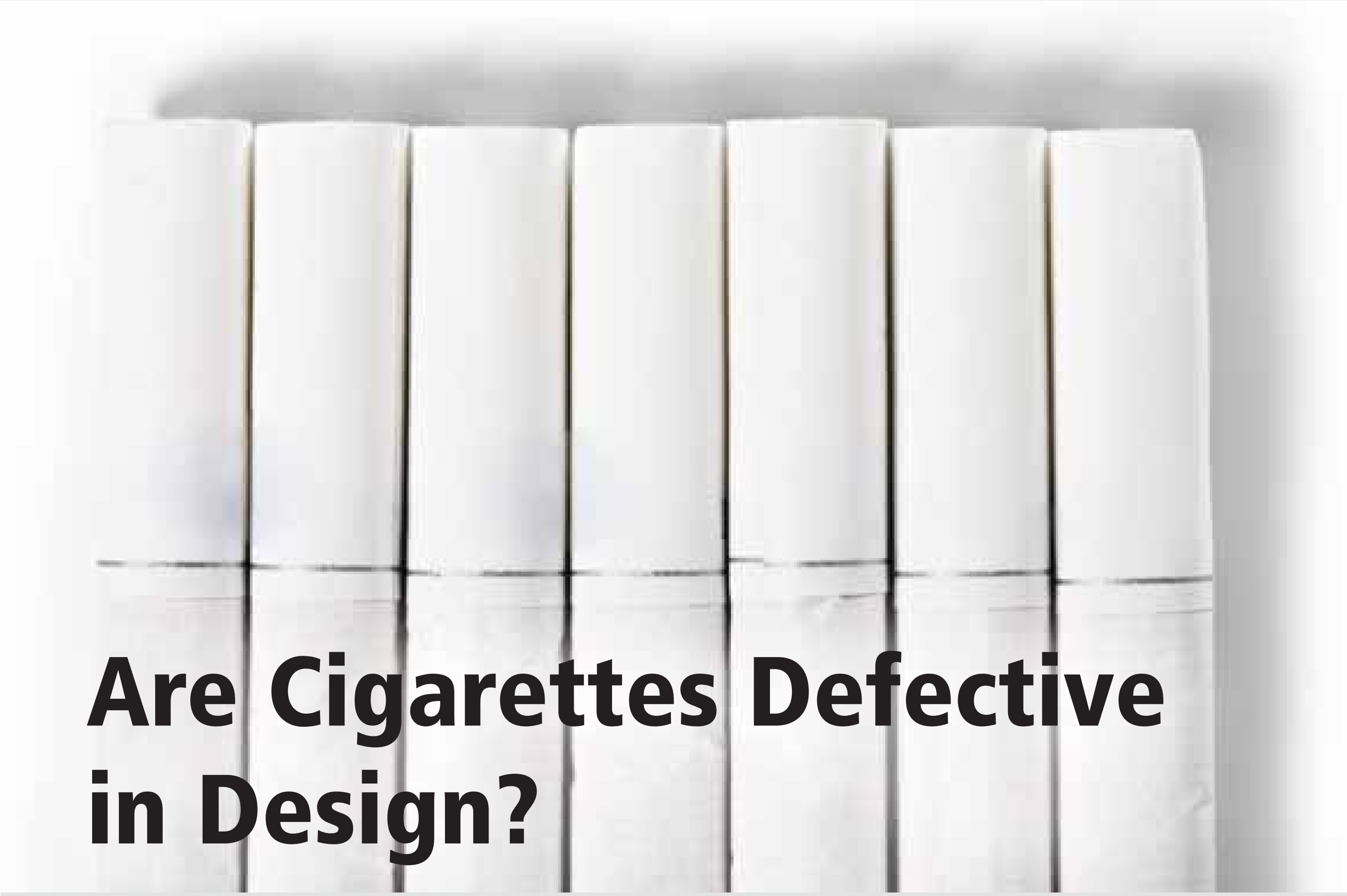
JANUARY 2009
VOL. 81 | NO. 1

NEW YORK STATE BAR ASSOCIATION
Journal

NYSBA



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by Robert G. Knaier

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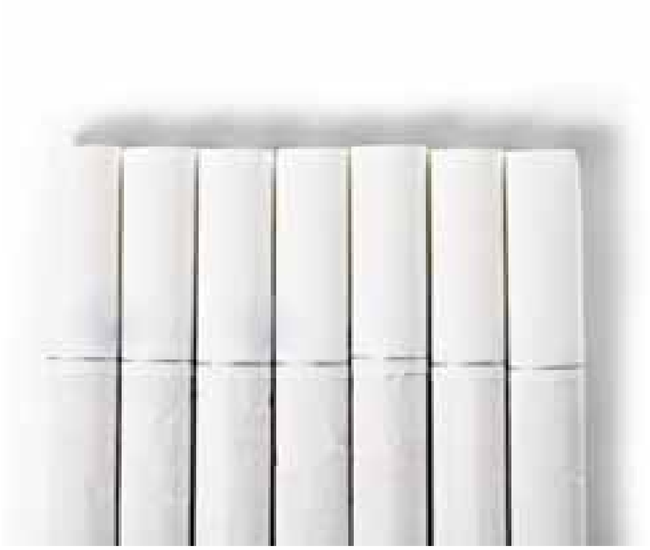

DEPARTMENTS

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. Copyright © 2009 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.

BERNICE K. LEBER

United Together in Troubled Times

"[The American Dream] has thrived because in our darkest hours, we have risen above the smallness of our divisions to forge a path towards a new and brighter day. We have acted boldly, bravely, and above all, together."

President-elect Barack Obama, Radio Address, November 22, 2008

The New Year has come. We have a new President entering the White House. Fannie Mae and Freddie Mac are poised to resume home foreclosures, unemployment remains at record highs, and we're all wondering how the financial crisis will continue to affect our practices, our families and our futures. Now, more than ever, is the time to remain united and vigilant in our efforts to press forward on issues and values that are important to our profession and the public whom we serve.

Who is around to remember practicing law during the Great Depression? Although the pundits have finally acknowledged what we've known for over a year now, we face similar hard times. Whether you are an attorney in the White House or in one of the city halls across America, whether you are a lawyer working to repair Wall Street, helping folks avoid mortgage foreclosure or restructuring businesses to weather this financial storm, you are each vital to the mission of our profession and the State Bar. I am proud to lead the largest voluntary state bar in the country, with over 75,000 members representing every state and more than 110 countries. Each of your voices lends influence and expertise to our work, and I am thankful for your continued support.

Like lawyers of generations past, of late you have answered the call in so many meaningful ways.

Last November, as the FDIC considered whether to include IOLA accounts within its Temporary Liquidity Guarantee Program, hundreds of you responded to my call to action by going to our Legislative Action Center and emailing the FDIC and your congressional leaders. This "quick response" system was an innovation in 2003 of Past President Lorraine Power Tharp who, fortunately for all of us, had the tremendous foresight to move us forward collectively and electronically. As a result of our superb grassroots effort this past November, a score of members of Congress from the New York delegation wrote to the FDIC with us. Upon receiving our appraisal that the lack of uniformity in extending account protections to lawyer IOLA accounts had the unintended consequence of reducing the flow of interest to support civil legal services and thereby harm the poor, the FDIC immediately agreed to treat IOLA accounts the same as individual demand bank accounts, thereby insuring the safety of millions of dollars used to fund civil legal services. The FDIC acknowledged that more than half the letters it received on this crucial issue – an issue that affects not just New York but 36 other states – came from our members. You truly made a difference in the lives of the needy, who depend upon civil legal services funding from the interest earned on these accounts.

For those of you who toil in the trenches and still make time in your hectic schedules to be a part of our initiatives and work at the State Bar, I say, thank you! From reports on lack of due process at Guantanamo Bay for prisoners held there, to new ethical standards for attorney conduct, to implementing our "Miles to Go" report to ensure greater diversity in the profession, to teaching a CLE program, to addressing needed reforms in the area of Wrongful Convictions, to responding to our recent efforts to improve our use and the public's use of court facilities through our State of the Courthouse Survey, to pitching in and handling pro bono a mortgage foreclosure conference or case, you have all strengthened our profession and improved our image to the public. In my recent travels and visits with the Nassau County Bar Association, the Onondaga Bar Association and the Brooklyn Bar Association, in our House of Delegates and our Executive Committee, just to name a few, I have been touched by your profound sense of duty not just to paying clients but also – and especially – for all those pro bono hours you give selflessly to those who cannot otherwise afford a lawyer during these troubled times. So many of you contributed as well during these hard times by providing hundreds of hours of legal service at polling places across the country Your service has not gone unnoticed.[1]

As seriously as we take our profession and our standing in our communities, so too must we direct our collective efforts to help those within

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BERNICE K. LEBER can be reached at bleber@nysba.org.

our ranks who may not be as fortunate. As we go forward into 2009, to borrow from Eric Goldman, we each have a rendezvous with destiny. For there is talk at law firms about cutting back, limiting or entirely eliminating support for bar memberships or bar functions or bar events. This is a serious issue for our futures.

How many of us learned "best practices" from colleagues in Sections and Committees? How many of us read our first legal update, attended our first CLE program, wrote our first report about the law by belonging to our bar association? Can we really distill knowledge and experience by renouncing our professional association? How do we instill professionalism in the next generation of lawyers if we do not encourage them to seek out the wisdom of other professionals?

For that matter, as many of you struggle in this difficult job market, our bar association provides needed support, guidance and direction. Particularly now, with the rise in our profession of those suffering from depression, drug dependency or alcoholism, our Lawyers' Assistance Program, chaired by Hon. Sally Krause and assisted by the tireless Patricia Spataro, provides confidential help, free of charge. If you're looking to brush up your resume or interviewing skills, or are considering moving to a different area of practice, our Committee on Lawyers in Transition, chaired by Lauren Wachtler, makes it part of our mission to help our members and similarly, find lawyers for those law firms with openings.

But none of this is possible unless we remain united together, strong in the belief that bar association activity is fundamental to our existence and our fulfillment as lawyers. We also know that true friendships are tested not just in good times but in the worst of times. So particularly in this year, when a lawyer inside your office or outside your firm calls for advice, to share a problem or ask for help, answer the call. Now is not the time to cut back on support for our bar association. If anything, the message I want to convey to you and our fellow members, particularly to those who are not members, is this: now is the time to join, to participate and to help one another.

I look forward to seeing you at my upcoming Presidential Summit, which will feature some of the most brilliant minds in our country who are confronting two of today's most pressing obstacles: the regulation of our financial markets and climate change. I am proud to be a member of a profession that can be part of the solution to these problems that affect us all. There's no time to waste. Together we cannot fail. ■

1. *See* Leslie Wayne, *Party Lawyers Ready to Keep an Eye on the Polls*, N.Y. Times, Oct. 28, 2008, p. A12; Petra Pasternak, *Lawyers Trade Billables for Election Day Volunteering*, law.com, Oct. 30, 2008, *available at* http://www.law.com/jsp/law/sfb/lawArticleSFB.jsp?id=1202425637804.

In Memoriam:
Lorraine Power Tharp and David S. Williams

Lorraine Power Tharp

We mourn the passing of Lorraine Power Tharp, the New York State Bar Association's 105th President and the third woman to lead the State Bar.

"Lorraine strongly believed that making a difference was not only her calling, but the duty of every attorney. She once said that every single lawyer has the ability to help someone and to solve somebody's problem. Lorraine's legacy is her resounding belief that every lawyer counts and that every person counts, and she lived every day to pursue that higher calling," said President Bernice K. Leber.

Tharp brought that philosophy to her term as president of the Association. The Association, she once said, is more than just a trade organization. It must be the voice of the law, if it is to be the voice of lawyers. It must advocate for the needs of the public. It must work to improve the lives of people, to improve the judiciary, to improve the law itself. Tharp reminded us that a large part of the work of the law – to help directly improve people's lives – is being performed every day by small firms and small-town attorneys, the "journeymen" attorneys. As president, she made an effort to meet with as many of those attorneys as possible.

During her presidential term, 2002–2003, Tharp created the Task Force on Increasing Diversity in the Judiciary, the Annual Meeting Presidential Summit and the Special Committee on Animals and the Law. She fought for an increase in the assigned counsel fee rate, adequate funding for civil legal services and the creation of a cutting-edge sexual harassment policy for law offices.

A native of Massena, Tharp graduated from Smith College and earned her law degree from Cornell Law School. She was the first woman lawyer at McNamee, Lochner, Titus & Williams and its first woman partner, in 1981. She later became a partner of Whiteman Osterman & Hanna LLP, chairing the Commercial and Residential Real Estate Practice Group. In 2003, Tharp received the Albany Law School's prestigious Kate Stoneman Award and in 2004 was named the New York County Lawyers' Association's Outstanding Women of the Bar.

David S. Williams

The New York State Bar Association mourns the passing of David Sterling Williams, retired partner of McNamee, Lochner, Titus & Williams, who served as the Association's 84th President, from 1981–1982.

"David was the consummate leader who was devoted to public service and to promoting always the best interests of the Association," said State Bar President Bernice K. Leber. "During his term as president, he addressed profound and important issues to the profession . . . and directly raised the level of the Bar."

During Williams's term, legislative and judicial action were taken on the important issues of the Clients' Security Fund and Lawyer Registration, initiatives carried over from previous presidential terms. His accomplishments included "expanding the Law, Youth & Citizenship program, increased lobbying efforts for civil legal services and creating a Corporate Counsel Section," noted Leber.

A native of Albany, Williams remained in the area and was an active community leader throughout his life. He graduated from Colgate University, served in the U.S. Army during World War II and earned his law degree from Albany Law School of Union University. He joined Whalen, McNamee, Creble & Nichols in 1946 and was made partner in 1950. In 2002, he received the Albany Law School Trustees Gold Medal Award.

Williams was well regarded by his colleagues for his vast knowledge of New York government and his affable manner. Former president Justin T. Vigdor sums it up best: "David was an old-school gentleman. Always gracious and genial."

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Construction Site Accidents
February 27 Albany

New York State and City Tax Institute
March 11 New York City

Legal Malpractice Litigation
(9:00 am – 1:00 pm)
March 20 Albany, New York City, Tarrytown
March 27 Long Island, Syracuse

Bridging the Gap
(2-day program)
March 25–26 Live session – New York City
Video Conferences in Albany and Buffalo

Women on the Move
(12:30 pm – 5:00 pm)
April 2 Albany

Introductory Strategies on Ethics and Civility in Everyday Lawyering
(9:00 am – 1:00 pm)
April 17 Albany, New York City, Rochester
April 24 Buffalo, Long Island

Starting Your Own Practice
April 21 New York City

Civil Trial Practice in the 9th Judicial District
(3:00 pm – 5:00 pm)
April 23 White Plains

International Trusts & Estates Law Institute
(2-day program)
April 23–24 New York City

International Practice Day – Beginner Level
April 30 New York City

DWI on Trial
(2-day program)
May 7–8 New York City

International Practice Day – Advanced Level
May 15 New York City

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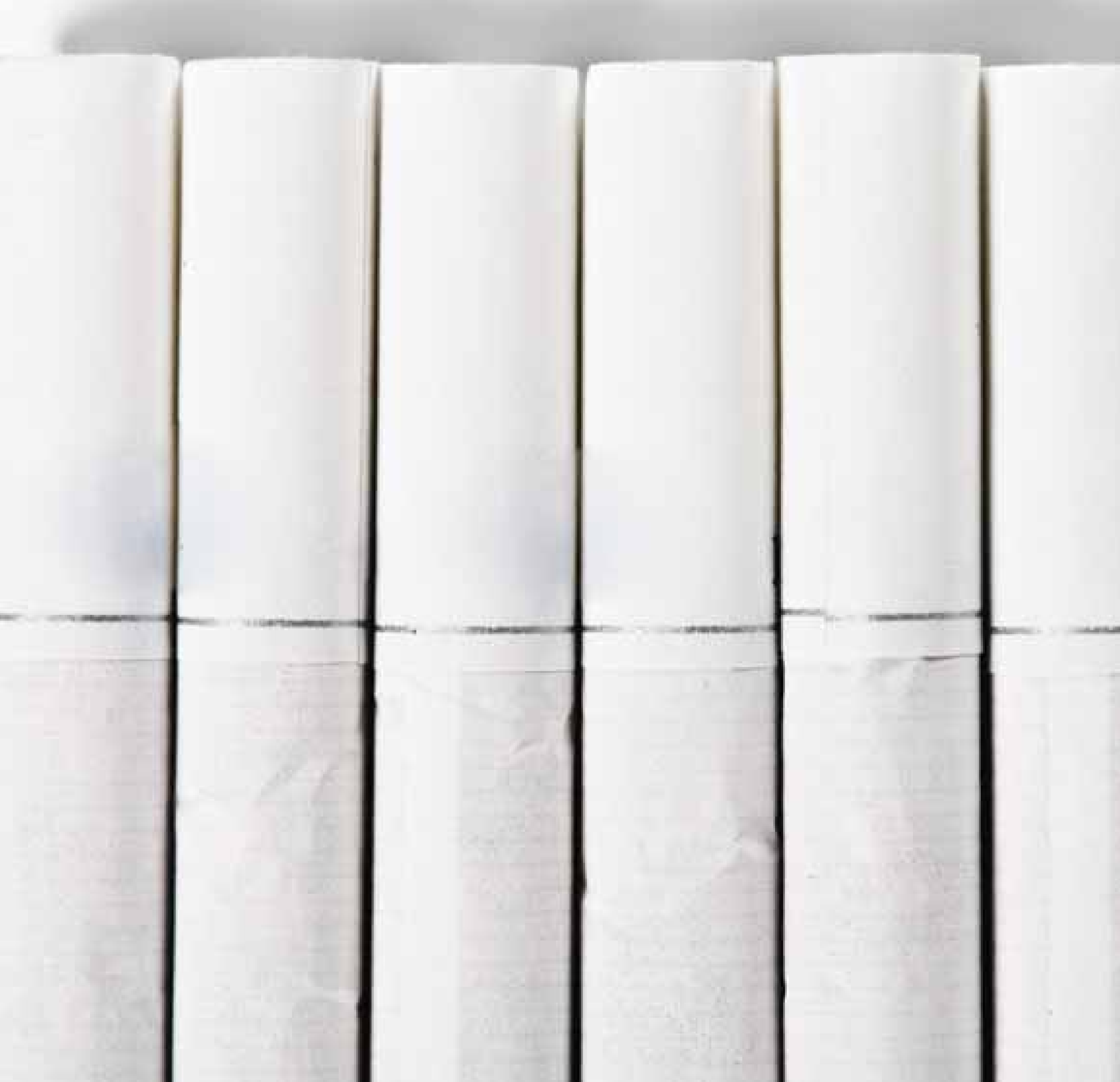
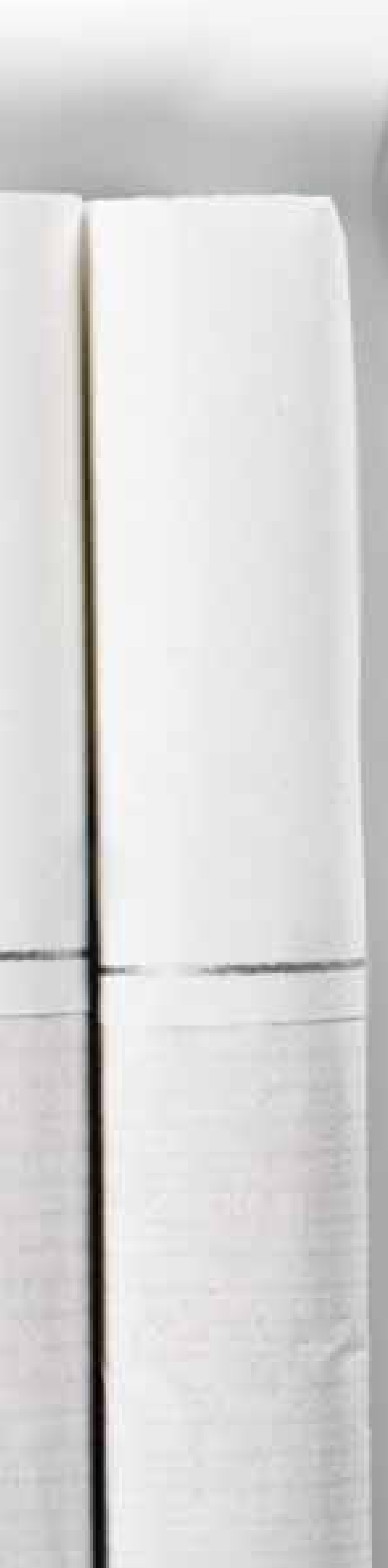
Are Cigarettes Defective in Design?

California and New York Diverge in Approach and Result

By Robert G. Knaier



Robert G. Knaier (robert.knaier@lw.com) is an associate with the San Diego office of Latham & Watkins LLP, where he is a member of the Litigation Department, practicing in the areas of products liability and mass torts. He received his B.A. from the University of California, San Diego, and his J.D. from Cornell Law School. Mr. Knaier would like to thank Loring Veenstra, a 2008 summer associate at Latham & Watkins' San Diego office and currently a third-year law student at Columbia Law School, for his valuable research assistance.



At one time, it seemed clear that consumer products that carry known health risks – such as alcohol, fatty foods, and tobacco – were not the sorts of products that could be considered "defective in design." The Restatement Second of Torts observed, for example, that "[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful."[1] That proposition is no longer so clear, and at least some courts have displayed a willingness to include consumer products such as cigarettes within the ambit of products liability.

Indeed, having been largely foreclosed from bringing claims under the theory that cigarette manufacturers "failed to warn" of the dangers of cigarettes,[2] plaintiffs have turned to the law of design defect, seeking to impose liability on cigarette manufacturers for alleged harms caused by their products. Courts in California and New York have reached notably divergent results in such cases. These results reveal that a difference in approach – whether reflected in procedural mechanisms such as the burden of proof or in substantive liability rules – has real implications for the outcome of products liability litigation and, in the case of cigarette design litigation, suggest a fundamental difference in the way courts view the appropriateness of permitting liability for harm allegedly caused by dangerous products that consumers nevertheless *want* to purchase.

Products Liability Law and "Design Defects"

The law of products liability has evolved to recognize three distinct ways in which a product manufacturer might be held liable for harm caused by a "defective" product.[3] The kinds of defect to which such liability might attach include, first, "manufacturing defects," or those instances in which a product "departs from its intended design even though all possible care was exercised in the preparation and marketing of the product."[4] For example, "when a product comes off the assembly line in a substandard condition,"[5] such as when a glass bottle has a flaw that ultimately causes it to shatter unexpectedly under ordinary use,[6] it is said to have a manufacturing defect. Second, a product might also be defective by virtue of "inadequate instructions or warnings."[7] Specifically, in such "failure to warn" cases, a manufacturer may incur liability if the omission of reasonable instructions or warnings "renders the product not reasonably safe."[8]

Finally, a product manufacturer might incur liability for harm caused by a product deemed defective in design.[9] Courts across the United States have long struggled with the notion of what constitutes a "defective" design for purposes of imposing liability for harm caused by consumer products. Many commentators have argued,[10] and many courts have held,[11] that a product is not defective in design unless it can be shown that the risks inherent in its design outweigh its benefits or "utility." More specifically, courts often require a showing that a "reasonable alternative design" was available, *i.e.*, that the manufacturer of the product could have utilized a safer design, at a reasonable cost, and without undue sacrifice to the utility of the product.[12] Indeed, the Restatement Third, Torts: Products Liability explains that this is the majority rule in the United States.[13]

The position taken in the Restatement Third has, however, "generated considerable controversy."[14] For some commentators,[15] and for a minority of courts,[16] whether a product is defective in design is a function of "consumer expectations"; that is, a design is defective if and only if it fails to satisfy a reasonable consumer's expectations of safety.[17] This approach is considered by some to be consistent with the spirit of products liability to the extent that it is less burdensome for plaintiffs and thus more effectively shifts the costs of product-related accidents to manufacturers. Those in favor of a risk/utility test in design defect cases, however, have argued that a standard looking only to consumer expectations is not only procedurally untenable, it also fails to account for the sort of practical considerations of *relative* safety and utility inherent in *every* product design – particularly in the design of technologically complex products.[18] As discussed below, on the choice between the "consumer expectations" test and the "reasonable alternative design" test, California and New York have taken different paths – and are producing different results.

> On the choice between the "consumer expectations" test and the "reasonable alternative design" test, California and New York have taken different paths.

California's Hybrid Approach

Courts in California apply a "hybrid" approach to claims of defective design, alternatively considering consumer expectations or risk/utility factors in various categories of cases.[19] In 1963, in *Greenman v. Yuba Power Products*, the California Supreme Court famously adopted "strict liability" for harm caused by products defective in design.[20] Fifteen years later, in *Barker v. Lull Engineering Co., Inc.*, the court clarified this notion, announcing a disjunctive, two-prong standard.[21] Specifically, the *Barker* court held that

> a product is defective in design if (1) the plaintiff proves that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, *or* (2) the plaintiff proves that the product's design proximately caused injury and the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.[22]

Thus, the *Barker* court held that a failure to meet reasonable consumer expectations can, by itself, render a product defective in design.[23] But consistent with its desire to permit liability even in the face of patent design defects, the court further held that even if a product meets consumer expectations – *i.e.*, even if a product's dangers are known or should be known to a reasonable consumer – that product may nevertheless be defective in design if its risks outweigh its benefits.[24]

The California Supreme Court more recently explained that the "consumer expectations" prong of *Barker* applies only in limited circumstances. In *Soule v. General Motors Corp.*, in which a plaintiff alleged that a design defect in an automobile "allowed its left front wheel to break free" during an accident, "collapse rearward, and smash the floorboard into her feet," the court held that the trial court erred in instructing a jury on the consumer expectations test.[25] The court explained that the complex nature of the alleged defect did not sensibly lend itself to an analysis of a consumer's "expectations."

