NEW YORK STATE BAR ASSOCIATION

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Journal

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January 2004

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On The Cover

This month's cover illustration was prepared to symbolize the similarities between litigation and chess, as described in the article that begins on page 10.

Cover Design by Erin Corcoran.

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

Our Man in Havana[1]

Where the government fears the people, we have liberty. Where the people fear the government, we have tyranny. Anonymous

I didn't really say everything I said. Yogi Berra.

None are more hopelessly enslaved than those who falsely believe that they are free. Goethe

It is the mark of an educated mind to be able to entertain a thought without accepting it. Aristotle

After I was nominated to be President-Elect of the Association, in 2001, people told me that there would be a lot of traveling involved in fulfilling my duties. I would have opportunities to go to many places around New York State, small and large, urban, rural, suburban and metropolitan. Oddly named places upstate, like Florida, Amsterdam and even Cuba. If they only knew how right and wrong they were!

In December, I took the opportunity to join a group drawn from Bar leadership around the country, under the auspices of the ABA, in traveling legally to Havana, Cuba. (For those of you who may not know it, the United States government has placed an embargo on trade with Cuba. While it is not illegal for American citizens to go to Cuba, "you can't get there from here" unless you go under a State Department license. Those licenses are now strictly limited, and our group was restricted to Bar leaders, and no spouses.)

Our group consisted of myself, a past chair and a future chair of the NYSBA International Law and Practice Section, Bar leaders from California, Minnesota, Illinois and Maryland, and law professors from California and Minnesota. Unfortunately, the nine of us didn't get to meet any Cuban baseball players.

Some of us went via New York and Miami, and the others via Los Angeles and Cancún. In a whirlwind five days, including travel days, we took a walking tour of Old Havana, met with Cuban law professors, a political advisor to the Cuban government, the Cuban national bar association, members of a Cuban "collectivo" (similar to a law firm with multiple offices), a Canadian foreign legal consultant, a Cuban accounting firm associated with one of the Final Four, a Foreign Service Officer at the U.S. Interest Section, and had a brief interlude with one of the local Committees for the Defense of the Revolution. Shopping was not high on the agenda, however, with a strict limit of $100 on the value of Cuban origin goods which we could bring back (including cigars). Three of us went on our own adventure to Callejon de Hamel, to see the Santeria section, touring the city in a 1956 Buick convertible, one of countless relics from the 1950s[2] still roaring around (and polluting) the streets. We also had the opportunity to sample Havana restaurants and paladars, night life, museums, the street scene and the markets.

During our visits, we heard much from the Cuban representatives, and learned a great deal about the Cuban government and its legal system. Needless to say, there were more differences than similarities. Cuban law is based on Spanish and French codes, and overriding all of it are the basic Cuban principles of socialism, recognition of Cuban independence, and revolutionary struggle.

I wouldn't recommend moving your law practice there.

People in Cuba who need lawyers go to a government office, and the government assigns a lawyer to them, and pays the legal fees (which make the old 18-b rates look good). The judges in the lower courts are selected by the local government councils, and sit in panels (no juries) usually of three or five. Higher courts are appointed by the National Assembly, which meets only two or three days a year. The majority of the judges on any given panel are lawyers, the rest of the panel are lay members. Written decisions are nearly unheard of, and the panels usually issue only results, sometimes with statements of reasons. There isn't any need to interpret the codes or laws; they say what they say, and the decisions are based on "justice." Appeals courts can make new findings of fact, and also review the law, but generally review only the result. Many legal matters, such as contracts, divorces, and other family matters, are handled by "notaries," who may be former law students who didn't pass the bar exam.

It may come as a surprise that there is sort of an IAS system, as the judges are appointed to sit only on particular types of panels: commercial, civil, criminal, family, etc. Even the national supreme court is divided up this way (but it also has a military part and a political

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part), and there are different supreme courts for different types of cases. Here's another surprise: the judges get paid more than the lawyers (but not much).

As is true of many other parts of our lives, we don't really get to appreciate some things until we get to experience what it is like without them. One cannot fully appreciate a market economy without experiencing a managed one. And one cannot fully appreciate the American legal system until you experience one which does not afford the basic protections we all take for granted. It took some time to get accustomed, when speaking of the criminal justice system, to the concept that the principal role of the lawyer for the defense was to negotiate the sentence, and when speaking of the civil justice system, to the concept that there are many wrongs without remedies. In Cuban accident cases, for example, the victim receives little, if any, compensation, although necessary medical treatment is provided. The person responsible for the accident is not required to compensate the victim, but may be punished criminally.

There is little need for commercial law, since nearly all businesses are owned by the Cuban government, and the arrangements between them are made by government officials. Foreign enterprises are sometimes permitted to operate in Cuba, but only after forming joint ventures with Cuban companies (aka the government) in which the Cuban company has either an equal ownership or at least a veto over all financial activity. Every transaction requires approval from innumerable government ministries, and many deals die from the delay.

No business gets to select its own employees. They are all provided by the government. It is extraordinarily difficult to fire an employee, a process which involves meetings with the employee council at the company, and extensive negotiations. Alternative dispute resolution reigns supreme, in the form of "negotiations" to resolve every dispute. In the case of foreign companies, employees are essentially leased from the government, the employer pays the government in hard currency, and the government pays the employees in Cuban pesos (26 to the dollar). The average Cuban family earns the equivalent of $20 US per month, although health care is free, and the cost of housing, electricity and water is minimal. Ration coupons provide the basic staples of the Cuban diet, which are chicken, pork, rice and beans.

Despite all this, Cubans seem to be able to make do, while hardly living in luxury. Housing conditions are deplorable, and overcrowding is rampant. Most Cubans own their homes, but can't sell them. They may trade them for other housing, with the approval of the government, in transactions which involve endless chains of trades where any one of them can fail and bring the entire chain to an end.

Everyone we met, including innumerable people on the street, were warm and friendly to the Americanos. Most of them had relatives living in Florida or California. Perhaps the most surprising element to all of us was the number of people with whom we met who expressed the view, even the utter conviction, that the United States was poised to invade Cuba, as soon as we get this little Iraq thing out of the way. I could go (and perhaps have already gone) on and on. Photos and more stories are available on request, and at the drop of a hat.

It was an amazing, fascinating, place to visit, but you wouldn't want to live there.

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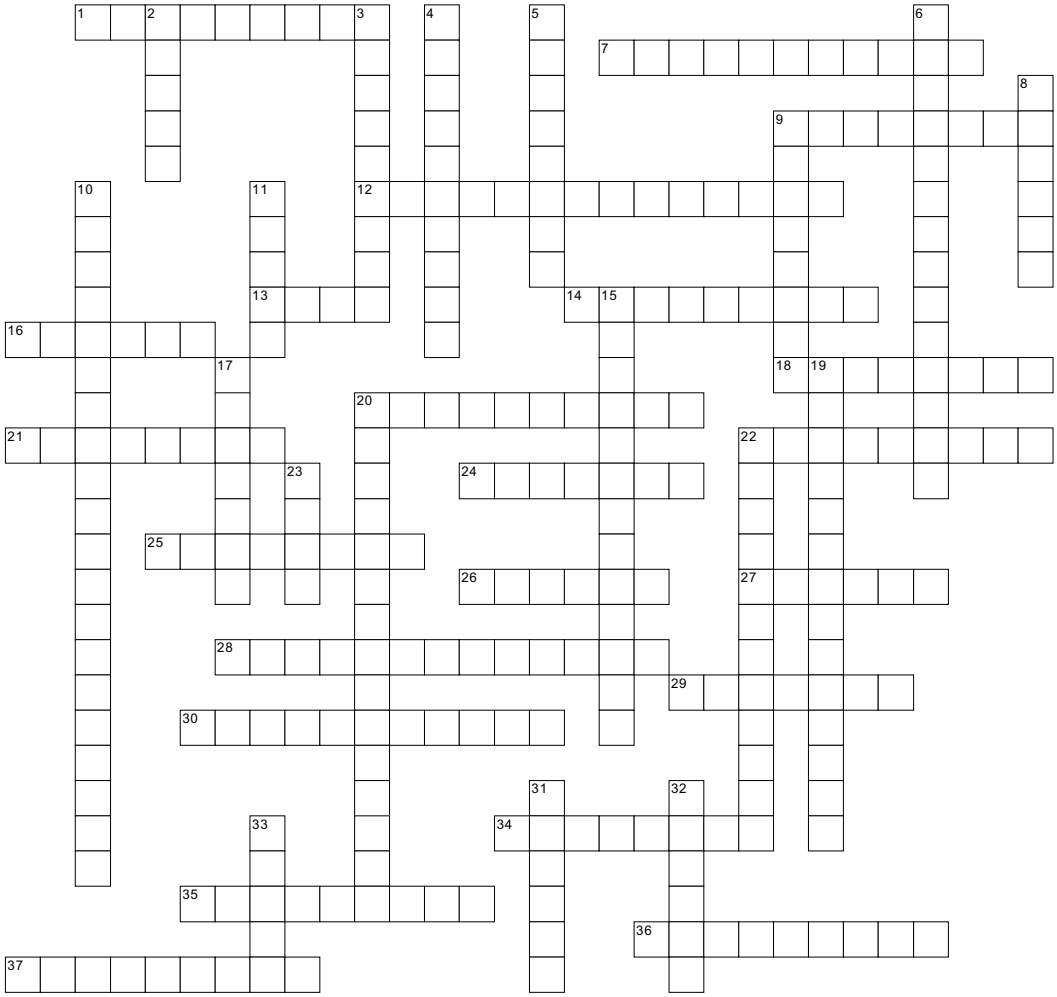
1. With apologies to Alec Guinness, Burl Ives, Maureen O'Hara and company.
2. The cars, not the members of our group.

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.)



Random Sampler, by J. David Eldridge

Across

1 Lat. a judicial vacation
7 A mechanical device that records the numbers dialed on a telephone
9 Distance of property along a street or river
12 Lat. in the place of a parent
13 A plot of ground set apart for a specific use
14 Lat. the court in which an action is tried
16 Hidden; concealed; dormant
18 A deed for a nominal sum or for love
20 Police inducing a person to commit a crime not contemplated
21 Imperfect; partial; unfinished
22 You'll know it when you see it
24 Hearing to determine the admissibility of an accused's statements
25 The explanatory clause at the beginning of a constitution or statute
26 Throwing goods overboard to lighten or save vessel
27 Lat. body
28 Unification of two or more actions
29 Distance from the property line within which building is prohibited
30 The act of a defaulter
34 Federal anti-racketeering act making it a crime to interfere with interstate commerce by extortion or violence
35 A Saxon horse thief
36 To bargain with another respecting a transaction
37 Body of law derived from judicial decisions

Down

2 A document entitling its holder to something of value, usually money or privilege
3 Wrong in itself
4 Time given to an adversary to answer a pleading
5 An estate for life or in fee
6 Using more employees than needed for a particular job
8 To convey or create an estate for years or for life
9 Colloquial term for refinancing a consumer loan
10 Where the landlord's act or omission renders premises uninhabitable
11 To overthrow; vacate; annul or make void
15 An interim Order
17 A knowing or skillful counselor
19 Sale of shares based upon advance information
20 Provision in a contract executable upon occurrence of an extrinsic event
22 An unwritten agreement
23 The Uniform Code of Military Justice
31 One who buys or sells goods for others
32 Neglect or failure to assert a right or claim over time which bars relief
33 Death on the High Seas Act

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Canons and Myths: Strategies to Enhance Success

BY SANFORD F. YOUNG

Litigation is a combination of chess and combat. Like chess, it is a contest of strategy, calculation and risk taking. And like combat, it requires commitment, resources and perseverance. It also requires cooperative and committed clients, and, obviously, decent facts and law.[1]

While many of the concepts below may be obvious and often practiced, the purpose of this and additional articles to follow in later months is to organize and gather together various litigation strategies and philosophies to give the litigator a clear frame of reference and method of analysis to enhance the chances of success and, at the same time, help minimize the risk and aggravation inherent in potentially contentious litigation.

Building a Healthy Client Relationship

The client must "own" his case.

Your client is the case. Without the client and the client's support and cooperation, there is no case – only compromise and aggravation. Moreover, what often begins as a unified and determined team relationship takes on its own dynamic, which, if not properly managed, can itself deteriorate into a troublesome situation.

At the outset, it is important to create a team effort with the client that will last. To sustain this it is essential that the client "*own*" *his case*. While ownership seems obvious and integral, it does not always exist and continue to the extent necessary and desirable. As the case drags on, for example, and perhaps fees are not being paid (such as in a contingency case or, worse, a client in default in paying your fees), the client's perception of how much time and effort his lawyer should be putting into the case, or his assessment of the feasibility of fighting versus settling, becomes skewed and may be at odds with the understanding of the lawyer, who feels he is carrying the whole burden of the case.

While no solution is foolproof, a number of considerations should be kept in mind from the onset of the case. First, no client should get a totally free ride. His commitment and stake in the case should be solidified through the client's initial, and ideally, continuing investment of one or more of the following: money (fees and expenses), time and effort, recognition of the criticality of the case's outcome and willingness to remain engaged in a team effort with the legal team.

Second, you must be sure to balance and temper the client's expectations. Do not get overly caught up in the client's zeal and feed into unrealistic expectations. On the other hand, you do not need to be a pessimist. As in many things, evenhandedness is the key. One ever-present danger is that clients confuse initial demands and *ad damnum* clauses with what is a likely outcome. The same goes for pleading various legal theories, such as seeking injunctive relief, punitive damages and attorney's fees. While doing so may be prudent, be sure the client understands the difference between what is demanded versus what is realistic. Here, there is a paradox: the stronger you articulate or argue your client's case, the higher his expectations, especially when he has not yet seen, and as likely does not read, the opposing arguments. Oftentimes, I find myself telling clients "*do not believe my BS*."

Be aware that the attorney-client relationship is dynamic. Often it will begin with great interest and enthusiasm. But at some point, the client – as do lawyers – may begin to lose enthusiasm and steam. The client's hopes and expectations may fluctuate as the case pro-

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Jan Rothman, an associate, assisted in the preparation of this article. She is a graduate of Boston University and received her J.D. from Rutgers Law School.

The characters in the illustrations that accompany this article are from a legal-themed chess set used by the author.

gresses. Unfortunately, at some point the client's interest in the case may steadily diminish and likely reach a low at the point where the client is needed most, such as at the time for depositions or for trial. Keeping the client on board is an ongoing and sometimes difficult process. Keep him informed of the case without unnecessarily burning him out, and keep him ready and primed to cooperate with you at every step. Keep him on the team: ready, willing and able to "hit the ground running."

The Retainer Agreement

Get it in writing.

While it is obvious that the retainer should be in writing,[2] it is good practice to be sure that it is signed by the client. Equally important, in addition to memorializing the terms of the fee arrangement and scope of services, it should confirm special considerations and concerns.

Obviously, one of the main issues is the fee arrangement – how to set the fee. While it is typical to set fees in personal injury cases at the percentages prescribed in the Court Rules[3] (which rules set forth the *maximum* percentage allowed[4]), in other situations the fee arrangement is more complicated and subject to negotiation and competition, especially for commercial cases. In setting such fees, there are various possibilities and variables: hourly charges, contingencies,[5] bonuses based on success, and blended arrangements, such as where there is either a reduced hourly rate plus contingency, or an initial minimum engagement fee[6] plus contingency. For any contingency fee, be cognizant of whether there will be a problem enforcing a judgment, from which the fee will come, and also consider whether there may be some unusual settlement or award (such as creating some business arrangement between the parties) that may make fixing the amount of the fee difficult or where payment may be deferred.

One of the more heavily negotiated items is the initial retainer (whether or not it is a minimum fee),[7] which plays a big part in ensuring that fees will be covered, as well as demonstrating the client's *ownership* of the case. Ideally, the retainer should cover a substantial portion of the expected fees to begin the case and carry it through its preliminary stages, or further. In determining the size of the retainer, consider the complexity of the case, the likely scenarios, emergent situations and, of course, the likelihood of getting paid. And, be especially wary of the client who insists that his is a "simple matter" – *in which case I would double the retainer!* It is also advisable to get an advance for expenses, which should be by way of a separate check deposited into your escrow account and disbursed as expenses are incurred. The retainer should also provide for the ability to request future advances for fees and especially for expenses. This will become very important when the case approaches trial. While the statutory (charging) lien is automatic,[8] it may also be a good idea to provide in the retainer agreement that all liens, statutory as well as retaining, apply to all recoveries in that or any other case being handled for that client. Also be aware that suing for unpaid fees is not a realistic strategy. Aside from mandatory arbitration rules,[9] suits for fees often bring on counterclaims and, as such, are frowned upon by malpractice carriers. In fact, on policy applications, some carriers are now asking about the age of the firm's receivables and whether and how many suits have been brought to recover fees.

There is real danger in underestimating your budget due to the many variable and unexpected contingencies that may occur.

If the fee is to be based on an hourly rate, consider whether that rate will be fixed or if it can be adjusted

when your fee schedule increases. If contingency or blended, before proposing your fee, you should chart out various scenarios for yourself to determine likely downsides and upsides. Be sure you are compensated fairly for the contingency and be sure that you do not find yourself in a situation where you are *hungry* for work today but will regret being locked-in in the future.

Some clients will ask for a budget or a cap. While budgets do not work well for complicated litigations, a budget may be a mandatory requirement of the client and thus unavoidable. Here are some observations and suggestions. First, there is real danger in underestimating your budget due to the many variable and unexpected contingencies that may occur. In estimating the time, do not overlook the very substantial time that will be required to communicate with your own client and engage in "hand holding." Indeed, with the advent of e-mail, clients are becoming more involved and demanding about feedback and dialogue. Second, while it is impossible to foresee every potential step in the course of the litigation, it may be possible to present a qualified budget that is broken down according to foreseeable and probable tasks and scenarios such as: fact analysis, legal analysis, pleadings, motions to dismiss and possible pleadings amendments, document review and discovery, interrogatories, depositions, dispositive motions (dismissal, as well as summary judgment), discovery disputes, pre-trial appearances, trial, post-trial motions and appeals. Obviously, the more open-ended and flexible the budget, the more realistic and prudent it will be. It is also desirable to eliminate some contingencies from the budget such as: injunctive relief, complex and successive dispositive motions, reargument, substantial discovery exchanges, large numbers of depositions, difficult discovery disputes, complex or lengthy trials, jury selection (especially in state courts that allow extensive *voir dire*), enforcement of judgments, and of course, appeals and retrials.

In complex cases, the retainer should enumerate significant client resources and the efforts the client will devote to the case.

Similar guidelines should apply to caps. The problem with caps, however, is that they work against you, as you can only go below, but not above (unless you build in enough exceptions, and your client heeds those exceptions). Also, you still have to worry about billing and fee collection. For this reason, rather than caps, flat fees paid up front (perhaps with some sort of contingency or bonus) may be more desirable (see above suggestions regarding blended fee arrangements).

Finally, in setting fees, consider the "*aggravation quotient*." That is, how likely is it that the case will take on its own life and take over yours, due to overly belligerent adversaries, unreasonable court demands, and intrusive or unreasonably demanding clients. If you are willing to take these cases, be sure that you are compensated for the extraordinary time and effort that will be expended; the time that will be taken away from other cases, interests and family; as well as the increased risks that such cases inevitably bring on (whether by way of inappropriate tactics by adversaries, and clients who, in the end, may not pay for this effort). To this end, remember that:

Difficult cases mean more time.
Difficult adversaries mean more time and aggravation.
Difficult clients mean more time, aggravation and risk.

The retainer should define the scope of the services. Depending on the case, considerations may have to be made for venue or jurisdictional changes that may require travel as well as the need to retain local counsel. Other considerations may be the need to add parties, the possibility that counterclaims (whether related or unrelated, and mandatory or permissive[10]) may be asserted by the opposing party, collateral suits, disputes over whether arbitration agreements apply, and potential liens by other counsel. Often overlooked, especially in *standard* personal injury cases retainers, are contingencies such as appeals.[11]

In complex cases, the retainer should enumerate significant client resources and the efforts the client will devote to the case. Examples may be employees of the client who are designated to help locate, assemble and organize documents, office facilities at the client location, managers to assist learning and assimilating complex technologies, technical assistance to organize documents, litigation liaisons and so forth. Such arrangements, so long as they do not compromise the attorney's role and control of the case, are very useful. For one thing, they enable the client to save on fees, especially in large cases involving numerous documents or complex technologies. For another thing, they make the case more manageable if the law firm's resources are limited – such as a small firm taking on a larger case. Such an arrangement also bolsters the team effort and goes a long, long way toward a successful outcome.

In cases where you are representing larger organizations, multiple parties, partnerships, entities or even a close corporation made up of more than one principal or other joint or common interest situations, be sure to specify with whom you can freely discuss confidential client information and strategies – preferably everything with all principals – and from whom you can take

directions. Also, consider what happens if conflicts occur between the principals.

It may also be advisable to include any special disclosures or concerns in the retainer. Those may involve your opinion that the case has a particularly low probability of success;[12] the potential risks that commencing suit may create, such as engendering the termination of a business relationship, inviting counterclaims; the danger of setting an adverse precedent; or contractual or statutory provisions for legal fees or other unusual costs that may be awarded against your client.

You are your client's voice.

Without dispute, you should represent your client and express his interests with zeal and passion. *You are your client's voice*. But, do so in a way that neither compromises your professionalism nor is frivolous or unjustified. Be assiduously honest and credible, and never ever jeopardize your license. In high-stakes litigation, the waters are surrounded by predators who will snap at you given the first opportunity. No case, no client, justifies jeopardizing your standards, ethics or license.

