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by Jyotin Hamid

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CONTENTS

OCTOBER 2008

BUT YOU PROMISED ME A PROMOTION

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DEPARTMENTS

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), 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 $20. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

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BERNICE K. LEBER

And Justice for All

In March 2008, as Immediate Past President Kate Madigan and I were at Touro Law School, holding the statewide conference on a civil right to counsel,* the State of New York found itself in the midst of a budget crisis. With a then-projected $5 billion budget deficit, the loss of 20% of state revenues derived from Wall Street and the concurrent downturn in the economy, secondary mortgage calamity and plummeting interest rates, legal services providers put every ounce of their collective efforts to restoring civil legal services funding to the level provided during the 2007 state budget negotiations, $15.7 million. The State Bar was proud to help with this effort.

The situation was bleak. Not only had former Governor Spitzer earmarked a meager $1 million for civil legal services on the assumption that the most favored customer interest rate would boost to IOLA funds and yield enough money to make up for the shortfall, but also the declining interest rates forewarned that the boost in IOLA funds was not likely to come to fruition any time soon, especially in a recession.

Since March, our collective efforts helped to restore some civil legal services funding – but just to $7.3 million, a drop in the bucket – and it is clear that New York's economic situation has only worsened. The deficit is now predicted to be $6.4 billion. Governor Paterson called an emergency session of the Legislature on August 19, and asked legislators and state agencies to cut their already leaner budgets by another 7%. In a live televised broadcast, Governor Paterson forewarned that New York was facing "increasingly harsh economic times," and stated that now is the time for government to "learn to do more with less."

Some reading this message might ask, is now the time to push for the implementation of civil Gideon? In these tough times, how will our taxpayers and government pay for it? The answer to this question is another "obvious truth": civil Gideon has become a necessity now for two primary reasons. First, in these tough economic times, it is becoming more difficult for our citizens to afford legal representation, and they need help now more than ever. This past July, home foreclosure filings nationwide were up 55%, with New York among the top 10 states for foreclosure filings. We know that those seeking help with a housing issue typically also need legal counsel on a host of other issues, not to mention the fact that the rising homeless population places an extreme burden on municipalities to provide alternative housing and sustenance.

Back in 2005, before we were facing the current crisis, the Office of Court Administration estimated that 75% of litigants in New York City Family Court and 90% in Housing Court appeared without an attorney in matters involving fundamental issues such as evictions, domestic violence, child custody, guardianship, visitation, support and paternity. Sixty percent of *pro se* litigants surveyed, with annual incomes ranging from under $15,000 to more than $45,000, believed they could not afford an attorney.

In 2008, it is not only the poor who are unable to afford an attorney. Middle-class New Yorkers are struggling to buy groceries, gasoline and energy to heat their homes, let alone find the money for attorney's fees. Yet to qualify for help from legal aid, a family of four must have an annual income that is less than $27,000. With the surge in housing foreclosures, it is evident that civil Gideon is not just a needed remedy for the poor. We also need to rethink what it means to be poor today, when not only the poor but also now, the middle class is squeezed and cannot afford legal representation. In the emails I received from you just before I began my term as President, a member suggested that we need to rethink the definition of the poor when it comes to filing papers *in forma pauperis*. For starters, I have sent this thoughtful suggestion on to our CPLR Committee to consider implementing.

Second, the failure to fund these critical services now will have devastating consequences in the short term. Dollars spent on civil legal services saves us triple – even quadruple – the amount we would otherwise spend down the road. For example, according to the New York City Department of Social Services report entitled, *The Homelessness Prevention Program: Outcomes and Effectiveness*, every dollar spent on indigent representation in eviction proceedings saves four dollars in costs related to homelessness. This is

Bernice K. Leber can be reached at bleber@nysba.org.

a particularly relevant example when you consider the on-going home foreclosure crisis. The loss of a home has brought the absence of fully funded civil legal services to the national stage. We see this in the programs and legislation offered to buy time for those facing foreclosure. But extending time to pay one's debt – without also providing legal counsel for those in need – is not truly affording a remedy at all.

A Nationwide Issue

At a recent Presidential Summit of all 50 state bar presidents and state delegates to the ABA that I chaired at my firm, Arent Fox, in New York City during the American Bar Association's Annual Meeting, access to justice topped the list of critical issues that we most want our United States presidential candidates to address meaningfully in the coming days. Jeffrey Bleich, president-elect of the State Bar of California, informed the group that in California there is just one legal services lawyer for every 8,000 people who need such services. H. Thomas Wells, president of the American Bar Association and representative for the Alabama Bar Association, noted that in 2007, $7.5 million was spent to elect judges in Alabama, while just $2 million was spent on access to justice. Barbara Bonar, president-elect of the Kentucky Bar Association, stated that in her state, the middle class was struggling to afford attorneys when facing foreclosure, divorce and child custody disputes. New York is, thus, not alone in our quest for justice for the poor.

As a result of our meeting, we State Bar Presidents have drafted a letter that will highlight access to justice as a top priority for our nation's newly elected president in 2009. Not surprisingly, the discussion included advocacy for a federal civil Gideon statute. All of the State Bar Presidents are prepared to sign the letter and forward it on to the campaigns of each presidential candidate. After the inauguration, we will ask for a meeting with the new president in order to request, among other issues facing our society, accountability and a response to the increased need for funding for civil legal services, for a federal civil Gideon statute, and for a loosening of current restrictions placed on Legal Services Corporation funds. This unity of purpose, voices and resources will enable us to accomplish much more than any one of us could individually. This unity of purpose gives us hope that things can change.

Funding Concerns

Over the next year as we have in the past, the State Bar will continue to advocate for a permanent stream of funding. We are continually communicating our position with Governor Paterson and the legislative leaders and as recently as August 19, 2008, wrote before the legislative session to request it. New York remains one of only seven states in our nation that do not provide permanent funding – a grim statistic that is often repeated on these pages. This is no distinction. New York needs to surpass our sister states of Massachusetts, New Jersey and Vermont, who provide two to four times the $5 we spend for each poor person in our state. We have advocated for funding to reach $50 million by 2010.

But we also are realists. Looking for dollars to fund necessary legal services for the poor, the State Bar, and in collaboration with The New York Bar Foundation, has taken the doctrine of *cy pres* on the road. We have been holding meetings with the Southern and Eastern District Courts, and with the Commercial Division to discuss ways in which to implement the use of *cy pres* funds to support civil legal services. *Cy pres* is not a predictable source of funding and so would not be a suitable substitute for permanent funding, but it is an untapped resource for civil legal services. We will continue to urge the bench and bar to find creative ways to secure legal services for the poor. Judge George Lowe and I have been working with the Federal Bench and State Commercial Divisions throughout the state to devise ways to ensure that residual funds make their way to needy civil legal services providers.

Among other things, I created a *cy pres* committee with my co-chair Judge George Lowe, which consists of a honored lawyers steeped in the process of applying to court for *cy pres* funding from existing class actions. Your President-Elect, Michael Getnick, is committed to continuing this important project. The Committee also is engaged in developing protocols, with your Secretary C. Bruce Lawrence, for the program both internally and through the Bar Foundation as well as in the courts. With over 50 years' experience making grants for civil legal services, the Bar Foundation and its board of directors are well-suited and experienced in assisting our state and federal courts and litigants with assessing worthy recipients of *cy pres* monies and finding the right nexus between the purpose for which the class action was brought and possible civil legal service providers to receive the award. The Committee is also actively investigating court dockets and will actively work with litigants and their counsel in helping to devise settlement agreements that will provide for *cy pres* funds to be administered, through the State Bar and Bar Foundation. The Committee is also making outreach to claims administrators to assist in this noble and worthy effort. In sum, we have resolutely committed ourselves and the resources of our organization to this effort.

We cannot do this alone. If we truly believe in justice for all as the Pledge of Allegiance states, then it is incumbent upon us, every one of us, to do all that we can as attorneys, whether by way of pro bono work, your advocacy, writing letters to our Congresspersons, making contributions, and the like – despite these difficult economic times in order to ensure that all Americans have representation when fighting for fundamental needs, such as housing, sustenance, safety, and child custody. Justice for all must be meaningful – for all Americans. ■

*A transcript of the conference, as well as articles on the subject of a civil right to counsel, will be published in the *Touro Law Review*, Volume 25, Issue 1.

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Write to Win: Advanced Legal Writing for the New York Attorney
(program: 9:00 – 12:40 pm)
Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 skills
October 6 Buffalo
October 7 Rochester
October 8 Syracuse
October 10 Albany
October 15 Long Island

Update 2008
Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 ethics and professionalism; 6.5 credit hours practice management and/or professional practice
October 10 Syracuse
October 24 New York City

Handling DWI Cases in New York – 2008 Update
Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 ethics and professionalism; 3.0 skills; 3.0 professional practice
October 16 Buffalo
October 23 Long Island
October 24 New York City
November 13 Albany

+Business and Family Entities: What the Divorce Lawyer Must Know
(program: 9:00 am – 12:45 pm)
Fulfills NY MCLE requirement (4.0): 4.0 practice management and/or professional practice
October 17 Buffalo
October 24 Long Island
November 14 Tarrytown
November 21 Syracuse

Risk Management for the Solo/Small Firm
(program: 1:00 pm – 5:00 pm)
October 21 Buffalo
October 28 Albany
November 18 Westchester
November 20 New York City

Henry Miller – The Trial
Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 ethics and professionalism; 6.5 skills
October 22 New York City
November 6 Long Island

Practical Skills Series: Probate and the Administration of Estates
Fulfills NY MCLE requirements for all attorneys (7.0): 1.0 ethics and professionalism; 2.5 skills; 3.5 practice management and/or professional practice
October 23 Albany; Buffalo; Long Island; New York City; Rochester; Syracuse; Westchester

Practical Skills Series: Basics of Bankruptcy
Fulfills NY MCLE requirements for all attorneys (7.5): 1.0 ethics and professionalism; 2.5 skills; 4.0 practice management
October 28 Buffalo; Syracuse
October 30 Albany; Long Island; New York City

+Update 2008 (video replays)
October 29 Albany; Binghamton
October 31 Rochester
November 5 Buffalo; Utica
November 6 Ithaca; Plattsburgh; Saratoga
November 13 Jamestown
November 14 Canton
November 18 Long Island; Suffern
November 21 Corning; Tarrytown; Watertown

Emerging Issues in Environmental Insurance
(program: 9:00 am – 12:55 pm)
Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 practice management and/or professional practice
October 31 New York City

Retirement Accounts in Elder Law Planning
October 31 Syracuse
November 6 Tarrytown
November 7 New York City
November 21 Albany
TBD Long Island

Accounting for Lawyers
November 5 Long Island
November 21 Albany

Tenth Annual Institute on Public Utility Law
November 7 Albany

Update on Landlord/Tenant Practice
(program: 9:00 am – 1:00 pm)
November 13 New York City

Ethics and Professionalism
(program: 9:00 am – 12:45 pm)
Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 ethics and professionalism
November 13 Syracuse
November 14 Long Island
November 18 Buffalo

Alternative Dispute Resolution in the Employment Context
(program: 9:00 am – 1:00 pm)
November 14 New York City

Construction Site Accidents
Fulfills NY MCLE requirement for all attorneys (7.0): 4.0 skills; 3.0 professional practice/practice management
November 14 Buffalo
November 20 Albany
November 21 Syracuse

Hot Topics in Real Property Law and Practice
November 14 Rochester; Tarrytown
November 17 Albany
November 18 Syracuse

+The Sale of Stock in a Closely-Held Business to an "ESOP" (Employee Stock Ownership Plan): A Diversification Strategy for Business Owners
(program: 9:00 am – 1:00 pm)
Fulfills NY MCLE requirement (4.5): 4.5 practice management and/or professional practice
November 18 New York City

Practical Skills Series: Basics of Mortgage Foreclosures and Workouts
Fulfills NY MCLE requirements for all attorneys (6.5): 3.0 skills; 3.5 practice management and/or professional practice
November 19 Albany; Buffalo; Long Island; New York City; Rochester; Syracuse
November 20 Westchester

+Sixth Annual Sophisticated Trusts and Estates Institute
Fulfills NY MCLE requirement (13.5): 13.5 practice management and/or professional practice
(two-day program)
November 20–21 New York City

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Jyotin Hamid (jhamid@debevoise.com) is a partner in Debevoise & Plimpton LLP's New York office. He is a member of the firm's litigation department, and his practice focuses on general commercial litigation and employment litigation. He received his law degree from Yale Law School.

But You Promised Me a Promotion

Are False Inducements Actionable in At-Will Employment?

By Jyotin Hamid

Can employers lie with impunity to prospective and current employees in order to induce them to accept employment or eschew other job opportunities? If the employment is at-will, the answer may be yes in nearly all cases. At-will employees have always had limited recourse under New York law to pursue claims that they were induced to leave secure positions or pass up better opportunities based on false promises from employers. The traditional view has been that, because at-will employment is freely terminable by the employer for any reason or for no reason,[1] an at-will employee may not reasonably rely on any promises about the duration, terms or conditions of a job and therefore cannot sustain a claim for fraudulent inducement if such promises turn out to be false.[2]

In 1992, in the seminal case of *Stewart v. Jackson & Nash*,[3] the U.S. Court of Appeals for the Second Circuit recognized a limited exception to this rule under New York law. The Second Circuit held that an at-will employee can pursue a fraudulent inducement claim against the employer if the suit seeks to redress injuries independent from the termination of the employment. Since *Stewart* was decided, federal courts construing New York law have sustained fraudulent inducement claims by at-will employees in several cases.[4]

Earlier this year, however, in a decision emphatically re-affirming New York's strong adherence to the at-will employment doctrine, the New York Court of Appeals narrowed – perhaps even to the vanishing point – the small avenue identified by *Stewart* through which at-will employees have been able to pursue fraudulent inducement claims in federal court.[5] Although the Court of Appeals in *Smalley v. Dreyfus Corp.*[6] declined to expressly abrogate the Second Circuit's holding in *Stewart*, the *Smalley* decision casts significant doubt on the continuing viability of claims based on the *Stewart* decision. This article examines the likely impact of the recent *Smalley* decision on *Stewart*, its federal court progeny and fraudulent inducement claims by at-will employees under New York law generally.

The At-Will Doctrine Under New York Law

New York law "presum[es] that employment for an indefinite or unspecified term is at will and may be freely terminated by either party at any time without cause or notice."[7] This presumption has been a bedrock principle of New York employment law since it was first adopted by the Court of Appeals in the 1895 case of *Martin v. New York Life Insurance Co.*[8] In *Murphy v. American Home Products Corp.*,[9] often cited as the modern foundation of

New York's at-will doctrine, the Court of Appeals reaffirmed the at-will presumption, declining to recognize a cause of action for wrongful discharge of an at-will employee or to hold that an employer's discretion to fire an at-will employee should be constrained by the implied covenant of good faith and fair dealing:

> In sum, under New York law as it now stands, absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employment at will remains unimpaired.[10]

And 25 years later in *Smalley*, the Court said, "In the decades since *Murphy*, we have repeatedly refused to recognize exceptions to, or pathways around, these principles."[11]

The essential import of the at-will presumption is that an at-will employee who claims that the employer reneged on assurances about the duration, terms or conditions of employment can rarely sustain a claim for breach of contract.[12] To overcome the at-will presumption, an employee must show an express agreement between the parties, typically but not always in the form of a written contract, limiting the employer's discretion.[13] Because the at-will presumption precludes breach of contract claims based on assurances about the likely duration, terms or conditions of employment that fall short of an express written limitation on the employer's discretion, plaintiffs have often turned instead to tort theories such as fraudulent inducement.

This has rarely been a successful strategy. Corollaries of the at-will doctrine impose substantial legal obstacles to claims by at-will employees that they were fraudulently induced to accept or remain at a job. New York courts often hold that at-will employees cannot satisfy the "reasonable reliance" element of a claim for fraudulent inducement because it cannot be reasonable to rely on assurances about the duration, terms or conditions of an employment relationship that the employer is at liberty to terminate at any time and for any reason.[14] In addition, applying the "well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated,"[15] New York courts often hold that a fraud claim based on allegations that an employer did not intend to keep a promise about the duration, terms or conditions of employment constitutes an impermissible attempt to restate a contract claim – unsustainable under the at-will doctrine – in the guise of a tort.[16] For example, in *Dalton v. Union Bank of Switzerland*,[17] the plaintiff alleged that he was induced to leave one bank and join another based on assurances that the defendant was hiring him for the "longer term," and he sued for breach of contract and fraudulent inducement when he was fired after only six months. The First Department held that the plaintiff's breach of contract claim was barred by the at-will rule because there was no express limitation on the employer's unfettered discretion to terminate his employment and that the fraudulent inducement claim was "similarly deficient in that it is a restatement of the first cause of action for breach of contract. . . . [N]o cause of action is stated or exists where the only fraud charged relates to a breach of the employment contract."[18]

Stewart v. Jackson & Nash

In 1992, in the case of *Stewart v. Jackson & Nash*,[19] the Second Circuit charted a narrow course through which employees could navigate around these legal obstacles and pursue successfully a fraudulent inducement claim based on false promises made by an employer.

The plaintiff in *Stewart* was an attorney. She alleged that she was induced to resign her position in the environmental law department of her old firm and take a job with the firm of Jackson & Nash, based on representations that the firm had recently secured a major environmental law client and was in the process of establishing an environmental law department, which she would head. Stewart alleged that the promised environmental law client, work and department never materialized and that she spent her tenure at Jackson & Nash doing general litigation work. After two years she was dismissed, and she filed a claim for fraudulent inducement in the U.S. District Court for the Southern District of New York.[20]

The firm moved to dismiss Stewart's claim, arguing that her employment was at-will; therefore, she could not reasonably rely on any assurances that might have been made and she could not avoid the effect of the at-will rule by labeling her action as one for fraud rather than breach of contract. At the District Court level, Judge Haight succinctly captured the essence of the defendants' position:

> Bluntly put, the Firm's argument is that an employer may lie to a prospective employee to obtain her services, and then discharge her with impunity if the employment is at will. It is an argument singularly lacking in grace.[21]

The absence of grace notwithstanding, the defendants' motion to dismiss was granted.

On appeal, the Second Circuit reversed and permitted Stewart's fraudulent inducement claim to proceed.[22] Under the Second Circuit's analysis, Stewart's case was not barred by the legal obstacles traditionally blocking at-will employees' fraudulent inducement claims. The key distinction, according to the Second Circuit, was that Stewart's injury from the allegedly fraudulent statements was independent of any harm resulting from the termination of her employment. Specifically, the Second Circuit found that by inducing her to leave a firm with an environmental law practice and spend two years doing

work unrelated to her chosen specialty, Stewart suffered "damage to her career development [that] was independent of her later termination from Jackson & Nash and began while she was still at the firm."[23] Stewart's claim was not, therefore, like prior unsuccessful claims by at-will employees, "a transparent attempt to restate the forbidden contractual challenge in the guise of tort."[24]

In many of these cases, the allegedly false inducements were promises about the likely duration or intended terms and conditions of the future employment.

The Second Circuit found actionable not only the allegedly false representation of existing fact that the firm had recently secured a major environmental law client, but also the additional representations that the firm was planning to build an environmental law practice and that Stewart would head the practice because the firm made those future promises with a present undisclosed intention of not performing them.[25]

Post-*Stewart* Fraudulent Inducement Claims in Federal Court

In the 15 years between the Second Circuit's decision in *Stewart* and the Court of Appeals's recent decision in *Smalley*, federal courts in New York have sustained several fraudulent inducement claims by at-will employees.[26]

Such claims have been allowed where "the injury alleged stems from leaving a former place of employment or agreeing to remain in a compromised position at a current place of employment."[27] For example, in *Hyman v. International Business Machines Corp.*, a plaintiff was allowed to pursue a claim that he suffered "loss of security and other benefits attendant to continued employment" with his former employer when he was induced to take a new job in reliance on false representations about the new employer's business;[28] in *Doehla v. Wathne Ltd., Inc.*,[29] *Cole v. Kobs & Draft Advertising, Inc.*[30] and *Garnier v. J.C. Penney Co., Inc.*,[31] plaintiffs were allowed to pursue claims that they suffered injuries to their "career development" as a result of being induced to leave better prior positions or forgo better opportunities; and in *Munn v. Marine Midland Bank, N.A.*[32] and *Lam v. American Express Co.*,[33] courts permitted fraudulent inducement claims to proceed to recover benefits that the plaintiffs alleged they surrendered at former places of employment as a result of being induced to leave those prior jobs and join the defendant employers.

In many of these cases, the allegedly false inducements were promises about the likely duration or intended terms and conditions of the future employment. For example, in *Munn*, the plaintiff claimed that he was induced to leave his prior job based on a false promise of "long term employment";[34] in *Doehla*, the plaintiff alleged false promises about the tasks he would be asked to perform;[35] and in *Cole*, the plaintiff alleged that she was induced to turn down a better offer based on assurances that if she stayed she would have "a great future" and would become an account manager.[36]

Although such promises are, of course, unenforceable under the at-will doctrine, the federal courts in these cases did not view the claims as impermissible attempts to restate as torts unsustainable contract claims. That is because the plaintiffs were not suing for damages flowing from the failure to perform on the unenforceable promises, but rather they were suing for collateral harm to career development or harm resulting from forgoing other opportunities. The federal courts following *Stewart* hold that although an at-will employee cannot reasonably rely on inducements relating to the duration, terms or conditions of employment to the extent of seeking redress for harm flowing from nonperformance of those inducements, the employee can reasonably rely on those inducements to the extent of seeking redress for injuries independent of the defendant's failure to perform on the inducements promised – such as harm to "career development," benefits forfeited by leaving a prior employer, or greater compensation forgone at an alternative job. For example, under the federal court precedents, while an at-will employee could not rely on a promise that she would become an account manager to the extent of suing to enforce that promise itself, she could rely on that promise to the extent of suing to recover for harm to her career if she passed up other, better opportunities, believing the promise to be true.[37]

Post-*Stewart* Fraudulent Inducement Claims in New York State Courts

By and large, New York state courts have remained inhospitable to fraudulent inducement claims by at-will employees even after *Stewart*.[38] In some cases, plaintiffs have not alleged an injury separate from the employers' failure to make good on allegedly false inducements and thus would fail to state a claim even under the *Stewart* line of federal court cases.[39] Other cases, though, are difficult to harmonize with the reasoning of the federal ones.