Reasoning that "the ordinary consumer of an automobile simply has no idea how it performs in all foreseeable situations, or how safe it should be made against all foreseeable hazards," the court held that "the consumer expectations test is reserved for cases in which the *everyday experience* of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions."[26] Indeed, noting that a "jury may not be left free to find a violation of ordinary consumer expectations whenever it chooses," the court held that "unless the facts actually permit an inference that the product's performance did not meet the minimum safety expectations of its ordinary users, the jury *must* engage in the balancing of risks and benefits required by the second prong of *Barker*."[27]

In any event, claims of design defect face little difficulty in reaching a jury in California. First, a plaintiff's evidentiary burden is not demanding. As one court recently explained, "[t]he plaintiff's burden is only to adduce evidence that would permit a jury to find that the defendant's design defect was the proximate cause of the plaintiff's injury," and "[e]ven a plaintiff's mere description of how an accident occurred" could satisfy this burden.[28] Moreover, as the *Barker* court stated, "once the plaintiff makes a prima facie showing that [her] injury was proximately caused by the product's design," it becomes the *defendant's burden* "to prove . . . that the product is not defective."[29] This can be a significant hurdle, and recent case law highlights the difficulty that defendants face in attempting to prove the *absence* of a defect – whether under *Barker*'s consumer expectations test[30] or the risk/utility test.[31]

California's Application of the Consumer Expectations Test to Cigarette Manufacturers

Consistent with the results in design defect cases generally, California courts have been somewhat permissive in allowing claims that cigarettes are defective in design to reach the jury. In *Boeken v. Philip Morris, Inc.*, for example, a plaintiff, who had been smoking since 1957 and who had developed lung cancer as a result, claimed, among other things, that the light cigarettes he had been smoking were defective in design.[32] In affirming a jury verdict in the plaintiff's favor, the court held that "the verdict may be affirmed on the basis of the consumer expectations test."[33] Specifically, the court found that the plaintiff had produced evidence sufficient to show that light cigarettes fail to "perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner."[34] This evidence consisted of (1) studies showing that "most smokers believe that light cigarettes are safer than regular cigarettes"; and (2) expert testimony that – contrary to the beliefs of most smokers – light cigarettes may be at least as dangerous as regular cigarettes for reasons such as "compensating," a phenomenon by which smokers take longer, deeper draws on light cigarettes because otherwise such cigarettes deliver less tar and nicotine.[35]

Similarly, in *Bullock v. Philip Morris USA, Inc.*, a plaintiff who had smoked cigarettes for 45 years prevailed at trial on a claim that those cigarettes were defective in design.[36] In affirming, the court held that the plaintiff produced sufficient evidence under *Barker*'s consumer expectations test:

> The evidence of [the defendant's] extensive efforts, through various means, to mislead the public about the adverse health effects of smoking cigarettes and create a false controversy as to whether smoking caused lung cancer and other diseases, and evidence that smokers are particularly vulnerable to such manipulation, is sufficient to support the finding that the ordinary consumer was misled and was unaware of the dangers of cigarette smoking.[37]

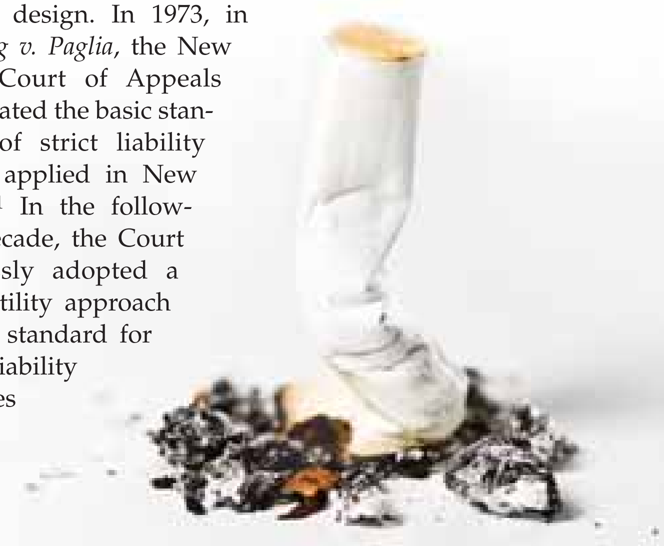
The court thus held that the true risks entailed by cigarettes ultimately disappointed the reasonable expectations of consumers – but only because the defendant had waged such a successful campaign to *inflate* those expectations in the first instance.

The opinions in *Boeken* and *Bullock* are notable for a few reasons. First, based as they are on claims of historical deception, their underlying rationale is arguably self-limiting. Specifically, these decisions appear to have applied the consumer expectations test to claims against cigarette manufacturers on the strength of the allegation that these defendants, at least in years past, deceived the public about the safety of their product. Thus, having artificially raised expectations, their product necessarily disappoints the reasonable expectations of those deceived. There will come a time, however – if it has not come already – when it will be wildly implausible to suppose that smokers have or had inaccurate expectations about the risks inherent in cigarettes. When that time comes, California courts will, one presumes, move to the second prong of *Barker*. As noted above, the structure of *Barker* is such that, even if a product comports with consumer expectations, it still must pass muster under a risk/utility test.

Furthermore, the courts in *Boeken* and *Bullock* each appear to have applied the consumer expectations test in a rather unreflective way. That is, neither decision contains an analysis of *whether* the consumer expectations test is appropriate in cigarette cases. Given the extent to which *Soule* circumscribed the applicability of that test, this is a conspicuous omission. While cigarettes appear to be simple products, the American Cancer Society has noted that "[m]ore than 4,000 individual chemicals have been identified in tobacco and tobacco smoke," including "more than 60 chemicals that are known to cause cancer (carcinogens)."[38] Furthermore, "[t]here are hundreds of substances added to cigarettes by manufacturers to enhance the flavor or to make smoking more pleasant."[39] Thus, it is not at all certain that the "the *everyday experience*" of cigarette users is such as to provide a reasonable basis on which to evaluate whether cigarettes – given their complexity and the varied illnesses with which they have been associated – are defective in *design*.[40] One could argue that the risks inherent in cigarette designs present precisely the sort of complex issues that can only be adequately addressed under a risk/utility framework.

New York Requires a Reasonable Alternative Design

Unlike in California, courts in New York straightforwardly apply a risk/utility test to all claims of design defect, specifically requiring that a plaintiff demonstrate the availability of a reasonable alternative design. In 1973, in *Codling v. Paglia*, the New York Court of Appeals articulated the basic standard of strict liability to be applied in New York.[41] In the following decade, the Court expressly adopted a risk/utility approach to the standard for strict liability in cases



alleging design defects. In *Robinson v. Reed-Prentice Division of Package Machinery Co.*,[42] the Court explained that "a defectively designed product is . . . *one whose utility does not outweigh the danger* inherent in its introduction into the stream of commerce."[43] And in *Voss v. Black & Decker Manufacturing*,[44] the Court opined that

> the proper standard to be applied should be whether [a] product as designed was "not reasonably safe" – that is, whether it is a product which, if the design defect were known at the time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner.[45]

Thus, the Court adopted a standard for design defect cases that requires a careful balancing of the risks *and* benefits of the product design at issue.[46]

The New York Court of Appeals thus sharply diverged from the California Supreme Court's approach to design defects. It did not adopt "consumer expectations" as a test of whether a product is defective in design.[47] In addition, unlike the burden shift faced by defendants in California, under which it is *their* obligation to demonstrate that a product's benefits outweigh its risks, the rule in New York is that "[t]he *plaintiff*, of course, is under an obligation to present evidence that the product, as designed, was not reasonably safe."[48]

Specifically, in New York a plaintiff is required to demonstrate that "there was a substantial likelihood of harm and it was feasible to design the product in a safer manner."[49] This evidence may consist of "expert testimony concerning either a prototype that the expert has prepared or similar equipment using an alternative design that has been put into use by other makers."[50] Alternatively, a plaintiff might offer expert testimony about the state of the art in a given field and the feasibility of employing an alternative, safer design.[51]

Notably – and as should be obvious from the nature of the balancing test applied in New York – reasonable alternative designs are not simply *safer* designs that are technologically and economically feasible to produce.[52] Rather, they are alternatives that, all things considered, offer a material reduction in risk *without sacrificing practical utility*.[53] The *Voss* court offered specific guidance in this regard, explaining that "[i]n balancing the risks inherent in the product, as designed, against its utility and cost," several factors are relevant, including:

> (1) the utility of the product to the public as a whole and to the individual user; (2) the nature of the product – that is, the likelihood that it will cause injury; (3) the availability of a safer design; (4) the potential for designing and manufacturing the product *so that it is safer but remains functional* and reasonably priced; (5) the ability of the plaintiff to have avoided injury by careful use of the product; (6) the degree of awareness of the potential danger of the product which reasonably can be attributed to the plaintiff; and (7) the manufacturer's ability to spread any cost related to improving the safety of the design.[54]

As described below, the notion that an alternative design's safety and feasibility must be balanced against its *utility* to determine whether it is truly a reasonable alternative has recently come to play a central role in cigarette design litigation.

New York's Limitation of Liability for Cigarette Manufacturers

Although a few courts in New York have permitted claims that cigarettes are defective in design to reach the jury,[55] on the whole, such claims have faced significant difficulty as a matter of law. Applying the requirement that plaintiffs demonstrate the availability of a "reasonable alternative design," courts in New York have rejected such design defect claims: (1) on evidentiary grounds, excluding expert evidence of alternative designs when such evidence has an insufficient foundation or is not relevant under the controlling standard; (2) for substantive reasons, finding that plaintiffs have failed to demonstrate that proposed alternative designs are reasonable under the balancing approach dictated by *Voss* – and specifically have failed to show that such alternatives do not unduly sacrifice the *utility* of cigarettes; and (3) with a sensitivity to the role of the judiciary in matters of public policy, declining to permit liability for harm caused by products that, while dangerous, are nevertheless desired by consumers.

The Rejection of Design Defect Claims on Evidentiary Grounds

Regarding evidentiary reasons for rejecting design defect claims against cigarette manufacturers, courts in New York have held that plaintiffs failed to present *admissible* evidence of reasonable alternative designs. In *Neri v. R.J. Reynolds Tobacco Co.*,[56] for example, the plaintiff submitted reports from two experts on the question of whether a reasonable alternative design existed for cigarettes. One expert, Dr. K. Michael Cummings, opined as to the "availability to Defendant of alternative cigarette designs, including the Premier and Eclipse cigarette designs which Defendant tested in the 1980s and 1990s."[57] The other expert, Dr. William A. Farone, opined on a proposed alternative design that he *theorized* could be implemented.[58] The court found both opinions inadmissible. Dr. Cummings (1) had failed to provide any scientific support for his opinion that the described designs were, in fact, safer than other cigarettes; and (2) had failed to address the *economic feasibility* of the prior designs, *i.e.*, whether cigarettes so designed would "remain[] functional and reasonably priced, and whether the manufacturer can spread the cost of any safety-related design changes."[59] And with regard to evidence of a newly theorized alternative design, the court found that Dr. Farone's proposal amounted to a hypothesis that, at least at this time, was "too speculative to be tested."[60] Having excluded the plaintiff's evidence of a reasonable alternative design, the court granted summary judgment in favor of the defendant.[61]

The Rejection of Design Defect Claims for Substantive Reasons

Even where courts have not excluded evidence of alternative cigarette designs, they have found that plaintiffs have nevertheless failed to meet the substantive requirement of demonstrating the availability of a reasonable alternative design. In some instances, this inquiry has turned on the question of economic feasibility. In *Tompkins v. R.J. Reynolds Tobacco Co.*, for example, survivors of an individual who had smoked unfiltered cigarettes for nearly 60 years claimed, among other things, that those cigarettes were defective in design.[62] The plaintiffs submitted a report from Dr. Cummings, again describing "several alternative cigarette designs that were available" to the defendant during the 1980s and 1990s.[63] In granting the defendant's motion for summary judgment, however, the court found that Dr. Cummings's report failed to raise a triable issue of fact regarding whether the designs he described constituted a reasonable alternative to the design used by the defendant.[64] The court found in part that, even taking into account Dr. Cummings's report, the plaintiffs had failed to produce any evidence of the "cost of manufacturing or marketing an alternative design, or whether an alternative product would be profitable for any company."[65]

More recently, courts in New York have begun to scrutinize cigarette design claims not only for their economic or technological feasibility, but also by recognizing that, in some circumstances, "consumer acceptance" is a crucial factor to consider in evaluating whether a proposed alternative design unacceptably sacrifices *utility*.

Indeed, at least two courts have recently applied the notion of consumer acceptance in rejecting design defect claims against cigarette manufacturers. In *Clinton v. Brown & Williamson Holdings, Inc.*, the plaintiff's expert, Dr. Farone, offered the opinion that the defendant could have adopted a reasonable alternative design for its cigarettes; specifically, he opined that it is feasible to manufacture cigarettes with reduced amounts of carcinogens, and also cigarettes that are "non-addictive."[66] The court found, however, that "all parties recognize[d]" that these proposed alternatives had been investigated and researched by the cigarette industry – and had been "indisputably rejected by consumers."[67]

The court thus recognized that safety and feasibility are not the only relevant considerations. That is, even if the plaintiff in *Clinton* could have established that the proposed alternative designs were safer and feasible to produce, that would not end the inquiry. Under the requirement of demonstrating the availability of a reasonable alternative design, the plaintiff had to show that a proposed design was a *reasonable* alternative, taking into account factors such as its utility to the product's consumers – which, in the case of cigarettes, is largely, if not entirely, a matter of subjective acceptability.

Safety and feasibility are not the only relevant considerations.

Similarly, consumer acceptability as a gauge of utility once again played a central role in *Rose v. Brown & Williamson Tobacco Corp.*[68] In *Rose*, the plaintiff contended that she developed lung cancer as a result of smoking "negligently designed" cigarettes.[69] Specifically, the plaintiff had smoked "regular" cigarettes for years, and, as proof of their defective design, she offered that "light" cigarettes constituted a reasonable alternative design by virtue of their reduced levels of tar and nicotine.[70] The plaintiff essentially argued that, given the availability of this safer design, cigarette manufacturers "should have sold only 'light' cigarettes . . . and should not have sold regular cigarettes."[71] The trial court permitted this claim to reach a jury, and the plaintiff obtained a verdict in her favor.

The Appellate Division reversed the jury's verdict and dismissed the plaintiff's claim. As of this writing, the New York Court of Appeals is reviewing that decision. The Appellate Division's reasoning is nevertheless instructive for its analysis of this claim under longstanding rules of products liability. Applying New York's test for design defect, the court focused on the "utility" of light cigarettes – and whether the plaintiff had demonstrated that their utility rendered them a reasonable alternative to regular cigarettes. Consistent with other cases in which courts have distinguished between a safer, feasible alternative design and a safer, feasible alternative design *that does not unduly sacrifice utility*,[72] the court in *Rose* explained that

> it must be recognized that two differently designed products that, like regular cigarettes and light cigarettes, are generally similar in function, may nonetheless yield results so different in quality as to make it impossible to characterize the design of the safer product as a feasible alternative to the design of the more hazardous product.[73]

In the case of cigarettes, in particular, the court noted that their "'usefulness' (such as it is) is the production . . . of certain subjective sensations and feelings in the user (the taste of tar and the psychological effect of nicotine)."[74]

The *Rose* court recognized that cigarettes are the sort of products that, while presenting significant risks, nevertheless "serve some subjective function or utility for smokers; if this were not true, the tobacco companies would quickly go out of business."[75] Thus, in the context of determining whether light cigarettes are a reasonable alternative to regular cigarettes – *i.e.*, are a safer alternative that does not unduly sacrifice utility – their "functionality can only be demonstrated by [their] acceptability to consumers."[76] Applying this criterion, the court found that the plaintiff had failed to carry her burden "to prove that, notwithstanding the reduced taste and psychological effect they provide, light cigarettes could feasibly serve the same function as regular cigarettes."[77] That is, the plaintiff failed to demonstrate that light cigarettes are, from a consumer's perspective, an acceptable *alternative* to regular cigarettes.[78]

The *Clinton* and *Rose* courts rejected liability because the proposed alternatives, even if feasible to produce and less dangerous, sacrificed too much of what is subjectively desired in the product at issue. Notably, this is consistent not only with New York law but also with the Restatement Third's position on design defect. As the Reporters' Note to the Restatement Third explained, a proposed alternative design

> may deprive a product of important features which make it desirable and attractive to many users and consumers. Courts that apply a "risk-utility" balancing test recognize that these considerations are central to the finding that a substitute design is a reasonable alternative. It is for this reason that courts take the position that the availability of a safer design does not *ipso facto* mean that the actual design is defective.[79]

Thus, *Clinton* and *Rose* demonstrate the difficulties faced by plaintiffs in alleging claims of design defect against manufacturers of products for which there may indeed be safer alternatives, but whose utility is largely determined by subjective consumer acceptance.

The Rejection of Design Defect Claims as Matters of Public Policy

Finally, and consistent with the importance of "consumer acceptance" as an indicator of utility, at least a few courts in New York have indicated that cigarette design defect claims may be problematic to the extent that they reflect an attempt to restrict consumer choice by removing whole categories of products from the market. As the *Clinton* court explained in evaluating proposed alternative cigarette designs, "[a] state law requirement that allows only cigarettes with no tar or no nicotine to be sold is virtually a ban on cigarettes, just as a requirement that allows only 'alcohol-free' liquor to be sold would be a ban on whiskey."[80] Similarly, the *Rose* court rejected the argument that "regular cigarettes are so dangerous that they should be outlawed, regardless of the absence of any feasible alternative design that would serve the same function."[81] For these courts, permitting liability for harm caused by dangerous products that consumers nevertheless *desire* may amount to a public policy choice not appropriately addressed by the judiciary.

A note about consumer desire is needed here. In some instances, the law of products liability allows for intrusions on what consumers may desire in a given product. For example, although some product users would rather not have certain cumbersome safety devices attached to products, courts nevertheless sensibly require manufacturers to adopt such devices if doing so strikes an acceptable balance between safety and utility.[82] Products like cigarettes, however, arguably present a special case. Alternative cigarette designs appear to necessarily encroach on the *core* aspect of what makes them desirable to consumers.

For better or worse, consumers want to smoke cigarettes largely because of "the taste of tar and the psychological effect of nicotine."[83] Thus, unlike requiring the manufacturer of a power saw to install a safety guard on its product – making it less convenient to use but not impinging on its core function of being able to cut wood or other materials – requiring cigarette manufacturers to reduce levels of tar and nicotine necessarily infringes on the very purpose for which consumers purchase cigarettes. It is like requiring the power saw manufacturer *to make its blades less sharp* – a patently unacceptable proposition.

It may very well be the case, then, that cigarettes are a kind of product that cannot be made safer without *unacceptable* reductions in utility *qua* acceptability. As noted in *Clinton*, certain proposed alternatives have been investigated and researched by the cigarette industry – and have been "indisputably rejected by consumers."[84] Similarly, consumers continue to choose "regular" cigarettes over "light" cigarettes, which suggests that, for at least one category of consumers, light cigarettes are an unacceptable substitute.[85] Although further research and development may reveal that cigarettes can be made safer without reducing their acceptability to consumers, *at this time* there may simply be no reasonable alternative design. And if that is true, then permitting a finding that cigarettes (or regular cigarettes) are defective in design arguably would amount to a ban on those products from the marketplace. This is, to be sure, a significant power to bestow on a judge and jury. Indeed, given questions of whether such power should be given to any body other than a democratically elected legislature, it is not surprising that "courts generally have concluded that legislatures and administrative agencies can, more appropriately than courts, consider the desirability of commercial distribution of some categories of widely used and consumed, but nevertheless dangerous, products."[86]

In accord with this general consensus, courts in New York have been loath to displace consumer choice by effectively removing desired products from the market – even where those products present significant risks. As the New York Court of Appeals has explained, "policy concerns mandate that the responsibility for risks that cannot reasonably be designed out of a product should be transferred to the consumer, the party who has the *choice* of using them or not."[87] And consistent with the notion that consumers should be permitted the choice of using dangerous products, courts in New York have indicated that the judiciary should largely yield to the democratic political process in these matters. As the *Rose* court said, the decision to remove a consumer product from the marketplace is "not one appropriately made by the judicial branch" but rather "is a political decision resting with the legislative branch of government or with regulators acting pursuant to a legislative grant of authority."[88]

Conclusion

California and New York each have well-developed bodies of law regarding products liability and the law of design defects in particular. Courts in each state, however, have made choices about both procedural and substantive details that necessarily have yielded divergent results. In California, the burden of *disproving* a defect effectively rests with defendants, whereas in New York, the burden of *proving* a defect squarely rests with the plaintiff. That these procedural choices have resulted in a more plaintiff-friendly liability regime in California is unsurprising.

But, substantive doctrinal choices also have driven a difference in results, particularly in the case of cigarette design defect litigation. Here, the differences are stark. In California, the application of the consumer expectations test to cigarette design claims suggests a somewhat unreflective willingness to extend liability to products for which there may not currently be a reasonable alternative design. In contrast, many courts in New York have found reasons to foreclose the possibility of liability, whether by finding expert evidence lacking, by looking to the notion of "consumer acceptance" as an important element of utility, or by self-consciously announcing that considerations of democratic public policy preclude them – as opposed to legislatures – from deciding that whole categories of consumer products should be deemed "defective" despite continued consumer demand. Indeed, whether one finds more comfort in the results reached in California or in New York may in large part depend on one's view of the role of the judiciary in matters of public policy. ■

1. Restatement Second of Torts § 402A, cmt. i ("Restatement Second").

2. *See, e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524, 527–28 (1992) (interpreting the Public Health Cigarette Smoking Act of 1969 as largely preempting claims that cigarette packages contain inadequate warnings).

3. *See* Restatement Third, Torts: Products Liability ("Restatement Third") § 2.

4. Restatement Third § 2(a).

5. *Barker v. Lull Eng'g Co., Inc.*, 20 Cal. 3d 413, 429, 573 P.2d 443 (1978).

6. *Cf. Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 461, 150 P.2d 436 (1944).

7. Restatement Third § 2(c).

8. *Id.*

9. Restatement Third § 2(b).

10. *See, e.g.*, James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Design*, 83 Cornell L. Rev. 867, 886 (1998); David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. Ill. L. Rev. 743, 754 (1996); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 835 (1973).

11. *See, e.g.*, *Armentrout v. FMC Corp.*, 842 P.2d 175, 183 (Colo. 1992); *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 183 (Mich. 1984); *Holm v. Sponco Mfg., Inc.*, 324 N.W.2d 207, 212 (Minn. 1982); *Auburn Mach. Works Co., Inc. v. Jones*, 366 So. 2d 1167, 1169–70 (Fla. 1979); *Turner v. Gen. Motors Corp.*, 584 S.W.2d 844, 847 (Tex. 1979); *Phipps v. Gen. Motors Corp.*, 363 A.2d 955, 959 (Md. 1976).

12. *See, e.g.*, *Rix v. Gen. Motors Corp.*, 723 P.2d 195, 201 (Mont. 1986); *Gen. Motors Corp. v. Edwards*, 482 So. 2d 1176, 1191 (Ala. 1985); *Uloth v. City Tank Corp.*, 384 N.E.2d 1188, 1193 (Mass. 1978); *see also* La. Rev. Stat. Ann. § 9:2800.56 (2008); Miss. Code Ann. § 11-1-63 (2008).

13. Restatement Third § 2(b) (explaining that a product "is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe").

14. Restatement Third, Introduction at 4.

15. *See, e.g.*, Douglas A. Kysar, *The Expectations of Consumers*, 103 Colum. L. Rev. 1700, 1762 (2003); Guido Calabresi & Jeffrey O. Cooper, *The Monsanto Lecture: New Directions in Tort Law*, 30 Val. U. L. Rev. 859, 865 (1996); Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 Va. L. Rev. 1296, 1325 (1974).

16. *See, e.g.*, *Kudlacek v. Fiat*, 509 N.W.2d 603, 610–11 (Neb. 1994); *Sumnicht v. Toyota Motor Sales, U.S.A., Inc.*, 360 N.W.2d 2, 15–16 (Wis. 1984); *Lee v. Volkswagen of Am., Inc.*, 688 P.2d 1283, 1285–86 (Okla. 1984).

17. The Restatement Third recognizes that although "consumer expectations" can be *relevant* to the inquiry into whether a given design is defective and a proposed alternative is reasonable, "consumer expectations do not constitute an *independent standard* for judging the defectiveness for product designs. . . . [S]tanding alone, [they] do not take into account whether the proposed alternative design could be implemented at reasonable cost, or whether an alternative design would provide greater overall safety." Restatement Third § 2, cmt. g (emphasis added).

18. *See, e.g.*, *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 270, 639 N.Y.S.2d 250 (1995) (noting that it has been suggested that "it is beyond the experience of most lay jurors to determine what an 'ordinary consumer' expects or 'how safe' a sophisticated modern product could or should be made to satisfy those expectations" without including in their analysis the feasibility of alternative, safer designs); *Soule v. Gen. Motors Corp.*, 8 Cal. 4th 548, 569, 882 P.2d 298 (1994) (setting forth the defendant's argument, among others, that the consumer expectations test "eliminates the careful balancing of risks and benefits which is essential to any design issue"); Restatement Third § 2, cmt. a ("Many product-related accident costs can be eliminated only by excessively sacrificing product features that make products useful and desirable. . . . Society benefits most when the right, or optimal, amount of product safety is achieved.").

19. Courts in California are not alone in taking this "hybrid" approach. *See, e.g.*, *Ontai v. Straub Clinic & Hosp., Inc.*, 659 P.2d 734, 739–40 (Haw. 1983); *Caterpillar Tractor v. Beck*, 593 P.2d 871, 884 (Alaska 1979).

20. 59 Cal. 2d 57, 63, 377 P.2d 897 (1963). Justice Traynor, the author of *Greenman*, had long believed that strict liability should be the rule in cases of harm caused by defective products. *See Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 461–68, 150 P.2d 436 (1944) (Traynor, J., concurring) (disagreeing with reliance on *res ipsa loquitor* as the basis for liability in a manufacturing defect case).

21. 20 Cal. 3d at 426–27.

22. *Id.* (emphasis added).

23. *Id.* at 429.

24. *Id.* at 430–31.

25. 8 Cal. 4th 548, 556, 882 P.2d 298 (1994). The court ultimately found, however, that the error was harmless, given that the parties had presented significant evidence regarding the risks and benefits of the design at issue, the jury had been instructed on both prongs of *Barker*, and "the consumer expectations theory was never emphasized at any point." *Id.* at 570–71.

26. *Id.* at 567 (quotation marks and citation omitted) (emphases in original). More recent case law has clarified that the "relevant inquiry" in determining the applicability of the consumer expectations test is "whether the ordinary consumer *of the defendant's product* would have minimum safety assumptions about the product's use that were not met." *Vanier v. Battery Handling Sys., Inc.*, No. Civ. S-06-978 LKK/PAN, 2007 WL 2688731, at *7 (E.D. Cal. Sept. 12, 2007) (emphasis in original); *cf. Bruce v. Clark Equip. Co., et al.*, No. Civ. S-05-01766 WBS KJM, 2007 WL 912927 (E.D. Cal. Mar. 26, 2007) ("An ordinary Bobcat user's minimum assumptions about loader safety are unlikely to extend to operating the loader in this unusual manner.").

27. *Soule v. Gen. Motors Corp.*, 8 Cal. 4th 548, 568, 882 P.2d 298 (1994) (emphasis added); *see also Vanier*, 2007 WL 2688731, at *7 ("[I]f the alleged design defect involves complex technical details such that the ordinary user of the product would have no minimum safety assumptions about the functioning of a particular product design, the consumer expectation test is inappropriate.").

28. *Vanier*, 2007 WL 2688731, at *7; *see also Campbell v. Gen. Motors Corp.*, 32 Cal. 3d 112, 125–26, 649 P.2d 224 (1982) (holding that a plaintiff's own testimony and her photographs of an allegedly defective city bus were "sufficient" to provide a jury with enough information with which to gauge their "own sense of whether the product meets ordinary expectations").

29. *Barker*, 20 Cal. 3d at 431.

