NEW YORK STATE BAR ASSOCIATION

MAY 2003 | VOL. 75 | NO. 4

Journal

New York Law Journal.

THE PALSGRAF TRIAL

NEGLIGENCE — PERSONAL INJURIES—DUTY—DUE CARE.

Negligence Is Not Actionable Unless It Involves an Invasion of a Legally Protected Interest and Is the Violation of a Right of the Injured Person, as Distinguished from the Violation of the Right of Another.

COURT OF APPEALS.

Decided May 29, 1928.

HELEN PALSGRAF, respondent, v. LONG ISLAND RAILROAD COMPANY, appellant.

Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department affirming by a divided court a judgment of the Trial Term entered on the verdict of a jury in favor of the plaintiff.

William McNamara for appellant; Matthew W. Wood for respondent.

Inside

Expert Witnesses
Hearsay Evidence
Divorce and Pension Plans
"Serious Injury" Threshold
Forms for Part 36 Rules

Editorial Offices
One Elk Street
Albany, NY 12207
(518) 463-3200
FAX (518) 463-8844

Advertising Representative
Network Publications
Sheri Fuller
10155 York Road, Suite 205
Crestridge Corporate Center
Hunt Valley, MD 21030
(410) 628-5760
e-mail: sfuller@networkpub.com

ON THE WORLD WIDE WEB:
http://www.nysba.org

Contents

Departments

On The Cover

The montage on this month's cover highlights the report of the *Palsgraf* decision as published in the *New York Law Journal*.

Accompanying an article about the 75th anniversary of the decision is the start of the story of the accident itself as it appeared in the *New York Times*.

Cover Design by Lori Herzing.

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

President's Message

LORRAINE POWER THARP

Legislatures And Law Day

As I write this message, we are at the end (I hope!) of a Northeast winter that has been unparalleled in my adult life. I have wonderful memories of a childhood in Massena, N.Y., with ice storms that led to power outages and days off from school – a slightly different perspective from my view of ice and power loss now. Our family would be together by candlelight, and it was fun and cozy. I remember, too, snowdrifts taller than my father, outdoor outlets where one plugged in a car so it would start up again, wind chill and cold that made the national news and winter "picnics" where we would go into the woods near the river and have tuna sandwiches and hot chocolate. For reminding me of these special times in my childhood, I thank the weather gods – but enough already. It is spring by the calendar and for those of us in the legal profession, that means two things: the federal and state legislatures in action and May 1, Law Day.

In a previous message, I discussed our legislative priorities and efforts on the state level. This year I participated for the first time in the American Bar Association's "ABA Day" in Washington, D.C. My activities included speaking on the need for an amendment to the Gramm-Leach-Bliley Act to exempt attorneys from the privacy notice requirements, and representing the NYSBA in meetings with members of the House of Representatives and the Senate. It was an interesting undertaking and amazing to me how much of the facts surrounding our legislative issues, particularly medical malpractice and tort laws generally, get lost in the rhetoric. Lawyers being there face-to-face with members of Congress, armed with facts and data to clear up myths and misconceptions really does help. That is often our most potent form of advocacy.

The ABA's agenda this year included not only the Gramm-Leach-Bliley amendment, but also opposition to federal involvement in the tort system (and opposition to the $250,000 pain and suffering cap), support for Legal Services Corporation funding and support for federal judicial pay raises.

My trip this time to Washington reminded me of two other visits. One was shortly after September 11, 2001, and I had a real desire to see once again the Lincoln Memorial. When I entered that marvelous structure, and stood in front of Lincoln's enormous (in all respects) statue, I simply cried. On either side of the memorial are printed two of Lincoln's speeches, without a description of which speech it is. I was looking at one when I was approached by a very large man, in full biker regalia. He pointed to what I was reading and asked, "What is that?" I told him it was the Gettysburg Address, that he should read it carefully and savor every word because it is perfect (scholars disagree as to some of the actual words and the final text, but that is another article). I left him there and when I was ready to go some time later, I looked over and my biker friend was still there, reading, standing with his bike helmet in hand. The right of each of us to be free, the sacrifices that have to be made to ensure that freedom – these are embodied in that humble president's simple words, and *all* of us can relate to those words.

The other D.C. visit was several years ago when I went to the Holocaust Museum. If I could, I would mandate that every young adult visit this museum with a teacher/guide. We savor and treasure each human life in this country, and that is as it should be. Each life lost in the Iraqi War was mourned by a nation, each prisoner of war was prayed for by a nation. Compare that to the mass destruction of humanity to which the Holocaust Museum bears witness. I went through the museum alone; at one point, I turned a corner and read the following quote on the wall:

> I have issued the command – and I'll have anybody who utters but one word of criticism executed by firing squad – that our war aim does not consist of reaching certain lines, but in the physical destruction of the enemy. Accordingly, I have placed my death-head formations in readiness – for the present only in the East – with orders to them to send to death mercilessly and without compassion, men, women, and children of Polish derivation and language. Only thus shall we gain the living space (Lebensraum) which we need. Who, after all, speaks today of the annihilation of the Armenians? *-Adolph Hitler, 1939*

Lorraine Power Tharp can be reached at Whiteman Osterman & Hanna, One Commerce Plaza, Albany, New York 12260, or by e-mail at lptharp@woh.com.

PRESIDENT'S MESSAGE

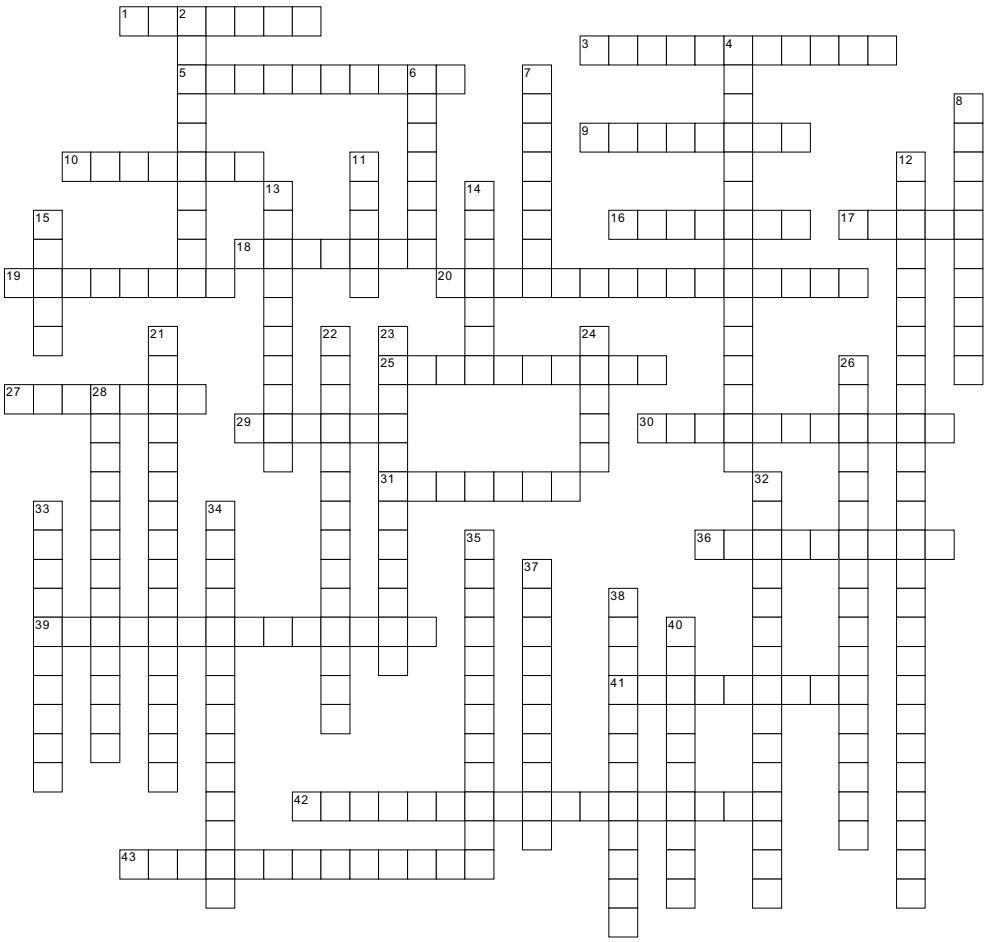
I am half Armenian, and it took me quite a while before I could continue walking through the museum. Both my grandparents lost their first families in the Armenian genocide, which transpired from 1915 to 1916 (continuing in many respects to 1923). We heard these stories as children, told to us not with hatred or to instill hatred, but so that we *would not* forget, so that we would speak out, so that the answer to Hitler's question would be forever changed.

Law Day. Our answer to the communist display of war power that could lead to mass destruction of humanity. On May 1 each year, we celebrate our rule of law, our freedom, our very real ability to say, as my Armenian grandmother did, "Life is sweet." At the Bar Center each year we give out the President's *Pro Bono* Awards, honoring the best among us who help change lives on a volunteer basis, the only profession that does so on such a large scale. Each one of those 19 award recipients – and each one of you reading this message who does *pro bono* work – contributes to what Law Day was intended to celebrate. Access to justice for *all* is the key – without it, our celebration would be meaningless.

I wish you happy spring, the renewal on all levels that accompanies spring, and the reenergizing of each of us in this marvelous profession of law.

CROSSWORD PUZZLE

The puzzles are prepared by J. David Eldridge, a partner at Pachman, Pachman & Eldridge, P.C., in Commack, NY. A gradute of Hofstra University, he received his J.D. from Touro Law School. Answers to this puzzle will be printed in the next issue. (The answer to the previous puzzle is on page 50.)



Empire State Evidence, by J. David Eldridge

Across

1 Where the lawyers speak with the judge outside of the jury's presence
3 Evidence of previous immoral, vicious, or criminal acts which is admissible on cross-examination to show the witness is unworthy of belief
5 Statements protected from discovery due to special nature of relationship between communicating parties
9 The process of determining an individual's status as an expert
10 Putting answers in the witness's mouth on direct
16 An out-of-court statement offered to prove the truth of the matter asserted
17 The regular practice of meeting a particular kind of situation with a certain type of conduct
18 Rule holding that a filed document more than 10 years old which affects real property is *prima facie* proof of its contents (CPLR 4522)
19 What every defendant has a right to do to a witness on cross-examination
20 Doctrine preventing commencement of an action in certain circumstances unless a written and executed contract or writing exists
25 The preliminary questions posed to a witness to establish the admissibility of certain evidence
27 To call a witness's veracity or credibility into question
29 The reason for doing something
30 The quality in a witness which renders his evidence worthy of belief
31 Evidence of what a witness thinks
36 Evidence of a person's moral standing in the community based on reputation
39 The introduction of evidence to show that a writing is what it purports to be
41 Concession or voluntary acknowledgment of the existence of certain facts
42 CPLR 4514 rule allowing impeachment of a witness by offering proof of a statement previously made which differs from testimony at trial
43 Evidentiary rule discouraging the introduction of evidence not contained within a contract

Down

2 The recorded testimony of a witness taken under oath pursuant to CPLR 3107
4 Hearsay exception under CPLR 4518 allowing introduction of documents regularly recorded at a job on or about the time of a transaction
6 A document, item or other tangible evidence shown to the jury and used during deliberations
7 Evidence tending to make a disputed fact more or less likely
8 What you call the impermissible attempt to add credence to unimpeached testimony or evidence
11 . . . and answered
12 Doctrine precluding use of evidence that a party attempted to correct a defective condition
13 What an expert, unlike a layperson, may provide while on the stand
14 When the judge agrees with your objection
15 What a party is deemed to do with an unrefuted statement others would have ordinarily denied
21 Hearsay exception based upon statement made by declarant during or soon after a startling event
22 Rule allowing the court to recognize facts which are either generally known or capable of ready determination via accurate and reliable sources
23 Counsel's burden when opposing party's objection is sustained
24 Opinion of the court
26 New York's Fifth Amendment parallel preventing this is found in CPLR 4501
28 A party presenting evidence who, by reason of education or experience, possesses superior knowledge of a subject relevant to issue before court
32 Rule prohibiting introduction of oral promise or declaration made by decedent (CPLR 4519)
33 Facts not directly connected with the principal matter or issue in dispute
34 How you mark an exhibit before introducing it into evidence
35 The original document rule (CPLR 4539)
37 The general opinion of a person held by those in the community
38 What you do to a witness whose credibility has suffered on cross-examination
40 Repetitious evidence

Trial Judge Burt Jay Humphrey Saw Jury Verdict as "Close Call"

By William H. Manz

"Well, I think not. Of course, it is a close call in my mind, but, at the same time, I will let the verdict stand."[1] With this ruling, Justice Burt Jay Humphrey, by denying the Long Island Railroad's motion to set aside the verdict in the *Palsgraf* trial, unwittingly accorded himself a permanent place in American legal history.[2]

Although now often referred to only as the "trial judge" or merely remembered as one of the "Passengers of *Palsgraf*,"[3] Humphrey was a well-known figure in the New York City legal community during his lifetime. A popular and respected judge, he was praised on his retirement as having "instilled a deep, sincere and abiding confidence on the part of the people of the county in the judicial system by his splendid record while on the bench."[4]

Burt Jay Humphrey served on the bench for 32 years, presided over several well-publicized trials, inaugurated the Queens County probation system,[5] and chaired the jurists' committee that advised the architects of the present Queens County Courthouse.[6] His view of the law was that "the human element and personal interest keep it from attaining the perfection that it has in theory."[7] He believed that humanity was "prone to error," but that if it were otherwise, "there would be no judges, and perhaps no newspapers."[8] His personal manner was described as cordial, friendly, tolerant, and never too busy to listen.[9] Lawyers reportedly admired him because of his courtesy and honesty,[10] and he earned the gratitude of many young attorneys because of his practice of appointing as referees individuals who were newly married or expecting a child.[11]

Early Years

Humphrey was born on April 23, 1866, in the Tompkins County village of Speedville, N.Y. The son of Edward L. Humphrey, a farmer,[12] and Manette Smith Humphrey,[13] he was educated in the local district schools, and attended high school in Owego, in Tioga County. The family's finances ruled out law school, so he instead read law in the offices of Supreme Court Justice Charles E. Parker and County Judge George F. Andrews.

Admitted to the bar in 1890,[14] Humphrey moved to Seattle to establish a law practice. He returned to Tioga County the next year to marry Frances Akins of Berkshire. Back in Seattle, Humphrey continued to practice law, and appeared several times before the Washington Supreme Court.[15] His Seattle practice was successful until the Panic of 1893. After struggling financially for several years, the Humphreys decided in 1897 to return to Berkshire. When they reached Grand Central Station in New York, they made a spur-of-the-moment decision to take a train to Jamaica, Queens. Finding that the then-small community reminded him of his hometown, Humphrey decided to stay and open a law office.[16]

Humphrey joined the Masons and the Elks, and was a member of the local fire company. When the company was disbanded after a paid department was established in Jamaica, Humphrey purchased for $14 the unit's large wooden desk, which he used for the rest of his career. As an attorney, he appears to have engaged in general practice, and appeared several times before the Appellate Division, Second Department.[17]

One notable incident involved the Ocean House, a hotel in Rockaway. The operator had failed to pay the remainder due on the lease, and was to be dispossessed. When Humphrey arrived with a law clerk and a marshal, the man retreated to his office and hid under his desk. The situation was resolved, when, with a policeman present, Humphrey, the clerk, and the marshal simply picked the man up and carried him out of the hotel.[18]

Election as County Judge

In 1903, Humphrey was nominated for county judge by the Queens County Democratic Party, headed by political boss Joseph "Curly Joe" Cassidy. Although

William H. Manz is the senior research librarian at St. John's University School of Law. A graduate of Holy Cross College, he received a master's degree in history from Northwestern University and a J.D. degree from St. John's University School of Law.

praised in the pro-Democratic press as "a young man of splendid ability, exalted reputation, and high moral courage,"[19] he was given no chance to win. He had received the nomination only because the incumbent, the popular Republican-Fusion candidate, Judge Harrison S. Moore, was regarded as unbeatable.[20] Humphrey, who had always wanted to become a judge, took the nomination seriously and promised a "whirlwind campaign." Aided by the large margin-of-victory of Democratic mayoral candidate, George B. McClellan, son of the Civil War general, over the Fusion candidate, Mayor Seth Low, the entire Cassidy slate prevailed at the polls, with Humphrey defeating Moore by more than 4,300 votes out of the almost 29,000 cast.[21]

Ironically, the most noteworthy event of Humphrey's first year on bench was an attempted burglary at his home. One evening in May 1904, Mrs. Humphrey's niece came downstairs and encountered burglars attempting to steal silverware and other items. As one man pointed a revolver at her, she ran back upstairs to warn the household. The intruders then fled without their loot and vanished.[22] Two years later, the Humphreys moved to a Jamaica residence he called Beach Haven, later enlarging the property in 1911 with the purchase of 21 additional lots.[23] For a time, they kept horses, chickens, and cows on the property. One night, a prowler took milk from a cow, and then attempted to steal corn from the garden, before being frightened off by Humphrey, who appeared on a balcony armed with a gun.[24]

Humphrey's early years as county judge also included involvement in a classic "lost boy" story. In April 1909, 3-year-old Edwin Biggs, accompanied by two dogs, left home, apparently intending to find a doctor for his seriously ill father (who later died of pneumonia). Darkness fell, and the boy became lost in the woods. Humphrey, who was out for a walk with his niece, encountered one of the dogs, which appeared to be agitated. They followed it, and soon heard the crying child. The boy was taken to the nearby Humphrey home, where Mrs. Humphrey was able to learn his name. The judge then personally returned the boy to his parents.[25]

In 1909, Humphrey ran for re-election as the candidate of both the regular Democratic Party and the Republicans. His opponent was George E. Cogswell, the candidate of the Independent Democrats, who were determined to oust Cassidy's political machine. Humphrey, benefiting from support by the Republicans[26] and the backing of the Queens County Bar Association,[27] won re-election, although Independent leader Lawrence Gresser prevailed over both Cassidy and the Republican candidate in the hotly contested race for borough president.

The Palsgraf Decision

Seventy-five years ago, on May 29, 1928, the Court of Appeals handed down *Palsgraf v. Long Island Railroad Co.*,[1] overturning a jury verdict in favor of Helen Palsgraf who had been injured when a scale on a railway platform overturned in the after-effects of an explosion triggered when a package containing fireworks fell to the rails. The unsuspicious bundle, wrapped in newspaper, had been under the arm of a man who jumped aboard the train after it was moving and seemed about to fall. A guard on the train who had held the door open reached forward to help the man while a guard on the platform pushed him from behind, but the bundle was dislodged and the explosion followed.

The 4-3 Court of Appeals decision written by Chief Justice Benjamin Cardozo overturned a 3-2 Appellate Division ruling that had upheld the jury verdict.[2] The Court of Appeals concluded that the conduct of the railroad's guard was not, in relation to Helen Palsgraf, negligence: "Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right." *Palsgraf* soon became a widely celebrated case that is still regularly cited by the courts.

This article chronicles the career of the trial judge, Burt Jay Humphrey, whose faith in the ability of juries to reach conclusions about the facts likely influenced his decision to let the verdict stand, thus setting the stage for the historic ruling. In addition to providing background on the *Palsgraf* case, the account of his career contains a revealing account of activity in the state's highest trial court during the early years of the 20th century.

1. 248 N.Y. 339, 162 N.E. 99 (1928).
2. 222 App. Div. 166, 225 N.Y.S. 412 (2d Dep't 1927).

During his second term as county judge, Humphrey became involved in a scandal that began when 16-year-old Clara Ellert went to the Queens County Courthouse to inquire about the case of her husband who had recently been arrested for petty theft. There, she encountered two Cassidy followers who promised to get her a lawyer. Instead, they took her across the street to the Democratic Party clubhouse, where they assaulted her.[28] Seeking justice, she told her story to Humphrey and the Queens district attorney, Matthew J. Smith, a member of

the Cassidy organization. When Smith attempted to dismiss the indictments against the accused Cassidy followers, the young woman enlisted the aid of Florence Eno, the leader of the local Suffragist Party. After the conviction of one of the men, a *New York Times* editorial critical of the way the case was handled prompted a Washington, D.C., woman to write a letter to the editor that suggested that both the district attorney and Humphrey had shielded the accused men.[29] Humphrey immediately responded with his own letter, stating that he had "been diligently pushing [the case] since it was first called to my attention."[30] The next week the *Times* printed a letter from Mrs. Eno that praised Humphrey's "absolutely fearless attitude and splendid help," and stated that it would have been impossible to get any indictments without his assistance.[31]

BOMB BLAST INJURES 13 IN STATION CROWD

Package of Fireworks Explodes in Beach-Bound Throng at East New York.

A PANIC AS TRAIN IS SHAKEN

Windows Are Smashed on Jamaica Express and Part of Platform Is Ripped Up.

Thirteen men and women, on their way to the Rockaways and other Long Island resorts, were painfully hurt yes-

In his 22 years on the county court bench, Humphrey presided over 700 civil and criminal trials.[32] These included a tomato-throwing incident,[33] displaced chickens,[34] and a dispute between two evangelists over the use of a tent.[35] While serving in the criminal term, he passed sentence on more than 1,200 persons,[36] including horse thieves,[37] various swindlers and con-artists,[38] a woman bigamist dubbed the "Kissless Bride,"[39] several absconding husbands,[40] and a man who had stolen $1.51 from a church poor box.[41]

Humphrey also presided over several well-publicized murder trials, including those of Augusta "Gussie" Humann, charged with conspiring in the murder of a former admirer, and Ernest and Marie Vetter, accused of murdering Mrs. Vetter's former fiancé, putting the body in a burlap bag, and dumping it into Jamaica Bay.[42] Ms. Humann was acquitted on a directed verdict when Humphrey found no evidence against her.[43] The Vetters, who had pleaded self-defense, escaped a murder conviction, and were instead found guilty of manslaughter.[44]

At least two other convicted murderers who were tried before Humphrey did not fare as well. In 1921, 17-year-old Peter Nunziato, convicted of the mugging-related murder of Wilfred P. Kotkov, a professor at the Jewish Theological Seminary,[45] received a death sentence and was later executed. In 1923, the death penalty was imposed on Albito Mastrota, 31, who, expecting to inherit his uncle's $50,000 estate, had strangled the man in his bed and then faked a murder scene.[46] Mastrota was executed on June 12, 1924.[47]

Sentencing Philosophy

Humphrey believed that one of his duties as a judge when sentencing convicted criminals was to protect the public. On one occasion, he said, "I am going to do all I can to stop holdups in Queens if I have to send every young loafer in this county to prison for life."[48] Although known for his attempts to reform first offenders, Humphrey gave long sentences to habitual criminals and to the perpetrators of particularly outrageous crimes. In imposing a sentence of 30 to 60 years in prison on two men who had abducted a young woman after robbing her companion, Humphrey stated, "There is a duty to society which looks to our courts for protection from crimes such as that with which you two young men are charged."[49]

When later sentencing four young men convicted of the same type of crime, he said, "Your crime was the worst I have known in the history of Queens County. You are entitled to no mercy."[50]

In imposing a 39-year sentence on an arsonist who admitted to setting fires to three tenement houses because life had been dull since he had left the army after World War I, Humphrey said, "You are a most dangerous man. I am going to give you the longest sentence I can."[51]

A 30-year sentence was imposed on a 16-year-old, who after having served a term in the New York Juvenile Asylum committed a series of burglaries, including one at the home of a policeman, where he tied up the wife and threatened to burn her unless she revealed the location of money and jewels.

A 40-year sentence was imposed on a 25-year-old man convicted of a robbery committed while out on bail for participation in a $65,000 burglary. Humphrey said, "You have been bad from the start. You have been bad ever since."[52]

In the case of a man who had stolen when he was drunk, the judge said, "I always do all that I can to encourage sobriety and so I am going to assist you by making it hard for you to get a drink. I will sentence you to Sing Sing for 10 years. That may take the edge off your appetite."[53]

CONTINUED ON PAGE 14

Personal Glimpses

Burt Jay Humphrey's long judicial career included events that gave special glimpses into his personality.

In his early days as a county judge, an attorney could not find the judge in his chambers and decided to look for him at his home. There he found Humphrey milking a cow. The judge explained that the hired man was away but "I can milk as well as he. This is a part of the close to the soil programme that keeps people human." The attorney then made his presentation while the judge continued with his milking.[1]

Another day, while sitting on the bench one day, Humphrey handed a lawyer a $5 bill to save the man the embarrassment of not being able to pay the costs of an adjournment.[2]

1. *Found the Court A-Milking, Lawyer Made His Argument While His Honor Finished the Job*, N.Y. Times, Aug. 8, 1908, at 3.
2. *Charity Gets Judge's Loan*, N.Y. Times, Sept. 9, 1916, at 6.

CONTINUED FROM PAGE 12

Humphrey was skeptical of expressions of remorse, noting that defendants "are more often sorry that they were caught than that they committed the crime."[54] He was not swayed by requests from influential persons to mitigate a sentence, as illustrated by the case of two college students who were sentenced to the Elmira Reformatory for car theft, despite a letter sent by the governor of Texas to the governor of New York on behalf of one of the defendants. In passing sentence, Humphrey stated, "I do not see why because your family is prominent and you have superior advantage that we should be lenient with you."[55]

Humphrey was also not always receptive to pleas for clemency. In 1907, he sentenced a convicted burglar to 15 years, despite the man's efforts to sway the court by quoting William Jennings Bryan on the need to encourage those who would honestly endeavor to lead a good and useful life after their discharge from prison.[56] This convict was described as "heartbroken" by his sentence, but not everyone sentenced by Humphrey was necessarily dissatisfied. In 1910, he gave two burglars identical sentences, and was thanked by one of them who had been angered by his accomplice's efforts to place all the blame on him.[57]

Prohibition Decisions

As a jurist in the Prohibition era, Humphrey had his share of liquor-related cases. These ranged from imposing small fines on minor offenders to more serious incidents. Humphrey realized that there could be disagreement about the wisdom of Prohibition, but was anxious to prevent the sale of poisonous bootleg liquor.[58]

When he fined a necktie manufacturer $500 after the man pled guilty to making homemade whiskey, Humphrey observed, "When a necktie manufacturer starts to make bootleg whiskey two things are likely to happen – either there will be an explosion because he does not understand the operation of a still or the whiskey is apt to be poison. I would impose a jail sentence if it wasn't for the fact that you have gone back to the necktie business."[59]

In a decision that was then seen as a blow to police raids and drew criticism from the assistant district attorney, Humphrey held that seizures of liquor under the Mollen-Gage Law must be made by the officer who procured the search warrant, and ordered the return of eight bottles of gin, two pint bottles of wine, and twenty-six bottles of beer taken from a Corona, N.Y,. man.[60]

A month later, a laborer who claimed that whiskey and wine worth $100,000 had been wrongfully seized did not initially fare as well. Seeking the return of the alcoholic beverages, he claimed to have acquired them before Prohibition. Noting that he could not understand how a man of such limited means could possibly own such a valuable cache of liquor, Humphrey upheld the seizure, saying the premises where they had been located was really a whiskey warehouse.[61] The Appellate Division, however, ordered the return of the liquor on the grounds that there had been an unreasonable delay in the issuance of the notice required by the State Prohibition Enforcement Act,[62] although two dissenting judges noted that the man's statement relating to ownership was "incredible on its face."[63]

Other Notable Cases

As a county judge, Humphrey had some pre-*Palsgraf* encounters with the Long Island Railroad. In 1910, he fined the railroad $500 for maintaining a nuisance by closing a public highway. Here, the right to lay out streets accorded the citizens of Jamaica by a 1734 royal grant prevailed over rights claimed by the LIRR under its 1834 charter.[64]

In 1923, he presided over the manslaughter indictments of the railroad's general superintendent, chief of police, and several LIRR employees, who were accused of culpability in fatal grade-crossing accidents.[65] Nothing apparently came of these indictments, but in 1924, Humphrey granted the district attorney's request for a special grand jury investigation of a serious derailment at the railroad's Sunnyside Yards that killed one woman and injured 36 other passengers.[66] Three LIRR employ-

CONTINUED ON PAGE 16

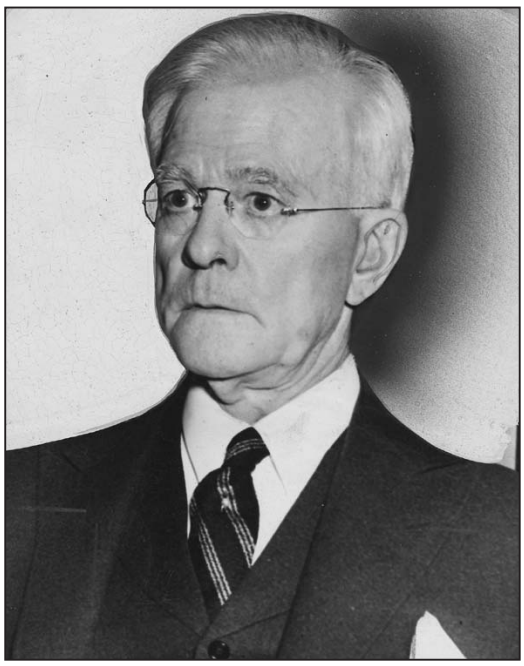
CONTINUED FROM PAGE 14

ees were later indicted, and one was convicted of manslaughter and sentenced to 60 days in the workhouse.[67]

Two unusual courtroom incidents related to Humphrey's belief in demonstrating the facts to juries: In a $25,000 suit brought by a woman burned in a steam cooker accident, an expert witness was permitted to demonstrate the proper use of the device by preparing corned beef and cabbage.[68] At the trial of a teller for stealing $15,000 from a Long Island City bank, Humphrey had a replica of the safe and its alarm system erected in the courtroom. Proceedings throughout the courthouse were interrupted when, in demonstrating the alarm system, the expert witness needed five minutes to turn off the device.[69]

In a 1914 murder trial, Humphrey ordered everyone not connected with the trial out of the courtroom. Supporters of the defendant, described by the *New York Times* as gangsters, then rioted, wrecking several waiting rooms before the police arrived.[70] Two years later, a woman testifying in a suit over a promissory note had a heart attack. She was carried into Humphrey's chambers, but was dead by the time a doctor arrived.[71]

In a 1926 child custody case, Humphrey encountered a feisty *pro se* litigant, a grandmother, who, speaking broken English, repeatedly interrupted the judge, and, on one occasion, told the attorney for the child's father to "shut up." Humphrey disregarded her unusual courtroom conduct and awarded custody to the woman. In ruling against the absentee father, Humphrey said to the 12-year-old granddaughter, "You have a fighting grandmother, and I have no fears as to her not taking care of you."[72]



This photograph accompanied Judge Humphrey's obituary in the *N.Y. Times*, Dec. 12, 1940.

Election to Supreme Court

After his re-election as county judge in 1915, Humphrey's ambitions turned toward the state Supreme Court. In 1918, he planned to run as an insurgent against the nominee of Queens Borough President Maurice Connolly. Humphrey, however, eventually acceded to the request of the state Democratic Party chairman and Governor Al Smith that in the interest of party unity he give up the race.[73] In 1920, he did get the nomination, but like every other Democrat running in the Second Judicial District he was defeated in the landslide victory of Republican presidential candidate Warren G. Harding.[74]

In 1925, he was nominated for justice when the expected Queens nominee, District Attorney Richard S. Newcombe, dropped out of the race when Connolly decided he did not want to create a vacancy in the district attorney position that would be filled by Governor Al Smith.[75] This time, Humphrey was victorious when a Democratic Party electoral sweep ousted the two incumbent Republican justices.[76]

Among the early cases after his election was the well-publicized trial of several Long Beach policemen accused of being involved in a rum-running plot.[77] In another case, he denied an annulment to a woman who said she was so drunk during her wedding ceremony that she had no memory of it. In a dispute over a strip of land adjoining the east end of Jones Beach State Park, Humphrey held that the 200 heirs of Captain John Seaman had no claim to the property because the 18th century grant by Governor Thomas Dongan did not include the land.[78]

Palsgraf Trial

Unlike the Dongan patent case, when *Palsgraf* appeared on Humphrey's docket, it did not give any indication of being particularly noteworthy. The entire trial lasted less than two days, with the jury taking only two hours and thirty-five minutes (including time out for lunch) to find the Long Island Railroad liable, and awarding Mrs. Palsgraf $6,000 in damages.

