NEW YORK STATE BAR ASSOCIATION

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Journal

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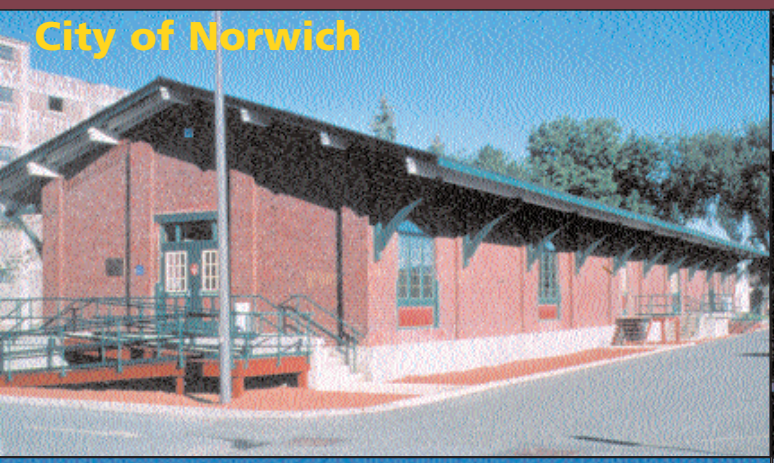

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ON THE COVER

This month's cover illustration shows, clockwise from upper left, new courthouse facilities in Norwich, Warsaw, Ithaca, Buffalo and Binghamton NY. Additional photos of projects that are in the planning or construction phases under the Court Facilities Act appear on pages 13 through 17.

Cover design by Lori Herzing and Jill Murphy
Courthouse photography by Sherry Wilmes

 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 $12. Periodical postage paid at Albany, NY with additional entry Endicott, NY. POSTMASTER: Send address changes to: One Elk Street, Albany, NY 12207.

President's Message

PAUL MICHAEL HASSETT

How Many Lawyers Should Society Have?

"Can't we do something to stop law schools from turning out so many new lawyers? We have enough lawyers already." Sound familiar? Whenever bar association officers sit down with members of the practicing bar to discuss their issues of concern, this question inevitably comes up. The question is a legitimate one, because the competitive pressure of the growing attorney population contributes to the difficulty many attorneys have in maintaining a comfortable standard of living. On the other hand, the answer is not a simple one, mainly because law schools and the practicing bar have entirely different goals and differing responsibilities to society.

For some time now, we have been meeting on a regular basis with the deans of New York's 15 law schools and have explored the problem of law school admissions and graduation levels, as well as many other issues of common interest. The responsibility of the bar in the education of lawyers has a long history in the United States. In the earliest days, admission to the bar was acquired through apprenticeship with a practicing lawyer, and it was not until early last century that legal education became the exclusive province of the American law schools. Despite the shift to the academy, the bar remained interested and influential in the process and, of course, the American Bar Association provides the sole accrediting process for law schools in the United States.

The last decade has seen several significant events in this relationship, beginning with the 1992 report of the American Bar Association Task Force on Law Schools and the Profession entitled "Legal Education and Professional Development—an Educational Continuum," commonly referred to as the MacCrate Report after the chair of the task force, Robert MacCrate, former president of our Association and of the ABA. The report urged a "shared responsibility" on behalf of the legal academy and the practicing bar to foster the professional development of lawyers and law students. Also in 1992, William R. Rakes, then President of the Virginia State Bar, convened a Conclave on the Education of Lawyers in Virginia. Rakes organized the conclave in response to what he called "a growing disjunction between the legal academy on the one hand and the practicing bar and the judiciary on the other." In a thoughtful article in *The Notre Dame Law Review*, Rakes quoted Judge Harry Edwards, writing in the *Michigan Law Review*, who said: "I fear that our law schools and law firms are moving in opposite directions . . . while the schools are moving towards pure theory, the firms are moving toward pure commerce, and the middle ground—ethical practice—has been deserted by both." The mission of the conclave paralleled the recommendation of the MacCrate Report: to foster greater cooperation between the practicing bar and the faculty and administration of law schools in the development of lawyers.

In the years since, 20 states have held similar conclaves, all aimed at improving the relationship between lawyers in the academy and lawyers in private practice and fostering the cooperation in the administration of legal education.

And just about a year ago, the National Conference of Bar Presidents, the National Association of Bar Executives, the National Conference of Bar Foundations and the Deans' Workshop of the Section of Legal Education and Admissions to the Bar gathered during the American Bar Association's Mid-Year Meeting in Dallas, Texas. More than 500 bar leaders and law school deans participated in a conference entitled "A National Dialogue on the Legal Education Continuum" and produced 10 separate workshops, each focused on a topic which collectively tackled the major issues involving the profession and legal education. The purpose of the program was to provide a national forum for bar association leaders and deans to discuss their respective roles in teaching competence, professional skills and the values of the profession, and to generate a sustainable action plan for working together for the future education of lawyers. It was the expectation of that conference that bar leaders and deans would explore avenues reassuring commitment to an advancement of those goals.

> At a joint luncheon of the NCBP, NABE and NCBF after the workshops, Robert MacCrate was the principal speaker. The pride in his voice was evident as he said:

Paul Michael Hassett can be reached at 1500 Liberty Building, Buffalo, N.Y. 14202.

> How rewarding it is to find, in the year 2000, law deans in their workshops grappling with the latest issues to confront the profession relating to multidisciplinary practice, and to find this joint assembly engaged in a national dialogue on the legal education continuum that the task force defined in the summer of 1992.

The luncheon concluded with the suggestion that state delegations to the program consider appropriate follow-up conferences to continue the dialogue.

Last November, the New York State Judicial Institute on Professionalism in the Law and our Association cooperated in a program entitled "A Convocation on the Face of the Profession," held at the Court of Appeals and at the Bar Center in Albany. Over the two days of the convocation, we discussed the profile of college graduates accepted to law school, the socialization of law students into the profession, and graduation and employment of students as members of the bar. The convocation ended with break-out sessions where the individual participants had an opportunity to share their views with panelists on these important issues.

As a part of the opening session of the convocation, I was privileged to have the opportunity to address all of the participants in the beautiful courtroom of the Court of Appeals. I used the opportunity to discuss the very thoughtful keynote address of John Sexton, dean of the New York University School of Law, at a program sponsored by the ABA Section on Legal Education and Admissions to the Bar during the ABA Annual Meeting last Summer in London. The program was entitled "Out of the Box—Thinking About the Training of Lawyers in the Next Millennium." Dean Sexton's insightful and provocative address questioned whether the American model of a three-year postgraduate legal education can long survive in the 21st Century. After recounting the challenges to the continuation of this model, Dean Sexton concluded that the traditional American law school education not only can, but must survive. He said

> [t]he United States is a society based on law and forged by lawyers. The law is our great arbiter, the principal means by which we have been able to knit one nation out of a people whose chief characteristic always has been diversity. And, just as the law has been a principal means for founding, defining, preserving, reforming, and democratizing a united America, our lawyers have been charged with setting the nation's values. The role of the lawyer is that of a fiduciary for and conscience of the civil realm—for if lawyers do not play that role, nobody will.

All of these events, beginning with the appointment of the ABA Task Force a decade ago, have contributed greatly to the dialogue between the practicing bar and legal educators about the course of American legal education. I am confident that this dialogue will continue here in New York State, and if we accept John Sexton's provocative challenge that American lawyers have been charged with setting the nation's values and must continue to function as the "conscience of the civil realm," then this discussion must certainly continue. I am hopeful that the process can be institutionalized and that instead of meeting with law school deans on an occasional basis, we will engage in continuing study of the major issues of the legal education process and meet on a predictable basis to share the results of those studies. I hope that our Association will have a major role in convening and continuing that discourse.

As I said earlier, whether we have too many lawyers is a complicated issue. Law schools do not have any responsibility for regulating the number of people who wish to attend law school and the practicing bar has no influence on whether universities continue to respond to that demand. Doug O'Brien, a longtime member and former chair of our Public Relations Committee and a radio journalist in New York City and lecturer on various professionalism topics, suggests the answer in these words:

> It is arguable there are too many attorneys, that is too many people willing to represent others. It's quite possible the marketplace doesn't need any more of those. I submit, however, there is no such thing as too many lawyers. How is it possible to have too many people who know how the world works? How can we have too many people who can deal with the civics of the day? Are there too many people who think clearly and rationally? Is it possible to have too many circumspect people? And how can there be too many people to look to for guidance and leadership?

Maybe those of us who have been privileged to be the beneficiaries of a law school education ought to be willing to share it with others, even if it does mean some more competition in the marketplace.

Editor's Mailbox

Point of View

The *Point of View* column by Justice Priscilla Hall of Kings County Supreme Court in the November-December 2000 issue of the *Journal* invites a different point of view from a 30-year prosecutor—if for no other reason than for the sake of "diversity." Cutting right to the chase, a lawyer or judge worth his or her salt must embody a scholarly knowledge of, and respect for, objective legal principles and a personal discipline to apply those principles with clinical neutrality. There is a profound lesson to be drawn from the Statue of Justice. The Lady is blindfolded. She cannot see who is in front of her, even his or her skin pigmentation. Without that blindfold, she could never hold the scales of justice even.

Justice Hall's *Point of View*, adapted from an address given by her to an American Bar Association "Town Meeting on Diversity in the Legal Profession," states that "white court officers would start to bristle as soon as [German Moses] . . . walked into the courtroom." Conspicuously absent is any attempt on her part to elucidate the word, "bristle." What is notably present before "white" and "bristle" is the justice's own description of Moses. He was "a defendant on my probation calendar"—for what crime and conviction and later criminal transgression is undisclosed. The justice here states that she cannot here remember. Moses was "sullen, sulking and scowling with a reputation for being difficult." "He was hostile." She "despaired of any alternative other than jail" because she "could not get a lawyer to represent him continually."

Contrary to the justice's assertion, the law is its own measure of right and wrong. The legal or logical authoritative nexus between jail if warranted by a probationer's conduct and an "alternative other than jail" being thwarted by his not having a lawyer "to represent him continually" is not explained by Justice Hall. Her jurisprudence appears to be that of an existentialist. According to her, a "patient" lawyer who became "exasperated also" persuaded her to have Moses psychiatrically examined "to determine whether he had some organic problem that was causing his bad attitude"—one may assume it to be the type of bad attitude associated with bristling by civilized persons. "All," in the unelucidated view of Justice Hall, "assumed that German Moses was unintelligent, unlettered and uneducable." Yet the psychiatric report—if Moses's patient lawyer assessed it correctly—showed Moses as being "probably the smartest person in the courtroom."

Overlooked in Justice Hall's *Point of View* was the examination's original purpose. It was not to find out how smart Moses was, *albeit* being so smart it could fairly be argued that Moses's madness had method to it. Although the smartest person in the courtroom, Moses, according to Justice Hall, "could not figure out how to negotiate in a racist society." She saw him "differently than others saw him" because she knew "how it feels to be invisible" and "could visualize" Moses.

She should read Henry Thoreau. Most men, as visualized by Thoreau, lead lives of quiet desperation. One born as one of six whose father was born one of thirteen and who had to leave school when he was 13 to help support his family may not appreciate Justice Hall's unelucidated conception of what it means to feel invisible or her professed ability to visualize others. Martin Luther King shamed a nation that was not living out the promise of its creed by stating that a man must be judged by the content of his character and not by the color of his skin. Judges worthy of their oaths must lead the way by speech and conduct in saying, "Amen!" And to his words, the writer offers those of Justice John Harlan, Sr. dissenting in *Plessy v. Ferguson*: "[I]n the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. *The law regards man as man, and takes no account of his surroundings or of his color* when his civil rights as guaranteed by the supreme law of the land are involved." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Emphasis added).

Starting out in the Bronx District Attorney's Office under Burton B. Roberts, every day of this writer's 30 years as a prosecutor—so far as God's wisdom factored through his human imperfection would give him the light to see it—was lived by Justice Harlan's message, not by poisonous and ignorant thinking to the contrary dressed up in semantic flapdoodle.

Lawrence N. Gray
Kings Park, N.Y.

Fifty-Year Retrospective

For we old-timers (50 or more years as lawyers), your January edition impressively combines nostalgia with mind-expanding data about specific, important changes in fundamentals.

Over the past half-century, not only has New York law evolved in major ways but also the practice of law has been substantially transformed.

Question: Does society in general and clients in particular in the year 2001 have more respect for New York law—and hold New York lawyers in higher regard than 50 years ago? The profession must set the goal that the answer 50 years from now is a loud, clear, enthusiastic YES.

George W. Nordham
Member of the N.Y. Bar
Winter Springs, Fla.

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Court Facilities Renewal

New York State is in the midst of a $3.5 billion capital construction program, the largest court construction program in the nation outside of the federal court system.

The New York State Judiciary Law makes local governments responsible for providing and maintaining court facilities. That means that in New York there are 117 local governments—57 counties and 60 cities—that provide courthouses for the operation of the Unified Court System.

In 1987, reacting to a statewide crisis in court facilities, the Legislature enacted the Court Facilities Act. The act reaffirmed the principle that providing and maintaining court facilities was a local responsibility, but, for the first time, it mandated a capital planning process to assist local governments in meeting that responsibility, provided for technical assistance from the Office of Court Administration and the State Dormitory Authority, and established a program of state financial aid to local governments.

The results of the Court Facilities Act are becoming visible throughout the state as the long process of arranging for new and remodeled courthouses bears fruit. Although much remains to be done, many local governments have already completed their capital plans. In many other localities, significant progress is being made.

The photographs on the cover and following pages illustrate some of the progress that has been made in the past decade and provide architects' renderings of some major projects now underway.

Ronald Younkins
Director of court facilities management,
and executive assistant to Justice Ann Pfau,
deputy chief administrative judge

On the cover (*clockwise from top left*):

The building now used by the Norwich City Court is a converted railroad depot. This project is an example of the "adaptive use" effort that has characterized several projects as state and local governments have found new uses for vacant buildings by converting them into much-needed court facilities. The "new" Rensselaer County Family Court featured in the November 1999 issue of the Journal was established in the "old" Rensselaer County Jail, and the Red Hook Community Center, featured in the June 2000 issue of the Journal, is housed in a renovated parochial school in Brooklyn. New city courts in Glen Cover and Hornell are housed in converted banks.

Across the state, new court complexes such as the Wyoming County facility shown on the cover have replaced buildings that were outdated, crowded and dilapidated. Similar complexes have been built in Washington County (see page 17) and in Wayne and Genesee counties.

Many new courthouses erected as part of the program have been honored with awards from the American Institute of Architects. Among those that have received these awards is the Ithaca City Courthouse designed by the firm of Perkins Eastman.

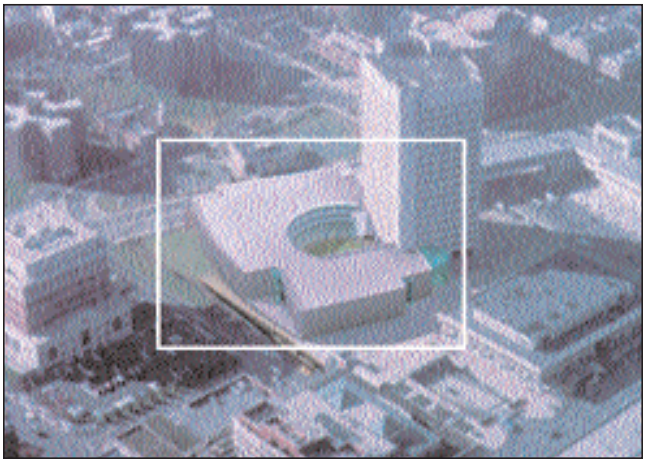
The architect's model of the Erie County Family Courthouse provides a preview of a facility that is nearly completed and will open later this year. The facility will also house the county's Department of Probation.

The Broome County Courthouse in Binghamton is an example of how improvements in Family Court facilities have been among the major success stories in the Court Facilities Program. The new courthouse replaced a facility that was regarded as one of the two worst in the state.

Before For more than 60 years, the Beacon City Court, housed on the second floor of the building directly over the police department, lacked such basic amenities as a waiting room and chambers. ▶

◀ **After** The new Beacon City Courthouse opened in 1996.

◀ **High-rise Justice** The Kings County Supreme Criminal/Family Courthouse—set for a groundbreaking this year—will house 74 courtrooms in a 33-story building, making it one of the largest courthouses ever to be built.

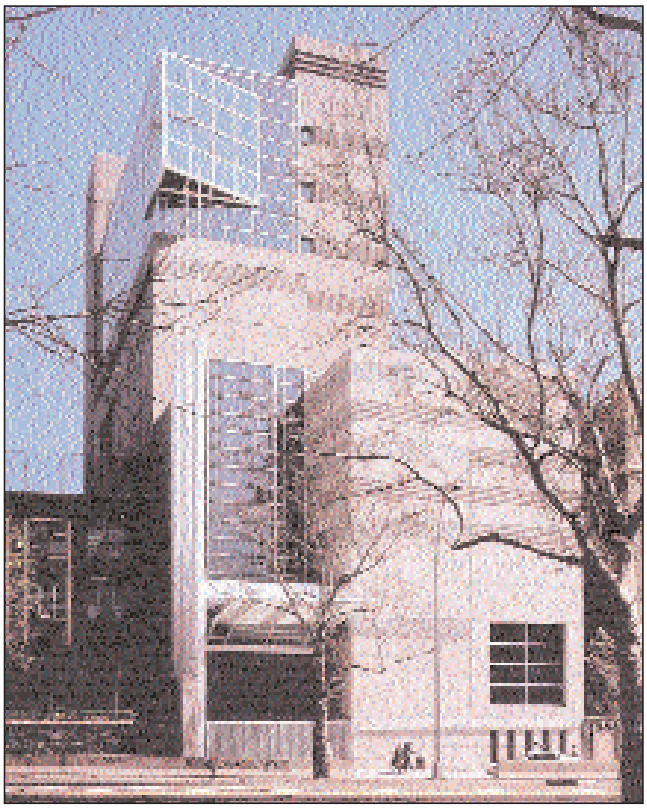


◀ **Breaking Ground** On January 23, 2001, a groundbreaking ceremony was held for the annex to the Westchester County Courthouse. This aerial view is a composite photo showing the existing high-rise courthouse at right and an artist's rendition of the annex (in box). Later this year, a groundbreaking will be held for a new courthouse in the adjoining county of Putnam.

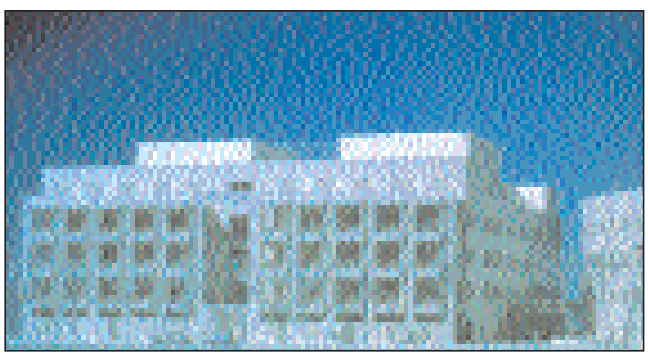
Justice for Families Pictured at right ▶ is the new Dutchess County Family Court building. Like the Broome County facility shown on the cover, it replaced a facility that was regarded as being among the worst in the state.

◀ **Cohalan Complex** One of the first major new court complexes completed after enactment of the Court Facilities Act was the Cohalan Court Complex in Central Islip, Long Island, which opened in 1992.

Public Safety Centers In many communities throughout the state, new public safety centers have been built, such as the Geneva City Courthouse. They provide a home both for the courts and the local police department.



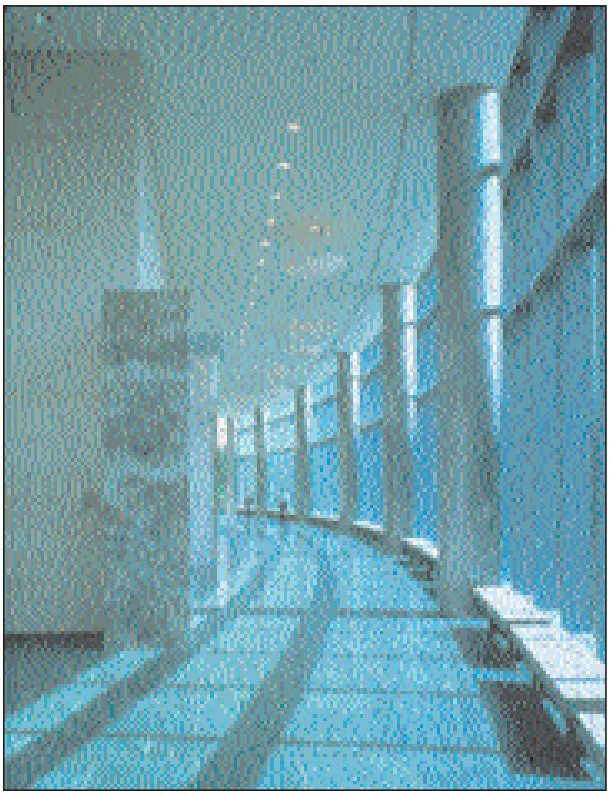
Out of the Basement The 11-story Bronx Housing Courthouse opened in 1997, allowing the court to leave dismal and crowded quarters in the basement of the Bronx County Courthouse.



Queens Family Courthouse In late 2001, the new Queens Family Courthouse will open, replacing cramped and inadequate space for the Family Court and related agencies.

◀ **Expansion Space** A major addition to the Rockland County Courthouse will open later this year. Another major new facility in the Ninth Judicial District, the Orange County Courthouse, will also open later this year.

The New York City Plan The 11-courtroom addition to the Queens Criminal Courthouse, completed in 1995, was the first major court project completed in New York City in 20 years. ▶



Historic Courthouses Reclaimed Many historic courthouses, such as the Seneca County Courthouse, have been saved, some with partial funding available through the State Historic Preservation bond program. They have then been renovated to meet the needs of today's courts. Livingston, St. Lawrence and Putnam Counties are among the other localities to restore historic courthouses. The restoration of the historic Schoharie County Courthouse will be completed later this year. ▶

◀ **"Superblock"** Construction on the 47-courtroom Bronx Criminal Court Complex—nicknamed the "Superblock"—will begin this year.

