SEPTEMBER 2005
VOL. 77 | NO. 7

NEW YORK STATE BAR ASSOCIATION

Journal

Scenic Standing

The 40th Anniversary of Scenic Hudson *and the Birth of Environmental Litigation*

by Skip Card

NEW Columns:
Tax Alert
Metes and Bounds

Also in this Issue

BESTSELLERS
FROM THE NYSBA BOOKSTORE
September 2005

Business, Corporate, Tax

Limited Liability Companies
Updated for 2004, this practical guide, written by Michele A. Santucci, enables the practitioner to navigate the Limited Liability Company Law with ease and confidence.
PN: 41244 / **Member $72** / List $80 / 336 pages

Civil Advocacy and Litigation

Preparing For and Trying the Civil Lawsuit, Second Edition
This loose-leaf volume updates and expands the first edition by adding five new chapters. Over 30 experts reveal the techniques and tactics they have found most effective when trying a civil lawsuit.
PN: 41953 / **Member $175** / List $225 / 1,302 pages

Debt Collection and Judgment Enforcement
This book offers guidance on the basics of debt collection from evaluating the claim and debtor, to demand upon the debtor and payment agreements, to alternatives to litigation.
PN: 42384 / **Member $72** / List $80 / 132 pages

Entertainment

Entertainment Law, Third Edition
This new edition contains a new chapter covering "Entertainment on the Internet—The Evolution of Entertainment Production, Distribution, Ownership and Control in the Digital Age."
PN: 40863 / **Member $125** / List $150 / 782 pages

Family and Matrimonial Law

Adoption Law: Practice and Procedure in the 21st Century with Forms on CD-ROM
Forms on CD
This new reference completely updates and expands *Adoption Law in New York*, adding new chapters and including over 250 pages of forms.
PN: 40204C / **Member $165** / List $200 / includes 942-page book

Matrimonial Law
This book provides a step-by-step overview for the practitioner handling a basic matrimonial case. Attorneys will benefit from the clear, basic review of the fundamentals and numerous "Practice Guides."
PN: 41214 / **Member $72** / List $80 / 256 pages

General Practice

New York Lawyer's Deskbook, Second Edition
Updated with 2004 Supplement
WINNER OF THE ABA'S CONSTABAR AWARD
The Second Edition consists of 25 chapters, each covering a different area of practice.
PN: 4150 / **Member $225** / List $275 / 1,942 pages

New York Lawyer's Formbook, Second Edition
Updated with 2004 Supplement
The *Formbook* is a companion volume to the *NY Lawyer's Deskbook* and includes 21 sections, each covering a different area of practice.
PN: 4155 / **Member $225** / List $275 / 3,060 pages

Real Estate

Commercial Leasing with Forms on CD-ROM
Forms on CD
This book examines in detail situations that arise during lease negotiations and numerous issues critical to both the tenant and the landlord. Especially useful are the sample model leases that cover conditions favorable to both the landlord and the tenant.
PN: 4041C / **Member $155** / List $200 / includes 1,344-page book

Real Estate Transactions — Commercial Property
This monograph provides an overview of the major issues in representing a commercial real estate client and suggests some practical approaches to solving problems that may arise.
PN: 40374 / **Member $72** / List $80 / 296 pages

Real Estate Transactions — Residential Property
This monograph is a practical, step-by-step guide for representing residential real estate purchasers or sellers. Topics include sales of resale homes, newly constructed homes, condominium units and cooperative apartments.
PN: 42144 / **Member $72** / List $80 / 400 pages

Trust and Estates/Elder Law

Elder Law and Will Drafting
Elder Law and Will Drafting provides a clear overview for attorneys in this practice and includes a sample will and representation letters, numerous checklists, forms and exhibits.
PN: 40824 / **Member $72** / List $80 / 250 pages

NEW!

CIVIL ADVOCACY AND LITIGATION

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

GENERAL PRACTICE

General Practice Forms on CD-ROM — 2004 Edition
Forms on CD
Available on CD, nearly 800 of the forms featured in the *N.Y. Lawyer's Deskbook* and *N.Y. Lawyer's Formbook*, and used by experienced practitioners in their daily practice. This newest edition features an advanced installation program compatible with Adobe® Acrobat Reader,™ Microsoft Word® and WordPerfect.®
PN: 61504 / **Member $280** / List $315

Insurance Law Practice — 2005 Supplement
Insurance Law Practice is a comprehensive guide to this complex area of the law. Written and edited by leading insurance law practitioners, both new and seasoned attorneys will benefit from its thorough coverage of the principles and its practical approach to the issues. The 2005 supplement completely revises the original text and adds two new chapters – "Inland Marine Insurance" and "Discovery in Coverage and Bad-Faith Litigation."
PN: 4125 / **Member $115** / List $140 / 1,136 pages

LABOR AND EMPLOYMENT LAW

Public Sector Labor and Employment Law, Second Edition — 2005 Supplement
Public Sector Labor and Employment Law is the leading reference on the subject in New York State. The 2005 supplement updates case and statutory law, features a completely rewritten chapter on "The Regulatory Network" and benefits from the guidance of Second Edition editors Jerome Lefkowitz and Melvin Osterman, and the fresh insights of editor Jean Doerr.
PN: 520504 / **Member $80** / List $95 / 644 pages

Prices include shipping and handling, but not applicable sales tax.

Expand your professional knowledge

NEW YORK STATE BAR ASSOCIATION

1.800.582.2452 www.nysba.org/pubs

Mention Code: CL2533

NEW YORK STATE BAR ASSOCIATION
Journal

CONTENTS

SEPTEMBER 2005

SCENIC STANDING

The 40th Anniversary of *Scenic Hudson* and the Birth of Environmental Litigation 10

BY SKIP CARD

Storm King Mountain rises over the Hudson River south of Cornwall-on-Hudson. In 1962, Consolidated Edison announced plans to build a pumped-storage hydroelectric plant (inset) at the base of the mountain.

Cover and inside photograph of Storm King Mountain: Skip Card. Artist's rendering: Courtesy of Consolidated Edison.

DEPARTMENTS

CARTOONS © CARTOONRESOURCE.COM

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. Copyright © 2005 by the New York State Bar Association. The *Journal* (ISSN 1529-3769), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $18. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

A. VINCENT BUZARD

The Power of E-Practice

In the practice of law, some things never change. We are part of a profession that has a long, proud tradition of playing a profoundly important role in shaping the law, zealously representing clients, and improving society. Some things do change, though. In the last decade, technology has had an extraordinary impact on how we do our work; and personal computers and the Internet have come to play an integral role in our professional lives. Word processing, document management, legal research, and e-mail are just a few of the many uses of computers that enhance our productivity.

The Association is committed to helping to lead the way in further developing and harnessing technology to better serve the needs of our profession. In this column, I would like to tell you about three distinct Association initiatives, all focusing on the use of technology: electronic filing, legal updates by e-mail, and law practice management.

The electronic transfer of legal documents and information between parties and courts is growing through programs in state and federal courts across the country. As electronic filing is developed in our state, the Association would like to be in the forefront. Therefore, I have created a Task Force on E-filing and appointed two able people to lead the group, Sharon Stern Gerstman and Wallace Leinheardt.

Sharon, a principal law clerk for State Supreme Court in the Eighth Judicial District and a recent chair of our Committee on Civil Practice Law and Rules, is knowledgeable about the court system and the CPLR. Since 2003, she has served as an Association Vice President. My old friend Wally was on the Executive Committee when I started there; he is a partner in the Trusts and Estates Practice Group at Jaspan Schlesinger Hoffman LLP in Garden City.

I have charged the Task Force with the mission of studying the progress that has been made in electronic filing in the courts; identifying and examining potential systems and procedures of electronic filing; evaluating strengths and weaknesses of each option; considering the needs of solo practitioners and small firms; and making recommendations to the Office of Court Administration.

As many of you know, in 2000, OCA initiated a pilot program, called the Filing By Electronic Means Project (FBEM), for electronically filing papers with the courts and county clerks in certain types of civil actions. Since then, the FBEM Project has been expanded, and it is now available in many counties.

Participating attorneys can file and serve papers, any time, any place, using a credit card to pay fees online. Time and money expended transporting materials to the courthouse and waiting on line can be eliminated, and parties can have greater access to court materials stored in electronic format. Our Task Force will consult clerks and solo and small-firm practitioners who have participated in the FBEM Project, so we can learn from their experience and assist in the development of the most user-friendly and effective system possible. We recognize that, even though electronic filing has advantages, it can be burdensome, and we want to avoid that.

On another technology front, through attending focus groups, I know that members need and want instant access to legal updates. I have asked if we could e-mail the *New York Law Digest* directly to members, and Editor David Siegel has accepted that proposal. So, soon we will e-mail the *Digest* to all members for whom we

A. VINCENT BUZARD can be reached at president@nysbar.com.

have e-mail addresses. You will continue to receive a printed copy of the *Digest* in the mail, and it is also available online.

In addition, I will be e-mailing periodic updates to you during my presidency and will be asking you for your opinions on various issues. We are also exploring ways to e-mail to members summaries of cases in specific areas of interest to them.

You can see that e-mail is an important way for the Association to reach out to people, but we do not have e-mail addresses for all members. So we are making a concerted effort to get everyone's e-mail address. If we do not have yours, soon you will be receiving a postcard asking you to provide it, and I encourage you to do so.

We are also rejuvenating our law practice management program, another critical area in which technology plays a vital role. I want our program to be a place New York lawyers can turn to for innovative, pragmatic information on technology, marketing, management, and finance. Toward that end, I am thrilled to announce that Francis Musselman is leading the new Committee on Law Practice Management.

Fran has played a pioneering role in this field, helping to advance the use of computers in the legal profession and serving as one of the first Chairs of the ABA Law Practice Management Section. Before his retirement, for many years he was the managing partner at Milbank, Tweed, Hadley & McCloy LLP. Thanks to Fran's stature in the law practice management field, we have been able to assemble an extraordinary committee of experts on the subject. At the group's first meeting, which I was pleased to attend, we discussed many exciting initiatives.

This fall, we intend to conduct a survey of lawyers to determine their needs in managing their practice, and at the Annual Meeting, we expect to offer a half-day program on law practice management. Other plans include revamping the law practice management page of our Web site to provide extensive resources and publishing articles on this topic in the Association's *Journal*. My sincere thanks go to Terry Brooks, CLE Senior Director, for his invaluable assistance in assembling the committee and helping to implement its agenda.

I welcome your ideas about how the Association can better serve our members' needs through the use of technology. To share your comments, just use technology – e-mail me! You can reach me at President@nysbar.com. ■

NYSBACLE

Partial Schedule of Fall Programs *(Subject to Change)*

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

Henry Miller – The Trial

Note: CLE seminar coupons and complimentary passes CANNOT be used for this program

Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 in ethics and professionalism; 6.5 in skills

September 9	New York City
September 23	Melville, LI
September 30	Tarrytown

+Three Hot Topics in Criminal Law (video replay)

(half-day program)

Fulfills NY MCLE requirement (4.0): 2.0 in ethics and professionalism; 2.0 in skills, practice management and/or areas of professional practice

September 16	Canton

+Benefits, Health Care and the Workplace

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

September 19	Albany
September 21	New York City
September 29	Rochester

+First Corporate Counsel Institute

(two-day program)

Note: CLE seminar coupons and complimentary passes CANNOT be used for this program

Fulfills NY MCLE requirement (14.5): 4.0 in ethics and professionalism; 10.5 in skills, practice management and/or areas of professional practice

September 22-23	New York City

When Your Client's Health Law Problems Become Your Own and Meet the AUSAs

(half-day program; includes luncheon)

Fulfills NY MCLE requirement for all attorneys (5.0): .5 in ethics and professionalism; 1.5 in skills; 3.0 in practice management and/or areas of professional practice

September 23	New York City

Ethics for Real Estate Attorneys

(half-day program)

Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 in ethics and professionalism

September 23	Albany
September 28	Rochester; Tarrytown
December 6	New York City

Federal Sentencing Advocacy After *Booker*, *Fanfan* and Their Progeny: Update and Strategic Advice from Experts and Key Figures

(half-day program)

Fulfills NY MCLE requirement for all attorneys (4.0): 1.5 in skills; 2.5 in practice management and/or professional practice

September 23	New York City
October 12	Albany
October 14	Buffalo

Practical Skills – Introduction to Estate Planning

Fulfills NY MCLE requirement for all attorneys (8.0): 1.0 in ethics and professionalism; 2.0 in skills; 5.0 in practice management and/or professional practice

October 6	Albany; Buffalo; Melville, LI; Mt. Kisco; New York City; Rochester; Syracuse

+Tenth Annual New York State and City Tax Institute

Note: CLE seminar coupons and complimentary passes CANNOT be used for this program

October 6	New York City

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

(program 8:30 – 5:30)

Fulfills NY MCLE requirement for all attorneys (9.0): 1.0 in ethics and professionalism; 2.5 in skills; 5.5 in practice management and/or areas of professional practice

October 6	Buffalo
October 7	Albany
October 11	Melville, LI
October 14	Syracuse
October 17	New York City; Tarrytown

Risk Management for Attorneys: How to Stay Out of Your Lawyer's Office

(half-day program)

Fulfills NY MCLE requirement for all attorneys (3.5): 2.5 in ethics and professionalism; 1.0 in practice management and/or areas of professional practice

October 7	Albany
October 21	Rochester
October 27	New York City
October 28	Melville, LI
December 2	Tarrytown

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

Update 2005
(Live Sessions)
Fulfills NY MCLE requirement for all attorneys (8.0): 1.0 in ethics and professionalism; 7.0 in practice management and/or areas of professional practice

October 7	Syracuse
November 4	New York City

+(Video Replays)
Fulfills NY MCLE requirement (8.0): 1.0 in ethics and professionalism; 7.0 in practice management and/or areas of professional practice

October 25	Albany
October 26	Utica
November 4	Jamestown
November 9	Plattsburgh; Saratoga
November 10	Ithaca
November 18	Buffalo; Canton
December 1	Binghamton; Poughkeepsie; White Plains
December 2	Loch Sheldrake; Melville, LI; Suffern; Watertown
December 7	Rochester

+Ethics and Professionalism (video replay)
Fulfills NY MCLE requirement (3.5): 3.5 in ethics and professionalism

October 14	Canton

Medical Malpractice Litigation
Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 in ethics and professionalism; 2.0 in skills; 4.0 practice management and/or areas of professional practice

October 14	Buffalo; New York City
October 21	Albany; Melville, LI

2005 Update and Overview on Premises Liability

October 14	Uniondale, LI
October 21	Syracuse
October 28	Buffalo; New York City

Bridging-the-Gap: Intellectual Property

October 20	Binghamton
October 27	Uniondale, LI
November 3	Albany; New York City
November 4	Tarrytown
November 17	Rochester

Practical Skills – Basic Matrimonial Practice
Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 in ethics and professionalism; 3.5 in skills; 2.5 in practice management and/or professional practice

October 18	Albany; Buffalo; New York City; Rochester; Smithtown, LI; Syracuse; Tarrytown

New York Appellate Practice

October 21	Albany
October 28	Tarrytown
November 9	Buffalo
November 10	Uniondale, LI
December 1	New York City

Divorce Law Birthdays 2005: Part B and Maintenance at 25, the CSSA at Sweet 16
Fulfills NY MCLE requirement for all attorneys (7.0): 7.0 in practice management and/or areas of professional practice

October 21	Buffalo
October 28	New York City
November 18	Melville, LI
December 2	Syracuse
December 9	Albany

Discovery Proceedings for Trusts and Estates Practitioners
(half-day program)
Fulfills NY MCLE requirement for all attorneys (3.0): 0.5 in ethics and professionalism; 1.0 in skills; 1.5 in practice management and/or areas of professional practice

October 27	Mt. Kisco
November 4	New York City
November 18	Smithtown, LI

+Seventh Annual Institute on Public Utility Law
Fulfills NY MCLE requirement (6.0): 1.0 in ethics and professionalism; 5.0 in skills, practice management and/or areas of professional practice

October 28	Albany

Mental Health Courts: Better Outcomes from the Legal and Mental Health Systems
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.5): 2.0 in ethics and professionalism; 1.0 in skills; 1.5 in practice management and/or areas of professional practice

November 4	New York City

To register

or for more information call toll free **1-800-582-2452**

In Albany and surrounding areas dial (518) 463-3724 • Or fax your request to (518) 487-5618
http://www.nysba.org/CLE/fall2005 (Note: As a NYSBA member, you'll receive a substantial discount)

Scenic Standing

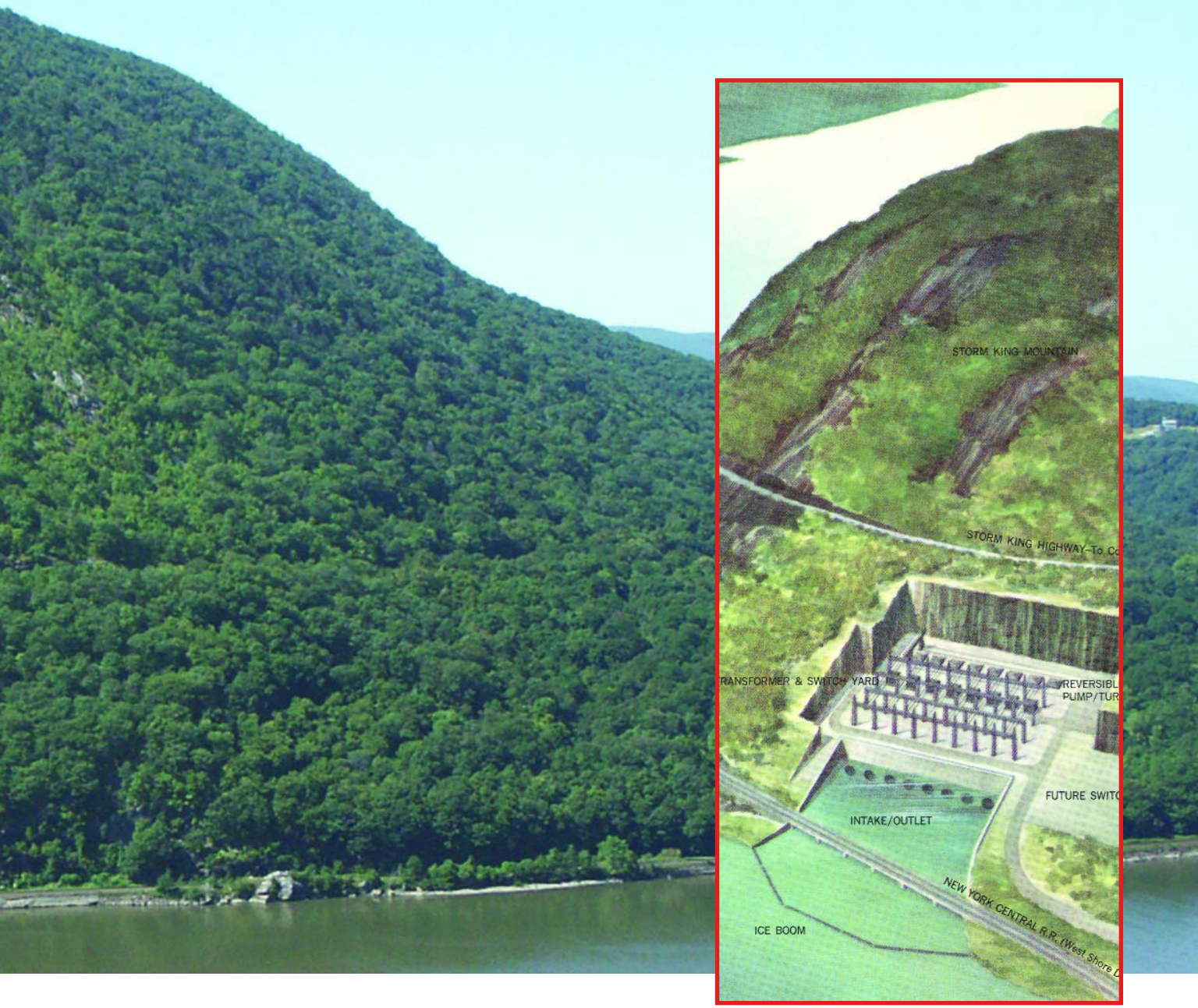
The 40th Anniversary of *Scenic Hudson* and the Birth of Environmental Litigation

by Skip Card

Albert Butzel stumbles occasionally as we scramble up the rocky trail toward the summit of Storm King Mountain, the 1,342-foot peak whose round profile shadows the Hudson River north of West Point. On paper, Storm King and Butzel are old friends – he spent 15 years of his legal career fighting for the mountain's preservation – but the physical feel of the mountain is a faded memory. Despite all his time spent on Storm King's behalf, this is only his second trip to its summit.

"I'm not much of a hiker," Butzel tells me. But after we cross Storm King's summit crest to a sloping viewpoint overlooking the Hudson, Butzel's appreciation of the scenery becomes obvious. A humid haze hangs thick in the air, distant peaks are obscured, ominous skies are barking thunder, and we are both drenched in sweat. Butzel seems delighted.

Manhattan freelance writer **Skip Card** <skipcard@earthlink.net> is a former newspaper reporter for *The News Tribune* of Tacoma, Washington. He is currently completing *Take a Hike: New York City*, a regional trail guide to be published in early 2006 by Foghorn Outdoors.



"Just look at that view," he says. Long patches of forest preserves line both banks of the mighty Hudson River, while to the east rise the tree-coated peaks of the Hudson Highlands. Directly below sits a picturesque marina. "Just beautiful," he says.

Beauty is legally significant at Storm King. This year marks the 40th anniversary of the 1965 case *Scenic Hudson Preservation Conference v. Federal Power Commission*,[1] often known simply as "*Scenic Hudson*." Here, Butzel and other attorneys, led by Lloyd Garrison, while fighting to halt a proposed Consolidated Edison hydroelectric plant, won the first federal ruling that recognized a public-interest group's right to sue to protect a site's natural beauty and historic importance. Many say the ruling marks the birth of environmental litigation.

The 1965 *Scenic Hudson* decision created a new legal principle, in effect putting a site's aesthetic and recreational values on par with any economic interest. It helped open the door to legislation such as the 1969 National Environmental Policy Act[2] and a host of environmental reforms that soon followed. It helped give birth to environmental advocacy groups like the Natural Resources Defense Council. Perhaps most important, it put legal doctrine in line with the nation's evolving environmental sentiments.

"It started people thinking in different ways," said Butzel, a Harvard Law School graduate who in 1965 was a 26-year-old associate working on the *Scenic Hudson* case for the firm of Paul, Weiss, Rifkind, Wharton & Garrison. "It really did open the courts in people's minds to litigation on behalf of the environment."

Others agree. Environmental attorney Richard Ayres, one of the founding staff members of the Natural Resources Defense Council, graduated in 1969 from Yale Law School with a law degree and a master's degree in political science from the Yale Graduate School. Ayres

didn't study environmental law at Yale, he said, because "there was no environmental law to study."

The 1965 *Scenic Hudson* case "was the case that opened the door to the federal courts for environmental claims," Ayres said. "Prior to that, there was no litigation in the federal courts that could be described as environmental, and the courts were basically hostile to it."

The Storm King controversy began in September 1962, when Consolidated Edison announced plans to build a hydroelectric plant at the base of the mountain along the Hudson River south of Cornwall. The plant was to be the world's largest "pumped-storage" generating plant, a facility capable of producing 2,000 megawatts of electricity for New York City and Westchester County, equivalent to about 18% of Con Ed's present-day needs.

Scenic Hudson opened the door to the federal courts for environmental claims.

During the day, water from a high reservoir to be built behind Whitehorse Mountain in the Harvard-owned Black Rock Forest would flow two miles through a 40-foot-diameter tunnel to hydroelectric turbines at the foot of Storm King Mountain. At night, Con Ed would reverse the flow, pumping river water back up the tunnel to refill the reservoir. This system wasn't particularly efficient – for every three kilowatts of electricity used to fill the reservoir, roughly two kilowatts would be generated when the water flowed back out – but with this method Con Ed could generate electricity to meet peak daytime demand, and then top off its reservoir at night when surplus power was available.

Con Ed chairman Harland Forbes told the *New York Times* in 1963 that "no difficulties are anticipated" in the plant's construction. Forbes might have been overly optimistic, but he had history on his side.

The idea of the government preserving or protecting untouched land simply because it was pretty to look at didn't take hold in the United States until the mid-19th century. California's Yosemite Valley first won scenic protection in 1864, when President Abraham Lincoln ceded the land to California to shield it from developers and land speculators. Similar protection was granted in 1872 to Yellowstone, which because it was located in the Wyoming Territory (not yet a state) became the nation's first national park, in fact if not yet in name.

More protection followed. In 1885, after a 29-year campaign begun by landscape artist Frederic Church and joined by Central Park mastermind Frederick Law Olmstead, New York State purchased 412 acres adjacent to Niagara Falls to create Reservation State Park, now known as Niagara Falls State Park. It is considered the nation's oldest state park.

By the dawn of the 20th century, U.S. citizens could lobby lawmakers for scenic preservation but had few legal remedies if their lobbying was ignored. In 1903, plans were announced for a highway to be cut across the round profile of Storm King Mountain, creating a highly visible scar on the mountain's east flank 200 feet above the Hudson. A 1907 taxpayer lawsuit temporarily halted condemnation proceedings, but the suit focused on improprieties in public spending. Plaintiffs also expressed fears the highway would mar the mountain's majesty, but such complaints found no legal foothold. The highway opened in 1922.

New York preservationists did win one early legal victory. When promoters of the 1932 Winter Olympics at Lake Placid announced plans for a bobsled run in the Sentinel Range on New York's Forest Preserve land, opponents sued, claiming the plans violated the "forever wild" provisions of the New York State Constitution. *Association for the Protection of the Adirondacks v. MacDonald*[3] reached the New York Court of Appeals in 1930, and the state high court sided with the plaintiffs. "The Adirondack Park was to be preserved, not destroyed," wrote Justice Frederick C. Crane. The bobsled run was moved to Mount Van Hoevenberg, where it exists today, and "forever wild" had legal meaning.

By the early 1960s, Americans' attitudes about environmental damage had evolved dramatically. Con Ed's plan for a massive plant at scenic and historic Storm King Mountain immediately raised concerns.

Some problems were quickly solved. The plant's original location was to be on land owned by the Palisades Interstate Park Commission at the narrow notch on the Hudson sometimes known as the Northern Gate, a fact that irked park commissioners. West Point Superintendent William Westmoreland also feared overhead power lines would interfere with Army helicopter traffic. Con Ed agreed to shift the plant off park land and bury transmission lines underground, and the plant won endorsements from park officials and Army brass. Later, Governor Nelson Rockefeller also backed the idea.

Con Ed officials saw little scenic value in the Storm King site. In his 1990 memoir *Some Lessons Learned: Recollections of 15 Years as Chairman of Consolidated Edison, 1967-1982*, Charles F. Luce describes taking a boat tour past the proposed location. "It lay on a steep bluff below the Storm King Highway and above the New York Central Railroad tracks, and was strewn with debris from construction of the highway many years before," Luce wrote. "It had no hiking paths or other recreational use."

Others saw beauty in the site, and opposition grew rapidly after a Con Ed annual report issued in April 1963 featured an artist's sketch of the proposed facility. The image showed the plant's reversible turbines and switch-

Hiking Storm King Mountain

What to expect: Several hiking trails run up and over Storm King Mountain past some of the most scenic viewpoints in the Hudson Valley. The trails are relatively short, but the steep, rocky scramble from the parking lot off Route 9W to Storm King's summit ridge will require hikers to use both hands and feet.

Recommended path: Storm King's highlights can be seen best by combining several trails to form a P-shaped loop. Trails on Storm King are not labeled with signs, but most paths are marked by color-coded blazes nailed to trees or painted on rocks. From the parking lot, walk west (to your left, as you face the mountain) and pick up the path marked by orange squares. Follow the trail steeply uphill over bedrock to a T-junction with the Stillman Trail (yellow blazes). Turn right onto Stillman and follow the yellow blazes uphill to Storm King's undulating summit ridge, on the way passing junctions with the Bluebird Trail (red and blue blazes) and Howell Trail (blue blazes). The best views lie a short distance beyond Storm King's 1,342-foot summit, where hikers can gaze out across the Hudson River past Poughkeepsie and Newburgh to the Catskills. Follow Stillman down to the By-Pass Trail (white blazes) and turn right. Follow By-Pass to the Howell Trail (blue blazes), and turn right again. Head west on Howell back to Stillman, and then turn left to retrace your original steps back down to the parking lot. Total distance: 3.1 miles.