At the trial, Mrs. Palsgraf's attorney was Matthew W. Wood, a *magna cum laude* graduate of Yale Law School, a former editor of the *Yale Law Journal*, and an experienced general practitioner with offices in the Woolworth Building. Trying the case for the LIRR was one of its most junior attorneys, William McNamara, a recent graduate of New York Law School.

Wood's examination of his witnesses concentrated on establishing a chain of causation and eliciting testimony that railroad employees had caused the unknown pas-

senger to drop his bundle of fireworks. McNamara, who called no witness of his own, focused on establishing the anonymous nature of the package. In doing so, his strategy appears to have been to convince Humphrey to rule favorably on a motion to dismiss the case, as indicated by the language he used when the last witness was late in appearing. Here, he said, "I move to dismiss the complaint. It surely can not be anticipated, when people are carrying fireworks in a package, and we can't have everybody open their bundles when they come on the station platform."[79]

Humphrey's role during the testimony was limited to asking a few questions that clarified what witnesses had said. He had to rule on only one objection, sustaining McNamara's objection to a statement by Wood's medical expert, the noted alienist and neurologist Dr. Graeme Hammond, which appeared to connect Mrs. Palsgraf's alleged insomnia with the accident. Both before and after Dr. Hammond's testimony, he denied McNamara's motions to dismiss the case.

His subsequent charge to the jury, described as "balanced,"[80] was as follows: "Did these men omit to do something which ordinarily prudent and careful train men should not omit to do?"[81] Humphrey then agreed to McNamara's request to charge the jury that it should draw no inference from the railroad's failure to call any witnesses, but denied his request for a charge that the trainmen's act of knocking the bundle loose was not the proximate cause of Mrs. Palsgraf's injuries.[82]

Once the jury had awarded Mrs. Palsgraf $6,000, Humphrey denied William McNamara's motion, made under § 549 of the Civil Practice Act, to set the verdict aside, indicating that although he regarded it as a close question, he would let the jury's decision stand.[83] His final action in *Palsgraf* came on May 27, 1927, when he refused the LIRR's motion for a new trial, leading to the appellate process that ultimately brought the case to Benjamin Cardozo.[84]

Humphrey's comments when ruling against McNamara's motion to set aside the verdict raise the question of whether the *Palsgraf* case might have taken a different course if another justice had been on the bench, particularly because Cardozo and others later expressed doubt about whether there had been any negligence on the part of the railroad.[85] From his comments, it appears that Humphrey also had his doubts about the strength of Wood's case, but it would not be surprising that his belief in the jury system as the best method for deciding questions of fact,[86] together with possible sympathy for Mrs. Palsgraf, helped influence his ruling in what he regarded as close call. If Humphrey had instead ruled for the LIRR, it is possible that Matthew W. Wood might not

CONTINUED ON PAGE 18

Donation to Women's Bar

Burt Jay Humphrey made legal news a final time in January 1939, when he donated his law library to the Queens County Women's Bar Association. He noted that he was "most impressed with their efforts in the face of difficulties that undoubtedly beset the young woman lawyer trying to make her way in the law."[1]

1. *Women Lawyers Get Humphrey's Library*, N.Y. Times, Jan. 24, 1939, at 17.

CONTINUED FROM PAGE 17

have pursued the case further, and it would have vanished from legal history.

Subsequent Decisions

In the years after *Palsgraf*, service on the Supreme Court brought the kind of criticism and controversy that Humphrey had not previously encountered. In 1927, a Brooklyn Republican leader publicly blamed the Democratic Supreme Court justices for court congestion, asserting that together they tried fewer cases than Republican Justice James C. Cropsey.[87]

Two years later, questions arose about Humphrey's service as a director of a real estate company. He responded by indicating that the company was formed to manage his own properties, that there were no public holdings, and that the directorship did not interfere with his judicial duties.[88]

In 1930, real estate was again an issue when John Haynes Holmes of the City Affairs Committee charged that the courts had made excessive awards in land condemnation cases, and said Humphrey and four other justices had "made the most indefensible awards." Humphrey answered by stating that every precaution had been taken in determining the awards, and that he had "a fairly good knowledge of property values in [Queens]."[89]

Humphrey also encountered difficulty in the contentious area of labor relations. In one incident, workers on strike against the Wise Shoe Co. had frightened customers and caused crowds to gather, obstructing the entrance to the store.[90] Humphrey granted an injunction enjoining the union from picketing and engaging in other strike-related activities against the shoe company.[91] The Appellate Division later held that extending the injunction to other stores operated by Wise was too broad, and struck provisions of the injunction regarding interference with business and persuading employees to stop working for the company.[92] The case went to the Court of Appeals, which finally enjoined all "shouting, collection of crowds, loitering upon or obstructing the sidewalk or entrance to the store," and "permitted peaceful picketing with sign or placard with truthful legend and persuasion by sign, notice or handbill."[93]

A labor case with more serious implications arose when longshoremen and teamsters refused to allow trucks with non-union truckers onto the Brooklyn wharves.[94] After a six-week trial, Humphrey granted a permanent injunction, holding that the steamship companies, as common carriers, could not allow their employees to refuse freight handled by non-union workers.[95] The unions attacked the ruling as "harking back to the past" and being "contrary to the expressed policy of Congress."[96] Union leader Joseph P. Ryan promptly announced that the unions would appeal, and threatened a general strike.[97] Mayor Fiorello LaGuardia supported the union's legal position, agreeing that the Norris-LaGuardia Act would be violated if the injunction were granted.[98] Serious problems seemed likely when union workers then staged a one-day strike that tied up the wharves,[99] but further difficulties were averted when Humphrey agreed to stay the injunction pending an appeal. On appeal, Sen. Burton K. Wheeler of Montana, serving as counsel for the unions, argued that the dispute involved questions of interstate commerce and could only be settled by a federal agency.[100] The Appellate Division agreed and reversed, lifting the injunction.[101]

In his final years on the bench, Humphrey also made the news because of events outside the courtroom. In 1935, he presided at the first wedding of eccentric heiress Doris Duke. Later that year, his home was again burglarized. An intruder entered through a second-story window while Humphrey, his wife, niece, and maid were asleep. Unlike the 1909 incident where the burglars fled empty-handed, the unknown intruder stole items valued at $1,000, such as jewelry, cash, and several watches, including one presented to Humphrey after his election as county judge in 1909, and silver vases presented to the judge after being re-elected as a county judge.[102]

Retirement

By the time of his retirement, the growth in the population of Queens County led to a change in Humphrey's living arrangements. In 1936, a street widening project required the removal of an eight-foot privet hedge that Humphrey had cultivated for 25 years as protection against the boisterous behavior of students from Jamaica High School, which was located across the street. The property was subsequently sold for $137,000 to a developer who later built two apartment houses on the site. The Humphreys then moved to a home in nearby Jamaica Estates.

After being forced to retire on January 1, 1937, because of the statutory age limit of 70 for Supreme Court justices, Humphrey was named head of an official inquiry into ambulance chasing.[103] One of the notable targets of the investigation was Dana Wallace, who was suspended from law practice for a year.[104] Ironically, Wallace was a former Queens district attorney who had appeared before Humphrey on numerous occasions in Queens County Court. The inquiry also resulted in several disbarments, and the firing of twelve policemen and the fining of two others for accepting money for soliciting clients.[105]

After being in poor health for about a year, Frances A. Humphrey died on Oct. 13, 1939.[106] In September 1940, Humphrey married Mabel Thuillard, 53, his late wife's niece, and his former legal secretary. Humphrey, who had himself been in poor health since suffering a stroke in 1939, died of a heart attack at his Jamaica Estates home on Dec. 11, 1940.[107] His funeral services were held at the First Presbyterian Church of Jamaica, where Humphrey had been an elder since 1903. The church was filled, and the crowd of mourners outside impeded traffic. After the service, his body was returned to Tioga County for burial in a country cemetery in Berkshire, N.Y.

---

1. Record at 55, *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), *reprinted in* Records and Briefs of Landmark Benjamin Cardozo Opinions (William H. Manz ed., 1999).
2. This article is based on research done for "*Palsgraf:* Cardozo's Urban Legend?" (appearing in the spring issue of the *Dickinson Law Review*), an article discussing the facts and personalities of the *Palsgraf* case.
3. *See* John T. Noonan, Faces and Masks of the Law: Cardozo, Holmes, Jefferson and Wythe as Makers of the Masks 130 (1976).
4. *Bar Extols Humphrey*, N.Y. Times, Feb. 7, 1937, at 50.
5. *Burt J. Humphrey, Ex-Justice Is Dead*, N.Y. Times, Dec. 12, 1940, at 27.
6. *New Court House Started in Queens*, N.Y. Times, Oct. 10, 1936, at 15.
7. *Veteran Jurist is 70 Today*, L.I. Daily Press, Apr. 23, 1936, at 1, 2.
8. *Id*.
9. *Humphrey Proposes Hasty Marriage Curb*, Brooklyn Eagle, June 3, 1937, at A3.
10. *Id*.
11. *Stroke Fatal to Humphrey, Retired Judge,* L.I. Daily Press, Dec. 11, 1940, at 1, 15.
12. N.Y. Times, *supra* note 5, at 27.
13. Henry I. Hazleton, The Boroughs of Brooklyn and Queens; Counties of Nassau and Suffolk Long Island New York 1609-1924 249 (1925).
14. *Burt Jay Humphrey, Democratic Candidate for County Judge*, [Long Island City] Daily Star, Oct. 3, 1903, at 4.
15. *See Port v. Parfit*, 30 P. 328 (Wash. 1892); *Sayward v. Nunan*, 32 P. 1022 (Wash. 1893); *Blumenthal v. Pacific Meat Co.*, 41 P. 47 (1895); *Fairfield v. Binnian*, 42 P. 632 (Wash. 1895).

16. *Stroke Fatal to Humphrey, Retired Judge*, L.I. Daily Press, Dec. 11, 1940, at 1, 15.
17. *See Miller v. Marshall*, 39 A.D. 630, 56 N.Y.S. 865 (2d Dep't 1899); *In re Watts*, 68 A.D. 357, 74 N.Y.S. 75 (2d Dep't 1903) (will construction); *Carberry v. Ennis*, 72 A.D. 489, 76 N.Y.S. 537 (2d Dep't 1902) (will construction); *Sherman v. Ludin*, 84 A.D. 579, 82 N.Y.S. 1032 (2d Dep't 1903) (landlord-tenant); *Kurz v. Doerr*, 86 A.D. 507, 83 N.Y.S. 736 (2d Dep't 1903); *Moran v. Kent*, 87 A.D. 610, 84 N.Y.S. 17 (2d Dep't 1903) (husband and wife separation).
18. *Hotel Dispossess Act Threatens Her Life*, N.Y. Times, Mar. 6, 1903, at 1.
19. *Vote the Ticket*, [Long Island City] Daily Star, Oct. 31, 1903, at 8.
20. L.I. Daily Press, *supra* note 11, at 27.
21. *For County Judge*, [Long Island City] Daily Star, Nov. 4, 1903, at 1.
22. *She Found Burglars at Work*, N.Y. Times, May 20, 1904, at 5.
23. *Jamaica-Hillcrest Auction*, N.Y. Times, June 11, 1911, at XX1.
24. *Humphrey's Cow Robbed*, L.I. Daily Press, Mar. 15, 1936.
25. *Babe in Woods Saved By His Dog*, N.Y. Times, Apr. 19, 1909, at 1.
26. *Cassidy the Issue in Queens Campaign*, N.Y. Times, Oct. 11, 1909, at 2.
27. *Queens Convention Halted*, N.Y. Times, Oct. 3, 1909, at 7.
28. *Politics and Crime in Queens*, N.Y. Times, June 18, at 1914, at 10.
29. *Corruption in Queens*, letter from Rheta Childe Dorr to the editor, N.Y. Times, June 20, 1914, at 8.
30. *The Ellert Case*, letter from Burt Jay Humphrey to the editor, N.Y. Times, June 21, 1914, at 14.
31. *Judge Humphrey Helped Mrs. Eno*, letter from Florence Eno to the editor, N.Y Times, June 30, 1914, at 10.
32. *Humphrey Resigns as a County Court Judge*, N.Y. Times, Dec. 19, 1925, at 7.
33. *She Didn't Throw Tomato*, N.Y. Times, July 8, 1922, at 10.
34. *900 Chickens Face Jail*, N.Y. Times, Apr. 27, 1922, at 6.
35. *Revival Rivalry Draws Two Groups*, N.Y. Times, Sept. 1, 1926, at 12.
36. *Humphrey Resigns as a County Judge*, N.Y. Times, Dec. 19, 1925, at 7.
37. *Horse Thief Sentenced*, N.Y. Times, Apr. 5, 1911, at 20.
38. *Says Spooks Failed to Win Sweetheart*, N.Y. Times, Mar. 14, 1922, at 19.
39. *Sentenced for Bigamy*, N.Y. Times, Feb. 17, 1925, at 7.
40. *Wife Deserter to Prison*, N.Y. Times, July 16, 1911, at C11; *Court Frees Husband*, N.Y. Times, May 10, 1922, at 17; *Runaway Husband is Paroled, Wife is Probation Officer*, N.Y. Times, Nov. 25, 1925, at 23.
41. *Life Term for Burglary*, N.Y. Times, July 11, 1908, at 14.
42. *Pair Face Murder Charge*, N.Y. Times, Dec. 10, 1923, at 18.
43. *Miss Humann Free by Order of Judge*, N.Y. Times, Dec. 15, 1921.
44. *Vetters Convicted of Manslaughter*, N.Y. Times, Dec. 22, 1923, at 26.
45. *Boy Sentenced to Die*, N.Y. Times, Apr. 19, 1921, at 7.
46. *Sentenced to Die in Chair*, N.Y. Times, July 3, 1923, at 8.
47. Daniel A. Hearn, Legal Executions in New York State: A Comprehensive Reference, 1639–1963 164 (1997).
48. *Bandits in Queens Risk Life Terms*, N.Y. Times, Mar. 8, 1921, at 9.
49. *2 Sent to Sing Sing for 30 to 60 Years*, N.Y. Times, Oct. 9, 1924, at 28.
50. *Long Terms for Attack; Four Young Men Held Up Auto, Bound Driver and Carried Girl Away*, N.Y. Times, Nov. 2, 1921, at 7.
51. *Incendiary Gets 39 Years*, N.Y. Times, Feb. 8, 1921, at 5.
52. *40-Year Sentence for Payroll Robber*, N.Y. Times, June 8, 1922, at 24.
53. *Steals When Drunk, Can't Keep Sober, Gets 10 Years in Prison*, N.Y. Times, July 11, 1922, at 14.
54. *Show Your Robber's Nerve, Court Tells Sobbing Youth*, N.Y. Times, Dec. 12, 1925, at 17.
55. *Jails Two College Thieves; Judge Reacts Against "Education" and "Family" Pleas for Pair*, N.Y. Times, Oct. 26, 1921, at 23.
56. *Prisoner Quotes Bryan*, N.Y. Times, Mar. 31, 1907, at 17.
57. *Burglar Turns on Another*, N.Y. Times, Apr. 4, 1910, at 9.
58. *Charges Grand Jury to Bar Deadly Rum*, N.Y. Times, Sept. 12, 1922, at 32.
59. *Fake Dry Agents Got $2000 Weekly*, N.Y. Times, Jan. 23, 1923, at 23.
60. *Ruling Seen As Blow to Liquor Raiders*, N.Y. Times, Feb. 4, 1923, at 22.
61. *Laborer Gets Back His $100,000 Liquor*, N.Y. Times, May 13, 1923, at 5.
62. 1921 N.Y. Laws ch. 156.
63. *People v. 1,400 Packages Containing Scotch Whiskey*, 206 A.D. 711, 200 N.Y.S. 941, 941 (App. Div. 1923).
64. *L.I. Railroad Convicted*, N.Y. Times, Jan. 8, 1910, at 3.
65. *Held for Fireman's Death*, N.Y. Times, May 8, 1923, at 23; *5 Held in Crossing Deaths*, N.Y. Times, Mar. 1, 1924, at 9.
66. *Grand Jury Inquiry Into Wreck Monday*, N.Y. Times, Aug. 6, 1924, at 16.
67. *Sent to Prison for Wreck*, N.Y. Times, May 6, 1926, at 6.
68. *Cooks Corned Beef for Jury to Show Steam Device Is Safe*, N.Y. Times, Nov. 16, 1926, at 29.
69. *Alarm Bell on Safe Halts Court Trials*, N.Y. Times, Nov. 16, 1922, at 2.
70. *Gangsters Riot in Court*, N.Y. Times, Dec. 15, 1914, at 5.
71. *Death Halts Story of Woman Witness*, N.Y. Times, Feb. 29, 1916, at 7.
72. *Fighting Grandmother Argues Case, Wins Custody of Child*, N.Y. Times, May 22, 1926, at 26.
73. *Bennett Quits Race in Favor of Lewis*, N.Y. Times, Aug. 17, 1918, at 14.
74. *Supreme Court – Second District*, N.Y. Times, Nov. 4, 1920, at 4; *City's Vote Goes to Harding and Smith*, N.Y. Times, Nov. 3, 1920, at 1.
75. *Queens Leaders to Meet*, N.Y. Times, Aug. 7, 1915, at 2; *Party Lines Drawn in Judiciary Slate*, N.Y. Times, Sept. 27, 1925, at 26.
76. *Walker Is Elected by Conclusive Vote*, N.Y. Times, Nov. 4, 1925, at 3.
77. *9 Held in Long Beach Plot; Hotel Man and Police Plead Not Guilty of Rum-Running Charges*, N.Y. Times, Mar. 24, 1931, at 36.

78. *State Wins Title to Seaman's Gore*, N.Y. Times, Apr. 24, 1932, at 23.
79. Record, *supra* note 1, at 48.
80. Noonan, *supra* note 3, at 130.
81. Record, *supra* note 1, at 56.
82. *Id*. at 57–58.
83. Section 549 permitted a judge to set aside a verdict if it was "contrary to evidence or contrary to law."
84. Record, *supra* note 1, at 12.
85. *See Palsgraf v. Long Island Railroad*, 248 N.Y. 339, 162 N.E. 99, 100 (1928) ("If there was a wrong to [the man with the fireworks package] at all, which may well be doubted"). *See also Petition of Kinsman Transit Co.*, 338 F.2d 708, 721 n.5 (2d Cir. 1964) (Friendly, J.) ("there is little evidence of negligence of any sort [in *Palsgraf*]").
86. *See* Brooklyn Eagle, *supra* note 9, at 1, 2.
87. *Puts Court Delays Up to Democrats*, N.Y. Times, Oct. 25, 1927, at 31.
88. *Justice Humphrey Admits Directorship*, N.Y. Times, Oct. 23, 1929, at 55.
89. *Two Justices Deny Land Award Waste*, N.Y. Times, Oct. 14, 1930, at 27.
90. *Wise Shoe Co., Inc. v. Lowenthal*, 266 N.Y. 264, 194 N.E. 749, 750 (1935).
91. *High Court Backs Shoe Picketing*, N.Y. Times, Feb. 28, 1935, at 1.
92. *Wise Shoe Co., Inc. v. Lowenthal*, 242 A.D. 660, 272 N.Y.S. 612, 612–13 (App. Div. 2d Dep't 1934), *modified*, 266 N.Y. 264, 194 N.E. 749 (1935).
93. *Wise Shoe Co.*, 266 N.Y. at 269.
94. *New York Lumber Trade Ass'n v. Lacey*, 277 N.Y.S. 519, 520–21 (Sup. Ct., Kings Co.), *rev'd*, 245 A.D. 262, 281 N.Y.S. 647 (2d Dep't), *aff'd*, 269 N.Y. 595, 199 N.E. 688 (1935).
95. *Id.* at 524.
96. *Non-Union Trucks Upheld by Court*, N.Y. Times, Jan. 3, 1935, at 7.
97. *Ryan Will Appeal Pier Labor Ruling*, N.Y. Times, Jan. 8, 1935, at 43.
98. *Id*.
99. *20,000 Drivers Quit Tying Up Wharves*, N.Y. Times, Jan. 29, 1935, at 1.
100. *Ship Union Curb Voided on Appeal*, N.Y. Times, July 13, 1935, at 27.
101. *New York Lumber Trade Ass'n v. Lacey*, 245 A.D. 262, 281 N.Y.S. 647 (App. Div. 2d Dep't), *aff'd*, 269 N.Y. 595, 199 N.E. 688 (1935).
102. *Burglar Ransacks Judge's Residence*, N.Y. Times, May 20, 1935, at 19.
103. *Humphrey Is Sworn In: Former Justice Takes Post as Referee in Brooklyn*, N.Y. Times, Jan. 3, 1937, at 39.
104. *Dana Wallace Gets Year's Suspension*, N.Y. Times, Jan. 1, 1938, at 2.
105. *Two Policemen Fined for Accepting "Gifts,"* N.Y. Times, July 19, 1938, at 5.
106. Obituary, N.Y. Times, Oct. 15, 1939, at 39.
107. N.Y. Times, *supra* note 5, at 27.

View From the Bench

Preparing an Expert Witness Is a Multi-Step Process

BY JOHN P. DIBLASI

One of the most difficult tasks that confront trial attorneys is preparing an expert witness to testify, and the questioning of such a witness on direct and cross examination. This article describes a basic format to assist counsel in developing a consistent approach to the preparation and questioning of an expert witness.

It is assumed at the outset that counsel who calls the expert as a witness has served a discovery response in compliance with the statutory requirements.[1] The failure to do so may result in the witness being precluded from giving testimony in whole or in part.[2]

Is the Expert Witness Necessary?

A threshold question that must be answered is whether the witness is necessary to the case, and whether in fact such testimony will be allowed by the court.

The Court of Appeals has held that as a "general rule the admissibility of expert testimony on a particular point is addressed to the discretion of the trial court."[3] The fact that you wish to call an expert to give an opinion does not mean that the court will allow you to do so. The Court of Appeals has further held that the "guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the jury."[4] It is the trial court's responsibility, in the first instance, to determine whether the jurors are able to draw a conclusion based upon their experience, observations, and knowledge, and "when they would be benefitted by the specialized knowledge of an expert witness."[5]

The Civil Pattern Jury Instruction pertaining to expert witnesses states that:

> When a case involves a matter of science or art or requires special knowledge or skill not ordinarily possessed by the average person, an expert is permitted to state his opinion for the information of the court and jury.[6]

It must be shown that the expert testimony is needed or the court, in its discretion, may refuse to admit such evidence.

The testimony of an expert may be offered to support or contradict the testimony of a fact witness. An example would be in a case where an accident reconstruction expert is called to support or contradict the testimony of a witness with respect to the happening of an accident.[7] Although this testimony may be allowed, it is within the discretion of the trial court to determine whether the testimony will help to clarify an issue that is beyond the knowledge of the typical juror. Generally, an attempt by counsel to have an examining physician, or almost any other expert, testify as to the credibility of a fact witness is not allowed. In this situation the expert opinion impinges on the jury function of determining the issue of the lay witness' credibility. This type of expert testimony turns the trial into a "battle of conflicting experts on the collateral issue of credibility."[8]

A common error is the failure of counsel to understand when expert testimony is needed to make a *prima facie* case. In almost every action involving professional negligence, such as medical malpractice, you will need expert testimony to establish a *prima facie* case. There is no issue as to the necessity of the expert testimony. The expert must give an opinion regarding the accepted standard of the profession and the deviation from same.[9] Generally, the expert must also give testimony as to proximate cause, specifically that the deviation resulted in the injuries and damages sustained.[10] In a products liability case expert testimony is necessary to establish a defect in the designing, making, inspecting and testing of a product and that said defect was a substantial factor in causing the plaintiff's injuries and damages.[11]

JOHN P. DIBLASI has been a justice of the state Supreme Court, Westchester County, since 1994. From 1990–1994, he was a city court judge in Mount Vernon. A fellow of the American Bar Foundation, he has taught trial advocacy skills at Pace University School of Law and his alma mater, St. John's University School of Law. He is a graduate of Syracuse University.

On the issue of damages, unless the amount is liquidated, expert testimony is almost always needed. In a contract action for goods sold and delivered, but not paid for, the damages are liquidated in that they may be determined by referring to the contract. No expert testimony is needed in such a case. In commercial actions, however, it is very common for attorneys to establish a *prima facie* case of liability through fact witnesses and to fail to have an expert available to testify as to damages that are not liquidated. Examples of this would be actions where damages are sought for diminution in the value of real property, loss of the value of goods, loss of profit, etc.

In personal injury actions, it is almost impossible to prove injuries and damages without an expert. In such a case a medical expert must testify regarding the diagnosis, the causal connection between the accident and the injuries, the prognosis for recovery and future disability.

An exception to the rule that expert testimony is needed to prove a *prima facie* case in malpractice actions is where the plaintiff is relying on a theory of *res ipsa loquitur*.[12] In medical malpractice actions this would involve a foreign object, such as a sponge, being left in the body of the patient. In this instance it must be established that the accident would not ordinarily occur without negligence, that it was caused by an agent or instrumentality in the exclusive control of the defendant, and that the accident was not due to any voluntary action or contribution on the plaintiff's part.

The Court of Appeals has also held that where "the very nature of the acts complained of bespeaks improper treatment"[13] no expert testimony is necessary. In a case where the treatment of a psychiatrist consisted of beating the patient during therapy sessions, the Court of Appeals held that the "defendant can hardly urge that the plaintiff must call an expert to demonstrate the impropriety of the assaultive acts."[14] In a legal malpractice action, a failure to comply with a statute that is a condition precedent to commencing an action would fall into the same category. The failure to commence an action within the time allowed by the statute of limitations or the failure to file a notice of claim is improper on its face. An expert need not be called to establish legal malpractice in this situation. However, in both instances expert testimony will be required on the issue of damages.

Finally, in the case where counsel will call more than one expert witness, the court in its discretion may limit the testimony of said witnesses on the ground that it is repetitive and therefore cumulative.[15]

Counsel must determine before retaining an expert witness:

- Is an expert needed to establish a *prima facie* case?
- If the expert is not needed to establish a *prima facie* case, will the court allow such testimony?
- If an expert is not needed to establish liability, is an expert required to prove damages?
- Is more than one expert necessary?
- If more than one expert is being called, is there any cumulative testimony that is likely to be excluded by the court?

Is the Witness Properly Qualified?

Assuming the court will allow the testimony of the expert, the court must next decide if the witness is properly qualified to testify to an opinion.[16] This is where the EXPROB analysis (see the checklist on page 25) begins.

There is no rigid rule requiring that the witness has gained his expertise in a certain way. The expert may be found qualified to give an opinion based upon study, observation or experience.[17] It is the responsibility of the jury to consider the expert's qualifications in evaluating the weight to be given that expert's opinion testimony. The court will instruct the jury that the opinion of the expert "is entitled to such weight as you find the expert's qualifications in the field warrant."[18]

One format to be followed in qualifying a witness as an expert is to ask questions regarding the following:

- What is your educational background?
- What professional training have you received?
- Where have you been professionally employed?
- Do you have any professional licenses? Or in the case of a physician: Are you duly licensed to practice medicine and surgery in this state?
- Do you have any special certifications in your profession? In the case of a physician: Are you board certified in any medical specialty?
- Are you a member of any professional societies or organizations?
- Have you received any awards or honors from your profession?
- Do you hold any teaching positions or have you given any lectures in your area of expertise?
- Are you the author of any publications?

Keep in mind that an expert does not necessarily have to be licensed in a field to give expert testimony,[19] nor does a physician have to be a specialist in a specific area of medicine to give an opinion.[20] It is, however, important to have witnesses testify to the fact that they are board certified in medicine, or have received special certification in any field. Witnesses should also explain the process whereby they became so certified, and what the certification means within the profession.

In your investigation or preparation of the expert witness to testify, an attempt should be made to determine whether anything in the witness's background

would have a negative impact on his credibility. If there is anything negative in the witness's professional background and you have no choice but to call this witness, it is far better to bring out any negative facts in the witness's background on direct examination. If you fail to do so, your adversary will on cross examination. This will surprise the jury, creating the appearance that the witness and counsel have concealed facts, and maximize the impact of the negative background information.

Finally, attorneys sometimes will concede that a witness is qualified to give an expert opinion, thereby hoping to prevent the jury from hearing his qualifications. Usually, this is in a case where the qualifications of the adversary's expert may be far superior to the expert to be called by the attorney who wishes to make the concession. While this is a good tactic, counsel will not be precluded from having the jury hear the expert's qualifications by virtue of such a concession.[21]

What Is the Witness Being Paid?

Once the witness has been properly qualified as an expert, compensation and related issues that may affect the witness's credibility should be fully and adequately addressed during direct examination. It is a mistake to assume that questions regarding these issues will not be asked on cross examination.

In this information age, it is easy to ascertain the number of times a witness has testified, for whom and whether the witness has given prior testimony in other proceedings regarding the same issues that are in dispute in the present case. It is a mistake to assume that your adversary will not be prepared to ask questions regarding these issues on cross examination. Therefore, it is recommended that on direct examination counsel question the expert as to his compensation and any related issues. The jury should not hear this testimony for the first time during cross examination. As with any negative in your case, by being the first to expose it you reduce its potential adverse impact on the jury. Further, it makes your adversary appear as if he is rehashing what has already been disclosed on direct examination.

The expert's compensation and related issues should also be addressed early in the direct examination. This information will be forgotten by the time the jury hears the expert's opinion. Jurors exhibit a negative reaction when they hear information regarding compensation and related issues after the expert has rendered an opinion, and at the end of the direct examination. It seems to immediately undermine any credibility that has been created during the direct, and serves as a perfect lead-in to the adversary's cross examination. Ask questions regarding compensation and related issues early in the direct examination of the expert and you will reduce any negative effect.

While trying a case, counsel for a defendant called an expert who often testified for defendants. Counsel avoided going into the compensation issue clearly hoping that it would not be covered on cross examination. On cross examination, the expert testified about his exorbitant compensation, that he had testified more than 100 times as an expert, that he had reviewed thousands of files as an expert for defendants only, that his income of $700,000 per year was derived solely from such reviews and testimony, and that he no longer practiced medicine. The jury's punitive verdict, assessed against this defendant, was the direct result of this testimony.

Areas that must be addressed on direct or cross examination are as follows:

- How much is the witness being compensated for his time in court today?
- What was his compensation for any pre-trial review and preparation?
- How many times has the witness testified as an expert in the past?
- How many times has the witness reviewed files for attorneys without testifying in the past?
- How many times has the witness testified as an expert or reviewed files for trial counsel and his firm?
- For which side does the expert usually conduct reviews and testify?
- What percentage of the witness's income is derived from performing reviews and giving testimony?
- If the witness was not present in court today, what would he be doing?

What Has the Expert Reviewed?

This topic has very serious ramifications that not only have an impact on the witness's credibility in general, but on the foundation for the opinion given by the expert. It is imperative that an expert witness be given for review everything in the possession of counsel that might in any way bear on the opinion. It is extremely damaging to the credibility of the expert witness to have reviewed some of the records but not all, some of the deposition testimony but not all, some of the trial testimony but not all. If any of these materials are relevant to the basis for the opinion, they must be provided to the witness. The expert witness must be ready to justify or distinguish the opinion in light of materials that do not support it. Some attorneys believe that they will get away with not providing some essential materials to the witness and that this will not be brought up on cross examination. This is a mistake.

