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NEW YORK STATE BAR ASSOCIATION

Journal

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by Victor J. Rocco

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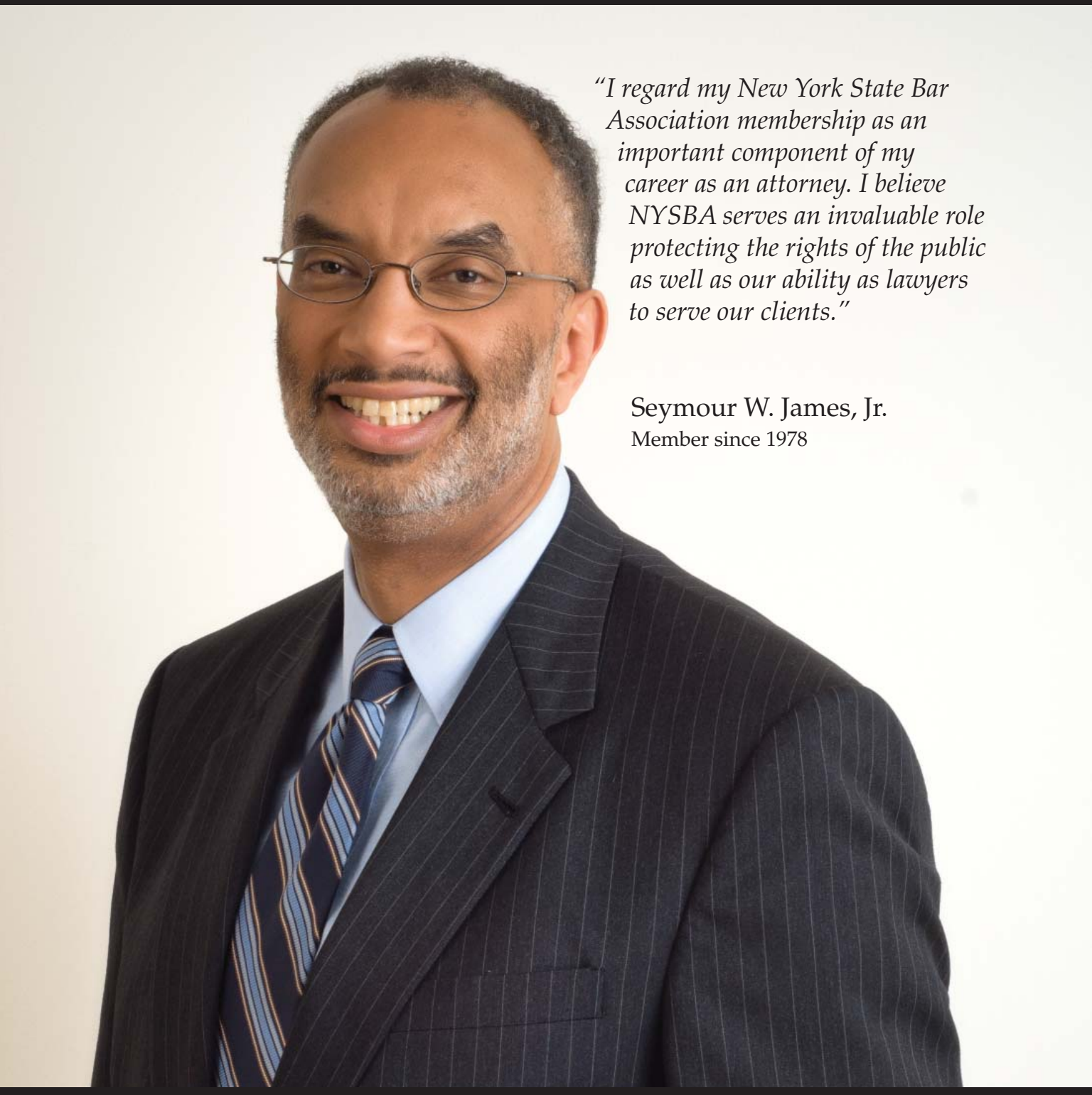

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Journal

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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. Copyright © 2008 by the New York State Bar Association. 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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KATHRYN GRANT MADIGAN

My Opening Farewell

As I conclude my whirlwind year as your acting President and extend my warmest wishes to my dear friend Bernice Leber, who will soon embark on her own life-altering year as President, one word comes to mind: gratitude. I am grateful for this extraordinary opportunity to lead the finest state bar association in the country. Grateful for our superb leadership team, including the officers and members of the Executive Committee and House of Delegates, Section and Committee chairs, active members, dedicated administration and staff, who have embraced the call to leadership through service. Grateful for my partners at Levene Gouldin & Thompson who gave me the support necessary to fulfill the duties of an office that now requires a full-time volunteer commitment.

Let me also acknowledge, with profound appreciation, the lawyers I have met in my travels throughout New York, the United States and beyond for your often-unheralded and selfless service on behalf of your clients, your communities and our justice system. I am awed by your compassion for the poor, our children, disabled and elderly, and for your spirited advocacy on their behalf, ensuring access to justice for all. I am inspired by your courage in giving voice to injustice wherever it may be found and in your vigorous defense of the rule of law.

In the first of these conversations last June, I made a commitment to serve our diverse membership authentically, driven by the desire to make a genuine and enduring difference. Recognizing that my short year as President was not about me or my agenda, but rather the needs of our Association at this particular moment in time, I focused on how best to secure our legacy as the voice of the profession in New York, to provide greater meaning, value and relevance for our members and to enhance our credibility and influence not only here in New York, but in national and international arenas. And while each of you will be the ultimate arbiter of how close we have come to achieving these objectives, I hope you will agree that we have made significant progress. And I have no doubt that our Annual Report to the Membership in the June issue of the *Journal* will be a testament to the breadth and depth of our unwavering commitment to justice and the dedication of our leadership.

We live in a world that is increasingly interdependent and we have endeavored to align the values of fairness, service, personal and professional potential, with our staff, our leadership, our members and the greater justice community. By focusing on the common good and our shared purposes, we have been able to forge new alliances and collaborations, and achieve a higher degree of engagement throughout all levels of the Association. Surely the unprecedented growth in our membership this year, from 72,000 to more than 76,000, is a reflection of that deeper connection.

In March our staff began an internal strategic planning process to redefine our changing organizational culture, working collectively to create the Bar Association of the future, one that not only fully engages each and every staff member, but which enhances productivity, cooperation, satisfaction and esprit de corps. The end result, we hope, will be a culture of excellence that will serve us well as we strive to provide superior customer service, one member at a time.

I look with great anticipation to the inspired leadership of our new President Bernice Leber, President-elect Mike Getnick, Treasurer Seymour James, and Secretary Bruce Lawrence as they – indeed all of our bar leaders – have the creative energy, commitment and vision to rise to the challenges of serving our diverse membership, nearly a quarter of whom live or practice outside New York and, increasingly, out of country.

And, on behalf of the Association, I extend our best wishes to Associate Executive Director John Williamson who is retiring after 32 years of service. Steady, incisive, diplomatic, with a mind-bending institutional memory, John will be missed. And we hope that Jim Ayers's "retirement" from a decade of service on the Executive Committee, including five consecutive years as Treasurer, will be temporary.

From the President's Blog, to blast e-mail advocacy in support of our state's judges, our beleaguered colleagues in Pakistan or other press-

KATHRYN GRANT MADIGAN can be reached at kmadigan@nysba.org.

ing issues, from the expansion of our Lawyer Assistance Program to our new online magazine *The Complete Lawyer*, rest assured that we will continue to explore and develop innovative ways to help you connect with essential Association programs and services and take advantage of the unparalleled opportunities for leadership, service, professional development and lifelong friendships. I take leave of office with the deepest conviction that our Association is uniquely poised to meet the growing demands and opportunities that lie ahead in an evolving global community.

It has been an honor to serve as your acting President. You, and this experience, have enriched my life in ways I could have never imagined a year ago. And I will continue, always, to pay that forward. This is only my opening farewell; it is not a goodbye. And if I might take some literary license with one of Garrison Keillor's trademarks: Be well, do the public good and keep in touch. ■

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Can the Commercial General Liability Policy Survive? Recent Development Affecting Coverage for Bodily Injury Claims Under the CGL Policy
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May 1 Buffalo
May 2 Syracuse
May 6 Plainview, LI

DWI on Trial VIII
Fulfills NY MCLE requirement for all attorneys (10.5): 7.5 skills; 3.0 professional practice
IMPORTANT NOTE: NYSBA CLE seminar coupons and complimentary passes cannot be used for this program.
May 1–2 New York City

Long Term Care 2008
Fulfills NY MCLE requirement for all attorneys (7.0): 7.0 professional practice
May 2 New York City
May 9 Albany
May 16 Rochester

Out the Door, But Not Over the Hill – Options for the Mature Lawyer
(program: 1:00–5:00 pm)
May 6 Albany
May 14 New York City

Representing a Political Candidate (And Winning!): A New York Election Law Primer
Fulfills NY MCLE requirement for all attorneys (4.0): 2.0 skills; 2.0 practice management and/or professional practice
(program: 9:00 am–1:00 pm)
May 7 New York City
May 14 Albany
May 16 Melville, LI; Syracuse

Practical Skills Series: Basics of Intellectual Property Law
Fulfills NY MCLE requirement for all attorneys (7.0): 2.0 skills; 5.0 practice management and/or professional practice
May 8 Buffalo; Hauppauge, LI; New York City; Syracuse

+Advanced Equitable Distribution: Valuing and Dividing Professional Practices and Closely-Held Businesses
Fulfills NY MCLE requirement (4.0): 4.0 practice management and/or professional practice
(program: 9:00 am–12:35 pm)
May 9 Rochester
May 16 Melville, LI
June 13 Albany
June 20 New York City

Immigration Law Update 2008
May 13–14 New York City

Getting Ready in New York: Public Health Emergency Legal Preparedness
Fulfills NY MCLE requirement for all attorneys (7.0): 7.0 practice management and/or professional practice
May 15 Yonkers

Practical Skills Series: Basic Tort and Insurance Law Practice
Fulfills NY MCLE requirement for all attorneys (6.5): 3.0 skills; 3.5 practice management and/or professional practice
May 20 Albany; Buffalo; Melville, LI; New York City; Syracuse; Westchester

+Beyond Medicaid: Alternative Methods for Financing Long Term Care
Fulfills NY MCLE requirement (7.0): 1.0 ethics and professionalism; 6.0 practice management and/or professional practice
May 21 Syracuse
June 4 Hauppauge, LI
June 5 New York City
June 6 Albany; Buffalo
June 17 Tarrytown

+Fourth Annual International Estate Planning Institute
(program: May 27, 2:00–5:30 pm; May 28, 8:15 am–5:00 pm)
Fulfills NY MCLE requirement (11.0): 11.0 practice management and/or professional practice
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May 27–28 New York City

Successfully Handling a 1404 Proceeding Under the SCPA
(program: 9:00 am–1:00 pm)
May 30 Binghamton
June 3 Westchester
June 4 Rochester
June 5 Syracuse
June 10 Albany
June 12 Buffalo; New York City
June 13 Hauppauge, LI

Ethics and Professionalism
(program: 9:00 am–12:35 pm)
Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 ethics and professionalism
June 2 Syracuse
June 6 Rochester
June 9 Buffalo
June 10 New York City
June 11 Westchester
June 12 Melville, LI; Ithaca
June 19 Albany

Ethics for Real Estate Lawyers
(program: 9:00 am–12:55 pm)
Fulfills NY MCLE requirement for all attorneys (4.0):
4.0 ethics and professionalism

June 2	Albany
June 10	Buffalo
June 17	New York City
June 19	Rochester
June 24	Westchester

Private Placement
(program: 6:30 pm–9:30 pm)

June 3	New York City

+Escrow Accounts (telephone seminar)
(program: 12:00 noon–1:30 pm)

June 4	All cities

+Tax Aspects of the Real Property Law Transactions
Fulfills NY MCLE requirement for all attorneys (4.5):
4.5 practice management and/or professional practice
(program: 9:00 am–1:00 pm)

June 4	Melville, LI
June 5	Albany; New York City
June 12	Rochester

+Law Firm Billing (telephone seminar)
(program: 12:00 noon–1:30 pm)

June 11	All cities

+Financing a Law Firm (telephone seminar)
(program: 12:00 noon–1:30 pm)

June 18	All cities

Article 81 of the Mental Hygiene Law
Fulfills NY MCLE requirement for all attorneys (7.5):
0.5 ethics and professionalism; 7.0 practice management and/or professional practice

June 24	New York City
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† Does not qualify as a basic level course and, therefore, cannot be used by newly admitted attorneys for New York MCLE credit.

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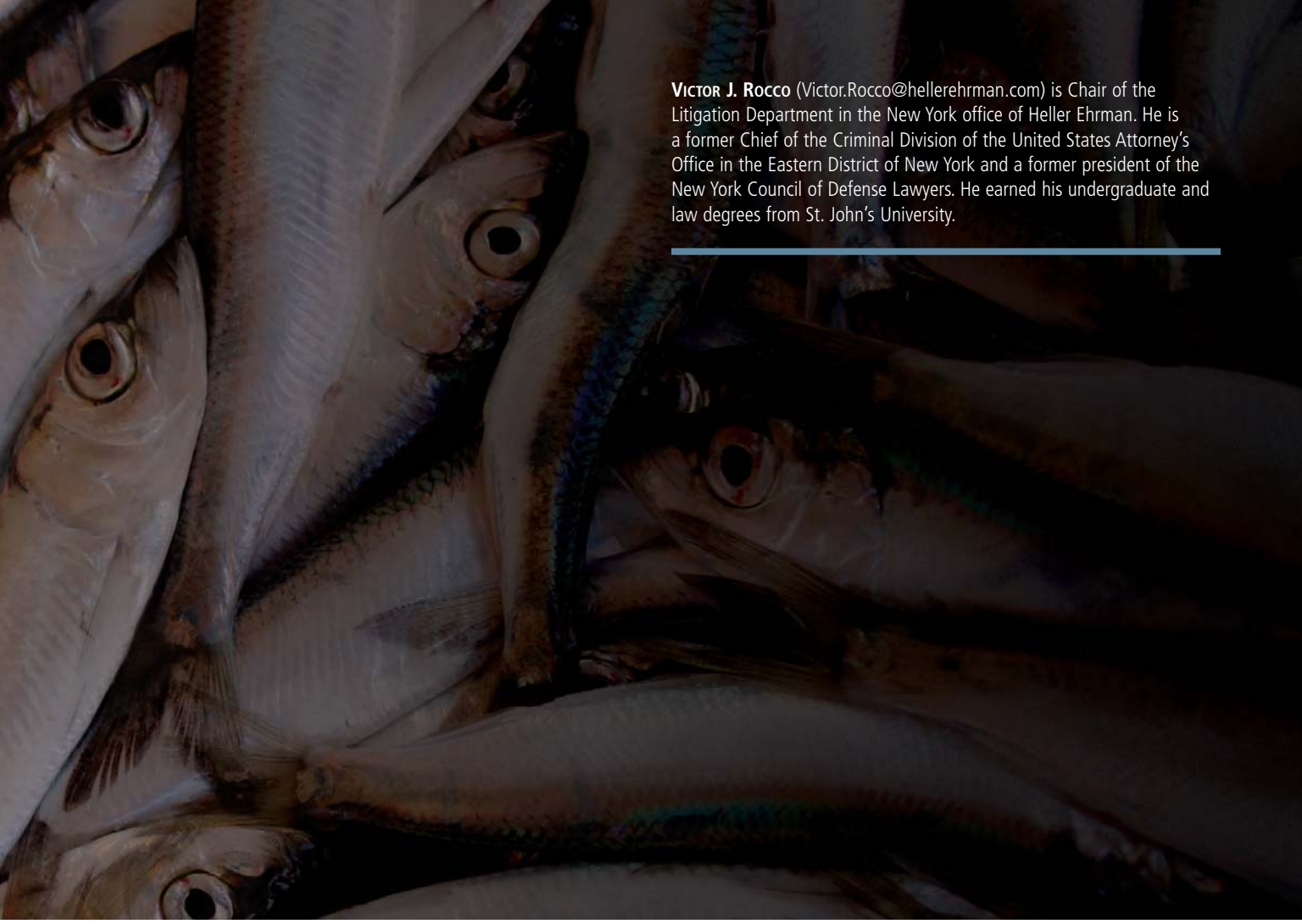
Wildlife Conservation Under the Lacey Act

International Cooperation or Legal Imperialism?

By Victor J. Rocco



Victor J. Rocco (Victor.Rocco@hellerehrman.com) is Chair of the Litigation Department in the New York office of Heller Ehrman. He is a former Chief of the Criminal Division of the United States Attorney's Office in the Eastern District of New York and a former president of the New York Council of Defense Lawyers. He earned his undergraduate and law degrees from St. John's University.

Maybe it's the genius of Congress, but the United States Code is littered with arcane and idiosyncratic criminal statutes, many of them discarded relics of long-gone eras, others versatile tools that have never fallen into disuse and are readily adaptable to a new age. The Lacey Act[1] (the "Act") is a rarely used federal criminal statute unknown even to many experienced criminal lawyers. Adopted in a spate of groundbreaking conservation measures during Theodore Roosevelt's administration, the statute was designed initially to protect birds and other wildlife and to serve primarily as a federal backstop for state wildlife conservation laws. The Act's scope and its penalties have grown significantly since its enactment in 1900, and in recent years, it has been used increasingly as a tool to prosecute trafficking in illegal fish and wildlife shipped into the United States from all over the world.

What makes the Lacey Act so unusual in the constellation of federal criminal statutes is that a violation of the Act can be triggered by an infraction of a state or foreign conservation law. Indeed, the most frequently used provisions of the present version of the Act prohibit interstate commerce in wildlife, fish, or plants that have been illegally taken, possessed, transported, or sold in violation of state, foreign, federal, or Indian tribal laws.[2] An analogous and better-known statute, the National Stolen Property Act (NSPA), also imposes criminal penalties for acts arising out of violations of state or foreign laws by punishing those who receive, sell, or dispose of goods that are "stolen," even as defined under the laws of a foreign jurisdiction, and then transported in interstate commerce.[3]

The Lacey Act's criminal penalties, however, are triggered by a far broader array of underlying conduct than the wrongdoing that triggers the provisions of the NSPA. Indeed, the underlying misconduct relating to fish or wildlife that may serve as a predicate for a Lacey Act offense ranges from violations of full-blown state or national laws to mere transgressions of technical, administrative rules and regulations.[4]

In recent years, federal prosecutors have taken advantage of the Act's unusually broad scope and, in conjunction with other federal criminal statutes, have succeeded in obtaining surprisingly stiff prison sentences and financial penalties for Lacey Act violations.[5] Today, the Lacey Act stands as a formidable stealth bomber in the government's war to preserve valued natural resources in an ever-shrinking world. On another and more disturbing level, however, the current use of the Lacey Act is testament to the growing policy of the United States to use

its resources aggressively to enforce the laws of foreign states.[6]

History and Purpose

Introduced in 1900 by Iowa congressman John Lacey, the primary purpose of the Lacey Act initially was "to supplement the State laws for the protection of game and birds," which were often ineffective to combat interstate trafficking in illegal wildlife.[7] Of particular concern to Congressman Lacey were poachers – also known as "pot hunters" – who could evade state law enforcement by taking game in violation of one state's laws, traveling to another state, and then selling the poached game there.[8] The state where the game had been taken could not prosecute the poacher, for want of jurisdiction, and the state where the game was sold could not prosecute the poacher because of contemporary limits on states' ability to regulate items that traveled in interstate commerce.[9] Congressman Lacey's solution to this anomaly was a federal law that would be triggered by the introduction of wildlife taken in violation of state wildlife laws into interstate commerce.[10]

The Lacey Act became the model for the Black Bass Act, a similar provision enacted by Congress in 1926 aimed at stopping the rampant overfishing of bass.[11] Like the Lacey Act – which originally did not apply to fish – the Black Bass Act was triggered by the introduction into interstate commerce of fish sold, purchased, or possessed in violation of state or territorial law.[12] As with the Lacey Act, Congress's primary concern was the inability of the individual states to enforce their own laws.[13]

Over the years, the Lacey and Black Bass Acts underwent a number of significant amendments, both expanding their reach and increasing their penalties. In 1935, foreign laws were added as possible predicates for a Lacey Act violation;[14] in 1981, the Black Bass Act was folded into the Lacey Act, and penalties for violations were substantially increased to a maximum prison term of five years and maximum fines of $250,000 for individuals and $500,000 for corporations;[15] and over time, the definitions of "fish" and "wildlife" were expanded to cover most nearly every species.[16] Despite these significant changes, the foremost purpose of the Act remained limited in scope: "not as increasing the federal role in managing wildlife, but as a federal tool to aid the states [and foreign governments] in enforcing their own laws concerning wildlife."[17]

Criminal Provisions and Construction

A violation of the Lacey Act occurs when there is a predicate violation of some state, foreign, federal, or Indian tribal law in the taking, possessing, transporting, or selling of fish or wildlife, and the defendant imports, exports, transports, sells, receives, acquires, or purchases the product of the underlying violation in interstate or foreign commerce.[18] A violation of the Act is a felony if the offender had knowledge that the fish or wildlife was taken, possessed, transported, or sold in violation of an underlying state or foreign law or regulation.[19] In order to prove a felony violation, the government need not demonstrate that the defendant had actual knowledge of the specific underlying laws or regulations that were violated or even that he or she was aware of the Lacey Act itself. To satisfy the Act's *mens rea* requirement, it is sufficient to prove merely that the defendant had knowledge that, in some fashion, the fish or wildlife was taken or shipped in contravention of some state, federal, foreign, or Indian tribal law or regulation.[20]

The defendant need not have actually committed the predicate local conservation law violation to violate the Lacey Act because the statute prohibits trafficking in the product of the underlying local violation, not the underlying violation itself.[21] And although the Act generally is referred to as a wildlife protection measure, the fish or wildlife covered by the Act does not have to be endangered or particularly valuable: almost any kind of "fish or wildlife," even species some might regard as pests, is covered under the Act's broad definition.[22]

The range of state and foreign laws and regulations that may serve as predicates for Lacey Act prosecutions is extremely broad. Indeed, the predicate law or regulation may be criminal, civil, or even administrative in nature, and either national or local in scope,[23] provided the law or regulation is related to fish or wildlife,[24] was validly promulgated and enacted,[25] and was in effect at the time of the commission of the offense (the law's subsequent invalidation is irrelevant).[26]

Although the Act incorporates the substantive elements of the predicate state or foreign law in establishing a federal offense, prosecutions under the Act, however, are governed by federal procedural rules, not those of the predicate law.[27] For example, regardless of the underlying law's statute of limitations period, the five-year limitations period for the Lacey Act controls the period for which a Lacey Act prosecution must be brought.[28] Similarly, with respect to punishment, it is the Act's penalties that control, not the underlying predicate law or regulation.[29]

Constitutional challenges to the Lacey Act routinely have been rejected. For instance, many defendants have challenged the Act on vagueness grounds, claiming that the words "any state or foreign law" fail to provide defendants with adequate notice of what is prohibited under the statute. Courts, however, have rejected these challenges on the ground that the Act's *scienter* requirement prevents it from criminally punishing individuals who are unaware they violated its provisions.[30] Thus, while criminal convictions may lie for importing the product of violations of seemingly trivial and arcane regulations such as fishing salmon from squid vessels[31] or packaging

lobster in cardboard instead of plastic boxes,[32] the government must prove that the defendant knew that the fish or wildlife had been caught or transported unlawfully.[33]

Defendants have also unsuccessfully challenged the Act on the grounds that the Act unconstitutionally delegates Congress's legislative powers to state and foreign governments.[34] Courts have rejected these challenges on the ground that state or foreign law violations merely trigger the Act's provisions and that a conviction under the Act requires proof of the additional element that the illegal fish or wildlife was imported, transported, or sold in interstate or foreign commerce.[35]

Nonconstitutional challenges to the Act have also failed. For instance, defendants have challenged Lacey Act prosecutions based on foreign *regulations* because the Act speaks only in terms of "any foreign law," while on the other hand, it specifically includes state laws *or* regulations.[36] Courts have rejected these challenges on the basis that the dictionary's generic definition of "laws" includes regulations,[37] and because the legislative history reveals Congress's intent to broaden, not limit, the Act's coverage of state and foreign laws.[38]

Although the Act's legislative history suggests that its primary purpose is to strengthen enforcement of state and foreign conservation laws, there is no exemption that would bar a prosecution under the Act even if the state or foreign jurisdiction previously had fully vindicated the local government's interests through its own prior prosecution of the underlying violation of its conservation laws. Nor would the Double Jeopardy Clause bar successive prosecutions in such circumstances, for two reasons: First, the well-established "dual sovereignty" exception to the Double Jeopardy Clause permits successive prosecutions by different jurisdictions even for the same underlying conduct.[39] Second, since the Lacey Act does not actually punish the violation of the predicate local law, but trafficking in the product of the local law violation, the Lacey Act and local conservation law offenses are not the "same" under the Double Jeopardy analysis established in *Blockburger v. United States*.[40]

The Act's penalties are severe. As noted previously, a felony violation of the Act carries a maximum five-year term of imprisonment, and a $250,000 fine for individuals ($500,000 for corporations).[41] Due to its unusual requirement of a predicate violation of local law, the Act permits prosecutors to "bootstrap" violations of mere civil laws or administrative regulations into federal felonies with substantial prison terms.[42] Indeed, a person convicted under the Lacey Act can face a substantial term of imprisonment for acts arising out of conduct for which the underlying jurisdiction, whose conservation laws were violated, imposes no criminal penalty at all.[43]

In recent years, the Act has been used to obtain significant prison terms and extract substantial financial penalties.[44] The applicable Sentencing Guideline, U.S.S.G. § 2Q2.1, directs that the offense level be increased according to the fraud table in U.S.S.G. § 2B1.1(b). Thus the offense level is based not on "loss" to the victim or gain to the defendant, but on the "market value" (ordinarily, the retail value) of the illegal fish or wildlife,[45] virtually ensuring harsh Guidelines ranges and significant financial penalties for large-scale commercial violators.[46] The use of the fraud table to calculate Guidelines in Lacey Act cases has resulted in prison sentences for Lacey Act violators that were unheard of at the time the Guidelines were promulgated. Indeed, a study of sentencing practices by the Federal Judicial Center, undertaken for the purposes of assisting the Federal Sentencing Commission in drafting the initial Guidelines, found that 86% of fish and wildlife law offenders were sentenced to probation and the average prison sentence for a fish and wildlife offense was approximately two weeks.[47]

The well-established "dual sovereignty" exception to the Double Jeopardy Clause permits successive prosecutions by different jurisdictions even for the same underlying conduct.