30. *See, e.g.*, *Vanier*, 2007 WL 2688731, at *7 (denying summary judgment to the manufacturer of a crane-operated system for lifting and moving large batteries, holding that the defendant failed to produce "evidence that, as a matter of law, the ordinary user of the battery gantry would not expect the battery to fall" as it had).

31. *See, e.g.*, *id.* at *8 (holding, after noting the "many factors" relevant to a risk/utility analysis – factors such as the "'gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design'" – that the defendant had not "met its burden to prove, as a matter of law, that the benefits of the [design] at issue outweigh its risks"); *Bruce*, 2007 WL 912927 at *7 (denying summary judgment to the manufacturer of a "Bobcat skid-steer loader"; after noting that "[d]efendants, of course, do not have to prove that the current, challenged design is the *safest* or *best* design in existence," and after describing the numerous safety features incorporated into the design of the product at issue, the court nevertheless held that it could not "say as a matter of law that the design is not defective"); *Gonzalez v. Autoliv ASO, Inc.*, 154 Cal. App. 4th 780, 787, 64 Cal. Rptr. 3d 908 (2007) (reversing a grant of summary judgment in favor of an airbag manufacturer on the ground that the defendant failed to produce evidence that "the benefits of the design outweigh its inherent risks; evidence necessary to show the *absence of a design defect*") (emphasis added).

32. 127 Cal. App. 4th 1640, 1649, 26 Cal. Rptr. 3d 638 (2005).

33. *Id.* at 1668.

34. *Id.* (quotation marks and citation omitted).

35. *Id.*

36. 159 Cal. App. 4th 655, 667, 71 Cal. Rptr. 3d 775 (2008).

37. *Id.* at 675.

38. *See* American Cancer Society: Cigarette Smoking, *available at* http://www.cancer.org/docroot/PED/content/PED_10_2X_Cigarette_Smoking.asp?sitearea=PED.

39. *Id.*

40. *Soule v. Gen. Motors Corp.*, 8 Cal. 4th 548, 567, 882 P.2d 298 (1994) (emphases in original).

41. 32 N.Y.2d 330, 342, 345 N.Y.S.2d 461 (1973).

42. 49 N.Y.2d 471, 426 N.Y.S.2d 717 (1980).

43. *Id.* at 479 (emphasis added).

44. 59 N.Y.2d 102, 463 N.Y.S.2d 398 (1983).

45. *Id.* at 108.

46. *See Denny*, 87 N.Y.2d at 257 (explaining that the approach in New York "is rooted in a recognition that there are both risks and benefits associated with many products and that there are instances in which a product's inherent dangers cannot be eliminated without simultaneously compromising or completely nullifying its benefits").

47. *See id.* at 269 ("Although some jurisdictions have recognized the consumer expectation standard, . . . New York has never done so."). Moreover, the Court has taken seriously the judicial and academic criticisms of the consumer expectations test, concluding that it "is unworkable when applied in cases involving design defects." *Id.* at 270.

48. *Voss*, 59 N.Y.2d at 108 (emphasis added).

49. *Id.*; *see also Clinton v. Brown & Williamson Holdings*, 498 F. Supp. 2d 639, 646 (S.D.N.Y. 2007) ("[P]roof of a feasible alternative design is a prerequisite to establish a prima facie design defect claim under New York law."); *Saladino v. Stewart & Stevenson Servs., Inc.*, No. 01-CV-7644 (SLT) (JMA), 2007 WL4285377, at *4 (E.D.N.Y. Dec. 3, 2007) (same; discussing *Voss* and quoting 1A N.Y. Pattern Jury Instructions, Comment to § 2:141 (3d ed. 2007)).

50. *Kosmynka v. Polaris Indus., Inc.*, 462 F.3d 74, 80 (2d Cir. 2006) (citing *Rypkema v. Time Mfg. Co.*, 263 F. Supp. 2d 687, 692 (S.D.N.Y. 2003)); *see also Warnke v. Warner-Lambert Co.*, 21 A.D.3d 654, 656–57, 799 N.Y.S.2d 666 (3d Dep't 2005).

51. *See* Restatement Third § 2, cmt. f.

52. Indeed, under such a test, one could argue that nearly any product design is "defective." Every product could be made safer. Knives could be less sharp. Bullets could be made of soft foam. Without considering whether such measures unacceptably reduce *utility*, an inquiry into "defectiveness" becomes meaningless.

53. *See, e.g.*, *Kosmynka*, 462 F.3d at 80–81 (holding, in a case in which a plaintiff alleged that an all terrain vehicle (ATV) was defective insofar as it did not include a "kill switch" to "cut power to the [ATV's] wheels if the vehicle climbed too steep a slope or accelerated too rapidly," that the plaintiff had "introduced no reasonable alternative design that would have made the [ATV] safer without *materially impairing the vehicle's utility*") (emphasis added); *Felix v. Akzo Nobel Coatings, Inc.*, 262 A.D.2d 447, 448–49, 692 N.Y.S.2d 413 (2d Dep't 1999) (rejecting a claim that a solvent-based lacquer sealer was defective in design, because the proposed alternative, a water-based lacquer sealer, although less combustible, did not have the same functionality).

54. *Voss*, 59 N.Y.2d at 109 (emphasis added); *cf. Micallef v. Miehle Co.*, 39 N.Y.2d 376, 386, 384 N.Y.S.2d 115 (1976) (explaining, in a case involving a claim for "negligent design," that "[w]hat constitutes reasonable care will, of course, vary with the surrounding circumstances and will involve a balancing of the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm") (quotation marks and citations omitted).

55. *See Semowich v. R.J. Reynolds Tobacco Co.*, No. 86-CV-118, 1988 WL 86313 (N.D.N.Y. Aug. 18, 1988); *Tomasino v. Am. Tobacco Co.*, 23 A.D.3d 546, 549, 807 N.Y.S.2d 603 (2d Dep't 2005); *Miele v. Am. Tobacco Co.*, 2 A.D.3d 799, 804–05, 770 N.Y.S.2d 386 (2d Dep't 2003); *Fabiano v. Philip Morris Inc.*, 15 Misc. 3d 1130(A), 847 N.Y.S.2d 901 (Sup. Ct., N.Y. Co. 2007), *rev'd on different grounds in Fabiano v. Philip Morris Inc.*, 54 A.D.3d 146, 862 N.Y.S.2d 487 (1st Dep't 2008).

56. No. 98-cv-371 (FJS/GJD), 2000 WL 33911224 (N.D.N.Y. Sept. 28, 2000).

57. *Id.* at *44–46.

58. *Id.* at *47–49.

59. *Id.* at *44–45.

60. *Id.* at *49.

61. *See also Tuosto v. Philip Morris USA, Inc.*, No. 05 Civ. 9384 (PKL), 2007 WL 2398507, at *13 (S.D.N.Y. Aug. 21, 2007) (granting defendant judgment on the pleadings, finding that an affidavit of Dr. Farone which had been *photocopied* from another case was procedurally deficient, having not been prepared for and signed in the present case).

62. 92 F. Supp. 2d 70, 73 (N.D.N.Y. 2000).

63. *Id.* at 85.

64. *Id.* at 85 n.8.

65. *Id.* at 85.

66. 498 F. Supp. 2d 639, 646–47 (S.D.N.Y. 2007).

67. *Id.* at 648.

68. 53 A.D.3d 80, 855 N.Y.S.2d 119 (1st Dep't 2008).

69. *Id.* at 81. One court recently explained that "[g]enerally, New York courts treat strict products liability [for defective design] and negligence claims as substantively similar." *Saladino v. Stewart & Stevenson Servs., Inc.*, No. 01-CV-7644 (SLT) (JMA), 2007 WL4285377, at *4 (E.D.N.Y. Dec. 3, 2007). Indeed many courts and commentators over the years have puzzled over how design defect cases, with their inherent weighing of risks and benefits, can be characterized as sounding in anything other than *negligence*. *See, e.g.*, *Prentis*, 365 N.W.2d at 184 ("The risk-utility balancing test is merely a detailed version of Judge Learned Hand's negligence calculus. As Dean Prosser has pointed out, the liability of the manufacturer rests 'upon a departure from proper standards of care, so that the tort is essentially a matter of negligence.'") (citing *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947), and quoting Prosser, Torts (4th ed.) § 96); *see also Denny*, 87 N.Y.2d at 258 (acknowledging that "the reality is that the risk/utility balancing test" applied in design defect cases "is a 'negligence-inspired' approach, since it invites the parties to adduce proof about the manufacturer's choices" and evaluate the manufacturer's judgment). New York courts, however, have drawn the following distinction: "Both claims entail a showing that a product defect caused the injury; but to show negligence, the plaintiff must also prove that the injury caused by the defect could have been reasonably foreseen by the manufacturer." *Kosmynka*, 462 F.3d at 86 (citing *Robinson*, 49 N.Y.2d at 426). This distinction does not alter the analysis here.

70. *Rose*, 53 A.D.3d at 81.

71. *Id.*

72. *See supra* notes 52–53.

73. 53 A.D.3d at 84.

74. *Id.* at 82.

75. *Id.* at 88.

76. *Id.*

77. *Id.* at 84.

78. *Id.* at 86–87.

79. Restatement Third § 2, Reporters' Note, cmt. f.

80. *Clinton*, 498 F. Supp. 2d at 648.

81. *Rose*, 53 A.D.3d at 88–89.

82. *See, e.g.*, *Scarangella v. Thomas Built Buses, Inc.*, 93 N.Y.2d 655, 660–61, 695 N.Y.S.2d 520 (1999).

83. *Rose*, 53 A.D.3d at 82.

84. *Clinton*, 498 F. Supp. 2d at 648.

85. *See Rose*, 53 A.D.3d at 85 ("[P]laintiffs' own experts apparently agreed that the great majority of smokers reject both low-tar and low-nicotine cigarettes.").

86. Restatement Third § 2, cmt. d; *see also* Restatement Second § 402A, cmt. i ("[A] manufacturer or seller breaches no legal duty to voluntary consumers by merely supplying, in an unadulterated form, a common commodity which cannot be made safer, but which the public desires to buy and ingest despite general understanding of its inherent dangers."); *but see McCarthy v. Olin Corp.*, 119 F.3d 148, 173–74 (2d Cir. 1997) (Calabresi, J., dissenting) (arguing that questions should have been certified to the New York Court of Appeals, so that it could consider "whether entire categories of products can be deemed defective in the absence of an alternative design"); *Jiminez v. Sears, Roebuck & Co.*, 4 Cal. 3d 379, 383, 482 P.2d 681 (1971) (Traynor, J.) ("[I]t has been suggested that liability might be imposed as to products whose norm is danger."); Restatement Third § 2, Comment e (noting that some "courts have suggested that the designs of some products are so manifestly unreasonable, in that they have low social utility and high degree of danger, that liability should attach even absent proof of a reasonable alternative design").

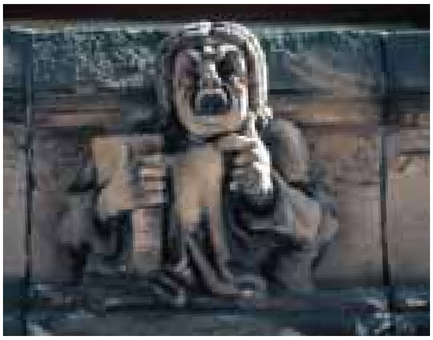
87. *Denny*, 87 N.Y.2d at 271 (emphasis added). Notably, the notion of consumer choice was central to the dissent in *Rose*. The dissent noted that the strong consumer demand for cigarettes – and regular cigarettes in particular – is at least in part a product of their addictive capacity. According to the dissent:

> [C]onsumer acceptability cannot be a factor in determining feasibility when the consumers are nicotine addicts – a class of consumer created by the defendants through their admitted manipulation of nicotine levels. It is hardly illuminating that sales and marketing data would show that nicotine addicts prefer cigarettes with sufficient levels of nicotine to sustain their addiction with minimum effort.

Rose, 53 A.D.3d at 91. It is unclear, however, whether this observation can justify a court in depriving all consumers of the choice to purchase regular cigarettes.

88. *Rose*, 53 A.D.3d at 89 (citing David G. Owen, *Inherent Product Hazards*, 93 Ky. L.J. 377, 383 (2004–2005); *see also Tuosto*, 2007 U.S. Dist. Lexis 61669 at *36 ("[A]llowing the allegation that cigarettes in general are defective to constitute a claim for improper design would contradict congressional policy deeming the sale of cigarettes legal."); *Clinton*, 498 F. Supp. 2d at 648 (noting that "the vast majority of courts have been markedly unreceptive to the call that they displace markets, legislatures, and governmental agencies by decreeing whole categories of products to be 'outlaws'") (quotation marks and citation omitted).

BY DAVID PAUL HOROWITZ



What About the CPLR?

No civil litigation topic is more likely to lead to eye rolling by lawyers and judges alike than New York State's expert disclosure scheme, codified in CPLR 3101(d)(1)(i). Enacted in 1986, and applicable to cases commenced on or after the effective date, July 25, 1986, CPLR 3101(d)(1)(i) was part of a package of legislation cobbled together to address, *inter alia*, the perceived medical malpractice crisis in the mid-'80s.

If "medical malpractice crisis" seems an event of more recent vintage, one eventually learns that it is a phenomenon that comes along about every 10 years or so, like those mammoth "Decennial Digests" I used to avoid in law school. The initial appearance of this "medical malpractice crisis" phenomenon was in the mid-'70s. That "crisis" resulted in the shortening of the medical, dental, and podiatric malpractice statutes from three years to two-and-one-half years (and no, I have no idea how podiatrists managed to jump onto that bandwagon).[1] The "crisis" resurfaced as an issue again this past year.

The enactment of CPLR 3101(d)(1)(i) was touted as signaling an end to "trial by ambush." Why? Because attorneys were now required, albeit only upon demand, to furnish their adversaries with certain information about the experts due to be called to testify at the time of trial. More than 20 years later, the jury is still out on whether this goal has been achieved.

Timing Is Everything

As I have mentioned numerous times in this column, the timing of the service of expert exchanges has been a frequently litigated issue. As practitioners are well aware, the only reference to the timing of expert exchanges pursuant to CPLR 3101(d)(1)(i) is the following: "However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph."[2]

There is no reference to any deadline for service of the expert exchange in a situation other than where the expert is retained "an insufficient period of time before the commencement of trial,"[3] whether by reference to the filing of the note of issue, the date set for trial, or any other benchmark familiar to litigators in New York state courts.

A Fatal "Omission"

In the last several years a subset of the expert timing issues has arisen in the Second Department: whether a trial court may, in an exercise of discretion, ignore affidavits and affirmations by an expert submitted by a party opposing summary judgment where the expert was not identified prior to the filing of the note of issue.

This issue is summarized in *New York Civil Disclosure*:

> Failure by a plaintiff to disclose expert information in advance of defendant's motion for summary judgment should not preclude plaintiff from submitting the expert's affidavit in opposition to the motion. *Downes v. American Monument Co.*, 283 A.D.2d 256, 724 N.Y.S.2d 610 (1st Dep't 2001) (the motion court properly considered the affidavit of plaintiff's expert witness in opposition to summary judgment, even though the plaintiff had failed to disclose the expert's identity previously, since there was no showing of willfulness in, or prejudice caused by the failure to disclose earlier); *Simpson v. Tenore and Guglielmo*, 287 A.D.2d 613, 731 N.Y.S.2d 859 (2d Dep't 2001) (after the defendant made out a *prima facie* case for summary judgment, it was proper for the court to consider the affidavit of plaintiff's expert, submitted in opposition to motion, despite the plaintiff's failure to serve a notice pursuant to CPLR 3101(d)(1)(i), absent evidence that plaintiff intentionally or willfully failed to disclose identity of expert and absent showing of prejudice). However, there is troubling contrary authority in the Second Department. In *Dawson v. Cafiero*,

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> 292 A.D.2d 488, 739 N.Y.S.2d 190 (2d Dep't 2002), plaintiffs served the affidavits after the filing [of] the note of issue attesting to the completion of discovery. The Second Department reversed the trial court denial of the motion, but affirmed the preclusion of plaintiff's experts for not exchanging the experts prior to the filing, and for certifying all discovery was complete, and further found that the affidavits failed to raise a triable issue of fact. *Dawson v. Cafiero*, 292 A.D.2d 488, 739 N.Y.S.2d 190 (2d Dep't 2002); *see also DeLeon v. State of New York*, 22 A.D.3d 786, 803 N.Y.S.2d 692 (2d Dep't 2005) ("The expert affidavit proffered by the claimant as the sole evidence to defeat the motion should have been rejected as he did not identify his expert in pretrial disclosure and served the affidavit after the date on which the note of issue was waived. Moreover, the expert affidavit consisted of mere speculative assertions unsupported by adequate foundational facts and accepted industry standards").[4]

Some solace was available to attorneys following *Dawson* and *DeLeon*, because both decisions pointed to independent grounds for granting summary judgment even when considering the proffered expert affidavits ("that the affidavits failed to raise a triable issue of fact"[5] and "the expert affidavit consisted of mere speculative assertions unsupported by adequate foundational facts and accepted industry standards"[6]). Nonetheless, *New York Civil Disclosure* ends with a warning to the bar:

> Warning:
> The *Dawson* case may be cited to mean that plaintiffs in the Second Department run a risk if they serve expert exchanges after the filing of the note of issue, although there is no statute or other rule mandating this. Perhaps there was a scheduling order specific to the case that was violated by the plaintiff, but the decision does not give any additional details.[7]

Singletree

On October 28, 2008, the Second Department in *Construction by Singletree, Inc. v. Lowe*[8] reiterated that a trial court, in the proper exercise of its discretion, may bar expert affidavits submitted in opposition to summary judgment motions where the expert has not been exchanged prior to the filing of the note of issue.

In *Singletree*, a subcontractor commenced an action to recover money allegedly owed by the owner and general contractor. The owner ("Lowe") cross-claimed for breach of warranty and liquidated damages against the general contractor ("J.C.").

After the completion of disclosure, the general contractor moved for summary judgment, seeking dismissal of the owner's claims. In opposition, the owner furnished expert affidavits both controverting the claims of faulty installation and opining on the cost of repair.

The Second Department agreed with the trial court that the general contractor had established *prima facie* entitlement to summary judgment on, *inter alia*, the breach of warranty claim, and that the owner had failed to raise a triable issue of fact, holding that the trial court had not abused its discretion

> [i]n declining to consider the affidavits of the purported experts proffered by Lowe, since Lowe failed to identify the experts in pretrial disclosure and served the affidavits after the note of issue and certificate of readiness attesting to the completion of discovery were filed in this matter.[9]

Justice Carni, concurring in part and dissenting in part, took issue with a portion of the panel's holding, highlighting the distinction between experts retained to testify at trial, and those retained as consultants:

> The preliminary conference stipulation and order which governed both pretrial disclosure and the filing of the note of issue provided that "expert disclosure shall be provided by all parties pursuant to CPLR 3101."
>
> The provision of the CPLR which was referenced in the trial court's preliminary conference order and stipulation is entitled "Trial Preparation," and provides in pertinent part as follows: "Upon request, each party shall identify each person whom the party expects *to call as an expert witness at trial* and shall disclose in reasonable detail the subject matter which each expert is expected to testify." (CPLR 3101[d][1][i]) (emphasis added).
>
> Therefore, the trial court's order, read in conjunction with CPLR 3101(d)(1)(i), only required the disclosure of experts retained for the purpose of providing testimony at the time of trial. Here, the appellant submitted affidavits from experts for the purpose of raising a material issue of fact in opposition to the motion of the defendant J.C. for summary judgment dismissing his cross claims. CPLR 3101(d)(1)(i) simply does not require the disclosure of experts or consultants that are retained and utilized by a party for purposes other than providing trial testimony.
>
> Accordingly, I respectfully disagree with my colleagues to the extent that the majority holds that CPLR 3101(d)(1)(i) requires the disclosure of consultants or experts retained for the purpose of opposing a summary judgment motion. There is no requirement that an expert or consultant who provides an affidavit for the limited purpose of opposing a summary judgment motion be the same expert trial witness who testifies at the subsequent trial. Even if CPLR 3101(d)(1)(i) applied to these affidavits, it is well settled that this provision does not require a party to respond to a demand for expert witness information at any specific time in any event. Were we concerned with expert trial witnesses on the eve of trial, which we are not, we would undertake the consideration of whether the alleged noncompliance with the statute was intentional or willful. However, such consideration is not necessary under the procedural posture of this case.
>
> In my view, the applicability of CPLR 3101(d)(1)(i) to the employment of experts opposing a summary judgment motion is contrary to the express language of the statute and beyond its clear legislative intent.[10]

How did the majority address this argument?

> Our dissenting colleague disagrees with this holding, arguing that CPLR 3101(d)(1)(i) applies only to an expert whom a party intends to call at trial, and ought not have precluded the trial court from considering previously undisclosed expert opinions submitted in opposition to a motion for summary judgment. We note, however, that the purpose of summary judgment is to determine whether there are genuine issues necessitating a trial. As such, "one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form."
>
> As it is undisputed that Lowe failed to identify any experts in pretrial disclosure whom he intended to call to testify at trial concerning whether the work was faulty or the extent of his alleged compensatory damages arising from that breach of warranty, and did not proffer any explanation for such failure, it was not an improvident exercise of discretion for the Supreme Court to have determined that the specific expert opinions set forth in the affidavits submitted in opposition to the motion for summary judgment could not be considered at trial. That circumstance, coupled with Lowe's failure to demonstrate how the facts set forth in the experts' affidavits could otherwise be established at trial, justified the Supreme Court's conclusion that Lowe failed to adequately establish the existence of a material issue of fact necessitating a trial in response to J.C.'s prima facie showing of entitlement to judgment as a matter of law. Accordingly, summary judgment dismissing so much of Lowe's second cross claim as was to recover compensatory damages for breach of warranty was properly awarded to J.C.[11]

It is difficult to reconcile the Second Department's holding in *Singletree* with its own prior jurisprudence, and its holding remains at odds with the case law in the other appellate divisions.

What is not difficult to understand is the danger this ruling presents to litigants in the Second Department. Despite the fact that the underlying disclosure orders in *Singletree* did not contain any specific directives concerning the exchange of experts beyond "expert disclosure shall be provided by all parties pursuant to CPLR 3101," disclosure of the expert post–note of issue was held to be untimely.

Conclusion

So what about the CPLR? The requirement imposed by the Second Department in *Singletree* appears contrary to a plain reading of CPLR 3101(d)(1)(i). It also fails to take into account the practice rampant throughout the department of conducting disclosure post–note of issue.

However, since an attack on the statutory infirmity of the Second

Department's holding is a slender reed upon which to hang one's hat, until such time, if ever, as the Court of Appeals weighs in on the issue, a pre–note of issue expert exchange in the Second Department would be advisable, where possible.

Where an expert exchange cannot be furnished pre-note, a response to the expert demand outlining why the expert cannot be exchanged pre-note (for example, the existence of outstanding, relevant disclosure to be conducted post-note, the unavailability of all necessary records and/or transcripts pre-note for an expert to review, or an insufficient amount of time between the completion of disclosure and the date set for the filing of the note of issue) can be served at the time the note of issue is filed. This "exchange" would document that the failure to serve a responsive expert exchange pre-note was not due to inadvertence or willfulness. It should also help to establish "good cause" under CPLR 3101(d)(1)(i) for a post-note exchange when opposing summary judgment.

Finally, where an expert has not been exchanged pre–note of issue, a prudent party opposing summary judgment should set forth "good cause" in the opposing papers explaining why the exchange could not be made pre-note. ■

1. CPLR 214-a.

2. CPLR 3101(d)(1)(i).

3. *Id.*

4. 1-22 LexisNexis AnswerGuide New York Civil Disclosure § 22.05 (citations omitted).

5. *Dawson v. Cafiero*, 292 A.D.2d 488, 739 N.Y.S.2d 190 (2d Dep't 2002).

6. *DeLeon v. State of N.Y.*, 22 A.D.3d 786, 803 N.Y.S.2d 692 (2d Dep't 2005).

7. 1-22 LexisNexis AnswerGuide New York Civil Disclosure § 22.05.

8. 2008 NY Slip Op 8287, 2008 WL 4743499 (2d Dep't Oct. 28, 2008).

9. *Id.* (citations omitted).

10. *Id.* (citation omitted).

11. *Id.* (citations omitted).

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The Eyewitness Conundrum

How Courts, Police and Attorneys Can Reduce Mistakes by Eyewitnesses

By Bennett L. Gershman

Eyewitnesses make mistakes. We know this empirically, anecdotally, and intuitively.[1] An eyewitness who makes an in-court identification of a defendant is probably the most unreliable of witnesses.[2] The inherent weakness of eyewitness identification is confirmed by the more than 200 post-conviction DNA exonerations, and supported by an increasingly powerful body of social science research.[3] Indeed, misidentification by eyewitnesses is claimed to be the largest single source of wrongful convictions and may in fact be responsible for more wrongful convictions than all other causes combined.[4]

Yet despite its inherent weakness, the testimony by an eyewitness has a powerful impact on juries. One commentator has noted, "[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'"[5] Undeniably, eyewitnesses are critical to solving crimes. Nevertheless, the recognition that some of these witnesses have later been proved wrong makes it imperative that the principal participants in the criminal justice system – judges, prosecutors, defense lawyers, and police – develop new approaches to ensure the accuracy of eyewitness testimony and reduce the incidence of courtroom misidentifications.

The Need for Protection Beyond *Wade v. United States*

Since the landmark case of *Wade v. United States*,[6] the Supreme Court has provided modest constitutional protections against the most blatantly unfair kinds of police identification procedures. Although *Wade* was a Sixth Amendment right-to-counsel case, the Court has most often invoked the guarantees of due process to ensure that pre-trial identification procedures employed by law enforcement are not so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[7] As the Court noted, it is the "likelihood of misidentification that violates . . . due process,"[8] and suggestive identification procedures increase that likelihood.[9] Since "reliability is the linchpin in determining the admissibility of identification testimony,"[10] the Court has enumerated several factors that must be considered by trial courts in weighing the extent to which the "corrupting effect of the suggestive identification" tainted the witness's ability to make a reliable courtroom identification.[11] These factors include (1) the witness's opportunity to view the defendant, (2) the degree of attention by the witness, (3) the accuracy of the description given to the police, (4) the witness's level of certainty, and (5) the lapse of time between the crime and the confrontation.[12]

The due process guarantee offers only limited constitutional protection, however. Highly suggestive identification procedures often do not rise to the level of a due process violation. Accordingly, given the seriousness of the problem of eyewitness misidentification, judges, prosecutors, police, and defense lawyers need to think creatively and adopt policies and protocols that go beyond the minimal protection afforded by due process. For the trial judge, this means adopting special procedural safeguards that would enable juries to make a more careful evaluation of the eyewitness's testimony.[13] For the prosecutor, this means evaluating the eyewitness's identification with greater care and not proceeding with a case that rests on the uncorroborated testimony of an eyewitness, unless the prosecutor is personally satisfied beyond any reasonable doubt that the eyewitness is making a reliable identification.[14] For the police, this means employing pre-trial identification procedures that have been demonstrated by a powerful body of scientific literature to ensure that identification procedures are administered in such a way as to enhance the accuracy of the witness's identification, and to avoid procedures that are more likely to produce mistaken identifications.[15] And for defense counsel, this means aggressively investigating the eyewitness's background, account of the crime, and encounters with the police; presenting all available and accessible independent evidence of the client's innocence; and conducting an effective cross-examination that is likely to expose deficiencies in the eyewitness's testimony.[16] The following sections elaborate on the special responsibilities of each of these participants.