Copyright 2000, New York-New Jersey Trail Conference. Used by permission.

Directions: Storm King Mountain sits on the west bank of the Hudson River between West Point and Cornwall-on-Hudson.

From the south: Cross the George Washington Bridge, take the first exit onto the Palisades Interstate Parkway and follow the parkway north to its end near the Bear Mountain Bridge traffic circle. Circle north onto Route 9W and drive past the West Point turnoffs. Park in the scenic Butter Hill-Storm King parking lot (access via northbound lanes only) at the sharp bend in Route 9W some 3.2 miles north of the junction with Routes 293 and 218.

From the north: Drive south on I-87 (New York State Thruway) to Exit 16, Harriman. Travel east on Route 6 to the Bear Mountain Bridge traffic circle and follow as above.

From the west: Take any major eastbound highway to I-87. Head south to Exit 16, Harriman. Travel east on Route 6 to the Bear Mountain Bridge traffic circle and follow as above.

From the east: Travel west to Bear Mountain Bridge, where Route 6 crosses the Hudson River near the border of Westchester and Putnam counties. Follow Route 6 across the bridge to the traffic circle and follow as above.

Rules, maps and contact information: No fees are charged for hiking or parking. Dogs must be leashed. Trails are shown on Map 7 of the West Hudson Trails hiking maps available from the New York-New Jersey Trail Conference <www.nynjtc.org>. Phone 201-512-9348. Note: The yellow-blazed Stillman Trail was recently rerouted, and the orange-blazed trail is not labeled on even the most recent maps. Trail relocations are shown online at <www.nynjtc.org/trails>. For more information, contact the Palisades Interstate Park Commission, phone 845-786-2701, Web site <www.pipc.org>.

Warning: Use caution in this area. Unexploded military ordnance was discovered on Storm King Mountain in 2000, so hikers are strongly warned not to wander from marked trails.

yards sitting inside an 800-foot-wide rectangular notch carved out of Storm King at the edge of the Hudson River.

"They were going to cut away the mountain," Butzel said. Many locals were shocked. In an editorial headlined "Defacing the Hudson," the *New York Times* wrote that the Con Ed plant and similar plants planned for the eastern side of the river "would desecrate great areas that are part of the natural and historic heritage of our country, and are still largely unspoiled and should remain that way."

Conservationists, hikers and historians hurried to oppose the plant. On November 8, 1963, at a meeting in the historic Octagon House in Irvington, New York, home of Hudson Valley historian Carl Carmer, local preservationists formed the Scenic Hudson Preservation

Conference, a coalition that included groups such as The Nature Conservancy and the New York-New Jersey Trail Conference, which maintained 17 miles of trails around Storm King and Black Rock Forest. Carmer was elected chairman.

The group's best hope lay in opposing the plant's license during hearings before the Federal Power Commission. Scenic Hudson hired attorney Dale Doty, a former FPC commissioner, to handle its arguments.

At a May 1964 licensing hearing, Con Ed lead attorney Randall Le Boeuf praised the plant's technical merits, stressed the need for additional power and touted the "uniquely advantageous" qualities of the Storm King site. Attorney Doty challenged some of Con Ed's technical claims but primarily called witnesses who said the plant would forever damage a beautiful and historically significant location. In his testimony, historian Carmer said it was proper to ask whether beauty should be sacrificed for commerce.

"The Hudson answers a spiritual need more necessary to the nation's health than all the commercial products it can provide, than all the money it can earn," Carmer said. "We believe that ugliness begets ugliness and that nature's beauty, once destroyed, may never be restored by artifice of man."

After the hearings, while the Federal Power Commission huddled, new opposition to the plant appeared, with citizens, lawmakers and the media putting new emphasis on Hudson Valley preservation. Studies were found that challenged the Con Ed plant's efficiency. Another study warned the plant's intake turbines could harm a crucial spawning area for Hudson River striped bass. A petition to reopen the licensing hearings was submitted but later denied.

On March 9, 1965, the Federal Power Commission granted a license for the plant, agreeing that the "minimal" impact to the site's natural beauty was no reason to halt construction of a needed power source.

Scenic Hudson appealed the ruling to the U.S. Court of Appeals for the Second Circuit. The Taconic Foundation agreed to finance the appeal if the group used the legal services of corporate attorney Lloyd Garrison, one of its board members.

Garrison and Simon Rifkind, partners in the law firm of Paul, Weiss, Rifkind, Wharton & Garrison, crafted a risky legal tactic to exploit the requirement that federally licensed power plants must take into account impacts on recreation. Another federal court had already ruled scenery was a component of recreation, laying the first brick of legal precedent. Their strategy was to show the Federal Power Commission that Con Ed had simply not done all that was required to merit a license.

Garrison and Rifkind assembled a legal team that included several new staff members, Al Butzel among them. Butzel said he was "naturally pessimistic" about overturning federal approval of the license but was impressed by the strategy Garrison and Rifkind had chosen.

"We thought our chances were pretty small, but we also thought we had a strong case," he said.

The Second Circuit Court of Appeals heard oral arguments on October 8, 1965. The Federal Power Commission, called to defend its approval of the Con Ed plant, claimed Scenic Hudson had no standing to sue because the members "make no claim of any personal economic injury resulting from the Commission's action." People might love Storm King's scenery, but love did not confer a legal right to challenge construction of the plant.

"The basic rule was thought to be that you had to have some sort of economic interest," Butzel said. Con Ed had made the same claim during the May licensing hearings when it tried to block Scenic Hudson's testimony, but the Federal Power Commission had rejected that request, a decision that now undermined the FPC's own argument.

Garrison argued before the court that the commission, by refusing to reopen its licensing hearings to new evidence on fisheries impacts and alternative sources of power, had not done a thorough job. Feasible alternatives with far fewer impacts had been presented but casually dismissed, he said.

To the surprise of most participants, the court on December 29, 1965, handed preservationists a victory and agreed the Federal Power Commission had not considered a sufficient number of alternatives. It said future proceedings must include a basic concern for the preservation of natural beauty, "keeping in mind that, in our affluent society, the cost of a project is only one of several factors to be considered."

In effect, the court said the commission "had enough information to know they should get more information," Butzel said. "They hadn't done their job."

Equally as important, the federal court ruled Scenic Hudson had a right to fight the project in court. The

Continued on Page 16

The court said future proceedings must include a basic concern for the preservation of natural beauty.

Continued From Page 14

judges ruled that people who by their conduct and activities exhibit a special interest in a site's aesthetic or recreational qualities "must be held to be included in the class of 'aggrieved' parties." Con Ed appealed the decision, but the U.S. Supreme Court refused to hear the case, and the precedent stood.

The 1965 ruling became an important milestone in the changing attitudes toward the environment. Soon afterward, in 1967, a group of four Long Island scientists successfully went to court to halt the use of the pesticide dichlorodiphenyl trichloroethane, better known as DDT. Their victory led to the creation of the Environmental Defense Fund.

Richard Ayres and other Yale students also grasped the ruling's implications and correctly sensed the change in environmental attitudes. They watched in 1969 as Congress passed the National Environmental Policy Act, the stated purpose of which was to "encourage productive and enjoyable harmony between man and his environment" and to "assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings." Inspired by such developments, Ayres and others formed the Natural Resources Defense Council, where Ayres worked as a staff attorney until 1991. Since 1992, he has served on the NRDC's board of directors.

NEPA also gave environmental groups standing in court, as did the 1970 Clean Air Act amendments and the 1972 Federal Water Pollution Control Act, thus codifying *Scenic Hudson*'s precedent in federal law. In just a few years, recognizing the environment's aesthetic value had jumped from breakthrough legal strategy to national policy.

Butzel's job, however, was just beginning. The Second Circuit ruling didn't kill Con Ed's plant, it just sent plans back for a more thorough hearing. By 1970, by the end of a second licensing request, the Federal Power Commission had an 18,000-page record, and no one could again argue it hadn't looked closely enough at the issue. The FPC granted Con Ed a license for the plant.

Opponents kept fighting and often got lucky, Butzel said. Appeals stalled plant construction at crucial moments. At other times, Con Ed's financial troubles kept construction from proceeding. Water quality permits were challenged successfully. Sportsmen and aquatic biologists, alarmed at the dangers to striped bass nesting sites, joined the fight. In 1974, errors were found in a fisheries study funded by Con Ed that vastly overstated downstream flow for the tidal Hudson River, thereby understating the effect on striped bass. It gave opponents another basis for appeal.

Con Ed tried compromise, even offering to put the turbines and powerhouse underground. The move mollified few and angered others, including New York City officials who worried underground blasting could cripple the nearby aqueduct that carried 40% of the city's water supply.

Butzel kept on the case, even taking it with him when he and fellow associate Peter Berle left Paul, Weiss, Rifkind, Wharton & Garrison and formed the firm Berle & Butzel, later Berle, Butzel, Kass & Case. By that time, Paul, Weiss was glad to be rid of the Storm King case, which had become a pro bono case that Butzel estimates had racked up at least $300,000 in unpaid fees.

In just a few years, recognizing the environment's aesthetic value had jumped from breakthrough legal strategy to national policy.

Litigation dragged on until 1980, by which time inefficient pumped-storage technology was no longer cutting-edge and the original cost of the facility had increased tenfold to $1.6 billion. Con Ed was also tired of fighting a battle that had become powerfully symbolic within the environmental movement. A 1980 settlement scrapping the Storm King plant was hailed by the *New York Times* as a "peace treaty on the Hudson."

Butzel left his law practice in 1985. Today, he is president of Friends of Hudson River Park, an organization working to support development of waterfront park lands on Manhattan's west side from 59th Street to the Battery.

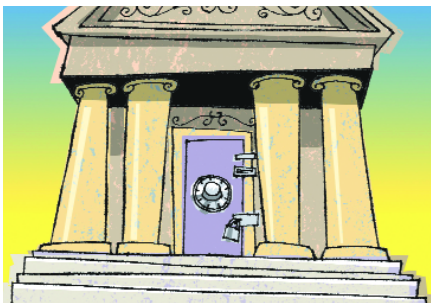
He doesn't get out in the woods much anymore, he explains as we move away from the Storm King viewpoint, walking swiftly along rocky trails to beat the approaching rain. He talks in detail about the tenacity of the Storm King supporters during the long fight, about the case's odd twists, about chance and timing. He is understandably proud of what was accomplished here, but he is quick to say good fortune played a role.

"We were lucky," Butzel says, more than once. In particular, he admits he and others might have spotted the erroneous claims about the Hudson River's flow. But had they done so, he said, their reason for the crucial 1974 appeal would have been lost, and the Con Ed plant might have been built after all.

We reach the car just as thunder claps above us. Seconds after we slam the car doors, a torrent of heavy rain washes over the parking lot. Al Butzel smiles inside the dry car. His luck on Storm King has held once again. ■

1. 354 F.2d 608 (2d Cir. 1965).
2. 42 U.S.C. §§ 4321–4347.
3. 253 N.Y. 234, 170 N.E. 902 (1930).

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.

"How Do I Dismiss Thee . . . ?"
Part II

Introduction

This is the second of a three-part article addressing post-commencement, non-summary judgment dismissals of civil cases. The first part attempted to give a brief historical and philosophical background on the development of these dismissal issues, suggested why courts are more empowered and may be more willing to use the dismissal weapons at their disposal, and addressed one particular type of dismissal: failing to appear in court. In this issue we address dismissals for failure to prosecute and for failure to restore cases after dismissal from the trial calendar for more than one year. The last part of this series will address dismissals arising in the disclosure world as a penalty for a party's, or an attorney's, failure to comply with disclosure orders.

90-Day Notices: CPLR 3216

CPLR 3216 provides a mechanism whereby a case may be dismissed for failure to prosecute the action where a party is unable, or unwilling, to proceed. The recalcitrant party is served with a demand, commonly called a 90-day notice. The notice demands that prosecution of the action be resumed and that a note of issue be filed within 90 days of the service of the notice. The notice informs the recipient that failure to file a note of issue within 90 days of receipt shall serve as the basis for the sender of the notice to move for dismissal. Although the rule permits a party or the court to serve the demand, 90-day notices were, historically, served almost exclusively by parties. This changed with the advent of Differentiated Case Management (DCM), when some courts began to use 90-day notices as a calendar control tool by routinely incorporating a CPLR 3216 demand into compliance conference orders.

Obtaining a CPLR 3216 Dismissal

Getting a case dismissed under CPLR 3216 is a two-step process when a party serves the notice. First, a party serves a 90-day notice in accordance with the statute (by registered or certified mail); and, if the note of issue is not timely filed, the party serving the notice thereafter makes a motion to dismiss.[1] With court-served 90-day notices, no motion is necessary. A party that blows a 90-day notice and is confronted with a motion to dismiss may avoid dismissal by demonstrating to the court a "good and meritorious" cause of action and a reasonable excuse for the delay.[2]

Although the receipt of a 90-day notice from a party typically causes rapid, shallow breathing and markedly increased perspiration in the recipient, courts have traditionally been relatively lenient in permitting a party to escape dismissal. In fact, the Court of Appeals recently reiterated its long-standing characterization of CPLR 3216 as being "extremely forgiving of litigation delay," holding, as a matter of law, that the Appellate Division had abused its discretion in dismissing a complaint where the plaintiff demonstrated both a meritorious cause of action and a justifiable excuse for the delay.[3] The Court found that the plaintiff had demonstrated a justifiable excuse for the delay, and that the delay

> was not willful or with intent to abandon the action, but rather was the result of neglect on the part of the [plaintiff's] previous attorneys (citation omitted) and that – upon transfer to the present attorney – pre-trial matters have proceeded with the knowledge and participation of defense counsel. Plaintiff likewise demonstrated the existence of a meritorious claim by submitting an affidavit from a medical expert.[4]

A Second Department decision, quoting the Court of Appeals's "extremely forgiving" language, emphasized that CPLR 3216 "never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on that plaintiff's unreasonable neglect to proceed."[5] The Second Department went on to hold that the dual showing of a justifiable excuse and the existence of a good and meritorious cause of action "is not strictly necessary in order for the plaintiff to escape such a dismissal." A variety of circumstances justified excusing the plaintiff's failure to comply with a 90-day notice, "including where a defendant, after having served the 90-day notice, demands additional pretrial discovery from the plaintiff, or where a defendant, prior to having served such a notice, has obstructed the plaintiff's own efforts to obtain legitimate pretrial disclosure from the defendant."[6] The Second Department concluded that "[t]here is no parallel between the circumstances of the instant case and those where CPLR 3216 dismissals have been justified based on patterns of persistent neglect, a history of extensive delay, evidence of an intent to abandon prosecution, and lack of any tenable excuse for such delay."[7]

This is a crucial distinction for any recipient of a 90-day notice to bear in mind, but particularly so where the 90-day notice was served by the court as a routine calendar control device. Delays in completing disclosure may well be the result of one or more defendants' conduct, rather than as a result of a plaintiff's failure to proceed, or both sides may bear responsibility. However, the penalty for failing to timely file a note of issue when served with a 90-day notice – dismissal – falls solely on the plaintiff.

Strict Construction (Sort Of) for CPLR 3216 Service Requirements

There is long-standing authority that the requirements of CPLR 3216 will be strictly construed, and dismissal will not be warranted where there has not been strict compliance with the predicate requirements for dismissal.[8] As explained by the Court of Appeals, a dismissal of an action for failure to prosecute is not part of the court's inherent power but is, instead, a legislative creation.[9] Accordingly, the Court of Appeals reversed the courts below for having "erred in granting the ex parte motions to dismiss on the grounds of 'gross laches' or failure to prosecute . . . the conceded failure of respondent or the court to afford petitioners adequate written notice constitutes a failure of a condition precedent to the dismissal (CPLR 3216 [b])."[10]

Proper notice and service is required whether a private litigant or the court has served the 90-day notice. Where the order below does not contain the notice required by CPLR 3216, there is a failure of a condition precedent, and a dismissal may not be granted.[11] "Here, because a certification order did not provide the 90-day notice required by CPLR 3216, there was a failure of a condition precedent, and the court was not authorized to dismiss the action on its own motion."[12] The First Department is in accord, holding

> [i]n this matter, no 90-day demand was served and the Preliminary Conference Order which directed plaintiff to file a note of issue by a certain date and further provides that "in the absence of notification, this matter will be deemed abandoned and dismissed" is insufficient to constitute such notice.[13]

However, one area in which courts do not strictly construe the statute is in the manner of service called for by CPLR 3216, which requires service by registered or certified mail.[14] In a case where the 90-day notice was served by a party, the court held that service by Federal Express accomplished the functional equivalent of certified or registered mail in providing documentary evidence of receipt, and 90-day notice served in this manner complied with service requirements.[15] When the court serves parties at a conference with 90-day notice, in hand, that service will be upheld.[16] The Second Department has affirmed a trial court dismissal of a plaintiff's complaint where both sides at a compliance conference had signed a compliance conference order containing a 90-day notice. The court ruled that the statutory requirement that the notice be served by certified or registered mail did not invalidate the notice when the parties were hand-served with it at the conference.[17] Denying receipt will be to no avail. In a First Department case, plaintiff's counsel denied having a copy of the court's order despite the fact that the copy of the order in the court's file bore plaintiff's counsel's

> The Court of Appeals recently reiterated its characterization of CPLR 3216 as being "extremely forgiving of litigation delay."

signature acknowledging receipt of the order, which the court held obviated the need for service by registered or certified mail.[18]

So far, so good. However, alongside the cases cited above, there is a long line of cases, particularly out of the Second Department, holding that the failure to file timely a note of issue in response to a proper, court-served, 90-day notice warrants dismissal.

> Treat the receipt of a CPLR 3216 demand with the utmost caution.

Not surprisingly, delay on the part of a party faced with a CPLR 3216 dismissal can be fatal. Where a trial court's certification order contained a 90-day notice, the plaintiff failed to move before the expiration of the 90 days to vacate the notice or extend its time, and failed to file a note of issue within the 90 days. More than two years after the default date, the plaintiff moved to have a note of issue filed more than one year after the expiration of the 90-day period deemed timely filed. Having failed to offer a justifiable excuse for the failure or a meritorious cause of action, the Second Department affirmed the trial court's denial of the motion.[19]

Knowing enough to move quickly to extend the time to file the note of issue is not always sufficient. A plaintiff, confronted with a court-served 90-day notice, moved to extend the time within which to file a note of issue. In affirming the trial court's dismissal of the plaintiff's case, the Second Department recited a brief, blunt, chronology of the plaintiff's failure, over a four-year period, to pursue disclosure coupled with a lack of a reasonable excuse and prejudice established by the defendant.[20]

Faced with a 90-day notice, aware that a motion to extend the time to file the note of issue may be denied, and with necessary disclosure outstanding, a litigant could be forgiven for determining that the safest course is to file the note of issue, and then complete disclosure during the pendency of the defendant's motion to vacate the note of issue, right? Wrong. The Second Department held that where the plaintiff timely filed a note of issue and certificate of readiness in response to a 90-day notice, but discovery was not complete, the "false statement of material fact" rendered the note of issue and certificate of readiness a nullity; hence, no filing was made in response to the 90-day notice, and the appellate court held that the trial court erred in failing to dismiss the action pursuant to CPLR 3216. Case dismissed.

There are cases where the appellate court will reinstate a dismissal arising from failure to file a note of issue in response to a court-served 90-day notice, but they are quite fact specific. The Second Department reversed a trial court's dismissal of a plaintiff's complaint for failure to file a note of issue. A sufficient affidavit of merit was submitted in opposition to the motion to dismiss, and the plaintiff alleged law office failure, resulting from a decline in productivity arising from the September 11, 2001, World Trade Center attack, as the excuse for failing to comply. Accepting law office failure as a reasonable excuse for the failure to timely file, the court concluded: "To the extent that the completion of discovery was delayed by the plaintiff's lack of diligence, it did not rise to the level of failure to prosecute the action. . . . In light of the strong public policy in favor of resolving cases on the merits, the complaint should be reinstated."[21] However, these are facts unlikely (hopefully) to be repeated.

Treat the receipt of a CPLR 3216 demand with the utmost caution, comply with all disclosure owed, and carefully document the failure of any other party to comply with disclosure or to otherwise delay the filing of the note of issue. Move, preferably by order to show cause, to be relieved of the terms of the notice, to have the time to file the note of issue extended by the court, or to permit disclosure to be conducted post-note. If the court does not extend the time, file the note of issue, carefully detailing the disclosure remaining on the certificate of readiness.

Dismissals Pursuant to CPLR 3404 and the Failure to Restore Marked-Off Actions

CPLR 3216 has no application once a case has been successfully placed on the trial calendar. However, this is not the time to relax one's vigil. In addition to dismissals as a result of the failure to appear at a scheduled conference, discussed in the first article in this series, the CPLR provides yet another mechanism for dismissing your case: CPLR 3404.

According to CPLR 3404, a case that is marked off, struck from the calendar or unanswered at a clerk's calendar call that is not restored within one year shall be deemed abandoned and dismissed, without the necessity of an order.[22] In other words, once a case on the trial calendar is off-calendar, for whatever reason, for more than one year, it is to be dismissed, and the dismissal may be entered by the clerk of the court.

For a number of years there was a split in appellate cases over whether a court could order a dismissal pursuant to CPLR 3404 prior to a case being placed on the trial calendar. This was resolved in the *Lopez* decision where the Second Department held "that CPLR 3404 should not be applied to cases in which a note of issue has not been filed."[23]

What happens when a note of issue is vacated and a case is stricken from the trial calendar? In *dicta*, the First Department has opined that where a plaintiff had filed a note of issue, and the case had thereafter been stricken from the trial calendar for the plaintiff's failure to provide discovery, and the defendant thereafter moved pursuant to CPLR 3404 to dismiss after more than one year had elapsed, the case did not revert to a pre-note of issue status, so that CPLR 3404 would apply and the action could be dismissed.[24]

A case dismissed pursuant to CPLR 3404 may be revived upon establishing the existence of each component of a four-part test: first, a meritorious case; second, a reasonable excuse for the delay; third, an intent not to abandon the action; and, fourth, a lack of prejudice to the defendant.[25] The First Department held that the plaintiff had satisfied each of the four criteria: A meritorious case was established because the defendant did not contest the affirmation of merit submitted by the plaintiff's physician, as was a reasonable excuse (a prolonged wait for trial in Bronx County was not unusual, and "[w]hile counsel may be faulted for failing to keep track of the status of the case, such an oversight amounts to law office failure, which may be accepted as an excuse for delay"). Furthermore, there was no intent to abandon the action (plaintiff's counsel alleged that he did not receive notice of the May 2000 conference, and due to the defendant's "no pay" position, the plaintiff was simply waiting for a trial date), and there was a lack of prejudice to the defendant (mere passage of time does not establish prejudice, and since the plaintiff had been deposed, records exchanged, and the defendant did not depose a witness or produce its doctor for deposition, the plaintiff demonstrated that the defendant was not prejudiced by the "faded memories of potential witnesses").[26]

To "restore a case that has been marked off the calendar pursuant to CPLR 3404, a plaintiff need only request restoration within one year following the mark-off date."[27]

Conclusion

Preliminary and compliance conference orders must be scrutinized for deadlines, and these deadlines must be carefully entered in a diary with the same care and concern once reserved for tracking statutes of limitations. You will sleep better knowing you have a system of alerts in place to allow you sufficient time to meet, or move to extend the time to meet, these deadlines. ■

1. It is important to remember that filed means filed, so a trip to the appropriate clerk's window is in order when the 90 days is about to run, since the note of issue merely landing in the clerk's in-basket is not a filing. More than one practitioner has had a case dismissed where service dropped off the note of issue, but the clerk did not log in and stamp it until the 91st day.

2. *Di Simone v. Good Samaritan Hosp.*, 100 N.Y.2d 632, 768 N.Y.S.2d 735 (2003).

3. *Id.*

4. *Id.*

5. *Davis v. Goodsell*, 6 A.D.3d 382, 383, 774 N.Y.S.2d 568 (2d Dep't 2004).

6. *Id.*

7. *Id.*

8. *Revell v. New York Cares Org., Inc.*, 307 A.D.2d 214, 763 N.Y.S.2d 259 (1st Dep't 2003); *accord, Ameropan Realty Corp. v. Rangeley Lakes Corp.*, 222 A.D.2d 631, 635 N.Y.S.2d 691 (2d Dep't 1995).

9. *Airmont Homes, Inc. v. Town of Ramapo*, 69 N.Y.2d 901, 516 N.Y.S.2d 193 (1987).

10. *Id.* at 903.

11. *Schwartz v. Nathanson*, 261 A.D.2d 527, 690 N.Y.S.2d 635 (2d Dep't 1999).

12. *Id.*

13. *Revell*, 307 A.D.2d 214; *but see, Heredia v. Two Kings, Inc.*, 4 A.D.3d 153, 772 N.Y.S.2d 44 (1st Dep't 2004) (although plaintiff's counsel denied having a copy of the court's order, the copy of the order in the court's file bore plaintiff's counsel's signature acknowledging receipt of the order, thus obviating the need for service by registered or certified mail. The court concluded: "The wording of the order gave sufficient notice to plaintiffs that failure to comply with the demand would result in dismissal."). *Id.*

14. CPLR 3216(b)(3).

15. *Secreto v. Int'l Bus. Mach. Corp.*, 194 Misc. 2d 512, 755 N.Y.S.2d 566 (Sup. Ct., Dutchess Co. 2003).

16. *Lu v. Scaduto*, 303 A.D.2d 750, 757 N.Y.S.2d 461 (2d Dep't 2003).

17. *Id.*

18. *But see Heredia*, 4 A.D.3d 153.

19. *Fraga v. Smithaven Open MRI*, 6 A.D.3d 494, 774 N.Y.S.2d 415 (2d Dep't 2004).

20. *Dhaliwahl v. Long Boat Taxi, Inc.*, 305 A.D.2d 449, 758 N.Y.S.2d 819 (2d Dep't 2003).

21. *Storchevoy v. Blinderman*, 303 A.D.2d 672, 757 N.Y.S.2d 82 (2d Dep't 2003).

22. CPLR 3404.

23. *Lopez v. Imperial Delivery Serv.*, 282 A.D.2d 190, 725 N.Y.S.2d 57 (2d Dep't), *appeal denied*, 96 N.Y.2d 937, 733 N.Y.S.2d 376 (2001).

24. *Nieman v. Sears, Roebuck & Co.*, 4 A.D.3d 255, 772 N.Y.S.2d 662 (1st Dep't 2004).

25. *Muriel v. St. Barnabas Hosp.*, 3 A.D.3d 419, 771 N.Y.S.2d 107 (1st Dep't 2004).

26. *Id.*

27. *Smith v. Avis Rent A Car Sys., Inc.*, 308 A.D.2d 573, 764 N.Y.S.2d 728 (2d Dep't 2003).

Funding Terrorism

How and Why to Set Up a Program to Identify Potential Insurer Links to Terrorist Organizations

By Douglas Hayden and Howard Feldman

Terrorism is about secretly hostile operatives striking against innocent civilians to wreak fear and havoc unjustified by the terrorists' true political and military strength. Operationally, terrorism is about moving money and obtaining and placing strategic assets. Without large amounts of untraceable money and local sources of equipment, terrorism could not exist. In that sense, terrorism has an eerie similarity to international drug dealing and other aspects of organized crime.

In the immediate aftermath of the terrorist attacks of September 11, 2001, on the World Trade Center and the Pentagon, President George W. Bush issued an Executive Order[1] prohibiting transactions with persons who commit or threaten to commit acts of terrorism, or who support terrorism.[2]

The New York State Insurance Fund (NYSIF) has joined several state funds in establishing procedures to observe protocols established by the Office of Foreign Assets Control (OFAC) division of the United States Treasury, which, by federal mandate, stem the flow of money that feeds and sustains international terrorist operations.

Lawyers representing banks and clients engaged in international commerce have for years been familiar with the due diligence and compliance aspects of OFAC policy. In recent years, OFAC compliance obligations have been broadened to include domestic insurance companies, domestic real estate companies[3] and other traditionally less federally regulated areas of commerce. Roughly classified as non-traditional financial institutions, these industries share in common the ability to transfer assets representing large sums of money, in swift, solitary transactions.

