28% is the true effective cost to the borrower.

Even if the closing attorney is able to explain how APR is calculated and how it can be used for comparison shopping, it still may not be the actual rate at which the borrower would pay if the loan is prepaid before maturity. According to the terms of the note, there is no penalty for prepayment. The current law does not require the lending institution to disclose to the borrower that their actual cost of the loan will be the same as the APR only if the loan is held to maturity. If the borrower chooses to prepay the loan, whether to refinance or as a result of the due-on-sale clause, prior to maturity, the actual cost of the loan will be higher than the APR. The actual cost is negatively related to the length of time for which the loan is held. A shorter time period will lead to higher costs because the additional loan-related costs will be spread over fewer years. Table 3 shows the actual cost of the loan if the borrower chooses to sell the house after five years, triggering a "due on sale" clause or decides to refinance to take advantage of a lower interest rate. The percentage increase in APR ranges from 0.06% to 0.27%. Thus, a borrower who is likely to prepay needs to base that decision on the actual cost.

Based on the above discussion, a borrower should be made aware of the fact that the disclosed APR can be used for comparison shopping only if (1) every bank uniformly deducts the same set of costs, and (2) the loan is not expected to be prepaid.

Variable Rate Mortgages (VRM)

If the mortgage involves a variable rate, greater caution must be exercised. Lenders often offer a "teaser" – an extremely low interest rate for the initial period, after which the interest rate will most likely increase based on the market. Because the lender cannot and should not be allowed to speculate the direction of future interest rates, the disclosed APR for a VRM is meaningless. The calculations of APR for a VRM require the lender to consider only the agreed-upon index at the time of origination plus the margin and assume that this rate would hold over the term of the mortgage.

In addition, even if the closing attorney or borrower raises questions about the APR calculation, under many circumstances the loan officer is unable to offer any specific explanation. Most financial institutions use software in which the loan officer is only required to enter the information pre-formatted into tables without necessarily understanding how the calculations are made.

Survey Results

During the period of February to April 2005, we distributed a total of 37 surveys to practicing attorneys and pro-

Table 1. Required Fees
(Fees that are always included in the APR calculation.)

Discount and Origination Points	$2,275.00
Prepaid Interest	$1041.90 (30 days)
Private Mortgage Insurance	NA
Document Preparation Fee	NA
Total	$3,316.90

Table 2. Third Party Costs

Title Insurance	$1,142.55
Attorney Fee	$625.00
Home Inspection Report	$0
Recording Fee	$75.00
Transfer Tax	$0
Credit Report	$0
Appraisal Fees	$300.00
Abstract	$200.00
Mortgage Cancellation Fee	$75.00
Commitment Fee	$565.00
Total	$2,982.55

Table 3. Variations in APR as a Result of Fees

When calculation includes required fees only (with 30 days prepaid interest).	5.07%
Actual cost if the mortgage is paid off or refinanced after 5 years.	5.20%
When calculation includes required fees only (with 1 day prepaid interest).	5.01%
Actual cost if the mortgage is paid off or refinanced after 5 years.	5.11%
When calculation includes required and optional fees.	5.10%
Actual cost if the mortgage is paid off or refinanced after 5 years.	5.25%
When calculation includes required and optional fees and other fees.	5.28%
Actual cost if the mortgage is paid off or refinanced after 5 years.	5.55%

fessors of finance throughout New York State. We received responses from 19 attorneys and one out of seven finance professors. The survey instrument contained 13 questions related to APR calculations and covered a range of questions such as the specific costs incorporated into the APR calculation and the participants' knowledge of and ability to explain to clients the relevance of APR to a real estate mortgage decision.

Out of the 19 attorney respondents, 16 stated that they are required to personally explain the documents to their clients. Although all of them indicated that they are familiar with the Truth in Lending laws, five claimed to have a high level of understanding.

Yet, concerning their ability to identify various categories of costs associated with the APR, 50% stated they were familiar with them but a majority of the practicing attorneys were unable to correctly pick out which costs are included in determining APR.

With regard to the effect of prepayment of the loan on the APR, only 12 selected the correct answer. Eight respondents indicated that their clients never asked any questions about the APR in the closing.

Based on the survey data, it is suggested that there is much room for improvement in Truth in Lending to make the disclosures more meaningful to borrowers. Practicing lawyers would also do well to review the components of the APR in order to better explain them to clients.

Conclusion

We have attempted to determine whether borrowers can utilize the disclosed APR to comparison shop among loans, and whether the APR represents the true cost of the loan. We concluded that the APR can be misleading to both borrowers and real estate attorneys, and this stems from several causes:

1. Flexible regulatory requirements and lenders' interpretation of the data;
2. Third-party charges a borrower is required to pay in connection with the purchase of a home, whether or not a mortgage is executed;
3. Subtle lender pressure on the borrower to use the services offered by the lender (e.g., title search and appraisal); these services are often more expensive compared to the going market rate; additionally, these costs are not reflected in the APR calculation;
4. The APR for mortgages that are not classified as fixed-rate mortgages is meaningless;
5. Predicting the borrower's future behavior in terms of prepayment or the loan due to sale or refinancing.

To make Truth in Lending helpful, consideration should be given to modifying the law so as to make the determination of APR more consistent. As one Web site succinctly stated, "The problem is that the truth has gone out of the Truth in Lending Act."[5] The current process is quite confusing to the attorneys involved in the closing, the borrower, and, surprisingly, to the lending industry. Until the law is improved, closing attorneys should take the time to better understand these mechanics and advise their clients as best they can. ■

1. Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146.

2. R. Link, Annotation, *What Constitutes Violation of Requirements of Truth in Lending Act (15 U.S.C.A. § 1601 et. seq.) Concerning Disclosure of Information in Credit Transactions – Civil Cases*, 113 A.L.R. Fed. 197 (1993–2004).

3. *Id.*

4. Various fees associated with the loan used in our example are summarized in Tables 2 and 3.

5. <www.consumerlaw.org>.

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2005 Update on Uninsured, Underinsured and Supplementary Uninsured Motorist Law – Part I

By Jonathan A. Dachs

It is my distinct pleasure to report once again on developments in uninsured motorist (UM), underinsured motorist (UIM), and supplementary uninsured motorist (SUM) law from the past calendar year. As has been the case in each of the past 12 years of my reports,[1] 2005 was another busy and significant year in this ever-changing and highly complex area of the law. Indeed, there were so many interesting and important decisions in 2005 that it is necessary to present this summary in two parts. This month's installment addresses general issues pertinent to all of these coverages and claims. In Part II, which will appear in the next issue of the *Journal*, I will address specific issues that affect these categories separately, and review several additional general issues as well.

Insured Persons – "Residents"

The definition of an "insured" under the UM and SUM endorsements includes a relative of the named insured, and, while residents of the same household, the spouse and relatives of either the named insured or spouse. The concept of residence has two components – physical presence and intent to remain. The issue of residency is often complicated by non-traditional living arrangements, where the question arises as to whether the claimant actually resided together with the policyholder.

In *Biundo v. New York Central Mutual*,[2] the court held that where the testimony at a framed issue hearing demonstrated that the claimant and her husband continued to reside with her parents until the extensive renovations to their newly purchased residence were completed, the determination that the claimant was a resident of her parents' household on the date of the accident and, therefore, an insured person under her parents' SUM endorsement, was supported by a fair interpretation of the evidence and would not be disturbed. The claimant actually resided in the insured household with some degree of permanence and with the intention to remain for an indefinite period of time.

In *State Farm Mutual Automobile Ins. Co. v. Nater*,[3] the injured claimant was in the process of getting a divorce from the policyholder, but lived in a separate apartment within the same jointly owned two-family home, at the time she was struck as a pedestrian by an uninsured motorcycle. Despite the fact that they lived in separate parts of the house, they continued to share all household expenses, just the way they had done when they still lived together in one of the two apartments. They continued to share the use of the family car. After the accident, the husband/insured filed an insurance claim under his policy on his wife's behalf. Under these circumstances, the court held that

> the details of their financial and living arrangements during the pendency of the divorce proceeding support the Supreme Court's findings of fact that the spouses continued to maintain a common household and reasonably anticipated that [the claimant] would continue to be afforded coverage under the husband's automobile insurance policy, particularly since they still shared the use of the same car.[4]

Thus, the court affirmed the denial of the insurer's petition to stay arbitration.

"Accidents"

By the express terms of the UM/SUM endorsements, coverage is not operative unless damages are caused by an "accident." The legislative intent behind the UM/SUM statutes was to protect innocent victims of motor vehicle *accidents*, and not to protect all victims of motor vehicles, regardless of how the vehicle may have been used as an instrument of injury.[5]

In *Allstate Ins. Co. v. Massre*,[6] the court granted the Petition to Stay Arbitration of an uninsured motorist claim based upon the determination that the collision was intentional and the claimant's injuries were, therefore, not the result of an accident.

In *Eagle Ins. Co. v. Davis*,[7] the court observed that "[a] collision caused in the furtherance of an insurance fraud scheme is not a covered accident under a policy of insurance." In *GEICO v. Robbins*,[8] the court held that there was ample evidence to support the hearing officer's finding that the "accident" was staged in perpetration of a fraudulent insurance scheme, and, therefore, not covered.

In *Davis*, the court added that "[w]hen a petition raises an issue of fact as to whether the automobile collision giving rise to the underlying request for arbitration was deliberate or intentional, the issue of fraud is subsumed under the coverage issue. Evidence of such fraud should be considered in determining the broader coverage issue" (citation omitted).

In *State Farm Mutual Auto. Ins. Co. v. Langan*,[9] the court observed that if the claimant's injuries were the result of an intentional assault (or an intentional homicide), then they were not the result of an accident and, therefore, were not covered by an uninsured motorist policy. In this case, however, the court held that the insurer failed to demonstrate, *prima facie*, that the offending driver intentionally struck the claimant, insofar as it relied upon "mere hearsay" and "failed to submit admissible proof of the incident's intentional nature." Thus, the court denied the insurer's motion for summary judgment declaring that the incident was not covered under the subject policy. Interestingly, the court also denied the claimant's cross-motion for summary judgment for the opposite declaration, *i.e.*, that the insurer was obligated to provide coverage for the injuries sustained in the incident because it, too, was not supported by admissible evidence. Although the claimant relied upon a police report to establish the accidental nature of the incident, there was no indication that the reporting officer witnessed the incident, or that eyewitnesses had a business duty to report the facts to the officer. Thus, that portion of the report relied upon by the claimant constituted inadmissible hearsay.

The "hot topic" in 2005 was whether the UM/SUM insurer must demonstrate prejudice before it could assert and rely upon the defense of noncompliance with the notice provisions of its policy.

In *Allstate Ins. Co. v. Ganesh*,[10] the court noted that if the tortfeasor's insurer lawfully disclaimed liability coverage because the collision was intentional or connected to fraudulent conduct and thus excluded from coverage, then the same intentional or fraudulent conduct would also void uninsured motorist benefits for the claimant under his own policy, even if he were an "innocent victim." In this case, however, the court rejected the insurer's proof of an intentional, staged event as "vague, conclusory theories or speculation," and thus granted the UM insurer's petition to stay arbitration.

Claimant/Insured's Duty to Provide Timely Notice of Claim

UM, UIM and SUM endorsements require the claimant, as a condition precedent to the right to apply for benefits, to give timely notice to the insurer of an intention to make a claim. Although the mandatory UM endorsement requires such notice to be given "within ninety days or as soon as practicable," Regulation 35-D's SUM endorsement requires simply that notice be given "as soon as practicable." A failure to satisfy the notice requirement vitiates the policy. The "hot topic" in 2005 was whether the UM/SUM insurer must demonstrate prejudice before it could assert and rely upon the defense of noncompliance with the notice provisions of its policy.

The Court of Appeals definitively spoke to the issue of the "no-prejudice" rule in two cases decided on the same day in April 2005. In *Argo Corp. v. Greater New York Mutual Ins. Co.*,[11] the Court held that the general "no-prejudice" rule applicable to liability insurance policies was not abrogated by its earlier decision in *Brandon v. Nationwide Mutual Ins. Co.*,[12] in which it had held that the carrier must show prejudice before disclaiming based on late notice of a lawsuit in the SUM context. The Court further held that *Brandon* should not be extended to cases where the carrier received unreasonably late notice of the claim. Insofar as the "rationale of the no-prejudice rule is clearly applicable to a late notice of lawsuit under a liability insurance policy," the Court held that a primary (liability) insurer need not demonstrate prejudice to disclaim coverage based upon a late notice of lawsuit.

However, in *Rekemeyer v. State Farm Mutual Automobile Ins. Co.*,[13] the Court held that the "no-prejudice" rule should be relaxed in SUM cases and, thus, "where an insured previously gives timely notice of the accident, the [SUM] carrier must establish that it is prejudiced by a late notice of SUM claim before it may properly disclaim coverage."

The Court explained in *Rekemeyer*, that although the "no-prejudice" rule has sometimes been characterized as the "traditional rule," it is actually a limited exception to two established contract principles: "(1) that ordinarily one seeking to escape the obligation to perform under a contract must demonstrate a material breach or prejudice; and (2) that a contractual duty [requiring strict compliance] ordinarily will not be construed as a condition precedent absent clear language showing that the parties intended to make it a condition" (citation omitted). The idea behind strict compliance with the notice provision in an insurance contract was to protect the carrier against fraud or collusion. Under the circumstances of the *Rekemeyer* case, where the plaintiff gave timely notice of the accident and made a claim for no-fault benefits soon thereafter, the Court found that notice was sufficient to promote the valid policy objective of curbing fraud or collusion. Under these circumstances, "application of a rule that contravenes general contract principles is not justified." The Court further concluded that the insurer should bear the burden of establishing prejudice "because it has the relevant information about its own claims-handling procedures and because the alternative approach would saddle the policyholder with the task of proving a negative."