Queens Civil Court Before the new Queens Civil Courthouse opened in 1998, lawyers and litigants had no place to meet in the courthouse and were forced to conference in fast-food restaurants in the neighborhood. ▶

◀ **Justice Complexes** Shown here is the new justice complex, in Washington County that replaced old facilities no longer capable of handling the county's needs. Similar complexes have been built in Wyoming County (shown on the cover) and in Wayne and Genesee Counties.

Expanded Enforcement Options For Orders of Protection Provide Powerful Reply to Domestic Violence

BY MARJORY D. FIELDS

Public awareness of domestic violence has increased during the past several years. This heightened awareness has had an impact on legislators, the judiciary and legal practitioners. Domestic Relations Law § 240 has been amended to include domestic violence as a factor in adjudicating custody and visitation rights.

In an effort to control domestic violence, the New York State Legislature has made it possible to pursue orders of protection in three courts with concurrent jurisdiction: criminal courts, the Supreme Court and the Family Court. Orders of protection (OP) and temporary orders of protection (TOP) are among the most powerful orders that can be issued by any court. It is therefore critical for attorneys to understand the procedures for obtaining and enforcing them.

This article provides a guide to applications for enhanced or modified OP and TOP provisions, and for civil contempt findings when the orders have been violated.

References in this article to "enforcement motions" include all of these forms of relief, as well as motions brought on by an order to show cause. Some citations are to the Family Court Law because it provides for the procedures and remedies described, which by analogy are applied in Supreme Court. Family Court Act provisions are appropriate for Supreme Court proceedings, because the Supreme Court has all the powers of the Family Court, and the legislative intent is the same for OP and TOP in all courts.[1] The official court forms for Supreme Court warrants of arrest, OP and TOP are provided as illustrations on pages 27-31.

The primary focus here is on the civil remedies. Simultaneous criminal prosecution for any crime defined in the Penal Law is likely also. A violation of a civil OP or TOP may be prosecuted as the crime of criminal contempt, a class E or class D felony.[2] In addition, criminal charges may be brought under the new stalking laws,[3] and for burglary, assault, menacing and endangering the welfare of a child, or for any other underlying crime or violation under the Penal Law. Many of the enforcement motions will be made following an arrest based on an allegation of violation of OP or TOP because of the mandatory arrest provisions of the Criminal Procedure Law.[4] Thus, enforcement motions will become more common, and require prompt hearings because restrained parties may be in custody.

Immediate Access to Court

Since enactment of 1999 N.Y. Laws, Chapter 606,[5] the Supreme Court must act on original applications for TOPs and OPs and enforcement motions within the same time frames imposed in Family Court. Thus, Supreme Court must file enforcement motions without delay on the same day such person first appears at court, and a hearing shall be held on the same day or the next day that the court is open.[6]

An OP usually provides that the restrained party not harass, menace, recklessly endanger, assault or attempt to assault the petitioner, and refrain from committing a family offense. The order may exclude a party from the marital home, and it may direct that the restrained party stay away from the protected party and child, their workplaces, schools, child care locations, and any other specific locations designated by the court.

In an opinion that provides a primer on appropriate provisions for OP, the Appellate Division, First Department, ruled in 1999 that it is error for the trial court to

MARJORY D. FIELDS was appointed to New York City Family Court in 1986 and has been assigned to the matrimonial complex in Supreme Court, New York County, since June 1999. Before being appointed to the bench, Justice Fields practiced matrimonial law for 15 years at Brooklyn Legal Services Corp. She is a graduate of City College of New York and received her J.D. degree from New York University Law School.

She thanks Ilana Gruebel, Esq., for organizational comments and Janet Fink, Esq., for research and comments on the federal gun removal and interstate enforcement provisions.

grant an OP but fail to restore the victim to the family home and exclude the offender from that home.[7] The Appellate Division stated that "the court should not base its decision solely on the fact that one party has found another place to stay and the other has not. A victim of the outrageous and life-threatening sort of abuse set forth in this matter cannot be held hostage to the potential homelessness of her abuser, who created the intolerable situation in the first instance."[8]

An OP usually provides that the restrained party not harass, menace, recklessly endanger, assault or attempt to assault the petitioner.

Emphasizing the trial court's power to exclude an offender from the family home, the Appellate Division stated,

> There is no logical rationale to limit the power of the court by prohibiting it from excluding a resident abusive spouse merely because the victim of the abuse has been forced by her abuser to flee their common home. Such a holding would reward the worst abusers, *i.e.*, those whose behavior was so violent or threatening that it forced their family members to leave home, with automatic possession of the home, and would obviously frustrate the intent of the statutory scheme, which seeks to protect, not punish the victims of domestic violence. [9]

The Appellate Division held that the trial court must decide the issue of possession of the family home even when this relief would be available in another proceeding.

> Clearly, recourse to a divorce proceeding was of little or no use to petitioner. Not only would she not be entitled to counsel in a divorce proceeding, but the commencement of a new action would cause further delay, during which time petitioner would remain excluded from her home by the threat of violence.[10]

Dispositional Hearings

In addition, the Appellate Division rejected the respondents' argument that a dispositional hearing was not necessary because

> respondents ceased harassing petitioner when ordered to do so in the original TOP. We can hardly require evidence of continuing harassment to be a condition to an order of exclusion in a situation where the respondents, who were found to have committed harassment, remain in the home while their victim has been forced to flee, thereby eliminating both their motivation and opportunity to further abuse her[11]

The Appellate Division also held that the trial court "erred in failing to hold a dispositional hearing to consider the issues of whether the OP should have included a provision excluding the respondents from the marital apartment and whether it should have extended for three years."[12] The Appellate Division emphasized the differences in the evidence admissible at the dispositional hearing from the fact-finding hearing. "A broader standard of admissibility of evidence is available on the dispositional hearing than at the fact-finding hearing, and evidence may be admitted as long as it is 'material and relevant' (FCA § 834), including hearsay and other evidence otherwise incompetent."[13]

When the evidence in a hearing or trial in Supreme Court establishes that the OP is needed for the duration of a custody order, counsel may request that the court consider that evidence when it frames the terms of the OP. The OP may contain a provision that a party may enter the residence at a specified time to remove specified personal belongings.[14] The order may direct that the police keep the peace while this is done. It must specify the date and time that the restrained party may remove the personal property. This will give the police specific information so that they may enforce the order.

Only items listed in the order may be removed. The list therefore must be detailed and complete. For example, a party could be permitted to take his or her clothing, books, legal documents, video or music tapes, compact disks, a specific television set, compact disk player, tape player, stereo tuner, computer disks and CDs, computer, printer, woodworking or electrical tools, child's toys, child's clothing and child's furniture (if that party is taking the child out of the home). The police or sheriff's officers will allow removal of those items, and no others.

The order may require the parties to observe any other conditions deemed necessary to further the purposes of the OP.[15] A modified or initial OP may extend for the duration of an order of custody based on a finding that an OP is necessary to effectuate the related custody order or that there was a violation of a prior OP.[16]

Firearms Surrender and License Revocation

Upon making an initial TOP or OP, or at the time an allegation of a violation of any OP or TOP is filed in any court, or after the court finds a willful violation of a TOP or OP, the court "*shall*":

- revoke a respondent's firearms license,
- order a respondent ineligible for such a license,
- order a respondent to surrender his firearms, or
- suspend a respondent's firearms license,

Court Guidance on Standards for Orders

Valuable guidance on orders of protection has been provided in a Court of Appeals case decided in December, *People v. Wood*.[1]

The court held that a prosecution for criminal contempt in the first degree was barred when it was based on violation of an order of protection issued by the City Court after the Family Court had found the defendant guilty of contempt for violating a Family Court order of protection based on the same acts. The court applied the test enunciated by the U.S. Supreme Court in *Blockburger v. United States*,[2] that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."[3]

This double jeopardy problem could arise again if a complainant has orders of protection with identical provisions from several courts effective in a single time period. In those circumstances, a single act or series of acts would violate the orders of protection from more than one court. Thus, as in *Wood*, "it would be impossible for defendant to be guilty of first degree criminal contempt for violating the City Court order of protection without concomitantly being guilty of contempt for violating the Family Court order of protection."[4] The Court of Appeals held also, "That the People sought to prove a violation of a City Court order and not a Family Court order does not, *under these circumstances*, alter the double jeopardy analysis under *Blockburger*."[5] [Emphasis added.] "The People cannot circumvent the double jeopardy bar simply by seeking to prosecute the criminal action for violation of another court order based on the same conduct . . . The invocation of double jeopardy considerations in this case . . . recognizes that these orders of protection had one and the same purpose."[6]

The holding in *Wood*, however, does *not* bar a prosecution for a crime other than criminal contempt after a Family Court contempt finding and penalty of incarceration. The Court of Appeals did not disturb the Fourth Department affirmance of that portion of the judgment of conviction for aggravated harassment in the second degree under Penal Law § 240.30(2).[7] The Court of Appeals made that clear: "The application of the *Blockburger* test in this case is unusual in that two successive contempt prosecutions are involved, rather than prosecutions for contempt and an underlying substantive offense (see, *United States v. Dixon*, 509 U.S. 688)."[8] Thus, a subsequent criminal prosecution for assault, arson, criminal trespass, and false imprisonment, for example, would not violate the defendant's right to be protected against double jeopardy arising from the same incident that was the basis of a Family Court disposition of a new order of protection with broader terms than the order which was violated, or a finding of aggravated circumstances as the basis for a three-year order.[9]

Furthermore, the holding in *Wood* does *not* bar Family Court from making a new order of protection with expanded terms regarding custody and visitation and exclusion from the family home based on a finding of violation of an order of protection after a criminal conviction or acquittal. Family Court may act to provide *civil* injunctive relief and protect children: these terms are not multiple *punishments* for the same act. The analogy would be to a tort action for damages after the disposition of a criminal prosecution for the same act. If there were a conviction, the plaintiff could have summary judgment on the liability issue, and a trial on the damages. If there were an acquittal, the plaintiff would have the opportunity to prove liability by a preponderance of the evidence.

As the Court of Appeals stated in *Wood*, "The Double Jeopardy Clause 'protects only against the imposition of multiple criminal punishments for the same offense.'"[10] The Court of Appeals concluded its decision in *Wood* by stating that "parallel court proceedings in different venues," are permitted when the relief is different.[11]

Marjory D. Fields

1. *People v. Wood*, 2000 N.Y. LEXIS 3893 (December 21, 2000) at 10. Both orders of protection in *Wood* directed defendant to have "no contact whatsoever" with complainant. *People v. Wood*, 260 A.D.2d 102, 104, 698 N.Y.S.2d 122 (4th Dep't 1999).
2. 284 U.S. 299, 304 (1932).
3. *Id.*
4. *People v. Wood*, 2000 N.Y. LEXIS 3893 at 8.
5. *Id.* at 9.
6. *Id.* at 10–11.
7. *Id.* at 3; *People v. Wood*, 260 A.D.2d 102, 110, 698 N.Y.S.2d 122 (4th Dep't 1999).
8. *Id.* at 7.
9. Family Court Act § 827. Expanded terms may require the restrained party to stay away from the protected party, exclude the restrained party from the family home, prohibit the restrained party from contacting the protected party by any means, award custody of children to the protected party, and deny the restrained party visits with children. Family Court Act §§ 846, 846-a.
10. *People v. Wood*, 2000 N.Y. LEXIS 3893 at 5.
11. *Id.* at 11.

when the conduct that led to the issuance of the initial TOP or OP, or which is the basis of the finding of a willful violation of a TOP or OP, involved

(i) a serious physical injury, as defined in Penal Law §10.00,
(ii) the use or threatened use of a deadly weapon or dangerous instrument as defined in Penal Law §10.00 (12), (13), or
(iii) behavior constituting any violent felony offense as defined Penal Law § 70.02, or
(iv) behavior constituting any stalking offense as defined in Penal Law §§ 120.45 through 120.60.[17]

The court has the *discretion* to revoke a respondent's firearms license, order a respondent ineligible for such a license, order a respondent to surrender his firearms, or suspend a respondent's firearms license when there is a substantial risk that a respondent may use or threaten to use a firearm unlawfully against the person for whose protection the TOP or OP is issued.[18]

The order to surrender firearms must specify where and when the firearms shall be surrendered, must describe the firearms, and must direct the authority receiving the firearms to notify the court of the surrender immediately.[19] The court is required to notify the Statewide Registry of Orders of Protection and Warrants of Arrest ("Statewide Registry") of all firearms revocation, suspension, ineligibility, or surrender orders.[20] A party may challenge the order revoking the firearms license, and is entitled to a hearing within 14 days of the challenge.[21]

Federal Gun Control Act

The Federal Gun Control Act[22] prohibits possessing, dealing in, and transporting enumerated firearms and ammunition by a restrained party for the duration of qualified TOPs and OPs that were issued after the restrained party had actual notice of the hearing and opportunity to be heard. A TOP or OP is a "qualifying order" prohibiting possession of firearms and ammunition under the Federal Gun Control Act when it:

- includes a specific finding that the person subject to the order represents a credible threat to the physical safety of a family member, or
- prohibits threats of force, or use of force, or attempted use of force against a family member.

The prohibitions do not apply to prevent official use of firearms and ammunition by military and law enforcement personnel in the line of duty ("official-use exception").[23] This exception does *not* apply to persons convicted of committing a federal or state misdemeanor or felony, as described below.[24]

The "Lautenberg Amendment" to the Federal Gun Control Act[25] further prohibits possessing, dealing in, and transporting enumerated firearms and ammunition by any person convicted of committing a federal or state misdemeanor or felony that satisfies the following criteria:

- An element of the misdemeanor must include use or attempted use of physical force or threatened use of a deadly weapon.
- The defendant must have been represented by counsel and tried by a jury, or have waived both counsel and a jury trial.
- The defendant must be (1) a current or former spouse of the victim, (2) a parent or guardian of the victim, (3) a person with whom the victim has a child in common, (4) a person who is cohabiting or has cohabited with the victim, or (5) a person in a relationship with the victim that is similar to a family relationship.[26] The court must state its specific findings as the basis for revoking a respondent's firearms license and ordering surrender of firearms and ammunition.[27]

Actual notice is deemed to have been received when the restrained party was in court at the time the order was made.

Full Faith and Credit for Out-of-State Orders

Every jurisdiction in the United States is required to enforce the TOPs and OPs issued by other jurisdictions when those orders were made in compliance with specified procedural requirements.[28] A TOP and OP still in effect is presumed enforceable (entitled to full faith and credit) when the issuing court had personal jurisdiction of the restrained party and the subject matter, and the restrained party was given either notice and an opportunity to be heard, or notice of an *ex parte* order and an opportunity to be heard within a short time.

A mutual OP may be enforced when the following procedural conditions are satisfied:

- A cross or counter petition, complaint or other pleading supporting the request for the OP was filed by the party seeking enforcement, and was served on the restrained party, who was given an opportunity to be heard; and
- The court made specific findings that the person seeking enforcement was entitled to an OP.

These provisions have been incorporated into New York law, along with provisions authorizing entry of out-of-state TOPs and OPs in the Statewide Registry without fee, and authorizing prosecution and mandatory arrest for violations of out-of-state orders.[29]

Enforcement Procedures

An OP and TOP may be enforced when the restrained party has actual notice of the order.[30] Actual notice is deemed to have been received when the restrained party was in court at the time the order was made, even if that party leaves the court without taking a copy of the order.[31] The official OP form has a space for the restrained party's signature. A signed acknowledgment of the order by the restrained party is proof of receipt and notice of the order.

When an OP or TOP is issued on default, the court will send the order to the police or sheriff's department for service on the restrained party in accordance the DRL.[32] The officer must file proof of service with the court, and notify the Statewide Registry that service was effected.[33] The clerk of court notifies the Statewide Registry when any court issues an OP or TOP.[34]

In the alternative, the protected party may arrange for service by personal delivery pursuant to CPLR § 308(1).[35] The affidavit of service must be filed with the court, and a request made that the clerk of court notify the Statewide Registry that service was effected.[36] Both methods are sufficient predicates for enforcement proceedings. When the OP or TOP cannot be served by personal delivery, after "reasonable efforts," the court may order substituted service.[37]

Contents of Moving Papers

When civil contempt remedies are requested, the moving papers *must* include the statutory warning language:

> The summons shall include on its face, printed or typewritten in a size equal to at least eight point bold type, a notice warning the respondent that a failure to appear in court may result in immediate arrest, and that, after an appearance in court, a finding that the respondent willfully failed to obey the order may result in commitment to jail for a term not to exceed six months, for contempt of court. The notice shall also advise the respondent of the right to counsel, and the right to assigned counsel, if indigent.[38]

A violation of an OP and TOP motion may be filed without an arrest, or immediately after an arrest. The enforcement application may proceed the same way an initial OP application is made.

The protected party must include the following in his or her affidavit in support of contempt or expansion of the provisions of the order:

- notice to the restrained party of the order for which enforcement is sought (a copy of the order should be attached to the motion papers);
- when and how service was effected (or a statement that the restrained party was present in court when the order was issued);
- specific provisions violated;
- date, nature and place of each violation;
- the course of conduct that violates the order (commencement date, duration and places of such conduct).

Service of Enforcement Motions

Contempt applications must be served by personal delivery to the restrained party.[39] Other enforcement motions may be served by mail. If the restrained party is evading personal delivery of the moving papers in an enforcement proceeding, upon a showing of reasonable efforts at personal delivery, the court may order substituted service in accordance with CPLR § 308(2), (3), (4), or (5).[40] Counsel should devise a method of service most likely to give actual notice of the enforcement proceedings, and present the court with sufficient facts to establish this by affidavit of the movant and affirmation of counsel.[41]

The police must serve the enforcement motion papers along with any new TOP, if the court issues a TOP when the enforcement motion is made.[42] The police will usually serve the enforcement motion papers, or to keep the peace, accompany anyone serving the moving papers, even if a TOP is not issued.[43]

Arrest Warrants

Arrest is the alternative jurisdictional basis for contempt and enforcement motions. The Supreme Court may issue a warrant of arrest for the restrained person after a motion alleging a violation of an OP or TOP is filed by the clerk.[44] The court may issue a warrant of arrest in lieu of service of the motion papers with a return date.[45] A violation proceeding may be considered an aggravating circumstance which requires immediate arrest of the respondent as set forth in the provisions of the FCA.[46]

A warrant should be issued when the summons (motion papers) cannot be served; or the restrained party has failed to obey the summons (appear on the return date); or the restrained party is likely to leave the jurisdiction; or a summons, in the court's opinion, would be ineffectual; or the safety of the petitioner (protected party) is endangered; or the safety of a child is endangered; or aggravating circumstances exist.[47]

The party requesting a warrant of arrest should establish these elements by brief testimony of the protected party or a police officer, or an affidavit establishing attempts to effect personal delivery of the papers by the police or a process server.

Arrest Without a Warrant

An order of protection is authority for arrest of a person alleged to have violated its terms.[48] An order of protection is analogous to a warrant. It is a court order that the protected adult and child require police protection.[49]

Arrest is mandatory when a police officer has probable cause to believe that an OP or TOP of which the accused has actual knowledge, and which directs the accused to stay away from the person protected by the order, was violated or the accused commits a "family offense" in violation of the order.[50] This provision applies to OPs entered pursuant to the DRL, the FCA or the CPL.[51]

When a violation of an OP or TOP is alleged, mandatory arrest applies, even though the complainant requests that an arrest not be made. In addition, police *authority* to arrest based on probable cause remains in effect after the mandatory arrest provisions sunset.[52] Police officers are directed not to discourage complainants from filing complaints.[53]

Although arrest is mandatory, the police retain the authority to issue an appearance ticket to a respondent accused of committing a misdemeanor or class E felony.[54] Many police and sheriff's departments, including the New York City Police Department, prohibit appearance tickets in family offense cases.[55] The New York City Police Department *Patrol Guide* directs police officers to make arrest in all cases in which there is probable cause to believe that there was a violation of an OP, even when the victim expressly requests that an arrest not be made.[56]

Various police and sheriff's departments have established local procedures for family offense matters. Counsel and clerks of court should request copies of these procedures so that they are familiar with local practices—such as arrest policies, designated domestic violence officers, or transportation to a place of safety.[57]

Default Proceedings Upon proof of service, when the restrained party defaults in appearing on the return day, the court may expand the OP provisions, hold a party in contempt and issue a warrant of arrest.[58] All the relief except an order of commitment will be available upon proof of substituted service.[59]

Initial Procedures on Enforcement Motions

The FCA provides that when a motion or a petition alleging a violation of an OP is filed, the court may either retain the matter to determine all the violation issues in a contempt proceeding or retain the matter, treating the allegations as new family offenses, if the moving party so requests.[60]

Alternatively, the court may "transfer" the alleged violations which are criminal conduct to the district attorney "for [criminal] prosecution pursuant to" FCA § 813,

and retain the remaining, non-criminal allegations to determine them in a contempt proceeding, or "transfer" the *entire* matter to a criminal court, pursuant to FCA § 813.[61] The district attorney, of course, retains "prosecutorial discretion" to decline to prosecute any matter.[62]

The Supreme Court may make a new TOP with additional provisions and issue a warrant of arrest based upon good cause (which is established through a brief *voir dire* of the protected party or other testimony).[63] The warrant requires the restrained party to be brought before the Supreme Court during court hours. When the Supreme Court is not in session, the respondent will be arraigned in the local criminal court and held for production in Supreme Court the next court day.[64]

The arrested party may be committed to custody of the sheriff or local corrections commissioner "until such time as bail is posted."

The Supreme Court may issue a new TOP, and a warrant of arrest when it transfers the entire matter to a criminal court. The TOP, however, must have a termination date to be valid. This date can be set based on the likely arraignment date in a criminal court. A criminal court may then continue the Supreme Court's TOP, or enter its own TOP and set a termination date consistent with its calendars.[65]

A protected party may both file a motion alleging a violation of a Supreme Court OP in the Supreme Court and ask the district attorney to file an accusatory instrument in a criminal court for the same violation.[66] When the alleged violation of the OP is an offense or a crime under the Penal Law, then the alleged violation of OP may be heard in a contempt of court proceeding in the Supreme Court, as well as forming the basis of criminal contempt prosecution pursuant to Penal Law § 215.50, 215.51 or 215.52, and the other relevant sections of the Penal Law in a criminal court.[67]

Violations of OPs or TOPs may be acts which do not constitute crimes or offenses under the Penal Law. For example, an OP or TOP may prohibit a party from being in the family home under the influence of alcohol or shouting at family members in the home. These are not offenses, but they are sufficient for a civil contempt of court proceeding, and a criminal prosecution for contempt of court, only.[68]

Arraignment

Once the court has personal jurisdiction over the restrained party in a violation of OP or TOP proceeding, the following procedures are required.