Further, it is not credible that a witness who claims to have reviewed numerous documents, pleadings and testimony in a case has not taken any notes. No juror believes this. Time and again jurors listen to the testimony of experts who are able to perform the feat of absorbing

an enormous amount of written information in coming to an opinion without taking a single note. In the event the witness admits to having taken notes the fact that they have not been brought to court will affect the expert witness's credibility and the weight the jury gives his testimony.

The areas to be covered with respect to the expert's review on direct or cross examination are:

- What materials did the witness review prior to coming to court to testify?
- Are there any relevant materials that were not reviewed?
- Was the witness aware of the existence of the materials not provided?
- Has the witness brought the materials that were reviewed to court?
- Were any notes made based upon the review of these materials by the witness?
- Did the witness bring the notes to court?
- Before the review, did counsel tell the witness what opinion that was being sought?
- Did the witness bring to court the transmittal letters and any other correspondence pertaining to his review and the opinion to be given?

What Is the Opinion?

CPLR 4515, form of expert opinion, reads as follows:

> Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinions and reasons first without first specifying the data upon which it is based. Upon cross examination, he may be required to specify the data and other criteria supporting the opinion.

CPLR 4515 gives counsel the option to elicit the expert opinion without using a long hypothetical question that asks the witness to assume certain facts. An expert witness need not set forth the basis for the opinion when asked a hypothetical question seeking an opinion based upon specific facts.[22]

The problem with hypothetical questions is that they are always long, complex and therefore confusing to the jury. Such questions often invite an objection to the form of the question which if sustained, results in the question being repeated. This only adds to the jury's confusion. Further, counsel always risks an objection to the question on the ground that it assumes facts that are not in evidence.

It is rare for an attorney to fail to ask the expert the reasoning underlying the opinion, even though this is not required. A jury would have little reason to believe the opinion of a witness who does not clearly set forth the basis for the opinion and the reasoning used in reaching same.

The EXPROB Checklist

The mnemonic *EXPROB* can provide a handy way to remember the key topics to be covered in the process of enhancing an expert's probability of being successful on the witness stand.

EX-Experience: What are the qualifications of the expert? Is he or she qualified to render an opinion?

P-Pay: When was the expert first retained? What type of compensation is being received? Has the expert ever testified before? For whom? What percentage of the expert's income comes from testifying? What would the expert be doing if not appearing in court?

R-Review: What material has the expert reviewed in reaching an opinion? Are there any relevant materials that were not reviewed? Has the expert brought to court the materials that were reviewed? Did the expert make any notes based upon the review? Did the expert bring the notes to court?

O-Opinion: What type of question will be used to elicit the expert's opinion? In what manner will the expert answer? Is the expert's testimony cumulative?

B-Basis: Is the foundation for the expert opinion contained in the record? What is the basis for the opinion? Is the opinion based upon the testimony of another witness in the proceeding or on information known to the witness from outside the proceeding? Does the basis for the expert opinion contain information that is false, inaccurate or incomplete?

Another area of concern is the form in which the expert opinion is given. Usually, the expert will state his opinion with "a reasonable degree of certainty or probability." There is no requirement that the opinion be given in this or any other specific form. The opinion may be given in

> any formulation from which it can be said that the witness' "whole opinion" reflects an acceptable level of certainty. . . . To be sure, this does not mean that the door is open to guess or surmise, and admittedly, "a degree of medical certainty," taken literally and without more, could very well be so characterized.[23]

The opinion may not be a guess or speculation.

Accordingly, it is suggested that counsel take advantage of the intent of the Legislature's liberalization of the common law rule that required the expert's opinion to be elicited through the use of a hypothetical question. Pursuant to CPLR 4515, counsel may ask the following questions to elicit the expert's opinion:

As to liability:

• Do you have an opinion with a reasonable degree of (medical, engineering, etc.) certainty or probability as to . . . ?

• What is your opinion?

• What is the basis for your opinion?

As to proximate cause:

• Do you have an opinion with a reasonable degree of (medical/engineering, etc.) certainty or probability as to whether the defendant's (departure from accepted practice/product defect, etc.) was a substantial factor in causing the plaintiff's injuries and damages?

• What is your opinion?

• What is the basis for your opinion?

These questions may be easily modified for any type of expert witness.

Counsel will often encounter an objection to the form of the question where the expert witness is asked to give an opinion as to the ultimate question of fact that will be submitted to the jury. Such a question is appropriate where the opinion of the expert is supported "by objective evidence."[24] It is appropriate therefore, for a doctor in an automobile accident case to testify to the permanent, significant or consequential limitations caused by the plaintiff's injuries, even though the jury questions will be asked in the same form.[25]

Finally, there is often much confusion regarding the form of the witness's opinion regarding proximate cause. Assuming the question is asked in the form set forth above, the risk is reduced. There are times, however, where the witness may give a response that is not as certain as counsel would like. The Court of Appeals has upheld cases where the expert's opinion on causation consisted of language that included "likely to increase," "could have caused," "could be," "possibly was," "probably was," "possible cause" and "it seems to be."[26]

What Is the Basis for the Opinion?

> The opinion(s) stated by the (each) expert who testified before you (was, were) based upon particular facts, as the expert obtained knowledge of them and testified to them before you, or as the attorney(s) who questioned the expert asked the expert to assume.[27]

The basis for the opinion is really the evidentiary foundation for the opinion set forth in the record. The Court of Appeals has held, "It is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness."[28] A failure to establish a proper evidentiary foundation in the record, either through the facts in the record, the personal knowledge of the expert, or a combination of both will result in a successful motion to strike the expert's opinion in whole or in part and have the jury disregard same.

Counsel who calls the expert witness must be sure that there is a proper foundation for the expert opinion. This issue is often not determined by the court until an objection is made after the opinion has been given. Because a hypothetical question setting forth the facts upon which the opinion is based is no longer required, the expert's opinion may be elicited without any reference to the underlying facts. This results in the objection being made after both the opinion and basis therefor have already been testified to.

There are two narrow exceptions to the rule that the opinion must be based upon facts in the record or the personal knowledge of the expert. If the expert is relying on out-of-court material, it must be "of a kind accepted in the profession as reliable in forming a professional opinion" or it must come "from a witness subject to full cross examination on the trial."[29] With scientific evidence, admissibility is determined by "general acceptance of the procedures and methodology as reliable within the scientific community."[30]

Once the factual basis for the opinion is set forth in the hypothetical[31] or through the expert's referral to an exhibit in evidence,[32] the witness is not required to set forth the reasoning or technical data underlying the opinion. The failure of the witness to set forth the reasoning for the opinion may be considered by the jurors in evaluating the weight they will give it.[33] The specific data upon which the opinion is based need not be brought out on direct examination and may be raised for the first time on cross examination.[34]

In the event the facts underlying the expert's opinion are not contained in the record of the court, the witness must first set forth those facts prior to giving the opinion.[35]

On cross examination, counsel must ask questions that show the witness has based the opinion on facts that are not true, or are inaccurate, unreliable or incomplete.

Topics that counsel should consider regarding the basis for the expert's opinion to be elicited at trial are:

• Is there sufficient evidence in the record to support the expert's opinion?

• Is the witness basing that opinion on facts personally known to him or her?

• If the witness is not relying upon facts in evidence or information that he or she has personal knowledge of, is the witness relying upon a statement of a person who will testify at the trial and is subject to cross examination; or, if based upon out of court material, is it of a type accepted in the witness's profession as reliable?

• If the witness is relying on facts known to him or her but not contained in the record, is the witness prepared to set forth those facts in advance of stating the opinion?

• Will the expert's opinion be elicited through a hypothetical question that sets forth the facts upon which the opinion is based?

• Will the expert's opinion be elicited through a question that is not hypothetical and does not contain the underlying facts?

• If a question that is not a hypothetical is asked, is the expert witness prepared to clearly set forth the basis for the opinion?

• Is any information upon which the expert is basing the opinion subject to question?

Preparing the Expert to Testify

The fact that a person is an "expert" creates in that witness an attitude of superiority that in many cases makes the person difficult for counsel and the court to control. If you have read all of the above, it should be clear as to each and every area you must cover to adequately prepare an expert to testify. There is no question that expert witnesses present particular problems for counsel. They are easily offended, do not like to be controlled and sometimes do more harm than good for the client's case if antagonized during the preparation process. That being said, I would suggest that expert witnesses be prepared with due regard for their egos, but in the same way that any other witness is prepared.[36]

The court will instruct the jury during its charge that the testimony of the expert "is subject to the same rules concerning reliability as the testimony of any other witness."[37] As discussed, it is essential that counsel prepare the expert with respect to all of the potential defects or weaknesses in the expert's testimony during direct examination. This will serve to reduce the adverse effect such information will have on the jury when elicited during cross.

Conclusion

This basic outline of strategy and the case law that involves an expert witness is just the beginning. The dedicated practitioner will read as many articles on this topic as possible, the cases cited in this article, and the many other cases on this topic that are important but could not be included in this discussion.

---

1. CPLR 3101(d)(1).
2. For an excellent look at the issue of expert witness discovery, see Richard S. Basuk, *Expert Witness Discovery for Medical Malpractice Cases in the Courts of New York: Is It Time to Take Off the Blindfolds?*, 76 N.Y.U. L. Rev., 527 (2001).
3. *De Long v. Erie*, 60 N.Y.2d 296, 305, 469 N.Y.S.2d 611 (1983).
4. *Id.*
5. *People v. Cronin*, 60 N.Y.2d 430, 431, 470 N.Y.S.2d 110 (1983).
6. 1A New York Pattern Jury Instructions – Civil 1:90 (3d ed., West Group 2002) (PJI).
7. *Sitaras v. Ricciardi*, 154 A.D.2d 451, 545 N.Y.S.2d 937 (2d Dep't 1989).
8. *Kravitz v. Long Island Jewish-Hillside Med. Ctr.*, 113 A.D.2d 577, 580, 497 N.Y.S.2d 51 (2d Dep't 1985).
9. *Prete v. Rafla-Demetirous*, 224 A.D.2d 674, 638 N.Y.S.2d 700 (2d Dep't 1996).
10. *Id.*
11. 1A PJI 2:120.
12. *Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489, 655 N.Y.S.2d 844 (1997); 1A PJI 2:65.
13. *Hammer v. Rosen*, 7 N.Y.2d 376, 379, 198 N.Y.S.2d 65 (1960).
14. *Id.*
15. *Abbott v. New Rochelle Hosp. Med. Ctr.*, 141 A.D.2d 589, 591, 529 N.Y.S.2d 352 (2d Dep't 1988).
16. *Meiselman v. Crown Heights Hosp.*, 285 N.Y. 389, 397, 34 N.E.2d 367 (1941).
17. *Caprara v. Chrysler*, 52 N.Y.2d 114, 121, 436 N.Y.S.2d 251 (1981).
18. 1A PJI 1:90.
19. *People v. Rice*, 159 N.Y. 400, 409, 54 N.E. 48 (1899).
20. *Forte v. Weiner*, 200 A.D.2d 421, 606 N.Y.S.2d 220 (1st Dep't 1994).
21. *Counihan v. J.H. Werbelovsky's Sons, Inc.*, 5 A.D.2d 80, 82, 168 N.Y.S.2d 829 (1st Dep't 1957).
22. *Tarlowe v. Metropolitan Ski Slopes, Inc.*, 28 N.Y.2d 410, 413, 322 N.Y.S.2d 665 (1971).
23. *Matott v. Ward*, 48 N.Y.2d 455, 458, 423 N.Y.S.2d 645 (1979).
24. *Dufel v. Green*, 84 N.Y.2d 795, 798, 622 N.Y.S.2d 900 (1995).
25. *Id*.
26. *See Matott*, 48 N.Y.2d at 460.
27. 1A PJI 1:90.
28. *Hambsch v. New York City Transit Auth.*, 63 N.Y.2d 723, 725, 480 N.Y.S.2d 195 (1984).
29. *People v. Sudgen*, 35 N.Y.2d 453, 460, 363 N.Y.S.2d 923 (1974).
30. *People v. Angelo*, 88 N.Y.2d 217, 221, 644 N.Y.S.2d 460 (1996); *see People v. Lee*, 96 N.Y.2d 157, 162, 726 N.Y.S.2d 361 (2001).
31. *See Tarlowe v. Metropolitan Ski Slopes, Inc.*, 28 N.Y.2d 410, 413, 322 N.Y.S.2d 665 (1971).
32. *People v. Crossland*, 9 N.Y.2d 464, 465, 214 N.Y.S.2d 728 (1961).
33. *See Tarlowe*, 28 N.Y.2d 410.
34. CPLR 4515.
35. *People v. Jones*, 73 N.Y.2d 427, 430, 541 N.Y.S.2d 340 (1989); *Mandel v. Geloso*, 206 A.D.2d 699, 614 N.Y.S.2d 645 (3d Dep't 1994).
36. John P. DiBlasi, *Preparing Your Witness for Trial*, N.Y. St. B.J., Vol. 65, No. 8, at 48 (Dec. 1993).
37. 1A PJI 1:90.

Current Trends On Rules for Hearsay

EDITOR'S NOTE: The following is another in a series of articles reflecting insights and information prepared for Continuing Legal Education presentations. The digest of the speaker's outline provides citations for new concepts and authorities, but well-established principles are not documented in detail.

BY ROBERT A. BARKER

For many years the general rule when invoking the professional reliability exception was that expert testimony had to be based on the expert's own observations, and on material introduced in evidence. In 1974, the Court of Appeals created two exceptions in *People v. Sugden*.[1]

First, if individuals interviewed by the expert testified at trial, the expert could use that information in forming and expressing an opinion, because the source could be cross-examined. Second, the expert could rely, at least in part, on material not in evidence if it "is of a kind accepted in the profession as reliable in forming a professional opinion." The court cited Federal Rule of Evidence 703, which expressly provides for an expert's reliance on non-record material if it is of a sort "reasonably relied upon by experts in the particular field."[2]

Although the "professional reliability" exception is usually included in the expert testimony category, it is essentially an exception to the hearsay rule – information finds its way into evidence for its truth even though the declarant(s) cannot be cross-examined. True, that information is found in the opinion of a witness who is subject to such cross-examination, but the cross-examiner is stymied when attempting to test the validity of that underlying premise or information.

In March of 2002 the Appellate Division, Second Department handed down an opinion on this issue in *Wagman v. Bradshaw*.[3] Not only did it thoroughly discuss the professional reliability exception, it also shook up the personal injury bar in the process.

Lawyers had come to rely on two cases to ease their medical proof requirements. *Pegg v. Shahin*[4] held that it was permissible for plaintiff's experts to base their opinions on the results of x-rays and MRI tests found in written reports interpreting those procedures. Neither the x-rays nor the MRI results were in evidence, and those who made the interpreting reports were not witnesses at the trial. All of this was justified under the professional reliability exception, because that information was said to confirm the conclusions drawn by the experts following their own examination of the plaintiff. In *Torregrossa v. Weinstein*[5] an MRI report was let in even though the doctor who prepared it did not testify; plaintiff's treating physician was allowed to testify on the basis of his own examination and his reliance on the report.

In *Wagman* plaintiff's counsel, no doubt relying on *Pegg* and *Torregrossa*, produced an expert witness, a chiropractor, who based his testimony on a report, written by a medical professional who was not a witness, interpreting an MRI result. The *Wagman* court ruled that this type of procedure could no longer be followed. The court stated that an unsupported MRI report should not be allowed in evidence in the first place, and that such an error is compounded by permitting an expert witness to base some of his opinion on the contents of the inadmissible report.

As Justice Luciano succinctly stated, "The plaintiff was thus allowed to place in evidence, by way of a treating chiropractor, a subjective interpretation of MRI films, from an inadmissible report written by a non-testifying health care professional." All of this was deemed a violation of the hearsay rule and the best evidence rule. The *Wagman* court thus rejected this use of the professional reliability exception and said *Pegg* and *Torregrossa* should no longer be followed.

ROBERT A. BARKER is professor of law emeritus at Albany Law School, where he taught courses in evidence, constitutional law, civil procedure, civil litigation and products liability. Earlier, he was an attorney with the U.S. Justice Department and an assistant at the Appellate Division in Albany. He graduated from Syracuse University and received his J.D. from its law school. He is the co-author (with Vincent Alexander) of *Evidence in New York and Federal Courts* (West 2001).

The court returned to basic principles set forth in *Hambsch v. New York City Transit Authority*.[6] There, the basis of the expert's opinion was his discussion with a nontestifying radiologist whose information was, in turn, based on an "unknown" study. The Court of Appeals rejected the professional reliability exception because there was no "reliability" to the outside data. The Court cited Justice Yesawich's concurring opinion in *Bordon v. Brady*[7] where he said, "Reliability of the material is the touchstone; once reliability is established, the medical expert may testify about it even though it would otherwise be considered inadmissible hearsay." In other words, if the reliability of the out-of-court data is established, the professional reliability exception can be applied and the expert may properly give an opinion based on his or her study of that material.

Not only did* Wagman v. Bradshaw *discuss the professional reliability exception, it also shook up the personal injury bar in the process.

The *Wagman* court found no reliability to the material underlying the chiropractor's opinion. He never saw the MRI films, and there was no information as to the author of the MRI report or the extent to which the films were actually interpreted.

Reliability Exception Tightened

Clearly, the exception has been tightened considerably, but it is not dead. Rather, two questions emerge: (1) how does one show reliability? and (2) what is the out-of-court data that qualifies under the professional reliability exception, even if it is reliable?

The first question is based on a concept underlying any hearsay exception. Material is allowed in evidence because there is little chance that it will have been fabricated. For example, the business record rule is based on the idea that the information, having been routinely gathered, will be truthful and accurate. Another is the spontaneous utterance rule, because whether it is based on excitement or represents a statement of present sense, it will be truthful because there is no time to conjure a fabrication. Similarly, statements made for medical diagnosis and treatment are deemed reliable since it would be unlikely that a patient seeking the proper treatment would lie about his or her symptoms.

Therefore, to make use of the professional reliability exception the out-of-court material must at the very least be clearly identified. The testifying witness should be able to recite chapter and verse as to her sources. Did she read the reports of other doctors? Who were they? In what context were these reports reviewed? Did she rely on x-rays or MRIs? If so, why not simply introduce the exhibit and have the witness testify directly with respect to it?

It seems rather obvious that the problem cases arise because counsel try to cut corners. There is no reason why the x-ray cannot be expeditiously introduced. In that regard, if the statutory requirements are met, CPLR 4532-a provides for almost summary admissibility of x-rays, MRIs, computed axial tomographs, positron emission tomographs, electromyograms, sonograms and fetal heart rate strips. Even if an x-ray is missing the Court of Appeals has held that secondary evidence (a physician's report and his testimony based on his examination of the x-ray) may be admissible.[8] Remember also that x-rays or any of the other test results can come into evidence as part of the hospital record under the business record rule (CPLR 4518), discussed later.

Obviously, the best trial witness will not be a chiropractor if, as in *Wagman*, he bases his opinion on the reports of others in areas where his expertise may be questionable. If the expert relies on an identifiable report made by a named health professional, that may be enough under the professional reliability exception; but why not get the report into evidence? If it is not expedient to produce the maker of the report at trial, at least get his or her deposition under CPLR 3101(a)(3) and introduce it at trial under CPLR 3117(a)(4), if for no other reason than to authenticate the report.

The second question concerns the sort of data needed to make out the reliability of the material itself. In the seminal *Sugden* case, the psychiatrist who testified for the prosecution had interviewed the teenaged defendant (who claimed insanity), read the statement given to police by an eyewitness (who testified at trial), examined a psychologist's report made when defendant was age 7 (together with other psychiatric and medical reports), and received defendant's written confession and the written statements of four other persons involved in the crime (only one of whom did not also testify). This was deemed to be the sort of material commonly relied upon when a psychiatrist makes his evaluation, as long as he is rendering his own evaluation based on that information and not merely adopting it. There seemed to be no issue in *Sugden* as to the reliability of the out-of-court medical information.

On the other hand, later Appellate Division cases provide no bright-line test. In *Brown v. County of Albany*[9] a medical expert's opinion was held properly excluded where the sole basis was reliance on a report of a nontestifying orthopedist who had treated plaintiff. Although the report itself was in evidence, there was no evidence to establish its reliability, which rested on the

history taken from plaintiff. In *Rosa v. Rinaldi*,[10] a medical malpractice case, defendant's expert medical witness, who had not examined plaintiff, based his opinion on defendant's office records, operative report, post-operative x-rays and reports prepared by four other physicians who had examined plaintiff (only two of whom testified). This was held an inadequate basis for the expert's testimony, the court finding that he could not base his opinion on out-of-court materials not established as reliable, or rely on opinions of others who did not testify.

In *Cleary v. City of New York*[11] an expert could not testify to an opinion formulated from information contained in an ambulance report unless the report was in evidence. On the other hand, in *Greene v. Xerox Corp.*[12] the court approved the opinion testimony of a vocational rehabilitation expert based on a labor market survey he had conducted by telephone, finding that this is the sort of data accepted in the profession as reliable.

These examples are not easy to reconcile, and the answers to the two questions posed above are not clear-cut. And, of course, the questions of reliability and the sort of data that can be relied upon overlap. After *Wagman,* all that can be said with any certainty is that the chances of satisfying the professional reliability exception increase in proportion to the extent that the material relied on can be identified and introduced. Introduction in evidence obviously reduces, if not altogether eliminates, the need to rely on the exception. In the end, careful counsel will have to thoroughly explore the sources of his or her expert's proposed testimony and make sure either that the professional reliability exception can be fully justified, or that as much relied-on data as possible is put in evidence.

Recent cases can serve to jog the memory and provide a refreshed understanding of what will, and what will not, constitute a business record under CPLR 4518.

Business Records

CPLR 4518(a) (and its counterpart, Fed. R. Evid. 803(6)) is without doubt the most frequently used hearsay exception. Indeed, it is relied on to such an extent that carelessness can easily creep in. It must always be remembered that there are firm requirements that have to be met, as set forth in the statute.

There are five statutory and case law requisites: (1) the record must be made in the regular course of the business or profession; (2) it must be the regular course of business to make the record; (3) the record must have been made at the time of the transaction or within a short time thereafter; (4) a foundation must be laid establishing requisites 1–3 (not necessarily by the person who actually made the entries, but by any person familiar with the business procedures); and (5) those persons who had provided the information entered in the records must have had a business duty to do so. The fifth requisite has proven to be the most troublesome. What is the source of the information that finds its way into the business record?[13]

Recent cases can serve to jog the memory and provide a refreshed understanding of what will, and what will not, constitute a business record under CPLR 4518.

The question in one case was whether the results of an IQ test prepared by a psychologist at the time of a particular individual's admission into the Association of Retarded Citizens (ARC) was admissible under the statute. An ARC employee testified that medical and psychological background information were essential for counseling, and that the IQ levels determined whether individuals could be accepted in the ARC program. The psychologist's IQ report was admitted because it was standard procedure that such intake reports be made and filed. The fact that the psychologist was not an ARC employee was not fatal, although where a business or professional entity receives records prepared by others, a foundation for admission usually cannot be established by the recipient. Here, however, the psychologist worked for and on behalf of the ARC and the ARC foundation witness could establish compliance with the ARC requirements.[14]

In another case, information in a job application such as address, references and the usual contents of such an application were held admissible as a business record. Although the applicant was not yet an employee, there was a guarantee of reliability because the applicant knew that any false information would be grounds for rejection. The application form and also a W-4 tax form completed by the applicant were routine requirements. The court noted that "[m]aintaining accurate personnel and tax records is a necessary function of virtually any business."[15]

How about a retail store's financial records to prove a deceased customer's debt? Owners of a grocery store lodged a claim against decedent's estate, decedent having been a credit customer who left over $95,000 unpaid. The estate claimed that since plaintiff was a grocery store and was not a lending institution, charge slips and ledger sheets could not come in under CPLR 4518. The

court ruled that the owner's foundation testimony was entirely sufficient to establish regularity of these records, which were of course essential to the grocery business.[16]

An entire case file maintained by a child protective agency was held admissible under the statute. It consisted of entries made by caseworkers relating to the welfare of the subject children, and appellant's counsel was afforded an opportunity to review the file prior to its coming into evidence.[17] This is to be compared to social services records containing information given by people who had no business duty to give it – *i.e.*, friends, neighbors, family members – rendering the records inadmissible.[18]

Letters and other correspondence that make their way into the recipient's business file will not be admissible under CPLR 4518. The sender, being outside the organization, would have had no routine business duty to furnish the information.[19]

Finally, a physician's office records are usually admissible under the business records exception, but a disability report dictated over the phone by plaintiff's physician and transcribed by the Department of Disability was not such a routine "day-by-day" record as would qualify under CPLR 4518.[20]

The "Speaking Agent" Rule

New York clings to the so-called "speaking agent" rule, under which any admission made by an employee is inadmissible against the employer unless it can be proved that the employee had some kind of authority to make the statement.

The key case is *Loschiavo v. Port Authority of New York*.[21] Plaintiff tripped and fell over a loose carpet in the "jetway" extending from defendant's airplane to the terminal. Defendant's employee stated that others had tripped and fallen in the same place, but the statement could not be used by plaintiff because the employee had no authority to make such statements. The Court of Appeals noted that the rule has been widely criticized, but referred any modification to the Legislature.

Fast forward to 2001 and *Tyrrell v. Wal-Mart Stores, Inc.*,[22] another Court of Appeals decision. Here, plaintiff slipped and fell on a slick substance on the floor of defendant's store. An unidentified employee came along and, according to defendant's husband's testimony, said, "I told somebody to clean this mess up." Even though the declarant may have had authority to supervise clean-ups, there was no evidence that she was authorized to make admissions; the Court of Appeals, agreeing with the Appellate Division,[23] again upheld the oft-criticized rule.

The New York approach certainly appears to be unrealistic, and even unjust, when compared to the more practical Federal Rules of Evidence. Under section 801(d)(2)(D), an admission by an employee, whether authorized or not, is admissible against the employer so long as it was made during the relationship and concerned a matter within the scope of the relationship.

Given the recent reaffirmation of the rule in the state courts, however, attorneys must continue to puzzle over what constitutes proof of "speaking authority." In that regard, language in *Spett v. President Monroe Building & Manufacturing Corp.*[24] is helpful. There, a statement harmful to defendant building owner (one Rose Levine, doing business as Harvey Printing Co.) was uttered by her husband, the "general foreman." The court stated:

> In the instant case Albert Levine's authority as agent for his wife, the defendant here, seems clearly to have been broad enough to include an admission of Harvey's responsibility for placement of the skid receivable against the defendant. Although called merely "general foreman," Levine was apparently the person who *ran* Harvey, in whom complete managerial responsibility for the enterprise was vested.

Thus, the necessary authority can be drawn from the circumstances which, in addition to the employee's actual duties, may include job title and job description. (In this vein, Wal-Mart's designation of employees as "associates" should perhaps be rethought.)

Of more than passing interest to the Bar, a lawyer's statements on behalf of his or her client can be admissible as admissions against the client.[25] This is because the lawyer is clothed with apparent authority to speak in the client's cause; indeed, it is well settled that a lawyer's statements made in settlement negotiations are binding on the client even if no express authority had been given the lawyer to settle for a certain amount.[26]

Finally, a partner's admission can be used against the partnership.[27] And, of course, even though the attempt

fell short in *Tyrrell*, plaintiff can try to get the employee's statement in as a spontaneous statement.

---

1. 35 N.Y.2d 453, 363 N.Y.S.2d 923 (1974).
2. It should be noted that Rule 703 was amended effective December 1, 2000 so that the data relied on need not be otherwise admissible in evidence.
3. 292 A.D.2d 84, 739 N.Y.S.2d 421 (2d Dep't 2002).
4. 237 A.D.2d 271, 654 N.Y.S.2d 395 (2d Dep't 1997).
5. 278 A.D.2d 487, 718 N.Y.S.2d 78 (2d Dep't 2000).
6. 63 N.Y.2d 723, 480 N.Y.S.2d 195 (1984).
7. 92 A.D.2d 983, 461 N.Y.S.2d 497 (3d Dep't 1983).
8. *Schozer v. William Penn Life Ins. Co.*, 84 N.Y.2d 639, 620 N.Y.S.2d 797 (1994).
9. 271 A.D.2d 819, 706 N.Y.S.2d 261 (3d Dep't 2000).
10. 270 A.D.2d 384, 704 N.Y.S.2d 891 (2d Dep't 2000).
11. 234 A.D.2d 411, 651 N.Y.S.2d 119 (2d Dep't 1996).
12. 244 A.D.2d 877, 665 N.Y.S.2d 137 (4th Dep't 1997).
13. *See Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930).
14. *People v. Cratsley*, 86 N.Y.2d 81, 629 N.Y.S.2d 992 (1995).
15. *People v. McKissick*, 281 A.D.2d 212, 721 N.Y.S.2d 646 (1st Dep't 2001).
16. *Trotti v. Estate of Buchanan*, 272 A.D.2d 660, 706 N.Y.S.2d 534 (3d Dep't 2000).
17. *In re R. Children*, 264 A.D.2d 423, 694 N.Y.S.2d 126 (2d Dep't 1999).
18. *In re Leon R.R.*, 48 N.Y.2d 117, 421 N.Y.S.2d 863 (1979).
19. *Puznowski v. Spirax Sarco, Inc.*, 275 A.D.2d 506, 712 N.Y.S.2d 216 (3d Dep't 2000).
20. *Flaherty v. Am. Turners N.Y., Inc.*, 291 A.D.2d 256, 738 N.Y.S.2d 29 (1st Dep't 2002).
21. 58 N.Y.2d 1040, 462 N.Y.S.2d 440 (1983).
22. 97 N.Y.2d 650, 737 N.Y.S.2d 43 (2001).
23. It should be noted that the Court of Appeals reversed the Appellate Division's finding that there was another basis for admission for the statement, as part of the *res gestae*. It held that there was no evidence that declarant made the statement while under the stress of excitement, or that there was no opportunity for deliberation.
24. 19 N.Y.2d 203, 278 N.Y.S.2d 826 (1967).
25. *In re Liquidation of Union Indem. Ins. Co.*, 89 N.Y.2d 94, 651 N.Y.S.2d 383 (1996).
26. *Hallock v. State of New York*, 64 N.Y.2d 224, 231–32, 485 N.Y.S.2d 510 (1984).
27. *See* McCormick on Evidence 156, § 259 (5th ed.).

Divorce Case Settlements Require Detailed Understanding Of Pension Plan Options

By Reuben David

Experience with the Equitable Distribution rules applicable to divorce settlements has shown that their preparation requires an understanding of the differences between private and public pension plans, together with careful review of the actuarial principles and assumptions used to estimate the value of pension benefits.

Thus an attorney preparing a Domestic Relations Order in a divorce case must consider all possible and potential benefits. Often overlooked is the issue of the death of the participant before the death of the divorced spouse, an event that can have a significant impact on the benefits available for the divorced spouse.

When marital property is being divided between the two spouses in a divorce action,[1] pension benefits acquired by either party are deemed marital property only to the extent the benefits were acquired during *coverture* – the period in the marriage when the participant was a member of the pension plan and accruing pension credit up to the date when the divorce action was commenced.

Equitable distribution, in most cases, results in a distributive award. In rare cases, the member of the pension plan has sufficient assets to pay to the spouse his or her share of the marital property. In almost all cases, when the pension rights mature and the monthly retirement payments become due, the pensioner pays through the pension plan a portion of each periodic payment due under the mandate of a court order.

Pension benefits yield monthly retirement allowance payments, and may also provide a death benefit. The pensioner may, however, select maximum retirement allowance, without optional modification, which results in no survivor benefit and a higher monthly retirement allowance.