In *Brennan Bros. Co., Inc. v. Lumbermen's Mutual Casualty Co.*,[14] a non-SUM case, the Appellate Division reiterated the general rule that

> as a condition precedent to an insurer's obligation to defend or indemnify, the insured must provide notice of any occurrence to the insurer within a reasonable period of time. Failure to comply with the notice requirement vitiates coverage unless the insured had a reasonable belief of nonliabilty. The insured bears the burden of proof of demonstrating that such belief was reasonable.[15]

In *Gallante Properties, Inc. v. State National Ins. Co.*,[16] the court noted that "lack of notice that an accident occurred constitutes a legitimate excuse for failing to notify the carrier."

The interpretation of the phrase "as soon as practicable" continued, as always, to be a topic of substantial litigation in 2005.

In *Rekemeyer v. State Farm Mutual Automobile Ins. Co.*,[17] the Appellate Division held that notice of an underinsured motorist claim given after a delay of one year was untimely where the claimant commenced a lawsuit in April 1999 seeking $1 million in damages, which in and of itself evidenced the perceived serious nature of her injuries. The court noted that she had asserted as early as July 1999 that she was suffering from severe and permanent injuries to her left arm and cervical spine, including a herniated paracentral disc "causing severe neck, left shoulder and arm pain with weakness and loss of mobility," and knew as early as September 1999 that the tortfeasor's policy provided less bodily injury coverage than her own policy; therefore, she knew that the tortfeasor was "underinsured," yet waited an additional six months before providing notice of intent to make an underinsured motorist claim.

The interpretation of the phrase "as soon as practicable" continued, as always, to be a topic of substantial litigation in 2005.

In affirming that portion of the Appellate Division's order which held the SUM notice untimely, the Court of Appeals noted:

> Although plaintiff had disabling injuries prior to the accident that may have interfered with her assessment of the extent of new injuries, she stated in her bill of particulars in the underlying personal injury action – drafted eight months before plaintiff notified defendant of her claim for SUM coverage – that she had suffered serious and permanent injuries as a result of the accident. The record thus belies any claim that she was unaware that her injuries were serious.[18]

As noted above, the Court of Appeals then modified the Appellate Division order by further holding that notwith-

standing the untimeliness of the SUM notice, the insurer was required to show prejudice resultant therefrom in order to disclaim coverage.

In *Figueroa v. Utica National Ins. Group*,[19] the court held that a delay of two months after claimants "should have realized that there was a reasonable possibility of their policy's involvement when the insurance investigator visited their home to obtain a statement regarding the accident" was unreasonable as a matter of law. "A duty to give an insurer notice arises 'when, from the information available relative to the accident, an insured could glean a reasonable possibility of their policy's involvement.'"[20]

In *State Farm Mutual v. Kathehis*,[21] the court held that the claimant's failure to notify the SUM carrier of a potential uninsured motorist claim for more than two years, only because of a lack of a police report with the offending vehicle's license number, represents a lack of diligence and "forecloses a finding that notice had been filed as soon as practicable." As stated by the Appellate Division: "Respondent's inability to discover the police report or otherwise learn the identity of the offending vehicle's owner or driver 'should have alerted him to the fact that he had a potential uninsured motorist claim' much sooner than the two and a half years it took him to give petitioner notice thereof."

On the other hand, in *426–428 West 46th Street Owners, Inc. v. Greater New York Mutual Ins. Co.*,[22] the court found that there was uncontradicted evidence presented by the plaintiff that, although it knew on August 27, 2002, that its tenant had been found lying incapacitated inside her apartment, and was taken by ambulance to the hospital, it lacked knowledge that she had sustained severe injuries from falling down stairs inside her apartment. The court also found that the tenant had given the plaintiff no information that would have led it to believe that she held it responsible for her injuries. The court thus held that the insurer failed to demonstrate that the plaintiff's delay in notifying the insurer of the incident until June 18, 2003 (almost 10 months later), shortly after the tenant commenced a lawsuit against the plaintiff, was unreasonable as a matter of law.

In *New York Central Mutual Ins. Co. v. Davalos*,[23] the court held that a letter making a claim pursuant to an uninsured motorist endorsement, which was sent at a time when, in fact, the tortfeasor's vehicle was actually insured, was premature and, thus, did not satisfy the notice requirement of the policy. Accordingly, where the claimant then waited nearly two years to notify the SUM carrier that the tortfeasor's carrier had disclaimed coverage, this notice was deemed untimely and arbitration was permanently stayed.

In *Becker v. Colonial Cooperative Ins. Co.*,[24] the court held that

> [w]hile an insured's failure to provide notice may justify a disclaimer vis-à-vis the insurer and the insured, it does not serve to cut off the right of an injured claimant to make a claim as against the insurer. Insurance Law § 3420(a)(2) expressly permits an injured party to recover any unsatisfied judgment against an insured, directly from the insurer. Insurance Law § 3420(a)(3), in effect, requires insurance companies to accept notice claims from injured parties. As was made clear more than 40 years ago, "[t]he statute having granted the injured person an independent right to give notice and to recover thereafter, he is not to be charged vicariously with the insured's delay."[25]

"The injured person's rights must be judged by the prospects for giving notice that were afforded to him, not by those available to the insured. What is reasonably possible for the insured may not be reasonably possible for the person he has injured. The passage of time does not of itself make delay unreasonable."[26] "When the injured party has pursued his rights with as much diligence 'as was reasonably possible' the statute shifts the risk of the insured's delay to the compensated risk-taker."[27] Thus, the pertinent inquiry is whether the plaintiff pursued his rights with as much diligence "as was reasonably possible."[28]

In *MTO Associates, Limited Partnership v. Republic Franklin Ins. Co.*,[29] the court stated that

> [i]n general, an insurance broker is considered the agent of the insured, not the insurance company, and notice to the broker is not deemed notice to the insurance company. However, "a broker will be held to have acted as the insurer's agent where there is some evidence of 'action on the insurer's part, or facts from which a general authority to represent the insurer may be inferred.'"[30]

In *AIU Ins. Co. v. Henry*,[31] the court held that the submission of an application for no-fault benefits does not suffice to constitute notice of a claim for uninsured motorist benefits.

In *Banuchis v. GEICO*,[32] the court held that service upon the insurer's in-house legal staff of a letter notifying it of a potential excess coverage claim was sufficient to constitute notice of the claim. As noted by the court, the attorneys that were served were employees of GEICO and handled many of the claims submitted to it. Moreover, GEICO's policy failed to prescribe any specific manner of notification of a claim or to designate a particular individual or department to which such notice should be directed. Under the circumstances of this case, the court inferred a general authority on the part of the attorney-employee to receive notice on behalf of GEICO in the ordinary course of his or her employment.

Discovery

The UM and SUM endorsements also contain provisions requiring, upon request, a statement under oath, examination under oath, physical examinations, authorizations and medical reports and records. The provision of each

type of discovery, if requested, is a condition precedent to recovery.

In *New York Central Mutual Fire Ins. Co. v. Caddigan*,[33] the court reiterated the general rule that pre-arbitration discovery must be timely requested or it will be precluded.

In *Connecticut Indemnity Ins. Co. v. LaPerla*,[34] the court denied the insurer's request for a stay of arbitration pending discovery where the insurer "had ample time . . . within which to seek discovery of the respondent insured as provided for in the insurance policy, and unjustifiably failed to utilize that opportunity" to obtain the discovery it sought in its petition.

In *Gibson v. Encompass Ins. Co.*,[35] the court affirmed the denial of the insurer's motion to strike the plaintiff's notice to produce the insurer's file regarding plaintiff's SUM claim, holding that "the sought-after disclosure was 'material and necessary' for the prosecution of plaintiff's action," and that the disclosure request was not "palpably improper." Moreover, the insurer failed to meet its burden of establishing that the file contained material that was privileged or otherwise exempt from discovery. The court further allowed the plaintiff to take the deposition of the insurer's underinsurance claim representative, who possessed "material and necessary information regarding the claim."

Petitions to Stay Arbitration: Arbitration vs. Litigation

Under Regulation 35-D and its prescribed SUM endorsement, the insured has the choice of proceeding to court or to arbitration to resolve disputes in cases involving coverage in excess of the statutory minimums of $25,000 per person/$50,000 per accident. Cases involving 25/50 coverage must be submitted to arbitration and cannot be litigated in court.

A recent example of an SUM lawsuit is *Murray v. Hartford Ins. Co*.[36] In that case, the court considered the issue of whether the plaintiff sustained a "serious injury" as defined in the No-Fault Law[37] – a condition precedent to a valid UM/SUM claim – and rejected the claim on the basis of a failure to meet the "serious injury" threshold. In *Smetanick v. Erie Ins. Group*,[38] an action to recover underinsured motorist benefits, a jury verdict on damages in favor of the plaintiff was upheld.

Filing and Service

CPLR 7503(c) provides, in pertinent part, that "[a]n application to stay arbitration must be made by the party served within twenty days after service upon him of the notice [of intention to arbitrate] or demand [for arbitration], or he shall be so precluded." The 20-day time limit is jurisdictional and, absent special circumstances, courts have no jurisdiction to consider an untimely application.[39]

In *AIU Ins. Co. v. Orellana*,[40] the court held that the issue of whether there was physical contact between the claimant's vehicle and a hit-and-run vehicle related to whether a condition of the insurance contract was complied with, and not whether the parties agreed to arbitrate and, therefore, had to be raised by petition to stay arbitration within the 20-day time limit prescribed by CPLR 7503(c).

The court noted in *State Farm Mutual v. Kathehis*[41] that when the 20th day after receipt of the Demand for Arbitration is a Sunday (or Saturday or public holiday), according to General Construction Law § 25(a), the Petition to Stay Arbitration may be filed the next business day.

In *Allstate Ins. Co. v. Lichtenstein*,[42] the claimant/insured served a notice of intent to arbitrate an *underinsured* motorist claim based on an accident with an underinsured vehicle. The insurer did not seek a stay of arbitration in response to that notice. Subsequently, the claimant/insured served a demand for arbitration, which specified the nature of the dispute as a hit-and-run, *i.e.*, an *un*insured motorist claim. The insurer timely moved to stay arbitration within 20 days of receipt of this second demand. The Supreme Court denied the petition on the ground that it was not brought within 20 days of the first notice of intent to arbitrate. On appeal, the Second Department noted that although the petition failed to establish that there were threshold issues concerning the claim for uninsured motorist benefits based on the alleged hit-and-run accident, such failure was excused by the confusion created by the myriad descriptions of the nature of the claim for which arbitration was sought in the various notices served by the claimant/insured.

Moreover, the claimant/insured's inaccurate specification of the basis for his demand for arbitration in the initial Notice of Intent made "it impossible [for the insurer] to determine if there [was] any basis to move to stay arbitration within the 20 day period" and, therefore, "did not serve to preclude [the insurer] from seeking a stay more than 20 days after its receipt." Accordingly, the court held that the denial of the petition should have been without prejudice to renewal, upon papers addressing any basis the insurer may have had for staying arbitration of what was then identified as an uninsured motorist claim based on an alleged hit-and-run accident.

Burden of Proof

An insurer seeking to stay arbitration of an uninsured motorist claim has the burden of establishing that the offending vehicle was insured at the time of the accident. Once a *prima facie* case of coverage is established, the burden shifts to the opposing party to come forward with evidence to the contrary.[43]

In *New York Central Mutual Fire Ins. Co. v. Licata*,[44] the court reaffirmed that a *prima facie* showing of the existence of insurance coverage can be made by producing a

police accident report containing an insurance code designation for an insurer, indicating coverage for the alleged offending vehicle.

In *Allstate Ins. Co. v. Esposito*,[45] the court held that in the absence of any proof undermining the validity of the other insurer's disclaimer of coverage, the disclaimer is effective and results in a valid SUM claim.

The court noted in *Allstate Ins. Co. v. Reilly*[46] that a "registration expansion search" would be sufficient to rebut a showing of insurance coverage contained on a police accident report. Moreover, evidence that a simple inquiry to the purported insurer for the tortfeasor elicited a denial of coverage, would also be sufficient to rebut the police accident report and force a framed issue hearing on the issue of coverage. The petitioning insurer, bearing the burden of proof, then would be constrained to join the purported insurer as a necessary party and prove that it insured the offending vehicle on the date of the accident.

In *Highlands Ins. Co. v. Baez*,[47] the court held that the petitioner had made a *prima facie* showing of coverage on the offending vehicle with a Department of Motor Vehicles FS-25 form listing the respondent as the insurer. The respondent insurer attempted to rebut this showing with the testimony of an employee to the effect that a computer search of the insurer's records, using the policy number and name of the owner listed on the police report, failed to turn up a policy insuring a person by that name and several variants thereof. The court held that "[t]his was less than the 'exhaustive search' required to shift the burden back to the petitioner to produce additional evidence of coverage." Specifically, the court observed that

> [n]o reason appears why [respondent] did not also search its records for the owner's address and telephone number, or the offending vehicle's model type and license plate number, all information that was provided in the police report and typically provided in insurance applications and entered into [respondent's] computer. Nor did [respondent] attempt to locate the owner by telephone or letter or compel her appearance at the hearing (citations omitted).

The court held in *AIU Ins. Co. v. Nunez*[48] that the petitioner made a *prima facie* showing of entitlement to a stay by submitting the police accident report and the DMV registration record showing coverage for the offending vehicle with the respondent insurer. However, the court held that the papers submitted in opposition raised issues of fact as to whether the subject collision was "deliberate or intentional" and/or whether the claimants participated in staging the collision and, thus, remitted the matter for a framed issue hearing on those issues.

In *Progressive Northwestern Ins. Co. v. Galluzzo*,[49] the court held that the respondent insurer failed to demonstrate, through credible evidence, that the policy it issued had been effectively canceled due to non-receipt of premium, and that the insurer's proof that it received payment after its due date was not credible or compelling.