Arraignment is before a Supreme Court justice, or a local criminal court when the Supreme Court is not in session, after an arrest for a violation of OP or TOP, or on a warrant of arrest issued by Supreme Court.[69] (Supreme Court is in session Monday through Friday, 9:00 a.m. to 5:00 p.m.) Local criminal courts are empowered to order the commitment of the arrested person, fix bail, or release the arrested person on his or her own recognizance.[70] The criminal court may make the matter returnable in the Supreme Court, in addition to scheduling further criminal proceedings.[71] The criminal court may not modify a Supreme Court TOP or OP.[72]

Bail

A person who has been arrested may be released by the "desk officer in charge at a police station" on paying *cash* bail for his or her appearance before the Supreme Court the next morning, when the highest charge is a misdemeanor or a class E felony.[73] This is known as a "Desk Appearance Ticket" or "DAT," or an "Appearance Ticket." It is no longer used in domestic violence cases pursuant to the New York City Police Department regulations.[74] Police departments or sheriff's offices outside New York City may issue DATs depending on their local policies.

After a motion has been made in Supreme Court, the court may require an arrested party to post bail in accordance with the CPL and the FCA.[75]

If a party first appears before the court pursuant to a summons, motion, or order to show cause, or if brought before the court pursuant to a warrant, the procedure is the same. The arrested party may be committed to custody of the sheriff or local corrections commissioner "until such time as bail is posted."[76]

Bail is mandatory when the highest charge is a misdemeanor.[77] The court must hold another hearing within 120 hours (or within 144 hours, if the time falls on Saturday, Sunday or legal holiday) after the commitment of a party to determine "whether sufficient cause exists to keep the respondent in custody," when respondent fails to post bail.[78]

When a party is arrested for any violation of a TOP or OP, which is a felony,[79] a Supreme Court justice may release the party, set bail or commit the party without setting bail.[80]

Right to Counsel

The court must inform both the moving party and the respondent on an enforcement motion, if indigent, that they have a statutory right to court-appointed counsel in family offense proceedings by analogy to FCA § 262(a)(ii) and CPL § 170.10(3).

Counsel must be assigned to the respondent at the first hearing date on the return of the motion or after arrest (arraignment) when a party is indigent.[81] A party may waive counsel after being informed of his or her rights in open court.[82]

Assigned counsel is usually compensated by the locality pursuant to County Law article 18-b. Corporation counsel or the county attorney may represent the protected party as is the practice in some Family Courts.[83] In the alternative, an indigent complainant may have 18-b counsel. Counsel assigned to represent an indigent party may be compensated by the other party, by court order, when that party is able to pay counsel fees.[84] A protected party who prevails in violation or OP proceedings and has retained counsel also may recover counsel fees from the restrained party.[85]

A guardian *ad litem* must be appointed to represent any party under the age of 18.[86] In addition, counsel (a law guardian),[87] must be appointed when that party is the respondent in an enforcement proceeding, or the guardian *ad litem* may retain counsel for the infant party.[88]

Remedies for Violation of TOP and OP

When the Supreme Court finds the restrained party has willfully violated an OP, the court may make a new OP, modify an existing OP, revoke or order the forfeiture of bail, order the restrained party to pay the petitioner's counsel fees, find the restrained party in contempt of court, commit the restrained party to jail for a term not to exceed six months, fine the restrained party, and revoke the restrained party's firearms license.[89]

The Supreme Court is empowered to revoke the restrained party's license "to carry, possess, repair and dispose of firearms pursuant to section 400.00 of the penal law," and order "immediate surrender and disposal of any firearm" the restrained party possesses, when the court finds the restrained party committed violent acts "constituting the crimes of menacing, reckless endangerment, assault or attempted assault."[90]

The court may also revoke a restrained party's firearms license, order a restrained party ineligible for such a license, order a restrained party to surrender his firearms, or suspend a restrained party's firearms license, on the same basis as if the court were issuing an initial OP.[91]

Double Jeopardy Allegations of violation of an OP or TOP may be the basis of a civil contempt proceeding in Supreme Court.[92] The same allegations may be the basis of a prosecution for criminal contempt pursuant to Penal Law §§ 215.51, 215.52, and a prosecution for any other crime under the Penal Law, such as stalking, assault, burglary and menacing.

Thus, double jeopardy problems may arise when all the elements of the criminal offenses charged and the civil contempt of court allegations are identical, and incarceration is the possible penalty for civil contempt and the crimes charged.[93]

Incarceration Penalty Upon a finding that the restrained party violated the terms of an OP or TOP of which the party had knowledge, the court may commit the party to jail for up to six months.[94] A civil commitment may be served on weekends and overnight with work-release time. At any time, the court may suspend the sentence, or revoke the work release and order the restrained party to serve the balance of the term full time.[95]

Conclusion

The procedures and forms for enforcing OPs and TOPs in Supreme Court are identical to those in Family Court. When the DRL is silent, the FCA provides the answers.

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1. New York State Constitution art. VI § 7(c); *Kagen v. Kagen*, 21 N.Y.2d 532, 536-37, 289 N.Y.S.2d 195 (1968).
2. N.Y. Penal Law §§ 215.51, 215.52. *See infra* note 93.
3. Penal Law §§ 120.45, 120.50, 120.55, 120.60).
4. N.Y. Criminal Procedure Law §§ 140.10(4) (hereinafter "CPL").
5. Codified as N.Y. Domestic Relations Law §§ 240(3), 252(8) (hereinafter "DRL").
6. DRL §§ 240(3), 252(8); N.Y. Family Court Act § 153-c (hereinafter "FCA").
7. *VC v. HC*, 257 A.D.2d 27, 33, 689 N.Y.S.2d 447 (1st Dep't 1999).
8. 257 A.D.2d at 34.
9. *Id.* at 33.
10. *Id.* at 34.
11. *Id.* at 36.
12. *Id*.
13. *Id.* at 32.
14. DRL §§ 240(3)(a)(4), 252(1)(d).
15. DRL § 240(3)(a)(7).
16. DRL § 240(1), (3).
17. FCA § 842-a(1)(a),(2)(a), (3)(a); DRL §§ 240(3), 252(9); CPL § 530.14(1), (3).
18. DRL §§ 240(3), 252(9); FCA § 842-a(1)(b), (2)(b), (3)(b); CPL § 530.14(1)(b), (2)(b), (3)(b).
19. FCA § 842-a(5).
20. FCA § 842-a(6).
21. FCA § 842-a(7).
22. 18 U.S.C. § 922 (g)(8).
23. 18 U.S.C. § 925.
24. 18 U.S.C. § 922(g)(9).
25. *Id.*

26. *Id.*
27. 18 U.S.C. § 922(g)(8).
28. 18 U.S.C. § 2265.
29. DRL §§ 240(3)(e), 240(3-c), 252(4), (7); Penal Law §§ 120.14, 215.51; CPL §§ 140.10, 530.11(5), 530.12(11), 530.14; N.Y. Executive Law § 221-a (hereinafter "Exec. L.").
30. *People v. McCowan*, 85 N.Y.2d 985, 629 N.Y.S.2d 163 (1995) (violation of order of protection dismissed because notice of terms was inadequate).
31. Penal Law §§ 215.51(d), 215.52; *People v. Bonner*, 256 A.D.2d 1219, 1219-20 (4th Dep't 1998).
32. DRL § 240(3-a).
33. Exec. L. § 221-a.
34. Exec. L. § 221-a(3).
35. DRL § 240 (3-a).
36. *Id*.
37. *See* FCA §§ 826(b), 846(c); N.Y. Civil Practice Law and Rules 308(2), (4), (5) (hereinafter "CPLR"). "Reasonable efforts" are shown by the affidavit of police or sheriff's officers or a civilian stating the efforts to effect personal delivery.
38. FCA § 846(b); N.Y. Judiciary Law § 756 (hereinafter "Jud. L.").
39. *See* FCA § 846(c); Jud. L. §§ 751, 761.
40. FCA § 826(b).
41. CPLR 308(5).
42. DRL § 240(3-a); FCA § 153-b(c); Exec. L. § 221-a.
43. FCA § 153-b(b).
44. DRL §§ 240(3-b), 252(2-a); FCA §§ 827, 846(d).
45. FCA §§ 827, 846(d).
46. *Id*.
47. FCA § 827.
48. CPL § 140.10(4); DRL § 240(3)(b), 252(2); FCA § 168(1).
49. S*orichetti v. City of New York*, 95 Misc. 2d 451, 408 N.Y.S.2d 219 (Sup. Ct., Bronx Co. 1978), *aff'd* 70 A.D.2d 573, 417 N.Y.S.2d 202 (1st Dep't 1979).
50. CPL § 140.10(4).
51. DRL §§ 240, 252; FCA articles 4, 5, 6, 8; CPL § 530.12. (CPL § 140.10(4) "mandatory arrest" for family offenses, sunsets July 1, 2001).
52. DRL §§ 240(3)(b), 252(2); CPL § 140.10.
53. FCA § 812(3); CPL § 530.11(3), (6).
54. CPL § 150.20; FCA § 155-a.
55. *New York City Police Department Patrol Guide*, (hereinafter "*Patrol Guide*,") "Procedure No. 208-36," & 22, p. 10.
56. *Patrol Guide*, Procedure No. 208-36.
57. FCA § 812(5); CPL § 530.11(6).
58. FCA § 846-a.
59. *See* FCA § 846(c).
60. FCA §§ 846, 847.
61. FCA § 846(b)(ii).
62. *United States v. Wayte*, 470 U.S. 598, 607 (1985).
63. FCA § 846(d).
64. DRL § 240(3-b).
65. *Id.*
66. FCA § 115(e); DRL §§ 812(1), 846(b).
67. Penal Law § 10; DRL § 240(3-b); FCA § 846 (b), (c), 847.
68. Penal Law § 215.51.
69. DRL §§ 252(2-a), 240(3-b). *See* CPL §§ 530.11(4), 530.12.
70. DRL §§ 240(3-b), 252(2-a).
71. *Id.*
72. *Id.*
73. CPL § 150.30; FCA § 155-a.
74. *Patrol Guide*, "Procedure No. 208-36," & 22, p.10.
75. CPL § 530.11(4), 530.12(9); FCA §§ 155, 821-a(3), (4).
76. FCA § 821-a(3)(c)(iii).
77. CPL § 530.20(1).
78. CPL § 180.80.
79. Penal Law §§ 215.51, or 215.52.
80. CPL § 530.20(2).
81. CPL § 170.10(3); CPLR art. 11.
82. FCA § 262 (a)(ii); *People v. Kaltenbach*, 60 N.Y.2d 797, 469 N.Y.S.2d 685 (1983).
83. FCA § 254(a).
84. FCA § 842(f).
85. *Id.*
86. CPLR 1201.
87. FCA § 249.
88. CPL § 170.10(3).
89. FCA §§ 846-a, 847; CPL § 530.12(11).
90. DRL § 240(3)(e); FCA § 842-a.
91. FCA § 842-a(3); Federal Gun Control Act 18 U.S.C. § 922(g)(8), (9).
92. Jud. L. § 753.
93. *United States v. Dixon*, 509 U.S. 688 (1993); *People v. Wood*, 260 A.D.2d 102, 698 N.Y.S.2d 122 (4th Dep't 1999) (criminal contempt prosecution violated double jeopardy when Family Court previously incarcerated the defendant for willful violation of an order of protection based on the same conduct; "same elements" test applied, citing *Dixon*), *aff'd* 2000 N.Y. LEXIS 3893 (December 21, 2000); *People v. Arnold*, 174 Misc. 2d 585, 664 N.Y.S.2d 1008 (Sup. Ct., Kings Co. 1997) (Family Court dispositions for violations of orders of protection preclude prosecution for criminal contempt (Penal Law §§ 215.51, 215.52) on double jeopardy grounds, but not underlying assault, burglary, and child endangerment crimes), cited with approval in both the Court of Appeals and the Appellate Division decisions in *People v. Wood*.
94. FCA § 846-a.
95. *Id.*

Form SC -2 11/99

ORI No: _____
Order No: _____
NYSID No. _____

At a _____ Term (IAS Part) _____ of the Supreme Court, State of New York, County of _____ _____, at the Courthouse at _____ _____, date _____

PRESENT: Hon. _____

In the Matter of a Proceeding under Section (240) (252) of the Domestic Relations Law

ORDER OF PROTECTION
D.R.L. 240 & 252

Index No. _____

Plaintiff/Petitioner
Date of Birth:

v.

Defendant/Respondent
Date of Birth:

❑ **Upon Default**
❑ **Both Parties Present In Court**
(check one)

NOTICE: YOUR FAILURE TO OBEY THIS ORDER MAY SUBJECT YOU TO MANDATORY ARREST, AND CRIMINAL PROSECUTION, WHICH MAY RESULT IN YOUR INCARCERATION FOR UP TO SEVEN YEARS FOR CRIMINAL CONTEMPT, AND/OR MAY SUBJECT YOU TO SUPREME COURT PROSECUTION AND PENALTIES FOR CONTEMPT OF COURT.

Whereas a determination has been made in accordance with section (240) (252) of the Domestic Relations Law,

Now, therefore, it is hereby ordered that [first name, middle initial and last name] _____ _____ observe the following conditions of behavior:

(Check Applicable Paragraphs and Subparagraphs)

[01] ❑ Stay away from [A] ❑ [name(s) of protected persons] _____, and/or from the [B] ❑ home of _____, [C] ❑ school of _____, [D] ❑ business of _____, [E] ❑ place of employment of _____, [F] ❑ other [specify location] _____ _____;

[14] ❑ Refrain from communication by mail or by telephone, e mail, voice-mail or other electronic means with [specify]: _____ _____.

[02] ❑ Refrain from assault, stalking, harassment, menacing, reckless endangerment, disorderly conduct, intimidation, threats or any criminal offense against [specify party or members of party's family or household] _____ _____;

[11] ❑ Permit [specify individual] _____ to enter the residence during [specify date/time] _____ in order to remove personal belongings not in issue in litigation;

[04] ❑ Refrain from (indicate acts) _____ that create an unreasonable risk to the health, safety, or welfare of [specify child(ren)] _____ _____;

[05] ❑ Permit [specify individual] _____, entitled by a court order or separation or other written agreement, to visit with [specify child(ren)] _____ during the following periods of time [specify] _____ _____ under the following terms and conditions [specify] _____;

[07] ❑ Custody of [specify child(ren)] _____ shall be awarded to [specify individual] _____ under the following terms and conditions [specify]: _____;

[12] ❑ Surrender any and all firearms owned or possessed, including, but not limited to, the following: _____. Such surrender shall take place on or before [specify date/time]: _____ at: _____.

❑ Pay or provide access to health or medical insurance for necessary medical care and treatment arising from the incident or incidents forming the basis of the order [specify beneficiary of treatment and coverage]_____;

❑ Pay counsel fees (and/or) any costs associated with the order to [specify person and terms]_____;

❑ Participate in an educational program, (and pay the costs thereof)[specify program] _____;

❑ Participate in a batterer's education program designed to help end violent behavior (and pay the costs thereof)[specify program]_____

❑ Pay to the petitioner/victim(s) restitution, as follows [specify terms]_____ (amount up to $1 0,000); and

[99] ❑ Observe such other conditions as are necessary to further the purposes of protection [specify conditions]_____;

It is further ordered that the above-named Defendant's/Respondent's license to carry, possess, repair, sell or otherwise dispose of a firearm or firearms, if any, pursuant to Penal Law §400.00, is hereby [13A] ❑ suspended or [13B] ❑revoked, (note: final order only) and/or [13C] ❑ the Defendant/Respondent shall remain ineligible to receive a firearm license during the period of this order. (Check **all** applicable boxes).

It is further ordered that this order of protection shall remain in effect until _____ (specify date).

The Domestic Relations Law provides that the presentation of a copy of this order of protection to a police officer or peace officer acting pursuant to his or her special duties shall authorize, and in some situations may require, such officer to arrest a person who is alleged to have violated the terms of the order and to bring him or her before the court to face whatever penalties may be imposed therefor.

Federal law provides that this order must be honored and enforced by state and tribal courts, including courts of a state, the District of Columbia, a commonwealth, territory or possession of the United States, if it is established that the person against whom the order is sought has or will be afforded reasonable notice and opportunity to be heard in accordance with state law sufficient to protect that person's rights (18 U.S.C. §§ 2265, 2266).

It is a federal offense to: cross state lines to violate an order of protection; cross state lines to engage in stalking, harassment or domestic violence; purchase, transfer, possess or receive a firearm following a conviction of a domestic violence misdemeanor involving the use or attempted use of physical force or a deadly weapon; or (for persons other than military or law enforcement officers while on duty) purchase, transport, possess or receive a firearm while an order of protection, issued after notice and an opportunity to be heard, prohibiting assault, harassment, threatening and/or stalking, is in effect (18 U.S.C. §§ 922(g)(8), 922(g)(9), 2261, 2261A, 2262).

Dated:

_____
JUSTICE
COURT (COURT SEAL)

Check If Applicable:

❑ **Personal Service Executed Date:** _____ **Time:** _____
❑ **Party Against Whom Order Issued Received Copy in Court Date:** _____.

ORI No: _____
Order No: _____
NYSID No: _____

At a _____ Term (IAS Part) _____ of the Supreme Court, State of New York, County of _____, at the Courthouse at _____, date _____

Form SC-1 11/99

PRESENT: Hon. _____

In the Matter of a Proceeding under Section (240) (252) of the Domestic Relations Law

TEMPORARY ORDER OF PROTECTION D.R.L. 240 & 252

Index No. _____

Plaintiff/Petitioner
Date of Birth:

v.

Defendant/Respondent
Date of Birth:

☐ **Ex parte**
☐ **Both Parties Present In Court**
(check one)

NOTICE: YOUR FAILURE TO OBEY THIS ORDER MAY SUBJECT YOU TO MANDATORY ARREST AND CRIMINAL PROSECUTION, WHICH MAY RESULT IN YOUR INCARCERATION FOR UP TO SEVEN YEARS FOR CRIMINAL CONTEMPT, AND/OR MAY SUBJECT YOU TO SUPREME COURT PROSECUTION AND PENALTIES FOR CONTEMPT OF COURT. IF YOU FAIL TO APPEAR IN COURT WHEN YOU ARE REQUIRED TO DO SO, THIS ORDER MAY BE EXTENDED IN YOUR ABSENCE AND CONTINUE IN EFFECT UNTIL YOU APPEAR IN COURT.

Whereas a determination has been made in accordance with section (240) (252) of the Domestic Relations Law,

Now, therefore, it is hereby ordered that [first name, middle initial and last name] _____ observe the following conditions of behavior:

(Check Applicable Paragraphs and Subparagraphs)

[01] ☐ Stay away from [A] ☐ [name(s) of protected persons] _____, and/or from the [B] ☐ home of _____, [C] ☐ school of _____, [D] ☐ business of _____, [E] ☐ place of employment of _____, [F] ☐ other [specify location] _____;

[14] ☐ Refrain from communication by mail or by telephone, e-mail, voice mail or other electronic means with [specify]: _____.

[02] ☐ Refrain from assault, stalking, harassment, menacing, reckless endangerment, disorderly conduct, intimidation, threats or any criminal offense against [specify party or members of party's family or household]: _____;

[11] ☐ Permit [specify individual] _____ to enter the residence during [specify date/time] _____ in order to remove personal belongings not in issue in litigation;

[04] ☐ Refrain from (indicate acts) _____ that create an unreasonable risk to the health, safety, or welfare of [specify child(ren)] _____;

[05] ☐ Permit [specify individual] _____, entitled by a court order or separation or other written agreement, to visit with [specify child(ren)] during the following periods of time [specify] _____; under the following terms and conditions [specify] _____;

Case Name: Order No: Docket No: SC-1 - Page 2

[07] ❑ Temporary Custody of [specify child(ren)] _____ shall be awarded to [specify individual] _____ under the following terms and conditions [specify]: _____ ;

[12] ❑ Surrender any and all firearms owned or possessed, including, but not limited to, the following: _____. Such surrender shall take place on or before [specify date/time]: _____ at: _____.

❑ Pay counsel fees and/or any costs associated with the order to [specify person and terms] _____ ;

[99] ❑ Observe such other conditions as are necessary to further the purposes of protection [specify conditions] _____

It is further ordered that the above-named Defendant's/Respondent's license to carry, possess, repair, sell or otherwise dispose of a firearm or firearms, if any, pursuant to Penal Law §400.00, is hereby [13A] ❑ suspended and/ or [13C] ❑ the Defendant/Respondent shall remain ineligible to receive a firearm license during the period of this order. (Check **all** applicable boxes).

It is further ordered that this order of protection shall remain in effect until (specify date)_____

The Domestic Relations Law provides that the presentation of a copy of this order of protection to a police officer or peace officer acting pursuant to his or her special duties shall authorize, and in some situations may require, such officer to arrest a person who is alleged to have violated the terms of the order and to bring him or her before the court to face whatever penalties may be imposed therefor.

Federal law provides that this order must be honored and enforced by state and tribal courts, including courts of a state, the District of Columbia, a commonwealth, territory or possession of the United States, if it is established that the person against whom the order is sought has or will be afforded reasonable notice and opportunity to be heard in accordance with state law sufficient to protect that person's rights (18 U.S.C.§§ 2265, 2266).

It is a federal offense to: cross state lines to violate an order of protection; cross state lines to engage in stalking, harassment or domestic violence; purchase, transfer, possess or receive a firearm following a conviction of a domestic violence misdemeanor involving the use or attempted use of physical force or a deadly weapon; or (for persons other than military or law enforcement officers while on duty) purchase, transport, possess or receive a firearm while an order of protection, issued after notice and an opportunity to be heard, prohibiting assault, harassment, threatening and/or stalking, is in effect (18 U.S.C. §§ 922(g)(8), 922(g)(9), 2261, 2261A, 2262).

