NEW YORK STATE BAR ASSOCIATION

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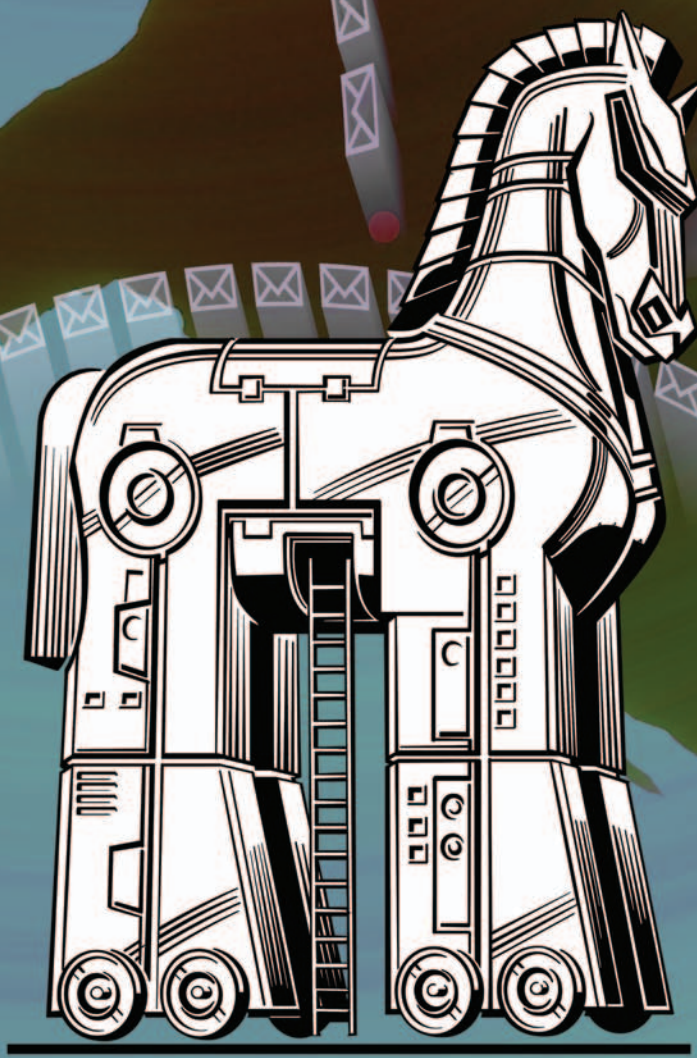
Journal

CYBERCRIME 2004: COMPUTERS + CONNECTIVITY



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February 2004

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On The Cover

The Trojan horse on the cover was chosen to symbolize the problems that arise when, much as the famous horse in the age of Greece's greatest prominence, apparently innocent computer files turn out to be the vehicles for delivering computer viruses and worms that disrupt the electronic age.

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's That Knocking At My Door?

It is error alone which needs the support of government. Truth can stand by itself. Thomas Jefferson

Democracy is not something you believe in or a place to hang your hat, but it's something you do. You participate. If you stop doing it, democracy crumbles. Abbie Hoffman

Individual rights are not subject to a public vote; a majority has no right to vote away the rights of a minority; the political function of rights is precisely to protect minorities from oppression by majorities. Ayn Rand

William Roper: *So, now you'd give the Devil benefit of law!*

Thomas More: *Yes. What would you do? Cut a great road through the law to get after the Devil?*

William Roper: *Yes! I'd cut down every law in England to do that.*

Thomas More: *Oh? And when the last law was down and the Devil turned round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's, and if you cut them down – and you're just the man to do it – do you really think you could stand upright in the wind that would blow then? Yes, I'd give the Devil benefit of law for my own safety's sake.* Robert Bolt, A Man For All Seasons

It's hard to lead a cavalry charge if you think you look funny on a horse. Adlai Stevenson

The preparation of the President's Message is one of the most daunting tasks for me. Although the Bar *Journal* is a publication that comes out only nine times a year, every time I finish a President's Message it seems that another one is due. And now, after this one, I am told that I have only two more opportunities to vent.

So, what has been on my mind this month? We just concluded our 127th Annual Meeting, an incredible event in which we broke all previous attendance records, and had a marvelous array of outstanding programs covering every conceivable topic. Our sections and committees outdid themselves, leaving one to speculate what they could possibly do to top this year's performance. As they (used to) say in Brooklyn, "Wait until next year!"

One theme has repeated itself through many of the activities I have engaged in during my terms as president-elect and president. The drumbeat of attacks on the judiciary, the legal system, and on lawyers, has been persistent, and pervasive. If I were given to conspiracy theories, I would consider whether there isn't a concerted movement in the nation to undermine the rule of law, and replace it with the personal philosophies of those who view themselves as our leaders.

The history I learned long ago was that this country was founded on the basis of tolerance, and independent thought. Contrary to the statements that one often hears in the media and in conversation, this country was not founded as a democracy; it is a republic. While we accept the general principle that the majority should rule, we sometimes forget the corollary that there are certain fundamental rights which everyone has, and which are not subject to majority rule.

So, contrary to a recent statement by the leader of one of our national legislative bodies, whether or not the majority of people favor the enactment of particular legislation is not determinative of whether the courts should sustain the legislation against constitutional challenge. And, contrary to many editorial comments, whether a court should decide a particular case in a particular way is not determined by what outcome would be more popular.

I have been reading recently about events in Iran, where the effects of the clerical revolution continue to plague the country as it seeks to find a governing structure. It was not surprising to learn that when the clerics came into power, and wanted to gain quick control over the nation's institutions, their first step was to abolish most of the laws, and render the lawyers ineffective. They abolished the secular courts, prohibited most of the practice of law, and admitted to practice thousands of untrained people in order to make sure that those who were handling legal matters were loyal to the state's new principles.

Shades of Dick the Butcher!!

But this shouldn't come as a surprise to those of us who study history. That lawyers are the ones who stand up for freedom, who defend the underprivileged and the unpopular, who protect the smallest of us from the forces of the more powerful, is known to us. From

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Shakespeare, to Sir Thomas More, to the present day, lawyers are the ones who know best that the rule of law, rather than the rule of people, is what makes America the great moral and political force that it is.

Students of history also know that from the beginning of our experiment in government, there have always been those who have sought to minimize personal freedoms, and impose conformity to norms established by the powerful. The winds of change have blown our society from one side to the other, but the ship has always righted itself, finding the proper and appropriate balance. Difficult times have required difficult measures, and difficult times have also generated unreasonable or unfair solutions.

Looking back on history (with the customary 20/20 hindsight we all enjoy), it is sometimes easy to identify some of the mistakes. *Korematsu v. U.S.*, *Buck v. Bell*, and *Plessy v. Ferguson* quickly come to mind. Taking the broader view, however, we can also recognize that we eventually got it right, and that in the long run the people of the United States can be counted upon to do the right thing.

Some of the same debate is going on now, over the Patriot Acts (I and II). At our annual meeting in New York, we had an intellectually stimulating discussion of this subject by an all-star panel. To me, one of the most significant points was made right at the beginning: not too many people have bothered to read the Patriot Act, but everyone seems to have an opinion about it.

Since our panel was composed of lawyers, and they weren't there in representational capacities, it was indeed refreshing to hear the "proponents" of the legislation concede that it has some difficulties and may in some cases be unduly harsh, and to hear the "opponents" concede that there are legitimate security concerns which make some legislation to secure our safety necessary. What struck me most about the discussion was that the removal of the talk show format, and the absence of any need for sound bites, generated a reasoned discussion, bringing out different points of view, and finding areas of common ground.

It was logical to conclude at the end that if our panelists were given the power to do so, they could probably write legislation acceptable to most people, and would accomplish most of what the proponents of the law wish to do. Unfortunately, the final versions of the legislation will be forged in the legislative crucible, where the rhetoric and posturing is more likely to prevail than the reasoned discussion of the issues.

So, what is the point of all this? To me, it is the constant inspiration I see wherever I go in my president's travels, meeting thousands of lawyers who are dedicated to the improvement of the profession, to the public good, and to the preservation of the rule of law. To me, it is the knowledge that we are indeed a noble profession, which holds to important principles, and stands up for our national values.

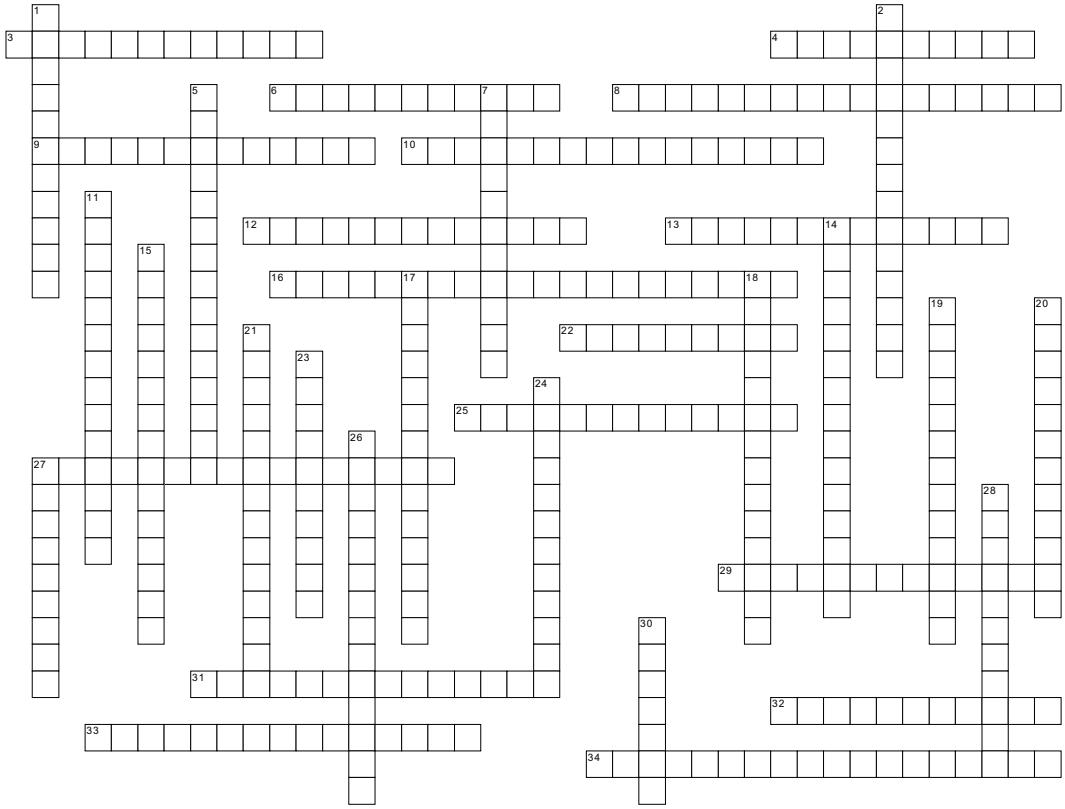
We may have an uphill fight in communicating to the public where we fit in the overall scheme of things. We may have to suffer the slings and arrows of misfortune brought on by the misdeeds of a very few. We may have to suffer the "humor" of the lawyer joke.

But, when all is said and done, we should be proud of what we do, and what the great majority of our colleagues do. We should be proud that our efforts and principles protect and preserve the best of our society for future generations.

As I have said many times before, it is up to each of us to continue to get this message out. In the immortal words of Rabbi Hillel: "If I am not for myself, then who will be for me? And if I am only for myself, what am I? And if not now, when?"

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.)



Famous American Lawyers, by J. David Eldridge

Across

3 Handled over 1,100 cases in three years; give him liberty or give him death

4 Defense attorney in the My Lai courts-martial, the Sam Sheppard case, O.J. Simpson trial and the Boston Strangler case

6 Well-known attorney who successfully defended former first brother, Roger Clinton and Susan McDougal, and now represents Scott Peterson

8 This illegitimate child grew up to fight in the Revolutionary War, was elected to the Continental Congress and authored the infamous *Federalist Papers*, only to die in a duel after being shot by Aaron Burr

9 Longest-serving United States senator in history

10 The first African-American justice of the United States Supreme Court, he won *Brown v. Board of Education*, helping end segregation

12 Secretary of state under Presidents Harrison, Tyler and Fillmore (the devil made him do it)

13 This president created federal income tax, the Federal Reserve and the FTC, but didn't want women to be able to vote

16 A political evangelist, he was the prosecutor in the "Monkey Trial," and drafted legislation to prevent Darwin's theory of evolution from being taught in public schools

22 A slaveholder who helped draft the Missouri Compromise, he was a congressman and senator, eventually appointed secretary of state under John Quincy Adams

25 Defended Charles Manson

27 Secretary of state under Presidents Harrison, Wilson and Eisenhower, he served as a delegate to the U.N. after WW II

29 Represented Alex Kelly, the man who fled to Switzerland for nine years to escape a double rape trial, and Michael Skakel, the man accused of murdering Martha Moxley

31 Represented Erik Menendez and one of the defendants in the Bob's Big Boy massacre

32 Lead prosecutor in the O.J. Simpson trial

33 Court of Appeals judge who landed on the U.S. Supreme Court; his decisions are still quoted with great respect today

34 This president didn't fear anything but fear itself

Down

1 His landmark litigation helped set the standards for forensic use of DNA; represented Hedda Nussbaum, O.J. Simpson and defendants in the Abner Louima case

2 Born in a log cabin and never attended law school, he rode the circuit for 20 years and tried over 5,000 cases before becoming president

5 Defended Cinque and the other slaves captured aboard the *Amistad*

7 Represented Imelda Marcos, Randy Weaver and Karen Silkwood

11 Represented O.J. Simpson, Michael Jackson, Reginal Denny and an Oklahoma City Bomber

14 Defense attorney in the Chicago Seven conspiracy case, he also defended Lenny Bruce, Stokely Carmichael, Jack Ruby, Martin Luther King, Jr., and Malcom X

15 Author of the Declaration of Independence, scientist, inventor, slaveholder and father of the University of Virginia

17 Beaten by Eisenhower in run for presidency, later appointed Ambassador to U.N. by President Kennedy

18 Harvard law professor who defended O.J. Simpson, Claus Von Bulow, Michael Milken, Jonathan Pollard, Leona Helmsley, Jim Bakker, Mike Tyson, Patty Hearst, F. Lee Bailey and William Kunstler

19 Senator; U.S. Attorney General under his president brother

20 Once a U.S. Attorney for the Southern District, was mayor of New York City when the Twin Towers fell

21 Congressman and senator who debated Abraham Lincoln, later serving in his cabinet

23 Represented presidential hopeful, Al Gore, in his unsuccessful run for the White House in 2000

24 He was not a crook

26 Law school dropout and underdog defender of civil rights, he saved the Leopold-Loeb defendants from execution, and represented the teacher in the famous "Monkey Trial" (defending the theory of evolution)

27 Colonial patriot who defended the British soldiers taking part in the Boston Massacre, he became president and later died within hours of Jefferson – 50 years to the day after the country's independence from Britain

28 Justice of the U.S. Supreme Court who made his reputation as a young attorney defending runaway slaves

30 First Chief Justice of the U.S. Supreme Court

Computers + Connectivity = New Opportunities for Criminals And Dilemmas for Investigators

By Thomas Fedorek

Anxiety about the sinister side of computer technology has long been an undercurrent in American society. *2001: A Space Odyssey*, released in 1968, expressed disquietude about the emerging power of computers in a famous scene of a computer cutting off life support to two astronauts and engaging the surviving astronaut in a battle of wits for control of the spacecraft. More than three decades after *2001*, the *Matrix* trilogy expressed even deeper disquietude, expanding the *2001* scenario to the entire culture, depicting a world where computers enslave the human race through a global artificial intelligence system.

In reality, humans still have the upper hand, at least for the time being. But anxiety is growing not so much about computers acting on their own but rather at the command of humans with criminal intent. More than 70% of Americans worry about becoming the victim of a cybercrime, according to a survey by the Information Technology Association of America.[1] In the hands of criminals, computers become weapons for inflicting terrible damage on people and property.

To state the case more precisely, computers plus *connectivity* are creating new opportunities for criminals and new dilemmas for investigators and prosecutors. Connectivity – the linking of computer networks worldwide through the Internet – enables criminals to operate with unprecedented speed and ease. As the Internet propagates throughout the world, the number of potential victims grows. The anonymity afforded by cyberspace decreases, to a significant degree, the criminal's risk of detection and capture, and increases, to an equally significant degree, the difficulty of investigating cybercrimes. The evanescence of digital evidence stymies traditional methods of search and seizure. The transnational nature of cyberspace is expanding vastly the criminal's ability to operate across borders while miring law enforcement agencies in jurisdictional quandaries.

This article describes the cybercrimes perpetrated most frequently against businesses and individuals and summarizes current trends expected to continue in 2004. It is based on a review of the literature as well as interviews with those on the front lines of the fight against cybercrime: prosecutors, investigators in both the public and private sectors, and cybersecurity experts at major corporations.

What Is Cybercrime?

The word "cybercrime" has been around for barely more than a decade. Its first appearance in a mainstream publication occurred in a 1992 *Forbes* article that reported "a computer crime wave is reaching epidemic proportions."[2] Today the epidemic has become a pandemic. *Forbes'* 1992 estimate of the annual cost of computer crime – $500 million to $5 billion – seems quaint today, when the cost of a single denial-of-service attack, such as the Slammer worm that crawled around the world in the summer of 2003, can exceed $1 billion.[3]

Within the legal community, there is a diversity of opinion about the specific criminal acts covered by the term "cybercrime." There is no case law definition of the term.[4] Some cybercrime specialists advocate a narrow definition of cybercrime, distinguishing between crimes perpetrated against computers and networks, and crimes that are merely facilitated by a computer.

Thomas Fedorek has been a corporate investigator for nearly 20 years. He is senior managing director in the New York headquarters of Citigate Global Intelligence & Security (CGIS), a subsidiary of London-based Incepta Group. CGIS provides investigative and litigation support services to law firms, and business intelligence and security services to corporations and financial institutions. Before entering the field of investigations, he was the reference librarian for Patterson, Belknap, Webb & Tyler. He holds a degree in the classics from Columbia University. He can be contacted at tom.fedorek@citigate-gis.com.

Mary Stutzman of CGIS assisted with the research for this article.

This article adopts the broad-based approach of Susan W. Brenner of the University of Dayton Law School, creator of an informative Web site devoted to cybercrime.[5] Brenner identifies three categories of computer crimes: crimes targeting computers and computer systems themselves (*e.g.*, hacking and denial-of-service attacks), crimes in which the computer is integral to the commission of the crime (*e.g.*, identity theft and online auction fraud) and crimes in which the computer is incidental (*e.g.*, use of a computer to store financial records of narcotics deals or other illegal activities). Brenner observes: "The offenses falling into the first two categories – *e.g.*, computer as target and computer as instrument – are sufficiently distinct to require the adoption of specialized legislation directed at these kinds of activities."[6]

The mass distribution of Trojan programs has eliminated many barriers to entry into the community of hackers.

The most significant federal statute directed at cybercrime is the Computer Fraud and Abuse Act, covering unauthorized access to computer systems used by the U.S. government, financial institutions and parties engaged in interstate or foreign commerce.[7] In response to the 9/11 terrorist attacks, portions of the act were amended by the USA Patriot Act of 2001.[8] The federal statute has civil applications, as well. For example, a growing body of case law is arising from Internet service providers who take action against spammers by alleging violations of the Computer Fraud and Abuse Act in combination with traditional tort claims such as trespass to chattels.[9] (Congress recently criminalized some forms of spamming in the CAN-SPAM Act of 2003.[10])

The New York cybercrime statute, Penal Law article 156, enacted in 1986, makes it a criminal offense to commit computer trespass, computer tampering and unlawful duplication of computer-related material.[11] Of course, many laws that apply to crimes committed in three-dimensional space, such as the copyright laws and the wire fraud statutes, apply as well to the corresponding crimes in cyberspace.

Cybercrime Against Business

Most cybercrimes against business involve some form of system penetration and intrusion.

A highly regarded source of information about cybercrimes targeting businesses is the *CSI/FBI Computer Crime and Security Survey*.[12] The annual report is prepared jointly by the Computer Security Institute and the FBI Computer Intrusion Squad, whose beat is San Francisco and Silicon Valley. It is based on responses of more than 500 computer security practitioners at corporations, financial institutions, government agencies, medical centers and universities. In the 2003 C*SI/FBI* survey, 56% of the respondents reported that they experienced unauthorized access to their organizations' computer systems in the preceding 12 months.

Who perpetrates cybercrimes against business? Of the respondents in the 2003 *CSI/FBI* survey, 82% say the intruders are the cyberburglars known as hackers. Despite the attention given to hackers in the mass media, intrusions are almost as likely to be inside jobs, with 77% of the respondents identifying disgruntled employees as sources of attack.

How do intruders get into a system? Hackers use specialized programs known collectively as "Trojan Horse software." Trojan Horse software is slipped into a system by way of seemingly innocuous e-mail attachments, pop-up and banner advertisements or Internet worms. Once within the target system, Trojan Horse programs enable hackers to activate programs already resident on the system, download data and upload new programs, particularly those that harvest passwords by recording keystrokes entered by users or by prompting users to enter their passwords.

Trojan Horse software is widely available for free download from any number of hacker sites. A recent edition of a bi-weekly alert published by the Department of Homeland Security listed almost 600 Trojan programs currently in use.[13] Whereas effective hacking used to require an advanced knowledge of programming, the mass distribution of Trojan programs has eliminated many barriers to entry into the community of hackers, where users of such off-the-shelf programs are known as "script kiddies." According to one information security expert, "these programs represent a fundamental change in the threat matrix; they are particularly dangerous to small and medium-sized businesses where there may not be any formal information security program."[14]

What is the motive for a system penetration? When the purpose of the intrusion is the theft of proprietary information, the motive is almost always financial. Trade secrets represent the return on a company's investment in research and development and therefore have a high value to competitor companies. In terms of economic damage, theft of proprietary information has been the top-ranked cybercrime for four years running in the *CSI/FBI* survey. In the 2003 survey, 21% of the respondents reported that proprietary information had been stolen from their organizations' computer systems during the preceding 12 months. Although this number is only half of the 42% of respondents who experienced

denial-of-service attacks, more dollars are at stake per victim: $70 million in losses reported by those who had proprietary information stolen from their computer systems, compared with $65 million in losses reported by the larger number of respondents who suffered denial-of-service attacks.

Industrial and economic espionage When trade secrets are stolen from a company's computer system, they often end up in the hands of one of the company's competitors – a case of industrial espionage. Of the respondents in the 2003 *CSI/FBI* survey, 40% said they suspected that U.S.-based competitors were likely sources of system intrusion, 25% pointed to foreign competitors and 28%, foreign governments. Industrial espionage becomes economic espionage when the perpetrator is an agent of a foreign government seeking to give its domestic industries unfair competitive advantages in the global marketplace.

