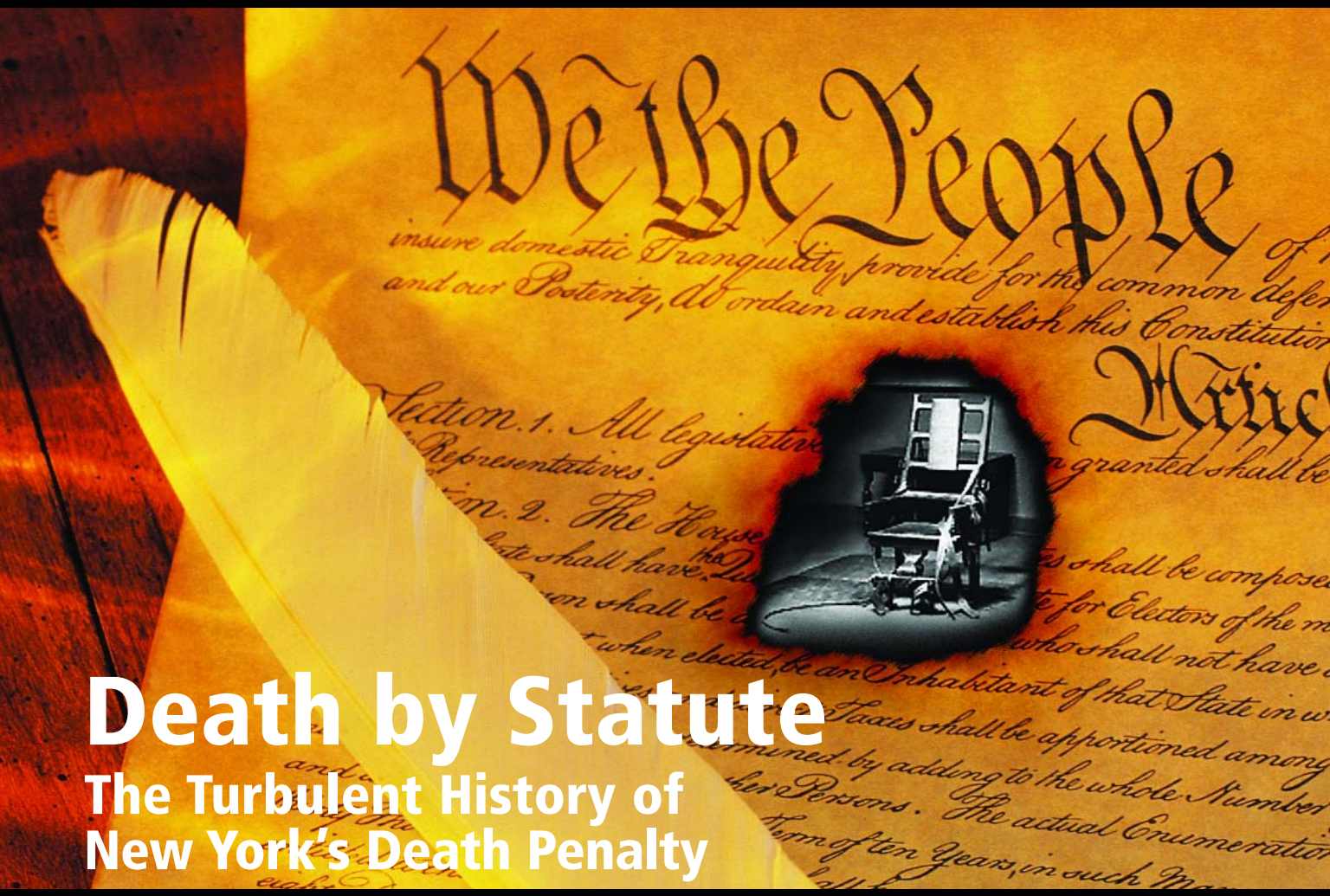
NEW YORK STATE BAR ASSOCIATION
Journal
FEBRUARY 2005
VOL. 77 | NO. 2



Death by Statute

The Turbulent History of New York's Death Penalty

A brief history of capital punishment in New York, up through its short-lived revival in the mid-1990s. Can New York craft a statute that will pass constitutional muster?

Edward J. Maggio

Also in this Issue

BESTSELLERS

FROM THE NYSBA BOOKSTORE

February 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. You will benefit from numerous forms, practice tips and appendixes.
(PN: 41244/**Member $72**/List $80)

Family Law

Matrimonial Law

Updated for 2004 by author Willard DaSilva, a leading matrimonial law practitioner, *Matrimonial Law* provides a step-by-step overview for the practitioner handling a basic matrimonial case. While the substantive law governing matrimonial actions is well covered, the emphasis is on the practical—the frequently encountered aspects of representing clients.
(PN: 41214/**Member $72**/List $80)

General Practice

Attorney Escrow Accounts—Rules, Regulations and Related Topics

This book comprehensively covers the most common situations where attorneys handle client funds and clearly discusses the legal and ethics issues encountered in handling clients' funds.
(PN: 4026/**Member $38**/List $50)

General Practice Forms

Available on CD for your convenience. This new edition features over 600 forms used by experienced practitioners in their daily practice including numerous government agency forms in .pdf format.
(PN: 61503/**Member $180**/List $205)

New York Lawyer's Deskbook, 2nd Ed.

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. Incorporating the 2004 Supplement, it updates and expands on the original text.
(PN: 4150/**Member $225**/List $275)

New York Lawyer's Formbook, 2nd Ed.

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. This revised edition incorporates the 2004 Supplement.
(PN: 4155/**Member $225**/List $275)

School Law, 30th Ed.

School Law has been widely recognized for many years as an excellent school law reference for board members, administrators and attorneys.
(PN: 42274/**Member $65**/List $80)

Health Law

Legal Manual for New York Physicians

This landmark text is a must-have for attorneys representing anyone involved with the medical profession and practitioners whose clients have questions relating to the medical field. The information in this manual is primarily presented in an easy-to-use Q&A format.
(PN: 4132/**Member $80**/List $95)

Real Estate

Real Estate Titles, 3rd Ed.

The third edition is an essential guide to the many complex subjects surrounding real estate titles. New practitioners will benefit from the comprehensive coverage by leading practitioners throughout New York State, and real estate experts will be able to turn to this book whenever a novel question arises.
(PN: 42101/**Member $130**/List $160)

Trusts & Estates/Elder Law

Guardianship Practice in New York State, 2004 Supp.

The 2004 Supplement to *Guardianship Practice* updates the fiduciary rules, case law and statutory law, and includes four new chapters covering Part 36, administration of antipsychotic medications, Kendra's Law and mediation, and an added judicial perspective on guardianship proceedings. It features editor's practical observations, "EPOs," providing synopses of and commentary on recent developments in the field.
(PN: 51138/**Member $90**/List $115)

NEW!

Civil Advocacy & Litigation

Preparing For and Trying the Civil Lawsuit, Second Edition

This loose-leaf volume updates and expands the extremely well-received first edition, by adding five new chapters. More than 20 of New York's leading trial practitioners, judges and professors reveal the techniques and tactics they have found most effective when trying a civil lawsuit. This book's 25 chapters cover all aspects of a civil lawsuit, from pretrial preparation to appeals.
(PN: 41953/**Member $175**/List $225)

Entertainment

Entertainment Law Third Edition

Completely revised and updated for the new millennium, *Entertainment Law*, Third Edition is a fresh look at this fascinating and complex field. Featuring a new chapter on "Entertainment and the Internet," *Entertainment Law*, Third Edition is edited by Howard Siegel and includes the insights and perspectives of top entertainment lawyers from the New York and California bars. It is highly recommended for both the experienced entertainment practitioner and the attorney making an initial foray into the field.
(PN: 40863/**Member $125**/List $150)

Family & Matrimonial Law

Adoption Law: Practice and Procedure in the 21st Century

This new reference completely updates and expands *Adoption Law in New York*, adding chapters on Intercountry Adoption; Adopting a Foster Child; Facilitators; Assisted Reproduction Technology; Adoption Assistance and Special Needs of Children; Mediation; Sibling Rights; and more, including over 250 pages of forms.
(PN: 40204/**Member $140**/List $165)

Real Estate

Commercial Leasing

Edited by Joshua Stein and sponsored by the Real Property Law Section of the NYSBA, this loose-leaf book, although it covers issues specific to New York, could apply to nearly every state. Written by leading experts, this comprehensive book will provide the link between practical issues and what attorneys experience in their daily practice.
(PN: 4041/**Member $130**/List $165)

Expand your professional knowledge

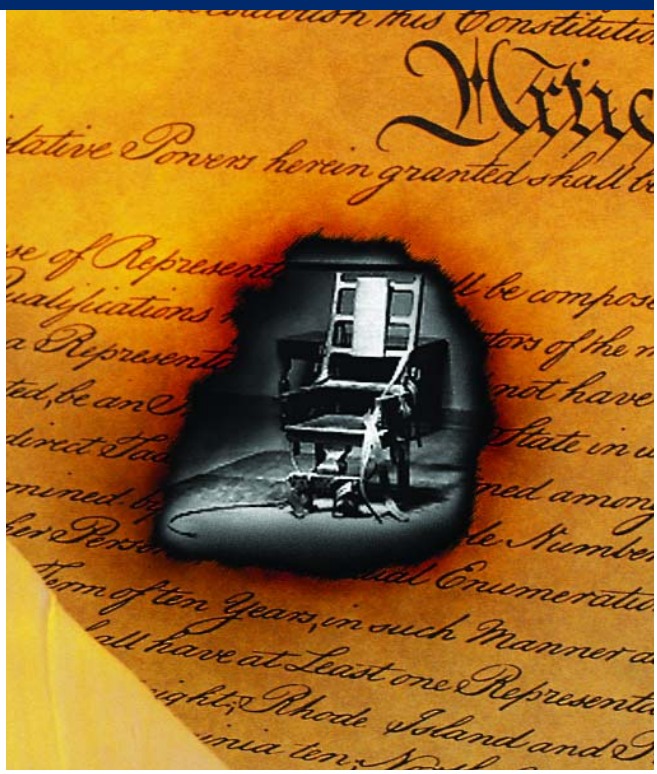
NEW YORK STATE BAR ASSOCIATION

1.800.582.2452 www.nysba.org/pubs

Mention Code: CL2398

CONTENTS

FEBRUARY 2005



DEATH BY STATUTE

The Turbulent History of New York's Death Penalty

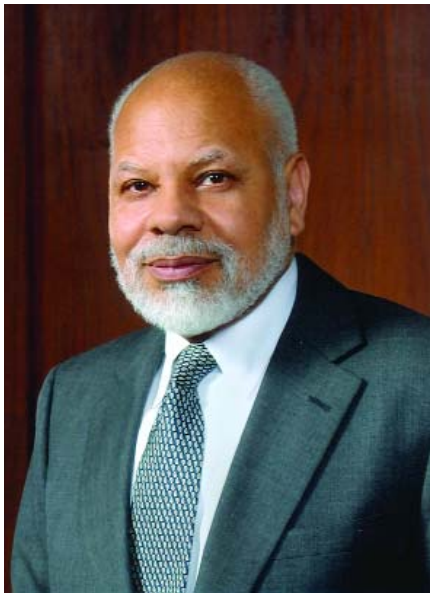
BY EDWARD J. MAGGIO

10

DEPARTMENTS

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. Copyright © 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.

KENNETH G. STANDARD



What Should the Tort System Be?

"Tort reform." As legislative sessions open at the state and federal levels, talk of tort reform is again in the hallways, on advocacy groups' agendas, on the airways, and in print. Just what does tort reform mean? Viewpoints reflect the broadest swing of the pendulum, from those who would dismantle the system to those who see no need for change. A sampling of the headlines from just the past week's news stories and editorials concerning speeches, summits, hearings and proposals give us a taste: "Bush Versus the Trial Lawyers: Not All Tort Reforms Are Created Equal," "9/11 Fund Can Offer Lessons for Tort Reform," "A Push in States to Curb Malpractice Costs," "Medical Mythology," and "Get Tort Reform Right."

So what *should* tort reform mean? What *should* the tort system be?

Using our collective knowledge to seek "reform in the law" is one of the State Bar Association's stated purposes. In identifying any provision in law or procedure possibly in need of improvement and considering solutions, we examine several factors. Does any proposal for change take into account the needs and rights of all concerned? Does it ensure access to justice and an opportunity for the individual of modest means or small business owners to be heard in a very real sense? Does it balance rights and responsibilities and provide for a means of redress? To examine these issues, to consider what changes are needed, and what are not, we must have all parties at the table, providing their knowledge and perspectives.

This year, we are continuing to take this approach in analyzing proposals concerning the tort system, bringing together counsel for defense and plaintiffs. Our long-standing position has been that injured persons have the right to seek compensation. Depriving people of this opportunity does not work in a democracy. It is a matter of fairness and of public confidence in the legal system.

Yet, realistically, any civil justice system designed by human beings cannot be perfect. There is always area for improvement, but improvements must be practical and beneficial to all. For instance, with House of Delegates approval, we have supported state legislation to equalize treatment of collateral sources in tort actions against public defendants, by applying the same standard used in cases against private defendants. Also with House approval, we have supported the elimination of vicarious liability for vehicle lessors and, subject to review of the language of actual bills, we have favored in principle amending the "scaffolding" law to codify the "recalcitrant worker" doctrine.

On the other hand, we have opposed proposals to eliminate joint and several liability as unfair to the injured plaintiff, who would have to assume the risk that all wrongdoing defendants will be able to pay their share of the plaintiff's full recovery. We have opposed calls to cap non-economic tort damages at $250,000, which would unjustly discriminate against the relatively small number of tort victims who suffer the most devastating injuries. We must remember that such awards also serve to protect all of us by deterring defendant misconduct. We also do not believe our tort system, the evolutionary result of more than two centuries of common law in the state, should be eroded by federal pre-emption. To do so would be to turn federalism on its head.

These are challenging issues. Our Association, involving members from all perspectives, is uniquely situated to

PRESIDENT'S MESSAGE

assist in keeping this discussion – and all proposals – on a constructive level and to be a resource to filter out unhelpful rhetoric and present a full and factual picture. Measures for change to the civil justice system must be based on actual evidence and facts, not inflated, inaccurate portrayals of the civil justice system, and they must be developed on a nonpartisan basis, not with broad-brush proposals that would dismantle and disenfranchise.

We are working to be a catalyst for the presentation of the full story, full facts and figures of the status of the tort system and the practical effect of proposed changes, and a catalyst for reasoned study, open discussion and gathering of a broad range of perspectives and debate, not only within, but far beyond the Bar Center. That is our message in communications with lawmakers, in talks with the business community, civic groups and the general public. That is what tort reform *should* mean and that is what efforts for tort reform *should* involve. That procedure is how our laws and legal process should be analyzed and improved. That is how public confidence is built and maintained. That is what democracy is all about.

These are the points that I am raising on behalf of the Association in my discussions with lawmakers, reporters, editorial boards, and leaders of other professional and civic organizations. Our advocacy, in the Legislature, in Congress, in the media, and in the community, is most effective when we have a chorus of voices from members of the bar and bar associations across the state.

This past week, I submitted an op-ed piece to the press. I want to share with you some of my observations from that article and encourage you to discuss these issues in your community and with your government representatives. I wrote that, unfortunately, the debate about tort reform is fueled by myths that present a distorted view of the issue – myths that claim that lawsuits and a so-called "litigation culture" cause many financial ills in this country, raise the cost of health care and consumer products. I cited the most recent data in a U.S. Justice Department report that the median jury verdict for all tort suits in state courts in 2001 was $37,000, down from $62,000 in 1991, without factoring in the effect of inflation. Despite talk of runaway juries, the median punitive damage award in 2001 was reported at $50,000.

Those who would erode the tort system, I said, most often fail to acknowledge that our civil justice system works well and provides checks and balances that allow people to be heard and cases to be brought. There are sanctions for frivolous actions by parties and attorneys. There are appeals. Let's not shut the courtroom door. Let's look at all the provisions carefully and ensure the checks and balances are properly functioning and consider means of improvement where warranted.

When policies are being framed on the hill in Washington and in Albany on these challenging issues, those in government must take a hard look at the facts, not misinformation. The right to seek redress of wrongs in court is precious, I wrote, and should not be restricted or abridged hastily, especially when change is based on erroneous assumptions.

Access to the civil legal system is a priority for our Association. We will continue to work intensely to give these issues the time, airing of perspectives and careful analysis that is necessary to do them justice. We encourage your perspectives and participation in these efforts. ■

KENNETH G. STANDARD can be reached by e-mail at president@nysbar.com.

NEW YORK STATE BAR ASSOCIATION
Journal

NYSBACLE

Tentative Schedule of Spring Programs *(Subject to Change)*

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

†International Estate Planning Institute (one-and-one-half day program)
Fulfills NY MCLE requirement (11.5): 11.5 in practice management and/or professional practice
Note: CLE Seminar coupons and complimentary passes cannot be used for this program

March 10–11	New York City

New York State's External Appeal Program: Lessons Learned, New Developments and Challenges Ahead
(half-day program)

March 11	New York City

Avoiding and Defending Legal Malpractice Actions
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.0): 2.0 in skills and 2.0 in practice management and/or professional practice

March 11	Rochester; Uniondale, LI
March 18	Albany; New York City

Hospital Tax Exemptions: Preparing to Defend Litigation
(half-day program)

March 16	New York City

The Heart of the Case w/ James McElhaney
Fulfills NY MCLE requirement for all attorneys (7.0): 7.0 in skills
Note: CLE Seminar coupons and complimentary passes cannot be used for this program

March 18	Uniondale, LI
June 2	Syracuse
June 3	New York City

†Benefits, Health Care and the Workplace

TBD	New York City
TBD	Albany
April 6	Rochester

Using the Internet for Legal Research w/ Leigh Webber
Fulfills NY MCLE requirement for all attorneys (6.5): 1.0 in ethics and professionalism; 5.5 in skills

March 31	New York City
April 1	Smithtown, LI
April 27	Rochester
April 28	Albany

Maintaining Ethics and Civility in Litigation: What Every Lawyer Needs to Know
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 in ethics and professionalism

April 8	New York City; Rochester
April 15	Albany; Uniondale, LI

Practical Skills Series: Family Court Practice
Fulfills NY MCLE requirement for all attorneys (7.5): 2.0 in ethics and professionalism; 3.0 in skills and 2.5 in practice management and/or professional practice

April 12	Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester

2005 Insurance Coverage Update – Personal Lines, Bad Faith and Other Developing Topics

April 15	New York City
April 29	Melville, LI; Syracuse
May 6	Albany; Buffalo

Federal Civil Practice: A Primer

April 22	New York City
April 29	Albany
May 6	Melville, LI; Rochester

Successfully Managing Your Matrimonial/ Equitable Distribution Cases: From First Contact with the Client Through Settlement

April 22	Rochester; Westchester
May 13	Albany; Smithtown, LI
May 20	New York City

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

Senior Housing: An Evolving Business

April 22	Albany
May 13	New York City

Basic Securities Law for the Business Practitioner

April 28	New York City

†Closing or Selling a Law Practice
(half-day program)
Fulfills NY MCLE requirement (4.0): 1.0 in ethics and professionalism; 3.0 in practice management and/or areas of professional practice

April 29	New York City
May 20	Melville, LI
June 17	Rochester

Three Hot Topics in Criminal Law
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.0): 2.0 in ethics and professionalism; .5 in skills; and 1.5 in practice management and professional practice

April 29	Rochester
May 6	Albany
May 19	Uniondale, LI
May 20	New York City

What Immigration Law Practitioners Must Know about the New Labor Certification Regulations

May 4	New York City

DWI: The Big Apple V
(one-and-one-half day program)
Note: CLE Seminar coupons cannot be used for this program

May 5–6	New York City

Handling Clients' Funds

May 5	Rochester
May 26	New York City
June 2	Albany

Damages

May 6	New York City
May 13	Buffalo; Melville, LI
May 20	Syracuse

The Nuts and Bolts of the Administration and Enforcement of Land Use Laws and Regulations

May 12	Syracuse
June 3	Albany; Buffalo; Tarrytown
June 9	Uniondale, LI

Practical Skills Series: Basic Elder Law Practice
Fulfills NY MCLE requirement for all attorneys (6.5): 1.0 in ethics and professionalism; 0.5 in skills and 5.0 in practice management and/or professional practice

May 16	Melville, LI; Rochester; Syracuse; Westchester
May 18	Albany; New York City

Estate Planning and Will Drafting

May 19	Tarrytown
May 25	Albany; Melville, LI
June 1	Binghamton
June 2	Buffalo
June 7	Syracuse
June 8	New York City; Rochester

Practical Skills Series: How to Commence a Civil Lawsuit
Fulfills NY MCLE requirement for all attorneys (6.5): 1.0 in ethics and professionalism; 2.0 in skills and 3.5 in practice management and/or professional practice

May 24	Albany; Buffalo; New York City; Rochester; Syracuse; Uniondale, LI; Westchester

Women on the Move III
(half-day program)

June 2	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/spring2005 (Note: As a NYSBA member, you'll receive a substantial discount)

In the days following the brutal slayings of

Death by Statute

The Turbulent History of New York's Death Penalty

By Edward J. Maggio

Edward J. Maggio
<emaggio@nyit.edu> is an assistant professor of criminal justice at the New York Institute of Technology. He is a graduate of Virginia Tech and received his law degree from New York Law School. He also holds a master of science degree in criminology and criminal justice from Oxford University.

The author wishes to thank the library staff of NYIT in Central Islip and the Legal Aid Society of Suffolk County for their help and support in the preparation of this article.

New York City Police Department Detectives Patrick Rafferty and Robert Parker, on September 10, 2004, many residents of the City and Long Island demanded that the Kings County District Attorney seek capital punishment following a conviction. Many were, therefore, surprised to learn of *People v. LaValle*,[1] in which the Court of Appeals held New York's 1995 death penalty statute unconstitutional and incurable absent enactment of a new statute.[2] The *LaValle* decision served to invalidate the death sentences of such infamous death row inmates as Nicholson McCoy, who was convicted of sodomizing and stabbing a co-worker while on parole, and Robert Shulman, who beat and dismembered three Long Island prostitutes.[3] Now, as a result of *LaValle*, the suspect charged with the murders of Detectives Rafferty and Parker cannot currently be subjected to the death penalty. Indeed, over the past several decades it has been increasingly difficult to find and develop a statute that would meet the constitutional standards delineated by the United States Supreme Court. In fact, lawmakers have struggled with New York's capital punishment statutes for centuries.

Death Penalty in Early New York

Under Dutch control, capital punishment in pre-colonial New York could be considered harsh, but sentencing had a degree of flexibility. Under the rules and practices of the time, men sometimes would be required to draw lots to determine who would be put to death when the members of the Dutch criminal court could not decide which individual had committed a particular criminal act.[4]

When the English military brought New York under the control of the British crown, a legal system was imposed that included the use of capital punishment for colonial defendants. Punishment in New York under British rule was similar to other English colonies of the time in that English judges often made use of pardons, although death under colonial law could be prescribed for a large number of penal law offenses.[5] In New York, some defendants were pardoned on the condition that they leave the province or, in a few cases, enlist in the army or navy. This practice of pardon from capital punishment soon became the norm.

> New York became a first among the states when it designated the electric chair as a new way to execute condemned prisoners.

In 18th century New York, 51.7% of condemned defendants won some form of mercy or pardon from the English court or governing officers.[6] This relaxed exercise of death penalty provisions generally continued throughout the colonial period. A noted exception occurred as the result of a case in 1741, one of the bloodiest episodes of capital punishment to take place during England's reign over Colonial America. The case concerned an alleged plot by blacks in conspiracy with white citizens to rise up, pillage and burn various buildings and locations in New York. A conspiracy trial involving more than 150 slaves and 20 white citizens took place. Eighteen white colonials and slaves were hung, and 13 slaves were burned at the stake.[7] When such incidents of suspected conspiracy or treason occurred, the English colonial courts were most likely to impose the death penalty. Criminal incidents or suspected transgressions were treated with greater scrutiny when the English colonial court felt there was an interference with the governance of the crown or a disruption of the public peace in New York.

With the creation of the United States of America, through the late 18th and the 19th centuries, New York's legal system began to evolve, slowly, from the criminal laws and proceedings left by the Dutch and English.

Capital Punishment in the Industrial Age

As the development of electricity reached new heights in improving the quality of life for people in the nation at work and in the home, New York legislators viewed this innovation as a means to implement more expedient and humane executions for criminal defendants in capital cases.

In 1888, the New York State Legislature passed a new capital punishment statute that mandated death by the use of electricity.[8] New York became a first among the states when it designated the electric chair as a new way to execute condemned prisoners.[9]

The Act of 1888 set forth the grounds for mandatory imposition of capital punishment using electricity. It made premeditated, felony, depraved murders and various forms of homicide a type of capital murder in which a convicted defendant had to face a mandatory death sentence that would be carried out by the state.[10] While some scholars have written that Vermont became the first state to execute a prisoner under state authority,[11] it is important to note that New York became the first state to institutionalize a formal legal system by which the state, and not local authorities, would carry out executions of convicted defendants.[12]

Following the decision to execute William Kemmler by means of the electric chair,[13] New York executed more prisoners under state authority than any other state in the nation, up to the 1930s.[14] New York was clearly leading the way in the development and implementation of capital punishment.

The Arc of the Statute

By the 1930s, New York had amended the capital punishment statute. Legislators began expanding the number of offenses warranting death as well as the role juries would play during a defendant's sentencing. The death penalty statute now included kidnapping as a capital crime warranting state execution. This was most likely in response to the Charles Lindbergh kidnapping case, one of the most significant news stories of the day.[15] Death penalty sentencing procedures were also adjusted so that by 1937, New York juries were permitted to make a sentencing recommendation to the court of either imprisonment or death for almost all capital cases.[16] During this period, New York courts generally gave great deference to juries' findings in the determination of the defendant's fate in a capital case.[17] Near the end of the 1930s, the implementation of capital punishment began to slow down, and by the 1940s and 1950s, executions in New York began to decrease. During the 1940s, New York State executed 114 prisoners, while in the 1950s only 55 prisoners were executed.[18]

Narrowing the Death Penalty

From 1952 to 1962, New York's legislature introduced bills not simply to reform or adjust the death penalty statute, but to completely abolish it.[19] Thus, New York

executed only nine prisoners in the early part of the 1960s.[20] Eddie Lee Mays, executed in 1963, still holds the title of the last person put to death by the state of New York.[21]

As national criticism of capital punishment statutes increased, New York legislators went back to the drawing board to make changes in the capital punishment statute. Prior to the Act of 1963, the death penalty statute still required mandatory death sentences for premeditated and deliberate killings.[22] In the Act of 1963, the legislature passed several amendments. Notably, the Act extended discretionary sentencing to premeditated and deliberate killings, and thus to all first-degree murder cases.[23] In addition, the Act made the jury's sentencing recommendation as to punishment of a defendant binding on New York trial courts.[24]

Following the changes to the death penalty statute, only treason brought an automatic capital sentence upon conviction.[25] The Act of 1963 offered more protections for defendants facing a possible sentence of death. The amendments also prohibited capital punishment for offenders under the age of 18 and allowed the judge to discharge the jury and sentence a defendant to life imprisonment if the court believed that death was unwarranted due to mitigating factors.[26]

> The Court's prior silence on the contours of the death penalty statutes that would be constitutionally acceptable was finally broken, and New York's new law did not meet the test.