Dated:

_____
JUSTICE
COURT (COURT SEAL)

Check If Applicable:

❑ **Personal Service Executed Date:** _____ **Time:** _____
❑ **Party Against Whom Order Issued Received Copy in Court Date:** _____.

WARRANT OF ARREST
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
PART 14

Index No.

In the Name of the People of the State of New York: To any Police Officer or Peace Officer in the State of New York:

In the case of:

_____, Plaintiff v. _____, Defendant

An Affidavit under Domestic Relations Law § 240(3)/252(3) Requesting Enforcement of an Order of Protection /Temporary Order of Protection having been filed in this Court, and alleging that
(Name) _____ violated the terms of that Order of Protection entered (date)_____, and the grounds specified in Domestic Relations Law §252(2)and (2-a) having been established, and this Court having found good cause to issue this warrant after hearing testimony in support of the violation application,

YOU ARE THEREFORE COMMANDED to arrest forthwith the above named person, and bring said person before this Court, to be dealt with according to the law.

YOU ARE FURTHER COMMANDED under the Domestic Relations Law, to bring before this Court the following Child or Children:
(Name and Date of Birth of Each Child) _____

_____

_____

The Protected Party (is) (is not) authorized to serve this Warrant.
This Warrant (may)(may not) be executed on a Sunday or at night.

Dated: _____

_____
Justice of the Supreme Court

BAIL IN THE SUM OF $ _____IS RECOMMENDED.

_____
Justice of the Supreme Court

Pursuant to Domestic Relations Law §252(7)(b), the Clerk of Court is directed to transmit information regarding this Warrant to the Statewide Registry of Orders of Protection and Warrants established pursuant to Executive Law §271-a.

Do Implied Contract Principles Or Fraud Theories Support Medicaid Suits Against Community Spouses?

By Marvin Rachlin

When a married man or woman needs care in a nursing home, the spouse who remains at home is required to sign a "spousal refusal" if he or she wishes to retain more than the couple's home and other assets up to a maximum of $84,120. Later, this "community spouse" may be sued by the local Medicaid agency under either implied contract principles or on the theory that the Debtor and Creditor Law prohibits the fraudulent conveyance of assets.

The validity of both approaches is questionable, given the way the Medicaid benefit system is now organized in New York and the implications that underlie the provisions of N.Y. Debtor and Creditor Law §§ 273 and 275.

Once a spousal refusal has been filed with a Medicaid application, the local agency that processes the application authorizes the start of payments to the nursing home for the institutionalized spouse, but the refusal provides the community spouse with no protection from litigation. He or she is liable to become the object of a lawsuit in which Medicaid contends that any assets beyond the allowable maximum of $84,120 should be used to reimburse Medicaid for payments made to the nursing home.

The target population consists of elderly individuals, already devastated by having a severely ill spouse and being separated by that spouse's institutionalization. Most have never been the subject of litigation in their lifetime, but now they are told that the government is suing them, they are terrified of impoverishment, and they are forced to pay legal fees to defend themselves.

Recoveries Based on Implied Contract

The theory of implied contract based on Social Services Law § 366(3)(a) (SSL) is the bedrock of the collection efforts by local Medicaid agencies such as the New York City Human Resources Administration. Statutory, regulatory and Medicaid application language also appear to support a premise of implied contract.[1] As with any contract issue, however, it is necessary to examine what obligation each party has agreed to accept or is statutorily required to perform. The inquiry must also explore the extent to which the parties have performed what was agreed upon, what is statutorily mandated, and whether the community spouse has actually agreed to repay the local Medicaid agency.[2]

When a local Medicaid agency engages in recovery litigation, it generally alleges that the implied contract is between the community spouse and the agency. It then alleges that the community spouse agreed to repay the local agency for medical care that it has provided for the institutional spouse.

For the local Medicaid agency to sue based on an implied contract, it must have a contractual responsibility to provide and/or pay for the medical care that it is seeking repayment for from the community spouse. To assess the viability of the theory, it is necessary to examine the function, responsibility and action of the local Medicaid agencies to determine whether they have truly performed a contractual obligation that entitles them to repayment.

Marvin Rachlin, of counsel to the law firm of Vincent J. Russo & Associates, P.C., of Westbury and Islandia since 1990, was chief counsel to the Nassau County Department of Social Services for more than 20 years. He was a member of the President's Council on Welfare Reform and served on the National Association of Counties, which was created by the governors of the 50 states to work on national legislation on issues involving welfare and Medicaid. He drafted New York State legislation and regulations regarding Medicaid and served on the New York State Governor's Task Force for Child Welfare Reform. He has lectured on elder law subjects before the National Academy of Elder Law Attorneys (NAELA) and numerous community and professional organizations. With Vincent J. Russo, he is the co-author of *New York Elder Law Practice* published by West Group. A graduate of Brooklyn College, he received his LL.B. from Brooklyn Law School.

Structure of the Program The legal basis of the Medicaid program is found in Title XIX of the Social Security Act.[3] The administration of the program, as defined by federal statutes and regulation, is the responsibility of the states,[4] although the statutes do permit a state to assign administration of the Medicaid program to its counties or local Medicaid agencies.[5]

At the inception of the Medicaid program in New York in 1966, the state opted for state supervision and local agency administration.[6] Despite the federal mandate for control of Medicaid by a single state agency, New York opted to divide the responsibility between the state Health Department and the state Department of Social Services (formerly the Welfare Department). The Health Department was responsible for setting reimbursement rates and medical standards for medical institutions such as hospitals and nursing homes. All other responsibilities were left to the Department of Social Services, including the role of supervising the administration of the Medicaid program by local agencies.

To address the basic question of whether the local agency can seek repayment from a community spouse for Medicaid payments, it becomes necessary to revisit the theory of implied contract.

The local agencies were given the responsibility to determine and recertify eligibility and to pay for all Medicaid services provided to eligible persons. Medical providers, including physicians, hospitals and nursing homes, billed the local agencies for services rendered and the local agencies paid those bills, subject to partial reimbursement from the state. In this context, local Medicaid agencies were authorized by statute to recoup their payments from legally responsible relatives in the community, and this arrangement led to the theory of implied contract.

Changes in Roles and Responsibilities Initially, the local Medicaid agency was responsible for 25% of the medical bill, although it first paid 100% and was then reimbursed for 75% of the amount by the state. New York State, in turn, billed the federal government for 50% of the medical bill. Within that structure, it is easy to understand how a theory of implied contract would justify recovery of medical bills paid by the local Medicaid agencies.

Although the statutory framework for recoupment of Medicaid payments by the local Medicaid agencies never changed, the role and responsibility of receiving bills and paying medical providers for services provided to Medicaid recipients was dramatically changed. The New York State Department of Social Services developed the Medicaid Management Information System and assumed the responsibility for all Medicaid payments.[7]

From that point forward, local Medicaid agencies neither received nor paid any Medicaid bills, nor did local Medicaid agencies bill the state to be reimbursed for the non-local share of the expenses. Instead, the state paid the bills and sought reimbursement for 25% of the expense from the local Medicaid agencies.

Having relieved the local agencies of their responsibilities under the Medicaid program, the state then embarked on a program to relieve local Medicaid agencies of their fiscal responsibility for the program.[8] Although the plan was to totally eliminate the local agency's fiscal responsibility for Medicaid, state fiscal problems interrupted the process, which was never completed even after the fiscal crisis ended. What was accomplished was the reduction of the local agency's fiscal responsibility to the state to 21% of the payment to nursing homes after the state deducted the 50% reimbursement provided by the federal government. The net responsibility of the local agencies to the state thus dropped to 9% of the total amount paid.[9]

In 1996, the joint administration of the Medicaid program by the New York State Department of Health and the Department of Social Services was ended and the program became the sole responsibility of the Department of Health.[10] Now not only does the Department of Health establish the Medicaid payment rates, it also receives the bills and pays the medical providers.

Current Role of the Local Agencies The role of the local Medicaid agencies in administering the Medicaid program is now limited to establishing initial and continuing Medicaid eligibility for persons within the geographic borders of the local agency and recording the eligibility information into a state computer system for use by the state Department of Health. Any issue or dispute about the correctness of a local agency's eligibility determination is appealed to the Department of Health, and the department's decision is binding on the local agency.[11]

To address the basic question of whether the local Medicaid agency can seek repayment from a community spouse for Medicaid payments made on behalf of an institutional spouse, it now becomes necessary to revisit the theory of implied contract.

The local Medicaid agency no longer performs the payment functions that gave rise to the implied contract theory. Even the statutory relationship to New York

State no longer exists. Because even an implied contract requires performance prior to a claim, and because repayment actions are brought by local Medicaid agencies no longer involved in the payment system, there is no basis for a recovery, actual or implied. The statutory basis for the implied contract has been removed, leaving behind only unsupported implied contract theory. If a community spouse is subject to the terms of an implied contract, that contract is not with the local Medicaid agency, and the local agency is not a proper party to enforce it.

There are several repayment statutes in the Social Services Law. Given the lack of any connection between the agencies and the Medicaid payment system, there is no basis for any repayment effort by the local Medicaid agencies.[12]

The structure of Medicaid is very different today than it was when local Medicaid agencies first paid the entire nursing home bill and then were reimbursed for 75% of what they paid.

The Medicaid repayment actions by local agencies are based upon an administrative structure that has not existed for many years. Having lost the ability to make Medicaid payments, local Medicaid agencies also lost the ability to recoup those payments.

It is time to revisit the existing statutory structure of the role of the local Medicaid agency as a provider of Medicaid services and a creditor of Medicaid recipients and their responsible relatives, which has been taken for granted for too many years.

Fraudulent Conveyance Theories

Any proceeding pursuant to the Debtor and Creditor Law is based on the underlying premise that there is a creditor and a debtor. When the current structure of Medicaid in New York State is examined, the question that arises is whether the local Medicaid agency is a creditor authorized to pursue recoveries against a community spouse.

As indicated above, the structure of Medicaid in New York State is very different today than it is was when local Medicaid agencies first paid the entire nursing home bill and then were reimbursed for 75% of what they paid. At that time, the local Medicaid agency was truly a creditor, paying the bills on behalf of eligible individuals, subject to reimbursement by the state. Now, however, the state pays the bill and seeks reimbursement for 9% of the amount from the local Medicaid agencies which are now debtors.

No Standing as Creditor Because the role of the local Medicaid agency has been changed from creditor to debtor, recovery actions for Medicaid payments made pursuant to the Debtor and Creditor Law are no longer viable. The local Medicaid agencies have now paid none of the medical bills that are the subject of the proceeding and are now debtors of the state regarding such payments. They have no standing as creditors pursuant to Debtor and Creditor Law § 275, which they often rely on when seeking to recover from community spouses who previously executed spousal refusals.

A first reading of the statute leaves the impression that it might be well suited for Medicaid recoveries. It relates to current gifts that render an individual unable to pay future debts. A closer analysis reveals, however, that this section has no application to transfers by a community spouse.

Under the applicable federal law,[13] Medicaid recovery actions may be maintained only against assets in excess of the Community Spouse Resource Allowance (CSRA). (*See the box on page 35.*) If a community spouse gives away any assets in excess of the CSRA amount, the result is the elimination of the liability to Medicaid. It cannot be said therefore, that such transfers will render the individual incapable of paying future debts, because no future Medicaid debts will occur in the absence of excess resources.

Debtor and Creditor Law § 275 may apply to many debtor-creditor situations, but it cannot be applied by the local Medicaid agency against a community spouse whose gifts lowered the assets total below the CSRA amount, the point at which assets are exempt from claims by Medicaid.

Debtor and Creditor Law § 273 is equally ineffective against community spouses. That section, also relied upon by local Medicaid agencies in actions against community spouses, refers to transfers that render the transferor insolvent. Debtor and Creditor Law § 271 defines insolvency as a level of assets below what will be required to pay probable liability on existing debts. Unlike § 275, § 273 relates only to existing and not to future debts. Statutory insolvency is tied directly to the debtor's liability. When a community spouse transfers assets below the CSRA, the result is the absence of liability. Such transfers do not render the community spouse insolvent according to the statute, and therefore cannot be subject to § 273.

In the traditional debtor-creditor situation, gifts by the debtor reduce or eliminate the debtor's ability to pay, but they have no effect on the debtor's liability to pay, thereby creating a creditor's right to pursue remedies available in the Debtor and Creditor Law. In the

Background on Medicaid Rules

The rules that govern financial eligibility for Medicaid assistance in paying nursing home bills are rooted in provisions of the Medicare Catastrophic Coverage Act (MCCA) passed by Congress in 1988. In addition to expanding Medicare to cover some additional services, the act changed the eligibility rules for Medicaid, recognizing the plight of "community spouses" who remain at home when a husband or wife enters a nursing home.

A key element of the changes was the concept of the Community Spouse Resource Allowance (CSRA), a level of assets (cash and/or investments) that the community spouse could hold in addition to the right to retain the family home. The CSRA was initially set at $60,000, but it now ranges from $74,820 to $87,000 depending on the couple's asset level when the need for nursing home care arose.[1] If a couple has $174,000 or more, the community spouse can retain the $87,000 maximum. The CSRA continues to be half when assets are less than $168,240, but after the asset total reaches $149,640, the CSRA never goes below $74,820. In addition, the community spouse may receive income of $2,175 per month.

Many community spouses find that the CSRA is not adequate to provide reasonable financial security. In the typical instance, a wife may be relying on $150,000 in assets invested at 4% to provide $6,000 in yearly income or $500 per month. That $500, together with perhaps $1,000 in Social Security for her husband and $675 in Social Security payments to her, leaves her with income of $2,175 a month. But when her husband dies, she becomes eligible to receive up to his $1,000 Social Security payment but loses her own of $675, her total income will drop to $1,500 per month. If, to qualify her husband for Medicaid, she reduced her resources to $75,000, she would have only $250 monthly in interest, and her income thus would be $1,850 per month while her husband remained alive and $1,250 after his death.

Faced with this type of financial dilemma, the wife typically turns to the "spousal refusal" process described in the main article and hopes that she will not be the subject of a Medicaid suit seeking to obtain $75,000 of the $150,000 that remains in her name.

The MCCA also governs the "transfer penalty" rules that apply when a Medicaid application is made.[2] For a resident of New York City, for every $7,517 that the couple has given away, the Medicaid applicant is ineligible for coverage for one month starting the first day of the month after the month in which the gift was made. A gift of $75,170 would make someone ineligible for institutional Medicaid for 10 months; but if it was given 10 months ago and the person was otherwise financially eligible for Medicaid, coverage could start immediately. Thus a gift of $75,170 in January would trigger a penalty period that would start February 1 and end November 30. The figure used to compute the penalty period ranges from $4,837 in the counties surrounding Syracuse to $7,840 in Nassau and Suffolk Counties.[3]

1. New York State Administrative Directive 96 ADM-11.
2. SSL § 366(5)(d).
3. *See* New York Elder Law Practice § 8:44. There are also periodic bulletins issued by the state Department of Health.

case of a community spouse, however, transfers reduce or eliminate the liability to pay, resulting in no right for the creditor to use the Debtor and Creditor Law, assuming there was any liability previously.

Medicaid Planning as a Right The absolute right to implement Medicaid planning has been clearly established by appellate courts in New York State. In *In re John XX*,[14] the Appellate Division stated that "current law rewards prudent Medicaid planning" and rejected Medicaid's argument that Medicaid planning transfers were fraudulent. In *In re Shah*,[15] the Court of Appeals stated that an individual has the absolute right to give assets away for any reason or for no reason. The absolute right to transfer assets to implement Medicaid planning has been guaranteed to individuals with capacity and on behalf of individuals lacking capacity.

There is thus no basis in statute, regulation or judicial decision that would limit or deny this right to a class of individuals solely on the basis that they have a spouse on Medicaid in a nursing home. Having experienced the value of Medicaid planning for the institutional spouse, the community spouse knows the need to do such planning for her/himself. There is no legal basis for distinguishing community spouses from all other members of our society and denying them the right to implement Medicaid planning.

To claim in a recovery action that Medicaid planning by a community spouse violates the Debtor and Creditor Law is to deny the right of an individual to do such planning. When a community spouse transfers assets without receiving consideration, such gifts are subject to all of Medicaid's "transfer penalty" rules.[16] Such gifts make the community spouse ineligible for nursing home care under the Medicaid program for a period of time that is based on the value of the assets transferred and the region where the individual lives.[17] There is no basis for Medicaid to impose an additional penalty on the community spouse by invoking the provisions of the Debtor and Creditor Law; it may impose no penalties beyond those contained in its rules.[18]

If Medicaid were not a governmental program, it could be stopped from initiating the proceedings currently favored by certain local Medicaid agencies.

When local Medicaid agencies initiate recovery actions against community spouses pursuant to the Debtor and Creditor Law, they are inappropriately seeking to impose additional penalties on transfers by community spouses. It would be difficult to imagine a debtor-creditor situation in which the creditor establishes rules by which the debtor can dispose of assets, and then claims that when made such transfers were fraudulent to the creditor pursuant to the Debtor and Creditor Law. Yet this is the scenario that arises when local Medicaid agencies initiate proceedings against community spouses pursuant to the Debtor and Creditor Law.

New York State has taken the position that transfers by a community spouse after the institutional spouse has been on Medicaid in a nursing home for one month or longer will not affect the eligibility of the institutional spouse.[19] The directive accomplishes two separate goals. It recognizes the community spouse's inalienable right to transfer assets, and it then goes on to insulate the institutional spouse from any penalty as a result of such transfers. For Medicaid to claim that those very transfers were fraudulent and in violation of the Debtor and Creditor Law defies logic, lacks credibility and fails to meet the criteria of the statute upon which Medicaid relies. Medicaid should not assume the dual role of enabler and victim, yet this is exactly what it attempts when it initiates such claims.

Given these circumstances, if Medicaid were not a governmental program, it could be stopped from initiating the proceedings currently favored by certain local Medicaid agencies. Although the Medicaid program may cloak itself with immunity from a defense of estoppel, it cannot avoid its scrutiny of its dual role regarding transfers by community spouses.

Conclusion

This article has been limited to recovery actions against "excess resources" (resources beyond the CSRA amounts) that are based on implied contract and/or the Debtor and Creditor Law. This should encompass the vast majority of recovery actions by local Medicaid agencies.

When confronted with a Medicaid recovery claim, attorneys should avoid any assumption that the community spouse is liable and that the local Medicaid agency can successfully sue for payments based upon that liability.

Medicaid is an extremely complicated and an ever-changing program by virtue of federal and state legislation, regulation and judicial decisions. By keeping current and by being innovative, community spouses will be better represented and better protected.

In closing, I pose the question of what would motivate a local Medicaid agency to sue elderly spouses when the actual cost of such litigation is likely to equal or exceed any recovery.

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1. SSL § 366(3); N.Y. Comp. Code R. & Regs. tit. 18, § 360-4.10 ("N.Y.C.R.R.").
2. "Repay" is defined as "To pay back; refund; restore; return." Black's Law Dictionary 1299 (6th ed. 1990).
3. 42 U.S.C. § 1396-1396v.
4. *See id*.
5. *See* 42 U.S.C. § 1396a.
6. SSL § 363-a.
7. SSL § 367-b; 18 N.Y.C.R.R. 540.6.
8. SSL § 368-a; 18 N.Y.C.R.R. 635.1(b)(7).
9. SSL § 368-a.
10. SSL § 363-a.
11. SSL § 22.
12. SSL §§ 101, 102, 104, 366(3)(a), (c), 369(3).
13. 42 U.S.C. § 1396p.
14. 226 A.D.2d 79, 652 N.Y.S.2d 329 (3d Dep't 1996).
15. 95 N.Y.2d 148, 733, 711 N.Y.S.2d 824 (2000).
16. SSL § 366(5)(d).
17. *See* New York Elder Law Practice § 8:44. There are also periodic bulletins issued by the state Department of Health.
18. *In re John XX*, 226 A.D.2d 79.
19. New York State Administrative Directive 96 ADM-11.

Notable Changes Affecting Estates In the Year 2000 Reformed Wills and Trusts for Tax Purposes

BY JOSHUA S. RUBENSTEIN

The 2000 Legislative Session brought a modest number of changes in the laws affecting estate planning and administration, most notably in the area of reforming wills and trusts for tax purposes. A review of the changes follows.

Estates, Powers and Trusts Law

1. Estates, Powers and Trusts Law § 2-1.7 has been amended to establish a presumption that where a person's absence follows exposure to a specific peril, a presumption of death may be made prior to the passage of three years from the date of such absence. The amendment also provides that where there is no known exposure to a specific peril, a presumption of death may be made prior to three years from the date of absence where clear and convincing evidence demonstrates that death is the only reasonable explanation for the absence. The change applies to proceedings commenced on or after August 30, 2000.[1]

2. A new EPTL § 2-1.12 has been added, to provide that all references in wills and trusts to the federal credit for state death taxes contained in a credit shelter formula bequest be deemed deleted unless the formula has been amended on or after February 1, 2000, or the will contains a specific indication to take the federal credit for state death taxes into account for non-tax reasons. The change applies to estates of decedents dying after January 31, 2000.[2]

3. EPTL § 8-1.8 has been amended to include a new paragraph (b-1), providing that trusts that are private foundations within the meaning of Internal Revenue Code § 509 are required to publish notice of the availability for public inspection of the private foundation's annual return, filed with the Internal Revenue Service. The change took effect January 1, 2001.[3]

4. A new EPTL § 11-1.11 has been added, permitting the non-judicial reformation of trusts by trustees for certain tax purposes. Under the section, unless expressly prohibited by the trust instrument, trustees may amend administrative and other provisions of the trust that have no significant dispositive effect (defined as a variance of no more than 5% in the actuarial values of the pre- and post-amendment interests) to prevent the disallowance of a charitable deduction, or a marital deduction for a non-citizen spouse, or treatment for purposes of the gift tax as a qualified personal residence trust, or treatment as a charitable remainder trust. To be effective, such an amendment must be acknowledged, signed by all of the trustees who are not the creator or a beneficiary, and filed in the court having jurisdiction over the instrument, after 30 days' prior notice of the right to object has been given to all persons interested in the trust (taking into account virtual representation). The change took effect immediately.[4]

Surrogate's Court Procedure Act

5. SCPA § 103 has been amended by adding two new subdivisions, 35-a and 37-a, which define mailing by express mail and by special mail service, and by amending subdivisions 35, 36 and 37 to correct the references to the U.S. Postal Service. The changes took effect on November 1, 2000.[5]

6. SCPA § 202-d has been amended to continue statutory requirements for publication of regulatory agendas in the State Register until December 31, 2002, and makes these documents more accessible by requiring the posting of regulatory agendas on agency web sites. These changes took effect immediately.[6]

7. SCPA § 307 has been amended to provide that service of process upon nondomiciliaries may be made by registered or certified mail or by special mail service without court order. These changes took effect November 1, 2000.[7]

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8. SCPA § 308 has been amended to correct the cross-reference for service upon a consular official. The change took effect November 1, 2000.[8]

9. SCPA § 309 has been amended to provide that service by special mail service is complete upon receipt. The change took effect November 1, 2000.[9]

SCPA § 1708 has been amended to authorize guardians of infants' funds to invest those funds in accordance with the Prudent Investor Act without subjecting the funds to the cost of a bond.