The Economic Espionage Act of 1996 made the theft of trade secrets a federal offense.[15] The act was passed in response to a growing number of economic espionage incidents at a time when 26 states had no criminal theft of trade secrets statutes in effect.[16] Prosecutions under the act have been infrequent. Companies may not report that their secrets have been stolen because they may not detect the theft, because intruders often assume the identities of authorized users, or the victims may not wish to reveal the defects in their security defenses. (Only 30% of the respondents in the 2003 *CSI/FBI* survey said they reported computer intrusions to law enforcement.)

It was not until 2002 that the first person was convicted under the Economic Espionage Act, a New York resident who sold proprietary documents from the company he worked for to a competitor who was bidding against his employer for a government contract.[17] There is a pending case in California in which two Chinese nationals have been indicted under the Economic Espionage Act for allegedly stealing trade secrets from U.S. companies to start a microprocessor company in China with government financing. The case is scheduled to go to trial in June 2004.[18] On the basis of arguments presented during pre-trial hearings, the prosecution is expected to emphasize the data that was found in the possession of the defendants when they were apprehended as they boarded a plane to China, while the defense is expected to question whether the data actually falls within the scope of the act's definition of "trade secret."

Thefts of trade secrets are often inside jobs. Disgruntled employees may shop their employer's secrets to competitors, as in the recent case in which a scientist is alleged to have transferred confidential research data about pharmaceutical products under development from his previous employer, Baxter Healthcare, to his new employer, Bayer Corp. A civil suit filed by Baxter accuses the scientist of downloading data onto disks prior to his departure from the firm and of then loading the data into the Bayer system.[19]

Employees may also use proprietary information to go into business for themselves. A recent case involves a Texas-based producer of computer-assisted drafting software, Alibre, Inc. In early 2003, the company discharged a programmer who then returned to his native Russia. Shortly thereafter, a computer-assisted drafting program, closely resembling a new Alibre product, was offered for sale on a Russian Web site. Upon examination of the Russian software, the company found it to be a "pixel for pixel match for every icon" of the U.S. product. When Alibre managed to contact its former employee by telephone, the employee admitted stealing the source code. He then brazenly offered to "settle" by discontinuing the English-language pirate in exchange for being allowed to continue the distribution of the Russian version, with impunity.[20]

Software piracy The experience of Alibre demonstrates the ease with which a pirated software program can be marketed over the Internet. The Business Software Alliance, which estimates that 39% of all software sold worldwide is pirated, comments on the role of the Internet in software piracy:

> Internet piracy offers a lower risk of detection than many other forms of unauthorized distribution. Software can be downloaded from the Internet in the privacy of one's home or office. The pirated program can be transferred from computer to computer anonymously and untouched by human hands. The very nature of the Internet – unrestricted, self-regulated and largely anonymous – requires that users exercise self-restraint and comply with the law voluntarily.[21]

While much pirated software is sold, some is distributed for free in violation of copyright laws. Certain hackers, known as "crackers," specialize in breaking the digital codes intended to prevent unauthorized duplication of software, video games and DVDs. Once the codes are broken, the software is distributed on "warez" sites.

To cite just a few recent examples of effective cracking: In November 2003, Nokia, the world's largest cell phone manufacturer, disclosed that hackers had cracked the copy-prevention codes for its new N-Gage portable video game device and were distributing the games for free over the Internet.[22] The source code for Half Life 2, the sequel to a popular video game, was stolen by hackers about two months prior to its release, scheduled for December 2003. The hackers made the code available on the Internet for free download. Valve Corp., the game's producer, said the theft was preceded by a month of

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concerted attacks on its system. Security experts blamed vulnerabilities in Microsoft's Internet Explorer.[23]

Whether the pirated software is sold for profit or distributed for free, the effect on the software producer is the same – lost sales and unrecovered R&D costs.

Theft of customer information While R&D-intensive industries such as software and pharmaceuticals are natural targets for hackers, so are the companies involved in e-tailing, e-banking and other forms of electronic commerce. The crown jewels of e-commerce companies are their databanks of customer information, including credit card numbers and other personal financial data.

Gone are the days when a criminal bent on credit card fraud needed to have possession of an actual plastic card, either stolen or counterfeited. A single successful hack can open a cornucopia of thousands of valid credit card account numbers with aggregate buying power of many millions of dollars. Healthcare providers, insurance companies and government agencies are also targets, as they maintain vast databanks containing confidential information about individuals.

To cite a few dramatic examples: In February 2003, a hacker gained access to more than eight million Visa and MasterCard numbers from Data Processors International, an Omaha-based transaction processor.[24] In August 2003, a server was hacked at Acxiom Corp., a manager of customer databases for companies such as General Electric, Microsoft, AT&T and Sears Roebuck.[25] In 2002, a hacker broke into the internal network of the *New York Times* and accessed a database containing personal information (including Social Security numbers and home telephone numbers) for more than 3,000 contributors to the newspaper's Op-Ed page. The hacker also created five fictitious user I.D.s on the *New York Times* account with LexisNexis and, over a three-month period, ran up $300,000 in search charges. The hacker was identified, in part, through LexisNexis searches he conducted on his own name and names of family members.[26]

As with other thefts of confidential information, the perpetrators may be insiders rather than hackers. Call center and customer service employees are often in a position to harvest personal data for identity thieves. According to Andrew Bartels of IT industry consultant Giga Information Group, "'In most cases, the online merchants have done a better job of protecting [their] databases from external hackers than they have protecting them from employee misuse.'"[27] The threat posed by insiders may intensify as an increasing number of companies move their call centers to offshore locations where local law enforcement may not place a high priority on protecting the personal information of American consumers.

Companies may have legal exposure for failing to install adequate protections for customer information. In 2002, the Internet Bureau of the New York State Attorney General's Office investigated a security breach at Ziff Davis Media, Inc. that exposed the personal information of 12,000 subscribers to *Electronic Gaming Monthly*. The data was not encrypted and could be accessed by anyone surfing the Internet. Ziff Davis Media settled the matter by agreeing to install effective security measures and by compensating the subscribers whose credit card information was exposed.[28] The Federal Trade Commission has filed several similar actions against companies for failing to protect customer information.

What happens to customer information once it has been stolen? There are thriving fencing operations that traffic in stolen information – Web sites with frequently changing Web addresses where one can buy credit card numbers, usually in packages of several hundred to several thousand numbers. The prices vary from 40 cents to $5 per card, depending on the level of authentication provided. Cards with the codes that are supposed to foil fraud sell at a premium. The servers that operate these cyberbazaars are often based in Russia or the former Soviet republics.[29]

Extortion Russian and eastern European hackers are involved in a new variation of the old protection racket. In the typical scenario, a U.S. company is contacted by hackers who present evidence of having gained unauthorized access to the company's systems. The hackers then attempt to extort a large amount of cash from the company by threatening to inflict major damage to the computer system unless they are paid.

E-Money, a Washington-based processor of online payment transactions, was the target of an extortion attempt in 2000. The president of the company received a phone call from Russia directing him to files within the E-Money system where he found evidence of successful hacking. The caller, claiming to have access to the company's customer database of credit card information, demanded $500,000 to go away. When E-Money failed to negotiate to the hacker's satisfaction, the system was attacked with spam-like traffic that slowed its transaction processing to a crawl. E-Money then called in the FBI, who executed a brilliant sting operation, engaging the hackers in e-mail conversations, winning their trust and ultimately luring two of them to the United States with the promise of high-paying jobs at a fictitious technology company. (The FBI, incidentally, received little in the way of cooperation from Russian law enforcement agencies.) Once in the United States, the hackers made the fatal error of boasting of their hacker exploits to their

new American "friends," whereupon they were arrested. In a plea agreement, one hacker admitted breaking into 16 U.S. companies and setting up fraudulent PayPal accounts with stolen credit card numbers.[30]

The FBI cracked a particularly nasty extortion case last year. In May 2003, a hacker e-mailed an extortion threat to the South Pole Research Center. The e-mail included enough confidential data to leave no doubt that the hacker had access to the server that controlled the life-support systems for the 50 scientists on the international research team in Antarctica. The FBI traced the e-mails to an Internet café in Bucharest and worked with Romanian law enforcement to apprehend two suspects.[31]

Each victim spent an average of 30 hours straightening out the problems caused by the identity theft, and an average of 60 hours in cases that involved the fraudulent opening of new accounts.

Cybercrime Against Individuals

Internet usage is by now thoroughly integrated into the lives of most Americans. According to a recent study by information security firm Verisign, Internet usage grew by more than 50% from August 2002 to August 2003 and e-mail usage rocketed a remarkable 245%.[32] The mass media have spotlighted Internet-enabled sex crimes such as child pornography, cyberstalking and the sexual enticement of juveniles. Without denying the seriousness of such offenses, the biggest threats to most individual Internet users are not sexual but financial.

Internet frauds Dot-com companies may have gone out of fashion on Wall Street, but on Main Street, e-commerce is booming. Retail e-commerce sales for the third quarter of 2003 was $13.291 billion, about a 27% increase over the same period in 2002, according to the U.S. Department of Commerce.[33] As consumers move online, so do fraudsters who target consumers and investors.

The Verisign study found a significant increase in Internet fraud, concluding that 6.2% of e-commerce transactions in the United States are potential fraud attempts. Consumer complaints of Internet fraud are tracked by the Internet Fraud Complaint Center (IFCC), operated by the not-for-profit National White Collar Crime Center. According to the IFCC's 2002 annual report, the most common complaint by far is online auction fraud, comprising 46% of complaints referred to IFCC. Nondelivery of merchandise or payment ranked second with 31%, and credit card fraud, third, with 11.6%. Investment frauds and other scams accounted for the remainder.[34]

The Internet is rife with classic swindles like Ponzi and pyramid schemes, "pump and dump" penny stock scams, bogus tax shelters and high-yield investment programs involving "prime bank" instruments. The old Nigerian letter scam, which in the 1990s became the Nigerian fax scam, now has a new lease on life as the Nigerian e-mail scam.[35]

Identity theft The fastest growing cyberfraud is identity theft. In a typical identity theft, a consumer's personal information – name, date of birth, Social Security number, credit card account numbers – is obtained without the consumer's knowledge, often from an online source. The identity thief then uses the victim's credit to make purchases or obtain cash advances.

The thief not only bills charges to existing accounts but may also use the misappropriated personal information to obtain new credit cards in the victim's name. Victims are usually not aware that their identities have been hijacked until the credit card bills begin arriving. Since in many cases the consumer's personal liability is limited by law, the biggest victims, in terms of financial loss, are merchants and financial institutions.

In September 2003, the Federal Trade Commission issued the most comprehensive study to date on identity theft.[36] The FTC study estimates that in a five-year period prior to early 2003, there were 27.3 million cases of identity theft in the United States. The fact that 9.9 million of those cases occurred in the final year of the period covered by the study suggests that this form of fraud is proliferating rapidly. Losses to businesses and financial institutions totaled nearly $48 billion. Losses to consumers totaled $5 billion. Monetary loss is only part of the price the victim pays. According to the FTC study, each victim spent an average of 30 hours straightening out the problems caused by the identity theft, and an average of 60 hours in cases that involved the fraudulent opening of new accounts.

The New York identity theft statute, which took effect in 2003, allows victims to bring civil action against perpetrators to seek restitution for losses due to identity theft. The law created three classes of identity theft and the related crime of possession of personal information with the intent to commit fraud, ranging from Class A misdemeanor to Class D felony.[37] In December 2003, President Bush signed the Fair and Accurate Credit Transactions Act of 2003, establishing safeguards to limit the impact of fraudulent charges on consumers' credit reports.[38]

Two recent cases in New York illustrate how identity thieves may collect personal information and put it to use.

The first case, a criminal matter in the Southern District of New York, has been dubbed "The Kinko's Caper" by the press. The defendant, Juju Jiang, pleaded guilty to computer fraud and software piracy in July 2003 and at time of writing is awaiting sentencing. Jiang visited 13 Kinko's copy shops in Manhattan where computers are available to the public on a pay-by-the-minute basis. Jiang surreptitiously installed keylogging software to record every keystroke made on the Kinko's computers, harvesting the results by dialing in remotely. Jiang was thereby able to obtain user names and passwords for a variety of online services, including programs that permitted users to access their home computers remotely. The scheme, which went on for two years, came to light when one of the victims witnessed his home computer turn on, seemingly by itself, and watched in amazement as an invisible intruder opened files and accessed his personal financial information. Jiang was identified as the perpetrator by an investigation by the Electronic Crimes Task Force of the United States Secret Service. A search of the computers in Jiang's home found personal information from 450 individuals.[39]

The second case, known as the "Buffalo Spammer" case, is the first prosecution under the New York identity theft law. The defendant, currently awaiting trial, is accused of using credit card and other personal information from 343 individuals to set up EarthLink e-mail accounts. The EarthLink accounts were then used to send 825 million spam e-mails advertising herbal sexual stimulants and other products. The defendant was compensated for his efforts with a percentage of sales generated by the spam. An investigation by the Internet Bureau of the New York Attorney General, the Buffalo Cyber Task Force of the FBI and the Computer Crime Unit of the New York State Police resulted in the arrest of Howard Carmack of Buffalo.[40]

Cybercrime Forecast

What current trends in cybercrime can we expect to escalate and intensify in 2004?

Drive-by hacking "Every technological advance is exploited by somebody at the expense of others who are vulnerable and less savvy," according to Lt. Ron Stevens, director of the Computer Crime Unit of the New York State Police. Advances in the technology of wireless networking – the phenomenon known as Wi-Fi – bring benefits to businesses and consumers, but also introduce new risks of intrusion. Theoretically, anyone armed with a directional antenna can eavesdrop on a wireless network, a practice known as "drive-by hacking." If the network traffic is not encrypted, the hacker has free access to all the data flowing through the network.

Encryption alone does not solve the problem. The original security system for Wi-Fi contained a fatal flaw that permitted an eavesdropper who collected a sufficient amount of data to discover the key (the large number used in conjunction with a cryptographic algorithm). Although an enhanced security system has been developed, intruders can still enter the system through "rogue hotspots" – unauthorized access points installed by users of a network. In other words, an employee who puts an unsecured home computer on his company's wireless network creates a gaping hole through which anyone within a quarter mile can gain access to the corporate network.[41]

Mike Prosser, a senior security analyst with Symantec Corp., a producer of antiviral software, analyzes trends for the semiannual *Symantec Internet Security Threat Report*. Prosser sees wireless vulnerabilities becoming a major issue in 2004, pointing out that in addition to exporting data from a penetrated wireless network, hackers may also import and install software for malicious purposes. He emphasizes the importance of treating Wi-Fi as an extension of the network, subject to the same security standards and safeguards. Prosser recommends securing the wireless network with several layers of security: encryption (Prosser recommends Wi-Fi Protected Access), access and authentication controls (*e.g.*, IPsec or clientless VPN technology), personal firewalls, intrusion detection software and antiviral software.

Phishing Identity theft is expected to continue escalating, according to Ken Dreifach, chief of the Internet Bureau in the Office of the Attorney General. There has also been a surge in the related phenomenon of "phishing" – a strategy to trick consumers into revealing their personal information to prospective identity thieves.

In a typical phishing incident, a consumer receives an e-mail that appears to have been sent by a well-known financial institution or e-commerce company. The e-mail usually has a link to a Web site or a pop-up box where the consumer is asked to "verify" or "update" account information by revealing personal information such as Social Security numbers, personal identifier numbers and other account-related information. Phishers create Web sites that closely duplicate the branding of an authentic company. The point of the fraud, of course, is to obtain personal information in order to perpetrate identity fraud. In recent months, phishers have cloned the branding of such well-known companies as Citibank, PayPal, Ebay, AOL and Amazon.com. Phishing is a cybercrime double play – the criminal first hijacks the branding of a reputable business enterprise and then steals personal information from consumers.

Internationalization Cybercrime has always been a cross-border enterprise. The year 2004 marks the tenth anniversary of the first online bank heist. In 1994, a gang of Russian hackers based in St. Petersburg penetrated a Citibank computer located in New Jersey, obtained customer passwords and codes and executed a series of wire transfers to accounts in the United States, Finland, the Netherlands, Germany and Israel. The one hacker who was successfully extradited to the United States admitted to stealing $3.7 million but, according to some accounts, the haul was in excess of $10 million.[42]

Look for increasing internationalization of cybercrime in 2004, says Assistant U.S. Attorney Joseph De Marco, head of the Computer Hacking and Intellectual Property unit in the Office of the U.S. Attorney for the Southern District of New York, who prosecuted the Kinko's Caper.

Russia and the former Soviet republics have long been cybercrime centers and points of origin for system penetrations. The IT security director of a major U.S. telecommunications company, interviewed for this article, said his company was recently assailed by a barrage of intrusion attempts that all originated from the same Internet café in Moscow. Romania is emerging as another cybercrime center. The extortion attempt against the South Pole Research Center is only one of such incidents originating from Romania. Brazil is emerging as the cybercrime center of South America.[43] Asked to identify the Asian cybercrime center, most sources mentioned China.

Countries where cybercrime flourishes tend to have weak laws dealing with computer crime, law enforcement agencies that lack computer forensic capabilities and an underdeveloped apparatus for collaborating with law enforcement agencies in other countries. "Extradition is a difficult process even in homicides, let alone for computer-enabled computer frauds," says Lt. Ron Stevens of the New York State Police.

These countries also tend to be home to powerful organized crime interests. Phil Williams of the CERT Coordination Center of Carnegie-Mellon University, who has studied the role of organized crime groups in cybercrime, writes: "[T]he synergy between organized crime and the Internet is not only very natural but also one that is likely to flourish and develop even further in the future. The Internet provides both channels and targets for crime and enables them to be exploited for considerable gain with a very low level of risk. For organized crime it is difficult to ask for more."[44]

Denial-of-service attacks Denial-of-service attacks cost many billions of dollars in lost productivity and personnel time spent on clean-up and repair. Attacks by viruses, worms and other malicious software ("malware") prevent a system from functioning normally by flooding it with an overload of data, altering or deleting files, devouring memory and generally wreaking havoc.

It appears to be a universal assumption in the information security community that there will be an escalation in the frequency and intensity of denial-of-service attacks in 2004. The 2003 *CSI/FBI* survey indicates that 42% of the respondents reported such attacks, up from 40% in 2002, 36% in 2001 and 27% in 2000. Mike Prosser of Symantec sees "blended threats," combinations of malicious code that accelerate the spread of attacks, as a major issue for 2004. Malware is also expected to invade cell phones and personal digital assistants as these devices interact increasingly with the Internet.[45]

Denial-of-service attacks straddle the boundary between crime and terrorism, affecting many businesses and individuals simultaneously and bringing senseless destruction to the networks that make possible online communication and commerce. Indeed, as with other acts of terrorism, it is exceedingly difficult for investigators to identify the perpetrators of such attacks or even to trace them to their countries of origin. According to an IT security director at a major U.S. company, there is a suspicion within IT security circles that the most virulent malware programs are not created by hackers but by the information warfare agencies of foreign nations who then disseminate them through the hacker community to test their effectiveness as offensive weapons.

2001: A Space Odyssey has a scene where Paleolithic hominids discover they can seize control of a communal water hole by wielding a tree branch as a club. In a memorable cinematic moment, the film leaps from Stone Age to Space Age as the club soars into the sky and morphs into a space station orbiting the earth. The film thereby weaves together the genesis of technology with the discovery of the weapon. Technology – from the Greek *techne*, "tool" – has two faces, the tool and the weapon, the plowshare and the sword, representing the opposing principles of creation and destruction. Is there a way for technology to create new tools for scientific discovery and economic growth and not at the same time place new weapons in the hands of criminals and terrorists? That question is the challenge now facing the law. The law is the Bellerophon who must tame the Pegasus of technology, for it is the law that is, in the words of Justice Frankfurter, "all we have standing between us and the tyranny of mere will and the cruelty of unbridled, undisciplined feeling."[46]

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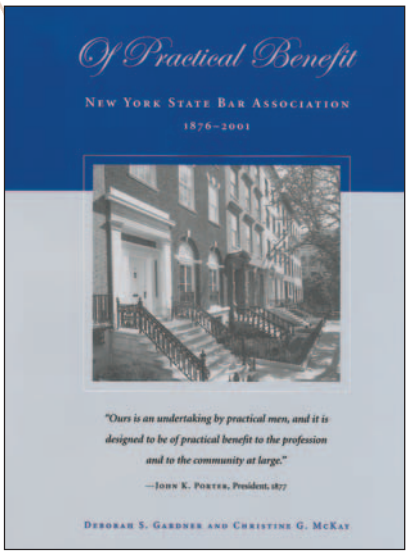

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Protections for Public Employees Who "Blow the Whistle" Appear to Be Inadequate

By William A. Herbert

There can be little doubt about the importance and value of public employees willing to "blow the whistle" on governmental employers or supervisors who are engaged in corruption, a violation of law or an act threatening health and safety. Misrepresentations and misdeeds by governmental officials that can affect domestic or foreign policy frequently come to light through the courageous disclosures of these individuals. In the private sector, corporate malfeasance rarely would be exposed without the willingness of employees to communicate with regulators.

This is recognized in state and local legislation designed to protect these whistleblowers, as well as by judicial and administrative determinations. However, a review of existing statutes and case law shielding public employees from retaliation for this kind of activity demonstrates that this protection remains inadequate, and may not be sufficient to allay the natural and inherent fear of reprisal felt by most employees.

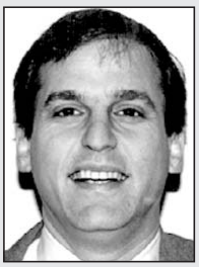
The Basic Antiretaliation Statute, Civil Service Law § 75-b

In 1984, the Legislature enacted Civil Service Law § 75-b, which grants public employees protections against retaliation for engaging in various forms of whistleblowing. One of the primary purposes of this legislation was to assure pubic employees that they would not face retaliation if they disclosed certain information to another governmental entity. A whistleblowing claim can be raised as a defense during disciplinary proceedings, can form the basis for a contract grievance or can be the predicate for a claim made in court in certain limited circumstances. Two decades later, and as is discussed below, it is questionable whether the statute has fulfilled its purpose.

Generally speaking, the law prohibits retaliatory action by public employers against public employees, but this, as noted, applies to information reported within government only. Significantly, Civil Service Law § 75-b does not provide any protections against retaliation for public employees who disclose governmental misconduct or perceived misconduct to members of the media.