For some politicians in the Assembly, increased protections for criminal defendants in capital cases under the Act of 1963 were not enough to ensure justice was being served. In 1965, Richard J. Bartlett, a Republican Assemblyman from upstate New York, led the Temporary Commission on Revision of the Penal Law and Criminal Code. This commission gave a final recommendation that the death penalty in New York State should be abolished by appropriate legislation with an immediately effective date – before further defendants

were sentenced to death.[27] The commission's recommendations forced legislators to reexamine the form of the death penalty statute, even with the amendments from the Act of 1963. Thus legislation followed in 1965 that limited the death penalty to deliberate and premeditated murders where the victim was a police officer killed in the line of duty or where a convicted prisoner killed another person while serving a life sentence in a New York State correctional facility.[28]

The Legislature Reverses Itself

Two years later, legislators had changed their minds again. This time politicians seeking to reform the death penalty statute were for its expansion, not abolition. In 1967, New York expanded the class of offenses punishable by death to again include felony murder as a capital crime.[29] Legislators probably thought the death penalty statute could be left alone at least for a few more years and that defendants could be sentenced to death and the executions carried out.

That hope soon became problematic. The United States at the time faced a moratorium on the death penalty as a result of constitutional challenges raised in state and federal courts all over the nation.[30] Before anyone could be sentenced to death and an execution carried out, New York was required to halt the implementation of the death penalty while the constitutional issues raised by these rulings were resolved.[31] Five years after New York's 1967 expansion of its statute, the constitutionality of such state statutes was clarified. In 1972, the United States Supreme Court delivered its decision in *Furman v. Georgia*, which made unconstitutional any state statute that granted juries unregulated discretion. The Court opined that such statutes resulted in death sentences being imposed in an arbitrary manner that clearly violated the Eighth Amendment.[32]

From New York State's perspective, the *Furman* decision caused problems. The decision by the Supreme Court, although clear on unregulated discretion, was silent on how state legislators could craft a statute that would pass constitutional muster. Legislators in New York were not alone in sensing that a vast amount of work lay ahead in amending the state's death penalty statute so as to meet the requirements of *Furman* – all capital punishment statutes across the nation were now unconstitutional. Thus, in the case of *People v. Fitzpatrick*, the New York Court of Appeals had little choice but to abide by the decision of the U.S. Supreme Court, and ruled the New York death penalty statute in its then-current form to be unconstitutional, due to the issue of unregulated jury discretion.[33]

New York legislators in 1974 tried again to reform the death penalty statute by returning to automatic death sentences for any intentional killing of a law enforcement officer, similar to the criteria of the 1965 death penalty legislation.[34] An automatic death sentence would also be imposed for any prisoner sentenced to life in prison who committed homicide.[35] Notwithstanding their efforts, New York legislators were caught off guard two years later by the Supreme Court. In 1976, the Court's prior silence on the contours of state death penalty statutes that would be constitutionally acceptable was finally broken, and New York's new law did not meet the test.

The Supreme Court, in a series of three rulings that year, made it clear that any death penalty statute created by a state that required a mandatory death sentence was unconstitutional under the Eighth and Fourteenth Amendments because such statutes precluded individualized sentencing.[36] It is important to note that the Justices on the Court at the time were not considered death penalty abolitionists. The Supreme Court did approve capital punishment statutes created by states, where such statutes clearly indicated guided discretion on the use of capital punishment as part of the statute.[37]

Even so, many legislators in New York hoped that the 1974 statute might not need revision because only a limited range of crimes required a mandatory sentence of death. That hope was dashed in 1977 with the decision in *Roberts v. Louisiana*, in which the Supreme Court clarified that any state's mandatory sentencing scheme in a death penalty statute would be unconstitutional even if such a scheme only applied to a limited range of crimes.[38] The New York Court of Appeals soon faced the issue again. In the case of *People v. Davis*, while holding back on the issue of whether homicide committed by an inmate in the New York correctional system would require a mandatory death sentence, the Court held the 1974 New York death penalty statute violated the federal Constitution.[39]

Death Penalty in Limbo

After the *Davis* ruling, the period from 1978 to 1994 could be characterized as the "rejection period" in Albany, because of how New York governors responded each time they were presented with a proposed new death penalty statute. A bill would be passed each year by the New York State Assembly and the New York State Senate, only to be vetoed by either Governor Carey or Governor Cuomo.[40] It has been noted that New York legislators never believed that any of the proposals during this peri-

od would actually become law because of the governors' public positions on the issue. In response, legislators generally took an aggressive stance on capital punishment in their proposed legislation because they felt no need for concern about a court determination construing the New York death penalty statute as unconstitutional.[41] When Governor Pataki signed the 1995 death penalty act, many legislators had not yet recovered from the general sense of frustration they had experienced in attempting to pass a death penalty statute into law. As some scholars have noted, the imposition of the death penalty in New York in the 1990s was a journey into the legal unknown.[42]

The 1995 Death Penalty Statute

Like those of the past, the 1995 death penalty statute had an Achilles' heel, though it is arguable that many legislators were not aware of the problem. Under the statute, once a guilty verdict is returned, a separate proceeding is commenced. In most cases, this is conducted before the same jury that deliberated on the issue of guilt.[43] During this latter proceeding, additional evidence is presented, this time on the question of sentence: whether the convicted defendant should receive a sentence of death or an alternative sentence. This is where the constitutional defect emerges.

Pursuant to New York's death penalty statute, the trial court was required to instruct jurors to decide whether the defendant should be sentenced to death or to life without parole.[44] Either choice had to be unanimous. The trial court was further required to instruct the jurors that if they failed to agree on either option, the court would sentence the defendant to life imprisonment, with parole eligibility after serving a minimum of 20 to 25 years.[45] This "deadlock instruction" is unique. No other death penalty statute in the country required judges to instruct jurors that if they could not unanimously agree between two choices available, the judge would sentence the defendant to a third, more lenient, option.[46]

The deadlock instruction was not viewed as constitutionally problematic by legislators, and was not amended. Despite an apparently operable death penalty statute, executions in New York did not suddenly commence where they left off in 1963. No one was executed under the 1995 Act, and juries resisted imposing capital punishment while some district attorneys declined to seek it at trial in homicide cases.[47]

At that point, *People v. LaValle* came before New York's Court of Appeals. Stephen LaValle had been on New York's death row for the violent 1997 murder of Patchogue-Medford High School teacher Cynthia Quinn.

New York's highest court closely scrutinized the constitutional problem posed by the deadlock instruction. The Court realized the force of the deadlock instruction over the decision-making process of jurors and, in a four-to-three ruling, held that the deadlock instruction was coercive for jurors deciding the fate of a convicted defendant.[48] In essence, the potential option before jurors of effectively allowing a defendant to be paroled created an unacceptable possibility in a capital case, in which they had returned a verdict of guilty.

Judge George Bundy Smith, writing for the majority, stated that jurors who faced a choice of life in prison without parole or death for a defendant were making decisions through fear and coercion because the defendant would otherwise be paroled in 20 years and would pose a potential threat to society.[49] Thus the deadlock instruction gave rise to an unconstitutional risk that one or more jurors would band together with fellow jurors in favoring the death of the defendant, in order to avoid the more lenient sentence that would follow in the event the jurors became deadlocked in their choice of punishment.[50]

Jurors who faced a choice of life in prison without parole or death were making decisions through fear and coercion.

The Court of Appeals also examined the New York State Constitution and considered whether the statute afforded the due process rights guaranteed under Article I, section 6. The Court then looked at the rulings of the U.S. Supreme Court. Quoting the Supreme Court's decision in *Woodson v. North Carolina*, the Court of Appeals wrote that "[b]ecause death is qualitatively different there is a 'corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'"[51] The Court further opined that the decisions made by an individual juror in a capital case should be the result of that juror's reasoned understanding appropriate to the case at hand.[52]

It is important to note that the Court of Appeals did not limit itself to an examination of case law and the New York constitution in writing the majority decision, but also looked to other sources of information. The Court considered several scientific studies of jury behavior, noting that "these studies provide the best available insight into jury behavior."[53] For example, the Court cited a study by Bowers & Steiner that found a tendency among jurors to grossly underestimate the period of time in which capital murderers usually stay incarcerated in prison.[54] The Court also referenced a study that confirmed a trend among jurors' deliberations to emphasize dangerousness, and found that misguided fears of early release can generate death sentences in capital cases.[55] The Court concluded that a legislative solution is required and stated:

> We have the power to eliminate an unconstitutional sentencing procedure, but we do not have the power to fill the void with a different procedure, particularly one that potentially imposes a greater sentence than the possible deadlock sentence that has been prescribed.[56]

As in the case of *People v. Gersewitz*, the Court of Appeals noted that it was limited in fixing the problem, explaining that the Court has "no power to supply even an inadvertent omission of the legislature."[57] The dissent, written by Judge Robert Smith, called the ruling "an astonishing holding" that improperly supplanted the role of the legislature.[58]

Since *LaValle*, the death sentences of convicted murderers Nicholson McCoy and Robert Shulman have been overturned. It is likely in the coming months that legislators and scholars alike will attempt to examine the full scope of the new constitutional rights referenced by the courts, and seek to address, once again, the constitutional weaknesses of the statute, particularly in light of pressure from the public. New York State must again return to square one in drafting a new death penalty statute. ■

1. *People v. LaValle*, 3 N.Y.3d 88, 783 N.Y.S.2d 485 (2004).
2. *See id.*
3. *Death-Row Killer Con Yawns as Judge Resentences Him*, Daily News, Sept. 9, 2004.
4. Russell Shorto, The Island at the Center of the World 84 (1st ed. 2004).
5. Lawrence Friedman, Crime and Punishment in American History 42 (1st ed. 1993).
6. *See id.*
6. *See id.* at 44.
8. Act of June 4, 1888 N.Y. Laws ch. 489, sec. 5, § 505.
9. See Friedman, *supra* note 5, at 44–45.
10. James R. Acker, *New York's Proposed Death Penalty Legislation: Constitutional and Policy Perspectives*, 54 Alb. L. Rev. 515 (1990).
11. Raymond Paternoster, Capital Punishment in America 7 (1st ed. 1991).
12. *See* Acker, *supra* note 10, at 515.
13. *People ex rel. Kemmler v. Durston*, 119 N.Y. 569, 575, 24 N.E. 6 (1890).
14. William Bowers, Legal Homicide app. A (1st ed. 1984).
15. *See id.* at 34.
16. *See* Acker, *supra* note 10, at 520.
17. *See id.*
18. Michael Lumer & Nancy Tenney, *The Death Penalty in New York: An Historical Perspective Article*, 4 J.L. & Pol'y 81 (1995).
19. *See* Acker, *supra* note 10, at 522.
20. *See* Lumer & Tenney, *supra* note 18.
21. Tracy Connor & Scott Shifrel, *View from Death Row*, Daily News, Nov. 27, 2002.
22. *See* Acker, *supra* note 10, at 523.

23. Act of May 3, 1963, 1963 N.Y. Laws ch. 994, § 1.

24. *See id.*

25. *See* Acker, *supra* note 10, at 522–23.

26. *See id.*

27. *See id.* at 524–25.

28. Act of June 1, 1965, 1965 N.Y. Laws ch. 321.

29. *See* Acker, *supra* note 10, at 527 nn.65–68.

30. Bowers, *supra* note 14, at 172–73.

31. *See id.*

32. *Furman v. Georgia*, 408 U.S. 238 (1972).

33. *People v. Fitzpatrick*, 32 N.Y.2d 499, 346 N.Y.S.2d 793, *cert. denied*, 414 U.S. 1033 (1973).

34. Acker, *supra* note 10, at 530.

35. *See id.*

36. *Jurek v. Texas*, 428 U.S. 262 (1976); *Profitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

37. *See Jurek*, 428 U.S. 262; *Profitt*, 428 U.S. 242; *Gregg*, 428 U.S. 153.

38. *Roberts v. Louisiana*, 431 U.S. 633 (1977).

39. *People v. Davis*, 43 N.Y.2d 17, 400 N.Y.S.2d 735 (1977).

40. *See* Lumer & Tenney, *supra* note 18, at 93.

41. James Dao, *Pataki and State Leaders Agree on Details of a Plan to Restore Death Penalty*, N.Y. Times, Feb. 16, 1995.

42. Franklin Zimring, *The Wages of Ambivalence: On the Context and Prospects of New York's Death Penalty*, 44 Buff. L. Rev. 303 (1996).

43. CPL § 400.27(2).

44. CPL § 400.27(10).

45. *See id.*

46. *See id.*

47. William Glaberson, *A 4-3 Ruling Effectively Halts Death Penalty in New York*, N.Y. Times, June 25, 2004.

48. *See People v. LaValle*, 3 N.Y.3d 88, 783 N.Y.S.2d 485 (2004).

49. *See id.* at 117–19.

50. *See id.*

51. *See id.* at 120; *see also Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

52. *See LaValle*, 3 N.Y.3d 88.

53. *See id.*

54. *See id.* at 117 (citing Bowers & Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605 (1999)).

55. *See id.* (citing Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 4 (1993)).

56. *LaValle*, 3 N.Y.3d 131.

57. *Id.* (quoting *People v. Gersewitz*, 294 N.Y. 163, 169, 61 N.E.2d 427 (1945)).

58. *See id.* at 143, 148.

DAVID PAUL HOROWITZ

The Expert Witness Primer

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.

Expert testimony is permitted in New York State courts "[w]hen a case involves a matter of science or art or requires special knowledge or skill not ordinarily possessed by the average person."[1] Selecting the proper expert, timely retention of the expert, and effective use of the expert at trial require careful planning and execution.[2]

The threshold determination required is whether expert testimony is needed to establish, *prima facie*, one or more claims or defenses in an action. For example, in a medical malpractice action, competent medical testimony is necessary in order to establish both a departure from good and accepted medical practice and proximate cause of the patient's injury resulting from the departure. Where expert testimony is required, a properly qualified and credentialed expert must be retained, and provided with the necessary information, materials, and site, product, record and client access, so the expert will be able to fully evaluate the claims or defenses and render a meaningful opinion.

There are many situations where expert testimony is not required, but is useful to support or bolster a claim, defense or element of damages. For example, while not usually required to prove economic loss to an injured plaintiff, a vocational expert may be useful to bolster a claim that a party cannot work, or is limited in the ability to work, and an economist can assist a jury in calculating past and future losses. The same exchange, foundation and other requirements governing experts apply to both required and "optional" experts.

Retaining the Expert

Careful consideration must be given to the timing of the expert's retention. Retention of the expert is different from noticing and exchanging the expert. While there are long-standing tactical reasons why attorneys delay the exchange of expert witnesses, often until the last possible moment (and sometimes, unfortunately for their clients, beyond the last possible moment), early retention of an expert can, and usually will, aid immeasurably in the proper and focused preparation of a case. Additionally, early retention of, and investigation and inspection by, an expert can minimize problems associated with spoliation of evidence.

More important than early retention of an expert is the retention of a qualified expert. Particularly when the area of expertise sought is one in which the attorney has little or no background, it is easy to be misled by an "expert" claiming to possess knowledge and expertise or certain credentials and qualifications, when, in fact, the expert does not. The best way to obtain a qualified expert is by way of recommendation from a knowledgeable attorney who has already worked with the expert. Where you cannot obtain referrals from attorneys who have used a qualified expert in the field, there are many companies that, for a fee, will review your case and recommend an appropriate expert.

Alternatively, careful research – and occasionally some legwork – can yield a well-qualified and credentialed expert. While conventional libraries have always contained important reference material for locating and vetting an expert, the Internet has made this work significantly faster, cheaper and more exhaustive, with the caveat that any information obtained in this manner be taken with at least a grain of salt, and often a healthy dose of skepticism. Finally, it is crucial to bear in mind that selecting the right expert is more than identifying a candidate with the requisite knowledge and background. The expert must be able to testify effectively in order to prevail at trial. This requires an evaluation of the expert's attitude, poise, and demeanor, as well as the ability to explain complex ideas and concepts in a way that is clear and simple, without being condescending. The world's leading expert may be a terrible witness, while another expert well down the ladder of prestige in a particular area of expertise may make a terrific witness.

Admissibility

New York State courts have traditionally followed and applied the *Frye*[3] test in determining whether an

expert's testimony should be admitted. More recently, some state courts have looked to the standard set forth in *Daubert*[4] to determine whether or not an expert should be permitted to testify.[5]

Traditionally, the role of a New York State judge in evaluating the admissibility of expert testimony is limited to a review under *Frye* and a determination, if objection is made, whether the scientific basis for the expert's testimony is generally accepted in the scientific community. If it is, the expert will be permitted to testify.

In 1993, the United States Supreme Court decided *Daubert*. That decision, along with subsequent decisions refining *Daubert*, represented a sea change from the federal courts' long-standing application of the *Frye* test. No longer was acceptance within the scientific community to be the key, but rather, in performing what the Court referred to as its "gate-keeping" function, federal district court judges were to make an initial determination, after a hearing, of whether that expert was qualified to testify. To do so, the Court recommended using a number of factors, including whether the expert's concept had been tested, the known rate of error for the testing, whether the expert's concept had been subjected to peer review, and whether the concept is generally accepted within the appropriate scientific community. The Supreme Court's subsequent ruling in *Kumho Tire*[6] extended these requirements to all expert testimony, not just scientific testimony.

Twice since the Supreme Court decided *Daubert*, the New York State Court of Appeals has reaffirmed that *Frye* remains the standard in New York.[7] In the 2000 *Andon* decision, the Court of Appeals stated that it does not favor mini-trials consisting of battles of experts: "[W]hile open discovery is crucial to the search for truth, equally important is the need to avoid undue delay created by battling experts."[8] This language from *Andon* may be an important indication of how the Court of Appeals would approach a case applying *Daubert*.

Although the First Department has not directly addressed the issue, the other Appellate Divisions have considered the applicability of *Frye* versus *Daubert*. The Second Department has not stated a switch from *Frye*, but has cited *Daubert* as authority for reviewing an expert's qualifications.[9] The Third Department continues to follow *Frye*.[10] However, the Third Department has also reviewed a lower court decision where the court "may arguably have implicitly employed, in part, the scientific reliability test [*Daubert*], rather than the controlling general acceptance test [*Frye*]," and did not directly criticize the trial court for doing so.[11] The Fourth Department, however, has referred to a blended *Frye/Daubert* test in reviewing a party's claim of error.[12] Whether this signals that the Fourth Department would follow *Daubert* is unclear.

Lower court decisions applying *Daubert*, while not numerous, may be instructive in determining whether expert testimony is admissible. In *Wahl v. American Honda Motor Co.*,[13] the plaintiff called an expert to testify concerning vehicle stability, and the expert sought to testify concerning a theory of vehicle dynamics he had developed. The court concluded that the expert was qualified to testify under *Daubert*. *Frye* continues to be applied where it is claimed the expert's methodologies are not generally accepted in the scientific community.[14]

While issues concerning admissibility may seem a long way off when an expert is first consulted or later, when a CPLR 3101(d)(1)(i) response is served, it is crucial to consider any and all admissibility issues no later than the time the exchange is made. A response that suggests a lack of proper foundation for admissibility may trigger a motion to dismiss or preclude. Better practice would be to make this determination at the time of retention of the expert so as to avoid the time and expense of retaining an expert who, ultimately, is not qualified. Although *Daubert* may never become the standard in New York State courts, as a practical matter, any expert's prospective testimony should be probed and tested using the *Daubert* factors because they will certainly be used by an adversary in cross-examining the witness. It is small consolation that an expert's testimony is admissible if the expert's credibility is demolished in front of the jury.

This is an evolving area of law, and practitioners are advised to pay close attention to new cases in this area, particularly any Appellate Division pronouncements. Meanwhile, it would be wise to consider prospective experts' eventual trial testimony under both *Frye* and *Daubert*.

Certain factors must always be considered in evaluating whether an expert is qualified to testify:

- Is the subject matter such that it requires or lends itself to expert testimony?
- Did the party offering the expert testimony comply with all disclosure requirements?
- Is the expert qualified to testify as an expert? and
- Do the expert's qualifications extend to the subject matter at issue?

In order for an expert to testify effectively, and for the expert's testimony to be admissible, the expert, under the attorney's guidance, must perform the necessary groundwork:

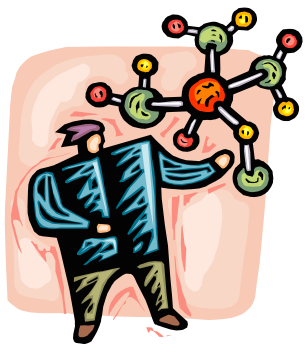
- Review all relevant material obtained through investigation and discovery;
- Review pertinent literature and other relevant information;
- Perform any necessary inspection of a scene or product, or conduct any necessary examination of a party;
- Determine whether any testing is necessary to support the expert's conclusions and, if needed, conduct such testing in such a manner as to prevent it from being undermined on cross-examination;

- Be attentive to spoliation issues, particularly when performing tests on actual evidence in a case;
- Determine whether or not to prepare a written report;[15]
- Review with the attorney the proposed expert exchange for accuracy and completeness; and
- Review all information obtained from and about the opposing side's expert.

Preparing the Expert Witness to Testify

A careful review of Pattern Jury Instruction (PJI) 1:90, the general jury charge in New York State court which explains to a jury the role of an expert and the weight the jury is to give the expert's testimony, should be the starting point for expert witness preparation. The cases cited in the comments provide an excellent overview of the applicable law. Familiarity with these requirements is crucial in preparing an expert witness to testify, and early consideration of these factors can identify potential weaknesses in an expert's qualifications or methodology with enough time to take corrective action.

Aside from the general requirements set forth in PJI 1:90, more specific areas for which expert testimony is offered will be governed by one or more additional sections of the PJI. For example, PJI 2:149 through 2:151D set forth the instructions, and underlying case law, for the different causes of action and requirements for proving damages in medical malpractice cases. If you are unaware of the elements of the claim or defense you are seeking to establish, you will not be able to properly prepare your expert witness.



Spend time preparing your expert. This may sound self-evident, but there is a tendency among attorneys, particularly those who are less experienced, to rely on the expert's courtroom experience and forgo extensive trial preparation. This is a mistake. No matter how experienced the expert is in testifying, and no matter how inexperienced the lawyer is who is proffering the expert, the lawyer must be in control of the witness's testimony, and control the pace, scope, and organization of the expert's testimony.

The best way to ensure the proper level of control over an expert's testimony is to spend time, in advance of, and away from, court, going over the details of the expert's testimony. Beware of an expert who is unable to make time to meet with you. That expert may well have difficulty freeing up time to come to court when needed.

Discuss with the expert all prior testimony he or she has given. Be on the lookout for instances where the expert has offered opinions at odds with the opinion to be offered in your case. Obtain as many transcripts as possible of your witness's testimony – from colleagues, bar associations and, if necessary, for-profit brief banks.

Do not spend all of your time reviewing direct testimony with the expert. Careful thought should be given to potential areas of cross-examination, and the expert should be prepared to address each of them. Advance preparation to address weaknesses will greatly enhance the odds of successfully overcoming those weaknesses.

Laying the Proper Foundation

Before the witness offers opinion testimony and the facts upon which the opinion testimony is based, the expert's qualifications must be elicited, on the record, and the witness must then be offered as an expert witness. Often, opposing counsel will offer to stipulate to the expert's qualifications. While it is tempting to accept this offer, acceptance will prevent the jury from hearing the details of the expert's qualifications. You must balance the potential benefit of a detailed recitation of the expert's qualifications against the potential for boring the jury (and judge).

The following elements should be covered, as applicable, in establishing a witness's qualifications:

- The witness has acquired degrees from educational institutions;
- The witness has other specialized training;
- The witness is licensed to practice in the field;
- The witness has practiced in the field for a substantial period of time;
- The witness has taught in the field;
- The witness has published in the field;
- The witness belongs to professional organizations in the field;
- The witness has previously testified as an expert on this subject.[16]

Carefully review the facts, testimony, and other evidence relied upon by the expert. If the expert's file has been subpoenaed into court, review it thoroughly to make certain it contains no extraneous materials. If it has not been subpoenaed, consider instructing the expert to bring only certain portions of the file to court. Elicit testimony from the expert detailing all of the materials reviewed for trial, including inspections performed, depositions and other discovery reviewed, and material reviewed that was obtained outside formal disclosure in the case.

Decide in advance whether to formulate hypothetical questions for the expert. New York does not require that questions seeking an expert's opinion be in hypothetical form. CPLR 4515 provides:

> Form of expert opinion. Unless the court orders otherwise, questions calling for the opinion of an expert

> witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data and other criteria supporting the opinion.

Despite the latitude offered by CPLR 4515, some judges will require a hypothetical. Accordingly, it is wise to inquire ahead of time as to the trial judge's practice. Even where it seems that a hypothetical is not required, having one prepared may prove beneficial in the event data upon which the expert's opinion is based has not gone into evidence according to plan.

Eliciting All Necessary Opinion Testimony

Do not forget to ask what the expert's opinion is. Stories abound, although they may be apocryphal, of instances where an attorney offering expert evidence asks the expert whether he or she has formed an opinion with a reasonable degree of specialized certainty, the expert answers in the affirmative, and the attorney says, "thank you," and moves on to another topic without asking what the opinion is. New York State court practice does not require the incantation of any specific language when eliciting an expert's opinion. What is required is that the expert's opinion reflects "an acceptable level of certainty."[17]

The witness must testify that an opinion has been formed, that the opinion is based upon an acceptable level of certainty and, thereafter, must state the opinion. Once the expert has rendered an opinion, it is good practice to have the expert explain the opinion and the significance of the underlying facts and evidence and the manner in which the facts and evidence support the expert's opinion.

Demonstrative Evidence

Many attorneys like to have their experts use demonstrative evidence. While not required, effective use of demonstrative evidence can significantly aid juror understanding and comprehension of otherwise difficult concepts or ideas. The admissibility of demonstrative evidence lies within the sound discretion of the trial court.[18] As always, the court must consider whether the probative value of the evidence outweighs its potential for prejudice. The Court of Appeals explained the balancing required:

> [T]hough tests and demonstrations in the courtroom are not lightly to be rejected when they would play a positive and helpful role in the ascertainment of truth, courts must be alert to the danger that, when ill-designed or not properly relevant to the point at issue, instead of being helpful they may serve but to mislead, confuse, divert or otherwise prejudice the purposes of the trial.[19]

In affirming the introduction of demonstrative evidence at trial, the Third Department explained that the demonstration was "not sensational or calculated to disrupt the 'calm judicial atmosphere of a court of justice' nor did it tend to confuse the issues of the case."[20]

It is crucial that a proper foundation be laid in order for demonstrative evidence to be admitted. An excellent source of sample foundations for demonstrative evidence is *New York Evidentiary Foundations*.[21] Samples include verification of a dia-

gram, marking a diagram, models, in-court demonstrations and out-of-court experiments. In another excellent resource, citing *People v. Scarola*,[22] Justice Helen E. Freedman has set forth a short checklist for foundation requirements:

- The evidence is relevant and material to the issues in the case;
- The probative value of the evidence is not substantially outweighed by the danger it will unfairly prejudice the opposing party; and
- The evidence must not be misleading.[23]

Generally, nominal variations in condition will not render testing inadmissible so long as the items being tested are the same in all "significant respects."[24] However, the Court of Appeals has held that demonstrative evidence that might properly have been excluded due to differences in condition could be admitted and the opposing party's interests sufficiently protected by allowing liberal cross-examination.[25] Generally, variations in condition will go to the weight of the evidence.[26]

Although no list can be all-inclusive, demonstrative evidence of many different types have been offered, some with a long pedigree of acceptance, and some involving cutting-edge technological or scientific questions. Creativity is often the key. A severely injured plaintiff who was unable to offer testimony under oath was permitted to be presented in court and questioned by his attorney, to aid the jury in evaluating the plaintiff's condition.[27]

Common types of demonstrative evidence include:

- in-court demonstrations;
- recording of out-of-court experimentation;
- view by jury (CPLR 4110-c);
- display of person or body part;
- photographs;
- slide presentations;
- overhead transparencies;
- movies and videotape;
- audiotape;
- computer simulations;
- computer (*e.g.*, Powerpoint) presentations;
- blackboard or marker board in-court diagrams/charts;
- prepared diagrams/charts/illustrations;
- scale models;
- anatomical models;
- videotaped deposition or trial testimony.