Be aware of and deal with subtle, and not-so-subtle, conflicting interests. Aside from the vast array of ethical conflicts that are studied in law school and CLE courses, also be aware that there are less obvious conflicts inherent in the practice of law that involve your own interests and biases. Those issues may involve a conflict between the duty you owe your client as compared with your own self-interest, such as your interest in earning a living, your concern not to offend or discourage other clients and potential cases, or your desire to achieve favorable or avoid unfavorable publicity. You may also have larger concerns about the societal impact of your case, or you may have various biases that will affect your loyalty and effort.

A Contest of Strategy, Tactics and Implementation

Allow your adversary to make mistakes; but don't make your own.

Some may view litigation as a contest of resources or even attrition – the big guy versus the little guy. This is a myth except, however, in the most extreme situations. In most cases, rationality and sanity reign. Moreover, for the small client, litigation is an excellent opportunity to turn smaller size and limited resources into a strength. Large and wealthy adversaries who employ large expensive counsel, who tend to assign layers of attorneys on a case, can be baited into squandering time and fees on proceedings that can be more efficiently and wisely handled by smaller experienced firms. Accordingly, while the resources must be sufficient to engage committed counsel and pay for required expenses, if well managed, they do not have to be greater than the adversary's. Indeed, the ideal strategy is to use the available resources efficiently while making it appear to the adversary that resources and commitment are limitless to achieve success and, through superior strategy and tactics, inducing the adversary to waste and use up resources.

Like chess, a lawsuit is won by superior strategy and tactics, as well as by superior implementation. For that reason, it is imperative to think strategically about the case.

Strategy calls for determining the major goals and methods of achievement. It requires long-range thinking and projecting – move after move, after move. It assesses how the other side will act or react as well as your responses. Moreover, strategy should not be formulated while "under the gun." An example of a strategy plan may be where you aim to achieve discovery of specific facts or documents, followed by a strong summary judgment motion. Strategy can change, but ideally, it will not change significantly as that loses time and resources. Yet, you must be agile enough to adjust your strategy as circumstances change and as you learn your case.

Tactics are the method for achieving the more global strategy. An example of tactics is when to move for summary judgment and what supporting papers and affidavits to use. Tactics are not as long term and may occasionally be adjusted or changed, even in the heat of battle. It is desirable to have the client participate in planning and adjusting strategy, and to a lesser extent,

tactics. But, whatever the case, the client should be consulted to approve any moves that would result in substantial costs or risks.

Implementation is the skill that carries out the tactics: for example, the ability to try a case well, cross-examine witnesses, take a deposition or draft a winning brief. Some trial attorneys are great in the courtroom, but to be a "killer" litigator also requires being a strategic thinker.

Equally important to the proficiency with which you handle the case is how well your adversary does. To this end, the chances of success are enhanced by mistakes that your adversary makes and by avoiding your own. For that reason, just like in chess, *always give your adversary the maximum opportunity to make mistakes, but avoid making your own.*

Your adversary does not have to be treated as a mortal enemy. In most cases, it pays to keep it friendly and courteous.

Innovation and Risk Taking

Turn negatives into positives.

Formulating and adjusting strategy and tactics requires learning your case, the ability to adjust and innovate to deal with changing or unexpected situations, knowing how to take calculated risks, and the ability to turn negative situations into positive attributes.

Learning your case means learning the

(1) facts,
(2) law,
(3) commitment and resources of your client,
(4) availability and quality of provable evidence,
(5) availability and quality of witnesses,
(6) evidence and witnesses against you,
(7) quality and biases of the forum (court, judge, jury panels)
(8) and the ability and tenacity of your adversary.

Innovation requires adjusting your strategy and tactics to deal with the changing realities of the case. This includes:

(9) Budgetary concerns and available resources.
(10) Changing circumstances.
(11) How each factor interplays with the others.
(12) Minimizing your own mistakes.
(13) Maximizing your adversaries' mistakes.

Risk taking is the ability to make assessments – *i.e.*, determine the feasibility – of the costs and risks of a given strategy or tactic versus the probability of success. Every decision, whether conscious or not, is based on this assessment. The goal is to make optimal decisions where the likelihood of success outweighs the costs and risks. Where attempted strategies and tactics prove unsuccessful, innovation and risk taking become more desirable. That is how you learn your case, as well as how you grow as a strategist – learning as you go. However, while innovation and surprise are often desirable, they are not always the optimal strategy. *When in doubt – i.e., close calls – "go conservative,"* unless you enjoy shooting from the hip and getting shot in the head.

It is also important to be able to *turn weaknesses into strengths, i.e.*, take negative situations, such as the discovery of damaging evidence or the sudden unavailability of a witness, and turn it into a positive development. For example, if a key witness becomes unavailable, it is an opportunity to reorient and simplify the case. If there is a strong adverse precedent, use it as a launching point to develop strong distinguishing points that will invite or challenge the court or, if necessary, an appellate forum to further develop and hone the applicable case law. Often, a perceived crisis in the progress of a case can be a blessing in disguise.

Dealing With Adversaries

Keep it friendly and courteous.

Your adversary does not have to be treated as a mortal enemy. In most cases, it pays to keep it friendly and courteous. And, in all circumstances, be honest and maintain credibility. Credibility goes much further than evasiveness or obstructionism.

Courtesy should be the rule of the day, even if your client wants you to be discourteous – for example, by denying extensions. Indeed, basic courtesies – civility in litigation – is becoming required.[13] Denying basic courtesies never pays off. Instead, it will cost you and the client in many ways, such as in engaging in unnecessary motion practice, forcing you to act hastily and inhibiting opportunities to have meaningful settlement discussions.

You should be sure, when appropriate, to extract reciprocal courtesies, such as providing yourself sufficient time to respond. When the courtesy is requested in a timely manner, such as before an answer is due, it should be given readily. But, if requested after time has expired, a tactical question arises of whether to forgive the default or to properly take advantage of it.

In dealing with your adversary, be aware of the tendency to engage in *knee-jerk* litigation. Thus, while you should try to avoid reactive and predictable strategies – even if they seem to be conservative – you should aim to take advantage of your adversary's own tendency to engage in predictable knee-jerk strategies.

Settlement

Approach settlement at the point of heightened uncertainty.

Although the great majority of cases are settled, the irony is that to enhance the chances of a good settlement, your perceived (and actual) objective must be to win the case. The goal is to make the adversary understand that he stands a substantial risk of losing and incurring substantial costs.

Often, the best time to approach settlement is at the point of greatest uncertainty, where you have already given some meaningful demonstration of the merits of your case and your resolve to succeed. I am not talking about posturing. I am talking about a real step in the progress of the case, which can come at various times and in various forms. Commencement of the suit is an obvious example, but it is not the strongest because pleadings, by their very nature, do not provide proof or precedent for the case. They only show some resolve. Likewise, discovery (particularly depositions) is a possible step, but also does not usually show the strength of your case. While in some cases taking the adversary's

deposition may produce anxiety, the earliest step to achieve that goal is probably a motion for summary judgment. A summary judgment motion is a perfect opportunity to put your best foot forward – to lay out your proof and the law while at the same time presenting an immediate threat of victory. Of course, a cross-motion is available to your adversary. (More on motions will be discussed in succeeding articles.)

Many attorneys are reluctant to be the first to suggest a possible settlement. While you must never show that you are anxious to settle, there is nothing wrong with showing interest in its exploration. Moreover, the best way to temper any fear of showing weakness is to move for summary judgment just before suggesting the exploration of settlement. Another obvious opportunity to settle comes on the eve of trial, but at that point in the litigation, expenses have been incurred and the benefits of settlement have been reduced.

Summary

Litigation is a contest that requires skill, knowledge and intuitive thinking. It must be approached as a team effort. The litigator must be able to formulate, innovate and execute feasible and goal-oriented strategies in a diverse and dynamic situation which, though avoidable, can become contentious and hostile.

Additional articles in coming months will consider myths and canons of pleadings, discovery, motion practice, trials and appeals, together with further consideration of settlements, client relations and team building.

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1. Because most, if not all, disputes have two sides, this article assumes that your potential client has met whatever minimum threshold you require for taking the case in terms of the facts and law. Also, while most of this article speaks from the plaintiff's point of view, the principles apply equally to defendants.

2. 22 N.Y.C.R.R. § 1215.1 generally requires a written letter of engagement which, at the minimum, must set forth an explanation of the legal services to be provided and the attorney's fees and billing practices. In addition, where applicable, § 1215.1 requires that the letter of engagement provide that the client may have the right to arbitrate fee disputes. 22 N.Y.C.R.R. §§ 1400.1–1400.7 set forth various special rules for domestic relations matters, including specific requirements for retainer agreements that must be executed by both parties and filed if the action is in the supreme court. 22 N.Y.C.R.R. § 1400.3. The rules also require giving prospective clients a prescribed written Statement of Client's Rights and Responsibilities in domestic relations matters. 22 N.Y.C.R.R. §§ 1200.11(f), 1400.2.

3. The various Appellate Division Departments provide two alternatives for setting contingent fees in retainer agreements covering personal injury and wrongful death claims. Thus, the following are considered "fair and reasonable": either a sliding scale (referred to as "Schedule A") equal to 50% of the first $1,000 recovered plus 40% of the next $2,000 plus 35% of the next $22,000 plus 25% of any amount over $25,000 or, in the alternative, a maximum of 33-1/3% of the sum recovered (referred to as "Schedule B"). *See* McKinney's New York Rules of Court §§ 603.7(e)(2) (1st Dep't), 691.20(e)(2) (2d Dep't), 806.13(b) (3d Dep't), 1022.31(b) (4th Dep't) (hereinafter "Local Court Rules"). In medical, dental or podiatric malpractice cases, N.Y. Judiciary Law § 474-a ("Jud. Law") mandates a different sliding scale equal to 30% of the first $250,000 recovered plus 25% of the next $250,000 plus 20% of the next $500,000 plus 15% of the next $250,000 plus 10% of any amount over $1,250,000. In both types of cases, the calculations are based on "the net sum recovered" after deducting expenses and disbursements. Jud. Law § 474-a(3); *see* Local Court Rules §§ 603.7(e)(3), 691.20(e)(3), 806.13(c), 1022.31(c). The rules also provide that if the attorney "believes in good faith that [Schedule A above the sliding scale], because of extraordinary circumstances, will not give him adequate compensation," that application can be made to the court for a greater fee "provided, however, that such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement." Jud. Law § 474-a(4); Local Court Rules §§ 603.7(e)(4), 691.20(e)(4), 806.13(d), 1022.31(d). In cases involving "infants," the fee must be approved by the court. Jud. Law § 474; see Local Court Rules §§ 603.7(e)(6), 691.20(e)(6), 806.13(e), 1022.31(e). To facilitate regulation of these fee arrangements, various Departments also require the filing of Retainer Statements and Closing Statements with the Office of Court Administration. *See* Local Court Rules §§ 603.7(a), (b), 691.20(a), (b).

4. In some states, attorneys sometimes set fees in personal injury cases on a competitive basis. Nothing prevents the negotiation of such fees in New York, although it is not commonly done.

5. 22 N.Y.C.R.R. § 1200.11(c)(2)(i) prohibits contingent fees in domestic relations matters.

6. An initial "minimum" engagement fee should be distinguished from a "nonrefundable" retainer, the latter of which is prohibited as an impediment on a client's ability to discharge his attorney. *See In re Cooperman*, 83 N.Y.2d 465, 473, 611 N.Y.S.2d 465 (1994) (the use of a special nonrefundable retainer fee agreement clashes with public policy because it inappropriately compromises the right to sever the fiduciary services relationship with the lawyer). In domestic relations matters, the Disciplinary Rules are fairly clear. Thus, while 22 N.Y.C.R.R. § 1200.11(c)(2)(ii) (DR 2-106(C)(2)(b)) prohibits nonrefundable fees ("A lawyer shall not include in the written retainer agreement a nonrefundable fee clause"), 22 N.Y.C.R.R. § 1400.4 makes the distinction clear:

> An attorney shall not enter into an arrangement for, charge or collect a nonrefundable retainer fee from a client. An attorney may enter into a "minimum fee" arrangement with a client that provides for the payment of a specific amount below which the fee will not fall based upon the handling of the case to its conclusion.

Hence, it would appear that the retainer agreement may provide for a minimum engagement fee if the attorney

handles the matter to its conclusion, so long as the agreement also provides for refundability in the event the attorney is discharged. *See* 22 N.Y.C.R.R. § 1200.15(a)(3) (DR 2-110(A)(3)) ("A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned."). While no comparable rule exist for non-domestic relations matters, since domestic relations matter are, as a matter of public and statutory policy the more protected and regulated, a strong argument can be made that the same distinction between minimum and nonrefundable retainers can be made for other types of cases. *See In re Cooperman*, 83 N.Y.2d at 476, where the Court stated:

> [W]e intend no effect or disturbance with respect to other types of appropriate and ethical fee agreements. Minimum fee arrangements and general retainers that provide for fees, not laden with the nonrefundability impediment irrespective of any services, will continue to be valid and not subject in and of themselves to professional discipline. (citation omitted).

7. *See supra* note 6.
8. The statutory attorney's lien set forth in Jud. Law § 475 (which codifies the common law "charging" lien) comes into existence, without notice or filing, upon the commencement of an action or proceeding and constitutes a vested interest in the cause of action. *LMWT Realty Corp. v. Davis Agency*, 85 N.Y.2d 462, 467, 626 N.Y.S.2d 39 (1995). Jud. Law § 475-a provides that prior to commencement of an action, a lien can be created by a notice of lien.
9. 22 N.Y.C.R.R. §§ 137.2, 1200.11(e), 1230.1.
10. *See, e.g.*, Fed. R. Civ. P. Rule 13(a) (mandatory counterclaims), 13(b) (permissive counterclaims).
11. In the case of appeals, while you may be more likely to agree to defend an appeal, such as where you won a trial, than prosecuting one from a defeat, it would be wise to exclude all appeals (whether final or interlocutory) and retain the ability to decide on the feasibility and merits if and when the situation arises.
12. Hopefully, even a somewhat weak case will be above the threshold so that you are not accused of bringing on a frivolous lawsuit. For example, 22 N.Y.C.R.R. § 130-1.1 provides for the imposition of sanctions against a party or an attorney or both, including costs and attorney's fees, for frivolous conduct, which is defined as conduct that is completely without merit, is undertaken to delay or harass, or asserts false material facts. *See Drummond v. Drummond*, 305 A.D.2d 450, 759 N.Y.S.2d 522 (2d Dep't 2003); *see also* Fed. R. Civ. P. 11(b); *Healey v. Chelsea Resources, Ltd.*, 947 F.2d 611, 622 (2d Cir. 1991).
13. New York Standards of Civility, McKinney's New York Rules of Court, pt. 1200, App. A.

Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation

BY SHIRA A. SCHEINDLIN AND JONATHAN M. REDGRAVE

The modern practice and use of special masters in federal courts gradually evolved from a strict and limited role for trial assistance prescribed by Federal Rule of Civil Procedure 53 to a more expanded view, with duties and responsibilities of masters extending to every stage of litigation. Recognizing that practice had stretched beyond the language of the long-standing rule, the Advisory Committee on Civil Rules undertook an effort to conform the rule to practice.

The result is a new rule, effective as of December 1, 2003, that differs markedly from its predecessor and sets forth precise guidelines for the appointment of special masters in the modern context. In general, the changes provide more flexibility in the use of special masters, permitting them to be used on an as-needed basis with the parties' consent or by court order when exceptional conditions apply.

This article reviews the history of Rule 53, the evolution of the use of special masters in practice, and the significant new provisions of Rule 53.

Historical Rule and Purpose

The practice of appointing or referring matters to a special master predates the adoption of Rule 53. Before it was enacted, federal courts relied on precedent and their inherent authority to appoint and define the duties and responsibilities of masters in law and equity cases.[1] This authority and practice were formally recognized and codified in the Federal Equity Rules of 1912. The revisions to federal equity procedure memorialized in the Equity Rules severely curtailed the use of masters, mandating that a reference to a master, save in matters of account, was to be the "exception, not the rule" and was permitted only upon a showing that some "exceptional condition" required it.[2]

The restrictive provisions of the Equity Rules were incorporated into the earliest Federal Rules of Civil Procedure in 1938 in the form of Rule 53.[3] Yet while the substantive provisions of Rule 53 were similar to the equity procedures, Rule 53 eliminated, as did the Federal Rules of Civil Procedure in general, the distinction between law and equity that previously existed. Accordingly, under Rule 53's unified procedure, different standards governed the use of masters in jury and non-jury proceedings. In both types of cases, Rule 53 continued to provide that appointment of a special master "shall be the exception and not the rule."[4]

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Rule 53 envisioned a rather limited role and purpose for masters. Located in the trial section of the Federal Rules, Rule 53 focused primarily on a master's use as a trial master, *i.e.*, hearing trial testimony and reporting recommended findings of fact. In the context of jury cases, "a reference shall be made only when the issues are complicated."[5] In analyzing whether a reference to a master was appropriate, courts considered whether the master would assist the jury in reaching a resolution, in many ways like a fact expert for the jury.[6] The master had the authority to conduct hearings, require the production of evidence, rule upon the admissibility of evidence, examine witnesses,[7] and was required to submit a report setting forth findings of fact.[8] The master's report was then presented to the jury as admissible evidence that the jury could consider.[9]

In non-jury matters, Rule 53 provided that "save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it."[10]

The limitations of the original Rule 53 and the use of masters in general were clarified by the Supreme Court in *La Buy v. Howes Leather Co.*[11] In *La Buy*, the Court reviewed a decision by the Court of Appeals granting a writ of mandamus ordering the District Court to vacate an order referring two large and complex antitrust cases to a trial master. In affirming the decision of the appellate court, the Supreme Court identified what considerations were insufficient to establish an exceptional condition, but it failed to define what considerations constituted an exceptional condition.

The District Court in *La Buy* based its order of reference on the congestion of its docket, the complicated and complex nature of antitrust litigation, and the duration of the trial. The Court declared that "congestion in itself is not such an exceptional circumstance as to warrant a reference to a master. If such were the test, present congestion would make references the rule rather than the exception."[12] The Court similarly rejected the District Court's reference based on the complexity of the issues. "[M]ost litigation in the antitrust field is complex. It does not follow[, however,] that antitrust litigants are not entitled to a trial before a court."[13] In fact, the Court believed the opposite to be true. The complexity of the field of law, the Court reasoned, was "an impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an *ad hoc* basis and ordinarily not experienced in judicial work."[14] Finally, the Court declared that the duration of a trial did not "offer exceptional grounds."[15]

The structure of Rule 53 and the Supreme Court's decision in *La Buy* significantly limited the use of special masters. The "exceptional condition" requirement was hard to meet,[16] especially in cases where one party did not agree that a special master was advisable, and thus reported use of Rule 53 was limited. Even so, changes in the volume and complexity of civil litigation gradually brought about an increased use of masters at every stage of litigation.

Modern Use and Practice

By the end of the 20th century, the use and practice of appointing special masters had grown beyond the language and design of Federal Rule of Civil Procedure 53. Unlike the original conception of the rule as a specialized device to assist the jury in fact analysis, a master's role in complex litigation grew to include overseeing complex and voluminous discovery issues, as well as implementation and enforcement of post-judgment orders and decrees. Courts that used special masters in these non-traditional roles either assumed that such appointments were sanctioned by Rule 53 or relied on the court's inherent authority to appoint non-judicial individuals to assist the court when needed.[17]

References of discovery and discovery disputes have been seen as particularly useful because of their time-consuming nature or need for immediate resolution.

With respect to "discovery" masters, district courts increasingly viewed resort to a Rule 53 master as necessary in light of increasing docket pressures and limited judicial resources.[18] Masters have been appointed to oversee the discovery process, which can entail resolving disputes, establishing procedures and schedules, monitoring document production, and attending depositions and conferences.[19] References of discovery and discovery disputes have been seen as particularly useful because of their time-consuming nature or need for immediate resolution.[20] Factors considered in these appointments included the volume of material to be produced and exchanged,[21] the scientific and technical nature of the information subject to discovery,[22] and the complexity of the underlying dispute.[23] Another important role that masters have filled is resolving claims of privilege that accompany document productions.[24]

The increased use of special masters under the existing framework of Rule 53 created a tension with the need to ensure that the role of masters remained limited. For ex-

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Federal Rule of Civil Procedure 53 – Masters (Effective December 1, 2003)

(a) Appointment.

(1) Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by

(i) some exceptional condition, or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pre-trial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

(2) A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 455 unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification.

(3) In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) Order Appointing Master.

(1) Notice. The court must give the parties notice and an opportunity to be heard before appointing a master. A party may suggest candidates for appointment.

(2) Contents. The order appointing a master must direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances – if any – in which the master may communicate *ex parte* with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(h).

(3) Entry of Order. The court may enter the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455 and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification.

(4) Amendment. The order appointing a master may be amended at any time after notice to the parties, and an opportunity to be heard.

(c) Master's Authority.

Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The master may by order impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(d) Evidentiary Hearings.

Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence.

(e) Master's Orders.

A master who makes an order must file the order and promptly serve a copy on each party. The clerk must enter the order on the docket.

(f) Master's Reports.

A master must report to the court as required by the order of appointment. The master must file the report and promptly serve a copy of the report on each party unless the court directs otherwise.

(g) Action on Master's Order, Report, or Recommendations.

(1) Action. In acting on a master's order, report, or recommendations, the court must afford an opportunity to be heard and may receive evidence, and may: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions.