10. SCPA § 1120 has been amended to correct the cross-reference for service upon an alien. The change took effect November 1, 2000.[10]

11. SCPA § 1707 has been amended to permit the court to issue temporary letters of guardianship for an infant's person or property or both. The change took effect November 19, 2000.[11]

12. SCPA § 1708 has been amended to authorize guardians of infants' funds to invest those funds in accordance with the Prudent Investor Act[12] without subjecting the infants' funds to the cost of a bond. The amendment provides that a bond may be dispensed with wholly or partly when it authorizes the guardian to invest guardianship funds pursuant to an investment advisory agreement with a bank, trust company, brokerage house or other financial services entity acceptable to the court. The change took effect immediately.[13]

13. SCPA § 1726(1)(c) has been amended to add a "progressively chronic" or "irreversibly fatal" illness to the definition of "debilitation." The change took effect November 19, 2000.[14]

14. SCPA § 1726(3) has been amended to permit a legal custodian and, if the parent, legal guardian or legal custodian cannot be located, the primary caretaker of an infant to petition for the appointment of a standby guardian. The change took effect November 19, 2000.[15]

15. SCPA § 1726(4) has been amended to permit a legal custodian and, if the parent, legal guardian or legal custodian cannot be located, the primary caretaker of an infant to designate a standby guardian by written designation. The change took effect November 19, 2000.[16]

16. SCPA § 1726(8) has been amended to require the appointment or designation of a standby guardian to be delivered to the infant's legal custodian or primary caretaker. The change took effect November 19, 2000.[17]

Education Law

17. Education Law § 695-e has been amended to provide that family tuition account owners may designate contingent account owners in the event of the death of the account owner. The provision includes a person who enters into agreement as a fiduciary on behalf of a trust within the definition of "account owner." The change took effect immediately.[18]

General Business Law

18. General Business Law § 453 has been amended to provide that monies paid in advance for funeral merchandise or services may be deposited in trust in a credit union or federal credit union, in addition to other banking institutions. The change took effect immediately.[19]

Insurance Law

19. Insurance Law § 1113 has been amended by adding a subpart to clarify that a policyholder certified as chronically ill can qualify for acceleration of death benefits. Loss ratio requirements for life insurance policies that allow the acceleration of death benefits to pay for long-term care services have been eliminated. The change took effect on January 2, 2001.[20]

Mental Hygiene Law

20. Mental Hygiene Law § 15.01 has been amended to provide that any references in article 15 to mentally retarded persons shall be deemed to apply to persons who are developmentally disabled. The change took effect immediately.[21]

21. Chapter 744 of the Laws of 1992 has been amended to provide that the expiration of certain provisions of law establishing the authority of the commission on quality of care for the mentally disabled to contract with community dispute resolution centers for the provision of administrative support and assistance for the operation of the surrogate decision-making program has been extended until June 30, 2005. The change took effect immediately.[22]

Not-For-Profit Corporation Law

22. Not-for-Profit Corporation Law § 406 has been amended to include a new paragraph (b-1), providing that domestic not-for-profit corporations that are private foundations within the meaning of § 509 of the Internal Revenue Code are required to publish notice of the availability for public inspection of the private foundation's annual return, filed with the Internal Revenue Service. The change took effect January 1, 2001.[23]

Retirement and Social Security Law

23. Retirement and Social Security Law § 448-a has been amended to provide that certain death benefits will apply to all new members of a public retirement system and to allow Tier 2, 3 and 4 members to be cov-

ered by the most advantageous death benefit. The change took effect immediately.[24]

1. Chapter 413 of the Laws of 2000, S6918, A10421, signed August 30, 2000.
2. Chapter 513 of the Laws of 2000, S6886, A10431, signed October 4, 2000.
3. Chapter 242 of the Laws of 2000, S7256, A10301, signed August 16, 2000.
4. Chapter 267 of the Laws of 2000, S3393-C, A7265-D, signed August 16, 2000.
5. Chapter 355 of the Laws of 2000, S6885, A9003, signed August 23, 2000.
6. Chapter 343 of the Laws of 2000, S8003-A, A11081-A, signed August 23, 2000.
7. Chapter 355 of the Laws of 2000, S6885, A9003, signed August 23, 2000.
8. Chapter 355 of the Laws of 2000, S6885, A9003, signed August 23, 2000.
9. Chapter 355 of the Laws of 2000, S6885, A9003, signed August 23, 2000.
10. Chapter 355 of the Laws of 2000, S6885, A9003, signed August 23, 2000.
11. Chapter 477 of the Laws of 2000, S5170-A, A7646-A, signed September 20, 2000.
12. Estate, Powers and Trusts Law § 11-2.3.
13. Chapter 43 of the Laws of 2000, S6238-A, A4758-A, signed June 6, 2000.
14. Chapter 477 of the Laws of 2000, S5170-A, A7646-A, signed September 20, 2000.
15. Chapter 477 of the Laws of 2000, S5170-A, A7646-A, signed September 20, 2000.
16. Chapter 477 of the Laws of 2000, S5170-A, A7646-A, signed September 20, 2000.
17. Chapter 477 of the Laws of 2000, S5170-A, A7646-A, signed September 20, 2000.
18. Chapter 535 of the Laws of 2000, S8144, A8834, signed October 4, 2000.
19. Chapter 353 of the Laws of 2000, S4744, A7248, signed August 23, 2000.
20. Chapter 537 of the Laws of 2000, S6680-B, A9597-B, signed October 4, 2000.
21. Chapter 78 of the Laws of 2000, S6919, A11079, signed June 23, 2000.
22. Chapter 94 of the Laws of 2000, S8038, A11324, signed June 23, 2000.
23. Chapter 242 of the Laws of 2000, S7256, A10301, signed August 16, 2000.
24. Chapter 554 of the Laws of 2000, S8131, A11414, signed October 31, 2000.

Judicial Departments Differ On Application of Spoliation Motion When Key Evidence Is Destroyed

BY JOSEPH B. RIZZO

Imagine representing a client in a big money civil lawsuit—only to find that before the lawsuit even was begun the adverse party had disposed of the key piece of physical evidence needed to establish your case. The act appears to have been negligent, rather than willful, in nature. What tools are available to seek justice for your client under these circumstances?

In recent years, some practitioners have dealt with an adversary's loss or destruction of critical evidence by means of the so-called "spoliation motion," an extremely powerful but often misunderstood and overlooked device that can turn a seemingly lost case into a winner. The motion has found favor in the First and Second Departments, but not in the Third and Fourth, and the Court of Appeals has not yet spoken. This article describes the nature of the application and how it has been treated in the Appellate Division.

The Motion and CPLR 3126 Remedies

The spoliation motion seeks summary judgment against a party who destroys or loses evidence, either willfully or negligently, while having actual or constructive notice of its importance to the litigation. The heart of the motion is the concept that once litigation is *foreseeable*, a duty arises to "aggressively protect the integrity" of evidentiary materials.[1]

Whether a party breached that duty is determined by measuring its conduct against an objective standard of reasonableness, a test illustrated by the Appellate Division, First Department, in the oft-cited cases of *Kirkland v. New York City Housing Authority*[2] and *Squitieri v. City of New York*.[3] If a breach occurred, the court can impose summary judgment against the offending party as a "matter of elementary fairness."[4]

This approach represents a somewhat radical departure from prior case law, which had addressed spoliation in the context of discovery sanctions available under CPLR 3126.[5] In the traditional scenario, a party's attorney serves a discovery notice, or obtains a court order, directing an opposing party to produce certain evidence for inspection. Counsel then finds that the evidence sought has been lost or destroyed. CPLR 3126 provides for various sanctions based upon a party's failure to produce the material requested, which increase in severity in proportion to the egregiousness of the loss or destruction.[6] The courts have long held, however, that the most drastic sanctions of preclusion (CPLR 3126(2)) and striking of pleadings (CPLR 3126(3)) are to be imposed only upon a showing of willful or contumacious behavior.[7]

The imposition of the most significant CPLR 3126 sanctions is thus (1) based on the assumption that the destruction or loss of evidence occurs during litigation, and (2) turns upon a determination of the offending party's willfulness or disobedience of court directions in failing to produce that evidence. Clearly, CPLR 3126 would be wholly inadequate to remedy the prejudice to the offended party in the circumstances mentioned at the outset of this article—a negligent loss of crucial evidence that occurred before litigation began.

Expanding the remedy to include a less-than-willful spoliation, even if it takes place prior to commencement of suit, makes intuitive sense, "since a party's negligent loss of evidence can be just as fatal" to an adversary's case as can willful or bad faith destruction.[8] However, acceptance has not been uniform in the Appellate Division.

The First and Second Departments

The approach taken in *Kirkland* and *Squitieri* reflected the developing acceptance of the motion by the trial and appellate courts of the First Department. An early illus-

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tration is found in *Interested Underwriters at Lloyd's v. Rheem Mfg. Co.*,[9] a case that arose in the Supreme Court, New York County, in which Justice Miller dismissed a plaintiff's complaint because he found that irreparable prejudice had been sustained by the defendant. This prejudice had resulted from the inexcusable, though not willful, destruction of critical evidence by the plaintiff's expert before that evidence could be examined by the defendant.

The *Interested Underwriters* holding was expressly adopted by the First Department in *Mudge, Rose, Guthrie, Alexander & Ferdon v. Penguin Air Conditioning Corp.*[10] where summary judgment was deemed to be an appropriate remedy for a plaintiff's negligent loss of evidence. *Mudge, Rose* was a property subrogation case involving the spoliation of a key component to an air conditioning system. When the system failed, a tremendous volume of water poured into the computer record room of the subrogor's law offices (undoubtedly, a nightmare we can all appreciate). The subject component was a reducer bushing that allegedly became stripped because of the negligence of only the defendant's maintenance personnel. During the litigation, the subject reducer bushing was innocently lost while being shipped from the plaintiff's expert to the plaintiff's attorney. It is undeniable that the defendants were irreparably prejudiced by the spoliation, having been denied the full and fair opportunity to examine this key piece of evidence. However, the spoliation was devoid of willful or contumacious conduct, so that neither the striking of the plaintiff's pleading nor even a preclusion order was technically warranted under CPLR 3126.[11] If the First Department had not applied spoliation motion principles to the facts of *Mudge, Rose*, no effective sanction would have been available, and the defendants likely would have been rendered helpless at trial due to the plaintiff's fortuitous loss of evidence.[12]

Expanding the remedy to include a less-than-willful spoliation, even if it takes place prior to commencement of suit, makes intuitive sense.

In the key *Kirkland* decision, the First Department built upon these earlier cases. It reversed the ruling of the trial court, and awarded summary judgment dismissing a third-party complaint based upon destruction of evidence that had been clearly negligent in nature. It did so because this was the sole means of curing the "extreme prejudice" facing the third-party defendant.[13] Later, in *Squitieri*, the court reiterated its acceptance of the remedy as follows:

> In *Kirkland* . . . we noted that numerous State and Federal courts "have found dismissal warranted when discovery orders were not violated, and even when the evidence was destroyed prior to the action being filed . . . notwithstanding that the destruction was not malicious . . . or in bad faith" [citations omitted].[14]

Such language was undoubtedly meant, at least in part, to point out the inadequacies of CPLR 3126 as means of combating spoliation in the real world. Further, *Kirkland* and *Squitieri* must be interpreted as an attempt by the First Department to expand judicial discretion with regard to the imposition of spoliation sanctions.

Following the First Department's lead with vigor, the Second Department crystallized the distinction between the spoliation motion and the traditional CPLR 3126 discovery motion in *DiDomenico v. C&S Aeromatik Supplies, Inc.*[15]:

> Separate and apart from CPLR 3126 sanctions is the evolving rule that a spoliator of key physical evidence is properly punished by striking of its pleading. This sanction has been applied even if the destruction occurred through negligence rather than willfulness, and even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation.[16]

In *DiDomenico*, an employee of a parcel delivery firm was injured when a box he was moving collapsed, spraying him with a caustic liquid stored inside. As plaintiff, he brought suit against the shipper of the box which sounded in negligence. He later amended his complaint to assert a direct cause of action against his employer, sounding in the negligent or intentional impairment of the ability to sue a third party. After exhaustive efforts to obtain discovery from the employer (both before and after the institution of the direct claim against it), the plaintiff learned that key evidence, including the box itself, had been destroyed by the employer. The plaintiff then brought a hybrid motion for an order striking the employer's answer on traditional CPLR 3126(3) grounds, as well as for summary judgment based upon spoliation. The shipper also cross-moved, solely in the form of a spoliation motion. The trial court denied both prongs of the plaintiff's motion and the shipper's cross-motion.

On appeal, the Second Department reversed. It struck the employer's answer as a CPLR 3126 sanction (based upon the employer's willful failure to provide discovery), but also awarded summary judgment in favor of both moving parties based upon spoliation. Summary judgment was granted not because of the willfulness of the employer's conduct (though it found

Attitudes Toward Spoliation

"Spoliation" is defined as the destruction of evidence.[1] *Black's Law Dictionary*, 5th Edition, expressly designates spoliation as an obstruction of justice. Spoliation is considered to be so serious that one New York appellate court has stated that it "should be rendered costly enough an enterprise that it will not be undertaken."[2]

Several jurisdictions, including California, Florida and Alaska, recognize spoliation as an independent actionable tort.[3]

1. *Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170, 666 N.Y.S.2d 609 (1st Dep't 1997), citing Hoenig, *Spoliation of Evidence: Preserving the Crown Jewels* N.Y.L.J. 12/13/88, p.3, and the citations therein.
2. *Id.* at 174.
3. *See Weigl v. Quincy Specialties Co.*, 158 Misc. 2d 753, 601 N.Y.S.2d 774 (Sup. Ct., N.Y. Co. 1993).

this to be so), but rather because the spoliation left the movants "prejudicially bereft of appropriate means to either present or confront a claim with incisive evidence."[17] This is, of course, the same concept previously endorsed by the First Department.

The Third and Fourth Departments

As is indicated above, the First and Second Departments have expressly recognized the viability of the spoliation motion. Other courts of the state, however, have not done so.

The Third Department seems to be struggling with, or perhaps simply resisting, the distinction between CPLR 3126 remedies and summary judgment based on spoliation. For example, the case of *Puccia v. Farley*,[18] although couched in terms of a traditional CPLR 3126 analysis, is permeated with the First Department's spoliation motion principles. Nevertheless, in affirming the trial court's dismissal of the plaintiff's complaint as a CPLR 3126 sanction, it did not perform any significant analysis of the willfulness of the spoliation. It thus is unclear whether *Puccia* demonstrates a lack of recognition of the spoliation motion, another attempt to expand the parameters of judicial discretion under CPLR 3126, or mere uncertainty.

The Fourth Department apparently is less ambivalent. In *Conderman v. Rochester Gas & Electric Corp.*,[19] the court refused even to acknowledge the existence of the spoliation motion. In *Conderman*, the plaintiffs were injured when telephone poles fell on the vehicles they were driving during a storm. The injured plaintiffs obtained a pre-litigation preservation and discovery order within 18 days of the incident, only to find that the defendant had discarded the poles within 24 hours of that incident, purportedly as part of its standard clean-up procedures. In reviewing the plaintiff's spoliation motion, the trial court found that the defendant's risk management personnel were present at the accident site in furtherance of, *inter alia*, a claims investigation, but took no steps to preserve the fallen poles.

The trial court also determined that before the spoliation occurred the defendant had constructive knowledge that the fallen poles would be necessary to a future litigation. Indeed, the trial court stated that the defendant's conduct evinced a "high degree of awareness of the likelihood" of a suit.[20] Despite these findings, the trial court resisted awarding summary judgment, instead fashioning various alternative sanctions. On appeal, the Fourth Department not only refused to grant summary judgment; it modified the trial court's order to deny the plaintiffs' motion in its entirety, apparently clinging to the express parameters of CPLR 3126.

Debate Among the Departments

The *Conderman* holding creates a debate among the departments of the Appellate Division on a number of levels. First, the Fourth Department was apparently averse to imposing sanctions of any kind in the absence of willfulness on the part of the spoliator, whereas the First and Second Departments have clearly found mere negligence to be sufficient to grant summary judgment.

In addition, the Fourth Department's analysis in *Conderman* turned, in large part, upon the fact that the spoliation occurred *prior* to the litigation.[21] The First and Second Departments, however, have stated (albeit in *dicta*) that summary judgment is warranted even where the spoliation takes place prior to commencement of suit, so long as the spoliator was aware at the time that the evidence might be needed for future litigation.[22] The latter view appears to be based on the realities of human nature; one can easily argue that a standard dependent on whether a lawsuit or formal claim has been commenced does little more than encourage a tortfeasor to discard evidence swiftly, before the potential claimant can act.

Finally, the Fourth Department decided *Conderman*, at least in part, on the basis that the spoliation occurred at the hands of a *defendant*. However, in *DiDomenico* the Second Department granted summary judgment in favor of the plaintiff as a sanction against a defendant, and in so doing eliminated any such distinction. It observed that spoliation can destroy a "party's ability to *present a case* or a defense."[23] (Emphasis added.) These

contradictory views may very well require resolution by the Court of Appeals.

Alternative: Direct Claim of Impairment

Practitioners, especially those whose cases will be bound by the holdings of the Third and Fourth Departments, should also consider seeking relief by way of direct causes of action against spoliators sounding in the negligent or intentional impairment of the ability to sue a third party.[24] As was the case in the *DiDomenico* matter, this theory arises almost exclusively in the employee/employer context, but it still may be persuasive where spoliation of evidence is involved.

The analysis would be virtually identical to that of the spoliation motion. For example, suppose that A was injured by an allegedly defective instrumentality owned by B, but that the instrumentality had been manufactured, serviced and maintained by C, who therefore would likely become A's principal target.

Further suppose that B, with knowledge that A likely would make a claim, discarded the subject instrumentality before A could inspect it. A's attorney should consider that under these circumstances B owed a duty to A to protect the instrumentality aggressively, and that B breached that duty. By pursuing, among other things, a direct cause of action against B (the spoliator) sounding in negligent or intentional impairment of A's rights as against C, the fundamentals and rationale of the spoliation motion are brought to the forefront of the litigation.

Conclusion

Regardless of how it occurred, spoliation of evidence should be carefully examined on a case-by-case basis, because it goes to the heart of tort law. If the spoliation appears to have been unreasonable and fundamentally unfair under the circumstances presented, a sanction that remedies the resulting prejudice should be aggressively pursued. Notwithstanding the absence of a judicial consensus or legislative action regarding summary disposition as this remedy, lesser CPLR 3126 sanctions should be left as alternatively requested relief only. The spoliation motion, or a direct claim based on its principles, is far better equipped for the task.

Legislative action may be the ultimate solution to the uncertainties that now exist in this area. Spoliation could be established as an independent tort cause of action; CPLR 3126 might be revised to acknowledge the harm done by unintentional loss or destruction of evidence; or a new a new evidentiary provision could be added to CPLR article 45 dedicated to spoliation remedies.

1. *Interested Underwriters Underwriters at Lloyd's v. Rheem Mfg. Co.*, N.Y.L.J., May 12, 1994, at p. 28.
2. 236 A.D.2d 170, 666 N.Y.S.2d 609 (1st Dep't 1997).
3. 248 A.D.2d 201, 669 N.Y.S.2d 589 (1st Dep't 1998).
4. *Kirkland*, 236 A.D.2d at 175.
5. Specific illustration of traditional CPLR § 3126 analysis can be found in *Miller v. County of Orange*, 120 A.D.2d 713, 502 N.Y.S.2d 510 (2d Dep't 1986); *Gaylord Bros., Inc. v. RND Co.*, 134 A.D.2d 848, 523 N.Y.S.2d 4 (4th Dep't 1987); *Schidzick v. Lear Siegler, Inc.*, 222 A.D.2d 841, 635 N.Y.S.2d 323 (3d Dep't 1995); *Hallock v. Bogart*, 206 A.D.2d 735, 614 N.Y.S.2d 651 (3d Dep't 1994); *Berwecky v. Montgomery Ward, Inc.*, 214 A.D.2d 936, 625 N.Y.S.2d 725, *lv. den*. 86 N.Y.2d 837, 634 N.Y.S.2d 445 (1995).
6. CPLR 3126 requires by its very language a finding that the offending party "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed. . . ."
7. *Gaylord Bros.*, 134 A.D.2d at 848; *Hallock*, 206 A.D.2d 735 at 736.
8. *Squitieri*, 248 A.D.2d at 203.
9. *Interested Underwriters Underwriters at Lloyd's v. Rheem Mfg. Co.*, N.Y.L.J., May 12, 1994, at p. 28.
10. 221 A.D.2d 243, 633 N.Y.S.2d 493 (1st Dep't 1995).
11. *See, e.g., Prasad v. BK Chevrolet, Inc.*, 184 A.D.2d 626, 584 N.Y.S.2d 881 (2d Dep't 1992); *Hallock*, 206 A.D.2d 735.
12. Please note that the dismissal of the plaintiff's complaint in *Mudge, Rose* was directed on a separate statute of limitations grounds, but summary judgment was deemed by the court to have been warranted due to spoliation as well.
13. *Kirkland*, 236 A.D.2d at 175 (citing *Perez v. Rondon*, N.Y.L.J., March 28, 1995, at p. 26).
14. *Squitieri*, 248 A.D.2d at 203.
15. 252 A.D.2d 41, 682 N.Y.S.2d 452 (2d Dep't 1998).
16. *Id*. at 53.
17. *Id*.
18. 261 A.D.2d 83, 699 N.Y.S.2d 576 (3d Dep't 1999).
19. 262 A.D.2d 1068, 693 N.Y.S.2d 787 (4th Dep't 1999).
20. *Londerman v. Rochester Gas & Electric*, 180 Misc. 2d 8, 687 N.Y.S.2d 213 (Sup. Ct., Monroe Co., 1998).
21. *See also Hoag v. Chase Pitkin Home and Garden Center*, 267 A.D.2d 1083, 701 N.Y.S.2d 569 (4th Dep't 1999).
22. *Squitieri*, 248 A.D.2d at 203; *DiDomenico*, at 53.
23. *DiDomenico*, 252 A.D.2d at 53.
24. *See, e.g., Vaughn v. City of New York*, 201 A.D.2d 556, 607 N.Y.S.2d 726 (2d Dep't 1994).