Expert witnesses are often crucial to obtaining a successful outcome in a case. Obtaining a successful outcome using expert testimony is most often the result of hard work, careful preparation, and thoughtful analysis. It is a wonderful feeling to walk into a courtroom knowing that you have a credentialed, personable, and effective expert to testify in support of your case. So research, prepare, practice, and go forth and conquer with your expert witness. ■

1. Pattern Jury Instructions 1:90.

2. Requirements for expert disclosure under CPLR 3101(d), a constantly shifting and evolving area, were addressed in an earlier article. See David Paul Horowitz, *Pretrial Expert Disclosure in State Court Cases*, N.Y. St. B. J., Vol. 75, No. 7, at 10 (Sept. 2003).

3. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

4. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

5. Readers may wish to review the recent two-part series appearing in the *Journal*: Harold L. Schwab, *Is It Junk or Genuine? Precluding Unreliable Scientific Testimony in New York – A Look at the Last 10 Years in the Wake of* Frye *and* Daubert, N.Y. St. B. J., vol. 76, no. 9, at 10 (Nov./Dec. 2004), Vol. 77, No. 1, at 25 (Jan. 2005).

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

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

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

9. *Hofman v. Toys "R" Us – NY Ltd. P'ship*, 272 A.D.2d 296, 707 N.Y.S.2d 641 (2d Dep't 2000).

10. *See People v. Johnson*, 273 A.D.2d 514, 709 N.Y.S.2d 230 (3d Dep't 2000).

11. *McCarthy v. Handel*, 297 A.D.2d 444, 448, 746 N.Y.S.2d 209 (3d Dep't 2002).

12. *Middleton v. Kenny*, 286 A.D.2d 957, 731 N.Y.S.2d 425 (4th Dep't 2001).

13. 181 Misc. 2d 396, 693 N.Y.S.2d 875 (Sup. Ct., Suffolk Co. 1999); *see Clemente v. Blumenberg*, 183 Misc. 2d 923, 705 N.Y.S.2d 792 (Sup. Ct., Rockland Co. 1999).

14. *See, e.g., Selig v. Pfizer, Inc.*, 185 Misc. 2d 600, 713 N.Y.S.2d 898 (Sup. Ct., N.Y. Co. 2000).

15. An expert's report is not required under CPLR 3101(d), and most experienced practitioners instruct their expert not to prepare a report.

16. Jonakait, et al., New York Evidentiary Foundations 287 (2d ed. 2002).

17. *Matott v. Ward*, 48 N.Y.2d 455, 423 N.Y.S.2d 645 (1979).

18. *See, e.g., People v. Acevedo*, 40 N.Y.2d 701, 389 N.Y.S.2d 811 (1976); *Klombers v. Lefkowitz*, 131 A.D.2d 815 (2d Dep't 1987).

19. *Acevedo*, 40 N.Y.2d 701.

20. *Riddle v. Mem'l Hosp.*, 43 A.D.2d 750, 751, 349 N.Y.S.2d 855 (3d Dep't 1973).

21. Jonakait, *supra* note 16.

22. 71 N.Y.2d 769, 530 N.Y.S.2d 83 (1988).

23. Hon. Helen E. Freedman, New York Objections (1st ed. 1998).

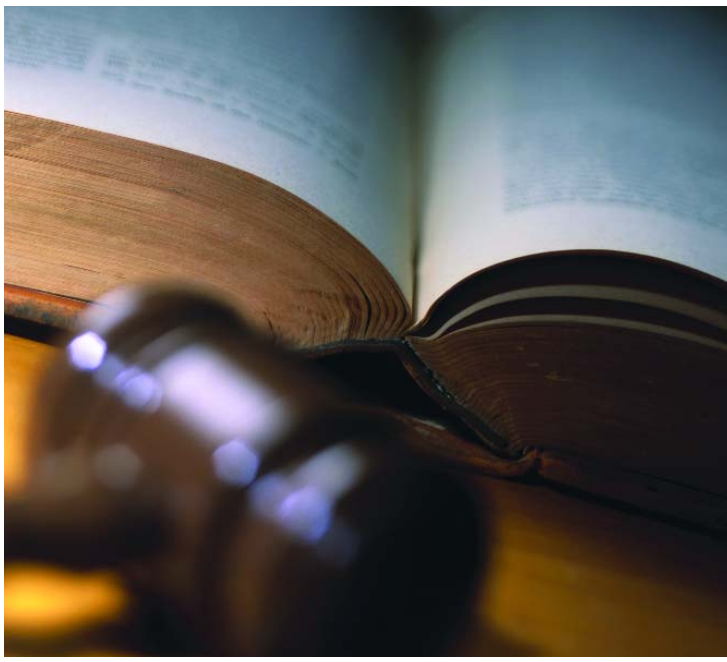
24. *Bolm v. Triumph Corp.*, 71 A.D.2d 429, 422 N.Y.S.2d 969 (4th Dep't 1979); *see also Flah's, Inc. v. Richard Rosette Elec., Inc.*, 155 A.D.2d 772, 547 N.Y.S.2d 935 (3d Dep't 1989).

25. *Uss v. Town of Oyster Bay*, 37 N.Y.2d 639, 376 N.Y.S.2d 449 (1975).

26. *People v. Diaz*, 163 Misc. 2d 390, 625 N.Y.S.2d 388 (Sup. Ct., Bronx Co. 1994).

27. *Harvey v. Mazal Am. Partners*, 165 A.D.2d 242, 566 N.Y.S.2d 242 (1st Dep't 1991).

Practice made perfect.



That is our *reason for being* at the New York State Bar Association: to help make your practice as close to perfect as possible.

Toward that end, we have established numerous member-only programs that can empower you to:

- Stay informed
- Sharpen your skills
- Save money
- Save time
- Meet CLE requirements
- Manage your career
- Make valuable contacts
- Make a difference
- Practice law better

"**NYSBA** has consistently yielded these benefits for my practice. I am committed to ensuring that it does the same for yours."

– Kenneth G. Standard, President
New York State Bar Association

New York State Bar Association 518.463.3200 www.nysba.org

Fernando A. Bohorquez, Jr., is an associate at Baker & Hostetler, LLP, in New York City, practicing in the areas of commercial litigation and white collar crime. This article was prepared in connection with Mr. Bohorquez' work as a member of the New York State Bar Association's Committee on Civil Rights. The author thanks the members of the Committee for their assistance in the preparation of this article, especially Peter Sherwin (Committee Chair), Robyn Crosson, and Tom Stein.

Challenges to Challenging The Patriot Act

Limits on Judicial Review and a Proposal for Reform

By Fernando A. Bohorquez, Jr.

Editor's Note: The following article presents a proposal for reform of what is commonly referred to as the Patriot Act. The contents of this article represent a point of view expressed by members of the Committee on Civil Rights of the New York State Bar Association; the views and positions expressed in this article have not been presented to the New York State Bar Association or accepted by it as a recommendation.

Enacted in the aftermath of September 11, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001,[1] generally known as the Patriot Act, has been a lightning rod of controversy from those on both sides of the political aisle who contend that the Act offends basic civil liberties under the First, Fourth and Fifth Amendments.[2] In a November 2003 speech before the Federalist Society, Attorney General John Ashcroft defended the Patriot Act, asserting that the Patriot Act provides the executive branch critical tools in the war on terrorism.[3] In defense of the Act, he noted that no court has found an abuse of the Patriot Act by the Department of Justice (DOJ) or Federal Bureau of Investigation (FBI).[4] He also observed that no civil case had been filed against the government under Section 223 of the Patriot Act, which allows citizens to seek damages for any willful violations of the Act.[5]

To be sure, there have been very few challenges to the Patriot Act in the federal courts in the years after the September 11 terrorist attack. But, when examined, the few cases existing reveal that the judiciary's relative silence on the Patriot Act indicates its lack of opportunity to hear a case or controversy rather than an imprimatur of approval, as the Attorney General suggested. A common theme among the cases on record is the prominence of preliminary issues of access and justiciability. To challenge an act of Congress in federal court, a party must first have access to the court and then establish that the challenge is a case and controversy ripe for the court's review. As the developing case law demonstrates, these first steps of access and justiciability cannot be taken for granted. In fact, these early procedural questions can be substantial obstacles to challenging provisions of the Patriot Act. Moreover, the foreclosure of substantive challenges to the Act is inconsistent with the judiciary's traditional role as the final arbiter on the legitimacy of legislative and executive actions, especially when those acts tread within the realm of civil liberties. These concerns become more acute when considered in the broad context of the Act's overall expansion of the government's surveillance powers.

This article first provides a brief overview of the Patriot Act and its amendments to the Foreign Intelligence Surveillance Act (FISA),[6] several criminal provisions under Title 18 of the U.S. Code, primarily those adopted in

the Antiterrorism and Effective Death Penalty Act (AEDPA), and the Electronic Communications Privacy Act (ECPA).[7] It then examines four cases that have reviewed the constitutionality of these provisions. The article concludes with observations on the emergence of access, standing and ripeness as key obstacles to challenging the Patriot Act and recommends steps Congress may take to alleviate some of these concerns.

Significant Amendments

Rather than a single body of legislation, the Patriot Act is a series of amendments to numerous sections of the U.S. Code. The Act's 156 sections amend several Acts of Congress ranging from the International Emergency Economic Powers Act, to Title III of the Omnibus Crime Control and Safe Street Acts of 1968 (Title III).[8] Considering the stated purpose of the Act – to provide law enforcement with the necessary tools to combat terrorism – many of the changes unsurprisingly revise various provisions of FISA and sections of the criminal code, including those reaching terrorist activity.

FISA and the Patriot Act Amendments

Enacted in 1978, FISA was Congress' attempt to balance the need of the executive branch to conduct foreign intelligence surveillance with the equally compelling need to protect the privacy of American citizens from potential abuses of such conduct.[9] FISA's purpose was "to provide a procedure under which the Attorney General can obtain a judicial warrant authorizing the use of electronic surveillance in the United States for foreign intelligence purposes."[10] FISA created the Foreign Intelligence Surveillance Court (FIS Court), originally comprised of seven federal district court judges selected by the Chief Justice of the Supreme Court.[11] The FIS Court hears applications made by federal law enforcement officials seeking orders to conduct electronic surveillance to obtain foreign intelligence information within the territorial United States; the court grants such application upon a finding of probable cause that: (1) the target of electronic surveillance is a "foreign power or an agent of a foreign power"; (2) that "each of the facilities or places at which the electronic surveillance is directed is being used . . . by a foreign power or agent of a foreign power"; and (3) that the application otherwise satisfies FISA's other requirements.[12]

In its first incarnation, FISA required the application to contain a certification by a national security officer and approval of the certification by the Attorney General that "*the* purpose for the surveillance is to obtain foreign intelligence information."[13] These applications are reviewed *in camera* and *ex parte*.[14] FISA also established an appellate court called the Foreign Intelligence Surveillance Court of Review (Court of Review) composed of three federal appellate court judges also selected by the Chief Justice.[15] FISA was amended in 1994 to cover physical searches[16] and again in 1998 to authorize the FIS Court, upon application of the FBI, to enter an *ex parte* order requiring four types of entities – common carriers, public accommodation facilities, physical storage facilities, and vehicle rental facilities – "to release records in [their] possession for an investigation to gather foreign intelligence information or an investigation concerning international terrorism . . . ."[17] If these entities were ordered to produce such records, they were prohibited from disclosing to any person, other than federal law enforcement officials, that the FBI had sought or obtained records under FISA.[18]

The Patriot Act made several changes to FISA. First, Section 218 amended FISA's foreign intelligence purpose standard in Section 1804(a)(7)(B) by replacing "*the* purpose" with "a *significant* purpose." Similarly, Section 504 of the Act added a section to FISA permitting federal law enforcement officers to coordinate efforts and consult with federal intelligence officers to prevent, investigate and protect against terrorist attacks.[19] Second, the Patriot Act amended specific provisions governing the manner and execution of electronic surveillance and physical searches.[20]

Among the most controversial provisions is Section 215, which expands FISA's so-called common carrier records provision under Section 1861. It authorizes the FBI to "make an application for an order requiring the production of *any tangible things* (including books, records, papers, documents, or other items)," rather than merely records, from any entity, not just common carriers.[21] Section 215 also removes the requirement that there be "specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power."[22] Now the FBI need only indicate that the "records concerned are *sought for* an authorized investigation . . . to protect against international terrorism or clandestine intelligence activities."[23] Section 215 extends the non-disclosure provision from common carriers to prohibit any entity served with a FISA order from disclosing that the FBI sought or obtained such records.[24] The provision also authorizes the FBI to obtain records of U.S. citizens and permanent residents based in part on First Amendment protected activities,[25] and to obtain records belonging to persons who are not citizens or permanent residents based solely upon such activities.[26]

AEDPA, ECPA and the Patriot Act Amendments

Title VIII of the Patriot Act amended various provisions of Title 18 of the U.S. Code dealing with terrorism-related crimes under the AEDPA. Sections 2339A and 2339B of Title 18 prohibit providing material support or resources to individuals or organizations engaged in acts of terrorism.[27] Section 805(a)(2)(B) of the Patriot Act broadens the definition of "material support or resources" to include

The extraordinary nature of foreign intelligence crimes fell within the Supreme Court's approval of entirely warrantless and even suspicionless searches that are designed to serve the government's special needs.

"expert advice or assistance" to designated foreign terrorist organizations.[28] Section 810 of the Patriot Act increases the penalty for anyone who "knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so" to 15 years imprisonment, or life if the death of any person results.[29]

Section 2709 of Title 18, a provision of the ECPA, permits the Director of the FBI to request through a National Security Letter (NSL) subscriber information, toll billing records and transactional records of an electronic communication service provider.[30] In its original form, Section 2709 required that the FBI certify that (1) the information sought was relevant to an authorized foreign counterintelligence investigation; and (2) there are specific and articulable facts that the person or entity to whom the information sought pertains is a foreign power or an agent of a foreign power.[31] Section 505 of the Patriot Act amended Section 2709 to remove the second requirement and "allow an NSL to be issued when the FBI certifies the information sought is 'relevant to an authorized foreign counterintelligence investigation.'"[32] Section 2709(c) prohibits a person served with an NSL from disclosing to any other person that the FBI has sought or obtained records.

Court Review

There have been relatively few court cases reviewing the Patriot Act. Four cases on record so far are: (1) *In re Sealed Case*;[33] (2) *Muslim Community Association of Ann Arbor v. Ashcroft*;[34] (3) *Humanitarian Law Project v. Ashcroft, et al.*;[35] and (4) *John Doe, et al. v. Ashcroft, et al*.[36] Each case is discussed in turn below.

In re Sealed Case

In re Sealed Case addressed an appeal by the government to the FISA Court of Review – the first in its 24 year history – of a FIS Court surveillance order imposing certain restrictions on the government. In approving a surveillance order, the FIS Court restricted law enforcement officials from making recommendations to intelligence officials concerning FISA searches or surveillances and directed the DOJ to ensure that law enforcement officials not use FISA procedures to enhance criminal prosecutions.[37] It also directed the DOJ to maintain a "wall" between counterintelligence officials and law enforcement officers.[38] The court based its decision on the understanding that FISA required the "primary purpose" of the order to be for foreign intelligence purposes rather than criminal prosecution.

On appeal, the government contended that the pre-Patriot Act barrier restricting its intention to use foreign intelligence information in criminal prosecutions was an illusion and even if such a wall existed in the past, the Patriot Act tore it down.[39] Technically, the government did not face an opponent on appeal. As the FIS Court only has jurisdiction to review applications and grant orders, constitutional challenges to the regime or an order cannot be heard by the court.[40] And only on "motion of the United States" will the Court of Review hear an appeal of the FIS Court.[41] Nevertheless, the American Civil Liberties Union (ACLU) and others submitted a letter to the United States Court of Appeals for the District of Columbia seeking permission to file an amicus brief, which was ultimately granted.[42] These parties argued that, among other things, the primary purpose test was constitutionally mandated by the Fourth Amendment as a safeguard against unreasonable searches and seizures.[43]

The FISA Court of Review agreed with the Government and overturned the lower court's decision. Based on the language and legislative history of FISA pre-Patriot Act, the Court held that Congress did not "preclude or limit the government's use or proposed use of foreign intelligence information, which included evidence of certain kinds of criminal activity, in a criminal prosecution."[44] It also rejected a long line of precedent holding that the "primary purpose" of a FISA order must be foreign intelligence surveillance, not criminal investigation.[45] Further, the Court found that the Patriot Act's FISA amendments signaled the death knell of the "primary purpose" test.[46] By changing "the purpose" to "a significant purpose," the Court of Review found that "[t]here is simply no question . . . that this amendment relaxed a requirement that the government show that its primary purpose was other than criminal prosecution."[47] In sum, "so long as the government entertains a realistic option of dealing with the [subject of the surveillance] other than through criminal prosecution, it satisfies the significant purpose test."[48]

After finding that a FISA order came close to meeting the requirements of a traditional warrant under Title III,[49] the Court of Review turned to the ultimate question, "whether, FISA, as amended by the Patriot Act, is a reasonable response based on a balance of the legitimate need of the government for foreign intelligence information to protect against national security threats with the protected rights of citizens."[50] To the extent that a FISA order is not "a warrant in the constitutional sense," the Court concluded that it was a reasonable compromise of these competing interests.[51] The Court found that the extraordinary nature of foreign intelligence crimes fell within the Supreme Court's approval of "entirely warrantless and even suspicionless searches that are designed to serve the government's 'special needs, beyond the normal need for law enforcement.'"[52] These warrantless searches are justified because they target "unique interests beyond ordinary, general law enforcement . . . [that] have another particular purpose such as

protections of citizens against special hazards or protection of our borders."[53] It is "[t]he nature of the 'emergency,' which is another word for threat, [which] takes the matter out of the realm of ordinary crime control."[54] In this light, FISA's "general programmatic purpose, to protect the nation against terrorists and espionage threats directed by foreign powers," distinguishes it from "ordinary crime control" and justifies the relaxed standards of the warrantless FISA order.[55] In sum, the Court found that FISA as amended by the Patriot Act was a constitutionally reasonable response to the terrorist threat.[56]

Muslim Community Association of Ann Arbor

On July 30, 2003, the ACLU filed the first constitutional challenge to Section 215 of the Patriot Act, *Muslim Community Association of Ann Arbor v. Ashcroft* ("MCA"), on behalf of six plaintiff organizations.[57] These organizations are a collection of Islamic non-profit groups that provide a broad range of services to local communities in Michigan and across the country.[58] The plaintiffs allege that the Government is using Section 215 to obtain their records and those of their members and clients.[59] The complaint's constitutional objections are three-fold. First, the plaintiffs assert that Section 215's authorization to execute searches without probable cause to believe the target of the order is a criminal suspect or foreign agent violates the Fourth Amendment.[60] Second, the plaintiffs maintain that the FBI's ability to obtain and execute Section 215 orders in secrecy violates the Fourth and Fifth Amendments because targets are never notified of the orders and Section 215 does not provide targeted individuals with notice or an opportunity to challenge the orders.[61] Finally, the plaintiffs argue that Section 215's non-disclosure provision violates the First Amendment as a prior restraint and by authorizing the FBI to investigate individuals based on their exercise of First Amendment freedoms.[62]

In October 2003, the government sought to dismiss the action on justiciability grounds. It contended that the plaintiffs lacked standing to challenge Section 215 because the government has never sought an order under Section 215 with respect to anyone, much less the plaintiffs.[63] Similarly, it argued that the complaint is not ripe for adjudication because the plaintiffs' reasonable belief that Section 215 is being used or will be used against them is based on conjecture and speculation.[64] In any event, according to the government, the plaintiffs' Fourth Amendment concerns were unwarranted because there is no requirement of probable cause when the government seeks the production of records.[65] Rather, similar to a subpoena, the standard is general reasonableness and Section 215 passes muster because it was authorized by Congress to seek documents relevant to a foreign intelligence or terrorist investigation.[66]

Further, the Fourth Amendment does not require prior notice to the target of an investigation before the court may order production of records pertaining to the target as in the case under Section 215.[67] Nor does Section 215 violate the Fifth Amendment, the government maintained, because it provides for judicial review before an order compelling production is issued.[68] Finally, the non-disclosure provision is valid because the First Amendment does not prevent the government from restricting the disclosure of information that may compromise a confidential foreign intelligence investigation.[69] Neither does the First Amendment categorically prohibit the state from conducting an investigation for the purposes of obtaining foreign intelligence information or preventing international terrorism based in whole or in part on First Amendment protected activities.[70]

The Court found that FISA as amended by the Patriot Act was a constitutionally reasonable response to the terrorist threat.

The plaintiffs responded that it made no difference under First Amendment precedent that the Attorney General had yet to use Section 215 because the plaintiffs need only establish a "credible threat" that they may be targeted under the statute to have standing.[71] Relying on declarations submitted by their members, the plaintiffs maintained that the FBI had already investigated organization members and therefore they faced a credible threat under Section 215.[72] Further, the plaintiffs cited Section 215's chilling effect on their free speech and association rights resulting in concrete harm, such as declines in attendance at mosques and decreases in charitable contri-

butions.[73] Further, the plaintiffs asserted that the government erroneously characterized the Section 215 order as a subpoena because the order is more similar to a search warrant in its immediacy, intrusiveness and imprimatur of judicial command.[74]

They maintained that Section 215 violates the Fourth Amendment because it enables the government to seize a wide array of personal records without first establishing probable cause.[75] The plaintiffs further noted that, contrary to the government's contention, Section 215 does not provide those served with a demand for records any opportunity to challenge the demand.[76] Neither does the statute elucidate to whom the challenge should be addressed, where and when it should be filed, and whether the challenge itself would trigger the non-disclosure provision.[77] Finally, the plaintiffs argued that Section 215's non-disclosure provision failed to pass First Amendment scrutiny because it is an automatic and indefinite prior restraint that is not narrowly tailored to the interest of national security.[78] As of this writing, the district court has yet to issue its decision.

Humanitarian Law Project

In August 2003, in *Humanitarian Law Project v. Ashcroft* (*HLP II*), the Humanitarian Law Project (HLP) and other non-profit organizations and individuals challenged Section 805(a)(2)(B) of the Patriot Act, codified at Title 18 U.S.C. §§ 2339A(b) and 2339B(a), which prohibits the provision of "expert advice and assistance" to groups designated as "foreign terrorist organizations" by the Secretary of State.[79] The HLP and others sought to provide humanitarian assistance and political advocacy training to the Kurdistan Worker's Party (KWP), the leading political organization representing Kurdish interests in Turkey.[80]

The remaining organizational plaintiffs sought to provide humanitarian assistance and political advocacy training to the Liberation Tigers of Tamil Eelam (LTTE), which represents the Tamil ethnic group in Sri Lanka in its self-determination efforts. The State Department designated the KWP and LTTE as "foreign terrorist organizations" in 1997.[81]

Plaintiffs maintained that but for Section 805(a)(2)(B)'s ban on providing "expert advice and assistance," they would continue, or commence, to provide training and other support to the KWP and LTTE members in peaceful political advocacy of human rights in Turkey and Sri Lanka.[82] Plaintiffs argued that the prohibition against providing such aid violated the First Amendment because it criminalizes the provision of "expert advice and assistance" to designated terrorist organizations without a specific intent to further the organizations' unlawful ends and was therefore impermissibly vague and substantially overbroad.[83]

Echoing a familiar theme, the government maintained that the court lacked jurisdiction to hear the plaintiffs' pre-enforcement challenge of the "expert advice or assistance" provision on grounds of standing and ripeness.[84] Not only did the plaintiffs fail to demonstrate a history of prosecution under Section 805(a)(2)(B), the government contended they failed to establish a "concrete plan" to violate the provision or that their intended conduct may fall within the statute's scope.[85]

The court rejected the government's justiciability arguments, finding that the plaintiffs had met the relevant requisites of standing and ripeness.

The court rejected the government's justiciability arguments, finding that the plaintiffs had met the relevant Article III requisites of standing and ripeness.[86] It held that the plaintiffs had satisfactorily articulated a concrete plan to violate the provision, as well as shown a credible threat of prosecution by highlighting the government's rigorous enforcement of the material support provision after September 11, LTTE and KWP's designation as terrorist groups, and the plaintiffs' long-standing support for these organizations.[87]

Significantly, all but two plaintiffs submitted affidavits detailing their expertise and how they intended to give material support.[88] Because the plaintiffs were challenging the ban on First Amendment grounds, the court found that they need not wait until they were actually prosecuted under the statute before challenging it. Rather, the question as the court saw it was "whether Plaintiffs' intended speech-related activities arguably fall within the statute's reach."[89] The court found that the plaintiffs who submitted affidavits outlining their expertise in the areas where the organizations or individuals intended to provide "expert advice and assistance" satisfied this requisite.[90] However, as to the organizational plaintiffs who did not, the court dismissed their claims for failure to establish a credible threat of prosecution.[91]

On summary judgment, the court held that the "expert advice and assistance" prohibition was impermissibly vague and invalidated the statute as applied to the remaining plaintiffs. The ban on providing "expert advice and assistance" was equally as vague as the prohibition on providing "training" and "personnel" that the court had previously struck down in *HLP I*.[92] In addition, Section 805(a)(2)(B) "places no limitation on the type of expert advice and assistance which is prohibited, and instead bans the provision of all expert advice and assistance . . ."[93] The court held that the terms "expert advice and assistance" were so vague they could

extend to unequivocally pure protected speech or First Amendment protected activities, such as the plaintiffs' conduct.[94] It did not, however, find that the plaintiffs had demonstrated that the ban was substantially overbroad in the constitutional sense.[95] The prohibition against providing "expert advice and assistance" is aimed at the legitimate state interest of curbing support for foreign terrorist organizations.[96] The court found that the plaintiffs had failed to demonstrate that the prohibition's application to speech was "'substantial' both in an absolute sense and relative to the scope of the law's plainly legitimate applications."[97]

John Doe v. Ashcroft

On April 30, 2004, the ACLU announced that three weeks earlier it had filed a challenge to the FBI's authority to issue NSLs under 18 U.S.C. § 2709, as amended by Section 505 of the Patriot Act.[98] The ACLU had filed suit on behalf of itself and an internet access firm that received an NSL (Doe). The plaintiffs initially filed the suit under seal to avoid triggering the non-disclosure provision of the statute. The plaintiffs then spent three weeks negotiating with the government to reach an agreement on what aspects of the complaint and the case could be disclosed before releasing a redacted complaint.[99] Plaintiffs alleged that Section 2709's subpoena power violated the due process demands of the Fourth Amendment and the non-disclosure provision contravened the First Amendment.[100] Plaintiffs subsequently filed a motion for summary judgment on their claims and the government cross-moved to dismiss, or in the alternative, for summary judgment.