Lawyers practicing in the post-9/11 period who have not already been called upon to advise their clients about OFAC compliance should advise their clients to pay attention every time they enter into a contract or pull out their checkbook. Their failure to counsel observance of the new regulations may expose their clients to excruciating audits, enforcement actions, and, in egregious cases, to the most heinous forms of adverse publicity.

OFAC has termed it "critical" that the insurance industry gain a better understanding of the economic sanctions and embargo programs. "The programs are a front line defense against foreign threats to our national safety, economy and security."[4]

These state funds have embarked upon an ambitious project to cross-check their databases with the United States Treasury Department's list of known terrorists and those who lend support to them. They recognize that an insurance company is a financial institution capable of being co-opted by international terrorism and organized crime.

Douglas Hayden is Acting Co-Executive Director/Chief Legal Officer and **Howard Feldman** is Principal Attorney with the New York State Insurance Fund.

This article is adapted from an article first printed in *AASCIF News*, April–May–June 2004 (The Newsletter of the American Association of State Compensation Insurance Funds, <www.aascif.org>).

As an aspect of war, federal economic sanctions actually go back to the War of 1812.[5] Modern sanction policy began in World War I and has generally been instituted under the authority of the Trading with the Enemy Act of 1917 (TWEA).[6]

OFAC itself was formally created in December 1950, following the entry of China into the Korean War, when President Truman declared a national emergency under the TWEA and froze all Chinese and North Korean assets subject to U.S. jurisdiction.

What we now know as peacetime economic sanctions began with the International Emergency Economic Powers Act of 1977 (IEEPA),[7] the first U.S. law involving peacetime sanctions.

Modern sanction legislation weaves the provisions of TWEA, IEEPA and several additional federal laws,[8] some of which originally targeted international narcotics trafficking, money laundering, and organized crime. The legislation was also used as a tool in foreign policy to isolate rogue nations such as Cuba and North Korea. These are all tied together by a series of Executive Orders and Presidential Declarations of Emergency under IEEPA.

Anybody who comes into possession of money or property belonging to an OFAC-listed SDN or Blocked Person must freeze those assets.

Many in the insurance industry incorrectly interchange OFAC with the USA Patriot Act.[9] As property and casualty insurance companies were temporarily exempted from the Patriot Act, those who confuse the two acts believe that the insurance industry is exempt from OFAC requirements. As you have seen, OFAC compliance is governed by a group of separate federal laws that, in most cases, predated the USA Patriot Act.

Money Laundering

Money laundering through the use of legitimate business is the lifeblood of terrorism. Money laundering is the process by which one conceals the existence, illegal source or illegal application of income, and disguises that income to make it appear legitimate. While banks were the traditional money-laundering vehicles, enforcement of banking rules have led money launderers to seek other financial institutions.[10] One substitute may be domestic insurance companies. These are the steps commonly followed by money launderers:

- Placement – Money is deposited in the financial system without drawing notice.
- Layering – Money is moved through multiple institutions and property ownership, often internationally, to make it difficult to trace the origins of the money.
- Integration – The now difficult-to-trace money is placed in the legitimate financial system of the locale where the terrorist organization is operating.

The Terrorist Next Door and NYSIF's Close Call

At this point, you might wonder how this relates to the casualty insurance industry as a whole, or the workers' compensation insurance industry in particular. At NYSIF, it quickly hit home when a former long-term insured, Carnival French Ice Cream, suddenly appeared in the news.

In November of 2003, acting on a tip, federal agents raided a tiny ice cream shop in the Park Slope section of Brooklyn. Agents who reviewed seized accounts were astonished to learn that Abad Elfgeeh's Carnival French Ice Cream shop had deposited $20 million in just the past five years. Upwards of $5 million had been deposited into the Carnival account in a one-year period alone. Tax records indicated an annual gross in ice cream sales of just $185,000.

Elfgeeh, a Yemeni immigrant who lived upstairs from the shop, was soon accused of making illegal money transfers to fellow Yemeni Sheik Hasa al-Moayad, who resided in Germany. Al-Moayad was extradited to the United States after being accused of funneling $20 million, recruits and weapons to al-Quaeda. He was convicted in March in Federal District Court in Brooklyn of conspiracy for providing material support to Hamas and for attempting to provide material support to al-Quaeda. In a taped conversation with FBI informants, al-Moayad promised to funnel more than $2 million to Hamas and laughed about a Hamas attack in Israel in which civilians had been killed.[11] Elfgeeh is facing a possible 10-year prison sentence.

Osama bin Laden has boasted that *hawalas*, informal money transfer networks, have created cracks in the Western financial system that "were as familiar to him and his al-Quaida colleagues as the lines of their own hands."[12]

On May 11, 2004, Federal Eastern District Judge Charles P. Sifton allowed Mr. Elfgeeh to withdraw his guilty plea. The decision stated that the plea that had been entered before a federal magistrate was flawed because Mr. Elfgeeh did not understand some of its terms and never acknowledged taking part in any conspiracy. As a result, Judge Sifton vacated the plea.[13]

While NYSIF has no indication that Elfgeeh misused his NYSIF policy, long-term business relationships are one of the cornerstones of financial trust. Fraud detection

systems used by many insurers may not be capable of detecting a sophisticated assault perpetrated by hostile foreign governments or internationally based money launderers. These would be uncharted areas of fraud to most insurers.

Domestic insurance companies can catch the average claimant committing fraud. Whether one could deal with professional agents of a foreign government who target casualty insurance companies is another matter. Could a scam that involved a long-term insured colluding with a claimant and provider be discovered?

Domestic casualty insurers are not used to viewing themselves as financial institutions. They may not realize that a terrorist or money launderer may be willing to accept a huge discount on money to legitimize it.

How OFAC Works

Here's how an OFAC compliance program works. A U.S. insurance company is prohibited, under any circumstance, from paying a claim or entering into a contract, including issuing a policy, with anyone on the OFAC list. The OFAC list contains the names of some 50,000 Specially Designated Nationals (SDN) and Blocked Persons, including numerous foreign agents and front organizations for terrorists and narcotics traffickers. The list is available at the OFAC Web site, <www.ustreas.gov/offices/eotffc/ofac>.

Anybody who comes into possession of money or property belonging to an OFAC-listed SDN or Blocked Person must freeze those assets. Once frozen, the holder must notify the Treasury Department's Compliance Program Division and await instructions for their disposition. OFAC may need additional time to research the entity and notify the insurance company of its final determination.

The list may be based on legislation from Congress, orders from the president or U.S. intelligence. OFAC is aware of the confusion that can be caused by similar names on the list, and will provide whatever assistance is necessary to help insurers avoid adjusting a claim or entering into a policy with an SDN or Blocked Person. OFAC is additionally aware of the unavoidable weakness under workers' compensation, the inability of an insurer to be aware of the names of all of its policyholders' related entities or policyholders' employees. OFAC will not hold the employer responsible for information that it did not know and is not in its possession, instead employing a reason-to-know standard.

OFAC Penalties

OFAC violators face both civil and criminal penalties. Civil penalties are set between $11,000 and $1 million per violation. Criminal violations can bring up to 12 years in prison. Here are some examples of violations settled with OFAC:

Company	Penalty	Offense
L.A. Dodgers	$75,000	Signing Two Cuban Nationals
CNA Insurance	$2,300,000	Selling Reinsurance to Cuban Companies
Ikea	$8,000	Importing Rugs from Taliban-Controlled Afghanistan
Tyson Foods	$150,000	Chicken Sent to Pre-War Iraq
Goodyear Tire	$195,000	Shipping Tires to Cuba Through Venezuela and Colombia
Johnson & Johnson	$110,000	Medical Supplies to Pre-War Iraq
GRE Insurance	$250,000	Insurance Coverage Group for Shipments to Pre-War Iraq and to Libya

Problems with OFAC

OFAC has its share of detractors who believe that OFAC is not rigorous enough. The Senate Finance Committee recently sent OFAC a letter setting forth its perceived deficiencies. Senator Charles Grassley, the Committee's Republican chairman, and Senator Max Baucus, its senior Democrat, cited numerous concerns about OFAC's performance, including evidence of sloppy record keeping, failure to provide required information to Congress and reliance on voluntary compliance by banks to impose sanctions against suspected terrorists. "This leaves OFAC in a position of not knowing what it does not know," the two senators wrote. "While many financial institutions report their own violations when they are detected, we do not have the luxury of assuming that all financial institutions do this."[14]

Other critics believe that OFAC compliance requirements are too rigorous. OFAC fails to include domestic sources in its SDN/Blocked Persons listings. This renders it incongruous to some that OFAC would require insurers managing only domestic lines to incur the expense of matching policies against exclusively foreign sources. To those critics, it is unlikely that such insurers will have sufficient exposure to proscribed foreign sources to justify the expense incurred. As the OFAC list contains primarily Islamic and Hispanic names, they also fear that law-abiding domestic policyholders and claimants with similar names to those on the list will have their transactions delayed.[15]

Setting Up a Program

Setting up an OFAC program will require the preparation of a clear policy linked to effective controls.

For a large integrated insurance company, just identifying all of the payment and contract centers – from claimant benefit payments, to policy issuing, to vendor, contractor and provider payments – would be a gargantuan task.

Because OFAC is an industry regulator, it does not mandate the adoption of any particular type of due diligence program. The program that is developed has to be tailored to your unique method of doing business. A

domestic insurer will come upon an SDN or Blocked Person less frequently than will an international insurer. Although a domestic insurer is looking for a needle in a haystack, it is an important needle.

Here are some practical pointers for setting up a program:

1. Appoint an OFAC compliance officer or better yet, a multi-disciplinary compliance committee. The major departments involved in policies, benefits and procurement should be represented, as well as the legal, finance and internal audit departments.

2. Identify all payment centers, policy issuance and contract sources. Here are some places that a state fund might look:

- Claims – benefit payments, legal counsel, investigators and providers.
- Policyholders – existing and new policies are written; canceled policies where refunds are possible.
- Company vendors – includes both contracts and purchasing.
- Financial – banks, investment managers, insurance and real estate brokers.
- Internal – employees, consultants, independent contractors including third-party administrators, and vendors of employee reimbursable expenses.

Assets must be frozen by placing them in interest-bearing accounts, at commercially reasonable rates.

3. Begin searching manually. Since every searching system produces matches, culling the true hits from false positives is the most difficult part of the program. You can manually download the list from the OFAC Web site <www.ustreas.gov/offices/enforcement/ofac> or utilize Web-based services such as <www.bridgertracker.com>. The Insurance Service Office (ISO) is another good source of software. Remember, the OFAC list can be updated as often as every three days.

4. Look for an automated solution. Once you begin searching high-volume areas such as claims benefit payments, you will need an automated solution. You can download the OFAC list and write a solution in-house. Or you can obtain one of many commercially available interdiction programs. Some providers will run your data through their program periodically, notifying you of all hits. These programs typically utilize filters that compare information, such as a policyholder's name, with selected data fields such as a terrorist's name, address and home country. A defined scoring system will determine whether a given transaction requires blocking or further inquiry.

5. Maintain records. Since you may need to demonstrate your commitment to OFAC compliance someday, it is advisable to maintain a record of your internal OFAC guidelines, internal controls and searches conducted, including how "hits" were investigated. This will also help when repeat hits are obtained in the case of continuing transactions with the same source.

Matches, Similar Names and False Positives

Once you begin mechanized matching, you will come up with a steady stream of hits. The list contains names from a large number of foreign countries, including many similar names. These can render most name-matching algorithms useless.

There is no one solution, but here are some ideas on how to proceed:

1. Check the score of your software program rating and try and figure out why it is not 100%. If it is 100%, look for information parameters beyond the scope of the search.

2. Check the country of origin of your claimant/policyholder against the one on the OFAC list.

3. See how long your claimant/policyholder has been in the United States and how long at the same address.

4. If your claimant/policyholder is not in the United States or has a foreign address, that should raise a red flag. A non-routine transaction involving the transfer of moneys across United States borders may require further inquiry. But don't rule out domestic sources of terrorism.

5. If you do not have an exact hit, but can't rule it out, call the OFAC hotline at 1-800-540-6322.

You may wish to assign an investigative unit, such as your special investigations unit, to run down your hits. Computer-related investigative skills go a long way toward resolving those issues.

What to Do When You Get a Match

If you get a match involving a monetary transaction such as a claim, you must first freeze the money. You must then report the transaction to OFAC within 10 days. Although there is no statutorily prescribed method for reporting the transaction, OFAC provides a form on its Web site. Be sure to include the names of the parties, dollar amount involved and information about the employee who is responsible for maintaining your blocked accounts.

You must then await instructions from OFAC. Assets must be frozen by placing them in interest-bearing accounts, at commercially reasonable rates, and holding them in instruments with maturities of less than 90 days. Blocked accounts may not be released without special permission from OFAC. Again, this is an important reason for integrating the finance department into your compliance committee.

Prior to confiscating the assets, OFAC itself may elect to give the SDN or Blocked Person notification, and

hence, an opportunity to free the assets. Finally, upon notification by OFAC, the assets are either freed or ordered to be paid over to OFAC.

In the case of a policy or contract, the insurance company may not enter into or maintain a policy with an SDN or Blocked Person. Does this require cancellation of existing policies? According to one source, no, but such policy would have to be frozen. What does "frozen" mean? The unearned premium must be calculated as though the policy had been canceled and deposited into the account established for OFAC-blocked transactions. No claims may be paid out of the policy.[16]

In the commercial arena, licenses for entering into transactions that would otherwise be blocked can be sought through the Department of Commerce (*e.g.*, selling a computer to a Cuban company). The OFAC insurance regulations do not as yet encompass such a process for insurance companies.

Very few domestic insurers are even aware of OFAC requirements, much less implement them. Yet a clear policy and implementation program is necessary to avoid problems later. The commitment of resources should match an insurer's exposure to the possibility of an adverse revelation and willingness to shoulder the result of the public disclosure of an SDN or Blocked Person transaction. Being known as the insurer that funded the next terrorist bombing or international drug deal is not an association that any insurer would want. ■

1. Exec. Order No. 13224 is entitled, "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit or Support Terrorism." 66 Fed. Reg. 49079 (Sept. 25, 2001).

2. Terrorism is defined in Executive Order 13224 as an activity that "involves a violent act or an act dangerous to human life, property or infrastructure, and appears to be intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion or to affect the conduct of a government by mass destruction, assassination, kidnapping or hostage taking." 66 FR 49079.

3. William W. Weisner & Hope K. Plasha, *Anti-Terrorism Law Imposes Duties upon Lenders and Others Must Stay on Alert for 'Restricted Parties,'* N.Y.L.J., Nov. 25, 2002.

4. Foreign Assets Control Regulations and the Insurance Industry, Office of Foreign Assets Control, U.S. Department of the Treasury, *available at* <http://www.treas.gov/offices/eotffc/ofac/regulations/t11facin.pdf> (Mar. 12 2003).

5. Bans on trade with Great Britain and France under the Embargo Act of 1807 (2 Stat. 451), and against Britain under the Non-Intercourse Act of 1809 (2 Stat. 528), were failed attempts to enforce American neutrality during the Napoleonic Wars.

6. Trading with the Enemy Act of 1917, Pub. L. No. 65-91, 40 Stat. 411 (1917), codified as 50 U.S.C. Appx. §§ 1–44.

7. International Emergency Economic Powers Act of 1977, Pub. L. No. 95-223, 91 Stat. 1625 (1977), codified as 50 U.S.C. §§ 1701–1707.

8. In addition to TWEA and IEEPA, OFAC relies on the Iraq Sanctions Act of 1990 (Pub. L. No. 101-513, codified as 50 U.S.C. § 1701), the United Nations Participation Act of 1945 (22 U.S.C. § 287(c)), the International Security and Development Cooperation Act of 1985 (22 U.S.C. §§ 2349aa-8, 2349aa-9), the Cuban Democracy Act of 1992 (22 U.S.C. §§ 6001–6010), the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (22 U.S.C. §§ 621–691), the Anti-terrorism and Effective Death Penalty Act of 1996 (8 U.S.C. § 219); 18 U.S.C. §§ 2332d, 2339B) and the Foreign Narcotics Kingpin Designation Act (21 U.S.C. §§ 1901–1908); 8 U.S.C. § 1182).

9. This juxtaposition was even seen in a *New York Law Journal* column: Marvin Bagwell, *Land Title Patriot Paperwork; A 9/11 Law Wastes Time and Money*, N.Y.L.J., Jan. 12, 2005.

10. The Bank Secrecy Act of 1970 requires U.S. banks to file a Currency Transaction Report (CTR) for cash deposits of $10,000 or more. 31 U.S.C. §§ 5313, 5316(a). Persons who conspire to conceal the existence, origin and transfer of bank deposits of more than $10,000 in cash by making deposits in sums less than $10,000 at several different banks or in increments at one bank (known as smurfing) violate the Conspiracy Act. 18 U.S.C. § 371; *United States v. Richter*, 610 F. Supp. 480 (N.D. Ill. 1985).

These laws were followed by several additional banking and other types of financial institution control laws, including: the Money Laundering Control Act of 1986 (Pub. L. No. 99-570, codified as 18 U.S.C. § 981), the Money Laundering Prosecution Improvement Act of 1988 (Pub. L. No. 105-310, codified as 18 U.S.C. § 981), the Crime Control Act of 1990 (Pub. L. No. 101-647, codified as 18 U.S.C. § 1), the Federal Deposit Insurance Corporation Improvement Act of 1991 (Pub. L. No. 102-242, codified as 12 U.S.C. § 1811), the Annunzio-Wylie Anti-money Laundering Act (Pub. L. No. 102-550, codified as 12 U.S.C. § 1811), the Money Laundering and Financial Crimes Strategy Act of 1998 (Pub. L. No. 105-310, codified as 31 U.S.C. § 5301), the Civil Asset Forfeiture Reform Act of 2000 (Pub. L. No. 106-185, codified as 18 U.S.C. § 981) and the USA Patriot Act of 2001 (Pub. L. No. 107-56, codified as 18 U.S.C. § 1).

11. Robert F. Worth, *Yemeni Cleric, Convicted in Terror Case, Is Sentenced to the Maximum*, N.Y. Times, July 29, 2005 at B3.

12. Associated Press State and Local Wire, *As Terror War Spreads into Money-Moving Network, an Ice Cream Shop Takes Center Stage*, Nov. 9, 2003.

13. William Glaberson, *Judge Vacates Guilty Plea in Yemeni Case*, N.Y. Times, May 12, 2003, at B1.

14. John Solomon, *Senators Question U.S. Ability to Block Terror Money*, N.Y. Sun, Jan. 2, 2004, at 4.

15. Marvin Bagwell, *supra* note 9.

16. Kathleen Jensen, *On the Trail of Terror: Insurers that Do Business with Known Terrorists or Drug Traffickers May Face Stiff Penalties Under New Rules Enforced by the Office of Foreign Assets Control*, Best's Rev., Sept. 1, 2002.

Changes Affecting Trust & Estate Law

2004 New York State Legislative Session

By Joshua S. Rubenstein

The 2004 legislative session saw significant activity affecting estate and trust planning and administration in New York. Important areas addressed include the unification of professional privileges, the termination of uneconomical trusts, the procedural and substantive requirements for guardianship proceedings, the appointment of attorney-executors, and the calculation of the New York State estate tax. The following provides a summary of each of these enactments, and their status as of press time.

Estates, Powers & Trusts Law (EPTL)

The EPTL has been amended by adding a new section, 7-1.19. This section allows any trustee or beneficiary of a lifetime or testamentary express trust, other than a wholly charitable trust, to apply to the surrogate's court for early termination, provided the court finds that (1) continuation of the trust is economically impractical, (2) the trust's early termination is not prohibited by the express terms of the disposing instrument, and (3) such termination would not defeat the specified trust purposes and would be in the best interests of its beneficiaries. Distribution shall be made among the current and presumptive remainder beneficiaries in such manner as the court determines. This change is effective immediately and applies to trusts whenever created.[1]

EPTL 10-10.1 has been amended to ensure that the language of the statute does not inadvertently create estate tax liability by limiting the permissible ascertainable standards that would override this savings statute (generally preventing trustees who are beneficiaries from exercising discretion in their own favor) to those enumerated in §§ 2041 and 2514 of the Internal Revenue Code.

The change is a result of the Governor's concern, after the 2003 amendment to EPTL 10-10.1, that the portion of the statute permitting other ascertainable standards might conflict with the federal tax law and inadvertently create a general power of appointment, to the detriment of a donee or trustee. This change is effective immediately.[2]

Insurance Law

Subsection (a) of Insurance Law § 1110 has been amended to authorize charities to issue gift annuities for cash and other property. Formerly, New York limited the assets charities were allowed to receive in exchange for a charitable gift annuity to cash and marketable securities. This change is effective immediately.[3]

Mental Hygiene Law

Section 81.03 of the Mental Hygiene Law (MHL) has been amended by adding "health care proxies" to the definition of "available resources" in subdivision (e), and by

Joshua S. Rubenstein is the managing partner at the New York office of Katten Muchin Rosenman LLP. He received his J.D. from Columbia University School of Law, where he was a Harlan Fiske Stone Scholar, and his B.A. *magna cum laude* from Columbia, where he was elected *Phi Beta Kappa*.

adding definitions of "life-sustaining treatment," "facility" and "mental hygiene facility" as new subdivisions (j), (k) and (*l*). This change is effective as of December 13, 2004 (90 days after enactment).[4]

Section 81.04 of the MHL has been amended to clarify that the jurisdiction of the surrogate's court over an Article 81 proceeding extends not just to persons who are residents of, or physically present in a county in which the proceeding is pending, but also to persons who have property in the county. This change is effective as of December 13, 2004 (90 days after enactment).[5]

MHL § 81.05 has been amended to clarify the location of venue when the alleged incapacitated person is in a facility. This change is effective as of December 13, 2004 (90 days after enactment).[6]

Section 81.06 of the MHL has been amended to allow institutions flexibility in identifying the person who acts on their behalf in commencing guardianship proceedings, by allowing the chief executive officer (CEO) to designate someone to assume this responsibility. Formerly, only the CEO could act in this capacity. This change is effective as of December 13, 2004 (90 days after enactment).[7]

Section 81.07 of the MHL has been amended to make substantial changes to the manner in which notice of a proceeding is to be given. This change is effective as of December 13, 2004 (90 days after enactment).[8]

Subsection (a)(2) of MHL § 81.08 has been amended to require that a petition identify the persons the petitioner intends to serve with notice of the proceeding in order to facilitate the court evaluator's investigation. This change is effective as of December 13, 2004 (90 days after enactment).[9]

Subsection (a)(5) of MHL § 81.08 has been amended to require the petition to include any of the information required by § 81.21(b) when powers are sought to transfer a part of the alleged incapacitated person's property or assets to or for the benefit of another person. This change is effective as of December 13, 2004 (90 days after enactment).[10]

Section 81.09 of the MHL, dealing with the duties of the court evaluator, has been amended by assigning the evaluator additional duties. These include determining whether the alleged incapacitated person understands English or only another language, thus requiring an interpreter. It also provides the court with authority to appoint as court evaluator "any person including, but not limited to, the mental hygiene legal service in the judicial department where the person resides, a not-for-profit corporation, an attorney, physician, psychologist, accountant, social worker, or nurse, with knowledge of property management, personal care skills, the problems associated with disabilities, and the private and public resources available for the type of limitations the person is alleged to have." This change is effective as of December 13, 2004 (90 days after enactment).[11]

MHL § 81.10 has been amended to clarify that persons seeking relief under the article have the right to be represented by legal counsel of their choice. This change is effective as of December 13, 2004 (90 days after enactment).[12]

Subsection (f) of MHL § 81.11 has been amended to allow only an incapacitated person or such person's counsel the right to request a jury trial. This change is effective as of December 13, 2004 (90 days after enactment).[13]

Section 81.13 of the MHL has been amended to reduce the time for the court to issue its decision to within seven days of the hearing. This change is effective as of December 13, 2004 (90 days after enactment).[14]

MHL § 81.15 is amended to give the court the power to decide whether an incapacitated person should receive copies of the initial and annual reports. This change is effective as of December 13, 2004 (90 days after enactment).[15]

Section 81.16 of the MHL has been amended to provide that the order and judgment be entered and served within 10 days of its signing, and that the court evaluator, guardian or counsel for a person subject to a proceeding, explain an order or judgment in a manner that the person

could reasonably be expected to understand. This change is effective as of December 13, 2004 (90 days after enactment).[16]

Subsection (a) of MHL § 81.21 has been amended to provide additional powers to a guardian to help enable the guardian to manage the person's estate, both during life and after death. This change is effective as of December 13, 2004 (90 days after enactment).[17]

The 2004 legislative session saw significant activity affecting estate and trust law.

Section 81.25 of the MHL has been amended to allow the court – in cases where the value of the estate is so great or for other sufficient reason for which the court determines it is inexpedient to require security in the full amount prescribed by law – to restrict some or all of the assets of an estate without further court order, and to require a bond in reduced amount. The statute accomplishes this by adding language almost identical to that of Surrogate's Court Procedure Act 803 (SCPA). This change is effective as of December 13, 2004 (90 days after enactment).[18]

Section 81.28 of the MHL has been amended to eliminate language referring to SCPA 2309, to clarify that the courts are not bound by the SCPA scheme in devising compensation for the guardian. This change is effective as of December 13, 2004 (90 days after enactment).[19]

Subsection (d) of MHL § 81.29 has been amended to provide the court with power to revoke durable powers of attorney in situations where the attorney-in-fact has breached his or her fiduciary duty. This change is effective as of December 13, 2004 (90 days after enactment).[20]

MHL § 81.30 has been amended to expand the requirements of the guardian's initial report. This change is effective as of December 13, 2004 (90 days after enactment).[21]

Section 81.31 of the MHL has been amended to permit the Mental Hygiene Legal Service to monitor the cases in which it has acted as counsel or court evaluator. This change is effective as of December 13, 2004 (90 days after enactment).[22]

Subsection (c) of MHL § 81.36 has been amended to permit the court to dispense with a hearing on an application for an order of modification increasing the powers of the guardian. This change is effective as of December 13, 2004.[23]

Not-For-Profit Corporation Law

Paragraph (b) of § 1401 of the Not-For-Profit Corporation Law has been amended to require owners of private cemeteries, prior to removal of interred bodies, to provide notice not only to the next of kin but also to the county clerk and county historian and, in the case of buried veterans, the New York State Division of Veterans' Affairs. In the absence of next of kin, the amendment further authorizes, but does not require, cemetery owners to act as a guardian to ensure proper reburial. This change is effective immediately.[24]

Public Health Law

Section 18 of the Public Health Law has been amended to add a patient's distributees, if no personal representative has been appointed, and the attorney for a qualified person or the patient's estate, if he or she has a power of attorney, as a qualified person to have access to a patient's medical records. This change is effective immediately.[25]

Surrogate's Court Procedure Act

Subdivision 1 of SCPA 1105 has been amended to provide that public administrators of the counties comprising the city of New York shall receive at least two-thirds of the amount paid to the judges of the surrogate's court of such counties. This change is effective as of February 27, 2005 (30 days after enactment).[26]

Subdivisions 2 and 3 of SCPA 2307-a have been amended to provide that a testator's written acknowledgment of disclosure relating to attorney-executors' fees and commissions must be separate from the will, but may be annexed to it. In addition, the acknowledgment form has also been amended to include a statement providing that absent the disclosure acknowledgment, an attorney serving as executor is entitled only to one-half the commission he or she would otherwise be entitled to receive. This change is effective immediately.[27]

Tax Law

Article 10 of the Tax Law, dealing with transfer, inheritance, and estate taxes of residents dying prior to September 1, 1930, has been repealed. Article 10-A, dealing with such taxes of nonresidents dying prior to September 1, 1930, and Articles 10-B and 10-C, dealing with such taxes of residents and nonresidents dying after August 31, 1930, and prior to April 1, 1963, appear not to have been repealed. This change is effective immediately but does not affect any refund applications.[28]

Subsection (b) of Tax Law § 952 has been amended to change the calculation of the estate tax for estates with property located both in New York and in another state. Specifically under this section, if a resident's estate includes real or tangible personal property having an actual situs outside of New York, the tax imposed shall be reduced only by "an amount determined by multiplying the maximum amount of the federal credit for state death taxes by a fraction, the numerator of which is the decedent's federal gross estate reduced by his or her New

York gross estate and denominator of which is his or her federal gross estate," and no longer by however much is claimed by other states, if that is less. This change is effective immediately for estates of decedents dying on or after January 1, 2002.[29]

Subsection (b) of § 960 of the Tax Law has been amended to extend to nonresidents the same relief afforded to residents under Tax Law § 952(b), as amended. This change is effective immediately for estates of decedents dying on or after January 1, 2002.[30]

Subsection (b) of Tax Law § 976 has been amended by changing the date on which interest begins to run for late estate tax payments. Interest for late estate tax payments will now begin to run from the original due date for filing the estate tax return and not from the date of the decedent's death. This change is effective immediately for the estates of decedents dying on or after February 1, 2000.[31]

1. 2004 N.Y. Laws ch. 359, A10967, S5166 (signed on August 10, 2004).
2. 2004 N.Y. Laws ch. 82, A10962, S6308 (signed on May 18, 2004).
3. 2004 N.Y. Laws ch. 199, A10286, S5987A (signed on July 20, 2004).
4. 2004 N.Y. Laws ch. 438, A8838A, S6830A (signed on September 14, 2004).
5. 2004 N.Y. Laws ch. 438, A8838A, S6830A (signed on September 14, 2004).
6. 2004 N.Y. Laws ch. 438, A8838A, S6830A (signed on September 14, 2004).
7. 2004 N.Y. Laws ch. 438, A8838A, S6830A (signed on September 14, 2004).
8. 2004 N.Y. Laws ch. 438, A8838A, S6830A (signed on September 14, 2004).
9. 2004 N.Y. Laws ch. 438, A8838A, S6830A (signed on September 14, 2004).
10. 2004 N.Y. Laws ch. 438, A8838A, S6830A (signed on September 14, 2004).
11. 2004 N.Y. Laws ch. 438, A8838A, S6830A (signed on September 14, 2004).
12. 2004 N.Y. Laws ch. 438, A8838A, S6830A (signed on September 14, 2004).
13. 2004 N.Y. Laws ch. 438, A8838A, S6830A (signed on September 14, 2004).
14. 2004 N.Y. Laws ch. 438, A8838A, S6830A (signed on September 14, 2004).
15. 2004 N.Y. Laws ch. 438, A8838A, S6830A (signed on September 14, 2004).
16. 2004 N.Y. Laws ch. 438, A8838A, S6830A (signed on September 14, 2004).
17. 2004 N.Y. Laws ch. 438, A8838A, S6830A (signed on September 14, 2004).
18. 2004 N.Y. Laws ch. 438, A8838A, S6830A (signed on September 14, 2004).
19. 2004 N.Y. Laws ch. 438, A8838A, S6830A (signed on September 14, 2004).
20. 2004 N.Y. Laws ch. 438, A8838A, S6830A (signed on September 14, 2004).
21. 2004 N.Y. Laws ch. 438, A8838A, S6830A (signed on September 14, 2004).
22. 2004 N.Y. Laws ch. 438, A8838A, S6830A (signed on September 14, 2004).
23. 2004 N.Y. Laws ch. 438, A8838A, S6830A (signed on September 14, 2004).
24. 2004 N.Y. Laws ch. 675, A3163A, S1465A (signed on November 3, 2004).
25. 2004 N.Y. Laws ch. 634, A8602-B, S4964A (signed on October 26, 2004).
26. 2004 N.Y. Laws ch. 751, A6619, S147-A (signed on January 28, 2005).
27. 2004 N.Y. Laws ch. 709, A11127, S6986 (signed on November 16, 2004).
28. 2004 N.Y. Laws ch. 60, A9560-B, S06060 (signed on August 20, 2004).
29. 2004 N.Y. Laws ch. 60, pt. I, § 5, A9560-B, S06060 (signed on August 20, 2004).
30. *Id.*
31. 2004 N.Y. Laws ch. 60, pt. I, § 2, A9560-B, S06060 (signed on August 20, 2004).