Unlike private pension plans, which are subject to the Employee Retirement Income Security Act (ERISA),[2] public pension plans do not allow for the pension to be divided between the parties by creating two separate accounts or separate interests. The division of marital property in public pension plans, which are not subject to 26 U.S.C. § 414(p), is not enforced until the actual retirement and the date when payments become due.

In public pension plans, the divorced husband and wife share the monthly retirement payments. No separate interests are awarded to the parties in the divorce action. The method of such division of property has not been prescribed by legislation in New York. However, a 1984 Court of Appeals decision[3] enunciated a method to implement the division of marital property resulting from pension benefits between spouses. It is an exception to the anti-assignment clause, which cannot be expanded, except by valid legislation or *stare decisis.*

In the 1984 case, the present value of the participant's interest was valued at $28,204.81. The spouse was awarded $14,204.40. The participant had the right to pay outright to the spouse what she was awarded in equitable distribution. Because the participant had no property of substance to be paid to the spouse, in order to satisfy her equitable portion, he was given the option to pay the spouse her share at any time before retirement, with interest. Should the participant fail to pay the sum due by the date of retirement, half of the monthly retirement allowance, payable to the participant, multiplied by the coverture period, then divided by the entire period of service, would be paid to the spouse periodically. This latter alternative is referred to as the distributive award. The issue of death benefits was discussed, but no *stare decisis* ruling was made. Death benefits may be substantial, and as such provisions for them should be made, or consideration should be taken, as to its present value in equitable distribution.

Death Benefit Options

In public pension plans, a former spouse is not treated as a "surviving spouse" to be entitled to death

Reuben David is a practicing attorney in New York City. A graduate of New York University, he received his J.D. from New York Law School.

benefits. The consent of the spouse of the participant is not required when the participant designates a beneficiary other than the spouse. To be a beneficiary of the death benefit upon the death of the participant, the participant must file the appropriate form designating the beneficiary for the specific death benefit when the participant selects an option upon retirement.

In a 1993 case,[4] the pensioner, who was required by a court order to designate his divorced spouse as beneficiary, subsequently filed a change of beneficiary naming a new spouse as the beneficiary. The court awarded the death benefit to the divorced spouse, despite the pensioner's filing to the contrary. This holding is *res judicata* not *stare decisis.*

A better understanding of how the plans operate can provide the parties affected with the options available and yield results that are as fair as possible in the circumstances.

In providing for a death benefit, a distinction must be made between death "in service" (before retirement) and death after retirement. There are two separate benefits, subject to two separate rules, depending on whether the death occurs in service or after retirement. The death benefit after retirement may be a substantial amount that should not be overlooked in determining the amount of the equitable distribution or distributive award.

When death occurs in service, the ex-spouse may be awarded part of the death benefit in the same ratio the coverture period bears to the entire period of service credited, as is done in the case of distributive award. Without such provision, the ex-spouse would lose the entire value of the share of equitable distribution that he or she should be entitled to receive.

The option selected at retirement has an impact on the amount of monthly retirement allowance paid to the pensioner and the divorced spouse of the pensioner. Two types of death benefits should be distinguished in death after retirement – a definite sum to be paid to the beneficiary or a monthly retirement allowance for the life of the beneficiary. Where the death benefit is a definite sum, there can be more than one beneficiary. Death benefits paid as periodic or monthly retirement allowances must be for one beneficiary only. The amounts of such payments depend upon the life expectancy of the beneficiary. The age of both parties, as reflected in the life expectancy, is a factor in determining the amount of the monthly retirement payments during a lifetime, based upon the actuarial present value of the pension. The beneficiary may not be changed, unlike in the case of a lump sum benefit, where the beneficiary may be changed as often as the pensioner desires.

When a retiring participant chooses to receive the maximum retirement allowance, which means that there will be no survivor benefit, there is no death benefit. Both the participant and the ex-spouse receive a higher monthly retirement allowance while the participant and the spouse are alive. The payments to both parties cease upon the death of the participant. If the spouse dies sooner, the portion of the payment to the spouse reverts to the participant.

Death benefits after retirement depend upon the option selected by the participant. The actuarial value of such benefit has substantial financial importance. The presumed time of death, which determines the duration of payments, and in turn the total sum, is speculative and subject to actuarial assumption. The duration of the life expectancy determines the amount of the periodic retirement allowance. The longer the anticipated life expectancy, the less the amount of the periodic payments. Therefore, when the option to receive payments for the duration of the beneficiary's life has been chosen, the beneficiary cannot be changed after finality.

The actuarial present value of the death benefit may be reflected in the monthly retirement allowance by increasing the amount of such monthly retirement allowance payments, if the value of the death benefit is not accounted for by making provisions for it. This would depend on the circumstances of the parties and their preference. Without this shifting in actuarial value, the share of the ex-spouse would be less than what that individual should be entitled to receive.

More Complex Issues

The more complex issues involve fitting the actuarial value of the portion to be paid to the former spouse from the death benefit, as stipulated between the parties, into one of the options available. These options are controlled by the plan provisions, which are statutory and may not be varied to suit the parties' agreement.

Some options provide for monthly payments to the spouse in amounts equal to the entire sum the pensioner was entitled to or half such amount. Other plans provide for the payment of percentages starting with the 10% and increasing by 10%. Other plans provide for death benefit for 25%, 50% or 75% of the payments the member was entitled to receive. Such payments are to be made for the life of the beneficiary. These options, once selected and finalized, cannot be changed because

the amount of the periodic payments depends on the life expectancy of the beneficiary. Therefore, the provisions of the plan should be ascertained so that the stipulation and the court order are in conformity. If, for instance, the present value of the pension is determined, and the spouse is awarded 12% of the death benefit as the share of death benefit, and there can be no such provision in the plan, the 12% may either be increased and at the same time the monthly retirement allowance be decreased, or vice versa.

If the pensioner selects the option that pays the balance of the reserve as a definite sum to become ascertained in the future, the pensioner may designate the divorced spouse for a portion determined by the same formula as the monthly retirement allowance paid to the divorced spouse during the lifetime of the pensioner.

The more appropriate method to guarantee the death benefit to the ex-spouse is to direct the pensioner in the court order to designate the divorced spouse as beneficiary of part of the death benefit within the framework of the statutory provisions which govern the plan. If the pensioner refuses to so designate the divorced spouse, the pensioner would be in contempt of court.

Under a 1993 amendment to the Social Security Law,[5] when a member or retiree of the State of New York Retirement System has been required by court order to take a certain retirement option or designate a beneficiary but has failed to do so, the state comptroller, pursuant to a subsequent court order, may make the change or designation under the authority of a subsequent court order. The subsequent order would be in lieu of a contempt proceeding.

A perfect equitable distribution, resulting in a distributive award, cannot be attained because the actual duration of life does not always match actuarial life expectancy. A better understanding of how the plans operate, however, can provide the parties affected with the options available and yield results that are as fair as possible in the circumstances.

---

1. As provided for in N.Y. Domestic Relations Law § 236 pt. B.
2. 29 U.S.C. § 1001 *et seq.*
3. *Majauskas v. Majauskas*, 61 N.Y.2d 481, 474 N.Y.S.2d 699 (1984).
4. *Kaplan v. Kaplan*, 82 N.Y.2d 300, 604 N.Y.S.2d 519 (1993).
5. 1999 N.Y. Laws ch. 300, § 1, *codified at* N.Y. Retirement and Social Security Law § 803-a.

Twenty Years of Decisions Have Refined "Serious Injury" Threshold In No-Fault Accident Cases

By Anthony J. Centone

Since the inception of New York's No-Fault Insurance Law in 1973,[1] the New York Court of Appeals has ruled on and interpreted the "serious injury" threshold provision in 10 major cases, most recently in a 2002 decision that combined three separate appeals.[2]

Starting with *Licari v. Elliott*[3] in 1982, the Court has attempted to clarify various aspects of Insurance Law § 5102(d),[4] the statute that defines what constitutes a "serious injury" and what entitles certain individuals injured in automobile accidents to sue for and recover "non-economic" damages stemming from those injuries.

Most recently, the Court of Appeals has defined the nature and extent of the "qualitative" objective medical proof a plaintiff must present to establish a triable issue of fact regarding what constitutes a serious injury. Taken together, these Court of Appeals cases provide guideposts for both plaintiff's and defense counsel to assess their case and prepare their strategy for potential "threshold" issues.

Injury Must Be More Than "Minor, Mild or Slight"

In the seminal threshold case *Licari*,[5] the Court determined that a major goal of the Legislature in adopting Insurance Law § 5102(d) was to keep "minor" injury cases out of the courts:

> We begin our analysis of these two categories of serious injury by recognizing that one of the obvious goals of the Legislature's scheme of no-fault automobile reparations is to keep minor personal injury cases out of court.[6]

In dealing with the category of a "significant limitation of use of a body function or system," Judge Jason, writing on behalf of a unanimous court, noted: "We believe that a minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute."[7]

Most significantly, however, the Court definitively established that it would be up to the trial court, in the first instance, to determine whether the plaintiff has sustained a serious injury as defined in Insurance Law § 5102(d).[8] Should the court find, on defendant's motion for summary judgment (or motion for a directed verdict, as in the case of *Licari*), that the plaintiff did not demonstrate that he or she sustained a serious injury, the case need go no further and the plaintiff's complaint seeking "non-economic" damages must be dismissed as a matter of law.

Finally, the Court noted that the "subjective quality" of certain types of pain, such as headaches and dizziness, cannot form the basis of a serious injury, as a matter of law.[9] In *Licari*, the Court held that the plaintiff, a taxi driver, who (1) missed only 24 days from work after the automobile accident; (2) suffered essentially cervical and lumbosacral sprain and strain along with occasional headaches, as a result of the accident; and (3) testified as to very few activities he was unable to do as of time of trial, did not, as a matter of law, sustain a serious injury under Insurance Law § 5102(d).[10]

Physician's Affidavit Cannot Be "Conclusory"

Soon after this first decision, the term "*Licari* motion" was coined and defendants frequently made motions for summary judgment seeking dismissal of motor vehicle lawsuits based on the plaintiff's lack of any serious injury. Three years after *Licari*, the Court of Appeals discussed the type of proof necessary for a plaintiff to establish a serious injury, when opposing a defendant's summary judgment motion of this kind.

In *Lopez v. Senatore*,[11] the Court dealt for the first time with the issue of specific medical proof submitted by the

Anthony J. Centone practices in the area of automobile insurance defense as a trial and appellate attorney. He is also an adjunct professor of law at Pace University School of Law, where he teaches civil practice. A graduate of Villanova University, he received his J.D. from Pace University School of Law.

plaintiff in opposition to a defendant's threshold motion for summary judgment. When analyzing the plaintiff's physician's affidavit, the Court noted that the "mere repetition of the word 'permanent' in the affidavit of a [plaintiff's] treating physician is insufficient to establish 'serious injury.'"[12]

The Court further held that summary judgment should be granted in favor of a defendant "where the plaintiff's evidence is limited to conclusory assertions tailored to meet statutory requirements."[13] The Court then held that, when a plaintiff's physician (1) sets forth in his affidavit the type of injuries suffered by the plaintiff and the plaintiff's course of treatment, (2) identifies the limitation of motion in the plaintiff's neck (whereby he could only turn his head 10 degrees to the right or left) and (3) expresses the opinion that there was significant limitation of a body function or system (all supported by exhibits such as office records), such evidence would be sufficient to defeat the defendant's summary judgment motion.[14]

Plaintiffs opposing a threshold motion for summary judgment must provide either a doctor's affirmation or affidavit if they hope to defeat the motion.

Lopez has thus come to stand as the guidepost for the type of proof a plaintiff needs to defeat a defendant's threshold motion.

Subjective Quality of Pain Alone Is Insufficient

In *Scheer v. Koubek*,[15] the Court established the premise that "pain," in and of itself, may not form the basis of serious injury under Insurance Law § 5102(d), rejecting a line of Third Department cases to the contrary.[16]

The plaintiff in *Scheer* had suffered only "soft tissue injury," which her own physician had described as "mild."[17] According to the appellate court decision, the defendant's physician in *Scheer* had testified that his one and only examination of the plaintiff revealed nothing but subjective complaints of pain; the plaintiff argued that this was sufficient to form the basis for establishing a serious injury.[18] Both the trial court and Appellate Division agreed.[19] The Court of Appeals reversed, however, citing *Licari*, and stated:

> The subjective quality of plaintiff's transitory pain does not fall within the objective verbal definition of serious injury as contemplated by the No-Fault Insurance Law.[20]

From this point on, New York law was clear in holding that proof of a serious injury would have to come from the plaintiff's physician, and not from the plaintiff personally; and this medical proof would have to demonstrate "objective" signs of injury, as opposed to the plaintiff's "subjective" complaints of pain, in order to raise an issue of fact sufficient to defeat the defendant's motion for summary judgment.

Plaintiff Must Present "Sworn" Medical Proof

In *Grasso v. Angerami*,[21] the Court further addressed plaintiff's medical proof by stating that the plaintiff's physician must provide his medical opinion by way of "sworn testimony" – *i.e.*, an affirmation or affidavit.

Before *Grasso*, there had been a split in the appellate divisions. The Second Department had accepted the plaintiff's unsworn medical reports and records as sufficient proof to defeat a defendant's motion for summary judgment.[22] The First Department, however, had required that the medical proof be in "admissible form."[23] The Court of Appeals partially resolved this issue by stating:

> In opposition to defendant's motion for summary judgment pursuant to Insurance Law § 5102(d), plaintiff tendered proof of "serious injury" in inadmissible form, namely an unsworn doctor's report. Inasmuch as plaintiff did not offer any excuse for his failure to provide the medical report in proper form, we need not consider whether proof of serious injury in inadmissible form is sufficient to defeat a motion for summary judgment pursuant to Insurance Law § 5102(d), if an acceptable excuse for the deficiency is offered.[24]

In doing so, the Court seems to have followed a long line of cases, most prominently *Zuckerman v. City of New York*,[25] which held that a party opposing a motion for summary judgment must present proof in admissible form *or* offer an acceptable excuse for failing to do so. It is now generally accepted that plaintiffs opposing a threshold motion for summary judgment *must* provide either a doctor's affirmation or affidavit if they hope to defeat the motion; unsworn medical reports and records will not suffice.

Nonetheless, a literal reading of *Grasso* leaves open the door that, if the plaintiff can offer a reasonable excuse for his failure to provide a doctor's affirmation or affidavit, *e.g.*, death of the plaintiff's only treating physician, a court could accept from the plaintiff "inadmissible" or "unsworn" medical proof that might be sufficient to defeat a threshold motion.

Curtailment of Activities Must Be to a "Great Extent"

A few months later, *Gaddy v. Eyler*[26] provided additional standards concerning the plaintiff's proof in op-

posing a threshold motion for summary judgment. There, the Court was asked to determine whether the plaintiff, who had sustained neck and back injuries, fell under one of three categories set forth in Insurance Law § 5102(d).[27]

The Court initially concluded that, because the plaintiff had only a "minor limitation of movement in her neck and back," she had failed to demonstrate a "permanent consequential limitation or use of a body organ or member" or a "significant limitation of use of a body function or system."[28] With regard to the "90-out-of-180-day" provision, the Court noted that the plaintiff had missed only two days of work and then returned to most of her daily routine (as a senior court stenographer), and that she submitted no evidence to support her contention that her household and recreational activities had been diminished as a result of her injuries.[29]

Because there was no proof that she had been "'curtailed from performing [her] usual activities to a great extent rather than some slight curtailment'" (quoting *Licari*), the Court held that the plaintiff failed to meet the 90/180 day threshold requirement as well.[30] In doing so, the Court stressed once again that minor injuries, with insignificant effect on a plaintiff's normal activities, would not qualify as a serious injury.[31]

Expert Opinion Must Be Supported By Factual Foundation

Three years later, the Court of Appeals dealt once again with the no-fault statute. In *Dufel v. Green*,[32] the issue was what specific questions a plaintiff's expert could be asked while testifying at trial concerning the plaintiff's medical condition. The defendant objected to certain questions asked of the plaintiff's experts by her counsel on direct examination. The Court noted:

> To establish that plaintiff had sustained a serious injury, plaintiff's two physicians were asked, in words tracking the statutory language, whether plaintiff sustained "a permanent consequential limitation" and "a significant limitation" of the use of a body member, function, organ or system. Over defendant's objection both answered that she had. The doctors were also asked in nonstatutory language whether plaintiff had sustained a permanent injury and both answered that she had.
>
> At the conclusion of the trial, the court asked the jury to determine whether plaintiff had sustained (1) permanent loss of a body organ, member, function or system; (2) permanent consequential limitation of use of a body function or system; (3) significant limitation of use of a body function or system; or (4) a medically determined injury preventing normal activities for 90 out of the 180 days following the accident. The jury returned a verdict finding in plaintiff's favor on questions 2, 3 and 4 and awarded her damages.[33]

The defendants claimed that the questions the plaintiff's counsel posed to the two physicians were improper because they were the same questions posed to the jury in the interrogatories contained in the verdict sheet. The Court held that whether an injury is "permanent" or a limitation is "significant" or "consequential" is a medical question beyond the knowledge of the average juror and thus requires the benefit of an expert's specialized knowledge.[34] Therefore, the opinion of the two physicians, even though framed in the precise statutory language, which also was the language in the interrogatories submitted to the jury, was proper, but the jury must still determine whether the objective medical evidence supported the expert's conclusion.

Furthermore, the Court noted that the expert's opinion must be supported by a "factual foundation," which gives the defendant the ability to cross-examine the expert and call into question his opinions.[35] The defendants could also call their own medical expert witnesses to rebut the plaintiff's experts, and the jury would still have to weigh the testimony of all of these witnesses in determining whether the plaintiff sustained a serious injury.[36]

Based on this ruling, most plaintiffs' counsel in automobile accident cases will now ask their medical experts the precise questions posed of the plaintiff's experts in *Dufel*. The Court in *Dufel*, however, did caution that there may be instances where particular questions posed in "statutory form are unduly prejudicial" and should, therefore, not be permitted, although the Court did not elaborate on this point.[37]

Permanent "Loss of Use" Must Be Total

In 2001, *Oberly v. Bangs Ambulance Inc*.[38] presented the issue of whether a plaintiff who maintained that he sustained a "permanent loss of use of a body organ, member, function or system" had to prove a "total loss" as opposed to only a "partial loss" of use.

The plaintiff, a dentist, alleged a "serious injury" to his right arm as a result of an automobile accident. He complained of "pain and cramping" in the arm and alleged that the pain limited "his ability to practice as a dentist."[39] Apparently, the injury did not prevent him from practicing dentistry, but in some way limited his ability to do his job fully (although the decision does not specify to what extent).

The defendant moved for summary judgment based on lack of a serious injury and the plaintiff decided to abandon all the serious injury provisions, except for his alleged "permanent loss of use" – *i.e.*, the injury to his right arm.[40] The plaintiff argued that the permanent loss need not be significant or total but that even a partial loss would qualify.[41]

The Court, interpreting legislative intent, first noted that if the Legislature had meant "permanent loss" to include "partial" loss of use, it would have qualified the phrase "permanent loss" accordingly.[42] Second, the Court said that the permanent loss standard was contained in the original 1973 version of the statute, and had survived the 1977 amendment to the statute, which added the categories of "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system."[43] The Court reasoned that these two categories relate to partial losses and, had the Legislature considered "permanent loss of use" to already include partial losses, there would have been no reason to add these categories to the statute.[44]

It is apparent, however, from a close reading of* Oberly *that this requirement of total "permanent loss of use" pertains only to that category of injury and does not apply to the other categories.

Many in the insurance industry believed that *Oberly* would result in a drastic increase in dismissal of threshold cases. It is apparent, however, from a close reading of *Oberly* that this requirement of *total* "permanent loss of use" pertains only to *that* category of injury and does not apply to the other categories such as "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system," both of which, according to the Court, require only a partial, not a total, limitation.

As such, the impact of *Oberly* apparently is on only one of the (essentially) four categories of injury, and a plaintiff can still rely on a *partial*, rather than *total*, "permanent consequential limitation of use" or "significant limitation of use."

Expert's Opinion May Be Either "Qualitative" or "Quantitative"

The most recent Court of Appeals threshold decision is *Toure v. Avis Rent-A-Car Systems*,[45] in which a trio of cases (*Toure*, *Manzano v. O'Neil* and *Nitti v. Cierrico*) were decided jointly in one opinion. As Judge Graffeo noted in the opening sentence of her opinion: "These three cases examine the nature and extent of qualitative, objective medical proof necessary for a plaintiff to meet the 'serious injury' threshold under the No-Fault Law."[46]

Initially, the Court noted that a plaintiff's expert *can* establish a plaintiff's physical limitation by giving a "numeric percentage" of the plaintiff's loss of range of motion to substantiate his or her claim.[47] This would be, for example, where a plaintiff's physician either testifies or states in his affirmation or affidavit that the plaintiff has a "20%" or "30-degree" loss of rotation in his cervical or lumbosacral spine. This would constitute a "quantitative" designation of the plaintiff's physical limitation.

The Court then went on to hold, however, that an expert's qualitative assessment of a plaintiff's physical limitations, when supported by objective evidence, is sufficient to create an issue of fact regarding serious injury as well. The qualitative assessment involves comparing the plaintiff's limitations to his "normal function, purpose and use of the affected body organ, member, function or system."[48] When this qualitative assessment is supported by objective evidence, a defendant can test the findings both through cross-examination as well as by way of his own expert.[49] If, however, the qualitative assessment is unsupported by objective evidence, it could be "wholly speculative" and defeat the purpose of the no-fault law, which is to eliminate "insignificant injuries."[50] Therefore, the court must determine whether this qualitative assessment meets certain criteria.

Toure Case In *Toure*, the plaintiff's physician, in his affirmation opposing the defendant's threshold motion, did *not* ascribe a specific percentage to the loss of range of motion in the plaintiff's spine. He did, however, set forth the "qualitative nature" of the plaintiff's limitations.

For instance, while Dr. Waltz did not indicate that the plaintiff had a 50% or 30-degree loss of range of motion in flexion in his lumbosacral spine, he did state that the plaintiff's CT scan and MRI showed herniated and bulging discs and that plaintiff had both muscle spasms and a "'decreased range of motion'" in his lumbosacral spine.[51] Furthermore, the physician related his findings to the "plaintiff's complaints of difficulty in sitting, standing and walking for extended periods of time and plaintiff's inability to lift heavy objects at work."[52] The plaintiff's physician concluded that "these limitations are a natural and expected medical consequence of his [plaintiff's] injuries."[53] The Court then noted:

> We cannot say that the alleged limitations of plaintiff's back and neck are so "minor, mild or slight" as to be considered insignificant within the meaning of Insurance Law § 5102(d). As our case law further requires, Dr. Waltz's opinion is supported by objective medical evidence, including MRI and CT scan tests and reports, paired with his observations of muscle spasms during his physical examination of plaintiff. Considered in the light most favorable to plaintiff, this evidence was sufficient to defeat defendant's motion for summary judgment.[54]

In doing so, the Court has apparently overruled prior appellate division case law, which consistently held that the plaintiff's physician must "specifically quantify" the alleged restriction of motion in plaintiff's cervical or lumbosacral spine by either "percentages" or "degrees."[55] According to *Toure*, the physician can now describe the limitation in terms of the daily routine activities (both work related and non-work related) that were affected by the injuries. There must, however, be sufficient "objective medical proof," *e.g.*, MRI or CT scan tests or reports, along with the doctor's own clinical findings during physical examination of the plaintiff, to support the physician's opinion. In the absence of the same, the qualitative assessment will be insufficient to defeat the defendant's motion.

Manzano Case *Manzano* involved a trial in which the defendant moved to set aside the jury's verdict of $70,000 in damages, based on the plaintiff's failure to establish a serious injury as a matter of law. The Court initially noted:

> In this case, plaintiff presented the testimony of her treating physician, Dr. Cambareri, who opined that plaintiff suffered two herniated cervical discs as a result of the automobile accident. His conclusion was supported by objective evidence introduced at trial, namely, the MRI films that he interpreted. Although this medical expert did not assign a quantitative percentage to the loss of range of motion in plaintiff's neck or back, he described the qualitative nature of plaintiff's limitations based on the normal function, purpose and use of her body parts. In particular, Dr. Cambareri correlated plaintiff's herniated discs with her inability to perform certain normal, daily tasks. These limitations are not so insignificant as to bar plaintiff's recovery under the No-Fault Law.[56]

Again, the Court relied upon the qualitative nature of the plaintiff's injury and her inability to perform certain normal daily tasks, such as heavy lifting, shoveling the driveway, cleaning the house and picking up the children.[57] The plaintiff's physician was again able to connect the "herniated discs," as demonstrated on MRI films of the plaintiff's spine which the physician had personally reviewed, to plaintiff's inability to carry out these tasks. Based on the same, the jury's finding of "serious injury" was upheld by the Court.

Nitti Case The last opinion in this trio of decisions, *Nitti*, involved a trial in which the plaintiff presented the testimony of a chiropractor who apparently had examined the plaintiff only twice before trial. These exams were six months apart. The chiropractor, Dr. Patriarco, also reviewed an MRI report of the plaintiff's spine that was not introduced into evidence at trial.[58] Nonetheless, Dr. Patriarco testified that the plaintiff "'sustained an L4-5 intervertebral disk disorder with associated neuritis, which was further complicated by a congenital anomaly,'" which would prevent the plaintiff from exercising and engaging in certain activities.[59] Dr. Patriarco also testified that he detected a muscle spasm in the plaintiff's right cervical spine that radiated into her shoulders and he also found restriction of motion in her neck and back.[60]

Based on this testimony, the jury found that the plaintiff sustained a serious injury under the 90/180 day category but not under the "significant limitation" category. The Court disagreed:

> Although medical testimony concerning observations of a spasm can constitute objective evidence in support of a serious injury, the spasm must be objectively ascertained. This requirement was not satisfied by the testimony of plaintiff's expert that he detected a spasm, where he did not, for example, indicate what test, if any, he performed to induce the spasm. Furthermore, Dr. Patriarco testified on cross-examination that the tests he administered to reach his conclusion regarding plaintiff's limitation of motion were subjective in nature as they relied on plaintiff's complaints of pain. Nor did the MRI report he mentioned constitute objective proof. *Toure* and *Manzano* recognize that an expert's conclusion based on a review of MRI films and reports can provide objective evidence of a serious injury. In this case, however, the witness merely mentioned an MRI report without testifying as to the findings in the report. Moreover, the MRI report was not introduced into evidence, thus foreclosing cross-examination. Nor did Dr. Patriarco testify that the underlying MRI film supported his diagnosis of an "L4-5 intervertebral disk disorder." Given the inadequacy of the objective medical proof supporting the opinion of plaintiff's expert, defendants' motion to set aside the verdict should have been granted.[61]

In *Nitti*, there was an absence of "objective proof" to support Dr. Patriarco's opinion that the plaintiff suffered from an "L4-5 intervertebral disk disorder with associated neuritis." Based on the same, the plaintiff failed to prove the existence of a serious injury. Perhaps the most significant statement in this opinion, however, is the following: "*Toure* and *Manzano* recognize that an expert's conclusion based on a review of MRI films and *reports* can provide objective evidence of a serious injury."[62] Is the Court now maintaining that a plaintiff's treating physician can rely upon "unsworn" MRI reports as a basis for his opinion that the plaintiff has sustained a serious injury under Insurance Law § 5102(d)?

If so, is this consistent with the Court's prior holding in *Grasso v. Angerami*,[63] that an unsworn doctor's report is inadmissible and thus insufficient to defeat a defendant's motion for summary judgment based on the no-fault "threshold"? Or does it simply mean that, in the plaintiff's physician's sworn affirmation or affidavit, he may rely, in part, on an unsworn MRI report, provided it is the type of report a physician would reasonably rely

upon in coming to his diagnosis? This seems more likely, although it is probable that we may need to wait and see whether the Court of Appeals provides further clarification on this issue in future decisions.

What seems clear from *Toure* is that courts no longer need to find that the plaintiff's medical expert quantified the plaintiff's alleged limitation of motion, in terms of percentages or degrees, but the physician can also qualify the restriction in terms of the plaintiff's daily activities, provided the plaintiff supplies an "objective" medical basis for the restrictions. This will no doubt dramatically affect the way both plaintiff's and defense counsel approach "threshold" motions in the future, as well as the way courts decide these motions.

---

1. Now known as the "Comprehensive Motor Vehicle Insurance Act," as amended effective September 1, 1984.
2. *Toure v. Avis Rent-A-Car Sys.*, 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002).
3. 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982).
4. Insurance Law § 5102(d) provides:

   > "Serious injury" means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

5. 57 N.Y.2d 230.
6. *Id*. at 236.
7. *Id*.
8. *Id*. at 238.
9. *Id*. at 238–39.
10. *Id*. at 238.
11. 65 N.Y.2d 1017, 494 N.Y.S.2d 101 (1985).
12. *Id*. at 1019.
13. *Id*.
14. *Id*. at 1020.
15. 70 N.Y.2d 678, 518 N.Y.S.2d 309 (1987).
16. *Scheer v. Koubek*, 126 A.D.2d 922, 511 N.Y.S.2d 435 (3d Dep't 1987); *Butchino v. Bush*, 109 A.D.2d 1001, 486 N.Y.S.2d 478 (3d Dep't 1985).
17. 70 N.Y.2d at 679.
18. 126 A.D.2d at 923–24.
19. *Id*. at 924.
20. 70 N.Y.2d at 679.
21. 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991).
22. *Palmer v. Amaker*, 141 A.D.2d 622, 529 N.Y.S.2d 536 (2d Dep't 1988).
23. *McLoyrd v. Pennypacker*, 178 A.D.2d 227, 577 N.Y.S.2d 272 (1st Dep't 1991).
24. *Grasso*, 79 N.Y.2d at 814–15.
25. 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980).
26. 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992).
27. *Id.* at 957.
28. *Id*.
29. *Id*. at 958.
30. *Id*.
31. *Id*.
32. 84 N.Y.2d 795, 622 N.Y.S.2d 900 (1995).
33. *Id.* at 797.
34. *Id*. at 798.
35. *Id*.
36. *Id*.
37. *Id*. at 799.
38. 96 N.Y.2d 295, 727 N.Y.S.2d 378 (2001).
39. *Id*. at 297.
40. *Id*.
41. *Id*.
42. *Id*. at 298–99.
43. *Id*. at 299.
44. *Id*.
45. 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002).
46. *Id*. at 350.
47. *Id*.
48. *Id*.
49. *Id*. at 351.
50. *Id*.
51. *Id*. at 352.
52. *Id*.
53. *Id*.
54. *Id*. at 353 (citations omitted).
55. *Forte v. Vaccaro*, 175 A.D.2d 153, 572 N.Y.S.2d 241 (2d Dep't 1991); *Philpotts v. Petrovic*, 160 A.D.2d 856, 554 N.Y.S.2d 289 (2d Dep't 1990).
56. 98 N.Y.2d at 355 (citation omitted).
57. *Id*. at 354.
58. *Id*. at 356.
59. *Id*.
60. *Id*.
61. *Id*. at 357–58.
62. *Id*. at 358 (emphasis added).
63. 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991).

New Rules Published For Fiduciary Appointments

The Office of Court Administration has published new rules that govern the appointments of guardians under Article 81 of the Mental Hygiene Law, related appointments in the guardianship process such as court evaluators and court-appointed attorneys for alleged incapacitated persons, guardians *ad litem* both in the context of Article 81 proceedings and in Surrogate's Court matters, and receivers and referees.

The rules are being codified as Part 36 in Title 22 of the New York Compilation of Codes, Rules and Regulations, which covers judiciary matters.