The initial version of the Guidelines carried less onerous sentences than those directed by the current version because the original fraud table had considerably lower market-value ranges and lower corresponding penalties.[48] The Sentencing Commission has never justified its use of the fraud table for sentencing Lacey Act offenders, and there is no indication that it adequately considered the fraud table's impact on sentences for Lacey Act violations in promulgating U.S.S.G. § 2Q2.1.[49]

In addition to prison terms and fines, criminal violators of the Act are subject to forfeiture of all equipment used in the commission of the offense.[50] The Act also provides for strict liability forfeiture of all fish or wildlife imported in violation of the Act's provisions.[51]

Foreign Law Prosecutions

Lacey Act prosecutions predicated on violations of foreign as opposed to state or federal laws have resulted in peculiar anomalies. For instance, "creative" charging practices in foreign law Lacey Act prosecutions can transmogrify violations of the most technical and barely enforced foreign regulations, carrying only minor civil penalties, into federal money laundering charges with 20-year prison sentences and equally astronomical finan-

cial penalties.[52] (This is accomplished by charging money laundering offenses based on the facilitation of underlying Lacey Act violations.) Although Lacey Act violations are excluded from the broad list of predicate money laundering charges, smuggling is not.[53] Where fish and wildlife that have been taken or shipped in violation of foreign laws are imported into the United States, prosecutors not only can charge Lacey Act violations, but can also recast the Lacey Act violation as a smuggling offense in violation of 18 U.S.C. § 545, by alleging that the fish and wildlife were imported "contrary to law" since they were imported in violation of the Lacey Act.[54]

In such cases, where proceeds from the sale of the smuggled goods are sent overseas and used to carry on the illegal activity, the defendant violates the money laundering statute (18 U.S.C. § 1956(a)(2)), which prohibits transferring funds between the United States and abroad to promote the carrying on of specified unlawful activity. Even where there is no basis for a money laundering charge, a smuggling charge based on a foreign law Lacey Act violation permits the government to ratchet up the financial penalties and to seek forfeiture of all proceeds of a Lacey Act offense as well as substituted assets under the provisions of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA). Forfeiture of proceeds would not be available for a straight Lacey Act prosecution.[55]

The ability of prosecutors to pyramid Lacey Act charges into smuggling charges and money laundering charges and seek draconian forfeitures in cases involving foreign law violations has the illogical and surely unforeseen effect of protecting foreign governments' conservation laws and resources more forcefully than those of the United States. For instance, a defendant who transports illegally caught fish or wildlife from a foreign country faces an exponentially higher sentence and substantially higher financial penalties than the defendant who imports the same quantity and value of illegally caught fish or wildlife from one U.S. state to another. As expressed in the Act's legislative history, the United States' primary interest in these prosecutions of foreign conservation laws is to supplement foreign governments' enforcement of those laws. Another, more utilitarian interest referred to in the legislative history is promoting reciprocal respect for American conservation laws abroad.[56] Although never explicitly mentioned in the Act's legislative history, a possible third interest reasonably inferable from its enactment under the Commerce Clause is keeping the channels of interstate and foreign commerce pure and free from tainted goods.

On the one hand, the Lacey Act is capable of fostering international comity. On the other hand, the Act is equally as capable of being misused as a convenient and potent tool to expand government's power. In *United States v. McNab*, the government prosecuted a Honduran citizen and exporter of Caribbean spiny lobster (*Panuliras argus*), and three American importers on Lacey Act and related smuggling and money laundering charges predicated, at bottom, on highly technical and controversial Honduran fishing laws.[57]

The underlying Honduran regulations required the packaging of the fish in cardboard boxes (the defendants had packaged the lobster in plastic) and prohibited harvesting lobsters with undersized tails and lobsters bearing eggs for profit.[58] All four of the defendants were convicted and three received sentences of 97 months' imprisonment.[59] Subsequent to the convictions, a Honduran court held that one of the disputed predicate regulations was invalid and, on appeal, the Republic of Honduras changed its original position on the disputed regulations and submitted an *amicus curiae* brief explaining that the defendants had not violated Honduran law.[60] The court of appeals ignored the Republic of Honduras's change in position and upheld the Lacey Act convictions despite the fact that the regulations were highly controversial.[61]

McNab is a prime example of the Lacey Act's potential to successfully enforce international conservation laws where the offenders elude prosecution by the foreign government or where that government lacks the resources to enforce its own laws. *McNab* also demonstrates, however, that the use of federal criminal statutes like the Lacey Act to enforce foreign law violations provides the United States with the power to decide for itself which laws or regulations of a foreign sovereign should be enforced. ■

1. 16 U.S.C. §§ 3371–3378. The Lacey Act is actually widely considered as America's oldest wildlife conservation statute.

2. 16 U.S.C. § 3372(a). The Act also prohibits the failure to plainly and accurately mark shipments or to submit false documents. *See* 16 U.S.C. §§ 3372(b), (d).

3. *See* 18 U.S.C. § 2315; *see, e.g.*, *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977); *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003).

4. *See, e.g.*, *United States v. Lee*, 937 F.2d 1388, 1392–93 (1991); *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003), *cert. denied*, 540 U.S. 1177, *cert. denied sub nom. Blanford v. United States*, 540 U.S. 1177 (2004).

5. *See, e.g.*, *United States v. Martinez-Malo*, 06 Cr. 20047 (S.D. Fla. 2006) (sentences of 21 months and one year, respectively, for co-conspirators convicted of scheme to import undersized spiny lobster tails); *United States v. Kapp*, 419 F.3d 666 (7th Cir. 2005), *aff'd*, 184 Fed. Appx. 556 (7th Cir. 2006) (51 months followed by a three-year term of supervised release); *United States v. Koczuk*, 156 F. Supp. 2d 757 (E.D.N.Y. 2001) (48 months and forfeiture of $70,000); *McNab*, 331 F.3d at 1235 (sentence of one defendant was 97 months' term of imprisonment and forfeiture of $800,000); *United States v. Lee*, 937 F.2d 1388 (9th Cir. 1991) (70 months); *United States v. Narte*, 197 F.3d 959 (9th Cir. 1999); *United States v. Silva*, 122 F.3d 412 (7th Cir. 1997) (82 months).

6. *See United States v. 144,774 Pounds of Blue King Crab*, 410 F.3d 1131 (9th Cir. 2005) (holding that King crab taken in violation of Russian fishing regulations is subject to forfeiture under the Lacey Act); *McClain*, 545 F.2d at 988 (examining whether pre-Colombian artifacts were "stolen" under Mexican law in a prosecution under the NSPA); *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003) (examining whether goods were "stolen" under Egyptian law in a prosecution under the NSPA); *United States v. Pasquantino*, 336 F.3d 321 (4th Cir. 2003), *cert. granted*, 541 U.S. 972 (2004) (affirming a mail fraud conviction based on scheme to defraud Canada and the Province of Ontario of excise duties and tax revenues); *McNab*, 331 F.3d at 1228 (affirming Lacey Act conviction based on importing lobster in violation of Honduran regulations); *Lee*, 937 F.2d at

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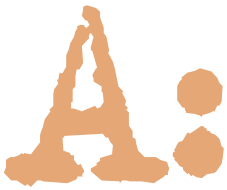
At 10 P.M., who do you want hanging out with you at the office?



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1388 (affirming Lacey Act conviction based on importing salmon caught in violation of Taiwanese regulations).

7. H.R. Rep. No. 56-474, at 1–2 (1900); *see also* 33 Cong. Rec. 4871 (Apr. 30, 1900). Congress recognized that the individual states were unable to protect their wildlife because their laws did not reach their neighboring states.

8. *See* Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 Pub. L. L.R. 27, 38-39 (1995); *see also* 33 Cong. Rec. 4871–74.

9. *See* H.R. Rep. 56-474, at 2 (1900); 33 Cong. Rec. 4871-74 (1900); *Geer v. Conn.*, 161 U.S. 519 (1896).

10. *See* Anderson at 39; *see also* H.R. Rep. No. 56-474, at 2–3.

11. *See* Black Bass Act, ch. 346, 44 Stat. 576 (1926).

12. *Id.*

13. *See* S. Rep. No. 69-612, at 1 (1926).

14. *See* Act of June 15, 1935, ch. 261, § 242, 49 Stat. 378, 380; H.R. Rep. No. 74-886, at 2 (1935);

15. *See generally* S. Rep. No. 97-123, at 1749 (1981).

16. *See generally* 16 U.S.C. § 3371(a). The Act was amended to also cover plants harvested or transported in violation of state law. *See* H.R. Rep. No. 97-276, at 12–13 (1981).

17. H.R. Rep. No. 97-276, at 7 (1981). *See also* 126 Cong. Rec.19,865 (July 28, 1980).

18. 16 U.S.C. § 3372(a)(2); *see generally United States v. Carpenter*, 933 F.2d 748 (9th Cir. 1991). The Act also establishes marking and false labeling offenses: (1) prohibiting the import, export, or transport in interstate commerce of any container of fish or wildlife unless the container has been plainly marked, labeled, or tagged in accordance with the regulations issued pursuant to 16 U.S.C. § 3376(a) (16 U.S.C. § 3372(b)); (2) prohibiting the submission of any false record or false identification of any fish, wildlife, or plant which has been or is intended to be transported in interstate or foreign commerce or imported, exported, transported or sold from any foreign country (16 U.S.C. § 3372(d)).

19. 16 U.S.C. § 3373(d)(1). A felony violation of the statute also requires that the market value of the illegal fish or wildlife exceed $350. A misdemeanor violation of the statute occurs if the defendant, in the exercise of due care, should have known that the fish or wildlife was imported in violation of the underlying law.

20. *See United States v. Santillan*, 243 F.3d 1125 (9th Cir. 2001); *United States v. Todd*, 735 F.2d 146, 151 (5th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

21. *See, e.g.*, *Lee*, 937 F.2d at 1393; *United States v. Mitchell*, 985 F.2d 1275 (4th Cir. 1993).

22. *See* 16 U.S.C. § 3371(a) ("The term 'fish or wildlife' means any wild animal, whether alive or dead, including without limitation any wild mammal, bird, reptile, amphibian, fish, mollusk, crustacean, arthropod, coelenterate, or other invertebrate, whether or not bred, hatched, or born in captivity, and includes any part, product, egg, or offspring thereof").

23. *See, e.g.*, *United States v. 144,774 Pounds of Blue King Crab*, 410 F.3d 1131 (9th Cir. 2005) (violation of fishing and resource protection laws of the Russian Federation); *United States v. Labs of Va., Inc.*, 272 F. Supp. 2d 764 (N.D. Ill. 2003) (violation of Decree of the Indonesian Minister of Forestry banning the export of wild-caught crab-eating Macaques); *McNab*, 331 F.3d at 1228 (violation of Honduran fishing regulations (1) prohibiting the capture of lobsters under 5.5 inches, (2) requiring that lobsters be inspected and processed in Honduras prior to exportation, (3) prohibiting the destruction and harvesting of lobster eggs); *United States v. One Afghan Urial Ovis Orientalis Blanfordi Fully Mounted Sheep*, 964 F.2d 474 (5th Cir. 1992) (violation of Pakistani regulations prohibiting the export of certain wildlife without proper permits); *Lee*, 937 F.3d at 1388 (violation of Taiwanese regulation prohibiting the catching of salmon from shrimp vessels).

24. In *United States v. Molt*, 599 F.2d 1217 (3d Cir. 1979), the Third Circuit affirmed the dismissal of Lacey Act charges based on alleged violations of a Fiji revenue law, holding that the Lacey Act required that the predicate law or regulation must be "designed and intended for the protection of wildlife." *Id.* at 1218. A subsequent report by the Senate Committee on Environment and Public Works recommending the passage of the 1981 Lacey Act amendments which folded the Black Bass Act into the Act discussed the *Molt* decision in passing, and noted that Congress had intended to include as predicate violations a broader range of laws and regulations than those which were designed solely for the protection of wildlife:

> Under a narrow reading of the *Molt* decision it might be argued that a state's hunting license law which is revenue-producing is not covered by the Lacey Act. However, such a law clearly does relate to wildlife and it is the committee's intent that it be covered by the Act.

S. Rep. No. 97-123 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1748, 1753.

Since the 1981 amendments, courts have required only that the law or regulation "relate or refer to" wildlife and need not have been enacted for its protection. *See One Afghan Urial Ovis Orientalis Blanfordi Fully Mounted Sheep*, 964 F.2d at 477; *United States v. Lewis*, 240 F.3d 866, 869 (10th Cir. 2001).

25. *See, e.g.*, *Maine v. Taylor*, 477 U.S. 131 (1986) (upholding Lacey Act conviction based on underlying violation of Maine statute prohibiting the importation of baitfish into Maine; the Court reversed the Court of Appeals ruling that the Maine statute violated the Commerce Clause); *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *United States v. Guthrie*, 50 F.3d 96 (11th Cir. 1995); *United States v. Sohappy*, 770 F.2d 816, 823–24 (9th Cir. 1985); *United States v. McDougall*, 25 F. Supp. 2d 85, 93–95 (N.D.N.Y. 1998); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (affirming the constitutionality of a Fish and Wildlife Service regulation that limited the taking of red wolves on private land because the regulated activity substantially affected interstate commerce and was part of a comprehensive federal program for the protection of endangered species).

26. *See McNab*, 324 F.3d at 1240–41 ("If the [underlying Honduran regulations] were valid in Honduras during the time period covered by the indictment, the defendants violated the Lacey Act by importing the lobsters in violation of those laws").

27. *See United States v. Borden*, 10 F.3d 1058, 1062 (4th Cir. 1993); *United States v. Thomas*, 887 F.2d 1341, 1348–49 (9th Cir. 1989); *Lee*, 937 F.3d at 1393.

28. *See Borden*, 10 F.3d at 1062.

29. *See infra* note 43 and accompanying text.

30. *See Lee*, 937 F.2d at 1394–95 ("In order to be subject to a criminal sanction, one must engage in conduct violative of 3372, *and* must know . . . that 'the fish or wildlife . . . were taken in violation of, or in a manner unlawful under, any underlying law, treaty or regulation.' 16 U.S.C. § 3373(d)(1)–(2)"). Congress noted that a general intent statute, *i.e.,* proscribing trafficking in wildlife without knowledge that it had been taken in violation of local law, "would contain too much potential for abuse." S. Rep. No. 97-123, *reprinted in* 1981 U.S.C.C.A.N. 1748, 1750.

31. *Lee*, 937 F.2d at 1391–93.

32. *McNab*, 331 F.3d at 1233.

33. *Lee*, 937 F.2d at 1394–95 ("The protections inserted by Congress prevent the Act from 'trap[ping] the innocent by not providing fair warning'") (internal citation omitted).

34. *See id*. at 1393–94; *United States v. Rioseco*, 845 F.2d 299, 302 (11th Cir. 1988); *United States v. Molt*, 599 F.2d 1217, 1219, n.1 (3d Cir. 1979) (calling the delegation argument "patently frivolous").

35. *See Lee*, 937 F.2d at 1393; *Rioseco*, 845 F.2d at 302.

36. *See* 16 U.S.C. § 3372(a)(2)(A) (emphasis added).

37. *See, e.g.*, *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824, 826 (9th Cir. 1989).

38. Courts have reasoned that such a narrow interpretation of the phrase "any foreign law" would be at odds with Congress's directive in the 1981 amendments to expand the scope and deterrence effect of the Act. *See, e.g.*, *594,464 Pounds of Salmon*, 871 F.2d at 827–28 (9th Cir. 1989) (in explaining why it interpreted "any foreign law" to include foreign regulations, the court stated that

> because of the wide range the forms of law may take given the world's many diverse legal and governmental systems, Congress would be hard-pressed to set forth a definition that would adequately encompass all of them. . . Thus, if Congress had sought to define "any foreign law" with any kind of specificity whatsoever, it might have effectively immunized . . . [conduct] under the Act despite violation of conservation laws of a large portion of the world's regimes that possess systems of law and government that defy easy definition or categorization.

See also McNab, 324 F.3d at 1235–39; *Lee*, 937 F.2d at 1391–92.

39. *See Heath v. Ala.*, 474 U.S. 82, 88 (1985). This "dual sovereignty" doctrine is based on the principle that "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" *Id.* at 88.

40. 284 U.S. 299 (1932) (the test of whether two provisions are the "same offense" for the purposes of Double Jeopardy analysis is whether each provi-

sion requires proof of a fact which the other does not). A Lacey Act prosecution following a local prosecution for the same underlying conduct may implicate the Department of Justice's "Petite" policy, its guidelines for exercising discretion in bringing a federal prosecution following a state prosecution involving "substantially the same act(s) or transactions." *See* United States Attorney's Manual (USAM) § 9-2.031. These guidelines preclude a federal prosecution following a state or federal prosecution based on substantially the same act(s) or transaction(s) unless three prerequisites are satisfied: (1) the matter must involve a "substantial federal interest"; (2) the prior prosecution must have left that interest "demonstrably unvindicated"; and (3) the government must believe that the conduct constitutes a federal offense and that there is sufficient evidence to "obtain and sustain a conviction by an unbiased trier of fact." *Id.* Courts have ruled that the Petite policy does not confer rights on criminal defendants and they may not invoke the policy as a bar to federal prosecution. *See, e.g., United States v. Snell*, 592 F.2d 1083 (9th Cir. 1979); *United States v. Howard*, 590 F.2d 564 (4th Cir. 1979).

41. *See* 16 U.S.C. § 3373(d)(1)(B); 18 U.S.C. § 3571(b)(3). Violations of the Act may be aggregated for charging purposes. *See United States v. Tempotech Indus., Inc.*, 100 F.3d 941 (2d Cir. 1996).

42. *See supra* note 5.

43. *See Lee*, 937 F.2d at 1392–93; *United States v. Cameron*, 888 F.2d 1279 (9th Cir. 1989).

44. *See supra* note 5.

45. U.S.S.G. § 2Q2.1(b)(3)(A), n.4.

46. In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the provisions of the Federal Sentencing Guidelines which made them mandatory violated the Sixth Amendment. Thus, the Guidelines are now advisory, but are a significant factor to be evaluated by the district court in imposing sentence, along with the factors set forth under 18 U.S.C. § 3553(a).

47. The study provided sentencing statistics for convictions between 1984 and the first two months of 1985. Federal Judicial Center, Punishments Imposed On Federal Offenders (1986). Of 208 convictions for "violating a statute governing killing or dealing in animals or plants" used in the report, 97 were for Lacey Act violations. *Id.* at 8-85. Of the 208 convictions, 86% received probation, and only 29 offenders served time in prison, with a mean period of imprisonment of 0.5 months (two weeks). *Id.* at 8-86–8-87. The highest sentence was a year and three months imprisonment. *Id.*

48. *See* U.S.S.G. § 2F1.1(b)(1).

49. *See* 18 U.S.C. § 3553(b)(1).

50. *See* 16 U.S.C. § 3374(a)(2).

51. *See* 16 U.S.C. § 3374(a)(1); *see also United States v. 144,774 Pounds of Blue King Crab*, 410 F.3d 1131 (9th Cir. 2005) (holding that fish or wildlife which was received in violation of the Lacey Act is contraband and precludes an "innocent owner" defense under the Civil Asset Forfeiture Reform Act, as well as upholding the Lacey Act's strict liability forfeiture provision).

52. *See Lee*, 937 F.2d at 1388; *see also Reptile Smuggler Sentenced to Nearly 6 Years in Prison, Signal That Illegal Wildlife Trade Will Not Be Tolerated, WWF Says*, U.S. Newswire, June 11, 2001.

53. *See* 18 U.S.C. § 1956(c).

54. *See, e.g., Lee*, 937 F.2d at 1396–97; *United States v. Mitchell*, 39 F.3d 465 (4th Cir. 1994).

55. *See* 18 U.S.C. § 981; 28 U.S.C. § 2461; 21 U.S.C. § 853(p).

56. *See* S. Rep. No. 91-526, at 1425.

57. *McNab*, 331 F.3d at 1228.

58. *Id.* at 1233.

59. *Id.* at 1235. An American distributor charged in the case was sentenced to 24 months' imprisonment.

60. Since the defendants were found guilty of conspiracy under a general verdict, there was no way of determining which of the predicate Honduran laws the jury relied upon in determining the defendants' guilt. Accordingly, on appeal, if any one of the predicate laws or regulations were found invalid during the period alleged in the indictment, the defendants' convictions would have to be reversed. *Id.* at 1239–40.

61. *Id.* at 1246–47.

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Tricks of the Trade

Introduction

Having addressed bad deposition behavior in the last issue's column, some suggestions for good behavior follow, together with some recommendations for appropriate procedures for dealing with a number of gray areas under the new rules.

Objection and Direction Not to Answer

A recent case reviewing deposition objections and directions not to answer is *Delta Financial Corp. v. Morrison*.[1] A claim of attorney-client privilege was raised at a deposition, and the deponent was instructed not to answer the question.[2] The parties in attendance agreed to continue the deposition, and to contact the Discovery Referee either at the conclusion of the deposition or when another issue requiring a ruling arose.[3] This is a good practice to adopt, unless the question objected to makes it impossible to pursue other areas of inquiry.

When a second question was objected to, the parties conducted an on-the-record teleconference with the Discovery Referee, who directed that letter briefs be submitted on the issue of the assertion of the litigation committee privilege.[4] (Conducting a deposition teleconference with the court on the record is the best practice, providing the court's permission to do so has been obtained. Asking the court to allow submission of letter briefs is an excellent procedure when the dispute requires careful consideration and analysis.) Thereafter, Justice Warshawsky determined that any ruling should come from the court, rather than the Discovery Referee, due to the paucity of case law addressing the issue.[5]

After reviewing the three categories of protected material – privileged matter, work product, and trial preparation material – the court discussed the tension between New York's liberal disclosure scheme and the ability to withhold relevant information if one of these protections is asserted. The burden is on the party claiming the privilege: "Consequently, the burden of establishing any right to protection is on the parties asserting it; the protection claim must be narrowly construed; and its application must be consistent with the purposes underlined immunity."[6] Conclusory assertions will not suffice, "rather the proponent of the privilege must set forth competent evidence establishing the elements of the privilege."[7] Understanding who has the burden and what the burden is to establish such entitlement is crucial.