"Right now, settling out of court looks good, but let's wait until the caffeine kicks in."

BY BARRETT D. MACK

Major Changes in Rules Governing Nonqualified Deferred Compensation Plans and Arrangements

President Bush signed the American Jobs Creation Act of 2004 on October 22, 2004.[1] By adding new Internal Revenue Code § 409A, the Act dramatically changed the rules that govern nonqualified deferred compensation plans and arrangements (NQDCA). The new Code section generally applies to amounts deferred under a NQDCA after December 31, 2004. Compliance with new Code § 409A, when required, is necessary to avoid a tax disaster.

This column briefly explains the requirements of § 409A and offers tips toward complying with the new law given IRS Notice 2005-1 (the "Notice"), issued December 20, 2004, which provides initial guidance on the requirements of § 409A and a generous transition period for compliance.

If a NQDCA does not in *form* or *operation* comply with the requirements of IRC § 409A, then all compensation deferred under the NQDCA will be includable in the recipient's gross income to the extent that compensation is not subject to a substantial risk of forfeiture.[2] The amount of the tax is also increased by an interest-based penalty, *plus* 20% of the compensation includable in the recipient's gross income.[3] Given the broad coverage of the Act, most NQDCAs will now have to meet the requirements of the new Code section. Further, the application of § 409A is not limited to NQDCAs between an employer and an employee, as it applies to NQDCAs between an independent contractor and a company, or between a partner and a partnership.[4]

Coverage

NQDCAs are deferred compensation arrangements that do not meet the tax qualification requirements of IRC § 401. NQDCAs are typically part of a compensation package designed to provide executive and middle-management employees with incentives in excess of those allowed under qualified plan rules. Approximately 92% of Fortune 1000 companies maintain a NQDCA.[5]

The Act defines the term "nonqualified deferred compensation plan" broadly as "any plan that provides for the deferral of compensation, other than . . . (A) a qualified employer plan, and (B) any bona fide vacation leave, sick leave, compensatory time, disability pay, or death benefit plan."[6] A plan includes any agreement, method or arrangement, including one that applies to only a single person.[7] Because of this broad definition, severance plans[8] and programs, individual employment agreements with deferrals, defined benefit restoration plans, supplemental executive retirement plans (SERPs), excess benefit plans, bonus and incentive deferral arrangements, 401(k) wrap plans, 457(f) plans, and 401(k) mirror plans are required to comply with new IRC § 409A. Stock appreciation rights (SARs) are also required to comply with the Act, although the Notice exempts SARs that meet particular requirements.[9]

Qualified retirement plans such as common 401(k) plans, 403(b) annuity plans, 457(b) plans, simplified employee pension (SEP) plans, SIMPLE plans (Savings Incentive Match Plan for Employees), 422 incentive stock option plans, and 423 employee stock purchase plans, are *not* required to comply with the Act.[10]

Avoiding a Tax Disaster

As a quick synopsis, IRC § 409A contains three basic requirements. The first requirement deals with timing of distributions from NQDCAs. Under the Act, distributions are only permitted upon one of the following six events: separation from service; disability; death; a time (or fixed schedule) specified under the NQDCA at the date of deferral; change in control; and unforeseeable emergency.[11] Each of

Barrett D. Mack is an attorney with The Goldstein Law Firm, P.C., located in Albany. He received his undergraduate degree from the University of Tennessee at Chattanooga, and his law degree from Albany Law School of Union University.

these permissible events is defined specifically under the Act and/or the Notice. More than likely, current NQDCAs must be amended to reflect these specific definitions.

The second requirement, and probably the most substantial, prohibits the acceleration of elected distributions except as provided by the Notice.[12] This provision of new IRC § 409A, in effect, has eliminated what are commonly referred to as "haircut provisions." Haircut provisions are common in current NQDCAs and permit participants to accelerate elected distributions subject to a penalty. These must be eliminated from current NQDCAs.

The third requirement deals with initial compensation deferral elections and subsequent changes (*delays*) in the time and form of payment.[13] The initial election to defer must be made during the calendar year prior to the year in which the compensation is earned, unless otherwise provided in regulations, or within 30 days after initial participation in the NQDCA. A subsequent election to further defer payment or change form of payment will not be effective for at least 12 months. Actual payment under a subsequent election may not be made for at least five years from the original payment date, except in the event of death, disability or an unforeseeable emergency. For NQDCAs in existence prior to and on December 31, 2004, the Notice treats deferral elections made by March 15, 2005 as valid under new § 409A.[14]

Section 409A(b) also contains other rules regarding the funding of NQDCAs. These rules, generally, will be met if (1) any amounts set aside to pay benefits under the NQDCA are kept and maintained within the United States (and not in any offshore trusts or accounts), and (2) no assets have been or will be restricted to pay benefits under the NQDCA in connection with a change in the employer's financial health, regardless of whether they are otherwise available to pay claims of the employer's creditors.

Finally, the Act requires amounts deferred under a NQDCA to be reported on Form W-2. In this regard, the Treasury issued Announcement 2004-96 which adds new Code Y for the 2005 Form W-2, for use in Box 12.[15]

> Compliance with new Code § 409A, when required, is necessary to avoid a tax disaster.

Effective Date

The requirements of the Act are applicable to amounts deferred in years beginning after December 31, 2004. Amounts deferred before the effective date are grandfathered and not subject to the Act, unless the NQDCA was "materially modified" after October 3, 2004. The Notice indicates that any addition of a new benefit, right, or feature, such as adding a haircut provision or accelerating vesting, is treated as a material modification, even if that benefit, such as an unforeseeable emergency distribution, is added to comply with new IRC § 409A.[16] The exercise of a reduction of an existing benefit, right, or feature (such as a change in plan administrator or the elimination of a haircut provision) is not a material modification.[17] The Notice explains in detail what amounts are actually grandfathered, but such is beyond the scope of this article.[18] Again, these rules should be reviewed.

Transition Relief

Although the Act requires major changes to NQDCAs, and is effective as of December 31, 2004, the Notice provides for a generous transitional period for compliance. Under the Notice, a NQDCA adopted before December 31, 2005, will not violate new Code § 409A if (1) the NQDCA is operated in good-faith compliance with the new rules, and (2) the NQDCA is amended on or before December 31, 2005, to comply with the new rules.[19]

In addition, generally, a NQDCA sponsor may not terminate a NQDCA that is subject to IRC § 409A and then make distributions. However a NQDCA sponsor may terminate and make distributions from a pre-October 4, 2004, NQDCA on or before December 31, 2005, without it being a material modification.[20] Finally, a NQDCA

adopted before December 31, 2005, can be amended to allow participants to cancel deferral elections made before then, or to terminate participation in 2005, in whole or in part, with respect to amounts deferred that are subject to IRC § 409A.[21]

Tips

Although generous transitional relief has been provided by the IRS, employers should begin reviewing their NQDCAs immediately for compliance with the new Code section. Employers should make sure that their existing NQDCAs are operated in good-faith compliance with the Act and the Notice, and are amended by December 31, 2005, to comply with new § 409A. In addition, employers should: (1) ask for the new 2005 deferral elections by March 15, 2005; (2) ask for new payment form and timing elections for pre-January 1, 2006, deferrals by December 31, 2005; (3) allow employees the opportunity to terminate NQDCA participation or cancel prior deferral elections by December 31, 2005; and (4) organize immediately with outside NQDCA recordkeepers, or other outside NQDCA administrators. The IRS has indicated in the Notice that additional guidance will be issued sometime in 2005.

Employers will need to again review their NQDCAs after this guidance is issued, but in the meantime can rely on the current Notice.[22] ■

1. P.L. 108-357 (HR 4520).
2. IRC § 409A(a)(1)(A) (2005).
3. IRC § 409A(a)(1)(B).
4. IRC § 409A(d)(1); IRS Notice 2005-1, Q & A-3(a), *available at* <http://www.irs.gov/irb/2005-02_IRB/ar13.html>.
5. CCH, American Jobs Creation Act of 2004, Law, Explanation and Analysis, ¶1405.
6. IRC § 409A(d)(1).
7. IRC § 409A(d)(3); IRS Notice 2005-1, Q & A-9.
8. Severance plans that are collectively bargained or cover no key employees do not need to comply with IRC § 409A in 2005, provided they are amended by December 31, 2005. IRS Notice 2005-1, Q & A-19(c).
9. The Notice provides detailed rules in regard to equity-based compensation. These rules are beyond the scope of this article. Employers should review these rules with a qualified expert.
10. IRC § 409A(d)(2); IRS Notice 2005-1, Q & A-3(b).
11. IRC § 409A(a)(2)(A).
12. The Notice allows acceleration of benefits payments for payment of benefits in connection with a domestic relations order, the payment of taxes resulting from taxation of deferred compensation under IRC § 457(f) plans, cash-outs of plan benefits by December 31 of the year in which an employee separates from service (or within 2 ½ months after the end of such year) in amounts of up to $10,000 and the payment of payroll taxes applicable to deferred compensation. IRS Notice 2005-1, Q & A-15; IRC § 409A(a)(3).
13. IRC § 409A(a)(4).
14. IRS Notice 2005-1, Q & A-21.
15. IRS Announcement 2004-96, *available at* <http://www.irs.gov/irb/2005-03_IRB/ar15.html>.
16. IRS Notice 2005-1, Q & A-18.
17. *Id.*
18. *See* IRS Notice 2005-1, Q & A-17.
19. IRS Notice 2005-1, Q & A-19.
20. IRS Notice 2005-1, Q & A-18(c).
21. IRS Notice 2005-1, Q & A-20.
22. IRS Notice 2005-1, § II.

NEW YORK STATE BAR ASSOCIATION

Bring a Law Student to **NYSBA Membership**

The leadership of the New York State Bar Association asks that you encourage law student membership among your law clerks, summer associates, and law student acquaintances.

Help the law students in your life jump-start their legal careers today, **for only $10**.

Joining is easy:

tell the law students you know to call **518.487.5577 / 800.582.2452** or go to **www.nysba.org** and point to Membership.

*Winners will be contacted by phone or e-mail and the prize will be e-mailed or mailed to the address indicated on the NYSBA law student membership application. Only one entry per person. Membership applications must be received by no later than 11:59 pm on Saturday, October 15, 2005. Odds of winning depend on the number of entries.

NYSBA

Yellowstone Injunctions in Federal Court

By Edward P. Yankelunas

A commercial tenant has a dispute with a landlord. The landlord demands that the tenant cure an alleged breach of the lease within the time stated in the lease. Now the tenant has a serious dilemma. If the cure period expires after litigation ensues and the tenant loses the fight with the landlord, the tenant would lose the ability to cure the default under the lease. The result would be eviction and the tenant's complete forfeiture of its investment and rights under the lease. What are the tenant's options?

A *Yellowstone* injunction is a powerful tool available to commercial tenants to challenge a landlord's claim of breach without risking eviction and the forfeiture of lease rights. This article provides a brief explanation of the seminal decision in *First National Stores v. Yellowstone Shopping Center*,[1] comments on the most recent decisions of the New York Court of Appeals relative to *Yellowstone* injunctions, and then addresses the availability of *Yellowstone* injunctions in federal court under the *Erie* doctrine.

Yellowstone injunctions maintain the status quo between commercial landlords and tenants by extending the cure period under the lease while the parties litigate the point in dispute. Should the tenant lose on the merits, the default may be cured and the lease saved. Moreover, conditions may be imposed to protect the landlord's interests. For example, the tenant may be required to post an undertaking or pay rent into escrow while the injunction is in effect. There is no question that *Yellowstone* injunctions are available in state court in New York upon a proper showing. However, the availability of such relief

Edward P. Yankelunas is a partner with Damon & Morey, LLP, in Buffalo, New York. He received his undergraduate degree from the State University of New York at Geneseo and his law degree from the State University of New York at Buffalo.

in diversity actions in federal court is less clear. The determination turns largely on whether a federal litigant's entitlement to a *Yellowstone* injunction presents a question of state substantive law or federal procedural law for the purpose of *Erie Railroad Co. v. Tompkins*.[2]

Because commercial tenants in shopping malls, office buildings and other commercial properties in New York are often business entities from throughout the United States, diversity jurisdiction in United States District Court often exists in the event of a dispute with the mall or building owner. A commercial tenant who has the option of invoking diversity jurisdiction should know whether or not the *Yellowstone* injunction is among its weapons in the event it chooses to litigate in federal court.

Yellowstone in State Court

In *First National Stores v. Yellowstone Shopping Center*,[3] the New York Court of Appeals first expressed its approval of what is now simply referred to as a *Yellowstone* injunction: an injunction which, as noted, maintains the status quo between a landlord and commercial tenant so that the tenant may protect its interest in the lease while challenging the landlord's assessment of its rights. The courts in New York have consistently held that the showing required of a tenant seeking a *Yellowstone* injunction is *far less* than that required for a preliminary injunction. Unlike applications for injunctions prescribed by Article 63 of the Civil Practice Law and Rules, applicants for *Yellowstone* injunctions have not been required to demonstrate likelihood of success, irreparable injury or that the equities favor injunctive relief.[4]

In fact, as was pointed out in *Jemaltown of 125th Street, Inc. v. Leon Betesh/Park Seen Realty Assoc.*,[5] "the traditional criteria for obtaining preliminary injunctive relief, *viz*, the likelihood of ultimate success on the merits, a balancing of the equities, and the danger of irreparable harm" represent the "wrong standard" when a commercial tenant applicant seeks a *Yellowstone* injunction because "[r]ather than requiring the tenant to prove, on his application, that he can cure the alleged defects, all he need do to obtain the *Yellowstone* injunction is to convince the Court of his desire and ability to cure the defects by any means short of vacating the premises."[6]

The most recent decisions of the New York Court of Appeals further define the parameters of the *Yellowstone* decision by emphasizing that, when upholding a commercial tenant's right to extend the cure period under a lease through a *Yellowstone* injunction, the courts will continue to enforce the landlord's rights under the lease. Specifically, in *Waldbaum, Inc. v. Fifth Avenue Realty Assoc.*,[7] the Court was confronted with the question of whether the granting of a *Yellowstone* injunction extending the cure period under the lease had any effect on the tenant's deadline to renew the lease. The Court concluded that the tolling of the cure period under the lease did not relieve the tenant of the necessity of complying with the condition precedent to renewal set forth in the lease.[8]

> *Yellowstone* injunctions maintain the status quo by extending the cure period while the parties litigate the point in dispute.

More recently, in *Graubard v. 600 Third Avenue Assoc.*,[9] the issue was whether the tenant remained obligated to pay interest on rent arrears at the rate specified by the lease after the granting of a *Yellowstone* injunction. Noting that "[a]lthough *Yellowstone* injunctions historically have been used to protect tenants from eviction, they provide a modicum of protection to landlords as well," the Court repeated the reasoning of *Waldbaum* that the injunction "does not nullify the remedies to which a landlord is otherwise entitled under the parties' contract" and directed that the interest be paid.[10]

Thus, the Court of Appeals has focused on the need to apply the teaching of the *Yellowstone* case in an even-handed manner, and *Yellowstone* injunctions remain a staple of commercial landlord-tenant law in New York.

Inconsistent Approach in Federal Courts

The decisions of the United States District Courts sitting in New York with respect to the availability of *Yellowstone* injunctions in federal court have been inconsistent. In *NL Industries Inc. v. PaineWebber Inc.*,[11] an action between a sublessor and sublessee relative to the possession of leased commercial premises, the court, sitting in diversity and citing *Yellowstone*, acknowledged that a tenant seeking to challenge a lease termination "must obtain injunctive relief to toll the running of the cure period."[12] After noting that the subtenant sought to enjoin the cure period under the lease at issue, the court, referencing *Yellowstone* and Federal Rule of Civil Procedure 65 (Rule 65), considered the application on the merits and concluded that the subtenant had failed to demonstrate that the cure period had not expired.[13]

The court also considered a commercial tenant's request for a *Yellowstone* injunction on the merits in *Broad Financial Center LLC v. National Association of Securities Dealers, Inc.*[14] There, because the tenant had already vacated the premises and a possible forfeiture of lease rights was no longer an issue, the court denied the tenant's request for the injunction. In so ruling, the court described a *Yellowstone* injunction as "an equitable device made available under New York law to prevent the cure period in a commercial real estate lease from expiring before the tenant can litigate its rights."[15] As in *NL Industries*, the court in *Broad Financial Center* did not

address the issue of whether requests for *Yellowstone* injunctions are governed by New York substantive law as articulated by the *Yellowstone* decision and its progeny, or by the more rigorous requirements of Rule 65.

However, in *The Children's Place Retail Stores Inc. v. Pyramid Co. of Onondaga*,[16] an unreported decision, the U.S. District Court for the Northern District of New York held that a *Yellowstone* injunction is a procedural device and that, therefore, the standard for a *Yellowstone* injunction articulated by New York's state courts was inapplicable in federal court. The court concluded that an application by a commercial tenant for an injunction tolling the passage of a cure period under a lease presented to a federal court sitting in diversity was governed by the requirements of Rule 65. In *Scherer v. Equitable Life Assurance Society of the United States*,[17] the U.S. District Court for the Southern District of New York was confronted with a request for a "*Yellowstone*-type" injunction by a claimant seeking to enjoin the cancellation of a disability income insurance policy. After concluding that *Yellowstone* injunctions are not available "outside of the landlord-tenant arena," the court, in a footnote and without addressing the question of whether *Yellowstone* injunctions are substantive or procedural, stated that "even if *Yellowstone* injunctions were available in the circumstances of this case in New York courts, it is difficult to see how that might help plaintiff here given that federal law controls the issuance of preliminary injunctions even in this diversity case."

Although the U.S. Court of Appeals for the Second Circuit has not specifically decided the question of whether *Yellowstone* injunctions are available in federal courts, in *Metropolitan Life Insurance Co. v. RJR Nabisco, Inc.*[18] the court said *Yellowstone* and its progeny constitute the "real estate law of New York."[19] *Metropolitan Life* involved a dispute concerning alleged defaults under a series of notes and debentures governed by indentures which provided for a "cure period" as to any default. After a dispute arose concerning an alleged default, the District Court granted a preliminary injunction tolling the running of the cure period contained in the indentures, pending a determination as to the issue of the alleged default.

On appeal, the Second Circuit reversed and concluded that the District Court's ruling was not authorized by "any body of applicable law." Specifically, the court found there was no New York "authority permitting the extension of the *Yellowstone* rule to the indentures at issue before the court."[20] In doing so, the court acknowledged that *First National Stores Inc. v. Yellowstone Shopping Center, Inc.*[21] was the "real estate law of New York," which, the court noted, was "limited to landlord-tenant relations."[22] The court wrote:

> To the extent that the court [below] relied on the real estate law of New York, that reliance was misplaced. We have found no indication that the state courts of New York have granted stays tolling cure-period type provisions except in landlord-tenant matters, where, because of the unique nature of real estate, the absence of a stay would result in a forfeiture.[23]

Clearly, it was the unique nature of real estate and the inequity that would result if a tenant could not toll the running of a cure period while litigating the point in dispute that led the New York Court of Appeals to add the *Yellowstone* injunction to the real estate law of New York. Arguably, because *Yellowstone* injunctions reflect a right to avoid forfeiture of a lease, and not solely a means or device to protect a right, the standard that evolved under *Yellowstone* is substantive and not procedural.

> One commentator has described Justice Frankfurter's test for separating substantive law from procedure as being "simultaneously elegant and deeply flawed."

The answer to the question of *Yellowstone*'s application in federal court necessarily begins with *Erie Railroad Co. v. Tompkins*.[24] Under the *Erie* doctrine, "federal courts will apply, in diversity cases, state law permitting the enforcement of a state-created right by means of an injunction."[25] The U.S. Supreme Court elaborated on the impact of the *Erie* doctrine on equitable remedies in federal court in *Guaranty Trust Co. v. York*.[26] Writing for the Court, Justice Frankfurter concluded:

> [S]ince a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.

In the context of motions for a preliminary injunction under Rule 65, the language from Justice Frankfurter's opinion in *Guaranty Trust* has been construed to mean that state law applies when "the remedy sought is so inextricably interwoven with the substantive right invaded that the denial of the remedy would be tantamount to the denial of the right."[27]

In the following frequently quoted passage from the *Guaranty Trust* opinion, Justice Frankfurter explained the

"outcome determination" test for evaluating the distinction between substance and procedure:

> It is . . . immaterial whether [a given state rule is] characterized either as "substantive" or "procedural" in State court opinions in any use of those terms unrelated to the specific issue before us. *Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.[28]

One commentator has described Justice Frankfurter's test for separating substantive law from procedure as being "simultaneously elegant and deeply flawed."[29] While elegant in its simplicity, the flaw, according to Professor Crump, is that the test is too simple because "[a]ny legal rule can determine the outcome in an appropriate case."[30] For example, the federal rules governing discovery or service of process could determine the outcome of a case, but that should not make those rules substantive.

Whether measured against Justice Frankfurter's "outcome determination test" in *Guaranty Trust* or the modified tests described below, *Yellowstone* represents the substantive law of the state of New York as articulated by New York's highest court. It represents a state-created right of a commercial tenant, who makes the required showing under the case law, "to avoid the forfeiture of [the tenant's] valuable improvements as well as of the good will it built upon the location of the leased premises."[31] Because a request for a *Yellowstone* injunction is an attempt to invoke the "real estate law of New York" to avoid forfeiture of a commercial lease, an application for a *Yellowstone* injunction presented to a federal court sitting in diversity represents a classic situation where the remedy requested is "inextricably interwoven" with the substantive right sought to be enforced.

It can be argued that a contrary view would be inconsistent with the reasoning of the Supreme Court in *Hanna v. Plumer*.[32] In *Hanna*, the Court acknowledged that if the federal rule involved does not cover the "point in dispute, *Erie* command[s] the enforcement of state law."[33] And in analyzing the applicability of a federal rule under the *Erie* doctrine, the Court noted that the application of the rule must be considered in light of the "twin aims" of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the law.[34] Writing for the Court, Chief Justice Warren went on to reason that

> [t]he line between substance and procedure shifts as the legal context changes. . . . When a situation is covered by one of the Federal Rules, the question facing the Court is a far cry from the typical, relatively unguided *Erie* choice: the Court has been instructed to apply the federal rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.[35]

Noting the Court's observation in *Hanna* that, pursuant to Article III of the Constitution, Congress had the "power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable as being classified as either,"[36] Professor Crump argues that *Hanna* resulted in the "gray-area-controlling federal rule approach."[37] In the gray area – where matters can be reasonably classified as either substantive or procedural – "the implied judgment that the matter was procedural would be accepted at face value. And if such a federal rule controlled, it would be given effect."[38] The Court further adjusted the line of demarcation between substance and procedure in *Walker v. Armco Steel Corp.*[39] There, the Court clarified the above-described *Hanna* approach by construing federal rules narrowly and holding that the state rule must be applied where the state and federal rule can "exist side by side, . . . each controlling in its own intended sphere without conflict."[40]

In order to comply with the teaching of *Hanna* and *Walker* and conclude that Rule 65 governs requests for *Yellowstone* injunctions, a federal court sitting in diversity would have to conclude either that the issue presented by a *Yellowstone* application is solely one of procedure, or that it is predominately procedural. While Rule 65 obviously is one of procedure, *Yellowstone* prescribes a state-created substantive right to avoid a lease forfeiture and to toll a cure period under a commercial lease; and the predominant issue when a *Yellowstone* injunction is requested is substantive under what the United States Court of Appeals for the Second Circuit has described as the "real estate law of New York." Also, unlike Rule 65 – which prescribes procedures for injunctions generally – *Yellowstone* provides for a specific equitable remedy in the specific context of landlord-tenant cases. The *Yellowstone* rule and Rule 65 can "exist side by side . . . each controlling its own intended sphere of coverage without conflict."[41]

Even if *Yellowstone* was found to be in direct conflict with Rule 65, the application of Rule 65 in the context of a request for a *Yellowstone* injunction must not violate the

Rules Enabling Act.[42] In pertinent part, the Rules Enabling Act provides:

> a) The Supreme Court shall have the power to prescribe general rules of *practice and procedure* and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> b) Such rules *shall not abridge*, enlarge or modify *any substantive right*.[43]

Unlike a competing statute or rule of procedure, *Yellowstone* had its birth in judge-made law.

Thus, Rule 65 may not be applied in a manner that abridges any substantive right under New York law. Applying Rule 65 in a manner at odds with *Yellowstone* would have that effect. A ruling that refuses the injunctive relief available under *Yellowstone* and requires a commercial tenant to pay rent or other charges in dispute to the landlord to avoid the forfeiture of a lease completely destroys the *Yellowstone* rule and abridges the tenant's substantive right under New York State law to avoid that very step. Further, if *Yellowstone* were never to apply in federal court, there would be strong incentive for a commercial landlord to remove landlord-tenant cases from state to federal court when diversity jurisdiction exists. That is precisely what the *Erie* doctrine is supposed to prevent and would clearly frustrate the "twin aims" of that doctrine by promoting forum shopping and an inequitable administration of the law.