Military Law Cases Present Diverse Array of Vital Issues For Individuals and the Government

By Eugene R. Fidell and David P. Sheldon

As with most forays into unfamiliar territory, entering the world of military law can often leave even the seasoned civilian attorney feeling more than a bit uneasy. This article responds to that initial reaction by painting a background mosaic in this practice area, which is at once vaguely familiar and thoroughly alien.

Only a handful of civilian lawyers—perhaps fewer than 100—handle military cases on a regular basis, although a somewhat larger number claim to do so. Virtually all of these attorneys have served in the armed forces themselves. As one might expect, there are civilian practitioners of military law near large military installations, but their numbers have dwindled as the base closing process has moved forward. It is very rare for any but small, specialized firms to hold themselves out as practitioners in this field. Large firms may become involved in military legal issues as part of their *pro bono* program, by court appointment, or where the client has some connection with an established commercial client or a lawyer in the firm. Generally, however, the number of attorneys practicing military law is small.

Given the paucity of regular practitioners, it is increasingly possible that such matters can indeed come in to a civilian law firm, which is not likely to have a great deal of experience in the area. Case intake may occur if the firm already represents a parent or other relative of a service member, or the employer of the relative. A "cold call" is also possible: a general practice firm may simply have been selected from the telephone directory, or perhaps through the Internet. For those who do not maintain a regular practice in the area, it can be helpful to have some idea of the legal issues and professional challenges these cases can present.

Broad Range of Issues

Because of recent high-profile court-martial cases and a relatively consistent stream of films (who can forget "The Caine Mutiny" or "A Few Good Men"?), as well as the current television show "JAG," many people (including lawyers) assume that military cases typically involve "shoot-'em-up" fact patterns and dramatic courtroom scenes. While there is indeed some of this, the stereotype can be quite misleading. It is more accurate to say that the matters under the broad heading of military law are remarkably diverse. They typically lack the ingredients for high drama, but nevertheless often present issues that are quite important to both the individuals and the government that controls their lives. The following is a partial list of matters in which military personnel may need legal services; some will sound familiar to the civilian attorney, and others require a word or two of explanation.

- Criminal matters: charges are disposed of either by court-martial[1] or by nonjudicial punishment.[2] (Courts-martial can impose penalties up to and including the death penalty.[3])
- Administrative discharge proceedings: these can lead to the lifetime stigma of a less than honorable discharge. There can be related discharge-upgrade proceedings before Discharge Review Boards.[4]
- Physical evaluation boards: their findings may affect lifetime pension and medical care rights.[5]
- Promotion issues: these can include promotion passovers,[6] promotion delays,[7] or removal from a senatorially confirmed promotion list.[8]

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- Retirement.[9]
- Professional credentialing disputes.[10]
- Record correction proceedings: these can salvage a career in which the member may have invested years of excellent service.[11]
- Pay and allowances disputes.[12]
- Flying Evaluation Boards: these tribunals can have a critical effect on the military and civilian career opportunities of aviators.[13]
- Officers seeking clarification of their active duty or tuition payback obligations, *e.g.*, after receiving advanced training.[14]
- Personnel seeking release from active duty, *e.g.*, as conscientious objectors.[15]
- Security clearance issues: these can have a severe effect on the member's reputation and future career opportunities.[16]
- Disenrollment of cadets and midshipmen at the service academies.[17]
- Application of the "don't ask, don't tell, don't pursue" policy with respect to gay and lesbian personnel.[18]
- Issues concerning the equal treatment of women and minorities.[19]

As the foregoing suggest, the range of issues that can arise is truly wide, and can be high stakes for the client. For example, the writers were consulted by a soldier who was considering refusing to take a required (and controversial) anthrax vaccination. There have also been cases in which personnel who were absent without leave—or even full-fledged deserters (including some who have been outside the United States for protracted periods)—sought assistance in arranging a smooth return to the military.

Military legal issues play out in a broad range of forums, ranging from the military courts and formal boards to the more familiar precincts of the federal District Courts and the U.S. Court of Federal Claims.

Features of Practice

Military cases demand all the classic skills of the profession. The issues may turn on the interpretation of the Constitution, statutes or regulations. Some cases call for intimate knowledge of criminal law and procedure. Others involve familiar administrative law doctrines. This is hardly surprising, as the military is a world-within-a-world, a pervasively regulated "specialized society separate from civilian society."[20]

Military legal issues play out in a broad range of forums, ranging from the military courts and formal or informal boards to the more familiar precincts of the federal District Courts and the U.S. Court of Federal Claims. Cases that seek a money judgment may require resort to statutes known as the Tucker Act[21] and Little Tucker Act.[22] Those cases in which military personnel seek judicial review of agency decisions, such as those rendered by the boards for correction of military and naval records, often lend themselves to review under the Administrative Procedure Act.[23] Which route should be taken in any particular case has to be very carefully considered. The choice is not always obvious and the consequences of a misstep can be devastating, as where the accrual date for the applicable statute of limitations differs from one judicial forum to another.

Some practice issues will be entirely recognizable to the civilian practitioner, but others will not. As with any civilian client, the GI already may have made the case more problematic by steps taken or not taken before counsel has been consulted. On the other hand, being able to find the law—usually a given in the civilian world—may not be so simple in a military matter. This is particularly so where a case turns on the construction of a regulation; counsel may find it surprisingly difficult, and frustrating, to obtain a copy in a timely fashion. This has been alleviated to a certain extent, in that many regulations (at least their current versions) have been posted on military Web sites, but this cannot be depended upon in all cases.

At times, it may be necessary to bring a case to the attention of senators or members of Congress in Washington, D.C. The client, relying on his or her position as a constituent, may even have done so before counsel comes on the scene. However, this often can prove of little value because the typical outcome is a *pro forma* letter that simply points out available legal remedies, such as the military record correction boards. In the end, the service constituent may be left feeling even more frustrated than before, and valuable time may have been lost.

Notwithstanding the limited use of members of Congress to resolve an individual's legal problems, it is true that to a certain extent military practice is concentrated in the Washington, D.C. area. All of the appellate courts of the military justice system[24] sit in or near the District of Columbia, and the several record correction boards sit there as well. To the extent that Tucker Act litigation is in the picture, the Court of Federal Claims' location is a further reason some clients seek counsel in this area. On the other hand, counsel elsewhere certainly appear with regularity before that court and the Washington-

based military courts and boards. Conversely, Washington-area counsel have been involved in trials elsewhere in the country and overseas.

Practitioners can also find themselves in civilian courts, and the frequency of such appearances may increase. A 1999 decision of the U.S. Supreme Court[25] reined in the authority of the military appellate courts to grant relief under the All Writs Act.[26] Arguably this should make it necessary to bring to the District Courts and Court of Federal Claims cases that might otherwise have been submitted to the U.S. Court of Appeals for the Armed Forces (formerly known as the U.S. Court of Military Appeals).

Many of the more experienced civilian practitioners of military law tend to concentrate on cases arising in a single branch of the service, often the one in which they served. Some of this is inevitable as word-of-mouth referral often occurs within the community of a single branch. On the other hand, those who practice in Washington are likely to serve clients in all branches. To be sure, each service has its own institutional culture; the value system in the Air Force may not be a perfect match with that in the Army. Terminology and organizational concepts may be different. Nevertheless, experience in representing clients from all of the uniformed services (including even the Commissioned Corps of the U.S. Public Health Service) suggests that these cultural differences are easily managed—provided one remains alert to their presence and possible effect on the case.

Fees and Related Client Issues

From a business perspective, there are three noteworthy aspects to representing military personnel on a recurring basis. For some matters, most notably those involving a criminal prosecution, a stigmatizing administrative discharge or a physical evaluation, personnel have a right to free legal counsel from the Judge Advocate General's office (JAG). It is difficult to compete with a competitor who charges nothing. On the other hand, even in these areas, GIs may look beyond JAG in order to secure an attorney with greater experience than a junior military lawyer. Indeed, service personnel and their families may simply want the comfort of knowing that *someone* outside the system is assisting.

In addition, uniformed lawyers cannot play a part in several important categories of cases. Examples include the prosecution of claims against the government,[27] a not uncommon occurrence. There also is no right to free counsel in non-judicial punishment cases,[28] even though such proceedings can wreck a career in the "zero defects" environment that has prevailed for a number of years.

A fact of life in this practice area is that many GIs who badly need civilian legal services cannot afford it. Only a privileged few, typically relatively senior officers, or enlisted personnel and junior officers whose families are in a position to lend financial support, can afford going rates. For this reason, many who need or want this kind of assistance do not receive it and proceed *pro se*, often with poor outcomes that are virtually impossible to untangle later. In those instances in which a client's family is in a position to assist, care must be taken to ensure that the client remains the decision maker.[29] The fee agreement should be carefully reviewed to make sure that everyone involved—especially the person paying the bills—understands that only the serviceman/woman can direct the attorney. Those who have represented military personnel are also familiar with the problem of the client who has not been completely honest with parents or other family members who have agreed to help. An early challenge to the attorney therefore simply will be to meet the client away from his or her family.

Even assuming a cooperative client and a family with some ability to help, financial resources are likely to be a problem.

Time and resources rarely favor the client. Even assuming a cooperative client and a family with some ability to help, financial resources are likely to be a problem. This means that counsel must recognize that the client may have only one "silver bullet" to expend. There is rarely room for wasted time or false starts. A lengthy research memorandum for "the file" is a luxury few military clients can afford. As a result, these cases often present the challenge of delivering quality legal services on an austerity budget. Adding to this challenge is the fact that, despite Congress's concern,[30] military administrative proceedings can drag on, and prolonging the adjudicatory process inevitably adds to the expense.

In cases where the client has military counsel, good practice requires working hard to keep that military counsel on the team. This should be done for several reasons: military counsel are on scene (which may be far from where civilian counsel are located), are generally highly motivated, and can play a valuable role as a local set of eyes and ears familiar with developments at the institution. Additionally, a team effort in which one of the attorneys is provided by the government is almost certain to reduce the client's bill.

Finally, the worldwide nature of the military community can mean that the civilian attorney engaged by the family never meets the client face-to-face. The shortest provision in the Uniform Code of Military Justice is the six-word article 5 ("Territorial applicability of this chapter"). A model of conciseness, it states: "This chapter applies in all places."[31] Today, with our armed forces deployed in a variety of permanent and temporary venues around the globe, it is often the case that legal advice is sought and given long distance. This calls upon all concerned to be creative about such communications tools as electronic mail, and to be diligent about confidentiality under conditions that are often more novel than routine.

Conclusion

The effective representation of military personnel is not only important to clients; through them, it benefits the nation as a whole. Civilian attorneys should not automatically avoid taking a military law case. The matter will almost certainly be challenging, and a good deed will be done. For attorneys who are uncomfortable in this new arena, a call to the local bar association can be made. The Directory of Civilian Practitioners of Military Law, which is published annually by the private, nonprofit National Institute of Military Justice, can provide access to valuable advice. These and other sources also can point the civilian practitioner to other attorneys if a referral is to be made.

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1. *E.g., Homcy v. Resor*, 455 F.2d 1345 (D.C. Cir. 1971).
2. *E.g., Robinson v. Dalton*, 45 F. Supp. 2d 1 (D.D.C. 1998).
3. *E.g., Loving v. United States*, 517 U.S. 748 (1996); 10 U.S.C. § 118 (1994).
4. *E.g., Matlovich v. Dep't of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978); *Nolan v. United States*, 44 Fed. Cl. 49 (1999).
5. *E.g., Champagne v. United States*, 136 F.3d 1300 (Fed. Cir. 1998).
6. *E.g., Porter v. United States*, 163 F.3d 1304 (Fed. Cir. 1998); *Engels v. United States*, 678 F.2d 173 (Ct. Cl. 1982).
7. *E.g., Rolader v. United States*, 42 Fed. Cl. 782 (1999); *Johnson v. West*, 1999 U.S. Dist. LEXIS 5145 (D.D.C. April 13, 1999); 10 U.S.C. § 629 (1994).
8. *E.g., Chandler v. U.S. Army*, 125 F.3d 1296 (9th Cir. 1997); *Cunningham v. Loy*, 24 F. Supp. 2d 236 (D. Conn. 1998).
9. *E.g., Greek v. United States*, 44 Fed. Cl. 43 (1999).
10. *E.g., Nishitani v. United States*, 42 Fed. Cl. 733 (1999) (holding such disputes nonreviewable in absence of tests or standards against which to measure military's conduct); *Voge v. Sec'y of the Navy*, 1994 U.S. App. LEXIS 23956 (4th Cir. Sept. 2, 1994) (per curiam), *cert. denied*, 514 U.S. 1016 (1995).
11. 10 U.S.C. § 1552 (1999); *see, e.g., Frizelle v. Slater*, 111 F.3d. 172 (D.C. Cir. 1997).
12. *E.g., Larionoff v. United States*, 431 U.S. 864 (1977) (Variable Reenlistment Bonus); *Voge v. United States*, 11 Cl. Ct. 510 (1987), *aff'd in part & vacated in part on other grounds*, 844 F.2d 776 (Fed. Cir.), *cert. denied*, 488 U.S. 941 (1988) (Additional Special Pay for physicians); *Nishitani,* 42 Fed. Cl. 733 (1999) (same); *Ponder v. United States*, 117 F.3d 549 (Fed. Cir. 1997) (Basic Allowance for Quarters).
13. *E.g., Wilson v. Walker*, 777 F.2d 427 (8th Cir. 1985); *Johnson v. Reed*, 609 F.2d 784 (5th Cir. 1980).
14. *E.g., Schaefer v. Cheney*, 725 F. Supp. 40 (D.D.C. 1989); *cf. Roetenberg v. Sec'y of the Air Force*, 73 F. Supp. 2d 631 (E.D. Va. 1999) (educational expenses for ROTC student).
15. *E.g., New v. Cohen*, 129 F.3d 639 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1048 (1998); *Roby v. U.S. Dep't of the Navy*, 76 F.3d 1052 (9th Cir. 1996).
16. *E.g., Davis v. Dalton*, 929 F. Supp. 467 (D.D.C. 1996); *Wilburn v. Dalton*, 832 F. Supp. 943 (E.D. Pa. 1993).
17. *E.g., Green v. Lehman*, 744 F.2d 1049 (4th Cir. 1984).
18. 10 U.S.C. § 654 (1999); *e.g., Thomasson v. Perry*, 80 F.3d 915 (4th Cir.), *cert. denied*, 519 U.S. 948 (1996).
19. *E.g., Randall v. United States*, 95 F.3d 339 (4th Cir. 1996); *Henry v. U.S. Dep't of the Navy*, 77 F.3d 271 (8th Cir. 1996); *Sirmans v. Caldera*, 27 F. Supp. 2d 248 (D.D.C. 1998).
20. *E.g., Parker v. Levy*, 417 U.S. 733, 743 (1974); *see also Weiss v. United States*, 510 U.S. 163, 174 (1994).
21. 28 U.S.C. § 1491 (1994).
22. 28 U.S.C. § 1346(a)(2) (1994).
23. 5 U.S.C. § 706 (1994).
24. These include the United States Court of Appeals for the Armed Forces, a five-member civilian court created under Article I of the Constitution, 10 U.S.C. §§ 941-42 (1994), and the services' Courts of Criminal Appeals, the judges of which are, with rare exception, uniformed officers. 10 U.S.C. § 866 (1994); *see generally Weiss v. United States*, 510 U.S. 163 (1994); *Ryder v. United States*, 515 U.S. 177 (1995). Each of these courts has its own bar admission process, *see* C.A.A.F.R. 13; Ct. Crim. App. R. 8, but the requirements are easily met.
25. *Clinton v. Goldsmith*, 526 U.S. 529 (1999).
26. 28 U.S.C. § 1651 (1994).
27. *See* 18 U.S.C. § 205(a)(1) (1994). The statute permits a government official to prosecute claims "in the proper discharge of his official duties," but we know of no case in which a judge advocate has received permission to take a case against the government into federal court other than the courts created by the Uniform Code of Military Justice (or the Supreme Court on review of a decision of one of the UCMJ-created courts).
28. 10 U.S.C. § 815 (1994).
29. An interesting recent development that could encourage the use of civilian counsel where military personnel face adverse action as a result of the performance of their duties is the availability of military professional liability insurance. *See* Military Report, Jan. 6, 2000, at 4, www.militaryreport.com.
30. Congress has imposed deadlines for action by the boards for correction of military records. 10 U.S.C. § 1557(a) (1999); 14 U.S.C. § 425 (1999).
31. 10 U.S.C. § 805 (1994).

Complex of Federal and State Laws Regulates Franchise Operations As Their Popularity Grows

By Mitchell J. Kassoff

Franchising is a huge and growing part of the nation's economy. More than 300,000 franchised small businesses operating in the United States account for an estimated $1 trillion worth of income each year and provide jobs for some eight million Americans.[1] Franchising has also entered the Internet era.[2]

Franchising in the United States is governed by federal law administered by the Federal Trade Commission[3] and by a variety of state statutes. Filing of documents with the Federal Trade Commission is not required to franchise.[4] Applicable state statutes include franchising laws, business opportunity laws and "Little FTC Acts."[5] In many cases, documentation demonstrating approval by the state must be filed before a franchise is offered for sale within the state. Some states[6] have statutes specific to certain industries. A state is permitted to enact and enforce laws relating to franchising that add to the provisions of federal law.[7] In addition, franchising is increasingly being regulated by other nations.[8]

Unlike securities laws, franchise-related statutes are not designed to be "Blue Sky" laws; instead their purpose is to provide prospective franchisees with information that can help them determine whether they should purchase a particular franchise.[9] In some states, however, the laws analyze a franchisor's financial statements and franchise agreements and make value judgments about them. If these documents do not meet the requirements of some state agencies, "Risk Factor" notices,[10] escrow requirements[11] and bonding requirements[12] may be imposed or the agencies may even refuse to register a franchise.[13]

Originally, franchisors had to use documents drafted according to the requirements of the Federal Trade Commission Disclosure Rule.[14] This created a situation that required different versions of the franchise disclosure document to comply with different state disclosure requirements. To allow franchisors to use the same document on a nationwide basis, a Uniform Franchise Offering Circular (UFOC) was developed and has since been amended by the Midwest Securities Commissioners Association and its successor, the North American Securities Administrators Association (NASAA). The Federal Trade Commission issued a franchise disclosure rule in 1978 allowing franchisors the option to use the UFOC in lieu of its document.[15] For this reason, most franchisors now use the UFOC.

Although the states have different disclosure requirements, in some cases a franchisor can use one UFOC nationwide by adopting state-specific language internally in the UFOC and addendums to the disclosure section and the franchise agreement. Nevertheless, some states have contradictory disclosure rules that result in the need for a state-specific UFOC.[16]

The UFOC generally contains a federal cover page, a state-specific cover page (with different language depending on the state),[17] a table of contents (listing the 23 required items[18] that are sections of the UFOC, followed by a list of exhibits in the UFOC), the disclosures for the 23 required items, financial statements (audited financial statements for the past three fiscal years, with unaudited financial statements that are within 90 days of the filing of the UFOC, if necessary),[19] copies of all agreements that the franchisee must execute, and a receipt page for the UFOC.[20]

Additional documents must be filed to register a franchisor to sell in a state. In New York, franchising is regulated by the Investor Protection and Securities Bureau in the office of the state attorney general. The bu-

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reau requires a facing page, application page, two copies of the UFOC, supplemental information sheet, verification of the application, salesman disclosure forms, consent to service of process, consent to use the franchisor's financial statements in the UFOC signed by the Certified Public Accountant who prepared them and possibly additional forms depending on specific circumstances.[21]

Franchise-related statutes are not designed to be "Blue Sky" laws; instead their purpose is to provide prospective franchisees with information that can help them determine whether they should purchase a particular franchise.

In certain circumstances, state registration is not necessary. Some states do not require registration if a franchisor has a federally registered trademark or service mark and provides a UFOC to prospective franchisees,[22] or if a franchisor has a certain specified amount of net worth,[23] or an offer is made to a maximum of two persons,[24] or an offer is made to an existing franchisee.[25]

The Federal Trade Commission has defined what constitutes "franchise."[26] In addition, each state that requires registration has its own definition of what is a "franchise"[27] to determine whether it requires registration or regulation.

To offer to sell a franchise in or from New York, a franchisor must first be registered.[28] This applies when an offer to sell a franchise is made in New York, when an offer to buy is accepted in New York, when the franchisee is domiciled in New York, or when the franchised business is or will be operated in New York. An offer to sell is made in New York when the offer either originated from New York or is directed by the offeror to New York and is received at the place where it is directed. An offer to sell is accepted in New York when acceptance is communicated to the offeror from New York.[29] Effectively this means that if a franchisor is located in New York it must register in New York to sell franchises either within or without New York State.

If a franchisor wishes to advertise, many states require that the advertisement first be filed with the state.[30] Many states[31] also require that reports be filed on sales. The federal rule[32] requires that a UFOC be given at least five business days before the date that agreements are to be executed, but many states require that the UFOC be given to the franchisee earlier.[33]

Advantages and Disadvantages of Franchising

Franchising allows a business to expand its operations and grow geographically. Unlike a chain system, the franchisor does not have to provide capital, management or employees for each location. This allows a franchisor to increase its profits more rapidly than by expanding on its own.