Justice Warshawsky reviewed § 221.2 of the uniform deposition rules and considered the objection actually interposed at the deposition:

> Although counsel for the LLC during the deposition, specifically cited the attorney-client privilege as the basis for the instruction not to answer the Questions in Dispute, he also stated, in a somewhat sweeping manner when pressed to set forth the basis for the instruction, that he was "talking about every privilege that attaches to the Litigation Committee." Notwithstanding the lack of specificity by counsel for the LLC and Stonehill regarding their claim of privilege other than the attorney-client privilege, the court will address this alternative invocation of privilege because it believes it is important to make the court's position on this issue known to the parties.[8]

The court next reviewed the attorney-client and work product doctrines and concluded:[9]

> [T]he court finds that there is no evidence in the transcript or otherwise that the work product of the "Litigation Committee" was the subject of work performed by an attorney or completed at the behest of an attorney. Answers to the Questions in Dispute will not reveal the opinions, thought processes and recommendations of counsel, i.e., attorney work-product. Accordingly, the court finds that the work-product privilege does not give rise to a proper basis for the objection and instruction not to answer the Questions in Dispute.[10]

Without ruling on the existence of a valid litigation committee,[11] the court ordered that the questions in dispute be answered at the next day of the witness's deposition testimony.[12]

Delta is instructive on a number of issues. First, it is critical to state – on the record at the deposition and contemporaneous with the objection and direction not to answer – the basis for the objection and the direction to the witness. The need for a contemporaneous objection was highlighted in one of the cases discussed in last issue's column, *Simmons v. Minerley*.[13] There, the court cited the absence of a contemporaneous explanation of the nature

of the objection when counsel directed the witness not to answer the question, as part of its reasoning in imposing a sanction.

Second, care must be taken to state the objection with specificity, and to enumerate each and every basis for the objection. Justice Warshawsky wrote that he entertained the objection, notwithstanding its lack of specificity, in order to provide guidance to the litigants in the case.[14] However, an argument can be made that an objection as to privilege, made after the fact, must nonetheless be considered by the court. Although there is not authority on point regarding deposition practice under the new rules, it has long been the case that a claim of privilege is one of two objections in the course of disclosure practice that, although not raised in a timely manner, may still be considered by the court (the other is a demand that is "palpably improper").[15] For this reason, if an objection and direction not to answer is made, and the objecting attorney later recognizes an additional objection based on privilege, the attorney should raise and argue the privilege objection even though not made at the time the objection was first raised at the deposition.

Leaving the Deposition Room to Confer

Despite having read the "new" deposition rules at least 50 times, I continue to miss things. Recently, at a CLE program, I was asked the following question: "Under Rule 221.3, can the deponent interrupt the deposition to speak to the attorney, since the rule only addresses the attorney interrupting the deposition." I quickly (and nervously) looked at the text of the rule (for the 51st time):

> § 221.3 Communication with the deponent
> An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

"I'll be damned" (I thought to myself). The rule does just refer to the attorney interrupting the deposition. In federal court practice the general rule is that neither the attorney nor the deponent may interrupt the deposition to confer, other than to discuss a privilege.[16] So what is the answer in New York state court?

A literal reading of the rule supports the position that the deponent may interrupt the deposition, and that only the attorney may not interrupt the deposition. Since the rule imposes no such restriction on the deponent, the deponent is free to interrupt the deposition as he or she sees fit.

Better and more numerous arguments can be made to support the position that the rule is designed to prevent interruption of the deposition by either the attorney or the deponent. First, and foremost, the purpose of the rule is to eliminate improper communication during the deposition; it would be eviscerated if interruptions were allowed to occur when initiated by the client (tales of attorneys and deponents communicating via some type of signaling are legion and, sadly, are not apocryphal). Second, to the extent the rule is designed to mirror the rules used at trial, neither the witness on the stand nor the attorney representing the witness has the right to interrupt trial testimony to confer privately. Third, to the extent that the new rules are designed to foster efficiency in conducting and completing depositions, interpreting the rule to reduce, rather than enlarge, the ability to interrupt the deposition is logical.

Until case law goes one way or another (or both), you will have to decide for yourself which argument is more persuasive.

Making a Record

The rules make quite clear, in a number of places, that speechifying, by anyone other than the witness, is not permitted. Where objections, or explanations for objections, need to be made, the rules state they are to be made clearly and succinctly (a Herculean task for most attorneys). The goal, of course, is twofold: first, to prevent coaching of the witness; second, to prevent interference with the deposition and harassment of the questioning attorney. All well and good, eliciting no objection (yes, a poor pun) from me.

What about a situation where you feel compelled to make a statement on the record that is neither short nor sweet? Perhaps there has been an objection and direction not to answer, requiring an explanation on the record encompassing a number of discrete bases. Perhaps there is an objection, and the objecting attorney is not certain of the basis, but wants to discuss the objection with those present. Perhaps a participant wants to strongly caution and/or admonish another attorney at the deposition, on the record, in an effort to stop improper behavior and salvage the deposition while, at the same time, avoiding the violation of one or more of the rules.

There is a simple and elegant solution. Prior to doing any of the above, direct the witness (if you represent the witness) to go outside the deposition room or, if you do not represent the witness, request that the attorney who does represent the witness excuse the witness so a discussion can be had among the attorneys, out of hearing of the witness. This comports with the goals of the rules. First, while the deposition is being interrupted, it is not being interrupted so an attorney can confer with a witness, since the witness and the attorney are in two different locations. Second, any discussion that takes place cannot influence the witness's testimony, since the witness is not present to hear the discussion.

Conclusion

The lay of the deposition landscape under Part 221 of the Uniform Rules becomes clearer with each passing day. Where uncertainty arises, acting in accordance with the spirit of the rules should suffice to avoid running afoul of them. ■

1. 15 Misc. 3d 308, 829 N.Y.S.2d 877 (Sup. Ct., N.Y. Co. 2007).
2. *Id.*
3. *Id.* at 310.
4. *Id.* at 311.
5. *Id.*
6. *Id.* at 315 (citations omitted).
7. *Id.* at 316 (citations omitted).
8. *Id.* at 319. *See* 22 N.Y.C.R.R. § 221.2.
9. *Id.* at 319–20.
10. *Id.* at 320.
11. The court did reach the issue in a subsequent decision reported at 2007 NY Slip Op. 51955U, 17 Misc. 3d 1113(A) (Sup. Ct., N.Y. Co. 2007), where the same privilege was asserted as the basis for withholding documents from disclosure. The court determined that the privilege, if it existed, did not apply to any of the documents at issue, found the assertion of the privilege to be frivolous, and ordered that the documents be exchanged. The court also ordered the withholding party, within 10 days of the date of the decision, to make a submission to the court as to why the party and counsel should not be sanctioned under Rule 130-1.1.
12. *Id.*
13. 16 Misc. 3d 1128(A), 847 N.Y.S.2d 905 (Sup. Ct., Dutchess Co. 2007) (Pagones, J.S.C.) ("It is significant to note that [plaintiff's counsel's] first response when the question was asked was not to object but to immediately direct his client not to answer, although there was no assertion of a permissible basis as set forth in § 221.2.").
14. The issue of the litigation committee and whether or not a privilege attached was the subject of a number of related decisions in the case.
15. *See, e.g., McMahon v. Aviette Agency, Inc.*, 301 A.D.2d 820, 753 N.Y.S.2d 605 (3d Dep't 2003); *see also* LexisNexis Answerguide New York Civil Disclosure, §§ 501–505.
16. David Horowitz, "Burden of Proof," N.Y. St. B.J., Oct. 2006, p. 30; Nov./Dec. 2006, p. 20.

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The Prognosis for Recovery

Health Insurance Subrogation

By Edward P. Hourihan, Jr. and Kareen Zeitounzian

In New York, a debate over the recovery rights of health insurance plans has brought the age-old doctrine of subrogation to the forefront of discussion in the legal and insurance communities. Subrogation is a well established principle of law that allows one party to "step into the shoes" of another to pursue a cause for legal action against a third. In the context of insurance, subrogation provides an insurer the opportunity to recover expenses advanced to its insured and later paid by a third-party tortfeasor. It is applied on the theories that (1) the party who has caused the damage should bear the ultimate burden of compensation, and (2) an insured should not be permitted to recover twice for one harm.[1]

Health insurers in this state have increasingly invoked the subrogation doctrine in an effort to protect limited plan assets as the cost of medical care has risen drastically over the past few years. In doing so, they have met considerable opposition. Because the amounts at stake frequently equal hundreds of thousands of dollars, many have pushed in the legislative and judicial arena to foreclose health insurers from recovering under this doctrine. The subrogation rights of health insurers have been upheld in this state despite such appeals.

This article will first examine the legal framework in New York that authorizes private health insurers to recoup medical costs paid under their policies. It will then address a number of the variables that bear weight on when, where and how courts enforce the subrogation rights of health insurers, as well as the competing legal arguments related to the subrogation doctrine's application to the health insurance system. Last, it will make note of the compelling public policy and economic reasons to protect the subrogation rights of health insurers.

The Means for Recovery

New York common law has established that an insurer is entitled to be subrogated *pro tanto* to any action found to exist between its insured and a third party, so long as the third party's negligence or wrongful act was the underlying cause of the loss paid for by the insurer.[2] This right is generally authorized under one of two basic doctrines of subrogation, conventional or legal subrogation; the latter is also referred to as "equitable subrogation." Under the doctrine of conventional subrogation, an insurer's subrogation right arises from an express provision in an agreement between the insurer-subrogee and the

insured-subrogor. In contrast, a claim for legal or equitable subrogation arises independent of any agreement; it is established by operation of law and accrues once an insurer makes payment on behalf of its insured.[3]

The Court of Appeals, in its 1996 decision in *Teichman v. Community Hospital*, recognized that health insurance companies in particular are entitled to pursue subrogation claims.[4] In *Teichman*, the health insurance carrier sought to assert a right of reimbursement (based on contract provisions) of medical expenses included in a settlement between its insured and a hospital defendant.[5] While the Court of Appeals held that the terms of the insurance contract did not give rise to a lien in favor of the insurer, it nevertheless maintained that the insurer had a right to intervene to defend its recoupment claim.

The *Teichman* court wrote, "[t]hat an insurer does not have a lien entitling it to proceed directly against a particular fund, however, is not the end of the inquiry. Under subrogation principles, an insurer might, for example, seek to recoup covered medical expenses in an action against a tortfeasor."[6]

A number of New York courts since *Teichman* have acknowledged a health insurer's right to be subrogated to an action between its insured and a third party. For example, in *Omiatek v. Marine Midland Bank, N.A.*, the Appellate Division, Fourth Department affirmed a health insurer's motion to adjudicate an equitable subrogation claim during a personal injury action commenced by its insured against a defendant.[7] The court concluded that the health insurer's right to recover as equitable subrogee must be maintained to avoid unjust enrichment. Specifically, it observed that such a ruling "both prevents a potential double recovery by plaintiffs and assures that tortfeasors, not ratepayers, will ultimately bear the expense" of loss.[8]

While for many years courts in this state have uniformly applied the equitable subrogation doctrine to property insurance, the *Omiatek* court was among the first to uphold this practice in the context of health insurance.[9] To date, the Fourth Department appears to be the only appellate department to recognize a health insurer's right to assert an equitable subrogation claim against a tortfeasor.[10]

It is important to note that New York courts have applied conventional subrogation to health insurance.[11] In fact, few have given their blessing to contractual provisions that provide for broad entitlements. For example, in *Nossoughi v. Federated Department Stores, Inc.*, the court noted that a health insurer can specify in its contract that its subrogation rights apply regardless of whether an insured's right of recovery from tort litigation is for medical benefits.[12] According to *Nossoughi*, previous decisions indicate that a contract may not only create a right of subrogation but, under certain circumstances, may also establish a lien.[13] Courts in this state seldom reach this finding, but at least one has held that a contractual provision of a private health insurance policy provided for a lien.[14]

The Made-Whole Rule

Once a subrogation claim has been established, courts must decide how to apportion any recovery obtained from a tortfeasor. The majority of jurisdictions in the United States have adopted the "made whole" rule – an equity principle that provides in some form that the insured must be fully compensated (or "made whole") before the insurer can receive repayment.[15]

Proponents of the rule contend that it offsets the fact that tort recovery rarely compensates a victim for all his or her injuries. Similarly, jurisdictions that adhere to the rule maintain that they are justified in denying subrogation in cases where recovery is inadequate to fully reimburse an insured for its losses since insurers are paid premiums to assume the risk of loss.[16] Moreover, it is argued that the application of the made-whole doctrine gives policyholders the full value of their foresight in buying insurance from the party who agreed to bear the risk.[17]

Although the made-whole rule is widely accepted, it has been sharply criticized. A primary critique is that the rule calls for a case-by-case determination of when an insured has been made whole. Requiring such adjudication after an underlying action has been resolved is thought to burden the courts and limit the total recovery available to either party. Opponents also argue that the made-whole rule results in higher insurance rates since insurers cannot rely on significant recoveries from subrogation claims to lower such rates.[18] States not adhering to the doctrine emphasize the principles of tort law over the principles of contract law. These jurisdictions believe that the focus should be on shifting the loss back onto the wrongdoer since it is the party truly responsible for causing an injury.

Courts in New York have adopted the made-whole rule of apportionment.[19] In fact, the Court of Appeals applied the rule when, in *Winkelmann*, it held that an insurer had no right to share in the proceeds of the insured's recovery from a tortfeasor because the award did not fully compensate the insured for its losses;[20] but it is important to highlight that *Winkelmann* involved a suit brought by an insured against a defendant-insurer.

Winkelmann affirmed that the state recognizes the traditional subrogation doctrine and reminded us that an insurer, who pays a full amount due under its policy, still possesses derivative and limited rights of the insured to bring a subrogation claim directly against a negligent third party to recoup amounts paid. This is true even if (1) the amount paid by the insurer is less than the insured's loss, and (2) the insurer proceeds with its claim prior to the insured being made whole by a tortfeasor.[21]

Thus, in New York, the made-whole doctrine seemingly applies solely when an insured has recovered from a third party and the insurer attempts to exercise its subrogation rights by way of reimbursement.[22] Courts have not applied the made-whole doctrine in cases where a *public* health insurer's right of subrogation was based on a reimbursement lien.[23] In *Calvanese v. Calvanese*, the Court of Appeals held that a Medicaid payer could collect costs from all of the personal injury settlement, not just the part allotted to medical expenses.[24] The injured individual in *Calvanese* asserted that his incentive to settle or pursue a claim at trial would be diminished if the sum recovered was all to go to Medicaid, but the court did not find this argument compelling. The court rationalized that the Medicaid payer instead could reduce the sum of its claim to revitalize the insured's incentive.[25]

Practices That Impede Recovery

General Releases

Subrogation claims by insurers depend upon the claims of their insured and are subject to whatever defenses tortfeasors have against the insured.[26] Consequently, an insured may prejudice an insurer's subrogation right if it executes a release of liability for loss caused by a third-party tortfeasor. Unless an express provision of the general release reserves the rights of the insurer or limits the scope of the release, the insurer's subrogation right will be destroyed.[27]

An insured may prejudice an insurer's subrogation right if it executes a release of liability for loss caused by a third-party tortfeasor.

To countervail this effect, some courts have held that a general release does not bar an insurer's right of recovery in cases where a tortfeasor had knowledge of the insurer's subrogation rights at the time of execution and the insurer has not consented to the release.[28] Thus the standard applies whether the tortfeasor has actual knowledge or information that, reasonably pursued, should give the tortfeasor knowledge that the insured has been indemnified by the insurer.[29] The courts agree that a contrary holding under these circumstances would defy the principles of equity on which subrogation is based.

Exploiting the Economic Loss Requirement

As a general matter, unless a contract provides otherwise, an insurer may recoup costs by means of subrogation only if an insured's tort claim against a third party draws compensation for economic loss.[30] Accordingly, in legal actions resulting in settlement, health insurers are not able to receive a refund for medical payments made under their policies if a settlement agreement does not specifically allocate recovery for such expenses.[31] Some have argued that this limitation undermines the health insurer's ability to recoup costs since settling parties may be able to fashion agreements that omit recovery for health-insured items.[32] Insured-plaintiffs and tortfeasor-defendants may, for example, structure settlements in a manner whereby monies are specifically allocated as an award for other than medical expenses (*i.e.*, pain and suffering, future earning, etc.). The original parties may also attempt to categorize a settlement award as compensation for "general damages" rather than for specific expenses.

Mindful that these practices may destroy an insurer's legitimate right to subrogation, courts have attempted to curtail the use of deceptive taxonomy.[33] In *Teichman*, the Court of Appeals entitled a health insurer to pursue a contractual right to collect a pro rata share of the settlement proceeds that its insured recovered from a third-party tortfeasor, albeit the proceeds were unallocated. The court held that where there is doubt as to the scope of a settlement agreement, an insurer may be given the opportunity to seek apportionment. The case was remanded to the trial court to determine whether the settlement at issue in fact indemnified the insured for the subrogated amount.[34]

While this decision stood to prove that an insured-plaintiff was not protected from sharing proceeds of a settlement merely because the settlement agreement did not name recovery for "economic loss," health insurers in this state still face an uphill battle defending their right to collect from settlements. One reason is that courts have barred an insurer's direct participation in settlement talks.[35] They have also refused to hold insureds or their attorneys liable to insurers for failing to include reimburseable items in settlement agreements.[36] The health insurer's mission to preserve its subrogation rights in settlement situations has therefore been an arduous one, to say the least.

The health insurer's quest has likewise been challenged in proceedings where verdicts are reached. Courts will not apportion judgment monies to insurers in the absence of proof that medical costs were incurred. Once medical expenses have been paid, however, an insured has little incentive to provide evidence for anything but items such as pain and suffering, loss of earnings, etc. Insurers often must stand on the sidelines and hope that their insureds will conduct suits against tortfeasors in a way that there is at least some recovery for insurers' economic losses.[37]

Intervention

More recently, health insurers have made a concerted effort to become party to their insureds' tort actions. Through intervention, insurers can monitor settlement distributions or secure a hand in the direction of proof at

trial.[38] Their endeavor has met with some success, and certainly some opposition.

Insurers claim that they are entitled to intervene, pursuant to CPLR 1012(a)(2), on account of their contractual subrogation or reimbursement rights with plaintiffs. CPLR 1012(a)(2) provides a statutory right to intervention when a party can show that it has unrepresented or inadequately represented rights in a dispute, which rights may be affected by a disposition or distribution of a claim for damages. For example, health insurers may make a motion to intervene under CPLR 1012(a)(2) on the grounds that their subrogation claims against tortfeasors are barred by the statute of limitations.[39]

Alternatively, insurers may seek intervention under CPLR 1013, which is referred to as permissive intervention. This affords a party an equitable right to intervene in any action where the intervenor's claim or defense presents a common question of law or fact.[40] Intervention is permitted in such instances so long as the court (in its discretion) determines that it will not cause undue delay or substantial prejudice to an original party.[41] According to precedent, courts must construe this statute liberally for the protection of those with a "real and substantial interest in the outcome of the proceeding."[42]

New York common law has established that health insurers may assert subrogation and/or reimbursement claims by way of this statutory authority.[43] Courts in this state have divergent opinions, however, regarding when intervention is proper. The primary controversy relates to the question of whether an insurer can intervene to assert its recoupment claim before the underlying tort action results in a settlement or verdict. Health insurers seek intervention at the early stages of a proceeding because settlements or judgments do not always allocate amounts, or allocate only minimal amounts, to past medical care. In contrast, plaintiffs and defendants argue that such intervention prejudices their claims or increases their liabilities and therefore should be deemed improper.

A majority of the appellate departments have sided with the parties that oppose pre-settlement or pre-judgment intervention by health insurers. In *Humbach*, the Second Department denied a health insurer's motion to intervene on a number of grounds, including, as relevant here, that intervention would prejudice the original plaintiff's case. The court reasoned that the health insurer's involvement at trial may lead a jury to speculate that the plaintiff had already been compensated by collateral sources.[44] It also held that a right to intervene could create an adversarial posture between the insurer and the insured, which in turn might delay the personal injury action. Moreover, such intervention may encourage others (such as disability insurance carriers, no-fault carriers or anyone who provided services to the plaintiff, relating to the injuries, that had not been paid) to file parallel motions. As a result, the court feared that "[s]imple personal injury actions would be transformed into complicated, unmanageable, multiparty litigation."[45] The First and Third Departments' decisions in *Holloran* and *Berry*, respectively, denied intervention on similar grounds.[46]

The primary controversy relates to the question of whether an insurer can intervene to assert its recoupment claim before the underlying tort action results in a settlement or verdict.

On the other hand, the Fourth Department has permitted a health insurer to intervene in an insured's tort action for the purpose of having its claim decided alongside the insured's. In two decisions, issued simultaneously in 2004, the appellate court held that the claims of an insurer and an insured shared common questions of law and fact.[47] According to the court, these claims arose "out of the same occurrence[s] that gave rise to plaintiffs' claim[s] for medical expenses and [are] similar enough to plaintiffs' claim[s] that defendant(s) [were] thereby placed on notice."[48] Thus, the court found the health insurer's intervention would not unduly delay the actions or unduly prejudice the rights of the plaintiffs.

The Fourth Department has since handed down a decision that barred an insurer from asserting an equitable subrogation claim by means of intervention.[49] In *Fasso*,

the appellate court affirmed a lower court's decision to dismiss an insurer's "complaint in intervention." While the lower court had permitted the insurer to intervene in a medical malpractice action commenced by its insured, it precluded the insurer from pursuing its subrogation cause of action once the insured and the defendant doctor reached a settlement in the early stages of trial. The appellate court held that a continuation of the insurer's action would nullify the settlement since the record showed the agreement satisfies both the insured's malpractice action and the insurer's subrogation action.[50] The basis of the court's decision here is notably unlike that of the court's earlier decisions.

It therefore appears that *Fasso* does not call into question the authority of its predecessors. Lower courts throughout the state have sided with the Fourth Department's 2004 decisions. For example, in *Nossoughi*, the supreme court allowed an applicant health insurer to file a motion to intervene in the pre-trial stages of a personal injury action.[51] The court recognized that although the insurer's subrogation claim could be brought as a separate action, individual trials of two claims based on the same incident "would not be consonant with the goals of judicial economy."[52] This decision represents a significant departure from the ruling in *Humbach*, in that it regards intervention as a means to promote judicial efficiency rather than a cause of complex litigation.

A second issue posing difficulty for health insures seeking to invoke subrogation rights through intervention is that, often, insurers do not receive notice of their insureds' tort actions against culpable third parties until after the parties have reached a settlement or the court has issued judgment. In such circumstances, if the applicable statute of limitations period for the subrogation claim has expired, a motion to intervene will be denied.[53] In their defense, plaintiffs have argued that a health insurer's subrogation claim is subject to the same statute of limitations period as the claim which they, as plaintiffs, advanced, meaning that the limitations period for the subrogation must run from the accident date rather than the date that an insurer makes payment on behalf of the insured. But courts have helped insurers refute this argument. In *Kaczmarski*, the appellate court held that under CPLR 203(f) health insurers' subrogation claims relate back to the time the insured asserts his or her claims for medical expenses.[54]

Health insurers that receive late notice of their insureds' tort actions may also have to surmount a defense of laches. Plaintiffs sometimes argue that the equitable doctrine of laches precludes health insurers from filing motions to intervene in the post-settlement or post-judgment stages of litigation. They emphasize that under both CPLR 1012 and 1013 a motion to intervene must be interposed in a timely manner.[55] Courts may not consider intervention in situations where an intervenor fails to comply with this standard.[56] In this regard, the question of timeliness is left to the sound discretion of the trial court.[57]

Recent court decisions have denied the claim that a health insurer should be barred from seeking intervention because it waited until the post-settlement stage to file the motion.[58] The court in *Glazer* held that "[c]ase law clearly establishes that a motion for intervention is not untimely merely because it is made after settlement of an action."[59] As such, the court looked to the record to determine whether the health insurer was late in bringing its motion to intervene. In this instance, it was established that the health insurer had commenced a separate action against the defendant immediately after learning of the underlying proceeding. The motion to intervene was then brought less than a year later. The record further demonstrated that, prior to making its motion, the health insurer had actively sought to determine whether the plaintiffs were pursuing an action against the defendant but had not received any response to its inquiries. In light of these facts, the laches doctrine was not applied to impede the health insurer's motion to intervene.

If the applicable statute of limitations period for the subrogation claim has expired, a motion to intervene will be denied.

The Implications of CPLR 4545

Last, one of the major topics of dispute relating to the subrogation rights of health insurers in this state is the implication of CPLR 4545, also known as the collateral source rule. The rule provides that a plaintiff's award for damages may be reduced by the amount received from an outside source as long as the latter corresponds to a category of economic loss for which damages were awarded. A defendant is entitled to this collateral source set-off if it meets a "reasonable certainty" standard of proof.[60]

In the context of personal injury actions, CPLR 4545(c) prohibits plaintiffs from recovering payments for past or future medical expenses reimbursed by their health insurers. This statute abrogated the common law rule that a plaintiff's recovery from a personal injury action would not be reduced by the fact that the medical expenses were paid by some source collateral to the defendant, like an insurance company. The main purpose of the statutory change was to prevent plaintiffs from receiving "windfalls and double recoveries for the same loss."[61]

Since the abrogation of the collateral source rule, the Court of Appeals has ruled that CPLR 4545 does not apply to pre-trial settlements.[62] The court in *Teichman* noted that this statute was designed to reduce a tortfea-

sor's "exposure," and while a tortfeasor does not have the power to negotiate its "exposure" once a case goes to trial, it does have the power to do so in settlement situations.[63] Accordingly, the court held that CPLR 4545(a) did not bar a health insurer from collecting against a settlement award.