On September 28, 2004, Judge Victor Marrero of the United States District Court of the Southern District of New York granted the plaintiff's motion for summary judgment, finding that Section 2709 violated the Fourth Amendment as applied and the First Amendment on its face. After an exhaustive review of Section 2709, its legislative history, and the pantheon of statutes and regulations that provide the Government with information-gathering powers comparable to NSLs, the court honed in on the disparities between Section 2709 and its legislative cousins.[101]

As opposed to the majority of information-gathering statutes, Section 2709 was silent to whether an NSL recipient could contact an attorney to comply with the demand and contained no provision for judicial enforcement or challenge of an NSL.[102] The lack of these provisions carried particular weight in the court's analysis because there are several bills in Congress that take aim at filling these statutory voids.[103] Relying on the conspicuous absence of these provisions from Section 2709 and evidence that Congress itself recognized the import of these omissions, the court refused to accept the government's "endeavors to heavily repair the statute" and find that Section 2709 implicitly affords an NSL recipient an opportunity to challenge an NSL before a judge and to disclose the NSL to an attorney to aid him or her with such a challenge.[104] But the court declined to invalidate the statute on its face.[105] Rather, the court found that as applied in the instant case, the operation of Section 2709 – apart from any theoretical reading the government applied – rendered it unconstitutional because in practice NSLs issued under Section 2709 "coerce[ ] the reasonable recipient into immediate compliance" with imposing language on FBI letterhead demanding compliance and complete secrecy.[106]

The court found it "highly unlikely that an NSL recipient reasonably would know that he may have a right to contest the NSL, and that a process to do so may exist through a judicial proceeding."[107] In sum, the court held that Section 2709 as applied violated the Fourth Amendment "because in all but the exceptional case it has the effect of authorizing coercive searches effectively immune from any judicial process."

Finally, the court turned to the self-described nub of the case, whether the government may enforce the non-disclosure provision of Section 2709(c) against Doe and other NSL recipients.[108] At the outset, it found that Section 2709(c) was subject to strict scrutiny because it is both a prior restraint and a content-based restriction.[109] The court had little difficulty in finding that the non-disclosure provision was an axiomatic prior restraint because it "prohibits speech before the speech occurs."[110] Similarly, the court concluded that the non-disclosure provision was content-based, notwithstanding that it was arguably viewpoint-neutral, because it "closes off [an] 'entire topic' from public discourse."[111] Applying strict scrutiny, the court found that Section 2709(c)'s categori-

> The plaintiffs had failed to demonstrate that the prohibition's application to speech was 'substantial.'

cal, perpetual and automatic ban on disclosure was not a narrowly tailored means to advance the government's legitimate national security interests.[112]

The court explicitly rejected the government's claim that the issuance of NSLs justified perpetual secrecy, finding that "an unlimited government warrant to conceal, effectively a form of secrecy *per se*, has no place in our open society."[113] The court had no quarrel with according the government a due measure of deference when it asserts secrecy for national security purposes. The fatal flaw, as the court saw it in Section 2709(c), is that the government cited "no authority supporting the open-ended proposition that it may universally apply these general principles to impose perpetual secrecy upon an entire category of future cases whose details are unknown and whose particular twists and turns may not justify, for all

time and all places, demanding unremitting concealment and imposing a disproportionate burden on free speech."[114]

Holding Section 2709(c) unconstitutional on its face, the court then determined that Sections 2709(a) and (b) could not be severed from 2709(c) because Congress could not have intended Sections 2709(a) and (b), the provisions authorizing the FBI to issue NSLs, to operate absent the non-disclosure provision in Section 2709(c).[115] Accordingly, the court invalided the remainder of Section 2709 as non-severable from Section 2709(c). The court stayed the order pending appeal.[116]

Procedural Obstacles

Early Lessons Learned

One would expect that one of the most controversial pieces of Congressional legislation since the McCarthy era would engender a litany of lawsuits. But perhaps the most surprising trend gleaned from the challenges to the Patriot Act is how few there are. Supporters, such as the Attorney General, cite the paucity of challenges as validating the Act's legitimacy.[117] However as demonstrated above, this position is belied by the practical problems with obtaining substantive judicial review of provisions of the Act.

First, with respect to many of the most sweeping and controversial provisions of the Patriot Act, the procedure for bringing a challenge in federal court is unclear. A party cannot challenge the constitutionality of a FISA surveillance order in the FIS Court because the court only has jurisdiction to approve or deny FISA applications.[118] Usually, the first time a party is even apprised of a FISA order is when its contents are used against that party in a criminal trial.[119] If never used in trial, a party cannot challenge an order because the party is unaware that it exists.[120] The secrecy and lack of any individual or public check on FISA is exemplified by the unusual posture of *In re Sealed* Case. In that case, the only reason the ACLU was aware of the government's appeal was because the FIS Court had decided – for the first time in its 24-year history – to publish its opinion.[121] Even then, the ACLU had to send a letter to the District of Columbia Court of Appeals in an attempt to determine the manner in which to file an amicus brief.[122]

The one-sided nature of FISA is particularly disconcerting in a system based on the evolution of precedent. It is further troubling because one of the signature legal disputes of our generation – drawing the balance between civil liberties and the government's surveillance powers in the war on terror – is narrowed to the fox and the farmer of the hen house. Under such conditions, the development of the rule of law in this increasingly important area – to the extent it will evolve at all – will inevitably be eschewed in favor of the government.

One of the more persuasive arguments raised by the *MCA* plaintiffs is the difficulty with challenging a Section 215 order because of the secrecy surrounding the statute. A target of a Section 215 order is not notified by the government, nor by anyone else for that matter (because of the non-disclosure provision), that the government has sought that person's medical records from a hospital. But even if the target became aware that the government is seeking records from one's bank, hospital or library, the statute does not provide a forum for the target to challenge such action. The same goes for the entity served with a Section 215 order. An entity served with a Section 215 order does not know where to challenge it, to whom the challenge should be addressed, how many days from being served with the order it has to challenge the order, and whether the mere challenge itself would trigger the non-disclosure provision and open it up to criminal liability. Under the plain language of the statute, a party served with an order cannot even consult with counsel.

The *MCA* plaintiffs' prescient analysis of Section 215's procedural problems was validated in Judge Marrero's opinion that struck down Section 2709 as amended by Section 505 of the Patriot Act. As discussed above, the court found that the absence of the availability of judicial process to enforce and contest the law rendered it unconstitutional. The court highlighted the fact that the instant case was the only challenge on record by an NSL recipient even though hundreds of NSLs had issued between October 2001 and January 2003.[123] To the court, this evidenced that, in practice, Section 2709 did not provide for judicial review and NSL recipients were unaware of any possible judicial review. The court noted that the statutory framework and the FBI's implementation "effectively keeps Section 2709 NSLs out of litigation altogether."[124]

One would expect that one of the most controversial pieces of Congressional legislation since the McCarthy era would engender a litany of lawsuits.

Second, even if a party could divine how, when and where to raise its claim, the individual faces the potentially substantial hurdles of standing and ripeness. It is basic law that to claim a case and controversy, the party bringing the action must have standing to do so and the controversy must be ripe for adjudication.[125] To establish standing, the plaintiff must demonstrate: (1) an injury in fact, (2) causation, *i.e.*, "a fairly traceable connection

between the plaintiff's injury and the complained-of conduct of the defendant," and (3) redressability, *i.e.*, "a likelihood that the requested relief will redress the alleged injury."[126] But courts are concerned "not only [with] the standing of litigants to assert particular claims, but also [with] the appropriate timing of judicial intervention."[127] In that case, a "claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."[128]

The government argued in *MCA* that the plaintiffs did not have standing to challenge the Patriot Act's provisions until the government actually applied those provisions to the plaintiffs because "[a]llegations of possible future injury do not satisfy the requirements of Article III."[129] The government harped on the fact that the plaintiffs' injuries stemmed from the fact that they "could be served" with a Section 215 order at some point in the future and therefore the court should dismiss their claims as conjectural. On the ripeness issue, the government focused on the Supreme Court's penchant for declining to adjudicate constitutional questions contingent upon future events in pre-enforcement settings.[130]

As discussed above, the *MCA* plaintiffs mounted a persuasive rebuttal to the government's standing and ripeness arguments, highlighting the less stringent Article III standard when First Amendment freedoms are involved. According to a long line of precedent, because the "threat of sanctions may deter [the exercise of First Amendment freedoms] almost as potentially as the actual application,"[131] pre-enforcement challenges to statutes infringing freedom of speech and association need only demonstrate a credible threat of sanctions to satisfy Article III standing.[132] Similar to the court's decision in *HLP II*, where it rejected the government's standing arguments precisely because the ban on providing "expert advice and assistance" threatened core First Amendment speech, the *MCA* plaintiffs may also prevail on the standing point, notwithstanding that the *HLP II* plaintiffs pleaded a more direct injury.

Notably, the *HLP II* court dismissed two plaintiffs who failed to submit affidavits detailing the expert advice and assistance they would provide, demonstrating that the court took the government's standing argument very seriously. Further, these cases have all arisen in the more relaxed standing context of the First Amendment. It is unclear how much more stringently a court would apply the doctrines of standing and justiciability when the free speech concerns recede from the stage and a party claims a constitutional injury separate and apart from the First Amendment.

It is the position of the Civil Rights Committee of the New York State Bar Association (the Civil Rights Committee) that, in view of the cloak of secrecy enveloping much that is concerned with the Patriot Act,[133] the reliance on the lack of challenges to the Act as indicia of its validity is misplaced. As discussed above, a target has no idea that the government is using Section 215 or NSLs to obtain personal information and likely never will. And even if the target has a reasonable belief that the government may be demanding or is poised to request records from that person's hospital, library or ISP, the target faces

a preemptive challenge under the doctrines of standing and ripeness. And although a party's hospital, library or ISP may have notice of an order by virtue of being served, it is equally difficult for the entity to challenge the Section 215 order or NSL because the Act does not spell out where an action should be filed and bringing the suit could subject it to criminal liability.

Amending the Patriot Act

In the wake of September 11, the Patriot Act passed quickly through both bodies of Congress. The Patriot Act originated as H.R. 2975 in the House on October 2, 2001, and S.1510 in the Senate on October 4, 2001.[134] Less than four weeks later, President Bush signed the consolidated House and Senate bill into law on October 26, 2001.[135] There was surprisingly little debate and analysis of the provisions. For instance, no committee reports accompanied the Act.[136] In addition, there was little opposition to the legislation. The House passed the Act by a margin of 357 to 66, while the Senate passed the legislation 98 to 1.[137]

Now, many in Congress are having second thoughts about the expansive powers granted to the executive branch under the Act. For instance, the Protecting the Rights of Individuals Act (PRI Act), seeks to limit Section 215 orders to records of a foreign power or an agent of a foreign power and exempt libraries from NSLs under Section 505.[138] The Security and Freedom Ensured Act (SAFE Act) proposes amendments similar to the PRI Act.[139] In addition to the PRI and SAFE Acts, there is the more recent Benjamin Franklin True Patriot Act, H.R. 3171, which essentially seeks to repeal the most controversial provisions of the Patriot Act, including Sections 215, 218, and 505.[140]

However, for the most part, the proposals do not address the procedural problems endemic to challenging a Patriot Act provision or a surveillance order issued under the Act.[141] Three years after the terrorist attack of September 11, it is the position of the Civil Rights Committee that Congress should take this opportunity to thoughtfully reassess the provisions of the Patriot Act, especially in light of the fact that many of these provisions are up for renewal in 2005.[142] In addition to the legislation currently before Congress addressing the alleged substantive excesses of the Patriot Act, the developing case law demonstrates a need for carefully crafted legislation that remedies the lack of statutory mechanisms serving as a check to the expanded surveillance and search powers of the Act.

In the case of Section 215 orders and NSLs, Congress should amend the Act to provide at least a base level of due process by affording third parties an opportunity to be heard before being forced to provide records. At a minimum, Congress should provide for some measure of judicial review and amend the non-disclosure provisions to permit a party served with a demand to consult counsel and any other party necessary to comply with the order. The process due should be similar to that afforded to parties served with subpoenas. A party served with a Section 215 or NSL demand for documents or records should be given: (1) the opportunity to quash or modify such demand before a neutral magistrate; and (2) a set amount of time to respond to such demands.[143] This proposal mirrors H.R. 3037 and S. 2555, which provide an ideal framework for safeguarding individual rights while protecting legitimate national security concerns in the context of NSLs.[144] However, these bills do not address the similar problems endemic to Section 215. This does not mean that Congress should not take steps to further minimize national security concerns. For instance, it could require that any challenge to such demands be filed under seal in federal court so long as the challenge itself is exempted from the non-disclosure provisions in Sections 215 and 505.

Because of the need to maintain the integrity of foreign intelligence and terrorist investigations, the potential safeguards for the target of an investigation must be less direct. Congress should require the Justice Department to issue an annual public report listing: (1) the total number of applications made for Section 215 orders, NSLs and FISA search orders; (2) the number of applications granted, modified or denied; (3) the number of United States persons targeted for such orders; (4) the types of businesses, e.g., libraries, hospitals, financial institutions, etc., producing records pursuant to such orders; and (5) the number of instances such information was used in a criminal prosecution.

This proposal largely tracks pending legislation,[145] and would modestly expand the DOJ's current FISA congressional reporting requirements.[146] Moreover, similar to the government's obligations under Title III's surveillance provisions, the government should be required to give notice to a target of a Section 215, NSLs or FISA surveillance order, within six months after the termination of the pertinent investigation.[147] Congress should also clarify that Section 223 of the Patriot Act, which provides for civil remedies for abuses of the Act's surveillance powers,

extends to illegal orders obtained under Section 215, NSLs or FISA.[148] Congressional monitoring combined with publication disclosure and the possibility of civil redress would serve as a deterrent to discourage the use of such invasive measures to investigate United States citizens with tenuous connections to terrorist organizations and foreign powers. Such a deterrent is warranted in light of the Patriot Act's broadening the scope of citizens and non-citizens alike subject to the surveillance and search powers of FISA and the limitation of judicial review of the exercise of such powers ushered in by the Act.

Conclusion

In its present form, the Patriot Act imposes significant problems for parties wishing to challenge it. The Patriot Act simultaneously augmented the government's surveillance powers and lowered the threshold of judicial review of such intrusions. The Act expanded the types of surveillance and searches at law enforcement's disposal in terrorist and foreign intelligence investigations while broadening the nature of the records susceptible to such searches, *e.g.*, library and hospital records. It also lowered the already threadbare avenues to judicial review applicable to such applications (in some cases rendering prior judicial review a nullity, *e.g.*, NSLs) and concomitantly expanded the net of such tools to encompass the personal records of U.S. citizens without requiring individualized evidence of any connection to a terrorist organization or foreign power.

To exacerbate that imbalance, the Act makes it difficult for an individual to challenge the Government's exercise of its new surveillance powers by expanding or implementing non-disclosure provisions concerning Section 215 orders and NSLs and omitting any mechanism by which a party could challenge such demands. Further, some parties, particularly the targets themselves, would likely face the pitfalls of standing and justiciability in bringing any challenge to such orders. The Act's broad scope, lack of precisely defined terms, and elements of secrecy, not only raises inherently serious civil liberty concerns, but they combine to forge substantial obstacles to any individual seeking to remedy any privacy violations.

The amendments proposed by the Civil Rights Committee in this Article are a modest attempt to correct that imbalance. In the post September 11 world it is clear that lawmakers need to work with law enforcement to craft legislation that will provide the latter with the proper tools to prevent potential terrorist attacks. That said, three years after the fall of the Twin Towers, Congress can now reassess the compromise it has struck between national security and individual liberty with a more discerning eye. While the executive branch must have some leeway to effectively combat terrorism, that does not mean it should do so in an arena cordoned off from the judiciary. The proposals described above would provide parties subject to the Act's surveillance and search orders, whether as a target or a record keeper, with the ability to challenge such actions and thereby effectively bring the courts back to their rightful place as an impartial arbiter on the possible excesses of the executive branch. ■

1. Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001).

2. *See, e.g., Conservative Voices Against the USA PATRIOT Act, at* http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12632&cc=206 (last visited September 15, 2003).

3. Prepared remarks of Attorney General Ashcroft at the Federalist Society National Convention (Nov. 15, 2003) *available at* http://www.lifeandliberty.gov/subs/speeches/agspeechfederalistsociety.htm.

4. *See id*.

5. *Id*.

6. Current version codified at 50 U.S.C. §§ 1801–1811.

7. Codified at 18 U.S.C. § 2510, *et seq.*

8. *See generally,* Congressional Research Service Report For Congress, Terrorism: Section by Section Analysis of the USA PATRIOT Act, Dec. 10, 2001, CRS 21203 ("CRS Report").

9. *See* S. Rep. No. 95-604, pt. 1, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3910.

10. S. Rep. No. 95-604, 95th Cong. 2d Sess. 5, *reprinted in* 1978 U.S.C.C.A.N. 3906.

11. 50 U.S.C. § 1803(a) (2000).

12. 50 U.S.C. § 1805(a)–(c). Whereas FISA regulates the electronic surveillance of foreign powers or their agents, Title III governs the surveillance of American citizens and requires law enforcement officials to obtain a warrant.

13. 50 U.S.C. § 1804(a)(7)(B) (2000) (emphasis added).

14. *Id*. § 1805.

15. *Id*. § 1803(b).

16. *See* Pub. L. No. 103-359, 108 Stat. 3444 (Oct. 14, 1994).

17. Pub. L. 105-272, 112 Stat. 2410-2412 (Oct. 20, 1998) (current version codified at 50 U.S.C. §1861).

18. *See id*.

19. Patriot Act § 504, 50 U.S.C. § 1806(k)(1).

20. Section 214 of the Patriot Act removed FISA's proscription against the use of pen registers and trap and trace devices against U.S. citizens and lawful permanent residents. A pen register records the telephone numbers dialed by a surveillance target, it "does not overhear oral communications and does not indicate whether calls are actually completed." *United States v. New York Tel. Co.*, 434 U.S. 159, 161 n.1 (1977). A "trap and trace" device records the telephone numbers of incoming calls received by the target. *United States Telecom Ass'n v. FBI*, 276 F.3d 620, 623 (D.C. Cir. 2001). Under Section 214, these electronic surveillance devices can now be used against citizens and lawful permanent residents if the information sought is certified as being "relevant to an ongoing investigation to protect against international terrorism or clandestine activities provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution." Patriot Act, § 214, codified at 50 U.S.C. § 1842 (a)(1), (c)(2).

21. Patriot Act § 215, codified at 50 U.S.C. § 1861(a)-(b) (emphasis added).

22. *ACLU v. DOJ*, 265 F. Supp. 2d 20, 23 (D.D.C. 2003) (citations omitted).

23. 50 U.S.C. § 1861(b)(2) (emphasis added).

24. *See* 50 U.S.C. § 1861(d).

25. *Id*. § 1861(a)(1), (a)(2)(b).

26. Patriot Act § 215, codified at 50 U.S.C. § 1861(a)(1); *see also id*. § 1861(a)(2)(B).

27. 18 U.S.C. §§ 2339A and 2339B.

28. Patriot Act § 805(a)(2)(B), codified at 18 U.S.C. §§ 2339A and 2339B.

29. Patriot Act § 810, codified at 18 U.S.C. § 2339B(a).

30. 18 U.S.C. § 2709 (2002).

31. 18 U.S.C. § 2709 (1988). In 1993, Congress expanded the second prong by

allowing the FBI to certify that there were specific and articulable facts to believe that the subject of the NSL had communicated with a person engaged in international terrorism "under circumstances giving reason to believe the communication concerned international terrorism." *See* Pub. L. 103-142, 107 Stat. 1491 (Nov. 17, 1993).

32. H. Rept., 107-236, at 61-2 (2001). Section 505 made similar changes to the Right To Financial Privacy Act, 12 U.S.C. § 3414(a)(5), and the Fair Credit Reporting Act, 15 U.S.C. § 1681u, to allow release of confidential financial and credit information upon request by the FBI with an NSL. *See* Patriot Act, § 505.

33. 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002).

34. CA No. 03-72913, filed July 30, 2003 (E.D. Mich.).

35. 2004 U.S. Dist. LEXIS 926 (C.D. Cal. Jan. 22, 2004), amended at 2004 U.S. Dist. LEXIS 4411 (C.D. Cal. March 17, 2004).

36. 334 F. Supp. 2d 471 (S.D.N.Y. 2004). In a related case, the ACLU filed a Freedom of Information Act request seeking information on how the DOJ had used its expanded powers under the Patriot Act. *ACLU v. DOJ*, 265 F. Supp. 2d 20 (D.D.C. 2003). The DOJ refused and the plaintiff filed suit in federal court. The court granted summary judgment in favor of the DOJ. Although this case did not challenge the constitutionality of the Act, the fact that the DOJ does not have to reveal to the public how it has put into use the provisions of the Patriot Act only serves to exacerbate the problems of standing and ripeness evinced in the cases discussed herein. For the DOJ's reporting requirements to Congress under the Act see text accompanying note 145, *infra*.

37. *In re Sealed Case*, 310 F.3d at 720 (quoting the May 17, 2002 FISA court order).

38. *Id*. at 720–21.

39. *Id*. at 721.

40. 50 U.S.C. § 1803(a).

41. *Id*.

42. Letter from Ann Beeson, et al., American Civil Liberties Union, to Melissa McKenney Ryan, Assistant Director, Legal Division, United States Court of Appeals for the District of Columbia Circuit (Sept. 4, 2002) ("ACLU Sept. 4, 2002 Letter") (on file with author).

43. 310 F.3d at 722.

44. *Id.* at 727.

45. *Id*. at 725, 721–24.

46. *Id.* at 729–32.

47. *Id.* at 732.

48. *Id*. at 735.

49. The Court found that FISA, as revised by the Patriot Act, met the Fourth Amendment's requirement of prior judicial review by a neutral magistrate, that its lesser showing of probable cause than Title III was reasonable due to the clandestine nature of foreign intelligence crimes and the required finding of an agent of a foreign power, and its more relaxed particularity requirements were in other ways more protective than Title III because it required certification by a national security officer and approval by the Attorney General. *Id.* at 738–40.

50. *Id*. at 742 (citing *United States v. United States Dist. Court*, 407 U.S. 297 (1972) (commonly referred to as the *Keith* decision)).

51. *Id.* at 742–46.

52. *Id.* at 745 (citations omitted).

53. *Id*. at 745–46.

54. *Id*. at 746.

55. *Id.*

56. *Id.* at 746. In a two sentence order, the Supreme Court denied the ACLU's petition for certiorari. *ACLU, et al. v. United States,* 538 U.S. 920 (2003).

57. Plaintiffs' Complaint, *Muslim Community Association of Ann Arbor, et al. v. Ashcroft, et al.* CA No. 03-72913 (E.D. Mich. filed July 30, 2003) ("Compl.").

58. Muslim Community Association of Ann Arbor ("MCA"), for instance, runs a mosque and an Islamic school in Ann Arbor, Michigan. Compl., ¶ 42. It maintains a variety of records on their members, including names, citizenship status, and family counseling. *Id.*

59. *Id*., ¶¶ 30-41.

60. *Id*., ¶¶ 153-54.

61. *Id*., ¶¶ 155-56.

62. *See id*.

63. Defendants' Motion to Dismiss at 10-16, *Muslim Community Association of Ann Arbor,* CA No. 03-72913 ("Mot. to Dismiss.").

64. Mot. to Dismiss at 16-19.

65. *Id*. at 19-21.

66. *Id*.

67. *Id.* at 22-23.

68. *Id.* at 23-26.

69. *Id.* at 25-37.

70. *Id.* at 37-40.

71. Plaintiffs' Opposition to Defendants' Motion to Dismiss at 13-15, *Muslim Community Association of Ann Arbor,* CA No. 03-72913 ("Opp.").

72. *Id*.

73. *Id*. at 15-19.

74. *Id*. at 26-27.

75. *Id*. at 26-28.

76. *Id.* at 29-30.

77. *Id*. at 30.

78. *Id*. at 38-39.

79. *Humanitarian Law Project, et al. v. Ashcroft, et al.*, 2004 U.S. Dist. LEXIS 926, as amended at 309 F. Supp. 2d 1185, 1193 (C.D. Cal. 2004) ("*HLP II*"). In a suit previously brought by HLP, the Court enjoined AEDPA's similar prohibitions on providing "training" and "personnel" to designated terrorist groups as unconstitutionally vague and overbroad. *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176 (C.D. Cal. 1998), *aff'd*, 205 F.3d 1130 (9th Cir. 2000), *cert. denied,* 523 U.S. 904 (2001) ("*HLP I*").

80. *HLP II*, 309 F. Supp. 2d at 1188–89.

81. *Id*. at 1188.

82. *Id*. at 1190.

83. *Id.* at 1193.

84. *Id.* at 1195

85. *Id*.

86. *Id*. at 1197.

87. *Id*.

88. *Id.* at 1196–97.

89. *Id.* at 1197.

90. *Id*. at 1197–98.

91. *Id*.

92. *Id.* at 1200.

93. *Id.* at 1201.

94. *Id.*

95. *Id*. at 1202.

96. *Id*.

97. *Id*. at 1203.

98. *See* ACLU Challenge to "National Security Letter" Authority, *at* http://www.aclu.org/SafeandFree/SafeandFreeNewsPrnt.cfm?ID=15543&c=262 (last visited September 15, 2004).

99. *See id.*

100. *John Doe, et al. v. Ashcroft, et al.*, 334 F. Supp. 2d 471, 475 (S.D.N.Y. 2004).

101. *See id*. at 479–91.

102. *Id.* at 492.

103. *Id.* at 493–94.

104. *Id.* at 496-501.

105. *Id*. at 506. The Court declined to determine whether Section 2709(a) and (b) should be invalidated under the Fourth Amendment on facial grounds because ultimately the statute could not pass muster under the First Amendment.

106. *Id*. at 502.

107. *Id*.

108. Notably, before addressing the constitutionality of the non-disclosure provision, the Court found that in some instances an NSL may violate an internet service provider *subscriber's* First Amendment rights of anonymous speech and free association by, among other things, compelling production of the subscriber's email addresses detailing with whom a subscriber has corresponded and the web pages visited by the subscriber. *Id.* at 509–511.

109. *Id.* at 511–12.

110. *Id*.

111. *Id*. at 513.

112. *Id.* at 514–24.

113. *Id*. at 520.

114. *Id*. at 524.

115. *Id*. at 524–25.

116. *Id*. at 527.

117. *See supra* text accompanying note 2.

118. *See id*.

119. However, even in the context of a motion to suppress or disclosure motion, the FISA material could still be shielded from the target and reviewed by the court *in camera* and *ex parte*, so long as the Attorney General represents that disclosure would harm national security. *Id*. § 1806(c)-(e).

120. In certain limited circumstances, the government is required to provide notice. *See* 50 U.S.C. § 1806(d).

121. *See supra*, Part III.A.

122. *See supra* text accompanying note 42.

123. *Doe*, 334 F. Supp. 2d at 502.

124. *Id*. at 505.

125. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Article III, §2 of the Constitution, extends the jurisdiction of the federal courts only to "cases and controversies." *Id.* To claim a case and controversy, the party bringing the action must have standing to do so and the controversy must be ripe for adjudication. *Id.*

126. *Steel Co.*, 523 U.S. at 103.

127. *Renne v. Geary*, 501 U.S. 312, 320 (1991).

128. *Texas v. United States,* 523 U.S. 296, 300 (1998) (citations omitted).

129. *Whitemore v. Arkansas*, 495 U.S. 149–58 (1990).

130. *See generally*, *Texas*, 523 U.S. at 300.

131. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

132. *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298–99 (1979).

133. *See, e.g., ACLU v. DOJ*, 265 F. Supp. 2d 20 (discussing DOJ's refusal to answer FOIA request seeking information regarding implementation and use of expanded search and surveillance powers under the Patriot Act).

134. *See* H.R. Rep. 107-807, Report on the Activities of the Committee on the Judiciary, House Report No. 107-807, Dec. 2, 2003, p. 79.