The Role of the Trial Judge

Trial courts traditionally have viewed the testimony of eyewitnesses as no different from the testimony of any other kinds of witness. In general, these courts have allowed the jury to evaluate the credibility of an eyewitness without any special instructions and have refused to allow experts to assist the jury in understanding the way in which perception and memory affect the reliability of an eyewitness's identification. In light of the recent explosion of scientific research and findings on perception and memory, however, and the increasing acknowledgment by courts and commentators that eyewitnesses are often mistaken, it seems only reasonable that trial courts should be open to new approaches to help jurors better evaluate eyewitness credibility.

A trial judge can ensure that a jury is equipped to analyze the testimony of identification witnesses, first, by giving the jury a special instruction that cautions the jurors to evaluate rigorously and carefully the courtroom identification by an eyewitness, and, second, by allowing experts to explain to the jury the kinds of factors that may impair an eyewitness's ability to make an accurate and reliable identification.

Jurors generally are unaware of the inherent weakness of eyewitness identifications.[17] When identification is a critical issue in a trial, courts should routinely respond to the dangers of mistaken identification by formulating special cautionary jury instructions emphasizing the fallibility of an eyewitness's identification and requiring the jury to find beyond a reasonable doubt that the eyewitness's identification is trustworthy. Such instructions should focus the jury's attention on well-documented factors, noted below, that affect the reliability of an eyewitness's identification.[18]

Several courts have formulated special cautionary instructions on identification testimony. One such instruction, modeled after *United States v. Telfaire*,[19] emphasizes the importance of the issue of identification, the government's burden of proof, and the kinds of factors that the jury should consider in evaluating the reliability of the identification. Many of these factors have been cited by courts and commentators as critical to the evaluation of the identification testimony and are contained in pattern criminal jury instructions.[20] Such instructions should include: (1) whether the witness knew the offender before the crime took place; (2) whether the witness had a good opportunity to observe the offender; (3) whether the witness was paying careful attention; (4) whether a description given by the witness was close to the way the offender actually looked; (5) the use of any suggestive or non-suggestive identification techniques; (6) the lapse of time between the occurrence and the witness's next opportunity to see the accused; and (7) whether the witness failed to make an identification or made an identification inconsistent with the identification he or she made at trial.[21]

When a witness's identification is weak or equivocal, a stronger instruction is called for that emphasizes the unreliability of eyewitness identifications and specifically directs the jury to scrutinize the identification testimony with great care and caution.[22] Many appellate courts, while recommending that a special identification instruction be given in such a case, typically leave the matter to the trial court's discretion.[23] Those courts that have adopted this approach have indicated that it is unreasonable to impose a rigid requirement that the specific instruction be given or an automatic reversal will result, particularly when the identification testimony is credible.[24] Nevertheless, this more flexible approach almost certainly would require that the issue of the reliability of the eyewitness's identification be fairly presented to the jury, and that the jury at a minimum be instructed to consider the credibility and reliability of the identification witness.[25] When identification is a critical issue at trial, however, the failure to give any guidance to a jury on the issue of identification is likely to be found an error.[26]

In addition to giving the jury special cautionary instructions on the dangers of eyewitness identification, courts have also been asked to allow experts to testify to the kinds of factors that have been found by scientific research to contribute to mistaken eyewitness identifications. The kinds of subjects about which experts have testified include: (1) the diminished accuracy of cross-racial identifications;[27] (2) the diminished accuracy when a weapon is present;[28] (3) the presence of extreme levels of stress, which can impair memory;[29] (4) the weakening effect on memory of the passage of time;[30] (5) the influence of the initial identification on later identifications;[31] (6) the lack of correlation between the confidence of a witness and the accuracy of the witness's identification;[32] (7) the impact of suggestive pre-trial identification procedures on the reliability of the eyewitness identification;[33] (8) the tendency of eyewitnesses to identify the person from the lineup who in their opinion looks most like the perpetrator;[34] and (9) the lack of correlation between the amount of time that a witness viewed the perpetrator and the witness's memory and retention of the event.[35]

Many courts disfavor expert testimony regarding the reliability of eyewitness identifications, believing it not helpful to a jury, and potentially confusing.[36] This is particularly true in cases in which the eyewitness identification evidence is compelling, or other evidence of guilt corroborates the eyewitness's testimony.[37] Nevertheless, the unmistakable trend, particularly among state courts, has been to allow experts to testify on the reliability of eyewitness identifications.[38] Such testimony typically addresses the well-documented factors, noted above, that can render an eyewitness's identification untrustworthy.[39] In addition, the testimony of experts may be necessary to counter many widely held misconceptions about the supposed reliability of identifications, and to apprise the jury of factors that might contribute to an inaccurate identification.[40] Experts most often are permitted to testify when the identification evidence is weak, and convictions have been reversed when trial courts have unreasonably excluded such proof.[41]

When courts are asked to allow experts to testify to novel scientific theories, they must assume the role of "gatekeeper" to determine whether a sufficient foundation has been laid for the introduction of such testimony. The federal courts, and many state courts, apply the foundational test of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[42] under which scientific expert testimony is admissible if the evidence (1) is based on "scientific knowledge," and (2) will "assist the trier of fact to understand or determine a fact in issue."[43] As noted above, courts that refuse to allow expert testimony on the fallibility of eyewitness identifications claim that such testimony is unnecessary and confusing, and may usurp the function of the jury in deciding questions of witness credibility. If an indigent defendant makes a proper request for an expert on eyewitness identification, the failure of a court to provide funds for the retention of the expert is likely an error if the defendant can demonstrate that a reasonably competent attorney for a paying client would have sought the assistance of the expert, and that the defendant was prejudiced by the lack of expert assistance.[44]

The Function of the Prosecutor

Many prosecutors view their role not simply as that of a partisan bent on obtaining a conviction, but as a neutral advocate who has a responsibility to assemble the evidence of guilt, place that evidence before a jury fairly and effectively, and allow the adversary system to produce an acceptable result. Thus, as one local prosecutor stated following the dismissal of a murder case in which an innocent defendant spent eight years in jail, based on mistaken identification: "We live by an adversarial system. Our job is to present evidence we believe is credible. The defense's job is to poke holes in it. In a sense, the system worked, although it took some time."[45] Another prosecutor made the following remark: "If the [alleged rape victim] came in and said she could not identify her assailants, then we don't have a case. If she says, yes, it's them, or one or two of them I have an obligation to put that to a jury."[46]

These comments present the question starkly: Did these prosecutors have an "obligation" to place these cases before a jury? Or did the prosecutors have an obligation to make an impartial and objective determination of the quality of the witnesses' identification before asking a jury to convict? The approach by the prosecutors in the above cases may well be incompatible with a prosecutor's constitutional and ethical responsibility to serve the cause of justice and to protect innocent persons from erroneous convictions.[47]

Prosecutors' responsibility to serve truth and justice requires them to make an independent evaluation of the credibility of the witnesses, the reliability of the evidence, and the truth of the defendant's guilt before putting the case before a jury. With respect to eyewitnesses, there is little doubt that an experienced prosecutor is much better qualified than a jury at judging their reliability.[48] A prosecutor has more information about the background of the witness, has spent more time studying the evidence, is familiar with the relevant literature on eyewitness credibility, and has acquired courtroom experience in prosecuting other cases involving eyewitness identifications.

A prosecutor's informal evaluation of an eyewitness's reliability is more trustworthy than that of a jury because a prosecutor can more readily maintain a neutral and objective view of the evidence. A jury's view of the evidence, particularly the testimony of an eyewitness, is typically influenced by a variety of prejudicial, non-evidentiary factors.[49] And, ironically, a prosecutor, even one who entertains a reasonable doubt about the reliability of his or her witnesses, may impress a jury with the strength of the case merely by virtue of the decision to prosecute. Juries trust prosecutors; they are impressed by the prosecutor's prestige and expertise.[50] Indeed, jurors may reasonably assume that the prosecutor would not have brought the case in the first place if he or she harbored any doubt, and the jury may further assume that additional evidence probably exists to support the hypothesis of guilt. The danger of letting a jury decide a questionable case involving weak eyewitness testimony is that juries usually reach a verdict, and that verdict usually is guilty.[51]

Where the testimony of an eyewitness is determinative of guilt, the prosecutor should approach the case with a healthy skepticism, a willingness to subject the hypothesis of guilt to rigorous testing, and the courage to decline prosecution if he or she entertains a reasonable doubt of the defendant's guilt. A prosecutor's evaluation of the reliability of eyewitnesses should be influenced by the quality of the police investigation. Thus, a prosecutor's determination of the accuracy of the eyewitness should depend to a very large extent on prior encounters between the witness and the police. A prosecutor should be vigilant in learning whether the police employed suggestive techniques in obtaining a pre-trial identification from an eyewitness.

A prosecutor should be alert to any motive a witness might have to falsify. One of the difficulties in evaluating the credibility of eyewitnesses is that they typically have no motive to make a false identification. In such cases, the question that is frequently encountered is whether the eyewitness is simply making a mistake – whether the witness's confidence in the identification is justified.[52] In other cases, however, an eyewitness may be deliberately falsifying an identification, and a prosecutor has a responsibility to scrutinize carefully the background of that witness.

In one highly publicized wrongful conviction case, the defendant spent eight years in jail for a double murder he did not commit, based on the uncorroborated testimony of an alleged eyewitness.[53] In that instance, the prosecutor was negligent in failing to investigate his witness's background. Had he done so, he would have learned that the witness was a psychopathic liar who was in prison in another state at the time he claimed to have witnessed the double murder.[54] Similarly, the testimony of several eyewitnesses in the murder trial of Randall Dale Adams, memorialized in the film documentary *The Thin Blue Line*,[55] offers a dramatic commentary on the susceptibility of juries to powerful but false identification testimony offered by a venal prosecutor. The film presents these identification witnesses as having given their testimony confidently, even with bravado, under circumstances in which they almost certainly knew that their testimony was false.[56]

Apart from an affirmative responsibility to promote the truth, a prosecutor has a corresponding duty not to engage in conduct that disserves the truth. Some prosecutors, either consciously or unconsciously, try to "adjust" or "polish up" the testimony of their identification witness to strengthen the probative force of their identification. Through various kinds of coaching, some prosecutors overtly, covertly, or unintentionally elicit from eyewitnesses additional facts that "adjust" the witness's memory and thereby improve the testimony, as well as create an artificial aura of certainty and confidence.[57] This "coaching" process is exemplified by the testimony of key identification witnesses in three recent Supreme Court cases – *Banks v. Dreke*,[58] *Strickler v. Greene*,[59] and *Kyles v. Whitley*.[60] The eyewitness's testimony in each of these cases was confident and convincing. Yet there is every reason to believe that their testimony was embellished – even contrived – as a result of coaching by the prosecutors. Moreover, as the above cases indicate, the courts have not been especially vigilant about suggestive interviewing techniques of witnesses, leaving it up to the adversary process to expose weaknesses and improprieties. And even assuming highly skilled defense counsel able to test the accuracy and truthfulness of the eyewitness – a basic postulate of the adversary system's effectiveness – the process necessarily malfunctions when the prosecutor is able to control and shape the information, and eliminate or polish up information detrimental to his or her case. To the extent that the above cases exemplify the process of eyewitness preparation by careless or even venal prosecutors, they provide a devastating commentary on the artificiality of courtroom testimony by eyewitnesses, the corresponding difficulty of the criminal justice system in reducing jury mistakes that produce miscarriages of justice, and the need for new approaches to lessen the instances of misidentifications.[61]

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Police Procedures

When a crime is reported, the police usually make the initial contact with victims and witnesses. When the perpetrator is unknown, the police employ a variety of procedures to attempt to identify a suspect.[62] These procedures typically seek to minimize suggestiveness by having the witness view a lineup containing several individuals standing together or having the witness view an array of photographs.[63] To be sure, there may be occasions when the police believe it is necessary to have the witness view a suspect in isolation or show the witness a single photograph. These latter encounters – denominated "show-ups" – are inherently suggestive and may violate due process.[64]

> Recording the details of the identification during or immediately after the process is critical.

The manner in which the police administer an identification procedure also may violate due process. The Supreme Court in *United States v. Wade*[65] described the kinds of suggestive procedures that contribute to mistaken identifications. The police might suggest to the witness the identity of the perpetrator or that the perpetrator is in the array; they might create a lineup in which a particular characteristic of one person in the array would likely draw the viewer's attention, or where one person in the array was dramatically different in appearance from the others in the group; or the police might allow several witnesses to view the lineup together.

The police can minimize suggestiveness in identification practices in several ways. Police probably are aware that when they present an eyewitness with a lineup, show-up, or photographic array, the eyewitness reasonably assumes that the police consider one of the persons to be the suspect.[66] The eyewitness in such a case might feel obligated to identify a person in the group who in the opinion of the eyewitness looks most like the perpetrator relative to the other members of the group. This phenomenon – known as the "relative judgment process" – has been borne out by scientific research.[67] The police may be able to neutralize this relative judgment process by affirmatively advising the eyewitness that the perpetrator might or might not be present in the identification procedure. Guidelines published by the National Institute of Justice suggest that, prior to a lineup, the witness should be instructed "that the person who committed the crime may or may not be present in the group of individuals."[68]

The police also can neutralize the relative judgment process by using what is known as a "sequential lineup." A sequential lineup involves showing the persons in the group – including a suspect and any fillers – one at a time rather than employing the customary practice of showing them all together. The benefit of a sequential lineup is that the viewer makes an identification based on a recollection of the incident and compares the person being viewed with the person he or she recalls as being involved in the incident.[69] The extent to which sequential lineups represent an important prophylactic against mistaken identifications is unclear, however. Experts claim that sequential lineups may reduce false identifications but also may reduce correct identifications.[70]

Another innovation advocated by researchers is the practice of using a "double-blind" lineup, where the officer conducting the lineup has no knowledge of the facts of the investigation and does not know whether any suspect is present in the lineup. Commentators claim that this practice reduces the chance that a police officer involved in the investigation may consciously or unconsciously telegraph cues regarding a particular individual. Double-blind testing traditionally has been a universally accepted methodology in scientific research and there is no reason why it should not become an accepted practice when police administer any type of lineup procedure.

Finally, the police should make every effort to record the details of the identification procedure, regardless whether it results in a positive identification, a non-identification, or a "near miss" or "near hit" where the identification is tentative, uncertain, and inconclusive.[71] Clearly, any dialogue between the police officer administering the lineup and the witness may be critical to understanding the level of confidence or uncertainty of the witness, and whether any suggestive cues occurred during the lineup procedure.[72] Recording the details of the identification during or immediately after the process is critical; it is likely that neither the officer nor the witness will accurately recall the details of the process after a lapse of time. Thus, guidelines must be issued that would require the lineup administrator to record in writing or, where feasible, electronically, the identification procedure employed. This should include a complete and accurate record of any resulting identification and non-identification, in the witness's own words, and indicate the witness's level of confidence, as well as a verbatim account of any exchange between the witness and the police.[73]

The Task of Defense Counsel

Representing a client who claims that he or she is innocent and has been wrongly identified poses one of the most daunting challenges to any defense lawyer. The lawyer knows from experience that the traditional truth-testing tools that might expose a witness's motive to lie are usually ineffective in the case of an eyewitness.

Demonstrating that an eyewitness is mistaken is extraordinarily difficult, particularly when the witness appears to be a sympathetic crime victim who has no motive to falsely accuse the defendant, and who insists that the identification is correct. Some attorneys are not up to this challenge, and a failure to effectively confront the prosecution's evidence is a significant cause of wrongful convictions.[74]

A lawyer representing a criminal defendant operates within a constitutional framework that requires the lawyer, at a minimum, to provide reasonably competent assistance.[75] To be sure, when misidentification is a critical issue, an attorney must become familiar with the legal and scientific literature on the "vagaries of eyewitness identification."[76] Moreover, again at a minimum, an attorney who represents a client who claims he is the "wrong man" must travel several roads in an effort to undermine the identification. The lawyer must aggressively investigate the background of the eyewitness, challenge the circumstances of the initial viewing of the accused, intelligently confront the eyewitness's testimony in court, and produce independent evidence proving that the client has been wrongly accused.

An attorney has a duty to attempt to locate and interview witnesses, including alibi witnesses who the defendant claims possess knowledge concerning the defendant's actions.[77] An attorney also has a duty to learn the physical details of the place where the crime occurred, and the physical, emotional, or psychological infirmities of the eyewitness, for use in cross-examination.[78] Indeed, inasmuch as cross-examination is claimed to be the most important adversarial safeguard to discovering the truth,[79] defense counsel should thoroughly prepare an effective strategy to challenge the eyewitness's identification, including an inquiry into the kinds of factors that may affect the eyewitness's memory and perception, and conduct an effective cross-examination.[80] Courts must afford defense counsel a meaningful opportunity to probe the reliability of an identification witness's testimony.[81] Defense counsel should also seek out a scientific expert who could testify about the way memory and perception affect the reliability of an eyewitness's identification, as well as the kinds of factors that contribute to misidentifications.[82] Assuming that defense counsel has made a sufficient offer of proof, he or she should be prepared to support the offer of proof at a pre-trial *in limine* evidentiary hearing.[83]

Convinced of their client's innocence, some defense lawyers may decide to approach the prosecutor with representations of that innocence. Many prosecutors are alert to a defense attorney's representations that the client is innocent, especially when the appeal comes from a defense attorney whom the prosecutor trusts.[84] Such claims probably are made sparingly so as not to impair an attorney's credibility. When given reason to doubt the eyewitness's accuracy, a prosecutor may take a "second look" at the case and possibly subject the eyewitness to a vigorous interrogation of the kind that might be expected from a skilled defense counsel at trial. Some prosecutors use polygraph examinations to clear innocent suspects or as a basis for further examination.[85] When a defense attorney represents that his or her client is innocent and that the client is willing to take a lie detector test, it would appear that a prosecutor incurs no significant disadvantage in administering such a test.

Finally, there may be opportunities for defense counsel to protect his or her client from an unfair courtroom identification by devising techniques to challenge the eyewitness inside the courtroom with a simulated identification procedure. Thus, counsel might request that the court allow an in-court line-up with other persons of similar description or have the defendant sit in the spectators' gallery or place more than one person at counsel table. Such a strategy obviously carries the risk that the witness will make a correct identification of the defendant. Defense attorneys have also devised questionable ploys to trick witnesses into misidentifying a defendant, such as substituting an individual at the counsel table who looks like the defendant, and who sits there while the prosecution's eyewitness misidentifies the stand-in as the perpetrator.[86]

Conclusion

Reducing the incidence of wrongful convictions based on eyewitness mistakes poses a difficult challenge to the criminal justice system. There is near-unanimity among courts and commentators that eyewitness mistakes account for more erroneous convictions than any other type of proof. It is therefore incumbent on every key participant in the criminal justice system – judge, prosecutor, police, and defense counsel – to use every available tool to protect an accused from being mistakenly identified by an eyewitness. For the judge, protecting the accused requires a willingness to give the jury special instructions on eyewitness identification and a willingness to allow the use of experts to inform the jury of the issues concerning the reliability of eyewitnesses. For the prosecutor, protecting the accused requires a willingness to undertake an objective and impartial investigation of the reliability of his or her eyewitnesses, and to refuse to present such witnesses when the prosecutor entertains a reasonable doubt about the accuracy of identifications. For the police, protecting persons from mistaken identifications requires the employment of new techniques that are capable of preventing the kinds of suggestiveness that taint the witness's in-court identification and create the potential for an unjust conviction of an innocent defendant. And for the defense attorney, protecting the client means more than simply providing constitutionally competent representation but, in addition, being willing to aggressively challenge the prosecutor's evidence to minimize the chance that the client will be wrongly convicted. ■

1. *See* Brian L. Cutler & Steven D. Penrod, Mistaken Identification 3-36 (1995) (describing numerous instances of misidentifications); Gary Wells, Eyewitness Identification (1988); Jennifer L. Davenport, Steven D. Penrod & Brian L. Cutler, *Eyewitness Identification Evidence*, 3 Psychol. Pub. Pol'y & L. 338 (1997) (noting that "both archival studies and psychological research suggest that eyewitnesses are frequently mistaken in their identification").

2. *See United States v. Wade*, 388 U.S. 218, 228–29 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.").

3. *See* Innocence Project, http://innocenceproject.com.

4. *See* Jim Dwyer et al., Actual Innocence 41–77 (2000) (documenting cases of wrongful convictions based on eyewitness mistakes); Edwin M. Borchard, Convicting the Innocent (1932) (documentation of 62 American and three British cases of convictions of innocent defendants); Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 Law & Hum. Behav. 289–92 (1988) (describing a study of more than 200 felony cases of wrongful conviction that found misidentification to be the single largest source of error, accounting for more than half of cases that had one main cause). *See also State v. Delgado*, 902 A.2d 888, 895 (N.J. 2006) ("Misidentification is widely recognized as the single greatest cause of wrongful convictions in this country.").

5. Elizabeth Loftus, Eyewitness Testimony 19 (1979). *See also United States v. Langford*, 802 F.2d 1176, 1182 (9th Cir. 1986) ("[J]uries almost unquestioningly accept eyewitness testimony.").

6. 388 U.S. 218 (1967).

7. *Simmons v. United States*, 390 U.S. 377, 384 (1968).

8. *Neil v. Biggers*, 409 U.S. 188, 198 (1972).

9. The Court has considered on several occasions the scope of the due process protection against the admission of evidence derived from, for suggestive identification procedures. *See Stovall v. Denno*, 388 U.S. 293 (1967) (totality of circumstances is test to determine whether suggestive show-up violates due process); *Simmons*, 390 U.S. 377 (initial identification by suggestive photographic array did not violate due process); *Foster v. California*, 394 U.S. 440 (1969) (procedures used to obtain identifications violated due process); *Coleman v. Alabama*, 399 U.S. 1 (1970) (pre-trial procedures used did not taint in-court identification); *Neil*, 409 U.S. 188 (discussing factors to be considered in evaluating likelihood of misidentification); *Manson v. Brathwaite*, 432 U.S. 98 (1977) (applying factors in *Biggers* to find no violation of due process).

10. *Manson*, 432 U.S. at 114.

11. *Id.*

12. *Neil*, 409 U.S. at 199–200.

13. *See infra* "The Role of the Trial Judge."

14. *See infra* "The Function of the Prosecutor."

15. *See infra* "Police Procedures."

16. *See infra* "The Task of Defense Counsel."

17. *State v. Long*, 721 P.2d 483, 490 (Utah 1986) ("jurors do not appreciate the fallibility of eyewitness testimony").

18. *See infra* notes 27–35, and accompanying text.

19. 469 F.2d 552, 558–59 (D.C. Cir. 1971).

20. *See* Pattern Criminal Jury Instructions, Federal Judicial Center 44–45 (1988); Comment at 45 ("For cases where such an identification will be determinative, a careful detailed instruction should be given to minimize any chance of misidentification.").

21. *Id.*

22. *See United States v. Barber*, 442 F.2d 517, 525 n.8 (3d Cir. 1971) (advising jury that "identification must be scrutinized with great care").

23. *See United States v. Johnson*, 848 F.2d 904 (8th Cir. 1988); *United States v. Thoma*, 713 F.2d 604, 607–08 (10th Cir. 1983); *People v. Whalen*, 59 N.Y.2d 273, 464 N.Y.S.2d 454 (1983).

24. *See United States v. Luis*, 835 F.2d 37, 41 (2d Cir. 1987) ("because the trial judge is in the best position to evaluate whether this charge is needed in the case before it, adopting a rigid requirement cuts back on the trial court's discretion in the conduct of the trial without any assurance that the fair administration of justice is thereby enhanced").

25. *See United States v. Miranda*, 986 F.2d 1283, 1285–86 (9th Cir. 1993) ("general instructions on the jury's duty to determine the credibility of witnesses and the burden of proof are fully adequate").

26. *See United States v. Fernandez*, 456 F.2d 638, 644 (2d Cir. 1972) (error to refuse any identification instruction).

27. *See United States v. Stevens*, 935 F.2d 1380, 1397 (3d Cir. 1991); *United States v. Smith*, 736 F.2d 1103, 1106 (6th Cir. 1984). *But see State v. Valentine*, 785 A.2d 940 (N.J. Super. 2001) (requirement that juries be instructed on the weaknesses of cross-racial identifications does not apply to cross-ethnic identifications).

28. The phenomenon is known as "weapon focus." *See Stevens*, 935 F.2d at 1396–97; *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985).

29. *See United States v. Sebetich*, 776 F.2d 412, 419 (3d Cir. 1985).

30. The phenomenon is known as the "forgetting curve." *See Sebetich*, 776 F.2d at 419; *Downing*, 753 F.2d at 1230–31.

31. The phenomenon is known as "relation back." *See Stevens*, 935 F.2d at 1399–1400. *See also United States v. Wade*, 388 U.S. 218, 229 (1967) ("it is matter of common experience that once a witness has picked the accused at the line-up, he is not likely to go back on his word later on").

32. *See State v. Ledbetter*, 881 A.2d 290, 311 (Conn. 2005) (citing numerous scientific studies suggesting that "a weak correlation, at most, exists between the level of certainty by the witness at the identification and the accuracy of that identification").

33. *See United States v. Norwood*, 939 F. Supp. 1132, 1139–40 (D.N.J. 1996).

34. The phenomenon is known as the "relative judgment process." *See Ledbetter*, 881 A.2d at 314 (citing empirical studies supporting this phenomenon).

35. *Norwood*, 939 F. Supp. at 1138.

36. *See United States v. Welch*, 368 F.3d 970 (7th Cir. 2004) (upholding exclusion of expert testimony as not capable of assisting jury); *United States v. Kime*, 99 F.3d 870, 884 (8th Cir. 1996) ("minimal probative value of the proffered expert testimony is outweighed by the danger of juror confusion"); *United States v. Serna*, 799 F.2d 842, 850 (2d Cir. 1986) ("expert's testimony would have done nothing but "muddy the waters"); *United States v. Sims*, 617 F.2d 1371, 1375 (9th Cir. 1980) ("the admissibility of this type of expert testimony is strongly disfavored by most courts").

37. *See, e.g., United States v. Curry*, 977 F.2d 1042, 1052 (7th Cir. 1992) (eyewitness testimony supported by much other evidence).

38. *See, e.g., State v. Cheatam*, 81 P.3d 830 (Wash. 2003) (en banc); *State v. DuBray*, 77 P.3d 247 (Mont. 2003); *Commonwealth v. Christie*, 98 S.W.3d 485 (Ky. 2002); *People v. Lee*, 96 N.Y.2d 157, 726 N.Y.S.2d 361 (2001); *Johnson v. State*, 526 S.E.2d 549 (Ga. 2000).