The Court of Appeals has yet to rule on the effect of CPLR 4545 in cases in the pre-verdict stage. The Fourth Department, however, has found that the collateral source offset provisions of CPLR 4545(c) would not prohibit a health insurer from recovering in subrogation the medical payments it made upon trial of the action.[64] Despite assertions that CPLR 4545(c) is applicable to prevent an insurer's double recovery, the appellate court permitted an insurer's pre-trial intervention on the ground that the insurer does not stand to recover twice when it pursues its subrogation right upon judgment.[65] In the appellate court's view, such a ruling was a logical extension of the common-law rule that CPLR 4545 does not alter an insurer's traditional subrogation remedy – a defendant can nonetheless be held responsible for subrogation to an insurer.[66]

Several courts have followed suit, determining that health insurers may pursue a claim for subrogation because CPLR 4545 does not operate to negate their rights.[67] In *Excellus v. Federal Express*, the court expressly held that the collateral source rule did not prevent a health insurer from directly enforcing its subrogation rights against an alleged tortfeasor because the insured's personal injury action was pleaded and prosecuted in such a way that no double recovery could be had.[68] The court maintained that there is no actual collateral source where a party has legal or equitable obligation to repay a sum to an insurance company; the monies received are immediately payable to a party with subrogation rights, therefore completely offsetting the collateral source.[69]

This application of CPLR 4545 appears to be consistent with the principles of subrogation. In subrogation actions, the insurer is the real party in interest. It is entitled to exclusive control of the subrogation claim, which is separate and distinct from those of the insured.[70] The insurer therefore is not receiving monies from a collateral source.[71] Moreover, this position corresponds with the collateral source rule's intent (1) to prevent multiple recoveries for the same loss by an injured party and (2) not to provide defendant tortfeasors with a windfall.[72] While a desired outcome of the collateral source rule is a possible reduction in the cost of liability insurance, there is no evidence that this result should be obtained at the expense of health insurers.[73]

Conclusion

Subrogation has long been considered a "highly favored" doctrine.[74] It has been authorized under our legal system since the early 19th century and is well accepted in state and federal courts throughout the United States. Its underlying rationale is significant: if a party suffers a loss as a result of another's misconduct, the latter party should not be able to evade responsibility simply because a third party has paid for the loss pursuant to a legal duty. This equitable principle is paramount under our legal system. Thus, the subrogation doctrine should be liberally applied in its defense.[75]

Aside from preventing culpable third parties from shifting liability, the subrogation doctrine also serves to preserve basic principles of insurance and to promote favorable economic outcomes. Insurers contract to indemnify their insureds for out-of-pocket losses. Denying their subrogation rights, in effect, allows insured individuals to receive more than what they bargained for from the insurance policy. Moreover, if accident victims are permitted to receive payment from both the wrongdoer and the insurer, not only are they unfairly compensated twice for their loss but an inefficient distribution of insurance resources results. Subrogation returns excess assets to insurers, who then can add the amounts to the overall resources available for accident compensation. In the end, this translates to a more efficient insurance payment system and thus lower premium rates for the public.

Nowhere is the need for cost control more pressing than in the field of health care. Virtually everyone recognizes that soaring health care costs have made it vital to

have such an efficient/affordable health insurance system. It is clear that effective subrogation and recoupment policies and procedures help serve this laudable goal. As such, the state Legislature and judiciary alike should take measures to uphold the subrogation rights of health insurers currently secured in New York law. ■

1. *See* 16 Couch on Insurance 2d § 61:18.

2. *Winkelmann v. Excelsior Ins. Co.*, 85 N.Y.2d 577, 581 626 N.Y.S.2d 994 (1995).

3. *Fed. Ins. Co. v. Arthur Anderson & Co.*, 75 N.Y.2d 366, 372, 553 N.Y.S.2d 291 (1990); *see also Teichman v. Cmty. Hosp. of W. Suffolk*, 87 N.Y.2d 514, 521, 640 N.Y.S.2d 472 (1996); *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 113 F. Supp. 2d 345, 378 (E.D.N.Y. 2000) (citations omitted).

4. *Teichman*, 87 N.Y.2d at 518.

5. *Id*. Like subrogation, reimbursement allows an insurer to recoup expenses for a loss paid on behalf of its insured. Under reimbursement, however, an insurer brings an independent right of action directly against its own insured. *See* 16 Couch on Insurance 2d § 222:81.

6. *Teichman*, 87 N.Y.2d at 521–22.

7. 9 A.D.3d 831, 781 N.Y.S.2d 389 (4th Dep't), *appeal dismissed*, 3 N.Y.3d 738, 786 N.Y.S.2d 816 (2004).

8. *Id*. at 832 (quoting *Teichman*, 87 N.Y.2d at 523).

9. *See, e.g.*, *Hamiltorn Fire Ins. Co. v. Greger*, 246 N.Y. 162, 166–67, 158 N.E. 60 (1927); *Conn. Fire Ins. Co. v. Erie Ry. Co.*, 73 N.Y. 399, 404–405 (1878).

10. *See Oakes v. Patel*, 23 A.D.3d 1023, 1024, 803 N.Y.S.2d 455 (4th Dep't 2005); *Glazer v. Lutz*, 9 Misc. 3d 1104(A), 806 N.Y.S.2d 444 (Sup. Ct., N.Y. Co. 2005). *Cf. Berry v. St. Peter's Hosp.*, 250 A.D.2d 63, 68, 678 N.Y.S.2d 674 (3d Dep't 1998); *Humbach v. Goldstein*, 229 A.D.2d 64, 68, 653 N.Y.S.2d 950 (2d Dep't 1997).

11. *See, e.g., Excellus Health Plan, Inc. v. Fed. Express Corp.*, 5 Misc. 3d 727, 734–35, 784 N.Y.S.2d 284 (Sup. Ct., Onondaga Co. 2003).

12. 175 Misc. 2d 585, 590, 669 N.Y.S.2d 479 (Sup. Ct., N.Y. Co. 1998).

13. *Id*. at 590.

14. *See Indep. Health Ass'n v. Grabenstatter*, 254 A.D.2d 722, 723, 678 N.Y.S.2d 220 (4th Dep't 1998). *Cf. Teichman*, 87 N.Y.2d at 520.

15. Elaine Rinaldi, *Apportionment of Recovery Between Insured and Insurer in a Subrogation Case*, 29 Tort & Ins. L.J. 803, 807.

16. *Id*. at 803.

17. *See* Steven Flower, *Toward Correcting the Misapplication of Subrogation Doctrine in California Healthcare*, 77 S. Cal. L. Rev. 1039, 1048 (2004).

18. *Id*.

19. *See, e.g., Berry v. St. Peter's Hosp.*, 250 A.D.2d 63, 66–67, 678 N.Y.S.2d 674 (3d Dep't 1998); *Glazer v. Lutz*, 9 Misc. 3d 1104(A), 4, 806 N.Y.S.2d 444 (Sup. Ct., N.Y. Co. 2005).

"I'm going to head home early. I've got a pretty nasty case of Irritable Attorney Syndrome."

20. *Winkelmann v. Excelsior Ins. Co.*, 85 N.Y.2d 577, 581, 626 N.Y.S.2d 994 (1995).

21. *Id*.

22. Lower courts have employed the "make whole" doctrine in the context of cases where an insurer intervenes in the underlying tort action between its insured and a tortfeasor. These cases need to be construed in light of *Winkelmann*.

23. *See, e.g., Harris v. City of N.Y.*, 16 Misc. 3d 674, 837 N.Y.S.2d 486 (Sup. Ct., N.Y. Co. 2007); *In re Estate of Virginia Ramirez*, 14 Misc. 3d 480, 826 N.Y.S.2d 553 (Sur. Ct., N.Y. Co. 2006). *Cf. Lugo v. Beth Israel Med. Ctr.*, 13 Misc. 3d 681, 819 N.Y.S.2d 892 (Sup. Ct., N.Y. Co. 2006).

24. 93 N.Y.2d 111, 119, 688 N.Y.S.2d 479 (1999).

25. *Id*. at 121.

26. *Great Am. Ins. Co. v. U.S.*, 575 F.2d 1031, 1034 (2d Cir. 1978).

27. *See Weinberg v. Transamerica Ins. Co.*, 62 N.Y.2d 379, 383–84, 477 N.Y.S.2d 99 (1984); *see also Progressive Ins. Co. v. Sheri Torah, Inc.*, 44 A.D.3d 857 (2d Dep't 2007).

28. *Allstate Ins. Co. v. Mazzola*, 175 F.3d 255, 260 (2d Cir. 1999) (quoting *Silinsky v. State-Wide Ins. Co.*, 30 A.D.2d 1, 3–4, 289 N.Y.S.2d 541 (2d Dep't 1968)). *See Aetna Cas. & Sur. Co. v. Schulman*, 70 A.D.2d 792, 793, 417 N.Y.S.2d 77 (1st Dep't 1979); *see also Aetna Casualty & Sur. Co. v. S. Siskind & Sons, Inc.*, 209 A.D.2d 215, 215–16, 618 N.Y.S.2d 314 (1st Dep't 1994). In contrast, if an insured executes an assignment of settlement proceeds to pay for private medical bills, such an agreement is enforceable. *Williamsburg S. Med. v. Maloney, Esq.*, N.Y.L.J., Feb. 10, 2003, p. 20, col. 6 (Civ. Ct., N.Y. Co.).

29. *Id*.; *Gibbs v. Hawaiian Eugenia Corp.*, 966 F.2d 101, 106 (2d Cir. 1992); *Hamiltorn Fire Ins. Co. v. Greger*, 246 N.Y. 162, 162 (1927); *Kozlowski v. Briggs Leasing Corp.*, 96 Misc. 2d 337, 343, 408 N.Y.S.2d 1001 (Sup. Ct., Kings Co. 1978); *Ocean Accident & Guaranty Corp. v. Hooker Electro-chem. Co.*, 240 N.Y. 37, 47 (1925).

30. *See generally S. Siskind & Sons*, 209 A.D.2d at 215–16; *Dymond v. Dunn*, 148 A.D.2d 56, 59, 543 N.Y.S.2d 230 (3d Dep't 1998); *Pang v. Maimonides Med. Ctr.-Maimonides Hosp.*, 105 A.D.2d 775, 778, 481 N.Y.S.2d 720 (2d Dep't 1984).

31. *Teichman v. Cmty. Hosp. of W. Suffolk*, 87 N.Y.2d 514, 522, 640 N.Y.S.2d 472 (1996).

32. *See, e.g., Singh v. Long Island Jewish Med. Ctr.*, 11 Misc. 3d 1054(A), 815 N.Y.S.2d 496 (Sup. Ct., Queens Co. 2006); *DelRossi v. Defendant V*, 6 Misc. 3d 454, 789 N.Y.S.2d 816 (Sup. Ct., Suffolk Co. 2004).

33. *See Kozlowski*, 96 Misc. 2d at 343. *See e.g., Scinta v. Kazmierczak*, 59 A.D.2d 313, 317, 399 N.Y.S.2d 545 (4th Dep't 1977). *See generally Reiss v. Roadhouse Rest.*, 14 Misc. 3d 1226(A), 836 N.Y.S.2d 495 (Sup. Ct., Richmond Co. 2007).

34. *Teichman*, 87 N.Y.2d at 522.

35. *Berry v. St. Peter's Hosp.*, 250 A.D.2d 63, 68–69, 678 N.Y.S.2d 674 (3d Dep't 1998).

36. *Indep. Health Ass'n v. Grabenstatter*, 254 A.D.2d 722, 723, 678 N.Y.S.2d 220 (4th Dep't 1998).

37. Siegel's Practice Review 81 (Mar. 1999).

38. *Id*.

39. *See Allstate Ins. Co. v. Stein*, 1 N.Y.3d 416, 420, 775 N.Y.S.2d 219 (2004).

40. *Plantech Hous. Inc. v. Conlan*, 74 A.D.2d 920, 921, 426 N.Y.S.2d 81 (2d Dep't 1980).

41. CPLR 1013.

42. *Plantech Hous. Inc.*, 74 A.D.2d at 921; *Bay State Heating & Air Conditioning Co. v. Am. Ins. Co.*, 78 A.D.2d 147, 149, 434 N.Y.S.2d 66 (4th Dep't 1980).

43. *See Teichman v. Cmty. Hosp. of W. Suffolk*, 87 N.Y.2d 514, 518, 640 N.Y.S.2d 472 (1996).

44. *Humbach v. Goldstein*, 229 A.D.2d 64, 68, 653 N.Y.S.2d 950 (2d Dep't 1997).

45. *Id. See also McGuire v. Long Island Jewish-Hillside Med. Ctr.*, 237 A.D.2d 417, 418, 654 N.Y.S.2d 420 (2d Dep't 1997).

46. *Halloran v. Don's 47 W. 44th St. Rest. Corp.*, 255 A.D.2d 206, 680 N.Y.S.2d 227 (1st Dep't 1998); *Berry*, 250 A.D.2d at 63.

47. *See Omiatek v. Marine Midland Bank, N.A.*, 9 A.D.3d 831, 832, 781 N.Y.S.2d 389 (4th Dep't), *appeal dismissed*, 3 N.Y.3d 738, 786 N.Y.S.2d 816 (2004); *Kaczmarski v. Suddaby, M.D. & Indep. Health Assoc. Inc.*, 9 A.D.3d 847, 848, 779 N.Y.S.2d 394 (4th Dep't 2004).

48. *Omiatek*, 9 A.D.3d at 831–32.

49. *See Fasso v. Doerr*, 46 A.D.3d 1358, 1359, 848 N.Y.S.2d 799 (4th Dep't 2007).

50. *Id.* at 2.

51. *Nossoughi v. Federated Dep't Stores, Inc.*, 175 Misc. 2d 585, 669 N.Y.S.2d 749 (Sup. Ct., N.Y. Co. 1998).

52. *Id.* at 590. *See also Glazer v. Lutz*, 9 Misc. 3d 1104(A), 4, 806 N.Y.S.2d 444 (Sup. Ct., N.Y. Co. 2005).

53. *See Berry v. St. Peter's Hosp.*, 250 A.D.2d 63, 68, 678 N.Y.S.2d 674 (3d Dep't 1998).

54. *Kaczmarski*, 9 A.D.3d at 848. *See generally McHale v. Anthony*, 41 A.D.3d 265, 839 N.Y.S.2d 33 (1st Dep't 2007).

55. *Glazer*, 9 Misc. 3d 1104(A), 4.

56. *See, e.g.*, *Oparaji v. Weston*, 293 A.D.2d 592, 593, 740 N.Y.S.2d 238 (2d Dep't 2002); *B.U.D. Sheetmetal Inc. v. Mass. Bay Ins. Co.*, 248 A.D.2d 856, 857, 670 N.Y.S.2d 228 (3d Dep't 1998); *Rectory Realty Assoc. v. Town of Southampton*, 151 A.D.2d 737, 543 N.Y.S.2d 128 (2d Dep't 1989).

57. David D. Siegel, New York Practice, § 183 at 300.

58. *Glazer*, 9 Misc. 3d at 3.

59. *Id. See Standford Assoc. v. Bd. of Assessors*, 39 A.D.2d 800, 332 N.Y.S.2d 286 (3d Dep't 1972).

60. *Firmes v. Chase Manhattan Auto. Fin. Corp.*, 2008 WL 193267 (2d Dep't 2008).

61. *Fisher v. Qualico Contracting Corp.*, 98 N.Y.2d 534, 537, 749 N.Y.S.2d 467 (2002). *See also Omiatek*, 9 A.D.3d at 831; *Kaczmarski*, 9 A.D.3d at 847.

62. *Teichman*, 87 N.Y.2d at 522–23.

63. NYS Law Digest No. 531 (Mar. 2004).

64. *See Omiatek*, 9 A.D.3d at 831; *Kaczmarski*, 9 A.D.3d at 847.

65. *Kaczmarski*, 9 A.D.3d at 847 (quoting *Fisher*, 98 N.Y.2d at 540).

66. *See Kelly v. Seager*, 163 A.D.2d 877, 558 N.Y.S.2d 403 (4th Dep't 1990). *See also Blue Cross & Blue Shield of N.J., Inc. v. Phillip Morris, Inc.*, 113 F. Supp. 2d 345, 380 (E.D.N.Y. 2000). *See generally Winkelmann v. Excelsior Ins. Co.*, 85 N.Y.2d 577, 581–83, 626 N.Y.S.2d 994 (1995).

67. *Principe v. City of N.Y.*, 11 Misc. 3d 879, 813 N.Y.S.2d 872 (Sup. Ct., Richmond Co. 2006); *Mossberg v. City of N.Y.*, 2006 NY Slip Op. 51963U (Sup. Ct., Kings Co. 2006). *See also Berry v. St. Peter's Hosp.*, 173 Misc. 2d 214, 221, 660 N.Y.S.2d 795 (Sup. Ct., Albany Co. 1997), *rev'd on other grounds*, 250 A.D.2d 63, 678 N.Y.S.2d 674 (3d Dep't 1998); *Pell v. Malibu Resorts Int'l*, N.Y.L.J., Mar. 18, 1997, p. 30, col. 6 (Sup. Ct., Nassau Co.).

68. *Excellus Health Plan, Inc. v. Fed. Express Corp.*, 5 Misc. 3d 727, 784 N.Y.S.2d 284 (Sup. Ct., Onondaga Co. 2003).

69. *Id.* at 736–38.

70. *Winkelmann v. Excelsior Ins. Co.*, 85 N.Y.2d 577, 582, 626 N.Y.S.2d 994 (1995).

71. *Niagara Frontier Transp. Auth. v. Vosbeck*, 236 A.D.2d 842, 655 N.Y.S.2d 869 (4th Dep't 1997).

72. *Id.*; *Excellus*, 5 Misc. 3d at 736–38.

73. *See Nossoughi v. Federated Dep't Stores, Inc.*, 175 Misc. 2d 585, 589–90, 669 N.Y.S.2d 479 (Sup. Ct., N.Y. Co. 1998) (quoting *Teichman v. Cmty. Hosp. of W. Suffolk*, 87 N.Y.2d 514, 640 N.Y.S.2d 472 (1996)).

74. *Bonham v. Coe*, 249 A.D. 428, 438, 292 N.Y.S.2d 423 (4th Dep't 1937).

75. *Id.*

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Streamlining Evidence

Alternative Methods of Authenticating Medical Records in Tort Actions

By Bran C. Noonan

"Authentication is perhaps the purest example of a rule respecting relevance: evidence admitted as something can have no probative value unless that is what it really is."
– Judge Friendly[1]

In almost every case involving physical injury, whether premises liability, toxic tort, or automobile accident, the plaintiff's attorney will seek to offer the victim's medical records into evidence at trial. Before the contents of a document can be considered as evidence, a court must first ascertain the authenticity of the document offered.[2] If documents, such as public records or newspapers, are not self-authenticating, a party must submit evidence that lays a proper foundation to establish their legitimacy.

At trial, whether in federal or state court, a custodian of records traditionally authenticates the medical records by testifying that the records were kept in the ordinary course of business.[3] This method has become rather outmoded and inefficient: a custodian is summoned to court to offer a few minutes of testimony unrelated to the substantive matters with minimal cross-examination, a service for which the plaintiff typically pays.[4]

Both courts and legislatures have intervened in this costly and time-consuming procedure, devising methods to streamline document authentication balanced against the need to ensure valid submissions. At the very least, a plaintiff may submit a certification from a custodian. Parties are also encouraged to stipulate to the entry of documents into evidence.[5] There are, however, instances when these remedies are unavailable, when an adversary refuses to stipulate or a custodian fails to execute a certification.[6] While case law on the subject is sparse, New York and federal courts have recognized, if sometimes tacitly, alternative methods of document authentication that may further simplify the authentication process.[7]

Authentication in New York Courts

Unlike its federal counterpart, the New York State Legislature has not codified rules of authentication into its civil code. A few statutory rules of authentication are scattered throughout Article 45 of the New York Civil Practice Law and Rules, such as CPLR 4518 and 4525. Nonetheless, New York offers five less-traditional methods of authentication.

Authentication-by-Production

New York courts have found documents authentic under what is termed the doctrine of "authentication-by-production," which maintains that documents are authenticated when produced by the party against whom they are offered.[8] In *Arbour v. Commercial Life Insurance Co.*, the appellate court found the documents authentic on the basis that the "records relied upon by defendant were submitted by plaintiff in response to defendant's discovery demands."[9] Some states, such Texas and Georgia,

have in fact concretized this doctrine into their civil codes, classifying such documents within the self-authentication index.[10] Authentication-by-production rests on the logic that the act of production itself serves as a representation for the party in receipt that the documents are what they claim to be. Therefore, producing parties are then effectively estopped from altering their position at summary judgment or trial.

Case law has not, however, addressed whether a party producing documents can authenticate them on the grounds that he or she turned them over during discovery. Whether or not the producing party submits the actual documents into evidence cannot prohibit him or her from employing this method, since the same question arises when a party receiving documents submits them into evidence. In other words, the production of documents during discovery does not guarantee their validity – it simply compels a producing party to ensure that the documents are genuine; otherwise, the documents may be used against him or her at trial. If a receiving party suspects a problem, that party still has to conduct his or her own investigation. Accordingly, there is a limited basis for courts to prohibit plaintiffs from admitting medical records that they produced during discovery.

Medical Releases

A hybrid of the authentication-by-production doctrine is the use of medical releases to authenticate documents. A defendant who receives a release from a plaintiff for medical records can use the release as proof of authenticity. The situation works similarly to authentication-by-production: instead of the plaintiff producing the documents, the plaintiff provides the mechanism to obtain them. In *Burnett v. Zito*,[11] the appellate court adopted the lower court's finding, which held that the defendant's submission of unsworn medical reports were authentic because, among other things, "plaintiff's authorization for release insured their authenticity."[12]

Yet the question remains whether a party may authenticate his or her own medical records at trial on the basis that counsel obtained them pursuant to the party's medical release. No case has addressed this issue. The countervailing concern is whether a hospital has produced genuine medical records for a plaintiff to offer into evidence. Typically, under the CPLR, a custodian of records provides a certification, which authenticates the records. However, allowing defendants to use a plaintiff's medical release to obtain and authenticate the plaintiff's records sidesteps the CPLR's certification commands. Thus, no legitimate basis exists against allowing both parties to authenticate records with a medical release.

Subpoenas

Whether an attorney may authenticate medical records on the basis that they were obtained in response to a subpoena has scarcely been addressed. In *Hoffman v. City of New York*,[13] one of the few cases that mentions the use of subpoenas in the authentication context, the defendant sought to preclude the plaintiff from offering his x-rays into evidence because they were not authenticated pursuant to CPLR 4532(a). The court held that the documents were authentic because, among other reasons, they were present due to the defendant's own subpoena.[14] The court did not hint at whether it would have found the documents equally authentic had the plaintiff received the documents in response to his own subpoena and then sought to authenticate them on that basis.

A narrow area of constitutional law sheds some light on the possible authentication authority of subpoenas. In *Fisher v. United States*,[15] the U.S. Supreme Court addressed whether the Fifth Amendment's protections against self-incrimination shielded taxpayers from responding to subpoenas for potentially incriminating documents. The Court stated that "[t]he act of producing evidence in response to a subpoena . . . has communicative aspects. . . . Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control. . . . It also would indicate the [subpoenaed person's] belief that the papers are those described in the subpoena."[16] In *Prudential Securities Inc. v. Brigianos*,[17] one of the few New York cases citing *Fisher*, a non-party moved to quash the plaintiff's subpoena for

business records. The court stated, in dictum, that the "[n]on-party['s] production of [certain documents] would implicitly authenticate those documents as his own."[18]

The main barrier to authenticating documents solely on the basis that they are those produced by a non-party pursuant to a subpoena is that CPLR 4518(c) requires medical records to "bear a certification or authentication by the head of the hospital, laboratory . . . or by an employee delegated for that purposed or by a qualified physician."[19] Whether a litigant can skirt the certification demands of the CPLR and solely rely on a subpoena is definitely plausible – the authentication-by-production method allows parties to avoid the certification requirement.

Unfortunately, few courts have employed and discussed CPLR 4543; it has only emerged in the criminal context.[24] Nonetheless, the section indicates that if an authentication method is permitted in federal court, the method may be carried over into the state system. The New York Proposed Evidence Code in fact closely mirrors the Federal Rules of Evidence. That would also follow with the Legislature's intent that the rules of authentication not be rigid and formulaic. For example, "the salutary purpose of CPLR 4518 [the business records rule] . . . is to obviate the calling of each employee who participated in making entries in business records."[25] Consider also CPLR 4532-a, which governs the admissibility of certain pictorial and graphical medical documents and maintains that failure to comply with its terms is not fatal if the document is "otherwise admissible" in some other manner.