Nevertheless, the type of disclosure that is protected under the statute is broad. Unlike its private sector counterpart, Labor Law § 740, Civil Service Law § 75-b is not limited to the reporting of health and safety violations that present a substantial and specific danger to the public health and safety.[1] The latter protects public employees who have no more than a reasonable belief that the conduct about which he or she complains constitutes some form of a violation of law, rule or regulation by the public employer.[2] By contrast, under Labor Law § 740 the employee must be able to prove that the complaints were in response to an actual health and safety violation of a law, rule or regulation by the private employer.[3]

The narrow substantive protections and procedures for private sector employees contained in the Labor Law reflect the continuing reluctance by the state Legislature and the courts to eliminate the common law employment-at-will doctrine.[4] The at-will doctrine is premised on the arguably antiquated idea that the employer-employee relationship is created through a freely negotiated agreement between the employer and employee, and may be terminated by either party. The doctrine leads to a strict construction of the applicable statutes, resulting in limited procedural and substantive protections for those private sector and public sector whistleblowers who lack contractual or statutory tenure protections.



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Despite the differences between Civil Service Law § 75-b and Labor Law § 740, courts continue to confuse their substantive standards when considering a whistleblower claim by public employees.[5] This confusion may be the result of a decision by the Legislature, some 20 years ago, to make Labor Law § 740 procedures applicable to plenary actions commenced pursuant to Civil Service Law § 75-b(3)(c).

Employee's Preliminary Notification Requirements

Civil Service Law § 75-b(2)(a) prohibits public employers from terminating or taking an adverse personnel action against a public employee because the employee disclosed information to a governmental body regarding

> a violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or . . . which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action.

Civil Service Law § 75-b(2) broadly defines "improper governmental action" to include any action "which is in violation of any federal, state or local law, rule or regulation."

Before reporting this information to another governmental agency, however, the public employee must make a good faith effort to provide the public employer with the information to be disclosed, and must give the employer a reasonable time to "take appropriate action, unless there is an imminent and serious danger to public health or safety."[6] Although the statute requires the employee to engage in this pre-disclosure notification, it does not require public employers to issue policies, or to conduct training identifying the appropriate procedure to be followed regarding such notification. This is problematic, because courts have been applying the notification requirement strictly.

The failure to follow the notification procedure before going to another governmental agency can be fatal to a Civil Service Law § 75-b claim challenging an employer's retaliatory action.[7] Furthermore, reporting of the misconduct to the supervisor who allegedly engaged in the misconduct is insufficient to satisfy the pre-disclosure requirement under Civil Service Law § 75-b(2)(b).[8]

In *Brohman v. New York Convention Center Operating Corp.*,[9] the First Department affirmed the granting of summary judgment dismissing a Civil Service Law § 75-b claim based on the failure of the plaintiff to make a good faith effort to notify the appointing authority or its designee of the information to be disclosed. The court stated that the appointing authority for the agency was the board of directors and its designee was its president and chief executive officer. Although the plaintiff had spoken with a vice-president as both a friend and sounding board, the First Department concluded that this conversation was insufficient to meet the statutory pre-disclosure notice requirement. Decisions such as *Brohman* demonstrate that notwithstanding the need to adhere strictly to the statute, the ability of a state employee to provide proper pre-disclosure notification is frequently complicated by a general lack of clarity as to who or what is the appointing authority or its designee for a particular agency.[10]

The timing of the pre-disclosure notice can also be fatal. The dismissal of a Civil Service Law § 75-b claim by a terminated probationary pharmacy employee was affirmed by the Appellate Division, Third Department based on an admission in the pleadings that the employee had contacted outside agencies regarding alleged violations "the next day" after he had communicated his concerns to his supervisors.[11] The Appellate Division concluded that the petitioner had failed to grant his supervisors a reasonable amount of time under Civil Service Law § 75-b(2)(b) to investigate and correct the problem.[12]

Reporting the information to the Inspector General's Office is not a perfect cure for an employee worried about retaliation.

The confusion regarding the pre-disclosure obligation is compounded in state employment. Under Executive Order 5.39, issued by Governor George Pataki, every state officer or employee must report promptly to the New York State Inspector General's Office "any information concerning corruption, fraud, criminal activity, conflicts of interest or abuse by another state officer or employee relating to his or her office or employment, or by a person having business dealings with a covered agency relating to those dealings."[13] Unlike Civil Service Law § 75-b, the Executive Order does not require pre-disclosure notification to an agency's appointing authority prior to contacting the New York State Inspector General's Office.

Reporting the information to the Inspector General's Office is not a perfect cure for an employee worried about retaliation, however. The Executive Order does not indicate whether such a report satisfies the pre-disclosure notification of the Civil Service Law. It also is silent regarding the role, if any, the New York State Inspector General's Office would play when it is alleged that pending disciplinary charges against a state employee are unlawfully motivated in violation of Civil

Service Law § 75-b. Finally, it is unclear whether the New York State Inspector General's Office has the authority to order a state agency to stay or withdraw disciplinary charges pending an investigation under the Executive Order.

Making Out a Retaliation Claim or Defense

Assuming that the pre-disclosure notification aspects of the statute have been satisfied, the next question is how an employee can assert a claim if he or she is the subject of retaliation for whistleblowing.

As noted, Civil Service Law § 75-b(2) prohibits public employers from taking an adverse personnel action against a public employee who engages in protected conduct under the statute. Pursuant to Civil Service Law § 75-b(1)(d), the phrase "personnel action" is defined as "an action affecting compensation, appointment, promotion, transfer, assignment, reassignment, reinstatement or evaluation of performance."

Few, if any, collective bargaining agreements contain provisions granting arbitrators additional remedial powers related to protected activities under Civil Service Law § 75-b.

The cases are fact-specific with regard to what constitutes an adverse personnel action. The Fourth Department has held that a public employer's actions aimed at precluding an employee from appointment from a civil service preferred eligibility list constituted retaliatory "personnel action" as defined in Civil Service Law 75-b(1)(d).[14] On the other hand, statements made by a member of a county board of supervisors to a county manager that he intended to offer a board resolution seeking the county manager's resignation or non-appointment was found insufficient to constitute an "adverse personnel action" actionable under Civil Service Law § 75-b.[15]

Satisfying the burden of proof can be difficult. In order to establish a Civil Service Law § 75-b claim, § 75-b(3)(a) provides that a public employee must establish that "but for" the protected activity, the adverse personnel action by the public employer would not have occurred. Accordingly, a Civil Service Law § 75-b claim will not be sustained where the public employer demonstrates a separate and independent basis for the adverse personnel action.[16] Without proof that a termination resulted solely from the protected activity, the disciplinary action will not be disturbed.[17]

This standard, as applied by the courts, is more stringent than the burden of proof in a whistleblower claim brought under the First Amendment, or a retaliation claim commenced under Title VII, 42 U.S.C. § 2000e-3(a).[18] In a recent decision, Judge Scheindlin of the Southern District questioned whether a private sector whistleblower suing his or her former employer in a Labor Law § 740 lawsuit had the burden to establish causation.[19]

Forums, Procedures for § 75-b Claims Can Be Impediments to Employees

When a public employee is subjected to disciplinary action under the procedures of Civil Service Law § 75, or any other procedure under state or local law, the only forum for raising the statutory whistleblower defense is the administrative disciplinary hearing or arbitration. If a collective bargaining agreement contains a provision prohibiting the employer from taking improper adverse personnel actions, and has a provision calling for final and binding arbitration, a public employee can challenge what is claimed to be a retaliatory personnel action through the grievance arbitration mechanism under Civil Service Law § 75-b(3)(b).

Pursuant to Civil Service Law § 75-b(3)(a), disciplinary arbitrators and administrative hearing officers must rule on the merits of the statutory defense in the arbitration award or hearing officer decision.

The statutory requirement that a Civil Service Law § 75-b whistleblower claim must be presented in the context of a disciplinary arbitration or a disciplinary administrative hearing is problematic for a variety of reasons.

Although unlawful discrimination and retaliation are "accomplished usually by devious and subtle means,"[20] most statutory and contractual disciplinary procedures do not provide the employee with an opportunity to conduct discovery, nor provide sufficient time to gather the necessary evidence to prove the employer's unlawful motivation. Even a public employee's ability to compel the production of documents through a subpoena *duces tecum* is constrained by the CPLR requirement that such subpoenas be court ordered.[21]

In addition, evidence gathering to prove the retaliatory motive is difficult because employees often are suspended during the disciplinary process. Many collective bargaining agreements permit employers to suspend the employee without pay pending the final outcome of disciplinary charges. Similarly, Civil Service Law § 75(3) permits the employer to suspend the employee for 30 days upon issuance of disciplinary charges, without having to provide any justification. If the employee is unable to proceed with the hearing within 30 days, the

employee can remain on suspension until the conclusion of the case.

Finally, and although Civil Service Law § 75-b rights have existed for close to 20 years, many arbitrators and hearing officers simply remain unfamiliar and untrained regarding the statutory whistleblower protections for public employees.

The value of being able to raise a Civil Service Law § 75-b defense in a Civil Service Law § 75 proceeding is substantially undermined by the fundamental inequality of the parties' positions: the public employer issues the charge and is the final decision maker of both the disciplinary charges and the whistleblower defense. In essence, under Civil Service Law § 75-b(3)(a), the employer has the final statutory authority to determine whether or not it was unlawfully motivated.

Relatedly, public employees fighting a § 75 disciplinary charge face yet another major obstacle when raising a whistleblower defense: the lack of a neutral hearing officer. Under the statutory scheme a public employer has wide discretion in selecting a hearing officer, and is not mandated to select a neutral individual. Although the Legislature has passed bills in three legislative sessions in the past decade which would have required public employers to utilize independent hearing officers during Civil Service Law § 75 hearings, they were vetoed by Governors Cuomo and Pataki. Despite the continuing lack of independent hearing officers in disciplinary proceedings, credibility determinations by such hearing officers regarding the motivation for, and the substance of, the disciplinary charges are granted great deference by a reviewing court.[22]

Administrative Remedies Limited

Even if the employee is successful in establishing a whistleblower defense, the permissible remedies in an administrative or arbitral forum are quite limited. An arbitrator or Civil Service Law § 75 hearing officer who determines that the disciplinary action or proposed disciplinary action was based solely on conduct protected by Civil Service Law § 75-b can recommend to the employer only the dismissal of the disciplinary charges, and, if appropriate, reinstatement of the employee with back wages.[23] A prevailing employee is not entitled to be reimbursed for his or her attorney fees and costs, nor is the employee entitled to receive compensatory or punitive damages.

An exception concerns school employees. Teachers and administrators subject to discipline under Education Law § 3020-a may be eligible for the granting of attorney fees and costs if the hearing officer determines that one or more of the disciplinary charges were frivolous.[24]

In the context of a disciplinary arbitration under a collective bargaining agreement, there is statutory authority for the arbitrator to "take other appropriate action as is permitted in the collectively negotiated agreement."[25] Similarly, when determining a non-disciplinary grievance asserting a violation of Civil Service Law § 75-b, an arbitrator may "take such action to remedy the violation as is permitted by the collectively negotiated agreement."[26] This is of limited value, however. Few, if any, collective bargaining agreements contain provisions granting arbitrators additional remedial powers related to protected activities under Civil Service Law § 75-b. Moreover, the statute is also unclear as to whether an arbitrator has the inherent authority to refer the matter to the New York State Inspector General's Office or another appropriate agency.

Court Proceedings for Certain Employees

Pursuant to Civil Service Law § 75-b(3)(c), public employees who lack protection under a collective bargaining agreement, Civil Service Law § 75, or other state or local law, have the same rights as private employees to commence a whistleblower lawsuit in a court of competent jurisdiction – but with the same limitations set forth in Labor Law § 740.[27] These workers – who may be, for example, probationary or provisional[28] – are entitled to commence an Article 78 proceeding or plenary action asserting a Civil Service Law § 75-b(3)(c) claim.[29] Unlike Article 78 proceedings seeking judicial review of disci-

plinary action imposed following an administrative hearing, litigation brought by these otherwise unprotected public employees requires the trial court to determine all the factual and legal questions presented.

Under Labor Law § 740(5), courts can order a successful Civil Service Law § 75-b plaintiff the following forms of relief: injunction; reinstatement to the same or similar positions; back wages and benefits; seniority; and reasonable costs and attorney fees. Punitive damages and compensatory mental anguish damages are unavailable to a successful plaintiff, however.[30] Recovery for loss of anticipated lost wages, anticipated lost overtime compensation and the value of anticipated lost benefits also are unavailable.[31]

While a whistleblower claim may be able to survive a motion for summary disposition in the employer's favor, ultimate success is at best uncertain.

Notwithstanding the ability to recover costs and attorney fees, the other limitations, along with the strict waiver provision of Labor Law § 740(7), discussed below, can discourage public employees who do not have tenure protections from reporting governmental misconduct. If they fear retaliation, they may be unwilling to waive all other possible statutory claims, and as a practical matter few have the resources to fund prolonged litigation.

If they do go forward in court, decisional law indicates that while a whistleblower claim may be able to survive a motion for summary disposition in the employer's favor, ultimate success is at best uncertain.

In an Article 78 proceeding brought pursuant to Civil Service Law § 75-b(3)(c), the Second Department held that if affidavits present a material issue of fact regarding the public employer's motivation, the public employee is entitled to a trial.[32] In *Sisson v. Lech*,[33] the Fourth Department reversed a directed verdict in favor of a public employer in a Civil Service Law § 75-b lawsuit brought by a terminated provisional employee. During the trial, evidence was presented that the termination was related to the fact that the employee reported that his superior was acting in an improper manner toward employees.

In *Garrity v. University at Albany*,[34] the Appellate Division, Third Department affirmed the dismissal of the Civil Service Law § 75-b claim, but reversed the dismissal of the petitioner's alternative claim under CPLR article 78 that his discharge was the result of bad faith. The appellate panel concluded that a trial was necessary because the probationary employee had not received an evaluation until his termination, his termination occurred simultaneously with the investigation triggered by his complaints, and the employer had failed to submit any documentary evidence supporting its assertion that the employee had been insubordinate.

A public employer's motion for summary judgment in a Civil Service Law § 75-b was denied when the employee presented sufficient facts, including an alleged threatening comment by her supervisor, to support her claim that she was terminated for complaining about the misuse of grant monies for partisan political purposes. In addition, the employee was able to demonstrate temporal proximity between her termination and her request for whistleblower status from the municipal investigatory agency.[35]

On the other hand, summary judgment was granted to a public employer in a federal court claim brought under the Civil Service Law when the plaintiff was unable to establish that her reassignment was retaliatory, or related to the complaints reported to the employer by the employee's mother.[36]

Specific Issues in Court Proceedings

A number of important procedural issues must be carefully examined before commencing a plenary court action or proceeding under Civil Service Law § 75-b or Labor Law § 740.

Whether a Civil Service Law § 75-b plaintiff or petitioner is entitled to a jury trial is open to question. In *Scaduto v. Restaurant Associates Industries, Inc.*,[37] the Appellate Division, First Department concluded that a defendant's motion to strike a plaintiff's jury demand in a whistleblower lawsuit should have been granted because the remedies permitted under Labor Law § 740(5) are all equitable in nature.

There may be subject matter jurisdiction limitations on pursuing a whistleblower claim against particular public employers. It has been held that lawsuits against the state of New York under Civil Service Law § 75-b(3)(c) cannot be litigated in federal court because Civil Service Law § 75-b does not constitute a waiver of New York's sovereign immunity under the Eleventh Amendment to the U.S. Constitution.[38] Rather, a Civil Service Law § 75-b court action or proceeding against the state of New York must be litigated in New York State Supreme Court. The Court of Claims lacks subject matter jurisdiction over such claims.[39]

Civil Service Law § 75-b(3)(c) claims can, however, be litigated in federal court as a pendent claim.[40] Nevertheless, some District Court judges are reluctant to rule on a pendent Article 78 proceeding that sets forth a Civil Service Law § 75-b claim.[41]

It also is possible that the claim will be dismissed based on that familiar municipal defense – failure to serve a notice of claim. Courts have ruled that a notice of claim is a procedural prerequisite for the commencement of a court action under Civil Service Law § 75-b against certain political subdivisions. In *Rigle v. County of Onondaga*,[42] the Appellate Division held that an action or Article 78 proceeding regarding an alleged violation of Civil Service Law § 75-b will be dismissed if a notice of claim has not been filed pursuant to Municipal Law § 50-a and County Law § 52.[43]

The waiver of the plaintiff's other legal rights by commencing a state statutory whistleblower lawsuit is another important consideration. Based on the draconian election of remedies provision contained in Labor Law § 740(7), a public employee waives the right to assert any other state law causes of action or contractual claims regarding the challenged adverse action by commencing such a lawsuit under Civil Service Law § 75-b.[44] It also should be noted that the pursuit of a whistleblower claim in arbitration, through the service of a demand for arbitration, can constitute a waiver of the right to pursue a plenary cause of action.[45]

Finally, estoppel or claim preclusion can become an issue. In *De Cinto v. Westchester County Medical Center*,[46] the Second Circuit Court of Appeals suggested that a determination under Civil Service Law § 75-b should be granted collateral estoppel effect in subsequent First Amendment litigation. In *Verbeek v. Teller*,[47] however, the District Court, presiding over a First Amendment lawsuit, denied an employer's application for an order giving preclusive effect to a Civil Service Law § 75 hearing officer's decision, which had rejected a whistleblower defense in a prior administrative proceeding. The court based its ruling on a finding that the burden of proof necessary to establish a Civil Service Law § 75-b defense is more stringent than the standards needed to establish a First Amendment claim based on the same facts.

In *Hagemann v. Molinari*,[48] the District Court declined a request by a public employer to apply the doctrine of judicial estoppel to a plaintiff's Civil Service Law claim, based on what the employer claimed were inconsistent allegations made by the plaintiff in a related state court defamation action. The court found that prior assertions were not sufficiently adopted by the state court.

In rendering a determination regarding estoppel, a court may also look at the quality of the prior proceedings. The Appellate Division, Third Department ruled that an administrative decision denying, without a hearing, an OSHA retaliation claim was not entitled to collateral estoppel in a subsequent state whistleblower action.[49]

Whistleblower Protection Under New York City Administrative Code

On February 18, 2003, New York City Mayor Bloomberg signed Local Law 10 of 2003, amending New York City Administrative Code § 12-113 to enhance protections for city workers who report corruption, criminal activity, conflicts of interest, gross mismanagement and abuses of authority.

Pursuant to New York City Administrative Code § 12-113(b)(1), New York City mayoral and non-mayoral departments and agencies are prohibited from taking an adverse personnel action against an employee for reporting information or conduct that the employee knows, or reasonably believes, to involve corruption, criminal activity, conflict of interest, gross mismanagement or abuse of authority. Under the 2003 amendments, the term "adverse personnel action" is broadly defined to include disciplinary action, a denial of promotion and other forms of retaliation such as a negative performance evaluation, a loss of office space or equipment and an unwanted transfer or reassignment.[50] The New York City Department of Investigation is granted primary jurisdiction to receive and investigate complaints of retaliation against city employees.

Permissible remedies for a violation of § 12-113(b)(1) include reinstatement to the position the employee held, or an equivalent position, with back wages; reinstatement of full seniority rights; and "other measures necessary to address the effects of the adverse personnel actions."[51]

An employee has limited procedural rights regarding court review, however. Unlike New York City Administrative Code § 8-502, which grants victims of employment discrimination the right to commence a plenary legal action in a court of competent jurisdiction, § 12-113 does not give victims of retaliation for whistleblowing such a right. Notwithstanding this restriction, § 12-113(f) provides that the statute should not be construed to limit the rights of an employee with regard to seeking judicial review of an adverse administrative determination (*i.e.*, a CPLR article 78 proceeding).

The local law also provides some guidance for an investigation and follow-up. Pursuant to New York City Administrative Code § 12-113(b)(2), and upon the request of the complaining employee, those receiving the report of the alleged adverse personnel action are required to make reasonable efforts to protect the anonymity of the employee.

If the department's investigation results in a determination that a retaliatory adverse personnel action has taken place, the Commissioner of Investigation is obligated to report the findings and recommendations to the appropriate agency head. After receiving the commissioner's findings, the agency head must decide whether

to take remedial action, and is required to report back to the commissioner regarding his or her decision. If the commissioner concludes appropriate remedial action has not taken place, the commissioner is authorized to consult with the agency head and provide a "reasonable opportunity" for the agency to take appropriate action. If the agency continues to refuse to remedy the retaliation, the commissioner is authorized to submit the findings and the agency's response to the mayor or, for non-mayoral agencies, to the officials or board that appointed the agency head.[52]

Courts will grant greater weight to public employee speech regarding governmental misconduct than to other forms of public employee speech.

Unfortunately, New York City Administrative Code § 12-113 does not make any explicit reference to the substantive and procedural provisions contained in Civil Service Law § 75-b. In addition, it is silent regarding the role of the Commissioner of Investigation during the disciplinary administrative or arbitral process when an employee asserts a Civil Service Law § 75-b defense. Although it provides many important substantive protections, it falls short as a fully realized approach to whistleblower protection for the New York City workforce.

Protections for Reporting "Improper Quality of Patient Care"

In 2002, the Legislature enacted Labor Law § 741, which prohibits both public and private health care employers from retaliating against employees for disclosing, or threatening to disclose, to a supervisor or a public body, an employer's activity, policy or practice that the employee believes, in good faith, constitutes "improper quality of patient care."[53] The law supplements, to some degree, the protections contained in Public Health Law § 2803-d, which are enforced through the New York State Department of Health.[54]

As with Civil Service Law § 75-b, Labor Law § 741(3) mandates that the employee present the improper patient care issue to the employer, and provide the employer with a reasonable opportunity to correct the activity, policy or practice, unless the employee has a reasonable belief that there is an imminent threat to public health or safety or to the heath of a specific patient.

Pursuant to Labor Law § 741(1)(d), the phrase "improper quality of patient care"

> means, with respect to patient care, any practice, procedure, action or failure to act of an employer which violates any law, rule, regulation or declaratory ruling adopted pursuant to law, where such violation relates to matters which may present a substantial and specific danger to public health or safety or a significant threat to the health of a specific patient.

Under Labor Law §§ 740(4)(d) and 741(4), enforcement of the substantive provisions of Labor Law § 741 is undertaken by the commencement of a lawsuit, which must be started within two years of the retaliatory action. However, because of the strict construction usually applied by state courts in interpreting whistleblower provisions, the difference between the procedures set forth in Civil Service Law § 75-b(3)(a) and Labor Law §§ 740(4) and 741(4) may result in unanticipated waivers of statutory protections by public employees. The procedure contained in Labor Law § 740 may be construed to prohibit a public employee from asserting a claim of retaliation based on the prior disclosure of improper quality of patient care as a defense during the disciplinary process, or the commencement of a plenary action under this section may lead a court to rule that the employee waived his or her right to assert a whistleblower defense in an arbitral or administrative forum.