The First Department's brief 1996 opinion in *Tannehill v. Paul Stuart, Inc.*,[40] is often cited as the leading New York state court case on fraudulent inducement claims by

at-will employees. Citing *Stewart*, the First Department in *Tannehill* accepted that the plaintiff had articulated an injury separate from "that alleged with respect to her insufficient breach of contract claim" by alleging that the employer's false promises induced her to leave her prior employment.[41] In *Tannehill*, however, the court dismissed the fraudulent inducement claim, holding that although the plaintiff had alleged a separate *injury*, the "wrongful *act* alleged in support of the fraud claim does not differ from the purely contract-related allegation that defendant did not intend to perform at the time it entered into the agreement."[42] The court went on to hold that because the employment was at-will, the plaintiff could not have reasonably relied on the employer's inducements.[43]

The injury/act distinction driving the First Department's decision in *Tannehill* is hard to square with *Stewart* and the federal court cases following it. If, as the First Department acknowledged, the plaintiff in *Tannehill* adequately alleged an injury separate from the employer's failure to perform on the promised inducements, under the federal court precedents that allegation should have led the *Tannehill* court to hold that the plaintiff could reasonably rely upon the inducements, not to the extent of suing to enforce them, but at least to the extent of suing to recover for collateral harm from leaving her prior employment.

New York state courts have not accepted the distinction drawn in the federal courts following *Stewart*: that a plaintiff may reasonably rely on an unenforceable promise regarding the duration, terms or conditions of employment to the extent of suing to recover for collateral harm, even if he or she may not reasonably rely on such promises to the extent of suing to enforce the promises themselves. As reflected in *Tannehill*, New York state courts appear to have taken the more absolute view that if the promises are unenforceable under the at-will doctrine, an at-will employee may not rely on them for any purpose, regardless of the theory of damages sought.[44]

New York state courts may also be more skeptical about whether collateral harms, such as harm to "career development," are recoverable. In *Geary v. Hunton & Williams*,[45] for example, a case with allegations similar to those in *Stewart*, the plaintiff alleged that his "career development"as a banking litigator was injured because he was induced to accept employment based on fraudulent representations about the defendant firm's practice in that area. The First Department held that the damages the plaintiff sought were inherently speculative, undeterminable and violative of the customary "out-of-pocket" rule, which holds that in a fraud action damages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained.[46] Similarly, in the recent case of *Hoeffner v. Orrick, Herrington & Sutcliffe LLP*,[47] the New York County Supreme Court held that damages to "career development" arising from a law firm's allegedly false representation to the plaintiff that he would become a partner if he stayed at the firm were not recoverable under New York's "out-of-pocket" rule.

Smalley v. Dreyfus Corp.

The Court of Appeals's recent decision in *Smalley v. Dreyfus Corp.*[48] can be read as a confirmation of the absolutist view reflected in *Tannehill* and a rejection of the distinction, based on the theory of damages sought, drawn by *Stewart* and its federal court progeny.

The allegations in *Smalley* make for a sympathetic case that would almost certainly have supported a claim under the federal court precedents. The plaintiffs were five at-will employees of Dreyfus Corp.'s Taxable Fixed Income Group (TFIG), who claimed that Dreyfus's management falsely denied rumors that Dreyfus was considering a merger between the TFIG and the fund management company Standish, Ayer & Wood. The plaintiffs claimed that they relied on these false denials – understanding that a merger would likely result in the dissolution of the TFIG – in agreeing to leave secure positions at other companies to come to Dreyfus or to turn down more lucrative offers elsewhere to remain at Dreyfus. Ultimately, the TFIG was merged with Standish, the plaintiffs' jobs were all eliminated and the plaintiffs brought suit in New York State Supreme Court, New York County, alleging that the no-merger assurances were knowingly false when made.[49]

New York state courts may also be more skeptical about whether collateral harms, such as harm to "career development," are recoverable.

At the trial court level, Justice Lowe granted the defendants' motion to dismiss, holding that the plaintiffs, as at-will employees, could not reasonably rely on any assurance of continued employment:

> Even if the defendants represented to the plaintiffs that there was no possibility of any merger between Standish and the Group or that the rumors were "false," there could not be any reasonable reliance on these representations on the part of the plaintiffs precisely because the plaintiffs were at will employees, dischargeable at the behest of either party.[50]

The First Department reversed, relying on *Stewart*.[51]

In a short opinion by Chief Judge Kaye, the Court of Appeals reversed the First Department and dismissed the plaintiffs' fraudulent inducement claims. The Court

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of Appeals held that "[w]ithout adopting or rejecting the Second Circuit's rationale," the *Stewart* case was "fundamentally different" from the case before it.[52] The Court noted that the injury alleged in *Stewart* – harm to the plaintiff's career development – arose "well before plaintiff's termination and w[as] unrelated to it."[53] By contrast, the injury suffered by the plaintiffs in *Smalley* was inseparable from the termination of their employment:

> The core of plaintiffs' claim is that they reasonably relied on no-merger promises in accepting and continuing employment with Dreyfus, and in eschewing other job opportunities. Thus, unlike *Stewart*, plaintiffs alleged no injury separate and distinct from termination of their at-will employment.[54]

What precisely the Court of Appeals meant in holding that the plaintiffs had "alleged no injury separate and distinct from termination of their at-will employment" bears some scrutiny. It is not literally correct that the plaintiffs "alleged" no injury separate from the termination of their employment. Indeed, in the preceding sentence the Court of Appeals acknowledged that the plaintiffs alleged that they relied on the defendants' fraud in accepting employment from Dreyfus and eschewing other opportunities, and the Court of Appeals noted that the First Department found that the plaintiffs had identified injuries separate from termination of employment based on these allegations. The plaintiffs' briefs and pleadings articulated in some detail harms they alleged they suffered from leaving secure, lucrative positions at other financial institutions, such as UBS, Guardian Life and Alliance Capital, and from passing up other opportunities, including, for example, that one plaintiff allegedly turned down a job offer from CSFB which "guaranteed" higher compensation than Dreyfus.

What the Court meant in holding that the plaintiffs "alleged" no injury separate from the termination of their employment is that the allegedly false promises at issue were, in essence, promises about the likely duration of the employment and therefore that the harm suffered by the plaintiffs arose only when the employment ceased to exist. Having equated the false promises with assurances about the likely duration of the plaintiffs' employment, the Court of Appeals went on to hold that such assurances can never be relied upon by an at-will employee and therefore cannot support a claim:

> In that the length of employment is not a material term of at-will employment, a party cannot be injured merely by the termination of the contract – neither party can be said to have reasonably relied upon the other's promise not to terminate the contract. Absent injury independent of termination, plaintiffs cannot recover damages for what is at bottom an alleged breach of contract in the guise of a tort.[55]

The Likely Impact of *Smalley*

Although the Court of Appeals in *Smalley* declined to abrogate expressly the reasoning in *Stewart*, the reasoning in *Smalley* leaves uncertain what, if any, fraudulent inducement claims by at-will employees remain viable under New York law. At a minimum, the narrow holding – that a false inducement is not actionable if its content is, in essence, an assurance about the likely duration of the employment – would have driven an opposite outcome in many of the federal cases following *Stewart*. For example, in *Hyman*, the federal court sustained a fraudulent inducement claim brought by an at-will employee who alleged that he left a secure prior position, joined a new employer based on the false assurance that the employer had obtained a customer contract that would ensure the employer's continued existence, and lost his job when the existence of the contract turned out to have been a lie and the employer's business folded.[56] In *Munn*, the plaintiff claimed that he was induced to leave his prior job based on a false promise of "long term employment."[57] And in *Cole*, the plaintiff alleged that she was induced to turn down a better offer based on assurances that if she stayed she would have "a great future."[58]

The claim is barred if it is based on an inducement that is essentially about the likely duration of employment.

In these and other, similar federal cases, promises that were essentially about the likely duration of employment were found actionable because the plaintiffs were not suing to enforce the promises themselves but rather were suing for injuries separate from the nonperformance of the promises. *Smalley* repudiates that distinction, holding that regardless of the theory of damages sought, the claim is barred if it is based on an inducement that is essentially about the likely duration of employment.

The impact of *Smalley* may be even broader. *Smalley* purports to distinguish between inducements about the likely duration of employment (which give rise to injury only when employment terminates) and inducements about terms and conditions of employment like those in *Stewart* (which give rise to harm to "career development" whether or not employment terminates). *Smalley* held that the former category can never support an at-will employee's claim for fraudulent inducement and expressly declined to address the impact of the latter category. There are sound bases, however, to predict that *Smalley*'s holding with respect to the former will eventually be extended to the latter.

First, the distinction, while clear as a matter of cold logic, becomes murkier in the face of practical reality. For example, although the injury to Stewart's "career

development" might theoretically have begun to accrue before her employment terminated, as Judge Haight held at the District Court level in *Stewart*, she would never have brought the lawsuit if the law firm had not fired her.[59] Indeed, it is inconceivable that Stewart could have remained at Jackson & Nash and simultaneously sustained a lawsuit against the firm based on the theory that her career would have been better if she had chosen a different firm instead.

Second, applying the distinction would yield curious results. For example, a law firm associate joining an environmental law practice would be able to sue if the firm misrepresented the number of clients in the practice but not if the firm fraudulently denied the truth that the entire practice was about to be shut down and all the lawyers in it let go.

Third, and most fundamental, the distinction may not hold up because the logic of *Smalley* applies equally to inducements about the duration of employment and inducements about terms and conditions. Simply put, the logic of *Smalley* is as follows:

- an inducement that promises continued employment cannot be relied upon by an at-will employee because length of employment is not a material term of an at-will employment contract;
- therefore, failure to perform on that promise cannot cause actionable harm.

The logic is easily expanded beyond assurances about the duration of employment to assurances about the terms and conditions of employment. The at-will presumption renders unenforceable promises about terms and conditions to the same extent as promises about duration of employment. Statutory proscriptions aside, at-will employees have no right to rely on their employer continuing to pay their current salary; maintaining their current title, duties or responsibilities; keeping its current clients; or even continuing in the same line of business. As a result, under the logic of *Smalley*, promises as to any of these matters cannot be relied upon by an at-will employee because none of them is a material term of an at-will employment contract; therefore, failure to perform on them cannot cause actionable harm.

Conclusion

After *Smalley*, the limited avenue available to at-will employees to pursue fraudulent inducement claims has narrowed considerably. At a minimum, it appears that inducements regarding the likely duration of a job – which could support a claim under federal court precedents, depending on the theory of the damages sought – are no longer actionable. Until the impact of *Smalley* is further developed in the case law, at-will employees can take some comfort in the Court of Appeals's decision not to abrogate expressly the Second Circuit decision in *Stewart* and will undoubtedly test the extent, if any, to which fraudulent inducement claims remain viable. Employers, however, will have a plausible argument that *Smalley* should preclude any fraudulent inducement action based on any alleged promises concerning the duration, terms or conditions of employment on which an at-will employee cannot reasonably rely. ■

1. *See, e.g.*, *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983).

2. *See, e.g.*, *Clark v. Helmsley Windsor Hotel*, 214 A.D.2d 365, 625 N.Y.S.2d 159 (1st Dep't 1995); *Tannehill v. Paul Stuart, Inc.*, 226 A.D.2d 117, 640 N.Y.S.2d 505 (1st Dep't 1996); *Arias v. Women in Need, Inc.*, 274 A.D.2d 353, 712 N.Y.S.2d 103 (1st Dep't 2000); *O'Connor v. Harbrew Imports, Ltd.*, 4 Misc. 3d 1016(A), 798 N.Y.S.2d 346 (Sup. Ct., N.Y. Co. 2004).

3. 976 F.2d 86 (2d Cir. 1992).

4. *See, e.g.*, *Garnier v. J.C. Penney Co., Inc.*, 863 F. Supp. 139 (S.D.N.Y. 1994); *Cole v. Kobs & Draft Advertising, Inc.*, 921 F. Supp. 220 (S.D.N.Y. 1996); *Munn v. Marine Midland Bank, N.A.*, 960 F. Supp. 632 (W.D.N.Y. 1996); *Doehla v. Wathne Ltd., Inc.*, No. 98 Civ. 6087, 2000 WL 987280 (S.D.N.Y. July 17, 2000); *Hyman v. Int'l Bus. Mach. Corp.*, No. 98 Civ. 1371, 2000 WL 1538161 (S.D.N.Y. Oct. 17, 2000); *Lam v. Am. Express Co.*, 265 F. Supp. 2d 225 (S.D.N.Y. 2003).

5. *Smalley v. Dreyfus Corp.*, 10 N.Y.3d 55, 853 N.Y.S.2d 270 (2008).

6. *Id.*

7. *Horn v. N.Y. Times*, 100 N.Y.2d 85, 90–91, 760 N.Y.S.2d 378 (2003).

8. 148 N.Y. 117, 42 N.E. 416 (1895).

9. 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983).

10. *Id.* at 305.

11. *Smalley*, 10 N.Y.3d at 58 (citations omitted). The Court of Appeals has recognized only one, very narrow, exception to the at-will rule, finding that the unique characteristics of the legal profession give rise to an implied-in-law obligation of a law firm not to fire an attorney for insisting on compliance with provisions of the Code of Professional Responsibility. *Wieder v. Skala*, 80 N.Y.2d 628, 593 N.Y.S.2d 752 (1992). The Court of Appeals later declined to extend this exception to a doctor who claimed that she had been fired in retaliation for refusing to breach physician-patient confidences. *Horn*, 100 N.Y.2d 85.

12. *See, e.g.*, *O'Connor v. Eastman Kodak Co.*, 65 N.Y.2d 724, 492 N.Y.S.2d 9 (1985); *Dalton v. Union Bank of Switzerland*, 134 A.D.2d 174, 520 N.Y.S.2d 764 (1st Dep't 1987); *Wexler v. Newsweek*, 109 A.D.2d 714, 487 N.Y.S.2d 330 (1st Dep't 1985).

13. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 457 N.Y.S.2d 193 (1982); *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 514 N.Y.S.2d 209 (1987).

14. *See Stewart v. Jackson & Nash*, 976 F.2d 86 (2d Cir. 1992).

15. *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 389, 521 N.Y.S.2d 653 (1987).

16. *See Weiner*, 57 N.Y.2d 458; *Sabetay*, 69 N.Y.2d 329.

17. 134 A.D.2d 174, 520 N.Y.S.2d 764 (1st Dep't 1987).

18. *Id.* at 176 (citations omitted).

19. 976 F.2d 86.

20. *Stewart v. Jackson & Nash*, 778 F. Supp. 790 (S.D.N.Y. 1991).

21. *Id.* at 792.

22. *Stewart*, 976 F.2d at 86.

23. *Id.* at 88.

24. *Id.*

25. *Id.* at 89; *see also Sabo v. Delman*, 3 N.Y.2d 155, 160, 164 N.Y.S.2d 714 (1957) (explaining that "mere promissory statements as to what will be done in the future are not actionable separate from a contract claim, but a promise made with a "preconceived and undisclosed intention of not performing" constitutes a material existing fact on which a separate claim may be predicated); *Deerfield Commc'ns Corp. v. Chesebrough-Ponds, Inc.*, 68 N.Y.2d 954, 510 N.Y.S.2d 88 (1986) (same).

26. *See Smalley v. Dreyfus Corp.*, 10 N.Y.3d 55, 853 N.Y.S.2d 270 (2008).

27. *Hyman v. Int'l Bus. Mach. Corp.*, No. 98 Civ. 1371, 2000 WL 1538161, at *3 (S.D.N.Y. Oct. 17, 2000).

28. *Id.*

29. No. 98 Civ. 6087, 2000 WL 987280 (S.D.N.Y. July 17, 2000).

30. 921 F. Supp. 220 (S.D.N.Y. 1996).

31. 863 F. Supp. 139 (S.D.N.Y. 1994).

32. 960 F. Supp. 632 (W.D.N.Y. 1996).

33. 265 F. Supp. 2d 225 (S.D.N.Y. 2003).

34. 960 F. Supp. at 643.

35. 2000 WL 987280.

36. 921 F. Supp. at 222.

37. *Cole*, 921 F. Supp. 220.

38. *See Stewart v. Jackson & Nash*, 976 F.2d 86 (2d Cir. 1992); *but see Backer v. Lewit*, 180 A.D.2d 134, 584 N.Y.S.2d 480 (1st Dep't 1992) (permitting fraudulent inducement claim on reasoning similar to *Stewart*); *Navaretta v. Group Health Inc.*, 191 A.D.2d 953, 595 N.Y.S.2d 839 (3d Dep't 1993) (permitting fraudulent inducement claim following *Stewart*).

39. *See, e.g., Sforza v. Health Ins. Plan of Greater N.Y., Inc.*, 210 A.D.2d 214, 619 N.Y.S.2d 734 (2d Dep't 1994); *Nagle v. Shearson Lehman Bros., Inc.*, 190 A.D.2d 568, 593 N.Y.S.2d 231 (1st Dep't 1993).

40. 226 A.D.2d 117, 640 N.Y.S.2d 505 (1st Dep't 1996).

41. 226 A.D.2d at 118.

42. *Id.* (emphasis in original).

43. *Id.*

44. *See Stewart*, 976 F.2d 86.

45. 257 A.D.2d 482, 684 N.Y.S.2d 207 (1st Dep't 1999).

46. *Id.* (citing *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76 (1996)).

47. N.Y.L.J., Aug. 11, 2008, p. 18, col. 1.

48. 10 N.Y.3d 55, 853 N.Y.S.2d 270 (2008).

49. *Id.*

50. *Smalley v. Dreyfus Corp.*, No. 601956/2005, 2006 WL 5110874, at *5 (Sup. Ct., N.Y. Co. Feb. 6, 2006).

51. *Smalley v. Dreyfus Corp.*, 40 A.D.3d 99, 832 N.Y.S.2d 157 (1st Dep't 2007).

52. 10 N.Y.3d at 59.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Hyman v. Int'l Bus. Mach. Corp.*, No. 98 Civ. 1371, 2000 WL 1538161, at *1 (S.D.N.Y. Oct. 17, 2000).

57. *Munn v. Marine Midland Bank, N.A.*, 960 F. Supp. 632 (W.D.N.Y. 1996).

58. *Cole v. Kobs & Draft Advertising, Inc.*, 921 F. Supp. 220, 222 (S.D.N.Y. 1996).

59. *Stewart v. Jackson & Nash*, 778 F. Supp. 790, 792 (S.D.N.Y. 1991).

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BY DAVID PAUL HOROWITZ

David Paul Horowitz (dhorowitz@nyls.edu) practices as a plaintiff's personal injury litigator in New York City. Mr. Horowitz teaches New York Practice at New York Law School, is a member of the Office of Court Administration's CPLR Advisory Committee, and is a frequent lecturer and writer on the subject.

"Dead [Wo]men Do Tell Tales"

The Dead Man's Statute is codified in CPLR 4519, and applies to a "[p]ersonal transaction or communication between witness and decedent or mentally ill person."[1] It bars,

> in certain situations, the introduction of testimony by a party or interested person as to the personal transactions and communications with the deceased [or mentally ill person]. Fairness and the preservation of equality, it is thought, require that one party should not be allowed to give his version of a communication or transaction when his adversary can no longer speak.[2]

The Dead Man's Statute has been much criticized, and the Office of Court Administration's CPLR Advisory Committee[3] has long recommended its repeal.[4] "Unfortunately, the tremendous and practically unanimous deluge of condemnation poured upon the Dead Man's statute by legal authorities and bar groups has failed to crumble or even shake the walls of the prohibition."[5]

Earlier this year, the Court of Appeals heard argument in *In re Zalk*:[6]

> This appeal calls upon us to decide whether the Dead Man's Statute (CPLR § 4519) applies in an attorney disciplinary proceeding involving how Richard A. Zalk handled a $200,000 down payment in a real estate transaction where he represented the seller, Ruth Gellman, subsequently deceased.[7]

The Court acknowledged the unpopularity of the Dead Man's Statute:

> "The rule of evidence popularly referred to as the Dead Man's Statute" was enacted by the New York Legislature in 1851, and is "widely considered to be the last vestige of the common-law rule which made all interested persons and parties incompetent to testify. After the general rule barring testimony from interested persons was abolished, a new rule was adopted to prevent the living from testifying to certain 'personal transactions' with the dead. One of the main purposes of the rule was to protect the estate of the deceased from claims of the living who, through their own perjury, could make factual assertions which the decedent could not refute in court."
>
> As we pointed out in *Wood*, "[w]hile the utility and wisdom of the rule have been often questioned throughout its history and the Legislature has often forcefully been urged to change or to modify the statute, it, nonetheless, has been consistently reenacted by the Legislature and remains a part of the law of this State."[8]

The appeal in *Zalk* gave succor to those seeking to bury the Dead Man's Statute (an event that, were it to occur, would occasion celebration, not mourning among most members of the bar). The First Department had concluded that the Dead Man's Statute did apply to Zalk's disciplinary hearing, and barred him from testifying, in connection with his conduct in handling the escrow account, about conversations he had with Mrs. Gellman wherein she told him to pay himself the balance remaining in the escrow account as his legal fee.[9] The facts underlying the appeal are worth reviewing.