(2) Time To Object or Move. A party may file objections to – or a motion to adopt or modify – the master's order, report, or recommendations no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time.

(3) Fact Findings. The court must decide *de novo* all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that:

(A) the master's findings will be reviewed for clear error, or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(4) Legal Conclusions. The court must decide *de novo* all objections to conclusions of law made or recommended by a master.

(5) Procedural Matters. Unless the order of appointment establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(h) Compensation.

(1) Fixing Compensation. The court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment, but the court may set a new basis and terms after notice and an opportunity to be heard.

(2) Payment. The compensation fixed under Rule 53(h)(1) must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) Allocation. The court must allocate payment of the master's compensation among the parties after considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(i) Appointment of Magistrate Judge.

A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.

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ample, in *United States v. Hooker Chemicals & Plastics Corp.*,[25] a case involving injuries allegedly stemming from the improper disposal of hazardous material, the court disapproved of a plan to refer all "routine" discovery and case management matters to a special master. The court stated that such a plan presented "an unacceptable risk of having significant, potentially dispositive issues taken away from the court."[26] Thus, courts that considered granting broad powers to a special master were cautioned to ensure that reference orders specifically delineated the matters referred and the powers a master could exercise.[27]

In addition to assisting in the management and resolution of discovery matters, special masters have been appointed to oversee issues arising after trial.[28] In these situations, the issues referred to masters primarily involved crafting and overseeing the remedial stage of litigation.[29] For example, an area specifically identified by the Federal Judicial Center as warranting the involvement of a special master under the prior version of Rule 53 was the administration of class settlements.[30] Remedial special masters also aided in monitoring compliance with post-judgment decrees.[31] Another post-trial function that special masters fulfilled was analyzing the continued validity of consent decrees.[32]

The New Rule 53

The objectives of the new rule are to harmonize best practices with rule-based principles in an effort to assure the effective use of special masters.

To conform Rule 53 to the contemporary practice of using masters during pre-trial, trial and post-trial stages, the Advisory Committee on Civil Rules recommended extensive revisions to the rule.[33] These changes,

which took effect December 1, 2003, and the amendments bring Rule 53 into harmony with current practice.

The amended Rule 53 has five significant aspects that affect civil practice: (1) the significantly limited use of special masters in most trials, but particularly jury trials; (2) the authorization for broad use of special masters when the parties consent; (3) the explicit authorization of masters to assist with pre-trial and post-trial matters; (4) the establishment of specific procedures and standards for the appointment of special masters; and (5) a definitive explication of the standards of review governing the actions of the master.

Trial masters The amended Rule 53 retains provisions relating to the appointment of trial masters with significant modification. Importantly, the rule eliminates the direct power of a court to appoint a trial master as to issues to be decided by a jury.[34] The use of a trial master in jury cases is nevertheless permitted, provided the parties consent.[35] This exception itself is limited, however, because the Advisory Committee cautions that a trial master "should be appointed in a jury case, with consent of the parties and concurrence of the court, only if the parties waive jury trial with respect to the issues submitted to the master or if the master's findings are to be submitted to the jury as evidence."[36] In no case, however, may a trial master be appointed to preside at a jury trial.

Collectively, these changes have brought Rule 53 into the 21st century. It remains to be seen whether they will result in the increased use of masters.

The amended rule continues to permit the use of trial masters in non-jury cases.[37] The standard for appointment of non-jury trial masters is carried forward in the amended rule, *i.e.*, an appointment is warranted only by "some exceptional condition."[38] According to the Advisory Committee Notes, this phrase is intended to retain the meaning afforded it under *La Buy* and its progeny.[39] Issues such as docket congestion, duration of trial, and complexity of issues do not constitute exceptional conditions.[40] The exceptions to this "exceptional condition" requirement are also retained. In matters of accounting or difficult computation of damages, use of a master is appropriate regardless of whether exceptional conditions are present.[41]

Consent masters The appointment of "consent masters" to fulfill any role is expressly approved with the consent of the parties.[42] The change imposes no restrictive standard on a master's appointment.[43] The only limitation, which appears in the Advisory Committee's Notes, indicates that party consent "does not require that the court make the appointment; the court retains unfettered discretion to refuse appointment."[44] Providing the district court with the ability to refuse a consensual appointment allows the court to retain its authority over managing its docket.

Pre-trial and post-trial masters To conform Rule 53 with the modern practice of referring pre-trial and post-trial matters to masters, Rule 53 explicitly provides that "pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge" may be referred to a special master.[45] No exceptional condition finding is required as had previously been true, although the Advisory Committee Notes reflect a continued concern that masters remain the exception and not the rule.[46] Overall, given the increasing volume of complex litigation, it is likely that there will be increased use of special masters for pre-trial and post-trial matters under the reformulated rule.

Duties specifically contemplated by the Advisory Committee include reviewing discovery documents for privilege, settlement negotiations, and administration of an organization. Reference to a special master to oversee complex decrees is also appropriate, particularly when a party has proved to be resistant or intransigent. As noted by the Advisory Committee, this practice has been sanctioned by the Supreme Court.[47]

Procedures for appointments The new Rule 53 sets out what are essentially "best practices" standards that have evolved over the past two decades in cases that have adapted the prior version of Rule 53 to fit specific circumstances. A number of these provisions are noteworthy.

Rule 53(a)(2) makes clear that the Code of Judicial Conduct is applicable to masters and that the standard of disqualification under 28 U.S.C. § 455 applies to masters absent consent of the parties.

Rule 53(b)(1) requires that the parties be given notice and an opportunity to be heard before a master is appointed, and that the parties can suggest candidates.

Rule 53(b)(3) specifically requires the proposed master to file an affidavit addressing the potential grounds, if any, for disqualification before the court can issue an order of appointment.

The Advisory Committee Notes to Rule 52(a)(2) and (3) further encourage the courts and parties to examine the considerations that may be involved in a consent appointment and to consider other limitations attendant to the appointment, such as a prohibition on the master (or the master's firm) from appearing before the court in any matter during the pendency of the appointment.[48]

In essence, these procedures are akin to other "sunshine" rules and are intended to bring a more formal and regulated practice to the appointment of masters to avoid real or apparent conflicts of interest.

The new rule also specifies the contents of an order appointing a master.[49] These include the specification of duties, the circumstances (if any) in which the master may have *ex parte* contact with the court or a party; the nature of materials to be preserved and filed as the record of the master's activities; the time limits and procedural aspects of filing the record and reviewing the master's orders, findings and recommendations; and the procedures for setting the master's compensation.[50]

The authority of a master (unless otherwise directed in the appointing order) is now set forth in Rule 53(c) and includes the ability to impose non-contempt sanctions upon a party under Rule 37 or 45 and to recommend contempt sanctions against a party and sanctions against a non-party.[51]

Review of orders, reports or recommendations Rule 53(e) and (f) dictate that the master's orders and reports must be filed and served. Rule 53(g) prescribes the procedures following the filing of the order, report or recommendation.

In particular, the court must afford the parties an opportunity to be heard and may receive evidence.[52] A party may file objections to (or a motion to adopt or modify) an order, report or recommendation no later than 20 days from service, unless the court sets a different time.[53] A court can affirm, modify, wholly or partially reject or reverse or resubmit to the master with instructions.[54]

Regarding the standard of review, the new Rule 53 contains the following provisions:

Findings of Fact:

> The court must decide *de novo* all objections to findings of fact unless the parties stipulate with the court's consent that (a) the master's findings will be reviewed for clear error[55] or (b) the findings of a master under Rule 53(a)(1)(A) or (C) will be final.[56]

Legal Conclusions:

> All objections to conclusions of law made or recommended are reviewed *de novo* by the district court.[57]

Procedural Matters:

> Unless a different standard of review is established in the appointing order, procedural rulings of a master are set aside only for an abuse of discretion.[58]

By spelling out the criteria for the standards of review, the new Rule 53 eliminates confusion that could arise from existing case law while providing mechanisms that allow for different standards of review where the parties stipulate and the court consents.[59]

Conclusion

The newly amended Rule 53 is vastly more flexible than its predecessor. It permits the use of special masters on an as-needed basis, with the parties' consent, or, when exceptional conditions require, by court order. In addition, the rule exposes the process to public scrutiny and encourages, if not requires, a new level of participation by the litigants. Finally, the rule requires that an order of appointment explicitly address the duties of the master, the cost of this service to the parties, communications between the court and the master, and between the parties and the master, and the standard of review for a master's decisions.

Collectively, these changes have brought Rule 53 into the 21st century. It remains to be seen whether they will result in the increased use of masters. Certainly it will result in increased citation to Rule 53, which now expressly permits the many uses that courts made of special masters in the past, albeit with or without citation to the former rule that did not accommodate those various uses.

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1. *See Ex Parte Peterson*, 253 U.S. 300, 312–13 (1920) (holding that a federal court has inherent authority to appoint a master whether sitting in equity or law); *Kimberly v. Arms*, 129 U.S. 512, 524–25 (1889) (stating that the reference of a case to a master has always been within the power of a court of chancery).
2. Rules of Practice in Equity 59, 226 U.S. 666 (1912).
3. Rule 53 is derived from the Equity Rules 49 and 51 (Evidence Taken Before Examiners, Etc.); 52 (Attendance of Witnesses Before Commissioner, Master, or Examiner); 59 (Reference to Masters – Exceptional, Not Usual); 60 (Proceedings Before Master); 61 (Master's Report – Documents Identified but not Set Forth); 61 1/2 (Master's Report – Presumption as to Correctness – Review); 62 (Powers of Master); 63 (Form of Accounts Before Master); 65 (Claimants Before Master Examinable by Him); 66 (Return of Master's Report – Exceptions – Hearing); and 68 (Appointment and Compensation of Masters). *See* 12A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure App. C (2003) (Advisory Committee Notes to Rule 53 as originally promulgated).
4. Fed. R. Civ. P. 53(b) (effective until Dec. 1, 2003); *see, e.g.*, *In re Armco, Inc.*, 770 F.2d 103, 105 (8th Cir. 1985) ("The courts have tended to read [Rule 53] somewhat narrowly, closely circumscribing the range of circumstances in which reference to a master is appropriate.").
5. Fed. R. Civ. P. 53(b) (effective until Dec. 1, 2003).
6. *See, e.g.*, *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1962) (stating that appointment of a master to assist the jury was appropriate "where the legal issues are too complicated for the jury adequately to handle alone"); *United States v. Horton*, 622 F.2d 144, 148 (5th Cir. 1980) (holding that reference to a master of a Medicare provider reimbursement case was appropriate when the "legal issues . . . were too complex for the jury of laymen to resolve without assistance"); *Burgess v. Williams*, 302 F.2d 91, 94 (4th Cir. 1962) (holding that use of master to aid jury in

bankruptcy case was proper since the issues were complicated and 1,500 separate transactions had to be examined); *Bd. of Educ. v. CNA Ins. Co.*, 113 F.R.D. 654, 655 (S.D.N.Y. 1987) (finding that a master was necessary to determine complicated issues involving reasonable value of substantial legal services and defense costs that, with volume of evidence, were too complicated for jury).

7. Fed. R. Civ. P. 53(c) (effective until Dec. 1, 2003).
8. Fed. R. Civ. P. 53(e)(3) (effective until Dec. 1, 2003).
9. *See Jackson v. Local Union 542, Int'l Union of Operating Eng'rs*, 155 F. Supp. 2d 332, 337 (E.D. Pa. 2001) ("Master's findings are simply admissible evidence to be considered by the jury, with the jury remaining the ultimate arbiter of fact.").
10. Fed. R. Civ. P. 53(b) (effective until, Dec. 1, 2003).
11. 352 U.S. 249 (1957).
12. *Id.* at 259.
13. *Id.*
14. *Id.*
15. *Id.*
16. "Exceptional conditions," however, were not required for the appointment of masters in all proceedings. Rule 53 specifically provided that in cases of accounting and difficult computation of damages, reference to a special master is warranted. *See, e.g.*, *Roy v. County of Lexington*, 141 F.3d 533, 549 (4th Cir. 1998) (affirming appointment of master to determine damages in Fair Labor Standards Act case); *Stauble v. Warrob, Inc.*, 977 F.2d 690, 694 (1st Cir. 1992) (stating that "masters are most helpful where complex quantitative issues bearing on damages must be resolved"); *Arthur Murray, Inc. v. Oliver*, 364 F.2d 28, 32–33 (8th Cir. 1966) (holding there was no abuse of discretion regarding appointment of special master to make an accounting analysis and compilation in suit for treble damages under antitrust statutes). A district court's discretion was also considerably greater in referring matters of computation. *See, e.g.*, *Southern Agency Co. v. LaSalle Cas. Co.*, 393 F.2d 907, 914 (8th Cir. 1968); *United States v. Conservation Chem. Co.*, 106 F.R.D. 210, 218 (W.D. Mo. 1985). In this regard, it has been suggested that reference of computation matters are particularly suited for the expertise of special masters because accounting and computation of damages requires "[n]o peculiar judicial talent or insight . . . and errors in accounting lend themselves to detection and correction on review." Irving R. Kaufman, *Masters in the Federal Courts: Rule 53*, 58 Colum. L. Rev. 452, 457 (1958). Despite the value of masters in accounting matters, a court's discretion was not unlimited and reference was restricted to complicated matters. *See Bowen Motor Coaches, Inc. v. N.Y. Cas. Co.*, 139 F.2d 332, 334 (5th Cir. 1943) (stating that in matters of account, matters must be complex and time-consuming).
17. *See, e.g.*, *Ex Parte Peterson*, 253 U.S. 300, 312 (1920) ("Courts have (at least in the absence of legislation to the contrary) inherent . . . authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause."). *Stauble*, 977 F.2d at 695 (stating, without discussion, that Rule 53 permits the appointment of special masters to oversee preparatory issues); *Active Prods. Corp. v. A.H. Choitz & Co.*, 163 F.R.D. 274, 282 (N.D. Ind. 1995) (citing inherent authority of court to appoint special masters); *United States v. Int'l Bus. Machs. Corp.*, 76 F.R.D. 97, 98 (S.D.N.Y. 1977) (appointing pursuant to Rule 53 an examiner to report to court as to information defendant possessed and produced, to supervise discovery and to conduct appropriate hearing); *Omnium Lyonnais D'Etancheite et Revetement Asphalte v. Dow Chem. Co.*, 73 F.R.D. 114, 118 (C.D. Cal. 1977) (relying on Rule 53 for authority to appoint master to supervise all discovery matters).
18. The practice of employing masters to oversee discovery is not a uniquely modern practice. Judge Learned Hand, while a district judge, indicated in 1917 that this practice was permissible. *Pressed Steel Car Co. v. Union Pacific R.R. Co.*, 241 F. 964, 967 (D.N.Y. 1917) (stating that the most convenient way to conduct discovery would be for the parties to agree upon a master).
19. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 967 (9th Cir. 1999) (permitting reference to special master of all pre-trial matters); *In re Bituminous Coal Operators' Ass'n*, 949 F.2d 1165, 1168–69 (D.C. Cir. 1991) (concluding that it is improper for district court to refer dispositive matters, but proper to refer pre-trial preparation matters); *In re United States Dep't of Defense*, 848 F.2d 232, 236–37 (D.C. Cir. 1988) (permitting reference of pre-trial matters); *In re Armco, Inc.*, 770 F.2d 103, 104–05 (8th Cir. 1985) (holding that litigation did not present exceptional condition to warrant reference to master of trial on merits but that master's broad authority to supervise and guide pre-trial matters was permissible); *Mercer v. Gerry Baby Prods. Co.*, 160 F.R.D. 576, 577–79 (S.D. Iowa 1995) (appointing master to supervise discovery because disagreement and accusations among lawyers created a chaotic atmosphere for discovery and misuse of discovery motions); 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2605, at 664 (2d ed. 1994) (stating that the "use of a special master to supervise discovery still may be appropriate and useful in unusual cases"); Manual for Complex Litigation (Third) §§ 21.424, 21.43 (1995).
20. Manual for Complex Litigation (Third) § 20.14 (1995).
21. *See, e.g.*, *Mobil Oil Corp. v. Altech Indus., Inc.*, 117 F.R.D. 650, 652 (C.D. Cal. 1987) (appointing master in order to supervise discovery due to conflicting factual evidence, high volume of documentary evidence, and anticipated addition of new parties by defendant); *In re "Agent Orange" Prod. Liab. Litig.*, 94 F.R.D. 173, 174 (E.D.N.Y. 1982) (appointing special master because discovery involved production of millions of documents). *But see Prudential Ins. Co. v. United States Gypsum Co.*, 991 F.2d 1080, 1087 (3d Cir. 1993) (concluding that "[n]either the volume of work generated by a case nor the complexity of that work will suffice to meet the 'exceptional condition' standard promulgated by Rule 53").
22. *See, e.g.*, *Omnium Lyonnais*, 73 F.R.D. at 117 (appointing master with technical and legal background to oversee discovery requiring individual review of hundreds of thousands of documents containing technical information); *Costello v. Wainwright*, 387 F. Supp. 324, 325 (M.D. Fla. 1973) (appointing special master because of highly technical nature of case and need for specialized medical knowledge).
23. *See, e.g.*, *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 380 (D.D.C. 1978) (referring to special master responsibility for monitoring production of over 700 documents and ruling on complicated privilege claims); *Fisher v. Harris,*

Upham & Co., 61 F.R.D. 447, 449 (S.D.N.Y. 1973) (appointing master to supervise discovery in complex securities action).

24. *See, e.g.*, *Dep't of Defense*, 848 F.2d at 235–36 (upholding the district court's order and stating that due to the practical difficulties of reviewing documents, the case amounted to an exceptional condition warranting the appointment of a master); *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973) ("[I]t is within the discretion of a trial court to designate a special master to examine documents. . . . This special master would not act as an advocate; he would, however, assist . . . by assuming much of the burden of examining and evaluating voluminous documents that currently falls on the trial judge."); *United States v. AT&T*, 461 F. Supp. 1314, 1346–49 (D.D.C. 1978) (appointing master to make preliminary rulings on all claims of work product and other privilege asserted during discovery).
25. 123 F.R.D. 62 (W.D.N.Y. 1988).
26. *Id.* at 63.
27. Jerome I. Braun, *Special Masters in Federal Court*, 161 F.R.D. 211, 216 (1995).
28. The practice of using special masters after liability has been established stems from the use of masters in equity. *See* Linda J. Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. Rev. 1297, 1321–23 (1975).
29. *See generally Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 481–82 (1986) (permitting appointment of master to ensure union's compliance with court's order to establish an affirmative action program); *Stauble*, 977 F.2d at 695 (recognizing use of master in connection with remedy-related issues).
30. Manual for Complex Litigation (Third) § 30.47 (1995); *see, e.g.*, *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1465 (D. Haw. 1995) (appointing special master to supervise taking depositions of 137 randomly selected class members to distribute award of compensatory damages to victims of human rights violations); *McLendon v. Continental Group, Inc.*, 749 F. Supp. 582, 612 (D.N.J. 1989) (appointing master in ERISA case to aid parties in post-liability settlement of damages for 5,000 claimants).
31. *See, e.g.*, *Williams v. Lane*, 851 F.2d 867, 884 (7th Cir. 1988) (approving appointment of special master due to continued failure to comply with order); *Nat'l Org. for Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 542–45 (9th Cir. 1987) (approving appointment of master to monitor compliance with injunction); *N.Y. State Ass'n for Retarded Children v. Carey*, 706 F.2d 956, 962–65 (2d Cir. 1983) (affirming reference to special master for monitoring defendant's compliance with consent decree entered in suit challenging conditions of institution for mentally retarded); *Hart v. Cmty. Sch. Bd.*, 383 F. Supp. 699, 764–69 (E.D.N.Y. 1974) (appointing law professor specializing in urban renewal as special master in desegregation case), *aff'd*, 512 F.2d 37 (2d Cir. 1975).
32. *In re Pearson*, 990 F.2d 653, 657–60 (1st Cir. 1993). *But see United States v. Microsoft Corp.*, 147 F.3d 935, 954 (D.C. Cir. 1998) (holding non-consensual appointment of a special master to consider propriety of permanent injunction was not proper and amounted to a complete abdication of the district court's Article III responsibilities).
33. The text of the amended Rule 53 (effective December 1, 2003) is set forth in the accompanying sidebar, see pages 20–21.
34. *See generally* Fed. R. Civ. P. 53.
35. Fed. R. Civ. P. 53(a)(1)(A).
36. Notes of Advisory Committee on 2003 Amendments, Fed. R. Civ. P. 53.
37. Fed. R. Civ. P. 53(a)(1)(B).
38. Fed. R. Civ. P. 53(a)(1)(B)(i).
39. Notes of Advisory Committee on 2003 Amendments, Fed. R. Civ. P. 53.
40. *Id.*
41. Fed. R. Civ. P. 53(a)(1)(B)(ii).
42. Fed. R. Civ. P. 53(a)(1)(A).
43. *Id.*
44. Notes of Advisory Committee on 2003 Amendments, Fed. R. Civ. P. 53.
45. Fed. R. Civ. P. 53(a)(1)(C).
46. Notes of Advisory Committee on 2003 Amendments, Fed. R. Civ. P. 53. As to pre-trial functions, the Advisory Committee noted that cases involving important public issues or many parties may not be particularly appropriate for a master's involvement and recommended that in those situations, judicial functions should be controlled by the court.
47. *Id.*
48. *Id*.
49. Fed. R. Civ. P. 53(b)(2).
50. *Id.*
51. Fed. R. Civ. P. 53(c).
52. Fed. R. Civ. P. 53(g)(1).
53. Fed. R. Civ. P. 53(g)(2).
54. Fed. R. Civ. P. 53(g)(1).
55. In this regard the Advisory Committee noted that "[c]lear-error review is more likely to be appropriate with respect to findings that do not go to the merits of the underlying claims or defenses, such as findings of fact bearing on a privilege objection to a discovery request." Notes of Advisory Committee on 2003 Amendments, Fed. R. Civ. P. 53.
56. Fed. R. Civ. P. 53(g)(3). The Advisory Committee's Note emphasizes that the court is free to decide the facts (as well as legal conclusions) *de novo* even absent an objection of the parties. Notes of Advisory Committee on 2003 Amendments, Fed. R. Civ. P. 53.
57. Fed. R. Civ. P. 53(g)(4).
58. Fed. R. Civ. P. 53(g)(5).
59. It should be noted that the court can, sua sponte, withdraw its consent to a stipulation for finality or clear-error review and may reopen the opportunity to object. Fed. R. Civ. P. 53(g)(2); Notes of Advisory Committee on 2003 Amendments, Fed. R. Civ. P. 53.