Protections for Union Whistleblowing Under the Taylor Law

New York's Public Employment Relations Board (PERB) has found that whistleblowing by a public employee in the context of union activity constitutes protected activity under the Taylor Law. In *Hudson Valley Community College*,[55] PERB held that a local union president's filing of a complaint with the New York State Department of Labor regarding a health and safety hazard constituted protected activity under the Taylor Law. The board found that the employer had violated the Taylor Law by serving disciplinary charges under Civil Service Law § 75 against the unit president in retaliation for his filing the complaint with the Department of Labor.[56]

Nevertheless, reflecting the sometimes uncertain scope of the protection, PERB's assistant director ruled in *County of Ulster*[57] that a union representative's comments regarding patient care at a county's health care facility made to a newspaper reporter during an interview at the union's office, was not protected by the Taylor Law, but may be protected by Civil Service Law § 75-b.

It should be noted that claims of retaliation for whistleblowing activities in a union context can be pursued as a defense in a Civil Service Law § 75 hearing without fear that it would impair a later improper labor practice charge against the public employer. Under the Taylor Law, PERB is prohibited from granting preclu-

sive effect to any finding of fact or conclusion of law reached by a Civil Service Law § 75 hearing officer.[58]

Protection for Filing Complaint Under Public Employment Safety And Health Act (PESHA)

Retaliation against a public employee for filing a health and safety complaint with the New York State Department of Labor under the Public Employment Safety and Health Act (PESHA), Labor Law § 27-a(10), or for instituting any proceeding under PESHA, is prohibited.

A PESHA discrimination complaint should be filed within 30 days of the claimed retaliation.[59] In *Hartnett v. New York City Transit Authority*,[60] however, the Court of Appeals upheld the discretion of the Commissioner of the New York State Department of Labor to accept administrative complaints beyond the 30-day period.

Following receipt of a complaint, the commissioner will conduct an investigation and render a determination within 90 days. During PESHA complaint inspections of the workplace, employees are entitled to be represented by their union.[61] If the commissioner determines that there has been a violation, he or she can request New York's State Attorney General to bring an action in state court for injunctive and any other appropriate relief, including reinstatement of the employee with back wages. In *Hartnett,* the Court held that such an action must be commenced within three years, pursuant to CPLR 214(2).

First Amendment Protections For Whistleblowers

In addition to the statutory protections against retaliation for "blowing the whistle" on governmental misconduct, as discussed above, public employees have First Amendment rights to engage in free speech and association, which provide additional, if limited, protections.

Whistleblowing activity, like other forms of speech by a public employee under the First Amendment, will be weighed against the interests of the public employer under the *Pickering* balancing test established by the United States Supreme Court.[62] First Amendment standards can work against the employee if his or her activity is too closely connected to a mere workplace dispute, rather than to the employee's desire to protect the public. When the content and context of the whistleblowing activity involves the employee's job performance, and is made at the workplace during a personal dispute with a supervisor regarding the performance of those duties, the speech may be deemed unprotected as not touching upon a matter of public concern.[63]

On the other hand, in *Vasbinder v. Ambach*,[64] the Second Circuit found that state supervisory staff had violated the First Amendment by demoting a vocational-rehabilitation employee for the employee's reporting of overcharges and duplicative billing to police authorities. In *Hulbert v. Wilhelm*,[65] the Seventh Circuit affirmed a judgment in favor of a public employee retaliated against for requesting an investigation regarding the open burning of allegedly toxic materials by the Highway Department. Disclosure of information regarding improper procedures of a municipal agency relating to building permits has been found by the Sixth Circuit to touch upon a matter of public concern because it relates to public safety, and hence is protected.[66] Similarly, speech concerning fraud and misuse of government funds during a Medicaid fraud investigation was found to touch upon a matter of public concern.[67]

It therefore may be seen that in applying the *Pickering* balancing test, courts will grant greater weight to public employee speech regarding governmental misconduct than to other forms of public employee speech.[68] Nevertheless, in a given instance, even a high level official reporting such misconduct may find himself unprotected by the First Amendment.[69]

Strengthening Protections For Whistleblowers

In view of the inherent risks to those employees who report wrongdoing on the part of employers, it is apparent that existing statutes and case law protecting whistleblowers in New York provide inadequate procedural protections and remedies. In order to fulfill New York's public policy of encouraging public employees to make these kinds of disclosures, the statutory framework needs to be amended.

As a first step, an open discussion and debate regarding the continued reliance and viability of the common law at-will doctrine should be undertaken. Such a debate is warranted based on the substantial changes in our economy over the past two centuries. Although whistleblower laws may be remedial in nature, courts frequently construe the statutory provisions strictly because they are in derogation of this common law doctrine.[70]

Even, and especially, if no change is made to this doctrine, modification of current procedural law can advance the expressed policy of the state. For example, all final determinations regarding claims of retaliation against whistleblowers made at the administrative level should be determined by a neutral party. At present, the authority given to a public employer or agency to, in effect, judge itself with respect to unlawful motivation and remedies under Civil Service Law § 75-b and New York City Administrative Code § 12-113 appears to be inconsistent with the general principle of checks and balances. This is compounded by the deference given by courts to findings made during Civil Service Law § 75

hearings, especially when whistleblowing is raised as a defense to the disciplinary action.

Further, the burdens of proof and available remedies should be reexamined. It is unclear that the Legislature intended to impose a more stringent burden of proof to make out a statutory whistleblower claim than what is necessary to establish an analogous First Amendment cause of action, yet it appears that employees face precisely that. In addition, if the intent of these laws is to deter retaliation by employers, perhaps employers should face more than having to pay back wages when a whistleblower is successful in demonstrating that he or she was punished for undertaking this protected activity.

The need for such additional remedies was understood by the Legislature in 2002 when it amended Labor Law § 740(4) to permit a court to order a civil penalty against an employer for retaliating against an employee for disclosing improper quality of patient care.[71] In the public sector, arbitrators and hearing officers authorized to hear whistleblower claims also should be granted the power to impose penalties on an employer and to make appropriate referrals to appropriate outside authorities upon a finding that an employee has been retaliated against for whistleblowing.

Finally, the Legislature should consider modifying the current waiver provision contained in Labor Law § 740(7). By requiring employees to surrender all other possible statutory and contractual claims by the mere filing of a whistleblower lawsuit, this provision deters them from undertaking a court challenge to what they perceive to be retaliation for whistleblowing.

Conclusion

It takes courage for a person economically dependent on an employer to report that the employer is engaged in wrongful conduct. The people of this state, through their legislature, should insure that such employees are guaranteed adequate and fair legal protections and remedies when they decide to "blow the whistle" on their employers.

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1. *See Remba v. Fed'n Employment & Guidance Serv.*, 76 N.Y.2d 801, 803, 559 N.Y.S.2d 961 (1990).
2. *See Bordell v. Gen. Elec.*, 88 N.Y.2d 869, 871, 644 N.Y.S.2d 912 (1996).
3. *See Noble v. 93 Univ. Place Corp.*, 2003 U.S. Dist. LEXIS 20742 (S.D.N.Y. Nov. 17, 2003).
4. *See Horn v. N.Y. Times*, 100 N.Y.2d 85, 90–91, 760 N.Y.S.2d 378 (2003).
5. *See Khan v. State Univ. of N.Y. Health Sci. Ctr.*, 288 A.D.2d 350, 734 N.Y.S.2d 92 (2d Dep't 2001).
6. Civil Service Law § 75-b(2)(b) ("Civ. Serv. Law").
7. *Moore v. County of Rockland*, 192 A.D.2d 1021, 1024, 596 N.Y.S.2d 908 (3d Dep't 1993).
8. *Bal v. City of N.Y.*, 266 A.D.2d 79, 698 N.Y.S.2d 852 (1st Dep't 1999).
9. 293 A.D.2d 299, 740 N.Y.S.2d 312 (1st Dep't 2002).
10. *See Montero v. Lum*, 68 N.Y.2d 253, 261–62, 508 N.Y.S.2d 397 (1986); 9 N.Y.C.R.R. § 5.39.
11. *Garrity v. Univ. at Albany*, 301 A.D.2d 1015, 755 N.Y.S.2d 471 (3d Dep't 2003).
12. *Id*. at 1017.
13. N.Y. Comp. Code R. & Regs. tit. 9, § 5.39 (N.Y.C.R.R.).
14. *Dobson v. Loos*, 277 A.D.2d 1013, 716 N.Y.S.2d 220 (4th Dep't 2000).
15. *Higgs v. County of Essex*, 232 A.D.2d 815, 648 N.Y.S.2d 787 (3d Dep't 1996).
16. *Rigle v. County of Onondaga*, 267 A.D.2d 1088, 701 N.Y.S.2d 222 (4th Dep't 1999), *appeal denied*, 94 N.Y.2d 764, 708 N.Y.S.2d 53 (2000); *Coombs v. Village of Canaseraga*, 247 A.D.2d 895, 668 N.Y.S.2d 862 (4th Dep't 1998); *Colao v. Village of Ellenville*, 223 A.D.2d 792, 636 N.Y.S.2d 446 (3d Dep't), *appeal dismissed*, *in part*, *motion denied*, *in part*, 87 N.Y.2d 1041, 644 N.Y.S.2d 137 (1996).
17. *Crossman-Battisti v. Traficanti*, 235 A.D.2d 566, 651 N.Y.S.2d 698 (3d Dep't 1997); *Plante v. Buono*, 172 A.D.2d 81, 576 N.Y.S.2d 924 (3d Dep't 1991), *appeal denied*, 79 N.Y.2d 456, 583 N.Y.S.2d 192 (1992).
18. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1039 (2d Cir. 1993).
19. *Noble v. 93 Univ. Place Corp.*, 2003 U.S. Dist. LEXIS 20742 (S.D.N.Y. Nov. 17, 2003).
20. *300 Gramatan Ave. Assocs. v. State Div. of Human Rights*, 45 N.Y.2d 176, 183, 408 N.Y.S.2d 54 (1978); *cf.* Education Law § 3020-a(c)(iii).
21. CPLR 2307.
22. *Collins v. Codd*, 38 N.Y.2d 269, 379 N.Y.S.2d 733 (1976); *Crossman-Battisti*, 235 A.D.2d 566; *Brey v. Bd. of Educ.*, 245 A.D.2d 613, 664 N.Y.S.2d 496 (3d Dep't 1997).
23. Civ. Serv. Law § 75-b(3)(a).
24. Education Law § 3020-a(4)(c).
25. Civ. Serv. Law § 75-b(3)(a).
26. Civ. Serv. Law § 75-b(3)(b).
27. *Higgs v. County of Essex*, 232 A.D. 2d 815, 648 N.Y.S.2d 787 (3d Dep't 1996).
28. These might also include those who are temporary or seasonal employees. Certain judicial employees also fall into this category. All may be represented by a union, but do not have protections as tenured employees.
29. *Edelman v. Israel*, 208 A.D.2d 1104, 617 N.Y.S.2d 911 (3d Dep't 1994); *Hanley v. N.Y. State Executive Dep't, Div. for Youth*, 182 A.D.2d 317, 589 N.Y.S.2d 366 (3d Dep't 1992).
30. *Gruenewald v. 132 W. 3lst St. Realty Corp.*, 205 A.D.2d 498, 613 N.Y.S.2d 39 (2d Dep't 1994); *Hoffman v. Altana, Inc.*, 198 A.D.2d 210, 603 N.Y.S.2d 499 (2d Dep't 1993); *Scaduto v. Rest. Assocs. Industries, Inc.*, 180 A.D.2d 458, 579 N.Y.S.2d 381 (1st Dep't 1992).
31. *Hoffman*, 198 A.D.2d 210.
32. *Weber v. County of Nassau*, 215 A.D.2d 567, 627 N.Y.S.2d 64 (2d Dep't 1995), *appeal dismissed*, *in part*, *appeal denied*, *in part*, 87 N.Y.2d 1053, 644 N.Y.S.2d 143 (1996); *see Edelman*, 208 A.D.2d 1104; *Hanley*, 182 A.D.2d 317.
33. 266 A.D.2d 858, 697 N.Y.S.2d 805 (4th Dep't 1999).

34. 301 A.D.2d 1015, 755 N.Y.S.2d 471 (3d Dep't 2003).
35. *Mullen v. City of N.Y.*, 2003 U.S. Dist. LEXIS 11353 (S.D.N.Y. June 27, 2003).
36. *Martinez v. City of N.Y.*, 2003 U.S. Dist. LEXIS 7295 (S.D.N.Y.), *aff'd*, 2003 U.S. App. LEXIS 24449 (2d Cir. Dec. 4, 2003).
37. 180 A.D.2d 458, 579 N.Y.S.2d 381 (1st Dep't 1992).
38. *See Roddini v. City Univ. of N.Y.*, 2003 U.S. Dist. LEXIS 2549 (S.D.N.Y. Feb. 14, 2003); *Fry v. McCall*, 945 F. Supp. 655 (S.D.N.Y. 1996); *Kirwin v. N.Y. State Office of Mental Health*, 665 F. Supp. 1034 (E.D.N.Y. 1987).
39. *Taylor v. State*, 160 Misc. 2d 120, 608 N.Y.S.2d 371 (Ct. Cl. 1994).
40. *Sagendorf-Teal v. County of Rensselaer*, 100 F.3d 270 (2d Cir. 1996).
41. *Verbeek v. Teller*, 114 F. Supp. 2d 139 (E.D.N.Y. 2000).
42. 267 A.D.2d 1088, 701 N.Y.S.2d 222 (4th Dep't 1999), *appeal denied*, 94 N.Y.2d 764, 708 N.Y.S.2d 53 (2000).
43. *See Wallikas v. Harder*, 67 F. Supp. 2d 82 (N.D.N.Y. 1999); *Roens v. N.Y. City Transit Auth.*, 202 A.D.2d 274, 609 N.Y.S.2d 6 (1st Dep't 1994).
44. *See Rigle*, 267 A.D.2d 1088; *Pipas v. Syracuse Home Ass'n*, 226 A.D.2d 1097, 641 N.Y.S.2d 768 (4th Dep't), *appeal denied*, 88 N.Y.2d 810, 649 N.Y.S.2d 377 (1996).
45. *Strattner v. Cabrini Med. Ctr.*, 257 A.D.2d 549, 682 N.Y.S.2d 594 (1st Dep't 1999).
46. 821 F.2d 111, 116–17 (2d Cir. 1987).
47. 158 F. Supp. 2d 267, 278 (E.D.N.Y. 2001).
48. 14 F. Supp. 2d 277 (E.D.N.Y. 1998).
49. *Heinitz v. Standard Constr.*, 202 A.D.2d 843, 609 N.Y.S.2d 102 (3d Dep't 1994).
50. *See* N.Y.C. Admin. Code § 12-113(a)(1).
51. N.Y.C. Admin. Code § 12-113(a)(2).
52. N.Y.C. Admin. Code § 12-113(e).
53. Labor Law § 741(2) ("Lab. Law").
54. *See* 10 N.Y.C.R.R. § 81.8.
55. 25 PERB ¶ 3039 (1992).
56. *See State of New York (DOCS)*, 29 PERB ¶ 4565 (1996).
57. 34 PERB ¶ 4546 (2001).
58. Civ. Serv. Law § 205(5)(d).
59. Lab. Law § 27-a(10)(b).
60. 86 N.Y.2d 438, 633 N.Y.S.2d 758 (1995).
61. Lab. Law § 27-a(5)(b); *Stone v. Sweeney*, 266 A.D.2d 103, 698 N.Y.S.2d 645 (1st Dep't 1999).
62. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *see Connick v. Myers*, 461 U.S. 138 (1983); Lab. Law § 27-a(5)(b); *Stone*, 266 A.D.2d 103.
63. *See Gragg v. Ky. Cabinet for Workforce Dev.*, 289 F.3d 958, 966–67 (6th Cir. 2002); *Wilkins v. Jakeway*, 44 Fed. App. 724 (6th Cir. 2002).
64. 926 F.2d 1333 (2d Cir. 1991).
65. 120 F.3d 648 (7th Cir. 1997).
66. *Hoover v. Radabaugh*, 307 F.3d 460, 466 (6th Cir. 2002).
67. *Marohnic v. Walker*, 800 F.2d 613 (6th Cir. 1986); *see Delgado v. Arthur Jones*, 282 F.3d 511, 517–18 (7th Cir. 2002) (internal police memorandum prepared in the context of a criminal investigation containing information regarding alleged criminal conduct by an elected official's relative touched upon a matter of public concern); *Taylor v. Phillip Keith*, 2003 Fed. App. 0270P (6th Cir. 2003) (information contained in a use of force report filed by a police officer regarding police brutality by another officer touched upon a matter of public concern).
68. *See Dangler v. N.Y. City Off-Track Betting Corp.*, 193 F.3d 130 (2d Cir. 1999).
69. *McEvoy v. Spencer*, 124 F.3d 92 (2d Cir. 1997).
70. *See* McKinney's Cons. Laws of N.Y., Book 1, § 304.
71. Lab. Law § 740(4)(d).

New York County Filing Project For Tax Certiorari Cases Records 30-fold Rise in Electronic Filings

BY JACQUELINE W. SILBERMANN

For several years, New York State has had a pilot program permitting electronic filing of court documents for certain types of cases in selected jurisdictions. Although progress has been slow, a major advance took place in the fall of 2003 with the filing of 6,065 tax certiorari cases in New York County, a 30-fold increase from 2002.

The objective of the pilot program has been to test the feasibility and utility of electronic filing and to learn about and address practical issues that may arise in its operation. Under governing legislation, the electronic filing program is authorized in (i) commercial cases in the Commercial Divisions of Albany, Monroe, Nassau, New York, Suffolk, and Westchester Counties; (ii) tax certiorari cases in Monroe, New York, Suffolk, and Westchester Counties; and (iii) certain cases in the Court of Claims. The Legislature has required that all parties must consent if electronic filing is to be used in any particular case. This sets the New York program apart from the system used in federal courts.

The benefits to electronic filers are many. The case can be initiated at any time of any day (although the summons and complaint must be served in the traditional manner absent agreement obtained in advance and, without such agreement, consent to electronic filing must be obtained after service). The utility that comes from the continuous availability of the system is illustrated by a case that one firm filed electronically in New York County during the several days the court was closed in the aftermath of the September 11th disaster.

Once the case is in the system, papers can be filed with the system at any time of the day or night; fees are paid online by credit card (and an electronic check payment option is under consideration). Service of papers is simple, being made through electronic messages advising that a paper has been filed and is available on the Web site. The system is easy to learn and simple to use. It produces a ready docket of all papers filed. Any such paper can be called up and studied at any time by any party from any location. No one need run to the record room to drag hard-copy files about. Numerous users at a firm can have access to any necessary paper simultaneously. It is now unnecessary to make copies of filed papers for members of a litigation team. All parties receive instantaneous notification of decisions, as well as filings.

Until recently, 252 cases had been filed, all in New York County.

The traditionalism of attorneys – their reluctance to part with old habits – is no doubt a major factor that has inhibited the use of electronic filing. In commercial litigation in New York County, many large firms have messengers in court often, so that perhaps the firms may not think it necessary to become comfortable with and use the new system, and smaller firms may feel they lack technical expertise; but the software truly is, by any reckoning, both easy to learn and easy to use. It resembles the federal software that firms increasingly must master, in any event.

Until 2002, governing law made only commercial cases eligible to be filed electronically in New York County. A legislative expansion covering tax certiorari cases in New York County took effect in the summer of 2002. The tax certiorari bar files new cases during a "window period" of several months that runs until late October. The 2002 expansion came so late in the year

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On behalf of the court, she wishes to acknowledge the devoted work of Jeffrey Carucci and the members of his court team, Edward Kvarantan, Kevin Duffy, and Christopher Gibson, and the leadership of the clerk-in-charge of the Motion Support Office, Frank Pollina. She also extends sincere thanks to Norman Goodman, the New York County clerk, and his staff for their assistance.

that there was little opportunity for the bar to familiarize itself with the newly relevant software. Even so, the court was able to receive 200 such cases in 2002.

In the fall of 2002, it was apparent to the Unified Court System; the New York County clerk, Norman Goodman; and the New York County Supreme Court that the potential existed for a significant increase in tax certiorari filings in the 2003 filing season. The New York County Supreme Court, through the energetic and essential leadership of its director of electronic filing, Jeffrey Carucci, and with the cooperation of Mr. Goodman, set to work on two fronts to make the potential a reality in 2003. First, it would be necessary, working with the county clerk, to involve the tax certiorari bar, the City of New York and the New York City Tax Commission in this undertaking. So Mr. Carucci undertook a vigorous effort to explain the program and demonstrate its utility for the bar and the city. Second, it would be necessary to consider and, if appropriate, to secure enhancements to the software to make the filing process as simple as possible for all parties. The result was a remarkable level of cooperation among the bar, the city, the county clerk and the court.

The system . . . produces a ready docket of all papers filed. Any such paper can be called up and studied at any time by any party from any location.

In numerous meetings and communications, the court demonstrated the electronic filing software and discussed with the bar and the Tax Commission any special needs or requirements they might have. The bar, led by the then-president of the Real Estate Tax Review Bar Association, Richard Steinberg, and Eric Weiss, a partner in the firm of Tuchman Katz Schwartz Gelles Korngold & Weiss, LLP in Manhattan, and Reed Schneider of the New York City Tax Commission, worked particularly closely with the court in evaluating the software and determining whether enhancements to it were practical and advisable given the realities of tax certiorari practice and the requirements of the bar. Mr. Weiss, who, in addition to his considerable gifts as a lawyer, is very knowledgeable about computer technology, was able to communicate effectively and productively with the Unified Court System's Department of Technology about the software, its capabilities and potentialities.

The result was a number of important enhancements to the software that improved the ease and speed of filings. This was particularly important because during the brief filing season a tax certiorari firm in Manhattan might initiate hundreds, even many hundreds of matters. Instead of individualized, case-by-case data entry, the system was revised to permit filers to download into the program the information needed to open a case taken from a disk that the filing attorney would prepare in his or her office for internal purposes. Forty cases could be opened at one time in this way by a single click of the mouse. The process of attaching copies of pleadings prepared in the Adobe Portable Document Format (PDF) was also simplified and expedited.