Zalk to Me

As recited by the First Department, Richard A. Zalk, holder of an unblemished 36-year disciplinary record as a member of the New York bar, was the subject of a disciplinary complaint involving legal fees he paid to himself for work performed over a 10-year period representing Ruth Gellman.

Zalk was first retained to represent the estate of Ruth's father in 1970, and, thereafter, performed work for Ruth and her husband, Arthur. After Arthur died in 1990, Zalk continued to represent Ruth; he negotiated the sale of a 22-unit garden apartment complex she had inherited from her father and, in 2000, closed the purchase on terms that were favorable to Mrs. Gellman. During this time Zalk was not paid for his services.

Zalk explained that he knew Ruth had cash-flow issues, and claimed that he had a verbal agreement, made over the course of a number of conversations with Ruth, that he would be paid for his work out of the proceeds of the sale of the apartment complex. Zalk said that at a dinner after the sale was completed, he was told by Mrs. Gellman that he could retain whatever remained in the escrow account after all expenses were paid, an amount that totaled approximately $162,000.

After her death, Ruth's daughters, whom Zalk had represented in connection with the sale of their mother's family home (work for which he was

not paid), demanded the monies in the escrow account. Zalk had already paid himself $100,000 out of that account, but made no further withdrawals after receiving the daughters' letter. The daughters wrote a letter of complaint and the Disciplinary Committee served Zalk with a notice and statement of charges. The charges, supplemented by stipulation, alleged the following:

> (1) violation of DR 1-102(A)(4), conduct involving dishonesty, fraud, deceit or misrepresentation; (2) misappropriation of funds in violation of DR 9-102(A); (3) violation of DR 9-102(B) by withdrawing funds from the escrow account on June 4, 2001 and September 24, 2001, after he was on notice that his right to the monies was disputed; (4) engaging in a conflict of interest by representing the Ruth Gellman estate once his claim to the escrow account was disputed by the co-administrators of the estate; and (5) conduct adversely reflecting on respondent's fitness as a lawyer, in violation of DR 1-102(A)(7).[10]

The Long *Zalk* to the Court of Appeals

After being served with the charges, Zalk sought to testify as to his conversations with Mrs. Gellman. "His explanation that the client had orally authorized him to take the remainder of the escrow monies as his fee for legal services provided to her over the previous 10 years was viewed by the Committee as irrelevant, inasmuch as it viewed the Dead Man's Statute (CPLR 4519) as precluding him from relying on any such claim."[11]

A hearing was held before a referee, and the Committee argued that the Dead Man's Statue barred Zalk from testifying as to his conversations with Mrs. Gellman:

> Looking at the "plain language of the statute," the referee reasoned that an attorney disciplinary proceeding was not "against the executor, administrator or survivor of a deceased person." He added that while Zalk "might be barred from testifying in an action brought by the sisters to recover the escrow funds," he "c[ould not] see how, in a disciplinary proceeding, he c[ould] be barred from offering his defense."

As to charges one and two, the referee found Zalk to be "a wholly credible witness" and that "no reason" existed in the record "to doubt that [Zalk] had an oral agreement with Ruth Gellman, or at the very least he believes he did"; to "suggest that [Zalk] had any wrongful intent"; or to conclude that he "engaged in any dishonesty, fraud, deceit or misrepresentation." Accordingly, the referee recommended that charges one and two be dismissed.

The referee found charge three to be "a closer question," but he ultimately concluded that Zalk "received no clear notice until he received the sisters' letter of October 14, 2001 . . . and after that notice he made no further withdrawals." He similarly recommended that charge four would "fall[]" because "there was no apparent 'conflict' before the sisters' October 14, 2001 letter – and [Zalk] performed no services after that date."

The referee, however, recommended that charge five be sustained, noting that Zalk's "handling of the $200,000 'adversely reflected on his fitness as a lawyer'" because of his "basic mistake . . . [of] not obtain[ing] a writing from Mrs. Gellman or other proof confirming their agreement." Additionally, he observed that the "fact remains that it looks awful when a lawyer makes an oral agreement with a sick, elderly woman in which she gives him a significant portion of her assets."

In recommending a sanction, the referee noted that "to call [the Committee's] recommendation [of disbarment] draconian is to understate greatly." In light of Zalk's record of 36 years of practice with-

> out any disciplinary problems, his cooperation with the investigation, acknowledged error in not recording the agreement, and positive references (including a Justice of Supreme Court before whom Zalk had appeared some 20 times), the referee recommended a public censure.[12]

The matter was heard by a hearing panel of the First Department, which rejected the referee's proposed sanction.[13] The First Department reaffirmed an earlier holding that the Dead Man's Statute was properly invoked in an attorney disciplinary hearing.[14] Applying the statute, the court determined that the attorney's testimony he had the now-deceased client's permission to pay himself his attorney's fee out of monies held for the client in the escrow account was inadmissible under the Dead Man's Statute as a defense against the disciplinary charges.[15]

The First Department held this way despite the fact that Zalk's testimony was "found to be credible and which findings [the First Department agreed], supports his assertion that his claim to the funds was asserted openly and in good faith."[16]

The determination that the Dead Man's Statue barred Zalk's testimony hinged on the element of adversity:

> The only element warranting discussion here is that of whether respondent's testimony is "against" the executor, administrator or survivor of the deceased person.
>
> We conclude that the testimony at issue should be viewed as "against" the Gellman estate; although the estate and the Gellman daughters are not formally parties to this proceeding, respondent's testimony was against their interest inasmuch as they contradict his asserted right to the funds and in effect interpose a competing claim.[17]

The First Department did permit testimony of the attorney's conversations with the decedent "in the context of determining the nature of the discipline to impose on [the attorney]," since the estate had no interest in that determination[18] and imposed a two-year suspension.[19]

The Court of Appeals reversed, concluding: "We therefore look to the language of section 4519, and reached the same conclusion as did the referee: although 'Zalk testified as a witness in his own behalf or interest,' he did *not* testify 'against the executor, administrator or survivor' of Mrs. Gellman. Rather, he testified against the Disciplinary Committee, which is none of the latter."[20]

The Court explained:

> In essence, the Committee takes the position that, although the Gellman daughters are not parties to the disciplinary proceeding, the rules of the Fund and the doctrine of collateral estoppel endow them with a vital interest in a finding that Zalk converted estate monies. But the Dead Man's Statute only applies to testimony "against the executor, administrator or survivor" of the deceased. It does not foreclose testimony that potentially cuts against these parties' interests in a contingent future proceeding.[21]

*Zalk*ing Points

So when does the Dead Man's Statute operate to bar testimony? A useful checklist is found in *Fisch on New York Evidence*:

> Ascertaining the competency of a witness under this complex statute can be simplified by the use of the following questions. If the answer to any one of the questions numbered 1–5 is negative, or the answer to either question 5 or 7 is affirmative then the witness is not disqualified:
>
> 1. Is this an action or proceeding in which the statute is operative?
> 2. Is this witness a person as to whom the statute operates?
> 3. Is this witness being examined in his own behalf or interest or in behalf of a party succeeding to his title or interest?
> 4. Is this witness being examined against a person protected by the statute?
> 5. Is the subject matter of the examination prohibited by the statute?
> 6. Is either the witness or his testimony covered by an exception to the statute?
> 7. Has the statute been waived?[22]

Conclusion

So, while the Dead Man's Statute is alive and well, Zalk will be able to testify concerning his conversations with Mrs. Gellman, and that testimony will be considered in determining whether he has violated the Disciplinary Rules.

As for the rest of us, we must continue to stay alert to questioning that may elicit testimony concerning personal transactions or communications between the witness and a decedent or mentally ill person. ■

1. CPLR 4519.
2. Edith L. Fisch, Fisch on New York Evidence § 264 (2d ed. 2008).
3. In the interest of full disclosure, I am a member of the Committee.
4. Advisory Comm. on Civil Practice, Report of the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York 90–91 (2007), *available at* http://nycourts.gov/ip/judiciaryslegislative/CivilPractice_07.pdf.
5. Fisch, *supra* note 1, § 309.
6. 10 N.Y.3d 669 (2008).
7. *Id.* at 672.
8. *Id.* (quoting *In re Wood*, 52 N.Y.2d 139, 143–144, 436 N.Y.S.2d 850 (1981) (citations omitted)).
9. *In re Zalk*, 45 A.D.3d 42, 49-50, 842 N.Y.S.2d 377 (1st Dep't 2007).
10. These facts are recited in the decision of the First Department in *Zalk*, 45 A.D.3d at 49–50.
11. *Id.* at 46.
12. *In re Zalk*, 10 N.Y.3d 669, 676–77 (2008).
13. *Zalk*, 45 A.D.3d at 49–50.
14. *Id.*; *see also id.* at 48 (citing *In re Prounis*, 230 A.D.2d 55, 57, 654 N.Y.S.2d 131, 132 (1st Dep't 1997)).
15. *Zalk*, 45 A.D.3d at 48–49.
16. *Id.* at 50 (citations omitted).
17. *Id.* at 48 (citations omitted).
18. *Id.* at 49.
19. *Id.* at 50.
20. *In re Zalk*, 10 N.Y.3d 669, 679 (2008) (emphasis in original).
21. *Id.*
22. Fisch, *supra* note 1, § 264.

BY JAMES J. COFFEY

James J. Coffey (jcoffey@westelcom.com) is a sole practitioner in Plattsburgh, New York, a Professor at the School of Business and Economics at SUNY Plattsburgh, and the Town Attorney for the Town of Plattsburgh. Mr. Coffey is a graduate of SUNY Plattsburgh; he received his MBA from the University of Connecticut and his J.D. from Suffolk University Law School.

Local Property Taxes – A Political Problem Masquerading as a Tax Problem

Asking people what tax they prefer is akin to asking them what disease they would prefer. The answer is always the same – "None." The reality is, however, that we can't wish away taxes any more than we can wish away disease. What we can do as intelligent human beings and taxpayers is make informed decisions about what taxes are best, as in the case of disease we decide what treatment is preferable. To refuse to choose is a choice, and usually the worst choice one can make. I don't wish to compare the seriousness of disease with the frustration of paying taxes; however, there is one major similarity: we have the ability to impact the consequences by making intelligent choices and understanding the real nature of the problem.

Local property taxes in New York State are increasing rapidly; in 2002 they were 49% above the national average.[1] So, although other states struggle with this problem, in New York the problem is far more serious.

To focus on the issues and to clear up the misinformation surrounding this very serious problem, I have developed a series of 10 true-or-false statements and have also provided what I consider to be the answers to the questions raised.

1. Local property taxes are a local issue.

False. Local property taxes are a state and federal issue as well as a local issue. The boundaries among federal, state and local government are artificial. Living in a town, county, village or city doesn't exempt a taxpayer from paying state and federal taxes. Every taxpayer pays taxes to the federal, state and local governments and, in return, receives benefits from each group.

Any attempt to solve the local property tax crisis without actively involving the taxing policies of the state and federal government will fail. Raising or even discussing the issue of taxes can take a political toll on those politicians exhibiting the courage to discuss the issue in a forthright and constructive way. As a result, our representatives at the state and federal level are fearful of being tarred with the tax brush. This unfortunately leads to a situation in which the people who have the power to solve the problem are fearful of using their power to address it. Instead, band-aid solutions are proposed; these offer little in the way of relief and only mask the real problem.

2. The income tax at both the state and federal level is a more equitable way to raise revenue than taxing real property at the local level.

True. The income tax at both the state and federal level collects tax in proportion to a taxpayer's ability to pay. The income tax at both the state and federal level is progressive, which protects those individuals who have low incomes. Taxpayers who find themselves out of work are not required to pay any taxes while, conversely, taxpayers whose incomes have increased pay additional taxes but still have additional disposable income.

Property taxes are unrelated to the taxpayer's ability to pay, which results in serious financial hardship for large segments of the population. Seniors often find themselves in a situation where their income is declining or stagnating. "Because 63.8% of seniors living below the federal poverty line are homeowners, rising property taxes have a particularly negative impact on seniors."[2] "In eight out of the twenty years the U.S. Advisory Commission of Intergovernmental Relations conducted surveys on opinions towards common taxes, elderly respondents chose the

local property tax as the most unfair. Not only seen as unpopular, property tax is often thought to be regressive, and it can be the most burdensome tax for low-income persons and the elderly."[3]

3. Real property taxes are arbitrary, subjective and subject to litigation.

True. The tax on a particular amount of taxable income is set by law. If in 2007, a taxpayer files as single and has taxable income of $50,000, his or her tax is $8,930.[4] Clearly no one enjoys paying taxes, but there is a certain value in knowing exactly how much tax you will be required to pay and that it is rationally linked to your income. There are few surprises with income tax. As a result, taxpayers who receive a raise rarely sue the Internal Revenue Service to get their taxes reduced.

Real property taxes are driven by factors that are often totally outside the control of the taxpayer. The real property taxes on a home may increase dramatically because the house across the street sold for a very high price. Imagine, for example, if the amount you paid in income tax was determined by the income of your next-door neighbor. The value placed on property relies on the best judgment of the local assessor, which by its very nature is subjective. Because of the arbitrary nature of the property tax, property owners, especially those with large assessments, often choose to contest their assessment in the courts. This litigation creates an additional financial burden for local government.

4. The federal government and state governments have more resources at their disposal and thus are in a better position to collect taxes than local governments.

True. Tax collection is a critical element of the taxation process. Collecting income tax by way of payroll deduction is extremely efficient. If an individual receives a raise, the income tax on the increase in pay is automatically collected with the next paycheck. Even racetrack winnings over a certain amount are subject to withholding prior to the individual's collecting the money.

The same is not true for real property taxes. Unless escrowed with the mortgage, taxes must be paid either in a lump sum or three installments over a short period of time. Unpaid property taxes must be advertised in the newspaper, creating an additional financial and administrative burden for local government. If the property owner can't pay the tax, the property is sold at a tax sale, a further administrative and financial burden for the local municipality.

The value placed on property relies on the best judgment of the local assessor, which by its very nature is subjective.

5. One of the major reasons local property taxes are so high is political.

True. The concept of taxation and government spending is simple. Governmental services must be paid for with revenue raised from taxes. The essential question is what will be the best source of these funds. A fact of political life is that politicians at the state and federal level feel compelled to always support income tax cuts. If, however, total government spending does not decline but income tax rates do decline, the shortfall in tax revenue must come from other sources, and the property tax is one of these sources.

Local governments can't print money like the federal government nor can they create unfunded mandates like state governments. Local governments, like their citizens, must pay their bills when they are due.

The decision to tax real property as opposed to income is a conscious, political decision.

6. Real property taxes in New York State are out of control.

True. "Local property tax levies totaled $38 billion in 2005 – reflecting an increase of more than $11 billion [42%] since 2000 and generating more revenue than even the State's $28 billion personal income tax."[5] This, coupled with the fact that these dramatic increases are not linked to any increase in taxpayer income, creates an intolerable situation for a great number of taxpayers. "Over the last 10 years property tax levies have grown by 60%, more than twice the rate of inflation during that period [28%]. Most of this growth occurred in the last 5 years – when property tax levies increased by 42 percent, compared to inflation of 13 percent."[6] What is so significant about these numbers is that even individuals who are receiving salary increases in excess of the cost of living will be falling behind. Imagine the fate of homeowners who are on a fixed income.

New York State is not unique in terms of this problem. A *Boston Globe* editorial published in 2006 noted that in 2002 "an average community depended on local property taxes for 49 percent of its revenues and on state aid for 28 percent. This year, the same town raises 53 percent of its revenues from local property taxes and receives only 24 percent from the state."[7] The shifting of the tax burden to property from income and other sources may work well politically, but

it does not work well for the average homeowner.

7. Income taxes and property taxes are not related.

False. Local governments receive tax dollars that have been collected at the state and federal level. This is only fair since everyone pays income and capital gains taxes to both the state and federal government. How much can be returned to the local governments is obviously dependent on how much the state and federal government are able to collect. As income and capital gains tax rates are reduced at the state and federal level, the ability of state and federal government to assist local governments is reduced. To the extent the state and federal governments are unable to financially assist local governments, the property owner must assume the burden.

Unfortunately, the belief that income taxes and property taxes are unrelated exists at the highest levels. In an article in *The Economist* regarding the New Jersey 2006 Senate race, the following statement appeared: "New Jersey has the nation's highest property-tax and tax reform is a much-debated matter. Although senators have nothing to do with setting local property-tax, whoever wins could help shape national tax policy."[8] The reality is that senators and representatives who reduce aid to states by reducing federal income taxes do cause local property taxes to increase.

8. Real property should not be taxed.

False. Despite some of the weak arguments in support of a property tax, property owners benefit from government services and, therefore, they should contribute to the cost of the government services. The fact that property taxes are linked to government spending hopefully causes school districts and local governments to be careful in their spending, or at least more careful than they would be if there was no linkage. Finally, property taxes provide the local community with a source of funds that can be used to address the community's unique needs. The issue is not whether real property should be taxed, but the extent to which it should be taxed.

One of the arguments for using a property tax is, "It is a reliable and effective way for local governments to raise revenue, in that it is imposed on a known, stable tax base and can be relatively easy to administer."[9] Implicit in this argument is the belief that property creates income to pay taxes, which it does not. If an individual loses his or her job, owning a home is a financial

burden not a stable source of income. Also, in the age of the subprime meltdown, the stability argument is getting somewhat thread-worn.

9. Deciding who should be subject to the property tax and who should be exempt is a destructive and divisive process for any community.

True. As property taxes increase and are relied on as a critical source of revenue, taxpayers become keenly aware that for each property owner that does not pay his or her share of property taxes the other taxpayers must assume that burden. This often leads to a strange logic. Taxpayers may want a hospital located near them but they may not want it in their town or city. They may want it in the next town over since, as a not-for-profit institution, it may not to be subject to property tax and in fact will absorb substantial tax dollars. Is it fair that our neighbor who is elderly, a veteran, a farmer, a church, a school, a college, a cemetery, should be taxed less than we are? Do we want the town's main employer to relocate because it can get a lower tax rate somewhere else? The reality is that, as property taxes increase, economic and social decisions become distorted. This distortion can be very damaging and create unneeded divisiveness in our communities.

Ironically one of the reasons given for taxing real property is that it creates a stable tax base. In reality what could create more economic instability than subjecting property owners to excessively high taxes that they lack the income to pay?

A few years ago the mayor of Plattsburgh suggested that religious organizations that owned tax-exempt property in the city might wish to consider contributing to the city coffers. No contributions were forthcoming. What was forthcoming was anger at being asked. Regardless of the merits of the request, the request illustrates how relying on property taxes to too great an extent can create serious problems within a community.

10. The real problem is not taxes but spending.

False. It is certainly true that governments, like large businesses, can be wasteful. It is also true that every effort should be made to reduce wasteful government spending. However, to believe government spending is going to fall dramatically is wishful thinking. Even with a dramatic decrease in spending, the question of where the money should come from still must be answered and that is a question politicians have been unwilling to address. The trouble with a statement like "The real problem is not taxes but spending" is that it lets politicians at the state and federal level off the hook for their failure to address the source-of-funds issue.

Conclusion

It appears very unlikely that our representatives at the state and federal level will ever be willing to openly discuss the relationship between property taxes and income taxes. This being the case, the obligation to introduce this critical issue into the political debate will fall to the citizenry. ■

1. Office of the New York State Comptroller, Division of Local Government Services and Economic Development. Property Taxes in New York State. Vol. 2, No. 2, Apr. 2006, p. 4.

2. Deanne Loonin & Elizabeth Renuart, *Symposium: The Middle Class Crunch: The Life and Debt Cycle: The Grieving Debt Burdens of Older Consumers and Related Policy Recommendations*, 44 Harv. J. on Legis. 167 (2007).

3. Robert C. Christopherson, *Missing the Forest for the Trees: The Illusory Half-Policy of Senior Citizen Property Tax Relief*, 13 Elder L.J. 195, p. 3.

4. Internal Revenue Code § 1(C).

5. Office of the New York State Comptroller, Division of Local Government Services and Economic Development. Property Taxes in New York State. Vol. 2, No. 2, Apr. 2006, p. 2.

6. *Id.* at 4.

7. Editorial, *Property-Tax Shell* Games, The Boston Globe, October 18, 2006, First edition.

8. *Ethics Schmethics; The New Jersey Senate Race*, The Economist, Oct. 21, 2006, U.S. edition.

9. Office of the New York State Comptroller, Division of Local Government Services and Economic Development. Property Taxes in New York State. Vol. 2, No. 2, Apr. 2006, p. 5.

BY ANDREW M. RESCHOVSKY AND JOAN YOUNGMAN

Andrew M. Reschovsky (Reschovsky@Lafollette.wisc.edu) is Professor of Applied Economics and Public Affairs, Robert M. La Follette School of Public Affairs, University of Wisconsin-Madison, and a Visiting Fellow, Lincoln Institute of Land Policy in Cambridge, Massachusetts. He is a graduate of Brandeis University, and received his Ph.D. in Economics from the University of Pennsylvania.

Joan Youngman (jyoungman@lincolninst.edu) is senior fellow and chairman of the Department of Valuation and Taxation at the Lincoln Institute of Land Policy in Cambridge, Massachusetts. A graduate of Harvard College and Harvard Law School, she is an attorney specializing in state and local taxation and legal problems of valuation for tax purposes.