To be eligible for appointments beginning June 1, attorneys must complete a new six-page application form, UCS-870, and file it with the Office of Court Administration.

The new rules, together with the application forms, are initially being provided on the OCA Web site, http://fbem.courts.state.ny.us. The application form can be filled out on line, or printed out and submitted by mail.

The new Part 36 Rules are reproduced on pages 45 and 46.

Reproduced below are the instructions for filling out the application form, followed by reduced-size copies of the form pages to illustrate the scope of the questions being asked.

INSTRUCTIONS: APPLICATION FOR APPOINTMENT PURSUANT TO PART 36 OF THE RULES OF THE CHIEF JUDGE

Part 36 of the Rules of the Chief Judge, effective June 1, 2003, requires that the judicial appointments listed below be made from lists established by the Chief Administrator of the Courts:

- **Guardian**
- **Guardian ad Litem**
- **Law Guardian (privately paid)**
- **Court Evaluator**
- **Attorney for Alleged Incapacitated Person**
- **Court Examiner**
- **Supplemental Needs Trustee**
- **Receiver**
- **Referee***(except special master or referee otherwise performing judicial functions in a quasi-judicial capacity).*

The following persons or entities performing services for guardians or receivers must also be appointed from the Chief Administrator's lists:

- **Counsel**
- **Accountant**
- **Auctioneer**
- **Appraiser**
- **Property Manager**
- **Real Estate Broker**

To be placed on a list, you must complete and submit this application and fulfill any applicable training requirements for an appointment. Beginning June 1, 2003, appointments will be made only from lists established through this application procedure; all prior lists expire on May 31, 2003. All persons or entities on prior lists must reapply to be eligible for appointment.

COMPLETING THE APPLICATION
Before you fill out the application, read the affirmation (Item 15) to determine if you are qualified to receive an appointment. Follow the instructions on the form for completing specific items.

CERTIFIED TRAINING
Part A of Item 7 of the application lists categories of appointment for which certified training is required. This training must be completed BEFORE an application may be submitted.

Certified training programs completed before June 1, 2003, will fulfill enrollment requirements for lists established on June 1, 2003, including CLE- approved programs conducted by Surrogate's Courts for guardians ad litem and certified training programs for guardians and court evaluators pursuant to Mental Hygiene Law Article 81. For all applications after June 1, 2003, no certified training programs completed more than two years before the date an application is submitted may be used to satisfy the training requirements. An attorney admitted to practice in the State of New York who has completed a certified training program for guardian and court evaluator pursuant to Article 81 of the Mental Hygiene Law may use that program in applying for enrollment on the list of attorneys for alleged incapacitated persons.

SPECIAL INSTRUCTIONS FOR APPLICANTS FOR LAW GUARDIAN (PRIVATELY PAID) AND COURT EXAMINER APPOINTMENTS
Applicants for privately paid law guardian in Departments of the Appellate Division where authorized, and for court examiner, must first be approved by the respective Appellate Divisions before lists for these positions may be established by the Chief Administrator. Applications for law guardian (privately paid) and court examiner appointments will be forwarded by the Office of Court Administration to the appropriate Appellate Division(s) for review and approval. Please contact the Appellate Division in your jurisdiction for further instructions regarding these categories of appointment.

INQUIRIES
For general information about appointments, including eligibility for list enrollment, certified training requirements, the sufficiency of prior training, and the date and location of certified training programs, contact:

NYS Office of Court Administration
Guardian and Fiduciary Services
140 Grand Street, Suite 701
White Plains, NY 10601

Internet: www.nycourts.gov/gfs
e-mail: GFS@courts.state.ny.us
Phone: 914-682-3210
Fax: 212-457-2608

APPLICATION FOR APPOINTMENT PURSUANT TO PART 36 OF THE RULES OF THE CHIEF JUDGE

THIS IS AN ON-LINE APPLICATION. THE DATA YOU ENTER IN ITEMS 1-14 BELOW WILL BE TRANSFERRED ELECTRONICALLY TO THE OFFICE OF COURT ADMINISTRATION, BUT TO COMPLETE THE APPLICATION PROCESS, YOU MUST PRINT AND SIGN THE FORM AND MAIL IT TO OCA ALONG WITH ANY ATTACHMENTS. PLEASE FOLLOW THE SPECIFIC PRINTING INSTRUCTIONS INCLUDED IN THE ON-LINE SUCCESS MESSAGE YOU WILL RECEIVE AFTER PRESSING CONTINUE FOLLOWING ITEM 15.

NOTE: BEFORE YOU COMPLETE THE APPLICATION, PLEASE CLICK HERE TO READ THE AFFIRMATION (ITEM 15) TO DETERMINE IF YOU ARE QUALIFIED.

Help

1. NAME (IF NYS ATTORNEY, ENTER NAME USED FOR ATTORNEY REGISTRATION):

FIRST | MIDDLE | LAST | SUFFIX (Sr., Jr., III)

2. PRIOR NAME/S:

FIRST | MIDDLE | LAST | SUFFIX (Sr., Jr., III)

FIRST | MIDDLE | LAST | SUFFIX (Sr., Jr., III)

3. SOCIAL SECURITY NUMBER:

Social Security Numbers are required in order to administer the disbursement of moneys that may constitute taxable income. 42 U.S.C. § 405 (c)(2)(C)(i).

4. ATTORNEYS ADMITTED TO PRACTICE IN NEW YORK STATE:

A- Attorney Registration #: *(See your biennial registration statement, or go to www.nycourts.gov - "Attorney Directory")*

B- Date / Department of Bar Admission - Year: **/ Department: 1st** ○ **2nd** ○ **3rd** ○ **4th** ○

C- Are you current in your registration with the Office of court administration? yes ○ **no** ○

5. EMPLOYMENT:

Current Business Address:

NAME OF EMPLOYER

STREET 1 | CITY/TOWN/VILLAGE | STATE (NY) | ZIP | ZIP+4

STREET 2

PHONE | FAX | E-MAIL

Check If Self Employed ☐ Years Employed

Most Recent Prior Employment *(Complete only if fewer than 5 years in current employment):* Not Applicable ☐

NAME OF EMPLOYER

STREET 1 | CITY/TOWN/VILLAGE | STATE (NY) | ZIP | ZIP+4

STREET 2

PHONE | FAX | E-MAIL

Check If Self Employed ☐ Years Employed

6. ADDRESS TO WHICH ALL NOTICES SHOULD BE SENT *(If different from current business address in no. 5):*

BUSINESS NAME (IF ANY)

STREET 1 | CITY/TOWN/VILLAGE | STATE (NY) | ZIP | ZIP+4

STREET 2

PHONE | FAX | E-MAIL

7-A. CATEGORIES OF APPOINTMENT FOR WHICH CERTIFIED TRAINING IS REQUIRED:
(no application for these categories will be processed unless the required training has been completed)

- Choose the category or categories of appointment for which you are applying by checking the box next to the category.
- Enter the year of the certified training program for which you received a certificate of satisfactory completion (For applications after June 1, 2003, must not be more than two years before the date this application is submitted).
- Enter the full name of the organization that sponsored the training program (e.g., the name of a bar assocation, law school, nonprofit social agency, Surrogate's Court guardian ad litem training program or Appellate Division law guardian training program).
- Attorneys applying for appointment as guardian ad litem, law guardian (privately paid) and attorney for alleged incapacitated person must be current in their registration to practice law in New York (see item 4).
- Indicate the number of times you served in the last 10 years for each category for which you are applying for appointment.
- You MAY also attach a resume of NO MORE THAN FOUR PAGES.

☐ a. **Guardian:** Year certified training completed

FULL NAME OF SPONSOR ORGANIZATION:

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ b. **Guardian ad litem:** Year certified training completed

FULL NAME OF SPONSOR ORGANIZATION:

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ c. **Law Guardian (privately paid)*:** Year certified training completed

* FOR APPOINTMENTS IN THE DEPARTMENTS OF THE APPELLATE DIVISION WHERE AUTHORIZED. *(Approval for placement on this list must be obtained from the Appellate Division. See INSTRUCTIONS)*

FULL NAME OF SPONSOR ORGANIZATION:

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ d. **Court Evaluator:** Year certified training completed

FULL NAME OF SPONSOR ORGANIZATION:

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ e. **Attorney for alleged incapacitated person:** Year certified training completed

FULL NAME OF SPONSOR ORGANIZATION:

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ f. **Court Examiner:** Year certified training completed

(Approval for placement on this list must be obtained from the Appellate Division. See Instructions)

FULL NAME OF SPONSOR ORGANIZATION:

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ g. **Supplemental needs trustee:** Year certified training completed

FULL NAME OF SPONSOR ORGANIZATION:

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ h. **Receiver:** Year certified training completed

FULL NAME OF SPONSOR ORGANIZATION:

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

7-B. CATEGORIES OF APPOINTMENT FOR WHICH CERTIFIED TRAINING IS NOT REQUIRED:

- Choose the category or categories of appointment for which you are applying by checking the box next to the category.
- In order to apply in the following categories, you MUST attach a resume of NO MORE THAN FOUR PAGES, which shall include information of government-issued licenses and certificates issued by professional schools or organizations.
- Attorneys applying for appointment as counsel to guardian or counsel to receiver must be current in their registration to practice law in New York State (see item 4).
- Indicate the number of times you served in the last ten years for each category for which you are applying for appointment.

☐ i. **Counsel to Receiver:**

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ j. **Counsel to Guardian:**

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ k. **Accountant:**

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ l. **Auctioneer:**

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ m. **Appraiser:**

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ n. **Property Manager:**

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ o. **Real Estate Broker:**

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ p. **Referee** *(Except special Master or Referee Otherwise performing judicial functions serving in a quasi-judicial capacity)*:

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

8. COUNTY/COUNTIES IN WHICH YOU ARE AVAILABLE FOR APPOINTMENT: (CLICK THE ? TO SELECT A COUNTY)

A- ? B- ?

C- ? D- ?

E- ? F- ?
G- ? H- ?

9. FOREIGN LANGUAGES SPOKEN FLUENTLY: (CLICK THE ? TO SELECT A LANGUAGE)
** FILL IN SHADED AREA ONLY IF CODE IS 99-OTHER*

A- ?
B- ?
C- ?
D- ?

10. ACADEMIC DEGREES AWARDED: (CLICK THE ? TO SELECT A DEGREE)
** FILL IN SHADED AREA ONLY IF CODE IS 99-OTHER*

A- ?
B- ?
C- ?
D- ?

11. ATTORNEYS ADMITTED TO PRACTICE OUTSIDE NEW YORK STATE:

Jurisdiction of Admission	Year of Admission	Active Status: Yes	No
		○	○
		○	○
		○	○
		○	○

12. AREAS OF SPECIAL INTEREST OF ATTORNEYS ADMITTED TO PRACTICE IN NEW YORK OR ANOTHER JURISDICTION:
(CLICK THE ? TO SELECT A SPECIALIZATION)
** FILL IN SHADED AREA ONLY IF CODE IS 99-OTHER*

A- ?
B- ?
C- ?
D- ?

13. PROFESSIONS OR OCCUPATIONS OTHER THAN ATTORNEYS: (CLICK THE ? TO SELECT A PROFESSION OR OCCUPATION)

Profession Or Occupation: ** FILL IN SHADED AREA ONLY IF CODE IS 99-OTHER	Licensing Entity:	Year License First Issued:	Active Status: Yes	No
A- ?			○	○
B- ?			○	○
C- ?			○	○
D- ?			○	○

14. PERSONAL BACKGROUND:
Have you ever been, or are proceedings pending in which you may be,

a.	convicted of a crime or offense, other than a traffic infraction (include military proceedings)?	○ Yes	○ No
b.	denied a professional or occupational license, or been censured by a licensing authority or had an occupational or professional license revoked or suspended?	○ Yes	○ No
c.	held in contempt of court?	○ Yes	○ No
d.	found civilly liable in an action involving fraud, misrepresentation, theft or conversion?	○ Yes	○ No
e.	discharged in bankruptcy?	○ Yes	○ No
f.	found liable for unpaid money judgments, liens or judgments of foreclosure?	○ Yes	○ No
g.	found liable for civil penalties for unpaid taxes?	○ Yes	○ No
h.	in default in the performance or discharge of any duty or obligation imposed by a judgment, decree, order or directive of any court or governmental agency?	○ Yes	○ No
i.	removed as a fiduciary by a court of competent jurisdiction for misconduct?	○ Yes	○ No
j.	in forfeiture of a bond?	○ Yes	○ No
k.	found to have committed an ethical violation as a member of a judicial, executive or legislative branch of government?	○ Yes	○ No

IF YOU ANSWERED YES TO ANY OF THE QUESTIONS ABOVE, YOU MUST ATTACH A SEPARATE SHEET OF PAPER AND EXPLAIN YOUR ANSWER IN DETAIL, GIVING ALL RELEVANT DATES.

15. AFFIRMATION:

I affirm, under penalty of perjury:

- All statements contained in this application are true and accurate to the best of my knowledge;
- I have read Part 36 of the Rules of the Chief Judge (22 NYCRR), and the Explanatory Note, attached to this application;
- I have fulfilled the training requirements for each category of appointment for which I am applying (see 7-A of the application) and have retained a certificate of satisfactory completion for each training program I am required to attend, and
- I am QUALIFIED to file this application, because **I AM NOT:**
  - a. a judge or housing judge of the Unified Court System or a relative of, or related by marriage to, a judge or housing judge of the Unified Court System within the sixth degree of relationship;
  - b. a judicial hearing officer in a county in which I am applying for appointment;
  - c. a full-time or part-time employee of the Unified Court System;
  - d. the spouse, brother/sister, parent or child of a full-time or part-time employee of the Unified Court System at or above salary grade JG24, or its equivalent: 1) employed in a judicial district in which I am applying for appointment or 2) with statewide responsibilities;
  - e. a person who currently serves, or has served within the last two years (commencing January 1, 2003), as chair, executive director, or the equivalent, of a state or county political party; the spouse, brother/sister, parent or child of such political party official; or a member, associate, counsel or employee of a law firm or entity with which such political party official is currently associated;
  - f. a former judge or housing judge of the Unified Court System who left office within the last two years (commencing January 1, 2003) and who is applying for appointment within the jurisdiction of prior judicial service, as defined by section 36.2(c)(5) of the Rules of the Chief Judge, or the spouse, brother/sister, parent or child of such former judge;
  - g. an attorney currently disbarred or suspended from the practice of law by any jurisdiction;
  - h. a person convicted of a felony for which no certificate of relief from disabilities has been received;
  - i. a person convicted of a misdemeanor for which sentence was imposed within the last five years and for which no certificate of relief from disabilities, or waiver by the Chief Administrator of the Courts, has been received;
  - j. a person who has been removed from an appointment list of the Chief Administrator of the Courts for unsatisfactory performance or conduct incompatible with appointment.

PART 36. APPOINTMENTS BY THE COURT

§ 36.0 PREAMBLE

Public trust in the judicial process demands that appointments by judges be fair, impartial and beyond reproach. Accordingly, these rules are intended to ensure that appointees are selected on the basis of merit, without favoritism, nepotism, politics or other factors unrelated to the qualifications of the appointee or the requirements of the case.

The rules cannot be written in a way that foresees every situation in which they should be applied. Therefore, the appointment of trained and competent persons, and the avoidance of factors unrelated to the merit of the appointments or the value of the work performed are the fundamental objectives that should guide all appointments made, and orders issued, pursuant to this Part.

§ 36.1 APPLICATION

(a) Except as set forth in subdivision (b), this Part shall apply to the following appointments made by any judge or justice of the Unified Court System:

(1) guardians;
(2) guardians ad litem, including guardians ad litem appointed to investigate and report to the court on particular issues, and their counsel and assistants;
(3) law guardians who are not paid from public funds, in those judicial departments where their appointments are authorized;
(4) court evaluators;
(5) attorneys for alleged incapacitated persons;
(6) court examiners;
(7) supplemental needs trustees;
(8) receivers;
(9) referees (other than special masters and those otherwise performing judicial functions in a quasi-judicial capacity);
(10) the following persons or entities performing services for guardians or receivers:
  (i) counsel
  (ii) accountants
  (iii) auctioneers
  (iv) appraisers
  (v) property managers
  (vi) real estate brokers

(b) Except for sections 36.2(c)(6) and 36.2(c)(7), this Part shall not apply to:

(1) appointments of law guardians pursuant to section 243 of the Family Court Act, guardians ad litem pursuant to section 403-a of the Surrogate's Court Procedure Act, or the Mental Hygiene Legal Service;
(2) the appointment of, or the appointment of any persons or entities performing services for, any of the following:
  (i) a guardian who is a relative of (A) the subject of the guardianship proceeding or (B) the beneficiary of a proceeding to create a supplemental needs trust; a person or entity nominated as guardian by the subject of the proceeding or proposed as guardian by a party to the proceeding; a supplemental needs trustee nominated by the beneficiary of a supplemental needs trust or proposed by a proponent of the trust; or a person or entity having a legally recognized duty or interest with respect to the subject of the proceeding;
  (ii) a guardian ad litem nominated by an infant of 14 years of age or over;
  (iii) a nonprofit institution performing property management or personal needs services, or acting as court evaluator;
  (iv) a bank or trust company as a depository for funds or as a supplemental needs trustee;
  (v) a public administrator or public official vested with the powers of an administrator;
  (vi) a person or institution whose appointment is required by law;
  (vii) a physician whose appointment as a guardian ad litem is necessary where emergency medical or surgical procedures are required.
(3) an appointment other than above without compensation, except that the appointee must file a notice of appointment pursuant to section 36.4(a) of this Part.

§ 36.2 APPOINTMENTS

(a) Appointments by the judge. All appointments of the persons or entities set forth in section 36.1, including those persons or entities set forth in section 36.1(a)(10) who perform services for guardians or receivers, shall be made by the judge authorized by law to make the appointment. In making appointments of persons or entities to perform services for guardians or receivers, the appointing judge may consider the recommendation of the guardian or receiver.

(b) Use of lists.

(1) All appointments pursuant to this Part shall be made by the appointing judge from the appropriate list of applicants established by the Chief Administrator of the Courts pursuant to section 36.3 of this Part.
(2) An appointing judge may appoint a person or entity not on the appropriate list of applicants upon a finding of good cause, which shall be set forth in writing and shall be filed with the fiduciary clerk at the time of the making of the appointment. The appointing judge shall send a copy of such writing to the Chief Administrator. A judge may not appoint a person or entity that has been removed from a list pursuant to section 36.3(e).
(3) Appointments made from outside the lists shall remain subject to all of the requirements and limitations set forth in this Part, except that the appointing judge may waive any education and training requirements where completion of these requirements would be impractical.

(c) Disqualifications from appointment.

(1) No person shall be appointed who is a judge or housing judge of the Unified Court System of the State of New York, or who is a relative of, or related by marriage to, a judge or housing judge of the Unified Court System within the sixth degree of relationship.
(2) No person serving as a judicial hearing officer pursuant to Part 122 of the Rules of the Chief Administrator shall be appointed in actions or proceedings in a court in a county where he or she serves on a judicial hearing officer panel for such court.
(3) No person shall be appointed who is a full-time or part-time employee of the Unified Court System. No person who is the spouse, sibling, parent or child of an employee who holds a position at salary grade JG24 or above, or its equivalent, shall be appointed by a court within the judicial district where the employee is employed or, with respect to an employee with statewide responsibilities, by any court in the state.
(4) (i) No person who is the chair or executive director, or their equivalent, of a state or county political party, or the spouse, sibling, parent or child of that official, shall be appointed while that official serves in that position and for a period of two years after that official no longer holds that position. This prohibition shall apply to the members, associates, counsel and employees of any law firms or entities while the official is associated with that firm or entity.
  (ii) No person who has served as a campaign chair, coordinator, manager, treasurer or finance chair for a candidate for judicial office, or the spouse, sibling, parent or child of that person, or anyone associated with the law firm of that person, shall be appointed by the judge for whom that service was performed for a period of two years following the judicial election. If the candidate is a sitting judge, the disqualifications shall apply as well from the time the person assumes any of the above roles during the campaign for judicial office.
(5) No former judge or housing judge of the Unified Court System, or the spouse, sibling, parent or child of such judge, shall be appointed, within two years from the date the judge left judicial office, by a court within the jurisdiction where the judge served. Jurisdiction is defined as follows:
  (i) The jurisdiction of a judge of the Court of Appeals shall be statewide.
  (ii) The jurisdiction of a justice of an Appellate Division shall be the judicial department within which the justice served.
  (iii) The jurisdiction of a justice of the Supreme Court and a judge of the Court of Claims shall be the principal judicial district within which the justice or judge served.

REV. 4/03

(iv) With respect to all other judges, the jurisdiction shall be the principal county within which the judge served.

(6) No attorney who has been disbarred or suspended from the practice of law shall be appointed during the period of disbarment or suspension.

(7) No person convicted of a felony, or for five years following the date of sentencing after conviction of a misdemeanor (unless otherwise waived by the Chief Administrator upon application), shall be appointed unless that person receives a certificate of relief from disabilities.

(8) No receiver or guardian shall be appointed as his or her own counsel, and no person associated with a law firm of that receiver or guardian shall be appointed as counsel to that receiver or guardian, unless there is a compelling reason to do so.

(9) No attorney for an alleged incapacitated person shall be appointed as guardian to that person, or as counsel to the guardian of that person.

(10) No person serving as a court evaluator shall be appointed as guardian for the incapacitated person except under extenuating circumstances that are set forth in writing and filed with the fiduciary clerk at the time of the appointment.

(d) Limitations on appointments based upon compensation.

(1) No person or entity shall be eligible to receive more than one appointment within a calendar year for which the compensation anticipated to be awarded to the appointee in any calendar year exceeds the sum of $15,000.

(2) If a person or entity has been awarded more than an aggregate of $50,000 in compensation by all courts during any calendar year, the person or entity shall not be eligible for compensated appointments by any court during the next calendar year.

(3) For purposes of this Part, the term "compensation" shall mean awards by a court of fees, commissions, allowances or other compensation, excluding costs and disbursements.

(4) These limitations shall not apply where the appointment is necessary to maintain continuity of representation of or service to the same person or entity in further or subsequent proceedings.

§ 36.3 PROCEDURE FOR APPOINTMENT

(a) Application for appointment. The Chief Administrator shall provide for the application by persons or entities seeking appointments pursuant to this Part on such forms as shall be promulgated by the Chief Administrator. The forms shall contain such information as is necessary to establish that the applicant meets the qualifications for the appointments covered by this Part and to apprise the appointing judge of the applicant's background.

(b) Qualifications for appointment. The Chief Administrator shall establish requirements of education and training for placement on the list of available applicants. These requirements shall consist, as appropriate, of substantive issues pertaining to each category of appointment — including applicable law, procedures, and ethics — as well as explications of the rules and procedures implementing the process established by this Part. Education and training courses and programs shall meet the requirements of these rules only if certified by the Chief Administrator. Attorney participants in these education and training courses and programs may be eligible for continuing legal education credit in accordance with the requirements of the Continuing Legal Education Board.

(c) Establishment of lists. The Chief Administrator shall establish separate lists of qualified applicants for each category of appointment, and shall make available such information as will enable the appointing judge to be apprised of the background of each applicant. The Chief Administrator may establish more than one list for the same appointment category where appropriate to apprise the appointing judge of applicants who have substantial experience in that category. Pursuant to section 81.32(b) of the Mental Hygiene Law, the Presiding Justice of the appropriate Appellate Division shall designate the qualified applicants on the lists of court examiners established by the Chief Administrator.

(d) Reregistration. The Chief Administrator shall establish a procedure requiring that each person or entity on a list reregister every two years in order to remain on the list.

(e) Removal from list. The Chief Administrator may remove any person or entity from any list for unsatisfactory performance or any conduct incompatible with appointment from that list, or if disqualified from appointment pursuant to this Part. A person or entity may not be removed except upon receipt of a written statement of reasons for the removal and an opportunity to provide an explanation and to submit facts in opposition to the removal.

§ 36.4 PROCEDURE AFTER APPOINTMENT

(a) Notice of appointment and certification of compliance.

(1) Every person or entity appointed pursuant to this Part shall file with the fiduciary clerk of the court from which the appointment is made, within 30 days of the making of the appointment, (i) a notice of appointment and (ii) a certification of compliance with this Part, on such form as promulgated by the Chief Administrator. Copies of this form shall be made available at the office of the fiduciary clerk and shall be transmitted by that clerk to the appointee immediately after the making of the appointment by the appointing judge. An appointee who accepts an appointment without compensation need not complete the certification of compliance portion of the form.

(2) The notice of appointment shall contain the date of the appointment and the nature of the appointment.

(3) The certification of compliance shall include:
(i) a statement that the appointment is in compliance with sections 36.2(c) and (d); and (ii) a list of all appointments received, or for which compensation has been awarded, during the current calendar year and the year immediately preceding the current calendar year, which shall contain (A) the name of the judge who made each appointment, (B) the compensation awarded, and (C) where compensation remains to be awarded, (i) the compensation anticipated to be awarded and (ii) separate identification of those appointments for which compensation of $15000 or more is anticipated to be awarded during any calendar year. The list shall include the appointment for which the filing is made.

(4) A person or entity who is required to complete the certification of compliance, but who is unable to certify that the appointment is in compliance with this Part, shall immediately so inform the appointing judge.

(b) Approval of compensation.

(1) Upon seeking approval of compensation of more than $500, an appointee must file with the fiduciary clerk, on such form as is promulgated by the Chief Administrator, a statement of approval of compensation, which shall contain a confirmation to be signed by the fiduciary clerk that the appointee has filed the notice of appointment and certification of compliance.

(2) A judge shall not approve compensation of more than $500, and no compensation shall be awarded, unless the appointee has filed the notice of appointment and certification of compliance form required by this Part and the fiduciary clerk has confirmed to the appointing judge the filing of that form.

(3) Each approval of compensation of $5,000 or more to appointees pursuant to this section shall be accompanied by a statement, in writing, of the reasons therefor by the judge. The judge shall file a copy of the order approving compensation and the statement with the fiduciary clerk at the time of the signing of the order.

(4) Compensation to appointees shall not exceed the fair value of services rendered. Appointees who serve as counsel to a guardian or receiver shall not be compensated as counsel for services that should have been performed by the guardian or receiver.

(c) Reporting of compensation received by law firms. A law firm whose members, associates and employees have had a total of $50,000 or more in compensation approved in a single calendar year for appointments made pursuant to this Part shall report such amounts on a form promulgated by the Chief Administrator.

(d) Exception. The procedure set forth in this section shall not apply to the appointment of a referee to sell real property and a referee to compute whose compensation for such appointments is not anticipated to exceed $550.

§ 36.5 PUBLICATION OF APPOINTMENTS.

(a) All forms filed pursuant to section 36.4 shall be public records.

(b) The Chief Administrator shall arrange for the periodic publication of the names of all persons and entities appointed by each appointing judge, and the compensation approved for each appointee.

REV. 4/03

POINT OF VIEW

The Cardozo Mystery

BY DANIEL J. KORNSTEIN

It is difficult getting to the essence of Benjamin Cardozo. For all his judicial opinions, for all the accounts of his contemporaries, for all the much-acclaimed recent books about Cardozo, we are still – 65 years after his death – almost clueless about the inner man.

Part of this void is due to the private nature of Cardozo himself, and to his singular devotion to work. Part is due to the reluctance of biographers to go beyond established fact. And part is due to Cardozo's special, exalted place in our legal pantheon. As a result, one of our great legal heroes remains to this day shrouded in mystery.

The Cardozo mystery has stymied the best biographical detectives. Strangely, until the 1990s, no serious analysis of Cardozo's life and work as a whole was even attempted. But that decade saw three book-length studies.

In 1990, the prolific and brilliant federal appeals judge Richard Posner published a short book called *Cardozo: A Study in Reputation* (University of Chicago Press) in which he focused, naturally enough, on Cardozo's memorable writing style. In trying to unravel what he referred to as the "mystery of Cardozo's reputation," Posner analyzed Cardozo's attributes and skills rather than his interior life. Posner's analysis was fine as far as it went, and did identify some traits enhancing Cardozo's reputation, but never explained why Cardozo had or developed those particular traits.

A second effort came in 1997 with *The World of Benjamin Cardozo* (Harvard University Press) by Richard Polenberg, a history professor at Cornell. Polenberg's insightful book concentrated more on Cardozo the man than did Posner's. But, nicely written as it was, it still fell short of finding the grail. It starts, but only starts, to explore a few of the crucial issues. It gets distracted by Cardozo's glittering judicial career. Once again a Cardozo sleuth failed to find the secret.

Five years ago, Cardozo fans expected to learn the answer. In 1998, Harvard law professor Andrew Kaufman published his long-awaited biography. Forty years in the making, Kaufman's *Cardozo* (Harvard University Press) was anticipated by scholars, lawyers and the reading public to be the great biography of a great judge, the first truly full-length effort to study the life and work of Cardozo.

It met immediate critical acclaim. Posner called *Cardozo* "perhaps the best biography of a major American judge ever written." Law professor G. Edward White, himself a biographer of Oliver Wendell Holmes, regarded Kaufman's book as "in many respects a model judicial biography." Others threw similar bouquets.

Despite its warm reception, however, the Kaufman book was disappointing to anyone hoping to find at last the real Cardozo. Kaufman's biography was, to borrow the language of equal protection cases, simultaneously overinclusive and underinclusive; that is, it at once said too much and too little. As a result, and this is the book's most serious flaw, Kaufman – like his predecessors – misses the true essence, the ultimate nature of Cardozo the man and the judge.

In short, for all its 731 fact-filled pages, *Cardozo* is unilluminating. Rather than foreclosing future biographies of Cardozo, Kaufman's volume unintentionally invites them to explore, if not definitively answer, the crucial biographical questions he fails even to ask.

Padding its length is too much detailed and elaborate discussion of Cardozo's cases. Kaufman's extended discussion of Cardozo's decisions leaves too little room for the life, which often seems to be squeezed in as an afterthought. In doing so, Kaufman's book fails to see important, unexplored links between his work and his life. Lost in the sea of legal facts and details are some basic aspects of the man's spirit and personality, the activating principles influencing the man, which, if properly understood, might explain his legal performance.

The Cardozo mystery has stymied the best biographical detectives.

Among the still-unanswered questions is: Why did Cardozo never marry, or, for that matter, never have any romantic relationship in his life? It is simply not enough to say that four of his five siblings never married, or to point out that he cared almost all his life for his elder sister Nellie, who raised him after their mother's death when he was 9. Those interesting facts do not, without more, sufficiently explain such a basic feature of a human being's personality.

Please don't misunderstand me. I do not propose a prurient look at Cardozo's private life. I am merely saying that it is impossible to understand Cardozo without trying to know why he was seemingly celibate all his life, and how, or if, that affected his attitudes toward women, his relationships with them and his judicial opinions dealing with marriage, of which there are several. Kaufman is unhelpful on this core mystery.

Equally unhelpful is Kaufman's failure to deal with the meaning and reasons for Cardozo's extraordinary decision never to attend religious services after his bar mitzvah. Cardozo came from a long line of orthodox

Sephardic Jews who were observant, prominent leaders of their synagogues. In these circumstances, his refusal to go to temple after the age of 13 was a monumental act of quiet personal rebellion, but one never fully addressed by Kaufman.

What does this spiritual revolt mean? What relevance did it have for the formation of Cardozo's character? Why did he do it? Did Cardozo, who always identified himself as a Jew and followed some Jewish traditions, for some reason lose his religious faith at an early age? Was he repelled by ritual? Did any of this bear on his legal philosophy? Was law, for Cardozo, a substitute for religion? Might his religious rebellion foreshadow the quiet revolution he worked in law, in which he changed (or modernized) the law while trying not to appear to do so?