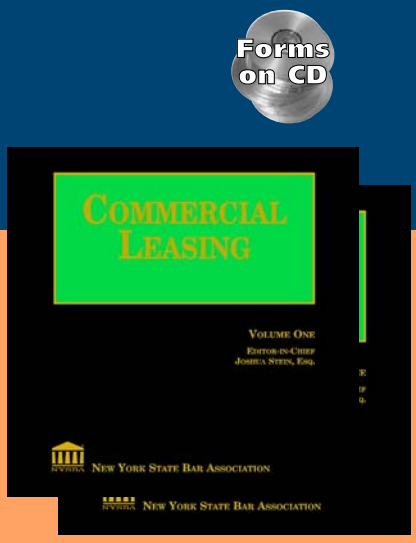
Conclusion

It is beyond the scope of this article to address and evaluate all of the changing tests which have been applied in discerning the line between substantive law and procedure under the *Erie* doctrine. It is submitted, however, that treating an application for a *Yellowstone* injunction presented to a federal court sitting in diversity as a procedural device and just another request for a preliminary injunction under Rule 65 cannot be reconciled with the source of the right being invoked in a *Yellowstone* injunction or the *Erie* doctrine. Unlike a competing statute or rule of procedure, *Yellowstone* had its birth in the judge-made law resulting from the decisions of New York's courts, not the action of the legislature or other rule-making body. Further, as part of the real estate law of New York, the right to seek a *Yellowstone* injunction plays an important function in New York's economy by promoting certainty with respect to rights in commercial real estate and the stability and predictability of commercial relationships that follow from that. Applying Rule 65 or any other federal rule of procedure in a manner that frustrates that state policy would "violate[] the fundamental tenet of federalism announced in *Erie* by regulating primary behavior that the Constitution leaves to the exclusive province of States."[44]

1. 21 N.Y.2d 630, 290 N.Y.S.2d 721 (1968).
2. 304 U.S. 64 (1938).
3. 21 N.Y.2d 630.
4. *Post v. 120 East End Ave. Corp.*, 62 N.Y.2d 19, 475 N.Y.S.2d 821 (1984).
5. 115 A.D.2d 381, 496 N.Y.S.2d 16 (1st Dep't 1985).
6. *Id.* at 382.
7. 85 N.Y.2d 600, 627 N.Y.S.2d 298 (1995).
8. *Id.* at 604.
9. 93 N.Y.2d 508, 693 N.Y.S.2d 91 (1999).
10. *Id.* at 515.
11. 720 F. Supp. 293 (S.D.N.Y. 1989).
12. *Id.* at 298.
13. *Id.* at 302.
14. 187 F. Supp. 2d 139 (S.D.N.Y. 2002).
15. *Id.* at 140; *see also Phoenix Racing, Ltd. v. Lebanon Valley Auto Racing Corp.*, 53 F. Supp. 2d 199 (N.D.N.Y. 1999) (noting that a *Yellowstone* injunction had been issued by the court in an earlier order in the case).
16. No. 97-CV-1047 (N.D.N.Y. Aug. 13, 1998).
17. No. 01-CIV-10193, 2001 U.S. Dist. LEXIS 20241 (S.D.N.Y. Dec. 4, 2001).
18. 906 F.2d 884 (2d Cir. 1990).
19. *Id.* at 889.
20. *Id.* 890–91.
21. 21 N.Y.2d 630, 290 N.Y.S.2d 721 (1968).
22. *Metro. Life Ins.*, 906 F.2d at 891.
23. *Id.*
24. 304 U.S. 604 (1938).
25. 19 Fed. Procedure, L. Ed. § 47:23 at p. 458.
26. 326 U.S. 99 (1945).
27. Wright, Miller & Kane, Federal Practice and Procedure; Civil § 2943 at p. 77; *see also Port of N.Y. Auth. v. Eastern Airlines*, 259 F. Supp. 745, 753 (E.D.N.Y. 1966).
28. 326 U.S. at 109.
29. Crump, *The Twilight Zone of the* Erie *Doctrine: Is There Really a Different Choice of Equitable Remedies in the 'Court a Block Away'?*, 1991 Wis. L. Rev. 1233.
30. *Id.* at 1238.
31. *Waldbaum v. Fifth Ave. Realty Assoc.*, 85 N.Y.2d 600, 607, 627 N.Y.S.2d 298 (1995).
32. 380 U.S. 460 (1965).
33. *Id.* at 470.
34. *Id.* at 468.
35. *Id.* at 469–71.
36. 1991 Wis. L. Rev. at 1265.
37. *Id.*
38. *Id.*
39. 446 U.S. 740 (1980).
40. *Id.* at 752.
41. *Id.*
42. *See Douglas v. NCNB Tex. Nat'l Bank*, 979 F.2d 1128, 1130 (5th Cir. 1992) ("this court must not apply a federal rule of civil procedure if application . . . violates . . . the Rules Enabling Act").
43. 28 U.S.C. § 2072 (emphasis added).
44. *Chambers v. NASCO*, 501 U.S. 32 (1991) (Kennedy, J., dissenting).

THE NEW YORK STATE BAR ASSOCIATION ANNOUNCES A MAJOR NEW PUBLICATION

Commercial Leasing



Your clients' existing lease will expire soon, or they're opening a new location or consolidating some functions. What if the construction goes over budget or takes too long? What if your clients can't move out before their old lease expires? Would your clients prefer flexibility or certainty in their lease?

The owner of a building faces an entirely different set of questions: How to get the right kinds of tenants into the building? How to assure that tenants pay the highest possible rent? Would the owner trade some rent revenue for greater tenant stability?

Commercial Leasing discusses all of these issues. This two-volume, 1,344-page reference is written and edited by leading experts in the field. It examines in detail the issues that arise in lease negotiations.

Commercial Leasing Forms on CD-ROM. This new product offers over 40 forms, checklists and model leases useful to both landlord and tenant.

Editor-in-Chief, Joshua Stein, Esq.

- Written from both landlord's and tenant's perspective
- Numerous checklists, model leases, forms, and contracts
- Covers everything from the basics to the "hidden" issues that can arise

Product Info and Prices

Book Prices*
2004 • 1,344 pp., loose-leaf, 2 volumes • PN: 4041
NYSBA Members $130
Non-Members $165

Book with Forms CD-ROM Prices
2004 • PN: 4041C
NYSBA Members $155
Non-Members $200

CD-ROM Prices
2004 • PN: 6041
NYSBA Members $55
Non-Members $75

* Prices include shipping/handling but not applicable sales tax.

Expand your professional knowledge

NEW YORK STATE BAR ASSOCIATION
1.800.582.2452 www.nysba.org/pubs
Mention Code: CL2539

Mediating Domestic Violence

A Potentially Dangerous Tool

By Susan L. Pollet

One in three women will suffer from some physical abuse in her lifetime from someone she knows. Six million American women are beaten each year by their husbands or boyfriends. Four thousand are killed as a result. Child abuse takes place in 70% of the households where domestic violence is also present. Twenty-eight percent of teen girls report some dating violence.[1]

These are daunting statistics. Responses to the pervasive problem they reflect have been multifaceted; some garner praise as being effective, others are condemned as inadequate or even harmful. Mediation exists as one such response. This article will examine its use, which has both proponents and detractors.

As Defined

The broadest definition of domestic violence includes "physical assault, threats, emotional abuse, verbal abuse, harassment, and humiliation by current or former intimate partners."[2] A description used by the Domestic Violence Screening Training Curriculum of the New York State Unified Court System, Office of ADR Programs, is

> a pattern of behavior used in an intimate relationship by a partner to establish power and control over the other partner. This coercive control is for the deliberate purpose of domination. The abuser uses physical, sexual, social, emotional and economic abuse to terrorize, intimidate, isolate, and manipulate the targeted partner. In an abusive relationship, the batterer's intention is to control his partner and to force that person to obey. Domestic violence occurs among all socioeconomic, racial, religious, and cultural groups. Without intervention, it will escalate in frequency and intensity.[3]

A form of such intervention, mediation, is defined as "a type of negotiation in which the parties use a neutral third party mediator to help them reach a voluntary settlement." The mediator, however, "is not authorized to impose a decision on the parties if they do not reach agreement through mutual consensus."[4]

The unequal position of abuser and victim, and the inherent nature of mediation, has sparked a debate about mediation's effectiveness – and even its safety – in the domestic violence context.

Mediation Debated

Mediation has been touted as an "excellent vehicle for conflict resolution for both men and women."[5] Mediation proponents do acknowledge that there are some cases where mediation is inappropriate.[6] However, proponents state that the reality is that there is a "continuum" of family violence that ranges from "pervasive abuse to occasional violence." It is therefore argued that mediation can

Susan L. Pollet is Executive Director, Pace Women's Justice Center. She is a graduate of Cornell University and Emory University School of Law. Maria Perinetti, a third-year Pace School of Law student, assisted in the preparation of this article.

be "an appropriate and effective problem-solving technique with at least a percentage of those persons whose lives have been touched at some point by violence."[7]

Proponents also contend that effective mediators can serve to correct a balance of power where there is an imbalance, and that mediation is more effective than the adversarial process because that process can exacerbate the relationship between abusive partners. They argue that litigation can be very expensive and can take a very long time, which extends the conflict with the batterer.[8] They cite research indicating that mediation may be effective in reducing abuse.[9]

However, there are also a number of arguments that can be made against the use of mediation in domestic violence cases. Notwithstanding the claim that mediation can level the playing field, as noted, detractors point out that mediation by its very nature is "premised on a relatively equal balance of power, and that where domestic violence is present, even the most skilled mediator will likely not be able to compensate for the disparity of power."[10] Further, mediation requires joint decision-making based upon honesty, a desire to settle the dispute, and a capacity to compromise – all of which are characteristics that are lacking in a domestic violence-filled relationship.[11] Indeed, abusers often engage in "victim blaming," and refuse to "acknowledge their responsibility for their violence and its impact on the family."[12]

There also is the claim that the entire process can be flawed because victims will not even be able to "articulate and/or discern their own interests and needs," in that they have been conditioned to put their spouse's needs above their own, and thus any resultant agreement would be made under duress.[13] Related to this is the fact that the batterer may use children and custody issues to force women to drop their financial claims, and domestic violence can cause victims to settle prematurely and not necessarily in their best interests.[14]

Further, victims are often "reluctant to voice any disagreement with the batterer" and may fear retaliation if they address the violence issue when the batterer is present.[15] It is even asserted that mediation puts victims at risk for continuing and future violence, especially because the most dangerous time for a battered woman "is when she separates from her partner."[16] For all these reasons, the mediators cannot "redress" the "long-term pattern of manipulation, coercion, and control."[17] Finally, there is a concern about the insight of the mediator: domestic violence can sometimes be "subtle," and the mediator may not be able to detect it.[18]

Current State of the Mediation Debate

Because of "soaring divorce rates" and "increasing burdens on court resources," California took the lead and in 1981 became the first state to mandate mediation of custody and visitation disputes.[19] Since that time, nearly every other state has implemented some form of mediation for domestic disputes; however, California is one of the small minority of states in which mediation is mandatory.[20]

Most advocates for domestic violence victims have stated that there should not be mediation when domestic violence is involved.[21] Critics of California's mandatory mediation legislation contend that it fails to "recognize and address the complexity of domestic violence and the dangerous implications that arise in the context of mediation in a battering relationship."[22]

> Mediation requires characteristics that are lacking in a domestic violence-filled relationship.

Judges have also weighed in on the issue. For example, the National Conference of Juvenile and Family Court Judges' Model Code on Domestic and Family Violence, in section 407, states that "courts shall not order mediation in domestic violence cases where a restraining order is in effect."[23] Similarly, even among states that have mandatory mediation programs, some permit the victims to opt out, or prohibit them from participating, where domestic violence is identified.[24]

Highlighting much of the foregoing, the Pace Women's Justice Center recently presented a program at Pace University's Judicial Institute titled "Domestic Violence and Responsible Mediation: A Critical Look at Screening and Safety," during which the various aspects of the issue were explored. Attending were judges, lawyers, mediators, and members of the domestic violence prevention community.

Participants noted that even though there is an increasing trend toward using alternative methods of dispute resolution in family law cases to "promote efficient justice and to better serve family relations,"[25] the "red flags" are up when domestic violence is in the mix. Professionals in all fields join in a desire to protect not only the legal rights of victims, but their physical and emotional well-being as well. All agree that mediation should not be employed in cases involving persistent, ongoing, and violent abuse.

There are circumstances, however, where it is difficult to come up with a "hard and fast" rule about the use of mediation: for example, those involving pushing and shoving years ago that never recurred; or when parties resolve conflict by manipulation, which can be damaging but is not overtly dangerous; or when there are threats or withdrawal of financial support, without physical abuse; or when the parties ask for mediation when they have outside legal counsel advising them.[26] Even though there is a continuing debate as to whether mediation can be

appropriate in domestic violence cases at any level, there is a significant focus on whether there are "effective tools to determine when such cases even exist, because research and experience has shown that victims and batterers rarely talk about the abuse."[27]

The program also revealed a real divergence in views regarding a critical question – whether or not victims can be protected through screening techniques before and during the mediation process. There are many different screening procedures that are utilized by private and community mediators, and by the courts. One such technique, often used by mediation services, is a face-to-face interview with each party separately, with the woman to be interviewed first. Proponents often speak of such techniques as promoting safety and self-determination.

Even where domestic violence has been identified (which, as noted above, is a circumstance that many believe renders mediation inappropriate), some services continue with the mediation, but employ "safeguards." These include the following: having the parties sit in different rooms during the mediation; making sure attorneys attend the mediation sessions with clients; providing a "safety plan" for the parties when leaving the mediation; utilizing only the most experienced mediators; and having more intensive follow-up of the enforcement of any agreements that may be reached.[28]

On the other hand, critics of mediation argue that the screening available for domestic violence is poor, and that there is an absence of legislative mandates for mediator training; they contend that this will lead to the "inevitable re-privatization of domestic violence" and will "set back the legislative progress achieved by the battered women's movement."[29]

Finally, other issues can arise that can influence whether mediation is appropriate. There can be a situation in which domestic violence has occurred in the past and the victim has been treated in therapy. In some circumstances, that might be a case ripe for mediation. For a person who has never had therapy, it might be needed as a support in order to proceed with mediation, even if such mediation would otherwise be an attractive option. As indicated, there are a number of "gray areas" in this family law area that do not lend themselves to easy answers, simply because it is difficult to be categorical about every nuance of human behavior.

Conclusion

Utilizing mediation in domestic violence cases can be an extremely serious undertaking. Mistakes can cost victims their lives. A host of problems can exist: screening tools may not work; mediators may not be sensitive and well trained in the domestic violence area; safety planning during the mediation process may fail; and follow-up may be inadequate. Nevertheless, rigid rules about its use may prevent certain cases from being handled by a mediator when it would be appropriate to do so. Experience teaches that there are many "gray area" cases for which there are no easy answers. The domestic violence community, the mediators and the courts must continue to work together to fashion appropriate rules, protocols and intelligent screening processes for those cases that seem to lend themselves to mediation, with safety of victims foremost in mind. ■

1. Amy Carron Day, *Responsible Mediation and Domestic Violence*, N.Y. Fam. L. Monthly, June 17, 2003, p. 1 (hereinafter "Day").

2. Mary P. Brewster, *Domestic Violence Theories, Research, and Practice Implications in* Handbook of Domestic Violence Intervention Strategies (Albert R. Roberts, ed., 2002).

3. Domestic Violence Screening Training Curriculum, "Policy of New York State's Unified Court System, Office of ADR Programs," *CDRC Program Manual*, Guideline II, Ch. 4, Pt. 4.030 (hereinafter "Domestic Violence Screening Training Curriculum").

4. Sarah Krieger, *The Dangers of Mediation in Domestic Violence*, 8 Cardozo Women's L.J. 235, 242 (2002) (hereinafter "Krieger").

5. Carol F. Simkin, *Exposing the Fallacy of Women Being Disadvantaged in Mediation*, N.Y.L.J., June 10, 2004, p. 4.

6. Rene L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 Ohio St. J. on Disp. Resol. 95, 100 (2001) (hereinafter "Rimelspach").

7. *Id*.

8. Day, *supra* note 1, at p. 2.

9. *Id*. (citing P. Salem & A.L. Milen, *Making Mediation Work in a Domestic Violence Case*, Fam. Advoc., Winter 1995).

10. Rimelspach, *supra* note 6, at p. 97.

11. *Id*.

12. Lois Schwaeber, *Domestic Violence: The Special Challenge in Custody and Visitation Dispute Resolution*, Divorce Litig., Aug. 1998, p. 141, 160 (hereinafter "Schwaeber").

13. Rimelspach, *supra* note 6, at p. 97.

14. Domestic Violence Screening Training Curriculum, *supra* note 3.

15. Schwaeber, *supra* note 12, at p. 160.

16. Rimelspach, *supra* note 6, at p. 99.

17. Schwaeber, *supra* note 12, at p. 160 (citing L. Newmark, A. Harrell & P. Salem, *Domestic Violence and Empowerment in Custody and Visitation Cases*, 33 Fam. & Conciliation Ct. Rev. 30 (Jan. 1995); Family Violence Prevention Fund, Family Violence: Improving Court Practice 28 (1990)).

18. Domestic Violence Screening Training Curriculum, *supra* note 3.

19. Alana Dunnigan, Comment: *Restoring Power to the Powerless: The Need to Reform California's Mandatory Mediation for Victims of Domestic Violence*, 37 U.S.F.L. Rev. 1031 (Summer 2003) (hereinafter "Dunnigan").

20. *Id*.

21. Day, *supra* note 1.

22. Dunnigan, *supra* note 19, at p. 1063.

23. Schwaeber, *supra* note 12, at p. 160.

24. *Id*.

25. Krieger, *supra* note 4.

26. Day, *supra* note 1, at p. 2.

27. *Id*. at p. 2.

28. *Id*. at p. 3.

29. Krieger, *supra* note 4, at p. 259.

BY BRUCE J. BERGMAN

Predatory Lending for All

A lawyer preparing a mortgage for a client – something he does only once in a while – called one afternoon with a number of questions. When he mentioned an interest rate of 14%, I asked if he had considered the requirements of the new "Predatory Lending" statute. "No," he said, he was unfamiliar with those. The lawyer quickly reconsidered the task he had accepted for his client in order to avoid a close brush with malpractice.

This suggests that any lawyer who may ever prepare a mortgage should have an understanding of what the statute imposes. Then too, any attorney who represents a borrower, or will foreclose a mortgage or represent the purchaser (or insurer) of a title devolving through a foreclosure, should understand the role of the statute. Of all the laws passed year in and year out, relatively few will affect an attorney's day-to-day practice. "Predatory Lending," however, just might play a regular role; thus, the mission here is to demystify this obscurity – if possible.

First, the statute at issue: Chapter 626 of the Laws of New York, 2002, amends the Banking Law (primarily adding new § 6-*l*), the General Business Law (adding new § 771-a) and the Real Property Actions and Proceedings Law (RPAPL) (adding new § 1302). It is effective as of April 1, 2003, applying to any covered loan for which application is made after that date.

Of course the law does not apply to all loans, but it is vital to determine which loans can be affected; and the provisions are profoundly serious. There must be a "home loan" and, once within that category, the statute will control if the loan crosses the threshold of being considered a "high cost home loan."

According to the statute, a home loan (including an open-end credit plan, but other than a reverse mortgage) is one where:

- the principal does not exceed the lesser of the Fannie Mae conforming loan amount or $300,000; and
- the borrower is a natural person; and
- the debt was incurred primarily for personal, family or household purposes; and
- the mortgaged property is in New York and is a one- to four-family house occupied as the borrower's principal residence.

Such a loan becomes "high cost" when it crosses one or more of the following lines:

- if a first mortgage, the interest rate exceeds eight points above the yield of treasury securities with a comparable maturity; or
- if a subordinate mortgage, the interest rate equals or exceeds nine points above the yield of treasury securities with a comparable maturity; or
- total points and fees exceed 5% of the loan amount when the loan is $50,000 or more, or 6% of the loan amount when the loan is $50,000 or more and the loan is a purchase money loan guaranteed by the FHA or VA.

Bruce J. Bergman <b.bergman@bhpp.com> is a partner at Berkman, Henoch, Peterson & Peddy, P.C. in Garden City and is the author of the three-volume treatise *Bergman on New York Mortgage Foreclosures*, Matthew Bender & Co., Inc. (rev. 2005). A graduate of Cornell University, he received his law degree from Fordham University School of Law.

If the loan spills over into predatory territory, what next? It depends upon one's perspective but, as mentioned, consequences are significant.

The major thrust of all this is imposition (by Banking Law § 6-*l*) of no fewer than 19 commandments relating to the mortgage, a compelling series of both do's and don'ts. Space prohibits listing all these, but the need to be aware of them if consummating a covered transaction is obvious and essential.

And the significance of the sundry mandates goes well beyond mere drafting of the mortgage documents. For example, if the mortgage is to be foreclosed, the new RPAPL §1302(1) requires the complaint to allege compliance with all the provisions of Banking Law §§ 595 and 6-*l*. Then, that allegation must be proved before judgment can be awarded. Violation of any provision of Banking Law § 6-*l* is specifically delineated as a defense to foreclosure (RPAPL § 1302(2)).

> Penalties for violation of the statute create unpredictable peril.

Note that an assignee of the mortgage may find it difficult – or impossible – to determine this compliance with certainty. As trying as it may be for a closing party to glean statutory compliance, it may be even more troublesome for a title company invited to insure such a title. What really occurred at the inception of the loan to comply with the statute may either be unclear as a matter of fact or open to interpretation as a matter of law. (Read each mandate to confirm that you could be likewise perplexed.)

Burdens of drafting and compliance aside (although these are significant indeed), penalties for violation of the statute create unpredictable peril. Loan assaults in general almost invariably emanate from disgruntled borrowers. In this realm of predatory lending, though, enforcement can come from the attorney general, the superintendent of banking or *any* party to the loan. A lender's liability for violation includes not only actual damages (inclusive of consequential and incidental damages) but statutory damages as well, requiring forfeiture of all interest – earned or unearned – points, fees and closing costs. Added too is court discretion to grant injunctive, declaratory or other equitable relief.

Should violation be held intentional, the loan is deemed void and the lender must then disgorge all payments received. In a foreclosure situation, recission is available as a defense or counterclaim with no statute of limitations to bar its use.

Conclusion seems an opportune time to highlight an earlier point. Many statutes languish in obscurity, recondite exercises for those still wearing eyeshades and ensconced at tall desks. Not this law. ■

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am a general practitioner with a potential win-win business deal with a long-time client. This person recently inherited seven co-operative apartments in a charming brownstone on the tony and expensive west side of Manhattan. She is both the sole beneficiary and executor, and hired me to settle the estate.

The estate has no liquid assets. There are sizeable estate taxes to be paid, both federal and state. After obtaining an appraisal of the apartments, my client listed two apartments for sale to raise funds to pay the estate taxes and for other administration expenses. One of the listed apartments quickly sold (I handled the closing) for about $20,000 over the appraised value.

There have been no realistic offers made on the second apartment, and the listing agreement with the broker has expired. As it happens, I have a daughter in graduate school a few blocks away from the building and would like to purchase the apartment for her. With 90% financing based on the appraised value, I should be able to swing the monthly mortgage payments and maintenance until my daughter gets a job (I hope) after she graduates. With the estate tax due date looming and the saving of brokerage commissions, I think it would be a great deal for my client as well.

I raised the idea with my client and she was delighted. She said that although she may be able to get a higher price on the open market, she so appreciated the work I have done for her over the years that I should consider any potential loss of profit to be a gift. She was also grateful that we wouldn't have to deal with another attorney on the contract of sale and closing.

I am unsure as to whether this transaction is permissible, professionally and ethically. If it is permissible, what precautions should I take, if any, to avoid even the appearance of impropriety?

Sincerely,

Wondering on the West Side

Dear Wondering:

Your uncertainty is understandable, and the question you pose must be evaluated from a conflicts-of-interest perspective.

The first issue is whether you may purchase the co-operative apartment from your client at all. Although a lawyer is not prohibited from entering into a contract with a client, it generally is inadvisable to do so because there is a risk that the lawyer may exploit the client by failing to disclose fully all existing conflicts or by taking steps during the course of the transaction that benefit the lawyer at the client's expense. *See, e.g., Schlanger v. Flaton*, 218 A.D.2d 597, 601, 631 N.Y.S.2d 293 (1st Dep't 1995).

This concern is reflected in the Disciplinary Rules, which provide that a lawyer may not accept or continue employment for a client, or enter into a business transaction with a client, if the differing interests of the lawyer and client will impair the lawyer's independent professional judgment. DR 5-101(A); DR 5-104(A). In addition, the opinions of the Committee on Professional Ethics state that it is unethical for a lawyer to recommend that a client purchase a product or service in which the lawyer has a personal financial interest. *See* N.Y.S.B.A. Comm. on Prof'l Ethics, Formal Op. 694 (1997) ("N.Y.S.B.A. Op.") (lawyer's financial incentive to influence client to secure contract of sale violates DR 5-104(A)); *see also In re Estate of Stalbe*, 130 Misc. 2d 725, 729, 497 N.Y.S.2d 237 (Sur. Ct., Queens Co. 1985) (lawyer breached fiduciary duty to client by acting in dual capacity as executor and real estate broker).

Your obligation to represent your client's interests zealously, *see* DR 7-101(A), includes advising your client to sell estate assets at a price that ensures adequate funds for estate expenses, and maximizes her inheritance. You, however, have a personal interest in purchasing the apartment at an affordable price so that you are able to make monthly mortgage and maintenance payments. In addition, even if the price offered for the apartment was objectively fair, there are other elements in the proposed transaction – such as the terms of the contract, the co-operative board's approval of the sale, and the financing of the sale – where your interests and those of your client are not fully aligned. These interests likely qualify as "differing interests" under the Code that may "adversely affect" your judgment or loyalty to the client. Accordingly, your involvement in the transaction may violate DR 5-101(A) and DR 5-104(A).

Notwithstanding these differing interests, however, you still may enter into the transaction with your client if certain conditions are met. They are as

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

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

follows: viewing the transaction objectively, your interests do not adversely affect your representation of or loyalty to the client; the terms of the transaction itself are fair and reasonable; the client consents after full disclosure; and you advise the client to consult with independent counsel. DR 5-101(A); DR 5-104(A). In fully disclosing the implications of your self interest, you should explain to your client the advantage of selling the apartment to a purchaser who does not require financing, and the co-operative board's potential rejection of your daughter's tenancy. Additionally, you should obtain the client's consent in writing. *See* N.Y.S.B.A. Op. 688 (1997). The transaction must be abandoned if the above conditions are not met and the client does not consent to waive the conflict.

If the transaction proceeds, the second issue is whether you may represent both the estate and yourself in preparing the documents for the sale and closing. DR 5-105(A) and (C) provide that attorneys may not represent multiple clients with differing interests, unless it is obvious that the lawyer can adequately represent the interests of each, and if each consents to the representation after full disclosure of the possible effect of such representation on the lawyer's independent professional judgment.

While the situation addressed in its opinion is not directly on point, the Committee on Professional Ethics has recognized the difficulty of a lawyer representing both the buyer and lender in a sale. It cautioned that "it would not be possible for one lawyer to play both roles, even with consent, because that would put the lawyer in a position of negotiating with him or herself." *See* N.Y.S.B.A. Op. 753 (2002). Where the parties "do not directly negotiate with each other," the Committee has recognized that dual representation "can be permissible with consent after disclosure." *Id*. In your case, representing yourself and your client in this transaction clearly raises the potential for a conflict, because it will be necessary for you to negotiate directly with your client. It therefore will not be possible for you to adequately represent both your interests and your client's interests. Accordingly, it appears that dual representation in the proposed transaction is not permissible under DR 5-105(A) and (C).

If you purchase the apartment at the appraised value, the final issue is whether the client's potential loss of profit, caused by removing the apartment from the market, constitutes an impermissible gift. EC 5-5 provides: "A lawyer should not suggest to his client that a gift be made to the lawyer or for the lawyer's benefit. . . . If a client voluntarily offers to make a gift to the lawyer, the lawyer may accept the gift, but before doing so, should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances." In your case, should the sale result in a loss of profit to the client, your offer to purchase the apartment at the appraised value could be construed as a suggestion that the client make a gift to you. If your offer is so construed, the transaction would be contrary to this Ethical Consideration.