Local Property Taxes – Improving an Important Revenue Source

It's easy, and politically popular, to deride the property tax. This is particularly the case in New York State, where the tax burden is high, its administration inconsistent, and legislative relief efforts flawed. Yet it would be a mistake, and one that New Yorkers would come to regret, if the state were to hobble rather than improve its property tax system. The property tax is far from perfect, yet its benefits as part of a mix of local government revenue sources greatly outweigh its shortcomings.

While the views presented in this article diverge in a number of important respects from those of the companion article by James Coffey, this does not suggest a wholesale disagreement that many of the failings of the property tax system in New York State noted by Mr. Coffey are real and harmful.

Property taxes in New York State are higher than average, and, of course, very unpopular. One reason is the visibility of the property tax. Homeowners, many of whom pay their annual property tax bill in two large installments, are painfully aware of it.[1] Individuals whose annual property tax liabilities are high relative to their current incomes can face great hardships. Others believe the property tax is unfair because homeowners with similarly valued properties can have highly divergent tax bills.

Many states are considering ways to sharply curtail the use of the property tax or to weaken its link to the value of property. In June, the New York State Commission on Property Tax Relief ("Commission") released a set of recommendations that included a limit on increases in tax collections and reform of STAR, the major school tax assistance program.[2] By recognizing the shortcomings of the current relief system, the Commission has set an example for larger reform efforts. New York State faces the challenge of improving the structure and administration of the property tax to allow it to function as a stable source of local government revenue.

Visibility and Accountability

The fact that homeowners are keenly aware of their property tax – they know exactly how much they pay in each year – is both a political liability and a virtue. Local residents can make informed decisions about the appropriate levels of taxes and services only if the costs of each are clear to them. The link between taxes, services, and accountability is much diminished when governments rely on sales taxes, which consumers pay bit by bit in countless small transactions, or on an income tax, which for most people is just one of a number of payroll deductions taken from their salary. Property tax bills always generate questions, challenges and calls for reform – and this is a good thing. The visibility of the property tax, and the perennial debate over its appropriate role in local government finance, generate a level of accountability never found in the more "hidden" taxes.

Local Taxes and Local Services

Property taxes in New York play an important role in funding local services such as police protection and sanitation, and perhaps most important, education. The fact that the property taxes that residents pay are directly related to the public services they receive greatly enhances the accountability of local elected officials to their constituents. Citizens "see" their real property tax dollars being spent, and if they don't believe their money is being well spent, they can demand better performance from their local governments and replace locally elected officials if things don't improve. Citizens using the power of their vote wield far greater influence on issues that directly impact their communities than they might in state and federal elections.

The real property tax assessment is truly a community function. Assessed values are determined in the first instance by the local government. It is each property owner's right to challenge that determination, first administratively and then in court. Moreover, the property taxpayer's assessment is determined by individuals who are known by name and who can be called upon to support and justify their determinations, quite unlike the experience of dealing with state and federal government taxing authorities.

A Political Problem: Reassessment and Uniformity

This is not to suggest that the computation and administration of the property tax in New York is currently straightforward or acceptable. Ideally, property taxes should be a simple percentage of the full market value of each property, with the property values updated annually through jurisdiction-wide revaluation. In this way, the assessed value of property, and hence annual property tax payments, would track real estate price changes. Unfortunately, New York does not require jurisdictions to reassess property in this manner. Because properties are reassessed infrequently, it is quite common for a homeowner to find that a neighbor's more valuable home is taxed less. "Spot reassessments" limited to property that has been recently sold are a perennial problem. So much of New York State has become entrenched in decades of non-revaluation that the "R" word has become equated with political suicide for many local lawmakers. In a particularly egregious case, Nassau County went without a full-scale reassessment from 1938 to 2003, with the perverse result that lower income residents of declining neighborhoods were paying a far higher percentage of their property value than more affluent taxpayers in prosperous areas. The 2003 reassessment followed a consent decree in a case brought by the New York Civil Liberties Union charging that the outdated assessments discriminated against minority homeowners.

Failure to reassess severely undermines the transparency and accountability of the tax. Few property owners could accurately describe the manner in which their assessments were derived or determine whether they are truly fair. Property taxation in New York is rife with misunderstandings, and misinformation – sometimes intentionally so. The lack of regular revaluations has resulted in many taxpayers paying less than their fair share of their community's fiscal needs, while others pay more. More than 30 years ago, in its landmark opinion in *Hellerstein v. Assessor of Islip*,[3] the Court of Appeals observed that

> the percentage of undervaluation is rarely a matter of common knowledge, so that it is extremely difficult to ascertain whether there is uniformity in the proportion or whether, through incompetence, favoritism, or corruption of the assessors, some portion of the taxpaying body are bearing the others' burdens, as between either individuals or local groups.

In other words, taxpayers who see a value on their tax bills that is below the market price of their property do not know whether they are paying more, less, or the same amount as others with property of the same value.

The real property tax is hardly arbitrary when administered properly.[4] It is a form of wealth-based taxation, and the fact that one person's property sells for a great sum does not necessarily imply that a neighboring property will pay a larger tax unless the homes are truly comparable. If they are, this indicates that the neighboring home is worth more and, in fairness, should bear a greater tax burden. New York State faces the challenge of implementing a *real* property tax system, not a tax on arbitrary and outdated values.

Because properties are reassessed infrequently, it is quite common for a homeowner to find that a neighbor's more valuable home is taxed less.

A Revenue Source for Local Government

The property tax is uniquely well suited to support independent local government. True independence in decision making requires a local source of revenue. Of course, the state government has an important role to play in financing the services provided by local governments, especially public education. Property values per capita and the needs of municipalities and school districts vary tremendously across the state, however. In New York, as elsewhere, state government financial assistance is crucial to local governments with low property wealth or high needs for public services. State aid supports public services and also allows local governments to reduce their reliance on the property tax.

One reason why property taxes are so high in New York is that state aid to local governments is relatively low. National data on state and local government revenue in support of public education indicate that in fiscal year 2006 (the latest year for which these data are available), the state government's share was 42.5%. Compare this to an average state share of 47.0% in the nation's other 49 states.

Local governments' reliance on state aid, however, is a two-edged sword. While more reliance on state funds allows lower property tax rates, history shows that state aid is an unreliable source of funding. When the economy slows, state governments' major revenue sources, individual and corporate income taxes and the sales tax, grow more slowly or, in a severe recession, actually decline. One of the most common ways that states respond to the resulting budget gaps is to reduce financial assistance to local governments. For example, state aid to public schools and municipal governments fell in actual dollars from fiscal year 2003 to fiscal year 2004,[5] as New York responded to the budget crisis it faced after the 2001 recession.

The cyclical nature of state financial assistance makes it all the more important that local governments retain a source of locally raised revenue that is as stable as possible. The property tax fits that bill. Despite the current decline in housing values that is plaguing many parts of the country, history demonstrates that property values, and hence property tax revenues, are a much more stable source of revenue than local sales or income taxes, which are much more closely linked to the level of local economic activity.

Proposals to replace property tax revenues with revenue from a local sales or income tax should be scrutinized with great care. A local sales tax can be easily avoided by shopping in a neighboring community without such a tax or that has lower rates. A local government income tax may well encourage taxpayers, especially those with high incomes, to relocate in a lower tax jurisdiction. The property tax is much more difficult to avoid. It is a tax on immobile resources, namely, buildings and land.

Many supporters of local sales and income taxes argue that a significant portion of the burden of these taxes will be *exported* to nonresidents who work, shop, or dine in their communities. However, while local-option taxes would benefit major cities, resort communities, and cities or towns with a strong retail sales base, many areas of the state lack the shopping or employment that would allow them to raise significant revenue. The result would be increasing disparities among communities in their ability to provide public services.

STAR Tax Relief

High property tax bills relative to current incomes and large increases in property tax from one year to the next lead to real economic hardships for homeowners. In recent years, the New York State government has responded to taxpayer complaints by establishing a number of property tax relief measures.

By far the largest property tax relief program is the School Property Tax Relief program (STAR). First enacted in 1997, it was expanded in 2006 and again in 2007. The STAR program provides homeowners with a property tax exemption. The exemption is larger for the elderly and for residents of counties where the average home sales price is above the state average. Homeowners receive tax relief both in the form of lower property tax bills (with the state reimbursing local governments) and as direct rebate payments from the state. Unfortunately, the STAR program has serious shortcomings. Its distribution of tax relief is inequitable, and it has had the unintended consequence of encouraging local governments to actually increase school property tax rates. STAR tax relief rises as property tax rates are increased. By making public education "cheaper," it provides an incen-

tive to support higher spending on education, which can negate a significant portion of the original STAR property tax relief.[6]

Renters, who bear part of the burden of increased property taxes in the form of higher rents, receive no benefit from STAR, although their incomes are generally lower than those of homeowners. Despite the fact that the 2007 revisions to STAR ended benefits to high-income taxpayers (those with incomes in excess of $250,000), the program continues to provide much larger property tax relief to residents of downstate suburban communities than to residents of New York's cities.

Renters receive no benefit from STAR.

The recommendations by the New York State Commission on Property Tax Relief show a willingness to reconsider the current system of property tax relief. This scrutiny should now be extended to issues of uniformity, reassessment, and tax administration.

Assessment Limits

A second property tax relief system limits the size of annual property tax increases in New York City and Nassau County by capping the amount by which some residential assessments can rise. Assessment limits will redistribute the property tax burden from the limited classes, usually residential property, to properties that are not subject to a cap. They may also redistribute the burden within the favored class, from properties experiencing greater appreciation to those experiencing less. If the assessment cap leads the jurisdiction to raise tax rates in order to collect the same amount of revenue, the increase in rates may outweigh the reduction in value for properties that are appreciating less rapidly than others. Such tax shifts will occur even if the assessment cap seemingly covers all property, as long as properties experience different rates of appreciation.[7]

An unintended consequence of the New York City assessment limits is their shift of taxes from higher value properties to lower value residences. As New York City Finance Commissioner Martha Stark explains,

> If you were to scan the *New York Times* Real Estate Section on any Sunday, you could probably find an owner of a $1 million brownstone in Park Slope, one of the wealthiest neighborhoods in Brooklyn, paying less tax than the owner of a $1 million home in Bedford-Stuyvesant, one of Brooklyn's less wealthy neighborhoods. Why? The limits on assessment increases tend to provide larger benefits in neighborhoods where sales prices are rising fast and smaller benefits in those neighborhoods where values are rising modestly.[8]

New York State has also enacted a "circuit breaker" program, so called because it is intended to place a ceiling on property tax liabilities that overload individuals' ability to pay. A textbook circuit breaker might, for example, eliminate property tax liability in excess of 10% of taxpayer income, with the additional property tax payment made by the state, so that the local government is held harmless. Unfortunately, New York's circuit breaker is a far cry from the textbook model. New York's circuit breaker phases out at income (very broadly defined) above $18,000, and offers maximum benefits of $375 to taxpayers over 65 and $75 to others. In addition, tax relief is available only to those whose homes are valued at less than $85,000.[9] It goes without saying that this circuit breaker does very little indeed to assist taxpayers with limited incomes who are struggling to meet their property tax liabilities.

While New York's efforts to provide property tax relief have reduced taxes for millions of homeowners and have slowed the growth of property taxes in the state,[10] they all have serious shortcomings. Reforming the way property tax relief is structured in New York could go a long way to increasing acceptance of the property tax as an essential element in the financing of local government services; it is evident from the experience in other states that effective relief programs can be implemented to shield those who are most vulnerable.

Conclusion

The property tax is a tool, and like any tool it can be misused. It is, however, one essential element in the revenue mix for independent local government. The most effective way to ensure that property tax burdens remain at acceptable levels is to maintain the accountability of local elected officials to taxpayers; to keep the property assessment process clear, accurate, and up to date; to provide a consistent level of state aid to local governments; and to target property tax relief to those most in need. ■

1. It is worth observing that even those owners whose taxes are paid by way of an escrow account must be provided with a copy of their property tax bill. *See* N.Y. Real Property Tax Law §§ 922, 954.

2. New York State Commission on Property Tax Relief, "A Preliminary Report of Findings and Recommendations to Governor David A. Paterson," *available at* http://www.cptr.state.ny.us/reports/CPTRPreliminaryReport_20080603.pdf.

3. 37 N.Y.2d 1, 371 N.Y.S.2d 388 (1975) (citations omitted).

4. Of course, the lack of revaluation in many New York State communities is the most common reason for arbitrariness in local taxation.

5. Andrew Reschovsky, *The Impact of State Government Fiscal Crises on Local Governments and Schools*, 36 St. & Loc. Gov't Rev. No. 2, 86 (Spring 2004).

6. For a detailed analysis of the STAR program see columns related to STAR in the *It's Elementary* series authored by Syracuse University economist John Yinger, *available at* http://cpr.maxwell.syr.edu/efap/MONTHLY_COLUMN/ColumnMainPage.htm.

7. Richard Dye & Daniel P. McMillen, *Surprise! An Unintended Consequence of Assessment Limitations*, Land Lines, July 2007 at 8–13, *available at* http://www.lincolninst.edu/pubs/PubDetail.aspx?pubid=1260.

8. Hearing of the Assembly Real Property Taxation Committee at 3–4, April 17, 2007 (testimony of Martha E. Stark, Commissioner, NYC Dep't of Fin.), *available at* http://www.nyc.gov/html/dof/html/pdf/07pdf/testimony_2007_04_07.pdf.

9. Karen Lyons, et al., *The Property Tax Circuit Breaker: An Introduction and Survey of Current Programs*, Center on Budget and Policy Priorities, at 14, March 21, 2007, *available at* http://www.cbpp.org/3-21-07sfp.pdf.

10. Based on data collected by the U.S. government, total property tax revenue in New York was equal to 4.9% of the state's personal income in fiscal year 1995. By fiscal year 2006, property taxes had declined to 4.6% of income.

Averting Disaster: Techniques for Analyzing Business Interruption Claims

By Russell Kranzler

Russell Kranzler, CPA, Cr.FA (russkranzler@hkmp.com) is partner in charge of forensic accounting and auditing at Held, Kranzler, McCosker and Pulice, LLP, in New York City. He received his B.S. in Business Administration from Ohio State University.

Major disasters, such as the September 11 terrorist attacks and Hurricane Katrina, grab the headlines, but more common events, such as fires, power outages or burst pipes, can also cause businesses significant problems – work stoppages, lost income and even termination of operations. Whatever the cause, business interruption insurance is essential, and businesses that conduct their own forensic accounting analysis immediately after the event can expedite the recovery process, maximize reimbursement from the insurance carrier and generally improve their chances for survival.

The Goal: Resumption of Operations as Soon as Possible

Prolonged business interruptions can have devastating long-term impacts: employees may look for work elsewhere; customers may lose confidence in the company; credit might dry up. In fact, approximately 40% of companies that experience a disaster will be out of business within five years, according to research conducted by The Gartner Group.

Obviously, businesses that resume normal operations as quickly as possible after an unplanned interruption are less likely to suffer this fate. A business continuity plan is an essential tool for resurrecting a company's operations, and business interruption insurance is an important component of that plan. This insurance replaces income lost as a result of a disaster and helps defray the expense of restoring normal operations. Business interruption insurance policies, because of the way they are written, often leave a certain amount of room for interpretation. Forensic accounting techniques can help an insured maximize its recovery by developing evidence to support its claim.

Assembling a Multidisciplinary Team

Immediately after a loss, it is critical to assemble a multidisciplinary team of competent, independent professionals to launch the recovery plan. With an attorney coordinating the effort, the team may include public adjusters, independent appraisers and forensic accountants with insurance experience.

Too often, businesses fall into the trap of relying too heavily on the insurance carrier's forensic accountants or its own internal accounting staff to calculate the business interruption loss. The insurance company's accountants, however, work for the carrier. Even if they endeavor to provide an accurate estimate of the loss, they have no incentive to pursue creative, but legitimate, interpretations of policy language that would enhance the insured's recovery.

On the other hand, an insured that performs its own analysis – measuring its losses and documenting its claims – can help define the scope of coverage under the policy. Such analysis provides the insured's team with the ammunition needed to clearly communicate the facts to claims adjusters and other insurance company representatives, and thereby to present a cogent basis for the claim.

It is important to move quickly. Soon after a business notifies the carrier of its claim, the carrier, with the advice of its adjuster, will establish a reserve. Once that figure is set, it can be very difficult to convince the carrier to settle for a larger amount. The business will benefit greatly if its financial experts have an opportunity to meet with the adjuster and provide their input into the development of a preliminary loss estimate. By providing the carrier's representatives with the relevant facts and educating them about the nature of the policyholder's business and its financial condition, a forensic accounting analysis can help ensure that the insurance company does not underestimate the loss.

Case Study: Recovery from Katrina

A large residential property owner had sustained a business interruption loss as a direct result of Hurricane Katrina. The property lost rental income for a period of 16 months on more than 1,000 rental units. The owner was satisfied with the loss estimate made by the insurance carrier's forensic accountants, but his attorney recommended performing his own, separate analysis to verify the calculations made by the carrier's expert.

This company's financial statements were maintained on a hybrid basis, meaning rental income was recorded when received and expenses were recorded when incurred. The company maintained records of rents billed and collected, as well as receivables, but chose to record income on a cash basis for purposes of its internal financial reporting. The insurance policy stated that the company was insured for the net income that the business would have "earned."

The carrier's calculations, which projected rental income on a cash basis, were consistent with the company's financial statements. But by adjusting the carrier's calculation to reflect projected rental income on an accrual basis – which was consistent with both the insurance policy language and generally accepted accounting principles – the insured's own expert enabled the company to support a claim that was $1.4 million higher than the carrier's initial determination.

As this example illustrates, a forensic accounting analysis, combined with the advice of the attorneys and adjustors in interpreting the policy language, can have a significant impact on the end result in a business interruption claim. In addition, providing this analysis to the insurer increases the likelihood that the claim will be resolved quickly, which improves the insured's chances of making a full recovery.

Measuring the Loss

The amount of a loss depends on how the policy defines "business income." The two most common definitions are

1. net income the business would have earned but for the loss, plus continuing operating expenses; or
2. lost gross earnings less non-continuing expenses.

These definitions are simply two different routes to the same destination: restoring the income the business would have earned had no loss occurred (subject to policy limits, of course). Maximizing a company's recovery involves

1. analyzing the company's performance prior to the loss;
2. estimating what the company would have earned during the recovery period had no loss occurred, based on historical trends, reasonable pre-loss business plans and projections, and current industry and market conditions; and
3. analyzing the company's fixed and variable costs to identify continuing and non-continuing expenses.

In estimating business interruption losses, insurance carriers typically focus on the insured's historical operating experience. But in many cases it is possible to demonstrate that the insured would have generated more income during the recovery period than it did in the past.

Consider the case of *General Insurance Co. of America v. Pathfinder Petroleum Co.*[1] The insured, which had been in business only eight months, had little or no profit before a fire destroyed its gasoline manufacturing plant. It sought to recover lost profits under a 90-day "use and occupancy" policy. One issue in the case was whether the

insured's recovery should include net profits that would have been earned by a polymerization plant the insured had contracted to build on the destroyed premises during the recovery period.

The insurance carrier argued that the insured should not recover these profits because the plant didn't exist at the time of the loss. The court disagreed, noting that the insurance policy covered net profits from the business of manufacturing gasoline and the contracted polymerization plant was part of that business. The loss of use of its facility prevented the insured from building the plant and earning the profits it would have generated.

This demonstrates that a thorough analysis of a company's pre-loss business plans and projections, as well as post-loss market conditions, can help it develop a picture of the expected financial performance but for the covered loss.

A thorough analysis of a company's pre-loss business plans and projections, as well as post-loss market conditions, can help it develop a picture of the expected financial performance but for the loss.

Profiting From Disaster?

It is clear that a loss calculation can consider post-loss market conditions to support a recovery of higher net profits than the insured enjoyed in the past. But what if the disaster that caused the loss also has an impact on those conditions? Can an insured calculate its lost profits based on increased demand for its products or services caused by the disaster itself? The answer to these questions depends on the specific policy language and its interpretation by the courts.

In *Prudential-LMI Commercial Insurance Co. v. Colleton Enterprises, Inc.*,[2] for example, the insured operated a Florida hotel that had been losing money for more than two and one-half years before Hurricane Hugo struck. After the hurricane damaged its property, the insured sought to recover lost profits under its business interruption policy. It claimed that had it not lost the use of its property, it would have profited from the influx of construction workers and other temporary residents into the area after the hurricane. Not surprisingly, the insurance company argued that the insured should not receive a "windfall" by virtue of the very disaster that caused its loss in the first place.

The answer turned on the meaning of the word "loss." In determining the insured's recovery, the insurance policy allowed consideration of its "probable earnings . . . had no loss occurred." If "loss" meant damage to the covered property, then the insured should be able to recover the profits it would have earned in the post-hurricane economy. But the court interpreted the term to mean the covered peril – that is, the hurricane. In other words, the insured was only allowed to recover the profits it would have earned if Hurricane Hugo had not happened.

A similar conclusion was reached in *American Automobile Insurance Co. v. Fisherman's Paradise Boats, Inc.*,[3] which concerned an insured's boat and marine accessory store damaged by Hurricane Andrew. The court rejected the insured's argument that it should be permitted to recover the profits it would have earned based on increased demand for its products in the hurricane's aftermath.