State Budget Shortfall in 2003 Was Impetus Behind Many Changes Affecting Trusts and Estates

BY JOSHUA S. RUBENSTEIN

The state's unprecedented budget shortfall in 2003 was the impetus behind many of the changes during the past year to the laws affecting the Trusts and Estates practice. Filing fees, attorney registration fees, and tax rates were increased as part of an overall attempt to cover the shortfall.

The remaining changes dealt with notice and thresholds in abandoned property proceedings, permissible acts by trusts and trustees, standby guardianships, appointment of fiduciaries, the right to a jury trial in Surrogate's Court proceedings, small claims assessment review of homes held in trusts, amendments to the state's 529 college savings program and new environmental liability protection for certain fiduciaries and beneficiaries. A summary of the changes follows.

Abandoned Property Law

Banking Organizations

Subdivision 1(h)(iii) of § 300 of the Abandoned Property Law (APL), dealing with mailing of notice to apparent owners of securities, was amended to delete the reference to now-repealed subdivision 6 of § 301. This change took effect immediately.[1]

Subdivision 6 of APL § 301, formerly providing for annual notice to owners of abandoned property, was repealed. The repeal took effect immediately.[2]

Miscellaneous Property

A new subdivision 4 was added to APL § 1315 to provide that any check issued by New York State that remains unpaid after one year from issuance shall be deemed abandoned property. This change took effect April 1, 2003.[3]

Subdivision 7 of APL § 1317, formerly providing for notice by title companies to owners of security deposits, has been repealed. The repeal took effect immediately.[4]

General Provisions

Subdivision 2(a) of APL § 1406 was amended by (a) raising the threshold amount or value of claims requiring a court proceeding from $1,500 to $5,000, and (b) requiring that the court that had original jurisdiction of the underlying matter must issue the order. The change took effect immediately.[5]

Subdivision 2(b) of APL § 1406 was amended by (a) providing that where the amount or value of the claim is less than $5,000, it shall be determined by the state comptroller; and (b) adding that the state comptroller's decision that there is insufficient information to establish a claim does not mean that the claim has been denied. The change took effect immediately.[6]

A new § 1422 has been added to the APL. It requires that any holder of unclaimed property not otherwise required to perform owner notification mailings send, not fewer than 90 days before the reporting date of the property, written notice by first-class mail to each person listed as owner of the property. The holder does not have to send written notice if the holder does not have (a) an address for the owner, or (b) the current address of the owner. Where notice is otherwise required, for unclaimed property valued at more than $1,000, the holder must send, not fewer than 60 days before the reporting date of the property, a second written notice by certified mail with a return receipt. The holder does not have to send a second written notice if: (a) the holder has received a claim from the owner; or (b) the first notice was returned as undeliverable. Both the first written notice and the second written notice should notify the owner that the property will be reported as abandoned property if the owner or an agent of the owner fails to claim it before the remittance date. The change took effect immediately.[7]

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Estates, Powers and Trusts Law

Charitable Trusts

Section 8-1.8 of the Estates, Powers and Trusts Law (EPTL) was amended to permit charitable split-interest trusts to retain excess business holdings or make jeopardizing investments, which was previously prohibited by EPTL 8-1.8 but allowed by the Internal Revenue Code, where (a) there is no income beneficiary who is a charity with more than 60% ownership of the trust assets, or (b) the charity's only interest in the trust is as a remainderman. It has also been amended to make certain stylistic changes. The amendment took effect immediately.[8]

Powers

EPTL 10-10.1 was amended to permit a trustee to exercise the power to make distributions to himself or herself as beneficiary, where (a) the trustee is also the grantor and the trust is revocable; (b) the power is to provide for the beneficiary's health, education, maintenance or support under Internal Revenue Code §§ 2041 and 2514; or (c) the trust instrument by express reference to this section expressly so provides. This amendment took effect immediately.[9]

SCPA 502 was amended to extend the right of a jury trial, if duly demanded, to proceedings in which the validity of a revocable lifetime trust is contested.

Judiciary Law

Fees

Section 468-a of the Judiciary Law was amended by raising the biennial attorney registration fee from $300 to $350. The new fee took effect July 15, 2003.[10]

Surrogate's Court Procedure Act

Trials and Hearings

Section 502 of the Surrogate's Court Procedure Act (SCPA) was amended to extend the right of a jury trial, if duly demanded, to proceedings in which the validity of a revocable lifetime trust is contested, provided that the proceedings (a) commence after the death of the creator and (b) raise a controverted question of fact. The amendment took effect immediately and applies to proceedings pending on or commenced after the effective date.[11]

Letters

SCPA 709 was amended to provide that a nominated co-fiduciary has standing to file objections to the grant of letters to a co-fiduciary. The amendment eliminates the anomaly that a co-fiduciary can have a co-fiduciary removed once the co-fiduciary has been appointed (pursuant to SCPA 711) but lacks standing to oppose such an appointment in the first place. The amendment took effect immediately.[12]

Guardians

SCPA 1726(1) was amended (a) to expand the definition of standby guardian to include individuals appointed to succeed not only the infant's parent but also the infant's legal guardian, legal custodian or primary caretaker upon death, incapacity, debilitation or death; (b) to add a definition of "legal guardian," meaning the court-appointed guardian of the infant's person and/or property; and (c) to make certain other conforming, definitional amendments. This change took effect January 1, 2004.[13]

SCPA 1726(2) was amended to make all of the provisions of Article 17 applicable to standby guardianships. The change took effect January 1, 2004.[14]

SCPA 1726(3) was amended to (a) include the petitioner's consent as one of the triggering events for a standby guardian's authority to act; (b) permit the petitioner's death to be established other than by a death certificate; and (c) delete the last sentence of subdivision 3(d)(ii), because it is inconsistent with the statutory language allowing the parent/*or* legal guardian, legal custodian or primary caretaker the option of specifying which event(s) will trigger his or her authority to act. These changes took effect January 1, 2004.[15]

SCPA 1726(4) was amended to (a) update the statutory form of designation of standby guardian to reflect these changes; (b) provide that a designation of standby guardian will be effective (even if made in another state) as long as it was validly executed in the jurisdiction (i) where the designator was domiciled at the time of execution, (ii) where it was executed or (iii) where the designator is domiciled at the time the designation becomes effective; (c) provide that the most recent designation is given effect when there are conflicting designations; and (d) include death as one of the triggering events for a standby guardian's authority to act. These changes took effect January 1, 2004.[16]

SCPA 1726(5) was amended to add legal guardians, legal custodians and primary caretakers as individuals who must receive notice of a standby guardian's petition for appointment. This change took effect January 1, 2004.[17]

SCPA 1726(6) was amended to add legal guardians, legal custodians and primary caretakers as individuals whose incapacity or debilitation must be established in writing by an attending physician. This change took effect January 1, 2004.[18]

SCPA 1726(7) was amended to add legal guardians, legal custodians and primary caretakers as individuals whose preexisting rights in such capacity are not diminished by the appointment of the standby guardian. This change took effect January 1, 2004.[19]

SCPA 1726(8) was amended to make clear that the standby guardian is appointed pursuant to SCPA 1726. This change took effect January 1, 2004.[20]

Mentally Retarded Persons

SCPA 1750-b was amended to allow not-for-profit agencies certified, licensed and regulated by the Office of Mental Retardation and Developmental Disabilities that have been appointed as Article 17-A guardians to make healthcare decisions for mentally retarded persons. The amendment took effect immediately.[21]

Exhibit A: Surrogate's Court Fees

Service	Statutory Authority	Previous Amount	New Amount
Recording an instrument settling an account	SCPA 2402(4)	$5 per page	$6 per page
Fee schedule for probate or administration	SCPA 2402(7)	Estate value	
		* less than $10,000: $35	$45
		* $10,000 – $20,000: $60	$75
		* $20,000 – $50,000: $170	$215
		* $50,000 – $100,000: $225	$280
		* $100,000 – $250,000: $335	$420
		* $200,000 – $500,000 $500	$625
		* Over $500,000 $1000	$1,250
File petition to:	SCPA 2402(8)(a)		
* Punish for contempt		$25	$30
* Suspend letters of fiduciary		$60	$75
* Suspend letters of custodian		$25	$30
* Fiduciary resigns		$25	$30
* Suspend fiduciary powers in war		$25	$30
* Produce will		$15	$20
* Will construction		$60	$75
* Determine right of election		$60	$75
* Appoint trustees		$35	$45
* Release versus State		$40	$50
* Guardian appointment		$15	$20
* Open safe deposit box		$15	$20
* Proceedings against fiduciary		$15	$20
* Proceedings by fiduciary		$60	$75
* Advice and directions		$60	$75
* Continue business		$35	$45
* Corp. trustee comp.		$7	$10
* Compel fiduciary accounting		$25	$30
File demand for jury	SCPA 2402(9)(i)	$120	$150
File objections to probate	SCPA 2402(9)(ii)	$120	$150
Note of issue	SCPA 2402(9)(iii)	$35	$45
Objection or answer in non-probate proceeding	SCPA 2402(9)(iv)	$60	$75
Will for safekeeping	SCPA 2402(9)(v)	$35	$45
Bond (less than $10,000)	SCPA 2402(9)(vi)	$15	$20
Bond (more than $10,000)	SCPA 2402(9)(vi)	$25	$30
Transcript of decree	SCPA 2402(10)	$15	$20
Certificate of letters	SCPA 2402(11)	$5	$6
Copy of will	SCPA 2402(12)(a)	$5 per page	$6 per page
Authenticating copy	SCPA 2402(12)(b)	$15	$20
Search or certify record under 25 years	SCPA 2402(13)	$25	$30
Search or certify record over 25 years	SCPA 2402(13)	$70	$90
Produce papers under subpoena within county	SCPA 2402(14)(a)	$25	$30
Produce papers under subpoena in other county	SCPA 2402(14)(b)	$0.25 per day	$0.30 per day
Recording an instrument	SCPA 2402(15)(a)	$6 per page	$8 per page
File authenticated copy of foreign will	SCPA 2402(15)(b)	$6 per page	$8 per page
Tax bill of costs	SCPA 2402(15)(c)	$10 per page	$15 per page

Court Fees

SCPA 2402 was amended to increase many of the user fees for the Surrogate's Court. The new fees are listed in Exhibit A (see page 28). The new fees took effect July 15, 2003.[22]

Real Property Tax Law

A new subdivision 9 was added to Real Property Tax Law § 730 in response to the increase in the placement of homes in trusts. A requirement for small claims assessment review of homes is that they be owner-occupied. Because a trustee is the legal owner of trust property, unless the trustee resides with the trust beneficiary the home is no longer owner-occupied. In some instances, trust beneficiaries have been denied access to small claims assessment review even though they are title occupants of their homes. The subdivision makes trust beneficiaries owners of their homes within the context of small claims assessment review. The subdivision took effect immediately.[23]

Tax Law

Estimated Tax for Passthrough Entities

A new paragraph 4 was added to subsection (c) of Tax Law § 658. The paragraph requires partnerships, K limited liability companies and S corporations to pay estimated taxes on New York source income for their non-resident partners, members and shareholders. The paragraph took effect immediately and applies to taxable years ending after December 31, 2002. Estimates due pursuant to this change were considered timely if paid by September 15, 2003.[24]

A new paragraph 11 was added to Tax Law § 197-b. The paragraph requires that any amount paid under paragraph 4 of subsection (c) of Tax Law § 658 is to be applied against the estimated tax of the taxpayer for the taxable year shown on the declaration filed under Tax Law § 197-a. The paragraph took effect immediately and applies to taxable years ending after December 31, 2002.[25]

A new paragraph 2 was added to subsection (d) of Tax Law § 213-b. The paragraph requires that any amount paid under paragraph 4 of subsection (c) of Tax Law § 658 is to be applied against the estimated tax of the taxpayer for the taxable year shown on the declaration filed under Tax Law § 213-a. The paragraph took effect immediately and applies to taxable years ending after December 31, 2002.[26]

A new paragraph 2 was been added to subsection (d) of Tax Law § 1461. The paragraph requires that any amount paid under paragraph 4 of subsection (c) of Tax Law § 658 is to be applied against the estimated tax of the taxpayer for the taxable year shown on the declaration filed under Tax Law § 1460. The paragraph took effect immediately and applies to taxable years ending after December 31, 2002.[27]

A new paragraph 2 was added to subsection (d) of Tax Law § 1514. The paragraph requires that any amount paid under paragraph 4 of subsection (c) of Tax Law § 658 is to be applied against the estimated tax of the taxpayer for the taxable year shown on the declaration filed under Tax Law § 1513. The paragraph took effect immediately and applies to taxable years ending after December 31, 2002.[28]

A new subsection (i) was added to Tax Law § 686. The subsection provides that when an entity required to pay estimated tax under paragraph 4 of subsection (c) of Tax Law § 658 overpays, the entity receives a refund of the excess of the overpayment. The subsection took effect immediately and applies to taxable years ending after December 31, 2002.[29]

Exhibit B: Trusts and Estates Tax Rates

2003	
AGI less than $8000	4%
$8000 – $11,000	$320 + 4.5% over $8000
$11,000 – $13,000	$455 + 5.25% over $11,000
$13,000 – $20,000	$560 + 5.9% over $13,000
$20,000 – $100,000	$973 + 6.85% over $20,000
$100,000 – $500,000*	$6453 + 7.5% over $100,000
Over $500,000	$36,453 + 7.7% over $500,000

2004	
AGI less than $8000	4%
$8000 – $11,000	$320 + 4.5% over $8000
$11,000 – $13,000	$455 + 5.25% over $11,000
$13,000 – $20,000	$560 + 5.9% over $13,000
$20,000 – $100,000	$973 + 6.85% over $20,000
$100,000 – $500,000	$6453 + 7.375% over $100,000
Over $500,000	$35,953 + 7.7% over $500,000

2005	
AGI less than $8000	4%
$8000 – $11,000	$320 + 4.5% over $8000
$11,000 – $13,000	$455 + 5.25% over $11,000
$13,000 – $20,000	$560 + 5.9% over $13,000
$20,000 – $100,000	$973 + 6.85% over $20,000
$100,000 – $500,000	$6453 + 7.25% over $100,000
Over $500,000	$35,453 + 7.7% over $500,000

*$125,000-$500,000, for heads of households
$150,000-$500,000, for married taxpayers

Fees

Tax Law § 658 was amended by (a) increasing the multiplier for the LLC filing fee from $50 to $100, and (b) raising the bounds of the LLC filing fee from $325 and $10,000 to $500 and $25,000 (*i.e.*, the filing fee can be neither less than $500 nor greater than $25,000). The new multiplier and bounds took effect immediately and apply to taxable years beginning in 2003 and 2004; they expire on January 1, 2005.[30]

Rates

Tax Law § 601 was amended by raising the tax rates for trusts and estates. The new rates are listed in Exhibit B (see page 29). The new rates are effective immediately.[31]

Two temporary tax rates for personal income have been added for 2003 through 2005. The first rate, for 2003, is 7.5% of taxable income if Adjusted Gross Income (AGI) is above $100,000 but less than $500,000 for single or married taxpayers filing separately; above $125,000 but less than $500,000 for heads of households; and above $150,000 but less than $500,000 for married taxpayers filing jointly. In 2004 the 7.5% rate is reduced to 7.375% for all filers. The rate is reduced further in 2005 for all filers to 7.25%. The second rate is 7.7% for all filers if AGI exceeds $500,000. The second rate stays at 7.7% for 2003 through 2005. The new rates took effect immediately and are scheduled to expire in 2006.[32]

Education Law

Education Law §§ 695-b and 695-e were amended to make several changes to the state's 529 college choice tuition savings program. The changes include (a) permitting a person acting as fiduciary or agent on behalf of a trust, estate, partnership or corporation, in addition to an individual, to be an account owner; (b) simplifying necessary procedures for making withdrawals; (c) increasing the cumulative contribution limit per designated beneficiary from $100,000 to a "maximum account balance" that is currently $235,000; and (d) eliminating the three-year minimum holding period requirement. These changes took effect immediately.[33]

Environmental Conservation Law

The New York State Superfund Refinancing and Brownfield Cleanup Act of 2003 amends the Environmental Conservation Law (ECL) to ensure the most efficient utilization of public and private funds for the investigation and remediation of contaminated sites. Specifically, it adds a new section ECL § 27-1323 to provide fiduciaries acting solely in fiduciary capacities with new liability exemptions and caps. Affirmative defenses are also provided to persons who acquired contaminated property by inheritance or bequest and have been exercising due care with respect to the hazardous waste. The affirmative defenses are consistent with federal law. These changes took effect immediately.[34]

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1. 2003 N.Y. Laws ch. 62, pt. P. § 2. (Governor's veto S1406-B, A2106-B overridden on May 15, 2003).
2. 2003 N.Y. Laws ch. 62, pt. P. §§ 1, 8.
3. 2003 N.Y. Laws ch. 62, pt. P. §§ 3, 8.
4. 2003 N.Y. Laws ch. 62, pt. P. §§ 4, 8.
5. 2003 N.Y. Laws ch. 62, pt. P. §§ 5, 8.
6. *Id*.
7. 2003 N.Y. Laws ch. 62, pt. P. §§ 6, 8.
8. 2003 N.Y. Laws ch. 639 (signed on October 7, 2003).
9. 2003 N.Y. Laws ch. 633 (signed on September 30, 2003).
10. 2003 N.Y. Laws ch. 62, pt. J. §§ 17, 38.
11. 2003 N.Y. Laws ch. 631 (signed on September 30, 2003).
12. 2003 N.Y. Laws ch. 612 (signed on September 30, 2003).
13. 2003 N.Y. Laws ch. 632, §§ 1, 2 (signed on September 30, 2003).
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*.
18. *Id*.
19. *Id*.
20. *Id*.
21. 2003 N.Y. Laws ch. 232 (signed on July 29, 2003).
22. 2003 N.Y. Laws ch. 62, pt. J, §§ 30, 38.
23. 2003 N.Y. Laws ch. 363 (signed on August 19, 2003).
24. 2003 N.Y. Laws ch. 62, pt. L3, §§ 1, 7, 8.
25. 2003 N.Y. Laws ch. 62, pt. L3, §§ 2, 8.
26. 2003 N.Y. Laws ch. 62, pt. L3, §§ 3, 8.
27. 2003 N.Y. Laws ch. 62, pt. L3, §§ 4, 8.
28. 2003 N.Y. Laws ch. 62, pt. L3, §§ 5, 8.
29. 2003 N.Y. Laws ch. 62, pt. L3, §§ 6, 8.
30. 2003 N.Y. Laws ch. 62, pt. L3, §§ 1, 2.
31. 2003 N.Y. Laws ch. 62, pt. Y3.
32. *Id*.
33. 2003 N.Y. Laws ch. 593 (signed on September 22, 2003).
34. 2003 N.Y. Laws ch. 1, pt. E, §§ 9, 13 (signed on October 7, 2003).

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Grutter and *Gratz* Decisions Underscore Pro-Diversity Trends In Schools and Businesses

BY JOHN E. HIGGINS

Over the past several months, old and new ideas about diversity – especially racial and ethnic diversity – have taken on new importance for law schools and other institutions of higher education, as well as for the nation's employers. In light of several recent pro-diversity developments nationally and closer to home in New York, the same must also be said for lawyers, private law firms, and state and local bar associations.

These developments include the U.S. Supreme Court's already historic decisions in *Grutter v. Bollinger*,[1] and *Gratz v. Bollinger*,[2] both decided by narrow majorities during its 2002–2003 term, which affirmed that racial and ethnic diversity in law schools and institutions of higher education are important, indeed constitutionally compelling, educational and national interests. The long-term consequences of these decisions are yet to be determined, but talk of "diversity" in all its many stripes, shapes, colors and hues has replaced talk about "affirmative action" in the new, more global parlance of the Court, in our nation's schools, and in businesses across the country.