The court noted in *Allstate Ins. Co. v. Albino*[50] that where a case is tried without a jury, the appellate court's power to review the evidence is as broad as that of the trial court, bearing in mind, of course, that

> due regard must be given to the discretion of the trial judge, who was in a position to assess the evidence and the credibility of the witnesses. . . . The trial court's determination will generally not be disturbed on appeal unless it is obvious that the conclusions could not have been reached under any fair interpretation of the evidence.

The court held that in the absence of any proof undermining the validity of the other insurer's disclaimer of coverage, the disclaimer is effective and results in a valid SUM claim.

In this case, the court opined that the trial judge "appeared to prejudge the case" before the petitioner had the opportunity to adduce any evidence. The court also criticized "the impatient manner in which the court conducted the proceeding." Thus, the court reversed the decision below and remitted the matter for a new hearing before a different judge.

Waiver of Right to Appeal

In *Basil Castrovinci Associates, Inc. v. District 65 Pension Plan*,[51] the court held, *inter alia*, that the plaintiffs waived their contentions in support of their appeal from the denial of their petition to stay arbitration "by participating in the arbitration process before filing a petition for a stay."

Default – Limits of Coverage

In *Kleynshvag v. GAN Ins. Co.*,[52] the alleged insurer for the offending vehicle was joined as a party respondent to a proceeding to stay arbitration of a claim for uninsured motorist benefits. The insurer did not appear in that proceeding and, as a result, a judgment was entered in which the UM carrier's petition was granted on the ground that the tortfeasor's insurer insured the offending vehicle. The finding of coverage was rendered on the insurer's default in the stay proceeding.

Thereafter, the plaintiff commenced an action against the tortfeasors. The defendants' insurer refused to accept service of the summons and complaint, contending that it did not insure the defendants. One of the defendants defaulted and, upon inquest, a judgment was entered against him in the sum of $125,000. A copy of that judgment with notice of entry was served upon the insurer.

Shortly thereafter, the plaintiff brought an action against the insurer, pursuant to Insurance Law § 3420(a)(2), to recover the amount of the unsatisfied judgment. In its answer to the complaint in that action, the insurer asserted as an affirmative defense that it did not issue a policy covering the subject accident. However, in motion papers, the insurer conceded that its search of its records was done by name, reverse name, and address, and that its records were not maintained in a fashion that would allow a search by vehicle identification number (VIN) or state registration number.

The court concluded that the insurer had the burden of proving the limit of the relevant coverage under its policy and rejected outright the insurer's contention that since it did not issue a policy at all, any liability on its part arose by operation of law and should be limited to the statutory minimum in effect at the time of the accident. Since the insurer did not meet its burden of showing that its liability should be limited to any amount less than the full amount of the plaintiff's judgment, the court held that the insurer was liable for the full amount of the judgment.

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Five years after the initial order granting the petition to stay arbitration and finding coverage, the insurer moved to vacate that order. That motion was denied. The Supreme Court then granted the plaintiff's motion for summary judgment and denied the insurer's cross-motion for summary judgment, but held that the insurer's liability was limited to $25,000, rather than the full $125,000 of the judgment. The Supreme Court explained that it was "constrained" by the earlier finding that there was a policy applicable at the time of the accident, but that faced with the task of "ascertain[ing] the terms of a policy which, in fact, does not appear to exist," limited the insurer's liability to the statutory minimum limits set forth in Vehicle & Traffic Law § 311(4)(a), *i.e.*, $25,000.

On appeal, the Appellate Division increased the amount of the insurer's liability to $125,000 – the full amount of the underlying judgment against its "insureds," with interest and costs, totaling $162,252.50. The court found that the plaintiff established the existence of a policy by showing that the insurer was made a party respondent to the proceeding to stay arbitration "and knowingly chose not to participate therein." Under the circumstances, the court held that the insurer was collaterally estopped from litigating the issue of coverage, even though that issue was initially determined on its default in the arbitration.

With respect to the issue of damages, the court held that "[i]t was [the insurer's] burden to prove any limitation on the plaintiff's right to recover" and that "having ignored every step in the judicial processes leading to this action, one which may have been unnecessary had [the insurer] chosen to participate earlier, [the insurer] should not be heard to complain now that it is called upon to satisfy a judgment that was entered following its calculated decision to ignore earlier stages of the plaintiff's claim."

In *Allstate Ins. Co. v. Hayes*,[53] the court held that the affirmation of the defaulting respondent's attorney, explaining his failure to appear on the fifth adjourned date of the hearing, after having appeared on the four previous dates, was sufficient to establish a reasonable excuse for the default. Insofar as counsel also made out a meritorious claim, the default was vacated.

Collateral Estoppel

In *Goepel v. City of New York*,[54] the court held that the individual defendant in the personal injury action, who brought a prior underinsured motorist arbitration proceeding and fully participated therein, was collaterally estopped from contesting liability in the action. However, the court further held that because the defendant City of New York, which was not a party to the defendant's arbitration proceeding, had no knowledge of that proceeding and had no incentive (other than issue preclusion) to become involved, it could not be collaterally estopped from contesting the defendant's liability merely because the individual defendant was operating a City vehicle in the course of his employment.

The judicial hearing officer (JHO) in *Melendez v. Budget Rent-A-Car*,[55] ruling on the issue of whether the offending vehicle belonged to an unidentified, hit-and-run driver, credited the owner's testimony that her license plate had been stolen, and that neither she nor her car had been involved in an accident. He denied the insurer's petition to stay an uninsured motorist arbitration demanded by the victim of the accident allegedly involving that car. In the underlying lawsuit brought against the vehicle's owner, the owner sought to amend her answer to assert the affirmative defense of collateral estoppel based upon the JHO's determination that she had not been the offending hit-and-run driver. She further argued that collateral estoppel precluded the plaintiff from re-litigating in the

personal injury action the issue of the defendant's non-involvement in the accident and, therefore, sought summary judgment dismissing the complaint against her.

The court first held that "the doctrine of collateral estoppel is applicable to give preclusive effect to a determination by a JHO at a framed issue hearing, pursuant to an Article 75 petition, denying a permanent stay of an arbitration of an uninsured motorist claim." The court then held that collateral estoppel barred the plaintiff from litigating the tort action against the defendant because there was the requisite presence of identical and decisive issues, and plaintiff had a full and fair opportunity to litigate at the prior hearing. The court rejected the contention that the doctrine should not apply because the framed issue hearing related to a small claim in comparison to the claim raised in the personal injury action. Moreover, it was the plaintiff who voluntarily chose to seek redress for her injuries via a UM arbitration, despite the pending personal injury action in which a contrary position was being espoused. ■

1. *See* Jonathan A. Dachs, *2004 Case Update: Uninsured, Underinsured, Supplementary Uninsured Motorist Law, Parts I and II*, N.Y. St. B.J. (May 2005) p. 38, (June 2005) p. 24; *2003 Update on Issues Affecting Accidents Involving Uninsured and/or Underinsured Motorists*, N.Y. St. B.J. (May 2004) p. 38; *2002 Update on Issues Affecting Accidents Involving Uninsured and/or Underinsured Motorists*, N.Y. St. B.J. (June 2003) p. 32; *A Review of Uninsured Motorist and Supplementary Uninsured Motorist Cases Decided in 2001*, N.Y. St. B.J. (July/Aug. 2002) p. 20; *Actions by Courts and Legislature in 2000 Addressed Issues Affecting Uninsured and Underinsured Drivers*, N.Y. St. B.J. (Sept. 2001) p. 26; *Summing Up 1999 "SUM" Decisions: Courts Provide New Guidance on Coverage Issues for Motorists*, N.Y. St. B.J. (July/Aug. 2000) p. 18; *Decisions in 1998 Clarified Issues Affecting Coverage for Uninsured and Underinsured Motorists*, N.Y. St. B.J. (May/June 1999) p. 8; *Legislative and Case Law Developments in UM/UIM/SUM Law – 1997*, N.Y. St. B.J. (Sept./Oct. 1998) p. 46; *Developments in Uninsured and Underinsured Motorist Coverage*, N.Y. St. B.J. (Sept./Oct. 1997) p. 18; *The Parts of the "SUM": Uninsured and Underinsured Motorist Coverage in 1995*, N.Y. St. B.J. (July/Aug. 1996) p. 42; *Uninsured and Underinsured Motorist Cases in 1994*, N.Y. St. B.J. (Nov. 1995) p. 24; *Uninsured and Underinsured . . . But Not Underlitigated – 1993: An Important Year for UM/UIM Coverage*, N.Y. St. B.J. (Sept./Oct. 1994) p. 13.

2. 14 A.D.3d 559, 789 N.Y.S.2d 195 (2d Dep't 2005).

3. 22 A.D.3d 762, 804 N.Y.S.2d 379 (2d Dep't 2005).

4. *Id.* at 763 (citations omitted).

5. *See McCarthy v. MVAIC*, 16 A.D.2d 35, 224 N.Y.S.2d 909 (4th Dep't 1962), *aff'd*, 12 N.Y.2d 922, 238 N.Y.S.2d 101 (1963).

6. 14 A.D.3d 610, 789 N.Y.S.2d 206 (2d Dep't 2005).

7. 22 A.D.3d 846, 847, 803 N.Y.S.2d 679 (2d Dep't 2005).

8. 15 A.D.3d 484, 789 N.Y.S.2d 719 (2d Dep't 2005).

9. 18 A.D.3d 860, 796 N.Y.S.2d 663 (2d Dep't 2005).

10. N.Y.L.J., May 13, 2005, p. 20, col. 1 (Sup. Ct., Bronx Co. 2005).

11. 4 N.Y.3d 332, 794 N.Y.S.2d 704 (2005). *See also Great Canal Realty Corp. v. Seneca Ins. Co.*, 13 A.D.3d 227, 787 N.Y.S.2d 22 (1st Dep't 2004), *rev'd*, 5 N.Y.3d 742, 800 N.Y.S.2d 521 (2005); *St. Charles Hosp. & Rehab. Ctr. v. Royal Globe Ins. Co. of Am.*, 18 A.D.3d 735, 795 N.Y.S.2d 343 (2d Dep't 2005).

12. 97 N.Y.2d 491, 743 N.Y.S.2d 13 53 (2002).

13. 4 N.Y.3d 468, 796 N.Y.S.2d 13 (2005).

14. 14 A.D.3d 525, 789 N.Y.S.2d 428 (2d Dep't 2005).

15. *Id.* at 526 (citations omitted). *See also DeFreitas v. TIG Ins. Co.*, 16 A.D.3d 451, 791 N.Y.S.2d 626 (2d Dep't 2005) ("Notice of the occurrence must be given to the insurer promptly after the insured receives notice that a claim against them will in fact be made").

16. 18 A.D.3d 498, 795 N.Y.S.2d 259 (2d Dep't 2005).

17. 7 A.D.3d 955, 777 N.Y.S.2d 551 (3d Dep't 2004), *modified*, 4 N.Y.3d 468, 796 N.Y.S.2d 13 (2005).

18. *Rekemeyer*, 4 N.Y.3d at 474.

19. 16 A.D.3d 616, 792 N.Y.S.2d 556 (2d Dep't 2005).

20. *See also Gallante Props. v. Allcity Ins. Co.*, 24 A.D.3d 414, 805 N.Y.S.2d 113 (2d Dep't 2005) (five-year delay in providing notice after becoming aware of the incident).

21. 4 Misc. 3d 1012(A), 791 N.Y.S.2d 874 (Sup. Ct., Bronx Co. 2004), *aff'd sub nom. State Farm Mut. v. Katehis*, 23 A.D.3d 224, 803 N.Y.S.2d 546 (1st Dep't 2005).

22. 23 A.D.3d 207, 804 N.Y.S.2d 61 (1st Dep't 2005).

23. 9 Misc. 3d 1101(A), 806 N.Y.S.2d 446 (Sup. Ct., Kings Co. 2005).

24. 24 A.D.3d 702, 806 N.Y.S.2d 720 (2d Dep't 2005).

25. *Id.* at 704 (quoting *Lauritano v. Am. Fid. Fire Ins. Co.*, 3 A.D.2d 564, 568, 162 N.Y.S.2d 553 (1st Dep't 1957), *aff'd*, 4 N.Y.2d 1028, 177 N.Y.S.2d 530 (1958)).

26. *Lauritano*, 3 A.D.2d at 568.

27. *Id.*

28. *Id. See also Appel v. Allstate Ins. Co.*, 20 A.D.3d 367, 799 N.Y.S.2d 467 (1st Dep't 2005).

29. 21 A.D.3d 1008, 801 N.Y.S.2d 412 (2d Dep't 2005).

30. *Id.* at 1008 (citations omitted). *See also Warnock Capital Corp. v. Hermitage Ins. Co.*, 21 A.D.3d 1091, 803 N.Y.S.2d 606 (2d Dep't 2005) (apparent authority to issue a binder); *Travelers Ins. Co. v. Raulli & Sons, Inc.*, 21 A.D.3d 1299, 802 N.Y.S.2d 823 (4th Dep't 2005).

31. 14 A.D.3d 506, 788 N.Y.S.2d 168 (2d Dep't 2005).

32. 14 A.D.3d 581, 789 N.Y.S.2d 221 (2d Dep't 2005).

33. 15 A.D.3d 581, 790 N.Y.S.2d 211 (2d Dep't 2005).

34. 21 A.D.3d 1262, 801 N.Y.S.2d 180 (4th Dep't 2005).

35. 23 A.D.3d 1047, 804 N.Y.S.2d 226 (4th Dep't 2005).

36. 23 A.D.3d 629, 804 N.Y.S.2d 416 (2d Dep't 2005).

37. Ins. Law § 5102(d).

38. 16 A.D.3d 957, 792 N.Y.S.2d 223 (3d Dep't 2005).

39. *See Transp. Ins. Co. v. Desena*, 17 A.D.3d 478, 792 N.Y.S.2d 334 (2d Dep't 2005).

40. 18 A.D.3d 652, 795 N.Y.S.2d 653 (2d Dep't 2005).