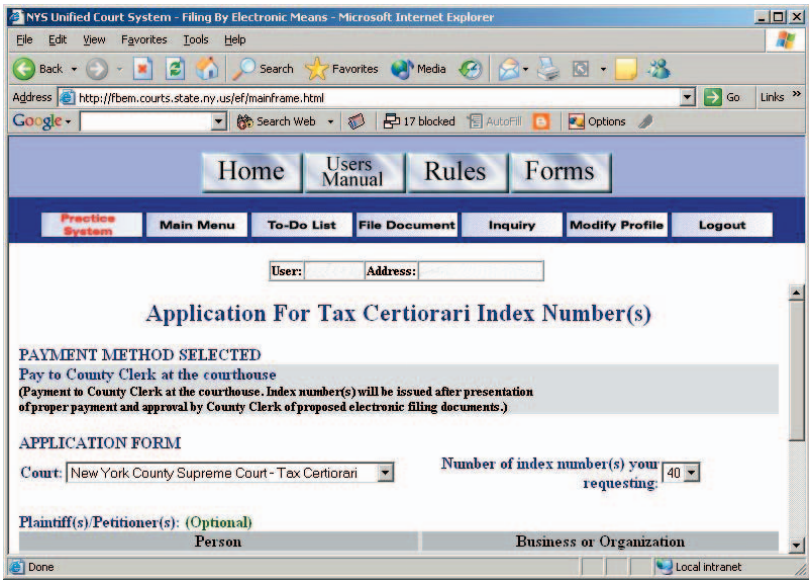
An additional filing option was created with the introduction of a template form for a pleading in which the variable data fields could be populated using the attorney's data file. Forty case files could be opened and 40 petitions could be created online and attached to the case files by basically a single mouse click.

The project team also sought to make an important set of enhancements to assist further the Tax Commission and the bar. The commission in the past had required attorneys to deliver to it a computer disk containing data on all cases filed by the attorney (petitioner name, location of property, dollar amount, etc.). The project team recognized, however, that it was possible for the electronic filing program, with some adjustments, to collect this data automatically from the filings made by attorneys and, upon the conclusion of the filing season, to provide the data to the Tax Commission, in the format preferred by it, for all cases filed. Thus, the Tax Commission would receive what it needed in a very convenient way and the attorneys would no longer have to concern themselves with preparing and delivering disks to the commission. The entire process was automated.

The software program was also configured to provide the county clerk with a daily report on all cases filed electronically and all filing fees paid online. This satisfied the clerk's record-keeping and accounting requirements.

Once the enhancements were made, Mr. Carucci brought all interested parties together to present the revised software. At that meeting, the Tax Commission, the city and the bar also made significant headway toward preparing a stipulation that shortly thereafter helped to facilitate the filing process.

In the stipulation, the city consented to the use of the electronic filing system by attorneys who executed the stipulation. The stipulation provided, in effect, that the issuance of an index number by the system constituted service on New York City. Thus, no hard-copy service was required. Nor were attorneys required to prepare and file affidavits of service with the county clerk. The system generated proof of service for the attorneys' files.



In the past, attorneys had been required to deliver to the county clerk what often were many boxes crammed full of pleadings. The county clerk needed to create a file jacket for each case and process each pleading. The attorneys would thereafter deliver to the clerk boxes of affidavits of service, which the clerk would have to file in the appropriate file jackets. None of this occurred this year for electronically filed cases because none of it was any longer necessary. Nor, as noted, did the attorneys have to concern themselves with delivering to the Tax Commission disks of data covering all electronically filed cases.

To assist attorneys in making the filings, Mr. Carucci and his team conducted training sessions for filers. The sessions helped to orient the bar to the system and gave filers confidence that they could use the system without difficulty.

Throughout the filing season, Mr. Carucci and staff served as a Help Desk, making themselves available continuously to the bar to answer any question that arose. The county clerk and the court worked together very smoothly.

The results were significant and dramatic. Over the course of about three weeks, attorneys filed 6,065 tax certiorari cases using the electronic filing system. This represented more than a 30-fold increase over the volume of filings in 2002, the first year of the availability of the service. Remarkably, more such cases were filed electronically in 2003 than were filed in hard-copy format.

The attorneys and the Tax Commission reaped the benefits outlined here. The workload of the county clerk was reduced. The system worked well, with few problems, and when problems did arise, Mr. Carucci and his team, along with the Department of Technology and the county clerk, resolved them satisfactorily and promptly. Indeed, the bar and the Tax Commission have expressed a desire to see the program expanded next year.

The experience over the past year shows the potentialities of the electronic filing system in New York. The benefits are demonstrable and clear; the fact that the tax certiorari users are eager to see the system expanded immediately speaks volumes. We expect even greater use of the system in New York County in 2004, and we hope that it will be used in the other counties where e-filing for tax certiorari cases is now permitted by the Legislature. In New York City, only one governmental entity handles these cases, but the process could be more cumbersome in other parts of the state where multiple taxing authorities may be involved. The hope is, however, that the benefits to the taxing authority and the bar will make it possible to surmount any complexities.

The experience in the tax certiorari inventory also underscores more broadly the benefits that electronic filing can bring to litigants in commercial cases. Obviously, there are differences between commercial cases and tax certiorari matters, in which pleadings are formulaic. Nevertheless, electronic filing makes life easier for the commercial practitioner who uses it, as has been the general experience of users.

The system is learned so quickly and used so easily that the attorney who feels he or she is lacking in technical skill should not hesitate to participate. We in New York County offer training (at no expense and with CLE credit attached) to assuage any doubt or fear prospective filers may have. We invite all commercial practitioners to call (212-374-6562). In addition, we understand that justices and court staff are gearing up in other counties in which Commercial Divisions exist, to open their doors to electronic filing and achieve progress in the near future.

Electronic filing is the future of the litigation process. One need not be a visionary to see that. This is certainly true for tax certiorari matters – indeed, the future is already here – and it will be true of other inventories too very soon. In New York County, our Commercial Division will be accelerating its efforts in the coming months to bring cases into the program, and other branches of the division will do so as well. We call on all commercial practitioners to work with us so that together we can smoothly and effectively usher in the new era.

In Vitro Fertilization Options Lead to the Question, "Who Gets The Pre-Embryos After Divorce?"

By Susan L. Pollet

For many individuals, giving birth to a child, the fulfillment of a life dream, is difficult to achieve. Approximately 10% of the U.S. population that is of reproductive age is affected by infertility.[1] With advancements in reproductive technology, infertile couples are increasingly turning to artificially assisted conception procedures.

When successful, these procedures can make dreams come true for the couples, but thorny legal issues arise if the couples later divorce.

The most popular procedure is in vitro fertilization (IVF), in which eggs are extracted from the woman's body, fertilized in a petri dish, and then reinserted into the womb. Up to 15 or 20 eggs may be extracted, but no more than two or three embryos are usually implanted at one time, resulting in excess embryos being frozen, to be inserted at a later date if the procedure fails.[2] Approximately 188,000 frozen pre-embryos now exist in the United States.[3] For many couples, IVF is their last opportunity to bear children with whom they have a genetic connection. The IVF procedure is expensive and requires enormous physical and emotional effort.

Legal issues arise when, after the embryos are frozen, but before implantation, couples divorce and disagree about what should be done with the frozen embryos. The available options usually involve "donation to the IVF clinic for research purposes, donation to another infertile couple, or use by one of the members of the original couple still wanting to have a child."[4]

At present, there are "no federal statutes that provide a uniform consensus on resolving the disputes over the ownership of pre-embryos."[5] Several states, including Florida, Illinois, Kentucky, Louisiana, Missouri, New Hampshire, New Mexico and Pennsylvania, have enacted legislation to address the disposition of frozen pre-embryos.[6]

A review of the literature, state case law and state legislation makes clear that scholars, courts and legislatures cannot agree on the future of frozen pre-embryos. There is, however, a "uniform consensus" that federal legislation should be enacted.[7] (The argument has been made that the reluctance to legislate in the area of reproductive technology may be due to moral or public policy disagreements about whether such technologies should be permitted at all.[8]) According to some commentators, the legislature must first define the rights of a pre-embryo by "determining its legal status."[9]

Approaches to Legal Status

Scholars state that courts and legislatures may apply three types of legal status to pre-embryos. The first is the "right-to-life approach" (the "person status"), which maintains that life begins at fertilization and that pre-embryos should never be destroyed.[10] The second approach gives pre-embryos the "status of property," and focuses upon the rights of the donors. The third is the "special respect" approach, which advocates a balancing test that takes into account the rights of all parties.[11] This third approach is supported by most commentators, including the American Fertility Society. It gives the pre-embryo respect "greater than that accorded to human tissue but not the respect accorded to actual persons."[12] Under this approach, it is ethically and legally acceptable to discard or prevent the transfer of pre-embryos to a uterus.[13]

One scholar, Diane K. Yang, recommends that federal legislation provide that disposition agreements be recognized, and that a model consent agreement be provided to the participants.[14] The use of a model form, it is argued, reduces the burden on the courts to determine the legality of the contract terms. It would shift the

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focus, instead, to whether the agreement is unenforceable because it violates a public policy concern.[15] The argument is that "signing a contract to decide the pre-embryos' fate is neither callous nor dangerous; it is the intelligent and forward-thinking choice."[16]

Scholar Erik W. Johnson suggests that the most effective way to "reduce litigation and limit uncertainty" in these cases is for legislation to require a consent form signed by both parents and the IVF clinic before treatment.[17] The rationale is that the legislation should provide for couples to be given information (counseling) on disposal and donation options, along with a comprehensive list of possible contingencies.[18] Johnson argues that the "best approach for courts to take is first to give deference to the consent agreements when determining pre-embryo disposition."[19] When a court has determined that the agreement was invalid, or when a consent form was never signed, Johnson maintains that the courts should balance each party's constitutional right to procreate.[20]

Another commentator, Karissa Hostrup Windsor, maintains that federal legislation should require that the disposition agreements contain several provisions, to wit, the fate of the pre-embryos in the event of various contingencies; that both spouses concur that the agreement will be binding between them, and between them and the clinic; that the contract will be enforceable in a court of law; and that contract defenses such as unconscionability or changed circumstances will not be permitted to prevent enforcement of the agreement.[21]

The main issues that courts have grappled with are "whether a court should enforce a couple's pre-conception agreement, whether a person can be forced to be a parent against his or her wishes, and whether one party's interest in becoming a parent outweighs the other party's interest in not becoming a parent."[22] Courts have a choice about various doctrines that can be applied to resolve such disputes. One commentator suggests that courts may "enforce a contract if one exists, or they may resolve the dispute based upon public policy, or they may characterize the pre-embryos as marital property and dispose of them accordingly, or they may apply the right to privacy."[23]

There are at least five reported cases in the United States of pre-embryo custody disputes in which the courts "awarded the pre-embryos to the party opposing implantation," which resulted in stopping the process "the parties began."[24] These courts, however, have disagreed on the reasons for their decisions.[25] One scholar, Ellen Waldman, suggests that the courts are striving to accomplish one goal – "to make sure that the parent who no longer wants the embryos containing his or her genetic material brought to term wins."[26] This has been characterized, also, as the "right not to be a parent."[27]

One scholar, Ellen Waldman, suggests that the courts are striving to accomplish one goal – "to make sure that the parent who no longer wants the embryos containing his or her genetic material brought to term wins."

New York Court of Appeals Decision

The New York Court of Appeals has issued one decision, *Kass v. Kass*,[28] that addressed the subject. The issue in *Kass* involved the disposition of five, frozen, stored pre-embryos created while the parties were still married, five years before the court decision. The parties divorced, and the woman wanted to implant the pre-embryos, claiming that this was her "only chance for genetic motherhood." The man objected "to the burdens of unwanted fatherhood." The father claimed that the parties had agreed at the inception of the effort that in the present circumstances they would donate the pre-embryos to the IVF program for "approved research purposes."

The Court of Appeals affirmed the Appellate Division, concluding that the parties' agreement to donate to the IVF program would control. Chief Judge Kaye's decision is remarkable in the thorough analysis it provides of the "legal landscape" and its deft summary of competing approaches to the issue of disposition of the pre-embryos. The decision states that agreements between gamete donors regarding disposition of pre-embryos should "generally be presumed valid and binding, and enforced in any dispute between them (citations omitted)."[29]

In addition to recognizing the value of carefully working out such agreements, the *Kass* decision also noted the difficulties inherent in agreements like these that "look to the future." The Court noted that "[d]ivorce; death, disappearance or incapacity of one or both partners; aging; the birth of other children are but a sampling of obvious changes in individual circumstances that might take place over time."[30] The Court emphasized that because of these factors, courts should honor the "parties' expressions of choice, made before disputes erupt, with the parties' overall direction always uppermost in the analysis."[31] The Court went on to use general principles of contract interpretation to arrive at its decision.

Conclusion

The use of IVF procedures and the preservation of extra pre-embryos can result in disagreements over the disposition of them after divorce. As aptly put by Chief Judge Kaye in the *Kass* decision, "As science races ahead, it leaves in its trail mind-numbing ethical and legal questions."[32] These questions, and their corresponding answers, are evolving.

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1. Diane K. Yang, Notes and Comments, *What's Mine Is Mine, But What's Yours Should Also Be Mine: An Analysis of State Statutes That Mandate the Implantation of Frozen Pre-embryos*, 10 J.L. & Pol'y 587 (2002). The author points out that in 1978, the first child conceived by IVF was born, and that more than 45,000 American babies have been conceived through IVF in the United States. *Id*. at 590.
2. Ellen Waldman, Symposium Issue: *2002 Women and the Law Conference: Women and Family Law: King Solomon in the Age of Assisted Reproduction*, 24 T. Jefferson L. Rev. 217, 218 (2002).
3. Tracey S. Pachman, *Disputes Over Frozen Pre-embryos & The "Right Not to Be a Parent,"* 12 Colum. J. Gender & L. 128, 130 (2003).
4. Karissa Hostrup Windsor, Note: *Disposition of Cryopreserved Pre-embryos After Divorce*, 88 Iowa L. Rev. 1001, 1003 (2003).
5. Yang, *supra* note 1, at 588.
6. *Id*.
7. *Id.* at 633.
8. F. Barrett Faulkner, *Applying Old Law to New Births: Protecting the Interests of Children Born Through New Reproductive Technology*, 2 J. High Tech. L. 27, 42-3 (2003).
9. Erik W. Johnson, Note: *Frozen Embryos: Determining Disposition Through Contract*, 55 Rutgers L. Rev. 793, 818 (2003).
10. Windsor, *supra* note 4, at 1007.
11. *Id*.
12. *Id*. at 1012.
13. *Id*.
14. Yang, *supra* note 1, at 634.
15. *Id.*
16. Johnson, *supra* note 9, at 820.
17. *Id.* at 794.
18. *Id.* at 819.
19. *Id*. at 795.
20. *Id*. at 820.
21. Windsor, *supra* note 4, at 1033.
22. Helen S. Shapo, *Frozen Pre-embryos and the Right to Change One's Mind*, 12 Duke J. Comp. & Int'l L. 75, 80 (2002).
23. Lainie M.C. Dillon, Notes and Comments: *Conundrums With Penumbras: The Right to Privacy Encompasses Non-Gamete Providers Who Create Pre-embryos With the Intent to Become Parents*, 78 Wash. L. Rev. 625, 627 (2003).
24. Shapo, *supra* note 22, at 76.
25. *Id.* at 77. This article gives a good discussion of those cases.
26. Waldman, *supra* note 2, at 221.
27. Pachman, *supra* note 3, at 131.
28. 91 N.Y.2d 554, 673 N.Y.S.2d 350 (1998).
29. *Id*. at 565.
30. *Id*. at 565–66.
31. *Id*. at 566.
32. *Id*. at 562.

Appeals Clinic

7 Tips on Whether to Appeal, How to Write Better Briefs

BY CYNTHIA FEATHERS

Training and literature on appeals give much attention to a long list of written rules. They are important, but the unwritten rules are more interesting. Experience from appellate practice for the State Attorney General, together with work as an institutional criminal defense provider and as a solo practitioner, has provided lessons in everyday considerations in handling appeals.

The seven suggestions here grew out of recent mentoring of *pro bono* attorneys and are illustrated with specific appeals. What makes appeals a unique and challenging stage of litigation is the primary focus. Why to seek a second opinion about whether to appeal and to be wary about settlement are the next topics. Finally, some ideas are offered for research, writing and oral argument.

1. Consider Not Appealing

If your client is a potential appellant, the threshold issue is whether to appeal. To make that decision, it is important to realize that an appeal is not a chance to retry the case; it is more like a new case. You are in a different court with different rules. The purpose of the appeal is not to determine what the fairest outcome might have been in the opinion of the reviewing court, but whether, based on the cold record and relevant law, the challenged ruling should be sustained. Justice sometimes is found not so much in the right result at the end of the appellate process, but in the fairness and integrity of the process itself.

The forces favoring affirmance are fierce. One Appellate Division judge said to departing clerks, "May you always be respondent." The appellant's chances of prevailing upon appeal depend in part upon the applicable standard of review. The lens through which the appellate court will view the record and the law can be dispositive. For example, is the relevant standard whether an administrative determination was supported by substantial evidence? As Article 78 litigants will attest, what is deemed substantial evidence may seem quite insubstantial. Is the governing standard whether the court below abused its discretion? The deference inhering in such standard is great.

If the appeal follows a jury trial and you contend that the verdict should be set aside as against the weight of evidence, convincing an intermediate appellate court, as you must, that no fair interpretation of the evidence could have yielded the challenged outcome will be an enormous task. The cause of a grievously injured client comes to mind. Before the subject car accident, he had few symptoms from a pre-existing injury and was thriving in his business and his family life. After the accident, he suffered years of agonizing pain and lost his business, his home and his marriage. The defendant won at trial. The reviewing court upheld the verdict. The Court of Appeals reversed because the proper standard had not been applied. Upon remand, however, the Appellate Division again sustained the verdict; the justices were able to discern a way the jury could have interpreted the evidence as to the pre-existing injury to produce the challenged result.

The point is not to abandon a palpably meritorious case in the face of a daunting standard of review. It is that counsel and client should make a careful assessment before embarking on any appeal and should proceed knowingly. If detached review reveals a weak position on appeal, then perhaps you should guide the client toward a decision that will save him much money and months of angst pending appeal. (Obviously, different considerations apply when you are assigned to represent an indigent criminal defendant whose liberty is at stake.) In hindsight, the vehemence of early clients in bitter matrimonial and estate disputes propelled two appeals that might have been better left unprosecuted. Years later, trial counsel in another case sought assis-

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tance in pursuing what appeared to be a frivolous federal appeal from an inviolable order dismissing a malicious prosecution claim. When turned away by appellate counsel, trial counsel went forward alone and suffered a huge Rule 11 sanction.

A familiar mantra of intermediate appellate courts is that they will defer to credibility findings, because the trier of fact was in a superior position to discern if witnesses were believable. Representing appellants when the central controversy concerns factual determinations is an unenviable position. The converse is true, too. Even if there is adverse legal authority, a respondent may survive a challenge if the appeal is framed or viewed essentially as a credibility contest. In one memorable case, the father disclaimed paternity and child support obligations. Unlike the usual scenario, equitable estoppel precluding such disclaimer was not applied to prevent HLA testing, but instead *after* such testing conclusively disproved paternity. The trial court believed the client mother's testimony about the bond between the father and the toddler. The reviewing court detailed such credibility findings and deferred to them.

Appeals involving pure legal questions may be more likely than distinctly factual inquiries to present opportunities for reversal. Challenges of orders rendered upon defense motions for summary judgment dismissing the complaint often present neat, discrete appeals and a realistic opportunity to preserve or win a day in court for plaintiffs. Where there was a trial, if you can focus on an erroneous ruling, evidentiary or otherwise, you will often do better than by relying on a straight weight of evidence approach. There are hurdles to overcome, however. For one thing, you must generally detail the evidence to show that the error was not harmless.

For another thing, the error had better be properly preserved. Otherwise, the appellate court will generally not consider it. In one murder case, the facts about the crime and about juror misconduct were shocking. The client was charged with murder in the death of her child, who had been severely burned by a boyfriend for taking forbidden food and had died from complications after months of suffering. There was compelling evidence that a deliberating juror had discussed the verdict with an alternate and then lied about her actions, an extraordinary example of disqualifying misconduct. Defense counsel made a motion, but did not fully and artfully explain the most viable basis for the discharge of the subject jurors, which would have necessitated a mistrial in the circumstances. The mother was convicted. On appeal, the misconduct arguments were rejected as unpreserved, and the court declined to review the issue in the interest of justice. Whether the rules of preservation are applied tautly or with elasticity may depend in part on how sympathetic the underlying facts are.

Counsel and client should make a careful assessment before embarking on any appeal and should proceed knowingly.

2. Seek a Fresh Eye

Knowing the case can be a drawback. The trial lawyer may know too much. He knows many matters that are not in the record and therefore irrelevant upon appeal. He may have strong views on the merits that color his assessment of the chances of success upon appeal. The investment in the case that made him so effective at the trial level may be a deficit upon appeal.

In one dramatic example of this common phenomenon, the surviving spouse of an inmate brought a successful civil rights action against the client agency for showing deliberate indifference to his medical needs. It was hard for zealous trial counsel to accept appellate counsel's concern that the reviewing court might not get past the inflammatory facts: the inmate had slit his own throat to get medical attention and died from cancer after being treated for an ulcer. The Second Circuit affirmed in a summary order.

It may help to have the record reviewed by someone unfamiliar with the case, but familiar with appeals. Such an attorney can learn the case just as the appellate court will – based exclusively on the record, reviewed with dispassion. This vantage point can be of great value in evaluating what issues to advance on appeal or whether to appeal at all. You may still want to handle the appeal yourself. Many versatile attorneys do both trials and appeals, thus drawing upon their knowledge of salient facts and law and sustaining their relationship with the client. They also sharpen trial skills, such as how to best preserve issues for appellate review. Appeals provide great rewards: not only a chance to right a wrong or sustain a right result, but to leave a lasting legacy; the decision in your case and its progeny may help subtly shape the contours of the common law.

If you lack the time or inclination to do the appeal, take your time to find the right appellate counsel. Some may know state court appeals, but not federal court appeals. Some may know civil appeals or a subset thereof, but not criminal appeals. Some may have been in the Appellate Division often, but in the state Court of Appeals rarely. Retain someone with whom you can comfortably collaborate. Do not worry that appellate coun-

sel will second-guess the moves you made. He will recognize the demands you faced versus the luxury he has: time to ponder his every move.

In appellate practice, there are various levels of expertise and specialization. For example, some attorneys have vast expertise in U.S. Supreme Court practice and can guide other appellate counsel lacking such experience. In one appeal, the Second Circuit affirmed dismissal of a habeas corpus petition involving an intriguing issue of first impression: whether a statutory exemption from prosecution as a felon in possession of a firearm, which applied to defendants who had their civil rights *restored*, should be extended to felons whose civil rights were *never taken away*. The client wished to petition for *certiorari* and relied on appointed counsel to do so. Guidance from a generous professional with expertise in U.S. Supreme Court practice was indispensable. (*Certiorari* was denied.)

3. Settle With Care

A number of appellate courts mandate attendance at settlement conferences for selected appeals. While such programs can facilitate a favorable ending to some cases, they present dangers to the unwary. In any case, carefully assess your chances of success on appeal before the conference.

In one case, a student had been speared through the middle by a shard of glass from a window that broke when he leaned on it, and the assigned judge induced him to settle with the client agency for significantly less than he had won in the trial court and might well have kept on appeal. The negotiations were aided in part by the long pendency of appeals and respondent's desire for quick resolution.