Other recent developments raising the diversity bar for the entire legal profession include the Equal Employment Opportunity Commission's cautiously optimistic 2003 report on Diversity in Law Firms ("2003 Diversity Report"),[3] and the recent challenge by the EEOC's current chair, Cari M. Dominguez. Speaking recently at a national conference of the American Bar Association, she said, "We must all make a constant, unwavering effort to ensure that our nation's law firms are open and inclusive to all individuals."[4] She also pointed out, as graphically illustrated in the EEOC's 2003 Diversity Report, that although significant strides have been made in the employment of women and minority attorneys by private law firms over the past 20 years (especially at large firms), as a profession, "we must also be mindful of how far we have to go."[5]

On November 10, 2003, the New York State Bar Association published a policy on diversity in its membership, governance, and leadership, which is likely to be the harbinger of even greater state-wide diversity initiatives. Similar efforts are also under way at the American Bar Association, which has long been committed to a policy of racial and ethnic diversity and to a goal of promoting the full and equal participation of minorities and women in the profession,[6] and in local bar associations.[7]

All of these pro-diversity developments are being driven by changing demographics affecting the nation, our schools and workplaces, and the military. At the same time, the growing diversity consciousness is being fueled by a wider recognition and acceptance from America's biggest businesses, and an increasing number of law firms, of the view that workplace diversity is good for competition and the corporate bottom line.[8] In other words, as businesses have come to associate diversity with greater competitiveness, new business, and even greater profits, colleges, universities, and law schools, and now lawyers, law firms, and bar associations are increasingly following suit.[9]

The central premise of this article is that if the legal profession – and private law firms in particular – fail to heed these calls and achieve greater diversity, the role of lawyers in an increasingly global economy will be marginalized and, in the words of the ABA's most recent

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past president, William G. Paul, "put at risk our profession's historic role as the connecting link between our society and the rule of law."[10]

Described here are steps that can be taken to avoid these risks within the parameters laid down by the Supreme Court during the past 25 years, together with a number of specific proactive efforts developed and suggested by American businesses, bar associations and diversity experts for those interested in "moving from lip service to diversity."[11]

Gratz and *Grutter* Declare Diversity A Compelling Interest

In *Gratz* and *Grutter*, both decided on June 23, 2003, the Supreme Court strictly scrutinized and resolved 14th Amendment/Equal Protection challenges by classes of white student applicants to the pro-diversity admissions policies at the University of Michigan Law School (*Grutter*), and at one of the University of Michigan's undergraduate colleges (*Gratz*).

Majorities in both* Grutter *and* Gratz *acknowledged that colleges and universities have a "compelling interest in securing the educational benefits of a diverse student body."

The 6–3 majority in *Gratz,* in an opinion written by Chief Justice Rehnquist, struck down a quota-like point system under which qualified underrepresented minority applicants (Blacks, Hispanics, and Native Americans) were automatically awarded 20 points (out of a possible 150) in the admissions process based solely on their race or national origin.[12] According to the Court, this use of race and ethnicity in the university's admissions program was unconstitutional because it was not tailored narrowly enough to any compelling governmental interest and failed to afford individualized consideration for all applicants.[13]

In the *Grutter* decision affecting the law school, however, a 5–4 majority of the Court upheld the use of race as a "plus" to be considered together with other factors in the law school's more flexible and holistic admissions process. When race and ethnicity are used in such "a flexible, nonmechanical way" and all qualified applicants compete for admission and are considered individually, the *Grutter* Court held that the 14th Amendment is not violated.[14] The *Grutter* Court also upheld the law school's use of numerical goals (not quotas or set-asides) designed to achieve an undefined "critical mass" of minority students, observing, "'[s]ome attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota."[15]

Majorities in both *Grutter* and *Gratz* expressly acknowledged that colleges and universities have a "compelling interest in securing the educational benefits of a diverse student body."[16] For this proposition, both *Gratz* and *Grutter* relied on and endorsed the Court's 1978 decision in *Regents of University of California v. Bakke*, where a narrow majority led by Justice Powell held that "the attainment of a diverse student body… is a constitutionally permissible goal for an institution of higher education."[17]

In both *Gratz* and *Grutter*, the Court also expressly endorsed the race-plus admissions plan at Harvard College, which was approvingly referred to by Justice Powell in *Bakke* more than 25 years ago.[18] Under that plan, as Justice Powell noted in *Bakke*, the legitimate interest of educational diversity "may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."[19]

Both *Grutter* and *Gratz* thus provide renewed vigor and a clearer road map for the use of such race-conscious and ethnicity-conscious programs in law schools and other institutions of higher education.

The "Business Case" Made in *Grutter*

The decisions in *Grutter* and *Gratz* do not specifically address the limits of what law firms and other private employers not subject to the dictates of the 14th Amendment may do to increase their own racial and ethnic diversity. Nor do *Grutter* and *Gratz* alter the discretion afforded to private employers for many years under Title VII of the Civil Rights Act of 1964 to adopt voluntary, race- and sex-conscious affirmative action plans to eliminate a manifest imbalance in traditionally segregated job categories.[20]

These voluntary private employment practices, including hiring and promotion policies modeled after the Harvard Plan cited with approval in *Bakke* and endorsed again in *Grutter*, remain lawful – and fully consistent with Title VII – when narrowly tailored and supported by a sufficient factual predicate. Indeed, as long as voluntary affirmative action policies and plans are temporary in nature and do not unnecessarily diminish the rights of non-minorities, these types of efforts to diversify private workplaces were upheld by the Supreme Court more than 15 years ago in *Johnson v. Transportation Agency*.[21] Neither *Grutter* nor *Gratz* curtails this important management prerogative.

Nonetheless, *Grutter* made the "business case" for diversity in America's workplaces clearer than it has

ever been. Indeed, the *Grutter* decision expressly acknowledged that "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[22] Thus, the majority decision written by Justice Sandra Day O'Connor in *Grutter* states:

> Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide training and education necessary to succeed in America.[23]

This position was also taken by 65 of America's largest businesses in a joint *amicus* brief in support of the law school's race-plus admissions policy. The companies included Xerox, General Electric, Eastman Kodak, Lockheed Martin, John Hancock Financial Services, Microsoft, Mitsubishi Motors, Pfizer, The Boeing Company, Coca-Cola, PepsiCo, Nike, Reebok, Sara Lee, Proctor & Gamble, Shell Oil, Chevron Texaco, DaimlerChrysler, American Express, Dow Chemical, General Mills, Johnson & Johnson, Kraft Foods, Kellogg, Whirlpool, United Airlines, PricewaterhouseCoopers, Bank One, and PPG Industries. Their brief states:

> The existence of racial and ethnic diversity in institutions of higher education is vital to [our] efforts to hire and maintain a diverse workforce . . . [and] such a workforce is important to [our] continued success in the global marketplace.[24]

Joining this pro-diversity lineup was corporate heavyweight General Motors, which filed a separate *amicus* brief in support of the University of Michigan Law School's race-plus diversity plan.[25] Its brief was cited and relied upon for support by Justice O'Connor in *Grutter*.[26]

Similarly, in another *amicus* brief supporting the law school's plan, more than two dozen former high-ranking military and civilian leaders of the Army, Navy, Air Force, and Marine Corps acknowledged that, to fulfill its mission, the military "must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting."[27] As this brief and the *Gutter* majority agreed, "[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective."[28]

Like the *Grutter* Court's admission that "race unfortunately still matters,"[29] these truisms, and the Court's recognition of them, suggest that diversity has emerged as an old idea whose time seems to have finally come. That idea – that public and private institutions, including law schools and other institutions of higher education, and our shared experiences as students, employees, and citizens are (or should be) enriched and enhanced through exposure to people of different races, ethnicities, cultures, and backgrounds – is hardly a new one. Indeed, it is an idea that has been debated (and sometimes beaten back) by courts, politicians, voters and able advocates at least since Jim Crow was a baby.

But only recently – and certainly not since the *Bakke* decision by a similar 5–4 majority back in 1978 – have the need for and benefits of diversity in higher education, in the military, and in the nation's workplaces been so clearly defined. And, only recently have racial and ethnic diversity programs in schools, government institutions, and workplaces received the kind of endorsement provided in *Grutter*, and to a lesser extent in *Gratz.*

Why Diversity Affects the Legal Profession

Lawyers play critical leadership roles in our nation's courts and governmental institutions. As explained by Justice O'Connor in *Grutter*:

> Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.[30]

The central role lawyers play in today's society was also recently highlighted by the EEOC in its 2003 Diversity Report, where EEOC Chair Dominguez observed:

> [L]awyers are very often key players in designing and activating the institutional mechanisms through which property is transferred, economic exchange is planned and enforced, injuries are compensated, crime is punished, marriages are dissolved and disputes are resolved. The ideologies and incentives of the lawyers engaged in these functions directly influence the lived experience of Americans, including whether they feel fairly treated by legal institutions.[31]

Consider also the changing demographics that affect our nation's cities, counties, and local communities. As noted in the *amicus* brief filed in *Grutter* by 65 of America's leading businesses, "The population of the United States is increasingly defined by its diversity."[32] Proof of this is demonstrated by the increasing numbers of African-Americans, Hispanics, Asians, and Native Americans tracked by federal census figures. According to one estimate, "these groups will constitute almost half – 47 percent – of the United States' population by the year 2050."[33]

These demographic trends are already changing the political landscape of cities and counties in New York

and elsewhere.[34] They are likewise changing the faces of the nation's law school graduates, who are also increasingly female, Black, Hispanic, Asian, and "multi-racial."[35]

These same shifting demographics provided a modern-day context for many of the *amicus* briefs filed in *Grutter*.[36] And it was these very same trends that caused former ABA President William Paul, in July 2002, to decry the "alarming lack of racial and ethnic minority representation in the legal profession."[37] A somewhat finer point was put on it when past ABA President Paul, commenting on data in support of this assessment, observed, "[O]ur profession is more than 90 percent white, and enrollment in our law schools is about 80 percent white. But 30 percent of our society are people of color, and in the next few decades it will be 50 percent."[38]

According to the EEOC, the number of women and minority attorneys (or other "legal professionals") employed at large firms increased significantly between 1975 and 2002.

The EEOC's Assessment of the Past 20 Years

The EEOC's 2003 Diversity Report looks critically at the historic stratification and under-representation of minorities and women in private law firms in light of the experience of the past 20 years. The report's most promising findings show proportionally dramatic and statistically significant increases in the numbers of female and minority attorneys hired in large private law firms across the country, including elite law firms in New York, Chicago, Washington, and Los Angeles.[39]

At these firms, as noted in one study cited by the EEOC, "'the lawyers . . . historically have been white Protestant men who graduated from prestigious law schools such as Harvard, Columbia, and Yale. As recently as 1970, women and people of color were almost completely excluded.'"[40] But the EEOC's report shows that the times have changed over the last 20 years, at least statistically, for women and minorities in larger firms.

Not surprisingly, the largest increases in minority and female attorneys have been at large firms (*i.e.*, those with 100 or more employees who are required to file annual EEO-1 reports with the government). The report also shows that the greatest increases have taken place at firms with multiple offices and offices in large metropolitan cities such as New York, Chicago, Los Angeles, Washington, Miami, etc.

According to the EEOC, the number of women and minority attorneys (or other "legal professionals") employed at large firms increased significantly between 1975 and 2002. Notably, the greatest advancements during this period have been made by women and Asian attorneys. In fact, according to the EEOC, women attorneys now make up 44% of all those employed as "legal professionals" in large firms, compared with 14% in 1974; Black or African-American attorneys have nearly doubled from 2.3% to 4.4% during this period; Hispanic attorneys have quadrupled to 2.95% from 0.7%; and Asian-American attorneys have outpaced all other attorneys of color, jumping in the last 18 years from 0.5% to 5.3% of all legal professionals employed in large firms.

Nevertheless, the EEOC's report tells a cautionary tale, full of signs indicating that much more can and must be done by large and small firms alike, particularly in terms of attrition. In particular, the report notes that "'male minority associates [are] more likely to have departed their employers within 28 months . . . and were far more likely to have departed within 55 months of their start date. . . . Nearly two-thirds . . . of female minority associates had departed their employers within 55 months compared to just over half . . . of women overall.'"[41]

An even greater problem exists with respect to what the EEOC calls the "major issue in law firms generally [concerning] the movement from an associate attorney to partner." According to the EEOC's report, the odds of becoming a partner in a private law firm are still stacked against minorities and women. The EEOC reports that "women's odds of working as law-firm partners are less than one-third of men's odds," and there are significant disparities between the odds of being made a partner for Blacks, Hispanics, and Asians and those of White men. The EEOC views these promotion-to-partner disparities as a special concern because, as explained in the 2003 Diversity Report:

> [P]romotion to partner not only involves the greatest increase in income within the law firm, but the partnership includes membership to a professional elite with access to substantial social and political capital. . . . More generally, partners of large corporate law firms are among the elite class in the U.S. . . . Given the power and influence that accompanies large law firm partnership, women's [and minorities'] attainment within law firms has larger societal ramifications for access and opportunities.[42]

According to the EEOC, all of these problems have "several broad implications for civil rights enforcement."[43] More specifically, the EEOC concludes, "[i]n

large, national law firms, the most pressing issues have probably shifted from hiring and initial access to problems concerning the terms and conditions of employment, especially promotion to partnership."[44] A different problem may exist at smaller, regional and local firms, where questions about the "fairness and openness of hiring practices probably still remain, particularly for minority lawyers."[45]

Proactive Steps to Increase Diversity

For law firms, the process of developing a business plan to increase and promote diversity within their workplaces cannot begin in earnest until it is acknowledged that the "[u]nderrepresentation of lawyers of color in our ranks is an institutional weakness and diminishes our capacity to serve."[46] In private firms, as recently articulated by the Minority Corporate Counsel Association (MCCA),[47] the reasons for this weakness include:

- A lack of understanding "of the link between diversity and the bottom line [and] its connection to strategic business initiatives."
- The "myth of meritocracy" at private law firms, which places a premium on law school GPAs, class rank and law review participation as the best measurements of a candidate's ability to practice law and develop business.
- Attrition and retention problems that create a "[r]evolving door" for associates of color (and women).
- A basic "[l]ack of senior partner commitment and involvement in the planning and execution of diversity initiatives."
- "Insufficient infrastructure and resources" committed by private firms to addressing diversity as a business imperative.
- The existence and perpetuation (at least in some places) of old stereotypes about minorities and women which "often . . . become 'self-fulfilling prophesies.'"
- "Good intentions but little willingness to examine specific issues at each firm historically."[48]

There are also many proactive steps that private law firms (and bar associations) can take, well within the bounds of the law, to increase their own racial and ethnic diversity. As recently explained by EEOC Chair Dominguez, law firms can increase the employment of both people of color and women by adopting programs with a "greater focus on diversity in the recruitment and hiring process" and with "increased mentoring and training opportunities," addressing the "pervasive problem of attrition, especially for women of color," providing more management authority at the partner level, and offering family-friendly policies and flexible work options.[49]

How does a law firm, bar association, or law school truly committed to real diversity not only "talk the talk" but "walk the walk?" At a minimum, there is consensus among businesses and diversity experts about the need for senior partner and managing partner commitment to the creation of a firm-wide diversity and equal employment opportunity program. Without this type of commitment from the very highest ranks of an organization, little if any serious or prolonged change can occur. In other words, as noted in the *amicus* briefs filed in *Grutter*, true diversity in any workplace requires that diversity and equal employment opportunity become "part of the very fabric of [our] cultures," that they be "implemented and overseen by senior managers," and that they be "supported at the highest levels."[50]

As noted in the* amicus *briefs filed in* Grutter, *true diversity in any workplace requires that diversity and equal employment opportunity become "part of the very fabric of [our] cultures."

The corporate *amicus* briefs filed in *Grutter* go further, stating that real commitment to the creation and maintenance of a diverse workforce also requires "substantial financial and human resources."[51] In this sense, law firms, state and local bar associations, and others truly committed to greater racial and ethnic (as well as gender) diversity in the legal profession would do well to follow more closely the direction of America's leading businesses.

Some other recommended steps, described in greater detail in the MCCA's *Getting Started: Moving from Lip Service to Diversity* report, include: (1) establishing firm-wide committees, task forces and focus groups to get "a handle on where the firm stands and why" and to develop a firm-wide business case for greater diversity; (2) adopting a zero-tolerance policy on all types of discrimination and harassment and making "the current environment hospitable to all attorneys"; (3) "invest[ing] in lateral minority and women hires" and adopting an "[a]ggressive and pro-active approach to finding qualified candidates," particularly attorneys of color and women; (4) creating "viable work/life programs" designed to enable all attorneys to better balance their personal/family lives with their professional commitments; (5) "expand[ing] recruitment at law schools" and actually hiring (not just interviewing) minority lawyers; and, (6) "encourag[ing] informal relationships between partners, senior attorneys and associates."

In addition, as explained in the *amicus* brief that the 65 American businesses filed in *Grutter*:

> [M]any of the *amici* pursue a variety of endeavors to support minority students in higher education, including participating in numerous joint initiatives with the University of Michigan and other leading universities with strong academic programs and diverse student bodies, providing under-represented minority students with substantial financial assistance and summer internship opportunities, recruiting and mentoring minority students, extending financial grants, and partnering with university staff and chapters of national minority professional organizations.[52]

If these extensive steps can be and are being taken by some of America's largest corporations, why can't they be (or why aren't they being) followed by more private law firms in New York and across the country? The answer is not simple, but anecdotal evidence suggests that these steps can be taken, and already have been in some places.[53] In others, they may never be.

That is where national, state, and local bar associations may be able to offer the greatest assistance, serving as a catalyst for greater action by private firms and by the profession as a whole, and as a clearinghouse of the many diversity programs available. In this regard, the ABA has been committed for many years to a broad policy of racial and ethnic diversity and to a goal of promoting the full and equal participation of minorities and women in the profession.[54]

More recently, the ABA, in conjunction with companies such as BellSouth Corporation and others, including many of the businesses that filed *amicus* briefs in *Grutter* and *Gratz*, has encouraged partnering corporations to become signatories to a compelling *Diversity in the Workplace Statement of Principle*.[55] The statement, now signed by more than 250 corporate and in-house legal departments, puts private law firms on notice that many corporate clients expect the law firms that represent their companies "actively to promote diversity within their work place." The statement continues by saying that in making their respective decisions concerning selection of outside counsel, "[we] will give significant weight to a firm's commitment and progress in the area of diversity."

The ABA has also published a *Resource Guide: Programs to Advance Racial and Ethnic Diversity in the Legal Profession*. This *Resource Guide*, which resulted from a 1999 ABA Colloquium on Diversity in the Legal Profession, contains a catalogue of diversity programs across the nation designed to "help increase opportunities for people of color to attend and graduate from law school, to pass the bar examination and be admitted to practice, and to be placed, retained and advanced in jobs, on the bench, as prosecutors, and throughout the profession."[56] There is much to recommend here. Indeed, the ABA's Resource Guide shows that there are many creative steps that can be taken to achieve greater diversity in all sectors of the profession, and there is no need to reinvent the wheel.

Attorneys in New York should also consider the diversity policy adopted on November 8, 2003, by the House of Delegates to the New York State Bar Association. That policy, which passed with some differences of opinion, states:

> The New York State Bar Association is committed to diversity in its membership, officers, staff, House of Delegates, Executive Committee, Sections, and Committees and their respective leaders. Diversity is an inclusive concept, encompassing gender, race, color, ethnic origin, national origin, religion, sexual orientation, age and disability.
>
> We are a richer and more effective Association because of diversity, as it increases our Association's strengths, capabilities and adaptability. Through increased diversity, our organization can more effectively address societal and member needs with the varied perspectives, experiences, knowledge, information and understanding inherent in a diverse membership.

Additional steps are being considered for adoption by the House of Delegates at the Annual Meeting in January 2004 in New York City.

When all is said and done, the greatest challenge for the Association and private law firms is to devise specific, action-oriented policies designed to meet the challenges of the 2003 Diversity Report and the Recommendations of the Special Committee on Association Governance. According to that Special Committee Report to the Bar Association's Executive Committee:

> [W]hile we can count more minority attorneys among our membership and in the House of Delegates than in earlier years, we are far from achieving levels of minority participation in which we can take pride. We must exert improved efforts . . . to become truly inclusive of members from all races, ethnic groups and other traditionally under-represented groups. One of our strongest assets . . . should be our diversity and we must take forceful and positive steps if we are to improve beyond our current situation.

The same things can be said for private law firms, as well as for law schools seeking to employ more diverse faculties and attract more diverse student bodies.

Conclusions

Some will say that little or nothing else needs to be done, or should be done until more judicial guidance is provided by the courts on precisely what types of private diversity programs are acceptable for law firms and bar associations. Others seeking to be more proac-

tive and to do more to embrace the benefits of diversity will seize this opportunity to dedicate or rededicate themselves to a more racially, ethnically, and in other ways more diverse profession of highly qualified attorneys, partners, judges, and association leaders.

If nothing else, all law firms and bar associations should revisit and review their policies, cultures and employment diversity (or lack thereof) not only in light of *Grutter* and *Gratz*, but also in the light of current marketplace realities, the changing demographics, and increasing competition among and for lawyers, law firms, and law students. To do otherwise, or to remain on the fence and do nothing, would be to abdicate our responsibility as a profession and miss out on an unprecedented, historic opportunity to make even more meaningful improvements in the number of racial and ethnic minorities in the profession, in private law firms, and in the leadership ranks of the bar associations we join.