41. 4 Misc. 3d 1012(A), 791 N.Y.S.2d 874 (Sup. Ct., Bronx Co. 2004), *aff'd sub. nom. State Farm Mut. v. Katehis*, 23 A.D.3d 224, 803 N.Y.S.2d 546 (1st Dep't 2005).

42. 24 A.D.3d 662, 806 N.Y.S.2d 697 (2d Dep't 2005).

43. *See N.Y. Cent. Mut. Fire Ins. Co. v. Licata*, 24 A.D.3d 450, 807 N.Y.S.2d 380 (2d Dep't 2005); *Allstate Ins. Co. v. Esposito*, 15 A.D.3d 648, 791 N.Y.S.2d 125 (2d Dep't 2005); *Eagle Ins. Co. v. Rodriguez*, 15 A.D.3d 399, 790 N.Y.S.2d 167 (2d Dep't 2005).

44. 24 A.D.3d 450, 807 N.Y.S.2d 380 (2d Dep't 2005).

45. 15 A.D.3d 648, 791 N.Y.S.2d 125 (2d Dep't 2005).

46. 15 A.D.3d 191, 789 N.Y.S.2d 128 (1st Dep't 2005).

47. 18 A.D.3d 238, 795 N.Y.S.2d 4 (1st Dep't 2005).

48. 17 A.D.3d 668, 793 N.Y.S.2d 514 (2d Dep't 2005).

49. 16 A.D.3d 692, 791 N.Y.S.2d 450 (2d Dep't 2005).

50. 16 A.D.3d 682, 792 N.Y.S.2d 518 (2d Dep't 2005).

51. 16 A.D.3d 493, 791 N.Y.S.2d 601 (2d Dep't 2005).

52. 13 A.D.3d 588, 789 N.Y.S.2d 160 (2d Dep't 2004), *aff'd as modified and remanded*, 21 A.D.3d 999, 801 N.Y.S.2d 383 (2d Dep't 2005); *see also* N. Dachs & J. Dachs, *The "Top 10" and the Insurance Case of the Year*, N.Y.L.J., Jan. 10, 2006.

53. 17 A.D.3d 669, 794 N.Y.S.2d 85 (2d Dep't 2005).

54. 23 A.D.3d 344, 804 N.Y.S.2d 95 (2d Dep't 2005).

55. 7 Misc. 3d 585, 794 N.Y.S.2d 830 (Sup. Ct., Bronx Co. 2005).

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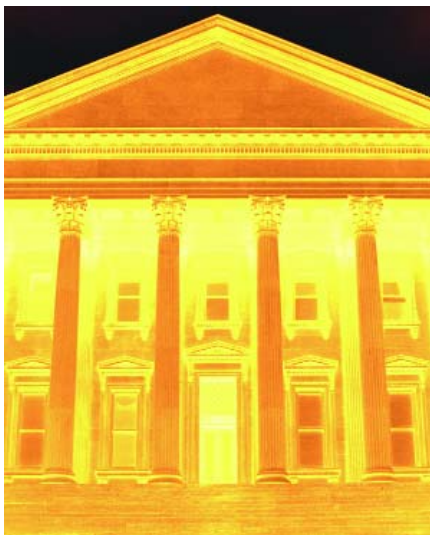

Pommells: The Facts, Nothing But the Facts

Recently, the *Journal* published an article titled "Paradigm Shift in No-Fault 'Serious Injury' Litigation,"[1] by Joseph D. Nohavicka. The article took as its subject the Court of Appeals decision in *Pommells v. Perez*,[2] and concluded that, in the aftermath of *Pommells*, "lower courts are charged with a new function in Insurance Law § 5102 litigation: weeding out fraudulent 'serious injury' cases that burden court dockets and impede the resolution of legitimate claims."[3]

The article gave rise to a great deal of comment and criticism on a plaintiffs' Internet listserve, of which one of this article's authors is a member, and sparked a number of thoughtful letters and e-mails to the editor of the *Journal*. In response, and at the suggestion of the *Journal's* Editor in Chief, we collaborated to write this article in rebuttal.[4]

Our primary criticism of the article is the blurring of the author's obvious defense-counsel- and insurer-oriented distaste for the No-Fault law with his analysis of the *Pommells* case, culminating in a statement of law that is unsupported by the decision. In taking language from the introduction to the Court's opinion, referred to neither directly nor indirectly by the Court in its ultimate decisions on the three cases before it, Mr. Nohavicka misleads the reader into believing that the Court of Appeals has enunciated a new "fraud" test for courts deciding no-fault threshold issues. There is simply no basis in the opinion for transforming one part of the Court's precatory language into a mandate for all lower courts to follow, yet Mr. Nohavicka presents this as a central holding of the Court's decision.

In fact, it is our belief that the *Pommells* decision simply elaborates longstanding guidelines mandated by the Court of Appeals, clarifying the burdens on a plaintiff seeking to defeat summary judgment where there is a gap or cessation of treatment or sufficient proof in support of the motion establishing a pre-existing condition as the cause of the plaintiff's injuries. *Pommells* creates no duty on the part of the trial court to determine fraud in the context of a summary judgment motion.

Initially, we recognize that the Court raised the presence of "fraud" in the no-fault world. Rightfully so. The Court should be concerned about its presence in all aspects of no-fault coverage, from deceitful health care providers to insurance carriers. However, we believe the Court's observation can only be viewed, at best, as dictum, *i.e.*, language that is "a nonbinding, incidental opinion on a point of law given by a judge in the course of a written opinion delivered in support of a judgment."[5]

So what did the Court say in *Pommells* about fraud in the no-fault world? It stated:

> No-Fault thus provides a compromise: prompt payment for basic economic loss to injured persons regardless of fault, in exchange for a limitation on litigation to cases involving serious injury. Abuse nonetheless abounds. From 1992 to 2000, reports of No-Fault fraud rose more than 1700% and constituted 75% of all automobile fraud reports received by the Insurance Department in 2000.[6]

This observation is not new. The presence of fraud was an element reviewed and commented upon by the

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court in *Medical Society of the State of N.Y. v. Serio*,[7] in reviewing the Superintendent of Insurance's promulgation of Regulation 68, and in *State Farm Mutual Automobile Insurance Co. v. Mallela*,[8] in answering a certified question from the Second Circuit as to whether insurance carriers could withhold payment for medical services provided by fraudulently incorporated medical providers. So, is there documented abuse in the no-fault world? Absolutely. Do these observations represent a "paradigm shift" or an attack on plaintiffs and their attorneys? Absolutely not.

Moreover, other aspects of no-fault litigation are of concern to the Court. As *Pommells* observes:

> There is, similarly, abuse of the No-Fault Law in failing to separate "serious injury" cases, which may proceed in court, from the mountains of other auto accident claims, which may not. That "basic economic loss" has remained capped at $50,000 since 1973 provides incentive to litigate.
>
> In the context of soft-tissue injuries involving complaints of pain that may be difficult to observe or quantify, deciding what is a "serious injury" can be particularly vexing. Additionally, whether there has been a "*significant*" limitation of use of a body function or system (the threshold statutory subcategory into which soft-tissue injury claims commonly fall) can itself be a complex, fact-laden determination. Many courts have approached injuries of this sort with a well-deserved skepticism. Indeed, failure to grant summary judgment even where the evidence justifies dismissal, burdens court dockets and impedes the resolution of legitimate claims. As a hint of the dimension of the situation, in less than three years, *Toure v. Avis Rent A Car Sys*. (98 NY2d 345 [2002]) – addressing similar issues – already has been cited more than 500 times in published decisions of our trial and appellate courts (representing only a small portion of the trial court activity).[9]

We would add another abuse present in *Pommells* itself, namely the bringing of threshold summary judgment motions by defense counsel which are not even supported by the defense moving papers as they show that in fact the plaintiff has sustained a serious injury.

Policy, societal, and legal issues permeate the no-fault claims and litigation. However, after surveying the three individual cases that were consolidated before the Court of Appeals in *Pommells*, together with the trilogy of cases that were consolidated and decided by the Court of Appeals in *Toure* in 2002,[10] Mr. Novahicka espouses a politically inspired course of action for New York courts to follow rather than a meaningful analysis of the Court's decision.

Do these observations represent a "paradigm shift" or an attack on plaintiffs and their attorneys? Absolutely not.

So, what result did the Court of Appeals arrive at in the three cases before it in *Pommells*? At the end of the day, in the Court of Appeals, the score was plaintiffs one, defendants two. Summary judgment had been ordered by the trial court in all three cases, and affirmed by the appellate divisions in all three. Interestingly, two of the cases,[11] one of which was reversed by the Court of Appeals, were appealable as of right, with two justices having dissented in the Appellate Division.[12]

So, what criteria did the Court of Appeals use to decide the three cases before it in *Pommells*, all of which involved herniations? Not by "weeding out fraudulent "serious injury" cases that burden court dockets and impede the resolution of legitimate claims." Instead, the Court utilized traditional, tried-and-true methodology to decide, as a matter of law, the entitlement of the defendants to summary judgment in the cases before it.

In *Pommells*, the Court held that the defendant established *prima facie* entitlement to summary judgment, shifting the burden to the plaintiff to "present objective medical proof of a serious injury causally related to the accident in order to survive summary dismissal. While the plaintiff submitted objective evidence regarding physical limitations, his history revealed two interrupting factors: cessation of treatment six months after the accident and a kidney condition."[13] While acknowledging that cessation of treatment was not dispositive, "a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so. Here, plaintiff provided no explanation whatever as to why he failed to pursue any treatment for his injuries after the initial six-month period, nor did his doctors."[14] The Court also found that the plaintiff had failed to address the effect of his kidney problem on his accident-related injuries, at least in part due to a failure of proof in relying, in part, on unsworn reports. This is one of the two cases in which two Appellate Division justices had voted to reverse the trial court's grant of summary judgment, and the opinion contains not a single reference to fraud, though the Court does mention that the plaintiff was referred to his treating doctors by his attorney.

In *Brown*, another case in which the plaintiff was referred to his treating physician by his lawyer, after being transported to the hospital by ambulance and released, the defendant also

established *prima facie* entitlement to summary judgment. All three of the defendant's doctors averred that "any limitations plaintiff suffered as a result of the accident were minor at best,"[15] and one of the three claimed that the herniations were chronic and degenerative in nature, *i.e.*, not causally related to the accident.[16] Faced with this showing:

> In opposition, plaintiff submitted the affirmation of his treating physician, Dr. Melamed, opining that plaintiff suffered from "a herniated disc, confirmed by MRI testing, at L5-S1 towards the right centrally indenting the thecal sac; bulging discs, also confirmed by MRI, at levels L3-L5; and acute cervical sprain." He added that his April 22, 2002 examination revealed numerical deficiencies in plaintiff's extension and flexion of the cervical and lumbar spine, and he opined, with a reasonable degree of medical certainty, that plaintiff's "inability to move his spine (lower back and neck) to the full range of what is normal [constituted a] definite severe and permanent injury" that was causally related to the accident. Finally, Dr. Melamed explained that "when it became clear, after extensive therapy in my office, that further treatment and visits would be only palliative in nature, upon discharge from this office, I instructed [plaintiff] as to strengthening and stabilizing home exercises, which consisted of back and neck stretches and strengthening techniques." Plaintiff's own affidavit noted that he continues to suffer "excruciating" pain in his neck and lower back when he stands for more than 15 minutes, and can no longer lift heavy objects; experiences numbness in his legs when he remains too long in the same position; and cannot continue his prior sports activities.

The trial court granted summary judgment, holding that the plaintiff had failed to explain a two-and-one-half year gap in treatment and for relying upon unsworn MRI reports. The appellate division, two justices dissenting, affirmed, "holding that plaintiff failed to both furnish an adequate explanation of the gap in treatment and address the suggested chronic disc condition."[17]

In reversing, the Court of Appeals, again with no mention of or allusion to fraud, held:

> Neither of the dispositive grounds in *Pommells* applies here. First, as to the so-called gap in treatment – the two and one-half years when plaintiff's injuries received no outside attention – Dr. Melamed explained that, once he determined further medical therapy would "be only palliative in nature," he terminated treatment and instructed plaintiff to continue exercises at home. A plaintiff need not incur the additional expense of consultation, treatment or therapy, merely to establish the seriousness or causal relation of his injury. Unlike *Pommells*, plaintiff's cessation of treatment was explained sufficiently to raise an issue of fact and survive summary judgment.
>
> Second, as to an alleged pre-existing condition, there is only Dr. Berkowitz's conclusory notation, itself insufficient to establish that plaintiff's pain might be chronic and unrelated to the accident. As opposed to the undisputed proof of plaintiff's contemporaneous, causally relevant kidney condition in *Pommells*, here even two of defendants' other doctors acknowledged that plaintiff's (relatively minor) injuries were caused by the car accident. On this record, plaintiff was not obliged to do more to overcome defendants' summary judgment motions, and we therefore reverse the Appellate Division's order and reinstate the complaint.[18]

Finally, in *Carasco*, where there is no mention of the plaintiff being referred to any medical provider by his attorneys, the defendant met its initial burden, and the trial court granted summary judgment, affirmed unanimously by the appellate division and affirmed by the Court of Appeals, again, with no mention of or allusion to fraud:

> As in *Pommells* and *Brown*, defendant's submissions shifted to plaintiff the burden of coming forward with evidence indicating a serious injury causally related to the accident. Unlike *Brown*, however, defendant presented evidence of a pre-existing degenerative disc condition causing plaintiff's alleged injuries, and plaintiff failed to rebut that evidence sufficiently to raise an issue of fact.
>
> Dr. Orlandi, after physically examining plaintiff and reviewing prior medical records, including MRIs and x-rays, concluded that the pain in areas identified as herniated by Dr. Miloradovich was caused by pre-existing and degenerative conditions. Even plaintiff's original doctor, Dr. Miloradovich, noted, in his final report, that plaintiff's pain was related to a prior condition.
>
> While plaintiff provided Dr. Lambrakis's expert's report of specific losses of range of motion in plaintiff's spine, that plaintiff suffered serious and permanent injuries which were causally related to the accident, plaintiff did not refute defendant's evidence of a pre-existing degenerative condition. To the contrary, the Lambrakis report supplied by plaintiff explained that the pain and loss of range of motion in the cervical spine was entirely consistent with those formations identified by the MRI and set forth by Drs. Miloradovich and Orlandi as related to a degenerative condition. In this case, with persuasive evidence that plaintiff's alleged pain and injuries were related to a pre-existing condition, plaintiff had the burden to come forward with evidence addressing defendant's claimed lack of causation. In the absence of any such evidence, we conclude – as did the trial court and Appellate Division – that defendant was entitled to summary dismissal of the complaint.[19]

COUNTERPOINT

In all the three cases reviewed by the Court of Appeals, the ability of the parties to meet the burdens imposed upon them by the law with competent, admissible proof, was determinative. In none of the cases was fraud a factor mentioned by the Court, *nor* was fraud alluded to.