Nor are these the only vital questions about Cardozo that Kaufman fails to ask, much less answer. Kaufman tells us that Cardozo was always an avid reader, and at one point lists several books and authors Cardozo read, but goes no further down that promising literary road. What a person reads is an important clue to his or her thinking and personality, the temper and disposition of his or her mind, particularly a person whose life was as uneventful and cloistered as Cardozo's was. I, for one, would desperately like to know what were Cardozo's favorite books, who were his favorite authors, and why. Answers to those questions would shed light on Cardozo's inner life, which to this day remains largely hidden.

Knowing what Cardozo liked to read might well help solve another fundamental question about his life in the law: Why and how did Cardozo, of all people, develop the unique literary style that so marks his writing and contributes so greatly to his long-lasting reputation? All Cardozo commentators, all law students, dwell on his distinctive and memorable writing style. Inverted sentences – "negligence there was none" – were but one of his many literary trademarks. How did the Cardozo style evolve?

Kaufman's fidelity to facts is vital, but facts are only the starting point in biography. Facts are often incomplete, so that the biographer must explain them, connect them, and even use them as the basis for creative but responsible interpretation to get to the heart of the human life under scrutiny, to reveal the subject's impulses or tendencies. It is almost as if Kaufman tries to camouflage lack of insight and understanding with vast amounts of diffuse and deadening detail. This is why his book is, in the final analysis, unenlightening. Kaufman gives us many facts but avoids the secret sparks of Cardozo's human flame.

Kaufman's biography of Cardozo may be the best and most complete so far, and for that we should be thankful, but it is in no way the last word. It should not cut off or discourage further study and writing about the great judge from New York. Too much remains to be done, too much remains to be probed, too much remains to be explained about the life and achievements of Cardozo. The existing books should stimulate, not stifle, further inquiry.

Of course, further inquiry may never reveal the secret of Cardozo's genius. It may not be possible to trace creativity and originality to particular events or relationships, conversations or influences in a person's life. Perhaps the Cardozo mystery is unsolvable.

Daniel J. Kornstein is a partner at Kornstein Veisz Wexler & Pollard, LLP, in Manhattan.

Attorney Professionalism Forum

To the Forum:

I am a litigator who practices with a small firm. I am involved in a federal case in which my relationship with my adversary, a partner in a large, national firm, has taken a turn for the worse. I requested her consent to a two-week adjournment of a summary judgment motion so that I could go on a previously-scheduled family vacation. No trial date had been set, and I therefore didn't see a problem. However, after (purportedly) consulting with her client, my adversary called me back and advised that although she would have been willing to agree to the adjournment, her client refused to give his consent.

As it turned out, I was still able to join my family for the vacation, but not without working nights and weekends in order to comply with the motion schedule. Not long after this incident, the same lawyer telephoned me to request an adjournment of another motion in the case, based on her own personal health. She declined to specify the health problem. I was angry that I had to make personal sacrifices because of my adversary's intransigence; I was suspicious of the *bona fides* of her health problem; and I was inclined to repay her lack of civility in kind. On the other hand, there was still no scheduled trial date in the case and no demonstrable prejudice to my client by the requested adjournment. Ultimately, I gave consent, but I feel more than a bit used. This is likely to come up again – if not with her, then with someone else – so my question is this: What were my professional obligations to my adversary?

Steamed in Syracuse

Dear Steamed:

It sounds to me that you successfully resisted a gut instinct to teach your adversary a lesson. The question is, what kind of a lesson would that have been?

Although Canon 7 of the Lawyer's Code of Professional Responsibility requires that, "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law," the Ethical Considerations should give pause to the overly zealous. Ethical Consideration 7-38 provides that, "A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters *which do not prejudice the rights of the client.*" (Emphasis added.) Your adversary properly considered the rights and needs of her client in determining whether or not to consent to your request for an adjournment. However, your adversary not only consulted with her client, but also delegated to him the exercise of professional judgment as to whether or not the requested adjournment would be prejudicial to his rights.

In this regard, I think your adversary erred. A judgment as to whether or not an adjournment should be granted must be made by the attorney, not by a lay person. By way of illustration, if a client instructed his attorney to disregard certain local customs of courtesy or practice – for example, not to return phone calls promptly – that attorney would be duty-bound, under the Code, to disregard the instruction. Likewise in your case. Although the attorney's client had an interest in expeditious resolution of the matter, the case was not yet on the trial calendar, and there would have been no obvious harm in granting the adjournment.

That being said, it does not fully answer your question, because you were on the receiving end of the discourteous act. I think you did the right thing in not responding in kind. Both you – and especially your adversary – might want to consider the New York State Standards of Civility, announced by the Office of Court Administration in September 1997, which are guidelines intended to encourage lawyers to observe principles of civility and decorum. Paragraph III recites that "A lawyer should respect the schedule and commitments of opposing counsel, consistent with protection of the client's interests." The New York State Bar Association Guidelines on Civility in Litigation has a similar guideline. Under ordinary circumstances, this means that a lawyer should agree to reasonable requests for adjournments, or for a waiver of formalities, when the legitimate interests of the client will not be compromised.

You candidly acknowledged that the case was not yet on the trial calendar, and that there was no pressing reason not to grant your adversary's request, aside from your adversary's prior discourtesy. Under the circumstances, it is apparent that you properly granted the adjournment, however distasteful that might have been

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.

for you. As one commentator has wisely observed in this magazine: "The fact is that you cannot control how opposing counsel will act, but you can always control how you act."[1] I hope that your courtesy contributes to a softening of the relationship between you and opposing counsel. And you may get a different response the next time you ask for an adjournment.

The Forum, by
Barry R. Temkin
Jacobowitz, Garfinkel & Lesman
New York City

1. John Stuart Smith, *Civility in the Courtroom from a Litigator's Perspective*, N.Y. St. B.J., Vol. 69, No. 4, at 28, 30 (May/June 1997).

QUESTION FOR NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

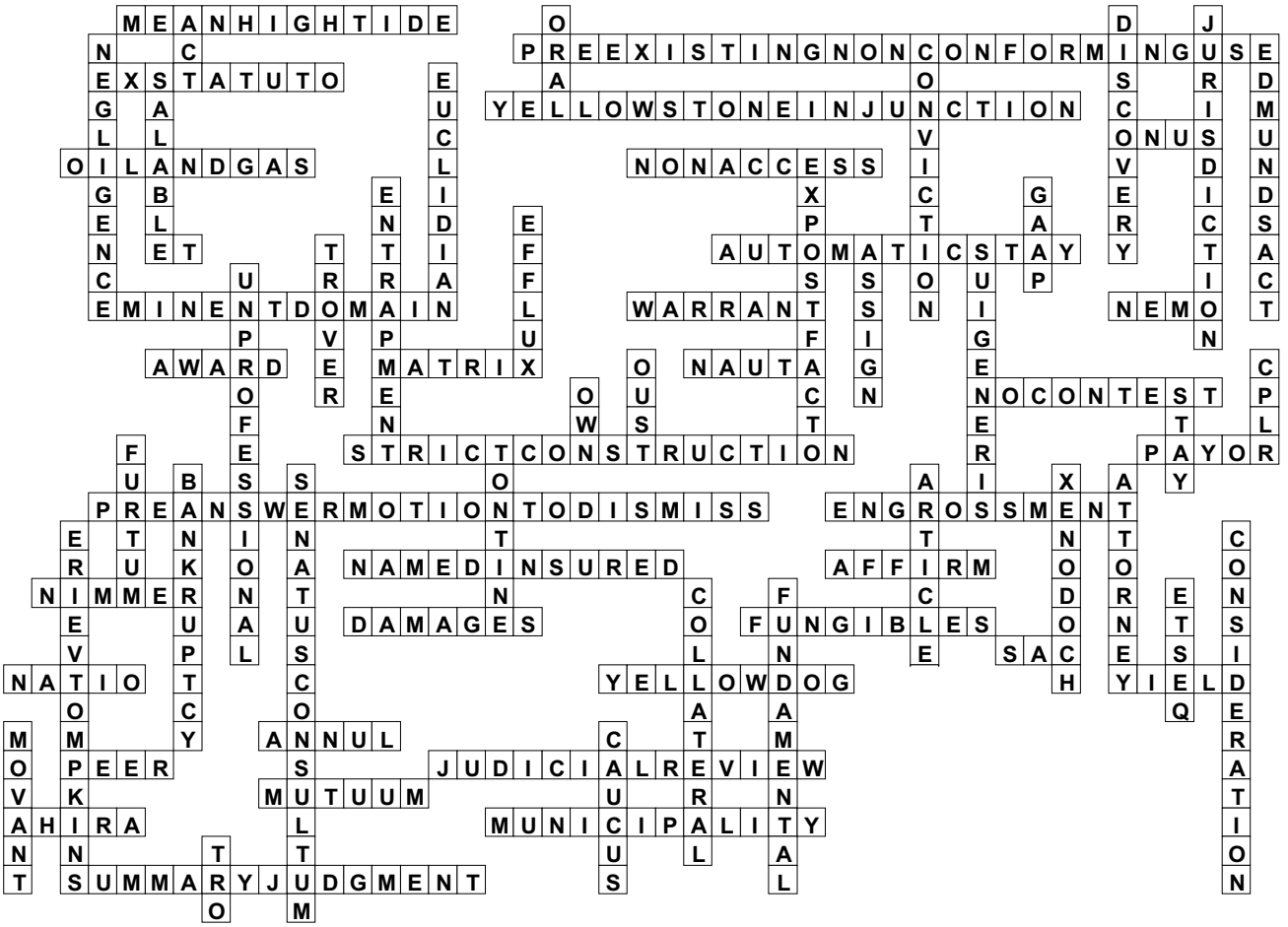
I have a client who is in a heated dispute with Mr. Vulnerable, a former business partner. My client has requested that to induce a settlement of the dispute, I pose the threat of a lawsuit by sending a draft complaint to counsel that has been retained by Mr. Vulnerable. My client asked me to include a cause of action that is based upon specious allegations that will be embarrassing to Mr. Vulnerable. To put even more pressure on Mr. Vulnerable, my client wants me to suggest to my adversary that my client has knowledge that Mr. Vulnerable engaged in tax fraud which we will report to the authorities (including a grievance committee since Mr. Vulnerable also happens to be an attorney) unless they accede to the proposed settlement. Finally, my client asked me to advise my adversary that it would be in his client's best interest to settle the dispute so that his client's fraudulent representations during the initial negotiations do not come to the attention of a disciplinary committee.

Sensing my uncertainty concerning his directions and suggestions about strategy, my client asked me if he should negotiate directly with Mr. Vulnerable rather than involving counsel.

I am having trouble determining whether my client's directives constitute zealous representation or unethical conduct.

Sincerely,
Confused in Canarsie

Crossword Puzzle answers from March/April 2003 issue.



Cut your legal research costs by 20% or more

Special Features

LawWatch™

LawWatch search agents scan Loislaw databases to find any new case law or statutes that pertain to your clients, your area of expertise, or your topics of interest. These results are automatically delivered via email or saved on your Loislaw personal start page.

GlobalCite℠ Included!

Loislaw's GlobalCite scans the entire Loislaw database for materials that have cited the document the user is viewing.

Loislaw—
The best tool at the best price.

PREMIER MEMBER NYSBA BENEFIT

Loislaw
An Aspen Publishers Company

Flat Rate Pricing

Printing, copying, downloading, hyperlinking to cited state and federal cases, statutes and other primary law, as well as 24/7 technical support are all included in a fixed monthly subscription rate.

Extensive Federal and State Law Databases

NYSBA Professional Law Library: contains over 1 million pages of New York primary law.

Exclusive! NYSBA CLE Reference Library: search NYSBA publications and link directly to the full text of the cited state or federal law.

Quality you can trust

The latest case law and legislative acts are available online. All Loislaw databases contain exact duplications of the official law, and are subject to a rigorous quality control process.

Great service

Extensive online help is built into every stage of the process.

Call Loislaw toll-free at 1-877-564-7529 for unlimited customer support 24 hours a day, seven days a week.

For a FREE TRIAL to Loislaw go to: **http://signup.loislaw.com/freetrial** (access code NYF02) or call **1-877-564-7529** today!

Language Tips

By Gertrude Block

Question: Please define the word *notwithstanding*. I believe many lawyers use that word incorrectly, as in the following statement: (Paragraph 18) "Notwithstanding the preceding paragraphs, you shall pay into the fund the sum of $1,000.00." When a previous paragraph states that you shall *not* pay $1,000.00, I believe that this statement relieves the necessity of paying that amount, but fellow lawyers have said that I'm wrong. Who is correct?

Answer: You are. The word *notwithstanding*, as used above, is a preposition, with the meaning of "in spite of" or "not prevented by." So Paragraph 18 means that "in spite of" whatever preceding paragraphs had to say on this subject, you must pay the $1,000.00. *Notwithstanding* can also be a conjunction, meaning "in spite of the fact," as in, "It was the same cause of action, notwithstanding that the facts differed." And it can be an adverb meaning "nevertheless" or "anyway," as in, "The suit was brought notwithstanding."

Question: My law students spell the word *foreseeable* without the first *e*. Is there a rule I can give them to avoid this misspelling?

Answer: Fortunately there is a simple and reliable test that decides the spelling of the prefixes *for* and *fore*. The spelling *fore* means "before." It is attached to a number of words, like *foreseeable, foreclosure,* and *forefather*, to mention only a few. On the other hand, the prefix *for*, which is cognate with the Modern German *ver*, adds to the word to which it is attached a sense of completion, exhaustion, or destruction. Compare, for example, the German word *verboten* with the English word *forbidden*.

Although the prefix *for* was widely used in Old English, it is used less often in Modern English. It still appears in words like *forgo* ("relinquish completely"), *forbid* ("prohibit utterly"), *forgive* ("excuse completely), *forsake* ("leave irrevocably"), *forswear* ("renounce unalterably"), and in a few other words. Legal language, being conservative in nature, probably uses the *for* prefix more frequently than it is used in general English. Outside of the law, people prefer to add the adverb *up* to indicate completion. Compare, for example, the statements, "She used it" and "She used it up." But the adverb *up* is now being used gratuitously and redundantly, as in a notice in the news: "Readers [responding to a poll] offered up suggestions on taxes."

Law students are certainly not the only people who confuse the prefixes *for* and *fore*. Journalists and judges make the same mistake. A headline in a daily newspaper recently announced, "Foresaking a Chance to Repay a Debt." And a 1981 court opinion begins, "Notwithstanding the forgoing . . ."

Potpourri

Nancy L. D'Antuono, professor of Italian and chair of the Department of Modern Languages at St. Mary's College, Notre Dame, commented in an e-mail that the word *agita* (discussed in this space some months ago, eliciting a flood of responses from New York readers) had been carried down through generations of Italian-Americans and "is now common parlance in all circles of linguistic origin, much like so many Yiddish expressions." She added that she is a native Brooklynite of Italian extraction.

Another reader, Harvard Lecturer Judith McLaughlin, sent an article that first appeared in the *Yale Law Journal* 463 (1993) and was reprinted in *Annals of Improbable Research*,[1] confirming the adoption of Yiddish words into the English language. Here are some comments about these words, from the *Annals* version.

The word *kosher* (which I do not have to tell readers means "prepared in accordance with Jewish dietary laws") appears more than 800 times in LEXIS, which will not surprise readers. But that word is also used figuratively in many cases. There is the insistence, in *United States v. Erwin*[2] that the law "tell the felon point blank that weapons are not kosher"; *Texas Pig Stands, Inc. v. Hard Rock Café International*,[3] concludes that "though not entirely kosher, Hard Rock's actions are not . . . swinish." (The *Pig Stands* case, according to the *Annals*, is just one in a series of pork jokes.)

Some time ago, I suggested that the "uh" sound in English has a pejorative connotation. I mentioned words like *glut, funk,* and *stunk* as a few examples, and, of course, the advertisement for Smucker's preserves, "With a name like Smucker's it has to be good." Further research indicates that some pejorative English words are derived from Yiddish words with similarly pejorative connotations.

A 1972 New York case concluded that calling the food at a restaurant "ground-up schmutz"[4] was not actionable because it expressed only an opinion. And the word *klutz*, defined as "slang" for "a dull-witted person, a bungler" comes from the same Yiddish word meaning "a wooden block." One of the parties in *Klopp v. Wackenhut Corp*.[5] contended that "[i]t had no duty to design the security station for klutzes and total idiots."

The Yiddish word *chutzpah* is firmly ensconced in English. It was used four times in published opinions in 1973, and even then courts didn't bother to define it. (*The American Heritage Dictionary* laconically defines it in two words, "brazenness, gall.") Since 1980 *chutzpah* has appeared more than a hundred times, while "unmitigated gall" appeared only 13 times. The most famous definition of *chutzpah* is a legal one: it's when a man kills both his parents and begs the court for mercy as an orphan.

In 1970 the Second Circuit felt it necessary to define *bagels* as "hard rolls shaped like doughnuts."[6] The need for this (incorrect) definition no longer exists. Yiddish has replaced Latin as "the spice of American argot." Professor D'Antuono says that Yiddish expressions are part of her speech, although she sometimes has to define them for her Middle West students.

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

---

1. Alex Kozinski & Eugene Volkh's "Lawsuit, Schmawsuit" appeared in 103 *Yale Law Journal*, p. 463 (1993) and *Annals of Improbable Research*, p. 6 (Sept./Oct. 1996).
2. 902 F.2d 510, 513 (7th Cir. 1990).
3. 951 F.2d 684, 698 (5th Cir. 1992).
4. *Steak Bit of Westbury, Inc. v. Newsday, Inc.*, 70 Misc. 2d 437, 438, 334 N.Y.S.2d 325, 328 (Sup. Ct., Nassau Co. 1972).
5. 824 P.2d 293, 297 (N.M. 1992).
6. *NLRB v. Bagel Bakers Council*, 434 F.2d 884, 886 (2d Cir. 1970).

MEMBERSHIP TOTALS

NEW REGULAR MEMBERS
1/1/03 - 4/22/03 _____2,719

NEW LAW STUDENT MEMBERS
1/1/03 - 4/22/03 _____404

TOTAL REGULAR MEMBERS AS OF
4/22/03 _____68,779

TOTAL LAW STUDENT MEMBERS AS OF 4/22/03_____4,757

TOTAL MEMBERSHIP AS OF
4/22/03 _____73,536

New Members Welcomed

FIRST DISTRICT

Mark Joseph Abate
Madina Y. Abbasova
John Anthony Adamo
Sameer Nitanand Advani
Holly Agajanian
Evelyn R. Agnant
Kyle Ross Ahlgren
Hae-june Ahn
Joshua Seth Akbar
Andrea Akivis
Daniela Alba
Todd Albert
Carmen Alonso
Dan Alster
Allison C. Altman
Sheryl Helayne Altwerger
Ginger Dawn Anders
Michael Henry Antonutti
Nicole Michelle Anzuoni
Jinan Monique Arafat
Kendra Louise Archer
Juan Alberto Arteaga
Anna Avrasin
Andrew M. Ayers
Vanessa Michael Bakert
Mimma Barila
Kelly M. Barnard
Robert N. Barnard
David Michael Baronoff
Kenneth Richard Barrows
Stephanie Dawn Batchelder
Matthew Clinton Bate
Michael Carl Becker
Robert Harrison Bell
Jamine Anne Bellarosa
Christopher Jason Bellotti
Shiri Ben-yishai(engel)
Daniel Herbert Bennett
Tracy L. Bentley
Jessica Alison Berets
Joshua David Bernstein
Nicole Ann Berryman
Farrah Robyn Berse
Carol Jean Beyers
Mamoni Bhattacharyya
Diahann Billings-Burford
Christopher Philip Bisgaard
Federica Bisone
Robert Nathaniel Black
Alexander Blishteyn
Emilio G. Boehringer
Thomas John Bogal
Anne E. Bogoch
Diana Bogomolnik
Julie Bogomolny
Alexander Spicola Bokor
Samuel Ethan Bonderoff
Toby Shawn Stuart Bordelon
Laurence Drew Borten
Stuart Michael Boyarsky
Michael A. Bracchi
Saul Brander
Benjamin Peppercorn Bratter
Eric Scott Braverman
Justin Charles Breen
Jerrold Lyle Bregman
Neil A. Bregman
Alexia Breuvart
Susan Carol Bronson
Nia M. Brown
Sheryl Ann Bruzzese
Lindsay A. Bush
James Peter Byrnes
Madelyn Calabrese
Molly Elizabeth Calvanese
Claire Diana Calvin
Jaimee Lynn Campbell
David Caracciolo
Elizabeth Louise Carr
Lucas Haig Carsley
Jessica Faye Carter
Marco-Aurelio Casalins
Megan Kathleen Caughran
Cara Ann Chambers
Stephanie Siu-Ying Chan
Rex T. Chang
Christopher Raymond Chase
Kostas Cheliotis
Christopher Chen
Michael C. Chen
Damian Gordon Chesterman
Theodore Joseph Chiacchio
Edward K. Chung
Seiyoung Sam Chung
Peter L. Cohen
Peggy Lyn Collen
Mary Ann Alvarez Colombo
Danielle Colonna
Marcus Anthony Colucci
Michael Earl Comerford
Willa Concannon
Jon Jerome Connolly
William Patrick Connolly
Jason Paul Conti
Jacques Cook
Bridget Ann Cooney
Christopher Edward Copeland
Dena L. Copulsky
Kristin Dorothy Corapi
Caroline Mala Corbin
Justin Michael Cordello
Brandon H. Cowart
Thomas F. Croke
Robyn Suzanne Crosson
David Crystal
James Joseph Cummings
William Arthur Curran
Albab Abraham Dabela
Amy Michelle Danziger
Felix Aleksandrovich Dashevsky
James Edward D'Auguste
Stephen Charles Davey
Ephraim Yitzchak Davidowitz
Ethan Zane Davis
Timothy Sean Davis
William Floyd Davis
Kerri Marie De Ruyter
Justin A. De Spirito
Brenna Kathleen De Vaney
Stephen Maxwell Dehoff
Robert Alexander Del Giorno
Melissa Lynn Delis
Jonathan DeMay
Jonathan Charles Derek
Christina Evangelos Diamantis
Caroline Spector Dicks
Robert Dale Doerfler
Kim Marie Domilici
Derek Brandon Dorn
Jeffrey Anthony Dougherty
Joanne Amy Doughty
Dara Michele Drossman
William Joseph Dubanevich
Felice Marie Duffy
Charles H. Dufresne
Blake Forrester Dunlap
David Matthew Dunn
Charles Gillen Dunne
Andrew Dutton
Bartosz M. Dzikowski
Matthew John Easter
Daniel Michael Eggerman
Andrew James Ehrlich
Morris Ehrlich
Jesse Eisenberg
Shawn J. Eisenberg
Sheldon Elefant
Ellen Victoria Endrizzi
Adam Engel
Juan Carlos Espinoza
Bruce E. Fader
Nadine Farid
Serena Iva Farquharson
Matthew J. Farrell
Natalie Elizabeth Fay
Timothy Johnson Fazio
Joseph R. Feehan
Laura A. Fernandez
Joseph Anthony Ferraro
Tony D. Feuerstein
Harmon L. Fields
Mark Joseph Fiore
Julie M. Fiorello
Elizabeth Flanagan
Gabrielle May Flateau
Alayne Cynthia Naomi Fleischman
Stephen Michael Fleming
Dierk Allen Flemming
Heidi Marie Flinn
Alexandra Elizabeth Flynn
Adam I. Forchheimer
Adam Douglas Ford
Peter M. Frankel
Michael Anthony Franlin
Schuyler Hendricks Frautschi
John Edward Freeland
Daniel L. Freidlin
Lisa Jean Fried
Bradley Ryan Friedman
Jason Evan Friedman
Kevin Andrew Fritz
Andrew J. Fuchs
Kevin Dugald Galbraith
Karmit Shlomit Galili
Salil Kiran Gandhi
William A. Garcia
Benjamin David Gardner
Seanna Beck Garrison
Christopher Jon Gawley
Michele Geiger
Lina Gelfer
Aude Gerspacher
Allen Aleksey Gessen
Padma Ghatage
Rebecca Sunite Gideon
Dina Ziva Gielchinsky
Melissa Sharon Gillespie
Alexander Porter Gillette
Betsy R. Ginsberg
Thomas V. Giordano
Jeremy B. Glickman
Andrew Charles Goldberg
Dianna Gail Goldenson
Jill L. Golderg
Beth Danielle Goldman
Geoffrey Fredric Goldschein
Antonia Golianopoulos
Alvaro Gomez De Memillera
Celso M. Gonzalez-Falla
Peter G. Goodman
Eddie L. Gordon
Alexis Gorton
David Sanders Gorton
Kathryn Sarah Gostinger
Yisroel Graftstein
Gina Marie Graham
Jeffrey S. Grand
V. David Granin
Notoya S. Green
Antoinette Lorenza Greenaway
David Scott Greenberg
Scott Jason Greenberg
Stacy J. Greenhouse
Glenn Jason Greilsamer
Christopher Leigh Gretina
Melissa Leigh Griffin
Pamela Joy Griffith
Gera Grinberg
Linda Marie Guecia
Maria Isabella Guerra
Aparna Gullapalli
Menaka Guruswamy
Alicia Rosa Gutierrez
Maria Evenlina Gutierrez
Elazar Guttman
Robert Guttmann
Raymond Nicholas Hannigan
Gordon Christopher Harriss
Tishawa Dellissia Hart
Aileen Patricia Haviland
Nicholas Evan Hecker
Arie Heijkoop
Jennifer Lynn Heil
Eric Rieger Heller
Victoria Ann Heller
Linda Eileen Henry
Susan Christine Henry
Keely Lane Herrick
Jennifer Lynn Herring
Louise Hiblin
Khue Van Hoang
Jonathan Rath Hoffman
Piper Hoffman
Gary L. Holland
Angela Diane Hooton
Judy Eliza Hopkins
Catherine Horta
Linda Anne Horvath
Nicolas Brian Hoskins
Andrew Robinson Hough
Jennifer E. Hu
Imar Lyman Hutchins
Jannine Marie Huth
Melissa Jean Hutson
Michael George Insalaco
Brian Thomas Isaacson
Michael H. Isenberg
Souren Avetick Israelyan
Ilysa Wendi Ivler
Rashondra Martrice Jackson
Erica Ruth Jacobson
Myriam Jaidi
Christopher Jamal James
Peter Janovsky
Patrice Polyxene Jean
Gongjun Ji
Dina Rynel Johnson
Mayah Yael Judovits
Veronica Seungwon Jung
Jason Daniel Kalish

Jennifer Natalie Kalnins
Arielle D. Kane
Rachel Brothman Kane
Ryan Anthony Kane
Jacob Max Kaplan
Joel Preston Karansky
Richard C. Kariss
David Steven Katz
Daniel Scott Kaufman
Ian H. Kaufman
Donna M. Keane
George Michael Kelakos
Wesley Herman Kelman
Wendy E. Kemp
Courtney Paige Kerker
Elizabeth Alia Khan
Atossa Kia
Daniel J. Kikel
Buhm-joon Kim
Jonathan Kim
Maureen Peyton King
Linda Elizabeth Kingsley
Russell Alexander Kivler
Brian Edward Klein
Minoru Kobayashi
Takahiro Kobayashi
Aya Kobori
Gregory Michael Koch
Marianne Laura Kotubetey
Thomas Kozak
Jacob Justin Kramer
Jonathan Adam Kramer
Caroline Louise Kraus
Michael Edward Kraver
Preethi Krishnamurthy
Ely M. Kronenberg
Angela L. Krueger
Susan Krunic
Erica W. Kuo
Ronny Lee Kurzman
Renet Margaret Anne Ladocsi
Ellen Elizabeth Lafferty
Rosemary L. Lane
Richard Hartshorn Langan
Alyson Leigh Lanzer
Robert Allen Laplante
Joshua James Larocca
Ali Reza Latifi
Jennifer H. Lee
Melissa Lori Lee
Sung-a Lee
Yisroel Y. Leshkowitz
Felix Samuel Leslie
Richard Leu
Julie Allyson Levi
Kenneth Michael Levy
Reuben John Levy
Robert Joseph Lewin
Anika Lewis
Henry Li
Jason Matthew Licht
Paul S. Lim
Gideon Lin
Joshua D. Liston
Matthew R. Litt
Xiangmin Liu
Jessica Lively
Matthew David Livingston
Elizabeth Anne Long
Peter Joseph Lopalo
Gavin Michael Loughlin
Steven William Lozner
Roopal Premchand Luhana
Rachael M. Luken
Matthew Abraham Lux
Kerri Anne Lyman
Garrett Adam Lynch
Timothy A. Macht
Diane Marie Macina
Eve Tova Madison
Brendan Stephen Maher
Robert Lawrence Maier
Craig Matthew Mait
Georgia Amanda Mallan
Catherine Ann Mangan
Pamela Marcogliese
Brian Seth Marcus
Abigail S. Margulies
Anabel Cynthia Mariani
Josephine Marrali
Katherine E. Marshall
Mia Rene Martin
Nicholas Bryan Martin
Vincent Robert Martorana
Shinsuke Matsumoto
Yuto Matsumura
Allison E. Maue
Sharon Kay Mauer
Michelle M. Mauro
Christopher Ryan May
Courtney Ann Mc Bride
Steven Kepner McCallister
Sarah Eddy McCallum
Joseph M. McConnon
Robert David McCreanor
Edward Michael McDonald
John Philip McGrath
John Patrick McGuinness
Gregory M. McLaughlin
Meloney Lambert McMurry
Venkata Medabalmi
Andrew Hodge Meier
Seth R. Merl
Adam Benjamin Michaels
Atara Miller
Jessica Wendy Miller
Racquel Alexandria Millman
John Jude Mills
Shigeki Minami
Joseph Gleason Minias
Erum Zehra Mirza
Gianfranco Gustavo Mitrione
Alina Janet Moffat
Michelle Diane Moller
Marcus Monteiro
Concepcion Altea Montoya
James A. Moore
Jason Darius Moore
Sidaya Ama Moore
Vanessa Marie Morales
Lesley Aimee Morisset
Jorge Carlos Moros-Nahim
Max Anderson Moseley
Scott William Moss
Andreas Mueller-Driver
Kumi Murano
Michael Simon Musante
Stefan Naresh Nadarajah
Noriko Nagasaki
Saya Nakano
Jennifer Amie Napuli
Rachel Lynn Nass
Lauren Charno Neches
Netanel Newberger
Eric R. Newcomer
Karen Anne Newirth
Lawrence Hale Newman
Carey W. Ng
Michael Paul Nicklin
Eri Nishikawa
Robert Lyon Norton
Michael Paul O'Brien
Margaret M. O'Connor
Orla J. O'Connor
Jennifer Clair O'Loughlin
Ruth Ann O'Neil
Christopher John O'Rielly
Temietan Ofuya
Sanae Okada
Jaclyn Amanda Okin
John Nicholas Orsini
Bisola Opeyemi Osho
Richard Joseph Pacheco
Elizabeth Padilla
Daniel James Paisley
Adina J. Pallante
Joanna Lee Panzera
Lourdes Elaine Paredes
Barbara Anne Parvis
Chakshu Shashikant Patel
Rosa Maria Patrone
Stacey Elizabeth Pauker
Jennifer Ellen Pearl
Maria Antoinette Pedraza-Perez
Andrew Michael Peken
Denis Lynn Penn
Wilfred Jose Anthony Pereira
Eucaris T. Perez-Valero
Rebecca C. Pergrim
Michael Adam Perlmutter
Charles John Pesant
Polixene Petrakopoulos
Justin Dennis Petruzzelli
Jaime A. Phillip
Christine Ann Phillips
Rachel F. Phillips
Renee Barbara Phillips
Henry Bowman Piper
Andrew E. Platek
Michael Paul Plodek
Amy Lynn Pludwin
Bernice Polanco
Talia Ruth Poleski
Ronelle Corinne Porter
Rachel Leah Posner
Andrew V. Poznanski
Maya Gopika Prabhu
Jascha Daniel Preuss
Adam Joshua Price
Rebecca Tamara Price
Laurie Beth Puhn
Manjari Dahlia Purkayastha
Hongxu Qin
Huiyue Qiu
David R. Quigley
Marina Rabinovich
Mark Michael Racic
Jerome Carl Ranawake
Emily Levine Rapalino
Joshua Nissim Ratner
Adam Daniel Raucher
Corey Allan Rayburn
Joseph Rebello
Seth Eric Redniss
Alon Rehany
James Matthew Reiland
Paul J. Reilly
Stefan H. Reisinger
Sheila Mackenly Rejouis
Dana Ann Remus
Douglas Campbell Rennie
Sarah Beth Reynolds
Han Saem Rhee
Soo-mi Rhee
Jennifer Whitten Richards
Robert A. Riva
Kimberly Lorene Roberts
Lesley Raye Robertson
Jeffrey Louis Robins
Corinne Renee Robinson
Elizabeth Anne Roche
Shannon Ann Rogers
Allan J.P. Rooney
Christopher James Rooney
Anne Laure Roret
Charles Nathan Rose
Nicholas Rose
Sarah C. Rosell
Alissa Rebecca Rosen
Lauren Fox Rosenberg
Sherie Beth Rosenberg
Rachel Adina Rosenthal
Jason T. Ross
Gloria Jean Rottell
Abby Faith Rudzin
Patricia Russo
Katherine Elizabeth Russum
Teresa G. Sadutto
Candace Christine Sady
Venus Eva Sahwany
Seth Lorin Saideman
Isabelle Sajous
Peggy D. Sanchez
Erick Matthew Sandler
Christina A. Santiago
Takefumi Sato
Robert Wilson Scheff
Lori Elayne Scher
Frank Rocco Schirripa
Michael H. Schmieder
David T. Schubauer
Daniel Foster Schubert
Daniel James Scott
Yan Senouf
Andrea Jean Sessa
Bejal Jayprakash Shah
Hassan Abbas Shakir
Amy Efron Shapiro
Robert J. Shapiro
Matthew Steven Shaw
Zita-Maria Sheehan
Adam Harris Sheinkin
Brian Michael Sher
Nkosi Diallo Shields
Bradley Scott Shoenfeld
Irina Shteynberg
Mark Solomon Silver
Mason Chandler Simpson
Ji Won Sin
Thomas V. Sjoblom
Constantine Nicholas Skarvelis
Alisha Clare Smith
Heather Alexia Smith
Joshua M. Smith
Richard George Smolev
Jason Willis Snell
Austin Kyongwon So
Desmond C.F. So
Rikki Alyse Solowey
Saema Somalya
James Richard Sommer
Sang-hoon Song
Marilyn Weaver Sonnie
Andrew Jay Sossen
Kimberly Ann Sparagna
Aruna C. Spencer
Daniel Franklin Spitalnic
Lakshmi Srinivasan
Frank Kirk Staiano
Meredith Leigh Steele
Jennifer Jaye Steen
Jeffrey Todd Steiner
Russell Mark Steinthal
Brian Scott Stern
Michael Jeremy Sternhell
Michael Gavin Strapp
Michelle Suh
Ana Marie Sulit
Denis James Sullivan
Matthew Summa
Mira Sun
April Chun-Yee Sung
Andrew Paul Swary
Joseph Taffy
Venera Evgenieva Taouchanova
Justin Michael Tarshis
Adam G. Tarsitano
Corey E. Tarzik
Angel Taveras
David J. Tayar
Lisa Jill Teich
Ira Kenneth Teicher
Raz Tepper