Critics of this conclusion, including the dissenting judge in *Prudential-LMI v. Colleton*, point out that "loss" most likely refers to the insured's loss, not the overall loss in the area struck by the disaster. And at least one federal court has agreed. In *Stamen v. CIGNA Property & Casualty Co.*,[4] several of the insured's grocery stores were damaged by Hurricane Andrew. The insured claimed business interruption losses based on the profits it would have earned had the stores stayed open after the hurricane. Rejecting the insurer's "windfall" argument, the court made a distinction between "loss" and "occurrence." In this case, the "occurrence" was the hurricane, while the "loss" was the property damage to the insured's stores. The court observed that if the insurer intended to calculate the insured's lost profits based on what it would have earned if the hurricane had never occurred then the policy could have used that language.

The insured also prevailed in a case involving different policy language. In *Levitz Furniture Corp. v. Houston Casualty Co.*,[5] a flood damaged the insured's furniture store and destroyed its showroom inventory. The court allowed the insured to recover lost profits based on increased demand for its products caused by the flood. Unlike the policy in *Prudential-LMI v. Colleton*, which allowed the insured to recover its probable earnings had *no loss occurred,* the policy in this case provided for recovery of earnings "had no interruption of production or suspension of business operations or services occurred."[6] The court distinguished *Colleton* and *American Automobile Insurance Co. v. Fisherman's Paradise*, explaining that in this case the policy unambiguously provided for coverage of income the insured would have earned "had no interruption occurred" and did not "exclude profit opportunities due to increased consumer demand created by the flood."[7]

Many newer business interruption policies contain language intended to prevent policyholders from recov-

ering a perceived windfall. The Insurance Services Office (ISO), for example, has amended its forms to exclude "any Net Income that would likely have been earned as a result of an increase in the volume of business due to favorable business conditions caused by the impact of the Covered Cause of Loss on customers or on other businesses."

In cases where a disaster affects post-loss market conditions, it's particularly critical to conduct an analysis of economic and market factors. If the policy language prevents the insured from taking advantage of post-loss opportunities – or if the courts in the relevant jurisdiction follow the *Colleton-Fisherman's Paradise* line of thinking – this analysis can help maximize the insured's recovery by distinguishing market conditions created by the disaster from those caused by other factors.

Determining the Period of Restoration

The period of restoration (POR) has an enormous impact on a company's potential recovery under a business interruption policy. Traditionally, policies have permitted an insured to recover lost income during the time it would take, with due diligence, to repair or replace the damaged property and resume operations under the same or equivalent conditions that existed before the disaster. Some policies also provide extended coverage to compensate the insured for the lingering impact of the disaster on sales even after operations are restored.

It is important for attorneys and financial experts to work together to ensure that an appropriate POR is used to calculate the loss. For example, the POR usually includes delays in repairing or rebuilding the property caused by the insurer, construction problems or other factors beyond the insured's control.

In some cases, it may be appropriate to extend the POR to allow the insured to make improvements to the property. In *Compagnie Des Bauxites de Guinea v. Insurance Co. of North America*,[8] for example, the court found that the POR should allow the insured time to improve its facility in order to prevent the same type of damage from recurring. And in *Anchor Toy Corp. v. American Eagle Fire Insurance Co.*,[9] the court rejected the insurance company's argument that the POR should be based on the time needed to build an identical structure. "It is beyond the bounds of reasonable contemplation," the court explained, "to expect that a replacement structure would ignore all progress in the art and slavishly retain any proven disadvantage. It must be the intent of the policy that the new building to be erected would be modern as well."[10]

Location as Factor in Recovery

The destruction of the World Trade Center (WTC) as a result of the September 11 terrorist attacks led to some interesting litigation over the appropriate POR. Traditionally, courts interpreted business interruption policies in a way that recognized the value of the insured's location. Even if an insured permanently relocated to a different location, the POR was based on the *theoretical* time it would take, with due diligence, to rebuild at the original location. This approach allowed the insured to recover for the lost value of its location – mitigated, of course, by any profits earned at the new location during the POR.

Some modern policies, however, have redefined the POR as the time it takes to repair or replace the damaged property or, if less, the time it takes to resume operations at a new, permanent location. Some courts have taken a similar approach, even in cases involving policies containing the traditional definition described above.

For example, *Duane Reade, Inc. v. St. Paul Fire & Marine Insurance Co.*[11] concerned the drugstore chain, which had operated a retail outlet in the WTC concourse. The district court found that the POR was the time needed for the insured to resume "functionally equivalent operations" at the location where its WTC store had been. The appellate court disagreed, however, defining the POR as the time required to "build a reasonably equivalent store *in a reasonably equivalent location.*"[12]

The court's conclusions in *Duane Reade* were based in part on a very narrow interpretation of the damaged property that triggered business interruption coverage, limiting it to the insured's *personal* property at the WTC store. The court also found that because the policy was a blanket policy covering all of the insured's stores, it was inappropriate to tie the POR to a specific site.

Other cases have reached a different conclusion. *Zurich American Insurance Co. v. ABM Industries*[13] involved a company that maintained facilities at the WTC and provided janitorial and engineering services to WTC tenants, and common areas. Its business interruption policy covered damage to property "owned, controlled, used, leased or intended for use by" the insured. Instrumental to ABM's recovery was the appellate court's finding that it "used" the WTC in its business.[14]

On remand from the circuit court of appeals, the district court distinguished this case from cases like *Duane Reade*: "ABM cannot simply relocate to another building and carry on its business. To the contrary, ABM's business was . . . fundamentally connected to its use of the common spaces at the World Trade Center."[15] The court concluded that the appropriate POR was "the hypothetical length of time required to rebuild the WTC."[16]

Scope of Coverage

Historically, business interruption coverage was triggered by direct damage to the insured property, but modern policies often provide broader protection. For example, many policies offer "ingress/egress" coverage, which compensates the insured when damage to a third party's property prevents access to the insured's business.

"Contingent business interruption" insurance protects a business against losses resulting from property damage suffered by a supplier or customer. Coverage can vary dramatically, however, from policy to policy. Some policies, for example, provide coverage up to overall policy limits, while others impose smaller limits on contingent business interruption claims. Also, some policies limit this type of coverage to specifically named customers or suppliers, while others are less restrictive. Interestingly, in *Zurich American Insurance Co. v. ABM Industries*, the insured had purchased contingent business interruption coverage, but it was subject to a $10 million limit. By establishing that it had an insurable interest in the WTC itself, the company was able to take advantage of its business interruption policy's overall limit of $127 million.

Historically, business interruption coverage was triggered by direct damage to the insured property, but modern policies often provide broader protection.

Major disasters can raise challenging issues regarding the scope of coverage. Most policies contain a "civil authority clause," which compensates a business for losses incurred when an order of a civil or military authority impedes access to the insured property. Would this allow a resort hotel in Hawaii, for example, to recover losses caused by the Federal Aviation Administration's ban on air travel after the September 11 terrorist attacks? Or was coverage limited to policyholders who sustained physical damage to their insured property?

The answer to these and other questions depends on the language of the policy and, in many cases, on the interpretation of that language by the courts.

Mitigating Losses

In the early stages of the claims process, it is critically important for a business that has suffered a disaster to identify actions it can take to mitigate losses. For example, a manufacturer or distributor that suffers a business interruption might be able to preserve its income stream

by shifting production or sales to another facility, or to an outside contractor. In most cases, the insurer will be willing to pay the extra expense resulting from such a shift because it should reduce the company's overall losses. In addition, offering to take these steps demonstrates to the insurer that the insured is acting in everyone's best interests.

Conclusion

Some policyholders take the approach of throwing every possible loss against the wall and seeing what sticks, but this is rarely a good strategy. Not only does it delay recovery while the insurer attempts to separate fact from fiction, but it is also a sure way to lose credibility with claims adjusters and other key insurance company decision-makers. Policyholders know more than anyone else about their business, their industry, and their financial condition. Conducting their own forensic accounting analysis gives them an opportunity to communicate relevant information to their insurers in language the latter can understand, enabling adjusters and others involved in the process to conduct an efficient, well-reasoned analysis of the claim.

Taking this step in the early stages of the claim not only maximizes an insured's ultimate recovery, but can also accelerate the reimbursement process and support requests for advance payments from the insurer – which can be essential to the company's cash flow as it restores its operations. The actions taken by a business immediately following a disaster therefore are critical, and can have an enormous impact not only on its insurance recovery, but on the survival of the business itself. Forensic accounting techniques can play an invaluable role in this process. ■

1. 145 F.2d 368 (9th Cir. 1944).
2. 976 F.2d 727 (4th Cir. 1992).
3. No. 93-2349, 1994 WL 1720238 (S.D. Fla. Oct. 3, 1994).
4. No. 93-1005, Slip Op. (S.D. Fla. June 13, 1994).
5. No. Civ. 96-1790, 1997 WL 218256 (E.D. La. Apr. 28, 1997).
6. *Id.* at *8.
7. *Id.*
8. 794 F.2d 871 (3d Cir. 1986).
9. 4 Misc. 2d 364, 155 N.Y.S.2d 600 (Sup. Ct., N.Y. Co. 1956).
10. *Id.* at 367.
11. 411 F.3d 384 (2d Cir. 2005).
12. *Id.* at 393 (emphasis added).
13. 265 F. Supp. 2d 302 (S.D.N.Y. 2003), *aff'd in part, vacated in part, rev'd in part by* 397 F.3d 158 (2d Cir. 2005), *on remand to* No. 01 Civ. 11200, 2006 WL 1293360 (S.D.N.Y. May 11, 2006).
14. *Zurich*, 397 F.3d at 165–67.
15. *Zurich*, 2006 WL 1293360, at *2.
16. *Id.* at *3.

Judith S. Kaye is Chief Judge of the State of New York.

June 20, 2008: The jury of all-women-"firsts" assembles for re-enactment of the trial of *United States v. Susan B. Anthony*.

Rewriting History: The Trial of Susan B. Anthony

By Judith S. Kaye

As a judge of the Court of Appeals these past 25 years, I have participated in reversing many decisions. But my experience on June 20, 2008, in the Ontario County Courthouse was unique: I sat as foreperson of a 14-member, all-women-"firsts" jury that reversed history and found Susan B. Anthony not guilty of violating the federal election laws when she cast a vote in the November 1872 election.

That unique experience for me climaxed two extraordinary days with extraordinary people, beginning in Saratoga with the County Court Judges Association, and continuing in Rochester with a stop first at the home of Susan B. Anthony and then at the Telesca Center (a remarkable achievement for civil legal services), an evening with the Monroe County Bar Association (for the swearing-in of its first African-American president, T. Andrew Brown), breakfast with the Greater Rochester Association of Women Attorneys, and a stop at the Hubbell Law Office (replicating an 18th-century law office).

Anticipating my appearance in the second-floor courtroom where Susan B. Anthony was actually tried and convicted, and not fearing disqualification as a juror, before leaving home I did some reading about that courageous lady and that dark period in American history. I'd like to share a few of my discoveries with *Journal* readers.

Susan B. Anthony, of course, was a longtime crusader for equal opportunity, prominent in both the antislavery and women's suffrage movements. Indeed, a larger-than-life statue of Susan B. Anthony and Frederick Douglass presides over the park just outside her home in Rochester, memorializing two heroes in our nation's struggle for equality.

As it turns out, passage of the Fourteenth Amendment in 1868 proved to be a mixed blessing for the women. Much to their surprise, and chagrin, they soon learned that the hard-won, noble words of that Amendment – guaranteeing every citizen of the United States the privileges of citizenship – for them did not include access to the ballot (or indeed many other rights). I had not previously focused on how integrated the two movements were and surely for the women how great the disappointment that they did not reap the full benefit of their tireless nationwide campaign.

Special Connections

In my research I discovered several special connections between Susan B. Anthony and former judges of the Court of Appeals – one a particularly proud connection, the other distinctly not.

On November 1, 1872, a group of about 50 "Anthony women" showed up at a voter registration office in

Rochester and overcame the resistance of the election inspectors. Four days later, again over strenuous opposition, Anthony cast her vote. Ultimately, she was indicted, arrested and convicted for "knowingly, wrongfully and unlawfully" voting in a federal election without having a right to vote.

Throughout, Susan B. Anthony was represented by former Court of Appeals Judge Henry Rogers Selden (1862–1864), whom she had met through her antislavery efforts. Henry Selden considered his defense of Susan B. Anthony (with co-counsel John VanVoorhis, grandfather of Court of Appeals Judge VanVoorhis (1953–1967)) the most celebrated case of his career.

When she consulted Selden regarding women's suffrage, he and his brother, Samuel Selden (Court of Appeals 1856–1862; Chief Judge 1862) advised her that, as a citizen of the United States, she had a right to vote. As Henry Selden wrote shortly after her arrest, "In my opinion, the idea that you can be charged with a crime on account of voting, or offering to vote, when you honestly believed yourself entitled to vote, is simply preposterous."

Owing to Anthony's advocacy throughout her home county of Monroe, her case was moved to adjoining Ontario County and proceeded to trial before a presumably more impartial jury and another former Court of Appeals Judge, Ward Hunt (1866–1870; Chief Judge 1868–1869). (Hunt at the time was actually a United States Supreme Court Justice sitting as a federal circuit court judge.) Because she was a woman, Anthony was not permitted to testify in her own defense, but Henry Selden took the stand to testify that she had voted on his advice.

The case, however, never reached the all-male jury: Judge Hunt directed a verdict of guilty. When he asked Anthony the perfunctory question whether she had anything to say why sentence should not be pronounced, she not surprisingly answered that she had a great deal to say – and she did. But it mattered not, and sentence was imposed: a $100 fine, with (Hunt added) no order of commitment until the fine was paid. Anthony vowed that she would never pay a dollar of that "unjust penalty," and she never did.

What a pleasure it was, on June 20, 2008, after the reenactment of a portion of the trial, to vindicate the judgment of Henry R. Selden. The jury unanimously, and enthusiastically, acquitted the defendant.

The Fruition of Her Work

As Susan B. Anthony lamented, "Oh, if I could live another century and see the fruition of all the work for women." She would, of course, have been thrilled by the achievements of her jurors: first female district attorney in New York State, first female elected to statewide office, first female president of the County Bar Association, and on and on.

Top: Susan B. Anthony and friends (including Canandaigua Mayor Ellen Polimeni), on the steps of the Hubbell Law Office.

Bottom: Judge Craig Doran leading the group to the Ontario County Courthouse.

Today, 135 years after that fateful prosecution, women have gained so many of the rights and opportunities Anthony had been denied: the rights to vote, to testify, to serve on a jury; the opportunity to practice law. Today, women are a majority of the New York State Court of Appeals, one-third of the nation's Chief Judges, in the solid double digits on the New York State bench, half or more of law school classes. Two successive presidents of the New York State Bar Association are women. Susan B. Anthony indeed would have been very pleased with the fruition of all the work for women.

Anthony actually closed that quote with a sigh: "There is so much yet to be done." And great though the gains have been, more than a century later still there is so much to be done to achieve genuine equality in our profession and in our society.

My upstate tour was a memorable one in many ways, and I am forever grateful to the principal organizers Judges Peter Buckley, Craig Doran and Thomas VanStrydonck. Perhaps the message of the visit that most lingers in my mind as I contemplate my next months and years are these words of Susan B. Anthony: "Failure is impossible." ■

Update: Did the Appellate Odds Change in 2007?

Statistics in New York State and Federal Courts

By Bentley Kassal

After being long confronted by clients and attorneys asking, "What are my chances on appeal?", I began to extract percentages from official court annual reports, limited to those of most interest to New York attorneys, for this and past articles.[1] As previously stated, here are actual statistics, presenting simple and accurate answers to these queries on a pragmatic basis, instead of guesswork, seat-of-the-pants opinions, ego or bravado.[2]

The data (and comments) for the year 2007 are for the following courts (including civil and, in most instances, criminal appeals):

1. New York Court of Appeals.
2. The Four Departments of the New York Appellate Division of the New York State Supreme Court.
3. The two Appellate Terms of the New York State Supreme Court, for the First and Second Departments.
4. U.S. Circuit Court for the Second Circuit.
5. U.S. Circuit Court for the District of Columbia.[3]
6. New York Court of Claims (a trial court).

The statistics are presented in percentages and in consecutive order, with the most recent year, 2007, shown on the left.

Bentley Kassal (BKassal@Skadden.com), a retired associate justice of the Appellate Division, First Department, also served as a judge in the Civil Court, a justice of the Supreme Court, New York County and an associate judge at the New York Court of Appeals in 1985. He was a New York State Assemblyman for six years. He received his law degree from Harvard Law School in 1940 and has been counsel to the litigation department at Skadden, Arps, Slate, Meagher & Flom LLP since 1997. This is Judge Kassal's sixth consecutive article on the subject of appellate statistics.

A significant change, originating in my 2006 report and continuing for most courts, is the omission of various other dispositions, which are not on the merits and are classified as "other" or "dismissed." They have not been factored into this report. Dispositions of criminal cases are included but only for the state appellate courts, not the federal courts.

New York Court of Appeals[4]

The percentages for appellate statistics for the five-year period, ending 2007, are:

Civil Cases					
	2007	2006	2005	2004	2003
Affirmed	56	66	55	58	51
Reversed	27	25	35	37	39
Modified	17	9	10	5	10

Criminal Cases					
	2007	2006	2005	2004	2003
Affirmed	66	71	70	81	70
Reversed	30	17	25	15	21
Modified	4	12	5	4	9

Comments

Although the affirmance rate spiked for 2006 civil cases, the rate for 2007 generally returned to the previous averages. In 2007, this resulted in a reduction of about 5% in the affirmance rate for criminal cases in comparison to 2006, an increase in reversals of about 80% and a reduction in modifications of about 65%.

Avenues to the Court of Appeals – Jurisdictional Predicates

Civil Appeals for 2007 (2006, 2005, 2004 and 2003 in parentheses)	
Dissents in Appellate Division	20 (17) (14) (26) (19)
Permission of Court of Appeals	48 (49) (57) (58) (64)
Permission of Appellate Division	25 (24) (22) (11) (9)
Constitutional Question	7 (10) (7) (5) (8)

Criminal Appeals for 2007 (2006, 2005 and 2004 in parentheses)	
Permission of Court of Appeals Judges	76 (85) (65) (90)
Permission of Appellate Division Justices	22 (15) (29) (8)
Other (including capital appeal)	2 (2) (6) (2)

Significant Other Statistics

1. The average time from argument or submission of appeals to decision in normal course was 35 days and, for all appeals, 31 days.
2. The average time from filing a notice of appeal or an order granting leave to appeal to oral argument was about six months, the same as previously.
3. The average time from when all papers were served and filed to oral argument was approximately two months, as in previous years.
4. The 2007 docket consisted of 340 notices of appeal and orders granting leave, with the previous years being 293, 284 and 296. Of the 340 for 2007, 279 were for civil (compared to 226 in 2006) and 61 for criminal (compared to 67 in 2006).
5. The total number of Appellate Division orders granting leave were 62 (49 civil and 13 criminal) of which the First Department granted 45 (34 civil and 11 criminal), which is 73% of the total of the four Departments.
6. As to the total motions filed, these increased in 2007 to 1,481 or 5.7% more than the 2006 total of 1,401.
7. Dispositions:
   (a) In 2007, 185 appeals (135 civil and 50 criminal) were decided, compared to 189 (127 civil and 62 criminal) in 2006.
   (b) Of the 185 appeals for 2007, 155 had no dissent.
   (c) Motions: 1,440 were decided in 2007 and 1,397 in 2006.
   (d) The average time from return date of motions to disposition for all motions was 53 days, with 62 days for civil motions for leave to appeal.
   (e) Of the 1,093 motions decided for leave to appeal in civil cases (73 more than in 2006), 7% were granted (6% in 2006).
8. Review of State Commission on Judicial Conduct determinations: Five were reviewed in 2007 with two resulting in confirming the sanction of removal and three in the suspension of three judges.
9. Rule 500.27 grants discretionary jurisdiction to the Court of Appeals to review certified questions from certain federal courts and other state courts of last resort. At the end of 2006, five such cases were pending and, in 2007, four were answered and the fifth was withdrawn. In 2007, seven new cases certified by the United States Court of Appeals for the Second Circuit were accepted, with five decided in 2007 and two pending.
10. Capital Appeals: Under the state Consecution and the death penalty statute, a direct appeal is provided for a judgment of conviction and capital sentence. In 2007, one case was decided under this provision, resulting in a vacatur of sentence and remittal for re-sentencing.

The Four Departments of the Appellate Division of the Supreme Court of the State of New York[5]

Civil Statistics for 2007 (2006, 2005, 2004 and 2003 in parentheses):[6]	First	Second	Third	Fourth
Affirmed	60 (64) (66) (66) (69)	60 (59) (61) (62) (59)	78 (80) (81) (78) (79)	68 (70) (70) (70) (66)
Reversed	26 (23) (21) (21) (18)	27 (29) (27) (28) (29)	10 (10) (10) (11) (11)	15 (14) (13) (12) (19)
Modified	14 (13) (13) (13) (13)	13 (12) (12) (10) (12)	12 (10) (9) (11) (10)	17 (16) (17) (18) (15)

Criminal Statistics for 2007 (2006, 2005, 2004 and 2003 in parentheses):	First	Second	Third	Fourth
Affirmed	88 (89) (88) (93) (93)	90 (88) (90) (90) (90)	84 (85) (87) (87) (86)	80 (80) (87) (89) (87)
Reversed	6 (3) (3) (2) (3)	4 (5) (5) (6) (6)	6 (6) (7) (6) (8)	9 (9) (5) (3) (4)
Modified	6 (8) (9) (5) (4)	6 (7) (5) (4) (4)	6 (9) (6) (7) (6)	11 (11) (8) (8) (9)

Comments

Affirmance Rates: For 2007, overall the civil affirmance rate for the First Department dropped 6% from 2006 and 10% from 2005. The other three Departments remained approximately the same.

