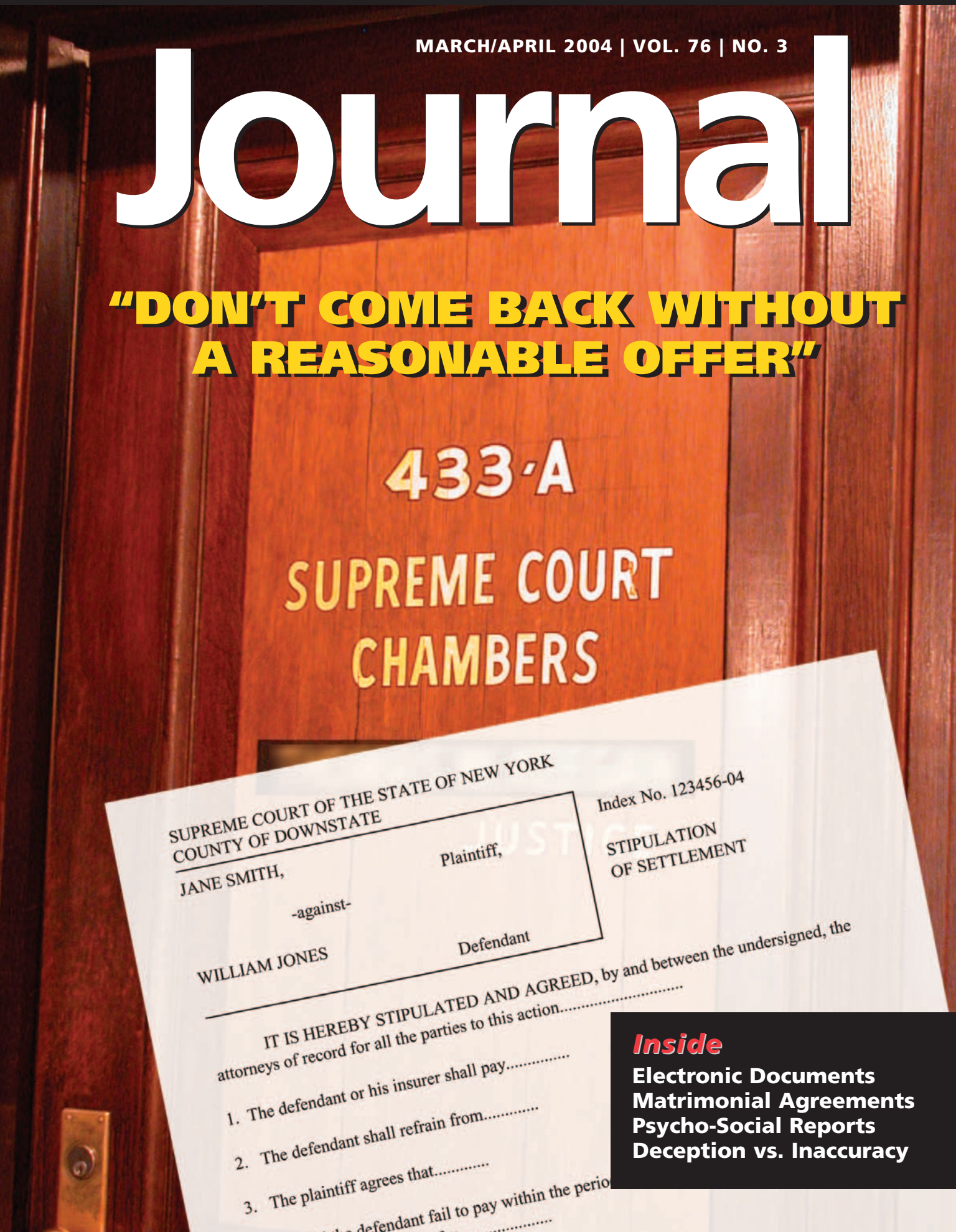
NEW YORK STATE BAR ASSOCIATION

MARCH/APRIL 2004 | VOL. 76 | NO. 3

Journal

"DON'T COME BACK WITHOUT A REASONABLE OFFER"



Inside

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Matrimonial Agreements
Psycho-Social Reports
Deception vs. Inaccuracy

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March/April 2004

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Contents

Departments

On The Cover

Behind closed doors in chambers, how far should the judge go in attempting to motivate the parties in a lawsuit to reach a settlement? The issue is addressed in the first of a two-part article on settlements, page 10.

Cover Design by Lori Herzing.

The *Journal* (ISSN 1529-3769), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $18. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

President's Message

A. Thomas Levin

Who Do You Trust?

Things are seldom what they seem, Skim milk masquerades as cream. . . . Little Buttercup, Gilbert and Sullivan's H.M.S. Pinafore

*'When **I** use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.'* Lewis Carroll, Through the Looking Glass

Perhaps one has to be very old before one learns how to be amused rather than shocked. Pearl S. Buck

1. No good deed goes unpunished.

2. Politicians talk themselves red, white and blue in the face. Clare Boothe Luce

It is by the goodness of God that in our country we have those three unspeakably precious things: freedom of speech, freedom of conscience, and the prudence never to practice either. Mark Twain

Recent events continue to provide fodder for the President's Message. All one has to do is read the daily newspaper, or listen to radio or watch television. Collections of astonishing statements and provocative action accumulate rapidly. Hardly a day goes by without some new example. Elevating common discourse into hyperbole seems to be a new art form. Let's look at some examples.

Speaking to a gathering of governors, at the White House, the U.S. secretary of education called the National Education Association, the nation's largest teachers union, a "terrorist organization," because, in his view, the union often acts at odds with the wishes of rank-and-file teachers regarding school standards and accountability. *The New York Times* properly characterized this statement as a "staggeringly stupid comment."[1]

Speaking to the Boston College Chief Executives Club, the head of the world's largest insurance conglomerate said of the battle over reforming class action litigation: "It's almost like fighting the war on terrorists. . . . I call the plaintiff's bar terrorists." This from a man who usually uses the "T" word in speeches calling for federal bailout of the insurance industry to protect it from losses caused by terrorist activity.

Then there is the other phrase currently in vogue, the "activist judge." These apparently come in two flavors, elected and unelected. In commenting upon decisions with which they disagree, many of our public officials are quick to condemn the "unelected activist judge," seemingly implying that a judge who is subject to the elective process would have made a different decision in order to pander to the electorate. Or, when it turns out that the judge being criticized indeed was elected, but made that decision anyway, the label is shortened to simply "activist judge."

Just what is an "activist judge" anyway? Apparently, it is a judge who makes a decision with which the commentator does not agree. So, in Massachusetts, it is the "activist judges" who interpreted the state and federal constitutions as requiring equal protection of the laws for everyone, thus validating same-sex marriages. Many of our public officials have urged that this decision be circumvented by any means possible. But, in New Jersey, where the courts have ruled that same-sex marriages are not permissible, the public officials are quick to state that "the courts have ruled, and we are bound by what the courts rule."

Another view would be that judges who rule against the government are "activist," whereas those who sustain government action are more moderate and reasonable, as if it were the function of the court simply to approve the status quo in all cases.

In fact, an analysis of many of the instances where judges are claimed to have acted in an "activist" manner discloses that the judicial action was usually taken to deal with an issue as to which the legislative body avoided its responsibility to enact legislation that is clear and comprehensive, or in some cases, to act in any way at all.

From all of this we can deduce the apparent legal principle that decisions with which one agrees are well-reasoned and controlling, and that the judges who write them are brilliant scholars of the law. In contrast, decisions with which one disagrees are only misguided rants deserving of no recognition whatever other than as examples of why the moron judge who issued them should be removed from office. I marvel at the relative ease with which some judges manage to move from one category to the other, and back again.

The use of hyperbolic language, and language that expresses personal attacks on anyone with whom we disagree, is something that needs to be brought under

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control. It is an unfortunate phenomenon of a society that is paying less and less attention to common mores, and in which the Golden Rule is given less and less attention. One would hope, and we should expect, that our public officials and corporate leaders would engage in more responsible behavior. Demonizing one's opponents, or adherents of differing points of view, may be effective discourse, but it is destructive of the public order.

Another example of this trend can be found in the recent decisions by local officials in various cities to perform marriage ceremonies for same-sex couples. In New York, we saw mayors, paying no attention whatever to their oaths of office, performing marriage ceremonies with full knowledge that the celebrants did not have a marriage license, and that New York law (DRL § 17) clearly makes performing a marriage ceremony under such circumstances a misdemeanor.

While one can debate whether same-sex marriages should be permitted, or even whether current law already permits them, those who believe in the rule of law recognize that we have adequate methods in place to resolve those issues. People denied a license can seek judicial relief. Officials who believe they should be permitted to issue such licenses can seek judicial relief. Same-gender couples married in a venue which permits such ceremony, and who seek to have that relationship validated in another state, can seek judicial relief.

The accepted means of resolving controversial issues traditionally has been the courts and the legislative bodies. The rule of law is not enhanced by the narcissistic behavior of public officials who pander to one point of view or another, particularly when they are not the ones who will have to deal with the resulting legal issues. It is unfortunate that so many officials have sought to gather attention to themselves, without regard to the legal difficulties they are creating for those they purport to have joined together.

There are those who will argue that this is a form of civil disobedience, as were the civil rights marches and sit-ins. And I agree. But I also believe that the rule of law means that those who disregard the law do so at their peril, and that they must be prepared to pay the price of violating the law. It is often overlooked that Henry David Thoreau, who pioneered the use of civil disobedience to protest laws thought to be unjust, went to jail for his conduct (at least until a friend paid his fine and obtained his release, to Thoreau's dismay).

With all this posturing and rhetoric going on all about us, it is difficult to find the voice of reason. At least it is for those who aren't paying attention to the New York State Bar Association.

In the midst of all this controversy, NYSBA has been steadily moving along, doing its job, looking at the issues and not the rhetoric, and doing what we do best: promote the interests of the public and the profession.

Our Special Committee to Review Legal Issues Affecting Same Sex Couples is moving forward with its studies, and we look forward to the debate over its forthcoming recommendations. Our Committee on Diversity and Leadership Development, together with the Committee on Minorities in the Profession, is leading us forward to increased diversity in our membership and leadership. Our Special Committee on Fiduciary Appointments is in the thick of the fray over further changes in the Part 36 Rules. The Special Committee on the Code of Judicial Conduct has cut through the rhetoric being flung about over judicial campaigns, and made eminently reasonable proposals for regulating campaign conduct. The Committee on the Jury System has issued its comments on changes being considered in the ways juries are selected. The Elder Law Section has spoken out against proposed changes in the Medicaid laws that would require middle-income families to dissipate their assets in order to obtain care for their elderly loved ones. The President's Committee on Access to Justice is in the forefront of activity to provide necessary representation to indigent persons in civil and criminal matters.

Hundreds of our members are involved in the activities of these and other committees, and our 23 sections. They are truly role models for the profession, people who care, and who give of themselves, to make the legal system and the lives of our friends and neighbors better.

If you are not participating in this effort, why not? Every one of us has an obligation to participate. As professionals, we enjoy privileges and are privy to knowledge which give us the unique ability to make a difference. With those privileges come responsibilities. Our association offers a myriad of ways in which you can participate. If you know of ongoing projects of which you would like to be a part, or if you want to participate but don't know how, drop me an e-mail at president@nysbar.com.

And last, dear member, do you have your free nysbar.com e-mail address? Check the Web site, <www.nysba.org>, for instructions on how to get one.

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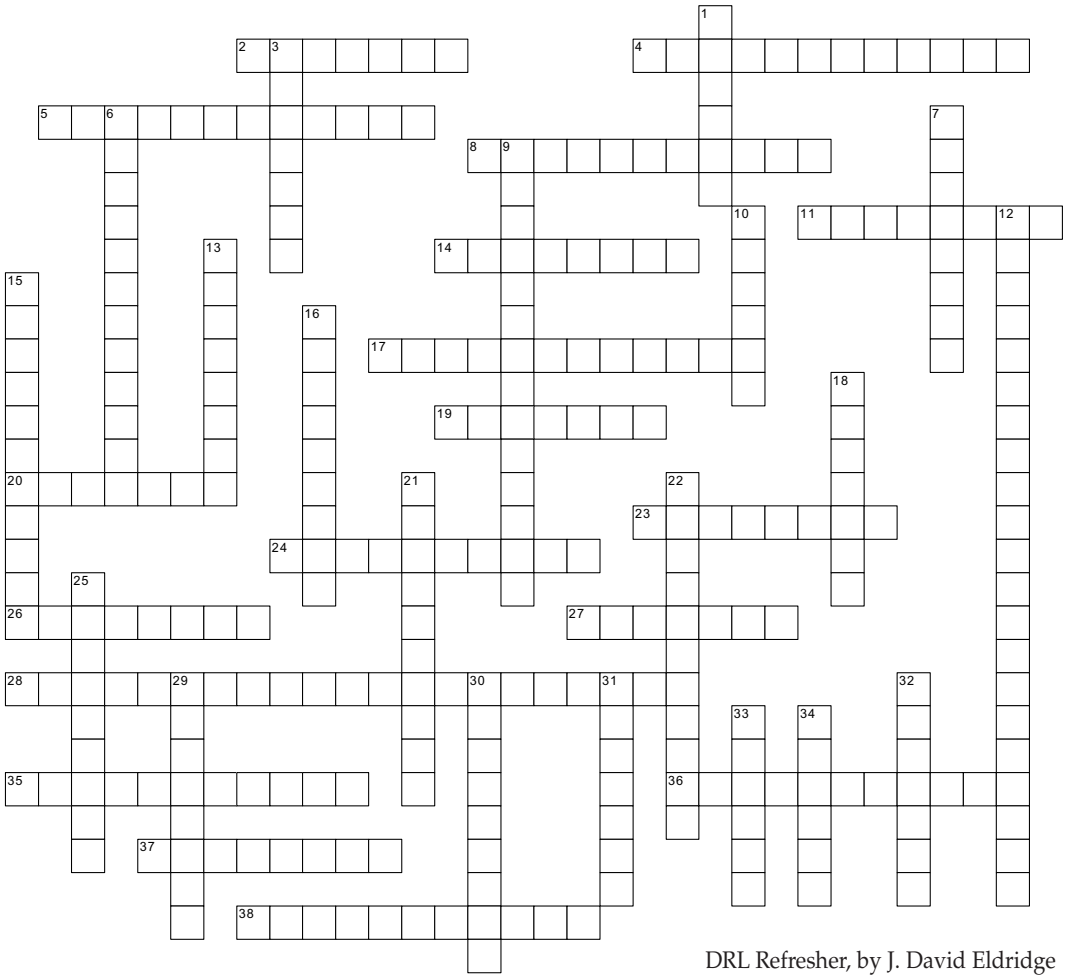
1. Not that it's a bad thing. After all, at least one court has noted that "[i]neptitude . . . is a constitutionally protected prerogative." *People v. Schoolfield*, 196 A.D.2d 111, 608 N.Y.S.2d 413 (1st Dep't 1994).

CROSSWORD PUZZLE

The puzzles are prepared by J. David Eldridge, a partner at Pachman, Pachman & Eldridge, P.C., in Commack, NY. A graduate of Hofstra University, he received his J.D. from Touro Law School. (The answers to this puzzle are on page 61.)



DRL Refresher, by J. David Eldridge

Across

2 Future _____ capacity

4 Money paid to maintain and educate an unemancipated child younger than 21 (DRL § 236)

5 Both parents share equally in the responsibility and control of child's upbringing (DRL § 240)

8 Where complaining spouse has proximately caused adultery of other spouse

11 Marriage is a civil _____ between consenting adults (under DRL § 10)

14 Legal process of terminating a child's rights and duties towards his natural parents to be substituted by new parents (DRL Article 7)

17 "_____ of the child." A controlling factor taken into consideration in many areas of family law (*e.g.*, custody)

19 Latin word originally meaning "sustenance"

20 Municipal approval before marrying requires you obtain one of these (under DRL § 13)

23 A spouse suing for divorce must attest that all steps have been taken to remove any _____ to remarriage (DRL § 253)

24 The marriage of a brother and sister is void (under DRL § 5) for being this

26 The person appointed by the court to care for and maintain the person and property of another (DRL Article 6)

27 Care and control over a child with responsibility to protect

28 No-fault statute empowering a court to divide marital property evenly regardless of title

35 Property acquired during the marriage is _____

36 Forgiveness and resumption of marital relations after adultery of one spouse

37 Property owned by one spouse prior to marriage is _____ from marital assets

38 Agreement often referred to as a "pre-nup"

Down

1 One wife at a time, please (DRL § 6)

3 A nice way of describing abandonment as grounds for divorce (DRL § 220)

6 A child born to unmarried parents

7 Youngest age at which persons may be married (with parental permission)

9 Resumption of marital relations (usually after a separation) implying forgiveness and a "fresh start"

10 What neither client can ever seem to get enough of

12 Maintenance to one's spouse may be reduced based upon this

13 In most states, it's the legal union of one man and one woman

15 What you have to do a lot of with matrimonial clients

16 Nullifies and abolishes a marriage as if it never existed

18 Legal separation of a husband and wife (DRL § 170)

21 The non-custodial parent's right to access a child

22 Defined as payments paid to a spouse at fixed intervals (DRL § 236)

25 The process of determining how much a couple's stuff is worth

29 Sexual intercourse between married person and another not a spouse

30 A spouse's _____ to pay court-ordered maintenance is one defense to contempt proceeding (DRL § 246)

31 Cruel and _____ treatment as a ground for divorce (DRL § 170)

32 What wives were sometimes thought of (a long time ago)

33 The divorcing spouse with the big bucks is often termed _____

34 A husband or wife

"Don't Come Back Without a Reasonable Offer"
The Extent of, and Limits on, Court Power to Foster Settlement

Part One – The Theory and Practice of Settlement Before the Court

By Brian J. Shoot and Christopher T. McGrath

A judge presiding in New York Supreme Court is faced with a case in which the plaintiff seems likely to prevail, and the damages may go into the millions. The attorney hired by the defendant's insurer says, "Judge, I'm very sorry, but it's out of my hands. I am just not authorized to go beyond $50,000." Perhaps the attorney adds, "Everything you are saying makes sense, but the people down in Atlanta [or wherever] have made a different judgment."

Can the judge *order* Apex Insurance Co., which is *not* a party in the case, to send an employee with authority up from its Atlanta offices? Assuming that the judge has such authority, *should* the judge do so?

A different case: the plaintiff's attorney has what the judge believes to be an overly optimistic view of the plaintiff's chances for success, or perhaps an inflated opinion of the probable damages. If the plaintiff's attorney would only be a bit more . . . reasonable, the case would probably settle before the trial begins, with a substantial savings in court resources.

Should the judge presiding at the pretrial settlement conference "talk up" the weaknesses of the plaintiff's case and the strengths of the defendant's case in an effort to bring the plaintiff's counsel "down to Earth?" Can (or should) the judge go a bit further, and raise defense arguments or objections that may not have occurred to the defendant's counsel? Can (or should) the judge go a bit further still and suggest that, should the case go to trial, he or she might exclude some of the plaintiff's key proof, or might be compelled to dismiss one of the plaintiff's damages claims, or might have to give some harmful jury instruction . . . even though the judge believes (or knows) that such rulings would be unlikely? Where does the line between permissible persuasion and overbearing tactics lie?

These questions become all the more critical given that (1) most cases do not actually go to trial; (2) some observers believe that many of the cases that ultimately settle during trial or jury selection *could have* and *should have* settled earlier, with consequent savings both to the litigants and the court system; and (3) there is a great deal of uncertainty not only about what the conference judge *can* do to foster settlement, but also about what the conference judge *should* do to foster settlement.

The national figure often bandied about for the percentage of cases that settle is 90%,[1] and New York is not materially different. According to figures that will soon be released by the Office of Court Administration in its report for calendar year 2002, 76,934 cases settled and only 7,357 cases went to verdict, meaning that 91.3% of that universe of cases settled. Of course, this may be viewed as somewhat misleading – for just as settlements far outnumber verdicts, dispositions (including dismissals and default judgments), far outnumber settlements.[2] But the essential point, with which few would disagree, is that far more cases settle than reach trial.

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Christopher T. McGrath is board certified by the National Board of Trial Advocacy, and is an instructor of trial techniques at the Hofstra University School of Law. He is graduate of St. John's University and received his J.D. from the University of Dayton School of Law.

Both are members of the firm of Sullivan, Papain, Block, McGrath & Cannavo, P.C., with offices in New York City and Nassau County.

The second fact of life noted above – that many cases settle during or after jury selection – has, as mentioned, drawn the criticism that the delay unnecessarily consumes limited resources (*i.e.*, a jury room and the attention and time of prospective jurors). These cases, the critics contend, could have settled days or weeks earlier at lower cost to the public and the parties. Whether or not such criticism is valid,[3] it is perceived to be true by some observers and thus triggers the question of whether judges can and/or should be doing more to settle such cases in advance of jury selection.

Finally, there is the paucity of rules in this key area. Although New York's court rules authorize the judge to order preliminary and pretrial conferences, which may include consideration of settlement of the action,[4] they do not even begin to detail *what* the court can (or cannot) do to effect that result, nor even whether the court should aggressively attempt to induce/persuade the parties to settle.

While settlement and pro-active judicial involvement in effecting the same are undoubtedly the flavors of the month, there are cogent arguments on both sides.

All this aside, the literature and our own anecdotal experience suggest that there is substantial disagreement, even among experienced judges, about the extent to which a trial court *should* utilize its powers (whatever those powers might be) to procure a settlement. At one polar extreme, some judges will say, "I'm all in favor of a settlement, but I'm not going to haggle with you two. You'll settle the case, or you'll see me at trial." At the other extreme, some judges aggressively try to settle each case that comes before them, and pride themselves on their abilities to dispose of large numbers of cases in that fashion.