However, even though you suggested the transaction, it was the client who offered to make the gift by sacrificing a potentially higher price on the open market. You may accept such a gift only if you urge your client to secure disinterested advice from independent counsel. Absent such independent advice, your agreement to purchase the apartment at a price that is potentially less than market value constitutes a breach of your professional responsibility to the client. *See, e.g.*, *In re Estate of Tank*, 132 Misc. 2d 146, 503 N.Y.S.2d 495 (Sur. Ct., Schoharie Co. 1986) (acceptance by attorney-draftsman of $5,000 bequest from his client constitutes overreaching).

In sum, to safeguard your client's interests, you should advise her to seek the advice and representation of independent counsel regarding the proposed transaction. Independent counsel will have the opportunity to evaluate the client's savings on brokerage fees, whether there are (or are likely to be) any realistic offers for the apartment above the appraised value, and negotiate with you to achieve a fair and reasonable price for the apartment. Representation by independent counsel will render the issues of dual representation and impermissible gift moot. If the client consents to the transaction after full disclosure, her representation by independent counsel will likely render the proposed transaction professionally and ethically permissible.

The Forum, by
Danielle M. White
Paul, Hastings, Janofsky
& Walker, LLP
New York, NY

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

Recently, an important client asked if my firm would substitute as counsel in a dispute in which prior counsel had filed a demand for arbitration pursuant to an agreement. It turned out that my firm had previously performed legal work on behalf of the named arbitrator. While I was debating whether it would be proper to accept the representation under these circumstances, and before any hearings had been held, the arbitrator, *sua sponte*, issued a decision that the matter in dispute was not within the scope of the arbitration agreement. Can I now properly go to court and argue that the arbitrator was wrong as a matter of law, seek to overturn his ruling under Article 75 of the CPLR, and ask that the arbitration be directed to proceed?

Sincerely,
I'd Rather Be Right

LANGUAGE TIPS

GERTRUDE BLOCK

Question: I have seen the word *fruesta* substituted for the two words "fruit fiesta." My dictionary doesn't list that word. Does it exist outside the mind of the person who used it?

Answer: Dictionaries do not list that term. Apparently it is a merger of the words, *fruit* and *fiesta* and was created by the W.C.T.U. (Women's Christian Temperance Union) to promote social gatherings serving only non-alcoholic drinks. (*See* Pyles & Algeo, *English, An Introduction to Language*, at 111.) Mergers are common in English; linguists call them *blends*. A recent letter-writer asked about the word *prebuttal*, a blend of *rebuttal* and *pre-*. Democrats created that word to denote a response, prepared in advance, to the State of the Union Message.

Blends combine part of the sounds and meanings of two words to create a new single word. In the case of *prebuttal*, the prefix *pre-* is substituted for the letters *re-* of *rebuttal*. Another blend was recently created by Roger Federer, after he had won the third straight final men's single match at Wimbledon. He described his win as a *threepeat*, a three-time repeat. Blends like these are coinages that may exist only for a single occasion, or that catch on to become part of the English language.

Many blends have caught on. Take the word *hamburger*, which was originally a phrase, *hamburger steak*, named for the German city of Hamburg. The story is that the Earl of Hamburg was exceedingly fond of ground beef, but often in a hurry. For a quick meal, without cutlery or a mess, he placed the slice of beef between two pieces of bread. Hamburgers became immensely popular and various versions of them were created, all involving blends. We can now order *cheeseburgers, fishburgers, low-fat burgers, soyburgers,* and possibly other combinations.

In creating blends, the second word of the original phrase is shortened and treated like a suffix, as in *-burger* for *hamburger*. The final syllables of *alcoholic* (*-oholic*) were attached to the words *work, shop,* and *chocolate,* creating the blends *workoholic, shopoholic,* and *chocoholic*. In that final blend, the word *chocolate* is shortened to become a prefix, *choco-* and joined to the newly created suffix *-holic* to form the blend.

And remember Watergate, the name of the hotel that provided a political scandal several decades ago? The last syllable of that name, *-gate*, became a newly created suffix in the blends *Leakgate* (in *The Washington Post*), *Spygate* (in *Business Week*), and *intimigate* (in a speech by a Democratic politician).

Other blends have limited usage. For example, in a recent advertisement, a dictionary of "hip-hop" language was announced. The dictionary is called *"Hiphoptionary."* It changes the last three syllables of *dictionary* (*-tionary*) into a suffix. From the French noun *sequel*, a blend was formed by treating the second syllable of *sequel* as a suffix and adding the prefix *pre-* to create *prequel.* And a *Time* magazine journalist created the blend *mingy*, which combines *mean* and *stingy*. Whether or not these recent blends will last is anybody's guess. (Linguists call these *nonce words* – words created for an occasion.)

But many blends have lasted so well that we do not even recognize them as merged phrases. For example, the word *twirl* came from *twist* and *whirl*; *flush* came from *flash* and *blush*; *chortle,* from *chuckle* and *snort*; *flurry,* from *flutter* and *hurry;* and *meld,* from *melt* and *weld*. And how could we manage without the word *brunch* (breakfast + lunch) and *motel* (hotel + motor), an overnight stop when traveling? Finally, if traveling with children affects you as it does me, how could we do without the word *frazzled*, a blend of the word *fray* (which in Middle English meant, "threadbare") and *hassled* (which in Middle English meant "tangled").

From the Mailbox

Washington, D.C. attorney Andreas Stargard has taken exception to my discussion about the negative construction "all . . . are not," which appeared in the March/April "Language Tips." I wrote that the construction is ambiguous because when people use it they erroneously believe they are expressing an unequivocal negative statement, although they are not. For example, when one says, "All cats are gray," that is an unambiguous negative statement. But the statement, "All cats are not gray," means that some, but not all, cats are gray. To avoid ambiguity, I wrote, one should say, "No cats are gray."

But Mr. Stargard wrote that "All cats are not gray," does express an unambiguous statement, equivalent to "No cats are gray." He pointed out that, as logic books reveal, "All . . . are not" is equivalent to "No . . . is." He added that all lawyers should be familiar with the classic E-E-I-O "Square of Oppositions," and the interrelationships between the universal and particular forms that it diagrams, which are studied by every logic student since Aristotle's *Organon*.

I confess that I was unaware of the "Square of Oppositions." The problem with an argument based on logic, however, is that language is not always based on logic. The statement, "All pit bulls are not vicious; they must be trained to attack," would, I think, be interpreted by most people to mean that only those pit bulls who are trained to attack are vicious.

The "all . . . are not" construction has deep roots in English. At the end of the 14th century Chaucer wrote, in *The Canterbury Tales*: "But al thing which shineth as the gold/Nis not gold, as that I have herd it told." That proverb

was not new with Chaucer; he borrowed it from *Parabolae*, a book of poetry, which he had translated from Latin.

The proverb "All that glitters is not gold" was then appropriated by Shakespeare in *The Merchant of Venice*. But Shakespeare substituted *glisters* for *glitters*: "All that glisters is not gold–/Often have you heard that told." (*I.e.*, "Things may not always be as they appear.")

And the expression is still being quoted today. ■

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 new book is *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co., 2004).

"When your litigation win/loss matches Old McDonald's, you can dress like him too."

Correction:

On page 31 of the June 2005 issue of the *Journal*, the article titled "2004 Case Update – Part II," discussed the holding in *Pomerico v. ELRAC, Inc.*, stating that tortfeasor recourse lies with MVAIC. That holding was reversed. Tortfeasor recourse lies with PMV, not MVAIC.

MEMBERSHIP TOTALS

New Regular Members 1/1/05 - 8/2/05	**6,162**
New Law Student Members 1/1/05 - 8/2/05	**541**
Total Regular Members as of 8/2/05	**64,287**
Total Law Student Members as of 8/2/05	**2,844**
Total Membership as of 8/2/05	**67,131**

NEW MEMBERS WELCOMED

FIRST DISTRICT
Shira Abilevitz
Lauren Eve Abolsky
Joshua Eli Abraham
Flavio A. Acosta
Diana Marie Adams
Michael David Adamski
Sheila Ahmed
James Bea Ahn
Ningur Akoglu
Matthew James Albrecht
Melissa Ann Alcantara
Aaron Lee Allardyce
Matthew William Alsdorf
Rachel Altfest
Chinedu Chigozie Amankulor
Alexan A. Amato
Stephen B. Amdur
Alain Anticoli
Gabriele Federico Maria Antonazzo
Marco Antonio Anzalone
Allison Lee Arenson
Leslie Y. Arias
Yael D. Aufgang
Khin Mai Aung
Pierre Elias Azzi
Marc T. Bacigalupo
Lisa Elena Bagley
Lauren Gail Baime
Ryan Steven Baker
Vijay Baliga
Gassan Adnan Baloul
Suzanne Balsam
Laura Jeannette Barrios
Amjad Ahasan Basheer
Sean J. Basinski
Anne Chandler Bass
Ann Margaret Batchelor
Sarah H. Bawany
Jason Mitchell Baxter
Laura Cecilia Beattie
Leora Ruth Bechor
Jason David Behfarin
Carly Rebecca Bellis
Cesar Carlos Bello
George Benaur
Zev Dan Benjamin
Michael Gordon Benwitt
Erik J. Berglund
Chad Ross Berkowitz
David A. Berman
Jennifer Hope Bernstein
Rishi Bhandari
Juan Miguel Biset
David Ellis Blabey
Valerie J. Blanks
Jennifer Starr Blau
Darren Stolper Bloch
Julie R. Boden
Amy Elizabeth Bohannon
Jennifer Ann Bonjean
Brandon Jon Bonzheim
Tamala Terese Boyd
William Sidney Bradley
Andrew Keith Braley
Gabriel Mark Brecher
Dawn Brehony
David C. Brenneman
Steven Michael Brine
Jeanne Robin Broderson
Leonid Bronfman
James H.L. Brown
Cheryl Rainville Brunetti
Julie B. Buchanan
Elizabeth Anne Buckey
Daniel Max Burstein
Michael Jay Burstein
Sarah L. Burt
Virginia Berry Butler
Colin Cabral
Paolo James Cammarota
John Campano
Peter Ian Campbell
Glenn Raymond Campion
Daniel E. Carey
Cynthia Carlson
Michael Robert Carney
Carrie Lynn Casey
Timothy John Casey
Linda N. Cassano
Michael Caughey
Brooke Stacey Causanschi
Eugenie M. Cesar-Fabian
Eric S. Chafetz
Elliot E. Chalom
Ngan Ling Chan
Charu Ambat Chandrasekhar
Lai Lee Chau
Brian Elie Chebli
Connie L. Chen
Fei Chen
Iris Yen Chen
Ronald C. Chen
Jennifer Zhou Cheng
Louis Keith Cherico
Cheri Ann Chestnut
Yula Chin
Meaghan Blaine Chmura
Alice Y. Cho
Bryan Sunghyun Cho
Elizabeth Yoona Cho
David Choi
Steven Kyung Choi
Novi Panaghiota Christopoulou
Dana Cicerani
Dacia Christina Cocariu
Raffaella Zaicaner Coelho
Carolyn E. Coffey
Akiva Meir Cohen
Melissa Joy Cohen
Saralyn Mary Cohen
David Jacob Cohn
Yafit Cohn
Anthony Neil Cole
La Donna Patrice Collier
Erika C. Collins
Samuel Jason Comer
Ciaran Patrick Ahern Connelly
Anna Thea Conrad
Emilie Beth Cooper
Susan M. Cordaro
Rose Cordero
Douglas Michael Cordiano
Gus Coritsidis
Adam Baskin Corndorf
Catalin Cosovanu
Nicoleta-laura Cosovanu
Jessica H. Costanzo
Elizabeth Susan Costello
Cherita Lataa' Coy
Katherine Heras Creenan
Martin J. Crisp
Christopher C. Crotty
Cristina Cruz
Monica Marie Cullen
Hovey Slayton Dabney
Sarah Valeria Dadush
Aileen Marie Daly
Jonathan Adam Danziger
Thomas De Simone
Vanessa Stich De Simone
Elliott Dear
John Paul Del Monaco
Michael John Deluca
Steven Vincent Deluca
Rachel Rubenstein Demeny
Yue Ting Deng
Penny A. Dentinger
Steven Costos Depalma
Paul James Devlin
Matthew Frederick Dexter
Tara R. Di Luca
Anthony Peter Di Matteo
Waleed Sammy Diab
Scott Lawrence Diamond
Tal E. Dickstein
James D. Dipasquale
Nicole M. Don Vito
Carol Ingrid Nulty Doody
David Andrew Dorfman
Brendan M. Doyle
Simon Peter Dunbar
Peter Michael Dunne
Neena Dutta
Jamie Lynn Dvoretzky
William Gamble Dwyer
Joe Wesley Earnhardt
Robyn Tracey Eaton
Mark Geoffrey Egnal
Alan I. Ellman
John Joseph Emslie
Gillian Ivy Epstein
Lauren Rachel Ernst
Daniel L. Evans
Elizabeth Marie Evenson
Andrew Falevich
Michael Robert Fastert
Christine Anne Favara
Isabelle S. Felix
Esther E. Ferguson
Zara F. Fernandes
Donya Fernandez
Natalie Anne Fernandez
Michael Francis Ferrari
Lissett Costa Ferreira
Heather Lynn Fesnak
Todd Lee Fettig
Roman R. Fichman
Adam D. Finkel
Brian Finkelstein
Elisabeth Hirsch Fischer
Marc Russell Fisher
Charlotte Eugenie Fishman
Jordana Lee Fishman
Ian P. Fitzgerald
Joseph T. Flaim
Irene Fondriest
Brian Robert Forman
Morgan Boyer Fox
Alice Do Amaral Peixoto Franco
Miri Keren Frankel
Howard Adam Freeman
Tamara Frehner
Robert Adam Freilich
David Freylikhman
Susan S. Friedman
Jonathan James Fuld
Cindy Furuno
Michael Robert Futterman
Carmel Esther Gabbay
Jessie Morgan Gabriel
Eric A. Gallo
Bryan Daniel Gant
Max Garfield
Andrew W. Gefell
Megan Ruth Genet
Joseph Raymond Geoghegan
Amy S. Gerrish
Meir Seth Gerstein
Oren Gertner
Michael H. Gibson
Candice Beth Gidney
Timothy Paul Gillen
Justin Michael Giovannelli
Valentina Gissin
Jeffrey Scott Glassman
Heather Ann Glatter
Adam Michael Gogolak
Daniel Louis Goldberg
Kathryn Alice Goldberg
Jill I. Goldenziel
Jennifer Susan Goldfarb
Grace Carmela R. Gonzales
Gwen Jacklyn Goodman
Justin Goodyear
Denys V. Gorbatiuk
Michael Adam Gordon
Patrick John Gordon
Robert Wayne Gordon
Christopher Anthony Gorman
Iris Melissa Gotlieb
Freyda Hannah Gottesman
Ili Graeler
Michael Robert Graif
Amanda Lynn Granacher
Kurt Wilhelm Grasinger
Matthew Scott Gray
Debbie Elena Green
Susanna Beth Green
Kristy Jean Greenberg
Sean Patrick Greene
Mary Jeannette Grendell
Lisa Marie Griffith
Dana S. Gross
Robert M. Grossman
Natasha S. Guinan
Suzette Won Haas
David Hager
Istvan Andras Hajdu
Victoria Elizabeth Haje
Yonina Deborah Halpern Gomberg
Caroline Pineda Han
Benjamin Joseph Handler
Elaine F. Harwell
Ryan James Hayward
Laura Miriam Heller
Daniel E. Hemli
Althea Sujanti Hennedige
Peter William Hennessey
Willaim Francis Hennessey
Kent Patrick Herman
Christine Marie Hernandez
Peter Daniel Herold
Halie Elisa Herrick
Allison Joy Hersh
Eric B. Hiatt
Emily Gould Hirshbein
Younsook Hong
Andrew Peter Hughes
John Reid Hunter
Jiwon Jamie Hur
Jennifer Ann Hurley
Jinho Justin Im
Zachary Alexander Intrater
Masako Irie
Matthew Turner Jackson
Jonathan Edward Jacoby
Douglas Christopher James
Melissa Kimberly James
Vernon L. James
Christine T. Jarmer
Jared Gregg Jensen

Junine Kelly Johnson
Sloan Slavin Jones Johnston
Julie Cassidy Jones
Nadia Ramadan Jones
Kelly Lynn Jordan
Scott Harris Kaiser
David Alexander Kanarek
Grace Kang
Pia Kristina Kappy
Gina E. Kapustin
James Stuart Kasmarcik
Ramzi Kassem
Amy Lyn Katcherian
Jonathan M. Kawka
Bryan Harrington Kelly
Joshua Douglas Kelner
Dimitrios Kerameus
Christopher Daniel Kercher
Kenn Kern
Natalya Khavin
Han Nah Kim
Hyun Kyung Kim
Hyun Jung Kim
Jenny H. Kim
Nayoung Kim
Sung-kee Kim
Joyce Lan Kin
Patrick M. Klauss
Alexa Lauren Klein
Jeffrey Howard Klein
John C. Knapp
Stefan Knirr
Scott E. Kolassa
Milana Koptsiovsky
Darah Rachel Kornell
Amanda Robin Kosonen
Raunak Kothari
Michael John Kowal
Elina Kreditor
Meridith Bogart Krell
Jeremy Sergio Kroger
Donna Krouzman
Nadia Leah Kule
Jamie Catherine Kulovitz
Melissa Danielle Kurfist
Michael Jason Kurland
Vivien Maxine Labaton
Magdalena Lachowska
Maria Couri Lahood
Christian Guido Lang
Matthew Brady Larsen
Eric Laufgraben
Carol Kim Le
Eunice Lee
Eunjoo Lee
Heather Ball Lee
Jenny Lee
Jinyoung Lee
Jung-chull Lee
Karl Lee
Rose Jane Lee
Sandra Lee
Jonathan Falk Lenzner
Thomas J. Lepri
Jennifer Kim Lerner
Ian Lester
Cindy Michel Levine
Noah Adam Levine
Nicholas James Lewin
Dori A. Lewis
Wenying Li
Jeffrey Liao
Scott Stephen Licata
Martha Elizabeth Lieberman
Douglas Michael Lightman
Monica Leticia Lima
Alvin Min Che Lin
Ivy Lin
Joshua D. Lindy
Elicia Ingrid Ling
Mariya Link
Natasha M. Lipcan
Ira J. Lipton
Benjamin Pi-wei Liu
Meredith Grace Livoti
Barbara Ratchel Llanes
Terry-ann Nicole Llewellyn
Michelle Lo
James G. Loftus
Mindy M. Lok
Tara Ellen Lombardi
Azalia Lopez
Daniel Michael Loss
Patricia J. Lubey
Faye Lubinof
Megan Rehn Ludwig
Marc Menachem Luftglass
Jennie Lundman
Maura Lynch
Jing Ma
Yan Ma
Ivette Celina Maddi
Meredith I. Madon
Hali Rachel Magier
Megan Mahle
Amrita Maini
Meron Makonnen
Emily Alice Malone
Namita Elizabeth Mani
Jonathan Davis Marcus
Daniel Reuben Margolis
William Lawrence Marino
Rachel Tovah Marks
Natasha Dominique Marosi
Paul G. Marquez
Tara Elaine Martenson
Yanire Martes
Thomas L. Martin
Adriana Maria Martinez
Rodrigo Martinez
Peter Ryan Massa
Yohei Masuda
Michele Leigh Mathers
Jason Curry Matson
Guy Maurice
Yael Lerman Mazar
Stephen Mazzalonga
Alison R. McCabe
Ryan Patrick McCarthy
Shawn Marie McEnnis
Kristin Leigh McFetridge
Erica Lee McHale
Ella Kathleen McHugh
Shannon Suzanne McKinnon
Katherine S. McLung
Elizabeth Kiernan McManus
Maeve Teresa McVeigh
James Brian Meadows
James M. Meaney
Heather Tracy Mehler
Kristin Ann Meister
Linda Kelly Mejias
Amanda Wolikow Merkur
Mark A. Merriman
Allan Edward Mesia
Lucericia T. Messiah
Jeffrey Thomas Michalczak
Evan David Michalovsky
Angela Farida Migally
Catherine Dong Soon Miller
Daniel Eugene Miller
Svetlana Mirkis
Paul Steel Mishkin
Natalia Misic
Carrie Elizabeth Mitchell
Shams Sherali Mitha
Cara Susan Mittleman
Azeema T. Mohaideen
Mark Molle
Patrick Joseph Monaghan
Jonathan Wells Monson
Alma Rosa Montanez
Christina Santos Monteiro
Carlos Strickert Montoya
Veronica Ei Chun Moo
David C. Moody
Timothy James Mooney
Laura Amanda Moore
Samuel K. Moore
Nancy Morisseau
Elyse Nicole Mosquini
Justin Mulaire
Christopher John Mullane
David Richard Mulle
Deborah Murad
Mork Murdock
Alfredo Murga
Lisa Alexandra Murison
Kevin Shaw Murphy
Adam David Nadborny
Jennifer Linker Nadborny
Christopher Neil Nardozzi
Yuval Navot
Omeca Natasha Nedd
Edward Eliezer Neiger
Mark John Nemetz
Emel Nesli
Karen B. Newman
Leslie K. Nguyen
Peter Andreas Nielsen
Kirstein A. Noethen
Robin R. Nordblad
William Stephen Norton
Edward L. Nurick
Ilya Nuzov
Adam Nyhan
Dara Epstein Obbard
Kirsten Lyn O'Connell
Brendan Daniel O'Connor
Mary Ellen O'Connor
Ryan Matthew O'Connor
Sean M. O'Driscoll
Anne O'Grady
Michel Patrick O'Hara
Peter Louis Olasky
Noah Jeffrey Ornstein
Noelle M. Ortega
Hirotoshi Osajima
Gerard D. O'Shea
Erin Emi Oshiro
Kevin Otero
Heidi Padawer
Susan Sujin Paek
James S. Paglinawan
Kylie Sara Pak
Nicholas A. Palumbo
Alexandros Papanikolaou
Rachel Rose Paras
Niraj Jayant Parekh
Kathryn Ann Parente
Agnes Inki Park
June Hee Park
Michael Jared Parker
Mary Elizabeth Parr
Justin Decker Parsons
Bryce Allan Pashler
James Joseph Pastore
Catherine Maria Pastrikos
Priti N. Patel
Ruchir Vipin Patel
Rachana Pathak
Amy Topiel Paul
Larissa Ursula Payne
Randy S. Pearlman
Alison R. Pearsall
Julia Jordan Peck
Rachel Molly Peckerman
Daniel Seth Peretz
Michael Adin Perkins
Alexander F. Peter
Melissa Anne Peterson
Kevin Charles Petkos
Zachary Adam Phelps
Yona Philips
Anthony Jude Picchione
Michael Thomas Pieja
Edan E. Pinkas
Dawn Marie Pinkston
Antonia Margit Pisacane
Christian James Pistilli
Timothy Robert Pitrelli
Stephanie Uhlman Poliseno
Paul Matthew Polking
Sally Spencer Pritchard
Kevin Lee Prokup
James B. Radford
Michelle Petra Radhay
Olivia Anne Radin
Jennifer E. Radwan
Brynn Marie Rail
Erik P. Raines
Jana C. Ramsey
Jessica Lorraine Rando
Erin Marie Randolph-Williams
Craig Charles Rappaport
Greta Ravitsky
Danya Shocair Reda
Veronica L. Reed
Stacey Alison Reiser
Marny Anderson Requa
Brooke Julia Richie
Carrie Jane Rief
Kenneth Anthony Riitho
Liliana Ripandelli
Anthony Joseph Risalvato
Katherine Ann Ritchie
John J. Rizio-Hamilton
Frederic S. Rochat
Alberto Rodriguez
Lisa A. Rodriguez
Ashley Lynne Rogers
Stephanie Roman
John F. Romano
Charles Lee Rombeau
Joseph Donald Romulus
Adam Loren Rosen
Jeremy M. Rosen
Dana Eve Rosenbaum
Jessica Lynn Rosenblat
Allyson Beth Rothberg
Amy Rozenfeld
Thomas David Rozner
Sara S. Rubenstein
Jason Paul Rubin
Yulia Rubin
John Thomas Rudy
Travis Desmond Rundlet
Kristina Runje
Ashley E. Rupp
Lisa Russell
Christian Richard Sabella
David Jonathan Saenz
Claudia Jennifer Saffar
Shobhna Saini
Claudio Damian Salas-Aguilar
Ajay Salhotra
Timothy Michael Salmon
Keith Nolan Sambur
Farzad Brian Samimi

Joshua Brett Sandberg
Madiana Aminata Sanoh
Mario Santa Maria
Giannina Santo
Teresa Faye Santos
Aram A. Sarafian
Narisa Sasitorn
Audra Lyn Savage
Hassen Amir Sayeed
Peter Edmund Sayer
Ian Carleton Schaefer
Amanda Jill Schaffer
Andrew H. Schapiro
Charles A. Scheer
Gregory John Schelble
Lawrence M. Schimmel
David N. Schleicher
Kristen P. Schmidt
Scott Allen Schneider
Jaimee Beth Schwartz
Richard Daniel Schwartz
Jeffrey Ira Schwimmer
Jeffrey Henri Seiden
Ismail Sinan Sekendiz
Jessica Louise Selb
Joseph Augustino Sena
Guilaine D'amour Senecal
Ingrid Catherine Seradarian
Christopher J. Serotta
Briana Maria Serra
Maia Sevilla-Sharon
Maryanne Sexton
Sasha Shaneza Shana Shafeek
Michael Adam Shafir
Omar Ashraf Shakoor
Gregory Darren Shalette
Dmitriy Shamrakov
Eamon John Shanahan
Alissa N. Shapiro
Meredith L. Sheldon
Chunxiang Shen
Michael Patrick Sheridan
Haruka Shibuya
Alison Jaroch Shilling
Renee Marie Shprecher
Kelly Kirk Shryoc
Oren L. Sibony
Lowell Jay Sidney
Lauren Paige Sierchio
Mara Brooke Sierchio
Bianca Marie Sierra
Tracy M. Sigal
Lindsay Nichole Silber
Jeffrey David Silberman
Catherine Flores Silie
Jeanne Andrea Silz
Terryl Osbert Simeina
Jeremy Sirota
Lindsey Rudd Skibell
Jill M. Slansky
Erin Courtney Slitt
Jonathan B. Slonim
Anne Kimball Small
Brian Steven Smetana
Christopher George Smith
Julie I. Smith
Gareth David Smyth
Graeme Paul Smyth
Gwen Elizabeth Snorteland
David Thomas Sobol
Matthew D. Sobolewski
Susie C. Sohn
Andrew Solodar
Richard Soto
Jennifer Elizabeth Spain
Michael A. Spector
Nell Aileen Spekman
Vanessa Marie Spencer
Craig M. Spierer
Christopher Grannis Spitler
Seth Eliot Spitzer
Andrew M. Sreniawski
Timothy James Staines
Amy Stasik
Steven N. Stefanucci
Cara G. Sterman
Rachel Victoria Stevens
Tamara Lee Stevenson
A Brendan Stewart
Kristin R. Stohner
Thomas Sun
Stefanie Jill Sundel
Emily Nicole Tabak
Christopher John Tan
Shirin Li-wen Tang
Sujata Menjoge Tanikella
Stanley Byron Tarr
Daniel Phillip Taub
Phoebe Ellen Taubman
Gerald Lester Taylor
Janet Metzger Taylor
Chelsea Willow Teachout
Jason M. Teich
John Joseph Tepedino
Christine Marie Terlep
Renato Pietro Termale
Daniel Ben Thacker
Cedrik L. Thiele
Emily J. Thompson
Leah Ruth Threatte
Lisa Marie Timmes
Richard C. Tisdale
Gwendolyn M. Toczko
Anthony Albert Tortora
Eric L. Trachtenberg
Amelie P. Trahant
James Trainor
Joseph William Trank
Joseph William Treloar
Pamela Nicole Troy
Rebecca Lucy Tsai
Travis J. Tu
Justin Turkat
Cedric J. Van Den Borren
Carl Van Der Zandt
Mark Alan Vandehaar
Stephen Gerald Vander Stoep
Liat Varozlavsky
Jeffrey T. Veber
Daniel John Venditti
John Gibson Verkjil
Don Steven Vermut
Victoria Vron
Michelle K. Waller
Erik C. Walsh
Phillip H. Wang
William Wang
Renee Ilana Wankoff
Joshua Louis Warren
Brooke Heather Wasserman
Seth B. Waxman
Jennifer Lee Weiers
Jonathan David Weiner
Katherine Broussard Weir
Adam David Weiss
Brian Scott Weiss
Jessica Lauren Weltman
Kenneth E. Werner
William Cabell Westbrook
Kimberly Erin White
Janet Mary Whittaker
Courtney Johanna Williams
Sani A. Williams
Jason Harold Wilson
Rachel E. Winard
Thaddeus Paul Wojcik
Benjamin Jarret Wolf
Kathleen Wong
Andrea Conarro Woody
Nick Mitar Wooldridge
Han-wen Annie Wu
Zachary Weijia Xu
Michael L. Yang
Yinghao Howard Yang
Su Ming Yeh
Michelle C. Yip
Janice Yoon
Nathalia Young
Reuven Benjamin Young
Earnest Dohn Leabres Yu
Daniel Kenneth Zach
Jennifer Marie Zanko
Joseph D. Zavaglia
Benjamin Alexander Zeliger
Qi Zhong
Adam Da-Hsin Zia