As to criminal affirmance rates, all the Departments were relatively unchanged.

Total Appellate Dispositions: The Second Department's total of dispositions for 2007 was 11,637, about 3% greater than the 11,301 for 2006. The First Department's total was 3,217, about 11% greater than 2,898 for 2006.

As to the number of oral arguments, the First had 1,231, the Second, 2,401, the Third, 678 and the Fourth, 881.

As to the number of motions decided, the First had 4,987, the Second 10,810, the Third, 5,562 and the Fourth, 4,326.

The Third Department's much higher affirmance percentage of 78% for civil cases, generally similar to the previous four years, is accounted for by the much greater number of Article 78 Administrative Appeals from state agency decisions, which appeals are reviewed on the standard of "substantial evidence."

The Appellate Terms of the First and Second Departments

Civil Statistics for 2007 (2006, 2005, 2004 and 2003 in parentheses):[6]		
	First Department	Second Department
Affirmed	61 (65) (62) (73) (67)	61 (61) (52) (57) (62)
Reversed	29 (23) (25) (17) (24)	28 (27) (35) (34) (34)
Modified	10 (12) (13) (10) (9)	11 (12) (13) (9) (4)

Criminal Statistics for 2007 (2006, 2005, 2004 and 2003 in parentheses):		
	First Department	Second Department
Affirmed	86 (69) (72) (80) (80)	38 (64) (70) (57) (62)
Reversed	14 (29) (23) (16) (12)	59 (32) (25) (34) (34)
Modified	0 (2) (5) (4) (8)	3 (4) (5) (9) (4)

Comments

The Second Department's Appellate Term had total dispositions of 1,504, more than four times the First Department's total of 370. In 2006, the Second's total of 1,492, was two and a half times greater than the First Department's total of 547. However, as to total arguments, the First had 329 as contrasted with Second's total of 372.

Regarding the affirmance rate for civil appeals, after argument or disposition, the First's rate was 60%, the same as for the Second with comparable reversal and modification percentages.

However, as to criminal appeals, the affirmance rate significantly increased to 86% for the First in sharp contrast to the 38% affirmance rate for the Second, which also had a reversal rate of 59% compared to the First's 14% – both remarkable changes.

As to the total motions decided, the First had 1,469 as against 3,228 for the Second, which was more than twice the amount for the First.

U.S. Circuit Courts of Appeal for the Second Circuit and the District of Columbia[7]

This year, for the second time, appellate statistics for civil cases are being presented as they are specifically set forth in the official report, namely, as "Other U.S. Civil" and "Other Private Civil." Additionally administrative appeals are being included for these two Circuits. The Court of Appeals for the Federal Circuit is not included since it has nationwide jurisdiction to hear appeals in specific cases, such as those involving international trade, government contracts, patents, trademarks and veterans' benefits. The statistics for 2006 are in parentheses.

	Second Circuit		Administrative Appeals
	Other U.S. Civil	Other Private Civil	
Affirmed	63 (67)	61 (71)	Affirmed 70 (70)
Reversed	10 (9)	12 (11)	Reversed 10 (17)
Dismissed	26 (24)	24 (18)	Dismissed 15 (13)
Remanded	1 (0)	3 (0)	Remanded 5 (0)

	District of Columbia		Administrative Appeals
	Other U.S. Civil	Other Private Civil	
Affirmed	83 (67)	85 (71)	Affirmed 63 (70)
Reversed	12 (9)	9 (11)	Reversed 20 (17)
Dismissed	2 (24)	3 (18)	Dismissed 12 (13)
Remanded	3 (0)	3 (0)	Remanded 5 (10)

Comments

In comparing civil appeals, both Circuit Courts have greater affirmance rates than the New York Court of Appeals and all four Appellate Division Departments, with the District of Columbia Court being much higher. The U.S. Circuit Court for the Second Circuit's affirmance rates are also slightly higher, on average, than both the First and Second Departments of the New York Appellate Division.

New York Court of Claims

This is a trial, not appellate, court. However, because it is a unique tribunal, these statistics may have significance for those practicing in this judicial arena.

1. A total of 1,415 claims of the 1,589 filed were disposed of in 2007, a large reduction from the 1,811 filed in 2006. There were awards in 89 cases in 2007 and 87 in 2006.
2. The total dollar amounts *claimed* in 2007, resulting in awards, was approximately $148,740,000 with the *actual awards* totaling $18,725,000, about the same as awarded in 2006, which was $18,472,000.
3. In essence, 6.3% of the claims filed in 2007 resulted in awards and 93.7% were dismissed. ■

1. The reports containing the above statistics are directly available. For the New York state courts, the information may be obtained at the Web site (www.nycourts.gov/reports/annual/index.shtml). For the United States Circuit Courts, contact the Administrative Office of the United States Courts, One Columbus Circle N.E., Washington, D.C. 20544 or visit its Web site (www.ca2.uscourts.gov/annualreports.htm).

2. According to Merriam Webster's Collegiate Dictionary, 10th Edition, "bravado" is "the quality or state of being foolhardy."

3. For both U.S. Circuit Courts listed, this includes civil cases and administrative appeals only – no criminal cases.

4. From the Annual Report of the Clerk of the Court of Appeals for 2007.

5. From Reports of the New York State Office of Court Administration.

6. "Dismissed" and "Other" are excluded since generally they are not on the merits.

7. Applicable to the 12-month periods ending September 30, 2007 and 2006. This year, for the first time, includes "Remanded."

BY PAUL BENNETT MARROW

Paul Bennett Marrow (pbmarrow@optonline.net) is an attorney and arbitrator. He practices in Chappaqua, N.Y. He is a member of panels for the AAA, ADR Systems, NAF, NAM, and FINRA. He is a Fellow (FCIArb) of the Charter Institute of Arbitrators, London, England.

When Discovery Seems Unavailable, It's Probably Available

Many attorneys believe that arbitration and discovery are simply incompatible. Others believe that discovery isn't available in arbitration or that arbitrators will refuse to order it. So it may come as a surprise that reasonable discovery is almost always available for the asking and that even in those situations where an arbitrator is uncooperative, a myriad of techniques and options are available to overcome that obstacle. This article reviews those options and techniques, the rules of the major providers (American Arbitration Association (AAA, Commercial Rules), JAMS, International Institute for Conflict Prevention and Resolution (CPR), National Arbitration Forum (NAF) and statutory mandates (CPLR Article 75 and the Federal Arbitration Act (FAA)) and some less likely to be spotted by those not familiar with the subtleties of an arbitration practice. The takeaway is that even when discovery seems to be beyond your grasp, all is not lost.

The Starting Point: Rules of the Providers

Neither the CPLR nor the FAA authorizes disclosure. Both speak only to the power of an arbitrator to compel witnesses to appear at a hearing by the issuance of a subpoena and the empowering of an arbitrator to administer an oath.[1] So the arbitration agreement and the rules agreed to by the parties establish the basic foundation for discovery rights.

The rules of all the providers speak to discovery in one form or another. With the possible exception of the rules of the AAA,[2] two levels of discovery can be anticipated:

1. *General* discovery that includes an opportunity to employ sophisticated techniques, and
2. *Limited* discovery in the form of an exchange of documents to be used at a hearing and witness lists.

The distinction between the two levels involves more than just an itemization of the tools for discovery. General discovery *requires an application to an arbitrator for an order of authorization* whereas limited discovery rights *can be invoked without any such application but are still subject to an order of an arbitrator denying the right.*

The rules for discovery vary greatly. So at the outset it is important to decide if discovery is likely to be an issue in any subsequent dispute and, if so, to compare all the rules. While parties can always agree to variations of the rules on an ad hoc basis, it probably isn't realistic to assume that after a dispute arises your adversary will willingly consent to a rules change favoring your right to discovery.

Let's take a look at what the rules of the above-mentioned four providers say with respect to these two levels of discovery.

General Discovery

The four providers' rules involving general discovery can be classified as follows:

1. Mechanisms not specified, arbitrator's discretion governs.
   - CPR Rule 11.
   - AAA Commercial Rules R-21.
2. Some mechanisms specified, arbitrator's discretion governs.
   - AAA Commercial Rules for Complex and Large Cases L-4.
3. Detailed rights with mechanisms specified, arbitrator's discretion governs.
   - JAMS: Right to specific types of discovery – depositions, exchange of documents, witness lists – arbitrator's discretion governs, disputes resolved by a special master – Rule 17.
   - NAF: Qualified right to specific types of discovery – written questions, exchange of information, depositions, arbitrator has discretion – Rule 29.

The right to sophisticated supplemental discovery techniques (depositions, interrogatories) is for the most part limited. CPR Rule 11 merely authorizes such discovery "as is appropriate to the circumstances." The standard for evaluating any request is "the needs of the parties and the desirability of making discovery expeditious and cost effective," which suggests that the arbitrator has authority to order depositions and interrogatories. AAA Rule 21, applicable to all commercial matters not deemed large and complex, authorizes the arbitrator to direct the discovery "consistent with the expedited nature of arbitration." AAA Rule L-4(d), applicable to large and complex commercial matters, specifically mentions depositions and interrogatories available "upon good cause shown and consistent with the expedited nature of arbitration."

JAMS Rule 17(b) grants each party the right to one deposition and gives

the arbitrator the discretion to order more "based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness."

NAF Rule 29(B)(1) allows a party to seek without limitation the disclosure of documents, 25 written interrogatories and "one or more depositions." In addition, Rule 29(B)(3) authorizes the use of Requests for Admissions and Requests for Physical or Mental Examinations subject to the standard of relevance, reliability and the informative nature of the information being sought, as well as the reasonableness, burdensome nature and expense of the request.

Keep in mind that, without exception, the rules of all providers allow the parties to tailor an arbitration clause so as to either increase or decrease the scope and detail of the rules provided. Such modifications must be consistent with applicable law and the policies of the provider and must be mutually agreed to in writing.

Limited Discovery

The purpose of discovery is to help the parties with understanding one another's case and reduce the possibilities for surprise. To this end, many of the providers have rules that create a nearly absolute right for the exchange of documents and witness lists, rights that are in place unless the arbitrator intercedes.

By way of example, AAA Rule L-4 subsections (e) and (f) require that unless the arbitrator rules otherwise, at least 10 days prior to the hearing, the parties must "exchange copies of all exhibits they intend to submit at the hearing."

CPR Rule 12.1 doesn't specifically require an exchange of documents or witness lists. However, the rule does require of each party a pre-hearing memorandum containing a statement of

- the facts;
- each claim;
- the applicable law and authorities upon which the party relies;
- the relief requested, including the basis for any damages claimed; and
- the nature and manner of presentation of the evidence, including the name, capacity and subject of testimony of any witnesses being called and an estimate of the time required for each witness's direct testimony.

JAMS Rule 17(a) requires parties to exchange all relevant and non-privileged documents to be relied upon at the hearing; witness lists, including the names of experts to be called; and any expert reports to be used at a hearing.

NAF Rule 31 requires that, prior to the hearing, the parties must exchange witness lists, exhibit lists, copies of all documents and property to be used at the hearing, and an affidavit of authenticity of any document to be introduced at the hearing.

Looking in Other Places

It's a good idea to also consider options that go beyond the four corners of the rules of a given provider.

One mechanism that can serve as a proxy for discovery is a motion for summary judgment. Only JAMS's rules specifically allow for such a motion.[3] The rules of all the other providers allow for applications to an arbitrator for determinations concerning the management and regulation of any phase of the arbitration proceeding. This standard should accommodate such a motion. Strategically, the mere making of the motion requires that the motion be answered in sufficient detail so as to assure that the motion will be denied.[4] The end result is that an opportunity is created to view in some detail what the opposition's case will look like and how it will be presented.

Another technique often overlooked is the issuance of a subpoena seeking production of something thought to exist but that is otherwise unavailable.

The FAA authorizes an arbitrator to issue a subpoena to "any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."[5] The CPLR provides that "[a]n arbitrator . . . in the arbitration proceeding has the power to issue subpoenas."[6] The CPLR also authorizes an attorney to issue a subpoena in an arbitration proceeding;[7] the FAA appears to be more restrictive.[8]

Two providers have rules regarding the issuance of a subpoena. JAMS Rule 21 is broad in scope, allowing the arbitrator to issue subpoenas if the subpoena is in accordance with applicable law. Significantly, there is no provision

in the rule allowing an attorney for a party to issue a subpoena.[9] NAF Rule 30 is similar in that an arbitrator is authorized to issue a subpoena ordering a non-party or "other person permitted by law" to produce documents or property or "ordering a witness to testify." Unlike JAMS Rule 21, Rule 30 subsections (D) and (K) specifically prohibit the issuance of a subpoena by a party or a party's lawyer and renders any attempt unenforceable. It is not clear as to whether this rule takes precedence over CPLR 7505.

The rules of the AAA and CPR are silent with respect to the issuance of a subpoena by either an arbitrator or an attorney appearing on a party's behalf. The rules of CPR, however, unlike those of the AAA, require an arbitrator to apply "substantive law" when making any determination involving a matter and permit an arbitrator to grant any relief allowed by the agreement of the parties and by applicable law.[10]

Summing It All Up

Arbitration and discovery do indeed coexist. The key is to try to tailor your needs to the rules that govern. This can take some effort, but it's well worth it in the long run. Arbitration is about getting a result in a very timely fashion. Arbitration is about efficiency. And arbitration is about fairness. Discovery is important and discovery is available. Getting the most out of arbitration and the rules of discovery that apply is a function of careful planning. ■

1. *De Sapro v. Kohlmeyer*, 35 N.Y. 2d 402, 406, 362 N.Y.S.2d 843 (1974); *Kahn v. N.Y. Times Co.*, 122 A.D.2d 655, 503 N.Y.S.2d 561 (1st Dep't 1986). *See* 9 U.S.C. § 7: "The arbitrators selected either as prescribed in this title [9 U.S.C. §§ 1 *et seq.*] or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case." CPLR 7505: "An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas. An arbitrator has the power to administer oaths."

2. Rules 21(b) and L-4(e) merely provide for an exchange of documents to be used at the hearing. No mention is made of any requirement that the parties exchange witness lists. As a practical matter, most arbitrators as a matter of course and good practice include in the scheduling and procedure order mandates concerning both.

3. Rule 18.

4. See discussion, Paul Bennett Marrow, *Motion Practice and Arbitration Proceedings From the Perspective of the Arbitrator*, N.Y. St. B. J. (Sept. 2007), p. 50.

5. 9 U.S.C. § 7.

6. CPLR 7505.

7. *Id.*; *see also* CPLR 2302(a).

8. Federal Rule of Civil Procedure 45(a)(3) provides:

> An attorney also may issue and sign a subpoena as an officer of:
>
> (A) a court in which the attorney is authorized to practice; or
>
> (B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.

9. Inasmuch as local law is said to govern the subpoena process, presumably an attorney could issue a subpoena under the authority of CPLR 7505.

10. Rule 10: Applicable Law(s) and Remedies.

BY MICHAEL M. MARIANI

Michael M. Mariani (mmariani@ftci.com) is Senior Vice President, Deputy General Trust Counsel and Director of Trust and Estate Services at Fiduciary Trust Company International. He is responsible for the Trust and Estate Administration Departments. He is also an Adjunct Professor at St. John's University School of Law. He received his J.D. from St. John's University School of Law, an LL.M. from New York University School of Law and a B.S. from Wilkes University.

Power of Attorney: An Important Estate Planning Document

Most estate planning documents deal with the disposition of assets after death. One of the more important documents, however, deals with the handling of an individual's affairs during life. If the individual becomes incapacitated or is simply unavailable due to hospitalization, illness, business travel or any other reason, a properly drafted power of attorney will provide a mechanism for resolving lifetime planning issues at a critical time.

A power of attorney is a document in which an individual (the principal) designates another individual as an agent (attorney-in-fact) to perform certain transactions on the principal's behalf. This is a very powerful document and in most instances becomes effective upon signing. Since the attorney-in-fact is able to perform the transactions enumerated in the document, including financial transactions, great care should be taken when choosing an agent. The most important traits are trustworthiness, good judgment and availability. In many instances, a spouse, child or other close family member is designated as the attorney-in-fact. At the time of execution, the principal must possess the requisite mental capacity to understand the nature and importance of the act of execution.

Durable Power of Attorney

Historically, under common law, a power of attorney was terminated upon the principal's incapacity. In 1954, the Commonwealth of Virginia enacted legislation allowing the designation to continue in force if the document specifically states that it will survive the principal's incapacity. Thus, the term "durable power of attorney" came into use. All 50 states and the District of Columbia now recognize the validity of a durable power of attorney.

The relevant provisions of the General Obligations Law authorize the creation of a durable and a nondurable general power of attorney. The major difference in the content of each document is that the durable statutory short form provides the following: "This durable Power of Attorney shall not be affected by my subsequent disability or incompetence";[1] the nondurable statutory short form of general power of attorney specifically states in bold letters: "THE POWERS YOU GRANT BELOW CEASE TO BE EFFECTIVE SHOULD YOU BECOME DISABLED OR INCOMPETENT."[2]

Generally speaking, unless the particular facts warrant otherwise, the power of attorney should be durable. In fact, in the past 32 years of practice, this author does not recall a situation that warranted the preparation, or use, of a nondurable power of attorney. The major benefit of a durable power of attorney is that the authority granted under the instrument survives the principal's incapacity and allows for access to, and controlled management of, the principal's assets, notwithstanding his or her subsequent disability or incompetence.[3]

In New York, the relevant statute mandates that the execution of the power of attorney (durable or nondurable) be acknowledged by the principal in the manner prescribed for the acknowledgment of a conveyance of real property.[4] There is no requirement that the principal's signature be witnessed or that the power of attorney be executed with all the formalities of a will execution.

Under the statutory short form power of attorney, the principal has the ability to appoint one agent, multiple agents to act together, or multiple agents, each of whom has the ability to act alone.[5] The major drawback of appointing multiple agents to act together, especially in situations when time is of the essence, is the unavailability of one or more of the multiple agents, or the inability of all of the agents to agree on a particular transaction.

The power of attorney (durable or nondurable) cannot be used to make medical or other health care decisions. These decisions can be made by an agent under a health care proxy created pursuant to Article 29-C of the N.Y. Public Health Law (PHL). Although the relevant statute does not specifically prohibit the appointment of multiple agents to act together,[6] better practice would dictate the appointment of one agent to act alone, with provision for an alternate agent, if the primary agent is unavailable, unwilling and not competent to serve as agent.[7]

Durable powers of attorney typically include the following provisions.

General Power of Attorney
The principal authorizes the attorney-in-fact to handle all business, financial and personal transactions on the principal's behalf.

Special or Limited Power of Attorney
The principal authorizes the attorney-in-fact to perform a specific transaction, for example, to fund a revocable trust or sell a parcel of real property.

Springing Power of Attorney
The attorney-in-fact's designation becomes effective at a specified future time or upon the occurrence of a specified contingency including, but not limited to, the principal becoming disabled or incapacitated.

For example, in New York the durable general springing statutory short form power of attorney[8] is set up to take effect at the happening of one of two future events. The first is the occurrence of a specified event which must be certified in a written statement by the person or persons enumerated in the document.[9] The second is the certification by a designated physician, the principal's regular physician, or by a licensed psychologist or psychiatrist that the principal suffers from diminished capacity that would preclude the principal from conducting affairs in a competent manner.[10] Thus, unlike the New York durable statutory short form power of attorney, which is effective immediately upon execution, the New York springing power of attorney becomes effective only when needed, upon the happening of a specific event or the certification of the principal's onset of diminished capacity.

An additional element must be considered in drafting an effective springing power of attorney, due to the relatively recent enactment of the Health Insurance Portability and Accountability Act (HIPAA),[11] a federal law designed, in part, to protect the confidentiality of an individual's health care information. Under HIPAA, no one but the patient himself or herself may access medical records, reports and evaluations. Thus, third parties are not permitted to access an individual's medical records and health care information, including an attorney-in-fact acting under a springing power of attorney seeking to prove that the principal is suffering from diminished capacity. Therefore, special care should be taken to prepare a separate HIPAA authorization form for the release of health care information to a designated personal representative, ideally to the attorney-in-fact. It should be noted that a HIPAA authorization may also be included in a well-drafted health care proxy.[12]

Advantages of Having a Power of Attorney

1. It is a valuable estate planning tool in situations where the extent, nature and value of an individual's assets do not merit the expense associated with the creation of a revocable trust.

2. The document remains effective despite the principal's incapacity or disability, without the need for court intervention or court supervision.

3. It is inexpensive and allows an individual to cope with the risks of future incapacity without potential delays and expenses (including legal, filing, and bond and accounting fees) of a court proceeding for the appointment of a guardian or conservator.

4. A properly drafted power of attorney provides certainty about who will handle the principal's financial affairs if, for whatever reason, the principal is not available or the principal becomes disabled.

5. The principal is not required to transfer property to the attorney-in-fact.

6. The principal may be able to designate a guardian or conservator through a power of attorney. This is a matter of local law, however, and counsel should be consulted in the appropriate jurisdiction.

Disadvantages of Having a Power of Attorney

1. A power of attorney should not be used as a substitute for a revocable trust. This is a trust created by a grantor to manage the grantor's assets during his or her lifetime. The primary benefit of a revocable trust is that it provides a pre-arranged mechanism to assure continued management and preservation of assets if an individual becomes incapacitated. The trust becomes irrevocable and unamendable at the grantor's death. It simplifies asset management at death and can also set forth all of the dispositive provisions of the grantor's estate plan. The power of attorney is only a viable document during the principal's lifetime; the authority granted to the agent in the document terminates at the principal's death. Nonetheless, a power of attorney should be used in conjunction with a properly drafted agreement creating a revocable trust.