135. Pub. L. 107-56, 115 Stat. 272 (2001).

136. *See In Re Sealed Case*, 310 F. 3d at 732. Many lawmakers of both political stripes have reassessed the manner in which the Patriot Act was passed. *See, e.g.,* Statement of Representative Don Young (R-AK) reported in *Young Wants changes in the Patriot Act*, ASSOCIATED PRESS, May 13, 2003, *available at* http://wwwjuneauempire.com/stories/051403/sta_legpatriotact.shtml (last visited September 15, 2004).

("I think the Patriot Act was not really thought out . . . in our desire for security and our enthusiasm in pursuing supposed[] terrorists, . . . we might be on the verge of giving up the freedoms which we're trying to protect . . . I don't think it's anybody's business what I'm reading in the library."); *See also* Statement of Representative Steney Hoyer (D-MD) reported in *Patriot Act Amendment Fails In House*, Boston Globe, July 9, 2004, *available at* http://www.bernie.house.gov/documents/articles/20040709103542.asp (last visited September 15, 2004) ("Everybody was panicked. We wanted to do something quickly, so we did it.").

137. "Anti-Terror Bill Becomes Law, Oct. 26, 2001, *available at* http://www.abcnews.com (last visited September 15, 2004).

138. S. 1552, 108th Cong., § 4 (2003).

139. S. 1709, 108th Cong., § 4-5 (2003).

140. H.R. 3171, 108th Cong., §§ 3-4 (2003).

141. The one notable exception are several bills aimed at amending Section 2709. *See*, H.R. 3179, 108th Cong., § 3 (2003) (bill seeking to provide government with judicial means to enforce NSL and similar requests and punishment for non-compliance); H.R. 3037, 108th Cong., § 3 (2003) (bill amending 2709 to (1) authorize judicial review of NSLs and similar disclosure requests; (2) direct that such "administrative subpoenas" reflect a return date within a reasonable time for the recipient to produce the requested material; (3) permit recipient to disclose the inquiry to anyone necessary to comply with the request or to obtain legal advice) and (4) provide for termination of nondisclosure requirement by the government or upon application to a court); S. 2555, 108th Cong., § 2 (2004) (same.)

142. Many of the amendments made by the Patriot Act, including Section 215, "cease to have effect on December 31, 2005." § 224(a). 115 Stat. at 295 (codified at 18 U.S.C. § 2510) (Supp. 2001)). On May 21, 2004, Senator Jon Kyl introduced a bill to repeal section 224 of the Act. *See* S. 2476, 108th Cong. (2004).

143. *See* Fed. R. Crim. 17(c)(2).

144. *See* text accompanying note 138, *supra.*

145. *See, e.g.,* S. 1552, 108th Cong., § 601 (2003) (amending FISA reporting provisions to include a public report).

146. DOJ is currently required to submit various reports to Congress concerning FISA search applications and orders. DOJ must submit a report to the House and Senate Judiciary Committees every six months accounting for the number of orders approved and denied for the production of tangible things under Section 215. *See* 50 U.S.C. § 1862(b). 50 U.S.C. § 1807 requires DOJ to submit a report to Congress in April of each year the total number of applications made the previous year for orders and extensions of orders approving electronic surveillance under FISA and the total number of such orders and extensions either granted, modified, or denied. On a semiannual basis, DOJ must submit a report to the House and Senate Judiciary Committees listing the number of physical searches approved under FISA, the number denied, and the number that involved searches of U.S. persons. *See* 50 U.S.C. § 1826. DOJ is also required to provide a similar report of the total number of orders approving and denying the use of pen registers and trap and trace devices.

147. 18 U.S.C. § 2518(8)(d) provides that the government must give notice to the target of a surveillance order under Title III within 90 days of termination of the investigation.

148. *See* Patriot Act § 223, codified at 18 U.S.C. § 2520 (Supp. 2001).

"The good news is I know this judge, which is also the bad news."

Scott Randall
<srandall@advancedlegal.com> is CEO of Advanced Legal Systems with offices in New York City, Portland, Oregon and Las Vegas, Nevada. He is the former Information Technology Director of Ball Janik, LLP, in Portland.

Expert Sourcing

Providing Small Firms with Large Firm Information Technology Resources

By Scott Randall

Most law firms outsource technology projects when they lack the in-house expertise. Smaller firms that are unable to maintain a large information technology, or "IT," staff are even more dependent on outsourcing. In the past, when a law firm hired an IT consultant to assist on a technology project, technicians were brought in to work only within the narrow boundaries of the project's scope. Consultants did not ask – and perhaps did not know to ask – crucial questions about how the technology fit into the law firm's practice or whether a better solution was available. Fortunately, outsourcing IT support has developed a model often referred to as "Expert Sourcing," which helps firms work more effectively with outside technology consultants.

Today's Expert Source consulting company focuses on the holistic success of the law firm as a business entity, whether the firm is a two- or 200-lawyer practice. Technology is not seen as an end in itself but, rather, as a tool to assist in the practice of law. Strategic planning is the most important area that an Expert Source consultant will discuss with a firm. Often the Expert Source is initially hired only for a small project. As the firm grows and seeks expanded capability, it will then ask the Expert Source consultant to provide a broader analysis of the firm's technology strengths and weaknesses.

The Expert Source consultant will meet with law firm members and staff for planning sessions to strategize beyond the project at hand and ask the broader questions: How will this program be used? Who will use it? How will information and work flow? How will the firm's staff and clients interface? The meeting is intended to accomplish a big-picture analysis that identifies how well the project would meet the law firm's business needs. Sometimes, when a smaller firm wants to know which software or system will work best, the firm will bring in an Expert Source consultant for a few hours to confer and discuss specific questions the firm may have.

The Expert Source consultant will discuss the most effective technology alternatives in view of the firm's needs and budget. For example, the law firm may not be aware that many software companies sell small-firm versions of powerful software originally created for larger firms, or that many software vendors now sell services through the Internet very inexpensively. The Expert Source will be able to assist the law firm in evaluating these options.

An Expert Source consultant can be located by asking colleagues in similar size firms or checking with the local or national chapter of LawNet <www.peertopeer.org>. An independent network of legal technology professionals, LawNet maintains a New York chapter. LawNet will direct the firm to consultants that specialize in law-related technology and have a solid understanding of the way law firms operate.

When interviewing potential consultants to serve your firm as a technology Expert Source, there are several factors to bear in mind. The Expert Source company must:

- Be knowledgeable about the needs of your firm's practice.
- Know how the technology system supports each practice area.
- Be prepared to re-engineer the business processes in the firm based on a thorough analysis of the existing processes. (This should be reviewed in depth with members of the firm before initiating any changes.)
- Be on-site and accessible as needed. (As long as the Expert Source can be on hand when needed, its office base is irrelevant. Technical expertise is far more important.)
- Provide references from firms of similar size and needs.

Most important, the Expert Source consultant must be someone the firm can trust completely. During every step of a technology project, from planning to maintenance, firm members and staff should be comfortable with the communication and feedback received from the Expert Source consultant, and the project should cause minimal interruption to the firm's operations. Sometimes, a highly skilled Expert Source may be new to a technology. In such cases, the consultant may offer the law firm a lower rate for the initial installation of the technology.

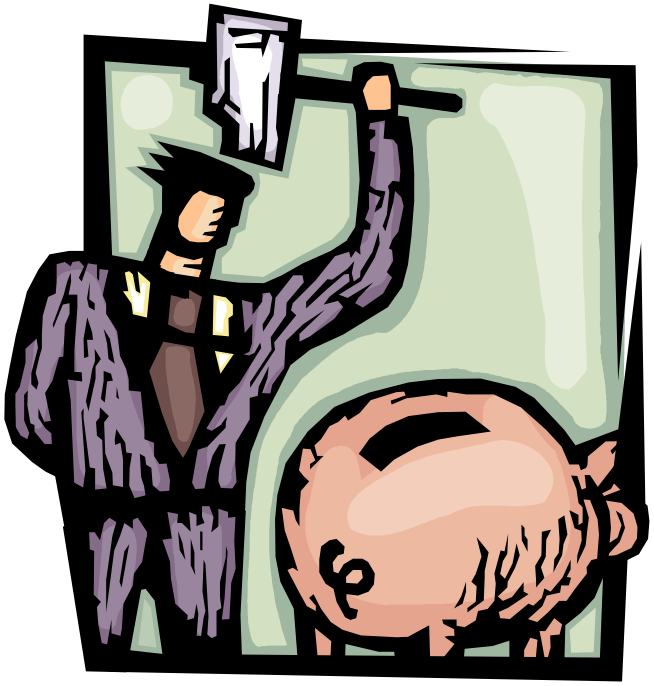
Regardless of the consultant's level of experience, the Expert Source should bring the project to completion in accordance with a predetermined schedule. A common failing of outsourced consultants is lack of follow-through. Expert Source consultants are often called upon to finish a project only partially completed by a previous vendor.

During a project, the Expert Source consultant should keep key staff members of the law firm fully informed at all times. In some circumstances, a request for proposals (RFP) is the best approach to initiating a major and expensive technology program. An Expert Source consultant can also assist the firm in creating an effective RFP that asks the right questions.

Projects for which a firm may bring in an Expert Source include, for example, conversions from WordPerfect to Microsoft Word with firm-wide training, or e-mail system conversions from Groupwise to Exchange. When a law firm is refreshing its technology leases or moving its premises and simultaneously updating its technology infrastructure, an Expert Source is invaluable. Web development is a rapidly expanding area for law firms, and a firm may require assistance with its Web site or customization of a portal feature of newly installed software.

The Expert Source consultant should be current on core areas of technology, such as remote access, data distribution, refined security, and optimized connectivity. For example, an area of great interest to law firms today is "telephony," the buzzword that replaces the phrase "developing telephone technology." Telephony is rapidly advancing as a result of major improvements in Voiceover Internet Protocol (VOIP) technology. Firms can expand their phone systems and increase remote accessibility by way of cable modem or DSL band at a reduced cost. As firms grow into national and international markets, their ability to add regional and overseas offices rapidly with improved telephone systems that are inexpensive and secure, are vital to such expansion.

Data security is another area of technology where Expert Sourcing can be key. With professional liability a major concern to all law firms, there is a need for law firms to work with an Expert Source consultant that is knowledgeable in this area. Sensitive and privileged data passes over the Internet and network T1 lines to many remote locations; and it is vital to completely safeguard the data from intrusion. Beyond basic firewall and VPN solutions, combined technologies such as Citrix software, a virtual desktop which allows remote users access to their e-mail and documents on their central servers, combined with RSA SecureID, an access code system that requires remote users to type in a number unique to the moment they log in upon entering the Citrix environment, is a simple example of a secure remote access solution that an Expert Source consultant can implement at a law firm.



All in the Family

A How-to Guide on Lending to Family Members

By Philip J. Michaels and Laura M. Twomey

Parents often make loans to their children or other family members so that they can buy a bigger home, put a swimming pool in the backyard, or start a business. Because it's "all in the family," these loans are often interest-free and undocumented. However, family lenders should be aware of the tax consequences of making intrafamily loans and should plan ahead to avoid unintended outcomes. This article will describe the penalties for failing to follow the rules and will explain how to set up an intrafamily loan that is free of surprises.

Undocumented Loans

Intrafamily loans can have both income-tax and gift-tax consequences if they are not structured properly. For example, when a parent makes an undocumented loan to a child and does not charge interest, it is likely that the loan will be deemed a gift to the child.[1] The loan could unintentionally use up a portion of the parent's "gift tax unified credit amount,"[2] or if the parent has already utilized his or her credit amount, the gift would be subject to gift tax. Therefore, it is imperative to document a loan with a promissory note to avoid the transfer being characterized as a gift.

Loans Charging Little or No Interest

Even where the parent asks the child to execute a promissory note, problems may arise if no interest is charged, or if too little interest is charged. The consequences vary depending on whether the principal of the loan is payable at the end of a term (a "Term Loan") or payable at any time on the parent's demand (a "Demand Loan").

Interest-Free Demand Loans. If a parent makes a Demand Loan to a child on an interest-free basis, the Internal Revenue Service will "impute" interest each year that the loan remains outstanding. In other words, the parent will be treated as if he or she had charged the child the appropriate rate of interest.[3] The appropriate rate of interest is set forth by the IRS and is known as the Applicable Federal Rate (AFR). We will discuss how to choose the correct AFR later in this article.

If, for example, a parent makes an interest-free Demand Loan of $200,000 to a child, and if the relevant AFR at the time of the loan is 4%, the parent will be treated as if he or she received $8,000 of taxable interest income for the year.[4] The parent will then be deemed to have gifted the $8,000 of interest back to the child.[5] This deemed gift may be subject to gift tax, depending on the parent's situation.[6] Each year that the loan remains outstanding, the parent will have another $8,000 of imputed

Philip J. Michaels is a partner at Fulbright & Jaworski LLP in New York. He is a fellow of the American College of Trust and Estate Counsel and an adjunct professor at New York Law School. A graduate of the University of Notre Dame, he received a J.D. from New York Law School and an LL.M. in taxation from New York University School of Law.

Laura M. Twomey is a senior associate at Fulbright & Jaworski LLP, where her concentration is on estate planning and taxation. She received both her bachelor's degree and a J.D. from Boston College, and an LL.M. in taxation from New York University School of Law.

The authors wish to thank associate Lindsay Brown for her assistance.

interest income and will be deemed to have made another $8,000 gift to the child.[7]

Low-Interest Demand Loans. Similar results occur when too little interest is charged. Again, the parent will be deemed to have charged the appropriate amount of interest. Therefore, even if the parent had charged 3% interest (or $6,000) in the example above, the parent will still be deemed to have charged 4% (or $8,000). Thus, the parent's interest income from this loan will still be $8,000 ($6,000 of actual interest and $2,000 of imputed interest.)[8] The parent, however, will only be deemed to have made a gift of the imputed interest, or $2,000.[9]

Interest-Free and Low-Interest Term Loans. If the parent makes a Term Loan instead of a Demand Loan, the income tax consequences are the same, but the gift tax consequences are different.[10] For example, let's assume the parent makes a $500,000 interest-free Term Loan to the child, payable in 10 years when the relevant AFR is 6%. For income tax purposes, the child will be deemed to have made an interest payment at the AFR rate of 6%, and the parent will be deemed to receive a phantom interest payment of $30,000 each year, which will be taxable interest income to the parent.[11] However, instead of treating the parent as if he or she gifted the interest payment to the child each year, the parent is treated as if he or she gifted all of the money necessary to make all imputed interest payments on the date that the loan was made.[12] In other words, the parent has made a substantial up-front gift on the date of the loan. The value of the parent's gift is the excess of (1) the amount of the loan over (2) the present value of all payments due under the loan. In our example, the value of the parent's gift is $220,803.[13] This calculation is a bit complex, but what is important to note is that if the parent had charged the child the AFR rate of 6%, the Term Loan would have resulted in no gift. It is wise to charge the AFR on a Term Loan to prevent a large up-front gift.[14]

Structuring Your Intrafamily Loan

As we have seen, it is important to document your loans and to charge interest at a rate no lower than the AFR. The AFR is determined by the IRS on a monthly basis. The AFR to be used depends on whether your loan will be a Demand Loan or a Term Loan. If the loan is a Demand Loan, the minimum interest rate to be charged is the short-term AFR compounded semi-annually.[15] However, since the loan is a Demand Loan that could be called at any time, or left outstanding for a lengthy period, the AFR must be reset periodically to avoid the gift tax consequences and phantom income described above.[16]

A Demand Loan should be structured as follows to avoid these tax consequences: the initial interest rate would be the short-term AFR in effect for the month of the loan.[17] If the loan is made in the first half of the year, the loan may initially bear interest at the January rate, if it is lower. Similarly, if the loan is made in the second half of the year, the loan may initially bear interest at the July rate, if it is lower.[18] Thereafter, the promissory note should provide that the interest rate will reset semi-annually (such as every January and July) to the short-term AFR compounded semi-annually then in effect. The interest rate could reset quarterly or monthly instead of semi-annually, so long as either the interest payments or the period for compounding corresponded to the same schedule.[19] Interest payments could either be due semi-annually when rates reset, or could be paid annually. If the note provides that interest is payable annually, the accrued but unpaid interest attributable to the first half of the year will bear interest during the second half of the year at the reset rate as if it were additional principal due to the semi-annual compounding (*i.e.*, interest on interest).

If the parent makes a Term Loan instead of a Demand Loan, the income tax consequences are the same, but the gift tax consequences are different.

If the loan is a Term Loan, the minimum interest rate to be charged will depend on the length of the term.[20] The minimum interest rate for loans with a term of three years or less is the short-term AFR, compounded semi-annually.[21] The minimum interest rate for loans with a term of at least three years and fewer than nine years is the mid-term AFR, compounded semi-annually.[22] The minimum rate for loans with terms of over nine years is the long-term AFR, compounded semi-annually.[23] Term Loans can use the appropriate AFR in effect on the date of the loan for the entire term of the loan.[24]

As noted above, the minimum AFR is based on semi-annual compounding. However, when the IRS publishes its schedule of interest rates, it provides short-, medium- and long-term AFRs compounded annually, semi-annually, quarterly, and monthly. The IRS notice setting forth all AFRs for the month of January 2005 is reproduced here as a sample (see page 40). In structuring your note, you should use the rate that corresponds to the terms of your note.[25] For instance, if your note provides that interest will compound annually, the minimum interest to be charged for a five-year loan made in January 2005 is 3.76%, the amount listed in the annual column of the mid-term rate. This is the economic equivalent of 3.73%, the amount listed in the semi-annual column.[26]

Notes should be structured so that interest at the relevant AFR is payable at least annually. Notes that provide

REV. RUL. 2005-2 TABLE 1

Applicable Federal Rates (AFR) for January 2005

	Annual	Period for Compounding Semiannual	Quarterly	Monthly
Short-term				
AFR	2.78%	2.76%	2.75%	2.74%
110% AFR	3.06%	3.04%	3.03%	3.02%
120% AFR	3.34%	3.31%	3.30%	3.29%
130% AFR	3.62%	3.59%	3.57%	3.56%
Mid-term				
AFR	3.76%	3.73%	3.71%	3.70%
110% AFR	4.14%	4.10%	4.08%	4.07%
120% AFR	4.53%	4.48%	4.46%	4.44%
130% AFR	4.91%	4.85%	4.82%	4.80%
150% AFR	5.68%	5.60%	5.56%	5.54%
175% AFR	6.64%	6.53%	6.48%	6.44%
Long-term				
AFR	4.76%	4.70%	4.67%	4.65%
110% AFR	5.24%	5.17%	5.14%	5.12%
120% AFR	5.72%	5.64%	5.60%	5.57%
130% AFR	6.20%	6.11%	6.06%	6.03%

that all interest will accrue and be payable at the end of the term will trigger income tax under the so-called Original Issue Discount or "OID" rules set forth in I.R.C. § 1274. In general, the OID rules would require the parent to recognize interest income each year even though the interest payments were not yet received. In some cases, the child may be able to deduct the interest in the year parent recognizes income, even though the child has not yet made the payment.[27]

Be cautious in drafting your promissory note, because its provisions will affect the relevant AFR. A 10-year promissory note that has an interest rate that resets every two years is deemed to be a two-year note, and thus the short-term AFR rather than the long-term AFR applies.[28] Similarly, a 10-year note that permits the lender to demand payment at any time prior to the end of the term would be categorized as a demand note and would require an interest rate that resets every six months in order to completely avoid the phantom income and gift-tax consequences described earlier.[29] On the other hand, a five-year note that grants the borrower the right to extend the term of the note for four years at the same interest rate is viewed as a nine-year note, making the long-term AFR the appropriate rate to be used.[30] Provisions that permit prepayment of a term loan or contain a clause that accelerates the loan upon the occurrence of an event are disregarded for purposes of determining the correct AFR.[31]

Parents will often make loans to children and then forgive a portion of the loan each year using the $11,000 Annual Exclusion from gift tax. The IRS has tried to recharacterize such loans as up-front gifts by arguing that this kind of annual forgiveness indicates that the parent had no intention of having the original note repaid. This argument has not been entirely successful due to the fact that the parent can change his or her mind at any time and enforce the terms of the loan or choose not to forgive any portion of it in a particular year.

In order to counteract this argument, parent and child should memorialize the loan with a promissory note and should take steps to respect the creditor-debtor relationship. For example, the parent should memorialize the forgiveness each year just prior to the due date of the interest payment with a letter that indicates how much of the forgiveness is interest and how much is principal. Similarly, if the term of the loan has expired, parent and child should execute a new promissory note at the appropriate interest rate.

Estate Planning With Intrafamily Notes

Intrafamily lending can be used to assist older generations with their estate planning. A grandparent who wants to transfer wealth to a grandchild can loan the money to the grandchild or to a trust for the grandchild without the payment of income or gift tax. For example, if the grandparent loans $500,000 to a trust for the grandchild, the grandparent will pay no gift tax or Generation Skipping Transfer Tax ("GST Tax").[32] The trust can invest the $500,000 for the benefit of the grandchild. The trust would be required to pay the interest on the loan each year at the AFR, which is generally lower than commercially available rates.[33]

The value of the $500,000 note will still be included in the grandparent's estate, as will the interest payments. In a sense, the note is appreciating in the grandparent's estate at the AFR rate. In comparison, it is quite likely that the investment in the grandchild's trust will increase at a greater rate than the AFR, with all of the appreciation passing outside of the grandparent's estate and without the imposition of any gift tax and GST Tax. Eventually, the $500,000 note is either satisfied by the trust or the grandparent can forgive the outstanding balance at death, bequeath it directly to the grandchild, or bequeath it to the grandchild's parent and the arrangement would continue after the grandparent's death.

Family members will always lend money to each other. By helping them arrange and document their loans appropriately, you can assist them in avoiding the surprises of imputed income or even a large, unintended gift. ■

1. "Transactions within a family group are subject to special scrutiny and the presumption is that a transfer between family members is a gift." *Miller v. Comm'r*, 71 T.C.M. 1674, 1196 Tax Ct. Memo LEXIS 5, *20 (1996) (citing *Harwood v. Comm'r*, 82 T.C. 239, 258 (1984)), *aff'd*, 1997 U.S. App. LEXIS 11426 (9th Cir. 1997); *see also Estate of Costanza v. Comm'r*, 320 F.3d 595, 597 (6th Cir. 2003). To rebut this presumption, there must be an affirmative showing that the parties had an expectation of repayment and an intention to enforce the debt. *See id.* at 597. Factors which evidence a loan rather than a gift include whether: (1) there was a promissory note or other evidence of indebtedness, (2) interest was charged, (3) there was any security or collateral, (4) there was a fixed maturity date, (5) a demand for repayment was made, (6) any actual repayment was made, (7) the transferee had the ability to repay, (8) any records maintained by the transferor and/or the transferee reflected the transaction as a loan, and (9) the manner in which the transaction was reported for federal tax purposes was consistent with a loan. *See Miller*, 1996 Tax Ct. Memo LEXIS at *21–*22 (citations omitted).

2. The "gift tax unified credit amount" is the amount which the parent is allowed to give away free of gift tax over the course of his or her life. I.R.C. § 2505. The gift tax unified credit amount is $1 million.

3. I.R.C. § 7872(a). While § 7872 applies to other kinds of loans, such as loans between employees and employers and loans between shareholders and corporations, the scope of this article is limited to intrafamily loans – that is, loans between natural persons (of any relation) where the foregone interest is in the nature of a gift.

4. I.R.C. § 7872(a); Prop. Reg. § 1.7872-6(a), (c).

5. I.R.C. § 7872(a); Prop. Reg. § 25.7872-1.

6. If a parent has made no other gifts to the child that year, the deemed gift will not be subject to gift tax because it will qualify for the Annual Exclusion from gift tax. Currently, the Annual Exclusion permits a parent to make an $11,000 gift to a child tax-free each year. If the parent has made other gifts to the child during the year, some or all of the deemed gift will either reduce the parent's remaining gift tax unified credit, or if there is none remaining, will be subject to gift tax.

7. I.R.C. § 7872(a)(2); Prop. Reg. §§ 1.7872-6(a), (c), 25.7872-1.

8. Prop. Reg. § 1.7872-6(c).

9. Prop. Reg. § 25.7872-1.

10. I.R.C. § 7872(d)(2).

11. I.R.C. § 7872(a); Prop. Reg. § 7872-6(a), (c).

12. I.R.C. § 7872(d)(2), (b)(i); Prop. Reg. § 25.7872-1.

13. I.R.C. § 7872(b)(i); Prop. Reg. § 25.7872-1.

14. There are two exceptions to the rules set forth above and they apply to both Demand Loans and Term Loans. First, if the total amount of all loans between the parent and child do not exceed $10,000, the imputed income and gift rules do not apply. I.R.C. § 7872(c)(2); Prop. Reg. § 1.7872-8(b)(1). However, if the child used the loan to purchase or carry income-producing assets, then the exception does not apply and the loan is subject to the phantom income and gift rules described above. Income-producing assets include a business, a certificate of deposit, a savings account, stock (whether or not dividends are paid), bonds and rental property. Prop. Reg. § 1.7872-8(b)(3), (4).

Second, if the total loans between the parent and child do not exceed $100,000, the amount treated as transferred from the child to the parent in payment of phantom income will not exceed the child's net investment income for the year. I.R.C. § 7872(d)(2). This exception applies only to the income tax treatment of intrafamily loans of $100,000 or less. The gift tax consequences remain the same as described above.

In determining whether a parent's loans to a child meet the thresholds for the above exceptions, all loans from the parent and the parent's spouse are aggregated. I.R.C. § 7872(f)(7); Prop. Reg. § 1.7872-11(c).

15. I.R.C. § 7872(f)(2)(B); Prop. Reg. § 1.7872-3(b)(3).

16. *See id.*

17. Prop. Reg. § 1.7872-3.

18. *Id.*

19. Prop. Reg. § 1.7872-4(e)(2)(i), (3) ex. (1).

20. I.R.C. § 7872(f)(2)(A); *see generally* I.R.C. § 1274(d).

21. I.R.C. § 7872(f)(2)(A); I.R.C. § 1274(d)(1)(A).

22. *Id.*

23. *Id.*

24. Prop. Reg. § 1.7872-3(b)(4).

25. Prop. Reg. § 1.7872-3(b)(1).

26. *See id.* The table of AFRs for January 2005 is set forth by Rev. Rul. 2005-2, tbl. 1.

27. In general, a child can only deduct the interest on any loan if it qualifies as investment interest or if the debt is a qualified education loan, a home acquisition or home equity loan, a trade or business loan, or passive activity loan. I.R.C. § 163(h). Assuming the interest is generally deductible, the child will be unable to deduct the interest until actually paid if the loan is incurred in connection with the purchase or carrying of personal use property. I.R.C. § 1275(b)(2).

28. Prop. Reg. § 1.7872-3(e)(2)(ii).

29. *See* Prop. Reg. § 1.7872-10(a)(1).

30. I.R.C. § 1274(d)(3); I.R.C. § 7872(f)(2)(A).

31. Prop. Reg. § 1.7872-10(a)(3).

32. In general terms, GST Tax is a flat tax of nearly 50%. It is imposed on gifts or bequests which "skip" a generation, such as a gift from a grandparent to a grandchild. The first $1,500,000 of transfers to "skip" persons are exempt from the tax. The exemption amount will be increasing incrementally under current law.

33. If a grandparent loans money to a grandchild directly, rather than to a trust for the grandchild, oftentimes the grandparent will forgive up to $11,000 in interest each year as an annual exclusion gift to the grandchild.

Protecting the Protectors

New Laws Shield Military Members and Their Families

By Stanley Kwieciak, III

Stanley Kwieciak, III, graduated with highest honors from Johns Hopkins University and, upon graduation, was commissioned a Second Lieutenant in the U.S. Army. He matriculated at St. Anne's College, Oxford University, and is currently a law student at Ohio State University and a student member of the New York State Bar Association. The views expressed in this article are those of the author and do not necessarily reflect those of the Department of Defense, the U.S. Army or their agencies.

