NEW YORK STATE BAR ASSOCIATION

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Journal

Is It Junk or Genuine?

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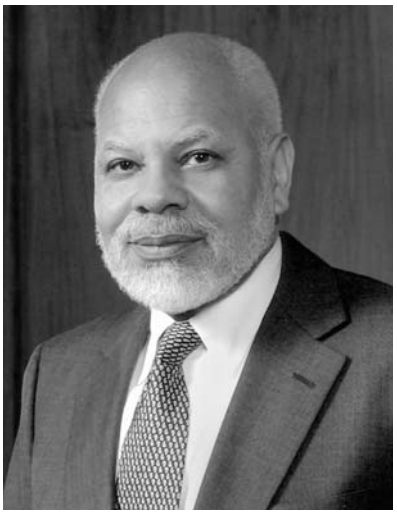
President's Message



KENNETH G. STANDARD

Raising Our Voices

"Ah . . . New York City in August . . . No Lawyers." A member of the Association told us about this sign at a store that she and countless other New Yorkers had seen in their daily travels. I wrote on behalf of the Association to the storeowner where the electronic sign was located to take issue with this message and list some of the many positive contributions that would be missing from our lives if lawyers were absent for a month, a week or a day.

The message, we were told, had been suggested by someone writing in to the store. In my letter, I recommended some alternative messages: (1) Lawyers donate free legal services to poor people – last year in New York, more than two million hours to the poor and disadvantaged and many more hours to countless charities and other not-for-profit entities. (2) Lawyers stand up boldly and resolutely to defend the rule of law and principles of justice, despite being the target of jokes by misguided copywriters, would-be pundits and others who fail to recognize the essential role that lawyers fill in protecting the basic rights of all within our shores, including non-citizens.

Also in August, on the Association leadership's daily review of law-related issues in the news, we came upon this headline in a magazine speak-out column: "Are trial lawyers robbing you? The legal feeding frenzy can rob you of a favorite doctor, destroy your job, and escalate the costs of the products you buy."

There, too, we responded with a letter with facts refuting the inflammatory misinformation in the article. As I explained, the tort system has not run amok. In 2002, only 2% of those who sustained serious injury actually filed a lawsuit and of the 90 million new cases filed in state courts that year, less than 1% involved tort matters. Our system of civil justice should not be summarily dismantled or eroded. Certainly, it should be the focus of constant review and constructive improvement, taking into account the needs of all concerned. For our democracy to continue, we all have to work to ensure that the average person and the small business have the same right to be heard and the same right to seek redress as wealthy physicians, global insurance companies and other large business interests. Any modification of the system must be accomplished by bringing together in good faith representatives of all perspectives. That is the Association's position. The voices of our Association members reflect these different backgrounds and insights. That is our strength.

Speaking out for the profession and for the justice system is one of the key responsibilities of our Association presidents. In these days of technological advancements that bring daily blizzards of information and opinions to the airwaves, Web, and elsewhere, it is particularly important to present a complete and accurate picture and work to increase public understanding about the legal system. We at the New York State Bar Association are committed to taking every opportunity to do so. Responding to articles and messages is one element of our efforts, and we urge you to bring such items to our attention and to share with us your efforts to speak out in your community.

We are not waiting for opportunities to respond. We are taking our message to the media, to public forums, to the community, and to lawmakers of how the legal system is functioning, what provisions need change, what approaches would be constructive, and what approaches would be detrimental. We are able to do that through our most important asset – the intellectual capital of our members and their commitment to ensuring that the legal process and profession can meet today's challenges while preserving the basic tenets of the rule of law and access to the justice system.

Over the past months, I have been meeting with reporters in the legal, business and general media to discuss the issues that we see as priorities and our positions for constructive change. The tort system has been a topic, as I described above. I have also described the need to reform the Rockefeller drug laws – an issue we have identified as a priority for legislative action to remedy the deleterious effect of these unduly harsh yet ineffective laws and to restore judicial discretion in sentencing. I also spoke with the media about the work underway by our Special Committee on State Constitution and Governance to examine and make recommenda-

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

tions to improve the functioning of the state legislative process, which has been plagued by 20 consecutive years of late budgets and the bottling up of needed legislation.

I also have been submitting op-ed pieces. As you may have seen in an opinion piece published in October in *The Buffalo News* and elsewhere, I spoke of how our justice system is designed to balance civil liberties and public safety and how, in this post 9/11 world, we need to remain vigilant that our laws and procedures continue to strike this balance. This is the view we have maintained in all our reports and recommendations on proposed and existing federal and state anti-terrorism legislation and regulations.

Each year, as we approach the new legislative session, we consider and identify several issues for priority action for the year ahead. To start the process, we invited by letter and e-mail our general membership, as well as our committees and sections, to submit suggestions. Following review by our Steering Committee on Legislative Priorities and the Committee on Legislative Policy, the Executive Committee decided we should continue efforts for drug law reform and for maintenance and improvement of access to the tort system and access to the civil justice system for both low-income and middle-income consumers.

We also added two items to our priority list. We will seek amendment of the Domestic Relations Law to provide for no-fault divorce in New York. This would add the irretrievable breakdown of a marriage to the current fault-based grounds – cruel and inhuman treatment, adultery, abandonment for one or more years, and imprisonment for at least three years – and to the provision of living apart for a year under a separation agreement or court decree. This affirmative legislative proposal was prepared by the Family Law Section and approved by the Executive Committee in June for submission to lawmakers. The Section observed that the present lack of no-fault provisions may result in he-said/she-said accusations between spouses, increased litigation costs and more embittered relationships.

The second addition to our priority list calls for legislation and related provisions to require videotaping of custodial interrogations by law enforcement authorities, to reduce the risk of false confessions and false claims of coercion. A joint resolution of the Criminal Justice Section and the New York County Lawyers' Association urging this legislation and related provisions was approved by the House of Delegates in June.

For each of these priorities, we are devising specific plans to spotlight the need for action, in our meetings and other communications with lawmakers, in speaking out in the media, and in discussing our perspectives with other organizations and in various forums. While the number of priority items is necessarily limited, we continue to pursue other affirmative legislative proposals and positions with lawmakers and in the media, working in concert with our sections and committees.

You can be assured that your Association will continue to raise its voice on your behalf, on behalf of our profession and on behalf of our society. We welcome and encourage your help in spreading the word.

NYSBACLE

Tentative Schedule of 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.

FALL PROGRAMS	DATE	LOCATION
† Update 2004 (video replays)	December 1 December 3 December 7 December 9	Poughkeepsie Canton; Loch Sheldrake Rochester Suffern
Local Criminal Court Practice (half-day program)	December 2 December 7	Buffalo Albany
Ethics and Professionalism (half-day program)	December 2 December 8	Uniondale, LI Syracuse
Hot Topics in Trusts and Estates Practice (half-day program)	December 9 December 10	Tarrytown Uniondale, LI
Modern Discovery (half-day program)	December 3	New York City
† Advanced Elder Law	December 2 December 3	Albany Westchester
Fundamentals of Banking Law and Regulation	December 1	New York City
The Heart of the Case with James McElhaney	December 1 December 2	Rochester New York City
† Advanced Real Estate Practice	December 3	New York City
SPRING PROGRAMS		
Bridging the Gap: Crossing Over Into Reality (two-day program)	February 9–10	New York City
† International Estate Planning Institute (one-and-one-half day program)	March 10–11	New York City
Avoiding and Defending Legal Malpractice (half-day program)	March 11 March 18	Rochester; Uniondale, LI Albany; New York City
A Primer on Civility and Ethics in Litigation (half-day program)	April 8 April 15	New York City; Rochester Albany; Uniondale, LI
2005 Insurance Coverage Update – Personal Lines, Bad Faith and Other Developing Topics	April 15 April 29 May 6	New York City Melville, LI; Syracuse Albany, Buffalo
Federal Civil Practice: A Primer	April 22 April 29 May 6	New York City; Rochester Albany Melville, LI
Senior Housing	April 22 May 13	Albany New York City
Three Hot Topics in Criminal Law	April 29 May 6 May 19 May 20	Rochester Albany Uniondale, LI New York City
DWI: The Big Apple V (one-and-one-half day program)	May 5–6	New York City

** Denotes revision

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

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Changes at the *Journal*

David Wilkes takes over as the new Editor-in-Chief of the *Journal* with this issue, succeeding Howard Angione. Mr. Wilkes plans to maintain and advance the preeminent reputation the *Journal* has achieved over its long history through the hard work, dedication and talent of his predecessors. Readers can expect to continue to see many of their favorite columns and writers, as well as the addition of new columnists providing regular advice and updates on substantive areas of law.

With the help of the *Journal*'s prestigious editorial board, Mr. Wilkes plans to expand the range and quantity of topics included in each issue. New "nuts and bolts" columns will be introduced that will appeal to a broader spectrum of readers. Design and graphics changes will also be introduced over the course of the coming year, including a shift to a full four-color format.

As Editor-in-Chief, Mr. Wilkes brings many years of publishing experience to the *Journal*. After working for a Manhattan book publisher and then earning his law degree, he became a staff writer and editorial board member for *Litigation News*, a publication of the American Bar Association. Since 2001, Mr. Wilkes has served as Senior Editor of *Real Estate Review*, an academic quarterly published by New York University and Thomson Publishing. He is a partner in the Westchester County firm of Huff Wilkes, LLP, representing commercial real estate owners and municipalities in a wide range of real estate litigation throughout New York State, with a particular concentration in commercial property tax appeals and eminent domain.

The interview process for the position of Editor-in-Chief was led by Kathryn Grant Madigan, Chair of the Committee on Association Publications and Secretary of the Executive Committee. Mr. Wilkes thanks the members of the committees for this opportunity to serve the New York State Bar Association, the board of editors for their enduring commitment to the *Journal*, Mr. Angione for the time he has devoted to making the transition a success, and the staff members of the Association for their tireless efforts to ensure the continuing quality of the *Journal*.

After six years at the helm, Howard Angione has reached the end of his term as Editor-in-Chief of the New York State Bar Association *Journal*, the Association's flagship publication.

During his tenure, Mr. Angione presided over a redesign of the *Journal* and added a ninth issue to the yearly publication schedule. He also incorporated several new columns, including the "Attorney Professionalism Forum," by the Committee on Attorney Professionalism; "Legal Writer" by Hon. Gerald Lebovits; and "Point of View," a forum for Association members to offer opinion pieces on current legal issues. One of Mr. Angione's goals was to give the editorial board a greater role, and in the last few years he published more articles by, and secured by, board members.

Mr. Angione came to the *Journal* after 22 years as an editor for the *New York Times* and the Associated Press and 10 years as an attorney, concentrating in elder law. He brought with him a keen sense of the importance of a pithy headline and a solid lead paragraph in drawing a reader into an article, and a passion for language and good writing. In addition to Judge Lebovits's column, Mr. Angione continued to publish "Language Tips" by Gertrude Block and, at least once a year, showcased a major article on writing.

The New York State Bar Association thanks and applauds Howard Angione for his two terms of dedicated service.

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

BY HAROLD L. SCHWAB

The admission of testimony from an expert witness is fraught with difficulty. Courts have struggled for many years to distinguish junk science from reliable evidence that is accepted by the scientific community. This is the first of two articles that review and analyze the significant reported New York cases since 1994 that reference either *Frye v. United States*[1] or *Daubert v. Merrell Dow Pharmaceuticals*,[2] the landmark cases in this field of law. These articles are intended to provide a helpful single-source reference for these cases. They should also serve as a useful synthesis and advancement of the jurisprudence relating to the preclusion of opinion testimony that is substantiated only by the word of the witness himself, or the so-called "ipse dixit" expert.[3]

A Look at *Frye*

The seminal New York case on the issue of *Daubert/Frye* application is *People v. Wesley*.[4] Remarkably, in the 10 years since *Wesley* there has been no Court of Appeals case discussing the possibility of a *Frye/Daubert* interface in New York. Many significant questions have been raised. Does *Frye* apply in cases involving scientific evidence that is not novel? Does *Frye* apply in cases involving technical expert testimony that is not scientific? Is there a bright line between evidence that is scientific and evidence that is technical?[5] What standards should be used by a trial court in deciding admissibility of expert evidence where *Frye* is not applicable? And, to what extent should trial courts hold *Frye* hearings prior to trial or immediately before prospective expert testimony during trial? Answers to some (but certainly not all) of these questions can be found in the evolving case law from trial courts, a few recent Appellate Division decisions, and the opinions of legal commentators over the past 10 years.

Frye Applies, But Not *Daubert*

People v. Wesley considered whether DNA profiling evidence was admissible, and if so, whether it should have been admitted in that case. DNA evidence was presented as novel scientific evidence at the time of the lower court proceedings in 1988 and 1989, which thus required a determination as to its reliability. The trial court held a hearing and ruled that the evidence was reliable and therefore admissible. A conviction of the accused resulted, and the Court of Appeals affirmed.