2. Generally speaking, no monitoring mechanism of the attorney-in-fact's actions, such as court supervision, exists with a power of attorney, and thus, it may also be a source of abuse. This issue came to light recently in *In re Ferrara*,[13] where the Court of Appeals unanimously reversed the Order of the Appellate Division and remitted the matter to the Rockland County Surrogate's Court for further proceedings. In *Ferrara*, although the agents were authorized to make gifts to themselves "without limitation," the court held that any such gifts had to be made in the principal's best interest, indicating that "[t]he term 'best interest' does not include such unqualified generosity to the holder of a power of attorney, especially where the gift virtually impoverishes a donor whose estate plan, shown by a recent will, contradicts any desire to benefit the recipient of the gift."[14]

3. Some banks, brokers and other third parties may be reluctant to deal with an attorney-in-fact under a valid power of attorney. Although New York banks and other financial institutions are required to honor a prop-

erly executed statutory short form power of attorney,[15] and their failure to honor such form shall be deemed unlawful,[16] the relevant statute lacks a procedural remedy for non-compliance. Some institutions require that their own forms be used and may refuse to honor any others.

4. The validity of the document and the scope of an attorney-in-fact's authority may be subject to suspicion after the passage of time.

5. Laws are still evolving in this area, and some uncertainty remains regarding the type of powers that can be granted to the attorney-in-fact.

Considering the pros and cons, the benefits of a well-drafted power of attorney far outweigh any drawbacks.

Considering the pros and cons, the benefits of a well-drafted power of attorney far outweigh any drawbacks.

Delegating Powers

A good starting point to determine what types of powers should be included in a durable general power of attorney is the statutory short form power of attorney, which typically lists the following types of powers that may be granted to the attorney-in-fact: real property transactions; stock and bond transactions; business operating transactions; banking and other financial institution transactions; and retirement plan transactions. (Note that the above-listed powers are further defined and set forth in state statutes.)

The Uniform Statutory Form Power of Attorney Act provides guidelines for creating a short form power of attorney. In 1988, The National Conference of Commissioners on Uniform State Laws approved the Uniform Act, and this act has been adopted in the following jurisdictions: Arkansas, California, Colorado, District of Columbia, Montana, New Mexico, Oklahoma, Rhode Island, Texas and Wisconsin. Other states that have enacted their own statutory short form durable powers of attorney include Alaska, Connecticut, Georgia, Illinois, Minnesota, Nevada, New York and North Carolina. For example, in New York, see GOL § 5-1501(1).

Generally speaking, the following powers are non-delegable: matters relating to marriage and divorce; executing, amending or revoking a will; voting in public elections; and performing services under a personal services contract.

Suggested Additional Powers and Provisions

Laws regarding powers of attorney vary from state to state and continue to evolve. In New York, the relevant statute specifically authorizes the draftsperson to supplement one or more of the powers enumerated in the statutory short form power of attorney and to add additional provisions that are not inconsistent with the other provisions of the statutory short form.[17] Check with local law to make certain that the following suggested powers and provisions are allowed in a particular jurisdiction:

Gift giving. Power to make annual exclusion gifts, up to $12,000 per year per donee, to identified donees, including the attorney-in-fact, and the power to make gifts to custodians, trustees and guardians on behalf of the intended donee.

Advancements. Power to make gifts in an amount up to the $12,000 annual gift tax exclusion when such gifts are made to beneficiaries of general bequests under the principal's will or trust agreement, and to treat those gifts as advancements in partial or full satisfaction of the disposition due the beneficiary under the will or trust agreement.

Medical expenses and tuition expenses. Authority to pay medical expenses and tuition expenses for family members and other specific donees pursuant to Internal Revenue Code § 2503(e) (without any gift tax consequences). Depending on the principal's financial circumstances, the principal may wish to limit these payments to $20,000 or $25,000 per year per donee.

Safe deposit box. Authority to gain access to safe deposit boxes in the principal's name, with authority to add or remove contents and to renew a lease or surrender the box.

Agents. Authority to employ brokers, realtors, accountants, attorneys, custodians, investment advisors and other agents to render services to the principal and to pay such agents for those services.

Create, modify or revoke a trust. Authority to create a revocable trust for the principal's benefit if none exists, and the power to modify or revoke an existing trust created by the principal, including adding all or any part of the property owned by the principal to any trust created by the principal for the principal's benefit.

Qualified disclaimers. Power to make qualified disclaimers of all or any part of a property interest, without court approval.

Nomination of conservator or guardian. Power to nominate a guardian or conservator of the principal's person, estate or both, including the attorney-in-fact.

Business interests. Power to continue the operation of any business in which the principal had an interest when the power of attorney was signed or a business in which the principal later acquired an interest.

All other matters. Power to act on behalf of the principal regarding all

other matters not specifically enumerated in the power of attorney form and which the principal can execute through an attorney-in-fact.

Successor attorney-in-fact. The principal should consider including a provision in the power of attorney form designating a successor attorney-in-fact to act if the nominated attorney-in-fact dies, resigns, becomes incapacitated or declines to accept the appointment.

Compensation. If the attorney-in-fact is to be compensated, the document should indicate how the compensation will be determined; if the attorney-in-fact is not to be compensated, the document should indicate that as well. In all cases, reimbursement would be expected for reasonable expenses incurred in connection with the services rendered as attorney-in-fact.

Revocation upon divorce. In some jurisdictions, unless the power of attorney or a court decree provides otherwise, the appointment of a principal's spouse as attorney-in-fact is revoked upon the entry of a decree of dissolution or legal separation or declaration of invalidity of the marriage.

Failure to act. This provision determines whether the attorney-in-fact will be liable for failure to act under a power of attorney when specific obligations are imposed on the attorney-in-fact to act under certain circumstances.

Accountability. If the principal dies, the attorney-in-fact would logically be accountable to the personal representative of the principal's estate. Accountability issues come up not only if the principal dies but also if the principal becomes incapacitated. In North Carolina, for example, in order for the power of attorney to remain valid if the principal becomes incapacitated, the attorney-in-fact is required to register the power of attorney in the office of the register of deeds of the appropriate county.

Portability. Acceptance of a power of attorney outside the state in which the document was executed may be difficult to attain. Third parties, including banks, brokerage firms and title companies of outside states, may or may not accept the document. It is generally recommended that if a principal owns real property in a state other than his or her domicile, the principal should execute a new power of attorney governed by the laws of the situs of the real property.

Although most practitioners focus on the preparation of a client's will or trust agreement, the complete estate plan should include ancillary documents such as a living will, health care proxy, HIPAA authorization form and more important, a durable power of attorney. ■

1. N.Y. General Obligations Law § 5-1501(1) (GOL).
2. GOL § 5-1501(1-a).
3. GOL § 5-1505(1).
4. GOL § 5-1501(1), (1-a).
5. *Id.*
6. PHL § 2981(2).
7. PHL § 2981(6).
8. GOL § 5-1506(5) (formally known as a "Power of Attorney Effective at a Future Time").
9. *Id.*
10. *Id.*
11. Pub. L. No. 104-191, 110 Stat. 1936.
12. In any event, health care proxies drafted several years ago should be reexamined to determine whether to include a provision designating the health care agent to serve as a personal representative for all purposes relating to HIPAA and to authorize the agent to execute any and all releases and other documents necessary to secure disclosure of the principal's records and other medical information protected by HIPAA.
13. 7 N.Y.3d 244, 819 N.Y.S.2d 215 (2006).
14. *Id.* at 254–55.
15. GOL § 5-1504(2).
16. GOL § 5-1504(3).
17. GOL § 5-1503(2), (3).

BY ELLIOTT WILCOX

Elliott Wilcox is a professional speaker and a member of the National Speakers Association. He has served as the lead trial attorney in over 140 jury trials, and teaches trial advocacy skills to hundreds of trial lawyers each year. He also publishes *Trial Tips*, the weekly trial advocacy tips newsletter <www.trialtheater.com>.

"Can You Hear Me Now?" Help the Audience Hear Your Message

It was a typical networking function. If you've ever tried networking to obtain clients, you know what they're like: Dozens of people seated at tables throughout the room, and everyone is given the opportunity to stand and briefly describe what they do for a living or what services they provide.

This event was no different . . . until a woman rose to tell us what she did and the services she provided.

Now, for all anyone knew, she could have held the secrets to improving our businesses a thousand-fold. For all we knew, her services could have been the panacea we were seeking. But we'll never know . . . *because we never heard her.*

No one else was talking. The outside noise was minimal. The room wasn't very loud. There weren't any external conditions that prevented us from hearing her.

But she didn't speak up, and she didn't speak clearly. We'll never know if she could have helped us or not. She probably missed business opportunities that evening because we couldn't hear her.

What about you? As a trained advocate, you speak on behalf of others. People expect more from you. They expect that your voice will be heard. Can they hear you? Is your voice powerful enough to be heard above the noise? Here are three simple tips you can use to improve the power of your voice.

1. Speak clearly. My grandfather is hard of hearing, and has difficulty understanding people speaking to him. He once shared a communication secret with me that I want to share with you. This secret won't just help you communicate to people with hearing difficulties; it will help you communicate to anyone. Here's the secret: The most important element to understanding someone is not how loudly they speak. It's not the *volume* of their speech, it's the *clarity.* You don't need to shout to be heard. It's more important that you make an effort to enunciate your words. Begin your training by repeating these tongue twisters aloud:

> *How much wood could a woodchuck chuck if a woodchuck could chuck wood?*
>
> *Peter Piper picked a peck of pickled peppers.*
>
> *The sixth sick sheik's sixth sheep's sick.*
>
> *Toy boat.* (It's more difficult than it looks!)

Repeat them aloud, over and over, until you pronounce each word clearly and distinctly. The increased clarity of your diction will help your audience understand you.

2. Stand tall. This tip is so simple that you learned it in second grade, when Mrs. Crabapple forced you to stand up at your desk when answering questions. Did you know that she was teaching you an effective communication tip?

Standing to speak is comparable to a concert violinist raising the violin to her chin before playing. Sure, she could place it in her lap and still get sound from it, but to make her instrument play at its *best,* it must be properly aligned. When you stand to speak, you make it easier for air to pass from your lungs, over your vocal cords, and out your mouth. Standing aligns your vocal instrument and ensures your voice performs at its best.

Here's a quick tip to improve upon what you learned in Mrs. Crabapple's class. Don't just stand next to your seat when addressing the group – the kids behind you won't hear you very well. Instead, move to a portion of the room where you aren't turning your back towards anyone. No one wants to stare at your butt anyway. Now, with everyone in eye view, you can project your voice towards them, immediately improving both your volume and your clarity.

3. Read your audience. How will you know if your audience can't hear you? It's not their responsibility to say, "Speak up! We can't hear you!" As the speaker, *you* must assume responsibility for being understood.

Make eye contact with people around the room and gauge their responses. If they can't hear you, you will see them leaning forward or cupping their ears, straining to hear. Adjust your volume accordingly. Seek feedback. Search with your eyes, and, if you're completely unsure, ask them ("If you can hear me, raise your right hand.") Understanding your audience's body language is especially important when you speak to jurors.

Continued on Page 61

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

My partner and I have a small law firm concentrating in matrimonial matters. Recently, my partner concluded a divorce case that resulted in a settlement yielding several million dollars for our client. Our retainer was based on an hourly rate, which has been paid in full. Our total fees amounted to $7,500.

My partner wishes to speak to our client and ask her to voluntarily pay our firm a bonus because of the exceptional result and the small fee we received. I feel very uncomfortable with his plan.

Can you help alleviate my concern?

Sincerely,

Uneasy Partner

Dear Uneasy Partner:

Your question calls for a review of the relevant Disciplinary Rules, Uniform Court Rules, and case law.

DR 2-106(C)(2) (22 N.Y.C.R.R. § 1200.11(c)(2)) provides as follows:

> C. A lawyer shall not enter into an arrangement for, charge or collect:
>
> 2. Any fee in a domestic relations matter:
>
> a. The payment or amount of which is contingent upon the securing of a divorce or in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement.

Since your partner's case has been concluded and the request is for a voluntary payment, it would seem that this is not a contingent fee arrangement. However, that alone does not provide an answer.

The case law in New York regarding this kind of circumstance is very sparse. The Appellate Division, First Department, in the case of *Weinstein v. Barnett*, 219 A.D.2d 77, 640 N.Y.S.2d 103 (1st Dep't 1996), is one of the few courts that have addressed the issue. This case involved a $2 million bonus in connection with the successful conclusion of a matrimonial case. Prior to retaining counsel, the highest offer of settlement was $750,000. Retained counsel effectuated a settlement in excess of $15 million. When the client executed the settlement agreement and other documents, she also signed a one-page agreement with her lawyer called a "Performance Fee Document," referred to by the client as a "Bonus Agreement." This agreement called for $2 million to be paid to counsel in three installments. The client made the first payment, then sued to rescind the agreement and for the return of the million-dollar payment that she already had made to the attorney.

The client moved for summary judgment and the trial court granted her motion. The court's decision was based on the fact that the attorney-client agreement came into being 24 hours before the husband signed the separation agreement. The court found that the bonus agreement in question was contingent upon the husband signing the separation agreement. The trial court said: "If the husband had raised any issues, defendant's self-interest in the result would have created the conflicted loyalty to the client that DR 2-106(C)(2) was designed to prevent." However, the Appellate Division, First Department, reversed on the ground that a question of fact existed as to whether or not the separation agreement was a "done deal" – *i.e.*, whether the husband's signature could be viewed as a mere formality – at the time the attorney-client agreement was signed. The First Department thus implicitly recognized the legality of the bonus agreement.

Neither the trial court nor the Appellate Division made reference to 22 N.Y.C.R.R. § 1400.3(8) or DR 2-106(C)(2)(b) both of which require written retainer agreements in domestic relations matters.

22 N.Y.C.R.R. § 1400.3(8), reads:

> 8. Any clause providing for a fee in addition to the agreed-upon rate, such as a reasonable minimum fee clause, must be defined in plain language and set forth the circumstances under which such fee may be incurred and how it will be calculated.

This rule applies to attorneys who, on or after November 30, 1993, undertake representation of a client "in a claim, action or proceeding, or preliminary to filing a claim, action or proceeding, in either the Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support, or alimony, or to enforce or modify a judgment or order in connection with any such claims, or proceedings." (22 N.Y.C.R.R. § 1400.1.)

In the *Weinstein* case (*supra*), the attorney was retained before November 30, 1993, and that may explain the court's silence on this issue. It thus cannot be said with confidence that this one decision resolves the matter for you.

The first question your partner must answer is, can he and his client amend their original retainer agreement to include language that will satisfy the provisions of 22 N.Y.C.R.R. § 1400.3(8)?

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

It appears that the answer is yes, but there is a no binding authority to be found. If your partner plans to proceed in this fashion he should make sure that he complies with 22 N.Y.C.R.R. § 1400.3, which requires a copy of the amended retainer agreement to be filed with the court within 15 days of the signing.

Another interesting case does shed some light on the issue. In *Sheresky Aronson & Mayefsky, LLP v. Whitmore*, 17 Misc. 3d 1108(A), 851 N.Y.S.2d 61 (Sup. Ct., N.Y. Co. 2007), the retainer agreement contained the following "Premium Fee" clause: "We reserve the right to discuss with you at the conclusion of the matter your payment of a reasonable additional fee to us, in excess of the actual time and disbursements, for exceptional results achieved, time expended, responsiveness accorded, or complexity involved in your case. However, no such fee will be charged to you without your consent."

At some point during the plaintiff's representation of the defendant/client, the defendant agreed to pay the plaintiff a "Premium Fee" or bonus of $150,000 payable in three equal payments of $50,000 each. After making the first payment the defendant notified the plaintiff that no further payments would be made.

The Supreme Court, New York County, dismissed the complaint on three grounds:

1. The "Premium Fee" clause failed to set forth in "plain language," among other things, how the fee would be calculated (22 N.Y.C.R.R. § 1400.3(8));
2. The additional fee was for services rendered in a domestic relations matter and therefore had to be in writing (DR 2-106(C)(2)(b); 22 N.Y.C.R.R. § 1200.11; 22 N.Y.C.R.R. § 1400.3(8)); and
3. The supplemental written agreement would have to be filed with the court (22 N.Y.C.R.R. § 1400.3).

This result was recently affirmed by the Appellate Division, First Department and reported in the *New York Law Journal* on July 10, 2008, at page 32.

In addition, two other potential problems with this sort of arrangement were pointed out in a *Syracuse Law Review* article by Patrick M. Connors (Vol. 47:655 at 669):

> It also appears, however, that such a bonus agreement may need to conform to the criteria set forth in Disciplinary Rule 5-104(A), governing lawyer's business relations with a client. Under this rule, the lawyer would be required, at a minimum, to advise the client to seek other counsel and to provide full consent to the terms of the transaction. The drafting of a fee agreement is generally not subject to this rule, but a bonus agreement similar to that in *Weinstein* that amends the original fee agreement may be. Lawyers who enter into this type of "bonus agreement" with a client should also be mindful of Ethical Consideration 5-5, which states that a "lawyer should not suggest to his client that a gift be made to himself or for his benefit." A lawyer may accept a voluntary gift from a client, but should urge the "client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances." A court may find that such a bonus agreement is a form of a gift, subject to these requirements, and may ultimately void [the transaction].

It seems that if your partner avoids the hazards discussed above he would not be acting unethically – but would he be acting professionally? Perhaps you should ask your partner what his reaction would be if, after a surgeon demonstrated extraordinary skill and saved his life, she asked him for a bonus upon his recuperation.

The Forum, by
George J. Nashak, Jr.
Ramo Nashak & Brown
Queens County

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am an associate at a major law firm working on a pro bono matter. Our client, who is currently serving a lengthy prison sentence, is seeking to vacate his conviction and to obtain a new trial.

In accord with firm guidelines, and with the assistance of the pro bono committee, I had completed certain required forms that had to be submitted before the firm would approve taking on the case. The firm approved the request and allotted 200 hours for which attorneys working on the matter will get billable hour credit. The firm, however, specified that the approval covered only the client's appeal. Thus, if we are successful in our motion for a new trial, our client is obliged to seek separate representation to handle that new trial.

I have been working on the matter for several months, and I expect to exceed the firm's 200-hour limit. Although I can request firm approval for additional hours to be credited towards my billable hour total, I am concerned that the firm will not view the request favorably. However, if I do not request firm approval for additional hours and continue to work on the appeal, there is a potential conflict between time that I spend working on the appeal and time that I spend working for paying, billable clients. Finally, even though our client is fully aware that our representation will not extend to a new trial, he has said on more than one occasion that he wants us to continue our representation if the new trial is granted.

Is it appropriate for me to continue handling this matter in light of the potential conflicts of interest raised by the firm's billable hour limit? Was it appropriate for us to limit the scope of our client's representation to handle only his appeal?

Sincerely,
Committed to Pro Bono

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: As a reader who enjoys hearing and collecting oxymorons, I was delighted to hear in a news commercial the phrase "Cadillac truck," which I have added to my list. Please write a column on the subject of oxymorons for other readers who enjoy them.

Answer: Some time ago, a reader of another state bar journal asked me to write a column on the subject of oxymorons. After it appeared, the e-mail indicated that more of my readers were oxymoron-enthusiasts than I had realized, so here is that column, as well as some of the e-mail that arrived after it was printed.

An oxymoron, as the name implies, is a term in which the first part contradicts the second. Derived from Greek, the word *oxy* meant "sharp," and the word *moron*, "foolish." I have some reservations about including the question that introduces this column as an oxymoron.

But each person decides what constitutes an oxymoron. The following terms were sent by individuals who considered them oxymorons: *man child*, *firewater*, *horsefly*, and *night light*. You may not agree that all those terms are oxymorons. Is there such a thing as a "delicious low-calories dinner"? If you think there isn't, you'd add that phrase to your list. Other selections that indicate bias are *Internal Revenue Service*, *friendly divorce*, *clean bomb*, *scheduled flight*, and *painless dentistry.* How about *federal assistance*, *social security*, and *family vacation*? As you can tell, your selection of oxymorons reveals more about you than about the language.

Apparently health-care professionals are also interested in oxymorons, prompting medical book publishers Lea and Febiger to sponsor an oxymoron contest. In that contest, the winning pairs were *exquisite pain* and *irregular rhythm.* Among the other entries were *idiot savant*, *ill health*, *medicinal cigarettes*, *static flow*, *sanitary sewer*, *negative impact*, and *intense apathy*.

Oxymorons have been around for a long time. Theodore Roosevelt, in referring to President John Tyler, is reported to have commented, "He has been called a mediocre man, but this is unwarranted flattery. He was a politician of monumental littleness." Legal terms that might be considered oxymorons are terms like *negative pregnant*, shorthand for a negative statement bearing affirmative possibilities. And how about *active and affirmative negligence*? A Michigan supreme court used that term in this context: "[A] guest can recover only where his injury is a result of the active and affirmative negligence of the host."

The words *affirmative* and *negative*, when combined with another word are fertile sources of oxymorons. In addition to *negative pregnant*, another reader suggested *affirmative pregnant*, which denotes an affirmative allegation that implies some negative in favor of the adverse party. Other readers suggested *negative impact* and *negative evidence.* Some of these terms are questionable, but no readers criticized their inclusion.