39. *See supra* notes and accompanying text.

40. *See People v. Mooney*, 76 N.Y.2d 827, 560 N.Y.S.2d 115 (1990) (dissenting opinion) ("The notion that jurors are generally aware from their everyday experience of the factors relevant to the reliability of eyewitness observation and identification has not only been properly condemned as 'makeshift reasoning' . . . but has been refuted by research demonstrating a number of common and widely held misconceptions on the subject among laypersons").

41. *See Stevens*, 935 F.2d 1380 (excluding expert testimony regarding correlation between accuracy and confidence in eyewitness identifications was abuse of discretion); *Downing*, 753 F.2d 1224 (excluding expert testimony on reliability of eyewitness identification because court believed it could never be helpful to jury was abuse of discretion); *People v. LeGrand*, 8 N.Y.3d 449, 835 N.Y.S.2d 523 (2007) (excluding expert testimony on reliability of eyewitness identification when there was no evidence corroborating the witness's identification testimony was abuse of discretion).

42. 509 U.S. 579 (1993). *Daubert* superseded *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which remains the standard is several states. Under *Frye*, expert testimony on novel scientific evidence is admissible if "the thing from which the deduction is made [is] sufficiently established to have gained general acceptance in the particular field to which it belongs." *Id.* at 1014. However,

"[t]here is rapidly growing dissatisfaction among courts and commentators with the *Frye* test." *Mooney*, 76 N.Y.2d at 830 (dissenting opinion).

43. *Daubert*, 509 U.S. at 591. *Daubert* provided trial judges with a series of "general observations" to determine whether a theory or technique is based upon "scientific knowledge" and is reliable. Such factors include (1) whether the expert's theory or technique can be, and has been, tested; (2) whether the methodology has been subjected to peer review and publication; (3) the frequency by which the methodology leads to erroneous results; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the methodology has been generally accepted in the scientific community. *Id.* at 593–94. *See also* Fed. Rule Evid. 702.

44. *United States v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996) ("it is unlikely that a reasonably competent attorney would have incurred the expense of hiring an eyewitness identification expert."); *State v. Reynolds*, 639 P.2d 461 (Kan. 1982) (no abuse of discretion in refusing to authorize services of expert on eyewitness identification).

45. *See* Jim Yardley, *Man Is Cleared in Murder Case After Eight Years,* N.Y. Times, Oct. 29, 1998, at B1.

46. *See* David Barstow & Duff Wilson, *Charges of Rape Against 3 at Duke Are Dropped,* N.Y. Times, Dec. 23, 2006.

47. *See Berger v. United States*, 295 U.S. 78, 88 (1935) ("The prosecutor's] interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."). *See also* Model Rules Of Professional Conduct Rule 3.8, Comment 1 (1983) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); Model Code of Professional Responsibility EC 7-13 (1981) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."); ABA Standards For Criminal Justice, The Prosecution Function Standard 3-1.2(c) (3d ed. 1993). *See also* Bennett L. Gershman, *The Prosecutor's Duty to Truth,* 14 Geo. J. Legal Ethics 309, 314–15 (2001) ("prosecutor has the overriding [constitutional and ethical] responsibility not simply to convict the guilty but to protect the innocent").

48. *See, e.g.,* Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt,* 16 J. Legal Stud. 395, 446 (1987) ("There is every reason to believe that prosecutors, with more information at their disposal and more experience, are considerably better than juries at judging identification in criminal cases.").

49. *See* Reid Hastie, Steven D. Penrod & Nancy Pennington, Inside the Jury 232 (1983) (discussing how inadmissible evidence and stricken testimony has impact on juror's decision making).

50. *See United States v. Young*, 470 U.S. 1, 18–19 (1985) ("prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence").

51. *See* Harry Kalven & Hans Zeisel, The American Jury 55–63 (1966).

52. *See State v. Ledbetter*, 881 A.2d 290, 311 (2005) ("a weak correlation, at most, exists between the level of certainty demonstrated by the witness and the accuracy of that identification").

53. *See* Jim Yardley, *Man Is Cleared in Murder Case After Eight Years,* N.Y. Times, Oct. 29, 1998, at B1.

54. *See* Kristin Choo, *Perjury With Conviction: Lawyers Can Use Strategic Tactics at Trial to Expose Pathological Liars on the Witness Stand,* A.B.A.J., June, 1999, at 71 (discussing wrongful prosecution of Jeffrey Blake, convicted of a double murder based on testimony of Dana Garner, a psychopathic liar whose bizarre and uncorroborated eyewitness testimony should have been more carefully scrutinized by prosecutor).

55. Miramax Films (1988).

56. *See* Bennett L. Gershman, Film Review, The Thin Blue Line*: Art or Trial in the Fact-Finding Process?*, 9 Pace L. Rev. 275, 287–94 (1989).

57. *See* Bennett L. Gershman, *Witness Coaching by Prosecutors,* 23 Cardozo L. Rev. 829, 846 (2002).

58. 540 U.S. 668, 677, 685, 705 (2004) (stating that a suppressed transcript of pretrial practice sessions shows how the prosecutor "intensively coached" and "closely rehearsed" the testimony of witnesses).

59. 527 U.S. 263, 272–75 (1999) (eyewitness initially told police she had only "muddled memories" of event but after series of extensive interviews with police and prosecutor gave an astonishingly detailed account of the event, claiming "I have an exceptionally good memory").

60. 514 U.S. 419, 443 & n.14, 454 (1995) (finding a clear implication of witness coaching from suppressed evidence as well as fact that testimony at subsequent trial was much more precise than at an earlier trial).

61. It should be noted that the prosecutor in each of the above cases not only engaged in impermissible witness-coaching but also withheld exculpatory evidence that would have severely discredited the witnesses' testimony. *See* Bennett L. Gershman, *Reflections on* Brady v. Maryland*,* 47 S. Tex. L. Rev.685 (2006).

62. Police often create a composite sketch of the perpetrator prepared by the victim and the police artist in order to reflect the witness's recollection. *See People v. Maldonado*, 97 N.Y.2d 522, 526, 743 N.Y.2d 389 (2002) (composite sketches are "critical investigative tools" in the way they "winnow the class of suspects from the infinite down to a lesser number of people" but are inadmissible as hearsay to prove a defendant's guilt unless they are used to rebut a charge of recent fabrication).

63. Given the practical difficulties of assembling a live lineup containing a fair sampling of persons resembling the perpetrator, it may be less suggestive to create a fair array through use of a photographic spread obtained from a computer that has been programmed to produce pictures of persons that are similar to the defendant. For an discussion of the comparative suggestiveness of a live lineup and a photo-spread, see *People v. Burrowes*, N.Y.L.J., Oct. 25, 2004, p. 21, col. 1 (Sup. Ct., Kings Co.).

64. *See, e.g.*, *United States v. Rogers*, 387 F.3d 925 (7th Cir. 2004) (placement of one narcotics offender in same cell as person whom he had earlier been unable to identify and whom he later identified was unnecessarily suggestive and tainted reliability of in-court identification).

65. 388 U.S. 218, 229–34 (1967).

66. *See State v. Ledbetter*, 881 A.2d 290, 314 (Conn. 2005).

67. *Id.*

68. *See* National Institute of Justice, *Eyewitness Identification: A Guide for Law Enforcement,* U.S. Dept. of Justice Pub. No. NCJ 1788240 (1999), at 32.

69. A substantial body of empirical data supports the reliability of sequential lineup procedures. Guidelines issued by the United States Department of Justice and the Attorney General of the State of New Jersey endorse the sequential lineup procedure. *See In re Wilson*, 191 Misc. 2d 224, 741 N.Y.S.2d 831 (Sup. Ct., Kings Co. 2002). The first reported case to use the sequential lineup is *State v. Armstrong*, 329 N.W.2d 386 (Wis. 1983).

70. *Compare In re Thomas*, 189 Misc. 2d 487, 733 N.Y.S.2d 591 (Sup. Ct., Kings Co. 2001) ("scientific community is unanimous in finding that sequential lineups are fairer and result in more accurate identification") *with Wilson*, 191 Misc. 2d 224 ("researchers have noted that in cases involving multiple perpetrators or child witnesses sequential lineups may be inferior to simultaneous lineups.").

71. *See State v. Delgado*, 902 A.2d 888 (N.J. 2006).

72. *Id.* at 894. *See also United States v. Ash*, 413 U.S. 300, 318–19 (1973) (selection of person other than accused or inability of witness to make any selection is useful to defense).

73. *See Delgado*, 902 A.2d at 895–97.

74. *See* Dwyer et al., *supra* note 4, at 183. *See also* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 Yale L.J. 1835 (1994); Dirk Johnson, *Shoddy Defense by Lawyers Puts Innocents on Death Row*, N.Y. Times, Feb. 5, 2000, at A1.

75. *See Strickland v. Washington*, 466 U.S. 668 (1984).

76. *United States v. Wade*, 388 U.S. 218, 228 (1967)

77. *See Henry v. Poole*, 409 F.3d 48 (2d Cir. 2005) (deficient performance in failing to present adequate alibi defense); *Washington v. Smith*, 219 F.3d 620 (7th Cir. 2000) (counsel fails to contact or produce critical alibi witnesses); *Lawrence v. Armontrout*, 900 F.2d 127 (8th Cir. 1990) (duty to pursue alibi defense); *Demarest v. Price*, 905 F. Supp. 1432 (D. Colo. 1995) (complete failure to investigate state's case and interview witnesses), *vacated by* 130 F.3d 922 (10th Cir. 1997). *But see DeLuca v. Lord*, 77 F.3d 578, 588 n.3 (2d Cir. 1996) (alibi defense need not be investigated if counsel believes it is improbable).

78. *See Helton v. Sec'y of Dep't of Corr.*, 233 F.3d 1322 (11th Cir. 2000) (failure to investigate or present physical evidence regarding victim).

79. 5 John Henry Wigmore, Evidence § 1367, at 32 (J. Chadbourne rev. ed. 1974) (describing cross-examination as "the greatest legal engine ever invented for the discovery of truth").

80. *See Berryman v. Morton*, 100 F.3d 1089, 1098 (3d Cir. 1996) ("Counsel had in his hands material for a devastating cross-examination of [complainant] on the critical issue in the case. Because of his failure to confront her with her prior sworn testimony, the jury did not learn that she had previously described the height of her attackers under oath, that she had previously recanted prior testimony given under oath and that her prior descriptions were much different from her testimony at the trial."); *Driscoll v. Delo*, 71 F.3d 701, 710–11 (8th Cir. 1995) ("[T]here is no objectively reasonable basis on which competent defense counsel could justify a decision not to impeach a state's eyewitness whose testimony, as the district court points out, took on such remarkable detail and clarity over time.").

81. *Harper v. Kelly*, 916 F.2d 54 (2d Cir. 1990) (court's preclusion of defense attorney's inquiry into victim's emotional state during robbery infringed harmfully on defendant's Sixth Amendment right to confront his accuser.).

82. *See supra* "The Role of the Trial Judge."

83. *United States v. Downing*, 753 F.2d 1224, 1241 (3d Cir. 1985) (*in limine* hearing the most efficient procedure that court can use in making determination of reliability); *State v. Gunter*, 554 A.2d 1356, 1357 (N.J. Super. 1989) ("[T]he question of the admissibility of the [expert's] evidence proffered here could only have been resolved by a hearing . . . to determine its scientific reliability and the extent to which, if at all, it would have assisted the jury in its understanding of the relevant matters beyond the common knowledge of human experience.").

84. *See* Lief H. Carter, The Limits of Order 85 (1974) ("[T]he prosecutor adjusts to cues from the defense attorney, the most important of which is the defense attorney's trustworthiness.").

85. *Id.* at 123 (describing policy in one prosecutor's office of "willingness to dismiss a case when polygraph examination indicated the suspect's innocence," and agreement between prosecutors and defense counsel "that if suspect failed the test he would plead guilty rather than take the case to trial.").

86. *See United States v. Thoreen*, 653 F.2d 1332 (9th Cir. 1981); *People v. Simac*, 641 N.E.2d 416 (Ill. 1994); *Miskovsky v. State ex rel. Jones*, 586 P.2d 1104 (Okla. App. 1978). *See also* ABA Committee on Ethics and Professional Responsibility, Informal Opinion No. 914 (1966) (unethical conduct for attorney to participate in substitution of other persons for true defendants).

The State Capitol.—Front (East) Elevation.

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Photos of the State Capitol, the Senate chambers and the Western Staircase are from the N.Y. Red Book, 1908, Volume 17. The photo of Governor Hughes is from the N.Y. Red Book, 1909, Volume 18. All photos are courtesy of the N.Y. Public Library, scanned publications collection.

The Past as Present: The Last "Dead Heat" in the State Senate, 100 Years Ago

By Bennett Liebman

In the last several years there has been considerable discussion among New York State politicians (and those interested in politicians) about what might happen if the state Senate were to become evenly divided between Democrats and Republicans. Currently, there are 62 Senate seats. Entering the 2008 elections, the Republican Party held 32 seats, and the Democrats held 30 seats. At the 2008 election, the Democrats picked up two seats and now technically have a 32-30 seat majority. Nonetheless, after the election several of the Democratic senators refused to align themselves with the leadership of either the Democratic or the Republican party. Thus, as of this writing, questions remain as to which party, if any party, would be the majority party in the state Senate.

Under these circumstances, the importance of the presiding officer of the Senate becomes amplified. The position comes with a "casting," or tie-breaking, vote in the chamber – but this is a power that comes with a large asterisk. The presiding officer traditionally is the lieutenant governor, but Lieutenant Governor David Paterson became Governor Paterson in March 2008. The temporary president of the Senate now has the casting vote.[1]

The important question that naturally flows from these political events is, What power would the lieutenant governor or presiding officer have in the Senate chamber should the equal division of that body occur? This article considers this power in its political and historical contexts, which may serve as guides in the present.

Governor Hughes vs. Horse Racing

Considerable light can be shed on the role of the presiding officer by examining the events that transpired in Albany 100 years ago. It was then that New Yorkers witnessed the last major tie vote in the New York State Senate. The subject was horse racing, a provincial and often perplexing issue that has perpetually plagued Albany. The chief protagonist in this debate was Governor Charles Evans Hughes. Simply put, he was determined to end gambling at racetracks in New York.

Governor Hughes had been elected at the height of the Progressive Era in American politics. One of the hallmarks of Progressive policies was antipathy towards gambling, and gambling in the early 20th century meant horse racing. In fact, Progressive policies were so successful that the number of racetracks in the United States dropped from 314 in 1897 to 25 in 1908.[2] Hughes wanted New York to be part of that trend, and as matters stood in 1908 he needed legislation to do it.

In 1894 the New York State Constitution had been amended to make all gambling in New York unconstitutional. Nevertheless, in 1895 the state Legislature had taken action to defang the constitutional provision by passing the Percy-Gray Law.[3] Under Percy-Gray, a gambling operation outside a racetrack would be a felony, but gambling at a racetrack would be subject only to a civil penalty – which was the amount of the bet. As a result, "practically all restraint was removed from poolselling and bookmaking on the tracks of racing associations, and the constitutional prohibition was nullified in its application to race tracks."[4]

In 1908 Governor Hughes went on the attack against the concept that the constitutional provision should be ineffective at racetracks.[5] In his annual message, Hughes stated:

> The Constitution makes it the duty of the Legislature to enact appropriate laws to prevent pool-selling, bookmaking and other kinds of gambling. Experience has shown that the laws enacted have not accomplished the purpose which the Constitution defines. The evils and demoralizing influence, and it may be added, the economic waste, at which the Constitution aimed, exist under the law and in fact are stimulated and increased through its provisions. . . . The Constitution makes no exception of race tracks. I recommend that the Legislature carry out the clear direction of the people without discrimination.[6]

Later in the legislative session Hughes wrote of gambling at racetracks: "This is a scandal of the first order and a disgrace to the State. The bills are not aimed at racing or at race tracks or at property. They are aimed at public gambling, prohibited by the Constitution, condemned by the moral sense of the people, irrespective of creed, and conceded to be the prolific source of poverty and crime."[7]

The legislation to criminalize gambling at racetracks (known as the Agnew-Hart bill after its two legislative sponsors) passed the state Assembly by an overwhelming vote of 126-9 on March 26, 1908.[8] The legislation then headed to the Senate, where the outcome was far less certain.

It reached the Senate floor for a vote on April 8, 1908. The atmosphere was uniquely raucous. *The New York Tribune* wrote, "Not in many years have such conditions of open, flagrant and notorious scandal accompanied a battle over the passage of important legislation."[9] The events of the day even included a charge by one senator that opponents of the bill had attempted to lure him away from attending the session.[10] In this environment, and after a long debate, the anti-racetrack betting bill was defeated by a tie vote of 25-25.[11]

The Role of the Lieutenant Governor

Lieutenant Governor Lewis Chanler did not vote to break the tie. Chanler, unlike Governor Hughes, was a Democrat. At the time of Chanler's election, candidates for lieutenant governor in New York did not run jointly with candidates for governor[12] but rather were elected separately. Indeed, Chanler ran unsuccessfully against Hughes for the governorship later that year.

During the debate in the Senate on the gambling bills Chanler was challenged to vote on the legislation by Republican Senator Armstrong, who was a supporter.[13] Armstrong asked Chanler to cast the deciding vote, stating, "And I call attention to the fact that this being a tie vote, the president of the Senate must cast the deciding one."[14] Chanler responded, "The Senator is not in order. He knows that the president of the Senate, not being a member of Senate, can't vote on the passage of a bill."[15]

Nonetheless, Chanler voted to break a tie on a procedural matter after the debate on the main bill. The opponents of the legislation (the majority of whom were Democrats) pressed for an immediate vote to reconsider the vote by which the legislation had been defeated. Their reasoning was that the effect of such a vote would be to prevent the Senate from reconsidering the legislation at its regular legislative session. The proponents of the legislation, led by Republican Senators Raines and Agnew, moved to table the motion. Chanler, despite his political party affiliation, voted with the proponents of the legislation to table the motion, thereby blocking the effort to prevent the legislation from being reconsidered.[16] The vote by the Lieutenant Governor "permits the Hughes forces to take up the question again if they can get one of the stray votes back on their side."[17] The next day Chanler was commended for his actions by the YMCA in Troy, New York. He was praised "for the 'honesty and courage of his convictions regardless of political sentiment in so casting his vote as to break the tie and save to the whole people the right again to present for passage the racetrack bills.'"[18]

The New York Tribune explained the situation by writing, "Under the rules of the Senate the presiding officer has the deciding vote in case of a tie on all purely parliamentary questions. He has no vote on the direct passage of a bill. For this reason he could not have broken the tie by which the bills were defeated."[19]

A similar explanation was offered by the *New York World*, which wrote,

> Lieutenant Governor Chanler, who has no vote on the final passage of a bill but who is permitted to dissolve a tie vote on motions voted with Raines and Agnew. Senator McCarron [a leading opponent of the racing bill] criticized the Lieutenant Governor for voting

> on the first motion, declaring that he should have refrained from taking a stand one way or the other.[20]

The Aftermath of the Tie Vote

Governor Hughes took immediate exception to the Senate vote against criminalizing racetrack gambling. He stated, "It is impossible to believe that the people will permit the plain mandate of the constitution to be ignored. The contest has not ended. It has only begun. It will continue until the will of the people has been obeyed."[21]

The Governor then called for an extraordinary session of the Legislature to pass the anti-gambling measures. In his message calling for the session, he wrote, "I, therefore, urge you to discharge a manifest duty and to end the discriminations in favor of race-track gambling which cupidity inspired and now seeks to maintain."[22]

At the extraordinary session, Hughes's bills passed by one vote in the Senate.[23] The legislation[24] did not entirely kill horse racing in New York, however. While the Kenilworth track in Buffalo closed,[25] the major thoroughbred tracks in downstate New York and Saratoga, while weakened, remained open. Further, lawsuits were filed which limited the effect of the Agnew-Hart Law. These suits were successful in that wagering transactions totally oral in nature were found not to violate the statutes on bookmaking,[26] and oral wagers continued to be taken at racetracks.

In 1910, while Hughes was still governor, the Legislature passed a bill which attempted to close the oral wagering loophole in the law.[27] This time, all the tracks closed. There was no horse racing in New York State in 1911 and 1912. Once again, however, suits were brought challenging the reach of the anti-gambling laws. In *Shane v. Gittens*,[28] the state Supreme Court, and then the Appellate Division, found that, notwithstanding the 1910 amendments, private oral gambling transactions did not constitute the crime of bookmaking. The crime of bookmaking required an element of professionalism or habitualness that was lacking in the oral transaction at issue.[29] Based on this case, horse racing resumed in New York on May 30, 1913.[30]

Oral bets on horse racing continued as the key means of legal gambling at the track until 1934, when a law loosening gambling penalties was enacted.[31] This law was similar to the Percy-Gray Law of 1895 and mandated only civil penalties for gambling violations committed at race tracks. This law too was replaced when pari-mutuel racing was authorized by amendment to the state Constitution in 1939.[32]

The 1908 Vote Spotlights the Powers of the Lieutenant Governor

The lively history of the 1908 gambling vote has meaning today because it brings into focus the overall powers of the lieutenant governor in New York State. Article IV, § 6

of the New York State Constitution makes that official the president of the Senate, but gives him or her only a "casting" vote. In general, a casting vote refers to the ability of the potential voter to break ties.[33] However, the casting vote power appears to be limited by Article III, § 14 of the state Constitution, which provides that no bill can be passed or become law "except by the assent of a majority of the members elected to each branch of the legislature." Thus, only if the lieutenant governor is considered a member of the Senate could he or she break a tie to ensure final passage of a bill.

To the extent that scholars have written on this subject, the conundrum has been resolved against true tie-breaking power in legislation, because the lieutenant governor has not been considered a member of the Senate. The leading treatise on constitutional history in New York is Charles Lincoln's five-volume *The Constitutional History of New York*.[34] Lincoln's work has been cited 42 times in New York State Court of Appeals decisions.

Lincoln states that the lieutenant governor cannot vote on the final passage of legislation: "It is obvious that this majority cannot be made up by the addition of the lieutenant governor's vote. He is not a member of the senate, and legislative power is not vested in him, but in the senate and assembly."[35]

Lincoln also believes, however, that on all votes that did not involve the passage of legislation the lieutenant governor could break ties with the casting vote.

> This power apparently extends to all matters not involving the passage of a bill and requiring only a majority vote, including the determination of election contests, senate rules, the choice of its officers, including the temporary president, resolutions, either separate or concurrent, adjournments, confirmations of appointments by the governor, and removals from office.[36]

Other authorities agree that the lieutenant governor may not vote on legislation.[37] Robert Ward has written,

> As a matter of law, the No. 2 executive office in New York is even weaker than its federal counterpart. Both officials preside over the Senate. The vice president, though, has the power to vote on any bill in the Senate when necessary to break a tie. The state Constitution gives the lieutenant governor a "casting vote" – his-

torically interpreted to mean a vote that can only be used on procedural matters.[38]

A similar observation was made by the Temporary State Commission on the Constitutional Convention, which was formed to help educate the State Constitutional Convention of 1967. The Commission advised that the lieutenant governor had enjoyed a casting vote in the Senate since the first state Constitution in 1777. Nevertheless, "since Section 14 of Article III provides that no bill is to become law 'except by the assent of the members elected to each branch of the legislature,' the Lieutenant Governor's casting vote may only be exercised in matters of legislative procedure."[39]

The Temporary Commission further suggested that if the decision were to be made to expand the powers of the lieutenant governor, there was the possibility of enabling him or her to vote on legislation.[40]

> Vote casting might be widened by a change in Article III, Section 14, to apply to all legislative matters. This would associate the office somewhat more forcefully with the legislative branch and would put New York practice in line with that of the federal arrangement and that of some states where the vice-president (or lieutenant-governor) votes on *any* matters on which the senate is tied.[41]

Other Ties in the New York Senate

Other than the 1908 racing bill, the most prominent tie votes in the state Senate involved a bill reorganizing the New York City police force in 1895. Over a period of several weeks that year, the bill repeatedly lost by a tie vote of 16-16.[42] Efforts to kill the bill from being reconsidered by the Senate after each failed tie vote were blocked by Lieutenant Governor Saxton – who used his casting vote much like Lieutenant Governor Chanler in 1908 – to keep the bill alive in the chamber.[43]

At one point during this long fight, Lieutenant Governor Saxton used his casting vote to break a tie on an amendment to the bill.[44] His vote was immediately challenged by Senate Minority Leader Cantor, who said, "The constitution says you shall vote only on questions of order. You cannot vote for a bill, and you cannot vote on this."[45]

The Lieutenant Governor said, "The constitution declares my right, and I have never heard such a thing doubted before and do not intend to be dictated to."[46]

After the amendment was agreed to, the entire bill came up for vote. It also tied 16-16. "The lieutenant governor not voting on final passage, it was declared lost, and a motion to reconsider was tabled."[47] In commenting on this contretemps between Lieutenant Governor Saxton and Senator Cantor, the *Brooklyn Eagle* noted, "The lieutenant governor is not denied a casting vote on the passage of bills through any idea that it would be improper for him to vote on bills, but simply because the requirements of majority of a whole to pass bills makes a tie impossible, and the casting vote, therefore, likewise impossible."[48]

The New York Times had a similar view on the legislative fight.

> There is nothing in the contention that Lieut. Gov. Saxton had no right to vote on the amendment. The Constitution says that he shall have "only a casting vote" in the Senate, and the sole restriction upon its use is the declaration that no bill shall "be passed except by the assent of a majority of the members elected to each branch of the Legislature." At any other stage of its progress, the "casting vote" may be used.[49]

In reviewing the voting on the police reorganization bill a decade later, former Senator Lexow, who was the primary sponsor of the legislation, said,

> I called up that bill a dozen times before the close of the session . . . and every time it was defeated by the tie vote, three Republicans voting with the Democrats to prevent its passage. Every day the bill failed, I moved to reconsider the vote and had the motion lie on the table. Lieutenant Governor Saxton could vote on the motion to reconsider, but he could not vote on the passage of the bill, so every day he would break the tie and bring the bill before the Senate and every day the roll call would show sixteen Senators for and sixteen against the measure. The last vote of the session was a tie vote on the Police Reorganization bill.[50]

There were other times where there were tie votes in the Senate, and on these occasions, the lieutenant governor would only use the casting vote where the issue did not involve the final passage of legislation.[51] For example, Lieutenant Governor Saxton refused to vote to break the tie on the Sailors' Boarding House bill, which also occurred in 1895.[52] He "ruled that he had the casting vote in all cases of a tie, except on the final passage of a measure."[53] There are no occasions where the casting vote of the lieutenant governor was utilized to pass legislation.