The stringent general acceptance standard first articulated in *Frye* was applied by the Court of Appeals, which determined that the issue of admissibility of DNA profiling evidence was novel but that there was general acceptance of its reliability in the scientific community. Writing for the majority, Judge Smith stated that a principle or procedure that is the basis for expert testimony must first be shown to have "gained general acceptance" in its field.[6] The specific procedure must be "generally acceptable as reliable," although the scientific community need not "unanimously indorse" the procedure.[7]

Concurring, Chief Judge Kaye wrote:

> The Court agrees unanimously that where the scientific evidence sought to be presented is novel, the test is that articulated in *Frye v. United States*, 293 F.1013, 1014, in essence whether there is general acceptance in the relevant scientific community that a technique or procedure is capable of being performed reliably.[8]

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Judge Kaye noted that the test according to *Frye* "'emphasizes counting scientists' votes, rather than on verifying the soundness of a scientific conclusion.'" Contrary to the majority, she concluded that the opinion of two scientists with commercial interests in the DNA work under consideration (they were primary developers and proponents of the technique) was insufficient to establish "general acceptance" in the scientific field. In other words, when deciding whether there is general acceptance – the very purpose of which is to ensure reliability – courts should not merely "count votes" but should analyze the reliability of those doing the voting.

When deciding whether there is general acceptance, courts should not merely "count votes" but should analyze the reliability of those doing the voting.

The *Daubert* decision was referenced by the *Wesley* court in two footnotes. Judge Smith wrote that *Daubert* was not applicable because, at least in federal courts, the *Frye* rule was superseded by Rule 702 of the Federal Rules of Evidence. Rule 702 permits testimony to be offered concerning scientific or technical evidence if it "will aid the fact finder in understanding the evidence or determining a fact in issue."[9] The rigidity of the "general acceptance" rule was contrasted with the "liberal thrust" of the Federal Rules of Evidence "and their 'general approach of relaxing the traditional barriers to "opinion" testimony.'"[10]

Judge Kaye in her footnote observed that "[e]ven the new Federal test articulated in *Daubert* . . . would require proof of reliability of novel scientific evidence."[11] Although a *Frye* hearing had been held by the trial court to determine whether the relevant scientific community had accepted DNA evidence as reliable, the majority opinion observed that a preliminary hearing was not mandatory: "[i]t should be noted that novel scientific evidence may be admitted without any hearing at all by the trial court."[12]

Although she did not believe that a preliminary hearing was mandatory, Judge Kaye emphasized the importance of conducting a foundational inquiry:

> Next, a foundational inquiry must be satisfied before such evidence is placed before the jury: in each case, the court must determine that the laboratory actually employed the accepted techniques. This foundational inquiry also goes to admissibility of the evidence, not simply its weight.[13]

And:

> Our cases have always required a foundational inquiry before scientific evidence can be admitted, even after a particular technique has passed out of the "twilight zone" of "novel" evidence that is the subject of *Frye* and is judicially noticed as reliable.[14]

Succinctly stated, *People v. Wesley* established that in cases involving novel scientific evidence the test to be applied is whether there is general acceptance within the relevant scientific community of techniques that, when properly performed, generate results that are reliable. An evidentiary preliminary hearing may be desirable for a trial court to make foundational determinations. New York remains a "*Frye* state," unlike the overwhelming majority of other jurisdictions.

Soft Science

Frye has been applied in New York not only to scientific evidence involving so-called "hard" sciences such as biology, chemistry and physics, but also to "soft" sciences involving psychology, sociology and psychiatry.[15] The "general acceptance" requirement of *Frye* has also been applied to various cases in the civil law field which on initial analysis may not appear to involve either "hard" or "soft" scientific evidence.

A case involving soft sciences that will be of particular interest to trial lawyers is *People v. LeGrand*.[16] The issue presented at a *Frye* hearing was whether a defense psychologist could testify concerning the accuracy of eyewitness identification testimony, known as "confidence-accuracy correlation," and related psychological concepts.[17] The trial court, summarizing the *Frye* and *Wesley* opinions, noted that the trial judge at an evidentiary hearing must apply a four-fold test to decide admissibility of scientific expert testimony. First, the

Frye's "Deception Device"

In *Frye v. United States*, a device known as the "systolic blood pressure deception device" produced a result that was favorable to the accused, who had been convicted of murder. On appeal, the issue was whether the result of the deception device should have been received in evidence. The Circuit Court of Appeals of the District of Columbia initially noted that courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery. However, "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." In affirming the judgment of conviction, the court concluded that the device had not gained sufficient standing and scientific recognition. Today, we know the device as a polygraph or, more colloquially, a lie detector.

court must determine whether the witness is competent in the field of expertise that he purports to address at trial. Second, the expert testimony must be based on a scientific principle or procedure that has been "sufficiently established to have gained general acceptance in the particular field in which it belongs." Third, there must be an inquiry into whether the "proffered expert testimony is beyond the ken of the jury." And fourth, it must be shown that the expert's opinion is relevant to the issue and facts of the case at bar.[18]

The trial court concluded that the proffered testimony of the asserted expert, Dr. Malpass, as to "confidence-accuracy correlation" and related psychological concepts was not generally accepted within the relevant psychological community and therefore denied defendant's motion for the admission of such evidence.

Application of the general acceptance standard has been particularly varied in the civil law field. A spinoscope machine, which is used to measure limitation in function as a result of low back pain, was held not to meet the *Frye* requirement in *Castrichini v. Rivera*.[19] Following a *Frye* hearing, the court precluded evidence offered by plaintiff's rehabilitation specialist of measurements obtained with the spinoscope device. Testimony by Dr. Gracovetsky, the inventor of the machine, his articles published in peer-reviewed journals, the fact that between 100 and 150 insurance companies in the United States reimbursed expenses for spinoscope examinations (although an equal number did not), and the use of some 50 to 60 of these machines in the United States and Canada were not enough to establish acceptance in the scientific community in general, according to the court.

In *Collins v. Welch*,[20] plaintiff's physician was prepared to testify that plaintiff was suffering from multiple chemical sensitivity (MCS) syndrome that rendered plaintiff hypersensitive to a wide variety of chemical compounds. Plaintiff alleged that certain work was negligently performed causing dust, fumes, and particles to enter the building and render her permanently disabled. The court conducted a *Frye* hearing and noted among other things that Dr. Hipp, her physician, admitted there was no diagnostic test for MCS, there were no studies to establish a causal relation between certain chemicals and MCS, he did not know to which specific chemicals plaintiff had been exposed and, most important, he conceded that his diagnosis of MCS "had not achieved general acceptability within the field of medicine." Plaintiff, however, referenced a decision of the Third Circuit Court of Appeals concluding that a diagnosis of MCS was admissible under *Daubert*. Despite this, the court concluded that *Frye* applies in New York and, citing the *Wesley* and *Castrichini* decisions with approval, that a different result must be obtained in the MCS case before the court. The court opined that in most cases *Frye* and *Daubert* would produce a similar result, but in some instances the "general acceptance" standard would "play a decisive and differentiating role."[21] "This is such a case," the *Collins* court wrote, and granted defendant's motion for an order precluding the offer of expert testimony advancing the MCS syndrome diagnosis.

Viagra Testimony Ineffective

In *Selig v. Pfizer, Inc.*,[22] defendant moved for an order directing a *Frye* hearing or, in the alternative, excluding plaintiff's proposed expert testimony that the erectile dysfunction drug Viagra caused plaintiff's heart attack and granting summary judgment. Defendant submitted affidavits from experts who concluded, among other things, that the opinions of plaintiff's doctor were not generally accepted in the scientific community. Plaintiff contended that *Frye* did not apply because the testimo-

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Collins v. Welch *Compares* Frye *and* Daubert:

"The present Federal rule [of *Daubert*], which dethrones the general acceptance test, is the expression of a reformist zeal to clear the underbrush and open all pathways to the truth. The *Frye* rule, in that context, is contrariant. Nevertheless, it faithfully reflects and supports the traditional reluctance of the common law to upset established liberty and property interests without good cause, supported by a preponderance of credible and reliable evidence.

"We conclude that the defendant's motion should be granted to the extent that it seeks an order to preclude the offer of expert testimony in support of the MCS syndrome diagnosis. The claim of bronchial injury caused by chemical fumes and dust, attributable to the negligent performance of roofing work, remains viable if supported by competent evidence at trial."[1]

1. 178 Misc. 2d 107, 111, 678 N.Y.S.2d 444 (Sup. Ct., Tompkins Co. 1998).

A Four-Part Test:

At an evidentiary hearing, courts are to apply a four-part test to decide whether scientific expert testimony is admissible.[1]

1. Is the witness competent in the field of expertise in which he seeks to testify before the court?

2. Is the expert testimony that is to be offered based on a scientific principle or procedure that has been "sufficiently established to have gained general acceptance in the particular field in which it belongs"?

3. Is the proffered expert testimony "beyond the ken of the jury"?

4. Is the proposed expert witness's opinion relevant to the issue and facts of the individual case?

1. *People v. LeGrand*, 196 Misc. 2d 179, 747 N.Y.S.2d 733 (Sup. Ct., N.Y. Co. 2002).

CONTINUED FROM PAGE 12

ny of Dr. Mallis did not involve a novel scientific technique such as in *Wesley* and *People v. Wernick*.[23] Justice York acknowledged that the issue was not based on an outwardly novel scientific technique but nevertheless applied the *Frye* standard: "Nonetheless, as in the other case applying the *Frye* standard, at issue here is whether Dr. Mallis' theory is supported by accepted scientific methods, particularly because his conclusions are allegedly novel."[24]

The trial court concluded that defendant on motion had made out a prima facie showing that the conclusion reached and the methodology utilized by Dr. Mallis were not generally accepted in the scientific community and that plaintiff had failed to rebut this prima facie showing. Hence, there was no need for a *Frye* hearing. The Appellate Division affirmed summary judgment based upon plaintiff's failure to make a showing that his expert's testimony had "gained general acceptance" in the particular field.

The *Frye* general acceptance requirement was applied in the medical malpractice case of *Lara v. New York City Health & Hospitals Corp.*[25] There, plaintiff's medical expert, Dr. Lechtenberg, testified to a so-called "slow bleed" causation theory resulting in the infant plaintiff being born with cerebral palsy. A *Frye* hearing was deemed necessary by the trial court because the testimony of plaintiff's medical expert was about the scientific likelihood of the causation, not about a medical departure. The court reserved decision following the hearing and the jury awarded the infant plaintiff a total of $12 million in damages. On post-trial motion, Justice Moskowitz concluded that the "slow bleed" theory was not generally accepted in the scientific community and what Dr. Lechtenberg had done was to take a number of medical textbook principles and combine them in order to arrive at his opinion.

A unanimous Appellate Division affirmed that the infant plaintiff did not meet the *Frye* requirement of showing that plaintiff's expert's theory was generally accepted in the medical community:

> As plaintiff's expert admitted, there are no reported medical cases or formal studies to support his theory. Therefore, the trial court correctly found that the expert "could not point to a reported case and could not point to a medical writing that set forth his theory even in general terms." Since plaintiff's malpractice claim relied solely on a theory, which is neither recognized nor accepted, Supreme Court properly granted defendants' motion to preclude plaintiff's expert's testimony.[26]

A *Frye* analysis was also used in *Saulpaugh v. Krafte*,[27] another medical malpractice case. There, plaintiff's pediatric neurologist had concluded that the infant, delivered by cesarean section, had suffered brain damage due to protracted fetal head compression during labor contractions that squeezed the blood out of plaintiff's head and deprived the brain cells of oxygen.

On motion, defendants opposed the prospective expert testimony by proffering the affidavit of a pediatrician in neonatology who averred that plaintiff's theory was not generally accepted in the medical field or supported by medical literature. In opposition, plaintiff submitted the affidavits of Dr. Charash and two other experts which supported the generally accepted theory that brain damage can occur due to head compression and lack of oxygen, but did not mention the core of plaintiff's theory that uterine contractions can squeeze blood out of the fetal head and lead to the type of brain damage that occurred.

A* Frye *hearing was necessary because the testimony was about the scientific likelihood of the causation, not about a medical departure.

The trial court, utilizing a *Frye* analysis, precluded the key causation testimony. Although finding that defendant had deviated from accepted medical practices, the jury found that those deviations were not a substantial factor in causing plaintiff's injuries. The

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judgment for the defendants was affirmed on appeal, holding that

> [b]road statements of general scientific acceptance, without accompanying support, are insufficient to meet the burden of establishing such acceptance. Absent any controlled studies, clinical data, medical literature, peer review or supportive proof indicating that Charash's theory was generally accepted by the relevant medical community, Supreme Court properly excluded testimony regarding that theory.[28]

Engineering Testimony Questioned

In a vehicular accident case, *Valentine v. Grossman*,[29] a *Frye* hearing was held at the request of the plaintiff. The *Frye* standard was applied to determine whether the conclusion reached by two defense biomechanical engineers – that the forces generated in an automobile accident were insufficient to cause the injuries claimed by plaintiff – was based upon valid scientific methods. The second biomechanical engineer relied upon studies that applied a 3.2-g force to living people and a 3.6-g force or greater to dummies, cadavers and animal tissue. The engineer testified that the difference between a 3.6-g force and a 3.2-g force was negligible. The trial court found that the scientific methods used were valid, but rejected the testimony of the second biomechanical engineer on relevancy grounds, namely, that the studies involving living people were not relevant as they employed only a 3.2-g force and the other studies did not involve living people.