Some oxymorons are created intentionally: for example, the term *deliberate speed* in the phrase "with all deliberate speed," in *Brown v. Board of Education*. A critic later noted that this phrase by itself delayed the process of outlawing segregation. (See transcript, *Justice Black and the Bill of Rights*, CBS News Special, Dec. 3, 1968.)

Other oxymorons are unintentional. One of my students coined an oxymoron when he said of another student's writing, "That's clearly ambiguous." And columnist William F. Buckley, Jr., editor of *National Review*, wrote about people who urge the legalization of drugs: "What legalization advocates seek is a heavy mitigation of the concomitant consequences of the war on drugs." ("Heavy mitigation?")

Some readers consider the term *substantive due process* an oxymoron. An Illinois attorney suggested *steadfast vacillation* and *deliberate negligence.* Other contributions from readers were: *pretty ugly*, *rolling stop*, *working vacation*, *bad health*, *deliberately thoughtless*, and *justifiable paranoia.* And a legal writing teacher at this law college who had just read his students' efforts at brief-writing nominated *legal brief*.

On reading this list, a reader sent this quote from John Kirshon, News editor of the *New York Times*, "Why did the oxymoron wear earplugs? To stop the deafening silence."

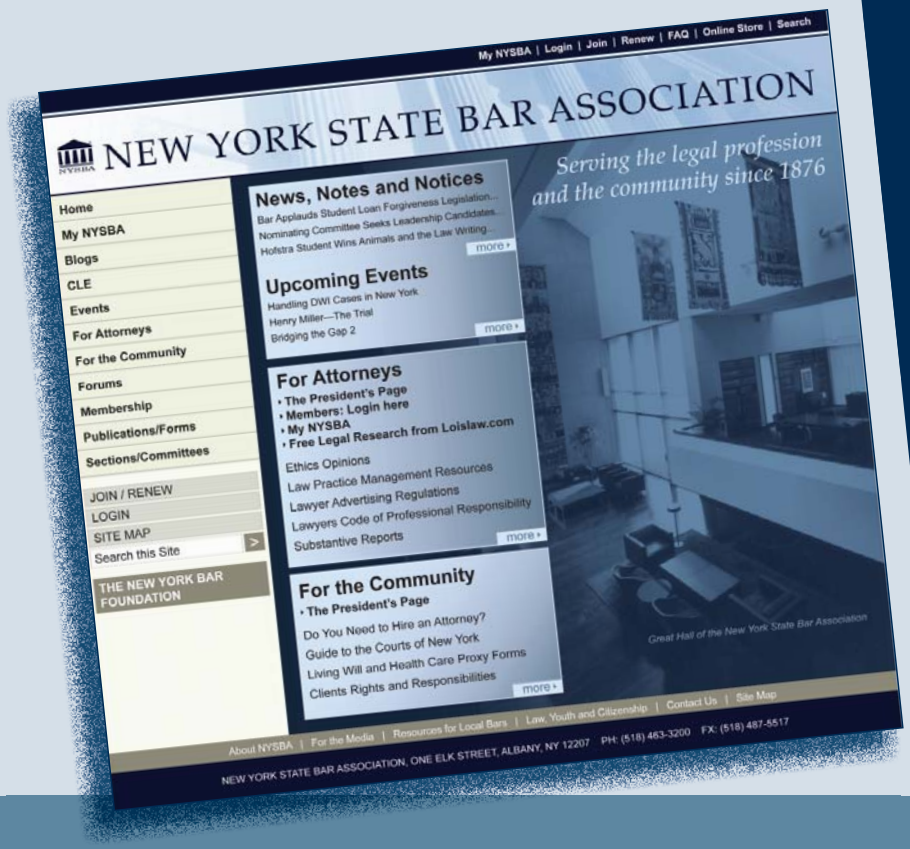
Question: My wife, parents, and many other people drive me crazy when they use the past tense for the verb *to text*. Some, like my wife, even use *text-ed-ed* as the past tense. (Please don't ask why I feel the need to interject my two cents; blame it on my law degree.)

Answer: West Palm Beach attorney Andrew S. Newell is surprisingly the first correspondent to ask this question. The verb *text* is one of the class of the so-called "weak" verbs in English. Weak verbs predominate in Modern English and they always add *-ed* to form the past tense. (The so-called "strong" verbs are those whose past tense is formed by an interior change in the verb (for example, *break*, *broke*, *broken*.)

The *-ed* ending of the "weak" verbs that end with a *d* or *t* sound is pronounced with a schwa sound (an unaccented *uh* sound) as in *dented, headed*. So you probably pronounce *texted* as "textud," with the stress on the first syllable, "text." Some linguists believe that the *-ed* ending is a truncated form of the past tense *did*, added during the Old English period (after 449 A.D., but before the Norman invasion in 1066 A.D.). When "new verbs" are created in Modern English they almost always add the predominant *-ed* ending of the "weak" verbs.

So pronounce the past tense of *text* "texted," but don't let it drive you crazy. ■

GERTRUDE BLOCK is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association). Her most recent book is *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co., 2004).



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Continued from Page 64

mistakes will affect your credibility. Readers will question the contents of a brief or memorandum when the writer makes these mistakes.[25] Reading a brief with spelling, grammar, and punctuation errors is like talking to someone who is picking his nose.[26] People will assume that a brief with these errors contains mistakes of fact.[27] The reader will think that a writer who doesn't care about these types of errors will carelessly fudge the big stuff.

Consider your commas, semicolons, and periods. These devices can slow readers down or speed them up.

Avoid adverbs, adjectives, and all false, cowardly, or boring intensifiers. Use concrete nouns and, even better, vigorous verbs.

Avoid embellishments like *italics*, underlining, or **bold font**.[28] These techniques suggest that you want to emphasize a fact or idea but don't know how to do so.[29] They also shout at the reader and say, "you're stupid." Treat the reader like a smart, busy professional. Express thoughts through content, not style. If a word or phrase doesn't stand out, delete all unnecessary information surrounding it, re-order the words to change the emphasis, or add detail.[30] Eliminate embellishments to sound confident.[31]

Advocates are less direct and wordier with the passive voice.[32] Use the subject-verb-object formation — who does what to whom.[33] The active voice engages the reader by emphasizing action and making sentences interesting.[34]

> *Single passive voice:* "According to the witness, a contract was signed by Jack to sell guns to Jill for $5000."

> *Double passive voice:* "According to the witness, a contract was signed to sell guns for $5000."

> *Active voice:* "According to the witness, Jack signed a contract to sell guns to Jill for $5000."

By stressing the actor, the active voice focuses on the subject of the sentence.[35] Characters become more sympathetic when they're the subject of the sentence.[36] The active voice also highlights your adversary's unfavorable actions.[37] Use the passive voice when you want to decrease intensity[38] or remove focus from the actor[39] or when the actor is unknown or already known.

Visual Aids

Visual aids are valuable tools for fact writing. The more complex the case, the more visual aids will clarify and simplify. Choose the graphic that emphasizes meaning best.[40] Use a map to show the relationship between cars at an intersection in a case about an automobile collision. Pictures and video footage tell the viewer what to watch for.[41] Charts, tables, and graphs communicate complex facts and statistics.

Choosing the graphic to present the facts depends on what information the advocate is trying to provide.[42] There are several types:

- Pie chart: Compares various amounts that together comprise a whole.[43]
- Bar graph: Compares changes over time in amounts that comprise a whole.[44]
- Multi-bar graph: Compares relative quantities over time.[45]
- Table: Compares statistics.

Tables can be read from left to right or top to bottom.[46] Begin with information the reader knows. Move to information the reader needs.[47]

- Diagrams: These include maps, drawings, and blueprints. Make the diagram simple so that the reader can extract the maximum information.[48] Focus on the relevant points in the diagram to minimize distraction and confusion.[49]

Record Citations

Lawyers must cite every assertion of fact to the record.[50] The record is composed of assorted documents, including transcripts, pleadings, affidavits, motions, prior decisions, and depositions. Precise citations require citing to the correct volume, page, and paragraph number in the record. The reader shouldn't have to, and probably won't, search through the record to find documents referred to in the fact section.

Tell the reader how you'll cite the record. For example, at the beginning of the fact section, explain that "Numerals in parentheses refer to pages (or folios) of record."[51] Citing page 43 might look like this, according to the Bluebook: (R. at 43.).

For advocates preparing persuasive briefs, record citations are a convincing tool.[52] Just as omitting or misrepresenting facts will diminish the advocate's credibility, careful and precise citations augment credibility.[53] Whenever doubt arises about whether a citation is necessary, err on the side of caution and include it.[54]

If you're uncertain whether you've accurately characterized a fact or idea, quote directly from the record.[55] Quotations should be used to make a point and to prove you're not making things up.[56] Some things are best and most memorably said in a witness's words. But too many quotations, or lengthy quotations, will dilute the fact section, bore the reader, and damage continuity.[57]

Show, Don't Tell

In persuasive briefs, an effective fact section persuades readers without letting them know they're being per-

Reading a brief with spelling, grammar, and punctuation errors is like talking to someone who's picking his nose.

suaded. A good brief allows readers to believe they've reached the legal conclusion without the writer's help. Persuasion is most effective when the writer allows the reader to reach the conclusion.[58]

> *Example* (reader reaches the conclusion): "At the time and place specified in the complaint, the defendant struck the plaintiff from behind with a stick."[59]
>
> *Example* (writer reaches the conclusion): "At the time and place specified in the complaint, the defendant committed a battery on the plaintiff."[60]

State the facts, not what those facts mean. Let readers determine the meaning of the facts for themselves. To do this, use the "show, don't tell" technique. Thus, write "1 + 1," but don't write "= 2." Save the "= 2" for the argument section or conclusion. To "show" is to describe in concrete, nonconclusory language. To "tell" is to characterize and conclude. The writer must "[l]et the facts themselves answer the question . . . ."[61]

Be specific and precise. For example, "the baseball was thrown fast" is imprecise. "The baseball was thrown at 95 miles an hour" enhances writing.

> *Show*: "When the Mets won the World Series, Jack jumped up in the air, shed tears, and shouted, 'I can't believe they won! I can't believe they won!'"
> *Tell:* "Jack was excited when the Mets won the World Series."
>
> *Show:* "The witness testified to X and later to Y."
>
> *Impermissible tell:* "Because of the witness's contradictions under oath, the witness is incredible as a matter of law."

Keep the Law in Mind

Craft the fact section to fit the law that will be presented in the brief's argument section.[62] Before reading the fact section, the reader will already have been introduced to the legal issues from the questions presented and the point headings in the table of contents.[63] Many judges will be familiar with the relevant law and will analyze the facts with that law in mind.[64] If the brief discusses "whether a particular statute applies to your case, marshall the facts that support your point of view that the statute does or does not apply."[65]

> Show, don't tell. Write "1 + 1," but don't write "= 2."

Ethical Considerations

Legal writers must uphold the ideals of good moral character, integrity, and professionalism.[66] Never omit facts, misrepresent the lower court's decision, or use quotation marks with references to the record where no witness had used the quoted words.[67] Evading the truth damages your credibility and the credibility of those associated with you.[68] Judge Clyde H. Hamilton has explained that "[a] statement of facts that omits relevant facts seriously undermines the omitting party's credibility, leaving the . . . impression that the party does not believe it can win if the judge learns of the omitted facts."[69] Opposing counsel or the judge will probably catch a misrepresentation of the facts, no matter how small.[70] Don't think you'll get away with it.

Don't overstate the facts. Understating always succeeds. Overstatement and exaggeration always fail.

State the facts clearly and honestly. Good brief and memorandum writers de-emphasize the irrelevant to stress what it is important. But to be ethical, they write fairly and clearly.[71] An advocate should "[a]im for a fact statement the court could use in its opinion if it finds in your favor."[72]

Conclusion

It's daunting to incorporate the many effective brief-writing devices into your fact section. To improve your fact writing, focus on a few strategies at a time rather than all of them at once.[73] Work on large-scale organizational techniques like section structure and humanizing your client separately from small-scale ones like sentence structure and word choice.[74]

Focus on choosing and organizing the facts. Determine from your theme which ones require emphasis.

It'll take several drafts to write an effective fact section.[75] Edit constantly. Even when you believe you've produced your final draft, set it aside for a while and re-read it.[76] Have colleagues and friends evaluate it.[77] The final product will be a fact section that will enhance the entire document. ■

1. Mary Barnard Ray & Barbara J. Cox, Beyond the Basics: A Text for Advanced Legal Writing 172, 185 (2d ed. 2003).
2. *Id.*
3. *Id.*
4. *Id.*
5. Girvan Peck, Writing Persuasive Briefs 39–42, 46–49 (1984); Ray & Cox, *supra* note 1, at 172–74, 185.
6. Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write a Persuasive Fact Section*, 32 Rutgers L.J. 459, 466 (2001).
7. Ray & Cox, *supra* note 1, at 180.
8. *Id.*
9. Foley & Robbins, *supra* note 6, at 466.
10. Ray & Cox, *supra* note 1, at 180; Peck, *supra* note 5, at 46–49.
11. Ray & Cox, *supra* note 1, at 180.
12. *Id.*
13. *Id.* at 181.
14. *Id.* at 183.
15. Peck, *supra* note 5, at 46–49; Ray & Cox, *supra* note 1, at 179.
16. Ray & Cox, *supra* note 1, at 179.
17. *Id.*
18. *Id.* at 184.
19. *Id.*
20. Lawrence T. D'Aloise, Jr. & Henry G. Miller, 8 Mark Davies et al., N.Y. Prac. Series — N.Y. Civ. Prac. § 16:1 (2008).
21. *Id.*; Charles R. Calleros, Legal Method and Writing 240 (5th ed. 2006); Mario Pittoni, Brief Writing and Argumentation 31 (3d ed. 1967); D'Aloise & Miller, *supra* note 20, at § 16:1.
22. Calleros, *supra* note 21, at 240.
23. *Id.*
24. Brian Quinn, *Dispelling Misconception*, 62 Tex. B.J. 890, 891 (1999) (quoted in Calleros, *supra* note 21, at 240–41).
25. Richard K. Neumann, Jr., Legal Reasoning and Legal Writing 237 (5th ed. 2005).
26. John Gardner, The Art of Fiction: Notes on Craft for Young Writers 99 (1984) (cited in Neumann, *supra* note 25, at 237).

Continued on Page 61

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The Legal Writer
Continued from Page 59

27. Neumann, *supra* note 25, at 237.
28. Pittoni, *supra* note 21, at 32.
29. Peck, *supra* note 5, at 182–84 (1984); Ray & Cox, *supra* note 1, at 179–84.
30. Ray & Cox, *supra* note 1, at 170.
31. Jonathan K. Van Patten, *Twenty-Five Propositions on Writing and Persuasion*, 49 S.D. L. Rev. 250, 269 (2003–04).
32. *Id.* at 269–70.
33. *Id.* at 270.
34. Ray & Cox, *supra* note 1, at 174; Van Patten, *supra* note 31, at 270.
35. Ray & Cox, *supra* note 1, at 174.
36. *Id.*
37. Van Patten, *supra* note 31, at 270.
38. *Id.*
39. Ray & Cox, *supra* note 1, at 157.
40. *Id.*
41. *Id.* at 157–58.
42. *Id.* at 158.
43. *Id.*
44. *Id.* at 159.
45. *Id.*
46. *Id.* at 160–61.
47. *Id.*
48. *Id.* at 161–62.
49. *Id.*
50. Pittoni, *supra* note 21, at 31.
51. *Id.*
52. Carole C. Berry, Effective Appellate Advocacy: Brief Writing and Oral Argument 91 (2d ed. 1999).
53. *Id.*
54. *Id.*
55. *Id.*
56. D'Aloise & Miller, *supra* note 20, at § 16:5.
57. *Id.*
58. *Id.*
59. Neumann, *supra* note 25, at 205.
60. *Id.*
61. D'Aloise & Miller, *supra* note 20, at § 16:5.
62. *Id.*
63. Van Patten, *supra* note 31, at 273.
64. Wesley Gilmer, Jr., Legal Research, Writing & Advocacy 183 (2d ed. 1987).
65. D'Aloise & Miller, *supra* note 20, at § 16:5.
66. Gerald Lebovits, *Legal-Writing Ethics — Part II*, 78 N.Y. St. B.J. 64, 64 (Nov./Dec. 2005).
67. Elizabeth Ahlgren Francies, *The Elements of Ordered Opinion Writing*, 38 Judges' J. 8, 8 (1999); Ray & Cox, *supra* note 1, at 169; Gerald Lebovits, *Legal-Writing Ethics — Part I*, 77 N.Y. St. B.J. 64, 52–53 (Oct. 2005).
68. Ray & Cox, *supra* note 1, at 169.
69. Clyde H. Hamilton, *Effective Appellate Brief Writing*, 50 S.C. L. Rev. 581, 585 (1999).
70. Ray & Cox, *supra* note 1, at 169.
71. Wendy B. Davis, *An Attorney's Ethical Obligations Include Clear Writing*, 72 N.Y. St. B.J. 50 (Jan. 2000); Lebovits, *supra* note 66, at 64.
72. Ray & Cox, *supra* note 1, at 169.
73. *Id.* at 186.
74. *Id.*
75. Pittoni, *supra* note 21, at 32; D'Aloise & Miller, *supra* note 20, at § 16:7.
76. D'Aloise & Miller, *supra* note 20, at § 16:7.
77. *Id.*

Presentation Skills for Lawyers
Continued from Page 51

They won't stop your summation to say, "I can't hear you." You need to read their body language.

Can you hear me now? You may have the greatest speech content on the planet. If you're networking to promote your legal skills, there may be people in the audience who desperately need your services and are willing to pay top dollar to receive them. But if they don't hear you, they will never know about you. The quality of your message won't matter if your audience can't hear you. Follow these tips, and you'll be heard above the noise. ■

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BY GERALD LEBOVITS

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at St. John's University School of Law. Judge Lebovits's e-mail address is GLebovits@aol.com.

Fact vs. Fiction: Writing the Facts — Part II

The Legal Writer continues from the last issue, discussing techniques to write fact sections in persuasive briefs and objective memorandums.

Writing Style

Facts the advocate wants to emphasize go at the beginning or end of a paragraph.[1]

Unfavorable facts can be de-emphasized by placing them in the middle of the paragraph.[2] Surrounding unfavorable facts with favorable ones diminishes the negative impact of unfavorable facts. This is known as the halo effect.

Use short paragraphs with few details when factual emphasis is important and long paragraphs with many details to de-emphasize facts.[3]

Explain in greater detail favorable facts than unfavorable ones.[4] Place facts requiring emphasis at the beginning or end of short sentences.[5] Notice in these examples how placing facts is important:

> *Example:* "Jack's on parole, but he's a good father."
> *Example:* "Jack's a good father, but he's on parole."

Word choice, like paragraph and sentence structure, affects how the reader interprets, analyzes, and understands facts. Word choice "pervades all other literary elements: What we call something goes a long way toward what or how a reader will think of that thing."[6] It's also the most common way that writers reveal their biases.[7] Lawyers drafting objective fact sections should select words devoid of obvious bias. Bias damages effectiveness.[8] *Example:* "The plaintiff was injured when a dog bit him." The word choice in this example is important. Do we call the dog "a 'pet,' a 'guard dog,' a 'Doberman,' or, simply by its name, 'Chocolate?'"[9]

The challenge of successful word choice lies in finding restraint.[10] Consider several factors:

- The word's meaning (denotation).[11]
- The word's emotional association (connotation).[12]
- Degree of detail: *Compare:* "The plaintiff, who is larger than the defendant, moved toward him." *Versus:* "The plaintiff, who is 6′ 3″ and weighs 210 pounds, strode toward the defendant, who is 5′ 10″ and weighs 160 pounds."[13] The first sentence is less descriptive than the second. The second sentence will garner more sympathy for the defendant.
- Repetition: Repeating words, phrases, and sentence and paragraph structures is an effective fact-writing technique. Repetition, which can be obvious or subtle, "creates a sense of heightened drama, an increased formality elevating the value of the content repeated."[14]
- Order of words and phrases: Yoda said it. Cardozo wrote it. Unusual are inversions. Placing words in unusual order draws attention.[15] Begin a sentence with a word or phrase that normally comes at the end.[16] *Example:* "*Smiling widely*, the children were supervised by their parents as they picked a puppy." Multiple introductory phrases is another unusual order.[17] *Example:* "*When Jack walked into the restaurant, as he did every Friday evening*, the waiter ushered him to his table."
- Rhythm: Control pace and tempo.[18] Rhythm conveys a mood and feeling.[19] *Example:* "While driving around town in his new, sleek, red car, Jack saw out of the corner of his eye a small girl run into the street. He slammed on the brakes. The brakes failed. He pulled the wheel and missed her by a hair." By placing the words "new, sleek, red" together, the reader is slowed down, and a sense of anticipation is created. The short second sentence conveys a sense of urgency and fear. The phrases "slammed on the brakes" and "pulled the wheel" speed up the rhythm as the action increases.

Avoid legal jargon. An example of jargon is using grandiose words like "grandiose."[20] Use plain, nonsyllabic English. Complicated, unfamiliar language confuses and decreases persuasiveness.[21] Even the most complex and abstract ideas must be stated simply and clearly.[22] Neither persuasive briefs nor objective memorandums are effective "if the reader must pause at every sentence to ponder its meaning."[23] According to Texas Justice Brian Quinn, "the use of legalese or 'six-bit' college words . . . . interferes in your communication with the court when the judge is constantly shifting attention from the brief to either a Webster's, Black's Law, or a Latin-to-English dictionary."[24]

Every memorandum must be checked repeatedly for spelling, grammar, and punctuation errors. These

Continued on Page 58

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