The court noted that the respondent could protect himself by exercising his right to subpoena the doctors or technicians if he suspected the report to be unauthentic.

Judicial Notice

Another method of authentication is for a litigant to request that a court take judicial notice of facts that establish the authentication requirements. In *Carmen I. v. Robert K.*,[20] the petitioner sought the admission of a laboratory report concerning the results of a blood test, to which the respondent refused to stipulate.[21] A certification authenticating the report would be inadmissible under CPLR 4518(c) because the laboratory did not qualify as a hospital. The court nonetheless took

> judicial notice of the standards and procedures inherent in the administering of blood tests, and of the objective scientific nature of both the test results and the interpretation of those results, coupled with the intent of the Legislature to have the evidence admitted, the court's desire to serve the interests of justice, consider competent evidence, and the exigencies of the court itself.[22]

Additionally, the court noted that the respondent could protect himself by exercising his right to subpoena the doctors or technicians if he suspected the report to be unauthentic.

CPLR 4543 Catch-All

Pursuant to CPLR 4543, nothing in Article 45 "prevents the proof of a fact or a writing by any method authorized by any applicable statute or by the rules of evidence at common law."[23] Therefore, litigants may use other statutes to authenticate documents, such as Business Corporation Law § 107 (corporate seal serves to authenticate documents), Domestic Relations Law § 14-a (marriage certificates are automatically deemed authentic), and CPLR 2105 (attorney certification may authentic copies of documents).

Authentication in Federal Court

Under § 901(a) of the Federal Rules of Evidence (FRE), evidence must be tendered to sufficiently support a finding that a document is genuine. While FRE § 901(b) catalogs a list of authentication methods, the Advisory Committee's notes point out that "[t]he examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of law."[26] Therefore, in the absence of a witness or certification form, the FRE and case law offer four additional methods of authentication.

Authentication-by-Production

As with New York, federal courts have endorsed the doctrine of authentication-by-production.[27] Documents may be deemed authentic when produced in response to discovery demands.[28] While the doctrine has been primarily reserved for parties authenticating documents received in response to their discovery demands, the principle was recently expanded in a case arising out of the Southern District of Indiana.

In *Schmutte v. Resort Condominiums International, LLC*,[29] the court extended the doctrine of authentication-by-production by allowing parties producing documents to authenticate them on that basis. There, the plaintiff sought to admit medical records he received from a non-party hospital (and then turned over to the defendant).

The district court did not consider as evidence of authentication the fact that the plaintiff procured the documents via a medical release, but found instead that, among other reasons, the plaintiff's documents were authentic because the plaintiff had produced them during the course of discovery.

Attorney Testimony/Declaration

In *Schmutte*, the district court also held that the medical records were authentic on the basis of the attorney's declaration. The plaintiff had annexed the medical release and the suspect documents as exhibits to his summary judgment motion. In her declaration to the summary judgment motion, plaintiff's counsel declared that she had personal knowledge that one exhibit was the medical release sent to the non-party hospital and another exhibit was the documents produced by the non-party in response to the release. The court held that this was a *prima facie* showing of authenticity under FRE § 901(b)(1), which authorizes authentication by testimony of a witness with personal knowledge. The court's use of FRE § 901(b)(1) is peculiar and potentially inappropriate since the plaintiff's attorney lacked the requisite personal knowledge to verify the origin, completeness, and accuracy of the medical records, as well as confirm that the medical records were kept in the ordinary course of business, which is required under the statute. That does not imply the method is unusable – the court instead should have held that the plaintiff's method of authentication consisted of an unenumerated method.

Circumstantial Evidence

Pursuant to FRE § 901(4), a party may offer circumstantial evidence of authenticity. This section acts as a catch-all and allows authentication on the basis of distinctive characteristics, such as appearance, contents, patterns, logos and so forth, taken in conjunction with circumstances. A court will consider the appearance and content of the document, such as the presence of a letterhead, a signature, and the parties' names, references to issues in dispute, and whether or not the contents conform to the type of document it appears to be.[30]

Courts will also consider other evidence in the record to buttress the circumstantial evidence. For example, a signature on an affidavit in the record that matches the signature on a letter may help to authenticate the letter.[31] The precise number of distinctive features a document must possess for authentication, however, is largely determined on a case-by-case basis. Some courts also view the doctrine of authentication-by-production as a part of – or concomitant with – FRE § 901(4).[32] Given that most hospital records contain specific indicia (hospital name, letterhead, author, and patient name and medical information), they should generally be deemed authentic on this basis alone.

Medical Releases and Subpoenas

Recently in *Evans v. CIDR*,[33] the district court tacitly approved medical records produced in response to a medical release as a viable method of authentication. In this case, the plaintiff authorized the release of medical records to the defendant/employer, which the plaintiff later sought to admit as evidence. The defendant challenged the admissibility of the plaintiff's medical records under the business record exception of FRE § 803(6), since the records were unsworn. The court determined that upon review of the records, there was nothing on the face of them to indicate that they lacked trustworthiness. In essence, the court bypassed the issue of authentication and moved to the question of admissible hearsay, which logically leads to the conclusion that the court found the records authentic on the basis that they were received in response to the medical release.

A case from the Southern District of New York suggests that a party may authenticate documents obtained in response to a subpoena using the *Fisher* and authentication-by-production rubrics. In *John Paul Mitchell Systems v. Quality King Distributors*,[34] the plaintiff sought the admission of a non-party's corporate records obtained in response to the plaintiff's subpoena. The court noted that "there [was] no dispute that [the] documents were produced by [the non-party's] custodian of records, in

response to a request for [its] documents . . . [therefore] he has implicitly authenticated these documents by his act of production as records maintained by [the non-party]."[35]

The key problem the case raises, however, is that the documents were produced by an individual defendant who served as the non-party entity's custodian of records. There is no indication whether the court would have arrived at the same conclusion had the non-party entity's custodian not been a party. Nonetheless, the principle of *Fisher*, which maintains that responding to subpoenas has authentication power, is sufficient grounds for the authentication of subpoenaed medical records produced by a hospital custodian.

Conclusion

New York and federal courts have recognized alternative methods to authenticate medical records that help conserve judicial, party, and non-party resources. These methods follow a trend that is moving away from the need for a custodian's approval and toward simple, flexible, and liberal procedures. Because evidentiary procedures are often in flux and intended to be functional rather than formulaic, courts and litigants can continue to devise alternative authentication methods. The common thread among the methods is that there is some mechanism that creates a presumption of authenticity and streamlines the procedure. ■

1. *U.S. v. Sliker*, 751 F.2d 477, 499 (2d Cir. 1984).
2. *See generally Kassim v. City of Schenectady*, 415 F.3d 246, 251 (2d Cir. 2005); *Mayer v. Angelica*, 790 F.2d 1315, 1316 (7th Cir. 1986).
3. *See* CPLR 4518; FRE §§ 901(b)(1), 902(11).
4. *See, e.g.*, *Carmen I. v. Robert K.*, 110 Misc. 2d 310, 441 N.Y.S.2d 926 (Fam. Ct., Kings Co. 1981) ("The difficulty with the procedure is that it prolongs trial, and imposes on the [party] the expense of paying a witness").
5. *Id*.
6. *Id*.
7. While the dearth of case law that addresses the issue primarily does so at the summary judgment stage, no policy or jurisprudential principle appears to prevent extending the use of the additional methods to authenticate documents at trial.
8. *See Barefield v. Bd. of Trustees of Cal. State Univ.*, 500 F. Supp. 2d 1244 (E.D. Cal. 2007); *Arbour v. Commercial Life Ins. Co.*, 240 A.D.2d 1001, 659 N.Y.S.2d 525 (3d Dep't 1997); *Oeffler v. Miles, Inc.*, 241 A.D.2d 822, 660 N.Y.S.2d 897 (3d Dep't 1997); *A.B. Med. Servs., PLLC v. Travelers Prop. Cas. Corp.*, 5 Misc. 3d 214, 783 N.Y.S.2d 244 (Civ. Ct., Kings Co. 2004); *U.S. v. Brown*, 688 F.2d 1112, 1115–16 (7th Cir. 1982); *John Paul Mitchell Sys. v. Quality King Distribs.*, 106 F. Supp. 2d 462, 471–73 (S.D.N.Y. 2000).
9. *Arbour*, 240 A.D.2d at 1002.
10. *See* Tex. R. Civ. P. § 193.7; O.C.G.A. § 24-7-3.
11. 252 A.D.2d 879, 676 N.Y.S.2d 318 (3d Dep't 1998).
12. *Id.* at 880; *see Oeffler*, 241 A.D.2d at 824.
13. 141 Misc. 2d 893, 535 N.Y.S.2d 342 (Sup. Ct., Kings Co. 1988).
14. *Id*.
15. 425 U.S. 391 (1976).
16. *Id.* at 410; *see also U.S. v. Beattie*, 522 F.2d 267, 270 (2d Cir. 1975) ("A subpoena demanding that an accused produce his own records is taken to be the equivalent of requiring him to take the stand and admit their genuineness."). (Friendly, J.).
17. 233 A.D.2d 18, 662 N.Y.S.2d 484 (1st Dep't 1997).
18. *Id.* at 22.
19. CPLR 4518(c); *see In re Kelly V.*, 94 Misc. 2d 172, 405 N.Y.S.2d 207 (Fam. Ct., N.Y. Co. 1978); *Restrepo v. State*, 146 Misc. 2d 349, 550 N.Y.S.2d 536 (N.Y. Ct. Cl. 1989).
20. *Carmen I. v. Robert K.*, 110 Misc. 2d 310, 441 N.Y.S.2d 926 (Fam. Ct., Kings Co. 1981) .
21. *Id*. at 311.
22. *Id*. at 312.
23. CPLR 4543.
24. *See, e.g.*, *People v. Richardson*, 88 N.Y.2d 1049, 650 N.Y.S.2d 633 (1996).
25. *Hoffman v. City of N.Y.*, 141 Misc. 2d 893, 894, 535 N.Y.S.2d 342 (Sup. Ct., Kings Co. 1988).
26. FRE § 901 Advisory Committee's notes, note to subdiv. (b).
27. *See U.S. v. Brown*, 688 F.2d 1112, 1115–16 (7th Cir. 1982); *John Paul Mitchell Sys. v. Quality King Distribs.*, 106 F. Supp. 2d 462, 471–73 (S.D.N.Y. 2000).
28. *See Hood v. Dryvit Sys., Inc.*, 2005 WL 3005612, *1 (N.D. Ill. 2005).
29. 2006 WL 3462656 (S.D. Ind. 2006).
30. *See U.S. v. Bagaric*, 706 F.2d 42, 67 (2d Cir. 1983); *John Paul Mitchell Sys.*, 106 F. Supp. 2d at 471–73; *Air Land Forwarders, Inc. v. U.S.*, 38 Fed. Cl. 547 (Fed. Cl. 1997).
31. *See Miller v. Whipker*, 2004 WL 1622212, *1 (S.D. Ind. 2004).
32. *See John Paul Mitchell Sys.*, 106 F. Supp. 2d at 471–73; *McKenna v. Pacific Rail Servs.*, 817 F. Supp. 498, 514 (D.N.J. 1993).
33. 2006 WL 1209904, *4 n.5 (S.D.N.Y. 2006).
34. 106 F. Supp. 2d 462.
35. *Id*. at 472.

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BY WILLIAM H. MANZ

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Local Legal Research in New York

Researching local law is often harder than researching law at a state or national level. The materials may be less familiar and more difficult to obtain, and those that are issued regularly may come from local or regional publishers rather than from well-known sources such as Thomson West or LexisNexis. Although local legal materials may possibly be available on the Internet, the content and design of local municipal Web sites vary greatly, and they are primarily intended to inform the public, not the legal researcher.

New York City Materials

Not surprisingly, the most extensive and widely available collection of legal materials for any municipality in the state is for New York City. The city charter and code are published in multi-volume loose-leaf sets: New York Legal Publishing Corp.'s *New York City Charter and Administrative Code Annotated* and Command Information Services' (formerly Lenz & Riecker) *Administrative Code & Charter – New York City*. Both editions are certified as correct by the President of the Senate and the Speaker of the Assembly.

For those without access to a library containing hard copy versions of the charter, code and rules, there are some online alternatives. The New York Legal Publishing Corp.'s edition is available on LexisNexis (NYADMIN and NYCCHT files) and Westlaw (NYCCODE database), and at the company's Web site (http://www.nylp.com). There is no free version of the charter and code on any New York City Web site, but they are both posted at New York State Bill Drafting Commission's Web site (http://public.leginfo.state.ny.us), accessed through the "Laws of New York" link and located at the bottom of a long list of links to the individual sections of the Consolidated Laws, unconsolidated laws, and court acts. Like this site's version of the Consolidated Laws, it is updated on a rolling basis, and is more current than anything available in print. It is provided for informational purposes only, however, as it does not contain the certification of accuracy found in the print versions.

Although the New York City Council Web site (http://www.nyccouncil.info) does not include the charter and code (it provides a link to the Bill Drafting Commission's online version), it does have databases containing the full text of intros (bills), resolutions, and local laws since 1990. Accessed through the "Legislation" link, they are searchable by word, date, committee, or issue. The site also provides an archive of reports, but these largely deal with broad issues, not individual bills or laws. Finally, there is an archive of press releases relating to legislation that begins with 2002. Hard copy versions of local laws are published in New York Legal Publishing's annual updates to its edition of the charter and code, and in the New York Legislative Service's *New York City Legislative Annual* and its bi-weekly *New York City Report*.

There are several published sources that include materials related to the legislative history of New York City enactments. Reports on intros are published in New York Legislative Service's *New York City Legislative Annual* and New York Legal Publishing's *New York Legal Advance Service*, while the proceedings of council meetings are published in the *City Record*. Formerly available only in hard copy or microfilm, the *City Record* is now offered on CD-ROM, beginning with 1998.

Other materials, including council briefing papers, hearing transcripts, and mayoral and council bill jackets, are available from city offices, but are more easily obtained through the New York Legislative Service. Its local law bill jackets will typically include a report, transcripts of testimony, a fiscal impact statement, and correspondence. They may also include news clippings and major studies done by outside agencies. Currently, the Service has over 500 local law bill jackets on file. The turnaround time to compile new jackets is from one to four days. The price is $150 for members and $175 for non-members, plus a 60-cents-a-page copying charge.

As with the charter and code, there are two major editions of the city regulations, the Rules of the City of New York. The current official version, published under contract with the city, is *New York City Rules and Regulations Annotated*. The most recent edition, which appeared in 2003, is a multi-volume soft-cover set, kept up-to-date with semi-annual pocket parts. Command Information Services publishes an annotated multi-volume

loose-leaf edition, *Rules of the City of New York*, which first appeared in 1991. LexisNexis provides subscribers with the Command Information Services edition of the rules in the NYCRUL file, while an electronic version of New York Legal Publishing's edition is provided by Westlaw's NYC-RULES database, and at the company's Web site. Proposed and new regulations are published in the daily *City Record*. However, an alternative to this publication is *City Regs*, a bi-weekly newsletter published by New York Law School and the New York Legislative Service, which digests summaries of the new and proposed rules.

The official version of the city's zoning regulations, the Zoning Resolution, is found in three, large, loose-leaf volumes published by the Department of City Planning. The Zoning Resolution is not available on LexisNexis or Westlaw, but an unofficial version is provided free at the Department of City Planning Web site (http://www.nyc.gov/html/dcp/home.html). The database has no word search feature; instead, the text of the various sections is accessed by through links in zoning text table or by accessing the table of contents.

New York City has had a large number of administrative agencies that issued decisions and rulings. Many of these were never published regularly, or were available at only a few libraries or from the issuing office. Online access was also very limited. For example, a decade ago, the decisions of the Office of Administrative Trials and Hearings were available in a database, which could only be accessed at the agency's office. Now, however, a very comprehensive collection of administrative materials is available on CityAdmin (http://www.citylaw.org/cityadmin.php), maintained by the New York Center of New York City Law at New York Law School.

This free searchable database currently contains over 35,000 decisions from a dozen city agencies, as well as mayoral executive orders, corporation counsel decisions, borough president Uniform Land Use Review Procedure (ULURP) recommendations, and city council land use resolutions. In addition, materials from a few city departments are available on LexisNexis and/or Westlaw. These include the Conflicts of Interest Board, the Commission on Human Rights, the Tax Tribunal, and the Corporation Counsel.

Resources for the Rest of the State

Compared to the large amount of information about New York City, the level of availability of legal resources for New York's larger and smaller cities, counties, townships, and villages remains rather basic. Although § 27(5) of the Municipal Home Rule Law charges the New York secretary of state's office with publishing local laws as a supplement to the session laws, this has not been done for over 20 years. An annual hard copy set, which first appeared in 1924, and which

was published under several different titles over the years, ceased publication in 1973. This was replaced with microfilm, but that version ended in 1981. However, the secretary of state's office continues to maintain a file of local laws arranged by municipality and local law number.

Large numbers of municipalities have codified their local laws. Over 700 of these are published by the General Code Co. of Rochester, which has been publishing municipal codes since 1962. Generally, no more than 10 to 15 copies of each code are printed, mostly for local distribution. Few libraries maintain comprehensive collections, and only the State Library in Albany has all the codes. Regional collections are held at the Sears Law Library at the University of Buffalo (Erie County and western New York), the Fourth Department library (most of western New York), the Boley Law Library at Syracuse University (Onondaga County), Pace Law Library (Westchester County), and Nassau Supreme Court Library (Nassau County).

In addition to its print products, General Code Co. provides a comprehensive, free online collection of over 200 municipal codes in its E-Code collection (http://www.generalcode.com/webcode2.html). These cover most major upstate cities, including Buffalo, Rochester, Binghamton, Albany, and Schenectady, as well as such heavily populated locations in the Greater New York area as the city of Yonkers, Nassau and Suffolk Counties, and the townships of Hempstead and Huntington. The codes are variously updated on a semi-annual, quarterly, or an as-needed basis; the date of the last update is provided. The online codes can be either browsed through links to the individual sections or searched with the Boolean word search feature. A far smaller number of local New York municipal codes are published by the Municipal Code Corp. of Tallahassee, Florida. Currently, four of these are posted online: Long Beach, Rome, Tonawanda, and Utica. Like those provided by General Code, the online codes are regularly updated, and can be either browsed or searched.

Municipal Web Sites

A final potential source is, of course, the Web sites of the municipalities themselves. Some post links to their codes at the General Code Web site, as well as a variety of other information. A check of various Web sites produced such information as the Westchester County sanitary code, posted at the county Web site (http://www.westchestergov.com/index.htm), the minutes of the proceedings of the Buffalo and Rochester city councils at the city Web sites (http://www.ci.buffalo.ny.us; http://www.ci.rochester.ny.us), the proceedings of the Suffolk County Legislature since 1991 (http://www.co.suffolk.ny.us/legis), the 2007 Nassau County local laws (http://www.nassaucountyny.gov/agencies/legis/index.html), and the local laws of Rockland County passed since 2006 (http://www.co.rockland.ny.us). Given the wide differences in content and design of these sites, the only way to find whether there is anything of value is to locate them with a search service like Google and then peruse the contents. ■

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New York State Consumer Protection Law and Class Actions – Part II

By Thomas A. Dickerson

In 2005, we reviewed 10 years' worth of consumer class actions brought pursuant to Article 9 of the N.Y. Civil Practice Law & Rules.[1] Now Part II of the article published in the *Journal*, in February 2008, discusses consumer class action cases reported from 2005–2007. It has been a good period for class actions, notwithstanding the reticence of some New York courts to certify mass torts,[2] or class actions challenging governmental operations[3] or asserting violations of statutory causes of actions that provide for an award of treble damages such as General Business Law § 340[4] or the federal Telephone Consumer Protection Act[5] (but not GBL § 349).[6] CPLR Article 9 class actions have primarily been brought on behalf of consumers[7] and employees, subcontractors and retirees,[8] property owners challenging tax assessments,[9] corporations and partnerships,[10] tenants,[11] property owners seeking oil and gas royalties,[12] and street vendors.[13]

Consumer class actions have asserted a variety of causes of actions including breach of contract,[14] quasi contractual claims and those seeking equitable relief,[15] breach of warranty,[16] fraud,[17] violations of GBL §§ 349 and 350,[18] and negligence.[19] They have also involved a variety of misrepresented or defective goods and services.

Advertising: One case worthy of note involved misrepresentations as to the number of copies of Spanish Yellow Pages printed and distributed annually.[20] In that case supreme court denied class certification because "the claims of the individual plaintiffs could be dealt with as efficiently, if not more so, in the Commercial Small Claims parts of the local courts."

Cars & Trucks: Among the noteworthy cases from 2007 in this consumer product class were one involving a defective Blue Tooth hands-free phone system in an Infiniti[21] and another involving failure to disclose the crash background of wrecked cars.[22]

Cigarettes: Of significance in 2007 was a First Department case involving "disputed interpretation of Master Settlement Agreement" brought attention to this contentious area of consumer law.[23]

Copying Costs: The Second Department ruled that "excessive charges" for "photocopying subpoenaed med-

ical records"[24] is an area of consumer law that warrants careful consideration.

Diamonds: The District Court of the Southern District of New York ruled on a jewelry case involving, among other things, "alleged price-fixing, anticompetitive conduct and other nefarious business practices."[25]

Drugs: Courts also ruled on several cases involving off-label marketing of Neurotin,[26] counterfeit Lipitor[27] and addictive OxyContin.[28] In the case involving the drug Neurontin, a class of purchasers asserted fraud claims, violations of GBL § 349 and alleged unjust enrichment "based on claims arising from 'off-label' uses," for which FDA approval had not yet been received. The claim, brought under GBL § 349, was dismissed due to an absence of actual injury.

In the OxyContin case the court had previously denied certification to a mass tort class action brought on behalf of "all prescribed users of the pain reliever drug, OxyContin." After the court forwarded the case to the New York Litigation Coordinating Panel, some 1,117 individual cases (plaintiffs resided in virtually all of the states in the nation as well as in Canada and the United Kingdom) were consolidated for discovery and pre-trial matters. Thereafter, the defendants moved to dismiss the 924 out-of-state cases on the grounds of inconvenient forum (CPLR 327) or require out-of-state plaintiffs to post a security for costs bond (CPLR 8501). The court denied the motion to dismiss the out-of-state claims but required each class member to post a security bond of $500, for a total of $462,000.

Electricity: Courts ruled on several cases involving electricity overcharges,[29] residential electric supply customer automatic renewal of contract without notice; failure to comply with GOL § 5-903[30] and seasonal electric service customers being overcharged in violation of the Public Service Commission (PSC) tariff.[31] In the overcharge case, following administrative litigation, the PSC ordered New York State Electric and Gas (NYSEG) to re-bill accounts of the two taxpayers and issue refunds where appropriate. As a result, the attorneys moved, on behalf of their clients, to vacate or modify a prior order to permit class certification and allow additional customers to obtain relief, a request which was denied.

With the attorneys' attempts to pursue a class action against NYSEG being stymied, they then commenced a proceeding essentially to impose a charging lien or constructive trust upon the refunds to be paid to other NYSEG customers, claiming that the refunds were due largely to their efforts in the prior litigation. In a similar action, plaintiffs in a class action challenging electricity rates stayed on grounds of primary jurisdiction, sought class certification after a ruling in their favor; thereafter a motion was denied, since the trial court had not retained jurisdiction and the plaintiffs failed to preserve issues on appeal. In its decision, the court observed the following: "We note that the PSC sent a letter to defendant in March 2004 requesting that it ascertain all other similarly situated customers who were adversely affected by defendant's misapplication of the tariff and to take necessary steps to re-bill such customers."

A proposed nationwide settlement provided for the issuance and guaranteed redemption of $3.5 million worth of discount coupons for the purchase of the defendant's snack products, and label monitoring and product testing.

Equipment Leases: In a case involving the failure to disclose all elements of equipment lease contracts,[32] the First Department observed that "[f]urther tending to show an intentional and deceptive concealment are allegations that defendants did not provide plaintiffs with fully executed copies of the leases and overcharged them by deducting amounts from their bank accounts greater than those called for by the leases."

Food & Drink: Cases involving Snapple marketing[33] and misrepresentations involving the fat and calorie content of Stay Slim products,[34] CremaLita frozen desserts,[35] and Pirate's Booty and Fruity Booty,[36] resulted in decisions of interest. In a case involving the Snapple Company, the plaintiff marketed, sold and distributed Snapple products to retail outlets in a certain area in New York City. The plaintiff commenced a class action against Snapple for unfair competition, and the court dismissed the complaint, finding that the distribution contract allowed Snapple to sell directly to public schools and municipal entities.