In this context, this first part of our discussion considers the arguments for and against settlement *per se,* and for and against pro-active judicial involvement in effecting those settlements. This segment also describes the various tools and techniques that a conference judge could potentially employ – some of which are controversial – to pursue settlement aggressively.

Are Settlements the Ideal?

For some, the question of whether having more cases settle earlier is a good thing is no question at all. It is, instead, an article of faith. Litigation, with its inevitable delays and its consequent monetary costs, is "bad." Settlement, as early as is feasible, and as often as possible, is "good."

Similarly, the question of whether the *modern* judge should actively encourage settlement is, for many members of the bench and bar, a foregone conclusion. Indeed, part of what defines the *modern* judge, as opposed to the ivory tower umpires of yesteryear (the common perception holds), is that today's judge appreciates arbitration, mediation and the myriad of options that collectively fall within the umbrella of alternative dispute resolution.

Yet, while settlement and pro-active judicial involvement in effecting the same are undoubtedly the flavors of the month, there are cogent arguments on both sides, and the picture is not nearly as clear as some would have it.

The three principal arguments in favor of settlement as a dispute-resolving mechanism (as opposed to disposition on the merits) are that (1) settlement is cheaper both for the parties and the court system;[5] (2) settlement avoids the all-or-nothing result, with one side winning and the other losing, that typically arises from disposition on the merits;[6] and (3) settlement can result in more creative and more individualized dispositions.[7]

The first two arguments in favor of settlement are clear enough. Regarding the last point, we offer the following concrete example from our own practice. When the states settled their highly publicized suits against the tobacco companies, that settlement required the tobacco companies to pay the states a great deal of money, but it also contained a number of non-monetary prohibitions and limitations by which the tobacco companies agreed to abide.[8] For example, the companies agreed to discontinue the use of cartoon characters (*e.g.*, Joe Camel) in the advertising or marketing of their products, a commitment that the states felt was very important in reducing the incidence of teenage smoking.[9] The companies also agreed to a ban on paid product placements in television, films or theaters, a ban on outdoor billboard advertisements, and various restrictions on industry lobbying activities.[10]

Although the money the industry paid in settlement was significantly less than the damages that potentially could have been imposed if the states had prevailed on the merits (or else the industry never would have agreed to settle), the *non*-monetary relief that was obtained through the settlement was different and greater than the states could have received from a merits disposition. This was so because the companies' First Amendment rights effectively dictated that many of the behavioral limitations described above could be effected *only* by agreement.

It is, in this context, hardly surprising that, for some, settlement is a triumph, and a merits disposition a

failure. Consider the following, and far from unique, view espoused by Professor Charles B. Craver:

> *When a dispute comes to the judge and is resolved in chambers rather than in the courtroom, everyone involved wins.* The court saves time and money, and the parties have achieved an agreement that gives each something. They also may be able to salvage a previously amicable relationship. *While trials tend to produce "win" or "lose" results, mediation strives for a "win-win" situation.*[11]

There are, however, cogent arguments against settlement as the "ideal" disposition, many of which were marshaled in Professor Owen M. Fiss's oft-cited piece, "Against Settlement."[12] For one thing, if we presume that "the law" would effect the correct and just disposition, then the different disposition that arises from settlement is, by definition, less correct and/or less just. Should we rejoice that a party who did not "deserve" any recovery at all obtained one through settlement? Should we be happy that a defendant company that deservedly would have had to pay $3 million will instead pay a fraction of that figure, or that a deserving plaintiff will be rather poorly compensated because he (or, dare we say it, his attorney) could not wait for trial, or could not risk a bad outcome?

This logically leads us to a second criticism of settlement. As Professor Fiss puts it, "the dispute-resolution story that underlies ADR implicitly asks us to assume a rough equality between the contending parties. . . . In truth, however, settlement is also a function of the resources available to each party to finance the litigation, and those resources are frequently distributed unequally."[13]

Yet another argument against settlement: the system needs, *we attorneys* need, reasoned precedents. Those cases that ultimately settle do so, at least in part, as a result of the parties' perception of what would likely occur if the case did not settle. That perception, in turn, is fueled and shaped by judicial dispositions and, most importantly, by appellate precedents. Without those precedents, which of course arise from the cases that do *not* settle, there would be no guidelines to use in settling cases.

Should we rejoice that a party who did not "deserve" any recovery at all obtained one through settlement?

As matters stand now, and as noted above, approximately 90% of all cases settle. Should that figure reach 96% or 98%, the argument goes, we would then have *an insufficient population of precedents* to fuel the settlement process, which would then be based on guesswork and surmise.

For Fiss and those who subscribe to this school of thought, settlement is the civil analogue of plea bargaining in criminal cases – perhaps a necessary evil, but certainly not something to be encouraged or praised:

> I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. . . . Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.
>
> * * *
>
> I recognize that judges often announce settlements not with a sense of frustration or disappointment, as my account of adjudication might suggest, but with a sigh of relief. But this sigh should be seen for precisely what it is: It is not a recognition that a job is done, nor an acknowledgment that a job need not be done because justice has been secured. It is instead based on another sentiment altogether, namely, that another case has been "moved along," which is true whether or not justice has been done or even needs to be done.[14]

How Involved in Settlement Should Judges Be?

Whether the judge presiding over a case should be pro-active[15] in attempting to effect settlements is, as with determining the value of settlement itself, a more difficult question than it may first appear to be. Of course, if one asks whether it is better to spend an hour achieving a disposition that is acceptable to both sides, in lieu of spending two weeks to obtain a verdict that would be deemed a great disappointment by one side, the answer seems self-evident. It is, perhaps, for this reason that some writers, and judges, so strongly feel that judges should and must be pro-active in "persuading" parties to settle.

Consider U.S. District Court Judge Harold Baer Jr.'s recent article on the subject.[16] Judge Baer strongly supports mediation in his own cases as a process that poses "the possibility of a creative resolution, something more and different than dollars."[17] He recognizes that there are some who argue it is unethical for a judge to mediate a case that appears on his or her own docket, and also acknowledges "[o]ther criticism that suggests that mediation is just a way to slough off cases in order to clear dockets that

CONTINUED ON PAGE 14

CONTINUED FROM PAGE 12

have grown unmanageable."[18] However, the judge responds to the first charge as one that "comes primarily from academics (who frequently possess little practice experience)"[19] and the second allegation as being "the product of minds without practical experience."[20]

Yet, while it may seem obviously better to spend the hour and settle on terms acceptable to both, rather than the two weeks at trial that ultimately disappoints one side, the choice becomes much less clear on closer inspection.

For one thing, the savings of court time and resources is hardly self-evident. Yes, an hour spent settling a case is less costly than two weeks trying the case to verdict, but wouldn't such a case likely settle anyway, if not that day then the next, without the judge's intervention? If so, the savings were less than initially supposed, and the court's involvement might have made little or no difference to the outcome, apart from hastening it.

Further, if one is to assess the overall impact upon the system, one must count not only those cases that settle, but also those cases in which the judge spends the hour attempting to settle the case, fails to do so, and the case goes to verdict anyway. In order for pro-active settlement techniques to improve the efficiency of the system, the time and effort saved in successfully settling cases must exceed the time and effort consumed in unsuccessfully attempting to settle cases. And, at least at this juncture, there seems to be little empirical evidence that this is generally so.[21]

It is not clear that studies conducted in other jurisdictions are necessarily applicable to New York practice.

It also is not clear, at least not to us, that studies conducted in other jurisdictions are necessarily applicable to New York practice. Indeed, when one reads about what certain out-of-state judges have done to settle certain cases, it is difficult to even imagine such events occurring in this state.

To illustrate: Professor Menkel-Meadows wrote about "one well-documented case" in which the "judge arranged several days of cocktail parties and country club dining to encourage a meeting of counsel in a complex case."[22] We presume that the incident occurred, and even presume that there must have been other similar episodes in which the trial judge went off the beaten path to settle a case. Yet here in New York, a state in which a judge in certain downstate counties may have 80 to 100 motions to resolve on any given motion day, a state in which some judges must wait months to get a working wall clock in their courtroom, such stories are absurdist fantasy.

Quite apart from concerns about whether pro-active involvement in settlement discussions really constitutes an efficient use of the judge's time, there are numerous other reasons why some judges prefer to adhere to their more traditional roles, and why some attorneys prefer that they do so. For one thing, the ethical rules governing judicial conduct are extremely vague, raising, at least in the minds of some, sharp questions about whether some of the more aggressive settlement techniques, discussed below, violate ethical norms.[23]

More concretely, some critics may argue "that the trial judge's new role, that of case manager instead of neutral arbiter, may result in a loss of the impartiality that has always been the hallmark of the trial judge."[24] The fear is that the judge, whether from being influenced by an argument advanced in settlement, or by chagrin directed at the party (or attorney) whose perceived intransigence made the trial necessary, may end up leaning toward one side rather than another.

To be sure, some of these concerns are not unique to the settlement process; a judge may have instead been influenced by reading/resolving a prior motion or by some earlier experience with an attorney in the case. However, an aggravating factor that distinguishes the concerns flowing from settlement discussions from others is that "much of the information disclosed to a judge during pretrial proceedings is imparted *ex parte*, and thus deprives the opposing party of the opportunity to hear it and challenge its validity."[25] The worry is not only that the judge may consciously or otherwise favor one party over another before a word of proof has been heard, but may do so on the basis of misleading allegations and/or inadmissible facts that the adversary would have had no way of knowing were even advanced, much less have had an opportunity to answer.[26]

There are, to be sure, responses to such concerns. Most obviously, judges are not *supposed* to penalize parties for failure to settle. Additionally, judges routinely and unavoidably consider claims and documents that may be wholly inadmissible, and yet are expected to thereafter render decisions based upon the law and the proof. Judge Baer adds that, while it is hard to "categorically" state that a judge will never "inflict his wrath . . . on the party he believes kept him from reaching closure . . . it seems to me that such a judge would likely take sides at some stage of the litigation anyway."[27]

Finally, and quite aside from any question of efficiency or ethics, the reality is that while some judges genuinely enjoy aggressively settling cases and believe themselves to be good at it, "[s]ome judges believe that involvement in settlement tarnishes their position and that they were appointed (or elected) to adjudicate, not to arbitrate or mediate."[28] Put bluntly, some judges feel that they became a judge in order to be "a judge," not a middle management executive in the business of moving cases.

These, in any event, are the main arguments for and against encouragement of settlement and for and against pro-active judicial encouragement of settlements, as gleaned from literature that, in the main, arises from and relates to *federal court* experience and practice. Yet, the fact is that the New York State judges carry caseloads that go so far beyond their federal brethren and so far beyond the caseloads typically carried by judges in less populous and less litigious states as to significantly alter the analysis in multiple respects. No judge sitting in Supreme Court in any downstate county has the luxury of arranging several days of "country club dining" to settle a particular case on the calendar. And, while the calendar may not be as burdensome in some upstate locales, we somehow suspect that few if any New York cases have settled in court-initiated discussions at the local country club.

There are, nonetheless, three conclusions that are probably just as valid in New York as they are anywhere.

First, as in other jurisdictions, New York has some judges who are very "active" in effecting settlements and others who are less so, and this will likely continue to be the case for a variety of reasons.

Second, although the foregoing has compared judges who actively seek settlements with those who do not, such a comparison is an over-simplification. In reality, an individual judge may actively seek settlement in one case that the judge perceives is likely to settle with a little "push," but may make little effort to settle another case that the judge perceives as unlikely to settle.

Finally, while one suspects that there will always be some judges who are less sanguine and enthusiastic about the active pursuit of settlements, it is likely true that in New York, just as elsewhere, *the trend* towards pro-active involvement is increasing.[29]

The "Arsenal" a Court Might Use To Foster Settlement of Cases

Assuming that the judge has decided that she or he will attempt to "encourage" the parties to settle their case, a wide range of options – or, if you will, weapons – may be at the judge's disposal.

Few attorneys would take umbrage with *most* of the techniques and strategies that Professor Charles B. Craver advocated in his piece titled "Mediation Techniques Every Judge Needs to Master."[30] He advises that the best time to broker a settlement is "[s]hortly before the scheduled trial date," when the "immediacy of the approaching trial date induces most attorneys and their clients to acknowledge that increasing financial and psychological pressures militate in favor of a nonadjudicated resolution of their controversy," and when "opposing counsel have become sufficiently familiar with the relevant legal doctrines and operative facts to rationally assess the overall circumstances."[31]

Professor Craver advises the judge/mediator to "be an 'active listener.'"[32] "Litigants should have an opportunity to articulate their respective positions without significant interruption" and "[f]ull disclosure may be promoted through nonjudgmental but emphatic interjections such as 'I understand,' 'I see,' 'I understand how you feel,' 'um hum,' etc."[33] Craver observes:

> This can be an important cathartic process, permitting both sides to fully express their underlying feelings and beliefs in a relatively sympathetic atmosphere. The mediator is actively listening to their situation, and the opposing side is finally being compelled to understand the other side of the controversy.[34]

Craver explains that parties are "encouraged to formulate solutions that could not be achieved through adjudication."[35] Counsel may also be asked to summarize the *other* side's position, just to be sure that counsel has listened to and understands that position.[36]

Craver recognizes and advocates clear limits to what the judge should do when acting as a mediator, however. He states that the judge should never use "any tactics which might undermine lawyer or public confidence in the legal process," for the "short-term benefit from the use of questionable conciliation techniques would not outweigh the loss of respect for the judicial system such disreputable conduct would be likely to engender."[37] More specifically, "[i]t is never appropriate to employ deliberately deceptive tactics to take advantage of some unsuspecting party."[38] "Trial or motion judges who participate in settlement discussions should never make pretrial or trial rulings that are primarily intended to increase settlement pressure on recalcitrant litigants. Nor should they ever give parties the impression that they might take inappropriately adverse action if greater concessions are not forthcoming from an intransigent litigant."[39]

"Trial or motion judges who participate in settlement discussions should never make pretrial or trial rulings that are primarily intended to increase settlement pressure on recalcitrant litigants."

Yet, there are judges who routinely cross the boundaries drawn by Professor Craver. And there are those who would object to at least some of the techniques/routines Craver advocates. For example, Craver states that "clients should normally be required to attend the formal settlement conference so the mediator can ascertain their expectations and 'enlighten' them when necessary,"[40] a feature that does not enjoy universal approval. Craver also advocates separate sessions with opposing sides if the initial joint meeting has proved ineffective, albeit with the caveat that "separate sessions would most likely be unproductive . . . if one side is really opposed to this technique."[41] That too takes us one or more steps beyond the kindly, understanding figure who merely punctuates counsel's point with an occasional "I see."

In a 1980 survey of 963 lawyers and judges, the respondents identified 70 different judicial settlement techniques that they had observed or used.[42] "The seventy techniques ranged from talking with both lawyers together about the settlement to more coercive techniques such as penalizing or threatening a lawyer for a refusal to settle."[43] The interesting part is this: of those 70 techniques that the respondents had claimed to have used or seen used, 17 were judged to be unethical by 40% or more of the respondents.[44] The 17 techniques that were viewed as unethical are as follows:

1. giving advice to the lawyer with the weaker case;

2. speaking personally with the client to persuade the client to accept a settlement offer;

3. coercing lawyers to settle;

4. siding with the stronger party to force agreement;

5. penalizing the client for the attorney's actions;

6. delaying ruling to the disadvantage of the stronger side;

7. giving favorable rulings to the lawyer with the weaker case;

8. forcing the client to explain to the judge why he or she will not accept the settlement;

9. penalizing a lawyer for not settling (*e.g.*, with dismissal or mistrial);

10. relaying information to and from the client;

11. giving information to the lawyer with the weaker case;

12. threatening the lawyer for not settling (*e.g.*, with dismissal or mistrial);

13. threatening to declare a mistrial if a decision is not rendered by a certain time during the time the jury is deliberating;

14. discussing an attorney's recalcitrance with a senior member of the attorney's firm;

15. transferring the case to another district on the day of the trial, to force settlement rather than to have the trial far away;

16. threatening to discuss an attorney's recalcitrance with a senior member of the attorney's firm; and

17. ordering the defendant to pay the settlement figure to charity instead of to the plaintiff.

In reviewing this list of settlement techniques that survey respondents deemed questionable, it is obvious that some of them were phrased/labeled in a fashion likely to earn disapproval, and that the turn of a word here and there might make the tool far more palatable. For example, while few would say that it is proper or appropriate for the judge to *coerce* lawyers to settle (#3 above) or to *threaten* a lawyer or party with adverse consequences should they fail to settle the case (#12 above), the techniques might seem far less forbidding if we characterize them as *persuading* the lawyers to settle and *logically detailing* the consequences that might arise from a failure to settle.

To the extent that the list is supposed to represent those settlement techniques that at least some judges employ at some times, but that some attorneys (or judges) would deem unethical, inappropriate or ques-

tionable, the list is also incomplete. Most notably, the list does not include the technique discussed in the first paragraph of this article. That is, the list does not include the technique of directing a non-party insurance carrier to attend and/or participate.

With these caveats, however, the list above can certainly serve as an illustrative, albeit somewhat loaded, collection of *some* of the debatable techniques that a judge could *potentially* employ in an effort to broker a settlement.

Next issue: The extent to which New York's court rules, and the court's "inherent authority" to manage litigation, empowers a judge to foster settlement, and some suggested guidelines and limits on the judicial role in settlement.

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1. Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. Rev. 485, 502 (1985) ("Over 90% of all cases (both civil and criminal) are currently settled and taken out of the system and, thus, are unavailable for common law rule making.").
2. The forthcoming OCA report will indicate that there were over 200,000 dispositions in 2002, meaning that most dispositions were not settlements.
3. Such is one of the concerns currently being evaluated by Chief Judge Kaye's Commission on the Jury.
4. 22 N.Y.C.R.R. §§ 202.12, 202.26.
5. *See* Daisy H. Floyd, *Can The Judge Do That? – The Need for a Clearer Role in Settlement*, 26 Ariz. St. L.J. 45, 50–51 (1995).
6. *See* Menkel-Meadow, *supra* note 1 at 504–505.
7. Hon. Harold Baer, Jr., *History, Process, and a Role for Judges in Mediating Their Own Cases*, 58 N.Y.U. Ann. Surv. Am. L. 131, 141 (2001).
8. *See State of N.Y. v. Philip Morris, Inc.*, 179 Misc. 2d 435, 686 N.Y.S.2d 564 (Sup. Ct., N.Y. Co. 1998), *aff'd*, 263 A.D.2d 400, 693 N.Y.S.2d 36 (1st Dep't 1999).
9. *Id*. at 445.
10. *Id*.
11. Charles B. Craver, *When Parties Can't Settle – Mediation Techniques Every Judge Needs to Master*, 26 No. 1, Judge's J. 4, 4–5 (1987) (emphasis added).
12. 93 Yale L.J. 1073 (1984).
13. *Id.* at 1076.
14. *Id.* at 1075, 1086.
15. The terminology apparently varies with the speaker. Professor Menkel-Meadow reports, "The judges themselves characterize this issue as whether they should be 'active' or 'passive.' Academics debate whether judges should be 'managers' or 'adjudicators.'" Menkel-Meadow, *supra* note 1 at 488.
16. Baer, *supra* note 7.
17. *Id*. at 141.
18. *Id*. at 148.
19. *Id*. at 146.
20. *Id*. at 148.
21. Menkel-Meadow, *supra* note 1 at 493:

    > The first systematic study of the pretrial conference was undertaken by Maurice Rosenberg on mandatory conference, voluntary conference, and nonconference cases in New Jersey. That study reported findings, as yet uncontradicted, that mandatory pretrial conferences improved the quality of trial proceedings, but actually reduced the efficiency of the court by consuming judges' time in handling conferences, rather than in trying cases (citations omitted).

22. *Id.* at 507.
23. Susan M. Gabriel, *Judicial Participation in Settlement: Pattern, Practice, and Ethics*, 4 Ohio St. J. on Disp. Resol. 81 (1988).
24. Floyd, *supra* note 5 at 48.
25. Gabriel, *supra*, note 23 at 92–93.
26. *Id.* at 92 ("a judge may become exposed to information during informal pretrial proceedings that may not otherwise constitute admissible evidence at trial. Unfortunately, because 'a bell cannot be unrung,' the judge 'may [already] have a tainted view of the facts before the trial even begins'").
27. Baer, *supra* note 7 at 146.
28. James A. Wall, Jr. & Dale E. Rude, *Judicial Involvement in Settlement: How Judges and Lawyers View It*, 72 Judicature 175 (1988).
29. Floyd, *supra* note 5 at 50–51 ("it is clear that the number of judges taking an active role in settlement has increased in recent years, in part because of the growing concern over litigation delay and expense").
30. Craver, *supra* note 11.
31. *Id*. at 6.
32. *Id*. at 7.
33. *Id*.
34. *Id*.
35. *Id*. at 8.
36. *Id*.
37. *Id*. at 42.
38. *Id*.
39. *Id*. at 43.
40. *Id*. at 7.
41. *Id*. at 8.
42. James A. Wall, Jr., et al., *Judicial Participation in Settlement*, Mo. J. Disp. Resol. 25, n. 45 (1984).
43. *Id*.
44. *Id*.