The franchisees, as individuals who own their own business, have every possible incentive to work hard to make their businesses a success. Because they are owners, their motivation is likely to be greater than that of a manager, even one who receives a percentage of the profits of the business.

With each new location, the franchisor immediately earns a profit in the form of the initial franchise fee, typically $5,000 to $25,000. The franchisor also receives a continuing royalty, usually 8% to 10% of the gross income of the franchisee.

One disadvantage is that after franchisees have learned how to operate a business they resent continued royalty payments. In some cases they look for a way to terminate the franchise contract. In other cases they may try to violate the terms of the franchise arrangements because they believe the franchisor is receiving more benefits than it deserves.

Another disadvantage is that the franchisor may be named in litigation involving the franchisee. Typically, this occurs when the franchisee is sued for injuries to its personnel or customers[34] or for various types of alleged discrimination. In these circumstances, if the franchisor has not detailed how the franchisee should act in the particular area affected, the franchisor has usually been successful in defending the lawsuit.

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1. International Franchise Association.
2. Devin Klein and David Koch, *The Electronic Franchise Agreement [Became] Reality October 1*, Franchising World (Oct. 2000) p. 21. With the deadline for the pending Electronic Signatures in Global and National Commerce Act (E-SIGN) passing its Oct. 1 implementation date, businesses will now be allowed to complete their contracting process online. E-SIGN legislation makes electronic records and electronic signatures as legally binding as ink signatures.
3. 16 C.F.R. pt. 436, (effective October 21, 1979).
4. Federal Trade Commission Interpretive Guides to Franchising and Business Opportunity Ventures Trade Regulation Rule, 44 Fed. Reg. 49, 966 (August 24, 1979).
5. Arkansas (Franchise Practices Act, Ark. Code of 1987, Title 4, Chap. 72, § 4-72-207), California (Franchise Investment Law, Cal. Corporations Code, Div. 5, Parts 1 to 6, §§ 31000 to 31516 and Contracts for Seller Assisted Marketing Plans, Cal. Civ. Code, Div. 3, Part 4, Title 2.7, §§ 1812.200 to 1812.221), Connecticut (Business Opportu-

nity Investment Act, Conn. Gen'l Stat., Title 36b, Chap. 672c, §§ 36b-60 to 36b-80), Florida (Franchises and Distributorships, Fla. Stat., 1995, Chap. 817, § 817.416 and Sale of Business Opportunities Act, Fla. Stat., 1995, Chap. 559 §§ 559.80 to 559.815), Georgia (Business Opportunity Sales, Code of Ga., Title 10, Chap. 1, Art. 15, Part 3, §§ 10-1-410 to 10-1-417), Hawaii (Franchise Investment Law, Haw. Rev. Stat., Title 26, Chap. 482E, §§ 482E-1 to 482E5, 482E8, 482E9, 482E11 and 482E12), Illinois (Franchise Disclosure Act of 1987, Ill Laws of 1987, Chap. 85-551 and Business Opportunity Sales Law of 1995, Ill Compiled Statutes of 1996, Chap. 815, §§ 602/5-1 to 602/5-135), Indiana (Ind. Code, Title 23, Art. 2, Chap. 2.5, §§ 1 to 51 and Business Opportunity Transactions, Ind. Code, Title 24, Art. 5, Chap. 8, §§ 1 to 21), Iowa (Business Opportunity Promotions Law, Iowa Code, 1995, Title XX, Chap. 523B, §§ 523B.1 to 523B.13), Kentucky (Sale of Business Opportunities Law, Ky. Rev. Stat. and 1988 Supp., Title XXIX, Chap. 367, §§ 367.801 to 367.819 and 367.990), Louisiana (Business Opportunity Sellers and Agents, Lou. Rev. Stat. of 1950, Title 51, Chap. 21, §§ 51:1801 to 51:804), Maine (Sale of Business Opportunities, Maine Rev. Stat. and 1990 Cum. Pocket Part, Title 32, Chap. 69-B, §§ 4691 to 4700-B), Maryland (Franchise Registration and Disclosure Law, Code of Md. Article-Business Regulation, Title 14, §§ 14-201 to 14-233 and Business Opportunity Sales Act, Code of Md., Title 14, §§ 14-101 to 14-129), Michigan (Franchise Investment Law, Mich. Comp. Laws, 1979, Chap 445, §§ 445.1501 to 445.1545 and Business Opportunities, incorporated into the Consumer Protection Act, Mich. Comp. Laws, 1979, §§ 445.901 to 445.922), Minnesota (Franchises, Minn. Stat. 1996, Chap. 80C, §§ 80C.01 to 80C.22), Mississippi (Miss. Code 1972, Title 75, Chap. 24, § 75-24-55), Nebraska, Seller-Assisted Marketing Plan Act, Rev. Stat. of Neb. 1943, Chap. 59, Art. 17, §§ 59-1701 to 59-1761), New Hampshire (Distributorship Disclosure Act, N.H. Rev. Stat., Title XXXI, Chap 358-E, §§ 358-E:1 to 358-E:8), New York (General Business Law, Art. 33, §§ 680 to 695), North Carolina (Business Opportunity Sales Law, Gen. Stat. of N.C., Chap. 66, Art. 19, §§ 66-94 to 66-100), North Dakota (Franchise Investment Law, N.D. Century Code, Title 51, Chap. 51-19, §§ 51-19-01 to 51-19-17), Ohio (Business Opportunity Purchasers Protection Act, Ohio Code, Title 13, Chap. 1334, §§ 1334.01 to 1334.15 and 1334.99), Oklahoma (Business Opportunity Sales Act, Ok. Stat., 1991, Title 71 Chap. 4, §§ 801 to 828), Oregon (Franchise Transactions, Or. Stat., Title 50, Chap 650, §§ 650.005 to 650.085), Rhode Island (Franchise Investment Act, Gen'l Laws of R.I., 1956, Title 19, Chap. 28.1, §§ 19-28.1-1 to 19-28.1-34), South Carolina (Business Opportunity Sales Act, Code of Laws of S.C. 1976, Title 39, Chap. 57, §§ 39-57-10 to 39-57-80), South Dakota (Franchises for Brand-Name Goods and Services, S.D. Codified Laws and 1971 Pocket Supp., Title 37, Chap. 37-5A, §§ 37-5A-1 to 37-5A-87 and Business Opportunities, S.D. Cod. Laws and 1989 Pocket Supp., Chap. 37-25A, §§ 37-25A-1 to 37-25A-54), Tennessee ("Little FTC Act," Tenn. Code, Title 47, Chap. 18, §§ 47-18-101 to 47-18-117), Texas (Business Opportunity Act, Business & Commerce Code, Title 4, Chap. 41, §§ 41.001 to 41.303), Utah ("Little FTC Act," Utah Code of 1953 and 1987 Supp., Title 13, Chap. 11, §§ 13-11-1 to 13-11-23 and Business Opportunity Disclosure Act, Utah Code 1953, 1989 Cum. Supp., Title 13, Chap. 15, §§ 13-15-1 to 13-15-6), Virginia (Retail Franchising Act, Va. Code of 1950, Title 13.1, Chap. 8, §§ 13.1-557 to 13.1-574 and "Little FTC Act," Code of 1950, 1987 Replacement Vol., Title 59.1, Chap. 17, §§ 59.1-196 to 59.1-207 and Business Opportunity Sales Act, Code of 1950, Title 59.1, Chap. 21, §§ 59.1-262 to 59.1-269), Washington (Franchise Investment Protection Act, 1989 Rev. Code of Wash., Title 19, Chap 19.100, §§ 19.100.010 to 19.100.940 and Business Opportunity Fraud Act, 1989 Rev. Code of Wash., Title 19, Chap 19.110, §§ 19.110.010 to 19.110.930), Wisconsin (Franchise Investment Law, Wisc. Stat., 1993-94, Chap 553, §§ 553.01 to 553.78 and Wisc. Organized Crime Control Act, Wisc. Stat., 1993-94, Chap 946, § 946.82) and Washington, D.C. ("Little FTC Act," D.C. Code, 1981, Title 28, Chap 39, §§ 28-3901 to 28-3908).

Regulations—California Administrative Code, Title 10, Chapter 3, Subchapter 2.6, §§ 310.000 to 310.505; Hawaii Department of Commerce and Consumer Affairs, Title III, Business Registration, Title 16, Chapter 37, §§ 16 to 37-1-16-37-8; Illinois Administrative Code, Title 14, Subtitle A, Chapter II, Part 200, §§ 200.100 to 200.901; Iowa Administrative Code, Insurance Division (191), Chapter 55, §§ 55.1 (523B) to 55.9 (523B); Maryland Code of Regulations, State Law Department, Division of Securities, Title 02, Subtitle 02, Chapter 8, §§ 02.02.08.01 to 02.02.08.17; Minnesota Rules, 1995, Department of Commerce, Chapter 2860, §§ 2860.0100 to 2860.9930; New York Department of Law, Bureau of Investor Protection and Securities—Codes, Rules and Regulations of the State of New York, Title 13, Chapter VII, §§ 200.1 to 201.16; Oklahoma Business Opportunity Regulations, Rules 660:25-1-1 to 660:25-1-3, 660:25-3-1, 660:25-3-2, 660:25-5-1 and 660:25-7-1; Oregon Administrative Rules, Department of Consumer and Business Services, Division of Finance and Securities, Chapter 441, Division 325, §§ 441-325-010 to 441-325-055 and Division 13, §§ 441-13-040; Texas Administrative Code, Title I, Part IV, Chapter 97, §§ 97.1 to 97.42; Virginia Administrative Code, Title 21, Chapter 110, §§ 5-110-10 to 5-110-90; Washington Administrative Code, Department of Financial Institutions, Securities Division, Chapter 460-80, §§ 460-80-100 to 460-80-910 and Chapter 460-82, §§ 460-82-200 and Wisconsin Administrative Code, Chapters SEC 31 to SEC 36, §§ SEC 31.01 to SEC 36.01.

6. California (Real Estate Licenses, Business and Professions Code, Div. 4, Part 1, Chap 3, Art. 3, § 10177(m)), Maryland (Gasohol and Gasoline Marketing, Code of Md., Article—Commercial Law Title 11, § 11-303), New York (Motor Fuels, General Business Law, Art. 11-B, § 199-b and Cigarettes, Tax Law, Art. 20-A, §§ 485 to 489), Tennessee (Motor Fuel Franchise, Tenn. Code, Title 47, Chap. 25, §§ 47-25-601 to 47-25-607), Vermont (Service Station Operators and oil companies, Vt. Stat., Title 9, Chap. 109, §§ 4103), Virginia (Motor Vehicles, Va. Code of 1950, Title 46.2, Chap. 15, Art. 7, §§ 46.2-1566 and 46.2-1567) and Washington, D.C. (Retail Service Stations, D.C. Code, 1981, Title 10, Chap 2, § 10-222).
7. 44 Fed. Reg. 49, 966 (August 24, 1979).
8. Australia, Brazil, Canada (Alberta, Ontario and Quebec provinces), China, France, Indonesia, Italy, Korea, Malaysia, Mexico, Romania, Russia, Spain and the European Union.
9. Federal Trade Commission Interpretive Guides to Franchising and Business Opportunity Ventures Trade Regulation Rule, 44 Fed. Reg. 49, 966 (August 24, 1979).
10. *E.g.*, New York—N.Y. Comp. Codes R. & Regs. tit. 13, § 200.4 (hereinafter "N.Y.C.R.R.").
11. *E.g.*, N.Y. General Business Law, Art. 33, § 685 (hereinafter "Gen. Bus. Law"); 13 N.Y.C.R.R. 200.6(a).
12. Gen. Bus. Law, Art. 33, § 685;13 N.Y.C.R.R 200.6(i).

13. *E.g.*, Minnesota and North Dakota.
14. 16 C.F.R. pt. 436.
15. 16 C.F.R. pt. 436.
16. *E.g.*, Indiana has required its agent to receive service of process to be listed in Item 1 of the UFOC and Minnesota has required that this information not be included in Item 1 of the UFOC for any sales of franchises to be made in its state for the same franchisor.
17. *E.g.*, New York—13 N.Y.C.R.R. § 200.4(a).
18. *E.g.*, New York—13 N.Y.C.R.R. § 200.4(b),(c)—Franchisor, Its Predecessors and Affiliates; Business Experience; Litigation; Bankruptcy; Initial Franchise Fee; Other Fees; Initial Investment; Restrictions on Sources of Products and Services; Franchisee's Obligations; Financing; Franchisor's Obligations; Territory; Trademarks; Patents, Copyrights and Proprietary Information; Obligation to Participate In The Actual Operation of the Franchise Business; Restrictions on What the Franchisee May Sell; Renewal, Termination, Transfer and Dispute Resolution; Public Figures; Earnings Claims; List of Outlets; Financial Statements; Contracts and Receipt.
19. *E.g.*, New York—13 N.Y.C.R.R. § 200.4(c).
20. NASAA guidelines adopted on April 25, 1993.
21. *E.g.*, New York—13 N.Y.C.R.R. § 200.10.
22. *E.g.*, Connecticut (Business Opportunity Investment Act, Conn. Gen'l Stat., Title 36b, Chap. 672c, §§ 36b-61(6)) provided a copy of the trademark or service mark is filed with the state prior to an offer or sale of the franchise in the state.
23. *E.g.*, New York—net worth of at least $5 million (Gen. Bus. Law, Art. 33, § 684(2)) and an exemption form is filed with the Attorney General prior to offering a franchise for sale.
24. *E.g.*, New York—Gen. Bus. Law, Art. 33, § 684(3)(c) (with additional conditions).
25. *E.g.*, New York—Gen. Bus. Law, Art. 33, § 684(3)(d) (with additional conditions).
26. 16 C.F.R. 436.2 Definitions.

    As used in this part, the following definitions shall apply:

    (a) The term "franchise" means any continuing commercial relationship created by any arrangement or arrangements whereby:

    (1)(i)(A) a person (hereinafter "franchisee") offers, sells, or distributes to any person other than a "franchisor" (as hereinafter defined), goods, commodities, or services which are:

    (1) Identified by a trademark, service mark, trade name, advertising or other commercial symbol designating another person (hereinafter "franchisor"); or

    (2) Indirectly or directly required or advised to meet the quality standards prescribed by another person (hereinafter "franchisor") where the franchisee operates under a name using the trademark, service mark, trade name, advertising or other commercial symbol designating the franchisor; and

    (B)(1) The franchisor exerts or has authority to exert a significant degree of control over the franchisee's method of operation, including but not limited to, the franchisee's business organization, promotional activities, management, marketing plan or business affairs; or

    (2) The franchisor gives significant assistance to the franchisee in the latter's method of operation, including, but not limited to, the franchisee's business organization, management, marketing plan, promotional activities, or business affairs; Provided, however, That assistance in the franchisee's promotional activities shall not, in the absence of assistance in other areas of the franchisee's method of operation, constitute significant assistance; or

    (ii)(A) A person (hereinafter "franchisee") offers, sells, or distributes to any person other than a "franchisor" (as hereinafter defined), goods, commodities, or services which are:

    (1) Supplied by another person (hereinafter "franchisor"), or

    (2) Supplied by a third person (*e.g.*, a supplier) with whom the franchisee is directly or indirectly required to do business by another person (hereinafter "franchisor"); or

    (3) Supplied by a third person (*e.g.*, a supplier) with whom the franchisee is directly or indirectly advised to do business by another person (hereinafter "franchisor") where such third person is affiliated with the franchisor; and

    (B) The franchisor:

    (1) Secures for the franchisee retail outlets or accounts for said goods, commodities, or services; or

    (2) Secures for the franchisee locations or sites for vending machines, rack displays, or any other product sales display used by the franchisee in the offering, sale, or distribution of said goods, commodities, or services; or

    (3) Provides to the franchisee the services of a person able to secure the retail outlets, accounts, sites or locations referred to in paragraphs (a)(1)(ii)(B) (1) and (2) of this section; and

    (2) The franchisee is required as a condition of obtaining or commencing the franchise operation to make a payment or a commitment to pay to the franchisor, or to a person affiliated with the franchisor.

    (3) Exemptions. (not listed here).

    (4) Exclusions. (not listed here).

Franchising in England

The franchising phenomenon is not limited to the United States. In England, for example, franchising is one of the fastest growing sectors of the economy. During the most recent reporting year, the number of franchisees in England rose 17% to 35,200, with yearly turnover reaching 8.9 billion British pounds. Approximately 317,000 people are employed in franchising in England, with 29.3% of all retail trade in England being carried out by franchised businesses.[1]

1. *Be Your Own Boss and Cut the Risks*, Birmingham Post (09/27/00) p. 24, Philip Williams.

27. *E.g.*, New York—Gen. Bus. Law, Art. 33, § 681:

    3. "Franchise" means a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which:

    (a) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor, and the franchisee is required to pay, directly or indirectly, a franchise fee, or

    (b) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate, and the franchisee is required to pay, directly or indirectly, a franchise fee. A franchise under this article shall not include any agreement, contract, or franchise subject to the provisions of article eleven-B of this chapter or section one hundred ninety-nine of this chapter, or any agreement or contract for the sale of motor fuel.

28. New York—Gen. Bus. Law, Art. 33, § 683(1).
29. New York—Gen. Bus. Law, Art. 33, § 681(12).
30. *E.g.*, New York (a minimum of seven days prior to use)—13 N.Y.C.R.R. § 200.09.
31. *E.g.*, New York (annually)—13 N.Y.C.R.R. § 200.08; Maryland (quarterly)—Code of Md. Regulations, additional Title 02, Subtitle 02, Chap. 8, § .02.02.08.14.
32. 16 C.F.R. § 436.1(g).
33. *E.g.*, New York (the earlier of (a) the first personal meeting with the franchisee to discuss the franchise or (b) ten business days before the franchisee signs any binding agreements or pays any money)—13 N.Y.C.R.R. § 200.4(c).
34. *See Walters v. Ramada Franchise Systems, Inc.*, 2000 Tex. App. LEXIS 5673 (Court of Appeals of Texas, Fifth District, Dallas August 24, 2000) in which a franchisor was denied summary judgment because it retained some control over the franchisee's operations.

POINT OF VIEW

Client Protection Funds Serve Noble and Pragmatic Needs

BY FREDERICK MILLER

Good news it is that the chief justices of the United States have committed their high courts to the survival and revitalization of law client protection funds. That commitment is expressed in the Conference of Chief Justices' "Action Plan for Lawyer Conduct and Professionalism (January 1999)," and the plan's operational and structural standards for these lawyer-financed programs to protect legal consumers.

Law client protection funds are one of the best kept secrets of the legal profession, except in a handful of states. From a national perspective, a huge number are little more than public-relations gimmicks. Witness the *National Law Journal*'s recent survey of protection funds nationwide. The headline of its special report captures its unhappy conclusion: "An Empty Promise." In state after state, protection funds are failing in their mission to protect clients and escrow beneficiaries from dishonest conduct in the practice of law.

I helped administer the New York Lawyers Fund for Client Protection from its beginning in 1982. During those 18 years, the Lawyers Fund—actually the lawyers of New York State—restored more than $85 million to victims of lawyer dishonesty. The Empire State has 175,000 licensed attorneys. Each active practitioner is assessed $50 annually to support the fund, which provides $300,000 in coverage for each eligible loss. More than 95% of all victims receive 100% reimbursement for their losses. The fund exists because of the pioneering efforts of the New York State Bar Association, which had one of the earliest client reimbursement programs in the United States.

Twenty-five years ago, I doubt that the nation's chief justices, or anyone else for that matter, gave much thought to law client protection funds. State courts protected legal consumers by disciplining errant lawyers. But there was an evolution underway and, and after lawyer discipline, there emerged the dual challenges of protecting clients from a lawyer's malpractice and the misuse of their money by theft and embezzlement.

Our notions of client protection evolve still. Newcomers include lawyers with alcohol and drug problems, and the resolution of disputes over legal fees. That's only the short list. Before long we'll be faced with a host of cyberspace issues in professionalism. It's no coincidence that these challenges emerged contemporaneously with the consumer protection movement in the United States. Lawyers may not think of their clients as consumers, but they are and this particular movement, thanks largely to lawyers, is a permanent feature of the landscape.

A client protection fund serves several purposes in a state's justice system; some noble and others pragmatic. The nobility is expressed in our profession's classic empathy with widows and orphans, the biblical representation of that part of the human condition that we call vulnerability. This empathy for the widows and orphans in our communities is part of our moral and cultural heritage, and probably our DNA. And it should not be a surprise that widows and orphans are the clientele of our protection funds; not literally, perhaps, but surely in their vulnerability to a lawyer's breach of trust.

But there are other reasons why our profession needs client protection funds. One is that existential thing called "trust." When Governor Hugh L. Carey approved the legislative bill that created New York's client protection fund, then called the Clients' Security Fund, his approval message contained the observation, "The legal profession depends upon the trust of clients." That's not something from a fortune cookie. Trust is absolutely essential to our system of dispute resolution.

Try to imagine how that system could operate without trust. Yes, clients have to trust their lawyers, but lawyers have to trust their clients. And lawyers have to trust one another. Likewise, lawyers must trust judges, and judges must trust the lawyers who appear before them. It's an infinite chain of trust. Consider the result if distrust permeated our law offices and our courtrooms. Without trust, affordable legal transactions would be impossible. Our system of dispute resolution would grind to a halt.

Professional self-interest, then, justifies the judicial supervision of client protection programs. And we cannot overlook the relationship between these programs and another major concern of the Conference of Chief Justices: How can lawyers and judges promote public trust and confidence in the American system of justice? The American Bar Association's Model Rules for Client Protection Funds provides one answer: "The purpose of the Lawyer's Fund for Client Protection is to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing losses caused by the dishonest conduct of lawyers."

Last October, Chief Justice Thomas Zlaket of Arizona spoke to a gathering of lawyers in Scottsdale. It was a frank sermon, even for a Sunday. The chief justice warned: "So long as people have a bad impression of lawyers and the legal profession, I don't think we've got a chance of significantly elevating public trust and confidence in the American justice system." It can't get plainer than that. It's downright discouraging that so many judicial and bar leaders seem unaware that client protection funds are wonderful vehicles for refreshing public trust and confidence in our institutions of justice. What could impress more favorably than lawyers opening their pockets to widows and orphans?