A class of consumers of Pirate's Booty, Veggie Booty and Fruity Booty brands snack food alleged that the defendant's advertising "made false and misleading claims concerning the amount of fat and calories contained in their products." A proposed nationwide settlement provided for the issuance and guaranteed redemption of $3.5 million worth of discount coupons for the purchase of the defendant's snack products, and label monitoring and product testing. The court noted that certification of the GBL claim may be appropriate if limited to New York residents and further held that "causes of action predicated on GBL 349 which do not require reli-

ance [may be certifiable, but] a nationwide class certification is inappropriate."

Hair Products: One consumer class action involved the failure to warn that "Easy Straight Hair Straightening System" may cause damage to hair and scalp.[37]

Insurance: Courts ruled on several cases involving insurance, including reduced reimbursements for medical supplies,[38] increased premiums without regard to factors in cost of insurance provisions,[39] inappropriate review procedures,[40] denial of MRI reimbursement because of absence of medical necessity,[41] termination of life insurance benefits,[42] challenge to demutualization[43] and challenge to issuance of dividends,[44] among other issues. In one case, the court certified a class of policyholders of flexible premium adjustable life insurance policies who alleged that the defendant "was not following the cost of insurance provisions in the policies when calculating the annual premiums . . . [which] were in excess of what they should have been according to the terms of the policies" and asserted, inter alia, claims of breach of contract, constructive trust and fraud in the sale of insurance contracts.

A class of health insurance participants alleged that the defendant's contracts provide "'all care – including hospitalization that is deemed to be medically necessary in accordance with the prevailing medical opinion within the appropriate specialty of the United States medical profession.'"[45] The plaintiffs alleged that it is the defendant's "practice to have unqualified lay personnel [rather than physicians] determine what care is medically necessary . . . based on actuarial utilization review guidelines that allegedly conflict with generally accepted medical standards." The court denied class certification because (1) the class definition was overbroad and (2) predominance of an individual's issues in the breach of contract and GBL § 349 claims.

A class of credit union members alleged breach of contract, breach of covenant of good faith and fair dealing, unjust enrichment and violation of GBL § 349 by the credit union. In dismissing the complaint, the court found that the documentary evidence "flatly contradicted the plaintiff's claim that the defendant . . . was obligated to maintain a group insurance policy for its members . . . that the credit union was authorized to terminate the insurance policy at any time."

In another case, a class of 10 million former policyholders "in Metropolitan Life Insurance company (MetLife), a mutual company, until MetLife converted to a stock insurance company" alleged, inter alia, a dilution of equity (injuries included "policyholders receiving a lower initial public offering price for the shares allotted to them"), sought approval of an opt-out notice, primarily, by publication together with a limited direct mailing of printed notices. Based upon a finding that the direct mail cost of individual notice "will certainly run into the millions of dollars" and that "it seems doubtful that significant numbers of class-members would desire to exclude themselves," the court granted the relief sought.

Loans/Credit Cards/Debit Cards: The factoring of accounts receivables.[46]

Mortgages: Courts ruled on several cases involving mortgages including document preparation fees that constitute the unlawful practice of law,[47] priority handling fees,[48] interest rate calculations,[49] late payment fees,[50] improper payments of yield spread premiums[51] and payoff statement fees.[52]

A class of mortgagees challenged the imposition of a $100 document preparation fee for services as constituting the unauthorized practice of law and violating Judiciary Law §§ 478, 484 and 495(3). Specifically, it was asserted that bank employees "completed certain blank lines contained in a standard 'Fannie Mae/Freddie Mac Uniform Instrument' . . . limited to the name and address of the borrower, the date of the loan and the terms of the loan, including the principal amount loaned, the interest rate and the monthly payment." Represented by counsel, the plaintiffs did not allege the receipt of any legal advice from the defendant at the closing. In dismissing the complaint the court held that charging "a fee and the preparation of the documents . . . did not transform defendant's actions into the unauthorized practice of law."[53]

A class of mortgagors challenged the defendant's $40 fee "charged for faxing the payoff statements" (which plaintiffs paid), asserting violations of GBL § 349 and Real Property Law § 274-a(2) ("mortgagee shall not charge for providing the mortgage-related documents, provided . . . the mortgagee may charge not more than twenty dollars, or such amount as may be fixed by the banking board, for each subsequent payoff statement") and "common-law causes of action alleging unjust enrichment, money had and received, and conversion."[54] The court sustained the statutory claims finding that the voluntary payment rule does not apply but does serve to bar the common law claims.

Mouthwash: In one case involving the popular mouthwash Listerine, misrepresentations were allegedly made claiming that "Listerine's as effective as floss."[55] In denying class certification, the court held that there was "no evidence that Pfizer increased the price of Listerine before, during or after the alleged false advertisements were made or otherwise received any inequitable financial gain from the product."

Shippers: In a case involving the imposition of "processing fees," a class of recipients of DHL packages sent from foreign countries challenged the imposition of such a fee ($5 or more).[56] The fee was defined by DHL as follows: "Conditions of Carriage: 'In the event that DHL advances customs or import duties/assessments on behalf of the consignee . . . a surcharge may . . . be assessed based on a flat rate or a percentage of the total amount advanced.'" The court denied class certification on the grounds of a lack of standing.

Telephones, Cell Phones & Faxes: Courts ruled on several cases involving digital mobile communications services and equipment,[57] "illegal 'slamming,'"[58] deficient cell phone service and failure to reveal additional or roaming charges,[59] and Add-A-Phone cell phone plans.[60] In one such case, a class of cell phone users claimed that the defendant misrepresented the availability of its Add-A-Phone "cell phone plan," distributed by Staples as a newspaper insert in approximately 200 newspapers nationwide. The plaintiff decided to sign up but claimed that the defendant "never fully honored the contract she entered into on September 18, 2001." In denying class certification, the court found the following: (1) a lack of numerosity ("Based upon the history of restitution provided to those who complained . . . there is only a minuscule number of actual potential class members who suffered injury as a result of defendants' allegedly fraudulent advertising"), (2) a lack of uniformity in advertising and plan contracts, and (3) a lack of typicality. In addition, the proposed nationwide class was unmanageable because the court would need "to apply the law of 50 different jurisdictions to the claims presented."

Tires: Courts ruled on cases alleging price fixing including one involving a class of tire purchasers who claimed "that defendants entered into a price-fixing agreement, overcharging tire manufacturers for [rubber processing chemicals], and that the overcharges trickled down the distribution chain to consumers."[61] These plaintiffs further alleged violations of GBL § 340 (the Donnelly Act) seeking "threefold the actual damages" and violations of GBL § 349, and made claims of unjust enrichment. After a careful analysis of the 1975 legislative histories of both CPLR Article 9 and the amendments to GBL § 340 ("treble damages provision and . . . costs and attorneys fees"), the court concluded that when "[r]ead together, we conclude that Donnelly Act threefold damages should be regarded as a penalty insofar as class actions are concerned. . . . Where a statute is already designed to foster litigation through an enhanced award, CPLR 901(b) acts to restrict recoveries in class actions absent statutory authorizations."[62]

Tools: Courts ruled on a case involving claims that tools marketed as being manufactured in the United States were made outside of the U.S.[63] In this case, a class of consumers alleged that Sears marketed its Craftsman tools "as 'Made in USA' although components of the products were made outside the United States as many of the tools have the names of other countries, e.g., 'China' or 'Mexico' diesunk or engraved into various parts of the tools." In dismissing the GBL § 349 claim the court found that plaintiffs had failed to prove actual injury, causation and territoriality.

Travel: Courts ruled on a case involving travel-related services, including foreign currency exchange rates applied to withdrawals from ATM machines outside the United States[64] and unsanitary "Spraypark" recreation facilities.[65] In a case involving Spraypark, class certification was granted by the Court of Claims on grounds that patrons alleged that the state was negligent in failing "to adequately maintain or monitor the sanitary conditions of the Spraypark water." The plaintiffs alleged that the Spraypark water "was contaminated with cryptosporidium, a highly contagious waterborne parasite [causing] abdominal cramping, diarrhea, nausea, vomiting, dehydration, fatigue, fever and loss of appetite."

TV & Cable: Courts ruled on several cases involving wrongfully collected "taxes and fees,"[66] unnecessary cable converter box rentals,[67] negative billing options[68] and violations of provisions of franchise agreements.[69]

In one case, the court sustained a GBL § 349 claim finding "'negative option billing' [violates] 47 U.S.C. § 543(f), which prohibits a cable company from charging a subscriber for any equipment that the subscriber has not affirmatively requested by name, and a subscriber's failure to refuse a cable operator's proposal to provide such equipment is not deemed to be an affirmative request."[70]

Water & Sewer Services: Improper imposition of 21% surcharge on past due accounts.[71]

Windows: Defective chemical preservative failed to keep windows from rotting and decaying.[72] ■

1. For a complete discussion of consumer class actions see Dickerson, *Class Actions: The Law of 50 States*, Law Journal Press, 2008, 6.04 (Class Actions) and 3 Weinstein Korn & Miller, *New York Civil Practice*, Article 9, Lexis-Nexis (MB) 901.05(3) (New York State).

2. *See Catalano v. Heraeus Kulzer, Inc.*, 305 A.D.2d 356, 759 N.Y.S.2d 159 (2d Dep't 2003); *Lieberman v. 293 Mediterranean Market Corp.*, 303 A.D.2d 560, 756 N.Y.S.2d 469 (2d Dep't 2003); *Aprea v. Hazeltine Corp.*, 247 A.D.2d 564, 669 N.Y.S.2d 61 (2d Dep't 1998); *cf. Osarczuk v. Associated Univs., Inc.*, 36 A.D.3d 872, 830 N.Y.S.2d 711 (2d Dep't 2007); *Fleming v. Barnwell Nursing Home & Health Facilities, Inc.*, 309 A.D.2d 1132, 766 N.Y.S.2d 241 (3d Dep't 2003); *Godwin Realty Assocs. v. CATV Enters.*, 275 A.D.2d 269, 712 N.Y.S.2d 39 (1st Dep't 2000); *Arroyo v. State of N.Y.*, 12 Misc. 3d 1197(A), 842 N.Y.S.2d 767 (N.Y. Ct. Cl. 2006); *Cunningham v. Am. Home Prods. Corp.*, N.Y.L.J., Sept. 21, 1999, p. 26, col. 5 (1st Dep't).

3. *See Mahoney v. Pataki*, 98 N.Y.2d 45, 745 N.Y.S.2d 760 (2002); *Jamie B. v. Hernandez*, 274 A.D.2d 335, 712 N.Y.S.2d 91 (1st Dep't 2000); *Davis v. Croft*, 237 A.D.2d 163, 654 N.Y.S.2d 374 (1st Dep't 1997); *cf. N.Y. City Coalition to End Lead Poisoning v. Giuliani*, 245 A.D.2d 49, 668 N.Y.S.2d 90 (1st Dep't 1997); *Chalfin v. Sabol*, 247 A.D.2d 309, 669 N.Y.S.2d 45 (1st Dep't 1998); *Yusuf v. City of N.Y.*, 309 A.D.2d 721, 766 N.Y.S.2d 554 (1st Dep't 2003); *Holcomb v. O'Rourke*, 255 A.D.2d 383, 678 N.Y.S.2d 698 (2d Dep't 1998); *Watts v. Wing*, 308 A.D.2d 391, 765 N.Y.S.2d 18 (1st Dep't 2003).

4. *See* Weinstein Korn & Miller, *supra* note 1, 901.28; *see also Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 831 N.Y.S.2d 760 (2007).

5. *See* Weinstein Korn & Miller, *supra* note 1, 901.28; *see also Giovanniello v. Carolina Wholesale Office Mach. Co.*, 29 A.D.3d 737, 815 N.Y.S.2d 248 (2d Dep't 2006); *Rudgayzer & Gratt v. Cape Canaveral Tours & Travel, Inc.*, 22 A.D.3d 148, 799 N.Y.S.2d 795 (2d Dep't 2005); *Leyse v. Flagship Capital Servs. Corp.*, 22 A.D.3d 426, 803 N.Y.S.2d 52 (1st Dep't 2005); *Ganci v. Cape Canaveral Tour & Travel, Inc.*, 21 A.D.3d 399, 799 N.Y.S.2d 737 (2d Dep't 2005); *Bonime v. Discount Funding Assocs., Inc.*, 21 A.D.3d 393, 799 N.Y.S.2d 418 (2d Dep't 2005). The courts have held that class action treatment of Telephone Consumer Protection Act claims is inappropriate under CPLR 901(b)'s prohibition of class actions seeking a penalty.

6. *See* Weinstein Korn & Miller, *supra* note 1, at 901.23(6)(c); *see also Lawlor v. Cablevision Sys. Corp.*, 15 Misc. 3d 1111(A), 839 N.Y.S.2d 433 (Sup. Ct., Nassau Co. 2007) (CPLR 901(b) not applied to GBL § 349 class actions if damages are limited to actual damages and class members may opt out).

7. *See* Dickerson, *New York Consumers Enjoy Statutory Protection Under Both State and Federal Statutes*, N.Y. St. B.J., Sept. 2004, p. 10; Dickerson, *Class Warfare, Aggregating and Prosecuting Consumer Claims as Class Actions - Part I*, N.Y. St. B.J., July/Aug. 2005, p. 18.

8. *See Jacobs v. Macy's E., Inc.*, 17 A.D.3d 318, 792 N.Y.S.2d 574 (2d Dep't 2005) (deductions for unidentified returns; class certification granted); *Lamarca v. Great Atl. & Pac. Tea Co. Inc.*, 16 Misc. 3d 1115(A), 847 N.Y.S.2d 897 (Sup. Ct., N.Y. Co. 2007) (off-the-clock wages; certification granted); *Alix v. Wal-Mart Stores, Inc.*, 16 Misc. 3d 844, 838 N.Y.S.2d 885 (Sup. Ct., N.Y. Co. 2007) (off-the-clock wages; certification denied); *Boss v. Am. Express Fin. Advisors, Inc.*, 6 N.Y.3d 242, 811 N.Y.S.2d 620 (2006) (challenging expense allowances; Minnesota forum selection clause enforced); *Matros Automated Elec. Constr. Corp. v. Libman*, 37 A.D.3d 313, 830 N.Y.S.2d 127 (1st Dep't 2007) (enforcing mechanics' liens; class certification denied); *ADCO Elec. Corp. v. McMahon*, 38 A.D.3d 805, 835 N.Y.S.2d 588 (2d Dep't 2007) (Article 3-A of Lien Law; time extended in which to move for class certification); *Rocco v. Pension Plan of N.Y. State Teamsters Conference Pension & Retirement Fund*, 5 Misc. 3d 1027(A), 799 N.Y.S.2d 163 (Sup. Ct., N.Y. Co. 2004) (motion to transfer granted).

9. *See Neama v. Town of Babylon*, 18 A.D.3d 836, 796 N.Y.S.2d 644 (2d Dep't 2005) (class certification denied; filing of a class action complaint "is not a sufficient indication of protest by each proposed class member"); *Vill. of Southampton v. Noa*, 13 Misc. 3d 1210(A), 84 N.Y.S.2d 754 (Sup. Ct., Suffolk Co. 2006) ("Generally, class actions are not favored as a vehicle for relief in real property tax certiorari proceedings.").

10. *See, e.g., Pressner v. MortgageIT Holdings, Inc.*, 16 Misc. 3d 1103(A), 841 N.Y.S.2d 828 (Sup. Ct., N.Y. Co. 2007) (settlement of class action challenging merger); *Sollins v. Alexander*, N.Y.L.J., July 28, 2006, p. 22, col. 1 (Sup. Ct., N.Y. Co. 2006) (selection of co-lead counsel approved); *In re N.Y. Stock Exchange/ Archipelago Merger*, 12 Misc. 3d 1184(A), 824 N.Y.S.2d 764 (Sup. Ct., N.Y. Co. 2005) (settlement approved).

11. *See, e.g., Chavis v. Allison & Co.*, 7 Misc. 3d 1001(A), 801 N.Y.S.2d 231 (Sup. Ct., Queens Co. 2005) (tenants seek to recoup damages for rent increase; complaint dismissed).

12. *See, e.g., Cherry v. Resource Am., Inc.*, 15 A.D.3d 1013, 788 N.Y.S.2d 911 (4th Dep't 2005) (class certification granted); *Freeman v. Great Lakes Energy Partners*, 12 A.D.3d 1170, 785 N.Y.S.2d 640 (4th Dep't 2004) (class certification granted).

13. *See, e.g., Ousmane v. City of N.Y.*, 7 Misc. 3d 1016(A), 801 N.Y.S.2d 238 (Sup Ct., N.Y. Co. 2005) (class of 20,000 licensed and unlicensed New York City street vendors challenge notices of violation; class certification granted).

14. *See* Weinstein Korn & Miller, *supra* note 1, 901.23(2).

15. *See* Weinstein Korn & Miller, *supra* note 1, 901.23(3).

16. *See* Weinstein Korn & Miller, *supra* note 1, 901.23(4).

17. *See* Weinstein Korn & Miller, *supra* note 1, 901.23(5).

18. *See* Weinstein Korn & Miller, *supra* note 1, 901.23(6).

19. *See* Weinstein Korn & Miller, *supra* note 1, 901.23(8).

20. *Nissenbaum & Assocs. v. Hispanic Media Group, USA*, 13 Misc. 3d 1216(A), 824 N.Y.S.2d 756 (Sup. Ct., Nassau Co. 2006).

21. *Mollins v. Nissan Motor Co.*, 14 Misc. 3d 1226(A), 836 N.Y.S.2d 494 (Sup. Ct., Nassau Co. 2007) (complaint dismissed; full refund).

22. *Jung v. The Major Auto. Cos., Inc.*, 17 Misc. 3d 1124(A) (Sup. Ct., Bronx Co. 2007).

23. *State v. Philip Morris, Inc.*, 30 A.D.3d 26, 813 N.Y.S.2d 71 (1st Dep't 2006) (dispute over interpretation of Master Settlement Agreement).

24. *Morales v. Copy Right, Inc.*, 28 A.D.3d 440, 813 N.Y.S.2d 731 (2d Dep't 2006) (complaint dismissed; voluntary payment doctrine).

25. *Leider v. Ralfe*, 387 F. Supp. 2d 283 (S.D.N.Y. 2005).

26. *Baron v. Pfizer, Inc.*, 42 A.D.3d 627, 840 N.Y.S.2d 445 (3d Dep't 2007).

27. *Dimich v. Med-Pro, Inc.*, 34 A.D.3d 329, 826 N.Y.S.2d 3 (1st Dep't 2006).

28. *In re OxyContin*, 15 Misc. 3d 388, 833 N.Y.S.2d 357 (Sup. Ct., N.Y. Co. 2007).

29. *Kantrowitz, Goldhamer & Graifman, P.C. v. N.Y. State Elec. & Gas Corp.*, 27 A.D.3d 872, 810 N.Y.S.2d 550 (3d Dep't 2006); *Twp. of Thompson v. N.Y. State Elec. & Gas Corp.*, 25 A.D.3d 850, 807 N.Y.S.2d 203 (3d Dep't 2006) (complaint dismissed; primary jurisdiction of Public Service Commission).

30. *Gentile v. Stay Slim, Inc.*, 11 Misc. 3d 1088(A), 819 N.Y.S.2d 848 (Sup. Ct., Queens Co. 2006) (denying class certification).

31. *KLCR Land Corp. v. N.Y. State Elec. & Gas Corp.*, 15 A.D.3d 719, 789 N.Y.S.2d 323 (3d Dep't 2005).

32. *Pludeman v. N. Leasing Sys., Inc.*, 40 A.D.3d 366, 837 N.Y.S.2d 10 (1st Dep't 2007).

33. *McGuckin v. Snapple Distribs., Inc.*, 41 A.D.3d 795, 837 N.Y.S.2d 576 (2d Dep't 2007).

34. *Emilio v. Robison Oil Corp.*, 15 A.D.3d 609, 790 N.Y.S.2d 535 (2d Dep't 2005) (denying certification).

35. *Brandt v. CremaLita Mgt. LLC*, N.Y.L.J., June 9, 2006, p. 29, col. 1 (Sup Ct., N.Y. Co. 2006).

36. *Berkman v. Robert's Am. Gourmet Food, Inc.*, 2007 WL 1815990 (Sup Ct., N.Y. Co. June 26, 2007).

37. *Hooper v. HM Mane Solutions, LLC*, 2006 WL 1214818 (Sup Ct., N.Y. Co. Mar. 15, 2006) (class certification denied; "mere purchase or use of Easy Straight is (not) actionable . . . without any injury").

38. *Globe Surgical Supply v. GEICO Ins. Co.*, 2006 WL 2042490 (Sup Ct., Nassau Co. July 19, 2006).

39. *Beller v. William Penn Life Ins. Co.*, 37 A.D.3d 747, 830 N.Y.S.2d 759 (2d Dep't 2007).

40. *Batas v. Prudential Ins. Co.*, 37 A.D.3d 320, 831 N.Y.S.2d 371 (1st Dep't 2007).

41. *Long Island Radiology v. Allstate Ins. Co.*, 2006 WL 1562091 (Sup. Ct., Nassau Co. June 7, 2006) (defendants' motion for summary judgment denied; plaintiff's cross-motion for summary judgment granted; class certification denied), *rev'd*, 36 A.D.3d 763, 830 N.Y.S.2d 192 (2d Dep't 2007).

42. *Cohen v. Nassau Educators Fed. Credit Union*, 37 A.D.3d 751, 832 N.Y.S.2d 50 (2d Dep't 2007).

43. *Fiala v. Metro. Life Ins. Co.*, 2007 WL 2772230 (Sup. Ct., N.Y. Co. Aug. 28, 2007).

44. *Rabouin v. Metro. Life Ins. Co.*, 25 A.D.3d 349, 806 N.Y.S.2d 584 (1st Dep't 2006) (decertification of global class of insureds).

45. *Batas*, 37 A.D.3d at 320.

46. *Mark Fabrics, Inc. v. GMAC Commercial Credit LLC*, N.Y.L.J., Dec. 22, 2005, p. 18, col. 3 (Sup Ct., N.Y. Co. 2006) (settlement approved; attorney fees reduced to "approximately 30% of the monetary recovery").

47. *Fuchs v. Wachovia Mortgage Corp.*, 41 A.D.3d 424, 838 N.Y.S.2d 148 (2d Dep't 2007); *see also Charter One Mortgage Corp. v. Condra*, 847 N.E.2d 207 (Ind. App. 2006), *transfer granted*, 860 N.E.2d 599 (Ind. Sup. 2006), *rev'd*, 865 N.E.2d 602 (Ind. Sup. 2007) ("if the completion of legal documents is incident to a lender's financing activities, it is generally not the practice of law, whether or not a fee is charged"); *King v. First Capital Fin. Servs. Corp.*, 215 Ill. 2d 1, 828 N.E.2d 1155 (2005) ("[T]he charging of a fee, without more, for the preparation of the loan documents by the lenders' employees did not transform their [permissible] conduct into the unauthorized practice of law"); *Dressel v. Ameribank*, 468 Mich. 557, 664 N.W.2d 151 (2003); *cf. Eisel v. Midwest Bankcentre*, 2006 WL 3408185 (Mo. App. E.D. Nov. 28, 2006), *aff'd*, 230 S.W.3d 335 (Mo. Sup. 2007).

48. *Dowd v. Alliance Mortgage Co.*, 32 A.D.3d 894, 822 N.Y.S.2d 558 (2d Dep't 2006) (holding that defendant was prohibited from charging fees for providing mortgage-related documents under Real Property Law § 274-a(2)).

49. *Daniel Fontana v. Champion Mortgage Co., Inc.*, 32 A.D.3d 453, 819 N.Y.S.2d 472 (2d Dep't 2006).

50. *Naposki v. First Nat'l Bank of Atlanta*, 18 A.D.3d 835, 798 N.Y.S.2d 62 (2d Dep't 2005) (defendant's efforts to moot plaintiff's claim by refunding his "late payment fee" was unavailing "as the defendant had not yet served an answer, and the plaintiff had not yet moved or was required to move for class certification").

51. *Shovak v. Long Island Commercial Bank*, 35 A.D.3d 837, 829 N.Y.S.2d 546 (2d Dep't 2006).

52. *MacDonell v. PHH Mortgage Corp.*, 45 A.D.3d 537, 846 N.Y.S.2d 223 (2d Dep't 2007).

53. *Fuchs*, 41 A.D.3d at 425.

54. *MacDonell*, 45 A.D.3d at 539.

55. *Whalen v. Pfizer*, 2005 WL 2875291 (Sup. Ct., N.Y. Co. Sept. 22, 2005).