Digging for Data

Today's Discovery Demands Require Proficiency in Searching Electronic Documents

BY MICHAEL M. WECHSLER AND MICHELE C.S. LANGE

As little as a decade ago, most law office operations relied on paper-based, "low-tech" methods – paper memorandums, paper documents in filing cabinets, paper meeting notes, paper communication. Some firms had begun to assign computers and e-mail accounts to a handful of "tech-savvy" practitioners, but there was still a great reluctance to change the way that the legal industry had been accustomed to doing business.

For the most part, the same could be said of the corporate atmosphere. Electronic discovery was not a familiar term to the average litigator or in-house counsel.

Today's corporate and law firm atmosphere could not be more different. Virtually every mode of documentation and communication has become electronic – e-mail, word processing software, laptops, faxes, databases, spreadsheets. No longer do clients store the vast majority of documents in a filing cabinet. In fact, 7 in 10 corporate documents are stored electronically, and almost 100% of all documents are created electronically.[1]

Keeping step with the proliferation of technology in the workplace, legal discovery has also added an "e" factor: e-discovery. In recognition of the reality that the vast majority of business is conducted electronically, lawyers now routinely seek production of their opponents' electronic data, and judges more frequently issue electronic document preservation orders. As a result, producing parties must develop and implement a plan to collect, analyze, categorize and produce e-mail, word-processed documents, spreadsheets, database information and more, in the most efficient and accurate manner.

What do the rules say with regard to electronic evidence? What is the optimal method for pursuing discovery of electronic documents? What will the court and opposing parties expect from you and your clients? How can technology help? This article addresses these questions and provides a roadmap for dealing with discovery of electronic documents.

Step 1: What Is Electronic Discovery?

Electronic documents include information created on an individual's computer using a word processor or stored and shared with others on the company's "file server." In working with the client's staff, counsel will find that data is commonly located on individual desktops and laptops, network hard drives, removable media (*e.g.*, floppy discs, tapes and CDs) and, increasingly, personal digital assistants (*e.g.*, Palm Pilots and Blackberries).

But in the case of electronic data, all is not as simple as it appears. E-data can exist in a myriad of different forms and places that are not so obvious – a company's old archive tapes that have long since been forgotten, an executive's handheld electronic organizer and mobile phone, and the memory in a fax machine that stores received data that cannot be printed immediately, such as when it runs out of paper. Data may also be in the possession of third parties, such as Internet service providers, and on the computer systems of other peripherally involved entities.

The Federal Rules of Civil Procedure and case law[2] specifically require the disclosure of "data compilations" (which is understood to include all forms of e-data, such as electronic files, databases and e-mails) following a full investigation of the case. This imposes a duty on attorneys to:

- Determine whether electronic data might be a legitimate part of the case.

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• Implement strategic e-discovery plans, including identifying, locating, retrieving, preserving and authenticating electronic evidence.

• Identify the most cost-effective means for responding to electronic discovery requests with minimum disruption to ongoing business operations of the client.

• Develop strategic plans for dealing with information technology systems and data of the client, the opposing party and third parties.

• Develop and implement data preservation plans.

• Formulate responses and objections to interrogatories and requests for production.

• Produce responsive documents to the opposing party, court or agency.

Step 2: Collecting the Data

After identifying the data sought and locating where it resides, counsel must collect the data for review.

It was common practice in the recent past for a partner responding to a discovery request to send a team of associates into a client's offices to copy and collect documents from the key users or "document custodians" who were likely to possess relevant materials. On average, 30,000 to 50,000 documents would be collected. This process was a feat, but not unconquerable. If the opposing party was extremely aggressive in pursuing e-mail and electronic documents, it was also commonplace to instruct the producing party to print those documents as well. Again, this was a feat, but not unconquerable as long as there were not that many documents or e-mail messages.

When working with electronic evidence today, the reality is that instead of 30,000 documents, 3 million documents are more likely, and printing them can prove most challenging. This increase can be explained by several factors, perhaps the most dominant being that electronic file storage is relatively inexpensive, especially in comparison with paper. Archiving millions of documents translates into the cost of printing all of those pages, organizing and placing them into boxes, and then finding physical space for long-term storage, such as in a warehouse.

If those millions of documents are in electronic form, they can be stored on a single tape the size of the palm of your hand. One 15 gigabyte computer hard drive contains approximately 1.25 to 1.5 million pages of documents. One 36 gigabyte network hard drive contains approximately 2.7 to 3.6 million pages, and most corporate enterprises have thousands of such hard drives this size or larger.

Practice Points: Defining the Scope of Electronic Discovery

At the beginning of any e-discovery project, counsel must define the scope of the project. Consider the following questions:

• What type of information is involved?

• What does the litigation team intend to do with the information once it is accessed? Do you want to simply look at the documents or are the relevant documents going to be produced to an opposing party, court or government agency?

• Do you want to be able to perform searches on the documents?

• How will the documents be reviewed for responsiveness and privilege?

• What are the deadlines for completing the discovery review?

Opening and printing this many documents is simply not feasible. In some cases, especially regarding electronic files, such conduct can even result in spoliation of evidence if any of a document's content or its valuable "metadata" is altered. Metadata is information about a document or "the data about the data," which is typically saved automatically within a document. Examples include information about who created a file, the date it was created and when it was last modified. For e-mail messages, header information typically includes who sent the e-mail, the list of the addressees and the date it was sent.

Step 3: Filtering the Data

In most cases, it makes sense to keep the data in an electronic format. It can be searched more quickly and efficiently, it can be branded easily with Bates numbers or other information, it can be redacted and annotated, and it can be catalogued and reorganized for production, depositions or trial.

E-discovery experts, the firm's litigation support department or the client's information technology department can create copies of the data without making any alterations and place it in a central storage location. Not every electronic document found within the files retrieved from a document custodian or on backup tapes is responsive or relevant to a discovery request, however. E-discovery filtering engines can be used to scan the data, eliminating the "jokes, recipes and spam" from the potentially responsive files and e-mails.

Some basic commercially available e-discovery filtering engines can be used by the firm's litigation support

Choosing a Database For Litigation Support

When choosing a litigation support database, asking the following questions can help to assure that the final selection is capable of meeting a firm's needs:

- How is the data imported into the litigation support database?
- What file formats and e-mail formats can the litigation support database handle?
- How much data can the litigation support database handle?
- Are the documents' metadata and text formatting preserved?
- Are the documents searchable? Are the attachments searchable?
- Can the documents be placed into responsive, non-responsive, privileged and other categories?
- Can the documents be redacted, highlighted, annotated, etc.?
- Does the in-house support have sufficient resources to handle a database of this nature and size?

department or the client's information technology staff. For large amounts of data or complicated types of data, however, the most efficient strategy is likely to be to seek the help of an e-discovery expert's proprietary filtering technology. Such proprietary technology can narrow the universe of data down to a smaller, more manageable set by providing enhanced options to better define a more complex but precise filtering process, such as:

- Limiting the universe of data to only those key individuals involved in the case.
- Limiting the universe of data to documents with specified file attributes, such as whether documents contain certain keywords, are of certain document types or were created or last accessed within a specified date range, etc.
- Removing or flagging documents, e-mail, and attachments by keyword searching for relevancy and privilege.
- Removing duplicate documents from the initial review and repopulating the collection for the final production.
- Removing extremely large files and reviewing for relevancy in the file's "native" format.
- Eliminating blank pages.
- Limiting spreadsheet and database files to a certain number of pages per tab or table.

Step 4: Review Options

After the data on the hard drives, backup tapes and servers has been gathered and culled using filtering technologies, the coordinating attorney must determine the data format for the internal review and contemplate the next step – the production to the court, governmental agency and/or opposing party. In most cases, two options are available for review – paper and electronic.

Paper review If a paper review is chosen, the electronic documents are printed. It is important that counsel verify that each document's metadata is printed to a slip-sheet or cover sheet in front of the document or is branded to the document as an overlay on the corners of the document. If this does not take place, valuable information about the document (such as size and modification dates) and e-mail (such as "bcc" recipients and attachments) could be lost because this information is not printed when the "print" button is pushed.

Counsel also needs to ensure that the team handling the printing can process the volume of documents that potentially will need to be produced. If the e-discovery is performed by an electronic evidence expert, pay special attention to ensure that the expert does not hand off the printing duties to a third party, which diminishes the client's flexibility and control over the project.

Electronic review The other option when reviewing documents for responsiveness or privilege is using some type of litigation support software or Web-based document repository. Using an electronic reviewing option is becoming more appealing for litigators faced with electronic document production, because it typically provides greater flexibility and efficiency than paper.

Such a review generally occurs in three ways: (1) looking at a collection of "loose" electronic files in their "native" format on a CD-ROM or DVD; (2) using a local database (such as Summation or Concordance); or (3) via an online document review repository – a Web-based database into which the data files have been loaded, usually after they have been converted to a standard file format for viewing, categorization and searching.

Although an electronic review may be conducted exclusively in one of these three general formats, all three are frequently used in varying degrees when appropriate and optimal. For example, are there documents that should be viewed in their native format? Will the data be imported into a localized litigation support system (*i.e.*, Concordance, Summation, etc.) that is not Web-based? Should the trial team consider entering the data into an e-discovery expert's online electronic document repository? Each of these approaches is discussed in the following sections.

CONTINUED ON PAGE 22

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Native review Native data refers to documents still in the original file format used to create them (*i.e.*, the specific software application that was used). For example, a native Microsoft Word file is a file in .doc format. The file extension ".doc" at the end of the "file name" on the computer tells the computer that the document is in Microsoft Word format. This Microsoft Word file can only be opened, viewed or modified in Microsoft Word or a compatible program to which it can be converted (such as another word processing program that can understand Microsoft Word files).

When files are reviewed in their native formats, they are typically copied from the hard drive of the person who created them to a CD-ROM or DVD and the attorneys doing the review use the same software. In this case, the native document is not processed or converted to a standard file type such as .tiff or .pdf. in order to facilitate viewing, review or production.

One of the emerging debates in the legal community on the topic of e-discovery is whether electronic documents and e-mail should be converted to a "uniform" format (such as a .tiff – "tagged image file format" – best thought of as a picture or image of the original document) or whether they should be kept in their native format for document review and production. This decision, which often occurs at the beginning of an e-discovery project, can affect almost every aspect of the e-discovery process – preservation, metadata, searchability and cost.

Some believe that reviewing native files as a whole is somehow more holistic, or that it offers some "special" information, or that it is more cost-effective than reviewing documents converted to .tiff or .pdf – perhaps because the files are reviewed exactly as they were created and no data conversion is needed. A select group of file types such as spreadsheets are more conducive to native review, *e.g.*, Microsoft Excel worksheets, because hidden cells, formulas and calculations may not be visible using other software or methods.

Native Review: Weaknesses and Strengths

"Native review," the process of examining documents in the electronic file format that was used to create them, generally has the following disadvantages:

• Data must be viewed using the original software application, including the proper version of the software. When more than one person (or hundreds of people, as is often the case) is conducting the review, the correct applications must be purchased and loaded on every machine used for document reviewing. This means that the firm needs to pay for and install dozens of applications (*e.g.*, MS Word, MS Outlook, MS Excel, WordPerfect, etc.) and all of the corresponding versions (97, 2000, XP, 2003, v3.0, v4.0, etc.) simply to begin the review.

• Searches across a native document universe are relatively slow and unwieldy. For example, using the "search" feature in Microsoft XP or the "look for" feature in MS Outlook can be rather "hit and miss" depending on the search parameters selected. Such features usually do not search e-mail attachments as well. Locating and viewing keywords sought typically requires opening each document in its native application and then searching to find the instances of each keyword. Metadata searching may also be significantly limited or inefficient – as opposed to stripping out the metadata into a searchable database, as is done in most other electronic review methods.

• With native file review there is a high potential for altering the native files. For example, word processing programs typically store "last modified" and "last accessed" dates in each document's metadata. The simple act of opening the file for review, even when no changes are made, will likely change the document's last accessed date, compromising the authenticity of the document.

• Going from review to production may not be a simple, transparent process. Because native file applications were not built for e-document review, some of the standard functionality built into an online repository, such as creating redactions and annotations, is not available. Bates number overlays also cannot be placed on native files.

The strengths of the native review option generally include the following:

• There is a potential for cost savings. The producing party does not have to pay for conversion of the data to a common file format (*e.g.*, .tiff, .pdf, etc.).

• Native documents appear exactly as they appeared to the custodian who created and maintained them.

• Reviewers can see all of the application's hidden features, such as spreadsheet formulas, tracked changes and links between documents, which might be lost when converting to a standard file format.

Others believe that conversion of files to a uniform format is the best choice because it allows the lawyer all of the advantages of high-speed processing technology, and there is no need to have "native" applications on every computer used in the review. The general pool of files may be best reviewed in a common file type, while spreadsheets represent an exception that can be easily isolated. In short, many believe that document conversion is the fastest and most inexpensive method for narrowing down thousands and millions of electronic documents for review and ultimately for finding and producing responsive documents. (See the box on page 22 for a detailed examination of the weaknesses and strengths of native review.)

Litigation support databases Litigation support databases (*i.e.*, Concordance, Summation, etc.) are very common today. These programs are localized (meaning they run on individual machines and are not Web-based) and were designed for managing and organizing documents in litigation.

Since the e-document explosion, most of these programs have added some basic electronic discovery capabilities. Attorneys should work closely with their firm's information technology and litigation support staffs to determine whether their litigation support database can handle the e-discovery tasks associated with the case at hand.

Online repositories Electronic document repositories represent the most modern document management and review tools. With these software programs, reviewers remotely access their documents via a secure Internet connection and review each document file by file.

The files must be converted to a standard file format or undergo some sort of text extraction in order for the documents to be placed into a Web-based tool with searching capabilities. Each page of a document is placed into a database after being converted into two separate components: (1) a graphic image (such as a .tiff, .pdf or .jpg format) that is able to be viewed in a standard browser, along with (2) an accompanying file that contains the text and metadata for each page.

In deciding which approach is the most cost-effective for a particular case, counsel should compare the total cost of the native review or litigation support database review with the total cost quoted by an electronic evidence expert, including the data load and hosting charges associated with the online repository effort. One of the concerns associated with converted file review is cost, given that an electronic evidence expert using proprietary conversion technology is usually needed to complete the work. Nevertheless, studies show that searching, viewing, classifying and marking data electronically saves time and money.[3] The ability to conduct more efficient and effective reviews in conjunction with the benefits of Bates numbering, automatic log creation and transparent overlays for production (*e.g.*, redactions) translates into lower costs at the end of an engagement as well as the ability to provide superior attorney work product.

Step 5: Production Options

Once the review is complete and all documents have been identified as responsive, non-responsive, privileged, or the like, counsel must focus on producing the responsive documents to the opposing party, court or government.

The two main questions that must be addressed at this stage are: In what format will the documents need to be produced? And, will the court, opposing party or government accept documents in an electronic format? These questions are best addressed by counsel long before the document review ever begins, typically at some of the first discovery planning conferences with the opposing party or court.

Although past custom has generally been to produce documents to the opponent in paper, it is generally accepted that production in electronic format may be demanded when available.[4] Given the fact that an overwhelming majority of corporate documents now exist in electronic form, production in electronic format should not come as a surprise to counsel. It is important that the requesting party make a strategic decision with regard to the format in which the data should be delivered, especially in light of the considerations described above concerning the ability to conduct an effective review of the evidence received.

The producing party also needs to carefully consider the format for production early in the evidentiary process. If a native format is agreed upon by the parties,

Average filtering reduction experienced using e-discovery experts

Type of storage medium	Approximate number of pages before filtering (assuming media is full to capacity with a mixture of file and email data)	Approximate number of pages after filtering
3.5" Diskette (1.44 Megabytes)	108 – 144	27 – 36
CD-Rom (625 Megabytes)	46,875 – 62,500	11,719 – 15,625
Hard Drive (15 Gig)	1,250,000 – 1,500,000	37,500 – 50,000
Network Hard Drive (36 Gig)	2,700,000 – 3,600,000	675,000 – 900,000
Backup Tape (40 Gig)	3,000,000 – 4,000,000	750,000 – 1,000,000

Selecting a Repository For Electronic Data

In selecting a repository for electronic data, the following features and questions should be considered:

• **Speed** – Look for a software package that provides for speedy document viewing. How many seconds does it take to log on to the system? How many seconds does it take to navigate between documents in the system?

• **Security** – The data review repository should handle all security issues. How are the documents protected against interception by someone else on the World Wide Web?

• **Ease of Use** – The software's graphical user interface (GUI) should be easy to use. The layout should be familiar (*i.e.*, similar to a common word processing or e-mail system such as Microsoft Office) and simple to navigate to the commonly used functionalities. What does the program's GUI look like? How many hours of training are necessary before the review team can begin looking at documents?

• **All-inclusive Software** – Can standard software be used, such as Microsoft's Internet Explorer? Must any additional software or licenses be purchased before the review begins? Are there any hidden costs associated with the review?

• **Robust Functionality** – These systems are constantly changing, offering the customer more advanced features and functionality. Does the repository offer note-taking? Highlighting? Redactions? Redaction coding? Privilege log creation? More?

• **Searching** – Being able to search the database of documents is one main advantage of keeping documents in an electronic format. How does the repository's searching work? Can the metadata be searched? Are notes and comments searchable? Is advanced searching (conceptual searching or fuzzy searching) available?

issues may exist concerning how to deal with files that contain privileged information, because redaction of portions of native files is not available. It is good practice to have a discussion with the law firm's litigation support manager or e-discovery expert early in the discovery process about the production options available at the end of an engagement.

Conclusion

Now more than ever, attorneys are finding that a basic understanding of technology (and in some cases thorough computer proficiency) is essential to litigate a matter effectively. No longer can parties or their counsel claim to be unaware of digital data. Instead, judges are expecting e-savvy litigators in their halls of justice.

The bottom line: e-discovery presents new challenges for today's litigator. The good news is that the problem is not unconquerable. Litigators have several options for dealing with electronic documents and e-mail. The challenges that must be addressed are understanding the process and options, and then finding the most appropriate, cost-effective solution for each particular case.

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1. Kevin Crane, Designing a Document Strategy, McGrew & McDaniel Group, Inc. (2000); Lori Enos, *Digital Data Changing Legal Landscape*, E-Commerce Times (May 16, 2000).
2. *See Rowe Entm't, Inc. v. The William Morris Agency*, 2002 WL 975713 (S.D.N.Y. May 9, 2002) ("Rules 26(b) and 34 for the Federal Rules of Civil Procedure instruct that computer-stored information is discoverable under the same rules that pertain to tangible, written materials."); *Linnen v. A.H. Robins Co.*, 1999 WL 462015 (Mass. Super. June 16, 1999) ("A discovery request aimed at the production of records retained in some electronic form is no different in principle, from a request for documents contained in any office file cabinet.").
3. George Socha & APS Document Management Group, "Determining Your Return on Investment (ROI) for Automating Litigation Support," <http://www.pagebid.com/newsletter/feb_2002.asp>.
4. *See Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 WL 649934 (S.D.N.Y. Nov. 3, 1995) ("The law is clear that data in computerized form is discoverable even if paper 'hard copies' of the information have been produced. . . . [T]oday it is black letter law that computerized data is discoverable if relevant.").

Drafting Matrimonial Agreements Requires Consideration of Possible Unconscionability Issues

By Paul Bennett Marrow and Kimberly S. Thomsen

The doctrine of unconscionability presents unique challenges for the draftsperson of any type of matrimonial agreement. Unconscionability issues affect what goes into and what is left out of the prenuptial agreement, the separation agreement and the stipulation of settlement as well as any amendments or modifications.

The rules governing actual application are unique to the different types of agreements encountered in the matrimonial law practice. An understanding of these complexities is essential to assuring that agreements withstand challenges based on the doctrine. The implications are far-reaching, even extending to circumstances involving gay and lesbian unions not otherwise recognized by New York law.

Overview

The theory of unconscionability is rooted in the common law and is incorporated into the statutory schemes governing marriages and divorce. In the eyes of the common law:

> [An] unconscionable bargain has been regarded as one "such as no [person] in his [or her] senses and not under delusion would make on the one hand, and as no honest and fair [person] would accept on the other" (*Hume v. United States*, 132 US 406, 411), the inequality being "so strong and manifest as to shock the conscience and confound the judgment of any [person] of common sense" (*Mandel v. Liebman*, 303 NY 88, 94).[1]

The traditional method of making determinations about unconscionability is rooted in the common law analysis of commercial contracts. In the commercial environment, courts evaluate both procedural and substantive factors:

1. Procedural unconscionability is about the circumstances surrounding the negotiation and execution of an agreement.

2. Substantive unconscionability is about the operation of a given term.

The vast majority of cases hold that both forms of unconscionability must be involved for equity to intervene.[2]

Traditional common law also requires that a contract term be evaluated in light of the circumstances that existed when the agreement was entered into, and it bars any consideration of changes in circumstances in the interval between contractual inception and a petition for relief in equity.[3] These rules are cast against a backdrop that requires accountability for agreeing to any set of terms and permits equitable intervention only when there is a risk that the integrity of the contracting process will be undermined.

By contrast, matrimonial agreements of all types involve a relationship in which society has vested interests that go beyond a desire to preserve the integrity of the contract process. At the very least, the state has an interest in the statutory obligations assumed when people marry and an interest in discouraging contractual arrangements that might render a contracting party a ward of the state. With these interests in mind the New York Domestic Relations Law ensures continuing jurisdiction over matrimonial agreements of all types[4] and permits consideration of an application for modification based on a showing of extreme hardship on either party.[5] In addition, the Domestic Relations Law also mandates procedural safeguards in the form

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of mandatory disclosure with the result that the inquiry about unconscionability is limited to a great degree to just the substantive side of the equation.[6]

Specifically, in New York, matrimonial agreements operate in the statutory setting of § 236 of the Domestic Relations Law (DRL)[7] and § 5-311 of the General Obligations Law (GOL).[8]

DRL § 236B(3) permits contractual arrangements dealing with four areas of interest to the draftsperson:

1. testamentary dispositions and waivers of the right of election;

2. ownership, division or distribution of separate and marital property;

3. spousal maintenance; and

4. custody, care, education and maintenance of children of a marriage.