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1. ___ U.S. ___, 123 S. Ct. 2325 (2003).
2. ___ U.S. ___, 123 S. Ct. 2411 (2003).
3. Equal Employment Opportunity Commission, Diversity in Law Firms (2003), *available at* <http://www.eeoc.gov/stats/reports/diversitylaw/index.html>.
4. *See* Equal Employment Opportunity Commission, *Law Firms Embrace Diversity, But Hurdles Remain* (press release) (October 22, 2003) *available at* <http://www.eeoc.gov/press/10-22-03.html>.
5. *Id*.
6. *See* Brief of the American Bar Association as Amicus Curiae in Support of Respondents at 3, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241), *available at* <http://supreme.lp.findlaw.com/supreme_court/briefs/02-241/02-241.mer.ami.aba.pdf> (describing Goal IX of the ABA's mission statement and efforts by the ABA to diversify its membership and leadership ranks).
7. *See*, *e.g.*, *American Bar Association Resource Guide: Programs to Advance Racial and Ethnic Diversity in the Legal Profession* (July 2000), *available at* <http://www.abanet.org/leadership/recmenu.html> (describing various diversity programs sponsored by the ABA and by law firms, law schools and local bar associations).
8. *See* Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (Nos. 02-241 and 02-516), *available at* <http://supreme.lp.findlaw.com/supreme_court/briefs/02-241/02-241.mer.ami.sixtyfive.pdf>. *See also Diversity: An Imperative for Business Success*, The Conf. Board (1999); *Diversity Helps to Deliver Better Business Benefits*, Personnel Today, June 18, 2002; Robert L. Lattimer, *The Case for Diversity in Global Business, and the Impact of Diversity on Team Performance*, Competitiveness Rev., Vol. 8, No. 2, at 3-17 (1998); Trevor Wilson, Diversity at Work: The Business Case for Equity (1996).
9. *See Race Matters: Law firms Are Recognizing that Diversity Is About Business. Just Ask Their Clients*, Legal Times, Mar. 17, 2003.
10. Foreword, *American Bar Association Resource Guide*, *supra* note 7, at 3.
11. *See* Minority Corporate Counsel Association, *Creating Pathways to Diversity: A Set of Recommended Practices for Law Firms*; Minority Corporate Counsel Association, *Getting Started: Moving from Lip Service to Diversity*, (2000), *available at* <http://www.mcca.com/site/data/researchprograms/lfbestpractices/pathways11/gettingstarted.pdf>.
12. *Gratz v. Bollinger*, 123 S. Ct. 2411, 2419 (2003).
13. *Id*. at 2428.
14. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2342 (2003).
15. *Id*. at 2343.
16. *Id*. at 2341.
17. 438 U.S. 265, 311–12 (1978). Justice Powell also observed, as previously observed by the Court in *Sweatt v. Painter*, 339 U.S. 629, 634 (1950), that "[t]he law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."
18. *See Gratz*, 123 S. Ct. at 2428; *Bakke*, 438 U.S. at 314; *Grutter*, 123 S. Ct. at 2342.
19. 438 U.S. at 320.
20. *See United Steelworkers v. Weber*, 443 U.S. 193 (1979) (upholding the right of private employers under Title VII to adopt temporary race-conscious plans aimed at eliminating manifest imbalances in traditionally segregated jobs where there is evidence of discrimination or a statistical disparity between minorities in the relevant labor market and those in an employer's work force).
21. 480 U.S. 616 (1987). *But see Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (making it clear that societal discrimination generally is not a sufficient factual predicate for voluntary race-conscious employment actions, and that layoff and termination decisions based on race or sex almost always fall too harshly on non-protected class members to withstand judicial scrutiny).
22. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2340 (2003).
23. *Id*. at 2341.
24. Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *supra* note 8, at 1.
25. *See* Brief of General Motors Corporation as Amicus Curiae in Support of Respondents, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (Nos. 02-241 and 02-516), *available at* <http://supreme.lp.findlaw.com/supreme_court/briefs/02-241/02-241.mer.ami.gm.pdf>.
26. 123 S. Ct. at 2340.
27. Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae in Support of Respondents at 29, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (Nos. 02-241 and 02-516), *available at* <http://supreme.lp.findlaw.com/supreme_court/briefs/02-241/02-241.mer.ami.military.pdf>.
28. *Id*. (quoted and agreed with by Justice O'Connor in *Grutter*, 123 S. Ct. at 2340).
29. *Grutter*, 123 S. Ct. at 2341.
30. *Id.* (citations omitted).
31. EEOC, Diversity in Law Firms, *supra* note 3, at 2.
32. Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents in *Grutter*, *supra* note 8, at 6.

33. *Id*.
34. *See*, *e.g.*, *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 2003 U.S. Dist. LEXIS 11386 (N.D.N.Y. July 7, 2003). In this case, decided under the 1965 Voting Rights Act, the District Court adopted in its entirety the report and recommendation of U.S. Magistrate Judge David R. Homer preliminarily enjoining the November 2003 local legislative elections in Albany County based on significant increases in the county's Black, Hispanic and "multi-racial" populations, and a history of voting-related discrimination in the creation of electoral districts and in Albany politics generally. Key to the Court's decision was 2000 census data showing that between 1990 and 2000, the minority communities in the county increased from 8.2% Black and 1.8% Hispanic, for a total of exactly 10% in 1990, to 10.7% Black and 3.1% Hispanic and 1.4% "multi-racial" in 2000, for a total of more than 15% minorities, entitling Blacks and Hispanics in the county a larger proportionate share of majority voting districts and thus more political clout.
35. According to the EEOC's October 2003 Diversity Report, between 1982 and 2002, the number of women receiving law degrees increased from 33% to 48.3%; the number of Blacks increased from 4.2% to 7.2%; the number of Hispanics went from 2.3% to 5.7%; and the number of Asians from 1.3% to 6.5%. EEOC, Diversity in Law Firms, *supra* note 3, Executive Summary at 1.
36. *See*, *e.g.*, Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *supra* note 8 at 8. *See also* Brief of Amici Curiae Massachusetts Institute of Technology, Leland Stanford Junior University, E.I. Du Pont De Nemours and Company, International Business Machine Corp., National Academy of Sciences, National Academy of Engineering, National Action Council for Minorities in Engineering, Inc., in support of Respondents, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (Nos. 02-241 and 02-516), *available at* <http://supreme.lp.findlaw.com/supreme_court/briefs/02-241/02-241.mer.ami.mit.pdf>.
37. Foreword, *American Bar Association Resource Guide*, *supra* note 7, at 3.
38. *Id*.
39. EEOC, Diversity in Law Firms, *supra* note 3, Executive Summary, at 1.
40. *Id*. at 3 (quoting Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration, 1997*, 46 Am. Univ. L. Rev. 669).
41. *Id.* at 4 (quoting the 2003 NALP Foundation Study of entry-level hiring and attrition, NALP Foundation for Law Career Research and Education, *Keeping the Keepers II: Mobility and Management of Associates* (2003) (Washington, D.C.)).
42. *Id*. at 17 (quoting C. Beckman & D. Phillips, *Interorganizational Determinants of Promotion: Client Leadership and the Promotion of Women Attorneys*, draft manuscript, Aug. 26, 2003).
43. *Id*.
44. *Id*.
45. *Id*.
46. *American Bar Association Resource Guide*, *supra* note 7, at 24 (quoting William G. Paul, former ABA President).
47. The MCCA is a growing group of corporate law departments and in-house counsel founded in 1997 "to advocate for the expanded hiring, retention, and promotion of minority attorneys in corporate law departments and the law firms that serve them." A wealth of information about the "Business Case for Diversity" and certain "Barriers to Success" and how to overcome them can be found on the MCCA's Web site at www.mcca.com.
48. Minority Corporate Counsel Association, *Creating Pathways to Diversity: A Set of Recommended Practices for Law Firms*, Executive Summary, Barriers to Success (2000), *available at* <http://www.mcca.com/site/data/researchprograms/lfbestpractices/pathways11/execsummary.pdf>.
49. *Race Matters: Law Firms Are Recognizing that Diversity Is About Business. Just Ask Their Clients*, Legal Times, Mar. 17, 2003.
50. Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *supra* note 8, at 1.
51. *Id.*
52. *Id*. at 1–2.
53. *See Race Matters: Law Firms Are Recognizing that Diversity Is About Business. Just Ask Their Clients*, Legal Times, Mar. 17, 2003.
54. *See* Brief of the American Bar Association as Amicus Curiae in Support of Respondents, *supra* note 6.
55. *See American Bar Association Resource Guide*, *supra* note 7, at 15.
56. *Id.* at 3.

Insurance Department Regulations To Stem Fraudulent No-Fault Claims Upheld by Court of Appeals

By Michael Billy Jr. and Skip Short

Far-reaching and significant changes to the New York no-fault automobile regulations promulgated by the State Insurance Department have recently been upheld by the New York State Court of Appeals.[1] These changes will require modifications by attorneys, insurers and claimants in this field and are designed to combat the insurance fraud in the no-fault system.

Background

New York's no-fault statute, Article 51 of the Insurance Law, was enacted in 1973 and took effect in 1974. After a period of observing the process, the legislature enacted a number of amendments that took effect in 1977, and the Insurance Department promulgated an extensive system of regulations. This regulatory system remained essentially intact until the new regulations, which were promulgated in 2001, took effect in 2002 and have now sustained court challenges.

The changes were a response to growing and pervasive fraud. Beginning in the early 1990s, the no-fault system suffered from some of the same problems as health care in general: increasing costs, difficulties in oversight and fraud. As other payment systems provided more law enforcement assistance, the New York no-fault system increasingly became beset by fraudulent operatives. In recent years, the governor's office, the Superintendent of Insurance, the State Assembly and the head of the State Senate Committee on Insurance all estimated that the cost of no-fault fraud to the consumer in New York reached $1 billion a year. A recent article in this *Journal* chronicled this trend.[2]

Attempting to address the problems, the Insurance Department sought to promulgate regulations that would reduce the time limit for submitting claims.[3] The Medical Society and the Trial Lawyers objected to the changes, and they filed a court challenge. Based upon the challenge, the regulations were stayed until April 2002. They were upheld by the Supreme Court, New York County, and then the Appellate Division, First Department,[4] and now have been upheld by the Court of Appeals in a unanimous 6–0 ruling on October 21, 2003.[5]

The Court of Appeals Ruling

The Court of Appeals noted that from 1992 to 2000 reports of no-fault fraud rose more than 1,700% and constituted more than 55% of all automobile fraud reports received by the Insurance Department. The decision cited information provided by the Insurance Department and *amici* describing how fraud rings orchestrated staged accidents, inflated their claims with medical mills and were "often associated with organized crime." The Court acknowledged that because health provider claims could be delayed for 180 days under the prior regulation, insurers were often presented with stacks of questionable bills for "patients" who had since recovered and whom they had limited opportunity to investigate.

The Court of Appeals reiterated the principle that it would defer to the insurance superintendent's special competence and expertise with respect to the insurance industry unless the superintendent's interpretation was irrational or unreasonable. The Court found ample rational basis and reason supporting the new regulation and upheld it against several areas of challenge.

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The Court rejected a general challenge that the insurance superintendent had been given legislative power, finding that the superintendent had administrative authority to implement and interpret under the Insurance Law. The Court also rejected a challenge that the superintendent had exceeded his authority by establishing time limits for submitting claims. The Court found that the legislature had chosen not to set forth such limits and that other regulators had set forth time limits when other statutes were silent. The Court then stated that the insurance superintendent had determined that the revised regulations were

> the most effective means of advancing the legislative intent of providing prompt payment of benefits as the loss is incurred, while reducing rampant abuse. That being so, this Court may not substitute its judgment for that of the Superintendent, but may determine only whether the Superintendent acted within the scope of his lawfully delegated authority.[6]

The Court found that he did, and rejected the excess of authority challenge. The Court similarly rejected the claim that the superintendent had delegated rule-making authority to insurers by requiring them to have standards for the denial of claims on timeliness. It found such a rule permissible so long as the general rule was set forth by the Insurance Department.[7]

The Court of Appeals found ample rational basis and reason supporting the new regulation and upheld it against several areas of challenge.

Finally, the Court upheld several specific provisions of the new regulations against challenge. It held that because Insurance Law § 5106 did not specify that interest was to be compounded, the superintendent was free to determine how interest would be calculated. The Court upheld a provision that attorney fees would not be awarded to an applicant whose charges exceeded the relevant fee schedules. The challengers had objected that such a provision would work as a forfeiture if there were valid parts of the claim. The Court found it to be a permissible limitation designed to deter overcharging by health providers. The Court upheld the limitation of assignments to claims for health benefits, finding it permissible to preclude assignment of other expenses, such as housekeeping and transportation, that the superintendent had determined were susceptible to abuse. Finally, the Court upheld a provision in the new regulations providing that for those claimants who choose arbitration under the option provided by Insurance Law § 5106, arbitrators may issue subpoenas on their own initiative and may "raise any issue that the arbitrator deems relevant to making an award."

In opposing the regulation and its decreased time limits, the challengers understandably expressed concern that some innocent claimants could have their benefits denied as a result of the time limits. The insurance superintendent sought to minimize this factor with protective mechanisms in the new regulations.

Significant Changes and Provisions

Licensing requirements The no-fault statute encompasses health care expenses. As the Court of Appeals explained in its ruling, as fraud in no-fault proliferated, the use of staged accidents followed by purported treatment at medical mills became a widespread practice. This fraud in many cases was enabled when criminal operatives were able to open medical practices by buying the names and licenses of medical doctors.[8]

In opposing insurers' efforts to probe such an illegal practice, some purported health providers argued that the insurers did not have the right to inquire whether a purported license on paper had in fact been illegally purchased from a medical doctor who did not actually own the facility – a practice that is a felony under Education Law § 6512. Although such a claim was uniformly rejected by the state courts of New York,[9] it did find a limited reception in two federal court decisions.[10]

In response to these arguments, the insurance superintendent took two actions. First, the new regulation explicitly states: "A provider of health care services is not eligible for reimbursement under section 5102(a)(1) of the Insurance Law if the provider fails to meet any applicable New York State or local licensing requirement necessary to perform such service in New York."[11] In summarizing the new provision, the department provided its opinion that such a result had previously been required, stating that § 65-3.16(a)(12) of the new regulations had been added "to clarify that a health care provider must be properly licensed to be eligible for reimbursement under no-fault."[12]

In addition, the superintendent required under both the old and new regulation that disclosure of professional corporation ownership and licensing must be set forth in every single claim form. To remove any doubt that such disclosure was authorized before the amendment, the department stated that prior to the amendment such information could have been requested by insurers. These actions thus provide insurers with tools to investigate and oppose the sale of medical licenses in order to submit no-fault claims.[13]

Written notice of claim The changes to the time an injured party must submit written notice of claim are key parts of the new regulatory framework. Under the old regulation, written notice of claim must have been given as soon as reasonably practicable, but in no event more than 90 days after the date of the accident. This period has been reduced to 30 days.[14]

While claimants will certainly need to act earlier, most insureds and household members know who their insurer is on the date of the accident and should be able to comply. There will, however, be some injured claimants who may not easily be able to obtain the insurance information. To protect these claimants, the regulations provide several safeguards. First, insurers are required to establish standards for review of determinations that notice is untimely, including but not limited to, "difficulty ascertaining the identity of the insurer."[15] Second, an expedited arbitration process has been created to resolve untimely denial disputes. Finally, the excuse for untimely claims has been liberalized. Under the old rules, late notice was excused if a claimant submitted "written proof that it was impossible to comply with such time limitations due to specific circumstances beyond such person's control." This burden was rarely satisfied. Under the new regulation, this "impossibility standard" has been eliminated, and late notice will be excused if a claimant submits "written proof providing clear and reasonable justification for the failure to comply with such time limitation."[16]

The biggest change is in the time for health expense proof of claim. It must still be submitted as soon as reasonably practicable, but in no event later than 45 days after the date services are rendered.

A significant body of arbitration rulings and master arbitration rulings had developed under the old standard for excusing untimeliness, but the standard was rarely met. Now, with numerous new arbitrators retained in recent years to respond to the significant increase in no-fault arbitrations, arbitrators and courts will be creating rules for when an excuse is "clear and reasonable." A period of uncertainty can be expected before the interpretation of the new standard becomes established. In general, some excuses, such as ignorance of the law, will probably continue to meet with an unfavorable reception, lest the exception swallow the rule. Others, such as claims that the insurer was not ascertainable, may require consideration of facts on a case-by-case basis.

Written proof of claim Under the old regulations, written proof of claim had three standards, depending upon the type of claim. In a claim for loss of earnings, the injured person had to submit written proof of claim as soon as reasonably practicable. In a claim of other expenses, the injured person had to submit written proof of claim as soon as reasonably practicable, but in no event later than 90 days after the service was rendered. In a claim for health service expense, the injured person had to submit written proof of claim as soon as reasonably practicable, but in no event later than 180 days after the service was rendered.

In addition, the submission of the health service expense could be given no later than 180 days after the service was rendered *or* 180 days after written notice was provided, whichever was later. Thus, in certain situations the time frame could be more than 180 days. For example, if the date of service was the 80th day after the accident and written notice was given on the 90th day after the accident, the 180 days would not begin to run on the date of service, but on the 90th day after written notice was provided.

The time limits for health expenses have been reduced from 180 to 45 days. The time limit for lost wages has been reduced to 90 days after the loss. The time limit for other expenses remains at 90 days.[17]

The biggest change is in the time frame for health expense proof of claim. It must still be submitted as soon as reasonably practicable, but in no event later than 45 days after the date services are rendered. The new regulations do not provide that the 45 days run from the date of service or when written notice was provided, whichever was later.

The purpose of reducing the outer limits for submitting health service claims was to combat fraudulent or exaggerated claims. Under the old regulations, providers often waited as long as possible to submit the claim. Insurers seeking to prevent fraud will now have an earlier opportunity to monitor and investigate claims.

As with written notice of claim, these reduced time limits have been accompanied by changes in the excuses for noncompliance. Under the old regulations, late written proof of claim could be excused if the injured person submitted "written proof that it was impossible to comply with such time limitations due to circumstances beyond such persons' control." Admittedly, the impossibility standard was a barrier to most late claims. Under the new regulations, impossibility has been eliminated and the stricter time limitations for proof of a claim will

be excused if the eligible injured person submits "written proof providing clear and reasonable justification" for the failure to comply.[18]

The Insurance Department never regulated the "impossibility" excuse in the old regulations. Under the new regulations, as with written notice of claim, the insurer is required to "establish standards for review of its determinations that applicants have provided" a late proof of claim. "In the case of proof of claim, such standards shall include, but not be limited to, appropriate consideration for emergency care providers, demonstrated difficulty in ascertaining the identity of the insurer and inadvertent submission to the incorrect insurer."[19] These standards must be available for review by Insurance Department examiners.

Furthermore, the failure of an employer to provide information necessary to establish proof of claim for lost wages shall not be used as a basis for denying a late submission of proof of claim. For example, if the insurer sends a Verification of Employment Form to an employer and the employer does not respond, a denial cannot be issued on the grounds that proof of claim was late.

Examination under oath The new regulation permits an insurer to require an examination under oath of an injured person or a health provider. This important option was not part of the old regulations, but it was supported by opinion letters of the Insurance Department, and cases conflicted over whether such an examination could be required by an insurer.[20]

Now, the examination under oath can be required as a verification request. Insurers must have available for monitoring by the department standards for such examinations. The failure to appear at such an examination is a failure to comply with a policy requirement that could result in the delay[21] and subsequent denial of a claim. This provision is a valuable tool in contesting claims by fraudulent health provider facilities.

Attorney fees To assist a no-fault claimant with a valid claim, Insurance Law § 5106 provides the successful claimant with the unique remedy of being able to recover attorney fees, subject to limitations established by the Insurance Department. The new regulations provide that if an applicant health provider's claim exceeds the fee schedule, no legal fee shall be awarded.[22] This is a worded as a mandatory provision not subject to interpretation, and it was specifically upheld in the Court of Appeals ruling.

Limitation of assignments The Court of Appeals specifically considered and upheld a provision in the new regulation that limits no-fault assignments to health-related services. The Court noted that the services excluded by this change included housekeeping and transportation, and pointed out that General Obligations Law § 13-101 is subject to public policy limitations.

The Court found that the insurance superintendent rationally concluded that public policy supported the restriction of no-fault assignments because of abuses, particularly with regard to housekeeping and transportation expenses. The change in the regulation does not eliminate coverage for necessary housekeeping and transportation claims. What it does do, by precluding such assignments, is to make it much more difficult for fraudulent ancillary providers who work with some medical mills to seek to attach such services to every claim.

Raising of issues by arbitrator The new regulations provide that an arbitrator may raise issues and subpoena witnesses.[23] This provision was upheld by the Court of Appeals, and it should provide arbitrators with full authority to question fraudulent claims.

Effective Dates of New Regulations

As with most changes to the Insurance Department regulations, parts of the new regulation take effect at different times.

The regulation itself took effect as of April 5, 2002, after the Appellate Division lifted the stay.[1]

The new endorsements applicable under the new regulations[2] take effect only as they are included in policies issued and/or renewed on and after April 5, 2002, and the new time limits are effective only if an accident occurs under a policy with the new time limits. For example, if a policy was renewed in March of 2002 and an accident covered under that policy took place in August of 2002, the time limits of the old regulation would apply. Thus, both the old and new time limits will continue to be the subject of court and arbitration matters for some time to come.

A different rule applies for self-insurers.[3] The time limits were effective for them as of April 5, 2002. While in general the claims practice rules set forth in 11 N.Y.C.R.R. subpart 65-3 and the arbitration rules set forth in 11 N.Y.C.R.R. subpart 65-4 took effect on April 5, 2002, rules related to the new time limits for notice and proof of claim are governed by the policy endorsement in effect.

1. *See* New York State Insurance Department, Circular Letter No. 9 (Apr. 9, 2002), *available at* <http://www.ins.state.ny.us/c102_09.htm>.
2. 11 N.Y.C.R.R. subpart 65-1.
3. 11 N.Y.C.R.R. subpart 65-2.

Interest Insurance Law § 5106 provides for the payment of 2% monthly interest on overdue claims. In the prior regulations, the Insurance Department provided that such interest was to be compounded monthly. The new regulations provide for simple interest,[24] not compounded monthly, and this provision was specifically upheld by the Court of Appeals.