The historical view is probably best summarized by an editorial run by the *Brooklyn Eagle* in 1891, after it appeared that there might be an even division between the parties in the Senate. The elected lieutenant governor was a Democrat. *The Eagle* opined:

> The "casting vote" of the lieutenant governor in case the senate is in a tie is a limited power which should be clearly understood now. It does not extend to votes on bills proposed as laws when on their final passage, but it does extend to all resolutions and to all amendments or motions on bills themselves, short of the final passage of such bills. . . . Thus, on the final passage of the bill, the lieutenant governor has no vote at all. He can, however, in case of a tie vote on the organization of the senate, because this is decided by resolution. He can also in like case vote on the appointment of committees, including reports of the committee on elections or contested seats.[54]

Tie Breaking in Other States

While New York history and commentary do not support the practice of having the lieutenant governor break tie votes on legislation, courts in other states faced with a similar issue have been divided.

> Courts in other states have found that the lieutenant governor is not authorized to break such ties.

Some courts have found that the lieutenant governor can utilize the casting vote to break the tie on legislation.[55] However, courts in other states have found that because the lieutenant governor is not a member of the state senate, he or she is not authorized to break such ties.[56] Perhaps the most interesting case is Michigan, where its supreme court initially determined that the lieutenant governor could not vote to break a tie on legislation[57] but 70 years later found that this could be done.[58] The court's changed view on the subject was largely determined by findings that subsequent changes made to the Michigan state constitution distinguished the latter case from the former.[59]

Conclusion

If New York were a blank slate on the issue, the power of the lieutenant governor to break ties on legislation would be very much in doubt. However, the practical construction given the state Constitution by scholars and prior lieutenant governors – especially as this view affected the course of racetrack gambling legislation a century ago – would lead one to conclude that the power does not exist. Only if a court were to disregard the history and practice outlined above might it conclude that the lieutenant governor could use the casting vote to break ties on legislation.[60] ■

1. With the position of lieutenant governor being vacant, that position is assumed on an acting basis by the temporary president of the Senate. The temporary president of the Senate (who in March of 2008 was Republican Senator Joseph L. Bruno) would be able to vote as a Senator and assume the casting vote of the lieutenant governor.
2. Robertson, The History of Thoroughbred Racing in America 196 (1964).
3. 1895 N.Y. Laws ch. 570. The Percy-Gray Law was found constitutional in *Sturgis v. Fallon*, 152 N.Y. 1, 46 N.E. 302 (1897); *see also People v Stedeker*, 175 N.Y. 57, 67 N.E. 132 (1903); *Lawrence v. Fallon*, 152 N.Y. 12, 46 N.E. 296 (1897).
4. John A. Lapp, *Race Track Gambling*, 2 Am. Pol. Sci. Rev. 422, 424 (1908).
5. Robertson, *supra* note 2, calls Hughes "the man who finally came nearest to accomplishing the demolition" of racing and states "[t]o the racing fraternity Charles Evans Hughes is notorious as the man who brought on a blackout." *Id.* at p. 194.
6. Public Papers of Governor Hughes, Annual Message 26 (1908).
7. *Id.* at 40–41.
8. *Race Track Bills Passed by Assembly*, N.Y. Times, Mar. 27, 1908.
9. *The Vote on Racing Bills*, N.Y. Tribune, Apr. 9, 1908.
10. *Racing Bills Are Defeated*, N.Y. Times, Apr. 9, 1908.
11. *Id.*
12. Until a 1953 amendment to the state Constitution, the governor and the lieutenant governor ran separately and not on a unified ticket. *See* Robert Alan Carter, New York State Constitution: Sources of Legislative Intent 39–40 (1988).
13. *Racing Bills Defeated*, N.Y. American, Apr. 9, 1908.
14. *Id.*
15. *Id.*
16. *Id.*; *see The Vote on Racing Bills*, N.Y. Tribune, Apr. 9, 1908.
17. *The Vote on Racing Bills*, N.Y. Tribune, Apr. 9, 1908; *see also Racing Bills Beaten, Hughes Will Fight On*, N.Y. Herald, Apr. 9, 1908.
18. *Lieutenant Governor Praised*, N.Y. Tribune, Apr. 10, 1908.
19. *See The Vote on Racing Bills*, N.Y. Tribune, Apr. 9, 1908.
20. *Race Track Bill Beaten, But May Yet Be Revived*, N.Y. World, Apr. 9, 1908. *The New York American* similarly noted that Senator McCarron stated, "The Lieutenant Governor is wrong. He should have refrained from voting." *Racing Bills Defeated*, N.Y. American, Apr. 9, 1908.
21. *See The Vote on Racing Bills*, N.Y. Tribune, Apr. 9, 1908.
22. *See* Public Papers of Governor Hughes, Annual Message 43 (1908).
23. *Hughes Signs Racing Bills*, N.Y. Times, June 12, 1908.
24. 1908 N.Y. Laws chs. 570, 571.
25. *See* http://www.buffalohistoryworks.com/tonawanda/tonawand.htm *and* http://wnyheritagepress.org/photos_week_2004/kenilworth/kenilworth.htm (last viewed February 28, 2008).
26. *See Lichtenstein v. Langan*, 196 N.Y. 260, 89 N.E. 921 (1909); *Jones v. Langan*, 132 A.D. 393, 116 N.Y.S. 718 (2d Dep't), *aff'd*, 196 N.Y. 551, 90 N.E. 1163 (1909).
27. L. 1910, chs. 486–488.
28. 78 Misc. 7, 137 N.Y.S. 670 (Sup. Ct. Nassau Special Term 1912), *aff'd*, 155 A.D. 921, 140 N.Y.S. 1139 (2d Dep't), *appeal dismissed*, 209 N.Y. 527, 102 N.E. 1111 (1913); *see also People v. Laude*, 81 Misc. 256, 143 N.Y.S. 156 (Nassau County Ct. 1913).
29. *Shane*, 78 Misc. at 13.
30. Robertson, *supra* note 1 at 213.
31. *See* R.L. Duffus, *Gambling Instinct Gets New Outlets*, N.Y. Times, Apr. 22, 1934; *Open Betting Bill Signed by Lehman*, N.Y. Times, Apr. 20, 1934; 1934 N.Y. Laws ch. 233.
32. *See* N.Y. State Constitution Art. I, § 9; Bryan Field, *New York Pari-Mutuel Betting Starts Today with Opening of Jamaica Track*, N.Y. Times, Apr. 15, 1940.
33. *See* Kevin M. Abel, *The Constitutional Mandate that the Lieutenant Governor Preside Over the Senate*, 27 Okla. City U.L. Rev. 645, 658 (2002); *Brown v. Foster*, 88 Me. 49 (Me. 1895). In E. Cobham Brewer, 1810–1897, Dictionary of Phrase and Fable (1898), "casting vote" is defined as "[t]he vote of the presiding officer when the votes of the assembly are equal. This final vote casts, turns, or determines the question." The American Heritage Dictionary of the English Language (4th ed. 2000) defines casting vote as "[t]he vote of a presiding officer in an assembly or council, given to break a tie." *Cf. Goldowitz v. Karnes*, 283 N.Y. 764, 28 N.E.2d 977 (1940).
34. Charles Z. Lincoln, The Constitutional History of New York (1906).
35. *Id.* at 4 Lincoln 482.
36. *Id.*

37. *See, e.g.*, Nancy Connell, *Lundine Only Wants a Portion of the Job Would Seek Senate Reprieve*, Albany Times Union, Oct. 24, 1986 (“The lieutenant governor does not have the power to cast a tie-breaking vote on legislation, although he can break a tie on a resolution.”).

38. Robert B. Ward, New York State Government 81 (2d ed. 2006).

39. *Temporary State Commission on the Constitutional Convention*, 14 St. Gov’t 90 (1967).

40. *Id.* at 92.

41. *Id.*

42. *Hard Words in Senate*, N.Y. Times, May 15, 1895.

43. *Id.*

44. *Saxton’ Vote Challenged*, Brook. Eagle, Apr. 24, 1895.

45. *Id.*; *see also Strangled in the Senate*, N.Y. Times, Apr. 25, 1895.

46. *Saxton’ Vote Challenged*, Brook. Eagle, Apr. 24, 1895.

47. *Id.*

48. *Casting Votes*, Brook. Eagle, Apr. 25, 1895.

49. *The Reorganization Bill*, N.Y. Times, Apr. 25, 1895.

50. *Lexow on His Old Bill*, N.Y. Tribune, Jan. 24, 1905.

51. *See Republican Senators and the Commission Bill*, N.Y. Times, May 18, 1882; *Action on Other Measures*, New York Times, May 8, 1884; *A Fight Over Investigations*, N.Y. Times, Apr. 11, 1894; *Aldermanic Elections Bill*, Brook. Eagle, Jan. 25, 1889.

52. *Hangs Fire in the Senate*, N.Y. Times, May 16, 1895.

53. *Id.*

54. *Legislature of New York*, Brook. Eagle, Nov. 4, 1891. *The Eagle*, in an editorial in 1895 concerning the consolidation of the City of New York, similarly said, “His power to vote to dissolve a tie extends only to resolutions, amendments or to motions preliminary to final passage of a measure and on its final passage he has no vote.” *Nothing If Not Referendum*, Brook. Eagle, May 10, 1895.

55. *Sweeney v. Otter*, 119 Idaho 135 (1990); Advisory Opinion on Constitutionality of 1978 PA 426, 403 Mich. 631 (1978); Opinion of Justices, 225 A.2d 481 (Del. 1966).

56. *Ctr. Bank v. Dep’t of Banking & Fin. of State*, 210 Neb. 227 (1981); *Sanstead v. Freed*, 251 N.W.2d 898 (ND 1977); *Easbey v. Highway Patrol Bd.*, 140 Mont. 383 (1962); *Coleman v. Miller*, 146 Kan. 390 (1937).

57. *Kelley v. Secretary of State*, 149 Mich. 343 (1907).

58. Advisory Opinion on Constitutionality of 1978 PA 426, *supra* note 55.

59. *Id.* at 641–42.

60. The temporary president of the Senate similarly cannot break ties on legislation since there would still not be a favorable vote on legislation by the majority of members elected to the Senate.

The Medicare Secondary Payer Statute

Medicare's Recovery Rights in the Context of Liability Insurance (Including Self-Insurance) and No-Fault Insurance

By Robert G. Trusiak

The Medicare program is administered by the Centers for Medicare & Medicaid Services (CMS), a component of the United States Department of Health and Human Services. Medicare claims on behalf of beneficiaries who have received medical items or services are reviewed and paid by CMS contractors, traditionally known as Part A "fiscal intermediaries" and Part B "carriers."[1] However, Medicare Secondary Payer (MSP) claims for reimbursement of conditional payments made by the Medicare program are handled by a single national contractor known as the Medicare Secondary Payer Recovery Contractor (MSPRC).[2] This article discusses compromise of Medicare Secondary Payor liability upon the negotiated resolution of the tort matter and the financial consequences associated with the absence of resolving Medicare liability.[3]

The MSP Statute

Congress created the MSP statute, § 1862(b) of the Social Security Act[4] to stem the skyrocketing costs of the Medicare program.[5] These provisions require that certain "primary plans"[6] – as relevant here, liability insurance (including self-insurance) and no-fault insurance plans – be the primary payer for items and services furnished to Medicare beneficiaries, leaving the Medicare program to provide benefits only as a "secondary" payer. Currently, the liability and no-fault insurance MSP provisions operate to save the Medicare Trust Funds approximately $500 million in known savings per year with overall MSP savings in excess of $6 billion per year.

The MSP provisions employ two mechanisms to protect Medicare funds and to ensure that Medicare is the secondary payer. First, these provisions prohibit Medicare from making payments for medical items and

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services that are otherwise reimbursable by Medicare if payment has already been made or can reasonably be expected to be made by another source that has primary payer responsibility.[7] Second, these provisions authorize Medicare, as an accommodation to minimize beneficiary concerns over continuity of care issues that might arise from delays in the payment of medical bills, to make payments if a primary plan has not made or cannot reasonably be expected to make payment promptly. However, any such payments are *conditioned* upon reimbursement to the Medicare Trust Funds.[8]

The MSP statute and implementing regulations make it explicitly clear that a primary plan, entities that make payment on behalf of a primary plan, and an entity that receives payment from a primary payer *shall* reimburse Medicare for any payment made with respect to an item or service if it is demonstrated that such primary payer has or had a responsibility to make payment with respect to such item or service.[9] Responsibility to make such a payment can be demonstrated in a number of ways, including the existence of a judgment or a payment conditioned on a recipient's compromise or release (whether or not there is a determination or admission of liability) with respect to what is claimed or released for the claim against the primary plan.[10] Further, Medicare is to be reimbursed within 60 days of payment by the primary plan, and interest may be imposed if the payment is not made within that time frame.[11] Moreover, if a primary plan learns that Medicare has made a payment for services for which the primary payer should have made the primary payment, it *must* give notice to Medicare, describing the particular circumstances, and it must repay Medicare.[12] On December 29, 2007, President Bush signed the "Medicare, Medicaid, and SCHIP Extension Act of 2007."[13]

In the event that the Medicare program is not reimbursed for its conditional payments made on behalf of its beneficiary, the MSP statute and regulations set forth numerous avenues of recovery available to the United States. First, the Medicare program may recover its conditional payments "by direct collection or by offset against any monies [it] owes the entity responsible for refunding the conditional payment."[14] Second, the United States "may bring an action against any or all entities that are or were required or responsible . . . to make payment with respect to the same item or service . . . under a primary plan."[15] This right is characterized as a "direct right of action."[16] Significantly, under this provision, the United States may actually sue the primary payer for *double damages*.[17] Additionally, the regulations require that in such circumstances, a "beneficiary must cooperate in the action."[18] Third, the United States may bring a direct action against "any entity that has received payment from a primary plan or from the proceeds of a primary plan's payment to any entity."[19] The Medicare regulations provide that CMS has a right of action to recover its payments from *any* entity that has received a primary payment and explicitly define the term "entity" as including "a beneficiary, provider, supplier, physician, attorney, State agency or private insurer."[20] In addition to these direct rights of action, Congress also provided the United States with a separate subrogation right. "The United States shall be subrogated . . . to any right under this subsection of an individual or any other entity to payment with respect to such item or service under a primary plan."[21]

Finally, it is also important to point out the "double payment" provisions of 42 C.F.R. § 411.24(i). In the case of a liability (including self-insurance) or no-fault settlement, judgment, or award, if a primary payer makes its payment to the beneficiary and Medicare is not reimbursed, or if it makes payment to an entity other than Medicare when it is, or should be, aware that Medicare has made a conditional primary payment, the primary payer must nonetheless reimburse Medicare.[22]

Medicare's Right to Reimbursement

Private attorneys regularly refer to Medicare's interest as a "lien." However, the use of this term is legally incorrect. In one of the few court cases to discuss this issue, the U.S. District Court for the Northern District of California noted that "[t]he MSP statute does not state that Medicare has a lien. . . . The Secretary maintains that Medicare's right is superior to a lien." The court went on to hold that the MSP statute does not give the government a claim against property and that "Medicare does not have a lien interest in the settlement awards." Rather, the statute creates a statutory claim for reimbursement which may be pursued by a direct action or through the right of subrogation.[23] Significantly, the courts have recognized that the United States' right of reimbursement "is paramount to any other claim."[24]

The Statute of Limitations

The proper statute of limitations applicable in cases involving liability insurance (including self-insurance) or no-fault insurance with primary payer responsibility is six years.[25] The courts have held that this limitations period is applicable to MSP claims through the application of 28 U.S.C. § 2415(a), which states that actions for money damages brought by the United States are barred unless filed within six years after the right of action accrues. In liability and no-fault cases, the right of action accrues from the *later* of the date of payment or the date that Medicare learns of the payment.

Medicare May Share Costs

Under Medicare's regulations, Medicare reduces its recovery to take account of the cost of procuring the judgment or settlement if procurement costs are incurred because the claim is disputed and those costs are borne by the party against which CMS seeks to recover.[26] This provision is based on the recognition that the beneficiary may have incurred certain fees and costs in obtaining his or her recovery. However, when CMS recovers directly from an insurer, there is no such pro rata reduction.

Reimbursement of Conditional Payments

As discussed above, the Medicare program certainly possesses the legal authority to bring a direct action against any primary plan responsible to make payment as a primary payer under the MSP statute.[27] However, it is far more consistent with the intent of Congress, which has authorized Medicare to make conditional payments for *the benefit* of Medicare beneficiaries, and more practical and sensible for all involved parties, to work together cooperatively to maximize MSP collections. Such cooperation fosters the laudable national goal of sustaining the long-term fiscal viability of the Medicare program and avoids overburdening the federal court system with expensive and unnecessary litigation.

On occasion, a personal injury attorney suggests that beneficiaries should attempt to avoid the obligations set forth in the MSP statute by filing an artfully worded complaint that seeks to exclude a claim for medical damages from its four corners. However, this appears to be at odds with § 3017(a) of the New York Civil Practice Law and Rules, which instructs a personal injury plaintiff to include only a prayer for general relief and not to set forth a specific recitation of damages. Section 3017(a) provides that a court may grant any type of relief within its jurisdiction appropriate to the proof, whether or not demanded.

Moreover, most releases issued in the context of personal injury settlements tend to be very broad in scope, releasing all causes of actions, sums of money, damages, claims, and demands of any kind, in law or equity, that a plaintiff ever had and further declare that the settlement constitutes payment for all damages and injuries arising from the incident. Medicare reads such a release as including damages for medical expenses and, if not reimbursed for its conditional payments, could seek double damages from the primary plan or could look to the beneficiary or the beneficiary's attorney as an entity that received payment from the settlement, judgment, or award for repayment of the Medicare conditional payment amount, if appropriate.[28] Thus, in settling a personal injury claim, a primary payer would assume the risk that it indeed was not settling any claim for medical damages.[29]

Additionally, it is not apparent why a primary payer would want to subject itself to two separate lawsuits arising from an injury caused by its insured – one by the injured Medicare beneficiary and a subsequent one by the United States, on behalf of the Medicare program. Federal court litigation is time-consuming and costly, and it

When Representing a Medicare Beneficiary

When representing a Medicare beneficiary:

- Attorneys should immediately contact the COBC at the outset of a case involving the representation of a Medicare beneficiary.
- The COBC can be reached at 1-800-999-1118 or by mail at: MEDICARE-COB, MSP Claims Investigation Project, P.O. Box 33847, Detroit, Michigan 48232.
- The COBC will need the Medicare beneficiary's full name, sex, date of birth, Social Security Number (SSN) or Medicare Health Insurance Claim Number (HICN), date of incident, and a description of the incident.
- After the information has been received and reviewed by the MSPRC, the beneficiary may access the interim conditional payment information at www.mymedicare.gov using his or her PIN number.
- The MSPRC must be notified in writing once a settlement, judgment, or award is reached. The date, amount recovered, and any attorney's fees or other procurement costs associated with the settlement, judgment, or award must be included. A copy of the settlement, judgment, or award may also be required.
- Once the information is reviewed the MSPRC will issue a recovery demand letter.
- Medicare beneficiary may appeal the decision of the MSPRC under 42 U.S.C. § 1395ff or request a waiver under 42 U.S.C. § 1395gg. Attorneys may also request a "compromise" under the criteria set forth in 42 C.F.R. § 405.376.
- All administrative remedies must be exhausted before any legal action may be brought in federal court. Compromises are discretionary and are not subject to appeal.

would make more sense for the primary payer to resolve all of its liability in one action and, in so doing, to support the important public policy of judicial economy.

It is also noted that a plaintiff's chances of maximizing his or her recovery in a personal injury lawsuit is significantly bolstered by the presentation of medical damages to the defendant. Medical expenses can oftentimes set the predicate for pain and suffering recovery and add "weight" to a plaintiff's claim. Moreover, as discussed above, Medicare may share in the cost of the plaintiff's prosecution of the lawsuit, often resulting in a material reduction in its recovery claim.[30] And, as mentioned, if Medicare must file a direct action against the primary payer, it will look to the beneficiary to assist in the prosecution of the case, as the regulations set forth a mandatory duty of cooperation. The failure to cooperate places the possibility of liability squarely upon the beneficiary's shoulders.[31]

No Ethical Concern

A personal injury attorney representing a client who is a Medicare beneficiary does not by virtue of that fact enter into a fiduciary relationship with the Medicare program. Medicare is not the attorney's client. Rather, the attorney is representing a client who has a legal obligation to *ensure* that Medicare is reimbursed for conditional payments that are the subject of a recovery against the tortfeasor.[32] Of course, the attorney has a duty to be familiar with all the laws that impact his or her obligations to the client.

Conclusion

At the outset of a case involving representation of a Medicare beneficiary in a personal injury/malpractice action, the attorney should immediately contact CMS's Coordination of Benefits Contractor (COBC) to initiate the opening of an MSP potential recovery case. The COBC can be reached at 1-800-999-1118 or by mail at: MEDICARE-COB, MSP Claims Investigation Project, P.O. Box 33847, Detroit, Michigan 48232. The COBC will need the Medicare beneficiary's full name, sex, date of birth, Social Security Number (SSN) or Medicare Health Insurance Claim Number (HICN), date of incident, and a description of the incident. The COBC updates CMS's Common Working File, which then transmits information to a system used by CMS's MSPRC to establish a potential recovery case. After information on claims paid by Medicare, starting with the date of incident, has been collected and reviewed to determine if the claims are related to what is being claimed or released by the beneficiary, the MSPRC sends *interim* conditional payment amount information to www.mymedicare.gov, where the beneficiary may access and print this information or authorize his or her representative to use the beneficiary's PIN number to do so. Once there is a settlement, judgment, or award, the MSPRC must be notified in writing of the date of the settlement, the amount of the settlement, and any attorney fees or other procurement costs borne by the beneficiary and associated with the settlement, judgment, or award. In some instances the MSPRC may require a copy of the settlement, judgment, or award. The MSPRC searches for additional Medicare-reimbursed claims and updates the conditional payment amount, as appropriate. The MSPRC then uses the settlement, judgment, or award information, including fees/costs borne by the beneficiary, as appropriate, to calculate the recovery claim amount and issue a recovery demand letter. The recovery demand letter includes information on the beneficiary's administrative appeal rights under 42 U.S.C. § 1395ff if there is a disagreement concerning the amount or existence of the recovery claim, as well as information on the right to request a waiver of recovery under 42 U.S.C. § 1395gg if the beneficiary believes he or she meets the criteria for such a waiver of recovery.[33] Ultimately, no legal action to contest Medicare's reimbursement of conditional payments can be filed in federal court until all applicable administrative remedies have been exhausted.[34] However, it should be noted that requesting a waiver of recovery pursuant to 42 U.S.C. § 1395gg is not required for exhaustion purposes.

If the attorney believes that the client's case warrants a compromise under the criteria set forth in 42 C.F.R. § 405.376, he or she can request that the appropriate CMS Regional Office compromise Medicare's recovery claim. However, compromise decisions are discretionary in nature and not subject to appeal. Additionally, compromise requests do not toll the time limit to file an appeal or toll the assessment of interest.

In conclusion, from Medicare's perspective, a cooperative approach involving the Medicare beneficiary, his or her attorney, and the primary plan/payer limits the necessity of time-consuming, expensive federal court litigation, limits the primary payer's risk of paying double damages and preserves judicial resources. Such an approach constitutes good public policy by effectuating Congress's intent to keep the Medicare program financially viable for present and future beneficiaries who depend upon this vital program. ■

1. *See* 42 C.F.R. pt. 421. CMS is now in the process of transitioning to a new type of claims-processing contractor known as a Medicare Administrative Contractor (MAC). MACs will handle both Part A and Part B matters.

2. The MSPRC has the responsibility for all new MSP recovery claims with the exception of the following: (1) provider/physician/other supplier duplicate primary payment recoveries, and (2) pending MSP accounts receivable where the recovery demand was issued by certain contractors prior to the advent of the MSPRC on October 1, 2006.

3. *See* J. Michael Hayes, *Are Medicare, Medicaid, and ERISA Liens? Resolving "Liens" in Personal Injury Settlements*, N.Y. St. B.J. Sept. 2007, p. 28.

4. 42 U.S.C. § 1395y(b).

5. *See* H.R. Rep. No. 96-1167 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5526, 5752; *U.S. v. Baxter Int'l, Inc.*, 345 F.3d 866, 874–75 (11th Cir. 2003); *Zinman v. Shalala*, 67 F.3d 841, 845 (9th Cir 1995).

6. Primary plans are defined at 42 U.S.C. § 1395y(b)(2)(A). *See also* 42 C.F.R. § 411.21. Although not the subject of this article, the MSP statute also applies

to employer group health plan arrangements and workers' compensation laws or plans.

7. *See* 42 U.S.C. § 1395y(b)(2)(A)(ii); 42 C.F.R. § 411.20(a)(2).

8. *See* 42 U.S.C. § 1395y(b)(2)(B)(i); *Baxter Int'l*, 345 F.3d at 892.

9. *See* 42 U.S.C. § 1395y(b)(2)(B)(ii); 42 C.F.R. § 411.22.

10. *Id.*

11. *See* 42 U.S.C. § 1395y(b)(2)(B)(ii).

12. *See* 42 C.F.R. §§ 411.25, 411.22.

13. Pub. L. No. 110-173, 121 Stat. 2492. (As relevant here, § 111 of the Act provides that liability (including self-insurance) and no-fault insurers, as of July 1, 2009, must determine Medicare beneficiary status on all claims and report those claims involving a Medicare beneficiary to the Secretary at the time of settlement, judgment, award, or other payment. If the reporting is not timely made, the Secretary may enforce a civil monetary penalty of $1,000 per day per individual. It is noted that these new requirements do not eliminate any existing MSP statutory or regulatory requirements.)

14. 42 C.F.R. § 411.24(d).

15. 42 U.S.C. § 1395y(b)(2)(B)(iii); 42 C.F.R. § 411.24(c)(2).

16. *See* 42 C.F.R. § 411.24(e).

17. 42 U.S.C. § 1395y(b)(2)(B)(iii); 42 C.F.R. § 411.24(c)(2).

18. 42 C.F.R. § 411.23.

19. 42 U.S.C. § 1395y(b)(2)(B(iii).

20. 42 C.F.R. § 411.24(g).

21. 42 U.S.C. § 1395y(b)(2)(B)(iv); *see also* 42 C.F.R. § 411.26(a). (It is noted that the Medicare regulations also empower Medicare to "join or intervene in any action related to the events that gave rise to the need for services for which Medicare is paid." 42 C.F.R. § 411.26(b). Since most of the underlying tort litigation takes place in state courts and since such courts lack jurisdiction over the Medicare program, CMS does not normally intervene in such actions. *See Hoste v. Shanty Creek Mgmt., Inc.*, 246 F. Supp. 2d 784, 788–89 (W.D. Mich. 2002); *Mitchell v. Health Care Serv. Corp.*, 633 F. Supp. 948, 949 (N.D. Ill. 1986).)

22. See *Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 417 (D.C. Cir. 1994), for a discussion of the "double payment" scenario.

23. *Zinman v. Shalala*, 835 F. Supp. 1163, 1170–71 (N.D. Cal. 1993), *aff'd*, 67 F.3d 841 (9th Cir. 1995).

24. *See, e.g., U.S. v. Geier*, 816 F. Supp. 1332, 1337 (W.D. Wis. 1993).