Only one portion of DRL § 236B(3), the subsection dealing with spousal maintenance, mentions unconscionability. It requires that all terms involving the amount and duration of maintenance be fair and reasonable when the agreement is made and not unconscionable at the time of entry of final judgment. These conditions are substantive in nature – *i.e.*, they speak to the operation of the terms of the agreement on the parties.

Matrimonial agreements involve a relationship in which society has vested interests that go beyond a desire to preserve the integrity of the contract process.

The maintenance provision directs that such terms must comply with the mandates of GOL § 5-311. That statute provides, in part, that contracts for support cannot be structured so as to cause either or both parties to become incapable of self-support so as to become a public charge.

DRL § 236B(3)(2), which grants parties the right to make provision for the ownership, division or distribution of any property, makes no mention of unconscionability.[9] This does not mean that the doctrine is inapplicable. DRL § 236 was adopted in 1980. Three years earlier, the Court of Appeals decided *Christian v. Christian*,[10] which holds that agreements for the division of any property are subject to the traditional doctrine because such agreements

> . . . unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith. There is a strict surveillance of all transactions between married persons, especially separation agreements.[11]

In short, it appears that DRL § 236B(3)(2) authorizes property settlement agreements, while *Christian* and its progeny subject those agreements to scrutiny pursuant to the traditional application of the doctrine of unconscionability at common law.[12] This perspective is consistent with the concerns of the state that a property settlement agreement could result in the impoverishment of one of the parties.

But for all that these statutes do accomplish, they do not define what is meant by an "unconscionable" agreement. Courts are charged with making that determination on a case-by-case basis. Meeting that challenge, the courts have created a system of situation-specific applications that require the attention of the draftsperson.

Agreement by Agreement

Prenuptial or antenuptial agreements and reconciliation agreements The vast majority of challenges to prenuptial agreements involve provisions dealing with ownership, division or distribution of separate and marital property and, to a lesser degree, spousal maintenance. Challenges can be made in connection with an action for separation or divorce or, if not merged, in a post-judgment action pursuant to the Domestic Relations Law.

Prenuptial agreements are presumed to be valid[13] and to reflect the intentions of the parties, even if the terms turn out to be a bad deal for either one.[14] Conclusory allegations of unconscionability are not sufficient to justify a hearing on the merits. Moreover, the standard set forth in *Christian* has been recognized to be harder to meet than the criteria set forth in DRL § 236.[15]

Property disposition agreements authorized by the Domestic Relations Law are reviewed as of the time the parties enter into them. The *Christian* decision contains language suggesting a multi-faceted test, with the reviewing Court taking into account more than just the substantive consequences of the agreement, and yet the decision makes no reference to the procedural or substantive nomenclature. Nevertheless, a careful reading of the decision leads to the conclusion that the Court was concerned first and foremost with the procedural aspects of the doctrine.[16] Subsequent decisions involving prenuptial agreements are unclear about exactly what is required, but even these decisions contain descriptive language portraying evidence of procedural or substantive factors.[17] The *Christian* decision does mandate that "[i]f the execution of the agreement . . . be fair, no further inquiry will be made."[18] This declaration, which at first blush is chilling, is understandable in light of the same Court's concern with the fiduciary relationship involved – "requiring the utmost of good faith."

Spousal maintenance provisions are sometimes included in prenuptial agreements, and disputes are usually

Checklist for Matrimonial Agreements

When drafting matrimonial agreements, consideration of the following issues can help the agreement survive a later claim of unconscionability.

1. Determine which areas of interest will be dealt with in the agreement.

2. Determine whether the commercial nomenclature for unconscionability is likely to come into play.

3. Recite the extent of all disclosure by the parties with respect to financial matters.

4. Indicate the details concerning counsel for all parties. If one party is not represented by counsel, indicate why and what efforts have been made concerning the retention of counsel. Both parties should be required to acknowledge that they were given full opportunity to seek the advice of counsel and both should disclaim that one attorney represented them both.

5. Where applicable, include a statement of acknowledgment by the parties that any imbalance in the distribution of separate and marital assets is deemed not to be an indication of unconscionability.

6. If an agreement for spousal maintenance relieves either or both of such an obligation, indicate that the parties are aware that the provision is subject to the terms of the General Obligations Law.

tied to those that call for a mutual renunciation of claims for support and maintenance. These agreements are, of course, subject to DRL § 236B(3) and (9), and GOL § 5-311. Conclusory allegations that such provisions create conditions that violate the GOL are not sufficient for a court to address the issue of unconscionability.[19]

Separation agreements and stipulations of settlement Challenges to separation agreements on grounds of unconscionability are broad and all-encompassing. Those involving only the disposition of separately owned and marital property are resolved by applying the principles set forth in *Christian*. These cases require some evidence of procedural mischief as a prerequisite to reviewing the substantive aspects of the agreement. Thus, agreements drafted with one attorney ostensibly representing both parties are sufficiently suspect to require further inquiry.[20]

Similarly, preliminary evidence of mental distress is sufficient to create an inference of unconscionability, warranting a hearing to review the substantive operation of a separation agreement.[21]

Separation agreements are not *per se* unconscionable simply because of an unequal division of marital property. Courts will look to the text of the agreement to determine issues such as whether both parties were represented by counsel and the extent of disclosure about the financial circumstances of the parties.

Procedural unconscionability is typified by overreaching. Overreaching has been defined to exclude self-delusion and disappointment.[22] However, indicators such as one party's having full control over all marital assets and income, the dominant party's attorney drawing the agreement and the other party not having any independent counseling, little or no financial disclosure and an agreement that awards all of the marital assets to the dominant party, if found together, have been found to be as a matter of law evidence of overreaching.[23]

Still, such indicators, taken individually, do not necessarily suggest overreaching. Individual factors have to be considered within the entire framework of a separation agreement, and it is the cumulative impact that eventually leads to a finding that a given separation agreement "shocks the conscience."[24] Where a party makes a conscious decision not to seek the advice of an attorney, that decision cannot be overlooked in determining the issues involved in overreaching.[25]

Provisions in a separation agreement that prescribe spousal maintenance are subject to review at the time of a final judgment and, at that time, the court's evaluation is usually made entirely on the basis of the substantive provisions of the agreement.[26]

Stipulations reached in open court during an ongoing proceeding can be attacked as being unconscionable, the immediacy of judicial review notwithstanding.[27] Thus, where a stipulation is arrived at in open court but is based on erroneous findings of a trial court, and that yields a substantively unconscionable result, the stipulation can be vacated.[28]

Similarly, a stipulation can be vacated where a party appears *pro se* and is put under pressure from the court to settle under circumstances that should have alerted the court to the need to become actively involved to avoid an unconscionable result.[29]

These rules notwithstanding, mere conclusory allegations that a stipulation is unconscionable are insufficient to justify judicial intervention of any kind.[30]

And, finally, where a party to a stipulation has received a substantial benefit, such as the payment of cash or the transfer of property pursuant to the terms of a stipulation, that party is deemed to have ratified its terms and cannot claim unconscionability.[31]

Implications for Homosexual Unions

GOL § 5-311 reflects public policy, and yet is limited to support and maintenance arrangements made by a *husband and wife*. An agreement that conflicts with public policy is *per se* unconscionable.[32] The basis for the pub-

lic policy as stated in the provision of the GOL is obvious: when a man and woman are united in marriage they accept the obligation to support one another in a manner that will not involve the state in the financial consequences of separation or divorce. Clearly public policy is to protect the state from having to assume financial responsibility for one or both parties to a marriage because of decisions made by the parties.

But this provision of the GOL is specific in the declaration that the stated public policy only applies to a man and woman who have been legally united in marriage. By its terms, homosexuals are not included in this statement of public policy. From this it seems reasonable to conclude that any agreement between homosexual partners for maintenance is not subject to the unconscionability provisions of the DRL, the GOL and the doctrine of *Christian*. This does not mean that such an agreement is *per se* void. It does mean that such an agreement would be interpreted in the same manner as a commercial agreement. Accordingly, it follows that, to establish unconscionability, the moving party would have to show evidence of both elements, procedural and substantive, to prevail. In short, the threshold for establishing unconscionability in situations involving homosexual unions is higher than that afforded a legally married heterosexual couple.

Does this make sense if the overriding concern embedded in the GOL is to protect society from being burdened by adverse consequences resulting from improvident private arrangements concerning support and maintenance? Moreover, does not such a double standard deny parties to a homosexual relationship equal protection under the law? These questions are for the moment unanswered, although recent decisions in Massachusetts and here in New York suggest that such double standards are inappropriate and unconstitutional.[33]

Conclusion

When attempting to define pornography, Justice Stewart wrote: "I could never succeed in intelligibly doing so. But I know it when I see it."[34] Most matrimonial practitioners will probably agree that this statement seems equally apropos when it comes to trying to define what is meant by "unconscionable."

What is very clear is that the issue of unconscionability cannot be ignored. If an attorney pays careful attention to the details of the circumstances surrounding negotiation and acceptance of the terms of the agreement, as well as the operation of the terms on the parties and the state, he or she will be in a much better position to draft something that will withstand judicial scrutiny and adequately protect the client.

In the final analysis, unconscionability is not an issue if both parties can be shown to have made full disclosure

of their respective circumstances and to have been given adequate opportunity to fully and objectively evaluate all the implications to be drawn from such disclosure.

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1. *Christian v. Christian*, 42 N.Y.2d 63, 71, 396 N.Y.S.2d 817 (1977).

2. *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 537 N.Y.S.2d 787 (1988); *State v. Avco Fin. Serv. Inc.*, 50 N.Y.2d 383, 429 N.Y.S.2d 181 (1980).

3. In *Pennise v. Pennise*, 120 Misc. 2d 782, 787–88, 466 N.Y.S.2d 631 (Sup. Ct., Nassau Co. 1983), the court explained:

   > Maintenance agreements are intended to take effect in the future and hence are inherently weakened by the inability of the parties to accurately foresee their future circumstances. In addition, the level of maintenance can spell the difference between feast and famine and thus implicates very strong public concerns that a spouse not become a public charge.
   >
   > On the other hand, property dispositions do not normally have the same impact on a spouse's standard of living as do maintenance agreements. Furthermore, the Legislature clearly intended to encourage property dispositions by contract, as an alternative to the previous disposition of property through title ownership. Obviously, the stability, and hence the efficaciousness, of such agreements would be severely undermined if they could be overturned years after execution upon a finding that an agreement was "unfair" when made or that it became "unconscionable" over time.

   This has implications involving the statute of limitations, CPLR 213. *Compare Bloomfield v. Bloomfield*, 97 N.Y.2d 188, 738 N.Y.S.2d 650 (2001), *with Frieman v. Frieman*, 178 Misc. 2d 764, 680 N.Y.S.2d 797 (Sup. Ct., Nassau Co. 1998), *and Zipes v. Zipes*, 158 Misc. 2d 368, 599 N.Y.S.2d 941 (Sup. Ct., Nassau Co. 1993).

4. *See Pintus v. Pintus*, 104 A.D.2d 866, 480 N.Y.S.2d 501 (2d Dep't 1984) (holding that arrangements sharing the contractual characteristics of a surviving separation agreement are included in the statutory use of the term "separation agreement").

5. DRL § 236B(9)(b); *see Beard v. Beard*, 300 A.D.2d 268, 751 N.Y.S.2d 304 (2d Dep't 2002); *Zinkiewicz v. Zinkiewicz*, 222 A.D.2d 684, 635 N.Y.S.2d 678 (2d Dep't 1995); *In re Alexander*, 203 A.D.2d 949, 612 N.Y.S.2d 97 (4th Dep't 1994).

6. *Klein v. Klein*, 246 A.D.2d 195, 676 N.Y.S.2d 69 (1st Dep't 1998); *Gilsten v. Gilsten*, 137 A.D.2d 411, 524 N.Y.S.2d 936 (1st Dep't 1988). *See Tuckman v. Tuckman*, 112 Misc. 2d 803, 447 N.Y.S.2d 654 (Sup. Ct., Rockland Co. 1982).

7. DRL § 236B(3):

   > Agreement of the parties. An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. . . . Such an agreement may include (1) a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will; (2) provision for the ownership, division or distribution of separate and marital property; (3) provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of section 5-311 of the general obligations law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment; and (4) provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of section two hundred forty of this article. Nothing in this subdivision shall be deemed to affect the validity of any agreement made prior to the effective date of this subdivision.

8. GOL § 5-311:

   > Except as provided in section two hundred thirty-six of the domestic relations law, a husband and wife cannot contract to alter or dissolve the marriage or to relieve either of his or her liability to support the other in such a manner that he or she will become incapable of self-support and therefore is likely to become a public charge. An agreement, heretofore or hereafter made between a husband and wife, shall not be considered a contract to alter or dissolve the marriage unless it contains an express provision requiring the dissolution of the marriage or provides for the procurement of grounds of divorce.

9. Does this imply that there was a legislative mistake and that what was really intended was that the entire of subpart (3) was intended to have application to the entirety of DRL § 236B(3)? The better answer would appear to be in the negative. See discussion in *Zipes v. Zipes*, 158 Misc. 2d 368, 376, 599 N.Y.S.2d 941 (Sup. Ct., Nassau Co. 1993).

10. *Christian v. Christian*, 42 N.Y.2d 63, 396 N.Y.S.2d 817 (1977).

11. *Id.* at 72 (citations omitted).

12. *Goldman v. Goldman*, 118 A.D.2d 498, 500 N.Y.S.2d 111 (1st Dep't 1986); *Pennise v. Pennise*, 120 Misc. 2d 782, 466 N.Y.S.2d 631 (Sup. Ct., Nassau Co. 1983); *compare Zipes*, 158 Misc. 2d 368.

13. There are five indispensable requirements for a valid prenuptial agreement:

    1. There must be complete financial disclosure by each party to the other. *See In re Greiff*, 92 N.Y.2d 341, 680 N.Y.S.2d 894 (1998).

    2. Each party must be separately represented by counsel of his or her choosing and without any suggestion by the other as to the choice. However, the failure of one party to be separately represented is not *per se* fatal if the independent selection is knowingly waived. *See Levine v. Levine*, 56 N.Y.2d 42, 451 N.Y.S.2d 26 (1982).

    3. Duress and emotional anxiety can't be a factor in the acceptance of the agreement.

    4. The document must be acknowledged in the same form as is required for a deed to be recorded. *Matisoff v. Dobi*, 90 N.Y.2d 127, 659 N.Y.S.2d 209 (1997).

    5. The agreement must comply with the DRL and the GOL.

14. *Clermont v. Clermont*, 198 A.D.2d 631, 603 N.Y.S.2d 923 (3d Dep't 1993), *appeal dismissed*, 83 N.Y.2d 953, 615 N.Y.S.2d 877 (1994).

15. *Zipes*, 158 Misc. 2d 368; *Pennise*, 120 Misc. 2d 782. *See Panossian v. Panossian*, 172 A.D.2d 811, 569 N.Y.S.2d 182 (2d Dep't 1991).

16. *See Zagari v. Zagari*, 191 Misc. 2d 733, 735, 736, 746 N.Y.S.2d 235 (Sup. Ct., Monroe Co. 2002):

> The *Christian* test is a two part test. There must be manifest unfairness coupled with overreaching. That the Court of Appeals was more concerned with the circumstances surrounding the execution of a marital agreement rather than the substance of the agreement itself is borne out in these passages from *Christian*: "These principles in mind, courts have thrown their cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity." Also, "when there has been full disclosure between the parties, not only of all relevant facts but also of their contextual significance, and there has been an absence of inequitable conduct or other infirmity which might vitiate the execution of the agreement, courts should not intrude so as to redesign the bargain arrived at by the parties on the ground that judicial wisdom in retrospect would view one or more of the specific provisions as improvident or one-sided." (citations omitted)
>
> * * *
>
> *Christian* and the cases decided thereafter clearly are focusing on procedural unconscionability. The inquiry is whether there was any fraud, overreaching or duress exhibited in the execution of the agreement which caused the bargain to be manifestly unfair. The overall circumstances between the parties existing at the time the agreement was entered into is of paramount concern. Usually, this type of determination can only be made after trial. It certainly cannot be made simply by only looking at the agreement itself. It is for this reason that all of the cases except two cited by defendant were decided after trial. In the two cases where no triable issues of fact were found, the courts had some proof of the parties' relative circumstances at the time of the agreement before it.

But see Clermont, 198 A.D.2d 631.

17. *Compare* cases cited in note 3 *supra.*

18. *Christian v. Christian*, 42 N.Y.2d 63, 73, 396 N.Y.S.2d 817 (1977).

19. *Valente v. Valente*, 269 A.D.2d 389, 703 N.Y.S.2d 206 (2d Dep't 2000); *Clanton v. Clanton*, 189 A.D.2d 849, 592 N.Y.S.2d 783 (2d Dep't 1993).

20. *Vandenburgh v. Vandenburgh*, 194 A.D.2d 957, 599 N.Y.S.2d 328 (3d Dep't 1993); *see Pennise v. Pennise*, 120 Misc. 2d 782, 788–89, 466 N.Y.S.2d 631 (Sup. Ct., Nassau Co. 1983):

> Moreover, a clear inference of overreaching arises since it is undisputed that the document was drafted by plaintiff's attorney and signed by defendant when she was not represented by counsel. Although the agreement contains a provision which states that the parties had consulted with counsel prior to its signing, plaintiff's attorney admits that he was aware that defendant had not consulted with any other attorney before the document was executed. Under these circumstances, defendant is entitled to a hearing at which she can seek to prove that the second stipulation was so unconscionable when made that it should not be enforced. (citations omitted)

21. *Compare Cardinal v. Cardinal*, 275 A.D.2d 756, 713 N.Y.S.2d 370 (2d Dep't 2000), *with Lyons v. Lyons*, 289 A.D.2d 902, 734 N.Y.S.2d 734 (3d Dep't 2001) (where a party's claim of chronic alcoholism was rejected as being unsubstantiated).

22. *Groper v. Groper*, 132 A.D.2d 492, 496, 518 N.Y.S.2d 379 (1st Dep't 1987).

23. *Tal v. Tal*, 158 Misc. 2d 703, 601 N.Y.S.2d 530 (Sup. Ct., Nassau Co. 1993).

24. *Lounsbury v. Lounsbury*, 300 A.D.2d 812, 752 N.Y.S.2d 103 (3d Dep't 2002); *McCaughey v. McCaughey*, 205 A.D.2d 330, 612 N.Y.S.2d 579 (1st Dep't 1994).

25. *Croote-Fluno v. Fluno*, 289 A.D.2d 669, 734 N.Y.S.2d 298 (3d Dep't 2001).

26. *Tuckman v. Tuckman*, 112 Misc. 2d 803, 447 N.Y.S.2d 654 (Sup. Ct., Rockland Co. 1982).

27. *Grunfeld v. Grunfeld*, 123 A.D.2d 64, 68–69, 509 N.Y.S.2d 928 (3d Dep't 1986):

> A litigant, in the highly charged atmosphere of a matrimonial action, when faced with the immediate choice of extended public proceedings or stipulation of settlement, will ofttimes opt for the latter course. Once reached, however, the open-court stipulation should not serve to spring the trap that will catch the unwary or the uninformed and bind the litigant forever in an unconscionable situation from which our courts will not relieve him or her. If no relief for unconscionability is available from an open-court stipulation in a matrimonial action, which by its very nature should be concerned with "equitable distribution," stipulations of settlement will be few indeed, for the competent attorney will not allow his or her client into a potential trap.

28. *Id.*

29. *Compare Yuda v. Yuda*, 143 A.D.2d 657, 533 N.Y.S.2d 75 (2d Dep't 1988), *with Hardenburgh v. Hardenburgh*, 158 A.D.2d 585, 551 N.Y.S.2d 552 (2d Dep't 1990).

30. *Sippel v. Sippel*, 241 A.D.2d 929, 661 N.Y.S.2d 366 (4th Dep't 1997); *Enright v. Enright*, 205 A.D.2d 732, 614 N.Y.S.2d 909 (2d Dep't 1994); *Hunt v. Hunt*, 184 A.D.2d 1010, 585 N.Y.S.2d 259 (4th Dep't 1992).

31. *Golfinopoulos v. Golfinopoulos*, 144 A.D.2d 537, 534 N.Y.S.2d 407 (2d Dep't 1988).

32. *George Backer Mgmt. Corp. v. Acme Quilting Co.*, 46 N.Y.2d 211, 413 N.Y.S.2d 135 (1978); *Rowe v. Great Atlantic & Pacific Tea Co.*, 46 N.Y.2d 62, 412 N.Y.S.2d 827 (1978); *Boga v. Case Catering Corp.*, 86 Misc. 2d 1052, 383 N.Y.S.2d 535 (Civil Ct., Queens Co. 1976); *see Bloomfield v. Bloomfield*, 97 N.Y.2d 188, 738 N.Y.S.2d 650 (2001).