SECOND DISTRICT
Simon Olatunde Ajose
Ariel A. Alarcon
Patrick S. Almonrode
Jaclyn Amsel
Ralph John Andrews
Nicholas Gabriel Arons
Matthew Todd Baskir
Laurice Zaki Bekheet Arroyo
Lara T. Bianchi
Anne Marie Broomfield
Lisa Marie Browne
Richard W. Bryan
Thomas Anthony Bucaro
Elizabeth A. Carini
Jordan Ryan Carpenter
Joel Cohen
Bernadette Yuan Connor
Brett Dakin
Dennis D. De Sousa
Marla Joi Di Resta
Paul Aaron Donowitz
Robert Ernest Olivier Dupont
Myra Elgabry
Jasmin J. Farhangian
Debra Ficarra
Valerie Erica Fletcher
Siobhan Cameron Garde
Lorraine Antonina Graffagnino
Jaclyn S. Granet
Tanja Grzeskowitz
Arzu Gurcan
Nicholas Seth Hanlon
Joshua Michael Hazard
Francis Xavier Heller
Simcha Herzog
Beth Ann Hurley
Michelle Maria Imbasciani
Marissa T. Jones
Ameet Balvant Kabrawala
Jason Matthew Kenner
Matthew Frederick Knouff
Albert Lee
Autumn Levine
Menachem Levoritz
Jacqueline Tamara Lopardo
Scott Alan Lustig
Sabeeha Imtiaz Madni
Melissa Ann Magliana
Jean Marie Martin
Michael Anthony Martone
Nicholas Melissinos
Philip B. Melnick
Carrie S. Miller
Erin Michelle O'Connor
Sarah Elizabeth O'Connor
Survi Parvatiyar
Anna Pervukhin
Adam Philip Pravda
Tara Lai Quinlan
Susan Quirk
Brian Rafferty
John Patrick Relihan
Won K. Rha
Nadya Esther Rosen
Melissa Sager
Joseph Salvo
Emily Erin Sandie
Laura Patricia Sette
Shannon June Stallings
Jerrold Louis Steigman
Elizabeth Mary Stellato
Sylvie Straus-Figueroa
Deena Abel Subar
Timothy Davis Syrett
Thomas Matthew Tillona
Elena A. Tisnovsky
Van Boyd Tracy
Jill Van Berg
Alexander Jacob Vanderweide
Zena Woldeyesus
Carl E. Zapffe
Carl A. Zetterstrom

THIRD DISTRICT
Robyn Adair
Joseph R. Alund
Bernadette M. Berardi
Andre Ashley Craig
Michael Dolich
Matthew T. Dunn
Gina Fiss
Charles A. Flint
Gustaf Gillberg
Michael D. Haith
Cynthia L. Hendricks
Stehle Hetman
Steven J. Huntzinger
Chirag B. Kabrawala
William A. Lawrence
Katherine Alyce McGuirl
Kelly Michael Monroe
Randal S. Putnam
Brian Quinn
George A. Schindler
Jamie N. Veley
Melissa Lynn Wilkie
Eddie L. Williams
Richard C. Williams

FOURTH DISTRICT
Michael Ronald Bergman
Heather L. Buanno
Patrick J. Campion
Louise P. Durante
Elizabeth Lisa Fairbanks-Fletcher
Daniel S. Glaser
Daniel F. Lieber
Andrew Marciniszyn
Barbara McRedmond
Christina Nolan
James D. Pasquale
Alla Reyfman
Jonathan G. Schopf
Thomas N. Steenburg
Thomas D. Titsworth
Shanon Dugan Vollmer

FIFTH DISTRICT
Devinn Nicole Barnette
Jennifer A. Dougherty
Rebecca Marie Kysar
Yoon Suh Lee
Mauricio R. Lopez
Keli A. Perrin
Edward Beacham Perry
Scott R. Phillipson
Lisa M. Robinson
Timothy Aloysius Roulan
Maryangela Scalzo
Patrick F. Scully
Bnai R. Silverbush
Kelann Brook Stirling

SIXTH DISTRICT
Thomas M. Bowes
Richard James Brink
Stephen K. Cornwell
Sara Seryung Kim
Michael John Neugebauer

SEVENTH DISTRICT
Yolanda Afua Asamoah-Wade
Dominick D. Barbieri
Christopher Bokelman
Janet Walters Cleary
Scott Michael Crane
Sean Michael Crowley
Andrew F. Emborsky
Jane Marie Gabriele
Danielle Rae Guistina
Andrew Martin Iserson
Shelley Alyse Jones
Kevin Thomas Kelly
Victoria L. King
Aaron O. Lavine
Jennifer Elizabeth Moffett
Jeffery Ray Morrow
Christa L. Muratore
Amy L. Reichhart
Antoun James Sakr
Mauri Aven Sankus
Beth A. Schonmuller
Audrey Michele Simon
Stephen P. Tarolli
Bronwen Elizabeth Van Hooft
Shihching Chu Wagner

EIGHTH DISTRICT
Bryan Wallace Brooks
Jason J. Cafarella
Jeremy A. Colby
Kimberly Suzanne Conidi
Michael B. Engdahl
Janine Crawley Fodor
Daniel Charles Gard
Ryan Patrick Hanna
Gregory A. Heeb
Lori Ann Hoffman
Ashley Wales Johnson
Carolyn Elizabeth Leed
Royston Mendonza
Nicholas Lawrence Mineo
James Robert Newton
Michael S.L. Roberts
John Matthew Sanchez
David Scott Sarkovics
Holly L. Webb
Blake Thomas Webber

NINTH DISTRICT
Gregory J. Auerbach
Rachelle M. Barjon
Wanda Yvette Blackwell
James A. Borer
Thomas Michael Bower
Dale Robert Brickwood
Lauren Elizabeth Brown
KC Caraballo
J. Patrick Carley
Cynthia Carlson
Audra Jean Cox
Jason Colin Cyrulnik
Jill Eileen Daly
Meredith Denecke
Elizabeth Uchenna Ezeoke
Linda Fakhoury
Adam Paul Fleischer
Lisa Nina Goodrich
Jason W. Holtz
Manjit Kaur Kalirao
Melissa Sia Kho
Jennifer Lynn Lucato
Glenn W. Magnell
Kevin F. Meade
Gary Arthur Munneke
Gregory M. Prindle
Marc William Rapuano
Jared Roger Rice
Lisa Rivera
Cecilia Rodriguez
Emilio Rodriguez
Alexander Bogutski Rosen
Reginald Eugene Rouzard
Christine Marie Sarro
Sarah Marilyn Schechter
Robert Brian Seibert
Michele L. Starr
Anthony E. Stiffler
Stephanie Robin Trager
Joseph Owen Tuffy
Soulafreda Valassis
Daniel Robert Walfish
Richard Edmond Weill
David Warner Woodworth

TENTH DISTRICT
Liliya Abramchayeva
Letal Algazy
Ann Marie Alves
Harry C. Anagnostopoulos
Alison Ross Andersen
Brooke L. Anthony
Samantha Lynn Banilower
Richard E. Barber
Ian Patrick Barry
John Bekian
Dalia Benelyahoo
Stephanie Faith Berman
Ilana A. Bernfeld
Angelo Mario Bianco
Dana Redway Boylan
Evan J. Camhi
Patrick E. Caraher
Maren Paige Cardillo
Muhammad Omar Qayyum Chaudhry
Sonya Jean Choung
Sean Michael Cronin
Georgia Damoulakis
Susan J. Deith
Martha Marlene Donovan
Cynthia Beth Endes
Ralph Joseph Esposito
Charo Ezdrin
Alia Fisco
Ian Thomas Fitzgerald
Steven Eric Frankel
David A. Gierasch
Adam Lee Glaser
David M. Gottlieb
Heather L. Graziano
Lauren Cecily Hancock
Jessica A. Heegan
Rodolfo Aunario Ilano
Devora Jenkins
John Andrew Kay
Lisa J. Kelty
Stephen Francis Kiely
Kelly E. Kinirons
Theresa Ann Kraker
David Kuehn
Daniel P. Lambert
Edward Charles Lannan
Debra Beth Lefing
David G. Luty
Jay Massaro
Danielle Mastriano
Victor L. Matthews
Christine Marie McInerney
Courtney Ann Michalske
Daniel Patrick Miklos
Adam Mottola
Jean E. Mulligan
Heather R. Nicoletti
Maeghan H. O'Keefe
Glenn Adam Opell
Franklin Rafael Pena
Lisa Angela Perillo
Syed F. Qamer
Tahirah Kalik Rankins
Sean Patrick Joseph Riordan
Michael Evan Ritchkin
Craig Edward Rosasco
Michael Carl-jude Rosenberger
Robert Seth Sachs
Rasleen K. Sahni
Brooke Alyse Schneider
Shahriar Sedgh
Abraham Elan Sharabi
Ivy Hsiang-ling Shen
Estee Forspan Shor
Narendra V. Singh
Stephen Stavola
Eyal Talassazan
Christopher A. Thompson
Alison M. Trainor
Meghan Ann Veitch
Stephanie Visconti
Robert S. Wolf
Natasha Makeba Wollaston

ELEVENTH DISTRICT
Christian Ucheson Aguocha
Brian Francis Allen
Eleni Zoe Angelopoulos
Enrique Francisco Augspach
Ilona Babinsky
Christina Agnes Bisset
Kimara Geralda Bonhomme
Christine Brennan
Djordje Caran
Andrea Anne Carlino
Alcides Alberto Casares
Gordon Patrick Chang
Randy Chang
Fred Sunghoon Chee
Cheryl R. Cillo
Carla Michelle Comisso
Jennifer Elias
David Florence
Nelly C. Grabovich
Lisa A. Gray
Vijay Kumar Gupta
Michael Matt Han
Mark Harris
Danielle L. Hartman
Khaleel N. Ismail
Joseph Kubler
Harris Liolis
Chungkon Liu
Christine Marie Maloney
Kathleen Marie Maloney
Lisa J. Masone
Julia Medynskaya
Erin Christine Ming
Alexandra Mishail
Jessica Molinares
Michael Patrick Mullahy
Jeffrey Pascale
Jennifer A. Pax
Rose M. Poggi
David Christopher Rimas
Shane Omar Rios
Timothy M. Rosen
Angela Marie Russo
Elizabeth Samson
Dennis Zachary Schwartz
Sarah Scofield
Sejal Shah
Melanie Dawn Shapiro
Nicole Diane Sharples
Steven Simicich
Matthew C. Simon
Zhejun Tan
Shichun Tang
Hyesun Ue
Sophia E. Valiotis
Nadi Ganesan Viswanathan
Nanine Jerelyn Wainwright
Ryan Wente Wang
Paul Sung Hun Yang
Jingmei Zeng
Min Zu

TWELFTH DISTRICT
Tatia Djuana Barnes
Merav Biton
Gloria Michele Bruzzano
Niya S. Bryant
Roberto H. Chavez
John J. Choe
Hasani Ayodele Stephen Claxton
Gerald John Doherty
Katherine Lida Doyle
Wenmin Du
Geovanny Fernandez
Shira Jyll Frackt
Martin Conway Galvin
Jeffrey Hunter Gamils
Tonya N. Green
Heather A. Hatcher
James Hinkle
Duane W. Johnson
Jacob Kaplan
Dawn Veronica Lake
Chani Katzen Laufer
Ryan William Lawler
Victor Li
Caroline Veronica Maher
Robert J. Marel
Lynnanne Chan Maurrasse
Dorothy Kelly McDonald
Eugene P. McGloin
Louis Newton Mendys
Liezl Irene Que Pangilinan
Darrol M. Pattillo
Laura Lynne Pitter
Hilary Sue Poris
Bethany Suzanne Pray
Trevor John Saccente
Mariam A. Sanni

Eylan Schulman
Crystal S. A. Scott
Stephanie Marie Sneed
Martha Juliette Vasquez
Ana Maria Vizzo
Omer Wiczyk
Janelle Lynn Winston
Misty Leann Wyatt

OUT OF STATE
Pierre Abinakle
Sandra Adams
Femi A. Aderohunmu-Adeniyi
Robert Jacob Adler
Cathal Ahern
Rana Sajjad Ahmad
Muna Nathalia Al-dilaimi
Rodney John Alberto
Lara-Anne Allem-Romanello
Nicole S. Allen
Jose R. Almonte
Robert Valpey Alvarado
Karni Amit
Ijeoma Oluchi Amobi
Randall K. Anderson
Scott Christian Anderson
Cariica Andrea
Gabor Antal
Irfana Anwer
Carol Lim Yee Leng Apel
Joseph Owen Armstrong
Eri Asano
Kimberly Baker
Christine Michelle Ballantyne
Chen Bao
Ori Bar-am
Elizabeth Ann Barrow
Jessie Christine Basner
Nicholas Jorg Baumgartner
Sarah Hawa Bawayn
Ashley Baynham
Keith A. Becker
Lazlo Beh
Brian Gabriel Benhamou
Valerie Bennett
Ryan Thomas Bergsieker
Daniel Berhane
Susan Jane Berkowitz
Guy F. Birkenmeier
Gael Bizel-Bizellot
Nigel Edwin Blackman
Adam Blank
David Bloch
Martin Blumann
Rajesh Kumar Bobal
Carolina Boechal-Lopes
Hugo K. Bonar
Tina Fernandes Botts
Joseph William Bowley
Jossy Ho Bragassam
Sarah Brandoff
James R. Brockway
Meredith Barri Brodsky
Mark R. Brown
Courtney Allison Bryan
Frank Turner Buford
Carla Burke
Anissa Burnley
Richard Allen Burns
Procop Buruiana
Niamh Patricia Butler
Salvatore Gerard Caldarise
Luis Fernando Calderon
Lawrence Anthony Calli
Kelly R. Camamis
Meredith Ann Campanale
Andrea Carska
Michael T. Carton
Barbara A. Casey
Susan June Campbell Caudell
Mana M. Celis
Maria Mayela Celis
Cindy S. Chae
Annoushka Josette Grace Chaillet
Hsiao-yang Chang
Serk Ha Chang
Jaime L. Chase
Gisela Chavez-Garcia
Michael James Chelland
Chao-ching Chen
Chasching Chen
I-Chieh Chen
Jie Chen
Ya-ping Chen
Diego Agustin Chighizola
Medea Barbara Chillemi
Rozain C. Chitty
Erin Rebecca Chlopak
Young Sun Cho
John T. Chung
Ting Lu John Chung
Christopher Allen Clausen
Heather Clements
Sara Beth Clevering
Conor Clyne
Darren Cohen
John Robert Cohn
Ramon Concha
Courtney Connell
Jason Conway
Randall Hastings Cook
Anthony Joseph Corino
Natalie Ann Corrigan
Amy D. Criscuolo
Fionnuala Croker
Matthew Jeffrey Cumming
Sinead Frances Cunningham
John Czajka
Amy Beth Dambeck
Jana K. Dammann
Scott Danaher
Jobe Galope Danganan
Samuel Louis David
Jaime Michele Davids
Townsend Davis
Daniel Steel Deller
Marit A. Delozier
Mike DeLuca
Eloitt Deur
Daniel P. Dillon
Nicholas G. Dimaio
Anthony D'Imperio
Yiraldi Dirocie
Robert W. Diubaldo
Stephen M. Dolben
Andrew Erskine Downes
Florence Dubosc
Anne Sophie Dufetre
Alan Duffy
Brian P. Duffy
Patricia Anne Dugan
Jamie N. Duong
Travis Eagan
T'shura Ann Elias
Hannah Franklyn Entwisle
Jeremy C.R. Entwisle
Liu Fang
Aaron Farkas
John A. Farmer
Jay L. Farrow
Michael Fastert
David T. Fasunloye
Sara Faulman
Olivier R. Favre
Barbacar Sedikh Faye
Olutobi D. Fayemiwo
Solomon S. Fenjiro
Karen Fenyus
Jennifer Mary Dunbar Ferns
Pablo Cesar Ferrante
Allison N. Fihma
Holly Elizabeth Files
Eve Lynne Filip
Erin M. Fishman
Eric Fleisig-Greene
Sarah Fleming
Jonathan Todd Flynn
Francine O'Neill Forster
Sabrina Renee Fox
Branden Francavillo
Unni Fredheim
Yuji Fujita
Hongjie Gao
Shan Gao
Andrea M. Garcia
Carla Natalia Gargiulo
Melanie Jane Gargliardo
Jefferson Stewart Garn
Lucia B. Garrett
Charles Travers Garvin
Travers Garvin
Jason Christopher Gavejian
Sanj Gayle
Divya Anna George
Erin Heather Gerstenzang
Diba Debbie Ghamkhar
Diba Ghamkhar-Nassiri
Kathleen Giles
Jennifer Lauren Giliberti
Rebecca Susan Giltner
Adrien Gingles
Nathaniel Michael Glasser
Kathleen Glis
Kevin M. Glynn
James David Golkow
Jennifer Layne Gonzalez
Julian Jose Gonzalez
Marlene Gonzalez
Megan Sloane Gordon
Megan Gorman
Sanjoy Kumar Goyle
Joshua E. Gradinger
Julie Ann Graves
Justin Adam Greenblum
Michael J. Grohs
Guillaume L. Groisard
Melanie K. Gross
Stacey A. Guthartz-Cohen
Myriah Aleah Habeeb
Esther Hagege
Mary J. Hahn
Mark Phillip Hale
Thomas Manlio Hall
Laura Rosen Hallett
Stephanie Hallouet
Adam F. Halper
Mary Kate Halpin
Jain Hang
Shinichiro Hara
Irina Haracoglou
Kaoru Harada
Dorothy Harbeck
Erika Harriford-McLaren
Joshua Harvey
Keiji Hattori
Jessica Ruth Hauser
Frederick John Hawkins
Hiroki Hayabuchi
Jie He
Morgan Heavener
Kristina C. Heese
Verena Hellweg
Vincent Paul Herman
Daniel R. Herr
Katherine Hersh
Sabine J. Hertveldt
Tracey C. Hinson
Georg Friedrich Hirsch
Steve G. Hockaday
Jason Douglas Hoge
Kristina Ann Hokenberg
Katherine Anne Holbrook
Sangseok Hong
Seung-in Hong
Seung-jin Hong
Akio Hoshi
Timothy Turner Howard
Yu-chieh Hsiao
Hong Hu
Ying H. Huang
Hayes Andrew Hunt
Elizabeth Husa
Jordi H. Hutchinson
Phillip Hwee
Christopher B. Hynes
Takeo Iijima
Muhammas Ikhlas
Takeshi Isokawa
Kenneth Wayne Jackman
Ryan Steven James
Debbie Jerome
Ming Ji
Ruth Jin
C. Johnson
Stephen Ashley Johnson
Alyson R. Jones
Christina Elizabeth Jones-Rowe
Kangwon Joo
Eun Young Jung
Saima R. Kahn
Daniel Robert Kalderimis
Abdulla Morgan Kamber
Shi Kang
Anne Kanyusik
Smit Kapadia
Tina R. Karkera
Jennifer Katz
Robert Jonathan Kaufman
Min Ke
Lindsey Kevn
Ashutosh Khaitan
Karen Khan
Danbee Kim
Dohoom Kim
Jongahn Kim
Joohee Kim
Justina Kingen
Jenna Lauter Klatell
Katherine G. Klaus
Blake Austin Klein
Catherine Mary Klein
Jason Edward Klurfeld
Danny Knight
Oxana Igorevna Kompaniyets
Margaret Korgul
Michael Korik
Charlene Kow
Jacqueline E. Kozary-Scott
Maria Kraybill
David Krell
Mahir Kucukalic
Pui-Yan Kwok
Hyuk J. Kwon
Tiffany Amanda Lacker
Arran Lal
Todd C. Landis
Raphaela Ute Lange
Gillian Mary Langman

Gina M. LaPlaca
Leah Lederberger
Byung Mun Lee
Corey Lee
Jae Soog Lee
JiYoung Lee
Jonathan Hyui Lee
Jong Ho Lee
Kangseop Lee
Li-Pu Lee
Soh Hyoun Lee
Somee Lee
Soo-Hyung Lee
Tae Ho Lee
Francesca Lefante
Rudolph Francis Lehrer
Jeffrey Alan Letalien
Anne LeVassuer
Matthew Strahl Levine
Sigal Lewkowicz
Ying Li
Marmaduke R. Ligon
Seoung Young Lim
Abbey Jane Lisbon
Silvia Xiao Wei Liu
Charlotta Ljungdahl
Wen-mei Lo
Scott A. London
Nicole Laura Lorenz
Tara Lynne Lotito
Michael Kah Heng Lum
Julie Judith Lurman
Dana Luther-Lambert
Elizabeth Jean Mackay
Iain Macsween
Damien P. Magee
Sina Maghsoudi
Norah Mallam
Tahmineh Irene Maloney
Maria Antonietta Mameli
Charysmel Farah Manasra
Adam D. Mandell
Yehuda I. Manor
Brian Christopher Martel
Nathaniel Lord Martin
Danielle Maschuci
Keith S. Massey
Adam Mauntah
William John McCallig
Daniel J. McCarey
Jared Dylan McCutchen
Donal McElwee
Lorna Corrie Howe McGregor
Peter McKenzie
Brian Christopher McPeake
C. McPherson
Caroline Daniel McWhorter
Dorothy D. Mehta
Amy Jill Metzger
Robert Migliorini
Marissa Miraldi
Deborah Misir
Mark N. Mogavero
Adrian Taylor Montgomery
Michelle Lynn Montoro
Anna Morawiec Mansfield
Noel Peter Mpada
Nora Newton Muller
Stephen P. Murray
Jeffrey Lee Murrell
Sharmila Leela Murthy
Vanessa C. Nagpal
Saiko Nakajima
Kenneth S. Nankin
Michael Patrick Nanne
Amanda Lynn Nelson
Kristen R. Nelson
Marcia Nelson
Jihui Ni
Palle Steinicke Nielsen
Kengo Nishigaki
Ernest Nnebe
Gabriel S. Oberfield
Cliodhna Maria O'Callaghan
Danielle O'Connell
Josephine Evbaruese Okunseri-Omobude
Tara Ollapally
Steve Omer
Francine Oneill Forster
Rita-Anne O'Neill
Olumuyiwa Adedoyin Oremosu
Alison O'Shea
Katherine G. Ovalle
Ellison K. Owusu-Fordwoutt
Claudia Teresa Parga Vazquez
Ji-Young Park
Isabel Jane Parker
Effie A. Patrick
Adam David Peacock
Carlos Rafael Pellecer Lopez
Jennifer M. Pendleton
Matthew Daniel Peterdy
Chris Phillips
Fulvio A. Picerno
Erin Kimberly Pitts
Claire L. Pizzarello
Kelly-Ann Pokrywa
Meri S. Ponist
Erin Elaine Powers
Michael Proto
Naveed A. Quraishi
Jessica L. Radke
Derek Dahlgren Reed
Danhoe Reedy-Girard
Harry M. Reichenberg
Arvidas Jonas Remeza
Lina Reyes
Jason E. Rheistein
Brian Patrick Rice
Shirley C.S. Rivadeneira
Keren Zipora Rivlin
Yvonne Marie Rizzo De Laguna
Kirsten Valerie Kucharik Robbins
Janet H. Roh
Kim Rosen
Kira Samuelle Rosen
Marcy Lauren Rosen
Nick Rosenberg
Alissa Rossman
Jan Elis Rozemeijer
Joseph John Russell
Lauren Clare Russell
Alissa Ryder
Kathleen M. Ryder
Eric Ryu
Yosuke Saitoh
Paul Salazar
Christina Salib
Cynthia Kellie Sargeant
Keita Sasaki
Matthew Richard Savare
William G. Schimmel
Joanne Rian Schleifman
Tobie Lozman Schlosstein
Luzius O. Schmid
Claudia Schubert
Friedrich Bela Schulte-Hillen
Andrew A. Seewald
Naomi Kate Seiler
Michael S. Selyem
Theary Chan Seng
Amanda Elizabeth Shafer
Miki Michael Shapira
Andrew Brendan Shea
Lorne Brahm Sheren
Shengming Shi
Sakura Shibata
Naoki Shibuya
Yoichi Shio
Maria I. Simmerman
Emily Mancina Simon
Karen C. Sinai
Anika Singh
Aaron Siri
Christine M. Siscaretti
Patricia Skuster
Jonathan Marc Slawsby
Bruce Douglas Smith
Shannon Kimberly Smith
Scott Michael Solkoff
Jamie Song
Samuel Spital
Amanda Bradshaw Steck
Adam T. Stofsky
Kosta Stanko Stojilkovic
Jennifer K. Stone
Lory C. Stone
Aaron Stonecash
Megan Jordan Strickland
Stephanie Stubbe
Stacy-Ann Elizabeth Suckoo
Sang Myun Suh
Nigar Suleman
Bernard Eelco Szabo
Satoshi Takagi
Tomoko Takezawa
Tzong-jyh Tarn
Joel Monroe Taylor
Lucai Terrazzer
Ros Mac Thoim
Dorothy E. Thornton
Asia Monique Timmons
Heather S. Timmons
John B. Treder
John Elliot Trinidad
Rachel Trirp
Shlomo Benjamin Troodler
Margaret Tsai
Po-keng Tsai
Koji Tsurumi
Sandhya Tulshyan
Martina Tusek
Zagar F. Vakhidov
Nicole Valenta
Michele Marie Vercoski
Renee Marie Von Elten
Adam Q. Voyles
Lori Anne Wagner
Manar Waheed
Corinne Lea Wainwright
Barbara Wally
Allison Christine Walsh
Suzanne Marie Walsh
Bangmin Wang
Hui-Ju Wang
Na Wang
Sarah Elizabeth Warlick
Yumiko Watanabe
Gregory Chales Watt
Eric Jason Weiner
Jo Florence Weingarten
John Frederick Weingold
Jennifer L. Westbrook
Jennifer Robin White
Charles David Wien
Peter Damian Wimmer
Roland Conrad Witzel
Robert M. Wolf
Janice Wu
Yu-chieh Wu
Geoffrey McIntyre Wyatt
Haifeng Xue
Li Xue
Jin Mo Yang
Jingyi Yang
Xueyu Yang
Hiroyuki Yasuda
Wendy Yeo
Erick C. Yin
Shouhau Yu
Mark David Yudell
Erica Lynn Zahornasky
Milosz Zemanek
Zheng Zha
Weihily Zhou
Taryn R. Zimmerman
Shaul Zioni

In Memorium

Loren C. Berry
Hilton Head Island, SC

Morris Bogash
New Rochelle, NY

Bryan Cullen
Albany, NY

Jerrold T. Doros
Atlanta, GA

Elizabeth S. Ellard
Cambridge, NY

Irvin B. Green
New York, NY

Norman Jay Itzkoff
Riverdale, NY

Vincent T. O'Donnell
Gouverneur, NY

Elizabeth Kasulis Padilla
Brooklyn, NY

Alfred L. Shiels
Yonkers, NY

— a problem because presentation counts for so much in legal writing. In WordPerfect, users can fix formatting issues like spacing and margin errors by using the "Reveal Codes" option. Press Alt + F3 and edit the document through the codes shown in a separate window at the bottom of the screen. Word doesn't have a code function that allows its users to edit every aspect of a document. But in Word 2002, the user can control formatting by using the "Reveal Formatting" function from the drop-down menu.