25. *See Manning v. Utilities Mut. Ins. Co., Inc.*, 254 F.3d 387, 397–98 (2d Cir. 2001).

26. *See* 42 C.F.R. § 411.37; *In re Zyprexa Prods. Liab. Litig.*, 451 F. Supp. 2d 458, 466 (E.D.N.Y. 2006).

27. *See* 42 U.S.C. § 1395y(b)(2)(B)(iii).

28. *See id.*; 42 C.F.R. § 411.24(c)(2); 42 C.F.R. § 411.42(g).

29. Medicare policy requires recovering payments from liability or no-fault settlements, judgments, or awards without regard to how the settlement, judgment, or award document stipulates or states disbursement should be made. This includes situations in which a settlement, judgment, or award does not expressly include damages for medical expenses. The only exception to this is when a court of competent jurisdiction or jury, *after ruling on the merits of the liability case*, specifically designates amounts that are for payment of pain and suffering or other amounts not related to medical items or services.

30. *See* 42 C.F.R. § 411.37.

31. *See* 42 C.F.R. § 411.23.

32. *See* 42 C.F.R. §§ 411.22(a), 411.24(g).

33. *See* 42 C.F.R. Part 405 (subpart I for administrative appeals and subpart C for waiver of recovery).

34. *See* 42 U.S.C. § 1395ii; *Cochran v. U.S. Health Care Fin. Admin.*, 291 F.3d 775, 778–79 (11th Cir. 2002); *Penoyer v. U.S.*, 2004 WL 437461 (N.D.N.Y. Feb. 3, 2004).

BY WILLIAM H. MANZ

Researching Administrative Decisions, Declaratory Rulings and Advisory Opinions

Under New York State law, certain state agencies and departments may issue decisions, declaratory rulings, and opinions. For decisions, this power derives from legislation. For example, the ability of the New York Workers' Compensation Board to hear disputed cases and render decisions derives from the Workers' Compensation Law.[1] In general, agency adjudicatory proceedings are governed by Article 3 of the N.Y. State Administrative Procedure Act (SAPA). Under SAPA, an adjudicatory proceeding is defined as "any activity which is not a rulemaking proceeding or an employee disciplinary action before an agency . . . in which a determination of the legal rights, duties or privileges of named parties thereto is required by law to be made only on a record and after an opportunity for a hearing."[2]

In the case of declaratory rulings, agencies formally interpret their own rules in response to a request, which may be based entirely upon hypothetical situations.[3] As § 204 of SAPA provides, "[o]n petition of any person, an agency may issue a declaratory ruling with respect to (i) the applicability to any person, property, or state of facts of any rule or statute enforceable by it, or (ii) whether any action by it should be taken pursuant to a rule."[4] Declaratory rulings are binding on an agency unless prospectively modified by the agency or set aside or altered by a court, and are subject to court review as provided in Article 78 of the CPLR.

Certain agencies, most notably the Office of the Attorney General and the Office of the Comptroller, render legal opinions to other governmental entities, including executive branch departments and municipal attorneys, on proposed actions. Attorney general opinions are either "formal" or "informal." Opinions issued to state agencies are denominated "formal" because the attorney general signs them as chief legal officer of the state. Informal opinions are issued to local government attorneys; they are called "informal" because it is ultimately the responsibility of the local government attorney to provide advice to the local government.[5]

Researching these rulings, decisions, and opinions has always been more complicated than researching case law, for numerous reasons. The only state-published, regularly issued, comprehensive source of materials from multiple agencies, the *State Department Reports*, ceased publication in 1958. This 75-volume set began in 1914 and was compiled by the Miscellaneous Reporter from 1917 to 1924, the Board of Estimate and Control from 1925 to 1928, the Division of the Budget from 1928 to 1944, and by the Department of State from 1944 to 1958. It included materials from a variety of sources, including the attorney general and the comptroller, and such agencies as the State Education Department, the Public Service Commission, the Insurance Department, and the former Industrial Board.

Over the years, only a limited number of agencies and departments individually published decisions, rulings, and opinions on a regular basis; many others followed a policy of non- or selective publication. As a result, items from a specific agency may appear under different titles, depending on the time period.[6] For example, decisions of the Commissioner of Education have appeared in the Education Department's annual reports (1900 to 1913), *State Department Reports* (1914 to 1958) and the *Education Department Reports* (1962–present). In some instances, publication of decisions or orders was erratic because of such factors as policy changes, budget cuts, or delays. Further research complications may arise from changes in agency names. The Education Department was once known as the Department of Public Instruction, while the Workers' Compensation Board was once the Industrial Board (1915 to 1921), the Industrial Commission (1922 to 1945),

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and the Workmen's Compensation Board (1945 to 1971). Another more recent example is the merger of the Lobbying Commission and the Ethics Commission to form the Commission on Public Integrity, as provided for by the Public Employee Ethics Reform Act of 2007.[7]

The amount of material available varies greatly depending on the issuing agency or department. Not surprisingly, an area with multiple, hard-copy sources is taxation. The CCH comprehensive loose-leaf tax set, *New York State Tax Reporter*, includes in its "New Matters" section the text of decisions by Division of Tax Appeals administrative law judges and the Tax Appeal Tribunal, as well as Department of Taxation and Finance advisory opinions. Historical coverage for this title is extensive since transfer binders date back to 1946. A second loose-leaf source, *New York Tax Cases*, published since 1992 by the William S. Hein Co., contains decisions of the New York City Tax Appeals Tribunal, the New York City Tax Appeals Tribunal Administrative Law Judge Division, the State of New York Tax Appeals Tribunal, and the Division of Tax Appeals. (A third source, RIA's *State and Local Taxes: New York*, which also reported tax decisions in hard copy, is now only available as an online product.)

Historically, materials from a small number of other state agencies have also been available in regularly published sets that can generally be found in larger law libraries. From 1979 to 2005, the comptroller's opinions were published in a loose-leaf format in *Opinions of the New York State Comptroller*, by Command Information Services. Attorney general opinions were published in another Command Information Services loose-leaf set, *Opinions of the New York State Attorney General*, from 1990 to 2006.[8] Earlier opinions are available in the attorney general's annual reports (1893 to 1958), *Informal Opinions of the Attorney General* (1932 to 1940, 1943 to 1958), and *Opinions of the Attorney General for the Year Ending ___* (1959 to 1989).

Workers' Compensation Board and Public Employment Relations Board decisions are published by LRP Publications. PERB's is the longest-running. Its *Official Decisions, Opinions and Related Matters of the Public Employment Relations Board of the State of New York* has been published since 1967. Appearing 12 times a year, this publication includes such features as a cumulative digest of cases, the full text of relevant statutes, and a case number index. Since 1987, LRP has published the decisions of the Workers' Compensation Board in the *New York Workers' Compensation Law Reporter*. Appearing 23 times a year, this publication also includes statutes, rules, and regulations.

Other print reporters include *Education Department Reports: Judicial Decisions of the Commissioner of Education* (LexisNexis/State Education Dep't 1962 to present), published since 1962, and *Decisions of the State Review Officer* (State Education Dep't 1991 to present), which consists of slip opinions on appeals from school district determinations involving handicapped children. Finally, although the Public Service Commission no longer publishes *Public Service Commission Reports* (1961 to 1994), its decisions still appear in hard copy in the *Public Utilities Reporter, Fourth Series*.

The increase in commercial online databases and free Internet sites has considerably broadened the availability of administrative decisions, rulings, and opinions. Many items that were formerly available only from the department or agency are now readily available online. Overall coverage varies; some

Web Addresses for State Agencies and Departments

Banking Department: http://www.banking.state.ny.us

Board of Elections: http://www.elections.state.ny.us

Commission on Judicial Conduct: http://www.scjc.state.ny.us

Commission on Public Integrity: http://www.nyintegrity.org/advisory

Commissioner of Education: http://www.counsel.nysed.gov

Committee on Open Government: http://www.dos.state.ny.us/coog/findex.html

Department of Environmental Conservation: http://www.dec.ny.gov/hearings/395.html

Department of Health: http://www.health.state.ny.us

Department of State: http://www.dos.state.ny.us

Department of Taxation & Finance: http://www.tax.state.ny.us/pubs_and_bulls/

Ethics Commission: http://www.nyintegrity.org/advisory

Insurance Department: http://www.ins.state.ny.us

Office of the State Comptroller: http://www.osc.state.ny.us

Office of the Attorney General: http://www.oag.state.ny.us

PERB: http://www.perb.state.ny.us/dec.asp

Public Service Commission: http://www.dps.state.ny.us

State Education Department Review Officer: http://www.sro.nysed.gov/dec.htm

Tax Appeals Tribunal: http://www.nysdta.org

Temporary State Commission on Lobbying: http://www.nyintegrity.org/advisory

On the Web: Current Online Coverage

	LexisNexis	Westlaw	Internet
Attorney General Opinions*	1976+	1977+	1995+
Banking Department Staff Interpretations	1990+		1990+
Board of Election Opinions			Varies
Commission on Judicial Conduct Opinions	1997+	1978+	1978+
Commission on Public Integrity Advisory Opinions			2008+
Commissioner of Education Decisions	1991+		1991+
Committee on Open Government Opinions			1993+
Comptroller's Opinions	1979+		1988+
Department of Environmental Conservation Decisions, etc.	1973+	1970+	Varies
Department of Health Administration Review Board Decisions	2000+		1990+
Department of Law No-Action Letters	1984–2003		
Department of State Materials			Varies
Department of Taxation & Finance Materials	1978+	1978+	Varies
Ethics Commission Advisory Opinions			1988–2007
Insurance Department Opinions & Letters	2000+	Varies	2000+
PERB Decisions and Opinions**	1986+	1982+	2000+
Public Service Commission Orders & Opinions***			1972
State Education Department Review Officer Decisions			1990+
Tax Appeals Tribunal	Varies	Varies	Varies
Temporary State Commission on Lobbying			1978–2005
Workers' Compensation Board Decisions	1989	1985	

* Attorney General opinions are also available to Bar Association members through Loislaw.

** The PERB Web site offers brief opinion summaries only. Those seeking full-text decisions are directed to Westlaw or the LRP print publication.

*** Comprehensive coverage begins with 1990.

materials are available commercially and for free online, some only commercially, and some only at the department or agency Web site. Similarly, database back files may vary greatly depending on the source. Online availability is subject to change. LexisNexis and Westlaw occasionally add materials from new administrative sources and less frequently stop updating databases. Similarly, new materials may appear on the Internet, but others may be dropped or have the extent of the back files altered. Formats also vary, with some sites providing documents in html or MS Word, while others offer pdf scans of the originals.

Not surprisingly, the commercial online sources are the easiest to use, having a standard interface and sophisticated search techniques. Many of the free Internet sites have only basic search features, if any, and essentially serve as document retrieval services. In addition, since the sites are primarily intended for the general public, not the legal researcher, legal-related materials may be difficult to find.

Finally, it should be noted that materials which are not included in a print publication or posted online may still be available. Generally, unpublished agency decisions, rulings and opinions are public records and, except in special circumstances, should be available upon request. In some cases, a FOIL request may be required. Information about making such requests is available at the Committee for Open Government Web site, http://www.dos.state.ny.us/coog/coogwww.html. ■

1. *See* N.Y. Workers' Compensation Law § 142.

2. SAPA § 102(3); *see also* Patrick J. Borchers & David L. Markell, New York State Administrative Procedure and Practice § 3.1 (2d ed. 1998).

3. Borchers & Markell, *supra* note 2, § 4.21 (citing *City of N.Y. v. N.Y. State Dep't of Health*, 164 Misc. 2d 247, 623 N.Y.S.2d 491 (Sup. Ct., Albany Co. 1995)).

4. SAPA § 204(1).

5. Opinions of the N.Y. State Attorney General, http://www.oag.state.ny.us/bureaus/appeals_opinions/search_intro.html (last visited Apr. 2, 2008).

6. For a comprehensive list of sources, see Robert Alan Carter, Sources of Published and Unpublished Administrative Opinions in New York State (rev. ed. 1994) (available for download as part of the State Library's digital collection), *available at* http://www.nysl.nysed.gov.

7. 2007 N.Y. Laws ch. 14, § 1.

8. The Office of the Attorney General plans to continue a print version of the opinions and is currently looking for a new publisher.

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am partner in a general practice firm that has been representing, successfully, a particular client in litigation and transactional matters for several years. The representation has been generally known by members of our local county bar association.

Our relationship with the client has been good. In addition, we have participated with the client in several high-profile community projects, and so have become identified as the attorneys for that client in the community at large.

Recently, it has come to my attention that one of my bar association colleagues (with whom I have no present cases) has been pursuing my client. I became aware that the client has been entertained by this colleague with trips to the theatre, and has been invited, as my colleague's guest, to golf, tennis and basketball games, as well as to community fund-raisers. Indeed, my client has indicated that she has become quite friendly with this colleague, whom she now considers to be a "golfing buddy and a good friend." Recently, my client indicated that when she complained about a business problem during a round of golf my colleague had suggested that her firm might better represent my client's business interests. I resent this obvious "poaching" attempt to take my client as her own.

My firm and I have been most loyal to our client during our many years of service, and I wonder – do any ethical or professionalism grounds exist that might preclude this "theft of client" effort by my competitive colleague?

Sincerely,
Feeling Victimized

Dear Victimized:

A critical concern of every practicing attorney is the retention of a client whose interests the attorney believes she has zealously pursued. As a consequence, the lawyer may come to consider the client as "bound to me," but that is not the nature of the attorney-client relationship.

Based upon the circumstances you describe, there indeed has been a solicitation of the client by your bar association colleague. Nevertheless, her tactics, although galling to you, appear to fall within the ambit of what is allowable under DR 2-103 of the New York Code of Professional Responsibility ("Code"). As stated in Simon's *New York Code of Professional Responsibility Annotated*, 2005 Edition, at page 223, a lawyer may say to a close friend, "After hearing your story, I think you ought to file a suit and I'd be glad to represent you," or "You really ought to come into my office to review your whole legal situation." Assuming the personal relationship, this conduct is permissible under the Code. In your case it appears that your bar association colleague has developed such a relationship with the client, and her approach therefore falls within the exception to the rule prohibiting solicitation.

Moreover, you must bear in mind the duties imposed upon the lawyer in the attorney-client relationship. These are, among other things, the duty to preserve client confidences and secrets (DR 4-101); the duty to exercise independent professional judgment (DR 5-101, 5-104, 5-105, 5-107); the duty to be competent (DR 6-101); and the duty to refrain from damaging or prejudicing the client (DR 7-101(A)). These obligations run one way – from the lawyer to the client. There are no correlative duties imposed upon the client, who is free to continue or discontinue the relationship with the lawyer. In short, a lawyer does not "own" the client; there are only duties owed by the attorney. Thus, your client is free to associate with and develop a close and friendly relationship with another lawyer, even one you clearly consider to be a predatory "client stealer."

A lesson here might be to deepen your own relationship with the client, and to move from being "good" to being "cordial" as well – and, of course, to continue producing successful results for the client in both transactional and litigated matters. As a suggestion, you might bring to your client's attention how you effectively utilized a suggestion the client may have made, and how important the counsel and client "team approach" was in achieving a favorable result. If the opportunity presents itself, you might also point out to your client the significance of having a partner in your firm with an excellent reputation in the legal community, as it was a critical factor in the successful handling of the client's transactional matter; the partner's reputation was acknowledged by the other attorney, the matter was thus not truly contested, and the client benefitted by saving time and avoiding additional legal expense. These are ways you might hold on to the client without gnashing your teeth over your colleague's behavior.

The Forum, by
Owen B. Walsh
Oyster Bay, N.Y.

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.**

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am an associate in a large Manhattan firm. Most of my clients are large corporations with thousands of employees. I have contact with several employees of one particular company on a daily basis and attend events sponsored by the company.

Here is my question. I have recently begun dating one of this company's employees, although I still interact with her professionally. I have not been asked to refrain from contact with her as a result of our romantic relationship, nor do I think that my legal judgment has been or will be compromised. However, some of my colleagues have suggested that these circumstances ultimately might cause problems for me and for our firm. Is there any reason to be concerned?

Sincerely,
Involved

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Speaking in Harrisburg, Pennsylvania, at the end of a long day campaigning, John McCain became confused while trying to express his disagreement with Congressman John Murtha, who had called the residents of that area "racist." McCain said, "I couldn't agree with him more," the opposite of what he intended. How could Mr. McCain have avoided that problem?

Answer: McCain's first problem, of course, was that he gave his speech at the end of a long day, during which he had attended three rallies in Pennsylvania, given five satellite interviews with TV stations and six radio interviews, done countless handshaking and considerable baby-kissing. His second problem was the pesky negative. Attempting to chastise and strongly disagree with Murtha for labeling residents "racist," McCain appeared instead to agree with Mr. Murtha.

Then, realizing his mistake, he made things worse trying to correct it, by saying, "I couldn't disagree with you," adding a negative instead of subtracting the original one. Finally, giving up the struggle to re-state his original remark, he said what he intended: "My friends, I could not disagree with [Murtha] more."

The adjectives *more* and *less* are often ambiguous, and academia confers no immunity to error. An official, commenting on the price a developer had asked for land this university wanted to buy, said, "This price amounts to nothing more than extortion." (He meant to say "less.")

McCain's dilemma recalls the problem with the statement, "I couldn't care less" (which means, "I care not at all"). That construction quickly became popular after it was introduced around the end of the 20th century. But noticing the two negatives in "couldn't care less," the public changed that expression to "could care less" (perhaps recalling the mathematical rule that two negatives make a positive). Removing the negative in *couldn't* changes the meaning of the statement from "I don't care at all" to "I do care somewhat."

A reader sent me a negative statement, asking "Isn't this ambiguous?" When asked about then-President Clinton's missile defense plan, President Bush had commented, "No decision would be better than a flawed decision." The remark is ambiguous. It can mean either "A flawed decision is better than no decision at all," or "It would be better to have no decision at all than to have a flawed one."

But negative ambiguity has one virtue: As Alexander Pope said, it can "damn with faint praise, assent with civil leer,/ And without sneering, teach the rest to sneer." When a college professor tells a student, "This is not bad writing," the professor does not mean that the writing is good. When a student asks a professor for a job recommendation, the professor can oblige by writing, "I cannot recommend him too highly."

A 1975 court rationalized the removal of a kidney from an incompetent man without his permission by saying, "The removal was not without benefit to him" (that "benefit" being the satisfaction the man would have felt at approving his gift).

Sometime ago, a reader commented on the ambiguity of *can't* in the instructions his ophthalmologist had written on his prescription: "Put 3 or 4 drops in each eye every day. You can't use too much of them." The reader asked, "Does *can't* mean, 'should not' or 'it is not possible to'?"

Another reader recalled Ed Asner's skit on *Saturday Night Live*, about the ambiguity of *can't*. Asner portrayed an engineer who had retired from his power plant position. His parting directions: "You can't put too much water in the generator." The following day, an engineer who read that instruction opened all the valves to increase the water flow (believing that the instruction meant, "It's not possible to add too much water").

A second engineer, who thought the instruction meant, "It is impossible to add enough water," left the valve open. But the third engineer understood the instructions to mean, "You should not add too much water," and closed the valve. Finally the three engineers called the retiree for help. He yelled, "Turn off the water! It rusts hell out of the valves!"

More examples of unintentional ambiguity could be listed, but it is refreshing also to see the opposite: brilliant and unambiguous metaphors. Here are a few:

> "[The codicil] creates a teasing illusion like a munificent bequest in a pauper's will."
>
> – Supreme Court Justice Robert Jackson

> "Expedience may tip the scales when arguments are nicely balanced."
>
> – Benjamin Cardozo

> "Science is a first-rate piece of furniture for a man's upper chamber, if he has common sense on the ground floor."
>
> – Oliver Wendell Holmes, Sr.

> "The advice of elders to young men is very apt to be as unreal as a list of the hundred best books."
>
> – Oliver Wendell Holmes, Jr.

> Definition of a gold mine: "A liar standing next to a big hole."
>
> – Mark Twain

> Definition of the word *recuse*: "It means you will not prosecute the safe-cracker you once held the flashlight for."
>
> – Mark Russell

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

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Todd Garrett Middler
Aaron Migdol
Anna Mihailova
Aaron Scott Miller
Samuel Rand Miller
Cristina Isabel Miller-ojeda Hagglund
Joseph Milowic
Richard Min
Michael Anthony Mincieli
Samuel Michael Mirkin
Daniel Scott Mirman
Katie Laura Mitchell
Skyla Rose Mitchell
Laurie Anne Moffat
Man-ni Mok
Marianna Moliver
Katarina Molnarova
John Wickliffe Moorman
David McLean Morrison
Larkin Moore Morton
Dimitrios Moscholeas
Michael John Mosiello
Christine Lauren Mott
Rongrong Mu
Jessica Elizabeth Muir-mccarey
Siddhartha Kishore Mukherjee
Adan Canizales Muller
Shaun Phillip Mulreed
Yeung Yin Daniel Mun
Patrick D'a Murdoch
Michele Murphy
Victoria Elizabeth Murphy
Abra Ruth Murray
David Hugh Murray
Irena Mykyta
Mitali Rasik Nagrecha
Newman Antoin Nahas
Vivien G. Naim
Amber Michelle Neal
Susan R. Necheles
Jessica Sophia Neff
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Klara Ng
Penelope Wai Ng
Wendy Ng
John Ngo
Hai Nhu Nguyen
Rebecca Claire Nierling
Leigh Hendrick Nisonson
Danielle A. Noonan
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Tasneem Shikari Novak
James Brendan Cushman O'Grady
Cindy Jane O'Hagan
Jessica Taylor O'Mary
Edward L. O'Toole
Udodilim Azukaego Okeke
Karina A. Olevsky
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Jose Ignacio Olmedo Lansac
John Hagan Olson
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Maria De Lourdes Olvera Monroy
Dan Or Hof
Adam Matthew Orgel
Shanna Nicole Orlich
James Alexander Orme
Jonathan Raymond Ozner
Ji Sun Pak
Kimberly Kristen Palermo
Serena Palumbo
Gregory Kingsley Pan
Aja Kathleen Pardini
Insoo Park
Jason Park
Sangyoon Park
Sylvia H. Park
Rebekah Hava Parker
Heather Nicole Parlier
Jennifer Pastarnack
Samir Balvant Patel
Seema Nagin Patel
Vladimir Pavlovic
Elizabeth Anne Paw
Erin Marie Payne
John Britton Payne
Robert Joseph Pellecchia
Amy Katherine Penn
Joshua Allan Penner
Diana Maria Perez
Rosalie Joann Perrone
John Whitney Perry
Mark Shelby Perry
Sergei Pershman
Courtney Janae Peterson
John William Peterson
Joseph Philip
Amy Jo Phillips
Nancy Katharine Picknally
Mazdak Pielsticker
Seth Alexander Piken
Anna T. Pinedo
Adriana Cecilia Pinon
Elisabeth Joy Piro
Johanna K. Pitcairn
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Allison Brooke Podell
Max Samuel Polonsky
David Andrew Pope
Andrew Mark Por
Joanna Camet Portella
Jason Bryant Porter
Jeanette Leah Potter
Matthew Vincent Povolny
Alka Pradhan
Wendy Anne Prager
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Arpan Kumar Punyani
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Lauren Jessica Rabinowitz
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Jeffrey Sandburg Reising
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Nazan Kristiana Riahei
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Taline Sahakian
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Lindsey Diamand Schatzberg
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Rachel Minden Schipper
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Marni F. Schlesinger
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Leaor David Schwartz
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Marc Jonathan Seibald
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Rahael Seifu
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Sanjay Sethi
Jean Paul Sevilla
Naureen Shah
Nirav S. Shah
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Valentina Shaknes
William Patrick Shanahan
Mark Howard Shapiro
Meredith Anne Sharoky
Brianne Alaine Shaw
Maryellen Shea
James Daniel Shead
Justin Lee Shearer
Leon Benjamin Sher
David Benjamin Sherman
Il Suk Shin
Judith Shophet
Cindy Shinli Shu
Ilya N. Shulman
Maria L. Sicuranza
David Hart Siegel
Carolyn Anne Silane
Ari Jay Silverman
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Michael Nathan Simkovic
Keith Simon
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Adam Michael Siry
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Kimberly Lauren Steefel
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Rose Ruth Stella
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Kardon Aaron Stolzman
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Jay Matthew Strader
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Stephen Christopher Szczerban
Makoto Takeda
Gerardo Fulvio Talamo
Hong Tang
Huimin Tang
Amanda Rachel Taub
Hannah Eliza Taylor
Nicholas Tebelekian
Alison Kim Swee Teh
Alesya Tepikina
Joaquin Pablo Terceno
Jamie Mary Thomas
Nakia Paula Thomas
Cynthia Louise Thompkins
Laurice Blair Thrasher
Pramod Thummala
Indran Thurairatnam
Erin Kathleen Tierney
Eu Ting
Lily Yuliani Tjioe
Joseph Lael Tobin
Thomas Sig Tollefsen
Shannon Kathleen Tomassi
Mariam Toure
Thao Ngoc Tran
Samantha Kay Trepel
Sergiu Zgripcea Troie
Joshua Morgan Troy
Travis Michael Troyer
Christopher Charles Tucker
Samantha Elizabeth Turino
Steven Wade Turnbull
Elizabeth Ross Turner
Miranda Holmes Turner
Cindy Eun Uh
Olga Marie Urbieta
Joshua Benjamin Urist
Avra Celine Van Der Zee
Nicole Valery Vanatko
Jarno Juhani Vanto
Zoe Agrambeli Vantzos
Amanda Leah Vaught
Rina R. Vazirani
Christopher Joseph Velenovsky
Leo Vellis
Sri Devi Venkatasamy
Carolina De Los Angeles Ventura
James Patrick Veverka
Jami Mills Vibbert
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Ramona Vijeyarasa
Danielle Brooke Vilinsky
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Kathryn Rebecca Vogel
Jelena Vojinovic
Lida Volgina
Lauren Rose Vollano
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Nikolay V. Vydashenko
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Richard Clarkson Wager
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Matthew Allen Walker
Shenade Michelle Walker
Tracy Morgan Wallach
Lena Feng Wang
Ying Wang
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Leah Larraine Weinberg
Leah Weinberg
Rachel Beth Weinberg
Ellen Pomfret Weir
Ronald Barry Weisenberg
Allison Grodin Weiss
Michelle Denise Weiss
Thomas John Welling
Nelson Honguo Wen
Peter Joseph Wenker
Laura Rachael Westfall
Mor Wetzler
Michelle Lynn Wexler
Elizabeth Ann White
Joseph Emmet White
Patrick John White
Eric N. Whitney
Keola Robert Whittaker
Michael Wiener
David R. Wilbur
Peter Edward Wilhelm
Jonathan S. Willett
Fenisha Ozella Williams
Simon Jeffery Charles Williams
Nicole R. Willis
Vanessa Anne Witt
Blanka Karolina Wolfe
Marc-andre Wolfe
Matthew Alan Wolfe
Adam Coulter Wolk
Hilary Joan Wolkoff
Misha Monique Wright
Nicole Kirsten Wright
Mark Wu
Wendy Wei Wu
Gregory D. Wyles
Michael Jonathan Wyman
Xu Xia
Zhangjun Xu
Maria Yam
Jared Andrew Yaman
Yanping Yang
Ayse Yazici
Christopher Yuk Lun Yeung
Catherine Yoon
Jaewon Yoon
Sara Yoon
Mark White Yopp
Diane Ribeiro Young
Fiona Tin Yau Young
Yan Yuan
Jason Kent Zachary
Leila Zahedani
Ariel Isaac Zell
Wen Zhang
Yu Zhang
Ming Zhao
Emily Zimmerman
H. Michael Zografakis
Yasmin Zohar
Rebecca Roselani Zubaty
Joseph Vincent Zujkowski