In another case, a wife sought to set aside a separation agreement that favored the client. The trial court had rejected her claim. Although the record and controlling authority seemed to indicate her chances of reversal were remote, the settlement judge scared the client husband into making an offer. The wife rejected the offer. The Appellate Division unanimously affirmed.

4. Research Doggedly

Do comprehensive research. Computer research using a well-formulated query or relevant key number is fine, but use it to supplement, rather than supplant, manual research, including consulting applicable statute annotations and practice commentaries and relevant treatises. When your research is done, sift through what you found to identify the gold nuggets: favorable controlling and persuasive authority. Distinguish troubling cases. Disregard other cases of secondary importance.

Doing thorough research can bring unexpected rewards. In an appeal involving dismissal of a complaint based upon lack of capacity, arising out of the filing of a bankruptcy petition that did not disclose the cause of action, research revealed a lone trial court decision that provided a blueprint for a strategy that brought success after two appeals.

Often treatises are a good entry point for finding relevant law. Occasionally, they are also decisive in your brief. In one appeal, trial counsel had pursued several arguments. The one issue that seemed very promising for appeal involved an unusual scenario: the respondent servient estate was arguably on constructive notice of the appellant dominant estate's right-of-way, even though the encumbrance was not recorded in respondent's chain of title. There was a dearth of case law. In ruling for the client, the reviewing court quoted at length the treatise relied upon in appellant's brief.

In the cases you find upon research and the results you achieve upon appeal, do not expect perfect consistency. Sometimes decisions from the same court seem inconsistent and irreconcilable. A pair of plea *vacatur* cases come to mind. One with more apparent merit brought defeat, while a similar one met success. Different panels, different results.

5. Keep It Simple

Simplicity is key. Not the simplicity of superficiality, but of deep analysis. Make it easy for the reviewing court to understand your position. When compiling the record, put the challenged judgment and decision up front. If the record contains a transcript, keep that numbering intact; for other pages, add a letter suffix. For massive, multi-thousand page records, devote plenty of time and thought to devising a strategy for managing the information and producing an appendix that will help the court find the key proof.

Decide what to call the parties at the outset and then be consistent. It is rarely appropriate to refer to opposing counsel by name. *Ad hominem* attacks are always poor form. The Statement of Facts section is just for facts, and the Argument is just for the argument. Therefore, avoid injecting argument in your facts, and in the argument, do not add new facts. Tell a vivid story. The factual presentation is critical. Craft it with care. Usually a chronological narrative works well. Before you begin, know your argument, since it may guide you to only lightly touch certain aspects of the record, but to delve deeply into others. Do not ignore damaging facts; deal with them. For every statement you make, cite a page in the record. Do not refer to anything that is not in the record, unless an exception to this rule applies.

Often there are only a few strong issues worth briefing. Making weak arguments detracts from the strong ones. If your argument sounds complicated, untangle it and state it simply and clearly. The heaviest lifting comes not from handling thousand-page transcripts, but from struggling to distill arguments to their essence and striving to present them with the elegance of a flow chart, rather than the twists and turns of a Byzantine maze.

Do not grossly distort the strength of your case or disregard its weaknesses. Just lay out your law and logic. If you represent respondent, and appellant has not aptly framed the issues, reframe them.

Do not feel constrained to respond to appellant's brief point by point; that is rarely the most forceful course. Professionally printed briefs look nice and crisp, but crisply written prose is far more important.

6. Prepare Fully for Argument

Oral argument is a chance to make key points, answer questions and dispel misconceptions. Prepare fully. Review the record and mark key pages. Reread the briefs and vital cases. You may gain a new perspective on the appeal. Decide the few points you want to highlight and prepare an outline.

Anticipate questions and prepare answers. When you argue, dive into the heart of your argument. Keep in mind that you are before a panel of appellate judges, not a jury. Logic, not drama, is appropriate.

Do not regard questions as interruptions. They are the most important part of oral advocacy. Good arguments are like an interesting dialogue about the law and the case among well-informed participants. When you are appellant, consider saving time for rebuttal if allowed. If you are respondent, be prepared to put aside your planned remarks to respond directly to appellant's arguments.

Do not read too much into the court's questions. They are not always an accurate barometer of what is to come. In one argument, the court attacked the attorneys for the four respondents to the naive delight of appellant and counsel, who months later were stunned by a stinging defeat in a decision finding discovery misconduct and precluding the core proof in the case.

7. Be a Mentor

If you have appellate experience, offering your time and talent to a local assigned counsel or *pro bono* program is one way you could fulfill the duty set forth in EC 2-25 to render public interest and *pro bono* legal service. Mentoring a *pro bono* attorney can be an especially rewarding and effective way to share your expertise, while advancing the public good.

Tactics and Strategy for Challenges To Government Action Give Both Sides Much to Consider

By Lawrence G. Malone

Like a Middle Ages army laying siege to a castle, a petitioner challenging state government action need only breach a single wall of the agency's defenses (jurisdiction, constitutional application, rationality and lawful process) to bring down the decision. Conversely, the government's attorneys must stave off the petitioner on each of these fundamental issues or lose the day.

The standards that courts use to review challenges to state agency action, however, change the dynamic and render the petitioners' mission nothing less than formidable.

Agency Jurisdiction

An agency has only those powers that are expressly stated in, or necessarily implied from, its enabling legislation.[1] Disputes over whether an agency was empowered to take a particular step, therefore, boil down to how the agency's statute should be read. Each side cites rules of statutory construction that ostensibly support its position and contend that the other has failed to realistically appraise the Legislature's intention.

Agencies, however, will ask courts to defer to their reading of their enabling statutes.[2] Although opponents will point out that deference is not appropriate when questions involve pure issues of law,[3] courts will afford the government deference if the dispute involves a highly technical matter that falls within the agency's expertise.[4]

Inasmuch as deference only results in application of the rational basis test, an agency's reading of its statute will not be upheld, even with deference, if it is irrational or contrary to the statute's plain language.[5] Nonetheless, the petitioner often carries the burden of showing irrationality.

Preemption Agencies may be authorized by state law to render a particular decision, but still be unable to do so because Congress has either expressly preempted the field or imposed statutory duties on federal agencies that would be frustrated if states regulated the field.[6] Preemption issues, therefore, turn on the will of Congress.[7] If states regulated an area before Congress acted, they should prevail on a preemption dispute unless the federal statute expressly evidences Congress's intent to alter the status quo.[8]

Preemption issues are often brought in federal court on the assumption that federal judges are less inclined to defer to state agencies. Parties who wish to contest an agency's jurisdiction, however (and argue, in the alternative, that even if the agency has jurisdiction, its authority is preempted by federal law), must go to state court because federal courts are unable to enjoin state agencies from violating state law.[9]

Constitutionality of Agency Action

Even assuming jurisdiction and the absence of preemption, agencies cannot exercise their authority in a manner that violates constitutional principles. Under the Separation of Powers doctrine, for example, administrative agencies are limited to "implementing" policies previously enacted into law by the Legislature.[10] Therefore, an agency decision that relies on an ill-defined, broad grant of authority to break new policy ground may be vulnerable to the non-delegation doctrine.[11]

Courts also have held agency decisions to violate: parties' First Amendment rights, the right to be compensated for a taking under the United States and New

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York State Constitutions,[12] the right to equal protection of the laws[13] and numerous other constitutional protections. Inasmuch as courts have an obligation to, when possible, interpret statutes in a fashion that preserves their constitutionality, they will sometimes conclude that agency action that violates a constitutional provision is ultra vires, arbitrary and capricious, or both.[14]

Persuasive constitutional challenges, therefore, can indirectly support jurisdictional and rationality arguments.

Rational Basis / Substantial Evidence

Judicial review of agency action is normally sought under Article 78 of the CPLR.[15] Even if agency action is consistent with federal law and the Constitution and within an agency's authority, it will be invalidated if it is arbitrary and capricious or, as discussed below, at odds with a relevant state statute.[16] If an agency decision follows mandatory evidentiary hearings, it must be supported by substantial evidence to be upheld.[17] Decisions that follow either paper proceedings, discretionary evidentiary hearings or legislative-type hearings must have a rational basis.[18]

As the Court of Appeals has noted that a court has limited discretion in reviewing whether an administrative determination based on a statutorily mandated hearing is lawful.[19] Courts have held, albeit not often, that agencies act arbitrarily if they fail to consider countervailing proof,[20] but evidence supporting the decision will usually prove sufficient for the agency even if credible testimony cuts against the decision.[21]

Parties challenging an agency rulemaking will not only review SAPA's procedural mandates, but may argue that SAPA requires agency rules to advance relevant legislative programs.

In reviewing non-evidentiary records, the court will apply a similar standard and uphold the agency if its action is rational.[22] Again, neither standard assures agency success,[23] but the petitioner's task is weighty.

Courts will refuse to confirm agency decisions based on clearly faulty reasoning or considerations not found in the agency decision.[24] Conversely, unless a petitioner's arguments go to jurisdiction, they normally will not be entertained unless they were preserved in the administrative record.[25]

Existing policy If an agency has promulgated a rule, a decision that breaks with the rule without explanation will be deemed arbitrary.[26] Inasmuch as this doctrine, like all of the above issues, is multi-layered, a range of arguments are available for an agency to escape its grasp. For example, government attorneys might well contend that the action under review did not require a distinguishing explanation because it was (a) consistent with the prior policy, or (b) represented a new rule, or (c) was unrelated to the prior rule.[27]

Applicable Statutory Requirements

In addition to establishing the limits of an agency's jurisdiction, enabling legislation sets forth procedures that an agency must follow in exercising its powers (*e.g.*, notice and comment requirements). Valuable case law usually explains the fine points of such procedures. For example, case law often will answer whether a statutory "hearing" requirement demands evidentiary hearings or simply written filings.[28] Similarly, a statutory provision may require agency action in a period of time, but case law will usually reveal whether the time is directory or mandatory.[29] Further, the consequences of failure to comply with a mandatory timeline are often found in case law.[30]

The State Administrative Procedure Act (SAPA) outlines the procedures that agencies are to follow in promulgating rules, rendering adjudications and acting on licenses. Rulemakings, for example, require notices of proposed rulemaking, that action be before but not after a certain time and that opinions be accompanied by various analyses (*e.g.*, regulatory impact statements). SAPA also controls whether ex parte contacts are permissible during administrative proceedings (*see* SAPA, § 307(2)). It bears noting, however, that agency regulations might prohibit such contacts in instances even when they are allowed by SAPA.

Parties challenging an agency rulemaking will not only review SAPA's procedural mandates, but may argue that SAPA requires agency rules to advance relevant legislative programs.[31] Government attorneys, however, generally will assert that SAPA is a procedural checklist for which there must only be substantial compliance.[32]

The State Environment Quality Review Act (SEQRA) directs agencies to take a "hard look" at actions that may have a significant impact on the environment.[33] Like SAPA, SEQRA has many nuances, which are formulated in case law.[34]

New York State's Open Meetings Law (Public Officers Law §§ 100–111) requires that deliberations of public bodies be open to the general public, with exceptions for executive sessions.[35] Parties considering the lawfulness of agency action under the Open Meetings Law

often search for pre-decisional discussions by a quorum of decisionmakers.[36] Such discussions, which are unlawful, should be contrasted with staff briefings, which are an acceptable means of preparing decisionmakers to deliberate at public meetings.

Conclusion

These guidelines scratch the surface of the legal principles that apply to the petitioner/agency contest, and experienced appellate counsel is a must.[37] Case law delves beneath the surface of each principle and enunciates numerous subtleties that often determine the outcome.

Government law clients – whether they be agencies or private parties affected by agency decisions – are best served by avoiding litigation. When decisions must be challenged, however, both sides have much to consider.

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1. *Niagara Mohawk Power Corp. v. Public Serv. Comm'n*, 69 N.Y.2d 365, 514 N.Y.S.2d 694 (1987).
2. *N.Y. Public Interest Research Group, Inc. v. N.Y. State Dep't of Ins.*, 66 N.Y.2d 444, 448, 497 N.Y.S.2d 645 (1985).
3. *Town of Brookhaven v. N.Y. State Bd. of Equalization & Assessment*, 88 N.Y.2d 354, 645 N.Y.S.2d 436 (1996).
4. *Med. Malpractice Ins. v. Superintendent of Ins.*, 72 N.Y.2d 753, 762, 537 N.Y.S.2d 1 (1988).
5. *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459, 426 N.Y.S.2d 454 (1980).
6. *N.Y. v. FERC*, 535 U.S. 1 (2002).
7. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986).
8. *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985).
9. *Pennhurst State Sch. & Hosp. et al. v. Haldeman*, 451 U.S. 1 (1981).
10. *Nicholas v. Kahn*, 47 N.Y.2d 24, 31, 416 N.Y.S.2d 565 (1979).
11. *Borealli v. Axlerod*, 71 N.Y.2d 1, 9, 523 N.Y.S.2d 464 (1987).
12. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984).
13. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).
14. *See, e.g., Crescent Estates Water Co. v. Public Serv. Comm'n*, 77 N.Y.2d 611, 569 N.Y.S.2d 386 (1991).
15. Under Article 78, the petitioner files and serves a notice of petition and petition to initiate the proceeding. *See* CPLR 7804(c). The petitioner may include affidavits in support of its arguments and bring the matter before the court 20 days after service of the notice of petition and petition. At least five days before the return date, respondent must serve its answer or move to dismiss the petition. See CPLR 7804(c), 7804(f). Respondent's answer may include supporting affidavits. *See* CPLR 7804(c). Respondent must include in its answer "a certified transcript of the record of the proceedings under consideration." *See* CPLR 7804(e). CPLR 7804(d) provides for a "reply" by petitioner (which may include supporting affidavits) to any "new matter [raised] in the answer" and it must be served at least one day before the return date.
16. *Pell v. Bd. of Ed.*, 34 N.Y.2d 222, 356 N.Y.S.2d 833 (1974).
17. *Kelly v. Safir*, 96 N.Y.2d 32, 38, 724 N.Y.S.2d 680 (2001).
18. *Associated Gen. Contractors v. N.Y. State Thruway Auth.*, 88 N.Y.2d 56, 643 N.Y.S.2d 480 (1996).
19. *Stork Rest., Inc. v. Boland*, 282 N.Y. 256, 273–74, 26 N.E.2d 247 (1940).
20. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *See N.Y. Tel. Co. v. Public Serv. Comm'n*, 29 N.Y.2d 164, 169, 324 N.Y.S.2d 53 (1971).
21. *Consolidated Edison v. Public Serv. Comm'n*, 74 A.D.2d 384, 428 N.Y.S.2d 343 (3d Dep't), *appeal denied*, 51 N.Y.2d 705, *appeal dismissed*, 51 N.Y.2d 877 (1980).
22. *Colton v. Berman*, 21 N.Y.2d 322, 287 N.Y.S.2d 647 (1967).
23. *Scherbyn v. Wayne-Finger Bd. of Coop. Ed. Servs.*, 77 N.Y.2d 753, 570 N.Y.S.2d 474 (1991).
24. *Trump-Equitable Fifth Ave. Co., v. Gliedman*, 57 N.Y.2d 588, 457 N.Y.S.2d 466 (1982).
25. *YMCA v. Rochester Pure Waters Dist.*, 37 N.Y.2d 371, 372 N.Y.S.2d 633 (1975).
26. *In re Charles A. Field Delivery Serv., Inc.*, 66 N.Y.2d 516, 518–21, 498 N.Y.S.2d 111 (1985).
27. *Richardson v. Comm'r of N.Y. City Dep't of Soc. Servs.*, 88 N.Y.2d 35, 643 N.Y.S.2d 19 (1996); *Ins. Premium Fin. Ass'n v. N.Y. State Dep't of Ins.*, 88 N.Y.2d 337, 645 N.Y.S.2d 428 (1996).
28. *See, e.g., N.Y. Tel. Co. v. Public Serv. Comm'n*, 59 A.D.2d 17, 397 N.Y.S.2d 223 (3d Dep't), *appeal denied*, 42 N.Y.2d 810 (1977).
29. *Rochester Gas & Elec. Corp. v. Maltbie*, 272 A.D. 162, 71 N.Y.S.2d 326 (3d Dep't 1947).
30. *N.Y. Tel. Co. v. Public Serv. Comm'n*, 64 A.D.2d 232, 249, 410 N.Y.S.2d 124 (3d Dep't 1978).
31. *Law Enforcement Officers Union v. State*, 229 A.D.2d 286, 655 N.Y.S.2d 770 (3d Dep't 1997); *American Transit Ins. Co. v. Corcoran*, 105 A.D.2d 30, 32, 482 N.Y.S.2d 748 (1st Dep't 1984), *aff'd*, 65 N.Y.2d 828, 493 N.Y.S.2d 122 (1985).
32. *See Indus. Liaison Comm. of Niagara Falls v. Williams*, 72 N.Y.2d 137, 144, 531 N.Y.S.2d 791 (1988).
33. *Spitzer v. Farrell*, 100 N.Y.2d 186, 190, 761 N.Y.S.2d 137 (2003).
34. *N.Y. City Coalition to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d 337, 763 N.Y.S.2d 530 (2003); *Jackson v. N.Y.S. Urban Div. Corp.*, 67 N.Y.2d 400, 503 N.Y.S.2d 298 (1986).
35. *Smith v. City of N.Y.*, 92 N.Y.2d 707, 685 N.Y.S.2d 910 (1999); *Gordon v. Vill. of Monticello*, 87 N.Y.2d 124, 127, 637 N.Y.S.2d 961 (1995).
36. *Orange County Pubs. v. Council of the City of Newburgh*, 60 A.D.2d 409, 201 N.Y.S.2d 84 (2d Dep't 1978).
37. There are also many procedural objections (*e.g.*, statute of limitations, standing and so on) that warrant attention.

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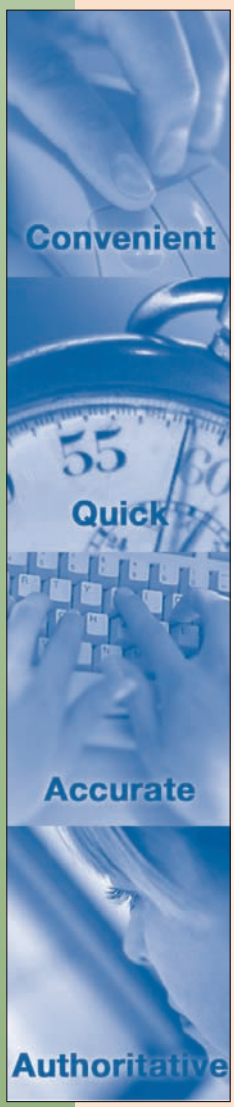

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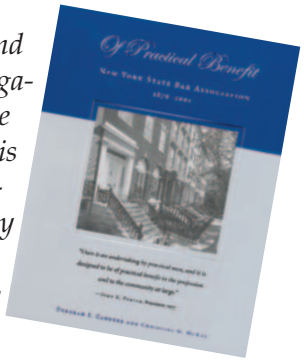


Recognizing that lawyers play a compelling role in the events that shape our lives and our nation, John K. Porter, the first president of the Association, challenged the new organization to "exercise a collective and permanent influence" on the great questions of the day. The evolution of how the Association and its members have sought to carry out this mission during the first 125 years of the Association's history is recorded in Of Practical Benefit: New York State Bar Association 1876–2001*, a 214-page volume recently published with the assistance of* American Heritage *magazine.*

Reproduced on this page are the opening "preview" paragraphs that set the stage for the five chapters of the book. They are followed by five pages from the book.

1876–1901 The New York State Bar Association was founded in November 1876, two weeks after voters went to the polls to choose between two lawyers, Rutherford B. Hayes and Samuel J. Tilden, as the next President of the United States. Calls for reform had filled the air as Americans wearied of corruption in the administration of President Ulysses S. Grant. The general who had led Union armies to victory could not control the forces of greed that bedeviled his administration and so, in his place, the Republicans nominated Rutherford B. Hayes, a three-time governor of Ohio. The Democrats nominated Governor Samuel J. Tilden of New York, famed for attacking and defeating the notorious "Tweed Ring," convicted of plundering New York City's municipal treasury of millions of dollars.

1902–1932 The Association's second quarter-century began with the tragedy of a presidential assassination. The new President, Theodore Roosevelt, was challenged to assure and calm a mourning nation as he took office. The period ended with the election of his kinsman, Franklin Delano Roosevelt, as President. He faced yet another serious threat to domestic stability, the Great Depression. In between, the 20th century arrived, with inventions and legal change that set patterns in social life, technology, government, and law that would endure until the new millennium.

1933–1952 Franklin Delano Roosevelt was sworn into office in March 1933 as the thirty-second President of the U.S., the beginning of an unprecedented tenure as the nation's leader and commander-in-chief. During the New Deal, federal legislation reshaped every facet of American life. Lawyers played a prominent role in administering these changes on both the national and the state levels. Legal challenges to New Deal programs originated in New York cases, such as *Schechter Poultry*, and New York voices from the State Bar were prominent in criticism of Roosevelt's court-packing scheme.

1953–1975 The January 1953 Annual Meeting of the Association, held the week after Dwight D. Eisenhower's inauguration as the thirty-fourth President of the U.S., occurred at a time of change and controversy in the legal profession and the nation. After almost a generation of unrelenting crisis, Americans may have wished to turn their back on public issues as they had in the 1920s, but the world had changed and that was no longer possible. Eisenhower inherited a war that was still raging in Korea after two and a half years. Julius and Ethel Rosenberg were awaiting execution at Sing Sing State Prison following their 1951 conviction for passing atomic secrets to the Soviet Union. The Soviet Union was about to enter a four-year internal power struggle as Joseph Stalin neared death.

1976–2001 The U.S. bicentennial and the State Bar's centennial were both celebrated in 1976. The nation's bicentennial celebrations seemed to add to the growing psychological recovery of New Yorkers after two years of unending fiscal crisis. In the summer of 1976, a multitude of tall ships headed into New York harbor and fireworks burst over the Statue of Liberty. Similar pyrotechnic displays were repeated at countless locations around the state on that glorious Fourth of July. The Democrats held their national convention in New York City, where they nominated James "Jimmy" Earl Carter of Plains, Georgia, for the presidency. His election on November 2 seemed to symbolize the beginning of a period of optimism. *The New York Times*, for example, reported on November 5 that the "Municipal Assistance Corporation found itself engulfed yesterday by a huge, unexpected demand for its new bonds – spurred by what financial officials said was new investor confidence in New York City." Whether it was Carter's election, or the public perception of the city's progress toward financial stability, or the bonds' high interest rates, better times seemed to lie ahead.