56. *Kings Choice Neckwear, Inc. v. DHL Airways, Inc.*, 41 A.D.3d 117, 836 N.Y.S.2d 605 (1st Dep't 2007).

57. *Fortune Limousine Serv., Inc. v. Nextel Commc'ns*, 35 A.D.3d 350, 826 N.Y.S.2d 392 (2d Dep't 2006) (complaint dismissed; plaintiff failed to invoke any statute or case law authorizing it to serve as a "private attorney general to vindicate the rights of the public").

58. *Baytree Capital Assocs., LLC v. AT&T Corp.*, 2005 WL 3163921 (Sup. Ct., N.Y. Co. May 31, 2005) ("Slamming" is defined by the F.C.C. as the practice of changing a consumer's traditional (wired) telephone service provider, including local, state-to-state, in-state and international long distance service, without the consumer's permission (public notice DA 00-2427 (Oct. 27, 2000). Slamming is illegal (*id.*; 27 U.S.C. § 258); GBL § 349 and unjust enrichment claims and class allegations dismissed).

59. *Heiko Law Offices, P.C. v. AT&T Wireless Servs., Inc.*, 2005 WL 670778 (Sup. Ct., N.Y. Co. Feb. 22, 2005) (mandatory arbitration agreement enforced).

60. *Naftulin v. Sprint Corp.*, 2007 WL 2429499 (Sup. Ct., Kings Co. Aug. 27, 2007).

61. *Sperry v. Crompton*, 8 N.Y.3d 204, 831 N.Y.S.2d 760 (2007).

62. *Id.* at 214.

63. *Vigiletti v. Sears, Roebuck & Co.*, 42 A.D.3d 497, 838 N.Y.S.2d 785 (2d Dep't 2007), *cert. denied*, 9 N.Y.3d 818 (2008).

64. *Relativity Travel, Ltd. v. JP Morgan Chase Bank*, 2006 WL 2918081 (Sup Ct., N.Y. Co. Feb. 14, 2006) ("[V]iewing Chase's practices as a whole including the failure to list the surcharge on the Account Statement or on Chase's website and the failure to properly inform its representatives about the surcharge are sufficient, if proved, to establish a prima facie case (under G.B.L. § 349)").

65. *Arroyo v. State of N.Y.*, 2006 WL 2390619 (N.Y. Ct. Cl. June 29, 2006).

66. *Lawlor v. Cablevision Sys. Corp.*, 2007 WL 914199 (Sup Ct., Nassau Co. Mar. 22, 2007) (motion to dismiss GBL § 349 claim and class action allegations denied).

67. *Saunders v. AOL Time Warner, Inc.*, 18 A.D.3d 216, 794 N.Y.S.2d 342 (1st Dep't 2005) (GBL § 349 claim dismissed without prejudice for re-filing against the proper defendant).

68. *Samuel v. Time Warner Cable*, 10 Misc. 3d 537, 809 N.Y.S.2d 408 (Sup Ct., N.Y. Co. 2005).

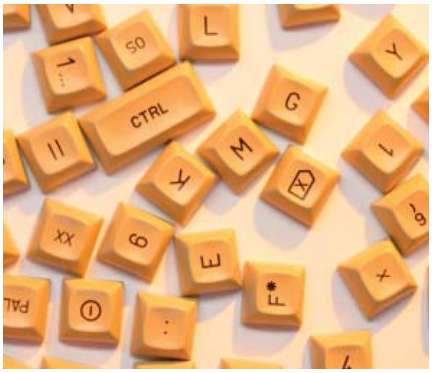
69. *Tepper v. Cablevision Sys. Corp.*, 19 A.D.3d 585, 797 N.Y.S.2d 131 (2d Dep't 2005) (no standing).

70. *Samuel*, 10 Misc. 3d at 548.

71. *Stevens v. Am. Water Servs., Inc.*, 32 A.D.3d 1188, 823 N.Y.S.2d 639 (4th Dep't 2006) (complaint in nature of Article 78 dismissed as time barred).

72. *Williams v. Marvin Windows*, 15 A.D.3d 393, 790 N.Y.S.2d 66 (2d Dep't 2005) (complaint dismissed; claims settled in Minnesota class action).

BY BRIAN D. CASEY



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Electronic Witnesses: The Use of Event Data Recorders in Motor Vehicle Accidents

A wealth of information may be available for use in cases involving motor vehicle accidents if the vehicles were equipped with event data recorders. Sometimes referred to as black boxes or sensing diagnostic modules, event data recorders in automobiles are similar to flight data recorders used in commercial airplanes.[1] Event data recorders were first installed in a small number of vehicles made by General Motors in 1974 and became widespread during the 1990s as automobile manufacturers were required to install safety airbags.[2] These recorders gather, interpret, and store data relevant to airbag deployment.[3] By one estimate, 70% of cars and trucks manufactured in 2004 were equipped with event data recorders.[4]

This article provides an overview of the history of event data recorders, outlines relevant case law, and makes suggestions for securing and preserving evidence from event data recorders for use in litigation.

Overview

An event data recorder will preserve approximately five to 20 seconds of pre-impact data.[5] The data include crucial information regarding braking, steering, vehicle speed, changes in velocity, and the use of – or failure to use – seatbelts, vehicle lights, and turn signals.[6] Significantly, the recorded data are now readily available to interested parties. In 2000, Vetronix Corporation began marketing a crash data retrieval system that permits a user to connect a laptop computer to an event data recorder, download the recorded data, and display it in the form of graphs and tables.[7] The list price of the Vetronix crash data retrieval system at the time of this writing is $2,595.[8]

Courts have consistently held that event data recorder technology and the retrieved data are reliable and, therefore, admissible under the *Frye* evidentiary standard.[9] One of the earlier such cases is *Bachman v. General Motors.* The plaintiff in *Bachman* alleged that she sustained serious personal injuries when her 1996 Chevrolet Cavalier's airbag inadvertently deployed, causing her to lose control of the vehicle.[10] General Motors sought and obtained a *Frye* hearing regarding admissibility of data downloaded from the event data recorder in the plaintiff's automobile.[11] The trial court, following the *Frye* hearing, determined that the downloaded data was admissible at trial under the *Frye* standard.[12]

The appellate court affirmed the trial court's ruling,[13] finding that the process of recording and downloading event data recorder information was not a novel technique or method.[14] The court noted that crash sensors such as the event data recorder had been in production in automobiles for over a decade, and the microprocessors that run them and record their data also run everyday appliances such as computers and televisions.[15]

Post–*Bachman*

New York courts have followed *Bachman*'s lead. In *People v. Christmann*, a New York State trooper used computer equipment in his police car to download information from the event data recorder in a defendant's vehicle shortly after a fatal automobile-pedestrian accident.[16] The trooper, in fact, had used Vetronix's crash data retrieval system to download the data.[17] The court cited to *Bachman* for the proposition that data retrieved from an event data recorder was generally accepted as reliable and accurate and, therefore, admissible in evidence.[18]

In *People v. Hopkins*, the defendant was charged with murder in the second degree, leaving the scene of an accident resulting in death or serious injury, and reckless driving.[19] Data downloaded from the event data recorder in the defendant's Cadillac showed that three to four seconds before impact the defendant was traveling 106 miles per hour.[20] The defendant moved for a *Frye* hearing to challenge the reliability of the data from the event data recorder.[21] The People opposed the defendant's request and urged the court to adopt the findings of *Bachman* and *Christmann*.[22] The People also submitted to the court several published articles regarding event data recorders.[23] The court determined that event data recorder technology was generally accepted as reliable in the relevant scientific community and, therefore, a *Frye* hearing was unnecessary to determine the admissibility of that evidence at trial.[24]

In *People v. Slade*, a *Frye* hearing was conducted to determine the admissibility of event data recorder information

pursuant to the *Frye* standard.[25] The defendants were each charged with two counts of manslaughter in the second degree following a high speed drag race between a 2002 Corvette and a 2002 Mercedes Benz.[26] At the *Frye* hearing, the People presented testimony from an expert witness regarding the scientific reliability and general acceptance of the event data recorders.[27] The testimony included an explanation of Vetronix's crash data retrieval system, which had been used to download the data.[28] Following the *Frye* hearing, the court found that the event data recorders and their underlying data were generally accepted as reliable in the relevant scientific community and, therefore, the *Frye* standard had been satisfied.[29] In support of its holding, the court cited to *Bachman* and *People v. Christmann*.[30]

In *Figueroa v. Gallager*, the plaintiffs alleged they sustained injuries when the front and side airbags in a 2002 Chevrolet Trailblazer failed to deploy upon impact.[31] General Motors moved for summary judgment on various grounds, including that the airbags functioned properly and the injuries were not enhanced by the non-deployment of the airbags.[32] General Motors supported the motion with an affidavit from one of its employees who served as a mechanical and automotive engineer with expertise in airbag design and safety.[33] General Motors' engineer, in his affidavit, testified that he had retrieved data from the module that controlled deployment of the airbags and that, based upon his analysis of the data, the impact to the front and side areas of the vehicle was not sufficient to cause the airbags to deploy.[34] Thus, he concluded, the airbags had functioned as designed.[35]

In opposition, the plaintiffs submitted an affidavit from, in the court's words, "a purported automobile safety expert."[36] That expert claimed the airbags had failed.[37] In reply, General Motors argued that the plaintiffs' expert was not an automotive engineer with any recognized expertise in the design of airbags, and that the plaintiffs' expert did not refer to any recognized measurements, tests, or other expert analysis or studies in support of his conclusions.[38] The court in *Figueroa*, without discussing the reliability or admissibility of data retrieved from event data recorders, concluded that there was no triable issue of fact with respect to any design defect and that General Motors was entitled to summary judgment.[39]

Open Questions

Despite the fact that information from event data recorders is generally available and likely admissible, there are certainly open questions regarding the infallibility of event data recorders.

For example, some experts have noted that information from event data recorders might be misleading unless interpreted by a competent accident reconstruction expert.[40] There are concerns that event data recorders only reliably detect movement when the principal direction of the automobile is forward, and movement of the automobile with respect to rear-end and side-impact accidents may not be detected by the event data recorder.[41]

There exists the possibility that the event data recorder itself may be damaged in the accident, as well as the potential loss of electrical power that permits the event data recorder to function after impact.[42] The General Motors' event data recorder may be inaccurate by up to one second.[43] Information may be erased by the jarring of the event data recorder following the accident.[44]

The governor of Maine, John Baldacci, was involved in an incident that serves either as an example of the possible unreliability of event data recorder information or the privileges of high office.[45] Baldacci's Chevrolet Suburban, which was operated by a driver, slid off an icy roadway.[46] The event data recorder placed the speed of the vehicle, at the time of airbag deployment, at 71 miles per hour; the event data recorder also indicated that Baldacci was not wearing his seatbelt at the time of the accident.[47]

There are concerns that event data recorders only reliably detect movement when the principal direction of the automobile is forward, and movement of the automobile with respect to rear-end and side-impact accidents may not be detected by the event data recorder.

That information was contradicted by the driver, who claimed that he was traveling at 55 miles per hour, and a State Police accident reconstruction expert, who estimated the speed of the vehicle at 55 to 65 miles per hour.[48] Moreover, Baldacci and his driver both claimed that Baldacci was wearing his seatbelt at the time of the accident, and Baldacci's doctors stated that Baldacci's minor injuries were consistent with seatbelt use.[49] Maine's Public Safety Commissioner ultimately adopted Baldacci's version of events.[50]

In any event, it is imperative that event data recorder information be secured as soon as possible following an accident, and that the retrieval of the information be performed by well-qualified experts. *Figueroa v. Gallager*, noted above, illustrates that an expert lacking qualifications in automobile safety, automobile engineering, or airbag design may not be the right person for the job.[51]

Securing and Preserving Evidence

Additionally, to thwart potential claims of spoliation of evidence, it is prudent to place all interested parties on notice of the time and place for the downloading of information from the event data recorder and any related inspection of

the vehicle. The failure to place other parties on notice will simply permit those parties to argue that the retrieval of the event data recorder information was performed improperly. Such arguments, if persuasively presented, may impact the weight the trier of fact gives to the event data recorder evidence or, in the worst-case scenario, result in severe sanctions to litigants, including dismissal of a complaint or striking of an answer.

Once information is retrieved from an event data recorder, that information must be preserved so that it may be shared with other parties to the litigation during the course of pre-trial discovery. Attorneys should, as a matter of course, make demand for disclosure of information from event data recorders as part of standard discovery demands in any case involving an automobile accident. If a vehicle, shortly after an accident, falls into the hands of an uncooperative third party, attorneys should make use of available procedural devices for obtaining pre-litigation discovery so that the vehicle may be inspected and information from the event data recorder may be retrieved and preserved.[52] ■

1. Andrew Askland, Ph.D., *The Double Edged Sword That Is the Event Data Recorder*, 25 Temp. J. Sci. Tech. & Envtl. L. 1 (Spring 2006).
2. *Id.*
3. *Id.* at 1–2.
4. *Id.* at 3.
5. *Id.* at 2.
6. *Id.*
7. *Id.* at 6; Kevin J. Powers, *David Hasselhoff No Longer Owns the Only Talking Car: Automotive Black Boxes in Criminal Law*, 39 Suffolk U. L. Rev. 289, 298 (Jan. 2005).
8. sbcommerce.vetronix.com
9. *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923).
10. *Bachman v. General Motors.*, 332 Ill. App. 3d 760, 765–66, 776 N.E.2d 262, 270–71 (Ill. App. Ct. 2002).
11. *Id.* at 766, 776 N.E.2d at 271.
12. *Id.* at 770, 776 N.E.2d at 274.
13. *Id.* at 778, 776 N.E.2d at 280.
14. *Id.* at 779, 776 N.E.2d at 281.
15. *Id.* at 779–80, 776 N.E.2d at 281.
16. *People v. Christmann*, 3 Misc. 3d 309, 310–11, 776 N.Y.S.2d 437 (Vill. of Newark Justice Ct. 2004).
17. *Id.* at 311.
18. *Id.* at 315–16.
19. *People v. Hopkins*, 6 Misc. 3d 1008(A), 800 N.Y.S.2d 353 (Monroe Co. Ct., 2004).
20. *Id.* at 4.
21. *Id.* at 12.
22. *Id.* at 12–13.
23. *Id.* at 13.
24. *Id.* at 14.
25. *People v. Slade*, No. 0666-03, 233 N.Y.L.J. 11 (Sup. Ct., Nassau Co. Jan. 18, 2005).
26. *Id.* at 1–2.
27. *Id.* at 10.
28. *Id.* at 11.
29. *Id.* at 14.
30. *Id.*
31. *Figueroa v. Gallager*, 20 A.D.3d 385, 386, 798 N.Y.S.2d 143 (2d Dep't 2005).
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 387.
37. *Id.*
38. *Id.*
39. *Id.*
40. Askland, *supra* note 1, at 6.
41. *Id.*
42. Patrick R. Mueller, *Every Time You Brake, Every Turn You Make – I'll Be Watching You: Protecting Driver Privacy in Event Data Recorder Information*, 2006 Wis. L. Rev. 135, 181 (2006).
43. *Id.*
44. Powers, *supra* note 7, at 298.
45. Mueller, *supra* note 42, at 186.
46. *Id.*
47. *Id.* at 182–83.
48. *Id.*
49. *Id.* at 183.
50. *Id.*
51. *Figueroa v. Gallager*, 20 A.D.3d 385, 798 N.Y.S.2d 143 (2d Dep't 2005).
52. CPLR 3102(c) provides that disclosure may be obtained before an action is commenced for the purpose of aiding in bringing an action or to preserve information, but only upon court order.

Law Day 2008 – "The Rule of Law"

The New York State Bar Association's Law, Youth and Citizenship (LYC) Program will celebrate this year's American Bar Association Law Day, offering a variety of resources for teachers, schools and the general public. The theme for 2008 is "The Rule of Law."

Last year's theme "Youth Empowering Youth" inspired NYSBA's new Youth Service Advocate Program and an LYC-produced mock-trial training video. *Mock Trial 101* and the Youth Service Advocate Program won one of the ABA's four Law Day 2007 Outstanding Activity Awards. This year, LYC continues this tradition, reaching out to schools and the community with innovative resources and materials, and forging strong partnerships with other groups, to promote the benefits of the Rule of Law.

Preparations for Law Day 2008 began last summer with a summit meeting, "Law Day: Sustaining the Program," at the Bar Center in Albany. New York education and Bar leaders from across New York met to discuss strategies and initiatives to promote both Law Day and civics education and to disseminate and sustain Law Day resources statewide.

The result of the summit was a list of resources and strategies for New York schools to help increase student achievement in citizenship education. The materials cut across multiple content areas and are packaged into an online civics education toolkit developed by the New York State Education Department.

NYSBA and LYC's Law Day partnership includes the New York Newspaper Publishers Association's Newspaper in Education Program. Newspapers across the state are publishing a five-part series highlighting this year's theme, "The Rule of Law." Each part in the series focuses on a significant Supreme Court case that originated in New York State and includes a classroom activity. A teacher's guide with student worksheets is available.

For more information on Law Day, contact lyc@nysba.org. If you are aware of any student activities planned in your area, please urge teachers and school personnel to explore the LYC Web site, www.lycny.org.

Law Day

A PROCLAMATION BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

WHEREAS it is fitting that the people of this Nation should remember with pride and vigilantly guard the great heritage of liberty, justice and equality under law which our forefathers bequeathed to us; and

WHEREAS it is our moral and civic obligation as free men and as Americans to preserve and strengthen that great heritage; and

WHEREAS the principle of guaranteed fundamental rights of individuals under the law is the heart and sinew of our Nation, and distinguishes our governmental system from the type of government that rules by might alone; and

WHEREAS our government has served as an inspiration and a beacon light for oppressed peoples of the World seeking freedom, justice and equality of the individual under law; and

WHEREAS universal application of the principles of the rule of law in the settlement of international disputes would greatly enhance the cause of a just and enduring peace; and

WHEREAS a day of national dedication to the principle of government under law would afford us an opportunity better to understand and appreciate the manifold virtues of such a government and to focus the attention of the World upon them;

NOW, THEREFORE, I, DWIGHT D. EISENHOWER, President of the United States of America, do hereby designate Thursday, May 1, 1958 as Law Day - USA. I urge the people of the United States to observe the designated day with appropriate ceremonies and activities, and I especially urge the legal profession, the press, and the radio, television and motion picture industries to promote and to participate in the observance of that date.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this Third Day of February in the Year of our Lord Nineteen Hundred and Fifty-eight, and of the Independence of the United States of America the One Hundred and Eighty-second.

(Signed) DWIGHT D. EISENHOWER By the President

JOHN FOSTER DULLES Secretary of State
The White House
February 3, 1958

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I devote a large part of my law practice to commercial real estate, including lease negotiation on behalf of a client who owns office buildings in the vicinity of my own office. Recently, I received a signed letter of intent from a broker engaged by my client outlining the terms of a new lease to an accountant, covering approximately 1,500 square feet for general office use.

I prepared the lease. As is often the case, the letter of intent provided the name and current address of the tenant, but did not include the name of an attorney representing the tenant. I called the broker who confirmed that no attorney had been identified by the tenant and, as I customarily do in such instances, I e-mailed the draft lease directly to the tenant. In my covering message, I requested that after review by him and counsel, he ask his attorney to call me to discuss the draft.

The following week I received a call from the prospective tenant. He asked me if he really needed an attorney to review the lease. Before I could even respond, he told me that he did not want to pay an attorney to do the work; that the cost of moving his office and preparing and furnishing the new space was taxing enough; and that colleagues who already rented space from my client assured him that he ran an efficient building and did not gouge his tenants. He then stated that he read the lease and asked if I could just answer a few questions.

Although I did not know my exact ethical and professional obligations in this situation, my antennae did go up so I punted and told him that I would get back to him. I grabbed my portable Code of Professional Responsibility and began to leaf through the applicable sections, but I am still not 100% sure what to do. I do not want to kill this deal by being overcautious and refusing to talk to this tenant (as I know the space has been empty a long time), but on the other hand, I do not want to compromise my allegiance to my client or do what is ethically or professionally improper. Please advise.

Signed,
Lost in Leaseland

Dear Lost in Leaseland:

As is often the case in questions of professional responsibility, the answer is not a simple "yes" or "no."

Disciplinary Rule 7-104, commonly referred to as the "no contact" rule, will assist you in resolving your dilemma. Section A of that Rule provides that when representing a client, a lawyer shall not "[c]ommunicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party." Your initial transmission of the draft lease directly to the prospective tenant did not offend this rule, because at the time you sent your e-mail you were unaware of any attorney representing this tenant. Nor did your subsequent telephone conversation with the tenant violate the rule, as he was not represented by an attorney at that time either.

However, you were correct in feeling uncomfortable when the tenant requested your assistance in reviewing the lease. As stated in EC 7-18, "[t]he legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel." Whether the matter consists of a contract negotiation, dispute resolution, or a real estate deal, a better result can be achieved if there is an attorney who zealously advocates for each party involved. Separate representation of all parties also avoids a conflict of interest that easily could arise if an attorney is asked advice by an unrepresented party. Bearing that in mind, I suggest that you disregard the tenant's objections to obtaining counsel, and use your adversarial skills to persuade him that it is better to engage his own attorney than to proceed on his own. Try to convince him that it would be far more beneficial to have someone knowledgeable assist him in understanding all the legal and business issues involved, and who then would be able to advocate on his behalf. If he responds that he does not know an attorney with expertise in this area, one solution would be to give him three names, or refer him to the local bar association's referral service.

If the tenant nevertheless insists on representing himself, you need not instantly hang up the telephone. The acceptable latitude of your interaction then depends upon the nature of his inquiries. Are they essentially factual in nature (*e.g.*, whether the security deposit will be put in an interest-bearing account, if building services are available on weekends, or whether the landlord will repaint the premises) – or are they legal? If they fall within the former category, you can reply. However, prior to answering even these types of questions you may want to ask the tenant to sign a letter

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.

for your file in which he acknowledges that you advised him to obtain counsel but that he declined to do so, and that he understood that you were representing the landlord's interests in this matter.

Another solution would be to direct the tenant to your client, or the broker, for answers to factual questions.

Other relevant factors in evaluating your professional responsibilities in this situation would be the experience and intelligence of the tenant, and the nature of the deal. The tenant in your fact pattern is an accountant, who presumably will have a certain level of experience in reviewing documents such as leases. Also to be considered is the complexity of the deal; this is not a lease of an entire floor or building, but rather of a single office of limited size. Given these circumstances, questions that do not go beyond the merely factual should give some comfort that you remain within the permissible bounds of professional responsibility when you answer them.

However, if the questions posed by this tenant are in the nature of seeking "legal advice," you cannot answer. DR 7-104 forbids a lawyer from "[g]iv[ing] advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer's client." As you undoubtedly know, a commercial lease typically is replete with provisions that are one-sided or highly favorable to the party preparing the initial draft, usually the landlord. In this case the landlord is working through you, his attorney.

As a result, there will be many sections in which the interests of the tenant will conflict with the interests of your client, and inquiries by the tenant about any of these sections will place you in an untenable position. For example, if the tenant were to pose questions on grace periods for defaults, hold-over penalties, restrictions on assignment and subleasing, or on other landlord-oriented provisions (all of which are often negotiated by savvy tenant's attorneys), you would be forbidden by this rule to give him advice, as the interests of your client and his interests are diametrically opposed. Counseling the tenant on these issues would both affect the loyalty you owe to your own client and deprive the tenant of the zealous advocacy that he deserves. Therefore, your sole recourse when faced with requests for legal advice, as opposed to mere factual inquiries, would be to advise the tenant that you are ethically prohibited from answering his questions, and to urge him to secure counsel.

In sum, you were correct to grab your Code of Professional Responsibility. Kudos for recognizing that this was a sticky situation that merited a careful analysis of your ethical and professional obligations.

The Forum, by
Susan F. Gibralter
Scarsdale, New York

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am a third-year associate in a small law firm. The principal partner (I'll call him "Rayne Maker") has developed a large and successful practice, with white-collar crime defense being foremost among practice areas. For the past several months I have been working closely with one of our white-collar clients ("Buck Sharp"), and have had multiple contacts with him, reviewing his records and drafting documents for his signature.

A few days ago Mr. Sharp came to my office with an envelope. He presented it to me and said it was a gift in appreciation of my efforts on his behalf. In the envelope was a lot of cash – two thousand dollars, in hundred-dollar bills. You can easily imagine my surprise (and joy) counting the bills: A nice birthday present for my wife! (Or five months of student loan payments.) After the initial euphoria passed, I inquired and learned that the firm has no policy on gifts. Up to this point I have told no one about the cash.

As you may have surmised, I would not be writing to the Forum if I felt totally comfortable with receiving and keeping the gift, and not telling Mr. Maker. Are there any rules that might guide me in this?