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Musa Ali
Kerry Lynn Ashton
Ronn Matthew Blitzer
Felicia L. Boles
Sabrina Lisa Bonne-annee
William Peter Bonomo
Randy Ryan Brathwaite
Olivier Gerard Cassagnol
Brian Chang
Lindsay Blair Coleman
Kathleen Anne Collins
Robert Wayne Conley
Tracy Linda D'andrade
Jason Eldridge
Morris Fateha
Jacob Avi Feiner
Richard Edward Freeman
Andrew Michael Friedman
Yael Friedman
David Brian Gerba
Robert Giancola
Kristina Giyaur
Oren L. Goldhaber
Jessica A. Horani
Ekaterina Idiatoulina
Syed Hasan Imam
Gerry T. Johnson
Eun Ju Jung
Nicole S. Junior
Joshua A. Katz

Ali Kazemi
Tatyana Kitovsky
Kate Kochendorfer
Yakov Kozlenko
Julie Labuticheva
Jeff Leung
Lynnette Nefertiti Lockhart
Joseph Daniel Maclellan
Laura Marie Maslauskas
Ani Van Dyke Mason
Lauren Hilley McSwain
Evelina Miller
Maria Novak
Stephanie Elizabeth Oddo
Elizabeth Joanne Owen
James Seongjin Park
Corey William Parson
Noah Harrison Passer
Gina Marie Patterson
Jonathan Andrew Paul
Serge Felix Petroff
Vlad Portnoy
Michael J. Rapfogel
Stephen Scott Roehm
Amber Shavers
Amber Nicole Shavers
Michael Earl Shaw
Dennis Raymond Shelton
Erin Geiger Smith
Julia Ann Smith
Connie Solimeo
Sudarsana Srinivasan
Andre Kevin Sulmers
Dafna Tachover
Sabrina Thanse
Nicole-Celina Urbont
Diana Vaynshenker
William Watt Waldner
Nathan Ernest Weill
Vielka Elisabeth Wilkinson
Samantha Young
Mariam Zakhary

THIRD DISTRICT
Elisabeth A. Colbath
Bradley Michael Fischer
James Daniel Horton
Nathan Sabourin
Lincy Marie Thomas
Kenneth Collins Weafer

FOURTH DISTRICT
Linda Ann Berkowitz
Brenna Kathleen Sharp

FIFTH DISTRICT
Stephen Lance Cimino
James Patrick Egan
Carlos A. Gavilondo
Jon Michael Taurisano

SIXTH DISTRICT
Jared Emeral Baker
F. Daniel Casella
Anna Dmitriev
Eric Leland Johnson

SEVENTH DISTRICT
Joseph Barrera
Daniel M. Howe
Silvia Maria Lopez
Kristen Jane Phillips
Susan Sutterfield Wilks
Shaun Robert Von Knasick
Susan Sutterfield Wilks
Richard W. Youngman

EIGHTH DISTRICT
Jillian E. Brevorka
Alan J. De Peters
Justin K. Kurtz
Anthony Edward Lipinski
Scott A. Stepien
Lori L. Thierfeldt
Denetra Dora Williams

NINTH DISTRICT
Ammar Akel
Jonathan R. Alden
Gillian Taicia Ballentine
Michael S. Bartolone
Stefanie A. Bashar
Dominique Renee Baxter
Roland Anthony Bloomer
Darren A. Bowie
Katharine B. Brown
Jody B. Burton
Nicole Lynn Caldararo
Beth Linea Carlson
Kathryn McKenzie Chandler
Areti Christoforatos
Joanna Helene D'Avella
Nicholas William Dicostanzo
Mariel Dreispiel
Alexandra Dapolito Dunn
Bryan Denis Duroy
Kimberly Ann Freyre
Reva Labroo Golkar
Tova Chava Gozdzik
Jeffrey Matthew Greenman
Mark Anthony Hidalgo
Jacob Hollander
Sheila Francis Jeyathurai
Michael Juliano
Daniel Scott Kaufman-Berson
Anna Liming Linne
Ann Luria
Kevin M. Mackay
Daniel Christopher Mara
Meghan Ann Mazzacone
Kristen Jeanne McCabe
Steven D. Meltzer
Marilyn Miller
Jennifer Rubin Moran
Anthony Morando
Joseph Scott Ostroff
Alia Riaz
Pamela Elkins Richardson
Jonathan Ritter
Stephen Sarkozy
Faisal H. Sheikh
Saad Turab Siddiqui
Tina P. Smith
Dana Lauren Steinberg
Wayne L. Thompson
Natalie Diane Torsiello
Genese Nicole Walker
Bradford White
Laura J. Winston
Alexander Greg Yeres

TENTH DISTRICT
Shaun P. Abraham
Shirlee Aminoff
Catherine Amitrano-king
Mark Kenward Antos
Jennifer Rose Asaro
Vadim Avdeychik
Elizabeth Aviles
Robert Miklos Babirad
Jesse Alex Baco
Stephen Rocco Barrese
Cindy Helene Barrois
Richard E. Beckerman
Bhavna Bhandari
Lisa Bisagni
Melisa Debra Bliss
Monique Renee Burton
Andrea Lynn Callan
Jeffrey Canarick
Grant L. Cartwright
Alison Belle Cennamo
Henry Chou
Zachary Craig Cohen
Elaine Mary Colavito
Timothy John Decicco
Sean P. Devaney
Karen Barbanel Estis
Kerri S. Flynn
Karen Anne Foley
Charlene Patricia Forde
John Nicholas Forte
Jasmine Garcia-Vieux
Kenneth Lawrence Gerber
Gavin Ross Goldstein
Joshua Jay Greene
David William Groeger
Paul Grotas
Paul B. Grotas
Byron Hakimi
Tara Hakimi
Kenneth Neal Hammer
James F. Hanley
Terence Fintan Hanley
Erika-rae Miller-rowe Harvey
Alireza Hedayati
Jessica Rachel Heller
Richard Jordan Hochroth
Fainna Kagan
Jasleen Kaur
Jacqueline S. Kim
George Konstantinos Kontakis
Kevin Phillip Krupnick
Meaghan Lawless
Jacqueline Susannah Linder
Carol Jane Litke
David A. Luden
Sean R. Macdavitt
Melissa Manginello
Orla McCabe
Karen Dawn McGuire
Robert Mehran
Eleonora Maria Migliaccio
Eric Matthew Milner
Noel Munier
Suzanne Marie Myron
Brian Scott Nache
Shagufah Nazaar
Edyta M. Okarma
M. Yvette Pacheco
Dominador Victor Pascual
Evelina Popijakowska
Caroline P. Raffa-Tyree
Jordan Elliot Reifler
Daniel H. Richland
Anna Rovenskaya
Steven James Rowley
Kevin Ryan Sahairam
Alisa Tannenbaum Schiff
Kristina Marie Scotto
Barry H. Serper
Olga Someras
Terrence Lee Tarver
Debbie M. Thomas
Monique Natasha Thomas
Dimos Chris Tripodianos
Stanley Chris Tripodianos
Brian Wilson
Brian John Wilson
Kerri-Ann Janice Wright
Jenny Yeh
Karl Egils Zamurs
Stephanos Zannikos

ELEVENTH DISTRICT
Ana Lucia Alvarado
Karen Aretha Blackman
Michael Bollag
Amatullah Khaliha Booth
Robert Harrison Brown
Marcelo Choi
Adam Reece Cohen
Ilham Elkoustaf
Isidro Tomas Garbanzos
Frank Giglio
Yasmeen Khali Gumbs
Brendan James Hennessey
Rachel Hezel
Courtney Norman Hogg
Lisa Ellyn Horwitz
Brian C. Hughes
Mikhail Ilyaich
Benjamin G. Johns
Irene Sook Kang
Argyrios Matthew Katos
Zena Jihyun Kim
Rinee Ramala Nalaine Kissoon
Jang Wook Kwon
Sean Robert Lally
Lin Lin
Hui Ma
Orla Jane McCabe
Brian McCaffrey
Caroline Meng
Gabriel Mignella
Kap Misir
Kapeil Misir
Judy M. Mok
Erin Molyneux
Lenh Sit Mong
Leslie C. Myers
Donovan Glen Rinker-Morris
Abigail Frances Rubenstein
Niranjan Gowd Sagapuram
Alejo Serra-ripol
Patrice E. Sessa
Frieda S. Shapiro
Carolyn J. Shields
Robert David Spitzer
Colleen Patricia Thorp
Tzy-Fai John Wong
Maria Hyunjun Yoo

TWELFTH DISTRICT
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Nicole Louise Bramstedt
Jennifer Leigh Buentello
Janene Dorya Carter
Sherine F. Cummings
Jose Defrank
Keren Lee Farkas
Sienna Mary Florence Fontaine
Phiona S. Gardner
Mineh Mesode Givens
La'teea Monet Goings
Morgan Blake Halley
Reginald Ademola Jacobs
Joana Kaso
Ingrid Gwenette Kelly
Jennifer Haesun Kim
Biju John Koshy
Kerwin Louis Ledesna
Scott Duffield Levy
Kathryn Elizabeth Miller
Jaimee Marc Nadell
Zachary Christian Neeley
Lisa Harumi Oshiro
Vanessa D. Overland
Daniel Arthur Padernacht

Robert A. Seeman
Ilana Will
Benjamin Barrett Wolff

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Khitam Ahmad Abdelkhaleq
David George-wayne Adams
Jennifer Collesano Adams
Michelle Denise Adams
Leonore Agrest
Bo Yong Ahn
Jehyun Ahn
Emilie B. Alexandre
Felipe Francisco Ballve Alice
Alexis Lynn Alire
Jeffrey Scott Allmon
David Robert Alperstein
Roberto Amore
Mark Hamilton Anania
Marian Ancheta
Vineet Aneja
Sofia Grace Lukban Angeles
Imran H. Ansari
Erika Arban
Hallie Joy Aronson
Ramazan Arslan
Oluwafunso Adesola Aweda
Ross Michael Aylward
Aravind Ayyar
Sandrine Azzoppard
Arzo Baher
Bing Bai
Simon Harald Baier
Haris Zaheer Bajwa
Blake Daniel Ballin
Chen Bao
Steven Todd Baron
Kyle Charles Barry
Susan L. Barry
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Matthew David Batastini
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Mike Willem Jozef Beckers
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Thomas Martin Beline
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Paul Richard Bessette
Glenn Bettelheim
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Shilpi Bhattacharya
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Sheila Bohm
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Eric Andrew Braun
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Adam Michael Brown
Jamaal Rashad Brown
Cynthia Anita Browning
Caroline Rieger Brownlie
Markus Burgstaller
Timothy Smith Burns
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Maria Francia Fatima Madar Caganda
Kristin Anne Calabrese
Duncan Joseph Campbell
Hui Cao
Xue Cao
Francesco Carloni
Eric Donald Carlson
Giles Austin Carmichael
Ellaine Antonio Carr
Lazaro Carvajal
France H. Casseus
Tara Eliza Castillo
Cecilia Ines Castro
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Sung Yong Chae
Yuk Yin Isis Chan
Hae Gyung Chang
Li-sung Chang
Michael June Chang
Sze Wan Florence Char
Jeffrey Mark Chebot
Liqin Chen
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Yaoyao Chi
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Joybell Chitbangonsyn
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Kyung Yoon Chung
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Stephen Joseph Cowen
Tara Marie Creegan
Bart Albert Leocadia Creve
Amand Benoit D'hondt
Gloria J. D'Souza
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Sharmili Poonam Das
Andrew Alfred Daun
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Aude Dupuis
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Yu-cheng Jack Fan
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Gaby Finkel
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Thad Spencer Florence
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Javier Fernando Flores
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Flore Nicole Foyatier
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Joseph Frank
Heather Margaret Franklyn
Sean Fraser
Ayana Niambi Free
Amy Shannon Freed
George Robert Freund
Qianfei Fu
Yijing Fu
Oliver Justin Fuchs
Michael Shingo Funaki
Corey John Gabriel
Kathrin Christa Gack
Karla Y. Garcia
Jane Garrido
Erica Gaston
Toya Lefay Gavin
Zelda Gerard
Matthew P. Gerber
Danielle Marie Gilberti
Karla Ann Gil bride
Francesca M. Gizzi
Vasileios Gkaremetsis
Evan Kaufman Glaberson
Hannah Beth Gladstein
Adam Joshua Glanzman
Scott Timothy Glennon
Maria A. Goetschalckx
Karen Virginia Goff
Hui Ling Goh
Michael Martin Goldberg
Akiva Eliahu Goldman
Jordan Seth Goldsmith
Adam Jacob Gopin
Jared Andrew Gordon
Meaghan Mary Goulding
Eric Jason Grabois
Richard John Grabowski
Stefan Graiche
Kenneth B. Grear
Aaron Paul Grieser
Richard David Grossman
Natalie Anne Guelfi
Leonardo Marques Guglielmi
Anik Guha
Maria Hajiyerou
Kelly Hyatt Hamilton
Elliot James Hammer
Henrik Juul Hansen
Yuko Hara
Johnathon Hardaway
William Leslie MacLean Haworth
Robert F. Hecht
Christopher Matthew Hemrick
Deborah Antoinette Heslenfeld
Kevin Wing Ho
Joy Elizabeth Hodge
Mee Hong Hoe
Yong Ho Hong
Tracy Claire Horan
Melanie Brooke Horn
Christopher Hoskey
George C. Howell
Wen-hsing Hu
Ran Huang
Xiaofei Huang
Yun Huang
David Scott Huberman
Jose Miguel Huerta
Alexandra Anne Hui
Bo Youl Hur
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Chi Ou Hwang
Justin Brett Incardone
Meredyth Lee Isaac
Nathanael David Isaacson
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Phillip Michael Jacobs
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Jeremy L. Janis
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Eddie Albert Jauregui
Vivek K. Jha
Mengbi Jiang
Qingwen Jiang
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Hilary Francoise Jochmans
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Meredith Allen Johnston
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Ayako Kaneko
Avraham Karlewski
Shaheen Karolia
Julia Anne Karwowski
Mona Francesa Salvacion W Katigbak
Naonori Kato
Ryotaro Kato
Krisztian Katona
Evangelia Katsari
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Glenn Anthony Kearney

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Paul Stephen Kelly
Michael Thomas Kenny
Mildred Caldwell Kerr
Eric Craige Keuling
Amani Cherry Mohsen Khalifa
Omar Aziz Khondker
Gokce Kilic
Won Juan Kim Yang
Beom Joon Kim
Bum Soon Kim
Byungkook Kim
Edward Chung-koo Kim
Jie Hyeong Kim
Kenneth Kim
Yeung Jin Kim
Younwhoi Kim
Yuho Kim
Lisa Faro King
Fusaka Kirinuki
Monika Gabriela Kislowska
Keirsten Klatch
Deanna L. Koestel
Kazunori Koike
Scott Jaller Koplik
Nobuo Kosaka
Ioanna Koukouli
Carl Krasik
Stephen Skelly Kreller
Mary Ann Angela Kricko
Karl Kronenberger
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adjourn [only] the [only] case [only]." Where you place the word "only" alters the sentence's meaning. *Correct:* "Only the prosecutor wanted to adjourn the case," meaning that the prosecutor, no one else, was interested in adjourning the case. *Or:* "The only prosecutor wanted to adjourn the case." This sentence indicates that there's only one prosecutor. *Or:* "The prosecutor only wanted to adjourn the case." The "only" placed here means that the prosecutor wanted to do nothing but adjourn the case. *Or:* "The prosecutor wanted only to adjourn the case." *Or:* "The prosecutor wanted to adjourn only the case." *Or:* "The prosecutor wanted to adjourn the only case." These sentences all indicate that the prosecutor desired to adjourn this one case and no other. *Or:* "The prosecutor wanted to adjourn the case only." The "only" in this position signals that the prosecutor wanted nothing to happen to the case except to adjourn. Writers must position modifiers carefully to state their intended meaning exactly.

Like hormonal high schoolers, modifiers fall for whatever is closest to them.

It's confusing when a phrase modifies two subjects simultaneously. *Incorrect:* "Even if the lawyer's summation persuaded the jury, viewing it as a whole, the summation was filled with objectionable arguments." It is unclear in this sentence whether the modifier "viewing it as a whole" modifies the lawyer's summation or the objectionable arguments. Sometimes inserting or adjusting a comma will fix the problem. If not, rearrange the sentence or break it into two. *Correct:* "Even if the lawyer's summation persuaded the jury, viewing it as a whole the summation was filled with objectionable arguments." *Or:* "Even if the lawyer's summation persuaded the jury viewing it as a whole, the summation was filled with objectionable arguments."

Incorrect: "The lawyer to whom the brief was delivered immediately saw the errors." Was the brief "delivered immediately" to the lawyer *or* did the lawyer "immediately see the errors?" "Immediately" simultaneously modifies the verbs "delivered" and "see." The meaning depends on which of the two verbs is modified. Rewriting the sentence so that the modifier no longer modifies both words clears up this ambiguity. *Correct:* "The brief was delivered immediately to the lawyer, who saw the errors." *Or:* "The brief was delivered to the lawyer, who immediately saw the errors."

Split Infinitives

"To be or to not be" isn't the question Shakespeare posed. He knew better than to vigorously split his infinitives. An infinitive is the word "to" followed by a verb. Modifiers placed in the middle of the infinitive create split infinitives, and splitting headaches for readers.

Move modifiers that sneak into an infinitive. *Incorrect:* "The law professor worked to steadily gain his students' respect." In this sentence, modifier "steadily" splits the infinitive "to gain." An easy solution is to reposition the modifier elsewhere in the sentence. *Correct:* "The law professor steadily worked to gain his students' respect."

Some splits cannot be corrected. *Example:* "We ask the members of the audience to kindly take their seats." The modifier "kindly" splits the infinitive "to take." The answer in most cases is to move the modifier out of the infinitive into a safer position. But nothing works in this example. *Incorrect:* "We ask . . . kindly . . . ." *Also incorrect:* "We ask the members of the audience to take their seats kindly."

Some split infinitives are so commonplace, they sound correct despite their grammatical inaccuracy. *Incorrect:* "Foreclosure filings in Supreme Court are expected next year to more than double." In this sentence, the modifier "more than" splits the infinitive "to double." Some split infinitives, like this one, cannot be corrected with mere modifier shifts. They require rewriting. *Correct:* "Foreclosure filings in Supreme Court are expected next year to more than double their current level."

Dangling Modifiers

A dangling modifier is a word or phrase that modifies the wrong phrase or describes something not in the sentence. The dangling parts of speech can also be transitions, like "hopefully" or "in conclusion." They can also be participles, which are verbs acting as adjectives in a sentence. Or they can be appositives, subject modifiers equivalent to another subject in the sentence. Dangling modifiers make sentences illogical, usually by allowing something to hang precariously at the beginning of a sentence.

The worst dangling-modifier offender is one that modifies no subject at all, leaving the reader to wonder who performed the action of the sentence. *Incorrect:* "When dangling, avoid using participles." In this sentence, the word "dangling" is the dangling modifier. "Dangling" is ambiguous: It doesn't refer logically to any word in a sentence. "Dangling" describes something absent from the sentence. *Correct:* "When writing dangling phrases, avoid using participles."

Incorrect: "To determine whether to reverse, four factors must be considered." Only a court, not factors, can determine, reverse, and consider. The subject of this sentence, "the court," is missing, leaving the modifier dangling without a subject. *Correct:* "The court must consider four factors to determine whether to reverse."

Incorrect: "Finding no error, the judgment was affirmed." In this elliptical clause, the writer fails to explain who found no error or who affirmed the judgment. The solution is to identify the subject. Using a noun or pronoun to identify the actor will eliminate the dangling modifier. *Correct:* "Finding no error, the court affirmed the judgment.

To prevent dangling, identify the subject of the sentence when using transitional words or phrases. *Incorrect:* "Hopefully, she will win her lawsuit." The transition "hopefully" fails to refer to a subject; it leaves the modifier dangling. *Correct:* "I hope she will win her lawsuit."

A dangling appositive is a subject that refers to the same subject elsewhere in the sentence. For example, in "The partner, the lawyer in the corner office, reviewed the documents," "the lawyer in the corner office" is the appositive that refers to the partner, the same subject. To avoid dangling, appositives must clearly refer to an equivalent phrase. *Incorrect:* "The litigator worked on her brief until 10:00 p.m., an unforeseen event that made her miss her dinner date." The appositive "an unforeseen event" doesn't clearly modify an equivalent subject in the sentence. *Correct:* "Late work, an unforeseen event, made the litigator miss her dinner date."

Some dangling modifiers confuse by identifying an incorrect subject. *Incorrect:* "Choosing to shop at the larger book store, the legal dictionary was purchased at a lower price." Because the subject — who chose to go to the larger book store — isn't identified, the reader will assume that the legal dictionary chose to go to the larger bookstore. The solution is to write in the active voice. Identify who is doing what to whom — subject, verb, object — and your modifiers won't dangle. *Correct:* "Choosing to go to the larger book store, the law student bought his legal dictionary at a lower price."

Incorrect: "Based on the court's decision, our client must appeal." "Based on" modifies "our client" and suggests that the decision was based on "our client." Inserting a noun or pronoun will remedy this dangling modifier. Sometimes abandoning the modifier will make a sentence easier to understand. *Correct:* "Our client must appeal the court's decision."

Here are two final suggestions to keep your modifiers in check: Focus on the part of the sentence you want to emphasize and highlight key ideas. Then skip confusion altogether: Instead of adverbs, use concrete nouns and, better, vigorous verbs that don't require modification. Do that and you'll rarely have to worry about modifier problems again. ■

> Modifiers placed in the middle of the infinitive create split infinitives, and splitting headaches.

1. Groucho Marx playing Capt. Geoffrey T. Spaulding in *Animal Crackers*, Paramount Studios (1930).

2. Walt Disney Studios (1964).

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 Law School. He thanks students Melissa Livingston (Brooklyn Law School) and Kathleen Roberts (New York Law School) for their research help. Judge Lebovits's e-mail address is GLebovits@aol.com.

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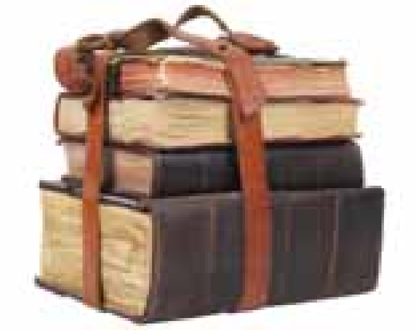
BY GERALD LEBOVITS



Writing Carefully, Misused Modifiers Must Be Avoided

Modifiers are adjectives and adverbs that limit or qualify the sense of other words in a sentence. A well-placed modifier qualifies the meaning of a phrase and gives the reader information. Correctly placed modifiers provide clarity and emphasis. Misplaced, squinting, or dangling modifiers lead to baffling, knotted prose that confuses and inadvertently amuses. Good legal writers must follow the rules of proper modification to avoid ambiguity and mistaken hilarity.

Misplaced Modifiers

You can lose your mind or even your head, but don't misplace your modifiers.

Like hormonal high schoolers, modifiers fall for whatever is closest to them. A misplaced modifier is a word, phrase, or clause placed too far from the word or idea it modifies. To prevent your modifiers from becoming involved with the wrong sort, always place them immediately next to the word being modified.

Incorrect: From Groucho Marx: "One morning I shot an elephant in my pajamas. How he got in my pajamas, I don't know."[1] Groucho misplaced the modifying phrase "in my pajamas" to get a laugh. The sentence would have lost its comedic value if he had correctly placed the modifier next to the phrase "one morning," the idea he modified. "I shot an elephant one morning while I was wearing my pajamas" would have been an appropriate, though unfunny, solution. Another unfunny but correct solution is to insert a comma to separate "one morning" from the rest of the sentence. *Correct:* "One morning, I shot an elephant while I was wearing my pajamas."

Incorrect: From the movie *Mary Poppins:* Bert: "Speaking of names, I know a man with a wooden leg named Smith." Uncle Albert: "What's the name of his other leg?"[2] The phrase "named Smith" is the modifier in this sentence; "named Smith" modifies "a wooden leg," giving the impression that one of the man's legs is named "Smith." Reordering the sentence so that "I once met a man" and "named Smith" are side by side will correct this misplaced modifier. *Correct:* "I once met a man named Smith who had a wooden leg."

Incorrect: "I threw the plaintiff across the courtroom a law book." The misplaced modifying phrase "across the courtroom" means that someone threw the plaintiff across the courtroom. The writer can clarify the sentence by reordering it or by inserting a preposition so that "across the courtroom" isn't modifying "I threw the law book." Using the preposition "to" will explain what's being thrown. *Correct:* "I threw a law book across the courtroom to the plaintiff."

The word "with" is a commonly misplaced modifier, indicating mistaken ownership in a sentence. *Incorrect:* "I went to a lawyer with legal problems." "With legal problems" modifies "a lawyer" because the modifying phrase is placed next to the wrong phrase. The misplaced modifier suggests that the lawyer has legal problems. To fix this sentence, place the modifying phrase "with legal problems" next to the phrase "I went," which is the action being modified. Notice how this sentence already has the preposition "to." Once you place the modifier next to the action or subject being modified, "to" helps the reader determine who in the sentence had the issues. *Correct:* "I went to a lawyer because I had legal problems." The trick is not to use "with" at the end a sentence. For instance, "I robbed a bank *with* money" suggests that I wasn't able to find a gun with which to rob the bank.

Incorrect: "The lawyer spoke to the judge with gusto." The modifier "with gusto" refers to the judge in this sentence instead of to the lawyer. Move the modifier so it correctly modifies the intended subject. *Correct:* "The lawyer, with gusto, spoke to the judge." *Or:* "With gusto, the lawyer spoke to the judge."

Squinting Modifiers

A squinting modifier is a word that floats mid-sentence, modifying two words or phrases at the same time. Modifiers confuse when they squint at both preceding and succeeding words or phrases. These one-word modifiers include "almost," "also," "even," "exactly," "hardly," "merely," "nearly," "scarcely," "simply," and "solely." Eliminate squinting modifiers by repositioning the modifier, rewriting the sentence, or inserting a comma.

In particular, watch out for one-word modifiers like "only" and "just." Where would you put "only" in this sentence: "The prosecutor wanted to adjourn the case"? "[Only] the [only] prosecutor [only] wanted [only] to

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