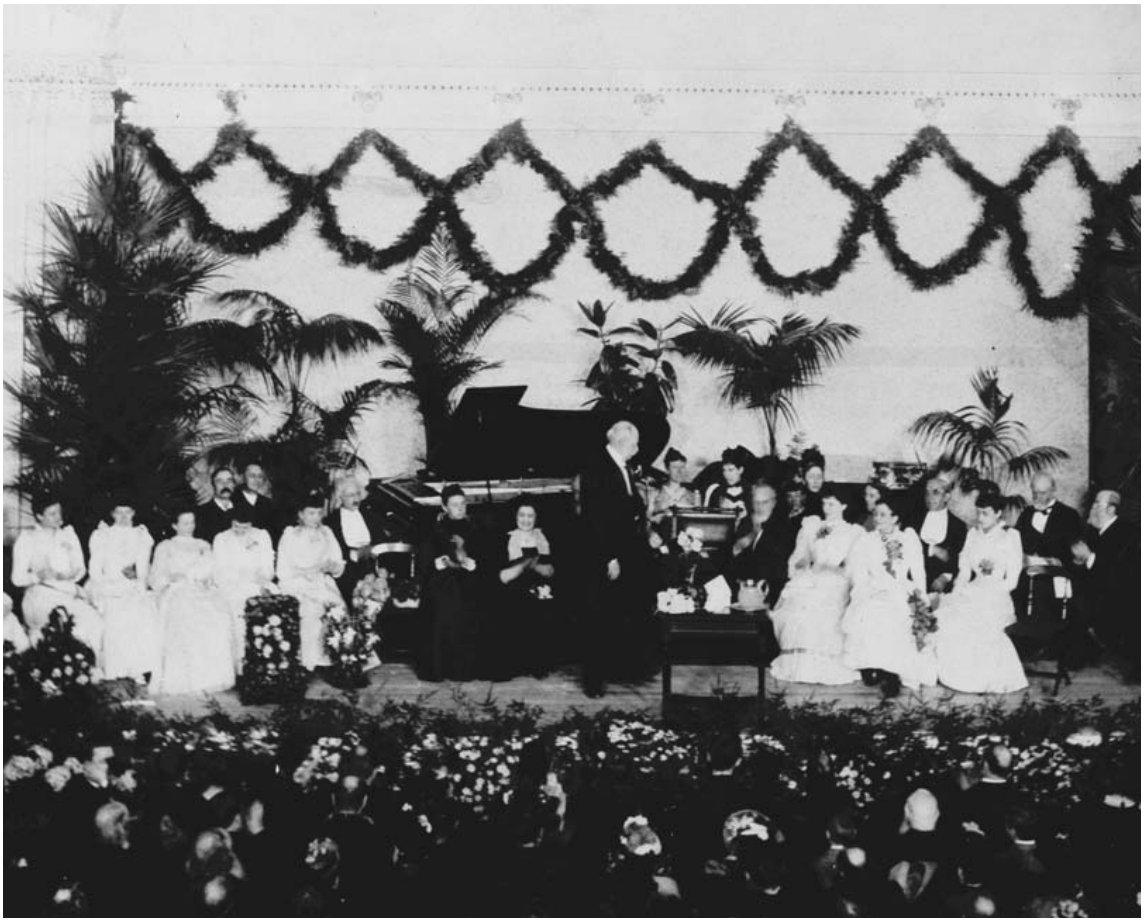
By the early 1890s, the State Bar had almost 800 members from all around the state, although the membership was only a fraction of the total bar. The number, however, was hardly a measure of the Association's influence. It had found much to do in its first decades, becoming deeply involved in important legal issues facing the state.

The Standing Committee on Law Reform was the expression of the very essence of the Association. Making the law better summed up the Association's self-imposed duty and reason for being. One of its early projects was improving the schedule and quality of the reports of the state's courts of record so that the reports came out regularly, were better written, and were eventually organized into an annual compilation, *Combined Official Series*.

How the central task of law reform was carried out in the early years of the Association is inseparable from the issue usually called "codification." The story started long before the Association's founding.

The New York Constitution of 1846 required the Legislature to write a statute to govern the procedure of the courts that would replace the complex rules of the common law and also unify the courts of law and equity. In short, the mandate was to do away with a court system and rules for carrying on lawsuits that were based on the ancient distinctions of the common law inherited from England. The complexities faced by the reformers were equaled only by the opposition they confronted. Mastery of the old system was not easy and was considered the mark of a "real" lawyer.

The task of codification was extremely difficult, yet it was carried out almost completely by one man, David Dudley Field, a member of the State Bar from its inception. Field came from a remarkable Connecticut family. His brother Stephen was one of the longest-serving Justices of the U.S. Supreme Court (1863–97); his brother Cyrus, a pioneer in transoceanic telegraphy, laid the first trans-Atlantic cable; Matthew was an engineer who designed the longest suspension bridge of his day; Jonathan was a lawyer and legislator in Massachusetts; and Henry, a newspaper editor, became David's biographer. As a young man David Field made a name for himself agitating for reform of court procedure and all but single-handedly wrote the reformed Code of Civil Procedure (enacted in 1848) required by the 1846 state constitution. The reformed procedure, soon dubbed the Field Code, was controversial, as was Field himself, not least for his defense of "Boss" Tweed and others of less-than-sterling reputation. Attitudes towards the man certainly colored judgments of his work and undermined support for his rationally laid-out system. The 1848 Code was repealed, and with the exception of the Penal Code adopted by New York State in 1881, Field's efforts to codify civil and crimi-



David Dudley Field in April 1891 addresses the first group of women to enroll in the "Woman's Law Class" of New York University. An active member of the State Bar from its inception, Field chaired its Committee on Law Reform and worked intensively to codify civil and criminal procedure for administration and court practice.

nal procedure for administration and court practice languished in New York, although they were widely influential in other states and nations, including England. In a speech to the State Bar in 1878, Field told his audience that "the words I have written, the laws that this hand has set down, are this moment the laws that encircle the whole globe. The sun does not shine in any of the twenty-four hours except upon some place of which the laws were written by me. Yet in the State of its origin, it is spit upon and condemned."

The heart of Field's idea was that the law should be accessible, able to be found written down in one place. That idea was most closely associated with Jeremy Bentham, the great English philosopher of the late eighteenth and early nineteenth centuries. Those who opposed Field were equally convinced that the common law, slowly developed over time by the courts, was best for society and would be true to the spirit of the American people. Field spoke constantly to law groups about the advantages of his system, which would alleviate the need for lawyers and judges to search "through hundreds and thousands of volumes" to find citations.

The City Bar made opposition to the codification of the civil law something of a crusade. Its leader was James C. Carter, a prosecutor of Boss Tweed and a founder of the City Bar and of the firm of Carter, Ledyard and Milburn. Carter characterized codes as "systems of despotic nations, a violation of natural law." While Field had support from *The New York Times* and other influential groups, it was to little avail. In 1887, on the verge of another legislative attempt to pass the code, the *Times* wrote in response to those who said the proposal, the product of eight years of work, was not perfect, "the way to codify is to codify; to do as well as possible in the beginning, and to profit by experience in remedying faults. Whatever the Bar Association [the City Bar] may say, we are proud of the work of the New-York codifiers." A letter writer to the *Times* pinned the blame on "those older lawyers, who are naturally the most influential, who feel that their stock in trade would be largely destroyed if codification made accessible to others those fountains of the law with which the outside world supposes them to be exclusively familiar."

The State Bar, however, thoroughly reviewed the arguments over the course of several years and then approved a report of the Committee on Law Reform, chaired by Field himself, that was limited to noting that the question of adoption of the civil code and the code of evidence was among the most important legal questions facing the state. Later the Association would give more substantial support to code and statutory reform. The *Times* continued to support code reform. It lamented Field's unfulfilled hopes at the time of his death in 1894, but saluted the recognition of his accomplishments elsewhere, "Once he journeyed around the world, and it is well within the mark to say that his foreign acquaintance and repute were second to those of no other American lawyer." The proliferation of statutes in New York by the twentieth century, which were somewhat organized in the Consolidated Laws, made most of the codification controversy obsolete.

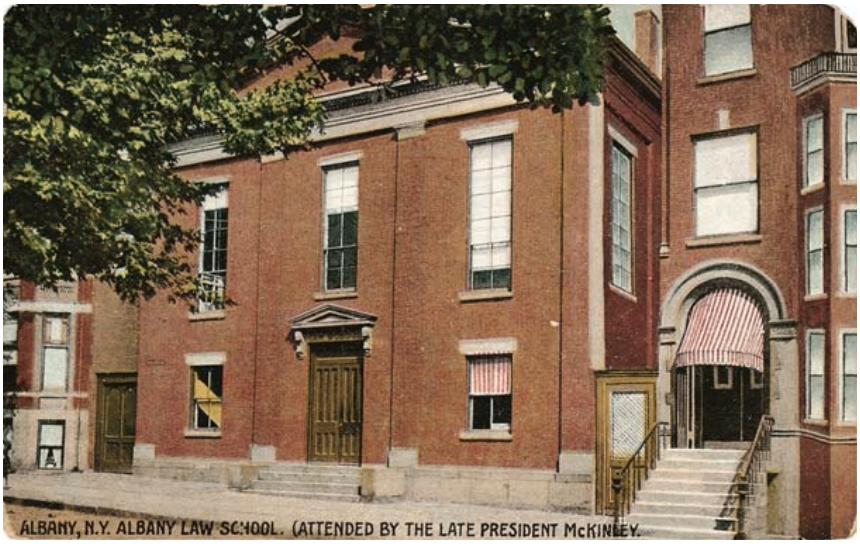
The activities of the State Bar were not confined to committee meetings and legislative lobbying. Members gained public attention by participating in some of the great legal adjudications of the day. The Samuel Tilden will contest was one such affair. The man who had tackled and defeated the most famous municipal villain using legal tools was himself the victim of a poorly drafted will after his death in 1886. Relatives challenged his desire to leave a substantial bequest of approximately $4 million to the formation of a public library, and the Dickensian litigation was not resolved for almost a decade. In 1895, several attorneys, including John Bigelow and John Cadwalader, arranged to combine the remaining Tilden Trust of $2 million with the Astor and Lenox libraries to create what is known as the New York Public Library, second only to the Library of Congress in its collections.

At times, the Association conscientiously investigated small, but important, issues and attempted to draft and enact legislation. Issues that had become over-

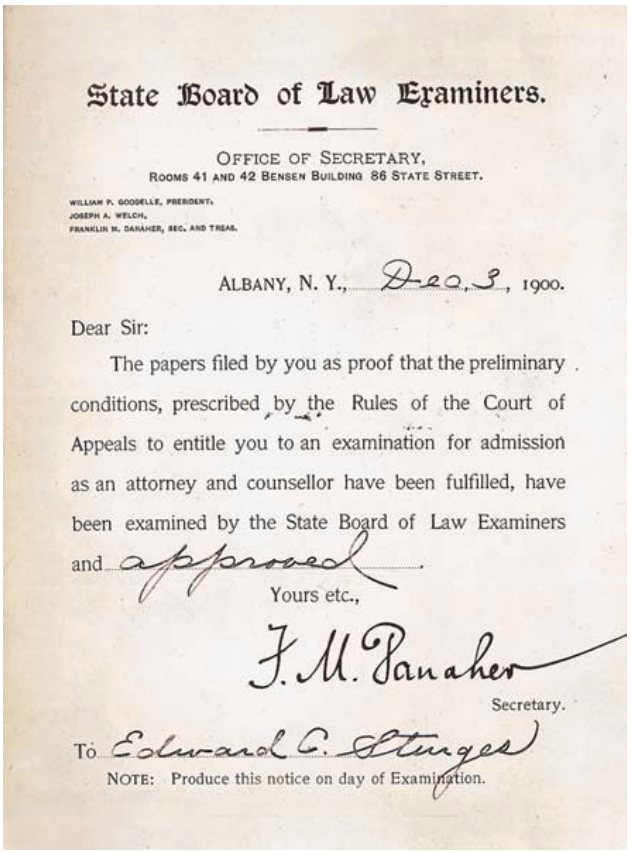
Qualifications for the Bar

The Association began to concentrate on other areas that would continue to interest its members into the twenty-first century. One of the obvious concerns was governing admission to the bar. The amendment of the judiciary article of the state constitution in 1869 omitted language governing admission. As a result, the Legislature passed a statute allowing the Court of Appeals to govern admission through rules of the court. The new rules allowed credit towards the required period of clerkship for study in a law school in New York State. The State Bar had no difficulty with that, although members discussed whether the rules should be changed to recognize study in out-of-state schools. The problem was the persistence of the "diploma privilege," legislation that allowed graduates of the state's four law schools in the 1870s, at Hamilton College, Columbia University, New York University, and Albany, to be admitted to the bar without taking the court-prescribed examination. In 1880 the Association voted to disapprove the diploma privilege, and appointed members to oppose the admission to practice of candidates who had not taken the examination.

The examinations, however, were not uniform throughout the state; separate examinations were given in each judicial district. The members of the Association gathered at the 1894 Annual Meeting endorsed the concept of uniform examinations in the name of fairness and quality control. George Chase, Dean of New York Law School, had pointed out that "if equity should not vary with the length of the chancellor's foot, the test of a student's legal acquirements should not vary with the breadth of the examiner's mind or the depth of the examiner's knowl-



A postcard from around 1910 depicts Albany Law School, the oldest law school in New York (founded in 1851), which was attended by William McKinley after his service in the Union Army during the Civil War.



State Board of Law Examiners.

OFFICE OF SECRETARY,
ROOMS 41 AND 42 BENSEN BUILDING 86 STATE STREET.

WILLIAM P. GOODELLE, PRESIDENT.
JOSEPH A. WELCH,
FRANKLIN M. DANAHER, SEC. AND TREAS.

ALBANY, N. Y., Dec. 3, 1900.

Dear Sir:

The papers filed by you as proof that the preliminary conditions, prescribed by the Rules of the Court of Appeals to entitle you to an examination for admission as an attorney and counsellor have been fulfilled, have been examined by the State Board of Law Examiners and approved.

Yours etc.,

F. M. Danaher
Secretary.

To Edward C. Stringer

NOTE: Produce this notice on day of Examination.

Offical permission to take the bar exam, 1900. In the 1890s the State Bar succeeded in securing legislation that established a Board of Law Examiners.

edge." Another speaker, Dean Austin Abbot of New York University Law School, noted that having a single statewide board of examiners would make it easier to eventually have a central registry of all the lawyers in the state.

The Association had lent its support to that notion in a resolution passed at the first Annual Meeting in 1877. Twenty years later a committee of the Association reported a bill for statewide registration that became law in 1898. The report of the committee proposing the bill that eventually became law minced no words. The requirements were minimal: a simple affidavit giving the term of court at which the applicant was admitted; a postage stamp for sending the affidavit to Albany; and, last but not least, a fee in the princely sum of twenty-five cents. So slight were these requirements that the report admonished all the lawyers of the state that "no member of the Bar should consider himself too good or be too crotchety to comply" with the requirements of the proposed law. A member who was a judge of the Municipal Court of New York City, George Roesch, strongly supported the bill, pointing to his own experience of bartenders "who draw bills of sale, chattel mortgages, wills containing important and serious provisions of trust, etc." These "young men" were easy to find. All you have to do is walk through "the east side of our city" looking for "signs reading 'Law and Collection Agency' over larger beer saloons." By January of 1899 some 13,500—presumably qualified—lawyers had registered and all those quarters added up to a fund that was to be applied to printing and distributing the list of registrants.

The Association's support of uniform examinations and central registration are not surprising, given the goals of bettering the legal profession and insuring that only competent lawyers be allowed to practice in the state. Both reforms would make professional discipline easier to maintain by diminishing the opportunities for favoritism. These changes also made it easier for a central authority, ultimately the Court of Appeals, to regulate the profession throughout the entire state. The lawyers of the Association showed themselves to be in the vanguard of social development as they supported centralization and professionalization in their struggles with localism.

Editor's Mailbox

Pro-Diversity Trends in Schools and Businesses

Diversity is Affirmative Action and Affirmative Action is Quotas.

The article by John E. Higgins and his "Proactive Steps to Increase Diversity" confirms my feelings that "Diversity" is just a form of "Affirmative Action" and as practiced, the imposition of quotas.

When "Affirmative Action" was first instituted as a concept, I supported it, thinking that society would use its resources to help the underprivileged become better able to compete in our world. I felt that if that happened it would be good for all. No one would be left behind.

That's not how it's developed. Now "Affirmative Action" has become a preference system under which individuals are rewarded over competitors not because of ability but because of race. And "Diversity" is the same.

Consider Mr. Higgins's "Steps to Increase Diversity." He feels that meritocracy should not be the best measure of a candidate's ability but those choosing a candidate should look to achieve "Diversity."

Some questions come to mind:

1. How do you know you have achieved "Diversity"?

Must each race have the same percentage representation in any group as – as what? The percentage of that race in – the state? – the country?

2. If you ignore merit do you get the most qualified persons?

3. Will a person who is rejected for a lesser qualified person of another race feel understanding for the situation? Should he be expected to? Will this not cause resentment?

4. Will a person using the services of a member of the preferred group feel the candidate is qualified or might it be felt that the candidate is there only because of Affirmative Action – or Diversity programs?

5. If we are truly looking for "Diversity" how about fat people, short people, ugly people? They too may all have been discriminated against so should all of them expect to be represented as well?

And finally, why not go back to what "Affirmative Action" was meant to do. Help those underprivileged compete. But once they compete the rules should be the same for all.

Gerald S. Deutsch
Glen Head, NY

TAX TECHNIQUES

Settlements and Taxes: The Seven Deadly Sins

BY ROBERT W. WOOD

In the process of settling a case, lawyers who have no tax background can perhaps be forgiven for failing to consider tax consequences and the attendant tax-planning opportunities. There is no such allowance made for tax practitioners. And, increasingly, lawyers and others associated with the litigation process are being asked to know at least the rudiments of these rules.

There are seven deadly sins, or to put a positive outlook on the situation, seven areas of concern. These seven topics should be considered in every case before the settlement agreement is signed and the money is paid.

1. *Underlying Claims*. Consider the underlying claims, because the tax treatment to the plaintiff will depend in large part on the so-called "origin of the claim" doctrine. Thus, in a case in which wages alone are sought, the resulting settlement ought to be treated as wages. Of course, in the vast majority of cases, there is a mixture of different claims, making the origin of the claim inquiry more complex.

2. *Language of Settlement*. Consider the language of the settlement agreement. Does the tax treatment of the payment depend on what you end up calling it? The answer should be no, but in fact is at least partially yes. While calling a settlement payment "physical injury damages" does not make it so in a case arising in a dramatically different context, the parties should call the recovery what they think it is. As a plaintiff, if you fail to put in express language about what the payment is, and its tax treatment (including withholding and/or tax reporting that is contemplated), you are making a mistake. While the IRS and the courts are not bound by such language, it does help.

3. *Consider Physical Injuries*. Section 104 of the Internal Revenue Code provides an exclusion from income for damages or settlements for physical personal injuries and/or physical sickness. Since the law was last changed (1996), there has been virtually no authority on what this new "physical" requirement means. Still, consider it where appropriate.

4. *Consider Attorney Fees*. This has been a bugaboo of the tax system for a number of years. There is a hotly contested split in the circuits in the United States over the tax treatment of contingent attorney fees. Should the plaintiff be taxed on the entire amount (even amounts paid directly to the plaintiff's lawyer), or only the net amount? Although a plaintiff will presumably be entitled to a deduction for the fees paid to the attorney (so you might think the plaintiff should be neutral about how this comes out), the combination of the miscellaneous itemized deduction limitations, phase-out and the alternative minimum tax, make this anything but equal. So far, not every circuit has decided this issue, but most have. Michigan, Alabama, Texas, Vermont, and perhaps Mississippi and Louisiana are all "good states" in which netting of attorney fees is allowed. Stay tuned for details on this hot issue.

5. *Consider Punitive Damages*. The Internal Revenue Service has long taken the position that punitive damages are always taxable. After several aborted attempts to make the statute explicit, the IRS finally had its way with Congress in 1996. Now punitive damages are always taxable. The question, though, is just what constitutes "punitive damages." The statute does not define it, nor do the regulations (nor the case law for that matter). If a case proceeds to judgment and the defendant writes a check to pay a punitive damage award, obviously this constitutes punitive damages. But what if a case settles? If a case settles on appeal and something that looks like punitive damages gets paid, is it to be treated that way? What if the case settles before the trial is even concluded, so there is no way an amount could be viewed as punitives? Is this clear? The IRS doesn't think so. Indeed, it has had success in a couple of cases, imposing punitive damage treatment even where the case was settled early on. The IRS position is that the mere allegation of punitive damages in the complaint may be enough to import punitive damages treatment. Beware.

6. *Consider 1099s*. Tax reporting should always be considered by plaintiffs and defendants. So also should withholding. It is best if the withholding and tax reporting that is contemplated to all parties is expressly set forth in the settlement agreement; this avoids misunderstandings. Considering the web of reporting and withholding rules, there is often room for disagreement as well as various other foul-ups. Try to avoid this by agreeing on everything in advance.

7. *Consider Indemnity*. The risks of the tax positions taken by defendants and plaintiffs should always be considered. Though parties often do not want to explicitly invoke this topic, it seems foolish not to if you are a defendant and you are being asked to insert tax language and tax reporting language into a settlement agreement. Consider if you want to ask the plaintiff for indemnity. Is the plaintiff able to satisfy the indemnity later? Do you want to ask the plaintiff's lawyer for indemnity, too? Do you demand a tax opin-

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NYSBACLE

Seminar Schedule, March – April 2004

(Subject to Change)

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

PROGRAM	DATE	LOCATION
Public Sector Labor and Employment Law	March 17 April 1 April 21 April 29	Albany Rochester New York City Hauppauge, LI
Immigration Law – Basics and Beyond	March 23–24	New York City
Microsoft Word for the Law Office w/Leigh Webber	March 25 March 26 April 14 April 15	Rochester Albany Uniondale, LI New York City
Practical Skills – Family Court Practice: Support, Family Offense Proceedings and Ethics	April 2	Albany, Buffalo, Uniondale, LI, New York City, Rochester, Syracuse, Westchester
Private Placement	April 14	New York City
Medicaid Planning with a Focus on Case Studies and Spousal Issues	April 15	Uniondale, LI
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	Buffalo, Uniondale, LI Albany
Advanced Evidence for the Matrimonial Lawyer: An Interactive Program	April 23	Rochester
Litigation Update – Keeping Pace with New Developments	April 30	Albany
Commercial Lines Insurance with Advanced Issues	April 30	New York City, Syracuse

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NYSBA

Language Tips

By Gertrude Block

Question: Stephen S. Strunck, staff counsel at IBM, asks for a column on the proper use of *shall* and *will*.