The appellate court concluded that the trial court erred in excluding the testimony of the second biomechanical engineer. To the contrary, the reviewing court found, the expert's testimony that the difference between the two studies was of no significance was "clearly relevant." Such testimony, the court wrote, would tend to make it more probable that the accident was not sufficiently severe to have caused the injuries, as defendants contended. "The weight to be accorded this expert testimony is a matter to be determined by the jury."[30]

Similarly, in *Clemente v. Blumenberg*,[31] the trial court conducted a *Frye* hearing to ascertain whether the proffered testimony of a defense biomechanical engineer was generally accepted in the engineering community. The issue was whether the forces generated in the two-vehicle accident were sufficient to have caused plaintiff's herniated disc. The defense expert, Salzer, based upon his review of photographs of the damaged vehicles, repair bills, and General Motors charts of repair costs in five-mile-per-hour crash tests, concluded that the change in velocity was only five miles per hour and that impacts of that nature, based upon data and studies, do not yield long-term serious injuries.

In contrast to the result in *Valentine*, however, Judge Maltese impliedly found such testimony to be novel and scientific and concluded that the testimony did not meet the *Frye* general acceptance standard. The opinion finds that the use of repair costs and photographs as the basis for determining that

> the change in velocity of two vehicles at impact is not a generally accepted method in any relevant field of engineering or under the laws of physics. Hence, under the *Frye* test of general acceptance, the opinion upon which it relies is inadmissible.[32]

The decision concludes:

> [H]e may not render an opinion based upon his report and testimony at the *Frye* hearing because the source of the data and the methodology employed by him in reaching his conclusion is not generally accepted in the relevant scientific or technical community to which it belongs.[33]

From *Frye* to *Daubert*

From the above, one can say with certainty that *Frye* is alive and well in New York and the general acceptance test has been applied in disciplines and factual situations which may not have been envisioned at the time of *People v. Wesley* in 1994 and certainly not in 1923 when *Frye v. United States* was decided. However, if novel science is to be a prerequisite, one must also ask whether there is an ever-present risk of expert preclusion simply because a significant number of votes do not exist to form a statistically valid basis for either general acceptance or the lack of such acceptance. More important, what defined parameters exist or should exist to evaluate admissibility of expert testimony in cases where the subject is not novel or not scientific? The path leads inexorably to *Daubert*, the subject of the forthcoming second part of this article.

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1. 293 F.1013 (D.C. Cir. 1923).
2. 509 U.S. 579 (1993).
3. "Ipse Dixit. He himself said it; something asserted but not proved." Black's Law Dictionary, 8th ed. "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert." *GE v. Joiner*, 522 U.S. 136 (1997).
4. 83 N.Y.2d 417, 611 N.Y.S.2d 97 (1994).

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5. The dictionary definition of the words "science" and "scientific" may be of interest to the reader although not necessarily dispositive of the issue.

> Science: 1(a) The observation, identification, description, experimental investigation and theoretical explanation of natural phenomena. (b) Such activity restricted to a class of natural phenomena. (c) Such activity applied to any class of phenomena. Methodological activity, discipline or study. An activity that appears to require study and method. Knowledge, esp., that gained through experience.
>
> "Scientific: Of, pertaining to, using or based on the methodology of science."

Webster's II New College Dictionary (1999).

6. *Wesley*, 83 N.Y.2d at 422–23.
7. *Id.* at 423.
8. *Id.* at 435 (citing *People v. Middleton*, 54 N.Y.2d 42, 49, 444 N.Y.S.2d 581 (1981)); (Kaye, C.J., concurring).
9. Fed. R. Evid. 702.
10. *Wesley*, 83 N.Y.2d at 423.
11. *Id.* at 435.
12. *Id.* at 426 (citations omitted).
13. *Id.* at 436.
14. *Id.* (citations omitted).
15. Hutter, Establishing the Reliability of Expert Testimony: The Principles, Theories and Methods Employed by the Expert: *Frye* or *Daubert*? "Out of the *Frye*-Ing Pan, Into the Hearing" 8, 9 (Summer Seminars, New York State Judiciary 2002).
16. 196 Misc. 2d 179, 747 N.Y.S.2d 733 (Sup. Ct., N.Y. Co. 2002) (Fried, J.).
17. There had previously been a unanimous decision by the Court of Appeals in *People v. Lee*, 96 N.Y.2d 157, 726 N.Y.S.2d 361 (2001), holding that while expert testimony on eyewitness identification is "not inadmissible per se, the decision whether to admit, it rests in the sound discretion of the trial court.
18. *LeGrand*, 196 Misc. 2d at 186–88.
19. 175 Misc. 2d 530, 669 N.Y.S.2d 140 (Sup. Ct., Monroe Co. 1997) (Fisher, J.).
20. 178 Misc. 2d 107, 678 N.Y.S.2d 444 (Sup. Ct., Tompkins Co. 1998) (Relihan, Jr., J.).
21. *Id.* at 111.
22. 185 Misc. 2d 600, 713 N.Y.S.2d 898 (Sup. Ct., N.Y. Co. 2000), *aff'd*, 290 A.D.2d 319, 735 N.Y.S.2d 549 (1st Dep't 2002).
23. 89 N.Y.2d 111, 651 N.Y.S.2d 392 (1996) (neonaticide syndrome).
24. *Selig*, 185 Misc. 2d at 606.
25. N.Y.L.J. Oct. 4, 2000, p. 26, col. 6 (Sup. Ct., N.Y. Co.) (Moskowitz, J.), *aff'd*, 305 A.D.2d 106, 757 N.Y.S.2d 740 (1st Dep't 2003).
26. *Lara*, 305 A.D.2d at 106 (citations omitted).
27. 5 A.D.3d 934, 774 N.Y.S.2d 194 (3d Dep't 2004).
28. *Id.* at 935–36 (citations omitted).
29. 283 A.D.2d 571, 724 N.Y.S.2d 504 (2d Dep't 2001).
30. *Id.* at 573 (citations omitted).
31. 183 Misc. 2d 923, 705 N.Y.S.2d 792 (Sup. Ct. Richmond Co. 1999) (Maltese, J.).
32. *Id.* at 934.
33. *Id*. One could well argue that the subject matter was only technical and not scientific in which event *Frye* would apparently not apply even though the methodology was on its face novel. However, it is common in automobile product liability cases for engineers to compare accident damage photographs to barrier crash test photographs and films to assist in arriving at change in velocity calculations. This generally accepted procedure was apparently not presented by the defense expert.

"All this, and I never had one case go to court."

Surrogate's Court Discovery

Recent Cases Illustrate Changes Under Provisions of SCPA

By Gary E. Bashian and James G. Yastion

Over the past 10 years, Surrogate's Court judges across the state have made a series of decisions dealing with discovery proceedings and "reverse" discovery proceedings under the Surrogate's Court Procedure Act (SCPA) that provide valuable guidance on how the statutes are being interpreted and how attorneys should develop strategies on behalf of their clients.

Some cases have involved the guillotine-like defense of the statute of limitations, which can be a clear-cut ending to any proceeding; others have revealed the unexpected breadth and utility of the discovery statutes; still others have provided an insight into the criminal dimensions of discovery proceedings

SCPA 2103 and 2104 address discovery proceedings generally, and SCPA 2105 deals with discovery proceedings against a fiduciary, which are commonly referred to as "reverse" discovery. SCPA 2103 and 2104 come into play where the fiduciary has collected the assets of the estate and finds, or has reason to believe, that not all of the assets are accounted for. The fiduciary can then bring a discovery proceeding to determine whether any other person has possession of estate assets and/or to take steps to obtain such assets.

The first of two distinct phases under SCPA 2103 is the "inquisitorial phase," which is used when the fiduciary is not sure whether the respondent possesses estate property and wants an examination to seek information. If the court finds reasonable grounds for the examination, it will order the respondent to appear and be examined. The second, or "hearing," phase is used when the fiduciary *knows* that the respondent has estate property. In this case, the court will issue a citation ordering the respondent to show cause why the property should not be delivered to the fiduciary.

The jurisdiction of the Surrogate's Court in discovery proceedings was expanded in 1994 to include real property. Now, a person can discover any and all personal or real property in which the decedent had an interest.

After the expansion of jurisdiction, SCPA 2103, 2104 and 2105 have remained largely the same. Since then, however, they have spawned numerous cases in which the rules were applied in various unique factual settings.

SCPA 2103 and 2104 as Applied

The 2002 case *In re Esposito*[1] involved a dispute over the statute of limitations in discovery proceedings. In an older case addressing the issue, the court in *In re Norstar Trust Co.*[2] applied a three-year statute of limitations, likening the action to one for replevin or conversion. The statute was said to accrue on the date the property was taken.

Esposito, however, covers the situation where the property is taken *after* the decedent's death. When this happens, CPLR 210(c) starts the statute running on either the date letters testamentary are issued or three years after the decedent's death, whichever is earlier. In *Esposito*, the decedent died on October 1, 1997, and the respondent allegedly took the property after the decedent's death. Letters testamentary were granted on May 24, 2001, and the fiduciary began the discovery proceeding on May 30, 2001. The court ultimately found that the petitioner commenced the action in a timely manner, within the three-year statute of limitations. If the property had been taken prior to the decedent's death, as was the case in *Norstar Trust Co.*, the action would have been time-barred. Because the property was taken after death, however, the statute started on October 1, 2000, which was three years after the decedent's death; the action was brought within three years of that date.

In re Kulesh[3] confirms that the jurisdiction of the Surrogate's Court also includes the determination and enforcement of contractual rights the decedent had with

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a third party. There, the decedent had entered into a retirement agreement with a corporation that entitled him to the future proceeds of certain claims the corporation had against third parties. When the claims were liquidated and the corporation refused to pay the estate the proceeds, the fiduciary commenced a discovery proceeding under SCPA 2103 to determine the estate's rights under the agreement and to enforce those rights. The respondent corporation filed a motion to dismiss for failure to state a cause of action, arguing that the purpose of a discovery proceeding was to obtain specific property or money that belongs to the estate and not to determine the decedent's contractual rights against the respondents. The court denied the motion to dismiss, holding that in light of the expansion of the Surrogate's Court's jurisdiction, an SCPA 2103 discovery proceeding was the proper remedy to determine the decedent's rights vis-à-vis the corporation with which he had dealings.

Only a fiduciary with full letters can be the target of a reverse discovery proceeding.

Similar to *Kulesh* is *In re Lambrou*,[4] in which the petitioners commenced a proceeding under SCPA 2103 to compel the respondent, a business associate of the decedent, to be examined, requesting discovery regarding certain real property and information pertaining to the respondent's management of a travel agency they had owned. In granting the petition and allowing discovery into matters such as the respondent's management of the business, the court confirmed the broad scope of the discovery proceeding under SCPA 2103.

A separate issue relating to discovery proceedings was addressed in the 1999 case of *In re Baron*.[5] The question was at what point is a guardian obligated to turn over an incapacitated person's funds when that individual has died. There, the preliminary executor of the deceased incapacitated person's estate sought turnover of the estate assets. The guardian asked for the court's direction as to whether she should retain the assets pending the settlement of her account, despite the preliminary executor's request that the assets be turned over to the estate. The court held that the guardian must turn over the assets to the executor immediately upon the incapacitated person's death, even before the guardian has accounted for them. The court explained that the guardian's authority over the ward's assets terminates upon the ward's death and turnover is, therefore, appropriate at that time.

In re LaFroscia[6] addressed the interplay of SCPA 2103 with criminal procedure. There, after a petition was filed and an inquest held, the court found that the respondent possessed $30,000 belonging to the estate and directed the respondent to pay that sum to the estate, plus interest. At the end of its decision the court noted its concern that the actions of the respondent were criminal in nature. The court, therefore, directed that the clerk of the Surrogate's Court serve a copy of its decision to the district attorney's office for further investigation and whatever action it deemed appropriate.

SCPA 2105 as Applied

SCPA 2105 allows an interested person to begin a reverse discovery proceeding to discover property in the possession of a fiduciary. Only a fiduciary with full letters can be the target of a reverse discovery proceeding, not a preliminary executor. Furthermore, one is not a target of a reverse discovery proceeding who merely happens to be holding estate assets.

These issues were addressed in *In re Dempsey*.[7] The decedent had a life estate in real property located in New York that was to pass to his issue upon his death. Upon the decedent's death, the decedent's son became preliminary executor of his estate and in that capacity collected rents from the property. The petitioners, decedent's grandchildren (children of a predeceased son), sought turnover of the rents from the son. The court

denied the petition, finding it outside the scope of an SCPA 2105 proceeding. The mere fact that the son was holding the rent did not make him a target of a reverse discovery proceeding, and neither did his status as preliminary executor. On this issue, the court asked, "[W]hat would happen to this proceeding, for example, if [the respondent] allowed his preliminary letters to expire? He would then no longer be a fiduciary . . . and the proceeding would be dismissed automatically."[8]

This case, therefore, begs the question of whether, in all cases, a reverse discovery proceeding against a mere preliminary executor will be entertained by the Surrogate's Court. A broad rule preventing reverse discovery proceedings against preliminary executors, or temporary fiduciaries for that matter, would have to be confirmed by further statutory or case law.

Only a person interested in the estate can bring a reverse discovery proceeding. The court clarified who is entitled to bring such a proceeding in *Tiffany v. Tiffany*.[9] There, a Massachusetts domiciliary had conveyed property located in New York to a lifetime trust and named his daughter trustee. The decedent's son contested the trust and decedent's will in Massachusetts and commenced a reverse discovery proceeding in New York under SCPA 2105. The court held that the son had no personal claim to, or right to immediate possession of, the realty and that those rights depended on the outcome of the Massachusetts proceeding. Only if the trust bequeathing the New York property to the daughter was voided would the son be "interested" in such property. The court, therefore, dismissed the son's proceeding, finding he was not an interested person and lacked status to bring a reverse discovery proceeding.