Rene John Theriault
Charles Daniel Thompson
Kerry Grace Thompson
Mark Errett Thompson
Beatrice Njeri Thuo
Gregory Alan Todd
Serge Todorvich
Jacqueline Bridget Tomasso
Marlene Toquica
Matthew Arnold Traupman
Anthony Stanley Traymore
Bonnie Alison Tucker
Gina Marie Tufaro
Jeremy Turk
Andrew C. Udin
Loren Robert Ungar
Pablo Javier Valverde Bohorquez
James F. Van Doren
Edward Albert Vasquez
Svetlana Vaynshenker
Jenna Moore Victoriano
Steven B. Vine
Barbara Viniegra
Nicholas J. Voglio
Harald K. Voigts
Petra Von Ziegesar
Holly A. Vu
Adir Gurion Waldman
Joshua Wesley Walker
Dana A. Wallach
Amanda Ruth Waller
Michelle Audrey Walsh
Alecia F.M. Walters
Lisa H. Wang
Kanchana Wangkeo
Andrew Howard Warren
Aaron David Wasserman
Kristy Lee Watson
David Stefan Watts
Lashonne Rochelle Watts
Richard Webster
Ian M. Weiskopf
Barton J. Weiss
Marni Elyse Weiss
Rachel Hold Weiss
Elizabeth Ann Wells
Christian Wentrup
Daniel L. Wilk
Kevin Wayne Williams
Scott Steven Winter
Sean David Wissman
Neil Edward Wolitzer
Catherine F. Wong
Richard C. Worcester
Vanya Wright
Cindy Yang
Michael B. York
Mathias Andy Youbi
Aron Ephraim Youngerwood
Lei Yu
Susan Jeanine Zachman
Julia Anne Zajkowski
Jack Zaremski
Anthony David Zatkos
Andrew D. Zdrahal
S. Jonathan Zepp
Yue Zhao
Meredith Leigh Zinman
Jennifer Ann Zinna
Julie A. Zwibelman

SECOND DISTRICT
Ajamu Ali
Melissa A. Angotti
Joshua A. Barsky
Ann-marie Beckford
Stefanie Birkmann
Larisa Blinderman
Zina Bronfman
Arkady Bukh
James M. Caffrey
Ronny Carny
Jerome David Chang
Claude A. Charles
Barry Clarke
Brad Coven
Anthony David Crispino
Jeffrey Thomas Curiale
Marlene Delon
Nicholas Robert Diamand
Lisa Kristin Digernes
Igor Dodin
Michael J. Doherty
Andrew J. Elmore
Clinton Alan Elmore
Galina I. Feldsherova
Michael J. Fitzpatrick
Keisha Monet Gaillard
Leslie Michelle Gales
Keisha Galliard
Diana Kahn Gersten
Colin Yong-ping Goh
Gloria Goldstein
Evan Charles Hammerman
Tahmina Kousar Hashmi
Dennis Conan Healy
Belinda Lavinia Heath
Julia Anna Hetlof
Natalie Marie Ippolito
Jamila Elizabeth Joseph
Peter M. Khrinenko
Christopher David King
Laura Kittross
Lynnann Klotz
Rupal Hasmukh Kothari
Trisha Elizabeth Lafache
Lori Beth Lasson
Chavie D. Levin
Maria Litos
Sean Patrick Loughran
Nathalie Mandel
Rosevelie Marquez
William F. Mastro
James Andrew Mcglynn
Neal Daniel Mcmahon
Irena Milosavljevic
John Thomas Morale
Mary Ellen Moule
Agnes Neiger
Lycette Nelson
Karl Matthew Nobert
Margaret A. Nolan
Safia A. Nurbhai
Kara A. Oboler
Jeffrey Charlton Parris
Shanell Parrish-Brown
Alla Peker
Judith T. Pierce
Kevin Adam Reiss
Lauren Risolo
Ryan Renaldo Rodriguez
Nicholas Justin Rose
Alaba Abiodun Rufai
Shannon Leslie Saks
Alec Sauchik
Matthew Ryan Scoll
Jageshwar Sharma
Marina Shepelsky
Laura L. Shockley
Robbin Slade
Sherry T. Stembridge
Stacey Beth Strich
Kathryn Mary Sweeney
Jean Lydia Tom
Van Bich Thi Tran
Vlad Turkiya
Angelo Jamie Vasquez
Michal W. Walder
Michael Lawrence Weisberg
William T. Whitenack
Bernard Williams

THIRD DISTRICT
Frederick M. Altman
John Jay Schuyler Arnold
Rebecca May Bausher
Stephen Andrew Becker
Alexander Louis Betke
Lynn M. Blake
Erin K. Calicchia
Mary Frances Carr
Jeremy Chen
Mark Chieco
Michael C. Clarke
Michael C. Conway
Tammy L. Cumo-smith
Erin M. Davis
James Clark Davis
Owen William Demuth
Christina Lynn Dickinson
Susan M. DiDonato
Todd Joseph Fanniff
Ariel Futerfas
Fatima Goodman
Brian R. Haak
Ursula Eve Hall
Randi Bea Heitzman
Lisa Michelle Kenneally-Dochat
Natasha Kerry
John William Kraigenow
Emeric M. Levatich
Marie-Alanna McKiernan
Adam Drew Michelini
Envar Ali Mir
Lori A. Mizerak
Kate Han Nepveu
David John Oppedisano
Whitney Magee Phelps
Kate M. Powers
Sandra D. Rivera Desbiens
Kathleen Anne Romanow
Barbara Ann Rothaupt
Benjamin A. Scales
Jennifer C. Shatz
Derek J. Spada
Jeremy Paul Spiegel
Derrek Tremonte Thomas
Robert Charles Tietjen
Mathew B. Tully
Jerry Lee Turcotte
Stephen D. Wendell
Mary A. Zendran
Shane Aubrey Zoni

FOURTH DISTRICT
Rachael Wendeen Barrantes
Vernitta Nadine Chambers
Rachelle R. Cohen
Patricia Ann Connelly
Kristine K. Flower
Thomas Keenan Frederick
Ilene S. Kleckner-Friedman
Amy J. Knussman
John A. Mancini
Stacey Lynn Peck
Michele Schettino
Elizabeth O. Williams
Karla Marie Williams-Buettner

FIFTH DISTRICT
Gilles R.R. Abitbol
Christine A. Benda
Frank E. Blando
Kathleen Walsh Bowen
Kristie Marie Carter
Sara M. Connell
James William Cunningham
Eric Michael Dolan
Darlene L. Donald
Sharon E. Fellows
Sheila Maureen Finn
Gregory Leo Germain
Ronald T. Gerwatowski
Kelly Jo Graves
Maureen T. Kissane
Rita Kuyumcuoglu
Kathryn J. Land
Jessica Manieri
Jessica Marie Manieri
Louis H. Mannara
Anthony R. Martoccia
James R. McGraw
Michael B. Meives
Adam William Meyers
Joseph P. Morawski
Indranil Mukerji
Scott A. Otis
Honor Angwin Paul
Mark Phillip Popiel
Matthew John Porter
David J. Reed
Wendy Sue Reese
Karen M. Richards
Aaron J. Ryder
Robbi L. Sackville
Rachael E. Savanyu
Kristin Ann Shanley
Michael Erik Shannon
David B. Snyder
Nicole M. True
Melanie Wlasuk

SIXTH DISTRICT
Lorelei B. Smith Miller
Alexander Muller
Wayne R. Nellis
Matthew Alan Peterson
Mary Jane Schubert
Lorelei B. Smith Miller
Sterling Francis Williams

SEVENTH DISTRICT
Michael John Ballman
Jessica Bret Birkahn
Timothy Scott Broshears
Andrew Martin Butler
Kathryn Mary Carney-Cole
Kathleen T. Carter
David P. Case
Eric Ryan Chase
Kevin M. Colmey
Stephen Joseph Dilorenzo
Gail A. Donofrio
Noah Doolittle
Noah R. Doolittle
Perry Michael Duckles
Vincent M. Ferrero
Chad William Flansburg
Annette M. Gifford
Jon Nelson Griffin
Chad M. Hummel
Laura A. Hutchinson
Laura Anne Jenks
Kim Koski-taylor
Jeffrey Douglas Kuhn
Jon Lazenby
Jon Charles Lazenby
Sarah Ellen Marshall
Kevin A. Mattei
Heather Maure
Ryan T. McAllister
Kevin K. McKain
Michael James Mengel
Melissa Anne Meyer
Karen M. Modzel
Jennifer M. Noto
Alexander M. Osborne
Munesh Patel
Katherine Ulrich Saracene
Derek Allan Thomson
Kambon Raymond Williams
Daniel Nathaniel Willkens

EIGHTH DISTRICT
Kelly M. Balcom
Danielle Marie Baldassarre
Matthew J. Beck
Kristy Lynn Berner
Sharon L. Black
Mary B. Bowman
Lisa Lu Britton-fusco
Carla Christiansen Brown
David Sydney Bruggeman
Paul J. Callahan
Joy Marie Carrier-Lamarca
Jennifer M. Catherine
Marco Cercone
Brian Cinelli
Jaime Louise Cirulli
Bernadette J. Clor
Tracie L. Covey
Tara N. Karch Cross
Ryan King Cummings
Rebecca Linette Dalpe
Johanna M. Dash
John Davis
John K. Davis
Deanna Louise Devries
Joanna Dickinson
Louis Brian Dingeldey
Scott Duquin
Jennifer Farrell
Jennifer S. Farrell
Karen Beth Feger
Carmen Lleana Fors
Brian M. Frank
Sandra Friedfertig
Melissa Ann Fruscione
Leslie Jean Gibbin
Joseph F. Gogan
Geoffrey S. Goss
Hillary Kaine Green
Steven R. Hamlin
Scott Thomas Hanson
Jennifer Ann Hemming
Robin Nara Hendler
Shawn P. Hennessy
Joan Grace Henry
John Daniel Hocieniec
Kevin G. Hutcheson
Stephen William Kelkenberg
Beth A. Keller
Laura A. Kelley
Edward Earl Key
Holly L. Kuznicki
Rebecca Diina Lacivita
Josie K. Lipsitz
Sarah Ann Loesch
Kevin Eugene Loftus
John D. Lopinski
Shawn Patrick Mcdonald
Ryan McPherson
Ryan Andrew Mcpherson
James P. Mulhern
Michael Brendon Mulvey
Michael Donald O'Keefe
Christopher T. Paresi
Karen Elizabeth Peterson
Daniel S. Piotrowicz
Thomas Edward Popek
V. Christopher Potenza
Melissa Potzler
Melissa Ann Potzler
Patrick Gerard Radel
Colin D. Ramsey
Melissa Ann Reese
James J. Rooney
Joshua Paul Rubin
Destin Ciotoli Santacrose
Christopher Anthony Schenk
Christopher D. Smith
Peter John Sorgi
Marc Angelo Phlip Spezzano
Rebecca M. Stadler
Paul Charles Steck
Michael A. Szkodzinski
Tiffany M. Szymanek
Jack Trachtenberg
Emily A. Vella
Justin Todd Wallens
Cynthia Lee Warren
Paul V. Webb
Jamie B. Welch
Melanie May Wojcik
Henry F. Wojtaszek

NINTH DISTRICT
Jennifer Ann Andaloro
James Stuart Andes
German Arevalo
Jeanne Regan Aronson
Andrew Louis Baffi
Alison Elizabeth Breedy
Robert Cadoux
Stephen Alphonse Cerrato
Jason S. Charkow
Jerri Ann Chomicki
Joshua S. Cole
June C.M. Colthirst
Rose M. Corbett
Joseph Charles Corneau
Dominic Anthony Crispino
Jennifer Lynn D'afflitto
Michael D'alessio
Adam J. Detsky
Stephen P. Dewey
Constantine G. Dimopoulos
William E. Duquette
Judith Anne Ehren
Laura M. Feigenbaum
Joy A. Fitzgerald
Daniel Christopher Folchetti
Trecia Ann Gillett
Brian Gordon
Justin Ari Greenspan
Walton F. Hill
Alysse Dawn Hopkins
Carol A. Korwatch
Andrew Seth Kowlowitz
Todd Ming Chun Li
Luz E. Lopez
John S. Marwell
Gilah Rose Mayer
James Mcknight
Joseph Medic
Kenneth Jude Miles
Eric Douglas Ossentjuk
Christina Manos Papadopoulos
Janel M. Pellegrino
Claire Cohan Pizzuti
Susan L. Pollet
Jesse J. Prisco
Elise Schwarz
Jeremy Adam Sears
Ami Shah
Emanuel Starakis
Olga A. Tenenbaum
Kelly L. Traver
Jeffrey Thomas Vespo
Laura Elizabeth Vincenzi
Andrew D. Walcott
Rebecca Ann Williams
Uri M. Wohlgemuth
Harold B. Woolfalk
John A. Zucker

TENTH DISTRICT
Stephen M. Abrami
Michael S. Ackerman
Joshua Glenn Alexander
Mersedeh Noghrei Aminzadeh
Justin Eric Angelino
Darren A. Aronow
Larry I. Badash
Dennis Christopher Bartling
Jeffrey Ross Beitler
Elana Dina Bernstein
Eric Brian Betron
Toni Jean Biscardi
Courtney Lynn Blakeslee
Ivan Marc Braverman
Kristin A. Brenner
Rosemarie Bruno
Christopher Douglas Buck
Sean M. Bunting
Marco Rocky Caridi
Bejo Charles Chacko
Ranakdevi Chudsama
Jessica Lauren Claus
Alexandra N. Cohen
Joseph G. Coluccio
Joseph T. Conley
Cristin Noel Connell
Noreen E. Conroy Domingo
Steven Joel Coran
Melissa Corwin
Patrick Sean Costello
Helen Corieth Coulton
Jennifer Lee Culver
Vincent Domenic D'agostino
Kristy A, D'angelo
Gerald V. Dandeneau
Yvanne Altagrace Daniel
Denise Davis
Michael Dibello
Elizabeth L. Diesa
Henry Claude Dieudonne
Matthew Jed Ditrapani
Douglas Jordan Domsky
Thomas Smith Donlon
Roseann Victoria Driscoll
John J. Ebel
Catherine Ruggieri Everett
Christopher Marcello Falconetti
Erica Robin Feynman
Wendy Michelle Fiel
Michael N. Fishman
Karen Lynne Fiumano
Thomas Michael Fleming
Amy P. Fletcher
Tatum J. Fox
Matthew Madison Frank
Daniel Freidlin
Eric David Friedhaber
James F. Gallagher
Laurie Michele Gapinski
James Salvadore Gentile
Kevin Ryan Glynn
Robert Michael Goodstein
Brian J. Grieco
James Michael Griffin
Gregory Grizopoulos
Kimberly Grosch
Ivan Guerrero
Craig Howard Handler
Christopher M. Hansen
David Harris
Garrett S. Hayim
Samuel P. Hechtman
Daniel Keith Henthorne
Brett David Morris Herr
Vincent James Imbesi
Ilana Helen Kahan
Richard J. Katz
John Dwight Kern
Paul Joshua Knepper
Dana Marian Koos
Hariharan Krishnaraj
Gopal T. Kukreja
Jeffrey D. Langlan
Samantha Beth Lansky
Ronald S. Lanza
Todd Lee
Gabrielle G. Legendre
Kimberly Jane Lombardo
Joaquin Jesus Lopez
Marilyn Lord-James
Lauren Meredith Mandel
Michele Mandell
Paul J. Margiotta
Linda Marshak
Linda Faith Marshak
Thomas William Mcnally
Patrick M. Megaro
Holly C. Meyer
Marilyn L. Miller
Dominick Minerva
David J. Moran
Michael F. Mullen
Michael S. Munk
Courtney Paige Murphy
Elaine Marie Murphy
Melissa Marie Murphy
Brian James Murray
Ruth Nazarian
Camille Nieves
Carol J. Notias
Jodi M. Nyear
Michael Joseph O'Connor
Laura Elizabeth O'Dare
Charles A. Omage
Adam J. Peretz
Jodi L. Pyser
Stephanie M. Reilly
Andrew J. Reinhart
Stephen Antonio Reynolds
Christopher A. Roben
Lamont Kenneth Rodgers
Anthony Bernard Rutkowski
Sharon V. Ryan
Joshua D. Saltman
Rachel- Anne Scelfo
Calliope Schickler
George Louis Schwab
Heidelind Marta Semmig
Devang C. Shah
Rovshan Chingiz Sharifov
Patrick J. Shelley
Jody A. Shelmidine
Beverly McQueery Smith
Brandy Alexis Smith
Louis Smookler
Beti Soulantzos
Elizabeth Walker Spencer
Gina Marie Spiteri
Melissa A. Sposato
Christian P. Staples
Justin Matthew Stoger
David Michael Streiner
Sean Roman Strockyj
Christina Marie Suriani
Jason Tenenbaum
Tsedeye Tibebe
Laurie P. Tiberi
Kimberly Dawn Tivin
James R. Tompkins
Carrie-Anne Tondo
Kenneth N. Troise
Laurie Marie Trotta
Kyung R. Um
Denise J. Vista
Mark Joseph Volpi
Winston S. Waters
Jill Weinberg Daly
Jill Dana Weinberg-Daly
Peter S. Will
Perry Y. Woo
Melodie Young
Suzanne Zacharias
Xiaochun Zhu

ELEVENTH DISTRICT
Neslihan Akbas
William Antwi

Christy Marie Bitet
Demetrios A. Bothos
Eli Bromberg
Dee Dee Byas
Mary Nga Lai Chan
Warren A. Cinamon
Diana Jacquelin Demirdjan
Julie Fiorello
Annette Hicks Gill
Steven H. Glassberg
Walter John Glibowski
Huang Huang
Jun Kang
Edward Kim
Gila Deborah Liska
Mary Ann E. Maloney
Titus Mathai
Zaheer Amir Merchant
Kimberly Ann Miller
Judah Neuman
Ngozichukwuka Henrietta Okwuwa
Norma Ovalle
Anthony Chris Papadopoulos
Euna Park
Jason J. Park
Andrew C. Puglisi
Doric Vivian Sam
Dmitriy Shulman
Daniel Justus Solinsky
Steven Michael Statharos
Nadira Shani Stewart
Vania Ming Tseng
Nick Tsoromokos
Jeffrey Dean Vanacore
Jordan Scott Wigdor
Les Wright
Kathy Giah-Yeh Wu

TWELFTH DISTRICT
Surajudeen Gbenga Agbaje
Zeevyah Aliza Benoff
Brittany Ann Berkey
Anna Boros
Thomas Anthony Boyle
Patricia Bridget Decola
Belinda Delgado
Michael Drezin
Heather Lynne Echenberg
William C. Etra
Beth Renee From
A. Yasmeen Gay
Elliot Shawn Kay
Sharon Mckenzie
Sawaka Nagano
Raju Sundaran
Keith Will Wynne
Jon A. Zepnick

OUT OF STATE
Thomas Arthur Abbate
Anna Katrina Roca Abendano
Shara Jill Abraham
David Ira Ackerman
Mark Edward Adams
Michael Seth Adler
Jeemun Ahn
Hisashi Aizawa
Elissa Marie Alben
Nilesh Yashwant Ameen
Anna Anatolitou
Jennifer Su-lan Ang
Okay Hyacinth Anyadiegwu
Tomas Miguel Araya
Ernest Arbizo
Eric Kendel Atkerson
Darryl Bryant Austin
Patricia Maria Basseto Avallone De Sa
Carolina Avendano Arce
Xiad Raymond Azar
David Peter Bailey
Frances Connie Bajada
Carleton Ezra Baler
Raymond Banoun
David Lynn Barnes
Kimberly Ann Bart
Paul Douglas Bates
Rajiv Kumar Batra
Julie Helene Becker
Julie Frances Bell
Molly Jennifer Bell
Brigitte P. Benoit
Richard W. Benson
Meytal Minda Berco
Arianna Rebecca Berg
Alyse Eva Berger
Roni Eileen Bergoffen
Eric S. Berman
Christine Nicole Bernacki
Vanda Silla De Paula Bernardes
Monica M. Berry
Jackeline Biddle
Randal Scot Biddle
Jennifer Leah Bills
Catherine Esther Bocskor
Izabela Ewa Boltryk
Gaelle Lia Bontinck
Laural Sabrina Boone
Matthew T. Boos
Janet Rita Bosi
Nicole Janet Bredefeld
Jenifer Rose Briggs
Gil Britzman
John Marley Bronsteen
Jay Ward Brown
Sashi Ysamu Brown
Victoria A. Bruno
Jason William Bryan
Amy Cathleen Buck
Rob Roy Buckingham
Elliott Matthew Buckner
Emil Budilovsky
Kerrie Louise Burmeister
Kevin L. Burns
Stacey Christina Burton
Julie Gail Bush
Christina Rose Busso
Pablo Esteban Bustos
Alison Lynne Butler
Mitchell Scott Cabot
Alison Elizabeth Cahill
Christina Nicole Campanella
Brian Cosmo Cannon
Rachel Lynn Cantor
Robert Brian Caplan
Michael Daniel Capozzi
Richard John Capriola
Michael Anthony Carbone
Nancy Weisberg Carman
Dario Victor Carnevale
Julie A. Cecile
Charles Centinaro
Lori Renee Cetani
Pei Feng Cheng
Simon Kai-tse Cheong
Warren Bartholomew Kam Wai Chik
Yong Kwang Cho
Gyuwan Choi
Jihoon Choi
Alexandra Elizabeth Chopin
Debra Chopp
Amit Chugh
Lisa Jane Clapp
Deanna D. Clark
Edmund Kpakpo Cofie
Travis Daniel Coleman
Neal David Colton
Mary Moynihan Connelly
Charles Cooper
George H. Cortelyou
William Ambrose Cotter
Cathleen Ann Coyle
Mackenzie Elizabeth Crane
Nonna Klimchenkova Crane
Deborah Melissa Crosbie
Michael Sean Daigle
Maura Ann Dalton
Jeffrey John Danile
Patrick Laurence Davis
Michael John De Benedictis
Marinel Malvar De Jesus
Tracy Lynn De Witt
Rajesh De
William Andrew Dean
William D. Deane
Michael A. D'Emidio
Olivier Detaffin
Brent Allen Devere
Jacques Dewerra
Wade Dorann Dicosmo
Chengfei Ding
Keith Michael Donoghue
Jane Abernethy Dorn
Matthew Cosmo Dorsi
Dipu Ashvin Doshi
David Richard Dratch
Cara Hope Drinan
Doug Dubitsky
Ann Marie Dunn
Anna Dymek Stoll
Joshua Easton
Rebecca Faith Ebert
Mathew Aaron Eckstein
Carl Folke Henschen Edman
Steven Andrew Engel
Marie Errera
Joseph Michael Fairfeild
Ileana Falticeni
Asteris James Fanikos
John Kenneth Felter
Ethan Abbott Fenn
Ronald A. Ferlazzo
Patrick Thoma Finnegan
Geraldine Rebeca Fischer
Lauren Beth Fischer
Sean Michael Flanagan
Elodie Anne Fleury
Chelsey Flood
Gregory Lee Florio
Michael Jeffrey Foncannon
Michael Leonard Foran
Todd Jeffrey Fox
David Matthew Fragale
Robert Jesse Franco
Alexis Freeman
Daphne Geraldine Frydman
Joanne Mary Fungaroli
Roy R. Galewski
Sean Michael Gallagher
Michelle Patricia Gallon
Anna-emily Chamblin Gaupp
Gerhard Paul Gengel
Christine Petronilla Gerald
Simon James Gildener
Alison Elizabeth Goldenbrg
Frances Ann Goldfarb
Marisa Beth Goldstein
Marcy Elissa Golomb
Maytal Gongolevsky
Christopher John Gonnella
Rebecca Amber Gonzalez
Tsirina Goroshit
James Kyle Grace
Jeffrey Mark Gradone
Elizabeth May Griffiths
Elizabeth Dara Gross
Kenneth Andrew Gross
Wei Gu
Alejandro Jose Guadarrama
Adam J. Gunnerson
Ricardo Hacham
Kelly Fitgerald Hagg
Lucy Hebron Halatyn
Sylvia Hall
Rochelle L. Haller
Jeong Hee Han
Theresa R. Hanczor
Joshua James Haringa
Elizabeth Brooke Harned
Joerg-Andre Harnisch
Ann M. Harris
Ethan David Harris
Mark Andrew Harris
Megan Jean Harris
Craig A. Hart
Kathleen Roberta Hartnett
Kelly A. Heffernan
David Richard Helenbrook
Chad Helin
Chad John Helin
Michael R. Herman
Sharon Elaine Hernandez
Kristina Amy Knutson Hickerson
Jesse Hiney
Graig Thomas Hoekenga
Allison Elyce Holzman
Helen Hong
Christine Alice Hopkinson
Yutonya Vonschella Horton
Kerry Gael Hotopp
Olivier Francois Hugot
Vanessa Wai Shan Hui
Ruth Patricia Hulston
Lynda Yi-tang Hung
Laura Leanne Ingledew
Roger Michael Iorio
Alexander Ioshpa
Shozo Iwasaki
Jun Hyok Jang
Lars Munch Jensen
Segun Tokunbo Jide
Anna L. Johnson
Christina Johnson
Christina Fischer Johnson
Kathleen Johnson
Matthew Scott Johnson
Edward M. Jordan
Erin Michele Jordan
Deepak John Joyce
Paige Marie Junker
Abigail Denbeaux Kahl
Gaukhar Maratovna Kaliaskarova
Laura Ann Kamps
Hiroyuki Kano
Koji Kato
Tsippy Kaufman
Ami Kiira Kayhko
Susan Elisabeth Kearns
Charles Patrick Kelly
Paul Thomas Kelly
Thomas Patrick Kelly
Bernadette Marie Kenny
Philip Gupta Kent
Jenny L. Kervin
Prince Fifi Kessie
Mykhalo V. Kharenko
John Kheit
Martha Virginia Kim
Seok Hwan Kim
Cormac P. Kissane
Donald Allen Klein
Meltem Fazilet Kodaman