Does *Pommells* represent a "paradigm shift" or an indictment of the plaintiff's bar? Not at all. Does it recognize that plaintiffs who are injured in automobile cases and present with disabling neck and back pain are entitled to pursue their personal injury claims? Absolutely, yes. Is it a valuable guide to litigating summary judgment motions involving the no-fault serious injury threshold? You bet. These observations represent *Pommells'* true enduring significance. ■

1. N.Y. St. B.J. (Jan. 2006) p. 26.
2. 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005).
3. Nohavicka, *supra* note 1, at 28.
4. In the interest of full disclosure, Professor Michael Hutter is, outside of his academic duties, special counsel to Powers & Santola, which represents personal injury plaintiffs, and David Paul Horowitz, as readers of his "Burden of Proof" column are well aware, represents personal injury plaintiffs as well.
5. Bryan A. Garner, A Dictionary of Modern Legal Usage (2nd ed.).
6. *Pommells*, 4 N.Y.3d at 573 (citations omitted).
7. 100 N.Y.2d 854, 768 N.Y.S.2d 423 (2003).
8. 4 N.Y.3d 313, 794 N.Y.S.2d 700 (2005).
9. *Pommells*, 4 N.Y.3d at 571–72 (emphasis in original).
10. *Toure v. Avis Rent A Car Sys., Inc.*, 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002).
11. *Pommells v. Perez* and *Brown v. Dunlap*.
12. In the third case of the *Pommells* trio, *Carasco v. Mendez*, the Appellate Division unanimously affirmed the trial court's grant of summary judgment.
13. *Pommells*, 4 N.Y.3d at 574.
14. *Id*. (citation omitted)
15. *Id*.
16. *Id*.
17. *Id*.
18. *Id*.
19. *Id*. at 580–81.

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: When I meet someone and say "next Friday," I mean not this coming Friday, but the following Friday. Recently, I was surprised to discover that not everyone understood next the way I do; when the person I was talking to mentioned the date she thought I had in mind, it was the very next Friday, not the Friday after that. Am I right or is she?

Answer: The problem is that the word *next* has a built-in ambiguity. The world seems to be divided between those who interpret *next* as you do, and those who interpret it as your friend does. In fact, the question has come up so often that some time ago I took an informal poll of my colleagues at the law college, and found that most of them consider that "next Friday" means this coming Friday, not the following Friday.

As lawyers tend to do, in response to my question my colleagues asked me a question: "How would I indicate the immediately following Friday if I were asked that question on a Thursday, the day before?" I would say "tomorrow," because *next Friday* implies *not* the Friday that imme diately follows.

"But suppose the conversation occurs on Saturday; then how would you indicate the Friday of the following week?" Then I would say "next Friday," violating my own rule that *next* does not mean "the very next." The ambiguity of *next* provides a lesson and a solution: Avoid using *next* when there is any possibility of ambiguity. Instead, state the exact date you intend.

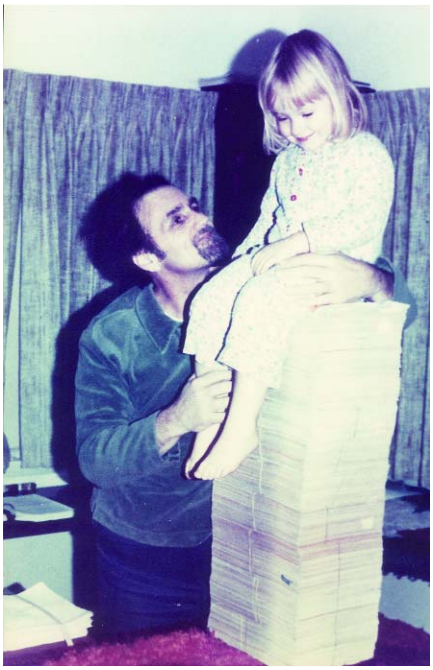
After my column on *next* appeared in a journal, someone sent me a copy of a "Miss Manners" column. A reader had asked Miss Manners' advice on the same subject, causing an argument at the dinner table. The father insisted that a dinner invitation for "next" Saturday meant "this coming Saturday," and other family members argued that it meant the Saturday after this one. Miss Manners' answer differed from mine, and was probably more sensible. "Listen to your father," she wrote, "for if you keep quibbling about words, no one will get fed."

Question: Even in well-edited publications, a usage has become popular, whose name I do not know. It might be called "anomalous adverb." It occurs in statements like, "As Patrick Henry famously said, 'Give me liberty or give me death.'" He may have said that loudly or softly or defiantly, but he didn't say it "famously." The fame came later.

Answer: My thanks to Attorney David Lester, who is knowledgeable about and interested in language, for commenting about this usage. I don't know its name either, but I call it "transferred modifier."

CONTINUED ON PAGE 55

BY DAVID D. SIEGEL



Professor David D. Siegel is a Distinguished Professor of Law at Albany Law School and the Editor of the *New York State Law Digest*. He is the author of *Siegel's New York Practice*, 7th Edition; Commentaries on New York Civil Practice in *McKinney's Consolidated Laws* and on federal civil practice in the United States Code Annotated (U.S.C.A.); *Conflict of Laws* in the West *Nutshell* Series; and *Siegel's Practice Review*, his monthly newsletter on practice that commenced publication in April of 1993.

My Life in Paper

It was a wintry day in 1962 at St. John's Law School, where I had just begun teaching law. It took place in Ms. Wiest's office because it was she who controlled the copying machine. She was the dean's secretary, a category of goddess at the time, and the copying machine – note the definite article – was in a little anteroom accessible only through her office. Ms. Wiest was a lovely person, but as the sole custodian of the school's sole copying machine, she had a heavy responsibility and had to be firm.

It was the first exam I had ever given and it was important that I retain a copy of it. Today one merely snaps a professorial finger in such need, and doors open to arrays of spectacular machinery that can copy, turn over, copy again, collate, staple, and play "Dixie," all at once. But not in 1962.

One had to make an appointment to use the machine. I did that, some three or four days in advance. It was an essay exam and took up only four pages. Today, the copying would occur in about 30 seconds. For me in 1962, it took three-quarters of an hour. It entailed preliminary instruction in the use of the copier and then the elaborate process of making the four copies.

It was exciting. Arising on the appointed day after a fitful sleep, I dressed as if going to the opera and appeared in Ms. Wiest's office with spare time – time that I used to further contemplate my new experience.

The moment arrived, and Ms. Wiest ushered me into the sacred chamber, where sat, on a table top, two pieces of equipment, side by side. These two were "the" copy machine. My first lesson was to take a piece of special paper and place it over the page I wanted copied, hold the two sheets together firmly at the edges, and feed them into a heated roller that caused the impression of the copied paper to be transferred onto the special paper. Not visibly, though, at least not yet. Visibility was the magic contribution of the second machine. This one had a tray of liquid inside. Now I separated the two papers as they had emerged, cozy and warm, from the first machine, and took the impressioned paper, separated it from the original, and placed it over yet another piece of special paper, this one a photographic overlay of some kind.

Again I went through a tight gripping procedure, again at the edges, and fed the two sheets into the liquid. As they emerged they went through another roller, this one to wring out the liquid. The roller then fed them, semi-dried, into my trembling hands. With those same hands, I separated the two sheets, thrilled to see one of them emerge as a copy of my original. A bit cloudy, but legible. Still a little damp, however. I went through this process with all four sheets. This made me a Copier 2nd Class, but I learned to my chagrin that the rank would not qualify me for either a promotion or a raise.

Forewarned about the possible dampness when I first made my appointment with Ms. Wiest, I had put the radiator on in my little office, to which I repaired forthwith, placing my treasured quartet strategically across the warm panels of the heater. I waited for them to dry.

On later copying occasions, I went about other chores as I left the copies to dry, but on this occasion – my initiation into the copying world – I was in no condition to do anything until the copies had been divested of all moisture. I was in fear of over-drying. Maybe even outright parching. I therefore stayed a while to watch the copies dry, momentarily forgetting the adage that a watched radiator never dries. Actually, it took only five or ten minutes. Not

bad for 1962. After my class on that day I went home and took a nice nap.

Jump now, not to the present – we're not ready for that yet – but to 1977, at Albany Law School, to which I switched when my family and I moved upstate. I had just completed the manuscript of the first edition of my textbook on *New York Practice*. No computers yet, but the school did have a fine, if primitive, Xerox machine that had no liquid or rollers. We may have had two such machines, possibly through an endowment, but the one that the faculty and students were allowed to use was in the library.

A brief aside, but a necessary preliminary in this saga: Al Alliegro, a vice president at West Publishing and a friend of mine, told me a long time ago about a prominent professor at a well-known law school who brought the manuscript of his textbook to the office of his publisher's president. (Let's just call the president Mr. Tipsy, and let it be known that the publisher wasn't West.) It was a Saturday afternoon. Mr. Tipsy had arranged to meet the professor there just to accept the manuscript, which would not start bona fide processing until the Monday following. Saturday was golf day for Mr. Tipsy, so off he went to play. He had placed the big manuscript on the carpet at a corner of his office.

If you're as apprehensive as I was about what happened next, I won't keep you in suspense. You guessed it, the whole manuscript got thrown out. The janitor's philosophy was that a floor is a floor, carpeted or not, and things on the floor get thrown out. I asked Al the inevitable question: Didn't the professor make a copy? He didn't, said Al, adding with a twinkle, "Dave, the company is still paying royalties on that unpublished book." The janitor's assumption that the manuscript was garbage was premature, in any event. Bench and bar might have been able to reach that conclusion on their own. They never got the chance.

That story dove into my psyche and retained a hallowed place: I never let an original manuscript, whether of a book of several thousand pages or of an article of only a dozen or so, out of my hands until I had made a copy of it. This meant making the copies myself, rather than having one of my student assistants do it. I stood in line at the Xerox machine, honoring the first-come, first-served rule, which made me defer even to those in line – including students, an indignity that no respectable faculty would tolerate today.

Copy in hand and stored away in some sacred place, I now took the original manuscript of my first edition home and prepared to send it to West. This was in the spring of 1977.

The manuscript was some 4,000 doubled-spaced pages, and printed on the heavy paper that West wanted us to use. It produced a pile almost two feet high, and a photograph of my daughter Rachel, two-and-a-half years old at the time, sitting on top of it. It's quite a memory now.

The next three editions of my book are a graphic progression through the printing world. The second edition, in 1991, was still done on paper, but the paper was thinner than before. (Not so the author.) The paper on the third edition, in 1999, was thinner still (but again, not so of the author, who seemed to expand in inverse proportion to the diminishing manuscript). I have photographs of all three editions, with my wife Rosemarie and our first daughter, Sheela, also in the picture.

The fourth edition, published just last year, in 2005, provides the ultimate contrast. I sent it to West in a small 5x7" envelope. The whole of it, with substantially more material than the earlier editions, fit onto two small "Zip Drive" disks. Actually, the third edition could have made almost equal use of the electronic age. The equipment was ready; the problem was that I wasn't.

I still don't even accept e-mail at school. I feel that if one is to be an old codger, one must have something to codge about.

An interesting note to end on: A young colleague of mine, Tom Gleason, is on the Advisory Committee on Civil Practice, our specialist there on electronic filing. I remarked to him, after my recent sojourn into the electronic world that one advantage was that it would save paper. Tom scoffed. On the contrary, he said, the electronic age has vastly increased the use of paper, because so many electronic users want a hard copy of their work product as well and get it, neat and clean, with the mere push of a button. And a revised copy with another push. Authors are usually willing to print out a whole document only for the sake of just a few editings on just a few pages.

The printing of my first edition, by the way, involved a bevy of linotype setters with aprons on. Hot lead, they called the process. More recently, of course, everything is electronic, which always makes the final product look good.

Unless you read it, of course, and find it eligible for a place on Mr. Tipsy's carpet. ■

MEET YOUR NEW OFFICERS

President
Mark H. Alcott

Mark H. Alcott, a senior litigation partner at Paul Weiss Rifkind Wharton & Garrison LLP in New York City, took office on June 1 as president of the 72,000-member New York State Bar Association. The House of Delegates, the Association's decision- and policy-making body, elected Alcott at the organization's 129th annual meeting, held this past January in Manhattan.

A resident of Larchmont, and an honors graduate of Harvard College and Harvard Law School, Alcott has been widely recognized for excellence in business litigation. He has handled major cases in both federal and state courts throughout the U.S. and abroad, including complex commercial actions, class actions, and international arbitrations.

Alcott served on the Association's 26-member Executive Committee as a member-at-large and then as vice president representing the First Judicial District (Manhattan), positions he held from 1999 to 2005, before assuming the office of president-elect. The committee oversees the management and administration of the state bar under policies determined by the House of Delegates.

In his many years of active membership in the Association, Alcott has held numerous leadership positions and launched a number of initiatives. He served as chair of the Association's Commercial and Federal Litigation Section. During his tenure as chair, section members worked on more than 100 projects through 44 committees and task forces. He established and led a section task force that proposed the creation of a statewide commercial court, and then served on the committee established by Chief Judge Judith S. Kaye that implemented that proposal.