Finally, *In re Rose*[10] shows how the court can combine and decide together separate proceedings under SCPA 2103 and 2105. In this case, claims were flowing between an estate and another entity. The estate had commenced a discovery proceeding against the decedent's cooperative apartment corporation seeking the stock to the apartment. The corporation in turn commenced a reverse discovery proceeding seeking maintenance arrears on the co-op from the estate and the costs of repairs to the apartment. The court combined the discovery and reverse discovery proceedings and thereby decided all the issues at once.

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1. N.Y.L.J., May 1, 2002, p. 21, col. 2 (Sur. Ct., N.Y. Co.).
2. 132 A.D.2d 973, 518 N.Y.S.2d 502 (4th Dep't), *appeal denied sub nom. In re Bellingham*, 70 N.Y.2d 614, 524 N.Y.S.2d 432 (1987).
3. N.Y.L.J., May 31, 2002, p. 22, col. 3 (Sur. Ct., Nassau Co.).
4. 208 A.D.2d 1093, 617 N.Y.S.2d 551 (3d Dep't 1994).
5. 180 Misc. 2d 766, 691 N.Y.S.2d 882 (Sur. Ct., N.Y. Co. 1999).
6. N.Y.L.J., Apr. 20, 1999, p. 30, col. 3 (Sur. Ct., Suffolk Co.).
7. N.Y.L.J., July 11, 2000, p. 33, col. 1 (Sur. Ct., Westchester Co.).
8. *Id.*
9. N.Y.L.J., Oct. 1, 2001, p. 27, col. 2 (Sur. Ct., Westchester Co.).
10. N.Y.L.J., Dec. 19, 1999, p. 32, col. 4 (Sur. Ct., Kings Co.).

Threshold Decisions on Electronic Discovery

By Kerry A. Brennan and Mia R. Martin

While the federal courts have been issuing numerous published decisions and developing standards on electronic discovery issues over the last several years, the New York state courts have remained silent on the subject. The proliferation of the use of e-mail and electronic databases makes it likely that almost every new case will involve electronic discovery. Without authoritative published decisions by New York state courts on issues involving electronic discovery, trial courts have had little guidance and have often been reluctant to follow federal cases on the subject.

The Nassau County Supreme Court's Commercial Division, acknowledging the absence of New York cases addressing electronic discovery, recently ruled that electronic data is discoverable, relying in part on federal precedent. In a departure from federal standards, however, the court in *Lipco Electrical Corp. v. ASG Consulting Corp.*, held that the party seeking electronic discovery should bear the cost of its production based on the presumption in New York that the requesting party is responsible for such costs in traditional discovery.[1] In another case, *Creditriskmonitor.com v. Fenerstock*, the court, upon request, appointed a forensic computer expert who "mirrored" the defendants' computers to search for information that was alleged not to exist.[2] E-mails relevant to the case were found, and it was further determined that others were destroyed. The findings resulted in substantial punitive damages and an award of attorneys fees.

Federal Precedent on Electronic Discovery

The federal courts have regularly acknowledged that electronic data is discoverable and compelled its production during discovery.[3] Moreover, in federal court there is a presumption that the responding party must bear the expense of complying with discovery requests.[4] In *Zubulake v. UBS Warburg LLC*, the court held that this presumption equally applies to accessible electronic discovery (*e.g.*, active, online data used to create, process or access electronic records; near line data, typically housed in a robotic storage device; and offline storage or archives).[5]

Cost shifting to the requesting party may be ordered, however, under Federal Rule of Civil Procedure 26(b)(2), and the *Zubulake* court suggested that cost shifting may be appropriate in connection with the production of inaccessible electronic data (*e.g.*, back-up tapes of compressed data, not organized for retrieval and which require registration, and erased, fragmented or deleted data that requires significant processing to recover). Subsequently, after a sampling of back-up tapes containing e-mails was restored and analyzed, the *Zubulake* court ordered the parties to share the cost of production, with the producing party bearing 75% of the expenses.

A useful guide on electronic discovery issues is "The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production"[6] (although most references are to federal cases, a comprehensive analysis is supplied). While the Sedona Principles suggest that "Production of Electronic Data and Documents Should Only Be Required in One Format,"[7] there may be circumstances where production of both paper and electronic data may be useful to the requesting party. Even if paper copies of

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The Sedona Principles for Electronic Document Production

1. Electronic data and documents are potentially discoverable under Fed. R. Civ. P. 34 or its state law equivalents. Organizations must properly preserve electronic data and documents that can reasonably be anticipated to be relevant to litigation.

2. When balancing the cost, burden, and need for electronic data and documents, courts and parties should apply the balancing standard embodied in Fed. R. Civ. P. 26(b)(2) and its state law equivalents, which require considering the technological feasibility and realistic costs of preserving, retrieving, producing, and reviewing electronic data, as well as the nature of the litigation and the amount in controversy.

3. Parties should confer early in discovery regarding the preservation and production of electronic data and documents when these matters are at issue in the litigation, and seek to agree on the scope of each party's rights and responsibilities.

4. Discovery requests should make as clear as possible what electronic documents and data are being asked for, while responses and objections to discovery should disclose the scope and limits of what is being produced.

5. The obligation to preserve electronic data and documents requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data.

6. Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronic data and documents.

7. The requesting party has the burden on a motion to compel to show that the responding party's steps to preserve and produce relevant electronic data and documents were inadequate.

8. The primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval. Resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the cost, burden, and disruption of retrieving and processing the data from such sources.

9. Absent a showing of special need and relevance a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual data or documents.

10. A responding party should follow reasonable procedures to protect privileges and objections to production of electronic data and documents.

11. A responding party may satisfy its good faith obligation to preserve and produce potentially responsive electronic data and documents by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data most likely to contain responsive information.

12. Unless it is material to resolving the dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court.

13. Absent a specific objection, agreement of the parties or order of the court, the reasonable costs of retrieving and reviewing electronic information for production should be borne by the responding party, unless the information sought is not reasonably available to the responding party in the ordinary course of business. If the data or formatting of the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information should be shifted to the requesting party.

14. Sanctions, including spoliation findings, should only be considered by the court if, upon a showing of a clear duty to preserve, the court finds that there was an intentional or reckless failure to preserve and produce relevant electronic data and that there is a reasonable probability that the loss of the evidence has materially prejudiced the adverse party.

Reprinted courtesy of The Sedona Conference. A complete version of The Sedona Principles is available at <www.thesedonaconference.org>.

the information have been produced, it does not preclude discovery of electronic data or the creation of a new electronic format, at least where the requesting party agrees to pay for it.[8] Furthermore, at least one federal court has ordered that a requesting party was not required to pay for paper copies where the producing party failed to disclose that it maintained certain of the information in electronic form which could have been produced in a less expensive manner.[9]

Lipco Electrical Corp. v. ASG Consulting Corp. ("*Lipco*")

The *Lipco* case involved the consolidation of two actions involving the same parties. In the first action, the

plaintiff, a joint venture comprising two electrical contractors, referred in this article as the Lipco Joint Venture, sued a consulting company, ASG Consulting, employed by the plaintiff to prepare estimates and bids for the public works projects. The Lipco Joint Venture alleged, among other things, that ASG Consulting overcharged it for services on certain projects and that these overbilling practices continued after ASG Consulting became part of the joint venture.

The Lipco Joint Venture sought damages to recover the alleged overcharges. In the second action, ASG Consulting sued the Lipco Joint Venture and one of the companies in the Lipco Joint Venture, seeking damages for violations of consulting agreements it executed with both defendants separately. ASG Consulting also alleged breaches of the Lipco Joint Venture's fiduciary duties and claimed that it was not permitted to review the books and records of the Lipco Joint Venture in which it became a partner. ASG Consulting sought damages and an accounting.

The Lipco Joint Venture requested certain of ASG Consulting's electronic data, including information reproduced on disk, hard drive and back-up tapes, and demanded that ASG Consulting bear the cost incurred in extracting and providing this material. ASG Consulting objected to the production of electronic data, but produced printouts of the requested information. ASG Consulting argued that because the printouts were supplied and extraction of the material from the computer hard drives was difficult, it should not be required to produce the electronic data.

The court was asked to decide whether electronic data is discoverable, and, if so, who should pay for its retrieval and production. Although recognizing that electronic discovery implicates different issues, the court noted that "[w]hether the court is dealing with traditional paper discovery or electronic discovery, the first issue the court must determine is whether the material sought is subject to disclosure as 'material and necessary' in the prosecution or defense of the action." The parties did not dispute that the subject was material, but ASG Consulting argued that production in electronic format was not necessary. Relying on federal precedent, including *Zubulake*, the *Lipco* court determined that "[r]aw computer data or electronic documents are discoverable."

The Lipco Joint Venture asserted that the raw electronic data was necessary to determine if the printouts were indeed accurate. The parties presented different views about the estimated costs of producing the requested electronic discovery. The Lipco Joint Venture contended that the process associated with such production would be relatively simple based on the commercial availability of the necessary software. ASG Consulting, on the other hand, asserted that the retrieval of the requested information from its computers would require it to retain a computer consultant and would be a time-consuming and expensive process.

The court followed the traditional New York "rule" that the party seeking discovery should incur the costs of the production. The court relied on two earlier cases that held, with respect to document discovery, that each party should shoulder the initial burden of financing its own suit.[10] Until the Lipco Joint Venture indicated a willingness to pay the costs incurred for the production of electronic data, the court would not compel its production. The court further noted that future requests for discovery of electronic data should be accompanied by a statement as to the actual costs for extracting the data.

The court has left open the possibility that the cost of production of electronic data could be apportioned

upon proper application, allowing the parties an opportunity to present detailed information regarding the actual cost of the production at issue.

Creditriskmonitor.com v. Fenerstock

In the *Creditriskmonitor.com* litigation, the plaintiff contended that the defendant left its employ taking customer information to his new employer, also a defendant, thus violating a noncompete clause in his employment contract. When e-mails and certain correspondence were not produced in discovery, the plaintiff alleged bad faith conduct and asked the court to appoint a forensic computer examiner; the court did so.

The court awarded $200,000 in punitive damages where the e-mails that were produced through electronic discovery directly contradicted previous affidavits sworn by the defendants.

The court determined that "[t]he [hundreds of] e-mails would not have been discovered without the services of an outside contractor who cloned the defendants' computers and then searched them" and noted that information in the e-mails directly contradicted previous affidavits sworn by the defendants. In its reasoning to impose punitive damages, the court further stated, "The proceeding would never have stretched out the way it had at an immense cost to the parties if the e-mails had not been shielded from discovery and in some cases destroyed." The court awarded a total of $200,000 in punitive damages against both the departing employee and the new company that hired him, adding that it would award to the plaintiff attorneys fees and expenses in an amount to be determined.

Electronic Discovery Considerations

While standards for electronic discovery in New York are still in their infancy, lawyers and litigants should not adopt a relaxed approach to this subject. Upon learning that litigation is probable, lawyers and litigants have a duty to preserve evidence, including electronic data. The easy manner in which electronic information can be altered and/or destroyed compels an early discussion of these issues. Counsel should consult with the client about the scope of information to be preserved; the impact of preservation on existing document retention and destruction policies; methods to accomplish preservation of paper and electronic data; and communications with employees and third parties (to whom functions may have been outsourced) about preserving paper and electronic data.

Although New York courts do not require parties to confer early about discovery (unlike the federal rules), litigants should attempt to learn as early as possible about whether the case will involve electronic discovery issues. Are documents available in electronic form? Would production in electronic form be less expensive than a document production? For example, it might be less expensive to record to a compact disc a producing party's documents than to pay the per-page copying charge. Moreover, for various reasons, including the age of the information needed, unintentional loss of documents, or the destruction of paper documents consistent with a document retention program, information may be available only in archived electronic format that may require restoration.

It is recommended that the requesting party identify at the outset the preferred method of production – paper or electronic data. This option of format would likely apply in New York as long as the requesting party is willing to pay for the form requested. In the *Lipco* case, the requesting party specifically sought electronic data, not merely a computer printout, but did not indicate a willingness to pay for the electronic form. It is likely not sufficient to claim that you need electronic data only in order to confirm that production in paper format was accurate.

Even if a requesting party opted for the electronic form and indicated a willingness to pay, the producing party could seek a protective order under CPLR 3103(a) if the request would prejudice that party in some fashion. Production in electronic form often implicates confidentiality and privilege issues. Because of the large volume of data typically involved with production of electronic discovery, parties should, prior to production, agree to protect against inadvertent disclosure of privileged, confidential or irrelevant information. Assistance from the court should be considered if the requesting party will not assent to such an agreement.

If a situation arises, like in *Creditriskmonitor.com*, where through common sense or inconsistencies it is determined that e-mail or other electronic data is not produced or has been withheld, the requesting party should seriously consider moving to compel production. If bad faith or destruction of evidence is suspected, the requesting party should seek the appointment of an electronic expert to mirror a party's computers and perform a forensic examination. When e-mail has been deleted, the file may remain on a computer's hard drive, and an expert may be able to determine the scope of e-mails that have been deleted. Failing to disclose elec-

tronic data or any other relevant evidence can result in serious consequences, including default judgment against a noncomplying party, sanctions, punitive damages, attorneys fees and costs, as well as criminal penalties for obstruction of justice.