33. *Compare Goodrich v. Dep't of Health*, 2003 Mass. LEXIS 814 (2003); *Langan v. St. Vincent's Hosp. of N.Y.*, 196 Misc. 2d 440, 765 N.Y.S.2d 411 (Sup. Ct., Nassau Co. 2003); *Storrs v. Holcomb*, 168 Misc. 2d 898, 645 N.Y.S.2d 286 (Sup. Ct., Tompkins Co. 1996), *dismissed*, 245 A.D.2d 943, 666 N.Y.S.2d 835 (3d Dep't 1997).

34. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

Forensic Social Work Reports Can Play Crucial Role in Mitigating Criminal and Immigration Cases

By Mark S. Silver

Social workers are taught to consider the person and the person's support systems when evaluating a problem, and to factor in any outside resources that may assist the client's psycho-social needs. Lawyers do not yet fully appreciate the amazing fund of resources that can benefit a client when advocating a legal position.

In recent years, extralegal resources beyond the "typical" legal realm have become a crucial part of developing any legal case. *Black's Law Dictionary* defines forensics as "belonging to courts of justice." That is, forensic experts are consultants to a lawyer when outside expertise is required in relation to legal principles and cases. Forensic accountants have been crucial in evaluating the extent of wrongdoing in accounting firms found to have negligent or criminal accounting practices. Forensic physicists and road experts routinely give testimony about motor vehicle accidents. Under New York case law, a plaintiff in a medical malpractice civil action may not proceed without a physician's affidavit in support of the claimed physical or medical injury. Forensic medical examiners are required when a death is thought to be from anything other than natural causes.

Perhaps the most widespread use of forensic experts by lawyers and the courts is in psycho-social reports written by social workers in the areas of family issues, child custody, child abuse and adoption. The psychiatric social worker's report explains the system and family issues that affect the client and his or her family, together with the systemic issues that serve to help or hinder the client. The report permits the court to weigh the client's claims and the hardships that the client will experience given the issues in his or her life.

Immigration and criminal lawyers face significant challenges in relating the circumstances of their clients to the legal issues in question. Proving extreme hardship, mitigating circumstances, trauma, abuse or good citizenship are difficult if the only evidence consists of the testimony by the client. Just as corroborating witnesses are essential for a criminal or civil defendant to bolster a case, it is also essential for immigration or criminal clients to have someone who can corroborate, augment or expand on their legal position to support or verify the veracity of their claims.

Immigration and criminal lawyers are beginning to understand the crucial role of supportive documentation and expert reports by forensic psychiatric social workers who describe the needs and experiences of their clients. In particular, immigration and criminal lawyers require experts in forensic social work to explain, support and reveal the experiences of clients in their country of origin or childhood, then contrast the past with their current life experiences. In many cases, lawyers who have made such referrals have later reported that the written psycho-social report was a key factor in the successful outcome of their clients' cases.

Legal Basis for a Forensic Social Work Report

Criminal lawyers increasingly understand the crucial role of supportive documentation and expert reports that reflect the needs and experiences of their clients. In particular, criminal lawyers require experts in social work to explain, support and reveal the client's challenging life experiences.

In a landmark decision last year, *Wiggins v. Smith*,[1] the U.S. Supreme Court found a Sixth Amendment violation due to the absence of a forensic social work report that would have brought to light mitigating factors in

Continued on page 34

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CONTINUED FROM PAGE 32

the defendant's background. The Court held that Wiggins's defense was prejudiced because counsel did not conduct a reasonable investigation or discover potentially powerful mitigating evidence. The Court noted,

> Wiggins experienced severe privation and abuse while in the custody of his alcoholic, absentee mother and physical torment, sexual molestation, and repeated rape while in foster care. His time spent homeless and his diminished mental capacities further augment his mitigation case. He thus has the kind of troubled history relevant to assessing a defendant's moral culpability.

The fundamental purpose of the psycho-social report is to reflect the client's story sympathetically through the assistance of a psychiatric social worker trained in family-systems and mental health issues.

Poor language skills Many clients have poor language skills, and they are not able to articulate with any degree of clarity or passion the hardships or issues that affect their circumstances. The lawyer will understand the case and the issues, but explaining the psycho-social subtleties and nuances requires professional expertise. It is seldom effective to wait until trial. Clients typically find it difficult or frightening to articulate in a courtroom setting their histories and experiences concerning their country of origin and their current life.

Fear of authority Clients who have experienced corrupt, inefficient or extortionist government officials in their country of origin will be reluctant to speak freely and openly. Many criminal defendants may have had similarly frightening experiences with police in the United States.

Mental health problems Clients may also fear speaking in a courtroom or feel inhibited due to a psychiatric or medical problem. Clients who suffer from depression, anxiety or psychotic disorders will be unable to explain what deportation or a prolonged sentence will mean to them and their families. Moreover, when a hardship case revolves around a family member who is psychiatrically ill, he or she may be unable to focus or have the cognitive ability to express how the disability has a negative impact on family members. These psychotic disorders may prevent clients from feeling sufficiently safe to speak their minds at criminal sentencing hearings.

It's worse than it looks Clients often present their lawyers with a case that in reality is more serious than they initially state. This may occur for several reasons. Clients who come from third-world countries, for example, often continue to idealize their homelands and do not fully account for the hardships that they have endured and their children will also endure if they are forced to return.

Psycho plus social There is an important interplay between the mental health and social/interpersonal issues that the client faces in any immigration case or criminal sentencing hearing. The case will be stronger if the interplay of these elements is presented coherently. For example, the fact that a child may have to abandon his present school encompasses many issues relating to the psychological effect on the child, the loss of the educational program, the transition to a new environment, the sudden absence of a group of friends, and the educational challenges of learning within a different education system. The confluence of these factors will make the child's loss, given the combination of psychological and social issues, all the greater.

The goal is to permit the reader to understand the client as a complete human being with needs and feelings by the time he or she has read the conclusion of the psycho-social evaluation.

The broadest picture possible The psycho-social forensic report inquires into development, education, employment, finances, healthcare, legal issues, military service, culture, language, religion and a host of other issues. It can outline the person's functioning regarding activities of daily living, including dressing, eating, bathing and other areas of self-care. Most persons with immigration cases and criminal sentencing matters are not presented to the judge as having real lives, families and issues. Judges are confronted with a large caseload of respondents from all over the world with diverse backgrounds and factual histories. It is essential to illuminate the client as a real person with feelings, needs, parents and siblings.

Purpose and Content of the Report

Sympathetic narrative Humanize the client's personal life history through a sympathetic narrative. Often the judge (and jury) may focus almost exclusively on the relevant evidentiary facts. The state or federal lawyer hopes that the judge (and jury) will view the defendant in an objective light, disregarding the subjective elements in the client's personal history. Presenting a forensic psycho-social report, however, permits the illustration of the client's humanity and personal identity.

While the government lawyer wishes to characterize the defendant's actions within the absolute parameters

of good versus bad, the forensic psycho-social report can flesh out the defendant's life challenges, family background, work history, education, hopes and dreams. This permits the client's life to be viewed as similar rather than dissimilar to the lives of people in the courtroom. The client's negative life experiences, losses, deaths and hardships should be highlighted to emphasize the difficulties and deficits that have disadvantaged the defendant.

The narrative developed in the forensic psycho-social report provides a holistic perspective of the defendant and illustrates the influences, contexts and people that may have derailed what otherwise could have been a more productive and positive life. Ultimately, the client must be understood as a human being with needs and feelings.

Overcoming expressive difficulties Professional expression can replace self-expression. Immigration and criminal clients often have poor English language skills and/or little education. As such they may find it difficult or frightening to articulate the histories and experiences that have affected their development.

Clients may also fear speaking in a courtroom or be inhibited due to a mental health or medical problem. Clients who suffer from depression, anxiety, low self-esteem, cognitive deficits, learning disabilities or psychotic disorders also will be unable to explain their background fully and describe how their environment has affected their lives. For such clients, the forensic social work report speaks for their personal lives when they cannot.

Providing context The client's conduct regarding the nature and recency of the crime needs to be placed in context. The nature, role and recency of the crime or illegal activity help to clarify the relative seriousness of the client's behavior given the client's life as a whole.

Is this a first-time offense by an impressionable young person or perhaps a person who acted in desperation for a specific reason? The defendant or immigration client may have a reasonable excuse for his or her actions.

Family role Stress the client's current family role. Most people exist in both a familial and social context. It is important to outline the emotional, physical, instrumental, informational and psychological support that clients provide to their families, extended families and communities.

In turn, it is essential to outline what clients have been taught and have gained through involvement with their family and social context.

Community ties Illustrate the client's community, educational, employment and property ties. Clients, like most people, are understood by their roles in their families and communities. To give context to a person's life, it is important to show good, normative character traits and contribution within a community.

Client's remorse, regret and growth The profound change in a client's life during incarceration or a period of review by a court, together with the client's ability to redirect his or her life, is often remarkable and may be an important part of the case. Moreover, if a significant time period has lapsed between verdict or plea and sentencing, a person may come to understand his or her life in a novel and humbling way. Many people commit crimes in a moment of recklessness. This moment of poor judgment can be counterbalanced by the contributions that individuals have made to their family and community since their actions.

Overall goal The goal is to permit the reader to understand the client as a complete human being with needs and feelings, by the time he or she has read the conclusion of the psycho-social evaluation. Finally, there may be an important area of inquiry that to a non-healthcare professional may seem either irrelevant or too embarrassing to ask of the client. Here, too, the forensic social worker can elicit the most personal issues in a compassionate manner while helping the client and lawyer to put forward the strongest possible case.

Construction of a Psycho-social Report

Every psycho-social report begins with a family background section. It is crucial because it helps to humanize and concretize a client and his or her family for a judge who is unfamiliar with the person's background. This section describes the client's country of origin and the early environment in which the client was raised. Included is a discussion of any hardships, such as poverty, war or abuse, that the client and his or her family may have experienced in their country of origin. Providing details can reinforce the idea that clients have not just a legal claim, but a context in which they grew up, such as friends with whom they played and parents in whom they confided their secrets or sadness and loneliness as children.

The family background section also provides a baseline or contrast between the person's life in his or her country of origin and life now in the United States. In hardship cases, for example, it is important to point out that a client's parents may have died at a young age from a disease that is quite treatable with American medical interventions and medications. The point can be made that the client's children would face the same lack of healthcare facilities if they are forced to leave the United States because their parents are deported. This is a concrete illustration of hardship and fear that any parent can relate to, no matter what the respondent's country of origin.

Sometimes a real-life example provides a powerful illustration, such as someone who has had a sibling or

parent die from lack of medical care that may be quite common (and inexpensive) in the United States. It is then clearer to the judge who reads the case just how serious the potential hardship will be for the child in question.

No two cases are ever alike, and each person or family contributes unique aspects of their lives to the picture. Two persons may emigrate from the same country yet have had quite different experiences in their country of origin. This is no more surprising than a wealthy person and a poor person having different experiences living in New York City. As long as there is internal consistency, the integrity of the client's individual experience will be maintained and recognized. The most effective reports are tailored to the specific needs of the clients and present them as individuals with particular lives and needs.

Current circumstances After describing a client's background, a report must also describe the defendant's current life, community contacts and participation, and how the person lives life on a daily basis. The normal goal is to show that the majority of the client's actions are law-abiding and reflect behavior that is common to most people, such as attending a regular job each day and/or caring for family members.

Each report inevitably contains unique elements, depending on different activities or endeavors that have marked the person's life. One report may require references to sexual abuse as a child, while another may require a description of outstanding athletic achievements during high school years.

In the end, the objective is to provide as thorough a picture as possible of the client's background, together with the current situation informed by a family-systems approach.

Mental status exam This inquiry examines specific mental health areas such as physical presentation, behavior, attitude, speech, affect and mood, and thought. It can often be illustrative of the very real internal turmoil that the client experiences as a result of a trauma or even the current immigration case. It is a standard part of any mental health report and should complement the substantive body of the report in light of the issues that the client and his or her family face. This gives the readers an internal view of the client and the suffering being experienced, rather than simply an external check on the systems involved in the client's life.

Conclusion The conclusion serves as both a summary of the important influences and issues from the person's life and the effect that the circumstances have had on his or her ability to function. The objective is to leave the judge with an understanding of the client, and the client's life in its context, that forms the basis for a persuasive case in the client's favor.

Eliciting Relevant Information

The following is a subset of the questions and topics designed to elicit useful family background information.

1. Who is in your family: members, ages, names, roles?

2. What were your coping strategies when growing up? Were you confident? How did you handle stress, anger, sadness, etc?

3. What was your parents' relationship like?

4. Was your family warm or cold to one another?

5. What role did you play? For example, did you have to care for others (by choice)?

6. Were there traumas or stressors in your family history such as war, violence, poverty, disease, unemployment, prejudice, racism, relocation, family arrested/jail, (political) detention?

7. Is there a medical, psychiatric, drug or military history in your family?

8. Did you have any learning, reading, studying or attention problems?

9. Were your developmental milestones normal, such as birth, walking, talking?

10. What were your hobbies or interests as a child? What are they now?

11. Did you have friends growing up? What is your social circle like now?

12. Did anyone ever harm you physically, emotionally, sexually, economically?

13. Did a person or circumstance ever make you feel ashamed or humiliated?

These and similar questions, although rather benign at first glance, repeatedly yield a rich source of information that explains much about the person's development, character, family, history of hardship or trauma, or the client's decision making or thinking on any one of several issues. This information also plays an important role in understanding the person's psychological and emotional needs as an adult. The strength and integrity of the psycho-social report depends on the factual details elicited from the client.

Asking a large array of questions also makes the client better prepared for the questions that may be asked by the judge or government lawyer during a court proceeding. Any inconsistencies or inaccuracies in their stories provide an occasion to explain that the interview is the time to be truthful, because non-truths are difficult to hide and can be picked up by a judge or lawyer more easily than the client may imagine. Most people are bad at lying, and their best interests are served by a consistent, honest recounting of their lives.

Four Types of Cases

The following are the four most general types of cases referred for a psycho-social evaluation in forensic

immigration work and the particular challenges that each case poses.

Individual and family extreme hardship In a hardship case, the client usually has close family members, often school-aged children, who would suffer hardship if the client is forced to leave the country. It is not unusual in such cases that the client has a spouse who is also in deportation proceedings. Such clients are often from countries in which the children's education, social and employment opportunities will be greatly diminished or compromised. Including the children's academic and non-academic accomplishments and awards illustrates the degree to which they view their education seriously and appreciate the unique opportunities available to them in the United States.

While judges tend to understand responsible adults as persons who have a solid work ethic, they understand responsible children as persons devoted to being hard-working students in their school programs.

Asking a large array of questions makes the client better prepared for the questions that may be asked by the judge or government lawyer during a court proceeding.

The major hardship issues typically concern transitions in the child's life, education, medical conditions, social context, friends and peers, healthcare coverage and care, culture (and multicultural issues), language (spoken, written or read), caregivers, privilege (insulation from poverty), emerging mental health issues on the part of family members, the difficulty for the parents to begin their lives over, dangers (such as crime, kidnapping or even polluted drinking water), poverty, unemployment and other psycho-social problems in the parents' country of origin.

Case Example. Mr. A was a 47-year-old married man with two children, ages 7 and 10 years. He had no legal status in the United States. The goal was to clearly establish that it would be an extreme hardship for his children, both American citizens, to relocate to a country in which they would experience a foreign culture, language and beliefs; strict restrictions on their actions, dress, friends and interests; possible poverty; government corruption; police ineptitude; healthcare and social service delivery scarcity; academic deficits; and language barriers. Moreover, in abandoning their home in the United States, the children would lose important social connections, friendships and opportunities for future education and employment. Such cases can be shown to be a terrible conflict for the parents as well. On the one hand, they do not wish to leave their children behind in the United States and tear apart the family. On the other hand, parents want their children to have every reasonable opportunity available to them.

Such cases become more challenging when no children are involved. In such instances it is crucial to illuminate the interpersonal connection and need between the spouses. It must not only be demonstrated that the couple cannot live without one another, but that this need is based not simply on their marriage, but, if relevant, a lifetime of loss or deaths. All show what it would mean for the spouse to experience yet another loss. If applicable, another route is to show the dependence of one spouse on the other and the essential role that the spouse plays in the mental health and well-being of the other person.

Case Example. A woman committed suicide in a Massachusetts town, leaving behind her husband, who had no legal status, and two children who were U.S. citizens. The children were in therapy to explore with the therapist the suicide of their mother. The father faced deportation. The judge asked that a psycho-social evaluation and report be undertaken to reflect whether it would be a hardship for the children to relocate to Brazil, given the difficulty of continuing their therapy in Brazil. I presented a lengthy background and history of the family life of the parents and children before the mother committed suicide. The report showed that for the children the real therapy was continuing to live their lives in their family home, and that relocation would necessarily be anti-therapeutic. In other words, the real therapy was not simply seeing a trusted therapist each week to discuss their mother's suicide but pursuing a normal life in the context of their familiar friends, school and surroundings. The psycho-social context was that relocation would be tantamount to an extreme hardship – not only might they be unable to find a competent therapist in Brazil, their environment itself was far more therapeutic than anything they could find in a formal therapy setting elsewhere.

Criminal cases In criminal cases, a court may consider many social and family factors under the *Marin* test,[2] which are best illustrated through a psycho-social assessment. The issues that should therefore be investigated during such an interview concern the nature of the crime, the recency of the crime, the quality of time devoted to rehabilitation during incarceration, the character of the person (and the person's family members), family ties in the United States, the length of residency in the United States, hardship issues (financial, physical, emotional, concrete) to the client and the client's family, whether the person has served in the United States armed forces, employment history, property or business

ties, community ties (including charitable work and contributions to the community), genuine rehabilitation after release from incarceration (expressions of remorse, regret and sincere reflection on his or her behavior, particularly during a rehabilitation phase while incarcerated), the maturity of the client (including the insight, judgment and emotional tools of the client at the time of evaluation), and the general life and career skills of the client.

Many people commit crimes in a moment of recklessness. This moment of poor judgment can be counterbalanced by laying out significant contributions to the person's family and community. Rehabilitation can be remarkable. A client who lived in the center of a world in which drugs were bought and sold every hour of every day turned, while she was incarcerated, to education, earned her doctorate and a few years after release became an associate college dean.

A psycho-social evaluation is a valuable resource that reflects an area of expertise that lawyers in many areas of legal practice are now considering a mandatory part of their case files.

It is also important to place the actions of individuals in the context of their lives. As such there may be a host of other mitigating factors that are important to investigate, because they could help to support or explain a client's behavior and decision making.

In order for a judge, jury and district attorneys to understand the client's actions, they must be placed in an extensive social history of the client's life. The social history is constructed through client interviews, a consideration of the forces that have acted upon the client, collateral interviews with multi-generational family members, and the collection and evaluation of life history records (school, hospital, child welfare agencies, etc.). When the forensic social worker gathers social history data, it often involves the revelation of painful secrets concerning mental illness, addiction and physical abuse within a family. This can be ameliorated by conducting not only thorough diagnostic interviews but sensitive collateral interviews.

The presentation of mitigating factors may be necessary at different stages of a case. For example, the district attorney has 120 days from a client's indictment to decide whether to seek the death penalty. The defense team can produce evidence of mitigation at this point to convince the district attorney that psycho-social issues requires that the district attorney not seek the death penalty.

Case Example. Mr. R, a 51-year-old Colombian-born man, was arrested after his daughter reported that he had sexually molested her. While interviewing the client about his childhood, he disclosed that as a young boy he had endured many years of sexual abuse by male cousins. This client later turned to alcohol abuse to self-medicate the deep shame and depression he secretly harbored. This early life experience served to inform the reader of the report about the client's past and the detrimental effect it had on him. However, the client had sought help and led a life of full rehabilitation and community work. The report did not attempt to justify, rationalize or excuse his behavior, it simply offered a more complete and humanistic understanding of the client.

It is worth noting that the issues relevant in a *Marin* review and the issues the Court said should have been explored by a forensic social worker in the *Wiggins v. Smith* case are essentially the same. In other words, the forensic social worker has the unique advantage of evaluating any client given any problem, and can strongly advocate and assist the client in his or her defense before a court for almost any kind of procedure or hearing.

Spousal abuse cases Spousal abuse evaluations are important in two particular situations – cases filed under the Violence Against Women Act,[3] I-360s and I-751s. The typical person who has endured physical, sexual or emotional abuse does not have physical scars or medical sequelae that can serve as a basis for concrete documentation by a physician, healthcare facility or social service agency. Moreover, while physical abuse may reflect a one-time incident, psychological trauma typically is a constant nightmare that the client must live with for months or years before extracting himself or herself from the situation.

Case Example. A man's wife was HIV+ and did not tell him for their three years of marriage. This woman had a severe personality disorder and her impulsiveness and lying caused the client to live without seeking medical treatment for a significant period of time. When he discovered the truth from his mother-in-law, he reacted with feelings of depression and horror. The emotional violence inflicted on him was well-documented through the psycho-social evaluation, including his social isolation, nightmares, inability to form new intimate relationships and the destruction of his trust in others.

Abuse, like persecution, is usually a systemic phenomenon that affects the victims in virtually every area of their life. The victim feels locked into a universe from which there is no escape. The person feels sad, lonely, fearful and isolated. Abusers often refuse to leave the

home until they feel that they no longer benefit from the relationship or when they feel their own safety is in acute jeopardy. The abuser works through intimidation, total control over the victim's social life, family and professional contacts, and verbal degradation of the victim. The victim feels a total lack of security. The quality and quantity of the abuse should be documented, and information should be provided on whether the abuser has abused others. The cruelty may be oppressively unbearable such that the victim feels humiliated, destroyed, devastated, shattered and ultimately considers self-harm as a means of escape.