Professional self-interest is served further by a benefit that most lawyers seldom think about: a law client protection fund, administered by the profession, is far superior to mandatory commercial insurance schemes. It's no exaggeration that mandatory bonding of lawyer escrow accounts would put lawyer licensing, as a practical matter, into the hands of the insurance industry. But it's a gross distortion of professional responsibility to consider a client protection fund as some sort of bar association charity. A protection fund is no more a charity, to my mind, than is a malpractice carrier, or a crime victims' fund, or the surety of a court-appointed fiduciary. Reimbursement or restitution of a client's loss should not be a "matter of grace" for the most influential profession in American society. The correct label is financial responsibility.

The *National Law Journal*'s survey of client protection funds documents that the most effective client protection programs in the United States are those that operate under the watchful eye of a state's high court. One problem with the bar association model is the understandable reluctance of elected bar leaders to publicly discuss dishonesty in the practice of law. There are also the financial implications in inviting claims to a fund that may be barely solvent. In a state like that, a protection fund has all the allure of Pandora's Box.

The Chief Justices' "Action Plan" articulates six basic standards for client protection funds, the first of which has been realized: all 50 states and the District of Columbia now have client protection funds. That was a 30-year effort.

The plan's second standard requires that a protection fund "substantially reimburse losses resulting from dishonest conduct in the practice of law." What's substantial reimbursement? Let me suggest a minimum standard: a client protection fund should reimburse fully 90% of all eligible victims. That's a plain and realistic goal. In New York, for example, the median client loss has never exceeded $15,000. Reimbursing losses like that should bankrupt no client protection fund or state bar association.

The plan's third standard requires that each protection fund be financed by a mandatory assessment on lawyers. The amount of that assessment, per capita, ultimately depends upon the fund's reimbursement policies and will vary, of course, from state to state. But an annual assessment of $50 per lawyer—less than a dollar a week—will produce a fund that everyone can brag about.

It is important that the legal profession provide the funding. That creates the incentive to support efforts to reduce client losses and claims. An effective client protection fund is not a cash register. It's more of a watchdog to identify weaknesses in statutes and procedures, which provide opportunities for dishonest lawyers to abuse the trust of clients.

The plan's fourth standard requires that the fund's assets be designated as a trust. This is essential to the fund's integrity as an institution of justice. If its assets can be raided to finance other programs, the fund's fiduciaries cannot be truly independent in their decision-making obligations. The same is true of the fund's revenue stream. It must be certain and reliable, with reserves adequate to deal with the unpredictable. In too many states, reimbursement awards are based on the fund's revenues, and not on the merits of the claims. That's rationing justice.

The fifth standard requires that a fund be managed by a board of trustees composed of lawyers and lay persons. Since 1982, the board of trustees in New York has consisted of five lawyers and two members who are not lawyers. One was an insurance company executive, another a banker, and the third is a newspaper publisher. There is simply one word, which describes their role: indispensable.

Without exception, every lawyer describes service on a fund's board of trustees as the most rewarding affiliation in a professional career. That opportunity should be spread around. Trustees should serve staggered terms of office, with an orderly cycle of replacements so that the fund's institutional memory is preserved. And in the interests of accountability, it would be helpful indeed if a member of the court served as a liaison to the fund.

The plan's final standard requires the fund to publicize its existence and its activities. In several of the United States, fund administrators are actually prohibited from publicly discussing their funds. Bar leaders do not want to admit there's an occasional bad apple in the barrel, nor do they want to encourage claims to a financially shaky fund. The unfortunate result is that these protection funds are known only to bar insiders.

I cannot emphasize too much the importance of consumer education. We did a lot of that in New York: public service announcements; escrow accounting programs for lawyers; consumer protection brochures for the public; frequent press releases about the fund's activities; radio and television interviews; and the creation and maintenance of a network with the media statewide. There was never a press release or interview that did not highlight the integrity and compassion

of our bar. These efforts paid off: Reimbursement claims to the fund have decreased nearly 50% since 1997, and the current number of pending claims is the lowest in 16 years. This didn't happen by chance.

The issue remaining is how our nation's high courts should implement these five standards. Let me suggest that each high court commission a straightforward analysis of the structure, procedures, and finances of its existing state fund, using the standards in the "Action Plan" as a yardstick, and the ABA's Model Rules for protection funds. This analysis will involve some arithmetic, but it's simple math: the actual amount of lawyer theft in your state; the revenue that would be needed to reimburse fully 90% of the victims; the operating expenses of the fund; the annual per capita lawyer assessment to pay these costs; and an appropriate reserve to meet unpredictable client losses.

As a young lawyer, I had the good fortune to work with a giant of a chief judge in the reorganization of authority for court management in the Empire State, judicial discipline, and the selection of judges of our Court of Appeals. Had I the gift of foresight, I would have suggested to Chief Judge Charles D. Breitel that he create an Office of Public Trust to support programs like a law client protection fund, an alcohol and substance abuse program for lawyers and judges, malpractice protection, the qualification and appointment of court-appointed fiduciaries, and consumer education projects to help New Yorkers maneuver through our maze of courts and laws. It would be a mini think tank, if you will, to promote public confidence that despite the complexity of life in the 21st century, the only reason we have lawyers and judges and courts is to protect people and their rights.

I think I could have sold him on the idea. Chief Judge Breitel appreciated, better than anyone I've ever met, the near-magical powers of a high court and a chief judge to get things done that ought to be done, and to keep them going. Persistence had a lot to do with it.

FREDERICK MILLER is counsel to the National Client Protection Organization, Inc., a nonprofit educational organization that provides *pro bono* support to law client protection funds. He is special counsel to the Albany law firm of Chamberlain, Kaufman & Jones. He served as executive director and counsel to the New York Lawyers Fund 1982-2000.

Lawyer's Bookshelf

Ladies and Gentlemen of the Jury, by Michael S. Leif, H. Mitchell Caldwell, and Ben Bycel, published by Simon & Schuster, New York, N.Y., 400 pages, $15.00. Reviewed by Richard H. Wagner.

The subtitle of this book, "Greatest Closing Arguments in Modern Law," provokes the question: What makes a closing argument great? The authors do not provide a direct reply, but they attempt to answer this question by providing examples from famous trials including the Nuremberg War Crimes Trial, the Silkwood case, the Manson trial, the Chicago Seven trial, and six others.

While the authors offer commentary on the arguments, they have no political agenda. As a result, both prosecutors and defense lawyers, liberals and conservatives, get equal play. The book leaves readers free to formulate their own conclusions about the art of making arguments without having to penetrate a political glaze.

As evidenced by the fact that the authors have included no examples of great oration done in a losing cause, the first requirement for deeming an argument great that can be distilled from this book is that it was for the winning side. This is only fair, as every lawyer that makes a closing argument is doing so on behalf of a client and, from the client's perspective, the only argument that can be called great is one that is effective in achieving the client's desired result.

However, the mere fact that the client prevailed does not mean that the attorney did a great job. As Justice Antonin Scalia has observed, because cases are decided on their merits, "not infrequently, a lawyer who has done a really terrible job . . . wins the case." Accordingly, in the sections preceding the edited transcript of each argument, the authors provide a commentary explaining the reasons why they believe it was effective. In so doing, they lay out some guidance on the tasks that must be accomplished to make an effective closing argument

To illustrate, the authors point out that at the end of World War II, there was far from unanimous agreement that the Nazi leaders should be accorded a trial. Indeed, the Churchill government advocated that summary execution was the "preferable course." However, the four victorious powers, the United States, France, Great Britain, and the Soviet Union, eventually decided that trials were necessary to re-establish the rule of law in Germany. Because the goal was to develop respect for the courts, these trials could not be mere show trials. As a result, there were 216 days of trial time, with 80 witnesses testifying in person, 143 witnesses testifying by interrogatories, and 4,000 pages of documentary evidence. With the world watching, Justice Robert Jackson, who had taken a leave of absence from the U.S. Supreme Court to act as the lead prosecutor at Nuremberg, had the job of distilling this mountain of evidence and dealing with the 23 defendants' various attempts to shift the blame. Against this unique backdrop, the authors point out that Jackson had to accomplish four tasks in his closing argument that prosecutors must accomplish even in more mundane cases:

> [First,] he had to take the vast scope of the Nazi's atrocities and give it a contextual framework in order to allow the jury [i.e., the panel of judges] to deal with the sheer enormity of the deeds. Next, he had to strike a clear and compelling theme . . . . Third, he had to clear the trial of the peripheral material brought by the defense, and keep the jurors focused on the significant facts and relevant issues. Finally, Jackson had to organize the evidence to assist the jurors in dealing with the huge amount of evidence that was introduced.

The transcript that follows lets the reader see how Jackson fulfilled those tasks.

Donald Re's argument for the defense in the trial of automaker John Delorean for narcotics smuggling provides a lesson on how a defense attorney can use a closing argument to overcome a seemingly insurmountable body of evidence. The prosecution had videotapes and eyewitness testimony implicating Delorean in a purported drug deal. The prosecution could also show motive because Delorean desperately needed cash to save the sports car company he had founded in a blaze of publicity. Because the alleged drug deal was actually a government sting operation, however, "Re put the FBI and DEA on trial," arguing that the government agents had entrapped his famous client in "a blind quest for fame and glory." But Re also realized that simply calling the government names would not be enough. Because the prosecution was asking the jurors to look at the totality of the circumstances, "Re went back to the beginning and painstakingly analyzed every contact, every meeting, and to the extent possible, explained it away by putting it into a context more favorable to Delorean." The transcript reveals just what a Herculean task this was, but it paid off with a prompt acquittal.

The book also demonstrates that the effectiveness of a closing argument depends heavily on its delivery. This is shown most clearly and albeit unintentionally by the two closing arguments of Clarence Darrow included in the book; one in his own defense to charges of bribing jurors in 1911, the other in defense of confessed murderers Nathan Leopold and Richard Loeb in 1924. Although

the former was to a jury and the latter to a judge, there is little difference in style. Both speeches reportedly left the courtrooms in tears and both achieved the results Darrow was seeking. Neither speech lends itself to the printed page, however. Divorced from the voice of the speaker, the reader is left to wade through pages of what appears to be rambling emotional rhetoric, dubious logic, long-winded discussions of seemingly irrelevant points, and personal attacks on the prosecutors.

This is not to say that each of the arguments presented has the entertainment value of an evening of reading deposition transcripts. Some of the arguments, such as Justice Jackson's closing at Nuremberg and Vincent Bugliosi's in Manson, are quite absorbing. In addition, because the arguments are from trials that achieved some notoriety and many are by well-known advocates, they hold the reader's attention much more than if the authors had selected examples of closing arguments from obscure patent cases.

In sum, while the authors do not define in so many words what makes a great closing argument, there is much to be learned from the examples of the art of advocacy that they have assembled. Reading such good examples of the art enhances one's ability to develop arguments whether before a jury, an appellate panel, or in a brief.

Richard H. Wagner, senior litigation counsel in the Verizon Legal Department in New York City, practices appellate and commercial litigation.

The Greatest Player Who Never Lived: A Golf Story, by J. Michael Veron, published by Sleeping Bear Press, 2000, 286 pages, $22.95. Reviewed by Robert D. Lang.

Many novels are now being written about lawyers and their practicing of law. Books about golfers and their practicing of golf are also very much in vogue. In his first novel, J. Michael Veron, himself a lawyer and golfer, combines the two themes—law and golf—to write a compelling page-turner novel entitled, "The Greatest Player Who Never Lived." Think John Grisham meets Bagger Vance and you get the general idea.

The novel concerns a law student who accepts a summer associate position at an Atlanta law firm. Far from receiving a plum assignment, he is "asked" to review the dusty legal files that belonged to golfing great Bobby Jones, who practiced law with the firm after he retired from tournament golf at the height of his golfing career. Not wishing to complain to the managing partner about his less than exciting assignment (which might not bode well for his receiving an offer from the firm), the summer associate dutifully reviews the old files. In the course of the review, he stumbles across an exchange of correspondence between Bobby Jones and Beau Stedman, an outstanding young golfer of undeniable talent.

Poised to challenge Jones for golfing greatness in the 1920s, Beau Stedman is instead abruptly forced to give up golf and flee the jurisdiction under the cloud of a murder investigation in which Stedman is accused of the crime. In the years that pass, Bobby Jones, acting sometimes as Stedman's lawyer but more often as his friend, arranges a number of money challenge matches between Stedman (playing under an assumed name) and such golfing greats as Walter Haig, Gene Sarzen, Sam Snead and the King himself, Arnold Palmer, both to allow Stedman to make a living and to continue Stedman's love of the game.

Intrigued by the story of Stedman and his relationship with Jones, the summer associate eventually takes steps to both bring the story of Beau Stedman to the attention of the general public and to solve the murder and clear Stedman's name. That effort leads to a hearing in federal court in New Jersey on an application for an injunction to prevent a public exhibit about Stedman that includes the summer associate's "proof" identifying the true murderer. Without giving away the end of the story, I will simply say that there are several twists and turns along the way, including the application of the federal rules of evidence.

The book will makes for an enjoyable read for lawyers while we patiently wait for the golf course to reopen this spring.

Robert D. Lang, a member of the firm of D'Amato & Lynch in New York City, wrote the "Lawsuits on the Links" article in July-August 2000 issue of the *Journal*.

New Members Welcomed

FIRST DISTRICT
Essam Ernest Abadir
Michael S. Abitbol
Sheri Lyn Abramson
Amy Tull Ackert
Scott Hazzar Allan
Dominador E. Almeda
Amy Sharo Amster
N. Tod Angkatavanich
Jose A. Arias
Michael S. Arlein
Steven C. Armbrust
Masako Asazuma
Danielle G. Avery
Linda Beth Azrin
Nicholas L. Baggaley
Asli U. Bali
Jasmine Ball
Mark Barnes
Jenette A. Barrow-Bosshart
Richard Willett Barton
Robin C. Beaver
Margarita Bejerano
Jonathan R. Bell
Tina C. Bennet
Jennifer Bergenfeld
Martin M. Berger
Susan L. Berger
Anita Bergman
Robin Bergstrom
David S. Berkowitz
Debra Berman
Joanna Marie Bernard
Mark David Bigos
Donald N. Billings
Michael David Birnbaum
Miranda Mary Homburg Biven
Sean Edward Blanchfield
Ronna Wineberg Blaser
Stacey D. Blayer
Madeleine Blot
Barri Lynn Bogner
David K. Bohrer
Mark Booker
Selma B. Borden
Elana M. Bourkoff
Suzanne M. Brackley
Alvin L. Bragg
Heiner H. Braun
Adam Harrison Braverman
George Brecher
Alys A. Brehio
Michael Anthony Brenna
Matthew Whitney Brissenden
Frederick Douglas Brock
Rachel L. Brod
Jennifer A. Bromley
Justin Jeffrey Brookman
Craig Richard Brown
Jane Sarah Browne
Shanise Vinet Bryant
Joseph Buongiorno
John W. Bustard
Desmond Fidelis Cahill
Maria L. Canovas
Lisa Fern Cantos
Boyd Gilardi Carano
Jason M. Casella
Tomaso Cenci
Gershon Chachanashvili
Steven R. Charno
Barry Y. Cheng
Jehangir Jal Choksi
Rupali Chopra
Chun H. Chung
Steven Chung
Arthur J. Ciampi
Denise Michele Clark
Rebecca S. Coccaro
Jason Fredric Cohen
Todd S. Corey
Danielle Cortina-Merolla
William Cozzolino
Daniel A. Crane
Don W. Cruse
Nilufer Dalal
Tamir Dardashtian
Raj B. Dave
Roy David
Aaron Davidson
Regina Dekhtyar
Mitul Indrajit Desai
Mark A. Dessi
Mary P. Devine
Deanna Dickerson
Michael Henry Dolan
Richard Philip Dolcetti
Margaret M. Drohan
Kristen M. Dunker
Michael Lawrence Eden
Abbey Walsh Ehrlich
Melissa Hannah Eidelheit
Robert G. Eisler
Gary I. Elias
J. Robert Ellner
Rebecca R. Embry
Norman Eng
Thomas F. English
Paul J. Epstein
Vincent A. Errante
Jacqueline D. Ewenstein
Susan Alexandria Fani
Stephen J. Fantozzi
Jarett Scott Fein
Sarah J. Fels
Christopher Micheal Ferguson
Mark Vincent Ferraro
Katharine M. Finch
Peter Raike. Fischer
Scott D. Fisher
Eugene Martin Fisher-Haydis
Kevin F. Flaherty
William B. Flannery
Bridget M. Fleming
Merrill E. Fliederbaum
Steven S. Flores
Mary Ellen Flynn
Patrick Michael Fogarty
Mary G. Fontenot
Elizabeth M. Formidoni
Adrien Fournier De Launay
David A. Frankel
Jonathan James Frankel
Stuart W. Fraser
William Jay Frazier
Richard N. Freeth
Darren Morris Fried
Chaim Yair Friedland
Elizabeth Alixandra Friedland
Seth L. Friedman
Nathaniel Friends
Gloria M. Fuentes
Adam Chihendeu Furber
James D. Fusso
Erica J. Galinski
Jay A. Galluzzo
Jeremy A. Gans
Romas Petras Garbaliauskas
Michael Gat
Matthew B. Giger
Katherine Mara Gitelson
Lisan L. Goines
Jason Mathew Gold
Erica J. Goldberg
Paul A. Goldberger
Lee M. Goldsmith
Scott R. Goldsmith
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Caryn K. Groce
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Asaf S. Hahami
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Claire Quinn Halligan
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Robert B. Hatchett
Tayanita Tara Hayes
Staciellen S. Heasley
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Karin L. Herrmann
David S. Hershey-Webb
Darryl C. Heslop
Eric Hill
James Oleg Hmelnitsky
Rachel L. Hochhauser
Ian K. Hochman
Robert S. Hoff
Tracie Lee Hoffman
Howard S. Hogan
Kevin Anne Hogan
Spring S. Hollis
Amy L. Holman
Maria G. Honrado
Jun Hu
Lynna Mary Huang
Serena Claire Hunn
Miles Mark Hunter
David S. Ivill
Alison Willis Jackson
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Language Tips

By Gertrude Block

Question: New York Attorney Richard J. Brickwedde has sent an interesting question about the meaning of a statute that reads: "It shall be unlawful for any person to distribute, sell, offer for sale or use . . . (a) Any pesticide which has not been registered pursuant to the provisions of this article . . ."

Mr. Brickwedde wrote that his firm is engaged in a debate over whether the words "has not been registered" mean that the pesticide must have been registered in the past or whether it must be currently registered. That is, whether it is unlawful for anyone to distribute (etc.) any pesticide that has not been registered in the past, or whether present registration of the pesticide is required.

Answer: To untangle the language, the reader must realize that the two negatives cancel each other out. If it is "unlawful to distribute" anything that "has not been registered" (in the past), it is therefore lawful to distribute anything that has been registered in the past. No language that I have seen in the material that Mr. Brickwedde provided changes that meaning.

The double negative ("unlawful" and "has not been registered") is the culprit. When one uses more than one negative to express an idea, confusion or ambiguity results. To avoid either problem, state negative ideas affirmatively whenever possible.

Mr. Brickwedde wrote that he believes that once the pesticide "has been registered" in the past, it is lawful to sell it. His opponents argue that the language of the statute requires that the pesticide be currently registered. I wrote Mr. Brickwedde that, based on the evidence he sent, his argument should prevail.

On another subject, Mr. Brickwedde added his vote for the salutation "Dear Gentle People," in response to the March-April 2000 "Language Tips," in which readers were asked to suggest acceptable substitutes to replace gender-based salutations. Although some respondents favored "Dear Gentle People," others objected on the ground that addressees were seldom "dear" and hardly ever "gentle." Most respondents favored "Greetings," despite my concern that the word would evoke unpleasant reminders of World War II draft-board letters.

Questions: A Rochester reader has sent several questions about grammar: (1) when to use 's as the possessive form and when it should be s', (2) the use of may versus might, and (3) the placement of commas and periods following titles.

Answer: To clarify question (1), the reader used the phrase, "Judge Williams'/Judge Williams's order," and added that the *New York Times* prefers the second spelling.

The *Times* is correct in using "Judge Williams's order," but would be equally correct in using "Judge Williams' order." Either construction is proper; the choice depends on whether one pronounces the final 's or not. I prefer "Judge Williams' order" because I do not pronounce the phrase as "Judge Williamses order."

Typically, in one-syllable possessive nouns that end in the s or z sound, the 's ending is added (and pronounced); for example, "the boss's request," "James's horse." For a complete analysis of possessive endings, see my *Effective Legal Writing*, Fifth Edition, Foundation Press, pages 49-51. This subject seems to trouble many readers, judging by the number of letters I receive on the subject.

Question (2): Whether to choose may or might in the sentence, "I will send a copy of this draft to Joe, who may/might change it." The reader added that he merely wishes to alert his client to the possibility that the data could change.

Answer: Both "may" and "might" are grammatically correct in the construction the Rochester correspondent submitted. But "might" is preferable because it avoids the ambiguity of "may." The reason is that the word "may" can mean either permission or possibility, and "might", in this sentence, means only possibility.

Consider the following statement: "Students may conform to the dress code," in which the reader cannot tell whether (1) students are permitted to conform to the dress code (permission) or (2) students will perhaps choose to conform to the dress code (possibility). In addition, in a negative statement, may can mean "prohibit." "Students may not use the halls after school hours" can mean either that students are not permitted to use the halls after school hours, or that possibly students will not do so.

Question (3): Where do the opening quotation marks belong in the sentence: I appeared on "The Riddle Show," when that is the title of the program referred to?

Answer: The opening quotation marks belong before "The" because that word is part of the program's title. If the program were titled "Riddle Show," the sentence would be punctuated: I appeared on the "Riddle Show."

Thanks to all correspondents for their helpful questions.

Gertrude Block is the writing specialist and a lecturer emeritus at Holland Law Center, University of Florida, Gainesville, FL 32611, and a consultant on language matters. She is the author of Effective Legal Writing, fifth edition (Foundation Press, July 1999), and co-author of Judicial Opinion Writing Manual (West Group for ABA, 1991).

The author welcomes the submission of questions to be answered in this column. Readers who do not object to their names being mentioned should state so in their letters. E-mail: Block@law.ufl.edu