If you determine that your own client has not preserved electronic data or other information, counsel should: investigate the circumstances of the loss or destruction promptly; be prepared to explain the circumstances of the loss or destruction; and consider notifying the opposing party as soon as reasonably practical. If the litigant is under a court order with respect to production when the loss or destruction is identified, the litigant should consider apprising the court at the same time as opposing counsel. A showing of good faith may help to avoid the dire consequences of negligent or intentional spoliation.

With the *Lipco* and *Creditriskmonitor.com* decisions, the New York courts have just begun to address what can oftentimes be gnarly electronic discovery issues. Further case law fleshing out the duties and responsibilities of counsel and litigants with respect to electronic discovery will likely follow in the next few years.

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1. No. 8775/01, 2004 N.Y. Misc. LEXIS 1337 (Sup. Ct., Nassau Co. Aug. 18, 2004).
2. No. 006211/2001 (Sup. Ct., Nassau Co. Aug. 6, 2004). "Mirroring" or "cloning" generally refers to the process of replicating bit-for-bit a computer's memory. The mirrored copy can then be analyzed by the forensic expert.
3. *See Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Playboy Enters., Inc. v. Welles*, 60 F. Supp. 2d 1050 (S.D. Cal. 1999); *Rowe Entm't, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002); *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 94 Civ. 2120, 1995 U.S. Dist. LEXIS 8822 (S.D.N.Y. Nov. 3, 1995).
4. *See, e.g.*, *Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340, 358 (1978).
5. Proposed amendments to the federal rules relating to electronic discovery can be found at <http://www.uscourts.gov/rules>.
6. <http://www.thesedonaconference.org/publications>.
7. Comment 12.c.
8. *Anti-Monopoly*, 1995 U.S. Dist. LEXIS 8822 at *1.
9. *In re Bristol-Myers Squibb Securities Litig.*, 205 F.R.D. 437, 441 (D.N.J. 2002).
10. *Schroeder v. Centro Pariso Tropical*, 233 A.D.2d 314, 649 N.Y.S.2d 820 (2d Dep't 1996); *Rubin v. Alamo Rent-a-Car*, 190 A.D.2d 661, 593 N.Y.S.2d 284 (2d Dep't 1993).

Update: Did the Odds Change in 2003?

Appellate Statistics in State and Federal Courts

By Bentley Kassal

Do the appellate statistics in our state and federal courts change significantly from year to year or are they essentially constant? Appellate attorneys generally rely on their own limited personal experience or their gut reaction when asked in a given case what they believe to be the chances of being affirmed, reversed or modified. But empirical data exists, there are real statistics available, and it is possible to know precisely the odds of a particular result in a given appellate court.

This study, the second by the author,[1] is based upon official appellate data from New York's principal courts, both state and federal, provided by the New York State Office of Court Administration and the Administrative Office of the United States Courts. The information covers the latest completed figures for the year 2003, together with the comparable ones, previously presented, for the years 2002 and 2001.

For the first time, additional categories and incidental information are being presented for these courts in these sectors:

1. New York Court of Appeals – criminal appeals;
2. Avenues to the New York Court of Appeals;
3. General conclusions about the New York Court of Appeals;
4. Appellate Terms of the New York State Supreme Court; First and Second Departments, Appellate Division.

Certain definite trends are discernible in these courts that support valid statistical conclusions as to the numerical likelihood of success in a given court, based solely on actual history.

The data herein pertains to the New York State Court of Appeals, the Four Departments of the Appellate Division of the State of New York, the Appellate Terms of the First and Second Departments (the only two in the state) and the United States Court of Appeals for the Second Circuit. Except for the New York State Court of Appeals, these statistics are for civil cases only.

All the data is presented in the following order: figures in the left-hand column are for 2003, those in the middle are for 2002 and those on the right for 2001.

The Court of Appeals – Civil Cases

A comparison of the percentage statistics for 2003 civil cases with those for 2002 and 2001, shows little significant change. The figures for 2003 are set forth in the left-hand column of these tables; those in parentheses are for 2002 and 2001, in the middle and right-hand columns respectively.

Court of Appeals of the State of New York

Affirmed	42	(41)	(40)
Reversed	31	(35)	(37)
Modified	9	(9)	(7)
Dismissed	0	(2)	(1)
Other	18	(13)	(15)

The "other" category consists mostly of matters certified to the Court by the U.S. Circuit Courts of Appeal, attorney disciplinary and judicial disciplinary proceedings. In this modified percentage table, with "other" being excluded, and in the same order of columns as above, the statistics are:

Affirmed	51	(48)	(47)
Reversed	38	(40)	(44)
Modified	11	(10)	(8)
Dismissed	0	(2)	(1)

Bentley Kassal, <bkassal@skadden.com>, a retired associate justice of the Appellate Division, First Department, also served as a judge in the Civil Court, City of New York; as a justice of the Supreme Court, New York County; and was a judge at the New York Court of Appeals for the April/May 1985 term. He received a J.D. from Harvard Law School in 1940. He is now counsel to the litigation department at Skadden, Arps, Slate, Meagher & Flom in New York City.

The Court of Appeals – Criminal Cases

For the first time, these statistics on criminal cases are presented for the year 2003:

Percentage of Total Criminal Cases

Affirmed	71
Reversed	20
Modified	7
Dismissed	2

Avenues to the Court of Appeals

Twenty-eight cases arrived at the Court in 2003 by way of notices of appeal, as a matter of right. At the same time, the discretionary statistics reveal 65 cases entered by the Court of Appeals granting leave, in contrast with a total of nine cases by way of leave granted by the Four Departments of the Appellate Division.

It is apparent from these statistics that the Court of Appeals is now basically a certiorari court, controlling, in great measure, its own calendar.

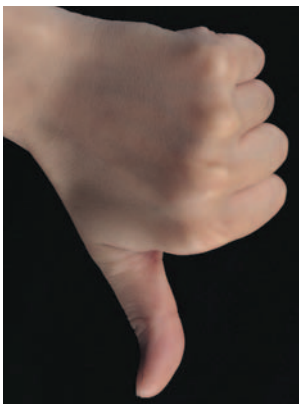
An incidental bit of intelligence for the appellate attorney: in 2003, the average period of time from the filing of an application to the Court of Appeals for leave to appeal until determination of the leave application was 58 days.

Trends in the Court of Appeals

There is a general movement, now clearly perceptible, by the Court of Appeals[2] in the following direction:

1. Issues fewer decisions now, a little less than 200 annually where 250–300 were the norm in the mid-1990s;

2. Steady decline in granting motions for leave to appeal, now about 6.5 percent as opposed to 11% in the mid-1990s;[3]

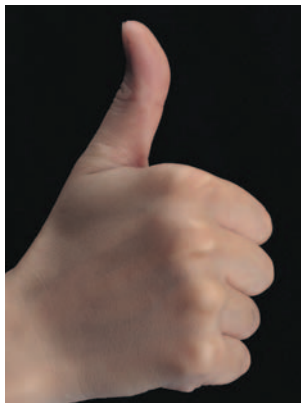


3. Significant reduction in leaves to appeal being granted by the Appellate Division. In 2003, only 7% of cases at the Court of Appeals were there via Appellate Division leave, as contrasted with 8.2% in 2002, 19% in 2001 and 12% in 2000.

4. Affirmance and reversal rates are relatively stable.

The Supreme Court's Four Appellate Divisions

	First	Second	Third	Fourth
Affirmed	62 (62) (62)	50 (53) (51)	75 (74) (73)	52 (50) (50)
Reversed	17 (16) (17)	25 (24) (25)	10 (10) (11)	15 (14) (14)
Modified	12 (13) (13)	10 (9) (9)	10 (10) (9)	12 (16) (16)
Dismissed	9 (9) (8)	15 (14) (15)	5 (6) (7)	21 (20) (20)



It can be observed that there are no significant changes in the above statistics for the period 2001 to 2003, inclusive. As stated in the previous article on this subject, the Third Department in Albany has a greater percentage of affirmances than the other departments because many of its cases are administrative appeals, directly from state agency determinations, where the CPLR Article 78 "substantial evidence" standard is applicable.

Appellate Term Civil Statistics for 2003

Appellate Term civil statistics are presented for the first time. They are as follows:

	First Department	Second Department
	(Percentages)	
Affirmed	61	52
Reversed	22	29
Modified	9	15
Dismissed	7	2
Other	1	2

Some observations pertaining to the above table may be made. The volume of Appellate Term cases differs greatly between the First and Second Departments. In the First, there were 269 appeals disposed of after argument or submission. In the Second, the number is 554, more than double the First. Comparing these affirmance and reversal percentage numbers with those of the respective Appellate Division statistics shows a remarkable similarity.

United States Court of Appeals, Second Circuit

As in the previous study, the figures presented for 2003 exclude bankruptcy and administrative appeals for the year ending September 30, 2003, and address only those cases entitled "Appeals Terminated on the Merits." Again, the figures in the left column are for 2003; the figures in parentheses in the next two columns are for 2002 and 2001 respectively:

Affirmed	59	(64)	(60)
Reversed	1	(3)	(2)
Dismissed	18	(15)	(18)
Remanded	17	(15)	(18)
Other	5	(3)	(2)

The pattern noted last year continues, in the comparison of these statistics with those for the New York Court of Appeals and the Four Departments of the Appellate Division, Supreme Court. It should be noted that generally there is a much greater percentage of affirmances in the Second Circuit, as well as dismissals, than in the New York state courts.

The reports containing the above statistics are directly available. For the New York state courts, the information may be obtained at the Web site, <www.nycourts.gov> ("Courts," Court Administration" and "reports"). For all the United States Circuit Courts, contact the Administrative Office of the United States Courts, One Columbus Circle N.E., Washington, D.C. 20544 or search its Web site, <www.uscourts.gov.secondcircuit>.[4]

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1. Bentley Kassal, *What Are the Odds? Appellate Statistics Reveal Patterns Among State and Federal Courts*, 76 N.Y. St. B.A. J., 46 (Jan. 2004).
2. John Caher, *Reports Show Decade's Changes in Caseloads, Criminal Appeals Heard*, N.Y.L.J., Apr. 9, 2004.
3. An excellent article as to the step-by-step procedure for seeking leave to the Court of Appeals, both from the Appellate Division and Court of Appeals, is Thomas R. Newman & Steven J. Ahmuty, Jr., *Appellate Practice – Motions for Leave to the Court of Appeals*, N.Y.L.J., Oct. 5, 2004, p. 3.
4. "Caseload Activity in the Appellate Division – 2003" published by the Office of Court Administration, Table 3; "Caseload Activity in the Court of Appeals – 2003" published by the Office of Court Administration, Table 2; Table B-5. Annual Report, United States Courts of Appeals, published by the Administrative Office of the United States Courts, covering all Circuits. *See* Analysis and Reports Branch Statistics Division Administrative Office of the U.S. Courts.

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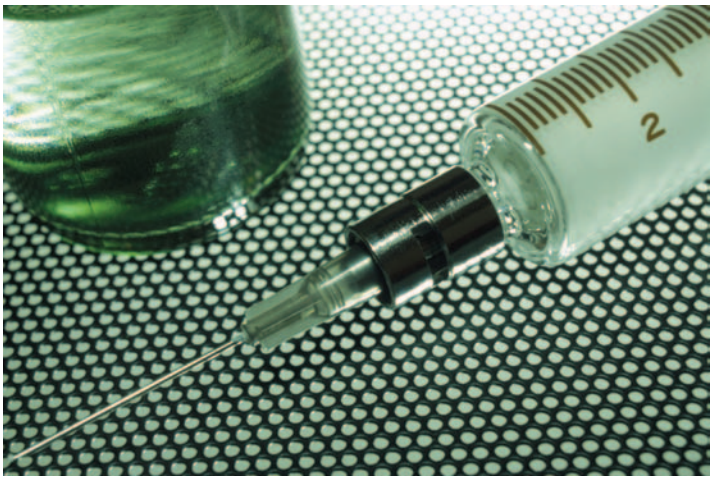
Know Thine Expert

Expert Witness Discovery in Medical Malpractice Cases: Supplementing Disclosure with Online Investigation

By Steven Wilkins

Your case appears solid. A qualified physician has assisted you by reviewing the medical records early in the course of the case, strengthening the preparation of the pleadings, allowing you to focus on the proper questions during depositions, and helping to frame the relevant issues at the settlement conference. The client's injuries were certainly severe enough to warrant this litigation. Unfortunately, the defense is unwilling or unable to settle. A trial date is set. You prepare yourself for battle. You must now determine by which means you will counter the testimony of the defendant's expert witness. Getting to know as much as possible about your adversary's expert witness is key, and the Internet provides the practitioner with rapid access to a wide range of such information.



Cross-examination of an expert witness in a medical malpractice action is one of the key areas where a case may be won or lost. Trial attorneys know that a successful outcome rests, in part, on undermining the credibility of the opposing expert. Weaknesses in the training, knowledge, skill or experience of the expert must be exposed. The expert's compensation for his testimony must be questioned critically, so as to make the jury aware of a possible financial incentive for the decision to provide testimony. The experienced plaintiff's attorney understands that the opposing expert may be utilized to make the jury aware of the 'conspiracy of silence' by which physicians are fraternally, if informally, bound to protect each other.[1]

Besides these universal, typical attacks on expert credibility, there are individual lines of questioning that can only be identified with adequate pre-trial investigation, but that are infinitely more powerful than any of the above general, universal insinuations. The best attacks result when the opposing expert is compelled to concede your view of the underlying medicine; but getting there often requires a lot of work. Additionally, the cross-examining attorney's ability to shake the protective armor of a "Marcus Welby" demeanor or the appearance of "Michael DeBakey" wisdom[2] can have a devastating effect.