Throughout 2004, many of us personally witnessed the deployment of units of the United States National Guard and Reserve. Members of the Army, Air Force, Marine Corps, Navy and Coast Guard from across the country have been mobilized for service in Afghanistan and Iraq. For New York and its citizens the most dramatic event of the war has been the mobilization of the 42nd Infantry Division,[1] known as the Rainbow Division, as well as several other Guard and Reserve units based in the state.

In the wake of these events, attorneys should make themselves aware of certain issues and statutes that bear directly upon clients who are service members, and their families, as well as those who may enter into commercial transactions with service members and those who employ them. The pertinent laws include the federal Servicemembers Civil Relief Act[2] (SCRA) and the Uniformed Services Employment and Reemployment Rights Act of 1994[3] (USERRA), along with their state counterpart, the New York Patriot Plan.[4]

Servicemembers Civil Relief Act (SCRA)

The SCRA replaced previous legislation called the Soldiers' and Sailors' Civil Relief Act[5] (SSCRA), making major amendments to the former law in the process. It is worth noting that the stated purpose of the statute is:

> (1) to provide for, strengthen, and expedite the national defense through protection extended by this Act to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and (2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.[6]

The general provisions of the SCRA expanded coverage from judicial proceedings (under the SSCRA) to "any judicial or administrative proceeding commenced in any court or agency."[7] It also broadened that protection to members of the National Guard[8] when they are called to active duty for more than 30 consecutive days by the President or the Secretary of Defense. The SCRA does not distinguish between officers and enlisted service members except indirectly and to the extent of the difference in military pay and ability to pay debts.

The SCRA provides guidance on protection against default, tolling of statutes of limitation and limitation on the maximum rate of interest on debt as applied to service members under Title II of the statute. A brief overview of each follows.

Protections Against Default

In a civil action or proceeding in which a defendant has not made an appearance, and it appears that the defendant serves in the military, the court may not enter a judgment until after the court appoints a *guardian ad litem* to represent the defendant.[9] Following this, if the service member has not received notice of the action or proceedings, the court must grant a stay for at least 90 days upon application of counsel or on the court's own motion.[10] Such a stay must be granted "if the court determines that (1) there may be a defense to the action and a defense cannot be presented without the presence of the defendant; or (2) after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists."[11] A plaintiff who, in order to avoid the statute, files a false affidavit claiming a defendant not to be in military service, will be subject to prosecution.[12]

The rules for protection against default judgment change when a service member has notice of the action or proceeding.[13] The SCRA mandates an automatic stay for at least 90 days upon the service member's request.[14] However, the request must be a letter or other communication[15] stating the reason the defendant's current military duty materially affects his or her ability to appear and stating a date when he or she will be available.[16] In

addition, the service member's commander must validate this information by similar means to the court.[17] While the SSCRA created concern about the service member making an "appearance" for jurisdictional purposes if this procedure were followed, the SCRA has made it clear that contacting the court for a stay does not constitute an appearance for jurisdictional purposes.[18]

If the period of a stay has elapsed, the service member can request an additional stay using the same procedure.[19] An additional stay is discretionary with the court. But, if the court refuses to grant a stay, the court must appoint a *guardian ad litem* to represent the service member.[20]

Default in Surrogate's Proceedings

Because the statute applies to all courts, it includes proceedings in the surrogate's court. When service members are distributees who must be cited to probate a will or judicially settle an accounting and they are on active duty, the statute applies. Accordingly, a service member who consents to the proceedings would not present an issue for the court. But, a service member who requests a stay after being cited is entitled to a stay in the probate proceeding. A service member who requests more than the initial 90-day stay must be appointed a *guardian ad litem* prior to the court taking further action.

Where a service member cannot be located, publication for jurisdiction and the appointment of a *guardian ad litem* may be required to protect his or her interests. The *guardian ad litem* can seek a stay for the service member and the SCRA requires the surrogate to grant a stay in the proceedings for at least 90 days. This does not prevent a preliminary executor's appointment on a probate matter so that the estate would not be harmed by the delay in probate. Where the service member has received notice of probate by proper service of citation, he can request a stay, backed up by his commander's certificate, validating the circumstances that prevent the service member from appearing. Again, the SCRA requires that a 90-day stay be granted.

Statute of Limitations

A corollary of a stay of proceedings is the tolling of a statute of limitations. The SCRA provides that the statute of limitations is tolled in any action or proceeding in any court or agency of any state or of the United States.[21]

Interest Cap

Although mortgage loan interest rates are at historical lows, credit card and other loan formats may be of concern to members of the military. The SCRA governs any obligation or liability bearing interest at a rate in excess of 6% per year.[22] It also covers such debt incurred either by the service member alone or together with a spouse.[23] The statute declares that interest shall be reduced to 6% during the period of military service.[24]

There are, however, some limitations and procedures. First, the loan must be a "pre-service" loan,[25] *i.e.*, prior to mobilization for active duty, and the service member's military pay must have affected the ability to pay the loan.[26] The burden is on the lender to establish that military pay has not materially affected the ability to pay.[27] The SCRA also makes it clear that the amount of interest in excess of 6% is not just deferred, but forgiven.[28]

Title III Protections

Attorneys will find several specific issues covered by Title III of the SCRA. Those of common interest include eviction from or termination of leases, installment contracts, and the foreclosure of mortgages.

Evictions

Without a court order, a service member or dependents cannot be evicted when the monthly rent is less than $2,465 – based on year 2004 figures.[29] Further, the court is given latitude by the statute to grant a stay of 90 days, "unless in the opinion of the court, justice and equity require a longer or shorter period of time."[30] The provisions of the SCRA concerning the granting of automatic stays generally do not apply to evictions.[31]

Installment Contracts

If a service member enters into an installment contract for real or personal property prior to active military service,[32] the contract cannot be terminated nor can the property be repossessed for breach of contract without a court order.[33] The court has broad equity powers under the statute.[34]

Mortgage Foreclosures

A mortgagee cannot foreclose on a mortgage originated before active military service without a court order.[35] The SCRA grants the court the power to "(1) stay the proceedings for a period of time as justice and equity require, or (2) adjust the obligation to preserve the interests of all parties."[36]

Termination of a Lease

The SCRA covers service members who enter into a lease – for the member or the member's dependents – for residential, professional, business, agricultural or similar purposes.[37] If the lease was contracted pre-service, the service member can terminate the lease.[38] If the lease is entered into during military service, the member can also terminate the lease if he or she receives orders for a permanent change of station (so-called "PCS Orders") or is deployed for a period of 90 days or more.[39]

The SCRA's most significant change to this area of the law concerns automobile leases. A pre-service vehicle lease may be terminated if the service member is ordered to active duty for 180 days or more.[40] An auto lease

entered into while on active duty can be terminated if PCS Orders send the service member outside the continental United States or the member is deployed for 180 days or more.[41]

The SCRA provides for termination of a lease. With respect to residential leases, the service member must give written notice (by personal delivery, private carrier or mail with return receipt) and a copy of military orders to the lessor.[42] Once the procedure is followed, the service member will owe the next 30-day payment and the lease is then deemed canceled.[43] With respect to a car lease, the member must give written notice with a copy of orders and also return the vehicle not later than 15 days after the date of written notice.[44] Once the procedure is followed, termination is effective on the date the notice is provided and the vehicle returned.[45]

Ability to Pay

Several of the provisions of the SCRA such as the cap on interest and mortgage foreclosures provide for equitable relief that is often correlated to the service member's ability to pay. In order to properly seek relief under the ability to pay provisions, one must be able to establish the amount of the service member's compensation.

Military pay is determined by grade or rank and years of service. Detailed and more comprehensive military pay tables and pay information can be found online at either <http://www.dfas.ml/money/milpay/pay/paytable2005.pdf>, which is the Defense Finance and Accounting Service's Web site, or <http://www.defenselink.mil/>, the Web site of the U.S. Department of Defense. The following table provides a sample of pay schedule for lower ranked enlisted and commissioned officers:

Basic Pay Per Month for Fiscal Year 2005

Pay Grade	2 years or less	Over 2 years	Over 3 years	Over 4 years	Over 6 years
E-1	1235.10	1235.10	1235.10	1235.10	1235.10
E-2	1384.50	1384.50	1384.50	1384.50	1384.50
E-3	1456.20	1547.70	1641.00	1641.00	1641.00
E-4	1612.80	1695.60	1787.10	1877.70	1957.80
E-5	1759.50	1877.10	1967.70	2060.70	2205.30
O-1	2343.60	2439.00	2948.10	2948.10	2948.10
O-2	2699.40	3074.70	3541.20	3660.90	3736.20
O-3	3124.50	3542.10	3823.20	4168.20	4367.70

E-1 through E-9 are enlisted ranks, while O-1 through O-10 are officer ranks.[46] The sample above reflects fiscal year (FY) 2005, which includes an increase in pay over FY 2004; there are several enlisted and officer ranks in addition to those shown in the sample. This is "Base Pay." In addition to base pay, military members receive housing allowances, family separation allowance, basic allowance for subsistence, and incentive and special pays (*e.g.*, aviators, hazardous duty, diving pay, hostile fire, submarine duty, linguist service, as well as medical, dental, veterinarian, psychologist, and optometrist officer professional pay). Notably, there is no special pay for military attorneys.

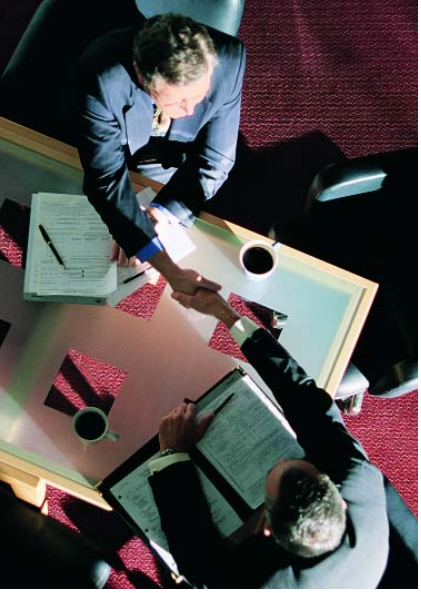
Uniformed Services Employment and Reemployment Rights Act

The USERRA replaced previous legislation called the Veteran's Reemployment Rights (VRR) law.[47] The USERRA's stated purpose is:

> (1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service; (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and (3) to prohibit discrimination against persons because of their service in the uniformed services.[48]

CONTINUED ON PAGE 46

Practice made perfect.



Save money.

Free online legal research. Programs to help you practice more profitably. Deep members-only discounts on continuing legal education programs and products, publications, NYSBA events, insurance and other necessities. With NYSBA's members-only resources and discounts, you can save more — far more — than the cost of membership:

- FREE online legal research, free from Loislaw.com
- Great member discounts on CLE seminars, publications and products for your law office
- Savings on life, disability, professional liability, and other insurance plans (that alone can more than cover the cost of your membership dues)
- Substantial discounts on legal software and computer hardware, office supplies, online legal research, even car rentals
- Law Practice Management seminars and resources to help you serve your clients more efficiently, and manage your practice and your time, better

NYSBA membership. It's enough to make your practice (nearly) perfect.

NYSBA

New York State Bar Association 518.463.3200 www.nysba.org

CONTINUED FROM PAGE 44

The statute accomplishes its purposes by giving statutory rights to service members to get their jobs back[49] when they return from military service and, in certain instances, employment benefits,[50] as if they had never left employment for military service.

A service member must fulfill certain obligations and conditions before becoming entitled to these employment protections. There are five criteria that the service member must meet to obtain the benefit of the statute:

- The service member must be employed in a civilian job.[51]
- The service member must provide notice to the employer that the service member is leaving for military service.[52]
- The cumulative period of service must not last more than five years.[53]
- The service member must be released from service under "honorable conditions."[54]
- The service member must report back to work in a timely fashion.[55]

If the service member has met these criteria, then the statute calls for "prompt" reinstatement[56] with accrued seniority.[57] The USERRA codified a 1946 United States Supreme Court case which held that the returning veteran "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during [his military service]."[58]

In addition to rehiring, the USERRA also provides protection to "status." For example, a manager is not required to accept a reduction in employment to the level of assistant manager[59] nor must an employee accept the same job in Alaska when he previously held the position with his employer in New York and the job is still there. The USERRA protects the civilian health insurance benefits of a service member by providing immediate reinstatement of civilian health insurance if provided by the employer. There can be no waiting period or exclusion for a pre-existing condition other than those that are service-related.[60] This right extends to coverage of the entire family of the service member.

The USERRA enhanced rights under VRR by affording special protection against discrimination and reprisal.[61] In addition, an employer who discharges an employee within one year of return from a period of service in excess of 180 days faces a heavy burden of proof that the termination was not discriminatory or for purposes of reprisal.[62] The shorter protection of 180 days is provided to a service member who served for a consecutive period of 31 to 180 days.[63] This was implemented to protect service members from "pro forma" or bad faith reinstatements.[64] In contrast to other labor laws that specify applicability only upon the existence of a threshold number of employees, the USERRA, by silence on the point, creates no such threshold before it applies.

Unlike the SCRA, the USERRA provides for governmental enforcement. A volunteer cadre of attorneys and trained non-attorneys act through the National Committee for Employer Support of the Guard and Reserve (NCESGR). This organization attempts to match a local ombudsman with the affected service member and the employer in an effort to educate all parties as to the law and seek a resolution of the matter. The NCESGR maintains a toll-free telephone number: 800-336-4590. This is an excellent first step and should be considered by attorneys called upon to advise service members. When a resolution is not achieved, the Veterans' Employment and Training Service (VETS) and the United States Department of Labor will render assistance.[65] They have the power to investigate the matter; the USERRA provides VETS with subpoena power in this regard.[66]

The New York Patriot Plan

On July 3, 2003, Governor George Pataki signed the Patriot Plan, a bill that was passed unanimously by the legislature to provide benefits and privileges to service members who are residents of the state of New York.[67] The Patriot Plan affirms, at the state level, many of the protections offered by the SCRA and the USERRA. General information about the New York Patriot Plan is available at <www.nyspatriotplan.org>. For greater details and specifics, the Web site provided by the New York Division of Military and Naval Affairs (DMNA) is helpful: <www.dmna.state.ny.us>. A wealth of telephone numbers and points of contact that may be of assistance to attorneys and their clients is available through this Web site under the heading, "Member Services" and the subsequent link entitled "Patriot Plan."

Of special interest to any service member who is also a public officer or employee of the state of New York is the right, under the Patriot Plan, to military leave with pay.[68] This statute allows public officers and employees to receive their full pay from the state for a period of 30 days or 22 working days, whichever is greater, in each calendar year, while also receiving full military pay.

Attorney General Eliot Spitzer has established a special help line to assist returning soldiers if they experience problems returning to the private sector. The current point of contact is Assistant Attorney General Devin Rice, at telephone (212) 416-8700. In a letter dated June 4, 2004, Attorney General Spitzer states that his office is ready to "vigorously enforce these laws."[69] ■

1. The 42nd Infantry Division, the "Rainbow Division," was mobilized for duty in Iraq. It is a National Guard unit and, until its call to active duty, was headquartered in the state of New York. It commands and controls units located in the northeast United States, with most of its members coming from New York State. At one point the Rainbow Division was commanded by General Douglas MacArthur during World War I. A typical Army division will command approximately 10,000 troops.

2. Pub. L. No. 108-189 (2003). The Servicemembers Civil Relief Act was signed into law by President Bush on December 19, 2003.

3. 38 U.S.C. §§ 4301–4333 (enacted October 13, 1994).

4. Exec. Order No. 125, 9 N.Y.C.R.R. § 5.125 (Mar. 24, 2003); 2003 N.Y. Laws ch. 106 (amending N.Y. Military Law §§ 300–328). *See* <http://www.dmna.state.ny.us/members/patriot.html>.

5. 50 U.S.C. §§ 501–594, which was enacted in 1940 to update a 1918 version of the same statute.

6. Pub. L. No. 108-189 (hereinafter SCRA).

7. SCRA § 102(b).

8. SCRA § 101(2)(A)(ii) extends coverage to members of the National Guard whether in Title 10 status or Title 32 status provided that the call to active service is authorized by the President or the Secretary of Defense and the service authorized is for a period of more than 30 consecutive days.

9. SCRA § 201(b)(2). If it cannot be determined whether a defendant is in military service, the court may require the plaintiff to file a surety bond to be in effect until the expiration of the time for appeal and setting aside of a judgment under the relevant state or federal law or regulation. SCRA § 201(b)(3).

10. SCRA § 201(d).

11. SCRA § 201(d)(1), (2).

12. SCRA § 201(c) (prosecution pursuant to Title 18 of the U.S.C. may result in fine or imprisonment for not more than one year, or both).

13. SCRA § 202.

14. SCRA § 202(b)(1).

15. "[O]ther communication" is not defined in the statute but is thought to include a fax, an e-mail or a phone call to the court clerk.

16. SCRA § 202(b)(2)(A).

17. SCRA § 202(b)(2)(B).

18. SCRA § 202(c).

19. SCRA § 202(d)(1).

20. SCRA § 202(d)(2).

21. SCRA § 206. However, SCRA § 206(c) makes a specific exception to this rule for Internal Revenue Service laws.

22. SCRA § 207(a)(1).

23. *Id*.

24. *Id*.

25. *Id*.

26. SCRA § 207(c).

27. *Id*.

28. SCRA § 207(a)(2).

29. SCRA § 301(a)(1); 69 Fed. Reg. 1281 (the amount of rent is increased annually by a housing price inflation adjustment).

30. SCRA § 301(b)(1)(A).

31. SCRA § 202(f).

32. SCRA § 302(a)(2).

33. SCRA § 302(a)(1).

34. *See* SCRA § 302(c).

35. SCRA § 303(c).

36. SCRA § 303(b).

37. SCRA § 305(b)(1).

38. SCRA § 305(b)(1)(A).

39. SCRA § 305(b)(1)(B).

40. SCRA § 305(b)(2)(A).

41. SCRA § 305(b)(2)(B).

42. SCRA § 305(c)(1)(A).

43. SCRA § 305(d).

44. SCRA § 305(c)(1)(B).

45. SCRA § 305(d).

46. For example in the U.S. Army: E-1 and E-2 are Privates; E-3 is a Private First Class; E-4 is a corporal; E-5 is a Sergeant; E-6 is a Staff Sergeant; E-7 is a Sergeant First Class; E-8 is a Master Sergeant or First Sergeant; E-9 is a Sergeant Major or Command Sergeant Major; O-1 is a Second Lieutenant; O-2 is a First Lieutenant; O-3 is a Captain; O-4 is a Major; O-5 is a Lieutenant Colonel; O-6 is a Colonel; O-7 is a Brigadier General; O-8 is a Major General; O-9 is a Lieutenant General; O-10 is a General. The Navy, Air Force, Marine Corps and Coast Guard have equivalent ratings but with differing titles.

47. 38 U.S.C. §§ 4301–4333; USERRA was enacted into law on October 13, 1994.

48. 38 U.S.C. § 4301.

49. 38 U.S.C. § 4312.

50. 38 U.S.C. § 4313(a)(2)(A) (requiring reemployment after 90 days of service to be in the same position or "a position of like seniority, status and pay").

51. This can even apply to a temporary position. The test is whether there was a reasonable expectation that the employment was indefinite or for a significant period. 38 U.S.C. § 4312(d)(1)(C).

52. 38 U.S.C. § 4312(a)(1). This is a change from the prior statute under the VRR, which did not require notification. *Compare* 38 U.S.C. §§ 4301(a), 4303(b), 4304(a), (c) (rules under VRR) *with* 38 U.S.C. § 4312(a)(1) (rule under USERRA). The exception under USERRA is in the event that notice is "impossible or unreasonable"; *see* 38 U.S.C. § 4312(b).

53. 38 U.S.C. § 4312(a)(2).

54. 38 U.S.C. § 4304.

55. 38 U.S.C. § 4312(e)(1)(A)(i) requires someone absent for up to 30 days of consecutive service to report back the next full regularly scheduled work period on the first full calendar day following completion of service and the expiration of eight hours after allowing for safe transportation from place of service to the person's residence. This is a change from VRR, which required next-day reporting. USERRA takes into account travel from training to home and allows the service member a chance to rest a day between military service and civilian reemployment. 38 U.S.C. § 4312(e)(1)(C) allows a service member with 31 to 180 days of continuous service a period of 14 days to submit for reemployment. 38 U.S.C. § 4312(e)(1)(D) allows a service member with more than 180 days of continuous service 90 days to submit for reemployment.

56. 38 U.S.C. § 4313(a) provides for the "right" but does not define "prompt." But, it is generally understood this means days rather than weeks or months. This is an accommodation to employers who may need to readjust the work schedules or employment of non-service members. *See Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992).

57. 38 U.S.C. § 4316(a).

58. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284–85 (1946).

59. *Ryan v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 15 F.3d 697, 699 (7th Cir. 1994).

60. 38 U.S.C. § 4317(b).

61. 38 U.S.C. § 4311.

62. 38 U.S.C. § 4316(c)(1).

63. 38 U.S.C. § 4316(c)(2).

64. *See Carter v. United States*, 407 F.2d 1238 (D.C. Cir. 1968).

65. 38 U.S.C. § 4321.

66. 38 U.S.C. § 4326.

67. Exec. Order No. 125 9 N.Y.C.R.R. § 5.125 (Mar. 24, 2003) 2003 N.Y. Laws ch. 106 (amending Military Law §§ 300–328).

68. Military Law § 242(b)5.

69. For more information, see the Attorney General's Web site at <http://www.oag.state.ny.us>.

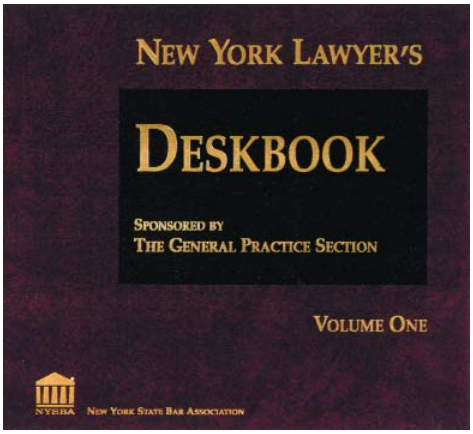
NYSBA**BOOKS**

Winner of the ABA's Constabar Award

The 2004 revision of

New York Lawyer's Deskbook

is now available.



Written and edited by leading practitioners, the *New York Lawyer's Deskbook* is a two-volume, 1700-plus-page resource, covering 25 different areas of practice. Each chapter offers a clear, basic review of its subject and the necessary steps for handling basic transactions in that area. The *Deskbook* gives both new and seasoned practitioners a solid footing in practice areas that may be unfamiliar to them. Practitioners already familiar with an area will use the *Deskbook* as a refresher and will benefit from its many helpful "Practice Guides."

The 2004 update to *Deskbook* features a substantially revised chapter on "Representing the Personal Injury Plaintiff in New York" and major revisions to the chapters on Elder Law, Residential Real Estate Transactions and Criminal Law. The case and statutory references are updated for every chapter.

1998 (Supp. 2004) • PN: 4150 • List Price: $275 • ***Mmbr. Price $225***

". . . one of the finest deskbooks that has ever been published."

Lucian L. Lodestro, Esq.
Lodestro, Vanstrom & Edwards
Jamestown, NY

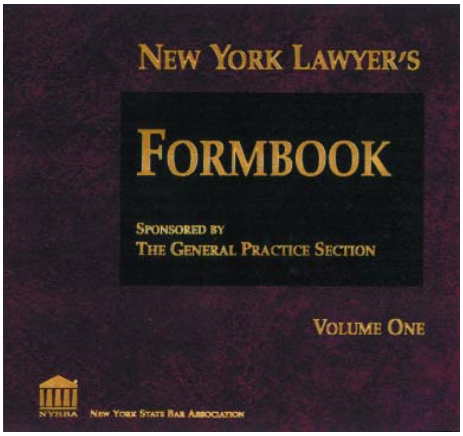
". . . an excellent tool for every practitioner."

Muriel S. Kessler, Esq.
Kessler and Kessler
New York, NY

The 2004 revision of

New York Lawyer's Formbook

is now available.



The *New York Lawyer's Formbook* is a 3-volume, 2,600-plus-page companion to the *Deskbook*. Consisting of 21 sections, covering 21 different areas of practice, the *Formbook* familiarizes practitioners with the forms and various other materials used when handling basic transactions in each area. *Formbook* includes commonly used official and commercial forms, and materials developed by the authors—original forms, checklists, worksheets and questionnaires used in their daily practice. Many of these forms and materials are referenced in the *Deskbook*. The forms in the 2004 revision are completely updated.

The *Deskbook* and *Formbook* are excellent resources by themselves, and when used together, their value is substantially increased. Annual revisions keep you up to date in all 25 areas of practice.

1998 (Supp. 2004) • PN: 4155 • List Price: $275 • ***Mmbr. Price $225***

To order call **1-800-582-2452** or visit us online at **www.nysba.org/pubs**

Mention code: CL2402 when ordering.

NYSBA
New York State Bar Association

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I have practiced general business law for many years. My practice focuses on business formation and general counseling to entrepreneurs and newly forming entities. For the most part, I represent a single member, partner, or shareholder in the negotiation and creation of various partnership, operating, and shareholder agreements. However, from time to time, I am asked by multiple parties to commit already-negotiated terms to paper, so an agreement can be formalized. Generally speaking, the major "deal" terms of these arrangements are settled before I become involved, and my job is simply to finalize the non-material terms. From time to time, however, the deal is still evolving when I begin drafting. In these situations, I always keep myself out of the negotiations and steadfastly refuse to counsel the parties individually until after the agreement is signed.

Recently, I was asked by two businesswomen to draft a partnership agreement for an import-export business that will have significant off-shore holdings. The material terms of the deal were all settled, and I was impressed by the parties' sophistication, demonstrated by the exhaustiveness of the terms they had outlined. My feeling was that it would be a simple matter to commit the partners' agreement to writing, given how thorough their negotiations had been. And, frankly, I saw the resulting business as a great potential client.

I began drafting the partnership agreement. However, I quickly discovered that, because of the nature and location of the business, there were several terms relating to ownership and owner liability that could lead to negative tax consequences for the parties if certain, albeit unlikely, events occurred. I called both parties on a conference call, explained my discovery, and offered several solutions for avoiding the problem. It became clear that Partner A had suggested the terms at issue, but on the conference call, both partners agreed that I should choose language which would avoid the problem. I returned to drafting the agreement.

A short time later, Partner A called me back and explained that she had been thinking about the conference call. She told me she had changed her mind and wanted to stick with her original language. She told me she would explain the switch to Partner B prior to execution of the agreement. When I asked why, she explained that she was considering filing for personal bankruptcy and had been told by her bankruptcy attorney that the language she included would allow her to shield the partnership assets from the bankruptcy proceeding. She insisted that I not share this information with her partner because she "didn't want her worrying about something that may never happen."

I've been wringing my hands for days. I spoke to one of my law partners who not only insisted that I disclose the confidence to Partner B, but is irate that I had taken on the matter in the first place. He tells me that by acting as a "scrivener," as I have so many times in the past, I am violating disciplinary rules and ethics. What should I do? I know if I tell Partner B, my chance to sign up the business as a new client is probably gone. Further, is my partner right? I always thought I was doing these projects "by the book," but have I been wrong?

Sincerely,

Desperate Drafter

Dear Desperate:

You find yourself in a tight spot. Regrettably, it is one which will be best handled by your withdrawing from the joint representation of the two partners, and changing your procedures to avoid similar problems in the future.