Master arbitration demands Insurance Law § 5106(c) provides that a party may appeal a no-fault arbitration award to a master arbitrator. In the past, the procedure for appealing such claims was somewhat technical; in some cases, it required more than an appeal of a supreme court case, and was a trap for the unwary. The Insurance Department has changed the procedure so that the drafting of the demand for master arbitration will no longer result in denial if it has technical defects, such as failing to include a description of the nature of the dispute.

In addition, there is a grace period for payment of the master arbitration fee. While master arbitration requests should still be drafted carefully with consideration of the requirements of the regulations,[25] it is now likely that more of these master arbitration appeals will be decided on the merits.

A Call for Change

Recognizing the damage being done to the premium-paying public and patients by the fraud in the no-fault system, the Insurance Department has sought to level the playing field with reduced time limits, examinations under oath and clear licensing requirements. Continued law enforcement assistance remains essential, however, and two reforms continue to be needed in this field.

First, in a 1997 decision, the Court of Appeals asked the legislature and the Insurance Department to clarify no-fault's 30-day period to pay or deny a claim, stating:

> we urge also . . . that the Legislature may well wish to examine the panoramic permutations of this genre of cases and enact more synchronized provisions in the highly technical and regulated general insurance and no-fault universes. The Superintendent of Insurance should, of course, assist the Legislature as necessary and as requested in such an endeavor.[26]

Commenting on the no-fault statute and regulations, Justice Wesley in the dissenting opinion in another 1997 decision wrote:

> We agree with the majority's characterization of the statutes and regulations in question in this case as a "Rube-Goldberg-like maze," and we join in its request to the Legislature and Superintendent of Insurance to study and remedy the "thicket" of apparent contradictions and difficulties presented.[27]

Six years later, the effect of an untimely denial of claim remains in dispute, and some commentators have suggested that an untimely claim can be used as a weapon to compel the payment of fraudulent claims.[28] Although there is disagreement about such a conclusion,[29] the legislature and the Insurance Department could take such an argument away from the perpetrators of fraudulent claims by clarifying that fraudulent claims can be contested without regard to the 30-day time limit of Insurance Law § 5106. Otherwise, the full benefit of the decreased time limits will be lost. While insurers will now begin to receive claims within 45 days of an accident, they still will not know in many cases which ones are fraudulent within 30 days of receipt.

Second, the option that now exists for a claimant to arbitrate or litigate a no-fault dispute can be used by fraudulent health providers to flood the courts with minor no-fault claims. This process has been used as a weapon to make it unproductive for insurers to contest fraudulent claims and to pressure the parties into supporting settlements to relieve the court congestion, a development recently discussed in the *Journal*.[30] Insurance Law § 5106 could be amended to provide that the legal fees and interest payable to a prevailing no-fault applicant will be received only by those who chose to arbitrate their claims. Such a change would not eliminate the option to file a lawsuit by those with substantial and serious claims, but it would relieve the courts of thousands of no-fault lawsuits for minimal amounts.

Conclusion

The new Insurance Department regulations will require changes by applicants and insurers alike. These changes will be helpful in fighting insurance fraud, although further reform is likely to be needed to purge this system of fraud and return it to the valuable coverage that it was 20 years ago.

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1. *Med. Soc'y of the State of N.Y. v. Serio*, N.Y.L.J., Oct. 22, 2003, p. 18, col. 1.
2. *See* Robert A. Stern, *Take the Money and Run: The Fraud Crisis in New York's No-Fault System*, N.Y. St. B.J., Vol. 75, No. 8, at 35 (Oct. 2003). *See also* Nicholas Stein, *Inside Operation BORIS*, Fortune, Vol. 148, No. 12, at 126 (Dec. 8, 2003). *See generally United States v. Lucien*, 347 F.3d 45 (2d Cir. 2003).
3. An earlier version of this regulation was invalidated on State Administrative Procedure grounds. *See Med. Soc'y of the State of N.Y. v. Levin*, 185 Misc. 2d 536, 712 N.Y.S.2d 745 (Sup. Ct., N.Y. Co. 2000), *aff'd*, 280 A.D.2d 309, 723 N.Y.S.2d 133 (1st Dep't 2001). The Insurance Department then took these objections into account and repromulgated the regulations, making some changes in response to the submission of interested parties. *See* Skip Short, *New No-Fault Regulations Promulgated*, N.Y.L.J., July 11, 2001, p. 1.
4. *Med. Soc'y of the State of N.Y. v. Serio*, N.Y.L.J., Feb. 22, 2002, p. 18 (Sup. Ct., N.Y. Co.), *aff'd*, 298 A.D.2d 255, 749 N.Y.S.2d 227 (1st Dep't 2002).
5. *Med. Soc'y of the State of N.Y. v. Serio*, N.Y.L.J., Oct. 22, 2003, p. 18, col. 1.

6. *Id.*
7. The challengers of the regulation also advanced a State Administrative Procedure Act objection, which they had previously done successfully with the prior regulation. This time they were not successful as the Court of Appeals found compliance with procedural requirements by the Insurance Department and noted that the superintendent had considered the comments of interested parties and had modified the provisions of the earlier regulation.
8. See, e.g., the practices described in *Allstate Ins. Co. v. TMR Medibill, Inc.*, N.Y.L.J., Aug. 4, 2000, p. 25 (E.D.N.Y.) (Sifton, J.).
9. *See, e.g., Valley Physical Med. & Rehab. P.C. v. N.Y. Cent. Mut. Ins. Co.*, 193 Misc. 2d 675, 676, 753 N.Y.S.2d 289 (App. Term, 2d Dep't 2002); *Oxford Health Plans v. Bettercare Health Care Pain Mgmt. & Rehab., P.C.*, N.Y.L.J., Sept. 19, 2002, p. 21; *Progressive Northeastern Ins. Co. v. Advanced Diagnostic & Treatment Med., P.C.*, N.Y.L.J., Aug. 2, 2001, p. 18, col. 2 (Sup. Ct., N.Y. Co.).
10. *See State Farm Mut. Auto. Ins. Co. v. Mallela*, 175 F. Supp. 2d 401 (E.D.N.Y. 2001) (currently on appeal to the Second Circuit) *and Universal Acupuncture Pain Servs., P.C. v. State Farm Mut. Auto. Ins. Co.*, 196 F. Supp. 2d 378 (S.D.N.Y. 2002) (permitting the issue to be potentially raised defensively but not offensively in a recovery action). *Mallela* was subsequently questioned in *Great South Bay Med. Care, P.C. v. State Farm*, 204 F. Supp. 2d 492 (E.D.N.Y. 2002).
11. 11 N.Y.C.R.R. § 65-3.16(a)(12).
12. 2001-19 N.Y. St. Reg. 17 (May 9, 2001).
13. It should be stressed that the doctors involved in this illegal practice are a very small minority of medical doctors. This practice is an assault on legitimate health providers as well as the public and the insurers who receive the fraudulent claims. All of these groups suffer when criminal elements enter into the health care field.
14. *See* 11 N.Y.C.R.R. § 65-1.1.
15. 11 N.Y.C.R.R. § 65-3.5(*l*).
16. 11 N.Y.C.R.R. § 65-1.1.
17. *Id.*
18. *Id.*
19. 11 N.Y.C.R.R. § 65-3.5(*l*).
20. *Compare Galante v. State Farm Ins. Co.*, 249 A.D.2d 506, 671 N.Y.S.2d 345 (2d Dep't 1998) (requiring compliance with EUO request) *with Bronx Med. Servs., P.C. v. Lumberman's Mut. Cas. Co.*, 2003 N.Y. Misc. LEXIS 777 (App. Term, 1st Dep't June 11, 2003) (EUO not enforced).
21. *See V.S. Med., P.C. v. State Farm Ins. Co.*, No. 26604/2002 (Sup. Ct., Queens Co. 2003).
22. 11 N.Y.C.R.R. § 65-4.6(i).
23. 11 N.Y.C.R.R. § 65-4.5(o).
24. 11 N.Y.C.R.R. § 65-3.9(a).
25. 11 N.Y.C.R.R. § 65-4.10.
26. *Cent. Gen. Hosp. v. Chubb Group of Ins. Co.*, 90 N.Y.2d 195, 201, 659 N.Y.S.2d 246 (1997).
27. *Presbyterian Hosp. v. Maryland Cas. Co.*, 90 N.Y.2d 274, 286, 660 N.Y.S.2d 536 (1997) (Wesley, J., dissenting).
28. *See* Norman H. Dachs & Jonathan A. Dachs, *Shunning Arbitration of No-Fault Disputes/Identity Theft*, N.Y.L.J., Jan. 14, 2003, p. 3, col. 1.
29. *See* William J. Natbony & Skip Short, *No-Fault Insurers Can Fight Fraudulent Claims*, N.Y.L.J., Oct. 17, 2003, p. 4.
30. *See* Stern, *supra* note 2.

What Are the Odds? Appellate Statistics Reveal Patterns Among State and Federal Courts

BY BENTLEY KASSAL

It is always helpful for litigators to research judges and appellate courts before making a motion, trying a case or appearing before an appellate tribunal. Part of this research can involve understanding what chance an order or judgment from a particular jurisdiction has of being upheld, modified or reversed on appeal.

While many attorneys tend to answer that question with a response that may best be described as visceral (defined in the dictionary as "not intellectual," "instinctive," "unreasoning," "dealing with crude or elemental emotions"),[1] some actual figures may prove more useful. What is presented here is based upon information provided by New York's principal appellate courts concerning civil cases, via the New York State Office of Court Administration and the Administrative Office of the United States Courts. The data indicate affirmances, reversals, modifications and dismissals, as well as "other" dispositions. The figures have been compiled for the years 2001 and 2002, and are the most recent statistics available.[2]

They are significant to the extent that they indicate certain trends in the various courts. The courts whose figures appear here are the four Departments of the Appellate Division of the New York State Supreme Court, the New York Court of Appeals and the United States Court of Appeals, Second Circuit. Their statistics appear below, with some incidental observations. Again, it should be noted that they reflect dispositions *of civil cases only* for these courts.

The figures are percentages of all civil appeals disposed.

The year 2002 is paired with 2001, which appears in parentheses.

The Four Departments of the Appellate Division

	FIRST	SECOND	THIRD	FOURTH
Affirmed	59 (58)	51 (49)	73 (72)	51 (49)
Reversed	15 (16)	23 (24)	10 (11)	14 (14)
Modified	12 (12)	9 (9)	10 (9)	16 (16)
Dismissed	9 (7)	13 (15)	6 (7)	18 (20)
Other	5 (7)	4 (3)	1 (1)	1 (1)

The First Department (sitting in New York County) has been fairly consistent in the three critical areas, "Affirmed," Reversed" and "Modified."

The Second Department (sitting in Kings County) had a much lower affirmance rate than the First Department (51%, 49% in 2001) and a much higher reversal rate (23%, 24% in 2001). It is also interesting to note the difference in volume, which of course cannot be gleaned from these percentages alone. Total dispositions for the Second Department in 2002 was 12,268, about 3.4 times greater than the First (3,617). It is apparent that the long-overdue creation of a Fifth Department would provide a more even distribution of cases.

The Third Department (sitting in Albany County) has a significantly higher affirmance rate than any of the others – 73% for 2002, 72% for 2001. The probable explanation for this is that many of its cases arise directly from administrative determinations by state agencies, which enjoy an easier path to affirmance under the substantial evidence standard of CPLR Article 78.

The Fourth Department (sitting in Monroe County) has an affirmance rate comparable to the Second Department (51% with 49% in 2001), but the other categories vary significantly.

Court of Appeals of the State of New York

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

CONTINUED ON PAGE 50

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

Editor's Mailbox

Medicolegal Aspects Of Whiplash Injury

The article by Anthony V. D'Antoni, D.C., M.S., in the October 2003 issue entitled *Medicolegal Aspects of Whiplash Injury – A Primer for Attorneys* begins with a quote from Sophocles, "The truth is always the strongest argument."

The *curriculum vitae* of the author describes him as a chiropractic physician. These are polar professions and are clearly delineated by the Education Law. In fact, "[o]nly a person licensed or otherwise authorized under this article shall practice medicine or use the title 'physician.'" N.Y. Education Law § 6522.

While chiropractors are barred from prescribing drugs and performing surgery, Mr. D'Antoni sprinkles his article with terminology that blurs the distinct lines of chiropractor and physician.

The article further contains leading questions followed by self-serving answers. Most significantly, Mr. D'Antoni cites to a Quebec Task Force, as reported in a chiropractic journal, which gives the elements of the most qualified person to treat a cervical acceleration/deceleration injury as being one who understands anatomy, neuroanatomy, peripheral anatomy, the autonomic nervous system and its influence on the locomotor system. Mr. D'Antoni concludes that chiropractic training exceeds medical training in these disciplines and thus chiropractic is the most logical choice for treatment.

These types of summary conclusions ofttimes result in patient delay in receiving timely, appropriate medical care as chiropractic practitioners can invest themselves with skills and predict outcomes not borne out by rational science or the medical model.

With such bold proclamations of chiropractic, it is especially critical for attorneys who appreciate the doctrine of informed consent to understand the beginnings of chiropractic.

A grocer, Daniel David Palmer, who purportedly healed a deaf gentleman through a thrust to the back, founded chiropractic. Despite the fact that the nerves controlling hearing are distinct from the spine, a new profession was born.

While medical consumers cherish the ability to choose a practitioner, a legal journal is obliged to adhere to fair, accurate and truthful labeling. While chiropractic may have a vested interest in the merger of "chiropractor" and "physician," members of the bar are invested with notions of truth and independence. We should not be employed as a *vehicle* in advancing an agenda, which may result in injuries, which *can* be diagnostically measured.

Abraham Kleinman, Esq.
Uniondale, N.Y.

The author of the article responds:

Mr. Kleinman correctly states that the title "chiropractic physician" is not permitted by law in the state of New York. I wrote and submitted the article when I was living and practicing in the state of Illinois, where the term "chiropractic physician" is acceptable by law.

The letter erroneously states that the article I cited from the Quebec Task Force[1] was "reported in a chiropractic journal." This was a major scientific monograph (in excess of 70 pages) published in the journal *Spine*. It is not a chiropractic journal but an internationally recognized, peer-reviewed, bi-weekly orthopaedics journal dedicated to the study of the spine.[2] Most of the Quebec Task Force members were medical physicians and epidemiologists, not chiropractors.

As I wrote in the article, "the field of CAD injury requires knowledge well beyond what is taught in chiropractic or medical school." My intention was to impress upon the readers that in order to be an expert in CAD injury, further study is required, regardless of whether the clinician is a chiropractor or medical physician. It is important to realize that chiropractic education (unlike undergraduate medical education) includes a comprehensive study of spinal biomechanics.

It is unfortunate that Mr. Kleinman believes that my article was "advancing an agenda." My intention was to inform attorneys about CAD trauma in an unbiased fashion by reviewing the current scientific literature.

Anthony V. D'Antoni, D.C., M.S.
Staten Island, N.Y.

1. Walter O. Spitzer et al., *Scientific Monograph of the Quebec Task Force on Whiplash-Associated Disorders: Redefining "Whiplash" and Its Management*, 20 Spine 1S (1995).
2. <http://www.spinejournal.com>.

Attorney Professionalism Forum

To the Forum:

I really need an answer on this one, and soon. Next month I have to make a sizable payment on my son's college tuition for the spring semester. I just do not have the cash on hand. My credit cards are pretty much maxed out. There is more than enough money in my attorney trust account to cover the payment, and most of those funds are escrowed until a business closing occurs for one of my clients – which is definitely not going to occur for at least two months, probably three. I have settlements on five cases pending. The money for one of them will definitely come in at the end of next month, and would cover the tuition. Two of the others are likely at that time as well. Unfortunately, the tuition is due a few weeks earlier, and my son's college is very strict about timely payment. I don't want him to be embarrassed, or, worse, prevented from registering for his classes.

What I would like to do is borrow just enough to cover the tuition from the trust account for a very brief period, no more than those few weeks, giving the trust account a promissory note in exchange. The note will absolutely be good and will be paid promptly from the settlement proceeds. Is this going to create any problems for me?

Thanks for your advice.

Sincerely,

Maxed Out in Mechanicville

Dear Maxed Out:

What you propose is a perfect example of a seemingly victimless act that appears unlikely to have any consequences either for you or for any of your clients. In fact, based on the assumptions you've made there's even a chance that you might "get away" with taking the loan. But before you pick up your check-writing pen, you should read DR 9-102, which clearly prohibits the transaction you contemplate. To be clear: you simply may not do it.

DR 9-102(A) states that "A lawyer in possession of any funds . . . belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds . . . or commingle such funds . . . with his or her own." The rule requires that trust funds be held "separate from any business or personal accounts of the lawyer or the lawyer's firm" (DR 9-102(B)(1)). The rule goes on to provide for disciplinary proceedings in the event of a violation (DR 9-102(J)).

There are few provisions in the Disciplinary Rules containing language that is more clear than the prohibition set forth in DR 9-102. The N.Y.S. Committee on Professional Ethics has opined that the "obvious intended core purpose" behind DR 9-102 is "to maintain the integrity of a client's funds for the benefit of that client only, until payment of those funds to, for or on behalf of that client" (State Bar Ethics Opinion No. 737 (22-00)). Without question, a loan of the type you describe would be contrary to the language of, and the purpose behind, this rule. Even the "safeguards" you mention – the anticipated short term of the loan, the planned rapid repayment through a "definite" settlement payment, and the issuance of a personal promissory note to the trust account – do nothing to make the proposed conduct less of a violation.

And, on a practical note, what if something goes wrong? What if the client for whom you are working on the business closing decides not to proceed, and demands immediate tender of his escrowed funds? What if one of the settlement checks you expect does not arrive, or does not clear? These possibilities may seem remote, but as can be seen from even a cursory review of attorney discipline case law, they do happen — and when they do, they provide no defense to a violation of DR 9-102.

Try to think of this from another perspective. While you or your son may face some embarrassment regarding your inability to make that tuition payment exactly on schedule, which would you find easier — to speak to the university about making a late payment arrangement, or to contact your clients and ask each of them to lend you some money to close the gap? My hunch is that you would never consider asking your clients for a loan (DR 5-104 puts significant restrictions on your ability to do so, in any event). So what makes it acceptable simply to borrow their money – held in your trust account – without their knowledge or permission?

Lest you consider taking the loan anyway, perhaps on the theory that no one will find out, consider the requirements of DR 9-102(D). That section places a duty on you to maintain detailed records of all activity and trans-

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.

actions relating to your escrow account and your law firm operating account. Unless you are considering violating this section as well (and note that under DR 9-102(J) failure to maintain the records for the trust account subjects you to the same discipline as misusing the funds themselves), the paperwork created by your loan will remain as permanent proof of your misconduct. In the event that your escrow account is ever reviewed by a Grievance Committee, even on an unrelated matter, the proof of your illegal loan will be right there for it to find.

Finally, consider this: while there may be a number of Disciplinary Rule violations that can result in action by a local Grievance Committee or an Appellate Division, there is no act more likely to lead to significant discipline than misusing or mishandling attorney trust funds (*see, e.g., In re Ford*, 287 A.D.2d 870, 732 N.Y.S.2d 115 (3d Dep't 2001); *In re Abbatine*, 263 A.D.2d 228, 700 N.Y.S.2d 211 (2d Dep't 1999); *In re Ferguson*, 259 A.D.2d 186, 694 N.Y.S.2d 113 (2d Dep't 1999); *In re Joyce*, 236 A.D.2d 116, 665 N.Y.S.2d 430 (2d Dep't 1997)).

Find another way to pay that tuition bill.

The Forum, by
Robert T. Schofield, Esq.
Whiteman Osterman & Hanna LLP
Albany, N.Y.

LETTERS TO THE FORUM:

We also received the following reader response to the question from "Maxed Out in Mechanicville":

Dear Maxed Out:

I really cannot believe that you wrote that letter, and I am even more amazed at the *Bar Journal* for publishing it. I would have thought this to be a fairly easy question on a law school exam.

The short answer is that you cannot touch those funds in your trust account for three reasons:

1. It is unethical.
2. It is immoral.
3. It is S-T-U-P-I-D.

I will let others explain the appropriate Disciplinary Rules regarding trust accounts and just point out that if you are basically unfamiliar with most Disciplinary Rules, those dealing with escrow accounts should be memorized, at least the basics.

I would like to address the last two items. When I said that it is immoral, I was not being facetious or hyperbolic. The money in your trust account is not your money – no way, no how, for nothing. Other people are depending upon you to safeguard their money. Attorneys do not have a lot of duties that can be labeled a sacred trust, but, if this is not one of them, it comes awfully close. Even if the rules were to let you do it, it would still be wrong.

It would also be extremely stupid. Why? Because Max Bailystock is not a good role model (if you do not catch the reference, watch the movie or Broadway version of *The Producers*). When you talk about the note being "absolutely" good and being paid promptly from a settlement, you are deluding yourself. In the legal business nothing goes as expected. If you have been in practice long enough to have a child in college, you must know that depending upon deadlines for real estate matters and litigation settlements is a tenuous proposition at best. In something of a correlation to Murphy's Law, things will always fall apart at the most inconvenient time possible.

At this point, you should ask yourself one simple question. Do you like practicing law? If the answer is "yes," try to imagine what it would be like to be on the outside looking in, because if anything does go wrong, that it a very real possibility. Aside from the shame of being suspended or disbarred, getting another job will probably not be that easy. I have not taken a survey, but my gut reaction is that "uses other people's money as his own" is not one of the employee characteristics sought by most employers.