First, though, in order to prepare an effective cross-examination of an expert, one must know who the expert will be. New York medical malpractice attorneys are well aware of the paradox that the Civil Practice Law and Rules places upon discovery when the subject is identifying the opposing medical expert. In fact, New York stands alone in its refusal to require[3] that the expert either be deposed or answer interrogatories.[4] In New York, the attorneys only become aware of the identity of the opposing party's expert at the time that their request for this information is answered.[5] Failure by the opposing counsel to give adequate notice of the expert's identity does not necessarily preclude the expert from testifying, although there can be some consequences to this oversight.[6] Of course, even the meaning of "identity" is somewhat skewed, since only the pertinent qualifications[7] and not the name of the expert need be given.[8]

Steven Wilkins M.D., J.D., FACS <medmalattorney service@nysbar.com> was a practicing general and critical care surgeon in New York before attending Hofstra University School of Law and being admitted to practice law in New York. He assists medical malpractice plaintiffs in reviewing medical records, procuring testifying experts, and conducting depositions, as well as assisting in case investigations.

Avoiding the Affirmation?

The American College of Surgeons recognized that many Fellows serve as expert witnesses, and it has recently prepared a form affirmation for experts to sign and provide to the attorney representing the party on whose behalf the expert intends to testify.[1] Medical malpractice attorneys may find this to be a useful additional resource in attacking an adversary's expert witness. The affirmation declares that the expert:

1. Will always be truthful;
2. Will conduct a thorough, fair, and impartial review of the facts and medical care provided, not excluding any relevant information;
3. Will provide evidence or testify only in matters in which the expert has relevant clinical experience and knowledge in the areas of medicine that are the subject of the proceeding;
4. Will evaluate the medical care provided in light of generally accepted standards, neither condemning performance that falls within generally accepted practice standards nor endorsing or condoning performance that falls below these standards;
5. Will evaluate the medical care provided in light of the generally accepted standards that prevailed at the time of the occurrence;
6. Will provide evidence or testimony that is complete, objective, scientifically based, and helpful to a just resolution of the proceeding;
7. Will make a clear distinction between a departure from accepted practice standards and an untoward outcome;
8. Will make every effort to determine whether there is a causal relationship between the alleged substandard practice and the medical outcome;
9. Will submit testimony to peer review, if requested by a professional organization to which the expert belongs;
10. Will not accept compensation that is contingent upon the outcome of the litigation.

Many experts will not provide this affirmation to their attorney, either as the result of an oversight or fear of reprisal from their professional organization if they are requested to submit their testimony for review (see 9 above). Nevertheless, failure to sign this affirmation provides the cross-examining attorney with the ability to question the rationale for not doing so, and suggest to the jury that the testimony provided does not live up to the high ideals put forward by the affirmation.

1. Expert Witness Affirmation, Bulletin of the American College of Surgeons, Vol. 89, No. 9, pp. 33–34 (Sept. 2004), *available at* <http:///www.facs.org/education/ethics/ewa_certificate.pdf> (Oct. 15, 2004).

Standing in stark contrast to this limitation on information regarding the expert is the general statutory acknowledgment that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof."[9] Thus, the CPLR simultaneously and confusingly endorses full disclosure while limiting its exchange.

This critical game of "kiss and tell" usually plays itself out in real life with disclosure of an expert's qualifications only a few days before trial begins. Since the time constraints are so severe, this article will concentrate on the Internet-based methods of investigating the likely opposing expert. By appealing to a sense of fair play, it is usually possible to get sufficient information from the opposing attorney to successfully distinguish the opposing expert from other physicians. What do you do with that information?

Computer programs that are widely available commercially can be used like a reverse telephone book to identify the physician by his vital statistics.[10] Once the name of the physician is obtained, investigative techniques and Internet-based services allow a more complete investigation to be performed.

1. Obtain past testimony given by the expert. Testimony offered in prior trials is often available online. Remember to check any state in which it is likely that the expert has testified. Cooperative clearinghouses run by many state medical societies offer such transcripts to members. By making your transcripts available to others, you gain access to a much larger number. Commercial groups throughout the country also have transcripts available for purchase, grouped by the physician expert's name.[11] These transcripts are especially important whenever the expert's point of view involves an issue in the case. When the expert has registered with an expert service, the service may be helpful in finding the past testimony of the expert in an attempt to tout their "product."

When a jury is confronted with contradictory testimony on a crucial matter, with both sides presenting experts who provide opposite views, the outcome will be uncertain. However, if the defense's expert is shown

to have adopted both points of view depending upon which side has paid him, there is a far greater likelihood of convincing a jury that the defense expert's testimony is unreliable.

2. Obtain information on any past civil or criminal actions with which the expert was involved. The witness's reputation for truthfulness or untruthfulness is relevant to his credibility and any decision the jury is impaneled to make. Because little uniform case law exists in New York on the admissibility of particular collateral issues involving an expert witness, any documented falsifications, misrepresentations, or outright lies are worth pursuing, even if the source of the "untruth" is far from the medical malpractice field.[12] The physician can be investigated through a Westlaw or Lexis search to identify any civil or criminal actions in which he was named as a party, or in which he provided testimony as an expert. This can be done through the Westlaw/Lexis search engines, by using the doctor's last name and degree (*e.g.*, "Smith, M.D."), and retrieving the cases that are found. Public records are also widely available online – one Web site permits actions on New York doctors' licenses to be researched. Sometimes, this investigation may uncover an expert's own related medical malpractice cases, too.

When discovered prior to trial, license infractions can have a devastatingly powerful effect on the jury.

3. Obtain copies of all contributions to medical literature made by the expert. Computerized collections of peer-reviewed medical journals are not as well organized – nor are contributions as easily found – as in the legal literature, but several services such as the National Library of Medicine, <http://www.nlm.nih.gov>, and <www.medscape.com> can be used to research articles authored by the expert. These may provide contradiction to the expected testimony. Equally important, is if these writings cite to a relevant reference text that contradicts the expected testimony, the expert is hard-pressed to explain why that text is not authoritative in his opinion. If the witness agrees that it is, then the text may be used as a source for cross-examination in order to discredit his testimony.

4. Research any license infractions on the OPMC Web site.[13] Although less than one percent of all physicians have been sanctioned with an action on their license, when discovered prior to trial and queried during cross-examination, the effect on the jury is devastatingly powerful. The New York State Office of Professional Medical Conduct (OPMC) sanctions physicians for acts of negligence, fraud, sexual misconduct, poor record-keeping, and a variety of other bad acts. The infractions and the initial charges are made available online, as are the official findings of the hearing committees charged with evaluating the physician's actions.

5. Search hospital Web sites for all hospitals where the expert physician has privileges. An often under-utilized source of information is the Web site of the hospitals at which the expert has privileges. Some experts even maintain their own Web sites. If the expert truly is an expert in the kind of case at issue, then his public writings – used to entice patients to use his services – are often excellent sources for his true opinions. Also, many academic centers provide information for prospective patients with particular diseases. They often summarize the expected course of treatment for afflicted patients, often minimizing the potential for complications and touting their own record. These narratives are fair game for discussion when the expert is employed by the hospital that provided the propaganda.

6. Get a copy of the curriculum vitae of the expert. The curriculum vitae, or resume, is usually offered after the expert has taken the stand. However, in order to completely review it, examining all of the journal articles, periodicals, and books that the expert has authored, it is preferable to obtain it in advance of the day of cross-examination. If the expert maintains an academic, university-based practice, then a call to his department or to his secretary requesting that the curriculum vitae be faxed has sometimes been successful. Occasionally one may find the expert's resume published on the university's Web site.

7. Perform an Internet search. Finally, merely typing the name of the expert into a search engine will often uncover excellent background information. "Googling" is easy to perform and leads to related Web sites that may be of use. In many cases, hobbies and pet interests of the expert witness are uncovered. These may be used to make the expert feel comfortable and perhaps more willing to cooperate, particularly if you, too, are a chess aficionado, a collector of old books, or a fan of the Brooklyn Dodgers.

Preparing for a medical malpractice trial requires understanding the underlying medical principles, but it also requires investigative skills that are made easier by the Worldwide Web. Don't go into battle without a full and timely assessment of the strengths and weaknesses of your adversaries and their experts.

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1. Richard Shandell & Patricia Smith, The Preparation and Trial of Medical Malpractice Cases § 15.05 (Law Journal Press, New York 2004).

2. Thomas Moore, *Trial Tactics*, *in* Practising Law Institute's Litigation and Administrative Practice Course Handbook Series, PLI Order No. HO-OOB6, 656 (Apr. 2001).
3. Though rarely invoked, New York does have provisions to voluntarily bind each side to an agreement to make their expert available for deposition. CPLR 3101(d)(1)(ii).
4. Richard Basuk, *Expert Witness Discovery for Medical Malpractice Cases in the Courts of New York*. 76 N.Y.U. L. Rev. 1527–61, n.6 (2001).
5. CPLR 3101(d)(1)(i). No strict time limit is given for the exchange of information.
6. *Id*. It is assumed that when failure to comply is inadequately explained, the attorney will be chastised, and perhaps, sanctioned.
7. Medical school attended, any residencies or fellowships completed, and board certifications.
8. CPLR 3101(d)(1)(i).
9. CPLR 3101(a).
10. The most widely used of these is the *ABMS Directory of Medical Specialists: ABMS Medical Specialists Plus*, from Elsevier, 11830 Westline Industrial Drive, St. Louis, MO 63146.
11. These services are arranged by state, so testimony given in other states cannot easily be obtained, but <www.verdictsearch.com>, <www.verdicts.com>, <www.jurispro.com> and <www.trialsmith.com> are among the larger depots for previous trial transcripts.
12. For instance, divorce proceedings are often the source for useful background information.
13. New York State maintains an extremely powerful discrediting tool. The New York State Web site, <http://www.nydoctorprofile.com/welcome.jsp>, allows any New York-licensed physician's record to be profiled. For out-of-state experts, other states maintain similar Web sites.

Hon. Judith Kaye: Remarks at Annual Meeting Dinner, January 22, 2003

Chief Judge Judith S. Kaye was the honored dinner speaker at the Annual Meeting of the New York State Bar Association on January 22, 2003, in New York City. Judge Kaye's comments on the difficult questions posed by the Frye *and* Daubert *decisions that are the subject of several articles in this issue of the* Journal *originally appeared in the Summer 2003* Torts, Insurance & Compensation Law Section Journal *(Vol. 32, No. 1), and are reprinted here.*

We are bombarded daily with news about developments in technology and science. Just recently, for example, the scientists had us convinced that alcohol consumption is not a good idea. Now they tell us that two glasses a day every day are even better than exercise for a healthy heart. And we all want healthy hearts, don't we? Thankfully, science and technology are not static subjects. Thankfully, neither is the law.

For more than half a century, New York courts have been applying the *Frye* test when asked to consider the admissibility of expert testimony based on a novel scientific theory. You, of course, are all well familiar with the *Frye* test. The *Frye* test requires courts to determine whether the theory has been generally accepted by the relevant scientific community. In the past decade, however, the federal courts have fashioned a new standard – the *Daubert* test – which requires courts themselves to assure whether all types of expert evidence are founded on reliable principles and methods, and whether they can validly be applied in the case at hand.

The difference, in a nutshell, is that *Frye* looks to consensus within the scientific community as an indicator of reliability, while *Daubert* requires judges to evaluate both the validity of the expert reasoning and its application to the case. Many state courts – including the courts of New York – have been wrestling with whether to adopt the federal standard.

As with so many things we experience as lawyers and judges, even after a full decade of debate the last word has not yet been spoken on the relative merits of the old and new tests. As *Daubert* has itself been tested in the crucible of litigation, it has become apparent that what was originally seen as a "liberalizing" test, in actual practice has not necessarily turned out to be one, and in many respects the tests have taken on new shadings and nuances that bring them closer to one another. Obviously, it would be inappropriate for me, as a sitting judge, to express an opinion as to which is the better test. But I can, and would like to, say just a word about the ongoing process.

At bottom, the renewed interest in re-evaluating the test for technical and scientific evidence reflects a much broader social development. It reflects that science and technology increasingly have pervaded every facet of our lives. That has brought many wonderful benefits, including the opportunity judges and juries now have to consider helpful opinion evidence about problems of causation, identity and damages that they could never before have explored. Take DNA evidence, for example, which has proved so central both in procuring convictions and in freeing the innocent, even from death row. But with all this dazzling new evidence, comes the greater risk that triers of fact will be led astray by unreliable testimony dressed up in the language and trappings of true science.

The choice between *Frye* and *Daubert* is important precisely because the more science and technology become essential to our every activity, the greater the potential benefit – and the potential danger – of such evidence in the courtroom.

While I can't say which is the better test, I can say that we will – judges and lawyers – continue this fascinating dialogue, and that we will together find a good balance, so that the great discoveries of modern science and technology will remain an aid, and not an obstacle, to truth-finding and the delivery of justice.

As the law develops on so many fronts, lots of debates like this are raging in the courts. Issues involving mass torts and punitive damages come immediately to mind, where the consequences of how we – judges and lawyers – strike the balance in the law are of enormous consequence not just to individual litigants but also to society at large. And isn't it great to be at the center of these exploding issues, using our time and talents to assure both justice in individual cases and the law's responsiveness to the demands of a new and changing world.