Answer: In Old and Middle English, both *shall* and *will* were used to express simple futurity, though sometimes *shall* was used to mean "obligation," and *will* merely "volition." In the 18th century, however, one John Wallis, an eminent Oxford University geometry professor, set up a complicated and not very clear formula based on Latin to distinguish the two auxiliary verbs. These rules were soon "clarified" by Robert Lowth, a theologian who believed that English as it existed was extremely imperfect, that it was "easily reducible to rules," and that it should be modeled after Latin, an ideal language.[1]

Generations of schoolchildren were taught to observe the rules that Lowth set forth to correct the "extremely imperfect" English of Shakespeare and other literary masters. Nobody seems to have questioned Lowth's authority or ability to formulate these rules, but neither the schoolchildren nor the teachers who taught them ever succeeded very well in following Lowth's directive: For first person singular and plural verbs (I, we), use *shall* to express simple futurity, but for the second and third person singular and plural verbs (you, he/she, it), use *shall* for determination or insistence. ("You shall obey my instructions.")

Lowth's rule governing *will* was exactly the opposite. Use *will* to express simple futurity in the second and third persons, but to express determination in the first person. The use of both verbs to express determination is seen in William Blake's line, "I will not cease from mental fight. Nor shall my sword sleep in my hand." (Prefatory poem, *Milton*, 1809.)

But aside from poets, almost nobody paid it any attention, and today Lowth's rule is forgotten, except by those who study etymology. The auxiliary verb *will* has almost entirely replaced *shall* in all contexts in modern English, except in legal usage, in which *shall* is often used to mean "must" or "have a duty to." (That usage and its obfuscatory results would fill another column.)

The merging of *shall* and *will* is clearly seen in the omnipresence of the contraction *'ll*, as in "I'll," "you'll," "they'll," etc. The use of *shall* and *should*, however, survives in first person interrogations: "Shall we attend the concert?" or in a question addressed to oneself: "Shall I get a haircut today?" And both *shall* and *will* are often replaced by the progressive form *going to* to express futurity. ("I'm going to have my hair cut today.")

Question: Lately I've been reading and hearing a novel use of the adjective *reticent*, to mean "reluctant," but it is not listed with that meaning in my dictionary. Is this meaning now acceptable?

Answer: Not yet, but its growing popularity may mean that it will eventually be listed as a synonym of *reluctant*. If the two meanings merge, it will be a pity because a valuable distinction will be lost. The noun *reticence* denotes a characteristic, and the adjective *reticent* describes a person who possesses that characteristic. President Calvin Coolidge ("Silent Cal") was said to be reticent, a man of few words. Both the noun and the adjective derive from the Latin verb *tacere* ("to be silent").

On the other hand, *reluctance* describes a particular reaction at a given time. The seldom-used verb *reluct*, comes from the Latin verb *reluctari* ("to struggle against"). The adjective *reluctant* is synonymous with "unwilling" or "averse," and appears in phrases like "reluctant to help." But currently many educated persons who ought to know the difference are using the word *reticent* when they mean *reluctant*, perhaps because the two adjectives look somewhat alike.

The original meaning of the adjective *problematic* has already virtually disappeared. Because it resembles the noun *problem*, it is widely used to mean "constituting a problem," but its original meaning was "questionable" or "debatable." What is debatable or questionable is not necessarily a problem, but that distinction has been lost.

David Mellinkoff, UCLA professor and lawyer was relentless in his fight against popular, unneeded change. At his death, his wife of 50 years recalled his losing battle to keep UCLA from following other law schools in changing the name of its law degree from LL.B to J.D. In a 1967 letter he wrote, "When the theater manager asks 'Is there a doctor in the house?' must he specify that the dying man doesn't want a lawyer?"

Wide usage ultimately always rules, but you and others like yourself who are aware of the distinction between *reticent* and *reluctant*, may be able to slow the merger of the two meanings by refusing to join the crowd. Good luck!

Gertrude Block is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association).

1. *See* Thomas Pyles, The Origin and Development of the English Language, 221, 226, (2d Ed., 1971).

Attorney Professionalism Forum

To the Forum:

In my capacity as a solo practitioner, I recently drafted and filed a federal civil rights complaint. It was verified by my client on the basis of her direct and personal knowledge regarding defendants' acts of misconduct and malfeasance. The causes of action and constitutional issues raised are complex, and are extremely sensitive because they touch on a continuing scandal involving these same defendants (I do not wish to be more specific than that), some of whom are attorneys.

Within a month after filing the complaint, I was approached by a non-party attorney for the defendants. He engaged in what I can only describe as an attempted act of extortion. In my client's presence, he threatened that I would be subjected to substantial disciplinary sanctions if we did not withdraw the complaint, which, as noted, she had verified, and which I had researched extensively as to issues of law. He also stated that he had connections with our local Grievance Committee in a further attempt to intimidate me, as well as my client.

My client, however, is not easily intimidated. She does not want to withdraw her complaint, nor to find another lawyer to represent her.

I now fear banishment from the legal profession that I have served for over 30 years because of the threats that were made. Am I overreacting? And should I respond in some fashion?

Sincerely,

Traumatized in Troy

Dear Traumatized:

When we take our oath as officers of the Court we swear that we will "support the constitutions of the United States and of the state of New York." (CPLR 9406(1)). In addition, we are bound by the 10 statements set forth in the Statement of Client's Rights, which we are required to display prominently in our law offices.

If we agree, as attorneys, to undertake the representation of a client whose lawful claims involve federal constitutional rights, the Statement of Client's Rights requires us to engage in ethical and professional conduct that adheres to the federal Constitution as well as to the Code of Professional Responsibility.

Notwithstanding your concerns, including your fear of banishment from the legal profession to which you have demonstrated continuing devotion and service for over 30 years, you should be commended for standing firm in order to protect your client's First Amendment rights and interests, and in accordance with your own First Amendment duties. By so doing, you also avoid a violation of the Disciplinary Rules, which specifically state that a lawyer shall not "[a]ccept from one other than the client any thing of value related to his or her representation of or employment by the client" (DR 5-107(a)(2)). An attorney's professional reputation and law practice are a "thing of value."

There is no doubt that the temptation to avoid substantial disciplinary consequences tested your professional integrity. If you had acceded to intimidation and extortion by the offending attorney, you would have personally and knowingly received a benefit, namely, a "thing of value," to the detriment and prejudice of your client's interests, contrary to the purpose of DR 5-107(a), and the economic value of your reputation and law practice would have been preserved in large part, except for the loss of a valued client.

Moreover, if you had disregarded your client's instructions and withdrawn her complaint, or your representation of her as counsel, for your own advantage (which you have not done), you would have violated DR 7-101(a) by not following the lawful objectives and interests of your client, and for failing to represent her zealously in accordance with her constitutional rights. This is what John Adams refused to do in agreeing to defend the British soldiers in Boston when no one else would take their case.

Finally, if you had given in you would have violated DR 5-101 because you would have put your own "financial, business, property, or personal interests" above the legitimate objectives of your client, which are set forth as remedies in her verified complaint. However, as you stood firm, the sticky wicket in this scenario involves the acts of the offending attorney.

Based upon your fact pattern the one who should be concerned about the filing of a complaint with the Disciplinary Committee is not you, but the attorney who made the threats. Such a filing pursuant to DR 1-103 may be in order because, at first blush, it appears that the offending attorney may

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.

The Attorney Professionalism Committee welcomes these articles and invites the membership 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.

have violated DR 1-102(a)(4), (5) and (7), although this is subject to interpretation. These provisions are of particular importance because they expressly state that a lawyer or law firm shall not violate a disciplinary rule or engage in prohibited conduct. There also may be a violation of DR 7-105 if the offending attorney's threat of a grievance complaint was akin to presenting criminal charges solely to gain advantage in a civil matter. If you conclude that a complaint is in order, the allegations must be specific and factual to avoid unsubstantiated statements which could be defamatory.

In conclusion, your fitness as a lawyer should be commended. You ethically performed your professional responsibilities by representing your client's lawful objectives zealously as is required by DR 7-101, by declining to acquiesce to the threats of the offending attorney, and by declining to engage in conduct that would have been prejudicial to the administration of justice, or that would have involved dishonesty, fraud, deceit or misrepresentation, as proscribed by DR 1-102(a)(4), (5) and (7).

The Forum, by
Joan C. Lipin
New York City

QUESTION FOR THE NEXT 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

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Speaking of J.D.'s, is it "attorney's fees," "attorneys' fees," "attorneys fees," or "attorney fees"? All the variants have their proponents. I prefer "attorney fees" because by law the fees belong to the client, not the attorney, and because "attorney" in this context assumes both singular and plural.

Take a quiz. Is this right? "Mr. Jones's rule provides that its the litigants's burden to satisfy the courts rules on President's Day."

Jones's is correct. *Its* should be *it's*. But because legal writing requires formality, write "it is." *Its* is the possessive, used for inanimate objects the same way "his" applies to "men"; *it's* is the contraction for "it is" and "it has"; *its'* is an illiteracy. "Litigants's" should be *litigants'*. This sentence is therefore all wrong: "Use the apostrophe in it's proper place and omit its' when its not needed." "Courts" should be "court's" or "courts'," depending on whether the word is singular or plural. "President's Day" should be "Presidents Day"; that day is pluralized because it belongs to us, not to Presidents Washington or Lincoln. Similarly, it's "the New Judges Seminar," not "the New Judges' Seminar. The seminar is for new judges; it isn't a seminar of the new judges or a seminar that belongs to new judges.

Follow the governmental, corporate, or institutional organization's usage, even when the usage is incorrect. Thus, write "New York County Lawyers' Association," even though NYCLA shouldn't have an apostrophe.[3] It's an association of lawyers. NYCLA doesn't belong to lawyers in New York County. Correct usage: "New York State Trial Lawyers Association."

To pluralize most nouns, add "s" ("lawyers") or "es" ("the Joneses") if the noun ends in "ch," "s," "sh," or "x." To make a singular noun possessive, add an apostrophe "s," even when the noun already ends in an "s." Nouns that end in "y" preceded by a vowel are pluralized with an "s": "attorneys.' Words that end in "uy" follow a different format: "soliloquies." Nouns whose concluding letter is a "y" require that the "y" change to an "i" and that "es" be added: "juries." Nouns ending in "o" are pluralized with an "s" if preceded by a vowel; consult your dictionary if a consonant precedes the final "o." Thus, "zeros" but "tomatoes." Some battles royal have been fought over how to pluralize plural compounds: "Attorneys General," *not* "Attorney Generals"; "notaries public," *not* "notary publics"; "passersby," *not* "passerbys"; "orders to show cause," *not* "order to show causes."

Add an "s" to a compound plural if there is no noun in the compound ("mix-ups") or if the compound ends in the suffix "-ful" ("armfuls"). Some words, but not names, that end in "f" or "fe" are made plural by changing the ending to "v" and adding "es" ("selves"). The spelling of a few words change when they become plural ("woman" *vs.* "women," "louse" *vs.* "lice"). Still other words remain constant whether they're singular or plural ("swine," "series"). Some foreign words are rendered plural by the rules of their language of origin ("analysis" *vs.* "analyses," "axis" *vs.* "axes").

To make most singular nouns possessive, add an apostrophe and an "s" if the last letter ends in "s," "x," or "z" sounds. To make plural nouns possessive, add an apostrophe (Joneses'), and add an *'s* to plural nouns that don't end in "s." Correct: "Women's rights," "Young Men's Christian Association."

But don't use an apostrophe when a word is used in the descriptive sense. Correct: "New York Yankees pitcher."

A proper noun ending in a sibilant is pluralized by adding an "es." One refers to the Lebovits family as the Lebovitses — a construction that makes my kids want to change their last name. A book that belongs to more than one Lebovits is "the Lebovitses' book," not "the Lebovits' book" or "the Lebovitses's book."

Not all legal writers add "es" to pluralize these nouns. This is what one judge thought of the rule:

> The author is aware of the grammatical rule which dictates that to create the plural form of a proper name that ends in an 's' one must add an 'es.' *E.g.*, *The Chicago Manual of Style* § 6.5 (13th rev. ed. 1982). Thus, the plural of 'Erkins' would be 'Erkinses.' However, the author finds the name 'Erkinses' so distracting that he chooses to ignore the rule. No such willingness to ignore the rules of the English language should be imputed to Judges Winter or Calabresi.[4]

For attorneys who want to atone for their legal-writing sins, knowing apostrophe and plural rules can mean the difference between a top-notch practice and grammatical malpractice.

Correction:

In my January 2004 column on clarity, I made fun of one part of Urban Lavery's classic article on writing clearly. I'd like to clear something up. Lavery was right all along. The correct French spelling of "clarity" is "clarté," not "clarité." Lavery's quotation is from Jules Renard: "La clarté est la politesse de l'homme de lettres." My eighth-grade French teacher gave me a lousy grade. My error vindicates his assessment. The moral? Legal writers should become good French spellers.

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

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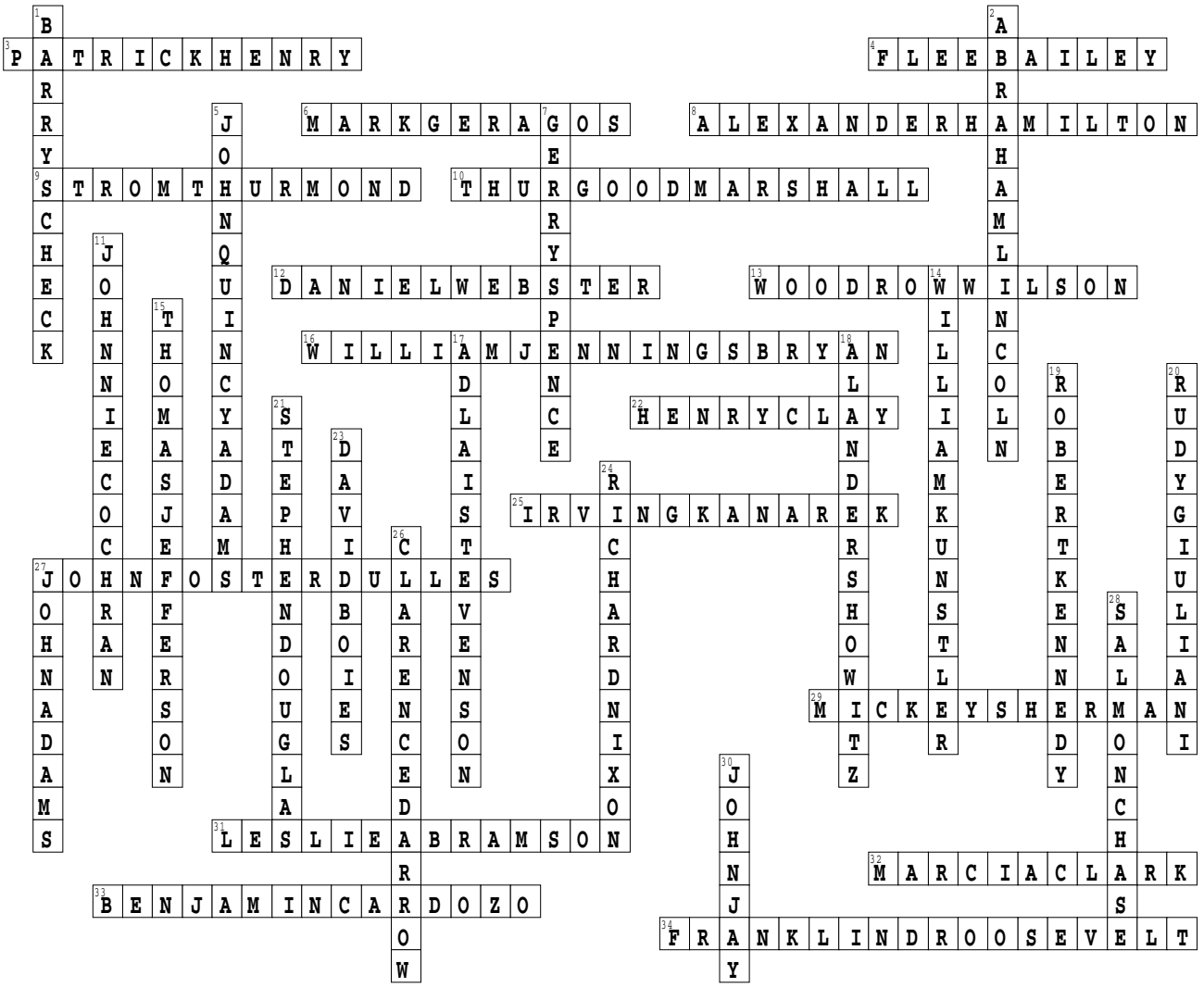
1. The term "apostrophe" as used in this column doesn't refer to the rhetorical device in which a writer turns from a discussion to address an absent person or personification. Two examples of that device: "Equity, oh Equity, the fairest flower in the judicial garden, where art thou?" *Elliott v. Denton & Denton*, 109 Nev. 979, 983, 860 P.2d 725, 728 (Nev. 1993)

Answers to Crossword Puzzle on page 8.



THE LEGAL WRITER

(Steffen, J., dissenting). "Send well to this Court, in all good time, the courage and the wisdom with which to confess the error of today's myopic majority . . . ." *Fritts v. Krugh*, 305 Mich. 97, 134, 92 N.W.2d 604, 618 (Mich. 1958) (Black, J., dissenting).

2. *See* Gertrude Block, *Language Tips*, 72 N.Y. St. B.J. 59, 59 (Jan. 2000).
3. I've been giving the legal-writing CLEs at NYCLA for the past few years. When NYCLA's Continuing Legal Education Institute hears about this column, I might have to find another job.
4. *In re Gaston & Snow*, 243 F.3d 599, 599 n.1 (2d Cir. 2001) (Van Graafeiland, J.).

TAX TECHNIQUES
CONTINUED FROM PAGE 52

ion? These and other issues should be addressed.

ROBERT W. WOOD practices law with Robert W. Wood, P.C., in San Francisco. Admitted to the bars of California, New York, Arizona, Wyoming, Montana and the District of Columbia, and qualified as a solicitor in England and Wales, he is a Certified Specialist in Taxation, and is the author of 28 books, including *Taxation of Damage Awards and Settlement Payments* (2d Ed. 1998, with 2001 supplement), published by the Tax Institute (info@taxinstitute.com).

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THE LEGAL WRITER

Apostrophe's and Plurals'

BY GERALD LEBOVITS

Correct apostrophe[1] and plural usage for attorneys isn't just splitting hairs — or splitting heirs. It's about splitting the difference between apostrophes and plurals. Among attorneys (attornies?), apostrophes and plurals have perpetually created more controversies than the rule against perpetuities, partly because the rules keep changing. Like my abs, the rules aren't as firm as they once were.

Attorneys often make apostrophe and plural mistakes. This column offers some malpractice insurance for the apostrophe- and plural-challenged attorney.

Apostrophes show ownership or possession. They're valuable because they condense writing. ("The Board of Directors of ACME Corporation" *vs.* "ACME Corporation's Board of Directors.") Apostrophes apply to people and, with increasing frequency, to inanimate objects. "The rules of the court," for example, are now "the court's rules." Apostrophes for some inanimate objects look inelegant, however: "Section 7's provisions" *becomes* "The provisions of Section 7."

Use an apostrophe "s" after a singular possessive ending in a sibilant (S, X, or Z sound): "Myers's Rum," *not* "Myers' Rum." Without the apostrophe, the latter variant would be pronounced, incorrectly, "Myer's Rum." This rule applies to sibilants, not to words that merely end in "S," "X," or "Z." Thus, *Illinois'* but not *Illinois's*. The "s" in "Illinois" is silent; the state is pronounced "ill-in-oy," not "ill-in-oise."

Don't use an apostrophe "s" after a plural possessive ending in a sibilant: "The courts' rules," *not* "The courts's rules."

Nonpossessive plural: *Mothers-in-law*. Possessive case plural: *Mothers-in-law's*. Use the periphrastic possessive if the possessive looks awkward: "St. Gertrude's's brief." *Becomes*: "The brief of St. Gertrude's."[2]

Some nouns violate all the rules. They look like plurals, are pronounced like singulars, and take no apostrophe, even when they're possessive: "United States brief" *or* "brief for the United States," *not* "United States's brief" *or* "United States' brief."

The inelegant apostrophe: "Acme Corporation's (Acme) stock certificates." *Becomes:* "The stock certificates of Acme Corporation (Acme)."

Use an apostrophe "s" after a second singular proper noun to show unity: "Ben & Jerry's ice cream," *not* "Ben's and Jerry's ice cream."

Use an apostrophe "s" after each singular proper noun to show disunity: "X's and Y's attorneys moved separately for severance."

Use an apostrophe to show contractions: "Can't" ("cannot," as in "unable," not a two-word "can not" — different from "may not," as in "not permitted to," and "might not," as in "perhaps not"); "I'll" ("I will," "I shall"); "I'm" ("I am"); "it's" ("it is" — different from the possessive "its"); "he's"; "she's"; "should've" ("should have," not "should of"); "they're" ("they are" — different from the possessive "their" or the location "there"); there's ("there is"); "you're" ("you are" — different from the possessive "your"); "you've" ("you have"); "who's" ("who is" — different from the possessive "whose"); and "we're" ("we are" — different from the subjunctive or the past plural "were"). Contractions are warm and friendly in informal writing. Contractions aren't appropriate in formal writing.

If you use contractions, make your verbs agree with their subjects. "He *don't* know where the Appellate Division is." *Becomes:* "He *doesn't* know where the Appellate Division is." (The singular *He* agrees with "does." *Don't* is the contraction for "do not.") "*Here's* my law books." *Becomes:* "*Here are* my law books." ("Law books" is a plural noun.) "*There's* my appellate briefs." *Becomes:* "*There are* my appellate briefs." ("Appellate briefs" is a plural noun.)

Use the apostrophe in its proper place and omit* its *when it's not needed.

Use an apostrophe to omit letters or figures. Letters: "*N Sync"; "rock 'n' roll"; "Amazin' Mets"; "good ol' boy"; "'cause" (for "because"); "bucket o' chicken," Gene Kelly's "Singin' in the Rain"; "till" (for "until") is correct, but 'til is incorrect. Figures: "He wrote his best appellate briefs in the '40s."

Plurals shouldn't have apostrophes if they don't show possession.

Use an apostrophe to omit "of" in dates ("four years' imprisonment").

Pronouns that express ownership never get an apostrophe: "his," "hers," "its," "ours," "theirs," "yours."

Mind your P's and Q's. 1990's or 1990s? The latter is more common, but the apostrophe in the former is no catastrophe. The key is to eliminate confusion. *A's*, for example, won't confuse. *As* will. Is *As* the word or the plural of *A*? Or maybe the misspelled version of a body part? If your reader will understand you if you don't use an apostrophe, don't use one. But don't add an apostrophe to pluralize an abbreviation that hasn't any internal periods: "OKs." Add an apostrophe to the "s" to abbreviations that have internal periods: "J.D.'s."

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