Nancy Rose Susan Kramer
Mark Alan Krasner
Wayne S. Kreger
William Owen Krekstein
Christopher A. Kroblin
Kristy Ann Kulina
David R. Kuney
Robin Harding Kyle
Karen Denise Lacomba
Yasmine Lahlou
Ori C. Landau
Denise Lanuto
Jacob Max Lebowitz
Ursula Anne Lecznar
Kyong Choon Lee
Min Ho Lee
Victor Kwok Chuen Lee
Fraser James Lees
Elizabeth Leise
Michael Glen Leventhal
Efrem Richard Levy
Jamie Brett Levy
Melissa E. Liebermann
Teri Ann Lindquist
Kenneth Linn
Stephanie Evangelos Litos
Kevin M. Littman
Jun Liu
Nicolas Lloreda
Joseph James Lo Bue
Laura Kathryne Love
Steven L. Lubell
Cristian Oliver Lucas-mas
Melissa Hambrick Luce
Hong Ky Luu
Patrick Kevin Lyons
Gregory Richard Macek
David Joseph Mairo
Richard James Maloney
Stephen Carl Maloney
Sigal Pearl Mandelker
Jack A. Maniko
Maria Corazon Maramag
Melissa Rose Martin
Luis Guarionex Martinez
Maria Clarissa Rustia Martinez
Junko Masumi
Thomas Dal Stenfeldt Mathiasen
Jeffrey Francis Mauer
Susannah Jeannette May
Ian Norman McCallister
Gina Carol McCool
Doreen Marie McCullough
Michael James McElligott
Julie Elizabeth Mcguire
Keith Ryan Mcmurdy
Luis Ignacio Mendoza
Jennifer Lee Merzon
Randi Aileen Meth
Joseph Walter Mik
Nicole Mikulas
Michael Richard Mildner
Glenn Dana Miller
Sarah Anne Miller
Timm Andrew Miller
Marcia Joan Mills
Ozair S. Minty
Anita Livia Mitra
Charles K. Mone
Adam C. Morris
Miriam Alexandra Munzberg
Karleen F. Murphy
Jessica Leigh Murtagh
Rika Nakajima
Alberto Navarro
Hal Harry Neeman
Michael R. Nelson
Fred Neufeld
Juliana McCrory Newton
Francoise Ng Dufaux
Paul Wei-han Ng
Bob Quang Tan Nguyen
David Michael Noble
Lisa Noja
Kanayo Ijeoma Nwachukwu
Darina Frances O'Connor
Haruhiko Ogasawara
Young J. Oh
Masashi Oi
Karen Lynn O'Keeffe
Arthur Thomas O'Reilly
Shannon O'Reilly
Gregory Chukwuemeka Osakwe
Joel Thomas Outlaw
Maravillas Oviedo
Pablo A. Palazzi
Beth Rebecca Palmer
Carla Nicole Palumbo
Anshul A. Pandya
Jennifer Lise Parkinson
Elieka Kate Patchen
David Aaron Paul
David Robert Peck
Angelo Charles Peruto
Danielle Anne Phillip
Bonnie Pierson-Murphy
Elizabeth Pietrowski
Karl Frederic Piirimae
Steven Edward Pilling
Kenneth James Pippin
Paul David Anthony Piquado
Davide Francesco Pisanu
Rebecca Thacher Plummer
John Andrew Poakeart
Astrid Pockrandt
Scott Jeremy Pohl
Peter Mathias Polke
Susanne Louise Pollatschek
Irene Popovic
Zachary Rian Potter
Fabrizio Maria Prandi
Edward Previte
Mallika Prinja
Victoria Christi Priola
Zahid Nisar Quraishi
Mark Deeds Rambler
Rowena Pinto Rao
Catherine L. Razzano
Frank Dennis Recine
Gregory Steven Reich
Gerard E. Reinhardt
Arnold E. Reiter
William Gregg Rice
Michael Lee Rich
Judith Olivia Riordan
Andrea Juanita Ritchie
Cristina Winter Ritchie
Thomas John Roberts
Benjamin John Robins
Lauren Bronwyn Rockerfeller
Scott Michael Rodman
Joanne Roman
Philip Lee Rothenberg
Martin Carl Rothfelder
Amy Marie Rottura
Jason Scott Rudnick
Kwang Hyun Ryoo
Greg Richard Saber
Mark Jason Sagat
Valerie Anne Salsgiver
Murray Sams
Michael San Giacomo
Daniel Mark Santarsiero
Rosella Santilli
Vafa Sarmasti
Paul Theodore Saulski
Eraklis Savas
Jeffrey Stephen Escobar Sculley
Rochelle Sendar
Paul Neil Lionel Parris Sexton
Simon Jay Shaffer
Purvi Patel Shah
Jeffrey David Shalom
Kenneth E. Sharperson
Ji Sun Shin
Jong Eun Shin
Michael W. Shiver
Hoon Sung Shon
Sadaf Siddiqui-Shakir
Amanda L. Siek
Andre Sigelmann
Justin Adam Silverman
Kwan Kiat Sim
Delphine Fabienne Simon
Robert P. Simons
Gavin Scott Ewan Sinclair
Jonathan Craig Skolnick
Brian Christopher Smith
Glen Patrick Smith
Mollie Megan Smith
Warren Smith
Jamila Deas Smoot
Kristin Marie Smrtic
Sanjit Singh Sodhi
Jiaolin Song
Lisa Soo
Lisa Siew Lee Soo
William N. Specht
Jennifer Alison Speigel
C.R. Srivatsan
Michael Joseph Stack
Joseph G. Stancato
Joseph D. Steinfield
Elisa Joanne Stewart
Elke M. Stoiber
Robert William Stradtman
Michele Straut
Kristine Elizabeth Stringer
Joel David Stroz
Walter B. Stuart
Alicia Sullivan
Joseph M. Sullivan
Melissa Ann Sullivan
Patrick James Sullivan
Bong-kyung Sung
Maryann Powell Surrick
Russell James Sweeting
Robert Swensen
Jaimie Hope Taff
Christopher Stephen Taffe
Hovig Ohannes Tanajian
Kathryn Elizabeth Remsen Tang
Gary Edward Taylor
Malia Tee
Kathy Ann Tenney
James Joseph Theisen
Andrew Peter Thomson
Sven Ulrich Timmberbeil
Stephen George Tomlinson
Patrick A. Toomey
Luis Francisco Torres Gonzalez
Michael Kane Travers
Barbara Wolfson Tuerkheimer
Malcolm K. Turner
James E. Tyner
Stephanie Oke Ubogu
Rebecca L. Ulisse
Oleg B. Uritsky
Nkem T. Uzoka
Elizabeth Anne Valandingham
Jason Paul Van Lenten
Leticia Castillo Vasquez
Deborah Alexandra Vennos
Helena Helga Johanna Verhagen
Daniel Eric Vielleville
Marion Caroline Volondat
Arsineh Voskanian
Uzma Wahhab
Phil Neal Walker
Michael J. Walsh
Cecillia Derphine Wang
Xinnan Wang
Whitney L. Warnke
Agnieszka Was
Matthew James Watkins
Sven Wehser
Richard Simon Weil
Mark Weinstein
Joan Alster Weisblatt
Jonathan Irving Weisstub
Jason Charles Welch
Brent Michael Westrop
Eric J. Wexler
Juliette L. White
Joseph Patrick Whitlock
Charles William Whitney
Philip Wild
Matthew Anthony Wills
David Justin Wilson
David Wallace Wilson
Frank Moseley Wilson
Paul M. Winke
Andrew Scott Winters
Krista L. Witanowski
William Peter Wittig
Gary Wickert Wolf
Matthew Wolf
Matthew Maurice Wolf
Bennett Ka-ying Wong
Vivian Wong
La Juan Amergene Wright
Valerie Ann Wright
Sungjoo Yoon
Dong-wuk Yuk
Edward M. Yures
Artur Sylvester Zawadowski
Daniel P. Zazzali
Jennifer Ann Zepralka
Hongjun Zhang
Li Zhang
Dennis Ziemba

In Memoriam

Herbert H. Blumberg
East Amherst, NY

Howard C. Buschman
New York, NY

Ruben A. Dankoff
Tenafly, NJ

James P. Doody
Scarsdale, NY

Bonnie Eisenstat
Rockville Centre, NY

William A. Glass
Port Jervis, NY

John P. Kennedy
Palm Harbor, FL

Joel B. Miller
New York, NY

Gilbert H. Weil
Scottsdale, AZ

lowed in many legal publications, many magazines and the popular press use a three-or-fewer rule.)

• Personifications: "Beauty is Truth."

• Nouns, adjectives, particles, and prefixes in hyphenated compounds. *Correct:* "The Pre-Columbian Art Show." But don't capitalize after a hyphen in hyphenated single words: "His address is 155 West Eighty-sixth Street."

• The first letter in a quotation, if the first letter is capitalized in the original and if the quotation is an independent clause. *Correct:* The judge wrote, "The appearance of propriety is as important as propriety itself." *Correct:* "The appearance of propriety," the judge wrote, "is as important as propriety itself." *Correct:* The judge wrote that an "appearance of propriety is as important as propriety itself."

• The names of organizations, institutions, ships, and buildings.

• States and political subdivisions: "State of New York." Capitalize "state" or "city" only when the entity it modifies is capitalized, when the state or city is a litigant, or when the state or city acts in its governmental capacity.

• "Government," but only when using as a short-hand reference for United States Government. In criminal cases in New York, the prosecution is called "the People."

• "Federal," but only modifying a capitalized word. *Correct:* "Federal Reserve." *Correct:* "The Government promulgated the federal budget."

• Brand names, trademarks, and artistic works.

• Botanical and zoological names if not in English. Capitalize the genus but not the species: "Hyacinthus orientalis" (but "hyacinth"), "Giraffa camelopardalis" (but "giraffe").

• The first letter of a word following a colon if what follows the colon is an independent clause, but not if what follows the colon is a dependant clause.

• Days ("Monday") and months ("March") but not seasons ("fall back, spring forward").

• Forms: "On April 15, the millionaire Park Avenue partner filed a Form 1040-EZ."

• Litigants' designations. Under the *Tanbook*, "plaintiff," "defendant," "petitioner," "appellant," "respondent," and like titles are lowercased and are not preceded by the article "the." Under the far-more-pervasive *Bluebook*, however, these titles are capitalized when referring to a specific litigant, and when so referring, they aren't preceded by an article. *Bluebook correct:* "The court sentenced Defendant to jail." *Bluebook correct:* "The *Jones* court found that a defendant who testifies should do so from the witness stand."

Do not capitalize:

• The names of statutes and rules that exist today only as legal doctrines: "statute of frauds," "statute of limitations," "rule against perpetuities."

• Titular appositives: "Convicted *T*errorist Timothy McVeigh was executed." *Becomes:* "Convicted *t*errorist Timothy McVeigh was executed." Garner calls this journalistic practice "titular tomfoolery."[1]

• The "the" before a capital: "He writes for the New York Law Journal." *Not:* "He writes for The New York Law Journal." But here's a helpful aid: The first legal-aid society in the United States is the organization in New York City. To distinguish that society from others, call it "The Legal Aid Society," with a capital "T."

• Proceedings (unless they are named after a case), legal words, foreign words, or applications, orders, papers, or motions.

Proceeding. "The court held a Suppression Hearing." *Becomes:* "The court held a suppression hearing." *But:* "The court held a combined *Mapp*, *Huntley*, and *Wade* hearing."

Legal words. "Plaintiff has the Burden of Proof." *Becomes:* "Plaintiff has the burden of proof."

Foreign words. "The doctrine of Stare Decisis applies." *Becomes:* "The doctrine of stare decisis applies."

Applications, orders, papers, and motions. "Defense counsel served an Application to Set Aside the Verdict." *Becomes:* "Defense counsel served an application to set aside the verdict." *Or* "Defense counsel served an application to set the verdict aside." "Respondent filed an Order to Show Cause." *Becomes:* "Respondent filed an order to show cause." "Appellant submitted his Opening Brief." *Becomes:* "Appellant submitted his opening brief." "Petitioner made a Motion to Reargue." *Becomes:* "Petitioner made a motion to reargue." *Or*, better, "Petitioner moved to reargue."

Some writers capitalize words to show irony or sarcasm. Justice Antonin Scalia: "[I]n the Land of the Free, democratically adopted laws are not so easily impeached by unelected judges."[2] That device stresses the words, but overuse dulls their effect. Other writers capitalize entire passages. That device, common in point headings in briefs, makes briefs hard to read.

The trend for legal writers (Writers) is to capitalize sparingly – to capitalize only when a rule requires a capital. In short, downsizing isn't just for the vertically challenged. It's for Readers and Writers who know the difference between "capital" and "Capitol."

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.

1. Bryan A. Garner, The Oxford Dictionary of American Usage and Style 7 (2000).
2. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 737 (1994) (Scalia, J., dissenting).

Headquarters Staff E-mail Addresses

Executive Staff
Patricia K. Bucklin, *Executive Director,* pbucklin@nysba.org
John A. Williamson, Jr., *Associate Executive Director,* jwilliamson@nysba.org
L. Beth Krueger, *Director of Administrative Services,* bkrueger@nysba.org
Kathleen R. Baxter, *Counsel,* kbaxter@nysba.org
Lisa Bataille, *Administrative Liaison,* lbataille@nysba.org
Kathleen M. Heider, *Director of Meetings,* kheider@nysba.org
Barbara Beauchamp, *Web Site Content Editor* bbeauchamp@nysba.org

Accounting
Kristin M. O'Brien, *Director of Finance,* kobrien@nysba.org
Anthony M. Moscatiello, *Controller,* tmoscatiello@nysba.org

Continuing Legal Education
Terry J. Brooks, *Director,* tbrooks@nysba.org
Jean E. Nelson II, *Associate Director,* jnelson@nysba.org
Jean Marie Grout, *Staff Attorney,* jgrout@nysba.org
Leslie A. Fattorusso, *Staff Attorney,* lfattorusso@nysba.org
Cheryl L. Wallingford, *Program Manager,* cwallingford@nysba.org
Daniel J. McMahon, *Assistant Director, Publications,* dmcmahon@nysba.org
Patricia B. Stockli, *Research Attorney,* pstockli@nysba.org

Governmental Relations
Ronald F. Kennedy, *Assistant Director,* rkennedy@nysba.org

Graphic Arts
Roger Buchanan, *Manager,* rbuchanan@nysba.org
William B. Faccioli, *Production Manager,* bfaccioli@nysba.org

Human Resources
Paula Doyle, *Director,* pdoyle@nysba.org

Law Practice Management
Stephen P. Gallagher, *Director,* sgallagher@nysba.org

Law, Youth and Citizenship Program
Deborah S. Shayo, *Director,* dshayo@nysba.org
Emil Zullo, *Assistant Director,* ezullo@nysba.org

Lawyer Assistance Program
Ray M. Lopez, *Director,* rlopez@nysba.org

Management Information Systems
John M. Nicoletta, *Director,* jnicoletta@nysba.org
Ajay Vohra, *Technical Support Manager,* avohra@nysba.org
Paul Wos, *Data Systems and Telecommunications Manager,* pwos@nysba.org
Margo J. Gunnarsson, *Database Services Administrator,* mgunnarsson@nysba.org

Marketing
Richard Martin, *Director,* rmartin@nysba.org

Media Services and Public Affairs
Bradley G. Carr, *Director,* bcarr@nysba.org
Frank J. Ciervo, *Associate Director,* fciervo@nysba.org
Amy Travison Jasiewicz, *Editor, State Bar News,* ajasiewicz@nysba.org

Membership
Patricia K. Wood, *Director,* pwood@nysba.org

Pro Bono Affairs
Cynthia Feathers, *Director,* cfeathers@nysba.org

The New York Bar Foundation

2002-2003 OFFICERS

Richard J. Bartlett
President
1 Washington Street
P.O. Box 2168
Glens Falls, NY 12801-2963

Robert L. Haig
Vice President
101 Park Avenue
New York, NY 10178-0001

Patricia K. Bucklin
Secretary
One Elk Street
Albany, NY 12207

Hon. Randolph F. Treece
Treasurer
375 State Street
Albany, NY 12210

DIRECTORS

James B. Ayers, *Albany*
John P. Bracken, *Islandia*
Cristine Cioffi, *Niskayuna*
Angelo T. Cometa, *New York City*
Maryann Saccomando Freedman, *Buffalo*
Emlyn I. Griffith, *Rome*
John H. Gross, *Northport*
Paul Michael Hassett, *Buffalo*
John R. Horan, *New York City*
Bernice K. Leber, *New York City*
Susan B. Lindenauer, *New York City*
Kay C. Murray, *New York City*
Robert L. Ostertag, *Poughkeepsie*
Thomas O. Rice, *Garden City*
M. Catherine Richardson, *Syracuse*

Journal Board Members Emeriti

As a tribute to their outstanding service to our *Journal*, we list here the names of each living editor emeritus of our *Journal*'s Board.

Richard J. Bartlett
Coleman Burke
John C. Clark, III
Angelo T. Cometa
Roger C. Cramton
Maryann Saccomando Freedman
Emlyn I. Griffith
H. Glen Hall
Paul S. Hoffman
Charles F. Krause
Philip H. Magner, Jr.
Wallace J. McDonald
J. Edward Meyer, III
Kenneth P. Nolan
Albert M. Rosenblatt
Robert J. Smith
Lawrence E. Walsh

2002-2003 OFFICERS

Lorraine Power Tharp, President
Albany
A. Thomas Levin, President-Elect
Mineola
Kenneth G. Standard, Treasurer
New York
A. Vincent Buzard, Secretary
Rochester

Vice-Presidents

First District
Mark H. Alcott, New York
Stephen D. Hoffman, New York
Second District
Edward S. Reich, Brooklyn
Third District
James B. Ayers, Albany
Fourth District
Peter D. FitzGerald, Glens Falls
Fifth District
James F. Dwyer, Syracuse
Sixth District
Kathryn Grant Madigan, Binghamton
Seventh District
C. Bruce Lawrence, Rochester
Eighth District
Joseph V. McCarthy, Buffalo
Ninth District
Joseph F. Longo, White Plains
Tenth District
A. Craig Purcell, Hauppauge
Eleventh District
Gary M. Darche, Queens
Twelfth District
Lawrence R. Bailey, Jr., New York

Members-at-Large of the Executive Committee

Michael E. Getnick
Matthew J. Kelly
Gunther J. Kilsch
Bernice K. Leber
Susan B. Lindenauer
David R. Pfalzgraf

† *Delegate to American Bar Association House of Delegates*
* *Past President*

Members of the House of Delegates

First District
Alcott, Mark H.
Baker, Theresa J.
Barasch, Sheldon
Berkowitz, Philip M.
† Bing, Hon. Jonathan L.
Bresler, Judith A.
Brown, Lloyd W., II
Capell, Philip J.
Chambers, Hon. Cheryl E.
Christian, Catherine A.
* Cometa, Angelo T.
Crane, Hon. Stephen G.
Cundiff, Victoria A.
Cuyler, Renaye B.
Eisman, Clyde J.
Eppler, Klaus
Farrell, Joseph H.
Finerty, Hon. Margaret J.
Fink, Rosalind S.
* Forger, Alexander D.
Freedman, Hon. Helen E.
Gerrard, Michael B.
* Gillespie, S. Hazard
Goldstein, M. Robert
Gross, Marjorie E.
Gutekunst, Claire P.
Haig, Robert L.
Handlin, Joseph J.
Harris, John B.
Harris, Martha W.
* Heming, Charles E.
Hoffman, Stephen D.
Jacobs, Robert A.
Jacobs, Sue C.
Jacoby, David E.
Jaffe, Hon. Barbara
Kilsch, Gunther H.
* King, Henry L.
Kougasian, Peter M.
†* Krane, Steven C.
Landy, Craig A.
Leber, Bernice K.
Lee, Charlotte C.
Levy, M. Barry
Lieberman, Ellen
Lindenauer, Susan B.
* MacCrate, Robert
Mandell, Andrew
Miller, Michael
Miller, Sonia E.
Milonas, Hon. E. Leo
Minkowitz, Martin
Mitzner, Melvyn
Opotowsky, Barbara Berger
* Patterson, Hon. Robert P., Jr.
Paul, Gerald G.
Quattlebaum, Poppy B.
Rayhill, James W.
Reimer, Norman L.
Reitzfeld, Alan D.
Richardson-Thomas, Edwina
Rifkin, Richard
Robertson, Edwin D.
Rosner, Seth
Rubenstein, Joshua S.
Russo, Salvatore J.
Safer, Jay G.
Schumacher, H. Richard
* Seymour, Whitney North, Jr.
Sherwin, Peter J.W.
Silkenat, James R.
Sloan, Pamela M.
Stenson, Lisa M.
Torrent, Damaris E.
Wales, H. Elliot

Second District
Cerchione, Gregory T.
Dollard, James A.
Fisher, Andrew S.
Golinski, Paul A.
Hesterberg, Gregory X.
Kamins, Barry
Morse, Andrea S.
Reich, Edward S.
Romero, Manuel A.
Sunshine, Hon. Jeffrey S.
Sunshine, Nancy T.

Third District
Ayers, James B.
Bauman, Harold J.
† Butler, Tyrone T.
Carreras, Marilyn T.
Defio, Elena M.R.
Flink, Edward B.
Friedman, Michael P.
Higgins, Patrick J.
Katzman, Gerald H.
Kelly, Matthew J.
King, Barbara J.
LaFave, Cynthia S.
Leistensnider, Ruth E.
Maney, Hon. Gerard E.
Miranda, David P.
Ricks, Wendy S.
† Tharp, Lorraine Power
Treece, Hon. Randolph F.
* Williams, David S.
* Yanas, John J.

Fourth District
Bartlett, Hon. Richard J.
Cioffi, Cristine
Coffey, Peter V.
FitzGerald, Peter D.
Heggen, Karen Ann
Hoye, Hon. Polly A.
Keniry, Hon. William H.
McAuliffe, J. Gerard, Jr.
Rodriguez, Stephen T.

Fifth District
Alessio, George Paul
Alsante, Cora A.
Amoroso, Gregory J.
Doerr, Donald C.
Dwyer, James F.
Fennell, Timothy J.
Fetter, Jeffrey M.
Getnick, Michael E.
Hayes, David M.
Kogut, Barry R.
Michaels, Joanne E.
Peterson, Margaret Murphy
Priore, Nicholas S.
Renzi, David A.
†* Richardson, M. Catherine
Rizzo, James S.
Seiter, Norman W., Jr.
Uebelhoer, Gail Nackley

Sixth District
Beehm, Angelina Cutrona
Gacioch, James C.
Kirkwood, Porter L.
Lewis, Richard C.
Madigan, Kathryn Grant
Mayer, Rosanne
Tyler, David A.
Walsh, Ronald, Jr.
Wayland-Smith, Tina

Seventh District
Buzard, A. Vincent
Castellano, June M.
Clifford, Eugene T.
Cristo, Louis B.
Dwyer, Michael C.
Grossman, James S.
Harren, Michael T.
Hartman, James M.
Lawrence, C. Bruce
†* Moore, James C.
* Palermo, Anthony R.
Reynolds, J. Thomas
Schraver, David M.
Tyo, John E.
* Van Graafeiland, Hon. Ellsworth
* Vigdor, Justin L.
†* Witmer, G. Robert, Jr.

Eighth District
Doyle, Vincent E., III
Edmunds, David L., Jr.
Evans, Sue M.
Flaherty, Michael J.
* Freedman, Maryann Saccomando
Gerstman, Sharon Stern
Graber, Garry M.
Guiney, Daniel J.
†* Hassett, Paul Michael
McCarthy, Joseph V.
Newman, Stephen M.
O'Connor, Edward J.
O'Mara, Timothy M.
Palmer, Thomas A.
Pfalzgraf, David R.
Sconiers, Hon. Rose H.
Seitz, Raymond H.

Ninth District
Aydelott, Judith A.
Bartlett, Mayo G.
Fedorchak, James M.
Geoghegan, John A.
Goldenberg, Ira S.
Herold, Hon. J. Radley
Ingrassia, John
Johnson, Martin T.
Klein, David M.
Kranis, Michael D.
Longo, Joseph F.
Manley, Mary Ellen
* Miller, Henry G.
Mosenson, Steven H.
O'Leary, Diane M.
* Ostertag, Robert L.
Plotsky, Glen A.
Riley, James K.
Standard, Kenneth G.
Sweeny, Hon. John W., Jr.
Walker, Hon. Sam D.

Tenth District
Asarch, Hon. Joel K.
* Bracken, John P.
Corcoran, Robert W.
Filiberto, Hon. Patricia M.
Fishberg, Gerard
Franchina, Emily F.
Fredrich, Dolores
Futter, Jeffrey L.
Gross, John H.
Karson, Scott M.
Kramer, Lynne A.
Lerose, Douglas J.
† Levin, A. Thomas
Levy, Peter H.
Meng, M. Kathryn
Monahan, Robert A.
Perlman, Irving
* Pruzansky, Joshua M.
Purcell, A. Craig
†* Rice, Thomas O.
Tully, Rosemarie
Walsh, Owen B.

Eleventh District
Darche, Gary M.
Dietz, John R.
Fedrizzi, Linda F.
James, Seymour W., Jr.
Nashak, George J., Jr.
Nizin, Leslie S.
Terranova, Arthur N.
Wimpfheimer, Steven

Twelfth District
Bailey, Lawrence R., Jr.
Friedberg, Alan B.
Horowitz, Richard M.
Millon, Steven E.
†* Pfeifer, Maxwell S.
Summer, Robert S.
Weinberger, Richard

Out-of-State
* Fales, Haliburton, 2d
Peskoe, Michael P.
* Walsh, Lawrence E.

THE LEGAL WRITER

Uppercasing Needn't Be a Capital Crime

BY GERALD LEBOVITS

Capitalizing correctly is a Capital Investment. Capitalizing incorrectly is a Capital Offense. Here are some rules for you (hereinafter referred to as the "Reader") to make your uppercasing upperclass.

Capitalize:

• The first letter in the first word of a sentence. Symbols and figures at the beginning of a sentence must be converted to words. Correct: "Section (not §) 1981 action."

• Titles of acts, ordinances, rules, regulations, and popular names of acts ("Dead Person's Statute") and constitutional clauses and amendments ("Equal Protection Clause"). Capitalize "Constitution" but not "constitutional." Lowercase words like "act" and "statute" when they stand alone, unless you are using "Act" as a shorthand second reference to previously identified legislation (or any other term or phrase) or turn it into an all-capitalized acronym. *Correct:* "The Wagner Act (Act). The Act provides . . . ." *Correct:* "The Environmental Protection Agency (EPA) has issued new regulations."

• The first letter in the first word of a direct question in a sentence.

• The first letter in the first word of a line of verse, unless the first letter is lowercased in the original.

• The first letter in the first word of a salutation and the complimentary close of a letter: "Respectfully Yours (or Submitted)" becomes "Respectfully yours (or submitted)."

• Proper names: "Canadians," "Air Force Two," "Exxon Corporation," "Humphrey Bogart."

• Words derived from proper names (proper adjectives): "New Yorker," "Orwellian." But capitalize only the adjective in a proper adjective: "Spanish-speaking residents."

• Titles that precede proper names: "Senior Associate Judge George Bundy Smith." Titles that go after a name are lowercased. *Correct:* "Jack Mozzarella is the president of the New York Cheese Company." "Mother Theresa." *But:* "Theresa was a mother superior." "The Reverend Dr. Martin Luther King Jr." *But:* "Dr. Martin Luther King Jr. was a reverend."

Similarly, lowercase titles that do not precede a name unless the title is "President of the United States" or "Justice of the United States Supreme Court." According to the *New York Law Reports Style Manual* (*Tanbook*), capitalize the "j" in "judge" or "justice" only when referring to a "Judge of the New York State Court of Appeals" or a "Justice of the Appellate Division" or as a short-form reference ("Justice Jones wrote the opinion. The Justice reasoned that . . . ."). General references to judges or judicial officers are lowercased. Correct: "Irving Younger was a New York City Civil Court judge."

• Courts and their parts: "County Court," "Housing Part." General references to "the court," "this court," or "courts" are lowercased unless referring to the U.S. Supreme Court or, under the *Tanbook*, to the New York Court of Appeals or the Appellate Division of the New York Supreme Court. Thus, lowercase "trial court" and "lower court." But lawyers love being deferential. You can't stop 'em from using capital "c" in "court." They even capitalize the "y" and "h" in the middle of a sentence when they write "Your Honor."

• The pronoun "I."

• All references to God: "the Supreme being," "the Creator," "the Sovereign," "the Lord," "Him," "He," "His Name," "Her," "She," "Her Name."

• Languages, religions, nationalities, countries, and races (African–American, Caucasian) but not colors (black, white).

• School courses but not academic disciplines unless the discipline is itself a proper noun. *Correct:* "I took Psychology 101 because I majored in psychology." *But:* "I took English 201 because English is my favorite subject."

Lawyers love being deferential. You can't stop 'em from using capital "c" in "court."

• Titles of relatives not preceded by a possessive: "It is as American as Mother's eating apple pie." *But:* "It is as American as my mother's eating apple pie." "My, Grandma, what big eyes you have!" *But:* "My grandma has big eyes."

• Historical events, eras, and documents: "World War II," "the Dark Ages," "Magna Carta."

• Compass points, but only when identifying a specific area, not when referring to a direction. "Grits is popular in the South." *But:* "The cold front in New York came from the north, from Canada, in a southerly direction."

• Words in titles of works. Don't capitalize articles and conjunctions or prepositions that have four or fewer letters. But capitalize the title's first and last word and the first word after a colon or an em dash, or the first word in a multideck title, even if the word is a preposition, an article, or a conjunction. *Correct:* Demetra M. Pappas, *Stopping New Yorkers' Stalkers: An Anti-Stalking Law for the Millennium*, 27 Fordham Urb. L.J. 945 (2000). (Although the four-or-fewer rule is fol-

CONTINUED ON PAGE 61

BESTSELLERS

FROM THE NYSBA BOOKSTORE

May/June 2003

General Practice

Attorney Escrow Accounts—Rules, Regulations and Related Topics

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

New York Lawyer's Deskbook, 2nd Ed.

Includes 2002 Supplement

WINNER OF THE ABA'S CONSTABAR AWARD. The second edition consists of 25 chapters, each covering a different area of practice. Incorporating the 2002 Supplement, it updates the original text, adds a new chapter on Limited Liability Companies, and more! (PN: 4150/**Member $180**/List $220)

New York Lawyer's Formbook, 2nd Ed.

Includes 2002 Supplement

The *Formbook* is a companion volume to the *NY Lawyer's Deskbook* and includes 21 sections, each covering a different area of prac-tice. This revised edition incorporates the 2002 Supplement. (PN: 4155/**Member $180**/ List $220)

General Practice Forms

Available on CD for your convenience. This new edition features over 450 forms used by experienced practitioners in their daily practice, including numerous government agency forms in pdf format. (PN: 61501/**Member $160**/List $195)

Family Law

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 practical—the frequently encountered aspects of representing clients. (PN: 41212/**Member $65**/List $75)

Miscellaneous

Ethics in Government—The Public Trust: A Two-Way Street

Editors Barbara Smith, Esq. and Professor Patricia Salkin, Esq., provide a one-stop shopping introduction to ethics in state and local government. (PN: 4092/ **Member $45**/List $55)

Real Estate

Mortgages

The authors of this monograph 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. (PN: 41382/**Member $50**/List $60)

Real Estate Titles, 3rd Ed.

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

Trusts and Estates/Elder Law

Elder Law and Will Drafting

The first part of this book provides an introduction to the scope and practice of elder law in New York State. Part two gives you a step-by-step overview of the drafting of a simple will—from the initial client interview to the will execution. (PN: 40822/**Member $55**/List $70)

Estate Planning and Will Drafting in New York

Provides an overview of the complex rules and considerations involved in the various aspects of estate planning in New York State. Get practical advice from experts in the field to be able to better advise your clients and have access to sample wills, forms and checklists used by the authors in their daily practice. (Book PN: 4095/**Member $130**/List $160)

Estate Planning & Will Drafting Forms on Disk, on CD in WordPerfect and Microsoft Word: Access commonly used forms and wills used by leading practitioners in their daily practice. (CD PN: 60951/**Member $155**/List $190)

Expand your professional knowledge

NEW YORK STATE BAR ASSOCIATION

1.800.582.2452 www.nysba.org/pubs

Mention Code: CL1812

NYSBA

NEW!

Business, Corporate, Tax

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. You will benefit from numerous forms, practice tips and appendixes. (PN: 4124/**Member $55**/List $70)

Civil Advocacy and Litigation

Insurance Law Practice

Written and edited by leading insurance law practitioners, *Insurance Law Practice* provides a thorough examination of the general principles of insurance law and covers the specifics as well. The 2003 supplement includes new chapters as well as updates to case and statutory law. (PN: 4125/**Member $115**/List $140, 2003 Supplement PN: 51252/**Member $60**/List $70)

General Practice

School Law, 29th Ed.

School Law has been widely recognized for many years as an excellent school law reference for board members, administrators and attorneys. (PN: 42272/**Member $65**/List $80)

Health Law

Legal Manual for New York Physicians

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

Coming Soon
Mental and Physical Disability

Representing People with Disabilities

This book, a comprehensive reference which covers the myriad legal concerns of people with disabilities—including an in-depth examination of the Americans with Disabilities Act. This is the ideal reference for those who want a "one-stop" source that provides a thorough overview of the legal framework affecting individuals with disabilities. (PN: 52151/**Member $115**/List $140)

Coming Soon
Trial

Evidentiary Privileges

(Grand Jury, Criminal and Civil Trials) *Evidentiary Privileges* is a valuable text of first reference for any attorney whose clients are called to testify. It covers the evidentiary, constitutional and purported privileges which may be asserted at the grand jury and at trial. Also examined are the duties and rights derived from constitutional, statutory and case law. (PN: 40993/**Member $43**/List $55)