And speaking of courts and law, I'd like to talk a little about the life I left when I joined the Court of Appeals, and the life I have.

This year I will reach my 10th anniversary as Chief Judge, my 20th as a Judge of the Court of Appeals. That translates into 20 years since I left the delights of practicing as a trial lawyer alongside you here in New York City – delights like dutifully recording every six minutes of my day on time sheets; dealing with sometimes difficult partners and clients, and even some difficult judges; and visiting warehouses of documents in exotic places like Bayonne, New Jersey, and Kingsport, Tennessee. Technology unquestionably has made many things better in a litigator's life – like keeping time records, and instantaneously accessing documents stored around the world, and PowerPoint presentations. But then again, technology has unquestionably also made some things harder, like expectations of courts and clients for immediate turnaround, and workdays that are even longer and more demanding than they were when "cut and paste" involved actual scissors and jars of rubber cement.

But it seems to me that the rewards of being a litigator remain as great as they always were.

I think of the deep-down satisfaction of creating and counseling a successful dispute resolution strategy, maybe even one that wholly avoids litigation; a cross-examination that pulls the legs out from under an adversary's case; a summation or oral argument that exhausts every personal and professional skill. There's discovering the smoking-gun document; obtaining a result that improves the client's life, ends an injustice, secures a right, makes new law, makes the world a little better; a compliment from the judge; a grateful client.

Unforgettable moments like these make everything else worthwhile. Those are surely unforgettable moments – even for me, even after nearly 20 years of the most glorious life imaginable, as a Judge of the Court of Appeals.

Those of you who have visited us in Albany know our magnificent courtroom. It is to my mind the perfect setting for the presentation of serious argument on serious law questions. I have seen no other courtroom like it. As the years go by, one of my major regrets is that I did not follow the advice of my Uncle Charlie on the day I was sworn in as a Judge of the Court of Appeals. He said: "Get your portrait painted right away."

I have to admit, I have at times during oral argument glanced up at those portraits, especially the portrait of Benjamin Cardozo. Gazing into Cardozo's saintly countenance I can appreciate a story I heard recently that speaks volumes about him. It seems that a New York City lawyer some years ago showed up at the State Law Library to do a bit of research just before afternoon argument. He handed his list of items to a gray-haired fellow at the desk, who returned a short time later with everything that had been requested. The attorney thanked the man for his help, completed his reading and went to lunch. At 2 p.m., the attorney was in the courtroom when the judges filed in. The gray-haired gentleman from the Law Library took his place in the Chief Judge's chair, nodded to the attorney and the arguments began.

After nearly 20 years on the Court, I can tell you the presence of those portraits has a definite impact on us. I'm sure you all feel it, too. That parade of portraits, beginning with John Jay and James Kent, for me represents a progression of the law and a powerful reminder that it is the institution that is enduring and not any of us fortunate enough to be part of it.

Often I wonder what the old gents, looking down on the proceedings, think of all of us today. Quite frankly, I have never felt a moment's skepticism, disapproval or disdain from any of them – not even when I moved several bottles of red nail polish into Judge Cardozo's desk.

If every now and again there may be a raised eyebrow up there, I think that is attributable more to the shocking change in the subject of the cases than any criticism of us. Back 150 or more years ago, the issues before the Court were overwhelmingly private property disputes – wills, deeds, mortgages, pledges, promissory notes, contracts, land use.

Today we have guns, murder and mayhem, even by children; Internet crimes, domestic violence, child sexual abuse and family dysfunction; suits against government for entitlements; what, and who, defines the end of a person's life; who has the right to frozen embryos in a dispute between former spouses.

No, on second thought, I doubt the old gents up there on our courtroom walls are even surprised by any of this. They have, after all, watched the steady flow of cases – snapshots of society documenting our advance from simpler times to the wonders of modern life. I have to think – I like to think – that they are on the whole satisfied because they can see that the system is working, indeed working well. The subjects have changed; the law we apply has changed, becoming increasingly statutory. Our predecessors didn't need to lose any

sleep over the application of *Frye* or *Daubert* to evidence regarding the stability of recreational vehicles, toxic mold, or the correlation between Viagra and cardiovascular disease.

But what has changed is not nearly as significant as what has endured. The Third Branch of government – the Least Dangerous Branch – continues to provide a fair and rational forum for the peaceful resolution of disputes. And it does this hand in glove with a vigorous corps of attorneys advocating with civility and zeal in the interests of their clients.

I invite all of you to drop by our courtroom. Come join us on the day, surely not long into the future, when we are finally asked to choose between *Frye* and *Daubert*. While I can't promise that I will personally retrieve books for you like some Chief Judges, I guarantee that you will feel both welcome and proud to be part of a profession that helps keep our law relevant to modern-day challenges and our nation true to its founding ideals of liberty and justice for all.

Attorney Professionalism Forum

To the Forum:

I am a new (*i.e.,* lowly) associate in a large firm. We represent a large corporation that has been sued by a person injured on its property, and I have been assigned to the case. The injured person is represented by a law firm in another state. One of the members of the plaintiff's firm is admitted in New York, and he is the one who signs the pleadings and discovery documents in the matter. However, it is the firm's non-New York lawyers who contact me regarding case status, evaluation, scheduling, etc.

A few days ago I was working late, reviewing the plaintiff's responses to our discovery demands. The plaintiff had included a stack of documents (employment records, medical records, accident reports, etc.) as part of those responses. These documents were held together by rubber bands, and were not bound in any other manner.

The last two pages clearly got into that stack unintentionally, and just as clearly were not supposed to be disclosed. They constituted a letter from the plaintiff himself to his attorneys, and it was addressed to the attorney in the firm who is admitted in New York. The letter detailed the financial hardship the plaintiff was having resulting from his inability to work. He asked the New York attorney for an "additional" loan because he had exhausted the "first" loan made to him by another member of the firm (one who is not admitted in New York).

The contents of the letter shocked me. However, because it was late I could not find a partner to give me some guidance, and I had a client meeting scheduled for the first thing in the morning to discuss the plaintiff's responses. That meeting took place, and although I was not altogether comfortable in doing so, I decided not to tell the client's representative about the letter because I had not talked to one of my superiors first.

After the meeting I got a chance to discuss the matter with a partner in my firm. He told me not to tell the client. He also directed me to write a letter to the plaintiff's counsel in the near future, advising that we would report his conduct to the Ethics Committee unless he agreed to reduce the initial settlement demand that had been made some time before.

I am not comfortable with keeping the information from the client, nor am I comfortable with threatening the plaintiff's attorney in this manner. In addition, don't I have an individual obligation under the disciplinary rules to report unethical conduct to the Ethics Committee once I become aware of it? One other small matter: I am afraid I will be fired if I disobey a partner's directive. Some advice would be most welcome.

Signed,

Frustrated First-Year Associate

Dear Frustrated:

Your frustration is understandable, as you find yourself caught between what you believe is the proper course of action and what a superior has told you to do.

A few general principles should be stated at the outset. You may be new to the profession, but you are a lawyer, and therefore are bound by the rules of professional conduct. As you are now a member of a self-regulating profession, in which everyone has a duty to adhere to those rules, you must do your part to ensure that your professional colleagues comply. That may take the form of encouragement, assistance, and, if necessary, enforcement through the reporting of violations. In addition, you are bound by the rules notwithstanding the fact that you may act at the direction of another person, in this case your superior at the firm.

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.

Having said that, you will not be in violation of your ethical obligations if you act in accord with a supervising lawyer's directive – provided the directive represents a reasonable response to a question of professional duty that has more than one possible answer. DR 1-104(F). If that is not the case (*i.e.*, the response is clearly wrong), following such a directive would mean that you have violated your own duty to comply with the rules.

The first step in your particular dilemma is to identify the nature of your responsibility. Disciplinary Rule

1-103(A) provides that "[a] lawyer possessing knowledge, . . . not protected as a confidence or a secret, of a violation . . . that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."

The circumstances under which you learned of your adversary's conduct bears on this issue. It appears that the letter from the plaintiff to his attorney was inadvertently disclosed, and that you did not realize that the letter was a confidential communication until you read it. New York City Ethics Opinion 2003-04 holds that a lawyer who receives a misdirected communication containing confidences should promptly notify the sender and refrain from further reading the communication. Nevertheless, the opinion goes on to state that "the receiving attorney is not prohibited . . . from using the information to which the attorney was exposed before knowing or having reason to know the communication was inadvertently sent." There are, however, restrictions; you may not exploit the information in such a way that it will undermine the administration of justice. DR 1-102(A)(5).

Next, you must determine if you have an obligation to report your adversary's conduct. This conduct clearly violates a Disciplinary Rule and therefore calls into question your adversary's fitness as a lawyer. Because you have knowledge of that conduct, you have an obligation to report it. Disciplinary Rule 5-103(B) states, "While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that . . . [a] lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses."

The issue was addressed in *In re Arensberg*, 159 A.D.2d 797, 553 N.Y.S.2d 859 (3d Dep't 1990). The respondents were charged with advancing financial assistance to clients in violation of DR 5-103(B). In their answer, they admitted that they were advancing funds to clients in addition to litigation expenses and were, in fact, aiding such clients in meeting personal financial obligations. The respondents claimed, however, that their conduct did not cause them to obtain a proprietary interest in their clients' cases, that the sums paid to the clients were interest free, were not to be repaid in the event of an unsuccessful result in the case, and that the alleged misconduct was pervasive in personal injury litigation. The court upheld the determination that the conduct violated DR 5-103(B) nonetheless.

New York State Bar Association Ethics Opinions are similarly clear. Ethics Opinion 133 states, "It is the opinion of this Committee that a lawyer may neither loan money or guarantee the notes of a negligence client except for those purposes specifically authorized by DR 5-103(B)." The prohibition extends beyond negligence cases. Ethics Opinion 553 reiterated the prohibition in a matrimonial case and Ethics Opinion 600 addressed the prohibition in the real estate context. In your particular case, the fact that the initial loan was made by a non-New York lawyer should not have any bearing on your assessment of the conduct. Most jurisdictions adhere to the same basic ethical standards. Further, by engaging in practice in New York, and by having a New York lawyer sign papers on its behalf, the plaintiff's firm has agreed to be bound by New York's professional obligations. *See, e.g.*, 22 N.Y.C.R.R. § 603.1(a) ("any attorney from another state . . . who participates in any action or proceeding in this judicial department, shall be subject to [the Appellate Division rules governing conduct of attorneys]").

The final issue, and undoubtedly the trickiest one for you, is the direction you received from the partner in the firm. He suggested that you use the information to coerce your adversary into reducing the settlement demand. Unfortunately, he has placed you in a difficult position because this directive, if followed, would constitute misconduct on your part. As noted earlier, you may not engage in conduct that is prejudicial to the administration of justice. Your adversary's violation of the rule against providing financial assistance to a client has nothing to do with the merits of the plaintiff's underlying case. Consequently, making use of that misconduct to influence the outcome of the litigation would be prejudicial to the plaintiff. Whether or not you should tell your own client is a judgment call, but if you choose to do so you should also let the client know that you will not allow the professional misconduct to influence your handling of the case.

As to your fear of retaliation within your firm, the suggestion here is that you discuss the matter with a partner who is not involved in this litigation. Better still, if your firm has an ethics committee present the matter to them. However, if you are ultimately directed to undertake a course of action that you believe is unethical, remember that your ethics are your own. The reputation you develop today is the reputation you will live with for the rest of your career.

The Forum
By: Theresa Joan Puleo
Goldberg Segalla LLP
Albany, NY

CONTINUED ON PAGE 40

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I am a sole practitioner in a small town. About a year and a half ago, a client came to me seeking representation in a property line dispute with his neighbor. My client previously had been using an attorney who had been less than diligent in moving the case forward, and my client had reported that attorney to the local disciplinary committee. His former lawyer had put the case in suit, and a settlement proposal had been sent to the neighbor's attorney. However, nothing further had been done for some time.

Shortly after I got involved, I contacted the neighbor's attorney to discuss the status of the case. Although our conversation was cordial, he didn't seem terribly well informed about the facts, so I offered to meet with him and attempt to work out a resolution of the matter. He indicated that he was interested in doing so, but would have to get back to me with dates. Several weeks elapsed without any communication from him, so I made attempts to contact him to arrange the meeting. After several more weeks went by it appeared to me that he was not interested in settling the case, and I served discovery demands on him.

The time to respond to the discovery came and went and I attempted to contact him to find out when I might receive responses to my demands. Once more those communications went unanswered. Following my obligations under the Uniform Rules, I began to create a record of my good-faith effort to resolve the discovery issues, but after several more weeks of silence I realized that my only recourse would be to contact the court. I did so and a discovery conference was scheduled. On the literal eve of the conference, the attorney called me and asked if I would consider arbitrating the case. Knowing that arbitration would likely lead to a resolution more quickly than waiting for a trial on our busy local docket, I accepted the offer and indicated that I would bring an arbitration agreement with me to the conference the next day.

My opposing counsel did not attend the conference, but instead sent a young associate from his office. The associate confirmed the understanding to arbitrate to the judge, but indicated that she had not been authorized to execute the agreement and that the attorney of record would arrange with me to have the document signed.

Several more weeks elapsed while I attempted to get opposing counsel's signature on the agreement. He fell completely out of contact. I have heard rumors in the local community that he is dealing with a serious personal situation involving a member of his family, but his office will not confirm that and he will not return any telephone calls or letters. I am now at a loss as to how to proceed. It has been several months since we agreed to arbitrate the matter, but the agreement to arbitrate has never been signed, and having taken the matter off the court's calendar I have no ability to move the matter forward in that forum.