Asylum cases Asylum cases may concern persecution or violence against a group of persons given their religion, sexual orientation or other affiliation within their country of origin. Although an individual makes the claim, the assertion is that others suffer from the same persecution. The clients essentially argue that returning to their country of origin would invite acute risk to their well-being. They therefore seek the safety and freedom of residing in the United States.

Such clients may have many illustrations of the persecution that they endured; or they may have been fortunate to escape the brutality that their peers endured because of their ability to hide or exist in an insulated environment. Many clients who have asylum claims have a mood disorder or an anxiety disorder, such as post-traumatic stress disorder.

Case Example. A man did not remember in which leg he was shot. The judge found this to be wholly unbelievable and dismissed the case. When an attorney brought this case to my attention a few months later, I suggested that there may be a rather simple and logical explanation. It is not uncommon for persons who have endured trauma and horror to discard important details from their minds. This may be because the person is trying to protect himself or herself psychologically from the stress and memory of the event. In fact, a symptom of post-traumatic stress disorder is an "inability to recall an important aspect of the trauma." The judge may have intuitively thought that someone who has endured a trauma would remember every detail of the episode for the rest of his or her life. The reality is, however, that our minds can be quite selective in what is retained and what is discarded in an effort to protect ourselves and cope with the stressful event.

Many clients miss the one-year deadline to file for their political asylum. A psycho-social evaluation may elicit a logical explanation. In a number of cases, clients have lived in a culture in which they could not trust government officials, or the government officials were corrupt or altogether inept. This experience may have made the clients feel that registration would have no effect. Moreover, many clients make a good faith effort to file their paperwork through an agency or an attorney. The naïve client may have paid several thousand dollars for assistance that ultimately is not only unhelpful but serves to put them past the one-year deadline. This too can be reflected in the psycho-social report.

Conclusion

A psycho-social evaluation and report can significantly augment the integrity of the client's immigration claim or mitigation case at a sentencing hearing. It is a valuable resource that reflects an area of expertise that lawyers in many areas of legal practice are now considering a mandatory part of their case files.

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1. 123 S. Ct. 2527, 2003 U.S. LEXIS 5014 (U.S. June 26, 2003).
2. *In re Marin*, 16 I. & N. Dec. 581 (BIA 1978).
3. Originally enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). The Act has been amended in 1996 and 2000. Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491 (2000); Pub. L. No. 104-201, 110 Stat. 2655 (1996) (codified as amended at 18 U.S.C. § 2261A).

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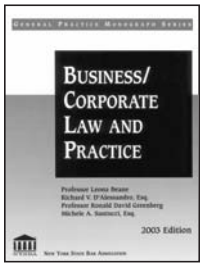

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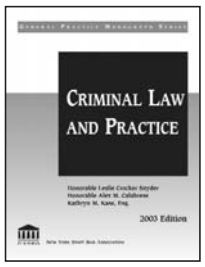

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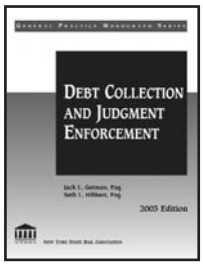

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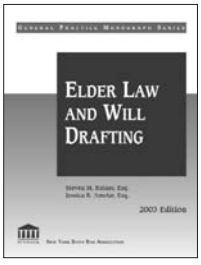

The first part of *Elder Law and Will Drafting* provides an introduction to the scope and practice of elder law in New York state. This edition also includes a step-by-step overview of the drafting of a simple will—from the initial client interview to the will execution.

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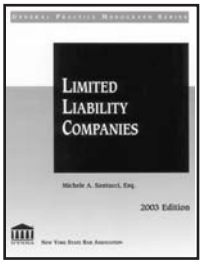
Limited Liability Companies



This practical guide, written by Michele A. Santucci, enables the practitioner to navigate the Limited Liability Company Law with ease and confidence. Benefit from numerous forms, practice tips and appendixes.

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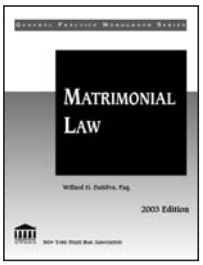

Written by Willard DaSilva, a leading matrimonial law practitioner, *Matrimonial Law* provides a step-by-step overview for the practitioner handling a basic matrimonial case. While the substantive law governing matrimonial actions is well-covered, the emphasis is on the frequently encountered aspects of representing clients.

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Mechanic's Liens

Mechanic's Liens, written by George Foster Mackey and Norman Alvy, is an invaluable guide to what can be a volatile area of practice. The methods of preparing, filing and enforcing mechanic's liens on both private and public works construction are covered.

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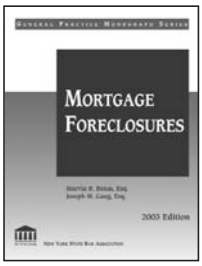

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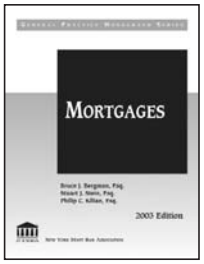

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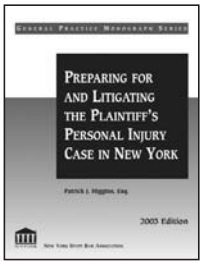

A quick reference guide to areas likely to be encountered in the preparation and trial of a civil case in New York State, this book has been greatly expanded by Patrick J. Higgins to include up-to-date case references and in-depth analyses on issues relating to this area of practice.

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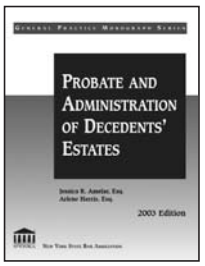

The authors, experienced trusts and estates practitioners, provide a step-by-step guide for handling a basic probate proceeding and for completing the appropriate tax-related forms.

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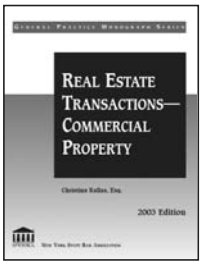

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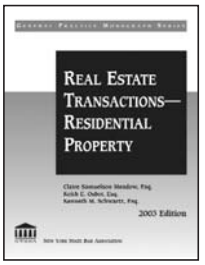

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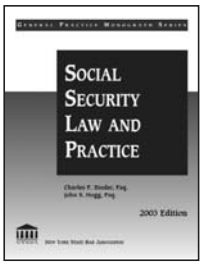

The Social Security Act is "among the most intricate ever drafted by Congress." This monograph offers valuable, practical advice on how to muddle through the enormous bureaucracy. With analysis of the statutes and regulations, the authors guide you through the various aspects of practice and procedure.

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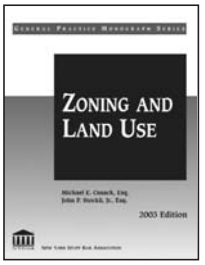

This publication is devoted to practitioners who need to understand the general goals, framework and statutes relevant to zoning and land use law in New York State. It provides a broad discussion of zoning and land use in New York.

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Distinguishing Intended Deception From Unconscious Inaccuracy

Misinformation in testimony is not always the product of intentional deception, but rather it often results from entirely natural unconscious cognitive mistakes. This article explores an aspect of witness psychology involving the significant potential for error inherent in the human mind's perception and memory processes.

BY JUSTIN S. TEFF

When evaluating the veracity of any assertion, it is essential to recognize that misinformation may regularly emerge absent even a hint of deceptive intent in the reporter. Indeed, the human mind processes and stores all incoming information in a series of stages, leaving open the possibility that unconscious, and hence unnoticed, distortion or error may arise at any moment. The result can be a witness who wholeheartedly believes the truth of an inaccurate recollection.

A comprehensive knowledge of this cognitive sequence can give the examiner a valuable analytical tool for uncovering unconscious errors and distinguishing them from instances of intentional deception.

Experiments in Witness Psychology

A few of the early experiments concerning the fallibility of memory had far-reaching results. In his work *On the Witness Stand* (1908), Professor Hugo Munsterberg details an experiment performed by noted criminologist Professor von Liszt. He staged a demonstration in front of his class in which two students, both players, became engaged in an altercation. One student drew a pistol, the professor stepped in to intervene, and the gun fired. Various students were then prompted to write reports of their observations both immediately and at intervals of a day or a week. Other students were subjected to actual cross-examination. Munsterberg reports:[1]

> As mistakes there were counted the omissions, the wrong additions and the alterations. The smallest number of mistakes gave twenty-six per cent. of erroneous statements; the largest was eighty per cent. The reports with reference to the second half of the performance, which was more strongly emotional, gave an average of fifteen per cent. more mistakes than those of the first half. Words were put into the mouths of men who had been silent spectators during the whole short episode; actions were attributed to the chief participants of which not the slightest trace existed; and essential parts of the tragi-comedy were completely eliminated from the memory of a number of witnesses.

Munsterberg relates a similar staged scene at a meeting of a scientific association composed of jurists, psychologists and physicians in Göttingen, Germany. From a festival outside, a clown in a bright uniform rushed into the meeting; a man with a pistol followed. The two engaged in a melee, a shot was fired, and the participants absconded. Unaware of the nature of the experiment, all observers were asked immediately to inscribe their recollections of the scene. The results were as follows:[2]

> Of the forty reports handed in, there was only one whose omissions were calculated as amounting to less than twenty per cent. of the characteristic acts; fourteen had twenty to forty per cent. of the facts omitted; twelve omitted forty to fifty per cent., and thirteen still more than fifty per cent. But besides the omissions there were only six among the forty which did not contain positively wrong statements; in twenty-four papers up to ten per cent. of the statements were free inventions, and in ten answers – that is, in one-fourth of the papers, – more than ten per cent. of the statements were absolutely false, in spite of the fact that they all came from scientifically trained observers.

Information Processing

Modern theorists concur that the psychic function of information processing involves a sequence of distinct yet interrelated stages or constituent operations.

When an event stimulus occurs, it must first be perceived and interpreted by the psyche, after which

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This article is a further exploration of concepts he examined in "How to Spot a Lie: Checking Substance and Source," which appeared in the July/August 2003 issue of the *Journal*.

this information may be encoded and stored in the brain for some period of time, eventually to be recollected and perhaps related. The stages are typically termed acquisition, retention and retrieval. They are interrelated sequentially, in that each stage is founded upon the net result of the preceding stage; what a person stores in memory naturally depends first upon what is perceived, and what later is retrieved is a product of both initial stages.

It is similarly beyond dispute that unconscious distortion or error may arise at any stage of this sequence, resulting in a subject who wholeheartedly believes the truth of an inaccurate recollection of information. Knowledge of this process can provide the examiner with an analytical framework for evaluating potential sources of unconscious error in otherwise seemingly honest witnesses.

Although the precise etiology of error is often elusive, the examiner by thorough investigation can uncover potential causes of mistake and posit probable effects, or vice versa, that may lead to the development of a theory of each witness and of the case. It is also possible that the examiner's impressions may be imparted to the fact-finder. What follows is a brief survey of the psychological research regarding the components of the human perception and memory systems, together with the potential for error that lurks at each successive stage of cognition.

Perception

The threshold perception or acquisition stage describes and entails operative processes, as external or internal[3] stimulation first invades the purview of our sensory organs, first registers with the psyche and is initially compared with existing information and interpreted, prior to encoding in short-term or working memory.

Psychologists sometimes refer to this component as the sensory buffer or sensory register stage. Jung explains, "[R]eality, so far as it lies outside our body's limits, is mediated to us chiefly by particles of light impinging on the retina of the eye. The organization of these particles produces a picture of the phenomenal world which depends essentially upon the constitution of the apperceiving psyche on the one hand, and upon that of the light medium on the other."[4] Elizabeth F. Loftus uses this same dichotomy by characterizing perception influences as "event factors" and "witness factors," either of which may potentially affect accuracy.[5] Such notions suggest that perception may be affected by both subjective or internal factors and objective or external indications.

External factors In contrast to the internal, more personal factors, the external or objective factors require scant explanation and are readily familiar to most investigators. These characteristics of the occurrence and environment increase or decrease the probability that an observer could have perceived the event with clarity.

Experimentation has borne out that the longer or more frequently a subject is exposed to a stimulus, the greater the chance of information being transferred to and retained in working and permanent memory.[6] Indeed, it appears some degree of rehearsal is a prerequisite to any retention. The strength of the incoming stimulus, be it volume of noise or luster of light, is another consideration.

Environmental factors such as the distance between an observer and an event, as well as any obstructions to a subject's sight, hearing or other involved sense, although no doubt matters of common sensibility, should also be noted. Also relevant, in connection with the ability to maintain attention, is the presence of background noise or other applicable distraction.

The amount of available light is a notorious factor affecting perception, both general visibility and color perception; this has an interesting physiological explanation. The retina contains mechanisms called rods and cones. Cones are responsible for color vision and operate in normal light levels, whereas the rods are active and allow us to see in low light levels, but have generally poor acuity and color perception. As illumination decreases, the cones become less active and the rods much more so; thus the abilities to see color and distinguish between objects diminish substantially. It has been noted that in moonlight most objects appear cast in shades of gray, and blood consistently appears black.

Internal factors To repeat a popular analogy, when one perceives a stimulus the sensory input is not recorded perfectly or even objectively, as might a video camera, but rather neutral stimuli are broken apart and reorganized, or interpreted, in light of numerous factors including all existing knowledge and experience. Two internal factors dominantly influencing perception are a subject's cognitive affect, mood and mindset at the moment of perception, and the previously formed psychic constructs and schema, the background against which all incoming stimulation is interpreted.[7]

Common experience discloses that daily mood can alter perception, as when, for instance, a person is simply having a bad day and is informed by another that a comment or statement was "taken the wrong way" – in other words, misinterpreted. More general cognitive affect may also play a role in perception, such as when one observer sees a glass to be half full while another regards it as half empty; whether one is in a positive or negative state of mind will drastically affect how the world is received.

The more sublime of the internal influences, however, involves the subconscious effects on perception

wrought by the existing sum total of the observer's knowledge, experience, wishes, beliefs, biases and expectations. Here the distortion might arise during the process in which the perceiver interprets the intruding stimulus by making mental associations and reducing it to verbal concepts.

When information initially invades the psyche, two processes are operative instantaneously. The sensory image is at once compared, contrasted and construed, in light of all previously stored information. The incoming stimulation is concurrently distilled for purposes of contemplation to verbal concepts or symbols. Both processes may potentially distort objective sensory information.

The details one does not perceive or recall precisely are often unwittingly fabricated in accordance with one's psychic constitution and purpose.

The first aspect of this sensory integration involves a comparison of the perceived stimulation to all previously gathered and stored information and knowledge. The phenomenon has also been described in terms of application of our schema, or the collected groups of information we retain about particular persons, objects, situations and any other category of knowledge. By way of comparison, these schema tell us what to expect about certain perceptions and how to interpret incoming information.[8] The function is necessary, for otherwise the mind would experience every sensation anew and perceive every stimulus as novel and unfamiliar. This is how we recognize certain incoming stimuli as previously experienced; this is how we conceive, for instance, how a lemon will taste without actually biting into it.

On the second point, it has long been observed that "the material with which we think is *language* and *verbal concepts*."[9] This is also known as directed thinking or thinking in words. Because all purposeful contemplation proceeds in this linguistic form, it follows that we must instinctively translate our perceptions of incoming stimuli into familiar verbal concepts, expressions and symbols for them to have cognitive utility. Many psychologists refer to this as "labeling." It is inevitable then, as Loftus describes, that such internal "linguistic responses" will literally prescribe how an image is perceived, encoded and recollected; the image stored in memory will be cast in the language or wording a subject initially uses, quite unconsciously, to describe it.[10] Illustrating both processes, one might see a lemon, recognize the image as familiar when compared with previously perceived pictures, recall that image is typically termed a "lemon," think "yellow," then "sour," then "juice," etc., as each person's individual past experiences with and ideas about a lemon engage the train of associations.

In the midst of this instantaneous translation, distortion may occur in various ways, two of particular note. First, a subject's cognitive constructs will have a direct correlation to the language and verbal symbols subconsciously chosen to describe a perception. Second, the constructs are all too often the raw material used to fill gaps in actual perception, regardless of whether the lapse in perception is recognized as such.

As noted, the language used for this internalization has a direct connection to the subject's cognitive constructs and schema, particularly referable to subjectively descriptive words.[11] Does the witness see a person walking; is the person rushing or hurrying, meandering or moseying; are a couple talking or debating, is one yelling at another, are they having an argument or fight? In the latter instance, the interpretation may depend largely on a subconscious comparison to one's familial and own interpersonal relationships, and thus what one deems normal social interaction. In a sense, we impose our internal ideas and expectations upon incoming objective stimulation by way of these constructs built about particular classes of information.[12]

The analysis of this unconscious use of language can be extremely telling. Assuming no other influence, the same words initially used for internal verbalization will be used later to orally relate the perception. The examiner should be cognizant of the words a subject uses to describe a stimulus and contemplate the reason. Although the subject's unabridged biography will be largely inaccessible, an examiner might attempt at least to ascertain the subject's base constructs (what do you consider to be "walking"?) and the nature of the comparison made (how much faster does one have to travel to be "running"?), in order to begin to assess what if any influence was had by the personal constructs.

Information gaps Perhaps the most important aspect of all these psychic phenomena, deserving of its own subsection, is that the result of any discreet lapse in the cognitive process will be a gap in the information stored in a subject's memory.

Because humans do not perceive the world in the objective manner recorded by a video camera, the information encoded and retained in memory has less the character of a motion picture and more that of an unfinished puzzle. When individuals recall the last grandiose affair attended, for example, they do not typically remember every single detail, but rather the

main theme or concept of the event, the most pertinent participants, details that had personal significance or forged a lasting impression, and perhaps some ancillary information. Yet surely each conversation in which the individuals engaged and every example of cuisine they sampled by far escapes them.

These information gaps, whether they arise from a lapse in perception, attention or decaying memory, are seldom realized quite as such. Instead, they are supplanted in any of various manners upon subsequent contemplation. In other words, the details one does not perceive or recall precisely are often unwittingly fabricated in accordance with one's psychic constitution and purpose; the existing mental constructs and schemata in the psyche may provide material for this process.[13]

As a general example, when most persons see a lemon, they surmise it is sour even without tasting it, when in fact the expectation has evoked an entirely unfounded conclusion regarding what is really a gap in the initial perception. Quite often a purported witness will report that he or she saw an entire accident, when in fact the person's attention was actually drawn to the occurrence as a result of the crash, allowing a clear perception of only the aftermath. As another odd but valid display, consider the following sentence: *Moedrn psholcyogy mgiht hlep attnreoys in cruot*. Although the intended meaning is not actually and literally perceived in those images, the human mind will fill in gaps from its existing knowledge and expectations. To illustrate the corresponding information lapse, try now without looking to repeat the actual spelling of the words as first read.

Attention

Constant and indiscriminate bombardment of incoming sensory input has long been known to have the ability to overwhelm the human psyche and render it incapable of any meaningful or purposeful activity. In conjunction with the perception function then, the mind requires a mechanism whereby it can select an object to which it will devote the majority of its energy, while simultaneously filtering out distracting stimulation. This function may properly be defined as the attention process. James observed:

> Everyone knows what attention is. It is the taking possession by the mind, in clear and vivid form, of one out of what seem several simultaneously possible objects or trains of thought. Focalization, concentration, consciousness are its essence. It implies withdrawal from some things in order to deal effectively with others.[14]

The examiner should be cognizant of two key aspects of the attention function, both of which may ultimately affect the accuracy of perception and memory. To wit, the depth and breadth of perception may be altered due to variations in both intensity and direction of a subject's attention.

The intensity of one's attention involves how much mental energy is really being devoted to a particular object, and may involve factors such as alertness,[15] anxiety,[16] interest, and emotional weight or value assigned to an object; it may also involve distracting factors that prevent elaborate rehearsal and assimilation.

The direction of attention involves the question of where a subject's mind is primarily focused or concentrated – in other words, the amount of cognitive energy being devoted to any one given object in the entire field of perception at a particular time. The act of physically directing attention to a particular external stimulus typically implies a prerequisite motor orientation or adjustment.

The significance or salience of an occurrence, both objective and subjective, will affect the direction of attention and the amount of attention a subject devotes to a particular event or detail, and hence the accuracy and thoroughness of recall.

In terms of objective salience, certain types of sensations are biologically and instinctively more impressive to humans than others. As a few examples, James provides "strange things, moving things, wild animals, bright things, pretty things, metallic things, words, blows, blood, etc."[17]

Subjectively, one's attention is naturally drawn to and lingers upon objects and stimuli that possess some personal significance or importance.[18] Everyday mundane details, such as the weather on any given evening, are not typically tendered the same intensity of attention as more significant news. On a similar note, activities performed repeatedly often become automatic in character and require much less attention for execution. As a result, however, the chance that one will remember what transpired in any particular instance of performing the activity decreases substantially.[19]

The degree of directed or conscious attention one permits a particular occurrence or stimulus is directly correlated to clarity of perception and depth of encoding, and hence the subject's ability to later recall the information.[20] Numerous experiments have demonstrated that under conditions of divided attention, encoding of information is not as effective as in controlled conditions.[21]

As described here, a lapse in attention is quite likely to create gaps in the information or picture to be encoded in memory. As time passes, these information gaps may be filled by imagination or generalization. The examiner should therefore investigate all aspects of a witness's attention to the event or matter to which the witness eventually attests.