Alcott chaired the Association's Special Committee on Administrative Adjudication, which, after an extensive, year-long study, recommended major changes in the administrative rules and procedures used in five state agencies (Motor Vehicles, Health, Family Assistance, Workers' Compensation and Environmental Conservation). He also chaired the Special Committee on Continuing Legal Education.

In addition to his state bar activities, Alcott is involved in civic, philanthropic and other professional endeavors. A past recipient of the American ORT Jurisprudence Award, he is a Fellow of the American College of Trial Lawyers, selected on the basis of intensive peer review, and served for two terms as chair of the Downstate New York Committee of the College. Alcott also served four years as chair of the College's International Committee. He is a Fellow of The New York Bar Foundation and the American Bar Foundation.

Alcott plays an active role as a federal and state mediator with the U.S. District Court for the Southern District of New York and the Commercial Division of the New York Supreme Court. He lectures on litigation issues in the U.S. and abroad, and is frequently invited to argue model cases at legal meetings and conventions.

President-Elect
Kathryn Grant Madigan

Kathryn Grant Madigan, a partner in the Binghamton law firm of Levene Gouldin & Thompson, LLP, took office on June 1 as president-elect of the 72,000-member New York State Bar Association. The House of Delegates, the Association's decision- and policy-making body, elected Madigan at the organization's 129th annual meeting, held this past January in Manhattan. As the current president-elect, Madigan chairs the House of Delegates and co-chairs the President's Committee on Access to Justice (formed to help ensure that civil legal representation is available to the poor). In accordance with NYSBA bylaws, she becomes president of the Association on June 1, 2007.

Madigan graduated Phi Beta Kappa from the University of Colorado at Boulder, where she received the 1975 Pacesetter (Outstanding Senior) Award, and was point guard for the Lady Buffs basketball team. She earned her law degree from Albany Law School.

She has held a number of leadership positions within the Association, serving 12 years on the Executive Committee, as secretary, as vice president for the Sixth Judicial District (Broome, Chemung, Chenango, Cortland, Delaware, Madison, Otsego, Schuyler, Tioga and Tompkins Counties) and as a member-at-large.

Chair of the Special Committee on Association Publications, Madigan led the 2004 search for the new editor-in-chief of the *Journal*, an Association publication. She is the former chair of the Membership Committee and the Elder Law Section, and chaired the section's Litigation Task Force, which recommended the historic *NYSBA v. Reno* lawsuit. A member of the Special Committee on Balanced Lives in the Law, she spoke on the topic at the 2005 Young Lawyers Section Annual Meeting Program. Madigan also serves on the committees on Bylaws, Diversity and Leadership Development, Membership, and the Special Committee on Fiduciary Appointments.

She served as founding chair of the Committee on Attorneys in Public Service. She was also a member of the

Executive Council of the New York State Conference of Bar Leaders, Task Force on Solo and Small Firm Practitioners, Committee on the Future of the Profession, and Nominating Committee. A long-term mentor for the Young Lawyers Section, Madigan has been a member of the House of Delegates for 19 years. She is a Life Fellow of The New York Bar Foundation and chair of the Sixth District Fellows.

Madigan was the first woman and the youngest person to serve as president of the Broome County Bar Association and remains an active member of its CLE Committee. Under her leadership, the local bar twice received NYSCBL's Award of Merit. A noted lecturer in the field of estate planning and elder law, Madigan is a member of the Administrative Board for the Offices of the Public Administrator, a Fellow of the American College of Trust and Estate Counsel, and a Fellow of the American Bar Foundation. She is also a member of the National Academy of Elder Law Attorneys.

She is a recipient of the 2000 Kate Stoneman Award given by Albany Law School and the 1987 NYSBA Outstanding Young Lawyer Award, and is listed in *America's Best Lawyers*.

Active in many community and civic organizations, Madigan is a trustee of the Binghamton University Foundation and is a past chair of the Harpur Forum. She is a trustee and past chair of the United Health Services Foundation. Madigan performs at the annual Broome County Chamber of Commerce Dinner as a *Live Wire Player*, and is a past president of the Chamber's Live Wire Club.

She has two sons, R. James "Jeb" Madigan, a graduate of Lafayette College (Easton, Pa.), and Grant, a student at St. Michael's College at the University of Toronto (Canada).

Secretary
Michael E. Getnick

Michael E. Getnick, a partner in Getnick Livingston Atkinson Gigliotti & Priore, LLP, of Utica, and of counsel to Getnick and Getnick of New York City, was elected secretary of the New York State Bar Association. He earned his undergraduate degree at Pennsylvania State University and his law degree at Cornell University.

Getnick most recently was a vice president representing the Fifth Judicial District (Herkimer, Jefferson, Lewis, Oneida, Onondaga and Oswego Counties). He is a member of the House of Delegates, a Fellow of The New York Bar Foundation, chair of the Committee on Court Operations, and a member of the Membership Committee.

Getnick is a past member of the Nominating Committee. In 1988, he received the Association's President's Pro Bono Service Award for the Fifth Judicial District. The award recognizes those lawyers for outstanding contribution of time, resources, and expertise in the provision of legal services to the poor. He is a member of the Fifth Judicial District Pro Bono Committee.

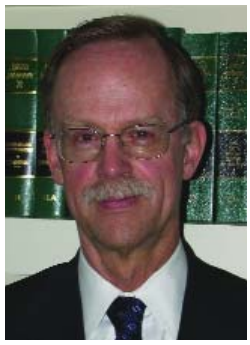
In addition to his Association activities, Getnick is a member and past president of the Oneida County Bar Association (OCBA) and an ex-officio member of the Onondaga County Bar Association.

He is past chair of OCBA's Liaison Committee to the NYSBA, the Domestic Relations Committee and the Private Attorney Involvement Committee. He is also a member of the National Institute for Trial Advocacy and the New York State Academy of Trial Lawyers.

In the community, Getnick is a member of the board of the American Heart Association Northeast Affiliate. He was the initial counsel and attorney who incorporated the Mohawk Valley Committee Against Child Abuse, Inc.

Getnick is past president and member of the board of directors of the Legal Aid Society of Mid-New York. A past president of the New Hartford Central School District Foundation, he was a trainer and speaker for the Mendez Anti-Drug Program for the New Hartford district.

He has also served as vice president of the YMCA of Utica, chair of the United Way's Committee for Fund Raising for Lawyers and Doctors, and a member of the board of directors of Family Services of Greater Utica.



Treasurer
James B. Ayers

James B. Ayers, a partner in the Albany law firm of Whiteman Osterman & Hanna, LLP, has been re-elected treasurer of the New York State Bar Association. A resident of Guilderland, Ayers received his undergraduate degree from Colgate University and earned his law degree from Columbia Law School.

Ayers has served in the public sector as: confidential law assistant to the state Supreme Court, Appellate Division; assistant counsel to Gov. Nelson A. Rockefeller; counsel, Temporary State Commission on Constitutional Tax Limitations; and special counsel to the Deputy Majority Leader, New York State Senate. Prior to joining Whiteman, Osterman & Hanna, he was a partner in the Albany law firm of DeGraff, Foy, Holt-Harris, Kunz & Devine.

An active member of the Association, Ayers has served as treasurer since 2002. He served as vice-president of the Third Judicial District (Albany, Columbia, Greene, Rensselaer, Schoharie, Sullivan and Ulster Counties) from 1999–2002. In addition, Ayers chaired the Trusts and Estates Law Section and has been a member of its Executive Committee since 1984. He is also a member of the Albany County and American

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ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I was retained by an insurance company to represent a professional who is a defendant in a litigated matter. Given the nature of the allegations, the outcome of the case could have significant implications for my client's license to practice her profession. Recently, the insurance carrier directed me to make a settlement offer to the plaintiff. My client has objected because she is concerned that any settlement of the case could have long-term, adverse consequences for her licensing status. It should be added that the particular policy she purchased requires her consent before I can offer or agree to any settlement.

I feel that I am being pulled in opposite directions. While I believe that the case is highly defensible, we all know that there are no guarantees in litigation. Moreover, while it is better to settle the claim with insurance company money rather than asking my client to reach into her own pockets, I believe that my client has a legitimate interest in keeping her record clean. What should I do?

Sincerely,

Tugged in Two

Dear Tugged:

Much has been written about the tripartite relationship between and among the insurance company, the lawyer it retains, and the insured, and the ethical issues arising from these relationships. *See, e.g.*, Eileen E. Buholtz, *Defense Counsel's Duties and Responsibilities to the Insurer and Insured,* 29 NYSBA Torts, Ins. & Comp. L. Section J. 9 (Winter 2000); *Public Service Mutual Insurance Co. v. Goldfarb,* 53 N.Y.2d 392 (1981) (dentist accused of covered as well as uncovered claims may choose un-conflicted counsel at carrier's expense); NY Eth. Op. 716, 1999 WL 221884 (NYSBA 1999).

While the terms of the insurance policy may mean that the client has given up some portion of her ability to make decisions regarding the case, you still owe your primary duty of loyalty to her. *See* NY Eth. Op. 721, 1999 WL 1756189 (NYSBA 1999) ("Despite the fact that an insurance company has retained the lawyer pursuant to its contractual duty to defend the policyholder, the client is the policyholder, not the insurance company"); NY Eth. Op. 716, 1999 WL 221884 (NYSBA 1999) (lawyer's primary allegiance is to insured).

The Lawyer's Code of Professional Responsibility ("Code") provides that: "Unless authorized by law, a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate his or her professional judgment in rendering such legal services, or to cause the lawyer to compromise the lawyer's duty to maintain the confidences and secrets of the client." DR 5-107(B); 22 N.Y.C.R.R. § 1200.26(b). The Code's Ethical Considerations urge a lawyer paid by another to "exercise professional judgment without regard to the interest or motives of a third person," and to "constantly guard against erosion of professional freedom." (EC 5-23.) The Code further reminds lawyers that the client has the authority to make decisions regarding the outcome of the case, including, among other things, "whether to accept a settlement offer." (EC 7-7.)

A dramatic illustration of the conflict between insured and insurer, and defense counsel's resolution of that conflict in favor of the client, is *Nelson Electrical Contracting Corp. v. Transcontinental Insurance Co.*, 231 A.D.2d 207, 660 N.Y.S.2d 220 (3d Dep't 1997). *Nelson* was a declaratory judgment action brought by a contractor against its insurance carrier.

The contractor was named in a personal injury action alleging causes of action for negligence, which was covered by the policy, and breach of contract, which was not. When faced with a summary judgment motion by another party on the (covered) negligence cause of action, defense counsel for the contractor made a tactical decision not to file any opposition, reasoning that the admission of negligence would maximize the client's insurance coverage, and shift recovery away from the uncovered breach of contract claim. The insurance carrier had urged defense counsel to oppose the summary judgment motion, and disclaimed when it was granted on default, citing the insured's duty to cooperate under the policy.

The Appellate Division held that the carrier still had a duty to pay on the negligence claim, and that the contractor's tactical default did not constitute failure to cooperate. Because of the conflict between the interests of the carrier and the policyholder, the latter – and its attorney – acted properly in placing the contractor's interests over those of the carrier. The court reasoned that counsel for the policyholder need not obtain the insurer's consent before pursuing a course of action beneficial to the insured. It stated that requiring the carrier's consent "would effectively enable the insurer to take control of the defense and subordinate the insured's interests to its own. This

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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would not only defeat the purpose of assigning independent counsel, it would pose an ethical dilemma for the insured's attorney, who, being bound to exercise professional judgment solely on behalf of the client . . . disregard[ing] the desires of others that might impair the lawyer's free judgment,' cannot permit the insurer 'to direct or regulate his or her professional judgment in rendering such legal services.'" 231 A.D.2d at 210 (citations to the Code omitted).

Thus, even though the policyholder has a contractual obligation to cooperate in the defense of the case, "these limitations cannot be construed so broadly as to prohibit the insured's counsel from making tactical decisions, such as those at issue here, which are part of a reasonable litigation strategy intended to decrease the likelihood of liability on the part of the insured." 231 A.D.2d at 210. Counsel's tactical decision to default on the summary judgment motion was accordingly held not to vitiate coverage. Thus, the court approved the conduct of a defense attorney who reasonably resolved a conflict in favor of the client and against the insurance carrier.

Most insurance policies give the insurance carrier the authority to settle cases in its discretion. However, the Code obligates an attorney to respect the wishes of the client. Fortunately for you, the potential conflict between the carrier and your client has been resolved because the policy provides for your client's control. You have described a situation in which the client has a "consent policy" such that she has the right to veto the settlement. Under these circumstances, you should inform your client of the desires of the insurance carrier (*see* EC 5-21), give the client your independent professional advice – then follow the instructions of your client, not the insurance carrier. NY Eth. Op. 721, *supra*.

The Forum, by
Barry R. Temkin
Fiedelman Garfinkel & Lesman
New York, NY

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am a first-year litigation associate in a large law firm. Like other large firms, mine litigates on behalf of Fortune 500 companies and other very wealthy clients.

Yesterday something occurred that really made me uncomfortable. The partner in charge of a hotly contested civil case, in which our firm represents a very profitable high-tech company, directed me to engage in "file cleansing" so that certain electronic documents in the client's files will become "lost" and untraceable. Apparently, the purpose is to protect the client's in-house legal team; its General Counsel was responsible for retaining our firm to replace prior counsel in the case. Before our firm got involved, prior counsel had convinced her not to produce those documents – which are very damaging – based on a strained interpretation of the opposing party's document request. Last week, however, the Court issued an order which removes the ambiguity upon which prior counsel had based its advice. Now, the General Counsel is afraid that in view of her earlier refusal production of the documents will be very embarrassing to her and her in-house colleagues.