Let's begin with the confidences shared with you by Partner A. DR 5-105(B) prohibits continued joint representation if independent professional judgment on behalf of a client is adversely affected by the joint representation. The State Bar Ethics Committee has opined that an attorney representing joint clients *must withdraw* from the joint representation if information obtained in confidence from one of the joint clients gives rise to a conflict of interest with the other joint client. State Bar Ethics Opinion 84-555 discusses the matter in full.

It is clear that your talk with Partner A triggered the operation of this rule, especially since she told you not to tell Partner B about the conversation. Leaving aside everything else we know about what it means to be an ethical and professional attorney, in light of DR 5-105(B) and your conversation with Partner A, there is simply no sure-fire way for you to go forward with this representation – either as the partners' drafting attorney or as individual counsel for either of them.

You should have preceded your engagement as the partners' attorney with the statement that there can be no confidences held by you as between

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.

either of them individually; at minimum, you should have made that point clear before Partner A told you about her bankruptcy concerns. Now, in keeping with your ethical and professional obligation to Partner B, you need to advise Partner A that you cannot honor her request for confidence, and that you must insist that Partner B is made aware of the issues Partner A raised in your private conversation with her. Only in this way can you fulfill your obligation of undivided loyalty to both clients. While you are probably correct that such insistence will likely end your relationship with the clients, you will rest easier knowing that you have done the right thing and have avoided a possible disciplinary complaint.

There is some good news, however. Your law partner is incorrect in stating that you cannot serve as an attorney for two parties who are reducing a partnership agreement to writing. To the contrary, as long as you closely follow the requirements of DR 5-105 and EC 5-16, you can ethically act as a scrivener. The keys to doing so are having a reasonable belief that you can competently represent both clients' interests and obtaining the clients' knowing consent after full disclosure of the risks and advantages of doing so. *See*, DR 5-105(C). My suspicion is that you have not been doing everything you need to do to ensure that you are meeting this burden when you take on joint clients. Luckily, EC 5-16 provides detailed guidance on how to assess the viability of joint representation and how to ensure that you give your clients full disclosure.

EC 5-16 requires that the following steps be taken before proceeding with a joint representation: (1) you must fully explain the implications of common representation to each client; (2) you must provide sufficient information to each client to permit the client to appreciate the potential conflict; (3) your guidance on these points must take into account the sophistication of the client, making sure he or she understands the significance of the conflict; (4) you should accept or continue employment only if each client consents in writing; and (5) if there are any circumstances that, if known, might cause any of the clients to question your undivided loyalty, you should also advise all of the clients of those circumstances.

EC 5-16 also provides a simple test to allow you to determine whether you can ethically proceed: "If a disinterested lawyer would conclude that any of the affected clients should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the client's consent." As you are the person making this assessment, you bear the burden of establishing that consent was properly obtained and relied upon by you. Finally, as noted above, you should tell all of the joint clients that you require their candor, but that they must understand that information told to you in the course of the joint representation will be shared with all of the other joint clients. *Accord*, City Bar Formal Opinion 2001-2.

If these requirements seem onerous, it is because, by serving as a scrivener, you are walking on a very sharply drawn line which balances efficiency and economy against client protection. Only by scrupulously following the rules can you assure yourself and your clients that their interests are being fully and fairly represented. Good luck and happy drafting!

The Forum, by
Robert T. Schofield
Whiteman Osterman & Hanna LLP
Albany, NY

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am a new associate in the litigation department of a law firm. A senior partner recently assigned a matter to me concerning someone I shall call Mrs. Privileged. Mrs. Privileged is the matriarch of the Privileged Family, which owns and develops much of the real estate in our county, including shopping centers, office buildings and residential complexes. For the past 10 years, the firm has handled all the commercial work for the Privileged Family, as well as personal matters for many of its members.

According to the senior partner, Mrs. Privileged claims that her gardener negligently over-fertilized her prize rose garden, rendering the roses unfit for the annual flower show in which she has participated for many years, and won medals for her displays. She claims $5,000 in damages and is furious with the gardener, so much so that she not only fired him, but also "spread the word" about his incompetence to her neighbors, many of whom also used him. Although I have never met Mrs. Privileged, the scuttlebutt around the office is that she is not very kind, to say the least, and is also penurious, despite her wealth.

As instructed, I prepared a complaint and commenced discovery. I just completed taking the deposition of the gardener, who is indigent, and was not represented by counsel. His testimony does not support our client's claim that he was negligent, and, even if it did and we obtained a judgment, his lack of assets would render it uncollectible. In addition, the gardener has been unable to find work, having been "blacklisted" by our client – who, I am convinced, is just being petty and spiteful. This is my first case without close supervision, and I want to make a good impression on an important client and the senior partner. As a matter of my own professional development, I am also anxious to take a case to trial. Nevertheless, I am conflicted, as I think that this case should not be continued. What should I do, particularly if the senior partner tells me to proceed not withstanding my concerns?

Sincerely,
An Attorney With a Thorny Issue

EDITOR'S MAILBOX

Editor's Note: We received the following letter in response to Ken Standard's President's Message published in the October 2004 issue of the NYSBA Journal.

To the Editor:

This is the first time I have written in response to a President's Message. In addition to the New York Bar, I am a member of the FLA, CT, and MA Bars, and nowhere have I seen addressed this very real problem, the difficulty of achieving a balance in our professional and personal lives.

I too would like to contribute more pro bono hours while spending time with my husband and family. However, the demands of the profession today with almost instantaneous communications, etc., make the legal professional a juggler. At some point, one of the balls juggled is going to fall, and the family, client, and pro bono hours suffer. Bravo for the Special Committee on Balanced Lives in the Law.

Kathleen K. DeMont
Jensen Beach, FL

Editor's Note: We received the following letter in response to "New York Consumers Enjoy Statutory Protections Under Both State and Federal Statutes" by Hon. Thomas A. Dickerson, published in the September 2004 issue of the NYSBA Journal.

To the Editor:

I read with interest Justice Dickerson's article in the September *Journal* on General Business Law § 349, until I reached his comment on page 14 that securities are not covered.

Justice Dickerson cites two lower court decisions from Supreme Court, New York County, in support of that proposition. Essentially the references to § 349 of the GBL in both of those cases are dictum. In fact, one of the cases is "not approved by reporter of decisions for reporting in state reports."

More importantly, Justice Dickerson failed to cite the Appellate Division, Fourth Department decision in *Scalp & Blade, Inc. and One v. Advest, Inc. and One*, 281 A.D.2d 882, 722 N.Y.S.2d 639, which clearly holds that GBL § 349 is applicable to securities transactions citing a long line of Court of Appeals cases holding that section applies "to virtually all economic activity" (*Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 698 N.Y.S.2d 615, 720 N.E.2d 892).

Very truly yours,
Donald G. McGrath
McGrath & Polvino PLLC

Justice Dickerson replies:

Thank you for the letter and the case cited therein which I have now read and will incorporate in my annual paper *Consumer Law 2005*, prepared for the New York State Judicial Seminar Program and available on the Internet as contrary authority for the proposition that GBL § 349 does not apply to securities transactions. Of the two Supreme Court cases which I cited for that proposition, *Fesseha v. TD Waterhouse Investor Services, Inc.*, 193 Misc. 2d 253, 747 N.Y.S.2d 676 (N.Y. Sup. 2002) ("Finally, § 349 does not apply here because, in addition to being a highly regulated industry, investments are not consumer goods") was affirmed by the Appellate Division, First Department at 305 A.D.2d 268, 761 N.Y.S.2d 22, 23 (1st Dep't 2003) ("Plaintiff's claim based in an alleged violation of GBL § 349 was properly dismissed since that statute is inapplicable to securities transactions [see numerous Appellate Division citations]").

In addition, see also the Appellate Division, Third Department's recent decision in *Gray v. Seaboard Securities, Inc.*, 96291, as discussed in New York Law Journal, January 18, 2005, p. 1 ("The Appellate Division, Third Department joined the vast majority of courts to have considered the issue and decided unanimously that General Business Law § 349 provides no relief to consumers alleging they were misled by a trading company").

Thomas A. Dickerson,
Justice of the Supreme Court

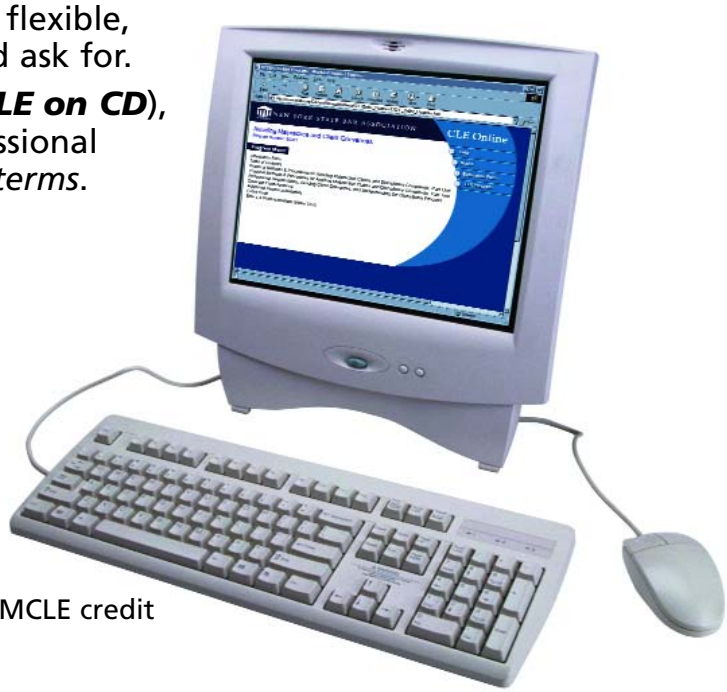
NYSBA's CLE Online

Bringing CLE to you...
anywhere, anytime.

NYSBA is proud to present the most flexible, "on demand" CLE solution you could ask for.

With ***CLE Online*** (also available as ***CLE on CD***), you can now get the valuable professional learning you're after...*on your own terms*.

- Get the best NY-specific content from *the state's #1 CLE provider*.
- Take "Cyber Portable" courses from your laptop, in your home office or at work, via the Internet or on CD.
- Stay at the head of your profession with outstanding CLE instruction and materials.
- Everything you need to obtain full MCLE credit is included ***online*** or ***on CD!***



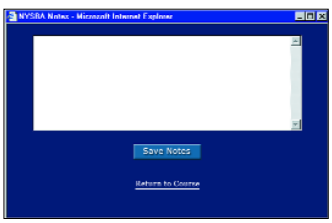
Come click for CLE credit at:

www.nysbaCLEonline.com

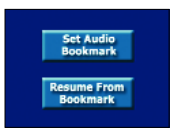
or purchase CDs
call 800-582-2452

NYSBA

CLE Online and *CLE on CD* Features



Electronic Notetaking
allows you to take notes while listening to your course, cut-and-paste from the texts, and access notes later – (on your computer or, in the case of ***CLE Online***, from any computer with Internet access).



Bookmarking
lets you stop your course at any point, then pick up right where you left off – days, even weeks later.

Audio Seminars
complement the onscreen course texts. You control the pace, and you can "bookmark" the audio at any point.

MCLE Credit
can be obtained easily once you've completed the course – the form is part of the program! Just fill it out and mail it in for your MCLE certificate.

LANGUAGE TIPS

GERTRUDE BLOCK

Question: A stay of execution has always meant "delay of execution." So "to stay an execution" should mean to delay it. But now stay (as in "stay the course") means "keep on." The "new" meaning contradicts the "old." What's going on?

Answer: Semantic change is what is going on, and in this case it causes confusion because the noun *stay* retains its original meaning of "delay."

Traditionally, the verb *stay* meant "stop," being derived from the Latin verb *stare* ("to stand"), and Middle English *steyen* ("to stop moving"). In some phrases, *stay* means "remain," as in "stay in place," "stay strong." But the 1973 edition of *The American Heritage Dictionary* listed an additional meaning of *stay*: "to continue on" (as in "stay busy"), in which the verb *stay* means "keep on."

Many people first heard that meaning when, in November 1982 then-President Ronald Reagan exhorted Congress to "stay the course" on his budget proposal. Most of the press dutifully reported that expression. But *Time* magazine rejected it. *Time*'s November 15 issue carried the headline: "America's message: Keep on Course!"

But language changes to represent public preference, so *stay* has now become an acceptable transitive verb, with the meaning of "continue on." For the former meaning of the phrase, will we substitute "hold up the execution"? If so, the noun phrase, *a stay of execution* may become a "fossil," the name given to words used only in one context (like *shrift* in *short shrift* and *teller* in *bank teller*. (Readers can probably think of others.)

Question: The phrase "creative ambiguity" got my attention recently. I saw it in a news dispatch which reported that the United Nations Security Council had passed a resolution containing "creative ambiguity" (about giving Iraqis veto power over United States military action). What does "creative ambiguity" mean?

Answer: This phrase has more political than semantic implications. However, to attempt an answer: Ambiguity is usually divided into two categories, intentional and unintentional. Perhaps the phrase "creative ambiguity" should be placed in the category, "intentional ambiguity."

If so, the adjective "creative" might have been selected because it is vague enough to serve as a euphemism for a more pertinent and objectionable adjective. Was the euphemism intended to mislead? And if so, was the attempt to mislead the Iraqis or the United States? Or was *creative* merely chosen to make whatever is going on seem palatable? The more I think about it, the more I am inclined to believe that the answer is political, and beyond my competence.

Question: Which is correct, "grounds for divorce" or "ground for divorce," when there is only one "ground"?

Answer: The definition that *Black's Law Dictionary* (Seventh Edition, 1999) gives for *ground* implies that the singular form stipulates only one ground. *Ground* is defined as, "The reason or point that something (as a legal claim or argument) relies on for validity." *Black's* lists as examples, "grounds for divorce," "grounds for appeal."

However, *West's Legal Thesaurus/Dictionary* (1986) defines *ground* as "foundation: points relied on," and uses as illustration, "reasonable ground to believe."

By defining *ground* as both "foundation" and "points relied on," *West's* seems to imply that the word *ground* can be either singular or plural.

A check of appellate opinions in *Words and Phrases* reveals that courts disagree about *ground*. As illustration of the lack of consensus, see some of the opinions below:

- "Legal grounds" must mean a sufficient legal basis for granting the relief sought. *Daniel v. Committee of Corrections*, 751 A.2d 398, 57. (The grammatical plural includes the singular.)
- "The word 'ground' is defined as meaning land; estate; possession; and in the plural, gardens; land; field belonging to a homestead . . ." N.J. Ch. 1910. (The grammatical singular includes the plural.)
- "Indispensable element of assertion of 'grounds' for legal action is allegation of fact or facts that form basis for claim . . ." *Armantrou v. Bohon*, 162 S.W.2d 867. (The grammatical plural includes both singular and plural.)

With so much variation in reputable usage, you should feel at liberty to use both *ground* and *grounds* as either singular or plural.

Addendum:

A book of my columns is now available. The title is *Legal Writing Advice: Questions and Answers*, published in December 2004 by William S. Hein & Co., Buffalo, New York. The book contains many of the questions asked by readers during the 25 years in which my columns have appeared in bar journals. Perhaps you'll discover a question you have asked!

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).

MEMBERSHIP TOTALS

NEW REGULAR MEMBERS 1/1/05 - 1/10/05	**15**
NEW LAW STUDENT MEMBERS 1/1/05 - 1/10/05	**35**
TOTAL REGULAR MEMBERS AS OF 1/10/05	**64,497**
TOTAL LAW STUDENT MEMBERS AS OF 1/10/05	**4,107**
TOTAL MEMBERSHIP AS OF 1/10/05	**71,604**

You're a New York State Bar Association member.

You recognize the relevance of NYSBA membership.

For that we say, *thank you.*

The NYSBA leadership and staff extend thanks to our more than 72,000 members — attorneys, judges and law students alike — for their membership support in 2004.

Your commitment as members has made NYSBA the largest voluntary state bar association in the country. You keep us vibrant and help make us a strong, effective voice for the profession.

Kenneth G. Standard
President

NYSBA

Patricia K. Bucklin
Executive Director

NEW MEMBERS WELCOMED

FIRST DISTRICT
Marjorie J. Aaron
Soraya Ruiz Abderrashman
Jill Marie Abrahamson
Nanette Aguirre
Kenneth L. Anderson
Ezekiel Daniel Arlin
Christopher John Arnold
Neil R. Bahnemann
Pierre Yann Bailet
Zabrina Teresa Barile
Aaron Mark Bell
Liba Benus
Monika Ona Bileris
Rina Janet Birnbaum
Nancy Jane Blumenthal
M. Elizabeth Brandon
Lauren T. Broderick
Thomas Edward Brois
Laura M. Burgardt
Ofoe Canacoo
Luca Cantelli
Claudine Caracciolo
Kelly Ann Carrero
Lucille Caruso
Roderick James Cassidy
Eric Wayne Castillo
Ming Han Chang
Vincent M. Chen
Jayne Park Cho
Hyun-Baek Chung
Maimiti Cohen-Solal
Russell James Collins
Ivy Colomba
Nicole Joy Coward
Georgina Donyuil Crawley
Helen R. Cristofalo
Douglas Mark Croland
Andrew John Davalla
Marcia Ellen De Geer
David De Pasquale
Bridget Kurtt Dejong
Brook Denneny
Richard Dickler
Michael Arthur Dougherty
Adam Drapkin
Sandi F. Dubin
Robin Lynn Duncan
Kenneth Carl Ehrhard
Timothy Howard Eskridge
Alejandro Daniel Filippa
Dianna Kristin Fiore
Robin Alexandra Marchisio Fisher
Beth Alexandra FitzPatrick
Benjamin Patrick Flattery
Justin Fisher Flowers
Diana L. Ford
Douglas Bradford Freeman
Kristi N. Gamble
Thomas M. Gannon
Suzanne Rose Garment
Gregory W. Gilliam
Cynthia Michelle Goldstein
Kegan Ellery Greene
Mari Elizabeth Groff
William A. Haddad
Frances Pierson Hadfield
Oren Buchanan Haker
Guy Halfteck
Justin Gerard Hamill
James Andrew Hamilton
Kimberly Ann Hamm
Elissa A. Hendler
Daniel James Hewitt
Caroline Jane Hickey
Hannah Hojeberg
Rachel Anne Hoover
Chiu-huey Hsia
Brian Paul Hudak
Ana Celia Humphreys
Joung Wook Hwang
Kristopher M. Hyman
Thomas Lawrence Iannarone
R. Evon Idahosa-Howard
Barry E. Janay
Botagoz Jardemalie
Todd Michael Jascott
Eurydice A. Kelley
Leon Edward Kelly
Kimberly Anne Kessler
Mark M. Khmelnitskiy
Joanne Hyeri Kim
Maxwell Sterling Kim
Philip Dongjoon Kim
Lois Kinney
Courtney Catherine Kirkman
Paul Kleidman
Lawrence Joseph Korb
Deborah Kovsky-apap
Paul Andrew Kuebler
Herbert Wingfung Kwan
Jeffrey William Lang
Keyana Capri Laws
Frederick Han Lee
Hio Kyeng Lee
Audrey Sewon Leigh
James Arthur Leiz
Paul Libretta
Elise G. Liebowitz
Lilian Rae Lindsay
Steven Maffei
Evelyn C. Mak
Mary Evelyn Marsden-Cochran
Lori A. Masco
Sean David McAndrew
Kirsty Gallandes McGuire
Laura J. McLaren
Mark Vanni McLaughlin
Keith McNally
Justin Matthew Michael
Emily L. Milligan
Saleem N. Moghal
David J. Monderer
Sheila Moreira
Natalie Anne Munroe
Mindy Ellen Nagorsky
Kanako Nakamura
Gerald Patrick Neugebauer
Michael Kai Ng
Jennifer Babieracki Noone
Colin Casey O'Brien
Eric O'Connor
Patrick Francis O'Gara
Laine Alee O'Mara
Matthew Michael Onek
Yewande Iyamide Oyesanya
Anne Claire Pansard
Sue J. Park
Beate Susanne Parra
Teresa Anne Rosen Peacocke
Dina Beth Penny
Alexandra Hetherington Perina
Nadia Natasha Persaud
Jonathan Craig Pisha
Oliver Platz
Jennifer Grace Presto
Mark Evan Proctor
Fei-lu Qian
Christopher David Rae
Michael Rafa
Shalini Kisten Rajoo
Chandana R. Rao
Robin Michelle Regan
Duncan James Reid
Scott Michael Reinhart
Vanessa Richards
Kimberly Anne Rohback
Kathryn A. Rubino
C. Scott Salmon
Joshua Matthew Samit
Marcus Charles Sands
Takuro Sasao
Donald F. Schneider
Stacy Helene Schneider
Asher Schoor
Daniel Eric Shaw
Melissa Sterling Shaw
Andrew Thomas Sheeley
Mirella Moshe Siskindovich
Darren Ross Spedale
Saiyanthan Kadirgamar Sriskandarajah
Andrew Ian Stemmer
Lisa Michele Stone
Stacey M. Strongarone
Miranda Jane Stupart
Samuel Sultanik
Kristy Michelle Tillman
Sherri Lauren Toub
Christopher Michael Tozzo
Winston Carrell Tucker
Hristo Ivanov Vachovsky
J. Bradley Vatrt
Donna Alison Von Rosenvinge
Michael P. Votto
Caroline Elizabeth Wainright
Catherine Ann Waligunda
Stephanie Shunwei Wang
Camila Weeks
Kimberly Caitlin Wheeler
Bradley William White
Daniel Winick
Tao Wu
Karen Yan
Talya D. Yisraeli
Rachel Sara Yoskowitz
Gary Youm
Hairong Yu
J.H. Jerry Zhu

SECOND DISTRICT
Amy Jeanne Bann
Rachel H. Brecher
Simon Daillie
Gregory Eidukas
Christopher D. Grace
Violet Pearl Moton
Scheherazade Salimi
David Storobin
Stephanie Toti
Mu-te Yu

THIRD DISTRICT
Kristin Dittus
Bruce N. Gyory

FOURTH DISTRICT
Andrew James Caruso

FIFTH DISTRICT
William Bradley Hunt
Sami Yaqube Naim

SEVENTH DISTRICT
Nicole G. Chalk

EIGHTH DISTRICT
Cory Robert Magnuson

NINTH DISTRICT
Robert Lantry Byrne
Catherine Mary Cosgrove
Timothy Brett Ettus
Shea Elizabeth Fitzekam
Courtney Elizabeth Graham
Alan Neil Kachalsky
Richard A. Miccio
Marina Michelutti
Damien Semel-Defeo
Dawn Sequinot-Noriega
Melissa Ann Smith
Anna Kirstine Thomsen

TENTH DISTRICT
Sima Asad Ali
Brian Kenneth Barnett
Gina M. Bonica
Cathie L. Britt
Pablo Esteban Bustos
Jason R. Danisi
Linda Filosa
Xiangan Gong
Jamie Leigh Guggenheim
Kimberly Allison Gurnick
Olivia Hetzler
Zuhra Jabeen Kapri
Steven Longo
Jonathan Michael Marmo
Natali Geula Matalon
Kiera J. Meehan
Heather T. Mehler
Danelle Monique Permenter
Elise Pfeffer
Amy M. Reinstein
Bonnie Nathanson Sicklick
Wendy Golda Sonneborn
Claire C. Tierney
Damin J. Toell
James Henry Vanek
Menakshi Varma

ELEVENTH DISTRICT
Latrice Basden-Clarke
Robert S. Gonzales
Rudy M. Greco
Tamara Lefranc
Elizabeth A. Oyen
David Ian Rabinowe
Joseph A. Suraci

TWELFTH DISTRICT
Melanie Amber Cunningham
Timothy Duignan
Sotheary Mar
Allison E. Mosher

OUT OF STATE
Ana Michelle Abarca
Sarah Ahn
Salman Motib Al-sudairi
Joseph Bebee Alexander
Candice Michele Alfonso
Eric Michael Allen

Kimberly Azzaro Andrade
Diego Baldomir
Edward George Baldwin
Thomas John Barlow
David N. Barry
Allison Elizabeth Beard
Laura Belendez
Gregory R. Bennett
Jamie McQuerrey Bennett
Alyse Deborah Bertenthal
Russell Lennard Bjorkman
Joanna Bochner
Michelle L. Bogre
Daniel M. Bono
Juan Carlos Bou
Stephen Michael Bourtin
Victor H. Boyajian
Lisa N. Brown
Benjamin Charles Browning
Kevin Bruce Bucknor
Jeremy Scott Burnich
Karen Patricia Buschardt-Pisarczyk
Terry Randall Bynum
Roni Byrne
Andy Ross Camacho
Robert William Carter
Catherine Margaret Cassidy
Dame Rose Siaotong Catalan
Stephanie Chalanset
Saeyoung Chang
Stephen George Charpentier
Marye Christina Cherry
Alan John Clark
Stephane Cliche
Andrew Joseph Curtin
Laura Ann D'anca
Michael Carter Davis
Tanuja Majumdar Dehne
Maria Beatriz P Dellore
Patrick Bernard Dillon
Roberto Dimichele
Claud Von Schilling Eley
Keri Lyn Encarnacion
Mohammed Zain Farooqui
Vugar Tahmasib Fataliyev
John Howard Fegan
Robert Craig Feldman
Lauren Jaclyn Finnegan
Daniel John Flanigan
Frank Walter Forman
Stephanie Day Fouts
Stefania Fusco
Elizabeth Ann Geschke
Silvia Pauline Glick
Karin Yvonne Goger
Satoshi Gomi
Jonathan Leon Gottfried
Matthew Haddad
John Lawrence Hadl
Haesung Han
Nicolas Jorge Herrera
Nobuyuki Kawai
Aram Kim
Richard Kuslan
Stephen John La Torre
Kai Liiva
Forrester C. Lord
Noah John Magrisso
Yijun Mao
Andrew C. Melzer
Erik Lennart Mengwall
Yoshiaki Ken Miyamoto
Corinna Marita Neunzig
Binh Van Nguyen
Mayada Gamal Osman
Pedro Pais De Almeida
Anthony Pappagallo
Gregory F. Penn
Kathleen Pugh
Oscar Thomas Ramirez
Christine Rehak
Kimmo Tapio Reina
Peter Rokkos
James Joseph Sample
Nikhil M. Shanbhag
Boriana Shikova
Asaad Khursheed Siddiqi
Ashwini Sukthankar
Qiang Sun
Wei-hsuan Szu
Jose Narciso Tezanos
Holly M. Travis
Steven D. Urgo
Cristina Vinzons Uy
Jorge Velarde
Melissa A. Volet
Richard Edward Vuernick
Lynn Karin Ward
Grant Kei Watanabe
David C. Wilburn
Amanda Dibrell Wilson

In Memorium

Robert S. Blume
East Setauket, NY

Paul F. Brown
Ballston Spa, NY

Harvey Burko
Brooklyn, NY

Myron Cohen
Farmingdale, NY

Albert P. DeLillo
Staten Island, NY

Janet Goglio
Merrick, NY

Mark Horn
North Miami Beach, FL

William E. Horton
Canandaigua, NY

William M. Kimball
New York, NY

Eric Chih-Cheng Kuo
Arcadia, CA

Charles J. Meyers
Culver City, CA

John S. Osborne
New York, NY

Charles Sabin
Delray Beach, FL

William S. Seldin
Ithaca, NY

Bernard Silverman
Liberty, NY

Myles Tralins
Miami, FL

Foundation Memorials

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

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

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

THE NEW YORK BAR FOUNDATION

CONTINUED FROM PAGE 64

All right or alright? — the former. "Alright" is not an accepted word.

All round, all around. "All round" is well rounded. "All around" is to circle.