Both dyslexia and dysgraphia can profoundly impair a lawyer's writing. Dyslexics are unable to read and edit accurately what's been written. Dysgraphics have poor motor and organizational skills. Because the LD often suffer from more than one disorder, with each LD having a unique combination of symptoms, the rest of this column will use the all-inclusive "LD" to refer to the effects that dyslexia and dysgraphia have on legal writing.

LD and Legal Writing

Writing is the most difficult activity the LD can perform. Practicing law revolves around documents. Writing letters, contracts, briefs, memorandums, motions, orders, and stipulations are daily rituals for lawyers. To the LD, writing is a slow, tedious struggle. But LD's effects can be mitigated.

A learning disability in writing affects four main areas: spelling, punctuation, sequencing ideas, and handwriting.[14] Spelling is affected because the LD often can't distinguish between sound and meaning. Some words are spelled correctly phonetically; others are difficult to spell from their letters' sounds. For example, the LD might spell "any," "said," and "because" like "eny," "sed," and "becos."[15] To cope with impaired spelling, LD lawyers should:

- Create mnemonic devices to remember how to spell tricky words — like mnemonic;[16]
- Continuously practice reading and seeing words; and
- Use word-processing software to draft their documents and spell check every time they exit a file.

> For the learning disabled lawyer, the key to writing well isn't to work harder, faster, longer. It's to develop efficient strategies to compensate.

LD writers can forget to capitalize a sentence's first word or use periods. Basic grammatical errors can make the LD lawyer's writing difficult to read. To remedy punctuation problems and to make the LD aware of grammar's importance, the LD lawyer should:

- Practice correcting sentences written without capital letters or punctuation;
- Write out sentences someone reads to them and edit those sentences;
- Read sentences aloud to understand where punctuation should be;
- Use the grammar check on WordPerfect or Word.

LD writers can have difficulty memorizing the sequence of movements that make up writing each letter. It's hard for them to remember how to write some round letters. (That's why some believe that LD is backward writing rather than a complex cognitive disorder.) The LD can get confused between a "b" and "d" or a "p" and "q." The best way to combat this confusion is to write in cursive or to use a word processor.

Critical for lawyers is the ability to tell a coherent story. LD writers can find it difficult to sequence ideas or tell a story in the correct order. To improve their ability to write logically, LD lawyers should:

- Outline before beginning any significant piece of writing;
- Write a paragraph for each major point and review it before finishing a first draft;
- Organize facts chronologically;
- Organize a legal argument by issue; within each issue, in the following order, start with your point, provide the legal rules, apply law to fact, rebut the other side's law and fact, and state the relief requested;
- Introduce something before explaining it;
- Watch out for undefined acronyms;
- Discuss things once, all in one place; and
- Organize the document's parts into increasingly smaller units using thesis paragraphs, topic sentences, and thesis sentences.

To improve their writing abilities in general, LD lawyers should also:

- Start early;
- Find a mentor to edit and teach writing and citing;
- Edit and re-edit, producing several drafts;
- When editing, check off corrections to avoid missing them;
- Read the final draft aloud forward and backward a few times;
- Edit on a hard copy rather than on the computer screen.
- Manage time carefully — leaving enough time to edit repeatedly; and
- Keep their workspace organized and uncluttered.

Reasonable Accommodations

Under the Americans with Disabilities Act (ADA) of 1990 and the Individuals with Disabilities Education Act (IDEA) of 1997, those with special needs must be placed on equal footing with those without disabilities.

The road to becoming a lawyer is grueling for all, and especially for the LD. A person must first conquer the law school admission test (LSAT), law-school exams, the Multistate Professional Responsibility Exam (MPRE), and the bar exam. These difficult tasks require students to analyze complex

facts in light of applicable law. Under the ADA, LDs are entitled to a reasonable accommodation during these exams if their major life activities of reading and writing are substantially limited.[17] Accommodations for LD students include:

- Extra time for exams;
- Large-print exams;
- A separate testing room;
- Administering oral rather than written exams;
- Allowing oral answers rather than requiring written ones;
- Giving the student a reader; and
- Letting the LD student use a word processor.[18]

Once out of law school and admitted to the bar, practicing lawyers receive no accommodations from clients or courts. The practice of law is unforgiving. Thus, LD lawyers must get professional treatment or develop coping strategies.

Coping Strategies from Successful LD Lawyers

LD lawyers can do extremely well, despite the myths and false assumptions they encounter. New York's David Boies is a successful litigator who has written a well-received memoir, *Courting Justice* (2004). Boies, a dyslexic, has coped by abandoning the written word. As Boies has said, "I trained myself to listen well."[19] His strategy is to argue without notes. That means he'll know his case cold because he memorizes details. Not using notes also lets him maintain eye-contact with his listeners.

The late Jeffrey Gallett often spoke about his profound LD. Required inspirational reading is his *The Judge Who Could Not Tell His Right From His Left and Other Tales of Learning Disabilities*.[20] By the time he was 46 years old, he was a New York City Family Court judge who had written five books, 40 articles, and over 30 published opinions. At 50, he was a Bankruptcy Judge for the Southern District of New York. Yet when he was 34, Judge Gallett discovered that he was dyslexic, dysgraphic, and discalculaic.[21] He was, he said, "a kind of talking frog — a learning disabled judge."[22]

By the time Judge Gallet was diagnosed, he had learned strategies to mitigate his LD. He used word processors, dictaphones, and computers instead of hand-writing documents.[23] Instead of doing math in his head, Judge Gallet used a calculator. His only concession was that he wouldn't see subtitled movies.[24]

An LD is a gift.[25] For the LD lawyer, the key to writing well isn't to work harder, faster, longer. It's to develop efficient strategies to compensate. With perseverance, determination, and a good attitude, the LD can become prolific, adept writers. ■

1. Unmesh Kher, *Deconstructing Dyslexia*, Time, Mar. 26, 2001, at 56, 56.

2. *LD Myths*, County College of Morris, *at* http://www.ccm.edu/horizons/LDmyth.html (visited May 5, 2005).

3. *LD at a Glance*, Nat'l Ctr. for Learning Disabilities, *at* http://www.ncld.org/LDInfoZone/InfoZone_FactSheet_LD.cfm (visited May 5, 2005).

4. *Id.*

5. *Genetic Cause of Dyslexia*, Med. Research News, *at* http://www.newsmedical.net/?id=8147 (Mar. 3, 2005).

6. ADHD, formerly called ADD, is characterized by difficulties focusing and controlling impulses and affects about two million American children. Nat'l Inst. of Mental Health, *at* http://www.nimh.nih.gov /publicat/adhd.cfm (visited May 5, 2005).

7. Dysnomia is characterized by a verbal difficulty recalling names or remembering words. Nalanda Inst., *at* http://www.nalandainstitute.org/aspfiles/types.asp#dysnomia (visited May 5, 2005).

8. Discalculaics have trouble with basic math problems and retaining basic math facts like the multiplication table. Nat'l Ctr. for Learning Disabilities, *at* http://www.ncld.org/LDInfoZone/InfoZone_FactSheet_Dyscalculia.cfm (visited May 5, 2005).

9. Suzanne Day, *Dyslexia: A Misunderstood Learning Difficulty, But Also a Hidden Gift*, Canada's Christian Community Online, *at* htpp://www.christianity.ca/education/homeschooling/2004/07.000.html (visited May 5, 2005).

10. Nat'l Ctr. for Learning Disabilities, *at* http://www.ncld.org/LDInfoZone/InfoZone_FactSheet_Dysgraphia.cfm (visited May 5, 2005).

11. Nat'l Ctr. for Learning Disabilities, *at* http://www.ncld.org/LDInfoZone/InfoZone_FactSheet_Dyslexia.cfm (visited May 5, 2005).

12. *Why is Dyslexia a Gift*?, http://www.dyslexia.com (visited May 5, 2005).

13. Kher, *supra* note 1, at 56.

14. John Bradford, *Dyslexia and Writing*, Dyslexia Online Magazine, *at* http://www.dyslexia-parent.com/mag40.html (visited May 5, 2005).

15. *Id.*

16. Think "Men never escape Mounties on nags in Canada."

17. *See, e.g.*, *Bartlett v. N.Y.S. Bd. Law Examiners*, No. 93 CIV 4986, 2001 U.S. Dist. LEXIS 11926, at *163 (S.D.N.Y. Aug. 15, 2001) (granting dyslexic-plaintiff accommodation under ADA to take New York bar exam). Some contend that the LD label is applied loosely and gives undeserving students an advantage during exams.

18. M. Kay Runyan & Joseph F. Smith, Jr., *Identifying and Accommodating Learning Disabled Law School Students*, 41 J. Legal Educ. 317, 328 (1991).

19. Dan Lynch, *David Boies Talks on Politics and the Need to Listen*, Miami Daily Bus. Rev., Feb.16, 2005, at 1.

20. 37 Buff. L. Rev. 739 (1989).

21. *Id.* at 743.

22. *Id.* at 740.

23. *Id.* at 750.

24. *Id.*

25. *See generally* Ronald D. Davis, *The Gift of Dyslexia (rev. ed. 1997)*.

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in New York County and an adjunct at New York Law School. He thanks court attorney Justin J. Campoli and David Koshers, a New York Law School student, for assisting in researching this column. Judge Lebovits's e-mail address is GLebovits@aol.com.

HEADQUARTERS STAFF EMAIL ADDRESSES

EXECUTIVE

Patricia K. Bucklin
Executive Director
pbucklin@nysba.org

John A. Williamson, Jr.
Associate Executive Director
jwilliamson@nysba.org

ADMINISTRATIVE SERVICES, MEETINGS AND MEDIA RELATIONS

ADMINISTRATIVE SERVICES

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

Law, Youth and Citizenship Program
Deborah S. Shayo, *Director*
dshayo@nysba.org

Rebecca Oldenburgh, *Program Manager*
roldenburgh@nysba.org

MEDIA SERVICES AND PUBLIC AFFAIRS
Bradley G. Carr, *Director*
bcarr@nysba.org

Frank J. Ciervo, *Associate Director*
fciervo@nysba.org

Patricia Sears Doherty, *Sr. Writer*
psearsdoherty@nysba.org

Monica Finch, *Editor, State Bar News*
mfinch@nysba.org

Terry Scheid, *Bar Services Coordinator*
tscheid@nysba.org

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

CONTINUING LEGAL EDUCATION

Terry J. Brooks, *Senior Director*
tbrooks@nysba.org

Debra York, *Registrar*
dyork@nysba.org

CLE PROGRAMS
Jean E. Nelson II, *Associate Director*
jnelson@nysba.org

Jean Marie Grout, *Staff Attorney*
jgrout@nysba.org

Leslie A. Fattorusso, *Staff Attorney*
lfattorusso@nysba.org

Cheryl L. Wallingford, *Program Manager*
cwallingford@nysba.org

CLE PUBLICATIONS
Daniel J. McMahon, *Director*
dmcmahon@nysba.org

Patricia B. Stockli, *Research Attorney*
pstockli@nysba.org

Katherine Suchocki, *Research Attorney*
ksuchocki@nysba.org

Mark Wilson, *Publications Manager*
mwilson@nysba.org

FINANCE AND HUMAN RESOURCES

Paula Doyle, *Senior Director*
pdoyle@nysba.org

FINANCE
Kristin M. O'Brien, *Director*
kobrien@nysba.org

Cynthia Gaynor, *Controller*
cgaynor@nysba.org

LEGAL AND GOVERNMENTAL AFFAIRS

Kathleen R. Mulligan-Baxter, *Senior Director*
kbaxter@nysba.org

COUNSEL'S OFFICE

GOVERNMENTAL RELATIONS
Glenn Lefebvre, *Director*
glefebvre@nysba.org

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

LAWYER ASSISTANCE PROGRAM

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

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

MARKETING AND INFORMATION SERVICES

Richard J. Martin, *Senior Director*
rmartin@nysba.org

DESKTOP PUBLISHING

MARKETING

MIS
John M. Nicoletta, *Director*
jnicoletta@nysba.org

Jeffrey Ordon, *Network Support Specialist*
jordon@nysba.org

Sonja Tompkins, *Records Supervisor*
stompkins@nysba.org

Gregory A. Vincent, *Database Administrator*
gvincent@nysba.org

Paul Wos, *Data Systems and Telecommunications Manager*,
pwos@nysba.org

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

MEMBERSHIP SERVICES

Patricia K. Wood, *Senior Director*
pwood@nysba.org

Megan O'Toole, *Membership Services Manager*
motoole@nysba.org

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

LAW PRACTICE MANAGEMENT

PRINT AND FACILITIES OPERATIONS

Roger E. Buchanan, *Senior Director*
rbuchanan@nysba.org

BUILDING MAINTENANCE

GRAPHICS

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

THE NEW YORK BAR FOUNDATION

2005-2006 OFFICERS

Robert L. Haig, *President*
101 Park Avenue, New York, NY 10178-0001

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

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

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

DIRECTORS

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

EX OFFICIO

Chair of The Fellows
M. Catherine Richardson, *Syracuse*

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

JOURNAL BOARD MEMBERS EMERITI

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

HOWARD ANGIONE
Immediate Past Editor-in-Chief

RICHARD J. BARTLETT
COLEMAN BURKE
JOHN C. CLARK, III
ANGELO T. COMETA
ROGER C. CRAMTON
MARYANN SACCOMANDO FREEDMAN
EMLYN I. GRIFFITH
H. GLEN HALL
PAUL S. HOFFMAN
CHARLES F. KRAUSE
PHILIP H. MAGNER, JR.
WALLACE J. MCDONALD
J. EDWARD MEYER, III
KENNETH P. NOLAN
ALBERT M. ROSENBLATT
SANFORD J. SCHLESINGER
ROBERT J. SMITH
LAWRENCE E. WALSH

2005-2006 OFFICERS

A. Vincent Buzard
President
Rochester

Mark H. Alcott
President-Elect
New York

James B. Ayers
Treasurer
Albany

Kathryn Grant Madigan
Secretary
Binghamton

Kenneth G. Standard
Immediate Past President
New York

VICE-PRESIDENTS

First District
Stephen D. Hoffman, *New York*
Bernice K. Leber, *New York*

Second District
Barry Kamins, *Brooklyn*

Third District
Rachel Kretser, *Albany*

Fourth District
Cristine Cioffi, *Niskayuna*

Fifth District
Michael E. Getnick, *Utica*

Sixth District
James C. Gacioch, *Binghamton*

Seventh District
C. Bruce Lawrence, *Rochester*

Eighth District
Sharon Stern Gerstman, *Buffalo*

Ninth District
Henry S. Berman, *White Plains*

Tenth District
Hon. Joel K. Asarch, *Hempstead*

Eleventh District
Seymour W. James, Jr., *Kew Gardens*

Twelfth District
Lawrence R. Bailey, *New York*

MEMBERS-AT-LARGE OF THE EXECUTIVE COMMITTEE

Donald C. Doerr
Vincent E. Doyle, III
David L. Edmunds, Jr.
John H. Gross
Claire P. Gutekunst
Glenn Lau-Kee
Jay G. Safer
David M. Schraver

MEMBERS OF THE HOUSE OF DELEGATES

First District
Alcott, Mark H.
Barson, Alan D.
Bienstock, Peter
Boyers, Hon. Seymour
Brett, Barry J.
Brown, Geraldine Reed
† Campos-Galvan, Manuel
Chambers, Hon. Cheryl E.
Cheng, Pui Chi
Christian, Catherine A.
* Cometa, Angelo T.
Davis, Tracee E.
Dimon, Samuel J.
Dominguez, Ivan J.
Eppler, Klaus
Ferrara, Lucas A.
Fish, Daniel G.
Flood, Marilyn J.
* Forger, Alexander D.
Frank, Paul M.
* Gillespie, S. Hazard
Grays, Taa R.
Green, Prof. Bruce A.
Gregory, Prof. John D.
Gross, Marjorie E.
Gutekunst, Claire P.
† Haig, Robert L.
Harris, Joel B.
Harris, John B.
Hendricks, Susan L.
Hoffman, Stephen D.
Hollyer, A. Rene
Horan, John R.
Jackson, Damian S.
Jacobs, Robert A.
Jacobs, Sue C.
Kiernan, Peter J.
* King, Henry L.
Kougasian, Peter M.
†* Krane, Steven C.
Kuntz, William F., II
Lansner, David J.
Leber, Bernice K.
Lee, Charlotte C.
Lesk, Ann B.
Levinsohn, Robert J.
Lieberman, Ellen
Lieberstein, Marc Ari
Lindenauer, Susan B.
* MacCrate, Robert
McShea, Sarah Diane
Millett, Eileen D.
Minkowitz, Martin
Mitchell, Thomas J.
Mitzner, Melvyn
Moreland, Thomas H.
Nathanson, Eugene
Nathanson, Malvina
* Patterson, Hon. Robert P., Jr.
Paul, Gerald G.
Plevan, Bettina B.
Reimer, Norman L.
Reitzfeld, Alan D.
Richman, Steven H.
Rifkin, Richard
Robertson, Edwin David
Rothstein, Alan
Runes, Richard N.
Safer, Jay G.
Schultz, Kenneth A.
* Seymour, Whitney North, Jr.
Sherman, Carol R.
Sherwin, Peter J.W.
Sherwood, O. Peter
Silkenat, James R.
Smoley, Lewis M.
Sonberg, Hon. Michael R.
Spitzmueller, Janiece Brown
Stenson, Lisa M.
Wachtler, Lauren J.
Wales, H. Elliot
Walsh, Susan J.
Warner, Rita Wasserstein
Williams, Bryan R.

Second District
Branda, Rose Ann C.
Connors, John P., Jr.
Cyrulnik, Hon. Miriam
DiGiovanna, Lawrence F.
Hall, Thomas J.
Kamins, Barry
Longo, Mark A.
Romero, Manuel A.
Slavin, Barton L.
Sunshine, Hon. Jeffrey S.
Sunshine, Nancy T.

Third District
Ayers, James B.
Carlucci, James A.
Copps, Anne Reynolds
Davidoff, Michael
DeFio, Elena M.R.
Dixon, Philip H.
Dolin, Thomas E.
Doyle, Hon. Cathryn M.
Fernandez, Hermes
Greenberg, Henry M.
Higgins, John Eric
Kelly, Matthew J.
Kinum, John B.
Kretser, Rachel
Lynch, Margaret Comard
Martinelli, Patricia
McNally, Richard J., Jr.
Meislahn, Harry P.
Moy, Lillian M.
Netter, Miriam M.
Perino, Justina Cintron
Potter, James T.
Privitera, John J.
Rosenberg, Philip
Sandner, James R.
†* Tharp, Lorraine Power
Thornton, Timothy B.
* Williams, David S.
* Yanas, John J.

Fourth District
Bartlett, Hon. Richard J.
Breedlove, Brian H.
Burke, J. David
Cantwell, Lori A.
Cioffi, Cristine
Hoffman, Robert W.
King, Barbara J.
Manning, John T.
McAuliffe, J. Gerard, Jr.
Pelagalli, Paul
Tishler, Nicholas E.

Fifth District
Benedict, Timothy A.
Carmen, Peter D.
Doerr, Donald C.
Fetter, Jeffrey M.
Getnick, Michael E.
Girouard, Theresa M.
Hayes, David M.
McClusky, James P.
Myers, Thomas E.
Norfleet, Doren P.
Peterson, Margaret Murphy
Priore, Nicholas S.
* Richardson, M. Catherine
Rivera, Ramon E.
Weinstein, Ellen Stempler

Sixth District
Campanella, Ottavio
Cummings, Patricia A.
Egan, Shirley K.
Gacioch, James C.
Gorgos, Mark S.
Lee, Carolyn S.
Madigan, Kathryn Grant
Smyk, Stephen D.
Tyler, David A.
Walsh, Ronald T., Jr.

Seventh District
Amuso, John P.
Barney, Brian J.
† Buzard, A. Vincent
Castellano, June M.
Doyle, Hon. John D.
Harren, Michael T.
Lawrence, C. Bruce
†* Moore, James C.
* Palermo, Anthony R.
Reynolds, J. Thomas
Schraver, David M.
Tyo, John E.
* Vigdor, Justin L.
* Witmer, G. Robert, Jr.

Eighth District
Brady, Thomas C.
Cosgrove, Edward C.
Doyle, Vincent E., III
Edmunds, David L., Jr.
Flaherty, Michael J.
* Freedman, Maryann Saccomando
Gerber, Daniel W.
Gerstman, Sharon Stern
†* Hassett, Paul Michael
Kelly, Michael T.
Lamantia, Stephen R.
Martin, Jeffrey R.
McCarthy, Jeremiah J.
McCarthy, Joseph V.
Meyer, Harry G.
Peradotto, Hon. Erin M.
Porcellio, Sharon M.
Seitz, Raymond H.
Shaw, James M.
Young, Oliver C.

Ninth District
Berman, Henry S.
Campanaro, Patricia L.
Enea, Anthony J.
Gordon Oliver, Arlene Antoinette
Gouz, Ronnie P.
Ingrassia, John
Johnson, Martin T.
Klein, David M.
Kranis, Michael D.
Krooks, Howard S.
Lagonia, Salvatore A.
Lau-Kee, Glenn
Lindgren, Thomas
Markhoff, Michael S.
Marwell, John S.
Miklitsch, Catherine M.
* Miller, Henry G.
Murray, Conal E.
†* Ostertag, Robert L.
Plotsky, Glen A.
Ramsey, Hon. B. Harold
Ruderman, Hon. Terry Jane
Seiden, Hon. Adam
†* Standard, Kenneth G.
Sweeny, Hon. John W., Jr.
Tyre, Margaret H.
Wallach, Sherry Levin
Welby, Thomas H.
Wilson, Leroy, Jr.
Zeltner, Peter P.

Tenth District
Asarch, Hon. Joel K.
* Bracken, John P.
Castillo, Nelson A.
Clarke, Lance D.
Cooper, Ilene S.
D'Angelo, Frank G.
Duffy, James P., III
Fredrich, Dolores
Giorgio, Frank, Jr.
Glanzer, Mona N.
Gross, John H.
Karson, Scott M.
Kossove, Scott E.
†* Levin, A. Thomas
Makofsky, Ellen G.
Mihalick, Andrew J.
Millman, Bruce R.
* Pruzansky, Joshua M.
Purcell, A. Craig
Quinlan, Robert F.
* Rice, Thomas O.
Santemma, Jon N.
Shulman, Sir. Arthur E.
Smolowitz, Barry M.
Sperendi, Michael F.
Tell, M. David
Thompson, Charlene R.
Tully, Rosemarie
Walsh, Owen B.

Eleventh District
Cohen, David L.
Dietz, John R.
Goldblum, A. Paul
Hans, Stephen D.
Haskel, Jules J.
James, Seymour W., Jr.
Lee, Chanwoo
Leinheardt, Wallace L.
Nashak, George J., Jr.
Rosenthal, Edward H.
Walsh, Jean T.

Twelfth District
Bailey, Lawrence R., Jr.
Chavez, Daniel M.
Kessler, Muriel S.
Millon, Steven E.
†* Pfeifer, Maxwell S.
Price, Hon. Richard Lee
Summer, Robert S.
Weinberger, Richard

Out-of-State
* Fales, Haliburton, II
Peskoe, Michael P.
Smith, Prof. Beverly McQueary
* Walsh, Lawrence E.

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

BY GERALD LEBOVITS

Learning Disabilities and the Legal Writer

Upward of 15% of Americans — lawyers included, readers of this column included — are learning disabled to some degree.[1] The effects of LD, short for learning disabled or learning disability, make lawyering especially difficult. Diagnosing and compensating for LD is essential.

The phrase "learning disability" carries a negative connotation. Stereotypes and myths abound. Some believe that the LD can't learn, have low IQs, or don't try hard enough.[2] That's nonsense. Some of the greatest thinkers and writers of the 20th Century have been LD. Among them: Alexander Graham Bell, Simón Bolívar, Winston Churchill, Walt Disney, Thomas Edison, Albert Einstein, George Patton, Nelson Rockefeller, and Woodrow Wilson. There's a correlation between creativity and LD.

How the LD's brain computes information makes reading, writing, speaking, and math difficult. But solutions are available. And the methods the LD should use to write clearly and coherently apply to all legal writers.

A learning disability is a neurological disorder that affects the brain's ability to receive, store, and respond to information.[3] It afflicts adults and children. Science recognizes no single, known cause for LD. Suspected contributors include exposure to toxins like lead,[4] pregnancy or birth problems, head injuries, nutritional deprivation, and heredity.[5] LDs manifest themselves differently in different people. LDs are lifelong challenges. No common cure or quick fix is available. With support and intervention, however, the LD can overcome obstacles and become successful in school, work, and life.

"Learning Disability" is an umbrella phrase, often encompassing a number of other, more specific disabilities like attention deficit hyperactivity disorder (ADHD),[6] dysnomia,[7] discalculia,[8] dyslexia, and dysgraphia. This column addresses dyslexia and dysgraphia — LDs that affect lawyers' writing the most. Dyslexia, the most common LD, is characterized by problems reading and understanding the written or spoken word.[9] Dysgraphia affects writing and organizational abilities and is characterized by poor spelling, handwriting, and written expression.[10]

> Some believe that the learning disabled can't learn, have low IQs, or don't try hard enough. That's nonsense.

Dyslexia

Dyslexia is more than reversing letters while reading. Dyslexics do not read backwards, although reversing letter sequence is sometimes a symptom. Dyslexics have difficulty reading and writing. Many also have problems expressing themselves. Dyslexia's warning signs include difficulty organizing thoughts, understanding that words are made up of sounds, pronouncing words, and spelling.[11] Professionals can identify the disability through testing. Self-diagnosis is a starting point. But professional help is necessary because each LD's treatment differs.

Dyslexics think more in pictures rather than in words. Their brains process information slowly because they transfer their pictures into words and vice versa.[12] When they encounter words that can't be put into pictures like "the," "was," or "and," the dyslexic might get confused or frustrated. That affects their concentration and confidence.

The more complex a written language is, the more pronounced the LD's symptoms become. English has about 1,120 different ways of spelling its 40 phonemes — the sounds that create words. By comparison, Italian needs only 33 letter combinations to spell out its 25 phonemes.[13] The result is that Italian dyslexics read and write better than American dyslexics.

Dyslexia affects an LD lawyer's writing. Often dyslexics will leave words out of their sentences, alter quotations from citations, or cite improperly by giving inaccurate page and volume numbers. The best remedies for this are rigorous editing, checking, and re-checking sentences, citations, and quotations — and then having someone else edit their work. In the computer age, an LD lawyer's inability to quote accurately can be corrected by cutting and pasting a quotation from a reliable source into a word-processed document.

Dysgraphia

Dysgraphia is characterized by poor handwriting. Dysgraphics have poor motor skills. They sometimes can't even determine which hand is dominant. The solution to illegible handwriting is to rely on word processors, speech-recognition software, or dictation.

A dysgraphic's poor typing skills can cancel out a word processor's benefits. Dysgraphia's symptoms will adversely affect how a document looks

CONTINUED ON PAGE 58





New York State Bar Association's Forms

NYSBA's Document Assembly Products

Automated by industry-leader HotDocs® software. Increase accuracy, save time and money. Access hundreds of forms used by experienced practitioners in their daily practice, including many forms promulgated by the Office of Court Administration and required by various New York State courts and agencies.

Fully automated, quick, convenient and authoritative, document assembly products are available for these practice areas:

- Family Law Forms
- Guardianship Forms
- Residential Real Estate Forms
- Surrogate's Forms

Prices include shipping and handling but not applicable sales tax and 1 year subscription for updates. Multiple user and annual renewal pricing is available.
Prices subject to change without notice.

NYSBA's Form Products on CD

Many of NYSBA's most relied-upon reference materials are accompanied by forms on CD. Have at your fingertips official forms, as well as forms, sample documents and checklists developed by leading attorneys in their own fields of practice. Avoid reinventing the wheel in an unusual situation, and rely instead on the expertise and guidance of NYSBA's authors, as they share their work product with you.

- Adoption Law: Practice and Procedure in the 21st Century Forms on CD
- Commercial Leasing Forms on CD
- Estate Planning and Will Drafting in New York Forms on CD
- General Practice Forms on CD
- New York Municipal Formbook Forms on CD
- Real Estate Practice Forms on CD

Prices include shipping and handling but not applicable sales tax. If a supplement or update is released within 3 months of your purchase, you will receive the update free of charge.

For more information, pricing and to order, call **1-800-582-2452** or visit us online at www.nysba.org/pubs

NYSBA