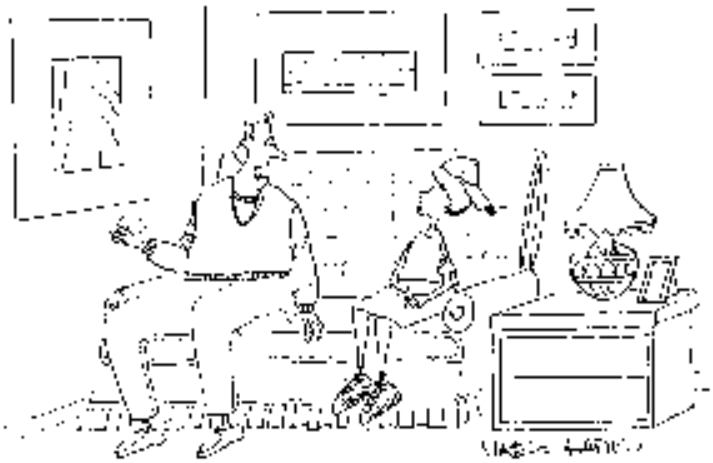
I do not know how to handle this situation. I want to act professionally, and do not want to sweep ethics violations under the rug. However, I also do not want to ruin my legal career by leaving my first job in acrimony, and be subject to the behind-the-scenes accusation that I am a "snitch."

What should I do?
Sincerely,
Sweating It Out

OFFICERS
CONTINUED FROM PAGE 49

Bar Associations and a Fellow of the American College of Trust and Estate Counsel.

In addition to his professional affiliations, Ayers has been active in various civic groups, including serving on the board of directors of the American Red Cross, Salvation Army, Historic Albany Foundation, Kattskill Bay Association, and the board of trustees of the Westminster Presbyterian Church. ■



"This is America, son. And that means when you grow up you can have everything you ever dreamed about. But to make that happen you'll need a really good lawyer."

Continued From Page 64

When writing a generic trial brief, or trial memorandum of law, your guide should be an appellate brief, with minor alterations. Place your issue in the "Question Presented" section. Next, include a "Statement of Facts." Following the statement of facts should be your "Argument" section, together with point headings and subpoint headings. State the relief you're seeking at the beginning of your argument section. Last, include a short "Conclusion" section in which you again tell the court what relief you're seeking. This is the basic layout of your brief. These "rules" should serve as a guide, not as a complete reference for brief writing.

When you have more than one issue, number them and match them up with the numbered point headings in your argument section, as if the issues are the questions and the point headings are the answers. You can have more than one issue, but don't resort to the kitchen-sink approach, unless you've a got a death-penalty or similarly important case in which you must protect and preserve the record. Otherwise, choose between one and four issues: "Restricting yourself to four or fewer issues [is] called the 'courage of exclusion.'"[27] Include more than four issues and the reader will lose focus. You'll have diverted attention from your crucial issues. When choosing issues, be selective.

Court Rules

Incorporate deep issues in your briefs, but not at the expense of breaking court rules. Instead, take advantage of the rules to make the court want to rule for you. Many courts have intricate rules regulating the form and the substance of briefs. Briefs usually contain the following items: (1) table of contents; (2) table of authorities (also known as "table of citations" or "table of cases, statutes, and authorities"); (3) issues presented (also known as "questions presented," "questions involved," or "statement of issues to be decided"); (4) nature of the case and facts (also called a "statement of the case" or "counter-statement of the case"); (5) summary of argument (where you outline your facts and law or summarize your argument section, depending on the jurisdiction) (6) argument; (7) conclusion; and (8) appendix.

In the New York State court system, write trial briefs (also called trial memorandums of law or memos of points and authorities) as you would an appellate brief.

In New York, the Appellate Terms of the First and Second Departments have different rules. The Appellate Term[28] for the First Department, aside from a page limitation of 50 pages for the main brief, does not provide any rules for the form and content of briefs.[29] The Appellate Term for the Second Department, Second and Eleventh Judicial Districts, requires that all briefs comply with CPLR 5528 (which pertains to the content of briefs and appendices) and CPLR 5529 (which pertains to the form of brief and appendices).[30] The same rule applies for the Appellate Term for the Second Department, Ninth and Tenth Judicial Districts.[31]

In New York, the First,[32] Second,[33] Third,[34] and Fourth[35] Departments have specific and almost identical rules for the content of an appellant's brief. The Third Department's rules are broad and general compared to the other departments. The Second and Third Departments provide that briefs must comply with CPLR 5528 and 5529. All four departments in New York require, among other things, a table of contents.[36] Some of the departments specifically require a table of authorities (First[37] and Fourth[38]), while other departments briefly mention it in passing (Second[39]) or not at all (Third). All four departments require that briefs contain "questions involved." The First[40] and Second[41] Departments specifically provide that the questions involved contain no names, dates, amounts, or particulars. These departments require that the questions involved be followed immediately by the answer given by the court from which the appeal is taken. The Third and Fourth Departments require that briefs comply with CPLR 5528 and 5529 when writing the questions involved.[42]

CPLR 5528(a) provides that when writing the "question involved," each question must be followed by the answer given by the court below. The question involved may contain no names, dates, amounts, or particulars. The First, Second, and Fourth Departments require a statement of the nature of the case and facts.[43] The Third Department requires compliance with CPLR 5528.[44] CPLR 5528(a)(3) provides that a statement of the nature of the case and of the facts will determine the questions involved. Make sure you support any references to pages in the appendix. The First, Second, and Fourth Departments also require an argument section.[45] The Third Department provides that you comply with CPLR 5528 in this respect.[46] CPLR 5528(a)(4) requires that the argument section be divided into points with distinct headings. All four departments provide specific rules for the content and form of the appendix.[47]

New York's rules don't provide for a preliminary statement, but most lawyers write one and include it just before or after the questions involved. A preliminary statement expands on the questions involved, gives some procedural history, dates, names, places, and particulars, and sums up the argument to follow.

When writing a question presented in any of the Four Departments, therefore, write it as the CPLR provides.

The New York Court of Appeals requires, among other things (1) a table of contents; (2) a table of cases and authorities; and (3) an appendix.[48] In motions for permission to appeal in civil cases, the court requires a (1) notice of motion; (2) statement of the procedural history; (3) jurisdictional statement; (4) statement of the "questions presented" for review; (5) disclosure statement; and (6) copies of all orders, opinions, or memorandums from the court below. The questions presented must state why they merit the court's review: that the issues are novel or of public importance, that

they present a conflict with the court's prior decisions, or that they involve a conflict among the departments of the Appellate Division. You must identify the particular portions of the record where the questions reviewed are raised and preserved.

Nowhere in the Court of Appeals's rules does it state that the questions presented be followed immediately by the answer given by the court below. But briefs submitted to the Court of Appeals have questions presented that are contemplated by the CPLR. Here's an example of a "question involved" that the CPLR contemplates, taken verbatim from a famous prosecution brief to the Court of Appeals:

> May a police officer approach and question a man when, during a patrol at night in an area of Manhattan in which numbers of burglaries have recently taken place, the officer observes that man walking at a fast pace, with a noticeable limp, covered with snow and carrying a television set in a pillowcase thrown over his shoulder.
>
> Answer of the court below: No, testimony and circumstances were inadequate to provide the detective with sufficient cause to approach and question the defendant.[49]

For the most part, writing a deep issue in this manner under New York's rules for the Appellate Term, Appellate Division, and Court of Appeals will be difficult because the question involved cannot be detailed. It's wise to frame your issue so that the answer implied is "yes," but the answer to the question will depend on how the court below ruled. As the above example shows, however, by including concrete facts you can still tailor your deep issue to conform to the CPLR and court rules. You can also include deep issues when writing the statement of the case. The facts you incorporate will help the court determine the issues involved.

In the federal system, when writing trial briefs, which the courts call memorandums of law, the Eastern, Northern, Southern, and Western Districts of New York don't give specific rules about how issues should be compiled or organized. But both the Eastern and Southern Districts tell you to set forth in point headings your "points and authorities."[50] In the Northern District, the only rules about memorandums of law tell you to have a table of contents and parallel citations.[51] In the Western District, the only limitation for a memorandum of law is a 25-page limit.[52] The district courts' rules in New York therefore allow lawyers to use deep issues exactly as this column suggests.

When submitting a brief to a federal court of appeals like the Second Circuit, for example, comply with Rule 28 of the Federal Rules of Appellate Procedure. Under thus rule, briefs should contain, among other things, the following items, in this order: (1) corporate disclosure statement; (2) table of contents; (3) table of authorities; (4) jurisdictional statement; (5) statement of the issues presented; (6) statement of the case; (7) summary of the argument; (8) argument; (9) short conclusion; and (10) certificate of compliance.[53] The brief must also conform to the local rule of court. The Second Circuit requires that you follow Rule 28 as well as Local Rule 28,[54] which provides that briefs be free from "burdensome, irrelevant, immaterial, and scandalous matter."[55] In your statement of the issues presented to the Second Circuit, use this column's deep-issue approach.

When submitting briefs to the United States Supreme Court, "the statement of the questions presented must precede all other matters, including the table of contents."[56] The Court requires the following items in this order immediately after the cover page: (1) questions presented; (2) list of all parties unless the caption contains all parties as well as an amended corporate disclosure statement; (3) table of contents and authorities; (4) citations of the (un)official reports of the opinions and orders entered by courts and administrative agencies; (5) statement of jurisdiction; (6) constitutional provisions, treaties, statutes, ordinances, and regulations verbatim with citations; (7) statement of the case along with the facts; (8) summary of the argument; (9) argument; and (10) conclusion. How you frame the issue to the Court suggests "the importance of conveying this vital information to the court at the very beginning of the brief."[57] Supreme Court requirements encourage lawyers to write a deep, persuasive question.

Organizing Deep Issues

Once you've narrowed down your issues, address them logically. In briefs and inter- or intra-office memorandums, organize them as follows:

- Discuss threshold issues before you discuss the merits of the case. A threshold issue is often a procedural issue, like whether the court has jurisdiction to consider the merits. Sometimes a threshold issue is substantive, like a statute-of-limitations question. Threshold issues can be dispositive.
- Lead with your best issue. The best issue is the one on which the reader is most likely to agree with you. Within your best issues, put essential things first. (This suggestion applies only to briefs, not office memorandums.)
- Discuss large claims or issues before you discuss less significant ones.
- If all the claims are equally large, discuss the claim that affects the litigation most. Thus, in a criminal appeal in which a defendant seeks a new trial or, alternatively, a reduced jail sentence, first discuss whether the appellate court should grant a new trial.
- Move logically through statutory or common-law tests. Often a case will depend on whether a litigant satisfied a multi-factor test enumerated in a statute or a seminal case. Discuss the issue in the sequence in which the statute or case lays out the factors.

- When the answer to one question depends on the answer to an earlier question, resolve the first question first. The reader will understand relationships more easily that way, and you'll avoid awkward cross-referencing. Discussing issues in the order they arose facilitates understanding if the issues arose chronologically. Everything else being equal, discuss issues by a hierarchy of authority: constitutional questions first, then statutory questions, then common-law questions.

Conclusion

Issue framing, among the most important aspects of legal writing,[58] is among the most ignored. The lawyer who frames the issue well might be the lawyer who wins.[59] Lawyers often focus on getting the law right rather than writing well,[60] but the two can't be separated. Don't lump all the critical information in the middle of a document, hoping that the reader will find the issue underneath all the legal words. Instead, make the reader's job easy. Say something of substance at the beginning and the end.[61] Use the deep-issue method to create a picture for readers that'll stand out in their mind — long after your brief or memorandum has been read. ■