My instinct is to bring an application to compel arbitration and for sanctions against my adversary because of his willful delay of this matter; my client has sustained unnecessary expenses because I have had to hound this attorney at every turn. My client also has been prevented from selling his property for nearly three years as a result of this unresolved litigation. Indeed, my client and I both believe that even his defendant neighbor is frustrated at the lack of progress. To make matters worse, my client's prior experience with the disciplinary committee has led him to urge me to report my opposing counsel for the delays.

I don't feel good about doing either of these things – I work in a small community and have always tried to maintain a cordial and civil relationship with the attorneys in the area. I feel particularly bad in light of the rumors I have heard about my opposing counsel's personal difficulties, but this case is important to my client and it needs to move forward. What should I do?

Sincerely,
Conflicted

Language Tips

By Gertrude Block

Question: Is the spelling "accidently" now correct? I have seen it in an opinion published in a Reporter and found it again in a casebook I use in my torts class. Here is the sentence:

> As the trial judge observed, the case is unusual in that the fatal shot was fired accidently by a police officer and not by the felons perpetrating the kidnapping. *Jackson v. State*, 408 A.2d 721, 715.

Answer: This question was asked by a colleague at the University of Florida Law School. I told him that the spelling is still incorrect, although it is often seen in the writing of journalists. It was surprising, however, to find it in a court reporter, and even more surprising to see it faithfully copied, without a *sic*, in a torts casebook.

It is easy to guess the reason for the misspelling. Adverbs are often formed by adding *-ly* to adjectives, for example *strong/strongly*, *harsh/harshly*, *interesting/interestingly*, and *quick/quickly*. So, by analogy, writers add *-ly* to other words, like *accident* and the result is *accidently*.

But there is a difference. *Accident* is a noun, not an adjective like the words listed above. The adjective form is accidental. If you are aware of that, you can follow the usual form of adding *-ly*; and the result is *accidentally*, not *accidently.*

Nouns often add -al to become adjectives; for example, *incident/incidental*, *instrument/instrumental*, *critic/critical*, *clinic/clinical*, and others you can probably think of. If you consider what word it is that you are making into an adverb before adding *-ly*, you probably won't be using substandard English. For example, *hope* becomes *hopeful* before it becomes *hopefully.* Of course, there are other arguments that you might make against using *hopefully* to mean "it is to be hoped," rather than to mean "in a hopeful manner," its traditional meaning. Arguments about that usage have been discussed in this space in the past.

Question: In the sentence, "The wine was chosen to _____ the entree," which verb is correct, *compliment* or *complement*? My instinct is to use *complement*, but in recent years I have seen it spelled *compliment*.

An artist, who had been paid $40,000 for a mural, claimed the city was at fault for failing to detect the spelling errors she had made. The city agreed to pay her an additional $6,000 for corrections!

Answer: The correspondent's instinct is right. The verb *to complement* means "to fill in or make complete." *Webster's Third* (1993) provides, as one illustration, the statement, "The museum is complemented by a spacious garden."

But it is understandable that the choice may be confusing. The verb *to compliment* means "to present (a person) with a token of esteem, respect, or admiration," which seems similar to the definition of *complement*. But if you remember that a person is complimented, but a situation or object is complemented, you can easily distinguish the two verbs.

My thanks to Scotia attorney Kathryn McCary for this interesting question, which had never previously been asked. No doubt this has confused many persons.

On the subject of spelling, a recent news item reported that a beautiful ceramic mural, on display as part of the new Livermore (California) Library, contained 11 misspelled names, including Einstein, Shakespeare, and Michelangelo. The artist who designed the mural had been paid $40,000 for her work, and she claimed the city was at fault for failing to detect the errors. The mural, she said, was designed to unite people and the misspellings did not matter. "People that are into humanities . . . they are not looking at the words," she said. The city agreed to pay the artist an additional $6,000 to correct the spelling errors!

Question: When I send one copy of two different documents (for example, one letter and one order), which of the following two statements is correct?

1. I enclose copies of the letter and the order.

2. I enclose a copy of the letter and the order.

Answer: This question is really not about grammatical correctness, but about clarity; both sentences are grammatically correct, but neither is as clear as it should be. You could revise question two by adding "one copy" in two places: "I enclose one copy of the letter and one copy of the order." Another unambiguous statement would be, "I enclose one copy each of the letter and of the order."

My thanks to the correspondent who asked this question, which is similar to others previously sent. Obviously there are a number of readers who are aware that the statements are confusing.

Potpourri:

A reader sent an amusing item from the sports section of her local newspaper. It read, "An hour-and-a-half before game time Tuesday night, a large portable marquis said that student seats were still available." The reader's comment: "I guess French royalty has fallen on hard times these days!"

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, *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co.), will be published this fall.

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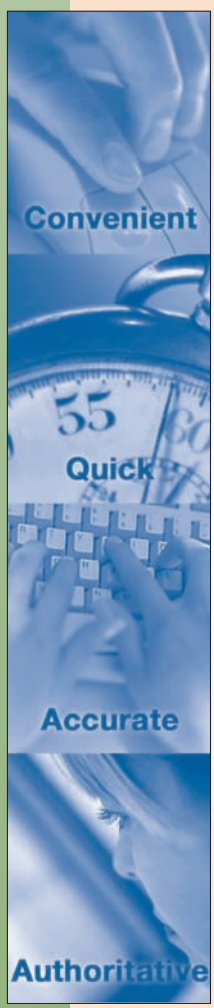

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(1st Dep't 1991) (mem.) (noting that rule against perpetuities is still alive), *rev'd on dissenting opn. below*, 91 N.Y.2d 19 (1991). New York trial-court opinions often omit pinpoint citations. Most full New York appellate opinions, and all federal opinions, include pinpoint citations.

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Parallel Citing

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Citations enable the reader to find the source. They also credit the source, convey the source's persuasiveness, and demonstrate whether law supports an argument. To help a court to rule for you, cite it right.

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.

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1. *See* The Legal Writer, *You Can Quote Me — Part II*, 76 N.Y. St. B.J. 64, 57 (*A. v. B.* and *B. v. A.* examples).
2. This is how to cite a citing reference that adds critical information: *In re Marino S.*, 100 N.Y.2d 361, 369 n.3, 795 N.E.2d 21, 25 n.3, 763 N.Y.S.2d 796, 800 n.3 (2003) (Kaye, C. J.) (citing Anne Crick & Gerald Lebovits, *Best Interests of the Child Remain Paramount in Proceedings to Terminate Parental Rights*, 73 N.Y. St. B.J. 41 (May 2001)).
3. Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* 89 (1930).
4. Stanley Mosk, *The Common Law and the Judicial Decision-Making Process*, 11 Harv. J.L. & Pub Pol'y 35, 35 (1988).
5. *See generally* Bryan A. Garner, *The Redbook: A Manual on Legal Style* 108–09 (2002).
6. *Disenhouse Assocs. v. Mazzaferro*, 135 Misc. 2d 1135, 1137 n.*, 519 N.Y.S.2d 119, 120 n.* (Civ. Ct. N.Y. County 1987) (urging all attorneys not to cite "the unofficial reports only") (citing CPLR 5529(e), which proves that in their appellate briefs, attorneys who cite New York cases must cite the Official Reports, if available); *accord In re Bernstein v. Luloff*, 34 A.D.2d 965, 965, 313 N.Y.S.2d 949, 949 (2d Dep't 1970) (mem.) (admonishing counsel to cite official reports); *La Manna Concrete, Inc. v. Friedman*, 34 A.D.2d 576, 576, 309 N.Y.S.2d 711, 713 (2d Dep't 1970) (mem.) (same); *People v. Matera*, 52 Misc. 2d 674, 687, 276 N.Y.S.2d 776, 789 (Sup. Ct. Queens County 1967) ("[W]e are required, in the rendition of our opinions, to cite New York decisions from the official reports, if any, as the counsel themselves are bound to do in their briefs on appeal.").

EDITOR'S MAILBOX

Balancing Act

I would like to thank Ken Standard for raising an important, relevant issue in his October "President's Message." I am currently a first-year law student, but looking into the future I am worried about the "balancing act" I will have to play between a demanding career and a family. The message to law students today is that by becoming a lawyer, you consent to having no life. You will work no less than twelve hours a day during the good weeks and frequently seven days a week. A lot of people consider the first few years out of law school as the "sacrifice" years where you do your time at a demanding firm and then leave to have more of a life. It's basically impossible to balance a family or spouse during that time and although I am very interested in law, I don't know if I am willing to do that. There's a great saying that, "No one on their death bed ever said 'I wish I spent more time at work.'" I think the concept is important to recognize.

Thank you,
Kelly Francin
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The Legal Writer

Write the Cites Right — Part II

By Gerald Lebovits

Last month the Legal Writer cited some rules about citing. We cite more rules to stop the *Bluebook* police from issuing citations for illegal citations.

Accuracy in Citing

Never cite as binding or persuasive an out-of-jurisdiction opinion that interprets a statute or rule different from the one you're interpreting. Be careful when citing a case affected by later statutory changes.

Never cite unpublishable opinions — those to which a court, typically a federal court of appeals, explicitly forbids, under penalty of contempt, anyone to cite — except for res judicata or collateral estoppel purposes.

Always alert the reader if your citation comes from a concurrence or a dissent. *Example:* Reid, J., concurring; Graffeo, J., concurring in part & dissenting in part. *Example: In re Notre Dame Leasing, LLC v. Rosario*, 2 N.Y.3d 459, 469, 812 N.E.2d 291, 296, 779 N.Y.S.2d 801, 806 (2004) (Ciparick, J., dissenting).

Always include in a parenthetical the court, county, department, district, and year for New York cases and the court, district, circuit, and year for federal cases.

Always include following your citation any leave (New York Court of Appeals) or certiorari (Supreme Court) granted or denied dispositions and any appeal granted or dismissed dispositions. Although the *Bluebook* tells you to add only recent certiorari denials unless the denial is relevant, adding all leave and certiorari denials proves that you shepardized your case.

Unless you must give a case's full procedural history, never cite reargument denials.

If your citation quotes another statute, case, or secondary authority, both must be cited if you're quoting from both.[1] If you're not quoting from both, citing the cited citation is permissible. Tell your reader that your citation cites something else, but only if the citing citation doubles the bang for your buck. For example, if you cite a helpful, on-point small-claims opinion, and for its proposition that opinion cites a Supreme Court opinion not entirely on point, cite the small-claims opinion and note that it cites the Supreme Court opinion. That will signify that at least the Small Claims court believed that the Supreme Court opinion supports its position. If, however, the Supreme Court opinion is really on point, cite only that opinion.[2]

Although it's uncommon in New York State style, use the federal practice of alerting the reader to the weight of authority: memorandum opinion, per curiam opinion, or en banc opinion, as follows: *A v. B*, 100 App. Div. 100 (4th Dep't 1936) (mem.); *B v. C*, 101 Misc. 101 (App. Term 1st Dep't 1937) (per curiam); *C v. D*, 102 F. 102 (2d Cir. 1938) (en banc).

Don't discuss a citation you've mentioned for the first time only in your preceding parenthetical citation, whether as a sentence citation or as a citational footnote. *Not:* "To be valid, a contract requires offer and acceptance. *A v. B*, 99 N.Y. 99 (1899). In *A v. B*, the court . . . ." Rather, introduce your citation in your text before you discuss it in your text. Anticipate that your citation won't be read — that your reader will read only your text. You must lay a foundation in the text, not in the citation, for anything you later discuss in the text.

Never rely on another source, even a published opinion, for your citation. Always verify independently the accuracy of your citation's numbers, quotations, and propositions.

String Citing

Limit string citing to three cases except when you must document the sources necessary to understand authority or a split in authority. Citing for completeness rather than to make your point denotes research writing that has no place in a memorandum designed to inform or a brief designed to persuade. When you string cite, separate authorities by semicolons. For obvious, threshold matters that require no elaboration, don't string cite at all. One good cite is good enough.

Ordering Authority

Which goes first: the Constitution or a U.S. Supreme Court opinion that interprets the Constitution? The Constitution, which is higher authority than a case that interprets it.

Always cite and use official citations in New York, if available.

Until this century, statutes were considered "warts on the body of the common law."[3] But "most American jurisdictions are now Code states."[4] Statutes must therefore be cited before cases. Unless a statute is unconstitutional or beyond the rule-making body's authority to enact, statutes are more authoritative than cases that interpret them.

The order of a string citation: constitutional provision before statute before rule and regulation before case; federal before state; highest court first; within co-equal courts, reverse chronological order; and secondary authority, in alphabetical order.

Pinpoint (Jump) Citations

Use pinpoint citations, even to the footnotes: *X v. Y*, 16 N.Y.2d 61, *62 n.3* (1981); *A v. B*, 91 A.D.2d 19, *19 & n.9*

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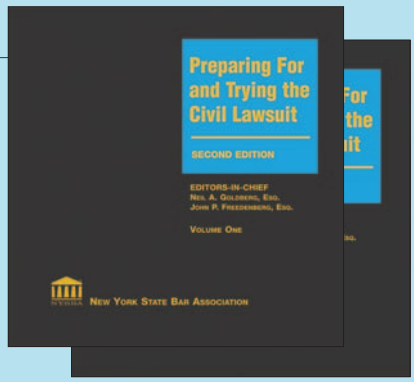

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