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1. Hugo Munsterberg, On the Witness Stand: Essays on Psychology and Crime 50–51 (1913) (1st ed. 1908).
2. *Id.* at 51–53.
3. Although the present discussion focuses primarily on external stimulation, it should also be considered that internal sensation or stimulation may be the subject of perception as well, as is involved when asking subjects to verbally describe how they felt emotionally in reaction to some stimulus or internal change. Such internal sensations, and their interpretation, are no less subject to distortion and error.
4. *See* Carl G. Jung, On the Nature of the Psyche (1969) (originally "Der Geist der Psychologie," *Eranos-Jahrbuch 1946* (Zurich, 1947)). This type of conception would appear to apply with equal force to stimulation or sensation involving sound, touch, taste and smell.
5. *See* Elizabeth F. Loftus, Eyewitness Testimony (1996). Loftus has published numerous works and is generally regarded as one of the leading researchers and thinkers in this area of forensic psychology.
6. *See id.* at 23–25.
7. This is in addition to a plain analysis of the relative medical acuity of the observer's needed sensory organs, eyes and ears for instance, and temporary sensory distortions such as intoxication or fatigue.
8. The effect of cognitive conditioning can be particularly significant. Indeed, what at first appears shocking to one subject may appear commonplace to another; what may warrant fear or disgust in one person may arouse excitement and admiration in another.
9. Carl G. Jung, Symbols of Transformation (1956) (originally *Transformations and Symbols of the Libido*, 1912).
10. *See* Loftus, *supra* note 5, at 82.
11. It has even been observed that as linguistics, and the schema, are cast in the custom and lexicon of the observer and her society, they may to some extent impose limitations upon conscious thought, irrespective of the individual wherewithal of the subject.
12. The seemingly inevitable tendency toward error in matters of subjective judgment or estimation, even when the information sought is objective and not descriptive, is a related matter of interest; repeated experiments have shown that people are exceptionally inaccurate when asked to estimate various features of an observation, such as speed, time, distance, height and weight, although such questions are commonly posed in litigation.
13. *See* Munsterberg, *supra* note 1, at 61 (noting, "we fill the blanks of our perceptions constantly with bits of reproduced memory material and take those reproductions for immediate impressions").
14. William James, The Principles of Psychology I, 403–404 (1950) (1st ed. 1890).
15. Some factors decreasing alertness are fatigue, intoxication and the effect of protracted attention.
16. Experiments have shown that stress and anxiety can have a substantial effect on perceptual ability. The Yerkes-Dodson experiments (1908) (*see* Robert M. Yerkes & John D. Dodson, *The Relation of Strength of Stimulus to Rapidity of Habit-Formation*, 18 J. Comp. Neurology & Psychol. 159, 459–82 (1908)) and their progeny demonstrate that a moderate level of arousal – excitements and emotions – will sharpen alertness and increase performance, whereas a very high or very low state of arousal will have negative and inhibitory effects. Some theorists posit this as a function of attention.

17. *See* James, *supra* note 14, at 417. James also devotes an entire chapter to the subject of instinct, in which he discusses how certain stimulation differs in effect from one creature to another. There has been described the phenomenon of "weapon focus," in which a person's attention will be drawn to a dangerous object if present, and recall of details peripheral to the weapon will suffer as a result.
18. Littell notes, "[P]ersons tend to have their attention drawn to things or stimuli that relate to the strongest biological or physiological needs operating at the time. And, other factors being equal, persons tend to notice those aspects of a situation about which they have strong thoughts, feelings, attitudes, or prejudices." *See* William Littell, *Unintentional Errors and Distortions in Testimony*, 17 Am. Jur. Proof of Facts 163 (2003).
19. It has been noted that skill acquisition becomes entrenched in the psyche and, as it develops, requires less mental energy or attention devoted in order for successful completion. This is particularly relevant to memories of professional conduct, as specialists often perform the same or similar activities day after day in a routine fashion.
20. *See* James, *supra* note 14, at 427 (noting, "we cannot deny that *an object once attended to will remain in the memory*, whilst one inattentively allowed to pass will leave no traces behind") (emphasis in original).
21. One example is documented in the experiment performed by Munsterberg with his own students, described above. *See* Guy M. Whipple, *Psychology of Testimony and Report*, 8 Psychol. Bull. 307 (1911); Daniel L. Schacter, The Seven Sins of Memory: How the Mind Forgets and Remembers, 44–45 (2001). James notes, "If, then, by the original question, how many ideas or things can we attend to at once, be meant how many entirely disconnected systems or processes of conception can go on simultaneously, the answer is, *not easily more than one, unless the processes are very habituated; but then two, or even three*, without very much oscillation of the attention." *See generally* James, *supra* note 14, at 409–416.

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Private Placement	April 14	New York City
Medicaid Planning with a Focus on Case Studies and Spousal Issues	April 15 May 14 May 24 June 3 June 9	Uniondale, LI Tarrytown New York City Syracuse Albany
Introduction to Ethical and Civility Issues in Litigation: What Every Lawyer Should Know	April 16 April 23 April 30	Melville, LI Albany, New York City Rochester
Federal Criminal Practice: Demystifying the Process	April 16	Buffalo, New York City
Practical Skills: Basics of Bankruptcy Practice	April 22	Albany, Buffalo, Melville, LI, New York City, Rochester, Syracuse, Westchester
MOLD: A Primer on Claims and Litigation in New York	April 23 April 30 May 7	Buffalo, Uniondale, LI Albany New York City
Advanced Evidence for the Matrimonial Lawyer: An Interactive Program	April 23 May 7 May 14 May 21 June 4	Rochester Melville, LI Mt. Kisco Albany New York City
Litigation Update – Keeping Pace with New Developments	April 30 May 7 May 14	Albany Uniondale, LI New York City Rochester
Commercial Lines Insurance with Advanced Issues	April 30 May 14 May 21	New York City, Syracuse Buffalo Albany, Uniondale, LI
Women on the Move II	May 6	Albany
DWI on Trial – The Big Apple IV	May 6 - 7	New York City
Discovery 2004	May 6 May 7 May 14 May 25	Syracuse Buffalo Hauppauge, LI New York City

PROGRAM	DATE	LOCATION
Real Estate and the Environment: New York's New Brownfield Law	May 7	Albany
	May 11	Syracuse
	May 19	New York City
	May 25	Melville, LI
	June 2	Buffalo
Legal and Regulatory Issues in Long Term Care: An Update and Primer	May 7	Rochester
	May 14	Albany, Melville, LI
	May 21	New York City
Accounting for Lawyers	May 11	New York City
	May 19	Melville, LI
	June 9	Rochester
	June 15	Albany
Settling an Estate	May 17	Albany
	May 20	Rochester
	May 26	Uniondale, LI
		Binghamton
	May 27	Westchester
	June 2	Syracuse
	June 3	Buffalo, New York City
Use of Experts in New York Civil Practice (Telephone Conference Seminar)	May 20	Telephone Conference
Discount Gifting Techniques in Estate Planning: QPRTs, GRATs, Family Limited Partnerships and LLCs	May 26	Albany
	June 2	New York City
		Rochester
	June 9	Melville, LI
Ethics and Professionalism	May 26	Westchester
	June 10	Buffalo
	June 11	Uniondale, LI, Syracuse
	June 16	Rochester
	June 18	Albany, New York City
Hot Topics in Real Property Law Practice	June 3	Uniondale, LI
	June 4	Buffalo
	June 9	Syracuse
	June 11	New York City
	June 18	Tarrytown
Planning to Win – The Hunt for the Winning Story – with James McElhaney	June 3	Albany
	June 4	New York City

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NYSBA

POINT OF VIEW

A Slippery Slope: Discovery Of Attorney Work Product

BY RICHARD GABRIEL

Imagine that you are in your conference room, preparing a client for an upcoming trial, when your paralegal comes in to give you a message. Off the cuff, you ask him or her what a jury might think about the client's appearance, as a witness. The next thing you know, your paralegal is being served with a subpoena to testify about the nature of that conversation.

Or maybe you are meeting with an expert witness and a graphic consultant to prepare exhibits. You happen to exchange a few comments about the expert's testimony in the upcoming trial. Within days, your graphic consultant is subpoenaed for deposition about the nature of that conversation.

Sound far-fetched? Not as far as a couple of recent filings in lawsuits are concerned. More and more, attorney work product and attorney-client privileges are coming under attack. Instead of challenging the confidentiality afforded an attorney with a paralegal or graphics consultant, however, these filings presume that, somehow, the attorney work product is discoverable when it includes the use of a trial consultant in witness preparation. These lawsuits beg the fundamental question: How much of an attorney's thought process should be discoverable?

This was precisely the issue that the Third U.S. Circuit Court of Appeals considered when it ruled recently that the attorney work product privilege protects the efforts of trial consultants from the discovery process. The case of *In re Cendant Corporation Securities Litigation*,[1] involving trial consultant and now ubiquitous media celebrity "Dr. Phil" McGraw, intensifies the spotlight on the expanding role of trial consultants in American jurisprudence.

The Appeals Court in the *Cendant* case reversed a ruling by U.S. District Court Judge William Walls that the attorney work product privilege does not cover pre-deposition preparation of a witness by a non-testifying trial consultant. Earlier, Judge Walls's ruling had reversed a special discovery master's findings that the work product and attorney-client privileges protected Dr. McGraw's preparation of an Ernst & Young witness who had drawn up financial statements in litigation with Cendant.

While the Third Circuit's ruling may garner a collective shrug in upholding these core privileges, it highlights three important issues involving the work of trial consultants.

First, the ruling demonstrates how highly the court values the advocacy process and the protections afforded counsel as they prepare and present a case. Since the trial consultant's work involves testing, clarifying and helping shape the presentation of the attorney's theories, evidence and case strategies, the work product privilege applies to the work of consultants – a witness, a graphic artist or another member of the trial team. This ruling naturally extends the confidentiality of oral, written and electronic communication among attorneys, their employees and their clients to the attorney's interaction with the trial consultants who help prepare their cases.

Second, although the opinion addresses the witness preparation conducted by Dr. McGraw, it can be interpreted as applying to all or most of the services that trial consultants provide, including strategy sessions, client discussions, jury research, demonstrative evidence development and jury selection. And while there may be attempts to interpret the law to exclude protection of our services, as long as the work is directed by counsel and pertains to counsel's thoughts, opinions and impressions, the work product protection applies.

Third, the ruling lays aside archaic misperceptions of the trial consultant as a kind of "charm school coach." The court acknowledges that the trial consultant is not there merely to make witnesses look good, to give sound bites or to conduct seminars on general principles. Since much litigation involves complex, scientific, academic or legal information that can confuse a jury, the role of the trial consultant is to clarify and assimilate – to help the attorney untangle the enigmatic web of facts, to understand and communicate them clearly and accurately.

The assaults on attorneys' rights that are being mounted with relentless regularity in legislatures and courtrooms nationwide give cause for alarm. Had the Third Circuit ruled that the trial consultant's work was not protected by privilege, would it have been too long a stretch to say that discussions with your law partner or paralegal or spouse are subject to discovery? Once you allow even a small opening in this crucial protection, where would the assault on privilege end?

At the heart of legal advocacy are the thoughts, impressions and opinions of the attorney. In the coming months, members of the American Society of Trial Consultants will talk with the numerous state and national legal associations about ways to protect this most essential privilege. All of us must be vigilant, get involved and work together tenaciously to preserve our professional rights and protect our abili-

ties to provide the most effective assistance for our clients.

The Third Circuit's full opinion can be downloaded from the American Society of Trial Consultants' Web site at www.astcweb.org. Information about ASTC and its members also can be obtained at this site.

RICHARD GABRIEL is president of the American Society of Trial Consultants (ASTC), a professional association established in 1982 to advance the discipline and practice of trial consulting. Its members work with attorneys in a variety of specialties, including mock trials, change of venue, jury selection, witness preparation, focus groups, surveys, public relations programs and others. Gabriel is also an author with Thompson-West Publications. His trial consulting firm, Decision Analysis, is based in Los Angeles, Calif.

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1. 343 F.3d 658 (2003).

EDITOR'S MAILBOX

Dear Mr. Levin:

I am a member of the New York State Bar Association, a former resident of Port Washington, and am currently in exile in Los Angeles, serving as the president of the Academy of Television Arts & Sciences. You will know our work primarily through our administration of the world-recognized "Emmy Awards" program.

I read with interest your President's message in the January issue of the *Journal*. I was intrigued and impressed, in no small part since I was in Havana at precisely the same time as you and under parallel circumstances. I was part of a licensed entertainment industry outreach trip.

Many of our reactions were the same: the abject poverty, the universal literacy, and the surprising goodwill towards a people (Americans) whose governmental policies have been aggressive, threatening and represent economic strangulation.

I take issue only with your "conclusion" that your readers "wouldn't want to live there." After 40 years of economic repression from their nearest geographic neighbor with whom they share so much culturally and intellectually, during which the former Soviet Union supported only its own military strategic agenda and then left the country "barefoot and pregnant," it should not be surprising that this country of 11 million highly educated and entrepreneurial people is not a hospitable environment for the *Yanquis*.

Two small examples from the outreach we conducted on our mission:

• During the severe energy crises of 1994–1995 (economically created after Russia left), there was little electricity to use for any aspect of normal life. As a result, without air conditioning in the brutal summers, Cuba lost forever a significant portion of its National Film Archive.

• The National Animation Company, state owned (naturally) and responsible for all of the country's output of animation, has but a single post-production editing suite as a result of the U.S. boycott on import of technology (it is well known that we strong-arm our allies from doing technological trade with Cuba). In the States, even a small animation company will have multiple such suites at its disposal.

My point is that in no small part the inhospitable socialist environment in Cuba has been terribly exacerbated by the decades of cruel U.S. economic policy. Jimmy Carter, Steven Spielberg and Robert Redford have all been recent "tourists" to view the issue firsthand. President Carter boldly met with dissidents, condemned Fidel's anti-human rights practices, but similarly spoke out against this U.S. economic strangulation. There appears to be some hope that after the upcoming national elections, regardless of which party prevails, this policy will be re-evaluated.

I know you share my view that as industry leaders, we have responsibility to make this country's position in support of all elements of natural law – rule of law, freedom of speech, and unfettered ability to express oneself politically or creatively (note however the absolute absence of petty crime or tourist scams in Havana) – a shining beacon of outreach.

I believe in the next few years we will both have the opportunity to revisit Havana and also, more importantly to contribute to and participate in its transition to vibrant, open, and eminently attractive place where we both might even consider "wanting to live"!

Keep up the dedicated work to public service. I certainly appreciate your commitment as a member of the NYSBA.

Very truly yours,
Todd P. Leavitt, President
Academy of Television Arts & Sciences
5220 Lankershim Blvd.
North Hollywood, CA 91601
leavitt@emmys.org

MEMBERSHIP TOTALS

NEW REGULAR MEMBERS
1/27/04 - 3/8/04 _____891

NEW LAW STUDENT MEMBERS
1/27/04 - 3/8/04 _____397

TOTAL REGULAR MEMBERS AS OF
3/8/04 _____68,980

TOTAL LAW STUDENT MEMBERS AS OF 3/8/04_____4,537

TOTAL MEMBERSHIP AS OF
3/8/04 _____73,517

Attorney Professionalism Forum

To the Forum:

For two years, I have diligently represented a client in a litigated matter, preparing numerous documents and reviewing endless correspondence, fielding telephone calls at all hours of the night and on weekends. Now that much of the work is complete, my client has discharged me in favor of another attorney, who is being compensated on a very hefty contingency fee basis. My fees have been paid in full. Since no substitution of counsel has been filed, I am still the attorney of record, and I am awaiting instructions on transfer of the file.

While still licking my wounds from my unceremonious discharge, I am outraged by the fee being charged by incoming counsel, especially since so much of the work is complete. While it is my wish to inform my erstwhile client that she is being overcharged by incoming counsel, I do not want to create the impression of being ungracious or a sore loser. On the other hand, I do not wish my client to be taken for a ride. What should I do?

Sincerely,

Fired in Flushing

Dear Fired:

While it is never fun to be fired, it is important to separate your bruised ego from your professional duties to your client, as your emotions may affect your judgment. Of course, under the Lawyer's Code of Professional Responsibility, the client's discharge requires your mandatory withdrawal from the case (*see* DR 2-110(B)(4)). As is true of all withdrawals, you must take reasonable steps "to avoid foreseeable prejudice to the rights of the client," including the delivery of all papers and property to which the client is entitled (DR 2-110(A)(2)).

Turning to your specific concerns, it is interesting that you do not question the competence or legal skill of incoming counsel, but merely the excessive nature of the fee, which is governed by DR 2-106 of the Code. Under Section A of that Rule, a lawyer is prohibited from charging an excessive fee. The reasonableness of an attorney's fee depends on such factors as the time and labor required, the amount of money involved, the result obtained, the time limitations imposed by the client and the legal skills of the attorney (*see* DR 2-106(B)). While some of these factors are objective, others are subjective.

If you feel strongly that incoming counsel may be overcharging your client, you may address this issue with her, provided that you do so in a dispassionate and professional manner. Do not try to dissuade the client from making a decision with which you presumably disagree, and about which you may not be fully objective. Under the Ethical Considerations of the Code, a lawyer is encouraged "to ensure that decisions of the client are made only after the client has been informed of relevant considerations" (EC 7-8). A lawyer is encouraged to initiate a decision-making process, and her advice to the client "need not be confined to purely legal considerations" (*id.*).

The Nassau County Bar Association Committee on Professional Ethics recently considered a delicate situation in which two lawyers were representing the same client in a criminal case, yet one wished to criticize the other to the client (Nassau Co. Op. 02-2). The Committee reasoned that a client retains an attorney not only for the attorney's legal skill, but for his or her professional judgment and opinions as well, and that these opinions may extend to "the capability of the other attorney in the case." Thus, the Committee concluded that "the inquiring attorney may inform the client of his or her opinion with regard to the other attorney" (*id.*).

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional questions and answers to be considered for future columns. Send your comments or your own 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, and is 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.

In your case, it would be best to put aside any personal feelings you may have as a result of your client's decision to terminate your services, and to consider her best interests. You should also consider the likely effect of your advice on the client, and whether she would perceive your advice as an attempt to put undue pressure on her to continue the professional relationship with you. Remember also that this might be your final contact with this client regarding this matter, and you do not want to leave the lasting impression that you are a sore loser, or are motivated by the taste of sour grapes. Moreover, your perception that the fee of incoming counsel is unreasonable within the meaning of DR 2-106 may be open to question, as there are a number of factors that can affect the reasonableness of a fee – some of which, as mentioned, are highly subjective. Finally, remember that you have been discharged, and although

you are still the attorney of record, you are at best a lame duck.

If, after weighing and considering all of the above, you are still persuaded that the incoming attorney is charging an excessive fee, you may tactfully give that opinion to the client. In doing so, however, you should make it clear that you are not attempting to change the client's mind about your discharge, but are merely rendering advice about the fee. Be prepared to step aside gracefully, if, as is likely, the client rejects this last piece of advice from you. Remember, the client presumably had a reason, whether valid or not, for looking elsewhere for legal representation.

The Forum, by
Barry R. Temkin
New York, NY

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

My client, a handyman, was hired to renovate a rural tavern which his employer was in the process of purchasing (along with the tavern's thriving bar business) from a sitting judge in a neighboring village. After an altercation concerning the work he was performing, my client was unceremoniously fired and told to "pack up and leave." When he asked to be paid, my client's employer allegedly tossed him out the door onto the street and stomped on his back. My client's erstwhile employer was arrested and charged with assault. I followed suit with a civil case for battery, seeking damages for the personal injuries my client suffered in the attack.

The defendant's attorney, a local practitioner, asked the district attorney to drop the criminal charge so that his client would not be denied the liquor license he needed for the bar business he was buying from the judge. Unknown to me at the time, however, the bar-owning judge (not the judge handling the criminal prosecution or the civil claim) was also at work on the case. He had placed an *ex parte* phone call to the district attorney, and had been cooperating with, and advocating for, the defendant. This judge sits within the jurisdiction of the district attorney prosecuting the case. The district attorney apparently succumbed to the judicial pressure and disposed of the criminal case by offering an "ACOD" (adjournment in contemplation of dismissal) of the criminal charge, thereby preserving the defendant's liquor license and the purchase of the business from the judge.

I feel that the rug was pulled out from underneath me. By her sweetheart plea bargain and behind-the-scenes dealings, the district attorney failed to protect the victim (my client), and undermined the pending civil case I am handling. The district attorney's *ex parte* communications with the judge are also troubling, especially since the judge had an economic interest in the outcome of the case. Finally, the district attorney utterly failed to protect the public from a recurrence of the defendant's dangerous rage – and I happen to know that he consumes alcohol while socializing in his newly licensed bar, making such a recurrence all the more likely.

My knowledge of these events has placed me in an awkward situation, and I'm not sure what I should be doing now. Is there a whistle that I should be blowing?

Sincerely,
Frustrated in Fryville

Questions, comments, alternate views? Contact us at journal@nysba.org.

POINT OF VIEW

State Legislative Power Supersedes Federal Laws in Accounting Reform

BY LOUIS GRUMET

Enron, WorldCom, Adelphia and other recent corporate scandals set the stage for Congress to change federal laws regarding the corporate accountability of SEC registrants. *The Sarbanes-Oxley Act* created the Public Company Accounting Oversight Board (PCAOB), with oversight from the Securities and Exchange Commission (SEC), to exercise serious disciplinary, quality control and rule-making powers over auditors of public companies.

Nonetheless, despite this federal legislation, a problem still exists in trying to identify certified public accountants who break the rules of professional conduct. The federal government cannot revoke a CPA's license to practice. Only the states hold this power.

In New York, accountancy laws have not changed substantially since 1947, creating friction between law and reality. The accounting profession has changed dramatically in the last five-plus decades. State regulation has not kept pace. Regulators have no authority over vast segments of today's profession, although the public would think otherwise.