1. *Estate of Rogers v. Comm'r*, 320 U.S. 410, 413 (1943).
2. Bryan A. Garner, *The Deep Issue: A New Approach to Framing Legal Questions*, 5 Scribes J. Legal Writing 1, 11 (1994) (hereinafter "Deep Issue").
3. *Id.*
4. *Id.* at 10.
5. *Id.*
6. Richard A. Posner, *Convincing a Federal Court of Appeals*, 25 Litigation 3, 3 (Winter 1999); Marcia L. McCormick, *Selecting and Framing the Issues on Appeal: A Powerful Persuasive Tool*, 90 Ill. B.J. 203, 204 (Apr. 2002).
7. McCormick, *supra* note 6, at 204.
8. Posner, *supra* note 6, at 4.
9. *Id.* at 3.
10. *Id.*
11. *Id.*
12. *Id.*
13. Deep Issue, *supra* note 2, at 14.
14. *Id.* at 15.
15. Bryan A. Garner, *Issue Framing: The Upshot of It All*, Trial, Apr. 4, 1997, at 74 (citing Karl L. Llewellyn, *A Lecture on Appellate Advocacy*, 29 U. Chi. L. Rev. 627, 630 (1962)).
16. Posner, *supra* note 6, at 4.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. Charles R. Calleros, Legal Method and Writing 432 (4th ed. 2002).
22. *See generally* The Legal Writer, *Legal-Writing Ethics — Part I*, 77 N.Y. St. B.J. 64 (Oct. 2005); The Legal Writer, *Legal-Writing Ethics — Part II*, 77 N.Y. St. B.J. 64 (Nov./Dec. 2005).
23. Calleros, *supra* note 21, at 432.
24. Adapted from Deep Issue, *supra* note 2, at 12.
25. *Id.* at 13.
26. *Id.*
27. Henry Weihofen, Legal Writing Style 258 (2d ed. 1980) (quoting John W. Davis).
28. *See generally* Gerald Lebovits & Deborah E. Fisher, *Winning Residential Appeals: Perfecting, Briefing, and Orally Arguing Appeals in the Appellate Term and Beyond*, 1 Landlord-Tenant Prac. Rep. 7 (June 2000) (Part III of the authors' three-part article).
29. *See* 22 N.Y.C.R.R. § 640.5.
30. 22 N.Y.C.R.R. § 731.2(a).
31. 22 N.Y.C.R.R. § 732.2(a).
32. 22 N.Y.C.R.R. § 600.10(d)(2).
33. As of January 18, 2006, for the Second Department, rely either on 22 N.Y.C.R.R. § 670.10.1(a) and 670.10.3(g)(2) available on Lexis, McKinney's Rules of Court, or the Second Department's rules 670.10.1(a) and 670.10.3(g)(2) *available at* http://www.courts.state.ny.us/courts/ad2/pdf/rulesofprocedure.pdf. On Westlaw and the bound New York Codes, Rules and Regulations, the rules are incorrectly cited as 670.10-a(a) and 670.10-c(g)(2).
34. 22 N.Y.C.R.R. § 800.8(a).
35. 22 N.Y.C.R.R. § 1000.4(f)(6).
36. 22 N.Y.C.R.R. §§ 600.10(d)(2)(i) (1st Dep't); 670.10.3(g)(2)(ii) (2d Dep't); 800.8(a) (3d Dep't); 1000.4(f)(6) (4th Dep't). As of January 18, 2006, for the Second Department, rely either on 22 N.Y.C.R.R. § 670.10.3(g)(2)(ii) available on Lexis, McKinney's Rules of Court, or http://www.courts.state.ny.us/courts/ad2/pdf/rulesofprocedure.pdf. On Westlaw and the bound New York Codes, Rules and Regulations, the rule is incorrectly cited as 670.10-c(g)(2)(ii).
37. 22 N.Y.C.R.R. § 600.10(d)(2)(i).
38. 22 N.Y.C.R.R. § 1000.4(f)(6).
39. 22 N.Y.C.R.R. §§ 670.10.3(a)(3) and 670.10.3(b). As of January 18, 2006, for the Second Department, rely either on 22 N.Y.C.R.R. § 670.10.3(a)(3) and 670.10.3(b) available on Lexis, McKinney's Rules of Court, or http://www.courts.state.ny.us/courts/ad2/pdf/rulesofprocedure.pdf. On Westlaw and the bound New York Codes, Rules and Regulations, the rules are incorrectly cited as 670.10-c(a)(3) and 670.10-c(b).
40. 22 N.Y.C.R.R. § 600.10(d)(2)(ii).
41. 22 N.Y.C.R.R. § 670.10.3(g)(2)(iii). As of January 18, 2006, for the Second Department, rely either on 22 N.Y.C.R.R. § 670.10.3(g)(2)(iii) available on Lexis, McKinney's Rules of Court, or http://www.courts.state.ny.us/courts/ad2/pdf/rulesofprocedure.pdf. On Westlaw and the bound New York Codes, Rules and Regulations, the rule is incorrectly cited as 670.10-c(g)(2)(iii).
42. 22 N.Y.C.R.R. §§ 800.8(a) (3d Dep't); 1000.4(f) (4th Dep't).
43. 22 N.Y.C.R.R. §§ 600.10(d)(2)(iii) (1st Dep't); 670.10.3(g)(2)(iv) (2d Dep't); 1000.4(f)(6) (4th Dep't). As of January 18, 2006, for the Second Department, rely either on 22 N.Y.C.R.R. § 670.10.3(g)(2)(iv) available on Lexis, McKinney's Rules of Court, or http://www.courts.state.ny.us/courts/ad2/pdf/rulesofprocedure.pdf. On Westlaw and the bound New York Codes, Rules and Regulations, the rule is incorrectly cited as 670.10-c(g)(2)(iv).
44. 22 N.Y.C.R.R. § 800.8(a).
45. 22 N.Y.C.R.R. §§ 600.10(d)(2)(iv) (1st Dep't); 670.10.3(g)(2)(v) (2d Dep't); 800.8(a) (3d Dep't); 1000.4(f)(6) (4th Dep't). As of January 18, 2006, for the Second Department, rely either on 22 NYCRR 670.10.3(g)(2)(v) available on Lexis, McKinney's Rules of Court, or http://www.courts.state.ny.us/courts/ad2/pdf/rulesofprocedure.pdf. On Westlaw and the bound New York Codes, Rules and Regulations, the rule is incorrectly cited as 670.10-c(g)(2)(v).
46. 22 N.Y.C.R.R. § 800.8(a).
47. 22 N.Y.C.R.R. §§ 600.10(c) (1st Dep't); 670.10.2(c) (2d Dep't) ; 800.8(b) (3d Dep't); 1000.4(d) (4th Dep't). As of January 18, 2006, for the Second Department, rely either on 22 NYCRR 670.10.2(c) available on Lexis, McKinney's Rules of Court, or http://www.courts.state.ny.us/courts/ad2/pdf/rulesofprocedure.pdf. On Westlaw and the bound New York Codes, Rules and Regulations, the rule is incorrectly cited as 670.10-b(c).
48. 22 N.Y.C.R.R. § 500.13(a).
49. Edward D. Re & Joseph R. Re, Brief Writing & Oral Argument 249 (7th ed. 1993) (quoting People's brief submitted to New York Court of Appeals in *People v. Moore*, 47 N.Y.2d 911, 419 N.Y.S.2d 495, 393 N.E.2d 489 (1979)).
50. S.D.N.Y. L.R. 7.1; E.D.N.Y. L.R. 7.1.
51. N.D.N.Y. L.R. 7.1(a)(1); 12.1(a).
52. W.D.N.Y. L.R. 7.1(e).
53. *See* Fed. R. App. P. 28.
54. *Id.*
55. Local Rule 28, *available at* http://www.ca2.uscourts.gov. (Follow "Clerk's Office" hyperlink; then follow "Rules" hyperlink; then follow "Local Rule 28. Briefs") (last visited Jan. 9, 2006).
56. Re & Re, *supra* note 49, at 110; *see also* Rule 24 of the Supreme Court of the United States, *available at* http://www.supremecourtus.gov/ctrules/rulesofthecourt.pdf) (last visited Jan. 9, 2006).
57. *Id.*
58. Deep Issue, *supra* note 2, at 2.
59. *Id.* at 11.
60. Wayne Schiess, *The Five Principles of Legal Writing: Any Lawyer Can Improve His or Her Writing — and Probably Needs To*, 49 Prac. Law. 11, 12 (June 2003).
61. Margaret Graham Tebo, *Get It Write the First Time: Organization, Attention to Detail Are the Keys to Effective Legal Writing*, 43 A.B.A. J. 1 (Nov. 2002).

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Language Tips
Continued From Page 45

Remember when the word *hopefully* used to mean "I hope," in statements like, "I looked hopefully at the sky for signs of rain"? Then some people began to use *hopefully* as a sentence modifier, to mean "it is to be hoped," causing considerable irritation among people who cared about clarity. One reader reported that a friend had even posted above her front door a sign paraphrasing Dante's *Inferno*: **"Abandon *hopefully* all who enter here."**

Supreme Court Justice Antonin Scalia also transferred a modifier, when he said that his decision not to recuse himself from a case involving Vice President Dick Cheney was "the proudest thing" he had done on the Court. The "thing" was not proud; Justice Scalia was proud, but that's not what he said. You have probably transferred modifiers: If you hit your thumb with your hammer instead of the nail you were aiming at, you may have mumbled something like, "That stupid hammer!" (or words to that effect) to avoid calling yourself "stupid."

Potpourri:

One optimistic feature about the news: *problems* seem to be disappearing. Unfortunately, however, problems are still with us; they are only absent from news items, in which the word *issues* – which used to mean "questions to be solved" – now substitutes for "problems."

Check your newspaper for *problems*. You may find them missing. In a recent interview, Lewis Mandell, a professor of finance and managerial economics at State University of New York at Buffalo School of Management used the word *problem* when he talked about high school seniors' lack of understanding about personal finances, but the journalist who reported his speech wrote, "The **problems** teens are having now with money could lead to even bigger **issues** down the road." And Pat Bolinski, executive director of Junior Achievement for two Florida counties, was quoted as saying, "The major **issue** is that many teens are unrealistic about lifestyle choice." *Issues* equal *problems*.

In another news item, Florida environmentalists discussed their fears that wildlife were rapidly losing their habitats: "We have the gopher tortoise issue, we have the panther issue down – south, the bald eagle nests – when we build homes, we throw wildlife out of theirs." Apparently, however, none of these is a "problem." Does that make you feel better? ■

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

EDITOR'S MAILBOX

Re: The Deductible New York Estate Tax

I read the excellent article appearing in the February 2006 issue of the New York State Bar Association *Journal* entitled "The Deductible New York Estate Tax." I am surprised however, that the article did not include reference to the use of an additional Q-Tip trust equal in amount, with some refinements, to the excess of the federal exemption over the state exemption. The Q-Tip election would then be made for both Q-Tip trusts even though the Q-Tip election for the second trust is unnecessary to reduce the federal estate tax to zero. On the death of the surviving spouse, the executor of that spouse's Will may request relief under Revenue Procedure 2001-38 to exclude the trust because the Q-Tip election for that trust was unnecessary to reduce the federal estate tax to zero. There was an over-utilization of the marital deduction.

Assuming that such relief is granted, New York State, pursuant to Tax Law § 961, should follow the federal ruling and not include the additional Q-Tip trust as part of the surviving spouse's estate. This correspondence is not intended or written to be used and cannot be used by anyone for the purpose of avoiding tax penalties. This notice is provided pursuant to U.S. Treasury Regulations governing tax practice.

Very truly yours,
Edward Newman
Carle Place, NY

Creditors' Claims, Redux

The February article entitled "Creditors' Claims – Do They Die With the Debtor?" ventured beyond what happens at death to retirement plan benefits into what happens when the owner of retirement plan benefits withdraws funds while still living. The otherwise very useful article stated: "It is clear that once these funds [retirement plan funds] reach his hands [the owner's], they are subject to attachment by his creditors" citing *Robbins v. DeBuono*, 218 F.3d 197. While this seems to be the opinion of the author and many other lawyers, I think Albert Feuer's conclusions in his letter to the Editor's Mailbox in the May 2006 issue of the *Journal* are closer to the truth. Feuer argues that the withdrawn funds are not subject to creditors' claims for various reasons with which I agree but he did not mention CPLR 5205(d) which specifically exempts payments made from qualified plans from the claims of judgment creditors regardless of whether or not they are needed for support.

I think it is important for people to know that in New York they can withdraw funds from their 401(k)s or IRAs without worrying about creditors so long, of course, as they draw on funds which are properly segregated from their other assets.

Sincerely,
Edward V. Atnally
White Plains, NY

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BY GERALD LEBOVITS

You Think *You* Have Issues? The Art of Framing Issues in Legal Writing — Part II

Last month the *Legal Writer* offered some suggestions on writing deep issues. We continue.

Writing Deep Issues in a Brief

The outcome of a case rests on how the court approaches the issues presented. Framing the right issue and the right answer go hand-in-hand. As Justice Felix Frankfurter explained, "the right answer usually depends on putting the right question."[1] In a brief, frame the deep issue so that if your question is accepted or answered in your favor, the case will turn your way.[2] The persuasive deep issue can have only one answer.[3] Express the issue fairly to support your theory of the case.[4] Find the premises that'll make the court reach your conclusion.[5] Spoon-feed your readers the issues to get the answer you want.[6] The way you frame the issue "is the spoon you will use to feed" the reader.[7]

When writing a brief, put yourself in the court's shoes.[8] The court has neither the time nor the specialization to know everything about your case. Make your brief "completely self-contained, intellectually as well as physically."[9] Explain the problem in the case and argue the law.[10] Tell the court the factors that'll affect the parties and the public.[11] Include the relevant part of a statute, contract, regulation, or any other document, if your case rests on interpreting them.[12] A judge will always ask, "What question am I supposed to answer in this case?"[13] State the answer to the question and how the court can, and why it should, rule for you. Give the court the issues in your case up front to capture the judicial imagination,[14] as explained in Part I of this column. Frame your issue in a way that "not only will help you capture the Court but which will stick your capture into the Court's head so that it can't forget it."[15] If you do all that, you've made the court's job easy, and that'll increase your odds of winning.

The majority of the briefs you'll write won't have dispositive precedents. So don't "ru[b] the judges' noses in the precedents."[16] Convince the court that your position "is the more reasonable one in light of all relevant circumstances."[17] Use case law, "not as a club with which to beat your opponent to death, but as a source of policies to guide decision."[18] Use case law to show that your position doesn't violate settled law.[19] Don't argue that the result for which you're advocating is "already 'in' the law"[20] when there's no dispositive precedent.

When phrasing a persuasive deep issue, don't state a false issue.[21] Never invent or skew facts or leave out any determinative facts — those facts on which a case turns — even if they hurt you.[22] From beginning to end, "you must maintain credibility and must fairly link the statement of the issue to your genuine argument on appeal."[23]

Here are some examples of persuasive deep issues.

> New York prohibits a person from suing for breach of an implied warranty when that person knowingly purchased used goods. Sue Second-Hand bought a 1985 Lemon convertible with 12,000 miles on the odometer. Should Second-Hand's claim for breach of implied warranty against Lemon be dismissed, given that the car was used when she bought it?[24] [55 words]
>
> At 10:30 one morning last fall, Father Michael Heaven was on his way to buy groceries for his parish when his car collided with Beelzebub Bumper's car. The Salvation Church, which owned Heaven's car, required its priests to buy groceries as part of their priestly functions. Was Heaven the Church's agent at the time of the accident? If so, should the Church be liable for damages?[25] [66 words]
>
> Shabby Steel manufactured and sold to Dumdum Designers a widget designed for a trolley system. With Shabby Steel's knowledge and approval, Dumdum Designers acquired the widget and added a new motor and cable, and integrated the widget into its defectively designed dumbwaiter system. The dumbwaiter injured Red Burns. Is Shabby Steel liable for Burns's injuries?[26] [55 words]

> Spoon-feed your issues to your readers to get the answer you want.

These examples of persuasive deep issues present the legal controversy, introduce the relevant facts, and suggest an answer of yes. The reader understands the events and will be receptive to your arguments and analysis.

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