And, if you are not concerned with yourself, at least think of your family. If anything goes wrong, all will become public. Do you think that your son would be real happy to know that his college education was made possible, in part, by your wrongdoing?

If the answer to the question of whether you like to practice law is "no," or "it's a job," the fact that you are asking if you can borrow against trust funds is probably an indication that it is time to change careers, or at least to consider a salaried position. You are starting to show signs that it is all getting to be a bit too much and you should do something constructive before disaster strikes.

To reiterate:
DON'T DO IT.
Sincerely,
Thomas Hegeman, Esq.
Oneonta, N.Y.

We received another reader response to the question from "Worried in Williamsville," about her sister dating her ex-husband's divorce attorney.

To the Forum:

Your November-December issue featured an inquiry by "Worried in Williamsville" who was concerned about the situation in which her sister, after a divorce, having been very impressed by her husband's attorney asked the attorney to represent her in the sale of her summer home. He also invited her to go to dinner with him, obviously the beginning of a social relationship. The writer wanted to know if there were any improprieties involved.

As a retired Justice of the Supreme Court, New York County, I refer the writer and readers to a decision I issued in 1993 in the case of *Sanders v. Rosen*, 605 N.Y.S.2d 805. In that case, a woman's former divorce lawyer, two years after the divorce was finalized, began a social relationship with her, prepared a new will for her, and jointly purchased a summer house, with the lawyer handling the details of the loan and closing. After they broke up the woman sued her former attorney and lover for malpractice, violations of the

Code of Professional Responsibility, and a host of other charges.

In my opinion I included a lengthy section on "Lawyers as Lovers." It distinguished between cases of an attorney abusing his position in dealing with a current client who is dependent and vulnerable. It was held, however, that

> Once an attorney-client relationship is ended . . . an attorney is certainly free to occupy the position of friend or lover.

It was also noted that

> Although some may doubt, attorneys are human beings, and they may seek and pursue relationships with persons they have met on vacation, at social affairs, or even in the office.

It is the relationship with a *current* client which may be proscribed. The guidelines for attorney behavior were clearly set forth:

> A lawyer, like any other person, may in his private life be a cad or a king, an inconstant lover or a rock of stability, gracious or a grouch, but in his professional life he may not overstep the bounds and abuse his position of trust as counsel, confidant, champion and fiduciary.

I concur entirely with the response of Michael P. Friedman, Esquire, that there is nothing wrong in the situation described. I just thought your readers should know that there is a judicial opinion with authorities backing up that response.

Very truly yours,
Edward J. Greenfield
J.S.C. (ret'd)
New York City

QUESTION FOR THE NEXT 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 nonparty 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

APPELLATE STATISTICS
CONTINUED FROM PAGE 46

Clearly, the affirmance rate is much lower than in all the Appellate Divisions, and the reversal rate is much higher.

United States Court of Appeals, Second Circuit

The percentages presented below exclude bankruptcy and administrative appeals for the periods ending on the 30th day of September, 2002 and 2001. They address only a category entitled "Appeals Terminated on the Merits."

Affirmed	64 (60)
Reversed	3 (2)
Dismissed	15 (18)
Remanded	15 (18)
Other	3 (2)

When compared with the New York State Court of Appeals and the Four Departments of the Appellate Division, Supreme Court, it is apparent that the Second Circuit affirms more determinations, and reverses fewer as well.

Attorneys who are interested can obtain the reports.[3] For the statistics pertaining to the New York State Court of Appeals and the four Departments of the Appellate Division, Supreme Court, go to www.nycourts.gov ("Courts," "Court Administration" and "Reports"). For the statistics pertaining to the U.S. Circuit Courts of Appeals, go to www.uscourts.gov, or contact the Administrative Office of the U.S. Courts, One Columbus Circle N.E., Washington, D.C. 20544. Second Circuit information is also available by calling (202) 502-1440.

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1. Merriam Webster's Collegiate Dictionary, Tenth Edition.
2. "Caseload Activity in the Appellate Division – 2002," published by the Office of Court Administration, Table 3; "Caseload Activity in the Court of Appeals – 2002" published by the Office of Court Administration, Table 2; Table B-5, Annual Report, United States Courts of Appeals, published by the Administrative Office of the United States Courts, covering all Circuits.
3. *See supra* note 2.

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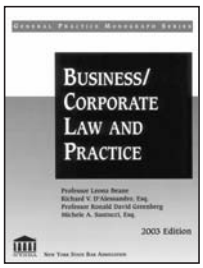

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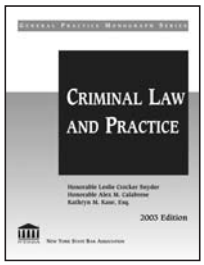

Criminal Law and Practice is a practical guide for attorneys representing clients charged with violations, misdemeanors or felonies. This monograph focuses on the types of offenses and crimes that the general practitioner is most likely to encounter.

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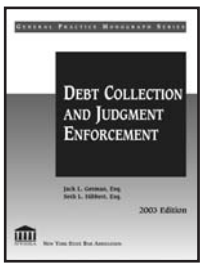
Debt Collection and Judgment Enforcement



This latest edition offers guidance on the basics of debt collection from evaluating the claim and debtor, to demand upon the debtor and payment agreements, to alternatives to litigation.

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List Price: $50
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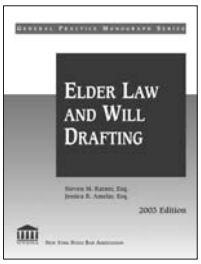
Elder Law and Will Drafting



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

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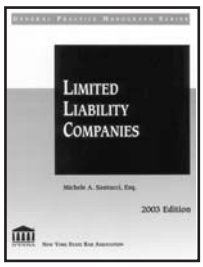
Limited Liability Companies



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

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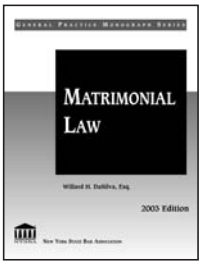
Matrimonial Law



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

2003 • PN: 41213
List Price: $75
Member Price: $65

Mechanic's Liens

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

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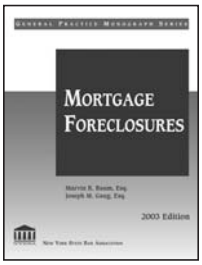
Mortgage Foreclosures



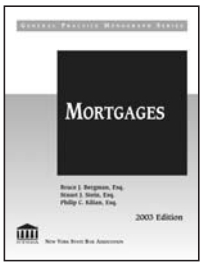
This monograph guides the practitioner through the basics of a mortgage foreclosure proceeding. With its helpful practice guides and many useful forms, this is an invaluable resource.

2003 • PN: 41413
List Price: $50
Member Price: $40

The titles included in the GENERAL PRACTICE MONOGRAPH SERIES are compiled from the most frequently consulted chapters in the *New York Lawyer's Deskbook* and the *New York Lawyer's Formbook*, a five-volume set that covers 25 areas of practice. The list price for all five volumes of the *Deskbook* and *Formbook* is $500.

Revised to Meet Your Practice Needs.

Mortgages



The authors of *Mortgages* provide a clause-by-clause analysis of the standard mortgage, introduce the recommended additional clauses most worthy of inclusion in a mortgage rider and provide a review of basic mortgage terms.

2003 • PN: 41383
List Price: $60
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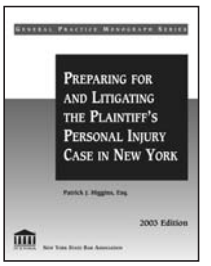
Preparing for and Litigating the Plaintiff's Personal Injury Case in New York



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

2003 • PN: 41913
List Price: $65
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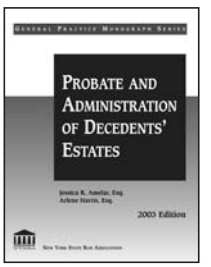
Probate and Administration of Decedents' Estates



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

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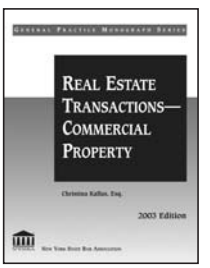
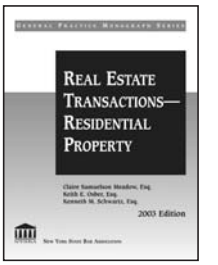
Real Estate Transactions—Commercial Property



This latest edition provides an overview of the major issues an attorney needs to address in representing a commercial real estate client and suggests some practical approaches to solving problems that may arise in the context of commercial real estate transactions.

2003 • PN: 40373
List Price: $70
Member Price: $55

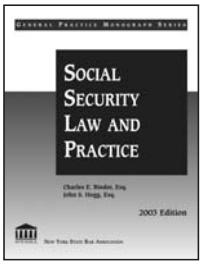
Real Estate Transactions—Residential Property



This reference is a practical guide for attorneys representing residential purchasers or sellers. This invaluable monograph covers sales of resale homes, newly constructed homes, condominium units and cooperative apartments.

2003 • PN: 42143
List Price: $75
Member Price: $62

Social Security Law and Practice



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

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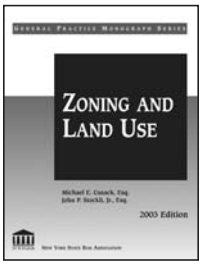
Member Price: $45

Zoning and Land Use



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

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Ninth Circuit. Compare their work with this impenetrable, pathological legaldegook from an appellate court: "*Parens patriae* cannot be *ad fundandam jurisdictionem*. The zoning question is *res inter alios acta*."[12] Then compare your writing to Justice Holmes's memorable and clear distinction between intentional and negligent wrongs: "[E]ven a dog distinguishes between being stumbled over and being kicked."[13]

• Punctuate for clarity. Periods, commas, colons, semicolons, and hyphens have many uses. They divide text for readability and provide elegance and variety. They also promote clarity.

Hyphens: "Ten inch thick briefs" *becomes*, depending on what you mean, "Ten-inch-thick briefs" *or* "Ten inch-thick briefs." Consider the song about "purple people eaters." Without the hyphen between "purple" and "people," the song is about purple creatures that eat people. With the hyphen between "purple" and "people," the song is about creatures that eat purple people.

Commas: Judge: "I want to see Ms. X and her client and I will be in court all morning." Without a comma between "Ms. X" and "and" or between "client" and "and," the reader does not know whether the judge wants to see Ms. X and her client or whether the client and the judge will be in court all morning.

Serial commas: "The court clerk must file the stipulation, the court papers and the decision and order." *Becomes*: "The court clerk must file the stipulation, the court papers, and the decision and order."

• Make your writing clear by counting words and syllables. On WordPerfect, go to "file," then "properties," and then "information" to see your "average word length" and "average words per sentence." Word choice, simplicity of syntax (arrangement of words in a sentence), and word and syllable length determine whether your opinion is readable under Flesch's "readability scale."[14] Under Flesch's formula, comic books score a 92, the *Harvard Law Review* a 32, the Internal Revenue Code a minus 6.[15]

• Once you have counted syllables, how many should you have? From Harvard Law Professor Edward H. Warren: "See to it that not less than sixty-six per cent of your words are words of one syllable, and that not less than eighty-three per cent are words of one or two syllables."[16]

Good legal writing is clear, simple writing. Judge Albert M. Rosenblatt has noted one result from a lack of clarity: "[W]hen a dispute breaks out and the contract is susceptible of two interpretations, it will be construed against the author's side (*Evelyn Building Corp. v. City of New York*, 257 NY 501, 513 [1931]). This is an apt, legal punishment designed to fit the crime of Writing with Lack of Clarity in the First Degree."[17] Only Hemingway could have said it better.

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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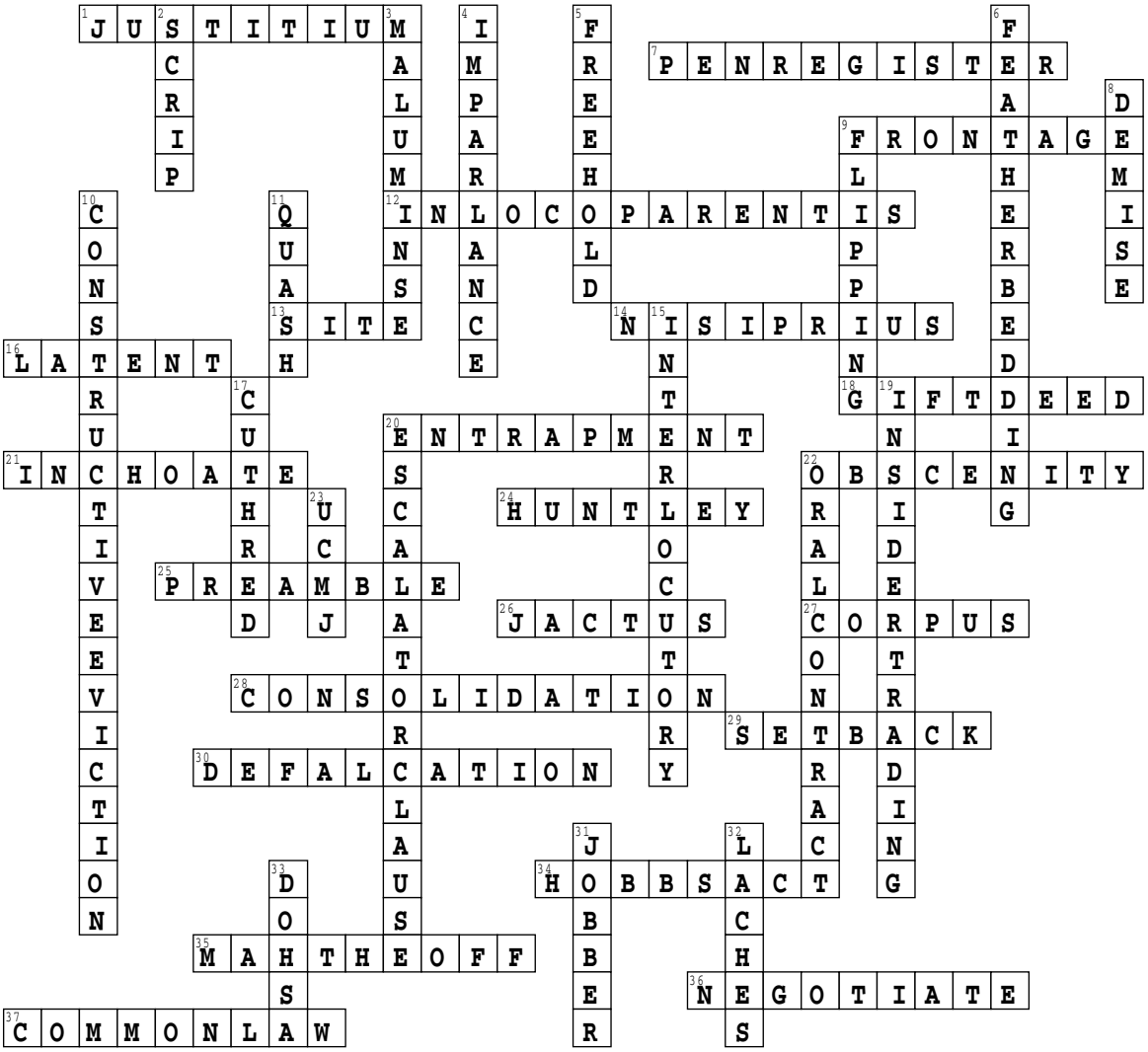
1. Quote It! Memorable Legal Quotations 18 (Eugene C. Gerhart ed. 1987) (quoting Daniel Webster).
2. Urban A. Lavery, *The Language of the Law*, 8 A.B.A. J. 169, 269 (May 1923) ("Clarity is polite.").
3. 7 A.B.A. J. 277 (June 1921).
4. Erik P. Belt, *Concerned Readers v. Judicial Opinion Writers*, 23 U. Mich. J.L. Ref. 463, 463 (1990) (quoting Oscar Wilde).
5. Harry Steinberg, *Be a Better Lawyer by Being a Better Writer*, N.Y.L.J., Oct. 13, 2000, p. 1, col. 1, p. 6, col. 6 (quoting William H. Taft).
6. James Fenimore Cooper, The American Democrat (1838).
7. Example inspired by Joseph M. Williams, Style: Ten Lessons in Clarity and Grace 6–7 (5th ed. 1997).
8. *See* George Orwell, *Politics and the English Language*, *in* 4 The Collected Essays, Journalism and Letters of George Orwell (1968).
9. Example inspired by Williams, *supra* note 7, at 7–8.
10. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 468–69 (1985) (Marshall, J., concurring in part and dissenting in part).
11. Robert Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 863–64 (Nov. 1951).
12. *Mississippi Bluff Motel, Inc. v. County of Rock Island*, 96 Ill. App. 3d 31, 34, 420 N.E.2d 748, 751 (1981) (Heiple, J.).
13. Oliver Wendell Holmes, The Common Law 3 (1881).
14. Rudolf Flesch, How to Write Plain English: A Book for Lawyers and Consumers 20–25 (1979).
15. For a good study of semiotics, or communication effectiveness, in opinion writing, see S. Sidney Ulmer, *Supreme Court Opinions: Getting the Message*, 3 Law & Policy Q. 263 (1981) (applying readability measurement for judicial opinions).
16. Edward H. Warren, Spartan Education 31 (1942).
17. Albert M. Rosenblatt, *Lawyers as Wordsmiths*, N.Y. St. B.J., vol. 69, No. 7, at 12 (Nov. 1997).

Answers to Crossword Puzzle on page 8.



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The Legal Writer

Free at Last From Obscurity: Clarity — Part 2

By Gerald Lebovits

Last month the *Legal Writer* offered some suggestions on how to write clearly. We continue.

• Study anything Ernest Hemingway wrote. See how many adjectives, adverbs, or conclusions he used. You'll find few. He wrote to the bone. His writing is made up almost entirely of descriptions, concrete and specific nouns, and concrete, active, and vigorous verbs — all in simple, short sentences with familiar words. Hemingway's illuminating and lean style led to his 1954 Nobel Prize for Literature. Lawyers needn't tell stories like Hemingway did, although legal writing can benefit from good storytelling. But all legal writers should copy his spare style.

To write like Hemingway, prefer verbs to nouns. Express actions as verbs. Express agents of actions as the subjects of those verbs. Verbs express action, condition, or state of being. Active verbs tell what the subject does.

Let there be no misunderstanding, and make no mistake: An occasional, well-placed adverb is necessary for style and effect. Article II, Section I, of the U.S. Constitution would be different without its adverbs: "I do *solemnly* swear (or affirm) that I will *faithfully* execute the office of President of the United States . . . ."

• Some writers use complicated language, intentionally or not, to mask their lack of understanding of the subject. Others write turgidly because they want to impress, because they believe that people are supposed to write that way, or because they don't know better. They err. As Webster stated in 1849, "The power of a clear statement is the great power at the bar."[1]

• Urban Lavery explained it nearly 80 years ago: "[T]here is no man to whom that famous French proverb applies with so much truth and force as the lawyer — 'La clarté est la politesse.'"[2] Of course, he did not explain it well enough for the unilingual American lawyer. And his editor didn't correct his misspelling of the French "clarité." But Lavery's article and its predecessor, *The Language of the Law*,[3] are literary classics every student of the law should read.

• Oscar Wilde was kidding when he wrote, "'Remain, as I do, incomprehensible: to be great is to be misunderstood.'"[4] President and later Chief Justice Taft wrote it right, though in the negative: "Don't write so that you can be understood; write so that you can't be misunderstood."[5] If a smart high school student gets your point, others will, too. The hallmark of good legal writing is that an intelligent lay person will understand it on the first read. Recall the classics. They articulate complicated concepts in plain, simple language. That's why they became classics.

• James Fenimore Cooper's formulation can be made simple by featuring the subject, eliminating a throat clearer, cutting an expletive, trimming unnecessary punctuation, adhering to gender neutrality, and writing in the positive: "One of the most certain evidences of a man of high breeding, is his simplicity of speech: a simplicity that is equally removed from vulgarity and exaggeration."[6] *Becomes*: "Well-bred people speak simply, without vulgarity or exaggeration."[7]

• George Orwell wrote the most influential essay on English style.[8] He argued that we can identify dishonest politicians and bureaucrats by their blank passives and nominalizations, which make language unclear. In describing that unclear writing, however, Orwell used the same blank passives and nominalizations he condemned in others. Orwell: "In addition, the passive voice is wherever possible used in preference to the active, and noun constructions are used instead of gerunds (*by examination of* instead of *by examining*)." Orwell rewritten: "In addition, dishonest and pretentious writers prefer the passive voice to the active and noun constructions to gerunds (*by examination of* instead of *by examining*)."[9]

• Take the "plain English" movement seriously. Why write "a means of egress" and then define the phrase as "a way to get out" when you can write "a way to get out" or "exit"? Note the power of earthiness, without foreign or polysyllabic words, from Justice Marshall: "A sign that says 'men only' looks very different on a bathroom door than a courthouse door."[10]

> ***Recall the classics. They articulate complicated concepts in plain, simple language.***

Some plain-English advice written in plain English, from Justice Jackson: "The advocate . . . . will master the short Saxon word that pierces the mind like a spear and the simple figure [of speech] that lights the understanding. He will never drive the judge to his dictionary."[11] One reason Justice Jackson wrote so well may be that law school never tainted him. He never graduated from law school.

For the power of plain English in opinion writing, read anything by Judge Richard Posner of the Seventh Circuit and Judge Alex Kozinski of the

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