And, would your advice be any different if Mr. Sharp had said to me: "The only gift I would like in return is your making sure Rayne Maker directs his personal attention to my case and gives it priority"?

Thank you for your help.

Sincerely,
Concerned About the Cash

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Please comment on the word *tase*, which *The New Oxford American Dictionary* says is a runner-up to its "2007 Word of the Year." If that indeed is a word, shouldn't it be spelled *taser*?

Answer: That depends. The verb *tase* was created because of the assumption *tase* was created from an original noun, *taser*, and a verb created from that noun would be "to tase." That same assumption gives us *act* from *actor*, *play* from *player*, and other analogous forms. (In fact both *player* and *actor* were nouns created from the original Old English verbs.)

Taser however, did not begin as a noun. It was created as an acronym from the first letters of the title "Thomas A. Swift Electric Rifle." Tom Swift was the boy-hero of early-20th-century action novels that were immensely popular with teenage boys of that period. Perhaps a majority of journalists remember Tom Swift novels. At any rate, most writers seem to retain the noun when they use it as a verb, although this is just my impression.

Speaking of the choice of the "Word of the Year," the dictionary named as the winner of that title the word *locavore*, a compound that may be created from the word *local* plus the final syllable of the word *carnivore*. *Locavore* seems to describe people who prefer to buy food in season from local farmers or to grow it themselves. The word *carnivore*, which means "flesh-eater," is derived from the Latin *carni* ("flesh") plus the Latin verb *vorare* ("to swallow up"). Thus *locavore* would aptly describe "people who prefer to eat locally grown food."

The words chosen as Word of the Year are often odd and short-lived, surviving for only a brief time. One candidate word might be "subprime," which leaped into prominence with the down-turn in the economy, exacerbated by loans made to people who were then forced to default on their payments. On this college campus, law students have changed the adjective to a verb and adapted it to refer to a more topical problem, commenting, "I subprimed my final exam!"

Another Word of the Year is "truthiness," which won the American Dialect Society's top slot in 2005 and Merriam-Webster's in 2006. *Webster's New Millennium* (Dictionary of English) defines *truthiness* as meaning: "The state of wishing things to be true; . . . conformity to beliefs one feels or wishes were true." "Truthiness" is therefore distinguishable from *truthfulness*, which means "the quality of being true." Like "virtual reality," *truthiness* is only the implication, not the reality, of truth. In fact, *truthiness* describes the opposite of reality. It is used pejoratively to indicate something one implies as true although it is untrue.

Television comedian Stephen Colbert coined the noun *truthiness* to indicate those things one claims to know intuitively, instinctively or from the gut, ignoring evidence, logic, intellectual examination or actual facts. Television watchers, bombarded by the assertions made by all candidates during the current presidential campaign, can understand that a coinage was needed to euphemistically describe their statements. Since *truthiness* is a handy word, expandable beyond politics, it may survive beyond the political campaign.

Occasionally, words that were candidates for Word of the Year disappear for a while, then re-emerge with new identities. The noun *ripoff* is a good example. Of course the word *rip* had been around for a long time, both as a verb since about 1770 meaning "tear or cut apart violently," and as a now-archaic noun, which meant "a dissolute person" or "some valueless article."

But during the early 1970s, the phrase *ripoff* emerged with a new meaning. It was first noticeable on this college campus in 1971. When I first heard some students use it, I asked students in my freshman English class what they thought it meant, and almost none of the students were able to define it. But *ripoff* rapidly became popular on campus, both as a verb and as a noun; and a year later, almost every student then in my freshman English class could define it accurately.

As a verb, they defined *ripoff* to mean to "rob or steal from," and soon it expanded to include "cheat"and "swindle." The noun *ripoff* meant either "robbery" or "theft,"or, as a verb or a noun, "swindle."

Adults, especially those who considered themselves young-in-heart, gradually adopted *ripoff*, at first often misusing it. But in a short time the public understood the term to have the original meanings assigned by its youthful innovators. However, *ripoff* then declined in popularity as quickly as it had emerged. By the late 1980s it was seldom heard or seen, although in its 1985 edition, *The American Heritage Dictionary*, College Dictionary, still listed it.

But now the verb seems to have been re-born. Although it has lost its second syllable, it retains its original meanings of figurative violence, tearing, or slashing. You can "rip" a thing ("The critic ripped the silly movie"), or a person ("Ultra-conservatives have ripped John McCain for being too moderate"). As slang, you may use it in the phrase *let rip* ("allow to proceed at full speed or violently"). Since it has returned to its earliest meaning, *rip* can no longer be a candidate for Word of the Year, but it will probably have a longer life. ■

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to use the telephone." "The court's rules require the parties to appear at 9:30 a.m." Apostrophes for some inanimate objects look inelegant. *Inelegant:* "Section 8's provisions require plaintiffs to seek administrative review." *Therefore:* "The provisions of Section 8 require plaintiffs to seek administrative review." Another inelegant apostrophe: "ABC Corporation's (ABC) stock certificates." *Therefore:* "The stock certificates of ABC Corporation (ABC)."

Some writers recommend using an apostrophe "s" after a singular possessive ending in a sibilant (ch, s, sh, x, z, and zh sound). Others use an apostrophe but omit the "s" after the apostrophe. The Legal Writer recommends adding an apostrophe "s." *Examples:* "Schwartz's brief"; "Myers's letter"; "boss's memo"; "witness's statement." The apostrophe "s" rule applies to sibilants, not to words that merely end in ch, s, sh, x, or z. *Incorrect:* Illinois's. *Correct:* Illinois'. The "s" in Illinois is pronounced as a "y": "ill-in-oy," not "ill-in-oise."

Overusing quotation marks will make you look egotistical or sarcastic.

In informal writing (and Legal Writer columns), use apostrophes to indicate a contraction: "Cannot" *becomes* "can't." "Do not" *becomes* "don't." "He is" *becomes* "he's." "I am" *becomes* "I'm." "It is" or "it has" *becomes* "it's" (different from the possessive "its"). "She is" *becomes* "she's." "They are" *becomes* "they're" (different from the possessive "their" or the location "there"). "We are" *becomes* "we're" (different from the subjunctive or the past plural "were"). "Who is" *becomes* "who's" (different from the possessive "whose"). "Would not" *becomes* "wouldn't." "You are" *becomes* "you're" (different from the possessive "your"). "You have" *becomes* "you've." *Examples:* "He's the firm's hardest-working attorney." "Who's going to cross-examine the witness?" "Don't argue with the judge."

Use apostrophes to omit letters. *Examples:* "Rockin' with the Oldies" (omitting a "g"). "Good ol' boy" (omitting a "d"). "Bucket o' chicken (omitting an "f"). "Wishin' you luck" (omitting a "g"). Use apostrophes to omit figures. *Examples:* "The Supreme Court wrote the decision in '01."

Use apostrophes to omit "of" in dates. *Example:* "He was released after 25 years' imprisonment."

Never use an apostrophe for pronouns that express ownership. *Correct:* "hers," "his," "its," "ours," "theirs," and "yours."

Don't use an apostrophe "s" after a plural possessive ending in a sibilant. *Incorrect:* "The courts's rules require 15 copies." *Correct:* "The courts' rules require 15 copies."

Pluralize a proper noun ending in a sibilant by adding an "es." *Correct:* "The Fishes" (members of the Fish family). Form the plural possessive by adding an apostrophe after the "es." *Example:* A book that belongs to more than one Fish is "the Fishes' book," not "the Fish' book" or "the Fishes's book." *Incorrect:* "The Jones' house" or "the Joneses's house." *Correct:* "The Joneses' house."

Use an apostrophe "s" for possessive-case plurals. *Examples:* "daughters-in-law's," "fathers-in-law's," "mothers-in-law's."

Some nouns look like plurals and are pronounced like singulars but take no apostrophe, even when they're possessive. *Incorrect:* "United States's brief" or "United States' brief." *Correct:* "United States brief" or "brief for the United States."

Use an apostrophe "s" after a second singular proper noun to show unity. *Example:* "Joe and Bob's firm hired three new attorneys." (Joe and Bob work for the same firm.)

Use an apostrophe "s" after each singular proper noun to show disunity. *Example:* "Mary's and Jane's attorneys moved for a mistrial." (Mary had an attorney; Jane had her own attorney.) When one of the possessors in a compound possessive is a personal pronoun, put both possessors in the possessive form to avoid confusing the reader. *Incorrect:* "Josh and my computers were erased last night." If you don't put an apostrophe "s" here, the reader will believe that Josh was erased last night. *Correct:* "Josh's and my computers were erased last night.

For numbers and abbreviations, it's optional to put an apostrophe before the "s." Use them to eliminate confusion. If your reader will understand you if you don't use an apostrophe, don't use one. 1960's or 1960s? "1960s" is more common, but "1960's" isn't tragic. Consider, however, the following example: "Judge Roe presided in the '40s." Putting an apostrophe before the "s" will confuse readers; leave it out.

"As" or "A's? *Example:* "She received only As in law school." "As" will confuse the reader: It could stand for the plural of "A" or the word "as."*Therefore:* "She received only A's in law school." UFOs or UFO's? Use an apostrophe if the reader will be confused without it.

Don't add an apostrophe to pluralize an abbreviation that has no internal periods. *Incorrect:* "OK's." *Correct:* "OKs." Add an apostrophe to the "s" to abbreviations that have internal periods. *Incorrect:* "J.D.s." *Correct:* "J.D.'s." *Incorrect:* "R.N.s." *Correct:* "R.N.'s." *Incorrect:* "Ph.D.s." *Correct:* "Ph.D.'s."

American holidays and greetings: "April Fool's Day," "Father's Day," "Mother's Day," "New Year's Day," "St. Patrick's Day," "St. Valentine's Day," and "Season's Greetings" all have their singular possessive form. "All Souls' Day" (Halloween) and "Parents' Day" take the plural form. "Martin Luther King Jr. Day" has no possessive. "Presidents Day" and "Veterans Day" are plural but not possessive; we celebrate the holiday in honor of Presidents Washington and Lincoln

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and for our veterans, but the holiday is everyone's holiday. "Daylight Saving Time" isn't possessive or plural.

12. Em and en dashes. An "em" dash ("—") is as wide as the capital letter "M" or sometimes longer, depending on the printer. In typing, the em dash is represented by two hyphens ("--"). An "en" dash ("–") is as wide as the capital letter "N." In print, an en dash is twice as wide as a hyphen ("-").

Use em dashes to emphasize. Em dashes are more emphatic than en dashes, colons, or parentheses. Parentheses are the least emphatic.

Em dashes set off abrupt changes in thought, interruptions, or supplemental explanations. If the change of thought, explanation, or interruption is in the middle of the sentence, add a closing em dash to signal the end of the change of thought, explanation, or interruption. What's enclosed between em dashes is an interpolated clause. *Examples:* "I submitted my brief — I believe it was Friday — to the court." "Accuracy, brevity, clarity, and honesty — these are virtues in legal writing." Use em dashes for emphasis. *Examples:* "The attorney charges $525 an hour — the rate for the firm's partners — for complicated cases."

Use em dashes to set off a phrase that has commas within it. *Example:* "Call only the witnesses — such as Dr. White, Ms. Brown, and Mr. Tan — essential to your case." Use em dashes to list the source of a quotation after the quotation. *Example:* "Nobody has a more sacred obligation to obey the law than those who make the law." — Sophocles.

Insert spaces before and after em dashes in typing when the text is fully justified, when the text appears distorted, or in publishing. Otherwise, do what you want.

Use en dashes to separate dates, locations, and numbers. Think of the en dash as a substitute for "to" or "through." *Examples:* "Please turn to pages 15–16 of the trial transcript." "After I left the courthouse, I went to the Buffalo Sabres–New York Islanders hockey game." "From 2004–2006, my client endured a hostile work environment." "The judge has Czechoslovakian–Romanian roots." "Plaintiff–appellee requests that the Fourth Department's decision be reversed." "This morning, I took the Albany–Syracuse flight."

In this example, the hyphen, en dash, and em dash are used correctly: "Ms. Smith-Jones spent five minutes reading the Finkestein–Ferrara text on landlord-tenant practice — and promptly fell asleep."

In WordPerfect: To insert an en dash, put your cursor at the text where you want to insert the en dash. Go to "Insert," then "Symbol," then "Typographical Symbols." The en dash is the symbol on the seventh line, third from the left (keystroke number 4,33). When you click "Insert and Close," the en dash will be inserted in the text where you've left your cursor. To insert an em dash, put your cursor in the text where you want to insert the em dash. Go to "Insert," then "Symbol," then "Typographical Symbols." The em dash is the symbol on the seventh line, fourth from the left (keystroke number 4,34).

In Microsoft Word: To insert an en or an em dash, put your cursor in the text where you want to insert the en or the em dash. Go to "Insert," then "Symbol," then "Special Characters." Click the first option, "Em dash," to insert an em dash or the second option, "En dash," to insert an en dash in your text.

Depending on how you've programmed your computer for WordPerfect's autocorrect feature, you can also create an en dash by tapping your keyboard hyphen key twice and then the space bar once. Create an em dash by tapping your keyboard hyphen key three times and the space bar once.

13. Slashes. Use slashes for "per." *Examples:* "James Roe, a partner in the firm, charges $525/hour." "The defendant traveled at 85 mi./hr." Use slashes in fractions: "20 3/4 inches."

Use slashes to divide one line of verse from the next in text; use a space before and after the slash. *Example:* "Some are born great, some / achieve greatness, and some have greatness thrust upon 'em."[6]

Use slashes to separate equally applicable terms. *Example:* "A minor's parent/legal guardian must be present during interrogation."

Use slashes to separate parts of a date in informal writing: "3/6/07."

Use slashes to set off things like "a/k/a" ("also known as"), "d/b/a" ("doing business as"), or "c/o" ("in care of"). *Correct:* "Robert Jones a/k/a Bobby Jones." "Johnny's Club d/b/a Johnny's Rock and Roll Bar." Putting a comma before "a/k/a," "d/b/a," or "c/o" is acceptable. *Example:* "Robert Jones, a/k/a Bobby Jones." "Johnny's Club, d/b/a Johnny's Rock and Roll Bar."

> Em dashes are more emphatic than en dashes, colons, or parentheses.

Don't use a slash for "and/or." Use only "or" if the conjunction is disjunctive: if it separates two or more options. *Example:* "I'm taking Legal Writing on a pass-or-fail basis." Use only "and" if the connection is conjunctive: if it joins and combines two or more options. If the phrase is disjunctive and conjunctive, write "x or y or both" or "x, y, or both." *Example:* "A defendant found guilty of driving while intoxicated may be sentenced to jail, a fine, or both."

Don't write "she/he/it" to make your writing gender-neutral.

14. Ellipses. Use ellipses to omit words from a quotation.

Use three-dot ellipses (". . ."), all separated by spaces, to show omissions of punctuation or a word or more in the middle of your sentence.

Use four-dot ellipses (". . . ."), all separated by spaces, to show omissions at the end of the sentence if (1) the end of the quotation is omitted;

(2) the part omitted is not a citation or a footnote; and (3) the remaining portion is an independent clause. Unless all three criteria are satisfied, use a period, not an ellipse.

According to the Tanbook, use brackets "[ ]" to indicate that language has been added or modified.[7] If the bracketed language replaces omitted language, don't use ellipses.[8] If you've omitted internal quotation marks, case citations, footnotes, or endnotes, note that omission in a parenthetical, not with ellipses. *Example:* The court found no illusory tenancy. (*See Plaintiff v Defendant*, 50 AD2d 50, 50 [5th Dept 2009] [citation omitted].)[9]

According to the Bluebook, use "a parenthetical clause after the citation to indicate when the source quoted contains any addition of emphasis, alteration to the original in the quoted text, or omission of citations, emphasis, internal quotation marks, or footnote call numbers."[10] *Example: Plaintiff v. Defendant*, 99 N.Y.S.2d 500, 511 (3d Dep't 2009) (finding that plaintiff was not closely related to victim) (internal quotation marks omitted).

Never use ellipses before a quotation. You're already telling the reader you're omitting something by how you introduce your quotation. *Incorrect:* ". . . the parties submitted post-trial briefs." *Correct:* "[T]he parties submitted post-trial briefs."

To omit words from the end of a sentence, insert the correct punctuation to end the sentence, and then insert the ellipses. *Original quotation:* "This morning, the parties in *A v. B* submitted briefs and argued the motion. By the afternoon, the judge issued a decision." The following is incorrect because it doesn't include ellipses to show omission: In the "morning, the parties in *A v. B* submitted briefs." *Correct:* In the "morning, the parties in *A v. B* submitted briefs . . . ." *Omission from the middle of a sentence:* In the "morning, the parties . . . submitted briefs and argued the motion."

Example 1: Omission from the end of a sentence: After the parties "submitted briefs and argued the motion. . . . the judge issued a decision." *Example 2: Omission from the end of a sentence:* Last week, "the parties in *A. v. B* submitted briefs . . . ." The ellipses in these examples might look the same, but the spacing is different. In the first example, the writer must include the period from the original quotation directly after "motion" and then insert ellipses (with a single space between them). In the second example, the writer extracts a portion of the sentence, not including the original period.

Pre-2004 Tanbook style required asterisks instead of ellipses to show omission. The Tanbook no longer allows asterisks.

Don't use ellipses instead of dot leaders in a document's table of contents or table of authorities.

To create dot leaders on WordPerfect, go to "Format," then "Line," then "Flush Right with Dot Leaders." The dot leaders will appear immediately after the place at which you've placed your cursor.

In Microsoft Word pre-2007 versions, go to "Format," then "Tabs." A screen will pop up. Under the "Tab stop position," type "6" so that the dot leaders are positioned six inches from the left-hand margin. Click on "Right" under "Alignment" and "2 . . . ." under "Leader." Hit "OK." Return to your document. Immediately after the text (where you want to insert the dot leaders), hit the "Tab" key on your keyboard to insert the dot leaders.

In Microsoft Word 2007 version, go to "Home," then "Paragraph." Once the "Paragraph" screen opens, press the bottom key, "Tabs." Follow the directions set forth above for Word pre-2007 to insert the dot leaders.

The easiest way to create a table of contents or a table of authorities in WordPerfect is to go to "Tools," then "Reference," then "Table of Contents" or "Table of Authorities." In Microsoft Word (2007 version), the easiest way is to go to "Reference," then "Table of Contents" or "Table of Authorities."

15. Accent marks. Use accent marks in names. *Examples:* "Aimée," "André," "Béatrice."

Use accent marks if they are in current English usage. *Examples:* "cliché," "divorcée," "fiancé" (male), "fiancée" (female). Use accent marks if the English word means something other than the one intended. *Example:* "résumé" as opposed to "resume" (resume).

In Microsoft Word (2007 version): To insert an accent mark, put your cursor at the text where you want to insert the accent mark. Go to "Insert," then "Symbol," then "More Symbols." Choose font: "normal text." Choose subset, for example "Arabic," "Basic Latin" (which includes French and Spanish), "Cyrillic," "Greek and Coptic," "Hebrew." With your mouse, click on the accent mark or accented letter of your choice.

In WordPerfect: To insert an accent mark, put your cursor at the text where you want to insert the accent mark. Go to "Insert," then "Symbol," then set the symbol to "Multinational." With your mouse, choose the corresponding accent or accented letter.

In the next column, the Legal Writer will discuss legal-writing controversies. ■

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. He thanks court attorney Alexandra Standish for researching this column. Judge Lebovits's e-mail address is GLebovits@aol.com.

1. New York Law Reports Style Manual (Tanbook) R. 11.1 (a), at 77 (2007), *available at* http://www.nycourts.gov/reporter/New_Styman.htm (html version) and http://www.nycourts.gov/reporter/NYStyleMan2007.pdf (pdf version) (last visited Dec. 11, 2007).
2. The Bluebook: A Uniform System of Citation R. 5.1(b)(i), at 69 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).
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4. Association of Legal Directors (ALWD) Citation Manual R. 47.4(a), at 341 (3d ed. 2006);
5. ALWD R. 47.5(a), at 344.
6. William Shakespeare, Twelfth Night act 2, sc. v.
7. Tanbook R. 11.1(d), at 78.
8. *Id.*
9. *Id.* R. 11.1(c), at 78.
10. Bluebook R. 5.2(d), at 69-70.

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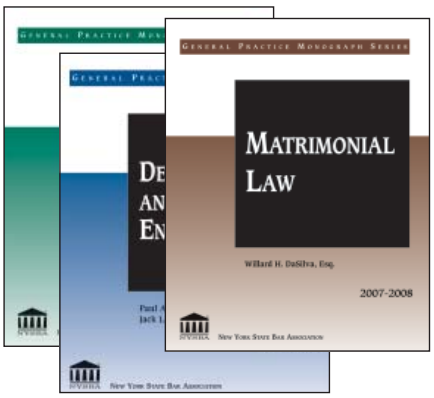

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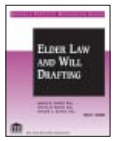

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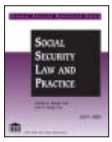

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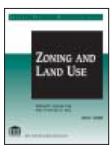

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BY GERALD LEBOVITS

Do's, Don'ts, and Maybes: Legal Writing Punctuation — Part III

In the last two columns, the Legal Writer discussed nine punctuation issues in legal writing. We continue with six more.

10. Quotation marks. Quotation marks come in three forms: single quotation marks (' '), double quotation marks (" "), and triple quotation marks ("' '"). To save space, British writers and American newspaper headlines use single quotation marks around quotations instead of double quotation marks. Other than for headlines, American usage requires that the first quotation mark be a double quotation mark and that the first internal quotation mark be a single quotation mark. The second internal quotation mark is a double quotation mark. *Example of a first quotation mark with single and double internal quotation marks:* "The judge noted that he'd never seen 'such "brilliant" lawyering' in all his years on the bench."

Use quotation marks for direct quotations, including a speaker's words. *Example:* "I told him I pulled the trigger because he deserved it." Don't use quotation marks until you start the quotation. *Incorrect:* "[The witness testified that she] pulled the trigger because he deserved it." *Correct:* The witness testified that she "pulled the trigger because he deserved it."

Don't use quotation marks and hyphens together. *Incorrect:* "Exculpatory-no" doctrine. *Correct:* Exculpatory-no doctrine or "exculpatory no" doctrine. *Incorrect:* "So-called" Spiegel Law. *Correct:* So-called Spiegel Law or "so called" Spiegel Law.

Use quotation marks to note that a word or phrase is inappropriate in context, but do so sparingly. *Example:* The "litter" of the law.

Overusing quotation marks will make you look egotistical or sarcastic. *Example:* My adversary's appellate brief was anything but "brief." Language loses impact with overused quotation marks. Make readers focus on content, not style, and especially not exaggerated style.

Use quotation marks to set off definitions or to explain or express words and phrases. *Examples:* "Sui generis" comes from Latin and originally meant "of its own kind." You should have a guilty conscience if you write "mens rea" instead of "guilty intent."

Use quotation marks to signal a newly invented word or phrase or an old word or phrase used in a new context. *Example:* He spent all his free time in front of a computer. Some would call him a "mouse potato."

Don't enclose indirect quotations — what someone says but not in the exact, original language — with quotation marks. *Example:* The judge told the attorneys to take their clients to the conference room.

In official New York State (Tanbook) style, enclose all quotations, including blocked quotations — single-spaced and double-indented quotations having 50 words or more — with quotation marks.[1]

According to the Bluebook, only quotations of 49 words or fewer should have quotation marks.[2] Quotations of 49 words or fewer should not be set off from the rest of the text. Quotations of 50 or more words (blocked quotations) should not have quotation marks around the text.[3]

According to the Association of Legal Writing Directors (ALWD) Citation Manual, use quotation marks for quotations of 49 or fewer words or if the quotation runs fewer than four lines of typed text and is not an epigraph or a quotation of verse or poetry.[4] For blocked quotations — if the quotation has 50 or more words, if it exceeds four lines of typed text, or if the material quoted is a verse or poem — don't use quotation marks at the beginning or end of the quotation.[5]

Single-paragraph quotations have quotation marks at the beginning and end of the quoted language. Multiple-paragraph quotations have quotation marks only at the beginning of each paragraph and at the end of the last paragraph.

Footnote and endnote numbers always go outside quotation marks. See text accompanying endnote 8 in this column for an example.

Parenthetical citations always go outside quotation marks. *Tanbook example:* "The court found no illusory tenancy." (*See Plaintiff v Defendant*, 50 AD2d 50, 50 [5th Dept 2009].)

Finally, the most important rules: Don't overquote; overquoting substitutes for analysis. Quote accurately; accurate quoting makes readers trust you. And use quotation marks if you're quoting; quote to be seen as a scholar, not a plagiarist.

11. Apostrophes. Use apostrophes to show ownership or possession, indicate a contraction, or form plurals.

Use apostrophes to form possessive nouns or pronouns. *Examples:* "She went to the judge's chambers

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