All together, altogether. "All together" means "things or people together." "Altogether" means "entirely, with all included," or "on the whole, with everything considered."

Allude, elude, refer. To "allude" is to imply or to refer indirectly. To "elude" is to forget or to avoid detection. To "refer" is to identify indirectly.

Alternate (alternately), alternative (alternatively), option. To "alternate" is to offer or do one after the other. An "alternative" is a choice between two things. For more than two choices, use "option," "selection," "possibility." Note: One cannot use "alternative" if no choice is offered. Thus, a last-minute decision to reschedule an event leads not to an alternative date but to a new, different date.

Although, while. "Although" is a contrast. "While" is a comparative time concept. Consider: "Judge A always rose when the jury entered the courtroom, while Judge B never did." Does the "while" here mean "at the same time," "and," "but," "whereas," or "although"?

Ambiguous, ambivalent. Something "ambiguous" is uncertain or unclear. To be "ambivalent" is to have mixed feelings or conflicting desires.

Amend, emend. To "amend" is to change formally. To "emend" is to correct a mistake. *Correct*: "The Legislature amended the statute to emend the statute's numbering."

Amid, among, between. Use "amid" with mass nouns and "among" with plural nouns. *Correct*: "Amid [not *among*] a series of authorities, this opinion stands out." *Incorrect*: "Amid [should be *among*] the judge's three loyal staff members, her law clerk stood out." Do not use "among" to mean "in," or "with." *Correct*: "In [or *with*, not *among*] the judge's contingent was his confidential secretary." "Among" refers to more than two people or things. "Between" ("by-twain") refers to two. Exceptions: (1) Use "between" if individual elements are closely related to one another. *Correct*: "An understanding was reached between the six co-defendants." (2) Use "between" to express the relation of one physical thing to many surrounding things. *Correct*: "The property I own is between three mountains." *Note:* Use an "and" to connect the two objects to which "between" refers. *Correct*: "Judge X sat in chambers between 8:00 a.m. and [not *to* or *or*] 9:00 a.m. every morning writing her opinions." Recall that the expression is "Between you and me," not the solecistic, hypercorrection "Between you and I." The contractual expression "between and among A, B, and C" means "among A, B, and C and between A and B, A and C, and B and C." If you read between the lines, you will find the following among White's bric-a-brac: "A lawyer who doesn't know the difference between 'among' and 'between' has missed his true calling as a bricklayer . . . . Why it is not enough to say simply that the contract is entered 'by' the parties is an issue going to the very heart of the law." D. Robert White, *The Official Lawyer's Handbook* 186 (1983).

Amount, number. An "amount" refers to a quantity of something that cannot be counted or counted easily: "amount of work," "amount of sand." A "number" refers to things that can be counted: "A number of motions."

Amuse, bemuse. To "amuse" is to entertain. To "bemuse" is to confuse. Correct: "The amusing lawyer bemused the jury."

Analogous, same, similar. "Analogous" refers to a partial similarity between different things. "Similar," meaning "general resemblance," is different from "same." "Judge X died of a heart attack. His son met a similar [should be *the same*] fate."

Antagonist, protagonist. An "antagonist" is an adversary. An "antagonist" is not necessarily the opposite of a "protagonist," the leading character in a story. "Antagonists" and "protagonists" may be good or bad.

Ante-, anti-. "Ante-" means "in front of" or "before." "Anti-" means "against" or "opposite." Use a hyphen after "anti" if the next letter is an "i" ("anti-interdependent") or a capital ("anti-Semitic"). (Note: "Antipasto" does not mean "against pasto." And "provolone" does not mean "in favor of volone.")

Anticipate, expect. To "anticipate" is to do something about a foreseen event. To "expect" something of a person, or from a nonperson, is to foresee but not do anything about it. *Correct*: "The judge anticipated the argument and therefore covered it in advance." *Correct*: "Judges expect loyalty of their law clerks and efficiency from their computers." Never follow "anticipate" with an infinitive or a "that" clause. *Incorrect*: "The attorney anticipated that his client would settle."

Anxious, eager. "Anxious" means "worried." "Eager" means "enthusiastic" or "impatient."

Any body, anybody, any one, anyone. "Any body" is a single mass of flesh, living or dead. Person in a morgue: "Is any body home?" "Anybody" is "anyone" — which is preferred to "anybody." When stressing a single person, use "any one": "The judge would have ruled for any one of them."

Any more, anymore. Use "anymore" to mean "no longer": "I do not write anymore." Otherwise, use "any more."

Any way, anyway. Use "anyway" to mean "in any event." *Correct*: "Although the litigants should settle the case, they will try it anyway." Otherwise, use "any way," which means "in whatever way."

Apology, excuse. Someone who "apologizes" accepts blame. Someone who offers an "excuse" accepts no blame.

Apparent, evident, obvious. Something "apparent" appears to be as believed. Something "evident" is proven. Something "obvious" is even more certain than something evident. The word "apparent" is apparently misused. "Judge Y died of apparent cancer." *Becomes*: "Judge Y apparently died of cancer." What is apparent is not the cancer but that Judge Y will now be judged by a court on high.

Appeal, apply. A litigant who "appeals" does so of right or after the litigant has already received permission to do so. But a litigant "applies" for discretionary review, such as for a writ of certiorari to the United States Supreme Court or for leave to the Court of Appeals.

Appraise, apprise. To "appraise" is to set a value. To "apprise" is to inform or notify.

Apprehend, comprehend. To "apprehend" is to come to know. To "comprehend" is to understand fully.

Arbitrator, arbiter. An "arbitrator" decides or settles legal disputes. An "arbiter" resolves disputes other than legal ones, such as a political or domestic dispute.

As, like. Use "as" as a comparison to introduce clauses: "It tastes good as [not *like*] a cigarette should." Otherwise, "as" is a comparative time concept. Do not use "as" as a conjunction to mean "because," "since," "when," or "while." Use "like" as a comparison to introduce nouns or noun phrases: "Judge A decides cases like Learned Hand did." Like, man, this is as good as it gets: "As" means "the same"; "like" means "similar to." Use "like" when you make a valid comparison between substantives. *Correct*: "The judge treats her court attorney like [not *as*] a friend." *Correct*: "Judges like [not *such as*] Brandeis write rhythmically." Do not use "like" in place of "as though" and "as if": "The judge sustained the objection *as if* [not *like*] the attorney had actually objected." And can you appreciate this? Do not use "appreciate" to mean "like." "I do not appreciate it when you question my integrity." *Becomes*: "I do not like it when you question my integrity." Old-fashioned grammarians prefer "so" to "as" in negative combinations, and all prefer "as" to "so" in positive combinations. *Correct*: "He is not *so* smart as Cardozo was." *Correct*: "He is *as* smart as Cardozo was."

Assume, presume. To "assume" is to posit the accuracy of an argument and then to go on from there. To "presume" is to take the truth of something for granted. *Correct*: "I assume [delete "for the sake of argument"] that you were told, 'Dr. Livingston, I presume?'"

Assure, ensure, insure, promise. *Correct*: "Please be assured that your insured investment will ensure high profits." Do not use "promise" as a verb to mean "assure." Hanging judge: "I *promise* you that you will be convicted." *Becomes*: "I *assure* you that you will be convicted." "Assure," which has the sense of setting someone's mind to rest, applies to persons. "Ensure" and "insure" imply making an outcome certain or securing something from harm. "Insure" means to cover with insurance.

Audience, spectator. An "audience" listens. "Spectators" look.

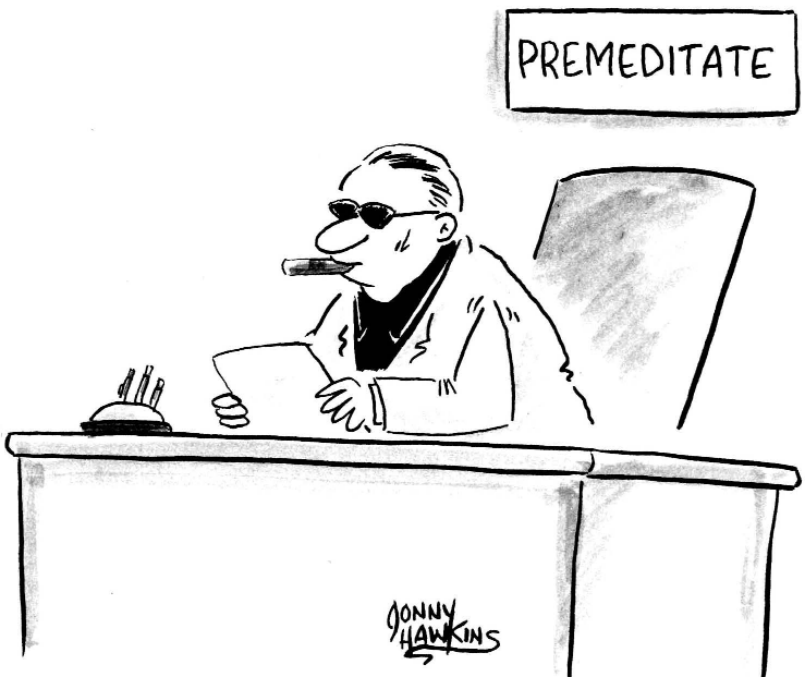
Authentic, genuine. What is "authentic" tells the truth about its subject. What is "genuine" is real. If you told your court-attorney colleagues about the amazing opinion you were drafting when all you really did was watch your judge conduct voir dire yet again, your story would be genuine but inauthentic. If you passed off as your own a true story you heard from another court attorney about writing an opinion, that story would be authentic but not genuine.

Average, median, mean, mode, mediocre. To determine an "average," add the numbers and divide by the number in that series. The "median" is the middle number. With three numbers, 1, 2, and 3, "2" is the median (and, in this example, also the average and the mean). The "mean" is determined by adding the highest and lowest and dividing by two. The "mode" is the most common number; the mode of 5, 5, and 6 is "5." "Mediocre" means "average." It does not mean "below average" or "bad."

Avocation, vocation. An "avocation" is a hobby. A "vocation" is a calling or profession.

Awhile. "Awhile," an adverb, is not preceded by "for." Correct: "Stay [not *for*] awhile." ■

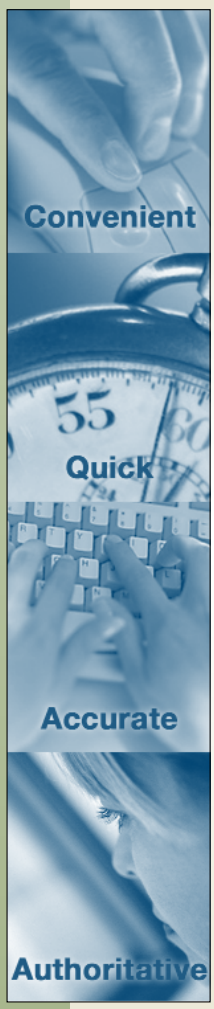
GERALD LEBOVITS is a judge of the New York City Civil Court, Housing Part, in Manhattan. An adjunct professor at New York Law School, he has written *Advanced Judicial Opinion Writing*, a handbook for New York's trial and appellate courts, from which this column is adapted. His e-mail address is Glebovits@aol.com.



New York State Bar Association's Forms

Automated by industry-leading HotDocs® document assembly software

Increase accuracy, eliminate repetitive typing and save time with these easy-to-use document assembly forms products.



Family Law Forms

Developed in collaboration with LexisNexis, NYSBA's Family Law Forms is the most authoritative and efficiently automated set of forms in this field. Access dozens of official forms promulgated by the New York State Office of Court Administration (OCA), as well as model matrimonial forms drafted by the distinguished veteran matrimonial law practitioner Willard H. DaSilva, a member of DaSilva, Hilowitz and McEvily LLP.

PN: 6260 • Member price • $291 • List price • $339

Guardianship Forms

When you're preparing legal documents, couldn't you use an extra hand? What if you didn't have to tie up your time retyping, cutting, pasting and proofing for errors? Now there's a quick and easy way to produce accurate guardianship documents, with New York State Bar Association's Guardianship Forms. This invaluable package contains 135 forms covering virtually every aspect of guardianship practice under Article 81 of the Mental Hygiene Law, ranging from the petition for guardianship to forms for annual and final accountings.

PN: 6120 • Member price • $375 • List price • $411

Residential Real Estate Forms

Discover how easy it is to electronically produce 200 different residential real estate forms—for both downstate and upstate transactions—with this automated set of forms. Quickly prepare clean, crisp, ready-to-file deeds, contracts of sale, clauses for numerous contingencies, various riders, escrow documents and closing agreements for traditional house sales, as well as for sales of cooperative and condominium units.

PN: 6250 • Member Price $351 • List Price $411

Surrogate's Forms

Now you can electronically produce forms for filing in New York surrogate's courts using your computer and a laser printer. This fully automated set of forms contains all of the official probate forms promulgated by the Office of Court Administration (OCA), including the official OCA Probate, Administration, Small Estates, Wrongful Death, Guardianship and Accounting Forms.

PN: 6229 • Member Price $315 • List Price $375

Prices include shipping, handling and 1 year subscription for updates.
Multiple user and annual renewal pricing is available.

To order call

1-800-582-2452 *or visit us online at* ***www.nysba.org/pubs***

Source code: CL2399

HEADQUARTERS STAFF EMAIL ADDRESSES

EXECUTIVE

Patricia K. Bucklin
Executive Director
pbucklin@nysba.org

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

L. Beth Krueger
Assistant Executive Director
bkrueger@nysba.org

ADMINISTRATIVE SERVICES, MEETINGS AND MEDIA RELATIONS

L. Beth Krueger
Assistant Executive Director

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

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

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

Amy Travison Jasiewicz, *Editor, State Bar News*
ajasiewicz@nysba.org

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

CONTINUING LEGAL EDUCATION

Terry J. Brooks, *Senior Director*
tbrooks@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

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
Ray M. Lopez, *Director*
lopez@nysba.org

LAWYER REFERRAL AND INFORMATION SERVICE

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

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

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

LAW PRACTICE MANAGEMENT
Cynthia Cornaire, *Director*
ccornaire@nysba.org

PRINT AND FACILITIES OPERATIONS

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

BUILDING MAINTENANCE

GRAPHICS

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

THE NEW YORK BAR FOUNDATION

2004-2005 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*
John J. Kenney, *New York City*
Steven C. Krane, *New York City*
Glenn Lau-Kee, *White Plains*
Bernice K. Leber, *New York City*
Susan B. Lindenauer, *New York City*
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*
Lucia B. Whisenand, *Syracuse*

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
ROBERT J. SMITH
LAWRENCE E. WALSH

2004-2005 OFFICERS

KENNETH G. STANDARD
President
New York

A. VINCENT BUZARD
President-Elect
Rochester

JAMES B. AYERS
Treasurer
Albany

KATHRYN GRANT MADIGAN
Secretary
Binghamton

A. THOMAS LEVIN
Immediate Past President
Mineola

VICE-PRESIDENTS

FIRST DISTRICT
Mark H. Alcott, *New York*
Stephen D. Hoffman, *New York*

SECOND DISTRICT
Barry M. 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., *Queens*

TWELFTH DISTRICT
Lawrence R. Bailey, Jr., *New York*

MEMBERS-AT-LARGE OF THE EXECUTIVE COMMITTEE

Donald C. Doerr
John H. Gross
Claire P. Gutekunst
David R. Pfalzgraf
Jay G. Safer
David M. Schraver

MEMBERS OF THE HOUSE OF DELEGATES

FIRST DISTRICT
Alcott, Mark H.
Barson, Alan D.
Bienstock, Peter
Blasi, Gregory J.
Boyers, Hon. Seymour
Brett, Barry J.
Brown, Geraldine R.
† Campos-Galvan, Manuel
Chambers, Hon. Cheryl E.
Cheng, Pui Chi
* Cometa, Angelo T.
Davis, Tracee E.
Dominguez, Ivan J.
Ferrara, Lucas A.
Fink, Rosalind S.
Finkelstein, Robert
Flood, Marilyn J.
* Forger, Alexander D.
* Gillespie, S. Hazard
Grays, Taa R.
Green, Prof. Bruce A.
Gregory, John D.
Gross, Marjorie E.
Gutekunst, Claire P.
† Haig, Robert L.
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.
†* Krane, Steven C.
Kuntz, William F., II
Lau-Kee, Glenn
Lee, Charlotte C.
Lesk, Ann B.
Levy, M. Barry
Lieberman, Ellen
Lieberstein, Marc Ari
Lindenauer, Susan B.
* MacCrate, Robert
McShea, Sarah Diane
Milito, Christopher Scott
Miller, Michael
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.
Ramos, Hon. Charles E.
Reimer, Norman L.
Reitzfeld, Alan D.
Richman, Steven H.
Rifkin, Richard
Rosner, Seth
Rothstein, Alan
Safer, Jay G.
* Seymour, Whitney North, Jr.
Sherman, Carol R.
Sherwin, Peter J.W.
Sherwood, O. Peter
Silkenat, James R.
Smoley, Lewis M.
Sonberg, Hon. Michael R.
Stenson, Lisa M.
Torrent, Damaris E.
Wales, H. Elliot
Walsh, Susan J.
Warner, Rita Wasserstein
Williams, Bryan R.

SECOND DISTRICT
Castillo, Nelson A.
Cerchione, Gregory T.
Connors, John P., Jr.
Cyrulnik, Hon. Miriam
DiGiovanna, Lawrence F.
Golinski, Paul A.
Hall, Thomas J.
Kamins, Barry
Longo, Mark A.
Romero, Manuel A.
Slavin, Barton L.
Sunshine, Hon. Jeffrey S.

THIRD DISTRICT
Ayers, James B.
Bauman, Harold J.
Cloonan, William N.
Copps, Anne Reynolds
DeFio, Elena M.R.
Dolin, Thomas E.
Engel, Hon. Franklyn J.
Fernandez, Hermes
Freeman, Paul M.
Greenberg, Henry M.
Hanna, John, Jr.
Higgins, John Eric
Higgins, Patrick J.
Kelly, Matthew J.
Kinum, John B.
Kretser, Rachel
Lynch, Margaret Comard
Lytle, James W.
Maier, Christopher T.
Meislahn, Harry P.
Miranda, David P.
Moy, Lillian M.
Perino, Justina R. Cintron
Privitera, John J.
†* Tharp, Lorraine Power
Thornton, Timothy B.
Treece, Hon. Randolph F.
* Yanas, John J.

FOURTH DISTRICT
Bartlett, Hon. Richard J.
Cantwell, Lori A.
Cioffi, Cristine
Clements, Thomas G.
Coffey, Peter V.
Dorsey, Matthew J.
Hoffman, Robert W.
King, Barbara J.
Pelagalli, Paul
Tishler, Nicholas E.

FIFTH DISTRICT
Alessio, George Paul
Benedict, Timothy A.
Doerr, Donald C.
Dunckel, Earl B.
Fetter, Jeffrey M.
Garramone, Hon. Anthony J.
Getnick, Michael E.
Hayes, David M.
Myers, Thomas E.
Norfleet, Doren P.
Peterson, Margaret Murphy
Plumley, Judy L.
Priore, Nicholas S.
* Richardson, M. Catherine
Weinstein, Ellen Stempler

SIXTH DISTRICT
Beehm, Angelina Cutrona
Denton, Christopher
Gacioch, James C.
Kachadourian, Mark
Lee, Carolyn S.
Lewis, Richard C.
Madigan, Kathryn Grant
Smyk, Stephen D.
Tyler, David A.
Wayland-Smith, Tina

SEVENTH DISTRICT
Ashcraft, Sara Stout
Barney, Brian J.
† Buzard, A. Vincent
Doyle, Hon. John D.
Frazee, Hon. Evelyn
Grossman, James S.
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.
Wolford, Michael R.

EIGHTH DISTRICT
Aversa, John M.
Doyle, Vincent E., III
Edmunds, David L., Jr.
Evans, Sue M.
Flaherty, Michael J.
* Freedman, Maryann Saccomando
Gerstman, Sharon Stern
* Hassett, Paul Michael
McCarthy, Jeremiah J.
Meyer, Harry G.
Peradotto, Hon. Erin M.
Pfalzgraf, David R.
Saleh, David J.
Seitz, Raymond H.
Shaw, James M.
Young, Oliver C.

NINTH DISTRICT
Bartlett, Mayo G.
Basso, John J.
Berman, Henry S.
Enea, Anthony
Fedorchak, James M.
Geoghegan, John A.
Goldenberg, Ira S.
Ingrassia, John
Johnson, Martin T.
Krooks, Howard S.
Marwell, John S.
Miklitsch, Catherine M.
* Miller, Henry G.
Murray, Conal E.
O'Leary, Diane M.
†* Ostertag, Robert L.
Plotsky, Glen A.
Ramsey, Hon. B. Harold
Riley, James K.
Seiden, Hon. Adam
† Standard, Kenneth G.
Sweeny, Hon. John W., Jr.
Walker, Hon. Sam D.
Wilson, Leroy, Jr.
Zeltner, Peter P.

TENTH DISTRICT
Asarch, Hon. Joel K.
* Bracken, John P.
D'Angelo, Frank G.
Duffy, James P., III
Fishberg, Gerard
Franchina, Emily F.
Fredrich, Dolores
Gross, John H.
Karson, Scott M.
Kossove, Scott E.
Labbe, Magdale L.
Lerose, Douglas J.
†* Levin, A. Thomas
Levy, Peter H.
Liotti, Thomas Francis
Millman, Bruce R.
Monahan, Robert A.
Perlman, Irving
* Pruzansky, Joshua M.
Purcell, A. Craig
Quinlan, Robert F.
* Rice, Thomas O.
Santemma, Jon N.
Shulman, Arthur E.
Smolowitz, Barry M.
Spellman, Thomas J., Jr.
Sperendi, Michael F.
Tell, M. David

ELEVENTH DISTRICT
Fedrizzi, Linda F.
Hans, Stephen D.
Haskel, Jules J.
James, Seymour W., Jr.
Lee, Chanwoo
Leinheardt, Wallace L.
Nashak, George J., Jr.
Nizin, Leslie S.
Rosenthal, Edward H.
Terranova, Arthur N.
Walsh, Jean T.

TWELFTH DISTRICT
Bailey, Lawrence R., Jr.
Chavez, Daniel M.
Kessler, Muriel S.
†* Pfeifer, Maxwell S.
Price, Hon. Richard Lee
Schwartz, Roy J.
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

Problem Words and Pairs in Legal Writing — Part I

Use words precisely. Use precise words. Eliminate improper word usage. And do not take this for granite: Make mincemeat of malapropisms — from the character Mrs. Malaprop in Richard Brinsley Sheridan's *The Rivals* (1775) — confusing words that sound alike. Make mountains of metathesis — transposing words, or sometimes things that just sound like words, like "ax" and "ask," "irrelevant" and "irrevelant." Finally, do not wix up your murds, and verse visa.

A lot. "A lot" is a measure of land. Only colloquially does the wordy "a lot of" mean "much" or "many." "Alot" is incorrect.

Ability, capacity. "Ability" is the power to do something. "Capacity" is the ability to receive or hold something. *A tip*: Avoid both words. "He has the ability to write well" *becomes* "He can write well" *or* "He writes well."

Abstruse, obtuse. "Abstruse" means "hard to understand." "Obtuse" means "slow to understand." *Correct*: "The reasoning of an obtuse judge is abstruse."

Academic, moot. Something "academic" is no longer relevant. Something "moot" is debatable. *Incorrect*: "Now that defendant's point is resolved against her, all her remaining contentions are moot." If "moot" meant what most lawyers believe it means, "moot" would have contrary meanings: (1) pertaining to a settled controversy and (2) pertaining to an unsettled controversy. Moot Court is offered by academia, and often sponsored by academicians, but Moot Court covers debatable points, not irrelevant ones.

Accounting. "Accounting" requires judgment. "Bookkeeping" records debits and credits uncritically.

Accused, alleged, claimed, suspected. By definition, someone cannot be an accused or suspected criminal, as in, "Mr. X is an accused murderer." God bless America: One is not a criminal until conviction. One can only be accused or suspected of murder. One may be accused of committing a crime, but one may not be accused of committing a civil fault. To "allege" is to assert without proof. One alleges in a complaint, therefore, but once proof, no matter how weak, is offered, the proof is no longer an allegation. Crimes and conditions can be "alleged"; people and law cannot be alleged. Wrong: "He is an alleged murderer." Wrong: "Appellant alleged that the statute provides that . . . ." An accusation is already an allegation. Thus, do not write, "Defendant was charged with alleged criminally possessing a sawed-off shotgun." When you give a reason for or against something, you do not allege; you contend or argue. A "claim" is a demand for or entitlement to relief. To "claim" is to assert a right to something. Except colloquially, to "claim" is not to "allege," "argue," "conclude," "contend," "declare," "maintain," or "state."

Actually. "Actually" means "in fact." It no longer means "now."

Adhesion, cohesion. Different substances are joined by "adhesion." Similar substances are joined by "cohesion."

Adjacent, contiguous. "Adjacent" means "neighboring." "Contiguous" means "touching," "abutting."

Admission, admittance, confession. "Admission" is used in the figurative and nonphysical sense. *Correct*: "Joe Shmo was admitted to the bar in 1981." "Admittance" is used in the physical sense. *Incorrect*: "No Admission. Restricted Area." (Should be "No Admittance.") In criminal law, an "admission" is a concession, without acknowledging guilt, that an allegation or factual assertion is true. A "confession" concedes the factual assertion and acknowledges guilt.

Adverse, averse. To be "adverse" is to be opposed. To be "averse" is to be unwilling. *Correct*: "Court attorneys averse to learning how to use computers must learn to tolerate adverse criticism."

Affect, effect. "Affect" as a verb: to influence; as a noun: a feeling or state. "Effect" as a noun: something resulting from another action; as a verb: to come into being, to cause something to happen. *Correct*: "Mr. X, whose manner is affected, put his theory into effect. His theory had a profound effect. It affected many things."

Affinity. To have an "affinity" with or between someone or something is to describe a reciprocal relationship. *Incorrect*: "Judge X has an affinity for the law." (The law cannot have an affinity for Judge X.) "Affinity" is followed by "between" or "with," not by "for" or "to." Colloquially, to have an "affinity" for someone means "to like someone." In this colloquial sense, "affinity" applies to people only. "Aptitude" or "knack" refer to things.

Aggravate, irritate. To "aggravate" is to worsen a condition. Only colloquially does it mean to "irritate" or "annoy."

Agreeable, compatible. To be "agreeable" is to be easy to get along with or enjoy. "Compatible" shows a relationship between people or things. *Correct*: "The judge and his law clerk are compatible because they are agreeable."

All ready, already. To be "all ready" is to be prepared. "Already" means "by this," "a specified time," or "previously." William Safire advises not to use a comma in "Enough already."

CONTINUED ON PAGE 58

Enhance your online legal research

NYSBA reference and form books online

Conveniently access NYSBA's comprehensive collection of reference books covering a full range of topics of interest to you from appellate and civil practice to entertainment, labor and zoning law.

Realize a tremendous savings by purchasing a subscription, through Loislaw, an Aspen Publishing Company, for **unlimited online access to more than 45 NYSBA titles**. Research **quicker, easier and more conveniently** because your subscription includes **– at no extra charge – links to the cases and statutes cited**.

NYSBA's top legal publications, written by leading attorneys and judges, include detailed indices, tables of authorities, practice guides, checklists and sample forms.

Get the information edge with NYSBA's online reference books – **Accurate. Convenient. Time and money saving**.

Special discounts are available for NYSBA members.

Subscribe Today!

Click **www.nysba.org/pubsonline**

Or, call **800-364-2512** to order.

PREMIER MEMBER NYSBA BENEFIT

NEW YORK STATE BAR ASSOCIATION