New York State now regulates CPAs only for attest services, such as audits, where they express a formal opinion on whether a client's financial statements reflect the client's financial position in accordance with generally accepted accounting principles. Attest services also include reviews, compilations, and certain forecasts and projections, each of which is a term of art with special meaning in CPA professional literature. Yet a typical CPA practice encompasses not only attest work, but also many other services, none of which are subject to regulation by the New York State Education Department (SED), the licensing body. In addition, once CPAs leave "public practice" and accept employment with business or government, they become completely unregulated.

Changing Landscape

After the birth of the CPA profession in 1896, preparing and auditing financial reports was its franchise in the same sense that litigation is the franchise of the legal profession. As the CPA profession grew beyond that franchise, regulation was frozen in time, leaving most areas of CPA practice unregulated. The current statute bears little relationship to actual CPA practice.

Non-attest services offered by CPA firms (as taken from firm Web sites) include SEC services, advice on all stages in the life cycle of a firm from initial public offering to divestiture, expert witness services and alternative dispute resolution, tax compliance and planning, consultating for mergers and acquisitions, management advisory services, corporate governance, feasibility studies, information technology, valuation services, personal financial planning, and investment advisory services.

The current view of the SED is that all of these non-attest services fall outside its regulatory authority.

Significantly, the Web sites of the Big Four firms were not consulted in developing this list. Not only do they perform more than 80% of the public company audits, they also have much more extensive non-audit services than smaller firms. Despite their immense size, however, they constitute only a small portion of the CPA profession. Of the nearly 30,000 members of the New York State Society of CPAs merely 6% are affiliated with Big Four accounting firms.

Non-litigation Expansion

The legal profession has also grown far beyond its initial franchise of litigation. A similar review of law firm Web sites yielded services including: SEC regulatory and compliance matters, tax services, corporate governance, mergers, acquisitions, divestitures, joint ventures, leveraged buy-outs, corporate recapitalizations and reorganizations, spin-offs, securities offerings, antitrust counseling and litigation, real estate transactions, commercial finance, creditors' rights, distribution, franchising and licensing, technology and intellectual property matters, and estate planning and trust planning.

Lawyers performing any of these non-litigation services are nevertheless fully subject to regulation. Unlike the CPA profession, regulation of the legal profession expands with the services rendered by lawyers. Imagine the confusion of practicing lawyers and the public if the regulation of attorneys had not kept pace with the growth of the legal profession's services.

A NYSBA report,[1] which includes a review of how the legal and CPA professions evolved, shows how the legal profession began to develop significantly in the late 19th century and beyond. Practice settings shifted from sole practitioners and tiny, local law firms to larger firms crossing first state, then national borders. Large corporations began hiring full-time, in-house attorneys. Lawyers expanded into new areas of practice. Imagine the confusion of practicing lawyers and the public if, similar to the current-day New York CPA, in-house counsels were exempt from regulation as attorneys because they did not litigate, or because they did not work in a law firm.

The reality is that "[a]ttorneys 'practice law' . . . if . . . they give legal advice or counsel to, or provide legal representation for, a particular body or individual in a particular situation in either the public or private sector."[2] This broad definition accommodates a growing, vibrant legal profession. Indeed, "[a]ll members of the New York Bar are presumed to be practicing law in New York unless otherwise shown."[3] Given this broad regulatory reach, modern-day lawyers are subject to the discipline, registration and continuing education requirements of the courts regardless of their employers, firm settings or practice areas.

There has been no similar development of regulatory processes for the CPA profession.

Regulation Reform

The extent of the regulatory lag in the CPA profession has begun to raise issues regarding the role of inadequate regulation in creating a vacuum that enabled recent scandals. Inadequate regulation is not the sole cause of these scandals, but reform in regulation is part of the solution.

The following reforms would be positive steps in dealing with the current environment:

- Subject all CPAs to registration, regulation and professional discipline and include all professional services by CPAs within the regulated scope of practice.
- Mandate that all CPAs, including those in private industry, meet substantial continuing professional education requirements. Now, CPAs inside corporations are not required by law to stay up-to-date through continuing education.
- Expand the current requirement for registration of CPA partnerships to cover all CPA firms, *i.e.*, sole practitioners, professional corporations and professional limited liability companies.
- Subject CPA firms, not just individual licensees, to substantial fines for professional misconduct.
- Make mandatory the current voluntary program of peer review for CPA firms that perform attest or compilation services and conduct them in accordance with state regulation.
- Include as qualifying experience for licensure, accounting, attest, auditing, tax return preparation and tax advisory service. (At present, experience is based primarily on the attest function.)

Unregulated CPAs

Perhaps the most significant step to take would be to include CPAs in private practice in professional regulation. Attorneys practicing as in-house legal counsel practice law. The same is not true of CPAs who have left public practice, that is, those serving in corporations. These CPAs serve in many capacities such as chief financial officers, controllers and internal auditors, as well as CEOs and other functions not connected with accounting.

When CPAs perform these roles in industry, existing New York law does not regulate them. The most notorious recent case is former WorldCom Inc. Chief Financial Officer Scott D. Sullivan, who is accused of leading a multibillion-dollar accounting fraud. He is licensed as a New York CPA. (Currently, the SED Office of the Professions Online Verification Web page shows Mr. Sullivan simply as "Not Registered." But he still holds the CPA designation.) In fact, SED informally stated that it has no jurisdiction over Mr. Sullivan because it regulates the CPA profession in the attest (audits, compilations, and review) area only. According to the SED interpretation of the scope of practice definition, which sets its authority, Sullivan was not practicing public accountancy. If, however, he is convicted of a crime under New York or federal law, he could be subject to penalty for professional misconduct, even if the crime is not in the practice of the profession as interpreted by SED.

Similarly striking, Robert Korkuc, the former chief accounting officer of Symbol Technologies, also a New York CPA, pleaded guilty in June 2003 to conspiracy and securities fraud charges at U.S. District Court in Central Islip, NY. Because the guilty plea related to a *civil* Securities and Exchange Commission violation and not to *criminal* charges, the SED has no jurisdiction over him under the general law of the professions; and, because he was not in the practice of public accountancy, the accountancy provisions do not apply. As a result, SED cannot revoke his license. A search of the SED Web site in late January revealed that Korkuc still had an active CPA license.

The statutory and regulatory provisions do not currently apply to CPAs that are not partners and perform only non-attest functions while employed in a CPA firm. These CPAs offer a variety of services, including tax preparation and advice, personal financial planning, design and implementation of financial information systems, appraisal or business valuations, and actuarial work. The public and users of CPA services believe they have protection and recourse where none exists under the current SED interpretation of existing law.

"Scope of Practice"

The sale of the non-attest assets of Goldstein Golub Kessler & Co. P.C., a New York City public accounting firm, to American Express Tax & Business Service (TBS) in 1998 brought to light the present SED interpretation of its regulatory authority. While developing a protocol for TBS and the new GGK LLP partnership, which retained the attest practice of its predecessor firm, the SED's Office of the Professions concluded that its jurisdiction over the CPA profession was strictly limited by the existing statute to a narrow definition of public accounting as the provision of certain audit, attest and compilation services. It confirmed in a statewide mailing that SED had no power to regulate CPAs not performing work in these limited areas.

The SED based its assessment of its limited regulatory reach on section 7401 of the Education Law, which establishes the "scope of practice" of public accountancy. The current language for section 7401 was written over 50 years ago, before CPAs began to leave public accounting firms in large numbers to work in industry and before the deregulatory trend created demands for extensive new services from professionals with the knowledge and skills of CPAs.

A new statute should reflect these changes in CPA practice and empower state regulators to discipline meaningfully and fairly without regard to place of employment or work performed.

LOUIS GRUMET is executive director of the New York State Society of Certified Public Accountants, the nation's largest and oldest state accounting association. A graduate of George Washington University, he received his J.D. from New York University Law School, an MPA from the University of Pittsburgh Graduate School of Public and International Affairs, and is a Certified Association Executive.

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1. *Preserving the Core Values of the American Legal Profession; The Place of Multidisciplinary Practice in the Law of Governing Lawyers*, Report of the New York State Bar Association Special Committee on the Law Governing Firm Structure and Operation, Albany, NY, Apr. 2000.
2. See the New York State Unified Court System section on Continuing Legal Education, *FAQ's for Experienced Attorneys*, at <http://www.nycourts.gov/attorneys/cle/attorney_faqs.shtml> (citing Restatement of Law, Third, *The Law Governing Lawyers*, Chapter 1, § 3).
3. *Id.*

New Members Welcomed

FIRST DISTRICT
Alejandro Alcala-gerez
Aimee Marie Allen
Alexandra Alperovich
Andres Alvarez
Elizabeth L. Anderson
Neha Arora
Sharon Azulay
David P. Badanes
Sasha Nathaniel Badian
Opal Clarice Bailey
Rochelle Balter
Dorian M. Barag
Arash G. Barkhordar
Kenneth Robert Barr
Sarah Copley Barrett
Lea Ling Beh
Alessia Tamara Bell
Jaime Cantor Ben
Leah Michelle Berenholz
Jason H. Berland
Matthew John Bizzaro
Michelle I. Blat
Julia A. Bogudlova
Raquel Ann Bonanno
Eneida Boniche
Jacquelyn R. Bonner
Kevin Michael Bopp
David W. Bowker
James W. Bozzomo
Stella Bretous
Amelie Von Briesen
Charles Patrick Bronowski
John F. Burke
Edgardo Cavalie-Fiedler
Heather Champion
Aleksandr Simon Cherny
Inamai Chettiar
Kevin I. Cho
Joseph Choi
Itiva Chopra
Pauline Maria Christo
Jason Craig Chumney
Connie Hae Won Chung
Jane S. Chwe
Justin H. Cohen
Mark J. Coleman
Sara Ann Collins
Harold James Connolly
James Simon Coons
Nancy Corcos
Kristine Lynn D'amato
Norma Lisa Da Rosa
Rachael Elaine Dehner
Alexandra Nicole Deneve
Aaron J. Devaney
Carolyn Anne Dizon
Shahkira Douglas
Ayn Ducao
Moran Eizenberger
Laurie Beth Emmer
Joseph A. Episcopio
Jennifer Jodi Ettenberg
Amanda Givens Feeman
Alicia D. Ferriabough
Harvey Fishbein
Gregory Adam Fishman
Christina Pappas Flinn
Caroline Marie Flintoft
Elizabeth Williams Fogarty
Jesse Cole Foley
Robert Sharp Forster
Gregory Scott Fragin
Kerry Ann Frank
Peter Fratangelo
Deborah Simone Fremder
Eric D. Friedlander
Gelsomina A. Gambardella
Hua Gao
Valeria Alejandra Garcia-Tufro
Andrzej Gasak
Andrew Jason Geiger
Scott Andrew Gelade
William D. Georges
Christopher R. Germain
Keyvan Ghaytanchi
John Charles Gilson
Brian R. Gish
David P. Gold
Jorge S. Gomes
Alexander Gomez
Collette Veronica Grant
Charles L. Green
Rebecca Meryl Green
Brendan E. Groarke
Jessica Amy Grossman
Chetan Gulati
James S. Gutierrez
Shahram Haghighi
Heather Ann Harris
Ken Laves Hashimoto
Francis C. Healy
Linda Jean Helble
Jason Richard Heller
Benjamin Joseph Henner
Luke F. Henry
Adam Stuart Heyman
Penny J. Hirsch-Edwards
Sven Carlisle Hodges
Daniel Watson Esterowitz Holt
Titia Alexandra Holtz
Kimberly Anne Horn
Haslyn A. Howard
David J. Hubbard
Andrew Hwang
Ryan C. Jacobs
Cara Jamal
Constance Crawford Hamilton Jameson
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Elizabeth M. Johanns
Eleanor Nancy Johnson
Jeffery Robert Johnson
Douglas Joseph Jones
Jeffrey M. Jones
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Adam Lance Kantor
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Mary Graf McClure
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only one of them, the correct word is "that." If Judge X has but one sentence and she does not want to impose it, use ", which," placing a comma before the "which."

Question: That or which? "I'm involved in litigation that [or , *which*] troubles me." *Answer:* If you're involved in lots of litigation and only one piece of it troubles you, it's "that." If you're involved in one piece of litigation only, and that one piece troubles you, it's ", which," placing a comma before the "which."

"That" & "which." "That which" *becomes* "what": "*That which* does not kill us makes us strong." *Becomes:* "*What* does not kill us makes us strong."

Which

The modifying "which." Keep modifiers next to the words and thoughts they modify: "Family Court rendered judgment for respondent *which* the Second Department reversed." *Becomes:* "Family Court rendered for respondent a judgment that the Second Department reversed." *Or* "The Second Department reversed Family Court's judgment for respondent."

The hard-working "which." Don't make your "whiches" work too hard. The antecedent becomes vague as the relative becomes remote: "Respondent stared wildly around the courtroom, which was noticeable to everyone." (What was noticeable? Respondent's staring wildly? The courtroom?) One solution is to divide the sentence into two: "Respondent stared wildly around the courtroom. Everyone noticed his wild stares." A better solution is to rearrange the sentence: "Everyone noticed that respondent stared wildly around the courtroom."

The elegant "which." Use the elegant "which" to replace the second "that": "This is the format [delete nonstructural *that*] the associate uses and *which* [not *that*] the client adopted."

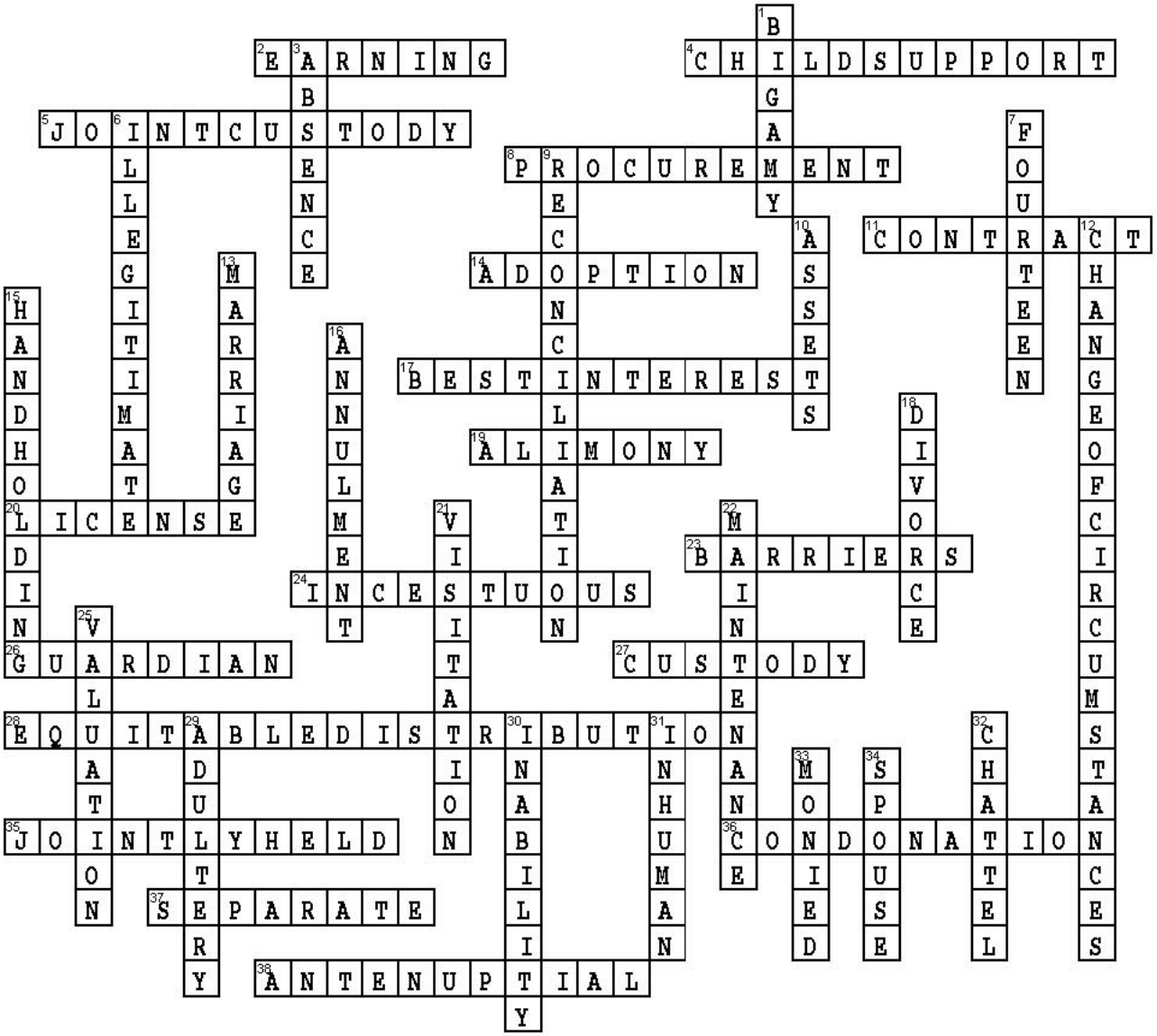
The appositive "which." Excise your "which" after an appositive: "This opinion, *which was* written for publication, is a masterpiece." *Becomes:* "This opinion, written for publication, is a masterpiece."

The legal "which." Withdraw your legal "whiches": "The parties entered into a contract in March 1955, which contract is binding." *Becomes:* "The parties entered into a binding contract in March 1955."

Knowing the difference between "that" and "which" separates the master from the apprentice. And that's not all, folks: Using that "that" correctly helps the reader understand which "which" is which. Which of us could disagree with that?

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.

Answers to Crossword Puzzle on page 8.



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The Legal Writer

That's the Way It Is: "That" and "Which" in Legal Writing

By Gerald Lebovits

Legal writing which depends on precision is all about eliminating ambiguity that all law firms who and lawyers that write strive for.

This column is dedicated to explaining why the preceding sentence should read: Legal writing, which depends on precision, is all about eliminating ambiguity. Lawyers should strive to write clearly.

That

Use "that" as a structural device to aid understanding; otherwise delete. Consider this ambiguous sentence: "The lawyer said on Monday he will write the brief." Is it "The lawyer said *that* on Monday he will write the brief?" *Or* "The lawyer said on Monday *that* he will write the brief?"

Structural "that":

• "The People alleged defendant committed murder." *Becomes:* "The People alleged *that* defendant committed murder." (The People cannot allege a defendant.)

• "The court held the 500-pound man was in contempt." *Becomes*: "The court held *that* the 500-pound man was in contempt." (The judge did not hold a 500-pound man.)

• The Gotham Writers' Workshop Mission (Copyright Gotham Writers' Workshop, Inc., 2000): "We believe anyone can write." *Becomes:* "We believe *that* anyone can write." (The Workshop does not believe anyone or everyone. Try promising the company that you will pay when the course is over.)

• "The Government decided the question did not need to be decided." *Becomes:* "The Government decided *that* the question did not need to be decided." (The Government did not decide the question.)

Nonstructural "that":

• "The point *that is* [or points *that are*, *that were*] being made here is not to be wordy." *Becomes:* "The point [or points *that are*, *that were*] being made here is not to be wordy."

• "The point *that* he made is not to be wordy." *Becomes:* "The point he made is not to be wordy."

The discoursive "that." Use "that" to distinguish between direct and indirect discourse. Direct discourse: "The senior partner said, 'Bill researched the issues.'" Indirect discourse: "The senior partner said *that* Bill researched the issues." *Not:* "The senior partner said Bill researched the issues."

Question: Can you string eight "thats" together in one sentence? *Answer:* "The legal-writing teacher said that that 'that,' that 'that' that that 'that' referred to, is a triply vague referent." (Written differently, the sentence might read: "Said the legal-writing teacher: 'The "that," which is the "that" to which the "that" refers, is a triply vague referent.'")

The extra "that." Avoid losing parallel structure by adding an unnecessary "that" in a string of clauses: "The paralegal explained that although she will draft the contract, *that* no one will read it." *Becomes:* "The paralegal explained that although she will draft the contract, no one will read it." The extra "that" is called a sentence extra.

The double "that." "That that" *becomes* "that this" or "that the."

That *vs.* Who

Differentiate between "that" (or ", which") and "who": "Who" refers to people and to named animals ("Sox, the ex-First Cat") and animals that have special qualities ("Mighty Mouse"). "That," ", which," and "it" refer to things, entities, concepts, and animals. "He's a man *that* always does the right thing." *Becomes:* "He's a man *who* always does the right thing." *Becomes:* "He always does the right thing." "Snidely & Whiplash is the law firm that [not *who*] represents objectant in Surrogate's Court."

Gerund usage. If the clause contains a human and a nonhuman, use a gerund: "The man *who* and the truck *that* crossed the street . . . ." *Becomes:* "The man and the truck *crossing* the street . . . ."

Withdraw your legal whiches by going which hunting.

That *vs.* Which

Learn the difference between "that," a demonstrative pronoun ("that law-review article"), and "which," an interrogative pronoun ("which law-review article?"). Learning the difference will also help you use the following correctly: "who," "whom," "whose," "whoever," "whichever," and "whatever."

Go which hunting. "That" is restrictive (or defining). "Which" is not restrictive (or nondefining).

A tip: If the word or concept before the "that" or the "which" is one of several, use "that." If the word or concept before the "that" or the "which" expresses a totality, use "which."

Question: That or which? "Judge X must impose a sentence that [or, *which*] she does not want to impose." *Answer:* If Judge X, who has several sentences to impose, does not want to impose

Continued on page 60

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